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

* The report was submitted after the deadline so as to include the most recent developments.

Summary

Gaza has again been the focus of violations of human rights and international humanitarian law in the Occupied Palestinian Territory (OPT). In response to the capture of Corporal Gilad Shalit by Palestinian militants on 25 June 2006, and the continued firing of Qassam rockets into Israel, Israel conducted two major military operations within Gaza - "Operation Summer Rains" and "Operation Autumn Clouds". In the course of these operations, the Israeli Defense Forces (IDF) made repeated military incursions into Gaza, accompanied by heavy artillery shelling and air-to-surface missile attacks. Missiles, shells and bulldozers destroyed or damaged homes, schools, hospitals, mosques, public buildings, bridges, water pipelines and electricity networks. Agricultural lands were levelled by bulldozers. Beit Hanoun was the subject of particularly heavy attacks, and on 8 November 19 civilians were killed and 55 wounded in an artillery attack. Economic sanctions have had a major impact on Gaza. About 70 per cent of Gaza's workforce is out of work or without pay and over 80 per cent of the population live below the official poverty line. The siege of Gaza is a form of collective punishment in violation of the Fourth Geneva Convention of 12 August 1949. The indiscriminate use of military power against civilians and civilian targets has resulted in serious war crimes.

The West Bank has also experienced serious human rights violations resulting from frequent military incursions; the construction of the Wall; house demolitions and checkpoints. Over 500 checkpoints and roadblocks obstruct freedom of movement within the OPT. The Wall being built in East Jerusalem is an instrument of social engineering designed to achieve the Judaization of Jerusalem by reducing the number of Palestinians in the city.

The construction of settlements continues. Today there are some 460,000 settlers in the West Bank and East Jerusalem. A study by an Israeli non-governmental organization (NGO) has shown that nearly 40 per cent of the land occupied by settlements in the West Bank is privately owned by Palestinians. It has become abundantly clear that the Wall and checkpoints are principally aimed at advancing the safety, convenience and comfort of settlers.

There are some 9,000 Palestinian prisoners in Israeli jails. There are serious complaints about the treatment, trial and imprisonment of prisoners.

Since 2000, over 500 persons have been killed in targeted assassinations, including a substantial number of innocent civilians. In December 2006 the Israeli High Court failed to find that such assassinations were unlawful but held that they might only be carried out as a last resort and within the bounds of proportionality.

Israeli law and practice makes it impossible for thousands of Palestinian families to live together. A new practice of refusing visas to foreign residents in the OPT has aggravated this situation.

Discrimination against Palestinians occurs in many fields. Moreover, the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid appears to be violated by many practices, particularly those denying freedom of movement to Palestinians.

There is a humanitarian crisis in the OPT resulting from the withholding of funds owed to the Palestinian Authority by the Government of Israel (estimated at about US$ 50 to 60 million per month) and from the economic isolation of the territory by the United States, the European Union (EU) and other States in response to the election of the Hamas Government. The Temporary International Mechanism set up by the EU to provide relief in certain sectors has gone some way towards reducing the crisis, but over 70 per cent of the Palestinian people live below the official poverty line. Health care and education have suffered as a result of a strike of workers in these sectors against the Palestinian Authority and the international community for the non-payment of salaries. In effect Israel and sections of the international community have imposed collective punishment on the Palestinian people.

Persons responsible for committing war crimes by the firing of shells and rockets into civilian areas without any apparent military advantage should be apprehended or prosecuted. This applies to Palestinians who fire Qassam rockets into Israel; and more so to members of the IDF who have committed such crimes on a much greater scale. While individual criminal accountability is important, the responsibility of the State of Israel for the violation of peremptory norms of international law in its actions against the Palestinian people should not be overlooked.

The international community has identified three regimes as inimical to human rights - colonialism, apartheid and foreign occupation. Israel is clearly in military occupation of the OPT. At the same time elements of the occupation constitute forms of colonialism and of apartheid, which are contrary to international law. What are the legal consequences of a regime of prolonged occupation with features of colonialism and apartheid for the occupied people, the occupying Power and third States? It is suggested that this question might appropriately be put to the International Court of Justice for a further advisory opinion.

The Occupied Palestinian Territory is the only instance of a developing country that is denied the right of self-determination and oppressed by a Western-affiliated State. The apparent failure of Western States to take steps to bring such a situation to an end places the future of the international protection of human rights in jeopardy as developing nations begin to question the commitment of Western States to human rights.

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I. INTRODUCTION

1. I visited the Occupied Palestinian Territory (OPT) and Israel from 1 to 8 December 2006 in order to collect information and opinions for the writing of this report. In the course of my mission I visited Jerusalem, Gaza, Jericho, the Jordan Valley, Jenin and Ramallah. While driving through the West Bank I took the opportunity to visit the villages of Bil'in and Bir Nabala, which have been seriously affected by the construction of the Wall; and Jiftlik and Al Aqaba, villages that illustrate the problems experienced in the Jordan Valley. Journeying through the West Bank inevitably exposes one to some of the worst features of life in the area: the Wall, Palestinian roads, checkpoints (both fixed and flying) and settlements. In Gaza, I visited Beit Hanoun, Beit Lahia, Jabalia, Gaza City and Deir el Balah.

2. During my visit I met with a wide range of persons - Palestinians, Israelis, foreign diplomats and United Nations officials. In Jerusalem, I attended two conferences: one on torture organized by the Public Committee Against Torture in Israel and Amnesty International; and the other on terrorism and human rights organized by the Minerva Center for Human Rights.

3. The Government of Israel does not recognize my mandate. Consequently, as in the past, I had no contact with government officials. This is unfortunate as it denies access to a valuable source of information and opinion. On the other hand, the Government of Israel facilitates my visit by providing me with a letter explaining the purpose of my visit to officials and requesting that they help to facilitate my movements. This has made crossing checkpoints considerably easier. I am grateful to the Government of Israel for its cooperation.

4. In the present report the term "Wall" is used instead of "barrier" or "fence". This term was carefully and deliberately used by the International Court of Justice in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004.

5. At the outset it is necessary to stress the scope and limitations of my mandate. I am required to report on violations of human rights and international humanitarian law by Israel in the OPT. This means that it is outside my mandate to report on violations of the human rights of Israelis by Palestinians, on the violation of human rights by the Palestinian Authority, or on human rights violations in the OPT not caused by Israel. This does not mean that I am unconcerned about such human rights violations. In my report I shall refer to the fact that the firing of Qassam rockets from Gaza into Israel violates international humanitarian law and is accordingly to be condemned. I shall also make reference to the strike in the West Bank, which has seriously damaged education and health, and to the increase of crime in the OPT, in the context of the humanitarian crisis in the OPT occasioned by the withholding of funds from the Palestinian Authority by Israel. I shall not consider the violation of human rights caused by Palestinian suicide bombers. Nor shall I consider the violation of human rights caused by the political conflict between Fatah and Hamas in the OPT. Such matters are of deep concern to me but my mandate precludes me from examining them.

II. GAZA

6. In August 2005, Israel withdrew its settlers and armed forces from Gaza. Statements by the Government of Israel that the withdrawal ended the occupation of Gaza are grossly inaccurate. Even before the commencement of "Operation Summer Rains", following the capture of Corporal Gilad Shalit, Gaza remained under the effective control of Israel. This control was manifested in a number of ways. Israel retained control of Gaza's air space, sea space and external borders, and the border crossings of Rafah (for persons) and Karni (for goods) were ultimately under Israeli control and remained closed for lengthy periods. In effect, following Israel's withdrawal, Gaza became a sealed off, imprisoned and occupied territory.

7. On 25 June 2006 a group of Palestinian militants attacked a military base near the Israeli Egyptian border. In retreating, they took Corporal Gilad Shalit with them as a captive. They demanded the release of the women and children in Israeli jails in return for his release. This act, together with the continued Qassam rocket fire into Israel, unleashed a savage response from the Government of Israel that went by the name of "Operation Summer Rains". This was followed by another military assault in November with the name of "Operation Autumn Clouds". These operations, which took the form of repeated military incursions into Gaza, accompanied by heavy shelling, rendered the question whether Gaza remains an occupied territory of academic interest only. Israel's assault on, and siege of Gaza, in the course of Operations "Summer Rains" and "Autumn Clouds" is described in the following paragraphs.

A. Military action

8. Between 25 June 2006 and the truce that came into force at the end of November 2006, over 400 Palestinians were killed and some 1,500 injured. More than half of those killed and wounded were civilians. Of those killed some 90 were children; and over 300 children were injured. During the same period 3 Israeli soldiers were killed and 18 wounded, and 2 Israeli civilians were killed and some 30 injured in Sderot and its precincts by Qassam rockets fired by Palestinians from Gaza.

9. In the course of Operations "Summer Rains" and "Autumn Clouds" the IDF carried out 364 military incursions into different parts of Gaza, accompanied by persistent artillery shelling and air-to-surface missile attacks. Missiles, shells and bulldozers destroyed, or caused serious damage to, homes, schools, hospitals, mosques, public buildings, bridges, water pipelines and sewage networks. On 27 June 2006, the Israeli Air Force destroyed all six transformers of the only domestic power plant in the Gaza Strip, which supplied 43 per cent of Gaza's daily electricity. This resulted in depriving half of the population of Gaza of electricity for several months. (At the time of writing, this power plant had been largely repaired, thanks to generous funding from the Governments of Egypt and Sweden, and is now able to provide 85 per cent of the electricity previously supplied.) Citrus groves and agricultural lands were levelled by bulldozers, and in the first phase of "Operation Summer Rains" F-16s flew low over Gaza, breaking the sound barrier and causing widespread terror among the population. Thousands of Palestinians were displaced from their homes as a result of Israel's military action. Israel justified its assault on Gaza on three grounds: the search for Corporal Shalit, the eradication of militant groups and their arms, and, above all, the stopping of Qassam rockets that have been regularly and repeatedly fired from Northern Gaza into civilian areas in Southern Israel.

10. Beit Hanoun in Northern Gaza, with a population of 40,000, was subjected to particularly vicious military action in November in the course of "Operation Autumn Clouds". During a six-day incursion 82 Palestinians, at least half of whom were civilians (including 21 children), were killed by the IDF. More than 260 people, including 60 children, were injured and hundreds of males between the ages of 16 and 40 were arrested. Forty thousand residents were confined to their homes as a result of a curfew as Israeli tanks and bulldozers rampaged through their town, destroying 279 homes, an 850-year-old mosque, public buildings, electricity networks, schools and hospitals, levelling orchards and digging up roads, water mains and sewage networks. In April 2006, the IDF narrowed the "safety zone" for artillery shelling, allowing targeting much closer to homes and populated areas. This, together with heavy artillery fire, contributed substantially to the increase in the loss of life and damage to property. There was also evidence of the use of a new and unusual weapon in Beit Hanoun, and elsewhere in Gaza, which has resulted in an increase in amputations. This weapon is believed to be the Dense Inert Metal Explosive missile (DIME).

11. Israel's assault on Beit Hanoun on 8 November 2006 culminated in the shelling of a home which resulted in the killing of 19 persons and wounding of 55 persons. The house, situated in a densely populated neighbourhood, was the home of the Al-Athamnah family, which lost 16 members on that fateful day. Of the 19 killed, all civilians, 7 were women and 8 children. I visited the destroyed home on 3 December and spoke to Mrs. Sa'ad Alla Moh'Al Athamnah, three of whose sons were killed and whose husband and a son were seriously wounded. Israel's explanation that a "technical failure" in the radar system of the artillery was to blame is questionable on a number of grounds. First, 12 to 15 high explosive artillery shells were fired over a time span of 30 minutes. Secondly, the home is located close to open fields that Israel probably suspected were used to launch Qassam rockets. Thirdly, the home had been occupied for the previous three nights by IDF soldiers who made a full inventory of the occupants of the building. Unfortunately, Israel has refused to accept any international investigation into this matter. It refused to allow a Human Rights Council mandated mission which was to have been led by Archbishop Desmond Tutu, to enter Israel and the Occupied Palestinian Territory and at the time of writing, has yet to respond to a resolution of the General Assembly of 17 November, adopted by 156 votes to 7, with 6 abstentions, which required the Secretary-General to send a fact-finding mission to the area. On 11 November the United States vetoed a Security Council draft resolution calling for the establishment of a fact-finding mission into the events of 8 November in Beit Hanoun. The failure of Israel to allow an international investigation into the killing of 19 persons in Beit Hanoun, or to undertake an impartial investigation of its own, is regrettable as it seems clear that the indiscriminate firing of shells into a civilian neighbourhood with no apparent military objective constituted a war crime, for which both the commanding officer and those who launched the 30-minute artillery attack should be held criminally responsible. The failure to hold anyone accountable for this atrocity illustrates the culture of impunity that prevails in the IDF.

12. Israel has justified its attack on Beit Hanoun as a defensive operation aimed at preventing the launching of Qassam rockets into Israel. It is true that over a thousand home-made rockets have been fired into civilian areas in Israel without any military target and that 2 Israelis have been killed and over 30 injured. Such actions cannot be condoned and clearly constitute a war crime. Nevertheless, Israel's response has been grossly disproportionate and indiscriminate and resulted in the commission of multiple war crimes.

13. In recent months Israel has resorted to a policy of terrorism by telephone. Militants are telephoned by Israeli intelligence agents and warned that their home is to be blown up within an hour. This threat is sometimes carried out and sometimes not. It appears that over 100 homes have been destroyed following such threats. In November, Palestinians rallied to the defence of persons threatened in this way by gathering on the roof of the house or in the street outside to prevent the bombing of the house. It is difficult to categorize such conduct as a war crime, as originally suggested by Human Rights Watch in a statement of 22 November (subsequently largely withdrawn in a statement of 16 December). Voluntary, collective action of this kind can at most be categorized as an act of civil disobedience against the occupying Power.

B. The humanitarian crisis

14. Gaza has become a besieged and imprisoned territory as a result of the economic sanctions imposed on the Occupied Palestinian Territory by Israel and the West, following Hamas' success in the January 2006 elections, and the military assault on the territory, following the capture of Corporal Gilad Shalit. External borders have been mainly closed and only opened to allow a minimum of imports and exports and foreign travel. This has produced a humanitarian crisis, one carefully managed by Israel, which punishes the people of Gaza without ringing alarm bells in the West. It is a controlled strangulation that apparently falls within the generous limits of international toleration.

15. There are six crossings into Gaza, all of which are controlled by Israel. Erez, which is used by diplomats, United Nations officials, international workers, approved journalists and a restricted number of patients travelling to Israeli hospitals; Nahal Oz, which is designed for fuel imports and has operated well below its capacity; Sofa, which is used for the import of construction material and some humanitarian supplies from United Nations agencies and has been open for only 60 per cent of the scheduled days; Kerem Shalom, which has been largely closed since 25 June, but has opened to allow the import of cables and appliances from Egypt to repair the Gaza power plant destroyed on 27 June 2006, and some humanitarian assistance.

16. Rafah, the crossing point for Gazans to Egypt, and Karni, the commercial crossing for the import and export of goods, are the principal crossing points. They are the subject of an Agreement on Movement and Access (AMA), entered into between Israel and the Palestinian Authority on 15 November 2005, which provides for Gazans to travel freely to Egypt through Rafah; and for a substantial increase in the number of export trucks through Karni. Since 25 June 2006, the Rafah crossing has been open for only 14 per cent of the scheduled opening days as a result of Israel's refusal to allow members of the European Border Assistance Mission, responsible for operating Rafah, to cross to Rafah through Kerem Shalom. The closure of Rafah has resulted in great hardships. The sick and wounded have not been able to travel freely to Egypt; those wishing to leave Gaza have had to wait patiently, sometimes for weeks, until Rafah opens; and Gazans returning home have often had to wait for weeks in Egypt until the Rafah crossing opened. The closure of Rafah has been justified as a reprisal for the capture of Corporal Shalit. The situation at Karni is no better. In terms of the AMA truckloads crossing Karni were to increase to 400 per day by the end of 2006. Instead, the crossing has been closed since April for 54 per cent of the scheduled operating days (for 71 per cent of such days since 25 June), and only 12 truckloads of goods on average have been exported. This has had disastrous consequences for the economy of Gaza. The agricultural produce from the former settlements was particularly affected as it perished while waiting to be exported at Karni. In the

end most of this produce was donated or destroyed in Gaza. Imports have also suffered seriously and many basic foodstuffs have not reached local markets. On 22 December 2006 the Government of Israel promised to allow 400 trucks to pass through Karni per day. This promise has still to be implemented.

17. The siege has had a major impact on employment. Construction workers are out of work as a result of the restriction on the import of construction materials; farmers (particularly those employed in the greenhouses of the former Israeli settlements) are unemployed as a result of the ban on exports of Palestinian produce; fishermen are out of work as a result of the ban on fishing along most of the Gaza coast; many shopkeepers have had to close their shops as a result of the lack of purchase power of Gazans; small factories employing some 25,000 workers have had to close; and the public service, while employed in theory is largely unpaid as a result of Israel's withholding of funds due to the Palestinian Authority and the refusal of the EU and the United States to transfer donations to the Palestinian Authority. Consequently about 70 per cent of Gaza's potential workforce is out of work or without pay. The signs of unemployment are distinctly visible. Construction works are abandoned; greenhouses that were flourishing with produce when I visited them in 2005 are now empty of produce; and fishermen that I visited at Deir El Balah sit idly on the shore, prohibited from setting out to sea.

18. Poverty is rife. Over 80 per cent of the population live below the official poverty line. 1.1 million Gazans of a population of 1.4 million receive food assistance from the United Nations Relief and Works Agency for Palestine refugees in the Near East and the World Food Programme. Recipients of food aid receive flour, rice, sugar, sunflower oil, powdered milk and lentils. Few can afford meat, fish - virtually unobtainable anyway as a result of the ban on fishing - vegetables and fruit. Shopkeepers generously give credit but their capacity to do so is being overstretched. (I visited a shopkeeper in Jabaliya who had granted US$ 20,000 credit to customers.) Moreover some basic foodstuffs are in short supply, and prices are inflated due to the closure of Karni crossing.

19. Although the Gaza power plant has now been restored to 85 per cent of its former capacity (thanks to Egypt and Sweden, and not to Israel which is responsible for supplying electricity to an occupied people), it must not be forgotten that for several months following the bombing of this power plant on 27 June 2006, the people of Gaza suffered in all aspects of their life from power stoppages: lighting, refrigerators, elevators, water supply and sewage were all affected; hospitals were unable to operate properly; and so on. The bombing of the power plant has rightly been described as a war crime for which Israel and members of the IDF must accept responsibility.[1]

20. Living conditions in Gaza are bleak in a society dominated by poverty, unemployment and military assault. Although hospitals have not suffered from strike action, as they have done in the West Bank, health care has suffered from military incursions and the closure of the crossings. For months hospitals were required to use generators for operation theatres; referrals abroad of patients have been hampered by the closing of Rafah; essential drugs are in short

[1] See B'Tselem, *Act of Vengeance: Israel's Bombing of the Gaza Power Plant and its Effects* (September 2006).

supply; clinics have been unable to operate because of military action; and members of the Palestine Red Crescent Society ambulance services have been killed in military operations. Chronic illnesses have increased. Anaemia has also increased as a result of the nutritional situation. Mental health is a serious problem, particularly among children, as a result of the trauma inflicted by military incursions and the death or injury of friends and family. Education has been affected by military assaults: schools have been closed and school buildings destroyed. Domestic violence and ordinary crime are on the increase. In 2006 nearly 200 Palestinians were killed and 1,000 injured in internal disputes and factional violence. Morale is low. The very fabric of Gazan society is threatened by the siege.

C. Legal assessment

21. Israel has violated a number of rights proclaimed in the International Covenant on Civil and Political Rights, particularly the right to life (art. 6), freedom from torture, inhuman or degrading treatment (art. 7), freedom from arbitrary arrest and detention (art. 9), freedom of movement (art. 12) and the right of children to protection (art. 24). It has also violated rights contained in the International Covenant on Economic, Social and Cultural Rights, notably "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing", freedom from hunger, and the right to food (art. 11) and the right to health (art. 12).

22. Israel has, in addition, violated the most fundamental rules of international humanitarian law, which constitute war crimes in terms of article 147 of the Fourth Geneva Convention and article 85 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I). These include direct attacks against civilians and civilian objects and attacks which fail to distinguish between military targets and civilians and civilian objects (arts. 48, 51 (4) and 52 (1) of Protocol I); the excessive use of force arising from disproportionate attacks on civilians and civilian objects (arts. 51 (4) and 51 (5) of Protocol I); the spreading of terror among the civilian population (art. 33 of the Fourth Geneva Convention and art. 51 (2) of Protocol I) and the destruction of property not justified by military necessity (art. 53 of the Fourth Geneva Convention). Above all, the Government of Israel has violated the prohibition on collective punishment of an occupied people contained in article 33 of the Fourth Geneva Convention. The indiscriminate and excessive use of force against civilians and civilian objects, the destruction of electricity and water supplies, the bombardment of public buildings, the restrictions on freedom of movement and the consequences that these actions have had upon public health, food, family life and the psychological well-being of the Palestinian people constitute a gross form of collective punishment. The capture of Corporal Shalit and the continuing firing of Qassam rockets into Israel cannot be condoned. On the other hand, they cannot justify the drastic punishment of a whole people in the way that Israel has done.

III. THE WEST BANK AND EAST JERUSALEM

23. Many of Israel's policies and practices in the West Bank seriously impinge upon the human rights of Palestinians. The Wall presently under construction in Palestinian territory, checkpoints and roadblocks, settlements, an arbitrary permit system, the pervasive practice of house demolitions, targeted assassinations, and arrests and imprisonment violate a wide range of civil and political rights. The sharp rise in military incursions into the West Bank has further

aggravated the situation. Economic and social rights have also suffered from the humanitarian crisis resulting from the occupation. It is estimated that 56 per cent of the population of the West Bank live below the official poverty line and are dependent on food aid.

A. The Wall

24. The Wall that Israel is presently building largely in Palestinian territory is clearly illegal. The International Court of Justice in its Advisory Opinion of 9 July 2004, asserted that it is contrary to international law and that Israel is under obligation to discontinue construction of the Wall and to dismantle those sections that have already been built forthwith. The Israeli High Court of Justice, in a judgement delivered in September 2005 in *Mara'abe v. the Prime Minister of Israel* case (HCJ 7957/04), dismissed the advisory opinion, arguing that the International Court of Justice had failed to have regard to the security considerations that had prompted the construction of the Wall. The basis of this judgement has now been undermined by the admission of the Government that the Wall is designed to serve a political purpose and not an exclusively security purpose. The admission that the Wall has in part been built to include West Bank settlements within the Wall and under Israel's direct protection, has led the High Court to rebuke the Government for misleading it in the *Mara'abe* hearing and other challenges to the legality of the Wall.[2] That the purpose of the Wall is to acquire land surrounding West Bank settlements and to include settlements within Israel can no longer be seriously challenged. The fact that 76 per cent of the West Bank settler population is enclosed within the Wall bears this out.

25. The Wall is planned to extend for 703 km. When it is finished, an estimated 60,500 West Bank Palestinians living in 42 villages and towns will reside in the closed zone between the Wall and the Green Line. More than 500,000 Palestinians living within 1 km of the Wall live on the eastern side but need to cross it to get to their farms and jobs and to maintain family connections. Eighty per cent of the Wall is built within the Palestinian territory itself and in order to incorporate the Ariel settlement block, it extends some 22 km into the West Bank. The closed zone includes many of the West Bank's most valuable water resources.

26. The Wall has serious humanitarian consequences for Palestinians living within the closed zone, i.e. the area between the Green Line and the Wall. They are cut off from places of employment, schools, universities and specialized medical care, and community life is seriously fragmented. Moreover they do not have 24-hour access to emergency health services. Palestinians who live on the eastern side of the Wall but whose land lies in the closed zone face serious economic hardship as a result of the fact that they are not able to reach their land to harvest crops or to graze their animals without permits. Permits are not easily granted. A host of obstacles are placed in the way of obtaining a permit. Bureaucratic procedures for obtaining permits are humiliating and obstructive. The United Nations Office for the Coordination of Humanitarian Affairs (OCHA) has estimated that 60 per cent of the farming families with land to the west of the Wall could no longer access their land.[3] To aggravate matters the opening and

[2] *Head of the Azzun Municipal Council, Abed Alatif Hassin and others v. State of Israel and the Military Commander of the West Bank* (HCJ 2733/05).

[3] OCHA Special Focus, November 2006.

closing of the gates leading to the closed zone are regulated in a highly arbitrary manner. In November 2006, OCHA carried out a survey in 57 communities located close to the Wall, which showed that only 26 of the 61 gates in the Wall were open to Palestinians for use all the year round and that these gates were only open for 64 per cent of the officially stated time.[4] Hardships experienced by Palestinians living within the closed zone and in the precincts of the Wall have already resulted in the displacement of some 15,000 persons, but it is feared that more will leave this area as life is made intolerable for them by the IDF and settlers.

B. Jerusalem and the Wall

27. The 75 km Wall being built in East Jerusalem is an instrument of social engineering designed to achieve the Judaization of Jerusalem by reducing the number of Palestinians in the city. The Wall is being built through Palestinian neighbourhoods, separating Palestinians from Palestinians, in a manner that cannot conceivably be justified on security grounds. It does, however, have serious implications for the human rights of some 230,000 Palestinians living in Jerusalem.

28. Palestinians living on the west side of the Wall will be allowed to retain their Jerusalem identity documents, which entitle them to certain benefits, particularly in respect of social security, but they will find it increasingly difficult to travel to cities in the West Bank such as Ramallah and Bethlehem, where many of them are employed. Moreover, if they elect to reside in the West Bank in order to be nearer to their places of work, they risk losing their Jerusalem identity documents and the right to live in Jerusalem because under Israel's so-called centre of life policy, Palestinians must prove that they currently live in the city of East Jerusalem to maintain their Jerusalem residency rights. Those relegated to the West Bank as a result of the construction of the Wall, who number about a quarter of the city's Palestinian population, will lose their Jerusalem identity documents and the attendant benefits. They will also require a permit to enter Jerusalem, and will be allowed to enter the city by only 4 of the 12 crossings in the Wall, which will considerably increase their commuting time and impede their access to schools, universities, hospitals, religious sites and places of employment.

29. The absurdity of the Wall in Jerusalem is illustrated by the case of ar-Ram. Some 60,000 people live in the suburb of ar-Ram just outside the municipal boundary of Jerusalem. About half of the residents are Jerusalemites who left Jerusalem because of the restrictions placed on Palestinians' building houses in the city. They are completely dependent on Jerusalem for work, education and hospitals. Yet now they are surrounded by the Wall and cut off from Jerusalem. To get to work, school or hospital they must travel a circuitous route of several kilometres and pass through the international terminal-like checkpoint at Qalandiya, and they may only do this if they have the correct permit. A journey that previously took them minutes is now extended into hours.

[4] Ibid.

30. The construction of the Wall in Jerusalem makes a mockery of Israel's commitment to religious freedom. Because of the wall, Palestinian Muslims and Christians are prevented from praying at the Al-Aqsa Mosque and the Church of the Holy Sepulchre respectively - if they are classified as West Bankers. The Wall also bars access by East Jerusalemite Christian Palestinians to the Church of the Holy Nativity in Bethlehem.

C. The Mini-Wall of South Hebron

31. In 2005, the Government of Israel abandoned its plan to build the Wall in Palestinian territory in the South Hebron district as a result of a court ruling and instead agreed to build the Wall along the Green Line. However, it then built a secondary Wall or mini-Wall along the original route which severely impacted the lives of thousands of Palestinians who lived south of the mini-Wall or whose lands were situated south of the mini-Wall. On 14 December 2006, the Israeli High Court of Justice ruled that this Wall was to be dismantled as it interfered disproportionately with the freedom of movement of Palestinian residents and their livestock.

D. Settlements: the new colonialism

32. Jewish settlements in the West Bank are illegal. They violate article 49, paragraph 6, of the Fourth Geneva Convention and their illegality has been confirmed by the International Court of Justice in its advisory opinion on the Wall. Despite the illegality of settlements and the unanimous condemnation of settlements by the international community, the Government of Israel persists in allowing settlements to grow. Sometimes settlement expansion occurs openly and with the full approval of the Government. As recently as December 2006, the Israeli Government officially approved the building of a new settlement - Maskiot - in the northern Jordan Valley. More frequently, expansion takes place stealthily under the guise of "natural growth", which has resulted in Israeli settlements growing at an average rate of 5.5 per cent compared with the 1.7 per cent average growth rate in Israeli cities. Sometimes settlements expand unlawfully in terms of Israeli law, but no attempt is made to enforce the law. Outposts are frequently established and threats to remove them are not carried out. As a result of expansion, the settler population in the West Bank numbers some 260,000 persons and that of East Jerusalem nearly 200,000. As indicated above, the Wall is presently being built in both the West Bank and East Jerusalem to ensure that most settlements will be enclosed within the Wall. Moreover, the three major settlement blocks of Gush Etzion, Ma'aleh Adumim and Ariel will effectively divide Palestinian territory into cantons, thereby destroying the territorial integrity of Palestine.

33. In October 2006, the Israeli NGO, Peace Now, published a study[5] which showed, on the basis of government maps and figures, that nearly 40 per cent of the land held by Israeli settlements in the West Bank is privately owned by Palestinians. The data shows, for example, that 86 per cent of the largest settlement of Ma'aleh Adumim is on Palestinian private property; that 35 per cent of Ariel is on private property; and that more than 3,400 buildings in settlements are constructed on land privately owned by Palestinians. The Israeli Government

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[5] *Breaking the Law in the West Bank - One Violation Leads to Another: Israeli Settlement Building on Private Palestinian Property*.

maintains that it respects Palestinian property in the West Bank and that it only, on a temporary basis, takes land there legally for security reasons. Moreover, article 46 of the Hague Regulations of 1907, which Israel acknowledges as binding upon it, provides that "private property … must be respected" and "cannot be confiscated". Peace Now's disclosure is an embarrassment to the Government of Israel but it is unlikely to respond positively as it has already repeatedly rejected the international community's complaint that settlements are contrary to article 49, paragraph 6, of the Fourth Geneva Convention. This new revelation does, however, serve to further emphasize the illegality of Israel's colonial empire - the settlements - in the West Bank.

34. The history of colonialism shows that there are "good" settlers and "bad" settlers. So it is with Israel's colonists. Many are ordinary Israelis who have been lured to the settlements by tax incentives and a better quality of life. On the other hand, there is a fanatic minority determined to assert its superiority over the Palestinian population by violent means. Throughout the West Bank there is evidence of settler violence, which often takes the form of destroying Palestinian olive groves or obstructing the olive harvest. Undoubtedly the most aggravated settler behaviour occurs in Hebron, where Palestinian schoolchildren are assaulted and humiliated on their way to schools, shopkeepers are beaten and residents live in fear of settler terror. Despite rulings of the High Court of Justice[6] that it is the duty of the IDF to protect Palestinian farmers from settlers, there is still evidence that the IDF turns a blind eye to settler violence and, on occasion, collaborates with the settlers in harassing and humiliating Palestinians.[7] Indeed I have witnessed such conduct on the part of the IDF myself in Hebron.

E. The Jordan Valley

35. Israel has abandoned earlier plans to build the Wall along the spine of the Occupied Palestinian Territory and to formally appropriate the Jordan Valley. It has nevertheless asserted its control over this region, which constitutes 25 per cent of the West Bank, in much the same way as it has done over the closed zone between the Wall and the Green Line on Palestine's western border. That Israel intends to remain permanently in the Jordan Valley is clear from government statements and is further manifested, first, by restrictions imposed on Palestinians and, second, by the exercise of Israeli control and the increase in the number of settlements in the Jordan Valley.

36. Palestinians living in the Jordan Valley must possess identity cards with a Jordan Valley address, and only those persons may travel within the Jordan Valley without Israeli permits. Other Palestinians, including non-resident landowners and workers, must obtain permits to enter the Jordan Valley and in practice such permits are not valid for overnight stays, necessitating daily commuting and delays at checkpoints connecting the Jordan Valley with the rest of the

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[6] *Rashad Morar v. The IDF Commander for Judea and Samaria* (HCJ 9593/04).

[7] See Yesh Din, *A Semblance of Law. Law Enforcement Upon Israeli Civilians in the West Bank* (June 2006).

West Bank. This has led to the isolation of the Jordan Valley. Travel restrictions make it difficult for farmers in the Jordan Valley to access markets in the West Bank as their produce is frequently held up at checkpoints, notably at Al Hamra, where it perishes in the process.

37. Housing in the Jordan Valley is a serious problem as most of the Valley is designated as Area C, which means that the Israeli authorities must give permission for the construction of houses and assert the power to demolish structures built without permission - a permission which is rarely forthcoming. On this mission I visited two villages in the Jordan Valley where structures were threatened with demolition by the IDF. The first was Jiftlik, where I visited a secondary school functioning in harsh conditions - with teachers mainly unpaid and no glass in the windows - where I was informed that the school had been served with a demolition order. The second was Al-Aqaba, a village located on the slope between the Jordan Valley and the northern West Bank mountain range. The village, which has no running water and electricity is supplied by generators, comprises 35 houses of which 16, including a mosque, clinic and kindergarten school, are threatened with demolition. The cheerful kindergarten, which I visited, has 85 children drawn from neighbouring communities. Since 1967, Al-Aqaba's population has decreased by 85 per cent, from 2,000 in 1967 to 300 persons today. What cynical exercise in social engineering could motivate the demolition of nearly half the structures in the village?

F. Freedom of movement? checkpoints

38. The number of checkpoints, including roadblocks, earth mounds and trenches, increased from 376 in August 2005 to 540 in December 2006. These checkpoints divide the West Bank into four distinct areas: the north (Nablus, Jenin and Tulkarem), the centre (Ramallah), the south (Hebron) and East Jerusalem. Within these areas further enclaves have been created by a system of checkpoints and roadblocks. Moreover highways for the use of Israelis only further fragment the Occupied Palestinian Territory into 10 small cantons or Bantustans. Cities are cut off from each other as a permit is required to travel from one area to another and permits are difficult to obtain. On 22 December 2006, the Government of Israel announced that it would dismantle 27 checkpoints to make life easier for Palestinians

39. The rules governing the granting of permits and passage through the checkpoints constantly change. Generally men between the ages of 18 and 35 are not allowed to leave the northern West Bank but there is no clear rule on this subject. Military orders on checkpoints are not published and it is left to Palestinians to find out by trial and error whether they will be allowed to pass through a checkpoint on a particular day. To further complicate matters, there is a secret list with some 180,000 names of security risks who may not pass through a checkpoint, but no notice is served on such a person on this list until he arrives at a checkpoint. The conduct of soldiers at the checkpoints is often rough. A person may be refused passage through a checkpoint for arguing with a soldier or explaining his documents. The principle of legality, requiring a law to be clear, consistent and published in advance, is completely unknown and disregarded at the checkpoints. Instead an arbitrary and capricious regime prevails.

40. Checkpoints and the poor quality of secondary roads Palestinians are obliged to use, in order to leave the main roads free for settler use, result in journeys that previously took 10 to 20 minutes taking 2 to 3 hours. Israel justifies these measures, together with the behaviour of its soldiers at checkpoints, on security grounds and claims that they have succeeded in thwarting the passage of numerous would-be suicide bombers. There is, however, another security

perspective. Palestinians perceive these measures to be designed, first, to serve the convenience of settlers and to facilitate their travel through the West Bank without having to make contact with Palestinians; and, secondly, to humiliate Palestinians by treating them as inferior human beings. The result is a suppressed anger that in the long term poses a greater threat to the security of Israel. In apartheid South Africa, a similar system designed to restrict the free movement of blacks - the notorious "pass laws" - created more anger and hostility to the apartheid regime than any other measure. Israel would do well to learn from this experience.

41. On 19 November the IDF Commander in the West Bank issued an order that prohibits Palestinians from travelling with Israelis in Israeli vehicles in the West Bank without a permit. Israeli human rights NGOs who travel with Palestinians in the West Bank see this as an attempt to curb their activities and have announced that they will refuse to apply for permits.

G. Military incursions

42. Since the election of the Hamas Government in January 2006, the IDF has intensified its military incursions into the West Bank. In November 2006 alone there were 656 IDF raids into the West Bank. These raids have involved the killing of some 150 Palestinians; and search and arrest action resulting in damage to property, injuries (an average of 179 per month) and arrests (an average of 500 per month). Most of these IDF operations have taken place in the northern West Bank, particularly Nablus and Jenin.

IV. PRISONERS

43. There are some 9,000 Palestinian prisoners in Israeli jails charged with or convicted of security offences, which range from violent acts against the Israeli Defense Forces to anti-Israeli political activities. This figure includes some 400 children and over 100 women. In addition there are over 700 administrative detainees, i.e. persons held without charge or trial, simply on the ground that the occupying Power regards them as security risks.

44. There are serious complaints about the treatment, trial and imprisonment of prisoners. Pretrial detention is accompanied by prolonged isolation and lengthy interrogation in painful positions. Threats, deception and sleep deprivation are essential features of this process.[8] Due process of law is undermined by trial before military courts and the obstructions placed in the way of defence counsel. Prison conditions are poor and family visits are rare. Israel holds political prisoners in jails in Israel rather than in the OPT, in violation of article 49 of the Fourth Geneva Convention, and then refuses the families of many of the prisoners the right to visit them.[9]

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[8] Antonio Marchesi, *Getting Around the International Prohibition of Torture: Responsibilities of the Israeli Government and the Palestinian National Authority* (December 2006), p. 27.

[9] B'Tselem, *Barred from Contact: Violation of the Right to Visit Palestinians held in Israeli Prisons* (September 2006).

45. Since 1967 over 650,000 Palestinians have been held in Israeli prisons. Hardly a family in Palestine has therefore been untouched by the Israeli prison system. Inevitably most prisoners emerge from prison embittered against the occupying Power.

V. TARGETED ASSASSINATIONS

46. Israel has a proud record on the death penalty. Since the creation of the State only two persons have been executed following a proper trial - the last being Adolf Eichmann. However, Israel's reputation as an abolitionist society has been tarnished by the practice of extrajudicial assassinations or targeted killings, which has been widely employed by the Israeli Defense Forces since the start of the Second Intifada in 2000. According to the Public Committee Against Torture in Israel, approximately 500 Palestinians have been killed by targeted assassinations, including 168 innocent civilians.

47. In December 2006, the Israeli High Court of Justice at last ruled on the lawfulness of targeted assassinations in *The Public Committee against Torture in Israel v. Government of Israel* case (HCJ 769/02). Clearly the court found itself in an awkward position as it wished to uphold justice without harming the security of the State. It failed to hold that targeted killings were unlawful. Instead, it held that under customary international law it could not be said "that this policy is always prohibited, just as it cannot be said that it is permitted in all circumstances according to the discretion of the military commander" (per President Beinisch). It rejected the argument that "terrorists" could be classified as unlawful combatants (para. 28), but held that the killing of a "terrorist" was permissible where a person took a "direct part" in hostile activity, with "direct part" defined broadly to include not only those who perpetrate terror attacks, but also those who transport the perpetrators, supervise them, collect intelligence or supply certain services (paras. 34-35). Having approved the targeted killing of "terrorists" in certain circumstances, the Court then set limits for such action: It should not be resorted to when a person could be arrested, without threatening the lives of soldiers (para. 40) or when the act would be disproportionate in that the harm done to civilians would outweigh the security advantage (paras. 44-46, 60). Measured by these standards, it is clear that many targeted assassinations would be adjudged to be unlawful. Whether the Court's decision will restrain the IDF remains to be seen. It retains a wide discretion and there is a real fear that it will continue to act as in the past. If it does, Israel will continue to be seen as an "abolitionist society" that employs the death penalty on a wide scale through the back door of "targeted assassinations".

VI. FAMILY SEPARATION

48. Israeli law and practice shows little respect for family life. Israeli Palestinians married to Palestinians from the Occupied Palestinian Territory cannot live together in Israel. Palestinians from the OPT cannot live together with foreign spouses:[10] Since 2000, a total of 120,000 requests for family unification have not been considered. Jerusalemites with Jerusalem identity cards cannot live together with their spouses who hold West Bank identity cards. The construction of the Wall in Jerusalem has separated 21 per cent of Palestinian households in

[10] B'Tselem and Ha Moked, *Perpetual Limbo: Israel's Freeze on Unification of Palestinian Families in the Occupied Territories* (July 2006).

East Jerusalem in this way.[11] Now there is a new problem: Israel has started to refuse the renewal of visas for Palestinians with foreign passports. Israel does not permit non-Jewish foreigners to receive residency rights in the OPT, but previously it allowed foreign passport holders, many of whom were born in Palestine, to renew their tourist visas every three months. The discontinuation of this policy since the election of the Hamas Government has resulted in persons who have lived in the OPT for years being denied visas and refused re-entry to the OPT. Consequently families are separated by the exclusion from the OPT of family members with foreign passports. Businessmen, students, lecturers, health-care and humanitarian workers have also been affected. Many "illegal" spouses continue to live in the OPT, but they do so in constant fear of arrest and expulsion. Why Israel has chosen to follow this vindictive policy is a matter of speculation. Is it for reasons of security? Or demography? A punishment for the election of Hamas? Or is it a wish to remove articulate critics of Israel?

VII. RACIAL DISCRIMINATION AND APARTHEID

49. Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1966 defines "racial discrimination" as meaning "any distinction, exclusion, restriction preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". This convention only requires States to prohibit and eliminate racial discrimination. Another convention, the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973, goes further and criminalizes practices of racial segregation and discrimination that, inter alia, involve the infliction on members of a racial group of serious bodily or mental harm, inhuman or degrading treatment, arbitrary arrest or the deliberate creation of conditions preventing the full development of a racial group by denying to such a group basic human rights and freedoms, including the right to freedom of movement, when such acts are committed "for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them".

50. Israel vehemently denies the application of these Conventions to its laws and practices in the Occupied Palestinian Territory. Despite this denial, it is difficult to resist the conclusion that many of Israel's laws and practices violate the 1966 Convention on the Elimination of All Forms of Racial Discrimination. Israelis are entitled to enter the closed zone between the Wall and the Green Line without permits while Palestinians require permits to enter the closed zone; house demolitions in the West Bank and East Jerusalem are carried out in a manner that discriminates against Palestinians; throughout the West Bank, and particularly in Hebron, settlers are given preferential treatment over Palestinians in respect of movement (major roads are reserved exclusively for settlers), building rights and army protection; and the laws governing family reunification (para. 48 above) unashamedly discriminate against Palestinians. It is less certain that the International Convention on the Suppression and Punishment of the Crime of Apartheid is violated. The IDF inflicts serious bodily and mental harm on Palestinians, both in Gaza (paras. 8-13 above) and the West Bank (para. 42 above); over 700 Palestinians are held

[11] Badil, *Displaced by the Wall* (September 2006).

without trial (para. 43 above); prisoners are subjected to inhuman and degrading treatment (para. 44 above); and Palestinians throughout the OPT are denied freedom of movement (paras. 38-41 above). Can it seriously be denied that the purpose of such action is to establish and maintain domination by one racial group (Jews) over another racial group (Palestinians) and systematically oppressing them? Israel denies that this is its intention or purpose. But such an intention or purpose may be inferred from the actions described in this report.

VIII. THE HUMANITARIAN CRISIS AND THE WITHHOLDING OF FUNDS FROM THE PALESTINIAN AUTHORITY

51. There is a humanitarian crisis in both the West Bank and Gaza. In Gaza, over 80 per cent of the population live below the official poverty line of US$ 2.10 per day while in the West Bank 56 per cent of households fall below the poverty line. This means that two thirds of all Palestinian households fall below the income poverty line, are dependent on food aid and unable to provide for their basic needs. Health care and education in the West Bank are badly affected by a strike that continued for several months - a strike against the non-payment of salaries by the Palestinian Authority (PA) since March, but also a protest against the international community for withholding funding from the PA. In such a situation it is not surprising that domestic violence and crime is on the increase.

52. In large measure the humanitarian crisis is the result of the termination of funding of the Palestinian Authority since Hamas was elected to office. The Government of Israel is withholding from the Palestinian Authority VAT monies amounting to US$ 50 to 60 million per month which it collects on behalf of the Authority on goods imported into the OPT. In law Israel has no right to refuse to transfer this money, which belongs to the Palestinian Authority under the 1994 Protocol on Economic Relations between the Government of Israel and the Palestine Liberation Organization (Paris Protocol). Predictably, Israel justifies its action on security grounds, but the real reason seems to be a determination to effect a regime change. In the process, Israel is violating its obligation as occupying Power to provide for the welfare of the occupied people. By deliberately making life as difficult as possible for the Palestinian people, by withholding funds and imposing harsh measures on them, Israel has embarked upon a policy of collective punishment in violation of article 33 of the Fourth Geneva Convention. Worse still it is creating a failed state on its own border which augurs ill for both the Occupied Palestinian Territory and Israel itself.

53. Israel is not alone to blame for the crisis in the OPT. Since the election of Hamas in January 2006, the United States, the European Union and other States, have likewise withheld funds from the Palestinian Authority by reason of its failure to recognize Israel, renounce violence and accept obligations previously assumed towards Israel. The decision of the United States Treasury to prohibit transactions with the Palestinian Authority has, moreover, resulted in banks refusing to transfer money to the PA. To aggravate matters the Quartet has gone along with this policy of political and financial isolation. In order to mitigate the crisis, the EU has set up a Temporary International Mechanism, endorsed by the Quartet, for the relief of Palestinians employed in the health sector, the uninterrupted supply of utilities, including fuel, and the provision of basic allowances to meet the needs of the poorest segment of the population. Although the EU disbursed US$ 865 million to the Palestinians in this way in 2006 - an increase of 27 per cent compared to EU funding in 2005 - it has not resulted in the payment of salaries to most Palestinians employed in the public sector. Health-care workers and teachers have received

some payments, but well short of their full salaries, and pensioners and social hardship cases have also received an allowance. However, owing to the withholding of tax revenues due to the PA by Israel, most government employees remain unpaid and are experiencing difficulty in paying their basic expenses, such as rent and electricity.

54. In effect, the Palestinian people have been subjected to economic sanctions - the first time an occupied people have been so treated. This is difficult to understand. Israel is in violation of major Security Council and General Assembly resolutions dealing with unlawful territorial change and the violation of human rights and has failed to implement the 2004 advisory opinion of the International Court of Justice, yet it escapes the imposition of sanctions. Instead, the Palestinian people, rather than the Palestinian Authority, have been subjected to possibly the most rigorous form of international sanctions imposed in modern times.

IX. CIVIL SOCIETY AND THE PROTECTION OF HUMAN RIGHTS

55. Civil society - Palestinian, Israeli and international - plays a major role in the protection of the human rights of the Palestinian people by means of public education, litigation, humanitarian aid and protective action. Non-governmental organizations collect, analyse and publicize information about human rights abuses in the Occupied Palestinian Territory. Where possible they petition the Israeli Supreme Court for redress. All the decisions of the Israeli Supreme Court, some helpful to the cause of human rights and some positively unhelpful, referred to in this report have been initiated by NGOs, mainly from Israel itself. NGOs working in the fields of health, education and welfare perform invaluable services. On occasion members of civil society intervene to protect Palestinians against the Israeli Defense Forces or settlers or to assist in the assertion of rights. The Israeli women's group, Machsom Watch, monitors the behaviour of members of the IDF at checkpoints and in so doing softens the conduct of some soldiers. Israeli peace activists have assisted in the harvesting of olives and protected Palestinian farmers against settler violence. Israeli and Palestinian activists regularly demonstrate against the construction of the Wall at places like in the village of Bil'in. Civil society must therefore be credited with having reduced the suffering of the Palestinian people.

X. INTERNATIONAL ACCOUNTABILITY AND RESPONSIBILITY

56. On a recent visit to the Occupied Palestinian Territory and Israel, the High Commissioner for Human Rights stressed the need for the accountability of Israelis and Palestinians for the violation of international humanitarian law and human rights law. Palestinians who launch Qassam rockets into Israel, killing and injuring civilians and damaging property, should be held individually accountable - that is prosecuted. But so should Israelis who have committed violations of international humanitarian law on a much greater scale. Despite the fact that Israel - unlike Palestine - has a sophisticated and advanced criminal justice system, prosecutions are very rare. Civil claims were impossible before the Israeli Supreme Court on 12 December 2006 overturned a law that prevented Palestinians from seeking compensation from Israel for damages from Israeli army activities in the OPT. Palestinians harmed in "non-belligerent" army operations in the OPT may now sue for redress. This ruling, however, does not alter the prohibition on compensation to Palestinians harmed in combat operations or to Palestinians belonging to "terrorist organizations" - such as Hamas.

57. Individual criminal accountability is no substitute for State responsibility. A State that violates international law by destroying the property of another State used for humanitarian purposes in an occupied territory may be held responsible by the injured State in accordance with the traditional principles of State responsibility. Moreover a State that systematically violates a peremptory norm of general international law may incur responsibility to the international community as a whole for such conduct; and be subject to an international claim for reparation at the instance of any State prepared to make such a claim.[12] Many States, particularly European States, have suffered damages as a result of Israeli attacks on their humanitarian assistance projects in the OPT. Moreover Israel has systematically violated peremptory norms of international law in the OPT, ranging from the denial of self-determination to serious crimes against humanity. States may well consider bringing claims against Israel under the rules governing State responsibility in order to induce it to comply with its obligations in the fields of human rights and humanitarian law.

XI. OCCUPATION, COLONIZATION AND APARTHEID: IS THERE A NEED FOR A FURTHER ADVISORY OPINION?

58. The international community, speaking through the United Nations, has identified three regimes as inimical to human rights - colonialism, apartheid and foreign occupation. Numerous resolutions of the General Assembly of the United Nations testify to this. Israel's occupation of the West Bank, Gaza and East Jerusalem contains elements of all three of these regimes, which is what makes the Occupied Palestinian Territory of special concern to the international community.

59. That the OPT is occupied by Israel and governed by the rules belonging to the special legal regime of occupation cannot be disputed. The International Court of Justice confirmed this in respect of the West Bank and East Jerusalem in its 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see, ICJ Reports, p. 136, paragraph 78), and held that the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 1949, was applicable to this Territory (ibid., para. 101). The Security Council, General Assembly and States Parties to the Fourth Geneva Convention have declared that this Convention is applicable to the entire OPT (ibid., paras. 96-99). Moreover, it is not possible to seriously argue, as Israel has attempted to do, that Israel has ceased to occupy Gaza since August 2005, when it withdrew its settlers and the Israel Defense Forces from Gaza. Even before the commencement of "Operation Summer Rains", following the capture of Corporal Gilad Shalit on 25 June 2006, Israel was able to exercise effective control over the Territory by reason of its control of Gaza's external borders, air space and sea space. Since that date it has exercised its military authority within Gaza by military incursions and shelling, in circumstances which clearly establish occupation (see paragraphs 8-13 above).

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[12] Draft articles on the Responsibility of States for Intentionally Wrongful Acts (arts. 40 and 48 (2) (b)), *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10).

60. Today there are over 460,000 Israeli settlers in the West Bank and East Jerusalem (para. 32 above). Moreover, Israel has appropriated agricultural land and water resources in the West Bank for its own use. This aspect of Israel's exploitation of the West Bank appears to be a form of colonialism of the kind declared to be a denial of fundamental human rights and contrary to the Charter of the United Nations as recalled in the General Assembly's Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 (Resolution 1514 XV).

61. Israel's practices and policies in the OPT are frequently likened to those of apartheid South Africa (see, for example, Jimmy Carter, *Palestine: Peace, Not Apartheid* (2006)). On the face of it, occupation and apartheid are two very different regimes. Occupation is not intended to be a long-term oppressive regime but an interim measure that maintains law and order in a territory following an armed conflict and pending a peace settlement. Apartheid is a system of institutionalized racial discrimination that the white minority in South Africa employed to maintain power over the black majority. It was characterized by the denial of political rights to blacks, the fragmentation of the country into white areas and black areas (called Bantustans) and by the imposition on blacks of restrictive measures designed to achieve white superiority, racial separation and white security. Freedom of movement was restricted by the "pass system" which sought to restrict the entry of blacks into the cities. Apartheid was enforced by a brutal security apparatus in which torture played a significant role. Although the two regimes are different, Israel's laws and practices in the OPT certainly resemble aspects of apartheid, as shown in paragraphs 49-50 above, and probably fall within the scope of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.

62. Colonialism and apartheid are contrary to international law. Occupation is a lawful regime, tolerated by the international community but not approved. Indeed over the past three decades it has, in the words of the Israeli scholar Eyal Benvenisti, "acquired a pejorative connotation".[13] What are the legal consequences of a regime of occupation that has continued for nearly 40 years? Clearly none of the obligations imposed on the occupying Power are reduced as a result of such a prolonged occupation.[14] But what are the legal consequences when such a regime has acquired some of the characteristics of colonialism and apartheid? Does it continue to be a lawful regime? Or does it cease to be a lawful regime, particularly in respect of "measures aimed at the occupants' own interests"?[15] And if this is the position, what are the legal consequences for the occupied people, the occupying Power and third States? Should questions of this kind not be addressed to the International Court of Justice for a further advisory opinion? It is true that the 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* has not had the desired effect of

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[13] *The International Law of Occupation* (1993), p. 212.

[14] See A. Roberts "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967" (1990) 84, *American Journal of International Law* 44, 55-57, 95.

[15] Benvenisti, op. cit (note 13), p. 216.

compelling the United Nations to take firmer action against the construction of the Wall. On the other hand, it must be remembered that the United Nations requested four advisory opinions from the International Court of Justice to guide it in its approach to South Africa's occupation of South-West Africa/Namibia. In these circumstances a request for another advisory opinion warrants serious consideration.

XII. CONCLUSION: ISRAEL, PALESTINE AND THE FUTURE OF HUMAN RIGHTS

63. **The Occupied Palestinian Territory is of special importance to the future of human rights in the world. Human rights in Palestine have been on the agenda of the United Nations for 60 years; and more particularly for the past 40 years since the occupation of East Jerusalem, the West Bank and the Gaza Strip in 1967. For years the occupation of Palestine and apartheid in South Africa vied for attention from the international community. In 1994, apartheid came to an end and Palestine became the only developing country in the world under the subjugation of a Western-affiliated regime. Herein lies its significance to the future of human rights. There are other regimes, particularly in the developing world, that suppress human rights, but there is no other case of a Western-affiliated regime that denies self-determination and human rights to a developing people and that has done so for so long. This explains why the OPT has become a test for the West, a test by which its commitment to human rights is to be judged. If the West fails this test, it can hardly expect the developing world to address human rights violations seriously in its own countries, and the West appears to be failing this test. The EU pays conscience money to the Palestinian people through the Temporary International Mechanism but nevertheless joins the United States and other Western countries, such as Australia and Canada, in failing to put pressure on Israel to accept Palestinian self-determination and to discontinue its violations of human rights. The Quartet, comprising the United States, the European Union, the United Nations and the Russian Federation, is a party to this failure. If the West, which has hitherto led the promotion of human rights throughout the world, cannot demonstrate a real commitment to the human rights of the Palestinian people, the international human rights movement, which can claim to be the greatest achievement of the international community of the past 60 years, will be endangered and placed in jeopardy.**
