

PROPERTY TRANSACTIONS IN THE OCCUPIED PALESTINIAN TERRITORY
LEGAL BRIEF
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Since the beginning of its occupation in 1967, Israel has carried out a policy of colonizing the Occupied Palestinian Territory (OPT), resulting in the creation of some 170 Israeli settlements with a population approaching half a million Israeli settlers.

For this purpose, Israel has transferred many rights or interests in land that it has confiscated from Palestinians to Israelis and foreigners. It has also facilitated private transfers of property rights or interests to Israelis and other foreigners.

Transactions of this kind violate international law. They are carried out without the consent of the real Palestinian owners, without the consent of the Palestinian government, in violation of the local law, and in pursuit of Israel's unlawful colonization policy.

Consequently, such transactions are null and void. The government of the future Palestinian state will not be under any obligation to honour such transactions. Therefore, holders of titles or interests derived from the unlawful transactions should take notice that their titles or interests may be invalidated without recourse against the Palestinian government or the real Palestinian owners.

1. Transactions as Part of Israeli Colonization

Throughout its 41-year occupation of Palestinian territory, Israel has been transferring parts of its own population to the Occupied Palestinian Territory (OPT) as part of its colonization policy. Today, some 468,000 Israeli settlers live in about 170 settlements scattered throughout the West Bank, including East Jerusalem.

In addition to violating international law, Israeli settlements and supporting infrastructure deny Palestinians access, use and benefit from some 40% of the West Bank. They fragment the West Bank into isolated islets, creating a narrow and fragmented Palestinian “economic space”. Movement of Palestinian people and goods is restricted, severely impairing Palestinians’ trade and access to services. As a result, settlements erode Palestinians’ fabric of life and the possibility of forming a Palestinian state,

2. Nature of Israeli Transactions in Palestinian Property

As part of its settlement activity, Israel builds housing units, businesses, and roads and other infrastructure for Israeli settlers on Palestinian land that it confiscates under various pretexts.¹ In doing so, the Israeli government treats land in the West Bank as if it owns it. As a rule, the Israeli government² sells a developer rights to develop the land and to sell the housing units

¹ Land confiscations for settlements occur under four main pretexts: (1) taking possession of land by way of a requisition order, which is supposed to be temporary and for the needs of the occupation army; (2) declaring land to be state land; (3) turning over possession of land of displaced Palestinian owners (“abandoned” or “absentee” property) to a government custodian; and (4) expropriating property, which is supposed to be for a public purpose that benefits the occupied population, in accordance with due process, and for adequate compensation. (See Yehezkel Lein, *Land Grab: Israel's Settlement Policy in the West Bank* (B'tselem, May 2002), 47ff.) As discussed below, Israel does not actually satisfy the conditions set by the law when it carries out these transactions for permanent settlement of its own civilian population.

² In the case of land in the West Bank, excluding Israeli-annexed areas in and around East Jerusalem, the public entity is the Civil Administration of the Ministry of Defense. In the case of land in Israeli-annexed East

built.³ The end-purchaser leases the land from the Israeli government,⁴ but purchases the building from the developer. In turn, some end-purchasers rent out their dwellings to other individuals. In some cases, Israelis or foreigners purportedly purchase land directly from Palestinian owners in private sales.

Israel also markets settlement housing units and other forms of investment abroad. For instance, in February 2007, Amana, one of the organizations promoting Jewish settlement in the OPT, hosted housing fairs in New York and New Jersey to solicit American citizens to purchase homes in Israeli settlements established in violation of international law, with plans for similar events in Miami and Chicago. About eight housing units in settlements, including Qiryat Arba and Qarnei Shomron, were sold at this event. Potential buyers were reportedly told that their investment was “insured, protected and 100 percent legal.”⁵ Similar events were held by other real estate companies in the United Kingdom later in the year, offering for sale properties in the settlements of Har Homa, Beitar Illit, Ma’ale Adumim and Maccabim in the West Bank.⁶

3. Illegality of Israeli Transactions in Palestinian Property

Since 1967, the Gaza Strip and the West Bank have been occupied by Israel.⁷ This is true of East Jerusalem as well. That Israel illegally annexed East Jerusalem and surrounding Palestinian areas in 1967, and hence applied its civilian laws there (unlike the rest of the West Bank where its military laws apply), has no bearing on the international legal status of those parts of the West Bank as occupied territory.⁸

Consequently, Israel’s relationship with the territory it occupies and with the inhabitants thereof are governed by international humanitarian law (IHL), as embodied in the *Hague Convention on the Laws and Customs of War on Land* and its attached Regulations of 1907,⁹ the

Jerusalem, the public entity is an Israeli governmental or quasi-governmental entity. The reason for the difference is the distinct status that the two areas of the West Bank have under Israeli domestic law. East Jerusalem and surrounding areas were formally annexed by Israel and therefore form an integral part of the state of Israel according to Israeli domestic law. (As discussed at fn 7 and accompanying text, the annexation is illegal under international law.) The rest of the West Bank is considered disputed territory under Israeli domestic law.

³ Although these arrangements traditionally do not involve a sale of the land to the developer, the rights of the developer, in terms of disposition and use of the land, are akin to that of an ordinary landholder. However, the distinction between ownership and leasehold possession becomes monetarily significant at a later stage. The end-purchaser will pay a reduced price (ordinarily about 91% of the total purchase value of the building/ flat and the land) in consideration of the fact that full rights of ownership are not being conferred.

⁴ Leasehold agreements generally provide for a leasehold term of 49 years with the option to renew at the end of such term for an additional 49 years, at a minimal cost to the settler. This cost is simply the capitalization of the original payments made by the settler. The settlers do not pay a monthly or even an annual sum for these leases. In fact, in most cases they do not pay any money at all beyond that which was paid to developers for the housing units.

⁵ Daphna Berman, “Settlers launch first drive in U.S. to sell homes” in *Ha’aretz* (3 March 2007).

⁶ Haroon Siddique, “Homes in illegal Israeli settlements for sale at London expo” in *The Guardian* (16 November 2007).

⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004), para. 101 (I.C.J.) [*ICJ Advisory Opinion*].

⁸ *Ibid.* See also UNSC Res. 252 (adopted 21 May 1968); UNSC Res. 267 (1969) (adopted 3 July 1969); UNSC Res. 298 (adopted 25 September 1971); UNSC Res. 476 (1980) (adopted 30 June 1980); and UNSC Res. 478 (1980) (adopted 20 August 1980).

⁹ *1907 Hague Convention IV Respecting the Laws and Customs of War on Land*, 18 October 1907, U.K.T.S. 9 (1910), Cd. 5030 [*Hague Regulations*].

Fourth Geneva Convention Relative to Civilian Persons in Time of War of 1949,¹⁰ and customary international law.

Under these rules, Israel's dispositions of occupied Palestinian property are illegal because:

1. an occupier is not authorized to confiscate or transfer title of land in occupied territory for its own purposes;
2. such transfers violate the local law, which must be respected by the occupier; and
3. the transfers form part of illegal settlement activity.

3.1. Transfer of public and private property in occupied territory

Public property. Under Article 55 of the *Hague Regulations*,¹¹ an occupant may only administer public property as a usufructuary. It does not gain sovereignty or title over any part of occupied territory. Further, Article 49 provides that the occupying power may only use the resources in the occupied territory "for the needs of the army or for the administration of the territory in question." Seizures or uses of property meant to serve the broader interests of the occupying power or its inhabitants are not permitted.¹² Israel thus has no right to sell Palestinian state land. Nor does it have a right to lease state land for long periods¹³ or for the purpose of settlement.

Private property. With few exceptions, an occupant must "respect private property" and may not confiscate it.¹⁴ In practice, however, Israel has confiscated substantial amounts of private

¹⁰ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, 12 August 1949, 75 U.N.T.S. (1950) 287 [Fourth Geneva Convention].

¹¹ "The occupying State shall be regarded only as administrator and usufructuary of public buildings, landed property, forests and agricultural undertakings belonging to the hostile state, and situated in the occupied country. It must safeguard the capital of such properties, and administer them in accordance with the rules of usufruct."

¹² The principle that the occupant's use of what is produced from state-owned immovable property is limited to meeting the expenses of the occupation has been confirmed by several court decisions after World War I and the decisions of the International Military Tribunal at Nuremberg. See, e.g., *Ralli Brothers v. German Government* (1923), [1923-24] 4 *Tribunaux Arbitraux Mixtes* 41 at 44, *Ann Dig.* (1923); *CIE des chemins des fer du Nord v. German State* (1929), [1929-30] 4 *Tribunaux Arbitraux Mixtes* 67, *Ann Dig.* (1929) 498; and *In re Flick*, 14 *Ann. Dig.* 266. See also *N.V. DeBataafsche Petroleum Maatschappij v. The War Damage Commission* (1957), 23 *I.L.R.* 810 at 821-22.

¹³ In discussing Article 55, B'tselem has stated that "[t]he occupying power may ... quarter 'administrative units in buildings...', 'work the land and harvest the crops, rent or lease land to private individuals, and the like,' but with the limitation that 'the leasehold may not exceed the period of the occupation.'" (Yuval Ginbar, *Israeli Settlement in the Occupied Territories as a Violation of Human Rights: Legal and Conceptual Aspects* (B'tselem, March 1997) at 13, citing Eyal Zamir, *State Lands in Judea and Samaria: A Legal Survey* (in Hebrew) (Jerusalem: Jerusalem Institute for Israel Studies 1985) at 11) That Israel typically grants renewable leases of 49 years to settlers, and constructs or permits the construction of such permanent structures as houses, commercial and industrial facilities, roads, and electricity and water infrastructure, is incompatible with the time limitations implicit in the rules of usufruct. That these lands may not be used for settlement of the occupier's civilian population, as discussed below, is another limitation on the occupier's use of occupied land.

¹⁴ *Hague Regulations*, *supra* note 9, Art. 46. Certain exceptional categories of seizure are lawful: (1) requisitions (*i.e.*, taking temporary possession of property for the needs of the occupying army), (2) expropriations (*i.e.*, compulsory transfers of title for a public purpose in exchange for adequate compensation), and (3) management of property whose owner is absent by the occupant acting as a trustee until the owner's return.

Palestinian property.¹⁵ In these cases, the unlawfulness of the confiscation renders the subsequent sale or lease of the confiscated property unlawful as well. In the exceptional cases when Israel may lawfully come to possess or otherwise control private Palestinian property,¹⁶ the subsequent sale or lease of such property for the purpose of permanent settlement falls outside the permissible uses of such property.¹⁷

3.2. Respecting local law in occupied territory

With some exceptions, the applicable local law, namely the Jordanian *Law for the Lease and Sale of Immovable Properties to Foreigners, No 40 of 1953* prohibits foreigners from owning immovable property,¹⁸ and requires the permission of the Council of Ministers for a foreigner to lease land for longer than a three-year period.¹⁹ Similarly, with few exceptions, the Jordanian *Law Concerning the Possession and Use of Immovable Property by Juridical Persons, No 61 of 1953* prohibits foreign legal persons from owning or possessing property.²⁰

Under international law, Jordanian laws as they existed on 4 June 1967 (the eve of the occupation) are applicable to the West Bank. Article 43 of the *Hague Regulations* requires an occupant to respect the laws in force in the occupied territory “unless absolutely prevented”

¹⁵ Israel commonly tries to justify such confiscations as falling within one of the exceptional categories. However, confiscations for the purpose of permanent settlement do not meet the criteria for any of the exceptions.

¹⁶ See fn 14.

¹⁷ As mentioned above, a requisition allows an occupant to take temporary possession of private property for the particular purpose of meeting the needs of the occupation army. Neither the nature of the occupant’s interest in the property (*i.e.*, temporary possession), nor the purpose of the requisition (*i.e.*, for the needs of the occupation army) allows for the sale or lease of the private property in question.

Taking custody of absentee property allows an occupant to manage the property as a trustee until the owner’s return. As in the case of requisitioned property, neither the nature of the occupant’s interest in absentee property (*i.e.*, temporary management), nor the purpose of the management (*i.e.*, for the benefit of the owner) permits Israel to sell the property, or to lease the property for permanent civilian Israeli settlement.

As for lawfully expropriated property, it must be treated in the same way as any other public property. As noted above, public property may not be sold, or leased in the circumstances or for the purpose Israel does, to a third party.

¹⁸ (27 January 1953) *Official Gazette*, Issue No. 1134 dated 16 February 1953 at 558, as am. by *Law No 12 of 1960* (2 February 1960) *Official Gazette*, Issue No. 1476, and *Law No 2 of 1962* (11 January 1962) *Official Gazette*, Issue No. 1599. The Law restricts a non-Jordanian person from owning immovable properties, except (1) lands in municipal areas or town planning areas sufficient for his housing and administration of his work, and not for trading purposes, (2) agricultural land that was under his possession or ownership before the enforcement of the Law, and (3) lands that fall within the area of the Eastern Ghor Canal Project if he was residing thereon from olden times. (Art. 3) Land outside of these exceptions could be owned by non-Jordanian Arabs to the extent sufficient for their residence and management of their business, with permission from the Council of Ministers. (Art. 4)

¹⁹ *Ibid.*, Art. 2.

²⁰ (25 March 1953) *Official Gazette* Issue No. 1140 dated 16 April 1953 at 683, as am. by *Law No 4 of 1957* (20 December 1956) *Official Gazette*, Issue No. 1313 dated 16 January 1957 at 48. The Law prohibits foreign legal persons from owning or possessing immovable property except with permission from the Council of Ministers, which is to be granted only if (1) the property is in a town or village, (2) the property does not exceed the organisation’s purposes, and (3) the acquisition is not for the purposes of mere possession or trading (Art. 5). Such bodies could acquire land outside of towns and villages if the public interest requires it, provided the other two conditions are met (Art. 8(A)).

from doing so.²¹ In 1971, Israel amended the Jordanian law that prohibits Israeli (and other foreign) companies from purchasing or acquiring land in the West Bank.²² Israel apparently made a similar amendment to allow individual foreigners to purchase or acquire land.²³ These annulments stand in violation of Article 43 and are invalid.²⁴ Therefore, property transactions benefiting Israelis or other foreigners remain in violation of the local law.

3.3. A part of colonization activity

Israeli settlement activity violates a number of non-derogable norms of international law.²⁵ As mentioned above, Israeli settlement activity undermines the possibility of forming a Palestinian state and, hence, violates the Palestinian people's right of self-determination.²⁶ It also violates the prohibitions against acquiring territory by force²⁷ and against transferring parts of an occupant's population to occupied territory.²⁸ As an integral part of Israeli settlement activity, Israeli transactions in Palestinian property violate these norms.

²¹ *Supra* note 9. Article 43 only permits new legislation or derogations from existing legislation if they are essential for (1) the security of the occupying power and of its forces, (2) the implementation of international humanitarian law (as far as the local legislation is contrary to such international law), or (3) the purpose of restoring and maintaining public order and civil life in the territory. (Marco Sassoli, "Article 43 of the Hague Regulations and Peace Operations in the Twenty-First Century", Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Cambridge, June 25-27, 2004, Program on Humanitarian Policy and Conflict Research at Harvard University at 2).

²² *Order relating to the Law concerning the Possession and Use of Immovable Property by Legal Entities (West Bank) (No. 419)*, 5731-1971, K.M.Z.M. No. 27 at 1002, as am. by 1983, K.M.Z.M. No. 57 at 12, authorizes the Head of the Israeli Civil Administration to allow foreign corporations to purchase and use lands, notwithstanding the conditions set by Jordanian law.

²³ Raja Shehadeh, *Occupier's Law: Israel and the West Bank* (Institute for Palestine Studies, Washington, DC: 1988) at 39.

²⁴ Israel's annulment does not fall within any of the permissible exceptions.

²⁵ A peremptory norm of general international law is one which is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." (*Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, Art. 53). The prohibition against aggression and the right of self-determination are both peremptory norms (International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries* (2001), commentary to Art. 40.)

²⁶ *ICJA advisory Opinion, supra* note 7, para. 118; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Art. 1; and *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Art. 1.

²⁷ *Charter of the United Nations*, Art. 2(4); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 14, paras. 187-190; *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 18, UN Doc. A/ 8018 (1970) 121; UNSC Res. 242 (1967) (adopted 22 November 1967); UNSC Res. 252 (1968) (adopted 21 May 1968); UNSC Res. 267 (1969) (adopted 3 July 1969); and UNSC Res. 478 (1980) (adopted 20 August 1980).

²⁸ *Fourth Geneva Convention, supra* note 10, Art. 49(6). The transfer of an occupier's civilian population to occupied territory also constitutes a War Crime. (*Rome Statute of the International Criminal Court*, A/ CONF.183/ 9*, Art. 8(2)(b)(viii), online: Rome Statute of the International Criminal Court <<http://untreaty.un.org/cod/icc/statute/rome.htm>>.

4. Implications of Israeli Transactions in Palestinian Property

Due to their illegality, the Palestinian government of the future Palestinian state will not be under any obligation to honour Israeli transactions in occupied Palestinian property that took place during Israel's occupation.

Historically, states under foreign military occupation have nullified or rescinded any purchases by individuals or corporations of the occupying country during the period of occupation. Upon liberation of the occupied state, all land reverted back to the nationals of the occupied territory who were the rightful owners. During World War II, for example, Belgium, Czechoslovakia, Greece, Luxembourg, Netherlands, Norway, Poland and Yugoslavia, all of which were occupied by Germany, issued decrees either voiding or rendering voidable transfers or restrictions on property rights arising from the occupant and/or during the occupation.²⁹

For instance, Belgium and Luxembourg annulled the disposal and pledging of state properties beyond the limits of normal administration.³⁰ “Also null and void [we]re any acts of disposition or granting of a security interest in movable or immovable property, stemming from the enemy, since May 10, 1940 [the date of invasion], involving confiscations, seizures, forced sales, or any other measures affecting private property.”³¹ The Belgian and Luxembourg decrees further provided that “[t]he restoration of [private and public] property ... is available against any possessor, the owner not being bound, in any case, to reimburse the price that it cost, the possessor keeping only his recourse against the party from whom he holds the property.”³² Such decrees also rendered voidable sales of private property by a private owner to a national of the occupant where the transaction was tainted by a lack of consent on the part of the occupied vendor.³³ In the *I.G. Farben* case, the US military court held:

Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law. The payment of a price or other adequate consideration does not, under such circumstances, relieve the act of its unlawful character.³⁴

²⁹ Jacob Robinson, “Transfer of Property in Enemy Occupied Territory” (1945), 39 A.J.I.L. 216.

³⁰ *Moniteur Belge* (London: 25 February 1941) at 46, Art. 1. “[B]uyers of immovable public property may be deprived by the returned sovereign of their purchases without having any claim to compensation. Such purchasers took the risk of losing the property to its rightful owner, and no reasonable interpretation of domestic or international law can justify indemnification for unlawful purchase, even if good faith were claimed.” (Gerhard von Glahn, *The Occupation of Enemy Territory* (University of Minnesota Press, 1957) at 260).

³¹ *Moniteur Belge*, *ibid.*, Art. 2.

³² *Ibid.*, Art. 8.

³³ Robinson, *supra* note 29.

³⁴ *U.S. v. Krauch*, [1949] 10 Law Reports of Trials of War Criminals, page 44 [*I.G. Farben*]. “If the owner was not coerced and his consent to the sale genuinely given, then the transaction is valid, but legal form will not protect a transaction induced “by threats, intimidation, pressure or by exploiting the position and power of the military occupant under circumstances indicating that the owner is being induced to part with his property against his will.” (Morris Greenspan, *The Modern Law of Land Warfare* (California: Cambridge, 1959) at 294-95, citing *I.G. Farben* at 47).

Such decrees applied to a variety of property interests. Norway's decree, for instance, provided that mortgages, leases and other encumbrances upon the real owner's title assumed by the possessor would impose no legal obligations upon the real owner.³⁵

For its part, the London International Law Conference of 1943, composed of almost all the states occupied in whole or in part by the Axis, including Russia and China, as well as the United States, the United Kingdom, and the British Dominions,³⁶ warned "in particular ... persons in neutral countries"³⁷ that:

6. ... rightful ownership remains in the person who has been dispossessed of anything by outright confiscation or by any device resulting from political pressure by the occupant; the title of a party in a third country derived from the occupant or from his associates or agents is invalid.

7. A person who acquires, even in good faith, any property, rights or interests which are or have been situated in occupied territory or are the property of nationals of that country will if his acquisition of them is derived directly or indirectly from acts of the occupant or his associates or agents not acquire an internationally valid title thereto as against the true owner unless such a title is valid by the law of the occupied country as applied by the reconstituted authorities after the liberation of the country.³⁸

More recently, the European Court of Human Rights upheld the property rights of Greek Cypriots displaced from Turkish-occupied northern Cyprus.³⁹

5. Conclusion

Potential Israeli and foreign purchasers of property in the Occupied Palestinian Territory, including East Jerusalem and other areas illegally annexed by Israel, should be advised that the future government of the Palestinian state will not be under any obligation to honour property titles or interests acquired under the Israeli occupation through transactions that violate international law or the rights of the rightful Palestinian (or other) owners under international and applicable local laws.

³⁵ Robinson, *supra* note 29 at 226-27.

³⁶ The signatories represented all the states occupied in whole or in part by the Axis (including Russia and China, but excluding Denmark and the Philippine Islands), as well as the United States, the United Kingdom, and the British Dominions. Neither the Baltic states nor Latin American countries were party to the declaration.

³⁷ Robinson, *supra* note 29 at 228.

³⁸ Von Glahn, *supra* note 30 at 194-95.

³⁹ *Loizidou v. Turkey* (1996), online: European Court of Human Rights <<http://www.echr.coe.int/echr/>>; *Fourth Interstate Application of Cyprus against Turkey* (2001), online: European Court of Human Rights <<http://www.echr.coe.int/echr/>>; and *Myra Xenides-Arestis v. Turkey* (2005), online: European Court of Human Rights <<http://www.echr.coe.int/echr/>>. Until 1989, the Turkish-Cypriot authorities issued "possessory certificates" to state bodies, Turkish-Cypriots and settlers from Turkey for property "abandoned" by Greek-Cypriot owners. Thereafter, they started issuing outright "title deeds".