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Written statement* submitted by Habitat International Coalition, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

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* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

UPR: The Dilemma over Non-participating States

The Universal Periodic Review (UPR) seeks "the fulfilment by each State of its human rights obligations and commitments in a manner [that] ensures universality of coverage and equal treatment with respect to all States". The non-cooperation of Israel in its scheduled round of the UPR, however, undermines the integrity of the process, particularly the universality principal inherent in human rights, the Council members' mutually binding UPR duties.

This unforeseen situation poses a dilemma to address the present contradiction of the UPR's core principals with an appropriate procedure. We urge the Council to consider its response on the basis of the standing obligations of its members to complete their own mandated task of this second round, namely, to review States' implementation of the recommendations of the first round and consider any human rights developments, including good practices.

As previous resolutions and decisions have refined the UPR mechanism during the review process, any necessary modificationsof modalities for the review in the second and subsequent cycles should maintain the core principles, foremost among them are universality and international cooperation.

This innovative mechanism would prove its resilience by completing the scheduled review of a delinquent State, providing that it not be in a state of debilatio at the time. That could be done in such a case by diligent Council members engaging in their appointed review of the standing recommendations with consideration given to its capacity-building needs, and proffering further recommendations through by usual diplomatic and documentary means. To support the members in their task, the Council could draw upon its own independent Special Procedures to testify during the session, and/or engage the wider human rights community. These measures could be accomplished with or without financial implications.

Thus, the Council would maintain the integrity of the UPR process, as well as ensure members' due diligence to ensure a truly "universal" periodic review. As the UPR mechanism and procedures evolve, this case provides the Council with an occasion to complete the procedural and methodological lacunae remaining with particular respect to member States' obligations to engage in international cooperation through erga omnes and extraterritorial obligations to correct an illegal situation that has grave consequences for human rights.

At its 23rd session, the Council reviewed the Independent Fact-finding Mission report on Israeli settlements, which was strikingly consistent with serial UN findings on the subject. It echoed the Security Council Commission's conclusions in S/RES/446, whose 1979 report already confirmed that "the Israeli Government is actively pursuing its willful, systematic large-scale process of establishing settlements in the occupied territories" in violation of international law.

Already in its resolution 465 (1980), the SC specified the collective and extraterritorial obligations of "all States not to provide Israel with any assistance to be used specifically in connexion with settlements in the occupied territories". Over thirty years later and with today's greater clarity of systematic breaches, advanced legal norms, accountability mechanisms and remedial options, the Council this year acknowledged the violations, but resolved to propose no action.

The Council's most-recent fact-finding mission report contributed updated references to the irrepressible accumulation of evidence on the subject and the development of international norms and available remedial measures. It acknowledged the prospect that the International

Criminal Court's jurisdiction may enable individual liability for conduct that amounts to international crimes, including Israel's "transfer of all or parts of the population of the occupied territory within or outside that territory." The report acknowledged that, "In a situation of prevailing impunity, the law on State responsibility for internationally wrongful acts, including third-State responsibility, is relevant." These responsibilities include the nonrecognition of, and noncooperation with the unlawful situation and those parties collaborating, supporting and/or benefitting from it. International law also requires States to pursue individual criminal responsibility for conduct that amounts to international crimes. These obligations prevail whether or not a State is party to the Rome Statute of the International Criminal Court.

The prohibition against such grave breaches and corresponding obligation of States to correct them has been the law among American States since the early 1800s, and international law since 1932. In 1933, American States reaffirmed the inadmissibility of acquiring territory by military and other means, and the OAU formally adopted this American legal legacy in 1964. UN GA resolutions 1514, 2526, and 3314 also consistently embody this principle.

The crime of population transfer, including the implementation of settlers and settler colonies, was codified in the London Conference of 1942 and prosecuted at Nuremburg and Tokyo following WW II. International law prohibitions against the crime were clarified in the Sub-commission's reports on the "human rights dimensions of population transfer" to the former Commission in 1993–97. However, Council resolution A/HRC/22/L.42 remains silent on the obligations of States to act accordingly, despite the Rome Statute also codifying population transfer and settler colonies as crimes against humanity and war crimes.

The 2013 independent international fact-finding mission also freshly reminded the Council members of the role of Israel's parastatal institutions in the settler-colony regime. As the report noted, the World Zionist Organization/Jewish Agency, as well as the Jewish National Fund and affiliates, are pivotal to the conduct of these crimes. As noted in A/HRC/23/NGO/85, at least 50 other States—including 18 Council members—actually host those institutions as tax-exempt "charities," while they recruit financial and human capital within their territories to build and maintain illegal settler colonies.

Upholding human rights, in general, and maintaining the UPR mechanism, in particular, are mutual and shared responsibilities of Council members. It would reflect well on the integrity of the Council for it to acknowledge not only Israel's violations by its occupation of Palestine, but also all other States' self-executing obligations to correct such an illegal situation.

Thus the duties of states in the UPR process have dimensions:

- The state under UPR review has a duty to cooperate in its review;
- Other states, in accordance with the principle of international cooperation, to fulfil their roles in the UPR process, including to review implementation of previous reviews, identify and take lessons from good practice, and to pose and follow further recommendations to ensure the universal respect, protection and fulfilment of human rights;
- The extraterritorial obligations of all states not to recognize, cooperate with or support an illegal situation of gross HR violations, and to take "effective measures" to correct the illegal situation.

With respect to the universality principle, specific "effective measures" needed for all States to address the gross violations of human rights committed under colonization, we redirect the Council's attention to A/HRC/23/NGO/85. We also urge States to proceed with

the timely UPR of Israel in view of States' duties within the Council, as well as extraterritorially.

Notes

[1] A/RES/60/251, para. 5(e).
[2] See HRC resolution 16/21 and decisions 17/119.
[3] "Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem," A/HRC/22/63, 7 February 2013.
[4] Security Council resolution S/RES/465, 1 March 19080, para. 3.
[5] "Follow-up to the report of the independent international fact-finding mission to investigate the implications of Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem" (A/HRC/22/L.45).
[6] A/HRC/22/63, op. cit., p. 5, para. 17.
[7] Articles 7 and 8(2)(b)(viii) of the Rome Statue on the Establishment of the International Criminal Court establish settlements (settler colonies) in occupied territories as both a crime against humanity and a war crime, respectively.
[8] International lawyers refer to 1932 as the date population transfers became legally prohibited. See Claire Palley, "Population Transfer," in Donna Gomein, ed., Broadening the Frontiers of Human Rights: Essays in Honour of Asbjørn Eide (Oslo: Scandinavian University Press, 1993), 229; and Claire Palley, "Population Transfer and International Law" (paper delivered at "UNPO Conference Population Transfer" conference, Tallinn, Estonia, 11–13 January 1992). See also "UNPO Conference Population Transfer" (conference report), at: http://unpo.org/downloads/Population-Transfer-1992.pdf and Ian Brownlie, International Law and the Use of Force by States (London: Clarendon Press, 1963), p. 410; U.S., Department of State, Publication 1983, Peace and War: United States Foreign Policy, 1931–1941 (Washington: U.S. Government Printing Office, 1943), pp.3–8. In addition to the First International Conference of American States in 1890, the United States Stimson Doctrine of 1932 and the 1932 League of Nations resolution on Japanese aggression in China is the Buenos Aires Declaration of 1936 and the Atlantic Charter of 1941. (See Lynk, S. Michael, "Conceived in Law: The Legal Foundations of Resolution 242," 2 July 2007, at: http://ssrn.com/abstract=1411698.) U.S. Secretary of State Henry L. Stimson's statement of 7 January 1932 against the Japanese occupation of Manchuria was pivotal. Echoing the long-standing position of the other American States, the USA "did not intend to recognize any situation, treaty or agreement [that] may be brought about by means contrary to the covenants and obligations of the Pact of Paris..." [American Journal of International Law, Vol. I, No. 1 (1932), p. 342.] The League of Nations Assembly affirmed this principle by resolution on 11 March 1932, unanimously adopting this 42-year-old inter-American policy (with China and Japan abstaining). Other pacts in the same period enshrine principles logically consistent with the "established" prohibition against acquisition of territory by force, which typically involves the push and pull factors of population transfer.
[9] La Convención de Montevideo on the rights and duties of States, at the 7th International American Conference (1933), recognized, in article 11, "the inviolability of the territory of the States and affirmed that it is inadmissible that the State territory be the subject of military occupation or other means of force, not even on a temporary basis." The OAS Member States meeting at Washington in October 1933 to end the Chaco Boreal War between Bolivia and Paraguay, affirmed the inadmissibility of the acquisition of territory by force, which language is included almost verbatim in the UN Resolution 2526 (XXV), the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (24 October 1970).
[10] Organization of African Unity resolution AGH/Res. 16(1) on decolonization, adopted at Cairo, 21 July 1964.
[11] GA resolution 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples, of 14 December 1960, a.k.a. as the Magna Carta for the right to decolonization as a principle of international law
[12] GA resolution 2526 (XXV) Declaration on Principles of International Law Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, 24 October 1970.

[13] 3314 (XXIX) Definition of Aggression (14 December 1974)

[14] N.B.: “The human rights dimensions of population transfer, including the implantation of settlers” (preliminary report presented by Mr. A.S. al-Khasawneh and Mr. R. Hatano), E/CN.4/Sub.2/1993/17, 6 July 1993, at: http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.1993.17*.En?Opendocument.

[15] The Rome Statute of the International Criminal Court, Article 7.

[16] Ibid., Article 8(2)(b)(viii), as also affirmed in GA resolution A/ES-10/573 - S/2012/899, stating that “Israeli settlement activities” constitute war crimes, and that Israel must be held accountable for such acts.

[17] Argentina, Austria, Brazil, Chile, Costa Rica, Czech Republic, Ecuador, Germany, Guatemala, India, Italy, Peru, Poland, Romania, Spain, Switzerland, United States of America and Venezuela (Bolivarian Republic of), cited in http://www.jnf.org/map.html, www.jnf.org and www.kklamericalatina.org, www.wzo.org, http://www.jnf.org/about-jnf/in-your-area/, http://www.wzo.org.il/Zionist-Federations, http://www.jafi.org/JewishAgency/English/Aliyah/Contact+Addresses/Representatives/Europe.htm, and http://www.jafi.org.il/JewishAgency/English/Contact+Us/International+Offices/.