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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 2005, adressée au secrétariat de la Commission
des 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 secrétariat de la Commission des droits de l'homme et a l'honneur de lui communiquer ci-joint la réponse d'Israël au rapport de John Dugard, Rapporteur spécial à la soixantième session de la Commission des droits de l'homme (E/CN.4/2005/29 et Add.1), soumis conformément aux résolutions 1993/2A et 2004/10 de la Commission.

La Mission permanente d'Israël demande que ce document* soit distribué en tant que document officiel de la Commission des droits de l'homme, au titre du point 8 de l'ordre du jour concernant la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967.

* Reproduit tel quel en annexe uniquement dans la langue dans laquelle il a été reçu.

Annex

Response to the Report and Addendum submitted by Mr. John Dugard, Special Rapporteur of the Commission on Human Rights

Introduction¹

Israel is pleased to note a number of new and positive elements in the latest document submitted by the Special Rapporteur. In particular, the Rapporteur takes note of some of the measures that Israel has undertaken in order to reduce friction and alleviate hardship for the Palestinians, despite the security risks involved.

Among the positive steps that the Rapporteur records are the release of 500 prisoners, the repeal of assigned residence orders, and the cessation of targeted killings and demolition of houses as security measures. He also notes the increased number of Palestinian workers and merchants permitted to enter Israel, the removal of checkpoints in the West Bank, and the handing over of West Bank cities to Palestinian control.

The Rapporteur also recognizes the significant changes being made by Israel to the route of the security fence as a result of the decision of Israel's High Court in the *Beit Sourik* case.

Finally, he recognizes that Israel's far-reaching disengagement initiative, including the evacuation of 8,500 people from the Gaza Strip, is "a brave move on the part of Israel". He goes on to state that the plan "is the right thing to do and should be acknowledged as such by those concerned about human rights and humanitarian law in the Palestinian territory".

Another positive development in the Rapporteur's Addendum is the recognition that, not only Israel, but also the Palestinian side has obligations and responsibilities. While, as in the past, the bulk of the document is directed at what it sees as Israel's failings and violations, the Addendum nonetheless refers to "violations on both sides" and includes the Rapporteur's clearest call yet for concerted action by the Palestinian leadership against terrorism:

"It is essential that the Palestinian Authority exercise control over militant groups responsible for violence against IDF and settlers within Palestine and for suicide bombings within Israel."

The one-sided mandate of the Special Rapporteur – an opportunity for change

The recognition by the Rapporteur that there are obligations on the Palestinian side, and that there have been violations of these obligations, is welcome, but at the same time it serves to

¹ The most recent report submitted by the Special Rapporteur is virtually identical to his previous report, circulated as document E/CN.4/2004/6 dated 8 September 2003. Accordingly, regarding the issues raised in this report, Israel refers to its previous response, circulated as document E/CN.4/2004/G/42 dated 2 April 2004. This current response relates primarily to the Addendum prepared by the Rapporteur after his visit to the region in February 2005, and circulated as document E/CN.4/2005/29/Add.1

underline the unsatisfactory nature of the Rapporteur's mandate. As noted in Israel's responses to previous reports, this mandate is unique and problematic in many respects, not least because it prejudices any investigation, assuming that there are violations at the outset. But the most conspicuous failing of the mandate is that it only authorizes the Rapporteur to consider violations on the Israeli side of the equation. It prevents the Rapporteur from recognizing that the situation reflects rights and responsibilities on both sides, and gives him no authority to consider the obligations and violations which he acknowledges exist on the Palestinian side.

The unbalanced nature of this mandate, which has been recognized and criticized by previous holders of the position of Special Rapporteur, is a clear and unfortunate example of the kind of bias that has undermined the credibility of the Commission. In the words of the recent Report of the Secretary-General's High Level Panel: "The Commission cannot be credible if it is seen to be maintaining double standards in addressing human rights concerns". Similarly, Human Rights Watch recently issued a statement deploring the fact that "the Commission traditionally neglects or downplays abuses by Palestinian armed groups" and urging that "That selectivity should end".

There could be no more appropriate time than the present, when progress towards greater human rights protection and reconciliation between Israelis and Palestinians is dependent on reciprocal steps by both sides to the conflict, for the inequity in the Rapporteur's mandate to be addressed. A balanced mandate would allow the Rapporteur to present a full and fair picture of the situation, and give his findings a weight which the current one-sided approach cannot achieve.

Beyond the mandate – a political agenda

Alongside the more positive elements noted above, the Addendum, for the most part, reiterates the political positions adopted in previous Reports, and, as in previous Reports, moulds facts and law to conform to a political agenda. Israel has responded to these distortions at length in response to the Rapporteur's previous reports, and can only express its disappointment that, notwithstanding its refutations, many of these elements continue to reappear in the Addendum.

In this current response, Israel prefers not to focus yet again on the misrepresentations and distortions, but rather to address two conceptual aspects of the Addendum which, in Israel's view, reflect an approach which is damaging to the new spirit of progress and reconciliation in the region: disregard for the agreed Road Map and peace agreement framework, and the discouragement of confidence building measures, including the disengagement initiative.

Disregard for the Road Map and the peace process

The international community has made it clear that the best, if not the only, hope of arriving at a resolution of the conflict is through the process set out in the "Road Map". This plan, proposed by the Quartet consisting of the United States, the Russian Federation, the European Union and the United Nations, has been accepted by both sides, and adopted by the Security Council. However, the Rapporteur fails to take account of the delicate process painstakingly crafted in this document.

This is particularly evident in the Rapporteur's attitude to the issue of settlements. This issue has been agreed by the parties to be one of the subjects that have to be addressed in permanent status negotiations. In the careful thinking of the Road Map, these talks can only take place after a

number of preliminary steps have occurred – including concerted Palestinian action to dismantle the terrorist infrastructure and to prevent the current indoctrination and incitement.

For the Rapporteur, however, Palestinian actions are irrelevant – as is the phased process agreed by the parties and the international community. Settlements, he insists, must be dismantled immediately, irrespective of any violence or failure to act on the Palestinian side.

A fundamental misunderstanding of both the Road Map and the Israeli-Palestinian agreements is also evident in the Rapporteur's treatment of Israel's security fence. With somewhat circular logic, he argues:

"The construction of the Wall postdates the Oslo agreement with its notion of leaving matters for 'permanent status talks' at some later, unforeseeable date. The Wall, according to Israel, is a security measure. As such, it requires immediate attention since the present focus of attention, according to the Sharm el-Sheikh agreement, is security."

One cannot help but be struck by the irony that the Rapporteur who, in his previous three reports, has been at pains to argue that Israel's motivation for constructing a fence is political and not security, now, when it seems convenient, is prepared to accept Israel's position that it is a security measure. But in fact, even on this basis, his argument that the Sharm el-Sheikh understandings require that the fence be dismantled is without basis. These understandings place no limitations on defensive measures taken by Israel. They do include an undertaking by Israel to refrain from military activity directed against Palestinians, "in parallel" (and the Rapporteur's omission of these words is revealing) to the Palestinian obligation to stop all acts of violence against all Israelis everywhere.

As regards the Israel-Palestinian agreements, the Rapporteur's implication is that, since the fence is not a "permanent status issue" these agreements require that it be dismantled immediately. But actually these agreements are explicit about the fact that Israel has both the obligation and the authority to take all necessary measures, including within the territories, to protect Israelis from terrorist attacks. As Article XII of the Interim Agreement, signed by Israel and the Palestinians, states:

Israel shall continue to carry the responsibility for the overall security of Israelis and settlements, for the purpose of safeguarding their international security and public order, and will have all the powers to take the steps necessary to meet this responsibility.

In fact it is the effectiveness of the fence – which in the year of its first construction led to an 84% reduction in deaths from terrorist attacks and a 92% reduction in injuries - that has enabled Israel to exercise restraint in the use of more intrusive security measures, and to take steps to help improve the humanitarian situation in the territories.

Discouraging confidence building measures – disengagement and prisoners

As noted, the Rapporteur expresses his approval of Israel's disengagement initiative, recognizing it as "a brave move" and "the right thing to do". However, the legal positions he adopts are actually counterproductive to the implementation of the initiative, and to the assumption of responsibility by the Palestinian side.

Israel has noted in its response to previous Reports that the Rapporteur's insistence that, following the withdrawal from the Gaza Strip, Israel will remain an 'occupying power', is legally questionable. To support his assertion that the legal test of occupation is "not whether the Occupying Power fails to exercise effective control over the territory, but whether it has the ability to exercise such power" the Special Rapporteur cites, but misreads, the Nuremberg Military Tribunal *Hostages Case*. In fact, the judgment in this case restates, with approval, the 1907 Hague regulations which are a clear and succinct statement of international law in this regard:

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

But beyond the legal inaccuracy inherent in it, the approach adopted by the Rapporteur is detrimental to the prospects of actually implementing the initiative that he welcomes. Insisting that Israel remain the occupying power, even after it has implemented an unprecedented and far-reaching withdrawal of forces, is likely to strengthen the positions of extremists on both sides. On the Israeli side, it broadcasts a message that painful and traumatic steps, like the removal of 8,500 individuals, some of them third generation in these areas, are perceived as having no substantive impact on the way that the world would look at the situation. At the same time, and perhaps more damagingly, it sends a message to Palestinians, that there is no real expectation that they should take responsibility for their own institutions, and the control of their lives.

A similarly detrimental approach is the casual attitude of the Addendum to the issue of prisoner releases. As the Rapporteur notes, Israel has already released 500 prisoners, and has committed itself to releasing more, as a confidence building measure. Additionally, following the Sharm el-Sheikh Summit, a joint Israeli-Palestinian ministerial committee was formed to deal with the subject. However, the release of such prisoners is a highly sensitive issue, not least because of the likelihood that, as in the past, released prisoners may return to the path of terror and commit further atrocities. But the Rapporteur sees no reason why Israel should not release terrorists, including "those involved in the killing of Israelis" other than "domestic opposition". Indeed the Rapporteur calls on Israel to take 'a bold step of a kind taken by other transitional societies, which have released prisoners', but fails to link this call with any call to action on the Palestinian side to ensure that theirs is indeed a transitional society, in which terrorism is being confronted. Demanding risk-taking by Israel on security matters, without requiring any action by the Palestinian side, can only undermine the effectiveness of confidence building measures to achieve progress on a mutual and reciprocal basis.

Conclusion

Today, there is a unique opportunity for Israelis and Palestinians to make genuine progress towards reconciliation and the protection of human rights. The Commission, and the Special Rapporteur, the credibility of both of which have suffered so greatly from the one-sided approach taken to this conflict, have a rare opportunity to redress the imbalance and to play a balanced and constructive role.

The Special Rapporteur's latest Addendum reflects the beginnings of an appreciation that the situation is not, as it has been portrayed in previous reports, a reality in which there are only

Palestinian rights and Israeli obligations, but rather a more complex one in which there are rights and obligations on both sides.

While the beginnings of this positive realization are welcome, the Reports of the Special Rapporteur cannot hope to have weight and influence, until the anachronistic and prejudicial mandate under which he operates is amended to conform with the new reality, as well as with the principles of equality and impartiality.

Beyond the imbalance inherent in the mandate, the content and approach reflected in these Reports also has to reflect calls for change both from within the region as well as from within the United Nations system. A Report which truly does this, and which supports the Road Map, the peace process, and confidence building measures by the parties, rather than discouraging them, will be major step forwards for the parties, and for the United Nations itself.
