



POSITION PAPER

A LEGAL COMMENTARY ON THE GENEVA ACCORD

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*WEST BANK AFFILIATE OF THE INTERNATIONAL COMMISSION OF JURISTS-GENEVA
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Al-Haq

Al-Haq, the West Bank affiliate of the International Commission of Jurists - Geneva, is a Palestinian human rights organisation located in Ramallah, West Bank. The organisation was established in 1979 to protect and promote human rights and rule of law in the Occupied Palestinian Territories (OPT), and has special consultative status with the UN Economic and Social Council. Al-Haq is committed to the uniform application of the universal principles of human rights regardless of the identity of the perpetrator or victim of abuse. In order to meet these goals, the organisation:

- * Conducts and disseminates legal and field research based on international human rights and humanitarian law.*
- * Monitors and documents human rights violations through an extensive database.*
- * Houses the only public library specialised in human rights in the West Bank.*
- * Provides free legal services to the Palestinian community.*

Through these activities, Al-Haq strives to bring to an end abuses committed by Israeli and Palestinian authorities. In addition, through the reinforcement of rule of law and the promotion of international legal standards, the organisation contributes to the development of a transparent and democratic civil society in Palestine. Al-Haq is a member of the Euro-Mediterranean Human Rights Network, the World Organisation Against Torture, the International Federation for Human Rights, and Habitat International Coalition.

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INTRODUCTION

On 1 December 2003, the ceremony to promote a peace accord, otherwise known as the Geneva Accord took place in Geneva, Switzerland. Drafted by Palestinian and Israeli negotiators acting in their private capacity,¹ the Accord received extensive international attention, and was hailed by some as creating an opportunity for the development of a new context within which peace negotiations between the two sides can take place to advance the peace process. Others considered it a remarkable achievement that "...feeds oxygen into the political debate",² and represented a counterpoint "...to the now conventional wisdom that there were no serious partners for negotiations and nothing to negotiate about".³

Nevertheless when evaluating the Geneva Accord in light of international law, it becomes clear that the accord is promising only on the face of it, and that it suffers from serious legal pitfalls and implications that makes it dangerous to consider this as a blueprint for any formal and permanent status agreement between the two sides in the future. In this paper, and in light of the controversy surrounding the Accord, Al-Haq seeks to highlight how the provisions of this Accord violate fundamental principles of international human rights and humanitarian law,⁴ and defy a decade of

¹ The Palestinian team was comprised of several former Palestinian authority ministers, current legislators and leaders from the ruling Fatah Party, such as Yasir Abed Rabbo and former Minister of Prisoner Affairs, Nabil Kassis. The Israeli side included former Minister of Justice and Israeli Labor Party Leader, Former Chief of Staff Amnon Lipkin-Shahak and Former Knesset (Israeli parliament) Avraham Burg in addition to several other current and former members of the Knesset.

² Interview with Marc Otte, Special Representative of the European Union for the Middle East Peace Process, Bitterlemons-International, Middle East Roundtable, Edition 17, Volume 1, 13 November 2003, www.bitterlemons-international.org

³ Miller, Aaron David, "One American's View", Bitterlemons-International, Middle East Roundtable, Edition 17, Volume 1, 13 November 2003, www.bitterlemons-international.org

⁴ The West Bank (including East Jerusalem) and Gaza Strip have been under Israeli military occupation since 1967 and the de jure applicability of the Fourth Geneva Convention to these territories has been recognised by the majority of the High Contracting Parties to the Convention, the United Nations Security Council (SC) and General Assembly (GA), and the International Committee of the Red Cross (ICRC).

United Nations (UN) resolutions, including Security Council (SC) resolutions 242 and 338, pertaining to the Israeli-Palestinian conflict.⁵

In addition, as this legal commentary will show, the Accord ignores many of the lessons that should have been drawn from previous peace initiatives, and how they are bound to fail when they disregard international law as a framework for resolving outstanding issues between the two sides. The importance of this analysis comes at a point when Al-Haq continues to bear witness to more than one initiative at the local and international level to bring about a settlement of the Israeli-Palestinian conflict,⁶ in a manner which fails to consider fundamental principles and standards of international human rights and humanitarian law, and which will contribute to a further deterioration of the human rights situation in the Occupied Palestinian Territories (OPT).

I. THE RIGHTS OF PALESTINIAN REFUGEES DISPLACED IN 1948⁷

One of the main shortcoming of the Geneva Accord is that it negates the concept of Palestinian right of return, particularly as affirmed through General Assembly (GA) Resolution 194(11),⁸ which

⁵ Following the occupation of the West Bank and Gaza Strip by Israel in 1967, the SC adopted Resolution 242 which emphasises “the inadmissibility of the acquisition of territory by force, [and] the withdrawal of Israeli armed forces from territories occupied in the recent conflict...” to achieve a just and lasting peace. In 1973 this resolution was reaffirmed by SC Resolution 338, which called for negotiations. Today both of these resolutions remain central to diplomatic and international efforts to resolve the conflict.

⁶ The most recent examples of these initiatives is the Gaza Disengagement Plan advocated by Israeli Prime Minister Ariel Sharon, which proposes a unilateral Israeli evacuation from the Gaza Strip and all Israeli settlements in return for maintaining control over parts of the West Bank as “...part of the state of Israel”, including settlements, military zones and “...places where Israel has additional interests”. In addition, Israel expressed its resolve to complete the building of what the UN Special Rapporteur on the Situation of Human Rights in the OPT has termed “the Annexation Wall”, and which will de facto annex substantial amounts of Palestinian land. In addition, it rejects the return of Palestinian refugees displaced in 1948 to Israel.

⁷ Palestine refugees are persons whose normal place of residence was Historic Palestine between June 1946 and May 1948, who lost both their homes and means of livelihood as a result of the 1948 Arab-Israeli conflict. The 1948 war led to the depopulation of an estimated 530 villages and displacement/expulsion of some 750,000 Palestinians. Since then, Israel has refused to allow the refugees to return to their homes, apart from a very small number of family reunification cases. The definition of who is a Palestinian refugee also includes the descendants of persons who became refugees in 1948. The number of registered Palestine refugees has subsequently grown from 914,000 in 1950 to more than four million in 2002, and continues to rise due to natural population growth. See United Nations Relief and Working Agency (UNRWA) www.unrwa.org

⁸ Paragraph 11 identifies three distinct rights that all Palestinian refugees are entitled to exercise and which are: return, restitution and compensation. See Res. 194 (III), UN GAOR, 3rd Sess., UN Doc A/810 (1948).

“resolves refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing [emphasis added] not to return and for loss of or damage to property...”

Although Article 7(2)(a) of the Geneva Accord recognizes that UN Resolution 194 and SC Resolution 242 represent the basis for resolving the refugee issue, it appears to grant only lip service to the Palestinians' right of return, which Israel has consistently denied to the Palestinians since 1948.

In fact the Geneva Accord undermines the very clear affirmations of Palestinian collective and individual rights spelled out in international law, by defining it in terms of a “problem” rather than of a “right”. This is despite the fact that the right of return constitutes customary international law,⁹ and therefore cannot be dismissed by the negotiators of the Geneva Accord. It is also an individual human right,¹⁰ which is protected by several international human rights treaties and resolutions.¹¹ Relinquishing the attribute of right from the issue of Palestinian refugees signifies that any solution for it will be subject to the wish and will of both parties and is not grounded in international law. It also signals that both parties have instead chosen to limit the implementation of UN resolutions that have repeatedly called upon Israel to realise the rights of Palestinian refugees affirmed Resolution 194 as the framework for a durable solution. In fact the Geneva Accord clearly states that “...those rights will be fulfilled once the provision of this Accord is implemented.”¹²

International law preserves the right of individuals to decide in a free and informed manner whether they want to exercise their right of return, or to

⁹ This was reflected in the recommendations of then UN Mediator Count Bernadotte for a solution and were incorporated into Resolution 194 (III) acknowledging that new rights were only affirmed and not created, by the explicit reference to “principles of international law...” in GA Resolution 194 (III)(1). See Takkenberg, *Lex, The Status of Palestinian Refugees in International Law*, Clarendon Press, Oxford, 1988.

¹⁰ International law guarantees individuals many rights. The individual right of return is separate from any “collective” right of return. While a collective implementation of this right is not an alternative to the individual right of return, its implementation might be viewed in some circumstances as a helpful for the realisation of a people’s collective right to self-determination. See “The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis”, BADIL Resource Center, January 2001.

¹¹ Article 13 of the Universal Declaration of Human Rights (UDHR), Article 12 of the International Covenant on Civil and Political Rights (ICCPR), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

¹² Article 7(2).

avail themselves of alternative solutions.¹³ However Article 7(4) of the Geneva Accord limits the refugees' choice of permanent residence to a future Palestinian state in the West Bank and Gaza Strip; to "areas in Israel being transferred to Palestine in the land swap following assumption of Palestinian sovereignty..." as outlined in the Accord; to third states, subject to their approval; and to present host countries.¹⁴ In the case of those refugees wishing to return to Israel, the provisions of the Accord stipulate that this will be in accordance with the numbers that Israel will submit to an International Commission representing the total number of Palestinian refugees that it wants to accept, and shall also "... be at the sovereign discretion of Israel".¹⁵

This effectively subjects the principle of the right of return to Israeli approval and discretion. Moreover, once the provisions of Accord are implemented, the accord considers the "refugee problem" solved. Article 7(6) stipulates, "Palestinian refugee status shall be terminated upon the realization of an individual refugee's permanent place of residence as determined by the International Commission". According to the Accord's provisions, this agreement provides for a permanent and complete resolution of the Palestinian refugee problem, and subsequently no claims may be raised, except those related to the implementation of this agreement.¹⁶

As Labor Party Chairman Amram Mitzna affirms, Israel's decision on who to let in on a case by case basis (and not under a right of return) will be "...final, written and not open to interpretation".¹⁷

The importance of this concession stems from the fact that the issue of the return of Palestinian refugees has always been ideologically opposed by

¹³ Under international refugee law, voluntary repatriation, i.e. implementation of the right of return is considered to be the primary solution to refugee flows, and is where Resolution 194 (III) places its emphasis. It is important to note that paragraph 11(1) which delineates the rights of Palestinian refugees does not include resettlement. The matter is included in Resolution 11(III)(2) as one amongst several ways to facilitate the implementation of the complete set of solutions to the refugees' plight based on the individual and free choice of the refugees.

¹⁴ Following the Arab-Israeli wars, the majority of Palestinian refugees are currently hosted by Jordan (317,177); Syria (94,973) and Lebanon (96,521). These numbers do not include Palestinian refugees displaced to the West Bank and Gaza Strip (where they roughly add up to 143,562 and 194,802 respectively). Statistics as of 30 June 2003 by UNRWA, www.unrwa.org.

¹⁵ Article 7(4)(e)(iii).

¹⁶ Article 7(7).

¹⁷ Sid Ahmed, Mohamed, "The Geneva Accord: Can hope be pinned on a new round of secret Israeli-Palestinian negotiations », *Al-Ahram Weekly*, 23-29 October 2003, www.weekly.ahram.org.eg/2003.

successive Israeli governments, for whom this is linked to the demographic endgame: the securing of a solid and stable Jewish majority. As Israeli architect of the accord Yossi Beilin points out, the Geneva Accord signifies that “no Palestinian will enter Israel under a ‘right of return’...there is no right of return in this agreement and there will be none”.¹⁸

In addition, no reference is made to the notion that Israel accepts responsibility for the displacement of Palestinians from their homes in 1948, or that it recognises the legal obligations contained in Resolution 194, which the GA has affirmed annually since its adoption. On the contrary, Article 7 of the Geneva Accord states that once an estimate of the value of Palestinian refugee property is made by an International Commission, this value will constitute the Israeli “...Lump sum contribution [emphasis added]” to an International Refugee Fund. This fund will oversee and manage the process whereby the status and permanent place of residence of Palestinian refugees is determined, and will administer the implementation of the compensation provisions. More importantly, the provision emphasises that “no other financial claims arising from the Palestinian refugee problem may be raised against Israel”.

Thus Israel would clearly be exempted from its legal responsibilities towards the refugees, despite the fact that the international community has considered Israel to be bound to ensuring the full implementation of the Palestinian right of return since its establishment in 1948.¹⁹

II. BILATERAL TREATY OBLIGATIONS AND COMMITMENTS UNDER THE UNITED NATIONS CHARTER

The Charter of the United Nations (UN) represents the constitution of this organisation and is an international treaty whose provisions bind all 1 states that are parties to it. According to the provisions of the Charter, the protection and promotion of universal respect for and the observance of, human rights and fundamental freedoms “...for all without distinction as to race, sex,

¹⁸ Sid Ahmed, Mohamed, *Ibid.*

¹⁹ In GA Resolution 273 (1949) admitting Israel to the UN, the GA recalled Resolution 194 (III) regarding repatriation, restitution and compensation for all displaced Palestinians.

language or religion” shall be amongst its main functions.²⁰

Nevertheless, the provisions of the Geneva Accord attempt to erode the significance of the Charter, and undermine respect for its distinct legal status. Article 2(6) of the Geneva Accord states that “relations between Israel and Palestine shall be based upon the provisions of the Charter of the United Nations without prejudice to the commitments undertaken by them in this Agreement.” This indicates that in the event of a conflict arising between the obligations under the provisions of the charter and those under the Geneva Accord, the parties have chosen to empower a bilateral agreement over the provisions of the UN Charter.

For example, while the prohibition on the acquisition of territory by force constitutes customary international law,²¹ the Accord envisages modifications to the Green Line (the de facto border between Israel and the OPT), and which the parties will then recognise “as the permanent, secure and internationally recognized international boundary between them”.²² This is in clear violation of principles of customary and conventional international law which recognize that violations of peremptory norms of international law (*jus cogens*) and commitments contrary to the UN Charter, constitute reasons for the declaring a treaty as invalid.²³

In this regard, Article 103 of the UN Charter stresses that in the event of such a conflict of obligations, the legal obligations of a member state “...under the present charter shall prevail”.

III. THE PALESTINIANS’ INDIVIDUAL AND COLLECTIVE RIGHT TO PROSECUTE THE OCCUPYING POWER

According to Article I of the Geneva Accord, the agreement is to end “...the era of conflict and ushers in a new era based on peace [and] cooperation”. It also stipulates that “the implementation of this agreement will settle all

²⁰ Article 55 and 56 bind member states to “observe and respect human rights of the UN Charter.” See Advisory Opinion on the Legal Consequences of the Continued Presence of South Africa in Namibia, I.C.J. Report 1971. In a study mandated by the GA, then-Secretary-General concluded that “{t}he phraseology of the Charter would encompass ..living in territories under belligerent occupation”. See “Respect for Human Rights in Armed Conflict: Report of the Secretary General”, 20 November 1969, UN Doc. A/7720, UNGA 24th session.

²¹ Article 2(4) of the UN Charter.

²² Article 4.

²³ Article 53 of the Vienna Convention on the Law of Treaties (1969) stipulates that “a treaty is void if at the time of its conclusion it conflicts with a peremptory norm of general international law”.

the claims of the parties arising from events occurring prior to its signature”, and that “no further claims related to events prior to this agreement may be raised by either party”.

Thus the Accord ignores the normative standards in international law against impunity for war crimes²⁴ and grave breaches of the Fourth Geneva Convention.²⁵ It also violates the provisions of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,²⁶ which stresses that the punishment of those crimes is not prevented by statutory limitations whether in relation to prosecution or to the enforcement of the punishment. Furthermore, it undermines any opportunity by Palestinian victims to hold Israeli perpetrators of such crimes accountable so that they may not be committed in future with impunity. It also negates their right to obtain individual or collective redress in the form of fair compensation for all damages resulting from Israel’s military occupation of the OPT.

IV. THE INDIVIDUAL AND COLLECTIVE RIGHT OF PALESTINIANS TO DEMAND COMPENSATION FOR ALL DAMAGES RESULTING FROM ISRAELI SETTLEMENT POLICY

One of the worst failings of this text is its clear exemption of the State of Israel from all its legal responsibilities of compensating Palestinians who have incurred damages as a result of the construction of Israeli settlements²⁷ and the unlawful practices of its settlers against the Palestinian civilian population. Thus the Geneva Accord only states that “the state of Israel shall be responsible for resettling the Israelis residing in Palestinian “lawful”

²⁴ Grave breaches are considered to be crimes of universal jurisdiction. This signifies that they are so universally recognised as abhorrent that any state can prosecute the perpetrators, regardless of their nationality, the nationality of the victims or the location of the crime.

²⁵ Grave breaches constitute war crimes and are concerned with individual responsibility for breaches of the laws of war. According to Article 147 of the Fourth Geneva Convention, these include: willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, willfully depriving a protected person of the rights of a fair and regular trial, and extensive destruction and appropriation of property not justified by military necessity.

²⁶ Adopted by GA Resolution 2391 of 26 November 1968.

²⁷ The establishment of settlements by Israel in the OPT started immediately after 1967. Initiated by the left wing Labour government during the period 1967-77, it continued under successive Labour and right wing Likud governments. Today, nearly 400,000 Israeli settlers live in more than 150 settlements throughout the OPT.

presence in the OPT. This undermines future opportunities to hold Israel accountable for having transferred its own civilians into the OPT, sovereign territory outside this territory”,²⁸ this provision does not extend to include all settlers, as Israel will maintain some settlements. Moreover, the use of the term “settlers residing” implies that settlers are entitled to a which in international humanitarian law amounts to a war crime.²⁹

According to international law, restitution has been established as the primary remedy in state practice.³⁰ Thus a state which has inflicted damages on the other party is responsible for implementing, rectifying, and ending the consequences resulting from a violation of the provisions and rules of law.³¹ The substance of this principle has been considered to confer rights directly on individuals.³² Many human rights conventions provide a right to an “effective remedy” which has often been interpreted as including a right to compensation.³³ In some instances, this right has been explicitly provided for.³⁴

This has also been the case in international humanitarian law. Article 3 of the Fourth Hague Convention 1907 confirms that a “belligerent party which violates the provisions of the [Hague] Regulations shall, if the case demands, be liable to pay compensation”. Furthermore, Article 148 of the Fourth Geneva Convention stipulates that a High Contracting Party cannot “absolve itself or any other High Contracting Party of any liability incurred” by either of them in respect of grave breaches they committed. According to the ICRC Commentary, this article

²⁸ Article 4(5).

²⁹ Article 147 of the Fourth Geneva Convention and Article 85 of Additional Protocol 1.

³⁰ The current Draft Articles on State Responsibility by the International Law Commission (ILC) takes a firm view on the primacy of restitution. Articles 42 and 43 provide for reparation and restitution in kind.

³¹ Therefore, a state committing illegal practices and acts affecting the right of another must “...wipe out all the consequences of the illegal act and re-establish the situation which, in all probability, have existed if that act had not been committed.” See Case Concerning Chorzow Factory Case (Claim for Indemnities), Permanent Court of International Justice, P.C.I.J. (Claim for Indemnities), Series A, No. 17, 13 September 1928.

³² According to Kalshoven, the word “compensation” should be understood as referring especially to individuals as beneficiaries of the rule. See expert opinion of F. Kalshoven, et al. in *War and Rights of the Individual*, H. Fujita, et al. (eds.), Nippon Hyoron-sha Co., Ltd. Publishers, Tokyo, 1999.

³³ For example Article 3 of the ICCPR and Article 25 of (ACHR). See also Human Rights Committee Case No. 45/2979 Pedro Pablo Camargo v. Colombia (in which the committee ordered the payment of compensation to a husband for the death of his wife), and Case No. 84/1981 Barbaro v. Uruguay (where appropriate compensation is to be paid to the family of the person killed).

³⁴ See Article 9(5) of the ICCPR which provides for the right to compensation for unlawful detention or arrest”, and Article 14(6) (compensation for miscarriages of justice); Article 5(5) of (ECHR) also stipulates that a person is to receive compensation for unlawful arrest or detention; Article 3 Protocol 7 of ECHR (compensation for miscarriage of justice) and Article 10 of the ACHR (miscarriage of justice).

“is intended to prevent the vanquished from being compelled in an armistice agreement or a peace treaty to renounce all compensation [emphasis added] due for breaches committed by persons in the service of the victor”.

Moreover, according to Article 4(5)(e) of the Geneva Accord, Israel will leave behind the immovable property, infrastructure and facilities in Israeli settlements to be transferred to the Palestinian side. The Accord then stipulates that an inventory of the fixed assets will be drawn up, and which “will be deducted from Israel’s contribution to the International Fund” that will compensate Palestinian refugees.³⁵ Thus, the Geneva Accord seems effectively to reward the unlawful actions taken by Israel in transferring part of its own population into occupied territory, in violation of international law, and in clear defiance of numerous resolutions by the Security Council, the General Assembly and other UN bodies.

V . ARBITRARY DEPRIVATION OF PALESTINIANS OF THEIR RIGHT TO PRIVATE PROPERTY

Although Article 4(5) of the Geneva Accord stipulates that once the settlements have been evacuated, Israel “shall keep intact the immovable property infrastructure and facilities in Israeli settlements to be transferred to Palestinian sovereignty”, it stresses that “the state of Palestine shall have *exclusive* [emphasis added] title to all land and any buildings, facilities, infrastructure or other property remaining in the settlements”. This misleads one to believe that all existing Israeli settlements were built on state land, and not as in the majority of cases on land that constitutes the private property of Palestinians,³⁶ confiscated by Israel in violation of fundamental provisions of international human rights and humanitarian law,

³⁵ Article 7(9)(e).

³⁶ Control over land has been at the core of the Israeli-Palestinian conflict. Since 1967, thousands of dunums of land have been seized from Palestinians by the Israeli military authority, thereby displacing several thousand landowners and farmers and dispossessing them of their property. The pretexts traditionally used by Israel for seizing private property includes: confiscating it for “public purposes in accordance with Israeli law (in the case of annexed East Jerusalem); closure or requisition of land for security reasons through military orders and seizure of Palestinian land by designating them to be state land in accordance with law existing at the time of Ottoman rule. See Matar, Ibrahim “Exploitation of Land and Water Resources for Jewish Colonies in the Occupied Territories”; “Powers and Duties of an Occupant in Relation to Land and Natural Resources,” *International Law and the Administration of Occupied Territory*, Emma Playfair (ed.), Clarendon Press, Oxford, 1988.

most notably Article 49 of the Fourth Geneva Convention. Put simply, the transfer of civilians by Israel into the OPT "...cannot but serve economic, social or strategic needs of the occupying state as such. To this extent it is strictly prohibited".³⁷

While under international humanitarian law, enemy private property may under certain circumstances be subject to confiscation, the private property of non-belligerent entities is protected against such a measure. As Article 46 of the Hague Regulations stipulates, private property must be respected and cannot be confiscated by an Occupying Power.³⁸ Furthermore, as an Occupying Power, Israel is not entitled to interfere in the economic activity of the territory under its control, unless such interference meets its own military or security needs; defrays the expenses involved in the belligerent occupation; or protects the interests and wellbeing of the Palestinian inhabitants.³⁹

Moreover, under the established principles of international law regarding the expropriation of foreign property, the failure of the Israeli military authorities to respect the right to private property triggers the right of property owners to compensation. By specifying that the Palestinian state will have exclusive ownership, the danger arises from the fact that relevant provisions private land and property, and would undermine their ability to reclaim it in the future.

VI. THE EXERCISE OF SELF DETERMINATION AND TERRITORIAL SOVEREIGNTY BY THE PALESTINIAN PEOPLE

Although the right to self-determination is closely linked to the notion of territorial sovereignty, for nearly four decades, Israel's establishment and continued expansion of settlements in the West Bank and Gaza Strip has been a central component of Israel's effort to consolidate control over the OPT, and to facilitate territorial acquisition. Undermining the territorial contiguity and economic viability of areas populated by Palestinians, this policy has so far precluded the establishment of a viable independent Palestinian state, and continues to infringe on the right of the Palestinians

³⁷ Cassese, Antonio, "Powers and Duties of an Occupant in Relation to Land and Natural Resources", *ibid.*

³⁸ Article 56 of the Hague Regulations.

³⁹ Cassese, Antonio, *supra* note 36.

to self-determination. It should be noted that the principle of self-determination features prominently in the UN Charter, and has been established by the practice of UN organs, as an essential pre-requisite for the realisation of other basic human rights.⁴⁰ In the case of the Palestinian people, more than 40 resolutions were passed in the last five decades in support of their right to self-determination,⁴¹ and in recognition that their “inalienable national rights” is a an indispensable condition for comprehensive, just and lasting peace in the Middle East.⁴²

Although the Geneva Accord envisages the establishment of a Palestinian state, it does not allow for an unfettered exercise of Palestinian sovereignty in the territory of that state. In fact the Accord has numerous provisions that address Israeli security concerns about possible risks resulting from the establishment of a Palestinian state, thereby making any agreement conditional upon Palestinian acceptance of significant restrictions.

In this regard, although Israeli settlement policy in the OPT continues to violate fundamental provisions of international human rights and humanitarian law,⁴³ the Geneva Accord does not make reference to its illegality, or mandate the evacuation of all settlements in the OPT⁴⁴, thereby effectively legalising them. This contravenes repeated statements by UN

⁴⁰ This is affirmed in Article 1 of the UN Charter and in Article 55 which deems it “necessary for peaceful and friendly relations among nations”. An important mentioning of the principle was made in the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the GA in 1960. It has since then been further developed in several GA Resolutions, most notably the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, which was adopted without vote, which provides evidence of the consensus among UN member states on the elaboration of the principle of self determination.

⁴¹ The first resolution to explicitly recognise the Palestinians as a people is GA resolution 2535 adopted in 1969, which has been reaffirmed by all subsequent resolutions that address this issue. Resolutions 2649 and 2672, both adopted in 1970, were followed to explicitly acknowledge the right of the Palestinians to self-determination.

⁴² General Assembly Resolution 34/70 (1979).

⁴³ Article 49 of the Fourth Geneva Convention states that “...the Occupying Power shall not deport or transfer parts of its own civilian population in the territory it occupies”. The Hague Regulations of 1907 also prohibit an occupying power to undertake permanent changes in the territories it occupies, unless these are due to military needs, or unless they are undertaken for the benefit of the local population, two exceptional criteria which Israel’s settlements in the OPT do not meet.

⁴⁴ Israel will be allowed to retain a number of settlements around Jerusalem. According to Mitzna, “...Givat, Zeev, old and new Givon, Maale Adumim, Gush Etzion, Neve Yaacov, Pisgat Zeev, French Hill, Ramot, Gilo and Armon Hanatziv will be part of the expanded city forever. None of the settlers in those areas will have to leave their homes”. See Abunimah, Ali, “A Disastrous Dead End: the Geneva Accords”, *The Electronic Intifada*, 28 October 2003, www.electronicintifada.net.

bodies have repeatedly declared that changes carried out by Israel in the OPT in contravention of international law are null and void, and have called upon Israel “to desist from all policies and practices affecting the physical character or demographic composition” in the same territories.⁴⁵ As previously mentioned, the only thing that the Geneva Accord states is that: “the state of Israel shall be responsible for resettling the Israelis residing in Palestinian sovereign territory in Israel in accordance with the schedule stipulated in the provisions of the Accord”,⁴⁶ subject to “Israel’s capacity to relocate, house and absorb settlers”.⁴⁷ Further, it also violates the provisions of bi-lateral agreements between them.⁴⁸

A closer examination of the Geneva Accord provisions supports the argument that it effectively undermines the territorial integrity and political independence of a Palestinian state, and that the restrictions it places on the manifestations of sovereignty contained within the Geneva Accord leave the concept meaningless. For instance, Israel will be able to maintain troops in the Jordan valley for an additional 36 months subject to renewal by the parties consent.

Furthermore, Article 5 of the Geneva Accord entitles Israel to maintain “an unseen” presence at Palestinian-controlled borders to monitor and inspect the movement of goods inside and out of the Palestinian state and to use “Palestinian sovereign airspace for training purposes.” The provisions of the Accord also stipulate that two early warning stations in the north and central West bank will be established whose internal security will be the responsibility of Israel. A corridor to link together the West Bank and Gaza Strip, and which would play a vital role to any viable Palestinian state, would also be under Israeli sovereignty.⁴⁹ Moreover, although both parties envisage the establishment of a multinational force to provide necessary security guarantees to the parties; act as a deterrent; and oversee the implementation of the Accord’s relevant provisions, it “... shall be deployed [only] in the State of Palestine”. No corresponding provisions relate to Israel.

⁴⁵ GA Resolution 2949.

⁴⁶ Article 4(5)(a).

⁴⁷ Article 5(7)(c).

⁴⁸ Israeli settlement policy is in breach of Article XXXI (7) of the Oslo Interim Agreement of 1993 that requires Israel and the Palestinians not to initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations between the two sides.

⁴⁹ Article 4(6).

Furthermore, the Geneva Accord endorses the possibility of land of the Geneva Accord would effectively annul the right of owners to their swap process.⁵⁰ Although modifications to the Green Line were made in the name of addressing “Israeli security concerns”, this undeniably violates the rights of the Palestinian people to self-determination and full sovereignty over the OPT in accordance with international law and UN resolutions. Moreover, the Geneva Accord that East Jerusalem would be divided between the two parties, with part of the city under Palestinian sovereignty and the Jewish quarter under Israeli sovereignty,⁵¹ thereby condoning Israel’s control over parts of East Jerusalem⁵² in violation of the customary prohibition on the acquisition of territory by force laid down in the UN Charter, and international humanitarian law.⁵³ Since 1967, both the GA and SC have reaffirmed that Israel is not entitled to change the legal status of Jerusalem, and have refused to recognise the law formally annexing that part of the city.⁵⁴

VII. UNDERMINING ALL UN RESOLUTIONS PERTAINING TO THE PALESTINIAN QUESTION.

Although the preamble of the Geneva Accord asserts that both parties will “conduct themselves in conformity with the norms of international law and the Charter of the United Nations”, and that it “will constitute the full implementation” of UN resolutions 242 and 338, Article 17 of the Accord calls “for a UN SC and GA resolution that endorses the agreement and supercedes the previous UN resolutions”. Not only does the Geneva Accord render null and void a decade of UN resolutions pertaining to the Palestinian Question, it also empowers a bilateral agreement over resolutions that represent the position of the international community over the last 50 years. These resolutions have addressed such issues such as the legal status of Jerusalem, the illegality of settlements,⁵⁵ the prohibition on the acquisition

⁵⁰ Article 4 and Map 1.

⁵¹ Article 6.

⁵² Following the 1967 war, East Jerusalem was placed under Israeli law, and then formally annexed in 1980.

⁵³ Article 43 of the Hague Regulations and Article 46 of the Fourth Geneva Convention.

⁵⁴ In SC Resolution 478 (1980), the Council “called upon those states that have established diplomatic missions in Jerusalem to withdraw such missions from the Holy City”.

⁵⁵ In 1980, the UN SC unanimously adopted a resolution stating that “Israel’s policies and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Fourth Geneva Convention.” In 1982, the GA also referring to the Fourth Convention, strongly condemned the “...establishment of new Israeli settlements and expansion of the existing settlements on private and public Arab lands, and transfer of an alien population thereto”.

of territory by force⁵⁶ and the Palestinian refugee's right of return, amongst others. This undermines the UN's historic role regarding the Palestinian Question and its legal commitments and obligations to find a just and lasting solution to this conflict (based on its role in the division of historic Palestine),⁵⁷ these resolutions ensure the protection and promotion of the rights of the Palestinian people.

CONCLUSION

Some commentators and political analysts have argued that given the current disparity of power between the two sides, the Geneva Accord may be the best that could be negotiated in the present climate. However, it is clear that the Geneva Accord fails to guarantee that fundamental principles of international law serve as the foundation for any blueprint for a permanent status agreement between the two sides.

Several provisions of the "Geneva Accord" are in contravention of international human rights and humanitarian law. Al-Haq is particularly concerned about the failure of the Geneva Accord to mandate the evacuation of all settlements, and that it revokes the Palestinian individual and collective right to return as clearly manifested in UN General Resolution 194. Since the Geneva Accord is constructed in a way where all claims of the parties prior to its signature are ended, it prevents any opportunity to obtain accountability for violations of international law. Last but not least the "Geneva Accord" states clearly that the provisions of the bi-lateral agreement supersede all previous UN resolutions related to the Palestinian Question, and have superiority over the provisions of the UN Charter.

In this regard, the Geneva Accord clearly ignores many of the lessons that should have been drawn from previous peace initiatives and plans, such as the Oslo Accord, and how they are bound to fail when they attempt to sideline international legal principles. For example, while the Declaration of Principles (DOP) referred to SC resolutions 242 and 338 as the basis

⁵⁶ According to the Declaration of Principles of International Law Concerning Friendly Relations between States "no territorial acquisition resulting from the threat or use of force shall be recognized as legal".

⁵⁷ On 29 November 1947, the UN GA passed Resolution 181 recommending the partition of British mandated Palestine into an independent Arab and Jewish state, with an internationalized Jerusalem.

for a permanent settlement, it failed to make reference to the Palestinians as a people or to mention their right to self-determination, and preferred to defer the question of Jerusalem to the permanent status negotiations.⁵⁸ In addition, the DOP makes no reference to the right of return of Palestinian refugees of 1948, or to GA Resolution 194 as a legal framework, but refers to refugees as one of the issues to be dealt with during permanent status negotiations.⁵⁹ Previous peace agreements also appear to have condoned Israel's settlement policy by unlawfully recognising Israel's authority over settlements and the applicability of Israeli law to the settler population.⁶⁰ Given the legal implications of many of its provisions, it is all too apparent that it would be dangerous to consider this a new bottom line from which any future negotiations would proceed.

The Preamble of the Accord states that it is to be concluded between the State of Israel and the Palestine Liberation Organisation (PLO) the representative of the Palestinian people. However, as Palestinian Prime Minister Ahmed Qureia stated, the Palestinian participants neither represent the PLO nor the Palestinian government.⁶¹ Hence, and in the absence of a referendum on the provisions of the Accord, it becomes imperative that the preamble unequivocally mentions that those who drafted this document do not officially represent the Palestinian people.

While Al-Haq welcomes the international community's interest and efforts to resolve the Israeli-Palestinian conflict and to terminate the Israeli occupation of the West Bank and Gaza Strip, it is Al-Haq's conviction that international law should not just inform and facilitate the process of negotiating outstanding key issues, but must form part of the very foundations on which this process is based.

In this regard, Al-Haq regrets the support of the Swiss government for the Geneva Accord, and considers it to conflict not just with its role as the depository of the Geneva Conventions, but also with its obligation as a High Contracting Party to the Four Geneva Convention to "ensure respect

⁵⁸ Article 5 of the DOP of 1993.

⁵⁹ Article 5 of the DOP. It is worth noting that in the case of Palestinians who became refugees following the 1967 Arab-Israeli war, Article 12 of the Declaration provided for modalities of admitting a number of them.

⁶⁰ Article 5 of the Cairo Agreement, and Article 17 of the Oslo II Agreement.

⁶¹ Urquhart, Conal, "Radical Plans for Middle East", *Guardian*, 2 December 2003.

for the convention under all circumstances”.⁶² Similarly, according to Article 146 of the Fourth Geneva Convention, High Contracting Parties such as Switzerland are in fact obligated to punish grave breaches. They must enact laws to investigate and punish those responsible for war crimes, and must also apprehend individuals alleged to have committed or to have ordered others to commit grave breaches, and either bring them to justice before their own courts or turn them over for trial in another country.

The ability of an agreement to deliver on human rights commitments will significantly affect and determine the nature of transition. In this regard, the willingness and ability of the international community to enforce a human rights framework is crucial. Otherwise, any efforts to achieve a just and durable solution to the conflict will not materialise. Therefore it remains the legal obligation of this community of states to ensure that Israel fully implement successive UN resolutions pertaining to the Palestinian Question in a manner that guarantees Palestinian refugees their right of return; enables the Palestinian people to exercise their right to self-determination and territorial sovereignty; and safeguards the human rights of the Palestinian civilian population.

⁶² Common Article 1 of the Four Geneva Conventions. As the ICRC Commentary notes, this article was intended to emphasize the responsibility of the Contracting Parties to “...prepare in advance, that is to say in peacetime, the legal material or other means of ensuring the faithful enforcement of the Convention when the occasion arises”, to prevent grave breaches from reoccurring.