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**QUESTION OF THE VIOLATION OF HUMAN RIGHTS IN THE OCCUPIED
ARAB TERRITORIES, INCLUDING PALESTINE**

**Note verbale dated 28 March 2003 from the Permanent Mission of Israel
to the United Nations Office in Geneva addressed to the secretariat
of the Commission on Human Rights**

The Permanent Mission of Israel to the United Nations Office and other International Organizations in Geneva presents its compliments to the secretariat of the Commission on Human Rights and has the honour to enclose herewith Israel's response* to the report of Mr. John Dugard, Special Rapporteur of the Commission on Human Rights dealing with the West Bank and Gaza, to the fifty-ninth session of the Commission on Human Rights, pursuant to Commission resolutions 1993/2 A and 2002/8, contained in document E/CN.4/2003/30.

The Permanent Mission of Israel requests that this document be circulated as an official document under agenda item 8 of the agenda of the fifty-ninth session of the Commission on Human Rights.

* Reproduced as received, in the language of submission only.

Annex

Response of Israel to the Report submitted by Professor John Dugard, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolutions 1993/2A and 2002/8

A. General Assumptions

While Israel has serious reservations regarding the allegations made by the Special Rapporteur in his latest Report, Israel nevertheless notes that the Rapporteur has reconsidered some of the assumptions reflected in previous reports. In particular, Israel notes that the Special Rapporteur has revised his position on five important issues:

1. Terrorist attacks on Israeli civilians are unlawful

A persistent theme of previous reports of the Special Rapporteur has been that Israel itself is ultimately responsible for acts of terrorism against Israeli citizens. Thus, these reports have asserted that “[i]t is the violation of human rights in the Occupied Palestinian Territory that has produced acts of terrorism in Israel” and that it is “the hopelessness of despair which *leads inexorably* to suicide bombings and other acts of violence against Israelis.”(emphasis added). Previous reports have also been hesitant about the unlawful nature of terrorist attacks, asserting that they are contrary to “emerging norms” of international law.

While the current Report is not entirely free of such assertions, it nevertheless does highlight the fact that there is no justification for acts of terror and that basic human rights such as the inherent right to life enshrined in Article 6, paragraph 1 of the International Covenant on Civil and Political Rights apply not only to Palestinians, but to Israelis as well (Para.6).

2. Terrorism directed against Israelis

In this latest Report, the Special Rapporteur includes a brief description of the effects of Palestinian terrorism on the lives of Israelis. In particular, he describes:

...the suicide bombers who have carried their lethal weapons of destruction onto buses and into busy shopping centers. Israel has been subjected to more than 1,100 terrorist attacks since September 2000. Between March and June 2002, when there was a spate of suicide

bombings in Israel, more than 250 Israelis were killed, of whom 164 were civilians and 32 children.

While the numbers of attacks and victims supplied by the Rapporteur are considerably lower than the figures recorded by Israel (Israel's defence forces have registered over *15,000* separate terrorist attacks during this period), the fact that the Rapporteur addresses the suffering of Israelis is noteworthy, since his mandate is limited to investigation of "Israeli violations". Accordingly, while this brief description of Palestinian terrorism is timely, it highlights the inadequacy of the Special Rapporteur's mandate, which is not only open-ended and prejudicial (because, among other things, it concludes that Israel is guilty of violations before considering any evidence), but also one-sided, requiring the Rapporteur to consider actions by Israel, while not permitting him to address violations and provocations by the other party to the conflict. Israel reiterates its previous calls to the Commission to reconsider and revise this mandate, calls which have been supported by several Special Rapporteurs.

3. Right of Israel to respond to terrorism and take measures to prevent terrorist attacks

None of the Special Rapporteur's reports, including the current report, give any indication of what measures to prevent acts of terrorism the Rapporteur considers permissible. Indeed, every measure taken by Israel cited in any of his reports to date is presented as being excessive, if not outright illegal. However, it is noteworthy that, in principle at least, the latest report contains the clearest recognition to date by the Rapporteur that Israel is, in principle at least, entitled to use force in order to prevent acts of terror:

That Israel has legitimate security concerns cannot be denied. That it is entitled to take strong action to prevent suicide bombings and other acts of terror is not disputed. (Para.4)

The Rapporteur also does recognize that the crucial dilemmas Israel faces in seeking to find effective but humane means of countering terror can only be assessed with some awareness of the realities of the horrendous and complex situation on the ground. As he notes:

It is not possible to adopt an armchair attitude in making this assessment. Israel is entitled to a wide margin of appreciation in its response. (Para.5)

4. Occupation: Territories handed over to the Palestinians cannot be considered "occupied".

In previous reports the Special Rapporteur has gone to considerable lengths to argue that the entire West Bank and Gaza Strip are "occupied territory" notwithstanding the transfer of significant parts of these areas to the Palestinians.

However, in the current report the Special Rapporteur repeatedly refers to Israel's "reoccupation" of cities in the West Bank, a belated acceptance of Israel's position

that, at least during those periods when Israeli forces are not present in these areas, they cannot be considered "occupied".

5. No moral equivalence between acts of terror and attempts to prevent them

Previous reports have contained troubling implications of moral equivalence between acts committed by terrorists, and acts designed to try to prevent them. In some cases, the reports have actually distorted the moral equation, implying that acts of Palestinian terrorism should be placed on a par with Israeli efforts to prevent them. This has been evident in a perverse use of terminology in which the Special Rapporteur characterised measures taken by Israel to counter terrorist acts, such as the indiscriminate murder of Israeli civilians riding buses, as acts of "military terror". Equally striking has been the Special Rapporteur's refusal to label as terrorists those whom he himself admits are carrying out terrorist attacks against Israelis, referring to them instead simply as "militants".

While this tendency to find moral equivalence remains apparent, to some extent, in the current report, the Rapporteur nevertheless appears to be making his clearest statement to date that terrorists, who measure their success in terms of innocent lives deliberately destroyed, are part of a different moral league than those fighting terrorism, for whom success is measured in terms of lives saved:

No attempt is made to seek an equivalence between civilian deaths caused by suicide bombings carried out by non-State actors, where civilians are deliberately targeted and civilian deaths that result from "collateral damage" in military action..." (Para.11 – *though in the remainder of this paragraph there is a regression to moral equivalence*)

B. Specific allegations

As noted, alongside these comments, the Special Rapporteur repeats a number of the problematic assumptions and unfounded charges made in previous reports. These include his thesis that the Israeli presence in the West Bank and Gaza Strip is the "root cause" of the Israeli-Palestinian conflict, and his assertion that the current situation is governed not only by the international law of armed conflict but also human rights law. These issues have been addressed at length by Israel in its responses to the Special Rapporteur's previous reports.

Inexplicably, after asserting that "many obligations of international humanitarian law" have been violated by Israel, the Rapporteur adds: "That this is so is not seriously contested by Israel". No basis for this astonishing and false claim is provided, and Israel once again refers the Rapporteur to its responses to his previous reports, which quite clearly contest many of his findings.

Israel's previous responses also address many of the specific allegations made by the Special Rapporteur in his current report. However, a number of issues raised by the Special Rapporteur cannot pass without some further comment:

1. The Humanitarian Crisis

There is no argument about the gravity of the humanitarian situation in the territories. However, the Special Rapporteur's insistence that this is purely a result of Israeli actions is inexplicable. Beyond the critical fact that Israel's security measures in these areas do not take place in a vacuum, but as a reluctant response to a concerted wave of Palestinian terrorism emerging from civilian areas, the Special Rapporteur completely ignores an even more immediate cause of poverty and deprivation: the appalling and widespread corruption throughout the Palestinian Authority. It is a tragedy of overwhelming proportions that the Palestinian people, who have received more international donor aid *per capita* than any other group, have seen so little of the benefits since these funds have been siphoned off by corrupt leaders and officials for personal gain. Regrettably, this tragedy is compounded by the Special Rapporteur's total silence on the matter.

The Special Rapporteur expresses his concern over the dilemma that, by providing aid to the Palestinians, the international donor community "might be seen to be contributing to the funding of the occupation". Strikingly, the Rapporteur does not address a far more acute dilemma that faces the international donor community and which is now being investigated by the European Union – whether by funding the current Palestinian regime it is supporting corruption and the financing of terrorism and incitement.

2. Children in the Conflict

While the Special Rapporteur does mention that over 100 hundred Israeli children have been killed since September 2000, his focus is on the suffering of Palestinian children. However his concern is selective in the extreme. As in previous reports, he ignores the calculated use of Palestinian children by terrorist organizations in perpetrating violence, including the active recruitment and involvement of children in the conflict, both as combatants and human shields – an explicit violation of fundamental principles of international law. Nor does the Special Rapporteur mention the incitement and virulent propaganda with which Palestinian children are indoctrinated in schoolbooks, through children's television and in summer camps that set out to prepare them for "martyrdom". The results of such indoctrination are painfully clear, as in the case of two Palestinian children aged 8 and 13 who were caught in January, armed with knives, trying to stab passers-by in the Israeli settlement of Netzarim.

One can only wonder why the Special Rapporteur, who repeatedly expresses concern about the welfare of Palestinian children, is so wilfully blind to this incessant abuse, which deprives an entire generation of even the possibility of contemplating peace.

3. "The Great Wall"

The Special Rapporteur's comments regarding the security fence being erected by Israel are revealing. Refusing to address the question of whether this is an effective or appropriate security measure, he explains:

Had the wall strictly followed the Green Line marking the 1967 borders between Israel and OPT, it might have been possible to confine the debate over the wall to the question whether a security wall of that kind would achieve its purpose.

The Rapporteur's confusion between the political and the security spheres is baffling. The security fence is one of a series of defensive measures that Israel has been forced to take, after repeated overtures to the Palestinian leadership to resolve the security crisis were rebuffed. Its location has been determined purely by security considerations and Israel's leadership has clearly stated that it has no political significance regarding any future agreement. Following the Rapporteur's suggestion that the fence should be along the 1967 line would, on the other hand, be a clear statement that this measure was dictated by political and not security considerations. The statement also represents the taking of a political position by the Rapporteur on the issues of borders – an issue that even the PLO has agreed is to be left to permanent status negotiations.

While the fence is a security measure, Israel has taken significant steps to mitigate its effect on the local population, including an appeals process before both security officials and Israel's High Court of Justice, measures to ensure continued access by farmers to land that the fence may cross, and full compensation for any land used in the construction of the fence.

C. Proportionality

The Special Rapporteur takes as the main focus of his Report the issue of proportionality. His treatment of the subject, however, is profoundly inconsistent. On the one hand, he asserts – correctly - that: “[I]t is not the function of the Special Rapporteur to pronounce judgment on the proportionality of measures taken by Israel in response to Palestine violence [sic]” (Para.45). On the other hand, the Report does little else than pass judgment on the proportionality of Israel's measures.

Moreover, the approach taken by the Rapporteur to the issue of proportionality is confusing, to say the least. Any discussion of proportionality should, it might be assumed, start with the preliminary question “Proportionate to what?” since it is the actual or threatened attack that gives rise to the right to use force, and dictates that degree of force that can be considered proportionate. Indeed, as the International Law Commission has noted, proportionality in the face of armed attacks is to be measured in relation to the action required to bring those attacks to an end.

However, the Rapporteur insists on focusing exclusively on Israel's actions, while editing the Palestinian terrorism that necessitated these measures out of the scenario. Beyond a few *pro forma* references to Palestinian violence in his introductory sections, his description of Israel's actions repeatedly creates the impression that these took place in a vacuum, and in the absence of any provocation or security necessity. The Report is rife with such assertions, but a few examples will suffice:

“Military operations have led to widespread arrests and detentions”(Executive Summary)

- In the Special Rapporteur's version of events, Israel's arrest and detention of terrorist suspects has nothing whatsoever to do with their acts of terrorism, or indeed the failure of the PA to comply with its obligation to arrest terrorists. Rather it is a result of "military operations".

"Vehicles carrying humanitarian aid are stopped and searched, with resulting delays...ambulances are sometimes denied access to hospitals or delayed unnecessarily" (Para.14)

- The Special Rapporteur paints a picture of random and arbitrary interruptions to the functioning of health and humanitarian services, without any reference whatsoever to the illegal abuse of ambulances and humanitarian vehicles by terrorist organisations for smuggling both ammunition and terrorists themselves. To cite just two of many examples: Nidal Abd El-Fatah Abdalla Nizal, an UNRWA ambulance driver arrested in August 2002, admitted to using his ambulance to transport arms and explosives to terrorist groups, while Nahed Rashid Ahmad Attalaj, another UNRWA employee, admitted using an UNRWA vehicle for transporting armed Fatah terrorists and explosives, including a 12 kg bomb. One can only wonder how the Special Rapporteur could arrive at the conclusion that delays to search vehicles are "unnecessary" without even considering the reason that searches have to be conducted.

"In November, IDF first shot John [sic] Hook and then allowed him to bleed to death" (Para. 14)

- This is a striking, but not untypical, example of how the Special Rapporteur ignores the context of events and so effectively rewrites history. Iain Hook was tragically killed in the course of gun battles between Palestinian terrorists shooting from in and around the UNRWA compound where Iain Hook worked, and IDF soldiers, seeking to apprehend wanted terrorist Abdala Najy Wachsh. The claim that Israel forces deliberately delayed Iain Hook's ambulance is also unfounded; the only delay caused to the ambulance resulted from the terrorist gunfire, which required it to take a less direct route.

"In many houses entered by the IDF, soldiers broke holes through the walls in order to reach neighbouring houses" (Para. 31)

This is but one example of how an intentionally one-sided picture distorts the Special Rapporteur's account of events in Jenin. The Jenin refugee camp was the Palestinians' proudly proclaimed "capital of suicide terrorism" and the small area in which Israeli soldiers were operating was, as humanitarian organisations have confirmed, densely packed with bomb factories. In order to protect these factories, terrorists had booby trapped the entrances, verandas and windows of these buildings - a measure which made it necessary for the IDF to break through walls in order to move from house to house. The Special Rapporteur, however, makes no reference whatsoever to the vast quantity of ordnance planted by the terrorists, suggesting that the making of holes in the wall was an act of wanton vandalism.

Furthermore, the Special Rapporteur does not even mention the fact that 23 Israeli soldiers were killed in this operation as a direct result of Israel's decision to deal with the terrorists in Jenin on a house-to-house basis, rather than to risk the danger of causing inevitable civilian casualties through the use of different measures, because it valued the lives of Palestinian civilians more highly than did the terrorists who hid behind them.

The Special Rapporteur is correct to focus on the issue of proportionality as being a key dilemma that must be addressed by any country fighting terrorism and concerned to do so within legal and humanitarian framework. But in practice, as these examples show, he is not interested in addressing the complex balancing of rights which proportionality requires, but rather in painting a simplistic picture, in which all is black and white, in which all Israeli actions are excessive.

The total failure of the Rapporteur's two-dimensional approach to even approximate to the real situation in the territories is most evident in his conclusion. After acknowledging that Israel's "right to respond to terror attacks and to prevent further attacks cannot be disputed" the Rapporteur presents two possible options for responding to terrorism:

When this response takes the form of life-threatening military action against militants and their bases, few will question the military necessity of such action or the link between attack and response. But when this action results in an excessive use of force that disregards the distinction between civilians and combatants, a humanitarian crisis that threatens the livelihood of a whole people.... serious questions must be asked about the proportionality of Israel's response and the boundaries of military necessity. (Para. 46)

In the false dichotomy presented by the Special Rapporteur, there are but two possibilities: precise attacks against "militants and their bases" which "few will question" on the one hand, and "excessive use of force that disregards the distinction between civilians and combatants", on the other. By artificially constructing the options in this way, the Rapporteur omits the truly horrendous and complex situation on the ground, in which terrorist groups, with the tacit – and at times active – support of the Palestinian leadership, have set up their bases and bomb factories in the heart of refugee camps and other civilian areas.

In this appalling scenario, not of Israel's making, the choice is much more complicated and difficult than the Rapporteur suggests. Sterile attacks against "militants and their bases" with no risk to the civilians behind whom they have placed themselves are unfortunately not an available option. Similarly, when terrorists have shown no qualms about hiding ammunition in ambulances, dressing as pregnant women and aid workers, and using children both as fighters and as their front line of defence, an effective fight against terrorism cannot be conducted with no impact whatsoever on civilian life.

In such a situation, there are – no matter what the Rapporteur would have us believe – no easy answers. As Israel's High Court of Justice, to which every Palestinian of the

territories has direct access and which constantly struggles with this balance, recently asserted:

Human rights cannot receive complete protection as if there were no terrorism and state security cannot receive complete protection as if there were no human rights. A delicate and sensitive balance is required. This is the price of democracy.” (HCJ 7015/02 3 September 2002)

Conclusion

Though in this latest Report, the Special Rapporteur demonstrates the beginnings of an understanding of the unlawful and unjustifiable nature of terrorism, and the right that states have to take measures against it, this insight, such as it is, remains purely on the abstract level. In practice, the Special Rapporteur continues to view Israel’s security measures as taking place in a vacuum, without any recognition of the terrorism and security threats that necessitate them. With this approach, it is hardly surprising that in the course of this Report – and all his previous reports – the Rapporteur has been unable to cite one instance of Israel’s actions against terrorism that he considers to have been legitimate and proportionate.

Israel has long expressed its concern that a political mandate such as that of the Special Rapporteur can only produce politically influenced reports. Sadly, the current Report only justifies this concern, and has nothing to offer those who genuinely wish to grapple with the real humanitarian dilemmas of the current situation.
