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تعزيز وحماية جميع حقوق الإنسان، المدنية والسياسية والاقتصادية والاجتماعية والثقافية، بما في ذلك الحق في التنمية

تقرير المقرر الخاص المعني بتعزيز وحماية حقوق الإنسان والحريات الأساسية في سياق مكافحة الإرهاب، السيد مارتن شاينين

إضافة

البعثة التي قام بها إلى إسرائيل، بما في ذلك زيارة الأرض الفلسطينية المحتلة

* يُعمـــم موجز هذا التقرير بجميع اللغات الرسمية. أما التقرير نفسه، الوارد في مرفق هذا الموجز، فيُعمم باللغة التي قُدم بها فقط.

موجز

قـــام المقرر الخاص المعني بتعزيز وحماية حقوق الإنسان والحريات الأساسية في سياق مكافحة الإرهاب، السيد مارتن شاينين، ببعثة إلى إسرائيل في الفترة من ٣ إلى ١٠ تموز/يوليه ٢٠٠٧، وزار الأرض الفلسطينية المحتلة. ويعـــترف المقـــرر الخاص في مقدمة هذا التقرير بالتحدي الخاص الذي تطرحه مكافحة الإرهاب في هذه المنطقة والعنف المدمر الذي يعانيه جميع المدنيين الذين يعيشون فيها. ويتصدى الفرع الثاني للإطار العام للقانون الواجب التطبيق الذي ينبغي في سياقه بحث التدابير التي اتخذتها إسرائيل لمكافحة الإرهاب، بما في ذلك العلاقة التفاعلية ما بين القانون الدولي لحقوق الإنسان والقانون الإنساني الدولي. ويتصدى هذا الفرع أيضاً لحالة الطوارئ التي أعلنتها إســـرائيل والـــتطورات الإيجابية التي يمكن أن تطرأ في مسألة أحكام عدم التقيد والإصلاح التشريعي. ولكن من الأمور التي تبعث على القلق بوجه خاص الآثار القانونية الناشئة عن تصنيف الأشخاص المشتبه في كونهم إرهابيين في فئة "المقاتلين غير الشرعيين".

وفي الفرع الثالث، ينظر المقرر الخاص في المشاكل المحددة التي يثيرها النظام القانوني الإسرائيلي فيما يتعلق بالتحقيق مع المشتبه في كونهم إرهابيين وملاحقتهم قضائياً، مثل التعاريف القانونية المتعلقة بالإرهاب؛ وأساليب الاستجواب التي تستخدمها الوكالة الأمنية الإسرائيلية؛ واستخدام المحاكم العسكرية. وفي الفرع الرابع، تُلقى على مسألة بناء الحاجز في الضفة الغربية، الذي يتكون من جدار في أجزاء منه ومن سياج في أجزاء أخرى، نظرة ناقدة فيما يتعلق بمشروعيته وتأثيره على الشعب الفلسطيني، وبخاصة أثره على الحقوق الاقتصادية والاجتماعية والثقافية. ويُسلِّط الفرع الخامس الضوء على بعض الشواغل الرئيسية فيما يتعلق بالوضع في غزة. ويتصدى المقرر الخاص في الفرع السادس للعمليات التي تقوم بها قوات الدفاع الإسرائيلية ومسائل استخدام الدروع البشرية وهدم المنازل والاغتيالات المستهدِفة، بما في ذلك قتل المدنيين.

وفي الفرع الأخير، يعرض المقرر الخاص استنتاجات وجيزة ويقدم توصياته إلى حكومة إسرائيل. وتتضمن التوصيات مسائل تتعلق بالإصلاح التشريعي ووقف الممارسات المنافية للقانون الدولي. ويوجه المقرر الخاص أيضاً انتـــباه الحكومـــة إلى أن ما تحدثه تدابير مكافحة الإرهاب أو الإجراءات الأمنية من تأثير عاطفي شديد يمكن أن يـــؤدي بســـهولة إلى نتائج عكسية. ويوصي المقرر الخاص بسحب جميع المستوطنات اليهودية المقامة في الأرض الفلسطينية المحتلة والاستعاضة عن الجزء غير المُنجز من الحاجز بهياكل أمنية تحترم من حيث موقعها الجغرافي الخط الأخضـــر أو تحظـــى بقبول الفلسطينيين. ولدى تنفيذ مثل هذا القرار، يوصي المقرر الخاص باتخاذ تدابير عاجلة لضمان عدم تأثير نظام التصاريح وإدارة نقاط التفتيش وسائر التدابير ذات الصلة في الأرض الفلسطينية المحتلة تأثيراً غير متناسب على التمتع بالحقوق المدنية والثقافية والاقتصادية والسياسية والاجتماعية في تلك الأرض.

Annex

REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COUNTERING TERRORISM ON HIS MISSION TO ISRAEL, INCLUDING VISIT TO OCCUPIED PALESTINIAN TERRITORY (3-10 JULY 2007)

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I. INTRODUCTION

1. Pursuant to Commission on Human Rights resolution 2005/80, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, conducted, at the invitation of the Government of Israel, a mission to Israel from 3 to 10 July, when he also visited the Occupied Palestinian Territory.[1]

2. The Special Rapporteur met with the Minister for Foreign Affairs of Israel, Tzipi Livni. The Special Rapporteur had meetings on a specialist level with the Ministry of Foreign Affairs, the Ministry of Justice, the Israeli Defense Force, the Israeli Security Agency, members of the Knesset (Parliament), the Counter Terrorism Bureau and former and current Presidents of the Supreme Court of Israel. He travelled to various parts of Israel, including to the Hasharon and Hadarim prisons where he was able to conduct private interviews of detainees in conformity with the Terms of Reference for Fact-Finding Missions by Special Rapporteurs,[2] and to the Ofer Military Court, where he observed ongoing proceedings and met with the judges. In the Occupied Palestinian Territory, he visited, inter alia, Bethlehem, Ramallah and Nablus, examined the route and impact of the barrier erected by Israel, and met with the President's Office of the Palestinian Authority. He met with lawyers, academics, victims of terrorism and non-governmental organizations from Israel and the Occupied Palestinian Territory. He was also briefed by a number of international organizations, including by United Nations interlocutors.

3. The Special Rapporteur is deeply mindful of the difficulties faced by Israel in its efforts to combat armed attacks and acts of terrorism and of the long history of violence in the region, which has had a devastating effect on the Israeli and Palestinian civilian population. While emphasizing that not all acts of violence committed against an occupying power, particularly when violence is targeted at the military forces of an occupying power, amount to acts of terrorism properly construed, the Special Rapporteur cannot ignore that, since the second intifada of September 2000 and up to October 2007, 1,165 Israelis were killed (71 per cent of whom were civilians) and 8,635 injured in over 300,000 violent attacks characterized by the Israeli Security Agency as terror attacks. Threats of military attack or terrorism against the Israeli people also arise from other parts of the region and further abroad. The Special Rapporteur was touched by the personal accounts of victims of terrorism, who have not only faced the loss of family members and other physical losses, but also struggle to overcome the psychological and fear-inducing consequences of terrorism.

4. Resorting to the methods of terrorism is always a morally inexcusable decision by a person. Despite this, the Special Rapporteur emphasizes that perpetrators of acts of terrorism do not fall into a vacuum in the application of the law, and he is encouraged in that regard by

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[1] The Special Rapporteur conducted his mission assisted by the Office of the United Nations High Commissioner for Human Rights and Dr. Alex Conte of the University of Southampton.

[2] E/CN.4/1998/45, appendix V.

the position of the Supreme Court of Israel that the fight against terrorism must be achieved through compliance with the law, including international law. He is furthermore pleased to receive assurances from Government sources that Israel is not involved in any global programme of extraordinary rendition or secret detention.

5. The Special Rapporteur underscores the fact that sustainable security can only be achieved through due respect for human rights. As emphasised by the United Nations High Commissioner for Human Rights at the conclusion of her visit to Israel on 23 November 2006, the entitlement of all individuals to enjoy their rights is not dependent upon there being peace. Respect for human rights for all and the rule of law forms one of the four pillars of the United Nations Global Counter-Terrorism Strategy, adopted by the General Assembly in its resolution 60/288 in September 2006. It is identified in the Strategy as "the fundamental basis of the fight against terrorism", thus applicable to all four pillars. Furthermore, the Strategy expressly identifies, in the preambular paragraph to pillar I, that a lack of the rule of law and violations of human rights amount to conditions conducive to the spread of terrorism. In the latter regard, as recognized by the Israeli Security Agency and the Israeli Counter-Terrorism Bureau, high on the list of motivations for carrying out terrorist attacks are those of revenge borne out of the attacker's personal or familial experience or perceptions of ill-treatment or humiliation. The Special Rapporteur further recalls that the Security Council has directed that all States members of the United Nations combat terrorism in compliance with international law, including international human rights and international humanitarian law.[3]

II. FRAMEWORK OF APPLICABLE LAW

A. International human rights and humanitarian law

6. The legal framework against which Israeli measures against terrorism are to be addressed is the combined effect of international humanitarian law and international human rights law. This is particularly the case with respect to Israeli conduct in, and the effect of counter-terrorism law and practice on, the Occupied Palestinian Territory, which has been under Israeli occupation for 40 years. Although Israel officially rejects the de jure application of the 1949 Geneva Conventions to the Occupied Palestinian Territory, it has undertaken to comply with the humanitarian principles under the Fourth Geneva Convention, which pertains to the protection of civilians during times of occupation.

7. With regard to the applicability of substantive norms of international humanitarian law, the Special Rapporteur agrees with the outcome of the positions of the International Committee of the Red Cross (ICRC) and the Israeli Supreme Court that the norms of this body of law, pertaining to international armed conflict, are applicable. The Special Rapporteur emphasizes that, since the adoption of the Geneva Conventions in 1949, the understanding of the substance and scope of international humanitarian law norms has evolved to the effect that the classification of an armed conflict as an international or non-international one cannot be treated as having major substantive

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[3] See for example Security Council resolution 1624 (2005), para. 4.

consequences for the international humanitarian law obligations of a State that is a party to an armed conflict. He refers, inter alia, to the ICRC study on customary norms of international humanitarian law, to the undertaking by Israel to respect the humanitarian principles of the Fourth Geneva Convention, and to sources of international humanitarian law that predate the 1949 Geneva Conventions, including The Hague Regulations of 1907. The Special Rapporteur is therefore of the view that, when considering its substantive obligations under international humanitarian law, it is not material whether Israel is a party to Additional Protocol II of 1977 or whether the West Bank was part of a sovereign State prior to the country's occupation of the Territory.

8. The Special Rapporteur notes the Israeli position that the International Covenant on Civil and Political Rights does not apply beyond its own territory, notably in the West Bank, especially as long as there is a situation of armed conflict there. He reminds Israel that international human rights law continues to apply during occupation or armed conflict. This is a point made clear by the Human Rights Committee in its general comments Nos. 29 and 31 and in its concluding observations on Israel,[4] and has been confirmed by the International Court of Justice.[5] As further explained in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, the International Court stated that the protection offered by human rights conventions did not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the International Covenant on Civil and Political Rights.[6] The conduct of Israeli counter-terrorist operations must therefore comply not only with international humanitarian law, but also with applicable international human rights law.

9. Those same bodies, the Human Rights Committee and the International Court of Justice have also confirmed that human rights, including those enshrined in the International Covenant on Civil and Political Rights, are legally binding upon a State when it acts outside its internationally recognized territory.[7] Therefore, as a State party to the Covenant, Israel is obliged to honour the rights laid down in it - including the absolute prohibition against torture or any other form of cruel, inhuman or degrading treatment - of anyone within its power or effective control, even if not situated

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[4] Human Rights Committee, general comment No. 31 (Nature of the general legal obligations on States parties to the Covenant) in *Official Records of the General Assembly, Fifty-ninth session, Supplement No. 40* (A/59/40), annex III; ibid., *Fifty-eight session, Supplement No. 40* (A/58/40), vol. I, chap. IV, para. 85 (11).

[5] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. 2006 Reports, 226, para. 25.

[6] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion*, I.C.J. Reports 2004, 136, para. 106. More recently, the Court applied both human rights law and international humanitarian law to the armed conflict between the Congo and Uganda: see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Merits* (2005), I.C.J. Reports, paras. 216-220 and 345 (3).

[7] See *Official Records of the General Assembly, Fifth-ninth session, Supplement No. 40* (A/59/40), annex III and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion*, I.C.J. Reports 2004, 136, at 179 (para. 109).

within the territory of Israel. With regard to the application of the Covenant and the International Covenant on Economic, Social and Cultural Rights to the Occupied Palestinian Territory, the Special Rapporteur therefore concludes that the provisions of both covenants apply to the benefit of the population of the Occupied Palestinian Territory, for all operations by Israeli authorities or agents in those territories that affect the enjoyment of rights enshrined in the covenants and fall within the ambit of the State responsibility of Israel under the principles of public international law.

B. Declared state of emergency

10. The Special Rapporteur notes with encouragement that Israel is reconsidering its derogation from aspects of the International Covenant on Civil and Political Rights under a state of emergency, which has been in existence since the establishment of the State of Israel. This reform is long overdue, as the current legal framework for countering terrorism is vague and outdated, partly based on pre-1948 instruments and hardly compatible with the requirement of legality and the country's commitment to democracy. The Special Rapporteur is troubled by the fact that a challenge to the lawfulness of the state of emergency has been pending before the Supreme Court of Israel for more than eight years. The Human Rights Committee has repeatedly expressed its concern with the sweeping nature of measures under the declared state of emergency.[8] The Special Rapporteur reiterates the Committee's position that recourse to derogations under article 4 must be temporary and exceptional in nature, and that the enunciation of certain rights within the International Covenant on Civil and Political Rights already provide for the proportionate limitation of rights as prescribed by law and necessary for the protection of national security or public order, including articles 12 (3), 19 (3) and 21, relating to the freedoms of movement and residence, opinion and expression, and peaceful assembly.[9]

11. The Special Rapporteur was informed that new counter-terrorism legislation is being drafted and is encouraged by advice from the Israeli Ministry of Justice that he will be consulted and invited to comment on this legislation prior to its introduction to the Knesset. The undertaking of this cooperative enterprise should be seen as representing an element of best practice in the development and reform of counter-terrorism law and practice. The Special Rapporteur further notes that Israel is in the process of establishing a written constitution to replace the various basic laws currently in existence, and that it will include a charter of rights. He encourages Israel to use this vehicle as an opportunity to fully incorporate its obligations under international human rights law.

C. Unlawful combatants

12. One troubling development in the counter-terrorist framework of the United States of America and Israel has been the classification of suspected terrorists as "unlawful enemy combatants" who purportedly find themselves in a gap in protection in respect of international

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[8] *Official Records of the General Assembly, Fifth-eighth session, Supplement No. 40* (A/58/40), vol. I, chap. IV, para. 85 (12).

[9] Ibid. See also ibid., *Fifty-seventh session, Supplement No. 40*, vol. I, annex VI, para. 2.

humanitarian law or certain parts of it. Most renowned is the use of this classification by the United States in respect of persons detained at Guantánamo Bay, a matter considered in the report of the Special Rapporteur on his mission to the United States. Israel has similarly adopted the terminology in its Incarceration of Unlawful Combatants Law 2002.

13. The adjective "unlawful" was used together with the noun "combatant" by Allan Rosas, in his treatise *The Legal Status of Prisoners of War* to describe persons who commit hostile acts in international conflicts without authorization to do so under the law of war.[10] "Unprivileged belligerent" would be a synonymous expression. While such persons may not be entitled to prisoner of war status, they nevertheless enjoy certain minimum protections in respect of detention and trial.[11] The Special Rapporteur wishes to make clear that the term "unlawful combatant" is a description of convenience, meaningful only in international armed conflicts and even then only denoting persons taking direct part in hostilities while not being members of the regular armed forces or of assimilated units.

III. INVESTIGATION AND PROSECUTION OF TERRORIST SUSPECTS

A. Definitions

14. In its resolution 1566 (2004), the Security Council called on all States to cooperate fully in the fight against terrorism and, in doing so, to prevent and punish acts that have the following three cumulative characteristics:

(a) Acts, including those against civilians, committed with the intention of causing death or serious bodily injury, or the taking of hostages;

(b) Irrespective of whether motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, also committed for the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population, or compelling a Government or an international organization to do or to abstain from doing any act;

(c) Such acts constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.

15. In the view of the Special Rapporteur, this cumulative characterization represents the type of conduct that should be acted against in the context of State counter-terrorist law and practice.[12] Terrorism can be distinguished from other crimes or warfare by its use of deadly or otherwise serious violence against "civilians", i.e. against innocent bystanders, or members of the general

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[10] Allan Rosas, *The Legal Status of Prisoners of War* (Turku, Institute for Human Rights, Abo Akademi University, 2005).

[11] See also United States Supreme Court ruling in *Hamdan v. Rumsfeld*, 548 U.S. (2006), p. 72.

[12] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (E/CN.4/2006/98), sect. III.

population or segments of it, or the taking of them as hostages, in order to cause fear or compel an international organization or Government to act or abstain from acting. Any definition of terrorism must comply with the requirements of legality (accessibility, precision and non-retroactivity), applicability to counter-terrorism alone, and non-discrimination.[13]

16. In its concluding observations on the second periodic report of Israel under the International Covenant on Civil and Political Rights, the Human Rights Committee expressed concern about the vagueness of definitions in Israeli counter-terrorism legislation and regulations which, although their application is subject to judicial review, appear to run counter to the principle of legality in several aspects owing to the ambiguous wording of the provisions and the use of several evidentiary presumptions to the detriment of the defendant.[14] The definition of an "act of terrorism" under article 1 of the Prohibition on Terrorist Financing Law 2004, for example, includes acts creating danger to the health or security of the public; serious damage to property; or serious disruption of vital infrastructures, systems or services. The Special Rapporteur takes the view that this definition goes beyond the Security Council's characterization by including acts the commission of which go beyond causing death or serious bodily injury or the taking of hostages. While the acts described by article 1 would certainly amount to criminal conduct, they should not be treated as terrorist acts in the view of the Special Rapporteur. In contrast, article 144D (2) (b) of the Penal Law 1977 is properly restricted in its definition of "an act of violence or terror" as an offence that causes injury to a person's body or places a person in danger of death or danger of grievous bodily injury.

B. Interrogation methods

17. Sitting as the High Court of Justice, the Supreme Court of Israel held in 1999 that former governmental guidelines governing the use by the Israeli Security Agency of "moderate physical pressure" during interrogation were invalid.[15] Although the decision of the Supreme Court held that the "necessity defence" under article 34 (11) of Penal Law 1977 could not serve to ex ante allow Israeli Security Agency investigators to employ such interrogation techniques, the Court's decision left open the possibility that the defence could be available post factum.[16]

18. The Special Rapporteur emphasizes that, even when properly applied, the necessity defence does not validate the application of physical or psychological means of torture or any form of cruel, inhuman or degrading treatment. It means, at most, that such wrongful conduct may, in certain very limited circumstances, go unpunished in respect of a particular individual. He further draws attention to the fact that, notwithstanding the operation of this defence, it will never absolve a State of its duty to secure accountability and provide an effective remedy for the human rights violation suffered. This position is consistent with that taken by the Human Rights Committee in

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[13] Ibid, paras. 45-50.

[14] *Official Records of the General Assembly, Fifth-eighth session, Supplement No. 40* (A/58/40), vol. I, chap. IV, para. 14.

[15] *Public Committee Against Torture in Israel v. The State of Israel* (HCJ 5100/94).

[16] Ibid., para. 40.

its concluding observations to the third periodic report by Israel under the International Covenant on Civil and Political Rights where, although it welcomed the Supreme Court's decision, it noted that there was no defence under article 7 of the Covenant to conduct amounting to torture or cruel, inhuman or degrading treatment, equally prohibited in non-derogable terms by article 7.[17]

19. It was therefore troubling to the Special Rapporteur to receive reports of the continued use by Israel of interrogation techniques such as beatings, sleep deprivation, use of the "shabach" position (where a person's hands are tied behind his back, and he is seated for long periods on a small and low chair tilted forward towards the ground), and excessively tight handcuffs.[18] It is reported that child detainees have been subject to similar treatment, and threats being made of having the child's family members beaten or their family home destroyed.[19] The Special Rapporteur received assurances that all instances of the use of moderate physical pressure fell within the bounds of the necessity defence, and that no individual interrogator has been the subject of criminal charges since the 1999 Supreme Court decision, despite the existence of mechanisms facilitating the reporting of abuse by persons under interrogation. In that regard, Israel has established a process by which any person under interrogation may make an allegation of ill-treatment, which will then be investigated by a complaints inspector. Although the rules of operation of the Israeli Security Agency do not allow interference with the investigations of the inspector, who reports directly to the State Attorney's Office, the Special Rapporteur is concerned about the ability of the inspector, as an employee of the Israeli Security Agency, to act truly independently from the Agency and thus vigorously investigate allegations of ill-treatment or torture. According to the statistics given to the Special Rapporteur, since 2000, the inspector has initiated more than 550 examinations, but only 4 have resulted in disciplinary measures and not a single one in prosecution. The Special Rapporteur disagrees with the Supreme Court ruling that article 34 (11) of the Penal Law may be used to permit the exercise of discretion in deciding whether to prosecute an individual interrogator against whom allegations have been made of torture or cruel, inhuman or degrading treatment.[16] Given the non-derogable and peremptory nature of the prohibition of torture, such determinations should only be made by a court during the course of a criminal trial.

20. In its 1999 decision, the Supreme Court of Israel accepted that the necessity defence could arise in instances of a "ticking bomb", and that the imminence criteria of the defence could be satisfied even if the "bomb" was set to explode in a few days, or even in a few weeks, provided the

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[17] *Official Records of the General Assembly, Fifth-eighth session, Supplement No. 40* (A/58/40), vol. I, chap. IV, para. 18.

[18] See for example Public Committee against Torture in Israel, "Ticking Bombs": Testimonies of Torture Victims in Israel (May 2007), and B'Tselem, "Utterly Forbidden. The Torture and Ill-treatment of Palestinian Detainees" in B'Tselem (May 2007).

[19] Defence for Children International, Palestine Section, Palestinian Child Political Prisoners 2006 Report, p. 5.

act was certain to materialize and that there were no alternative means of preventing it.[20] This explanation by the Court is very troublesome and the Special Rapporteur was shocked by the unconvincing and vague illustrations by the Israeli Security Agency of when a "ticking bomb" scenario may be applicable. One such example given concerned the apprehension of a person found in possession of a small laboratory for manufacturing explosives and items capable of being used to perpetrate a kidnapping. Based upon information that the person had previously attempted a kidnapping, although not prosecuted for it, the Israeli Security Agency advised that it took these facts as amounting to a "ticking bomb" scenario, although special interrogation techniques were not actually used.

21. The Special Rapporteur was also concerned by the admission by the Israeli Security Agency officials that, in principle, there was no distinction, in the use of the "ticking bomb" scenario, between a terrorist suspect and a person otherwise holding information about a terrorist incident. He was further troubled by the process by which individual interrogators would, in line with internal guidelines, seek approval from the Director of the Israeli Security Agency for the existence of a "ticking bomb" scenario and the application of special interrogation techniques. This appears to render the use of special interrogation techniques a matter of policy rather than a case-by-case ex post facto defence in respect of wrongful conduct. Properly applied, the necessity defence only applies in respect of an improvised reaction by an interrogator in relation to an unpredictable event.[21]

C. Arrest and detention of security suspects

22. The arrest and detention of Palestinians in the West Bank, with the exception of those from East Jerusalem, is governed to a large extent by military orders. Such orders do not require Israeli authorities to inform the person at the time of arrest of the reasons for their detention, at variance with article 9 (2) of the International Covenant on Civil and Political Rights. Although Israel has notified the United Nations of its intention to derogate from article 9 of the Covenant, any derogation must be both necessary and proportionate. There is no good reason for failing to inform a person of the reasons for their detention at the time of arrest.

23. According to the Criminal Procedures (Non-Resident Detainee Suspected of Security Offense) (Temporary Provision) Law 2006, a suspect may be held for up to 96 hours before being brought before a judge. It also allows a suspect to be held for 35 days without an indictment.

24. The same law permits a security suspect to be detained for up to 21 days without access to a lawyer. Since detainees do not have a right to family visits before an indictment is filed against them, according to article 12 (b) of the Criminal Procedure (Enforcement - Arrests) (Conditions of Detention) Regulations 1997, this creates a situation whereby a detainee may be held without

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[20] *Public Committee against Torture in Israel v. The State of Israel* (HCJ 5100/94), para. 34.

[21] Ibid, para. 36.

contact with the outside world for periods that could amount to weeks at a time. The Special Rapporteur is gravely concerned about this position, since it is in just this type of circumstance that the risk arises of a detained person being made subject to torture, or cruel, inhuman or degrading treatment.[22]

25. Of further concern to the Special Rapporteur is the use in the West Bank of "administrative detention" authorized under Military Order 1229 (1988). This Order empowers military commanders in the West Bank to detain an individual for up to six months if they have "reasonable grounds to presume that the security of the area or public security require the detention" subject to confirmation by the District Court. Commanders can extend detentions for additional periods of up to six months, and the Military Order does not define a maximum cumulative period of administrative detention, thus meaning that detention can be extended indefinitely. At June 2007, Israel was holding approximately 830 Palestinians in administrative detention, and the Special Rapporteur is aware of cases in which persons have been held for periods of years under administrative detention. The terms "security of the area" and "public security" are not defined, their interpretation being left to military commanders, and thus lack the level of precision required by the principle of legality. Furthermore, much of the information concerning the reasons for such detention is classified, such that the detainee and his or her lawyer have no access to this information, available to the military court confirming the detention, and thereby no effective means of contesting the grounds of the detention. This is at variance with article 14 of the International Covenant on Civil and Political Rights, which not only guarantees the right to a fair criminal trial, but also requires that fundamental principles of fair trial be respected in any matter dealt with by a judicial body.

26. Detention of persons is also possible under the Incarceration of Unlawful Combatants Law 2002, which authorizes the Chief of General Staff to detain an "unlawful combatant", subject to judicial review every six months, along similar lines to the administrative detention regime. Particularly problematic in this regard is not only the use of the term "unlawful combatant", as discussed earlier in this report, but also its definition, which includes persons who have "indirectly" participated in hostile acts against the State of Israel. The latter term remains undefined and is therefore open to abuse and inconsistent with the principle of legality.

27. Although it would be improper to suggest that the right to liberty of members of political parties should be any greater than others, the Special Rapporteur urges caution in this area to ensure that counter-terrorism is never used as a means of obfuscating the existence or development of democracy. He notes that 45 of 132 members of the Palestinian Legislative Council have been charged with affiliation with, or membership in, a proscribed organization and are currently detained by Israel; 4 of them are being held in administrative detention.

28. Of the 700 Palestinian children arrested in 2006, 25 were held on administrative detention orders.[23] Article 37 (b) of the Convention on the Rights of the Child requires, inter alia, that the

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[22] As recognized by the Commission on Human Rights in its resolution 2005/39, para 9.

[23] Defence for Children International, Palestine Section, Palestinian Child Political Prisoners 2006 Report, p.1.

detention or imprisonment of a child be used as a measure of last resort and for the shortest appropriate period of time. There are also reports that solitary confinement has been used by prison authorities as a means of encouraging confessions from children, or as a punishment for infractions of prison rules.[24] Rule 67 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice prohibits disciplinary measures against children to include solitary confinement. Furthermore, whereas rule 26 (2) requires child detainees to receive educational care according to their age, it is reported that Hasharon prison, being one of five Israeli prisons at which children are detained, is the only facility providing Palestinian child prisoners with education facilities.[25]

D. Use of military courts

29. Terrorist and security suspects in the West Bank, who may be either civilians or persons directly participating in hostilities, are normally tried before military courts. In its general comment No. 32, the Human Rights Committee emphasized that the trial of civilians in military or special courts could raise serious problems as far as the equitable, impartial and independent administration of justice was concerned. Therefore, the Committee stressed the need that all necessary measures be taken to ensure that such trials are held under conditions which genuinely afford the full guarantees stipulated in article 14. According to the Committee, trials of civilians by military courts should be exceptional, and the jurisdiction of military courts should be limited to military personnel. The exercise of jurisdiction by a military court over civilians not performing military tasks is normally inconsistent with the fair, impartial and independent administration of justice.[26] The Committee has also clearly stated that the right to trial by an independent and impartial tribunal is so central to the due process of law that it is an absolute right that may suffer no exception, and thus not capable of derogation under article 4 of the International Covenant on Civil and Political Rights.[27] In a long line of helpful jurisprudence on the subject, the European Court of Human Rights has spoken of the need for a tribunal to be subjectively free of prejudice or personal bias, and to have an appearance of impartiality from an objective viewpoint.[28] While the Special Rapporteur makes no judgement as to the impartiality or otherwise of individual military judges, the fact remains that military courts have an appearance of a potential lack of independence and impartiality, which on its own brings into question the fairness of trials.

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[24] Ibid., p. 14.

[25] Ibid., pp. 12 and 13.

[26] Human Rights Committee, general comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial) (CCPR/C/GC/32), para. 22. For relevant examples of jurisprudence of the European Court of Human Rights, see *Ocalan v. Turkey* (2005) ECHR 282, para. 115 and *Incal v. Turkey* (1998), ECHR 48, para. 75.

[27] See, for example, *González del Rio v. Peru* (CCPR/C/46/D/263/1987), para. 5.2 and Human Rights Committee general comment No. 29, para. 11 and general comment No. 32, para. 6.

[28] See, for example, *Findlay v. United Kingdom* (1997) ECHR 8, para. 75.

IV. CONSTRUCTION OF A BARRIER IN THE WEST BANK

30. Central to the Israeli strategy in the fight against terrorism, and the suppression of suicide bombings in particular, is the continuing construction of a barrier - partly a wall and partly a fenced zone with multiple physical obstacles - between Israel and certain towns in the West Bank. According to Government interlocutors heard during the visit, the existence of this physical barrier makes terrorist operations more difficult, because they require greater coordination among more people; more opportunities for mistakes to be made are thus created and give more time for the detection and interception of terrorist operations. This, combined with reliance upon human intelligence, detection and other technology, has been credited by the Government as resulting in a marked reduction in the incidence of terrorist acts within the territory of Israel proper, from the height of 213 casualties in 2002 to 11 in 2006. According to the statistics provided by the Government, there has been an 85 per cent decline in the number of suicide attacks and an 80 per cent decline in the number of casualties.

31. Notwithstanding the correlation between the construction of the barrier and the reduction in the number of successful terrorist attacks against Israeli civilians, the barrier is having an enormously negative impact on the enjoyment of human rights by the Palestinian people. A considerable part of the Occupied Palestinian Territory, including towns and villages, is being separated from the rest of the Territory by the barrier. The winding route of the barrier is creating multiple obstacles for movement between even close-by communities within the Occupied Palestinian Territory and establishing a "seam zone" of land between the Green Line and the route of the barrier, representing approximately 10 per cent of the West Bank. The Office for the Coordination of Humanitarian Affairs in the Occupied Palestinian Territory reports a dramatic and continuing deterioration in the socio-economic conditions of many parts of the West Bank since the construction of the barrier.

A. Legality of the barrier and Israeli settlements in the West Bank

32. In its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the International Court of Justice held that the construction of the barrier was contrary to international law, despite the argument that its construction was consistent with the inherent right to self-defence of Israel and with Article 51 of the Charter of the United Nations.[29] The Court determined that Israel was under an obligation to immediately cease the construction of the barrier and to dismantle the structure, and to make reparation for all damage caused by its construction.[30] It is very problematic, in that regard, that the route of the barrier does not follow the Green Line but is largely located within the Occupied Palestinian Territory, capturing on its western side, or within so-called "fingers" extending deep into the Palestinian territory, several Israeli settlements located there.

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[29] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion*, I.C.J. Reports 2004, 136, para. 163 (3) (A).

[30] Ibid., para. 163 (3) (B) and (C).

33. Since the occupation of the West Bank in 1967, Israel has established an extensive system of roads and has improved or expanded existing roads. Although Israel explains that this work was, and continues to be, undertaken out of military needs and to improve infrastructure to the benefit of the Palestinian people, many such roads, such as routes 463 and 466, are built for use by Israelis only, and one cannot disagree with the conclusions of non-governmental organizations that this has been done to benefit and encourage the expansion of Israeli settlements in the West Bank.[31] Between 1997 and 2004, the number of Jewish settlers in the West Bank increased from 152,300 to 232,700, an increase of almost 53 per cent and representing 10 per cent of the entire population of the West Bank (not including East Jerusalem).[32]

34. The Special Rapporteur is troubled by the approach of the Supreme Court of Israel, which has rejected the outcome of the decision of the International Court of Justice and instead accepted the legitimacy and continued construction of the barrier on the basis of military necessity and the need to secure the safety of Israeli settlements in the West Bank. The Supreme Court's decisions have addressed the exact route of the barrier and often ordered changes to it but failed to address the legality of Israeli settlements in the West Bank. The International Court of Justice ruled, in that regard, that the policy applied by Israel since 1977 of establishing settlements in the Occupied Palestinian Territory was contrary to international law.[33] This position is consistent with that taken by the Security Council in response to the establishment of the policy by Israel,[34] and with the principle reflected in article 49 (6) of the Fourth Geneva Convention, which provides that an occupying power "shall not deport or transfer parts of its own civilian population into the territory it occupies".

35. The Special Rapporteur notes that the route of the barrier does not always appear to coincide with the location and protection of Israelis. The wall in Bethlehem, for example (and as affirmed by the Supreme Court), extends through the city to encircle Rachel's Tomb for the purpose of protecting Israeli visitors to the tomb. Furthermore, the route of the barrier in Bethlehem has caused a dramatic collapse in the economy of what was before a relatively prosperous area and centre of commerce for the Palestinian people, and has also resulted in a steep decline in Bethlehem's tourism sector.[35]

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[31] See, for example "Forbidden Roads. The Discriminatory West Bank Road Regime" in B'Tselem (August 2004).

[32] See "Perpetual Limbo. Israel's Freeze on Unification of Palestinian Families in the Occupied Territories", in B'Tselem (July 2006).

[33] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion*, I.C.J. Reports 2004, 136, para. 120.

[34] Security Council resolutions 452 (1979) and 465 (1980), para. 6.

[35] Office for the Coordination of Humanitarian Affairs, *Costs of Conflict: The Changing Face of Bethlehem* (Jerusalem, United Nations, December 2004).

36. The Special Rapporteur heard from Government sources of a long-term plan to replace the current and not yet complete unilaterally-positioned barrier with an agreed international border with a future Palestinian State. Until this is achieved on the basis of genuine negotiations and agreement, the Special Rapporteur emphasizes that no part of the barrier must be treated as a fait accompli or annexation of territory. To do so would amount to an illegal annexation of territory by Israel.

B. Impact of the barrier on the Palestinian people

37. As a physical obstruction, the barrier has an impact on the ability of the people in the West Bank to move from one place to another. Checkpoints at various locations are used for the security screening of people. A feature of these checkpoints is that many are closed without notice, this aimed at disrupting the execution of terrorist attacks. In April and May of 2007, 549 and 537 checkpoints were closed respectively. An average of almost 200 "flying checkpoints" each week were utilized by the Israeli Defense Forces during the same period.[36]

38. Security measures by Israel must not have a disproportionate impact on the lives of ordinary Palestinian people. Two crucial elements are relevant in this regard in order both to comply with the requirements of international human rights and to counteract the experiences by Palestinians of the barrier causing increasing arbitrariness and oppression. There must be a reduction in the level of hardship to people moving inside the Occupied Palestinian Territory. The practical implementation of all security measures, including at checkpoints and terminals, must also be by professional, transparent, accountable and, to the greatest possible extent, civilian means. While the civilianization of such work appears to be an important means of reducing tensions in the practical implementation of such measures, it is essential that there be a high level of accountability and professional training of civilian actors, including training on human rights and humanitarian law. The Special Rapporteur was troubled, for example, by the presence of a contracted security civilian at Qalqiliya terminal, who strolled casually outside the facility with his finger permanently on the trigger of his weapon without any sense of discipline or discretion. The need to secure accountability and full compliance by Israel with its international obligations, including as the occupying power, speaks against privatization as the method by which security measures are transferred from the military to civilians.

39. As a result of closures and the system of permits regulating the movement of people from one area to another, the Palestinian people are adversely affected in their ability to gain access to education; health services, including emergency medical treatment; other social services; and places of employment. Access by ordinary Palestinians to their land and water resources, including through the devastation or separation from villages of agricultural land in the course of erecting the barrier, is also being impeded, in some cases to the point of having a devastating socio-economic impact on communities.

40. Delays at checkpoints have complicated childbirth for Palestinian women. This has resulted in the delivery of children at checkpoints and unattended roadside births, putting at risk the health of both child and mother, and leading to numerous miscarriages and the death of at least five

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[36] Office for the Coordination of Humanitarian Affairs, Closure Update (April 2007).

mothers.[37] These hardships are reported to have contributed to an 8.2 per cent increase in home deliveries.[38] The Special Rapporteur was furthermore troubled to hear of three cases in April 2007 in which Palestinian ambulance drivers are said to have been harassed and beaten at checkpoints in the Jenin area.[39] If true, not only were the civil rights of those individuals violated, as was the right to physical and mental health for all, as guaranteed under article 12 (1) of the International Covenant on Economic, Social and Cultural Rights, but it would also constitute a violation of international humanitarian law norms, which require that medical personnel be respected and protected at all times.

41. As a result of the barrier, Palestinian children encounter significant obstacles in attending or remaining at educational institutions. It also affects the movement of teaching staff, whether this be as a result of the barrier having been erected between "closed" communities and educational facilities, or the difficulties in obtaining special permits from the Israel Defense Forces to enter areas in which educational facilities are present.[40] As reflected in article 50 of the Fourth Geneva Convention, it is the duty of an occupying power to cooperate with national and local authorities to facilitate the proper working of all institutions devoted to the care and education of children. The Special Rapporteur was very troubled by reports of incidents involving attacks by the Israel Defense Forces on students, military raids on schools and the destruction of schools and school property.[41]

42. The permits regime also has an impact on the integrity of family units and the ability of men and women to marry with people outside their own permit zones. The permits regime, and checkpoint closures and procedures, have also had a negative impact on the ability of families to visit those in detention, whether sentenced prisoners or those held in administrative detention.[42]

43. In its advisory opinion on the wall, the International Court of Justice, after having found international humanitarian law, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child applicable in respect of the conduct of Israel in the Occupied Palestinian Territory,

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[37] Henrietta Aswad, "Checkpoints Compound the Risks of Childbirth for Palestinian Woman", 15 May 2007 (available from www.unfpa.org); and World Health Organization internal report, The issue of Palestinian pregnant women giving birth at Israeli checkpoints.

[38] Henrietta Aswad, ibid.

[39] "Abuse of Ambulance Drivers in Jenin Area" (16 April 2007)), available from the Al-Haq website www.alhaq.org.

[40] Defence for Children International, Palestine Section, "Sustained occupation, suspended dreams: an analysis of human rights violations against Palestinian children in 2005", (Ramallah, 2005), pp. 55-58.

[41] Ibid., pp. 58-62.

[42] "Barred from contact: violation of the right to visit Palestinians held in Israeli prisons" in B'Tselem (September 2006).

concluded that various infringements of rights enshrined in those treaties resulting from the wall and its associated regime could not be justified by military exigencies or by the requirements of national security or public order. Hence, the construction of the wall constituted a breach by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.[43] The Special Rapporteur acknowledges that many of the human rights affected by the barrier and associated security measures, such as freedom of movement (article 12 of the International Covenant on Civil and Political Rights) and the right to privacy (art. 17) are subject to permissible limitations. In addition, during a publicly declared state of emergency, they may also be subject to derogations. As various interlocutors informed him of instances of arbitrariness or unprofessional conduct in the implementation of the security measures, and as the route of the barrier continues to breach international law, the Special Rapporteur is nevertheless convinced that the barrier and its associated regime continues to cause effects that violate the international obligations of Israel under both humanitarian law and human rights law. In respect of the Special Rapporteur's own mandate, it is even more important that the barrier and its associated measures are widely experienced by the Palestinians as unlawful, destructive to normal human life, and humiliating. As a consequence, the barrier has counterproductive effects by contributing to conditions that are conducive to the recruitment to terrorism.

V. SITUATION IN GAZA

44. Under the Disengagement Plan Implementation Law 2005, Israel has withdrawn all 21 Jewish settlements from the Gaza Strip. The Disengagement Plan ends, from the perspective of Israel, its occupation of the Gaza Strip and is in furtherance of a two-State solution in the pre-1948 territory of Palestine. While the Special Rapporteur accepts that the level of control by Israel over Gaza may fall short of occupation within the meaning of article 42 of The Hague Regulations, as a territory actually placed under the authority of a hostile army, Israel still exercises a good deal of control over the situation in the territory. With limited exceptions, Israel has sealed the borders of Gaza, and controls the only sea port in its vicinity. It retains a contingent of military personnel on the border between Egypt and Gaza, for the purpose of preventing the smuggling of arms from Egyptian territory into the Gaza Strip. Without the cooperation of Israel, Gaza is thus isolated from international trade routes and from its West Bank neighbours. The Israel Defense Forces also enforce a fishing limit of 6 nautical miles from the shore of Gaza, in marked contrast with the 20 nautical mile fishing limit under the 1995 Oslo Agreements, thus having a severe impact on the fishing industry of Gaza and its economy.[44]

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[43] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion*, I.C.J. Reports 2004, 136, para. 137.

[44] Office for the Coordination of Humanitarian Affairs, "Gaza Fishing: An Industry in Danger" (April 2007).

45. The consequent restriction of movement has resulted in similar consequences as those felt in the West Bank, outlined earlier in this report, particularly heightened in the context of the movement of persons between Gaza and the West Bank. If there is indeed to be a two-State solution in which Gaza and the West Bank are to function as a single State, as envisaged by the General Assembly in its 1948 Partition Plan for Palestine (General Assembly resolution 181 (II) and under the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, an urgent and concerted effort must be made to facilitate the movement of people and goods between the dislocated territories in a manner that has the least possible impact on movement and without the use of an arbitrary and non-reviewable permits regime.

46. The Special Rapporteur is deeply concerned about the recent deterioration of the humanitarian situation in Gaza, particularly following the numerous military interventions of the Israel Defense Forces since disengagement, including the bombing of the Gaza electricity power station on 28 June 2006, which destroyed six transformers responsible for 43 per cent of the total power capacity in Gaza. The Special Rapporteur is cognizant of the security threats arising from Gaza, heightened by recurring factional violence, and the fact that terrorist factions within the territory continue to repeatedly attack civilians in Israel. He nevertheless reminds Israel that international humanitarian law restricts the use of military force, including through the requirement to distinguish between civilians and military objectives.

VI. ISRAELI DEFENSE FORCE OPERATIONS

47. Particularly problematic to counter-terrorist operations in Israel and the Occupied Palestinian Territory is the overlap between armed conflict and policing. The Israeli Defense Force is a conscript armed force, with young soldiers facing a daily dilemma between the preservation of their own lives and the legitimate recognition and targeting of threats. This combination has led to many instances of unprofessional conduct, readily acknowledged by senior military staff and civil servants with whom the Special Rapporteur met. Such conduct can serve to undermine the very role of the Israel Defense Forces in seeking to achieve a sustainable end to terrorist activities. This is most palpably evident in the Israel Defense Forces security screening and search procedures at checkpoints, raising concerns about privacy and non-discrimination, particularly heightened in the case of women and children. The Special Rapporteur regrets that the Government of Israel chose not to share with him existing standing orders concerning searches by the Israel Defense Forces of persons, including those at checkpoints.

A. Use of “human shields”

48. Despite a decision of the Supreme Court of Israel in 2005 banning the use of human shields, the Special Rapporteur received allegations supported by videotape recordings of recent incidents in Nablus and Balata that Palestinians, including children, continue to be exposed to violence during the conduct of Israel Defense Forces operations by either forcing them to enter potentially dangerous buildings ahead of Israeli soldiers or to stand in front of military vehicles to stop the throwing of stones against those vehicles. Such unprofessional conduct may be deeply traumatizing for the individuals in question, in particular children, and has the effect of causing frustration and anger among the Palestinian people.

B. Demolition of houses

49. The Special Rapporteur heard from various interlocutors, including the Office for the Coordination of Humanitarian Affairs in the Occupied Palestinian Territory, of the demolition of housing by Israel. He was told of many such demolitions in response to the construction of houses without a permit or in some other way contrary to building laws, but was troubled to learn of the inconsistent and apparently discriminatory enforcement of such laws, whereby demolition consistently occurs in the case of property owned by Palestinians but rarely in the case of property owned by Israelis. According to reports, in July 2005, the village of Khirbet Tana in Nablus was almost entirely demolished, including an elementary school which had previously had 40 pupils enrolled, leaving only a mosque and a single building standing.[45]

50. As stated by the Human Rights Committee in its concluding observations on the second periodic report of Israel, the demolition of property and houses of families, some of whose members were or are suspected of involvement in terrorist activities or suicide bombings, contravenes the obligation of Israel to ensure without discrimination the right not to be subjected to arbitrary interference with one's home (art. 17), freedom to choose one's residence (art. 12), equality of all persons before the law and equal protection of the law (art. 26), and not to be subject to torture or cruel and inhuman treatment (art. 7). Although the Government's response to this view was that, in the midst of combat and when dictated by operational necessity, Israeli security forces may lawfully destroy structures used by terrorists, the Special Rapporteur remains concerned that the actual practice of the Israel Defense Forces appears to go well beyond such operational needs and does indeed amount to the breaches of the International Covenant on Civil and Political Rights noted by the Human Rights Committee.[46]

C. Targeted killings and the killing of civilians

51. The Special Rapporteur is troubled by the decision of the Supreme Court concerning targeted killings, in which the Court correctly noted that, under international humanitarian law, a person directly participating in hostilities may during armed conflict be a legitimate military target, but where it applied an overly broad and vague explanation of what amounted to direct participation in hostilities and paid insufficient attention to the fact that not every instance of terrorist conduct falls under the law of armed conflict.[47]

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[45] See Office for the Coordination of Humanitarian Affairs, "Costs of conflict: Nablus after five years of conflict" (December 2005).

[46] Comments by the Government of Israel on the concluding observations of the Human Rights Committee (CCPR/CO/78/ISR.Add.1), part III, para. 2.

[47] *Public Committee against Torture in Israel v. The Government of Israel* (HCJ 769/02).

52. The Court nevertheless qualified its position by stating that such recourse must be by way of last resort and that arrest must always be preferred and actively pursued. It also determined that, in every case of a targeted killing, a thorough and independent investigation must be held as to the precision of the identification of the target and the circumstances in which the killing took place. The Special Rapporteur endorses the Court's decision in this regard, as a matter consistent with the right to life and authoritative jurisprudence concerning the establishment of thorough, independent and impartial investigations into the loss of life caused by State agents.[48] He is therefore troubled by reports that such investigations are rare, and, when carried out, are conducted internally, by members of the Israel Defense Forces, with details of such investigations and their findings not made public.[49] As emphasized by the Special Rapporteur on extrajudicial executions, it is essential to ensure that the applicable rules of international human rights and humanitarian law are respected even in the midst of crisis, indeed especially in times of crisis.[50] Furthermore, where violations of law are found to have occurred, adequate reparation must be made.

53. The Special Rapporteur was encouraged to hear from the Israeli Security Agency its position that civilians taking direct part in hostilities may not be attacked if less harmful means, such as arrest and trial, can be employed, consistent with the decision of the Supreme Court. Such an approach, regrettably, does not appear to be borne out by statistics on civilian deaths. A total of 678 Palestinian civilians were killed in 2006, of which 127 were children.[51] Between the start of the intifada in 2000 and the end of 2005, 728 Palestinian children were killed as a result of Israeli military activity in the Occupied Palestinian Territory, representing the highest number of child fatalities at the hand of Israeli forces in any five-year period since the 1967 occupation

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[48] See, for example, *Edwards v. United Kingdom* (1992), ECHR 77.

[49] Office for the Coordination of Humanitarian Affairs, The Humanitarian Monitor (April 2007), p. 4; and, more generally, Al-Haq, "Extrajudicial Killings", Update on Al-Haq's November 2006 background brief on Israel's extrajudicial killings in the Occupied Palestinian Territory (June 2007).

[50] OHCHR press release, "Special Rapporteur on extrajudicial executions calls for accountability for killings in Occupied Palestinian Territory and Israel" (12 July 2006).

[51] The casualties in these figures include deaths caused during the course of Israel Defense Forces operations, artillery shelling, search and arrest campaigns, barrier demonstrations, targeted killings and settler violence. The figures do not include events indirectly related to the occupation of the Occupied Palestinian Territory, such as casualties from unexploded ordnance and the like, or where the circumstances of death remain unclear or are in dispute. See Office for the Coordination of Humanitarian Affairs, *The Humanitarian Monitor* (April 2007), pp. 5-6 and 25 (note 1).

of the West Bank.[52] The Special Rapporteur was alarmed to receive reports of the killing of persons apprehended by Israeli agents in situations where such persons could have been arrested or provided with medical treatment to prevent death.[53]

VII. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

54. The Special Rapporteur is encouraged by the reconsideration by Israel of its derogation from aspects of the International Covenant on Civil and Political Rights, and its invitation to him to comment upon new counter-terrorism legislation currently being drafted. He identifies this cooperative enterprise as one to be commended as an element of best practice. He has, in contrast, also identified serious situations of incompatibility of the country's obligations pertaining to human rights and fundamental freedoms with its counter-terrorism law and practice. Such situations include the prohibition of torture or cruel, inhuman or degrading treatment; the right to life and humanitarian law principles concerning legitimate targeting; the right to liberty and fair trial; and the severe impact of the construction of the barrier in the West Bank and associated measures on the enjoyment of civil, cultural, economic, political and social rights and freedoms in the Occupied Palestinian Territory. Addressing the full range of those situations is imperative, not only to secure compliance by Israel with its international obligations but also to address conditions that may be conducive to recruitment to terrorism.

B. Recommendations

55. **The Special Rapporteur recommends that Israel, in the development of its counter-terrorism legislation, ensure that definitions of terrorism and security suspects are precise and limited to the countering of terrorism and the maintenance of national security, respectively. Definitions surrounding the countering of terrorism should be restricted to the suppression and criminalization of acts of deadly or otherwise serious physical violence against civilians, i.e., members of the general population or segments of it, or the taking of hostages, coupled with the cumulative conditions identified by the Security Council in its resolution 1566 (2004). All legislation, regulations and military orders must comply with the requirements of the principle of legality with regard to accessibility, precision and non-retroactivity. Having achieved those requirements, the enactment by the Knesset of this new legislation should be accompanied by a repeal or revocation of all current counter-terrorism legislation, regulations and military orders. He further recommends that the Incarceration of Unlawful Combatants Law be repealed, without replacement.**

56. **The Special Rapporteur is encouraged by the decision of the Supreme Court of Israel regarding interrogation techniques by the Israeli Security Agency, but recommends that**

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[52] Defence for Children International, Palestine Section, "Sustained occupation, suspended dreams: an analysis of human rights violations against Palestinian children in 2005" (Ramallah, 2005), p. 21.

[53] Al-Haq, "Extrajudicial Killings", Update on Al-Haq's November 2006 background brief on Israel's extrajudicial killings in the Occupied Palestinian Territory (June 2007).

urgent steps be taken to ensure full compliance with that decision and associated international obligations. Since the proper application of the necessity defence under article 34 (11) of the Penal Law cannot validate conduct amounting to torture or cruel, inhuman or degrading treatment, the Special Rapporteur recommends that steps be taken to establish mechanisms by which victims of such conduct are provided with an effective remedy. Given the concerns that the Special Rapporteur has with the independence of the Israeli Security Agency complaints inspector, the non-derogable and peremptory nature of the prohibitions, and the apparent lack of understanding by Israeli Security Agency officers of the parameters of the necessity defence, he further recommends that all complaints of torture or cruel, inhuman or degrading treatment be referred to the Attorney General's office for the immediate filing of criminal charges against the individual interrogator wherever such complaints point to conduct that, if proven, would amount to torture or cruel, inhuman or degrading treatment, and that only the courts may pronounce on the applicability and effect of the necessity defence.

57. **With regard to arrest and detention, the Special Rapporteur recommends that Israel take steps to ensure that all persons are informed of the reasons for their detention at the time of their arrest. He recommends the amendment of the Criminal Procedures (Non-Resident Detainee Suspected of Security Offense) (Temporary Provision) Law 2006 to ensure that security suspects are provided with immediate and continued access to legal counsel and, where appropriate, family visits. In the context of administrative detention, he recommends that the terms "security of the area" and "public security", currently under Military Order 1229, be defined with precision, and that steps be taken, such as the establishment of a panel of security-cleared counsel, to ensure that representations are able to be made to the district court on behalf of a detainee upon the making or extension of administrative detention orders. The practice of military or other courts authorizing administrative detention on the basis of evidence available neither to the detainee nor counsel should be discontinued as incompatible with article 14 (1) of the International Covenant on Civil and Political Rights.**

58. **The Special Rapporteur urges that care be taken to ensure that counter-terrorism law and practice never be used as a means of preventing or undermining the development of democracy in Palestinian territory. He further urges Israel to ensure that the detention or imprisonment of a child be used as a measure of last resort, that solitary confinement never be used by prison authorities as a means of coercion or punishment of children, and that all facilities in which children are detained provide educational care appropriate to the age of each child.**

59. **Given the illegality under international law of the existence and continued development of Jewish settlements in the Occupied Palestinian Territory, the Special Rapporteur recommends that a decision be made immediately to withdraw all such settlements and to replace the still unfinished barrier, extending deep into Palestinian territory, with a security infrastructure that, by its geographical position, respects the Green Line or is otherwise accepted by the Palestinians. During the process of implementing such a decision, the Special Rapporteur recommends urgent action to ensure that the permits regime, the administration of checkpoints, and all other associated measures in the Occupied Palestinian Territory do not have a disproportionate impact on the enjoyment of civil,**

cultural, economic, political and social rights in the territory. He also recommends that security measures be civilianized through means other than their privatization.

60. **The Special Rapporteur urges Israel to respect the rules of international humanitarian law, including the fundamental requirement of distinguishing between civilians and military objectives when resorting to the use of force. This must be the case irrespective of whether Israel is responding to an armed attack from Gaza, Lebanon or elsewhere and whether it classifies the attack as terrorism.**

61. **The Special Rapporteur urges Israel to ensure that any demolition of housing or other destruction of private property conducted as a measure aimed at combating or preventing terrorism is resorted to in strict compliance with international law and is accompanied by adequate reparation. Due to the high emotional impact of such measures easily leading to counterproductive effects in a sustainable fight against terrorism, the Special Rapporteur recommends that the Government of Israel exercise extreme caution in resorting to such measures.**

62. **While acknowledging that military necessity may dictate the deliberate killing of enemy combatants during an armed conflict, the Special Rapporteur recommends that transparent laws and guidelines on the practice of targeted killings be established, and that they be strictly limited to persons directly participating in hostilities and as a means of last resort after all possible measures to apprehend the person have been taken. All such killings must be followed by a thorough and independent investigation as to the accuracy of the identification of the target, whether alternative means were available, and whether the action was undertaken in a manner ensuring that no civilian casualties were caused. The result of such investigations should be made public and, where violations of law are established, adequate reparation made.**
