ADVANCE UNEDITED VERSION

Distr.

A/HRC/10/20
17 March 2009

Original: ENGLISH

HUMAN RIGHTS COUNCIL
Tenth session
Agenda Item 7

HUMAN RIGHTS SITUATION IN PALESTINE AND OTHER OCCUPIED ARAB TERRITORIES

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

Summary

In the light of resolution S-9 adopted by the Human Rights Council at its ninth special session, the present report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 focuses on the main international law and human rights issues raised by Israel military operations commencing on 27 December 2008 and ending on 18 January 2009. He challenges the widespread emphasis on whether Israeli force was disproportionate in relation to Palestinian threats to Israeli security, and focuses on the prior question of whether Israeli force was legally justified at all. He concludes that such recourse to force was not legally justified given the circumstances and diplomatic alternatives available, and was potentially a crime against peace.

The Special Rapporteur also gives relevance to the pre-existing blockade of Gaza, which was in massive violation of the Fourth Geneva Convention, suggesting the presence of war crimes and possibly crimes against humanity. He considers the tactics pursued during the attacks by both sides, condemning the firing of rockets at Israeli civilian targets, and suggests the unlawfulness of disallowing civilians in Gaza to have an option to leave the war zone to become refugees, as well as the charges of unlawful weapons and combat tactics. He recommends that an expert inquiry into these matters be conducted to confirm the status under international law of war crimes allegations, and to consider alternative approaches to accountability.

Finally, the Special Rapporteur insists that Israeli security and the realization of the Palestinian right of self-determination are fundamentally connected, and that the recognition of this aspect of the situation suggests the importance of an intensified diplomatic effort, respect by all parties of relevant international law rights, and implementation of the long deferred Israeli withdrawal from occupied Palestine as initially prescribed by the Security Council in its resolution 242 (1967). Until such steps are taken the Palestinian right of resistance within the limits of international humanitarian law and Israeli security policy will inevitably clash, giving rise to ever new cycles of violence. The Special Rapporteur also recommends action in response to the denial by Israel of entry to him on 14 December 2008.

CONTENTS

I. Introduction

1. The present report does not have benefit from a recent mission to Gaza. Such a mission was planned and attempted in mid-December 2008, but was not carried out due to the denial of entry to the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967. The mission was to include a visit to the West Bank and East Jerusalem, and was supposed to commence with a scheduled meeting with the President of the Palestine Authority, Mahmoud Abbas. Entry was denied on 14 December 2008, the Special Rapporteur was detained in a facility close to Ben Gurion Airport, then expelled from Israel the day after. Such a refusal to cooperate with a United Nations representative, not to mention the somewhat humiliating treatment accorded (detention in a locked and dirty cell with five other detainees and excessive body search), has set an unfortunate precedent with respect to the treatment of a representative of the United Nations Human Rights Council, and more generally of the United Nations itself. This precedent should be seriously challenged for the sake of both the mandate and more broadly, to ensure that in future Member States accord appropriate respect and cooperation with official United Nations missions and activities. One possible form of challenge would be to seek an advisory opinion from the International Court of Justice as to the applicability of the Convention on the Privileges and Immunities of the United Nations. Since such an approach, even if undertaken, would not produce a result in the near future, it would also be important to seek a modification as soon as possible to the position of Israel via diplomatic channels.

2. The expulsion of the Special Rapporteur made information gathering on the ground impossible. In the light of resolution S-9/1 of the Human Rights Council adopted at theist ninth special session, the report will focus on the main international law issues raised by Israel military operations commencing on 27 December 2008 and ending on 18 January 2009. It also considers implications for international criminal law, and discusses the underlying debate as to whether the attacks themselves were violations of the Charter of the United Nations, and international law. This broader inquiry is perhaps not strictly

within the ambit of the mandate as a distinct subject matter, but its resolution bears directly on the interpretation of alleged violations of international humanitarian and human rights law, which in turn underpin contentions of war crimes and crimes against humanity, as well as implications for accountability and individual criminal responsibility.

II. INTRODUCTORY CLARIFICATIONS

3. A conceptual complexity arises from the nature of the participants in this conflict with respect to international law. International law governing the use of force has developed over time to regulate the behaviour of States in their relations with one another. Without in any way questioning the unity of the occupied Palestinian Territory, it is important to come to terms with the reality of Gaza as sealed off from the rest of occupied Palestine and not directly represented, given its present administrative structure, in international diplomatic arenas, such as the donors' conference at Sharm-al-Sheikh or in the United Nations. At the same time, the purposes of international law governing force is concerned with the protection of peoples and the preservation of peace, a sentiment echoed in Article 2 paragraph 4 of the Charter extended beyond relations among States by the phrase "or in any other manner inconsistent with the purposes of the United Nations". In the enumeration of purposes of the United Nations, Article 1 paragraph 1 affirms the obligation to resolve disputes by peaceful means "in conformity with the principles of justice and international law". These provisions, if read in the light of the Preamble to the Charter, clearly condition an assessment of any use of force in international relations that extends beyond the limits of territorial sovereignty. The decision of the International Court of Justice in the Nicaragua case extended this reasoning with regard to the inhibitions on defensive claims to use force to general international law beyond the framework of the Charter.

4. With regard to Gaza there is a further concern with respect to the nature of the legal obligations of Israel towards the Gazan population. Israel officially contends that after the

implementation of its disengagement plan in 2005 it is no longer an occupying power, and therefore is not responsible for observance of the obligations set forth in the Fourth Geneva Convention. That contention has been widely rejected by expert opinion, by the de facto realities of effective control, and by official pronouncements by for instance the United Nations High Commissioner for Human Rights and the Secretary-General (A/HRC/8/17), the General Assembly in its resolutions 63/96 and 63/98 and the Security Council in its resolution 1860. Since 2005, Israel has completely controlled all entry and exit routes by land and sea and asserted control over Gazan airspace and territorial waters. By imposing a blockade, in effect since the summer of 2007, it has profoundly affected the life and well-being of every single person living in Gaza. Therefore, regardless of the international status of the occupied Palestinian territory with respect to the use of force, the obligations of the Fourth Geneva Convention, as well as those of international human rights law and international criminal law, are fully applicable.

5. The final introductory clarification concerns the relations of international human rights law and international humanitarian law to international criminal law. Not every violation of human rights or infraction of the Geneva conventions constitutes a war crime or a crime of State. Moreover, criminal intent, by way of mental attitude or through circumstantial evidence, must be established. In essence, “grave breaches” of the Geneva Conventions as defined in article 147 of the Fourth Geneva Convention normally provide a legal foundation for allegations of war crimes. It is to be noted that the role of international criminal law is to identify and implement the fundamental obligations of international humanitarian law in wartime, but also to take account of severe violations of human rights arising from oppressive patterns of peacetime governance.

6. The recommended scope of investigation should combine attention to violations of international humanitarian law, the laws of war, and general international law (treaty and customary) as it bears on the rights and duties of Israel as the occupying Power, and Hamas as the party exercising effective political control in Gaza at the present time. It is to be expected that Israel would cooperate with any investigation authorized by the

United Nations in accordance with its obligations as a Member State under Article 56 of the Charter of the United Nations calling upon members to cooperate with the Organization, as well as the additional duties contained in the Convention on the Privileges and Immunities of the United Nations. It is disquieting, however, to read that Prime Minister Ehud Olmert and other Israeli high officials have made formal statements to the effect of taking all necessary steps to protect any member of the Israel Defense Forces from being accused, and, if excused, to prevent indictment and prosecution.[1] Such sentiments seem inconsistent with any expectation of serious official cooperation with a proposed investigation. It may be necessary, given this prospect, to place greater reliance on respected nongovernmental organizations compiling evidence and submitting reports, and on formal interviews with qualified observers and witnesses.

III. INHERENT ILLEGALITY: LEGALLY MANDATORY DISTINCTION BETWEEN CIVILIAN AND MILITARY TARGETS IMPOSSIBLE IN LARGE SCALE SUSTAINED ATTACKS ON GAZA AS COMMENCED BY ISRAEL ON 27 DECEMBER 2008

7. It is the view of the Special Rapporteur that the most important legal issue raised by an investigation of the recent military operations concerns the basic Israeli claim to use modern weaponry on a large scale against an occupied population living under the confined conditions that existed in Gaza. This involves trying to establish whether, under the conditions that existed in Gaza, it is possible with sufficient consistency to distinguish between military targets and the surrounding civilian population. If it is not possible to do so, then launching the attacks is inherently unlawful, and would seem to constitute a war crime of the greatest magnitude under international law. On the basis of the preliminary evidence available, there is reason to reach this conclusion.

8. Considering that the attacks were directed at densely populated areas, it was to some extent inevitable and certainly foreseeable that hospitals, religious and educational sites

[1] "The soldiers and commanders who were sent on mission in Gaza must know that they are safe from various tribunals and that the state of Israel will assist them on this issue and defend them.", Los Angeles Times,26 January 2009.

and United Nations facilities would be hit by Israeli military ordinance, and that extensive civilian casualties would result. As all borders were sealed, civilians could not escape from the orbit of harm. For authoritative and more specific conclusions on these points, it will be necessary to mount an investigation based on knowledge of Israeli weaponry, tactics and doctrine to assess the degree to which, in concrete cases, it would have been possible, given the battlefield conditions, to avoid non-military targets and to spare Palestinian civilians to a greater extent. Even without this investigation, on the basis of available reports and statistics, it is possible to draw the important preliminary conclusion that, given the number of Palestinian civilian casualties and degree of devastation of non-military targets in Gaza, the Israelis either refrained from drawing the distinction required by customary and treaty international law or were unable to do so under the prevailing combat conditions, making the attacks impossible to reconcile with international law. On the basis of existing information, the principal results of the military operation were as follows:

(a) A total of 1,434 Palestinian were killed. Of these, 235 were combatants. 960 civilians reportedly lost their lives, including 288 children and 121 women. 239 police officers were also killed; the majority (235) in air strikes carried out the first day. 5,303 Palestinians were injured, including 1,606 children and 828 women (namely 1 in every 225 Gazans was killed or injured, not counting mental injury, which must be assumed to be extensive);[2]

(b) Homes and public infrastructure throughout Gaza, especially in Gaza City, sustained extensive damage, including several United Nations facilities; an estimated 21,000 homes were either totally destroyed or badly damaged;

[2] A recent report by Near East Consulting quoted by the Office for the Coordination of Humanitarian Affairs in its Gaza Humanitarian Situation Report of 26 January 2009 concluded that 96 per cent of Gaza residents suffer from depression, with intense depression being experienced by 81 per cent of the residents of North Gaza and Rafah districts. Such mental deterioration is itself an indication of a failure by the occupying power to discharge its basic duty to safeguard the health of civilians living under occupation.

(c) A total of 51,000 people were internally displaced in makeshift shelters that provided minimal protection, while others fled to homes of friends and relatives that seemed slightly safer.[3]

9. There is no way to reconcile the general purposes and specific prescriptions of international humanitarian law with the scale and nature of the Israeli military attacks commenced on 27 December 2008. The Israeli attacks with F-16 fighter bombers, Apache helicopters, long-range artillery from the ground and sea were directed at an essentially defenceless society of 1.5 million persons. As recent reports submitted to the Council by the Special Rapporteur emphasized, the residents of Gaza were particularly vulnerable to physical and mental damage from such attacks as the society as a whole had been brought to the brink of collapse by 18 months of blockade that restricted the flow of food, fuel, and medical supplies to sub-subsistence levels and was responsible, according to health specialists, for a serious overall decline in the health of the population and of the health system. Any assessment under international law of the attacks of 27 December should take into account the weakened condition of the Gazan civilian population resulting from the sustained unlawfulness of the pre-existing Israeli blockade that violated articles 33 (prohibition on collective punishment) and 55 (duty to provide food and health care to the occupied population) of the Fourth Geneva Convention. Considering the obligation of the occupying Power to care for the well-being of the civilian occupied population, mounting a comprehensive attack on a society already weakened by unlawful occupation practices would appear to aggravate the breach of responsibility described in the above owing to the difficulties of maintaining the principle of distinction.

10. The deputy head of the embassy of Israel at the European Union, Ambassador Zvi Tal, during discussions with a committee of the European Parliament, sought to defend the

[3] Field Update from the Humanitarian Coordinator, 9 February 2009, and the Gaza Flash Appeal, 2 February 2009 of the Office for the Coordination of Humanitarian Affairs; as well as,and the Palestinian Centre for Human Rights, Press Release, Ref: 36/2009, 12 March 2009.

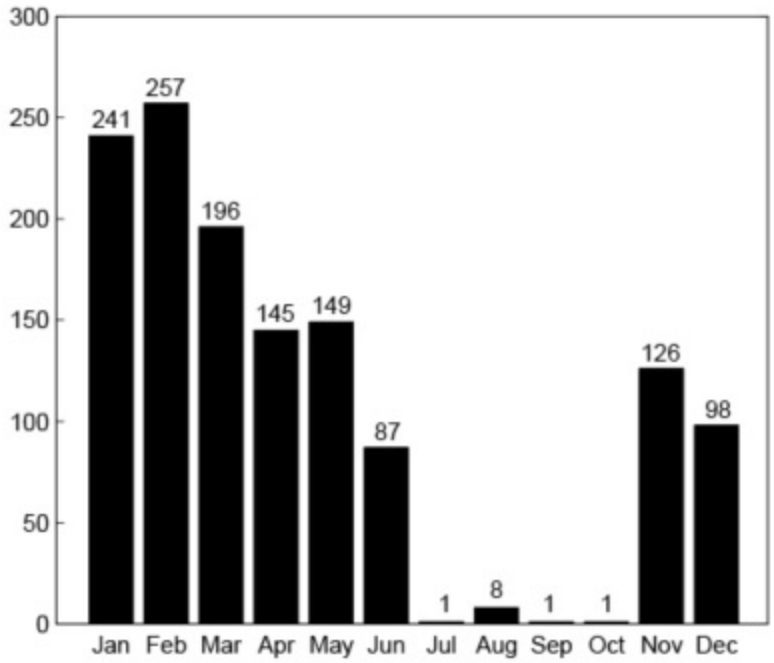
attacks on Gaza by describing them as addressing “a very peculiar situation.” In responding to allegations about the bombing of United Nations schools in Gaza, he was quoted as saying: “Sometimes in the heat of fire and the exchange of fire, we do make mistakes. We're not infallible.” This is deeply misleading in its characterization of the war zone. It is not a matter of mistakes and fallibility, but rather a massive assault on a densely populated urbanized setting where the defining reality could not but subject the entire civilian population to an inhumane form of warfare that kills, maims and inflicts mental harm that is likely to have long-term effects, especially on children that make up more than 50 per cent of the Gazan population.

IV. NON-EXHAUSTION OF DIPLOMATIC REMEDIES, DISPROPORTIONALITY, NON-DEFENSIVE NATURE OF THE ATTACKS

11. It is a requirement of international customary law, as well as of the Charter of the United Nations, Article 2 paragraph 4 interpreted in the light of Article 1 paragraph 1 that recourse to force to resolve an international dispute should be a last resort after the exhaustion of diplomatic remedies and peaceful alternatives, even in circumstances where a valid claim of self-defence exists, absent a condition of urgency, assuming for the moment that an occupying power can ever claim a right of self-defense (for doubt about the availability of such a claim see para 28).[4] In the context of protecting Israeli society from rockets fired from Gaza, the evidence overwhelmingly supports the conclusion that the ceasefire in place as of 19 June 2008 had been an effective instrument for achieving this goal, as measured by the incidence of rockets fired and with regard to Israeli casualties sustained.

12. The graph below, based on Israeli sources, shows the number of Palestinian rockets and mortar shells fired each month in 2008, with the period of the ceasefire stretching basically from its initiation on 19 June to its effective termination on 4 November when Israel struck a lethal blow in Gaza that reportedly killed at least six Hamas operatives. It dramatically demonstrates the extent to which the ceasefire was by far the most secure period with respect to the threats posed by the rockets:

[4] Of course, this analysis presupposes the rejection of the Israeli contention that Gaza has not been legally 'occupied' since the disengagement plan was implemented in 2005.



13. The authors of a study based on the data displayed in the graph above[5] concluded that "the ceasefire was remarkably effective; after it began in June 2008, the rate of rocket and mortar fire from Gaza dropped to almost zero, and stayed there for almost four months." The experience of the temporary ceasefire demonstrates both the willingness and the capacity of those exerting control in Gaza to eliminate rocket and mortar attacks.

14. Beyond this, records show that, during the ceasefire, it was predominantly Israel that resorted to conduct inconsistent with the undertaking, and Hamas that retaliated. According to the above-mentioned study, during a longer period, from 2000 to 2008, it was found that, in 79 per cent of the violent interaction incidents it was Israel that broke the pause in violence. In the course of events preceding the attacks of 27 December, the breakdown of the truce followed a series of incidents on 4 November in which Israel killed a Palestinian in Gaza, mortars were fired from Gaza in retaliation, and then an Israeli air strike was launched that killed an additional six Palestinians in Gaza; in other

[5] Nancy Kanwisher, Hohannes Haushofer, and Anat Biletzski, "Reigniting Violence: How Do Ceasefires End?" 24 January 2009

words, the breakdown of the ceasefire seems to have been mainly a result of Israeli violations, although this offers no legal, moral or political excuse for firing of rockets aimed at civilian targets, which itself amounts to a clear violation of international humanitarian law.

15. Furthermore, Hamas leaders have repeatedly and formally proposed extending the ceasefire, including for long periods. Khalid Mish'al writing in The Guardian on January 6, 2009 said “When this broken truce neared its end, we expressed our readiness for a new comprehensive truce in return for lifting the blockade and opening all Gaza crossings, including Rafah.” It is notable that the President of the USA, Barack Obama, has called for this result in a statement accompanying his appointment of George Mitchell as Special Envoy on the Israel/Palestine conflict: “As part of a lasting ceasefire, Gaza's border crossings should be open to allow the flow of aid and commerce.” This assertion is consistent with the call made by the Security Council in its resolution 1860 (2009) for “unimpeded provision and distribution throughout Gaza of humanitarian assistance, including food, fuel, and medical treatment,” which in effect prescribes the end of the blockade of Gaza that has been maintained by Israel in violation of articles 33 and 55 of the Fourth Geneva Convention.

16. The continuing refusal of Israel to acknowledge Hamas as a political actor, based on the label of “terrorist organization” has obstructed all attempts to implement human rights and address security concerns by way of diplomacy rather than through reliance on force. This refusal is important for reasons already mentioned (see para. 8 above), namely, that the population density in Gaza means that reliance on large-scale military operations to ensure Israeli security cannot be reconciled with the legal obligations under the Fourth Geneva Convention to protect to the extent possible the safety and well-being of the occupied Gazan population.

17. There are several relevant conclusions that demonstrate this link between relying on non-violent options and the requirements of international humanitarian law:

(a) The temporary ceasefire was impressively successful in shutting down cross-border violence and casualties on both sides;

(b) The Palestinian side adhered to the ceasefire, with relatively few exceptions, and relied on violence almost exclusively in reactive modes, while Israel failed to implement its undertaking to lift the blockade and seems mainly responsible for breaking lulls in the violence by engaging in targeted assassinations and other violent and unlawful provocations, most significantly by its air strike on 4 November 2008;

(c) The Hamas leadership appears ready at present to restore the ceasefire provided that the blockade is unconditionally lifted, which should in any event happen owing to its unlawful character, and should also be accompanied by guarantees against weapons smuggling on the Palestinian side, and a commitment to desist from targeted assassinations on the Israeli side;

(d) If substantiated by further investigation, this overall pattern prevailing at the time the attacks were launched would undermine the claim by Israel that its recourse to force was "necessary" and "defensive", both features of which must be present to support a valid claim under international law of self-defence;

(e) On the above basis, the contention that the use of force by Israel was "disproportionate" should not divert our attention from the prior question of the unlawfulness of recourse to force. If for the sake of argument, however, the claim of self-defence and defensive force is accepted, it would appear that the air, ground, and sea attacks by Israel were grossly and intentionally disproportionate when measured against either the threat posed or harm done, as well as with respect to the disconnect between the high level of violence relied upon and the specific security goals being pursued. This legal sentiment is authoritatively expressed in Article 51(5)(b) of the Protocol I of the Geneva Conventions, in which prohibited disproportionate attacks are defined as "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." Israel did little to disguise its deliberate policy of disproportionate use of force, thereby acknowledging a refusal to comply with this fundamental requirement of international customary law. The

Prime Minister of Israel was quoted after the ceasefire by the press agency Reuters as saying: "The Government's position was from the outset that if there is shooting at the residents of the south, there will be a harsh Israeli response that will be disproportionate."[6] To the extent that the Prime Minister's comment reflects Israeli policy, it was a novel and blatant repudiation of one of the most fundamental aspects of international law governing the use of force.

V. REFUGEE DENIAL

18. In an unprecedented belligerent policy, Israel refused to allow the entire civilian population of Gaza, with the exception of 200 foreign wives, to leave the war zone during the 22 days of attack that commenced on 27 December. As the United Nations High Commissioner for Refugees stated on 6 January 2009, Gaza is "the only conflict in the world in which people are not even allowed to flee." All crossings from Israel were kept closed during the attacks, except for rare and minor exceptions. By so doing, children, women, sick and disabled persons were unable to avail themselves of the refugee option to flee from the locus of immediate harm resulting from the military operations of Israel. This condition was aggravated by the absence of places to hide from the ravages of war in Gaza, given its small size, dense population and absence of natural or man-made shelters.

19. International humanitarian law has not specifically and explicitly at this time anticipated such an abuse of civilians, but the policy as implemented would suggest the importance of an impartial investigation to determine whether such practices of "refugee denial" constitute a crime against humanity as understood in international criminal law. The initial definition of crimes against humanity, developed in relation to the war crimes trials after the Second World War, is "murder, extermination, enslavement, deportation and other inhumane acts done against any civilian population". More authoritative is the definition contained in Article 7(1)(k) of the Rome Statute, according to which crimes against humanity includes "inhumane acts (…) intentionally causing great suffering, or

[6] See http://www.reuters.com/article/worldNews/idUSTE5100OY20090201

serious injury to body or to mental or physical health." Refugee denial under these circumstances of confined occupation is an instance of "inhumane acts", during which the entire civilian population of Gaza was subjected to the extreme physical and psychological hazards of modern warfare within a very small overall territory. It should be kept in mind that this restriction on free movement, to escape from the war zone, was imposed on a population already severely weakened by the effects of the blockade.

20. The small size of Gaza and its geographic character also operated to deny most of the population remaining within its borders of an opportunity to internally remove itself from the combat zones. In this sense, the entire Gaza Strip became a war zone, although the actual combat area on the ground was more limited. In effect, leaving Gaza was the only way to remove oneself to a position of safety. In this respect, the option to become an internally displaced person was, as a practical matter, unavailable to the civilian population, although some civilians sought relative safety in shelters that were made available on an emergency basis for a tiny fraction of the population, mainly through the efforts of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and other United Nations and Non-Governmental Organizations' efforts. In some situations the shelters were not always treated as sanctuaries by the Israeli armed forces. Six UNRWA emergency shelters were damaged during Operation Cast Lead.[7]

21. Furthermore, given such emergency conditions, it seemed feasible to establish temporary refugee camps either in southern Israel or in neighboring countries for the duration of the attacks. This course of action had allowed almost one million Kosovars (almost half the civilian population) to obtain temporary refuge in the neighbouring former Yugoslav Republic of Macedonia during the bombing by the North Atlantic Treaty Organization in

[7] A much publicized instance was Beit Lahiya, where about 1,600 displaced Gazans had taken shelter at an UNRWA school, on which the UNRWA's spokesman said: "Where you have a direct hit on an UNRWA school where about 1,600 people have taken refuge, where the Israeli Army knows the coordinates and knows who's there, where this comes as the latest in a catalogue of direct and indirect hits on UNRWA facilities, there have to investigations to establish whether war crimes have been committed.", "Israel declares ceasefire; Hamas say it will fight on", New York Times, 18 January 2009.

1999. It seems evident that, had Serbia denied the Kosovo population such a refugee option by controlling egress, it would have been accused of inhumane behaviour and criminality by the world community. It would seem that the law of war and international human rights law, for the sake of the protection of civilian innocence in wartime situations, needs to affirm the right of every non-combatant civilian to become a refugee, or at least to have the right to seek such a status, especially if the conditions for an internal "refugee" option are not present.

22. Such an affirmation does not address the related question as to whether neighbouring countries have a legal duty to accommodate, to the extent feasible and at least temporarily, civilians seeking to escape from an ongoing war zone. It would seem at the very least that Israel as occupying Power and belligerent party had such a legal obligation. In a general way, such an obligation is set forth in articles 13 to 26 of the Fourth Geneva Convention. Especially relevant are article 15 which looks to the establishment of "neutralized zones" to shelter the civilian population from "the effects of war", article 16 which imposes a special duty to accord the sick and wounded, as well as expectant mothers, "particular attention and respect", and article 24 which imposes a duty on the occupying Power to protect any children under 15 who are orphans or separated from their families, and obliges it to "facilitate the reception of such children in a neutral country for the duration of the conflict".

23. It is acknowledged that the particular circumstances in Gaza made it difficult, but not entirely impossible, to fulfill these obligations in the manner set forth in the Fourth Geneva Convention. What seems clear, however, is that Israel as occupying Power should have adapted these protective goals to the situation facing the population of Gaza, and that this was feasible to a considerable degree, at least to the minimum extent of allowing particularly vulnerable categories of persons within the civilian population, such as children, the sick and disabled, orphans, the elderly and the wounded, to leave. On 21 January 2009, the Executive Board of the World Health Organization reported, for instance, that more than half of the civilian casualties (over 1,300 dead and thousands

injured) caused by the Israeli military operations were women, children, infants and elderly persons. This difficulty also gives weight to the argument (see paras 8-10 above) that contends that such a military operation, by its intrinsic nature, generates war crimes.

24. There are further implications with regard to upholding human rights and international humanitarian law under wartime conditions. Confining the civilian population to the war zone also makes it more difficult, if not impossible, to sustain consistently the distinction between military and civilian targets, in combat situations. It also complicates an assessment of claims made by Israel that Hamas used civilians as human shields, and used civilian sites such as schools and mosques from which to engage in resistance. If civilians could not leave the war zone under such crowded conditions, some degree of intermingling would necessarily occur, especially in life and death situations.

VI. EXPERT INQUIRY ON WAR CRIMES

25. There have been widespread calls for an investigation of the allegations of war crimes associated with the recent encounter in Gaza. The United Nations Secretary-General has called for such an investigation, urging that in the event that evidence of war crimes is found, mechanisms for accountability should be established. The High Commissioner for Human Rights has also supported an investigation of possible war crimes, recommending that it consider allegations of war crimes on both Israeli and Palestinian sides of the conflict. The Special Rapporteur does not propose another investigation but an expert inquiry to report on the implications of available evidence for international humanitarian law, especially the implications of war crimes of apparent violations. Such a report should also take into account the specific undertakings of the Human Rights Council. In contemplating such an inquiry, it is important that several factors be considered, including the preliminary question as to the applicable body of international law, and the concluding question regarding the availability of mechanisms of accountability. The inquiry should be conducted by three or more respected experts in international human rights law and international criminal law.

A. Scope of the inquiry

26. An inquiry, complementary to the fact-finding mission authorized by the Council in its resolution S-9/1, should be authorized to perform two basic tasks: to review all reports, including those pursuant to resolution S-9/1 results; and to establish, as definitively as possible, the facts underlying the main allegations of war crimes, including evidence in the form of eye-witness testimony, of contested battlefield practices, as well as explanations in exoneration or mitigation to the extent available, especially if provided by Israeli and Palestinian military commanders and political leaders. In other words, despite the apparent one-sidedness of the Gaza attack, allegations of war crimes on *both* sides of the conflict should be taken into account. With respect to Hamas, this refers primarily to the factual profile relating to the rockets fired from its territory, including the determination of intent and issues of attribution (whether rockets were being fired by independent militias or even by groups opposed to Hamas). It would also need to consider all available evidence bearing on the types of weapons used and the combat circumstances of use. It would also be helpful if the inquiry report addressed such issues as the source of applicable rules of international criminal law by which to assess the evidence and that it recommend alternative procedures for establishing potential accountability on the part of individuals and political actors, especially with respect to the responsibility and capacity of the United Nations system. In this regard, legal uncertainties and political obstacles to the establishment of effective mechanisms should be acknowledged in the report.

27. It should be remembered that establishing evidence of the violation of international humanitarian law creates a non-criminal responsibility on the part of a State, and possibly of a non-State actor depending on the view taken with regard to the recent development of international treaty and customary laws of war, including the overall impact of Protocol I to the Geneva Conventions (1977) on the clarification of relevant legal norms. It should be made clear in the inquiry report that violations of the laws of war, even if grave breaches, do not automatically constitute war crimes or crimes against humanity or

crimes against peace, although the Rome Statute in Article 8 treats all established grave breaches as war crimes. Potential legal accountability of political actors (including States) and individuals requires further assessment of whether the allegations and evidence appear to indicate violations of international humanitarian law and international human rights law and thus provide a solid basis in fact and law for charging the commission of international crimes. [8]

28. It is important that an inquiry in the context of the military operations initiated on 27 December 2008 and continuing until 18 January 2009, evaluate the allegations on both sides, including the issues of alleged criminality associated with both the decisions of the Government of Israel to launch the attacks and initiate a ground invasion of Gaza, as well as the circumstances surrounding the firing of rockets by Palestinian militants. It is further recommended that the underlying claim of Israel that it was acting in self-defence be evaluated in relation to the contention that such an attack violated Article 2 paragraph 4 of the Charter of the United Nations and amounted to an act of aggression under the circumstances, and whether the reliance on disproportionate use of force or the inherently indiscriminate nature of the military campaign should be treated as a criminal violation of international customary and treaty law. There exists here a complex and unresolved issue as to whether an occupying power can claim "self-defence" in relation to an occupied society, and whether its use of force, even if excessive, and of a border-crossing variety, can be regarded as "aggression". Israel seems to be barred from relying on its status as occupier considering that it claims that the occupation has ended, but of course the inquiry report need not respect that interpretation of the legal relationship.

29. There are difficult issues bearing on the status of what were called crimes against peace at the Nuremberg trials. On the one hand, the Rome Statute establishing the International

[8] The International Court of Justice in the Bosnia Genocide Case made clear that a state can be held legally responsible for the commission of the crime of genocide, although only individuals can be prosecuted, convicted, and punished for violations of international criminal law (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), paragraphs 142-201). Such a reference is intended solely to clarify the issue of potential state responsibility, and is not meant to imply directly or indirectly that the Israeli military operations in Gaza could be construed as 'genocide.'

Criminal Court does not yet include aggression or crimes against peace as falling within the competence of the tribunal due to the inability to agree upon a definition of aggression. In the event that there is agreement within the framework of the International Criminal Court, then the crime of aggression could be prosecuted (Article 5.2 of the Statute). On the other side of this question of the clarity of the anti-aggression norm embedded in crimes against peace is the majority decision of the British House of Lords in the recent case of *Regina v. Jones* and others, to the effect that the criminality of aggressive war established at Nuremberg remains firmly established in international customary law and its bearing on contested uses of force remains authoritative. This is an important issue that casts a shadow over the entire controversy about the Israeli attacks, and should be clarified to the extent possible in the inquiry report.

30. Other legal concerns relating to the inquiry and any accountability sequel involve the distinctive nature of the belligerent parties, including questions about the proper assessment of the legal responsibility of an occupying Power towards the occupied people from the perspective of international criminal law, the legal effects on the nature of Israeli criminal responsibility given its disengagement from Gaza in 2005, and the criminal responsibility under international law of a non-State actor that was exercising de facto administrative and governmental control during the period being investigated.

B. Applicable international criminal law

31. The applicable body of international criminal law for any investigation would include the jurisprudence compiled by the ad hoc International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, which has fully examined violations of the laws of war, as contained in the jurisdictional statutes setting up such tribunals, established under the authority of the Security Council. It should also include the list of international crimes enumerated in the Rome Statute of the International Criminal Court.

32. The crimes described in the London Agreement establishing the Nuremberg Tribunal in 1945 were subsequently confirmed as part of customary international law by the International Law Commission in 1950 under the rubric of "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal".[9] These principles are treated by most international law experts as constituting "peremptory norms" as defined in article 53 of the Vienna Convention on the Law of Treaties (1988): "A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Thus, if the Nuremberg categories of criminality qualify as peremptory norms embedded in international customary law, these crimes remain valid and relevant for the purpose of assessing the Israeli attacks under the labels of "crimes against peace", "war crimes", and "crimes against humanity". Reliance on the relevance of these crimes, especially crimes against peace, is singularly important to allow assessment of the underlying allegation that the Israeli attacks commencing on 27 December 2008 were intrinsically criminal because of their incapacity to maintain the distinction between military and civilian targets, a contention that Israeli political and military leaders challenge. If a solid basis in fact and evidence could be provided to back up this contention, it would provide the grounds for contending that the highest political and military leaders could potentially be held criminally responsible.

33. Alleged crimes associated with battlefield operations and command policy, such as the targeting of schools, mosques, ambulances, residential homes and health facilities, should be investigated to the extent possible, including evidence pertaining to the existence of deliberate intent or gross negligence. Extenuating circumstances should be taken into account, including allegations that buildings and their near surroundings were being used for combat purposes. It is important that this evidence be gathered quickly, and that the cooperation of the parties be solicited to the extent that the investigation establishes a prima facie case with respect to war crimes, and the responsible perpetrators can be

[9] Yearbook of the International Law Commission, 1950, vol. II, para. 97.

identified, then the investigating report should either recommend that the parties be encouraged to establish criminal law procedures by which such individuals can be indicted, prosecuted, accorded due process and punished if found guilty, or propose some alternative mechanism. It is quite likely that the investigation will be able to establish that certain practices and incidents have the characteristics of war crimes, but that it will be impossible to identify the supposed perpetrator(s), at least not without the cooperation of the parties engaged in combat.

34. Alleged crimes associated with legally dubious use of weaponry such as white phosphorous (which burns through clothing, sticks to skin and burns flesh to the bone), flachette bombs (which expel razor sharp darts), and Dense Inert Metal Explosives (DIME) bombs (causing intense explosions in a small area and body parts to be blown apart) should also be investigated. None of these weapons is, per se, explicitly banned by international law, but there is considerable support for the view that their use in dense urban areas where civilians are known to be or are habitually present would be a war crime. An investigation is needed to establish the extent of such use, and the specific circumstances under which use occurred. To the extent that a basis for criminal prosecution is established, the orbit of responsibility should focus on the command levels of decision with respect to policies and practices governing use, and generally accord serious, yet subordinate, attention to the identity of the low level perpetrators carrying out orders. Here too the cooperation of Israeli governmental authorities should be evaluated as a means of achieving accountability; if not regarded as reliable, alternative approaches should be recommended.

35. The practices of Hamas alleged to constitute war crimes should also be investigated, including the firing of rockets and mortar shells aimed at civilian targets; the alleged use of children and civilians as “human shields”; and the abuse of the protected status of certain structures either to hide weaponry or as places of sanctuary for carrying on combat operations. The extent to which these latter practices are distinct crimes or serve to mitigate or excuse failures by Israel to respect the immunity of such targets needs to be

determined. Here also, it is important to concentrate on the appropriate level of military and political command to determine the locus of possible criminality, and to recommend how accountability should be assessed.

C. Availability of mechanisms of accountability

36. An investigation should also address the mechanisms of accountability evaluated in terms of jurisdictional competence and political plausibility if it determines that substantial grounds for holding individuals and other political actors criminally responsible exist. Since Israel is not a State Party to the Rome Statute establishing the International Criminal Court, the most efficient mechanism for assessing accountability would be to establish, under the authority of the Security Council, an ad hoc criminal tribunal for occupied Gaza, following the precedents of the 1990s (although this does not seem politically plausible under current conditions). It would also be theoretically possible for the Security Council acting under Chapter VII of the Charter to refer the situation to the Court for further action. It is arguable (although contested) that the General Assembly might establish such a tribunal by invoking its authority to "establish such subsidiary organs as it deems necessary for the performance of its functions". Whether such an initiative is related to the functions of the Assembly is an unresolved matter. There is also some question as to whether the fact that the Security Council, in its resolution 1860 (2009) "decided to remain seized of the matter" makes it constitutionally inappropriate for the Assembly to take any action relating to the situation in Gaza resulting from the Israeli military operations.

37. Ideally, Israel, as the sovereign State exercising control over the territory where the alleged offences took place, should be the locus of judicial assessment, whether by its normal criminal law procedures or through the establishment of a special ad hoc process - but for reasons previously discussed (see para 6 above) this is extremely unlikely to take place. Nonetheless, human rights groups in Israel and occupied Palestine are compiling as much information as possible relating to allegations of war crimes to provide the legal grounds for recourse to national legal systems.

38. From the outlook of competence and plausibility, the most available accountability initiatives are associated with national criminal law procedures in those countries, such as Belgium and Spain, that give to their courts legal authority to prosecute war crimes under the rubric of universal jurisdiction, provided that the accused individual is physically present. It is likely that such an option would be influenced by the existence of a persuasive report under the auspices of the United Nations that recommended accountability.

39. The above mentioned situation has led the Minister for Justice of Israel, Daniel Friedman, to be designated to protect any Israeli detained abroad in accordance with the public pronouncement made by Prime Minister Olmert at a gathering of military officers a few days after the Gaza ceasefire went into effect: “The Government will stand like a fortified wall to protect each and every one of you from allegations”. Israel also warned that it will take reprisals in the event that Israelis are arrested and charged abroad. Note that potential initiatives in national judicial settings are not limited to battlefield specific offences, but can be extended to encompass alleged crimes at the highest political and military levels of government. The case involving the indictment of former head of State of Chile, Agusto Pinochet, adjudicated these issues in the Spanish and British legal systems, as well as in Chile itself, during the late 1990s and early 2000s.

VII. THE BROADER SETTING OF THE ATTACKS

40. At the conclusion of the present report, it seems appropriate to reaffirm the connection between Israeli security concerns and the Palestinian right of self-determination. As long as Palestinian basic rights continue to be denied, the Palestinian right of resistance to occupation within the confines of international law and in accord with the Palestinian right of self-determination is bound to collide with the pursuit of security by Israel under conditions of prolonged occupation. In this respect, a durable end to violence on both sides requires an intensification of diplomacy with a sense of urgency, and far greater resolve by all parties to respect international law, particularly as it bears on the

occupation as set forth in the Fourth Geneva Convention. Furthermore, it is important to acknowledge that the time has long passed for the implementation of Security Council resolution 242 (1967) requiring Israel to withdraw from Palestinian territories, for Israel to close unlawful settlements, desist from efforts to alter the demographics of East Jerusalem, respect the advisory opinion on the Wall of the International Court of Justice of 2004, and bring the occupation to a genuine end, either through negotiations or by unilateral action.

VIII. RECOMMENDATIONS

41. **The Special Rapporteur recommends that:**

(a) An advisory opinion on the obligations of a Member State to cooperate with special procedures of the Human Rights Council in relation to the application of Article 56 of the Charter of the United Nations and the relevant provisions of the Convention on the Privileges and Immunities of the United Nations be requested;

(b) A procedure for conducting an expert inquiry from the perspective of the role of the Human Rights Council into allegations of war crimes associated with Israeli military operations in Gaza from 27 December 2008 to 18 January 2009 be established;

(c) It be recognized that the Palestinian right of resistance under international law within the limits of international humanitarian law continually collides with Israeli security concerns as occupying Power, requiring basic adjustments in the relationship of the parties premised on respect for the legal rights of the Palestinian people; and that sustainable peace in Gaza requires the permanent lifting of the blockade in the short term, and a diplomatic process that seeks peace in accordance with the requirements of international law in the long term.