UNITED NATIONS **A**

General Assembly

Distr.

A/HRC/10/20
18 February 2009

Original: ENGLISH

HUMAN RIGHTS COUNCIL
Tenth session
Item 7 of the provisional agenda

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, this report focus 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. It challenges the widespread emphasis on whether Israeli force was 'disproportionate' in relation to Palestinian threats to Israeli security, and focuses on the prior question as to whether Israeli force was legally justified at all. It 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 report 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.

This report also considers the tactics pursued during the attacks by both sides, condemning the firing of rockets at Israeli civilian targets, and also suggesting 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. It recommends an expert inquiry into these matters to confirm the status under international law of war crimes allegations, and to consider alternative approaches to accountability.

Finally, the report insists that Israeli security and the realization of the Palestinian right of self-determination are fundamentally connected, and that the recognition of this feature of the situation suggests the importance of both 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 in UN Security Council Resolution 242 adopted in 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 report also recommends action in response to Israel's denial of entry to the Special Rapporteur on 14 December 2008.

CONTENTS

Introduction

1. This report does not have the benefit of a recent mission to Gaza. Such a mission was planned and attempted for mid-December 2008, but was not carried out due to the denial of entry to the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967. The mission to Gaza was also planned to include a visit to the West Bank and East Jerusalem, and was supposed to commence with a scheduled meeting with Mahmoud Abbas, President of the Palestine Authority. The denial took place on 14 December and was followed by detention at a facility close to Ben Gurion Airport, and expulsion from Israel on 15 December. Such a refusal to cooperate with a UN representative, as well as the somewhat humiliating treatment accorded (detention in a locked and dirty cell with five other detainees; excessive body search), has set an unfortunate precedent with respect to the treatment of a representative of the UN Human Rights Council, and more generally of the UN itself. This precedent should be seriously challenged both for the sake of this mandate and more broadly, to ensure that in the future Member States accord appropriate respect and cooperation with official UN 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. Because 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 of Israel's position via diplomatic channels.

2. The expulsion of the Special Rapporteur unfortunately made information gathering on the ground impossible. In light of HRC resolution S-9 adopted at the Special Session on Gaza his 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, as well as discussing the underlying debate as to whether the attacks themselves were violations of the United Nations Charter, and international law. This broader inquiry is perhaps not strictly speaking 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.

I. INTRODUCTORY CLARIFICATIONS

3. There is a conceptual complexity arising 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 behavior 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, and this sentiment is echoed in Article 2(4) of the Charter is 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 UN, Article 1(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 light of the Preamble to the UN 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 as to the inhibitions on defensive claims to use force to general international law beyond the framework of the UN Charter.

4. In relation to Gaza there is a further concern with respect to the nature of Israel's legal obligations toward the Gazan population. Israel officially contends that after the implementation of its disengagement plan in 2005 it no longer is an occupying power, and as a result is not responsible for observance of the obligations set forth in the Fourth

Geneva Convention. This contention has been widely rejected both by expert opinion, by the de facto realities of effective control, and by official pronouncements by for instance the UN High Commissioner for Human Rights (A/HRC/8/17), the General Assembly (A/63/96, A/63/98), the UN Secretary General (A/HRC/8/17) and the Security Council (S/RES/1860). Israel since 2005 has completely controlled all entry and exit routes by land and sea, as well as asserted control over Gazan airspace and territorial waters. And by imposing a blockade in effect since the summer of 2007 it has profoundly affected the life and wellbeing 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 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 UN in accordance with its obligations as a Member State under Article 56 of the UN Charter calling upon members to cooperate with the UN, 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 Israeli Defense Forces from being accused, and if excused to prevent indictment and prosecution: "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."[1] Such sentiments seem inconsistent with any expectation of serious form of 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, as well as on formal interviews with qualified observers and witnesses.

II. 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 associated with an investigation of the recent military operations involves 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. As the following paragraphs attempt to show on the basis of the preliminary available evidence 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] Quoted in Los Angeles Times, January 26, 2009, A6.

and UN facilities would be hit by Israeli military ordinance, and 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 for some greater avoidance of non-military targets to have occurred and to have spared Palestinian civilians to a greater extent. Even without this investigation, on the basis of available reports and statistics, it is possible to draw an important preliminary conclusion that given the level of Palestinian civilian casualties and Gazan devastation of non-military targets, the Israelis attacking 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, several principal results of the military operation, were as follows:

- 1434 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. 5303 Palestinians were injured, including 1606 children and 828 women (that is, 1 of 225 Gazans were killed or injured, not counting mental injury, which must be assumed to be extensive[2]);
- Homes and public infrastructure throughout Gaza, especially in Gaza City, sustained extensive damage, including several UN facilities; an estimated 21,000 homes were either totally destroyed or badly damaged;

[2] A recent report by the Near East Consulting concluded that 96% of Gaza residents suffer from depression, with intense depression being experienced by 81% of the residents of North Gaza and Rafah districts (OCHA, Gaza Humanitarian Situation Report, 26 January 2009). 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.

- 51,000 people were internally displaced in makeshift shelters that provided minimal protection, and 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 defenseless society of 1.5 million persons. As recent reports to the HRC by the Special Rapporteur had emphasized, the residents of Gaza were particularly vulnerable to physical and mental damage from such attacks as the society as a whole had been previously brought to the edge of collapse by 18 months of blockade that restricted to sub-subsistence levels the flow of food, fuel, and medical supplies, 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 27 December attacks should take account of the weakened condition of the Gazan civilian populations resulting from the sustained unlawfulness of the preexisting Israeli blockade that violated Article 33 (prohibition on collective punishment) and Article 55 (duty to provide food and health care to the occupied population) of the Fourth Geneva Convention. Considering the overriding obligation of the occupying power to care for the wellbeing 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 prior paragraph due to the difficulties of maintaining the principle of distinction.

10. Ambassador Zvi Tal, the deputy head of Israel's embassy at the European Union, when discussing with a committee of the European Parliament, sought to defend the attacks on Gaza as addressing a situation that he described as “a very peculiar one.” In responding to

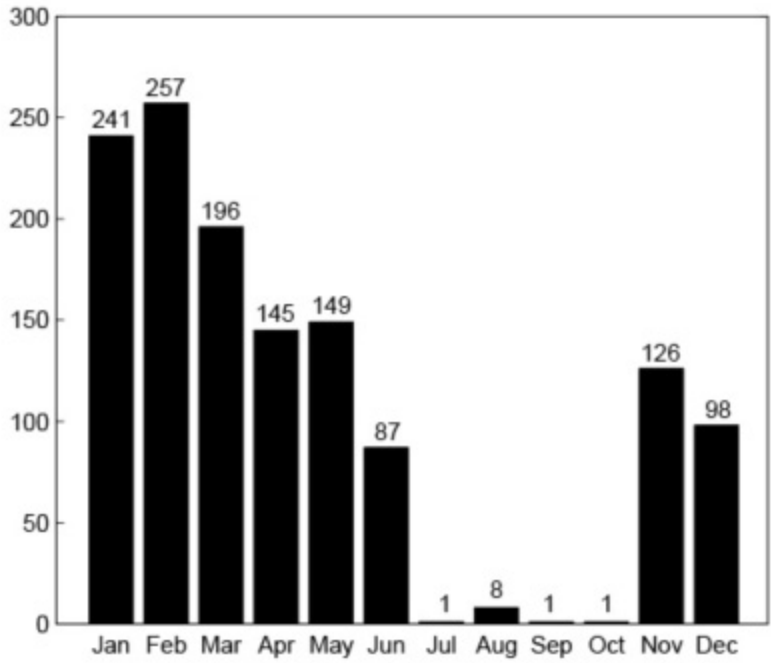
[3] OCHA (Field Update from the Humanitarian Coordinator, 9 February 2009 and the Gaza Flash Appeal, 2 February 2009) and Palestinian Centre for Human Rights, Press Release, Ref: 36/2009, 12 March 2009.

allegations about the bombing of UN schools in Gaza, Ambassador Tal 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% of the Gazan population.

III. 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 UN Charter, Article 2(4) interpreted in light of Article 1(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 under circumstances where a valid claim of self-defense 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). 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. 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 June 19, 2008 had functioned as an effective instrument for achieving this goal, both as measured by the incidence of rockets fired and with regard to Israeli casualties sustained.

12. The following graph, based on Israeli sources, shows the number of Palestinian rockets and mortar shells fired each month during 2008, with the period of the ceasefire stretching basically from its initiation on June 19 to its effective termination on November 4 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:



13. The study by Nancy Kanwisher, Hohannes Haushofer, and Anat Biletzski, “Reigniting Violence: How Do Ceasefires End?” Jan. 24, 2009, which relies on the data displayed above concludes 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, the record shows that during the ceasefire it was predominantly Israel that resorted to conduct inconsistent with the undertaking, and Hamas that retaliated. According to the study mentioned in the prior paragraph during a longer period, 2000-2008, it was found that in 79% of the violent interaction incidents it was Israel that broke the pause in violence. And in the course of events preceding the December 27th attacks, the breakdown of the truce followed a series of incidents on November 4th 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. That

is, 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 IHL.

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 American president, 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 cease-fire, Gaza's border crossings should be open to allow the flow of aid and commerce.” This assertion is consistent with the call in UN Security Council Resolution 1860 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 Article 33, 55 of the Fourth Geneva Convention.

16. Israel's continuing refusal to acknowledge Hamas as a political actor, based on the label of `terrorist organization,” has obstructed any attempt to implement human rights and address security concerns by way of diplomacy rather than through reliance on force. This refusal is important for reasons mentioned in Para. [3], 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 wellbeing of the occupied Gazan population.

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

- the temporary ceasefire was impressively successful in shutting down cross-border violence and casualties on both sides;
- 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 November 4th air strike;
- the Hamas leadership appears ready at present to restore the ceasefire provided that the blockade is unconditionally lifted, which should in any event happen due to its unlawful character, and should be accompanied by guarantees against weapons smuggling on the Palestinian side, and a commitment to desist from targeted assassinations on the Israeli side;
- this overall pattern prevailing at the time the attacks were launched, if substantiated by further investigation, undermines Israel's claim 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-defense;
- on this basis, the contention that Israeli use of force was “disproportionate” should not be allowed to divert our attention from the prior question of the unlawfulness of recourse to force. But if for the sake of argument the claim of self-defense and defensive force is accepted it would appear that Israel's air, ground, and sea attacks were grossly and intentionally disproportionate as measured against either the threat posed or harm done, as well with respect to the existence of a 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 Israeli Prime Minister was

quoted after the ceasefire 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."[4]To the extent that Mr. Olmert's comment reflects Israel's policy it represents a novel and blatant repudiation of one of the most fundamental aspects of international law governing the use of force.

IV. 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 December 27th. As the UN High Commissioner for Refugees put it, Gaza is "the only conflict in the world in which people are not even allowed to flee."[5] All crossings from Israel were kept closed during the attacks, except for some 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 Israel's military operations. 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 manmade 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 this is understood in international criminal law. The initial definition of crimes against humanity, developed in relation to the war crimes trials after World War II, is as follows: "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 serious injury to body or to mental or physical health." Refugee denial under these

[4] Quoted by Reuters, see http://www.reuters.com/article/worldNews/idUSTE5100OY20090201
[5] Statement of 6 January 2009.

circumstances of confined occupation is an instance of "inhumane acts" that subjected the entire Gazan civilian population to the extreme physical and psychological hazards of modern warfare carried on within a very small overall territory. It should be kept in mind that this restriction on free movement for 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 the borders of Gaza 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 UNRWA and other UN and NGO efforts. In some situations the shelters were not always treated as sanctuaries by the Israeli armed forces. 6 UNRWA emergency shelters were damaged during Operation Cast Lead. A much publicized instance was Beit Lahiya, where about 1,600 displaced Gazans had taken shelter at an UNRWA school, on which Christopher Gunness, 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."[6]

21. Furthermore, it seemed feasible given such emergency conditions to establish temporary refugee camps either in southern Israel or in neighboring countries for the duration of the intense attacks. This pattern had allowed almost one million Kosovars, almost half the civilian population, to obtain temporary refuge in neighboring Macedonia during the 1999 NATO War. It seems evident that had Serbia denied the Kosovo population such a

[6] New York Times, 18 January 2009.

refugee option by controlling egress it would have been accused of inhumane behavior 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 neighboring 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 and belligerent party had such a legal obligation. In a general way such an obligation is set forth in the Fourth Geneva Convention, Articles 13-26; especially relevant is Article 15 that looks toward the establishment of `neutralized zones' to shelter the civilian population from `the effects of war,' Article 16 that imposes a special duty to accord the sick and wounded, as well as expectant mothers, “particular attention and respect,” and Article 24 that 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, but what seems clear 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 (children, sick, disabled, orphans, elderly, wounded) to leave. It has been reported, for instance, that more than half of the civilian casualties (over 1300 dead and thousands injured) caused by the Israeli military operations are “women, children, infants and elderly persons.”[7]

[7] Executive Board of the WHO, EB124.R4, 21 Jan 2009.

This difficulty also gives weight to the argument in para. [8-10] that contends that such a military operation by its intrinsic natures generates war crimes.

24. There is a further implication with regard to upholding human rights and international humanitarian law under wartime conditions. Confining the civilian population to the war zone also make 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 that Israel made 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 absent themselves from the war zone under such crowded conditions, some degree of intermingling would necessarily occur, especially in life and death situations.

V. WAR CRIMES EXPERT INQUIRY

25. There have been widespread calls for investigating allegations of war crimes associated with the recent encounter in Gaza. The UN Secretary General has called for such an investigation, urging that in the event that evidence of war crimes is present that mechanisms for accountability should be established. The UN High Commissioner for Human Rights has also supported an investigation of possible war crimes, recommending that an investigation consider allegations of war crimes on both Israeli and Palestinian sides of the conflict. What is proposed here is not an additional investigation but an expert inquiry producing a report emphasizing the implications of available evidence for international humanitarian law, especially war crimes implications of the apparent violations. Such a report should be prepared mindful of the specific undertakings of the Human Rights Council. In contemplating such an inquiry it is important to take several considerations into account, including the preliminary question as to the applicable body of international law, and the concluding question as to 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 Inquiry

26. An inquiry, complementary to the fact-finding mission authorized by HRC Resolution S-9, should be authorized for the performance of two basic tasks: to review all reports, including the S-9 results, 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. That is, 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 combat circumstances of use. It would be additionally helpful for the inquiry report to address such issues as the source of applicable rules of international criminal law by which to assess the evidence and to 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 as to the recent development of international treaty and customary laws of war, including the overall impact of Additional Geneva Protocol I (1977) to 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 the further assessment that the allegations and evidence appear to be 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. The International Court of Justice in the Bosnia Genocide Case[8] 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. 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.'

28. It is important that an inquiry in the context of the military operations initiated on December 27, 2008 and continuing for 22 days until January 18, 2009, evaluate the allegations on both sides, including examining 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-defense be evaluated in relation to the contention that such an attack violated Article 2(4) of the United Nations Charter 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 the complex, and unresolved issue, as to whether an occupying power can claim 'self-defense' 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 here 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.

[8] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), paragraphs 142-201

29. There are difficult issues bearing on the status of what was called at the Nuremberg Judgment crimes against peace. On the one side, the statute establishing the International Criminal Court, the so-called Rome Treaty, 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 high court in the 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 casting its 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 that relate to the inquiry and any accountability sequel involve the distinctive nature of the belligerent parties, including questions as to the proper assessment of the legal responsibility of an occupying power toward 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 Former Yugoslavia and Ad Hoc 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 UN Security Council. It should

also include the list of international crimes enumerated in the Rome Statute of the International Criminal Court.

32. The crimes contained 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 the "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal." 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 character." Thus, if the Nuremberg categories of criminality qualify as peremptory norms embedded in international customary law then 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 so as to allow assessment of the underlying allegation that the Israeli attacks commencing on December 27 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 be potentially 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 contentions 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 identified, then the investigating report should either recommend encouraging the parties 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 (burns through clothing, sticks to skin, burns flesh to the bone), flachette bombs (expel razor sharp darts), and DIME bombs (causing intense explosions in a small area, causing body parts to be blown apart) should also be investigated. None of these weapons, per se, is 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, and if not viewed 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. It needs to be determined the extent to which these latter practices are distinct crimes or serve to mitigate or excuse Israeli failures to respect the immunity of such targets. 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 to assess accountability.

C. Availability of mechanisms of accountability

36. An investigation should also address the mechanisms for accountability evaluated in terms of jurisdictional competence and political plausibility if it determines there exist substantial grounds for seeking to hold individuals and other political actors criminally responsible. Since Israel is not a member of the ICC, 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, but this seems not politically plausible under current conditions. It would also be theoretically possible for the Security Council acting under Chapter VII to refer the situation to the ICC for further action. It is arguable, although contested, that the General Assembly might establish such a tribunal 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 General Assembly is an unresolved matter. There is also some question as to whether provision (10) in SC Res. 1860 that "decides to remain seized of the matter" make its constitutionally inappropriate for the General 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 offenses 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 (in para [7]] this is extremely unlikely to take place. However, 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, which give to their courts legal authority to prosecute for war crimes under the rubric of universal jurisdiction provided that the accused individual is physically present. It is likely that such a national option would be influenced by the existence of a persuasive report under the auspices of the United Nations that recommended accountability.

39. This has led the Israeli Minister of Justice, 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 has also warned that it will take reprisals in the event of that Israelis are arrested and charged abroad. Note that potential initiatives in national judicial settings are not limited to battlefield specific offenses, but can be extended to encompass alleged crimes at the highest political and military levels of government. The case involving the indictment of Auguste Pinochet, former head of state in Chile, adjudicated these issues in the Spanish and British legal systems, as well as in Chile itself, during the late 1990s and early 2000s.

VI. THE WIDER SETTING OF THE ATTACKS

40. In concluding this report it seems important to reassert 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 rights 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 Israeli pursuit of security under conditions of prolonged occupation. In these respects, a durable end to violence on both sides requires

an intensification of diplomacy with a sense of urgency, and a 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. As well it is important to acknowledge that the time has long passed for the implementation of Security Council Resolution 242 requiring Israel to withdraw from Palestinian territories, close unlawful settlements, desist from efforts to alter the demographics of East Jerusalem, respect the 2004 ICJ Advisory Opinion on the Security Wall, and bring the occupation to a *genuine* end, either through negotiations or by unilateral action.

VI. RECOMMENDATIONS

(i) Request 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 UN Charter and the relevant provisions of the Convention on the Privileges and Immunities of the United Nations;

(ii) Establish 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 conducted in Gaza between December 27, 2008 and January 18, 2009;

(iii) Recognize 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 a sustainable peace in relation to Gaza requires a permanent lifting of the blockade in the short-term, but a diplomatic process that seeks peace in accordance with the requirements of international law in the long term.