LAWYERS FOR PALESTINIAN HUMAN RIGHTS

LPHR Q&A: Are agreed land swaps between an occupying power and an occupied people permissible under international law and should the UK government reconsider its position supporting it

At the UN Security Council on 22 May 2019, the UK government reiterated its position that it agrees in principle to the Palestinian National Authority (**PA**) and Israel 'agreeing land swaps' as part of the peace process. The PA has previously indicated it would be willing to consider land swaps as part of an agreement to end Israel's military occupation of the occupied Palestinian territory (**oPt**).

In this Q&A we set out the legality of land swap agreements between occupying powers and occupied people under international law. We also explain why support for such agreements by third states, including the UK, is likely to be in breach of their obligations under international law.

What is meant by land swaps and why do they matter from an international law perspective?

In recent years there has been frequent reference to the idea of 'land swaps' being agreed by the PA and Israel as part of a peace process agreement. While there are disagreements about the amount of territory to be swapped, the propositions would allow essentially Israel to retain major settlements in the occupied West Bank in exchange for the liberated Palestinian state acquiring land currently within the state of Israel.

The proposal to include land swaps in an agreement made prior to the end of Israel's occupation of Palestinian territory raises serious concerns from an international law perspective.

Firstly, as elaborated below, international humanitarian law absolutely prohibits territorial exchanges or agreements between occupying and occupied parties while the occupation is ongoing. Any land swap agreement made prior to the end of the occupation of Palestine would therefore have no legal validity.

Secondly, Israeli settlements are illegal under international humanitarian law. Their illegality has been confirmed by the International Court of Justice (**ICJ**), the UN Security Council, the UN General Assembly and the UN Human Rights Council.[1] The proposal to include land swaps in any

1 International Court of Justice, *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004 (**Advisory Opinion on the Wall**); UN SC Res 465 (1980) and UN SC Res 2334 (2016); UNGA Res 71/97 (2016); and UNHRC Res 31/36 (2016).

comprehensive agreement between Israel and the PA would therefore permit Israel to permanently retain illegal settlements and their associated infrastructure – including the illegal Separation Barrier, military checkpoints and settler-only bypass roads - that were constructed in flagrant breach of international law and which impinge upon a wide range of human rights affecting Palestinians. This would set an alarming precedent, undermining respect for the rule of law at the international level by effectively rewarding repeated and serious violations of international law by an occupying power against an occupied people.

Finally, because both land swap agreements and settlements constructed by an occupying power are prohibited under international humanitarian law and, in addition, seriously impede the ability by the Palestinian people to effectively fulfil their fundamental right to self-determination, third states (including the UK) are legally bound to refuse recognition or support for an agreement that incorporates such proposals.

What is the legal framework prohibiting land swaps between an occupying power and an occupied people?

As the oPt is under Israeli military occupation, Israel is bound by the provisions of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (**Fourth Geneva Convention**) and the Hague Convention (IV) respecting the Laws and Customs of War on Land (**Hague Regulations**) in respect of its activities in the oPt. The applicability of the Fourth Geneva Convention to the oPt has been confirmed by the ICJ, the Security Council and the General Assembly.[2] The Fourth Geneva Convention protects the rights of an occupied population to their territory, homes and property while they are under occupation. As noted above, this includes protection from the creation of settlements by the occupying power within the occupied territory.

The Fourth Geneva Convention stipulates that agreements made between an occupying power and authorities of the occupied territory cannot adversely affect the rights of the occupied population or deprive them of the protections granted to them by the Fourth Geneva Convention, nor can any annexation of their territory be agreed between the parties during occupation.[3] This is set out in:

2 Advisory Opinion on the Wall; UNGA Res 56/60 (2001); UN GA Res 58/97 (2003); UN SC Res 1544 (2004); and UN Doc S/RES/56/60.

3 Fourth Geneva Convention (1949) Articles 7, 8 and 47

- Article 7: which prohibits the parties to an occupation from forming agreements that would, "*adversely affect the situation*" or "*restrict the rights*" guaranteed to occupied populations under the Fourth Geneva Convention;
- Article 8: which stipulates that an occupied population, "*may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article* [7] ..."; and
- Article 47: which guarantees the inviolability of the rights of an occupied population under the Convention including that they, "*shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention …* ***by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory***". [text bolded by LPHR for emphasis]

As set out above, Article 47 explicitly prohibits the annexation of any occupied territory by an occupying power during occupation. Together with Articles 7 and 8, Article 47 also prohibits any agreement made during occupation which would allow for annexation. Article 47 makes it clear that no derogations are permitted from these provisions. In this context it must be noted that the rules of the Geneva Conventions are largely recognised as having the elevated status of peremptory norms under international law.[4] Moreover, the absolute prohibition against annexation is universally accepted as being a fundamental and overriding international law principle. The elevated nature of these specific international law norms has the specific and significant legal consequence that all states are legally bound not to recognise a situation arising from a serious breach of that norm, nor aid or assist in the maintenance of that serious breach [this Q&A elaborates on this aspect further below].

Commentary on Article 47 provided by the International Committee of the Red Cross (ICRC) notes the drafters' intention to prohibit any "*anticipated annexation"* of territories by occupying powers, as well as their intention to address the prohibition in international law on action taken during an occupation which violates the rights of the occupied population and which is, "*based solely on the military strength of the Occupying Power and not on a sovereign decision by the*

4 See International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996. The ICJ affirmed that the Geneva Conventions, "*constitute intransgressible principles of international customary law*" (para 79). This was confirmed in the Advisory Opinion on the Wall, para. 157. See also Draft Articles on State Responsibility (2001), commentary on Article 40, para. 5 ("*In the light of the description by ICJ of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory.*"); Report of the International Law Commission on the work of its fifty-eighth session, UN Doc. A/61/10, 2006, Chapter XII, para. 251, p. 182 ("*The most frequently cited examples of jus cogens norms are … basic rules of international humanitarian law applicable in armed conflict*"); and ICTY, Kupreškić Trial Judgment, 2000, para. 520 ("*most norms of international humanitarian law, in particular those prohibiting war crimes… are also peremptory norms of international law or jus cogens, i.e. of a non-derogable and overriding character*").

occupied State."[5] The ICRC commentary on Article 47 further underscores the importance of the inclusion of this rule amongst the civilian protections provided for by the Fourth Geneva Convention, by noting "*the Diplomatic Conference wished to reaffirm it... [b]ecause there is in this case a particularly great danger of the Occupying Power forcing the Power whose territory is occupied to conclude agreements prejudicial to protected persons."*[6] In the same vein, the current UN Special Rapporteur on the Palestinian Territories has firmly noted, "*a belligerent occupier cannot, under any circumstances, acquire the right to conquer, annex or gain any legal or sovereign title over any part of the territory under its occupation. This is one of the most well-established principles of modern international law."*[7]

What would be the legal status of a land swap agreement made under occupation?

In accordance with customary international law, for the cession of territory of one state to another to be legally binding, the full consent of the ceding state to renounce its sovereign rights over that territory is required. Under 52 of the Vienna Convention on the Law of Treaties, this consent cannot be procured through the use or threat of force.[8] It follows that cession cannot lawfully take place while a territory is under occupation by force. While the occupation is ongoing the PA cannot provide the sovereign consent required for the valid transfer of territory to Israel.

As set out above, land swap agreements made during occupation would constitute a serious breach of provisions of the Fourth Geneva Convention and the absolute prohibition against annexation, which have the elevated status of being peremptory norms under international law. As result of its conflict with a peremptory norm of international law, the agreement would be deemed null and void, as provided by Article 53 of the Vienna Convention on the Law of Treaties.[9] Article 47 of the ICRC commentary notes that in such a scenario, "*an Occupying Power continues to be bound to apply the Convention as a whole even when, in disregard of the*

5 ICRC Commentary on the Fourth Geneva Convention (1958)

6 Ibid.

7 *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967,* S. Michael Lynk, submitted in accordance with Human Rights Council resolution 5/1. 23 October 2017 A/72/43106

8 Article 52 Vienna Convention on the Law of Treaties (1969)

9 Vienna Convention on the Law of Treaties (1969). Accesible at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf

rules of international law, it claims during a conflict to have annexed all or part of an occupied territory."[10]

Because any agreement regarding the exchange of territory cannot take place during occupation, it again follows that an agreement on land swaps would only be possible once the occupation of the oPt had ceased. Only once occupation has ceased is it possible, as noted by the ICRC, for the parties to agree on territorial exchanges as part of a treaty agreement. [11]

What obligations do third states, including the UK, have in respect of land swap agreements made in breach of international law?

The UK is a signatory to UN Security Council Resolution 242, which emphasised the absolute prohibition against annexation under customary international law - "the inadmissibility of the acquisition of territory by war" - as part of its articulation of core principles necessary for establishing peace between Israel and its neighbours.[12] The UK has therefore explicitly affirmed that any territory acquired by Israel during the occupation in serious breach of the peremptory norm of customary international law that prohibits annexation of territory, cannot be legally recognised by third states, including the UK. This conclusion is reinforced by noting, as aforementioned above, that the rules of the Geneva Conventions – which includes Articles 7, 8 and 47 of the Fourth Geneva Convention - are largely recognised as having the elevated status of being peremptory norms under international law.[13]

In this context, significant guidance is provided by Article 41 of the International Law Commission's Draft articles on Responsibility of States for Internationally Wrongful Acts. It affirms that no state shall recognise as lawful any situation created by a serious breach of peremptory norms under international law, nor shall provide aid or assistance in maintaining

10 1958 ICRC Commentary on Article 47 GC IV, para 2, accessible at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/c4712fe71392afe1c12563cd0042c34a

11 1958 ICRC Commentary on Article 47 GC IV, para 4

12 UN SC Res 242 (1967)

13 See International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996. The ICJ affirmed that the Geneva Conventions, "*constitute intransgressible principles of international customary law*" (para 79). This was confirmed in the Advisory Opinion on the Wall, para. 157. See also Draft Articles on State Responsibility (2001), commentary on Article 40, para. 5 ("*In the light of the description by ICJ of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory.*"); Report of the International Law Commission on the work of its fifty-eighth session, UN Doc. A/61/10, 2006, Chapter XII, para. 251, p. 182 ("*The most frequently cited examples of jus cogens norms are … basic rules of international humanitarian law applicable in armed conflict*"); and ICTY, Kupreškić Trial Judgment, 2000, para. 520 ("*most norms of international humanitarian law, in particular those prohibiting war crimes… are also peremptory norms of international law or jus cogens, i.e. of a non-derogable and overriding character*").

that situation.[14] These provisions are regarded as principles of customary international law binding on all states, and Article 41 finds support in international practice and in decisions of ICJ.[15] Both an agreement to exchange territory during occupation, and the creation of illegal settlements during occupation, constitute serious breaches of peremptory norms. Furthermore, settlements and its associated infrastructure severely impede the exercise of by the Palestinians people of its fundamental right to self-determination, which is also a peremptory norm under international law. Accordingly, any third party state recognition or support for land swap agreements made during the occupation that gives Israel sovereignty over illegal settlements and their associated infrastructure – and which by their mere existence also seriously infringes a wide range of basic human rights of Palestinians - is likely to be in breach of that state's obligations under international law.

In addition, it should be highlighted that Article 1 of the Fourth Geneva Convention (to which the UK is a party) requires all parties to the Convention to "*ensure respect for the present Convention in all circumstances.*"[16]

For the UK to recognise a land swap agreement made in breach of the Fourth Geneva Convention would therefore be in apparent breach of its binding obligations under customary international law, and its legal obligation under Article 1 of the Fourth Geneva Convention that arises through being a signatory to the Geneva Conventions.

Conclusion

This Q&A has provided an outline of the international legal framework governing land swap agreements in the context of occupation, confirming the illegality of such agreements under international law as well as the corresponding legal obligations placed upon third party states to refuse to recognise or support such agreements.

In summary, due to the provisions of Articles 7, 8 and 47 of the Fourth Geneva Convention, annexation cannot take place during occupation, and agreements cannot be made during occupation that would result in the annexation of occupied territory. These provisions constitute peremptory norms of international law from which no derogation is permitted. As a result, any agreement to exchange territory made between parties to an occupation whilst the occupation is ongoing would be in serious breach of peremptory norms of international law, and would therefore be null and void as provided by the Vienna Convention on the Law of Treaties.

14 Article 41 (2) Draft articles on Responsibility of States for Internationally Wrongful Acts (2001)

15 ILC Commentary on Draft articles on Responsibility of States for Internationally Wrongful Acts (2001), Commentary on Article 41, para 6

16 Article 1 Fourth Geneva Convention (1949)

It follows that Israel and the PA cannot agree to exchanges of territory while the occupation is ongoing. Land swap agreements would also serve to grant Israel sovereignty over illegal settlements and their associated infrastructure which were created in serious breach of the exercise by the Palestinian people of the fundamental right to self-determination, which is a further peremptory norm of international law. Any agreement between Israel and Palestine regarding the exchange of territory can therefore only take place once Israel has ceased to occupy the oPt. Only once withdrawal has taken place could territorial exchanges be potentially agreed.

The obligation of any third state, including the UK, to refuse to recognise the validity of land swap agreements made during occupation, is further affirmed by principles of customary international law under which states shall not recognise as lawful any situation arising from a serious breach of peremptory norms of international law, nor aid or assist the maintenance of that serious breach. Any third state recognition or support for land swap agreements made during the occupation is therefore likely to be in breach of that state's customary international law obligations under the laws of international responsibility. Because the UK is a signatory to the Fourth Geneva Convention, it is also legally obligated under Common Article 1 of the Geneva Conventions to ensure respect for the provisions of the Convention at all times.

We accordingly suggest that the UK government should properly consider urgently reviewing and revising its recent statements of support for land swaps as part of a comprehensive agreement. A substantially adjusted position is required for the UK to demonstrate that they are acting in conformity with their legal obligations arising under customary international law, the laws of international responsibility, the law of treaties, and the Fourth Geneva Convention. It is concerning that the UK is currently adopting a position that conflicts with its international law obligations and long-standing position recognising the flagrant illegality of settlements, and which would undermine the rules-based international order by effectively rewarding repeated and serious violations of international law by an occupying power against an occupied people.

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