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QUESTION DE LA VIOLATION DES DROITS DE L'HOMME
DANS LES TERRITOIRES ARABES OCCUPÉS,
Y COMPRIS LA PALESTINE

Note verbale datée du 29 mars 2004, adressée au Haut-Commissariat des Nations Unies
pour les droits de l'homme par la Mission permanente d'Israël
auprès de l'Office des Nations Unies à Genève

La Mission permanente d'Israël auprès de l'Office des Nations Unies et des autres organisations internationales à Genève présente ses compliments au Haut-Commissariat des Nations Unies pour les droits de l'homme et a l'honneur de lui communiquer ci-joint la réponse du Gouvernement israélien à l'additif au rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, John Dugard (E/CN.4/2004/6/Add.1).

La Mission permanente d'Israël demande que ce document* soit présenté à la Commission des droits de l'homme à sa soixantième session en tant que document officiel au titre du point 8 de l'ordre du jour.

* L'annexe est reproduite telle qu'elle a été reçue, dans la langue originale seulement.

Annex

Response of Israel to the Addendum submitted by Mr. John Dugard, Special Rapporteur to the Commission on Human Rights to his Report dated 8 September 2003

General

Israel is compelled once again to respond to the latest contribution of the Special Rapporteur, the Addendum to his Report of 8 September 2003.

Sadly, the tenor of this document is no different from previous reports of the Special Rapporteur; it is an unashamed attempt to use the role of the Rapporteur to seek to advance a clearly political agenda.

In order to adapt the reality to his political outlook, the Rapporteur runs roughshod over both facts and established principles of international law. As a result, unlike the reports of many observers and human rights organisations which can and do make a valuable contribution to the ongoing debate on humanitarian issues within Israel, the Rapporteur's wholesale rejection of the current complex situation in favour of a simplistic picture in which one side of the conflict has a total monopoly on victimhood places this Report well outside the realm of any reasonable discourse.

Regrettably, even as a pro-Palestinian political campaign, the Special Rapporteur's efforts are destined to fail. The refusal to acknowledge any Palestinian obligation or wrongdoing whatsoever, even in the face of transparent corruption and involvement in terrorism, reflects a patronizing attitude to Palestinian society that can only undermine any attempt to develop a responsible and accountable leadership.

As Israel wrote in its response to the Rapporteur's last Report:

...The Rapporteur is less interested in reporting than he is in presenting a virtual reality which conforms to his political agenda; a reality in which no Israeli action in self-defense is justified, in which the Palestinian leadership is untainted by support for terrorism or corruption, and indeed all Palestinian ills can be laid at Israel's doorstep. ... By placing the entire blame for the hardship facing Palestinians on Israel, it absolves the terrorists that have taken Palestinian society hostage, the corrupt leadership that has incited and abused the Palestinian people, and those Arab states that have deliberately sought to fund and inflame terrorism in the region. In so doing, this Report is clearly part of the problem and not the solution.

The evidentiary basis of the Addendum

"The task of the Special Rapporteur" wrote the Special Rapporteur in his last Report "is to report on facts". But any attempt to address the specific charges raised by the

Rapporteur is frustrated by the vagueness of his allegations, which are based almost entirely on rumour and speculation. The Addendum is rife with unsubstantiated and unattributed reports – "reports of deaths en route to hospitals", shops "reportedly closed in Qualqiliya", and in one emotive passage, reports of neighbors "savaged by IDF sniffer dogs".

At times the Rapporteur does not even grace his allegations with the status of a "report" but simply states impressions of his own, with no indication of their basis other than that this is the way things 'seem' to the Rapporteur. Thus, checkpoints "*seem*" to have as one of their goals the humiliation of the Palestinian people; the fence "*seems*" to be mainly aimed at the seizure of land for purposes unrelated to security", and "it *seems* that this [the fence] is a case of constructive confiscation". With no documentation, reasoning, evidence or other support, it is hard for any response to relate to the charges raised in the bizarre "seem" zone presented by the Rapporteur.

The problem is that the rumour mill propagated by the Rapporteur is self-perpetuating. Unfounded statistics from other documents (such as the astonishing and arbitrary statistic from an OCHA report that 680,000 Palestinians will be "directly harmed" by the wall – currently some 5000 Palestinians are directly affected) are cited by the Rapporteur, and while even he admits that "Estimates of this kind may not be completely accurate, he insists that they are supported by unnamed "reliable sources". In turn, the Rapporteur's own inventions are cited as authority elsewhere. Thus, for example, in a presentation in the recent advisory opinion proceedings before the International Court of Justice, the Palestinian presentation based all its statistical and graphical evidence on the planned construction of an eastern fence, even though such a fence has never been authorized. Unable to find any basis for the planned or approved construction of such fence, crucial to their argument, the Palestinian representatives fell back on the Special Rapporteur, stating: "The United Nations Secretary-General's report divides construction of the Wall into four phases. A fifth phase of construction is projected, as noted by the United Nations Special Rapporteur and [sic?] the Commission on Human Rights." This unsubstantiated and grossly misleading projection appeared unquestioningly on every one of the maps presented by the Palestinian representatives to the Court.

Assertions by the Rapporteur that the security fence is 'electric' may also have been the basis for the Palestinian allegation to the Court that the fence is "electrified". In fact, the fence is neither electric nor electrified, though it does have electronic sensors to detect intruders.

Impact of Reports on the peace process

The Special Rapporteur opens his report by seeking to defend himself from charges that "reports of this kind are unhelpful to the peace process in the Middle East" since the parties should be able to resolve their differences "free from the restraints of international law". But in order to create a straw doll to be struck down, the Special Rapporteur misstates the argument against his reports, and indeed his mandate. The argument is not that the application of international law, or even the investigation of violations, is unhelpful, but rather that the one-sided interpretations provided by the

current Special Rapporteur are so far removed from both law and reality, as to be useless. In the world of the Special Rapporteur there are only Israeli responsibilities and Palestinian rights – no Israeli rights and Palestinian responsibilities.

As regards Israeli rights, it is striking that in the course of all his reports as Special Rapporteur, there is *not a single* Israeli measure in the fight against terrorism that the Rapporteur has considered to be legitimate or proportionate.

As regards Palestinian responsibilities, these are simply not recognised. To an extent, this is a problem inherent in the Special Rapporteur's mandate which, as numerous previous Rapporteurs have concluded, is problematic in the extreme; it not only prejudices the Rapporteur's findings but also obliges him to report only on "Israeli violations" and not those of the other party to the conflict.

But the current Rapporteur not only refuses to report on Palestinian violations of their fundamental obligations; he goes as far as to suggest that those obligations do not even exist. Listing the principles of international law that have to be applied to the current situation, the Rapporteur includes: "*the signing of treaties under duress*"(para.3). This intriguing inclusion is helpful in understanding the Rapporteur's approach; the Palestinians cannot be held accountable for any of their undertakings – to fight terrorism, to collect illegal weapons to end incitement – because, after all, these were signed "under duress". The Special Rapporteur fails to explain, however, how it was that the United States, the Russian Federation, Egypt, Jordan, the European Union and Norway, all of which signed as witnesses to these agreements, failed to notice the 'illegality' of the entire exercise.

The approach adopted by the Special Rapporteur is not only grossly patronising to the Palestinians, suggesting that they are incapable of running their affairs and complying with their obligations, but it undermines the prospect of any future progress by agreement. Why indeed should Israel take risks for peace, and endanger its security by handing territory to the Palestinians, if the Special Rapporteur will be ready and waiting to absolve the Palestinians for any violations of agreements that were reached "under duress"?

The Special Rapporteur's Ambivalence with regard to Terrorism

The Reports of the current Rapporteur have reflected a disturbing ambivalence in his attitude to terrorism. In his earliest report, it will be recalled, he had difficulty in finding suicide bombings to be unlawful, suggesting only that they contravened "emerging norm of international law".

In the current Addendum, it is troubling to see his disregard of the murder of Israeli civilians within the territories. "Palestinian suicide bombers have caused death and devastation **within Israel**", he states, going on to describe "fanatical Palestinians prepared to spread terror **throughout Israel**."(para.4) Against the background of a Palestinian leadership which continues to regard attacks against Israeli children, men and women in the territories not as terror but as acts of heroic resistance, the Special Rapporteur does nothing to disabuse the reader of this view. The failure to condemn as terrorism the deliberate murder of civilians, wherever they are, is at odds with the

position of leading international human rights and humanitarian organisations, that such attacks are violations of international law, and are war crimes and crimes against humanity. It is also at odds with United Nations resolutions and with specific Palestinian obligations, including in the Road Map, to act to prevent attacks "against Israelis anywhere".

Proportionality and the security expertise of the Special Rapporteur

The Rapporteur has no hesitation in determining that Israeli measures "are seriously disproportionate to the dangers to which Israel is subjected"(para.4). And yet nowhere in the Addendum, nor in any of his previous reports, is there any attempt to assess the extent of these dangers. In the absence of any such assessment, the manner in which he reaches his determination of legitimate proportionality remains a mystery.

The calculus of the Rapporteur's estimation of proportionality is skewed still further by his insistence on exaggerating Israel's security capabilities. Thus, objecting to the demolition of houses in Rafah, the Special Rapporteur does not deny that "tunnels from Egyptian territory into Rafah exist" and that "these tunnels are used for the smuggling of goods and arms" but rather asks "whether the high-tech IDF does not have the expertise to discover and destroy these tunnels in the vacant territory adjacent to the wall?"(para. 6), answering his own question by declaring the tunnels merely a "pretext". Regrettably, the Special Rapporteur does not choose to share with the "high-tech IDF" his expertise on how such tunnels, deep below ground and deliberately concealed by houses, are to be uncovered.

The Rapporteur's security expertise extends also to the route of the Security Fence. With no analysis whatsoever of the strategic requirements of a barrier to prevent terrorist infiltrations, he blithely declares that "Security could just as easily, and probably more effectively, have been achieved by building the Wall to the West along the Green Line"(para.11). The Special Rapporteur gives no indication as to how an arbitrary and temporary armistice line, never intended either as a border or a defensive boundary, which runs through villages, and valleys with high ground on either side, could provide an effective line for Israel's temporary security fence. Nor does he mention those areas where for topographical reasons, the fence juts not into the West Bank but into Israel. Any serious analysis of the necessity of the routing of the fence would also have to consider, in relation to every section of the fence, the nature and scale of the terrorist threat faced by Israel, as well as the effectiveness of the fence in preventing them. It would also need to address whether alternative routing, particularly in areas abutting centers of civilian population could provide similar protection, and whether, for the 4-5% of the fence that consists of a concrete wall, sniper shootings at Israelis justify this measure. The Rapporteur, however, felt no need to consider any such matters before asserting that any construction whatsoever within the West Bank "cannot be justified as a legitimate or proportionate response to terrorism".

The dismissive ease with which the Special Rapporteur makes his amateur assertions on crucial issues of security leaves a bitter taste. These are not hypothetical questions, but matters of life and death. 945 Israelis have already been murdered by terrorists,

and as the Rapporteur was writing his report, terrorists were preparing themselves to murder more.

Omissions and misrepresentations

As noted, the Addendum is rife with rumor and speculation. What are more striking, however, are the omissions of readily available facts, which can only be explained by wilful blindness. The omissions are legion, but a few examples will suffice:

Environment:

The Rapporteur states that there is "no evidence that Israel carried out an environmental impact assessment before it embarked on the construction of the Wall."(para.10). In fact, environmental impact experts are consulted at every stage of the planning and construction of the fence, and environmental considerations have had a significant impact on its route.

The Rapporteur further asserts "Thousands of olive and citrus trees have been uprooted" (para. 10). He fails to add, however, that tens of thousand of trees which had to be uprooted, have been replanted at locations designated by the Palestinian landowners at Israel's expense.

Notification to landowners:

Regarding claims that the temporary appropriation of land for the fence is conducted in accordance with the due process of law, the Special Rapporteur insists that he "found no evidence to substantiate these claims"(para. 12). To the contrary, he asserts that "Notices of land seizure in many instances have simply been served by placing an order of seizure under a stone or on a tree. Sometimes the order is written in Hebrew only with no Arabic translation."(para.13)

In fact, notices placed on land are an additional form of notification, beyond official notification to the Palestinian liaison officer, and the posting of every order in the local coordination office. Contrary to the Rapporteur's assertion, all orders are in Arabic as well as Hebrew. Additionally, all landowners and local leaders are invited to participate in field surveys and notified of their rights to compensation for the use of the land, and for loss of profits, as well as their rights to object and to appeal.

Objections and appeals:

The Rapporteur alleges that in most instances objections are not lodged due to shortness of notice or lack of funds. In fact, if any landowners are unable to lodge objections within a week, extensions are freely granted. As regards "lack of funds", the lodging of an objection is not subject to payment, and indeed any letter from a landowner expressing a reservation about the fence is treated as an objection.

To date hundreds of objections and reservations have been submitted. Every objection is considered individually, and where necessary meetings are held with community leaders and the individuals concerned in order to find appropriate solutions. As a result many changes have taken place in the route of the fence and in the finding of local solutions such as the provision of alternative water resources, transportation arrangements for schoolchildren and teachers, the addition of agricultural gates and so on.

If the objection of a landowner is not met to his satisfaction he has the right to petition Israel's High Court of Justice. Work on the fence is postponed a further week to enable such a petition to be submitted. To date over twenty petitions have been filed, the majority resulting in agreed changes to the route.

These hearings are common knowledge and are open to the public. That the Special Rapporteur "found no evidence" of due process, is curious in the extreme.

Investigation of IDF behaviour:

The IDF, asserts the Rapporteur "does not in most cases investigate the killing of civilians or prosecute those responsible (para.5).

In fact, the IDF conducts a detailed and independent field investigation in relation to any incident in which a Palestinian resident of the West Bank or Gaza Strip is killed. The results of every investigation are transferred to the Military Prosecutor for legal examination, and in any instance in which there is a suspicion that a criminal offence has been committed, a criminal investigation is undertaken by the Military Police.

Since the outbreak of the current wave of Palestinian violence, over 470 criminal investigations have been initiated in relation to the actions of IDF officers and soldiers in the territories. Of these, 173 relate to damage to property, 193 crimes of violence, 71 shooting incidents and 37 other crimes (such as detaining individuals at checkpoints).

Following these criminal investigations, over 654 indictments have been filed within military courts. Further indictments are expected shortly as more investigations are concluded. Some 40 trials have already taken place, all of them resulting in convictions and sentences of actual imprisonment. 16 of these related to crimes involving shooting which resulted in death or injury.

Humanitarian considerations:

The Rapporteur's Addendum is silent on the extensive efforts made by Israel to ease the impact of the fence on the lives of affected Palestinians. No reference is made to the significant changes that have been made to the route of the fence, nor to the underpasses being constructed to connect separated Palestinian areas. While the Addendum paints a dire picture of the impact of the fence on healthcare

("there are no hospitals in the Closed Zone") it does not mention the new health care facilities constructed by Israel, such as the kidney dialysis center in Mukassat hospital, to ensure continued treatment.

On the issue of gates and crossing points the Rapporteur asserts that there are currently only 31 and that most are open for limited periods of the day only (para 14). In fact there are 44, of which most are open 24 hours a day.

The Rapporteur describes the situation of schoolchildren separated from their schools, but fails to make any reference to the efforts exerted by Israel to find solutions for those children separated from their schools, including the hiring of Palestinian buses, funded by the Israeli civil administration, to take children to school.

But perhaps the most significant omission of the Special Rapporteur is in his description of his visit to a Palestinian school in Gaza, in which he graphically recounts the children's "experiences of military occupation". "To deny childhood to children is unforgivable" he adds. Unforgivable, perhaps, except when committed by the Palestinian leadership. For all his concern for the plight of the Palestinian people, the Special Rapporteur can find nothing to say about the vicious incitement and indoctrination of children in Palestinian schoolbooks and children's television, the poisonous glorification of suicide bombers as martyrs with posters on school walls, the militant hatred-filled summer camps, and the cynical manipulation which has led children as young as 12 to be involved in terrorist bomb attacks. On this denial of childhood to children, the Rapporteur is silent.

Needless to say, on the denial of childhood to 110 Israeli children murdered by Palestinian terrorists since September 2000 (75 in bombing attacks, 29 in shooting attacks, and 6 in stoning/other attacks), the Rapporteur says not a word.

Political implications:

As in previous Reports the Rapporteur attributes the basest of motivations to every Israeli action. He insists that the fence is an act of "*de facto* annexation" with arrangements "designed to pressure Palestinians into leaving their homes". Not only does he provide no evidence or support for these charges, but he ignores Israel's repeated insistence that the fence - a temporary, defensive measure - has no effect on the status of the land, or on the outcome of future negotiations. These points were reiterated most recently by Israel's foreign minister, Silvan Shalom, on March 17, 2004:

As regards the security fence, I wish to clearly reiterate three points:

The fence is solely a defensive measure, intended to protect Israelis from suicide bombings and other terrorist attacks. It is not a political act. It is not intended to be a border or to prejudice any future negotiations with the Palestinians. It has no

effect on the status of the land on which it is constructed. It is simply the most effective method we have found, after over 20,000 separate terrorist attacks in the last three and half years, to save the lives of our civilians.

Second, the fence is temporary. Its sole purpose is security, and it can be moved or removed in accordance with any agreement we may reach. Israel has moved hundreds of kilometers of fences in the past, despite the expense involved, when we signed peace agreements with Egypt and Jordan, and when we left Lebanon. The fence is reversible. The lives taken by terrorism are not.

And finally, we are keenly aware of the impact of the fence on the lives of Palestinians. We have no wish to damage Palestinian quality of life. That is why we are constantly reviewing the humanitarian arrangements and the routing of the fence, and have already introduced changes. We are committed to continuing to review all aspect of the fence, to find the most effective and humane way of protecting lives without causing unnecessary hardship to the Palestinian population.

As the Prime Minister has said, we remain committed to fulfilling our commitments under the Roadmap, and will do everything we can to promote peace. Protecting the lives of our citizens and taking terror out of the equation is a crucial step in this direction.

Conclusion

The mandate of the Special Rapporteur, unique in its one-sided, open-ended and prejudgmental nature, is clearly problematic, and does nothing to enhance the standing of the Commission. However the damage to the Commission's reputation caused by the mandate pales in comparison to that caused by the current Rapporteur and his abuse of his official position as a platform for his personal political views.

If the blatant misstatements of law and fact that have riddled every document submitted to the Commission by this Rapporteur to date were not sufficient, the use by him of his title as Special Rapporteur to publish political tirades in the media emphasises still further his inappropriateness for this position, or indeed any other position of equal responsibility.

For the Commission to continue to grant an individual with such obviously predetermined prejudices, so unconcerned by facts and balance, so nonchalant with invocation and disregard for international law – at his convenience, the right to speak from an ostensible position of authority, can only further cheapen the very values that the Commission claims to champion.