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Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk*

Summary

This report examines developments related to human rights in the Occupied Palestinian Territories from the period from July through December 2009. The Special Rapporteur gives primary attention to the establishment, activities and main findings of the United Nations Fact-Finding Mission on the Gaza Conflict. Reactions to the Mission report, including criticisms and objections from the international community, are also reviewed.

The Special Rapporteur considers the question of Israeli settlements and their impact on the enjoyment of human rights. In this regard, the current initiatives of the Government of Israel in relation to the settlements are discussed, and reactions at the local and international levels are examined. Recent efforts to demonstrate against the construction of a wall in the West Bank by the Government of Israel are also discussed.

The report gives considerable attention to the ongoing blockade of Gaza by the Government of Israel. In this context, the implications of the blockade for efforts to rebuild following Operation Cast Lead are highlighted, as well as persistent calls from the international community for Israel to lift the blockade. The Special Rapporteur recalls the situation of Palestinian refugees, and emphasizes the need to keep their plight on the agenda of any effort to establish peace. Finally, the report welcomes a civil society-led campaign to boycott, divest from and sanction Israel for its occupation of Palestinian territories.

*Late submission.

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I. Introduction

1. The Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 has again been compelled to prepare this report without the benefit of the cooperation of the State of Israel. In practical terms, this has meant a continuing refusal to grant access to the Occupied Palestinian Territories to a representative of the United Nations. This violates Israel's obligations as a Member State, it impairs the capacity of the Human Rights Council to serve the international community, and denies the people living under occupation a critical outlet to convey grievances regarding violations of international humanitarian law or international human rights law, thus interfering with the ability of the United Nations and Member States to exercise their responsibilities to stop these violations. This report, then, is based on the best efforts of the Special Rapporteur to gain reliable information bearing on the range of issues arising from the continuing occupation, including from secondary sources and the testimony of witnesses. In the future an effort will be made to visit the Gaza Strip in a formal mission facilitated by the Government of Egypt. The Special Rapporteur has been given assurances that the Government of Egypt intends to grant him permission to enter Gaza by way of the Rafah Crossing.

2. This report covers developments related to human rights in the Occupied Palestinian Territories (OPT) from July through December 2009. Most developments are connected to issues discussed in prior reports of the Special Rapporteur. New concerns addressed in the present report include the treatment, by the Human Rights Council and other organs of the United Nations, of the report of the United Nations Fact-finding Mission on the Gaza Conflict, and the role of civil society initiatives that seek to protect human rights in the OPT, in particular given the inability or unwillingness of the United Nations and other international actors to uphold human rights and the severity of the deprivations confronting Palestinians, who have been living for so long under the burdens of a harsh occupation. This harshness has long been flagged as being of an emergency character with respect to the 1.5 million residents of the Gaza Strip, especially since the imposition of the unlawful Israeli blockade, beginning in June 2007, which has been widely condemned as a flagrant and serious violation of the prohibition on collective punishment expressed in article 33 of the Fourth Geneva Convention, relative to the Protection of Civilian Persons in Time of War, which unconditionally condemns collective punishment. There are also some new concerns that have been prompted by the announcement by the Government of Israel of a temporary and partial 10-month freeze on settlement expansion in the West Bank and the resultant resistance to this ban by settlers and their settler organizations, often taking the form of recourse to violence against Palestinians, their persons, their property and their public facilities. Israel has not displayed due diligence in discharging its primary responsibility as occupying Power to protect the occupied civilian population.

II. The United Nations Fact-finding Mission on the Gaza Conflict

3. The United Nations Fact-finding Mission on the Gaza Conflict released its report (FFM report)¹ on 15 September 2009. It was discussed by the Human Rights Council on 29 September 2009. The Mission undertook a comprehensive investigation of allegations of war crimes committed by both Israel and Hamas during Operation Cast Lead, which was carried out by Israel in the Gaza Strip from 27 December 2008 to 18 January 2009 and resulted in the death of 1,434 Palestinians (960 of whom were civilians), injuries to 5,303 Palestinians, and the death of 13 Israelis (3 of whom were civilians). The mandate of the Fact-finding Mission was as follows: "To investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, after or during."² The investigation was carried out over a period of three months by a four-person mission led by Justice Richard Goldstone, former member of the South African Constitutional Court and former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda. The other members of the mission were Hina Jilani, Advocate of the Supreme Court of Pakistan; Christine Chinkin of the London School of Economics and Political Science; and Desmond Travers, formerly an officer in the Irish Defence Forces.

4. The main findings of the FFM report reinforced conclusions reached earlier by an Arab League fact-finding mission³ headed by John Dugard, former Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, and by a range of respected international, Israeli and Palestinian human rights organizations.⁴ The most significant general conclusion reached was that during Operation Cast Lead the attacks by the Israel Defense Forces (IDF) were aimed at the population of the Gaza Strip as a whole and, as such, constituted collective punishment that violated Israel's obligations arising out of its "effective occupation"⁵ of Gaza.⁶

5. This main finding of collective punishment, together with a series of specific abuses in incidents where the IDF was found to have deliberately targeted civilians and civilian structures, led the Fact-Finding Mission to conclude that crimes against humanity might have been committed by Israel.⁷ The FFM report also concluded that the rockets fired from Gaza into Israeli territory were indiscriminate, and as such their use constituted war crimes that amounted to crimes against humanity.⁸ Given the asymmetric casualty totals and Israel's initiation of Operation Cast Lead, far more attention was given in the FFM report to the allegations of IDF criminality than to that of Hamas.

6. The rather elaborate recommendations in the FFM report were preoccupied with the challenge of overcoming “the culture of impunity” that had immunized similar criminality in the past, and sought mechanisms of accountability that would result in the prosecution of perpetrators. At the same time, the FFM report, in recognition of the general international policy of allowing political actors to establish their own domestic procedures of accountability, recommended that Israel and the appropriate authorities in Gaza be given six months to establish their own independent, credible investigations of allegations and put in place procedures to assess accountability.

7. This process is supposed to have been monitored by a body of independent experts appointed by the Human Rights Council, and, if the Council deems the results unsatisfactory, then it is to refer the report to the Security Council for transfer to the International Criminal Court for appropriate action.⁹ Further, the FFM report recommended that countries with laws conferring universal jurisdiction on national criminal courts pursue investigation, detention and indictment of alleged perpetrators, as appropriate.¹⁰

8. The FFM report was discussed in the Human Rights Council and resolution S-12/1 was adopted on 16 October 2009 by a vote of 25 in favour,⁶ opposed, and 11 abstaining. On 15 October 2009, the United Nations High Commissioner for Human Rights told the Human Rights Council of her support for the FFM report and its recommendations, urging action to counter impunity by investigating and prosecuting those against whom substantial evidence existed to support war crimes accusations. Significantly, the High Commissioner asserted that holding war criminals accountable should not be considered as an obstacle to a peace process, which is the position taken by leading Member States of the United Nations in response to similar allegations regarding criminal charges directed at Sudanese officials responsible for Darfur.¹¹ On 5 November 2009, the General Assembly adopted resolution 64/10 by a vote of 144 in favour, 18 opposed, and 44 abstaining, calling upon Israel and the Palestinian side to undertake, within a period of three months, independent, credible investigations, with provision for referral to the Security Council in the event that the parties do not carry out satisfactory self-investigations. The Secretary-General has been tasked with the responsibility of monitoring the process and reporting to the General Assembly as to whether there has been compliance. To date there has been no appointment of a panel of international law experts to evaluate the assessment process as recommended by the FFM.

A. Criticisms of the report of the United Nations Fact-finding Mission on the Gaza Conflict

9. As the United Nations Fact-finding Mission on the Gaza Conflict has framed the discussion of Israeli accountability under international humanitarian law during Operation Cast Lead, the Special Rapporteur considers it important to discuss the status of the report and criticisms directed at it. Israel and the United States of America both levelled heavy criticism at the report, contending that it was biased and one-sided. On a more technical level there was a suggestion that United Nations rules on fact finding were not adhered to, as Professor Chinkin, a member of the mission, had already been on record as supporting the allegations prior to her appointment.¹² Justice Goldstone explained that if the mission had been a strictly judicial undertaking, then Professor Chinkin would have been disqualified, but given the framework of inquiry, the qualifications for membership were competence and objectivity in the discharge of the inquiry.¹³ There were a variety of highly emotional attacks on the FFM report made by top Israeli political leaders, among other persons associated with the Government of Israel. The former Israeli Ambassador to the United Nations, Dore Gold, contended that the Goldstone report was the “most serious and vicious indictment of the State of Israel bearing the seal of the United Nations” since the anti-Zionist resolution of 1975.¹⁴

10. The more substantive argument against the approach taken in the report was that it neglected to take into account the actuality of a conflict in which Israel, as a democratic State, was entitled to defend itself by all effective means against Hamas, which is officially listed internationally as a terrorist organization. The implication of this argument seemed to be that the nature of the parties, in this instance, suspends the normal application of the rules of international humanitarian law. The representative of Israel to the General Assembly attacked the text of the report as disregarding Israel’s right to self-defence and that as such it amounted to a gift to terrorism. In fact, the FFM report affirmed Israel’s right to use force to defend itself, limiting its findings to the widely-supported conclusion that it was criminally unlawful to use force against the Gazan population as a whole, and also criminally unlawful to target civilians deliberately or to strike intentionally at protected buildings, including a variety of lethal attacks on United Nations facilities in Gaza that were lending shelter to Gazan civilians. There were also objections made by the United States representative to the call for the involvement of the Security Council or General Assembly in securing implementation of the report, claiming that the Human Rights Council was the appropriate forum. That argument was set forth despite — or possibly because of — the lack of any enforcement role or capability. Such efforts to steer subsequent action relating to the report away from implementation procedures seems designed to preserve Israeli impunity, and prompted the respected Gazan human rights leader and recipient of the Robert F. Kennedy Award, Raji Sourani, to remark: “We hope the Goldstone Report doesn’t end as piles of paper.”¹⁵

B. Objections from Palestinians to the report of the United Nations Fact-finding Mission on the Gaza Conflict

11. Most attention has been paid to Israeli complaints directed at the FFM report. Virtually no attention has been paid to Palestinian complaints, and in truth, the representatives of the Palestinian Authority have devoted themselves to the implementation of the recommendations contained in the report without expressing objections. Yet there are objections that should be considered as part of a comprehensive effort to gain a clearer understanding of the issues, as well as of the debate.

12. First of all, the FFM report pays no attention to the surrounding circumstances of a temporary Israel-Hamas ceasefire that had been put in place in June 2008, with notable success in reducing cross-border violence, especially as regards rockets. It also ignores the provocative violence of Israel during the ceasefire, especially the incident of 4 November 2008 in which Israel killed six Palestinians inside Gaza, as well as the frequent attempts by Hamas representatives to extend the ceasefire for as long as 10 years if Israel would lift the blockade and open the crossings. It is notable that these overtures by Hamas were made notwithstanding the failure by Israel to fulfil its commitments during the temporary ceasefire by easing, if not lifting, the blockade, which was in any event intrinsically unlawful under the Fourth Geneva Convention. The Israeli Ministry of Foreign Affairs acknowledges that the number of rockets fired from Gaza into Israel declined by 80 per cent during the ceasefire.¹⁶

13. From the perspective of international law, these elements raise serious questions as to whether Israel was entitled to act “defensively” under the circumstances, especially as it refused to explore the relevance of a diplomatic alternative to unbridled military force against an impoverished and crowded Gazan society, force that lacked clear military targets or even an opposing military. Also notable is the failure of the FFM report to take account of the refusal of Israel to allow civilians, including women and children, as well as the disabled, to exit Gaza and become refugees. This policy of locking civilians into a combat zone during sustained military attacks, denying them the right to seek refuge, is not explicitly prohibited in any existing human rights treaty or covenant, but seems clearly inconsistent with the prohibition of customary international law on cruel and inhumane tactics, and appears to be at odds with the fundamental duty of Israel, under the Fourth Geneva Convention, to provide protection to an occupied population. Finally, it is notable that the FFM report devotes considerable sympathetic attention to the captivity of the single Israeli soldier, Gilad Shalit, but no comparable concern is expressed in the report for the thousands of Palestinians being held in detention (estimated to be between 8,000 and 10,000, many without charge).

14. These serious gaps in the FFM report suggest that the contention of an anti-Israeli bias is without foundation. In fact, despite the refusal of Israel to cooperate with the Mission, the report indicates incredibly diligent efforts to meet with witnesses sympathetic to the arguments of the Israeli Government, including paying expenses associated with providing testimony received from the mayor of Sderot and from Israelis directly involved in Operation Cast Lead. Given the credibility of the members of the Mission, and in particular of Justice Goldstone himself, who insisted on including allegations of Palestinian war crimes within the FFM undertaking, it would seem irresponsible and frivolous to mount an argument against the findings and recommendations built around either the claim that anything emanating from the Human Rights Council is bound to be biased, or that the report, by finding the IDF responsible for the commission of war crimes, is by the very nature of its conclusions exhibiting an anti-Israeli, or in some dramatically-inflamed claims, even an anti-Semitic bias.

C. Intrinsic unlawfulness

15. The FFM report was based on a fact-finding mission. It was probably correct for this reason to overlook the underlying concern as to whether the rather restrictive legal framing of the FFM inquiry is suitable for this kind of asymmetric encounter, in which the Palestinian side lacked any weaponry to defend itself against a modern military machine and Israel defined its war aims as extending to the civilian infrastructure of the Gaza Strip. The ratio of casualties on both sides, even leaving aside the widespread trauma induced among the civilian population (estimated by some psychologists as being as

high as 90 per cent), exhibits clearly the one-sided character of the encounter.¹⁷ In addition, the property damage caused by Operation Cast Lead was entirely inside Gaza.¹⁸ Is reliance on such a blunt instrument of destruction, particularly under circumstances of effective occupation, ever capable of being reconciled with the values and principles embodied in international humanitarian law? At the very least, the character of Operation Cast Lead suggests the importance of raising such a question within the setting of the Human Rights Council or, as an alternative, encouraging or formally requesting the International Committee of the Red Cross to examine the topic.

D. Implementing the report of the United Nations Fact-finding Mission on the Gaza Conflict: universal jurisdiction

16. Among the most controversial, yet consequential, recommendations of the FFM report, is its endorsement of seeking accountability by way of “universal jurisdiction” through national judicial systems that contain such legislative authorization. The recommendation is formulated as follows: “In the context of increasing unwillingness on the part of Israel to open criminal investigations that comply with international standards, the Mission supports the reliance on universal jurisdiction as an avenue for States to investigate violations of the grave breach provisions of the Geneva Conventions of 1949, prevent impunity and promote international accountability.”¹⁹

17. In addressing ordinary international crimes, such as piracy or counterfeiting, it has long been the case that national courts exercise their authority to attach legal consequences, including for crimes, to behaviour that takes place beyond territorial jurisdiction. What is new is the assertion of this authority in relation to war crimes, crimes against humanity, genocide and torture. Most countries do not have such an authorization or do not exercise their authority in relation to war crimes committed outside national territory. For those that do, it is possible to pursue allegations of war crimes in relation to those who acted on behalf of either Israel or Hamas during Operation Cast Lead, to arrest, indict, prosecute, and punish.

18. Although there are political ways to insulate potential defendants from such a legal process, in national courts reliance on universal jurisdiction is not subject to the sorts of constraints that block efforts to achieve accountability within the United Nations system. As indicated in the FFM recommendation, recourse to universal jurisdiction is only deemed appropriate in those situations where there are substantial grounds to believe that a government cannot or will not take advantage of its own prerogative (and duty) to investigate authoritatively on its own. That is, the first line of defence against impunity is through the governmental procedures of the State whose nationals are suspected to be perpetrators. Some Israeli journalists and public figures have called on the Israeli Government to fulfil this obligation, arguing that even if the FFM report can be set aside because of its supposed bias and the auspices under which it was produced, this does not mean that the IDF acted in full accordance with international humanitarian law during Operation Cast Lead.²⁰

19. It has been reported that the Israeli Foreign Minister at the time of Operation Cast Lead and currently an opposition leader, Tzipi Livni, cancelled a visit to London in December 2009, because of the expectation that she would be arrested and charged with war crimes.²¹ A spokesperson for the Israeli Ministry of Foreign Affairs has confirmed that an arrest warrant had been issued in Britain charging Ms. Livni with orchestrating the attacks in Gaza.²² Some confusion exists, as Ms. Livni’s office released a statement indicating that her trip was cancelled due to a scheduling conflict two weeks prior to her departure date.²³ The issuance of this arrest warrant, although later withdrawn, has prompted efforts to amend British law as a matter of urgency to ensure that diplomatic contact with Israeli officials will not be threatened.²⁴

20. It is important to remember that there have been other situations involving controversial foreign public figures in which concerns about their possible detention and arrest has arisen. The most famous British case involved the detention of the former Chilean head of State, Augusto Pinochet, in 1998 in response to a Spanish request for extradition to face torture and other criminal charges associated with his years as head of State in Chile. There have also been some recent problems faced by Israeli officials who were considering a visit to Britain. The Minister of Defence, Ehud Barak, was granted immunity from the legal process by the British Government while on a visit to London to deliver a speech.²⁵ In October 2009, Deputy Prime Minister Moshe Ya’alon, was apparently advised by the Israeli Government to cancel a speaking engagement in London because he might be arrested.²⁶

III. Settlements in the Palestinian territories and their impact on the enjoyment of human rights

A. Settlement freeze

21. On 25 November 2009, Prime Minister Netanyahu proposed a 10-month freeze on settlement growth in the West Bank, which was approved by Israel’s security cabinet by a vote of 11–1.²⁷ Mr. Netanyahu described the initiative as following from the urging of “our friends” that once Israel takes “the first meaningful step” towards peace “the Arab world and the Palestinians will follow”.²⁸ The Prime Minister described the freeze as “a policy of restraint regarding the settlements which will include a suspension of new permits and new construction in Judea and Samaria” reassuring the settlers with “a promise to enable a normal life to continue for three hundred thousand Israeli citizens, our brothers and sisters”.²⁹ The announcement was viewed positively by the Government of the United States, but encountered criticism from both the Palestinian Authority and the leadership of the settler movement.³⁰

22. Palestinian criticism centred on the fact that the freeze did not include public buildings in the West Bank settlements, several thousand residential units under construction, or any building in occupied East Jerusalem. The original call for a freeze, by President Barack Obama, did call for a temporary freeze to be extended to the whole of the OPT, including East Jerusalem. The disappointing response of the United States to the Israeli initiative was articulated by Secretary of State Hillary Clinton: “Today’s announcement by the Government of Israel helps move forward towards resolving the Israeli-Palestinian conflict. We believe that through good-faith negotiations the parties can mutually agree on an outcome which ends the conflict and reconciles the Palestinian goal of an independent and viable state based on the 1967 lines, with agreed swaps, and the Israeli goal of a Jewish state with secure and recognized borders that reflect subsequent developments and meet Israeli security requirements”.³¹ One can only wonder about how big a departure from 1967 borders are envisaged to “reflect subsequent developments” and “meet Israeli security requirements”. Such an assertion by a senior official of the United States Government seems to be a virtual invitation to Israel to continue creating facts on the ground, presumably even if these facts occur in violation of international humanitarian law. It is also notable that, in his statement announcing the freeze, the Israeli Prime Minister twice used the settler terminology of Greater Israel, that is, “Judea and Samaria”, rather than the language adopted by the United Nations and the international community, that is, “the occupied West Bank” or simply “the West Bank”, which could be interpreted as staking an implicit claim for the eventual annexation of the West Bank, and not as a step towards the establishment of a viable Palestinian state.³²

23. The settlement movement, represented by Danny Dayan, chair of the main settler body, defiantly expressed objections: “We are 300,000 citizens living in 150 communities. It is impossible to freeze us. I don’t know how it will happen, but we will break this freeze.”³³ A variety of legal and non-violent settler initiatives have reinforced the Dayan statement, as well as an array of unlawful violent expressions of opposition to the freeze. The scope of the freeze is definitely less than meets the eye. Despite the freeze, construction will continue on 3,000 housing units in West Bank settlements for which permits have already been issued, and the freeze does not apply to public facilities such as schools, shops, meeting and administrative halls. It will, however, delay the construction of 18,000 housing units for which permits have been issued, but will not be built during the freeze. In addition, it has been reported that hundreds of construction permits were obtained by various settlements just prior to the announcement of the freeze. A Likud minister, Benny Begin, has said that the settlement population could grow by 10,000 even during the period of the freeze. To further diminish the impact of the freeze, after a large settler demonstration in Tel Aviv, the Prime Minister offered settlements some new tax breaks and other economic benefits, as well as reassuring settlers that after the freeze period “my government will revert to the policies of previous governments in relation to construction”.³⁴

24. As has been pointed out many times in past reports of the Special Rapporteur and his predecessors, the settlements are all unlawful due to the prohibition in article 49 (6) of the Fourth Geneva Convention. This provision prohibits the transfer of the population of an occupying Power to the occupied territory, particularly in this case where Israeli withdrawal to the 1967 borders — as legally prescribed by Security Council resolution 242 — is gravely compromised by the extensive settlement development, its related network of Israeli-only roads, the ongoing construction of the separation barrier, and the sustained effort to establish favourable facts on the ground, which would ultimately be relied upon by Israel as the basis for negotiating some agreed outcome. Finally, there have been hints by Mr. Netanyahu that if the Palestinian Authority does not soon reciprocate to the extent of agreeing to start peace talks, Israel may suspend the partial freeze.³⁵ Whether such a suspension would be significant beyond the atmospherics of pre-negotiation give and take is questionable, considering the large gap between what Israel seems to regard as its best offer and what the Palestinians are seeking as an

acceptable outcome.

B. The Israeli national regional priorities plan

25. There are further developments that suggest the real intentions of Israel with respect to the future of the settlements, and that undermine the credibility of the freeze as a prelude to the withdrawal of Israel from the West Bank, at least from the territory outside the so-called settlement blocs. In this respect, the 21 votes to 5 adoption by the full Israeli cabinet of a plan to fund settlements within the framework of “national regional priorities” to the extent of \$30 million for about 90 settlements, homes for 110,000 existing settlers, is a disturbing development.³⁶ Such investment would not make any sense if Israel is contemplating relinquishing substantial control over the West Bank, as these settlements are spread out all over the occupied territory. As the respected Palestinian negotiator, Saeb Erekat, has observed, these moves demonstrate that the freeze is “a sham”, and reveal Israel’s real goals.³⁷ A close cabinet associate of Mr. Netanyahu, Yuval Steinitz, Minister of Finance, confirmed this concern by pointing out that the priorities plan shows that the Netanyahu Government continues to support the settlers despite the freeze.³⁸ A strident critique has appeared in *Haaretz* under the byline of Zvi Bar’el: “The folly lies in how the new map renders void the decision to freeze construction in the settlements. ... The objective, then, is to create housing opportunities in the settlements and increase the number of settlers, as well as other dubious facts on the ground.”³⁹ What seems most destructive of prospects for the realization of the Palestinian right of self-determination is the treatment of former “fringe settlements” as if they were part of settlement blocs, making the national regional priorities plan a major expansion of permanent settlements. However, the Prime Minister reacted by declaring that nothing is permanent until final status talks have been concluded.⁴⁰ The Palestinian Authority has reportedly considered responding by issuing a directive to prohibit Palestinians from working in West Bank settlements.⁴¹

C. Attack on Hassan Hader Mosque

26. One of the worst incidents of settler violence following establishment of the freeze has been the burning of Hassan Hader Mosque in Yasuf village south of Nablus, on the night of 11 December 2009. The library of the mosque was burned, destroying copies of the Koran and other holy objects.⁴² Graffiti written on the walls confirmed that this was a so-called “price-tag” punitive act against Palestinians, with the aim of offsetting the burdens imposed on settlers by the freeze. As a supporter of the arson, Rabbi Yosef Elitzur of a yeshiva in Yitzhar explained: “If the Jews don’t have quiet – the Arabs won’t have quiet either; if the Arabs win because of violence against Jews, Jews will win because of violence against Arabs.”⁴³ By and large, however, Jewish leaders, including the Prime Minister and President, decried the crime against the mosque and called for an investigation and punishment of the arsonists.⁴⁴ Many rabbis, including several from nearby settlements, have denounced the crime, calling it “a distortion of Jewish values” and proclaiming that religious sites are inviolate, being outside the domain of national struggle.⁴⁵ Robert Serry, the United Nations Special Coordinator for Middle East Peace Process, made the following comment on the incident: “Desecrating a place of worship is deplorable. This attack is part of a broader and ongoing phenomenon of settler violence against Palestinian civilians, property, and land. Far too little is being done by Israeli authorities to enforce the rule of law on violent extremists, leading to a climate of impunity.”⁴⁶ There have been dozens of other “price-tag” incidents occasioned by the freeze, involving settler violence against Palestinian property and agriculture, especially olive trees that the occupying Power is obligated to protect as a matter of the highest priority.⁴⁷ Furthermore, there have been concerns related to insufficient protection from Israeli security forces and limited investigations.

D. East Jerusalem settlements

27. The initial observation is to take note of the original effort to persuade the Government of Israel to place a temporary ban on all settlement growth, including East Jerusalem. To include East Jerusalem would have demonstrated at least some openness to allowing the Palestinians to look forward to a state with Jerusalem as its capital. To persist with “natural growth,” especially when linked with the West Bank freeze, the accelerated rate of house demolitions and evictions and the denial of residency rights to Palestinians, seems to convey an unwillingness on the part of Israel to include any provision for a Palestinian capital in Jerusalem in a negotiated end to the conflict. This impression is strengthened by Prime Minister Netanyahu’s announcement that his office, as well as municipal authorities, would henceforth have to approve demolition orders.⁴⁸ Of course, this could mean greater restraint in the future. Time will tell.

28. Israelis argue that the eviction of Palestinian occupants was to restore the homes of Jews that had been seized during the period 1948–1967 when East Jerusalem was occupied and administered by Jordan. Yet in 2009 more Palestinians were stripped of their residency rights than in any year between 1967 and 2007. In the course of the year, according to Israeli figures, 4,577 Palestinians were deprived of residency status.⁴⁹ Palestinians interpret this pattern as an effort to alter the demographic balance in East Jerusalem so as to strengthen Israeli claims to the whole of Jerusalem. There are now approximately 200,000 Jewish settlers in East Jerusalem, which brings the respective populations in Jerusalem to about 65 per cent Jewish (500,000) as compared to 35 per cent Palestinian (250,000). Attention was given to a statement made by European Union (EU) Foreign Ministers on the Middle East peace process in early December, especially the paragraph pertaining to East Jerusalem. A leaked early draft prepared by Sweden definitely supported the idea of East Jerusalem as the capital of the future Palestinian state, which upset the Government of Israel.⁵⁰ After intense lobbying the final EU ministerial statement was much more equivocal, concluding in vague general terms: “If there is to be genuine peace, a way must be found through negotiations to resolve the status of Jerusalem as a future capital of two states.”⁵¹ The statement was much more supportive of the Palestinians in relation to demolitions and evictions, which were condemned as violations of Palestinian rights under occupation and as Israeli violations of international law. The Human Rights Council possesses the authority to insist on Israel ending its occupation of the entire Occupied Palestinian Territory, including East Jerusalem, both as the basis for a just, lasting, and comprehensive peace and in view of the persistent failure of Israel to uphold its legal duties as the occupying Power, as these are specified by international humanitarian law.

IV. Demonstrations against the wall in the West Bank

29. As earlier reports have demonstrated, the construction of the separation wall on occupied Palestinian territory that has been continuing since 2002 is one of the clearest examples of the unlawful character of the Israeli occupation of the West Bank, in direct violation of several fundamental Palestinian human rights, including the right of self-determination. This assessment has been confirmed by a 14–1 vote of the International Court of Justice in an Advisory Opinion, which called upon Israel to dismantle the wall and pay reparations to Palestinians who have been harmed by its construction.⁵² These conclusions were accepted by an overwhelming vote of the General Assembly, and rejected without qualification by Israel.⁵³ Not surprisingly, Palestinian residents of the West Bank most directly affected by the wall have tried to interfere with and object to, and to the extent possible, prevent its construction, relying almost totally on non-violent tactics. These acts of resistance are continuing at present. Israel has been charged with use of excessive force, causing several deaths and injuries in dealing with anti-wall demonstrations and activists, among whom are Palestinians, Israelis and peace activists from foreign countries. Witnesses and human rights groups have reported use of live ammunition on several occasions, as well as tear gas and rubber bullets.⁵⁴ Weekly demonstrations continue at the wall sites in the Palestinian villages of Bi’lin and Ni’lin.⁵⁵ In December 2009, Abdallah Abu Ramah, high school teacher and coordinator of Bi’lin Popular Committee, was arrested in his home at 2 a.m. in the presence of his wife and children, while the house was surrounded by seven military jeeps, surely a terrifying and humiliating experience that served no security purpose.⁵⁶ Mr. Abu Ramah was charged with the unlawful possession of arms which, incredibly, turned out to be a collection of used Israeli tear gas canisters that had been shot by the Israeli security forces at the protestors. Similarly, the internationally respected human rights figure, leader of the Stop the Wall Coalition and known for his advocacy of non-violent tactics, Jamal Juma, was arrested on 16 December 2009 and charged with the crime of “incitement”. The manifest absurdity of such charges strongly suggests that Israeli intention is to demoralize the anti-wall campaign by criminalizing the non-violent human rights activism, a pattern that should be a matter of grave concern to the Human Rights Council. Additional night raids on anti-wall activists have been carried out by Israeli security forces in Nablus on several recent occasions.⁵⁷

V. The blockade of Gaza

30. One year after Operation Cast Lead, the humanitarian situation in Gaza not only remains deplorable, but has worsened. The total blockade of the Gaza Strip remains in full effect, having lasted now for nearly three years, contributing to deteriorating physical and mental health for 1.5 million persons. A series of recent deaths from swine flu have caused fears of an onslaught of the disease against a population whose resistance has been reduced due to an inadequate diet and medical care, and otherwise living under constant threat.⁵⁸ Further, the sanitation system continues to deteriorate, not only adding to

the hazards of life in Gaza, but resulting in the dumping of 40–50 million litres per day of partially treated or untreated sewage into the Mediterranean Sea, as well as contaminating parts of the water supply in Gaza and endangering the fish in coastal waters.⁵⁹ After the end of hostilities in Gaza last January, States gathered at a donor conference in Sharm el-Sheikh pledged \$4.5 billion in funds for the reconstruction of Gaza. However, Israel has extended its blockade to include virtually all building materials, thereby preventing efforts to rectify the extensive damage wrought by Operation Cast Lead.

31. Electricity is also only partially available to the population. The latest figures released by the Gaza Electricity Distribution Company (GEDO) show that electricity supply has been cut to 25 per cent below actual demand, is only available for eight hours each day, and then only four days a week.⁶⁰ GEDO expects that the electricity shortage will increase to 35 per cent during the coming winter months, leaving residents without electricity for 18–32 hours per week. Such shortages, arising in part from restrictions on the availability of spare parts for repair, are an aspect of the unlawful collective punishment associated with the blockade. The shortage of cooking fuel and electricity has also made it almost impossible for bakeries, factories, and greenhouses to operate normally, worsening conditions of poverty and unemployment.⁶¹

32. There are uncontested reports that an underground fence, extending for 10–11 kilometres, as much as 18 metres below the surface, is being built on Egyptian territory close to the Gaza Strip border. The stated purpose of this construction is to protect Egyptian national security and guard against infiltrations of perpetrators of terrorist activities to be carried out inside Egypt. On the other hand, there may be some genuine Israeli concern regarding weapons smuggling to Gaza through the tunnels that also serve as a humanitarian lifeline to Gaza, due to the severity and long duration of the unlawful Israeli blockade of goods needed for normal living. As is understandable for a society facing harsh externally imposed economic coercion, an alternative economy has emerged in the Gaza Strip, producing a vibrant black market. The destruction and disruption of the tunnels is discussed only insofar as it bears on Israel's legal responsibilities, which as an occupying power, has legal responsibility to protect the civilian population of the Gaza strip. Above all, the central reality is that the blockade is unlawful, a continuing and massive form of collective punishment. As such, it represents a fundamental violation of Israel's responsibility to protect the civilian population of the occupied Gaza Strip.

33. The United Nations Relief and Works Agency (UNRWA) has started to build mud houses for those Palestinians made homeless by the attacks a year ago; the first mud house was recently completed, and the announced plan is to build 120 mud houses at a cost of \$10,000 each.⁶² The houses take three months to build and are a direct response to the absence of blockaded building materials such as cement, glass, and steel. This gesture of relief is welcome, but it is pathetically small in relation to the thousands made homeless by Operation Cast Lead.

34. Many world leaders, including Tony Blair, the envoy of the Quartet, and President Barack Obama, as well as the General Assembly, have called upon Israel to lift the blockade, open the crossings, and end this regime of collective punishment afflicting the entire population of the Gaza Strip, but so far to no avail. Israeli defiance of these calls to end the blockade has been consistently ignored, creating a crisis of confidence in the sincerity and true intentions of the international community. Even the persistent rumours of an impending prisoner swap, in which Gilad Shalit would be released along with many hundred Palestinian prisoners, do not promise an end to the blockade.⁶³ Nor has the absence of Israeli casualties due to rocket attacks post Operation Cast Lead, or the low incidence of such attacks, produced any change. In the face of these tremendous challenges, it is Gazan civil society that has demonstrated the most consistent resolve against the blockade. Several convoys of activists bringing medical supplies and food have attempted to cross into Gaza from Egypt, and have encountered difficulties when seeking transit permission from Cairo. Such initiatives are symbolic expressions of commitment to wage a legitimacy war on behalf of the Palestinians so long as their basic rights are being suppressed and their collective well-being subject to extraordinary stress. These initiatives also serve to expose the limited capacity of and effort by the United Nations to fulfil its responsibilities to protect the civilian population of Gaza from this oppressive occupation that has lasted for more than 42 years.

VI. The plight of Palestinian refugees

35. An important and unwelcome change in the overall posture of the Palestine/Israel conflict is the decreasing attention, in relevant diplomatic and human rights discourse, devoted to the plight of Palestinian refugees, in particular regarding the extent to which their rights as refugees should be fulfilled. Since the Special Rapporteur's mandate is concerned only with the OPT, discussion will necessarily be limited. Yet the wider implications for the total Palestinian refugee population of over 4 million should not be ignored. The underlying question is whether the refugees living in Gaza and the West Bank enjoy the right of return under international law if they were forced out or fled in 1948. The fundamental text is General Assembly resolution 194 (III) adopted on 11 December 1948, and especially paragraph 11: "Resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return ...".

36. By its nature a General Assembly resolution has no independent binding authority, and does not create legal obligations. Yet in this case it seemed to express a consensus widely shared at the time by governments as to the rights of the parties, and thus deserving of implementation. This language of paragraph 11 has been generally interpreted as conferring an unconditional right of repatriation, in accordance with customary international law, although implementation has been inconsistent due to the control exercised by sovereign States over who may enter their territory. More carefully considered, the second part of the paragraph looks towards implementation, instructing the Conciliation Commission (at the time representing the United Nations in trying to resolve the conflict) "to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees ...".

37. Israel has over the years used its diplomatic muscle to minimize Palestinian expectations with regard to exercising a right of return. However, up to and including the 1967 War the refugee issue remained salient. The canonical Security Council resolution 242 unanimously called in 1967 for "a just settlement of the refugee problem" as an essential element in its conception of peace, but the shift from the language of paragraph 11 of General Assembly resolution 194 (III) represents a partial retreat as it leaves open the question of what would constitute "a just settlement" and who would determine what is "just". It refers not to the rights of refugees but to "the refugee problem". Fast forward to 2009, and there is little discussion of the current plight of the refugees living for generations in miserable conditions in Gaza and the West Bank. The Special Rapporteur shares the assessment recently made by Karen AbuZayd, the Commissioner-General of UNRWA, that for these refugee issues to remain unresolved 60 years after the dispossession and displacement of several hundred thousand Palestinians is unacceptable. In her words the acknowledgement of "the 60-year-old injustice" would be "a first step towards addressing the consequences of that injustice".⁶⁴ Ms. AbuZayd movingly expresses her concern in the form of an appeal: "As forced displacements continue across the West Bank, as Palestinians are evicted from their homes in East Jerusalem, I ask a simple question. Is it not time for those engaged in the peace process to muster the will and the courage to address the Palestine refugee question?"⁶⁵

VII. Boycotts, divestments and sanctions

38. Operation Cast Lead shocked the conscience of humanity, giving rise to feelings of solidarity around the world with the ordeal and struggle of the Palestinian people. These feelings were intensified by the awareness that neither the neighbouring States nor the United Nations, nor its most powerful Member States, were willing or able to protect the Palestinian people and uphold their rights. The spectacle of a people under siege, as has been the case now for over 30 months in the Gaza Strip, has deepened this sense that there exists some responsibility for people everywhere to take appropriate, non-violent action. Civil society's global Boycott, Divestment and Sanctions (BDS) campaign, aimed at bringing non-violent economic and social pressure to bear to end the Israeli occupation, is the outgrowth of these sentiments, and it has been expanding at a rapid rate during the last few years. This sense of an anti-occupation movement of worldwide scope has come to resemble in many respects the anti-apartheid movement that made important contributions to the transformation of the political climate in South Africa in the late 1980s.

39. The boycott dimension of BDS takes many forms. For example, the boycott in Europe of products produced by Israeli settlements; Britain has now allowed stores to put stickers on food and other products reading "Israeli settlement produce". Soccer games and other athletic events involving Israel have been cancelled or protests mounted. Similar efforts have been made with respect to academic and cultural interaction. Artists and performers have been asked to refuse invitations from Israel, or at least to contribute the proceeds of a performance to Palestinian relief. Stores and companies around the world have been boycotted based on their dealings for profit in the OPT. On the divestment front, contracts have been terminated or bids not made. In addition, a growing number of churches and universities are extending their efforts to invest in a spirit of social responsibility, and are excluding companies that are perceived to be profiting from the Israeli occupation. Individuals and NGOs have come out in support of BDS in increasing numbers. It is a central battleground in the legitimacy war being waged by and on behalf of Palestinians. It is also making use of persuasive and coercive non-violent means to secure the human rights of Palestinians living under oppressive and unlawful conditions of occupation that the actions of diplomacy or the authority of the

organized international community seem unable to correct. BDS represents the mobilized efforts of global civil society to replace a regime of force with the rule of law in relation to the OPT.

VIII. Recommendations

40. The following recommendations drawn from the body of the report are emphasized as matters of urgency:

- (a) The Human Rights Council should call for the full implementation of the recommendations of the report of the United Nations Fact-finding Mission on the Gaza Conflict with respect to ensuring that accountability for war crimes associated with Operation Cast Lead takes place in accordance with due process for those accused;
- (b) Members of the Human Rights Council should be urged to convey to their Governments a call for the implementation of the report in relation to the exercise of universal jurisdiction against anyone who is present on or enters their sovereign territory and for whom substantial evidence of war crimes exists;
- (c) The Human Rights Council should commission or prepare a study of one-sided or asymmetric warfare in relation to claims to use of force and international humanitarian law, especially when the claimant State also has the status of being the occupying Power;
- (d) The rights of Palestinian refugees to a just solution, especially in circumstances of prolonged occupation, should be reasserted and be an integral element in future peace negotiations;
- (e) Consideration should be given to the Boycott, Divestment, and Sanctions campaign as a means of implementing human rights, including the right of self-determination, and guidelines should be provided for such a campaign.

Notes

¹ A/HRC/12/48.

² Ibid., para. 151.

³ Independent Fact-Finding Committee on Gaza to the League of Arab States, *No Safe Place*, 30 April 2009, available at http://www.arableagueonline.org/las/picture_gallery/reportfull/FINAL.pdf.

⁴ See inter alia, Human Rights Watch, *Rain of Fire. Israel's Unlawful Use of White Phosphorus in Gaza*, March 2009; "Israel/Gaza: Operation Cast Lead: 22 days of death and destruction", Amnesty International, July 2009; "Guidelines for Israel's Investigation into Operation Cast Lead", B'Tselem, position paper, February 2009; Palestinian Centre for Human Rights, *Targeted Civilians*, 2009.

⁵ Israel, since its disengagement of 2005, no longer directly occupies Gaza, but continues to have the legal duties of an occupying Power under international humanitarian law due to its total control of the crossings into and out of Gaza, as well as the air space and coastal access.

⁶ See A/HRC/12/48, para. 1883.

⁷ Ibid., para. 1335.

⁸ Ibid., para. 108.

⁹ Ibid., paras. 1968–1969.

¹⁰ Ibid., para. 1975.

¹¹ See statement by the United Nations High Commissioner for Human Rights at the twelfth special session of the Human Rights Council, available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/6781752DD0ED2F1DC12576500047E3D3?opendocument>.

¹² "Israel's bombardment of Gaza is not self-defence, it's a war crime", *The Sunday Times*, 11 January 2009.

¹³ Brandeis University Debate, 6 November 2009. A video of Justice Goldstone's intervention is available at <http://www.youtube.com/watch?v=XtbHfKM6sM>.

¹⁴ "Dore Gold Illustrates UN Goldstone Report Bias Against Israel In Brandeis Debate", Israel News Agency, 5 November 2009.

¹⁵ "UN human rights chief endorses Goldstone Gaza report", *Haaretz*, 2 November 2009.

¹⁶ See the Ministry of Foreign Affairs website at <http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Palestinian+terror+since+2000/Terror+in+Gaza+Two+months+since+the+Hamas+takeover+16-Aug-2007.htm>.

¹⁷ See above para. 3.

¹⁸ For more information on the extent of damage suffered during Operation Cast Lead, please refer to the reports indicated in footnote 3 above. See also Office for the Coordination of Humanitarian Affairs (OCHA), OPT, <http://www.ochaopt.org/gazacrisis/index.php?section=3>.

¹⁹ A/HRC/12/48, para. 127.

²⁰ For example Professor Avi Sagi of Bar Ilan University, *Haaretz*, 14 December 2009. Available at <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=1134917>.

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²² See also "UK ponders law change after Tzipi Livni arrest warrant", BBC News, 15 December 2009, available at http://news.bbc.co.uk/2/hi/middle_east/8415161.stm.

²³ "British court issued Gaza arrest warrant for former Israeli minister Tzipi Livni", *The Guardian*, 14 December 2009. Available at <http://www.guardian.co.uk/world/2009/dec/14/tzipi-livni-israel-gaza-arrest>.

²⁴ "UK to review war crimes warrants after Tzipi Livni arrest row", *The Guardian*, 15 December 2009, available at <http://www.guardian.co.uk/world/2009/dec/15/israel-tzipi-livni-arrest-warrant>.

²⁵ "Israeli minister Ehud Barak faces war crimes arrest threat during UK visit", *The Guardian*, 29 September 2009. Available at <http://www.guardian.co.uk/world/2009/sep/29/ehud-barak-war-crimes-israel>.

²⁶ "General Moshe Yaalon cancels London trip after arrest fear over Gaza bombing", *The Times*, 6 October 2009. Available at <http://www.timesonline.co.uk/tol/news/uk/article6862322.ece>.

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²⁸ "Mideast: settlements 'moratorium' still short of freeze", IPS News, 25 November 2009, available at <http://ipsnews.net/news.asp?idnews=49421>.

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³⁰ See for instance, "Let us make peace, declares Netanyahu", *The Jerusalem Post*, 26 November 2009.

³¹ "Israel's announcement regarding settlements", Hillary Clinton, available at <http://www.state.gov/secretary/rm/2009a/11/132434.htm>.

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³³ "Israel settlement freeze: Benjamin Netanyahu promises 10-month halt, angering allies", *Christian Science Monitor*, 25 November 2009.

³⁴ See footnote 33 above.

³⁵ Ibid.

³⁶ "Israel votes new funding for settlements", Reuters Alertnet, 13 December 2009.

³⁷ Ibid.

³⁸ Ibid.

³⁹ "The map of national folly", Zvi Bar'el, *Haaretz*, 14 December 2009, available at <http://www.haaretz.com/hasen/spages/1134595.html>.

⁴⁰ "Palestinians. National priority map is blueprint for settlement expansion", *Haaretz*, 19 December 2009, available at <http://www.haaretz.com/hasen/spages/1134699.html>. See also "Labor ministers: help periphery, not settlements", Ynet, 12 October 2009, available at <http://www.ynet.co.il/english/articles/0.7340.L-3817996.00.html>.

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