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Rapport du Conseil des droits de l'homme

Rapport de la mission internationale indépendante d'établissement des faits

Note du Président de l'Assemblée générale

1. Dans sa décision 64/507 du 28 octobre 2009, l'Assemblée générale a décidé d'examiner directement en séance plénière le rapport du Conseil des droits de l'homme sur les travaux de sa douzième session extraordinaire (A/64/53/Add.1).
2. Dans sa résolution S/12/1 figurant dans le rapport susmentionné du Conseil des droits de l'homme, celui-ci a recommandé que l'Assemblée générale examine le rapport de la mission internationale indépendante d'établissement des faits pendant la partie principale de sa soixante-quatrième session.
3. Le Président de la soixante-quatrième session de l'Assemblée générale a l'honneur de transmettre aux États Membres le rapport de la mission internationale indépendante d'établissement des faits (voir annexe).



Annexe

**Rapport de la Mission d'établissement des faits
de l'Organisation des Nations Unies sur le conflit de Gaza***

* Anglais seulement : à paraître sous la cote A/HRC/12/48.

**Report of the United Nations Fact-Finding Mission
on the Gaza Conflict**

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ACRONYMS AND ABBREVIATIONS

ACRI	Association for Civil Rights in Israel
BMC	businessman card
CLA	Coordination and Liaison Administration
CMWU	Coastal Municipalities Water Utility
COGAT	Coordinator of Government Activities in the Territories
DFLP	Democratic Front for the Liberation of Palestine
DIME	dense inert metal explosive
DSS	United Nations Department of Safety and Security
FAO	Food and Agriculture Organization of the United Nations
GIS	General Intelligence Service
HaMoked	Center for the Defense of the Individual
HCC	Humanitarian Coordination Centre
IAF	Israeli air force
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHR	Independent Commission for Human Rights
ICRC	International Committee of the Red Cross
IDF	Israeli Defense Forces
IED	improvised explosive device
IHL	international humanitarian law
IHRL	international human rights law
ILO	International Labour Organization
IOF	Israeli occupation forces
MADA	Palestinian Center for Development and Media Freedoms
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
OCHA	Office for the Coordination of Humanitarian Affairs
OHCHR	Office of the United Nations High Commissioner for Human Rights
PALTRADE	Palestine Trade Center
PCATI	Public Committee against Torture in Israel
PCHR	Palestinian Centre for Human Rights
PFLP	Popular Front for the Liberation of Palestine
PHR-Israel	Physicians for Human Rights – Israel
PLO	Palestine Liberation Organization
PRC	Popular Resistance Committee
PRCS	Palestinian Red Crescent Society
TAWTHEQ	Central Commission for Documentation and Pursuit of Israeli War Criminals
UAV	unmanned aviation vehicle
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNFPA	United Nations Population Fund
UNHCR	Office of the United Nations High Commissioner for Refugees
UNICEF	United Nations Children’s Fund
UNITAR	United Nations Institute for Training and Research

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UNOSAT
UNRWA

Operational Satellite Applications Programme
United Nations Relief and Works Agency for Palestine Refugees in the
Near East

WFP
WHO

World Food Programme
World Health Organization

EXECUTIVE SUMMARY

A. Introduction

1. On 3 April 2009, the President of the Human Rights Council established the United Nations Fact Finding Mission on the Gaza Conflict with the mandate “to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after.”
2. The President appointed Justice Richard Goldstone, former judge of the Constitutional Court of South Africa and former Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, to head the Mission. The other three appointed members were: Professor Christine Chinkin, Professor of International Law at the London School of Economics and Political Science, who was a member of the high-level fact-finding mission to Beit Hanoun (2008); Ms. Hina Jilani, Advocate of the Supreme Court of Pakistan and former Special Representative of the Secretary-General on the situation of human rights defenders, who was a member of the International Commission of Inquiry on Darfur (2004); and Colonel Desmond Travers, a former Officer in Ireland’s Defence Forces and member of the Board of Directors of the Institute for International Criminal Investigations.
3. As is usual practice, the Office of the United Nations High Commissioner for Human Rights (OHCHR) established a secretariat to support the Mission.
4. The Mission interpreted the mandate as requiring it to place the civilian population of the region at the centre of its concerns regarding the violations of international law.
5. The Mission convened for the first time in Geneva between 4 and 8 May 2009. Additionally, the Mission met in Geneva on 20 May, on 4 and 5 July, and between 1 and 4 August 2009. The Mission conducted three field visits: two to the Gaza Strip between 30 May and 6 June, and between 25 June and 1 July 2009; and one visit to Amman on 2 and 3 July 2009. Several staff of the Mission’s secretariat were deployed in Gaza from 22 May to 4 July 2009 to conduct field investigations.
6. Notes verbales were sent to all Member States of the United Nations and United Nations organs and bodies on 7 May 2009. On 8 June 2009, the Mission issued a call for submissions inviting all interested persons and organizations to submit relevant information and documentation to assist in the implementation of its mandate.
7. Public hearings were held in Gaza on 28 and 29 June and in Geneva on 6 and 7 July 2009.
8. The Mission repeatedly sought to obtain the cooperation of the Government of Israel. After numerous attempts had failed, the Mission sought and obtained the assistance of the Government of Egypt to enable it to enter the Gaza Strip through the Rafah crossing.
9. The Mission has enjoyed the support and cooperation of the Palestinian Authority and of the Permanent Observer Mission of Palestine to the United Nations. Due to the lack of cooperation from the Israeli Government, the Mission was unable to meet members of the

Palestinian Authority in the West Bank. The Mission did, however, meet officials of the Palestinian Authority, including a cabinet minister, in Amman. During its visits to the Gaza Strip, the Mission held meetings with senior members of the Gaza authorities and they extended their full cooperation and support to the Mission.

10. Subsequent to the public hearings in Geneva, the Mission was informed that a Palestinian participant, Mr. Muhammad Srour, had been detained by Israeli security forces when returning to the West Bank and became concerned that his detention may have been a consequence of his appearance before the Mission. The Mission is in contact with him and continues to monitor developments.

B. Methodology

11. To implement its mandate, the Mission determined that it was required to consider any actions by all parties that might have constituted violations of international human rights law or international humanitarian law. The mandate also required it to review related actions in the entire Occupied Palestinian Territory and Israel.

12. With regard to temporal scope, the Mission decided to focus primarily on events, actions or circumstances occurring since 19 June 2008, when a ceasefire was agreed between the Government of Israel and Hamas. The Mission has also taken into consideration matters occurring after the end of military operations that constitute continuing human rights and international humanitarian law violations related to or as a consequence of the military operations, up to 31 July 2009.

13. The Mission also analysed the historical context of the events that led to the military operations in Gaza between 27 December 2008 and 18 January 2009 and the links between these operations and overarching Israeli policies vis-à-vis the Occupied Palestinian Territory.

14. The Mission considered that the reference in its mandate to violations committed “in the context” of the December–January military operations required it to include restrictions on human rights and fundamental freedoms relating to Israel's strategies and actions in the context of its military operations.

15. The normative framework for the Mission has been general international law, the Charter of the United Nations, international humanitarian law, international human rights law and international criminal law.

16. This report does not purport to be exhaustive in documenting the very high number of relevant incidents that occurred in the period covered by the Mission’s mandate. Nevertheless, the Mission considers that the report is illustrative of the main patterns of violations. In Gaza, the Mission investigated 36 incidents.

17. The Mission based its work on an independent and impartial analysis of compliance by the parties with their obligations under international human rights and humanitarian law in the context of the recent conflict in Gaza, and on international investigative standards developed by the United Nations.

18. The Mission adopted an inclusive approach to gathering information and seeking views. Information-gathering methods included: (a) the review of reports from different sources; (b) interviews with victims, witnesses and other persons having relevant information; (c) site visits to specific locations in Gaza where incidents had occurred; (d) the analysis of video and photographic images, including satellite imagery; (e) the review of medical reports about injuries to victims; (f) the forensic analysis of weapons and ammunition remnants collected at incident sites; (g) meetings with a variety of interlocutors; (h) invitations to provide information relating to the Mission's investigation requirements; (i) the wide circulation of a public call for written submissions; (j) public hearings in Gaza and in Geneva.

19. The Mission conducted 188 individual interviews. It reviewed more than 300 reports, submissions and other documentation either researched of its own motion, received in reply to its call for submissions and notes verbales or provided during meetings or otherwise, amounting to more than 10,000 pages, over 30 videos and 1,200 photographs.

20. By refusing to cooperate with the Mission, the Government of Israel prevented it from meeting Israeli Government officials, but also from travelling to Israel to meet Israeli victims and to the West Bank to meet Palestinian Authority representatives and Palestinian victims.

21. The Mission conducted field visits, including investigations of incident sites, in the Gaza Strip. This allowed the Mission to observe first-hand the situation on the ground, and speak to many witnesses and other relevant persons.

22. The purpose of the public hearings, which were broadcast live, was to enable victims, witnesses and experts from all sides to the conflict to speak directly to as many people as possible in the region as well as in the international community. The Mission gave priority to the participation of victims and people from the affected communities. The 38 public testimonies covered facts as well as legal and military matters. The Mission had initially intended to hold hearings in Gaza, Israel and the West Bank. However, denial of access to Israel and the West Bank resulted in the decision to hold hearings of participants from Israel and the West Bank in Geneva.

23. In establishing its findings, the Mission sought to rely primarily and whenever possible on information it gathered first-hand. Information produced by others, including reports, affidavits and media reports, was used primarily as corroboration.

24. The Mission's final conclusions on the reliability of the information received were based on its own assessment of the credibility and reliability of the witnesses it met, verifying the sources and the methodology used in the reports and documents produced by others, cross-referencing the relevant material and information, and assessing whether, in all the circumstances, there was sufficient credible and reliable information for the Mission to make a finding in fact.

25. On this basis, the Mission has, to the best of its ability, determined what facts have been established. In many cases it has found that acts entailing individual criminal responsibility have been committed. In all of these cases the Mission has found that there is sufficient information to establish the objective elements of the crimes in question. In almost all of the cases the Mission has also been able to determine whether or not it appears that the acts in question were done

deliberately or recklessly or in the knowledge that the consequence that resulted would result in the ordinary course of events. The Mission has thus referred in many cases to the relevant fault element (*mens rea*). The Mission fully appreciates the importance of the presumption of innocence: the findings in the report do not subvert the operation of that principle. The findings do not attempt to identify the individuals responsible for the commission of offences nor do they pretend to reach the standard of proof applicable in criminal trials.

26. In order to provide the parties concerned with an opportunity to submit additional relevant information and express their position and respond to allegations, the Mission also submitted comprehensive lists of questions to the Government of Israel, the Palestinian Authority and the Gaza authorities in advance of completing its analysis and findings. The Mission received replies from the Palestinian Authority and the Gaza authorities but not from Israel.

C. Facts investigated by the Mission, factual and legal findings

The Occupied Palestinian Territory: the Gaza Strip

1. The blockade

27. The Mission focused (chap. V) on the process of economic and political isolation imposed by Israel on the Gaza Strip, generally referred to as a blockade. The blockade comprises measures such as restrictions on the goods that can be imported into Gaza and the closure of border crossings for people, goods and services, sometimes for days, including cuts in the provision of fuel and electricity. Gaza's economy is further severely affected by the reduction of the fishing zone open to Palestinian fishermen and the establishment of a buffer zone along the border between Gaza and Israel, which reduces the land available for agriculture and industry. In addition to creating an emergency situation, the blockade has significantly weakened the capacities of the population and of the health, water and other public sectors to respond to the emergency created by the military operations.

28. The Mission holds the view that Israel continues to be duty-bound under the Fourth Geneva Convention and to the full extent of the means available to it to ensure the supply of foodstuff, medical and hospital items and other goods to meet the humanitarian needs of the population of the Gaza Strip without qualification.

2. Overview of Israel's military operations in the Gaza Strip and casualties

29. Israel deployed its navy, air force and army in the operation it codenamed "Operation Cast Lead". The military operations in the Gaza Strip included two main phases, the air phase and the air-land phase, and lasted from 27 December 2008 to 18 January 2009. The Israeli offensive began with a week-long air attack, from 27 December until 3 January 2009. The air force continued to play an important role in assisting and covering the ground forces from 3 January to 18 January 2009. The army was responsible for the ground invasion, which began on 3 January 2009, when ground troops entered Gaza from the north and the east. The available information indicates that the Golani, Givati and Paratrooper Brigades and five Armoured Corps Brigades were involved. The navy was used in part to shell the Gaza coast during the operations. Chapter VI also locates the incidents investigated by the Mission, described in chapters VII to XV, in the context of the military operations.

30. Statistics about Palestinians who lost their lives during the military operations vary. Based on extensive field research, non-governmental organizations place the overall number of persons killed between 1,387 and 1,417. The Gaza authorities report 1,444 fatalities. The Government of Israel provides a figure of 1,166. The data provided by non-governmental sources on the percentage of civilians among those killed are generally consistent and raise very serious concerns about the way Israel conducted the military operations in Gaza.

31. According to the Government of Israel, during the military operations there were four Israeli fatalities in southern Israel, of whom three were civilians and one a soldier. They were killed by rocket and mortar attacks by Palestinian armed groups. In addition, nine Israeli soldiers were killed during the fighting inside the Gaza strip, four of whom as a result of friendly fire.

3. Attacks by Israeli forces on government buildings and persons of the Gaza authorities, including police

32. The Israeli armed forces launched numerous attacks against buildings and persons of the Gaza authorities. As far as attacks on buildings are concerned, the Mission examined the Israeli strikes against the Palestinian Legislative Council building and the Gaza main prison (chap. VII). Both buildings were destroyed and can no longer be used. Statements by Israeli Government and armed forces representatives justified the attacks arguing that political and administrative institutions in Gaza are part of the “ Hamas terrorist infrastructure ”. The Mission rejects this position. It finds that there is no evidence that the Legislative Council building and the Gaza main prison made an effective contribution to military action. On the information available to it, the Mission finds that the attacks on these buildings constituted deliberate attacks on civilian objects in violation of the rule of customary international humanitarian law whereby attacks must be strictly limited to military objectives. These facts further indicate the commission of the grave breach of extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly.

33. The Mission examined the attacks against six police facilities, four of them during the first minutes of the military operations on 27 December 2008, resulting in the death of 99 policemen and nine members of the public. Overall, the approximately 240 policemen killed by Israeli forces constitute more than one sixth of the Palestinian casualties. The circumstances of the attacks seem to indicate, and the Government of Israel’s July 2009 report on the military operations confirm, that the policemen were deliberately targeted and killed on the ground that the police, as an institution or a large part of the policemen individually, are, in the Government of Israel’s view, part of the Palestinian military forces in Gaza.

34. To examine whether the attacks against the police were compatible with the principle of distinction between civilian and military objects and persons, the Mission analysed the institutional development of the Gaza police since Hamas took complete control of Gaza in July 2007 and merged the Gaza police with the “ Executive Force ” it had created after its election victory. The Mission finds that, while a great number of the Gaza policemen were recruited among Hamas supporters or members of Palestinian armed groups, the Gaza police were a civilian law-enforcement agency. The Mission also concludes that the policemen killed on 27 December 2008 cannot be said to have been taking a direct part in hostilities and thus did not lose their civilian immunity from direct attack as civilians on this basis. The Mission accepts that there may be individual members of the Gaza police that were at the same time members of

Palestinian armed groups and thus combatants. It concludes, however, that the attacks against the police facilities on the first day of the armed operations failed to strike an acceptable balance between the direct military advantage anticipated (i.e. the killing of those policemen who may have been members of Palestinian armed groups) and the loss of civilian life (i.e. the other policemen killed and members of the public who would inevitably have been present or in the vicinity), and therefore violated international humanitarian law.

4. Obligation on Palestinian armed groups in Gaza to take feasible precautions to protect the civilian population and civilian objects

35. The Mission examined whether and to what extent the Palestinian armed groups violated their obligation to exercise care and take all feasible precautions to protect the civilian population in Gaza from the inherent dangers of the military operations (chap. VIII). The Mission was faced with a certain reluctance by the persons it interviewed in Gaza to discuss the activities of the armed groups. On the basis of the information gathered, the Mission found that Palestinian armed groups were present in urban areas during the military operations and launched rockets from urban areas. It may be that the Palestinian combatants did not at all times adequately distinguish themselves from the civilian population. The Mission found no evidence, however, to suggest that Palestinian armed groups either directed civilians to areas where attacks were being launched or that they forced civilians to remain within the vicinity of the attacks.

36. Although the incidents investigated by the Mission did not establish the use of mosques for military purposes or to shield military activities, it cannot exclude that this might have occurred in other cases. The Mission did not find any evidence to support the allegations that hospital facilities were used by the Gaza authorities or by Palestinian armed groups to shield military activities or that ambulances were used to transport combatants or for other military purposes. On the basis of its own investigations and the statements by United Nations officials, the Mission excludes that Palestinian armed groups engaged in combat activities from United Nations facilities that were used as shelters during the military operations. The Mission cannot, however, discount the possibility that Palestinian armed groups were active in the vicinity of such United Nations facilities and hospitals. While the conduct of hostilities in built-up areas does not, of itself, constitute a violation of international law, Palestinian armed groups, where they launched attacks close to civilian or protected buildings, unnecessarily exposed the civilian population of Gaza to danger.

5. Obligation on Israel to take feasible precautions to protect the civilian population and civilian objects in Gaza

37. The Mission examined how the Israeli armed forces discharged their obligation to take all feasible precautions to protect the civilian population of Gaza, including particularly the obligation to give effective advance warning of attacks (chap. IX). The Mission acknowledges the significant efforts made by Israel to issue warnings through telephone calls, leaflets and radio broadcasts, and accepts that in some cases, particularly when the warnings were sufficiently specific, they encouraged residents to leave an area and get out of harm's way. However, the Mission also notes factors that significantly undermined the effectiveness of the warnings issued. These include the lack of specificity and thus credibility of many pre-recorded phone messages and leaflets. The credibility of instructions to move to city centres for safety was also diminished by the fact that the city centres themselves had been the subject of intense attacks during the air

phase of the military operations. The Mission also examined the practice of dropping lighter explosives on roofs (so-called roof knocking). It concludes that this technique is not effective as a warning and constitutes a form of attack against the civilians inhabiting the building. Finally, the Mission stresses that the fact that a warning was issued does not relieve commanders and their subordinates of taking all other feasible measures to distinguish between civilians and combatants.

38. The Mission also examined the precautions taken by the Israeli armed forces in the context of three specific attacks they launched. On 15 January 2009, the field office compound of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) in Gaza City came under shelling with high explosive and white phosphorous munitions. The Mission notes that the attack was extremely dangerous, as the compound offered shelter to between 600 and 700 civilians and contained a huge fuel depot. The Israeli armed forces continued their attack over several hours despite having been fully alerted to the risks they created. The Mission concludes that the Israeli armed forces violated the requirement under customary international law to take all feasible precautions in the choice of means and method of attack with a view to avoiding and in any event minimizing incidental loss of civilian life, injury to civilians and damage to civilian objects.

39. The Mission also finds that, on the same day, the Israeli armed forces directly and intentionally attacked al-Quds hospital in Gaza City and the adjacent ambulance depot with white phosphorous shells. The attack caused fires which took a whole day to extinguish and caused panic among the sick and wounded who had to be evacuated. The Mission finds that no warning was given at any point of an imminent strike. On the basis of its investigation, the Mission rejects the allegation that fire was directed at the Israeli armed forces from within the hospital.

40. The Mission also examined the intense artillery attacks, again including white phosphorous munitions, on al-Wafa hospital in eastern Gaza City, a facility for patients receiving long-term care and suffering from particularly serious injuries. On the basis of the information gathered, the Mission found a violation of the prohibition of attacks on civilian hospitals in both cases. The Mission also highlights that the warnings given by leaflets and pre-recorded phone messages in the case of al-Wafa hospital demonstrate the complete ineffectiveness of certain kinds of routine and generic warnings.

6. Indiscriminate attacks by Israeli forces resulting in the loss of life and injury to civilians

41. The Mission examined the mortar shelling of al-Fakhura junction in Jabaliyah next to a UNRWA school, which, at the time, was sheltering more than 1,300 people (chap. X). The Israeli armed forces launched at least four mortar shells. One landed in the courtyard of a family home, killing 11 people assembled there. Three other shells landed on al-Fakhura Street, killing at least a further 24 people and injuring as many as 40. The Mission examined in detail statements by Israeli Government representatives alleging that the attack was launched in response to a mortar attack from an armed Palestinian group. While the Mission does not exclude that this may have been the case, it considers the credibility of Israel's position damaged by the series of inconsistencies, contradictions and factual inaccuracies in the statements justifying the attack.

42. In drawing its legal conclusions on the attack on al-Fakhura junction, the Mission recognizes that, for all armies, decisions on proportionality, weighing the military advantage to be gained against the risk of killing civilians, will present very genuine dilemmas in certain cases. The Mission does not consider this to be such a case. The firing of at least four mortar shells to attempt to kill a small number of specified individuals in a setting where large numbers of civilians were going about their daily business and 1,368 people were sheltering nearby cannot meet the test of what a reasonable commander would have determined to be an acceptable loss of civilian life for the military advantage sought. The Mission thus considers the attack to have been indiscriminate, in violation of international law, and to have violated the right to life of the Palestinian civilians killed in these incidents.

7. Deliberate attacks against the civilian population

43. The Mission investigated 11 incidents in which the Israeli armed forces launched direct attacks against civilians with lethal outcome (chap. XI). The facts in all but one of the attacks indicate no justifiable military objective. The first two are attacks on houses in the al-Samouni neighbourhood south of Gaza City, including the shelling of a house in which Palestinian civilians had been forced to assemble by the Israeli armed forces. The following group of seven incidents concern the shooting of civilians while they were trying to leave their homes to walk to a safer place, waving white flags and, in some of the cases, following an injunction from the Israeli forces to do so. The facts gathered by the Mission indicate that all the attacks occurred under circumstances in which the Israeli armed forces were in control of the area and had previously entered into contact with or had at least observed the persons they subsequently attacked, so that they must have been aware of their civilian status. In the majority of these incidents, the consequences of the Israeli attacks against civilians were aggravated by their subsequent refusal to allow the evacuation of the wounded or to permit access to ambulances.

44. These incidents indicate that the instructions given to the Israeli armed forces moving into Gaza provided for a low threshold for the use of lethal fire against the civilian population. The Mission found strong corroboration of this trend in the testimonies of Israeli soldiers collected in two publications it reviewed.

45. The Mission further examined an incident in which a mosque was targeted with a missile during early evening prayers, resulting in the death of 15 people, and an attack with flechette munitions on a crowd of family and neighbours at a condolence tent, killing five. The Mission finds that both attacks constitute intentional attacks against the civilian population and civilian objects.

46. From the facts ascertained in all the above cases, the Mission finds that the conduct of the Israeli armed forces constitutes grave breaches of the Fourth Geneva Convention in respect of wilful killings and wilfully causing great suffering to protected persons and, as such, give rise to individual criminal responsibility. It also finds that the direct targeting and arbitrary killing of Palestinian civilians is a violation of the right to life.

47. The last incident concerns the bombing of a house resulting in the killing of 22 family members. Israel's position in this case is that there was an "operational error" and that the intended target was a neighbouring house storing weapons. On the basis of its investigation, the Mission expresses significant doubts about the Israeli authorities' account of the incident. The

Mission concludes that, if a mistake was indeed made, there could not be said to be a case of wilful killing. State responsibility of Israel for an internationally wrongful act would, however, remain.

8. The use of certain weapons

48. Based on its investigation of incidents involving the use of certain weapons such as white phosphorous and flechette missiles, the Mission, while accepting that white phosphorous is not at this stage proscribed under international law, finds that the Israeli armed forces were systematically reckless in determining its use in built-up areas. Moreover, doctors who treated patients with white phosphorous wounds spoke about the severity and sometimes untreatable nature of the burns caused by the substance. The Mission believes that serious consideration should be given to banning the use of white phosphorous in built-up areas. As to flechettes, the Mission notes that they are an area weapon incapable of discriminating between objectives after detonation. They are, therefore, particularly unsuitable for use in urban settings where there is reason to believe civilians may be present.

49. While the Mission is not in a position to state with certainty that so-called dense inert metal explosive (DIME) munitions were used by the Israeli armed forces, it did receive reports from Palestinian and foreign doctors who had operated in Gaza during the military operations of a high percentage of patients with injuries compatible with their impact. DIME weapons and weapons armed with heavy metal are not prohibited under international law as it currently stands, but do raise specific health concerns. Finally, the Mission received allegations that depleted and non-depleted uranium were used by the Israeli armed forces in Gaza. These allegations were not further investigated by the Mission.

9. Attacks on the foundations of civilian life in Gaza: destruction of industrial infrastructure, food production, water installations, sewage treatment plants and housing

50. The Mission investigated several incidents involving the destruction of industrial infrastructure, food production, water installations, sewage treatment plants and housing (chap. XIII). Already at the beginning of the military operations, el-Bader flour mill was the only flour mill in the Gaza Strip still operating. The flour mill was hit by a series of air strikes on 9 January 2009, after several false warnings had been issued on previous days. The Mission finds that its destruction had no military justification. The nature of the strikes, in particular the precise targeting of crucial machinery, suggests that the intention was to disable the factory's productive capacity. From the facts it ascertained, the Mission finds that there has been a violation of the grave breaches provisions of the Fourth Geneva Convention. Unlawful and wanton destruction which is not justified by military necessity amounts to a war crime. The Mission also finds that the destruction of the mill was carried out to deny sustenance to the civilian population, which is a violation of customary international law and may constitute a war crime. The strike on the flour mill furthermore constitutes a violation of the right to adequate food and means of subsistence.

51. The chicken farms of Mr. Sameh Sawafeary in the Zeytoun neighbourhood south of Gaza City reportedly supplied over 10 per cent of the Gaza egg market. Armoured bulldozers of the Israeli armed forces systematically flattened the chicken coops, killing all 31,000 chickens inside, and destroyed the plant and material necessary for the business. The Mission concludes

that this was a deliberate act of wanton destruction not justified by any military necessity and draws the same legal conclusions as in the case of the destruction of the flour mill.

52. The Israeli armed forces also carried out a strike against a wall of one of the raw sewage lagoons of the Gaza wastewater treatment plant, which caused the outflow of more than 200,000 cubic metres of raw sewage onto neighbouring farmland. The circumstances of the strike suggest that it was deliberate and premeditated. The Namar wells complex in Jabaliyah consisted of two water wells, pumping machines, a generator, fuel storage, a reservoir chlorination unit, buildings and related equipment. All were destroyed by multiple air strikes on the first day of the Israeli aerial attack. The Mission considers it unlikely that a target the size of the Namar wells could have been hit by multiple strikes in error. It found no grounds to suggest that there was any military advantage to be had by hitting the wells and noted that there was no suggestion that Palestinian armed groups had used the wells for any purpose. Considering that the right to drinking water is part of the right to adequate food, the Mission makes the same legal findings as in the case of the el-Bader flour mill.

53. During its visits to the Gaza Strip, the Mission witnessed the extent of the destruction of residential housing caused by air strikes, mortar and artillery shelling, missile strikes, the operation of bulldozers and demolition charges. In some cases, residential neighbourhoods were subjected to air-launched bombing and to intensive shelling apparently in the context of the advance of Israeli ground forces. In others, the facts gathered by the Mission strongly suggest that the destruction of housing was carried out in the absence of any link to combat engagements with Palestinian armed groups or any other effective contribution to military action. Combining the results of its own fact-finding on the ground with UNOSAT satellite imagery and the published testimonies of Israeli soldiers, the Mission concludes that, in addition to the extensive destruction of housing for so-called operational necessity during their advance, the Israeli armed forces engaged in another wave of systematic destruction of civilian buildings during the last three days of their presence in Gaza, aware of their imminent withdrawal. The conduct of the Israeli armed forces in this respect violated the principle of distinction between civilian and military objects and amounted to the grave breach of “extensive destruction... of property, not justified by military necessity and carried out unlawfully and wantonly”. The Israeli armed forces furthermore violated the right to adequate housing of the families concerned.

54. The attacks on industrial facilities, food production and water infrastructure investigated by the Mission are part of a broader pattern of destruction, which includes the destruction of the only cement-packaging plant in Gaza (the Atta Abu Jubbah plant), the Abu Eida factories for ready-mix concrete, further chicken farms and the al-Wadiyah Group’s food and drinks factories. The facts ascertained by the Mission indicate that there was a deliberate and systematic policy on the part of the Israeli armed forces to target industrial sites and water installations.

10. The use of Palestinian civilians as human shields

55. The Mission investigated four incidents in which the Israeli armed forces coerced Palestinian civilian men at gunpoint to take part in house searches during the military operations (chap. XIV). The men were blindfolded and handcuffed as they were forced to enter houses ahead of the Israeli soldiers. In one of the incidents, Israeli soldiers repeatedly forced a man to enter a house in which Palestinian combatants were hiding. Published testimonies of Israeli soldiers who took part in the military operations confirm the continuation of this practice, despite

clear orders from Israel's High Court to the armed forces to put an end to it and repeated public assurances from the armed forces that the practice had been discontinued. The Mission concludes that this practice amounts to the use of Palestinian civilians as human shields and is therefore prohibited by international humanitarian law. It puts the right to life of the civilians at risk in an arbitrary and unlawful manner and constitutes cruel and inhuman treatment. The use of human shields also is a war crime. The Palestinian men used as human shields were questioned under threat of death or injury to extract information about Hamas, Palestinian combatants and tunnels. This constitutes a further violation of international humanitarian law.

11. Deprivation of liberty: Gazans detained during the Israeli military operations of 27 December 2008 to 18 January 2009

56. During the military operations, the Israeli armed forces rounded up large numbers of civilians and detained them in houses and open spaces in Gaza and, in the case of many Palestinian men, also took them to detention facilities in Israel. In the cases investigated by the Mission, the facts gathered indicate that none of the civilians was armed or posed any apparent threat to the Israeli soldiers. Chapter XV of the report is based on the Mission's interviews with Palestinian men who were detained, as well as on its review of other relevant material, including interviews with relatives and statements from other victims submitted to it.

57. From the facts gathered, the Mission finds that numerous violations of international humanitarian law and human rights law were committed in the context of these detentions. Civilians, including women and children, were detained in degrading conditions, deprived of food, water and access to sanitary facilities, and exposed to the elements in January without any shelter. The men were handcuffed, blindfolded and repeatedly made to strip, sometimes naked, at different stages of their detention.

58. In the al-Atatra area in north-western Gaza, Israeli troops had dug out sandpits in which Palestinian men, women and children were detained. Israeli tanks and artillery positions were located inside the sandpits and around them and fired from next to the detainees.

59. The Palestinian men who were taken to detention facilities in Israel were subjected to degrading conditions of detention, harsh interrogation, beatings and other physical and mental abuse. Some of them were charged with being unlawful combatants. Those interviewed by the Mission were released after the proceedings against them had apparently been discontinued.

60. In addition to arbitrary deprivation of liberty and violation of due process rights, the cases of the detained Palestinian civilians highlight a common thread of the interaction between Israeli soldiers and Palestinian civilians which also emerged clearly in many cases discussed elsewhere in the report: continuous and systematic abuse, outrages on personal dignity, humiliating and degrading treatment contrary to fundamental principles of international humanitarian law and human rights law. The Mission concludes that this treatment constitutes the infliction of a collective penalty on these civilians and amounts to measures of intimidation and terror. Such acts are grave breaches of the Geneva Conventions and constitute a war crime.

12. Objectives and strategy of Israel's military operations in Gaza

61. The Mission reviewed available information on the planning of the Israeli military operations in Gaza, on the advanced military technology available to the Israeli armed forces and on their training in international humanitarian law (chap. XVI). According to official Government information, the Israeli armed forces have an elaborate legal advice and training system in place, which seeks to ensure knowledge of the relevant legal obligations and support to commanders for compliance in the field. The Israeli armed forces possess very advanced hardware and are also a market leader in the production of some of the most advanced pieces of military technology available, including unmanned aviation vehicles (UAVs). They have a very significant capacity for precision strikes by a variety of methods, including aerial and ground launches. Taking into account the ability to plan, the means to execute plans with the most developed technology available, and statements by the Israeli military that almost no errors occurred, the Mission finds that the incidents and patterns of events considered in the report are the result of deliberate planning and policy decisions.

62. The tactics used by the Israeli armed forces in the Gaza offensive are consistent with previous practices, most recently during the Lebanon war in 2006. A concept known as the Dahiya doctrine emerged then, involving the application of disproportionate force and the causing of great damage and destruction to civilian property and infrastructure, and suffering to civilian populations. The Mission concludes from a review of the facts on the ground that it witnessed for itself that what was prescribed as the best strategy appears to have been precisely what was put into practice.

63. In the framing of Israeli military objectives with regard to the Gaza operations, the concept of Hamas' "supporting infrastructure" is particularly worrying as it appears to transform civilians and civilian objects into legitimate targets. Statements by Israeli political and military leaders prior to and during the military operations in Gaza indicate that the Israeli military conception of what was necessary in a war with Hamas viewed disproportionate destruction and creating maximum disruption in the lives of many people as a legitimate means to achieve not only military but also political goals.

64. Statements by Israeli leaders to the effect that the destruction of civilian objects would be justified as a response to rocket attacks ("destroy 100 homes for every rocket fired") indicate the possibility of resorting to reprisals. The Mission is of the view that reprisals against civilians in armed hostilities are contrary to international humanitarian law.

13. The impact of the military operations and of the blockade on the people of Gaza and their human rights

65. The Mission examined the combined impact of the military operations and of the blockade on the Gaza population and its enjoyment of human rights. The economy, employment opportunities and family livelihoods were already severely affected by the blockade when the Israeli offensive began. Insufficient supply of fuel for electricity generation had a negative impact on industrial activity, on the operation of hospitals, on water supply to households and on sewage treatment. Import restrictions and the ban on all exports from Gaza affected the industrial sector and agricultural production. Unemployment levels and the percentage of the population living in poverty or deep poverty were rising.

66. In this precarious situation, the military operations destroyed a substantial part of the economic infrastructure. As many factories were targeted and destroyed or damaged, poverty, unemployment and food insecurity further increased dramatically. The agricultural sector similarly suffered from the destruction of farmland, water wells and fishing boats during the military operations. The continuation of the blockade impedes the reconstruction of the economic infrastructure that was destroyed.

67. The razing of farmland and the destruction of greenhouses are expected to further worsen food insecurity despite the increased quantities of food items allowed into Gaza since the beginning of the military operations. Dependence on food assistance increases. Levels of stunting and thinness in children and of anaemia prevalence in children and pregnant women were worrying even before the military operations. The hardship caused by the extensive destruction of shelter (the United Nations Development Programme reported 3,354 houses completely destroyed and 11,112 partially damaged) and the resulting displacement particularly affects children and women. The destruction of water and sanitation infrastructure (such as the destruction of the Namar wells and the attack against the water treatment plant described in chapter XIII) aggravated the pre-existing situation. Even before the military operations, 80 per cent of the water supplied in Gaza did not meet the World Health Organization's standards for drinking water. The discharge of untreated or partially treated wastewater into the sea is a further health hazard worsened by the military operations.

68. The military operations and resulting casualties subjected the beleaguered Gaza health sector to additional strain. Hospitals and ambulances were targeted by Israeli attacks. Patients with chronic health conditions could not be given priority in hospitals faced with an influx of patients with life-threatening injuries. Patients injured during the hostilities were often discharged quickly to free beds. The long-term health impact of these early discharges, as well as of weapons containing substances such as tungsten and white phosphorous, remains a source of concern. While the exact number of people who will suffer permanent disabilities is still unknown, the Mission understands that many persons who sustained traumatic injuries during the conflict still face the risk of permanent disability owing to complications and inadequate follow-up and physical rehabilitation.

69. The number of persons suffering from mental health problems is also bound to increase. The Mission investigated a number of incidents in which adults and children witnessed the killing of loved ones. Doctors of the Gaza Community Mental Health Programme gave information to the Mission on psychosomatic disorders, on a widespread state of alienation in the population and on "numbness" as a result of severe loss. They told the Mission that these conditions were in turn likely to increase the readiness to embrace violence and extremism. They also told the Mission that 20 per cent of children in the Gaza Strip suffer from post-traumatic stress disorders.

70. Children's psychological learning difficulties are compounded by the impact of the blockade and the military operations on the education infrastructure. Some 280 schools and kindergartens were destroyed in a situation in which restrictions on the importation of construction materials meant that many school buildings were already in serious need of repair.

71. The Mission's attention was also drawn to the particular manner in which women were affected by the military operations. The cases of women interviewed by the Mission in Gaza

dramatically illustrate the suffering caused by the feeling of inability to provide children with the care and security they need. Women's responsibility for the household and the children often forces them to conceal their own sufferings, resulting in their issues remaining unaddressed. The number of women who are the sole breadwinners increased, but their employment opportunities remain significantly inferior to men's. The military operations and increased poverty add to the potential for conflicts in the family and between widows and their in-laws.

72. The Mission acknowledges that the supply of humanitarian goods, particularly foodstuffs, allowed into Gaza by Israel temporarily increased during the military operations. The level of goods allowed into Gaza before the military operations was, however, insufficient to meet the needs of the population even before hostilities started, and has again decreased since the end of the military operations. From the facts ascertained by it, the Mission believes that Israel has violated its obligation to allow free passage of all consignments of medical and hospital objects, food and clothing (article 23 of the Fourth Geneva Convention). The Mission also finds that Israel violated specific obligations which it has as the occupying Power and which are spelled out in the Fourth Geneva Convention, such as the duty to maintain medical and hospital establishments and services and to agree to relief schemes if the occupied territory is not well supplied.

73. The Mission also concludes that in the destruction by the Israeli armed forces of private residential houses, water wells, water tanks, agricultural land and greenhouses there was a specific purpose of denying sustenance to the population of the Gaza Strip. The Mission finds that Israel violated its duty to respect the right of the Gaza population to an adequate standard of living, including access to adequate food, water and housing. The Mission, moreover, finds violations of specific human rights provisions protecting children, particularly those who are victims of armed conflict, women and the disabled.

74. The conditions of life in Gaza, resulting from deliberate actions of the Israeli armed forces and the declared policies of the Government of Israel – as they were presented by its authorized and legitimate representatives – with regard to the Gaza Strip before, during and after the military operation, cumulatively indicate the intention to inflict collective punishment on the people of the Gaza Strip in violation of international humanitarian law.

75. Finally, the Mission considered whether the series of acts that deprive Palestinians in the Gaza Strip of their means of sustenance, employment, housing and water, that deny their freedom of movement and their right to leave and enter their own country, that limit their access to courts of law and effective remedies could amount to persecution, a crime against humanity. From the facts available to it, the Mission is of the view that some of the actions of the Government of Israel might justify a competent court finding that crimes against humanity have been committed.

14. The continuing detention of Israeli soldier Gilad Shalit

76. The Mission notes the continued detention of Gilad Shalit, a member of the Israeli armed forces, captured in 2006 by a Palestinian armed group. In reaction to his capture, the Israeli Government ordered a number of attacks against infrastructure in the Gaza Strip and Palestinian Authority offices as well as the arrest of eight Palestinian Government ministers and 26 members of the Palestinian Legislative Council. The Mission heard testimonies indicating that, during the

military operations of December 2008 – January 2009, Israeli soldiers questioned captured Palestinians about the whereabouts of Gilad Shalit. Gilad Shalit's father, Noam Shalit, appeared before the Mission at the public hearing held in Geneva on 6 July 2009.

77. The Mission is of the opinion that, as a soldier who belongs to the Israeli armed forces and who was captured during an enemy incursion into Israel, Gilad Shalit meets the requirements for prisoner-of-war status under the Third Geneva Convention. As such, he should be protected, treated humanely and be allowed external communication as appropriate according to that Convention. The International Committee of the Red Cross (ICRC) should be allowed to visit him without delay. Information about his condition should also be provided promptly to his family.

78. The Mission is concerned by declarations made by various Israeli officials who have indicated the intention of maintaining the blockade of the Gaza Strip until the release of Gilad Shalit. The Mission is of the opinion that this would constitute collective punishment of the civilian population of the Gaza Strip.

15. Internal violence and targeting of Fatah affiliates by security services under the control of the Gaza authorities

79. The Mission obtained information about violence against political opponents by the security services that report to the Gaza authorities. These included the killing of a number of Gaza residents between the beginning of the Israeli military operations and 27 February. Among these were some detainees who had been at al-Saraya detention facility on 28 December and who had fled following the Israeli aerial attack. Not all those killed after escaping detention were Fatah affiliates, detained for political reasons, or charged with collaborating with the enemy. Some of the escapees had been convicted of serious crimes, such as drug-dealing or murder, and had been sentenced to death. The Mission was informed that the movement of many Fatah members was restricted during Israel's military operations in Gaza and that many were put under house arrest. According to the Gaza authorities, arrests were made only after the end of the Israeli military operations and only in relation to criminal acts and to restore public order.

80. The Mission gathered first-hand information on five cases of Fatah affiliates detained, killed or subject to physical abuse by members of the security forces or armed groups in Gaza. In most cases those abducted from their homes or otherwise detained were reportedly not accused of offences related to specific incidents, but rather targeted because of their political affiliation. When charges were laid, these were always linked to suspected political activities. The testimonies of witnesses and the reports provided by international and domestic human rights organizations bear striking similarities and indicate that these attacks were not randomly executed, but constituted part of a pattern of organized violence directed mainly against Fatah affiliates and supporters. The Mission finds that such actions constitute serious violations of human rights and are not consistent with either the Universal Declaration of Human Rights or the Palestinian Basic Law.

The Occupied Palestinian Territory: the West Bank, including East Jerusalem

81. The Mission considered developments in Gaza and the West Bank as closely interrelated, and analysed both to reach an informed understanding of and to report on issues within its mandate.

82. A consequence of Israel's non-cooperation with the Mission was that the Mission was unable to visit the West Bank to investigate alleged violations of international law there. However, the Mission has received many oral and written reports and other relevant materials from Palestinian, Israeli and international human rights organizations and institutions. In addition, the Mission has met representatives of human rights organizations, members of the Palestinian legislature and community leaders. It heard experts, witnesses and victims at the public hearings, interviewed affected individuals and witnesses, and reviewed video and photographic material.

1. Treatment of Palestinians in the West Bank by Israeli security forces, including use of excessive or lethal force during demonstrations

83. Various witnesses and experts informed the Mission of a sharp rise in the use of force by the Israeli security forces against Palestinians in the West Bank from the beginning of the Israeli operations in Gaza (chap. XX). A number of protestors were killed by Israeli forces during Palestinian demonstrations, including in support of the Gaza population under attack, and scores were injured. The level of violence used in the West Bank during the time of the operation in Gaza was sustained also after the operation.

84. Of particular concern to the Mission were allegations of the use of unnecessary, lethal force by Israeli security forces, the use of live ammunitions, and the provision in the Israeli armed forces "open fire regulations" of different rules to deal with disturbances where only Palestinians are present and those where Israelis are present. This raises serious concern with regard to discriminatory policies vis-à-vis Palestinians. Eyewitnesses also reported to the Mission on the use of sniper fire in the context of crowd control. Witnesses spoke of the markedly different atmosphere they encountered in the confrontation with the soldiers and border police during demonstrations in which all checks and balances had been removed. Several witnesses told the Mission that during the operation in Gaza, the sense in the West Bank was one of a "free for all", where anything was permitted.

85. Little if any action is taken by the Israeli authorities to investigate, prosecute and punish violence against Palestinians, including killings, by settlers and members of the security forces, resulting in a situation of impunity. The Mission concludes that Israel has failed to fulfil its obligations to protect the Palestinians from violence by private individuals under both international human rights law and international humanitarian law.

2. Detention of Palestinians in Israeli prisons

86. It is estimated that, since the beginning of the occupation, approximately 700,000 Palestinian men, women and children have been detained by Israel. According to estimates, as at 1 June 2009, there were approximately 8,100 Palestinian "political prisoners" in detention in Israel, including 60 women and 390 children. Most of these detainees are charged or convicted

by the Israeli military court system that operates for Palestinians in the West Bank and under which due process rights for Palestinians are severely limited. Many are held in administrative detention and some under the Israeli “Unlawful Combatants Law”.

87. The Mission focused on a number of issues in relation to Palestinian detainees that in its view are linked to the December-January Israeli military operations in Gaza or their context.

88. Legal measures since Israel’s disengagement from Gaza in 2005 have resulted in differential treatment for Gazan detainees. A 2006 law altered due process guarantees and is applied only to Palestinian suspects, the overwhelming majority of whom are from Gaza, according to Israeli Government sources. The ICRC Family Visits Programme in the Gaza Strip was suspended in 2007, barring all means of communication between Gazan prisoners and the outside world.

89. During the Israeli military operations in Gaza, the number of children detained by Israel was higher than in the same period in 2008. Many children were reportedly arrested on the street and/or during demonstrations in the West Bank. The number of child detainees continued to be high in the months following the end of the operations, accompanied by reports of abuses by Israeli security forces.

90. A feature of Israel’s detention practice vis-à-vis the Palestinians since 2005 has been the arrest of Hamas affiliates. A few months before the elections for the Palestinian Legislative Council in 2005, Israel arrested numerous persons who had been involved in municipal or Legislative Council elections. Following the capture by Palestinian armed groups of Israeli soldier Gilad Shalit in June 2006, the Israeli armed forces arrested some 65 members of the Legislative Council, mayors and ministers, mostly Hamas members. All were held at least two years, generally in inadequate conditions. Further arrests of Hamas leaders were conducted during the military operations in Gaza. The detention of members of the Legislative Council has meant that it has been unable to function and exercise its legislative and oversight function over the Palestinian executive.

91. The Mission finds that these practices have resulted in violations of international human rights and humanitarian law, including the prohibition of arbitrary detention, the right to equal protection under the law and not to be discriminated based on political beliefs and the special protections to which children are entitled. The Mission also finds that the detention of members of the Legislative Council may amount to collective punishment contrary to international humanitarian law.

3. Restrictions on freedom of movement in the West Bank

92. In the West Bank, Israel has long imposed a system of restrictions on movement. Movement is restricted by a combination of physical obstacles, such as roadblocks, checkpoints and the Wall, and administrative measures, such as identity cards, permits, assigned residence, laws on family reunification, and policies on the right to enter from abroad and the right of return for refugees. Palestinians are denied access to areas expropriated for the building of the Wall and its infrastructure, for use by settlements, buffer zones, military bases and military training zones, and the roads built to connect these places. Many of these roads are “Israeli only” and forbidden for Palestinian use. Tens of thousands of Palestinians today are subject to a travel ban imposed

by Israel, preventing them from travelling abroad. A number of witnesses and experts invited by the Mission to meet in Amman and participate in the hearings in Geneva could not meet the Mission owing to this travel ban.

93. The Mission has received reports that, during the Israeli offensive in Gaza, restrictions on movement in the West Bank were tightened. Israel imposed a “closure” on the West Bank for several days. In addition, there were more checkpoints in the West Bank, including in East Jerusalem, for the duration of the operation. Most of these were so-called flying checkpoints. In January 2009, several areas of the West Bank between the Wall and the Green Line were declared “closed military areas”.

94. During and following the operations in Gaza, Israel tightened its hold on the West Bank by increasing expropriations, house demolitions and demolition orders, granting more permits for homes built in settlements and intensifying the exploitation of the natural resources in the West Bank. Following the operations in Gaza, Israel has amended the regulations which determine the ability of persons with “Gaza ID” to move to the West Bank and vice versa, further entrenching the separation between the people of the West Bank and Gaza.

95. Israel’s Ministry of Housing and Planning is planning a further 73,000 settlement homes in the West Bank. The building of 15,000 of these homes has already been approved and, if all the plans are realized, the number of settlers in the Occupied Palestinian Territory will double.

96. The Mission believes that the restrictions on movement and access to which Palestinians in the West Bank are subject, in general, and the tighter restrictions during and, to some extent, after the military operations in Gaza, in particular, are disproportionate to any military objective served. In addition, the Mission is concerned about the steps taken recently to formalize the separation between Gaza and the West Bank, and as such between two parts of the Occupied Palestinian Territory.

4. Internal violence and targeting of Hamas supporters by the Palestinian Authority, restrictions on freedom of expression and assembly

97. The Mission has received allegations of violations relevant to its mandate committed by the Palestinian Authority in the period under inquiry. These include violations related to the treatment of (suspected) Hamas affiliates by the security services, including unlawful arrest and detention. Several Palestinian human rights organizations have reported that practices used by the Palestinian Authority security forces in the West Bank amount to torture and cruel, inhuman and degrading treatment and punishment. There have been a number of deaths in detention to which it is suspected that torture and other ill-treatment may have contributed or which they may have caused. Complaints of such practices have not been investigated.

98. Allegations were also received about the use of excessive force and the suppression of demonstrations by Palestinian security services – particularly those in support of the population of Gaza during the Israeli military operations. On these occasions Palestinian Authority security services have allegedly arrested many individuals and prevented the media from covering the events. The Mission also received allegations of harassment by Palestinian security services of journalists who expressed critical views.

99. The disabling of the Palestinian Legislative Council following the arrest and detention by Israel of several of its members has effectively curtailed parliamentary oversight over the Palestinian Authority executive. The executive has passed decrees and regulations to enable it to continue its day-to-day operations.

100. Other allegations include the arbitrary closure of charities and associations affiliated with Hamas and other Islamic groups or the revocation and non-renewal of their licences, the forcible replacement of board members of Islamic schools and other institutions, and the dismissal of Hamas-affiliated teachers.

101. The Palestinian Authority continues to discharge a large number of civil and military service employees, or suspend their salaries, under the pretext of “non-adherence to the legitimate authority” or “non-obtainment of security approval” on their appointments, which has become a pre-requirement for enrolment in public service. In effect, this measure excludes Hamas supporters or affiliates from public sector employment.

102. The Mission is of the view that the reported measures are inconsistent with the Palestinian Authority’s obligations deriving from the Universal Declaration of Human Rights and the Palestinian Basic Law.

Israel

1. Impact on civilians of rocket and mortar attacks by Palestinian armed groups on southern Israel

103. Palestinian armed groups have launched about 8000 rockets and mortars into southern Israel since 2001 (chap. XXIV). While communities such as Sderot and Nir Am kibbutz have been within the range of rocket and mortar fire since the beginning, the range of rocket fire increased to nearly 40 kilometres from the Gaza border, encompassing towns as far north as Ashdod, during the Israeli military operations in Gaza.

104. Between 18 June 2008 and 18 January 2009, rockets fired by Palestinian armed groups in Gaza have killed three civilians inside Israel and two civilians in Gaza when a rocket landed short of the border on 26 December 2008. Reportedly, over 1000 civilians inside Israel were physically injured as a result of rocket and mortar attacks, 918 of whom were injured during the time of the Israeli military operations in Gaza.

105. The Mission has taken particular note of the high level of psychological trauma suffered by the civilian population inside Israel. Data gathered by an Israeli organization in October 2007 found that 28.4 per cent of adults and 72–94 per cent of children in Sderot suffered from post-traumatic stress disorder. During the military operations in Gaza 1596 people were reportedly treated for stress-related injuries while afterwards over 500 people were treated.

106. Rockets and mortars have damaged houses, schools and cars in southern Israel. On 5 March 2009, a rocket struck a synagogue in Netivot. The rocket and mortar fire has adversely affected the right to education of children and adults living in southern Israel. This is a result of school closures and interruptions to classes by alerts and moving to shelters but also the

diminished ability to learn that is witnessed in individuals experiencing symptoms of psychological trauma.

107. The rocket and mortar fire has also had an adverse impact on the economic and social life of the affected communities. For communities such as Ashdod, Yavne, Beersheba, which experienced rocket strikes for the first time during the Israeli military operations in Gaza, there was a brief interruption to their economic and cultural activities brought about by the temporary displacement of some residents. For towns closer to the Gaza border, which have been under rocket and mortar fire since 2001, the recent escalation has added to the exodus of residents.

108. The Mission has determined that the rockets and, to a lesser extent, the mortars fired by the Palestinian armed groups are incapable of being directed towards specific military objectives and have been fired into areas where civilian populations are based. The Mission has further determined that these attacks constitute indiscriminate attacks upon the civilian population of southern Israel and that, where there is no intended military target and the rockets and mortars are launched into a civilian population, they constitute a deliberate attack against a civilian population. These acts would constitute war crimes and may amount to crimes against humanity. Given the seeming inability of the Palestinian armed groups to direct the rockets and mortars towards specific targets and given that the attacks have caused very little damage to Israeli military assets, the Mission finds that there is significant evidence to suggest that one of the primary purposes of the rocket and mortar attacks is to spread terror among the Israeli civilian population, a violation of international law.

109. Noting that some of the Palestinian armed groups, among them Hamas, have publicly expressed their intention to target civilians in reprisal for the civilian fatalities in Gaza as a result of Israeli military operations, the Mission is of the view that reprisals against civilians in armed hostilities are contrary to international humanitarian law.

110. The Mission notes that the relatively few casualties sustained by civilians inside Israel is due in large part to the precautions put into place by Israel. This includes an early warning system, the provision of public shelters and fortifications of schools and other public buildings at great financial cost – a projected US\$ 460 million between 2005 and 2011 – to the Government of Israel. The Mission is greatly concerned, however, about the lack of an early warning system and a lack of public shelters and fortifications for the Palestinian Israeli communities living in unrecognized and in some of the recognized villages that are within the range of rocket and mortars being fired by Palestinian armed groups in Gaza.

2. Repression of dissent in Israel, the right of access to information and treatment of human rights defenders

111. The Mission received reports that individuals and groups, viewed as sources of criticism of Israel's military operations were subjected to repression or attempted repression by the Government of Israel. Amidst a high level of support for the Israeli military operations in Gaza from the Israeli Jewish population, there were also widespread protests against the military operations inside Israel. Hundreds of thousands – mainly, but not exclusively, Palestinian citizens of Israel – protested. While, in the main, the protests were permitted to take place, there were occasions when, reportedly, protesters had difficulty in obtaining permits – particularly in areas populated mainly by Palestinian Israelis. In Israel and in occupied East Jerusalem 715

people were arrested during the protests. There appear to have been no arrests of counter-protesters and 34 per cent of those arrested were under 18 years of age. The Mission notes that a relatively small proportion of those protesting were arrested. The Mission urges the Government of Israel to ensure that the police authorities respect the rights of all its citizens, without discrimination, including freedom of expression and the right to peaceful assembly, as guaranteed to them by the International Covenant on Civil and Political Rights.

112. The Mission notes with concern the reported instances of physical violence committed by members of the police against protesters, including the beating of protesters and other inappropriate conduct such as subjecting Palestinian citizens of Israel who were arrested to racial abuse and making sexual comments about female members of their families. Article 10 of the Covenant requires that those deprived of their liberty be treated with humanity and respect for the inherent dignity of the human person.

113. Of the protesters brought before the Israeli courts, the Palestinian Israelis were disproportionately held in detention pending trial. The element of discrimination and differential treatment between Palestinian and Jewish citizens of Israel by the judicial authorities, as indicated in the reports received, is a substantial cause for concern.

114. The interviews of political activists by the Israeli General Security Services were cited as the actions contributing most significantly to a climate of repression inside Israel. The Mission is concerned about activists being compelled to attend interviews with Shabak (also known as Shin Bet), without there being any legal obligation on them to do so, and in general at the alleged interrogation of political activists about their political activities.

115. The Mission received reports concerning the investigation by the Government of Israel into New Profile on allegations that it was inciting draft-dodging, a criminal offence, and reports that the Government was seeking to terminate funding from foreign Governments for Breaking the Silence, following its publication of testimonies of Israeli soldiers concerning the conduct of the Israeli armed forces in Gaza in December 2008 and January 2009. The Mission is concerned that the Government of Israel's action with regard to these organizations may have an intimidating effect on other Israeli human rights organizations. The so-called United Nations Declaration on Human Rights Defenders guarantees the right "to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means". If motivated by reaction to the organization's exercise of its freedom of expression, lobbying foreign Governments to terminate funding would be contrary to the spirit of the Declaration.

116. The Government of Israel imposed a ban on media access to Gaza following 5 November 2008. Furthermore, access was denied to human rights organizations and the ban continues for some international and Israeli organizations. The Mission can find no justification for this. The presence of journalists and international human rights monitors aids the investigation and wide public reporting of the conduct of the parties to the conflict, and can inhibit misconduct. The Mission observes that Israel, in its actions against political activists, non-governmental organizations and the media, has attempted to reduce public scrutiny of both its conduct during its military operations in Gaza and the consequences that these operations had for the residents of Gaza, possibly seeking to prevent investigation and public reporting thereon.

D. Accountability

1. Proceedings and responses by Israel to allegations of violations by its armed forces against Palestinians

117. Investigations and, if appropriate, prosecutions of those suspected of serious violations are necessary if respect for human rights and humanitarian law is to be ensured and to prevent the development of a climate of impunity. States have a duty under international law to investigate allegations of violations.

118. The Mission reviewed public information and reports from the Government of Israel concerning actions taken to discharge its obligation to investigate alleged violations (chap. XXVI). It addressed to Israel a number of questions on this issue, but it did not receive a reply.

119. In response to allegations of serious violations of human rights law and international humanitarian law, the Military Advocate General ordered some criminal investigations that were closed two weeks later concluding that allegations “were based on hearsay”. The Israeli armed forces also released the results of five special investigations carried out by high-ranking military officers, which concluded that “throughout the fighting in Gaza, the IDF operated in accordance with international law”, but the investigations reportedly revealed a very small number of errors. On 30 July 2009 the media reported that the Military Advocate General had ordered the military police to launch criminal investigations into 14 cases out of nearly 100 complaints of criminal conduct by soldiers. No details were offered.

120. The Mission reviewed the Israeli internal system of investigation and prosecution according to its national legislation and in the light of practice. The system comprises: (a) disciplinary proceedings; (b) operational debriefings (also known as “operational investigations”); (c) special investigations, performed by a senior officer at the request of the chief of staff; and (d) military police investigations, carried out by the Criminal Investigation Division of the military police. At the heart of the system lies the so-called operational debriefing. The debriefings are reviews of incidents and operations conducted by soldiers from the same unit or line of command together with a superior officer. They are meant to serve operational purposes.

121. International human rights law and humanitarian law require States to investigate and, if appropriate, prosecute allegations of serious violations by military personnel. International law has also established that such investigations should comply with standards of impartiality, independence, promptness and effectiveness. The Mission holds that the Israeli system of investigation does not comply with all those principles. In relation to the “operational debriefing” used by the Israeli armed forces as an investigative tool, the Mission holds the view that a tool designed for the review of performance and to learn lessons can hardly be an effective and impartial investigation mechanism that should be instituted after every military operation where allegations of serious violations have been made. It does not comply with internationally recognized principles of impartiality and promptness in investigations. The fact that proper criminal investigations can start only after the “operational debriefing” is over is a major flaw in the Israeli system of investigation.

122. The Mission concludes that there are serious doubts about the willingness of Israel to carry out genuine investigations in an impartial, independent, prompt and effective way as required by international law. The Mission is also of the view that the Israeli system overall presents inherently discriminatory features that make the pursuit of justice for Palestinian victims very difficult.

2. Proceedings by Palestinian authorities

(a) Proceedings related to actions in the Gaza Strip

123. The Mission found no evidence of any system of public monitoring or accountability for serious violations of international humanitarian law and human rights law set up by the Gaza authorities. The Mission is concerned with the consistent disregard for international humanitarian law with which armed groups in the Gaza Strip conduct their armed activities, through rocket and mortar fire, directed against Israel. Despite some media reports, the Mission remains unconvinced that any genuine and effective initiatives have been taken by the authorities to address the serious issues of violation of international humanitarian law in the conduct of armed activities by militant groups in the Gaza Strip.

124. Notwithstanding statements by the Gaza authorities and any action that they may have taken, of which the Mission is unaware, the Mission also considers that allegations of killings, torture and mistreatment within the Gaza Strip have gone largely without investigation.

(b) Proceedings related to actions in the West Bank

125. With regard to relevant violations identified in the West Bank, it appears that, with few exceptions, there has been a degree of tolerance towards human rights violations against political opponents, which has resulted in a lack of accountability for such actions. The Ministry of Interior has also ignored the High Court's decisions to release a number of detainees or to reopen some associations closed by the administration.

126. In the circumstances, the Mission is unable to consider the measures taken by the Palestinian Authority as meaningful for holding to account perpetrators of serious violations of international law and believes that the responsibility for protecting the rights of the people inherent in the authority assumed by the Palestinian Authority must be fulfilled with greater commitment

3. Universal jurisdiction

127. In the context of increasing unwillingness on the part of Israel to open criminal investigations that comply with international standards, the Mission supports the reliance on universal jurisdiction as an avenue for States to investigate violations of the grave breach provisions of the Geneva Conventions of 1949, prevent impunity and promote international accountability (chap. XXVIII).

4. Reparations

128. International law also establishes that, whenever a violation of an international obligation occurs, an obligation to provide reparation arises. It is the view of the Mission that the current

constitutional structure and legislation in Israel leaves very little room, if any, for Palestinians to seek compensation. The international community needs to provide for an additional or alternative mechanism of compensation for damage or loss incurred by Palestinian civilians during the military operations (chap. XXIX).

E. Conclusions and recommendations

129. The Mission draws general conclusions on its investigations in chapter XXX, which also includes a summary of its legal findings.

130. The Mission then makes recommendations to a number of United Nations bodies, Israel, the responsible Palestinian authorities and the international community on: (a) accountability for serious violations of international humanitarian law; (b) reparations; (c) serious violations of human rights law; (d) the blockade and reconstruction; (e) the use of weapons and military procedures; (f) the protection of human rights organizations and defenders ; (g) follow-up to the Mission's recommendations. The recommendations are detailed in chapter XXXI.

PART ONE: METHODOLOGY, CONTEXT AND APPLICABLE LAW

INTRODUCTION

131. On 3 April 2009, the President of the Human Rights Council established the United Nations Fact Finding Mission on the Gaza Conflict with the mandate “to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after.” The appointment of the Mission followed the adoption on 12 January 2009 of resolution S-9/1 on the grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip, by the United Nations Human Rights Council at the end of its ninth special session.

132. The President appointed Justice Richard Goldstone, former judge of the Constitutional Court of South Africa and former Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, to head the Mission. The other three appointed members were: Professor Christine Chinkin, Professor of International Law at the London School of Economics and Political Science, who was a member of the high-level fact-finding mission to Beit Hanoun (2008); Ms. Hina Jilani, Advocate of the Supreme Court of Pakistan and former Special Representative of the Secretary-General on the situation of human rights defenders, who was a member of the International Commission of Inquiry on Darfur (2004); and Colonel Desmond Travers, a former Officer in Ireland’s Defence Forces and member of the Board of Directors of the Institute for International Criminal Investigations.

133. As is usual practice, the Office of the United Nations High Commissioner for Human Rights (OHCHR) established a secretariat to support the Mission.

134. Between the adoption of resolution S-9/1 in January and the establishment of the Mission at the beginning of April, a broad cross section of actors, including domestic and international non-governmental organizations (NGOs) and United Nations agencies and bodies, had already conducted numerous investigations and produced reports on the military operations in Gaza, all of which were taken into account by the Mission in its work of fact-finding and analysis.

135. Bearing in mind that the resolution of the Council had called for the urgent dispatch of the Mission and given the 11-week delay in its establishment, the Mission agreed to be bound by a short time frame (about three months) to complete its work and report to the Council at the earliest opportunity.

136. The Mission interpreted the mandate as requiring it to place the civilian population of the region at the centre of its concerns regarding the violations of international law. Accordingly, the Mission has made victims its first priority and it will draw attention to their plight in the context of the events under investigation. The members of the Mission hope that their situation will not be neglected by any political agenda for the region.

137. The Mission considered it crucial for the implementation of its mandate to meet with the widest possible range of stakeholders relevant to the facts under inquiry. During the three months of its work in Geneva, Gaza, Amman and elsewhere, the Mission met representatives of civil

society, including domestic and international NGOs; women's organizations; bar associations; military analysts; medical doctors; mental health experts; representatives of the business/private sector, including agriculture and fishery; representatives of associations of persons with disabilities; journalists and other representatives of domestic and international media outlets; representatives of United Nations organs and bodies as well as other international organizations: the Secretary-General of the United Nations, the United Nations High Commissioner for Human Rights; the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), the Special Coordinator for the Middle East Peace Process, the Head of the United Nations Board of Inquiry into incidents in Gaza; diplomatic representatives of Member States of the United Nations in Geneva and in the Occupied Palestinian Territory; members of the Palestinian Legislative Council from both Gaza and the West Bank; ministers and officials of the Palestinian Authority; senior members of the Gaza authorities;¹ former Government and military officials of the Government of Israel (see annex I).

138. The Mission convened for the first time in Geneva between 4 and 8 May 2009, when it established its methods of work and a three-month programme of activities. It also had initial briefings and consultations with a wide range of stakeholders. The Mission met the diplomatic community in Geneva, including the President of the Human Rights Council, members of the Council and sponsors of resolution S-9/1.

139. Additionally, the Mission met in Geneva on 20 May, on 4 and 5 July, and between 1 and 4 August 2009. The Mission conducted three field visits: two to the Gaza Strip between 30 May and 6 June, and between 25 June and 1 July 2009; and one visit to Amman on 2 and 3 July 2009. Several staff of the Mission's secretariat were present in Gaza from 22 May to 4 July 2009.

140. On 7 May, notes verbales were sent to all United Nations organs and bodies and Member States of the United Nations. Egypt, Lebanon, Romania, the United Nations Children's Fund (UNICEF) on behalf of the 1612 Working Group on Grave Violations against Children established for Israel and the Occupied Palestinian Territory,² the World Health Organization (WHO), and the United Nations Population Fund (UNFPA) replied to the notes verbales. Documentation was also made available by other specialized agencies and other organizations in the United Nations system, including the Food and Agriculture Organization of the United Nations (FAO), the United Nations Conference on Trade and Development (UNCTAD), the United Nations Development Programme (UNDP), UNRWA, and the Operational Satellite Applications Programme (UNOSAT) of the United Nations Institute for Training and Research (UNITAR). On 8 June 2009, the Mission issued a call for submissions inviting all interested persons and organizations to submit relevant information and documentation to assist in the implementation of its mandate. In response, the Mission received 31 submissions from individuals and organizations. Throughout its work, the Mission received or had access to a variety of documents from multiple sources (see chap. I).

¹ The term "Gaza authorities" is used to refer to the de facto Hamas-led authorities established in Gaza since June 2007. See chap. II for details.

² This Working Group was set up following the adoption by the United Nations Security Council of resolution 1612/2005) establishing a monitoring and reporting mechanism to ensure the protection of children affected by armed conflict.

141. Public hearings were held in Gaza on 28 and 29 June and in Geneva on 6 and 7 July 2009.

142. Upon appointment on 3 April 2009, the Head of the Mission held a press conference in Geneva together with the President of the Human Rights Council. The Mission issued a press release on 8 May, at the end of its first official meeting, and on 29 May, before travelling to Gaza. Additionally, the Mission held press conferences in Gaza on 4 June, at the end of its first visit, and on 7 July 2009, at the end of the public hearings in Geneva. The Head of the Mission was interviewed several times by the international media³.

Cooperation with the parties

143. Since its inception, the Mission has requested the cooperation of all relevant authorities to enable it to visit and meet victims in Gaza, the West Bank and Israel.

144. Immediately upon appointment, the Head of the Mission sought to consult the Permanent Representative of Israel to the United Nations Office at Geneva, who unfortunately declined to meet him. Following an exchange of letters between 3 and 7 April, the Permanent Representative of Israel informed the Head of the Mission that his Government would not be able to cooperate with the Mission. On 29 April, an additional invitation to the Permanent Representative of Israel to meet the Mission was also unsuccessful. On 4 May, the Mission wrote to the Prime Minister of Israel, reiterating its request for cooperation, in particular by providing access to Gaza, the West Bank, including East Jerusalem, and Israel. During a meeting on 6 May 2009 with the President of Israel, the United Nations Secretary-General referred to and supported the Mission's request for cooperation from the Government of Israel. In a letter dated 20 May 2009, the Mission attempted again to obtain the cooperation of the Israeli Government, especially in view of its planned visit to the Gaza Strip. In view of the refusal of cooperation from the Government of Israel, in order to be able to fulfil the mandate entrusted by the Human Rights Council within the aforementioned time frame, the Mission sought and obtained the assistance of the Government of Egypt to enable it to enter Gaza through the Rafah crossing. The Mission had additional written exchanges with the Permanent Representative of Israel in Geneva between 2 and 17 July 2009. (See annex II.)

145. Upon appointment, the Head of the Mission consulted the Permanent Observer of Palestine to the United Nations Office at Geneva, who promptly extended the cooperation of the Palestinian Authority to the Mission. The Mission has remained in contact with the Permanent Observer Mission of Palestine, and has enjoyed the support and cooperation of the Palestinian Authority. Due to the lack of cooperation from the Israeli Government, the Mission was unable to meet members of the Palestinian Authority in the West Bank. The Mission did, however, meet officials of the Palestinian Authority, including a cabinet minister, in Amman. A Palestinian minister was prevented from travelling to meet the Mission in Amman (see chap. I). During its visits to the Gaza Strip, the Mission held meetings with senior members of the Gaza authorities and they extended their full cooperation and support to the Mission.

³ The webpage of the Mission can be found at: <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm>.

Protection of persons cooperating with the Mission

146. In the implementation of its mandate the Mission has called for the protections that are required under the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, better known as the Declaration on Human Rights Defenders, to be accorded to all who gave testimony at the public hearings. The Mission also was guided by Commission on Human Rights resolution 2005/9 which “urges Governments to refrain from all acts of intimidation or reprisal against (a) those who seek to cooperate or have cooperated with representatives of United Nations human rights bodies, or who have provided testimony or information to them”.

147. Subsequent to the public hearings in Geneva, the Mission was informed that a Palestinian participant, Mr. Muhammad Srour, had been detained by Israeli security forces when returning to the West Bank and became concerned that his detention may have been a consequence of his appearance before the Mission. The Mission wrote to the Permanent Representative of Israel in Geneva expressing its concern. In response, the Permanent Representative informed the Mission that the detention of the person concerned was unrelated to his appearance at the public hearing. Mr. Srour was subsequently released on bail. The Mission is in contact with him and continues to monitor developments.

148. The Mission is also concerned about anonymous calls and messages received on private phone numbers and e-mail addresses by some of those who provided information to it or assisted in its work in the Gaza Strip. The contents seemed to imply that the originators of these anonymous calls and messages regarded those who cooperated with the Mission as potentially associated with armed groups. One of the recipients conveyed to the Mission apprehensions about personal safety and a feeling of intimidation. The Mission also wishes to record that there are others who have declined to appear before it or to provide information or, having cooperated with the Mission, have asked that their names should not be disclosed, for fear of reprisal.

Acknowledgments

149. The Mission is deeply grateful to the numerous Palestinians and Israelis, especially victims and witnesses of violations, who have shared with it their stories and views. It is equally grateful to the many Palestinian and Israeli civil society and NGOs, and to the Palestinian Independent Commission for Human Rights. They are at the forefront of the protection and promotion of human rights in the region and carry out their work with courage, professionalism and independence in very difficult circumstances. The Mission is also grateful to all the domestic and international NGOs that have supported its mandate and have provided a vast amount of relevant and well-documented information. Without the support and the assistance of United Nations agencies, programmes and other bodies, and particularly of the United Nations staff in Gaza, the Mission would have not been able to complete its work. Heartfelt thanks go to all of them. The Mission wishes to especially acknowledge the invaluable support received by the dedicated staff of UNRWA. The Mission expresses its gratitude to the United Nations security personnel and interpreters, who have professionally and sensitively accomplished their difficult tasks. In addition to the secretariat of the Mission appointed by OHCHR, a multinational team with a broad range of professional experience, the gratitude of the Mission goes also to the staff of OHCHR in Geneva, the Occupied Palestinian Territory and New York. A particular mention

goes to all those who assisted with the daunting task of organizing at very short notice the public hearings in Gaza and in Geneva. The Mission wishes to formally thank the Government of Egypt and in particular the Permanent Mission of Egypt in Geneva. The Mission wishes to formally thank the Governments of Jordan and of Switzerland for facilitating the issuance of entry visas at short notice. The Mission also wishes to acknowledge the continued support received from the United Nations Secretary-General.

150. Finally, the Mission wishes to thank the people of Gaza for their warm welcome, their humanity and their hospitality in spite of such difficult and painful circumstances.

I. METHODOLOGY

A. Mandate and terms of reference

151. In his letter appointing the members of the Mission, the President of the Council entrusted the Mission with the following mandate: “to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after.”

152. To implement its mandate, the Mission determined that it was required to consider any actions by all parties that might have constituted violations of international human rights law or international humanitarian law. The mandate also required it to review related actions in the entire Occupied Palestinian Territory and Israel.

153. With regard to temporal scope, the Mission’s broad mandate includes violations before, during and after the military operations that were conducted in Gaza between 27 December 2008 and 18 January 2009. The Mission considered that, while the Gaza events must be seen in the context of the overall conflict and situation in the Occupied Palestinian Territory, in view of the limited time and resources available, it would be beyond its abilities to focus on conduct or actions that took place long before the military operation of December–January. The Mission therefore decided to focus primarily on events, actions or circumstances occurring since 19 June 2008, when a ceasefire was agreed between the Government of Israel and Hamas. The Mission has also taken into consideration matters occurring after the end of military operations that constitute continuing human rights and international humanitarian law violations related to or as a consequence of the military operation, up to 31 July 2009.

154. The Mission considered that the reference in its mandate to violations committed in the context of the December–January military operations required it to go beyond violations that took place directly as part of the operations. Thus violations within its mandate include those that are linked to the December–January military operations in terms of time, objectives and targets, and include restrictions on human rights and fundamental freedoms relating to Israel's strategies and actions in the context of its military operations.

155. The normative framework for the Mission has been general international law, the Charter of the United Nations, international humanitarian law, international human rights law and international criminal law.

B. Methods of work

156. The Mission reviewed all allegations raised in connection with issues under its mandate. The review included analysis of material in the public domain, including the many reports produced after the military operations concluded, information provided to the Mission through additional documentation and a series of meetings with experts who had been to the area or studied matters of interest to the Mission.

157. In view of the time frame within which it had to complete its work, the Mission necessarily had to be selective in the choice of issues and incidents for investigation. The report does not purport to be exhaustive in documenting the very high number of relevant incidents that occurred in the period covered by the Mission's mandate and especially during the military operations in Gaza. Nevertheless, the Mission considers that the report is illustrative of the main patterns of violations. The Mission also stresses that the exclusion of issues or incidents from the report in no way reflects on the seriousness of the relevant allegations.

158. The Mission based its work on an independent and impartial analysis of compliance by the parties with their obligations under international human rights and humanitarian law in the context of the recent conflict in Gaza, and on international investigative standards developed by the United Nations.

159. The Mission adopted an inclusive approach to receiving information and views on matters within its mandate. Information-gathering methods included:

(a) The review of reports of international organizations, including the United Nations; reports and other documentation, including affidavits, produced by non-governmental and civil society organizations (Palestinian, Israeli and international); media reports; and writings of academics and analysts on the conflict;

(b) Interviews with victims, witnesses and other persons having relevant information. In keeping with established human rights methodology and in order to ensure both the safety and privacy of the interviewees and the integrity of the information provided, such interviews were conducted in private. The Mission decided not to interview children. The Mission conducted 188 individual interviews. Most interviews were conducted in person. If the Mission was unable to meet the relevant persons, interviews were conducted by telephone. Also in keeping with normal practice for this type of report and to continue to protect their safety and privacy, the names of the victims, witnesses and other sources are generally not explicitly referred to in the report and codes are used instead. The names of individuals who publicly testified at the hearings held by the Mission or who have explicitly agreed to be named (see below) are, however, identified;

(c) Site visits to specific locations in Gaza where incidents had occurred. The Mission investigated 36 incidents in Gaza;

(d) The analysis of video and photographic images, including satellite imagery provided by UNOSAT, and expert analysis of such images;

(e) The review of medical reports about injuries to victims;

(f) The forensic analysis of weapons and ammunition remnants collected at incident sites;

(g) Meetings with a variety of interlocutors, including members of the diplomatic community, representatives of the parties concerned, NGOs, professional associations, military analysts, medical doctors, legal experts, scientists, United Nations staff;

(h) Invitations, through notes verbales, to United Nations Members States and United Nations agencies, departments and bodies to provide information relating to the Mission's investigation requirements;

(i) The wide circulation of a public call for written submissions from NGOs and other organizations and individuals interested in bringing information to the attention of the Mission. As a result, it received numerous submissions from organizations and individuals from Israel, the Occupied Palestinian Territory and elsewhere in the world;

(j) Public hearings in Gaza and in Geneva⁴ to hear: (i) victims and witnesses of violations; and (ii) individuals with specialized knowledge and expertise on the context and impact of the hostilities.

160. The Mission reviewed more than 300 reports, submissions and other documentation either researched of its own motion, received in reply to its call for submissions and notes verbales or provided during meetings or otherwise, amounting to more than 10,000 pages, over 30 videos and 1,200 photographs.

161. The methods adopted to gather and verify information and reach conclusions were for the most part guided by best practice methodology developed in the context of United Nations investigations. In the case of Israel and the West Bank, adjustments were required in view of the Mission's inability to access those areas due to lack of cooperation from Israel.

162. The Mission's preferred option would have been to visit all areas covered by its mandate and undertake on-site investigations in all. The Government of Israel, however, refused to cooperate with the Mission at three levels: (a) it refused to meet the Mission and to provide access to Government officials, including military, and documentation; (b) it precluded the Mission from travelling to Israel in order to meet with Israeli victims, witnesses, members of civil society and NGOs; and (c) it prevented the Mission from travelling to the West Bank, including East Jerusalem, to meet members of the Palestinian Authority and Palestinian victims, witnesses, non-governmental or civil society organizations living or located in the West Bank.

163. Accordingly, the Mission conducted field visits, including investigations of incident sites, in the Gaza Strip. This allowed the Mission to observe first-hand the situation on the ground, and speak to many witnesses and other relevant persons. The Mission considered this particularly important to form an understanding of the situation, the context, impact and consequences of the conflict on people, and to assess violations of international law.

⁴ The public hearings are webcast by the United Nations and can be viewed by visiting the webcast archive at: <http://www.un.org/webcast/unhrc/archive.asp?go=090628>.

164. The Mission gathered first-hand information with regard to the situation in Israel and in the West Bank by conducting telephone interviews with victims, community representatives, local authorities, members of NGOs and experts; by hearing testimonies from victims, witnesses and experts from Israel and from the West Bank at the public hearings in Geneva; and by holding meetings and private interviews both in Amman and in Geneva.

165. The Mission's efforts in this regard were partially thwarted because of restrictions on the freedom of movement of some of the people that the Mission wished to interview. The Mission was not able to meet as planned the Palestinian Minister of Justice, Dr. Ali al-Khashan, in Amman, as he was not allowed by Israel to leave the West Bank. The Mission was also unable to meet Ms. Khalida Jarrar, a member of the Palestinian Legislative Council, who is subject to a travel ban by Israel (see chap. XXII). It held a teleconference with her. A Palestinian witness at the Geneva public hearings, Mr. Shawan Jabarin, had to be heard by videoconference as he is also subject to a travel ban by Israel.

A note on the public hearings

166. The purpose of the public hearings, which were broadcast live, was to enable victims, witnesses and experts from all sides to the conflict to speak directly to as many people as possible in the region as well as in the international community. The Mission is of the view that no written word can replace the voice of victims. While not all issues and incidents under investigation by the Mission were addressed during the hearings, the 38 public testimonies covered a wide range of relevant facts as well as legal and military matters. The Mission had initially intended to hold hearings in Gaza, Israel and the West Bank. However, denial of access to Israel and the West Bank resulted in the decision to hold hearings of participants from Israel and the West Bank in Geneva.

167. Participants in the hearings were identified in the course of the Mission's investigations, and had either first-hand experience or information or specialized knowledge of the issues under investigation and analysis. In keeping with the objectives of the hearings, the Mission gave priority to the participation of victims and people from the affected communities. Participants took part in the hearings on a voluntary basis. Some individuals declined to participate for fear of reprisal. The Mission received expressions of gratitude from participants, as well as members of the affected communities, for having provided an opportunity to speak publicly of their experiences.

C. Assessment of information

168. In establishing its findings, the Mission sought to rely primarily and whenever possible on information it gathered first-hand, including through on-site observations, interviews and meetings with relevant persons. Information produced by others, including reports, affidavits and media reports, was used primarily as corroboration.

169. The section of the report on the Gaza Strip is based on first-hand information gathered and verified by the Mission. To assess the situation in Israel and in the West Bank, the Mission had to make comparatively greater use of information produced by others for the reasons explained above. These sections too, however, include first-hand information directly gathered and verified by the Mission.

170. The Mission met or spoke with witnesses, listened to what they had to say and questioned them wherever necessary. Taking into account the demeanour of witnesses, the plausibility of their accounts and the consistency of these accounts with the circumstances observed by it and with other testimonies, the Mission was able to determine the credibility and reliability of those people it heard. Regarding the large amount of documentary information the Mission received or had access to as documents in the public domain, it tried as far as possible to speak with the authors of the documents in order to ascertain the methodologies used and to clarify any doubts or problems.

171. The final conclusions on the reliability of the information received were made taking all of these matters into consideration, cross-referencing the relevant material and information, and assessing whether, in all the circumstances, there was sufficient information of a credible and reliable nature for the Mission to make a finding in fact.

172. On the basis set out above, the Mission has, to the best of its ability, determined what facts have been established. In many cases it has found that acts entailing individual criminal responsibility have been committed. In all of these cases the Mission has found that there is sufficient information to establish the objective elements of the crimes in question. In almost all of the cases the Mission has also been able to determine whether or not it appears that the acts in question were done deliberately or recklessly or in the knowledge that the consequence that resulted would result in the ordinary course of events, that is, the Mission has referred in many cases to the relevant fault element (*mens rea*). The Mission fully appreciates the importance of the presumption of innocence: the findings in the report do not subvert the operation of that principle. The findings do not attempt to identify the individuals responsible for the commission of offences nor do they pretend to reach the standard of proof applicable in criminal trials.

D. Consultation with the parties

173. The Mission received documentation related to its mandate from the Palestinian Authority. During its visits in Gaza, the Mission was provided with significant material and documentation by the Gaza authorities. On 29 July, it received, through UN Watch, a paper⁵ on the military operations in Gaza that sets out the Government of Israel's position on many issues investigated by the Mission.

174. During its meetings in Gaza, Amman and Geneva, the Mission discussed matters within its mandate with Palestinian counterparts. While no cooperation was received from the Government of Israel, the Mission met a number of Israeli citizens formerly in senior Government positions.

175. In order to provide the parties concerned with an opportunity to submit additional relevant information and express their position and respond to allegations, the Mission also submitted comprehensive lists of questions to the Government of Israel, the Palestinian Authority and the

⁵ "The operation in Gaza: Factual and legal aspects", July 2009, published on the website of the Israeli Ministry of Foreign Affairs, available at http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/Operation_in_Gaza-Factual_and_Legal_Aspects.htm.

Gaza authorities in advance of completing its analysis and findings. The Mission received replies from the Palestinian Authority and the Gaza authorities but not from Israel.

II. CONTEXT

176. The Mission is of the view that the events that it was mandated to investigate should not be considered in isolation. They are part of a broader context, and are deeply rooted in the many years of Israeli occupation of the Palestinian Territory and in the political and violent confrontation that have characterized the history of the region. A review of the historical, political and military developments between the Six-Day War in 1967 and the announcement of the “period of calm” (*Tahdiyah*) in June 2008,⁶ and of Israeli policies towards the Occupied Palestinian Territory is necessary to consider and understand the events that fall more directly within the scope of the Mission’s mandate.

A. Historical context

177. The West Bank, including East Jerusalem, and the Gaza Strip were captured by Israel following the Six-Day War of June 1967. The two non-contiguous areas had been administered by Jordan and Egypt, respectively, since the establishment of the “Green Line” along the 1949 Armistice demarcation, separating the newly founded State of Israel and its neighbours. After 1967, the two areas were administered directly by military commanders until 1981 and since then through a “Civil Administration” established by the Israeli armed forces. “Military orders” were used to rule the civil affairs of the Palestinian population superimposing and often revoking pre-existing Jordanian laws in the West Bank and Egyptian laws in the Gaza Strip. East Jerusalem was annexed to the Israeli municipality of the city and in 1980 the Knesset passed a law which declared that “Jerusalem, complete and united, is the capital of Israel”. With Security Council resolution 478 (1980), the United Nations declared this law “null and void”, condemning any attempt to “alter the character and status of Jerusalem”.⁷ No member of the United Nations, apart from Israel, recognizes the annexation of East Jerusalem.

178. After the Likud party won the 1977 Israeli elections, the establishment of settlements within the occupied territories of the West Bank and the Gaza Strip dramatically accelerated, and the expropriation of Palestinian lands and the construction of settlements have continued unabated to this day. Many years of growing tension and violence concerning the unresolved status of the Palestinian territory occupied by Israel ensued. In 1987 a widespread popular uprising – the intifada – was forcefully repressed by the Israeli security forces but lasted until 1993, when the leadership of the Palestine Liberation Organization (PLO) and the Government

⁶ Due to obvious space limitations, the historical context does not make reference to the numerous important events that took place during this period (such as the 1973 War, the Camp David Accords, the peace treaty with Jordan, the 2006 Lebanon War and many others).

⁷ Adopted by 14 votes to none, with 1 abstention (United States of America).

of Israel agreed to recognize each other and signed the “Declaration of Principles on Interim Self-Government Arrangements” also known as the “Oslo I Accord”.⁸

179. In 1994 the Palestinian Authority was established following the Oslo I Accord and in 1995 “the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip”, also known as “Oslo II”,⁹ detailed practical steps to be implemented by the parties in view of the negotiations on the final status of the territory. The assassination of Israeli Prime Minister Yitzhak Rabin by an Israeli extremist in 1995 dealt a lethal blow to the peace process. Successive Israeli Governments and the Palestinian political leadership failed to reach an agreement on the final status at the United States-sponsored Camp David summit in 2000 and during direct talks in Taba (Egypt) in 2001.

180. A second popular uprising erupted in September 2000, after the then opposition leader Ariel Sharon conducted a controversial visit to the Temple Mount/al-Haram al-Sharif in Jerusalem.¹⁰ This second intifada set off an unprecedented cycle of violence.

181. According to independent sources, while the Israeli-Palestinian conflict claimed the lives of 1,549 Palestinians and 421 Israelis between 1987 and 2000,¹¹ between September 2000 and December 2008, 5,500 Palestinians were killed (593 as result of intra-Palestinian violence) as well as 1,062 Israelis and 64 foreigners.¹²

182. According to Israel’s Ministry of Foreign Affairs, 154 suicide bomb attacks against Israeli civilians and military personnel took place between 1993 and 2007. They killed 542 individuals,

⁸ The Agreement contained a specific provision for the establishment of a “strong police force” to “guarantee public order and internal security for the Palestinians of the West Bank and the Gaza Strip”. See <http://www.reliefweb.int/rw/rwb.nsf/db900SID/MHII-62DANP?OpenDocument>.

⁹ The Agreement defined three areas of jurisdiction in Gaza and the West Bank: area “A”, in which Palestinians would have full administrative and security responsibilities; area “B”, in which Palestinians would have administrative responsibilities, but Israelis would retain security control; and area “C”, where Israelis would maintain administrative and security responsibilities. See <http://www.reliefweb.int/rw/rwb.nsf/db900SID/MHII-62DAP5?OpenDocument>.

¹⁰ Situated at the heart of the Old City in East Jerusalem, the site is of religious significance to both Muslims and Jews. The Temple Mount/al-Haram al-Sharif (the Noble Sanctuary) is the location of al-Aqsa and the Dome of the Rock mosques, the third most sacred place in Islam. It is also believed to be the location of the two ancient Jewish temples. The southern section of its western external perimeter is what is known as the Western Wall. Haram al-Sharif is administered by an Islamic trust (Waqf) and religious rituals performed there by non-Muslims are forbidden.

¹¹ See B’Tselem statistics (“Fatalities in the first Intifada”), available at: http://www.btselem.org/English/Statistics/First_Intifada_Tables.asp.

¹² See B’Tselem statistics (“Fatalities”), available at: <http://www.btselem.org/English/Statistics/Casualties.asp>

with a peak in 2002 of 220 individuals killed in 55 suicide attacks.¹³ The last recorded suicide attack took place in February 2008 in the Israeli city of Dimona.¹⁴

183. The firing of rockets and mortars from Gaza into Israel began in 2001.¹⁵ Israeli sources report that as many as 3,455 rockets and 3,742 mortar shells were fired into Israel from Gaza until mid-June 2008.¹⁶

184. After his election as Prime Minister in 2001, the Likud leader Ariel Sharon discontinued any direct contacts with the Palestinian leadership, in effect putting an end to talks on the final status.

185. In June 2002, the beginning of the construction of the separation Wall, which encroached on Palestinian land to encompass most Israeli settlement areas in the West Bank as well as East Jerusalem, left almost half a million Palestinians on the western side of the divide, cutting historical, social, cultural and economic ties with the rest of the Palestinians in the West Bank.¹⁷ In 2004, the International Court of Justice issued an advisory opinion on the legality of the Wall being built by Israel, at the request of the United Nations General Assembly. The Court stated that Israel must cease construction of the barrier, dismantle the parts of the barrier that were built inside the West Bank, revoke the orders issued relating to its construction and compensate the Palestinians who suffered losses as a result of the barrier.¹⁸ Israel disregarded the views of the Court and construction of the Wall continued. In 2004 and 2005, the Israeli Supreme Court, sitting as the High Court of Justice (see sect. D below), ruled that some parts of the route of the Wall violated the principle of “proportionality” in both Israeli and international law, causing harm to an “occupied population” and that the construction of the structure should be done in a way to lessen the prejudicial impact on the rights of the resident Palestinians. The Israeli Court

¹³ See website of the Ministry of Foreign Affairs (“Suicide and other bombing attacks in Israel since the Declaration of Principles (Sept. 1993)”), available at: <http://www.mfa.gov.il/MFA/Terrorism-%20Obstacle%20to%20Peace/Palestinian%20terror%20since%202000/Suicide%20and%20Other%20Bombing%20Attacks%20in%20Israel%20Since>

¹⁴ BBC News, “Israeli killed in suicide bombing”, 4 February 2008, available at: http://news.bbc.co.uk/2/hi/middle_east/7225775.stm

¹⁵ “The operation in Gaza...” states that the firing of rockets and mortars from Gaza started in 2000. The same sources quoted in the report, however, put the beginning of the firing of rockets and mortars in 2001. The report states that between 2000 and 2008 “Israel was bombarded by some 12,000 rockets and mortar shells between 2000 and 2008, including nearly 3,000 rockets and mortar shells in 2008 alone.”

¹⁶ Intelligence and Terrorism Information Center at the Israel Intelligence Heritage & Commemoration Center, “Rocket threat from the Gaza Strip, 2000-2007”, December 2007, available at: http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/rocket_threat_e.htm; and “Summary of rocket fire and mortar shelling in 2008”, January 2009, available at: http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/ipc_e007.pdf

¹⁷ See B’tselem statistics (Separation barrier statistics), available at: http://www.btselem.org/English/Separation_Barrier/Statistics.asp.

¹⁸ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004.

ordered the rerouting of different portions of the Wall,¹⁹ but considered the structure legal in principle.²⁰

186. In 2002, the so-called Quartet (the United States, the European Union, the Russian Federation and the United Nations) proposed a plan to resolve the Israeli-Palestinian conflict. The plan came to be known as the “road map to peace.”²¹ The road map envisaged that the Palestinians would engage in democratic reforms and renounce violent means and that Israel would accept a Palestinian Government and cease settlement activities. Fulfilment of the road map’s commitments would lead to negotiations on the final status. The road map remains unimplemented. The same year, the League of Arab States adopted a proposal that Saudi Arabia presented at the Beirut Summit in which its members pledged to establish normal relations with Israel in the context of a comprehensive peace that would establish a Palestinian State within the border of 1967.²²

187. On 6 June 2004, the Israeli Cabinet adopted a “disengagement plan” providing for the unilateral removal from the Gaza Strip of Israeli security forces and Israeli civilians living in settlements. The plan was endorsed by the Knesset on 26 October of the same year. With the evacuation of all Israeli residents and associated security personnel from the Gaza Strip completed on 12 September 2005, Israel declared that “there will be no basis for claiming that the Gaza Strip is occupied territory” (on the continued occupation, see chapter IV). Under the disengagement plan, however, the Israeli armed forces continued to maintain control over Gaza’s borders, coastline and airspace, and Israel reserved “its inherent right of self-defence, both preventive and reactive, including where necessary the use of force, in respect of threats emanating from the Gaza Strip.” Israel removed both settlements and military bases protecting the settlers from the Gaza Strip, redeploying on Gaza’s southern border and repositioning its forces to other areas just outside the Gaza Strip. In addition to controlling the borders, coastline and airspace, after the implementation of the disengagement plan, Israel continued to control Gaza’s telecommunications, water, electricity and sewage networks, as well as the population registry, and the flow of people and goods into and out of the territory while the inhabitants of Gaza continued to rely on the Israeli currency.²³

188. After years of disassociation from the Oslo process, Hamas changed its position about the legitimacy of the Palestinian Authority and decided to participate in the elections of January

¹⁹ Many of these rulings have had only a marginal impact on the Palestinian population.

²⁰ The Court opened its deliberation by stating that “since 1967, Israel has been holding the areas of Judea and Samaria [...] in belligerent occupation”, see *Beit Sourik Village Council v. The Government of Israel and Commander of the IDF Forces in the West Bank*, case No. 2056/04, Judgement of 30 June 2004 and *Mara’abe et al. v. The Prime Minister of Israel et al.*, case No. 7957/04, Judgement of 15 September 2005.

²¹ “A performance-based road map to a permanent two-State solution to the Israeli-Palestinian conflict”, available at: <http://www.un.org/news/dh/mideast/roadmap122002.pdf>

²² Available at: <http://www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/5a7229b652beb9c5c1256b8a0054b62e>

²³ See “Disengagement Plan - General Outline”, 15 April 2004, available at: <http://www.pmo.gov.il/PMOEng/Archive/Press+Releases/2004/Disengagement+Plan/Disengagement+Plan.htm>; and “Overall concept of the Disengagement Plan”, 15 April 2004, available at: <http://www.pmo.gov.il/PMOEng/Archive/Press+Releases/2004/Disengagement+Plan/DisengagementPlan.htm>.

2006. The List of Change and Reform, of which Hamas represented the main component, won the elections for the Palestinian Legislative Council and formed a Government. Shortly thereafter, the international community redirected international aid from the Palestinian Authority to international organizations and humanitarian agencies, isolating the new Palestinian executive in a stated effort to put pressure on it to accept the so-called Quartet Principles. The Quartet had already announced that, to be recognized by the international community, any Palestinian Government should adhere to three “Principles”: (i) recognition of the State of Israel, (ii) recognition of previous agreements and (iii) renunciation of violence.²⁴ Israel also imposed economic sanctions on the Hamas-led Palestinian Authority Government, including by withholding tax revenues it collected on imports and introducing additional restrictions on the movement of goods to and from the Gaza Strip. Israel declared that sanctions would be lifted only when the new Palestinian Government would abide by the Quartet Principles.²⁵

189. In June 2006, a squad drawn from three groups – the Popular Resistance Committees, al-Qassam Brigades and the until then unknown Army of Islam – excavated a tunnel under the Gaza-Israel border and attacked the military base of Kerem Shalom inside Israel, blowing up a tank, killing two soldiers and capturing a third, Corporal Gilad Shalit. In reaction to the capture, the Israeli Government conducted a number of targeted assassinations of alleged militants belonging to Hamas and other groups; arrested Palestinian Authority cabinet ministers, Hamas parliamentarians and other leaders in the West Bank; attacked key civilian infrastructure in the Gaza Strip, such as the main power plant, the main bridge in central Gaza and Palestinian Authority offices; tightened the economic isolation; and carried out major armed thrusts into the Gaza Strip for the first time since August 2005.²⁶

190. After the refusal of the politically defeated Fatah movement to cede the control of Palestinian Authority institutions and specifically security institutions to the new Government, armed clashes erupted between the two political groups both in the Gaza Strip and the West Bank. In February 2007, Palestinian leaders assembled in Mecca signed an agreement sponsored by Saudi Arabia that led to the formation of a coalition Government that was approved by the Palestinian Legislative Council in March.²⁷ The coalition Government was headed by Hamas and included members of other political movements, including Fatah, as well as independents. After only four months, violent clashes erupted again between armed and security forces loyal to Fatah and Hamas. By 14 June 2007, Hamas forces and armed groups had seized all Palestinian

²⁴ See “Briefing to the Security Council on the situation in the Middle East”, by Ms Angela Kane, Assistant Secretary-General for Political Affairs, 31 January 2006, available at: <http://www.unsco.org/Documents/Statements/MSCB/2008/January%2031.pdf>

²⁵ In June 2006, Hamas subscribed to the so-called Prisoners Document, a common political platform shared by Fatah, Hamas, Islamic Jihad, the Popular Front for the Liberation of Palestine (PFLP) and the Democratic Front for the Liberation of Palestine (DFLP). An implicit recognition of the State of Israel could be traced to the statement that “the right to establish their independent state with al-Quds al-Sharif as its capital on all territories occupied in 1967”. See <http://www.miftah.org/Display.cfm?DocId=10371&CategoryId=32>.

²⁶ See International Crisis Group, “Israel/Palestine/Lebanon: Climbing out of the abyss”, Middle East Report N° 57, 25 July 2006.

²⁷ See “Briefing to the Security Council on the situation in the Middle East”, by Mr B. Lynn Pascoe, 25 April 2007, available at: <http://www.unsco.org/Documents/Statements/MSCB/2007/April%202007.pdf>.

Authority security installations and government buildings in the Gaza Strip.²⁸ The President of the Palestinian Authority dismissed the Hamas-led Government (hereinafter called the Gaza authorities), declared a state of emergency and established an emergency Government based in the West Bank, which was largely recognized by the international community.²⁹

191. In November 2007, the United States of America sponsored the organization of a new comprehensive peace conference. At the Conference – held in Annapolis, Maryland, United States of America – the Palestinian President and the Israeli Prime Minister agreed to resume negotiations by the end of 2007. In addition, they agreed to work continuously to reach a two-State solution by the end of 2008.

192. On 19 September 2007, the Government of Israel declared Gaza “hostile territory.”³⁰ This was followed by the imposition of further severe reductions in the transfer of goods and supplies of fuel and electricity to the Strip. Since then, Israel has only sporadically allowed the opening of all the crossings into the Gaza Strip, at times completely closing them.³¹ (See also chapter V.)

193. Israeli military operations in Gaza and the West Bank started well before the so-called disengagement of 2005. “Operation Defensive Shield” in 2002 was the largest military operation in the West Bank since the 1967 Six-Day War. It began with an incursion into Ramallah, placing the then President of the Palestinian Authority, Yasser Arafat, under siege in his offices, and was followed by incursions into the six largest cities in the West Bank and their surrounding localities. During the three weeks of the military incursions in areas that were under the direct control of the Palestinian Authority, 497 Palestinians were killed.³² The siege on the half destroyed Ramallah *Muqataa* compound of President Arafat was lifted only at the end of 2004 when he was flown to Paris to undergo medical treatment. He later died there.

194. “Operation Rainbow” of 2004 targeted the Rafah area of the Gaza Strip and left about 50 Palestinians dead. “Operation Days of Penitence” was carried out between September and October 2004. According to the Israeli Government, it was launched in retaliation for the firing of rockets against the town of Sderot and Israeli settlements inside the Gaza Strip. It targeted the towns of Beit Hanoun and Beit Lahia and the Jabaliyah refugee camp and resulted in the deaths of more than 100 Palestinians and 5 Israelis.

195. From the disengagement until November 2006, the Israeli armed forces fired approximately 15,000 artillery shells and conducted more than 550 air strikes into the Gaza Strip. Israeli military attacks killed approximately 525 people in Gaza. Over the same period, at

²⁸ See International Crisis Group, “After Gaza”, Middle East Report N°68, 2 August 2007. See also Vanity Fair, “The Gaza bombshell”, April 2008, available at: <http://www.vanityfair.com/politics/features/2008/04/gaza200804>

²⁹ For reactions in support of the emergency Government by the United States, the European Union and Arab States, see “After Gaza...”.

³⁰ “Security cabinet declares Gaza hostile territory”, 19 September 2007, and “Behind the headlines: Israel designates Gaza a ‘hostile territory’”, 24 September 2007, available from the website of Israel’s Ministry of Foreign Affairs at www.mfa.gov.il

³¹ A/HRC/7/76.

³² A/ES-10/186.

least 1,700 rockets and mortars were fired into Israel by Palestinian militants, injuring 41 Israelis. The conflict culminated, in 2006, in the Israeli military incursions into Gaza, codenamed “Summer Rains” and “Autumn Clouds”, the latter focusing on the north of the Strip around the town of Beit Hanoun, where shortly after the end of the military operations in November, 19 people, of whom 18 of the same family, were killed by artillery fire in one incident.³³

196. In February 2008, a rocket attack from Gaza hit the Israeli city of Ashkelon causing light injuries. The Israeli armed forces launched an operation codenamed “Hot Winter” during which the air force conducted at least 75 air strikes on different targets within the Gaza Strip. As a result of the military operation, more than 100 Palestinians and 2 Israelis were killed in Gaza.³⁴

197. In June 2008, an informal “period of calm” (*Tahdiyah*) of six months was agreed through Egypt’s mediation. (For more details, see chapter III.)

B. Overview of Israel’s pattern of policies and conduct relevant to the Occupied Palestinian Territory, and links between the situation in Gaza and in the West Bank

198. Since 1967, Israel has built hundreds of settlements in the West Bank, including East Jerusalem, and the Gaza Strip. Such settlements were recognized by its Ministry of Interior as Israeli “communities” subjected to Israeli law. The above-mentioned Advisory Opinion by the International Court of Justice advisory opinion and “a number of United Nations resolutions have all affirmed that Israel’s practice of constructing settlements – in effect, the transfer by an occupying Power of parts of its own civilian population into the territory it occupies – constitutes a breach of the Fourth Geneva Convention”³⁵ (on the position of the Israeli High Court of Justice on the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, see chapter IV). Sixteen settlements in the Gaza Strip and three in the northern West Bank were dismantled in 2005 during the implementation of the so-called Israeli disengagement plan, but the establishment of new settlements continued. In 2007, there were more than 450,000 Israeli citizens living in 149 settlements in the West Bank, including East Jerusalem. According to United Nations sources, almost 40 per cent of the West Bank is now taken up by Israeli infrastructure associated with the settlements, including roads, barriers, buffer zones and military bases. Data released by the Israeli Central Bureau of Statistics showed that construction in these settlements has increased in 2008 by a factor of 1.8 in comparison with the same period in 2007. The number of tenders in East Jerusalem has increased by 3,728 per cent (1,761 housing units, compared with 46 in 2007). Until the end of the 1970s, the Government of Israel claimed that the settlements were established on the grounds of military necessity and security, but it has since abandoned this position.³⁶

³³ A/HRC/9/26.

³⁴ A/HRC/8/17.

³⁵ A/63/519.

³⁶ Ibid.

199. It is estimated that 33 per cent of the settlements have been built on private land owned by Palestinians, much of it expropriated by the State of Israel on asserted grounds of military necessity. Following a ruling of the Israeli High Court of Justice in 1979, the Government of Israel changed its policy of land confiscation on the asserted ground of military necessity and started having recourse to civil laws relating to land confiscation in place under Ottoman rule. According to these laws, land may be seized either because no one can prove ownership in accordance with the required standard of evidence or because the area in which it is situated is declared a closed military zone which farmers are prohibited from entering.³⁷

200. “Since 1967, the Israeli authorities have demolished thousands of Palestinian-owned structures in the [Occupied Palestinian Territory], including an estimated 2,000 houses in East Jerusalem.”³⁸ During the first quarter of 2008, the Israeli authorities demolished 124 structures in the West Bank, including East Jerusalem, for lack of permits. Of those, 61 were residential buildings whose demolition caused the displacement of many Palestinians, including children. Demolition of structures and residential buildings has been a feature of the Israeli policy that has displaced Palestinians mainly in the Jordan Valley and in East Jerusalem, but also in other areas of the West Bank. The Israeli authorities justify the majority of these demolitions by claiming that the structures or buildings lack the necessary permits. The relevant Israeli authorities rarely issue building permits for Palestinians, frequently refusing them on the basis that the construction is in violation of the mandatory regional outline plans approved by the British Mandate Government of Palestine in the 1940s.³⁹ Areas in East Jerusalem face the prospect of mass demolitions. Carrying out pending demolition orders would affect a combined total of more than 3,600 persons.⁴⁰ The combined effects of the Israeli policies of expanding and establishing new settlements, the demolition of Palestinian-owned properties, including houses, the restrictive and discriminatory housing policies as well as the Wall have been described as a way of “actively pursuing the illegal annexation” of East Jerusalem.⁴¹

³⁷ Ibid.

³⁸ Office for the Coordination of Humanitarian Affairs (OCHA), “The planning crisis in East Jerusalem: Understanding the phenomenon of ‘illegal’ construction”, Special Focus, April 2009, available at: http://www.ochaopt.org/documents/ocha_opt_planning_crisis_east_jerusalem_april_2009_english.pdf

³⁹ A/63/518.

⁴⁰ OCHA, Special Focus, April 2009.

⁴¹ The Guardian, “Israel annexing East Jerusalem, says EU”, 7 March 2009, available at: <http://www.guardian.co.uk/world/2009/mar/07/israel-palestine-eu-report-jerusalem>

201. The route of the Wall weaves between Palestinian villages and neighbourhoods and has contributed to the fragmentation of the West Bank into a series of enclaves separated from one another (see map⁴² below). The Wall encircles settlements built around Jerusalem and within the West Bank and connects them to Israel. Eighty per cent of Israeli inhabitants of these settlements reside to the west of the Wall. The route of the Wall, which has created a demarcation, is to a great degree determined by the objective of incorporating settlements into the Israeli side and to exclude Palestinians from these areas.⁴³ If completed, 85 per cent of the Wall will be located inside the West Bank, and 9.5 per cent of West Bank territory, including East Jerusalem, will be cut off from the rest of the West Bank. It is estimated that 385,000 Israeli citizens in 80 settlements out of the total of 450,000 Israeli citizens in 149 settlements and 260,000 Palestinians, including in East Jerusalem, will be located between the Wall and the Green Line. In addition, approximately 125,000 Palestinians in 28 communities will be surrounded on three sides and 26,000 Palestinians in eight communities will be surrounded on four sides.⁴⁴ A number of surveys compiled by United Nations agencies⁴⁵ found that many Palestinian communities cut off by the Wall do not enjoy full access to emergency health services, posing severe challenges in medical emergencies and for expectant mothers. In addition the Wall cuts off residents in closed areas from schools and universities, also having an impact on social relations and especially on traditional marriage patterns. The Wall isolates the land and water resources of a large number of Palestinians, having a negative impact on agricultural practices and on rural livelihoods.

202. Despite the claim by Israel that restrictions of movement within the West Bank are imposed on Palestinian residents for security purposes, most of those internal restrictions appear to have been designed to guarantee unobstructed travel to the Israeli inhabitants of the settlements. None of these restrictions applies to Israeli citizens travelling throughout the West Bank.⁴⁶

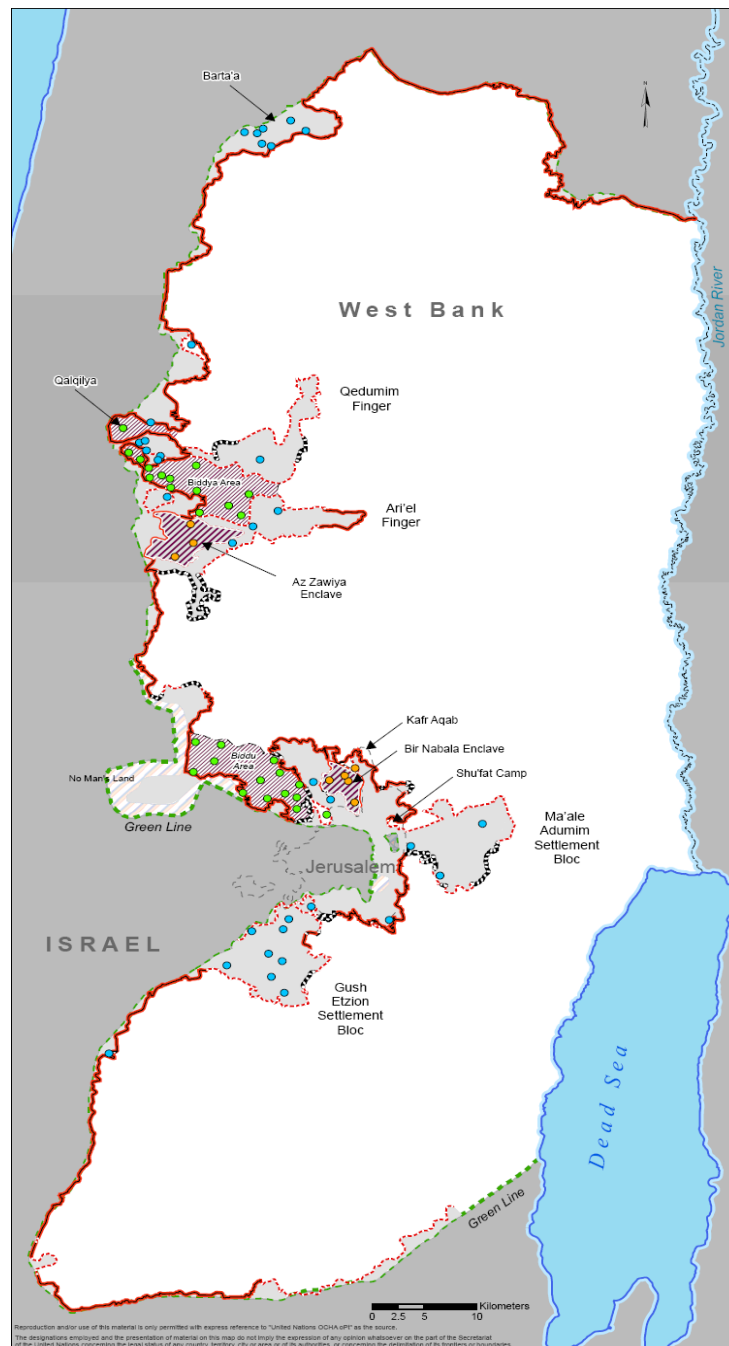
⁴² OCHA, “West Bank barrier route projections”, July 2008, available at: http://www.ochaopt.org/documents/BarrierRouteProjections_July_2008.pdf

⁴³ A/63/519.

⁴⁴ OCHA, “Five years after the International Court of Justice Advisory Opinion: A summary of the humanitarian impact of the barrier”, July 2009 (Updated August 2009), available at: http://www.ochaopt.org/documents/ocha_opt_barrier_report_july_2009_english_low_res.pdf.

⁴⁵ OCHA and UNRWA surveys quoted in OCHA Special Focus, – “Three years later: The humanitarian impact of the barrier since the International Court of Justice Opinion”, 9 July 2007, available at: http://www.ochaopt.org/documents/ICJ4_Special_Focus_July2007.pdf.

⁴⁶ A/63/519.



203. A two-tiered road system has been established throughout the West Bank in which main roads are reserved for the exclusive use of Israeli citizens while Palestinians are confined to a different (and inferior) road network. The Israeli-built roads in the West Bank form a network linking Israeli settlements with one another and to Israel proper. Palestinians are denied free access to approximately 1,500 km of roads within the West Bank.⁴⁷ Travel on these roads by

⁴⁷ Most prohibited roads comprise the major north-south and east-west routes in the West Bank. These are reserved for settlers, Israeli security forces and non-Palestinian international passport holders, including international United Nations staff.

Palestinians is completely forbidden. Partially prohibited roads are those for which a special permit is required, while restricted roads are those on which individuals travelling on such roads who are not from the local area must have a permit.⁴⁸

204. The policy of “closure”, i.e. closures of entire areas and restrictions on the movement for goods and people on the basis of alleged security threats to Israeli citizens, has been a characteristic of the Israeli control over the Gaza Strip and the West Bank since 1996 and has dramatically affected the lives of Palestinians. “Perhaps the most devastating effect of the heightened closure has been a dramatic rise in unemployment levels in the West Bank and Gaza Strip. Because the closure restricts the movement of all people (and goods) in and out of the Gaza Strip and West Bank, as well as movement within the West Bank itself, workers from these territories have been unable to reach their places of employment. According to the Palestinian Ministry of Labour, unemployment in Gaza has increased from 50 per cent to 74 per cent (and from 30 per cent to 50 per cent in the West Bank). Before the heightened closure, 22,000 Gazans (down from 80,000 in 1987) and 26,000 West Bankers had permits to work in Israel.” “Losses from unemployment amount to \$1.04 million daily for the Gaza Strip alone – \$750,000 from lost wages in Israel and \$290,000 from lost wages in local sectors. The Palestinian Bureau of Statistics (PBS) estimates that from February 25 to April 4, the Gaza Strip and West Bank lost \$78.3 million in wages and income.”⁴⁹ In June 2009, more than 40 United Nations and other humanitarian agencies urged Israel to lift its blockade of Gaza, where nearly everyone depends on international humanitarian assistance, and indiscriminate sanctions are affecting the entire population of 1.5 million⁵⁰ (see also chap. V).

205. A number of Israeli policies and measures especially since 1996 have contributed to effectively separating Gaza from the West Bank, despite the commitments contained in the Oslo I Accord by which “the two sides view the West Bank and the Gaza Strip as a single territorial unit, whose integrity will be preserved during the interim period.” The imposition of tight closures and limitations on movement has chiefly contributed to this separation.⁵¹ With the implementation of the “disengagement plan” and after Hamas secured control of the Gaza Strip, the imposition of an almost total closure has meant that direct contact is no longer possible with Palestinians from the West Bank. The arrest by Israel of members of the Palestinian Legislative Council and other Palestinian Authority officials has also resulted in the inability of many institutions to function properly and prevented Palestinians from the two areas to work together. In the past few years a new permit system has been imposed on Palestinians of the Gaza Strip living in the West Bank. Without such a permit they can be declared “illegal aliens”. In addition, the Israeli authorities – who are in control of the population registry – have stopped updating the addresses of Palestinians who have moved from Gaza to the West Bank. The new requirement

⁴⁸ A/63/519.

⁴⁹ Sara Roy, “Economic deterioration in the Gaza Strip”, Middle East Report, No. 200 (Summer 2006), available at: <http://www.merip.org/mer/mer200/roy.html>.

⁵⁰ “UN, aid agencies call for end to Israel’s two-year blockade of Gaza” (17 June 2009), available at: <http://www.un.org/apps/news/story.asp?NewsID=31174&Cr=gaza&Cr1>.

⁵¹ “The total separation of the Gaza Strip from the West Bank is one of the greatest achievements of Israeli politics.” See Amira Hass, “An Israeli achievement” (20 April 2009), available at: <http://www.bitterlemons.org/previous/bl200409ed15.html#isr2>.

for a permit is based on a person's registered address, enabling Israel to bar Palestinians whose registered address is in Gaza from moving to the West Bank. This measure has also retroactively turned many Palestinians who already live in the West Bank into illegal residents. These policies have had a devastating impact on many families that were effectively forced to live apart or, in order to live together, move to the Gaza Strip with no possibility of returning to the West Bank.⁵² Israel has bureaucratically and logistically effectively split and separated not only Palestinians in the occupied territories and their families in Israel, but also Palestinian residents of Jerusalem and those in the rest of the territory and between Gazans and West Bankers/Jerusalemmites.⁵³

206. Despite prohibitions under international humanitarian law (IHL),⁵⁴ Israel has applied its domestic laws throughout the Occupied Palestinian Territory since 1967. Notably, existing planning and construction laws were annulled and replaced with military orders, and related civil powers transferred from local authorities to Israeli institutions, with ultimate discretion resting with military commanders.⁵⁵ The application of Israeli domestic laws has resulted in institutionalized discrimination against Palestinians in the Occupied Palestinian Territory to the benefit of Jewish settlers, both Israeli citizens and others. Exclusive benefits reserved for Jews derive from the two-tiered civil status under Israel's domestic legal regime based on a "Jewish nationality," which entitles "persons of Jewish race or descendancy"⁵⁶ to superior rights and privileges, particularly in land use, housing, development, immigration and access to natural resources, as affirmed in key legislation.⁵⁷ Administrative procedures qualify indigenous inhabitants of the Occupied Palestinian Territory as "alien persons" and, thus, prohibited from building on, or renting, large portions of land designated by the Government of Israel as "State land".⁵⁸

207. The two-tiered civil status under Israeli law, favouring "Jewish nationals" (*le'om yehudi*) over persons holding Israeli citizenship (*ezrahut*), has been a subject of concern under the International Covenant on Economic, Social and Cultural Rights, particularly those forms of discrimination carried out through Israel's parastatal agencies (World Zionist Organization/Jewish Agency, Jewish National Fund and their affiliates), which dominate land

⁵² B'Tselem and Hamoked, "Separated entities - Israel divides Palestinian population of West Bank and Gaza Strip", available at: http://www.btselem.org/Download/200809_Separated%20Entities_Eng.pdf.

⁵³ Amira Hass, op. cit.

⁵⁴ The Hague Regulations (art. 43).

⁵⁵ Order regarding the Towns, Villages and Buildings Planning Law (Judea and Samaria) (No. 418), 5731-1971 (QMZM 5732 1000; 5736 1422, 1494; 5741 246; 5742 718, 872; 5743, No. 57, at 50; 5744, No. 66, at 30), para. 8.

⁵⁶ Jewish National Fund, Memorandum of Association, art. 3 (c).

⁵⁷ For those holding "Jewish nationality" (as distinct from Israeli citizenship), special immigration rights and privileges are provided in the Basic Law: Law of Return (1950), as well as development and access to natural resources under the Basic Law: "Israel Lands" (1960).

⁵⁸ An alien person is defined as one who falls outside the following categories: (a) an Israeli citizen; (b) a person who has immigrated (to Israel) under the Basic Law: Law of Return; (c) someone who is entitled to the status of immigrant under the Law of Return, i.e. a Jew by descent or religion; (d) a company controlled by (a), (b) or (c).

use, housing and development.⁵⁹ The Committee on Economic, Social and Cultural Rights also has recognized that Israel's application of a "Jewish nationality" distinct from Israeli citizenship institutionalizes discrimination that disadvantages all Palestinians, in particular, refugees.⁶⁰

208. In 2007, the Committee on the Elimination of Racial Discrimination highlighted another discriminatory policy imposed by the Israeli authorities on Palestinian residents of the Occupied Palestinian Territory as well as those who are Israeli citizens (but denied a legal "nationality" status).⁶¹ The "Citizenship and Entry into Israel Law (Temporary Order)" of 31 May 2003 bars the possibility of granting Israeli citizenship and residence permits in Israel, including through family reunification, to residents of the Occupied Palestinian Territory. The Committee noted that such measures have a disproportionate impact on Arab Israeli citizens who marry Palestinians from the Occupied Palestinian Territory and wish to live together with their families in Israel. While noting the State party's legitimate objective of guaranteeing the safety of its citizens, the Committee expressed concern about the fact that these "temporary" measures have systematically been renewed and have been expanded to citizens of "enemy States".⁶²

209. Since 1967, about 750,000 Palestinians have been detained at some point by the Government of Israel, according to Palestinian human rights organizations. Currently, there are approximately 8,100 Palestinian prisoners in Israeli prisons and detention centres, roughly 550 of whom are administrative detainees.⁶³ Administrative detention is detention without charge or trial, authorized by an administrative order rather than by judicial decree. The conditions of Palestinians in Israeli detention facilities have been the subject of considerable international criticism, including concerns of torture and other ill-treatment. Palestinian detainees can normally be visited only by first-degree relatives (see chapter XXI). However, following Hamas' seizure of full control in the Gaza Strip in June 2007, the Israeli authorities suspended visits from

⁵⁹ In 1998, the Committee on Economic, Social and Cultural Rights observed "with grave concern that the Status Law of 1952 authorizes the World Zionist Organization/Jewish Agency and its subsidiaries, including the Jewish National Fund, to control most of the land in Israel, since these institutions are chartered to benefit Jews exclusively. [...] large-scale and systematic confiscation of Palestinian land and property by the State and the transfer of that property to these agencies constitute an institutionalized form of discrimination because these agencies by definition would deny the use of these properties to non-Jews. Thus, these practices constitute a breach of Israel's obligations under the Covenant." (E/C.12/1/Add.27, para. 11).

⁶⁰ In its 2003 review, the Committee on Economic, Social and Cultural Rights also observed with particular concern that "the status of 'Jewish nationality,' which is a ground for exclusive preferential treatment for persons of Jewish nationality under the Israeli Law of Return, granting them automatic citizenship and financial government benefits, thus resulting in practice in discriminatory treatment against non-Jews, in particular Palestinian refugees." (E/C.12/1/Add.90, para. 18).

⁶¹ The "Or" Commission, a panel appointed by the Israeli Government in 2000, found that Arab citizens suffer discrimination in Israel and levelled criticism at the Government for failing to give fair and equal attention to the needs of Arab citizens of Israel. See its full report at: http://elyon1.court.gov.il/heb/veadot/or/inside_index.htm (in Hebrew).

⁶² CERD/C/ISR/CO/13.

⁶³ Mission's Public hearings, Geneva (7 July 2009). Testimony of Ms. Sahar Francis, Director of Addameer, available at: <http://webcast.un.org/ramgen/ondemand/conferences/unhrc/gaza/gaza090707am1-eng.rm?start=00:00:00&end=00:47:46>

family members travelling from Gaza to Palestinian detainees in Israel, depriving more than 900 detainees of direct contact with their relatives.⁶⁴

C. Relevant political and administrative structures in the Gaza Strip and the West Bank

210. The Palestinian Legislative Council is the legislature of the Palestinian Authority; a unicameral body with 132 members, elected from 16 electoral districts in the West Bank and Gaza. Its initial composition, whose normal cycle is four years, was 88 members. In accordance with the Oslo Accords, the first Palestinian elections took place in 1996 under the supervision of international monitors. In 2000, a second round of planned elections did not take place due to the flaring-up of the second intifada. In January 2006, the second general polls took place. The elections resulted in a majority for the List of Change and Reform.⁶⁵ On 29 June, days after the capture of Gilad Shalit, the Israeli armed forces in the West Bank arrested eight Palestinian Government ministers and 26 members of the Palestinian Legislative Council.⁶⁶ The Council has been unable to operate since, as the continued detention of its members means it cannot achieve a quorum.

211. The Palestinian Basic Law was developed to function as a temporary constitution for the Palestinian Authority until the establishment of an independent State and a permanent constitution for Palestine can be drawn up. The Basic Law was passed by the Palestinian Legislative Council in 1997 and ratified by the President of the Palestinian Authority in 2002. It has been amended twice: in 2003, the political system was changed to introduce a prime minister and, in 2005, it was amended to conform to the new Election Law.⁶⁷ The legal system comprises a body of laws and decrees which include those remaining from previous centuries – Ottoman, British, Jordanian (in the West Bank), Egyptian (in the Gaza Strip) and Israeli – and legislation introduced by presidential decrees and laws passed by the Palestinian Legislative Council.⁶⁸

212. In the jurisdiction of the Palestinian Authority, the court system comprises Magistrate Courts, dealing with misdemeanours; Courts of First Instance, dealing with more serious crimes and appeals against judgements handed down by Magistrate Courts; Appeal Courts, which hear appeals against judgements of the Courts of First Instance; and the High Court, which provides the highest level of appeal. A Supreme Criminal Court was set up in 2006 to try crimes such as murder, abduction, rape, so-called honour crimes and attacks on national security. Military Courts hear cases involving members of the security forces and apply the 1979 PLO Revolutionary Code. The Attorney General and the prosecutors investigate and prosecute crimes, oversee the legality of detentions and investigate complaints by detainees. The Attorney General and the judges are nominated by the Higher Judicial Council, which is headed by the President

⁶⁴ A/63/518.

⁶⁵ The name of the list on which Hamas representatives ran for election.

⁶⁶ See chap. XXI.

⁶⁷ The Palestinian Basic Law: <http://www.palestinianbasiclaw.org>

⁶⁸ Amnesty International, “Occupied Palestinian Territories torn apart by factional strife”, available at: <http://www.amnesty.org/en/library/asset/MDE21/020/2007/en/dom-MDE210202007en.html>.

of the High Court, but appointed by the Palestinian Authority's President.⁶⁹ Since June 2007, the Gaza authorities have restructured the judiciary in violation of Palestinian laws. To replace officials who had left their jobs under instruction of the Palestinian Authority, the Gaza authorities appointed judges and prosecutors generally lacking experience and independence.⁷⁰

213. Before June 2007, there were about 12,600 Palestinian police officers in Gaza and 6,500 in the West Bank under a unified command. Palestinian civil police were operating from 10 district headquarters (including the one in Ramallah, which is also its main central command). After Hamas seized full control of the Gaza Strip, official data about police numbers are available only for the West Bank, where there are 78 police facilities, including district headquarters, general stations and posts, public order compounds, prisons and detention centres, training centres and stations for border police, tourist police, criminal investigation police and traffic police.⁷¹

214. In 2005 various security forces were consolidated into three branches: National Security, Internal Security and General Intelligence, each comprising several forces. General Intelligence includes Military Intelligence and the Military Police, and is under the direct control of the Palestinian Authority's President, as is the Presidential Guard/Force 17. National Security and Internal Security are under the jurisdiction of the Ministers of National Security and the Interior, respectively, but their heads are appointed by the Palestinian Authority's President. In 2006, the then Hamas Interior Minister established the Executive Force, mainly composed of members of al-Qassam Brigades and Hamas supporters.⁷² Since Hamas seized control in June 2007, law and order and other security functions have been performed by Hamas security organizations.⁷³ The Gaza authorities announced a series of new bodies or mechanisms to replace the Palestinian Authority's security forces and judicial institutions that have refused to operate under or alongside the Hamas administration.⁷⁴ In September 2007, the Internal Security Force was established with most of its personnel coming from al-Qassam Brigades. In October 2007, Hamas dissolved the Executive Force and absorbed its personnel into the police. Both the Internal Security Force and the police report to the minister of interior.⁷⁵ (See chapter X.)

215. Most Palestinian political parties have an armed wing or armed groups affiliated to them.⁷⁶ The two largest armed groups are al-Aqsa Brigades, the armed wing of Fatah, and al-

⁶⁹ Ibid.

⁷⁰ Human Rights Watch, *Internal Fight: Palestinian Abuses in Gaza and the West Bank* (July 2008), available at: <http://www.hrw.org/en/reports/2008/07/29/internal-fight-0>.

⁷¹ The European Union's police mission for the Palestinian Territories (2008), available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/EUPOL%20COPPS%20booklet.pdf>.

⁷² See chap. VII.

⁷³ Central Intelligence Agency, *The World Fact Book 2009* (Gaza Strip), available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/gz.html>.

⁷⁴ "Occupied Palestinian Territories torn apart...".

⁷⁵ Internal Fight...

⁷⁶ The armed wings of the Islamic Jihad, the Popular Front for the Liberation of Palestine and the Democratic Front for the Liberation of Palestine. There are also other smaller splinter groups.

Qassam Brigades, the armed wing of Hamas. Al-Aqsa Brigades were established by Fatah activists, including members of the Palestinian Authority's security forces, shortly after the outbreak of the second intifada. Al-Qassam Brigades were established in the early 1990s with the stated aim of conducting armed resistance to Israeli occupation.⁷⁷

D. Relevant political and administrative structures in Israel

216. In Israel, a largely ceremonial President is elected by the 120-seat Knesset for a seven-year, non-renewable term. The Prime Minister is usually the leader of the largest party or coalition in the Knesset, whose members are elected by party-list, proportional representation for four-year terms. The three main parties are the centre-left Labour Party, the centrist Kadima and the right-wing Likud.⁷⁸

217. Following legislative elections, the President assigns a Knesset member – traditionally the leader of the largest party – the task of forming a governing coalition.

218. Israel has no formal constitution; some of the functions of a constitution are fulfilled by the Declaration of Establishment (1948), the Basic Laws of the parliament (Knesset) and the Israeli Citizenship Law.

219. The court system comprises Magistrates' Courts, which are courts of first instance in criminal and civil matters; District Courts, which are courts of first instance with jurisdiction over serious criminal offences which carry the death penalty or more than seven years' imprisonment and act as appellate courts for the judgments of the Magistrates' Court; and the Supreme Court, which is the highest judicial instance of the country.⁷⁹ The Supreme Court hears direct petitions from Israeli citizens. It also hears cases related to Palestinian residents of the West Bank and Gaza Strip sitting as the High Court of Justice.⁸⁰ Palestinian civilians charged with security-related and other criminal offences are, however, commonly tried in the Israeli military court system. Since 1967, more than 200,000 cases have been brought before military courts, where Palestinian civilians have been prosecuted and judged by the military authorities. About half the prisoners currently being held in Israel have been sentenced to prison terms by military courts.⁸¹

⁷⁷ "Occupied Palestinian Territories torn apart...".

⁷⁸ Freedom House. Country report: Israel (2009), available at: <http://www.freedomhouse.org/template.cfm?page=22&country=7630&year=2009>.

⁷⁹ The State of Israel – The Judicial Authority, at: <http://elyon1.court.gov.il/eng/home/index.html>.

⁸⁰ "As the High Court of Justice, the Supreme Court rules as a court of first instance, primarily in matters regarding the legality of decisions of State authorities: Government decisions, those of local authorities and other bodies and persons performing public functions under the law. It rules on matters in which it considers it necessary to grant relief in the interests of justice, and which are not within the jurisdiction of another court or tribunal." See The State of Israel – Judicial Authority (The Supreme Court), at: <http://elyon1.court.gov.il/eng/rashut/maarechet.html>.

⁸¹ See Yesh Din – Volunteers for Human Rights, Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories (December 2007), available at: <http://www.yesh-din.org/site/images/BackyardProceedingsEng.pdf>.

220. The Israeli police is a civilian force mandated to fight crime, control traffic and maintain public safety. The border police (*Magav*) is the military branch of the Israeli police, with combat, counter-terrorism and riot-control units.

221. Branches of the military are the Israeli Defense Forces (IDF), Israeli Naval Forces (INF) and the Israeli Air Force (IAF). The Israeli military is headed by the Chief of General Staff under the Minister of Defense. The structure of the Israeli army comprises four regional commands: (a) the Northern Command; (b) the Central Command; (c) the Southern Command; and (d) the Home Front Command. The Coordinator of Government Activities in the Territories (COGAT) – formerly known as the “Civil Administration” – is a unit in the Israeli Ministry of Defense that administers areas of the West Bank and coordinates with international organizations operating in the West Bank and the Gaza Strip.

222. The Israeli intelligence services are: (a) the Institute for Intelligence and Special Operations (*Mossad*); (b) the Israeli Security Agency (formerly the General Security Services) or the Israeli internal security service (*Shin Bet* or *Shabak*); and (c) the Military Intelligence (*Aman*).

III. EVENTS OCCURRING BETWEEN THE “CEASEFIRE” OF 18 JUNE 2008 BETWEEN ISRAEL AND THE GAZA AUTHORITIES AND THE START OF ISRAEL’S MILITARY OPERATIONS IN GAZA ON 27 DECEMBER 2008

223. As mentioned in chapter I, in order to implement its mandate the Mission decided to focus primarily on events, actions or circumstances that had occurred since 19 June 2008, when a ceasefire was agreed between the Government of Israel and Hamas. Accordingly, both in the context of its mandate and in order to be informed about the environment in which the Israeli military operations in the Gaza Strip took place, the Mission reviewed incidents relevant to the ceasefire that were reported to have taken place between 19 June 2008 and the start of Israel’s military operations in the Gaza Strip. Information about these incidents, which are recorded in chronological order, was gathered primarily from documents in the public domain and may not represent all incidents that occurred during this period.⁸²

224. On 18 June 2008, the Gaza authorities and Israel announced a six-month ceasefire in an agreement brokered by Egypt.⁸³ The ceasefire came into effect on 19 June 2008 at 6 a.m.⁸⁴

⁸² Sources include public statements issued by the Gaza authorities, Palestinian armed groups and Israel, reports of the United Nations, national and international NGOs and the media.

⁸³ The ceasefire was officially termed “a period of calm” (Tahdiyah in Arabic). It has also been referred to as “security calm” and “lull”.

⁸⁴ Prime Minister Olmert’s comments on the calm in the south, Press Release, 18 June 2008, Prime Minister’s Office, available at: <http://www.pmo.gov.il/PMOEng/Archive/Press+Releases/2008/06/spokecalm180608.htm>; Al Ahram Weekly, “Calm for now”, 19 June 2008, available at: <http://weekly.ahram.org.eg/2008/902/eg2.htm>; Felesteen Newspaper, “Gaza: Hamas: the Tahdiyah is the fruit of the resilience and resistance of the (resistance) groups and its unity”, 18 June 2009, available at: <http://www.felesteen.ps/file/pdf/2008/06/18/1.pdf>; 19 June 2009; Felesteen Newspaper, Gaza, Tahdiya starts today accompanied with international and popular welcoming, <http://www.felesteen.ps/file/pdf/2008/06/19/1.pdf>. See chap. II.

225. The terms of the ceasefire agreement were not set out in any formal, written document and, according to recent analysis, the Gaza authorities' and Israel's understanding of the terms differed substantially.⁸⁵ According to information reported by OCHA, the agreement included a commitment by the Gaza authorities to halt attacks by Palestinian armed groups against Israel immediately and a commitment by Israel to cease its military operations in Gaza. Israel also reportedly agreed to ease its blockade of Gaza and gradually lift its ban on the import of a large number of commodities.⁸⁶ According to Egyptian sources quoted by the International Crisis Group,⁸⁷ after three weeks the two sides were to commence negotiations for a prisoner exchange and the opening of the Rafah crossing.

226. The agreement was made in respect to the territory of the Gaza Strip only, but Egypt reportedly undertook to work to expand the ceasefire to the West Bank after the initial six-month ceasefire had elapsed.⁸⁸

227. The first incident relevant to the ceasefire reportedly took place on 23 June 2008, when a 67-year-old Palestinian civilian was injured when the Israeli military stationed at the border north-west of Beit Lahia opened fire on a group of Palestinians trying to collect fire wood near the border. Also on 23 June, two mortar shells were reportedly fired from central Gaza. One landed near the Nahal Oz crossing and the other in the Negev desert; no injuries were reported.⁸⁹

228. Between 18 and 24 June 2008, the Karni (al-Mintar) crossing conveyor belt was opened for four days for wheat and animal feed but was closed to all other imports and exports. The Erez crossing was open for six days to allow the movement of diplomats, international humanitarian workers and critical medical cases. OCHA indicated that senior Palestinian businessmen were also allowed to cross. The Sufa crossing was open for five days during the week ending 24 June 2008, while the Kerem Shalom and Rafah crossings remained closed. The Nahal Oz energy pipelines were open on the six scheduled operating days.⁹⁰

⁸⁵ See International Crisis Group, "Ending the war in Gaza", Middle East Briefing No. 26, 5 January 2009, p. 3, available at: http://www.crisisgroup.org/library/documents/middle_east__north_africa/arab_israeli_conflict/b26_ending_the_war_in_gaza.pdf.

⁸⁶ OCHA, Protection of Civilians Weekly Report (18–24 June 2008), available at: http://www.ochaopt.org/documents/Weekly_Briefing_Notes_265_English.pdf; see also "Ending the war...", which also notes that crossing points were to be opened after 72 hours (6 a.m. on 22 June 2008) to allow 30 per cent more goods into Gaza and, on 1 July 2009, all crossings were to be opened to allow for the transfer of goods into Gaza (footnote 1). It is the Mission's understanding that, in relation to the transfer of goods, the agreement did not include materials that could be used to make explosives or projectiles.

⁸⁷ See "Ending the war...".

⁸⁸ "Ending the war...", footnote 1. See also The Jerusalem Post, "End of truce? 3 Kassams hit w. Negev", 24 June 2008, available at <http://www.jpost.com/servlet/Satellite?cid=1214132667653&pagename=JPost%2FJPostArticle%2FShowFull>.

⁸⁹ OCHA, Protection of Civilians Weekly Report (18–24 June 2008).

⁹⁰ Ibid.

229. Shortly after midnight on 24 June 2008, a mortar fired from Gaza landed in the Negev near the Karni checkpoint, causing no injuries or damage.⁹¹ No group claimed responsibility for the attack.⁹²

230. At dawn on 24 June 2008, the Israeli armed forces launched a raid in the West Bank town of Nablus in which an Islamic Jihad activist and another Palestinian man were killed.⁹³ According to statements reportedly made by the Palestinian armed group Islamic Jihad, it responded by firing three Qassam rockets into Israel, which landed in the western Negev desert.⁹⁴ It added: “We cannot keep our hands tied when this is happening to our brothers in the West Bank”, while a Gaza authorities spokesman was quoted as saying that the rocket attack came as a result of “Israeli provocation” but that Hamas, as the Gaza authorities, was “committed to the security calm”.⁹⁵ In Israel, the Foreign Ministry spokesperson termed the rocket attacks “a grave violation of the ceasefire”⁹⁶ and said it would consider reimposing economic sanctions.⁹⁷

231. On 26 June 2008, Israel’s Defense Ministry ordered the reclosure of the Gaza border crossings, save for special humanitarian cases, in response to the rocket attacks two days previously.⁹⁸ The Gaza authorities accused Israel of violating the ceasefire, stating “if the crossings remain closed, the truce will collapse”.⁹⁹

232. Later on 26 June 2008, one rocket was fired from Gaza into Israel for which the Palestinian armed group al-Aqsa Martyrs’ Brigades claimed responsibility.¹⁰⁰ As reported by the Xinhua news agency, the armed group stated that “the truce must include the West Bank and all

⁹¹ Rianovosti, “Mortar attack from Gaza hit Israel”, 24 June 2008, available at: <http://en.rian.ru/world/20080624/111867958.html>; “End of truce?...”.

⁹² “Mortar attack...”.

⁹³ “End of truce?...”; The New York Times, “Rockets hit Israel, breaking Hamas truce”, 25 June 2008, available at <http://www.nytimes.com/2008/06/25/world/middleeast/25mideast.html>

⁹⁴ “End of truce?...”.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ BBC News, “Rockets ‘violated Gaza ceasefire’”, 24 June 2008, available at: http://news.bbc.co.uk/2/hi/middle_east/7470530.stm

⁹⁸ Xinhua News, “Israeli FM calls for immediate military response to Qassam attacks”, 26 June 2008.

⁹⁹ Gaza authorities, “The Government: Closing the crossings is an infringement of truce, and we call Egypt to interpose”, press statement (25 June 2008), available at: <http://www.moi.gov.ps/en/?page=633167343250594025&Nid=4702>; see also “Israeli FM calls for immediate military response...”.

¹⁰⁰ OCHA, Protection of Civilians Weekly Report (25 June–1 July 2008), available at: http://www.ochaopt.org/documents/Weekly_Briefing_Notes_266.pdf.

sorts of aggression must stop”.¹⁰¹ The Israeli Foreign Minister commented, “I do not care which organization fired the rocket, Israel must respond militarily and immediately.”¹⁰²

233. On 27 June 2008, the al-Aqsa Martyrs’ Brigades claimed responsibility for firing mortar shells into Israel, one of which landed near Sderot. The head of the Gaza authorities, Ismail Haniyah, called on all the Palestinian factions to adhere to the ceasefire, stating that “the factions and the people accepted the lull in order to secure two interests – an end to aggression and the lifting of the siege”. A spokesman for the Gaza authorities was quoted as saying that it considered the rocket attacks to be “unpatriotic” and that Hamas was considering the possibility of taking action against those perpetrating the attacks against Israel.¹⁰³

234. On 28 June 2008, mortar shells were reportedly fired at the Karni crossing but no group claimed responsibility. On 29 June 2008, the crossings into Gaza were closed,¹⁰⁴ save for the delivery of fuel.

235. On 30 June 2008, Israel reported that a rocket fired from Gaza fell near the kibbutz of Miflasim. No group claimed responsibility and Israel confirmed that as of 1 July 2008 no rocket fragments had been located. Israel closed the crossings which had been reopened the day before. The Gaza authorities rejected the assertion that a rocket had in fact been fired and called the closure of the crossings “unjustified”.¹⁰⁵

236. On several occasions during the last two weeks of June, the Israeli navy fired at Palestinian fishermen off the Gaza coast, forcing them to return to shore.¹⁰⁶

237. During the month of June, the number of truckloads of goods allowed into Gaza represented only 17 per cent of the number that entered Gaza in May 2007, before Hamas seized control of the Gaza Strip. No exports had been allowed out of Gaza by Israel since December 2007.¹⁰⁷

¹⁰¹ Xinhua News, “Israeli FM calls for immediate military response ...”.

¹⁰² Israel Ministry of Foreign Affairs: “FM Livni: Israel will not tolerate violations of the calm”, press release (26 June 2008), available at: <http://www.mfa.gov.il/MFA/About+the+Ministry/MFA+Spokesman/2008/Israel%20will%20not%20tolerate%20violations%20of%20the%20calm%2026-Jun-2008>.

¹⁰³ Ynet News, “Haniyeh: All Palestinian factions should honor truce”, 27 June 2008; <http://www.ynetnews.com/articles/0,7340,L-3561133,00.html>.

¹⁰⁴ Intelligence and Terrorism Information Center at the Israel Intelligence Heritage & Commemoration Center, “The six months of the lull arrangement”, December 2008.

¹⁰⁵ The Guardian, “Israel closes Gaza crossing after reported rocket attack”, 1 July 2008, available at: <http://www.guardian.co.uk/world/2008/jul/01/israelandthepalestinians.middleeast>.

¹⁰⁶ OCHA, Protection of Civilians Weekly Report (18–24 June 2008) and Protection of Civilians Weekly Report (25 June–1 July 2008).

¹⁰⁷ OCHA, The Humanitarian Monitor, No. 26 (June 2008), available at http://www.ochaopt.org/documents/HM_June_2008.pdf.

238. On 1 July 2008, a spokesman for the Gaza authorities accused the Israeli armed forces of shooting a 65-year-old Palestinian woman who was living near the border. Israel said that it was investigating the claim.¹⁰⁸

239. On 2 July 2008, Israel reopened the Sufa and Karni crossings to allow passage of goods into Gaza, while 45 medical evacuations were allowed through the Erez crossing.¹⁰⁹

240. Also on 2 July 2008, several thousand Palestinians attempted to break into the Rafah terminal and cross into Egypt. Egyptian security forces responded with water cannons and tear gas to force them back into Gaza.¹¹⁰

241. On 3 July 2008, a rocket launched from Gaza struck north of Sderot and Israel closed the crossings into Gaza for the day on 4 July 2008 in response.¹¹¹

242. On 7 July 2008, a mortar shell fired from Gaza landed near the Karni crossing, on the Gaza side.¹¹² On the same day, Israeli forces began raids on institutions in Nablus that it believed to be linked to Hamas. Over the following four days, a mosque, a newspaper and other offices were raided, and a medical centre and the Nafha Prisoners' Association were closed down.¹¹³

243. On 8 July 2008, two mortars were fired from Gaza,¹¹⁴ one landing at the Sufa crossing and the other inside the Gaza Strip. Israel closed the crossings briefly. Following the firing of another mortar shell into Israel, the crossing was again closed.

244. On 9 July 2008, Israeli forces shot dead a Hamas member near the West Bank city of Jenin. This led Palestinian Authority Prime Minister Salam Fayyad to warn that the Israeli military actions in the West Bank were undermining the Palestinian Authority and its efforts to improve security.¹¹⁵

245. On 10 July 2008, the Israeli armed forces shot and killed a member of al-Aqsa Martyrs' Brigades near the Kissufim crossing. The Israeli armed forces stated that warning shots had been fired. In response, the al-Aqsa Martyrs' Brigades fired two rockets into Israel which landed in an open area. Sources inside Gaza said that the Gaza authorities had arrested those responsible for

¹⁰⁸ "Israel closes Gaza crossings after reported rocket...".

¹⁰⁹ Government of Israel Ministry of Foreign Affairs, "Humanitarian Assistance to Gaza during the period of calm (19 June – Dec 18, 2009)", 26 December 2008, available at http://www.mfa.gov.il/MFA/Government/Communiques/2008/Humanitarian_assistance%20to_Gaza_since_June_19_calm_understanding_18_Nov_2008.

¹¹⁰ OCHA, Protection of Civilians Weekly Report (2–8 July 2008), available at: http://www.ochaopt.org/documents/Weekly_Briefing_Notes_267.pdf.

¹¹¹ "The six months...".

¹¹² OCHA, Protection of Civilians Weekly Report (2–8 July 2008).

¹¹³ PCHR, "PCHR condemns IOF measures against Nablus charities", press release (8 July 2009), available at: <http://www.pchrgaza.org/files/PressR/English/2008/62-2008.html>; BBC News, "Gaza militants fire two rockets", 10 July 2008, available at: http://news.bbc.co.uk/2/hi/middle_east/7500322.stm

¹¹⁴ "The six months...".

¹¹⁵ "Gaza militants fire...".

firing the rockets and the al-Aqsa Martyrs' Brigades stated that its members had been "abducted" by Hamas.¹¹⁶

246. According to Israeli sources, on 12 July 2008 a rocket launched from the Gaza Strip struck an open area in Sha'ar Hanegev and on 13 July 2008 two mortar shells fired fell short inside the Gaza border. This led to Israel closing the Nahal Oz and Sufa crossings. On 15 July 2008, a mortar shell struck territory inside Israel, while three rockets misfired and landed inside the Gaza Strip, in separate incidents on 25, 29 and 31 July 2008.¹¹⁷

247. On 29 July, a 10-year-old boy was shot in the head and killed by the Israeli Border Police during a demonstration against the wall in Ni'lin in the West Bank. During a clash with Israeli Border Police the following day, after the funeral in Ni'lin, a 17 year-old boy was shot in the head and died on 4 August.¹¹⁸

248. During July 2008, the amount of commodities allowed into Gaza by Israel was assessed by OCHA as remaining "far below the actual needs" and was "restricted to certain selected essential humanitarian items". The imports were 46 per cent of those entering Gaza in May 2007, prior to the Hamas' seizing control of the Gaza Strip. As a result of the restriction on imports and total ban on exports, 95 per cent of Gaza's industries remained closed.¹¹⁹

249. In August 2008, according to Israeli sources, three mortars and eight rockets were fired into Israel from the Gaza Strip. They included a rocket which struck Sderot on 11 August 2008,¹²⁰ prompting Israel's closure of the crossings, as well as a rocket fired on 20 August 2008, which once again led to the closure of the border crossings.¹²¹

250. During August, there was a reduction in the number of truckloads carrying goods into Gaza. August imports represented 70 per cent of the July 2008 imports and 23 per cent of the May 2007 level.¹²²

251. In September 2008, three mortars and one rocket were fired into Israel from the Gaza Strip, according to Israeli sources.¹²³

¹¹⁶ Ibid.; Reuters, " Hamas arrests first rocket squads since truce", 10 July 2008, available at: <http://www.reuters.com/article/latestCrisis/idUSL10355564>.

¹¹⁷ "The six months...".

¹¹⁸ Al-Haq, "Right to life of Palestinian children disregarded in Ni'lin as Israel's policy of wilful killing of civilians continues", press release (7 August 2008), available at: <http://www.alhaq.org/etemplate.php?id=387>.

¹¹⁹ OCHA, The Humanitarian Monitor, No. 27 (July 2008), available at: http://www.ochaopt.org/documents/Humanitarian_Monitor_July_2008.pdf.

¹²⁰ "The six months...".

¹²¹ Office of the United Nations High Commissioner for Refugees (UNHCR), "Israel-Occupied Palestine Territories: Rocket attack throws Gaza crossing plan into jeopardy", 20 August 2008, available at: <http://www.unhcr.org/refworld/topic,45a5199f2,4874797e3b,48ae79b81e,0.html>.

¹²² OCHA, The Humanitarian Monitor, No. 28 (August 2008), available at http://www.ochaopt.org/documents/ocha_opt_humanitarian_monitor_08_2008_english.pdf.

252. During September, the movement of goods and people in and out of Gaza through the crossing increased, with levels of imports at 37 per cent of the May 2007 level. The Sufa crossing closed on 13 September 2008 and goods were redirected through Kerem Shalom, as Israel stated that it intended to have only one goods crossing open at any one time.¹²⁴

253. In October 2008, Israeli sources stated that only one rocket and one mortar were fired into Israel from the Gaza Strip.¹²⁵ There was a 30 per cent decline in imports allowed into Gaza by Israel as compared to September 2008, partly due to the closure of the crossings during the Jewish holidays. Imports were at 26 per cent of the level of May 2007. Tunnels under the Rafah border reportedly proliferated during this period and allowed the entry of otherwise unavailable goods. Collapsing tunnels continued to cause casualties.¹²⁶

254. After two months in which few incidents were reported, the ceasefire began to founder on 4 November 2008 following an incursion by Israeli soldiers into the Gaza Strip, which Israel stated was to close a cross-border tunnel that in Israel's view was intended to be used by Palestinian fighters to kidnap Israeli soldiers. The soldiers attacked a house in the Wadi al-Salqa village, east of Deir al-Balah, which was alleged to be the starting point of the tunnel, killing a member of the al-Qassam Brigades. Several Israeli soldiers were wounded. In response, the al-Qassam Brigades fired more than 30 Qassam rockets into Israel. Israel responded with an air strike that left a further five members of the al-Qassam Brigades dead. Both sides blamed the other for the escalation of violence. Hamas also accused Israel of trying to disrupt talks between Hamas and Fatah that were scheduled for the following week in Cairo.¹²⁷ Israel closed the crossings into the Gaza Strip on 5 November 2008 and they remained closed until 24 November 2008, when they were opened briefly to allow humanitarian supplies to enter.¹²⁸

255. According to the Israeli internal intelligence service (known as *Shin Bet* or *Shabak*), 22 rockets and nine mortars were fired into Israel between 5 and 12 November 2008.¹²⁹ The crossings into the Gaza Strip remained closed during this time. On 14 November 2008, Amnesty

¹²³ "The six months...".

¹²⁴ OCHA, The Humanitarian Monitor, No. 29 (September 2008), available at: http://www.ochaopt.org/documents/ocha_opt_humanitarian_monitor_2008_10_1_english.pdf.

¹²⁵ Intelligence and Terrorism Information Center at the Israel Intelligence Heritage & Commemoration Center, "Summary of rocket fire and mortar shelling in 2008", January 2009.

¹²⁶ OCHA, The Humanitarian Monitor, No. 30 (October 2008), available at: http://www.ochaopt.org/documents/ocha_opt_humanitarian_monitor_oct_2008_10_english.pdf.

¹²⁷ The Guardian, "Gaza truce broken as Israeli raid kills six Hamas gunmen", 5 November 2008, available at: <http://www.guardian.co.uk/world/2008/nov/05/israelandthepalestinians>; The Times, "Six die in Israeli attack over Hamas 'tunnel under border to kidnap soldier'", 6 November 2008, available at http://www.timesonline.co.uk/tol/news/world/middle_east/article5089940.ece. A Hamas spokesman was quoted as saying "The Israelis began this tension and they must pay an expensive price" while an Israeli spokesman stated "this operation was in response to a Hamas intrusion of the quiet".

¹²⁸ JTA, "Israel closes Gaza crossings after attack", 25 November 2008, available at http://jta.org/news/article-print/2008/11/25/1001205/israel-closes-gaza-crossings-after-attack?TB_iframe=true&width=750&height=500.

¹²⁹ Israel Security Agency, "Weekly update, November 5-12, 2008", available at <http://www.shabak.gov.il/SiteCollectionImages/english/TerrorInfo/weekly-update-12-11-08-En.pdf>.

International issued a press release calling on Israel to allow humanitarian aid and medical supplies to enter.¹³⁰

256. On 17 November 2008, Amnesty International issued another press release, noting that on that day Israel had allowed a limited number of trucks carrying humanitarian assistance to enter Gaza. Amnesty International also noted that an additional ten members of Palestinian armed groups had been killed by Israeli air strikes since the killing of six members of Palestinian armed groups by Israel on 4 November 2008.¹³¹

257. Palestinian armed groups fired rockets and mortars into Israel throughout November 2008. According to Israeli sources, 125 rockets were fired into Israel during November 2008 (compared to one in October) and 68 mortar shells were fired (also compared to one in October).¹³² On 14 November 2008, a resident of Sderot was lightly injured by shrapnel.

258. Israel closed the crossings into Gaza for most of November 2008, although 42 trucks of humanitarian aid were permitted to cross on 24 November 2008 and about 60 on 26 November 2008.¹³³ According to OCHA, the number of trucks allowed into Gaza in November 2008 was 81 per cent lower than in October 2008. Shortages forced most of Gaza's bakeries to close and UNRWA suspended food distribution for five days to 750,000 Gazans owing to a lack of food supplies.¹³⁴

259. Rocket and mortar fire by Palestinian armed groups continued unabated throughout December 2008.¹³⁵ According to Israeli sources, 71 rockets and 59 mortars were fired into Israel between 1 and 18 December.¹³⁶ The number of rockets and mortars fired from the Gaza Strip into Israel spiked,¹³⁷ following the killing by the Israeli armed forces of an Islamic Jihad

¹³⁰ Amnesty International, "Israel blocks deliveries to Gaza", 14 November 2008, available at <http://www.amnesty.org/en/news-and-updates/news/israeli-army-blocks-deliveries-gaza-20081114>.

¹³¹ Amnesty International, "Israeli Army relaxes restrictions on humanitarian aid to Gaza", 17 November 2008, available at <http://www.amnesty.org/en/news/news-and-updates/israeli-army-relaxes-restrictions-humanitarian-aid-gaza-20081117>.

¹³² "Summary of rocket fire...".

¹³³ JTA, "Israel closes Gaza crossings after attack..." and "Kassams continue to strike Negev", 27 November 2008, available at http://jta.org/news/article-print/2008/11/27/1001233/kassams-continue-to-strike-negev?TB_iframe=true&width=750&height=500.

¹³⁴ OCHA The Humanitarian Monitor, No. 31 (November 2008), available at: http://www.ochaopt.org/documents/ocha_opt_humanitarian_monitor_2008_11_1_english.pdf.

¹³⁵ See, for example, JTA, "Kassams fired again from Gaza", 3 December 2008, available at: http://jta.org/news/article-print/2008/12/03/1001316/attacks-from-gaza-increase?TB_iframe=true&width=750&height=500; JTA, "Rockets barrage Israel over weekend", 7 December 2008, available at: http://jta.org/news/article-print/2008/12/07/1001377/rockets-barrage-israel-over-weekend?TB_iframe=true&width=750&height=500; JTA, "Three injured in Kassam attack", 17 December 2008, available at: http://jta.org/news/article/2008/12/17/1001621/more-kassams-rain-on-israel#comment_72450; and JTA, "Kassam rocket hits Sderot home", 21 December 2008, available at: <http://jta.org/news/article/2008/12/21/1001713/kassam-rocket-hits-sderot-home>.

¹³⁶ "Summary of rocket fire...".

¹³⁷ Ibid.

commander in the West Bank on 15 December 2008.¹³⁸ One of the rockets launched from the Gaza Strip on 17 December 2008 struck the car park of a shopping centre in Sderot, injuring three people and causing significant damage to property.¹³⁹

260. On 2 December 2008, the Israeli air force killed two Palestinian children and seriously injured two others when one of its aircraft fired a missile at a group of Palestinian children who were sitting in a street near Rafah. An Israeli military spokesman admitted responsibility for the attack and claimed that it was targeting members of Palestinian armed groups. Eyewitnesses informed the Palestinian Centre for Human Rights (PCHR) that the victims were civilians.¹⁴⁰

261. On 5 December 2008, an Israeli aircraft fired a missile at members of what PCHR described as “activists of the Palestinian resistance” in Jabaliyah refugee camp in the northern Gaza Strip, seriously wounding one person.¹⁴¹ On 18 December, an Israeli air strike killed a man in Beit Lahia.¹⁴² The same day, Israeli aircraft attacked a car maintenance workshop in the city of Khan Yunis in the southern Gaza Strip. The workshop was destroyed and a number of nearby houses were damaged.¹⁴³

262. On 18 December 2008, the Gaza authorities declared that the truce was at an end and would not be renewed on the grounds that Israel had not abided by its obligations to end the blockade on Gaza.¹⁴⁴

263. On 21 December 2008, a rocket hit a house in Sderot and a foreign worker was injured as a result of a rocket striking Ashkelon.¹⁴⁵ Israel responded with air strikes into Gaza City, wounding a Palestinian infant in her home.¹⁴⁶ Israel’s Prime Minister and Defense Minister stated that Israel would no longer practise restraint following the rocket attacks.¹⁴⁷

¹³⁸ JTA, “Kassams hit Israel after terrorist killed”, 16 December 2008, available at: http://jta.org/news/article-print/2008/12/16/1001575/kassams-hit-israel-after-terrorist-killed?TB_iframe=true&width=750&height=500.

¹³⁹ “Three injured...”.

¹⁴⁰ PCHR, “Weekly report on Israeli human rights violations in the Occupied Palestinian Territory”, No. 48/2008 (24 November – 3 December 2008), available at: http://www.pchrgaza.org/files/W_report/English/2008/04-12-2008.htm.

¹⁴¹ PCHR, “Weekly report on Israeli human rights violations in the Occupied Palestinian Territory”, No. 49/2008 (4-17 December), available at: http://www.pchrgaza.org/files/W_report/English/2008/18-12-2008.htm. The Mission notes the lack of clarity as to whether these were armed members of the Palestinian armed groups or civilians.

¹⁴² Al-Jazeera, “Israeli missile kills Gaza man”, 18 December 2008, available at: <http://english.aljazeera.net/news/middleeast/2008/12/2008121721428340460.html>.

¹⁴³ PCHR, “Weekly report on Israeli human rights violations in the Occupied Palestinian Territory”, No. 50/2008 (18–23 December 2008), available at: http://www.pchrgaza.org/files/W_report/English/2008/24-12-2008.htm.

¹⁴⁴ Reuters, “ Hamas declares end to ceasefire with Israel in Gaza”, 18 December 2008, available at: <http://www.reuters.com/article/topNews/idUSLI75623220081218>.

¹⁴⁵ “Kassam rocket...”.

¹⁴⁶ “Weekly report...”, No. 50/2008.

¹⁴⁷ “Kassam rocket...”.

264. On 22 December 2008, a 24-hour ceasefire was declared at Egypt's request. Three rockets and one mortar were launched from Gaza that day. Israel opened the border to allow a limited amount of humanitarian aid to enter Gaza.¹⁴⁸

265. By 23 December 2008, rocket and mortar fire was again increasing significantly; 30 rockets and 30 mortars were fired into Israel on 24 December 2008.¹⁴⁹ The Israeli armed forces continued to conduct air strikes on positions inside Gaza and the crossings into Israel remained closed. On 26 December 2008, a rocket launched from Gaza fell short and hit a house in northern Gaza killing two girls, aged 5 and 12.¹⁵⁰

266. The intensified closure regime on the Gaza crossings which began in November continued in December, with imports restricted to very basic food items and limited amounts of fuel, animal feed and medical supplies. According to OCHA, many basic food items were no longer available and negligible amounts of fuel were allowed to enter Gaza. This resulted in the health sector in Gaza deteriorating further into a critical condition, with hospitals continuing to face problems as a result of power cuts, low stocks of fuel to operate back-up generators, lack of spare parts for medical equipment and shortages of consumables and medical supplies.¹⁵¹ On 18 December 2008, UNRWA once again suspended its food distribution programme for the rest of the month, owing to shortages.¹⁵²

267. On 27 December 2008, Israel started its military operations in Gaza.¹⁵³

IV. APPLICABLE LAW

268. The Mission's mandate covers all violations of international human rights law (IHRL) and international humanitarian law (IHL) that might have been committed at any time, whether before, during or after, in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 to 18 January 2009. The Mission has therefore carried out its task within the framework of general international law, in particular IHRL and IHL.

A. Self-determination

269. A fundamental element in the legal framework is the principle of self-determination of peoples, derived from the Charter of the United Nations, Article 1, accepted as constituting

¹⁴⁸ JTA, " Hamas curtails launching rockets for 24 hours", 22 December 2008, available at: http://jta.org/news/article-print/2008/12/22/1001726/hamas-stops-launching-rockets-for-24-hours?TB_iframe=true&width=750&height=500; "Summary of rocket fire..."

¹⁴⁹ "Summary of rocket fire..."

¹⁵⁰ Fox News, "Palestinian rockets kill 2 schoolgirls in Gaza", 26 December 2008, available at <http://www.foxnews.com/story/0,2933,473066,00.html>.

¹⁵¹ OCHA, The Humanitarian Monitor, No. 32 (December 2008), available at: http://www.ochaopt.org/documents/ocha_opt_humanitarian_monitor_2008_12_1_15_english.pdf.

¹⁵² UNRWA, "UNRWA suspends food distribution in Gaza", press release (18 December 2008), available at: http://www.un.org/unrwa/news/releases/pr-2008/gaz_18dec08.html.

¹⁵³ The New York Times, "Israelis say strikes against Hamas will continue", 28 December 2008, available at: http://www.nytimes.com/2008/12/28/world/middleeast/28mideast.html?_r=2&hp.

customary international law, and set out as a right of peoples in the two International Covenants on Human Rights (common article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)). The right of the Palestinian people to self-determination has been affirmed by the General Assembly and the International Court of Justice in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.¹⁵⁴ Self-determination has special prominence in the context of the recent events and military hostilities in the region, because they are but one episode in the long occupation of the Palestinian territory. The right to self-determination has an *erga omnes* character whereby all States have the duty to promote its realization. This is also recognized by the United Nations General Assembly, which has declared that peoples who resist forcible action depriving them of their right to self-determination have the right to seek and receive support from third parties.¹⁵⁵ Those who take action amounting to military force must comply with IHL.

B. International humanitarian law

270. All parties to the armed conflict are bound by relevant rules of IHL, whether of conventional or customary character. International humanitarian law comprises principles and rules applicable to the conduct of military hostilities and provides for restraints upon the conduct of military action so as to protect civilians and those that are *hors de combat*. It also applies to situations of belligerent occupation.

271. Israel is a party to the four Geneva Conventions of 12 August 1949, but has not ratified their Additional Protocols I or II on the protection of victims of armed conflict. In addition, Israel is a party to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, as well as its Protocol I on Non-Detectable Fragments, both of 10 October 1980.

272. Many of the rules contained in the Fourth Hague Convention respecting the Laws and Customs of War on Land and the Regulations annexed to it, and the four Geneva Conventions and their Additional Protocols are now part of customary international law. Israel's High Court of Justice has confirmed that Israel must adhere to those rules and principles reflected in the Fourth Geneva Convention, the Regulations annexed to the Fourth Hague Convention and the customary international law principles reflected in certain provisions of Additional Protocol I to the Geneva Conventions of 1949. The Government of Israel accepts that, although it is not a party to the Additional Protocol I, some of its provisions accurately reflect customary international law.¹⁵⁶ Under the rules of State responsibility, Israel is responsible for any violations of international law attributable to it. Specifically, under the Fourth Geneva

¹⁵⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, p. 135, paras. 149, 155 and 159.

¹⁵⁵ *Ibid.*, para. 156; Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970).

¹⁵⁶ "The operation in Gaza...", para. 31.

Convention, article 29, “the Party to a conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.”

273. The legal framework applicable to situations of occupation includes provisions contained in the Hague Regulations (especially articles 42–56), the Fourth Geneva Convention (especially articles 47–78) and Additional Protocol I, and customary international law. The successive steps in the development of that legal framework represent attempts by the international community to protect human beings better from the effects of war while giving due account to military necessity.

274. Article 42 of the Hague Regulations, regarded as customary international law,¹⁵⁷ prescribes that “territory is considered occupied when it is actually placed under the authority of the hostile army”. The occupying authority so established shall take all measures in its power “to restore, and ensure, as far as possible, public order and safety” in the occupied area (art. 43). These provisions call for an examination of whether there was exercise of authority by Israel in the Gaza Strip during the period under investigation.

275. While the drafters of the Hague Regulations were as much concerned with protecting the rights of the State whose territory is occupied as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians (“protected persons”¹⁵⁸) in times of war regardless of the status of the occupied territories.¹⁵⁹ That the Fourth Geneva Convention contains requirements in many respects more flexible than the Hague Regulations and thus offering greater protections was recognized by the International Criminal Tribunal for the former Yugoslavia in the Naletelic case, where the Trial Chamber applied the test contained in article 6 of the Fourth Geneva Convention: the protections provided for in the Fourth Geneva Convention become operative as soon as the protected persons fall “in the hands” of a hostile army or an occupying Power, this being understood not in its physical sense but in the broader sense of being “in the power” of a hostile army. The Trial Chamber concluded that: “the application of the law of occupation as it effects ‘individuals’ as civilians protected under Geneva Convention IV does not require that the occupying Power have actual authority”.¹⁶⁰

276. Israel has without doubt at all times relevant to the mandate of the Mission exercised effective control over the Gaza Strip. The Mission is of the view that the circumstances of this control establish that the Gaza Strip remains occupied by Israel. The provisions of the Fourth Geneva Convention therefore apply at all relevant times with regard to the obligations of Israel towards the population of the Gaza Strip.

¹⁵⁷ Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, I.C.J. Reports 2005, para. 172; Legal Consequences..., para. 78.

¹⁵⁸ Under the Fourth Geneva Convention, protected persons are those who, at a given moment and in any manner whatsoever, find themselves in the hands of a party to the conflict or occupying Power of which they are not nationals.

¹⁵⁹ Legal Consequences..., para. 95.

¹⁶⁰ *Prosecutor v. Naletilić*, case No. IT-98-34-T, Decision of 31 March 2003, paras. 219-222.

277. Despite Israel's declared intention to relinquish its position as an occupying Power by evacuating troops and settlers from the Gaza Strip during its 2005 "disengagement",¹⁶¹ the international community continues to regard it as the occupying Power.¹⁶²

278. Given the specific geopolitical configuration of the Gaza Strip, the powers that Israel exercises from the borders enable it to determine the conditions of life within the Gaza Strip. Israel controls the border crossings (including to a significant degree the Rafah crossing to Egypt, under the terms of the Agreement on Movement and Access¹⁶³) and decides what and who gets in or out of the Gaza Strip. It also controls the territorial sea adjacent to the Gaza Strip and has declared a virtual blockade and limits to the fishing zone, thereby regulating economic activity in that zone. It also keeps complete control of the airspace of the Gaza Strip, inter alia, through continuous surveillance by aircraft and unmanned aviation vehicles (UAVs) or drones. It makes military incursions and from time to time hit targets within the Gaza Strip. No-go areas are declared within the Gaza Strip near the border where Israeli settlements used to be and enforced by the Israeli armed forces. Furthermore, Israel regulates the local monetary market based on the Israeli currency (the new sheqel) and controls taxes and custom duties.

279. The ultimate authority over the Occupied Palestinian Territory still lies with Israel. Under the law and practice of occupation, the establishment by the occupying Power of a temporary administration over an occupied territory is not an essential requirement for occupation, although it could be one element among others that indicates the existence of such occupation.¹⁶⁴ In fact, as shown in the case of Denmark during the Second World War, the occupier can leave in place an existing local administration or allow a new one to be installed for as long as it preserves for itself the ultimate authority. Although Israel has transferred to the Palestinian Authority a series of functions within designated zones, it has done so by agreement, through the Oslo Accords and related understandings, keeping for itself "powers and responsibilities not so transferred".¹⁶⁵ When Israel unilaterally evacuated troops and settlements from the Gaza Strip, it left in place a Palestinian local administration. There is no local governing body to which full authority has been transferred. In this regard, the Mission recalls that the International Court of Justice, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, regards the transfer of powers and responsibilities by Israel under various agreements with the Palestine Liberation Organization (PLO) as having "done nothing" to alter the character of Israel as an occupying Power.¹⁶⁶

¹⁶¹ Disengagement Plan – General Outline, Prime Minister's Office, 15 April 2004, para. 2 (i)(3), available at www.pmo.gov.il/PMOEng/Archive/Press+Releases/2004/Disengagement+Plan.

¹⁶² Security Council resolution 1860 (2009) and Human Rights Council resolution S-9/1.

¹⁶³ This Agreement of November 2005 represents the commitments of the Government of Israel and the Palestinian Authority. Its implementation and further elaboration will be assisted by the Quartet Special Envoy for Disengagement and his staff and/or the United States Security Coordinator and his staff. It is available at [http://unispal.un.org/unispal.nsf/b987b5db9bee37bf85256d0a00549525/c9a5aa5245d910bb852570bb0051711c/\\$FILE/Rafah%20agreement.pdf](http://unispal.un.org/unispal.nsf/b987b5db9bee37bf85256d0a00549525/c9a5aa5245d910bb852570bb0051711c/$FILE/Rafah%20agreement.pdf).

¹⁶⁴ Prosecutor v. Naletilić, para. 217.

¹⁶⁵ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 1995, art. I (1).

¹⁶⁶ Legal Consequences..., paras. 76–78.

280. Although the essential elements of occupation are present in the Gaza Strip, account must be taken of the fact that inside Gaza there is a *de facto* local administration, which carries out the functions and responsibilities in various areas transferred to the Palestine Authority under the Oslo Accords, to the extent that it is able to do so in the light of the closures and blockade imposed by Israel.

281. The developments that have taken place in the past two decades, in particular through the jurisprudence of international tribunals, have led to the conclusion that the substantive rules applicable to either international or non-international armed conflicts are converging. The Mission nonetheless recognizes that certain differences exist in relation to the regime of enforcement established by treaty law, in particular the regime of “grave breaches” contained in the Geneva Conventions.

282. Military hostilities took place between the Israeli armed forces and the military wing of Hamas (al-Qassam Brigades) and of other Palestinian factions, including the al-Aqsa Martyrs’ Brigades, loosely affiliated with the Fatah movement in control of the Palestine Authority. The Israeli Supreme Court has seen the confrontation between Israeli armed forces and what it calls “terrorist organizations” active in the Occupied Palestinian Territory as an international armed conflict on two grounds: the existing context of the occupation and the cross-border nature of the confrontation.¹⁶⁷ Nonetheless, as the Government of Israel suggests, the classification of the armed conflict in question as international or non-international, may not be too important as “many similar norms and principles govern both types of conflicts”.¹⁶⁸

283. It is common for armed conflicts to present elements of an international as well as of a non-international character. The rules contained in article 3 common to the four Geneva Conventions, regarded as customary international law, are the baseline rules applicable to all conflicts.¹⁶⁹ The concern for the protection of civilians and those *hors de combat* in all kinds of conflicts has led to an increasing convergence in the principles and rules applicable to international and non-international armed conflicts, as was authoritatively held by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Tadić* case. Indeed, “what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.”¹⁷⁰ This relates not only to the protection of civilians but also to both methods and means of warfare.

284. A convergence between human rights protections and humanitarian law protections is also in operation. The rules contained in article 75 of Additional Protocol I, which reflect customary law, define a series of fundamental guarantees and protections, such as the prohibitions against torture, murder and inhuman conditions of detention, recognized also under human rights law.

¹⁶⁷ The Public Committee against Torture in Israel v. The Government of Israel (Targeted Killings case).

¹⁶⁸ “The operation in Gaza...”, para. 30.

¹⁶⁹ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p.14.

¹⁷⁰ Prosecutor v. Tadić, case No. IT-94-1-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction of 2 October 1995, para. 119. See also para. 96 ff.

These protections apply to all persons in the power of a party to the conflict “who do not benefit from more favourable treatment” under the Geneva Conventions and its Protocols.

285. The foregoing customary and conventional humanitarian rules are relevant to the investigation of the events that occurred in connection with the military operations of December 2008 and January 2009.

C. International criminal law

286. International criminal law has become a necessary instrument for the enforcement of IHL and IHRL. Criminal proceedings and sanctions have a deterrent function and offer a measure of justice for the victims of violations. The international community increasingly looks to criminal justice as an effective mechanism of accountability and justice in the face of abuse and impunity. The Mission regards the rules and definitions of international criminal law as crucial to the fulfilment of its mandate to look at all violations of IHL and IHRL by all parties to the conflict.

287. Crimes under international law are defined in treaties and also in customary international law. Violations of fundamental humanitarian rules applicable in all types of conflict entail individual criminal responsibility under customary law.¹⁷¹ They encompass crimes against humanity, war crimes and genocide. Other crimes not necessarily committed as a war crime or crime against humanity are torture and enforced disappearance.

288. The four Geneva Conventions of 1949 establish a regime of enforcement through the definition of grave breaches of some of their provisions relating to protected persons. Grave breaches are premised on the importance of the value under attack and the seriousness of the act or omission that constitutes the breach. Article 147 of the Fourth Geneva Convention defines grave breaches as:

... those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

289. Article 146 requires States parties to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the listed grave breaches. They are under the obligation “to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.”

¹⁷¹ Ibid., paras. 128 ff. In paragraph 134, the Appeals Chamber stated: “All of these factors confirm that customary international law imposes criminal liability for serious violations of common article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.”

290. These and other crimes are also listed in the Rome Statute of the International Criminal Court, article 8 (2) (a) (“grave breaches”) and 8 (2) (b) (“other serious violations of the laws and customs applicable in international armed conflict”).¹⁷²

291. War crimes are serious breaches of international humanitarian law that apply to armed conflicts and entail individual criminal responsibility under treaty or customary law. War crimes can be committed in the context of armed conflicts of an international character as well as those of a non-international character. This category of crimes includes and/or overlaps with the grave breaches as defined in the four Geneva Conventions.

292. War crimes comprise crimes against protected persons (including wilful killing, torture or other inhuman acts, taking hostages, and collective punishments); crimes against property (including extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly, destroying or seizing property of the enemy, pillaging, and declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party); crimes relating to the use of prohibited methods and means of warfare (including directing an attack against civilians or civilian objects, launching an attack directed against legitimate targets if such attack causes excessive incidental civilian casualties or damage to the environment, improper use of the protective emblems, the use of starvation of civilians as a method of warfare, use of human shields and acts of terror). In addition, article 8 (2) (b) (iii) of the Rome Statute defines as a war crime the direct attack against protected personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission.

293. Crimes against humanity are crimes that shock the conscience of humanity. The Statutes of the International Criminal Tribunal for the former Yugoslavia and of the International Criminal Tribunal for Rwanda provided for the prosecution of crimes against humanity. These crimes comprise murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions and other inhuman acts when they are part of a widespread or systematic attack against any civilian population.¹⁷³ Although under the Statute of the International Criminal Tribunal for the former Yugoslavia crimes against humanity must be committed in armed conflict, such a requirement is not part of the customary law definition of the crime.

D. International human rights law

294. Israel has ratified several of the most important international human rights treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination, ICCPR, ICESCR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women.

¹⁷² The possible application of the Rome Statute to the conflict in Gaza is still being discussed. The validity under its article 12 (3) of the Palestinian declaration accepting the International Criminal Court’s jurisdiction is being evaluated by the Office of the Tribunal’s Prosecutor.

¹⁷³ See International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Kunarac*, case No. IT-96-23, Judgement of 12 June 2002, para. 85.

295. It is now widely accepted that human rights treaties continue to apply in situations of armed conflict. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice considered that “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation....”¹⁷⁴

296. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice held that, in the context of armed conflict, IHL is *lex specialis* in relation to human rights. It is today commonly understood that human rights law would continue to apply as long as it is not modified or set aside by IHL. In any case, the general rule of human rights law does not lose its effectiveness and will remain in the background to inform the application and interpretation of the relevant humanitarian law rule. For instance, the preamble to Additional Protocol II to the Geneva Conventions recalls the protection of international human rights for the human person, supporting the view that IHL and IHRL are operative in situations of conflict.

297. The human rights treaties ratified by Israel are also binding in relation to Israeli conduct in the Occupied Palestinian Territory. Article 2 of ICCPR obliges each State party to respect and to ensure to all individuals “within its territory and subject to its jurisdiction” the rights recognized within it. In the words of the Human Rights Committee, “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party”.¹⁷⁵

298. The International Court of Justice has also held that ICCPR applies “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”.¹⁷⁶ Accordingly, the Human Rights Committee has considered that ICCPR also applies to the benefit of people within the Occupied Palestinian Territory.¹⁷⁷ The Committees established to monitor compliance with the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women by their States parties have equally determined that Israel’s human rights obligations extend to the population of the Occupied Palestinian Territory.¹⁷⁸

299. The Mission also notes that Israel has not derogated from its obligations under article 4 of ICCPR. Israel’s declaration made upon ratification of the Covenant only concerns derogations to article 9 of ICCPR, regarding deprivation of liberty. The state of emergency in Israel has been in force ever since it was proclaimed in 1948. ICESCR does not explicitly allow for derogations in time of public emergency or war.

¹⁷⁴ *Legal Consequences...*, para. 106; see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, p. 226, para. 25.

¹⁷⁵ General comment No. 31 (2004), para. 10.

¹⁷⁶ *Legal Consequences...*, para. 111; see also *Case concerning Armed Activities...*, para. 216.

¹⁷⁷ “Concluding observations of the Human Rights Committee” (CCPR/CO/78/ISR).

¹⁷⁸ See, for instance, “Concluding observations of the Committee on Economic, Social and Cultural Rights” (E/C.12/1/Add.90).

300. Contemporary interpretation of the Hague Regulations has taken a progressive view on the scope of their application. The International Court of Justice, when concluding that Uganda was the occupying Power in the Ituri region in the Democratic Republic of the Congo, also held that Uganda's obligation to "restore, and ensure, as far as possible, public order and safety" included "the duty to secure respect for the applicable rules of international human rights law and international humanitarian law".¹⁷⁹

301. In relation to the application of human rights law during the military operations and to the connected events, the Mission wishes to briefly address four issues of legal significance.

302. The first is the impact of the inauguration in 1995 of limited Palestinian self-government and the evacuation of the Gaza Strip by Israel in 2005 on Israel's international obligations. United Nations human rights treaty bodies have continued to hold Israel responsible for implementing its human rights treaty obligations in the Occupied Palestinian Territory after the establishment of Palestinian self-government bodies.¹⁸⁰ Those bodies have not drawn any distinction between Gaza and the West Bank in this regard, the Occupied Palestinian Territory being regarded as a single unit. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice succinctly addressed the question by noting that, under the International Covenant on Economic, Social and Cultural Rights, Israel is "under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities".¹⁸¹ In a recent report about Gaza, nine special procedures of the Human Rights Council considered that the unilateral disengagement from the Gaza Strip does not relieve Israel "from complying with its human rights obligations towards the population of that territory; Israel remains bound to the extent that the measures it adopts affect the enjoyment of human rights of the residents of the Gaza Strip."¹⁸²

303. Israel most recently argued before the Committee against Torture that it no longer had human rights obligations under the Convention with regard to Gaza due to the effect of the 2005 "disengagement". In rejecting the argument, the Committee stated "the State party maintains control and jurisdiction in many aspects on the occupied Palestinian territories."¹⁸³ The Mission agrees that transferring powers and functions to self-governing bodies does not exempt Israel from its obligations to guarantee human rights to people within its jurisdiction or under its effective control. Israel would also have a duty to refrain from actions that obstruct efforts by Palestinian self-governing bodies to guarantee the enjoyment of human rights in the Occupied Palestinian Territory and should facilitate that action.

304. A second issue relates to the human rights obligations of the Palestinian Authority, the de facto authority in the Gaza Strip and other political and military actors. As non-State actors, the

¹⁷⁹ Case concerning Armed Activities..., para. 178.

¹⁸⁰ For instance, in its 2003 concluding observations, the Committee on Economic, Social and Cultural Rights reiterated "its regret at the State party's refusal to report on the occupied territories" (E/C.12/1/Add.90, para. 15).

¹⁸¹ Legal Consequences..., para. 112.

¹⁸² A/HRC/10/22, para. 20.

¹⁸³ "Concluding observations of the Committee against Torture" (CAT/C/ISR/CO/4, para. 11).

question of their human rights obligations must be addressed. It should be noted that the same issue does not arise with regard to IHL obligations, the question being settled some time ago. As the Special Court for Sierra Leone held, “it is well settled that *all* parties to an armed conflict, whether States or non-State actors, are bound by international humanitarian law, even though only States may become parties to international treaties.”¹⁸⁴

305. The relationship between IHL and IHRL is rapidly evolving, in particular in relation to non-State actors’ obligations, with the ultimate goal of enhancing the protection of people and to enable them to enjoy their human rights in all circumstances. In the context of the matter within the Mission’s mandate, it is clear that non-State actors that exercise government-like functions over a territory have a duty to respect human rights.

306. The Mission notes that the Palestinian Authority, through its public undertakings as well as those of the Palestine Liberation Organization (PLO) and the Palestinian Legislative Council, has declared its commitment to respect international human rights law in several instances, including in the context of international agreements. This commitment is also contained in the Palestinian Basic Law.¹⁸⁵

307. The obligations of the Gaza authorities may be viewed through a different lens but leading to the same result. The Gaza authorities also reiterated to the Mission their commitments to respect human rights. Hamas has also made a series of unilateral declarations of respect for human rights. Furthermore, the Palestinian Basic Law with its many human rights provisions also applies in the Gaza Strip.¹⁸⁶

308. A third issue to be addressed here relates to the right to self-determination and its application to the definition of combatant status and its impact on the principle of distinction. Armed conflicts opposing national liberation movements and/or resistance movements against colonialism and occupation are regarded as international armed conflicts by Additional Protocol I, article 1 (4). Under international law, notably Additional Protocol I to the Geneva Conventions, any action of resistance pursuant to the right to self-determination should be exercised with full respect of other human rights and IHL.

¹⁸⁴ See for instance, Prosecutor v. Sam Hinga Norman, case SCSL-2004-14-AR72(E), Decision on preliminary motion based on lack of jurisdiction (child recruitment) (31 May 2004), para. 22.

¹⁸⁵ Legal Consequences..., para. 91; A/HRC/10/22, para. 21; Barcelona Declaration, 27-28 November 1995, available at: <http://www.euromedrights.net/281>. The Palestinian Basic Law can be found at <http://www.palestinianbasiclaw.org/2002-basic-law>. See also “Report of the High Commissioner for Human Rights on the implementation on Human Rights Council resolution 7/1” (A/HRC/8/17, para. 8).

¹⁸⁶ Meeting and correspondence with the Mission. In this respect nine special procedures mandate holders have stated: “non-State actors that exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control” (A/HRC/10/22, para. 21). This view follows the statement in the same line by four other special procedures mandate holders who visited Lebanon in the aftermath of the 2006 war: “Although Hezbollah, a non-State actor, cannot become a party to these human rights treaties, it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights ... It is especially appropriate and feasible to call for an armed group to respect human rights norms when it exercises significant control over territory and population and has an identifiable political structure.” (A/HRC/2/7, para. 19). See also A/HRC/10/22, para. 9.

309. Finally, it is also useful to briefly recall that States not party to an armed conflict have responsibilities and a crucial role to play for the protection of civilians and those *hors de combat* and for the protection of their rights. Under article 1 common to the Geneva Conventions 1949, the “High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” This provision entails obligations not only in relation to actors and conduct within the jurisdiction of each State but also in relation to the international enforcement of the Conventions. States parties to the Geneva Conventions also have the obligation to facilitate the passage of humanitarian relief and a role to play in the provision of such assistance for the protected population in case of need (articles 23 and 59 of the Fourth Geneva Convention).

310. To conclude, the Mission wishes to emphasize that all parties to an armed conflict have the obligation to respect the enjoyment of human rights by all.



PART TWO: OCCUPIED PALESTINIAN TERRITORY

THE GAZA STRIP

SECTION A: MILITARY OPERATIONS

V. THE BLOCKADE: INTRODUCTION AND OVERVIEW

311. The military operations of 28 December to 19 January 2009 and their impact cannot be fully evaluated without taking account of the context and the prevailing living conditions at the time they began. In material respects, the military hostilities were a culmination of the long process of economic and political isolation imposed on the Gaza Strip by Israel, which is generally described as a blockade. This chapter provides an overview of the blockade, while chapter XVII provides a detailed analysis of the cumulative impact of the blockade and the military operations on the people in Gaza and their human rights.

312. The series of economic and political measures imposed against the Gaza Strip began around February 2006 with the Hamas electoral victory in the legislative elections. This was also accompanied by the withholding of financial support for the Gaza Strip by some donor countries and actions of other countries that amounted to open or tacit support of the Israeli blockade. Hamas took over effective power in the Gaza Strip on 15 June 2007. Shortly thereafter Israel declared the Gaza Strip a “hostile territory,”¹⁸⁷ enacting a series of economic, social and military measures purportedly designed to isolate and strangle Hamas. These have made a deep impact on the population’s living standards.

313. The blockade comprises measures such as the closure of border crossings, sometimes completely for a number of days, for people, goods and services, and for the provision of fuel and electricity. The closure has had severe effects on trade and general business activity, agriculture and industry in the Gaza Strip. Electricity and fuel that are provided from Israel are essential for a broad range of activities from business to education, health services, industry and agriculture. Further limits to the fishing area in the sea adjacent to the Gaza Strip were fixed and enforced by Israel, negatively impacting on fishing activities and the livelihood of the fishing community. Israel also established a buffer zone of variable and uncertain width along the border, together with a sizeable no-go area in the northern part of the Gaza Strip where some Israeli settlements used to be situated. This no-go area is in practice an enlarged buffer zone in the northern part of the Gaza Strip where people cannot go. The creation of the buffer zone has forced the relocation of a number of factories from this area closer to Gaza City, causing serious environmental concerns and potential health hazards for the population. People’s movements have also been drastically restricted, with only a few businesspeople allowed to cross on a very irregular and unpredictable basis.

314. Because of the occupation, which created so many ties of dependence, and for other geographic, political and historical reasons, the availability of goods and services as well as the carrying-on of daily life in the Gaza Strip are highly dependent on Israel and its policies

¹⁸⁷ <http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm>.

regarding the area. Food and other consumable items as well as fuel, electricity, construction materials and other items are traded from or through Israel. Israel also serves as the communication channel for the population of Gaza with the rest of the Occupied Palestinian Territory and the world, including for purposes of education and exchange programmes. There are five crossing points between Israel and the Gaza Strip: Erez (basically dedicated to the transit of people), Nahal Oz (for fuel), Karni (for grains), Kerem Shalom (for goods) and Sufa (for goods). Israeli control of these crossings has always been restrictive for the Gaza population. Since the beginning of the blockade, and particularly during and after the military operation, not only has the measure of restriction increased, but control has been exercised arbitrarily, resulting in uncertainty of access even for those items purportedly allowed entry by Israel.

315. Movement of people through the Erez crossing to Israel and the Rafah crossing to Egypt has been almost completely blocked. Exceptions include unpredictable and irregular permission for emergency medical evacuations, access to diplomats and international humanitarian staff and only limited access to some businesspeople.

316. The movement of goods has been restricted to imports of basic humanitarian supplies through the Kerem Shalom crossing point as well as to a limited quantity of fuel. The quantities of goods allowed into the Gaza Strip have not only been insufficient to meet local demands, they also exclude several items essential for the manufacturing of goods and the processing of food products, as well as many other goods that are needed. This is compounded by the unpredictable way in which crossings are managed. Neither the list of items allowed into the Gaza Strip nor the criteria for their selection are made known to the public.

317. Before the military operation, the blockade had resulted in a significant reduction in the number of trucks allowed through the crossings. The number of trucks is considered a fair measure of the amount of imports into or exports from the Gaza Strip. This number increased slightly during the period of calm between June and November 2008, but declined sharply again in November, due to the resumption of hostilities following the Israeli military incursion. The daily average of truckloads crossing the border in November–December 2008 was between 23 and 30, but it increased after the start of military hostilities to up to five times that number during January 2009.¹⁸⁸ However, at no time was it close to what it had been prior to June 2007 or to the amount actually necessary to meet the needs of the population.

318. The 2005 Agreement of Movement and Access called for a daily flow of some 400 trucks in and out of Gaza by the end of 2006, which was already lower than before the second intifada, but not even that level was ever reached.¹⁸⁹ Information supplied to the Mission reveals that imports into and exports from the Gaza Strip before the closure in 2007 reached a monthly average of 10,400 and 1,380 truckloads, respectively. This declined to about 2,834 truckloads of imports and no exports after the recent military operations. Immediately after the operations, there was only one isolated instance in which exports of flowers were allowed from the Gaza

¹⁸⁸ OCHA, *The Humanitarian Monitor*, No. 33 (January 2009).

¹⁸⁹ International Labour Office, “The situation of workers in the occupied Arab territories”, Report of the Director-General to the International Labour Conference, 98th session, 2009, appendix, para. 24.

Strip in March 2009. Some 134 truckloads of cash crops were exported in total between June 2007 and May 2009.¹⁹⁰

319. In effect, economic activity in the Gaza Strip was severely affected because of the blockade. Since the military operation, the economy has almost come to a standstill. The private sector, particularly the manufacturing industry, has suffered irreparable damage.

320. The blockade and freeze on the movement of goods imposed by Israel have spurred a black market economy in the Gaza Strip that provides basic consumables but is unreliable and unaffordable for the majority of the people. The tunnels built under the Gaza-Egypt border have become a lifeline for the Gaza economy and the people. Increasing amounts of fuel (benzine and diesel) come through those tunnels as well as consumables. While for the Gaza population this is a necessary means of survival in the circumstances, the black market is likely to hold back economic recovery and sustainability, even when the blockade is lifted.

321. The blockade has also included measures relating to access to the sea and airspace. Under the Oslo Accords, the fishing zone limit was set at 20 nautical miles. However, Israel set the limit unilaterally at 6 nautical miles and maintained this limit from October 2006 to January 2009, when it further restricted it to 3 nautical miles. The only airfield in Gaza has been closed and a project to rebuild the small airport was suspended after the seizure of power by Hamas. Israel keeps total control over Gaza's airspace.

322. In mid-December 2008, following an Israeli military incursion into the Gaza Strip and rockets fired into Israel by Hamas, all the crossings were totally closed for eight days.¹⁹¹ Other military or militant activities in areas near the crossings have also led to total closures over certain periods of time. Total and partial closures have significantly contributed to an emergency situation that became a full-fledged humanitarian crisis after the military operations of December 2008–January 2009. During December 2008, UNRWA had to suspend its delivery of food assistance due to the total depletion of its food stocks. Other humanitarian agencies had to reduce or postpone delivery of food and other forms of assistance. The unavailability of banknotes as a result of an Israeli prohibition also prevented humanitarian agencies from implementing “cash for work” or similar programmes over lengthy periods of time.¹⁹²

323. The implementation of the restrictive measures as part of the blockade of the Gaza Strip created not only an emergency situation but also significantly weakened the capacities of the health, water and emergency sectors in Gaza to adequately respond to a worsening situation.¹⁹³ The impact on the local economy further reduced the resilience and coping capacities of the local population and has aggravated the effects of the war on livelihoods and living standards (see below, chap. XVII).

¹⁹⁰ Information submitted by PalTrade, “Gaza private sector status”, 18 June 2009. The Mission also acknowledges the information provided by the Palestinian Authority in its reply to questions from the Mission, 5 August 2009.

¹⁹¹ The Humanitarian Monitor, No. 32.

¹⁹² The Humanitarian Monitor, No. 32, p. 5.

¹⁹³ This impact was noted and analysed in “Report of the high-level fact-finding mission to Beit Hanoun established under Council resolution S-3/1” (A/HRC/9/26, paras. 55 ff).

324. The Mission asked the Government of Israel to provide information in relation to the blockade on the Gaza Strip. It requested information on the criteria applied to determine which goods are or are not allowed to enter the Gaza Strip, the reasons for restricting or preventing cash and bank transfers, the reasons for imposing restrictions on the ability of Gazans to leave the Gaza Strip, including for urgent medical reasons, the reasons for the highly restrictive policy permit applied to international donors, humanitarian and human rights organizations wishing to enter the Gaza Strip, and the reasons and legal basis for establishing a limited fishing zone. No reply was received on any of these questions.

325. The legality of some of the measures imposed by the Government of Israel (the reduction in the supply of electricity and fuel) was the subject of a petition to the Supreme Court of Israel.¹⁹⁴ The petitioners comprised a group of NGOs operating within Israel together with Palestinian citizens and groups who argued that the planned cuts in the supply of fuel and electricity were inconsistent with the obligations of Israel under the Fourth Geneva Convention relating to the protection of civilians.¹⁹⁵ The Court's ruling recognizes that Israel has obligations under humanitarian law vis-à-vis the Gaza Strip under which the intended supply of fuel and electricity was considered "capable of satisfying the essential humanitarian needs of the Gaza Strip at the present". The Court, however, did not indicate what would constitute "essential humanitarian needs" and appears to have left those details for the authorities to determine.

326. The Mission holds the view that Israel continues to be duty-bound under the Fourth Geneva Convention and to the full extent of the means available to it to ensure the supply of foodstuff, medical and hospital items and others to meet the humanitarian needs of the population of the Gaza Strip without qualification. Furthermore, the Mission notes the information it received regarding the lack of compliance by the Government of Israel even with the minimum levels set by the Israeli Court, and in this regard observes that the Government retains wide discretion about the timing and manner of delivering fuel and electricity supplies to the Gaza Strip, and that this discretion appears to have been exercised capriciously and arbitrarily.

VI. OVERVIEW OF MILITARY OPERATIONS CONDUCTED BY ISRAEL IN GAZA BETWEEN 27 DECEMBER 2008 AND 18 JANUARY 2009 AND DATA ON CASUALTIES

327. This chapter provides an overview for the purposes of identifying the key parties in the conduct of the military operations and their dynamics, and to indicate which incidents occurred during those phases which are the subject of detailed analysis in this report. The focus is on the Israeli military operations in Gaza.

¹⁹⁴ Jaber Al-Bassiouni Ahmed et al. v. Prime Minister and Minister of Defense, case No. 9132/07, Judgement of 30 January 2008, available at http://elyon1.court.gov.il/Files_ENG/07/320/091/n25/07091320.n25.pdf.

¹⁹⁵ Petition to stop electricity and fuel cuts to the Gaza Strip, 28 November 2007. The petition, related affidavits, excerpts from the State's answers and excerpts from the Court's decision are all available at: <http://www.gisha.org/index.php?intLanguage=2&intSiteSN=110&intItemId=742>.

A. The parties relevant to the conduct of military activities in Gaza between 27 December 2008 and 18 January 2009

1. The Israeli armed forces

328. The information available shows that Israel deployed its navy, air force and army in the operation it codenamed “Operation Cast Lead”.

329. The navy was used in part to shell the Gaza coast during the military operations.

330. The air force was also used throughout the military operations in a way that appears in its own view to have been innovative. Having been responsible for the vast majority of operational activities in the first week, it continued to play an important role in assisting and covering the ground forces from 3 January to 18 January 2009.¹⁹⁶

331. The army was responsible for the ground invasion, which began on 3 January 2009. The available information indicates that the Golani, Givati and Paratrooper Brigades and five Armoured Corps Brigades were involved. Assaults on three fronts with combined armour and infantry brigades were also augmented by specialist Arabic-language, intelligence and, in particular, combat engineer troops. The engineer troops equipped with armoured D-9 bulldozers were also trained in operations to counter improvised explosive devices (IEDs). Forward elements of these attack formations could rely on direct support from the air force to call air strikes or to direct them, to call in helicopter missile attacks and to direct their own attached missile-mounted UAVs.¹⁹⁷

2. Palestinian armed groups

332. The Palestinian armed factions operating in the Gaza Strip, and claiming responsibility for the majority of the rocket and mortar launchings, are the Hamas’ Izz ad-Din al-Qassam Brigades,¹⁹⁸ the al-Aqsa Martyrs’ Brigades, the Islamic Jihad, the Abu Ali Mustafa Brigades,¹⁹⁹ which are the military wing of the Popular Front for the Liberation of Palestine (PFLP), and al-Naser Salah ad-Din Brigades, which are the military wing of the Popular Resistance Committees (PRC).²⁰⁰ PRC is a coalition of different armed factions that oppose what they perceive as the Palestinian Authority’s and Fatah’s conciliatory approach towards Israel.

¹⁹⁶ See Anthony H. Cordesman, “The ‘Gaza war’: A strategic analysis”, Centre for Strategic and International Studies (2009), p. 41.

¹⁹⁷ Alon Ben-David, “Israeli offensive seeks ‘new security reality’ in Gaza”, *Jane's Defence Weekly*, 8 January 2009; *Jane's 'Sentinel' Services*, “Country Risk Assessments – Israel”, 4 February 2009.

¹⁹⁸ Named after a Syrian who worked with displaced Palestinians in what is now northern Israel, and died in a clash with British troops in 1935, sparking the 1936–39 Palestinian revolt.

¹⁹⁹ The Abu Ali Mustafa Brigades claimed responsibility for launching 177 rockets and 115 mortars on several towns and villages inside Israel during the period of the military operations in Gaza.

See <http://www.kataebabuali.ps/inf2/articles-action-show-id-223.htm>.

²⁰⁰ During the period of the military operations in Gaza, al-Naser Salah ad-Din Brigades claimed responsibility for the launching of 132 rockets and 88 mortars. See <http://www.moqawmh.com/moqa/view.php?view=1&id=300>.

B. The phases of the hostilities

1. Air phase²⁰¹

333. The Israeli armed forces began the military operations with a week-long air attack, from 27 December until 3 January 2009. One study suggests that they had drawn up a list of 603 targets to be hit as they belonged to Hamas suspects or were part of what Israel viewed as the Hamas infrastructure. The study claims that a senior Israeli officer reported that all 603 targets had been hit before the end of the fourth day of the aerial operations in the first week. Officially, the spokesman of the Israeli forces claimed that 526 targets had been hit by 31 December 2008.²⁰²

334. An analysis of the strikes in a report of the Palestinian Centre for Human Rights gives the following breakdown.

335. “IOF [Israeli occupation forces] have launched at least 300 air and sea strikes against the Gaza Strip. These strikes have targeted 37 houses; 67 security and training sites; 20 workshops; 25 public and private institutions; seven mosques; and three educational institutions. The public institutions that have been bombarded are: the compound of ministries, the building of the Palestinian Legislative Council, the building of the cabinet in Gaza City; the buildings of the agricultural control department and the Municipality of Bani Suhaila in Khan Yunis; the buildings of Rafah Municipality and Governorate. The air strikes have targeted also four money exchange shops, a clinic, three fishing harbours, the Islamic University and two schools.”²⁰³

336. Of the incidents addressed in detail in this report, the following occurred during this phase:

- The attack on Arafat City Police Station;
- Attacks on four other police stations, one in Deir al-Balah and three in Gaza City;
- The attack on the Palestinian Legislative Council building and the Ministry of Justice;
- The attack on Gaza main prison in the al-Sarayah complex, Gaza City.

337. Israeli air force activities continued throughout the military operations. In total, it has been suggested that between 2,300 and 3,000 sorties were flown.²⁰⁴

²⁰¹ Although principally recognized as an aerial phase, there was a significant contribution from the Israeli navy not only in the first week.

²⁰² Cordesman, op. cit., p. 30.

²⁰³ PCHR, “Weekly report on Israeli human rights violations in the Occupied Palestinian Territory”, No. 51/2008 (24–31 December 2008), available at: http://www.pchrgaza.org/files/W_report/English/2008/pdf/weekly%20report%2051.pdf.

²⁰⁴ Cordesman, op. cit., p. 41. He cites Lt. Gen. Ashkenazi saying that the air force flew 2,300 successful air strikes but notes other senior officials told him the real number was closer to 3,000.

2. The air-land phase

338. Around 3 January 2009 Israeli ground troops entered Gaza from the north and east. One study suggests that “the war was fought largely by the southern Command using brigade teams that operated with a high degree of independence and freedom to adapt and innovate”.²⁰⁵

339. One of the key initial objectives described by one soldier involved was to divide the Gaza Strip into two parts, i.e. to split and fragment it, with Nitzarim constituting the midpoint.²⁰⁶ The division therefore ran from the Karni crossing point to the coast in a south-westerly direction. After creating the split, the Israeli armed forces concentrated all of their ground forces in the north. Targets in the south were hit from the air, such as in Rafah.

340. At least in the initial phase it appears forces from the Givati Brigade entered from the east and approached Gaza City from the south. It is understood that forces from the Armoured

341. Corps Brigade also operated in this area but probably at a later stage.²⁰⁷ Zeytoun, on the southern outskirts of Gaza, took the brunt of these brigade operations, with incidents of attacks on the civilian population.

342. It appears that those with primary responsibility in the north of Gaza, especially around Beit Lahia and al-Atatra, included forces from the Golani Brigade.

343. The forces focusing on the area between Gaza City and the northern section, especially in Jabaliyah, appear to have been drawn largely from the Paratrooper Brigade.

344. The movement into the south of Gaza City reached at least as far as Zeytoun on 3 January 2009. Some of the troops entering there on that day appear to have been brought in by helicopter rather than arriving by land. Israeli armed forces maintained a presence in Zeytoun until the final withdrawal.²⁰⁸ It is understood that the original forces that entered Zeytoun were at least partially replaced by other troops at some point, but it is not known if any of the original forces remained in the area throughout the period.²⁰⁹

345. In the other brigade areas regular troops were augmented or replaced by reservists who were called up after the initial ground attacks.

²⁰⁵ Ibid., p. 39.

²⁰⁶ Breaking the Silence, *Soldiers' Testimonies from Operation Cast Lead, Gaza 2009*, testimony 20, p. 48, available at: http://www.breakingthesilence.org.il/oferet/ENGLISH_oferet.pdf.

²⁰⁷ *Soldiers' Testimonies* ..., testimony 2, p. 9.

²⁰⁸ See accounts of the attack on the Sawafeary chicken farm attack in chapter XIII and the taking of the Juha house in Zaytoun in chapter IX.

²⁰⁹ *Soldiers' Testimonies* ..., testimony 2, p. 9.

346. Zeytoun was an area of particularly intense action by Israeli forces, yet there are almost no indications of armed resistance in the area at the time.²¹⁰

347. Among the issues of particular concern to the Mission in Zeytoun are the killings of the Samouni family, the mass destruction in the area, including the systematic demolition of the Sawafeary chicken farms, and the air strike that killed 22 members of the al-Daya family.

348. The forces in Zeytoun also appear to have been responsible for the push towards the area around Tal el-Hawa and Rimal in the south-west of Gaza City, about three kilometres from Zeytoun. The Mission has information that indicates that tanks took up positions in and around Tal el-Hawa around 4 and 5 January. Sources indicate that there was a presence there throughout the hostilities, as also evidenced by the artillery fire from around this area on 14 and 15 January on the compound of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and al-Quds hospital, both of which the Mission addresses in detail.

349. The forces responsible for the execution of the Israeli plan in the north-east of the Gaza Strip included the Golani Brigade. Among the areas of special concern in this regard are al-Atatra and Beit Lahia. Various witnesses indicate that in the past there has at times been some armed presence in the area. Information taken from websites apparently belonging to Palestinian armed groups indicates that these were areas of some resistance. The Mission heard from several witnesses about the scale of the destruction that occurred there as a result of artillery fire after the ground phase began on 3 January. Information indicates a sustained attack with aerial and artillery fire from 3 to 8 January. The Mission addresses a number of particular cases that occurred in this context, such as the alleged use of human shields, the alleged widespread mistreatment of civilians, including detentions, and transfers of large numbers to Israeli prisons in unlawful circumstances.

350. In the Jabaliyah area, located between Beit Lahia and Gaza City, the Mission understands that at least for part of the time there was a significant presence of the Paratrooper Brigade.²¹¹ At the beginning of the ground phase it is noted that an Israeli projectile struck the al-Maqadmah mosque, killing at least 15 civilians. A few days later the al-Fakhura Street incident occurred in the same area when a series of mortars fired by the Israeli armed forces killed at least 35 people.

351. Around 15 January the Israeli armed forces began withdrawing from their positions in the main areas described above. As they did so, there appeared to be a practice of systematically demolishing a large number of structures, including houses, water installations, such as tanks on the roofs of houses, and of agricultural land. A renewed aerial phase in Rafah was also conducted in the last few days of the military operations. Whereas the strikes in the first week appear to have been relatively selective, the last few days saw an increase in the number of

²¹⁰ See Jerusalem Center for Public Affairs, “The hidden dimension of Palestinian war casualties in operation ‘cast lead’: Hamas fire on Palestinian areas”, by Lt. Col. (res.) Jonathan Dahoah Halevi.

²¹¹ See, for example, Haartz, “IDF investigation shows errant mortar hit UN building in Gaza”, 11 January 2009, available at: <http://www.haaretz.com/hasen/spages/1054284.html>.

strikes with several hundred targets hit, causing not only very substantial damage to buildings but also, according to some, underground structural damage.²¹²

C. Data on casualties during the Israeli military operations in Gaza from 28 December 2008 to 17 January 2009

1. Palestinian casualties

352. The Mission received statistics on the fatalities of the military operations from the Gaza authorities, specifically from the Central Commission for Documentation and Pursuit of Israeli War Criminals (TAWTHEQ),²¹³ as well as from PCHR,²¹⁴ Al Mezan²¹⁵ and B'Tselem.²¹⁶ The first three also provided lists of all the persons killed in the military operations, with their names, sex, age, address, occupation, and place and date of the fatal attack. Another NGO, Defence for Children International – Palestine Section,²¹⁷ provided a list of all the children killed.

353. The three lists give different numbers. According to TAWTHEQ, 1,444 persons were killed. The two Palestinian NGOs provide a lower number, 1,417 victims according to PCHR and 1,409 according to Al Mezan, while B'Tselem mentions 1,387 victims. The Mission has not cross-checked the three lists. TAWTHEQ, PCHR, Al Mezan and B'Tselem also provide disaggregated data.

354. TAWTHEQ reports that 341 of those killed were children (under 18), 248 members of the police, 11 members of the Internal Security Service and 5 members of the National Security Service. It provides no figures for the number of combatants killed.

355. PCHR divides the overall 1,417 victims into 926 civilians, 255 police²¹⁸ and 236 combatants.²¹⁹ It reports that 313 of the dead were children and 116 women.

356. Al Mezan reports that overall 1,409 persons were killed during the military operations, of whom 237 were combatants (including 13 under-age combatants) and 1,172 non-combatants, including 342 children, 111 women and 136 members of the police.²²⁰ Thus, according to PCHR

²¹² UNOSAT Report.

²¹³ These lists were prepared by the Gaza authorities' Ministry of Justice, TAWTHEQ, The Central Commission for Documentation and Pursuit of Israeli War Criminals and submitted to the Mission.

²¹⁴ The list is available at: <http://www.pchrgaza.org/files/PressR/English/2008/list.pdf>.

²¹⁵ Al Mezan Center for Human Rights, "Cast lead offensive in numbers", available at: <http://www.mezan.org/upload/8941.pdf>. In September 2009 Al Mezan published an updated list of victims with 1,412 names.

²¹⁶ B'Tselem, "B'Tselem publishes complete fatality figures from operation cast lead", press release, 9 September 2009, available at: http://www.btselem.org/English/Press_Releases/20090909.asp.

²¹⁷ The list is available at <http://www.dci-pal.org/english/display.cfm?DocId=917&CategoryId=1>.

²¹⁸ In the PCHR list of victims the police officers are classified as civilians.

²¹⁹ PCHR, "Confirmed figures reveal the true extent of the destruction inflicted upon the Gaza Strip; Israel's offensive resulted in 1,417 dead, including 926 civilians, 255 police officers, and 236 fighters", press release, 12 March 2009, available at: <http://www.pchrgaza.org/files/PressR/English/2008/36-2009.html>

²²⁰ "Cast lead offensive in numbers...", p. 7.

and Al Mezan, fewer than 17 per cent of the Palestinians killed during the military operations were combatants.

357. B'Tselem states that, of the 1,387 Palestinians who were killed, 773 did not take part in the hostilities, including 320 minors and 109 women over the age of 18. Of those killed, 330 took part in the hostilities and 248 were Palestinian police officers, most of whom were killed in aerial bombings of police stations on the first day of the operations. For 36 people B'Tselem could not determine whether they had participated in the hostilities or not.

358. According to Defence for Children International, 348 children were killed during the military operations.²²¹

359. The Israeli armed forces claim that 1,166 Palestinians were killed during the military operations “according to the data gathered by the Research Department of the Israel Defense Intelligence”. They allege that “709 of them are identified as Hamas terror operatives”, 295 are “uninvolved Palestinians”, while the remaining 162 are “men that have not yet been attributed to any organization”.²²² Of the 295 “uninvolved Palestinians”, 89 were children under the age of 16 and 49 women. According to these figures, at least 60 per cent, and possibly as many as three out of four, of those killed were combatants. The Mission notes, however, that the Israeli Government has not published a list of victims or other data supporting its assertions, nor has it, to the Mission’s knowledge, explained the divergence between its statistics and those published by three Palestinian sources, except insofar as the classification of policemen as combatants is concerned.²²³

360. The Mission, not having investigated all incidents involving loss of life in the Gaza Strip, will not make findings regarding the overall number of persons killed nor regarding the percentage of civilians among those killed. The incidents it did investigate, and on which it will make findings based on the information it gathered, involve the death of more than 220 persons, at least 47 of them children and 19 adult women.

361. The Mission notes that the statistics from non-governmental sources are generally consistent. Statistics alleging that fewer than one out of five persons killed in an armed conflict was a combatant, such as those provided by PCHR and Al Mezan as a result of months of field research,²²⁴ raise very serious concerns about the way Israel conducted the military operations in Gaza. The counterclaims published by the Government of Israel fall far short of international law standards.

²²¹ Defence for Children International confirmed the deaths of another five children caused indirectly by the military operations.

²²² IDF spokesperson, “Majority of Palestinians killed in operation cast lead: Terror operatives”, 26 March 2009, available at <http://dover.idf.il/IDF/English/News/today/09/03/2602.htm>; see also *The Jerusalem Post*, “IDF releases cast lead casualty number”, 26 March 2009.

²²³ On the question of whether Gaza policemen were civilians or combatants, see chap. VII.

²²⁴ The Mission notes that the figures from B'Tselem, which distinguish between casualties who took part in the hostilities and those who did not, lead to similar results. If the policemen were added to those who did not take part in hostilities (as Al Mezan and PCHR do in adding the policemen to the civilians killed), the B'Tselem statistics would indicate that approximately one in four Palestinians killed was taking part in hostilities.

362. The Mission also notes that – as the Government of Israel argues at length²²⁵ – there are circumstances under international humanitarian law in which military actions resulting in the loss of civilian life would not be unlawful. These include attacks directed against military objectives that comply with the principles of discrimination and proportionality, but nonetheless kill civilians. They also include the killing of persons who, though not members of an armed group, participate directly in the hostilities. The reportedly exceedingly high percentage of civilians among those killed raises concerns about the precautions taken by Israel in launching attacks as well as the legality of many of the attacks, as elaborated further in this report with regard to the specific incidents investigated by the Mission.

363. The Mission finally notes that it cannot entirely discount the possibility that Palestinian civilians may have been killed as a result of fire by Palestinian armed groups in encounters with the Israeli armed forces, as argued in a submission to the Mission,²²⁶ although it has not encountered any information suggesting that this was the case.²²⁷

2. Israeli casualties

364. The Israeli Ministry of Foreign Affairs reported that, during the military operations from 27 December 2008 to 18 January 2009, there were four Israeli casualties²²⁸ in southern Israel (all adults), of whom three were civilians and one was a soldier.²²⁹ In addition, nine Israeli soldiers were killed during the fighting inside the Gaza Strip, four of whom by friendly fire.²³⁰ B'Tselem²³¹ confirmed these numbers, stating that during the operations Palestinians killed nine Israelis, of whom three civilians, who were reportedly killed by Qassam and Grad rocket fire, and six members of the security forces, while another four soldiers were killed by friendly fire.²³²

²²⁵ “The operation in Gaza...”, paras. 89–141.

²²⁶ “The hidden dimension of Palestinian war casualties...”. This submission is examined in chapter VIII below.

²²⁷ The Mission has, however, investigated cases of alleged extrajudicial executions of Palestinians by Palestinian armed groups during the military operations (see chap. XIX).

²²⁸ http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Israel_strikes_back_against_Hamas_terror_infrastructure_Gaza_27-Dec-2008.htm.

²²⁹ http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Victims_Hamas_rocket_fire_Hamas_ends_calm_Dec-2008.htm.

²³⁰ http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/IDF_soldiers_killed_Operation_Cast_Lead.htm.

²³¹ B'Tselem, “B'Tselem’s investigation of fatalities in Operation Cast Lead”, p. 2, available at: http://www.btselem.org/Download/20090909_Cast_Lead_Fatalities_Eng.pdf.

²³² Al-Qassam Brigades’ website reports that, during the conflict, they killed 102 Israeli soldiers (“The outcome of al-Qassam operations during the Battle of *al-Furqan*” (in Arabic), available at: http://www.alqassam.ps/arabic/special_files/al-furqan/30.pdf). On 19 January 2009, Abu Obeida, a spokesperson for the group, stated that “Israel lost ‘at least 80 soldiers’ in the fighting”. See al-Arabiya News Channel, “ Hamas says only 48 fighters slain in Israel war”, 19 January 2009, available at: <http://www.alarabiya.net/articles/2009/01/19/64513.html>. The large discrepancy in the data confirms the Mission’s observations below in the report about the reliability of the information about the Gaza military operations posted on websites of al-Qassam and other Palestinian armed groups.

VII. ATTACKS ON GOVERNMENT BUILDINGS AND POLICE

A. Deliberate attacks on Gaza government infrastructure

1. Overview of damage to Gaza government buildings

365. In its early recovery and reconstruction plan for Gaza, the Palestinian Authority states that “seven government institutions were either completely or partially levelled (including the Government Palace, the Archives building, the General Personnel Council, and the Presidential Compound), and the Ministries of Interior, Justice and Culture were either partially or entirely destroyed, along with their associated compounds. In addition, 19 municipal facilities were damaged and 11 were totally destroyed, including commercial centres such as markets, slaughterhouses and stores.”²³³

2. The Israeli air strikes on the Gaza main prison and on the Palestinian Legislative Council building

366. The Mission visited two locations where government buildings were destroyed by Israeli air strikes: the Palestinian Legislative Council building and the main prison in the al-Saraya complex in Gaza City. In addition, the Mission visited six police stations, which will be discussed separately below.

367. The Mission visited the remains of the Gaza City main prison and interviewed two senior police officers who were, according to their testimony, eyewitnesses to the attack. The Mission also reviewed reports on the attack from other sources based on the testimony of prisoners. It furthermore addressed questions to the Government of Israel regarding the military advantage pursued in attacking the Palestinian Legislative Council building and the main prison in Gaza City, but received no reply.

368. The main prison was located in a densely built-up area of Gaza City in the al-Saraya complex of buildings occupied by government departments, including the Ministries of Education, Transport and the Interior. The prison itself was an old building, several stories high, reportedly used as a prison by successive authorities in charge of Gaza during the previous and present centuries. It held both common offenders and political detainees.

369. While there were some discrepancies in the different accounts of this incident, the Mission was able to ascertain that the complex was attacked at 11 a.m. on 28 December 2008, on the second day of the air strikes by Israel. At the time of the attack between 200 and 300 prisoners were held in the facility, most of the almost 700 prisoners having been released in the days before the strike.²³⁴ The accounts given by officials regarding the number of fatalities and

²³³ Palestinian National Authority, Palestinian National Early Recovery and Reconstruction Plan for Gaza 2009-2010, March 2009, p. 41.

²³⁴ According to statements by the police to the Mission, around 400 minor offenders had been released by the authorities to reduce overcrowding, so that when the hostilities started about 300 prisoners remained there. According to a NGO report based on the testimony of prisoners, “authorities released about 580 of the prisoners after the bombings started [i.e. on 27 December 2008], but kept in custody roughly 115 alleged collaborators with Israel, about 70 Fatah supporters held on various charges, and some persons convicted of criminal offences who had

injured among the prisoners are contradicted by NGO reports and the Mission heard allegations of extrajudicial executions of escaping prisoners by, or at the behest of, the Gaza authorities, which the Mission deals with in chapter XIX. Police officials told the Mission that one prison guard was killed and several injured by the Israeli strike, as the first missile hit the guards' quarters, and that no prisoners were seriously injured. The guards had opened the prison doors immediately after the first strike. Others reported that "some prisoners were killed in the bombing, while others escaped the destroyed building."²³⁵ A number of prisoners injured in the attack went to al-Shifa hospital in Gaza City for treatment after escaping from the prison.

370. Despite the limited number of casualties that may have occurred, the high probability of more serious loss of life and of injuries in an attack on a populated prison facility could not have been discounted by the Israeli forces. The Mission has taken note of the assessment of the Israeli air force that 99 per cent of the strikes it carried out were accurate.²³⁶ In the light of this claim and in the absence of explanations to the contrary from the Israeli Government, it can only be concluded that the prison was the intended target of the strike. There is no indication from the information gathered on the incident and an inspection of the site that there was any cause for considering the prison building a "military objective".

371. The Palestinian Legislative Council building in central Gaza City was, according to information provided by the Israeli armed forces on their official web site, attacked on 31 December 2008. Mr. Ahmad Bahr, then Acting Speaker of the Palestinian Legislative Council in Gaza, stated to the Mission that it was hit by three missiles launched from fighter planes. The Mission visited the damaged assembly room. It also saw the rubble of the severely damaged three-storey building of the Parliament, which had been completed two years before. It was explained to the Mission that the new building contained a videoconferencing room which allowed the Gazan parliamentarians to hold joint sessions with the members of Parliament based in Ramallah. No casualties as a result of the strike on the Legislative Council building were reported to the Mission.

372. The Mission notes that the Israeli armed forces acknowledged in their "Summary of overnight events" of 1 January 2009 that:

The IAF and Israel Naval Forces struck around 20 Hamas targets throughout the Gaza Strip during late night and early morning hours (Dec. 31).

Among the sites targeted were.

The buildings housing Hamas' Ministry of Justice and Legislative Assembly, both located in the Tel El-Hawwa government complex. Hamas Government sites serve as a critical component of the terrorist groups' infrastructure in Gaza.²³⁷

been sentenced to death." See Human Rights Watch, *Under Cover of War: Hamas Political Violence in Gaza* (April 2009), p. 11.

²³⁵ "Ending the war...", footnote 62.

²³⁶ See also chapter XVI.

²³⁷ <http://dover.idf.il/IDF/English/opcast/op/press/0101.htm>.

373. The Israeli army spokesperson further elaborated: “The attack on strategic government objectives, which constitute part of Hamas’s mechanism of control, is a direct response to the continued firing on communities in southern Israel by the Hamas terrorist organization.”²³⁸

3. The position of the Government of Israel

374. The Mission observes that the Government of Israel is not alleging that any Hamas military activity, such as launching of rockets, storage of weapons or planning of operations, was carried out in the Legislative Council building, the Ministry of Justice or the main prison. The justification of the Government of Israel for the strike on the Palestinian Legislative Council is that it is a “Hamas Government site”, and that such sites “serve as a critical component of the terrorist groups’ infrastructure in Gaza” and “constitute part of Hamas’s mechanism of control”.

375. This explanation posted on the Israeli armed forces’ official website is integrated and elaborated on by numerous statements made by current and former senior Government officials to the media. Major Avital Leibovich, a spokesperson of the Israeli armed forces, reportedly argued “anything affiliated with Hamas is a legitimate target.”²³⁹ The deputy chief of staff, Maj. Gen. Dan Harel, reportedly told a meeting with heads of local authorities in southern Israel that:

This operation is different from previous ones. We have set a high goal which we are aiming for. We are hitting not only terrorists and launchers, but also the whole Hamas government and all its wings. [...] We are hitting government buildings, production factories, security wings and more. We are demanding governmental responsibility from Hamas and are not making distinctions between the various wings. After this operation there will not be one Hamas building left standing in Gaza, and we plan to change the rules of the game.²⁴⁰

376. Israeli armed forces’ spokesman Captain Benjamin Rutland reportedly stated: “Our definition is that anyone who is involved with terrorism within Hamas is a valid target. This ranges from the strictly military institutions and includes the political institutions that provide the logistical funding and human resources for the terrorist arm.”²⁴¹

377. Mr. Matti Steinberg, a former senior adviser to the Israeli General Security Services, argued that “Hamas’s civilian infrastructure is a very, very sensitive target. If you want to put pressure on them, this is how”.²⁴² Less than three months before the hostilities in Gaza began, Col. Gabriel Siboni similarly argued that:

²³⁸ Official statement by an Israeli military spokesman, 1 January 2009, available at: http://dover.idf.il/IDF/News_Channels/art_mivzaim/09/01/0101.htm (in Hebrew).

²³⁹ *The Washington Post*, “All-out war declared on Hamas”, 30 December 2008.

²⁴⁰ *Ynet*, “Deputy chief of staff: worst still ahead”, 29 December 2008.

²⁴¹ BBC News, “Gaza conflict: who is a civilian?”, 5 January 2009, available at: http://news.bbc.co.uk/2/hi/middle_east/7811386.stm.

²⁴² “All-out war...”.

... the IDF will be required to strike hard at Hamas and to refrain from the cat and mouse games of searching for Qassam rocket launchers. The IDF should not be expected to stop the rocket and missile fire against the Israeli home front through attacks on the launchers themselves, but by means of imposing a ceasefire on the enemy.²⁴³

378. The Mission understands all these statements to imply that, in the view of their authors, in order to be effective, military operations have to be directed not only against military targets but also against the non-military infrastructure.

379. The Israeli Government's discussion of the "targeting of Hamas terrorist infrastructure" asserts that, "consistent with the principle of distinction, IDF forces attacked military targets directly connected to Hamas and other terrorist organizations' military activities against Israel." This statement is followed by a list of examples of objectives, such as command posts of al-Qassam Brigades, alleged weapons storage sites and training camps, rocket and mortar launch sites, and tunnels. The list also refers twice to a location identified as the office of Ismail Haniyah, "head of the Hamas administration". This list is followed, however, by a statement reiterating and elaborating the argument that there is really no distinction to be made between military and civilian objectives as far as government and public administration in Gaza are concerned:

While Hamas operates ministries and is in charge of a variety of administrative and traditionally governmental functions in the Gaza Strip, it still remains a terrorist organization. Many of the ostensibly civilian elements of its regime are in reality active components of its terrorist and military efforts. Indeed, Hamas does not separate its civilian and military activities in the manner in which a legitimate government might. Instead, Hamas uses apparatuses under its control, including quasi-governmental institutions, to promote its terrorist activity.²⁴⁴

4. Factual findings

380. From the facts gathered by it, the Mission finds that Israel launched direct attacks against the main prison in Gaza City on 28 December 2008 and against the Palestinian Legislative Council building in Gaza City on 31 December 2008. The attacks substantially damaged the buildings, making them unfit for use. At least one person was killed in the attack on the prison, while there were apparently no casualties in the attack on the Legislative Council building.

381. The factual question of whether these two institutions and their buildings served a military purpose must be considered with regard to the legal definition of military objectives. It is addressed in the following section.

²⁴³ Gabriel Siboni, "Disproportionate force: Israel's concept of response in light of the second Lebanon war", *Institute for National Security Studies Insight*, No. 74 (2 October 2008), available at: <http://www.inss.org.il/publications.php?cat=21&incat=&read=2222>.

²⁴⁴ "The operation in Gaza...", paras. 233-235.

5. Legal analysis

382. In assessing the Israeli strikes against the Legislative Council building and the main prison, the Mission first of all notes that Hamas is an organization with distinct political, military and social welfare components.²⁴⁵

383. Since July 2007 Hamas has been the de facto government authority in Gaza. As recognized by the Israeli Government,²⁴⁶ the Hamas-led authorities in Gaza have been responsible for the civilian administration of Gaza. For instance, they employ civil servants and workers, run schools, hospitals, traffic police and the administration of justice. The fact that these institutions and the buildings housing them have been administered by authorities led by Hamas since July 2007, and no longer by a government composed of both Hamas and Fatah members has, in the view of the Mission, no bearing on the continued civilian character of these institutions. Regarding the prison, the Mission finds the consequences of the attack aptly described in the answer to its questions received from the Gaza authorities: “As a result of this targeting, great numbers of those who were detained pending trial in criminal cases and of those convicted of major crimes such as murder escaped. This has caused disorder and chaos, encouraged ‘family revenge’ cases and people taking the law into their own hands.”²⁴⁷ As far as the Palestinian Legislative Council building is concerned, it served representatives from all Palestinian parties who won seats in the 2006 elections (which were recognized as free and fair by international observers).

384. The Mission met with Gaza-based Legislative Council members belonging to Hamas, to Fatah and to the Popular Front for the Liberation of Palestine.²⁴⁸ While Hamas constitutes the de facto authority in Gaza, the buildings attacked and destroyed served a public purpose that cannot be regarded as “promoting Hamas terrorist activity”.

385. The fundamental rule of international humanitarian law applicable to attacks against buildings and infrastructure is enshrined in article 52 of Additional Protocol I (“General Protection of civilian objects”). This provision is generally recognized as codifying customary law applicable to both international and non-international armed conflicts.²⁴⁹

²⁴⁵ This situation is recognized also by Governments which have listed Hamas’ military component as “terrorist”. The Australian Government’s listing of al-Qassam Brigades as a terrorist organization (last updated 14 September 2007), for instance, explains: “The functions of the Hamas organization, which has distinct civilian and military wings, include legitimate political and social activities. Its welfare and mosque networks act as a base for its recruitment and propaganda activities. Its terrorist operations are conducted by its military wing, the Izz ad-Din al-Qassam Brigades.”

²⁴⁶ “The operation in Gaza...”, para. 235.

²⁴⁷ Reply from the Gaza authorities to the Mission’s list of questions (July 2009).

²⁴⁸ The Mission also spoke with West Bank-based Legislative Council members.

²⁴⁹ International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law*, vol. I, Jean-Marie Henckaerts and Louise Doswald-Beck, eds. (Cambridge University Press, 2005), rules of customary law 7–9. The Israeli Government recognizes this principle. See “The operation in Gaza...”, para. 95.

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

386. The statement by the Israeli Government concerning the attack on the Legislative Council building and the Ministry of Justice does not suggest any “effective contribution to military action” that the buildings might have been making. No reference is made to any “definite military advantage” that their destruction would offer. Instead, the explanation is that government buildings constitute “part of Hamas’s mechanism of control”, that they “serve as a critical component of the terrorist groups’ infrastructure in Gaza” and that “ostensibly civilian elements of [the Hamas] regime are in reality active components of its terrorist and military efforts.”

387. The Mission observes that there is nothing unique in the fact that in Gaza ministries and prisons are part of the government’s “mechanism of control” and that the legislature’s assembly hall and administrative buildings are a critical component of the government infrastructure. That is not, however, the test applied by international humanitarian law and accepted State practice to distinguish between civilian and military objects. The Mission reviewed, for instance, the tentative list of military objectives drawn up by Major General A.P.V. Rogers, a former Director of the British Army Legal Services, and a proposed list of military objectives drawn up by the International Committee of the Red Cross (ICRC). There is nothing in this comprehensive list of military objectives that comes close to a legislative assembly’s building or a prison. As far as ministries are concerned, both lists limit the definition of military objective to “war ministries”.²⁵⁰

388. The Mission further notes that international humanitarian law also recognizes a category of civilian objects which may nonetheless be targeted in the course of armed conflict to the extent that they have a “dual use”. Examples often made for such dual-use objects, which serve both civilian and military purposes, are civilian infrastructures such as telecommunications, power-generating stations or bridges, *in so far as they are used by the military in addition to their civilian use*. There is no indication, nor any allegation of any such dual use of the Legislative Council building or of the Gaza main prison.

²⁵⁰ “Final report to the Prosecutor by the Committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia”, paras. 38–39, available at: <http://www.un.org/icty/pressreal/nato061300.htm#IVA64d>.

389. There is an absence of evidence or, indeed, any allegation from the Israeli Government and armed forces that the Legislative Council building, the Ministry of Justice or the Gaza main prison “made an effective contribution to military action.” On the information available to it, the Mission finds that the attacks on these buildings constituted deliberate attacks on civilian objects in violation of the rule of customary international humanitarian law whereby attacks must be strictly limited to military objectives.

390. In the Mission's view these facts further indicate the commission of the grave breach of extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly, as defined in article 147 of the Fourth Geneva Convention.

391. The Mission rejects the analysis of present and former senior Israeli officials that, because of the alleged nature of the Hamas government in Gaza, the distinction between civilian and military parts of the government infrastructure is no longer relevant in relation to Israel's conflict with Hamas. This analysis is accompanied, in the statements of Col. Gabriel Siboni and Mr. Matti Steinberg, by an explicit argument that Israel should “put pressure” on Hamas by targeting civilian infrastructure to attain its war aims.

392. The Mission is of the view that this is a dangerous argument that should be vigorously rejected as incompatible with the cardinal principle of distinction. International humanitarian law prohibits attacks against targets that do not make an effective contribution to military action. Attacks that are not directed against military (or dual use) objectives are violations of the laws of war, no matter how promising the attacker considers them from a strategic or political point of view. As a recent academic contribution to the discussion on whether “new wars” require “new laws” has noted, “if this argument [that attacks against political, financial or psychological targets may prove more effective than those against military or dual-use objectives] was decisive, in some societies – in particular in democracies – it may be hospital maternity wards, kindergartens, religious shrines, or homes for the elderly whose destruction would most affect the willingness of the military or of the government to continue the war.”²⁵¹

B. Deliberate attacks on the Gaza police

393. Information received by the Mission indicates that 248 members of the Gaza police were killed in the course of Israel's military operations.²⁵² In other words, more than one out of every six casualties was a member of the Gaza police.

394. The Mission visited the “Arafat City” police headquarters in Gaza City and five police stations: the Abbas police station (central Gaza City), three police stations in neighbourhoods in the east and south of Gaza City (Zeytoun, al-Shujaeyah and al-Tuffah) and the Deir al-Balah investigative police station. The Mission interviewed the Director of Police, the police spokesman, station commanders at the stations visited and other persons knowledgeable about

²⁵¹ Marco Sassoli, “Targeting: the scope and utility of the concept of “military objectives” for the protection of civilians in contemporary armed conflicts”, *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, D. Wippman and M. Evangelista, eds. (Ardsley, New York; Transnational Publishers; 2005), p. 196.

²⁵² The Central Commission for Documentation and Pursuit of Israeli War Criminals (TAWTHEQ), established by the Gaza authorities' Ministry of Justice.

the Gaza police. The Mission also reviewed allegations about the Gaza internal security forces made by the Israeli Government and also mentioned in a report (in Hebrew) by the Orient Research Group Ltd., an Israeli organization commissioned by the then Israeli Prime Minister Ehud Olmert to produce this report.²⁵³

395. The attacks investigated by the Mission were all directed against facilities used by the police force called *shurta* (police) in official documents of the Gaza authorities and referred to as “civil police” in many English reports.

396. The Arafat City police headquarters and three of the five police stations visited were attacked during the first minutes of the Israeli military operations in Gaza, between 11.20 and 11.35 a.m. on 27 December 2009. According to witnesses, the attacks were carried out primarily with bombs and missiles launched from fighter jets. Missiles launched by naval forces might also have been used.

397. According to the information received by the Mission from TAWTHEQ, 29 other police stations were targeted by the Israeli armed forces in addition to the five police stations visited by the Mission. Twenty-four were targeted on 27 December 2008 (mostly during the first minutes of the attack), the first day of the military operations, nine on the following day and one on 14 January 2009.

1. Information regarding the attacks on the police headquarters and police stations visited by the Mission

398. Arafat City police headquarters occupy a large compound in central Gaza. They are used by the civil police (*shurta*), one of the police forces operating in Gaza, as office space and for training courses. The Mission visited three sites in the compound in which missiles or bombs had struck. In one large yard, three missiles struck the participants of a police training course. Forty-eight policemen were killed on the spot, five more were wounded, two of whom subsequently succumbed to their injuries.

399. While it appears that all the policemen killed in this location were taking part in a training course, there is conflicting information on the details. Most reports by NGOs are to the effect that these were police “cadets” in the midst of a graduation ceremony. The Gaza police spokesperson, however, told the Mission that they were serving policemen, who had been taking a three-week course and who were, at the time of the strike, doing “morning sport exercise”.²⁵⁴ The contents of the training course reportedly were “protocol”, i.e. how to deal with

²⁵³ See Lt. Col. (res.) Jonathan Dahoah-Halevi, “Fatal casualties of the Palestinian security forces – Myth vs. Reality” (Orient Research Group Ltd., 2009). Its author is a former adviser to the Policy Planning Division of the Israel Ministry of Foreign Affairs and current researcher at the Jerusalem Center for Public Affairs and co-founder of the Orient Research Group Ltd. In a letter to the Mission, the author stated that the report had been commissioned “to identify the police officers killed and the extent of their affiliation with Hamas, Palestinian Islamic Jihad and other terrorist organizations.” As to the sources and methodology employed, he explained that he had examined materials in the public domain, including official lists of policemen who were killed published by the Palestinian Police and the Gaza authorities, NGO reports and material published by Palestinian armed groups. “The operation in Gaza...” relies on this report, referring to it as “a recent study” (para. 247).

²⁵⁴ Mission phone interview with Mr. Shahwan, Gaza police spokesperson, 12 July 2009.

representatives of foreign Governments and international delegations, and rescue operations. An obituary of one of the policemen killed, published on the website of al-Qassam Brigades, claims that he was attending “a military refreshing course.”²⁵⁵

400. The police gave the Mission small cube-shaped (4x4x4 mm³ and 2x4x4 mm³) metal fragments allegedly from the missiles fired at this location. Information provided by NGOs that visited the site soon after the strike and collected samples of the munitions fragments confirm that they were found there. Laboratory analysis of the cubes establishes that they are made of tungsten.²⁵⁶

401. In a second location at Arafat City police headquarters, two projectiles fired by Israeli fighter jets left two craters. No one was present in the area at the time of the strike. The third location visited by the Mission was near the north gate of the police headquarters where a projectile, most likely a missile, killed police chief Tawfiq Jabr. Reports indicate that other sites at the police headquarters, not visited by the Mission, were also targeted.

402. A second police training course targeted was reportedly attended by around 50 policemen. Twenty-eight of them were killed in the strike. According to the police spokesperson, the training course was designed to instruct police officers on how to deal with police officers who abused their power as well as on cultural and economic issues relevant to police work.²⁵⁷ Moreover, as the survivors were trying to flee through the western gate of the police city, they were reportedly targeted by two anti-personnel missiles, which caused deaths and injuries. While the Mission did not receive official information from the Gaza authorities on the number of policemen killed at the police headquarters on 27 December 2008, a report by an NGO submitted to the Mission states that 89 policemen died as a result of this attack.

403. Abbas police station in central Gaza City was, according to the station commander, hit by three missiles on 27 December 2008 at 11.35 a.m.²⁵⁸ Officials at the police station had just been informed of the attack on Arafat City police a few minutes earlier and immediate evacuation of the station had begun. Nine policemen were killed, 20 more reportedly injured. There were, according to the station commander, five detainees (common criminal suspects) in the police cells, who were released before the attack. There were members of the public going about their normal business at the police station at the time of the strike, including women and children. TAWTHEQ estimates the material damage caused by the attack at US\$ 80,000.

²⁵⁵ See <http://www.alqassam.ps/arabic/sohdaa5.php?id=1342>.

²⁵⁶ Laboratory analysis was carried out under the supervision of Lt. Col. Lane of Ireland’s Defence Forces, an expert witness of the Mission. In his report to the Mission he notes that “the IDF have deployed newly developed high-precision low-collateral damage missile systems.... In mid-2004 Rafael noted that a new warhead for the Spike had been developed for operations in urban areas.” See also Human Rights Watch, *Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Launched Missiles* (June 2009), where it is stated that the fragments are likely to have been from drone-launched “Spike” missiles produced by the Israeli firm Rafael Advanced Defense Systems (pp. 6-7, 11-12).

²⁵⁷ Mission phone interview with Mr. Shahwan, Gaza Police Spokesperson, 12 July 2009.

²⁵⁸ Interview with station commander, Maj. Iyad Jabr el Horani, 9 June 2009.

404. The police station in the al-Tuffah neighbourhood of Gaza City, a recently completed three-storey building, was struck by three missiles around 11.30 a.m. on 27 December 2009.²⁵⁹ Also according to the station commander, no policemen were killed, as it had been possible to evacuate the police station very rapidly after another target in the neighbourhood had been hit. Many civilian bystanders were, however, allegedly injured. The station was hit again in the course of the hostilities. TAWTHEQ estimates the material damage caused by the attack at US\$ 150,000.

405. The Deir al-Balah investigative police station was attacked between 11.30 and 11.45 a.m. on 27 December 2008. According to a police officer interviewed by the Mission,²⁶⁰ the police station was hit by a missile fired from an F-16. Other witnesses interviewed by the Mission recalled several explosions, the first of them most likely on a plot adjacent to the police station. Police officers who were inside the station at the time of the attack²⁶¹ reported that routine police activities were taking place. Suspects were being interrogated (there were four or five persons held in the station's jail) and residents of the area were filing complaints. One police officer, Ashraf Hamadah Abu Kuwaik, was killed in the strike, and five other officers and one civilian were also injured.

406. The attack on the Deir al-Balah investigative police station cost the lives of six members of the public, who were in the vicinity. As a result of the explosions at the police station and of the debris, walls at the house of the al-Burdini family next to the police station collapsed, killing the 10-year-old Kamelia al-Burdini²⁶² and injuring several other members of the family. At a wholesale fruit and vegetable market next to the police station on Salah ad-Din Street, where between 50 and 100 persons were trading at the time, debris from the police station killed five persons, among them Abd al-Hakim Rajab Muhammad Mansi, 32, and his son, Uday Hakim Mansi, and injured many others.²⁶³

407. The strikes on al-Shujaeyah and Zeytoun police stations, on 28 December 2008 and 14 January 2009, did not result in the deaths of any policemen, as after the 27 December attacks the police stations had been evacuated.²⁶⁴ In the attack on al-Shujaeyah police station, however, two women, a man and a child, standing on the opposite side of the road, were reportedly killed by debris. TAWTHEQ estimates the material damage caused by the attacks on al-Shujaeyah and Zeytoun police stations at US\$ 210,000 and US\$ 900,000, respectively.

²⁵⁹ Interview with Tuffah station commander, Maj. Aymal el-Batniji, 9 June 2009.

²⁶⁰ Interview with First Lieutenant Samih Sabbah, 30 June 2009.

²⁶¹ Interviews with First Lieutenant Samih Sabbah and criminal investigation officer Ahmad Abu Slimya, 30 June 2009.

²⁶² Interview with Refaet al-Burdini, 30 June 2009.

²⁶³ Interview with Muhammad Ibrahim Khalid. The names of two of the persons killed are on the PCHR list of child victims of the hostilities.

²⁶⁴ Interviews with Zeytoun station commander, Maj. Mahmoud Kehael, and Lt. Mahmoud Idallo of al-Shujaeyah station.

2. Conflicting characterizations of the Gaza security forces

(a) The approach of the Government of Israel

408. The position of the Government of Israel is that “due to their military functions, these internal security forces were not accorded the immunity from attack generally granted to civilians.” It alleges that, in May 2006, Hamas formed the Executive Force as a loyal militia, “[drawing] this paramilitary force largely from its military wing, the Izz al-Din al-Qassam Brigades, and armed the members with anti-tank missiles, mortars, machine guns and grenades. The newly recruited commanders and subordinates were not obliged to give up their military wing affiliation, and continued to operate simultaneously in both functions.” It further alleges that after the June 2007 seizure of full control over Gaza, Hamas restructured the Executive Force and subdivided it into several units, including the police, who “assumed many traditional law enforcement functions”. It goes on to say that its members, however, remained members of Hamas’ military wing and their weaponry continued to include machine guns and anti-tank weapons. “[...] the former Executive Force continued to be closely integrated with — although not formally part of — the al-Qassam Brigades. [...] many members of the internal security services also served directly in the al-Qassam Brigades.” Regarding the military operations, the Israeli Government alleges that “Hamas intended to, and did, in fact, employ its internal security forces for military activities during the Gaza Operation.” It further alleges that the “collective role of the Gaza ‘police’ as an integral part of Hamas armed forces is further evidenced by the fact that many Gaza ‘policemen’ were also members of the al-Qassam Brigades.” To support this allegation, an Israeli Government paper shows pictures of four men killed during the military operations. Each of the men is shown in two pictures purportedly downloaded from Palestinian websites, one identifying the man as a policeman, the other as a member of al-Qassam Brigades. Finally, the paper refers to the above-mentioned study of the Orient Research Group Ltd., stating that it found that “more than nine out of every ten alleged ‘civilian police’ were found to be armed terrorist activists and combatants directly engaged in hostilities against Israel.”²⁶⁵

(b) The approach of the Gaza authorities

409. The characterization of the Gaza internal security forces by the Government of Israel differs sharply from the tasks of the police as they are described on the official website of the Gaza Ministry of Interior, in orders to the police issued by the Minister of Interior which the Mission has reviewed, and in the interviews with the Director of Police and the police spokesman conducted by the Mission.

410. The Director of Police, Gen. Jamal al-Jarrah, also known as Abu Obeidah, stated that “the role of the police is to solve problems of the population, combat drug trafficking, arrest criminals.” He reported that they are equipped with Kalashnikov firearms and batons, as the authorities have not been able to obtain other police equipment, such as tear gas and small guns. Gen. Abu Obeidah acknowledged that there were complaints about the “harsh” methods of the

²⁶⁵ “The operation in Gaza...”, paras. 237, 239, 241-242 and 245-247.

Gaza police, but showed pride in their success in reducing lawlessness in the Gaza Strip.²⁶⁶ This assessment was shared by many whom the Mission interviewed in the course of its investigations. The police orders and the Ministry's website similarly describe the police as a law-enforcement agency. As to allegations that the police and al-Qassam Brigades were "interchangeable", the Director of Police asserted that they were "absolutely not true".

411. According to the police spokesperson, during the military operations the mandate of the police was firstly to "protect the internal front", i.e. ensure that the relationship between the civilian population and the authorities stayed "intact". Secondly, the police were to monitor the distribution of humanitarian goods to the civilian population. Thirdly, they were to continue regular law-enforcement duties, with a particular focus on combating looting and speculation on prices.²⁶⁷

3. The Mission's assessment of the role and composition of the police

412. In order to shed some light on where the truth might lie between these two conflicting descriptions of the police, the Mission finds it necessary to examine the development of the security forces linked to Hamas after its election victory in January 2006. When Mr. Said Seyam, a senior Hamas representative,²⁶⁸ took office as the Palestinian Authority's Minister of Interior in April 2006, he found that he had little or no control over the Palestinian Authority's security forces, which were put under the control of the President of the Palestinian Authority and of officials loyal to him.²⁶⁹ On 20 April 2006, he announced the formation of a new security force reporting directly to him. This was the Security Forces Support Unit, also known as the Executive Force (*al-Quwwa al-Tanfiziyya*). The new security force appears to have had a double function as both a law-enforcement agency and, at least potentially, a military force. It was officially charged with enforcing public security and protecting property. At the same time, he appointed Mr. Jamal Abu Samhadana, commander of the Popular Resistance Committees, as the head of the Executive Force²⁷⁰ and announced that it would be composed of 3,000 new recruits

²⁶⁶ Mission meeting with the Gaza authorities' Director of Police, 4 June 2009. On both successes in restoring order and violations of human rights by the Gaza police after June 2007, see also International Crisis Group, "Ruling Palestine I: Gaza under Hamas", Middle East Report No. 73, 19 March 2008, p. 10.

²⁶⁷ Mission meeting with Gaza authorities' police spokesperson, 9 June 2009. According to the International Crisis Group, during the hostilities, "the Qassam Brigades and some civil police members (still referred to locally as the "Executive Forces") patrolled streets in civilian clothes; some wore badges to establish their official status. They continued to arrest lawbreakers, detaining them in ordinary apartments since prisons have been destroyed; this helps explain why thus far there has been no report of looting or increase in crime. Likewise, security personnel maintained order in breadlines that sometimes stretched to hundreds of people and prevented unrest at the overburdened hospitals, where tempers easily flare." "Ending the war...", p. 8).

²⁶⁸ Said Seyam was killed by an Israeli air strike on 15 January 2009 together with several members of his family (TAWTHEQ documents submitted to the Mission; see also International Crisis Group, "Gaza's unfinished business", Middle East Report N°85, 23 April 2009, p. 5.)

²⁶⁹ See, for instance, International Crisis Group, "Palestinians, Israel, and the Quartet: Pulling back from the brink", Middle East Report N°54, 13 June 2006, p. 12.

²⁷⁰ Ibid., pp. 13 and 20; "Fatal casualties...". Abu Samhadana and three other members of the Popular Resistance Committees were killed by an Israeli air strike on 8 or 9 June 2006.

from various Palestinian armed groups, including al-Qassam Brigades.²⁷¹ The newly appointed commander reportedly declared: “[The Executive Force] will be the nucleus of the future Palestinian army. The resistance must continue. We have only one enemy. ... I will continue to carry the rifle and pull the trigger whenever required to defend my people. We are also a force against corruption. We are against thieves, corrupt officials and law breakers.”²⁷²

413. In August 2007, following the June 2007 Hamas seizure of full control over Gaza, the current Director of the Gaza authorities’ civil police, then head of the Executive Force, Gen. Abu Obeidah, described the planned reorganization of the security services in Gaza. Executive Force members were to be integrated into the civil police. He reportedly stated that Hamas was “working hard to retrain Executive Force members to perform police duties” and that the “Force will be in charge of chasing drug dealers and lawless residents”. At the same time, he stated that “members of the Force are religious, and are resistance fighters.”²⁷³

414. In October 2007, the security services operating in Gaza were reorganized. The previous Palestinian Authority’s police agencies in Gaza were merged with the Executive Force.²⁷⁴ The security forces under the control of the Ministry of Interior emerging from this reorganization comprise the Civil Police, the Civil Defence, the Internal Security (an intelligence agency) and the National Security. Their mandates, according to the Gaza authorities’ Ministry of Interior’s website,²⁷⁵ are differentiated.

415. The National Security force is given specific military tasks, such as “the protection of the State from any foreign aggression” and “responsibility for the defence of the Palestinian homeland in the face of external and internal threats”. It is thus plainly a military force whose members are, under international humanitarian law, combatants.²⁷⁶ The functions of the police have been outlined above.

416. On 1 January 2009, during the Israeli military operations in Gaza, the police spokesperson, Mr. Islam Shahwan, informed the media that the police commanders had managed to hold three meetings at secret locations since the beginning of the armed operations. He added that “an action plan has been put forward, and we have conducted an assessment of the situation

²⁷¹ “Palestinians, Israel, and the Quartet...”, p. 13. The “Executive Force consisted in summer of 2007 of some estimated 6,800 members of the armed wings of Hamas and the Popular Resistance Committees”, R. Friedrich and A. Luethold, eds., *Entry-Points to Palestinian Security Sector Reform* (Geneva Centre for the Democratic Control of Armed Forces, 2007), p. 162.

²⁷² “Palestinians, Israel, and the Quartet...”, footnote 105.

²⁷³ International Middle East Media Center, “Interview with the leader of the Hamas-formed Executive Force”, 17 August 2007, available at: <http://www.imemc.org/article/49939>.

²⁷⁴ See, e.g., Xinhua, “Hamas Executive Force merged into police force in Gaza: official”, 2 October: “Ihab al-Ghusein, a spokesman with the Interior Ministry, made the remarks during a news conference in Gaza. Al-Ghusein said the mission of the Executive Force ‘is now over, and it is time to include the force into the official police force that belongs to the ministry of interior.’”

²⁷⁵ See the Arabic-language website of the Gaza Ministry of Interior: <http://www.moi.gov.ps/?page=633734043174687500>.

²⁷⁶ See the Arabic-language website of the National Security Forces: <http://www.nsf.gov.ps>.

and a general alert has been declared by the police and among the security forces in case of any emergency or a ground invasion. Police officers received clear orders from the leadership to face (“يوأجه” in Arabic) the enemy, if the Gaza Strip were to be invaded.”²⁷⁷ Confirming to the Mission that he had been correctly quoted, Mr. Shahwan stated that the instructions given at that meeting were to the effect that in the event of a ground invasion, and particularly if the Israeli armed forces were to enter urban settlements in Gaza, the police was to continue its work of ensuring that basic food stuffs reached the population, of directing the population to safe places, and of upholding public order in the face of the invasion. Mr. Shahwan further stated that not a single policeman had been killed in combat during the armed operations, proving that the instructions had been strictly obeyed by the policemen.

417. The Mission notes that there are no allegations that the police as an organized force took part in combat during the armed operations. On the basis of the information provided by the Gaza authorities and of the above-mentioned study of the Orient Research Group Ltd., it would appear that 75 per cent of its members killed in the course of the military operations died as a result of the air strikes carried out during the first minutes of the Israeli attack. These men had not engaged in combat with the Israeli armed forces.²⁷⁸

418. The Mission also notes that while the then commander of the Executive Forces and now Director of Police did reportedly say in August 2007 that members of the Executive Force were “resistance fighters”, he stressed in the same interview the authorities’ intention to develop it into a law enforcement force. The Mission notes that a situation in which a recently constituted civilian police force integrates former members of armed groups would not be unique to Gaza. That prior membership in itself would not be sufficient to establish that the police in Gaza is a part of al-Qassam Brigades or other armed groups.

419. Except for the statements of the police spokesperson, the Israel Government has presented no other basis on which a presumption can be made against the overall civilian nature of the police in Gaza. It is true that the police and the security forces created by Hamas in Gaza may have their origins in the Executive Force. However, while the Mission would not rule out the possibility that there might be individuals in the police force who retain their links to the armed groups, it believes that the assertion on the part of the Government of Israel that “an overwhelming majority of the police forces were also members of the Hamas military wing or

²⁷⁷ His statements are reported in the Arabic original on a website of the Egyptian Muslim Brotherhood, at <http://www.ikhwanonline.com/Article.asp?ArtID=43756&SecID=450>. The journalist states that in spite of the Israeli air attacks against police stations, the police continued to do law enforcement work and to direct the traffic: “members of the Criminal Investigation and the Internal Security caught a quantity of drugs in some of the targeted areas, and at the entrances of some of the crossroads and cities within the Strip, where one can observe members of the police in civilian clothes monitoring the traffic”.

²⁷⁸ In “Fatal casualties...”, the Orient Research Group Ltd, however, identifies 31 policemen who it alleges were killed in combat in Gaza during the period from 3 to 18 January. In a few cases the information is rather specific, such as “killed on 4 January in Jabalya after launching rockets” or “killed on 6 January while fighting the IDF in Deir al-Balah”. In other cases it is more generic, such as “killed while fighting the IDF”. The Mission accepts that this might indicate that some individual members of the Gaza police were at the same time members of armed groups. The Mission is also mindful, as explained below, that the claims of armed groups that a person killed during the armed operations was one of their members have to be treated with care.

activists of Hamas or other terrorist organizations”,²⁷⁹ appears to be an overstatement that has led to prejudicial presumptions against the nature of the police force that may not be justified.

420. In his meeting with the Mission, the Director of Police was very open in acknowledging that many of his men were Hamas supporters, but insisted at the same time there are others who supported other Palestinian factions.²⁸⁰ Police station commanders interviewed by the Mission stated that most of their men (70 per cent according to the estimates of one station commander, 95 per cent in another station) had joined the police after June 2007.²⁸¹ The Mission understands that most, if not all, of the post-June 2007 recruits into the civil police, will have been recruited from the Executive Force, which was strongly loyal to Hamas.

421. The Mission also notes, however, that in senior positions in the police, the representation of non-Hamas men appears to have been broader. The Director of Police killed on 27 December 2008, Mr. Tawfiq Jabr, was generally known as not being affiliated with Hamas. Several of the station commanders interviewed by the Mission were also not Hamas affiliates but men who had joined the Palestinian Authority’s police after the Oslo Accords allowed the Palestinians to constitute their own law-enforcement agencies. They had thus served in the Palestinian police in Gaza for more than 10 years before Hamas seized control of it in June 2007.

422. The Mission further notes that the study conducted by the Orient Research Group Ltd. names policemen killed during the attack, whom it identifies as members of Hamas, al-Qassam Brigades, other armed Palestinian groups or “terror operatives” whose affiliation is not known. In 78 out of 178 cases the policemen are alleged to be members of al-Qassam Brigades on the sole basis that they were allegedly Hamas members.

423. Furthermore, it appears from the response to the Mission from the Orient Research Group Ltd. describing its methodology that its information on police members’ alleged affiliation with armed groups was based to a large extent on the websites of the armed groups. In this respect, the Mission is mindful of a recent report by a Palestinian human rights NGO drawing attention to the “issue of the ‘adoption’ of killed persons by resistance groups; i.e. declaration by a political or armed group that the person killed was one of their members. Often, when persons, including children, are killed by actions of the Israeli armed forces, political and/or armed groups ‘adopt’ them as ‘martyrs’ placing their photographs on their websites and commending their contribution to resisting occupation. This does not mean that those persons killed were involved in resistance activities in any way. The families accept this ‘adoption’ of deceased family members for various reasons including the willingness of resistance groups to provide financial support to the families and pay for funeral costs of the persons killed.” As the NGO concludes, “these cases require in-depth investigation on a case-by-case basis in order to determine every person’s status according to his actual affiliation”.²⁸²

²⁷⁹ “The operation in Gaza...”, para. 247.

²⁸⁰ Mission meeting with Director of Police, 4 June 2009.

²⁸¹ Mission interviews with Gaza City police station commanders, 9 June 2009.

²⁸² Al Mezan Center for Human Rights, “Cast lead offensive in numbers”, p. 5.

4. Factual findings

424. From the facts gathered by it, the Mission estimates that 99 policemen and nine members of the public were killed in the attacks on the police headquarters and the five police stations inspected by the Mission. The Gaza authorities state that overall 248 policemen were killed by the Israeli armed forces during the military operations. The study by the Orient Research Group Ltd. identifies 345 men allegedly belonging to the Gaza internal security forces killed by Israeli attacks during the military operations. It identifies 240 of the 345 alleged members of the internal security forces as members of the police. This is very close to the number provided by the Gaza authorities.²⁸³

425. The facts gathered by the Mission indicate that the policemen were the intended targets of the attacks. The Israeli Government²⁸⁴ is quite clear on this, and has not suggested that the attacks on the police were not intended. The type of ammunition used at the Arafat City police headquarters is designed to kill or incapacitate people in the area of impact and has little or no effect on buildings or other infrastructure. In other locations at the civil police headquarters in Gaza City the munitions used were such that the damage to infrastructure was minimal compared to the cost in lives among the policemen. With regard to the other police stations visited by the Mission, damage to the buildings was extensive but the number of policemen killed was limited, with the exception of Abbas police station in central Gaza City, where nine policemen were killed. There is no question that the approximately 100 policemen who died in the attacks on the stations visited by the Mission were deliberately targeted and killed by the Israeli armed forces.

426. The attacks on the police headquarters and five police stations visited by the Mission were carried out during the first minutes of the surprise air bombing campaign launched by the Israeli armed forces against Gaza shortly before 11.30 a.m. on 27 December.

427. From the facts gathered by it, the Mission finds that there is insufficient information to conclude that the Gaza police as a whole had been “incorporated” into the armed forces of the Gaza authorities. The statement by the police spokesperson on 1 January 2009 (after the attacks of 27 December 2008 had been carried out) cannot, on its own, justify the assertion that the police were part and parcel of the armed forces.

428. The Mission could not verify the allegations of membership of armed groups of policemen. In half the cases, moreover, the allegations appear to be based merely on an equation of membership in Hamas (in itself alleged on the basis of unverifiable information) with membership in al-Qassam Brigades, which in the view of the Mission is not justified. Finally, even according to the study referred to by the Israeli Government, 34 policemen without any affiliation to Hamas or a Palestinian armed group were killed in the armed operations, the great majority of them in the bombardment of police stations on the first day of the military operations.

²⁸³ ”Fatal casualties...” assigns the remaining victims to national security (5), civil defence (11) and internal security (2), with the remaining 85 identified as belonging to security forces without being able to state which one.

²⁸⁴ “The operation in Gaza...”, pp. 89-95.

429. An “obituary” published on a website of al-Qassam Brigades states that one of the training courses at the police headquarters in Gaza on 27 December 2008 was a “military refresher course”. That is, however, contradicted by the police spokesperson and a number of the reports received by the Mission from NGOs. It is also not suggested by the Israeli Government that that was a reason for attacking it. As a distinct probability, the Mission finds that the policemen killed there were neither engaged in any military activity at the time of the attacks nor carrying out preparations for combat. At the other police stations, the police were engaged in a range of routine tasks, including questioning detainees and handling issues for members of the public who were present in police facilities in the middle of an ordinary day.

5. Legal analysis

(a) The applicable rules of international humanitarian law

430. The general rule of international humanitarian law is that members of law-enforcement agencies are considered part of the civilian population, unless they have been incorporated into the armed forces of a party to the conflict.²⁸⁵ This principle is accepted by the Israeli Government.²⁸⁶ The obligation to distinguish at all times between the civilian population and combatants and to direct attacks only against military objectives²⁸⁷ (the principle of distinction) therefore generally prohibits attacks against members of the law-enforcement agencies. In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice recognized the principle of distinction as an “intransgressible” principle of customary international law.

431. There are three situations in which direct attacks against members of police forces would not constitute a violation of the principle of distinction. First, if the law-enforcement agency or the unit to which the policeman belongs has been “incorporated” into the armed forces, thus conferring combatant status upon its members. Second, if individual members of the law-enforcement agency are at the same time members of an armed group, they would be combatants.²⁸⁸ Thirdly, individual members of the law-enforcement agency, like any civilians,

²⁸⁵ Article 43 (3) of Additional Protocol I provides: “Whenever a party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other parties to the conflict.”

²⁸⁶ “The operation in Gaza...” (para. 238) states that “whereas members of a civilian police force that is solely a civilian police force, who have no combat function are not considered combatants under the Law of Armed Conflict, international law recognizes that this principle does not apply where police are part of the armed forces of a party.”

²⁸⁷ Article 48 of Additional Protocol I expresses the principle in the following terms:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

²⁸⁸ The ICRC Commentary to Additional Protocol I argues that “any interpretation which would allow combatants as meant in article 43 to “demobilize” at will in order to return to their status as civilians and to take up their status as combatants once again, as the situation changes or as military operations may require, would have the effect of cancelling any progress that this article has achieved. ... [Article 44] does not allow this combatant to have the status of a combatant while he is in action, and the status of a civilian at other times” (pp. 515-516).

may not be targeted “unless and for such time as they take a direct part in hostilities.”²⁸⁹ Finally, as with civilians generally, policemen might be indirectly injured or killed in an attack which is directed at a military objective, as long as the attack complies with the principle of proportionality.

(b) Conclusion

432. The Mission will now draw conclusions with regard to each of these grounds potentially justifying the attacks against the police.

433. First, as already noted above, the Mission finds that there is insufficient information to conclude that the Gaza police as a whole had been “incorporated” into the armed forces of the Gaza authorities. Accordingly, the policemen killed cannot be considered to have been combatants by virtue of their membership in the police.

434. Second, the Mission finds that the policemen killed on 27 December 2008 cannot be said to have been taking a direct part in hostilities. Thus, they did not lose their civilian immunity from direct attack as civilians on this ground.²⁹⁰

435. Third, the Mission examined whether the attacks on the police stations could be justified on the basis that there were, allegedly, members of Palestinian armed groups among the policemen. The question would thus be one of proportionality. The principle of proportionality is reflected in Additional Protocol I, which prohibits launching attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”²⁹¹

²⁸⁹ Pursuant to article 51 (3) of Additional Protocol I, civilians enjoy immunity from attack “unless and for such time as they take a direct part in hostilities.” According to ICRC, this rule also reflects customary international law: “Civilians are protected against attack unless and for such time as they take a direct part in hostilities” (rule 6). *Customary International Humanitarian Law*.... The Mission is aware that Israel is not a party to Additional Protocol I and reportedly does not accept the qualifying phrase “and for such time” as reflective of customary law (see Y. Dinstein, “The ICRC customary international humanitarian law study”, *Israel Yearbook on Human Rights*, vol. 36 (2006), p. 11). In its report on the military operations, the Government of Israel refers to a definition of direct participation in hostilities by Israel’s High Court of Justice as “involving all persons that perform the function of combatants, including “a civilian bearing arms (openly or concealed) who is on his way to the place where he will use them against the army, at such place, or on his way back from it,” as well as “a person who collected intelligence on the army, whether on issues regarding the hostilities ... or beyond those issues...; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may.” (“The operation in Gaza...”, para. 120).

The Mission is of the view that, for the purposes of the legal analysis of the attacks on the police stations considered here, it is not decisive whether the rule binding Israel is that “civilians are protected against attack unless and for such time as they take a direct part in hostilities” or only “unless they take direct part in hostilities”.

²⁹⁰ This finding does not apply to those policemen who were members of al-Qassam Brigades, who were therefore combatants and not civilians.

²⁹¹ Israel recognizes that “customary international law bars military attacks that are anticipated to harm civilians excessively in relation to the expected military advantage.” “The operation in Gaza...”, para. 120.

436. The Mission has earlier accepted that there may be individual members of the Gaza police that were at the same time members of al-Qassam Brigades or other Palestinian armed groups and thus combatants. Even if the Israeli armed forces had reliable information that some individual members of the police were also members of armed groups, this did not deprive the whole police force of its status as a civilian law-enforcement agency.²⁹²

437. From the facts available to it, the Mission finds that the deliberate killing of 99 members of the police at the police headquarters and three police stations²⁹³ during the first minutes of the military operations, while they were engaged in civilian tasks inside civilian police facilities, constitutes an attack which failed to strike an acceptable balance between the direct military advantage anticipated (i.e. the killing of those policemen who may have been members of Palestinian armed groups) and the loss of civilian life (i.e. the other policemen killed and members of the public who would inevitably have been present or in the vicinity). The attacks on the Arafat City police headquarters and the Abbas Street police station, al-Tuffah police station and the Deir al-Balah investigative police station constituted disproportionate attacks in violation of customary international humanitarian law.

438. From the facts available to it, the Mission further believes that there has been a violation of the inherent right to life of those members of the police killed in the attacks of 27 December 2007 who were not members of armed groups by depriving them arbitrarily of their life in violation of article 6 of the International Covenant on Civil and Political Rights.

VIII. OBLIGATION ON PALESTINIAN ARMED GROUPS IN GAZA TO TAKE FEASIBLE PRECAUTIONS TO PROTECT THE CIVILIAN POPULATION

439. An assessment of the events occurring during the military operations in Gaza in December 2008 - January 2009 requires an investigation of the tactics used both by the Israeli armed forces and by the Palestinian armed groups in the context of their obligations under international humanitarian law to take constant care to minimize the risk of harm to the civilian population and to civilian objects. The Mission examines the extent to which the Israeli armed forces took all feasible precautions in chapter IX, as well as in the examination of individual incidents. In this chapter, the Mission examines allegations that the conduct of the Palestinian armed groups placed the civilian population of Gaza and civilian objects at risk of attack.

440. In its efforts to gather more direct information on the subject, during its investigations in Gaza and in interviews with victims and witnesses of incidents and other informed individuals, the Mission raised questions regarding the conduct of Palestinian armed groups during the hostilities in Gaza. The Mission notes that those interviewed in Gaza appeared reluctant to speak about the presence of or conduct of hostilities by the Palestinian armed groups. Whatever the

²⁹² “The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character” (Additional Protocol I, art. 50 (3)).

²⁹³ These are the policemen killed at the police headquarters and police stations visited by the Mission. The overall number of policemen killed on 27 December 2008 is around 180, according to the Orient Research Group Ltd. See “Fatal casualties...”.

reasons for their reluctance, the Mission does not discount that the interviewees' reluctance may have stemmed from a fear of reprisals.²⁹⁴

441. The Mission also addressed questions regarding the tactics used by Palestinian armed groups to the Gaza authorities. They responded that they had nothing to do, directly or indirectly, with al-Qassam Brigades or other armed groups and had no knowledge of their tactics.²⁹⁵ To gather first-hand information on the matter, the Mission requested a meeting with representatives of armed groups. However, the groups were not agreeable to such a meeting. The Mission, consequently, had little option but to rely upon indirect sources to a greater extent than for other parts of its investigation.

442. In forming an opinion on the subject, the Mission did use information it had gathered in the course of investigating certain incidents during the December-January military operations. However, the Mission mostly reviewed the allegations made in reports by the Government of Israel, by private individuals and organizations,²⁹⁶ and by NGOs.²⁹⁷

443. The Mission focused on allegations that Palestinian fighters had launched attacks from within civilian areas and from protected sites (such as schools, mosques and medical units); used civilian and protected sites as bases for military activity; misused medical facilities and ambulances; stored weapons in mosques; failed to distinguish themselves from the civilian population and, in so doing, used the Gazan civilian population as a shield against Israeli attack. The Mission further sought information concerning allegations that Palestinian armed groups had booby-trapped civilian property.²⁹⁸

444. The significance of these allegations is twofold. First, the alleged conduct might constitute a violation by the Palestinian armed groups of their obligation of care to prevent harm to the civilian population or the prohibition against the deliberate use of civilians to shield from military activity. Second, the Government of Israel and others argue that certain attacks by Israeli armed forces on civilian objects or protected sites were justified by the unlawful use that Palestinian armed groups made of them. In the words of a report by the Israeli armed forces on its shelling of a United Nations compound in which at least 600 Palestinian civilians had taken refuge, such attacks were “the unfortunate result of the type of warfare that Hamas forced upon

²⁹⁴ See chap. XX.

²⁹⁵ Response of the Gaza authorities to the Mission.

²⁹⁶ Submissions to the Mission by the Jerusalem Center for Public Affairs, B'nai Brith International, Take A Pen, the National Lawyers Guild, Mr. Maurice Ostroff, Ms. Yvonne Green and Mr. Peter Wertheim on behalf of a group of Australian lawyers.

²⁹⁷ For example, Amnesty International, *Israel/Gaza: Operation “Cast Lead”: 22 days of death and destruction*, (London, 2009); International Crisis Group, “Gaza’s unfinished business”, Middle East Report, No. 85, 23 April 2009; Human Rights Watch, *Rockets from Gaza: Harm to Civilians from Palestinian Armed Groups’ Rocket Attacks*, (August 2009).

²⁹⁸ “The operation in Gaza...”, pp. 55-76. The Mission understands the criticisms made by the Government of Israel to Hamas’ tactics to apply also to other Palestinian armed groups.

the IDF, involving combat in the Gaza Strip's urban spaces and adjacent to facilities associated with international organizations.”²⁹⁹

445. The Mission will address the justifications put forward by the Government of Israel for attacks on protected sites that it alleged were being used by Palestinian armed groups and that are investigated in this report.

A. Launching attacks from within civilian areas and from within or in the immediate vicinity of protected sites

446. The Mission investigated two incidents in which the Government of Israel alleged that Palestinian combatants had fired on the Israeli armed forces from within a United Nations protected site or its immediate vicinity in densely populated urban areas. In the case of the shelling in al-Fakhura Street by the Israeli armed forces on 6 January 2009 (chap. X), the Mission accepted, on the basis of information in the reports it had seen, the possibility of mortar attacks from Palestinian combatants in the vicinity of the school.

447. In the incident at the UNRWA compound in the neighbourhood of Rimal, in the centre of Gaza City, senior international UNRWA staff indicate that they were unaware of any sustained fire at the relevant time from anywhere in the nearby areas (chap. IX). In that case the Mission was unable to make a finding as to whether any combat activity was being conducted by Palestinian armed groups against the Israeli armed forces in that area at that time.

448. The Mission spoke with two witnesses who testified to the launching of rockets from urban areas. One witness stated seeing rockets being launched from a narrow street and from a square in Gaza City without providing further details as to when this occurred.³⁰⁰ A second witness told the Mission that rockets may have been fired from within the Sheikh Radwan neighbourhood north of Gaza City during the military operations in Gaza.³⁰¹

449. The Mission found corroboration of these witness accounts in a number of reports from international NGOs. In reports issued following Israel's military operations in Gaza, Amnesty International, the International Crisis Group and Human Rights Watch each determined that the rocket units of the Palestinian armed groups operated from within populated areas.³⁰² Human Rights Watch and the International Crisis Group gathered reports from civilians about instances in which armed groups had launched or had attempted to launch rockets near residential areas. Human Rights Watch quoted a resident of northern Gaza as stating that, on 1 January 2009, residents of the area prevented Palestinian fighters, who they believed were preparing to launch

²⁹⁹ <http://dover.idf.il/IDF/English/opcast/postop/press/2202.htm>. According to the Israeli Government, “when a party to an armed conflict uses civilian and protected spaces for military purposes, those spaces become legitimate targets for the opposing side, thereby placing civilian lives and infrastructure in great danger” (“The operation in Gaza...”, para. 153).

³⁰⁰ Mission interview with RA/01, June 2009.

³⁰¹ Mission interview with RA/02, June 2009.

³⁰² Israel/Gaza: Operation “Cast Lead”: 22 days..., pp.74–75; “Gaza’s unfinished business...”, p. 3; Rockets from Gaza..., p. 21.

rockets, from entering a garden next to the building in which they lived.³⁰³ The International Crisis Group interviewed a resident of Beit Lahia who stated that fighters used his land to fire rockets, which he did not dare to resist, as his father had previously been shot in the leg by a member of such an armed group when he had tried to prevent them from using his land as a rocket launching site.³⁰⁴ Amnesty International conducted interviews with residents of Gaza who stated that they had observed Palestinian fighters firing a rocket from a courtyard of a Government school in Gaza City at a time when the schools were closed. In another area of Gaza City, another resident reportedly showed an Amnesty International researcher a place from which a rocket had been launched, 50 metres from a residential building.³⁰⁵ Amnesty International also reported, however, that it had seen no evidence that rockets had been launched from residential houses or buildings while civilians were still in them.

450. Both the International Crisis Group and Human Rights Watch found that the practice of firing close to or within populated areas became more prevalent as the Israeli armed forces took control of the more open or outlying areas.³⁰⁶

451. The Mission reviewed the pictures allegedly showing the launching of rockets “from within or near residential buildings, including schools, mosques and hospitals” in the Israeli Government’s paper³⁰⁷ and in several of the submissions it received.³⁰⁸ The Mission notes that it is not reasonably possible to determine whether those photographs show what is alleged. As the Israeli Government concedes,³⁰⁹ many of them refer not to the December 2008-January 2009 period, but to previous alleged instances of firing of rockets from Gaza.³¹⁰

452. In view of the information communicated to it and the material it was able to review, the Mission believes that there are indications that Palestinian armed groups launched rockets from urban areas. In those instances in which Palestinian armed groups did indeed fire rockets or mortars from urban areas the question remains whether this was done with the specific intent of shielding the combatants from counter-attack. The Mission has not been able to obtain any direct evidence on this question; nor do reports from other observers provide a clear answer.

453. According to the International Crisis Group, for instance, a fighter for Islamic Jihad stated in an interview that “the most important thing is achieving our military goals. We stay away from the houses if we can, but that’s often impossible”, which suggests the absence of intent. The same NGO also reports an interview with three Palestinian combatants in January 2009 in

³⁰³ *Rockets from Gaza...*, p. 22.

³⁰⁴ “Gaza’s unfinished business...”, p. 3, footnote 29.

³⁰⁵ *Israel/Gaza: Operation “Cast Lead”: 22 days...*, p. 74.

³⁰⁶ *Rockets from Gaza...*, p. 21; “Gaza’s unfinished business...”, p. 3.

³⁰⁷ “The operation in Gaza...”, para. 155.

³⁰⁸ See, for instance, submission to the Mission by Mr. Maurice Ostroff.

³⁰⁹ “The operation in Gaza...”, para. 155.

³¹⁰ The following video, referred to in a submission to the Mission by B’nai B’rith International, appears to show the launching of rockets from within an urban area, allegedly from within a school, on 8 January 2009:

<http://www.youtube.com/watch?v=UN9WzUc7iB0>

which the fighters reportedly stated that rockets and mortars were launched in close proximity to homes and alleyways “in the hope that nearby civilians would deter Israel from responding”.³¹¹

454. The Mission now turns to the related but distinct question of whether and to what extent Palestinian armed groups made use of residential housing and of protected sites, such as schools, hospitals, mosques and United Nations facilities, in their engagements with Israeli ground forces.

455. The Mission also examined the question of the presence and activities of members of Palestinian armed groups in chapter XI. As already mentioned, Palestinian witnesses were generally reluctant to speak to the Mission about the activity of Palestinian armed groups in their neighbourhoods. For the present purposes, it suffices to say that, in some of the cases, there was evidence of the presence of Palestinian armed groups in residential areas.³¹²

456. The Mission received a submission from a colonel of the reserve of the Israeli armed forces that seeks to illuminate the “combat principles” of Palestinian armed groups. His report is based on material published by Palestinian armed groups on their websites. The report describes alleged tactics such as “seizing houses as military positions for the purpose of staging ambushes against IDF forces” and “deploying explosive charges of various types (IEDs, penetrating, bounding, anti personnel etc.) in the vicinity of residences and detonating them”, “booby-trapping houses ... and detonating the charges”, and “conducting fighting and sniper fire at IDF forces operating in the built-up areas”.³¹³

457. This submission provides useful information. It tends to show, for instance, that ground engagements between Israeli forces and Palestinian armed groups were most intense in areas of mixed urban-rural character on the outskirts of Gaza City, Jabaliyah and Beit Lahia.

458. The Mission notes, however, that the one incident described in the submission which it has investigated itself illustrates the unreliability of some of the sources the report relies on. In this incident, the source claimed that three Palestinian combatants had laid an ambush in a house in Izbet Abd Rabbo, hurled explosives at the Israeli armed forces and managed to drag a wounded Israeli soldier into the house. From the facts it has itself gathered, the Mission can exclude that in this incident the Palestinian combatants managed to capture an Israeli soldier. This example suggests that some websites of Palestinian armed groups might magnify the extent to which Palestinians successfully attacked Israeli forces in urban areas.

459. Other sources reviewed by the Mission confirm scepticism about the intensity of attacks on the Israeli armed forces by Palestinian armed groups in built-up areas. The Mission notes that a thread running through many of the Israeli soldiers’ testimonies collected by the Israeli NGO Breaking the Silence is that they had no encounters with Palestinian combatants.³¹⁴ According to another NGO report, “ Hamas fighters plainly were frustrated by their inability to engage in street

³¹¹ “Gaza’s unfinished business...”, p. 3.

³¹² See the case of Majdi Abd Rabbo in chapter XIV.

³¹³ “The hidden dimension of Palestinian war casualties...”, pp. 1-2 and 20.

³¹⁴ *Soldiers’ Testimonies...* , testimony 34, p. 76, and Rabin Academy testimonies.

battles”.³¹⁵ Generally, the Mission received relatively few reports of actual crossfire between the Israeli armed forces and Palestinian armed groups. This would also appear to be reflected in the low number of Israeli soldiers killed or injured during the ground offensive.³¹⁶ The Mission also notes that in none of the incidents it investigated was there any indication that civilians were killed in crossfire between Palestinian armed groups and the Israeli armed forces.

460. While the Mission is unable to form an opinion on the exact nature or the intensity of combat activities carried out by the armed groups in urban residential areas that would have placed the civilian population and civilian objects at risk of attack, their presence in these areas as combatants is established from the information that has come to the attention of the Mission.

B. Booby-trapping of civilian houses

461. In chapter XIV the Mission will report on different incidents in which witnesses have described the circumstances in which they had been used by the Israeli armed forces during house searches and forced at gunpoint to enter houses ahead of the Israeli soldiers. These witnesses testified that they had been used in this way to enter several houses. None of them encountered a booby trap or other improvised explosive devices during the house searches. The Mission is also mindful of other incidents it has investigated that involved entry into civilian houses by Israeli soldiers in different areas in Gaza. None of these incidents showed the use of booby traps.

462. The Mission, however, recalls the allegations levelled in the reports that it has reviewed. The Government of Israel alleges that Hamas planted booby traps in “homes, roads, schools and even entire neighbourhoods”. It adds, “in essence, the Hamas strategy was to transform the urban areas of the Gaza Strip into a massive death trap for IDF forces, in gross disregard for the safety of the civilian population.”³¹⁷ The Mission notes that the existence of booby-trapped houses is mentioned in testimonies of Israeli soldiers collected by *Breaking the Silence*. One soldier recounts witnessing the detonation of a powerful explosion inside a house as a bulldozer approached it. A second soldier stated “many explosive charges were found, they also blew up, no one was hurt. Tank Corps or Corps of Engineers units blew them up. Usually they did not explode because most of the ones we found were wired and had to be detonated, but whoever was supposed to detonate them had run off. It was live, however, ready...”.³¹⁸ Also the reports published by Palestinian armed groups, on which the submission to the Mission on the tactics of Palestinian combatants by the Jerusalem Centre for Public Affairs is based, suggest that booby-

³¹⁵ According to the International Crisis Group, Hamas “tried to draw Israeli troops into densely populated urban areas, especially Hamas strongholds that had been prepared for counter-attack. A fighter described battles as a lethal ‘game of hide and seek’ in which Israel sought to lure fighters into open space, while Hamas attempted to bring Israeli troops onto their preferred terrain. The soldiers refused the bait, Hamas fighters plainly were frustrated by their inability to engage in street battles.” (“Gaza’s unfinished business...”, p. 3).

³¹⁶ Israeli armed forces reportedly lost 10 soldiers in combat between 27 December 2008 and 18 January 2009, with dozens of soldiers wounded. Four of the Israeli dead appear to have been killed by friendly fire (Cordesman, op. cit., p. 57).

³¹⁷ “The operation in Gaza...”, paras 181.

³¹⁸ *Soldiers’ testimonies*..., testimony 20, p. 48, and testimony 23, p. 54.

trapped civilian houses were a frequently used tactic.³¹⁹ According to the Israeli Government, “because roads and buildings were often mined, IDF forces had to target them to protect themselves”.³²⁰

463. While, in the light of the above reports, the Mission does not discount the use of booby traps by the Palestinian armed groups, it has no basis to conclude that civilian lives were put at risk, as none of the reports record the presence of civilians in or near the houses in which booby traps are alleged to have been set.

C. Use of mosques to launch attacks against the Israeli armed forces or to store weapons

464. The Israeli Government alleges that “ Hamas abused the protection accorded to places of worship, making a practice of storing weapons in mosques”. This assertion is supported by pictures of Israeli soldiers in a room amid weaponry, including anti-tank weapons, which are alleged to have been taken upon discovery of a weapons cache in a Jabaliyah mosque during the military operations.³²¹ The Mission notes that Israeli soldiers speaking at the Rabin Academy “Fighters’ Talk” recount coming under fire from Palestinian combatants positioned in a mosque.³²²

465. Although the Mission was not able to investigate the allegation of the use of mosques generally by Palestinian groups for storing weapons, it did investigate the incident of a missile attack by the Israeli armed forces against al-Maqadmah mosque on the outskirts of Jabaliyah camp, in which at least 15 people were killed and 40 injured on 3 January 2009 (see chap. XI). The Mission found no evidence that this mosque was used for the storage of weapons or any military activity by Palestinian armed groups. As far as this mosque is concerned, therefore, the Mission found no basis for such an allegation. However, the Mission is unable to make a determination regarding the allegation in general nor with respect to any other mosque that was attacked by the Israeli armed forces during the military operations.

D. Misuse of medical facilities and ambulances

1. Use of hospitals for military purposes

466. The Government of Israel alleges that

Hamas systematically used medical facilities, vehicles and uniforms as cover for terrorist operations, in clear violation of the Law of Armed Conflict. This included the extensive use of ambulances bearing the protective emblems of the Red Cross and

³¹⁹ See “The hidden dimension of Palestinian war casualties...”.

³²⁰ “The operation in Gaza...”, paras 184. On the destruction of civilian houses by the Israeli armed forces, see chap. XIII.

³²¹ “The operation in Gaza...”, para. 164. The Mission notes that there is no mention of which mosque in Jabaliyah the pictures allegedly refer to nor of the date on which the weapons cache was found and the pictures taken.

³²² “Fighters’ Talk” testimonies, pp. 4-5.

Crescent ... and the use of hospitals and medical infrastructure as headquarters, situation rooms, command centres and hiding places.³²³

467. As described in detail in chapter IX, the Mission investigated the attacks against al-Quds hospital in Tal el-Hawa, one of the hospitals which were allegedly used for military purposes by Palestinian armed groups. This hospital was directly hit by white phosphorous shells and at least one high explosive shell on 15 January 2009. The Mission conducted extensive interviews with al-Quds hospital staff and others who were in the area at the time of the attack and concluded that it was unlikely that there was any armed presence in any of the hospital buildings at that time. The Mission also investigated the attacks against al-Wafa Hospital in eastern Gaza City. As in the case of al-Quds hospital, after hearing credible testimony from doctors at that hospital, the Mission excluded the possibility that there were combatants inside the hospital at the time of the attack. However, the Mission did not make any findings with respect to the possible presence of Palestinian combatants in the surroundings of the hospital.

468. In its report, the Government of Israel states that Hamas used two units and a ground-floor wing of al-Shifa hospital, the largest in the Gaza Strip, as a military base.³²⁴ As its sources, it cites an interview with a “Hamas activist” captured by Israel and an Italian newspaper article,³²⁵ which in turn bases this assertion on a single anonymous source. The Mission did not investigate the case of al-Shifa hospital and is not in a position to make any finding with regard to these allegations.

469. On the basis of the investigations it has conducted, the Mission did not find any evidence to support the allegations made by the Israeli Government.

2. Ambulances

470. The Government of Israel alleges that “Hamas made particular use of ambulances, which frequently served as an escape route out of a heated battle with IDF forces.”³²⁶

471. The Mission investigated cases in which ambulances were denied access to wounded Palestinians. Three cases in particular are described in chapter XI: the attempts of the Palestinian Red Crescent Society (PRCS) to evacuate the wounded from the al-Samouni neighbourhood south of Gaza City after the attack on the house of Ateya al-Samouni and after the shelling of the house of Wa’el al-Samouni; the attempt of an ambulance driver to rescue the daughters of Khalid and Kawthar Abd Rabbo in Izbat Abd Rabbo; and the attempt of an ambulance driver to evacuate Rouhiyah al-Najjar after she had been hit by an Israeli sniper. In all three cases the Mission found, on the facts it gathered, that the Israeli armed forces must have known that there were no combatants among the people to be rescued or in the immediate vicinity.

³²³ “The operation in Gaza...”, para. 171.

³²⁴ Ibid., para. 172. “Ismail Haniyeh, the head of Hamas in the Gaza Strip, located his Southern Command centre in one of the Shifa Hospital units, while the senior leaders of Hamas stationed themselves in another unit.”

³²⁵ *Corriere della Serra*, “Così i ragazzini di Hamas ci hanno utilizzato come bersagli”, 21 January 2009.

³²⁶ “The operation in Gaza...”, para. 176.

472. The Mission is aware of an interview reportedly given by an ambulance driver to an Australian newspaper, in which he describes how Palestinian combatants unsuccessfully tried to force him to evacuate them from a house in which they were apparently trapped. The same driver reportedly told the journalist that “ Hamas made several attempts to hijack the ambulance fleet of al-Quds Hospital”. He also describes how the PRCS ambulance teams managed to avert this misuse of ambulances. According to this report, relied on by the Israeli Government, the attempts of Palestinian combatants to exploit ambulances as shield for military operations were not successful in the face of the courageous resistance of the PRCS staff members.³²⁷

473. This is consistent with the statements of representatives of the Palestinian Red Crescent Society in Gaza who, in interviews with the Mission, denied that their ambulances were used at any time by Palestinian combatants. Finally, in a submission to the Mission, Magen David Adom stated that “there was no use of PRCS ambulances for the transport of weapons or ammunition ... [and] there was no misuse of the emblem by PRCS.”³²⁸

474. While it is not possible to say that no attempts were ever made by any armed groups to use ambulances during the military operations, the Mission has substantial material from the investigations it conducted and the enquiries it made to convince it that, if any ambulances were used by Palestinian armed groups, it would have been the exception, not the rule. None of the ambulance drivers that were directly interviewed by the Mission reported any attempt by the armed groups to use the ambulances for any ulterior purpose. Moreover, of the ambulance staff members and their volunteer assistants that were killed or injured in the course of their duties, none was a member of any armed groups, so far as the Mission is aware.

E. Forcing civilians to remain in an area for the specific purpose of sheltering that area or forces in that area from attack

475. As discussed in more detail in other parts of the report, the Mission asked numerous witnesses in Gaza why they had stayed in their homes in spite of the shelling, bombing and Israeli ground invasion. They stated that they had decided to stay put either because they had experienced previous incursions and, based on past experience, did not think they would be at risk as long as they remained indoors³²⁹ or because they had no safe place to go.³³⁰ In addition, some witnesses stated that they had chosen to stay because they wished to watch over their homes and property.³³¹ The Mission did not find any evidence of civilians being forced to remain in their houses by Palestinian armed groups.

³²⁷ Ibid., para. 177-179.

³²⁸ Communication by Magen David Adom to the Mission, 9 August 2009. Magen David Adom is Israel’s national [emergency medical, disaster, ambulance and blood bank](#) service. It is a member of the [International Federation of Red Cross and Red Crescent Societies](#) and has a long-standing cooperation with the Palestinian Red Crescent Society. That no PRCS ambulances had been used to transport weapons or fighters was also stated forcefully by a Magen David Adom representative to representatives of the Mission in Geneva on 22 July 2009.

³²⁹ Mission interview with Khaled Abd Rabbo.

³³⁰ See chap. IX.

³³¹ Interview with Abbas Ahmad Ibrahim Halawa, 3 June 2009 (see chap. XIV on the case of Abbas Ahmad Ibrahim Halawa).

476. The Mission's attention has been drawn to a well-known incident in which women and children followed calls to gather on the roof of the house of a Palestinian man who had been informed by the Israeli authorities that his house would be targeted. This incident has been documented in video footage in the public domain³³² and is referred to in submissions received by the Mission as evidence of the use of human shields. The Mission notes, however, that the incident occurred in 2007. No such incidents are alleged by the Israeli Government with regard to the military operations that began on 27 December 2008. The Mission received no reports of such incidents from other sources. On the contrary, in one case investigated by the Mission,³³³ a Hamas official received a phone call from the Israeli armed forces to the effect that his house would soon be targeted. He evacuated the house with his family and alerted the neighbours to the imminent threat so that they, too, were able to leave their homes before the missile did indeed strike.

477. The Mission is also aware of the public statement by Mr. Fathi Hammad, a Hamas member of the Palestinian Legislative Council, on 29 February 2009, which is adduced as evidence of Hamas' use of human shields. Mr. Hammad reportedly stated that

... the Palestinian people has developed its [methods] of death seeking. For the Palestinian people, death became an industry, at which women excel and so do all people on this land: the elderly excel, the mujahideen excel and the children excel. Accordingly, [Hamas] created a human shield of women, children, the elderly and the mujahideen, against the Zionist bombing machine.³³⁴

478. Although the Mission finds this statement morally repugnant, it does not consider it to constitute evidence that Hamas forced Palestinian civilians to shield military objectives against attack. The Government of Israel has not identified any such cases.

F. Mingling with the civilian population to shield combatants against attack

479. When military operations take place in areas in which civilians are present, the importance of military dress and distinctive signs to distinguish combatants from civilians is all the greater. The Mission notes that only one of the incidents it investigated clearly involved the presence of Palestinian combatants. In that incident, the witness told the Mission that three fighters trapped in his neighbour's house were "wearing military camouflage and headbands of the al-Qassam Brigades".³³⁵

480. Reports on the military operations by NGOs suggest that in general members of Palestinian armed groups did not wear military uniforms. One report states that after the destruction caused by the Israeli air strikes at the start of the military operations, members of al-

³³² See <http://switch3.castup.net/cunet/gm.asp?ai=58&ar=StandingOnRoof-V&ak=null>.

³³³ See the case of Mr. Abu Askar in chapter X.

³³⁴ "The operation in Gaza...", para. 186. A video recording of this speech is available at <http://www.youtube.com/watch?v=ArJbn-IUCh4>.

³³⁵ See the case of Mr. Majdi Abd Rabbo in chapter XIV.

Qassam Brigades abandoned military dress and patrolled streets “in civilian clothes”.³³⁶ A second report states that members of the Palestinian armed groups “also mixed with the civilian population, although this would be difficult to avoid in the small and overcrowded Gaza Strip, and there is no evidence that they did so with the intent of shielding themselves”.³³⁷

481. Finally, on this issue, it is relevant to mention that the Israeli Government has produced no visual or other evidence to support its allegation that Palestinian combatants “mingle routinely with civilians in order to cover their movements”.³³⁸

G. Factual findings

482. On the basis of the information it gathered, the Mission finds that there are indications that Palestinian armed groups launched rockets from urban areas. The Mission has not been able to obtain any direct evidence that this was done with the specific intent of shielding the rocket launchers from counterstrikes by the Israeli armed forces. The Mission also notes, however, that Palestinian armed groups do not appear to have given Gaza residents sufficient warning of their intention to launch rockets from their neighbourhoods to allow them to leave and protect themselves against Israeli strikes at the rocket launching sites. The Mission notes that, in any event, given the densely populated character of the northern half of the Gaza Strip, once Israeli forces gained control of the more open or outlying areas during the first days of the ground invasion, most -- if not all -- locations still accessible to Palestinian armed groups were in urban areas.

483. The Mission finds that the presence of Palestinian armed fighters in urban residential areas during the military operations is established. On the basis of the information it gathered, the Mission is unable to form an opinion on the exact nature or the intensity of their combat activities in urban residential areas that would have placed the civilian population and civilian objects at risk of attack. While reports reviewed by the Mission credibly indicate that members of Palestinian armed groups were not always dressed in a way that distinguished them from civilians, the Mission found no evidence that Palestinian combatants mingled with the civilian population with the intention of shielding themselves from attack.³³⁹

484. From the information it gathered, the Mission does not discount the use of booby traps by the Palestinian armed groups. The Mission has no basis to conclude that civilian lives were put at risk, since none of the reports records the presence of civilians in or near the houses that were allegedly booby-trapped.

³³⁶ “Gaza’s unfinished business...”, p. 8. This report also appears to suggest that members of al-Qassam Brigades were at least in part engaged in law enforcement and internal security functions rather than in combat with the Israeli armed forces.

³³⁷ *Israel/Gaza: Operation “Cast Lead”: 22 days...*

³³⁸ “The operation in Gaza...”, para. 186.

³³⁹ It has also been reported that specialist Israeli troops operated in Gaza during the military operations in civilian attire to liaise with informants and as *francs-tireurs*; Jane’s Sentinel Services, Country Risk Assessments – Israel, 30 January 2009.

485. On the basis of its own investigations and statements by United Nations officials, the Mission excludes that Palestinian armed groups engaged in combat activities from United Nations facilities that were used as shelters during the military operations. The Mission cannot discount the possibility that Palestinian armed groups were active in the vicinity of such facilities.

486. The Mission is unable to make any determination on the general allegation that Palestinian armed groups used mosques for military purposes. It notes that, in the one incident it investigated of an Israeli attack on a mosque, it found no indication that the mosque was so used.

487. On the basis of the investigations it has conducted, the Mission did not find any evidence to support the allegations that hospital facilities were used by the Gaza authorities or by Palestinian armed groups to shield military activities and that ambulances were used to transport combatants or for other military purposes.

488. On the basis of the information it gathered, the Mission found no indication that the civilian population was forced by Hamas or Palestinian armed groups to remain in areas under attack from the Israeli armed forces.

H. Legal findings

489. Customary international humanitarian law establishes that all “parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks.”³⁴⁰

490. Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas.³⁴¹ Each party to the conflict must, to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives.³⁴²

491. These rules of customary international law are reflected in article 57 (1) of Additional Protocol I: “In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.” The following paragraphs of article 57 set forth the specific precautions to be taken by a party launching an attack.³⁴³

492. In addition to the general duty to take constant care to spare the civilian population in the conduct of military operations, international humanitarian law establishes a specific prohibition against the use of civilians as human shields. Article 28 of the Fourth Geneva Convention specifically addresses this issue: “The presence of a protected person may not be used to render certain points or areas immune from military operations”. This is reinforced by article 51 (7) of Additional Protocol I:

³⁴⁰ *Customary International Humanitarian Law...*, rule 22.

³⁴¹ *Ibid.*, rule 23.

³⁴² *Ibid.*, rule 24.

³⁴³ See chap. IX.

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

These provisions reflect rules of customary law.³⁴⁴

493. The Mission finds it useful to clarify what is meant, from a legal perspective, by using civilians or a civilian population as a human shield. Parties to a conflict are not permitted to use a civilian population or individual civilians in order to render certain points or areas immune from military operations. It is not in dispute that both Palestinian armed groups and Israeli forces were fighting within an area populated by civilians. Fighting within civilian areas is not, by itself, sufficient for a finding that a party is using the civilian population living in the area of the fighting as a human shield. As the words of article 57 (1) show (“shall not be used to render”, “in order to attempt to shield”), an intention to use the civilian population in order to shield an area from military attack is required.

494. From the information available to it, the Mission found no evidence to suggest that Palestinian armed groups either directed civilians to areas where attacks were being launched or forced civilians to remain within the vicinity of the attacks.

495. The reports received by the Mission suggest that it is likely that the Palestinian armed groups did not at all times adequately distinguish themselves from the civilian population among whom the hostilities were being conducted. Their failure to distinguish themselves from the civilian population by distinctive signs is not a violation of international law in itself, but would have denied them some of the legal privileges afforded to combatants. What international law demands, however, is that those engaged in combat take all feasible precautions to protect civilians in the conduct of their hostilities. The Mission found no evidence that members of Palestinian armed groups engaged in combat in civilian dress. It can, therefore, not find a violation of the obligation not to endanger the civilian population in this respect.

496. The conduct of hostilities in built-up areas does not, of itself, constitute a violation of international law. However, launching attacks - whether of rockets and mortars at the population of southern Israel or at the Israeli armed forces inside Gaza - close to civilian or protected buildings constitutes a failure to take all feasible precautions. In cases where this occurred, the Palestinian armed groups would have unnecessarily exposed the civilian population of Gaza to the inherent dangers of the military operations taking place around them. This would have constituted a violation of the customary rules of international humanitarian law referred to above. It would also have constituted a violation of the right to life and physical integrity of the civilians thereby endangered.

497. Although the situations investigated by the Mission did not establish the use of mosques for military purposes or to shield military activities, the Mission cannot exclude that this might

³⁴⁴ *Customary International Humanitarian Law...*, rule 97.

have occurred in other cases. As far as hospitals and United Nations facilities are concerned, the Mission found that it could not exclude that Palestinian armed groups engaged in combat activities in the vicinity of these protected sites. The Mission wishes to emphasize that the launching of attacks from or in the vicinity of civilian buildings and protected areas are serious violations of the obligation on the armed groups to take constant care to protect civilians from the inherent dangers created by military operations.

498. The Mission asked the Gaza authorities to provide information on the sites from where the Palestinian armed groups had launched attacks against Israel and against the Israeli armed forces in Gaza. The Mission similarly asked whether, to their knowledge, civilian buildings and mosques had been used to store weapons. In their response, the Gaza authorities stated that they had no information on the activities of the Palestinian armed groups or about the storage of weapons in mosques and civilian buildings. The Mission does not find this response to be entirely plausible. The Mission notes, more importantly, that, whether the answer reflects the reality or not, the Gaza authorities are obliged under international law to control the activities of armed groups operating on the territory under their control.³⁴⁵ If they failed to take the necessary measures to prevent the Palestinian armed groups from endangering the civilian population by conducting hostilities in a manner incompatible with international humanitarian law, they would bear responsibility for the damage done to the civilians living in Gaza.

IX. OBLIGATION ON ISRAEL TO TAKE FEASIBLE PRECAUTIONS TO PROTECT CIVILIAN POPULATION AND CIVILIAN OBJECTS IN GAZA

499. This chapter focuses on incidents where the Mission considered compliance by Israel with its obligations under the Fourth Geneva Convention and customary rules of international law in relation to taking feasible precautions. In particular, it considers whether everything feasible was done to verify that objectives to be attacked were neither civilians nor civilian objects and were not subject to special protection, whether all feasible precautions were taken in respect of the choice of weapons used and whether the military advantage sought was excessive in relation to the expected loss of civilian life or civilian objects. Before entering into specific incidents, it considers the obligation to provide warnings in relation to attacks.

A. Warnings

500. The Israeli Government has stated that it took the following steps to warn the civilian population of Gaza:³⁴⁶

- The Israeli armed forces made 20,000 calls on 27 December and 10,000 on 29 December 2008;
- 300,000 warning notes were dropped over the whole of the Gaza Strip on 28 December;
- 80,000 leaflets were dropped in Rafah on 29 December;

³⁴⁵ See chap. IV.

³⁴⁶ http://www.mfa.gov.il/MFA/Government/Communiques/2009/IDF_warns_Gaza_population_7-Jan-2009.htm.

- In the context of the beginning of ground operations on 3 January, 300,000 leaflets were dropped in the entire Gaza Strip, especially in the northern and eastern parts;
- On 5 January, 300,000 leaflets were dropped in Gaza City, Khan Yunis and Rafah;
- In total some 165,000 telephone calls were made throughout the military operations;³⁴⁷
- In total some 2,500,000 leaflets were dropped.³⁴⁸

501. In addition to these measures, the Israeli Ministry of Foreign Affairs explains that the telephone calls were both direct calls and pre-recorded messages, that it made radio broadcasts, and that it developed a practice of dropping apparently light explosives on rooftops (referred to by some as “roof-knocking”).³⁴⁹

502. The Mission has reviewed the text of several of the leaflets dropped by the Israeli armed forces and listened to all of the messages recorded on the website of the Israeli Ministry of Foreign Affairs.³⁵⁰ It accepts that Israel dropped leaflets, made phone calls, left recorded messages and dropped smaller explosives on roofs as stated by the Israeli Government.

1. Telephone calls

503. The Mission received first-hand information about some of these methods in its interviews with witnesses in Gaza. In the report on the attack at al-Fakhura Street junction (see chap. X), the Mission notes the credible account of Mr. Abu Askar of the telephone warning he received as a result of which he was able to evacuate up to 40 people from his and other houses. He received that call at around 1.45 a.m. and Israeli forces destroyed his house with a missile strike seven minutes later.

504. The Mission is also aware of circumstances in which telephone warnings may have caused fear and confusion. Al-Bader Flour Mills Co. (see chap. XIII) received two recorded messages indicating the mill was to be destroyed, but neither of these was acted upon. Five days later the mill was struck in the early hours of the morning with no warning whatsoever. The owners of the business and their staff suffered anxiety by having to evacuate the premises on two occasions as a result of receiving such messages when no strikes took place.

³⁴⁷ “The operation in Gaza...”, para. 264.

³⁴⁸ Ibid.

³⁴⁹ http://www.mfa.gov.il/MFA/Government/Communiques/2009/IDF_warns_Gaza_population_7-Jan-2009.htm. With regard to roof-knocking, see, for instance, Cordesman, op. cit., p. 13 (the Israeli armed forces “developed small 10-20 kilogram bombs that could be used as both warning shots – sometimes referred to as knocking on the roof”...).

³⁵⁰ http://www.mfa.gov.il/MFA/Government/Communiques/2009/IDF_warns_Gaza_population_7-Jan-2009.htm.

505. Israel's Ministry of Foreign Affairs states that more than 165,000 telephone calls were made issuing warnings. The Mission has received information that there were at least two types of telephone calls. One was a direct and specific warning, as was received by Mr. Abu Askar. The other was a more generic, recorded message, such as the type received by al-Bader Flour Mills. The Mission does not know and, as far as it can determine, Israel has not indicated what proportion of the 30,000 telephone calls was pre-recorded and more generic and what proportion was specific.

2. Roof-knocking

506. The Israeli Government describes that in certain circumstances its armed forces fired "warning shots from light weapons that hit the roofs of the designated targets"—a practice referred to as roof-knocking. The Israeli Government indicates that this practice was used when it appeared that people had remained in their houses despite being given some previous warning.³⁵¹ It is not clear whether this was the only circumstance in which this method was employed. The Mission heard that in the al-Daya incident (see chap. XI) the Israeli Government claims to have made such a warning shot, albeit to the wrong house.³⁵² The Mission also saw in the Sawafeary house (see chap. XIII) that a missile had penetrated the rear of the house on the wall near the ceiling, gone through an internal wall and exited through the wall at the front of the house near the windows. At the time (around 10 p.m. on 3 January 2009) there were several family members in the house, who happened to be lying down. The Mission cannot say what size of weapon was used on this occasion, although it was sufficiently powerful to penetrate three walls, or whether it was intended as a warning.

3. Radio broadcasts and leaflet dropping

507. The radio broadcasts that the Mission listened to appeared to be generic. For example, on 3 January 2009 a radio broadcast made the following points:

- Gaza residents are welcome to receive food and medical supplies, delivered via the Rafah, Karni and Kerem Shalom passages, at the UNRWA centres throughout the Gaza Strip;
- Israel calls on the population to move to city centres for its own safety.³⁵³

This warning preceded the ground phase of the military operations. Its language clearly indicates that UNRWA centres should be regarded as places of safety and civilians may collect food from them.

³⁵¹ "The operation in Gaza...", para. 264.

³⁵² Note that a witness has indicated that an elderly man was killed when struck by a missile some 10 minutes before the al-Daya house was struck. The Mission has also noted significant doubts on the version of events presented by the Israeli Government on this case, including on the issue of the warning shot.

³⁵³ http://www.mfa.gov.il/MFA/Government/Communiques/2009/IDF_warns_Gaza_population_7-Jan-2009.htm.

508. Leaflets dropped appear to fall into a number of categories. One leaflet did not deal with attacks on a particular place but on the storage of weapons and ammunition:

To the residents of the Gaza Strip;

- The IDF will act against any movements and elements conducting terrorist activities against the residents of the State of Israel;
- The IDF will hit and destroy any building or site containing ammunition and weapons;
- As of the publication of this announcement, anyone having ammunition and/or weapons in his home is risking his life and must leave the place for the safety of his own life and that of his family;
- You have been warned.³⁵⁴

509. In some areas specific warnings were sometimes given. One example of a sufficiently specific warning is that issued to the residents of Rafah:

Because your houses are used by Hamas for military equipment smuggling and storing, the Israeli Defense Forces (IDF) will attack the areas between Sea Street and till the Egyptian border...

All the Residents of the following neighbourhoods: Block O – al-Barazil neighbourhood – al-Shu'ara'- Keshta- al-Salam neighbourhood should evacuate their houses till beyond Sea Street. The evacuation enters into force from now till tomorrow at 8 a.m.

For your safety and for the safety of your children, apply this notice.³⁵⁵

4. Factual findings

510. Whether a warning is deemed to be effective is a complex matter depending on the facts and circumstances prevailing at the time, the availability of the means for providing the warning and the evaluation of the costs to the purported military advantage.

511. Israel was in a strong position to prepare and issue effective warnings. The preparations for its military operations were “extensive and thorough.”³⁵⁶ Israel had intimate knowledge and

³⁵⁴ Ibid.

³⁵⁵ “No safe place”, report of the Independent Fact Finding Committee on Gaza presented to the League of Arab States (30 April 2009), p. 241. Note a similarly specific kind of warning issued to the residents of al-Shujaeyah (“The operation in Gaza...”, footnote 225).

³⁵⁶ Prime Minister Olmert, press conference on 27 December 2008, available at: http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2008/PM_Olmert_press_briefing_IDF_operation_Gaza_Strip_27-Dec-2008.htm.

sophisticated up-to-date intelligence in its planning. It had the means to use the landlines and mobile telephone networks. It had complete domination of Gaza's airspace. In terms of the practical capabilities of issuing warnings, it is perhaps difficult to imagine more propitious circumstances.

512. The Mission accepts that the element of surprise that was sought in the initial strikes might well have provided a degree of justification for not giving any advance notice of the time the strikes would take place or the buildings that would be struck.³⁵⁷

(a) The question of whether civilians could be expected to respond to the warnings to leave their homes

513. The Mission recognizes that leaflets dropped from the air can have some direct benefit in assisting the civilian population to get out of harm's way. The effectiveness will depend on three considerations: the clarity of the message, the credibility of the threat and the possibility of those receiving the warning taking action to escape the threat.

514. The Mission has already cited one kind of leaflet which referred to the likelihood of attacks on locations storing weapons and ammunitions. At the beginning of the land-air phase of the operations, the Israeli armed forces also dropped leaflets and made broadcasts advising people to move towards city centres.

515. There had been an intense aerial campaign from 27 December 2008 until 3 January 2009 that had seen hundreds of buildings destroyed in built-up areas of city centres. Civilians not living in city centres were being asked to leave their homes to go to places that as far as they could reasonably assess were already in much more danger than they were in their own homes. In order for the warning to be effective there had to be an objective basis to believe that they would be safer elsewhere. The Mission does not consider that such an objective evaluation could reasonably have been made by civilians in the Gaza Strip.

516. During its meetings with people in Gaza the Mission was told on several occasions of the sense that there was "nowhere to go". The nature of the attacks in the first week had caused deep shock. The widespread attacks created a dilemma not only about where to go but about whether it was safe to leave at all.

517. Even if in the minds of the Israeli armed forces it would have been safer, from 3 January onwards, for civilians to go to city centres, nothing that had happened in the preceding week could lead those civilians to the same conclusion given the widespread destruction of areas and buildings. The events that occurred in those locations after 3 January appear to support the view that going to the city centres offered little guarantee of safety.

³⁵⁷ The recognition of a legitimate element of surprise does not necessarily mean that the Mission accepts the targets chosen were legally justifiable in the circumstances. That matter is dealt with in different parts of this report.

(b) Events in the city centre after the warning to go there was issued

518. On 3 January 2009 the attack on al-Maqadmah mosque took place in a built-up area in central Jabaliyah. Three days after the 3 January warning was given to move to central locations and attend United Nations centres there was the Israeli mortar attack immediately outside a large United Nations shelter killing at least 35 people in Jabaliyah at al-Fakhura Street.³⁵⁸

519. Following the attack in al-Fakhura Street, the Director of Operations in Gaza of UNRWA, John Ging, stated in a press conference on 7 January 2009: “There is nowhere safe in Gaza. Everyone here is terrorized and traumatized.”³⁵⁹

520. On 15 January the UNRWA compound in Tal el-Hawa (Gaza City) was seriously damaged when it was struck by white phosphorous. Between 600 and 700 civilians were sheltering there at the time and were put in grave danger. The same day the nearby al-Quds hospital was struck directly by a number of missiles, including white phosphorous shells, again putting staff and patients in great danger (see sect. C below).

521. The day after the UNRWA compound was hit, John Ging repeated that what had happened there had happened throughout Gaza. He said that the United Nations and the civilian population were “all in the same boat” and that nobody could be said to be safe in Gaza.³⁶⁰

(c) The inference that those who did not go to the city centres must be combatants

522. The warning to go to city centres came at the start of the ground invasion. In the Mission’s view it was unreasonable to assume, in the circumstances, that civilians would indeed leave their homes. As a consequence, the conclusion that allegedly formed part of the logic of soldiers on the ground that those who had stayed put had to be combatants was wholly unwarranted.³⁶¹ There are many reasons why people may not have responded. In several cases the Mission heard from witnesses about people who were physically disabled, too frail or deaf so that it was difficult or impossible to respond to the warning. In other cases, as outlined above, civilians who

³⁵⁸ The Mission concludes elsewhere that this attack was indiscriminate in nature (see chap. X).

³⁵⁹ *The Daily Mail*, “Gaza’s darkest day: 40 die as Israel bombs ‘safe haven’ UN school”, 7 January 2009.

³⁶⁰ Press conference on humanitarian situation in Gaza (16 January 2009), available at http://www.un.org/News/briefings/docs/2009/090116_Gaza.doc.htm. See also “No safe place”, p. 74.

³⁶¹ See, for example, statements made by soldiers in a seminar in Tel Aviv: “At first we were told to break into a house... Go upstairs and shoot every person we see... The upper echelons said this was allowed because anyone remaining in this area, inside Gaza City, is incriminated, a terrorist, who did not escape.”

Transcript of seminar from Channel 10 News on file with Mission. See also *Breaking the Silence, Soldiers’ Testimonies from Operation Cast Lead, Gaza 2009*, available at: http://www.breakingthesilence.org.il/oferet/ENGLISH_oferet.pdf. Throughout the report soldiers indicate that the rules of engagement employed meant that no consideration was given to the idea that there may be “innocents” and that in the case of any doubt whatsoever soldiers were to shoot. (“That too was mentioned, that if we see something suspect and shoot, better to hit an innocent that hesitate to target an enemy”, p. 50; “if anything arouses our suspicion, we mustn’t hesitate because the enemy hides among civilians”, p. 51.) Note also the discussion on “wet entry” and “dry entry” (pp. 14-15. This discussion indicates that, in approaching a house, missiles, tank fire, grenades and machine gun fire would be used. This method of approach is borne out in the case of the Juha family. Family members were fired upon when congregating in a room downstairs in their house in Zeytoun. See chap. XI.

could have responded may have had legitimate reasons not to do so. The issuance of warning is one measure that should be taken wherever possible. The fact that a warning was issued does not, however, relieve a commander or his subordinates from taking all other feasible measures to distinguish between civilians and combatants.³⁶²

523. Israeli armed forces had created the circumstances in which civilians could not reasonably believe the city centres were safe. An effective warning had to make clear why, even in those circumstances, it was better for civilians to leave than to stay in their homes.

5. Israel's review

524. According to press reports,³⁶³ military sources, including representatives from the military prosecution's international law department, have agreed that more specific information, such as more accurate timetables for strikes to be carried out and escape routes, should be given in warnings. The press report goes on to say: "Fliers distributed by the IDF from now on will also be more detailed in order to make it clear to civilians that their lives are in danger and give them a chance to flee. It was also determined in the hearing that the military made multiple efforts to prevent civilian casualties in January's offensive."

525. The Mission cannot confirm if such press reports are accurate but notes two things. Firstly, any improvements in practice in this regard are to be welcomed. Secondly, the changes, if reported correctly, appear to address the matters that have been touched on in this section. Those were matters that could not be considered in any way as unforeseeable in the circumstances at the time the warnings were in fact issued. While improvements are welcome in this case, it would also appear to indicate that circumstances almost certainly permitted much better warnings to be given than was the case.

6. Legal findings

526. Chapter IV of Additional Protocol I to the Geneva Conventions addresses the issue of precautionary measures that must be taken. Article 57 (1) states that "in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects."

527. Article 57 (2) (c) requires that "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."

528. The Mission regards both these provisions to be norms of customary international law.³⁶⁴ In addition, Israel appears to consider itself bound by the obligation to provide effective warnings under customary law.

³⁶² Note in particular the testimony of Prof. Michael Newton to the Mission at the Geneva public hearings on 7 July 2009. See <http://www.un.org/webcast/unhrc/archive.asp?go=090707>.

³⁶³ See *Ynetnews*, "IDF to give better warnings before attacks", 29 September 2007.

³⁶⁴ According to ICRC, article 57 (1) codifies the principle of precautions in attack and article 57 (2) (c) is a rule of customary international law applicable to international and non-international armed conflict. *Customary International Humanitarian Law...*, pp. 51 and 62.

529. The determination of whether the circumstances permit a warning must be made in the context of a good-faith attempt to adhere to the underlying duty to minimize death and injury to civilians or damage to civilian objects. The key limitation on the application of the rule is if the military advantage of surprise would be undermined by giving a warning. The same calculation of proportionality has to be made here as in other circumstances. The question is whether the injury or damage done to civilians or civilian objects by not giving a warning is excessive in relation to the advantage to be gained by the element of surprise for the particular operation. There may be other circumstances when a warning is simply not possible.

530. Article 57 (2) (c) requires the warning to be effective. The Mission understands by this that it must reach those who are likely to be in danger from the planned attack, it must give them sufficient time to react to the warning, it must clearly explain what they should do to avoid harm and it must be a credible warning. The warning also has to be clear so that the civilians are not in doubt that it is indeed addressed to them. As far as possible, warnings should state the location to be affected and where the civilians should seek safety. A credible warning means that civilians should be in no doubt that it is intended to be acted upon, as a false alarm or hoax may undermine future warnings, putting civilians at risk.

(a) Pre-recorded generic telephone calls

531. As regards the generic nature of some pre-recorded phone messages, the Mission finds that these lacked credibility and clarity, and generated fear and uncertainty. In substance, there is little difference between telephone messages and leaflets that are not specific. The Mission takes the view that pre-recorded messages with generic information may not be considered generally effective.

(b) Warning shots delivered to roofs

532. The Mission is doubtful whether roof-knocking should be understood as a warning as such.³⁶⁵ In the context of a large-scale military operation including aerial attacks, civilians cannot be expected to know whether a small explosion is a warning of an impending attack or part of an actual attack. In relation to the incident at the Sawafeary house recounted above, the Mission cannot say for certain if this missile was meant to warn or to kill. It notes that, if this was meant as a warning shot, it has to be deemed reckless in the extreme.

533. The legal requirement is for an effective warning to be given. This means that it should not require civilians to guess the meaning of the warning. The technique of using small explosives to frighten civilians into evacuation, even if the intent is to warn, may cause terror and confuse the affected civilians.

534. The Mission does not have sufficient information to assess the accuracy of the Israeli Government's claim that the warning shot method was used only when previous warnings (leaflets, broadcasts or telephone calls) had not been acted upon. However, in many circumstances it is not clear why another call could not be made if it had already been possible to

³⁶⁵ The Mission notes and agrees with a similar position set out by Diakonia in its report on Operation Cast Lead of 30 June 2009, p. 9.

call the inhabitants of a house. The Mission notes that these warnings all took place in situations where the view appears to have been reached that those in the house are civilians or predominantly civilians. If the choice is between making another call or firing a light missile that carries with it a significant risk of killing those civilians, the Mission is not convinced that it would not have been feasible to make another call to confirm that a strike was about to be made.

535. Finally, apart from the issue of fear and ambiguity, there is the question of danger. The idea that an attack, however limited in itself, can be understood as an effective warning in the meaning of article 57 (2) (c) is rejected by the Mission.

(c) Leaflets

536. The leaflets and radio broadcasts that told people to leave their homes and head towards city centres were in most cases lacking in specificity and clarity: people could not be certain that the warnings were directed at them in particular, since they were being issued as far as they could tell to almost everyone, and they could not tell when they should leave since there was rarely an indication of when attacks would take place. Furthermore, in the circumstances created by the Israeli armed forces, people could not reasonably be expected to flee to what appeared to be even less safe places on the basis of such non-specific warnings. Therefore, the Mission does not consider such warnings to have been the most effective possible in the circumstances and, indeed, doubts that many were effective at all.

7. Conclusions

537. While noting the statements of the significant efforts made by the Israeli armed forces to issue warnings, the sole question for the Mission to consider at this point is whether the different kinds of warnings issued can be considered as sufficiently effective in the circumstances to constitute compliance with article 57 (2) (c).

538. The Mission accepts that the warnings issued by the Israeli armed forces in some cases encouraged numbers of people to flee and get out of harm's way in respect of the ground invasion, but this is not sufficient to consider them as generally effective.

539. The Mission considers that some of the leaflets with specific warnings, such as those that Israel indicates were issued in Rafah and al-Shujaeyah, may be regarded as effective. However, the Mission does not consider that general messages telling people to leave wherever they were and go to city centres, in the particular circumstances of this military campaign, meet the threshold of effectiveness.

540. The Mission regards some specific telephone calls to have provided effective warnings but treats with caution the figure of 165,000 calls made. Without sufficient information to know how many of these were specific, it cannot say to what extent such efforts might be regarded as effective.

541. The Mission does not consider the technique of firing missiles into or on top of buildings as capable of being described as a warning, much less an effective warning. It is a dangerous practice and in essence constitutes a form of attack rather than a warning.

542. The Mission is also mindful of several incidents it has investigated where civilians were killed or otherwise harmed and met with humiliation and degrading treatment by Israeli soldiers, while fleeing from locations about which some form of warning was issued. The effectiveness of the warnings has to be assessed in the light of the overall circumstances that prevailed and the subjective view of conditions that the civilians concerned would take in deciding upon their response to the warning.

B. UNRWA compound, Gaza City

543. The field office compound of UNRWA is situated in the southern Rimal area of Gaza City. On the morning of 15 January 2009 it came under sustained shelling from the Israeli armed forces. At least three high explosive shells and seven white phosphorous container shells struck the workshop and warehouse area of the compound causing massive damage as a result of ensuing fires. Five of the shells exploded in the compound including all three high explosive shells. Two complete container shells of white phosphorous were retrieved. Five additional white phosphorous shells were retrieved but not in their complete form. These five shells deposited large amounts of the phosphorus wedges contained in the shells into the compound, if not in fact all of the wedges. At least three shells hit the Gaza Training Centre and caused light injuries to one staff member. At the time of the attack there were between 600 and 700 civilians sheltering in the compound. The remaining shells hit the area in and around the fuel depot and workshop.

544. The Mission has inspected the site and interviewed several of the people who were present at the time. It has also had access to detailed written materials produced by the UNRWA office in relation to its inquiries into the incident. It has furthermore addressed questions to the Government of Israel regarding the use of white phosphorous munitions to strike within the UNRWA compound and the direct military advantage pursued by their use under the circumstances, but has received no reply.

545. The Mission will not here repeat all of the details of the attack that are recounted accurately in a number of other reports.³⁶⁶ It will, however, join with others in noting the bravery of two staff members in particular in dealing with the white phosphorous in close proximity to thousands of litres of fuel stored in tankers. Had the fuel depot exploded, it would have caused untold deaths and damage. The swift and courageous actions of these two people at huge personal risk may have prevented a disaster of gigantic proportions and their efforts should be so recognized.

546. In this particular case, the Mission's interest lay in what was known by the Israeli armed forces at the time, what steps were feasible to reduce the massive risk to civilian life and why were these steps not taken.

³⁶⁶ For instance, Secretary-General's summary of the Report of the United Nations Headquarters Board of Inquiry into certain incidents in the Gaza Strip between 27 December 2008 and 19 January 2009 and reports by Human Rights Watch (*Rain of Fire: Israel's Unlawful Use of White Phosphorous in Gaza* (March 2009), pp. 41 ff) and Amnesty International (*Israel/Gaza: Operation "Cast Lead": 22 days of death and destruction* (London, 2009), p. 31).

1. The immediate context

547. Shelling had been ongoing since the night of 14 January. The areas of Tal el-Hawa and southern Rimal had come under attack. There had been shelling close to the UNRWA compound at various points during the night. In the morning of 15 January staff in the UNRWA compound were instructed to remain inside as much as possible.

2. The risks

548. The UNRWA compound contained, among other things, a substantial fuel depot. The depot has an underground storage facility, which at the time had about 120,000 litres of fuel. Fuel tankers parked above ground had around 49,000 litres of fuel in them. In addition to the obvious and immediate risk of fire in these circumstances, the compound also stored large quantities of medical supplies, food, clothing and blankets in the warehouses.

549. Conservative estimates suggest that between 600 and 700 civilians were taking shelter in the compound at that time.

550. The principal and immediate risk was, therefore, of what might have been a catastrophic fire caused by the ignition of the fuel in the direct vicinity of the site where hundreds of civilians had sought shelter directly in response to the Israeli warnings of 3 January 2009.

3. The strikes

551. The Mission considers the witnesses it interviewed about this incident to be reliable and credible. After careful analysis of the information it received, the Mission finds that the following can be established with a high degree of certainty:

552. Three high explosive shells hit the compound. Two landed on the Gaza Training Centre and one landed in the car park. Complete or substantial parts of seven white phosphorous container shells landed in the compound. The wedges in these container shells were either discharged totally or very substantially in the compound. One shell, which was seen directly by a senior international staff member with many years' of active military service, detonated on impact or only a very short distance from the ground.

553. One high explosive shell struck the Gaza Training Centre's yard and was witnessed by at least two guards and left a crater.

554. Two high explosive shells landed on the roof of the education building. There are two large holes in the roof and shrapnel all around.

555. A white phosphorous container shell struck the Project and Logistics Division Building.

556. One white phosphorous container shell hit the back of a vehicle in the spare parts store, coming through a wall on the south side at a high point. This is believed to have caused the fire to start in the workshop area.

557. One white phosphorous container shell or a substantial part thereof came through a wire fence at the top of the southern boundary of the compound near the spare parts and workshop area, causing damage to a vehicle there.
558. One white phosphorous container shell landed in the workshop embedding itself in the concrete.
559. One white phosphorous container shell or a substantial part thereof came through the roof of the painting bay.
560. One white phosphorous container shell or a substantial part thereof struck a manhole cover near small warehouses storing food.
561. One white phosphorous container shell struck near a generator on concrete ground.
562. Seven of the ten strikes occurred in an area smaller than a standard football pitch. The whole area, including the three other strikes on or near the Gaza Training Centre, would be no more than two football pitches.
563. The precise moment when each of the strikes occurred cannot be stated with certainty but all occurred between 8 a.m. and 12 noon.

4. Communications and responses

564. For the purposes of liaison with the Israeli authorities, the counterpart of the United Nations Department of Safety and Security (DSS) is the Coordinator of Government Activities in the Territories (COGAT). This is a unit within the Israeli Ministry of Defense. In Gaza the day-to-day liaison and coordination activity with COGAT is carried out by the Coordination and Liaison Administration (CLA), located on the Israeli side of the Erez crossing. CLA is the military unit responsible for the coordination of access to and from Gaza in connection with the facilitation of civilian and humanitarian needs. DSS at the time routinely liaised with COGAT through CLA.
565. From 27 December until 2 January DSS communicated with COGAT/CLA by telephone and by e-mail. The Mission is in possession of the names of the Israeli officers with whom such contact was established and maintained. In the second phase of the conflict, COGAT intervention increased and new personnel added to their capacity. Two new contacts were added to those already established.
566. The most comprehensive list of relevant data was forwarded to COGAT/CLA on 3 April 2008, including all United Nations installations. As of 29 December 2008 COGAT/CLA had been provided with an updated list of the coordinates of all United Nations offices, international residences and pre-identified possible emergency shelters. Throughout the military operations DSS was in almost daily communication, providing detailed information on coordinates of relevant emergency shelters and distributions centres. The Mission has been shown the relevant log of all such communications.
567. On the day in question DSS made at least seven phone calls to COGAT/CLA counterparts between 8.14 a.m. and 1.45 p.m. These conversations addressed, for instance, the proximity of

Israeli fire, the damage done to UNRWA installations, requests that fire be redirected or withdrawn, and coordination for the removal of fuel tankers.

568. Despite calls beginning at 8.14 a.m., it does not appear that COGAT/CLA was able to confirm that contact had been established with the relevant brigade until 11.06 a.m.

569. Other information available to the Mission shows that the Deputy Director of Operations of UNRWA, who was in Jerusalem at the time was engaged in frequent calls to senior Israeli officials. He had received a call at 9 a.m. from John Ging, the Director of Operations at UNRWA, advising him of the shelling near the compound and had been asked to demand that the shelling be stopped by calling the Israeli armed forces' Humanitarian Coordination Centre (HCC) in Tel Aviv. He made a total of 26 calls to the head of HCC or to his assistant as well as to members of COGAT/CLA. He was assured on a number of occasions by the head of HCC that shelling had stopped, but it was clear when he relayed this message back to Gaza that shelling was continuing. The Deputy Director had warned of the immediate risk to the fuel depot and those seeking shelter.

5. Weapons used

570. Analysis of the shells used in the strikes that hit the UNRWA compound indicates clearly that at least seven shells were white phosphorous shells, three of which were complete and four of which were very substantial components of the shells. Military experts indicate that in all probability these shells were fired from a 155 mm Howitzer.

571. Three other missiles were determined clearly by UNRWA military experts to have been high explosive missiles.

6. The Israeli response

572. On 15 January the Israeli Defence Minister, Ehud Barak, said the attack had been a "grave error" and apologized, according to the United Nations Secretary-General, who had spoken with him earlier in a meeting in Tel Aviv. The same day the Israeli Prime Minister said that it was "absolutely true that we were attacked from that place, but the consequences are very sad and we apologize for it". The Israeli Welfare and Social Services Minister made subsequent statements suggesting there had been gunfire directed at Israeli troops from adjacent premises. He said it was shrapnel from the return fire that entered the UNRWA compound causing the blaze.³⁶⁷

573. On 22 April the summary of the conclusions of the Israeli armed forces' investigations reported as follows:

... the IDF deployed a smoke screen in order to protect a tank force operating in the neighbourhood from Hamas anti-tank crews who had positioned themselves adjacent to the UNRWA headquarters. The smoke screen was intended to block the terrorists' field of view. Information received by the IDF shows that the smoke screen did assist in protecting the force and prevented precise anti-tank fire against

³⁶⁷ <http://www.jpost.com/servlet/Satellite?cid=1232292898771&pagename=JPArticle%2FShowFull>.

IDF forces. The smoke projectiles were fired at an area a considerable distance from the UNRWA headquarters, and were not intended to cause damage to either person or property. However, it appears that fragments of the smoke projectiles did hit a warehouse located in the headquarters, causing it to catch fire.

During the incident, claims were also made that an explosive shell or shrapnel hit the UNRWA headquarters. The investigation showed that these were shells, or shell fragments that were fired at military targets within the battle zone.

The damage caused to the UNRWA headquarters during the fighting in the Tel El-Hawwa neighbourhood is the unfortunate result of the type of warfare that Hamas forced upon the IDF, involving combat in the Gaza Strip's urban spaces and adjacent to facilities associated with international organizations. These results could not be predicted.

Nevertheless, it is clear that the forces did not intend, at any stage, to hit a UN facility. Following UN complaints that an explosive shell had hit the headquarters, the forces were ordered to cease firing explosive shells in the region in question. Following the receipt of reports about the fire in the warehouse, all firing in the area was stopped. The entry of fire-fighting trucks to the area was coordinated with the IDF in order to assist in extinguishing the fire.³⁶⁸

574. In its report of July 2009 on the military operations, the Israeli Government explains that the “primary rationale” for firing white phosphorous was to “produce a smokescreen to protect Israeli forces from the Hamas anti-tank crews operating adjacent to the UNRWA headquarters”. The report goes on to assert:

The IDF sought to maintain a safety distance of several hundred metres from sensitive sites, including the UNRWA compound. Despite the maintenance of a safety distance, some felt wedges and other components of the projectiles apparently landed in the compound after the release of felt wedges in the air. The IDF neither anticipated nor intended this outcome.³⁶⁹

575. The Mission has a number of observations about the conclusions of the Israeli Government. First, it does not share the circumspect or indeed understated representation of the nature and extent of the strikes in the compound. There were ten strikes: three high explosive shells landed and exploded in the compound; seven white phosphorous container shells discharged completely or very substantially in the confines of a very limited space around particularly vulnerable areas of the UNRWA compound. This is not a matter of a limited number of wedges falling inside the compound or shrapnel or parts of shells landing in the compound as the shells exploded elsewhere. It is important to emphasize that we are dealing with shells exploding or discharging inside the compound in areas where hazardous material was stored.

³⁶⁸ <http://dover.idf.il/IDF/English/opcast/postop/press/2202.htm>.

³⁶⁹ “The operation in Gaza...”, paras. 344 and 346.

576. Secondly, the claim that this result was neither intended nor anticipated has to be reviewed carefully. In the first place the Mission affirms the result to be reviewed is not fragments and wedges landing in the compound but ten shells landing and exploding inside the compound. It is difficult to accept that the consequences were not appreciated and foreseen by the Israeli armed forces.

577. Those in the Israeli army who deploy white phosphorous, or indeed any artillery shells, are expertly trained to factor in the relevant complexities of targeting, including wind force and the earth's curvature. They have to know the area they are firing at, possible obstacles in hitting the target and the other environmental factors necessary to ensure an effective strike. It is also clear that, having determined that it was necessary to establish a safety distance, the presence of the UNRWA installations was a factor present in the minds of those carrying out the shelling.

578. The question then becomes how specialists expertly trained in the complex issue of artillery deployment and aware of the presence of an extremely sensitive site can strike that site ten times while apparently trying to avoid it.

579. The Mission's scepticism that the result was not anticipated is confirmed by the fact that from around 8 a.m. on 15 January UNRWA officials began a series of calls to a number of officials explaining precisely what was going on. These calls were made to the appropriate people at COGAT/CLA as a result of prearranged coordination and further reinforced by the numerous calls by the Deputy Director of UNRWA to senior Israeli military officials in Tel Aviv.

580. In particular, the Israeli military officials were informed that shells had indeed struck inside the compound by the series of phone calls made by UNRWA officials.

581. The Mission is in possession of information that indicates a senior UNRWA official called the head of HCC in Tel Aviv and a number of his immediate subordinates several times. In particular a call was made at 10.31 a.m. by the official to the Israeli armed forces to explain that white phosphorous had landed in the compound and had set fire to the warehouse. He was told "by Tel Aviv" that the firing had stopped. To be clear, this means that by 10.30 a.m. at the latest channels of communication had been opened between Tel Aviv and those on the ground in Gaza City responsible for the firing of the shells, albeit not necessarily directly, but sufficient to be receiving reports of what was going on from Israeli troops on the ground.

582. At 10.30 a.m. staff at the UNRWA compound noted five white phosphorous container shells had discharged in the confines of the compound. At 10.40 a.m. the UNRWA official was again in direct communication with Tel Aviv explaining specifically that "the targeting is taking place in the vicinity of the workshop" and requiring that the Israeli armed forces desist immediately. In particular, he pointed out that what was required was a cessation of the firing for a sustained period of time to allow staff to bring the fire under control.

583. At 11.17 a.m. the same senior UNRWA official was informed in a phone call from UNRWA staff in the compound that a further two rounds had impacted "within the last ten minutes".

584. At 11.53 a.m., in a further telephone call, the senior UNRWA official indicated to the COGAT/CLA contact person that the firing had been unforgivable and unacceptable. He noted that efforts had been made since 09.30 a.m. to get the firing to stop and that UNRWA had been told in several calls that the firing had been ordered to be stopped at higher levels, yet it continued. The UNRWA official noted that it was incomprehensible that, with the amount of surveillance and geographic positioning system (GPS) information, the most vulnerable part of the compound had been repeatedly struck.

585. In all the circumstances the Mission rejects the Israeli armed forces' assertion to the effect that it was not anticipated that the shells would land in the compound. The Israeli armed forces were told what was happening. It no longer had to anticipate it. The Israeli armed forces' responses in Tel Aviv and in COGAT/CLA indicate quite clearly that they understood the nature and scale of what was happening. Their responses in particular indicate that orders had been given to stop the firing.

7. Factual and legal findings

586. The Mission considers that Israeli armed forces had all of the information necessary to appreciate the danger they were creating as a result of their firing at the UNRWA installations, in particular the fuel depot, and to the civilians gathered there. Orders were said to have been issued to cease firing in the vicinity of the UNWRA premises.

587. The Israeli Government's report cites with approval a passage from the report to the Prosecutor of the International Criminal Tribunal for the former Yugoslavia in relation to the bombing of the Federal Republic of Yugoslavia by the North Atlantic Treaty Organization (NATO) in 1998. The Mission has also considered that report. On the issue of intent it states:

Attacks which are not directed against military objectives (particularly attacks directed against the civilian population) and attacks which cause disproportionate civilian casualties or civilian property damage may constitute the actus reus for the offence of unlawful attack under article 3 of the ICTY Statute. The mens rea for the offence is intention or recklessness, not simple negligence. In determining whether or not the mens rea requirement has been met, it should be borne in mind that commanders deciding on an attack have duties:

- (a) To do everything practicable to verify that the objectives to be attacked are military objectives;
- (b) To take all practicable precautions in the choice of methods and means of warfare with a view to avoiding or in any event to minimizing incidental civilian casualties or civilian property damage; and
- (c) To refrain from launching attacks which may be expected to cause disproportionate civilian casualties or civilian property damage.³⁷⁰

³⁷⁰ "Final report to the Prosecutor...", para. 28.

588. The Mission agrees that this passage correctly reflects both the nature of the intent required and the relevant duties of a commander.

589. Even if the Israeli armed forces were under fire from anti-tank missiles from Palestinian armed groups at the time, all of the information referred to above indicates that the commanders in question did not take all feasible precautions in the choice of methods and means of warfare with a view to avoiding or, in any event, to minimizing incidental civilian casualties or civilian property damage.

590. The Mission is not attempting to second-guess with hindsight the decisions of commanders. The fact is that the events in question continued over a period of some three hours. In these circumstances the Israeli armed forces were not confronted by surprise fire to which they had to respond with whatever materiel was available to them at the time. If they were faced with anti-tank missiles, that was hardly something of which they had been unaware for an appreciable time.

591. Statements made to the Mission by senior UNRWA international staff indicate that they were unaware of any sustained fire at the relevant time from anywhere in the nearby areas. The Mission notes that official statements made on 15 January by Israel's Prime Minister had indicated with complete certainty that firing by Palestinian armed groups had occurred from within the UNRWA compound.³⁷¹ This was later contradicted and corrected to state that the armed groups occupied positions near to but outside the compound.³⁷² The Mission considers it important to record that the initial allegation was incorrect and this appears now to be accepted as such by the Israeli.

592. The Mission concludes that the Israeli commanders knew of the location of the UNRWA premises and indeed of the layout of the compound in terms of the most vulnerable areas and especially the fuel depot before the shelling took place around 8 a.m.

593. Even if the Israeli Government's position regarding the position of Palestinian armed groups is taken at face value, the Mission concludes that, given the evident threat of substantial damage to several hundred civilian lives and to civilian property in using white phosphorous in that particular line of fire, the advantage gained from using white phosphorous to screen Israeli armed forces' tanks from anti-tank fire from armed opposition groups could not be deemed proportionate.

594. Having been fully alerted not to the risks but to the actual consequences of the course of action, Israeli armed forces continued with precisely the same conduct as a result of which further shells hit the compound. Such conduct, in the Mission's view, reflects a reckless disregard for the consequences of the choice of the means adopted in combating the anti-tank fire

³⁷¹ Israel's Prime Minister, Ehud Olmert, told the United Nations Secretary-General that troops shelled the building in response to Hamas gunfire coming from within, but nonetheless said it should not have happened. Israeli troops "were attacked from there and the response was harsh", Olmert said. "It is absolutely true that we were attacked from that place, but the consequences are very sad and we apologize for it", he added. See <http://www.guardian.co.uk/world/2009/jan/15/israel-gaza-offensive-truce-talks>. The same quotation is reported in multiple sources.

³⁷² "The operation in Gaza...", para. 347.

the Israeli authorities claim they were facing. The decision to continue using the same means in the face of such knowledge compounds that recklessness. It deprived the UNRWA staff of the ability to contain the fires that had been caused and led to millions of dollars worth of damage that could have been avoided. It also put in danger some 700 lives, including staff and sheltering civilians.

595. The Mission, therefore, concludes on the basis of the information it received and in the absence of any credible refuting evidence that Israeli armed forces violated the customary international law requirement to take all feasible precautions in the choice of means and method of attack with a view to avoiding and in any event minimizing incidental loss of civilian life, injury to civilians and damage to civilian objects as reflected in article 57 (2) (a) (ii) of Additional Protocol I to the Geneva Conventions.

C. Al-Quds hospital, Tal el-Hawa, Gaza City

596. Al-Quds hospital belongs to the Palestinian Red Crescent Society (PRCS). It consists of three buildings facing west towards the sea and occupying the corner of Jami'at ad-Duwal al-Arabiyah Street and al-Abraj Street in the area of Tal el-Hawa. The building nearest the corner is seven storeys high. Its principal purposes were administrative and cultural rather than medical. It stored a huge quantity of PRCS archives. The middle building contains the accident and emergency treatment area as well as other offices. The building furthest from the corner is the main medical building with operating theatres in the basement. About 200 metres eastwards on al-Abraj Street is the Palestinian Red Crescent ambulance depot. These buildings all suffered significant damage in the course of an Israeli bombardment on 15 January 2009, which included the use of white phosphorous. The attacks endangered the lives of the staff and more than 50 patients in the hospital. There was no warning given for any of the attacks.

597. The Mission met staff from the hospital on six separate occasions, three of them on site visits. Two extended site visits included inspections not only of the hospital premises, but also of the ambulance depot, of the damage done to apartment buildings on that street and of the area opposite the hospital to assess the damage done by fighting in that area. Three long interviews were carried out with one doctor individually, another was carried out with two doctors together and there were two group meetings with four and five doctors, respectively. The Mission also received a considerable body of photographs and digital video footage of the events of the day in question. It furthermore addressed questions to the Government of Israel regarding the use of white phosphorous munitions against al-Quds hospital and the direct military advantage pursued by their use under the circumstances, but received no reply.

598. The doctors with whom the Mission spoke all occupied senior positions but also witnessed the events that occurred throughout that day. The Mission was impressed with their objectivity and the genuine distress several of them showed at being unable to help or protect the sick and wounded who had come to the hospital. Throughout that day many of the staff, including the doctors, took exceptional risks to stop fire spreading, including by removing white phosphorous wedges from near diesel tanks. One doctor in particular showed remarkable courage. He left the hospital to drive an ambulance through artillery shelling as he sought to bring an eight-year-old girl to al-Shifa hospital for treatment which he was no longer able to provide in al-Quds. Having taken the girl there, he drove back to the hospital in the same conditions to continue assisting the efforts to fight the fires.

1. The facts

599. When the Israeli air offensive began on 27 December a government building opposite the al-Quds administrative building on al-Abraj Street was almost totally destroyed. The building had previously served as a criminal detention centre and is still referred to locally by that designation although it had recently been used for other purposes, including customs administration. The same building was reportedly struck on a number of other occasions after 27 December. When the Mission visited in June 2009, the site was completely demolished.

600. Diagonally opposite al-Quds Hospital on Jami'at ad-Duwal al-Arabiyah Street was another building rented to the Government and used primarily for public registry functions. Today only the ground floor of the building remains. Witnesses indicate that the upper floors had been destroyed, probably by artillery fire, around 6 and 7 January.

601. Three senior doctors at the hospital and two residents from al-Abraj Street indicated that at some point between 3 and 6 January several tanks were stationed several hundred metres east of al-Quds hospital, visible from the ambulance depot. Throughout the days of 5, 6, 7 and 8 January there was significant artillery fire on a number of civilian apartment buildings on al-Abraj Street. On 8 January 2009 the seventh-floor apartment of Dr. Jaber Abu al-Naja was struck. His wife and son-in-law were killed immediately as they sat on the balcony of the apartment eating pastries. His wife was cut in half by the explosion and his son-in-law was thrown from the balcony on to the street below. His daughter, Ihsan, was seriously injured and taken to al-Quds hospital for treatment. Dr. Jaber Abu al-Naja is the former Ambassador of the PLO to Senegal and a well-known Fatah politician.³⁷³

602. By 15 January the area immediately to the south of al-Quds hospital (the customs building and the registry building) had been totally or very substantially destroyed. The area to the east on al-Abraj Street had been significantly attacked by artillery fire.

603. By this time a large number of civilians (several hundreds) had also gathered in the hospital buildings seeking safety.

604. During the night of 14 January Israeli armed forces began an extended barrage of artillery fire over the area. It continued into the morning of 15 January. Between 8 and 9 a.m. doctors in the main building were in the principal meeting room when shells landed on either side of the building. They saw white phosphorous wedges burning near a container of diesel and efforts were successfully made to move those away. The initial explosions had blown out the office windows. At about the same time it became apparent that the administrative building on the corner had also been hit. The hospital building next to it has a large timber-built component. The risk of fire spreading was immense and a witness described how hospital staff, including senior doctors, all sought to break, by hand, the wooden bridge way that linked the administrative building to the hospital building to prevent the fire from spreading.

605. Shortly after the initial explosions and fire were observed, a tank shell directly penetrated the rear of the middle hospital building. That part of the building is made of corrugated iron and

³⁷³ Interview with Dr. Jaber Abu al-Naja, 4 July 2009.

the entry point of the shell is easily detectable. The shell then penetrated the inner concrete wall of the hospital where the pharmacy was located. The pharmacy was completely destroyed as a result. An eyewitness described that, through the holes made in the corrugated iron, he observed a tank on a road between two buildings about 400 metres eastwards. Although he could not say whether it was this tank that had struck the hospital directly, it was in a direct line in relation to the entry point of the shell.

606. Throughout the day the hospital was unable to procure the assistance of civil defence forces or other fire-fighting support. As a result, the staff of the hospital were almost entirely consumed with the task of saving the buildings and ensuring the safety of patients.

607. It was not until around 4 p.m. that it was possible to coordinate an evacuation of hospital patients with the assistance of ICRC, which made clear upon arrival that it would be able to carry out this procedure only once. Those not evacuated at this point were relocated to the operating theatres of the hospital.

608. At around 8 p.m. another fire broke out causing serious damage to the main hospital building. As a result of this fire it was decided to carry out a total evacuation of the remaining patients as well as a number of local residents who had sought refuge in the hospital. It was at this stage that one of the senior doctors took an eight-year-old girl who had been struck by a bullet in the jaw and was critically ill to al-Shifa hospital, where she later died. At that point he says he felt that there was very heavy fire in the area and that there appeared to be some attempts to aim directly at or near to the ambulance.

609. Meanwhile, 200 metres to the east in al-Abraj Street the PRCS ambulance depot had also been severely damaged. One of its principal buildings was entirely destroyed. The Mission also saw the remnants of three PRCS ambulances that had been parked at the entrance to the depot. Two had been crushed by tanks but not burned out. The other ambulance showed signs of having been struck directly in the front below the windscreen by a missile of some description and having been burned out.

610. The devastation caused to both the hospital buildings, including the loss of all archives in the administrative building, and the ambulance depot was immense, as was the risk to the safety of the patients.

611. The Mission examined a number of the shells retrieved by the hospital staff and reviewed footage taken at the time as well as still photographs.

2. The Israeli position

612. The Israeli authorities did not specifically mention the incident at al-Quds hospital in the conclusions of their investigations on 22 April 2009.³⁷⁴

³⁷⁴ Annex B addresses some allegations regarding the use of ambulances, but not the attack on the hospital. See <http://dover.idf.il/IDF/English/Press+Releases/09/4/2202.htm>.

613. In its report of July 2009 (para. 173) the Israeli Government quotes part of an article from *Newsweek* magazine:

One of the most notorious incidents during the war was the Jan. 15 shelling of the Palestinian Red Crescent Society buildings in the downtown Tal-al Hawa part of Gaza City, followed by a shell hitting their Al Quds Hospital next door; the subsequent fire forced all 500 patients to be evacuated. Asked if there were any militants firing from the hospital or the Red Crescent buildings, hospital director general Dr. Khalid Judah chose his words carefully. 'I am not able to say if anyone was using the PRCS buildings [the two Palestine Red Crescent Society buildings adjacent to the hospital], but I know for a fact that no one was using the hospital.' In the Tal-al Hawa neighborhood nearby, however, Talal Safadi, an official in the leftist Palestinian People's Party, said that resistance fighters were firing from positions all around the hospital. He shrugged that off, having a bigger beef with Hamas. 'They failed to win the battle.' Or as his fellow PPP official, Walid al Awad, put it: 'It was a mistake to give Israel the excuse to come in.'³⁷⁵

While the Israeli Government does not comment further on the specific attack, it would appear to invoke these comments to justify the strikes on the hospital and surrounding area.

614. The Mission understands that the Israeli Government may consider relying on journalists' reporting as likely to be treated as more impartial than reliance on its own intelligence information. The Mission is nonetheless struck by the lack of any suggestion in Israel's report of July 2009 that there were members of armed groups present in the hospital at the time.

3. Factual findings

615. The Mission finds that on the morning of 15 January the hospital building and the administrative building were struck by a number of shells containing white phosphorous and by at least one high explosive shell. The fires these caused led to panic and chaos among the sick and wounded, necessitated two evacuations in extremely perilous conditions, caused huge financial losses as a result of the damage and put the lives of several hundred civilians including medical staff at very great risk.

616. The Mission also notes that, as a result of the conditions the attack created, the hospital was unable to provide the necessary care for an eight-year-old girl. Despite heroic attempts to save her, she died later in another hospital. The girl had been shot by an Israeli sniper. The Mission finds the Israeli armed forces responsible for her death.

617. On the issue of armed groups being present in the hospital buildings, the Mission does not agree that anything in the extract cited above from *Newsweek* magazine justifies the conclusion that the hospital premises were being used by armed groups. The fact that Dr. Judah spoke with certainty about matters within his knowledge cannot be presumed to mean that he believed other

³⁷⁵ "Hamas and its discontents", 20 January 2009.

parts of the hospital premises were being used by armed groups. That may be journalistic gloss and is tantamount to putting words in the mouth of Dr. Judah. The comments attributed to Mr. Safadi that “resistance fighters were firing from positions all around the hospital” can mean either that people were inside the hospital firing or were in positions outside but near to the hospital. The journalist did not clarify precisely what was meant.

618. The Mission, having carried out over eight hours of interviews with senior and junior staff, and having sought to verify the matter with others, including journalists who were in the area at that time, has concluded that it is unlikely there was any armed presence in any of the hospital buildings at the time of the attack.

619. The Mission finds that no warning was given at any point of an imminent strike and at no time has the Israeli Government suggested such a warning was given.³⁷⁶

620. Reviewing the scene at the time of the strikes on al-Quds hospital, it is important to bear in mind that a great deal of destruction had already occurred and that buildings with an apparent connection to the local government had been attacked and largely destroyed. As such, Israeli tanks had a relatively clear view of the area immediately to the south of the hospital. The Mission also notes that as a result of the attacks on al-Abraj Street by tanks for several days, the scope for resistance, if any, from that particular quarter had been significantly reduced.

621. The Mission is aware of reports that there was significant resistance from Palestinian armed groups in the Tal el-Hawa area on the night of 14 January.³⁷⁷ Information available alleges that on the night of 14 January Israeli troops had entered buildings on al-Abraj Street, used human shields to check if there was any presence of enemy combatants or explosive devices and found none. Reports do not specify the nature, scale or precise location of resistance in Tal el-Hawa. The Mission notes that in the buildings directly opposite al-Quds hospital on Jami’at ad-Duwal al-Arabiyah Street there is very little sign of damage to any of the buildings on that side of the street, and certainly nothing that compares to the damage to the buildings on al-Abraj Street.

622. The Mission takes into account the damage that had already occurred between 27 December and 8 January on al-Abraj and Jami’at ad-Duwal al-Arabiyah Streets, and the lack of apparent damage to the buildings directly opposite the hospital on Jami’at ad-Duwal al-Arabiyah Street. It also takes account of the sighting of at least one tank whose direct line of fire, bearing in mind that it was surrounded by tall buildings on both sides, was the hospital itself. It also notes the credible sightings of Israeli aircraft in the area at various points throughout the day. It further notes the extensive damage to the ambulance depot at the same time as the strikes

³⁷⁶ In its conclusions of its investigations published on 22 April, the Israeli armed forces highlight the fact, in connection with its investigation into allegations of attacks on medical services, that they gave warnings. One related to an ambulance and another to a clinic. There is no mention of al-Quds hospital. See <http://dover.idf.il/IDF/English/Press+Releases/09/4/2202.htm>.

³⁷⁷ The Mission has noted a witness account in relation to Israeli armed forces’ use of human shields on al-Abraj Street on the night of 14 January, thus indicating that there was indeed a very active Israeli presence on the ground. See Al Mezan Center for Human Rights, “Hiding behind civilians: April 2009 update report”, p. 8.

on the hospital occurred and the apparently unexplainable crushing of ambulances parked outside the depot.

623. In the light of all these considerations, the Mission finds that there are reasonable grounds to believe that the hospital and the ambulance depot, as well as the ambulances themselves, were the object of a direct attack by the Israeli armed forces in the area at the time and that the hospital could not be described in any respect at that time as a military objective.

4. Legal findings

624. Article 18 of the Fourth Geneva Convention provides that civilian hospitals may in no circumstances be the object of attack but shall at all times be respected and protected by the parties to the conflict.

625. Article 19 provides that the protection to which civilian hospitals are entitled shall cease “only after due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded.”

626. Even in the unlikely event that there was any armed group present on hospital premises, there is no suggestion even by the Israeli authorities that a warning was given to the hospital of an intention to strike it. As such the Mission finds on the information before it that Israeli armed forces violated articles 18 and 19 of the Fourth Geneva Convention.

627. On considering the information before it, the Mission takes the view that there was intent to strike the hospital, as evidenced in particular by the high explosive artillery shell that penetrated the rear of the hospital and destroyed the pharmacy.

628. Even if it is suggested that there was no intent to directly strike the hospital but that Palestinian armed groups had taken up positions near al-Quds hospital, the Israeli armed forces would still have been bound to ensure that risk of death, injury or damage to the people in the hospital or the hospital itself would not be excessive in relation to the military advantage anticipated in attacking the hospital.

629. Taking into account the weapons used, and in particular the use of white phosphorous in and around a hospital that the Israeli armed forces knew was not only dealing with scores of injured and wounded but also giving shelter to several hundred civilians, the Mission finds, based on all the information available to it, that in directly striking the hospital and the ambulance depot the Israeli armed forces in these circumstances violated article 18 of the Fourth Geneva Convention and violated customary international law in relation to proportionality.

D. Attacks on al-Wafa hospital, 5 and 16 January 2009

630. The Mission interviewed three senior doctors of al-Wafa hospital. One was Dr. Khamis el-Essi, its Director. The two other doctors do not wish to be identified. The Mission has also reviewed information in the public domain in relation to the various alleged attacks on the hospital.

631. Al-Wafa hospital is located at the eastern part of al-Shujaeyah (east Gaza City), very close to the Israel-Gaza eastern border. It was founded in 1996 and provides long-term care to

those suffering from head and spinal injuries. Many patients are elderly. It can accommodate over 50 patients.

632. The hospital consists of three buildings. From south to north these are the administrative building (three floors), the hospital buildings (rooms of patients and surgeries, seven floors) and the building for the elderly (reception and rehabilitation, three floors).

1. The facts

633. The hospital was the object of a significant attack on 16 April 2008. Tanks fired in and around the hospital area, damaging a large number of patient rooms and causing significant destruction of the building for rehabilitative care for the elderly. Hospital staff indicate there was no armed presence inside the hospital at that time but cannot say whether there may have been a presence outside.

634. During the military operations, the hospital was attacked again. Despite media reports that a warning had been given, hospital staff deny that any specific warning was received. Leaflets had been dropped in the area with general indications that support of Hamas would be punished. The hospital had also received a number of telephone warnings with recorded messages but with no specific indication that the hospital itself would be the object of an attack, much less with an indication of when that would occur. One doctor indicated that the hospital had received around four such messages each day since 27 December 2008.

635. On 5 January, the hospital was attacked with intensive artillery fire, including white phosphorous shells. Senior doctors indicate that generic recorded telephone warnings were actually received during the shelling. The latest warning the hospital received on 5 January was at 4.30 p.m. Following this, at around 12.30-1 a.m. on 6 January, white phosphorous shells landed in the area surrounding the administrative building and on its roof.

636. The white phosphorous caused damage to the administrative building only, destroying the roof.

637. All three witnesses of the senior medical staff confirm absolutely that there was no presence of any armed resistance inside the hospital. They are not able to confirm or deny the presence of such elements outside of the hospital.

638. The hospital was attacked again with artillery fire on 16 January 2009 at 2 a.m. No specific warning was given. Again a general recorded message had been received saying that people located in the border areas should leave and threatening punitive measures to those who stayed. Again doctors confirm there was no armed presence inside the hospital but cannot say what was occurring outside it.

639. The attack damaged the building for elderly patients on the ground and third floors as well as the roof. It damaged the third and fourth floors of the central hospital building.

640. Doctors estimate that the tanks were as close as 70 metres from the hospital.

641. The damage to the hospital (as a result of the two attacks) is estimated at US\$ 550,000.

642. As to why the hospital was the subject of these attacks, doctors speculate that its location close to the border is one possible reason. Another relates to the rumour that Israel believes that Muhammad al-Deif, a well-known Hamas militant, is treated inside the hospital.

643. According to one witness in the hospital, Israeli armed forces tried to assassinate Mr. al-Deif on 12 July 2006. Although he survived the assassination attempt, he was badly hurt and, according to some rumours, his legs were amputated and he became blind. It seems that Israel believes that he receives some rehabilitation and medical treatment at al-Wafa hospital.

644. On 5 February 2003, for instance, Israeli snipers shot and killed two staff nurses who were on duty inside the hospital (Abd al-Karim Lubad and Omar Hassan, both aged 21).³⁷⁸

2. Factual findings

645. The Mission notes that the three witnesses interviewed are senior doctors in the hospital. The Mission found them to be credible and reliable. They clarified a number of apparently inaccurate statements that have appeared in press reports, especially regarding the nature of the warnings given.

646. The Mission considers that the warnings given cannot be considered as a warning within the meaning of article 19 of the Fourth Geneva Convention. It was not specific and no indication was given about when the attack would take place or how much time there was to evacuate the hospital.

647. As to the reasons for the multiple attacks on the hospital in 2003, 2008 and 2009, the Mission is not in a position to comment.

3. Legal findings

648. The Mission finds that the choice of deploying white phosphorous shells in and around such a building, where patients receiving long-term care and suffering from particularly serious injuries were especially vulnerable, was not acceptable in the circumstances. The Mission is particularly concerned about the attack on the hospital on 16 January from such close proximity. Even if there was some degree of armed resistance in the area (which the Mission cannot confirm), commanders in deploying such weaponry must take into account all the facts and circumstances.

649. The Mission considers the use of white phosphorous in such an area as reckless and not justifiable in relation to any military advantage sought in the particular circumstances.

650. The Mission considers that the general protection given to hospitals indicates the need for particular consideration to be given to the use of such especially hazardous materials. The failure to provide sufficient warning indicates in the Mission's view a wilful failure to consider seriously the consequences of using such weapons in those circumstances.

³⁷⁸ See <http://www.hrea.org/lists/hr-health-professionals/markup/msg00099.html>.

651. The Mission notes that the case of al-Wafa hospital demonstrates the complete ineffectiveness of certain kinds of warnings. The information the Mission has received points towards a kind of repetition and routine warning system taking no account at all of the realities of the hospital.

652. As such the Mission considers that, from all the information available to it, the Israeli armed forces violated articles 18 and 19 of the Fourth Geneva Convention as well as customary international law as reflected in Additional Protocol I, articles 57 (2) (b) and (c).

X. INDISCRIMINATE ATTACKS BY ISRAELI ARMED FORCES RESULTING IN THE LOSS OF LIFE AND INJURY TO CIVILIANS

A. The shelling in al-Fakhura Street by Israeli armed forces

653. In the afternoon of 6 January at least four mortar bombs fired by Israeli armed forces exploded near the al-Fakhura junction in the al-Fakhura area of the Jabaliyah camp in northern Gaza.³⁷⁹

654. The Mission interviewed Mr. Muhammed Fouad Abu Askar on three occasions. His brother and two sons were killed in the attack.³⁸⁰ It also met surviving members of the al-Deeb family on two occasions.³⁸¹ The Mission interviewed four men who had lost family members in the attack, the Director of the UNRWA premises that were being used as a shelter for civilians and a number of journalists who covered the story. In addition, the Mission has seen a number of statements provided to organizations in Gaza in the form of affidavits. The Mission has also considered to the degree possible the information available from Israeli sources on the circumstances of the strike.

B. The facts surrounding the Israeli armed forces' mortar shelling

655. On 5 January 2009 UNRWA had opened the elementary school on al-Fakhura Street to provide shelter to civilians fleeing the areas where the Israeli armed forces had entered.

656. The Mission spoke on two occasions with the Director of the shelter about its management. He said that about 90 per cent of those in the shelter had come from outside of Jabaliyah camp, largely from the al-Atatra area. He explained that the shelter was guarded by

³⁷⁹ Interviewees' statements vary, asserting between four and six shells landed. The Mission saw for itself what it assessed to be the effects of mortars that landed. The crater in the orchard beside the al-Deeb house may have been caused by a mortar, but given the nature of the surroundings it is less easy to tell in terms of shrapnel patterns. The Mission does not reject the possibility that more landed but was not able to inspect those sites or to come to a firm view confirming the additional shells.

³⁸⁰ Mr. Abu Askar is a Hamas member. He also provided testimony at the public hearings in Gaza. He was detained on the charge of being a member of Hamas in 1992. He is the Director-General for Religious Affairs (a voluntary position) and is on the Dialogue Committee, organizing the pilgrimage to Mecca (Saudi Arabia). He is in charge of the Hamas Follow-Up Committee in North Gaza related to the settlement of disputes between Hamas and other groups in the Occupied Palestinian Territory. He has a master's degree in education and is currently pursuing a PhD in the Syrian Arab Republic. He denies any involvement in armed militant activities.

³⁸¹ Two of the members of the family also presented their testimony at the public hearings in Gaza.

security staff at its entry points and that all people coming in were registered by name and searched to ensure no weapons were being taken into the premises.

657. UNRWA has confirmed to the Mission that the Israeli armed forces were fully aware that the school was being used as a shelter from 5 January 2005. UNRWA materials indicate that there were 1,368 people in the shelter at the time.

658. About 16 hours prior to the shelling on the afternoon of 6 January 2009, Israeli armed forces had already carried out at least one strike, destroying the house of Mr. Abu Askar. At around 1.45 a.m. on 6 January 2009, Mr. Abu Askar received a personal telephone call from the Israeli armed forces advising him that he should evacuate the house and everyone in it because it was going to be destroyed by an air strike. The building housed not only his immediate family but a large number of his extended family, about 40 in all. Mr. Abu Askar responded quickly, evacuating not only his own extended family but also advising neighbours of the imminent strike. The survivors of the al-Deeb family confirm they were advised at this time by Mr. Abu Askar of the call he had received.

659. The house was struck by a missile from an F-16 according to Mr. Abu Askar about seven minutes after the call was received. Several hours later, at around 6 a.m., he returned to the site of the house with members of his family hoping to retrieve some items of furniture. There he noticed that a number of other houses in the area also appeared to have been hit at some time in the intervening four hours. In the course of that day Mr. Abu Askar and members of his family took various steps to prepare the move of the family to rented accommodation nearby.

660. Mr. Abu Askar was in the street at around 4 p.m., when several mortars landed. He believes that there were about 150 people in the street at the time. The Director of the shelter confirmed that the street outside the school was generally busy. It had become busier than usual due to the large influx of people into the school looking for shelter. Some relatives were coming to the school to visit those who had recently arrived and new people were arriving to seek shelter, including with belongings on donkey carts.

661. Witnesses indicate that all of the explosions were over within around two minutes. One shell landed directly in the courtyard outside the al-Deeb house, where most of the family was gathered. Surviving family members interviewed by the Mission explained that nine members of the family were killed immediately. Ziyad Samir al-Deeb lost both legs as a result of the blast.³⁸² Surviving family members and neighbours carried the dead and injured one after another to hospital. Ambulances came, but most casualties were transported in private cars. Alaa Deeb, a daughter of Mo'in Deeb, was taken to al-Shifa hospital and thereafter to Egypt, where she died of her injuries. In total, 11 members of the family died, including four women and four girls.

662. Apart from the shell that landed in the al-Deeb courtyard, three other shells landed in the street outside. The total spread of the four mortars was a little over 100 metres. The Mission cannot specify in which order the mortars fell, but proceeding southwards from the al-Deeb house along al-Fakhura Street, the Mission saw the impact of another mortar, 45 metres away, a third was seen a further 50 metres south and a fourth a further 10 metres south.

³⁸² Ziyad al-Deeb testified before the Mission at the public hearings in Gaza along with his uncle.

663. The three other shells that the Mission could identify as having landed at different places on al-Fakhura Street killed at least 24 people. The witnesses estimate that up to another 40 were injured by the blasts.³⁸³ The Mission has not been able to verify those figures, but having inspected the site and viewed the footage, it does not consider these numbers to be exaggerated.

664. Among those killed immediately were two sons of Mr. Abu Askar, Imad, aged 13, and Khaled Abu Askar, aged 19. Mr. Abu Askar's brother Arafat was also killed.

665. The Director of the UNRWA school shelter confirmed to the Mission that the blasts had damaged the part of the school building facing onto al-Fakhura Street. Up to nine people were injured. One boy of 16, who was sheltering in the school but was in the street at the time, was killed. No one inside the school was killed. He confirmed that no shell had directly hit the United Nations premises either inside or outside.

666. Witnesses have described the scene of chaos and carnage caused by the bombs. They indicate that people were ferried to hospitals in private cars because of the difficulties in reaching ambulance services at the time, although some ambulances did arrive.

C. The Israeli position

667. Contradictory accounts emerge from official Israeli statements. The initial position accepted that Israeli forces had struck inside the UNRWA school, claiming to be in response to Hamas fire. A later response accepted that Hamas had not been in the UNRWA school but had allegedly fired from 80 metres away from the school. Finally, the Israeli Government claimed that in fact Hamas operatives were launching mortars at Israeli armed forces for around one hour, firing every few minutes until the Israeli armed forces identified them and returned fire, killing a number of them.

668. On 6 January the Israeli armed forces posted the following statement on their website:

An initial inquiry by forces on operating in the area of the incident indicates that a number of mortar shells were fired at IDF forces from within the Jebaliya school. In response to the incoming enemy fire, the forces returned mortar fire to the source.

This is not the first time that Hamas has fired mortars and rockets from schools, in such a way deliberately using civilians as human shields in their acts of terror against Israel. This was already proven several months ago by footage from an unmanned plane showing rockets and mortars being fired from the yard of an UNRWA school.

Again, we emphasize that this announcement is based on an initial inquiry.

After an investigation that took place over the past hour it has been found that among the dead at the Jebaliya school were Hamas terror operatives and a mortar

³⁸³ A number of reports put the total figure of deaths at 42 or 43, including the al-Deeb family deaths. The Mission has not been able to contact all the relatives of those reported to have died.

battery squad who were firing on IDF forces in the area. Hamas operatives Immad Abu Iskar and Hassan Abu Iskar were among terrorists identified killed.³⁸⁴

669. Further statements from spokespersons for the Prime Minister,³⁸⁵ the Foreign Ministry and the Israeli armed forces all adhered to the position set out in the statement cited above. In two interviews the Prime Minister's spokesman, Mr. Regev, emphasized that he considered Hamas were mounting a cover-up in relation to the fact the senior operatives had been killed by the Israeli armed forces in its strike and in particular that two persons, Imad and Hassan Abu Askar, were "well-known members of the Hamas military machine – part of the rocket network".³⁸⁶

670. The position set out on 6 January was repeated again in comments to the press on 12 January by an Israeli armed forces' spokesman.³⁸⁷

671. On 15 and 19 February 2009 *The Jerusalem Post* published reports quoting Colonel Moshe Levi of CLA. He indicated that the stories of 40 or more dying as a result of the attack were the result of distortions and that in fact the Israeli armed forces had killed 12 people, including nine Hamas operatives and three non-combatants. The report of 19 February lists 7 of the 12 he said were killed. He also pointed out that the Israeli surveillance footage showed only "few stretchers were brought in to evacuate people".

672. On 22 April 2009 the Israeli armed forces published the results of their preliminary investigations, stating a completely different position from that previously expressed:

³⁸⁴ http://www.mfa.gov.il/MFA/Government/Communiques/2009/Initial_inquiry_school_incident_6-Jan-2009.htm.

³⁸⁵ On 7 January in a television interview on the British Broadcasting Corporation's programme *Newsnight*, Mr. Regev indicated that he believed that the Israeli armed forces had attacked the school because they had come under fire, that the school was occupied by Hamas operatives and that those Hamas operatives had committed a war crime by using the premises for the purpose of launching mortars. See <http://www.youtube.com/watch?gl=GB&hl=en-GB&v=9wv0giW1elo&feature=Playlist&p=9277810AA376DF8D&playnext=1&index=5>.

In another interview he indicated the Israeli armed forces' patrol returned fire having received mortar fire, that he assumed the school had been taken by force by Hamas "with guns" and held the people in the school as "hostages". See <https://www.csionline.org/resources/news/9/462-strike-on-gaza-school-kills-40?tmpl=component&print=1&page>.

On the same day Major Avital Leibovich, spokeswoman of the Israeli armed forces, in an interview with Channel 4 news said that Hamas had fired from "the vicinity of the school" but later asserted that the two Hamas militants were inside the school firing at the Israeli armed forces. See <http://link.brightcove.com/services/player/bcpid1184614595?bctid=6539745001>

On the same day Israeli armed forces' spokesman Captain Benjamin Rutland made a presentation posted on YouTube. He indicated that it had transpired later that the mortar fire had come from within a United Nations school, that this was a crime on the part of Hamas and that civilians had been killed. He noted, however, that Hamas terror operatives had been killed including the well-known Abu Askar brothers. Another Israeli armed forces spokesperson confirmed on 12 January that it was adhering to the same positions as had been expressed on 6 and 7 January. See <http://dover.idf.il/IDF/English/News/today/09/4/2201.htm>.

³⁸⁶ See <https://www.csionline.org/resources/news/9/462-strike-on-gaza-school-kills-40?tmpl=component&print=1&page>

³⁸⁷ The statement of Captain Ishai David in *The Jerusalem Post* on 12 January 2009.

Regarding the UNRWA school in Jabaliya, the Fahoura school, the investigation concluded that the IDF used minimal and proportionate retaliatory fire, using the most precise weapons available to them. Hamas made this necessary, as it fired mortar shells at Israeli forces 80 metres from the school. Additionally, it was concluded that all of the shells fired by IDF forces landed outside of the school grounds.³⁸⁸

673. In July 2009 the Israeli Government stated:

Soon after the source of fire was detected, a scouting unit was dispatched to confirm the location. Approximately 50 minutes after the mortar attack had begun, two independent sources cross-verified the location of the mortars. Only subsequent to this, and after verification of a safety margin of at least 50 metres between the target (i.e. the identified source of the mortar fire) and the UNRWA school, did the force respond to the ongoing barrage, by using the most accurate weapon available to it – 120-mm mortars.³⁸⁹

D. Other reports

674. The Mission carried out nine interviews with people who were present in al-Fakhura Street, in the al-Deeb yard or in the UNRWA school. No witness stated that he had heard any firing prior to the Israeli armed forces' mortars landing. On the other hand, the Mission is aware of at least two reports that indicate local residents had heard such fire in the area.³⁹⁰

675. The Mission notes that the statement of the Israeli armed forces on 22 April did not indicate where the Hamas fire came from, only stating it was 80 metres away. The Mission finds it difficult to understand how the Israeli armed forces could have come to this view without having the information at the same time that Hamas operatives had been firing mortars for almost one hour. It regards these new allegations as lacking credibility. However, the Mission accepts, for the purposes of this report, that some firing may have occurred that gave rise to the Israeli armed forces' response.

676. It seems clear to the Mission that Israel's Government developed a position justifying the striking of an UNRWA school as a result of the immediate outcry generated by initial erroneous reports that the school had been hit. That effort included a number of statements, in particular those by Mr. Regev and Major Leibovich, which turned out to be erroneous.

677. The Mission notes the comment of Colonel Moshe Levi in *The Jerusalem Post* on 15 February 2009 casting doubt on the numbers of dead noting that Israeli surveillance saw only

³⁸⁸ <http://dover.idf.il/IDF/English/News/today/09/4/2201.htm>.

³⁸⁹ "The operation in Gaza...", para. 338.

³⁹⁰ One report comes from the Associated Press, whose sources insisted on anonymity. The other is by a correspondent of the British Channel 4 News programme who reports that locals told him "militants had been firing rockets" at the Israeli armed forces and were running down the street to get away. See Jonathan Miller, "Why UN 'reversal' over Gaza school should be treated with caution". Channel 4, 5 February 2009, available at: http://www.channel4.com/news/articles/world/middle_east/why+un+reversal+over+gaza+school+should+be+treated+with+caution/2924657.

a few stretchers being used to lift the dead and injured. If Israel had that capacity of surveillance in the immediate aftermath of the shelling, it must have been able to see that the shells had hit on the street outside the school and not inside the school. Furthermore, if such surveillance was recorded, in the face of serious allegations levelled against the Israeli armed forces by several sources after the military operation in Gaza, the Government could have made this footage public in order to establish the truth of its claims regarding this incident.

678. Finally, the Mission comes to the repeated assertion of the Israeli authorities as to the identities of those killed in the strikes. The most detailed attempt to name these come in Col. Levi's statement of the 12 dead, including nine militants and three non-combatants. On 19 February *The Jerusalem Post* published seven of the names given to them by CLA. The Mission notes that CLA did not provide any information to explain where the information on the dead came from. None of the seven names corresponds with any the Mission has so far established died in the attack.

679. The position assumed by Colonel Levi of CLA is problematic in the light of the relatively uncomplicated case of the al-Deeb family, of whom nine members died immediately and two died later. Four of these were women and four were children. Given these figures alone, and the relative ease with which the victims could be identified, the Mission considers the CLA assertions as to the total numbers and identities of those killed in the Israeli armed forces' mortar strikes to be unreliable. Even if the Israeli authorities were to be correct in saying that nine combatants were killed, they are, in the considered view of the Mission, incorrect in stating that only three non-combatants were killed.

680. A further assertion made several times by Israeli spokespersons on 6 and 7 January and confirmed again on 12 January was that the strikes had not only managed to hit the militant rocket launchers but had also killed two senior Hamas militants, namely Imad Abu Askar and Hassan Abu Askar.³⁹¹ Again, for the most part these early assertions indicated that both had been killed in the UNRWA school. It is noticeable that the Israeli armed forces' summary of their own preliminary investigations does not repeat this claim.

681. What is now clear is that, if any Hamas operatives were killed by the Israeli strike, they were not killed in the school premises. It is difficult for the Mission to understand how the Israeli authorities could establish with such certainty within a matter of hours the identities of two of the Hamas operatives it had killed but could not establish within a week that the alleged firing had not come from the school and that the Israeli armed forces had not hit the school.

682. The Mission is satisfied that three Abu Askar family members were killed: Imad, aged 13, his brother Khaled, aged 19, and their uncle, Arafat, aged 33. Mr. Mark Regev indicated that Imad Abu Askar was a well-known member of Hamas's militant operation and of some significance in the rocket-launching operations. Major Leibovich and Captain Rutland also named Imad as one of the two operatives killed.

³⁹¹ In her interview with Channel 4 News, Major Leibovich in fact appears to say "Amr Abu Askar" after some hesitation but in the light of the other statements the Mission considers this to have been an error on her part and that in all likelihood she intended to say "Imad".

683. The Mission does not deny the possibility of children being recruited by Palestinian armed groups. However, in the case of Imad Abu Askar, the Mission is satisfied that he was not a Hamas operative. Apart from his father's vehement and, in the Mission's view, credible rejection of any such claim, two other factors appear relevant. Firstly, since it has become clear that Imad was a 13-year-old boy it is noticeable that Israel has not commented further on the allegation of his alleged Hamas activity in general or the allegation in particular that on the day in question he had launched mortars at Israel.

684. Secondly, the Israeli armed forces directly called Mr. Abu Askar early in the morning of 6 January notifying him that his house would be attacked imminently. If Imad Abu Askar was as notorious and important as alleged, despite his young age, the Mission presumes that the Israeli authorities would have known where he lived and, in particular, that he lived in the very house they were about to destroy. It is extremely doubtful that the Israeli armed forces, having identified the house where alleged Hamas militants of some significance lived, would warn them so that they may escape and then bomb the house.

685. There is no indication that anyone of the name of Hassan Abu Askar was killed in the attacks as far as the Mission can determine. The Mission notes that the two Hamas operatives Israeli reports refer to were at least on one occasion referred to as brothers. Mr. Abu Askar confirms that there is no one of such a name in his family.

686. It would appear that shortly after the attack the Israeli armed forces received some information that two Abu Askar brothers had been killed. That much is indeed true. However, the use made of that information appears to the Mission to have been knowingly distorted. The brothers were Imad and Khaled, not Imad and Hassan as asserted. One was a 13-year-old boy, the other was a recently married 19-year-old. The certainty and specificity with which the Israeli authorities spoke at the time make it very difficult for them to suggest now that they had simply mixed up the names.

E. Factual findings

687. The facts gathered by the Mission indicate that on 6 January 2006 at around 1.45 a.m. the Israeli forces called Mr. Abu Askar's house, alerted him to the imminent strike on his house and proceeded to destroy it with an aerial strike about seven minutes later. As a result of the warning, Mr. Abu Askar was able to save himself and his family. The Mission finds that the Israeli forces did not seek to kill Mr. Abu Askar or the members of his family with this strike.

688. The Mission also finds that at around 4 p.m. Israeli forces launched at least four mortar shells. One landed in the al-Deeb courtyard, killing nine people immediately and two later on.

689. Three other shells landed on al-Fakhura Street, which was busy at the time, killing at least a further 24 people and injuring as many as 40.

690. The Mission notes that the attack may have been in response to a mortar attack from an armed Palestinian group but considers the credibility of Israel's position damaged by the series of inconsistencies and factual inaccuracies.

F. Legal findings

691. Elements of article 50 of Additional Protocol I reflect customary international law and provide the following:

2. The civilian population comprises all persons who are civilians.
3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

692. Article 57 is relevant in relation to the following provisions:

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
2. With respect to attacks, the following precautions shall be taken:
 - (a) Those who plan or decide upon an attack shall:
 - (i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
 - (ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
 - (iii) Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
 - (b) An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
 - (c) Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

693. The Mission considers there are two key issues to be considered in the present case: the issue of proportionality in relation to the military advantage to be gained and the choice of weapons used.

694. A detailed discussion of the difficulties of assessing military advantage is presented in the analysis of the Committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia in 1998.³⁹² According to that Committee, the following are some of the relevant questions to be asked:

- (a) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants and or the damage to civilian objects?
- (b) What do you include or exclude in totalling your sums?
- (c) What is the standard of measurement in time or space? And
- (d) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?

695. The Committee reflected further:

The answers to these questions are not simple. It may be necessary to resolve them on a case-by-case basis, and the answers may differ depending on the background and values of the decision maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to non-combatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases. It is suggested that the determination of relative values must be that of the "reasonable military commander". Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to non-combatants or the damage to civilian objects was clearly disproportionate to the military advantage gained.

696. Accepting that these views are helpful to inform the present discussion, the Mission finds the following:

- (a) The military advantage to be gained was to stop the alleged firing of mortars that posed a risk to the lives of Israeli armed forces;
- (b) Even if there were people firing mortars near al-Fakhura Street, the calculation of the military advantage had to be assessed bearing in mind the chances of success in killing the targets as against the risk of firing into a street full of civilians and very near a shelter with 1,368 civilians and of which the Israeli authorities had been informed.

697. The Mission recognizes that for all armies proportionality decisions will present very genuine dilemmas in certain cases. The Mission does not consider this to be such a case.

³⁹² "Final report to the Prosecutor...", paras. 47-50.

698. The Mission does not say that the Israeli armed forces had to accept the risk to themselves at all cost, but in addressing that risk it appears to the Mission that they had ample opportunity to make a choice of weapons that would have significantly limited the risk to civilians in the area. According to the position the Government has itself taken, Israeli forces had a full 50 minutes to respond to this threat – or at least they took a full 50 minutes to respond to it. Given the mobilization speeds of helicopters and fighter jets in the context of the military operations in Gaza, the Mission finds it difficult to believe that mortars were the most accurate weapons available at the time. The time in question is almost 1 hour. The decision is difficult to justify.

699. The choice of weapon – mortars – appears to have been a reckless one. Mortars are area weapons. They kill or maim whoever is within the impact zone after detonation and they are incapable of distinguishing between combatants and civilians. A decision to deploy them in a location filled with civilians is a decision that a commander knows will result in the death and injuries of some of those civilians.

700. Even if the version of events presented now by Israel is to be believed, the Mission does not consider that the choice of deploying mortar weapons in a busy street with around 150 civilians in it (not to mention those within the school) can be justified. The Mission does not consider that in these circumstances it was a choice that any reasonable commander would have made.

701. From the facts available to it, the Mission believes that there has been a violation of:

- Additional Protocol I, articles 57 (2) (a) (ii) and (iii) as set out above;
- The inherent right to life of the Palestinian civilians killed in the above incidents by depriving them arbitrarily of their life in violation of article 6 of the International Covenant on Civil and Political Rights.

702. The Mission views as being unreliable the versions given by the Israeli authorities. The confusion as to what was hit, the erroneous allegations of who was specifically hit and where the armed groups were firing from, the indication that Israeli surveillance watched the scene but nonetheless could not detect where the strikes occurred, all combine to give the impression of either profound confusion or obfuscation.

703. Whatever the truth, the Mission is of the view that the deployment of at least four mortar shells to attempt to kill a small number of specified individuals in a setting where large numbers of civilians were going about their daily business and 1,368 people were sheltering nearby cannot meet the test of what a reasonable commander would have determined to be an acceptable loss of civilian life for the military advantage sought.

XI. DELIBERATE ATTACKS AGAINST THE CIVILIAN POPULATION

704. According to the Israeli Government, the Israeli armed forces' rules of engagement for the military operation in Gaza emphasized the principle of distinction as one of four "guiding principles that applied in an integrated and cumulative manner: military necessity, distinction, proportionality and humanity". It defines the principle of distinction in the following terms: "Strikes shall be directed against military objectives and combatants only. It is absolutely

prohibited to intentionally strike civilians or civilian objects (in contrast to incidental proportional harm).”³⁹³

705. The Mission investigated 11 incidents in which serious allegations of direct attacks with lethal outcome were made against civilians. There appears to have been no justifiable military objective pursued in any of them. The first two incidents concern alleged attacks by Israeli armed forces against houses in the al-Samouni neighbourhood of Gaza during the initial phase of the ground invasion. The following group of seven incidents concern the alleged shooting of civilians who were trying to leave their homes to walk to a safer place, waving white flags and, in some of the cases, following an injunction from the Israeli armed forces to do so. In the last of these seven cases, a house was allegedly shelled with white phosphorous, killing five and injuring others. Two further members of the family were allegedly shot by Israeli troops as they tried to evacuate the wounded to a hospital. In the following incident, a mosque was targeted during the early evening prayer, resulting in the death of 15. In many of the incidents, the Israeli armed forces allegedly obstructed emergency medical help to the wounded. A further incident concerns the bombing of a family house, killing 22 family members. In the last of the incidents described, a crowd of family and neighbours at a condolence tent was attacked with flechettes.

A. Attacks on the houses of Ateya al-Samouni and Wa’el al-Samouni in Zeytoun, resulting in the death of 23 members of the al-Samouni family

706. To investigate the attacks on the houses of Ateya and Wa’el al-Samouni, which killed 23 members of the extended al-Samouni family, the Mission visited the site of the incidents.³⁹⁴ It interviewed five members of the al-Samouni family and several of their neighbours on site.³⁹⁵ Two members of the extended al-Samouni family, who were eyewitnesses to the incident, Messrs. Wa’el and Saleh al-Samouni, testified at the public hearing in Gaza. The Mission also interviewed PRCS ambulance drivers who went to the area on 4, 7 and 18 January 2009, and obtained copies of PRCS records. The Mission finally reviewed material on this incident submitted to it by TAWTHEQ as well as by NGOs.

707. The so-called al-Samouni area is part of Zeytoun, south of Gaza City, bordered to the east by al-Sekka Street, which in that part of Gaza runs parallel and very close to Salah ad-Din Street. It is inhabited by members of the extended al-Samouni family, which gives its name to the area, as well as by other families, such as the Arafats and the Hajjis. Al-Samouni area is more rural than urban, houses used to stand next to small olive and fig groves, chicken coops and other small plots of agricultural land. A small mosque stood in the centre of the neighbourhood. These no longer existed at the time of the Mission’s visit in June 2009. The Mission saw very few

³⁹³ “The operation in Gaza...”, para. 222.

³⁹⁴ Graffiti left by Israeli soldiers in the house of Talal al-Samouni, which were photographed by the Mission, included (a) in Hebrew, under the Star of David: “The Jewish people are alive” and, above a capital “T” [referring to the army (*Tsahal*)], “This [the letter T] was written with blood”; (b) on a drawing of a grave, in English and Arabic, “Arabs 1948-2008”; and (c) in English: “You can run but you can not hide”, “Die you all”, “1 is down, 999,999 to go”, “Arabs need to die” and “Make war not peace”.

³⁹⁵ Testimony to the Mission by Saleh al-Samouni, Talal al-Samouni, Wa’el Faris al-Samouni, Muhammad Asaad al-Samouni, Ms. Massouda Sobhia al-Samouni, Mr. Faraj Ata al-Samouni, Mrs. Abir Muhammad Hajji and Mr. Fawzi Arafat, 3 June 2009.

buildings left and a few tents standing amidst the rubble of collapsed houses and bulldozed land.³⁹⁶

708. The Israeli ground offensive from the east reached al-Samouni neighbourhood around 4 a.m. on 4 January 2009. In addition to the ground forces moving in from the east, there were, in all likelihood, heliborne³⁹⁷ troops that landed on the roofs of several houses in the area. Residents told the Mission that there was shooting in the neighbourhood in the night of 3 to 4 January and again the following night, but denied having seen any Palestinian fighters.

1. The killing of Ateya al-Samouni and his son Ahmad

709. During the morning of 4 January 2009, Israeli soldiers entered many of the houses in al-Samouni area. One of the first, around 5 a.m., was the house of Ateya Helmi al-Samouni, a 45-year-old man. Faraj, his 22-year-old son, had already met Israeli soldiers some minutes earlier as he stepped outside the house to warn his neighbours that their roof was burning. The soldiers entered Ateya al-Samouni's house by force, throwing some explosive device, possibly a grenade. In the midst of the smoke, fire and loud noise, Ateya al-Samouni stepped forward, his arms raised, and declared that he was the owner of the house. The soldiers shot him while he was still holding his ID and an Israeli driving licence in his hands. The soldiers then opened gunfire inside the room in which all the approximately 20 family members were gathered. Several were injured, Ahmad, a boy of four, particularly seriously. Soldiers with night vision equipment entered the room and closely inspected each of those present. The soldiers then moved to the next room and set fire to it. The smoke from that room soon started to suffocate the family. A witness speaking to the Mission recalled seeing "white stuff" coming out of the mouth of his 17-month-old nephew and helping him to breathe.

710. At about 6.30 a.m. the soldiers ordered the family to leave the house. They had to leave Ateya's body behind but were carrying Ahmad, who was still breathing. The family tried to enter the house of an uncle next door, but were not allowed to do so by the soldiers. The soldiers told them to take the road and leave the area, but a few metres further a different group of soldiers stopped them and ordered the men to undress completely. Faraj al-Samouni, who was carrying the severely injured Ahmad, pleaded with them to be allowed to take the injured to Gaza. The soldiers allegedly replied using abusive language. They also said "You are bad Arabs". "You go to Nitzarim".

711. Faraj al-Samouni, his mother and others entered the house of an uncle in the neighbourhood. From there, they called PRCS. As described below, at around 4 p.m. that day a PRCS ambulance managed to come in the vicinity of the house where Ahmad was lying wounded, but was prevented by the Israeli armed forces from rescuing him. Ahmad died at

³⁹⁶ The UNOSAT report (p. 21) counts "114 ... destroyed or severely damaged buildings, ... 27 damaged greenhouse complexes, and 17 impact craters along roads or in cultivated fields" in the area of al-Samouni Street. A soldier stationed in Zeytoun during the military operations recalled that he observed through his binoculars "increasing devastation. Houses that disappear with time, farm land ploughed over time." (*Soldiers' testimonies...*, testimony 37, p. 82).

³⁹⁷ One witness told the Mission that on 5 January 2009, walking on Salah ad-Din Street towards Gaza, he saw by the roadside parachutes Israeli troops had used to land in the area.

around 2 a.m. during the night of 4 to 5 January.³⁹⁸ The following morning those present in the house, about 45 persons, decided to leave. They made themselves white flags and walked in the direction of Salah ad-Din Street. A group of soldiers on the street told them to go back to the house, but the witness said that they walked on in the direction of Gaza. The soldiers shot at their feet, without injuring anyone, however. Two kilometres further north on Salah ad-Din Street, they found ambulances which took the injured to al-Shifa hospital in Gaza.

2. The attack on the house of Wa'el al-Samouni

712. In other cases, the entry of soldiers was less violent than in Ateya al-Samouni's home. In one instance, the soldiers landed on the roof and descended the stairs to the ground floor, separated men from women, searched and handcuffed the men.³⁹⁹ In another case they broke into a house by knocking a hole in the wall with a sledgehammer.⁴⁰⁰ At the house of Saleh al-Samouni, the Israeli soldiers knocked on the door and ordered those inside to open it. All the persons inside the house stepped out one by one and Saleh's father identified each of the family members in Hebrew for the soldiers. According to Saleh al-Samouni, they asked to be allowed to go to Gaza City, but the soldiers refused and instead ordered them to go to Wa'el al-Samouni's house across the street.

713. The Israeli soldiers also ordered those in other houses to move to Wa'el al-Samouni's house. As a result, around 100 members of the extended al-Samouni family, the majority women and children, were assembled in that house by noon on 4 January. There was hardly any water and no milk for the babies. Around 5 p.m. on 4 January, one of the women went outside to fetch firewood. There was some flour in the house and she made bread, one piece for each of those present.

714. In the morning of 5 January 2009, around 6.30 – 7 a.m., Wa'el al-Samouni, Saleh al-Samouni, Hamdi Maher al-Samouni, Muhammad Ibrahim al-Samouni and Iyad al-Samouni, stepped outside the house to collect firewood. Rashad Helmi al-Samouni remained standing next to the door of the house. Saleh al-Samouni has pointed out to the Mission that from where the Israeli soldiers were positioned on the roofs of the houses they could see the men clearly. Suddenly, a projectile struck next to the five men, close to the door of Wa'el's house and killed Muhammad Ibrahim al-Samouni and, probably, Hamdi Maher al-Samouni.⁴⁰¹ The other men managed to retreat to the house. Within about five minutes, two or three more projectiles had struck the house directly. Saleh and Wa'el al-Samouni stated at the public hearing that these were missiles launched from Apache helicopters. The Mission has not been able to determine the type of munition used.

³⁹⁸ Faraj al-Samouni also told the Mission that, at the time of Ahmad's death, another relative gave birth to a baby in the same house. The following day the mother, who had to be transported in a wheelchair because she had broken her leg doing household chores, and the baby were among the group that managed to evacuate to Gaza City. Mother and child are in good health.

³⁹⁹ Testimony of Muhammad Asaad al-Samouni, 3 June 2009.

⁴⁰⁰ Testimony of Saleh al-Samouni, 3 June 2009.

⁴⁰¹ The Mission notes that while all testimonies agree that Muhammad Ibrahim al-Samouni died on the spot, there are some discrepancies as to whether Hamdi Maher al-Samouni was killed by the first strike or died subsequently inside the house.

715. Saleh al-Samouni stated that overall 21 family members were killed and 19 injured in the attack on Wa'el al-Samouni's house. The dead include Saleh al-Samouni's father, Talal Helmi al-Samouni, his mother, Rahma Muhammad al-Samouni, and his two-year-old daughter Azza. Three of his sons, aged five, three and less than one year (Mahmoud, Omar and Ahmad), were injured, but survived. Of Wa'el's immediate family, a daughter and a son (Rezqa, 14, and Fares, 12) were killed, while two smaller children (Abdullah and Muhammad) were injured.⁴⁰² The photographs of all the dead victims were shown to the Mission at the home of the al-Samouni family and displayed at the public hearing in Gaza.

716. After the shelling of Wa'el al-Samouni's house, most of those inside decided to leave immediately and walk to Gaza City, leaving behind the dead and some of the wounded. The women waved their scarves. Soldiers, however, ordered the al-Samounis to return to the house. When family members replied that there were many injured among them, the soldiers' reaction was, according to Saleh al-Samouni, "go back to death". They decided not to follow this injunction and walked in the direction of Gaza City. Once in Gaza, they went to PRCS and told them about the injured that had remained behind.

3. The attempts of PRCS and ICRC to rescue the civilians in the al-Samouni area

717. PRCS had made its first attempt to evacuate the injured from the al-Samouni area on 4 January 2009 around 4 p.m. after receiving a call from the family of Ateya al-Samouni. PRCS had called ICRC, asking it to coordinate its entry into the area with the Israeli armed forces. A PRCS ambulance from al-Quds hospital managed to reach the al-Samouni area. The ambulance had turned west off Salah ad-Din Street when, at one of the first houses in the area, Israeli soldiers on the ground and on the roof of one of the houses directed their guns at it and ordered it to stop. The driver and the nurse were ordered to get out of the vehicle, raise their hands, take off their clothes and lie on the ground. Israeli soldiers then searched them and the vehicle for 5 to 10 minutes. Having found nothing, the soldiers ordered the ambulance team to return to Gaza City, in spite of their pleas to be allowed to pick up some wounded. In his statement to the Mission, the ambulance driver recalled seeing women and children huddling under the staircase in a house, but not being allowed to take them with him.⁴⁰³

718. As soon as the first evacuees from the al-Samouni family arrived in Gaza City on 5 January, PRCS and ICRC requested permission from the Israeli armed forces to go into the al Samouni neighbourhood to evacuate the wounded. These requests were denied. On 6 January around 6.45 p.m., one ICRC car and four PRCS ambulances drove towards the al-Samouni area

⁴⁰² The names of the other 15 members of the extended al-Samouni family killed in the attack on Wa'el al-Samouni's house are: Rabab Izaat (female, aged 37); Tawfiq Rashad (male, aged 22); Layla Nabeeh (female, aged 44); Ismaeil Ibrahim (male, aged 16); Ishaq Ibrahim (male, aged 14); Maha Muhammad (female, aged 20); Muhammad Hilmi Talal (the six-year-old son of Maha); Hanan Khamis Sa'di (female, aged 36); Huda Naiel (female, aged 17); Rezqa Muhammad Mahmoud (female, aged 56); Safaa Sobhi (female, aged 24); al-Moa'tasim Bilah Muhammad (male, aged six months); Hamdi Maher (male, aged 24); Rashad Helmi (male, aged 42); Nassar Ibrahim Hilmi (male, aged 6).

⁴⁰³ Mission interview with PRCS driver W2, 10 June 2009.

in spite of the lack of coordination with the Israeli armed forces, but were not allowed to enter the area and evacuate the wounded.

719. On 7 January 2009, the Israeli armed forces finally authorized ICRC and PRCS to go to the al-Samouni area during the “temporary ceasefire” declared from 1 to 4 p.m. on that day.⁴⁰⁴ Three PRCS ambulances, an ICRC car and another car used to transport bodies drove down Salah ad-Din Street from Gaza City until, 1.5 km north of the al-Samouni area, they found it closed by sand mounds. ICRC tried to coordinate with the Israeli armed forces to have the road opened, but they refused and asked the ambulance staff to walk the remaining 1.5 km.

720. Once in the al-Samouni neighbourhood, PRCS looked for survivors in the houses. An ambulance driver who was part of the team told the Mission that in Wa’el al-Samouni’s house they found 15 dead bodies and two seriously injured children.⁴⁰⁵ One of the children had a deep wound in the shoulder, which was infected and giving off a foul odour. The children were dehydrated and scared of the PRCS staff member. In a house close by, they found 11 persons in one room, including a dead woman.

721. The rescue teams had only three hours for the entire operation and the evacuees were physically weak and emotionally very unstable. The road had been damaged by the impact of shells and the movement of Israeli armed forces, including tanks and bulldozers. The rescuers put all the elderly on a cart and pulled it themselves for 1.5 kilometres to the place where they had been forced to leave the ambulances. The dead bodies lying in the street or under the rubble, among them women and children, as well as the dead they had found in the houses had to be left behind. On the way back to the cars, PRCS staff entered one house where they found a man with two broken legs. While they were carrying the man out of the house, the Israeli armed forces started firing at the house, probably to warn that the three-hour “temporary ceasefire” were about to expire. PRCS was not able to return to the area until 18 January.

722. On 18 January 2009, members of the al-Samouni family were finally able to return to their neighbourhood. They found that Wa’el al-Samouni’s house, as most other houses in the neighbourhood and the small mosque, had been demolished. The Israeli armed forces had destroyed the building on top of the bodies of those who died in the attack. Pictures taken on 18 January show feet and legs sticking out from under the rubble and sand, and rescuers pulling out the bodies of women, men and children. A witness described to the Mission family members taking away the corpses on horse carts, a young man sitting in shock beside the ruins of his house and, above all, the extremely strong smell of death.⁴⁰⁶

4. Factual findings

723. The Mission found the foregoing witnesses to be credible and reliable. It has no reason to doubt their testimony.

⁴⁰⁴ Mission interview with PRCS driver W1, 10 June 2009.

⁴⁰⁵ Ibid.

⁴⁰⁶ Mission interview with witness W2, 7 June 2009.

724. With regard to the context in which the attacks on the houses of Ateya al-Samouni and Wa'el al-Samouni took place, the Mission notes that there is some indication that there might have been a presence of Palestinian combatants in the al-Samouni neighbourhood during the first hours of the Israeli ground attack. A witness told the Mission that when he heard the first shots in the vicinity of his house in the night of 3 to 4 January, he at first thought it was Palestinian fighters. An NGO report submitted to the Mission states that a Palestinian combatant, reportedly a member of the Islamic Jihad, was killed in the al-Samouni area around midnight between 3 and 4 January.⁴⁰⁷

725. The Mission considers, however, that the testimonies of the witnesses strongly suggest that already before daybreak on 4 January 2009 the Israeli armed forces were in full control of the al-Samouni neighbourhood. The Israeli soldiers had taken up position on the roofs of the houses in the area. According to several witnesses, the soldiers on the street spoke to residents who had ventured out of their houses.⁴⁰⁸ In some cases (for instance, at the house of Saleh al-Samouni and at the house Iyad al-Samouni was in, see below), they entered the houses non-violently after knocking on the door. According to Saleh al-Samouni, the prolonged identification of all the persons present in his house (his father identifying each family member in Hebrew for the soldiers) took place outside. The soldiers appear to have been confident that they were not at immediate risk of being attacked.

726. The Mission also reviewed the submission it received from an Israeli researcher, arguing generally that statements from Palestinian residents claiming that no fighting took place in their neighbourhood are disproved by the accounts Palestinian armed groups give of the armed operations. The Mission notes that, as far as the al-Samouni neighbourhood is concerned, this report would appear to support the statements of the witnesses that there was no combat.⁴⁰⁹

727. Regarding the attack on Ateya al-Samouni's house, the Mission finds that the account given to it by Faraj al-Samouni is corroborated by the soldiers' testimonies published by the Israeli NGO Breaking the Silence. The assault on Ateya al-Samouni's house appears to be the procedure of the Israeli armed forces referred to as a "wet entry". A "wet entry" is, according to the soldier's explanation, "missiles, tank fire, machine-gun fire into the house, grenades. Shoot as we enter a room. The idea was that when we enter a house, no one there could fire at us." This procedure was, according to the soldier, thoroughly practised during recent Israeli armed forces manoeuvres.⁴¹⁰

728. The Mission notes that considering the generally calm circumstances that appear to have prevailed in the al-Samouni neighbourhood at the time (as evidenced by the way the soldiers

⁴⁰⁷ Al Mezan's table of children killed during the military operations in Gaza.

⁴⁰⁸ Testimonies of Saleh al-Samouni and Faraj al-Samouni.

⁴⁰⁹ "The hidden dimension of Palestinian war casualties...". Only 4 of the more than 100 entries in the submission refer to combat action in Zeytoun, the much larger part of Gaza City of which al-Samouni neighbourhood is a part. The incidents in Zeytoun that are mentioned reportedly occurred on 6, 7, 11 and 13 January 2009, and consist of Palestinian combatants opening fire against Israeli troops with rocket-propelled grenades, a mortar (in one case) and detonating an explosive device.

⁴¹⁰ *Soldiers' Testimonies*..., testimony 4, p. 14; see also testimony 37, p. 82.

entered other houses after knocking on the door) and the fact that the soldiers had already spoken to Faraj al-Samouni, one of the persons in Ateya al-Samouni's house, the Mission cannot see any circumstance justifying the violent entry into the house.

729. With regard to the attack on the five men who stepped out of Wa'el al-Samouni's house to fetch firewood in the early morning of 5 January 2009 and to the subsequent shelling of the house, the Mission notes that the members of the other families who had been moved by the Israeli forces into Wa'el al-Samouni's house had been searched by Israeli soldiers, as recounted by Saleh al-Samouni. Everything indicates that the Israeli forces knew that there were about 100 civilians in the house. Indeed, the families had asked to be allowed to leave the area towards a safer place, but had been ordered to stay in Wa'el al-Samouni's house. The house must have been under constant observation by the Israeli soldiers, who had complete control over the area at the time.

730. The Mission was not able to determine whether the attack was carried out by missiles launched from Apache helicopters, as Saleh and Wa'el al-Samouni told the Mission at the public hearing in Gaza, or by other munitions. Nevertheless, the fact that a first projectile struck next to the five men soon after they had left the house (at a time at which there was no combat in the area) and two or three projectiles struck the house after the survivors had retreated into the house, indicates that the weaponry used allowed a high degree of precision with a short response time and that the five men and then the house were the intended targets of the attack.

731. The Mission notes that, four days later, the Israeli armed forces denied that the attack on the house of Wa'el al-Samouni had taken place. On 9 January 2009, an Israeli army spokesman, Jacob Dallal, reportedly told the Reuters news agency that "the IDF did not mass people into any specific building. [...] Furthermore, we checked with regard to IDF fire on the 5th. The IDF did not target any building in or near Zeitun on the 5th."⁴¹¹ The Mission is not aware of any subsequent statement from the Israeli Government which would contradict this blanket denial or suggest that the allegations have been the subject of further investigation.

732. With regard to the obstruction of emergency medical access to the wounded in the al-Samouni neighbourhood, the Mission notes that four-year-old Ahmad al-Samouni was still alive at 4 p.m. on 4 January 2009, when the PRCS ambulance called by his relatives managed to arrive within what the Mission estimates to be 100 to 200 metres from the house where he was. In fact, he died about 10 hours later, which suggests that he might have had a good chance of survival. Israeli soldiers stopped the ambulance and thoroughly searched the driver, nurse and vehicle.⁴¹² Although they did not find anything indicating that the ambulance staff was not on a genuine emergency mission to evacuate a wounded civilian, they forced the ambulance to return to Gaza City without the injured Ahmad.

733. On 5 and 6 January 2009, following the arrival in Gaza City hospitals of survivors of the attack on Wa'el al-Samouni's house, PRCS and ICRC requested permission from the Israeli

⁴¹¹ http://www.javno.com/en-world/gaza-boy-recounts-house-of-death_222451.

⁴¹² In addition to searching the ambulance driver and the nurse, the Israeli soldiers also appear to have intended to humiliate them by forcing them to lie down on the street in their underwear for 5 to 10 minutes, in the cold of an early January late afternoon.

armed forces to go into the al-Samouni neighbourhood to evacuate the wounded. These requests were denied. According to the information available to PRCS, the Israeli armed forces told ICRC that there were combat operations going on in the area. A PRCS ambulance driver who was part of the PRCS convoy which went to the area in spite of the refusal of the Israeli armed forces to grant permission, reported that there were no clashes at the time.⁴¹³ PRCS and ICRC were not able to evacuate the wounded from the area until 7 January in the afternoon.

734. The information before it leads the Mission to believe that the Israeli armed forces arbitrarily prevented the evacuation of the wounded from the al-Samouni area, thereby causing at least one additional death, worsening of the injuries in others, and severe psychological trauma in at least some of the victims, particularly children.

735. These findings are corroborated by the press release ICRC issued on 8 January 2008:

The ICRC had requested safe passage for ambulances to access this neighbourhood [the al-Samouni area in Zeytoun] since 3 January but it only received permission to do so from the Israel Defense Forces during the afternoon of 7 January.

The ICRC/PRCS team found four small children next to their dead mothers in one of the houses. They were too weak to stand up on their own. One man was also found alive, too weak to stand up. In all there were at least 12 corpses lying on mattresses.

In another house, the ICRC/PRCS rescue team found 15 other survivors of this attack including several wounded. In yet another house, they found an additional three corpses. Israeli soldiers posted at a military position some 80 metres away from this house ordered the rescue team to leave the area which they refused to do. There were several other positions of the Israel Defense Forces nearby as well as two tanks.⁴¹⁴

B. Killing of civilians attempting to leave their homes to walk to safer areas

1. The shooting of Iyad al-Samouni

736. The Mission received testimony on the death of Iyad al-Samouni from Muhammad Asaad al-Samouni and Fawzi Arafat, as well as from a PRCS staff member. In the night of 3 to 4 January 2009, Iyad al-Samouni, his wife and five children were, together with about 40 other members of their extended family in Asaad al-Samouni's house, very close to the houses of Wa'el al-Samouni and Ateya al-Samouni (the scenes of the incidents described above). At 1 a.m. on 4 January 2009 they heard noise on the roof. At around 5 a.m. Israeli soldiers walked down the stairs from the roof, knocked on the door and entered the house. They asked for Hamas fighters. The residents replied that there were none. The soldiers then separated women, children and the elderly from the men. The men were forced into a separate room, blindfolded and handcuffed with plastic handcuffs. They were allowed to go to the toilet only after one of the men urinated on himself. The soldiers stationed themselves in the house.

⁴¹³ PRCS records at al-Quds hospital.

⁴¹⁴ <http://www.icrc.org/web/eng/siteeng0.nsf/html/palestine-news-080109>.

737. In the morning of 5 January 2009, after the shelling of Wa'el al-Samouni's house, two of the survivors took refuge in Asaad al-Samouni's house. From the testimonies received, the Mission is not able to state whether the Israeli soldiers then ordered the al-Samouni family members in the house to leave and walk to Gaza City, or whether it was the families who pleaded with the soldiers to be allowed to leave having heard the appalling news of what had happened to their relatives in Wa'el al-Samouni's house. In any event, the persons assembled in Asaad al-Samouni's house walked out of the house and down al-Samouni Street to take Salah ad-Din Street in the direction of Gaza City. They had been instructed by the soldiers to walk directly to Gaza City without stopping or diverting from the direct route. The men were still handcuffed and the soldiers had told them that they would be shot if they attempted to remove the handcuffs.

738. On Salah ad-Din Street, just a few metres north of al-Samouni Street and in front of the Juha family house,⁴¹⁵ a single or several of the Israeli soldiers positioned on the roofs of the houses opened fire. Iyad was struck in the leg and fell to the ground.⁴¹⁶ Muhammad Asaad al-Samouni, who was walking immediately behind him, moved to help him, but an Israeli soldier on a rooftop ordered him to walk on. When he saw the red point of a laser beam on his body and understood that an Israeli soldier had taken aim at him, he desisted. The Israeli soldiers also fired warning shots at Muhammad Asaad al-Samouni's father to prevent him from assisting Iyad to get back on his feet. Iyad al-Samouni's wife and children were prevented from helping him by further warning shots. Fawzi Arafat, who was part of another group walking from the al-Samouni neighbourhood to Gaza, told the Mission that he saw Iyad al-Samouni lying on the ground, his hands shackled with white plastic handcuffs, blood pouring from the wounds in his legs, begging for help. Fawzi Arafat stated that he yelled at an Israeli soldier "we want to evacuate the wounded man". The soldier, however, pointed his gun at Iyad's wife and children and ordered them to move on without him.

739. Iyad al-Samouni's family and relatives were forced to abandon him and continue to walk towards Gaza City. At al-Shifa hospital they reported his case and those of the other dead and wounded left behind. Representatives of PRCS told them that the Israeli armed forces were not permitting them to access the area.

740. A PRCS staff member⁴¹⁷ told the Mission that three days later, on 8 January 2009, PRCS was granted permission by the Israeli armed forces through ICRC to evacuate Iyad al-Samouni. The PRCS staff member found him on the ground in Salah ad-Din Street in the place described by his relatives. He was still handcuffed. He had been shot in both legs and had bled to death.

⁴¹⁵ This is the home of the family of Mu'een Juha, see the case of the shooting of Ibrahim Juha discussed below in the chapter.

⁴¹⁶ According to the researchers of a Palestinian NGO who investigated this case, the mobile phone in the pocket of the cousin walking in front of Iyad al-Samouni rang and Iyad al-Samouni tried to take the phone out of his pocket (the cousin's hands were tied as well, so he could not reach into his pocket himself), whereupon the Israeli soldier opened fire. This detail was not mentioned to the Mission in its interviews.

⁴¹⁷ Mission interview with PRCS driver W4, 10 June 2009.

2. Factual findings

741. The Mission found the witnesses it heard in relation to the shooting of Iyad al-Samouni to be credible and reliable. It has no reason to doubt the veracity of the main elements of their testimony, which is corroborated by the testimony of the PRCS ambulance driver.

742. The Mission finds that Iyad al-Samouni was part of a large group of civilians who were leaving their homes and walking towards Gaza City in an area under the complete control of the Israeli armed forces. His hands were tied with white plastic handcuffs. The soldier who opened fire on him should have known, on the basis of the plastic handcuffs if not of coordination with his fellow soldiers stationed in Asaad al-Samouni's house a few hundred metres away, that he had been searched and detained by the Israeli armed forces. In opening fire on Iyad al-Samouni, the Israeli armed forces shot deliberately at a civilian who posed no threat to them.

743. While the fire directed at Iyad al-Samouni could have been intended to incapacitate rather than to kill, by threatening his family members and friends with lethal fire, the Israeli armed forces ensured that he did not receive lifesaving medical help. They deliberately let him bleed to death.

744. The Mission found that the witnesses who spoke about the death of Iyad al-Samouni appeared to be profoundly traumatized by the recollection of his pleading for help from his wife, children and relatives. They also recalled the helplessness of his family, who were under a very credible threat of being shot themselves if they came to his help, and who were compelled to abandon him on the road to bleed to death.

3. The death of Muhammad Hajji in the attack on his family's house and the shooting of Shahd Hajji and Ola Masood Arafat

745. The Mission interviewed Mrs. Abir Hajji in private and received her testimony at the public hearing in Gaza.

746. In the night of 4 to 5 January 2009, the family of Muhammad Hajji and his wife Abir⁴¹⁸ was at home in the al-Samouni neighbourhood. In the hope of being safer from the shooting, they had put their mattresses on the floor. At around 1.30 a.m., Abir Hajji heard a very loud explosion, which shook the house and shattered the windows. Some minutes later, Abir Hajji was in a different room from the rest of the family, looking for her mobile phone to use as a torch, when she heard a second explosion, this time apparently inside the house. The children screamed, shouted "Dad!", but her husband did not reply. In the pitch-darkness she found her husband and felt that he was injured on one side of his head, in the area of the eye and the ear. Her daughters Noor, aged 6, and Nagham, aged 13, were injured.

747. She called her neighbour and brother-in-law, Nasser Hajji, who examined his brother and told her that he was dead. As they were preparing to move to Nasser Hajji's house, Israeli soldiers broke into the house shooting. The soldiers asked Nasser Hajji whether he "was

⁴¹⁸ Muhammad and Abir Hajji had five children, four daughters, Ghada (aged 16), Nagham (aged 13), Noor al-Huda (aged 6) and Shahd (aged 3), and a son, Amin (aged 11).

Hamas”, which he denied assuring them that nobody in the area was a member of either Hamas or Fatah. Mrs. Hajji remembers the soldiers laughing and insisting that Nasser Hajji “was Hamas”. The laughing added to her pain, as the soldiers had seen her dead husband and the children. Nasser Hajji was ordered to undress and then pull his brother’s body to another room, where the soldiers threw mattresses and blankets on the body (the body was still lying in the same position when Abir Hajji returned to her home two weeks later). Her children asked her whether they would be killed as well. She told them to say the *Shehada*, the prayer recited in the face of death. Mrs. Hajji also recalled that the soldiers were breaking the tiles on the floor of the house and digging in the earth below. Asked about this at the public hearing, she expressed the opinion that this was to obtain sand for the sandbags they subsequently placed on the roof of the house.⁴¹⁹

748. After some time, during which they were sitting on the ground as ordered by the Israeli soldiers, Mrs. Hajji, her children and Nasser Hajji were taken to Nasser’s house. There they found four households of the extended Hajji family. The young men had been handcuffed and four of them also blindfolded. About 60 Israeli soldiers were in the house. Mrs. Hajji recalled them carrying around food and drinks and relaxing in the couches. One of her daughters asked to be allowed to eat something. The soldiers first denied her request, but then allowed her to go into the kitchen and get a small piece of bread.

749. After the midday prayers on 5 January 2009, the Israeli soldiers separated the men from the women and children. The latter were ordered to walk to Rafah. The Hajjis protested, asking to be allowed to go to Gaza City, where they had relatives, but the soldiers told them that they would be shot if they tried to walk to Gaza City. Nasser Hajji and his 18-year-old son were allowed to walk with the women and children, while the other men stayed behind.⁴²⁰

750. The group of Hajji family members walked down the alley to al-Sekka Street. There they were joined by members of the Arafat family, who also live in the al-Samouni neighbourhood, carrying white flags. On al-Sekka Street, one of the Israeli soldiers standing on a rooftop ordered the families to turn south and walk towards Rafah. The families begged to be allowed to walk to Gaza City instead. Without warning, the Israeli soldiers opened fire, “shooting at random” according to Abir Hajji. Ola Masood Arafat, a 28-year-old woman, was struck by a bullet and died on the spot. Mrs. Hajji was wounded in her right arm. Her three-year-old daughter Shahd was shot in the chest. Abir Hajji, who was still carrying Shahd, her other children, her mother-in-law and others managed to take refuge in a house. There they found out that Shahd was still alive.

751. Later on, they left the house and walked together with other families to Salah ad-Din Street and then south on that road. When they reached the Gaza wadi, a motorist took Abir Hajji and her daughter Shahd to a hospital in Deir al-Balah. Shahd died of her wound very soon after

⁴¹⁹ *Soldiers’ Testimonies...* suggests that breaking the tiles in civilian homes was a standard practice with two purposes: to fill sandbags (“Take for example the house we were in – it was abandoned and you go about it as if you own it. You break floor tiles to make sandbags, you break stuff to prepare an outpost”, testimony 46, p. 100,) and to search for tunnels (“You’re also told to wreck the floor tiles to check for tunnels”, testimony 23, p. 54)

⁴²⁰ Abir Hajji learned after the armed operations that they had been detained in that house for another three days and then released.

arriving at the hospital. Abir Hajji, who was two months pregnant at the time, also suffered a miscarriage.

4. Factual findings

752. The Mission found Mrs. Hajji to be a credible and reliable witness. It has no reason to doubt the veracity of her testimony. The Mission also notes that according to the testimony of four other witnesses (those it heard in the case of Ibrahim Juha below), a very similar incident occurred in the immediate vicinity on the same day.

753. With regard to the death of Muhammad Hajji, the Mission notes that Mrs. Hajji's testimony does not provide sufficient information to establish exactly what happened. On the basis of the information before it, the Mission can neither make a statement as to what type of weapon killed him, nor as to whether he was the intended target of a direct attack. The circumstances of his death suggest, however, that he was killed by fire from the Israeli armed forces while at home in a room with his children.

754. As to the fatal shooting of Shahd Hajji and Ola Masood Arafat, Mrs. Hajji's testimony as well as that of Mr. Mu'een Juha and Mrs. Juha, the parents of Ibrahim Juha, of Mr. Sameh Sawafeary and of Mr. Rajab Darwish Mughrabi (see the case of Ibrahim Juha below) all establish that there were no combat operations in the area at the time of the incident. Indeed, the Israeli armed forces would not have ordered the members of the extended Hajji, Arafat, Juha and Sawafeary families to walk to Rafah, thereby asking hundreds of civilians to come out of their houses and fill the streets, if there had been any fighting in the neighbourhood at the time. The Israeli armed forces opened fire on a group of persons they had interacted with during the preceding 12 hours and therefore knew to be civilians. In doing so they killed Ola Masood Arafat and three-year-old Shahd Hajji and injured her mother, who was holding her in her arms.

5. The shooting of Ibrahim Juha

755. The Mission interviewed three eyewitnesses to the shooting of Ibrahim Juha and a further witness of the events surrounding the shooting.⁴²¹ The events preceding and following the shooting of Ibrahim Juha are described in greater detail in chapter XIII below in connection with the destruction of the Sawafeary chicken farms.

756. The Juha family lives in a house on al-Sekka Street a few meters north of where al-Samouni Street goes off Salah ad-Din Street to the west. The house was struck by several missiles during the night of 3 to 4 January 2009, which had caused significant destruction. In the early morning of 4 January, Israeli soldiers entered the house and fired into the room where the Juha family, consisting of Mr. Juha, his two wives, his mother and 13 children, was assembled. Photographs of the scene taken by Mr. Juha show that numerous rounds were discharged. The family was made to assemble in the upper part of the house. They were then ordered to leave the house and walk towards Rafah.

⁴²¹ Mr. Mu'een Juha and Mrs. Juha, the parents of Ibrahim, Mr. Sameh Sawafeary and Mr. Mughrabi.

757. The Juha family and their neighbours, the Sawafeary family, walked down al-Sekka Street for 100 metres in the direction of Rafah. When they reached the house of another neighbour, Mr. Abu Zur, they were invited into that house and decided to stay there. The three families spent 4 January in the house. On the morning of 5 January the house was the subject of intense firing from Israeli troops in the vicinity. After some time Israeli soldiers approached the house and ordered everyone to come out. The men were separated from the women. From the group of men four were separated and required to strip to their underwear. They were held in a house opposite the Abu Zur house, belonging to Mr. Subhi al-Samouni. The remaining group was told once again to leave the area and walk towards Rafah. Mr. Juha recounts that walking down al Sekka Street the group came to a point where a large crater blocked the way ahead and the surrounding rubble provided a difficult obstacle for some members of his family, including his ageing mother, who had fainted shortly before outside the Abu Zur house.

758. In the face of these obstacles the group of three families walked east towards Salah ad-Din Street. There they entered the house of another family, the Mughrabis. With the arrival of the Juha, Sawafeary and Abu Zur families, there were now more than 70 persons assembled in the house.

759. Mr. Juha told the Mission that, after taking a little rest in the Mughrabi house, he came to the view that it was impossible for them all to stay there, given their substantial numbers and the earlier experience of the intense firing at the Abu Zur house. He decided that they should seek to go back into the street and move to another place. Mr. Mughrabi strongly advised against this.

760. The Juha, Abu Zur and Sawafeary families went back into the street in the afternoon of 5 January. Mr. Juha had his mother in front of him propped up on a two-wheeled trolley as she was unable to walk. Mr. Sawafeary was near to him at the front of the group. Behind him, towards the middle of the group, was his 15-year-old son, Ibrahim, carrying a white flag. Mr. Juha believes he heard two shots. One of the shots hit his son in the chest. The group immediately sought cover once again in the Mughrabi house. They tried to care for Ibrahim in the workshop at the front of the house. His mother tried to sew the wound with a needle and thread and sterilize the materials with eau de cologne. Ibrahim died some six hours after he was shot.

761. The group of over 70 persons remained in the house until 8 January in the afternoon, when ICRC and PRCS representatives came to the neighbourhood and they managed to leave the area and walk to Gaza City.

6. Factual findings

762. The Mission found the witnesses of the shooting of Ibrahim Juha to be credible and reliable. It has no reason to doubt the veracity of their testimony.

763. The testimonies of Mr. Mu'een Juha and Mrs. Juha, Mr. Sameh Sawafeary and Mr. Rajab Darwish Mughrabi, as well as of Mrs. Abir Hajji, all establish that there were no combat operations in the area at the time of the incident. The Israeli armed forces had attacked Mr. Juha's house and that of Mr. Abu Zur, where the Juhas and other families had taken refuge, forcing them to leave the area. It was the Israeli armed forces that ordered these families to take the road to Rafah. In sum, the Israeli armed forces deliberately opened fire on a group of persons

they had interacted with during the preceding 24 hours and therefore knew to be civilians, killing the child Ibrahim Juha.

7. The killing of Majda and Rayya Hajaj

764. The Mission visited Juhr ad-Dik village twice and interviewed three eyewitnesses of the killing of Majda and Rayya Hajaj⁴²² and two other members of the family, sons of Rayya Hajaj (and brothers of Majda). The Mission also measured the distances between the reported location of the victims at the time of the shooting and the tanks. The Mission further obtained copies of the PRCS records on its attempts to obtain approval from the Israeli armed forces to dispatch ambulances to Juhr ad-Dik. Finally, the Mission saw the agricultural land destroyed by tanks and bulldozers, the rubble remaining of the house of Saleh Hajaj, and the devastation and graffiti⁴²³ left by the Israeli soldiers in Youssef Hajaj's house.

765. Juhr ad-Dik is a village in an agricultural area south-east of Gaza City, about 1.5 kilometres from the border with Israel (the so-called Green Line). On 3 January 2009, an Israeli tank force entered Juhr ad-Dik. Part of the tank force moved on towards Salah ad-Din Street and Zeytoun; the remaining force occupied Juhr ad-Dik.⁴²⁴

766. On 4 January 2009, at about 6 a.m., shells hit the house of Youssef Hajaj's family, where he, his wife and children, the wife and children of his brother Majd (who was not with his family), their sister Majda, aged 37, and mother Rayya, aged 65, were taking shelter. A daughter of Youssef, 13-year-old Manar, was injured. Between 9 and 10 a.m., the Hajaj family decided to move to the house of their neighbour Muhammad al-Safdi. Around 11 a.m., Youssef Hajaj received a phone call from his brother Majd, informing him that the Israeli armed forces had announced on local radio stations (al-Aqsa and al-Hurriya) that people living along the border between Israel and Gaza should evacuate their houses to remain safe. Having prepared two make-shift white flags, which were carried by Majda Hajaj and Ahmad Muhammad al-Safdi, 25 years old, who was also holding his two-year-old son in his arms, 26 members of the two families (more than half of them children)⁴²⁵ left the al-Safdi house. They started walking down the road westwards, where a group of Israeli tanks was standing at a distance of 320 metres.⁴²⁶ They walked very slowly, covering 200 metres in about 10 minutes. The group was some 120 metres away from the Israeli tanks when, without warning, they were fired on from the direction of the tanks. Majda Hajaj and her mother, Rayya, were hit. Majda died of her injuries instantly. Rayya tried to flee, but fell to the ground after a few metres.

⁴²² Mission interviews of Ms. Farhaneh Hajaj, Ms. Siham Hajaj, Mr. Muhammad al-Safdi, Mr. Youssef Hajaj and Mr. Saleh Hajaj.

⁴²³ Graffiti photographed by the Mission in the Hajaj house included, in Hebrew, names and dates, such as "Yahir Ben Eliezer Commander mon. [for month] March 2006" and "Yohanana Boutboul Commander mon. [for month] November 2005" and, in English, the phrase "Death will find you soon".

⁴²⁴ Testimony to the Mission by Youssef and Saleh Hajaj, 3 June 2009.

⁴²⁵ The overall number of persons leaving the house of the al-Safdi family was also indicated to the Mission as 28. The Mission was told that 17 children led the procession.

⁴²⁶ This and the other distances mentioned in the summary of the case were measured with GPS instruments.

767. The others scrambled back to the al-Safdi family house, and managed to take shelter behind a shack next to it and later inside the house. Members of the Hajjaj family called PRCS for help with the evacuation of Majda and Rayya Hajaj's bodies. PRCS in turn contacted ICRC. The Israeli armed forces denied ICRC access to Juhr ad-Dik on the ground that the area had been declared a military zone.⁴²⁷ The two families spent the remainder of the day and the night sheltering under the staircase in the al-Safdi house, while the Israeli armed forces continued to direct shell and machine-gun fire at the house. The following day they walked to Gaza City by a different, circuitous route. The Hajjaj family found the bodies of Majda and Rayya Hajaj under the rubble when they were able to return to Juhr ad-Dik on the evening of 18 January 2009.

8. Factual findings

768. The Mission found the witnesses interviewed to be credible and reliable. It has no reason to doubt the veracity of their testimony.

769. The Mission finds that Majda and Rayya Hajaj were part of a group of civilians moving with white flags through an area in which there was, at the time, no combat. Moreover, the Israeli armed forces had, according to witnesses interviewed by the Mission, called over local radio on the civilian population of Juhr ad-Dik to evacuate their homes and walk towards Gaza City. In the light of these reported circumstances, and particularly considering that the civilians were at a distance of more than 100 metres from them, the Israeli soldiers could not have perceived an imminent threat from the movement of people in that area, as they would have expected the civilians to respond to the call for evacuation. The Mission, therefore, finds the shooting and killing of Majda and Rayya Hajjaj a deliberate act on the part of the Israeli soldiers.

9. The shooting of Amal, Souad, Samar and Hajja Souad Abd Rabbo

770. The Mission visited the site of the shooting of Amal, Souad, Samar and Hajja Souad Abd Rabbo and interviewed an eyewitness, Mr. Khalid Abd Rabbo, on site. Khalid and Kawthar Abd Rabbo gave their testimony at the public hearing in Gaza on 28 June 2009. The Mission also reviewed sworn statements from two additional witnesses it was not able to interview in person.⁴²⁸

771. The family of Khalid Abd Rabbo and his wife Kawthar lived on the ground floor of a four-storey building in the eastern part of Izbat Abd Rabbo, a neighbourhood east of Jabaliyah inhabited primarily by members of their extended family. Khalid Abd Rabbo's parents and brothers with their families lived on the upper floors of the house. The residents of Izbat Abd Rabbo started hearing the sound of shooting and of the Israeli ground incursion in the evening of 3 January 2009. Khalid Abd Rabbo's family decided to stay inside the house, all gathered on the ground floor, as they had done safely during previous Israeli incursions into the neighbourhood.

772. In the late morning of 7 January 2009, Israeli tanks moved onto the small piece of agricultural land in front of the house. Shortly after 12.30 p.m., the inhabitants of that part of Izbat Abd Rabbo heard megaphone messages telling all residents to leave. According to one

⁴²⁷ PRCS records confirm the ICRC requests to the Israeli armed forces to be allowed access to Juhr ad-Dik.

⁴²⁸ Affidavits of W5 and W6.

witness's recollection, there had also been a radio message broadcast by the Israeli armed forces around 12.30 announcing that there would be a temporary cessation of shooting between 1 and 4 p.m. that day, during which time residents of the area were asked to walk to central Jabaliyah.

773. At about 12.50 p.m., Khalid Abd Rabbo, his wife Kawthar, their three daughters, Souad (aged 9), Samar (aged 5) and Amal (aged 3), and his mother, Hajja Souad Abd Rabbo, stepped out of the house, all of them carrying white flags. Less than 10 metres from the door was a tank, turned towards their house. Two soldiers were sitting on top of it having a snack (one was eating chips, the other chocolate, according to one of the witnesses). The family stood still, waiting for orders from the soldiers as to what they should do, but none was given. Without warning, a third soldier emerged from inside the tank and started shooting at the three girls and then also at their grandmother. Several bullets hit Souad in the chest, Amal in the stomach and Samar in the back. Hajja Souad was hit in the lower back and in the left arm.

774. Khalid and Kawthar Abd Rabbo carried their three daughters and mother back inside the house. There, they and the family members who had stayed inside tried to call for help by mobile phone. They also shouted for help and a neighbour, Sameeh Atwa Rasheed al-Sheikh, who was an ambulance driver and had his ambulance parked next to his house, decided to come to their help. He put on his ambulance crew clothes and asked his son to put on a fluorescent jacket. They had driven a few metres from their house to the immediate vicinity of the Abd Rabbo house when Israeli soldiers near the Abed Rabbo house ordered them to halt and get out of the vehicle. Sameeh al-Sheikh protested that he had heard cries for help from the Abd Rabbo family and intended to bring the wounded to hospital. The soldiers ordered him and his son to undress and then re-dress. They then ordered them to abandon the ambulance and to walk towards Jabaliyah, which they complied with. When the families returned to Izbat Abd Rabbo on 18 January, they found the ambulance was in the same place but had been crushed, probably by a tank.

775. Inside the Abed Rabbo house, Amal and Souad died of their wounds. The family decided that they had to make an attempt to walk to Jabalya and take Samar, the dead bodies of Amal and Souad, and their grandmother to hospital. Khaled and Kawthar Abd Rabbo, and other family members and neighbours carried the girls on their shoulders. Hajja Souad was carried by family and neighbours on a bed. Samar was transferred to al-Shifa hospital and then, through Egypt, to Belgium, where she still is in hospital. According to her parents, Samar suffered a spinal injury and will remain paraplegic for the rest of her life.

776. When Khalid Abd Rabbo returned to his home on 18 January 2009, his house, as most houses in that part of Izbat Abd Rabbo, had been demolished. He drew the Mission's attention to an anti-tank mine under the rubble of a neighbour's house.⁴²⁹

10. Factual findings

777. The Mission found Khalid and Kawthar Abd Rabbo to be credible and reliable witnesses. It has no reason to doubt the veracity of the main elements of their testimony. The Mission also

⁴²⁹ The UNOSAT report (p. 14) counts 341 buildings in Izbat Abd Rabbo destroyed or severely damaged as a result of the military operations.

reviewed several sworn statements they and other eyewitnesses gave to NGOs about the incident and found them to be consistent with the account it received.

778. The Mission notes that, in general, Izbat Abd Rabbo and the nearby areas of Jabal al-Kashef and Jabal al-Rayes appear to have been among the locations in Gaza which saw the most intense combat during the military operations.⁴³⁰ The testimony of Khalid and Kawthar Abd Rabbo, however, shows that the Israeli armed forces were not engaged in combat or fearing an attack at the time of the incident. Two soldiers were sitting on the tank in front of the Abd Rabbo family house and having a snack. They clearly did not perceive any danger from the house, its occupants or the surroundings. Moreover, when the family, consisting of a man, a young and an elderly woman, and three small girls, some of them waving white flags, stepped out of the house, they stood still for several minutes waiting for instructions from the soldiers. The Israeli soldiers could, therefore, not reasonably have perceived any threat from the group. Indeed, the fact that the gunfire was directed at the three girls and, subsequently, at the elderly woman, and not at the young adult couple, can be seen as further corroborating the finding that there was no reasonable ground for the soldier shooting to assume that any of the members of the group were directly participating in the hostilities. The Mission finds that the soldier deliberately directed lethal fire at Souad, Samar and Amal Abd Rabbo and at their grandmother, Hajja Souad Abd Rabbo.

779. The Mission further finds that, by preventing Sameeh al-Sheikh from taking the wounded to the nearest hospital in his ambulance, the Israeli armed forces deliberately further aggravated the consequences of the shooting. The Mission recalls that the soldiers had forced Sameeh al-Sheikh and his son to get out of the ambulance, undress and then re-dress. They therefore knew that they did not constitute a threat. Instead of allowing them to take the gravely wounded Samar Abd Rabbo to hospital, the soldiers forced Sameeh al-Sheikh and his son to abandon the ambulance and to walk towards Jabaliyah.

11. The shooting of Rouhiyah al-Najjar

780. The Mission visited the site of the shooting of Rouhiyah al-Najjar in Khuza'a. It interviewed two eyewitnesses of the shooting and six other witnesses to the events, including Yasmine al-Najjar, Nasser al-Najjar, Rouhiyah al-Najjar's husband, and their daughter Hiba.

781. The Israeli armed forces launched the attack against Khuza'a, a small town about half a kilometre from the border (Green Line) with Israel east of Khan Yunis, around 10 p.m. on 12 January 2009. During the night, they used white phosphorous munitions, causing fires to break out in the al-Najjar neighbourhood on the eastern fringe of Khuza'a. Families in the neighbourhood, including the family of Nasser al-Najjar, his first wife Rouhiyah and their daughter Hiba, spent much of the night trying to extinguish fires in their houses. Israeli armed forces, possibly heliborne troops, had taken position on the roofs of some houses in the neighbourhood and observed the residents as they attempted to fight the fires. Around 3 a.m. residents also began to hear the noise of approaching tanks and bulldozers, with which they were well familiar, as in 2008 there had been several Israeli incursions into the farmland to the north

⁴³⁰ "The hidden dimension of Palestinian war casualties..." suggests that these areas were among those in which Palestinian combatants most frequently engaged the Israeli armed forces.

and east of Khuza'a, in the course of which bulldozers flattened fields, groves, chicken coops and greenhouses.

782. In the early morning hours, some of the residents, including Rouhiyah al-Najjar, climbed on the roofs of their houses and hoisted improvised white flags. Using megaphones, the Israeli armed forces asked the men of the neighbourhood to come out of the houses and walk towards the tanks. There the men were separated into two groups which were then held in different houses under the control of the soldiers.

783. At some point between 7 and 7.45 a.m., Rouhiyah al-Najjar and the women in her immediate neighbourhood decided to leave their homes and walk with their children to the town centre. The group of women was headed by Rouhiyah al-Najjar and her 23-year-old neighbour and relative Yasmine al-Najjar, both carrying white flags. Rouhiyah's daughter Hiba was right behind her. Other women were holding up babies in their arms, shouting "God is great!" and "We have children!" The group of women and children started moving down a straight alley, about six or seven metres wide, flanked on both sides by houses. At the other end of the alley, a little more than 200 metres away,⁴³¹ was the house of Faris al-Najjar, which had been occupied by numerous Israeli soldiers (around 60 according to one witness). The soldiers had made a hole in the wall of the first floor of the house, giving them a good view down the alley into which the group of women and children were advancing. When Rouhiyah al-Najjar was about 200 metres from Faris al-Najjar's house, a shot fired from that house hit her in the temple (she had just turned her head towards her neighbour next to her to encourage her). Rouhiyah al-Najjar fell to the ground; Yasmine was struck in her leg. This single shot was followed by concentrated gunfire, which forced the group of women and children to scramble back into the houses of Osama al-Najjar and Shawki al-Najjar, though it did not cause further injury. Because of the fire from the Israeli soldiers, they did not dare to leave the house and look after Rouhiyah al-Najjar. They stayed inside until around noon the same day, when they made a second, successful attempt to leave the neighbourhood and walk to a safer part of Khuza'a.

784. An ambulance driver from Khan Yunis hospital, Marwan Abu Reda, received a phone call from Khuza'a asking for emergency help for Rouhiyah al-Najjar at around 7.45 a.m. He immediately drove to Khuza'a and arrived in the neighbourhood shortly after 8 a.m., i.e. within no more than an hour from the shooting. He was already in the alley where Rouhiyah al-Najjar was lying on the ground⁴³² when soldiers opened fire from houses or rooftops, forcing him to make a U-turn and take the ambulance to a nearby alley. He called PRCS and asked it to seek access to the injured woman, through ICRC and in coordination with the Israeli armed forces, without success. Marwan Abu Reda was not able to pick up Rouhiyah al-Najjar's (by then lifeless) body until the evening of that day. He confirmed to the Mission that she had received a bullet in the temple.

⁴³¹ The Mission did not measure the distance; this is an estimate.

⁴³² The Mission does not have information which would allow it to state whether Rouhiyah al-Najjar was still alive when the ambulance arrived.

12. Factual findings

785. The Mission has no reason to doubt the veracity of the main elements of the testimony of the witnesses it heard with regard to the shooting of Rouhiyah al-Najjar.

786. The Mission's site inspection and the testimony of several witnesses appear to establish that the group of women and children led by Rouhiyah al-Najjar had slowly walked for at least 20 metres before the shot that killed Rouhiyah was fired. During that time, Israeli soldiers standing on the roofs of the houses in the neighbourhood had ample time to observe the group. The fact that, after shooting Rouhiyah and Yasmine al-Najjar, the soldiers directed warning fire at the group without injuring anyone, but forcing them to retreat to a house, is further indication that the soldiers had not observed any threat to them from the group.⁴³³ Indeed, a few hours later the same group was allowed to walk past the soldiers to a safer area of Khuza'a. The Mission accordingly finds that Rouhiyah al-Najjar was deliberately shot by an Israeli soldier who had no reason to assume that she was a combatant or otherwise taking part in hostilities.

787. The Mission also observes that, while it is unclear whether the ambulance from Khan Yunis hospital could have saved Rouhiyah al-Najjar's life, the Israeli forces prevented the evacuation of the wounded woman without any justification.

13. The Abu Halima family case

788. The Mission interviewed three members of the Abu Halima family who were eyewitnesses to the events described below.⁴³⁴ The Mission also spoke to the doctor who treated some of the family members.⁴³⁵ The Mission reviewed a report by Physicians for Human Rights – Israel and Palestinian Medical Relief Society which includes analysis by doctors who observed the wounds of the surviving victims at the beginning of March 2009 and also has medical reports confirming the injuries they suffered.⁴³⁶ Finally, the Mission reviewed information received from TAWTHEQ.

789. On 3 and 4 January 2009, the initial days of the ground invasion, there was heavy aerial bombardment and shelling by tanks of the open areas around Siyafa village, in al-Atatra neighbourhood west of Beit Lahia. Most residents are farmers and, although the Israeli armed

⁴³³ The Mission was not given any testimony about the presence of Palestinian combatants in Khuza'a at the time of this incident. In fact, Khuza'a municipal officials expressly denied that there was any combatant activity in Khuza'a at the time of the Israeli ground invasion, arguing that, Khuza'a and the surrounding fields being such an open area, there was no place for fighters to take cover. These statements are contradicted by reports indicating that "about one dozen fighters had directly engaged the IDF in Khuza'a. But these engagements appear to have been minimal, with the fighters mostly retreating whenever the Israeli forces advanced." (Human Rights Watch, *Rain of Fire: Israel's Unlawful Use of White Phosphorous in Gaza* (March 2009), pp. 53-54).

⁴³⁴ Mission interviews with Sabah Abu Halima (aged 45), Muhammad Sa'ad Abu Halima (aged 24), Omar Sa'ad Abu Halima (aged 18), 15 June 2009.

⁴³⁵ Mission interview with Dr. Nafeez, the burns expert from al-Shifa hospital, 12 June 2009.

⁴³⁶ Physicians for Human Rights-Israel and Palestinian Medical Relief Society, "Final report: Independent fact-finding mission into violations of human rights in the Gaza Strip during the period 27.12.08-18.01.09", pp. 51-55, available at: http://www.phr.org.il/phr/files/articlefile_1241949935203.pdf.

forces had dropped leaflets warning civilians to leave the area, most had chosen to stay. Based on their previous experiences of ground invasions, they reportedly believed that they were not in danger.

790. On 4 January 2009, the bombardment reportedly increased as Israeli troops moved into and took control of al-Atatra neighbourhood. The Abu Halima family was sheltering in the home of Muhammad Sa'ad Abu Halima and Sabah Abu Halima in Sifaya village. The house has two floors; the ground floor is used for storage and the living quarters are on the upper floor. According to Sabah Abu Halima,⁴³⁷ 16 members of her immediate family were sheltering on the upper floor.

791. In the afternoon, after hearing that a shell had hit the adjacent house of Sabah Abu Halima's brother-in-law, most of the family moved from the bedroom into a hallway in the middle of the upper floor, where they thought they would be better protected. At around 4.30 p.m., a white phosphorous shell came through the ceiling into the room where they were sheltering.

792. According to family members who survived,⁴³⁸ there was intense fire and white smoke in the room, the walls of which were glowing red. Five members of the family died immediately or within a short period: Muhammad Sa'ad Abu Halima (aged 45) and four of his children, sons Abd al-Rahim Sa'ad (aged 14), Zaid (aged 12) and Hamza (aged 8), and daughter Shahid (aged 18 months). Muhammad Sa'ad and Abd al-Rahim Sa'ad were decapitated, the others burnt to death. Five members of the family escaped and suffered various degrees of burns: Sabah Abu Halima, her sons Youssef (aged 16) and Ali (aged 4), daughter-in-law Ghada (aged 21), and Ghada's daughter Farah (aged 2).⁴³⁹

793. Family members tried to call an ambulance, but the Israeli armed forces had declared the area a closed military zone and ambulances were not permitted to enter. Two cousins put Sabah Abu Halima in the back of a tractor trailer and drove her to Kamal Idwan hospital in Beit Lahia. The driver reported that he reached the hospital despite coming under fire from Israeli soldiers posted inside the Omar Bin Khattab school for girls on the road to al-Atatra.⁴⁴⁰ One cousin remained with Sabah Abu Halima, while the other returned to help the rest of the family.

794. The remaining survivors and the injured were placed on a second tractor trailer to take them to Kamal Idwan hospital. The remains of Shahid Abu Halima were also taken. The tractor was driven by a cousin, Muhammad Hekmat Abu Halima (aged 16). Another cousin, Matar Abu Halima (aged 17), his brother Ali (aged 11) and his mother, Nabila, accompanied them.

⁴³⁷ Statement by Sabah Abu Halima to the Mission on 15 June 2009.

⁴³⁸ Statements by Sabah Abu Halima, Muhammad Sa'ad Abu Halima and Omar Sa'ad Abu Halima to the Mission on 15 June 2009.

⁴³⁹ Given the seriousness of their injuries, Sabah, Farah and Ghada Abu Halima were transferred to Egypt for treatment. Ghada died there in late March 2009.

⁴⁴⁰ www.dci-pal.org/English/Doc/Press/Case-Study_Cast-Lead_Abu-Halima_Family_FINAL.pdf.

795. When they reached the crossroads next to the Omar Bin Khattab school in al-Atatra, Israeli soldiers positioned on the roof of a nearby house, some ten metres away, ordered them to stop. Muhammad Hekmat, Matar, Ali, Nabila and Matar got down and stood beside the tractor. One or more soldiers opened fire, hitting Muhammad Hekmat Abu Halima in the chest and Matar Abu Halima in the abdomen.⁴⁴¹ Both died as a result of their injuries. Ali, Omar and Nabila Abu Halima fled. Omar was shot in the arm, but they eventually reached Kamal Idwan hospital.

796. The remaining family members were ordered to abandon the tractors and walk. They were not permitted to take the bodies of the two dead boys, or the remains of Shahid Abu Halima, which were recovered four days later, on 8 January. Ghada Abu Halima, who had burns on 45 per cent of her body, had great difficulty walking. After some 500 metres, a vehicle picked up several members of the family, including Ghada and Farah, and took them to al-Shifa hospital in Gaza City.

797. Dr. Nafiz Abu Shaban, Chief of Plastic Surgery at al-Shifa hospital, confirmed that Sabah, Ghada and Farah Abu Halima were admitted there with serious burns and were transferred to Egypt for treatment. The doctor believed that the burns were caused by contact with white phosphorous.⁴⁴²

14. Factual findings

798. The Mission found Sabah Abu Halima, Muhammad Sa'ad Abu Halima and Omar Sa'ad Abu Halima to be credible and reliable witnesses. It has no reason to doubt the veracity of the main elements of their testimonies, which were corroborated by the testimony of Dr. Nafiz Abu Shaban of al-Shifa hospital.

799. With regard to the white phosphorous shelling of the Abu Halima family house, the Mission notes that the house is located in a village in a rural area. The shelling occurred on 4 January 2009 at a time when Israeli ground forces were apparently advancing into al-Atatra. Moreover, the Israeli armed forces had dropped leaflets warning civilians to leave. Under the circumstances, the Mission cannot make any determination as to whether the shelling of the Abu Halima house was a direct attack against a civilian objective, an indiscriminate attack or a justifiable part of the broader military operation.

800. With regard to the shooting of Muhammad Hekmat Abu Halima and Matar Abu Halima, the Mission notes that the Israeli soldiers had ordered the tractor on which they were transporting the wounded to stop and had ordered the two cousins (aged 16 and 17) to come down. They had complied with those instructions and were standing next to the tractor, when the Israeli soldiers standing on the roof of a nearby house opened fire on them. The soldiers cannot have been mistaken about the circumstance that these were two civilians taking gravely wounded persons to a hospital. The shooting of Muhammad Hekmat Abu Halima and Matar Abu Halima was a direct

⁴⁴¹ According to statements given by Omar and Nabila Abu Halima to the NGO Defence for Children International (ibid.). Information provided to the Mission by Omar Abu Halima on 15 June 2009 was less detailed but consistent with this information.

⁴⁴² Mission interview, 12 June 2009.

lethal attack on two under-age civilians. The fact that they were hit in the chest and the abdomen, respectively, indicates that the intention was to kill them.

801. The Mission further notes that in this case the Israeli armed forces denied the ambulances access to the area to evacuate the wounded and then opened fire on the relatives of the wounded who were trying to take them to the nearest hospital.

C. Information concerning the instructions given to the Israeli armed forces with regard to the opening of fire against civilians

802. The Mission found in the above incidents that the Israeli armed forces repeatedly opened fire on civilians who were not taking part in the hostilities and who posed no threat to them. These incidents indicate that the instructions given to the Israeli armed forces moving into Gaza provided for a low threshold for the use of lethal fire against the civilian population. The Mission found strong corroboration of this trend emerging from its fact-finding in the testimonies of Israeli soldiers collected by the Israeli NGO Breaking the Silence⁴⁴³ and in the Protocol of the Rabin Academy's "Fighters' Talk". These testimonies suggest in particular that the instructions given to the soldiers conveyed two "policies". Both are an expression of the aim to eliminate as far as possible any risk to the lives of the Israeli soldiers.

803. The first policy could be summarized, in the words of one of the soldiers: "if we see something suspect and shoot, better hit an innocent than hesitate to target an enemy." Another soldier attributed the following instructions to his battalion commander: "If you are not sure – shoot. If there is doubt then there is no doubt." The first soldier summarized the briefing from the battalion commander as follows "the enemy was hiding behind civilian population. [...] if we suspect someone, we should not give him the benefit of the doubt. Eventually, this could be an enemy, even if it's some old woman approaching the house. It could be an old woman carrying an explosive charge." A third soldier explained "you don't only shoot when threatened. The assumption is that you constantly feel threatened, so anything there threatens you, and you shoot. No one actually said 'shoot regardless' or 'shoot anything that moves.' But we were not ordered to open fire only if there was a real threat."⁴⁴⁴

804. The Mission notes that some soldiers stated that they agreed with the instructions to "shoot in case of doubt." One of them explained "this is the difference between urban warfare and a limited confrontation. In urban warfare, anyone is your enemy. No innocents." Another told of his profound discomfort with the policy and of how he and his comrades had attempted to question their commander about it after a clearly harmless man was shot.⁴⁴⁵ While they disagreed about the legitimacy and morality of the policy, they had little doubt about the terms of the instructions: each soldier and commander on the ground had to exercise judgement,⁴⁴⁶ but the policy was to shoot in case of doubt.

⁴⁴³ *Soldiers' Testimonies*....

⁴⁴⁴ *Ibid.*, testimony 21, pp. 50–51, testimony 7, p. 20, and testimony 9, p. 24.

⁴⁴⁵ *Ibid.*, testimony 7, p. 20, and testimony 14, pp. 38-39.

⁴⁴⁶ *Ibid.*, testimony 13, p. 37.

805. The second policy clearly emerging from the soldiers' testimonies is explained by one of the soldiers as follows: "One of the things in this procedure [the outpost procedure, which is being applied in areas held by the Israeli armed forces after the Gaza ground invasion] is setting red lines. It means that whoever crosses this limit is shot, no questions asked. [...] Shoot to kill."⁴⁴⁷ In one incident highly relevant to the cases investigated by the Mission because of factual similarities, a soldier recounted an event he witnessed.⁴⁴⁸ A family is ordered to leave their house. For reasons that remain unclear, probably a misunderstanding, the mother and two children turn left instead of right after having walked between 100 and 200 metres from their house. They thereby cross a "red line" established by the Israeli unit (of whose existence the mother and children could have no knowledge). An Israeli marksman on the roof of the house they had just left opens fire on the woman and her two children, killing them. As the soldier speaking at the Rabin Academy's "Fighters' Talk" a month later observes, "from our perspective, he [the marksman] did his job according to the orders he was given".

806. "Incessant" alerts about suicide bombers⁴⁴⁹ meant that even civilians clearly identified by the soldiers as carrying no arms were perceived as a threat as soon as they came within a certain distance from the soldiers – a threat to be eliminated, also without warning fire, as a second might be enough for the "suicide bomber" to get close enough to harm the soldiers.

807. The Mission notes that many of the persons interviewed in Gaza described incidents in which they were, individually, as part of a group or in a vehicle, exposed to intense gunfire from Israeli soldiers – but without being hit or injured. This was the case, for instance, of an ambulance drivers attempting to drive into an area which the Israeli armed forces had decided he should not enter.⁴⁵⁰ In the Khuza'a case, after the lethal shooting of Rouhiyah al-Najjar and wounding of Yasmine al-Najjar, the other women and children were exposed to fire from the Israeli soldiers, which forced them to retreat to the houses they had been trying to leave.⁴⁵¹ These incidents suggest that the Israeli armed forces made ample use of gunfire to "communicate" with the civilian population, to issue injunctions to civilians not to walk or not to drive any further in a certain direction or to immediately retreat to a building they were about to leave. The terrifying effect this sort of non-verbal communication had on those at the receiving end is evident, as is the likelihood of lethal consequences.

808. The Mission also read testimony from soldiers who recounted cases in which, although a civilian had come within a distance from them which would have required opening fire under the rules imparted to them, they decided not to shoot because they did not consider the civilian a threat to them.

⁴⁴⁷ Ibid., testimony 12, p. 32, also testimony 21, p. 52; and the of "Ram" in the Rabin Academy Fighters' Talk, pp. 6-7.

⁴⁴⁸ Testimony of "Ram" in the Rabin Academy Fighters' Talk, pp. 6-7. The Mission notes that "Ram" clearly states that he was an eyewitness to the incident.

⁴⁴⁹ For instance, *Soldiers' Testimonies...*, testimony 13, p. 37, and testimony 22, p. 53.

⁴⁵⁰ Interview with Marwan Abu Reda, 11 June 2009. For a description of warning shots in front of moving vehicles, see *Soldiers' Testimonies...*, testimony 12, p. 33.

⁴⁵¹ This would appear to have been the case also in the shooting of Majda and Rayya Hajaj in Juhr ad-Dik.

D. Legal findings with regard to the cases investigated by the Mission

809. The fundamental principles applicable to these incidents, which are cornerstones of both treaty-based and customary international humanitarian law, are that “the parties to the conflict shall at all times distinguish between the civilian population and combatants”⁴⁵² and that “the civilian population as such, as well as individual civilians, shall not be the object of attack”.⁴⁵³ The Israeli Government refers to the principle of distinction as “the first core principle of the Law of Armed Conflict.” It further states that “the IDF’s emphasis on compliance with the Law of Armed Conflict was also directly incorporated into the rules of engagement for the Gaza Operation.” The principle of distinction was reportedly incorporated in the following terms: “Strikes shall be directed against military objectives and combatants only. It is absolutely prohibited to intentionally strike civilians or civilian objects (in contrast to incidental proportional harm).”⁴⁵⁴

810. In reviewing the above incidents the Mission found in every case that the Israeli armed forces had carried out direct intentional strikes against civilians. The only exception is the shelling of the Abu Halima family home, where the Mission does not have sufficient information on the military situation prevailing at the time to reach a conclusion.

811. The Mission found that, on the basis of the facts it was able to ascertain, in none of the cases reviewed were there any grounds which could have reasonably induced the Israeli armed forces to assume that the civilians attacked were in fact taking a direct part in the hostilities and had thus lost their immunity against direct attacks.⁴⁵⁵

812. The Mission therefore finds that the Israeli armed forces have violated the prohibition under customary international law and reflected in article 51 (2) of Additional Protocol I that the civilian population as such will not be the object of attacks. This finding applies to the attacks on the houses of Ateya and Wa’el al-Samouni, the shooting of Iyad al-Samouni, of Shahd Hajji and Ola Masood Arafat, of Ibrahim Juha, of Rayya and Majda Hajaj, of Amal, Souad, Samar, and Hajja Souad Abd Rabbo, of Rouhiyah al-Najjar, and of Muhammad Hekmat Abu Halima and Matar Abu Halima. In these incidents, 34 Palestinian civilians lost their lives owing to Israeli fire intentionally directed at them. Numerous others were injured, some very severely and with permanent consequences.

813. Not only are civilians not to be the object of attacks, they are also “entitled in all circumstances, to respect for their persons ... protected especially against all acts of violence or threats thereof” (Fourth Geneva Convention, art. 27). Fundamental guarantees set out in article 75 of Additional Protocol I include the absolute prohibition “at any time and in any place” of “violence to the life, health, or physical or mental well-being of persons”. According to the facts presented to the Mission, these provisions have been violated.

⁴⁵² Additional Protocol I, art. 48.

⁴⁵³ Additional Protocol I, art. 51 (2).

⁴⁵⁴ “The operation in Gaza...”, paras. 94 and 222.

⁴⁵⁵ Pursuant to article 51 (3) of Protocol Additional I, civilians enjoy immunity from attack “unless and for such time as they take a direct part in hostilities.” On the status of this rule in customary law, see chap. VII.

814. The State of Israel would be responsible under international law for these internationally wrongful actions carried out by its agents

815. From the facts ascertained, the Mission finds that the conduct of the Israeli armed forces in these cases would constitute grave breaches of the Fourth Geneva Convention in respect of wilful killings and wilfully causing great suffering to protected persons⁴⁵⁶ and as such give rise to individual criminal responsibility.

816. The Mission also finds that the direct targeting and arbitrary killing of Palestinian civilians is a violation by the Israeli armed forces of the right to life as provided in article 6 of the International Covenant on Civil and Political Rights.

817. In most of the cases examined above, the Mission finds that the Israeli armed forces denied the medical emergency services access to the wounded civilians. This was the case with regard to all the incidents occurring in the al-Samouni neighbourhood, particularly after the shooting of Ahmad al-Samouni, where the PRCS ambulance was forced to return to Gaza City having come within 100 metres of the gravely wounded boy. Ambulances were also arbitrarily prevented from reaching the wounded after the attack on Wa'el al-Samouni's house, most dramatically after the shooting of Amal, Souad, Samar, and Hajja Souad Abd Rabbo and of Rouhiyah al-Najjar. In the case of the shooting of Muhammad Hekmat Abu Halima and Matar Abu Halima, it is the rescuers who were executed, preventing them from taking their severely burned relatives to hospital. In the case of Iyad al-Samouni, finally, the relatives who wanted to assist him were threatened with being shot themselves.

818. The Mission recalls that article 10 (2) of Additional Protocol I provides that "In all circumstances [the wounded] shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. ..." This provision enjoys customary international law status. The Mission is mindful that "the obligation to protect and care for the wounded ... is an obligation of means." It applies whenever circumstances permit. However, "each party to the conflict must use its best efforts to provide protection and care for the wounded, ... , including permitting humanitarian organizations to provide for their protection and care."⁴⁵⁷

819. The facts ascertained by the Mission establish that in the incidents investigated the Israeli armed forces did not use their best efforts to provide humanitarian organizations access to the wounded. On the contrary, the facts indicate that, while the circumstances permitted giving access, the Israeli armed forces arbitrarily withheld it.

820. On this basis, the Mission finds a violation of the obligation under customary international law to treat the wounded humanely.

⁴⁵⁶ Article 147 of the Fourth Geneva Convention defines the "wilful killing" of protected persons as a grave breach of the Convention. The same qualification is applied to acts which "wilfully caus[e] great suffering or serious injury to body or health".

⁴⁵⁷ *Customary International Humanitarian Law...*, rule 110 and p. 402.

821. The conduct of the Israeli armed forces amounted to violations of the right to life where it resulted in death, and to a violation of the right to physical integrity, and to cruel and inhuman treatment in other cases, which constitutes a violation of articles 6 and 7 of the International Covenant on Civil and Political Rights.

E. The attack on the al-Maqadmah mosque, 3 January 2009

1. The facts gathered by the Mission

822. The al-Maqadmah mosque is situated near the north-west outskirts of Jabaliyah camp, close to Beit Lahia. It is located less than 100 metres from the Kamal Idwan hospital, in the al-Alami housing project. At least 15 people were killed and around 40 injured – many seriously – when the Israeli armed forces struck the entrance of the mosque with a missile.

823. The Mission heard five eyewitnesses who had been in the mosque at the time it was struck. Two of them had been facing the door as the explosion occurred. Three of them had been kneeling facing the opposite direction and had been seriously injured. The Mission also heard from a number of relatives of those who died in the attack and has seen a number of sworn statements signed by them testifying to the facts they witnessed.⁴⁵⁸ The Mission also heard again from three witnesses it had interviewed earlier at the public hearings in Gaza. Finally, the Mission reviewed information received from TAWTHEQ.

824. On the evening of 3 January 2009, between 5 and 6 p.m., a large number of people had gathered in the mosque for evening prayers. Witnesses indicate that between 200 and 300 men had gathered on the first floor.⁴⁵⁹ A number of women had also congregated in the basement at that time. Witnesses explained that in time of fear or emergency it was the tradition to combine sunset and evening prayers.⁴⁶⁰ In addition, the Mission heard that, while some time normally elapses between the muezzin calling the faithful to prayer and the prayers beginning, at this time it was the practice to begin prayers almost immediately.

825. The witnesses indicated that prayers had ended and the sermon was just beginning. At that point there was an explosion in the doorway to the mosque. One of the two wooden doors was blown off its hinges and all the way across the prayer area to the opposite wall.

826. As a result of the explosion at least 15 people died. Almost all were inside the mosque at the time. One of the casualties was a boy who had been sitting at the entrance. His leg was blown off by the missile strike and found afterwards on the roof of the mosque. A large number, around 40, suffered injuries. Many were taken to the Kamal Idwan hospital for treatment.

⁴⁵⁸ Note, for example, the affidavit of Ismail al-Salawi, brother of the sheikh at the mosque. He recounts how he was on his way to the mosque when his 13-year-old daughter ran towards him screaming that it had been bombed. He rushed in to find a scene of bloody chaos. As an immediate result of the strike his grandson Muhammad (13 years old), his nephews Hani (8 years old) and Omar (27 years old) were killed. See also a similar explanation of events by Ayisha Ibrahim, whose husband, Abdul Rahman (46), and son Ra'id were killed in the attack.

⁴⁵⁹ Sheikh al-Salawi, interviewed on 3 June 2009 and 4 July 2009.

⁴⁶⁰ See, for example, Sheikh al-Salawi at the public hearing in Gaza on 27 July 2009, available at <http://www.realnetworks.com>

827. On visiting the mosque, the Mission was able to observe the damage done to it. Its immediate entrance is on a raised level from the external pavement and is reached via a ramp. There are a number of stairs below the doorway, now covered by the raised entrance at the end of the ramp. The stairs underneath the ramp were damaged and the concrete had been pierced. There was a scorch mark on the ground and stairs.

828. The Mission has also viewed a number of photographs taken shortly after the strike and considers them to be reliable. They showed that something had penetrated the concrete (about three inches thick) immediately outside of the mosque doorway and then hit the pavement at the bottom of the stairs below the concrete covering. The ramp and entrance level structure had a wall about one metre high built on its outer side. The part of the wall opposite the mosque door was blown away.

829. The Mission observed that the interior walls of the mosque and part of the exterior wall around the doorway appeared to have suffered significant damage as a result of a spray of small metal cubes. A good number of these were lodged in the wall even at the time of the Mission's visit to the site in June 2009. Several of these were retrieved and the Mission could see how deeply embedded they were in the concrete walls.

830. Apart from the aforementioned visit to the mosque, the Mission has interviewed its sheikh on three occasions, its imam twice, its muezzin, several members of the sheikh's family, several of those injured in the blast and a number of the relatives who lost family members and who assisted in the immediate aftermath of the attack. It has seen medical certificates that bear out the nature of those injuries related by the young men it interviewed. The Mission questioned all of the witnesses and sought to clarify any doubts it may have had.

2. The position of the Israeli Government and the Israeli armed forces

831. The Israeli armed forces' response to the allegations states:

... relating to a strike against the "Maqadme" mosque in Beit-Lahiya on January 3rd, 2009, it was discovered that as opposed to the claims, the mosque was not attacked at all. Furthermore, it was found that the supposed uninvolved civilians who were the casualties of the attack were in fact Hamas operatives killed while fighting against the IDF.⁴⁶¹

832. Apart from the apparent contradictions it contains, the Mission notes that the statement does not indicate in any way the nature of the inquiry, the source of its information or the reliability and credibility of such sources.

833. In July 2009 the Israeli Government repeated the same position.⁴⁶²

⁴⁶¹ "Conclusions of investigations into central claims and issues in Operation Cast Lead", 22 April 2009, annex C. The document was approved and authorized by the Chief of the General Staff Lt. Gen. Gabi Ashkenazi. It is available at: <http://dover.idf.il/IDF/English/opcast/postop/press/2201.htm>

⁴⁶² "The operation in Gaza...".

3. Factual findings

834. The Mission has established that the Israeli armed forces fired a missile that struck near the doorway of the mosque. The penetration pattern witnessed on the concrete ramp and stairs underneath is consistent with that which would be expected of a shrapnel fragmentation sleeve fitted onto an air-to-ground missile. Shrapnel cubes that the Mission retrieved from the rear inside wall of the mosque are consistent with what would be expected to be discharged by a missile of this nature.⁴⁶³

835. The strike killed at least 15 people attending the mosque for prayers and very seriously injured several others.

836. The Mission is not in a position to say from which kind of aircraft or air-launch platform the missile was fired. It believes the testimony of the witnesses regarding the circumstances of the attack, finding it plausible and consistent not only with the other witnesses, but also with the physical evidence at the scene. The Mission also notes that a number of local organizations sent representatives to the site of the attack very shortly after it occurred and they witnessed the scene for themselves. The Mission has also spoken with them and notes that their accounts are consistent with the testimony provided by the witnesses it heard.

837. There has been no suggestion that the al-Maqadmah mosque was being used at that time to launch rockets, store weapons or shelter combatants.⁴⁶⁴ Since it does not appear from the testimonies of the incident or the inspection of the site that any other damage was done in the area at that time, the Mission concludes that what occurred was an isolated strike and not in connection with an ongoing battle or exchange of fire.

4. Legal findings

838. In the absence of any explanation as to the circumstances that led to the missile strike on al-Maqadmah mosque and taking into account the credible and reliable accounts the Mission heard from multiple witnesses, as well as the matters it could review for itself by visiting the site, the Mission concludes that the mosque was intentionally targeted by the Israeli armed forces. The Mission also takes into account the precision and sophistication of the Israeli armed forces' munitions in making this finding.

839. The Mission's finding is strengthened in the face of the unsatisfactory and demonstrably false position of the Israeli Government.

840. It follows that this was an attack on the civilian population as such and not on a military objective.

⁴⁶³ The Mission considers it possible in analysing the information available that the missile in question may have been a modified high-explosive anti-tank missile, sometimes referred to as either augmented high-explosive anti-tank (AHEAT) or high-explosive dual-purpose (HEDP).

⁴⁶⁴ See, for example, statements made by Israel in "The operation in Gaza...", para. 234.

841. Based on the facts ascertained, the Mission finds that the Israeli armed forces have violated the prohibition under customary international law that the civilian population as such will not be the object of attacks as reflected in article 51 (2) of Additional Protocol I.

842. Based on those facts, the violations also constitute a grave breach of the Fourth Geneva Convention in respect of wilful killings and wilfully causing great suffering to protected persons.

843. The Mission also finds that the State of Israel would be responsible for the arbitrary deprivation of the right to life, in relation to article 6 of the International Covenant on Civil and Political Rights, of those killed.

F. The attack on the al-Daya family house, 6 January 2009

1. The facts gathered by the Mission

844. On 6 January 2009, the al-Daya Family house located on al-Rai'i Street in Zeytoun, south-east of Gaza City, was struck by a projectile fired from an F-16 aircraft which killed 22 members of the family. Twelve of those killed were children under 10.

845. In June 2009, the Mission visited the site of the incident where it interviewed two of the four surviving members from the al-Daya family and a number of local residents.⁴⁶⁵ Further inquiries and interviews were conducted in late July with neighbours of the al-Daya family.

846. The al-Daya house was a four-storey building with seven apartments owned by Fayez Musbah al-Daya. Each apartment was occupied by one of his seven sons, some married and living with their own families, and two unmarried daughters.

847. The Israeli armed forces reached Zeytoun on 3 January. Witnesses interviewed by the Mission said that the Israeli armed forces dropped leaflets in the area instructing people not to support Hamas and to provide the Israeli armed forces with information, at a given number, on military activities in the neighbourhood, including details of weapon facilities.⁴⁶⁶

848. Witnesses mentioned that a rumour had circulated that the Israeli forces were going to bomb a house in the neighbourhood, which led several families to leave their homes.⁴⁶⁷ A few families chose to stay, including the remaining members of the al-Daya family and five other families.⁴⁶⁸

849. On the morning of 6 January, at around 5.35 a.m. a missile was reportedly fired in the vicinity of the al-Daya house, close to the Hassan al-Banna mosque, which killed an elderly man. Witnesses stated that the strike occurred shortly after the morning prayers had ended and when the man was on his way home. The same witnesses confirmed that the death of the man in

⁴⁶⁵ Muhammad Fayez al-Daya, Rida Fayez al-Daya, Aimer al-Daya and Hafez al-Daya.

⁴⁶⁶ Mission interviews with Muhammad Salam al-Ra'i, Deeb al-Ra'i, Faraj al-Ra'i and Rida al-Daya, July 2009.

⁴⁶⁷ Those who left included the eldest son of the al-Daya family, Nafez al-Daya, his wife and seven children.

⁴⁶⁸ The families of Zuher al-Ra'i (an estimated 16 people), Faraj al-Ra'i (an estimated 15 people), Jumaa al-Ra'i (an estimated 7 people), Mahmoud al-Hindi (an estimated 4 people) and Shawqi Sa'd.

question was caused not by a bullet but by a small missile. Approximately 10 minutes later, at around 5.45 a.m. the al-Daya family house was hit by a projectile from an F-16 aircraft.

850. Twenty-two members of the al-Daya family inside the house were killed.⁴⁶⁹

851. The Mission interviewed a number of neighbours. Each one of them said they had not received any warning call from the Israeli forces prior to the strike on the al-Daya house and confirmed that no other house in the street was struck after the al-Daya house had been hit.

852. Owing to the location of the house and the narrow street access it took several hours before neighbours were able to dig through the rubble. One brother, Radwan al-Daya, was pulled out of the debris alive and taken to the hospital with the help of a PRCS worker who lived near the al-Daya house. He died three days later having suffered severe asphyxiation. Several bodies were recovered only after the withdrawal of the Israeli armed forces.

2. The Israeli position

853. On 22 April 2009 the Israeli armed forces issued the following statement:

[...] The Al-Daia family residence in the Zeitoun neighbourhood in the city of Gaza (January 6th, 2009) – the incident in question was a result of an operational error with unfortunate consequences. The investigation concluded that the IDF intended to attack a weapons storage facility that was located in the building next to the Al-Daia family residence. It appears that following an error, the structure that was planned to be attacked was the Al-Daia residence rather than the building containing the weapons.⁴⁷⁰

854. In July 2009 the Israeli Government stated the following:

The IDF has concluded that this tragic event was the result of an operational error. An investigation determined that the IDF intended to strike a weapons' storage facility located in a building next to this residence. However, the IDF erroneously targeted the Al-Daia residence, rather than the weapons storehouse. Although the IDF did provide warning shots to the roof of the Al-Daia residence, other warnings (such as the warning phone call) were made to the building *actually* containing the weapons, not the Al-Daia residence.

The IDF is examining how the unfortunate operational error occurred, in order to reinforce safeguards and to prevent its recurrence. Israel deeply regrets the tragic outcome. This is the kind of mistake that can occur during intensive fighting in a crowded environment, against an enemy that uses civilian neighbourhoods as cover for its operations. IDF forces did not intentionally target civilians. This lack of unlawful intent

⁴⁶⁹ These included the wife of Muhammad al-Daya (one of the surviving family members), their three daughters and one son, all under seven, who were crushed under the rubble of the house. Most of them were asleep at the time of the attack. Others killed included Fayez al-Daya and his wife; Iyad al-Daya and his wife Rawda, their three daughters and three sons, all under 10; Ramez al-Daya, his wife Safa, and their six-month-old daughter and two-year-old son; two sisters, Raghdah and Sabrine, and Radwan al-Daya.

⁴⁷⁰ "Conclusions of investigations...", annex C.

has been a critical factor, in past incidents involving operational mistakes by other armies (such as NATO's erroneous bombing of the Chinese Embassy in the former Yugoslavia), in determining that no violation of the Law of Armed Conflict occurred. Similarly, although its attack on the Al-Daia residence was a tragic error, it did not constitute a violation of the laws of war.⁴⁷¹

3. Factual findings

855. Israel's position is that the al-Daya house was destroyed as a result of an "operational error" made at some point in the planning of the operation. It says the target that should have been hit was a neighbouring house storing weapons. The Mission has interviewed the residents of the neighbouring houses and visited the site. No neighbouring house was attacked at any time after the al-Daya house was destroyed. The Mission finds it difficult to understand how a target apparently important enough to be targeted for such definitive destruction in the first place, as a result of what it apparently contained, could then remain free from attack for the remaining 12 days of the land operation.

856. The Mission is unable to verify claims that a warning was given by means of firing a small missile to the roof as the house was destroyed and the residents killed. Local witnesses have reported that a small missile did appear to strike an elderly man in the neighbourhood about 10 minutes before the al-Daya house was destroyed but the Mission is not in a position to say whether this is likely to have been an errant warning shot.

857. The Israeli authorities have not indicated with any precision which house they called but the claim that a warning call was made to the house that allegedly contained weapons has been denied by all local residents. No such call was received by anyone in the houses neighbouring the al-Daya house.

858. In these circumstances there are significant doubts about the Israeli authorities' account of the incident and what has been offered to date does not in the view of the Mission constitute an explanation.

859. Besides the main difficulties mentioned above, there are a number of issues that could have been easily clarified but were not. The precise nature of the operational error remains unclear, as does the time it occurred and who was responsible for it. Similarly, it would appear that the warnings system failed at various points: the Government of Israel reports that a warning was given on the basis that it believed there was a house storing weapons. Given the power of the projectile that destroyed the four-storey al-Daya building, the Mission wonders what the consequences would have been if the projectile had in fact struck a weapons store, yet there is no suggestion by the Israeli authorities of a warning having been given to neighbouring houses that secondary explosions were possible. Not only does it appear that the wrong warnings were given to the wrong people, but if the existence of the storage facility is to be believed at all, it would also appear that the apparently feasible step of warning locals of entirely foreseeable danger was not taken either.

⁴⁷¹ "The operation in Gaza...", paras. 386-387.

860. The Mission finds the version of events offered so far by Israel to be unsatisfactory. The details given are not sufficient to clarify the nature of the very serious error that has been made, if it was an error. In so far as any explanation has been given, it appears to lack coherence and raises more questions than it answers.

4. Legal findings

861. In the absence of information necessary to determine the precise circumstances of the incident, the Mission can make no findings on possible violations of international humanitarian law or international criminal law. If indeed a mistake was made and the intention was to destroy a house nearby rather than to kill the al-Daya family, there could not be said to be a case of wilful killing as the requisite degree of criminal intent would not have been established on the part of the individuals responsible.⁴⁷²

862. However, the issue of State responsibility remains. The International Law Commission's articles on the responsibility of States for internationally wrongful acts⁴⁷³ are silent on whether such a mistake relieves a State of its international responsibility for the commission of an internationally wrongful act and the requirement of fault in international law is controversial. In a commentary on the articles, Crawford and Olleson consider that "if a State deliberately carries out some specific act, there is less room for it to argue that the harmful consequences were unintended and should be disregarded. Everything depends on the specific context and on the content and interpretation of the obligation said to have been breached".⁴⁷⁴

863. The obligation breached in this case is the duty to ensure the general protection of the civilian population against the dangers arising from military operations, as reflected in article 51 (1) of Additional Protocol I.

864. The firing of the projectile was a deliberate act in so far as it was planned, by Israel's admission, to strike the al-Daya house. The fact that target selection had gone wrong at the planning stage does not strip the act of its deliberate character. The consequences may have been unintended; the act was deliberate. Taken together with further facts (such as the failure to deliver an effective warning) and the nature of the "intransgressible obligation" to protect civilian life, the Mission considers that, even if a fault element is required, the available information demonstrates a substantial failure of due diligence on the part of Israel. As such, the Mission considers Israel to be liable for the consequences of this wrongful act.

865. The Mission finds that Israel's lack of due diligence in this case also constitutes a violation of the right to life as set out in article 6 of the International Covenant on Civil and Political Rights, to which Israel is a party. The right to life includes the negative obligation to respect life and the positive obligation to protect life. The Human Rights Committee has stated that States parties should take measures not only to prevent and punish deprivation by criminal

⁴⁷² See, for example, article 32 of the Rome Statute.

⁴⁷³ Annexed to General Assembly resolution 56/83.

⁴⁷⁴ J. Crawford and S. Olleson, "The nature and forms of international responsibility", in *International Law*, M. Evans, ed. (Oxford, Oxford University Press, 2003).

acts, but also to prevent arbitrary killing by their own security forces.⁴⁷⁵ No exception is made for acts during war.

866. The right to life also includes a procedural component that requires adequate investigation of any alleged violation “promptly, thoroughly and effectively through independent and impartial bodies” for “failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.”⁴⁷⁶ The investigation of the Israeli armed forces referred to above lacks transparency and credibility. The failure of Israel to comply with the procedural requirement adds to the frustration and anger felt by survivors, who have received no credible explanation for what occurred.

G. Attack on the Abd al-Dayem condolence tents

1. The facts gathered by the Mission

867. On 4 January 2009 the Israeli armed forces struck an ambulance in the Beit Lahia area with a flechette missile as it was attending a number of wounded persons who had been hit in an earlier attack. Those wounded in the first attack had also been hit by a flechette missile. As a result of the attack on the ambulance, one of the first-aid volunteers in the ambulance crew, Arafa Abd al-Dayem, suffered severe injuries. He died later the same afternoon.

868. The following day, as is the custom, the family set up condolence tents where family and friends would pay their respects and comfort the grieving relatives. The family home is in Izbat Beit Hanoun, a built-up area in the north-east corner of the Gaza strip. It is located between Jabaliyah and Beit Hanoun, about 3 kilometres from the border with Israel both to the north and to the east. Although the Israeli armed forces had entered Gaza at the time of the incident, in this area they remained on the Israeli side of the “Green Line” border. Two tents were set up – one for male visitors and one for female visitors. They were positioned at about ten metres from each other. The male tent was outside the house of Mohammed Deeb Abd al-Dayem, the father of the ambulance driver.

869. The tents were struck three times in two hours, again with flechette missiles.

870. The Mission spoke to several of the witnesses who had attended and survived the attacks on the condolence tents. The Mission noted the great pride Arafa Abd al-Dayem’s father had in his son and the deep sense of loss he clearly felt.

871. As regards the attacks on the condolence tents, witnesses stated that at around 7.30 a.m. on 5 January, the house of Mohammed Deeb Abd al-Dayem, was hit by a shell. The shell struck the fourth floor of the five-storey building causing the roof to collapse.⁴⁷⁷ Three men at the gathering, including the father of the deceased, were slightly wounded and taken to the Kamal

⁴⁷⁵ General comment No. 6 (1982), para. 3.

⁴⁷⁶ Human Rights Committee, general comment No. 31 (2004), para. 15. See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 3 (b).

⁴⁷⁷ Testimony of IK/12 and IK/13 to the Mission on 30 June 2009.

Idwan hospital in Beit Lahia for treatment. They returned to the house at around 8.15 a.m. where a decision was taken by the mourners to end the condolence ceremony for fear of further attacks.

872. The witness stated that at around 8.30 a.m. when the people were leaving the house of Mohammed Deeb Abd al-Dayem and moving towards the women's condolence tent, two flechette missiles struck within a few metres of the tent and less than half a minute apart. Around 20 to 30 persons assembled there were injured. The injured include a 13-year-old boy who received a flechette injury to the right side of his head and a 33-year-old man who sustained injuries to the chest and head, his body punctuated with little holes according to a witness who saw his corpse being prepared for burial. A 22-year-old man was wounded in the abdomen, the chest and the head. A 16-year-old boy sustained injuries to the head and the neck. A 26-year-old man sustained injuries to his chest, head and left leg. These five persons died of their injuries. Another 17 persons present at the scene, including 14 men, two children (aged 17 and 11) and one woman were injured.

873. IK/12, who survived the attack, still has several flechettes embedded in his body, including in his chest, and is unable to move freely without pain.

874. Witnesses described that their sense of loss was aggravated by the fact that they could not access the injured or dead in hospitals as movement was restricted owing to continued shelling in and around the neighbourhood. Only two families out of the five families of the dead were able to conduct the burial according to their traditional customs and practices.

2. The Israeli position

875. The Israeli Government does not appear to have made any public comment on the allegations surrounding the Abd al-Dayem case, despite information about it being in the public domain for some time.⁴⁷⁸ It has, however, recalled that the Israeli High Court of Justice has rejected the argument that flechette munitions are by their nature indiscriminate and maintains that subject to the general requirements of the rules of armed conflict their use is legal.⁴⁷⁹

3. Factual findings

876. The Mission visited the area and the house of the Abd al-Dayem family. It spoke with the father of Arafa Abd al-Dayem, who had died as a result of the injuries received while working as a first-aid volunteer, and with several of the witnesses who had attended the condolence ceremonies.

877. The account of the incidents was consistent and plausible. The fact that it was mainly men who were killed near the women's tent is explained by the fact that the strikes occurred precisely when the men were making their way across the road.

⁴⁷⁸ The incident is mentioned in Amnesty International, *Fuelling Conflict: Foreign Arms Supplies to Usrael/Gaza* (February 2009).

⁴⁷⁹ See "The operation in Gaza...", paras. 431-435.

878. The Mission can see nothing at all that points to the house of Mohammed Deeb Abd al-Dayem, or the condolence tents constituting a military objective. The repeated nature of the strikes indicates that there was a deliberate attempt to kill members of the group or the entire group, but no information about the purpose of the strikes has been forthcoming from the Israeli authorities.

879. The Mission inspected the sites of the attacks and was left in no doubt that they had been entirely deliberate. There was a tent at each side of the wide road. The particular area is relatively open.

4. Legal findings

880. While international humanitarian law does not explicitly prohibit the use of flechettes in all circumstances, the principles of proportionality and precautions necessary in attack render their use illegal. Flechettes are 4-cm-long metal darts used as anti-personnel weapons that penetrate straight through human bone and can cause serious, often fatal, injuries.⁴⁸⁰ Discharged from tank shells and aircraft or UAV-launched missiles, they are fired in salvo and are therefore an area anti-personnel weapon. They are, therefore, by their nature lacking in discrimination.

881. The Mission notes that, during the condolence ceremony, flechette shells were fired in the vicinity of a large group of civilians, killing 5 and injuring more than 20. To consider the attacks indiscriminate would imply that there was a military objective underlying the attacks in the first place. The Mission has no information on which to base such a conclusion and notes the silence of the Israeli authorities on the incident.

882. The Mission therefore considers that the families participating in the condolence ceremony were civilians and taking no active part in hostilities. The attacks on the condolence tent on the morning of 4 January were entirely unjustified and unnecessary. The attacks seemed designed to kill and maim the victims directly and otherwise to terrify the people in the area rather than to pursue any genuine military objective.

883. The Mission finds that the attack on the Abd al-Dayem family condolence tents constitutes an intentional attack against the civilian population and civilian objects, wilful killing and the wilful infliction of suffering. In particular, the Mission believes that any party using a flechette missile in circumstances that are totally or predominantly civilian cannot fail to anticipate the severe and unnecessary suffering of the civilians affected.

884. Based on the facts ascertained, the Mission therefore finds there to have been violations of customary international law in respect of a deliberate attack on civilians. It considers the attack was not only an attack intended to kill but also to spread terror among the civilian population, given the nature of the weapon used. (See art. 51 (2) of Additional Protocol I.)

⁴⁸⁰ Amnesty International, *Israel/Gaza: Operation "Cast Lead": 22 days of death and destruction* (London, 2009) and B'Tselem, "Flechette shells: an illegal weapon", available at: <http://www.btselem.org/english/firearms/flechette.asp>.

885. The Mission also finds the attack to constitute a grave breach of the Fourth Geneva Convention with respect to article 147 regarding wilful killings and wilfully causing great suffering.

XII. THE USE OF CERTAIN WEAPONS

886. In the course of its inquiries, the Mission was made aware of the use of certain weapons by the Israeli armed forces. This chapter does not intend to present a comprehensive analysis of all the aspects raised on the kinds of weaponry used during the military operations. It is rather a summary of the Mission's views on a number of issues that arise from the foregoing chapters in relation to the obligation to take all feasible precautions in the choice of the means and methods of warfare. Many of the issues brought to the Mission's attention had already received scrutiny in the press or as a result of analysis carried out by a number of organizations.⁴⁸¹ Among these issues was the use of white phosphorous, the use of flechette missiles, the use of so-called dense inert metal explosive (DIME) munitions, and the use of depleted uranium.

A. White phosphorous

887. White phosphorous was used throughout the ground phase of the operations. The Israeli Government has set out its reasons for doing so, emphasizing that it is not only not a proscribed weapon under international law but that it was deployed with a high degree of success.⁴⁸²

888. It has explained that it used white phosphorous in two forms. One was as exploding munitions used as mortar shells by ground and naval forces. It says that in this form it was deployed only in unpopulated areas for marking and signalling purposes, and not in an anti-personnel capacity. It claims that, as a result of international concerns, it decided to stop using these munitions on 7 January 2009, although this was not required by international law. It also acknowledges the use of smoke projectiles containing felt wedges dipped in white phosphorous.

889. The Mission understands the means of deploying these smoke projectiles was that they were fired as a canister shell by 155-mm howitzers. The projectile was timed or programmed to air-burst over its designated target. The canister shell then discharged a quantity of felt wedges impregnated with white phosphorous, usually in the order of 160 wedges in a fan-like dispersion earthwards. These wedges with white phosphorous, which is a pyrophoric chemical (that is, self-igniting when in contact with the air), emit smoke and continue to do so until the chemical is exhausted or deprived of air. Wedges of white phosphorous therefore remain active and have done so in Gaza for up to 21 and 24 days after discharge. It is technically possible that there are

⁴⁸¹ See, for example, Physicians for Human Rights-Israel, Report of the Independent Fact Finding Mission into violations in the Gaza Strip during the period 27.12.08-18.01.09, http://www.phr.org.il/phr/files/articlefile_1241949935203.pdf, Human Rights Watch, Rain of Fire: Israel's Unlawful Use of White Phosphorous in Gaza (March 2009), Amnesty International, Fuelling conflict: Foreign arms supplies to Israel/Gaza (February 2009), Report of the Independent Fact Finding Committee on Gaza, "No safe place...", paras. 206-207; Summary of the Report of the United Nations Headquarters Board of Inquiry, paras. 46-56, documentation provided by UNRWA.

⁴⁸² "The operation in Gaza...", paras. 406-430. The Mission addressed written questions to the Government of Israel regarding the use of white phosphorous during the military operations in Gaza. No reply was received.

still active white phosphorous wedges in Gaza – in water tanks or in sewage systems, for example. Children have subsequently been injured by coming in contact with such wedges.

890. The Mission has recounted a number of incidents where it has particular concern about the choice to use white phosphorous. These incidents have been addressed in detail elsewhere and include the incidents at the UNRWA compound in Gaza City, the attacks on al-Quds and al-Wafa hospitals, also in Gaza City, and the use of white phosphorous in the attack on the Abu Halima family to the north of al-Atatra and in Khuz'a.

891. The Mission notes that, at least in the case of Abu Halima,⁴⁸³ it appears that the white phosphorous was deployed by means of an exploding shell and not as a smoke projectile. This occurred several days after the apparent decision to stop using the munitions on 7 January 2009.

892. The Mission has also spoken at some length to a number of local and international medical experts who treated patients in Gaza who suffered burns as a result of exposure to white phosphorous.

893. The Mission need not repeat much of what it has already concluded on the choice to use white phosphorous in specific circumstances. It has already made clear that the risks it posed to the civilian population and civilian objects in the area under attack were excessive in relation to the specific military advantages sought.

894. The Israeli Government has frequently pointed out the difficulties posed by fighting in built-up areas. One of the difficulties is the proximity of civilian premises to possible military targets. Commanders have no choice but to factor in the risk to such premises and the people inside them in deciding which weapons to use. The Mission finds that the Israeli armed forces were systematically reckless in determining to use white phosphorous in built-up areas and in particular in and around areas of particular importance to civilian health and safety.

895. In addition to the reckless use of white phosphorous, the Mission must emphasize that it is concerned not only with the inordinate risks the Israeli armed forces took in using it, but also the damage it caused in fact. In speaking with medical experts and practitioners, it was impressed by the severity and sometimes untreatable nature of the burns caused by the substance.

896. Several doctors told of how they believed they had dealt with a wound successfully only to find unexpected complications developing as a result of the phosphorous having caused deeper damage to tissue and organs than could be detected at the time. Several patients died, according to doctors, as a result of organ failure resulting from the burns.

897. A senior doctor at al-Shifa hospital in Gaza City confirmed that Sabah, Ghada and Farah Abu Halima were admitted with serious burns and transferred to Egypt for treatment. The doctor believed that the burns were caused by contact with white phosphorous.⁴⁸⁴

⁴⁸³ See chap. XI.

⁴⁸⁴ Mission interview on 12 June 2009.

898. The doctor commented that, before the military operations, the hospital was not familiar with white phosphorous burns. Staff became concerned when patients who had been sent home after treatment of apparently minor burns would come back in the following days with more serious wounds. They found that when they removed the bandages that had been applied to a wound that still contained fragments of white phosphorous, smoke would come from the wound, even hours after the injury. White phosphorous continues to burn as long as it is in contact with oxygen.

899. International doctors working with al-Shifa staff, some of whom had worked in Lebanon during the 2006 war, identified white phosphorous as the cause of these injuries and the treatment was adapted accordingly. Any apparent white phosphorous burn was immediately covered with a wet sponge and the particles extracted. White phosphorous sticks to tissue, so all flesh and sometimes the muscle around the burn would have to be excised.

900. In addition, the highly toxic substance, used so widely in civilian settings posed a real health threat to doctors dealing with patients. Medical staff reported to the Mission how even working in the areas where the phosphorous had been used made them feel sick, their lips would swell and they would become extremely thirsty and nauseous.

901. While accepting that white phosphorous is not at this stage proscribed under international law, the Mission considers that the repeated misuse of the substance by the Israeli armed forces during this operation calls into question the wisdom of allowing its continued use without some further degree of control. The Mission understands the need to use obscurants and illuminants for various reasons during military operations and especially in screening troops from observation or enemy fire. There are, however, other screening and illuminating means which are free from the toxicities, volatilities and hazards that are inherent in the chemical white phosphorous. The use of white phosphorous in any form in and around areas dedicated to the health and safety of civilians has been shown to carry very substantial risks. The Mission therefore believes that serious consideration should be given to banning the use of white phosphorous as an obscurant.

B. Flechettes⁴⁸⁵

902. Flechettes are small, dart-like pieces of composite metal and are usually fired in salvo from canister projectiles or shells. Those fired and retrieved in Gaza were 4 cm long and approximately 2–4 mm wide, having a pointed end and a fletched end.

903. Flechettes are used in an anti-personnel role and are discharged in such quantities that they cover an area forward of the canister shell. As an area weapon, on impact the darts will hit whatever is within a certain zone. They are incapable of discriminating between objectives after detonation. They are, therefore, particularly unsuitable for use in urban settings where there is reason to believe civilians may be present.

⁴⁸⁵ See “The operation in Gaza...”, paras. 431-434. The report simply states that the weapons are not proscribed and this was reiterated by the Israeli High Court of Justice in 2002. Although it does not address specific allegations, it does state in general terms that allegations are still being investigated (para. 435). The Mission addressed questions to the Government of Israel regarding the use of flechettes during the military operations in Gaza. No reply was received.

904. Flechettes were fired during the military operations on several occasions by tanks and on at least one occasion from an air-to-surface missile of the “Helfire” type.⁴⁸⁶ In all cases those hit by these devices were civilians and in one case were attending a condolence tent following the loss of a family member who was also killed by flechettes.

905. Flechettes are known to bend, break or “tumble” on impact with human flesh. Such performances are often part of the flechettes design characteristic and are marketed as such. “Tumbling” in particular is adjudged to be a further determination of the projectiles “incapacitation” effect.⁴⁸⁷ The Mission notes, however, that flechettes can be designed to be free of these post-impact characteristics if it is desired that they should do so.

C. Alleged use of munitions causing a specific type of injury

906. The Mission received reports from Palestinian and foreign doctors who operated in Gaza during the military operations of a strikingly high percentage of patients with severed legs as a result of the impact of projectiles launched by the Israeli armed forces. Dr. Mads Gilbert, a Norwegian anaesthetist, and Dr. Eric Fosse, a Norwegian surgeon, who carried out surgery in al-Shifa Hospital from 31 December 2008 to 10 January 2009,⁴⁸⁸ described to the Mission the characteristics of the wounds. The amputations mostly occurred at waist height in children, generally lower in adults, and were combined with skin-deep, third-degree burns, four to six fingers upward from the amputation. Where the amputation took place, the flesh was cauterized as a result of the heat. The patients with these amputations had no shrapnel wounds, but red flashes on the abdomen and chest. The excision of large pieces of flesh was not infrequent in these patients. Dr. Gilbert added that the patients also suffered internal burns. This description was confirmed to the Mission by Palestinian surgeons.

907. The Mission understands such injuries to be compatible with the impact of DIME weapons. DIME weapons consist of a carbon-fibre casing filled with a homogeneous mixture of an explosive material and small particles, basically a powder, of a heavy metal, for instance, a tungsten alloy. Upon detonation of the explosive, the casing disintegrates into extremely small, non-lethal fibres. The tungsten powder tears apart anything it hits. The impact of such weapons in general causes very severe wounds within a relatively limited diameter (compared to other projectiles) from the point of detonation. As the small heavy metal particles can slice through soft tissue and bone, survivors close to the lethal zone may have their limbs amputated and tungsten alloy particles embedded in their bodies. The probabilities of injuries to persons at a greater distance from the detonation point are reduced compared to more conventional projectiles. It is therefore also referred to as a “focused lethality munition”.⁴⁸⁹

⁴⁸⁶ See Abduldayem case in chapter XI.

⁴⁸⁷ William Kokinakis and Joseph Sperrazza, “Criteria for incapacitating soldiers with fragments and flechettes (U)”, Ballistic Research Laboratories Report Number 1269, Aberdeen Proving Ground, Maryland (January 1965).

⁴⁸⁸ Mads Gilbert and Eric Fosse, “Inside Gaza’s al-Shifa hospital”, *The Lancet*, vol. 373, No. 9659 (17 January 2009), p. 200.

⁴⁸⁹ The DIME munitions subject of discussion here are distinct from the missile described, for example, in the al Maqadmah mosque case. In that case the missile had been fitted with a micro-shrapnel fragmentation sleeve. The

908. The materials submitted to the Mission, including by the expert witness Lt. Col. Lane, point to specific medical concerns with regard to survivors of DIME weapon injuries.⁴⁹⁰ The tungsten alloy particles are suspected to be highly carcinogenic and so small that they cannot be extracted from the patient's body. Dr. Gilbert noted that there had been no follow-up studies on the survivors of this type of amputation observed in Gaza and Lebanon since 2006 following Israeli military operations. There is some research suggesting that these patients might be at increased risk of cancer. These concerns apply equally to missile or projectile shrapnel of heavy metal such as tungsten or tungsten alloy which was used in at least two occasions in Gaza. The carcinogenic hazards are the same no matter the delivery means or the size or shape of the pieces of the metal that enter human flesh.

D. Factual findings on the use of munitions causing a specific type of injury

909. From the facts it gathered, the Mission finds that the allegations that DIME weapons were used by the Israeli armed forces in Gaza during the military operations require further clarification with regard to their use and, particularly, the health-care needs of survivors of the amputations attributed to DIME weapons.

910. The Mission notes that DIME or heavy metal shrapnel weapons and weapons armed with heavy metal are not prohibited under international law as it currently stands. The "focused lethality" reportedly pursued in the development of DIME weapons could be seen as advancing compliance with the principle of distinction. The Mission also observes, however, that there remains a very high risk of harming civilians when using these weapons in built-up areas and that concerns have been expressed that DIME weapons could have a particularly adverse impact on the enjoyment of the right to health of survivors, which would go beyond the impact generally associated with being affected by anti-personnel weapons in an armed conflict.

E. Allegations regarding the use of depleted and non-depleted uranium munitions by the Israeli armed forces

911. The Mission received submissions and reviewed reports alleging the use of depleted uranium weapons by the Israeli armed forces during the military operations in Gaza.⁴⁹¹ While it cannot be excluded that such weapons were used, on the basis of the information received the Mission decided not to investigate the matter further.

912. The Mission also received a submission which alleged that the analysis of the air filter taken from an ambulance which was in operation in the Beit Lahia area during the military

micro-shrapnel consisted of tungsten or tungsten alloy cubes, which may have similar carcinogenic hazards as the powder or fibres in DIME.

⁴⁹⁰ Written submissions to the Mission by expert witness Lt. Col. Lane.

⁴⁹¹ Arab Commission for Human Rights, Action des citoyens pour le désarmement nucléaire and International Coalition Against War Criminals, Preliminary report, Mission for Gaza, April 2009 by Jean-François Fechino, pp. 55-60; Action des citoyens pour le désarmement nucléaire, On the use of radioactive weapons in the Gaza Strip during « Operation Cast Lead » (27 December 2008 - 18 January 2009), <http://www.acdn.net/>.

operations showed unusually high levels of non-depleted uranium and niobium in the air.⁴⁹² In view of the limited time available, the Mission could not further investigate this matter.

XIII. ATTACKS ON THE FOUNDATIONS OF CIVILIAN LIFE IN GAZA: DESTRUCTION OF INDUSTRIAL INFRASTRUCTURE, FOOD PRODUCTION, WATER INSTALLATIONS, SEWAGE TREATMENT PLANTS AND HOUSING

A. The destruction of el-Bader flour mill

913. The Mission visited the site of the air strikes and surveyed the surrounding area in Sudaniyah, west of Jabaliyah. It met and interviewed the Hamada brothers, joint owners of the el-Bader flour mill, on four occasions. It spoke with representatives of the business community about the context and consequences of the strike on the flour mill. Mr. Hamada also testified at the public hearings in Gaza.⁴⁹³ The Mission also addressed questions to the Government of Israel with regard to the military advantage pursued in attacking the el-Bader flour mill, but received no reply.

914. The Hamada brothers are well-established businessmen and hold *Businessman Cards*, issued by the Israeli authorities to facilitate business travel to and from Israel. The flour mill is one of several businesses owned by the brothers on this site, including a tomato-canning factory and a factory for the production of nappies. These last two businesses were closed down sometime before the beginning of the Israeli military operations in Gaza, as the blockade led to a lack of supplies. According to Mr. Rashad Hamada, the tomato-canning business failed primarily because of the Israeli authorities' refusal to allow tins for canning into Gaza. The owners had transferred many employees from the businesses that had closed down to the flour mill so that these employees would continue to draw a salary. At the time of its destruction, the flour mill employed more than 50 people.

915. The el-Bader flour mill began operations in 1999.⁴⁹⁴ By 27 December 2008, it was the only one of Gaza's three flour mills still operating. The others had ceased operations owing to a lack of supplies. The el-Bader mill was able to continue in part because of its greater storage capacity.

⁴⁹² Submission by Chris Busby & Dai Williams. *Battlefield Fallout: Evidence of Uranium and Niobium in Weapons Employed by the Israeli Military in Gaza. Analysis of Ambulance Air Filter and Bomb Crater.*

⁴⁹³ The Mission met Rashad Hamada and other members of the Palestinian business community on 3 June 2009 and interviewed him at the site of the el-Bader flour mill on 4 June 2009. Mr. Hamada testified at the public hearings in Gaza on 29 June 2009.

⁴⁹⁴ Rashad Hamada stated that the aim of the business, besides making a profit, was to help Gaza to be more self-sustaining economically and thus to reduce dependence on external supplies. He indicated that the increase in running costs caused by the blockade gave Israeli competitors a considerable advantage. The cost of electricity, for example, was approximately 50 per cent higher than it was for his competitors in Israel. In addition, since the Israeli Government had closed the Erez crossing and all imports and exports had to go through the Karni crossing, transport costs had increased 10-fold. The increased cost for the consumer had, as a result, also been significant. The retail price of milled flour had risen, in his estimation, by perhaps as much as 10 per cent.

916. On 30 December 2008, a recorded warning was left on the flour mill's answering machine to the effect that the message was from the Israeli armed forces and that the building should be evacuated immediately. The approximately 45 workers in the mill at the time were evacuated at around 9.30 a.m.

917. Following the evacuation, Mr. Hamada called a business associate in Israel, explained what had happened and asked him for advice. The business associate called him back, indicating that he had spoken with contacts in the Israeli armed forces on Mr. Hamada's behalf, and had been told that, although the mill had been on a list of proposed targets, they had decided not to proceed with the strike. Mr. Hamada did not receive any information as to why his mill might have been targeted.

918. As a result of these conversations and the fact that there had been no strike, the employees returned to work the next day. Work continued for a number of days until a second recorded warning was received on or around 4 January 2009. The flour mill was again evacuated and Mr. Hamada again contacted his business associate in Israel. The same scenario unfolded whereby Mr. Hamada received a call later on to the effect that the Israeli armed forces had informed his associate that the mill would not be hit. The employees returned to work in the light of the information and the fact that the warnings had not been put into effect.

919. On 9 January, at around 3 or 4 a.m., the flour mill was hit by an air strike, possibly by an F-16. The missile struck the floor that housed one of the machines indispensable to the mill's functioning, completely destroying it. The guard who was on duty at the time called Mr. Hamada to inform him that the building had been hit and was on fire. He was unhurt. In the next 60 to 90 minutes the mill was hit several times by missiles fired from an Apache helicopter. These missiles hit the upper floors of the factory, destroying key machinery. Adjoining buildings, including the grain store, were not hit. The strikes entirely disabled the factory and it has not been back in operation since. A large amount of grain remains at the site but cannot be processed.

920. The Israeli armed forces occupied the disabled building until around 13 January. Hundreds of shells were found on its roof after the soldiers left. They appeared to be 40-mm grenade machine-gun spent cartridges.

921. The Hamada brothers rejected any suggestion that the building was at any time used for any purpose by Palestinian armed groups. They pointed out that all of the buildings and factories were surrounded by a high wall and manned by at least one guard at night. In addition, the Israeli authorities knew them as businessmen and they would not have been given Businessman Cards had there been any reason for the Israeli Government to suspect that they were involved with or supported armed groups. They were both adamant that their interest was and always had been industrial and commercial, and that the last thing they were prepared to do was put their business at risk.

1. Factual findings

922. The Mission found the Hamada brothers to be credible and reliable witnesses. It has no reason to doubt the veracity of their testimony. The information they provided was corroborated

by other representatives of the Gaza business community with whom the Mission discussed the context and consequences of the strike on the flour mill.

923. The owners and employees of the flour mill were forced to evacuate the building twice because of the two recorded warnings left on the answerphone, which were not followed by air strikes. They were put into a state of fear as a result of the false alarms. When the mill was hit on 9 January, the strike happened without prior warning, raising questions about the efficacy or seriousness of the warnings system used by the Israeli armed forces.

924. The consequences of the strike on the flour mill were significant. Not only are all the employees out of work, the capacity of Gaza to produce milled flour, the most basic staple ingredient of the local diet, has been greatly diminished. As a result, the population of Gaza is now more dependent on the Israeli authorities' granting permission for flour and bread to enter the Gaza Strip.

925. Available information does not suggest that the Israeli authorities have investigated the destruction of the flour mill. The Mission finds the version of the Hamada brothers to be credible and in line with the Israeli practice of leaving telephone warnings of impending attacks.

2. Legal findings

926. In considering the degree to which there may have been violations of international humanitarian law, the Mission refers to article 52 of Additional Protocol 1, which is set out in full above at chapter VII. The Mission also considers the following provisions to be relevant to its deliberations:

Article 54 (1) and (2) of Additional Protocol I

1. Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

Article 147 of the Fourth Geneva Convention provides:

Grave breaches to which the preceding article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

927. No other buildings in the industrial compound belonging to the Hamadas were damaged at the time of the strikes. It appears that the strikes on the flour mill were intentional and precise.

928. The Hamada brothers are well-known businessmen. The Israeli authorities did not appear to consider them either before or after the military operations to be a threat, given the unrestricted issuance of their Businessman Cards and their ability to travel to Israel afterwards. The issuance of a Businessman Card is no trifle, especially in the context of the ongoing restrictions on trade. It is not plausible that the Israeli authorities would issue such a document to any party it regarded with suspicion.

929. The only issue that remains to be examined is whether there was any reason for the flour mill to have been deemed a military objective on 9 January. The building was one of the tallest in the area and would have offered extensive views to the Israeli armed forces. The Mission notes that taking control of the building might be deemed a legitimate objective in the circumstances. However, by 9 January the Israeli armed forces were fully aware that the flour mill could be evacuated at short notice by using the warning message system. If the reason for attacking the mill was to gain control of it for observation and control purposes, it made no sense to bomb the principal machinery and to destroy the upper floors. There is also no suggestion that the Israeli armed forces considered the building to be a source of enemy fire.

930. The nature of the strikes on the mill and in particular the precise targeting of crucial machinery on one of the mid-level floors suggests that the intention was to disable its productive capacity. There appears to be no plausible justification for the extensive damage to the flour mill if the sole objective was to take control of the building. It thus appears that the only purpose was to put an end to the production of flour in the Gaza Strip.

931. From the facts it ascertained, the Mission finds that there has been a violation of the grave breaches provisions of the Fourth Geneva Convention. Unlawful and wanton destruction which is not justified by military necessity would amount to a war crime.

932. Having concluded that the strikes were without any military justification, and therefore wanton and unlawful, the Mission finds it useful to consider if there was any non-military purpose to the strikes.

933. The aim of the strike, if not military, could only have been to destroy the local capacity to produce flour. The question is whether such deliberate destruction of the sole remaining flour-producing capacity in the Gaza Strip can be described as having been done for the purpose of denying sustenance to the civilian population.

934. Article 54 (1) and (2) of Additional Protocol I reflect customary international law.⁴⁹⁵ Article 54 (2) prohibits acts whose specific purpose is the denial of sustenance for whatever reason, including starvation, forced displacement or anything else. In short, the motive for denying sustenance need not be to starve the civilian population. Indeed, the motive is irrelevant.

⁴⁹⁵ In this respect the Mission agrees with the views expressed by ICRC in *Customary Rules of International Law...*, pp. 189-193.

935. The civilian population is increasingly dependent on external humanitarian assistance, whose arrival depends on permission from the Israeli authorities. While it is not suggested that starvation is imminent, the health and welfare of the population at large have been profoundly affected by the blockade and the military operations. The only reason why starvation is not imminent however is precisely the provision of humanitarian assistance. Without such assistance Gaza's civilian population would not be able to feed itself.⁴⁹⁶

936. States cannot escape their obligations not to deny the means of sustenance simply by presuming the international community will fill the gap they have created by deliberately destroying the existing capacity.

937. From the facts ascertained by it, the Mission finds that the destruction of the mill was carried out for the purpose of denying sustenance to the civilian population, which is a violation of customary international law as reflected in article 54 (2) of Additional Protocol I and may constitute a war crime.

3. The right to food⁴⁹⁷

938. The right to adequate food therefore requires the right to food security (through either self-production or adequate income) and the "fundamental" right to be free from hunger.⁴⁹⁸ That Israel has not created a state of hunger is the result largely of the external aid provided to the population of Gaza. It has, however, severely affected the ability of Gazans both to produce food and to purchase it.

939. Article 1 of the International Covenant on Civil and Political Rights states that "in no case may a people be deprived of its own means of subsistence."

940. The right to adequate food is also reflected in the Convention on the Elimination of All Forms of Discrimination against Women, which requires State parties to guarantee to women "adequate nutrition during pregnancy and lactation."

941. The Mission finds that, as a result of its actions to destroy food and water supplies and infrastructure, Israel has violated article 1 of the International Covenant on Civil and Political Rights, article 11 of the International Covenant on Economic, Social and Cultural Rights and article 12 (2) of the Convention on the Elimination of All Forms of Discrimination against Women.

⁴⁹⁶ According to John Ging, 80 per cent of the Gazan population is dependent on UNRWA for food supplies. Interview with IRIN, 20 January 2009.

⁴⁹⁷ See chap. XVII.

⁴⁹⁸ See Randle C. DeFalco, "The right to food in Gaza: Israel's obligations under international law", *Rutgers Law Record*, vol. 35 (Spring 2009), available at: http://www.lawrecord.com/rutgers_law_record/2009/05/the-right-to-food-in-gaza-israels-obligations-under-international-law.html#sdfootnote24sym.

B. The destruction of the Sawafeary chicken farms

942. On or around the night of 3 January 2009 Israeli troops arrived at a number of houses on al-Sekka Road in Zeytoun. The Mission interviewed four people who were direct witnesses to and victims of the events that occurred in the aftermath of their arrival. One witness was interviewed three times for a total of five hours and testified at the public hearings in Gaza.⁴⁹⁹ Another three were interviewed for an hour each. The Mission also visited the site of the Sawafeary chicken farms. Finally, the Mission addressed questions to the Government of Israel with regard to the military advantage pursued in attacking Mr. Sawafeary's chicken farms, but received no reply. The following narrative reflects the eyewitness accounts.

943. Sameh Sawafeary is a chicken farmer. His family has been in the egg production business for many years. He indicated that he, his brothers and his children owned 11 chicken farms in Zeytoun as of December 2008. The farms housed more than 100,000 chickens.

944. On 3 January, Mr. Sawafeary, who was in his home on al-Sekka Road in the al-Samouni neighbourhood of Zeytoun with his family, was alerted by an al-Jazeera television news broadcast at around 8 p.m. that an Israeli ground invasion was imminent.⁵⁰⁰ As a result, he took a number of precautions, including hiding money and other valuables. He then gathered around 11 members of his family on the upper floor of the two-storey concrete house. At around 10 p.m. a missile struck the house, entering through the rear of the upper floor and exiting near the window of the living room opposite. The missile passed over several of Mr. Sawafeary's children and grandchildren, who were lying on the floor. No one was injured.

945. At around 11 p.m., Mr. Sawafeary heard the sound of helicopters flying over his house followed by soldiers landing on his roof. The soldiers remained there until 7 a.m. the next morning, firing what he described as "a rain of bullets". The family stayed, terrified, on the floor of an upstairs room.

946. At around 7.15 a.m. on 4 January, soldiers came into the upstairs room where the family was sheltering. They separated the men from the women and put the women in another room. The hands of the men and the boys were tied behind their backs, except for one of Mr. Sawafeary's sons who has only one arm. After some time the commander told Mr. Sawafeary that they should walk south and "go to Rafah". The soldiers then searched the house. The 11 members of the household there at the time left the house as instructed.

947. The Sawafeary family spent the following five days in terror. Together with neighbouring families they spent one night in the Abu Zur house and the following three in the nearby house of Mr. Rajab Mughrabi. During that time they suffered a number of violations at the hands of the Israeli armed forces, including the killing of the child Ibrahim Juha (see chap. XI).

948. For the purposes of this section the Mission refers to the information it received about the systematic destruction that occurred for several days and which the witnesses were able to see during the time they were forced by the circumstances to remain in the house of Mr. Mughrabi.

⁴⁹⁹ Interviewed by the Mission in Gaza on 3 June and 14 June and at the Gaza public hearing on 29 June.

⁵⁰⁰ The previous night, a garage next door had been destroyed by an air strike.

949. Mr. Sawafeary and Mr. Mughrabi informed the Mission that they had watched Israeli armoured bulldozers systematically destroy land, crops, chickens and farm infrastructure. Mr. Mughrabi stated that he watched the bulldozers plough through fields with crops and trees, destroying everything in their path. Mr. Sawafeary stated that he saw less, as he was watching through a small opening because he was afraid of being seen and shot. He stated that he saw only two or three “tanks”, but was not in a position to say whether there were more. He watched as the armoured bulldozers destroyed the chicken farms, crushing the wire mesh coops with the chickens inside. He could not see his own farms and the chickens he could see being destroyed were not his. He noted that the drivers of the tanks would spend hours flattening the chicken coops, sometimes stopping for coffee breaks, before resuming their work.

950. When he left Mr. Mughrabi’s house on 8 January, Mr. Sawafeary was able to see that his own farms did not appear to have been subjected to the destruction he had witnessed from inside the house. However, when he was able to return to his home after the Israeli withdrawal all 31,000 of his chickens had been killed and the coops systematically flattened.

951. The Mission visited the site and saw the still flattened mesh coops, which had been covered with corrugated iron, as well as the remains of water tanks and machinery. The Mission was also shown the remnants of a small mosque near the end of one of the lines of the coops that had been destroyed. The remains of some dead chickens were still visible and Mr. Sawafeary stated that it had been a mammoth task to clean up the area when he returned. He pointed out that, in addition to the loss of livestock, the farm had been completely automated with significant investment in machinery, all of which had been destroyed, as had the plant for packaging the eggs. In short, the business had been razed to the ground. A protective grille, believed to be part of a D-9 armoured bulldozer, was found at the site.

952. The Mission notes comments from one soldier to *Breaking the Silence* that appears to broadly corroborate the destruction in Zeytoun, probably at the hands of the Givati Brigade.⁵⁰¹

953. The Mission inspected the inside of Mr. Sawafeary’s house and noted damage to the upper floor, where a missile had penetrated. It also observed a number of graffiti that appeared to have been written by Israeli troops. One said “424 Givati”. There were others apparently written in Russian.

954. Mr. Sawafeary told the Mission that he and his family together supplied approximately 35 per cent of the egg market in Gaza. His own farms supplied over 10 per cent. He noted that it was not only his farms that had been destroyed but also most of his family’s farms had been destroyed in the same way as his. He estimated that close to 100,000 chickens were killed in the process.

955. The Mission has reviewed the relevant UNOSAT report and satellite imagery. One satellite image shows the Sawafeary chicken farms in June 2007 and another shows the area in

⁵⁰¹ *Soldiers’ Testimonies...*, testimony 37, p. 82.

January 2009. The images depict clearly the size of the farms and the surrounding area. The destruction is plainly visible in the second image.⁵⁰²

1. Factual findings

956. The systematic destruction along with the large numbers of killings of civilians suggest premeditation and a high level of planning. Even in the context of a campaign that had many serious violations of international humanitarian law, the events in Zeytoun at this time stand out.

957. The Mission finds that the destruction of the land and farms in the area was not justified by the pursuit of any military objective. The Israeli armed forces that arrived took control of the area within a matter of hours. They remained there until 18 January. The destruction of the land was not necessary to move the tanks or equipment or gain any particular visual advantage.

958. An inspection of the scene indicates that the area is relatively sparsely populated. The Mission rejects the idea that the Sawafeary farm was destroyed in the pursuit of any military objective.

959. The destruction of the farms appears to have been wanton and not militarily necessary. Not only were the coops with the chickens destroyed, but all of the plant and machinery of the farms as well.

960. From the facts ascertained by it, the Mission finds that the Sawafeary chicken farms, the 31,000 chickens and the plant and material necessary for the business were systematically and deliberately destroyed, and that this constituted a deliberate act of wanton destruction not justified by any military necessity.

2. Legal findings

961. The Mission makes the same findings regarding article 147 of the Fourth Geneva Convention and article 54 (2) of Additional Protocol I, article 1 of the International Covenant on Civil and Political Rights, article 11 of the International Covenant on Economic, Social and Cultural Rights and article 12 (2) of the Convention on the Elimination of All Forms of Discrimination against Women as it made above in relation to the el-Bader flour mill.

C. The destruction of water and sewage installation

1. The Gaza wastewater treatment plant, Road No. 10, al-Sheikh Ejlin, Gaza City

962. The Mission visited the site of al-Sheikh Ejlin treatment plant on 3 and 17 June 2009. While there it interviewed the Director of the Coastal Municipalities Water Utility (CMWU), Mr. Munther Shublaq, inspected the plant, the site of lagoon No. 3 and the location where a large pipe carrying raw sewage had been ruptured. On 3 June, the Mission also visited a nearby farm that had been inundated with raw sewage and spoke to the farmer. The Mission interviewed Mr.

⁵⁰² UNOSAT satellite image analysis, 27 April 2009, p. 29.

Munther Shublaq a second time at length on 14 June 2009. The Mission took photographs of the area, and obtained plans and diagrams of the plant. Finally, the Mission addressed questions to the Government of Israel with regard to the military advantage pursued in attacking al-Sheikh Ejlin treatment plant, but received no reply.

963. The Gaza wastewater treatment plant is located in the coastal area south-west of Gaza City in the al-Sheikh Ejlin neighbourhood. It was built in 1977 and expanded with support from development cooperation. It consists of a number of installations, including offices, tanks and lagoons to store raw sewage.

964. At some point between 3 and 10 January, a large missile hit the northernmost wall of lagoon No. 3, causing a massive outflow of raw sewage, which travelled a distance of 1.2 kilometres and damaged 5.5 hectares of land, including agricultural land, according to UNOSAT satellite imagery.

965. The chief of the plant, Mr. Jaoudat al-Dalou, explained to the Mission that when the Israeli ground offensive started around 3 January, all staff left for security reasons, as did the local residents of the sparsely populated area. Around 14 January, he received a phone call from someone in the vicinity of the plant reporting the strike on lagoon No. 3 and the flooding of neighbouring farmland by sewage. He contacted ICRC and PRCS to seek permission from the Israeli armed forces to go to the plant and carry out urgent repairs. Permission was denied on the grounds that the area was a “military zone”.

966. After the withdrawal of the Israeli armed forces, Mr. al-Dalou and his colleagues returned to al-Sheikh Ejlin to inspect the damage. They also saw what they believed to be unexploded bombs nearby and called the police to contact UNRWA to clear the area. Mr. al-Dalou found a crater five metres deep on the north-east side of lagoon No. 3. The damaged wall took over four days to repair at a cost of some US\$ 158,000. More than 200,000 cubic metres of raw sewage had flowed into neighbouring farmland.

967. In addition, a number of items, including an incubator, had been taken out of the plant and used by Israeli soldiers to make a barricade or protection wall. The damage done by the impact of bullets could still be seen on interior walls. Shattered windows had still not been replaced as glass was not available. Other damaged equipment included distillation equipment (damaged beyond repair) and a nitrogen ammonium machine.

968. In interviews with the Mission, Mr. Munther Shublaq, who issued a CMWU report of the damage in January 2009,⁵⁰³ confirmed that staff had left upon the arrival of Israeli ground forces and did not return until their withdrawal. He also indicated that on hearing news of the rupture of lagoon No. 3 he made several unsuccessful efforts to obtain permission to access the area to stop the damage caused by the outflow.

969. The Mission noted breaks in a large raw-sewage pipe which ran to the north of lagoon No. 3. Plant officials suggested that clearly visible markings on the pipe had been made by tanks.

⁵⁰³ CMWU, “Damage assessment report: water and waste water infrastructure and facilities”, January 2009, available at: http://www.cmwu.ps/upload/Damages_Assessment_for_W_WW_after_War2009.pdf.

The routes of such pipes are marked by 1.5-metre-high, red and white poles to ensure that care is taken not to damage the pipes. The damage is very close to one such pole.

970. The precise date of the strike on Lagoon No. 3 is uncertain because there were no witnesses in the area at the time. With satellite images it is, however, possible to establish that the strike must have occurred before 10 January 2009, as the images clearly show the massive outflow of sewage from the lagoon on that date.

971. It is also possible to ascertain from the satellite images that the strike on the lagoon wall's eastern side created a breach of about 22 metres, through which the sewage flowed. The same images show the route of the outflow and where it stopped. The United Nations Environment Programme carried out a ground survey of the site on 30 January 2009 and data from that survey were added to the UNOSAT image interpretation.

972. The plant occupies a position at the top of a hill and provides a view over a considerable area of open land, which is mainly farmland. As such, it might reasonably be considered to be of strategic interest.

Factual findings

973. The plant was effectively abandoned by staff when the ground invasion began. The strike on lagoon No. 3 must have occurred after the Israeli armed forces had taken control of the plant and the surrounding area as the employees interviewed confirmed that it was intact when they left the area. Although the damage to the raw-sewage pipe may have been caused by a tank stopping or passing over it, the Mission is not in a position to conclude that this was in fact what occurred.

974. Notwithstanding the possible military advantage offered to the Israeli armed forces by the plant's location, the Mission cannot find any justification for striking the lagoon with what must have been a very powerful missile, sufficient to cause a breach 5 metres deep and 22 metres wide. It is highly unlikely that Palestinian armed groups could have taken up positions in or around the lagoon after the initial occupation of the area by Israeli armed forces: any such groups would have been exposed in the open area. The fact that the lagoon wall was struck precisely there where it would cause outflow of the raw sewage suggests that the strike was deliberate and premeditated.

2. Namar wells group, Salah ad-Din Street, Jabaliyah refugee camp

975. The Mission visited the site of the Namar wells group on 17 June 2009.⁵⁰⁴ It interviewed engineer Ramadan Nai'm, CMWU water production and storage manager, and Ibrahim al-Ejjla, CMWU media coordinator. The Mission took photographs of the site. The Mission also addressed questions to the Government of Israel with regard to the military advantage pursued in attacking the Namar wells group, but received no reply.

⁵⁰⁴ The Namar wells group consists of two of installations situated in Jabaliyah. See "Damage assessment report...".

976. The wells group stood approximately 50 metres from the Jabaliyah refugee camp's administration building, which was also destroyed. A crater (approximately five metres wide) was still visible in the grounds belonging to the civil administration, with at its bottom the case of a rocket.⁵⁰⁵

977. This was a complex of two water well pumps, one in operation and another next to it as standby. Mr. Ramadan Nai'm told the Mission how proud CMWU had been of this water well, which produced more than 200 cubic metres per hour of the best-quality water in the area. The well supplied water to some 25,000 people in eastern and central Jabaliyah. The standby well pump was capable of pumping some 100 cubic metres of water. Both were completely destroyed on 27 December by an airstrike.

978. In the Namar water wells complex there were not only pumping machines but also a 180 kg generator, a fuel store, a reservoir chlorination unit, buildings and related equipment. These were also destroyed.

979. The operator, Mr. Abdullah Ismail al-Zein, was killed in the air strike while he was working at the station. He was employed by the Municipality rather than by CMWU and had been working in the station for four years. He was blown to pieces and his identity was established when his shoes were found three days later.

980. The strike also blew up the pipes connecting the wells to other water wells; incoming water spilled into the area for some 10 days before the pipes could be shut off.

981. Mr. Nai'm informed the Mission that he tried through the mediation of ICRC to get permission from the Israeli armed forces to repair the supply pipes, but permission was not granted and he was obliged to wait until the withdrawal of the Israeli armed forces.

982. It was calculated that repairs to this group of water wells would cost around US\$ 200,000, excluding the ancillary but necessary civil engineering works.

983. Mr. Nai'm stated that at least 10 bombs were used to destroy the complex. Not a single wall was left intact.

Factual findings

984. From the facts ascertained by it, the Mission finds that the Namar wells were destroyed by multiple air strikes on the first day of the Israeli aerial attack and that civil administration buildings located at approximately 50 metres were also destroyed.

985. The question remains as to whether the Israeli air strikes on the Namar wells group were deliberate or made in error. The Mission notes that the deployment systems and aircraft used in the strikes of 27 December (principally F-16 fighter jets and UAVs) are capable of a high degree of precision. It notes also that, by all accounts, a great deal of preparation had been put into determining and designating the targets of air strikes. The Mission considers it unlikely that a target the size of the Namar wells could have been hit by multiple strikes in error, given the

⁵⁰⁵ Photographs of the damage can be found in "Damage assessment report...".

nature of the deployment systems and the distance between the wells and any neighbouring buildings. The facts thus indicate that the strikes on the Namar wells group were intentional.

986. The Mission found no grounds to suggest that there was any military advantage to be gained from hitting the wells. There was no suggestion that Palestinian armed groups had used the wells for any purpose.

3. Legal findings

987. From the facts ascertained by it, the Mission makes similar findings to those set out regarding the violation of article 147 of the Fourth Geneva Conventions and article 54 (2) of Additional Protocol I in relation to the destruction of the el-Bader flour mill.

988. The right to food clearly includes the right to have adequate access to water. The Mission finds that this was denied to the people served by the Namar wells. It took some 75 days to repair them

989. The Mission also finds that the killing of Mr. Abdullah Ismail al-Zein was unlawful and constitutes a violation of the right to life. Since targeting the wells constituted an act of wanton destruction, the incidental loss of life cannot be justified with regard to any military advantage.

D. The destruction of housing

990. The Mission received information about the extensive destruction of houses and private property during the military operations.⁵⁰⁶ During its own visits to the Gaza Strip, the Mission witnessed the extent of the destruction caused by air strikes, mortar and artillery shelling, missile strikes, the operation of bulldozers and demolition charges. Some areas of the Gaza Strip were more heavily affected than others, but the Mission saw many piles of rubble where, prior to the military operations, there had been multi-storey houses.

991. In many, if not most, of the incidents investigated by the Mission, described in chapters X, XI, XIV and XV, the victims it interviewed not only suffered the loss of loved ones (or were used as human shields or detained), but also saw their homes severely damaged or completely destroyed. For present purposes, the Mission will recall a few of the incidents relating to the destruction of housing.

992. In some cases, the damage to or destruction of housing was arguably related to the conduct of military operations against Palestinian combatants. The houses of Majdi Abd Rabbo

⁵⁰⁶ Information received includes the following reports: Al Mezan, Statistical Report on Persons Killed and Property Destroyed by Israeli Occupation Forces during Operation Cast Lead, June 2009, Al-Dameer Gaza, IOF Targets Civilian Premises and Cultural Properties during its Offensive on the Gaza Strip, May 2009, Submission to the Mission by Habitat International Coalition's Housing and Land Rights Network entitled "Targeting Shelters and Shelter Seekers during Operation Cast Lead in the Context of Israeli Military Practice.", and Submission to the Mission by the Centre on Housing Rights and Evictions (COHRE), June 2009, pp. 3-4.

and of his neighbour, HS/08, for instance, were destroyed in combat against the three Palestinian fighters hiding in HS/08's house (see chap. XIV).⁵⁰⁷

993. In many others, such as the shelling of the houses of Mahmoud Abd Rabbo al-Ajrami (chap. XIV), of the Sawafeary family (see above and chap. XI) and of the Abu Halima family (chap. XI), the houses were in the general path of the advancing Israeli ground troops.

994. In a third group of cases, however, the facts ascertained by the Mission strongly suggest that housing was destroyed without their having any direct link to combat operations. On 6 January 2009 at 1.45 a.m., Mr. Abu Askar received a phone call from the Israeli armed forces informing him that his family should evacuate their house as it was going to be targeted by an air strike. This warning was put into practice a few minutes later, when the home of about 40 members of the extended Abu Askar family was destroyed by a missile (see chap. X).

995. In Juhf ad-Dik, after the killing of Majda and Rayya Hajaj (chap. XI), the Israeli armed forces directed machine-gun fire at the house of the al-Safadi family for the entire afternoon of 4 January 2009. The soldiers firing at the house had seen the Hajaj and al-Safadi families taking refuge there after their failed attempt to flee to Gaza City. When the Hajaj family managed to leave Juhf ad-Dik the following day, Israeli troops apparently took up position in Mr. Youssef Hajaj's house, which they rendered completely uninhabitable, as the Mission saw for itself during a visit. His brother Saleh Hajaj was even less fortunate. His house was reduced to a pile of rubble.

996. Other neighbourhoods were destroyed during the last few days of the military operations as the Israeli armed forces were preparing to withdraw. For example, in an incident described below, after an attempt to demolish a cement-packaging plant in east Gaza, soldiers also destroyed the surrounding houses of the owner and the employees. The factory owner, Mr. Abu Jubbah, had hidden in the house for two days with seven members of his family. Suddenly, a direct strike on the side of the house warned them that the house was to be destroyed and they should leave. Waving a white flag, Mr. Abu Jubbah left the house in a rush, put his family in a car and drove off. On their way they saw tanks and soldiers in the area. Their house was destroyed by shelling. It took several strikes to destroy it, while the factory facilities and the fence were demolished by bulldozers. Housing for 55 factory workers was also demolished with bulldozers.⁵⁰⁸

997. Two further cases investigated by the Mission also exemplify the deliberate demolition of residential housing. The house of Wa'el al-Samouni, in which 21 family members died, was damaged but still standing when PRCS and ICRC extracted the wounded survivors in the afternoon of 7 January 2009 (chap. XI). When the family and rescuers returned to the area on 18 January, the house was completely demolished. As the Mission could see for itself during its visit to the area as well as on photographs taken on that day, the manner in which the house had collapsed strongly indicated that this was the result of deliberate demolition and not of combat.

⁵⁰⁷ The Mission is only noting that there was a factual link between combat and the destruction of the houses, it is not making a finding as to whether the destruction of the two civilian houses was proportionate to the military objective to be achieved.

⁵⁰⁸ Mission interview with Mr. Atta Abu Jubbah, owner of the cement packaging factory.

Similarly, when Khalid Abd Rabbo returned to the home of his extended family in Izbat Abd Rabbo (which he had abandoned intact after the shooting of his daughters, see chap. XI) after the withdrawal of the Israeli armed forces, he found it completely demolished, as were the other houses in the vicinity. Khalid Abd Rabbo drew the Mission's attention to what appeared to be an anti-tank mine visible under the rubble of his neighbour's house, which had reportedly been used by the Israeli armed forces to cause the controlled explosion which brought down the building. As in the case of Wa'el al-Samouni's house, the way the buildings had collapsed strongly suggests that both Khaled Abd Rabbo's house and that of his neighbour were deliberately demolished by explosives experts, rather than damaged during combat. Khaled Abd Rabbo added that, to his knowledge, his house had been demolished by the Israeli armed forces shortly before they withdrew from Gaza.

1. Factual findings

998. From the facts gathered, the Mission concludes that, in a number of cases it investigated, the Israeli armed forces launched direct attacks against residential houses, destroying them. Although the Mission does not have complete information on the circumstances prevailing in Juhf ad-Dik, al-Samouni neighbourhood and Izbat Abd Rabbo when the houses of the Hajaj, al-Samouni and Khalid Abd Rabbo families were destroyed, the information in its possession strongly suggests that they were destroyed outside of any combat engagements with Palestinian armed groups. Nor were these houses otherwise making any effective contribution to military action. These attacks deprived the extended families living there of shelter and of a significant part of their property.

999. In other cases, residential neighbourhoods were subjected to air-launched bombing and to intensive shelling apparently in the context of the advance of Israeli ground forces. In these cases, although the facts gathered by the Mission do not suggest that the residential houses were directly targeted, it doubts whether there were military objectives pursued by the shelling.

2. Corroboration of Mission's factual findings and widespread nature of housing destruction

1000. Testimonies of Israeli soldiers deployed in Gaza during the military operations corroborate what the Mission saw for itself and heard from the witnesses it interviewed. Several of the soldiers interviewed by *Breaking the Silence* spoke of the unprecedented scale of destruction of houses and of "intentional, systematic destruction."⁵⁰⁹ The testimonies of the soldiers appear to distinguish between three phases in or types of destruction of residential housing. First, there is the destruction which is incidental to the actual combat between the advancing Israeli forces and the Palestinian combatants or to Israeli forces directing fire at locations from which rockets were launched.⁵¹⁰ Second, there is destruction of houses for what

⁵⁰⁹ *Soldiers' Testimonies...*, pp. 59, 66, 69 and 101. One soldier recalls: "There was a point where D-9s were razing areas. It was amazing. At first you go in and see lots of houses. A week later, after the razing, you see the horizon further away, almost to the sea. They simply took down all the houses around so the terrorists would have nowhere else to hide."

⁵¹⁰ In "The hidden dimension of Palestinian war casualties...", the Jerusalem Centre for Public Affairs argues that Palestinian houses were also demolished when Palestinian armed groups attacked houses in Gaza in which the Israeli armed forces had taken up positions. This argument is supported with reports of incidents gathered from websites of Palestinian armed groups, such as the following referring to the evening of 9 January 2009: "Three RPG

is termed “operational reasons”. This is the deliberate destruction of houses from which fire had been opened on Israeli soldiers or which were suspected of being booby-trapped, containing tunnels or being used for weapons storage.⁵¹¹ “Operational necessity” also embraced the destruction of houses which obstructed visibility for the Israeli armed forces or had a “strategic advantage” for them.⁵¹² “In case of any doubt, takedown houses. You don’t need confirmation for anything, if you want”, were the instructions of one commander to his troops.⁵¹³

1001. The third phase of destruction of housing was no longer tied to the “operational necessities” of the ongoing military operations. It was in view of “the day after” the Israeli armed forces withdrew from Gaza. In the words of one Israeli soldier:

... then we were told there are houses to be demolished for the sake of “the day after”. The day after is actually a thought that obviously we’re going in for a limited period of time which could be a week and it might also be a few months. But it’s not a longer span of time without defining what it is. And the rationale was that we want to come out with the area remaining sterile as far as we’re concerned. And the best way to do this is by razing. That way we have good firing capacity, good visibility for observation, we can see anything, we control a very large part of the area and very effectively. This was the meaning of demolition for the sake of the day after. In practical terms this meant taking a house that is not implicated in any way, that its single sin is the fact that it is situated on top of a hill in the Gaza Strip.⁵¹⁴

1002. Satellite imagery provided by UNOSAT at the Mission’s request is consistent with the soldiers’ testimonies. It shows, for instance, that 65 per cent of the destruction/damage of buildings in Rafah was caused by airstrikes between 11 and 18 January. By contrast, 54 per cent of the destruction/damage in Izbet Abd Rabbo (east Gaza) occurred between 6 and 10 January as the Israeli troops advanced into the city.⁵¹⁵

1003. The UNOSAT reports on the destruction of buildings in al-Samouni neighbourhood and al-Atatra, two areas that suffered particularly heavy destruction of civilian housing and other buildings, show that most were destroyed during the last three days of the Israeli armed forces’ presence on the ground in Gaza. In al-Samouni, out of 114 severely damaged or completely destroyed buildings, 60 were destroyed between 27 December 2008 and 10 January 2009 (i.e. the

rockets and machine guns are fired against a house where IDF soldiers took up positions in the Ezvet Abd Rabbo region in the eastern sector of Jabalya” (p. 12).

⁵¹¹ *Soldiers’ Testimonies*..., pp. 26, 35, 44, 56, 59, 61 (“Sometimes you know the house is empty. You know as far as you can know. Now if the house disrupts your defence line, you take it down with a tank or a bulldozer. We took an eight-storey house and the instruction was not to enter any doorway because it would be booby-trapped.”), and 66 (“we were to raze as much as possible of the area. Such razing is a euphemism for intentional, systematic destruction, enabling total visibility. Razing was meant to give us the advantage of full control over fire and field of view, to see exactly what was happening throughout the zone. So that no one could hide anything from us.”).

⁵¹² *Ibid.*, pp. 12, 61, 100 and 101.

⁵¹³ *Ibid.*, p. 56.

⁵¹⁴ *Ibid.*, p. 66. See also p. 69.

⁵¹⁵ UNOSAT satellite imagery, pp. 14 ff.

air phase and the advance of the ground invasion), only 4 between 10 and 16 January and 50 between 16 and 19 January 2009.⁵¹⁶ Similarly, in al-Atatra, out of 94 severely damaged or completely destroyed buildings, 36 were destroyed between 27 December 2008 and 10 January 2009, only 6 between 10 and 16 January, and 52 between 16 and 19 January 2009.⁵¹⁷

1004. These figures confirm that a first phase of extensive destruction of housing for the “operational necessity” of the advancing Israeli forces in these areas was followed by a period of relative idleness on the part of the Israeli bulldozers and explosives engineers. But during the last three days, aware of their imminent withdrawal, the Israeli armed forces engaged in another wave of systematic destruction of civilian buildings.⁵¹⁸

3. Legal findings

1005. From the facts ascertained by it, the Mission finds that the houses of the families of Saleh Hajaj, of Wa’el al-Samouni, of Khalid Abd Rabbo and of Muhammad Fouad Abu Askar were subjected to direct attacks in spite of their unmistakably civilian nature. They did not present any apparent threat to the Israeli armed forces. These attacks violated the principle of distinction in customary international humanitarian law as codified in article 52 of Additional Protocol I.

1006. Considering the facts it has gathered on the destruction of these houses from the soldiers’ testimonies and the UNOSAT report, the Mission finds that the conduct of the Israeli armed forces in these cases amounted to the grave breach of “extensive destruction... of property, not justified by military necessity and carried out unlawfully and wantonly” under article 147 of the Fourth Geneva Convention.

1007. Article 11 of the International Covenant on Economic, Social and Cultural Rights requires State parties to “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate... housing”. From the facts ascertained by it, the Mission finds that the Israeli armed forces violated the right to adequate housing of the families concerned.

E. Analysis of the pattern of widespread destruction of economic and infrastructural targets

1008. The Mission interviewed Mr. Amr Hamad, the Deputy General-Secretary of the Palestinian Federation of Industries, on three separate occasions, including at the public hearings in Gaza. The Mission also met a number of businessmen involved in fishing, strawberry farming, construction, including concrete and cement production and packaging, food and drinks production, car mechanics and repairs, livestock farming and refrigeration. While much of the information provided to the Mission focused on the effect of the restrictions Israel had imposed

⁵¹⁶ UNOSAT report, p. 17.

⁵¹⁷ Ibid., pp. 20–21.

⁵¹⁸ The Mission finally notes that, in its formal submission, Housing and Land Rights Network – Habitat International Coalition provides a detailed historical account of the Israeli army practices of targeting civilian homes and generating displaced populations that suggests a pattern that is not unique to the military operation in Gaza of December 2008 – January 2009, but “consistent over time and across borders”.

on the Gaza Strip for a considerable time before 27 December 2008, significant information was also provided on the effect of the attacks during the Israeli military operations in Gaza.

1009. Mr. Amr Hamad indicated that 324 factories had been destroyed during the Israeli military operations at a cost of 40,000 jobs. In its detailed written report on the impact of the Israeli military activities, the Palestinian Federation of Industries points out that 200 businesses and factories were destroyed in Gaza City, 101 in northern Gaza and 20 in southern Gaza. Of the total 324 premises damaged, almost 30 per cent were linked to the metals and engineering sector, over 20 per cent to construction and 16 per cent to furniture businesses. Other sectors with significant losses were aluminium, food, sewing textiles, chemicals and cosmetics, plastics and rubber, paper and carton, and handicrafts. The Federation states that more than half were totally destroyed.

1010. The Federation emphasized that “the Gaza Strip’s most crucial industries, and ones which require the greatest investment, were most severely hit”.⁵¹⁹ Eleven of the 324 premises struck by the Israeli armed forces were linked to the food industry and the losses incurred amount to some US\$ 37 million, i.e. over one third of all the losses to the industrial sector. Similarly, while the construction sector suffered 69 of the 324 strikes, this represented just under 30 per cent of the total damage. The report notes that the majority of the losses resulting from the strikes on the 324 premises related to machinery costs (50 per cent), while just over a quarter relate to the buildings themselves.

1011. The Mission found the information provided by Mr. Hamad, as well as the report produced by the Palestinian Federation of Industries, to be credible and reliable. The Mission discussed and was satisfied by the methodology used in compiling the report, which was produced with the support of the Konrad Adenauer Foundation. The Mission also found that the testimony of businessmen whose premises had been struck or destroyed by the Israeli armed forces corroborate information provided by Mr. Hamad and the Palestinian Federation of Industries.

1. Construction industry

1012. One of the incidents Mr. Hamad referred to at the public hearing relates to the destruction of the only cement-packaging plant in Gaza. The Mission also interviewed its owner, Mr. Atta Abu Jubbah.⁵²⁰ According to the reconstruction of the events, the Israeli armed forces began striking the plant from the air, damaging it significantly. Later ground forces -- equipped with bulldozers and tanks -- moved in and used mines and explosives to destroy the silo that used to contain 4,000 tons of cement. Helicopters launched rockets to destroy the main manufacturing line and fired holes into the cement containers. Bulldozers were used to destroy the factory walls. Over four days the factory was systematically destroyed. The Mission spoke with a number of other witnesses able to verify this account and considers it to be reliable. Among those witnesses was a civil engineer who inspected the site and confirmed that certain aspects of the destruction

⁵¹⁹ Page 14 of the Report of the Palestinian Federation of Industries.

⁵²⁰ Mission interview with Mr. Atta Abu Jubbah, Gaza, 17 June 2009.

could have been achieved only by placing explosives inside the building. The silo had not been entirely destroyed in the aerial attacks, so explosives were attached to its supporting columns.

1013. The plant was an important part of Gaza's construction industry. It produced cement in bags, selling 200 tons per day with a profit of US\$ 15 per ton. The company is valued at some US\$ 12 million. As mentioned above, the owner's house was also destroyed by rocket fire.

1014. The owner is one of fewer than 100 businessmen who are in possession of the Businessman Card issued by Israel. The Mission notes that the plant was not destroyed during the aerial phase but was systematically reduced to rubble in a concerted effort over several days at the end of the military operations.

1015. The destruction of Mr. Atta Abu Jubbah's plant forms part of what appears to have been a very deliberate strategy of attacking the construction industry. The Palestinian Federation of Industries also provides detail on the systematic and total destruction of the Abu Eida factories for ready-mix concrete. They were established in 1993. Nineteen of the 27 concrete factories were reported to have been destroyed, representing 85 per cent of the productive capacity.

1016. The ability to produce and supply concrete in a context where external supplies are entirely controlled by Israel is a matter not only of economic importance but arguably one of human necessity to satisfy the basic need for shelter. Even if the population can get by in makeshift accommodation or by living in cramped conditions with their extended families, the capacity to repair the massive damage done to buildings without internally produced concrete is severely reduced. To the extent that concrete is allowed to enter at all, it is significantly more expensive than domestically produced concrete.

1017. There appears to have been no military reason or justification for destroying the factory. This conclusion is borne out by the long established trading history of the owners and their recognition through the Businessman Cards.

2. Destruction of the remaining food industry

1018. As already reported, more than a third of all egg factories were destroyed by the Israeli armed forces. Other testimonies, for example that of the Mayor of al-Atatra,⁵²¹ who referred to the destruction of his sister's chicken farms, indicated that a substantial part of the chicken farming industry appears to have been deliberately and systematically destroyed.

1019. The Mission also notes the destruction of the al-Wadiyah Group's factories. The al-Wadiyah Group employed some 170 people, had been in business since 1954 and produced a variety of food and drinks. Dr. al-Wadiyah presented a detailed account of its activities and losses to the Mission.⁵²²

⁵²¹ Mission interview with Muhammad Husein al-Atar, Mayor of al-Atatra, 3 June 2009.

⁵²² Mission interview with Dr. Yasser al-Wadia, 3 June 2009.

1020. The Mission found no reason to believe that the premises of the flour mill, chicken farms and food-processing plants that were destroyed had been used for purposes that would render them in any way military objectives.

1021. The Mission also reviewed satellite images showing significant destruction of greenhouses throughout Gaza.⁵²³ In total, it is estimated that over 30 hectares of greenhouses were demolished; 11.2 hectares were destroyed in Gaza City and 9.5 hectares in north Gaza. The Mission found that the large-scale and systematic destruction of greenhouses was not justified by any possible military objective.

3. Destruction of water installations

1022. Finally, in relation to the supply and treatment of water, the Mission analysed a limited number of cases. The strikes on the al-Sheikh Ejlin plant and on the Namar water wells have been described in some detail. The Mission also spoke at length with Mr. Munther Shublaq, who was responsible for the CMWU Damage Assessment Report. That report indicates that all types of water installations appeared to have been damaged to some extent during the Israeli operations, but notes especially that in some areas, particularly Beit Lahia, Jabaliyah, Beit Hanoun, part of Zeytoun, south of Rafah and the villages in the east, buildings, water and wastewater infrastructure and other facilities have been totally destroyed. “Those areas need a complete water and wastewater infrastructure which may require re-designing the networks based on the new population in the area”.⁵²⁴

1023. Mr. Munther Shublaq noted that, although a number of wells had been struck, the worst effects had been as a result of the damage to water-treatment plants and sewage pipes. The Mission heard a number of reports that indicated that the strikes on plants, pipes, wells and tanks had put considerable pressure on the sanitation and water-supply system.

1024. The Palestinian Authority claimed that 5,708 roof water storage tanks were destroyed, but it is not clear how many of these were on the roofs of the 4,036 houses that the Palestinian Authority stated were destroyed.

1025. The Mission found that the targeting of water-related installations was not justified by any possible military objective.

4. Conclusions

1026. The facts ascertained by the Mission indicate that there was a deliberate and systematic policy on the part of the Israeli armed forces to target industrial sites and water installations. In a number of testimonies given to *Breaking the Silence*, Israeli soldiers have described in detail the way in which what is at one point euphemistically referred to as “infrastructure work” was

⁵²³ UNOSAT report, pp. 23–27. See also chapter XVII.

⁵²⁴ “Damage assessment report...”, p. 8.

carried out. The deployment of bulldozers for systematic destruction is graphically recounted. Soldiers confirm in considerable detail information provided to the Mission by witnesses.⁵²⁵

1027. The Mission refers to chapter XVII, where it found that the systematic destruction of food production, water services and construction industries was related to the overall policy of disproportionate destruction of a significant part of Gaza's infrastructure.

5. General legal findings

1028. The Mission has made detailed findings in relation to each of the incidents set out above. However, given the nature of the systematic attacks on the food, water and infrastructure provision in Gaza during the military operations, the Mission also believes it is important to highlight the issue of State responsibility and the liability of Israel in relation to the internationally wrongful acts committed.

1029. While the element of fault is controversial in the law of State responsibility, the Mission has found that in all of the cases described above both the act and the consequence were intended.

1030. Israel had a number of duties in respect of its actions during the military operations. These included the general obligation reflected in article 52 of Additional Protocol I to ensure that civilian objects are not the objects of attack and to ensure the protection of objects indispensable to the survival of the civilian population. In addition, the customary norms of international law contained in article 54 (2) of Additional Protocol I require States not to destroy objects indispensable to the survival of the population.

1031. Israel displayed a premeditated determination to achieve the objective of destruction. It is, therefore, responsible for the internationally wrongful acts it perpetrated in breach of the duties specified above.

XIV. THE USE OF PALESTINIAN CIVILIANS AS HUMAN SHIELDS

1032. The Mission received allegations that in two areas in north Gaza Israeli troops used Palestinian men as human shields whilst conducting house searches. The Palestinian men were allegedly forced to enter houses at gunpoint in front of or, in one case, instead of soldiers. The Mission investigated four cases. One incident took place in the Izbet Abd Rabbo neighbourhood and another in al-Salam neighbourhood, both east of Jabaliyah, close to the border with Israel. Two incidents took place in al-Israa neighbourhood, west of Beit Lahia. The Mission visited

⁵²⁵ See *Soldiers' Testimonies...*, testimony 17 on "infrastructure work" and the razing of orchards, p. 44 and testimony 29, p. 66. Note also testimony 46 on the practice of D-9 armoured bulldozers effectively working around the clock, largely destroying orchards (p. 100). The Mission notes that an issue raised on several occasions was the idea of the "day after" – the circumstances that Israel would find after finishing the military operations in terms of addressing future attacks from Gaza. Even if this could be conceived of as a longer-term strategic military goal, it is not a legitimate one in these circumstances. It does not meet the appropriate test for military advantage in the pursuit of certain objectives. Nor does it meet the test of military necessity referred to in the grave breaches provisions. See also chapter XVI.

each of the locations and interviewed a number of witnesses. In each case, the Mission found the allegations to be credible.

A. The case of Majdi Abd Rabbo

1033. To investigate this case, the Mission visited Izbat Abd Rabbo. The Mission interviewed Mr. Majdi Abd Rabbo⁵²⁶ and several of his neighbours.⁵²⁷ It also obtained two sworn statements Majdi Abd Rabbo had given to two NGOs.

1034. Majdi Abd Rabbo, a man aged 39 at the time of the incident, is married and the father of five children aged between 16 years and 14 months. He is an intelligence officer of the Palestinian Authority. He lived with his family in a house on the main street of Izbat Abd Rabbo, al-Quds Street, which in this section is commonly known as Izbat Abd Rabbo Street. His family house stood next to Salah ad-Din mosque. The home of the family of Khalid and Kawthar Abd Rabbo (see chap. XI) is less than 500 metres east of the Majdi Abd Rabbo family home.

1035. Majdi Abd Rabbo recounted that, at around 9.30 a.m. on 5 January 2009, he heard loud banging on the outer door of the house. He asked who was at the door and someone responded in Arabic, ordering him to open the door. He opened the door and saw in front of him a handcuffed Palestinian man, whom he later found out to be HS/07, aged 20. A group of around 15 Israeli soldiers stood behind HS/07. One of the soldiers was holding a weapon to HS/07's head. The soldiers pushed HS/07 to one side and four soldiers pointed their weapons at Majdi Abd Rabbo. They ordered him to undress down to his underwear. He was then told to dress again and they pushed him into the house.

1036. The soldiers ordered him to call his children one by one. He started with his eldest son, aged 16, who was ordered by the soldiers to strip naked. The same process was followed with the two other sons, aged nine and eight. He then called his daughter, aged 14, who was told to press her clothes to her body and turn around. His wife, who was holding their baby daughter, was also told to press her clothes to her body, and then to take the baby's trousers off.

1037. Majdi Abd Rabbo stated that the soldiers then forced him to walk in front of them as they searched the house, room by room, holding a firearm to his head. They questioned him about the house behind his. He told them that the house was empty and the owner, HS/08, had been absent for four years working in the Sudan. There was a small gap between the two houses, but they were joined at the roof. The soldiers gave him a sledgehammer, the kind used to break stones, and told him to break a hole through the dividing wall into HS/08's house. This took around 15 minutes.

1038. From the roof, the soldiers entered HS/08's house, pushing Majdi Abd Rabbo ahead of them down the stairs while they watched over his shoulders. They had descended only a few steps, however, when the soldiers apparently detected some movement in the house, started

⁵²⁶ Mission interview with Majdi Abd Rabbo.

⁵²⁷ Mission interviews with Muhammad Muhammad Abd Rabbo, Muhammad 'Aish Muhammad Abd Rabbo, witness HS/11 and Iyad Abd Rabbo.

shouting, pulled Majdi Abd Rabbo back and rushed back into his house over the roof. Majdi Abd Rabbo heard some gun shots.

1039. The soldiers ran out into the street, forcing Majdi Abd Rabbo and HS/07 with them while they were shooting. Both were taken into the adjacent mosque, where there were a large number of soldiers with military equipment. They were forced to sit down and then handcuffed.

1040. The soldiers used the raised area of the mosque, from where the imam leads prayers, to fire at Majdi Abd Rabbo's house and the houses next to it. He shouted at the soldiers to stop, as his family was still in the house. A soldier told him to shut up or they would shoot him. The shooting continued for around 30 minutes. After a lull, the soldiers warned that there would be a huge explosion and, indeed, about three minutes later there was a huge explosion. The explosion was followed by intensive gunfire and artillery shells. Majdi Abd Rabbo could not identify the source of the explosion.⁵²⁸

1041. In the meantime, he had been forced to break a hole in the wall of the mosque on the south side and into the neighbouring house. He had then been interrogated about his knowledge of Hamas and the location of tunnels. Subsequently, he was taken and detained together with a group of neighbours, men and women, in another house in the neighbourhood (the HS/09 family home).

1042. When the shooting stopped, soldiers came to fetch him. He was taken to the road next to his house, to an empty area behind HS/08's house. He saw that HS/08's house and the entrance area of his house had been damaged. There were numerous soldiers standing next to the house, including some officers. He saw a senior officer talking to the soldiers who raided his house, and the officer then came to speak to him, through an Arabic-speaking soldier. The soldier said that they had killed the fighters inside the house and told him to go into the house and come back with their clothes and weapons. He protested, saying that he just wanted to find out if his family was safe. The officer told him to obey their orders if he wanted to see his family again. He refused to go, and was kicked and beaten by soldiers with their weapons until he gave in.

1043. He approached HS/08's house from the street. The entrance was destroyed and blocked by rubble. He went back to the officer and told him that he could not get in. The officer told him to go through the roof instead. He went into his own house, which he found empty, except for a soldier. This reinforced his anxiety about the fate of his family. At this point, there was no major damage to his house. He crossed the roof and went down the stairs into HS/08's house. He was scared that the fighters would shoot at him and shouted, "I am a Palestinian, a neighbour. I am being forced to come into this house." In a room at the bottom of the stairs he found three armed young men wearing military camouflage and headbands of al-Qassam Brigades. They pointed their weapons at him. He told them that the Israeli soldiers thought that they had been killed and had sent him to check. He said that he was helpless as the soldiers had taken his wife and

⁵²⁸ Other sources clarify that HS/08's house had been bombed by Israeli aircraft which had been called in by the soldiers in the mosque. Jerusalem Center for Public Affairs, "The hidden dimension of Palestinian war casualties in operation 'cast lead': Hamas fire on Palestinian areas", p. 20; *Soldiers' Testimonies...*, p. 7 ("The [combat] helicopters fired anti-tank missiles" according to testimony 1, which in this part appears to repeat an account heard from other soldiers).

children. The armed men told him that they had seen everything, and asked him to go back to the soldiers and tell them what he had seen.

1044. He went back outside, again crossing over the roof of his house. As he approached the soldiers, they pointed their weapons at him and ordered him to stop, strip naked and turn around. After he dressed again, he told them what he had seen. Initially, the soldiers did not believe him. They asked how he knew that they were Hamas militants and he explained about their headbands. The soldiers asked about their weapons. He replied that they were carrying Kalashnikovs. The officer told him that, if he was lying, he would be shot dead.

1045. He was handcuffed and taken back to the HS/09 family house for detention. At around 3 p.m., he heard gunfire for around 30 minutes. The soldiers came back for him and took him to the same officer. This time he noticed different soldiers present with different military equipment. Through the translator, the officer told him that they had killed the militants, and told him to go in and bring back their bodies. Again he refused, saying “this is not my job, I don’t want to die.” He lied to them, saying that the three militants had told him that if he came back, they would kill him. The officer told him that, as they had already killed the militants, he should not worry. He added that they had fired two missiles into the house, which must have killed the militants. When he still resisted, he was beaten and kicked again, until he went into HS/08’s house via the roof again.

1046. He found the house very badly damaged. The bottom part of the stairs was missing. He again went in shouting, to alert the militants if they were still alive. He found them in the same room as before. Two were unharmed. The third was badly injured, covered in blood, with wounds to his shoulder and abdomen. They asked him what was going on outside and he told them that the area was fully occupied and the soldiers had taken numerous hostages, including his family.

1047. The wounded man gave him his name (HS/10) and asked him to tell his family what had happened. Majdi Abd Rabbo promised to do so if he survived and later did so. Another of the three told him to tell the Israeli officer that, if he was a real man, he would come to them himself.

1048. Majdi Abd Rabbo returned to the soldiers, who again forced him to strip naked before they approached him. He told the officer that two of the militants were unharmed. The officer swore at him and accused him of lying. Majdi Abd Rabbo then repeated the message from the militant, at which the officer and four other soldiers assaulted him with their weapons and insulted him.

1049. The officer asked Majdi Abd Rabbo for his identity card. He replied that it was in his house but gave him the ID card number. The officer checked the number via an electronic device. Three minutes later the officer asked him if it was true that he worked with the head of Palestinian Authority’s intelligence services, which he confirmed. The officer asked him if he was with Abu Mazen and a Fatah affiliate. He said he was.

1050. The soldiers brought Majdi Abd Rabbo a megaphone and told him to use it to call the militants. He initially refused but did so under threat. As instructed, he told the militants to surrender, that ICRC was present and they could hand themselves over. There was no response.

1051. By then, night had fallen. Majdi Abd Rabbo was again handcuffed and taken back to the house of the HS/09 family. Thirty to forty minutes later, he heard shooting and a huge explosion. Soldiers came to tell him that they had bombed HS/08's house and ordered him to go in again and check on the fighters.

1052. The Israeli armed forces had floodlit the area. Majdi Abd Rabbo found both his and HS/08's house very badly damaged. He could not use the roof of his house to enter HS/08's house, as it had collapsed. He went back to the soldiers, who again made him strip, this time to his underwear. He asked where his family was and said that he could not reach the fighters because of the damage to the houses. He accused the soldiers of destroying his house. The officer said that they had only hit HS/08's house. Majdi Abd Rabbo was then handcuffed. Until this time, he had been given no food or water, and it was very cold. After a while, his handcuffs were removed, he was told to dress and taken back to the HS/09 family house, to the room where he found that other people were being held. All the men and boys in this room were handcuffed and their ankles were tied. A soldier came with some drinking glasses and smashed them at the entrance to the room where they were being held. After smashing the glasses, he left again. Majdi Abd Rabbo had developed a severe headache. Another detainee, who spoke Hebrew, called a soldier to say that Majdi Abd Rabbo was sick and needed medicine. The soldier told him to keep quiet or he would be shot. A woman tied a scarf around Majdi Abd Rabbo's head to ease the pain.

1053. At around 7 a.m., Majdi Abd Rabbo was taken back to the soldiers outside. He was questioned about the number of fighters in the house. He confirmed that he had seen only three.

1054. Two young Palestinian men from the neighbourhood were brought over. A soldier gave them a camera and told them to go into the house and take photos of the fighters. The two tried to refuse, and were beaten and kicked. The soldier showed them how to use the camera and they went into HS/08's house through the damaged main entrance. About 10 minutes later, they came back with photos of the three fighters. Two appeared to be dead, under rubble. The third was also trapped by rubble but appeared to be alive and was still holding his firearm. A soldier showed Majdi Abd Rabbo the photos and asked if these were the same people. He confirmed they were.

1055. A soldier took the megaphone and told the fighters that they had 15 minutes to surrender, that the neighbourhood was under the control of the Israeli armed forces and that, if they did not surrender, they would hit the house with an air strike.

1056. Fifteen minutes later, a soldier came with a dog, which had electronic gear attached to its body and what looked like a camera on its head. Another soldier had a small laptop. The dog handler sent the dog into the house. A few minutes later, shots were heard and the dog came running out. It had been shot and subsequently died.

1057. At around 10.30 a.m. on 6 January 2009, a bulldozer arrived and started to level the house. The bulldozer moved from east to west, demolishing everything in its way. Majdi Abd Rabbo watched it demolish his own house and HS/08's house. He and the two young men were told to go back to the HS/09 house. They heard shooting.

1058. At around 3 p.m., he was taken back close to the site of his and HS/08's house. He told the Mission that he saw the bodies of the three fighters lying on the ground in the rubble of the house.

1059. The soldiers then forced him to enter other houses on the street as they searched them. All the houses were empty. The soldiers forced him to go into the house alone initially and, when he came out, sent in a dog to search the house. During the house searches he managed to find some water to drink, the first drink he had had for two days. At midnight, the soldiers took him back to the HS/09 family house.

1060. On 7 January, all the men and boys were taken from the HS/09 family house and transferred to the house of a cousin of Majdi Abd Rabbo's in the same neighbourhood. There were more than 100 men and boys, including members of his extended family, aged between 15 and 70. The women were being held elsewhere. Majdi Abd Rabbo's immediate family members were not there, and he learnt that no one had seen them. He remained extremely anxious about their safety.

1061. At around 11 p.m., the men and boys in that house were told that they were going to be released, and that they should all walk west towards Jabaliyah, without turning left or right, on threat of being shot. They found Izbat Abd Rabbo Street severely damaged. Majdi Abd Rabbo went to his sister's house in Jabaliyah, where he was reunited with his wife and children on 9 January 2009. His wife then told him that they had stayed for some hours in the house, during the first shooting on 5 January, and had then fled with a white flag to a neighbour's house.

1062. Majdi Abd Rabbo told the Mission that he and his family were traumatized by what had happened to them and did not know what to do now, having lost their home and all their possessions. His children were all suffering psychologically and performing poorly at school. Five months later, in June 2009, Majdi Abd Rabbo was still having nightmares.

1063. The Mission notes that his account to it implies that there were at least three other Palestinian men compelled by the Israeli armed forces to search houses. A journalist's account indicates that the author "spoke with eight residents of Izbat Abd Rabbo neighbourhood, who testified that they were made to accompany IDF soldiers on missions involving breaking into and searching houses [...]. The eight estimated that about 20 local people were made to carry out "escort and protection" missions of various kinds, [...], between January 5 and January 12."⁵²⁹

B. The case of Abbas Ahmad Ibrahim Halawa

1064. The Mission interviewed Mr. Abbas Ahmad Ibrahim Halawa and his wife,⁵³⁰ and visited al-Israa, the neighbourhood west of Beit Lahia, where his house is located.

1065. When hostilities started on 27 December 2008, Abbas Ahmad Ibrahim Halawa, aged 59, asked his family to leave the home and stayed behind alone. On 9 January 2009, after a day of

⁵²⁹ Haaretz, "Gazans: IDF used us as 'human shields' during offensive", 28 March 2008, available at: <http://www.haaretz.com/hasen/spages/1065594.html>.

⁵³⁰ Mission interviews with Abbas Ahmad Ibrahim Halawa and his wife.

shelling, the ground forces invaded the north-west of his neighbourhood. At around 0.05 a.m. on 5 January 2009, the Israeli armed forces stormed into his house. He was hiding under the staircase and screamed when they reached him, putting his hands in the air. The soldiers had torch lights on their rifles and helmets, and their faces were painted black.

1066. At gunpoint, the soldiers ordered him to take off his clothes, which he did except for his underwear. They made him turn around and ordered him to dress again. By this time there were some 40 soldiers in the house. His hands were tied behind his back, his legs were tied and he was blindfolded. He was severely beaten. He was then taken to a neighbour's house. He told the soldiers that he had bad asthma, but they would not allow him to take his inhaler.

1067. In the neighbour's house, he was questioned by an Israeli officer about the whereabouts of Gilad Shalit and the location of Hamas tunnels and rocket launch sites. The soldiers threatened to blow up his house if he did not tell them. He insisted that he did not know the answers to their questions. He pleaded that he had worked in Israel for 30 years and had built hundreds of houses there. He speaks fluent Hebrew and communicated with the soldiers in Hebrew.

1068. After about 30 minutes, he was taken to a different location in the vicinity and made to sit down. After another 15 minutes, he was again made to walk to a different location. He was still blindfolded; the ties binding his legs had been loosened slightly, but walking was difficult. One of the soldiers was directing his footsteps while holding him at gunpoint.

1069. In a house that he subsequently recognized as that of a neighbour, one of the soldiers untied his legs and the blindfold. His hands remained tied. He saw a number of soldiers in the house and around 15 officers sitting in the living room. They had maps and radios in front of them. One of the officers (there were three stripes on the shoulder of his uniform) asked him to identify his house on the map, and then asked him about the location of tunnels and rocket launching sites. He answered that he did not know. He was blindfolded again but he could see a little through the blindfold.

1070. He was then taken out of the house and onto the road. As previously, he was held from behind, a weapon pressed against his back or the back of his head. Due to the damage to the roads caused by the tanks and other military equipment, walking was difficult. For about two hours he walked around as directed by the soldiers. They would stop and call: "Who is in the house?" They would then open fire, force Abbas Ahmad Ibrahim Halawa to go into the house while they were gathering behind him, and then leave the house again after the search. He was made to go into five houses in this way. They did not find anyone in any of the houses.

1071. Thereafter, they walked and stopped for about an hour without any shooting. Finally, he was ordered to sit down on the ground and covered with a blanket. He was held for two days at this location, which he identified to be near the American School in north Gaza, close to an Israeli armed forces' tank position. During the two days he was given neither food nor water.

1072. He was then transported, blindfolded, in what he believes was a tank, for about 90 minutes to another location which he believes was Netsalim (Nitzarim), where he was thrown on the ground. He was kept there for two days and nights in the open, during which time the soldiers refused to give him a blanket. During the two days he was again interrogated several times about

the location of Hamas tunnels and rockets, and about Gilad Shalit's whereabouts. He was beaten and threatened with death if he did not provide the information.

1073. At around 5 p.m. on the second day he was taken in a closed vehicle, which he believes was a truck, to a detention centre inside Israel, which he heard a soldier refer to as Telmund. He was fingerprinted and taken to see a doctor, whom he told that he was suffering from acute asthma and severe pain from a back injury caused by the beating.⁵³¹ The doctor did not give him medication. He was placed in a cell, where he was again refused a blanket.

1074. He was interrogated again at the detention centre, this time by civilians and then transferred to another location, where he was held together with some 50 Arabs. After two days, he was taken to the Erez border crossing and told to walk back into Gaza. Soldiers shot around his feet and over his head as he walked. He managed to reach his sister's house, where he collapsed and was taken to al-Shifa hospital.

1075. When he returned to his house, he found it vandalized. When the Mission spoke to him, he was still traumatized from the treatment he had undergone at the hands of the Israeli armed forces.

C. The case of Mahmoud Abd Rabbo al-Ajrami

1076. Mr. Mahmoud Abd Rabbo al-Ajrami was interviewed twice, at length, by the Mission. He also testified at the public hearing in Gaza on 30 June 2009.

1077. Mahmoud Abd Rabbo al-Ajrami is a former civil servant, whose last position was as Assistant Foreign Minister. He resigned from the Ministry when Hamas took over Gaza and has not worked since. He, his wife and 15-year-old daughter lived in a house in the same neighbourhood west of Beit Lahia as Abbas Ahmad Ibrahim Halawa. The area was shelled during the initial air strikes of the Israeli campaign. Mahmoud Abd Rabbo al-Ajrami's home was directly hit for the first time on 2 or 3 January 2009, according to him by tank shells and by missiles fired by Apache helicopters, which seriously damaged external and internal walls. Tanks came into the area on 3 or 4 January and initially were positioned around 500 metres north of his house.

1078. He stayed in the house with his wife and daughter. As he told the Mission, he had decided not to leave because of his father's experience of leaving his home in Israel and not being able to return. On an unspecified date during the first week of January, however, he decided that this was proving too difficult for his daughter. He called a taxi and his daughter moved to the house of an uncle in a safer area.

1079. On 9 January 2009, shelling of the area was particularly intensive. According to Mahmoud Abd Rabbo al-Ajrami, 10 tank shells hit his house. His wife received light injuries from shrapnel and broken glass. In the night of 9 to 10 January 2009, around midnight, soldiers made a violent entry into their home, where he and his wife were sheltering on the ground floor,

⁵³¹ The Mission was provided medical documentation supporting his statement that he suffered two fractured vertebrae as a result of the beating by Israeli soldiers. He now has to wear a corset to support his spine.

underneath the stairs. They threw a grenade into the entrance on the west side of the building and entered the house shooting.

1080. An officer ordered Mahmoud Abd Rabbo al-Ajrami to lift his robe (he was in nightclothes) and turn around. He then told Mahmoud Abd Rabbo al-Ajrami's wife to press her clothes close to her body and turn around. Mahmoud Abd Rabbo al-Ajrami and his wife were then taken to a neighbouring house where soldiers took his identity card and checked his identity on a laptop computer. An officer interrogated him about the location of Hamas tunnels, rockets, Palestinian fighters and Gilad Shalit. He responded that he could not provide that information because he did not know, that he was previously a member of the Fatah administration. The soldier responded: "You are Hamas; Hamas killed all Fatah and others in Gaza, so you must be Hamas." Mahmoud Abd Rabbo al-Ajrami insisted that he was a civilian. The officer told him again that he had five minutes in which to give him information or he would be shot. Five minutes later, he again responded that he did not know anything about the questions asked.

1081. He was handcuffed with his hands in front of him and blindfolded. Two or three soldiers took him by the shoulders and forced him to walk in front of them. His wife tried to go with him but they pushed her back into the room. It was by now around 2 a.m. The soldiers took him up to the second floor of the building and threw him down. He landed on rubble and fainted. When he came to, he had severe pain in his right side and had difficulty breathing. He found out later that he had broken four ribs and he had severe bruising down his right leg. Four soldiers forced him to stand. He was moaning with the pain but did not want them to hear. It was raining and still dark. The soldiers pushed him against a wall and walked away from him. He thought that they were going to shoot him. He was still blindfolded.

1082. In the early morning hours, the soldiers took him and another man (whom he subsequently found out to be his neighbour Abbas Ahmad Ibrahim Halawa) and forced them to walk in front of them. Mahmoud Abd Rabbo al-Ajrami was blindfolded and a gun was held to the back of his head. He thinks that there were around 25 soldiers behind him and the other Palestinian man. Having walked in this way for a while, both he and the other man were forced to enter several houses with the soldiers taking cover behind them. In Mahmoud Abd Rabbo al-Ajrami's recollection, on six or seven occasions the soldiers opened fire. They did not find anyone in any of the houses.

1083. After these house searches, the soldiers, Mahmoud Abd Rabbo al-Ajrami and Abbas Ahmad Ibrahim Halawa walked north towards a place called Dogit, a former settlement. He could hear the movement of tanks and see tank positions. Both men were forced to sit on the ground. Mahmoud Abd Rabbo al-Ajrami had his hands handcuffed in front; the other man had his hands handcuffed behind him. It was still raining, very cold, and Mahmoud Abd Rabbo al-Ajrami's ribs and leg were very stiff and painful. They were left there without food, water or blankets until morning. At around 10 a.m., soldiers took Abbas Ahmad Ibrahim Halawa for interrogation.

1084. During that and the following day, Mahmoud Abd Rabbo al-Ajrami was also interrogated, by a senior officer. On the second day, he was taken to the edge of the camp and told to walk back south into Gaza City. He was able to reach the outskirts of the city and was helped by a stranger to reach a family member's house, from where he was taken to al-Shifa hospital.

1085. On returning to his house, he found it ransacked and vandalized. He recounted that many items of value had been stolen, including jewellery and electronic equipment.

D. The case of AD/03

1086. The summary of AD/03's case is based on his interview by the Mission. His case is also discussed in chapter XV, which gives more details on his case.

1087. AD/03 is a resident of al-Salam neighbourhood, located east of Jabaliyah, close to the eastern border with Israel. On 8 January, at around noon, the Israeli armed forces made an announcement ordering all residents of the area to evacuate their homes and come out in the street. The men were separated from the women and children, the men being told to line up against a wall. They were told to lift their shirts and to strip to their underwear. They remained in that position, stripped and lined up against the wall for approximately 15 minutes. The women and children were told to go to Jabaliyah. Shortly afterwards, AD/03 and three others (his brother, a cousin and an unknown man) were made to lie on the ground, were blindfolded and their hands were tied behind their backs with plastic strips. They were detained overnight in a house, in a room together with three men who identified themselves as residents of Izbat Abd Rabbo. The next morning, on 9 January, their blindfolds were removed and the seven men were interrogated.

1088. On the second day of detention, the Israeli armed forces began to use a number of the detainees as human shields. At this point the detainees had been without food and without sleep for a day. There were constant death threats and insults. To carry out house searches, the Israelis took off AD/03's blindfold but he remained handcuffed. He was forced to walk in front of the soldiers and told that, if he saw someone in the house but failed to tell the Israeli soldiers, he would be killed. He was instructed to search each room in each house cupboard by cupboard. After one house was completed, he was taken to another house with a gun pressed against his head and told to carry out the same search there. He was punched, slapped and insulted throughout the process. AD/03 indicates that he was forced to do this twice while the group was held in this house for eight days. Others were also required to do it. On the first occasion he was forced to carry out searches in three houses and on the second occasion in four houses. AD/03 estimates that each time he was involved in searches for between one hour and one and a half hours. At no point did he come across any explosive devices or armed group members.

E. Denial of the allegations by the Israeli armed forces

1089. Reacting to reports of the use of civilian men as human shields in Izbat Abd Rabbo, the Israeli armed forces' Spokesperson's Unit told an Israeli journalist:

The IDF is a moral army and its soldiers operate according to the spirit and values of the IDF, and we suggest a thorough examination of the allegations of Palestinian elements with vested interests. The IDF troops were instructed unequivocally not to make use of the civilian population within the combat framework for any purpose whatsoever, certainly not as "human shields."

Following an examination with the commanders of the forces that were in the area in question, no evidence was found of the cases mentioned. Anyone who tries to accuse

the IDF of actions of this kind creates a mistaken and misleading impression of the IDF and its fighters, who operate according to moral criteria and international law.⁵³²

F. Factual findings

1090. The Mission found the foregoing witnesses to be credible and reliable. It has no reason to doubt the veracity of their accounts and found that the different stories serve to support the allegation that Palestinians were used as human shields.

1091. The Mission notes in particular that Mr. Majdi Abd Rabbo has told the story of his experience from 5 to 7 January 2009 to several NGOs, to several journalists and to the Mission without any material inconsistencies. There are some minor inconsistencies, which are not, in the opinion of the Mission, sufficiently weighty to cast doubt on the general reliability of Majdi Abd Rabbo. There are also, not surprisingly, some elements of the long account which appear in some versions and not in others. The Mission finds that these inconsistencies do not undermine the credibility of Majdi Abd Rabbo's account.

1092. The Mission further notes that one of the Israeli soldiers interviewed by the NGO Breaking the Silence recounts the case of Majdi Abd Rabbo. The soldier describes the case in great detail and mentions having personally met Majdi Abd Rabbo.⁵³³ Finally, the Mission notes that the submission it has received from the Jerusalem Center for Public Affairs, while not containing a summary of Majdi Abd Rabbo's role in the incident in which the three Palestinian fighters were killed, also refers to the incident.⁵³⁴

⁵³² "Gazans: IDF used us as 'human shields' during offensive".

⁵³³ The Mission notes, however, that the soldier does not appear to have been a direct witness to the incident, but rather heard it from others and subsequently met Majdi Abd Rabbo. *Soldiers' Testimonies...*, pp. 7-8:

"Testimony 1 [...] In one case, our men tried to get them to come out, then they opened fire, fired some anti-tank missiles at the house and at some point brought in a D-9, bulldozer, and combat helicopters. There were three armed men inside. The helicopters fired anti-tank missiles and again the neighbour was sent in. At first he told them that nothing had happened to them yet, they were still in there. Again helicopters were summoned and fired, I don't know at what stage of escalation (in the use of force). The neighbour was sent in once again. He said that two were dead and one was still alive, so a D-9 was brought in and started demolishing the house over him until the neighbour went in, the last armed man came out and was caught and passed on to the Shabak. [...] [Some civilians] were made to smash walls with 5-kilo sledgehammers. There was a wall around a yard where the force didn't want to use the gate, it needed an alternative opening for fear of booby-traps or any other device. So the "Johnnies" themselves were required to bang open another hole with a sledgehammer. Talking of such things, by the way, there was a story published by Amira Hass in Haaretz daily newspaper, about Jebalya where a guy tells exactly the same thing. It's the guy who was sent. I saw him afterwards, the guy who was made to go into that house three times. He also told us about being given sledgehammers to break walls."

The newspaper article referred to by this testimony is "Gazans: IDF used us as 'human shields' during offensive". The Mission notes that the soldier who gave testimony 1 states that one of the three Palestinian combatants was arrested, while Majdi Abd Rabbo's testimony is that he saw all three of them dead.

⁵³⁴ "The hidden dimension..." p. 20. This submission is a "war diary" pieced together "from detailed data that both Hamas and its Izz ad-Din Qassam Brigades have published." That this incident and the story of Majdi Abd Rabbo are the same is corroborated by comparing the three names of the killed Palestinian combatants mentioned in both accounts (one name is identical, the second very similar).

1093. In more general terms, the Mission notes that the statements of the men used as human shields by the Israeli armed forces during house searches are corroborated by statements made by Israeli soldiers to the NGO Breaking the Silence. The soldier providing testimony 1 speaks of the “Johnnie procedure”: “It was the first week of the war, fighting was intense, there were explosive charges to expose, tunnels in open spaces and armed men inside houses. [...] Close in on each house. The method used has a new name now – no longer 'neighbour procedure.' Now people are called 'Johnnie.' They're Palestinian civilians, and they're called Johnnies [...] To every house we close in on, we send the neighbour in, 'the Johnnie,' and if there are armed men inside, we start, like working the 'pressure cooker' in the West Bank.” This soldier then mentions that some commanders were “bothered” by the fact that “civilians were used to a greater extent than just sending them into houses.” A second soldier interviewed by Breaking the Silence, testimony 17, appears to have discussed the “Johnnie procedure” at length, but his testimony was censored or otherwise cut in that respect, so that we can only read: “They [civilians found in houses] were used as ‘Johnnies’ (at a different point in the interview the witness described the ‘Johnnie’ procedure, using Palestinian civilians as human shields during house searches), and then released, and we’re finding them in later searches.”⁵³⁵

1094. The Mission thus finds that while these testimonies do not confirm the details of the specific cases it investigated, they strongly support the general allegation that the Israeli armed forces engaged in the practice of compelling Palestinian civilians to accompany them on house searches.

1095. In conclusion, from the facts it gathered, the Mission finds that Messrs. Majdi Abd Rabbo, Abbas Ahmad Ibrahim Halawa, Mahmoud Abd Rabbo al-Ajrani and AD/03 were captured by the Israeli armed forces while they were in their homes, in some cases together with their families, and were then forced at gunpoint to search houses together with the Israeli armed forces. The Mission also finds on the basis of those facts that they were all subject to cruel, inhuman and degrading treatment during their captivity.

G. Legal findings

1096. Several provisions of international humanitarian law prohibit the practice of using civilian men captured by the armed forces to search houses in which the invading army suspects the risk of ambushes or booby traps.

1097. This practice constitutes the use of involuntary human shields and is a violation of article 28 of the Fourth Geneva Convention which reads: “The presence of a protected person may not be used to render certain points or areas immune from military operations.” Article 51, paragraph 7, of Additional Protocol I (set out in full in chapter VIII above) adds that “the presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military

⁵³⁵ *Soldiers’ Testimonies...*, pp. 7–8 and 46. A third soldier recounts discussing the use of Palestinian civilians with his unit commander. The unit commander denied knowing about this, but the soldier concludes: “This procedure of using civilians exists, he knows about this. 'Neighbour procedure' is an official army procedure; it's just not called that any longer. The brigade commander was on the ground the whole time. He even came to visit us one day. An official army procedure means army instructions.” *Ibid.*, p. 107.

objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.” The prohibition of the use of human shields also has customary law status (rule 97 of the ICRC rules of customary humanitarian law⁵³⁶), both in international and in non-international armed conflict. The Mission, therefore, finds that the Israeli armed forces have violated article 28 of the Fourth Geneva Convention and the prohibition under customary international law that the civilian population as such will not be the object of attacks, as reflected in article 51 (2) of Additional Protocol I.

1098. In 2002, the Israeli Supreme Court sitting as the High Court of Justice was seized of a case regarding the use of a very similar practice in the West Bank, at the time known as the “neighbour procedure”. The petitioners, seven Israeli and Palestinian human rights organizations, described cases in which “the IDF forced Palestinian residents to walk through and scan buildings suspected to be booby-trapped, and in which it ordered them to enter certain areas before the combat forces, in order to find wanted persons there; also described are cases in which the army used residents as a “human shield” which accompanied the combat forces, to serve as a shield against attack on those forces. [...] Further described were cases in which local residents were asked about the presence of wanted persons and weapons, under threat of bodily injury or death, should the questions go unanswered.”⁵³⁷ In other words, the petitioners described incidents analogous to those investigated by the Mission in Gaza.

1099. In their response to the petition, the Israeli armed forces and other respondents “clarified unequivocally that they recognize that the forces operating in the field are categorically forbidden from using Palestinian residents as a ‘live shield’ or as ‘hostages’, and that involving local residents in any activity exposing them to danger to life or limb is prohibited.”⁵³⁸ The Israeli armed forces also submitted to the High Court of Justice a directive regarding the use of the so-called “early warning” procedure. This procedure relied on the allegedly exclusively voluntary cooperation of Palestinian civilians to give wanted persons a warning to turn themselves in. The directive states that “it is strictly forbidden to use the local resident in military missions (e.g. locating explosive charges, intelligence gathering).” It also provides “it is strictly forbidden to use a local resident as a ‘live shield’ against attack. Thus, during the advance of the force, accompanied by the local resident, the latter is not to be positioned at the head of the force.”⁵³⁹

1100. As a result of these assurances given by the Israeli armed forces, the High Court of Justice did not rule on the so-called neighbour procedure, but on the “early warning” procedure. In its ruling, it found that the “early warning” procedure was also “at odds with international law” and

⁵³⁶ *Customary International Humanitarian Law...*, p. 337. The Israeli Government recognizes the customary nature of the principle enshrined in Additional Protocol I, article 51 (7) (“The operation in Gaza...”, para. 151).

⁵³⁷ Adalah Legal Centre for Arab Minority Rights in Israel et al. v. Commander of the Central Region et al., case No. 3799/02, Judgement of 23 June 2005.

⁵³⁸ Ibid., Opinion Justice D. Beinisch.

⁵³⁹ Ibid., para. 7.

ordered the armed forces to desist from any further use of the procedure.⁵⁴⁰ In reaching this outcome, Supreme Court President A. Barak left no doubt that he considered the “neighbour procedure” to violate article 28 of the Fourth Geneva Convention. He quotes approvingly from J. Pictet’s *Commentary* to the Fourth Geneva Convention, in which it is stated that “such practices [the use of human shields], the object of which is to divert enemy fire, have rightly been condemned as cruel and barbaric”.

1101. When reporting on its military operations in Gaza, the Israeli Government stated:

IDF’s rules of engagement strictly prohibit the use of civilians as human shields. Moreover, the Israel Supreme Court has ruled that use of civilians in any capacity for the purpose of military operations is unlawful, including the use of civilians to call terrorists hiding in buildings. Following this judgement, this latter practice has also been proscribed by IDF orders. The IDF is committed to enforcing this prohibition.

The IDF took a variety of measures to teach and instil awareness of these rules of engagement in commanders and soldiers.⁵⁴¹

The Israeli Government does not, however, in any way mention the very specific allegations of use of Palestinian civilians as human shields in January 2009 which have been in the public domain since they were published in an Israeli newspaper in March 2009⁵⁴² and in NGO reports from April 2009 onwards, and which have been brought to the attention of the Attorney-General of Israel in letters by Israeli NGOs.

1102. The Mission further finds from the facts available to it that the conduct of the Israeli armed forces in the cases above violates article 31 of the Fourth Geneva Convention. This provision dictates that “no physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.” The ICRC Commentary notes that “article 31 prohibits coercion for any purpose or reason and the obtaining of information is only given as an example. Thus, the custom, hitherto accepted in practice but disputed in theory, that an invasion army may force the inhabitants of an occupied territory to serve as ‘guides’ is now forbidden.”⁵⁴³

1103. The questioning of civilians under threat of death or injury by Israeli soldiers, who demanded information about Hamas and the location of Palestinian combatants and tunnels, also constitutes a violation of article 31. The Mission has no information on cases in which such a threat was actually followed by the killing of a captured civilian. However, Messrs. Majdi Abd Rabbo, Abbas Ahmad Ibrahim Halawa and Mahmoud Abd Rabbo al-Ajrmi, all claim that they were threatened with execution. Majdi Abd Rabbo also claimed that he was kicked and beaten by soldiers until he gave in to their request to enter the house of HS/08. Mahmoud Abd Rabbo

⁵⁴⁰ Ibid., para. 25.

⁵⁴¹ “The operation in Gaza...”, paras. 227-228.

⁵⁴² “Gazans: IDF used us as ‘human shields’ during offensive”.

⁵⁴³ p. 220.

al-Ajrami was thrown from the second floor of his house after refusing to provide information to Israeli soldiers, resulting in several broken ribs.

1104. The use of the “neighbour procedure”, now apparently renamed “Johnnie procedure”, constitutes a violation of fundamental human rights norms. It puts the right to life of the civilians concerned, protected in article 6 of ICCPR, at risk in an arbitrary and unlawful way. The anguish to which civilians who, blindfolded and handcuffed, are forced at gunpoint to enter houses which – this is the reason they are forced to enter the houses – might be booby-trapped or harbour combatants who might open fire on them, can only be described as cruel and inhuman treatment prohibited by article 7 of ICCPR. Furthermore, the witnesses were all deprived of liberty and the security of their person violated. This also constitute a violation of article 9 of ICCPR. The Mission must state that numerous civilians who came into contact with the Israeli armed forces during the military operation recounted shocking stories of humiliation that would certainly be in stark contravention of the principle of respect for human dignity, which forms the core of all human rights and fundamental freedoms.

1105. The Mission also finds that the intentional use as human shields of those whose accounts are presented above qualifies as inhuman treatment of and wilfully causing great suffering to protected persons under the Fourth Geneva Convention. As such, the Mission considers the conduct of the Israeli armed forces in relation to such persons to amount to grave breaches of the said Convention. The use of human shields is also a war crime under article 8 (2) (b) (xxiii) of the Rome Statute.

1106. Finally, the Mission finds that obliging Majdi Abd Rabbo to use a megaphone to call on the men trapped in the house behind his to surrender, on the grounds that ICRC was present and they could safely hand themselves over, qualifies as a violation of article 37 of Additional Protocol I of the Geneva Conventions, which prohibits perfidy. At the time, the Izbet Abd Rabbo area was a closed military zone into which no one, including ICRC, was permitted to enter. Perfidy is defined by article 37 as “acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence”. Acts amounting to perfidy resulting in death or serious personal injury are also a war crime under article 8 (2) (b) (vii) of the Rome Statute.

XV. DEPRIVATION OF LIBERTY: GAZANS DETAINED DURING THE ISRAELI MILITARY OPERATIONS OF 27 DECEMBER 2008 TO 18 JANUARY 2009

1107. According to information that the Mission received, hundreds of Gazans, including women and children, were detained by the Israeli armed forces during the military operations. Their exact number is not known. Some were held for hours or days in homes, other buildings or sandpits in the Gaza Strip; others were taken into detention in Israel, either immediately or after an initial period of detention in the Gaza Strip. A number of people were held in army bases (e.g. Sde Teiman⁵⁴⁴), others were held in prison, and some released detainees do not know where they

⁵⁴⁴ Correspondence with HaMoked, 22 July 2009. See also the testimony of AD/06 taken by Addameer, Prisoners Support and Human Rights Association.

were held. Some detainees have reported abuse during detention, including beatings, and being kept in unsanitary conditions, without any or with only inadequate food or toilet facilities. Some released persons have reported that they were used as human shields during their detention, for example, forced to walk in front of soldiers and enter buildings ahead of soldiers.⁵⁴⁵

1108. On 28 January 2009, seven Israeli human rights organizations appealed to the Israeli Military Judge Advocate General and to the Attorney General, concerning the “appalling conditions in which Palestinians arrested during the fighting in Gaza were held, and the humiliating and inhuman treatment to which they were subjected from the time of their arrest until their transfer to the custody of the Israel Prison Service.”⁵⁴⁶

1109. The number of detainees that were eventually taken to Israeli prisons has been estimated at around 100.⁵⁴⁷ Some of them have since been released. It often took the families and lawyers several weeks to find out that their loved ones or clients were being detained. Some lawyers have alleged that Israel deliberately did not disclose the number of detentions, even to ICRC.⁵⁴⁸ Human rights organization Adalah have filed a freedom of information request to the Government, but at the time of writing this report is yet to receive a response. Eventually many were released by the Israeli Prison Service but the Mission is not in a position to determine the exact number.

1110. A PCATI lawyer representing detainees, Mr. Bader, who spoke at the Mission’s public hearings in Geneva, interviewed a number of the detainees in Israeli prisons and relayed their testimonies. These include stories from prisoners who said they were used as human shields or held in sandpits.

1111. The Mission has interviewed a number of persons who were detained by the Israeli armed forces for substantial periods of time during the military operations in Gaza and thereafter. In the course of that detention they were in some cases held without trial or respect for basic due process guarantees, and were mentally and physically abused. The Mission has also heard directly from legal representatives of several people who were detained at this time, including some of those referred to above. Moreover, the Mission addressed questions to the Government of Israel with regard to the number of persons from Gaza detained by Israel during the military operations and the duration of their detention, including how many remain in custody. The Mission asked how many persons detained in Gaza were charged with being “unlawful combatants” and on what basis, how many were subjected to trial and what due process guarantees were afforded to them. No reply was received.

⁵⁴⁵ PCATI Affidavit submitted to the Mission. Addameer, Prisoners Support and Human Rights Association affidavit of AD/06.

⁵⁴⁶ The complaint was submitted by the Public Committee against Torture in Israel (PCATI), the Association for Civil Rights in Israel (ACRI), HaMoked – Centre for the Defence of the Individual, Physicians for Human Rights – Israel (PHR-Israel), B’Tselem, Adalah and Yesh Din. See http://www.btselem.org/english/press_releases/20090128.asp

⁵⁴⁷ Figures supplied to the Mission by PCHR, Adalah and PCATI.

⁵⁴⁸ Correspondence with Addameer, Prisoners Support and Human Rights Association, 25 June 2009.

A. Al-Atatra sandpits

1112. Al-Atatra is located 10 kilometres north of Gaza City, west of Beit Lahia and three to four kilometres south of the Green Line. The neighbourhood is largely agricultural with orange and lemon orchards. On the morning of 5 January, it suffered heavy aerial bombardment, which was followed by a ground incursion by Israeli troops. The Mission met six people, members of the same extended family⁵⁴⁹ and residents of al-Atatra, three of whom were direct witnesses and victims of the events that occurred in the aftermath of the ground incursion.⁵⁵⁰ Their testimonies are supported by those of three others, also residents of al-Atatra, submitted to the Mission by an NGO.⁵⁵¹

1113. On the morning of 5 January, shortly after the ground operations began, an estimated 40 Israeli soldiers broke into several homes, including that of AD/01, who described to the Mission how 65 persons, several of whom were holding white flags, were made to assemble in the street. The soldiers separated the men from the women. The men were made to line up against a wall and strip to their underwear. AD/01 indicated that any attempt to resist the soldiers was met with physical force, resulting in injuries.

1114. Approximately 20 minutes later, they were taken into a house owned by Mr. Khalil Misbah Attar, where they were detained for a day, the men still separated from the women. The house had been struck by a number of missiles that morning and was badly damaged. Witnesses indicated to the Mission that the house was at that time being used by the Israeli armed forces as a military base and sniper position.⁵⁵²

1115. At around 10 p.m., all of the men were handcuffed behind their backs with plastic restraints and blindfolded. The men, 11 women and at least seven children below the age of 14 were taken on foot to al-Kakloul located south of the American School, one to two kilometres away. Many of the men remained in their underwear, exposed to the harsh winter weather.⁵⁵³ Al-Kakloul is very close to Israeli military artillery and tank positions, and while the detainees were held here at least one tank was engaged in frequent firing.

1116. AD/01 told the Mission that, on arrival at al-Kakloul, everyone was asked to clamber down into trenches, which had been dug to create a pit surrounded by a wall of sand, about three metres high. There were three such pits, each of which was surrounded by barbed wire. They were estimated to cover about 7,000 square metres (“six or seven *donums*”) each. AD/01 described how they were assembled in long single files, rather than massed together, and held in

⁵⁴⁹ For security reasons the witnesses from the family are referred to by coded reference here.

⁵⁵⁰ Testimony to the Mission by AD/01 (plus three others), 30 June 2009.

⁵⁵¹ Affidavit of RR, RS and RT, residents of al-Atatra, submitted to the Mission by Adv. Majd Bader.

Public Committee Against Torture in Israel who testified at the public hearings in Geneva.

⁵⁵² The use of Mr. Khalil Misbah Attar’s house as a detention place is corroborated in the testimony of Samir Ali Muhammad Attar collected in an affidavit by Advocate Mahar Talhamy on behalf of PCATI, available at: http://www.stoptorture.org.il/files/28109_eng.pdf.

⁵⁵³ According to the BBC weather services, temperatures in the Gaza Strip in December and January, on average, vary from maximum 17° to minimum 7° Celsius.

these pits, in the open air and exposed to cold temperatures for three days (till 8 January). Each pit accommodated approximately 20 people. They were forced to sit in stress positions, on their knees and leaning forward keeping their heads down. They were monitored by soldiers and were not allowed to communicate with each other. They had no access to food or water on the first day of their internment, and were given a sip of water and an olive each to eat on the second and third days of their detention (6 and 7 January). They had limited access to toilet facilities. The men had to wait for two to three hours after asking before they were allowed to leave the pits to relieve themselves and sometimes were able to remove their blindfolds for the purpose. A few of them were told to relieve themselves inside the pit, behind a small mound of sand. They stated that it was culturally too difficult for the women to seek permission to relieve themselves and they did not ask.

1117. AD/01 states that some tanks were inside the pit with at least one tank positioned at the eastern end.⁵⁵⁴ While the people were held there, the tank facing inland each day sporadically fired on the houses along the road opposite the site.

1118. AD/01B and AD/01C recounted that on 8 January, the women and children were released and told to go to Jabaliyah. The men were transferred to military barracks near the northern border, identified as the Izokim Barracks. At the Izokim barracks, the men were detained in pits similar to but smaller than those in al-Kaklouk. They continued to be exposed to the cold temperature, rain and the constant sound of tank movement overhead. The witnesses have described to the Mission the experience of continued and prolonged exposure to the sound of this tank movement as disorienting and creating feelings of futility, isolation, helplessness and abject terror.

1119. The men were held handcuffed and in their underwear in the Izokim barracks overnight. They were questioned intermittently, mostly on details and locations of Qassam rockets, the tunnels and the whereabouts of Hamas parliamentarians. According to statements made to the Mission, they were beaten during the interrogation and threatened with death and being run over by tanks. The Mission notes that the nature and types of questions asked remained the same throughout the interrogations in various detention facilities.

1120. On 9 January, the men were taken to a prison in Israel, indentified by one witness as the Negev prison, where they remained until 12 January. They were detained in one section of the prison, alternating between being held in isolation and in shared cells, and were subjected to harsh interrogation, often by two people dressed in civilian clothes. Interrogation focused on the identification of Hamas tunnels and arms as well as the whereabouts of Gilad Shalit.

1121. AD/01B and AD/01C recounted that they were shackled to a chair with plastic strips and interrogated several times, with AD/01B stating that he was made to strip naked during an interrogation. He was kept in solitary confinement where a soldier would come intermittently during the day, and slam the cell door open and shut, exposing him to extremely cold temperatures. AD/01C stated that during the first interrogation he was verbally threatened and in the subsequent two he was blindfolded and beaten. He was made to stand up and face the wall,

⁵⁵⁴ This is corroborated in the statement by RR to PCATI.

following which his face was smashed against the wall several times before he was severely beaten (kicked and punched) on his back and buttocks.

1122. Requests for clothing were denied. During the interrogation the detainees were informed that they were “illegal combatants” and that they had no protection under the Geneva Conventions. They had limited access to food, water and sanitation. Their morning meal was a bottle-cap-sized piece of bread with a drop of marmalade. The evening meal, if provided, consisted of rotting sardines and cheese on mouldy bread.

1123. AD/01C described the experience of being detained, stripped and shackled as one of abandonment, desperation, suffocation and isolation. He continues to experience discomfort where he was beaten and is unable to sit and sleep comfortably.

1124. AD/01C stated that while in Negev prison an additional group arrived. They were kept separately in the second section. The exact number of detainees in the second group is unknown, although AD/01C indicated to the Mission that the second group was smaller.

1125. On 12 January, nine people including the witnesses were blindfolded, handcuffed and transported to the Erez border. AD/01 described to the Mission how they were subjected to harsh interrogation at Erez and made to strip completely. Several hours later they were told to run into Gaza, to look straight ahead and not to look back.

1126. AD/01 states that all 65 detainees from the original group taken from al-Atatra to Israel were eventually released. Some members of his family were detained afterwards, but not in the original group of 65. At the time of writing, three of these remain incarcerated in various detention facilities of the Israel Prison Service. An unknown number remain in prison facing charges of being illegal combatants and members of al-Qassam Brigades. The first hearing was scheduled to be held in August in Israel (exact date not known).

B. Detention and abuse of AD/02

1127. AD/02 was interviewed by the Mission on 1 July 2009. He is a resident of Beit Lahia and a businessman. He was detained on 4 January 2009 for around 85 days. In that period he was held in Beersheba and Negev prisons, after being detained in locations identified as military posts. He was mentally and physically abused. He appeared before what appeared to be a criminal court, but the precise nature of the proceedings and their results were never made clear to him. He was released without explanation and returned to the Erez border and told to re-enter Gaza.

1128. By 3 January AD/02 and his extended family, numbering over 200, had gathered together in Beit Lahia as a result of the attacks that were taking place in the area. At around 4 a.m. on 4 January Israeli troops entered the area shooting. They ordered everyone out of the house and separated the men from the women and children. They selected 15 of the men, without asking for names. The women and children were ordered to go south. AD/02 recounted that the 15 men, including him, were separated from the other men and were blindfolded and handcuffed with

plastic strips.⁵⁵⁵ They were taken on foot to an open space half a kilometre away. An hour later, they were taken to a house where they were joined by an estimated 54 or 55 people, who apparently also wore blindfolds.

1129. AD/02 described how they were interrogated in a separate room, individually and at times in groups of two or three. He stated that some of the men, though not him, were beaten during the interrogation and were made to clamber down into trenches or pits, dug in the ground outside the house, big enough to accommodate one person. They were kept in the pits for several hours at a time, handcuffed and blindfolded, with no access to toilets.

1130. Later that night, 15 people – four women and at least 11 children – were brought to the house. They were detained overnight in the corridor outside the room where the men were detained. The next morning, on 4 January, the men, women and children were taken out of the house to an open space. The men remained blindfolded and handcuffed. AD/02 stated that the open space was a military post with many tanks and soldiers. They were all told to sit in the middle of the empty space. A fence of barbed wire was then erected around them. They sat within the barbed enclosure all day and all night in close proximity to the movement and sound of military tanks.

1131. AD/02 stated that 18 to 20 other men were held overnight in an open truck, exposed to the cold and rain. AD/02 knew this from talking to some of the men the following morning.⁵⁵⁶

1132. On 5 January, 18 to 20 men, not including AD/02, were taken from the military post to an unknown location.⁵⁵⁷ AD/02 and 35 others were taken to an area described by him as located north of Gaza City and in Israel. They remained handcuffed and blindfolded for an hour and a half. Then a roll-call was taken, their blindfolds removed and they were interrogated by a person who identified himself as an intelligence officer. Shortly afterwards, AD/02 and a few others (exact number not known) were interviewed by a group of people identifying themselves as part of a television crew. AD/02 does not know the name and/or details of the television channel. They were then led to an open space, where they stayed all evening exposed to the rain and cold. Later that night (5–6 January) they were blindfolded and shackled with chains and taken to a location which AD/02 subsequently learned was the Beersheba prison facility. A few hours later, at dawn, their blindfolds and handcuffs were removed.

1133. AD/02 recounted that he was in extreme pain as the handcuffs were very tight, adding to the pain caused by pre-existing injuries to his hands and wrist. Earlier in his life, he had suffered serious burns and the scarring on his hands and arms is evident. There is continued nerve damage to the skin tissue which causes significant pain in cold weather. His gloves were taken away by

⁵⁵⁵ Jerusalem Centre for Public Affairs submission, page 48; see also testimony 21 in *Soldiers' Testimonies...*, which supports AD/01's statement: "we go in, call out to the owner to open, gather all the males, shackled them, gather the family in one room and begin to search", p. 50.

⁵⁵⁶ AD/02's statement is corroborated in a letter sent by various NGOs (ACRI, PCATI, HaMoked, PHR, B'Tselem, Yesh Din and Adalah) to the Military Advocate General on 8 January 2009, available at: http://www.stoptorture.org.il/files/28109_eng.pdf.

⁵⁵⁷ AD/02 indicated that it was later learned that the men had been taken to Ashkelon prison before being brought to the Beersheba Prison, where they were grouped with the others, including AD/02.

soldiers during an interrogation, exposing his hands to the extreme cold. His requests for medical assistance were ignored several times before his arrival in Beersheba, where he was given access to a doctor. He was, however, given only a non-medicated lotion.

1134. AD/02 stated that he was detained in Beersheba for approximately a week. He was intermittently kept in isolation and then in a courtyard with several other detainees. In one instance, he was blindfolded, handcuffed and shackled, and interrogated for approximately two hours by three people. He was verbally abused and beaten during the interrogation, his hair was pulled and he was kicked with one of the interrogators attempting to push his boots through the loop of the handcuffs tied around his wrists.

1135. On or around 13 January, pursuant to an interrogation by a person dressed in civilian clothes, AD/02 was blindfolded and handcuffed and taken to the Negev prison. He remained there until the end of March. During this time he was transferred at least 10 times from one cell to another.

1136. On arrival his handcuffs were removed and he was taken to a ward, which consisted of small one-man cells with iron doors and no windows. The cells each contained an iron bench. Two hours later, he was blindfolded and taken to an interrogation room, where he was stripped and made to stand alone, naked, for almost an hour before his clothes were returned and he was handcuffed and shackled. He was taken by four people to another room, where he was beaten with the butt of a rifle while also being kicked and punched several times. The beating lasted for about 30 minutes. He was then left alone in the room for about 2 hours. He was then taken to a large communal space referred by the soldiers as the "tents." There were seven or eight such spaces or tents spread across the prison.

1137. AD/02 said that he was unable to stand owing to the severe injuries sustained during the beatings and had to be carried to the tents. He was taken to a doctor, given some medicines and allowed to take a shower. AD/02 stated that he stayed in the tent area for about a week before being transferred to a cell occupied by four people. The cell had an iron bed and a bunk bed. Two people including AD/02 slept on the floor. The cell was dark and filthy. There was no clean water and no toilet. During the entire week the men had to relieve themselves in the cell, which was never cleaned.

1138. AD/02 remained in the cell for about one week. At some time during this period he was taken, blindfolded, handcuffed and shackled, by bus to what appeared to be a court. On arrival, his handcuffs and blindfold were removed. He remained shackled when he was taken inside the courtroom. The courtroom had a standard layout with the judge seated behind a table in the centre of the room. The prosecution was on one side and the defence on the other. They were all dressed in civilian clothes. Once inside the courtroom, AD/02 was made to sign a consent form, accepting the lawyer reportedly appointed to defend him. Although the lawyer identified himself as belonging to a human rights organization, he gave no name. As the proceedings began, the judge addressed AD/02 and read out the charge against him. The judge announced that he was being charged with being an illegal combatant but did not explain specific charges. AD/02 was asked no questions. When the defence lawyer asked for the charge to be elaborated, the judge replied that the charges were part of a secret dossier and could not be elaborated upon or revealed. The proceeding lasted about 30 minutes and AD/02 was taken back to Negev.

1139. A week later, around or on 28 January, AD/02 was transferred to another section of the prison, where roll-calls and strip searches were carried out regularly. Some 8 to 10 days later, around 7 February, he and 14 others, were moved to a larger ward with prisoners from the West Bank. The ICRC was given access to them.

1140. On 8 February, AD/02 was transferred, twice, to another section of the prison and shortly afterwards to the cell where he had first been detained on arrival at Negev. On 9 February, at around noon, he and several others were transferred, for the ninth time, to another section of the prison occupied by a large number of prisoners, including those from the West Bank. AD/02 indicated that several of them were parliamentarians. He remained in this section for approximately 20 days. During this time he three times met a person who identified himself as a lawyer. He was informed of the charges against him, which included membership and involvement with the resistance.

1141. On 2 March, he was transferred with 10 others to yet another section of the prison. They were put in two rooms, five in each room. The rooms had graffiti on the wall that read *illegal combatants* in English and in Hebrew. They had limited access to toilets and were given uncooked food to eat.

1142. Around 29–30 March, AD/02 was finally released. He and his brother, a cousin and two other residents of Izbet Abd Rabbo were blindfolded and handcuffed and taken to the Erez border, where they were interrogated for approximately four hours. They were then told to cross the border and not look back. They were given no explanation about either their detention or their release.

C. AD/03

1143. AD/03 is a resident of al-Salam neighbourhood, east of Jabaliyah and close to the eastern border with Israel. His arrest and detention were preceded by aerial attacks and a ground invasion in his neighbourhood. His house was struck several times, over a period of five days, by projectiles fired from F-16 aircraft. The attacks continued throughout the night when most people were asleep.⁵⁵⁸ As a result of the continued attacks, he sought refuge in a relative's house nearby.

1144. AD/03 stated that, although the area could be considered as a frontline where armed groups had been present, the neighbourhood could not reasonably have been perceived as a military threat by the time the Israeli armed forces arrived on the ground. There was no resistance going on in the neighbourhood when it was targeted. If the intent of the attacks was to

⁵⁵⁸ On the afternoon of 3 January, AD/03's house was struck twice by projectiles, within two hours, causing significant damage. He and his family moved to a relative's house nearby, where they stayed overnight. On 4 January in the evening, when AD/03 had returned to his own home, it was struck for the third time and part of the roof collapsed. AD/03 sustained minor injuries; his mother and his wife sustained more serious injuries. Later that night, at around 9.40 p.m., the house was hit by a fourth rocket, which was followed by another attack 20 minutes later that completely destroyed the ground floor facade injuring AD/03's father's second wife. Another shell (the sixth attack) was fired shortly afterwards. AD/03 and his family relocated for the second time to his cousin's house, where they remained for four nights, until 7 January. On the morning of 8 January, aerial bombardment intensified to the extent that three explosions/shells were reportedly heard every minute.

destroy alleged command centres, positions or weapons caches of Hamas, he felt that those positions would have been destroyed in the first few attacks on the neighbourhood given the intensity of the shelling.

1145. On 8 January, at around 11.30 a.m., the house where AD/03 was seeking refuge was struck by a missile so he decided to return to his own house. He described how Israeli soldiers fired at them, including women and children carrying white flags, when they tried to leave his cousin's house. His father's wife sustained a bullet injury to her leg. Thirty minutes later, around noon, the Israeli armed forces ordered all residents to evacuate their homes and come out in the street. The men were separated from the women and children, and told to line up against a wall, lift their shirts and strip to their underwear. They remained stripped and lined up against the wall for approximately 15 minutes. The men, women and children were then told to walk down the street.

1146. AD/03 recounted that the street was blocked with large piles of heavy rubble and debris of bulldozed buildings, which provided a difficult obstacle for several people, including children and elderly people. They walked 200-250 metres before arriving at a house. Two hours later the women and children were told to go to Jabaliyah. Shortly afterwards, AD/03, his brother, cousin and an unknown man were taken to another room, where they were forced to lie on the ground. They were then blindfolded and their hands were tied behind their backs with plastic strips. They were interrogated individually for several hours. Later that evening, they were made to walk about 100 metres eastward to another house. They were detained overnight in a room, together with three others, who identified themselves as residents of Abd Rabbo. They had no access to food, water or toilets. The next morning, on 9 January, their blindfolds were removed and all seven were interrogated, individually, by one soldier.

1147. AD/03 stated that the house was being used as a military base and sniper position. On the second day of detention the Israeli soldiers began to use some detainees as human shields. By then the detainees had been without food and sleep for a day. They had been subjected to what AD/03 described as psychological torture. There were constant death threats and insults. To carry out house searches as human shields the Israeli soldiers took off AD/03's blindfold but he remained handcuffed. He was forced to walk in front of the soldiers and told that, if he saw someone in the house but failed to tell them, he would be killed. He was instructed to search each room in each house cupboard by cupboard. After one house was completed he was taken to another house with a gun pressed against his head and told to carry out the same procedure there. He was punched, slapped and insulted throughout the process.

1148. AD/03 indicated that he was forced to do this twice while the group was being held in this house for eight days. Others were also required to do the same thing. On the first occasion he was forced to carry out searches in three houses and on the second in four. AD/03 estimates that these searches took between one hour and one hour and a half. At no point did he come across any explosive devices or armed group members.

1149. AD/03 stated that, at the end of every search, the houses were vandalized by the Israeli soldiers, who broke doors, windows, kitchenware and furniture, for instance.⁵⁵⁹

1150. At the end of the day he was taken back to the house, where he and six others continued to be detained for 8 days, until 16 January. They had limited access to food and water and were often denied access to toilets. They were told that their ordeal would continue indefinitely. One soldier reportedly told them that the soldiers were “following instructions issued by the chain of command.”

1151. For the first time the detainees were asked for proof of identity. AD/03 said that their identification documents were thoroughly inspected. Had they revealed anything in relation to militant activities, he believed they would have been killed.

1152. On 16 January they were handcuffed, with plastic strips tied very tightly around their wrists, made to stand in a single file, blindfolded and told to hold on to the shirt of the person standing in front of them. They were made to walk towards a military tank positioned very close to the house where they had been detained and told to sit on top of each other inside the tank. The tank drove on a bumpy track and over big boulders causing them to frequently slam against the sides of the tank. About three hours later it stopped in an unknown location. On arrival, they were asked to clamber down into holes or pits about three to four metres deep. AD/03 stated that they were in a military post, as they heard the voices of several soldiers laughing and joking noisily. They remained blindfolded and handcuffed and exposed to the continued sound of tank movement overhead. They remained in the pit for about one hour and were then made to sit inside a tank that moved in circles.

1153. Shortly afterwards, their handcuffs were removed and they were shackled with chains inside a bus. They were accompanied by soldiers who spoke Hebrew. On arrival, they were searched and then interrogated for eight hours before being taken to the military barracks in Beersheba. Then they were made to line against the wall before being asked to strip naked. They were made to stand, blindfolded, naked and exposed to the cold winds, for about three or four hours.

1154. On 19 January, eight people, including AD/03, his brother and one other man from the group of seven who were taken to Beersheba on 16 January, were shackled inside the bus, made to bend forward and keep their heads down, between their knees, and were taken to Negev prison, a journey that lasted approximately four hours. During this journey they were continuously beaten, kicked and punched by four or five soldiers on board. According to AD/03, the detainees sustained serious injuries and were bleeding, two bleeding more profusely than the others. Two detainees reportedly even fainted. He stated that soldiers on board made constant reference to shackling practices in the Russian Federation, leading AD/03 to believe that the soldiers were from there.

⁵⁵⁹ The account of a soldier interviewed by Breaking the Silence and the account in the submission of the Jerusalem Centre for Public Affairs clarify that soldiers would vandalize houses after searches. Jerusalem Center for Public Affairs submission, p. 78. “The family was not in there, they had run away. He [one of the soldiers] took out notebooks and textbooks and ripped them. One guy smashes cupboards for kicks, out of boredom. [...]” *Soldiers’ Testimonies*..., testimony 35, p. 80.

1155. On arrival at Negev, they were severely beaten by the prison security for approximately one and a half hours before being put into cells and told that they were caught during battle and were illegal combatants. Later that night, 10 more people joined the group of detainees.

1156. AD/03 described how on the second day of their incarceration, 20 January, the detainees (at this point 18 in number) were told that they would be interrogated in accordance with their alleged political affiliations. Several of them pointed out that they had none. They were grouped apart. AD/03 said that they talked among themselves and he found out that nine of them were livestock farmers and three or four were merchants and traders.

1157. AD/03 described how the detainees were divided into two groups of nine each and put in a section of the prison referred to as the *mardaban*, which was divided into two wards containing 10 iron beds each and guarded by Israeli Arab soldiers. They remained incarcerated for eight days, until 27 January, with limited access to food, water, toilets and physical exercise.

1158. On 24 January, AD/03 was given access to a lawyer, affiliated with Addameer, Prisoners Support and Human Rights Association,⁵⁶⁰ for the first and only time. The Mission interviewed him⁵⁶¹ and he confirmed that he had visited AD/03 and his brother on 25 January 2009. The lawyer's evidence provided corroboration of the detention of AD/03 and his brother (who was also assisted by the lawyer), and the conditions under which he was subjected to criminal proceedings in Israel. The lawyer was informed by the Israeli authorities that AD/03 was detained under the illegal combatant law but he was not given the dossier to review. His brother was never formally charged.

1159. On 25 January, the detainees were told that they would be taken to Beersheba for their trial. On 26 January, all 18 detainees were shackled with iron chains to iron benches in a bus, handcuffed with iron handcuffs and taken to Beersheba. They were not blindfolded. The journey lasted five hours during which the bus drove on bumpy roads causing the detainees to slam against the sides of the bus. They were detained in Beersheba overnight in overcrowded cells together with people convicted of serious offences, according to AD/03. They were mostly Israeli Jews.

1160. The following morning, on 27 January, they were taken back to the Negev prison in shackles and handcuffs. They were given no information regarding the scheduled hearing. The outcome of the proceedings was not clear to AD/03 at the time, as he believed he had been "acquitted" only when they were returned to the Negev prison.

1161. The lawyer from Addameer was present in the court. According to him, the prosecutor made the decision not to proceed with the case rather than the detainees being acquitted. The lawyer confirms that they were held in Ktziot prison in the Negev Desert and released on 27 January.

⁵⁶⁰ The Mission has heard directly from AD/03's legal representative, who stated that he received a copy of his file, but not the secret file, from the Prosecutor's Office on 21 January 2009. AD/03 was arrested on suspicion of being an illegal combatant.

⁵⁶¹ The lawyer had been alerted to the cases by Al Mezan, a human rights organization in Gaza.

1162. AD/03 said they were then taken back to Beersheba and later to the Erez border, where they were released. They were told to run into Gaza and not look back.

1163. AD/03 indicated that two others, detained with him, were released a month later. Two others continue to be detained in the Ktziot prison and are reportedly awaiting trial. The status and whereabouts of 11 others are not known.

D. Factual findings

1164. The Mission found the witnesses credible and reliable taking into account their demeanour and the consistency of their statements. At least one of them was still suffering considerable anguish because of the treatment he had endured at the hands of the Israeli soldiers and other officials. The Mission notes that there are several common features to these incidents that disclose a pattern of behaviour on the part of the Israeli soldiers, indicating that the treatment meted out to the persons deposing before the Mission were not isolated incidents. The facts available to the Mission indicate that:

- All three locations were near the border with Israel;
- Before the arrival of ground troops, all three had been under aerial or ground attack. The soldiers on the ground were in complete control of the area at the time of their encounter with the civilians;
- There was no combat activity by the persons reporting, nor any likelihood of such activity being under way in the area or nearby at the time that the soldiers started the operation against civilians in the three locations. None of the civilians was armed or posed any apparent threat to the soldiers. In two of the incidents they were holding white flags as a sign of their non-combatant status;
- It is clear in two of the incidents that none of those detained had been asked for their names by the soldiers for several days. This establishes that there was no definite suspicion against them that they were combatants or otherwise engaged in hostile activities;
- In all cases a number of persons were herded together and detained in open spaces for several hours at a time and exposed to extreme weather conditions;
- The soldiers deliberately subjected civilians, including women and children, to cruel, inhuman and degrading treatment throughout their ordeal in order to terrorize, intimidate and humiliate them. The men were made to strip, sometimes naked, at different stages of their detention. All the men were handcuffed in a most painful manner and blindfolded, increasing their sense of fear and helplessness;
- Men, women and children were held close to artillery and tank positions, where constant shelling and firing was taking place, thus not only exposing them to danger, but increasing their fear and terror. This was deliberate, as is apparent from the fact that the sandpits to which they were taken were specially prepared and surrounded by barbed wire;

- During their detention in the Gaza Strip, whether in the open or in houses, the detainees were subjected to beatings and other physical abuse that amounts to torture. This continued systematically throughout their detention;
- Civilians were used as human shields by the Israeli armed forces on more than one occasion in one of the three incidents. Taking account of other incidents in which the Mission has found this to have happened, it would not be difficult to conclude that this was a practice repeatedly adopted by the Israeli armed forces during the military operation in Gaza;
- Many civilians were transferred across the border to Israel and detained in open spaces as well as in prisons;
- The methods of interrogation amounted not only to torture in some of the cases, but also to physical and moral coercion of civilians to obtain information;
- These persons were subjected to torture, maltreatment and foul conditions in the prisons. They were deprived of food and water for several hours at a time and any food they did receive was inadequate and inedible;
- While in detention in Israel they were denied due process.

E. Legal findings

1165. The Mission considers the following legal provisions relevant to its consideration of the matters presented above:⁵⁶²

Article 4 of the Fourth Geneva Convention

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II are, however, wider in application, as defined in article 13.

Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, or by the Geneva

⁵⁶² The Mission does not repeat here the provisions already cited elsewhere, such as article 57 of Additional Protocol I or common article 3.

Convention relative to the Treatment of Prisoners of War of 12 August 1949, shall not be considered as protected persons within the meaning of the present Convention.

Article 5 of the Fourth Geneva Convention

Where, in the territory of a party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or occupying Power, as the case may be.

Article 27 of the Fourth Geneva Convention

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

Article 76 of the Fourth Geneva Convention

Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein. They shall, if possible, be separated from other detainees and shall enjoy conditions of food and hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in prisons in the occupied country.

They shall receive the medical attention required by their state of health. They shall also have the right to receive any spiritual assistance which they may require.

Women shall be confined in separate quarters and shall be under the direct supervision of women.

Proper regard shall be paid to the special treatment due to minors.

Protected persons who are detained shall have the right to be visited by delegates of the protecting Power and of the International Committee of the Red Cross, in accordance with the provisions of article 143.

Such persons shall have the right to receive at least one relief parcel monthly.

1166. Relevant parts of article 75 of Additional Protocol I, which reflect customary international law, provide:

1. In so far as they are affected by a situation referred to in article 1 of this Protocol, persons who are in the power of a party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) Violence to the life, health, or physical or mental well-being of persons, in particular:

[...]

(ii) torture of all kinds, whether physical or mental;

(iii) corporal punishment; and

[...]

(b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

(c) The taking of hostages;

(d) Collective punishments; and

(e) Threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) No one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) Anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) Anyone charged with an offence shall have the right to be tried in his presence;

(f) No one shall be compelled to testify against himself or to confess guilt;

(g) Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(h) No one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) Anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and

(j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned,

they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

(a) Persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

(b) Any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

1167. From the facts available to it, and in the absence of any information refuting the allegations that the incidents described above took place, the Mission finds that there have been a number of violations of international humanitarian law and human rights law.

1168. All of the persons held were civilians and protected persons under article 4 of the Fourth Geneva Convention. The Mission does not accept the proposition that the men were detained as or considered to be unlawful combatants and therefore beyond the protection of the Fourth Geneva Convention. An individual loses the status of protected person only if that person is “definitely suspected of or engaged in activities hostile to the security of the State” (art. 5). The Mission has not heard any information suggesting this to be the case. Even if a person is no longer entitled to the status of protected person, article 5 provides that such persons must “be treated with humanity” and “shall not be deprived of the rights of fair and regular trial.” Furthermore, under Additional Protocol I, article 75, they shall enjoy “as a minimum” the protections provided by that article.

1169. The Mission has considered to what extent the actions of the Israeli armed forces might legitimately be considered as some kind of internment in the light of the resistance from armed groups in the area generally, although not in the context of the specific detentions. These people from Gaza were detained in prisons inside Israel (Beersheba, Ashkelon and Negev prisons), contrary to the Fourth Geneva Convention, which stipulates in article 76 that protected persons should be detained inside the occupied territory and not transferred out of it unless there is a pressing security need.⁵⁶³ It also makes clear that internment is the most severe measure that a

⁵⁶³ ICRC also specifies that, in occupied territories, civilians can be interned, or placed in assigned residence, only within the frontiers of the occupied country itself. See ICRC Commentary on article 78 of the Fourth Geneva Convention.

detaining authority or occupying Power may take with respect to protected persons against whom no criminal proceedings have been initiated. Internment is a preventive administrative measure and cannot be considered a penal sanction.⁵⁶⁴ Recourse to the measure may be had only if the security of the State makes it “absolutely necessary” (art. 42) or “for imperative reasons of security” (art. 78).

1170. The Mission does not consider that the information it has received supports defining the treatment described above as internment.

1171. The rounding-up of large groups of civilians and their prolonged detention under the circumstances described above constitute a collective penalty on those persons in violation of article 33 of the Fourth Geneva Convention and article 50 of the Hague Regulations. Such treatment amounts to measures of intimidation and terrorism, prohibited under article 33 and a grave breach of the Convention that constitutes a war crime.

1172. By holding the detainees in sandpits without privacy, the Israeli soldiers failed to ensure respect for their persons or to treat them humanely as required by article 27 of the Fourth Geneva Convention. The information before the Mission suggests that this treatment could not be justified as necessary “measures of control and security.” This treatment also constituted outrages on personal dignity, humiliating and degrading treatment contrary to the Geneva Conventions, common article 3, and Additional Protocol I, article 75 (2) (b). The abuse, which required a considerable degree of planning and control, was sufficiently severe to constitute inhuman treatment within the meaning of article 147 of the Fourth Geneva Convention and thus a grave breach of the said Convention that would constitute a war crime.

1173. “Women shall be the object of special respect”, in accordance with article 76 of Additional Protocol I. The Mission finds, on the information before it, that the treatment of the women in the sandpits, where they endured especially distressing circumstances, was contrary to this provision and would also constitute a war crime.

1174. The Mission has received information relating to the particular treatment received by some witnesses, such as shackling, severe beatings during detention and interrogation, being held in foul conditions or solitary confinement, which added to their already profound sense of degradation. Such treatment violates article 31 of the Fourth Geneva Convention, which prohibits physical or moral coercion against protected persons, “in particular to gain information from them”. This would also constitute a war crime.

1175. Furthermore, on the basis of this information, the Mission considers that the severe beatings, constant humiliating and degrading treatment and detention in foul conditions allegedly suffered by individuals in the Gaza Strip under the control of the Israelis and in detention in Israel, would constitute torture, and a grave breach under article 147 of the Fourth Geneva Convention and a violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Such violations also constitute war crimes.

⁵⁶⁴ ICRC Commentary on the Fourth Geneva Convention.

1176. From the facts ascertained by it, the Mission believes that there has also been a violation of articles 7 and 10 of the International Covenant on Civil and Political Rights, as well as of article 14 ICCPR with regard to the right to be brought before a judge at the earliest opportunity, the right to be informed of the charges against one, the right to consult with legal counsel and the right to be provided with a meaningful opportunity to defend oneself.

XVI. OBJECTIVES AND STRATEGY OF ISRAEL'S MILITARY OPERATIONS IN GAZA

1177. This chapter addresses the objectives and the strategy underlying the Israeli military operations in Gaza.

A. Planning

1178. The question of whether incidents involving the Israeli armed forces that occurred between 27 December 2008 and 18 January 2009 are likely to be the result of error, the activities of rogue elements or a deliberate policy or planning depends on a number of factors, including the degree and level of planning involved, the degree of discretion field commanders have in operations, the technical sophistication and specification of weaponry, and the degree of control commanders have over their subordinates.

1179. The Government of Israel has refused to cooperate with the Mission. The Mission has therefore been unable to interview high-level members of the Israeli armed forces. It has, nevertheless, reviewed a significant amount of commentary and conducted a number of interviews on planning and discipline, including with persons who have been connected with the planning of Israeli military operations in the recent past. The Mission has also analysed the views expressed by Israeli officials in official statements, official activities and articles, and considered comments by former senior soldiers and politicians.

1. The context

1180. Before considering the issue of planning there is an important issue that has to be borne in mind about the context of Israeli operations in Gaza. The land mass of Gaza covers 360 square kilometres of land. Israel had a physical presence on the ground for almost 40 years with a significant military force until 2005. Israel's extensive and intimate knowledge of the realities of Gaza present a considerable advantage in terms of planning military operations. The Mission has seen grid maps in possession of the Israeli armed forces, for example, that show the identification by number of blocks of houses throughout Gaza City.

1181. In addition to such detailed background knowledge, it is also clear that the Israeli armed forces were able to access the telephone networks to contact a significant number of users in the course of their operations.⁵⁶⁵

1182. Since the departure of its ground forces from Gaza in 2005, Israel has maintained almost total control over land access and total control over air and sea access.⁵⁶⁶ This has also included

⁵⁶⁵ See "The operation in Gaza...", paras. 8, 24, 138, 264, 350, 354, 375, 389 and 447.

the ability to maintain a monitoring capacity in Gaza, by a variety of surveillance and electronic means, including UAVs. In short, Israel's intelligence gathering capacity in Gaza since its ground forces withdrew has remained extremely effective.

2. Legal input and training of soldiers on legal standards

1183. The Israeli Government has set out the legal training and supervision relevant to the planning, execution and investigation of military operations.⁵⁶⁷ The Mission also met Col. (Ret.) Daniel Reisner, who was the head of the International Legal Department of the Military Advocate General's Office of the Israeli Defense Forces from 1995 until 2004. In an interview with the Mission he explained how the principles and contents of international humanitarian law were instilled into officers. He explained the four-tiered training system, reflecting elements similar to those presented by the Government, which seeks to ensure knowledge of the relevant legal obligations for compliance in the field. Firstly, during training all soldiers and officers receive basic courses on relevant legal matters. The more senior the ranks, the more training is required "so that it becomes ingrained". Secondly, before a significant or new operation, legal advice will be given. Col. Reisner indicated that he understood from talking with colleagues still in active service that detailed consultations had taken place with legal advisers in the planning of the December-January military operations. He was not in a position to say what that advice had been. Thirdly, there would be real-time legal support to commanders and decision makers at headquarters, command and division levels (but not at regiment levels or below). The fourth stage is that of investigation and prosecution wherever necessary.

1184. The same framework explained by Col. Reisner appears to be repeated in similar detail in a presentation of the Office of the Legal Adviser to the Ministry of Foreign Affairs.⁵⁶⁸

3. The means at the disposal of the Israeli armed forces

1185. The Israeli armed forces are, in technological terms, among the most advanced in the world.⁵⁶⁹ Not only do they possess the most advanced hardware in many respects, they are also a market leader in the production of some of the most advanced pieces of technology available, including UAVs.⁵⁷⁰ They have a very significant capacity for precision strikes by a variety of methods, including aerial and ground launches. Moreover, some new targeting systems may have been employed in Gaza.⁵⁷¹

⁵⁶⁶ See chap. IV.

⁵⁶⁷ "The operation in Gaza...", paras. 212-221.

⁵⁶⁸ <http://www.mfa.gov.il/NR/rdonlyres/8DC5105D-A2A1-4709-9874-F42F1D1DA44B/0/TaubGazaLegalAspects270509.pps>.

⁵⁶⁹ For a detailed breakdown of Israeli capacity, see [http://www.inss.org.il/upload/\(FILE\)1245235226.pdf](http://www.inss.org.il/upload/(FILE)1245235226.pdf).

⁵⁷⁰ Ibid., pp. 8-9.

⁵⁷¹ According to the Israeli armed forces, the system, controlled by a computer and composed of 120 ml mortars, was developed for use by ground forces. "The Keshet weapons system is an autonomous mortar with the ability to aim and navigate independently. It fires at a fast speed and has the capacity to fire the first mortar accurately within a minute". See <http://dover.idf.il/IDF/English/News/today/2008n/04/1401.htm>.

1186. Taking into account all of the foregoing factors, the Mission, therefore, concludes that Israel had the means necessary to plan the December-January military operations in detail. Given both the means at Israel's disposal and the apparent degree of training, including training in international humanitarian law, and legal advice received, the Mission considers it highly unlikely that actions were taken, at least in the aerial phase of the operations, that had not been the subject of planning and deliberation.⁵⁷² In relation to the land-air phase, ground commanders would have had some discretion to decide on the specific tactics used to attack or respond to attacks. The same degree of planning and premeditation would therefore not be present. However, the Mission deduces from a review of many elements, including some soldiers' statements at seminars in Tel Aviv and to *Breaking the Silence*, that what occurred on the ground reflected guidance that had been provided to soldiers in training and briefing exercises.⁵⁷³

1187. The Mission notes that it has found only one example where the Israeli authorities have acknowledged that an error had occurred. This was in relation to the deaths of 22 members of the al-Daya family in Zeytoun. The Government of Israel explained that its armed forces had intended to strike the house next door, but that errors were made in the planning of the operation.⁵⁷⁴ The Mission expresses elsewhere its concerns about this explanation (see chap. XI). However, since it appears to be the only incident that has elicited an admission of error by the Israeli authorities, the Mission takes the view that the Government of Israel does not consider the other strikes brought to its attention to be the result of similar or other errors.

1188. In relation to air strikes, the Mission notes the statement issued in Hebrew posted on the website of the Israeli armed forces on 23 March 2009:

Official data gathered by the Air Force concluded that 99 per cent of the firing that was carried out hit targets accurately. It also concluded that over 80 per cent of the bombs and missiles used by the Air Force are defined as accurate and their use reduces innocent casualties significantly...⁵⁷⁵

1189. The Mission understands this to mean that in over 80 per cent of its attacks the Air Force deployed weapons considered to be accurate by definition – what are known colloquially as precision weapons as a result of guidance technology. In the other 20 per cent of attacks, therefore, it apparently used unguided bombs. According to the Israeli armed forces, the fact that these 20 per cent were unguided did not diminish their accuracy in hitting their targets, but may have caused greater damage than those caused by precision or “accurate” weapons.

⁵⁷² See “The operation in Gaza...”, para. 236.

⁵⁷³ See, for example, a soldier's report of a junior officer's briefing before entering Gaza: “I want aggression. If we suspect a building we take down this building. If there's a suspect on one of the floors of that building we shell it. No second thoughts. It's either them or us. Let it be them... No one has second thoughts. Let error take their lives, not ours”. See transcript from Channel Ten News on record with the Mission of soldiers speaking at a seminar in Tel Aviv.

⁵⁷⁴ “The operation in Gaza...”, paras. 385-387. The Israeli Government's comments in relation to the attack on a truck with oxygen tanks is somewhat more equivocal. The blame is put on the proximity of the tanks to alleged armed groups. *Ibid.*, paras. 398-400.

⁵⁷⁵ http://dover.idf.il/IDF/News_Channels/today/09/03/2301.htm (Mission's own translation).

1190. These represent extremely important findings by the Israeli Air Force. It means that what was struck was meant to be struck. It should also be borne in mind that the beginning of the ground phase of the operation on 3 January did not mean the end of the use of the Israeli Air Force. The statement indicates:

During the days prior to the operation "Cast Lead", every brigade was provided with an escorting UAV squadron that would participate in action with it during the operation. Teams from the squadrons arrived at the armour and infantry corps, personally met the soldiers they were about to join and assisted in planning the infantry manoeuvres. The UAV squadrons had representatives in the command headquarters and officers in locations of actual combat who assisted in communication between the UAVs – operated by only two people, who are in Israeli territory – and the forces on the ground. The assistance of UAVs sometimes reached a ratio of one UAV to a regiment and, during extreme cases, even one UAV to a team.

1191. Taking into account the ability to plan, the means to execute plans with the most developed technology available, the indication that almost no errors occurred and the determination by investigating authorities thus far that no violations occurred, the Mission finds that the incident and patterns of events that are considered in this report have resulted from deliberate planning and policy decisions throughout the chain of command, down to the standard operating procedures and instructions given to the troops on the ground.

B. The development of strategic objectives in Israeli military thinking

1192. Israel's operations in the Occupied Palestinian Territory have had certain consistent features. In particular, the destruction of buildings, including houses, has been a recurrent tactical theme.⁵⁷⁶ The specific means Israel has adopted to meet its military objectives in the Occupied Palestinian Territory and in Lebanon have repeatedly been censured by the United Nations Security Council, especially its attacks on houses.⁵⁷⁷ The military operations from 27 December to 18 January did not occur in a vacuum, either in terms of proximate causes in relation to the Hamas/Israeli dynamics or in relation to the development of Israeli military thinking about how best to describe the nature of its military objectives.

1193. A review of the available information reveals that, while many of the tactics remain the same, the reframing of the strategic goals has resulted in a qualitative shift from relatively focused operations⁵⁷⁸ to massive and deliberate destruction.

1194. In its operations in southern Lebanon in 2006, there emerged from Israeli military thinking a concept known as the Dahiya doctrine, as a result of the approach taken to the Beirut

⁵⁷⁶ See, for example, Housing and Land Rights Network – Habitat International Coalition's submission to the Mission (pp. 12-28).

⁵⁷⁷ Security Council resolutions 101 (1953), 106 (1955), 111 (1956), 171 (1962), 228 (1966), 248 (1968), 265 (1969), 270 (1969), 313 (1972), 316 (1972), 332 (1973), 347 (1974), 450 (1979), 501 (1982), 515 (1982), 520 (1982) and 1544 (2004).

⁵⁷⁸ The reference to relatively focused operations here should not be misunderstood as an indication that all such actions were acceptable in terms of distinction and proportionality. It is merely a comparative reference.

neighbourhood of that name.⁵⁷⁹ Major General Gadi Eisenkot, the Israeli Northern Command chief, expressed the premise of the doctrine:

1195. What happened in the Dahiya quarter of Beirut in 2006 will happen in every village from which Israel is fired on. [...] We will apply disproportionate force on it and cause great damage and destruction there. From our standpoint, these are not civilian villages, they are military bases. [...] This is not a recommendation. This is a plan. And it has been approved.⁵⁸⁰

1196. After the war in southern Lebanon in 2006, a number of senior former military figures appeared to develop the thinking that underlay the strategy set out by Gen. Eisenkot. In particular Major General (Ret.) Giora Eiland⁵⁸¹ has argued that, in the event of another war with Hizbullah,⁵⁸² the target must not be the defeat of Hizbullah but “the elimination of the Lebanese military, the destruction of the national infrastructure and intense suffering among the population... Serious damage to the Republic of Lebanon, the destruction of homes and infrastructure, and the suffering of hundreds of thousands of people are consequences that can influence Hizbollah’s behaviour more than anything else”.⁵⁸³

1197. These thoughts, published in October 2008 were preceded by one month by the reflections of Col. (Ret.) Gabriel Siboni:⁵⁸⁴

With an outbreak of hostilities, the IDF will need to act immediately, decisively, and with force that is disproportionate to the enemy's actions and the threat it poses. Such a response aims at inflicting damage and meting out punishment to an extent that will demand long and expensive reconstruction processes. The strike must be carried out as quickly as possible, and must prioritize damaging assets over seeking out each and every launcher. Punishment must be aimed at decision makers and the power elite... In Lebanon, attacks should both aim at Hizbollah’s military capabilities and should target economic interests and the centres of civilian power that support the organization. Moreover, the closer the relationship between Hezbollah and the Lebanese Government, the more the elements of the Lebanese State infrastructure should be targeted. Such a response will create a lasting memory among ... Lebanese decision makers, thereby increasing Israeli deterrence and reducing the likelihood of hostilities against Israel for an

⁵⁷⁹ During the 2006 Lebanon war, Israel inflicted massive destruction on Dahiya, which it considered to be a stronghold of Hizbullah.

⁵⁸⁰ Ynet, “Israel warns Hizbullah war would invite destruction”, 10 March 2008.

⁵⁸¹ Former Chief of the Israeli National Security Council, former National Security Adviser to the Prime Minister, and prior to that head of the IDF Operation Branch.

⁵⁸² Although Major General Eiland was writing about Lebanon and the Syrian Arab Republic, it is the suggestion of the objectives and the means of obtaining them that is striking in relation to what occurred in Gaza.

⁵⁸³ Giora Eiland, “The third Lebanon war: target Lebanon”, Strategic Assessment, vol. 11, No. 2 (November 2008), p. 9.

⁵⁸⁴ Colonel (Res.) of the IDF. Researcher for Institute for National Strategic Studies. Former fighter and commander in the Golani Brigade, completed his service as the brigade’s reconnaissance unit commander. Within the scope of his reserve service, he served as senior staff officer of the Golani Brigade, Deputy Commander of the logistics unit, and Chief of Staff of an armoured division in the north.

extended period. At the same time, it will force Syria, Hizbollah, and Lebanon to commit to lengthy and resource-intensive reconstruction programmes...

This approach is applicable to the Gaza Strip as well. There, the IDF will be required to strike hard at Hamas and to refrain from the cat and mouse games of searching for Qassam rocket launchers. The IDF should not be expected to stop the rocket and missile fire against the Israeli home front through attacks on the launchers themselves, but by means of imposing a ceasefire on the enemy.⁵⁸⁵

1198. General Eisenkot used the language quoted above while he was in active service in a senior command position and clarified that this was not a theoretical idea but an approved plan. Major General Eiland, though retired, was a man of considerable seniority. Colonel Siboni, while less senior than the other two, was nonetheless an experienced officer writing on his field of expertise in a publication regarded as serious.

1199. The Mission does not have to consider whether Israeli military officials were directly influenced by these writings. It is able to conclude from a review of the facts on the ground that it witnessed for itself that what is prescribed as the best strategy appears to have been precisely what was put into practice.

C. Official Israeli statements on the objectives of the military operations in Gaza

1200. The Mission is aware of the official statements on the goals of the military operations:

The Operation was limited to what the IDF believed necessary to accomplish its objectives: to stop the bombardment of Israeli civilians by destroying and damaging the mortar and rocket launching apparatus and its supporting infrastructure, and to improve the safety and security of Southern Israel and its residents by reducing the ability of Hamas and other terrorist organizations in Gaza to carry out future attacks.⁵⁸⁶

1201. The Israeli Government states that this expression of its objectives is no broader than those expressed by NATO in 1998 during its campaign in the Federal Republic of Yugoslavia.

1202. The Mission makes no comment on the legality or otherwise of NATO actions there.

D. The strategy to achieve the objectives

1203. The issue that is of special concern to the Mission is the conceptualization of the “supporting infrastructure”. The notion is indicated quite clearly in General Eisenkot’s statements in 2006 and reinforced by the reflections cited by non-serving but well-informed military thinkers.

⁵⁸⁵ Siboni, *op. cit.* This appears very similar to the so-called Dahiya doctrine. See, for example, Ed Blanche, *Jane’s Rockets and Missiles*, 3 February 2009, citing Major General Gadi Eisenkot.

⁵⁸⁶ See “The operation in Gaza...”, para. 83.

1204. On 6 January 2009, during the military operations in Gaza, Deputy Prime Minister Eli Yishai⁵⁸⁷ stated: "It [should be] possible to destroy Gaza, so they will understand not to mess with us". He added that "it is a great opportunity to demolish thousands of houses of all the terrorists, so they will think twice before they launch rockets". "I hope the operation will come to an end with great achievements and with the complete destruction of terrorism and Hamas. In my opinion, they should be razed to the ground, so thousands of houses, tunnels and industries will be demolished". He added that "residents of the South are strengthening us, so the operation will continue until a total destruction of Hamas [is achieved]".⁵⁸⁸

1205. On 2 February 2009, after the end of the military operations, Eli Yishai went on: "Even if the rockets fall in an open air or to the sea, we should hit their infrastructure, and destroy 100 homes for every rocket fired."⁵⁸⁹

1206. On 13 January 2009, Israel's Foreign Minister, Tzipi Livni, was quoted as saying:

We have proven to Hamas that we have changed the equation. Israel is not a country upon which you fire missiles and it does not respond. It is a country that when you fire on its citizens it responds by going wild – and this is a good thing.⁵⁹⁰

1207. It is in the context of comments such as these that the massive destruction of businesses, agricultural land, chicken farms and residential houses has to be understood. In particular, the Mission notes the large-scale destruction that occurred in the days leading up to the end of the operations. During the withdrawal phase it appears that possibly thousands of homes were destroyed. The Mission has referred elsewhere in this report to the "day after" doctrine,⁵⁹¹ as explained in the testimonies of Israeli soldiers, which can fit in with the general approach of massively disproportionate destruction without much difficulty.

1208. The concept of what constituted the supporting infrastructure has to be understood not only in the context of the military operations of December and January, but in the tightening of the restrictions of access to goods and people into and out of Gaza, especially since Hamas took power. The Mission does not accept that these restrictions can be characterized as primarily an attempt to limit the flow of materials to armed groups. The expected impact, and the Mission believes primary purpose, was to bring about a situation in which the civilian population would

⁵⁸⁷During the military operation in Gaza, Eli Yishai served as [Deputy Prime Minister](#) and Minister of Industry, Trade, and Labour in the Government of Mr. Olmert. He serves in the current Government headed by Mr. Netanyahu as Internal Affairs Minister as well as Deputy Prime Minister. During the military operations in Gaza, he was also a member of the Security Cabinet for National Security within the Israeli Cabinet. Its duties include setting the targets of the security system and its policies; questions related to the Israeli armed forces, issues related to intelligence, foreign policy, military and security operations, and coordination of the activities of the Government in "Judea, Samaria and Gaza". See <http://www.pmo.gov.il/PMO/Archive/Decisions/2006/05/des20.htm> (in Hebrew).

⁵⁸⁸ <http://news.walla.co.il/?w=/1412570> (in Hebrew).

⁵⁸⁹ <http://www.ynet.co.il/Ext/Comp/ArticleLayout/CdaArticlePrintPreview/1,2506,L-3665452,00.html> (2 February 2009, in Hebrew).

⁵⁹⁰ The Independent, Israeli cabinet divided over fresh Gaza surge, 13 January 2009.

⁵⁹¹ See chap. XIII.

find life so intolerable that they would leave (if that were possible) or turn Hamas out of office, as well as to collectively punish the civilian population.

1209. The Israeli Government has stated:

While Hamas operates ministries and is in charge of a variety of administrative and traditionally governmental functions in the Gaza Strip, it still remains a terrorist organization. Many of the ostensibly civilian elements of its regime are in reality active components of its terrorist and military efforts. Indeed, Hamas does not separate its civilian and military activities in the manner in which a legitimate government might. Instead, Hamas uses apparatuses under its control, including quasi-governmental institutions, to promote its terrorist activity.⁵⁹²

1210. The framing of the military objectives Israel sought to strike is thus very wide indeed. There is, in particular, a lack of clarity about the concept of promoting “terrorist activity”: since Israel claims there is no real division between civilian and military activities and it considers Hamas to be a terrorist organization, it would appear that anyone who supports Hamas in any way may be considered as promoting its terrorist activity. Hamas was the clear winner of the latest elections in Gaza. It is not far-fetched for the Mission to consider that Israel regards very large sections of the Gazan civilian population as part of the “supporting infrastructure”.

1211. The indiscriminate and disproportionate impact of the restrictions on the movement of goods and people indicates that, from as early as some point in 2007, Israel had already determined its view about what constitutes attacking the supporting infrastructure, and it appears to encompass effectively the population of Gaza.

1212. A statement of objectives that explicitly admits the intentional targeting of civilian objects as part of the Israeli strategy is attributed to the Deputy Chief of Staff, Maj. Gen. Dan Harel. While the Israeli military operations in Gaza were under way, Maj. Gen. Harel was reported as saying, in a meeting with local authorities in southern Israel:

This operation is different from previous ones. We have set a high goal which we are aiming for. We are hitting not only terrorists and launchers, but also the whole *Hamas* government and all its wings. [...] We are hitting government buildings, production factories, security wings and more. We are demanding governmental responsibility from Hamas and are not making distinctions between the various wings. After this operation there will not be one Hamas building left standing in Gaza, and we plan to change the rules of the game.⁵⁹³

E. Conclusions

1213. The Israeli military conception of what was necessary in a future war with Hamas seems to have been developed from at least the time of the 2006 conflict in southern Lebanon. It finds its origin in a military doctrine that views disproportionate destruction and creating maximum

⁵⁹² “The operation in Gaza...”, para. 235.

⁵⁹³ *Ynet*, “Deputy chief of staff: worst still ahead”.

disruption in the lives of many people as a legitimate means to achieve military and political goals.

1214. Through its overly broad framing of the “supporting infrastructure”, the Israeli armed forces have sought to construct a scope for their activities that, in the Mission’s view, was designed to have inevitably dire consequences for the non-combatants in Gaza.

1215. Statements by political and military leaders prior to and during the military operations in Gaza leave little doubt that disproportionate destruction and violence against civilians were part of a deliberate policy.⁵⁹⁴

1216. To the extent to which statements such as that of Mr. Yishai on 2 February 2009 indicate that the destruction of civilian objects, homes in that case, would be justified as a response to rocket attacks (“destroy 100 homes for every rocket fired”), the Mission is of the view that reprisals against civilians in armed hostilities are contrary to international humanitarian law.⁵⁹⁵ Even if such actions could be considered a lawful reprisal, they do not meet the stringent conditions imposed, in particular they are disproportionate,⁵⁹⁶ and violate fundamental human rights and obligations of a humanitarian character.⁵⁹⁷ One party's targeting of civilians or civilian areas can never justify the opposing party’s targeting of civilians and civilian objects, such as homes, public and religious buildings, or schools.

XVII. THE IMPACT OF THE BLOCKADE AND OF THE MILITARY OPERATIONS ON THE PEOPLE OF GAZA AND THEIR HUMAN RIGHTS

“A military commander’s obligation does not end with avoiding harm to the lives and the dignity of the local residents, a “negative obligation”, but his obligation is also “positive”- he must protect the lives and dignity of the residents, within the constraints of the time and place....” Justice Barak (HCJ 764/04)

“As long as Israel has control of the transfer of necessities and the supply of humanitarian needs to the Gaza Strip, it is bound by the obligations of international humanitarian law to allow the civilian population to have access, inter alia, to medical facilities, food and water, as well as additional humanitarian items”.
Justice Beinisch (HCJ 201/09)

1217. During its visits to the Occupied Palestinian Territory, and its meetings and hearings in Gaza, Amman, Geneva and other places, the Mission saw for itself and received reports and

⁵⁹⁴ Highlighting the pattern of military actions targeting civilian shelters and shelter seekers, the Habitat International Coalition concludes: “The official statements that accompany these actions [...] seem to reflect a presumption that any source of brutality against the indigenous inhabitants would convert the victims into agents of the attackers’ preferred outcome: defeat of resistance” (submission, cited, p. 40).

⁵⁹⁵ See Additional Protocol I, art. 51 (6).

⁵⁹⁶ *Customary International Humanitarian Law...*, pp. 513–518.

⁵⁹⁷ See also article 50 of the articles on responsibility of States for internationally wrongful acts of the International Law Commission (General Assembly resolution 56/83, annex).

testimonies about the negative effects that the severe restrictions on the movement of goods and people from and to the Gaza Strip had caused to the full enjoyment of a range of social, economic and civil rights by women, men and children. These reports and testimonies come from a variety of sources, including businesspeople, industry owners, ordinary residents, public officials and NGOs in the Occupied Palestinian Territory and abroad.

1218. People in Gaza, as in other parts of the Occupied Palestinian Territory, have been living under foreign occupation for decades and enduring the restrictions and other effects of the policies implemented by the occupying Power. While the start of the blockade and the most recent military operations have undoubtedly added to those restrictions and scarcities, people in Gaza have not been living in what can be called a “normal” situation for a long time.

1219. The restrictions imposed by Israel on the imports to and exports from the Gaza Strip through the border crossings as well as the naval and airspace blockade have had a severe impact on the availability and accessibility of a whole range of goods and services necessary for the people of Gaza to enjoy their human rights. Their already eroded ability to access and buy basic goods was compounded by the effects of the four-week Israeli military campaign, which further restricted access to those essential items and destroyed goods, land, facilities and infrastructure vital for the enjoyment of their fundamental rights. In conjunction, the blockade and the military hostilities have created a situation in which most people are destitute. Women and children have been particularly affected. The current situation has been described as a crisis of human dignity.⁵⁹⁸

A. The economy, livelihoods and employment

1220. The Mission received information about the state of the economy, employment and family livelihoods in the Gaza Strip. Before the December-January military operations, the Gaza economy was already in dire straights, with few business sectors able to operate at full capacity. The blockade restricted or denied entry to a range of items and energy necessary for the economy to function. These included fuel and industrial diesel for the Gaza power plant to produce enough electricity for factories and businesses to function and for agricultural activities to continue on a regular basis. The net result was a stalled economy, with many businesses, factories and farms either closed or operating at reduced capacity.

1221. Electricity was purchased directly from Israel (51 per cent) and Egypt (7 per cent), while the Gaza power plant produced only 34 per cent, leaving an 8 per cent electricity deficit. Following additional cuts by Israel in the supply of industrial fuel, the Gaza power plant further reduced its output. The shortage of fuel caused the plant to malfunction, while the lack of spare parts and maintenance is likely to damage the plant in the long term.⁵⁹⁹ According to OCHA, the electricity shortfall in the Gaza Strip was 41 per cent by 15 December 2008. Cooking gas was also restricted although less drastically.

⁵⁹⁸ WHO report 2009, p. 8.

⁵⁹⁹ OCHA, “Gaza humanitarian situation report: the impact of the blockade on the Gaza Strip”, 15 December 2008.

1222. Raw materials, equipment, spare parts and other inputs necessary for industrial and agricultural activity were not allowed into the Gaza Strip either.

1223. The consequences for day-to-day life were considerable. Some areas of the Gaza Strip were left without electricity for several hours a week, many households, especially those in buildings that depend on the use of water pumps, had access to water only a few hours a week. Intermittent electricity supply damaged medical equipment in hospitals and doctors' practices, and generally disrupted civilian life. The operation of sewage treatment facilities was also reduced and increased quantities of untreated sewage were dumped into the sea, causing public health risks and pollution, which in turn affected fishing.

1224. Several companies closed or cut back their operations, laying off employees, who consequently lost their livelihoods. Information provided to the Mission covering June 2007 to July 2008 showed that 98 per cent of industries were temporarily shut down and five establishments were relocated to the West Bank and Jordan. Around 16,000 workers were laid off. The ban on all exports caused losses for the agricultural sector estimated at US\$ 30 million up until July 2008 and 40,000 jobs lost. Similarly, the construction sector endured severe losses resulting from the halt in development projects and other construction projects owing to the absence of construction materials. Some 42,000 workers were reported to have lost their jobs as a result.⁶⁰⁰ Those who were laid off searched for employment in other sectors, such as agriculture, or joined the ranks of those who live on food assistance from the United Nations and aid agencies.

1225. As a result of the closure of the crossings to the transit of people, many families also lost the financial support they had from relatives, usually the male head of the family, who used to work abroad, either in Israel or in neighbouring Arab countries.⁶⁰¹ In its submission to the Mission, UNCTAD stated that 15.4 per cent of Gaza's labour force was employed in Israel by 2000.⁶⁰² In his presentation to the Mission, the economist Shir Hever explained that by 2009 no one from Gaza could find work in Israel. Even Palestinian workers from the West Bank mostly work in industrial zones in settlements rather than in Israel.⁶⁰³

1226. By December 2008 the destructive impact of the blockade on the local economy had doubled unemployment levels. While in 2007 79 per cent of households lived below the official poverty line (US\$ 4 per capita/day) and some 70 per cent below the deep poverty line (US\$ 3 per capita/day), these figures were expected to increase by the end of 2008 – even before the Israeli military operations. The Mission received information from organizations explaining how the agricultural sector had traditionally absorbed unemployed workers from other sectors, but in the circumstances imposed by the blockade, without fertilizers, pesticides, machinery, spare parts

⁶⁰⁰ Palestine Trade Center (PALTRADE), "Gaza Strip: A year through siege", July 2008.

⁶⁰¹ GISHA Legal Center for Freedom of Movement and Physicians for Human Rights – Israel, *Rafah Crossing: Who holds the keys?* (March 2009).

⁶⁰² UNCTAD submission, p. 4.

⁶⁰³ Mission meeting with Shir Hever, Alternative Information Centre, 2 July 2009.

and, crucially, without access to markets, it could no longer fulfil the role of shock absorber.⁶⁰⁴ In its submission to the Mission, UNCTAD noted that when the industrial and agricultural sectors lost their capacity to provide jobs, public administration and services absorbed up to 54 per cent of Gaza's labour force (up from 37 per cent in 1999). UNCTAD concluded:

The ultimate impact of this momentum is the systematic erosion of the Palestinian productive base to deprive them from the ability to produce and feed themselves, and turn them into poor consumers of essential goods imported mainly from Israel and financed mainly by donors.

1227. The military operations destroyed a substantial part of the Gaza Strip's economic infrastructure and its capacity to support decent livelihoods for families. Many factories and businesses were directly targeted and destroyed or damaged. Poverty, unemployment and food insecurity increased dramatically.

1228. Information provided to the Mission showed that some 700 private (industry and trade) businesses were damaged or destroyed during the military operations, with direct losses totalling approximately US\$ 140 million. The industrial sector appeared the most affected, as it suffered 61 per cent of those losses, in particular in the sub-sectors of construction and food.⁶⁰⁵ Because of the extent and gravity of the destruction inflicted on the industrial sector, businesspeople and industrialists who spoke to the Mission stated their belief that Israel had as one of its military objectives the destruction of local industrial capacity so as to harm the prospects for an economic recovery in the Gaza Strip.⁶⁰⁶

1229. The severe restrictions on the availability of banknotes imposed by Israel caused serious disruptions in economic transactions and affected the ability of the public sector and the non-governmental sector to carry out operations such as contracting or procuring goods and services.

1230. The agricultural sector, including crop farming, fisheries, livestock farming and poultry farming, suffered direct losses worth some US\$ 170 million. Indirect losses have still to be definitively calculated. One business organization estimates that 60 per cent of all agricultural land had been destroyed, 40 per cent directly during the military operations.⁶⁰⁷ Moreover, 17 per cent of all orchards, 8.3 per cent of livestock, 2.6 per cent of poultry, 18.1 per cent of hatcheries, 25.6 per cent of beehives, 9.2 per cent of open fields and 13 per cent of groundwater wells were destroyed. Agriculture had already lost a third of its capacity since the start of the second intifada and the frequent Israeli incursions, according to NGO estimates used by UNDP-Gaza.⁶⁰⁸ Parts of

⁶⁰⁴ Meetings with representatives from the agricultural sector in Gaza, 30 June 2009; meeting with representatives of Campaign to End the Siege, Gaza, 29 June 2009.

⁶⁰⁵ Private Sector Coordination Council Gaza Governorates, "Gaza private sector: Post-war status and needs", 25 February 2009.

⁶⁰⁶ Interviews with Amr Hamad of the Palestinian Federation of Industries and with Ali Abu Shalah of the Palestinian Business Association.

⁶⁰⁷ "Gaza private sector: post-war status...", p. 5.

⁶⁰⁸ UNDP, FAO and Ministry of Agriculture, "Assessment of impact of cast lead operation: estimated direct losses to agriculture in the Gaza Strip between 27 December 2008 and 18 January 2009".

the land were reportedly contaminated by unexploded munitions and chemical weapons residues (e.g. white phosphorous) and would need to be tested and cleared before agricultural activity could resume.⁶⁰⁹ Some 250 agricultural wells were reportedly destroyed or severely damaged.

1231. Fishing that provided direct employment to some 3,000 people was also affected by the blockade and the military operations. Several boats and some fishermen were directly hit. The Mission met representatives of fishermen's associations and a fisherman testified at the public hearings in Gaza.⁶¹⁰ One fisherman interviewed by the Mission explained that he had previously owned a fishing boat, mainly to fish sardines. It was hit by shelling as it was moored beside the civil defence buildings that were hit by air strikes on 27 December. Half of it was destroyed. Another small boat was also destroyed as were the nets. The family house was also destroyed and he had been out of work since the beginning of the military operations in December. However, his fishing activities had already been affected before the operations, when the Government of Israel had imposed a limit of six nautical miles for fishing, and then further reduced it to only three.⁶¹¹

1232. The continuation of the blockade does not permit the reconstruction of the economic infrastructure that was destroyed. Not only do construction materials continue to be banned but the provision of energy is also still insufficient and irregular. Local purchasing capacity being shattered, there is not enough market demand for many products.

1233. Exports also continue to be prohibited, with the exception of some truckloads of flowers that crossed the borders between January and March 2009. Without external markets, local production of all kinds has no prospect and so employment and livelihoods will remain precarious and diminished. A strawberry farmer and the Head of the Association of Strawberry Farmers based in Beit Lahia explained that before the military operations he used to export up to 2,000 tons of strawberries to Europe. Hundreds of *donums* of land were destroyed during the operations as well as some 300 greenhouses and 2,000 acres of citrus trees. As a result, they had lost the European market for their products.⁶¹²

B. Food and nutrition

1234. The availability of food in the Gaza Strip is determined by the amount imported through the crossings and that which is locally produced. The Mission received credible information indicating that during the months preceding the military operations both sources of food suffered from the severe restrictions imposed by Israel.

1235. The closing of the Karni grain conveyor belt, the only mechanism for importing wheat, during part of December, resulted in the depletion of wheat stocks, forcing the six mills in the Gaza Strip to close down or reduce operations. The el-Bader flour mill appeared to be the only

⁶⁰⁹ "Gaza private sector: post-war status...", p. 5; FAO, "Impact of Gaza crisis: Agricultural sector report", p. 16; WHO Report, p. 29.

⁶¹⁰ Public hearings, Gaza, 29 June 2009.

⁶¹¹ Meeting with the Mission, Gaza, 3 June 2009.

⁶¹² Meeting with the Mission, Gaza, 3 June 2009.

one that kept working as its owners had kept a good stock of grain, but it was later bombed and destroyed (see chap. XIII). However, about one third of the previous number of truckloads of wheat continued entering through the Kerem Shalom crossing. The blockade was tightened following the confrontations of November 2008, further restricting United Nations food assistance. On 18 December, UNRWA was compelled to halt its food distribution programme to thousands of families because its stocks were depleted. It also had to downsize its cash-for-work programmes as it ran out of banknotes.

1236. By December 2008 food insecurity was on the rise. Food security is the capacity of each individual to have access to sufficient and adequate food at all times. The Mission received information indicating that rising food insecurity was the result falling income levels, eroded livelihoods and higher food prices. Some food items were also unavailable in the local markets. Consequently, the average Gazan household was spending two thirds of its income on food.⁶¹³ People had to reduce the quantity and the quality of food they ate, shifting a diet based on low-cost and high-energy cereals, sugar and oil.

1237. Changes in diet patterns are likely to prejudice the long-term health and nutrition of the population. According to the WHO office in Gaza, there are indications of chronic micronutrient deficiencies among the population, in particular among children. Among the most worrying indicators is the high prevalence of stunting among 6- to 16-year-old children (7.2 per cent), while the prevalence of thinness among that group was 3.4 per cent for 2008 (the WHO standard is 5 per cent). Levels of anaemia are alarming: 66 per cent on average among 9- to 12-month-old babies (the rate being higher for girls (69 per cent)). On average, 35 per cent of pregnant women suffer from anaemia.⁶¹⁴

1238. During the military operations the availability and quality of fresh food dropped: local production was suspended during the fighting and local produce was spoilt. Mr. Muhammad Husein al-Atar, Mayor of al-Atatra, told the Mission how agricultural land in his neighbourhood was razed. The area is close to the Israeli border and 95 per cent of the work is farming-related. Israeli military incursions had been happening since 2000 accompanied by destruction and bulldozing. As a result, 50,000 acres of land had not a single tree left standing and between 10 and 15 farmers had been killed every year during the last nine years. During the December – January military operations the area was bombed from the air, land and sea. He had personally lost three (industrial) refrigerators, each capable of holding 600 tons of vegetables, for instance. His sister's chicken farms were also destroyed, including some 70,000 chickens (see chap. XIII).⁶¹⁵

1239. The destruction of land and greenhouses has an impact on the availability of fresh food in the Gaza Strip and, consequently, on the total supply of micronutrients to the population. Satellite imagery commissioned by the Mission shows that for the whole Gaza Strip an estimated 187 greenhouse complexes were either destroyed or severely damaged, representing approximately 30.2 hectares. Of all the destroyed greenhouses 68.6 per cent were in the Gaza

⁶¹³ “Gaza humanitarian situation report: the impact...”.

⁶¹⁴ Nutrition indicators for 2008 and 2009 provided by WHO office in Gaza to the Mission.

⁶¹⁵ Meeting with the Mission, 3 June 2009.

and Gaza North Governorates; and 85.4 per cent were destroyed or damaged during the last week of the military operations. Satellite imagery also gives strong indications that tanks and/or heavy vehicles were likely to have been responsible for most of the damage.⁶¹⁶

1240. Despite the increased quantities of food allowed into Gaza since the beginning of hostilities, representing between 60 and 80 per cent of all truckloads, wheat flour was in short supply. This was probably the result of the severe depletion of local stocks following the tighter restrictions during December. After the ceasefire was declared by the parties to the conflict, access to food remained problematic for most people many prices had risen and there was a lack of income and banknotes. It was reported that the military operations caused food insecurity to increase and affect up to 75 per cent of the population.⁶¹⁷

1241. In a rapid assessment, FAO and the World Food Programme (WFP) found that food availability was back to pre-military operations levels, but the supply of fresh food was likely to decrease in the immediate future due to the large-scale destruction. Prices continued to be very high and some items were prohibitively expensive (e.g. poultry, eggs and meat) and unaffordable. However, severe access problems persisted and were aggravated for a population whose income and livelihoods had been shattered, despite the food assistance provided by the United Nations and aid agencies.⁶¹⁸

C. Housing

1242. Figures about the overall damage to residential housing vary according to the source and time of the measurement as well as the methodology. The human rights NGO Al Mezan reports that a total 11,135 homes were partially or fully destroyed.⁶¹⁹ According to the human rights NGO Al-Dameer-Gaza, 2,011 civilian and cultural premises were destroyed, of which 1,404 were houses that were completely demolished and 453 were partially destroyed or damaged.⁶²⁰ A UNDP survey immediately after the end of military operations reported 3,354 houses completely destroyed and 11,112 partially damaged.⁶²¹ The destruction was more serious in the north, where 65 per cent of houses were completely destroyed. As a result of the destruction, more than 600 tons of rubble had to be removed, with the consequent costs and potential impact on the environment and public health. Information provided to the Mission showed that much of the construction in Gaza contained important amounts of asbestos, the particles of which had been or could be released into the air at the time of destruction or removal. The refugee population was concentrated in the north and the destruction of residential housing appeared to have particularly affected them.

⁶¹⁶ UNOSAT satellite imagery, p. 23. See also chap. XIII.

⁶¹⁷ OCHA, *The Humanitarian Monitor*, No. 33 (January 2009).

⁶¹⁸ FAO and WFP, "Report of the rapid qualitative emergency food security assessment – Gaza Strip", 24 February 2009.

⁶¹⁹ Al Mezan Center for Human Rights, "Cast lead offensive in numbers".

⁶²⁰ Al-Dameer Gaza, "IOF targets civilian premises and cultural properties during its offensive on the Gaza Strip", May 2009.

⁶²¹ *The Humanitarian Monitor*, No. 33, p. 7. A figure similar to this was provided by the Palestinian Authority in its reply to questions by the Mission, 5 August 2009.

1243. The destruction or damage of their homes forced many people to flee and find shelter with relatives or agencies providing assistance, such as UNRWA. At the height of the military operations UNRWA was providing shelter to 50,896 displaced persons in 50 shelters. This number was estimated to be a fraction of those who had become homeless, most of whom found temporary shelter with relatives. The Mission was informed that this situation created extreme hardship for people who had to share already deteriorated and limited housing, sanitary and water facilities. It saw for itself people who were still living in tents some six months after the end of the operations.

1244. Children and women were particularly affected by the hardship caused by the destruction of homes and the displacement. Housing and Land Rights Network – Habitat International Coalition reported that “of those forced to seek shelter following the military damage or destruction of their home, over half were children. While female-headed households constitute only a relatively small percentage of the total affected families (7 per cent), their number in absolute terms, 763 such families, is significant.”⁶²²

1245. The impact of the destruction of housing is aggravated by the substantial destruction of the Gaza construction industry during the military operations. In chapter XIII, the Mission described the destruction of the Atta Abu Jubbah cement-packaging plant, which formed a significant part of the construction materials industry in Gaza. The Mission also noted reports regarding the destruction of 19 producing plants (representing 85 per cent of the production capacity of the Gaza factories of ready-mix concrete). External supplies of concrete and other building materials into Gaza are entirely controlled by Israel, which has banned imports of cement into Gaza. The thousands of families who have lost their shelter as a result of the military operations are therefore prevented by the blockade imposed by Israel from rebuilding their homes.

D. Water and sanitation

1246. The Mission received submissions, testimonies and information about the effects of the blockade and of the military operations on the supply of and access to water and sanitation facilities by the population of the Gaza Strip.⁶²³ During the months preceding the military operations the water and sanitation sectors were already under severe strain. The lack of construction materials, pipes and spare parts had prevented the building of additional infrastructure and the proper maintenance of existing facilities. Desalinization plants and works to preserve the aquifer had to be postponed. By December 2008, OCHA reported that the degradation of the system “is posing a major public health hazard”.⁶²⁴ Frequent power outages, fuel shortages and a lack of spare parts for electricity generators had also affected the functioning of the water and sanitation systems.

⁶²² Submission to the Mission by Housing and Land Rights Network -- Habitat International Coalition, “Targeting shelters and shelter seekers during operation Cast Lead in the context of Israeli military practice”.

⁶²³ Submission by the Centre on Housing Rights and Evictions (COHRE); Al Mezan Center for Human Rights, “The impact of the Israeli offensive on the right to water in the Gaza Strip”, February 2009.

⁶²⁴ “Gaza humanitarian situation report: the impact...”.

1247. By December 2008, it was reported that some 80 per cent of Gaza's water wells were only partially functioning while the others were not functioning at all. This situation had already affected the population's access to water: over half of the residents of Gaza City had access to running water few hours a week, with those living in houses and buildings using water pumps spending many hours trying to get water by other means. Of the water supplied in Gaza 80 per cent did not meet WHO standards for drinking water owing to, among other factors, the shortage of chlorine to purify the water. Important health risks were consequently likely to arise. Other health hazards were expected to arise from the practice of discharging untreated or partially treated wastewater into the sea. More than 70 million litres a day were discharged into the sea, creating significant environmental damage and health risks for human beings and marine life.

1248. As with other sectors, the military operations worsened the situation in the water and sanitation sector. Services and infrastructure already partially paralysed or in serious need of maintenance suffered further destruction or damage. The Gaza wastewater treatment plant was hit sometime between 3 and 10 January and one of its lagoons was severely damaged (see chap. XIII). Sewage pipes leading to the plant and others in different parts of the city were hit or damaged. Up to 11 water wells that supplied water for human consumption were hit and 3 completely destroyed.⁶²⁵ Thousands of metres of water and sewage pipes/networks were destroyed or damaged and around 5,700 rooftop water tanks destroyed and some 2,900 damaged.

1249. By the end of January only 70 per cent of Gaza's water wells were working, either whether fully or partially, i.e. 10 per cent less than before the hostilities. At the height of the military operations some 500,000 Palestinians did not have access to running water at all, whereas the rest received water for few hours a week. Sanitation and water facilities in public shelters were overwhelmed, and raw sewage ran through fields and streets in some areas. The water authorities' reparations team were prevented from going to the sites to carry out urgent repairs and had to wait in most cases until Israeli troops had withdrawn. All urgent repairs were done on a provisional basis given the lack or shortage of construction materials and equipment. The Mission witnessed how precarious those repairs could be when it saw one sewage pipe in the vicinity of the Gaza wastewater treatment plant explode during a site visit.

E. Environment

1250. The Mission has received comments and concerns from non-governmental organizations and concerned individuals in Gaza relating to threatened environmental damage by reason of munitions or debris from munitions. These concerns relate to the fear that hazardous material might have remained or will remain in the soil and water of parts of the Gaza Strip for indefinite periods of time and could enter the food chain or otherwise be hazardous to life.

1251. The Mission was unable to further investigate these concerns, but is aware of an environmental impact study being undertaken by the United Nations Environmental Programme (UNEP) in the Gaza Strip. Preliminary results from UNEP indicate that the environment in the Gaza Strip has been seriously impacted by the Israeli military operations of December-January.

⁶²⁵ "Damage assessment report...". Al Mezan reports that 112 wells were destroyed but it clarifies that this figure includes agricultural wells; COHRE submission to the Mission.

In particular, the groundwater in Gaza show high nitrate levels exceeding WHO ceilings, putting infants at risk of nitrate poisoning.

F. Physical and mental health

1252. The capacity of the health sector in the Gaza Strip was already diminished by the blockade when the Israeli offensive started. While hospitals and clinics continued operating, the quality of their service and its accessibility were eroded. The insufficient and erratic supply of electricity caused equipment to malfunction even when the staff had recourse to generators. Power cuts and water impurities damaged equipment and created additional health hazards. The lack of maintenance and spare parts that were blocked at the crossings further compounded the situation. In addition, the lack of construction materials and inputs hampered the development of additional facilities and needed infrastructure.

1253. Reported confrontation between the Palestinian Authority in Ramallah and the Gaza authorities also affected the quantity and quality of the service provided. The Ministry of Health in Ramallah had been responsible for the supply of medicines to Gaza since September 2008, but it was reported that few trucks with medicines actually reached the Gaza Strip after that time resulting in serious availability problems for some 20 per cent of essential medicines. The referral of patients needing specialized treatment abroad (e.g. in Israel, Jordan and Egypt) was also affected by the blockade established in 2007. Before that date only some 9 per cent of patients intending to cross the border were rejected or their permits delayed, but that proportion had reached some 22 per cent by September 2008.⁶²⁶

1254. The beleaguered health sector was subjected to severe strain when the military operations started on 28 December. Hospitals and health centres of the Ministry of Health worked on an emergency basis under extremely difficult conditions and with limited resources. They nevertheless responded effectively to the crisis. Urgent medical interventions to treat critical injuries were performed under severe circumstances. Of the 5,380 injured people reported by the Ministry, 40 per cent were admitted to the main hospitals, but because of the policy of discharging patients as soon as feasible to free up beds and staff, there were concerns that some injuries (e.g. burns and acute surgical conditions) might have led to complications as follow-up care may have been inadequate. Some injuries will result in permanent disability (see also section G below).

1255. Medical facilities and personnel were targeted during the fighting. Seventeen health personnel were killed and 26 injured. In total, 29 ambulances were damaged or destroyed by bombs or crushed by armoured vehicles, while 48 per cent of Gaza's 122 health facilities were either directly or indirectly hit by shelling. Medical relief and rescue were in many cases also intentionally hindered.

1256. OCHA reported that medical supplies, including drugs and equipment, were allowed into the Gaza Strip in larger quantities during January in the midst of the fighting. However, logistical difficulties and the fact that many medicines had a very short expiration date prevented the health staff from using the increased quantities for the benefit of patients. Finally, the situation of

⁶²⁶ WHO Report....; "Gaza humanitarian situation report: the impact...".

patients with chronic health conditions, such as heart and kidney problems, became a concern because patients with critical life-threatening injuries requiring urgent attention were given priority.⁶²⁷

1257. The destruction of sewage treatment facilities and pipes together with the lack of purifying materials had consequences for public health. Thousands of litres of untreated sewage dumped in fields or in the sea created a potential health hazard. The Mission received information about recent epidemiological tests of water samples. The samples had been collected from all water networks and wells, especially from areas targeted during the military operations, to investigate the presence of microbiological pollutants. Information on water-related diarrhoea among children under age 3 attending UNRWA facilities was collected weekly in January and February 2009. The analyses showed an increase of 18 per cent between 19 January and 8 February. Moreover, 14 per cent of the water samples collected in February were polluted with microbiological pollutants. The increase in diarrhoeal disease was also confirmed to have occurred in the areas where the water had been contaminated.⁶²⁸

1258. WHO also cited the preliminary results from UNEP initial sampling in Gaza, which showed that “much of the rubble is contaminated with asbestos; damage to the waste treatment system had contaminated the aquifer; the health waste handling system had completely broken down, with such waste going into domestic waste. The results on heavy metal contamination are so far inconclusive.”⁶²⁹ The Mission also investigated and confirmed allegations about the use of weapons whose potential long-term impact on individual victims’ health raises concern. They include allegations of the use of weapons containing chemical pollutants such as tungsten and white phosphorus (see also chapter XII).⁶³⁰

1259. Conditions under Israeli occupation prior to 2005, together with poverty and the difficulties caused by the blockade, had already made a deep impact on the mental health of the local population. The three weeks of intense bombardment and military ground action added new, serious psychological traumas, especially noticeable in children. According to Dr. Iyad al Sarraj of the Gaza Community Mental Health Programme, over 20 per cent of Palestinian children in Gaza suffer from post-traumatic stress disorders, the symptoms of which “will appear over the days, months, years, or decades to come”.⁶³¹

1260. One particular characteristic of the conflict, namely that the population could not flee the conflict areas as can be done in many conflicts, and had no shelters or safe places in which to hide or protect themselves, reinforced feelings of being trapped, defenceless and vulnerable to more attacks with a sense of inevitability.⁶³² Many of those who met the Mission stated that they felt terrorized.

⁶²⁷ The Humanitarian Monitor, No. 33.

⁶²⁸ WHO, “Quality of water in the Gaza Strip”, March 2009.

⁶²⁹ WHO Report, p. 29.

⁶³⁰ Report of the Mission by Physicians for Human Rights-Israel, p. 75-76.

⁶³¹ Public hearing, Gaza, 29 June 2009.

⁶³² WHO report, p. 12.

1261. According to Dr. Ahmad Abu Tawahina, psychosomatic disorders have a particularly serious impact on Palestinian society, where social stigma is often associated with mental suffering. In general, this makes it difficult for people to express psychological problems. This condition is frequently experienced in the form of recurrent psychosomatic symptoms, such as migraines, pains in joints and muscles, general fatigue and the inability to do even normal daily activities. Most of these patients are referred not to mental health practitioners, but to general physicians, who prescribe drugs to alleviate the symptoms and not the causes. This in turn has given rise to a serious problem of drug dependency.⁶³³

1262. The sense of security that comes from living in a supportive and safe environment had already been eroded over the years by constant attacks and military confrontation, but was further undermined by the direct experience and/or witnessing of violence against relatives. The widespread destruction, the displacement, the inability to find a safe place anywhere, together with the direct exposure to life-threatening events will continue to have a serious impact on the population. The general state of the inhabitants of the Gaza Strip was described as a form of alienation.⁶³⁴

1263. Many of the mental health problems are the result of years of conflict, living in poverty, scarcity and instability in the area and will probably continue until the root causes are eliminated. People, in particular children, live or grow up in a society under occupation, with constant episodes of violence and no sense of security or normalcy.

1264. The situation is compounded by the relative scarcity of qualified professionals and inadequate facilities. The Gaza Community Mental Health Programme has only about 40 members of staff specialized in mental health, including physicians, social researchers, nurses, as well as psychologists. According to Dr. al-Sarraj, this number is not sufficient to cover even the needs of Gaza City district, whereas for the entire population of the Gaza Strip a team of 300 specialists would be necessary.⁶³⁵

1265. Over the past two decades, the Gaza Community Mental Health Programme and others have worked to build resilience in people. They told the Mission that the recent military operations had wiped out their achievements. People suffering severe loss also detach themselves from reality, in a phenomenon called “numbness”. According to Dr. Tawahina, the general feeling among most people in Gaza is that they have been completely abandoned by the international community. This feeling of abandonment in turn increases their frustration, creating additional pain, and leads eventually to more violence and extremism. The Gaza Community Mental Health Programme studied children’s attitudes towards violence and found that, as a result of this situation, and especially when children had lost their parents and with them the

⁶³³ Dr. Ahmad Abu Tawahina, Gaza Community Mental Health Programme, public hearing, Gaza, 29 June 2009, available at: <http://www.un.org/webcast/unhrc/archive.asp?go=090629>.

⁶³⁴ Ibid.

⁶³⁵ Dr. Iyad al-Sarraj, public hearing, Gaza, 29 June 2009, available at: <http://www.un.org/webcast/unhrc/archive.asp?go=090629>.

associated protection and sense of security, they tended to look at “martyrs” and members of armed groups as adult role models instead.⁶³⁶

1266. A study conducted by the United Nations Development Fund for Women (UNIFEM) revealed that men also showed more symptoms of psychological trauma after the December-January military operations. Based on specialists’ reports, the Mission is of the view that this could in part be due to the additional stress that men face as heads of families in a male-dominated society when they are unable to fulfil their role as main breadwinners or to provide protection and security to their children, wives and other family members.⁶³⁷

1267. Based on previous experiences with emergencies, WHO expects the number of people with serious mental health disorders to increase by an average of 1 per cent above the baseline and with mild to moderate disorders by 5 to 10 per cent “provided that a protective environment is restored”.⁶³⁸

G. Education

1268. The Mission received information about the state of the education sector in the Gaza Strip. UNRWA operates one of the largest school systems in the Middle East and has been the main provider of basic education to Palestine refugees for nearly five decades. The Mission was greatly impressed by its activities and achievements. UNRWA runs 221 schools, while the Government runs 383. UNRWA schools are also a vehicle for health-monitoring and food/nutritional programmes. That Palestinians have high levels of education is largely the result of that work. By the same token, the Mission was shocked to learn how badly educational facilities and activities in the Gaza Strip have been affected as a result of the blockade and the recent military operations.

1269. Information and testimonies received by the Mission showed that the education system was affected in several ways by the restrictions imposed by the blockade. The lack of construction materials had halted all new construction. Repairs to the educational infrastructure also had to be postponed. Around 88 per cent of UNRWA schools and 82 per cent of Government schools operated on a shift system to cope with the demand. The lack of educational material and equipment hampered the ability to maintain teaching standards. This situation was causing a decline in attendance and performance at governmental schools.⁶³⁹

1270. The ban on the movement of people through the crossings affected not only university students planning to study or already undertaking studies abroad, but also the possibilities for academics and scholars to travel abroad on academic exchanges. Between July and September 2008 only 70 students managed to leave the Gaza Strip via Erez but hundreds saw their aspirations to study abroad truncated.

⁶³⁶ Meeting of the Mission with the Gaza Community Mental Health Programme, 4 June 2009.

⁶³⁷ United Nations, *Voicing the Needs of Women and Men in Gaza*, 2009, p. 32.

⁶³⁸ WHO report, p. 13.

⁶³⁹ UNRWA and the Association of International Development Agencies (AIDA), “The Gaza blockade: Children and education fact sheet”.

1271. The military operations destroyed or damaged at least 280 schools and kindergartens. Six of them were located in northern Gaza, affecting some 9,000 pupils, who had to be relocated. According to the Ministry of Education and Higher Education, 164 pupils and 12 teachers were killed during the military operations. Another 454 pupils and five teachers were injured. At UNRWA schools, 86 children and three teachers were killed, and 402 children and 14 teachers injured. During the military operations, 44 UNRWA schools were used as emergency shelters to cope with the more than 50,000 displaced individuals.

1272. Schools were generally closed for the duration of the hostilities, disrupting the study programme. After the ceasefire it was unclear how many students and teachers returned to schools but that number was reported to reach up to 90 per cent in UNRWA schools.⁶⁴⁰ Children and teachers reported situations of anxiety and trauma as a result of the extreme violence to which they had been exposed and the loss of relatives or friends. The Mission heard that the start of the military operations with air strikes at a time when schools were functioning exposed children to a heightened risk and filled them with fear and panic. Schools and the roads towards them occasionally remained unsafe because of the presence of explosive remnants of war. Two Palestinian children were killed by those explosives in Zeytoun shortly after the ceasefire was declared. The Mission heard reports that some children were injured by white phosphorus on their way to school.

1273. The Mission saw the destruction caused to the American School. It also saw the destruction caused at the Islamic University and in other university buildings that were destroyed or damaged. These were civilian, educational buildings and the Mission did not find any information about their use as a military facility or their contribution to a military effort that might have made them a legitimate target in the eyes of the Israeli armed forces.

1274. The Mission was also informed of indoctrination programmes allegedly introduced by the Gaza authorities, and of a process of ideological and political polarization. Such programmes have a high potential for imposing models of education at odds with human rights values and with a culture of peace and tolerance. In this regard, the Mission believes that efforts to incorporate human rights in the curricula should be encouraged by the relevant authorities.

H. Impact on women and children

1275. The attention of the Mission was drawn to the particular manner in which children and women had been affected by the blockade policies and the military operations. In its report, WHO took figures from PCHR: out of 1,417 persons killed, 313 were children and 116 women. It also takes figures from the Israeli armed forces that showed that 1,166 were killed, of whom 49 were women and 89 were under 16.⁶⁴¹ Among the 5,380 injured, 1,872 were children and 800 women.⁶⁴² The Mission directly investigated many incidents in which women and children had been killed as a result of deliberate or indiscriminate attacks by the Israeli armed forces.⁶⁴³

⁶⁴⁰ The Humanitarian Monitor, No. 33.

⁶⁴¹ WHO report, p. 10.

⁶⁴² The Palestinian National Early Recovery and Reconstruction Plan....

⁶⁴³ See chapters VII, X, XI and XIV.

WHO also reported that among the many injured people who crossed the Rafah border and were accepted for medical treatment in Egypt during the second week of the military operations there were 10 children showing a single bullet injury to the head and one with two.

1276. The Mission held interviews with a number of women and representatives of women's organizations and heard the testimony of Mariam Zaqout of the Culture and Free Thought Association.⁶⁴⁴ It heard that the blockade and the military operations had aggravated poverty, which particularly affected women, who must find food and other essentials for their families. Women were often the sole breadwinners (for instance, if male family members had died or been injured as a result of conflict or violence, or were imprisoned) but jobs were hard to come by. Over 300 women had been widowed as a result of the military operations and had become dependent on food and income assistance. In addition, women bore a greater social burden, having to deal with daily life made harsher by the crisis and, at the same time, provide security and care for injured family members and children, their own and others who have lost their parents. These responsibilities sometimes compelled them to conceal their own sufferings, so their concerns remained unaddressed.

1277. In the same interviews, the participants stated that women were particularly affected by the destruction of homes and the invasion of privacy. Having to live in tents without privacy or appropriate sanitary facilities added to their hardship. Moreover, the military operations had strained relations among family members. Psychological pressures on men and women, together with financial difficulties, led to family disputes, family violence and divorce. There were frequent disputes between widows and their in-laws regarding child custody and inheritance. Widows were also under increased pressure to get married again to be able to sustain themselves. Consequently, there was an increase in women seeking legal aid, as legal problems tended to become aggravated because of shortcomings in the law and fewer safeguards for the rights of women.⁶⁴⁵

1278. The particular manner in which the conflict affected women was dramatically illustrated for the Mission by the testimony of a woman of the al-Samouni family (see chap. XI). She had three children and was pregnant when her family and her house came under attack. She commented on how the children were scared and crying. She was distressed when recounting how her 10-month-old baby, whom she was carrying in her arms, was hungry but she did not have anything to give him to eat, and how she tried to feed him by chewing on a piece of bread, the only food available, and giving it to him. She also managed to get half a cup of water from an ill functioning tap. There were other babies and older children. She and her sister exposed themselves to danger by going out to search for food for them. Her husband, mother and sister were killed but she managed to survive. Her other son was wounded in the back, and she carried both out of the house.⁶⁴⁶

1279. Many women felt helpless and embarrassed at not being able to protect and care for their children. Others felt frustrated, invaded in their personal space and powerless when their houses

⁶⁴⁴ Public hearings, Gaza, 29 June 2009.

⁶⁴⁵ Meeting with women's organizations, 3 June 2009.

⁶⁴⁶ Mission interview with Mrs. Massouda Sobhia al-Samouni, Gaza, 3 June 2009.

and possessions were destroyed or vandalized. Those feelings contributed to their psychological suffering.⁶⁴⁷

1280. A UNFPA study conducted immediately after the December-January military operations reported a 40 per cent increase in miscarriages admitted to maternity wards, a 50 per cent increase in neonatal deaths, a rise in obstetric complications and anecdotal evidence of deaths or health complications because pregnant women were unable to reach hospital to deliver their babies.⁶⁴⁸ Women interviewed in the context of another UNFPA study expressed extreme fears for themselves and their loved ones. Associated symptoms included anxiety, panic attacks, feelings of insecurity, disturbed sleep and eating patterns, depression, sadness and fear of sudden death.⁶⁴⁹

1281. Adults and children showed signs of profound depression, while children suffered from insomnia and bed-wetting. Numerous testimonies received by the Mission highlight the presence of children in situations where houses were searched or occupied with force by Israeli soldiers, and when killings occurred.⁶⁵⁰ The Mission heard the testimony of a mother whose children, aged 3 to 16, had witnessed the killing of their father in their own house. With Israeli soldiers forcefully questioning their mother and uncle and vandalizing their house, the children asked their mother whether they would be killed as well. Their mother felt the only comfort she could give them was to tell them to say the *Shehada*, the prayer recited in the face of death.⁶⁵¹ Children were present in improvised shelters on United Nations premises, enduring the trauma of displacement as well as feelings of fear from the military attacks and of deep insecurity from having been attacked in their own homes or in a shelter that was expected to be safe. During its visits, the Mission saw many children living with their families in the ruins of their homes and in makeshift accommodation. The trauma for children having witnessed violence and often the killing of their own family members will no doubt be long-lasting. Mrs. Massouda Sobhia al-Samouni told the Mission that her son was still traumatized. He kept placing coins in his mouth and when she told him it was dangerous and he might die if he did so, he replied that he wanted to join his father.

1282. Some 30 per cent of children screened at UNRWA schools had mental health problems, while some 10 per cent of children had lost relatives or friends or lost their homes and

⁶⁴⁷ Culture and Free Thought Association and UNFPA, “Gaza crisis: Psychosocial consequences for women, youth and men”, executive summary, 27 April 2009, p. 3.

⁶⁴⁸ UNFPA, “Gaza crisis: impact on reproductive health, especially maternal and newborn health and obstetric care”, draft report, 10 February 2009.

⁶⁴⁹ Culture and Free Thought Association, “Gaza crisis: Psycho-social consequences for women”, executive summary, 8 February 2009.

⁶⁵⁰ See, for example, chapters X and XI. See also the testimony of Mrs. Abir Hajji at the public hearing, Gaza, 6 June 2009, recounting the killing of her husband in the presence of her children.

⁶⁵¹ Mission interview with Mrs. Abir Hajji, Gaza, 3 June 2009. Mrs. Hajji also participated in the public hearings, Gaza, 28–29 June 2009.

possessions. WHO estimated that some 30,000 children would need continued psychological support and warned of the potential for many to grow up with aggressive attitudes and hatred.⁶⁵²

I. Persons with disabilities

1283. Information provided to the Mission showed that many of those who were injured during the Israeli military operations sustained permanent disabilities owing to the severity of their injuries and/or the lack of adequate and timely medical attention and rehabilitation. Gaza hospitals reportedly had to discharge patients too early so as to handle incoming emergencies. Other cases resulted in amputations or disfigurement. About 30 per cent of patients were expected to have long-term disabilities.⁶⁵³

1284. WHO reported that by mid-April 2009 the number of people with different types of permanent disability (e.g. brain injuries, amputations, spinal injuries, hearing deficiencies, mental health problems) as a result of the military operations was not yet known. It reported speculations that there might be some 1000 amputees; but information provided by the WHO office in Gaza and based on estimates by Handicap International indicated that around 200 persons underwent amputations.⁶⁵⁴

1285. While the exact number of people who will suffer permanent disabilities is still unknown, the Mission understands that many persons who sustained traumatic injuries during the conflict still face the risk of permanent disability owing to complications and inadequate follow-up and physical rehabilitation.⁶⁵⁵

1286. The Mission also heard moving accounts of families with disabled relatives whose disability had slowed their evacuation from a dangerous area or who lived with a constant fear that, in an emergency, their families would have to leave them behind because it would be too difficult to evacuate them.

1287. One testimony concerned a person whose electric wheelchair was lost after his house was targeted and destroyed. Since the residents were given very short notice of the impending attack, the wheelchair could not be salvaged and the person had to be taken to safety on a plastic chair carried by four people.

1288. The Mission also heard a testimony concerning a pregnant woman who was instructed by an Israeli soldier to evacuate her home with her children, but to leave behind a mentally disabled child, which she refused to do.

1289. Even in the relative safety of shelters, people with disabilities continued to be exposed to additional hardship, as these shelters were not equipped for their special needs. The Mission heard of the case of a person with a hearing disability who was sheltering in an UNRWA school,

⁶⁵² WHO report, p. 13.

⁶⁵³ The Humanitarian Monitor, No. 33.

⁶⁵⁴ WHO report, p. 11; Gaza Situation Report Feb - May 2009, WHO Gaza, provided to the Mission.

⁶⁵⁵ Gaza Situation report.

but was unable to communicate in sign language or understand what was happening and experienced sheer fear.

1290. Frequent disruptions in the power supply had a severe impact on the medical equipment needed by many people with disabilities. People using wheelchairs had to face additional hurdles when streets started piling up with the rubble from destroyed buildings and infrastructure.

1291. In addition, programmes for people with disabilities had to be closed down during the military operations and rehabilitation services stopped (for instance, organizations providing assistance were unable to access stocks of wheelchairs and other aids). Many social, educational, medical and psychological programmes have not yet fully resumed.⁶⁵⁶

J. Impact on humanitarian assistance provided by the United Nations

1292. The tightening of the blockade during the two months before the military operations entailed additional restrictions also for United Nations programmes and activities, in particular those of UNRWA, WFP and others that provide food and other forms of support. The Mission was informed that, as a result of the blockade and the Israeli limitations on the delivery of humanitarian assistance, the capacity of UNRWA to mitigate the effects of the military operations on the civilian population was reduced.⁶⁵⁷ As stated above, just days before the Israeli military operations started, UNRWA had to suspend its food assistance programmes and scale down other programmes.

1293. But the impact of the blockade also extended to several humanitarian projects that had been planned or were in progress and had to be stopped and postponed. Most of them were in health, sanitation, water and education.

1294. During the military operations, UNRWA workers and trucks were also hit, resulting in deaths and injuries. The Board of Inquiry established by the United Nations Secretary-General investigated a number of incidents in which United Nations facilities were targeted and issued a report determining responsibilities.⁶⁵⁸ The Mission is of the view that the factual findings made by the Board of Inquiry entail legal liability for those responsible (see below).

1295. The Mission learned that seven UNRWA staff members (none of them on duty), five job creation programme contractors (one on duty) and three contractors were killed; 21 other contractors were injured. In all, 57 UNRWA buildings were damaged by shelling or airstrikes, including 36 schools (six serving as emergency shelters), seven health centres, three sanitation offices, two warehouses and five other buildings.

1296. Thirty-five UNRWA vehicles, including three armoured vehicles, were damaged. From its remaining 321 vehicles, only 286 are operational and 7 are damaged beyond repair.

⁶⁵⁶ Meeting of the Mission with the Society for Disabled in the Gaza Strip, 30 June 2009.

⁶⁵⁷ Meeting of the Mission with UNRWA, 1 June 2009.

⁶⁵⁸ See Summary of the Report of the United Nations Headquarters Board of Inquiry.

1297. UNRWA informed the Mission that between 27 December and 19 January, 536 UNRWA trucks entered the Gaza Strip through the Kerem Shalom border crossing. By 21 January, 394 trucks had entered through Karni and 2089 through Kerem Shalom (including private, humanitarian and UNRWA trucks). UNRWA considered these amounts to be insufficient to meet the humanitarian needs of the population of the Gaza Strip.⁶⁵⁹

1298. The Israeli Government stated that “from the commencement of the Gaza Operation and for its duration” a total of 1,511 trucks with supplies from Israel as well as diesel, cooking gas and other fuel were allowed into the Gaza Strip. It would appear that some 60 per cent of these supplies were foodstuffs. The Israeli Government states that (presumably during the same period) it also coordinated the passage of 706 trucks carrying donations from international organizations and various countries.⁶⁶⁰ Information from UNRWA suggests that these quantities were irrelevant given the situation prevailing during the military operation and the local needs. For instance, although fuel for the power plant was let in, it was inadequate, forcing the power plant to shut down and causing 16-hour power cuts in some areas. Israel also reported allowing in 2,277,000 litres of diesel during the military operations, but according to UNRWA records only 199,400 litres were allowed in, while OCHA records suggest only 92,000 litres were allowed in, compared to 6,628,400 litres in January 2007.⁶⁶¹

1299. The Israeli Government also provided information about medical supplies that were brought into the Gaza Strip, but the figures are imprecise or incomplete as it was unclear what unit of measure was being used. In addition, many of the agencies listed were not actually bringing in medical supplies. For instance, its report lists that WFP brought in “3,611” medical supplies, but information made available to the Mission indicated that WFP was bringing in only flour and hygiene kits.

K. Legal analysis

1300. Obligations under international humanitarian law are relevant for the assessment of the facts described above. As mentioned earlier, the Fourth Geneva Convention as well as provisions of Additional Protocol I reflecting customary international law apply to the actions of Israel in the Occupied Palestinian Territory before and during the military operations. The protections owed under international humanitarian law to the civilian population of the Gaza Strip by all parties to the conflict include the duty to allow the free passage of humanitarian medical supplies, as well as consignments of essential foodstuffs and clothing for children, pregnant women and mothers at the earliest opportunity (article 23 of the Fourth Geneva Convention). Article 70 of Additional Protocol I provides that parties to a conflict are obliged to allow the passage of articles that are essential for the civilian population, at the earliest opportunity and without delay.

⁶⁵⁹ By 1 February UNRWA was providing food assistance to 900,000 registered Palestine refugees, 504,000 of them children, in the Gaza Strip. There are 1,048,125 refugees in the Gaza Strip (74 per cent of the population), see UNRWA, “Fact sheet: Consequences of the conflict in the Gaza Strip 27 December 2008- 18 January 2009”.

⁶⁶⁰ “The operation in Gaza...”, para. 271.

⁶⁶¹ OCHA also reported that in January 2009 no imports of petrol to Gaza were registered, compared to 1,522,250 litres in January 2007; 915,310 kilograms of cooking gas was imported in January 2009, compared to 5,238,030 in January 2007; and 3,760,400 litres of industrial diesel, compared to 8,370,290 in January 2007.

1301. The relevant provisions of the Fourth Geneva Convention relating to the duties of an occupying Power should also be taken into consideration, in particular the obligations contained in articles 50 (duty to facilitate the working of care and education institutions), 55 (duty to ensure food and medical supplies to the population), 56 (duty to ensure and maintain medical and hospital establishments and services), 59 (duty to agree on relief schemes if the occupied territory is not well supplied) and 60 (duty to continue performing obligations even if third parties provide relief consignments). Several provisions of Additional Protocol I reflecting customary international law are also relevant here, including articles 51 and 52, which prohibit attacks on civilians and on civilian objects, and article 54, which prohibits the destruction of objects indispensable to the survival of the civilian population.

1302. Access to adequate food, shelter and clothing, as part of an adequate standard of living, are human rights recognized in article 11 of the International Covenant on Economic, Social and Cultural Rights. The same instrument recognizes the rights to education and to the highest attainable standard of physical and mental health (art. 12). The content of these rights and the corresponding State duties has been clarified by the United Nations Committee on Economic, Social and Cultural Rights. The Convention on the Rights of the Child protects the child's right to life, survival and development (art. 6) and to be protected from all forms of mental or physical violence (art. 19), to the highest standard of health (art. 24), to an adequate standard of living (art. 27) and to education (arts. 28 and 29). Although these instruments protect women and men, girls and boys alike, the Convention on the Elimination of All Forms of Discrimination against Women adds more specification and scope to those obligations with regard to women. All these human rights obligations are applicable to Israel with respect to its actions in the Gaza Strip since they apply also in situations of armed conflict.

1303. Some rights contained in the International Covenant on Economic, Social and Cultural Rights are subject to progressive realization. This means that they can be achieved only over time. States have an obligation to move as expeditiously and effectively as possible towards that goal. Deliberate retrogressive measures are permitted only under stringent conditions.⁶⁶²

1304. The Mission recalls in this regard its analysis of the Israeli objectives and strategies during the military operations in chapter XVI. There the Mission referred to statements made by Deputy Prime Minister Eli Yishai on 6 January 2009: "It [should be] possible to destroy Gaza, so they will understand not to mess with us". He added that "it is a great opportunity to demolish thousands of houses of all the terrorists, so they will think twice before they launch rockets". The Mission also referred to the so-called Dahiya doctrine, which requires widespread destruction as a means of deterrence and seems to have been put into practice. These objectives and strategies should be kept in mind with regard to the following analysis.

1305. The Mission considers that the closure of or the restrictions imposed on border crossings by Israel in the immediate period before the military operations subjected the local population to extreme hardship and deprivations that are inconsistent with their protected status. The restrictions on the entry of foodstuffs, medical supplies, agricultural and industrial input, including industrial fuel, together with the restrictions on the use of land near the border and on

⁶⁶² General comment No. 3 (1990), para 9.

fishing in the sea have resulted in widespread poverty, increased dependence on food and other assistance, increased unemployment and economic paralysis. The Mission can conclude only that Israel has and continues to violate its obligations as an occupying Power under the Fourth Geneva Convention.

1306. The Mission has given consideration to the argument put forward by the Israeli Government that the above policies and restrictions are being imposed as a form of sanction. However, such blanket sanctions are not permitted under international law. The Committee on Economic, Social and Cultural Rights has addressed economic sanctions and their effects on the enjoyment of economic and social rights, and held:

[...] whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights [and]

[...] it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of the country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country.⁶⁶³

1307. In respect to the right to water, the Committee stated: “States parties should refrain at all times from imposing embargoes or similar measures that prevent the supply of water, as well as goods and services essential for securing the right to water.” Similar considerations apply to food and health services and goods.⁶⁶⁴

1308. The Mission also notes that reprisals and collective penalties are prohibited under international humanitarian law.

1309. The Mission has considered the question of military security. As serious as the situation that arises when rockets and mortars are fired on or near border crossings may be, the Mission considers that it does not justify a policy of collective punishment of the civilian population of the Gaza Strip. The Mission is aware of the Government of Israel’s declaration of the Gaza Strip as a “hostile territory”. Again, for the Mission, such a declaration does not relieve Israel of its obligations towards the civilian population of the Gaza Strip under international humanitarian law.

1310. Moreover, the Mission takes note that following the decision of the Supreme Court of Israel in what is known as the *Fuel and electricity* case,⁶⁶⁵ Israel reconsidered its obligations relating to the amounts and types of humanitarian supplies that it allowed into the Gaza Strip to meet “vital humanitarian needs”. Whatever that somewhat vague standard may be, the Mission stresses that Israel is bound to ensure supplies to meet the humanitarian needs of the population, to the fullest extent possible.

⁶⁶³ General comment No. 8 (1997), paras. 4 and 16.

⁶⁶⁴ General comments No. 15 (2002) and No. 12 (1999), para. 8.

⁶⁶⁵ Gaber et al. v. The Prime Minister, case No. 9132/07.

1311. In sum, the Mission restates its view that Israel has not fulfilled its duties as an occupying Power in relation to the Gaza Strip.

1312. Again, reference is made to the blockade and Israel's obligation to respect, protect, facilitate or provide, to the extent possible, for the enjoyment of the whole range of economic, social and cultural rights in the Gaza Strip. At the very least, Israel is "under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities".⁶⁶⁶ Israel's actions have led to a severe deterioration and regression in the levels of realization of those rights. Consequently, the Mission finds that Israel has failed to comply with those obligations.

1313. The Mission has also given consideration to the extent and type of military operations conducted by Israel in the Gaza Strip between 27 December 2008 and 18 January 2009. As mentioned earlier, provisions of the Fourth Geneva Convention and of Additional Protocol I that reflect international customary law apply to those operations. Their obligations include that under the Fourth Geneva Convention to give particular protection and respect to the infirm and expectant mothers (art. 16), to respect and protect civilian hospitals and medical personnel (arts. 18 and 20), and to allow the free passage of all consignments of medical and hospital objects, food and clothing subject to certain conditions (art. 23). The Mission will address here only respect for the provisions contained in article 23, which it considers to be part of customary international law. With regard to Additional Protocol I, the Mission will address here Israel's compliance with article 54.

1314. The Government of Israel has provided information about the actions it took to ensure the supply of humanitarian assistance to the Gaza Strip and to ensure that medical relief and rescue as well as essential facilities would function during the hostilities. These actions allegedly comprised: the continuous supply of humanitarian aid through the crossings; coordination of evacuation within the Gaza Strip and outside; a unilateral suspension of military operations each day to enable the resupply of assistance for the population and actions to ensure the functioning of essential infrastructure in the Gaza Strip. To this end, the Government of Israel reported that it established a number of coordinating and liaison bodies with Palestinian authorities and organizations, the United Nations agencies on the ground and humanitarian agencies, such as ICRC. The Government also reported that a number of trucks carrying humanitarian goods from Israel and from other countries, including from international organizations, were given passage.

1315. In response, the Mission draws attention to the fact that no consideration was given to the situation that prevailed in the Gaza Strip before the military operations. In particular, the Mission notes that the amounts and types of food, medical and hospital items and clothing were wholly insufficient to meet the humanitarian needs of the population. Given that since the end of the operations the number of truckloads allowed through the crossings has again fallen, the humanitarian supplies are even less sufficient.

1316. At the height of the military operations, several NGOs appealed to the Government of Israel to ensure a sufficient supply of electricity and fuel to the Gaza Strip to allow for the

⁶⁶⁶ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, para. 112.

functioning of vital services.⁶⁶⁷ At the same time, two petitions were filed with the Supreme Court of Israel on 7 and 9 of January, respectively, to order the Government to ensure that the Israeli armed forces did not attack ambulances and medical personnel and that sufficient electricity and fuel were supplied to enable hospitals, water and sanitation systems to function during the conflict. On 19 January, as military operations ended, the Supreme Court ruled denying both petitions.⁶⁶⁸

1317. The Government of Israel seems to see the hardship and suffering of Palestinians as an inevitable consequence of a situation of war. The Government's statement that "civilian populations inevitably and tragically suffer during a time of armed combat, particularly where the combat operations take place in densely populated urban areas"⁶⁶⁹ may be correct, but this does not relieve Israel from its obligations under international humanitarian law.

1318. From the facts it ascertained and the foregoing analysis, the Mission finds that Israel has violated its obligation to allow the free passage of all consignments of medical and hospital stores and objects, food and clothing (article 23 of the Fourth Geneva Convention).

1319. Article 54 of Additional Protocol I contains the prohibition:

to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas..., drinking water installations and supplies and irrigation works for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse party, whatever the motive [...].

The Mission regards this rule as reflective of international customary law. In this context, Israel's obligations to respect, protect and facilitate or provide for the realization of economic, social and cultural rights, and its obligations under the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women are also relevant, and have been undermined by the blockade and restrictions on the Gaza Strip, as well as the actions taken during the military operations.

1320. With regard to article 54 (2) of Additional Protocol I, the Mission recalls its analysis included in chapter XIII on the destruction of buildings, food production and industry. From the facts ascertained and the circumstances described in the present chapter and in chapters XIII and XVI, the Mission concludes that in the destruction or damaging of greenhouses, agricultural land, water wells for irrigation and irrigation networks there was the specific purpose of denying their use for the sustenance of the civilian population of the Gaza Strip. Furthermore, this

⁶⁶⁷ An excerpt from the Hebrew appeal is available in an English press release at: <http://www.gisha.org/UserFiles/File/Press%20Materials/HR%20groups%20-%20resumption%20of%20gaza%20fuel%20supplies%201-1-09%20-%20online%20version.pdf>

⁶⁶⁸ Physicians for Human Rights et. al. v. The Prime Minister et. al., case No. 201/09, and Gisha Legal Centre for Freedom of Movement et al. v. Minister of Defense, case No. 248/09, Judgement of 19 January 2009, para. 26, available at http://elyon1.court.gov.il/files_eng/09/010/002/n07/09002010.n07.pdf

⁶⁶⁹ "The operation in Gaza...", para. 277.

appears to be done as part of a policy of collective punishment of the civilian population as elaborated below.

1321. With respect to the right to water, the Committee on Economic, Social and Cultural Rights stated:

The obligation to *respect* [the right to water] requires that States parties refrain from [...] limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law.⁶⁷⁰

1322. This language is similar to that of a resolution adopted by consensus at the 26th International Conference of the Red Cross and Red Crescent that calls upon parties to a conflict to “take all feasible measures to avoid in their military operations, all acts liable to destroy or damage water sources.”⁶⁷¹

1323. Similar considerations apply to the right to adequate housing.⁶⁷² The widespread destruction of residential housing, water wells and pipe networks cannot be seen as an inevitable or necessary incidence of military hostilities. Israel had a duty to distinguish between civilian and military objects and not to direct any attacks at civilians or civilian objects. The Mission has not received any information suggesting that all the houses destroyed served as hideouts for Hamas fighters or were booby-trapped and does not accept that this was the case. The patterns of destruction described in the present chapter and in others reveal that many houses were fired at or demolished after their occupants had been ordered to leave them. There was then no clear necessity for Israeli soldiers to occupy such properties or to destroy them. They were in effective control of the area. In other cases, houses were demolished with bulldozers during the last few days of the military operations when, again, Israeli forces were in total control of the areas in which the houses were located. Military necessity and the need to prevent rockets being fired from the houses into Israel do not seem to the Mission plausible reasons for this widespread destruction. These considerations apply equally to the destruction of agricultural land and greenhouses, which are so important for local food security.

1324. From the facts available to it and by virtue of the foregoing considerations, the Mission believes that the destruction of private residential houses, water wells, water tanks, agricultural land and greenhouses violates Israel’s duties to respect the right of the people in the Gaza Strip to an adequate standard of living (including food, housing and water).

1325. The Mission is aware of the statement of the Committee on the Rights of the Child that many of the fundamental rights of the child “have been blatantly violated during this crisis”.⁶⁷³ On the basis of this finding and on the facts as described above, the Mission also considers that

⁶⁷⁰ General comment No. 15 (2002), para. 21.

⁶⁷¹ *Customary International Humanitarian Law...*, p. 150.

⁶⁷² Submission to the Mission made by COHRE.

⁶⁷³ Committee on the Rights of the Child, “Effects of the Gaza conflict on children ‘devastating’”, statement, 12 January 2009.

Israel has violated its obligations under the Convention on the Rights of the Child during its military operations in the Gaza Strip and in particular of article 24 (1), stipulating that “States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health-care services”; article 38 (1), stipulating that “States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child”; and article 38 (4), stipulating that “States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict”.

1326. The Mission also notes that Israel is in continuing violation of article 39 of the Convention in that, by actively preventing reconstruction efforts, it does not fulfil its obligations to “take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: [...] armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child”.

1327. The Mission is also aware of the statement made by the Committee on the Elimination of All Forms of Discrimination against Women that “the human rights of women and children in Gaza, in particular to peace and security, free movement, livelihood and health, have been seriously violated during this military engagement.”⁶⁷⁴ It concurs with this statement. The Mission also notes that the Convention on the Rights of Persons with Disabilities, article 11, requires States parties to take “all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict”. Israel has signed, but not yet ratified, this Convention and is thus under an obligation not to defeat its object and purpose.

1328. The Mission also considered whether the Gaza population was subject to collective punishment or penalty. According to article 33 of the Fourth Geneva Convention, “collective penalties and likewise all measures of intimidation or of terrorism are prohibited”. Article 75 (2) (d) of Additional Protocol I includes collective punishment as an act that is “prohibited at any time and in any place whatsoever”. Reprisals against protected persons are also prohibited under article 33. These prohibitions are part of customary international law.⁶⁷⁵

1329. The Mission notes that the scope of collective penalties goes beyond physical or criminal sanctions to encompass also “sanctions and harassment of any sort, administrative, by police action or otherwise”.⁶⁷⁶ The cumulative effect of the blockade policies, with the consequent hardship and deprivation among the whole population, and of the military operations coupled with statements by Israel made to the effect that the whole of the Gaza Strip was a “hostile territory” strongly suggest that there was an intent to subject the Gaza population to conditions such that they would be induced into withdrawing their support from Hamas. This was apparently confirmed by the then Minister of Foreign Affairs of Israel commenting on the

⁶⁷⁴ United Nations, UN committee says women’s rights were seriously violated during Gaza conflict, press release, 6 February 2009.

⁶⁷⁵ See *Customary International Humanitarian Law...*, p. 374.

⁶⁷⁶ ICRC Commentary to Additional Protocol I, p. 3055.

decision by the Supreme Court to uphold the fuel cuts: “The Palestinians need to understand that business is not usual, I mean there is no equation in which Israeli children will be under attacks by Kassam rockets on a daily basis and life in the Gaza Strip can be as usual”.⁶⁷⁷

1330. The above statements should also be seen in the light of what the Mission has identified as the objectives and strategies of Israel before and during the operations (see chap. XVI). Israel, rather than fighting the Palestinian armed groups operating in Gaza in a targeted way, has chosen to punish the whole Gaza Strip and the population in it with economic, political and military sanctions. This has been seen and felt by many people with whom the Mission spoke as a form of collective punishment inflicted on the Palestinians because of their political choices.

1331. The facts ascertained by the Mission, the conditions resulting from the deliberate actions of the Israeli armed forces and the declared policies of the Israeli Government – as they were presented by its authorized representatives – with regard to the Gaza Strip before, during and after the military operation, cumulatively indicate the intention to inflict collective punishment on the people of the Gaza Strip. The Mission, therefore, finds a violation of the provisions of article 33 of the Fourth Geneva Convention.

1332. The Mission has also considered the question of whether the crime of persecution as a form of crime against humanity had been committed against the civilian population of the Gaza Strip. To establish that a crime against humanity was committed it would have to be established that there was a widespread or systematic attack on a civilian population that blatantly discriminated and infringed a fundamental right recognized under international customary law or treaty, and was carried out deliberately with the intention so to discriminate.⁶⁷⁸

The crime of persecution encompasses a variety of acts, including, inter alia, those of physical, economic or judicial nature, that violate an individual’s right to the equal enjoyment of his basic rights.⁶⁷⁹

1333. In *Prosecutor v. Kupreskic* judgement, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia describes the types of acts that would constitute the crime of persecution in the following terms:

[...]

(c) Persecution can also involve a variety of other discriminatory acts, involving attacks on political, social, and economic rights. [...]

⁶⁷⁷ *Global Security*, “Israel’s Supreme Court upholds fuel cuts to Gaza”, 30 November 2007, available at: <http://www.globalsecurity.org/military/library/news/2007/11/mil-071130-voa02.htm>. The issue is also addressed in the submission to the Mission by Diakonia.

⁶⁷⁸ *Prosecutor v. Kunarac et al.*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, case No. IT-96-23-T and No. IT-96-23/1-T, Judgement of 22 February 2001, para. 431.

⁶⁷⁹ *Prosecutor v. Tadić*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, case No. IT-94-1-T, Judgement of 7 May 1997, para. 710.

(d) Persecution is commonly used to describe a series of acts rather than a single act. Acts of persecution will usually form part of a policy or at least of a patterned practice, and must be regarded in their context. [...]

(e) [...] discriminatory acts charged as persecution must not be considered in isolation. Some of the acts mentioned above may not, in and of themselves, be so serious as to constitute a crime against humanity. For example, restrictions placed on a particular group to curtail their rights to participate in particular aspects of social life (such as visits to public parks, theatres or libraries) constitute discrimination, which is in itself a reprehensible act; however, they may not in and of themselves amount to persecution. These acts must not be considered in isolation but examined in their context and weighed for their cumulative effect.⁶⁸⁰

1334. The Mission has described above a series of acts that deprive Palestinians in the Gaza Strip from their means of subsistence, employment, housing and water. Palestinians are further denied freedom of movement and their right to leave and enter their own country. Later the report will address the extent to which Palestinian rights to access a court of law and an effective remedy are limited or denied by Israeli laws (see chap. XXVII)

1335. From the facts available to it, the Mission is of the view that some of the actions of the Government of Israel might justify a competent court finding that crimes against humanity have been committed.

XVIII. THE CONTINUING DETENTION OF ISRAELI SOLDIER GILAD SHALIT

1336. The Mission notes the continued detention of Gilad Shalit, a member of the Israeli armed forces, captured in 2006 by Palestinian armed groups during a cross-border operation. In reaction to the capture, the Israeli Government ordered a number of incursions to attack important infrastructure in the Gaza Strip as well as Palestinian Authority offices. This was followed by the arrest of eight Palestinian Government ministers and 26 members of the Palestinian Legislative Council by the Israeli security forces (see chap. II).

1337. Israeli Government officials have repeatedly stated that the easing of the blockade on the Gaza Strip (see chaps. V and XVII) is linked to the release of Gilad Shalit. In February 2009, it appeared that the Israeli Government had dropped its demand for Palestinian militants to release Gilad Shalit before it would end the blockade.⁶⁸¹ However, the then Deputy Prime Minister stated shortly after that "Israel is facing a serious humanitarian crisis, and it is called Gilad Shalit, and... until he is returned home, not only will we not allow more cargo to reach the residents of Gaza, we will even diminish it." Israel's then Prime Minister also stated that "we will not reopen the border crossings [into Gaza] and assist Hamas so long as Gilad Shalit is in

⁶⁸⁰ *Prosecutor v. Kupreškić et al.*, case No. IT-95-16-T, Judgement of 14 January 2000, para. 615.

⁶⁸¹ Agence France Presse quoted by France 24 – "Israel drops Shalit release from truce demands, Hamas claims", 6 February 2009.

their brutal prison."⁶⁸² According to the CBS News Channel, this position was reiterated by the current Israeli Prime Minister in July 2009.⁶⁸³

1338. In October 2008, a Hamas spokesman stated that “the Shalit case is dependent on prisoners swap... He will never be released if the Israeli occupation does not release Palestinian prisoners whom Hamas wants free....”⁶⁸⁴

1339. The Mission is aware that negotiations, through intermediaries, continue with regard to the exchange of prisoners between the Israeli Government and Hamas representatives.

1340. The Mission asked the Gaza authorities to confirm the status of Gilad Shalit. In their reply, which the Mission considered to be unsatisfactory, the Gaza authorities denied being involved in any way with the capture and detention of Gilad Shalit and stated that they are not in possession of any information regarding his current status.

1341. During its investigations in the Gaza Strip, the Mission heard testimonies indicating that during the military operations of December 2008 – January 2009, Israeli soldiers questioned captured Palestinians about the whereabouts of Gilad Shalit (see chap. XV).

1342. Gilad Shalit’s father, Noam Shalit, appeared before the Mission at the public hearing held in Geneva on 6 July 2009.⁶⁸⁵ He informed the Mission of his extreme concern about the condition of his son, who has not been able to communicate with his family and has not been allowed to receive ICRC visits. Mr. Shalit expressed concern about the health and psychological status of his son after more than three years of captivity and appealed for his release.

Legal findings and conclusions

1343. The Mission is of the opinion that, as a soldier who belongs to the Israeli armed forces and who was captured during an enemy incursion into Israel, Gilad Shalit meets the requirements for prisoner-of-war status under the Third Geneva Convention. As such, he should be protected, treated humanely and be allowed external communication as appropriate according to that Convention. ICRC should be allowed to visit him without delay. Information about his condition should also be provided promptly to his family.

1344. The Mission is concerned by the declarations referred to above, made by various Israeli officials, who have indicated the intention of maintaining the blockade of the Gaza Strip until the release of Gilad Shalit. The Mission is of the opinion that this would constitute collective punishment of the civilian population of the Gaza Strip.

⁶⁸² Amnesty International, “Detainees used as bargaining chips by both sides in Israel/Gaza conflict”, 20 March 2009.

⁶⁸³ CBS News Channel, “Gaza blockade remains until Shalit freed”, 30 July 2009.

⁶⁸⁴ “Detainees used as bargaining chips...”.

⁶⁸⁵ Mission’s public hearings: <http://www.un.org/webcast/unhrc/archive.asp?go=090706>.

SECTION B: INTERNAL VIOLENCE

XIX. INTERNAL VIOLENCE AND TARGETING OF FATAH AFFILIATES BY SECURITY SERVICES UNDER THE CONTROL OF THE GAZA AUTHORITIES

1345. The Mission has received reports and allegations of violations committed in Gaza by the security services in the period under inquiry. It has heard some of those allegations first-hand and investigated them by comparing the accounts it received with reports of domestic and international human rights organizations.

1346. From the beginning of 2006, when Hamas won the majority of seats in the Palestinian Legislative Council, violence between competing Palestinian political groups in the Gaza Strip escalated. Armed clashes periodically erupted between the security forces affiliated with the two main political groups – Fatah and Hamas – and culminated in June 2007, when Hamas seized control of the Palestinian Authority’s civil and security institutions of the Gaza Strip.⁶⁸⁶

1347. During the six months preceding the Israeli military operations in Gaza of December 2008-January 2009, reports of deaths in suspicious circumstances and abuses by the security services reporting to the Gaza authorities continued to be documented by domestic monitoring mechanisms, including by the Independent Commission for Human Rights (ICHR).⁶⁸⁷

1348. Between June and December 2008, ICHR received 45 complaints from citizens alleging that they were subjected to torture while being detained or interrogated. All these complaints were lodged against the Ministry of Interior, the police, the military intelligence, the general intelligence and the internal security services of the Gaza authorities, as well as al-Qassam Brigades.

1349. During the same period, ICHR received about 250 complaints from citizens that security agencies (namely the internal security and the police) detained them without respecting legally prescribed procedures. In particular, ICHR reported that no arrest warrants from the competent authorities were presented to detainees and that the security services searched civilian houses without having obtained the relevant search warrants. ICHR reported that family visits to detainees were denied, especially in the al-Saraya and al-Mashtal detention and interrogation centres of the internal security agency. In addition, detainees were not brought before the judicial

⁶⁸⁶ Non-governmental organizations reported that members of the security forces and armed groups belonging to both groups “committed grave human rights abuses and displayed a flagrant disregard for the safety of the civilian population.” “Both sides killed captured rivals and abducted scores of members of rival groups and held them hostage, to be exchanged for friends and relatives held by their rivals.” See “Occupied Palestinian Territories torn apart...”.

⁶⁸⁷ The Independent Commission for Human Rights is an independent Palestinian institution established in 1993 by Presidential Decree with a broad mandate in accordance with national and international norms. This mandate gives it the authority to deal with human rights violations; complaints of abuse of power submitted by citizens; education and promotion; monitoring; and generally integrating human rights into Palestinian legislation and practices. The Mission was impressed by the outstanding work of the institutions in both Gaza and the West Bank. See ICHR, “Monthly reports on violations of HR” (June to December 2008), available at: <http://www.ichr.ps/etemplate.php?id=12>.

authorities within the legally prescribed period. According to ICHR, the security services also continued to detain citizens with arrest warrants issued by the military justice authority.

1350. Many leaders of the Fatah movement as well as the Governors of Khan Yunis and Gaza were at the time of drafting this report still in detention at the al-Mashtal detention and interrogation centre.

1351. In the course of its investigations in Gaza, the Mission obtained information from international and domestic organizations and from individuals in Gaza about violence against political opponents by the security services that report to the Gaza authorities. The Israeli attacks, including the aerial strikes targeting police stations and the main prison in Gaza City (see chap. VII), created chaos, making it impossible to independently verify initial reports about violations by the security services. Towards the end of the military operations, however, domestic human rights organizations started to verify such allegations, including by analysing information from hospitals that they had received bodies of persons who had apparently not been killed in the Israeli attacks.

1352. According to both domestic and international human rights organizations, members of the security services and unidentified gunmen killed between 29 and 32 Gaza residents between the beginning of the Israeli military operations and 27 February.⁶⁸⁸ Among these, between 17 and 22 detainees, who had been at al-Saraya detention facility on 28 December and had fled following an Israeli aerial attack, were killed in seemingly extrajudicial or summary executions, some of them while seeking medical assistance in hospitals (see chap. VII).

1353. Not all those killed after escaping detention were Fatah affiliates, detained for political reasons, or charged with collaborating with the enemy. Some of the escapees had been convicted of serious crimes, such as drug-dealing or murder, and had been sentenced to death.⁶⁸⁹ Regardless of the intended scope of the Israeli attack on the prison, the effect was to create a chaotic situation that, according to some domestic observers,⁶⁹⁰ was exploited by some elements in the security services.

1354. During the course of its work in Gaza, the Mission heard first-hand accounts of violations against Fatah affiliates committed during the period of the Israeli military operations. Some of the witnesses who were interviewed by the Mission were severely distressed and asked that their identity not be disclosed for fear of retaliation. The Mission questioned the witnesses and found them to be credible. The following cases are among those reported to the Mission and are based on information it gathered from a variety of sources.

⁶⁸⁸ See Under Cover of War...; ICHR, “Monthly report on human rights and freedoms in the PNA-controlled territory”, January 2009, available at: <http://www.ichr.ps/pdfs/eMRV-1-09.pdf>; PCHR, “Special report: inter-Palestinian human rights violations in the Gaza Strip”, 3 February 2009, available at: http://www.pchrgaza.org/files/Reports/English/pdf_spec/Increase_rep.pdf.

⁶⁸⁹ No death sentence has been carried out since the Hamas takeover. Death sentences must be approved by the Palestinian Authority’s President, who has not approved any of these sentences since Hamas took control of the administration of justice in Gaza. The last official execution was carried out in 2005 by firing squad.

⁶⁹⁰ Mission interview with a civil society activist, Gaza City, June 2009.

1355. One of the individuals killed following their escape from the damaged al-Saraya prison was a Fatah affiliate who had been arrested and detained long before the Israeli military operations in Gaza. For about two weeks his family made several unsuccessful enquiries with different security services to discover his whereabouts. After finally tracing him, the family was able to visit him in the detention facility run by the internal security and saw that he was in poor health as the likely result of torture and inadequate detention conditions. He was reportedly not able to speak freely while in detention.

1356. He was still in al-Saraya prison on 28 December 2008, when it was hit during an Israeli aerial bombardment. His dead body was later found with signs of bullet wounds at al-Shifa hospital in Gaza City. The family was told that he had been shot dead by unknown persons. Independent sources consulted by the Mission seem to indicate that the victim had fled from al-Saraya detention facility after the aerial attack and had been wounded in the attack itself or shot by the prison staff trying to prevent detainees from escaping.⁶⁹¹

1357. The Mission received a number of reports of violent attacks against individuals affiliated with Fatah⁶⁹² by armed men who broke into their homes. In one incident,⁶⁹³ a group of persons claiming to be police officers knocked at the door of a family residence in Gaza City. The family was confronted by a group of 7 to 10 men wearing civilian clothes, most of them masked. They took one member of the family outside. When they brought him back roughly half an hour later, he appeared to have been beaten violently with metal pipes. He died of his injuries about a month later.⁶⁹⁴

1358. In another incident reported to the Mission, a group of 10 to 12 masked men wearing military uniforms broke into the residence of an individual who used to work for the preventive security under the Palestinian Authority before the Hamas takeover. When the family tried to resist attempts to capture him, the masked men started shooting indiscriminately, killing one member of the family and injuring 11 others. After the shooting, the masked men fled. According to the information provided to the Mission, when the injured were transferred to al-

⁶⁹¹ The Mission ascertained that on 28 December 2008, the second day of the air strikes by Israel, about 200 to 300 prisoners were still held in the facility. Most of the almost 700 prisoners had been released in the previous days. According to a Human Rights Watch report based on the testimony of prisoners, “authorities ... kept in custody roughly 115 alleged collaborators with Israel, about 70 Fatah supporters held on various charges, and some persons convicted of criminal offences who had been sentenced to death. Some of the remaining detainees escaped the following day when Israel bombed the prison, but were subsequently tracked down and killed by masked gunmen. The ICHR documented 20 cases of escaped prisoners being shot and killed by masked gunmen from December 28 to January 31; at least 12 of the victims had been detained in the prison for allegedly ‘collaborating with the enemy.’ Seventeen of the 29 people killed by gunmen that the Palestinian Center for Human Rights (PCHR) reported from December 28 to February 27 were prisoners and detainees who had fled the prison compound after Israel’s attack, including 13 men sentenced to death for collaboration with Israel, three convicted of common crimes, and one man awaiting trial.” (Under Cover of War....). The Gaza authorities informed the Mission (in correspondence of July 2009) that only 11 persons accused or convicted of criminal offences remained in their custody and were transferred “under supervision” to a residential apartment. See also chap. VIII.

⁶⁹² Dates and other identifying information have been removed to protect sources.

⁶⁹³ Mission interviews, Gaza, June 2009.

⁶⁹⁴ “In total, Palestinian human rights groups documented nine deaths by torture or severe beating in Gaza in January, February and March 2009”. Under Cover of War....

Shifa hospital, members of the security services there prevented medical staff from providing assistance.

1359. The Mission was informed that – although serious – this was only one of many incidents in which this family had been targeted by Hamas operatives. One year earlier, a member of the family had been abducted and shot in the legs.

1360. The Mission was also informed of an incident in which a group of armed, masked men broke into the house of a Fatah supporter in Gaza City, abducted him and took him to a nearby location, where he was tortured and shot in the leg. He was reportedly left unconscious and rescued by neighbours. The ordeal reportedly lasted about one hour. The same individual had previously been arrested by members of the security services and kept in detention for a month and a half. He was released only after signing a pledge not to participate in Fatah political celebrations or occasions.

1361. The Mission was informed that, in another incident, three armed, masked men wearing symbols of al-Qassam Brigades broke into the residence in Gaza City of an individual who is a Fatah supporter and on the payroll of a Fatah-controlled institution. The men started beating everyone inside, including a child, and were screaming insults. All the males were then reportedly made to go outside – where other masked men were waiting – and were beaten with metal bars and with rifle butts. After this, the masked men took one of the men to a nearby location, where they again beat him very violently. While he was being beaten, the masked men reportedly kept insulting him, accusing him of collaborating with Israel and calling him a traitor. In response to a question by the Mission, a witness stated that he had the feeling that there was a clear chain of command among the group of masked men. Shortly before meeting the Mission, the same individual had been summoned by the internal security in Gaza along with other Fatah affiliates and kept for four hours at an internal security detention centre in Gaza City before being released.

1362. Similarly, a group of people who were identified as belonging to the internal security stormed the residence of an individual in Gaza City and beat members of the family. The group was composed of masked men who left only after shooting him in the leg. The victim was allegedly prevented by members of the security services from getting treatment at al-Shifa hospital for his injuries. He had previously been arrested and detained by members of the security services. During his detention, he was allegedly subjected to different forms of torture, including beatings, *shabah*,⁶⁹⁵ electric shocks and sleep deprivation. His captors did not reportedly question him or levy specific charges against him. Finally, towards the end of his detention, he was formally accused of “having contacts with the Ramallah government”. He was reportedly arrested again after the end of the conflict by members of the security services and again subjected to torture.

1363. The Mission was also informed of the case of another Fatah affiliate who had been summoned by the internal security in Gaza and detained on the basis of evidence provided by another member of his family who accused him of collaborating with Israel. Additional abuses allegedly committed by the security services include the confiscation of property from the

⁶⁹⁵ A torture method in which the prisoner is tightly shackled for long periods.

families of Fatah affiliates, as well as additional cases of torture while in detention in facilities that they operate.

1364. The Mission was informed that the movement of many Fatah members was restricted during Israel's military operations in Gaza and that many were put under house arrest very early on and threatened with "action" should they disobey. Hundreds of cases in which house arrest was imposed without any kind of due process were reported to domestic human rights organizations during this period. Some individuals received a written order from the police or the internal security (the Mission has a sample of these orders), or a verbal order from the members of al-Qassam Brigades or the internal security. In some cases, those issuing these orders would not identify themselves. The Mission was informed of one case in which an individual put under house arrest in this way was allegedly shot dead by the security services when he and other members of his family were evacuated from their home owing to the presence of the Israeli armed forces.⁶⁹⁶

1365. The Gaza authorities denied that any arrests had taken place in Gaza between 27 December 2008 and 18 January 2009 owing to the insecurity created by the Israeli military operations.⁶⁹⁷ They stated that arrests were made only after the end of these operations and only in relation to criminal acts, "security prevention and to restore public order".

A. Factual findings

1366. The Mission finds that the statements provided to it in relation to abuses committed by the Gaza authorities' security services are credible and has no reason to doubt their veracity.

1367. As for violent attacks against individuals either in their homes or after being taken from their homes, this finding is reinforced by a number of factors. The pattern of armed and sometimes uniformed, masked men breaking into houses is described in almost all incidents reported to the Mission. Also, in most cases those abducted from their homes or otherwise detained were reportedly not accused of offences related to specific incidents, but rather targeted because of their political affiliation. When charges were laid, these were always linked to suspected political activities contrary to the perceived interest of the Gaza authorities. Some of the accounts also indicate that elements of hierarchical control were present within the groups of armed, masked men executing the attacks. The testimonies of witnesses and the reports provided by international and domestic human rights organizations bear striking similarities and indicate that these attacks were not randomly executed, but constituted part of a pattern of organized violence directed mainly against Fatah affiliates and supporters.

1368. In relation to the allegations that between 27 December 2008 and 18 January 2009 more than 20 persons suspected of collaborating with Israel were killed or maimed by being shot in the leg or otherwise severely injured, the Gaza authorities stated that their investigations found these incidents to be the result of family feuds "or otherwise they were individual acts motivated by personal revenge." In addition, they stated that "the Government, through its competent

⁶⁹⁶ Mission interview with a civil society activist, Gaza City, June 2009.

⁶⁹⁷ Mission correspondence with the Gaza authorities, July 2009.

agencies, opened investigations into these events immediately after the war, and submitted charges before the competent Courts.”⁶⁹⁸ According to PCHR, however, on 2 February 2009 a spokesperson for the Gaza authorities stated that “the Government makes distinctions between abuses of law and the actions of the Palestinian resistance during the war, regarding the execution of some collaborators who are involved in collaborating with the [Israeli] occupation.”⁶⁹⁹ The statement seems to express support for a number of acts of violence that occurred in the chaotic atmosphere created by the military operations.

B. Legal findings

1369. Although not internationally recognized and therefore not able to be party to international human rights treaties, the Gaza authorities have an obligation to respect and enforce the protection of the human rights of the people of Gaza, inasmuch as they exercise effective control over the territory, including law enforcement and the administration of justice⁷⁰⁰ (see chap. IV).

1370. Before Hamas took full control of the Gaza Strip in June 2007, its leaders had publicly indicated that they would respect international human rights standards.⁷⁰¹ In July 2009, the Gaza authorities formally stated to the Mission that they accepted the obligation to respect human rights and fundamental freedoms, including those enshrined in the Universal Declaration of Human Rights and in the Palestinian Basic Law. They added that “the Government is in permanent contact with the Red Cross and human rights organizations, and listens to their observations and takes into account their recommendations as far as it can, and those institutions can testify on that”.⁷⁰²

1371. From the facts ascertained by it, the Mission finds that the actions by members of the security services described above constitute serious violations of human rights and are not consistent with either the Universal Declaration of Human Rights or the Palestinian Basic Law. In particular, regarding the Universal Declaration – which has become part of international customary law – they are in violation of article 3 in relation to everyone’s right to life, liberty and security of the person; article 5 in relation to the freedom from torture and cruel, inhuman or degrading treatment or punishment; article 9 stating that no one shall be subjected to arbitrary

⁶⁹⁸ Written reply from the Gaza authorities to the Mission; July 2009.

⁶⁹⁹ Taher al-Nouno, a spokesman of the Gaza authorities, attended the press conference with Ehab al-Ghusein, spokesman of the Ministry of the Interior, and Islam Shahwan, spokesman of the Palestinian police in Gaza. See “Special report...”.

⁷⁰⁰ For example, in their joint report on Lebanon and Israel, a group of four United Nations Special Rapporteurs concluded that: “Although Hezbollah, a non-State actor, cannot become a party to these human rights treaties, it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights. [...] It is especially appropriate and feasible to call for an armed group to respect human rights norms when it exercises significant control over territory and population and has an identifiable political structure” (A/HRC/2/7, para. 19). See A/HRC/6/76, paras. 4-9, for a brief overview of relevant events leading up to Hamas’ seizure of full control in the Gaza Strip. (See also Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford, Oxford University Press, 2006), chap. 7.

⁷⁰¹ See A/HRC/8/17.

⁷⁰² The Gaza authorities have allowed IHCR to function uninterruptedly and regularly deal with the complaints it brings to their attention.

arrest and detention; articles 10 and 11 regarding the right to fair and impartial legal proceedings; and article 19 regarding the freedom of opinion and expression, including the freedom to hold opinions without interference.

1372. The Mission takes note of the statement of the Gaza authorities of the opening of criminal investigations into some of the killings that happened between 28 December 2008 and 18 January 2009. It is, however, concerned that – according to the Gaza authorities – these investigations concern only family feuds or individual acts motivated by personal revenge. The Mission also notes with concern that, at the time of drafting this report, appeals by international and domestic human rights organizations to the Gaza authorities to conduct serious investigations into all allegations of violations, to bring perpetrators to justice and to publish all of their findings remain unanswered. Failure to conduct credible investigations into these allegations and hold those responsible accountable will prevent the victims from accessing justice and encourage a culture of impunity.

THE WEST BANK, INCLUDING EAST JERUSALEM

1373. As explained above in chapter I, the Mission believes that the reference in its mandate to violations “in the context” of the military operations in Gaza required it to go beyond the violations that occurred in and around Gaza. It also believes that violations within its mandate in terms of time, objectives and targets, include those that are linked to the December 2008 – January 2009 military operations, and include restrictions on human rights and fundamental freedoms related to the strategies and actions of Israel in the context of its military operations.

1374. Developments in Gaza and the West Bank are closely interrelated, in the Mission’s view, an analysis of both is necessary to reach an informed understanding of and to report on issues within the Mission’s mandate. On the one hand, the events in Gaza have consequences in the West Bank, on the other, pre-existing problems in the West Bank have been exacerbated by the Gaza military operations.

1375. In its examination of the West Bank with respect to actions taken by Israel, the Mission focused on four key aspects in their linkage to the Israeli military operations in Gaza: (a) the sharp increase in the use of force by Israeli security forces, including the military, in the West Bank; (b) the tightening and entrenchment of the system of movement and access restrictions; (c) the issue of Palestinian detainees and especially the increase in child detainees during and after the military operations; and (d) the Gaza corollary of the detention of Hamas members of the Palestinian Legislative Council.⁷⁰³ While the treatment by the Gaza authorities of those opposing its policies is discussed in chapter XIX, similar issues with regard to the conduct of the Palestinian Authority in the West Bank also called for investigation. Linkages with the Israeli operation in Gaza are elaborated in the respective chapters.

⁷⁰³ The issue of Gazans detained by Israel during and following the operations from December 2008 to January 2009 is discussed in chapter XV.

Methodology

1376. One consequence of the refusal by Israel to cooperate with the Mission was that it was unable to visit the West Bank to investigate alleged violations of international law. The Mission nonetheless received many oral and written reports and other relevant materials from Palestinian, Israeli and international human rights organizations and institutions. In addition, the Mission met with representatives of a number of human rights organizations and with members of the Palestinian legislature and other community leaders (see annex). It invited experts, witnesses and victims to participate in the public hearings held in Geneva on 6 and 7 July 2009. The Mission also conducted telephone interviews with affected individuals and witnesses, and reviewed relevant video and photographic material.

1377. Owing to the lack of access to the West Bank, the chapters in the section below rely on secondary information to a greater extent than in the previous sections.

1378. The Mission found the witnesses it heard in relation to the situation in the West Bank to be credible and reliable. The Mission is also satisfied that the reports it reviewed and to which it refers are credible and based on sound methodologies.

1379. The Mission also wrote to the Palestinian Authority and the Government of Israel seeking information and official positions on, inter alia, the issues addressed in this section. The information received by the Palestinian Authority was taken into account in the present chapter. The Government of Israel has not responded to the Mission's requests.

1380. Owing to the complexity of the issues relating to Palestinian detainees and of freedom of movement and access, the chapters on these issues include an explanatory introduction that sets out the factual parameters of the problems and explains some of the key terminology and concepts.

XX. TREATMENT OF PALESTINIANS IN THE WEST BANK BY ISRAELI SECURITY FORCES, INCLUDING USE OF EXCESSIVE OR LETHAL FORCE DURING DEMONSTRATIONS

1381. The information gathered by the Mission indicates an ongoing pattern of ill treatment and use of force by the Israeli security forces against Palestinians in the West Bank, including East Jerusalem. Ill treatment and low levels of force are reported being common in encounters at checkpoints between Palestinians and the Israeli security forces (army, police and border police),⁷⁰⁴ while a greater, sometimes lethal, degree of force has been used during demonstrations, incursions and search and arrest operations. With heavily armed Israeli military forces present throughout the West Bank, the possibility of violence always exists. As a witness reported to the Mission, "the use of force is part of the system of control of the occupation, where a key element is fear, which can only be sustained by the constant threat and the periodic act of violence".⁷⁰⁵

⁷⁰⁴ B'Tselem, "Beatings & Abuse" (www.btselem.org/english/beatings_and_abuse/index.asp). For the use of private contractors at checkpoints, see chap. XXI.

⁷⁰⁵ Mission interview with Defence for Children International-Palestine Section, 3 July 2009.

1382. Violence against Palestinians in the West Bank does not only come from the security forces. The Israeli military operations in Gaza commenced when the West Bank was experiencing some of the worst acts of settler violence in several years.⁷⁰⁶

1383. Witnesses and experts informed the Mission of a sharp increase in the use of force by the Israeli security forces against Palestinians in the West Bank from the commencement of the Israeli operations in Gaza.⁷⁰⁷ A number of protesters were killed and scores were injured by Israeli forces during Palestinian demonstrations following the beginning of the,⁷⁰⁸ the degree of violence employed in the West Bank during the operations in Gaza, has been sustained since 18 January.⁷⁰⁹ Reports from non-governmental organizations confirm this information.⁷¹⁰

A. Settler violence in the West Bank in the period preceding the Israeli military operations in Gaza

1384. In early December 2008, Israeli settlers in the city of Hebron rioted and perpetrated acts of violence against the local Palestinian population. Although Israel, as the occupying power, has the responsibility to maintain public order and safety in the occupied territory,⁷¹¹ the Israeli police did not intervene to protect Palestinians.⁷¹² Settler violence is a regular occurrence, targeting primarily Palestinian civilians and their property but also, on occasion, Israeli soldiers.⁷¹³ According to the Office for the Coordination of Humanitarian Affairs, “a root cause

⁷⁰⁶ Office for the Coordination of Humanitarian Affairs Special Focus: “Unprotected: Israeli settler violence against Palestinian civilians and their property”, December 2008. In its reply to the Mission (5 August 2009), the Palestinian Authority reported 58 acts of violence perpetrated by settlers on Palestinian civilians from 16 November 2008 to 15 December 2008, compared to a monthly average of 26 reported incidents in the year to date..

⁷⁰⁷ The NGO Al-Haq reported another particularly disturbing case of “what appears to be a willful killing” of a farmer from Hebron on 17 January 2009. According to medical personnel who were asked to collect his body from the Israeli soldiers by whom he had been detained, the farmer appeared to have been shot at point blank in the stomach while seated. See “A vicious reminder of occupation in the West Bank: Israeli soldiers Kill Palestinian farmer in Hebron”. Al-Haq press release, 17 January 2009.

⁷⁰⁸ Mission interview with Al-Haq, 2 July 2009 (six deaths were recorded by Al-Haq). See also Weekly Protection of Civilians reports of the Office for the Coordination of Humanitarian Affairs for the relevant period; the communication received by the Mission from the Palestinian Authority, which reported 30 injuries by shooting from 27 December 2008 to 18 January 2009; the statements of Mohamed Srour and Jonathan Pollak at the public hearings in Geneva, 6 July 2009; and B’Tselem press release of 18 June 2009 “Prohibit live ammunition in circumstances that are not life-threatening in the West Bank”.

⁷⁰⁹ Mission meetings with B’Tselem on 3 July 2009 and Al-Haq on 2 July 2009.

⁷¹⁰ B’Tselem reported an increase in the number of beatings, and referred to some particularly serious cases, including that of an elderly shepherdess whose arm was broken by border police on 11 March 2009. “Border police break arm of Halimeh a-Shawamreh, near the Separation Barrier”, Deir al-‘Asal al-Foqa, March 2009”.

⁷¹¹ The Palestinian Authority is not allowed to enter the part of the Old City of Hebron known as “H2” as a result of the Protocol Concerning the Redeployment in Hebron of January 1997.. With regard to the general situation in Hebron see www.btselem.org/English/Hebron/.

⁷¹² “Al-Haq calls for immediate measures to stop settler violence in Hebron and throughout the Occupied Palestinian Territory”, Al-Haq urgent release, 5 December 2005. In its reply to the Mission, the Palestinian Authority reported 335 settler attacks from 19 May 2008 to 17 July 2009.

⁷¹³ In 2008, the Office for the Coordination of Humanitarian Affairs recorded 290 incidents of settler violence, resulting in 131 Palestinian deaths, a substantial rise over previous years. Most incidents reported involved groups of

of the phenomenon is Israel's decade-long policy of facilitating and encouraging the settling of its citizens inside occupied Palestinian territory, defined as transfer of population and prohibited by international humanitarian law."⁷¹⁴ Israeli media attribute the increase in settler violence to the settler movement which became increasingly radicalized after the Gaza Disengagement in August 2005.⁷¹⁵

1385. According to various sources,⁷¹⁶ rioting erupted in Hebron on 4 December 2008 after the evacuation by the Israeli security forces of Israeli settlers from the Rajabi family home in the old city of Hebron. United Nations sources reported that, at first, clashes erupted between settlers and Israeli security forces, causing injuries on both sides; afterwards, "violence continued in Hebron city. Groups of settlers threw stones at Palestinian houses and set fire to vehicles, agricultural fields, houses and the contents of one mosque. Settlers also attempted to force entry into Palestinian homes."⁷¹⁷ One incident in which Israeli settler Ze'ev Braude shot and injured three members of the al-Matariyeh family was filmed and broadcast by the international media.⁷¹⁸

1386. The wave of violence continued for days.⁷¹⁹ Palestinian hospitals reported 17 injuries during the period, including five bullet wounds.⁷²⁰

settlers attacking vulnerable targets (children, women and the elderly) mainly in the Hebron and Nablus areas. In January 2007, B'Tselem launched a camera distribution and video advocacy project focusing on the Occupied Palestinian Territory. The project aims at providing "Palestinians living in high-conflict areas with video cameras, with the goal of bringing the reality of their lives under occupation to the attention of the Israeli and international public, exposing and seeking redress for violations of human rights." The B'Tselem project has resulted in footage of these kinds of attacks being publicized, such as the attack by settlers on herders in Susya, June 2008..

⁷¹⁴ Office for the Coordination of Humanitarian Affairs Special Focus: "Unprotected: Israeli settler violence against Palestinian civilians and their property", December 2008.

⁷¹⁵ See also, "Israel's religious right and the question of settlements", International Crisis Group Middle East Report N°89 – 20 July 2009.

⁷¹⁶ "Settler violence after evacuation of Occupied House", Temporary International Presence, Hebron, Press Release; "Israel braces for settler violence in wake of Hebron house evacuation", *Ha'aretz*, 5 December 2008, and "Dozens injured as Israeli army removes settlers from Hebron house", Maan News Net, 4 December 2008.

⁷¹⁷ Office for the Coordination of Humanitarian Affairs Special Focus: "Unprotected: Israeli settler violence against Palestinian civilians and their property", December 2008.

⁷¹⁸ For example, "Settlers filmed shooting at Palestinians turn themselves in", *Ha'aretz*, 7 December 2008. The settler was eventually released and not charged or prosecuted.

⁷¹⁹ According to the Office for the Coordination of Humanitarian Affairs, "settler violence quickly spread to other West Bank areas (...) groups of settlers threw stones at Palestinian vehicles in more than twelve locations on the day of the evacuation and attacked Palestinian communities, setting fire to Palestinian property and land, cutting down olive trees, slashing vehicle tires and vandalizing other property", Office for the Coordination of Humanitarian Affairs Special Focus: "Unprotected: Israeli settler violence against Palestinian civilians and their property", December 2008., See also the Alternative Information Centre Settler Violence report for November/December 2008 available at www.alternativenews.org/publications/164-settler-violence-reports/1829-settler-violence-report-november-december-2008-.html and *Ha'aretz*: www.haaretz.com/hasen/spages/1043794.html

⁷²⁰ "IDF declares Hebron area a closed Military Zone after settler rampage", *Ha'aretz*, 4 December 2008. <http://>

1387. The use of force against Gaza solidarity demonstrations in the West Bank during the Israeli operations in Gaza

1388. There was a significant increase in the use of force by Israeli security forces during demonstrations in the West Bank after the start of the Israeli operations in Gaza. The degree of force used against protests during the previous year had already been high, including during protests against the Wall in places such as Jayyous, al-Ma'sara, Bi'lin and Ni'lin.⁷²¹ The villages where demonstrations are regularly held have lost or stand to lose much of their land to Israeli settlements and the Wall. A vibrant grass-roots, non-violent resistance movement has evolved that has attracted support from Israeli and international activists. New tactics and weapons used by the Israeli security forces aimed at suppressing the popular movement⁷²² have resulted in deaths and injuries. For example, in July 2008, Israeli border police killed two children, Ahmad Musa, aged 10,⁷²³ and Yusef Amara, aged 17, both of whom were shot in the head.⁷²⁴

1389. Another cause of concern for the Mission were further allegations of the use of unnecessary, lethal force by Israeli security forces. At the public hearing in Geneva of 6 July 2009, two witnesses, Mohamed Srour and Jonathan Pollak, described the fatal shooting, on 28 December 2008, of two young men from the village of Ni'lin during a protest against the Israeli operations in Gaza. Mr Srour was himself shot in the leg during the same protest.⁷²⁵

1390. At the hearing on 6 July, Mr Srour stated that as a result of this war, many people all around the West Bank, but also in his village Ni'lin, wanted to demonstrate and express their solidarity with the people of Gaza. The demonstration included important participation of people from the different solidarity movements, from Israel as well from the international community.” The two witnesses spoke of the atmosphere that they had encountered in the confrontation with

⁷²¹ “Repression Allowed, Resistance Denied: Israel’s suppression of the popular movement against the Apartheid Wall of Annexation”, Addameer and Stop the Wall report, July 2009. For a list of the 19 people including 11 children killed in anti-wall demonstrations up until July 2009, see <http://palsolidarity.org/2009/06/7647> .

⁷²² See Ni'lin Factsheet at <http://stopthewall.org/factsheets/1669.shtml>

⁷²³ 29 July 2008: Killing of Ahmed Husam Yusef Mousa (10) in Ni'lin. According to Al-Haq “Ahmad Husam Musa, a ten-year-old child, hid in an olive grove. A member of the Israeli Border Police saw Ahmad Musa, left the Border Police vehicle, aimed his rifle and fired a live bullet. Shot from a distance of 50 metres, the bullet entered Ahmad Musa’s forehead and exited through the back of his skull. While two of the demonstration’s organisers attempted to carry Ahmad Musa to safety, they were fired upon by the Border Police. They succeeded in carrying the child to safety, but he was already dead”, “Right to life of Palestinian children disregarded in Ni'lin as Israel’s policy of wilful killing of civilians continues”, Al-Haq press release, 7 August 2008.

⁷²⁴ “Right to life of Palestinian children disregarded in Ni'lin as Israel’s policy of wilful killing of civilians continues”, Al-Haq press release, 7 August 2008. See also “Repression Allowed, Resistance Denied: Israel’s suppression of the popular movement against the Apartheid Wall of Annexation”, Addameer and Stop the Wall report, July 2009. To illustrate the use of unusual weapons which, the report states, is aimed at creating lasting injury, on 13 June 2008, Ibrahim Burnat (aged 26) was shot three times in the thigh while in the weekly anti-Wall demonstration in Bi'lin. According to his medical report, he was shot with an explosive bullet. The report also states that, in the four villages mentioned, 1,566 people had been injured while six people had been killed at protests.

⁷²⁵ The testimony of Mr. Srour and Mr. Pollak, including a video of the events can be viewed at <http://webcast.un.org/ramgen/ondemand/conferences/unhrc/gaza/gaza090706pm1-eng.rm?start=00:35:37&end=01:41:24>.

the soldiers and border police, which was markedly different from the situation before the operations in Gaza. Mr. Pollak stated:

The atmosphere of the incident, and during and after the start of the war generally was that all checks and balances had been removed. The soldiers were saying things related to the Gaza war, taunting things like, "It's a shame we're not in Gaza killing Arabs." There seemed to be an enthusiasm to confront and the amount of live ammunition used shows this. The behaviour of the soldiers has escalated immensely – not that in the past the army was so gentle.

1391. According to the witnesses, the main demonstration had ended when the army and border police used tear gas and stun grenades to disperse the crowd. The next sequence of events took place on the edge of the village, at a considerable distance from the site of the construction of the Wall. The two young men killed were part of a small group of demonstrators, some of whom had thrown stones at the soldiers. In video footage, four or five soldiers appeared to be casually walking around and not seemingly threatened. No tear gas was used at that stage. Dozens of rounds of live ammunition were fired in the direction of the group of young men, hitting three of them within minutes of each other. Mohamed Khawaja was shot in the forehead; Arafat Khawaja, who had turned to run away, was shot in the back, and Mohammed Srour was shot in the leg. Subsequently an ambulance was prevented from reaching the victims, who had to be carried some distance and were eventually put onto a pick-up truck, at which the army fired tear gas. Arafat Khawaja was pronounced dead on arrival at the hospital and Mohamed Khawaja passed away a few days later.

1392. Two Palestinians were killed during other protests against the military operations in Gaza. On 4 January, Mufid Walwel was shot dead during a demonstration near Qalqilya, where the Wall is to be built. In Hebron, on 16 January, Mus'ab Da'na died after being shot in the head. According to an NGO report, the Israeli border police are believed to have been responsible for both incidents.⁷²⁶

1393. The Mission has asked the Government of Israel to explain the increased use of live ammunitions during demonstrations in the West Bank, but has received no reply.

B. The increased level of force since the end of the operations in Gaza

1394. Since the end of the December-January military operations in Gaza, the increased level of force has reportedly continued against demonstrators and in other situations. The Mission heard from an eye witness, how, on 13 March 2009, United States citizen Tristan Anderson was hit, while participating in an anti-Wall demonstration in Ni'lin, with a high velocity tear gas canister in the forehead. According to the witness, Mr. Anderson was taking pictures of Israeli soldiers and border police attacking the demonstrators. A high velocity long-range tear gas canister was used at short range, crushing his forehead. As he laid on the ground, the border police, who would have been able to see him falling down and lying on the ground, continued to shoot tear gas in his direction. Video footage received by the Mission showed Palestinian paramedics in bright orange uniforms putting Mr. Anderson's body on to a stretcher, a tear gas canister landing

⁷²⁶ Al-Haq affidavit No. 4667/2009 and 4608/2009.

directly beside them and a large cloud of gas developing.⁷²⁷ According to the witness, Israeli forces delayed Mr. Anderson's transfer from the Palestinian ambulance to an Israeli ambulance at the checkpoint before entering Israel.⁷²⁸ At 1 August 2009, Mr. Anderson remains in a critical condition in an Israeli hospital.

1395. On 17 April 2009, in Bi'lin, Bassem Abu Rahma was killed by a high velocity tear gas canister which was shot at his chest from a distance of 30 to 40 metres. The killing, which took place during a peaceful demonstration against the Wall, was filmed.⁷²⁹ The footage shows Mr. Abu Rahma standing on a small hill, clearly visible and not armed or otherwise posing a threat.

1396. Eye witnesses reported to the Mission that they felt that it had become almost a sport for snipers, who now routinely enter villages and occupy roofs of buildings, to aim at protesters in a manner that is inappropriate in the context of crowd control, with apparent disregard for the lives or limbs of the persons they hit.⁷³⁰

1397. On 5 June 2009, five people were shot by snipers in a demonstration in Ni'lin, of whom one, Aqel Srour, was killed, and another, a 15 year-old boy, was shot in the abdomen and will be permanently disabled.⁷³¹ Al-Haq described the shooting of Srour, who according to Al-Haq had run to assist the boy who was shot in the abdomen, as a case of "wilful killing".⁷³²

1398. The weapons used by the security forces are also a cause for concern. Many of the injuries to protesters during anti-Wall demonstrations in recent months (in Ni'lin, Bi'lin, Jayyous, Bitunya and Budrus) and the death of Aqel Srour and that of a 14-year-old who was killed in Hebron in February⁷³³ were reportedly inflicted by a .22 caliber Ruger rifle. B'Tselem has protested against the use of this weapon as a means of crowd control on the grounds that it is potentially lethal.⁷³⁴ In its response to B'Tselem's letter of 26 February, the Israeli Judge Advocate General wrote, that "the open-fire regulations applying to the .22 ammunition are

⁷²⁷ See <http://palsolidarity.org/2009/03/5324>.

⁷²⁸ Mission telephone interview with Ulrika Karlsson, 5 August 2009. Israel does not allow Palestinian ambulances to enter Israel. The witness also reported having been shot herself in January, in the calf, with a .22 bullet shot aimed at her, while moments later the only other person near her was shot in the foot. See also the Democracy Now news report "US Consul General says awaiting Israeli Report on IDF shooting of American citizen", 16 March 2009.

⁷²⁹ "Our peaceful village should no longer be the graveyard of our youth", 17 April 2009, at the website www.bilin-village.org/english/articles/press-and-independent-media/Our-Peaceful-Towns-Should-No-Longer-Be-The-Graveyard-Of-Our-Youth.

⁷³⁰ Mission telephone interview with Ulrika Karlsson on 5 August 2009 and direct interview with Jonathan Pollak on 6 July 2009.

⁷³¹ Mission interview with Jonathan Pollak and Mohamed Srour on 6 July 2009 and telephone interview with Ulrika Karlsson on 5 August 2009. See also Addameer report.

⁷³² "The willful killing of Aqel Srour following a Ni'lin demonstration against the Annexation Wall: a deplorable illustration of impunity's slippery slope", Al-Haq press release, 25 June 2009.

⁷³³ "Prohibit live ammunition in circumstances that are not life-threatening in the West Bank", B'Tselem, Press Release, 18 June 2009.

⁷³⁴ Correspondence received by the Mission, available at www.btselem.org/English/Press_Releases/20090709.asp.

comparable, in general, to the open-fire rules applying to “ordinary” ammunition” and that “following your letter, we directed that the forces again be instructed with respect to the binding Open-Fire Regulations that apply to use of the Ruger rifle.”⁷³⁵ However, from the nature of the killing of Aqel Srour and the injuries sustained by protesters in the months following the Judge Advocate General’s response, it is clear that the use of the Ruger rifle has not been tempered.⁷³⁶

1399. The Israeli armed forces’ open-fire regulations for the West Bank provide that different rules apply in situations where Israeli citizens are present, as compared to situations where there are only Palestinians present.⁷³⁷ For example, they provide for the use of live ammunitions under certain conditions, in the case of violent “disturbances”⁷³⁸ near the Wall or in the nearby area. Where Israelis participate, however, the use of live ammunitions is forbidden. Similarly different provisions are found with regard to the use of warning shots and rubber bullets. Witnesses indicated to the Mission, however, that the army no longer distinguishes between Palestinians and their Israeli and international supporters, and uses a greater degree of force against all.⁷³⁹

1400. The Mission asked the Government of Israel about the differences in open fire regulations applied in the Occupied Palestinian Territory in situations in which Israeli citizens are present as opposed to situations where none are present, but has received no reply.

1401. In a recent court hearing, Colonel Virob, an Israeli Brigade Commander in the West Bank, defended the routine use of force in achieving the goals of the occupation.⁷⁴⁰ According to the Association for Civil Rights in Israel, when Colonel Virob was asked about using physical force during an investigation against people who are not suspects, he stated that “using violence and aggression to prevent the situation from escalating and the need to use even more violence is not only allowed but sometimes imperative (...), giving a blow, a push, in a situation even with people who are not involved in an operational situation, if it can advance the mission, is certainly possible.” He added that “the way you use violence should also be appropriate (...), a slap, sometimes a hit to the back of the neck or the chest, in cases that there is friction, a reaction from the Palestinian side, sometimes a knee jab or strangulation to calm someone down is reasonable.”⁷⁴¹

1402. The Mission considers with concern reports of gratuitous abuse by Israeli soldiers. It heard testimonies in a video footage shown on Israeli television⁷⁴² that described a search and

⁷³⁵ Letter from Major Yehoshua Gortler, Legal Assistant to the Judge Advocate General to B’Tselem, dated 15 March 2009.

⁷³⁶ See also B’Tselem letter to Brig. Gen. Avichai Mandelblit, Judge Advocate General, 17 June 2009.

⁷³⁷ See *Open Fire Regulations Booklet for the Soldier in Judea and Samaria region*, issued by the Headquarters of the Central Command in July 2006. See “Open fire regulations for Palestinians only” (in Hebrew), *Maariv* at www.nrg.co.il/online/1/ART1/590/452.html.

⁷³⁸ Situations of disturbances are defined as those that may be the result of demonstrations, marches, and similar events.

⁷³⁹ Mission interview with Jonathan Pollak, 6 July 2009.

⁷⁴⁰ “Truth walks into a Jaffa court”, by Michael Sfar, *Yesh Din*, 10 June 2009.

⁷⁴¹ Association for Civil Rights in Israel Press Release, 24 June 2009.

⁷⁴² Available at <http://news.nana10.co.il/Article/?ArticleID=641918&TypeID=1&sid=126>.

detain operation by the Kfir brigade in the West Bank village of Haris. Hundreds of troops had participated in a nocturnal raid on a village aimed at finding boys who were thought to have thrown stones at settlers' cars some days previously. On 9 June 2009, *The Independent* reported on the operation, quoting soldiers of the Kfir Brigade involved. One was quoted as saying he saw many soldiers "just knee [Palestinians] because it's boring, because you stand there ten hours, you're not doing anything, so they beat people up."⁷⁴³ A second soldier described a "fanatical atmosphere" during the search operations. "We would go into a house and turn the whole thing upside down", he recalled, but no weapons were found. "They confiscated kitchen knives." The first soldier stated that numerous soldiers were involved. "There were a lot of reservists that participated, and they totally had a celebration on the Palestinians: curses, humiliation, pulling hair and ears, kicks, slaps. These things were the norm." He described the beating of a child:

The soldiers who took [detainees] to the toilet just exploded [over] them with beatings; cursed them with no reason. When they took one Arab to the toilet so that he could urinate, one of them gave him a slap that brought him to the ground. He had been handcuffed from behind with a nylon restraint and blindfolded. He wasn't insolent, he didn't do anything to get on anyone's nerves ... [it was] just because he's an Arab. He was something like 15 years old.

1403. He stated that the incidents in the toilet were the "extreme" and added that the beatings did not draw blood. They were "dry beatings, but it's still a beating".⁷⁴⁴

1404. Video footage uploaded to the internet by Israeli border police, and filed under "comedy" offers an insight into how wanton abuse is perceived by members of the security forces themselves.⁷⁴⁵ The Mission has received reports of other, similar occurrences,⁷⁴⁶ giving rise to the concern that an increased level of force and the dehumanization have become normalized in the practice of security forces.

C. The role of impunity

1405. Several witnesses told the Mission that, during the operations in Gaza, the sense in the West Bank was one of a "free for all", where any behavior was permitted for Israeli forces. An even greater use of force than that used in the West Bank could be attributed to a change in atmosphere or attitude towards the "other" during time of war. There are indications that this shift in attitude was also apparent during the war in Lebanon in 2006.⁷⁴⁷ The concept of what is

⁷⁴³ "Bound, Blindfolded and Beaten, By Israeli Troops", *The Independent*, 9 June 2009.

⁷⁴⁴ Ibid.

⁷⁴⁵ "Border Police upload footage of their abuse of Palestinians to YouTube", *Ha'aretz*, 19 June 2009. The article reports how in the footage an Arab youth slaps himself while a voice is heard instructing him to say "I love you, Border Police," and "I will f**k you, Palestine," in Arabic, to the raucous laughter of those present, all border police.

⁷⁴⁶ For example, "Soldiers come across Palestinians and detain and abuse them for hours, Dura, April 2009", B'Tselem.

⁷⁴⁷ Mission telephone interview with Sarit Michael, 5 August 2009. In the video footage of the shooting of an Israeli demonstrator during the war in Lebanon in 2006, a border police member can be heard saying, after the order to

considered “normal” and “acceptable” conduct risks shifting to even higher levels, if those in positions of responsibility do not respond appropriately. In the face of the recently increase in violence by the Israeli security forces in the West Bank, B’Tselem stated that condemnations by Ministers and other officials

remain solely declarative. Security forces, meanwhile, misusing their power, continue to abuse and beat Palestinians, among them, minors (...). If a message is sent to security forces, it is that even if the establishment does not accept acts of violence, it will not take measures against those who commit them. The effect of such a message is that the lives and dignity of Palestinians are meaningless and that security forces can continue, pursuant to the function they serve, to abuse, humiliate, and beat Palestinians with whom they come into contact.⁷⁴⁸

1406. In the past, every case in which a Palestinian not participating in hostilities was killed was subject to criminal investigation. This policy changed in 2000. Criminal investigations are now the exception,⁷⁴⁹ these cases are now simply discussed in an “operational debriefing” by the military itself.⁷⁵⁰ In 2003, the Association for Civil Rights in Israel and B’Tselem filed a petition to reverse this policy change, demanding that every civilian death be independently investigated. The petition included demands for investigations into individual deaths as well as the principle question relating to the overall policy. The former were dismissed, while the principle question is still pending.⁷⁵¹

1407. Yesh Din reports that over 90 per cent of investigations into settler violence are closed without an “indictment being filed”.⁷⁵² B’Tselem reported in June 2009 that the charges against Mr Braude, the Hebron settler who was filmed shooting and injuring three Palestinians in December 2009, would be dropped, as the court had ordered that “secret evidence” against him be disclosed, and the potential public harm of this disclosure would outweigh the harm done by a person, documented as having committed a violent crime, being released back into society.⁷⁵³

open fire was given, “now we’re in Lebanon”. When passing by the injured demonstrator lying on the ground bleeding from his head injury, the commander ignored the calls by a woman to get an ambulance for the injured Israeli. He answers that there are many Israelis injured in Lebanon, too. As shown in the footage, the demonstrator was shot at close range from behind, as he was walking in front of the soldiers. See www.liveleak.com/view?i=8dba196f36.

⁷⁴⁸ “Beating and Abuse”, B’Tselem.

⁷⁴⁹ Mission telephone interview with the Association for Civil Rights in Israel, 29 July 2009.

⁷⁵⁰ Mission interview with Daniel Reisner, 6 July 2009. See also “Response to the Attorney-General's Refusal Concerning a Gaza Probe” at www.acri.org.il/eng/story.aspx?id=635 and chapter XXVIII below.

⁷⁵¹ See the Association for Civil Rights in Israel press release at www.acri.org.il/eng/Story.aspx?id=216. Text of the petition is available at www.btselem.org/english/Legal_Documents/HC9594_03_Investigations_Appeal.rtf.

⁷⁵² “Law Enforcement upon Israeli Civilians in the OPT”, Yesh Din data sheet, July 2008.

⁷⁵³ B’Tselem compares this to the admission in judicial proceedings of secret evidence in the prosecution of Palestinians (see also section below). See “8 June ’09: Bring Ze’ev Braude, the shooter from Hebron, to justice” B’Tselem press release.

1408. In July 2009, an Israeli activist who had been shot in the head in 2006 by the Israeli border police was awarded compensation for his injury in an out of court settlement. To date, the commander who ordered the shooting has not been subject to criminal investigation.⁷⁵⁴

1409. On 7 July 2008, Ashraf Abu-Rahma was shot at short range while blindfolded and handcuffed. The incident was filmed and widely broadcast.⁷⁵⁵ When the Israeli Military Advocate General charged the officer who ordered the shooting with “conduct unbecoming”, Israeli international law Professor Orna Ben-Naftali stated that “the decision (was) indicative of a policy of tolerance towards violence against non-violent civilian protests against the construction of the Separation Wall”. She added that “the implication of such a policy is twofold: first, it might transform ‘conduct unbecoming’ – which as a matter of law is a war crime – into a crime against humanity; second, it may well be construed as an invitation to the international community to intervene through the exercise of universal jurisdiction.”⁷⁵⁶

D. Legal analysis and conclusions

1410. Israel has obligations to Palestinians in the West Bank under both international humanitarian law and international human rights law. With regard to the former, the obligations flow from the status of Israel as the occupying power and the consequent obligations concerning protected persons. With regard to the latter, specific human rights obligations to all individuals in the West Bank arise from both customary law and the obligations assumed by Israel under the various human rights conventions that it has ratified. The obligations under both bodies of law are complementary and mutually reinforcing, and provide a clear framework against which the facts outlined above may be analysed (see chapter IV above). With regard to the issues discussed in the present chapter, the most relevant obligations are set out below.

1. Violence by settlers against Palestinians in the West Bank

1411. Israel has an obligation under customary law, as reflected in article 43 of the Hague Regulations, to ensure public order and safety in the West Bank:

Article 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

⁷⁵⁴ Mission telephone interview with the Association for Civil Rights in Israel, 29 July 2009.

⁷⁵⁵ “Soldiers fires ‘rubber’ bullet at handcuffed, blindfolded Palestinian”, B’Tselem, July 2008, at www.btselem.org/English/Video/20080707_Nilin_Shooting.asp.

⁷⁵⁶ “Whose ‘conduct unbecoming’? The shooting of a handcuffed, blindfolded Palestinian demonstrator, by Orna Ben-Naftali and Noam Zamir, *Journal of International Criminal Justice*, 3 March 2009. Recently, the Israeli Military Advocate General’s decision to charge commander Omri Bomberg and his subordinate with “conduct unbecoming” was overturned, the second time in recent decades that a decision by the Military Advocate General has been overturned. The first being related to the demotion of General Tamir, who let his 14-year-old son drive his military vehicle, see “Neither an officer nor a gentleman”, *Ha’aretz*, 31 July 2008; and “Israeli High Court of Justice rules against Judge Advocate General’s ‘extremely unreasonable’ decision”, B’Tselem press release, 1 July 2009.

1412. This obligation is supported by the obligation by Israel under article 27 of the Fourth Geneva Convention (set out in chapter XV above) to ensure that Palestinians, as protected persons, are protected against all acts or threats of violence.

1413. Israel also has obligations under international human rights law to protect Palestinians from violence by private individuals, and to investigate and punish acts of violence through the application of criminal law, without discrimination.

1414. Palestinians thus have “the right to security of the person” under article 9 (1) of the International Covenant on Civil and Political Rights, which the Human Rights Committee has read to mean that the State has an obligation to take reasonable and appropriate measures to protect individuals from threats to the life of persons under their jurisdiction, including threats from private actors.⁷⁵⁷ Under article 2 of the Covenant, Israel has an obligation “to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant” and to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy”. In applying the law, Israel has an obligation under article 26 of the Covenant to ensure that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law”. Finally, insofar as acts of violence amounting to cruel, inhuman or degrading treatment are perpetrated by private individuals with the acquiescence of public officials (including security forces), Israel has an obligation under article 16 of the Convention against Torture to prevent such acts:

Article 16 (1). Each State party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment ..., when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Conclusions

1415. With regard to violent acts perpetrated by settlers against Palestinians, such as those relating to the cases of December 2008 in Hebron reported above, the Mission concludes, on the basis of the reports received and the video footage viewed, that Israel has failed to fulfil its obligations to protect the Palestinians from violence by private individuals under both international human rights law and international humanitarian law. In some instances, evidence of the acquiescence of the security forces in this violence could amount to a violation of the relevant obligations relating to cruel, inhuman or degrading treatment.

1416. Insofar as this acquiescence only occurs in respect of violence against Palestinians by settlers, and not vice-versa, there is a strong argument that the behaviour of the security forces is in breach of the obligations of Israel to not discriminate on the basis of national origin under the International Covenant on Civil and Political Rights.

1417. The facts also suggest a violation of article 26 of the International Covenant on Civil and Political Rights guaranteeing equal protection of the law, particularly insofar as there is a failure to investigate Palestinians’ allegations of assault by settlers.

⁷⁵⁷ For example, *William Eduardo Delgado Paez v. Colombia*, Communication 195/1985, views adopted 12 July 1990.

1418. Finally, the failure by Israel to adequately investigate allegations of the failure of the State to protect Palestinians, and of the acquiescence of state actors before the violence of private actors and thus to provide an effective remedy for those suffering human rights violations also place Israel in violation of article 2 of the International Covenant on Civil and Political Rights.

2. Actions by Israel with regard to Gaza solidarity demonstrations

1419. All individuals in the West Bank enjoy the right to freedom of expression provided in article 19 of the International Covenant on Civil and Political Rights:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

1420. Israel has an obligation under article 21 of the International Covenant on Civil and Political Rights to recognize the right of peaceful assembly. While restrictions may be placed on the exercise of this right, they must be “in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others”. In accordance with article 2 of the Covenant, any restrictions on the right of peaceful assembly can only be imposed “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

1421. In dealing with Palestinian civilians, including in the context of public demonstrations, Israel has an obligation under articles 2 and 6 of the International Covenant on Civil and Political Rights to ensure, without distinction of any kind, that no one is arbitrarily deprived of their life:

Article 2 (a). Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 6 (1). Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

1422. A further obligation on Israel is to ensure that no one is subject to torture or to cruel, inhuman or degrading treatment or punishment (article 7 of the International Covenant on Civil and Political Rights and articles 2 and 16 of the Convention against Torture), without discrimination.

1423. The Fourth Geneva Convention places a number of obligations on Israel relevant to the treatment of Palestinians participating in demonstrations. Under article 27, Israel must ensure that Palestinians as protected persons are “at all times ... humanely treated, and ... protected, especially against all acts of violence or threats thereof and against insults and public curiosity”. Treatment by Israel as the occupier must be “without any adverse distinction based, in particular, on race, religion or political opinion”. From article 32 derives the prohibition of “taking any

measure of such a character as to cause the physical suffering or extermination of protected persons”.

1424. Finally, Israel has obligations under articles 146 and 147, as set out in chapter IV, which include an obligation to:

bring before its courts persons alleged to have committed, or to have ordered to be committed ... grave breaches of the Fourth Geneva Convention, including wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

1425. The content of the international human rights obligations set out above has been clarified through a number of other sources, including the jurisprudence of the human rights treaty bodies (in this, particularly the Human Rights Committee), and various standards adopted under the auspices of the United Nations. The most relevant in respect of the facts outlined above are set out below.

1426. The permissible use of force by those exercising police powers is narrowly construed under international human rights law. The Code of Conduct for Law Enforcement Officials,⁷⁵⁸ states that law enforcement officials (which include military authorities when exercising police powers) “may use force only when strictly necessary and to the extent required for the performance of their duty” (art. 3). Under the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials:⁷⁵⁹

law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.

1427. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials are obliged, inter alia, to “ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment”.

1428. Insofar as the events involve individuals who are human rights defenders, the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders) is also relevant,⁷⁶⁰ in particular article 5 which affirms the right of

⁷⁵⁸ General Assembly resolution 34/169.

⁷⁵⁹ Adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990.

⁷⁶⁰ General Assembly resolution, 53/144, annex. Israel joined consensus when the Declaration was adopted by the Assembly.

everyone “to meet or assemble peacefully” for the purpose of promoting and protecting human rights and fundamental freedoms.

Conclusions

1429. The dispersal by Israeli security forces of demonstrations in the West Bank is *prima facie* in violation of the rights to freedom of expression and to peaceful assembly. Insofar as the protesters were protesting against the violation of human rights in Gaza, the activities of the security forces in dispersing demonstrations ran counter to the provisions of the Declaration on Human Rights Defenders.

1430. Regardless of whether the facts indicate that the above mentioned rights could be permissibly limited under the terms of the International Covenant on Civil and Political Rights, the methods and means of dispersal are questionable. The use of force described to the Mission against peaceful demonstrations is clearly prohibited in such situations, in particular the lethal use of tear gas canisters against demonstrators, of live ammunition (including .22 ammunition), and of snipers. It should be emphasized that the norms relating to the use of force by law enforcement officers outlined above, continue to apply even when the demonstrations are no longer peaceful, such as when stones are thrown, such as in the case of the Ni’lin demonstration of 28 December. The situation described by the witnesses to the killings in Ni’lin suggests that firearms were used when there was no threat to the life of the Israeli security forces or others under their protection. According to the witnesses, both the deceased were shot in the upper body and one of them in the back.

1431. On the basis of the facts obtained, the Mission finds that the use of firearms resulting in the death of demonstrators constitutes a violation of article 6 of the International Covenant on Civil and Political Rights as an arbitrary deprivation of life. Reports that Israeli security forces delayed the provision of medical aid to the injured in at least two demonstrations also suggest that violations occurred under the Fourth Geneva Convention and Principle 5 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

1432. The impermissible use of force that resulted in injury rather than death is in clear violation of a number of standards, including articles 7 and 9 of the International Covenant on Civil and Political Rights.

1433. The use of snipers and lethal ammunitions against demonstrators in situations where there is no threat to soldiers’ lives or to the lives of others under their protection appears to indicate an intention, or at least recklessness, to cause harm to civilians, which may amount to wilful killing. Several of the incidents reported to the Mission raise concerns in this regard.

1434. The discrimination in the open-fire regulations for security forces dealing with demonstrations based on the presence of persons of a particular nationality, violates the principle of non-discrimination of article 2 of the International Covenant on Civil and Political Rights and article 27 of the Fourth Geneva Convention. These violations are all the more serious insofar as the regulations reflect a State policy based on discrimination.

3. Violence by Israeli security forces outside the context of demonstrations

1435. Reports on incidents such as the raid on Haris of March 2009 and the types of acts described by Colonel Virob, as well as those described in affidavits reviewed by the Mission raise concerns with regard to their compliance with article 32 of the Fourth Geneva Convention, article 7 of the International Covenant on Civil and Political Rights and article 16 of the Convention against Torture on the prevention of cruel, inhuman or degrading treatment or punishment.

4. Accountability

1436. The Mission emphasizes that effective investigation and, if appropriate, prosecution resulting from acts by its agents or by third parties involving deprivation of life, serious injuries and torture or inhuman or degrading treatment or punishment, and other possible violations of international humanitarian law and human rights law, is an obligation of the State of Israel. The Mission is concerned that the facts before it point to a failure by Israel to do so with regard to acts committed against Palestinians as reported above.

5. Conclusions

1437. The Mission is alarmed at both the reported increase in settler violence over the past year and the failure of the Israeli security forces to prevent settler attacks against Palestinian civilians and their property.

1438. The Mission is also gravely concerned at the increased use of force, including the use of lethal force, in response to demonstrations, and at the generalized violence of security forces against Palestinians living under occupation in the West Bank. Of particular concern is the apparent and systematic lack of accountability for acts of violence committed by Israeli security forces against Palestinian civilians.

1439. While the filming of incidents has led to the exposure of particular grave incidents of violence, the Mission is also concerned about violence that may have occurred out of sight gone unreported.

1440. In the opinion of the Mission, a line has been crossed, what is fallaciously considered acceptable “wartime behaviour” has become the norm. Public support for a more hard-line attitude towards Palestinians generally,⁷⁶¹ lack of public censure and lack of accountability⁷⁶² all combine to increase the already critical level of violence against the protected population.

⁷⁶¹ As stated by a number of interviewees, such as Sarit Michaeli during a telephone interview, 5 August 2009.

⁷⁶² Michael Sfar, a prominent Israeli human rights lawyer, concludes in an article entitled “The price of internal legal opposition to human rights abuses”, in which he reviews 35 years of human rights practice in Israel, “by lodging petitions to the Israeli High Court, human rights lawyers act as public relations agents of the occupation by promoting the notion that Palestinian residents have a recourse to justice.”

XXI. DETENTION OF PALESTINIANS IN ISRAELI PRISONS

1441. According to estimates, as at 1 June 2009, there were approximately 8,100 Palestinian “political prisoners” in detention in Israel, including 60 women and around 390 children.⁷⁶³ Most of these detainees are charged or convicted by the Israeli military court system that operates for Palestinians in the West Bank. The most common convictions are for stone-throwing. Being a “member of an illegal organization” is another common charge.⁷⁶⁴ All but one of the Israeli prisons holding Palestinians from the Occupied Palestinian Territory are located inside Israel.⁷⁶⁵

1442. As at June 2009, of all the Palestinians held by Israel for reasons related to the occupation, 512 were held without charge or trial, of whom 12 were held under the Israeli Unlawful Combatants Law and 500 as “administrative detainees”.^{766, 767}

1443. The military courts system has been specifically set up by Israel to deal with Palestinians from the Occupied Palestinian Territory, while Israeli citizens living or otherwise present in the West Bank, if arrested, are dealt with under the Israeli civilian legal system. The Palestinian Authority is not allowed to arrest or detain Israeli citizens.⁷⁶⁸

1444. It is estimated that during the past 43 years of occupation, approximately 700,000 Palestinian men, women and children have been detained under Israeli military orders.⁷⁶⁹ Israel argues that these detentions are necessary on grounds of security.

⁷⁶³ Estimates vary. The Mission is using figures provided by Addameer, Prisoners Support and Human Rights Association at 1 June 2009. Its General Director, Ms. Sahar Francis, explained at the public hearing in Geneva on 7 July 2009 that its statistics were based on monthly figures published by the Israeli prison authority and on its own monthly visits to detention facilities in Israel. The organization also attempted to collect direct information from the prisoners. Providing exact statistics was difficult as these figures changed daily, with new arrests and releases. She mentioned, for example, that in 2008, the Israeli military arrested more than 4,000 people, so the average was around 300 per day. Addameer defines as “political prisoners” those prisoners detained in relation with the occupation, as opposed to detainees suspected or convicted of crimes/offences unrelated to the occupation.

⁷⁶⁴ Ms. Sahar Francis, testimony at the public hearing, Geneva, 7 July 2009.

⁷⁶⁵ See “Yesh Din Petitions HCJ: Stop holding Palestinian detainees inside Israel. Yesh Din, along with the Association for Civil Rights in Israel (ACRI) and HaMoked: Center for the Defence of the Individual, filed a petition to the HCJ on March 25, 2009 demanding that prisoners and detainees who reside in the West Bank not be held in facilities within Israel, and that arraignment hearings for such detainees also not be held in courts outside the West Bank”. See also, for instance, *Backyard Proceedings...* See also <http://www.hamoked.org/>. See also Lisa Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (University of California Press, 2005).

⁷⁶⁶ Figures provided by Addameer for 1 June 2009.

⁷⁶⁷ The original military order dealing specifically with administrative detention is Military Order No. 1226. Subsequent amendments to it have each received different numbers. The most recent is: Order regarding Administrative Detentions (Temporary Order) [Combined version] (Judea and Samaria) (No. 1591), 2007. See also Addameer, “Administrative detention in the Occupied Palestinian Territory: A legal analysis report”, November 2008.

⁷⁶⁸ The Palestinian-Israeli Interim Agreement on the West Bank and Gaza Strip, annex IV, Protocol Concerning Legal Affairs, art. I.

⁷⁶⁹ A/HRC/7/17.

1445. Due process rights for Palestinians in the Israeli military court system are severely limited. Military Order No. 378, which is the main source regulating detention and trial, allows for a Palestinian detainee from the Occupied Palestinian Territory, including children as young as 12, to be held for up to eight days before being brought before a military judge (Israeli detainees must be brought before a judge within 48 hours). Moreover, Palestinian detainees can be held for up to 90 days without access to a lawyer (compared to 48 hours for Israeli detainees).⁷⁷⁰ Palestinian detainees can be held for up to 188 days before being charged (an Israeli detainee must be charged within 30 days).⁷⁷¹

1446. Accusations of torture and other ill-treatment during arrest, interrogation and detention are common, while the court system is criticized for the use of coerced evidence.⁷⁷² It is also alleged that complaints about the ill-treatment of detainees rarely lead to investigations or to prosecution, let alone conviction.⁷⁷³ The Israeli military court system treats Palestinian children as adults from the age of 16.⁷⁷⁴ Israeli citizens, however, are considered adults only from the age of 18.

1447. Palestinian prisoners are reportedly held in substandard detention facilities (for example, Ktziot prison houses prisoners in tents) with very limited access to health care and education.⁷⁷⁵ Detention inside Israel also means that many detainees do not receive family visits, as their relatives are prohibited from entering Israel (see chap. XXII).

1448. During the Israeli military operations in Gaza, scores of Gazans were detained by the Israeli armed forces. A portion of those were taken to prisons inside Israel, where some remain at the time of writing. This is discussed in chapter XV.

A. Issues linked to Israel's December-January military operations in Gaza

1. Differential treatment of Gaza prisoners

1449. After its disengagement from Gaza in August 2005, Israel ceased to apply its military orders to Gaza and began to prosecute Gaza detainees under domestic criminal law. In June

⁷⁷⁰ Articles 78c and d of Military Order No. 378 "Order Concerning Security Directives" and the Israeli Criminal Procedure (Powers of Enforcement – Detention) Law 1996.

⁷⁷¹ See also, for instance, *Backyard Proceedings*.... See also <http://www.hamoked.org>.

⁷⁷² In its review of Israel in May 2009, the United Nations Committee against Torture expressed concern inter alia at the "numerous, ongoing and consistent allegations" of the use of methods of interrogation contrary to the Convention (CAT/C/ISR/CO/4). See also the United Against Torture coalition's three "Alternative Reports" to the Committee, September 2008; United Against Torture Report, April 2009; examples of torture practised in the briefing by PCATI and the World Organisation against Torture to the Committee (April 2009); Amnesty International's report to the Committee.

⁷⁷³ PCATI, "No defence: Soldier violence against Palestinian detainees", Periodic Report, June 2008, p. 38; see also Yesh Din's Accountability Project statistics: <http://www.yesh-din.org/site/index.php?page=criminal3&lang=en>.

⁷⁷⁴ See Military Order No. 132.

⁷⁷⁵ On child detainees, see below; on female detainees, see, for instance, Addameer, "In need of protection: Palestinian female prisoners in Israeli detention", November 2008.

2006, the Knesset passed a law⁷⁷⁶ which alters existing Israeli criminal law due process guarantees by, for example, allowing a detainee to be held incommunicado for 21 days (after an initial appearance before a judge within 96 hours).⁷⁷⁷

1450. The Law does not discriminate. However, in practice, it is applied only to Palestinian suspects, whether Palestinians from the Occupied Palestinian Territory or Palestinian citizens of Israel. According to estimates submitted to the Knesset's Constitution, Law and Justice Committee by the head of the investigations unit of the General Security Services concerning the applicability of the Law, "over 90 per cent of detainees (to whom this Law was applied) were from the Gaza Strip, but there were cases of detainees who are not from the Gaza Strip such as East Jerusalem and the Arab-Israeli... who are Israeli civilians."⁷⁷⁸

1451. The Law was extended in January 2008. In January 2009 a petition submitted to the Israeli High Court of Justice by ACRI, PCATI and Adalah was heard. The Court criticized many aspects of the law, but the Government argued that it had secret materials that explained why such a law was necessary. In March 2009, the Court decided, on the basis of the secret evidence provided by the State, that the restrictions imposed by the Law were legal and proportionate.⁷⁷⁹ In protest against the Court's use of secret evidence to determine the constitutionality of the Law, the human rights organizations withdrew their petition.⁷⁸⁰

(a) Unlawful Combatants Law

1452. The Israeli Internment of Unlawful Combatants Law 2002 provides for the indefinite detention of "foreign" nationals.⁷⁸¹ It offers a lower level of protection than the Law described above. In addition, it provides for a lower burden of proof and a higher threshold for judicial review.⁷⁸² In its submission to the Committee against Torture, the United Against Torture

⁷⁷⁶ Criminal Procedure (Enforcement Powers – Detention) (Detainee Suspected of Security Offence) (Temporary Order) Law 2006.

⁷⁷⁷ Compared to detainees held under the regular criminal procedural law, who have to be brought before a judge within 24 hours, or 48 hours, as per the Criminal Procedure (Powers of Enforcement – Arrests) Law – 1996. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism commented, on 5 July 2006, following the adoption on 27 June 2006 by the Knesset of Law 5765 – 2006 "Criminal Procedure (Enforcement Powers – Detention) (Detainees Suspected of Security Offences) (Temporary Provision)": "The law still does not provide all the necessary procedural safeguards for individuals detained for security reasons. In particular, the law provides that an individual may be held in detention for up to 96 hours before being brought before a judge and may not be present in court when a decision on the extension of the detention is made during the period when he is barred from contact with a legal counsel. In addition, while the provisions on access to legal counsel have not been worsened by this new law, the 21 days of detention without access to legal counsel authorized by the detention law currently in force remain incompatible with international human rights law" (A/HRC/4/26/Add.1).

⁷⁷⁸ Quoted in the petition submitted by ACRI, PCATI and Adalah to the High Court of Justice, *The Public Committee against Torture et al. v. Minister of Justice et al.*, case No. 2028/08.

⁷⁷⁹ ACRI and Partners, "Revoke law severely limiting due process rights", press release, 4 January 2009.

⁷⁸⁰ ACRI, "Illegal decision by HCJ Judges to hear classified GSS evidence", press release, 24 March 2009.

⁷⁸¹ According to Adalah's data, the Law has been applied only to Gazans in the past six months, see "New data on Palestinian prisoners incarcerated in Israeli prisons", *Adalah's Newsletter*, vol. 62, July 2009.

⁷⁸² Mission correspondence with HaMoked, 22 July 2009.

coalition of NGOs concludes that “an examination of its provisions suggests that the goal behind the law is to allow Israel to hold suspects as hostages who can be used as bargaining chips in future negotiations”.

1453. According to this Law, a person is designated an “unlawful combatant” by the Chief of General Staff. The definition the Law gives to the concept of “unlawful combatant” is:

a person who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel, where the conditions prescribed in article 4 of the Third Geneva Convention of 12th August 1949 with respect to prisoners-of-war and granting prisoner-of-war status in international humanitarian law, do not apply to him (art. 2).

1454. The amendments made to the Law in July 2008, which included lengthening the time detainees can be held before they must be brought before a judge and before they must be allowed access to a lawyer, were challenged and upheld on appeal. Israel’s Court of Criminal Appeals considered the Law constitutional and consistent with international humanitarian law.⁷⁸³

1455. Detention under this Law does not require admission of guilt or the existence of evidence acceptable as part of fair trial standards. According to Al-Mezan, “this law essentially licenses the military to hold individuals arbitrarily and indefinitely, on the basis of assumed rather than proven guilt that they are conducting direct or indirect activities that could harm the security of Israel or are affiliated to groups working to harm the security of Israel.”⁷⁸⁴

(b) Gaza and the ICRC Family Visits Programme

1456. On 6 June 2007, the Israeli authorities suspended the ICRC Family Visits Programme in the Gaza Strip, effectively barring all means of communication between Gazan prisoners and the outside world.⁷⁸⁵ Before the new arrests of Gazan residents during Israel’s latest offensive in the Gaza Strip (see chapter XV), the ban affected approximately 900 prisoners and their families. In June 2009, ICRC called for the ban to be lifted.⁷⁸⁶

1457. According to Addameer, the timing of the decision to ban family visits coincided with factional fighting in the Gaza Strip which was followed by Hamas’ seizing of control, a party which Israel does not recognize and defines as a “terrorist” organization. Therefore, the decision to suspend the programme appears to be a form of collective punishment intended to coerce Palestinians to respond to Israel’s demands in terms of Palestinian leadership.⁷⁸⁷ On 17 June 2008, Adalah filed a petition on behalf of Gazan prisoners’ families, Al-Mezan and the

⁷⁸³ Supreme Court sitting as the Court of Criminal Appeals, *A and B v. State of Israel*, Judgement of 11 June 2008.

⁷⁸⁴ “Al-Mezan calls for release of all detainees held by Israel and especially those categorized as ‘unlawful combatants’ in contravention of international law and human rights principles”, 26 March 2009.

⁷⁸⁵ Palestinian detainees are not normally given access to telephones or the Internet.

⁷⁸⁶ ICRC, “Gaza: families should be allowed to resume visits to relatives detained in Israel”, news release, 10 June 2009.

⁷⁸⁷ Addameer, “The Palestinian prisoners of Israel”, fact sheet, February 2009.

Association for the Palestinian Prisoners, challenging the legality of the ban on visits.⁷⁸⁸ At the time of writing, this petition remained pending.⁷⁸⁹ In October 2008, the Government of Israel submitted arguments to the Supreme Court to suggest that the State is not obliged to permit families from Gaza to visit their relatives incarcerated in Israeli prisons.⁷⁹⁰

1458. In addition, during the December-January military operations in Gaza, Adalah filed a petition demanding that Gazan prisoners should be allowed to use the telephone to contact family members. Not allowing this, Adalah argues, violates detainees' right to dignity and their right to family life, and "transforms their imprisonment to a humiliating and degrading experience that contradicts international norms and conventions, in particular the Universal Declaration of Human Rights."⁷⁹¹ According to Adalah, the Prison Authority replied that they allowed each detainee to use the telephone once. Some prisoners confirmed to Adalah that they had been allowed to use the telephone, but others said that they were not allowed to do so on the grounds that they did not present a certificate proving that a close relative had passed away during the offensive.⁷⁹²

2. Increase in children from the West Bank arrested and detained during or after the military operations in Gaza

1459. The Mission received information that during the Israeli military operations in Gaza the numbers of children from the West Bank detained by Israel increased. According to Defence for Children International – Palestine Section, the figures for January and February were 389 and 423, compared with 327 and 307 the previous year and a monthly average of 319 in 2008. Many of these children were reportedly arrested on the street and/or during demonstrations.⁷⁹³ Defence for Children International also found that their average age changed: for the 12–15 age range, the percentage is usually 23; in January–February 2009, it was 36.⁷⁹⁴ In January–March, it represented 69 children in the Israeli military courts. As of 20 June 2009, eight of these children

⁷⁸⁸ Adalah, "Adalah, Al Mezan and the Association for the Palestinian Prisoners petition Supreme Court demanding that Palestinians from Gaza be permitted to visit their relatives incarcerated in Israeli prisons", press release, 17 June 2008.

⁷⁸⁹ Mission correspondence with Adalah, 2 August 2009.

⁷⁹⁰ Adalah, "State to Supreme Court: Israel not obliged to permit families from Gaza to visit their relatives incarcerated in Israeli prisons", press release, 27 October 2008.

⁷⁹¹ Adalah: "Adalah to [Attorney General] and Prison Service: Prisoners from Gaza incarcerated in Israel must be allowed to use telephones to check on their family members", press release, 31 December 2008.

⁷⁹² Mission correspondence with Adalah, 2 August 2009.

⁷⁹³ Defence for Children International – Palestine Section, "DCI concerned by increase in arrests of West Bank children", statement, 17 January 2009. In the first two weeks of January 10 Palestinian children were brought before Israeli military courts in pretrial hearings, while the normal monthly average is 10-15. Many of these children were arrested from the street and/or during demonstrations."

⁷⁹⁴ Submission to the Mission. See also "DCI concerned by sharp increase in detention of child", statement, 11 March 2009.

were released without charge, while among the 61 charged, 47 were sentenced and 14 are still awaiting trial.⁷⁹⁵

1460. Defence for Children International also found that there was a change in the percentages of children charged with particular offences in the first three months of 2009: in 2008, 27 per cent of children had been charged with throwing stones, as opposed to 61 per cent in the period covered by the report. “During OCL, the army didn’t want to lose control of the West Bank, so they came down like a tonne of bricks on demonstrations.” It concludes “The fact that many of these children were younger than the average child detainee and the fact that the majority were charged with minor offences suggest that this increase is the result of children’s participation in a high number of demonstrations in the West Bank during Operation Cast Lead, and the increased use of force, including mass arrest, by Israeli authorities to suppress and discourage these protests.”⁷⁹⁶

Number of Palestinian children in Israeli detention at the end of each month (2008)⁷⁹⁷

<i>Year/Month</i>	<i>Jan</i>	<i>Feb</i>	<i>Mar</i>	<i>Apr</i>	<i>May</i>	<i>Jun</i>	<i>Jul</i>	<i>Aug</i>	<i>Sep</i>	<i>Oct</i>	<i>Nov</i>	<i>Dec</i>
2008	327	307	325	327	337	323	324	293	304	297	327	342
2009	389	423	420	391	346	355	-	-	-	-	-	-

Note: These figures are not cumulative.

1461. One of the cases recorded by Defence for Children International is summarized as follows:

Ahmad Q.: 15-year-old boy arrested on 1 January 2009 and accused of throwing stones. On 1 January 2009, Ahmad was protesting against the war in Gaza near Qalandiya checkpoint. He was arrested by soldiers and dragged 100 metres to a jeep. He was slapped and kicked, had his hands tied with plastic cords and he was blindfolded. He was transferred to Atarot for interrogation, made to sit outside in the cold until 4 a.m., transferred to Ofer prison, and then to prisons inside Israel. He was charged with throwing stones and sentenced to four and a half months in prison and fined NIS 1,000.

1462. The Israeli operations in Gaza caused a wave of demonstrations that did not end with the operations. Child detentions continued to be high in February and March, with the high percentage of children charged with stone-throwing indicating that they were detained during demonstrations. Defence for Children International reports two incidents of mass arrests of

⁷⁹⁵ Submission to the Mission, p. 4. Defence for Children International – Palestine Section estimates that it represents 30-40 per cent of children appearing before Israeli military courts.

⁷⁹⁶ Mission meeting with Defence for Children International, 3 July 2009. On the increased use of force by the Israeli military in the West Bank, see chap. XX.

⁷⁹⁷ Defence for Children International – Palestine Section. These numbers are essentially taken up by West Bank ID holders. Palestinian children (and adults) with Jerusalem ID are generally processed by civilian Israeli courts. The numbers do not include children from Gaza. (Mission interview with Gerard Horton of Defence for Children International, 24 July 2009.)

children after demonstrations in January and March 2009, including one in the village of Haris, where the Israeli armed forces entered the village at around midnight and rounded up about 90 children, detaining them in a school for almost a day, before finally arresting four of them.⁷⁹⁸ The same incident was referred to in the British media and included testimony by Col. Itai Virob commander of the Kfir Brigade:

The worst beatings were in the bathrooms, he said. "The soldiers who took [detainees] to the toilet just exploded [over] them with beatings; cursed them with no reason. When they took one Arab to the toilet so that he could urinate, one of them gave him a slap that brought him to the ground. He had been handcuffed from behind with a nylon restraint and blindfolded. He wasn't insolent, he didn't do anything to get on anyone's nerves... [it was] just because he's an Arab. He was something like 15 years old."⁷⁹⁹

1463. On 6 March 2009, the President of Defence for Children International wrote to the Israeli Minister of Justice, Daniel Friedmann, seeking an explanation for the sharp increase in the number of Palestinian children being detained by Israel and notified the United Nations Committee on the Rights of the Child of these developments. At the time of writing, there had been no response.⁸⁰⁰

1464. In its report on Israel's detention of Palestinian children, Defence for Children International concluded that the abuse of Palestinian children by Israeli authorities is systematic and institutionalized.⁸⁰¹

1465. In a statement issued in support of this report, UNICEF, WHO, OHCHR and local and international child protection agencies (together the 1612 Working Group on Grave Violations against Children) stated that, "Israeli military courts violate many basic fair trial rights according to international humanitarian and human rights law... For example, in almost all cases, the primary evidence used to convict children is a confession obtained through coercive interrogations carried out in the absence of a lawyer. The most common charge made against children was stone-throwing (about 27 per cent), which carries a maximum sentence of 20 years. With the potential for harsh sentences, approximately 95 per cent of cases end in the child pleading guilty, whether the offence was committed or not."⁸⁰²

1466. A former Israeli military commander told the BBC that Palestinian youngsters are routinely ill-treated by Israeli soldiers while in custody. The BBC website item included a video of a young Palestinian boy being arrested at night. Col. Efrati, who had left the army five months

⁷⁹⁸ Submission to the Mission, p. 6.

⁷⁹⁹ *The Independent*, "Bound, blindfolded and beaten – by Israeli troops", 9 June 2009.

⁸⁰⁰ Submission to the Mission.

⁸⁰¹ Defence for Children International, *Palestinian Child Prisoners: The systematic and institutionalised ill-treatment and torture of Palestinian children by Israeli authorities* (June 2009).

⁸⁰² Statement available at: http://www.unicef.org/oPt/1612_STATEMENT_JUNE_9.pdf. The Working Group is chaired by UNICEF and includes OCHA, OHCHR, UNRWA, WHO, Save the Children Alliance, Al-Mezan Centre for Human Rights, B'Tselem, Defence for Children International – Palestine Section and PC HR.

previously, said: “I never arrested anyone younger than nine or 10, but 14, 13, 11 for me, they're still kids. But they're arrested like adults. Every soldier who was in the Occupied Territories can tell you the same story. The first months after I left the army I dreamed about kids all the time. Jewish kids. Arab kids. Screaming.”⁸⁰³ He added, “Maybe [the kid is] blindfolded for him not to see the base and how we’re working... But I believe maybe we put the blindfold because we don't want to see his eyes. You don't want him to look at us - you know, beg us to stop, or cry in front of us. It's a lot easier if we don't see his eyes.”⁸⁰⁴

3. Members of the Palestinian Legislative Council

1467. In September 2005, i.e. some months before the Palestinian Legislative Council elections, the Israeli military conducted a two-day arrest campaign in which 450 persons affiliated with the political parties Hamas and Islamic Jihad were detained. These individuals had been involved in either, or both, the municipal elections or the Council elections. Most were kept in administrative detention and many were released just before or after the Palestinian Legislative Council elections on 25 January 2006. Some candidates were elected while in detention. A number of those released were subsequently rearrested.⁸⁰⁵

1468. Hamas had taken part in municipal elections in 2005 and in Council elections in mid-2005. While Hamas is considered an unlawful organization by Israel,⁸⁰⁶ its candidates participated under a list named “Change and Reform Bloc”, underlining the main election pledge of reforming the system. Not all candidates and elected persons on that list were members of Hamas; some independent candidates joined the list, including a number of Palestinian Christians.⁸⁰⁷

1469. Israel had not banned the Change and Reform Bloc from participating in the elections, which were supported by the international community.⁸⁰⁸ Reportedly, Israel had agreed the list of proposed candidates for the elections with the Palestinian Authority⁸⁰⁹ and facilitated voting on the day.⁸¹⁰ However, the mass arrests in September 2005 hampered campaigning and

⁸⁰³ BBC News, “Israeli troops accused of abuse”, 5 August 2009, available at: http://news.bbc.co.uk/2/hi/middle_east/8186522.stm.

⁸⁰⁴ BBC News, “Israeli troops ‘ill-treat kids’”, 6 August 2009, available at: http://news.bbc.co.uk/2/hi/middle_east/8186905.stm.

⁸⁰⁵ Addameer, “The arrest and detention of Palestinian Legislative Council Members”, fact sheet, available at: <http://addameer.info/?p=503>.

⁸⁰⁶ See State of Israel - Defence Ministry: List of Declarations and Orders, available in Hebrew at: <http://www.mod.gov.il/pages/general/pdfs/terror.pdf>. Hamas was declared a “terrorist group” by Israel on 22 June 1989 (applicable in Israel) and in the Occupied Palestinian Territory on 26 February 1996.

⁸⁰⁷ “The arrest and detention...”.

⁸⁰⁸ See, for instance, European Union “Javier SOLANA, EU High Representative for the CFSP, welcomes announcements by Israeli and Palestinian leaders on Palestinian Authorities elections”, statement, 16 January 2006.

⁸⁰⁹ Mission interview with Mr. Fadi Qawasme, 6 July 2009.

⁸¹⁰ Reportedly, by opening Israeli post offices in East Jerusalem as polling stations and transporting the ballot boxes to the Palestinian Authority’s counting offices at the end of the day. Mr. Fadi Qawasme, testimony at the public hearing in Geneva, 3 July 2009, and Mission interviews with Ms. Sahar Francis, 22 July 2009, and with Dr. Omar Abd al-Razeq, member of the Council, 16 July 2009.

organization, and candidates of all parties were banned by Israel from campaigning in Jerusalem. The Mission met Dr. Mustafa Barghouti, a member of the Council for the Palestinian National Initiative, who reported being arrested and beaten while attempting to campaign for the elections in Jerusalem.⁸¹¹

1470. Nevertheless, the “Change and Reform” list won the elections, gaining 74 seats out of 132, which is said to have come as a surprise to all involved. The tenth Government was inaugurated on 20 March 2006 and included a number of non-Hamas ministers.⁸¹²

1471. As referred to in chapters II and XVIII, on 24 June 2006, an Israeli soldier, Gilad Shalit, was captured by Palestinian armed groups based in Gaza. The Government of Israel held the Palestinian Authority fully responsible for his capture “with all this implies”. It made it clear that it would “take all necessary actions” to bring about his release and that “no person or organization will have immunity at this time”.⁸¹³ On 29 June, the Israeli armed forces arrested some 65 members of the Palestinian Legislative Council, mayors and ministers. Most were Hamas members.⁸¹⁴ They were taken from their homes during the night. Interviewees described situations where up to 20 jeeps surrounded a Council member’s home or where their homes were ransacked, and computers and papers taken.⁸¹⁵

1472. According to Mr. Fadi Qawasme, lawyer to most of the detained Council members, the members detained on 29 June were prevented from having access to lawyers for a week, during which time they were interrogated. Some refused to cooperate; others openly admitted that they were members of Change and Reform. Some were released; others were kept in detention and charged with “membership of a terrorist organization”,⁸¹⁶ or held under administrative detention orders. The prosecution requested that all should be remanded in custody pending trial, a period which took two years. Mr. Qawasme protested against the charges on the grounds that members of the Council should have immunity from prosecution; that they did not recognize the jurisdiction of the court (those arrested should have come under the jurisdiction of the Palestinian Authority according to the Oslo Accords) and argued that Israel had accepted the participation of Change and Reform in the elections.⁸¹⁷

1473. Also according to Mr. Qawasme, the Court initially accepted the arguments and proposed releasing all on bail. The prosecution appealed and rejected the lawyer’s arguments, claiming that Israel had not allowed Hamas to participate in the elections, and that “Change and Reform”

⁸¹¹ Mission meeting with Dr. Mustafa Barghouti, 3 July 2009.

⁸¹² See Institute for Middle East Understanding, “Meet the new Palestinian Authority Cabinet”, 20 March 2006, available at: <http://imeu.net/news/article00764.shtml>.

⁸¹³ Prime Minister’s Office, “Political-Security Cabinet convenes”, press release, 25 June 2006, available at: <http://www.pmo.gov.il/PMOEng/Archive/Press+Releases/2006/06/spokekab250606.htm>.

⁸¹⁴ Mr. Fadi Qawasme, testimony at the public hearing in Geneva, 3 July 2009, and PCHR, “Weekly report on Israeli human rights violations in the Occupied Palestinian Territory”, No. 26/2006 (29 June-5 July 2006), available at: http://www.pchrgaza.org/files/W_report/English/2006/06-07-2006.htm.

⁸¹⁵ Mission interview with Dr. Mariam Saleh, member of the Council and former detainee, 27 July 2009.

⁸¹⁶ Prevention of Terror Ordinance No. 33 of 1948.

⁸¹⁷ Mr. Fadi Qawasme, testimony at the public hearing, Geneva, 3 July 2009.

was in fact Hamas. In February 2007, a year after the election, Israel declared “Change and Reform” a prohibited organization.⁸¹⁸ All were held for at least two years and some were convicted of “membership of Change and Reform”, or “standing in election on behalf of Change and Reform”. The minimum sentence given to the Council members was 42 months, with longer sentences for higher-ranking members.

(a) Arrest, interrogation and detention conditions

1474. The Mission interviewed three members of the Palestinian Legislative Council who were detained by Israel.⁸¹⁹ Dr. Mariam Saleh related how, on the night of her arrest, around 20-25 military jeeps surrounded her house and masked men entered the house by force. Having locked Dr. Saleh and her family on the balcony, they ransacked the house before putting her in a military jeep. They drove her to her office, which they entered by force and from which they took her computer hard disc and many papers. She was then taken to al-Maskobiya (an interrogation centre in Jerusalem), where she was held for a month. She reported being interrogated for three-day stretches from 8 a.m. to 5 a.m. the next morning. Dr. Saleh further reported that her son and husband were brought to the interrogation centre in order to pressure her into confessing that she was a member of Hamas.⁸²⁰

1475. The interviewees related that, as most members were in their fifties or sixties, detention was hard to cope with and a particularly humiliating experience.⁸²¹ They spoke of a lack of access to medical assistance and proper medication, of ailments worsening because of the dire detention conditions, of a lack of adequate food, and of specific dietary adjustment for a diabetic patient for instance. They further spoke of humiliation by prison guards (who initially found it amusing to have, for example, a minister as prisoner), of attempts to gain confessions by collaborators, of the use of stress positions and of sleep deprivation. They further reported extremely difficult transport conditions, being enclosed in a car with a dog, for example, or being shackled hands and feet inside a bus for 12 hours at a time with no water or access to a toilet. The trips from prison to court and back could take many days, with the bus stopping at a number of different prisons on the way picking up and dropping off passengers, and the detainees being tied up and crammed for lengthy periods despite some being elderly and in poor health. One

⁸¹⁸ Change and Reform was declared an “unlawful association” by Israel on 22 February 2007 (applicable in Israel) and in the Occupied Palestinian Territory (by Israeli military order) on 22 July 2007.

⁸¹⁹ Dr. Mariam Saleh, Minister for Women in the 10th Palestinian Government, detained November 2007 and released June 2008; Dr. Omar Abd al-Razeq, Minister of Finance in the 10th Palestinian Government, detained 13 December 2005, released 13 March 2006, detained 29 June 2006, released 3 August 2008, detained 15 December 2008, released 28 April 2009; and WB/01, detained in 2007 and released in the past six months.

⁸²⁰ Mission interview with Dr. Mariam Saleh, 27 July 2009. A PCATI report details the frequent use of family members to pressure detainees, despite an Israeli High Court decision banning the practice. PCATI, “Family matters: Using family members to pressure detainees under GSS interrogation”, April 2008. See also B’Tselem, “Human rights organizations: Prohibit GSS use of family members to pressure interrogees”, petition, 16 April 2008, available at: http://www.btselem.org/english/Press_Releases/20080416.asp.

⁸²¹ According to PCATI, even seemingly innocuous measures such as cuffing (both hands and feet) are used in a deliberate way. Painful shackling is done for invalid and irrelevant reasons, which include causing pain and suffering, punishment, intimidation, and illegally eliciting information and confessions. The practice of shackling may be used by the various authorities as a tool for dehumanizing Palestinian detainees subject to the control of the occupying Power. PCATI, “Shackling as a form of torture and abuse”, Periodic Report, June 2009.

interviewee reported having spent altogether about 350 days, “almost a year”, on such multi-day trips.⁸²²

1476. Interviewees reported extremely limited family visits, with one being told his mother was not considered “immediate family” and not being allowed a visit from her for three years.⁸²³

1477. The former detainees interviewed by the Mission feared rearrest, at times had been rearrested, on the same charges, and reported trying to minimize their travel and public appearances.⁸²⁴ One interviewee reported that, during his last detention, he had been given a two-year suspended sentence, which would take him past any prospective election date. He added that, in any case, no one could stand in these elections for Hamas or Change and Reform, since doing so had become punishable and subject to three years’ imprisonment.⁸²⁵ All interviewees also reported family and friends receiving threats and being harassed by Palestinian Authority security forces.⁸²⁶

1478. According to B’Tselem, Israeli officials have made public statements relating the arrests of the Council members to political goals:

in an interview with [Associated Press] a few hours after the first wave of arrests, on 29 June 2006, Major-General Yair Naveh, OC Central Command, said that the decision to arrest senior Palestinian officials was made by the political echelon and that they would be released upon the release of Gilad Shalit. In an interview with the army radio station on 24 May 2007, the day that the second wave of arrests took place, the then Defense Minister, Amir Peretz, stated that “the arrest of those heads of Hamas is to show the military organizations that we demand that the firing stop.”⁸²⁷

1479. The Inter-Parliamentary Union has recently adopted a number of resolutions protesting against the arrest and detention of the Palestinian parliamentarians, including those from the Change and Reform Bloc. It notes that the Council members were sentenced to much longer periods in detention than persons convicted of military action and that “clearly, the intention was to keep them in prison for the rest of their parliamentary term.” It “considers that the rearrest of four Change and Reform parliamentarians following the failure of the negotiations regarding the release of Gilad Shalit and the simultaneous restrictions of the rights of political prisoners suggests that Israel is in fact holding the [Palestinian Legislative Council] members concerned as hostages.”⁸²⁸

⁸²² Mission interview with Dr. Omar Abd al-Razeq, 16 July 2009.

⁸²³ Ibid.

⁸²⁴ Mission interview with WB/01, 16 July 2009.

⁸²⁵ Mission interview with Dr. Omar Abd al-Razeq, 16 July 2009.

⁸²⁶ Mission interviews with Dr. Omar Abd al-Razeq, 16 July 2009, and Dr. Mariam Saleh, 27 July 2009.

⁸²⁷ B’Tselem, “Detention of senior Palestinian officials – wrongful infringement of fundamental rights”, press release, 1 August 2007.

⁸²⁸ Resolutions adopted unanimously by its Governing Council at its 184th session (Addis Ababa, 10 April 2009), see <http://www.ipu.org/conf-e/120/120.pdf>.

(b) Associated measures

1480. In May 2006, the Israeli Minister of Interior at the time, Roni Bar-On, decided to revoke the permanent residency status (i.e. the right to reside in Jerusalem under Israeli law) of four Council members (including the then Minister of Jerusalem Affairs). The letter received stated “Pursuant to [the Law of Entry into Israel], you are deemed to be a resident in the State of Israel. You are obliged to pay allegiance to the State of Israel. Nonetheless, your actions prove otherwise and indicate that your allegiance is paid to the Palestinian Authority.”⁸²⁹ The members petitioned the Israeli High Court, while ACRI and Adalah submitted an amicus curiae brief, arguing that the Jerusalemites’ reduction to permanent resident status of the city after it was annexed by Israel could not be removed. The human rights organizations argued that the residency status of the members was cancelled because the Government of Israel did not welcome the election result.⁸³⁰ The petition was filed at the Israeli High Court of Justice contesting the status removal or de facto exile, in 2006, but it is still pending.⁸³¹ Potentially, a ruling that Jerusalem residency can be revoked on the basis of a lack of loyalty to Israel could have extremely far-reaching consequences for the Palestinian residents of occupied East Jerusalem. Until now Israeli law has allowed the revocation of Jerusalem residency rights only of Palestinians who are unable to prove that their “centre of life” is in Jerusalem.⁸³²

(c) Recent developments

1481. In January 2009, during the Israeli operation in Gaza, the Israeli armed forces once again arrested a number of Hamas leaders on 1 and 9 January 2009.

1482. Addameer comments “the timing of the waves of arrests indicates that the arrests were intended to put pressure on the Palestinian people and its leadership.”⁸³³ Interviewees have indicated that the arrest campaigns effectively work as deterrence. They report having family members, colleagues and employees arrested by both Israel and the Palestinian Authority.

1483. In March, two Council members and former detainees interviewed by the Mission reported that a group of detainees associated with Hamas were given mobile telephones and asked to meet as a group and to intervene in the negotiations surrounding the release of Gilad Shalit. According to the interviewees, detainees were gathered from different prisons for this meeting in Ktziot prison in the Negev. Some detainees were brought out of solitary confinement for this purpose, while solitary confinement is normally imposed because allowing these specific

⁸²⁹ Al-Haq, “Attacking democracy: Recent Israeli attacks on Palestinian democratic institutions”, November 2006, available at: <http://www.alhaq.org/pdfs/Attacking%20Democracy.pdf>.

⁸³⁰ Adalah, “Israeli Supreme Court: Members of the Palestinian Legislative Council whose Jerusalem residency status was revoked must be given an opportunity to submit applications to reinstate it”.
press release, 17 September 2008.

⁸³¹ *Khalid Abu Arafah et al. v. Minister of Interior*, case No. 7803/06.

⁸³² See B’Tselem, “Revocation of residency in East Jerusalem”.

⁸³³ “The arrest and detention...”.

detainees to meet and speak with others is considered a security risk.⁸³⁴ On this occasion, the group of senior Hamas detainees (Council members and other leaders) were asked to call other Hamas leaders in Gaza and Damascus to influence the negotiations over Gilad Shalit and the prisoner exchange. However, they decided not to cooperate, stating that they were not free to confer or negotiate from detention.⁸³⁵

1484. According to Addameer, a few hours after Hamas declared an end to the negotiations for the release of Gilad Shalit, the Israeli armed forces conducted a series of raids into the West Bank towns of Nablus, Ramallah, Hebron and Bethlehem, and arrested four Council members, the former Deputy Prime Minister of the 10th Government, a university professor and a Hamas leader.⁸³⁶ For PCHR these arrests “could be acts of pressure exerted by Israel on the Hamas leadership in order to resolve the case of captured Israeli soldier Gilad Shalit, and conclude the prisoner exchange.”⁸³⁷ Ms. Sahar Francis of Addameer commented:

It is unthinkable that the Israeli Government first engages in a political process and negotiations with Hamas, and then kidnaps 10 political leaders, associated with the movement and uses them as bargaining chips. This is not only a form of collective punishment, which in itself is a violation of international humanitarian law, but also a politically counterproductive move.⁸³⁸

(d) The downgrading of Hamas prisoners’ detention conditions

1485. On 18 March 2009, the Israeli Justice Minister, Daniel Friedmann, established a committee to “work to reduce privileges afforded Hamas and Islamic Jihad security prisoners”.⁸³⁹ He reportedly announced in the media that the downgrade was intended “to match [these prisoners’] conditions of incarceration to those of Gilad Shalit”.⁸⁴⁰ The Mission interviewed two former Hamas detainees who confirmed that from the end of March they had stopped receiving newspapers and books and had their “recreation” time reduced to 3 hours per

⁸³⁴ According to human rights organizations, some prisoners have been held in isolation from between five months to 23 years. Physicians for Human Rights – Israel and Addameer, “The sounds of silence: Isolation and solitary confinement of Palestinians in Israeli detention”, July 2008.

⁸³⁵ Mission interviews with WB/01, and with Dr. Omar Abd al-Razeq, 16 July 2009.

⁸³⁶ Addameer, “Addameer condemns IOF’s abduction of 10 political leaders”, press release, 19 March 2009, available at: <http://addameer.info/?p=934>.

⁸³⁷ PCHR, “PCHR condemns IOF acts of reprisal on Hamas affiliated political leaders in the West Bank”, press release, 19 March 2009.

⁸³⁸ “Addameer condemns...”.

⁸³⁹ “The team will include representatives of the Attorney General’s office, the Israel Prison Service, the IDF and the ISA, and will work to reduce privileges afforded Hamas and Islamic Jihad security prisoners.” Cabinet communique, 22 March 2009, available at: http://www.mfa.gov.il/MFA/Government/Communiques/2009/Cabinet_communique_22-Mar-2009.

⁸⁴⁰ Quoted by HaMoked in its “Position paper regarding the proposal for downgrading the incarceration conditions of prisoners associated with Hamas”, available at: www.hamoked.org.il/items/111330_eng.pdf.

day.⁸⁴¹ According to HaMoked, the decision to create the committee “establishes the use of a large group of prisoners as ‘bargaining chips’ until the resolution of a matter to which they have no connection and which they cannot influence.”⁸⁴² According to Addameer, “on 29 March the Israeli Government accepted recommendations presented by a special Ministerial Committee aiming at downgrading detention conditions of prisoners identified with Hamas and Islamic Jihad.”⁸⁴³

(e) Effect of the detention of the Palestinian Legislative Council’s members: disabling the legislative and enabling the executive

1486. The detention of the Council’s members has meant that it has been unable to function for three years and no laws have been passed. According to ICHR, it has not been able to exercise its oversight function over the Government’s administrative and financial performance, “whether through the questioning, granting/withholding confidence, or holding the Government accountable, or inquiry of finding the facts in cases of grave violations of Palestinian human rights during 2008.”⁸⁴⁴

1487. Conversely, the executive authority in the West Bank has played a major role in legislative policymaking – where the Government has referred a number of laws to the President, and the President issued 11 decisions with the power of law in 2008.⁸⁴⁵ The Palestinian Basic Law provides that a caretaker government may, in exceptional circumstances which cannot be postponed, issue decisions with the power of law; however these must be submitted to the Council at the first available session and be approved or cease to have power of law. ICHR argues that some of the laws issued by the President of the Palestinian Authority represent a retreat from the legal guarantees for the protection of fundamental rights and freedoms of Palestinian citizens (see chap. XXIII).

B. Legal analysis and conclusions

1488. The detention practices mentioned in the introduction to this chapter have been found by various United Nations bodies to be in violation of international human rights and humanitarian law. In the analysis that follows, the Mission has restricted itself to analysing the specific violations relevant to its mandate.

⁸⁴¹ Note that these are normally paid for by the Palestinian Authority’s Ministry of Detainees’ and Ex-Detainees’ Affairs. “Recreation time” is the time detainees are able to leave their cells and, as such, includes time spent in the showers, meal times, etc.

⁸⁴² “Position paper regarding the proposal...”.

⁸⁴³ Addameer, “The continuous violation of Palestinian political prisoners’ rights”, *public statement*, 17 April 2009, available at: <http://addameer.info/?p=945>.

⁸⁴⁴ ICHR, *Fourteenth Annual Report*, p. 24.

⁸⁴⁵ *Ibid.*, p. 25.

1. The military court system and Israel's detention of Palestinians from the Occupied Palestinian Territory in general

1489. International law gives the occupying Power the right to detain members of the protected population both for criminal offences and for imperative security reasons (see below under “administrative detention”). According to international humanitarian law, as an exception to the preservation of legal conditions in the occupied territory, the occupying Power can “subject the population of the occupied territory to provisions which are essential to enable the occupying Power to fulfil its obligations under the present Convention” (article 64 of the Fourth Geneva Convention). It can establish military courts to prosecute local residents for violations of these provisions (art. 66), which should be “properly constituted, non-political”, a requirement intended to prevent the use of such courts for political or racist persecution, and they should “sit in the occupied territory”, a provision which is intended to ensure due process for detainees and accused persons brought before them.⁸⁴⁶

1490. Articles 67 to 75 of the Fourth Geneva Convention contain a number of fair trial guarantees the military courts should offer, including the right to choose a defence lawyer, who shall be able to visit freely (art. 72). However, based on information received by the Mission, even this most basic principle is not normally complied with in the Israeli military court system.

1491. Article 9 (3) of ICCPR requires anyone arrested or detained on a criminal charge to be brought promptly before a judge and to be brought to trial within a reasonable time or to be released. The provisions of Israeli Military Order No. 378 are not in line with this requirement.

2. The use of detention in the context of the Mission's mandate

1492. The detention of members of the Palestinian Legislative Council and their conviction for being members of a particular political party violate the prohibition on discrimination based on political belief, contrary to article 26 of ICCPR:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status.

1493. In addition they violate article 25:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors [...].

⁸⁴⁶ Jean S. Pictet (ed.), *Commentary: The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva, ICRC, 1958), pp. 335-336.

1494. The Mission finds that the detentions, insofar as they were carried out in response to political events unrelated to the individual members detained, may amount to collective punishment, contrary to article 33 of the Fourth Geneva Convention:

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

[...]

Reprisals against protected persons and their property are prohibited.

1495. The facts gathered by the Mission also indicate a violation of the right not to be arbitrarily detained as protected by article 9 (1) of ICCPR:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

3. Detention of children

1496. Article 76 of the Fourth Geneva Convention requires that proper regard should be paid to the special treatment due to minors in detention. The facts gathered by the Mission indicate that Palestinian minors are not given the special treatment due to them, in particular minors aged 16 and 17, who are treated as adults.

1497. Article 37 (b) of the Convention on the Rights of the Child provides that “the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate time.” This requirement appears to have been violated by the detention of children in large numbers during or following demonstrations.

1498. The detention of large numbers of children and others participating in demonstrations may also be contrary to the provisions of the Declaration on Human Rights Defenders relating to the protection of the right to protest against violations of human rights.

1499. Reports of ill-treatment of children by Israeli security forces, described above, indicate violations of article 37 of the Convention on the Rights of the Child.

4. Additional legal issues

1500. The removal of residency status (of the Council members from East Jerusalem) based on their (implied) refusal to pay allegiance to Israel constitutes a violation of article 45 of the Hague Regulations which provides that “it is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power,” which is also part of customary international law.

1501. The removal of residency status could additionally amount to deportation, which violates the Fourth Geneva Convention, article 49. In addition, it violates the individual’s freedom to choose his residency (article 12 of ICCPR), which, on the face of it, cannot be justifiably

curtailed under the exceptions foreseen by article 12 (3). If such curtailment is based on political belief it is prima facie inconsistent with articles 2 (non-discrimination) and 19 (freedom of opinion) of ICCPR. In addition, the revocation could constitute an unlawful interference with family life, contrary to article 17, as well as the right to family life in article 23, where residency status revocation means the family can no longer live together as one unit.⁸⁴⁷

1502. The systematic discrimination, both in law and in practice, against Palestinians in legislation (including the existence of an entirely separate legal and court system which offers systematically worse conditions than that applicable to Israelis) and practice during arrest, detention, trial and sentencing compared with Israeli citizens⁸⁴⁸ is contrary to ICCPR, article 2, and potentially in violation of the prohibition on persecution as a crime against humanity.⁸⁴⁹

5. Conclusions

1503. The Mission is concerned about the detention of children and adults on political grounds, in poor conditions and outside the occupied territory in violation of international humanitarian law. The Mission notes the very high number of Palestinians who have been detained since the beginning of the occupation (amounting to 40 per cent of the adult male population of the Occupied Palestinian Territory) according to a practice that appears to aim at exercising control, humiliating, instilling fear, deterring political activity and serving political interests.

1504. The Mission is equally concerned by the reports of coercion and torture during interrogations, trials based on coerced confessions or secret evidence, and the reportedly systematic and institutionalized ill-treatment in prisons.

1505. The Mission is particularly alarmed at the arrest and detention of hundreds of young children, and the rise in child detention during and following the Israeli military operations in Gaza. The ill-treatment of children and adults described to the Mission is disturbing in its seemingly deliberate cruelty.

1506. The legal instruments allowing for the indefinite detention of “unlawful combatants”, as well as enshrining the deficient due process regimes, the differential treatment of Palestinian and Israeli prisoners (including the differential definition of a “child”), and the exemptions de facto allowing for harsher interrogation techniques raise concerns about the legal system being a part of this practice, rendering it deliberate and systematic.

1507. The Mission notes with concern the arrest and lengthy detention of democratically elected Palestinian parliamentarians, which appears to be a deliberate act to interrupt the democratic functioning and self-governance of Palestinians.

⁸⁴⁷ On the revocation of Jerusalem residency rights generally, see B’Tselem, http://www.btselem.org/English/Jerusalem/Revocation_of_Residency.asp.

⁸⁴⁸ There is also discrimination between Jewish Israeli citizens and Palestinian Israeli citizens, in law and practice.

⁸⁴⁹ Article 7 of the Rome Statute.

XXII. ISRAELI VIOLATIONS OF THE RIGHT TO FREE MOVEMENT AND ACCESS

1508. In the West Bank, Israel has imposed a system of interlocking measures, only some of which are physical barriers that restrict the movement and access of Palestinians within the West Bank. This includes movement between Jerusalem and the rest of the West Bank, between the West Bank and Israel, between the West Bank and Gaza and between the West Bank and the outside world and vice versa.

1509. Movement is restricted by physical obstacles, such as roadblocks, checkpoints and the Wall, but also by administrative measures, such as identity cards, permits, assigned residence, laws on family reunification and policies on the right to enter from abroad and the right of return for refugees. The restriction on the ability to move freely, without obstacle or delay, or without another person's authorization, is often perceived as a humiliating experience.⁸⁵⁰

1510. Restrictions include denial access, mainly to Jerusalem for all Palestinians except those who are designated by Israel as Jerusalem residents,⁸⁵¹ citizens of Israel and special permit holders⁸⁵². Special permits are rarely granted.⁸⁵³

1511. Palestinians are denied access to areas expropriated for the building of the Wall and its infrastructure, for use by settlements,⁸⁵⁴ buffer zones, military bases and military training zones,⁸⁵⁵ and the roads built to connect these places. Many of the roads are "Israeli only"⁸⁵⁶ and

⁸⁵⁰ See the reports of MACHSOM WATCH, a volunteer network of Israeli women who monitor checkpoints on a daily basis at www.machsomwatch.org/en. See also, "Ground to a halt: denial of Palestinians' freedom of movement in the West Bank", B'Tselem, August 2007 and the interview with Nadera Shalhoub-Kevorkian, on her book *Militarization and Violence against Women in Conflict Zones in the Middle East*, at www.opendemocracy.net/article/email/checkpoints-and-counter-spaces. Checkpoints are also sites of confrontation: see chap. XXI.

⁸⁵¹ Around 225,000 Palestinian with Jerusalem identity cards live in the part of Jerusalem between the Wall and the Green Line. A number of East Jerusalem areas and suburbs, however, now fall outside the Wall, such as Abu Dis, Kafr Aqab, and Shu'fat refugee camp. "Five years after the International Court of Justice advisory opinion: a summary of the humanitarian impact of the Barrier", Office for the Coordination of Humanitarian Affairs, July 2009.

⁸⁵² East Jerusalem Palestinians have identity cards showing their status as "permanent residents" of Israel. Palestinians living in the remainder of the West Bank have West Bank identity cards and need to apply for special permits to enter East Jerusalem.

⁸⁵³ Shawan Jabarin, General Director of Al-Haq, Geneva public hearing, 6 July 2009 (by videoconference).

⁸⁵⁴ Palestinians are normally not allowed to enter settlements, except for those employed in settlement industrial zones or in the settlements, who normally require permits. For a comprehensive overview of the settlement project, see "Land Grab, Israel's settlement policy in the West Bank", B'Tselem, September 2008; and "Access Denied: Israeli Measures to Deny Access to Land around Settlements", B'Tselem, May 2002.

⁸⁵⁵ This applies to much of the Jordan Valley. See "The Eastern Border: Palestinians of the Jordan Valley", Jordan Valley Solidarity, 15 February 2009., available at www.jordanvalleysolidarity.org/index.php?option=com_content&task=view&id=166&Itemid=9 The Mission met with the Mayor of Al-Akaba village in the Jordan Valley, Mr. Sami Sadeq, who gave an account of his experience of living in a village surrounded by military training grounds, 3 July 2009.

⁸⁵⁶ Access also includes foreign citizens.

forbidden for Palestinian use.⁸⁵⁷ An example of an “Israeli only” road is Road 443, between Tel Aviv and Jerusalem, which passes through the West Bank. Once a major Palestinian traffic artery serving 33 villages, this stretch of the road has now been turned into a highway that Palestinians are forbidden to use. A number of tunnels have been built under the road to enable access, but movement is still extremely restricted for the villagers.⁸⁵⁸

1512. Movement between Gaza and the West Bank for Palestinians is virtually impossible.

1513. Generally speaking, Israelis can and do travel freely around the West Bank, with the exception of the main Palestinian cities, which are off limits to Israelis, according to Israeli law.⁸⁵⁹

1514. The Mission has reviewed claims that foreign passport holders, whether or not of Palestinian origin, can and are regularly denied entry to the West Bank by Israeli border authorities.⁸⁶⁰ According to a report of June 2009 received by the Mission, in the first six months of 2009, the number of entry denial cases reported increased relative to the last quarter of 2008, “raising concerns that Israel is again escalating its policy of arbitrary entry denial”.⁸⁶¹ Recent reports criticize the new “Palestinian Authority only” visas issued by Israel to foreign citizens.⁸⁶² These practices severely limit the ability of international humanitarian workers and human rights defenders to carry out their activities.⁸⁶³

⁸⁵⁷ See “Checkpoints, physical obstructions, and forbidden roads”, B’Tselem, at www.btselem.org/english/Freedom_of_Movement/Checkpoints_and_Forbidden_Roads.asp; and “Road 443, West Bank road for Israelis only”, B’Tselem at www.btselem.org/English/Freedom_of_Movement/Road_443.asp. See also Shawan Jabarin, Geneva public hearings, 6 July 2009 (by videoconference).

⁸⁵⁸ Other access restrictions are more difficult to grasp, such as access with usage restriction; for example on land and in urban areas where no building or agriculture is permitted, or where environmental pollution has made the land unusable. See testimony of Shawan Jabarin, Geneva public hearings, 6 July 2009 (by videoconference), and “Road 443, West Bank road for Israelis only”, B’Tselem; “The prohibited zone: Israeli planning policy in the Palestinian villages in area C”, Bimkom, at http://eng.bimkom.org/_Uploads/23ProhibitedZone.pdf; See also “Foul play: neglect of waste water treatment in the West Bank”, B’Tselem, www.btselem.org/English/Publications/Summaries/200906_Foul_Play.asp.

⁸⁵⁹ Israeli Military Order 378 “Order on the Security Provisions (Judea and Samaria) (No. 378) 1970 – Proclamation regarding Closing and Area (Prohibition of Entry and Stay) (Israelis) (Area A), issued 5 October 2000, signed by General Itzhak Eitan.

⁸⁶⁰ See the reports published by the Campaign on the Right to Entry at www.righttoenter.ps/. On 16 December 2008, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, was denied entry into Israel: see, www.righttoenter.ps/images/Press_Release_Richard_Falk.pdf and A/HRC10/20.

⁸⁶¹ Campaign for the right to enter the Occupied Palestinian Territory, situation update report, September 2008-June-2009.

⁸⁶² “Israel toughens entry for foreigners with West bank ties”, Amira Hass, *Ha’aretz*, 12 August 2009.

⁸⁶³ The practices also restrict the movement of foreign passport holders of Palestinian origin; see “Why is Israel limiting movement of Palestinian-Canadian businessman?”, Amira Hass, *Ha’aretz*, 19 August 2009.

A. Movement restrictions affecting the Mission's work

1515. At the public hearing in Geneva on 6 July 2009, Mr. Shawan Jabarin of Al-Haq reported that tens of thousands of Palestinians today are subject to a travel ban imposed by Israel, preventing them from travelling abroad. Mr. Jabarin, whom the Mission heard in Geneva by way of videoconference, had been subject to such a travel ban since he became the director of Al-Haq, the West Bank's oldest human rights organization. Mr Jabarin challenged his travel ban in the Israeli High Court after he was prevented from travelling to the Netherlands to receive a human rights prize, but the ban was upheld on the basis of 'secret evidence'.⁸⁶⁴ Mr. Jabarin believed that the ban was imposed as punishment. On 3 July 2009, the Mission also spoke with Khalida Jarrar, a member of the Palestinian Legislative Council for the Palestinian Liberation Front Party, by telephone conference, as she too was unable to travel out of the West Bank because of an Israeli-imposed travel ban. Ms Jarrar, who prior to her election to the Palestinian Legislative Council in 2006 directed the prisoners' rights organization Addameer, told the Mission that she had not been allowed to travel out of the West Bank since attending the Human Rights Defenders Summit in Paris in 1998.⁸⁶⁵

1516. The Mission has already referred to the fact that the Palestinian Minister for Justice, Dr. Ali Khashan, was unable to leave the West Bank to meet the Mission in Amman, Jordan he had been prevented from crossing the border.⁸⁶⁶

B. Movement and access and the Israeli military operations in Gaza

1517. The Mission received reports that, during the Israeli offensive in Gaza, movement restrictions in the West Bank were tightened. For several days, Israel imposed a "closure" on the West Bank, a restrictive measure in addition to those already in place. Given that it is an ad hoc measure, people cannot plan their movements around it.

1518. It was also reported to the Mission that, during and following the operations in Gaza, Israel tightened its hold on the West Bank through more expropriation, an increase in house demolitions, demolition orders and permits granted for homes built in settlements, and increased exploitation of the West bank's natural resources. Various policies and decisions implemented in the first six months of 2009 relating to settlements, and Jerusalem's demography, affected the access and movement of Palestinians, while increasing the overall control by Israel over the West Bank.

1519. Following the operations in Gaza, the Mission received reports that Israel had amended the regulations determining the ability of persons with a Gaza identity card to move to the West

⁸⁶⁴ For the Israeli High Court decision of 10 March 2009 (Al-Haq translation), see www.alhaq.org/pdfs/Shawan-abarin-v.pdf; see also "Travel ban on Al-Haq General Director upheld: once again, the Israeli judiciary demonstrates its subservience to the military and security authorities", Al-Haq Press Release, 11 March 2009; "Dutch Foreign Minister condemns travel ban imposed by Israel on Al-Haq General Director", statement of the Foreign Ministry of the Netherlands, 11 March 2009; A/HRC/11/41/Add.1.

⁸⁶⁵ For example E/CN.4/2006/95/Add.1.

⁸⁶⁶ See chap. I.

Bank, and vice versa, further entrenching the separation between the people of the West Bank and Gaza.

C. West Bank closures during the Israeli operations in Gaza

1520. Information received by the Mission showed that, in addition to the everyday restrictions on movement and access during the Israeli operations in Gaza, Israel implemented a full closure of the West Bank for six days.⁸⁶⁷ During a closure, Palestinians with West Bank identity cards (see below) and valid permits to enter East Jerusalem or Israel are prevented from doing so.⁸⁶⁸

1521. The closures affected thousands of workers, students, people needing to have access to Palestinian hospitals in East Jerusalem, worshippers and those visiting family and friends. Furthermore, according to reports received by the Mission, the number of checkpoints in the West Bank, including in East Jerusalem, was increased during the operations, most being “flying” checkpoints (ad hoc checkpoints operating for anything between one hour and the duration of the operations in Gaza).⁸⁶⁹ According to Shir Hever, an economist from the Alternative Information Centre, each day of closure costs the Palestinian economy \$ 4.5 million and 276 jobs and drives 646 people below the poverty line.⁸⁷⁰

1522. The Office for the Coordination of Humanitarian Affairs reports that, on 2 January 2009, the Israeli army prevented males aged between 16 and 50 from crossing Huwara checkpoint to travel south.⁸⁷¹ Huwara checkpoint is the main checkpoint on the main north-south route in the West Bank and lies between the cities of Jenin, Tulkarm, Qalqilia and Nablus in the north, and Ramallah, Jericho, Bethlehem and Hebron in the middle and south. Closing Huwara checkpoint effectively prevents Palestinians from this region from going south, as there are no other accessible roads.

1523. In addition, according to the Office for the Coordination of Humanitarian Affairs, in January 2009, Israel declared the area between the Wall and the Green line in Hebron, parts of Salfit, Ramallah, and in between the Wall and the Jerusalem municipality borders a “closed military area”, with serious consequences for the Palestinian population.⁸⁷² Prior to this, access to land beyond the Wall (the so-called “seam zone”, between the Wall and the Green Line⁸⁷³)

⁸⁶⁷ The dates were, 2, 3, 9,10, 16 and 17 January 2009. See Office for the Coordination of Humanitarian Affairs Weekly Report for 1-8 January 2009, 9-15 January and 16-20 January.

⁸⁶⁸ Shawan Jabarin, Geneva public hearings, 6 July 2009 (by videoconference).

⁸⁶⁹ Meeting with Al-Haq, and the Palestinian Centre for Human Rights, 2 July 2009.

⁸⁷⁰ Submission to the Mission by Shir Hever, Alternative Information Centre,.

⁸⁷¹ Office for the Coordination of Humanitarian Affairs Weekly Report, 1-8 January 2009.

⁸⁷² Office for the Coordination of Humanitarian Affairs, The Humanitarian Monitor No. 33, January 2009.

⁸⁷³ “Between Fences: The Enclaves Created by the Separation Barrier”, Bimkom, at http://eng.bimkom.org/_Uploads/4GderotEng.pdf. For a general picture see Office for the Coordination of Humanitarian Affairs Closure Map, June 2009, at www.ochaopt.org/documents/ocha_opt_closure_map_west_bank_june_2009.pdf; some 85 per cent of the route of the Wall lies inside the West Bank, the area between the Wall and the Green line amounts to 8.5 per cent of the West Bank (including East Jerusalem) See “Five years after the International Court of Justice advisory opinion: A summary of the humanitarian impact of the Barrier”, Office for the Coordination of Humanitarian Affairs, July 2009.

was already restricted as access required prior coordination with the Israeli army. The new measures meant that land owners had to provide proof of ownership (which is difficult to obtain) and apply for visitors' permits to be able to have access to their land. Applications for permits by farm labourers who are not land owners were routinely rejected. According to Mr. Shawan Jabarin, human rights monitors are not granted permits either.⁸⁷⁴ Fewer than 20 per cent of those who used to farm their lands in 67 localities in the northern West Bank, which had been declared closed previously, are now reportedly granted permits. Those who do obtain permits face long waiting times, restricted gate opening hours, physical searches and restrictions on the kinds of farming equipment allowed to pass. In addition, thousands of people reside in the areas now or previously declared "closed military zones". They now require permits to live in their own homes and must often pass through gates in order to have access to work, health care, education and other services. The area declared a closed military zone in January includes the Jerusalem suburb of Dahiet al-Barid. According to the Applied Research Institute of Jerusalem, around 14,000 Palestinians in this suburb stand to lose their Jerusalem residency status as well as municipal services.⁸⁷⁵

D. New measures to formalize the separation of Gaza and the West Bank

1524. The Mission received reports about measures that further formalize the separation of Gaza and the West Bank. Following HaMoked's petition to the High Court, a new Israeli Ministry of Defense procedure has been revealed detailing the very strict conditions under which a resident of the Gaza Strip may change her or his residency to that of the West Bank.⁸⁷⁶ The procedure of 8 March 2009 states:

Against the backdrop of the security/political situation in the Gaza Strip it has been decided on State level to limit the movement of residents between the Gaza Strip and the Judea and Samaria area to the necessary minimum, so that for all practical purposes entry of residents of Gaza into the Judea and Samaria areas shall only be allowed in the most exceptional humanitarian cases." ... "the Deputy Minister of Defence... established that in every case involving the settlement of Gaza residents in the Judea and Samaria Area one should adopt the most restrictive policy, which is derived a fortiori from the general policy of restricting movement between the two Areas. The Deputy Minister clarified that a family relationship, in and of itself, does not qualify as a humanitarian reason that would justify settlement by Gaza residents in the Judea and Samaria Area.

1525. In the terms of the procedure, as reviewed by the Mission, one of the situations envisaged by the regulations, is where

⁸⁷⁴ Shawan Jabarin, Geneva public hearings, 6 July 2009 (by videoconference).

⁸⁷⁵ "14,000 Palestinian Jerusalemites stand to lose their residency rights", Applied Research Institute, 5 January 2009 at http://www.poica.org/editor/case_studies/view.php?recordID=1802; for the issue of municipal services in East Jerusalem generally, see "Life in the garbage: a report on sanitation services in East Jerusalem", Association for Civil rights in Israel, June 2009 at www.acri.org.il/pdf/sanitationeng.pdf.

⁸⁷⁶ Translation of the procedure by Gisha and HaMoked available from the website www.gisha.org/UserFiles/File/Legal%20Documents%20WB_Gaza_Full_Procedure-Eng.pdf.

A minor resident of Gaza who is under 16 years old, where one of his parents, who was a resident of Gaza, passed away and the other parent is a resident of the Judea and Samaria Area and there is no other family relative who is a resident of Gaza who is able to take the minor under his wings. In the event that it is necessary, the nature and scope of the existing relationship with the parent who is a resident of the Judea and Samaria Area shall be examined in relation to the degree, nature and scope of the relationship with other family relatives in Gaza (para. 10 B).

1526. Furthermore, according to paragraph 15 of the procedure, a successful application is subject to periodic renewal and a seven-year “naturalization” period, after which there is an examination “as to whether to grant a permit of settlement in the Judea and Samaria Area and a change of the registered address in the copy of the file of the Palestinian population registry, which is in the possession of the Israeli side”.

1527. In the reports reviewed by the Mission, HaMoked and Gisha call this regulation an additional measure in a deliberate Israeli policy to deepen the separation between the West Bank and Gaza “in the pursuance by Israel of political goals at the expense of the civilian population, in blatant violation of international humanitarian law.” It also “undermines the possibility of a two state solution”, and “contradicts a long list of Israeli undertakings to conduct negotiations for the establishment of an independent, viable Palestinian State, including an explicit commitment in the Oslo Accords to preserve the status of the West Bank and Gaza Strip as a ‘single territorial unit’”.⁸⁷⁷

E. Movement and access, current situation

1528. According to information available the Mission, in the past eight months certain measures by the Government of Israel have improved freedom of movement in certain places, in particular access to the cities of Nablus, Tulkarm, Hebron and Ramallah. For example, the permit requirement was removed for vehicles entering Nablus, two junctions near Hebron were opened and a checkpoint was removed outside Tulkarm. In Ramallah, a “fabric of life”⁸⁷⁸ alternative route was opened for access from the West.⁸⁷⁹

1529. United Nations sources observe, however, that during this time the restrictions on Palestinian traffic and the ease of Israeli and settler traffic in the West Bank have become entrenched. Checkpoints have also been expanded and some temporary checkpoints have become more permanent (for example with gates instead of earth mounds). In addition, the improvement or opening of “fabric of life” roads alternative roads to closed main roads still necessitates the confiscation of land.

⁸⁷⁷ Gisha and HaMoked position paper, available at www.gisha.org/UserFiles/File/publications/WB_Gaza_Procedure-PositionP-Eng.pdf.

⁸⁷⁸ The concept of “fabric of life” was introduced by the Israeli army to denote alternative roads for Palestinians who are no longer allowed to use the “Israel only” main roads; see “Alternative roads for Palestinians”, B’Tselem, at www.btselem.org/english/Freedom_of_Movement/Alternative_Roads_for_Palestinians.asp.

⁸⁷⁹ Office for the Coordination of Humanitarian Affairs, West Bank Movement and Access update, June 2009, at www.ochaopt.org/documents/ocha_opt_movement_access_2009_june_english.pdf.

1530. The Office for the Coordination of Humanitarian affairs maps 613 physical obstacles, including 68 staffed checkpoints and 541 unstaffed obstacles such as roadblocks. This number excludes the 84 obstacles blocking Palestinian access and movement within the Israeli-controlled area of Hebron city (“H2”), 63 crossing points in the Wall and an average of 70 random (or “flying”) checkpoints deployed every week since the beginning of 2009.⁸⁸⁰ In addition to the road obstacles, the Wall continues to be built; large areas between the Wall and the Green Line (the “seam zone”) have been declared closed to Palestinians.⁸⁸¹

1531. Harsh military measures, such as prolonged curfews on individual villages in the northern West Bank, have further restricted movement, and approximately 28 per cent of the West Bank is now declared a closed military zone with recent stricter enforcement, especially affecting farmers and herders.

1532. The Mission has also received reports about the recent introduction by Israel of measures aimed at “modernizing” the access and movement restrictions which, by making monitoring and recording of movement of individuals easier, would have the effect of consolidating the restrictions. The measures include the introduction of magnetic cards for use in automated checkpoints, the privatization of checkpoints and access gates and the computerization of certain checkpoints on or near the Green Line as of 1st May 2009.⁸⁸² The measures have raised a concern that permits for politically active individuals will be more frequently cancelled. In addition, considering the current open debate in international law on the liability of private security contractors, the privatization of checkpoints raises concerns about accountability.⁸⁸³

1533. Therefore, while there have been some (albeit limited) positive developments in the period between September 2008 and March 2009, the measures taken during this and previous periods indicate a further entrenchment of the system of movement and access restrictions, with the result that “the space available for Palestinian development is increasingly constrained”.

1534. The Mission notes that it is misleading to look at the freedom of movement of the Palestinians of the West Bank without considering where they can actually. For example, recent reports have raised the Mission’s concern about broader policies leading to the “silent transfer” of Palestinians out of Jerusalem. The first six months of 2009 saw a dramatic rise in demolition

⁸⁸⁰ Compared with a weekly average of 60 for the first four months of 2008, and 87 per week for June to September (Office for the Coordination of Humanitarian Affairs closure update, 30 April 2008 – 31 September 2008, at http://www.ochaopt.org/documents/ocha_opt_closure_update_2008_09_english.pdf).

⁸⁸¹ In the Salfit, Ramallah, Bethlehem and Hebron governorates. See Office for the Coordination of Humanitarian Affairs, West Bank Movement and Access update, June 2009, at www.ochaopt.org/documents/ocha_opt_movement_access_2009_june_english.pdf.

⁸⁸² Shawan Jabarin, Geneva public hearings, 6 July 2009 (by videoconference). See Stop the Wall press release at <http://stopthewall.org/latestnews/1931.shtml>.

⁸⁸³ See “The Privatization of Checkpoints and the Late Occupation”, Eilat Maoz at www.whoprofits.org/Article%20Data.php?doc_id=705.

orders, including demolitions of entire villages and neighborhoods,⁸⁸⁴ and approvals for new settlement construction in both East Jerusalem and the rest of the West Bank.

F. Jerusalem: accelerating the “silent transfer”

1535. In May 2009, the *New York Times* reported that the Office Israeli Prime Minister of Israel and the Israeli-defined Jerusalem municipality, in cooperation with the Jerusalem Development Authority and settler organizations, were implementing an eight-year “confidential” plan to create a string of nine parks, pathways and sites, incorporating new or existing settlements in and around East Jerusalem. The NGO Peace Now concluded that “the completion of the Israeli plan will change dramatically the map of East Jerusalem and might prevent a permanent status agreement and a compromise in Jerusalem.”⁸⁸⁵

1536. In a report reviewed by the Mission, the Association for Civil Rights in Israel stated that, in Jerusalem “discrimination in planning and building, expropriation of lands, and minimal investment in physical infrastructure and government and municipal services - these are concrete expressions of an Israeli policy designed to secure a Jewish majority in Jerusalem and push Palestinian residents outside the city's borders.”⁸⁸⁶

1537. In a report of April 2009, addressing “the failure of the Israeli authorities to provide adequate planning for Palestinian neighborhoods”, the Office for the Coordination of Humanitarian affairs states that “some 60,000 Palestinians in East Jerusalem ... are at risk of having their homes demolished by the Israeli authorities. This is a conservative estimate and the actual number may be much higher.”⁸⁸⁷

G. New settlements, land expropriation and the demolition of villages in Area C

1538. In reports reviewed by the Mission, Peace Now stated in March 2009 that the Ministry of Housing and Planning was planning a further 73,000 settlement homes to be built in the West

⁸⁸⁴ For example, in the Jordan Valley, and a neighborhood in Jerusalem (al-Bustan in Silwan). On 4 June 2009, a village was almost entirely destroyed in the Jordan Valley. “Israeli authorities demolished 13 residential structures, 19 animal pens, and 18 traditional *taboun* ovens in the Bedouin community of Khirbet ar Ras al Ahmar in the Jordan Valley. A water tank, tractor, and trolley were also confiscated Eighteen households were displaced, including at least 67 children”. Office for the Coordination of Humanitarian Affairs Protection of Civilians report (27 May-2 June 2009)

⁸⁸⁵ “Parks fortify Israel’s claims to Jerusalem”, *New York Times*, 9 May 2009.

⁸⁸⁶ The report concludes that “for decades, the legal possibility of issuing building permits for new construction on East Jerusalem has been practically non-existent. (...) The discrimination is clear, its purpose to limit legal construction in the Palestinian areas and constrict the space available for the development of Arab neighborhoods, The City’s Outline Plan, ‘Jerusalem 2000’, approved in 2006 (...) perpetuates the discriminatory policies by failing to provide adequate housing units, employment sources, and infrastructure in East Jerusalem”. “The state of human rights in East Jerusalem - Facts and Figures”, Association for Civil Rights in Israel report, May 2009.

⁸⁸⁷ “Special Focus: the planning crisis in East Jerusalem: understanding the phenomenon of ‘illegal’ construction”, Office for the Coordination of Humanitarian Affairs, April 2009. The United Nations Special Coordinator, Robert Serry, stated that these “actions harm ordinary Palestinians, heighten tensions in the city, undermine efforts to build trust and promote negotiations, and are contrary to international law and Israel’s commitments”, 22 April 2009.

Bank.⁸⁸⁸ According to Peace Now, the building of 15,000 of these homes had already been approved, and, if all the plans are realized, the number of settlers in the occupied Palestinian territory will double.⁸⁸⁹

1539. Construction works on Maskiyot, a new settlement, were reportedly commenced in the Jordan Valley as of May 2009.⁸⁹⁰ At the same time, Palestinians in the Jordan Valley and more generally in Area C are at risk of displacement. On 26 January 2009, the High Court of Justice of Israel rejected a petition submitted by the Association for Civil Rights in Israel and Rabbis for Human Rights on behalf of the Palestinian residents of Khirbet Tana, “effectively allowing the State to destroy all of the village's houses but one, despite the lack of viable planning alternatives for the area's Palestinian residents”.⁸⁹¹ In a recent report reviewed by the Mission, Bimkom concluded that the Israeli Civil Administration applied “a deliberate and consistent policy in Area C with the goal of restricting Palestinian construction and development and limiting its spatial dispersion”.⁸⁹²

H. Connecting the dots

1540. According to reports reviewed by the Mission, aside from the settlements themselves, much new infrastructure is being built to service the settlements, including roads, rail and tram lines, tunnels and waste dumps. Notable examples of these are the Jerusalem ring road (eastern section) a four-lane highway which will connect Israeli settlements in East Jerusalem and run through Palestinian neighborhoods, requiring the confiscation of many dunums⁸⁹³ of Palestinian land and demolitions of homes and businesses;⁸⁹⁴ and the Jerusalem light rail project and train line between Tel Aviv and Jerusalem part of which will run through the West Bank.⁸⁹⁵

1541. Observers have noted that Israeli control over the movement and access of the West Bank Palestinians is necessary to maintain control over the West Bank's land and natural resources.

⁸⁸⁸ “Ministry of Housing's plans for the West Bank”, Peace Now, March 2009 available at www.peacenow.org.il and on the website of the Israeli government at www.govmap.gov.il.

⁸⁸⁹ An increase of approximately 300,000 people, based on an average of four people in each housing unit. According to the report, there are plans to double the size of some settlements, including Beitar Illit, Ariel, Givat Ze'ev, Maaleh Adumim, Efrat and Geva Binyamin, and approximately 19,000 housing units are planned in settlements that are beyond the constructed path of the Wall.

⁸⁹⁰ “A new settlement starts to be constructed: Maskiyot” Peace Now, 18 June 2009. See also “Israel planning mass expansion of West Bank settlement bloc” *Ha'aretz*, 27 February 2009 and “Secret Israeli database reveals full extent of illegal settlement”, *Ha'aretz*, 1 February 2009.

⁸⁹¹ Press release, Association for Civil Rights in Israel, 5 February 2009.

⁸⁹² “The Prohibited Zone: Israeli planning policy in the Palestinian villages in Area C”, Bimkom.

⁸⁹³ One dunum is equivalent to one square kilometre.

⁸⁹⁴ “Carving up the Palestinian capital: The Israeli ring road around occupied East Jerusalem”, Negotiations Support Unit of the Palestine Liberation Organization fact sheet, February 2008, available at www.nad-plo.org/facts/jerusalem/ringroad.pdf. See also the campaign by the Al-Quds University Human Rights Clinic at www.stoptheringroad.net/q3.php and the briefing paper by Adalah available at www.adalah.org/features/land/Briefing%20Paper%20on%20the%20Eastern%20Ring%20Road.doc.

⁸⁹⁵ Peace Now “An objection to expansion of Israel Railway's Jerusalem-Tel-Aviv line” Peace Now, 11 May 2009.

Easing Palestinian access on alternative roads and the removal of some checkpoints would allow Israel to offer “transportational”, rather than territorial contiguity. At the same time, full Israeli access through the separate road system and full control over the border allow for a level of continuous population control. The increased movement and access limitations recently implemented by Israel in the West Bank, would seem to share with the military operations of December 2008 - January 2009 Israel’s objective of “getting rid of Gaza in order to consolidate its permanent hold on the West Bank”.⁸⁹⁶

I. Legal analysis and conclusions

1542. The occupying Power may restrict the right to free movement in certain circumstances, but it must safeguard the fundamental rights of the protected people at all times. Any movement restriction, to be lawful under international humanitarian law, however, must be necessary and proportionate to the harm caused to the protected people.

1543. The right to freedom of movement is enshrined in article 13 of the Universal Declaration of Human Rights, and in article 12 of the International Covenant on Civil and Political Rights. When the right is restricted, it affects the exercise of any number of other rights, including those set forth in the International Covenant on Economic, Social and Cultural Rights, such as the right to work (art. 6), the right to protection of family life (art. 10), the right to an adequate standard of living (art. 11), the right to health (art. 12) and the right to education (art. 13).

1544. If the decision to restrict movement is based on a person’s belonging to an ethnic or national group, this constitutes unlawful discrimination contrary to articles 1 and 2 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights and article 75 of Additional Protocol I to the Geneva Conventions, which is part of customary international law. Israel allows Israeli citizens to move around the West Bank including the settlements, relatively freely. According to B’Tselem, the Israeli military has openly admitted that the restrictions on Palestinians are there to enable Jewish settlers to move about freely.⁸⁹⁷

1545. Where checkpoints become a site of humiliation of the protected population by military or civilian operators, this may entail a violation of article 75 (2) (b) of Additional Protocol I to the Geneva Conventions (which is part of customary international law), which outlaws “outrages upon personal dignity, in particular humiliating and degrading treatment”.

1546. Settlements are contrary to article 49 (6) of the Fourth Geneva Convention.⁸⁹⁸ Furthermore, they violate Palestinian property rights and the prohibition on the occupying Power of changing the nature and legal status of the Occupied Palestinian Territory (art. 55 of the Hague Regulations), may constitute direct discrimination against Palestinians, besides causing

⁸⁹⁶ Mission interview with Jeff Halper, Director of the Israeli Committee against House Demolition, 6 August 2009.

⁸⁹⁷ “Restrictions on Movement”, B’Tselem at www.btselem.org/English/Freedom_of_Movement/.

⁸⁹⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion, [2004], International Court of Justice, rep. 136, para. 120; Security Council resolutions 904 (1994), 465 (1980), 452 (1979), 446 (1979) and General Assembly resolutions ES10/6, ES10/14, and 61/118 and the Declaration of the Conference of High Contracting Parties to the Fourth Geneva Convention,, Geneva, 5 December 2001.

restriction of movement, hindering economic and social development, and access to health, education and social services. In addition, the extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly, amount to a “grave breach” of article 147 of the Geneva Convention. The Wall, which, to the extent it is built inside the West Bank is contrary to international law,⁸⁹⁹ the de facto annexation of the parts of the West Bank that fall on the “Israeli side” of the Wall (9.5 per cent of the West Bank),⁹⁰⁰ five years since the advisory opinion of the International Court of Justice that the Wall must be dismantled, now amount to the acquisition of territory by force, contrary to the Charter of the United Nations.⁹⁰¹

1547. From the facts ascertained by or available to it, the Mission believes that the movement and access restrictions to which West Bank Palestinians are subject are disproportionate to any military objective served, in general, particularly in light of the increased restrictions during and to some extent since the military operations in Gaza. The restrictions do not safeguard the fundamental rights of those protected as required by international humanitarian law and international human rights law.

1548. From the facts available to it, the Mission believes that in the movement and access policy there has been a violation of the right not to be discriminated against on the basis of race or national origin. The Mission is concerned about the steps taken recently to formalize the separation of Gaza from the West Bank, and, as such, of two parts of the Occupied Palestinian Territory. The Mission is also concerned that the increasingly entrenched array of movement and access restrictions, both physical and non-physical, amount to a deliberate policy of closely controlling a population in order to make use of areas of its land. From the facts available, the Mission believes that these restrictions constitute violations of fundamental rights.

1549. Insofar that movement and access restrictions, the settlements and their infrastructure, demographic policies with regards to Jerusalem and Area C, and the separation of Gaza from the West Bank prevent a viable, contiguous and sovereign Palestinian State from being created, they are in violation of the *jus cogens* right to self-determination.

XXIII. INTERNAL VIOLENCE, TARGETING OF HAMAS SUPPORTERS AND RESTRICTIONS ON FREEDOM OF ASSEMBLY AND EXPRESSION BY THE PALESTINIAN AUTHORITY

1550. The Mission has received allegations of violations relevant to its mandate committed by the Palestinian Authority in the period under inquiry. These include violations related to the treatment of (suspected) Hamas affiliates by the Preventive Security Service, the Military Intelligence and the General Intelligence, such as their unlawful arrest and detention, and ill-

⁸⁹⁹ The International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136.

⁹⁰⁰ Office for the Coordination of Humanitarian Affairs, “Five years after the International Court of Justice Advisory Opinion: A summary of the humanitarian impact of the Barrier”, July 2009.

⁹⁰¹ Paragraph 121 of the advisory opinion states that the “Court considers that the construction of the wall and its associated régime create a “fait accompli” on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to de facto annexation”.

treatment of political opponents while in detention. Other allegations are the arbitrary closure of charities and associations affiliated with Hamas and other Islamic groups⁹⁰² or the revocation and non-renewal of their licences,⁹⁰³ the forcible replacement of board members of Islamic schools and other institutions and the dismissal of Hamas affiliated teachers.⁹⁰⁴

1551. There have also been allegations of the use of excessive force and the suppression by Palestinian security services of demonstrations, particularly those in support of the population of Gaza during the Israeli military operations.⁹⁰⁵ On these occasions the Palestinian Authority's security services allegedly arrested many individuals⁹⁰⁶ and prevented the media from covering the events, at times breaking cameras or erasing footage.⁹⁰⁷ The Mission also received allegations of harassment by Palestinian security services of journalists who expressed critical views of the Palestinian Authority.⁹⁰⁸

1552. The Mission noted the reluctance of some of the residents of the West Bank it approached to speak openly about these issues. A number of individuals expressed concern that there might be repercussions if they did so.⁹⁰⁹

1553. The Mission also received reports that highlight the lack of parliamentary oversight over acts and decisions by the executive. As noted in chapter XXIII, the arrest and detention by Israel of several members of the Palestinian Legislative Council has effectively curtailed such parliamentary oversight.⁹¹⁰ The executive has passed decrees and regulations⁹¹¹ to enable it to

⁹⁰² See, for instance, Al-Haq, "Overview of the internal human rights situation in the Occupied Palestinian Territory", June 2009; International Crisis Group, "Palestine divided", Middle East Briefing, No. 25, 17 December 2008, p. 12; ICHR, *Fourteenth Annual Report* (2008), pp. 152–168, PCHR, *Annual Report 2008*; Mission telephone interview with Al-Haq, 15 July 2009.

⁹⁰³ PCHR, *Annual Report 2008*, pp. 93-96; *The Financial Times*, "West Bank 'tsunami' hits Hamas and allies", 29 July 2009.

⁹⁰⁴ "Overview of the internal human rights situation..."; "Palestine divided...", p. 12; ICHR, *Fourteenth Annual Report*, pp. 103–111, PCHR, *Annual Report 2008*, p. 101; Mission telephone interview with Al-Haq, 15 July 2009.

⁹⁰⁵ OCHA, "Protection of civilians weekly reports", 24–30 December 2008, 1-8 January 2009, 9-15 January 2009, 16–20 January 2009; Mission telephone interview with Al-Haq, 15 July 2009; Mission telephone interview with WB/02, 16 July 2009; Mission meeting with ICHR, Amman; ICHR, "Monthly report on violations of human rights in the PNA-controlled territory", January 2009; Al-Haq, "Field report", January–March 2009.

⁹⁰⁶ Mission telephone interview with WB/02, 16 July 2009; Mission telephone interview with Al-Haq, 15 July 2009. Arrests reportedly include members or supporters of Islamic parties but also left-wing student leaders.

⁹⁰⁷ "Monthly report on violations...", January 2009; Palestinian Center for Development and Media Freedoms (MADA), "Violations of media freedoms in OPT during January 2009"; Mission telephone interview with Muhammad Jaradat, 16 July 2009.

⁹⁰⁸ See, for instance, MADA, *Annual Report: 257 Violations of Media Freedoms in OPT during 2008*, which includes affidavits.

⁹⁰⁹ Al-Haq notes in its "Field report" for January–March 2009 that there is a general reluctance on the part of West Bank Palestinians to testify on intra-Palestinian violence. Few complaints are filed, both because complainants have little confidence that the authorities will taken action (Mission telephone interview with WB/02, 16 July 2009) and because they fear negative repercussions.

⁹¹⁰ Mission interview with Ms. Khalida Jarrar, 30 July 2009; ICHR, *Fourteenth Annual Report*, p. 24.

continue its day-to-day operations. Palestinian human rights organizations have argued that this has resulted in the use of the security apparatus to suppress political opposition and of military courts to ignore any judicial challenge to arbitrary detention on political grounds.⁹¹²

1554. The Mission asked the Palestinian Authority for information about the above allegations; however its reply does not address these issues.⁹¹³

A. Crackdown by the Palestinian Authority on Hamas and other Islamic parties

1. Arrest and detention by the security forces

1555. Before the Israeli military operations in Gaza, domestic human rights organizations were already reporting a practice of arbitrary arrest by the Palestinian Authority of members and (suspected) supporters of Hamas in the West Bank.⁹¹⁴ The practice has reportedly continued. According to ICHR, over 400 persons arrested by the Palestinian Authority's security forces "primarily for reasons of political affiliation" were in detention, as of 31 May 2009. ICHR has confirmed the 400 cases individually through prison visits, but states that the total number is probably closer to 700,⁹¹⁵ The human rights NGO Al-Haq estimates that over 800 persons were being held as at mid-July 2009.⁹¹⁶ The Mission has asked the Palestinian Authority, inter alia, to confirm the numbers of persons held in detention by its Preventive Security Force, Military Intelligence and General Intelligence, and the legal basis for their detention, but has received no reply on this issue.

1556. The Palestinian Authority has a court system similar to most others, with civilian criminal and civil courts and a court of appeal, and military courts, which have jurisdiction over military matters.⁹¹⁷

⁹¹¹ The executive has passed decrees to grant the Minister for Local Government the right to dissolve the local council or dismiss its head (Presidential Decree No. 9) and to limit the right to strike for civil servants (Decree No. 5) (ICHR, *Fourteenth Annual Report*, pp. 25–26) and see PCHR, "PCHR has reservations about regulations adopted in the context of ongoing political fragmentation", position paper, 23 June 2009.

⁹¹² ICHR, *Fourteenth Annual Report*; Al-Haq, "Al-Haq calls upon the President of the Palestinian National Authority and the Higher Judiciary Council to restore exclusive civil jurisdiction over civilians", urgent call, 3 September 2008; ICHR, "The detention of civilians by Palestinian security agencies with a stamp of approval by the Military Judicial Commission", Special Report No. 64, December 2008; "Overview of the internal human rights situation...".

⁹¹³ Reply of the Palestinian Authority to the Mission, 5 August 2009.

⁹¹⁴ Al-Haq, "Field report", July–September 2008, and Mission interview with Al-Haq, 15 July 2009; PCHR, "PCHR gravely concerned over the deterioration of the human rights situation in the Occupied Palestinian Territory", press release, 30 July 2008.

⁹¹⁵ Mission telephone interview with ICHR, 30 July 2009.

⁹¹⁶ Mission telephone interview with Al-Haq, 15 July 2009. ICHR states that only a very small number of non-Hamas affiliated detainees are held by the Palestinian Authority's security forces (Mission telephone interview with ICHR, 30 July 2009).

⁹¹⁷ See, for instance, Birzeit University Institute of Law, "Legal system and legislative process in Palestine".

1557. The Mission has received reports that arrests are often carried out without an arrest warrant or with a warrant issued by the Military Judicial Commission (a military court) rather than by a civilian court.⁹¹⁸ The Amended Basic Law of 2003, article 101 (2), states that military courts “shall not have any jurisdiction beyond military affairs”. On 30 August 2008, the Palestinian High Court of Justice confirmed that the Military Attorney General⁹¹⁹ and the Military Judicial Commission had no jurisdiction over civilians. In addition, in the past year many of its decisions have supported this view in individual cases relating to the arrest or detention of civilians. However, these civilian court rulings have mostly been ignored by the security forces and the military judiciary.⁹²⁰

1558. Information received by the Mission suggests that detainees held by the security forces do not know when they will be released, normally without being charged and tried, rarely have access to a lawyer or are allowed family visits.⁹²¹

2. Torture and other ill-treatment

1559. Several Palestinian human rights organizations have reported that practices used by the Palestinian Authority’s security forces, particularly the Preventive Security Force, Military Intelligence and the General Intelligence service, against several people in the West Bank amount to torture and cruel, inhuman and degrading treatment and punishment. They have documented examples of such treatment during detention through testimonies of victims, some of whom have political affiliations with Hamas.⁹²² They have also reported a number of deaths

⁹¹⁸ ICHR, *Fourteenth Annual Report*.

⁹¹⁹ ICHR refers to this person in English as the “Chief of the Military Judicial Commission”.

⁹²⁰ “Al-Haq calls upon the President...”; “The detention of civilians...”; “Overview of the internal human rights situation...”.

⁹²¹ ICHR, *Fourteenth Annual Report*; “The detention of civilians...”.

⁹²² Various affidavits have been collected by Al-Haq, Addameer, PCHR and ICHR. For instance, Al-Haq’s testimony taken from Marwan Khaled Saleh al-Khalili reports ill-treatment he received at the hands of the Preventive Security force, which included the “shabeh”, a stress position involving a very small, slanted chair, to which he was bound for four days. He suffered two strokes and permanent injury, according to his testimony. He was released after being asked to sign a pledge to leave his work for the Hamas Social Committee (Al-Haq affidavit No. 4364/2008.). In another of Al-Haq’s testimonies, relating to October 2008, Muhammad Suleiman Mahmoud Dagher reports on the torture, death threats and beatings he and another man received at the hands of an unknown Palestinian Authority security agency. At one point during his detention, he was made to stand on a chair while his interrogator placed a rope, which was suspended from the ceiling, around his neck. The interrogator then reportedly said “if you do not confess, we will kill you”. He also had a gun put to his head and threatened (Al-Haq affidavit No. 4460/2008). An additional example of abuse and intimidation is recorded by a lawyer of the Addameer Prisoner Support and Human Rights Association, relating to a visit of a detainee who was also a lawyer. “They told him that when he will get out from the prison he will be handicapped and that ‘you are no better than Majd al-Barghouti’ [who died in General Intelligence Service (GIS) detention in February 2008] and also told him he should consider himself from now on fired from his work, and that his membership at the Bar association will be suspended. The interrogator reportedly said to X, ‘don’t you know that the President of the Bar Association is from Fatah?’” (affidavit received by the Mission from Addameer).

in detention to which it is suspected that torture and other ill-treatment may have contributed or which they may have caused.⁹²³

1560. According to these organizations, complaints of such practices have not been investigated and because of the failure of the competent authorities to oversee these agencies or hold them accountable for their practices, impunity for serious violations of human rights prevails. One organization asserts that, “Silence, connivance and a failure to prevent or oversee such acts all manifest a definitive presumption of the consent or acquiescence of public officials to inflict such pain and suffering.”⁹²⁴

3. Freedom of association

1561. There have been reports that freedom of association, which is protected by the Palestinian Basic Law, has been violated with respect to several organizations, on the basis of their political views and affiliations. Hamas-affiliated organizations have been particularly targeted since 2008.⁹²⁵ On 14 July 2008, PCHR issued a report describing the “interference of the Ministry of Interior and Security Forces in election affairs of the Women’s Arab Union.” The report described how a committee consisting of Ministry of Interior officials, Preventive Security and General Intelligence staff banned five candidates from standing for election to the board of the Union.⁹²⁶ It has reportedly become common for the Palestinian Authority to disapprove of the appointment of board members with specific political affiliations, to request their replacement with its own nominees, and to refuse the (re-)registration of associations that do not comply with this request.⁹²⁷ Human rights organizations are reportedly not exempt from interference by the Palestinian Authority’s security forces. The Mission heard from one organization’s staff member that he and his colleagues received physical threats from the security forces. Furthermore, reported complications in administrative processes, such as delays in the opening of bank

⁹²³ PCHR press releases: “PCHR calls for disclosure of circumstances of Palestinian death in custody in Jericho”, 7 October 2008; “PCHR calls upon the Government in Ramallah to investigate death of a detainee in Jenin Preventive Security Service Headquarters”, 9 February 2009; “Detainee dies in the GIS prison in Hebron”, 15 June 2009; “PCHR calls for investigation into death of Palestinian held in custody by the Preventive Security Service in Hebron”, 6 August 2009; “PCHR calls upon the Government in Ramallah to investigate death of Palestinian in GIS custody in Nablus”, 11 August 2009.

⁹²⁴ Al-Haq, *Torturing Each Other* (July 2008).

⁹²⁵ In July 2008, the *Financial Times* reported that “with almost the entire West Bank leadership of Hamas in jail, the [Palestinian Authority] and Israel have now taken aim at what is widely seen as a crucial source of the group’s political strength: the tight network of schools, orphanages, clinics, charities and businesses run by the Islamists” (“West Bank ‘tsunami’...”). Entire boards of NGOs have been replaced with committees appointed by the Palestinian Authority (“Palestine divided...”, p. 12.).

⁹²⁶ PCHR, “PCHR condemns interference of the Ministry of Interior and security forces in election affairs of the Women’s Arab Union in Nablus”, press release, 14 July 2008.

⁹²⁷ ICHR, *Fourteenth Annual Report*. PCHR reported the forceful closure on 10 August of a number of associations and printing workshops in Hebron (“PCHR condemns attacks on civil society organizations and the continued arrests against Hamas members in the West Bank”, press release, 10 August 2008). ICHR reports that, on March 16, the Palestinian Preventive Security agency closed the Scientific Medical Association, a 24-hour medical centre housing a pharmacy, laboratory, dental clinic, osteopaths, gynaecologists and paediatricians, which had been operating for 17 years (ICHR, “Monthly report on violations...”, March 2009).

accounts and in carrying out financial transactions, result in additional hindrances to the work of these organizations.⁹²⁸

4. Appointments

1562. According to ICHR, “the Caretaker Government continues to discharge a large number of civil and military service employees, or suspend their salaries, under the pretext of ‘non-adherence to the legitimate authority’ or ‘non-obtainment of security approval’ on their appointments, which has become a pre-requirement for enrolment in public service”.⁹²⁹ In effect, this measure excludes Hamas supporters or affiliates from public sector employment.⁹³⁰

1563. According to PCHR, at the start of the 2008 school year, “on 14 October, the Ministry of Education in Ramallah sent written notices to dozens of teachers, cancelling their employment contracts, and dismissing them without notice. The notices claimed that the Ministry of Education did not approve their employment any longer.”⁹³¹ Al-Haq reported that some teachers were asked to sign pledges to refrain from political activity.⁹³² ICHR reported that 200 teachers were dismissed (not reappointed) at this time. ICHR petitioned the Palestinian High Court of Justice to seek the reappointment of around 50 of them, and is still waiting for a decision.⁹³³

B. Freedom of the press, freedom of expression and opinion

1564. Allegations of violations of press freedom by the Palestinian Authority in the West Bank in the past year are linked to reports of arrests of journalists, the closure of media offices, the forcible changing of newspaper and news website headlines,⁹³⁴ attacks against photographers, some of whom have been forced to delete material and breaking or confiscating photographic equipment.⁹³⁵ The journalists’ association Palestinian Center for Development and Media Freedoms (MADA) reports a gradually worsening situation.⁹³⁶

⁹²⁸ Mission interview with Al-Haq, 2 July 2009.

⁹²⁹ ICHR, *Fourteenth Annual Report*, p. 21.

⁹³⁰ Mission telephone interview with ICHR, 30 July 2009.

⁹³¹ PCHR, “PCHR calls upon the Palestinian Government to reverse decision to dismiss dozens of West Bank teachers”, press release, 27 October 2008.

⁹³² Al-Haq affidavit No. 4439/2008, 27 October 2008.

⁹³³ Mission telephone interview with ICHR, 30 July 2009.

⁹³⁴ Mission telephone interview with Al-Haq, 15 July 2009.

⁹³⁵ PCHR press releases: “PCHR condemns continued detention of journalists by Preventive Security Service in the West Bank”, 12 February 2009; “Unknown persons shoot at offices of al-Hayat al-Jadeeda newspaper in al-Bireh, and car of Government official in Nablus”, 9 February 2009 <http://www.pchrgaza.org/files/PressR/English/2008/25-2009.html> 30-Nov. 2008; “PCHR condemns attacking journalists and media institutions in the West Bank and Gaza Strip”, 30 November 2008.

⁹³⁶ MADA, *Annual Report: 257 Violations of Media Freedoms in OPT during 2008*. There are many other examples; see, for instance, “PCHR gravely concerned over deterioration...”.

1565. The Mission received several reports of direct or indirect interference in media coverage of demonstrations in the West Bank during the Israeli military operations in Gaza. The Mission was informed, for example, that the Palestinian Authority censored television programmes and newspapers, and that editors were at times informed verbally not to use certain terms or words, or not to broadcast programmes that could be considered as incitement against the Palestinian Authority.⁹³⁷

1566. MADA reported that, on 2 January 2009, an Associated Press photographer covering a march in Ramallah in support of the people of Gaza was attacked by members of the Military Intelligence. The photographer said a security official in civilian clothing first shouted at him to stop taking pictures and then he was assaulted by two security agents and taken by force to a nearby building, where he was beaten until he lost consciousness. He was taken initially to the intelligence headquarters but then transferred to a hospital, where he was treated for a broken nose and subsequently released.⁹³⁸

1567. In another incident, on 18 January 2009, a well-known West Bank journalist was reportedly detained overnight at Preventive Security headquarters in Hebron and questioned about an interview he had given to the al-Quds Satellite Channel in which he was critical of the Palestinian Authority.⁹³⁹ According to his affidavit, he was then brought before the Director of the Preventive Security in Hebron, who he said encouraged him to exercise self-censorship.⁹⁴⁰

1568. Between 24 and 27 January 2009, four correspondents of al-Quds Satellite Channel were arrested by the Preventive Security Service, the Palestinian General Intelligence and the Palestinian Military Intelligence, and interrogated about their work.⁹⁴¹

1569. On 22 April 2009, PCHR noted the arrest by the police in Nablus of a professor of political science at An-Najah University in Nablus who had expressed support for Hamas on a programme of the al-Aqsa television channel when asked to comment on the recent attack against members of the Palestinian Legislative Council by the security forces.⁹⁴²

1570. On 16 July 2009, the Prime Minister issued a decision to close the international television channel al-Jazeera in the West Bank, because it broadcast an interview with a senior Fatah leader, who accused senior Palestinian Authority officials of being implicated in the death of former President Arafat.⁹⁴³ Although the ban was lifted on 18 July, the Prime Minister

⁹³⁷ Mission interview with Al-Haq, 2 July 2003.

⁹³⁸ “Violations of media freedoms...”.

⁹³⁹ Al-Haq affidavit No. 4634/2009, 22 January 2009.

⁹⁴⁰ Ibid. See also “Violations of media freedoms...”.

⁹⁴¹ “Violations of media freedoms...”.

⁹⁴² PCHR press releases: “PCHR notes with grave concern the arrest of Dr. Abdul Sattar Qasem by the Palestinian police in Nablus”, 22 April 2009; “PCHR condemns attack on [Palestinian Legislative Council] member Sheikh al-Beetawi”, 20 April 2009.

⁹⁴³ PCHR, “PCHR condemns decision to suspend al-Jazeera's work in the West Bank”, press release, 16 July 2009; Human Rights Watch, “Palestinian Authority: lift the ban on al-Jazeera”, 17 July 2009; International Federation of Journalists, “IFJ condemns Palestinian Authority over ban on al-Jazeera”, 16 July 2009.

announced that he would pursue legal action against the channel “for its continuous incitement against the Palestinian National Authority.”⁹⁴⁴

C. Freedom of assembly: repression of demonstrations during the Israeli military operations in Gaza of 27 December 2008-18 January 2009

1571. The Mission received information from various sources that demonstrations in support of Gaza were both prevented from taking place and, in some cases, violently repressed.⁹⁴⁵

1572. Security officers reportedly used excessive force during demonstrations on 2 January in Hebron and Ramallah. At both events, protestors suffered injuries after being beaten by security officers. Journalists at the Hebron protest were prevented from reporting on the event.⁹⁴⁶

1573. Al-Haq informed the Mission that a student demonstration at Birzeit on 5 January 2009, which had the stated aim of “showing the occupation forces that Palestinian students reject all aggression against Gaza”, saw a heavy deployment of Palestinian Preventive Security, General Intelligence and Military Intelligence services personnel. Many students were reportedly beaten;⁹⁴⁷ 50 were injured, 9 of whom were hospitalized. Many were also detained, although most were released later the same day. Ms. Khalida Jarrar, a member of the Palestinian Legislative Council, informed the Mission that she had received a call from one of the students asking her to come to the hospital and witness the injuries.⁹⁴⁸

1574. According to Al-Haq, on 26 January, after the end of the Israeli military operations in Gaza, a peaceful sit-in was held near the security forces’ headquarters in Hebron against detentions on political grounds. Reportedly, “security forces beat demonstrators, including children, with sticks. Although several demonstrators were injured, security forces impeded access of medical personnel.”⁹⁴⁹ The affidavit of one eyewitness states that “Palestinian security officers demanded that we disperse and take our banners down. As demonstrators refused to disband, a group of female security officers started beating them with sticks. The security officers addressed the demonstrators, saying: ‘You are Shiite. In Gaza, you shot the legs of Fatah activists. You stole food supplies in Gaza.’ Security officers also impeded access to a Palestinian ambulance and prevented medics from evacuating eight injured protestors.”⁹⁵⁰

1575. In another serious incident, a former student leader who used to be a well-known political activist informed the Mission that he was tortured by the Palestinian Authority’s security forces,

⁹⁴⁴ Al-Jazeera, “Al-Jazeera West Bank ban ‘revoked’”, 19 July 2009.

⁹⁴⁵ Mission interview with PCHR, 2 July 2009; Mission interview with ICHR, 2 July 2009; Mission Interview with Al-Haq, 2 July 2009; “Monthly report on violations...”, January 2009; “Field report”, January-March 2009.

⁹⁴⁶ “Monthly report on violations...”, January 2009.

⁹⁴⁷ Mission interview with Al-Haq, 2 July 2009; ICHR reported in similar terms on the event, Mission interview with ICHR, 2 July 2009.

⁹⁴⁸ Mission interview with WB/02, 16 July 2009.

⁹⁴⁹ “Field report”, January–March 2009.

⁹⁵⁰ Al-Haq affidavit No. 4692/2009, 7 February 2009; see also “Monthly report on violations...”, January 2009.

apparently because of his protest activities. During the Israeli military operations in Gaza, he took part in daily protests and was stopped several times by the security services. He reported that on 2 January 2009, after the Friday midday prayers, he was stopped by security personnel in plain clothes and in uniform in the centre of Ramallah. He was pushed into a car carrying the emblem of the Palestinian Authority, where electrical shocks were applied to his body. He was then taken to the Military Intelligence office and interrogated. He alleges that a high-ranking Military Intelligence official threatened him with six months' arrest under the emergency law and warned him not to criticize the Palestinian Authority and to refrain from talking about the resistance, Hamas and Gaza.⁹⁵¹

D. Legal analysis

1576. The Palestinian Authority, inasmuch as it exercises control over the territory and people, has an obligation to respect and enforce the protection of human rights.⁹⁵² When assessing the aforementioned alleged violations, the terms of international human rights law, to the extent that it forms part of customary international law, must be examined. Most provisions of the Universal Declaration of Human Rights are considered part of customary international law and would, therefore, apply. In addition, the Palestinian Authority has declared its commitment to respect international human rights law. The Palestinian Basic Law contains a number of articles protecting human rights as well as a commitment to abide by major human rights instruments.⁹⁵³ Article 10 (2) states that "The Palestinian National Authority shall work without delay to join regional and international declarations and covenants which protect human rights". The Basic Law itself broadly encompasses the rights enshrined in the Universal Declaration of Human Rights.

1577. According to information received by the Mission, which it considers to be reliable, the Palestinian Authority has carried out arbitrary and unlawful arrests and detentions of political opponents in the West Bank, and regularly denied political detainees access to legal representation and basic due process rights, including the right to be brought promptly before a court and charged with a recognizable criminal offence, contrary to the norms contained in articles 9 and 10 of the Universal Declaration of Human Rights. Arresting individuals based on their political opinions also constitutes a discriminatory practice contrary to article 1.

1578. Subjecting detainees to acts of torture, cruel, inhuman or degrading treatment is prohibited by the customary international law norm reflected in article 5 of the Universal Declaration, and constitutes a violation of their right to security of the person as contained in article 3. Insofar as torture or other cruel, inhuman or degrading treatment can be established, individual criminal responsibility attaches to the perpetrator and any one else ordering, assisting or participating in the commission of the crime.

⁹⁵¹ Mission telephone interview with WB/02, 16 July 2009.

⁹⁵² It is necessary to note in this respect that the Palestinian Authority's control and law enforcement ability extend only to "Area A", and that they are also subject to the ultimate control by the occupying Power, which thus retains overall control and responsibility (see Fourth Geneva Convention, art. 47).

⁹⁵³ See chap. IV.

1579. Death in detention as a result of wilful killing, torture or other forms of abuse constitutes a violation of the right to life reflected in article 3 of the Universal Declaration.

1580. Excessive force in policing demonstrations in the instances reported above contravenes the requirements of the United Nations Code of Conduct for Law Enforcement Officials (art. 3) and the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (principle 4) that law enforcement officials use force only when strictly necessary and to the extent required for the performance of their duty, and that they apply non-violent means first, using force only if other means remain ineffective or without any promise of achieving the intended result. In addition, it may violate the right to freedom of expression, the right to peaceful assembly (article 20 of the Universal Declaration of Human Rights) and the right not to be discriminated on the basis of political opinions.

1581. Reports that the Palestinian Authority interfered with the work of journalists and the media give rise to the concern that the right to freedom of opinion and expression has been interfered with. According to article 19 of the Universal Declaration of Human Rights, this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

1582. The Mission considers that the information it received about the requirement for security approval and recognition of the “legitimate authority” as a prerequisite for public office, as well as for teaching and other posts in public schools and membership on boards of associations, suggests a violation of the right to hold public office and of the right not to be discriminated on the basis of political beliefs.

1583. Interference with the constitution of boards of associations, or the registration of certain associations on grounds of political allegiance, would, if confirmed, indicate a violation of the right to form associations (article 20 of the Universal Declaration). Dismissal from public appointment on the basis of (presumed) political affiliation violates the right to work, to just and favourable conditions of work and to protection against unemployment (art. 23) and the right to non-discrimination (art. 1).

E. Conclusions

1584. From the information available to it, the Mission finds that there are features of the repressive measures against actual or perceived Hamas affiliates and supporters in the West Bank that would constitute violations of international law. Furthermore, in efforts to minimize the power and influence of Hamas, the protection and the promotion of human rights have generally been eroded. The Mission notes that these measures and their objectives are relevant to the context within which the Israeli offensive in Gaza was launched, as analysed in chapter II.⁹⁵⁴

1585. The Mission is concerned that, by failing to take action to put an end to the practices described above, the Palestinian executive and judicial authorities are contributing to the further

⁹⁵⁴ “Leading security figures have taken to referring to Hamas in front of Israeli counterparts as a ‘common enemy’ and speak in crudely violent terms of how they plan to treat it” (“Palestine divided...”).

deterioration of the fundamental rights and freedoms of Palestinians, the rule of law and the independence of the judiciary.

1586. It appears from the information the Mission received that the Palestinian Authority's actions against political opponents in the West Bank started in January 2006, intensified between 27 December 2008 and 18 January 2009, and is continuing until today.

1587. The Mission considers detentions on political grounds legally unacceptable for several reasons: the arrest and indefinite detention (without trial) by security services and under the military judiciary system are in violation of Palestinian law and international human rights law; and the arrests and detentions are apparently based on political affiliation, which would violate the right not to be arbitrarily detained, the right to a fair trial, and the right not to be discriminated against on the basis of one's political opinion, which are both part of customary international law. Moreover, the reports of torture and other forms of ill-treatment during arrest and detention, and the reports of deaths in detention raise further concerns and warrant proper investigation and accountability.

1588. The Mission is concerned about interference with the freedom of the media.

1589. It is a serious concern to the Mission that the normal system of checks and balances between the executive, the legislative and the judiciary branches in the area controlled by the Palestinian Authority appears to be flawed. There seems to be little evidence of a functioning accountability system to counter instances of torture and other forms of abuse of power. It is also of serious that, in the absence of governmental oversight, civil society organizations are receiving threats and being harassed and seeing their operations impeded by administrative obstacles.⁹⁵⁵

⁹⁵⁵ Mission interview with Al-Haq, 2 July 2009.

PART THREE: ISRAEL

1590. The Mission, in examining, as required by its mandate, alleged violations occurring in the context of the Israeli military operations conducted in Gaza from 27 December 2008 to 18 January 2009, whether before, during or after, also considered allegations of violations against Israeli citizens and residents. The Mission focused on two areas that it considered particularly relevant: (a) the launching of rockets and mortars from the Gaza Strip into southern Israel by Palestinian armed groups, and their effects on the civilian population; (b) the action taken by the Government of Israel to repress dissent among its citizens and residents vis-à-vis its military operations in Gaza, and to limit independent and critical reporting on it by human rights organizations and media.

Methodology

1591. One consequence of the lack of cooperation by Israel with the Mission was that it was unable to visit Israel to investigate alleged violations of international law, and in particular to visit relevant sites and interview victims and witnesses. The Mission has, however, received many reports and other relevant materials from Israeli organizations and individuals, including Palestinians living in Israel, and from international human rights organizations and institutions. The Mission, also, met with representatives of a number of Israeli human rights organizations (see annex). The Mission conducted telephone interviews with people either living in or working with communities in southern Israel, including the Bedouin Palestinian community in the unrecognized villages in the Negev. It also interviewed many people in relation to the other matters within its mandate. Israeli victims, witnesses, experts and representatives of southern Israel local authorities appeared at the public hearings held in Geneva on 6 July 2009. Representatives of Israeli civil society and non governmental organizations working on human rights inside Israel were contacted either via video link or telephone. The issue of rocket and mortar attacks on Israel was also covered in interviews conducted in Gaza in May and June 2009 and in communications with the Gaza authorities.

1592. Owing to the lack of access, the chapters in the section below rely more broadly on secondary information than the previous sections.

1593. The Mission found the witnesses it heard in relation to the situation in Israel to be credible and reliable. The Mission has also written to the Gaza authorities and the Government of Israel seeking information and official positions on, inter alia, the issues addressed in the section below. The information received by the Gaza authorities is taken into account in this chapter. The Government of Israel has not responded.

XXIV. THE IMPACT ON CIVILIANS OF ROCKET AND MORTAR ATTACKS BY PALESTINIAN ARMED GROUPS ON SOUTHERN ISRAEL

1594. The Mission conducted telephone interviews with people either living in or working with communities in southern Israel. Five residents of southern Israel appeared at the public hearings in Geneva on 6 July 2009 while three representatives of the Israel Trauma Center for Victims of Terror and War (NATAL) appeared via videolink from Tel Aviv. The issue of rocket and mortar attacks on Israel was also covered in interviews conducted in Gaza in May and June 2009 and in communications with the Gaza authorities.

1595. The Mission was unable to conduct on-site investigations owing to the decision of the Government of Israel not to cooperate with the Mission.

1596. The Mission addressed questions to the Government of Israel regarding individuals who have been affected by rocket and other fire from the Gaza Strip. The request of information included data about any psychological, social and economic harm caused by the rocket and mortar shells that have been launched into Israel. The Mission did not receive any reply to its questions.

1597. Since April 2001, Palestinian armed groups have launched more than 8,000 rockets and mortars from Gaza into southern Israel.⁹⁵⁶ Communities such as Sderot, the surrounding kibbutzim and some of the unrecognized villages in the Negev have been in range since that time. During the Israeli military operations in Gaza in December 2008 and January 2009, the range of the rockets and mortars increased significantly to nearly 40 kilometres from the Gaza border, encompassing the Israeli towns of Yavne 30 kilometres to the north and Beersheba 28 kilometres to the southeast.

1598. Since the rocket and mortar fire does not often hit populated areas, and because of the precautions taken by the Government of Israel, the rockets and mortars have caused relatively few fatalities and physical injuries among the residents of southern Israel. Property damage, while by no means insignificant, has not been extensive. More widespread, however, has been the psychological trauma and the feeling of insecurity that living under rocket fire has caused and continues to cause, to people living in the affected towns and villages, as well as the erosion of the economic, social and cultural life of these communities.

1599. Every death and injury is not only a tragedy but a matter of utmost concern to the Mission. The Mission wishes to emphasize that the issues of concern, and indeed the consequences of any attack affecting civilians, cannot be reduced to a recitation of statistics, nor should they be.

A. Summary of rocket and mortar fire from 18 June 2008 to 31 July 2009

1. 18 June 2008-26 December 2008

1600. According to Israeli sources,⁹⁵⁷ 230 rockets and 298 mortars were fired against Israel between 18 June and 26 December 2008; 227 rockets and 285 mortars struck territory inside the State of Israel. Media reports indicate that areas struck by rockets included the Western

⁹⁵⁶ Statistics taken from the Report of the Intelligence and Terrorism Information Center at the Israel Intelligence Heritage & Commemoration Center (IICC), "Summary of rocket fire and mortar shelling in 2008"; available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/ipc_e007.pdf.

⁹⁵⁷ These figures have been cross-referenced against those given in a report of the IICC entitled "The Six Months of the Lull Arrangement", December 2008. Available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e017.pdf.

Negev,⁹⁵⁸ Sderot⁹⁵⁹ and Ashkelon.⁹⁶⁰ This includes the 157 rockets and 203 mortars that were fired during the ceasefire, which ended officially on 18 December 2008.⁹⁶¹

1601. The Mission notes that 92 per cent (212) of the rockets and 93 per cent (279) of the mortars fired between 18 June and 26 December 2008 were fired after 5 November 2008.⁹⁶²

1602. While there were no fatalities inside Israel, two young Palestinian girls, aged 5 and 12 years, were killed when a rocket fell short, landing in northern Gaza on 26 December 2008.⁹⁶³

1603. Media reports indicated that, during this period, six Israelis and one foreign worker were wounded as a result of rockets landing in built-up areas in southern Israel. Where rockets did not land in open space, property damage was sustained. As is discussed below, an unknown number of people in southern Israel were treated for shock following the sounding of the early warning system and the subsequent rocket strikes.⁹⁶⁴

2. 27 December 2008-18 January 2009

1604. According to the Israeli authorities, armed groups in Gaza fired approximately 570 rockets and 205 mortars into Israel during the 22 days of the military operations in Gaza.⁹⁶⁵ On their websites, the al-Qassam Brigades and Islamic Jihad claimed to have fired over 800 rockets into Israel during this time.⁹⁶⁶

1605. During the Israeli military operations in Gaza, the range of rocket and mortar fire increased dramatically, reaching towns such as Beersheba 28 kilometres to the south-east and Ashdod 24 kilometres to the north of the Gaza Strip. Rockets continued to fall in areas such as

⁹⁵⁸ On 24 June 2008, 3 Qassam rockets struck the Western Negev; see “End of Truce? 2 Kassam hit w. Negev”, *Jerusalem Post*, 24 June 2008. On 27 November 2008, a rocket struck and damaged a house on a kibbutz in the western Negev; see “Kassams continue to strike Negev”, *JTA*, 27 November 2008.

⁹⁵⁹ On 24 June 2008, a rocket hit the yard of a house in Sderot; see “Rockets ‘violated Gaza ceasefire’”, *BBC News*, 24 June 2008.

⁹⁶⁰ For example, on 14 November 2008, several rockets struck Ashkelon; *The Times*, “ Hamas militants step up rocket attacks on Israel”, 15 November 2008. Ashkelon is approximately 20 kilometres from the Gaza border.

⁹⁶¹ *Ibid.*

⁹⁶² On 5 November 2008, Israel made an incursion into Gaza claiming that its aim was to close a cross-border tunnel that Palestinian fighters intended to use to kidnap an Israeli soldier. During the incursion, a member of Hamas was killed and several Israeli soldiers were wounded. See “Gaza truce broken as Israeli raid kills six Hamas gunmen”, *The Guardian*, 5 November 2008.

⁹⁶³ ‘Palestinian rockets kill 2 schoolgirls in Gaza’, *Fox News.com*, 26 December 2008.

⁹⁶⁴ The Mission notes that the submission of 9 August 2009 by Magen David Adom (‘MDA’) detailed 407 stress-related injuries in Sderot alone from 1 June to 26 December 2008.

⁹⁶⁵ See, Israel Ministry of Foreign Affairs at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Missile+fire+from+Gaza+on+Israeli+civilian+targets+Aug+2007.htm>; see also “Rockets from Gaza”, Human Rights Watch, 6 August 2009, p.8. According to HRW, the IDF stated that 650 rockets had been launched from Gaza, but only 570 rockets had struck Israel.

⁹⁶⁶ HRW report of 6 August 2009, p. 2.

Sderot, the Eshkol Regional Council and the surrounding kibbutzim, which had experienced rockets strikes since 2001. A total of 90 rockets struck Sderot during the 22 days of military operations in Gaza.⁹⁶⁷

1606. During the period of the operations, three civilian fatalities and one military fatality were recorded in Israel resulting from the rocket and mortar strikes launched from Gaza. According to Magen David Adom, 918 people were injured (17 critically injured, 62 medium injuries and 829 lightly injured) in this time period.⁹⁶⁸ There were also 1,595 people inside Israel treated for stress-related injuries.⁹⁶⁹

3. 19 January 2009-31 July 2009

1607. According to the Israeli authorities, more than 100 rockets and 65 mortars were fired into Israel after 19 January 2009.⁹⁷⁰ No fatalities resulted from these rocket and mortar strikes. The Mission was unable to obtain any official statistics of civilians physically injured by rockets and mortars during this time. On 1 February 2009, one Israeli civilian was lightly wounded when mortar shells, fired from Gaza, exploded in the Sha'ar Hanegev region.

1608. The majority of the rockets and mortars were fired prior to 15 March 2009. On 12 March 2009, the Ministry of the Interior of the Gaza authorities stated that rockets were being “fired at the wrong time” and that the Gaza authorities were investigating those responsible.⁹⁷¹ On 20 April 2009, a member of Hamas called on other armed groups to stop firing rockets “in the interests of the Palestinian people”.⁹⁷² On 19 July 2009, Xinhua News reported that Hamas had arrested two members of Islamic Jihad firing mortars at Israeli forces.⁹⁷³

1609. In July 2009, Hamas declared that it was entering a period of “cultural resistance”, stating that it was suspending its use of rockets and shifting its focus to winning support at home and abroad through cultural initiatives and public relations.⁹⁷⁴

B. Relevant Palestinian armed groups

1610. The Palestinian armed factions operating in the Gaza Strip and claiming responsibility for the majority of the rocket and mortar launchings are the Izz al-Din al-Qassam Brigades⁹⁷⁵, the al Aqsa Martyrs' Brigades and Islamic Jihad. A brief description of each group is given below.

⁹⁶⁷ Ibid, p.8.

⁹⁶⁸ Submission to the Mission, 9 August 2009.

⁹⁶⁹ Ibid.

⁹⁷⁰ See, Israel Ministry of Foreign Affairs at http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Palestinian_ceasefire_violations_since_end_Operation_Cast_Lead.htm.

⁹⁷¹ “Hamas criticizes Gaza rocket fire”, *Al Jazeera* 13 March 2009.

⁹⁷² “Hamas discusses resistance regulation with Gaza groups”, *Xinhua News Agency*, 22 April 2009.

⁹⁷³ “Hamas reportedly arrests Gaza operatives firing at Israeli troops”, *Xinhua News Agency*, 19 July 2009.

⁹⁷⁴ The New York Times, “Hamas Shifts From Rockets to Culture War”, 23 July 2009, available at <http://www.nytimes.com/2009/07/24/world/middleeast/24gaza.html?scp=2&sq=hamas&st=cse>.

1611. The 'al Qassam Brigades' are the armed wing of the Hamas political movement. According to a June 2007 report of Human Rights Watch, the al-Qassam brigades initiated the manufacture of rockets, now generically known as "Qassams", inside the Gaza Strip.⁹⁷⁶ According to figures given on the Al-Qassam Brigades website, the group launched 335 Qassam rockets, 211 Grad rockets and 397 mortars into Israel during the Israeli military operations in Gaza.⁹⁷⁷

1612. The al-Aqsa Martyrs' Brigades were organized during the second intifada and claim affiliation with Fatah. This group too has claimed responsibility for rocket and mortar fire on Israel following the Egyptian brokered ceasefire (*tahdiya*), which started on 18 June 2008.

1613. Islamic Jihad wields considerably less political power than either Hamas or Fatah. Its military wing is known as Saraya al-Quds and the group calls the rockets it manufactures inside Gaza, 'al Quds'. Islamic Jihad has made numerous claims of responsibility for the launching of rockets into Israel,⁹⁷⁸ including the first spate of rocket fire after 18 June 2008.

1614. On its website, the Abu Ali Mustafa Brigades,⁹⁷⁹ the military wing of The Popular Front for the Liberation of Palestine also claimed responsibility for launching 177 rocket attacks and 115 mortars on several towns and villages inside Israel from 27 December 2008 to 18 January 2009.

1615. The al-Naser Salah ad-Din Brigades, the military wing of the Popular Resistance Committee has stated that it too has launched rockets into Israel.⁹⁸⁰ The Committee is a coalition of different armed factions who oppose what they perceive as the Palestinian Authority and Fatah's conciliatory approach to Israel.

C. Type of rockets and mortars held by Palestinian armed groups⁹⁸¹

1616. There is little independent confirmation of the types of weaponry held by Palestinian armed groups or the number of weapons that may be stockpiled. According to an Amnesty International report, of February 2009, the arsenals held by armed groups in the Gaza Strip include: al-Qassam (or al-Quds), 122mm Grad and 220 Fajr-3 rockets as well as the al-Battar, the Banna 1 and Banna 2 anti-armour rockets.

⁹⁷⁵ The group was named after a Syrian who worked with displaced Palestinians in what is now northern Israel, and died in a clash with British troops in 1935, sparking the Palestinian revolt of 1936-9.

⁹⁷⁶ "Indiscriminate Fire", Human Rights Watch, 30 June 2007.

⁹⁷⁷ See <http://www.alqassam.ps/arabic/upload/forkan.pdf>.

⁹⁷⁸ According to statistics provided on its website, the Saraya al-Quds Brigades claimed responsibility for the firing of 235 mortar and rockets during the military operations, See <http://www.israj.net/vb/t1839/>.

⁹⁷⁹ See <http://www.kataebabuali.ps/inf2/articles-action-show-id-223.htm>.

⁹⁸⁰ During the operations in Gaza, the group claimed responsibility for launching 132 rockets and 88 mortars. See <http://www.moqawmh.com/moqa/view.php?view=1&id=300>.

⁹⁸¹ See the Amnesty International report "Fuelling the Conflict: Foreign arms supplies to Israel/Gaza", 23 February 2009; p. 15-16 and p. 30-31.

1. al-Qassams

1617. There are thought to be at least three generations of Qassam rockets: (a) the Qassam 1, developed in 2001, with a range of 4.5 kilometres and an explosive load of 0.5 kilograms; (b) the Qassam 2, developed in 2002, with a range of 8-9.5 kilometres and an explosive load of 5-9 kilogram; and (c) the Qassam 3, developed in 2005, and with a range of 10 kilometres and an explosive load of 20 kilograms.⁹⁸²

1618. The rockets manufactured in the Gaza Strip are fashioned from rudimentary materials, such as hollow metal pipes. They are relatively unsophisticated weapons and lack a guidance system, and so cannot be aimed at specific targets.⁹⁸³ Jane's Terrorism and Security Monitor has described them as "inaccurate, short-range and rarely lethal".⁹⁸⁴ Even so, Qassam rockets have inflicted both fatalities and injuries to residents of southern Israel.

2. 122 mm Grad rocket

1619. 122 mm Grad rocket is a Russian-designed missile with a range of approximately 20 to 25 kilometres. Given the higher level of technological sophistication and the fact that it is manufactured with material not easily (if at all) available in Gaza, it is likely that they are not made in Gaza.

1620. While most 122 mm Grad rockets have a range of about 20 kilometres, some have landed 40 kilometres inside Israel.⁹⁸⁵ Global Security has concluded that on the basis of photographs, that the rockets that struck open space near Yavne and Bnei Darom on 28 December 2008 were Chinese-manufactured 122 mm WeiShei-1E rockets, which can travel distances of 20 to 40 kilometres.⁹⁸⁶

3. 220 mm Fajr-3 rocket

1621. The 220 mm Fajr-3 rocket is Iranian designed and is also thought to be smuggled into Gaza.

4. Anti-armour rockets

1622. Palestinian armed groups are also alleged to possess Chinese-designed rockets that have been smuggled into Gaza.⁹⁸⁷ According to Jane's Defence Weekly, Hamas is also in possession

⁹⁸² Technical Report to the United Nations Fact-Finding Mission on the Gaza Conflict, Irish Defence Force Ordinance School, July 2009.

⁹⁸³ Ibid.

⁹⁸⁴ Rocket powered 'Hamastan, Jane's Terrorism and Security Monitor, "11 July 2007.

⁹⁸⁵ For example, in Beersheba on 30 and 31 December 2008: "Rockets reach Beersheba, cause damage", *Ynet News*, 30 December 2008.; "Rocket barrages hit Beersheba, Ashkelon; 5 lightly hurt", *Ynet News*, 31 December 2008.

⁹⁸⁶ "Hamas Rockets", Global Security, available at <http://www.globalsecurity.org/military/world/para/hamas-qassam.htm>.

⁹⁸⁷ "Hamas deploys rocket arsenal against Israel", Jane's Defence Weekly, 14 January 2009.

of several home-made anti–armour rockets, including the al-Battar, the Banna 1 and the Banna 2.⁹⁸⁸

5. Mortars

1623. Mortars are short-range weapons that are generally more accurate than rockets manufactured inside the Gaza Strip.⁹⁸⁹ Mortars have rudimentary aiming systems, in which the coordinates of previous strikes can be used to better target subsequent launches. Most mortars have a range of 2 kilometres; according to the Jaffa Centre for Strategic Studies, however, the Palestinian Sariya-1 is a 240 mm mortar with 15 kilometre range.⁹⁹⁰

D. Rocket and mortar attacks by the Palestinian armed groups on Israel⁹⁹¹

1624. The Mission is providing a brief history of rocket and mortars attacks, as it is relevant to an understanding of the breadth and depth of the psychological trauma suffered by residents of communities closest to the border, such as Sderot, that have been in range since 2001.

1625. The first recorded rocket launch took place on 16 April 2001. On 10 February 2002, the first rocket struck territory inside Israel, when a Qassam 2 rocket fired from Gaza landed in a field six kilometres from the border, near Kibbutz Sa'ad, in the Negev.⁹⁹² The first recorded strike of a rocket from Gaza on an Israeli city was on 5 March 2002, when two rockets struck Sderot.⁹⁹³

1626. According to statistics compiled by the Intelligence and Terrorism Information Centre at the Israel Heritage & Commemoration Center an organization with links to the Government of Israel, 3,455 rockets and 3,742 mortar shells were fired into Israel from Gaza from 16 April 2001 to 18 June 2008.

1627. The first civilian casualties from rocket fire were recorded on 28 June 2004 in Sderot, when Afik Zahavi (4 years old) and Mordehai Yosef (49 years old) were killed by a Qassam rocket. Afik's mother, Ruthie Zahavi (28 years old) was critically injured and nine others were wounded. Hamas claimed responsibility.⁹⁹⁴

⁹⁸⁸ Ibid.

⁹⁸⁹ Technical Report to the United Nations Fact-Finding Mission on the Gaza Conflict, Irish Defence Force Ordinance School, July 2009.

⁹⁹⁰ <http://www.weaponsurvey.com/missilesrockets.htm>.

⁹⁹¹ Statistics are taken from the report by Intelligence and Terrorism Information Center at the Israel Intelligence Heritage & Commemoration Center, "Summary of rocket fire and mortar shelling in 2008".

⁹⁹² "The homemade rocket that could change the Mideast", *The Times*, 11 February 2002. .Note, however, that the al-Qassam Brigades website posted a press release on 26 October 2001, in which the group claimed responsibility for a rocket attack against an Israeli town inside Israel: <http://www.alqassam.ps/arabic/sinaat.php?id=16>.

⁹⁹³ <http://www.israelemb.org/articles/2002/March/2002030500.html>.

⁹⁹⁴ "Israel steps up military action after Hamas rocket attack from Gaza strikes nursery", *The Independent*, 29 June 2004.

1628. From 28 June 2004, when the first fatalities from rocket fire were recorded, to 17 June 2008, 21 Israeli citizens, including two Palestinian citizens of Israel, two Palestinians and one foreign worker were killed inside Israel as a result of rocket attacks and mortar fire. In addition, a Palestinian was killed in Gaza when a rocket landed short of the border, and 20 Palestinians were killed when a vehicle transporting rockets exploded in Jabaliya refugee camp. Eleven of those killed inside Israel were killed in Sderot, a town of just over 20,000 people situated just over a kilometre from the Gaza Strip border.

E. Statements by Palestinian armed groups concerning their launching of rockets into Israel

1629. The al-Qassam Brigades, al-Aqsa Brigades, Islamic Jihad and Popular Resistance Committee all claimed responsibility for rocket and mortar attacks during the time period under review by the Mission. Palestinian armed groups generally justify these attacks as a legitimate form of resistance to Israeli occupation and as acts of self-defence and reprisals for Israeli attacks.⁹⁹⁵

1630. On 5 January 2009, Hamas member Mahmoud Zahar was quoted as saying that “the Israeli enemy ... shelled everyone in Gaza. They shelled children and hospitals and mosques, and in doing so, they gave us legitimacy to strike them in the same way”.⁹⁹⁶

1631. On 6 January 2009, during the Israeli military operations in Gaza, Khaled Mashal, Chairman of the Hamas Political Bureau wrote in an open letter that the demand to stop the Palestinian resistance was ‘absurd ... our modest home made-rockets are our cry of protest to the world’⁹⁹⁷. Hamas, in a press release published on 28 December 2008,⁹⁹⁸ declared:

We appeal to all factions of the Palestinian resistance and its military arm, especially the Brigades of the Martyr Izz el-Din al-Qassam to declare a state of general alert ... and take upon themselves the responsibility to protect the Palestinian people, by striking with all the strength it has the Zionists enemy, its military barracks and colonies, and by using all forms of resistance ... including the martyrdom operations and striking the Zionist depths...”

⁹⁹⁵ For example, on 24 June 2008, Islamic Jihad fired three Qassam rockets from Gaza into the Western Negev following the targeted assassination of one of its members, Tarek Abu Ghally and another in Nablus earlier that day. Islamic Jihad stated “we cannot keep our hands tied when this is happening to our brother in the West Bank” (The Jerusalem Post, 24 June 2008). See also chap. III.

⁹⁹⁶ HRW report of 6 August 2009, p. 2.

⁹⁹⁷ “This brutality will never break our will to be free” *The Guardian*, 6 January 2009. It should be noted that couple of month after the end of OCL and in an interview with *the New York Times*, Mashal stated that “not firing the rockets currently is part of an evaluation from the movement which serves the Palestinians’ interest. After all, the firing is a method, not a goal. Resistance is a legitimate right, but practicing such a right comes under evaluation by the movement’s leaders”. See <http://www.nytimes.com/2009/05/05/world/middleeast/05meshal.html>.

⁹⁹⁸ Press release, available at: <http://www.palestine-info.info/Ar/default.aspx?xyz=U6Qq7k%2bcOd87MDI46m9rUxJEpmO%2bi1s7qWPRV4XDeu2%2fQ%2bDRjgQnm%2f7wZogCTxIzGTevVWJc5MsXTUO3OLNIY3YA5siKloAlZ6oS1ivXknPx%2fFTToxPOB%2f8FLcGJbXOfO%2fHKW97wLT20%3d>.

1632. A spokesperson for the Popular Front for the Liberation of Palestine (PFLP) stated two days before the end of the operations in Gaza that “the rockets are both practical and a symbolic representation of our resistance to the occupier”.⁹⁹⁹

1633. On 25 May 2009, the Gaza authorities denied that they were preventing rocket attacks on Israel. A spokesman stated “we don’t make such decision without agreeing with all the resistance factions in a national consensus...The factions have the right to respond to any Zionist crime using any sort of resistance and there is no lull with the [Israeli] occupation”.¹⁰⁰⁰

F. Statements by the Gaza authorities to the Mission

1634. In a meeting with the Mission on 1 June 2008, the Gaza authorities stated that they had taken the initiative to spare civilian lives when they renounced suicide attacks in April 2006.¹⁰⁰¹ At the same meeting, a Government spokesperson stated that the resistance factions did not aim their rockets at civilians but rather at IDF artillery and other positions from which attacks against Gaza were launched.

1635. In response to questions by the Mission, on 29 July 2009, the Gaza authorities stated that they had “nothing to do, directly or indirectly, with al-Qassam or other resistance factions” and stated that they were able to exercise a degree of persuasion over the armed factions in relation to proposed ceasefires. While noting that the weaponry used by the armed factions was not accurate, the Gaza authorities discouraged the targeting of civilians.

1636. Despite various attempts, the Mission was unable to contact members of armed factions operating within the Gaza Strip.

G. Precautionary measures in effect in southern Israel

1. The Tseva Adom early warning system

1637. The *Tseva Adom* (or ‘Red Colour’) is an early warning radar system installed by the Israeli armed forces in towns in southern Israel. It was installed in Sderot in 2002 and in different areas of Ashkelon in 2005 and 2006.

1638. When the early warning system detects the signature of a rocket launch originating in Gaza, it automatically activates the public broadcast warning system in nearby Israeli communities and military bases. A two-tone electronic audio alert is broadcast twice, followed by a recorded female voice intoning the words “*Tseva Adom*”. The entire programme is repeated until all rockets have hit and launches are no longer detected. During the public hearings held in Geneva on 6 July 2009, Noam Bedein of the Sderot Media Center screened footage of the

⁹⁹⁹ <http://www.pflp.ps/english/?q=pflp-interview-ma-news-agency-israeli-aggression-g>.

¹⁰⁰⁰ Xinhua News, 25 May 2005.

¹⁰⁰¹ The statement was widely reported in the international media. See, “*Hamas in call to end suicide bombings*”, *The Guardian*, 9 April 2006.

sounding of the early warning system in Sderot and its effect on the community, for the benefit of the Mission.¹⁰⁰²

1639. In Sderot, the system gives residents a warning of approximately 15 seconds before an incoming missile strikes. The further residents are from the Gaza Strip, the longer the warning period. Residents of Ashkelon interviewed by the Mission estimated that the system gives them a 20 second warning, while residents of the more northern city of Ashdod or of the town of Beersheba in the Negev estimate that the system gives them a warning of approximately 40 to 45 seconds.

1640. It should be noted that the *Tseva Adom* system is not 100 per cent effective; according to Noam Bedein, the system failed to detect a rocket that struck Sderot on 21 May 2007, killing one and wounding two others.¹⁰⁰³ Moreover, the system may also give false alerts, a fact which led authorities in Ashkelon to switch off the system in May 2008. Consequently, no warning was given when a rocket struck a shopping centre on 14 May 2008, seriously injuring three people (including Dr. Emilia Siderer, who appeared before the Mission at the public hearings held in Geneva on 6 July 2009).

1641. The sounding of the *Tseva Adom* system and the knowledge that it does not provide a guaranteed forewarning of a rocket strike, have, according to organizations providing mental health services, also had a profound, adverse psychological effect on the communities living within the range of rocket and mortar fire. This issue is discussed in detail below.

2. Construction of fortifications and shelters

1642. In recent years, the Government of Israel has fortified towns in southern Israel with bomb shelters. Some residential homes contain “secure rooms”. In March 2008, the Government fortified 120 bus-stops in Sderot¹⁰⁰⁴ and, by January 2009, all schools in Sderot had been fortified against rocket attacks.

1643. According to an article published in *Haaretz*, approximately 5,000 residents of southern Israel, mostly elderly immigrants from the former Soviet Union, lacked proper reinforced rooms or reasonable access to public shelters.¹⁰⁰⁵ In interviews with residents of the affected communities in southern Israel, the Mission received reports of families abandoning the upper floors of their homes and living together in a room on the ground floor for fear of the failure of the early warning system and/or not being able to descend from the upper floors quickly enough reach a shelter.¹⁰⁰⁶

¹⁰⁰² “15 Seconds in Sderot”, available at <http://www.youtube.com/watch?v=ygb6VrW8WZw>; “First day of School”, available at http://www.youtube.com/watch?v=mFss6p5sTPE&feature=channel_page.

¹⁰⁰³ Telephone interview with Noam Bedein/ Sderot Media Centre, 28 June 2009. See also , ‘Woman killed, two wounded in Qassam rocket strike on Sderot’, *Haaretz*, 28 May 2007.

¹⁰⁰⁴ “Gov't places 120 fortified bus stops in rocket-plagued Sderot”, *Haaretz*, 5 March 2008.

¹⁰⁰⁵ “5000 southerners, mostly elderly, lack access to rocket shelter”, *Haaretz*, 4 February 2009,

¹⁰⁰⁶ Telephone interviews with Eric Yalin, 30 June 2009; Rachel Perez, 30 June 2009; Rachel Sushan, 30 June 2009; Naomi Benbassat- Lifshitz, 2 July 2009; Dina Cohen, 5 July 2009; Stewart Ganulin (Hope for Sderot), 8 July 2009.

1644. In March 2009, Sderot inaugurated a reinforced children's recreation centre, designed to provide a rocket-proof place for children to play.¹⁰⁰⁷ There are fortified playgrounds in Sderot, with concrete tunnels painted to look like caterpillars.¹⁰⁰⁸

1645. The Government of Israel has stated that, on current information, spending on fortifications and shelters between 2005 and 2011 will amount to approximately \$ 460 million.¹⁰⁰⁹ It should be noted, however, that the fortifications do not necessarily prevent rockets penetrating these buildings; for instance, on 3 January 2009, a Grad rocket penetrated the fortification of a school in Ashkelon, striking an empty classroom.¹⁰¹⁰

1646. The Mission is concerned about the lack of provision of public shelters and fortifications in the unrecognized villages in the Negev and in some of the recognized towns and villages populated by Palestinian citizens of Israel, living within the range of rocket and mortar fire (see paragraph X below).

H. Impact of rocket and mortar fire on communities in southern Israel

1647. The Mission notes that the impact on communities is greater than the numbers of fatalities and injuries actually sustained. The Mission also notes the information in the Government of Israel paper of July 2009, in which an article from *the Guardian* article was cited, stating that as at July 2009, 92 per cent of Sderot residents had seen or heard a rocket impact, 56 per cent had had shrapnel fall on their homes and 65 per cent knew someone who had been injured.¹⁰¹¹

1. Fatalities

1648. Between 18 June 2008 and 31 July 2009, there were four fatalities in Israel as a consequence of rocket and mortar fire from Gaza, of which there were three civilian and one military casualties.

1649. On 27 December 2008, Beber Vaknin, 58 years of age, of Netivot was killed when a rocket fired from Gaza hit an apartment building in Netivot.

1650. On 29 December 2008, Hani al-Mahdi, 27 years of age, of Aroar, a Bedouin settlement in the Negev, was killed when a Grad-type missile fired from Gaza exploded at a construction site in Ashkelon. On the same day, in a separate incident, Irit Sheetrit, 39 years of age, was killed and several wounded when a Grad rocket exploded in the centre of Ashdod. The al-Qassam Brigades claimed responsibility for the attack.

¹⁰⁰⁷ “An Israeli playground, fortified against rockets”, *The New York Times*, 12 March 2009.

¹⁰⁰⁸ , “On Israel-Gaza border, teens learn legacy of hate”, *Tampa Bay News*, 8 February 2009.

¹⁰⁰⁹ Government of Israel, “The Operation in Gaza: 27 December 2008 – 18 January 2009, Factual and Legal Aspects”, July 2009”, para. 43 and fn. 23.

¹⁰¹⁰ “Experts: Grads in Ashkelon were advanced”, *Ynet News*, 1 March 2009.

¹⁰¹¹ “The operation in Gaza...”, para. 46, citing statistics appearing in “Middle East Conflict”, *the Guardian*, 15 July 2009.

1651. On 29 December 2008, a member of the military, Warrant Officer Lutfi Nasraladin, 38 years of age, of the Druze town of Daliat el-Carmel, was killed by a mortar attack on a military base near Nahal Oz.

2. Physical injuries

1652. According to Magen David Adom (MDA), during the period of the Israeli military operations in Gaza, a total of 918 civilians were wounded by rocket attacks. This figure includes 27 critically wounded, 62 moderately wounded and 829 lightly wounded.¹⁰¹² From 19 January to 19 March 2009, 10 people physically injured from rocket fire were treated by MDA.¹⁰¹³

3. Psychological trauma/ mental health

1653. In interviews with both residents of southern Israel and the organizations dealing with mental health issues, the issue of psychological trauma suffered by adults and children living in the zone of rocket fire was repeatedly raised. While news articles sometimes report on people being treated for shock following a rocket strike, both individuals and organizations have voiced a real frustration with the lack of focus on what they termed the “invisible damage” caused by rockets. According to MDA, 1,596 people were treated by health facilities in Israel between 27 December 2008 and 18 January 2009.¹⁰¹⁴ From 19 January to 2 August 2009, 549 people from Sderot alone were treated for stress-related injuries.¹⁰¹⁵

1654. A study of October 2007, commissioned by NATAL, on the impact of the ongoing traumatic stress conditions on Sderot¹⁰¹⁶ found that 28.4 per cent of adults and between 72 and 94 per cent of children in Sderot reported signs indicative of post-traumatic stress disorder.¹⁰¹⁷ The study also found that children under the age of 12 years showed a high frequency of reported

¹⁰¹² MDA communication to the Mission, 9 August 2009. The Mission notes the figures given in the HRW report of August 2009 which outlined the number of people treated by MDA: 770 people including 3 fatalities, 4 severely wounded, 11 moderately wounded and 167 lightly wounded. See HRW report of August 2009, p. 8.

¹⁰¹³ HRW report of August 2009, p. 8.

¹⁰¹⁴ MDA communication to the Mission, 9 August 2009. Human Rights Watch quotes reports from MDA that it had itself treated 570 cases of people suffering from stress-related injuries: see HRW report of August 2009, p. 8. This figure was confirmed in a meeting between MDA and representatives of the Mission in Geneva on 22 July 2009.

¹⁰¹⁵ Ibid.

¹⁰¹⁶ Available at <http://www.theisraelproject.org/atf/cf/%7B84dc5887-741e-4056-8d91-a389164bc94e%7D/NATAL%20STATS%20FOR%20WEB.PPT#353,1>, The Impact of the Ongoing Traumatic Stress Conditions on Sderot Research Survey for NATAL – The Israel Trauma Center for Victims of Terror and War: Initial Findings & Recommendations. See also “Study: Most Sderot kids exhibit post-traumatic stress symptoms” *Haaretz*, 17 January 2008.

¹⁰¹⁷ Telephone interview with Orly Gal, NATAL, 28 June 2009; See also, “Study: Most Sderot kids exhibit post-traumatic stress symptoms”, *Haaretz*, 17 January 2008; These findings were confirmed by Dr. Rony Berger who spoke at the public hearings in Geneva on 6 July 2009. Dr Berger also stated that consumption of tranquillisers was 2.5 times as high in Sderot than in communities of similar size and socio-economic status that did not live under bombardment. The Mission notes also the 29 July 2009 submission by Dr. Yechiel Lasry, Mayor of Ashdod in which he detailed similar symptoms in children in Ashdod following the rocket attacks on Ashdod during the military operations in Gaza.

symptoms including fear, avoidance, behavioural problems, problems at school, somatic problems, regression and difficulty in sleeping.¹⁰¹⁸

1655. In a submission to the Mission, Dr. Rony Berger, a clinical psychologist and Director of Community Services described a January 2009 visit to a family in Ofakim, a town 12-15 kilometres from the Gaza border, in the following terms:

The family was referred to the Community Staff for treatment by the father, who works at one of the factories in the south. He said that his house had “turned into a madhouse”, and that the level of stress was so high that “you could cut the air with a knife”....When I reached the family home in Ofakim, I found a house full of children (12 children, aged one year to 22 years). It was a large house, and full of life; perhaps more accurately – frantic. I arrived exactly as the siren was sounding, and I saw a range of anxiety-related responses, some of which were certainly extreme. The mother was screaming at the top of her voice, her sister turned completely white, the younger children cried, the eldest daughter (22) froze and had difficulty moving towards the secure room, while her younger brother (14) seemed almost catatonic. The father, who had called me, moved towards the reinforced room slowly and apathetically, as he turned towards me, pointing towards his family members, and said: “You see what I have to deal with every day.” His daughter urged him, screaming, to move faster, but it seemed that the louder she shouted, the slower he moved towards the reinforced room. They started arguing very loudly, while all the rest of the family joined into the fray.¹⁰¹⁹

1656. Dalia Yosef of the Sderot Resiliency Center stated that the Center’s 18 therapists provided counselling to over 300 people in Sderot during the military operations in Gaza and noted that trauma symptoms were particularly noticeable in children. Ms. Yosef stated that trauma was triggered not only by the rocket strikes but also by the sounding of the early warning system alerts, even where no rocket strike subsequently occurred.¹⁰²⁰

1657. The observations made by the organizations dealing with treating trauma were borne out in the descriptions of daily life made in the interviews held with residents in the affected communities.¹⁰²¹ The Community Manager of Kibbutz Gevim, near Sderot, stated that 60 per cent of children in the kibbutz were in touch with psychological services.¹⁰²² A resident of

¹⁰¹⁸ At a meeting with the Mission on 22 July 2009, MDA described similar symptoms of stress-related injuries that their paramedics had observed and treated when called out following rocket and mortar attacks in southern Israel.

¹⁰¹⁹ Submission by NATAL, ‘Description of a recent home visit by NATAL’s Dr Rony Berger to a family in Ofakim – January 2009, submitted to the Mission on 3 July 2009.

¹⁰²⁰ Telephone interview with Dalia Yosef, Sderot Resiliency Center, 2 July 2009.

¹⁰²¹ For example, Ofer Shinar during the public hearings in Geneva on 6 July 2009 described his observation of psychological trauma of civilians, including his students, in Sderot following rocket attacks during the time of the operation in Gaza.

¹⁰²² Telephone interview with Avi Kadosh, 26 June 2009.

Beersheba described how she was unable to sleep in her apartment because of panic attacks and how she now lived with relatives.¹⁰²³

1658. In a telephone interview on 29 July 2009, Avirama Golan, a journalist for *Haaretz* who lived in Sderot from April 2008 to May 2009, commented on the psychological impact of living under rocket fire:

You get used to it in a sense but it changes your perception of the world, of the way that the world functions. Your sense of what is normal becomes skewed. You cannot be sure of anything. All the authorities that children have - their mother, their father - they don't count. Nothing can keep you safe.

4. Damage to property

1659. Where rockets have landed in towns and villages in southern Israel, they have caused localized property damage. This has included private houses¹⁰²⁴ and cars.¹⁰²⁵ During the operations in Gaza, a total of nine schools and kindergartens in Sderot, Beersheba, Ashdod, Ashkelon and Kiryat Ha Hinoch were hit and damaged by rockets.¹⁰²⁶ Two kindergartens were struck and damaged by rocket fire in Ashdod.¹⁰²⁷ On 8 January 2009, a Grad rocket hit a school in Ashkelon.¹⁰²⁸

1660. On 26 February 2009, a rocket launched from Gaza damaged two houses in Sderot.¹⁰²⁹ On 5 March 2009, a rocket hit a synagogue in Netivot, causing light damage.¹⁰³⁰

1661. The Mission was not able to obtain an estimate of the financial cost of the damage to property caused by rocket and mortar fire. In its paper of July 2009, the Government of Israel stated, “for direct damage caused to buildings or property as a result of rocket or mortar attacks 2,400 claims, amounting to a total of 31 million NIS (\$7.95 million) were submitted in 2008, in

¹⁰²³ Telephone interview with Rachel Perez, 30 June 2009.

¹⁰²⁴ For example, a house in a kibbutz in the Negev was damaged by a rocket on 27 November 2008; see, “Kassams continue to strike Negev”, *JTA*, 27 November 2008.

¹⁰²⁵ On 17 December 2008, a rocket landed in the carpark of a shopping centre in Sderot, injuring three people and causing serious damage to a supermarket and to cars. See “Three injured in Kassam attack”, *JTA*, 17 December 2008.

¹⁰²⁶ Report of the Secretary-General on Children and Armed Conflict, delivered to the 63rd Session of the General Assembly, UN Doc S/2009/158, para. 90, dated 26 March 2009. Details of the damage to Ashkelon schools were also given by Benny Vaknin, mayor of Ashkelon and Dr. Alan Marcus, Director of Strategic Planning, in their presentation to the Mission at the public hearings in Geneva on 6 July 2009.

¹⁰²⁷ “Rocket slams into Ashdod kindergarten”, *Jerusalem Post*, 6 January 2009.

¹⁰²⁸ “4 troops hurt in mortar attack; Grad hits Ashkelon school”, *Ynet News*, 8 January 2009; Testimony of Benny Vaknin, mayor of Ashkelon and Dr. Alan Marcus, Director of Strategic Planning, to the Mission at the public hearings in Geneva on 6 July 2009.

¹⁰²⁹ “Kassam damages two Sderot home”, *JTA*, 26 February 2009.

¹⁰³⁰ “Rocket hits synagogue in Netivot; IAF destroys Gaza tunnels”, *Haaretz*, 9 March 2009.

addition to 2,300 additional claims between January and July 2009, of which a total of approximately 25 million NIS (\$6.4 million) was granted thus far".¹⁰³¹

5. Impact on the right to education

1662. The combination of the early warning systems alarms (and the move to the shelters), the rockets strikes and the ongoing psychological trauma caused by the alerts and the strikes had an adverse impact on the right to education of children and young adults in the affected communities in southern Israel.¹⁰³²

1663. Most obvious is the disruption caused to education caused by the closure of schools during heightened hostilities. During the operations in Gaza, educational institutions in Sderot, Ashkelon and Ashdod and across areas within rocket range were closed.

1664. Even when classes are held in more peaceful times, education is disrupted by students having to move to secure areas every time that the early warning system sounds, at time from 10 to 20 times a day, making it virtually impossible for classes to be held. When interviewed on 24 June 2009, Merav Moshe, a lecturer at Sapir College near Sderot, told the Mission:

At Sapir, the atmosphere is tense. Both the faculty and the students are in a state of fear and are perpetually anxious. It is impossible to teach or for students to concentrate on their studies when they have to run back and forth to the shelters. Even in classes that are protected, the students need to move forward and herd in the front of the room away from the windows. It is not a good learning or teaching environment.

1665. Commenting on the impact of the education of children in the kibbutzim near Sderot, Avi Kadosh, during a telephone interview on 29 June 2009, stated

Children here can't run around and play. They have to stay close to a secure place. The older ones have grown up with it and know the drills. They know they have 15 seconds to get inside to a protected place. Some children have been born into it and for them; they clap their hands and run to the safety room. It is also difficult for them to get to class. The rockets are disruptive and the atmosphere is not conducive to learning.

1666. Those who are experiencing symptoms of post-traumatic stress disorder have a diminished ability to learn. In a telephone interview on 29 June 2009, Batya Katar, the Director of the Parents' Committee concerned with schools and kindergartens in Sderot, told the Mission

¹⁰³¹ "The operation in Gaza...", footnote 27.

¹⁰³² According to the Government of Israel, there were a total of 196,444 students within the rocket range; "The operation in Gaza...", para. 50.

It is difficult to describe the suffering of the children when they hear the red alert. They do not even need to see the Qassam, just the alert is enough. Children start to cry, to wet themselves. Sometimes it is like people are having an epileptic fit: they start shaking uncontrollably. Immediately, when there is an alert near a school, a group of psychologists usually come to speak to the students.¹⁰³³

1667. In their interviews, three lecturers at Sapir College spoke of students who, following repeated rocket attacks on the school, felt unable to continue their studies.¹⁰³⁴ Ofer Shinar, during the public hearings in Geneva on 6 July 2009, gave a description of a student at Sapir College who had assisted in escorting residents of Sderot during the time of the military operations in Gaza, and later suffered from psychological trauma and stopped attending most of her classes. The issue of students either dropping out of their courses or transferring to colleges outside rocket range has had significant financial implications for Sapir College, which depends, in part, on student fees to fund itself.¹⁰³⁵

1668. Similar statements were made during a telephone interview on 26 June 2009, by the Community Director of Kibbutz Nir-Am and Kibbutz Gevim, Avi Kadosh, who stated that families with young children were increasingly leaving their homes in the kibbutzim to move to safer places and that this made it increasingly difficult to run the education system on the kibbutz.

1669. During a telephone interview on 2 July 2009, Dalia Yosef of the Sderot Resiliency Center stated:

The children do not have a routine life, in a safe place, and it affects their ability to learn and to be educated. Schools are not safe places for them, nor are their homes. The stress affects their behaviour and how it impacts them. There is increasing violence in the schools as the children act out. There is a lot of stress in the air and it is difficult to exist for a long time in this situation without being affected. It is of course the same for the children in Gaza. They do not have a chance to have a normal life.

6. Impact on the economic and social life of communities

1670. In the interviews conducted by the Mission, it was clear that the impact on communities that had only recently come under the effect of rocket and mortar fire was different to that on those that had been living in that situation for the past five to eight years.

1671. In towns such as Ashdod, Yavne and Beersheba, which experienced rocket strikes for the first time during the military operations in Gaza, there was temporary displacement of some of its residents, who chose to move northwards out of the range of fire for the duration of the

¹⁰³³ Mission also notes the submission of 29 July 2009 by Dr, Yechiel Lasry, mayor of Ashdod which quotes the head of the Ashdod Psychology Center, Mr. Haviv Galili, as saying that it took 6-8 weeks for a number of a classes “to return to stability and normal life”.

¹⁰³⁴ Telephone interviews with Ofer Shinar and Julie Chaitin, 25 June 2009; Merav Moshe, 28 June 2009.

¹⁰³⁵ Telephone interview with Merav Moshe, 28 June 2009.

operations. In these towns, brief disruption to the economic and social life of the communities was experienced.

1672. In towns closer to the Gaza border, such as Sderot, the recent rocket fire has merely consolidated an exodus started in the previous years. In an interview with the Mission, Eli Moyal, former mayor of Sderot, stated:

Over 15 per cent of the people living in Sderot have left, moved away permanently. Mainly it was the people who could afford to move and it meant that a lot of business closed down – almost half the businesses that existed in 2001 have closed down. It also meant that the municipality was losing its tax base and it made it much more difficult to supply the services that we are supposed to. This includes kindergartens and other educational services.

1673. Stewart Ganulin, on behalf of Hope for Sderot, a non-profit organization which assists, financially and practically, those injured by rocket fire and families who have lost a member, stated to the Mission on 8 July 2009, that the organization alone was helping 576 people from 133 families of the 3000 families on welfare in Sderot.

1674. The kibbutzim surrounding Sderot have also been particularly affected because tourists from abroad and other parts of Israel no longer come to stay there. Yeela Ranan, interviewed on 9 July 2009, stated that house prices in Sderot had fallen by 50 per cent. Both residents of Sderot and the surrounding kibbutzim commented on the downturn in their livelihood resulting from living in a community under rocket and mortar fire.

7. The unrecognized Palestinian Arab Bedouin villages of the Negev

1675. The unrecognized villages in the Negev are Palestinian Arab Bedouin villages that are not recognized by Israel¹⁰³⁶ and have been subjected to demolitions by the Israeli authorities. They are not marked on any commercial maps and are ineligible for municipal services such as connection to the electricity grid, water mains or for garbage collection. According to the Director of the Regional Council for the Unrecognized Villages, Atwa Abu Fraih, in an interview on 30 July 2009, approximately 90,000 people live in these villages, including 17,000 schoolchildren.

1676. According to Physicians for Human Rights - Israel, these villages are in range of rocket fire but have no early warning system, nor have any shelters been built to protect the residents who live there.¹⁰³⁷ As much was confirmed by the Director of the Regional Council of Unrecognized Villages, Atwa Abu Fraih, who told the Mission that most of the structures in the

¹⁰³⁶ Between 1948 and 1966, Israel imposed a military administration on Palestinian Israelis in the region and designated 85 per cent of the Negev as "State land." All Bedouin habitation was retroactively termed illegal and consequently remains, with few exceptions, unrecognized under Israeli planning criteria and therefore subject to demolition and appropriation into regional plans under Jewish Agency criteria; (i.e., exclusively for "Jewish nationals").

¹⁰³⁷ Telephone interview with Wasim Abas, Physicians for Human Rights – Israel, 8 July 2009. See also "Israeli Arabs on Gaza firing line lack shelter", *MSNBC.com*, 4 January 2009.

villages were made of zinc, including all the schools and that none of the unrecognized villages had any shelters from rocket or mortar fire. He also pointed out that none of the unrecognized villages was equipped with the early warning alarm system though seven recognized villages did. Unrecognized villages close to either recognized villages with an early warning system or Jewish Israeli towns could hear the alarms. He stated, however, that the early warning system was of little use if there were no shelters. The Director of the Regional Council stated that, if a rocket landed in the unrecognized villages, the consequences would be “disastrous”.

1677. While no fatalities or injuries have been recorded in these communities, Physicians for Human Rights – Israel has confirmed that a number of the residents of these villages have been referred for psychological treatment in the aftermath of rocket and mortar strikes.

8. Recognized Palestinian towns and villages in southern Israel

1678. Where the towns and villages predominantly populated by Palestinian citizens of Israel are recognized (and consequently eligible for municipal services such as electricity), they still lack the public shelters commonly found in towns and villages populated predominantly by Israel’s Jewish citizens.

1679. Rahat is located 24 kilometres from Gaza and has a population of 45,000 residents. It has no public shelters and few houses have secure rooms. On 30 January 2009, a rocket exploded approximately half a mile from Rahat. The Government of Israel, in a report in the *Associated Press*, stated that it was conducting a public information campaign in Arabic in the broadcast and print media; according to residents, however, this was of little use if public shelters were not made available.¹⁰³⁸

1680. In its recent paper, “The Operation in Gaza: Factual and Legal Aspects”, the Government of Israel stated that the

Israeli authorities took a variety of measures to protect its citizens and to reduce the risk to civilians, with special attention being given to sensitive facilities, such as educational institutions and hospitals. These efforts included the establishment of public shelters and fortifications of public institutions, as well as the instruction of the population in risk how to act in times of emergency.¹⁰³⁹

1681. The Mission is concerned about the disparity in treatment of Jewish and Palestinian citizens by the Government of Israel in the installation of early warning systems and provision of public shelters and fortified schools between its Jewish and Palestinian citizens. This is particularly noticeable in the case of the unrecognized villages, some of which are within the now increased zone of rocket fire, and which have no means of protection from rocket and mortar attacks.

¹⁰³⁸ “Israeli Arabs on Gaza firing line lack shelter”, *MSNBC.com*, 4 January 2009.

¹⁰³⁹ “The operation in Gaza...”, para. 42.

I. Legal analysis and conclusions

1682. The Mission emphasizes the obligation of the Gaza authorities to respect international law (see chap. IV above), and is of the view that this requires the prevention and prosecution of violations of international law occurring within its area of de facto governmental authority.¹⁰⁴⁰ The issue of accountability is discussed below. The Mission considers that the international humanitarian law norms referred to below are relevant to an analysis of the situation described above.

1683. International law attributes a duty to parties to hostilities to protect and respect civilians. Such a duty is part of customary international law and is codified in treaty law through article 27, paragraph 1, of Geneva Convention IV. Furthermore, combatants have an obligation, under article 48 of Additional Protocol I, to distinguish between civilians and combatants and civilian objects and military objects during the conduct of hostilities. Article 51 (4) of Additional Protocol I explicitly prohibits indiscriminate attacks. Article 51 (6) of Additional Protocol I strictly prohibits reprisals against civilians. The relevant legal provisions are set out above in chapter XVI.

1684. Article 51(2) of Additional Protocol I prohibits “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”. Article 13 (2) of Additional Protocol II contains a similar prohibition. Article 4 (2) (d) of Additional Protocol II prohibits acts of terrorism as a violation of the “fundamental guarantees” of humane treatment under the Additional Protocol.¹⁰⁴¹ The same rule is considered a rule of customary law in international and non international armed conflicts.¹⁰⁴² Such a crime has been charged in indictments both before the International Criminal Tribunal for the former Yugoslavia and the Special Court for Sierra Leone.

1685. At the Special Court for Sierra Leone, Trial Chamber 1, in the case of *Prosecutor v. Sesay et al.*, held that the elements of the above-mentioned offence were as follows:

- (i) Acts or threats of violence;
- (ii) The Accused wilfully made the civilian population or individual civilians not taking direct part in hostilities the objects of those acts or threats of violence;

¹⁰⁴⁰ The Mission draws attention to the ‘Trail Smelter’ arbitration in which the arbitration tribunal found that “under the principles of international law...no state has the right to use or permit the use of its territory in such a manner as to cause injury [by fumes] in or to the territory or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence”; Trail Smelter Arbitration, (1938/1941) 3 R.I.A.A. 1905.

¹⁰⁴¹ This prohibition was, in turn, based on article 33 of Geneva Convention IV, which prohibited “all measures of intimidation or of terrorism” of or against protected persons.

¹⁰⁴² Study on international humanitarian law, ICRC, Vol. 1, Rule 2.

- (iii) The acts or threats of violence were carried out with the specific intent of spreading terror among the civilian population.¹⁰⁴³

1686. The Appeals Chamber of the ICTY in *Prosecutor v. Galic* held that:

The acts or threats of violence constitutive of the crime of terror shall not however be limited to direct attacks against civilians or threats thereof but may include indiscriminate or disproportionate attacks or threats thereof. The nature of the acts or threats of violence directed against the civilian population can vary; the primary concern [...] is that those acts or threats of violence be committed with the specific intent to spread terror among the civilian population.¹⁰⁴⁴

J. Findings

1687. There is no justification in international law for the launching of rockets and mortars that cannot be directed at specific military targets into areas where civilian populations are located. Indeed, Palestinian armed groups, among them Hamas, have publicly expressed their intention to target Israel civilians. The al-Qassam Brigades, on their website, claimed responsibility for the deaths of each of the Israeli civilians killed by rocket fire during the operations in Gaza.¹⁰⁴⁵

1688. From the facts it ascertained, the Mission finds that the Palestinian armed groups have failed in their duty to protect and respect civilians. Even though the al-Qassam Brigades and other armed groups in Gaza have recently claimed that they do not intend to harm civilians, the fact that they continue to launch rockets at populated areas without any definite military targets and are aware of the consequences to civilians indicates an intent to target civilians. Furthermore, the launching of unguided rockets and mortars breaches the fundamental principle of distinction: an attack must distinguish between military and civilian targets. Where there is no intended military target and the rockets and mortars are launched into civilian areas, they constitute a deliberate attack against the civilian population.

1689. Given the apparent inability of the Palestinian armed groups to aim rockets and mortars at specific targets and, the fact that the attacks have caused very little damage to Israeli military assets, it is plausible that one of the primary purposes of these continued attacks is to spread terror – prohibited under international humanitarian law – among the civilian population of southern Israel.

¹⁰⁴³ *Prosecutor v. Sesay et al.*, Trial Judgment, 2 March 2009. See also *Prosecutor v. Galic*, Trial Judgment, 5 December 2003 at para. 133 and Appeal Judgment, 30 November 2006 at para. 104. The *Galic* Judgments use the words “with the primary purpose”, rather than with the “specific intent”.

¹⁰⁴⁴ *Prosecutor v. Galic*, Appeal Judgment, 30 November 2006, para. 102. This position was endorsed by the Appeals Chamber of the SCSL in *Prosecutor v. Fofana et al.*, Appeal Judgment, 28 May 2008, para. 351.

¹⁰⁴⁵ <http://www.alqassam.ps/arabic/statments1.php?id=4066>;
<http://www.alqassam.ps/arabic/statments1.php?id=4088>; <http://www.alqassam.ps/arabic/statments1.php?id=4098>.
 See also, “South under fire; 2 Israelis killed”, Ynet News, “29 December 2008.

1690. The above view is supported by public statements of the armed groups, such as that made by Hamas on 5 November 2008. Following an Israeli raid in Gaza¹⁰⁴⁶ which resulted in the death of five Hamas militants¹⁰⁴⁷, a Hamas spokesman stated “The Israelis began this tension and they must pay an expensive price... They cannot leave us drowning in blood while they sleep soundly in their beds”.¹⁰⁴⁸ As noted in chapter XVI, reprisal attacks cannot be carried out against a civilian population.

1691. From the facts available, the Mission finds that the rocket and mortars attacks, launched by Palestinian armed groups in Gaza, have caused terror in the affected communities of southern Israel and in Israel as a whole. Furthermore, it is the Mission’s view that the mortars and rockets are uncontrolled and uncontrollable, respectively. This indicates the commission of an indiscriminate attack on the civilian population of southern Israel, a war crime, and may amount to crimes against humanity. These attacks have caused loss of life and physical and mental injury to civilians and damage to private houses, religious buildings and property and have eroded the economic and cultural life of the affected communities.

XXV. REPRESSION OF DISSENT IN ISRAEL, RIGHT TO ACCESS TO INFORMATION AND TREATMENT OF HUMAN RIGHTS DEFENDERS

1692. In the course of its investigations, including in meetings, submissions and public testimonies, the Mission received allegations that sources of criticism of actions by Israel during and following the military operations of December 2008-January 2009 from inside Israel were subjected to attempted or actual repression, and that the rights of freedom of association and expression for individuals and groups had been violated. In this regard, concerns were also raised about the denial of access to the media and to human rights monitors prior, during and after the military operations in Gaza.

1693. The Mission conducted telephone interviews with people who participated in protests or who worked for non-governmental organizations working on human rights inside Israel. Shir Hever of the Alternative Information Center appeared at the public hearings held in Geneva on 6 July 2009 to speak specifically about the issue of repression of dissent inside Israel. This issue was also discussed in meetings with and submissions by human rights organizations, journalists and other relevant individuals.

1694. The Mission was unable to conduct on-site investigations owing to the decision by the Government of Israel not to cooperate with the Mission. Accordingly, it was not able possible to obtain the views of the police and other State authorities involved in some of the incidents. The Mission has taken this into account in its assessment of the available information.

¹⁰⁴⁶ The Israeli forces declared that the incursion was aim at destroying a tunnel which they believed was being dug to kidnap Israeli soldiers.

¹⁰⁴⁷ One militant was killed in the fighting while four others were killed following an Israeli air strike on rocket launchers after 30 Qassam rockets had been launched into Israel following the Israeli incursion.

¹⁰⁴⁸ “Six die in Israeli attack over Hamas tunnel under border to kidnap soldier”, *The Times*, 6 November 2008.

1695. The Mission addressed questions to the Government of Israel regarding Israeli citizens arrested during or as result of demonstrations during the military operations in Gaza. The Mission did not receive any reply to its questions.

1696. The Mission has identified five areas warranting further examination: (a) the matters arising from protests inside Israel; (b) the judicial responses to these actions; (c) the interrogation of political activists by the General Security Services (*Shabak*); (d) freedom of association and the treatment of human rights organizations inside Israel and (e) access of the media and of human rights monitors to Gaza prior to, during and after the military operations.

A. Protests inside Israel

1. General

1697. While the majority of Jewish citizens in Israel supported military action in Gaza,¹⁰⁴⁹ demonstrations and vigils were held across Israel – daily in some areas - against the military operations. As might be expected, smaller protests took place on weekdays, while larger ones were held on on the weekends. Protests took place in numerous towns and villages across Israel, the most important being: the demonstration of 150,000 people in Sakhnin,¹⁰⁵⁰ the largest demonstration of Palestinian Israelis since 1948; a 100,000-strong protest in Baqa al Gharbiyah in the “Triangle”;¹⁰⁵¹ a demonstration of 15,000 people in Naqab; a protest by more than 10,000 people in Tel Aviv and protests of a similar size in Haifa. Protests were also witnessed in southern localities, including Beersheba and Ararah.¹⁰⁵² Daily protests took place not only in towns and villages populated mainly by Palestinian citizens of Israel, but also in Haifa¹⁰⁵³ and Tel Aviv.

1698. According to information received by the Mission, the protests against the Israeli military operations in Gaza were, in the main, attended by Palestinian Israelis; even though protests usually also included Jewish Israelis. In Tel Aviv, Jewish Israelis reportedly made up 30 to 40 per cent of the larger weekend demonstrations.¹⁰⁵⁴ The Mission took note of reports that in areas where mainly Jewish Israelis resided, such as Tel Aviv and Beersheba, counter protests were sometimes organized or spontaneously formed. While there were verbal confrontations between the two groups of protesters, physical violence was rare.

¹⁰⁴⁹ “Poll shows most Israelis back IDF action in Gaza”, *Haaretz*, 15 January 2009; “Israeli Arabs Recoil at Attacks on Gaza as Allegiance to Their Country Is Strained”, *New York Times*, 20 January 2009.

¹⁰⁵⁰ “Worldwide protests denounce Israel”, *Al Jazeera*, 3 January 2009.

¹⁰⁵¹ The area commonly known as the “Triangle” is a concentration of Palestinian Israeli towns and villages adjacent to the [Green Line](#), located in the eastern [Sharon plain](#). From the air, the towns and villages form a triangle, thus the name.

¹⁰⁵² Telephone interviews with Leah Shakdiel, 24 June 2009; Atwa Abu Fraih, 30 July 2009.

¹⁰⁵³ Significantly, Haifa has a sizeable Palestinian Israel population. In 2003, the Israeli Central Bureau of Statistics found that 9 per cent of the population of Haifa was Palestinian Israeli; see www.cbs.gov.il/statistical/arab_pop03e.pdf.

¹⁰⁵⁴ Telephone interview with Haggai Matar, 24 July 2009.

2. Police conduct

1699. According to information received by the Mission, in areas of northern Israel populated mainly by Israel's Palestinian citizens (such as Sakhnin, Nazareth and Baqa al-Gharbiyah), the police did not enter the town during the protests but remained on the outskirts. This decision was apparently taken in coordination with town authorities,¹⁰⁵⁵ on the agreed view that the protests would be more orderly if the police remained out of sight.

1700. In Tel Aviv and Haifa, the police tended to be visible to protesters.¹⁰⁵⁶ With a few exceptions (see below) police interference was limited. In Haifa, smaller demonstrations were attended by almost as many police officers as protesters, and the number of cameras being used by the police to record the protest had an intimidating effect.¹⁰⁵⁷ Police blocked off streets around the demonstrations in both cities, with the consequence that protests took place in near deserted areas; one protester remarked that "it was as though we were demonstrating to ourselves".¹⁰⁵⁸ While the media had free access, the Mission's attention was drawn to the fact that there was little coverage of the protests by the international or Israeli media.

1701. In the south, in towns populated by Palestinian Israelis, police action mirrored that taken in the North; remaining on the outskirts of the town while the protests continued inside. There were reports, however, of significant difficulties for protesters in obtaining permits, even where the protests were being staged in areas outside the military zone in effect in the areas around Gaza. This compared unfavourably with reports from Tel Aviv and Haifa, where police generally allowed protests, regardless of whether permits had been obtained.

1702. In areas in the south populated by Jewish Israelis, such as Beersheba, police maintained a presence near the demonstrators and were apparently less tolerant of the protests against the military operations in Gaza than their colleagues policing protests in the north. One protester stated that this was because dissent in the south was an embarrassment to Israel, which claimed that the military operations in Gaza were motivated by the need to defend southern Israel.¹⁰⁵⁹ It should be noted, however, that there were significant episodes of counter protest in Beersheba, which had come under rocket fire during the operations in Gaza.¹⁰⁶⁰

¹⁰⁵⁵ Telephone interviews with Ameer Makhoul, 27 July 2009; Hassan Tabaja, 29 July 2009; "Israeli Arabs Recoil at Attacks on Gaza as Allegiance to Their Country Is Strained", *New York Times*, 20 January 2009.

¹⁰⁵⁶ Telephone interviews with Ameer Makhoul, 27 July 2009; Sahar Abdo, 26 July 2009; Hakim Bishara, 29 July 2009.

¹⁰⁵⁷ Telephone interview with Sahar Abdo, 26 July 2009.

¹⁰⁵⁸ Telephone interview with Ronen Shamir, 22 July 2009. The Mission acknowledges that there may be legitimate public security and order concerns that require such action but has not been able to discuss them with the police authorities owing to the refusal of Israel to cooperate with the Mission.

¹⁰⁵⁹ Telephone interview with Haggai Matar, 24 July 2009.

¹⁰⁶⁰ Telephone interviews with Leah Shakdiel, 24 June 2009; Merav Moshe, 28 June 2009.

3. Arrests of protesters

1703. According to statistics that Adalah obtained from the police, 715 protesters were arrested inside Israel.¹⁰⁶¹ This number included 277 people arrested in Jerusalem. Unfortunately, the statistics make no distinction between East and West Jerusalem.¹⁰⁶²

1704. The Mission notes that, given the large number of people involved in the demonstrations, which it estimates to be in the hundreds of thousands, relatively few arrests were made. It was, however, struck by reports that no arrests seem to have been made of people participating in counter-demonstrations supporting the military operations in the Gaza Strip.

1705. According to the police statistics obtained by Adalah, 34 per cent of those arrested were under the age of 18.¹⁰⁶³ Of those charged with an offence, the majority were charged with “attacking police officers”, “unlawful assembly” and “disturbing public order”.¹⁰⁶⁴ While Adalah noted that only in a few cases were those arrested charged with “endangering life on a public road”,¹⁰⁶⁵ the Meezan Center for Human Rights in Nazareth noted that a large number of those arrested in the northern areas mainly populated by Palestinian Israelis had been charged with that offence.¹⁰⁶⁶

4. Physical violence against protesters

1706. The Mission received several submissions about the beating of protesters by the police. These incidents appeared to have been a disproportionate response by the police either when they believed that the protesters were not complying, or not complying fast enough, with their orders and, in some instances, where protesters were themselves breaking the law (for example, by throwing stones at the police).

Ben Gurion street, Haifa, 1 January 2009

1707. On 1 January 2009, a silent candle-light vigil was held on Ben Gurion street in Haifa. A number of prominent Palestinian Israeli actors were present at the vigil, including Hanan Helu and Saleh Bakri. In a telephone interview on 29 July 2009, Mr. Bakri stated that, the police and members of the Israeli special forces requested that the group move, which it did before sitting further down the street. Protesters were then confronted by the police and beaten about their lower bodies; some of them were arrested.¹⁰⁶⁷ According to Adalah, the police refused to provide

¹⁰⁶¹ Adalah, “Protest Prohibited: Restricting the Freedom of Speech by Law Enforcement Authorities during the Gaza Military Operation”, (Hebrew), August 2009 (the “August 2009 Adalah report”), p. 2.

¹⁰⁶² The Mission considers East Jerusalem part of the Occupied Palestinian Territories, with the consequence that had the Mission been able to distinguish arrests in East Jerusalem from those in West Jerusalem, the former would have been included in the statistics of arrest in protests occurring in the West Bank.

¹⁰⁶³ Adalah report of August 2009, p. 6.

¹⁰⁶⁴ Ibid.

¹⁰⁶⁵ Ibid, p. 2.

¹⁰⁶⁶ Telephone interview with Hassan Tabaja, 29 July 2009.

¹⁰⁶⁷ Telephone interview with Saleh Bakri, 29 July 2009.

medical assistance to the injured protesters who were detained.¹⁰⁶⁸ Those who were arrested and taken to the police station reported that the police verbally abused them and made sexual comments about female members of their families. At the police station, Mr. Bakri, well known in Israeli and Palestinian public life, was made to stand without moving for 30 minutes facing the Israeli flag while police officers took photographs and filmed him.¹⁰⁶⁹

Egyptian embassy, Tel Aviv, 29 December 2008

1708. On 29 December 2008, approximately 120 people protested in the vicinity of the Egyptian embassy in Tel Aviv. They were protesting against what they believed to be Egyptian support for the action by Israel in Gaza. The demonstration was being held in a designated area, as indicated both by Israeli police and, reportedly, members of the Israeli special forces at the scene.¹⁰⁷⁰ According to one protester, soon after the protest started, people passing by started to verbally abuse the protesters and waved Israeli flags at them. The police and members of the special forces asked the protesters to leave.¹⁰⁷¹ According to the same protester, the police started to hit the other protesters about the lower body with sticks in an apparent effort to disperse them.¹⁰⁷² Another protester stated that she had been released by the police once they realized that she was Jewish, while the Palestinian Israeli protesters were arrested.¹⁰⁷³

Kofor Cana and Umm al-Fahem (dates unknown)

1709. During the Israeli military operations in Gaza, protests were held in Kofor Cana¹⁰⁷⁴ and Umm al-Fahem,¹⁰⁷⁵ both throughout the week and on weekends. According to Hassan Tabaja, a lawyer at the Meezan Center for Human Rights, in both places there were instances of police violence and use of tear gas in reaction to stone throwing by some of the younger protesters. There were reports that the police also beat bystanders.¹⁰⁷⁶ Those arrested reported having been beaten both in police vans and at the police station, subjected to racial abuse and sexual comments made about female members of their families.¹⁰⁷⁷

¹⁰⁶⁸ Adalah, news update, 2 January 2009.

¹⁰⁶⁹ Telephone interview with Saleh Bakri, 29 July 2009.

¹⁰⁷⁰ Telephone interview with Sahar Abdo, 26 July 2009.

¹⁰⁷¹ Telephone interview with Sahar Abdo, 26 July 2009.

¹⁰⁷² Telephone interview with Sahar Abdo, 26 July 2009; see also “6 demonstrators protesting Israeli Gaza op arrested in Tel Aviv”, *Haaretz*, available at <http://www.haaretz.com/hasen/spages/1050980.html>.

¹⁰⁷³ “6 demonstrators protesting Israeli Gaza op arrested in Tel Aviv”, *Haaretz*.

¹⁰⁷⁴ A Palestinian Israeli town in the Galilee with a population of approximately 20,000 people.

¹⁰⁷⁵ A Palestinian Israeli town in the Haifa District with a population of just under 45,000 people.

¹⁰⁷⁶ Telephone interview with Hassan Tabaja, 29 July 2009. Mr. Tabaja, as part of his work with the Meezan Center for Human Rights, helped arrange representation for those arrested.

¹⁰⁷⁷ Telephone interview with Hassan Tabaja, 29 July 2009.

5. Other inappropriate conduct

1710. The Mission was informed that permission was denied for or attempts were made to prevent demonstrations, such as the “Critical Mass” bicycle protest on 1 January 2009 in Tel Aviv which was barred from moving beyond Rabin Square;¹⁰⁷⁸ in another instance, a bus in which protesters were travelling to participate in demonstrations was prevented by the police from reaching its destinations in Tel Aviv;¹⁰⁷⁹ the bus driver was intimidated by the police, his licence confiscated and the bus was impounded. On 16 January 2009, two buses of protesters accompanying a truck of medical supplies for Gaza donated by Physicians for Human Rights Israel were stopped near Ashkelon and prevented from entering the military zone, where gatherings of more than four people were not permitted for security reasons. The police, however, confiscated the drivers’ licences, told the drivers to follow them and took the licences to Tel Aviv, where the drivers could collect them.¹⁰⁸⁰ The drivers were reportedly told that, if they proceeded further, they would lose their licences.

1711. In the case of one demonstration planned in Tel Aviv, the police had placed a condition that no Palestinian flags would be allowed at the demonstration. The organizers approached the Court on the grounds that there was no such restriction in the law. The police issued a permit before the case was decided, and the demonstration was held with Palestinian flags.¹⁰⁸¹ Other demonstrations with protesters holding Palestinian flags were also held in Tel Aviv without any interference by the police.¹⁰⁸²

B. Judicial responses following the arrests of protesters

1. Detention pending trial

1712. In his public testimony before the Mission, Shir Hever of the Alternative Information Center highlighted a worrying new trend in the way that arrests of protestors were dealt with in the Israeli legal system. In many cases, the Prosecutor requests that the Court order that the protester be detained pending conviction or release and that these submissions are generally accepted by the courts. According to Hever, detention pending trial is usually reserved for defendants thought to be dangerous, not for people arrested during protests. This has resulted in protesters being detained for weeks and months at a time.¹⁰⁸³

1713. Hassan Tabaja stated that those arrested often faced “super-charged” indictments, where the most serious possible charge had been selected by the Prosecution.¹⁰⁸⁴ For example, for protesting on a road, instead of being charged with disturbing the peace or an illegal gathering,

¹⁰⁷⁸ Telephone interview with Haggai Matar, 24 July 2009.

¹⁰⁷⁹ Telephone interview with Sahar Abdo, 26 July 2009.

¹⁰⁸⁰ Telephone interview with Ran Yaron, 22 July 2009.

¹⁰⁸¹ Telephone interviews with Haggai Matar, 24 July 2009; Avner Pinchuk (ACRI), 29 July 2009.

¹⁰⁸² Telephone interview with Hakim Bishara, 29 July 2009.

¹⁰⁸³ Testimony of Shir Hever, Alternative Information Centre, Geneva Public Hearings, 6 July 2009; Yesh Gvul.

¹⁰⁸⁴ Telephone interview with Hassan Tabaja, 29 July 2009.

people were sometimes charged with “endangering life on a public road”, a charge that carries a sentence of 20 years. The severity of the charge greatly increases the chance of being detained pending trial.

1714. On 12 January 2009, the Israeli Supreme Court decided that, given the ongoing military operations in Gaza, it could not allow certain persons to be released on bail.¹⁰⁸⁵ This decision was subsequently followed by those of the lower courts, where petitions demanding the release of individuals arrested in connection with the demonstrations were refused.¹⁰⁸⁶

1715. It is clear from statistics obtained by Adalah from the Israeli police that, of all the protesters arrested; it was the Palestinian Israelis who were disproportionately held in detention pending trial. For example, of the 60 people arrested in the Northern District of Israel (mainly populated by Palestinian Israelis), all were detained pending trial; in Tel Aviv, of the 27 people arrested, none were detained pending trial. According to the Meezan Center for Human Rights in Nazareth, there are still people being detained pending trial following their arrest at the protests against the military operations in Gaza.¹⁰⁸⁷

2. Bail conditions

1716. Where people were released, the courts sometimes set bail conditions that affected not only the individual’s ability to attend protests, but also, in the case of students, their right to education.

1717. Ran Tzoref, arrested at a protest in Beersheba on 14 January 2009, was reportedly released on the condition that he did not leave his village in northern Israel for two to three months. Not only could he not attend subsequent protests, he could not attend classes at his university either.¹⁰⁸⁸

1718. One of the protesters arrested in the demonstration near the Egyptian embassy in Tel Aviv on 29 December 2008 was a student from Tel Aviv University. As part of her bail conditions, the Mission was told that she was not allowed to enter Tel Aviv for one month, resulting in her being unable to attend classes.¹⁰⁸⁹

C. The interrogation of political activists by the General Security Services

1719. During the Israeli military operations in Gaza, members of Arab political parties and activists in various non-governmental organizations were invited in for interrogation by the General Security Services, commonly known as the Shabak.

¹⁰⁸⁵ The State of Israel v. Anonymous, 12 January 2009, Supreme Court Decision, 459-09; August 2009 Adalah report, p. 35.

¹⁰⁸⁶ August 2009 Adalah report, p. 15.

¹⁰⁸⁷ Telephone interview with Hassan Tabaja, 29 July 2009.

¹⁰⁸⁸ Telephone interview with Haggai Matar, 24 July 2009.

¹⁰⁸⁹ Telephone interview with Sahar Abdo, 26 July 2009.

1720. According to *Adalah*, the Shabak incorrectly informed those invited that they were required by law to come. Ameer Makhoul, the Director of Ittijah and Chairperson of the Popular Committee for the Protection of Political Freedoms, declined the invitation to the interrogation because he was not legally required to do so. He stated that, shortly afterwards, police officers arrived at his office and took him to the interview.¹⁰⁹⁰

1721. Mr. Makhoul was taken to the Shabak headquarters in Tel Aviv, where he was kept for four hours, during which time, he was questioned about the people he knew and their whereabouts. , On refusing to answer, he was told that, if he continued his political activities, he would be sent to prison and that, if he wished to go to Gaza, arrangements could be made to send him there. During his interview, it became apparent that the Shabak was aware of his address, and the car he drove, and referred to a speech that he had made in Haifa on 29 December 2008.

1722. The Mission received reports of 20 prominent activists and political figures within the Palestinian community being called in for interrogation by the Shabak and being questioned about their political activities.¹⁰⁹¹ It has also received reports of younger political activists having been taken for interview and asked to collaborate with the Israeli authorities. In the case of student activists, the offer of collaboration was accompanied by the threat of arrest or of future difficulties in continuing their studies.¹⁰⁹²

1723. According to those interviewed, the summoning and indeed taking of activists for interrogation by the Shabak created a climate of intimidation against dissent in Israel. Many activists appear to have been “invited” for interview following their attendance at protests against the military operations in Gaza and their presence at protests was noted by those interviewing them.¹⁰⁹³

D. Freedom of association and treatment of human rights organizations inside Israel

1. New Profile

1724. Israeli authorities initiated an investigation into activists working with New Profile, a non-governmental feminist organization, accusing them of inciting Israelis to avoid military service. While “incitement to draft dodging” is an offence under Israeli law, it was the first time that any group had been investigated for that offence.¹⁰⁹⁴

1725. On 26 April 2009, Israeli authorities raided the homes of six activists and seized their computers, detaining the activists and summoning 10 others for interrogation.¹⁰⁹⁵ Some activists

¹⁰⁹⁰ Telephone interview with Ameer Makhoul, 27 July 2009; *Adalah*, news update, 2 January 2009.

¹⁰⁹¹ Telephone interview with Ameer Makhoul, 27 July 2009.

¹⁰⁹² Telephone interview with Ameer Makhoul, 27 July 2009.

¹⁰⁹³ Telephone interview with Ameer Makhoul, 27 July 2009. See also *Adalah* news update, 2 January 2009.

¹⁰⁹⁴ “Web site for IDF draft dodgers faces criminal probe”, *Haaretz*, 15 September 2008.

¹⁰⁹⁵ “Israel’s war against youth”, *The Guardian*, 5 May 2009.

were detained and interrogated about their ideological and political views; some were released on the condition that they have no contact with other members of their organization.¹⁰⁹⁶

1726. As part of their investigation into New Profile, a search warrant was issued for the offices of HaMoked, a non-governmental human rights legal organization, for which a member of New Profile had previously worked. According to a published letter from New Profile's attorney to the Deputy Attorney General of Israel, the breadth of the warrant meant that the investigators were able to search through legally privileged material.¹⁰⁹⁷

2. Breaking the Silence

1727. On 15 July 2009, Breaking the Silence, an Israeli non-governmental organization of veteran Israeli soldiers that collects the testimonies of soldiers who serve in the occupied territories, published a booklet entitled "Soldiers' Testimonies from Operation Cast Lead, Gaza, 2009". The booklet contained testimonies of 54 soldiers who had served in Gaza during the military operations. On its website, Breaking the Silence, stated that the testimonies revealed "gaps between the reports given by the army following January's events; the needless destruction of houses; firing phosphorous in populated areas and an atmosphere that encouraged shooting anywhere."¹⁰⁹⁸

1728. Breaking the Silence's publication was widely reported in the media.¹⁰⁹⁹ The Government of Israel, through the IDF Spokesman Unit, stated that the report comprised "anonymous and general testimonies, without investigating their details or credibility", and that "a considerable number of the testimonies in this report are also based on hearsay and word of mouth".¹¹⁰⁰ The Unit stated that the Israeli military authorities were committed to investigating thoroughly any claims made, where there was sufficient information to do so, and that "from testimonies which have been published, including those in this report, and from the investigations conducted by the IDF into the operation, it is clear that IDF soldiers operated in accord with international law and the orders they received, despite the complex and difficult fighting."¹¹⁰¹

1729. On 17 July 2009, the *Jerusalem Post* reported that Breaking the Silence's published donor list included several European Governments.¹¹⁰² Later that week, *Haaretz* reported that the Israeli Ambassador to the Netherlands had met with the Director-General of the Foreign Ministry of the Netherlands to complain about that country's funding of Breaking the Silence, urging that the funding be terminated.¹¹⁰³ On 29 July 2009, *Haaretz* reported that, in a meeting with the

¹⁰⁹⁶ Letter to the Deputy State Prosecutor, New Profile, 27 April 2009.

¹⁰⁹⁷ Letter to the Deputy State Prosecutor, New Profile, 27 April 2009.

¹⁰⁹⁸ http://www.breakingthesilence.org.il/oferet/news_item_e.asp?id=1.

¹⁰⁹⁹ For example, "Breaking the silence on Gaza abuses", *BBC News*, 15 July 2009,; "Report claims Israelis used Palestinians as human shields", *CNN*, 15 July 2009.

¹¹⁰⁰ www.mfa.gov.il/MFA/Government/Communiques/2009/Reaction_to_Breaking_Silence_report_15_Jul_2009.

¹¹⁰¹ *Ibid*.

¹¹⁰² "Europeans funding 'Breaking the Silence', *Jerusalem Post*, 17 July 2009.

¹¹⁰³ "Group that exposed 'IDF crimes' in Gaza slams Israel bid to choke off its funds", *Haaretz*, 26 July 2009.

Ambassador of the United Kingdom to Israel, the Deputy Director-General of the Foreign Ministry of Israel asked “the reasons behind Britain's funding of the group and whether the money was used to fund the recent report on Operation Cast Lead.”¹¹⁰⁴

1730. On 31 July 2009, the Jerusalem Post published an article in which it reported that senior Israeli officials were looking into whether it would be possible to ban donations from foreign governments to political NGOs.¹¹⁰⁵ On 2 August 2009, *Haaretz* reported that Israel had asked the Government of Spain to terminate its funding of Breaking the Silence.¹¹⁰⁶

1731. Breaking the Silence issued a statement in which it accused the Foreign Ministry of a “witch-hunt”, saying that it testified to the erosion of the “democratic culture” in Israel.¹¹⁰⁷

1732. The Mission is concerned that the actions of the Government of Israel with regard to these organizations may have the effect of intimidating other Israeli organizations working on documenting and reporting human rights violations. The Mission underlines the importance that these organizations, who carry out essential work in a difficult environment, be able to operate freely.

E. The access of the media and human rights monitors to Gaza prior to, during and after the military operations

1733. The decision by Israel to deny access to the media and international human rights monitors to Gaza during -and indeed prior- to the start of its military operations in Gaza on 27 December 2008, created a storm of protest from the international media and human rights NGOs.¹¹⁰⁸ Some human rights organizations, including Human Rights Watch and B'Tselem, are still denied access to Gaza to this day.¹¹⁰⁹

1734. The Mission notes that, during the military operations in Gaza, there were a number of Palestinian human rights organizations conducting independent monitoring of international human rights and international humanitarian law. As noted elsewhere in the present report, the Mission found the work of these organizations to be of very a high professional standard and one that deserved recognition given the extremely difficult circumstances under which they usually operated, particularly during the Israeli military operations. The Mission is of the view that the presence of international human rights monitors would have been of great assistance in not only investigating and reporting but also in the publicizing of events on the ground.

¹¹⁰⁴ “Israel targets U.K. funding of group that exposed 'IDF crimes' in Gaza”, *Haaretz*, 29 July 2009.

¹¹⁰⁵ “Israel aims to outlaw foreign gov't funds for subversive NGOs”, *Jerusalem Post*, 31 July 2009.

¹¹⁰⁶ “Israel asks Spain to stop funding group that reported IDF 'crimes' in Gaza”, *Haaretz*, 2 August 2009.

¹¹⁰⁷ “Israel aims to outlaw foreign gov't funds for subversive NGOs”, *Jerusalem Post*, 31 July 2009.

¹¹⁰⁸ For example, “Israel: allow media and rights monitors Access into Gaza”, Human Rights Watch, 5 January 2009; “Israel puts Media Clamp on Gaza”, *The New York Times*, 7 January 2009; and “Media Frustration over Gaza ban grows”, *The Guardian*, 14 January 2009.

¹¹⁰⁹ “Israel: end ban on human rights monitors”, B'Tselem press release, 22 February 2009; Email communication between the Mission and Human Rights Watch, 2 August 2009.

1. Media

1735. Israeli military authorities stopped allowing foreign journalists into the Gaza Strip, without prior notification to media organizations, on 5 November 2008 when hostilities escalated.¹¹¹⁰ Israeli citizens, including journalists, have been barred from entering the Gaza strip since the abduction in 2006 of Gilad Shalit, on security grounds. One journalist, Amira Hass, has been arrested on two occasions, in December 2008 and in May 2009, for being in Gaza illegally.¹¹¹¹

1736. After the closure, on 5 November 2008, of the Gaza Strip to journalists (among other groups, including human rights monitors), there was international and domestic protest; the ban was lifted briefly on 4 December 2008, but reinstated the following day. At the start of the military operations in Gaza, Israeli defence officials indicated that there would be a complete ban on access of the media to Gaza for the duration of the operations. On 27 December 2008, the day military operations started, the Israeli authorities imposed a closed military zone inside Gaza and through a 2-kilometre strip around its perimeter.

1737. On 19 November 2008, the heads of many international news organizations, including the BBC, CNN and Reuters, protested against the ban on media access to Gaza in a letter to the then President Ehud Olmert.¹¹¹² On 24 November 2008, the Foreign Press Association petitioned the Supreme Court to rule on the legality of such a ban.¹¹¹³

1738. In an open letter, dated 29 December 2008, the Foreign Press Association stated that the denial of media access to Gaza was

an unprecedented restriction of press freedom. As a result, the world's media is unable to accurately report on events inside Gaza at this critical time... Despite our protests, the Israeli authorities have refused to let journalists in... Never before have journalists been prevented from doing their work in this way. We believe it is vital that journalists be allowed to find out for themselves what is going on in Gaza. Israel controls access to Gaza. Israel must allow professional journalists access to this important story.¹¹¹⁴

1739. On 31 December 2008, the Supreme Court ruled on the Association's petition, ordering that the Government of Israel to grant 12 journalists entry into Gaza each time the Erez crossing opened.¹¹¹⁵ On 2 January 2009, the Court amended its order to state that eight journalists, rather than 12, should be admitted whenever the Erez crossing opened.¹¹¹⁶

¹¹¹⁰ "CPJ urges Israel to examine Gaza limits, military strikes", Committee to Protect Journalists, 2 April 2009.

¹¹¹¹ "Haaretz journalist Amira Hass arrested for illegal stay in Gaza", *Haaretz*, 2 December 2008; and "Haaretz reporter Amira Hass arrested upon leaving Gaza", *Haaretz*, 12 May 2009.

¹¹¹² "Israel: allow media and rights monitors access into Gaza", Human Rights Watch, 5 January 2009.

¹¹¹³ "CPJ urges Israel to examine Gaza limits, military strikes", Committee to Protect Journalists, 2 April 2009.

¹¹¹⁴ Open Letter, Foreign Press Association, 29 December 2008, available at <http://www.fpa.org.il/?categoryId=414>

¹¹¹⁵ "Israel: allow media and rights monitors access into Gaza", Human Rights Watch, 5 January 2009.

¹¹¹⁶ "CPJ urges Israel to examine Gaza limits, military strikes", Committee to Protect Journalists, 2 April 2009.

1740. On 8 January 2009, the Israeli authorities briefly gave the BBC and two Israeli channels access to accompany Israeli forces into Gaza. On 22 January 2009, access was granted to eight journalists to accompany Israeli forces into Gaza. The media and non-governmental organizations continued to complain about the lack of independent, unfettered access to Gaza.¹¹¹⁷ On the same day, the United Nations Chief of Communications and Public Information called on the Government of Israel to ensure immediate access to the international media to Gaza, stressing the need for “full and independent” coverage of events.¹¹¹⁸

1741. On 23 January 2009, five days after its unilateral ceasefire, Israel removed all restrictions put in place in early November 2008 and the media was given free access to Gaza.

1742. On 25 January 2009, the Supreme Court of Israel issued its final ruling, overturning the blanket ban and stating that reporters should have access to Gaza “unless the security situation changes drastically in such a way that the Erez crossing has to be closed completely for security reasons, and we assume that this will happen only in dire circumstances of concrete danger”.¹¹¹⁹

1743. There have been various explanations from the Government of Israel. A spokesman from the Embassy of Israel in London, speaking to *Press Gazette*, stated “Gaza is a war zone and so it is very difficult to allow people who are not soldiers in. Their presence might endanger both themselves and our operations there”.¹¹²⁰

1744. The Director of Press Office of the Government of Israel, Daniel Seaman, stated “Any journalist who enters Gaza becomes a fig leaf and front for the Hamas terror organization, and I see no reason why we should help that”.¹¹²¹ He was later quoted in the Associated Press as saying for foreign journalists were “unprofessional” and took “questionable reports at face value without checking”.¹¹²²

1745. On 7 January 2009, the Ambassador for Israel to the United Kingdom, Ron Proser, claimed that infighting at the Foreign Press Association about which journalists should be admitted was responsible for the press not entering Gaza,¹¹²³ this was categorically denied by the Association.¹¹²⁴ On 22 January 2009, *Haaretz* reported a split in the Government of Israel over press access to Gaza, stating the Ministry of Defense and the army had withdrawn their

¹¹¹⁷ “Allow the news media into the Gaza Strip! Appeal by the world’s media and Reporters Without Borders to the Israeli authorities”, Reporters Without Borders, 9 January 2009.

¹¹¹⁸ “UN calls on Israel for immediate media access to Gaza”, *Merco Press*, 9 January 2009.

¹¹¹⁹ “CPJ urges Israel to examine Gaza limits, military strikes”, Committee to Protect Journalists, 2 April 2009.

¹¹²⁰ “Foreign Journalists continue to fight for Gaza access”, *Press Gazette*, 7 January 2009.

¹¹²¹ “Israel puts media clamp on Gaza”, *The New York Times*, 7 January 2009.

¹¹²² “Foreign Journalists continue to fight for Gaza access”, *Press Gazette*, 7 January 2009.

¹¹²³ “CPJ urges Israel to examine Gaza limits, military strikes”, Committee to Protect Journalists, 2 April 2009.

¹¹²⁴ Foreign Press Association, 13 January 2009, available at <http://www.fpa.org.il/?categoryId=406>.

opposition to media entry into Gaza, but that the Prime Minister's Office had ordered that the media ban be maintained.¹¹²⁵

1746. The media ban, coupled with the comments made by the Director of the Government's Press Office have raised concerns, aired in the media, that the ban was aimed at controlling the narrative of the conflict for political reasons.¹¹²⁶

2. International human rights monitors

1747. The denial of access to Gaza had an impact not only on the media, but also international human rights monitors, who required access to report violations and, like journalists, make events in Gaza known to the public. The Mission also notes that the presence of international human rights monitors is likely to have a deterrent effect, dissuading parties to a conflict from engaging in violations of international law.

1748. On 31 December 2008, Amnesty International issued a statement calling for Israel to allow "humanitarian workers and observers" immediate access to Gaza.¹¹²⁷

1749. Human Rights Watch requested permission from the Israel military authorities to enter Gaza on 5 January 2009. The request was rejected on 9 February 2009 on the grounds that Human Rights Watch was not registered with the Ministry of Social Affairs.¹¹²⁸ Human Rights Watch asked for clarification, given that it had never heard of such a requirement, even though it had received permission to enter Gaza on previous occasions, and was unsure of the basis in Israeli law or regulation for such a requirement. To date, Human Rights Watch has yet to receive a response from the Israeli authorities.¹¹²⁹ At 2 August 2009, it had still not been granted permission by the Israeli authorities to enter Gaza to conduct investigations.¹¹³⁰

1750. On 20 January 2009, B'Tselem requested permission from the Israel military authorities for its fieldwork director to enter Gaza; the application was rejected on 29 January 2009.¹¹³¹ In a news update dated 19 January 2009, Amnesty International stated that it had made numerous applications to the Israeli authorities to enter Gaza, but had received no response.¹¹³²

¹¹²⁵ "CPJ urges Israel to examine Gaza limits, military strikes", Committee to Protect Journalists, 2 April 2009.

¹¹²⁶ For example, "Israel puts media clamp on Gaza", *The New York Times*, 7 January 2009; and "Media frustration over Gaza ban grows", *The Guardian*, 14 January 2009.

¹¹²⁷ "Israel/ OPT: Immediate access to humanitarian workers and observers essential", Amnesty International, 31 December 2008.

¹¹²⁸ "Israel: End ban on human rights monitors", B'Tselem press release, 22 February 2009; and Email communication between the Mission and Human Rights Watch, 2 August 2009.

¹¹²⁹ *Ibid.*

¹¹³⁰ *Ibid.*

¹¹³¹ *Ibid.*

¹¹³² "Amnesty International team gains access to Gaza", Amnesty International, 19 January 2009.

1751. To date, Amnesty International, Human Rights Watch and B'Tselem have been denied access to Gaza to collect data for their independent investigations into allegation of war crimes committed by both the Israeli forces and Palestinian armed groups.

F. Legal analysis and conclusions

1752. International human rights law, applicable during armed conflict, upholds the right to freedom of expression.

International Covenant on Civil and Political Rights

1753. Article 19 of the International Covenant on Civil and Political Rights (ICCPR) provides that

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

1754. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

1. For respect of the rights or reputations of others.
2. For the protection of national security or of public order (ordre public), or of public health or morals.

1755. Articles 21 and 22 of ICCPR recognize the right to peaceful assembly and the right to freedom of association, respectively.

1756. Furthermore, article 10 provides that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms

1757. This Declaration is also known by its abbreviated name “The Declaration on Human Rights Defenders”.

1758. Article 5 of the Declaration recognizes the right (a) to meet or assemble peacefully; (b) to form, join and participate in non-governmental organizations, associations or groups; (c) to communicate with non-governmental or intergovernmental organizations.

1759. Article 6 states that

Everyone has the right, individually and in association with others:

- (a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;
- (b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;
- (c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.

1760. Article 12 states

1. Everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.
2. The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.
3. In this connection, everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms.

1761. Article 13 of the Declaration recognizes that “Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration.”

1. Protests

1762. The information received by the Mission indicates that there was no systematic policy to prevent street demonstrations against the military action being pursued in Gaza. The Mission notes, however, that there were occasions when protesters, reportedly, had difficulty in obtaining permits, particularly in areas populated mainly by Palestinian Israelis, and where the police placed obstacles in the way of protesters seeking to exercise their right to peaceful assembly and freedom of speech.

1763. Owing to the failure to cooperate by the Government of Israel, the Mission does not have sufficient information to determine whether there were sound public order or security reasons for the decisions made by the police. It however takes note of the reports received and urges the Government of Israel to ensure that the police authorities, throughout Israel, respect the rights of all its citizens, without discrimination, including the freedom of expression and the right to peaceful assembly, as guaranteed to them by the International Covenant on Civil and Political Rights.

1764. The Mission views with particular concern the reported instances of physical violence against protesters and other forms of humiliation suffered by protesters at the hands of the police. It reminds the Government of Israel that those deprived of their liberty shall, as provided by article 10 of ICCPR, be treated with humanity and respect for the inherent dignity of the human person.

2. Judicial responses

1765. The Mission does not have sufficient information about individual cases brought to its attention to come to a definitive finding. Nevertheless, the element of discrimination between the and differential treatment of Palestinian and Jewish citizens of Israel by the judicial authorities, as reflected in the reports received, is a substantial cause for concern.

3. Interrogations by the General Security Services

1766. The Mission is concerned about activists being compelled to attend interviews with the General Security Services, in the absence of any legal obligation to do so. More broadly, the Mission expresses its concern at the alleged interrogation of political activists about their political activities. Of the interviews conducted by the Mission, the issue of interrogation by the Shabak was cited most prominently as creating intolerance of dissent in Israel.

4. Freedom of association and treatment of human rights organizations

1767. The Mission is greatly concerned about allegations of hostile retaliatory actions taken against civil society organizations for criticism of the Israeli authorities and for exposing alleged violations of international human rights and humanitarian law during the military operations.

1768. In the case of alleged attempts to interfere with the funding of Breaking the Silence, the Declaration on Human Rights Defenders guarantees the right “to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means”. While lobbying foreign Governments to terminate funding does not directly violate this right, such an action, if motivated by a reaction to the organization’s exercise of its freedom of expression, would be contrary to the spirit of the Declaration.

5. Access to information: access of media and human rights monitors to Gaza

1769. With regard to the denial of media access to Gaza during the military operations there and the continued denial of access to Gaza to various international human rights monitors to the present day, the Mission notes that the presence of journalists and international human rights monitors aides the investigation and broad public reporting on the conduct of the parties to the conflict and that their presence can dissuade misconduct.

1770. According to the 1995 Johannesburg Principles on National Security, Freedom of Expression and Access to Information¹¹³³, Governments

may not prevent journalists or representatives of intergovernmental or non-governmental organizations which monitor adherence to human rights or humanitarian standards from entering areas where there are reasonable grounds to believe that violations of human rights or humanitarian law are being, or have been, committed. Governments may not exclude journalists or representatives of such organizations from areas that are experiencing violence or armed conflict, except where their presence would pose a clear risk to the safety of others.

1771. The Mission is concerned about the near total exclusion of the media and human rights monitors from Gaza since 5 November 2008. While the media have been permitted access since 23 January 2009, the Mission is very concerned that groups such as Human Rights Watch, Amnesty International and B'Tselem continue to be denied access to the Gaza Strip by the Israeli military authorities and therefore are obstructed in their investigations into alleged violations of law during the military operations. The Mission can see no viable reason for this denial of access.

1772. The Mission observes that Israel, in its actions against political activists, NGOs and the media, has attempted to minimise public scrutiny of its conduct both during its military operations in Gaza and the consequences that these operations have had for the residents of Gaza. The perception that the Israeli authorities, by denying access to the media and human rights monitors, sought to prevent investigation and reporting of the conduct of the operations by the Israeli military seems warranted. The burden of dispelling such a perception rests on the Government of Israel.

¹¹³³ The Principles (E/CN.4/1996/31) were endorsed by the United Nations Special Rapporteur on freedom of opinion and expression, in his reports to the Commission on Human Rights at its fifty-second, fifty-fourth, fifty-fifth and fifty-seventh sessions, and referred to by the Commission in its annual resolutions on freedom of expression every year from 1996.

PART FOUR: ACCOUNTABILITY AND JUDICIAL REMEDIES

XXVI. PROCEEDINGS AND RESPONSES BY ISRAEL TO ALLEGATIONS OF VIOLATIONS BY ITS ARMED FORCES AGAINST PALESTINIANS

1773. Investigations and, if appropriate, prosecutions of those suspected of serious violations are necessary if respect for human rights and humanitarian law is to be ensured and to prevent the development of a climate of impunity. States have a duty under international law to investigate allegations of violations.

1774. As seen in the preceding chapters, the Mission has investigated a large number of allegations of violations and has found that many of them have substance. The Mission was thus obliged to consider the extent to which Israel has complied with its obligations under international law to investigate those alleged violations. The Mission requested information from the Government of Israel on any inquiry it had conducted into the incidents the Mission had investigated, and the conclusions of such inquiries, if any, but did not receive any reply.

1775. Allegations concerning alleged serious violations of human rights law and international humanitarian law emerged almost as soon as the military operations began. Israel claims to have carried out limited investigations into these allegations, some of which are ongoing.

1776. In the aftermath of the military operations, a group of eight Israeli NGOs wrote to the Attorney General, Mr. Meni Mazuz, requesting the establishment of an independent and effective mechanism to investigate allegations of grave violations of the laws of war during the Gaza offensive. They requested that the investigation should also address “the legality of the actual orders and directives given to forces in the field” and held that the Military Advocate General’s office was not in a position to carry out a proper investigation because of his personal involvement and that of his office’s personnel “during stages of decision-making” in the conflict, which would compromise the neutrality and independence of the investigation.¹¹³⁴

1777. In replying to the letter, the office of the Attorney General explained that after the conclusion of the military operations “the IDF began to carry out its operational briefings”, which would also examine various events in which civilians were harmed. It did not accept the assertion that the Military Advocate General’s dual position, as legal adviser to the military authorities and as a person tasked with ensuring that military personnel charged with breaking the law are tried, disqualified him from participating in the investigation.¹¹³⁵

1778. The NGOs sent another letter,¹¹³⁶ but this time the Attorney General did not reply.

¹¹³⁴ ACRI letter to the Attorney General of Israel, Mr. Menachem Mazuz, on behalf of nine human rights organizations, dated 20 January 2009, available at: <http://www.acri.org.il/pdf/Gaza200109.pdf>.

¹¹³⁵ Reply of Attorney Raz Nizri on behalf of the Attorney General of Israel, dated 24 February 2009, available at: <http://www.acri.org.il/pdf/Gaza240209.pdf>.

¹¹³⁶ Second letter to the Attorney General, on behalf of 11 human rights organizations, dated 19 March 2009, available at: <http://www.acri.org.il/pdf/gaza190309.pdf>.

1779. On 5 February 2009, a group of Israeli scholars and jurists wrote to the Attorney General also requesting the establishment of an independent body to investigate the actions that had taken place during the military operations. The Mission is not aware that they received any reply.

1780. The Mission also saw press statements regarding the opening of investigations into allegations reportedly made by soldiers at the “Rabin” Preparation Program. On 19 March 2009, the Military Advocate General, Brig. Gen. Avichai Mendelblit, instructed the Criminal Investigation Division of the military police to investigate alleged actions by soldiers during the military operations. The decision came in response to a letter sent to him a few weeks earlier by the head of the Rabin program reporting claims made by soldiers about firing at civilians.¹¹³⁷ Eleven days later the investigation was closed on the basis that the crucial components of the allegations “were based on hearsay and not supported by facts”. According to the Israeli armed forces, the investigation found that the soldiers in question had not actually witnessed the alleged events.¹¹³⁸ In a report released by the Government of Israel in July 2009, two of the incidents investigated were briefly discussed. Not having had access to the outcome of these investigations, the Mission is unable to evaluate the report.¹¹³⁹

1781. On 22 April the Israeli armed forces released publicly the results of five investigations carried out by teams headed by officers of the rank of colonel. The same information was later reproduced in the report issued by the Government of Israel.¹¹⁴⁰ The Israeli armed forces stated that the members of the team had had no direct involvement in the chain of command during the military operations in Gaza and had acted with independence, enjoying full access to information, persons and evidence. The process was described as involving “a series of operational investigations”.¹¹⁴¹

1782. According to the same source, the five investigations addressed:

- (a) Claims regarding incidents where United Nations and international facilities were fired upon and damaged;
- (b) Incidents involving shooting at medical facilities, buildings, vehicles and crews;
- (c) Claims regarding incidents in which many uninvolved civilians were harmed;
- (d) The use of weaponry containing phosphorous;
- (e) Damage to infrastructure and destruction of buildings by ground forces.

¹¹³⁷ “The IDF Chief of the General Staff refers to claims made at the Rabin preparation center”, 23 March 2009; “The IDF Chief Advocate general orders investigation of claims made at the Rabin preparation center”, 19 March 2009; both available at <http://dover.idf.il/IDF/English/Press+Releases/default.htm>.

¹¹³⁸ “Military Police investigation concerning statements made at the Rabin Center: Based on hearsay”, 30 March 2009, available at <http://dover.idf.il/IDF/English/Press+Releases/default.htm>.

¹¹³⁹ “The operation in Gaza...”, paras. 324-329.

¹¹⁴⁰ Ibid., paras. 318-320.

¹¹⁴¹ “Conclusion of investigations...”.

1783. The observations and conclusions of these investigations have been addressed elsewhere in this report. The conclusion, as stated in the Israeli armed forces' press release, was that "throughout the fighting in Gaza, the IDF operated in accordance with international law". However, the "investigations revealed a very small number of incidents in which intelligence or operational errors took place during the fighting".

1784. The Israeli armed forces stated that the investigation was lengthy and that some specific issues were still being checked and additional allegations were being investigated. The "experts' investigations", it was emphasized, were not a replacement for the central Israeli armed forces' operational investigation into the entire operation, which was under way and to be concluded in June 2009.

1785. In its response to a report by Amnesty International,¹¹⁴² the Israeli armed forces recalled the "number of investigations" it has conducted following the military operations. In addition to those ordered by the Chief of the General Staff, Lt. Gen. Gabi Ashkenazi, the Israeli armed forces stated it was looking at complaints from various sources, and that "in certain cases, the Chief Military Advocate has already ordered the opening of a criminal investigation".¹¹⁴³

1786. On 30 July 2009 there were media reports that the Military Advocate General had ordered the military police to launch criminal investigations into 14 cases out of nearly 100 complaints against soldiers about criminal conduct during the military operations. An official comprehensive report publicly released on the same day spoke of 13 cases, but no details of the cases were offered.¹¹⁴⁴

1787. The Mission is not aware of any other investigation or of any other action taken either by the Military Advocate General or the Attorney General in connection with the military operations.

1788. Regarding violence against Palestinians outside the Gaza Strip but in relation to the military operations of December 2008 – January 2009, the Mission has been unable to gather information about any investigations that may be taking place.

A. Israel's system of investigation and prosecution

1789. The Mission considers that in assessing Israel's fulfilment of its duty to investigate regard should be had to its internal legal and judicial systems. In cases of suspected wrongdoing the Israeli armed forces may, by law, carry out investigations through: (a) disciplinary proceedings; (b) operational debriefings (also known as "operational investigations"); (c) special

¹¹⁴² *Israel/Gaza: Operation "Cast Lead": 22 days....*

¹¹⁴³ "IDF response to Amnesty report", 2 July 2009, available at: <http://www.reliefweb.int/rw/rwb.nsf/db900SID/MUMA-7TL866?OpenDocument>.

¹¹⁴⁴ *The Jerusalem Post*, "IDF orders criminal probes into 14 cases of alleged misconduct", 30 July 2009; "The operation in Gaza...", para. 12.

investigations, by a senior officer at the request of the chief of staff; and (d) military police investigations, by the Criminal Investigation Division of the military police.¹¹⁴⁵

1. Disciplinary proceedings

1790. Disciplinary proceedings are usually instituted for minor infractions of military discipline and rules, and do not apply to investigations into serious violations of human rights or humanitarian law. They are not relevant to the alleged violations with which the Mission is concerned.

1791. Several actors play a role in this system of investigation and prosecution: the army, the military police, the Military Advocate General and the courts martial.

1792. The Israeli armed forces officially describe the mission of the Military Advocate General's corps as follows:

The Military Advocate General's Corps' supervises and enforces the rule of law throughout the IDF and provides legal advice to the Chief of Staff and all divisions of the IDF in areas relating to military, domestic and international law. Its mission is to instil the general principles of law and the values of justice in the IDF.¹¹⁴⁶

1793. The Mission notes that the Military Advocate General is a military officer, who provides legal advice to the military and at the same time investigates and prosecutes these same military. It also notes that the Government of Israel insists that, despite being part of the military corps, the Military Advocate General acts with full functional independence.

2. Operational debriefings

1794. Article 539 (A) (a) of the Law on Military Justice defines an operational debriefing as: "a procedure held by the army, according to the army orders and regulations, with respect to an incident that has taken place during a training or a military operation or with connection to them".

1795. The debriefings are reviews of incidents and operations conducted by soldiers from the same unit or line of command together with a superior officer. They are meant to serve operational purposes. Following every military operation "of any kind, a field investigation is conducted in order to examine the performance of the forces and to learn what aspects should be preserved and what aspects should be improved".¹¹⁴⁷ They are supposed to be confidential so that soldiers speak openly. The findings are forwarded to the Military Advocate General's office, which may or may not find that there are grounds to suspect that a crime has been committed and order a full criminal investigation. However, if a criminal investigation is opened and the case

¹¹⁴⁵ Law on Military Justice 1954/1955. See also Human Rights Watch, *Promoting Impunity: The Israeli Military's Failure to Investigate Wrongdoing* (June 2005), pp. 39 ff.

¹¹⁴⁶ <http://dover.idf.il/IDF/English/units/other/advocate/Mission/default.htm>.

¹¹⁴⁷ "The operation in Gaza...", para. 291.

goes to trial the debriefing cannot be used as evidence in subsequent proceedings (article 539 (A) of the Military Justice Act).

1796. The use of military debriefings as a regular tool to address incidents emerging from military operations became the rule after an official change of policy was introduced in 2000.¹¹⁴⁸ The new policy was consistent with a shift to armed conflict paradigm in addressing the intifada. This change of policy meant that criminal investigations were not necessarily the first step even in the face of credible allegations of serious offences committed by military personnel.

1797. The office of the Military Advocate General can consult the operational debriefing and if it considers that a criminal investigation is warranted on the basis of the testimony of soldiers during the debriefing, it can issue orders to that effect. A criminal investigation must start de novo.

3. Special investigations

1798. The Minister of Defense and the Chief of the General Staff may also appoint an officer or group of officers – often high-ranking officers – to investigate high-profile or sensitive matters. The material gathered in special investigations also remains confidential and may not be used as evidence in court proceedings. However, the special investigator makes findings and formulates recommendations. Criminal investigations can be initiated only after the special investigator's work is complete.

4. Criminal investigations

1799. The Military Advocate General may order the Criminal Investigation Division to open a criminal investigation if he finds that there is “reasonable suspicion” that an offence may have been committed by military personnel.

1800. A summary of the operational debriefings is normally sent to the Military Advocate General's office, but he may ask to view the full notes. To order the opening of a criminal investigation, the Military Advocate General normally consults with a major general (article 539 (A)(b)(4)(b) of the Law on Military Justice). The materials of the operational debriefing will not serve in such a criminal investigation and will remain confidential from the investigative authorities (art. 539 (A)(b)(4)).

1801. A decision by the Military Advocate General to open or not to open a criminal investigation and his decision to indict or not to indict the suspects may be reviewed by the Attorney General. A complainant or an NGO can trigger this process by simply sending a letter

¹¹⁴⁸ Mission interview with Col. (ret.) Daniel Reisner in Geneva, on 6 July 2009. See also an interview with him when he was Assistant Military Advocate General for international law and head of the Israeli armed forces' International Law Department, in *Promoting Impunity...*, p. 41; see also B'Tselem, “Military police investigations during the al-Aqsa intifada”, available at: http://www.btselem.org/English/Accountability/Investigatin_of_Complaints.asp

directly to the Attorney General. The Supreme Court may be petitioned to review the Military Advocate General's or the Attorney General's decisions.¹¹⁴⁹

1802. The investigation by the Criminal Investigation Division should produce a file, which is sent to the Military Advocate General's office for completion. The Military Advocate General may decide to close the file for lack of evidence, return it for further investigation or issue an indictment. If an indictment is issued, the case proceeds to a court martial before the district and the special military courts, which are formed by three to five judges, the majority of whom have to be officers. Decisions are taken by majority vote and need not be reasoned "unless the Military Justice Law prescribes otherwise" (arts. 392–393).

1803. A decision by a district or special court martial can be appealed to the Military Court of Appeals, whose final decision may need to be confirmed by the Chief of General Staff after consultation with the Military Advocate General. Israel reported that in the past the Chief of General Staff had confirmed all sentences presented to him.¹¹⁵⁰ Victims or their legal representatives may appeal decisions not to indict to the Military Advocate General and, if unsuccessful, to the High Court of Justice.

B. Legal assessment

1804. Both international humanitarian law and international human rights law establish a clear obligation for States to investigate and, if appropriate, prosecute allegations of serious violations by military personnel whether during military operations or not. This rule finds expression in articles 49 of the First Geneva Convention, article 50 of the Second Geneva Convention, article 129 of the Third Geneva Convention and article 146 of the Fourth Geneva Convention; in articles 2 and 6 of ICCPR and article 6 of the Convention against Torture. The Mission considers the obligations on States to investigate and, if appropriate, to prosecute war crimes and other crimes allegedly committed by their armed forces or in their territory as a norm of international customary law.¹¹⁵¹

1805. International humanitarian law contains an obligation to investigate grave breaches of the Geneva Conventions. This obligation flows generally from their common article 1, but more specifically from their foregoing provisions. Article 146 (2) of the Fourth Geneva Convention provides that each High Contracting Party shall be under the obligation "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts...".

1806. There is a parallel obligation to investigate under international human rights law. Article 2 of ICCPR requires a State party to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in it and also to ensure an effective remedy for any person whose rights have been violated. Failure to ensure the rights as required by article 2 would give rise to an independent violation,

¹¹⁴⁹ "The operation in Gaza...", para. 300.

¹¹⁵⁰ Ibid.

¹¹⁵¹ *Customary International Humanitarian Law...*, rule 158, p. 607; E/CN/4/2006/53, paras. 33-43.

... as a result of States parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.

[...]

A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant...¹¹⁵²

1807. In several decisions on individual communications concerning offences against the right to life and physical integrity, the Human Rights Committee has held that the failure to investigate and punish the perpetrators constitutes a violation of the Covenant. For instance, in *Bautista de Arellana v. Colombia*, the Committee held:

... that the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies a fortiori in cases in which the perpetrators of such violations have been identified.¹¹⁵³

1808. This obligation to investigate under human rights law applies equally to actions that take place during armed conflict. In *Isayeva v. Russia*, a case concerning a woman whose relatives were killed by indiscriminate shelling in Chechnya by Russian forces, the European Court of Human Rights held that the requirements of article 2 of the European Convention applied. This provision, read with article 1 (“to secure to everyone... the rights and freedoms defined in [the] Convention”) would require “by implication that there should be some form of effective judicial investigation when individuals have been killed as a result of the use of force”.¹¹⁵⁴

1809. The Court laid down a series of principles which such an investigation should observe: inter alia, that authorities must act on their own motion, act with independence, be effective and prompt.

1810. The Inter-American Court of Human Rights has established similar jurisprudence.¹¹⁵⁵

1811. The Mission holds the view that the duty to investigate allegations of serious violations of the right to life and physical integrity under ICCPR extends equally to allegations about acts committed in the context of armed conflict.

¹¹⁵² Human Rights Committee, general comment 31 (2004), paras. 8 and 15.

¹¹⁵³ *Bautista de Arellana v. Colombia*, communication No. 563/1993, views of 27 October 1995, para 8.6; See also, *José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v. Colombia*, communication No. 612/1995, views of 29 July 1995, para 8.8; *Rajapakse v. Sri Lanka*, communication No. 1250/2004, views of 14 July 2006, para. 9.3.

¹¹⁵⁴ Case *Isayeva v. Russia*, application no. 57950/00, Judgement of 24 February 2005, para. 209.

¹¹⁵⁵ See *Case of the Ituango Massacres v. Colombia, Case of the Mapiripán Massacre v. Colombia*,

1812. The State's duty to investigate is also firmly established in the jurisprudence of the Supreme Court of Israel. Thus, in the *Targeted killings* case, which addresses the use of armed force in a context regarded as armed conflict, it held:

... after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent¹¹⁵⁶

1813. The Mission notes that Israel does not question its duty to investigate allegations of serious offences by its armed forces. On the contrary, it has repeatedly stated that the investigation system that it has put in place is effective.¹¹⁵⁷

1814. It remains to be considered whether, in carrying out its duty to investigate allegations of serious violations, Israel has observed the universal principles of independence, effectiveness, promptness and impartiality. These principles have been developed in the jurisprudence of international courts of human rights and are agreed upon by the States represented within the relevant United Nations bodies.¹¹⁵⁸

1815. The Mission finds that the system put in place by Israel, and described above, to deal with allegations of serious wrongdoing by armed forces personnel does not comply with all those principles.

1816. The system is not effective in addressing the violations and uncovering the truth. In this respect the Mission recalls the statements of Col. (res.) Ilan Katz, until March 2003 the Deputy Military Advocate General, criticizing the use of operational debriefings by commanders in order to prevent criminal investigations. In a meeting of the Israel Bar Association's Military and Security Committee, Col. (res.) Katz was reported to have stated:

From the beginning of the uprising and as of August 2004, about 90 [Military Police Criminal Investigation Division] investigations were opened into the injuries and deaths of Palestinians. About 70 investigations were opened in the last year alone. That shows that they saw that the Operational Debriefing did not lead to uncovering the truth and then the [Military Advocate General] gave an order to begin [Military Police Criminal Investigation Division] investigations. I used to be part of the policy that allowed the Army to use the military debriefing, but the Army did not use the Operational Debriefing appropriately because of a failure to comply with regulations and orders. That tool did not prove itself.

¹¹⁵⁶ *Public Committee against Torture in Israel et al. v. Government of Israel et al.*, case No. 769/02, 13 December 2006, para. 40.

¹¹⁵⁷ "The operation in Gaza...", paras. 283 ff.

¹¹⁵⁸ *Principles on the Effective Prevention and Investigation of Extrajudicial, Arbitrary and Summary Executions* (Economic and Social Council resolution 1989/65, annex), and *the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (General Assembly resolution 55/89, annex).

1817. Col. (res.) Katz appears to admit that the system does not comply with the requirement of promptness. Even if a decision is made by the Military Advocate General to order the opening of criminal investigations, investigation is usually nearly impossible at that point:

The reason is that when the commanders conduct an operational debriefing they destroy the scene of the crime, and months later it is difficult to find traces of evidence on the ground. You cannot even check the gun from which the shots were fired because by the time the [Military Police Criminal Investigation Division] investigation begins many more shots have been fired by the same gun, or in some cases the gun changes hands and it is very hard to trace it. The debriefing law has a certain logic because it raises the level of credibility of the operational debriefings, but the way it is exploited by commanders in order to prevent [Military Police Criminal Investigation Division] investigations is not reasonable.¹¹⁵⁹

1818. The Mission notes that the report in which the above statements appear has not been contradicted by the Government of Israel. The statements are also consistent with other assessments. Human Rights Watch studied the cases that were investigated between 2000 and 2004, and concluded that very few had actually gone to full criminal investigations and that even fewer had ended in indictments. When convictions did follow, the penalties were noticeably more lenient than those imposed on Palestinian offenders. The organization Yesh Din came to similar conclusions in its study of cases from 2000 to the end of 2007.¹¹⁶⁰

1819. Operational debriefing, to review operational performance, is not an appropriate tool to conduct investigations of allegations of serious violations of human rights and humanitarian law. It appears to the Mission that established methods of criminal investigations such as visits to the crime scene, interviews with witnesses and victims, and assessment by reference to established legal standards have not been adopted. The operational debriefings as well as the five “expert” investigations carried out by the Israeli armed forces into events during the December–January military operations in Gaza appear to have relied exclusively on interviews with Israeli officers and soldiers. As such, these investigations did not comply with required legal standards.

1820. The Israeli armed forces stated that it had conducted more than 100 “military investigations” into allegations of wrongdoing during the military operations in Gaza. Some 13 criminal investigations have been opened. On the basis of the facts available to it and on the circumstances, the Mission finds that a delay of six months to start these criminal investigations constitutes undue delay in the face of the serious allegations that have been made by many people and organizations.

1821. Amnesty International has said about the public outcomes of Israeli armed forces’ investigations into events during the military operations:

¹¹⁵⁹ *Maariv*, “The MPCID does not know how to do its job”, 1 January 2005, cited in Yesh Din: Volunteers for Human Rights, *Exceptions: Prosecution of IDF Soldiers during and after the Second Intifada, 2000–2007* (September 2008), p. 23.

¹¹⁶⁰ *Promoting Impunity...*, pp. 100 ff.; *Exceptions: Prosecution...*, pp. 33 ff.; see also B’Tselem, “Military police investigations during the al-Aqsa intifada”, available at: http://www.btselem.org/English/Accountability/Investigatin_of_Complaints.asp.

The information made public only refers to a handful of cases and lacks crucial details. It mostly repeats claims made by the army and the authorities many times since the early days of Operation “Cast Lead”, but does not provide evidence to back up the allegations. It does not even attempt to explain the overwhelming majority of civilian deaths nor the massive destruction caused to civilian buildings in Gaza.¹¹⁶¹

1822. In this regard, the Mission recalls the recommendations made to Israel by the Committee against Torture to “conduct an independent inquiry to ensure a prompt, independent and full investigation” into the responsibility of the State and non-State actors during the war. This recommendation was issued after Israel released the results of five “special investigations” in April 2009.¹¹⁶²

1823. On the basis of the information before it and the above considerations the Mission finds that the failure of Israel to open prompt, independent and impartial criminal investigations even after six months have elapsed constitute a violation of its obligation to genuinely investigate allegations of war crimes and other crimes, and other serious violations of international law.

1824. The obligation on Israel to prevent, investigate and punish violations of human rights applies also to its actions or omissions in the West Bank. Such obligation includes the duty to take appropriate measures or to exercise due diligence to prevent, investigate or redress harm caused by private persons.¹¹⁶³ As stated above, the Mission has not received any information indicating the initiation of criminal or other investigations into violence against Palestinians in the West Bank, including East Jerusalem, related to the military operations in the Gaza Strip. Israel appears to do little to protect Palestinians from settler violence and, if investigations into such violence are opened, they are reported to be prolonged and usually result in no action. Yesh Din reports that over 90 per cent of investigations into settler violence are closed without an indictment being filed.

1825. If settlers are convicted, the sentences are reported to be very light.¹¹⁶⁴ This practice should be contrasted with the harsh treatment and punishment meted out to Palestinians who harm Israelis. This has been described as a discriminatory policy.¹¹⁶⁵ Similarly, action against members of security forces who commit acts of violence, including killings, serious injuries and other abuses, against Palestinians is very rare. Information available to the Mission points to a systematic lack of accountability of members of the security forces for such acts.¹¹⁶⁶

1826. The Government of Israel also reports that, in October 2007, the Office of the Military Advocate for Operational Affairs was established to investigate cases of operational misconduct

¹¹⁶¹ *Israel/Gaza: Operation “Cast Lead”: 22 days...*, p. 93.

¹¹⁶² CAT/C/ISR/CO/4, para. 29.

¹¹⁶³ Human Rights Committee, general comment No. 31 (2004), para. 8.

¹¹⁶⁴ Yesh Din, “Law enforcement upon Israeli civilians in the OPT: Yesh Din’s monitoring”, data sheet, July 2008.

¹¹⁶⁵ B’Tselem, “Handling of complaints of settler violence”, available at: http://www.btselem.org/english/Settler_Violence/Law_Enforcement.asp

¹¹⁶⁶ See chap. XXI.

by Israeli armed forces soldiers against Palestinian civilians. This special military prosecution unit allows the automatic opening of criminal investigations in all cases. As a result, the Government reports, the numbers of criminal investigations launched in 2007 and 2008 in relation to abuse against Palestinians have more than doubled, from 152 in 2006 to 351 in 2007 and 323 in 2008.¹¹⁶⁷ However, no figures are provided about how many of those investigations resulted in indictments and in convictions, and the offence for which the concerned persons were finally convicted.

1827. The same paper by the Government of Israel states that, in military courts as a whole, from January 2002 to December 2008 inclusive, there have been 1,467 criminal investigations, leading to 140 indictments. As of December 2008, 103 defendants had been convicted and 10 cases were still pending. During the first six months of 2009, 123 criminal investigations were opened, leading to 10 indictments so far.¹¹⁶⁸ This information is contradicted, in addition to being incomplete.

1828. Yesh Din points out that the limited number of indictments leads, in practice, to even fewer convictions. Most of those convictions are for offences that do not reflect the degree of gravity of the action. For instance, from September 2000 to the end of 2007, only 135 soldiers were indicted, of whom some 113 had been convicted by mid-2008. Only 22 underwent full criminal trials in courts martial and 95 were convicted on the basis of their confessions. But as many as 73 confessed to amended indictments and were therefore convicted of less serious offences than the original charges. This situation has been attributed partially to the system of plea-bargaining officially used in Israel and to the willingness of the Military Prosecutor to agree to lesser offences and penalties having due regard, inter alia, to the difficulties encountered in gathering sufficient evidence to back up the original charge.¹¹⁶⁹

1829. Another contributing factor is the unprofessional way in which criminal investigations are carried out, making it virtually impossible to prove the charges beyond reasonable doubt. Courts martial have criticized those investigations on several occasions. Military criminal investigators do not seem interested in interviewing victims or witnesses and the quality of evidence gathered is low.¹¹⁷⁰

1830. The change of policy instituted in 2000 determining that full criminal investigations are possible only after “operational debriefings” have been carried out means that in practice criminal investigations do not begin before six months after the events in question. By that time evidence may be corrupted or no longer available.

1831. The Mission holds the view that a tool designed for the review of performance and to learn lessons can hardly be an effective and impartial investigation mechanism that should be instituted after every military operation where allegations of serious violations have been made. It does not comply with internationally recognized principles of independence, impartiality,

¹¹⁶⁷ “The operation in Gaza...”, paras. 294-295.

¹¹⁶⁸ Ibid., para. 293.

¹¹⁶⁹ *Exceptions: Prosecution...*, pp. 33-35.

¹¹⁷⁰ Ibid., pp. 27-28.

effectiveness and promptness in investigations. The fact that proper criminal investigations can start only after the “operational debriefing” is over is a major flaw in the Israeli system of investigation.

1832. The Mission concludes that there are serious doubts about the willingness of Israel to carry out genuine investigations in an impartial, independent, prompt and effective way as required by international law. The Mission is also of the view that the Israeli system presents inherently discriminatory features that have proven to make the pursuit of justice for Palestinian victims very difficult.

1833. In this context, the Mission notes that on 21 January 2009 the Office of the Prosecutor of the International Criminal Court received a declaration in the following terms:

‘Pursuant to the provisions of article 12, paragraph 3, of the Statute of the International Criminal Court, the Government of Palestine hereby recognizes the jurisdiction of the Court for the purposes of identifying, prosecuting and judging the authors and accomplices of acts committed in the territory of Palestine since 1 July 2002.’

1834. Article 12 of the Rome Statute - Preconditions to the exercise of jurisdiction - reads as follows:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

1835. The Prosecutor may determine that for the purposes of article 12, paragraph 3, under customary international law, Palestine qualifies as “a State”.

XXVII. PROCEEDINGS BY PALESTINIAN AUTHORITIES

A. Proceedings related to actions in the Gaza Strip

1836. The Gaza authorities are responsible for ensuring that effective measures for accountability for violations of IHRL and IHL committed by armed groups acting in or from the

Gaza Strip are established. The Mission points out that such responsibility would continue to rest on any authority exercising government-like functions in the Gaza Strip.

1837. ICHR reports that actions in the Gaza Strip in respect of accountability are limited to the formation of committees to monitor and report on a number of human rights violations.¹¹⁷¹

1838. However, there is no evidence of any system of public monitoring or accountability for serious IHL and IHRL violations. The Mission has heard credible reports of such violations that are discussed in other parts of this report. In particular, the Mission is concerned about the consistent disregard of IHL with which all armed groups in the Gaza Strip conduct their armed activities directed against Israel.

1839. The Mission notes that:

(a) On 10 July 2008, it was reported by BBC that “ Hamas security forces” had arrested two members of al-Aqsa Martyrs’ Brigades who had launched rocket attacks on Israel the day before.¹¹⁷² According to the same report, al-Aqsa Martyrs’ Brigades said members of Hamas’ security forces had chased and “abducted” two of their members. Reuters, later on 10 July 2008, reported that an additional four members of al-Aqsa Martyrs’ Brigades were arrested by Hamas as they tried to fire rockets into Israel;¹¹⁷³

(b) On 9 March 2009, Islamic Jihad stated that the Internal Security had arrested 10 of its members and forced them to sign statements prior to their being released pledging that they would cease rocket fire on Israel;¹¹⁷⁴

(c) On 13 March 2009, an official of the Gaza authorities was reported as saying that security forces would track and arrest anyone suspected of firing rockets into Israel, stating “the rockets have been fired at the wrong time”;¹¹⁷⁵

¹¹⁷¹ ICHR, *Fourteenth Annual Report*, pp. 179 ff. In relation to internal violence, Al-Mezan pointed out that “previous commissions of inquiry that were established to investigate these violations failed to make public their findings, which has contributed to the reoccurrence of violations” (“Al-Mezan welcomes decision of Prime Minister in Gaza to approve Commission of Inquiry recommendation to dismiss and bring to justice perpetrators of law and human rights violations”, 1 April 2009). Similarly, PCHR lamented “the failure of the Palestinian authorities to take any action to prosecute the perpetrators or to make available the results of any investigations. This contributes to the proliferation of such crimes” (“PCHR demands investigation into death of a civilian tortured by members of the Intelligence Services in Gaza”, press release, 25 March 2009).

¹¹⁷² BBC News, “Gaza militants fire two rockets”, 10 July 2008, available at: http://news.bbc.co.uk/2/hi/middle_east/7500322.stm.

¹¹⁷³ Reuters, “ Hamas arrests militants after rocket fire”, 10 July 2008, available at: <http://www.reuters.com/article/latestCrisis/idUSL103182282>.

¹¹⁷⁴ Ynet News, “Islamic Jihad: Hamas arrested 10 of our men”, 9 March 2009, available at: <http://www.ynetnews.com/articles/0,7340,L-3683385,00.html>; see also BBC News, “ Hamas threatens rocket militants”, 12 March 2009, available at: http://news.bbc.co.uk/2/hi/middle_east/7940371.stm.

¹¹⁷⁵ *World Tribune*, “ Hamas cracks down on the unauthorized, random firing of rockets at Israel”, 13 March 2009.

(d) On 11 July 2009, the Islamic Jihad released a statement in which asserted that two of its members had been arrested by “interior security officials” as they had been preparing to fire mortars into Israel.¹¹⁷⁶

1840. As far as incidents of killing, torture and mistreatment within the Gaza Strip in connection with or in the context of the military operations are concerned,¹¹⁷⁷ the Gaza authorities stated that they had investigated allegations of abuse and found that the incidents were “family revenge cases” or individual acts motivated by revenge. Through its competent agencies, the authorities stated that they “had opened investigations into these events immediately after the war” and submitted charges before the competent courts.¹¹⁷⁸ Notwithstanding this statement and any action that the Gaza authorities may have taken, of which the Mission is unaware, the Mission considers that allegations in this respect have gone largely without investigation.

1841. The Mission has taken into account the media reports referred to above, but remains unconvinced that any genuine and effective initiatives have been taken by the authorities to address the serious issues of violation of IHL in the conduct of armed activities by militant groups in the Gaza Strip. The Mission was also given no evidence of any arrests, investigation or prosecution connected with the serious violations of the peremptory norms of international law that have been alleged in information presented in other parts of this report, be these against Palestinian civilians in Gaza or against Israeli civilians.

1842. The Mission is aware that Hamas continues to view all armed activities directed against Israel as resistance to occupation and practices of the occupation, and, therefore, a legitimate right of the Palestinian people. The Mission fully recognizes the Palestinian people’s right to self-determination, in accordance with the Charter of the United Nations and international human rights conventions. It also acknowledges that United Nations bodies and others have repeatedly pointed out practices of the Israeli occupation that deprive Palestinians of their human rights and fundamental freedoms. Nevertheless, the Mission forcefully reiterates that the peremptory norms of customary international law, both of human rights law and humanitarian law, apply to all actions that may be undertaken in response to, or to oppose, human rights violations.

B. Proceedings related to actions in the West Bank

1843. The Palestinian Authority has a duty to respect and ensure respect for human rights and humanitarian law in the areas under its authority and control. The duty to investigate and, if appropriate, prosecute alleged perpetrators of serious crimes is also incumbent upon it. It has a general duty to provide an effective remedy to those who allege that their rights have been infringed.

1844. Article 32 of the Palestinian Basic Law provides:

¹¹⁷⁶ *Haaretz*, “ Hamas nabs two Islamic Jihad preparing to fire mortars at Israel”, 11 July 2009.

¹¹⁷⁷ See chap. XX.

¹¹⁷⁸ Written reply to list of questions formulated by the Mission, July 2009, on file with the Mission secretariat.

Any violation of any personal freedom, of the sanctity of the private life of human beings, or of any of the rights or liberties that have been guaranteed by the law or by this Basic Law shall be considered a crime. Criminal and civil cases resulting from such violations may not be subject to any statute of limitations. The National Authority shall guarantee a fair remedy to those who suffer from such damage.

1845. In its 2008 report, ICHR addresses the system of accountability in the Occupied Palestinian Territory, including the West Bank and the Gaza Strip. Victims of violations may submit a petition to the Attorney General, who should start investigations according to the law. Compensation can also be requested and obtained from the Palestinian Authority through a civil suit. The 1960 Jordanian Penal Code still applies in the West Bank. There is also provision for the enforceability of judicial rulings and sentences (article 106 of the Basic Law).

1846. The Basic Law grants the Palestinian Legislative Council the power to set up fact-finding committees to inquire into any matter of public concern (art. 58), including human rights and freedoms. ICHR observes that, of the few committees established to address human rights issues, none has found its recommendations or findings translated into criminal prosecutions.¹¹⁷⁹ With few exceptions, it appears that there has been a degree of tolerance towards human rights violations against political opponents, which has resulted in a lack of accountability for such actions.¹¹⁸⁰

1847. The Ministry of Interior has also ignored the High Court's decisions to release a number of detainees or to reopen some associations closed by the administration. The police put in place an internal disciplinary mechanism under which a total of 430 police were sanctioned during 2008. But the Preventive Security agencies and the General Intelligence agencies have not taken any similar measures.¹¹⁸¹

1848. The Mission requested information from the Palestinian Authority about any investigation it had initiated into allegations of violations by members of Palestinian security forces in areas under its jurisdiction. In its reply to the list of questions formulated by the Mission, the Palestinian Authority did not provide any information in this respect. In the circumstances, the Mission is unable to consider the measures taken by the Palestinian Authority as meaningful for holding to account perpetrators of serious violations of international law and believes that the responsibility for protecting the rights of the people inherent in the authority assumed by the Palestinian Authority must be fulfilled with greater commitment.

XXVIII. UNIVERSAL JURISDICTION

1849. In their search for justice, victims of serious violations of human rights have often looked for accountability mechanisms in other countries when there were none at home or the existing ones did not offer an effective remedy. The principle of universality, which says that international crimes that violate fundamental human values are a concern for the entire

¹¹⁷⁹ ICHR, *Fourteenth Annual Report*, p. 182.

¹¹⁸⁰ See chap. XXIII.

¹¹⁸¹ ICHR, *Fourteenth Annual Report*, p. 185.

international community, underpins the exercise of criminal jurisdiction in many States. The exercise of criminal jurisdiction on the basis of the universality principle concerns especially serious crimes regardless of the place of commission, the nationality of the perpetrator or the nationality of the victim. This form of jurisdiction is concurrent with others based on more traditional principles of territoriality, active and passive nationality, and it is not subsidiary to them.

1850. It is uncontroversial today that States may confer upon their courts the right to exercise universal jurisdiction over international crimes, including war crimes, crimes against humanity and genocide.¹¹⁸² However, there is lingering controversy about the conditions or requirements for the exercise of that jurisdiction and, in particular, about whether the alleged perpetrator should be physically in the territory of the prosecuting State or not.

1851. Universal jurisdiction is also established under certain conventions as an obligation for their States parties. Such is the case of the Fourth Geneva Convention, whose article 146 requires each high contracting party “to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches” and to bring such persons, regardless of their nationality, before its own courts.

1852. Article 5 of the Convention against Torture requires States parties to take measures to establish jurisdiction over the offence of torture and of complicity or participation in torture when the alleged offender is in a territory under its jurisdiction.

1853. Many countries around the world incorporate the principle of universal jurisdiction into their national legislation, including Australia, Bangladesh, Belgium, Costa Rica and Spain.

1854. In connection with past events in the Occupied Palestinian Territory, the Mission is aware of one case pending before the Spanish courts. It concerns the killing of Hamas leader Salah Shehadeh on 22 July 2002 by a one-ton bomb fired from an Israeli F-16 aircraft. The strike also killed a number of other people in the same house and in the house next door. The investigating judge admitted the case for investigation on the basis of the universality principle and after determining that the Israeli internal investigation system did not satisfy the requirements of the right to an effective remedy. This decision was overturned by the Appeals Chamber, whose decision is, in turn, being appealed now to the Supreme Court.¹¹⁸³

1855. There are other cases pending before national courts of several European States, such as the Netherlands¹¹⁸⁴ and Norway.¹¹⁸⁵ In South Africa, a request for prosecution is being considered by the National Prosecuting Authority.¹¹⁸⁶

¹¹⁸² See *Customary International Humanitarian Law...*, rule 157, p. 604.

¹¹⁸³ Auto, 4 May 2009, Juzgado Central de Instrucción No. 4, Audiencia Nacional; Auto No. 1/09, 9 July 2009, Sala de lo Penal Pleno, Audiencia Nacional.

¹¹⁸⁴ PCHR, “Torture victim seeks prosecution of former head of Israeli general security services”, press release, 6 October 2008, available at <http://www.pchrgaza.org/files/PressR/English/2008/92-2008.html>. This case is brought under articles 6 and 7 of the Convention against Torture.

1856. Criminal investigations and prosecutions by countries other than Israel are possible on the basis of the principle of nationality of the offender. Several countries provide their courts with jurisdiction over their own nationals regardless of the place where the offence has been committed. For instance, article 5 of the Convention against Torture requires States parties to establish jurisdiction over offences defined in it when the offender is a national.

1857. It is the view of the Mission that universal jurisdiction is a potentially efficient tool for enforcing international humanitarian law and international human rights law, preventing impunity and promoting international accountability. In the context of increasing unwillingness on the part of Israel to open criminal investigations that comply with international standards and establish judicial accountability over its military actions in the Occupied Palestinian Territory, and until such a time as clarity is achieved as to whether the International Criminal Court will exercise jurisdiction over alleged crimes committed in the Occupied Palestinian Territory, including in Gaza, the Mission supports the reliance on universal jurisdiction as an avenue for States to investigate violations of grave breach provisions of the Geneva Convention of 1949, prevent impunity and promote international accountability.

XXIX. REPARATION

1858. The extent of the damage and destruction inflicted on Palestinian lives and property, and on Palestinian civilian objects has been substantial. The Palestinian Authority estimated the total cost of early recovery and reconstruction at US\$ 1,326 million in March 2009.¹¹⁸⁷ To this amount should be added the indirect costs of the impact on human and animal health, the environment and market opportunities. These losses are still to be estimated.

1859. The international community, bilateral donors and multilateral agencies (including the United Nations specialized agencies, programmes and funds) have been responsive to the urgent needs of the Palestinian people in the Gaza Strip. A number of development NGOs operating in the Gaza Strip have redoubled their efforts. The Gaza Flash Appeal 2009,¹¹⁸⁸ prepared by aid agencies operating in the Gaza Strip, called for US\$ 613 million to meet the requirements of urgent life-saving projects and initial crucial repairs to infrastructure over a period of nine months. By the middle of 2009 only a fraction of those requirements had been met. The United Nations Resident/Humanitarian Coordinator in the Occupied Palestinian Territory has said that although donor countries had pledged billions of dollars for Gaza's reconstruction, it cannot begin because of the ongoing Israeli blockade.¹¹⁸⁹ In addition, some international donors are

¹¹⁸⁵ Spiegel Online International, "War crimes in Gaza? Palestinian lawyers take on Israel", 6 May 2009, available at: <http://www.spiegel.de/international/world/0,1518,628773,00.html>. Lawyers in Norway are seeking an arrest warrant against several senior Israeli officials.

¹¹⁸⁶ The request, against more than 70 persons, was submitted by civil society organizations under a South African law which gives effect to the Rome Statute and makes the prosecution of war crimes and crimes against humanity a legal obligation.

¹¹⁸⁷ *Palestinian National Early Recovery and Reconstruction Plan...*, p. 11.

¹¹⁸⁸ Occupied Palestinian Territory: Gaza Flash Appeal, Consolidated Appeal Process, 2009.

¹¹⁸⁹ United Nations News Centre, "Unresolved Gaza crisis hampering efforts to advance Mid-East peace – UN envoy", 23 June 2009.

reluctant to disburse funds in the current climate of uncertainty created by the rift between the two rival Palestinian political groups in Gaza and the West Bank.¹¹⁹⁰

1860. Notwithstanding the response by the Palestinian Authority and the international community to the crisis resulting from the combined effect of the blockade and the military operations of December 2008–January 2009, the Mission is more concerned about the individuals (women, men, children and the elderly) and their families, and their ability to rebuild their lives after this traumatic experience. The Mission is conscious that rebuilding Palestinian lives and livelihoods will not be fully possible until the effects of the occupation, the blockade and successive military incursions are eliminated. One should not lose sight, however, of the individual human dimension. That dimension flows from the right to a remedy and reparation that the Palestinian people and individual Palestinians have under international law. Palestinian lives, physical integrity and health have been affected, in many cases very seriously and irreparably. In addition to the loss of life and limb, considerable mental harm has been inflicted on many people who have lost relatives and often financial support. The psychological harm caused to the Palestinians in Gaza is still to be assessed and also requires reparation measures; so, too, the destruction of houses and private property.

A. The right to a remedy and reparation under international

1861. The obligation to make full reparation for the loss or injury caused is an international obligation incumbent upon a State responsible for an unlawful act. International law also recognizes victims' rights to an effective remedy and reparations for damage or loss resulting from violations of their human rights. This obligation and these rights are recognized in international treaties and customary international law.

1862. As early as 1927, the Permanent Court of International Justice established the provision of reparation for the injury caused by an international wrongful act as a principle of international law: "Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself".¹¹⁹¹

1863. This principle was codified by the International Law Commission in article 31 of its draft articles on responsibility of States for internationally wrongful acts.¹¹⁹²

1864. The principle that a State responsible for breaching an international obligation should repair the damage or loss caused can also be found in international humanitarian law conventions and human rights treaties. These include article 3 of the 1907 Fourth Hague Convention, article 51 of the First Geneva Convention, article 52 of the Second Geneva Convention, article 131 of the Third Geneva Convention and article 148 of the Fourth Geneva Convention. A similar rule is provided for in article 91 of Additional Protocol I to the Geneva Conventions.

¹¹⁹⁰ *The New York Times*, "Makeshift repairs not enough for battered Gaza", 17 August 2009.

¹¹⁹¹ *Chorzów Factory case*, 1927, P.C.I.J. (Ser. A) No. 9, p. 21.

¹¹⁹² General Assembly resolution 56/83, annex; see also *Customary International Humanitarian Law...*, rule 150, p. 537.

1865. Reparation as part of the right to a remedy has been enshrined in article 2 (3) of ICCPR, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and article 39 of the Convention on the Rights of the Child. The Rome Statute also provides for the right of victims to participation in the proceedings (art. 68 (3)) and to reparations (art. 75).¹¹⁹³

1866. Reparation can take the form of restitution, compensation or satisfaction, but may also include measures of rehabilitation of victims and guarantees of non-repetition.¹¹⁹⁴

B. Compensation and reparations to the Palestinian people in the Gaza Strip

1867. According to news reports, UNDP and the Palestinian Authority signed an agreement allocating US\$ 270 million for the restoration of the agricultural sector in Gaza. This will allow for the payment of a compensation package to Palestinian farmers for property damaged during the most recent military operations in Gaza, repair of the damaged infrastructure, damaged orchards, fisheries, livestock, greenhouses, irrigation networks and roads.¹¹⁹⁵ Cash assistance was also to be provided to some 10,000 non-refugee Palestinians whose houses have been destroyed or damaged.¹¹⁹⁶ While in Gaza City, the Mission learnt that such compensation schemes were being implemented.

1868. These assistance and compensation schemes notwithstanding, the Mission is of the view that international law requires the State responsible for the internationally wrongful act to provide reparation and compensation to the victim. To the Mission's knowledge, Israel has to date considered compensation to be paid only to the United Nations for the damage inflicted on United Nations personnel and facilities, without acknowledging responsibility.¹¹⁹⁷ At the very least, similar compensation should be offered to Palestinian individuals.

1869. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice affirmed that "Israel has the

¹¹⁹³ See also principle 11 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147):

Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.

¹¹⁹⁴ See article 34 of the draft articles on responsibility of States for internationally wrongful acts. Rehabilitation and guarantees of non-repetition are listed as forms of reparation in the above-mentioned Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

¹¹⁹⁵ UNDP, "Farmers to receive compensation for damaged property in Gaza", news release, 26 February 2009.

¹¹⁹⁶ UNDP, "10,000 families in Gaza to receive cash assistance for damaged homes", news release, 10 February 2009.

¹¹⁹⁷ Agence France-Presse, "Israel offering compensation for UN Gaza damage: official", 3 July 2009.

obligation to make reparation for the damage caused to all natural and legal persons concerned.”¹¹⁹⁸ The United Nations has established the United Nations Registry of Damages, which collects data on damage caused to Palestinians by the construction of the Wall.¹¹⁹⁹ Domestic law of Israel would be one vehicle to make possible reparations for affected Palestinians.

1870. The possibilities for obtaining reparation and compensation in the Israeli legal system have been limited. A 2001 amendment to the Civil Wrongs Act extended the definition of “acts of war” and set procedural limitations on Palestinians’ ability to bring claims against Israel. These limitations include the shortening of the period before the statute of limitations applies and the requirement to submit a “notice” of damage to the Israeli Defense Minister in advance of the claim and within two months after the damage occurred.¹²⁰⁰ Additional amendments passed in 2002 and 2005 prevent the courts from hearing claims relating to actions by security forces in “conflict zones” proclaimed as such by the Minister of Defense, and give immunity to the State against claims by subjects of enemy States or members of “terrorist organizations”.¹²⁰¹ Under the last two amendments the character of the harmful act, the circumstances under which harm was suffered and the causality link between the perpetrator and the harm have become irrelevant. The Mission received information that the amendments allowed the Minister of Defense to declare areas in the Occupied Palestinian Territory as “conflict zones” retroactively.

1871. The 2005 amendment No. 7 was challenged before the Supreme Court of Israel, which ruled in 2006 that section 5C of the Civil Wrongs Law (as amended in 2005) was not constitutional. Therefore, the provision that makes Israel immune from civil liability for acts of security forces in declared “zones of conflict” was struck down. However, the ruling did not pronounce on the constitutionality of section 5B of the Law, which grants immunity to the State against civil claims brought by subjects of a State enemy of Israel and persons active in or members of a terrorist organization.¹²⁰² At the same time, other amendments passed prior to 2005 have not been challenged and stand as law in force in the land.

1872. The Mission is concerned that the possibilities for civil compensation for damage and loss of property suffered by Palestinians during military operations are limited in Israeli domestic law since that damage is generally seen as the result of “acts of war” regardless of the nature of the action. In a recent decision concerning a claim on behalf of a Palestinian killed by helicopter fire on 16 April 2002 during the so-called Operation Defensive Shield, in Nablus, the Court ruled that this was an “act of war” designed to “vanquish the terrorist infrastructure”. The Jerusalem Magistrate’s Court held that an air strike is clearly an act of war “that the legislator intended to

¹¹⁹⁸ *Legal Consequences ...*, para. 152.

¹¹⁹⁹ Its mandate is limited to the registration of the damage or loss suffered as a result of the construction of the Wall in the Occupied Palestinian Territory.

¹²⁰⁰ Civil Wrongs (Liability of the State) (Amendment – Claims Arising from Activity of Security Forces in Judea and Samaria and the Gaza Strip) Law, 2001, sections 2 and 3, available at: www.hamoked.org.il.

¹²⁰¹ Civil Wrongs (Liability of the State) (Amendment No. 5) (Filing of Claims against the State by a Subject of an Enemy State or Resident of a Zone of Conflict) Law, 2002, and Civil Wrongs (Liability of the State) (Amendment No. 7) Law, 2005, sections 5B and 5C.

¹²⁰² *Adalah et al. v. Minister of Defense et al.*, case No. 8276/05, Judgement of 12 December 2006.

make immune to prosecution” even when the plaintiffs showed that the victim was a civilian standing on the roof of his house.¹²⁰³

1873. It is the view of the Mission that the current constitutional structure and legislation in Israel leaves very little room, if any, for Palestinians to seek compensation. The international community needs to provide an additional or alternative mechanism of compensation by Israel for damage or loss incurred by Palestinian civilians during the military operations. In this regard, the Mission notes that the International Commission of Inquiry on Darfur and the Commission of Inquiry on Lebanon expressed similar concerns about the need for compensation for the victims.¹²⁰⁴

¹²⁰³ *Odah et al. v. The State of Israel*, case No. C/007798/04, Judgement of June 2009 not yet reported.

¹²⁰⁴ “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-general, pursuant to Security Council resolution 1564 of 18 September 2004”, para. 601; “Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1” (A/HRC/3/2, para. 349).

PART FIVE: CONCLUSIONS AND RECOMMENDATIONS

XXX. CONCLUSIONS

A. Concluding observations

1874. **An objective assessment of the events it investigated and their causes and context is crucial for the success of any effort to achieve justice for victims of violations and peace and security in the region, and as such is in the interest of all concerned and affected by this situation, including the parties to the continuing hostilities. It is in this spirit, and with full appreciation of the complexity of its task, that the Mission received and implemented its mandate.**

1875. **The international community as well as Israel and, to the extent determined by their authority and means, Palestinian authorities, have the responsibility to protect victims of violations and ensure that they do not continue to suffer the scourge of war or the oppression and humiliations of occupation or indiscriminate rocket attacks. People of Palestine have the right to freely determine their own political and economic system, including the right to resist forcible deprivation of their right to self-determination and the right to live, in peace and freedom, in their own State. The people of Israel have the right to live in peace and security. Both peoples are entitled to justice in accordance with international law.**

1876. **In carrying out its mandate, the Mission had regard, as its only guides, for general international law, international human rights and humanitarian law, and the obligations they place on States, the obligations they place on non-State actors and, above all, the rights and entitlements they bestow on individuals. This in no way implies equating the position of Israel as the occupying Power with that of the occupied Palestinian population or entities representing it. The differences with regard to the power and capacity to inflict harm or to protect, including by securing justice when violations occur, are obvious and a comparison is neither possible nor necessary. What requires equal attention and effort, however, is the protection of all victims in accordance with international law.**

B. The Israeli military operations in Gaza: relevance to and links with Israel's policies vis-à-vis the Occupied Palestinian Territory

1877. **The Mission is of the view that Israel's military operation in Gaza between 27 December 2008 and 18 January 2009 and its impact cannot be understood or assessed in isolation from developments prior and subsequent to it. The operation fits into a continuum of policies aimed at pursuing Israel's political objectives with regard to Gaza and the Occupied Palestinian Territory as a whole. Many such policies are based on or result in violations of international human rights and humanitarian law. Military objectives as stated by the Government of Israel do not explain the facts ascertained by the Mission, nor are they congruous with the patterns identified by the Mission during the investigation.**

1878. **The continuum is evident most immediately with the policy of blockade that preceded the operations and that in the Mission's view amounts to collective punishment**

intentionally inflicted by the Government of Israel on the people of the Gaza Strip. When the operations began, the Gaza Strip had been under a severe regime of closures and restrictions on the movement of people, goods and services for almost three years. This included basic necessities of life, such as food and medical supplies, and products required for the conduct of daily life, such as fuel, electricity, school items, and repair and construction material. These measures were imposed by Israel purportedly to isolate and weaken Hamas after its electoral victory in view of the perceived continuing threat to Israel's security that it represented. Their effect was compounded by the withholding of financial and other assistance by some donors on similar grounds. Adding hardship to the already difficult situation in the Gaza Strip, the effects of the prolonged blockade did not spare any aspect of the life of Gazans. Prior to the military operation, the Gaza economy had been depleted, the health sector beleaguered, the population had been made dependent on humanitarian assistance for survival and the conduct of daily life. Men, women and children were psychologically suffering from long-standing poverty, insecurity and violence, and enforced confinement in a heavily overcrowded territory. The dignity of the people of Gaza had been severely eroded. This was the situation in the Gaza Strip when the Israeli armed forces launched their offensive in December 2008. The military operations and the manner in which they were conducted considerably exacerbated the aforementioned effects of the blockade. The result, in a very short time, was unprecedented long-term damage both to the people and to their development and recovery prospects.

1879. An analysis of the modalities and impact of the December-January military operations also sets them, in the Mission's view, in a continuum with a number of other pre-existing Israeli policies with regard to the Occupied Palestinian Territory. The progressive isolation and separation of the Gaza Strip from the West Bank, a policy that began much earlier and which was consolidated in particular with the imposition of tight closures, restrictions on movement and eventually the blockade, are among the most apparent. Several measures adopted by Israel in the West Bank during and following the military operations in Gaza also further deepen Israel's control over the West Bank, including East Jerusalem, and point to a convergence of objectives with the Gaza military operations. Such measures include increased land expropriation, house demolitions, demolition orders and permits to build homes in settlements, greater and more formalized access and movement restrictions on Palestinians, new and stricter procedures for residents of the Gaza Strip to change their residency to the West Bank. Systematic efforts to hinder and control Palestinian self-determined democratic processes, not least through the detention of elected political representatives and members of Government and the punishment of the Gaza population for its perceived support for Hamas, culminated in the attacks on government buildings during the Gaza offensive, most prominently the Palestinian Legislative Council. The cumulative impact of these policies and actions make prospects for political and economic integration between Gaza and the West Bank more remote.

C. Nature, objectives and targets of the Israeli military operations in Gaza

1880. Both Palestinians and Israelis whom the Mission met repeatedly stressed that the military operations carried out by Israel in Gaza from 27 December 2008 until 18 January 2009 were qualitatively different from any previous military action by Israel in the Occupied Palestinian Territory. Despite the hard conditions that have long been prevailing

in the Gaza Strip, victims and long-time observers stated that the operations were unprecedented in their severity and that their consequences would be long-lasting.

1881. When the Mission conducted its first visit to the Gaza Strip in early June 2009, almost five months had passed since the end of the Israeli military operations. The devastating effects of the operations on the population were, however, unequivocally manifest. In addition to the visible destruction of houses, factories, wells, schools, hospitals, police stations and other public buildings, the sight of families, including the elderly and children, still living amid the rubble of their former dwellings – no reconstruction possible due to the continuing blockade – was evidence of the protracted impact of the operations on the living conditions of the Gaza population. Reports of the trauma suffered during the attacks, the stress due to the uncertainty about the future, the hardship of life and the fear of further attacks, pointed to less tangible but not less real long-term effects.

1882. Women were affected in significant ways. Their situation must be given specific attention in any effort to address the consequences of the blockade, of the continuing occupation and of the latest Israeli military operations.

1883. The Gaza military operations were, according to the Israeli Government, thoroughly and extensively planned. While the Israeli Government has sought to portray its operations as essentially a response to rocket attacks in the exercise of its right to self-defence, the Mission considers the plan to have been directed, at least in part, at a different target: the people of Gaza as a whole.

1884. In this respect, the operations were in furtherance of an overall policy aimed at punishing the Gaza population for its resilience and for its apparent support for Hamas, and possibly with the intent of forcing a change in such support. The Mission considers this position to be firmly based in fact, bearing in mind what it saw and heard on the ground, what it read in the accounts of soldiers who served in the campaign, and what it heard and read from current and former military officers and political leaders whom the Mission considers to be representative of the thinking that informed the policy and strategy of the military operations.

1885. The Mission recognizes that the principal focus in the aftermath of military operations will often be on the people who have been killed – more than 1,400 in just three weeks. This is rightly so. Part of the functions of reports such as this is to attempt, albeit in a very small way, to restore the dignity of those whose rights have been violated in the most fundamental way of all – the arbitrary deprivation of life. It is important that the international community asserts formally and unequivocally that such violence to the most basic fundamental rights and freedoms of individuals should not be overlooked and should be condemned.

1886. In this respect, the Mission recognizes that not all deaths constitute violations of international humanitarian law. The principle of proportionality acknowledges that, under certain strict conditions, actions resulting in the loss of civilian life may not be unlawful. What makes the application and assessment of proportionality difficult in respect of many of the events investigated by the Mission is that deeds by the Israeli armed forces and words of military and political leaders prior to and during the operations indicate that, as a

whole, they were premised on a deliberate policy of disproportionate force aimed not at the enemy but at the “supporting infrastructure.” In practice, this appears to have meant the civilian population.

1887. The timing of the first Israeli attack, at 11.30 a.m. on a weekday, when children were returning from school and the streets of Gaza were crowded with people going about their daily business, appears to have been calculated to create the greatest disruption and widespread panic among the civilian population. The treatment of many civilians detained or even killed while trying to surrender is one manifestation of the way in which the effective rules of engagement, standard operating procedures and instructions to the troops on the ground appear to have been framed in order to create an environment in which due regard for civilian lives and basic human dignity was replaced with disregard for basic international humanitarian law and human rights norms.

1888. The Mission recognizes fully that the Israeli armed forces, like any army attempting to act within the parameters of international law, must avoid taking undue risks with their soldiers’ lives, but neither can they transfer that risk onto the lives of civilian men, women and children. The fundamental principles of distinction and proportionality apply on the battlefield, whether that battlefield is a built-up urban area or an open field.

1889. The repeated failure to distinguish between combatants and civilians appears to the Mission to have been the result of deliberate guidance issued to soldiers, as described by some of them, and not the result of occasional lapses.

1890. The Mission recognizes that some of those killed were combatants directly engaged in hostilities against Israel, but many were not. The outcome and the modalities of the operations indicate, in the Mission’s view, that they were only partially aimed at killing leaders and members of Hamas, al-Qassam Brigades and other armed groups. They were also to a large degree aimed at destroying or incapacitating civilian property and the means of subsistence of the civilian population.

1891. It is clear from evidence gathered by the Mission that the destruction of food supply installations, water sanitation systems, concrete factories and residential houses was the result of a deliberate and systematic policy by the Israeli armed forces. It was not carried out because those objects presented a military threat or opportunity, but to make the daily process of living, and dignified living, more difficult for the civilian population.

1892. Allied to the systematic destruction of the economic capacity of the Gaza Strip, there appears also to have been an assault on the dignity of the people. This was seen not only in the use of human shields and unlawful detentions sometimes in unacceptable conditions, but also in the vandalizing of houses when occupied and the way in which people were treated when their houses were entered. The graffiti on the walls, the obscenities and often racist slogans, all constituted an overall image of humiliation and dehumanization of the Palestinian population.

1893. The operations were carefully planned in all their phases. Legal opinions and advice were given throughout the planning stages and at certain operational levels during the campaign. There were almost no mistakes made according to the Government of Israel. It

is in these circumstances that the Mission concludes that what occurred in just over three weeks at the end of 2008 and the beginning of 2009 was a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population, radically diminish its local economic capacity both to work and to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability.

1894. The Mission has noted with concern public statements by Israeli officials, including senior military officials, to the effect that the use of disproportionate force, attacks on civilian population and the destruction of civilian property are legitimate means to achieve Israel's military and political objectives. The Mission believes that such statements not only undermine the entire regime of international law, they are inconsistent with the spirit of the Charter of the United Nations and, therefore, deserve to be categorically denounced.

1895. Whatever violations of international humanitarian and human rights law may have been committed, the systematic and deliberate nature of the activities described in this report leave the Mission in no doubt that responsibility lies in the first place with those who designed, planned, ordered and oversaw the operations.

D. Occupation, resilience and civil society

1896. The accounts of more severe violence during the recent military operations did not obscure the fact that the concept of "normalcy" in the Gaza Strip has long been redefined owing to the protracted situation of abuse and lack of protection deriving from the decades-long occupation.

1897. As the Mission focused on investigating and analysing the specific matters within its mandate, Israel's continuing occupation of the Gaza Strip and the West Bank emerged as the fundamental factor underlying violations of international humanitarian and human rights law against the protected population and undermining prospects for development and peace. Israel's failure to acknowledge and exercise its responsibilities as the occupying Power further exacerbated the effects of occupation on the Palestinian people, and continue to do so. Furthermore, the harsh and unlawful practices of occupation, far from quelling resistance, breed it, including its violent manifestations. The Mission is of the view that ending occupation is a prerequisite for the return of a dignified life for Palestinians, as well as development and a peaceful solution to the conflict.

1898. The Mission was struck by the resilience and dignity shown by people in the face of dire circumstances. UNRWA Director of Operations, John Ging, relayed to the Mission the answer of a Gaza teacher during a discussion after the end of the Israeli military operations about strengthening human rights education in schools. Rather than expressing scepticism at the relevance of teaching human rights in a context of renewed denial of rights, the teacher unhesitantly supported the resumption of human rights education: "This is a war of values, and we are not going to lose it".

1899. The assiduous work of Palestinian non-governmental and civil society organizations in providing support to the population in such extreme circumstances, and in giving voice to the suffering and expectations of victims of violations deserves to be fully acknowledged. Their role in helping to sustain the resilience and dignity of the population cannot be

overstated. The Mission heard many accounts of NGO workers, doctors, ambulance drivers, journalists, human rights monitors, who, at the height of the military operations, risked their lives to be of service to people in need. They frequently relayed the anxiety of having to choose between remaining close to their own families or continuing to work to assist others in need, thereby often being cut off from news about the safety or whereabouts of family members. The Mission wishes to pay tribute to the courage and work of the numerous individuals who so contributed to alleviating the suffering of the population and to report on the events in Gaza.

E. Rocket and mortar attacks in Israel

1900. Palestinian armed groups have launched thousands of rockets and mortars into Israel since April 2001. These have succeeded in causing terror within Israel's civilian population, as evidenced by the high rates of psychological trauma within the affected communities. The attacks have also led to an erosion of the social, cultural and economic lives of the communities in southern Israel, and have affected the rights to education of the tens of thousands of children and young adults who attend classes in the affected areas.

1901. Between 27 December 2008 and 18 January 2009, these attacks left four people dead and hundreds injured. That there have not been more casualties is due to a combination of luck and measures taken by the Israeli Government, including the fortification of public buildings, the construction of shelters and, in times of escalated hostilities, the closure of schools.

1902. The Mission notes, with concern, that Israel has not provided the same level of protection from rockets and mortars to affected Palestinian citizens as it has to Jewish citizens. In particular, it has failed to provide public shelters or fortification of schools, for example, to the Palestinian communities living in the unrecognized villages and some of the recognized villages. It ought to go without saying that the thousands of Palestinian Israelis—including a significant number of children – who live within the range of rocket fire, deserve the same protection as the Israeli Government provides to its Jewish citizens.

F. Dissenting voices in Israel

1903. While the Israeli military offensive in Gaza was widely supported by the Israeli public, there were also dissenting voices, which expressed themselves through demonstrations, protests, as well as public reporting on Israel's conduct. The Mission is of the view that actions of the Israeli Government during and following the military operations in the Gaza Strip, including interrogation of political activists, repression of criticism and sources of potential criticism of Israeli military actions, in particular NGOs, have contributed significantly to a political climate in which dissent with the Government and its actions in the Occupied Palestinian Territory is not tolerated. The denial of media access to Gaza and the continuing denial of access to human rights monitors are, in the Mission's view, an attempt both to remove the Government's actions in the Occupied Palestinian Territory from public scrutiny and to impede investigations and reporting of the conduct of the parties to the conflict in the Gaza Strip.

1904. In this context of increased intolerance for dissenting opinions in Israel, the Mission wishes to acknowledge the difficult work of NGOs in Israel, which courageously continue to express criticism of Government action that violates international human rights and humanitarian law. The work of these organizations is essential not only to ensure independent information to the Israeli and international public, but also to encourage a facts-based debate about these issues within Israeli society.

G. The impact of dehumanization

1905. As in many conflicts, one of the features of the Palestinian-Israeli conflict is the dehumanization of the other, and of victims in particular. Palestinian psychiatrist Dr. Iyad al-Sarraj explained the cycle of aggression and victimization through which “the Palestinian in the eyes of the Israeli soldier is not an equal human being. Sometimes [...] even becomes a demon [...]” This “culture of demonization and dehumanization” adds to a state of paranoia. “Paranoia has two sides, the side of victimization, I am a victim of this world, the whole world is against me and on the other side, I am superior to this world and I can oppress it. This leads to what is called the arrogance of power.” As Palestinians, “we look in general to the Israelis as demons and that we can hate them, that what we do is a reaction, and we say that the Israelis can only understand the language of power. The same thing that we say about the Israelis they say about us, that we only understand the language of violence or force. There we see the arrogance of power and [the Israeli] uses it without thinking of humanity at all. In my view we are seeing not only a state of war but also a state that is cultural and psychological and I hope, I wish that the Israelis would start, and there are many, many Jews in the world and in Israel that look into themselves, have an insight that would make them, alleviate the fear that they have because there’s a state of fear in Israel, in spite of all the power, and that they would start to walk on the road of dealing with the consequences of their own victimization and to start dealing with the Palestinian as a human being, a full human being who’s equal in rights with the Israeli and also the other way around, the Palestinian must deal with himself, must respect himself and respect his own differences in order to be able to stand before the Israeli also as a full human being with equal rights and obligations. This is the real road for justice and for peace.”

1906. Israeli college teacher Ofer Shinar offered a similar analysis: “Israeli society’s problem is that, because of the conflict, Israeli society feels itself to be a victim and to a large extent that’s justified and it’s very difficult for Israeli society to move and to feel that it can also see the other side and to understand that the other side is also a victim. This I think is the greatest tragedy of the conflict and it’s terribly difficult to overcome it [...] I think that the initiative that you’ve taken in listening to [...] people [...] is very important. The message that you’re giving Israeli society is absolutely unambiguous that you are impartial that you should be able to see that the feeling of being a victim is something that characterizes both sides. What requires you to take this responsibility is the fact that you have to understand how difficult it is to get this message through to Israeli society, how closed the Israeli society is, how difficult it is for Israeli society to understand that the other side is not just the party which is infringing our own human rights, but how they are having their human rights infringed, how they are suffering as well.”

1907. The Mission, in fulfilling its mandate to investigate alleged violations of international law that occurred in the context of the December 2008 – January 2009 military operations in Gaza, spoke predominantly to those most affected by the most recent events in a conflict that has spanned decades. As may be expected, the Mission found societies scarred by living in conflict with significant psychological trauma stemming from a life that may rightly seem to those living in more peaceful countries to be unbearable.

1908. Both the Palestinians and the Israelis are legitimately angered at the lives that they are forced to lead. For the Palestinians, the anger about individual events – the civilian casualties, injuries and destruction in Gaza following from military attacks, the blockade, the continued construction of the Wall outside of the 1967 borders – feed into an underlying anger about the continuing Israeli occupation, its daily humiliations and their as-yet-unfulfilled right to self-determination. For the Israelis, the public statements of Palestinian armed groups celebrating rocket and mortar attacks on civilians strengthen a deep-rooted concern that negotiation will yield little and that their nation remains under existential threat from which only it can protect its people. In this way, both the Israelis and the Palestinians share a secret fear – for some, a belief – that each has no intention of accepting the other's right to a country of their own. This anger and fear are unfortunately ably represented by many politicians.

1909. Some Israelis pointed out to the Mission that policies of the Israeli Government relating to the isolation of the Gaza Strip and the tighter restrictions on the movement of Palestinians within the Occupied Palestinian Territory and between the Occupied Palestinian Territory and Israel, have contributed to increasing the distance between Palestinians and Israelis, reducing the opportunities to interact other than in situations of control and coercion such as checkpoints and military posts.

1910. In this context, the Mission was encouraged by reports of exchange and cooperation between Palestinians and Israelis, for example with regard to mental health specialists working with Palestinians from Gaza and southern Israel's communities, and with regard to cooperation between Magen David Adom and the Palestinian Red Crescent Society, especially in the West Bank, as they fulfil a shared commitment to providing humanitarian assistance to the communities in which they work, regardless of the ethnicity of the patient who lies before them.

H. The intra-Palestinian situation

1911. The division and violence between Fatah and Hamas, which culminated in the establishment of parallel governance entities and structures in the Gaza Strip and the West Bank, is having adverse consequences for the human rights of the Palestinian population in both areas, as well as contributing to erode the rule of law in the Occupied Palestinian Territory in addition to the threats already linked to foreign occupation. Even with the narrow focus of the Mission on violations relevant to the context of the December-January military operations, the diminishing protections for Palestinians are evident from the cases of arbitrary deprivation of life, arbitrary detention of political activists or sympathizers, limitations on freedom of expression and association, and abuses by security forces. The situation is compounded by the ever reducing role of the judiciary in ensuring the rule of law and legal remedies for violations. A resolution of the internal divisions based on the

free will and decisions of Palestinians and without external interference would strengthen the ability of Palestinian authorities and institutions to protect the rights of the people under their responsibility.

I. The need for protection and the role of the international community

1912. International law sets obligations on States not only to respect but also to ensure respect for international humanitarian law. The International Court of Justice stated in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* that “all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention”.

1913. The 2005 World Summit Outcome document recognized that the international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from, inter alia, war crimes and crimes against humanity. The document stressed that the Members of the United Nations are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In 2009, the Secretary-General, in his report on implementing the responsibility to protect, noted that the enumeration of these crimes did not “detract in any way from the much broader range of obligations existing under international humanitarian law, international human rights law, refugee law and international criminal law.”

1914. After decades of sustained conflict, the level of threat to which both Palestinians and Israelis are subjected has not abated, but if anything increased with continued escalations of violence, death and suffering for the civilian population, of which the December-January military operations in Gaza are only the most recent occurrence. Israel is therefore also failing to protect its own citizens by refusing to acknowledge the futility of resorting to violent means and military power.

1915. Israeli incursions and military actions in the Gaza Strip did not stop after the end of the military operations of December – January.

1916. The Security Council has placed the protection of civilian populations on its agenda as a regular item, recognizing it as a matter falling within its responsibility. The Mission notes that the international community has been largely silent and has to date failed to act to ensure the protection of the civilian population in the Gaza Strip and generally the Occupied Palestinian Territory. Suffice it to notice the lack of adequate reaction to the blockade and its consequences, to the Gaza military operations and, in their aftermath, to the continuing obstacles to reconstruction. The Mission also considers that the isolation of the Gaza authorities and the sanctions against the Gaza Strip have had a negative impact on the protection of the population. Immediate action to enable reconstruction in Gaza is

no doubt required. However, it also needs to be accompanied by a firmer and principled stance by the international community on violations of international humanitarian and human rights law and long delayed action to end them. Protection of civilian populations requires respect for international law and accountability for violations. When the international community does not live up to its own legal standards, the threat to the international rule of law is obvious and potentially far-reaching in its consequences.

1917. The Mission acknowledges and emphasizes the impressive and essential role played by the staff of the numerous United Nations agencies and bodies working to assist the population of the Occupied Palestinian Territory in all aspects of daily life. An additional disturbing feature of the December-January military operations was the disregard in several incidents, some of which are documented in this report, for the inviolability of United Nations premises, facilities and staff. It ought to go without saying that attacks on the United Nations are unacceptable and undermine its ability to fulfil its protection and assistance role vis-à-vis a population that so badly needs it.

J. Summary of legal findings

1918. Detailed legal findings by the Mission are included in each of the chapters of the report where specific facts and events are analysed. The following is a summary of those findings.

1. Actions by Israel in Gaza in the context of the military operations of 27 December 2008 to 18 January 2009

(a) Precautions in launching attacks

1919. The Mission finds that in a number of cases Israel failed to take feasible precautions required by customary law reflected in article 57 (2) (a) (ii) of Additional Protocol I to avoid or minimize incidental loss of civilian life, injury to civilians and damage to civilian objects. The firing of white phosphorus shells over the UNRWA compound in Gaza City is one of such cases in which precautions were not taken in the choice of weapons and methods in the attack, and these facts were compounded by reckless disregard for the consequences. The intentional strike at al-Quds hospital using high-explosive artillery shells and white phosphorous in and around the hospital also violated articles 18 and 19 of the Fourth Geneva Convention. With regard to the attack against al-Wafa hospital, the Mission found a violation of the same provisions, as well as a violation of the customary law prohibition against attacks which may be expected to cause excessive damage to civilians and civilian objects.

1920. The Mission finds that the different kinds of warnings issued by Israel in Gaza cannot be considered as sufficiently effective in the circumstances to comply with customary law as reflected in Additional Protocol I, article 57 (2) (c). While some of the leaflet warnings were specific in nature, the Mission does not consider that general messages telling people to leave wherever they were and go to city centres, in the particular circumstances of the military campaign, meet the threshold of effectiveness. Firing missiles into or on top of buildings as a “warning” is essentially a dangerous practice and a form of attack rather than a warning.

(b) Incidents involving the killing of civilians

1921. The Mission found numerous instances of deliberate attacks on civilians and civilian objects (individuals, whole families, houses, mosques) in violation of the fundamental international humanitarian law principle of distinction, resulting in deaths and serious injuries. In these cases the Mission found that the protected status of civilians was not respected and the attacks were intentional, in clear violation of customary law reflected in article 51 (2) and 75 of Additional Protocol I, article 27 of the Fourth Geneva Convention and articles 6 and 7 of the International Covenant on Civil and Political Rights. In some cases the Mission additionally concluded that the attack was also launched with the intention of spreading terror among the civilian population. Moreover, in several of the incidents investigated, the Israeli armed forces not only did not use their best efforts to permit humanitarian organizations access to the wounded and medical relief, as required by customary international law reflected in article 10 (2) of Additional Protocol I, but they arbitrarily withheld such access.

1922. With regard to one incident investigated, involving the death of at least 35 Palestinians, the Mission finds that the Israeli armed forces launched an attack which a reasonable commander would have expected to cause excessive loss of civilian life in relation to the military advantage sought, in violation of customary international humanitarian law as reflected in Additional Protocol I, articles 57 (2) (a) (ii) and (iii). The Mission finds a violation of the right to life (ICCPR, article 6) of the civilians killed in this incident.

1923. The Mission also concludes that Israel, by deliberately attacking police stations and killing large numbers of policemen (99 in the incidents investigated by the Mission) during the first minutes of the military operations, failed to respect the principle of proportionality between the military advantage anticipated by killing some policemen who might have been members of Palestinian armed groups and the loss of civilian life (the majority of policemen and members of the public present in the police stations or nearby during the attack). Therefore, these were disproportionate attacks in violation of customary international law. The Mission finds a violation of the right to life (ICCPR, article 6) of the policemen killed in these attacks who were not members of Palestinian armed groups.

(c) Certain weapons used by the Israeli armed forces

1924. In relation to the weapons used by the Israeli armed forces during military operations, the Mission accepts that white phosphorous, flechettes and heavy metal (such as tungsten) are not currently proscribed under international law. Their use is, however, restricted or even prohibited in certain circumstances by virtue of the principles of proportionality and precautions necessary in the attack. Flechettes, as an area weapon, are particularly unsuitable for use in urban settings, while, in the Mission's view, the use of white phosphorous as an obscurant at least should be banned because of the number and variety of hazards that attach to the use of such a pyrophoric chemical.

(d) Treatment of Palestinians in the hands of the Israeli armed forces

(i) Use of human shields

1925. The Mission investigated several incidents in which the Israeli armed forces used local Palestinian residents to enter houses which might be booby-trapped or harbour enemy combatants (this practice, known in the West Bank as “neighbour procedure”, was called “Johnnie procedure” during the military operations in Gaza). The Mission found that the practice constitutes the use of human shields prohibited by international humanitarian law. It further constitutes a violation of the right to life, protected in article 6 of ICCPR, and of the prohibition against cruel and inhuman treatment in its article 7.

1926. The questioning of Palestinian civilians under threat of death or injury to extract information about Hamas and Palestinian combatants and tunnels constitutes a violation of article 31 of the Fourth Geneva Convention, which prohibits physical or moral coercion against protected persons.

(ii) Detention

1927. The Mission found that the Israeli armed forces in Gaza rounded up and detained large groups of persons protected under the Fourth Geneva Convention. The Mission finds that their detention cannot be justified either as detention of “unlawful combatants” or as internment of civilians for imperative reasons of security. The Mission considers that the severe beatings, constant humiliating and degrading treatment and detention in foul conditions allegedly suffered by individuals in the Gaza Strip under the control of the Israeli armed forces and in detention in Israel, constitute a failure to treat protected persons humanely in violation of article 27 of the Fourth Geneva Convention, as well as violations of articles 7 and 10 of the International Covenant on Civil and Political Rights regarding torture and the treatment of persons in detention, and of its article 14 with regard to due process guarantees. The treatment of women during detention was contrary to the special respect for women required under customary law as reflected in the article 76 of Additional Protocol I. The Mission finds that the rounding-up of large groups of civilians and their prolonged detention under the circumstances described in this report constitute a collective penalty on those persons in violation of article 33 of the Fourth Geneva Convention and article 50 of the Hague Regulations. Such treatment amounts to measures of intimidation or terror prohibited by article 33 of the Fourth Geneva Convention.

(e) Destruction of property

1928. The Mission finds that the attacks against the Palestinian Legislative Council building and the main prison in Gaza constituted deliberate attacks on civilian objects in violation of the rule of customary international humanitarian law whereby attacks must be strictly limited to military objectives.

1929. The Mission also finds that the Israeli armed forces unlawfully and wantonly attacked and destroyed without military necessity a number of food production or food-processing objects and facilities (including mills, land and greenhouses), drinking-water installations, farms and animals in violation of the principle of distinction. From the facts

ascertained by it, the Mission finds that this destruction was carried out with the purpose of denying sustenance to the civilian population, in violation of customary law reflected in article 54 (2) of the First Additional Protocol. The Mission further concludes that the Israeli armed forces carried out widespread destruction of private residential houses, water wells and water tanks unlawfully and wantonly.

1930. In addition to being violations of international humanitarian law, these extensive wanton acts of destruction amount to violations of Israel's duties to respect the right to an adequate standard of living of the people in the Gaza Strip, which includes the rights to food, water and housing, as well as the right to the highest attainable standard of health, protected under articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights.

(f) Impact of the blockade and the military operations on the Gaza population

1931. The Mission concludes that the blockade policies implemented by Israel against the Gaza Strip, in particular the closure of or restrictions imposed on border crossings in the immediate period before the military operations, subjected the local population to extreme hardship and deprivations that amounted to a violation of Israel's obligations as an occupying Power under the Fourth Geneva Convention. These measures led to a severe deterioration and regression in the levels of realization of economic and social rights of Palestinians in the Gaza Strip and weakened its social and economic fabric, leaving health, education, sanitation and other essential services in a very vulnerable position to cope with the immediate effects of the military operations.

1932. The Mission finds that, despite the information circulated by Israel about the humanitarian relief schemes in place during the military operations, Israel has essentially violated its obligation to allow free passage of all consignments of medical and hospital objects, food and clothing that were needed to meet the urgent humanitarian needs of the civilian population in the context of the military operations, which is in violation of article 23 of the Fourth Geneva Convention.

1933. In addition to the above general findings, the Mission also considers that Israel has violated its specific obligations under the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women, including the rights to peace and security, free movement, livelihood and health.

1934. The Mission concludes that the conditions resulting from deliberate actions of the Israeli armed forces and the declared policies of the Government with regard to the Gaza Strip before, during and after the military operation cumulatively indicate the intention to inflict collective punishment on the people of the Gaza Strip. The Mission, therefore, finds a violation of the provisions of article 33 of the Fourth Geneva Convention.

(g) Grave breaches of the Geneva Conventions and acts raising individual criminal responsibility under international criminal law

1935. From the facts gathered, the Mission found that the following grave breaches of the Fourth Geneva Convention were committed by the Israeli armed forces in Gaza: wilful

killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, and extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly. As grave breaches these acts give rise to individual criminal responsibility. The Mission notes that the use of human shields also constitutes a war crime under the Rome Statute of the International Criminal Court.

1936. The Mission further considers that the series of acts that deprive Palestinians in the Gaza Strip of their means of subsistence, employment, housing and water, that deny their freedom of movement and their right to leave and enter their own country, that limit their rights to access a court of law and an effective remedy, could lead a competent court to find that the crime of persecution, a crime against humanity, has been committed.

2. Actions by Israel in the West Bank in the context of the military operations in Gaza from 27 December 2008 to 18 January 2009

(a) Treatment of Palestinians in the West Bank by Israeli security forces, including use of excessive or lethal force during demonstrations

1937. With regard to acts of violence by settlers against Palestinians, the Mission concludes that Israel has failed to fulfil its international obligations to protect the Palestinians from violence by private individuals under both international human rights law and international humanitarian law. In some instances security forces acquiesced to the acts of violence in violation of the prohibition against cruel, inhuman or degrading treatment. When this acquiescence occurs only in respect of violence against Palestinians by settlers and not vice versa, it would amount to discrimination on the basis of national origin, prohibited under ICCPR.

1938. Israel also violated a series of human rights by unlawfully repressing peaceful public demonstrations and using excessive force against demonstrators. The use of firearms, including live ammunitions, and the use of snipers resulting in the death of demonstrators are a violation of article 6 of ICCPR as an arbitrary deprivation of life and, in the circumstances examined by the Mission, appear to indicate an intention or at least a recklessness towards causing harm to civilians which may amount to wilful killing.

1939. Excessive use of force that resulted in injury rather than death constitutes violations of a number of standards, including articles 7 and 9 of ICCPR. These violations are compounded by the seemingly discriminatory “open fire regulations” for security forces dealing with demonstrations, based on the presence of persons with a particular nationality, violating the principle of non-discrimination in ICCPR (art. 2) as well as under article 27 of the Fourth Geneva Convention.

1940. The Mission finds that Israel failed to investigate, and when appropriate prosecute, acts by its agents or by third parties involving serious violations of international humanitarian law and human rights law.

1941. The Mission was alarmed at the reported increase in settler violence in the past year and the failure of the Israeli security forces to prevent settlers’ attacks against Palestinian civilians and their property. These are accompanied by a series of violations by Israeli

forces or acquiesced by them, including the removal of residential status from Palestinians, which could eventually lead to a situation of virtual deportation and entail additional violations of other rights.

(b) Detention of Palestinians by Israel

1942. The Mission analysed information it received on the detention of Palestinians in Israeli prisons during or in the context of the military operations of December 2008–January 2009 and found those practices generally inconsistent with human rights and international humanitarian law. The military court system to which Palestinians from the Occupied Palestinian Territory are subjected deprives them of due process guarantees in keeping with international law.

1943. The Mission finds that the detention of members of the Palestinian Legislative Council by Israel violates the right not to be arbitrarily detained, as protected by article 9 of ICCPR. Insofar as it is based on political affiliation and prevents those members from participating in the conduct of public affairs, it is also in violation of its articles 25 recognizing the right to take part in public affairs and 26, which provides for the right to equal protection under the law. Insofar as their detention is unrelated to their individual behaviour, it constitutes collective punishment, prohibited by article 33 of the Fourth Geneva Convention. Information on the detention of large numbers of children and their treatment by Israeli security forces point to violations of their rights under ICCPR and the Convention on the Rights of the Child.

(c) Violations of the right to free movement and access

1944. The Mission finds that the extensive restrictions imposed by Israel on the movement and access of Palestinians in the West Bank are disproportionate to any legitimate objective served and in violation of article 27 of the Fourth Geneva Convention and article 12 of ICCPR, guaranteeing freedom of movement.

1945. Where checkpoints become a site of humiliation of the protected population by military or civilian operators, this may entail a violation of the customary law rule reflected in article 75 (2) (b) of Additional Protocol I.

1946. The continued construction of settlements in occupied territory constitutes a violation of article 49 of the Fourth Geneva Convention. The extensive destruction and appropriation of property, including land confiscation and house demolitions in the West Bank, including East Jerusalem, not justified by military necessity and carried out unlawfully and wantonly, amounts to a grave breach under article 147 of the Fourth Geneva Convention.

1947. Insofar as movement and access restrictions, the settlements and their infrastructure, demographic policies vis-à-vis Jerusalem and “Area C” of the West Bank, as well as the separation of Gaza from the West Bank, prevent a viable, contiguous and sovereign Palestinian State from arising, they are in violation of the *jus cogens* right to self-determination.

3. Actions by Israel in Israel

1948. In relation to alleged violations within Israel, the Mission concludes that, although there does not appear to be a policy in this respect, there were occasions when reportedly the authorities placed obstacles in the way of protesters seeking to exercise their right to peaceful assembly and freedom of speech to criticize Israel's military actions in the Gaza Strip. These rights are protected by the International Covenant on Civil and Political Rights. Instances of physical violence against protesters and other humiliations, not rising to the level of physical violence, of the protesters by the police violated Israel's obligations under article 10 of the Covenant. The Mission is also concerned about activists being compelled to attend interviews with the General Security Services (*Shabak*), which reportedly creates an atmosphere intolerant of dissent within Israel. Hostile retaliatory actions against civil society organizations by the Government of Israel for criticisms of the Israeli authorities and for exposing alleged violations of international human rights law and international humanitarian law during the military operations are inconsistent with the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

1949. The Mission finds that the imposition of a near blanket exclusion of the media and human rights monitors from Gaza since 5 November 2008 and throughout the operations is inconsistent with Israel's obligations with regard to the right to access to information.

4. Actions by Palestinian armed groups

1950. In relation to the firing of rockets and mortars into southern Israel by Palestinian armed groups operating in the Gaza Strip, the Mission finds that the Palestinian armed groups fail to distinguish between military targets and the civilian population and civilian objects in southern Israel. The launching of rockets and mortars which cannot be aimed with sufficient precisions at military targets breaches the fundamental principle of distinction. Where there is no intended military target and the rockets and mortars are launched into civilian areas, they constitute a deliberate attack against the civilian population. These actions would constitute war crimes and may amount to crimes against humanity.

1951. The Mission concludes that the rocket and mortars attacks, launched by Palestinian armed groups operating from Gaza, have caused terror in the affected communities of southern Israel. The attacks have caused loss of life and physical and mental injury to civilians as well as damaging private houses, religious buildings and property, and eroded the economic and cultural life of the affected communities and severely affected economic and social rights of the population.

1952. With regard to the continuing detention of Israeli soldier Gilad Shalit, the Mission finds that, as a soldier who belongs to the Israeli armed forces and who was captured during an enemy incursion into Israel, Gilad Shalit meets the requirements for prisoner-of-war status under the Third Geneva Convention and should be protected, treated humanely and be allowed external communication as appropriate according to that Convention.

1953. The Mission also examined whether the Palestinian armed groups complied with their obligations under international humanitarian law to take constant care to minimize the risk of harm to the civilian population in Gaza among whom the hostilities were being conducted. The conduct of hostilities in built-up areas does not, of itself, constitute a violation of international law. However, launching attacks – whether of rockets and mortars at the population of southern Israel or at the Israeli armed forces inside Gaza – close to civilian or protected buildings constitutes a failure to take all feasible precautions. In cases where this occurred, the Palestinian armed groups would have unnecessarily exposed the civilian population of Gaza to the inherent dangers of the military operations taking place around them. The Mission found no evidence to suggest that Palestinian armed groups either directed civilians to areas where attacks were being launched or that they forced civilians to remain within the vicinity of the attacks. The Mission also found no evidence that members of Palestinian armed groups engaged in combat in civilian dress. Although in the one incident of an Israeli attack on a mosque it investigated the Mission found that there was no indication that that mosque was used for military purposes or to shield military activities, the Mission cannot exclude that this might have occurred in other cases.

5. Actions by responsible Palestinian authorities

1954. Although the Gaza authorities deny any control over armed groups and responsibility for their acts, in the Mission's view, if they failed to take the necessary measures to prevent the Palestinian armed groups from endangering the civilian population, the Gaza authorities would bear responsibility for the damage arising to the civilians living in Gaza.

1955. The Mission finds that security services under the control of the Gaza authorities carried out extrajudicial executions, arbitrary arrests, detentions and ill-treatment of people, in particular political opponents, which constitute serious violations of the human rights to life, to liberty and security of the person, to freedom from torture or cruel, inhuman or degrading treatment or punishment, to be protected against arbitrary arrest and detention, to a fair and impartial legal proceeding; and to freedom of opinion and expression, including freedom to hold opinions without interference.

1956. The Mission also concludes that the Palestinian Authority's actions against political opponents in the West Bank, which started in January 2006 and intensified during the period between 27 December 2008 and 18 January 2009, constitute violations of human rights and of the Palestinians' own Basic Law. Detentions on political grounds violate the rights to liberty and security of person, to a fair trial and the right not to be discriminated against on the basis of one's political opinion, which are all part of customary international law. Reports of torture and other forms of ill-treatment during arrest and detention and of death in detention require prompt investigation and accountability.

K. The need for accountability

1957. The Mission was struck by the repeated comment of Palestinian victims, human rights defenders, civil society interlocutors and officials that they hoped that this would be the last investigative mission of its kind, because action for justice would follow from it. It

was struck, as well, by the comment that every time a report is published and no action follows, this “emboldens Israel and her conviction of being untouchable”. To deny modes of accountability reinforces impunity, and tarnishes the credibility of the United Nations and of the international community. The Mission believes these comments ought to be at the forefront in the consideration by Members States and United Nations bodies of its findings and recommendations and action consequent upon them.

1958. The Mission is firmly convinced that justice and respect for the rule of law are the indispensable basis for peace. The prolonged situation of impunity has created a justice crisis in the Occupied Palestinian Territory that warrants action.

1959. After reviewing Israel’s system of investigation and prosecution of serious violations of human rights and humanitarian law, in particular of suspected war crimes and crimes against humanity, the Mission found major structural flaws that, in its view, make the system inconsistent with international standards. With military “operational debriefings” at the core of the system, there is no effective and impartial investigation mechanism and victims of such alleged violations are deprived of any effective or prompt remedy. Furthermore, such investigations, being internal to the Israeli military authority, do not comply with international standards of independence and impartiality. The Mission believes that the few investigations conducted by the Israeli authorities on alleged serious violations of international human rights and humanitarian law and, in particular, alleged war crimes, in the context of the military operations in Gaza between 27 December 2008 and 18 January 2009, are affected by the defects in the system, have been unduly delayed despite the gravity of the allegations, and, therefore, lack the required credibility and conformity with international standards. The Mission is concerned that investigations of relatively less serious violations that the Government of Israel claims to be investigating have also been unduly protracted.

1960. The Mission noted the pattern of delays, inaction or otherwise unsatisfactory handling by Israeli authorities of investigations, prosecutions and convictions of military personnel and settlers for violence and offences against Palestinians, including in the West Bank, as well as their discriminatory outcome. Additionally, the current constitutional and legal framework in Israel provides very few possibilities, if any, for Palestinians to seek compensation and reparations.

1961. In the light of the information it reviewed and its analysis, the Mission concludes that there are serious doubts about the willingness of Israel to carry out genuine investigations in an impartial, independent, prompt and effective way as required by international law. The Mission is also of the view that the system presents inherently discriminatory features that make the pursuit of justice for Palestinian victims extremely difficult.

1962. With regard to allegations of violations of international humanitarian law falling within the jurisdiction of responsible Palestinian authorities in Gaza, the Mission finds that these allegations have not been investigated.

1963. The Mission notes that the responsibility to investigate violations of international human rights and humanitarian law, prosecute if appropriate and try perpetrators belongs in the first place to domestic authorities and institutions. This is a legal obligation

incumbent on States and State-like entities. However, where domestic authorities are unable or unwilling to comply with this obligation, international justice mechanisms must be activated to prevent impunity.

1964. The Mission believes that, in the circumstances, there is little potential for accountability for serious violations of international humanitarian and human rights law through domestic institutions in Israel and even less in Gaza. The Mission is of the view that long-standing impunity has been a key factor in the perpetuation of violence in the region and in the reoccurrence of violations, as well as in the erosion of confidence among Palestinians and many Israelis concerning prospects for justice and a peaceful solution to the conflict.

1965. The Mission considers that several of the violations referred to in this report amount to grave breaches of the Fourth Geneva Convention. It notes that there is a duty imposed by the Geneva Conventions on all high contracting parties to search for and bring before their courts those responsible for the alleged violations.

1966. The Mission considers that the serious violations of international humanitarian law recounted in this report fall within the subject-matter jurisdiction of the International Criminal Court. The Mission notes that the United Nations Security Council has long recognized the impact of the situation in the Middle East, including the Palestinian question, on international peace and security, and that it regularly considers and reviews this situation. The Mission is persuaded that, in the light of the long-standing nature of the conflict, the frequent and consistent allegations of violations of international humanitarian law against all parties, the apparent increase in intensity of such violations in the recent military operations, and the regrettable possibility of a return to further violence, meaningful and practical steps to end impunity for such violations would offer an effective way to deter such violations recurring in the future. The Mission is of the view that the prosecution of persons responsible for serious violations of international humanitarian law would contribute to ending such violations, to the protection of civilians and to the restoration and maintenance of peace.

XXXI. RECOMMENDATIONS

1967. The Mission makes the following recommendations related to:

- (a) Accountability for serious violations of international humanitarian law;**
- (b) Reparations;**
- (c) Serious violations of human rights law;**
- (d) The blockade and reconstruction;**
- (e) The use of weapons and military procedures;**
- (f) The protection of human rights organizations and defenders;**
- (g) Follow-up to the Mission's recommendations.**

1968. **To the Human Rights Council,**

(a) **The Mission recommends that the United Nations Human Rights Council should endorse the recommendations contained in this report, take appropriate action to implement them as recommended by the Mission and through other means as it may deem appropriate, and continue to review their implementation in future sessions;**

(b) **In view of the gravity of the violations of international human rights and humanitarian law and possible war crimes and crimes against humanity that it has reported, the Mission recommends that the United Nations Human Rights Council should request the United Nations Secretary-General to bring this report to the attention of the United Nations Security Council under Article 99 of the Charter of the United Nations so that the Security Council may consider action according to the Mission's relevant recommendations below;**

(c) **The Mission further recommends that the United Nations Human Rights Council should formally submit this report to the Prosecutor of the International Criminal Court;**

(d) **The Mission recommends that the Human Rights Council should submit this report to the General Assembly with a request that it should be considered;**

(e) **The Mission recommends that the Human Rights Council should bring the Mission's recommendations to the attention of the relevant United Nations human rights treaty bodies so that they may include review of progress in their implementation, as may be relevant to their mandate and procedures, in their periodic review of compliance by Israel with its human rights obligations. The Mission further recommends that the Human Rights Council should consider review of progress as part of its universal periodic review process.**

1969. **To the United Nations Security Council,**

(a) **The Mission recommends that the Security Council should require the Government of Israel, under Article 40 of the Charter of the United Nations:**

- (i) **To take all appropriate steps, within a period of three months, to launch appropriate investigations that are independent and in conformity with international standards, into the serious violations of international humanitarian and international human rights law reported by the Mission and any other serious allegations that might come to its attention;**
- (ii) **To inform the Security Council, within a further period of three months, of actions taken, or in process of being taken, by the Government of Israel to inquire into, investigate and prosecute such serious violations;**

(b) **The Mission further recommends that the Security Council should at the same time establish an independent committee of experts in international humanitarian and human rights law to monitor and report on any domestic legal or other proceedings undertaken by the Government of Israel in relation to the aforesaid investigations. Such**

committee of experts should report at the end of the six-month period to the Security Council on its assessment of relevant domestic proceedings initiated by the Government of Israel, including their progress, effectiveness and genuineness, so that the Security Council may assess whether appropriate action to ensure justice for victims and accountability for perpetrators has been or is being taken at the domestic level. The Security Council should request the committee to report to it at determined intervals, as may be necessary. The committee should be appropriately supported by the Office of the United Nations High Commissioner for Human Rights;

(c) The Mission recommends that, upon receipt of the committee's report, the Security Council should consider the situation and, in the absence of good-faith investigations that are independent and in conformity with international standards having been undertaken or being under way within six months of the date of its resolution under Article 40 by the appropriate authorities of the State of Israel, again acting under Chapter VII of the Charter of the United Nations, refer the situation in Gaza to the Prosecutor of the International Criminal Court pursuant to article 13 (b) of the Rome Statute;

(d) The Mission recommends that the Security Council should require the independent committee of experts referred to in subparagraph (b) to monitor and report on any domestic legal or other proceedings undertaken by the relevant authorities in the Gaza Strip in relation to the aforesaid investigations. The committee should report at the end of the six-month period to the Security Council on its assessment of relevant domestic proceedings initiated by the relevant authorities in Gaza, including their progress, effectiveness and genuineness, so that the Security Council may assess whether appropriate action to ensure justice for victims and accountability for perpetrators has been taken or is being taken at the domestic level. The Security Council should request the committee to report to it at determined intervals, as may be necessary;

(e) The Mission recommends that, upon receipt of the committee's report, the Security Council should consider the situation and, in the absence of good-faith investigations that are independent and in conformity with international standards having been undertaken or being under way within six months of the date of its resolution under Article 40 by the appropriate authorities in Gaza, acting under Chapter VII of the Charter of the United Nations, refer the situation in Gaza to the Prosecutor of the International Criminal Court pursuant to article 13 (b) of the Rome Statute;

(f) The Mission recommends that lack of cooperation by the Government of Israel or the Gaza authorities with the work of the committee should be regarded by the Security Council to be obstruction of the work of the committee.

1970. To the Prosecutor of the International Criminal Court, with reference to the declaration under article 12 (3) received by the Office of the Prosecutor of the International Criminal Court from the Government of Palestine, the Mission considers that accountability for victims and the interests of peace and justice in the region require that the Prosecutor should make the required legal determination as expeditiously as possible.

1971. To the General Assembly,

(a) The Mission recommends that the General Assembly should request the Security Council to report to it on measures taken with regard to ensuring accountability for serious violations of international humanitarian law and human rights in relation to the facts in this report and any other relevant facts in the context of the military operations in Gaza, including the implementation of the Mission's recommendations. The General Assembly may remain apprised of the matter until it is satisfied that appropriate action is taken at the domestic or international level in order to ensure justice for victims and accountability for perpetrators. The General Assembly may consider whether additional action within its powers is required in the interests of justice, including under its resolution 377 (V) on uniting for peace;

(b) The Mission recommends that the General Assembly should establish an escrow fund to be used to pay adequate compensation to Palestinians who have suffered loss and damage as a result of unlawful acts attributable to Israel during the December–January military operation and actions in connection with it, and that the Government of Israel should pay the required amounts into such fund. The Mission further recommends that the General Assembly should ask the Office of the United Nations High Commissioner for Human Rights to provide expert advice on the appropriate modalities to establish the escrow fund;

(c) The Mission recommends that the General Assembly should ask the Government of Switzerland to convene a conference of the high contracting parties to the Fourth Geneva Convention of 1949 on measures to enforce the Convention in the Occupied Palestinian Territory and to ensure its respect in accordance with its article 1;

(d) The Mission recommends that the General Assembly should promote an urgent discussion on the future legality of the use of certain munitions referred to in this report, and in particular white phosphorous, flechettes and heavy metal such as tungsten. In such discussion the General Assembly should draw inter alia on the expertise of the International Committee of the Red Cross (ICRC). The Mission further recommends that the Government of Israel should undertake a moratorium on the use of such weapons in the light of the human suffering and damage they have caused in the Gaza Strip.

1972. To the State of Israel,

(a) The Mission recommends that Israel should immediately cease the border closures and restrictions on passage through border crossings with the Gaza Strip and allow the passage of goods necessary and sufficient to meet the needs of the population, for the recovery and reconstruction of housing and essential services, and for the resumption of meaningful economic activity in the Gaza Strip;

(b) The Mission recommends that Israel should cease the restrictions on access to the sea for fishing purposes imposed on the Gaza Strip and allow such fishing activities within the 20 nautical miles as provided for in the Oslo Accords. It further recommends that Israel should allow the resumption of agricultural activity within the Gaza Strip, including within areas in the vicinity of the borders with Israel;

(c) Israel should initiate a review of the rules of engagement, standard operating procedures, open fire regulations and other guidance for military and security personnel. The Mission recommends that Israel should avail itself of the expertise of the International Committee of the Red Cross, the Office of the United Nations High Commissioner for Human Rights and other relevant bodies, and Israeli experts, civil society organizations with the relevant expertise and specialization, in order to ensure compliance in this respect with international humanitarian law and international human rights law. In particular such rules of engagement should ensure that the principles of proportionality, distinction, precaution and non-discrimination are effectively integrated in all such guidance and in any oral briefings provided to officers, soldiers and security forces, so as to avoid the recurrence of Palestinian civilian deaths, destruction and affronts on human dignity in violation of international law;

(d) The Mission recommends that Israel should allow freedom of movement for Palestinians within the Occupied Palestinian Territory - within the West Bank, including East Jerusalem, between the Gaza Strip and the West Bank, and between the Occupied Palestinian Territory and the outside world - in accordance with international human rights standards and international commitments entered into by Israel and the representatives of the Palestinian people. The Mission further recommends that Israel should forthwith lift travel bans currently placed on Palestinians by reason of their human rights or political activities;

(e) The Mission recommends that Israel should release Palestinians who are detained in Israeli prisons in connection with the occupation. The release of children should be an utmost priority. The Mission further recommends that Israel should cease the discriminatory treatment of Palestinian detainees. Family visits for prisoners from Gaza should resume;

(f) The Mission recommends that Israel should forthwith cease interference with national political processes in the Occupied Palestinian Territory, and as a first step release all members of the Palestinian Legislative Council currently in detention and allow all members of the Council to move between Gaza and the West Bank so that it may resume functioning;

(g) The Mission recommends that the Government of Israel should cease actions aimed at limiting the expression of criticism by civil society and members of the public concerning Israel's policies and conduct during the military operations in the Gaza Strip. The Mission also recommends that Israel should set up an independent inquiry to assess whether the treatment by Israeli judicial authorities of Palestinian and Jewish Israelis expressing dissent in connection with the offensive was discriminatory, in terms of both charges and detention pending trial. The results of the inquiry should be made public and, subject to the findings, appropriate remedial action should be taken;

(h) The Mission recommends that the Government of Israel should refrain from any action of reprisal against Palestinian and Israeli individuals and organizations that have cooperated with the United Nations Fact Finding Mission on the Gaza Conflict, in particular individuals who have appeared at the public hearings held by the Mission in Gaza and Geneva and expressed criticism of actions by Israel;

(i) The Mission recommends that Israel should reiterate its commitment to respecting the inviolability of United Nations premises and personnel and that it should undertake all appropriate measures to ensure that there is no repetition of violations in the future. It further recommends that reparation to the United Nations should be provided fully and without further delay by Israel, and that the General Assembly should consider this matter.

1973. To Palestinian armed groups,

(a) The Mission recommends that Palestinian armed groups should undertake forthwith to respect international humanitarian law, in particular by renouncing attacks on Israeli civilians and civilian objects, and take all feasible precautionary measures to avoid harm to Palestinian civilians during hostilities;

(b) The Mission recommends that Palestinian armed groups who hold Israeli soldier Gilad Shalit in detention should release him on humanitarian grounds. Pending such release they should recognize his status as prisoner of war, treat him as such, and allow him ICRC visits.

1974. To responsible Palestinian authorities,

(a) The Mission recommends that the Palestinian Authority should issue clear instructions to security forces under its command to abide by human rights norms as enshrined in the Palestinian Basic Law and international instruments, ensure prompt and independent investigation of all allegations of serious human rights violations by security forces under its control, and end resort to military justice to deal with cases involving civilians;

(b) The Mission recommends that the Palestinian Authority and the Gaza authorities should release without delay all political detainees currently in their power and refrain from further arrests on political grounds and in violation of international human rights law;

(c) The Mission recommends that the Palestinian Authority and the Gaza authorities should continue to enable the free and independent operation of Palestinian non-governmental organizations, including human rights organizations, and of the Independent Commission for Human Rights.

1975. To the international community,

(a) The Mission recommends that the States parties to the Geneva Conventions of 1949 should start criminal investigations in national courts, using universal jurisdiction, where there is sufficient evidence of the commission of grave breaches of the Geneva Conventions of 1949. Where so warranted following investigation, alleged perpetrators should be arrested and prosecuted in accordance with internationally recognized standards of justice;

(b) International aid providers should step up financial and technical assistance for organizations providing psychological support and mental health services to the Palestinian population;

(c) In view of their crucial function, the Mission recommends that donor countries/assistance providers should continue to support the work of Palestinian and Israeli human rights organizations in documenting and publicly reporting on violations of human rights and international humanitarian law, and advising relevant authorities on their compliance with international law;

(d) The Mission recommends that States involved in peace negotiations between Israel and representatives of the Palestinian people, especially the Quartet, should ensure that respect for the rule of law, international law and human rights assumes a central role in internationally sponsored peace initiatives;

(e) In view of the allegations and reports about long-term environmental damage that may have been created by certain munitions or debris from munitions, the Mission recommends that a programme of environmental monitoring should take place under the auspices of the United Nations, for as long as deemed necessary. The programme should include the Gaza Strip and areas within southern Israel close to impact sites. The environmental monitoring programme should be in accordance with the recommendations of an independent body, and samples and analyses should be analysed by one or more independent expert institutions. Such recommendations, at least at the outset, should include measurement mechanisms which address the fears of the population of Gaza and southern Israel at this time and should at a minimum be in a position to determine the presences of heavy metals of all varieties, white phosphorous, tungsten micro-shrapnel and granules and such other chemicals as may be revealed by the investigation.

1976. To the international community and responsible Palestinian authorities,

(a) The Mission recommends that appropriate mechanisms should be established to ensure that the funds pledged by international donors for reconstruction activities in the Gaza Strip are smoothly and efficiently disbursed, and urgently put to use for the benefit of the population of Gaza;

(b) In view of the consequences of the military operations, the Mission recommends that responsible Palestinian authorities as well as international aid providers should pay special attention to the needs of persons with disabilities. In addition, the Mission recommends that medical follow-up should be ensured by relevant international and Palestinian structures with regard to patients who suffered amputations or were otherwise injured by munitions, the nature of which has not been clarified, in order to monitor any possible long-term impact on their health. Financial and technical assistance should be provided to ensure adequate medical follow-up to Palestinian patients.

1977. To the international community, Israel and Palestinian authorities,

(a) The Mission recommends that Israel and representatives of the Palestinian people, and international actors involved in the peace process, should involve Israeli and

Palestinian civil society in devising sustainable peace agreements based on respect for international law. The participation of women should be ensured in accordance with Security Council resolution 1325 (2000);

(b) The Mission recommends that attention should be given to the position of women and steps be taken to ensure their access to compensation, legal assistance and economic security.

1978. To the United Nations Secretary-General, the Mission recommends that the Secretary-General should develop a policy to integrate human rights in peace initiatives in which the United Nations is involved, especially the Quartet, and request the United Nations High Commissioner for Human Rights to provide the expertise required to implement this recommendation.

1979. To the Office of the United Nations High Commissioner for Human Rights,

(a) The Mission recommends that the Office of the United Nations High Commissioner for Human Rights should monitor the situation of persons who have cooperated with the United Nations Fact Finding Mission on the Gaza Conflict and periodically update the Human Rights Council through its public reports and in other ways as it may deem appropriate;

(b) The Mission recommends that the Office of the High Commissioner for Human Rights should give attention to the Mission's recommendations in its periodic reporting on the Occupied Palestinian Territory to the Human Rights Council.

Annex I

List of meetings held by the United Nations Fact Finding Mission on the Gaza Conflict

Diplomatic Missions

- Diplomatic Community in the Gaza Strip, West Bank and East Jerusalem¹²⁰⁵
- Permanent Mission of the Arab Republic of Egypt to the United Nations in Geneva, chair of the African Group
- Permanent Mission of France to the United Nations in Geneva
- Permanent Mission of the Islamic Republic of Pakistan to the United Nations in Geneva, chair of the Organisation of the Islamic Conference Group
- Permanent Mission of the Kingdom of Great Britain and Northern Ireland to the United Nations in Geneva
- Permanent Observer Mission of Palestine to the United Nations in Geneva
- Permanent Mission of the Republic of Cuba to the United Nations in Geneva, chair of the Non-aligned Movement Group
- Permanent Mission of the Republic of Yemen to the United Nations in Geneva, chair of the Arab Group
- Permanent Mission of the Russian Federation to the United Nations in Geneva
- Permanent Mission of Sweden to the United Nations in Geneva
- Permanent Mission of Switzerland to the United Nations in Geneva
- Permanent Mission of the United States of America to the United Nations in Geneva

Domestic authorities

- Palestinian Authority, Minister of Health
- Palestinian Authority, Negotiation Support Unit
- Members of the Palestinian Legislative Council (PLC)
- Gaza authorities

United Nations and International Organizations

- International Committee of the Red Cross

¹²⁰⁵ Australia, Austria, Belgium, Canada, Chile, Egypt, Germany, Ireland, Italy, Netherlands, Norway, Poland, Spain, Sweden, Switzerland and United Kingdom.

- League of Arab States Gaza Fact Finding Mission
- United Nations High Commissioner for Human Rights
- Office of the High Commissioner for Human Rights (OHCHR), Director, Field Operations and Technical Cooperation Division
- Office of the High Commissioner for Human Rights (OHCHR), Middle East and North Africa Unit
- Office of the High Commissioner for Human Rights (OHCHR), OPT
- Office of the High Commissioner for Human Rights (OHCHR), New York Office
- United Nations Special Coordinator for the Middle East Peace Process and UNSCO staff
- United Nations Country Team in the Gaza Strip¹²⁰⁶
- United Nations Department of Safety and Security (UNDSS)
- United Nations Development Programme (UNDP)
- United Nations Headquarters Board of Inquiry into certain incidents in the Gaza Strip between 27 December 2008 and 19 January 2009, Head
- United Nations Human Rights Council, President
- United Nations Institute for Training and Research (UNITAR) Operational Satellite Applications Programme (UNOSAT)
- United Nations Secretary General
- United Nations Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967
- United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), Commissioner General
- United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), Director Gaza Operations
- United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), Field Legal Office, Gaza
- Special Representative of the United Nations' Secretary General on Children in Armed Conflict
- World Health Organization (WHO)

Non-governmental organizations

- Town hall meeting with Geneva based NGOs¹²⁰⁷

¹²⁰⁶ FAO, OCHA, OHCHR, UNDP, UNESCO, UNFPA, UNICEF, UNIFEM, UNSCO, UNOPS, UNRWA, WHO and WFP.

- AlAtaa Charitable Association
- Al-Dameer Association for Human Rights
- Adalah, The Legal Centre for Arab Minority Rights in Israel
- Addameer, Prisoners Support and Human Rights Association
- Agricultural Development Association (PARC)
- Al-Haq
- Al-Mezan Center for Human Rights
- Alternative Information Centre
- Amnesty International
- B'Tselem, the Israeli Information Center for Human Rights in the Occupied Territories
- Center for Women's Legal Research and Consulting
- Culture and Free Thought Association
- Defense of Children International – Palestine Section (DCI)
- Gaza Mental Health Program (GMHP)
- General Union of Palestinian Women
- Gisha, Legal Center for Freedom of Movement
- Human Rights Watch
- Ma'an Development Center
- Magen David Adom in Israel
- Mandela Institute
- Palestinian Agricultural Development Society
- Palestinian Center for Human Rights (PCHR)
- Palestinian International Campaign to End the Siege on Gaza
- Palestinian Medical Relief Society

¹²⁰⁷ The following NGOs confirmed participation: Al-Hakim Foundation to ONUG, Amnesty International, Arab Commission for Human Rights, Asian Forum for Human Rights and Development, CETIM Centre Europe-tiers monde, Defence for Children International, EAFORD, Genève peoples, Human Rights Watch, ICTJ Geneva and Program on Peace and Justice, International Alliance Women, International Commission of Jurists, International Council of Jewish Women, International Secretariat of the Conference of NGOs, International Service for Human Rights, Istituto Internazionale Maria Ausiliatrice and VIDES, Lawyers' Rights Watch Canada, Mouvement contre le racisme et pour l'amitié entre les peuples, Oxfam International Geneva, Pax Christi International, , The Lutheran World Federation, UN WATCH, WFW, WILPF, Women's International League for Peace and Freedom, World Alliance of YMCAs, WVI, WWSF.

- Palestinian Network of NGOs
- Palestinian Red Crescent Society (PRCS)
- Palestinian Woman Developmental Studies Association
- Palestinian Woman Information and Media Centre
- Physicians for Human Rights – Israel
- Society for Disabled in the Gaza Strip
- Stop the Wall
- Yesh Gvul
- Union of Agricultural Work Committees
- Union of Health Care Committees
- Union of Health Work Committees
- Women's Affairs Centre

National human rights institutions

- Palestinian Independent Commission for Human Rights (ICHR)

Other organizations

- General Syndicate of Fishers
- Palestinian Bar Association in Gaza
- Palestinian Businessmen Association
- Palestinian Federation of Industry
- Palestinian Trade Center

Annex II

Correspondence between the United Nations Fact Finding Mission on the Gaza Conflict and the Government of Israel regarding Access and Cooperation

NATIONS UNIES



UNITED NATIONS

HUMAN RIGHTS COUNCIL
INTERNATIONAL INDEPENDENT FACT FINDING MISSION ESTABLISHED BY
RESOLUTION S-9/1

Téléfax: (41-22) 928 9003
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3 April 2009

Dear Ambassador,

I was hoping to have the opportunity of meeting with you this morning and especially prior to the press conference at which the Members of the Fact Finding Mission are to be announced. I am disappointed to learn that this will not be possible.

I wished personally to assure you that prior to considering the invitation to lead the Mission, I satisfied myself that it would be given unbiased and even-handed terms of reference. In particular, it seemed to me that it was crucial, in order to assess the military actions conducted by Israel, and in particular to investigate the effects on Israeli citizens of the rocket attacks that emanated from Gaza. It is also clearly necessary to take into account all relevant contextual facts that might be relevant to assess the actions that were taken by Israel in response to the attacks.

It is my earnest wish that the Mission should visit the areas that were effected by the rocket attacks and, if possible, to meet with some of the victims of those attacks, to ascertain the physical damage caused by them, as well as the effect that they had on an ongoing basis upon the civilian population in the effected areas of Israel. I need hardly add that it would also be important for the Mission to have access to the relevant officials in the Israeli Government and, of course, relevant military officials.

As a completely independent body, the Mission will now be determining its own terms of reference. I would hope that I could consult with the Government of Israel and take into account its views with regard to the terms of reference. Your advice in this regard would be much appreciated.

H.E. Ambassador Aharon Leshno-Yaar
Permanent Representative of Israel
To the United Nations in Geneva
Avenue de la Pais 1-3
1202 Geneva

I am willing to come to Geneva to meet with you at a mutually convenient time or, if that would be more helpful, to travel to Jerusalem to meet with Israeli Government officials there.

I do hope that you will find it possible to respond to this communication at your earliest convenience.

Please accept, Excellency, the assurances of my highest consideration.

A handwritten signature in black ink, appearing to read "Richard Goldstone". The signature is fluid and cursive, with a prominent initial "R".

Richard Goldstone
Head of the Fact-Finding Mission
established under HRC resolution S-9/1

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Mission permanente d'Israël
auprès de l'Office des Nations Unies
et des Organisations Internationales à Genève

משלחת ישראל
ליד משרד האומות המאוחדות
והארגונים הבינלאומיים בג'נבה

Justice Richard Goldstone
OHCHR
Palais des Nations
1211 Geneva 10
Fax 022 928 9003

Geneva, 7 April 2009

Dear Justice Goldstone,

Thank you for your letter dated April 3, 2009, concerning the HRC Fact-Finding Mission.

It is with regret that I have to inform you that Israel will not be able to cooperate with the proposed Fact-Finding Mission. While I appreciate your efforts to obtain assurances that the Mission would be unbiased and even-handed, it remains the fact that the legal basis of the mission is HRC Resolution S-9/1. This grossly politicized resolution prejudices the issue at hand, determining at the outset that Israel has perpetrated grave violations of human rights and implying that Israel has deliberately targeted civilians and medical facilities, and systematically destroyed the cultural heritage of the Palestinian people. It calls for urgent international action directed only against Israel and, as regards the proposed Fact-Finding Mission, makes clear that it regards its mandate as exclusively focused on Israeli violations of human rights and humanitarian law. The fact that several distinguished individuals approached to head the Mission declined reflects the problematic nature of the Mission and its mandate.

The hopelessly one-sided nature of the HRC resolution was reflected in the Explanations of Vote of numerous states, including the European Union - which stated that it found the mandate of the proposed Mission to be unbalanced, and noted that investigations were currently being conducted under the leadership of the UN Secretary-General, as well as by Israel. Indeed, as you may be aware, Israel is engaged in a series of far-reaching investigations regarding many aspects of the "Cast Lead" Operation, and has cooperated intensively with the UN Secretary-General's Board of Inquiry.

I have no doubts regarding your genuine desire to ensure that the proposed HRC Mission would be balanced, but am concerned that neither your own commitment to ensure impartiality nor any assurance given to you by any individual have the force to change its legal basis. Even if the Mission were to choose to operate in accordance with its own terms of reference, resolution S-9/1 would still provide the basis for the Council's treatment of the Mission's report and any subsequent proceedings.

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PAGE 03

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I wish to stress that Israel's decision in this matter is not intended in any way to reflect on its sincere respect for you personally, or on your longstanding commitment to ensuring respect for the rights and welfare of Israelis and Palestinians alike. Rather it derives solely from a reluctant recognition of the politicization that has so deeply infected the Human Rights Council.

With sincere best wishes,



Aharon Meshno Yaar
Ambassador
Permanent Representative

NATIONS UNIES



UNITED NATIONS

HUMAN RIGHTS COUNCIL
INTERNATIONAL INDEPENDENT FACT FINDING MISSION

Téléfax: (41-22) 928 9003
Address: Palais des Nations, Geneva
Telephone : (41 22) 928 9205
E-mail : finarotta@ohchr.org

8 April 2009

Dear Ambassador,

I wish to thank you for your letter of 7 April, 2009. I have taken note of the arguments put forward in the letter on the basis of which your Government is of the view that it is prevented from cooperating with the Fact Finding Mission that I have been designated to lead. In this respect, I would like to point out that the Mission has been requested and established by the President of the UN HRC to "investigate all violations of International Human Rights Law and International Humanitarian Law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after." As such, the scope of the Mission's investigation is not the result of its own deliberations or personal convictions, however legitimate or authoritative. It is a clear mandate, legally and formally given to it.


As I mentioned in my previous letter, the Fact Finding Mission will be guided by its mandate, and conduct its work independently and impartially. I also respectfully submit that it would be in the interest of the Government of Israel and of Israeli victims to cooperate with the Mission so that its and their views, concerns and submissions could receive appropriate attention and consideration and be reflected in the outcome of the Mission's work.

H.E. Ambassador Aharon Leshno-Yaar
Permanent Representative of Israel
To the United Nations in Geneva
Avenue de la Pais 1-3
1202 Geneva

I would greatly appreciate it if this letter could be brought to the attention of your Government, and your Government's position reconsidered in light of the above clarifications.

I remain available for any further discussions and meetings with you or other Government representatives as may be appropriate.

Please accept, Excellency, the assurances of my highest consideration.

A handwritten signature in black ink, appearing to read 'Richard Goldstone', with a horizontal line underneath the name.

Richard Goldstone
Head of the International Independent
Fact-Finding Mission

cc: H.E. Ambassador Martin Ihoeghian Uhomobhi
President of the Human Rights Council

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UNITED NATIONS FACT FINDING MISSION ON THE GAZA CONFLICT

Fax: (41-22) 928 9003, Telephone: (41 22) 928 9205, E-mail: fmarotta@ohchr.org

GFFM/O-10/090429RG

29 April 2009

Dear Ambassador,

I am writing to you in my capacity as Head of the United Nations Fact-finding Mission established by the President of the Human Rights Council, Ambassador Martin Ihoeghian Uhomobhi, to investigate all violations of International Human Rights Law and International Humanitarian Law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after. As you are aware, Professor Christine Chinkin, Ms. Hina Jilani, and Colonel (retired) Desmond Travers are the other Members of the Mission.

The Fact Finding Mission will convene in Geneva during the first week of May to start its work. We would appreciate the opportunity of meeting with you to discuss any issue of relevance to the implementation of the Mission's mandate. We also look forward to discussing the contents of our previous correspondence on this issue.

Should this be convenient to you, I would like to propose Tuesday 5 May at 9:00 AM.

Please accept, Your Excellency, the assurances of my highest consideration

A handwritten signature in black ink, appearing to read "Richard Goldstone".

Richard Goldstone
Head of the United Nations
Fact-Finding Mission on the Gaza Conflict

H.E. Ambassador Aharon Leshno-Yaar
Permanent Representative of Israel
To the United Nations in Geneva
Avenue de la Paix 1-3
1202 Geneva

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UNITED NATIONS FACT FINDING MISSION ON THE GAZA CONFLICT

Fax: (41-22) 928 9003, Telephone: (41 22) 928 9205, E-mail: fmarotta@ohchr.org

GFFM/O-23/090429FM

The Secretariat of the United Nations Fact Finding Mission on the Gaza Conflict presents its compliments to the Permanent Mission of Israel and has the honour to forward herewith a letter from the Head of the United Nations Fact Finding Mission on the Gaza Conflict, Justice Richard Goldstone addressed to His Excellency, Mr. Benjamin Netanyahu, Prime Minister of the Government of Israel.

The Secretariat of the United Nations Fact Finding Mission on the Gaza Conflict should be grateful if the Permanent Mission could transmit the attached letter to His Excellency, the Prime Minister.

Geneva, 5 May 2009

A handwritten signature in black ink, appearing to be 'el' or similar, written over the date.

Permanent Mission of Israël
Avenue de la Paix 1-3
1202 Geneva

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UNITED NATIONS FACT FINDING MISSION ON THE GAZA CONFLICT

Fax: (41-22) 928 9003, Telephone: (41 22) 928 9205, E-mail: finarotta@ohchr.org

GFFM/O-22/090429RG

4 May 2009

Dear Mr. Prime Minister,

I am writing to you in my capacity as Head of the United Nations Fact-finding Mission on the Gaza conflict appointed on 3 April 2009 by the President of the Human Rights Council, Ambassador Martin Shoeghian Uhomibhi. Professor Christine Chinkin, Ms. Hina Jilani, and Colonel (retired) Desmond Travers are the other Members of the Mission.

The Fact Finding Mission is mandated to investigate all violations of International Human Rights Law and International Humanitarian Law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after. The Mission will conduct its work independently and impartially.

Since the official announcement of its establishment, the Mission has received numerous attestations of support by international scholars and legal practitioners, academic and professional institutions, international and domestic human rights and civil society organisations - including Israeli and Palestinian organisations - as well as member states of the United Nations.

I am writing to seek your Government's cooperation in the implementation of the Mission's mandate, including by providing access to Israel, the Gaza Strip, the West Bank including East Jerusalem to enable the Mission to meet with victims of alleged violations and relevant authorities, including military officials, and access to documentation relevant to our inquiry.

I believe that it is crucial, in order to assess the military actions conducted by Israel, including the investigation of the effects on Israeli citizens of the rocket attacks that emanated from Gaza, that the Mission should visit the areas that were effected by those attacks. It is the earnest wish of the Mission to meet, if possible, with some of the victims of the rocket attacks, to ascertain the physical damage, as well as the effect that they had on an on-going basis upon the civilian population in the effected areas of Israel.

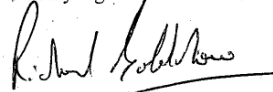
I also respectfully submit that it would be in the interest of the Government of Israel and of Israeli victims to cooperate with the Mission so that its and their views, concerns and submissions could receive appropriate attention and consideration and be reflected in the outcome of the Mission's work.

His Excellency Benjamin Netanyahu
Prime Minister
Jerusalem, Israel

We would also respectfully seek an opportunity to meet with you and with other relevant members of your Government.

I look forward to hearing from you and your support for the implementation of our tasks.

Please accept, Mr. Prime Minister, the assurances of my highest consideration.



Richard Goldstone
Head of the United Nations
Fact-Finding Mission on
the Gaza Conflict

cc: H.E. Ambassador Aharon Leshno-Yaar Permanent Representative of Israel to the United Nations in Geneva
H.E. Ambassador Martin I. Uhomobhi, President of the Human Rights Council
Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights
Prof Christine Chinkin, United Nations Fact-finding Mission on the Gaza Conflict
Ms. Hina Jilani, United Nations Fact-finding Mission on the Gaza Conflict
Col (retired) Desmond Travers, United Nations Fact-finding Mission on the Gaza Conflict

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UNITED NATIONS FACT FINDING MISSION ON THE GAZA CONFLICT

Fax: (41-22) 928 9003, Telephone: (41 22) 928 9205, E-mail: fmarotta@ohchr.org

GFFM/O-33/090520RG

Geneva, 20 May 2009

Dear Ambassador,

I refer to our previous correspondence with regard to the United Nations Fact Finding Mission on the Gaza Conflict, that was established by the President of the Human Rights Council, Ambassador Martin Ihoeghian Uhomobhi, and that I am heading. As you are aware, the Mission is mandated to investigate all violations of International Human Rights Law and International Humanitarian Law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after.

In my letters of 3 and 8 April 2009 addressed to you, and in my letter of 4 May 2009 addressed to Prime Minister Netanyahu, I requested the cooperation of the Government of Israel in the implementation of the Mission's mandate, including by providing access to Israel, the Gaza Strip and the West Bank, including East Jerusalem, to enable the Mission to meet with victims of alleged violations and relevant authorities. I also requested access to documentation relevant to our inquiry.

To-date, I have received no reply to my request. I had hoped to be able to discuss this issue during the first meeting of the Fact Finding Mission in Geneva in early May; however my letter of 29 April 2009 inviting you to meet with the Mission Members went unanswered.

The Mission is required to submit its report by early August, and is thus working under a very tight timeline. In order to accomplish our task within the expected deadline, we are planning to complete field investigations by end June. Accordingly, we need to proceed expeditiously in the implementation of the various phases of our work.

In view of the lack of answers to my various communications, and in order to be able to fulfil the mandate entrusted to the Fact Finding Mission, I have sought the assistance of the Government of Egypt to facilitate entry into Gaza through the Rafah crossing.

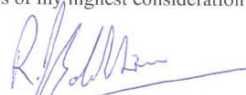
I would like to reiterate that the Mission's preferred option would be to carry out field investigations in Israel, the West Bank and Gaza. We are also planning to hold public hearings of victims of alleged violations and experts and would like to hold those on-site. Should this not be possible due to a refusal of the Government of Israel to cooperate, or even to provide access to its territory, the West Bank and Gaza, we will however proceed with alternative arrangements. These will include arranging for meetings with victims from Israel and the West Bank and for public hearings outside Israel and the Occupied Palestinian Territory.

H.E. Ambassador Aharon Leshno-Yaar
Permanent Representative of Israel
To the United Nations in Geneva
Avenue de la Pais 1-3
1202 Geneva

I would appreciate receiving a reply to my request by Friday 21st May, failing which the Mission will proceed with alternative arrangements.

I would like to underline again that the Mission would very much regret not to be able to meet with victims of alleged violations and visit relevant sites as we firmly believe that it would be in the interest of Israeli and Palestinian victims alike for us to be able to do so.

Please accept, Your Excellency, the assurances of my highest consideration



Richard Goldstone
Head of the United Nations
Fact-Finding Mission on the Gaza Conflict

cc: H.E. Ambassador Martin I. Uhomobhi, President of the Human Rights Council
Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights
Prof Christine Chinkin, United Nations Fact-finding Mission on the Gaza Conflict
Ms. Hina Jilani, United Nations Fact-finding Mission on the Gaza Conflict
Col (retired) Desmond Travers, United Nations Fact-finding Mission on the Gaza Conflict



Mission permanente d'Israël
auprès de l'Office des Nations Unies
et des Organisations Internationales à Genève

משלחת ישראל
ליד משרד האומות המאוחדות
והארגונים הבינלאומיים בג'נבה

Justice Richard Goldstone
Head of the UN Fact-Finding Mission
On the Gaza Conflict
OHCHR
Palais des Nations
1211 Geneva 10

Geneva, 2 July 2009

Dear Justice Goldstone,

Thank you for your letter dated 20 May 2009. I have been asked in this response to respond also to your letter dated 4 May 2009 to Prime Minister Netanyahu.

I regret your impression that you have received no reply to your request for cooperation with the proposed Mission. I reiterate the official response to your request contained in my previous letter to you, dated 7 April 2007, that regrettably Israel will not be able to cooperate with the proposed Mission.

I also reiterate that this decision does not reflect in any way on you personally or the regard with which you are held in Israel. It is simply a recognition that the legal basis of the proposed mission is HRC Resolution S-9/1. This resolution, beyond its inflammatory and prejudicial language, clearly provides that the mandate of the Mission is limited to investigating "violations" by "the occupying Power, Israel against the Palestinian people" (OP14).

You will understand Israel's reluctance to cooperate with or give legitimacy to a Mission mandated to investigate the lawful use of force by a State to protect its citizens, yet required to ignore the illegal use of force by terrorist groups which made such action necessary.

Indeed it was this prejudicial and one-sided mandate which prompted many States, including the European Union, Canada, Japan and Switzerland, to refuse to support the Resolution and which led a distinguished list of human rights experts to decline the invitation to head the proposed Mission. As Mary Robinson, former High Commissioner for Human Rights, stated in explaining her refusal to serve as Head of the Mission:

"I am afraid the resolution is not balanced because it focuses on what Israel did, without calling for an investigation on the launch of the rockets by Hamas. This is unfortunately a practice by the Council: adopting resolutions guided not by human rights but by politics. This is very regrettable." (*Le Temps*, 4 February 2009).

I note your assurances that the mandate of the Mission as expressed to you by the President of the Council is not as set out in the Council Resolution. I note also that you yourself have distanced yourself from this text. (In our correspondence you have ceased signing your letters as Head of the "Fact-finding Mission **established under HRC Resolution S-9/I**" and now use the term "International Independent Fact Finding Mission" or United Nations Fact Finding Mission on the Gaza Conflict" - though the term "Gaza Conflict" would itself seem to exclude the relevance of attacks on Southern Israel.)

However, as a matter of law, no statement by any individual, including the President of the Council, has the force to change the mandate of the Mission. Moreover, even subsequent to his supposed clarifications, in a press conference on 16 April 2009, Ambassador Uhomoibhi stated clearly that it is operative paragraph 14 of Resolution S-9/I which "spells out the mandate".

This accords with the provisions of the UN General Assembly's Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security (A/RES/46/59) which provides that: "The decision by the competent United Nations organ to undertake fact-finding **should always contain a clear mandate for the fact-finding Mission**" (para. 17, emphasis added). And indeed Resolution S-9/I does contain a clear mandate, albeit one which is hard to reconcile with the Declaration on Fact-finding's requirement that "Fact-finding should be comprehensive, objective, impartial and timely" (para.3).

I also note that, even should the Mission choose to operate in accordance with terms of reference which it has devised for itself, the Council's treatment of its report and any subsequent proceedings would still be based on the terms of Resolution S-9/I. And indeed there is nothing in the practice of the Council as it relates to Israel to date, that suggests it would not continue with its wholly one-sided approach.

Israel's decision not to cooperate with the Mission is, I should emphasize, without prejudice to its conviction that any allegations of wrongdoing by Israeli forces in the course of the conflict must be investigated, and where appropriate, prosecuted. It is for this reason that the IDF initiated a series of far-reaching command investigations into a wide range of incidents and operational aspects of the conflict. In the past such investigations have led to criminal prosecutions. The findings are currently being examined by the Military Advocate General, and will also be examined by the Attorney General. Both the decisions of the Military Advocate General and of the Attorney General can be appealed – by Israelis or Palestinians alike – to the Supreme Court sitting as the High Court of Justice.

Israel's decision was prompted purely by the legal basis of the Mission and its mandate, and without regard to the personalities involved. (In passing, however, I am obliged to register serious concern that one member of the Mission was signatory during the conflict to a public letter which made a number of clearly political and

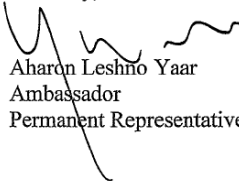
prejudgmental assertions, including that "the rocket attacks on Israel by Hamas do not amount to an armed attack entitling Israel to rely on self-defence(!)" [*Sunday Times Letters Page*, 11, January 2009]).

Some aspects of the conduct of the Mission have, in Israel's view, supported its decision not to cooperate with this initiative. Reports that the members of the Mission were accompanied at every stage of their visit to Gaza by Hamas officials gives serious reason to doubt that any true picture of the situation in Gaza, and especially of the cynical abuse of the civilian population by Hamas, can possibly emerge.

Israel is also concerned and confused by the decision to hold public hearings, broadcast on television and internet, as part of the fact-finding process. As you yourself have noted, this procedure is unprecedented as part of fact-finding operations. The very point of a fact-finding mission is that a team of experts bring their experience and judgment to bear in assessing the available evidence and drawing responsible conclusions – not that raw evidence, perhaps of questionable authenticity, is directly broadcast into the public arena. Such a trial by public opinion, which of necessity cannot give any weight to confidential or sensitive information, can serve little purpose in ascertaining the truth, and is only likely to prejudice public opinion in advance of any other conclusions.

I take this opportunity to emphasize once again that Israel's decision should not be interpreted in any way as an aspersion on your own integrity or commitment to impartiality. To the contrary, your involvement prompted Israel to give closer and more considered thought to its response to this initiative and increases our regret that it is not one we can cooperate with or support.

Sincerely,



Aharon Leshno Yaar
Ambassador
Permanent Representative

NATIONS UNIES



UNITED NATIONS

UNITED NATIONS FACT FINDING MISSION ON THE GAZA CONFLICT

Fax: (41-22) 928 9003, Telephone: (41 22) 928 9205, E-mail: factfindinggaza@ohchr.org

GFFM/O-80/090717RG

17 July 2009

Dear Ambassador Yaar,

Thank you for your letter dated 2 July 2009.

At the outset, I would like to record that the reason for my impression that no final word was given by your Government to my request for its cooperation was the terms of sometimes conflicting statements coming from your Foreign Office and the lack of response to my letters to Prime Minister Netanyahu of 4 May 2009 and to you of 8 April and 20 May 2009.

I had hoped that the terms of the mandate that I received from the President of the Human Rights Council and the absence of objections by the Human Rights Council when informed of this mandate would constitute a reason for Israel to support this opportunity, rather than undermine it. Governments that were unhappy with the terms of Resolution S-9/1 subsequently offered their support to the mandate given to my Mission.

In the light of the decision of your Government not to cooperate, there is little point in my responding to all the issues raised in your letter. I must, however, categorically deny the allegation that Hamas officials accompanied the Members of the Fact Finding Mission at all, let alone "at every stage of their visit to Gaza". Reports to that effect are denial of truth, as I have already publicly stated. I would have found this to be quite unacceptable.

I have made public the motivation for holding public hearings. The fact that this kind of hearing is unprecedented is hardly a reason for criticism and it is incorrect to suggest that it is 'trial by public opinion'. The hearings are no more than an attempt to allow the voices and faces of victims from all sides to be heard and seen by the public and especially in Israel and the occupied Palestinian territory, including Gaza and the West Bank. The facts that might emerge from the hearings are one part of our fact finding activities and will be evaluated in the same way as will all other information obtained by the Mission.

H.E. Ambassador Aharon Leshmo-Yaar
Permanent Representative of Israel
To the United Nations in Geneva
Avenue de la Paix 1-3
1202 Geneva

Notwithstanding the decision by your Government not to cooperate, we have sent you for onward transmission to your Government a series of questions on issues that concern our Mission, based on information gathered during the course of our work. I would welcome a response from your Government to our letter of 10 July 2009. We are similarly transmitting questions on matters of concern to the Palestinian Authority and to the Gaza authorities.

I am appreciative of your Government's acknowledgement of my personal commitment to impartiality with regard to all aspects of the Mission's work. This commitment is shared by all Members of the Mission and will be fully reflected in our report. It is my hope and assumption that the Human Rights Council will accept it accordingly.

Please accept, Your Excellency, the assurances of my highest consideration.

A handwritten signature in black ink, appearing to read "Richard Goldstone". The signature is written in a cursive style with a horizontal line underneath.

Richard Goldstone
Head
United Nations Fact Finding Mission on the Gaza Conflict

Annex III

Replies to Mission's Call for Submissions of 8 June 2009¹²⁰⁸

- 1) Al Mezan, Gaza
- 2) Adalah ; ACRI ; Gisha ; HaMoked ; Physicians for Human Rights ; PCATI ; Yesh Din (Joint Submission), Israel
- 3) Alternative Information Center, Israel
- 4) Australia Lawyer Group, Australia
- 5) B'nai B'rith International, United States of America
- 6) Busby, Chris, United Kingdom
- 7) Central Committee for Documentation and Pursuit of Israeli War Criminals – *Tawtheq*, Gaza
- 8) Centre on Housing Rights and Evictions COHRE, Geneva
- 9) Defence for Children International (DCI) – Palestine, Jerusalem
- 10) Diakonia – Humanitarian Law, Jerusalem
- 11) Eyre, Peter (location unknown)
- 12) Euro-Mediterranean Human Rights Network (EMHRN), Brussels
- 13) Green, Yvonne, United Kingdom
- 14) Housing and Land Rights Network – Habitat International Coalition, Egypt
- 15) Inge Genefke and Bent Sorensen Anti-Torture Support Foundation, Brussels
- 16) Iranian Islamic Human Rights Commission (IHRC), Tehran
- 17) Jerusalem Centre for Public Affairs, Jerusalem
- 18) Lacey, Ian, Australia
- 19) Leas, James Marc, United States of America
- 20) Matas, David, Winnipeg
- 21) National Lawyers Guild, New York
- 22) National Lawyers Guild, New York
- 23) NGO Monitor, Jerusalem
- 24) Ostroff, Maurice (location unknown)
- 25) Ostroff, Maurice (location unknown)
- 26) Richter, Elihu, Israel

¹²⁰⁸ The list only includes information formally submitted to the Mission in reply to the Call for Submission of 8 June 2009. The list is not inclusive of other information and material provided to the Mission by organizations and individuals.

- 27) Richter, Elihu, Israel
- 28) Shinar, Ofer, Israel
- 29) Take-a-Pen, Israel
- 30) The 1612 Working Group on Grave Violations against Children established for Israel and the Occupied Palestinian Territory
- 31) World Health Organization-West Bank and Gaza, Jerusalem.



Assemblée générale

Distr. générale
1^{er} décembre 2009

Soixante-quatrième session
Point 64 de l'ordre du jour

Résolution adoptée par l'Assemblée générale le 5 novembre 2009

[sans renvoi à une grande commission (A/64/L.11 et Add.1)]

64/10. Suite donnée au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza

L'Assemblée générale,

Guidée par les buts et principes énoncés dans la Charte des Nations Unies,

Rappelant les règles et principes pertinents du droit international, notamment humanitaire et des droits de l'homme, en particulier la Convention de Genève relative à la protection des personnes civiles en temps de guerre, du 12 août 1949¹, qui est applicable au territoire palestinien occupé, y compris Jérusalem-Est,

Rappelant également la Déclaration universelle des droits de l'homme² et les autres instruments internationaux relatifs aux droits de l'homme, dont le Pacte international relatif aux droits civils et politiques³, le Pacte international relatif aux droits économiques, sociaux et culturels³ et la Convention relative aux droits de l'enfant⁴,

Rappelant en outre ses résolutions sur la question, notamment sa résolution ES-10/18 du 16 janvier 2009, adoptée lors de sa dixième session extraordinaire d'urgence,

Rappelant les résolutions du Conseil de sécurité sur la question, notamment la résolution 1860 (2009) du 8 janvier 2009,

Rappelant également les résolutions pertinentes du Conseil des droits de l'homme, notamment la résolution S-12/1 du 16 octobre 2009,

¹ Nations Unies, *Recueil des Traités*, vol. 75, n° 973.

² Résolution 217 A (III).

³ Voir résolution 2200 A (XXI), annexe.

⁴ Nations Unies, *Recueil des Traités*, vol. 1577, n° 27531.



Remerciant la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza d'avoir établi un rapport complet sous la direction du juge Richard Goldstone⁵,

Affirmant qu'il incombe à toutes les parties de respecter le droit international humanitaire et le droit international des droits de l'homme,

Insistant sur l'importance que revêtent la sécurité et le bien-être de tous les civils, et réaffirmant l'obligation d'assurer la protection des civils en période de conflit armé,

Profondément préoccupée par les informations relatives aux sérieuses violations des droits de l'homme et aux graves infractions au droit international humanitaire commises pendant les opérations militaires israéliennes lancées dans la bande de Gaza le 27 décembre 2008, notamment celles qui figurent dans les conclusions de la Mission d'établissement des faits et de la Commission d'enquête établie par le Secrétaire général⁶,

Condamnant toutes les attaques visant des civils et des installations ou institutions civiles, notamment les locaux de l'Organisation des Nations Unies,

Soulignant que les auteurs de toutes les violations du droit international humanitaire et du droit international des droits de l'homme doivent être comptables de leurs actes afin de lutter contre l'impunité, de garantir la justice, de prévenir de nouvelles violations et de promouvoir la paix,

Convaincue qu'un règlement juste, final et global de la question de Palestine, qui est au cœur du conflit arabo-israélien, est indispensable à l'instauration d'une paix et d'une stabilité globales, justes et durables au Moyen-Orient,

1. *Approuve* le rapport du Conseil des droits de l'homme sur les travaux de sa douzième session extraordinaire, tenue les 15 et 16 octobre 2009⁷;

2. *Prie* le Secrétaire général de transmettre au Conseil de sécurité le rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza⁵;

3. *Demande* au Gouvernement israélien de prendre dans les trois mois toutes les mesures nécessaires en vue de procéder à des investigations indépendantes, crédibles et conformes aux normes internationales, sur les graves violations du droit international humanitaire et du droit international des droits de l'homme qui ont été signalées par la Mission d'établissement des faits, afin que les responsabilités soient établies et que justice soit faite;

4. *Demande instamment*, conformément aux recommandations de la Mission d'établissement des faits, que la partie palestinienne procède dans les trois mois à des investigations indépendantes, crédibles et conformes aux normes internationales, sur les graves violations du droit international humanitaire et du droit international des droits de l'homme qui ont été signalées par la Mission d'établissement des faits, afin que les responsabilités soient établies et que justice soit faite;

5. *Recommande* que le Gouvernement suisse, en sa qualité de dépositaire de la Convention de Genève relative à la protection des personnes civiles en temps de

⁵ A/HRC/12/48.

⁶ A/63/855-S/2009/250.

⁷ A/64/53/Add.1.

guerre¹, fasse au plus tôt le nécessaire afin de convoquer à nouveau une Conférence des Hautes Parties contractantes à la quatrième Convention de Genève sur les mesures à prendre pour imposer la Convention dans le territoire palestinien occupé, y compris Jérusalem-Est, et la faire respecter, conformément à l'article premier ;

6. *Prie* le Secrétaire général de lui présenter dans un délai de trois mois un rapport sur l'application de la présente résolution afin de déterminer les nouvelles mesures qui doivent être prises, le cas échéant, par les organes et organismes des Nations Unies, dont le Conseil de sécurité ;

7. *Décide* de rester saisie de la question.

*39^e séance plénière
5 novembre 2009*



Assemblée générale

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Point 64 de l'ordre du jour

Résolution adoptée par l'Assemblée générale le 26 février 2010

[sans renvoi à une grande commission (A/64/L.48 et Add.1)]

64/254. Deuxième suite donnée au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza

L'Assemblée générale,

Rappelant ses résolutions sur la question, dont la résolution 64/10 adoptée le 5 novembre 2009, dans le cadre de la suite donnée au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza¹,

Rappelant également les règles et principes applicables du droit international, notamment humanitaire, et du droit des droits de l'homme, en particulier la Convention de Genève relative à la protection des personnes civiles en temps de guerre, du 12 août 1949², qui est applicable au territoire palestinien occupé, y compris Jérusalem-Est,

Rappelant en outre la Déclaration universelle des droits de l'homme³ et les autres instruments internationaux relatifs aux droits de l'homme, dont le Pacte international relatif aux droits civils et politiques⁴, le Pacte international relatif aux droits économiques, sociaux et culturels⁴ et la Convention relative aux droits de l'enfant⁵,

Réaffirmant que toutes les parties ont l'obligation de respecter le droit international humanitaire et les droits de l'homme,

Insistant de nouveau sur l'importance que revêtent la sécurité et le bien-être de tous les civils et réaffirmant les obligations prévues par le droit international en ce qui concerne la protection des civils en période de conflit armé,

¹ A/HRC/12/48.

² Nations Unies, *Recueil des Traités*, vol. 75, n° 973.

³ Résolution 217 A (III).

⁴ Voir résolution 2200 A (XXI), annexe.

⁵ Nations Unies, *Recueil des Traités*, vol. 1577, n° 27531.



Soulignant qu'il faut exiger des comptes dans tous les cas de violation du droit international humanitaire et des droits de l'homme, afin de lutter contre l'impunité, de garantir la justice, de prévenir de nouvelles violations et de promouvoir la paix,

Convaincue qu'un règlement juste, durable et global de la question de Palestine, qui est au cœur du conflit arabo-israélien, est indispensable à l'instauration d'une paix et d'une stabilité globales, justes et durables au Moyen-Orient,

1. *Prend acte* du rapport du Secrétaire général en date du 4 février 2010⁶, soumis en application du paragraphe 6 de sa résolution 64/10 ;

2. *Demande de nouveau* au Gouvernement israélien de procéder à des investigations indépendantes, crédibles et conformes aux normes internationales sur les graves violations du droit international humanitaire et des droits de l'homme qui ont été signalées par la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza, afin que les responsabilités soient établies et que justice soit faite ;

3. *Demande de nouveau instamment* que la partie palestinienne procède à des investigations indépendantes, crédibles et conformes aux normes internationales sur les graves violations du droit international humanitaire et des droits de l'homme qui ont été signalées par la Mission d'établissement des faits, afin que les responsabilités soient établies et que justice soit faite ;

4. *Recommande de nouveau* que le Gouvernement suisse, en sa qualité de dépositaire de la Convention de Genève relative à la protection des personnes civiles en temps de guerre², convoque à nouveau, au plus tôt, une conférence des Hautes Parties contractantes à la quatrième Convention de Genève sur les mesures à prendre pour imposer la Convention dans le territoire palestinien occupé, y compris Jérusalem-Est, et la faire respecter, conformément à l'article premier, en gardant à l'esprit la convocation d'une conférence de ce type et la déclaration adoptée le 15 juillet 1999, ainsi que la reprise de cette conférence et la déclaration adoptée le 5 décembre 2001 ;

5. *Prie* le Secrétaire général de lui présenter, dans un délai de cinq mois, un rapport sur l'application de la présente résolution afin de déterminer quelles nouvelles mesures doivent être prises, le cas échéant, par les organes et organismes compétents de l'Organisation des Nations Unies, dont le Conseil de sécurité ;

6. *Décide* de rester saisie de la question.

72^e séance plénière
26 février 2010

⁶ A/64/651.



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Rapport du Conseil des droits de l'homme

Suite donnée au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza

Rapport du Secrétaire général

Résumé

Le présent rapport est soumis en application de la résolution 64/10 de l'Assemblée générale en date du 5 novembre 2009. Le 3 décembre 2009, le Secrétaire général a adressé à la Mission permanente d'Israël auprès de l'Organisation des Nations Unies, à la Mission permanente d'observation de la Palestine auprès de l'Organisation des Nations Unies et à la Mission permanente de la Suisse auprès de l'Organisation des Nations Unies des notes verbales dans lesquelles il appelait leur attention sur les dispositions pertinentes de la résolution 64/10 et leur demandait de communiquer par écrit des informations le 29 janvier 2010 au plus tard sur les mesures qui avaient pu être adoptées ou étaient en cours d'adoption dans le cadre de leur mise en œuvre. On trouvera en annexe le texte intégral des documents que le Secrétariat a reçus comme suite à ces demandes. Le rapport contient également les observations du Secrétaire général.



I. Introduction

1. Le présent rapport est soumis conformément au paragraphe 6 de la résolution 64/10 de l'Assemblée générale en date du 5 novembre 2009, relative à la suite donnée au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza et dans laquelle l'Assemblée priait le Secrétaire général de lui présenter dans un délai de trois mois un rapport sur l'application de cette résolution. Pour répondre à cette demande, il fallait s'enquérir des mesures que les parties désignées aux paragraphes 3, 4 et 5 avaient prises.

2. Le 3 décembre 2009, le Secrétaire général a appelé l'attention de la Mission permanente d'Israël auprès de l'Organisation des Nations Unies sur la résolution 64/10 en lui demandant de communiquer au Secrétariat des informations par écrit le 29 janvier 2010 au plus tard sur toutes mesures que le Gouvernement israélien avait pu prendre ou se disposait à prendre pour donner suite à la demande exprimée par l'Assemblée générale au paragraphe 3 de ladite résolution.

3. Le 29 janvier 2010, le Secrétariat a reçu de l'État d'Israël un document intitulé « Le point des enquêtes sur l'Opération de Gaza ». Le texte intégral de ce document figure dans l'annexe I au présent rapport.

4. Le 3 décembre 2009, le Secrétaire général a appelé l'attention de la Mission d'observation permanente de la Palestine auprès de l'Organisation des Nations Unies sur la résolution 64/10 en lui demandant de communiquer au Secrétariat des informations par écrit le 29 janvier 2010 au plus tard sur toutes mesures que la partie palestinienne avait pu prendre ou se disposait à prendre pour donner suite à la demande pressante formulée par l'Assemblée générale au paragraphe 4 de ladite résolution.

5. Le 29 janvier 2010, le Secrétaire général a reçu de la Mission d'observation permanente de la Palestine une lettre datée du même jour qui transmettait le texte d'une lettre du Premier Ministre de l'Autorité palestinienne, M. Salam Fayyad, datée du 27 janvier 2010. On trouvera le texte intégral de ces lettres dans l'annexe II au présent rapport.

6. Le 3 décembre 2009, le Secrétaire général a appelé l'attention de la Mission permanente de la Suisse auprès de l'Organisation des Nations Unies sur la résolution 64/10 en lui demandant de communiquer au Secrétariat des informations par écrit le 29 janvier 2010 au plus tard sur toutes mesures que le Gouvernement suisse avait pu prendre ou se disposait à prendre pour donner suite à la recommandation formulée par l'Assemblée générale au paragraphe 5 de ladite résolution.

7. Le 29 janvier 2010, le Secrétaire général a reçu de la Mission permanente de la Suisse une lettre datée du même jour concernant les démarches entreprises par la Suisse dans le cadre de la mise en œuvre de la résolution 64/10 de l'Assemblée générale pour donner suite au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza. On trouvera le texte intégral de cette lettre dans l'annexe III au présent rapport.

II. Observations

8. Au début de l'année 2009, je me suis rendu aussi bien à Gaza que dans le sud d'Israël afin d'aider à mettre un terme aux combats et afin de rendre hommage aux personnes – si nombreuses – qui ont été tuées ou blessées au cours du conflit à Gaza et dans les alentours et de marquer ma préoccupation à leur égard. J'étais et je suis toujours profondément affecté par les immenses ravages humains et matériels et par les souffrances qui ont été observés dans la bande de Gaza et en même temps ému par la détresse des civils qui ont été exposés à des tirs aveugles de roquettes et de mortiers dans le sud d'Israël.

9. Je considère que, par principe, le droit international humanitaire doit être pleinement respecté et que les civils doivent être protégés dans toutes les situations et en toutes circonstances. C'est pourquoi j'ai demandé, à plusieurs reprises, à toutes les parties de mener des enquêtes internes fiables sur le déroulement du conflit de Gaza. J'espère que des dispositions seront prises à cet effet chaque fois qu'il existe des allégations crédibles d'atteintes aux droits de l'homme.

10. J'espère aussi sincèrement que la résolution 64/10 de l'Assemblée générale a contribué à encourager le Gouvernement israélien et la partie palestinienne à procéder à des investigations indépendantes, crédibles et conformes aux normes internationales.

11. Je note, à la lecture des documents reçus, que les démarches entreprises par les Gouvernements d'Israël et de la Suisse se poursuivent et que la partie palestinienne a engagé ses propres démarches le 25 janvier 2010. De ce fait, il est impossible de porter un jugement sur la mise en œuvre de la résolution par les parties intéressées.

Annexe I

[Original : anglais]

**Le point des enquêtes sur l'Opération de Gaza
Janvier 2010**

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Résumé

1. Le présent document est un exposé de la façon dont Israël mène les enquêtes sur les accusations de violation du droit des conflits armés. Il fait une place particulièrement importante aux enquêtes, poursuites judiciaires et enseignements tirés de l'expérience se rapportant aux activités des Forces de défense israéliennes (FDI) pendant l'Opération de Gaza (également dénommée « Plomb durci »), entre le 27 décembre 2008 et le 18 janvier 2009.

2. Le présent document complète et actualise le contenu d'un autre, publié par Israël en 2009 et intitulé *The Operation in Gaza: Factual and Legal Aspects*¹, où étaient traitées tout un éventail de questions d'ordre factuel ou juridique concernant l'Opération de Gaza. On y trouvait notamment des récits détaillés concernant les tirs de mortier et de roquette incessants du Hamas contre des civils israéliens (on en a compté environ 12 000 au cours des huit années qui ont précédé l'opération) et la portée sans cesse grandissante de ces tirs, les attentats-suicides du Hamas et le trafic d'armes et de munitions auquel celui-ci se livrait en passant par des tunnels creusés sous la frontière entre Gaza et l'Égypte, ainsi que ce qu'Israël avait fait pour tenter d'écarter ces menaces sans recourir à des moyens militaires, y compris par des initiatives diplomatiques et des appels urgents lancés aux Nations Unies.

3. On trouvait également dans ce document un exposé du cadre juridique régissant le recours à la force et les principes – y compris ceux de distinction et de proportionnalité – qui s'appliquent dans ce genre de conflit. Les efforts déployés par les FDI pour que ces principes soient respectés pendant l'Opération de Gaza y étaient aussi décrits, ainsi que les méthodes employées par le Hamas, en particulier sa manière de détourner les règles destinées à protéger les civils, qui a été à l'origine de dilemmes opérationnels si dramatiques.

4. Figuraient également dans *The Operation in Gaza* les conclusions préliminaires de plusieurs des enquêtes lancées après l'Opération, bien que ces enquêtes fussent, et elles le restent, en cours d'exécution. C'est pourquoi six mois après la publication du premier document, il convient à nouveau de faire le point, en public, de ce qui a été accompli et des conclusions auxquelles mènent actuellement les investigations. Nombre de celles-ci ne sont pas terminées, mais l'intention est d'offrir une image claire et actuelle de l'état des enquêtes conduites par Israël.

5. Le système d'investigation appliqué par Israël en cas d'accusation de violation du droit des conflits armés est analogue à ceux adoptés par d'autres pays démocratiques, dont le Royaume-Uni, les États-Unis, l'Australie et le Canada. Israël a montré qu'il était capable, pour défendre le droit des conflits armés, de donner suite à de graves accusations, et qu'il en avait la volonté, comme l'ont confirmé des observateurs extérieurs et des appareils judiciaires étrangers.

6. Le système d'investigation israélien est stratifié en plusieurs niveaux d'examen, afin de garantir son impartialité et son indépendance. Le Bureau de l'Avocat général des armées décide s'il y a lieu d'ouvrir une enquête criminelle et de mettre des soldats des FDI en accusation. L'Avocat général des armées est indépendant, juridiquement, de la hiérarchie militaire. Le Procureur général d'Israël

¹ *The Operation in Gaza: Factual and Legal Aspects* : http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_in_Gaza-Factual_and_Legal_Aspects.htm.

exerce sur lui un contrôle civil, car il peut examiner toutes ses décisions d'ouvrir ou non une enquête, ou de prononcer une mise en accusation. La Cour suprême israélienne exerce aussi un contrôle judiciaire, soit en tant qu'instance d'appel, soit en vertu de son pouvoir de contrôle judiciaire s'étendant à toute décision de l'Avocat général des armées ou du Procureur général de la justice civile. Un contrôle judiciaire peut être provoqué – et cela se produit souvent – par une requête de n'importe quelle partie concernée, y compris des organisations non gouvernementales, des Palestiniens et d'autres non citoyens.

7. On trouve dans le présent document un exposé assez détaillé de l'organisation et du fonctionnement des divers éléments du système d'investigation israélien, le but étant en particulier de corriger les idées fausses et les inexactitudes contenues dans les récents rapports où ces mécanismes étaient décrits².

8. Dans l'exposé de la manière dont ces mécanismes ont fonctionné pendant l'Opération de Gaza, il est noté que, jusqu'à présent, les FDI ont ouvert des enquêtes portant sur 150 incidents distincts survenus dans le cadre de l'Opération, dont un certain nombre de leur propre initiative. D'autres ont été ouvertes comme suite à des plaintes déposées par des civils palestiniens ou des organisations non gouvernementales locales ou internationales, ou à la publication d'informations par l'ONU ou par la presse.

9. Jusqu'à présent, sur ces 150 incidents, 36 ont été jugés justifier une enquête judiciaire; au cours de ces enquêtes, presque 100 plaignants et témoins palestiniens ont été entendus, ainsi qu'environ 500 soldats et officiers des FDI. On trouve décrits dans le présent document certains des problèmes posés par la réalisation des enquêtes, notamment la difficulté d'avoir accès aux éléments de preuve concernant ce qui est survenu sur le champ de bataille et la nécessité de s'organiser, avec des organisations non gouvernementales telles que B'Tselem, pour trouver et interroger les témoins palestiniens. Pour faire face à ces difficultés, des équipes spéciales d'enquêteurs ont été constituées, qui enquêtent sur les plaintes issues de l'Opération de Gaza.

10. Le présent document porte sur toutes les enquêtes lancées à la suite de l'Opération de Gaza; il n'est pas limité à ceux dont il est fait état dans le rapport de la Mission d'établissement des faits du Conseil des droits de l'homme sur le conflit de Gaza, présidée par le juge Richard Goldstone (dit « le Rapport du Conseil des droits de l'homme sur l'établissement des faits » ou « le Rapport »). Comme il l'a déjà expliqué, Israël est en désaccord avec les conclusions et recommandations qui y sont formulées, car elles sont entachées de nombreuses méprises et erreurs fondamentales concernant l'Opération de Gaza, ses fins et le système de justice israélien. Néanmoins, le présent document ne se veut pas une réponse complète au Rapport, ni un catalogue des graves inexactitudes et faussetés qu'on y trouve.

11. À propos des 34 incidents relatés dans le Rapport du Conseil des droits de l'homme sur l'établissement des faits, il faut noter qu'Israël enquêtait déjà sur 22 d'entre eux avant même que ledit rapport soit publié. Dès sa publication, des enquêtes ont été ouvertes sur les 12 autres, dont aucun n'avait été porté à l'attention

² De nombreuses affirmations du rapport de la Mission d'établissement des faits du Conseil des droits de l'homme sur le conflit de Gaza sont inexactes – par exemple, celles selon lesquelles les enquêtes judiciaires ne pourraient pas se faire tant qu'une enquête de commandement n'a pas été achevée, ou tous les enquêteurs feraient directement partie de la chaîne de commandement.

des autorités israéliennes. On trouvera dans le présent document des renseignements sur l'état d'avancement de ces enquêtes. Il convient également de noter que, dans certains cas, après avoir examiné toutes les pièces du dossier, l'Avocat général des armées a jugé qu'il n'y avait pas lieu de lancer une enquête judiciaire. Plusieurs cas de ce genre sont décrits en détail dans le présent document.

12. Le présent document donne aussi des renseignements frais sur les enquêtes de commandement spéciales ouvertes par le chef d'état-major général des FDI après la fin des hostilités de Gaza. Comme il est noté dans *The Operation in Gaza*, peu après la fin de l'Opération, le chef d'état-major général a chargé cinq commandants d'unité de haut rang d'enquêter sur les plus graves des accusations. Sur la recommandation de l'Avocat général des armées, il a récemment ouvert une sixième enquête spéciale afin que de nouvelles allégations soient examinées et qu'une plainte que le responsable d'une enquête de commandement n'avait pas pu corroborer soit réexaminée.

13. On trouvera dans le présent document des données fraîches sur les conclusions de ces investigations, qui n'ont pas seulement donné lieu à des enquêtes judiciaires, à d'autres enquêtes de commandement et à des procédures disciplinaires, mais aussi permis de tirer des enseignements, sur le plan opérationnel, qui ont entraîné des changements qui sont déjà faits ou qui sont en cours.

14. En conclusion, il est constaté qu'il importe que les activités d'investigation soient menées sans délai. En même temps, il faut veiller à ce que les procédures juridiques se déroulent de manière rigoureuse et parfaitement régulière, comparable à ce qui se fait dans d'autres États mus par le respect de l'état de droit.

I. Introduction

1. Le présent document donne un exposé de la façon dont Israël enquête sur les accusations de violation du droit des conflits armés¹. Il fait une place particulièrement importante aux enquêtes, poursuites judiciaires et enseignements tirés de l'expérience se rapportant aux activités menées par les Forces de défense israéliennes (FDI) pendant l'Opération de Gaza (également dénommée « Plomb durci »), entre le 27 décembre 2008 et le 18 janvier 2009.

2. L'Opération de Gaza a été un exemple frappant de la complexité et de la difficulté des conflits asymétriques dans lesquels les États se trouvent de plus en plus souvent engagés. Lorsque c'est le cas, ils sont contraints d'affronter un ennemi qui n'est pas un État, qui ne se considère pas comme soumis à des obligations d'ordre juridique ou humanitaire et pour qui le viol de ces principes fait partie d'une stratégie délibérée, ce qui aggrave les risques courus par sa propre population et par celle de l'État attaqué.

3. Face à de telles difficultés et aux graves dilemmes posés en temps réel par des militants agissant de l'intérieur de zones peuplées de civils, les conseils en matière de droit et le respect absolu des obligations juridiques et humanitaires revêtent une importance primordiale. À l'échelon international, cela nécessite qu'on s'efforce sans cesse de faire en sorte que les principes du droit des conflits armés fassent partie intégrante de la formation des soldats et de ceux qui les commandent, et qu'ils éclairent les décisions prises tant au stade des préparatifs que dans le feu de l'action.

4. Au-delà de ces mesures, qui sont généralement prises avant ou pendant les opérations, il faut absolument accorder aussi une importance extrême à l'analyse rétrospective du déroulement de ces opérations. Cela suppose une analyse rigoureuse de tous les incidents qui conduisent à s'interroger sur le bien-fondé et la légalité des mesures et des décisions prises. Du fait de la complexité et de l'ampleur de ce genre d'opération, il est inévitable qu'il y ait eu des situations tragiques et que de mauvaises décisions et des erreurs de jugement aient été commises². Le fait qu'il y ait des conséquences tragiques, notamment la mort de civils et des dégâts matériels, ne signifie pas nécessairement que des violations du droit international ont été commises. En revanche, lorsqu'il ressort des faits que des violations ont eu lieu, il faut que la lumière soit faite et que les coupables soient poursuivis.

5. Israël tient à ce que chaque incident de ce genre fasse l'objet d'une enquête approfondie et équitable, afin de pouvoir en tirer les enseignements, et à ce que, s'il y a lieu, des procédures judiciaires ou disciplinaires soient ouvertes. Dans cet esprit, la règle appliquée par les FDI est que chaque accusation concernant un acte répréhensible, quelle qu'en soit la source, doit faire l'objet d'une enquête. Comme on le voit dans le présent document, les 150 incidents distincts auxquels cette règle a été appliquée au lendemain de l'Opération de Gaza ont donné lieu non seulement à

¹ L'expression « droit des conflits armés » est employée ici dans son sens ordinaire, qui renvoie aux obligations que le droit impose aux parties à un conflit armé dans l'exécution de leurs opérations militaires. L'expression « droit international humanitaire » est employée par nombre de commentateurs et de pays comme si elle était interchangeable avec la première. Comme beaucoup d'autres pays, Israël préfère parler du droit des conflits armés.

² Cette réalité a été rappelée à Israël, dans toute sa dureté, par le fait que presque la moitié de ses soldats tués pendant l'Opération de Gaza sont morts parce que le feu des FDI avait été dirigé contre eux par erreur.

des enquêtes ouvertes en raison du désarroi que certains d'entre eux causaient à Israël, mais aussi à des enquêtes effectuées comme suite à des plaintes ou des informations provenant d'habitants palestiniens, d'organisations non gouvernementales locales et internationales, des Nations Unies ou de la presse.

6. Les parties I et II du présent document donnent une vue d'ensemble des mécanismes israéliens concernant les enquêtes sur des violations du droit des conflits armés qui auraient été commises. Certains de ces mécanismes sont internes aux FDI mais indépendants de la chaîne de commandement militaire, d'autres sont des mécanismes civils de surveillance tels que le Ministère de la justice et la Cour suprême constituée en Haute Cour de justice, qui a un droit de contrôle judiciaire sur toutes les décisions d'engager ou non des poursuites contre une personne soupçonnée d'avoir commis une infraction. Le système israélien d'instruction et de poursuites en justice est comparable à celui de bien des pays démocratiques devant faire face à des difficultés analogues, et dans la partie III il est question de tels systèmes mis en place par d'autres États.

7. La partie IV est consacrée aux plaintes concernant des violations du droit des conflits armés qui auraient eu lieu pendant l'Opération de Gaza et donne l'état d'avancement des enquêtes qui ont été ouvertes. Il y est également question des enseignements tirés de l'expérience, y compris les changements apportés aux consignes opérationnelles pour tenir compte des conclusions des enquêtes déjà effectuées.

II. Vue d'ensemble du système israélien d'examen des accusations de faute de comportement

8. Israël est une démocratie dotée d'un système de justice développé. Bien qu'il ait dû faire face constamment à des menaces contre son existence même venant des pays voisins et d'agents qui ne sont pas au service d'un État, il est attaché à l'état de droit. Comme sa Cour suprême l'a constaté :

« Tel est le sort de la démocratie – elle ne considère pas tous les moyens comme acceptables, et elle ne s'autorise pas toujours à recourir à ceux de ses ennemis. Elle doit parfois se battre avec une main attachée derrière le dos. Mais cela ne l'empêche pas d'être en position de force. L'état de droit et la liberté de l'individu sont d'importants éléments de sa conception de la sécurité. Au bout du compte, ils la dynamisent, et la force qu'ils lui donnent lui permet de surmonter les difficultés. »³

9. En vertu du Statut des Forces armées israéliennes, les FDI sont subordonnées au gouvernement civil et doivent lui rendre compte. Comme toute autre autorité de l'État, elles doivent respecter l'état de droit, y compris les règles pertinentes du droit international. Le système de justice israélien oblige les pouvoirs publics, y compris les FDI, à respecter les obligations que leur confère la loi.

10. En tout premier lieu, Israël veut former les agents de l'État – les troupes et le commandement des FDI, en l'occurrence – et leur faire connaître leurs devoirs et les restrictions auxquelles ils sont soumis. Par exemple, les principes du droit des

³ *Public Committee Against Torture in Israel v. State of Israel*, HCJ 5100/94, par. 39 (6 septembre 1999).

conflits armés sont largement diffusés partout dans les rangs des FDI⁴. Le système de justice israélien est conçu non seulement pour punir les coupables, lorsqu'on soupçonne que ces principes ont été violés, et dissuader ceux qui envisageraient de les imiter, mais aussi pour permettre de dédommager les parties victimes d'infractions commises par l'État. Le fait qu'un adversaire ne respecte pas le droit, ou la gravité de la menace qu'il représente, ne saurait excuser une conduite défiant la loi ou répréhensible.

11. Pour garantir le respect de l'état de droit, y compris en ce qui concerne le droit international et le droit des conflits armés, les FDI ont mis en place un système d'investigation et de poursuites en cas d'accusations de faute de comportement. Comme ses homologues dans nombre de pays, ce système est fait de multiples pièces et comporte de nombreux niveaux d'examen – l'appareil disciplinaire interne des armées, le réseau de police militaire, les procureurs et les tribunaux, ainsi que les mécanismes de surveillance des autorités civiles et judiciaires. S'il est vrai que telle ou telle pièce de ce système peut, comme dans n'importe quelle administration publique, ne pas toujours fonctionner comme elle devrait, l'état de droit est maintenu grâce à la multiplicité des poids et contrepoids.

A. Le système de justice militaire

12. Comme celui de bien d'autres démocraties, le système de justice militaire d'Israël fait partie des forces militaires de l'État, mais mène ses activités en toute indépendance. La loi de 1955 sur la justice militaire a porté création du système de cours martiales et régit les enquêtes, les mises en accusation et les poursuites menées contre ceux qui sont accusés d'une faute de conduite. Ce système de justice militaire s'occupe de toutes les allégations concernant des infractions ou des violations de la loi commises par des membres des FDI, y compris les accusations de faute de conduite commise sur le champ de bataille.

13. Ce système de justice militaire comporte trois branches : le Bureau de l'Avocat général des armées, la Division des enquêtes criminelles de la police militaire et les tribunaux militaires.

1. Le Bureau de l'Avocat général des armées

14. Le Bureau de l'Avocat général des armées, formé de juristes extrêmement compétents et bien formés, est chargé de faire régner l'état de droit dans l'ensemble des FDI⁵. Il donne aussi des avis au chef d'état-major général et à toutes les composantes des FDI sur des questions de droit militaire, national ou international⁶. Les décisions et opinions juridiques de l'Avocat général des armées s'imposent à toutes les composantes de l'appareil militaire⁷.

⁴ Cette diffusion est particulièrement importante, la législation israélienne interdisant à un soldat d'obéir à un ordre qui est manifestement contraire à la loi.

⁵ Loi sur la justice militaire, par. 178, alinéas 2) et 4); Règlement 2.0613(2)(a) du Commandement suprême des FDI.

⁶ Loi sur la justice militaire, par. 178, alinéa 1); Règlement 2.0613(2)(b)(4) du Commandement suprême des FDI.

⁷ Voir *Avivit Atiyah c. Attorney General*, HCJ 4723/96, par. 11 (29 juillet 1997).

15. Bien qu'étant membre de l'état-major général des FDI, l'Avocat général des armées en est indépendant sur le plan juridique. D'après les règlements du Commandement suprême des FDI, il exerce ses pouvoirs et son autorité en n'étant « soumis à aucune autorité fors la loi »⁸. Cela signifie qu'aucune autorité ne lui est supérieure en ce qui concerne les questions de droit. Il ne reçoit d'ordres d'aucun officier supérieur, à l'exception du chef d'état-major général lorsqu'il s'agit d'une question sans caractère juridique. Comme l'a expliqué un ancien titulaire du poste, le Bureau de l'Avocat général des armées a un statut différent de celui de tous les autres membres des forces armées :

« Les membres du Bureau de l'Avocat général des armées ne reçoivent pas d'ordres du commandement de l'unité au sein de laquelle ils se trouvent, et ils prennent leurs décisions en toute latitude. L'Avocat général des armées n'est pas subordonné au chef d'état-major dans l'exercice de ses prérogatives, et il n'est placé, ni de fait, sous aucun commandement, ni de droit. »⁹

16. L'indépendance de l'Avocat général des armées vaut pour tous les membres de son bureau. Chacun d'eux dépend uniquement de lui et ne reçoit aucun ordre de chefs militaires n'appartenant pas au Bureau.

17. Le mode de désignation de l'Avocat général des armées est encore une preuve de son indépendance. En vertu de la loi sur la justice militaire, le Ministre de la défense le nomme sur la recommandation du chef d'état-major général des FDI¹⁰. La plupart des autres officiers de haut rang des FDI sont nommés directement par le chef d'état-major général.

18. La dualité des attributions de l'Avocat général des armées, qui touchent à la répression des infractions en même temps qu'elles sont consultatives, rappelle celles du chef de la justice militaire d'autres pays, le Royaume-Uni par exemple¹¹. Les unités du Bureau de l'Avocat général des armées qui donnent des avis aux FDI ne sont pas les mêmes que celles qui examinent les accusations portées contre des membres des FDI et effectuent les poursuites, fonction qui est assurée par le Procureur général militaire, les avocats des armées (qui dirigent des équipes régionales ou autres) et les procureurs militaires (collectivement, « le Bureau du Procureur général militaire »).

19. Le système de justice militaire habilite l'Avocat général des armées, le Procureur général militaire et les avocats des armées à ordonner la poursuite de soldats accusés d'infractions militaires visées par la loi sur la justice militaire (absence sans permission, conduite indigne d'un officier, pillage, etc.), ainsi que d'infractions contre le Code pénal israélien¹². Lorsque les faits permettent de considérer comme raisonnablement probable la commission d'une infraction, un avocat des armées peut ordonner à un procureur de déposer une mise en accusation devant un tribunal militaire, ou à un chef d'unité de tenir une audience disciplinaire. Comme toute procédure judiciaire, celle-ci impose aux procureurs militaires

⁸ Règlement 2.0613(9)(A) du Commandement suprême des FDI.

⁹ Menachem Finkelstein et Yifat Tomer, *The Israeli Military Legal System – An Overview of the Current Situation and a Glimpse Into the Future*, 52 AIR FORCE L. REV. 137, 140 (2002) (sans les notes de bas de page), http://findarticles.com/p/articles/mi_m6007/is_2002_Wntr/ai_103136516/?tn=content;col1.

¹⁰ Loi sur la justice militaire, alinéa a) du paragraphe 177.

¹¹ Voir plus bas la partie III.E.

¹² Loi sur la justice militaire, par. 280.

d'étudier soigneusement les pièces du dossier et de ne déposer une mise en accusation que si celui-ci est suffisamment solide¹³.

20. En 2007, l'Avocat général des armées a créé au sein du Bureau du Procureur général militaire le Bureau de l'Avocat des armées pour les affaires opérationnelles, chargé de superviser toutes les enquêtes et d'effectuer les poursuites contre les personnes accusées de faute de comportement commise pendant les activités opérationnelles – en particulier s'agissant de soldats des FDI accusés de s'être conduits de façon répréhensible au cours d'opérations militaires. Le mandat de ce Bureau consiste notamment à enquêter et à effectuer des poursuites dans des cas présumés de violations du droit des conflits armés. Les procureurs qui y sont affectés reçoivent une formation spéciale et ont des connaissances d'expert qui leur permettent de faire face aux difficultés très particulières que posent l'enquête et les poursuites dans ce genre d'affaire. Lorsque c'est nécessaire, cette unité reçoit en renfort des officiers appartenant à d'autres unités.

2. Division des enquêtes criminelles de la police militaire

21. La Division des enquêtes criminelles de la police militaire est la principale entité des Forces de défense israéliennes ayant pour vocation d'enquêter sur les crimes qui auraient été commis par des soldats. Elle compte des centaines d'enquêteurs spécialisés, y compris des réservistes, qui sont affectés à différents services régionaux ou spécialisés. Le stage de formation, qui dure environ six mois, comprend des études juridiques à l'École de droit militaire des FDI, placée sous l'autorité de l'Avocat général des armées. Suit après l'examen administré par un avocat des armées que le soldat doit réussir pour être autorisé à exercer la fonction d'enquêteur de la Division¹⁴.

22. Le champ des activités de la Division est très étendu. Au cours des cinq dernières années, elle a ouvert quelque 3 300 enquêtes en moyenne chaque année et recueilli plus de 11 000 témoignages. En moyenne, 5 500 suspects font l'objet d'enquête et 1 400 personnes sont arrêtées chaque année. En 2009, 7 % de ces enquêtes découlaient de plaintes déposées par des Palestiniens.

23. Les enquêteurs saisis de plaintes déposées par des Palestiniens reçoivent une formation spécialisée, y compris en droit international. Certains d'entre eux sont arabophones et les autres font appel à des interprètes de langue arabe qui assistent aux entretiens avec l'auteur de la plainte et les témoins palestiniens.

24. S'il y a lieu, les enquêteurs de la Division consultent les membres du Bureau de l'Avocat général des armées aux fins de la conduite de toute enquête. En outre, l'Avocat général des armées a désigné au sein du Bureau en question un juriste qui exerce les fonctions de conseiller juridique auprès de la Division. Ce conseiller a notamment pour tâche de veiller à voir consacrer les choix de principe juridiques dans les instructions et règlements de la Division.

25. Au terme de l'enquête, la Division fait rapport aux services du Procureur militaire et transmet le dossier pour examen par un procureur. Bien souvent, ces

¹³ Selon la jurisprudence de la Cour suprême israélienne, une mise en accusation ne peut être prononcée que s'il existe, au vu de toutes les pièces versées au dossier, y compris les éléments de preuve à décharge, « une probabilité raisonnable de condamnation ». Voir par exemple *Yahav c. State Attorney*, HCJ 2534/97 (30 juin 1997).

¹⁴ Loi relative à la justice militaire, par. 252, A 3).

services renvoient le dossier à la Division en joignant des instructions concrètes pour la conduite d'une enquête complémentaire. Si un complément d'enquête n'est pas nécessaire, un avocat des armées ou le Procureur général militaire apprécie l'opportunité d'engager des poursuites pénales ou disciplinaires au vu des éléments de preuve disponibles et de la nature de la faute présumée. Dans les affaires particulièrement complexes ou sensibles, cette décision est prise en consultation avec l'Avocat général des armées.

3. Tribunaux militaires

26. Les tribunaux militaires connaissent des accusations portées contre des soldats des FDI pour infractions militaires et autres infractions pénales par une cour martiale. Ces tribunaux, qui comprennent la Cour d'appel militaire et plusieurs juridictions régionales, sont composés de juges militaires professionnels et d'officiers ordinaires (qui ne doivent avoir aucun lien avec les affaires dont ils sont saisis). Au moins un juge militaire professionnel doit siéger dans chaque cour martiale et les magistrats professionnels doivent être majoritaires dans une chambre d'appel¹⁵. La loi relative à la justice militaire dispose que « dans l'administration de la justice, un juge militaire n'est soumis à aucune autorité autre que celle de la loi et [qu']il n'est nullement soumis à l'autorité de ses chefs »¹⁶.

27. Les juges militaires professionnels ne sont pas nommés par des commandants militaires. C'est une commission indépendante, composée du Ministre de la défense, du Ministre de la justice, de membres de la Cour suprême israélienne et de la Cour d'appel militaire, et d'un représentant du barreau israélien (entre autres), qui procède aux nominations¹⁷. Les juges militaires professionnels siègent dans une juridiction militaire distincte dirigée par le Président de la Cour d'appel susmentionnée. Le corps auquel ils appartiennent comprend de nombreux juges de droit commun qui peuvent être appelés à présider des procès militaires en leur qualité de réservistes¹⁸. Les juges militaires professionnels ne peuvent être révoqués qu'en cas de faute grave, selon une procédure spéciale.

28. Bien que les tribunaux militaires soient situés dans des bases militaires, leurs audiences sont généralement ouvertes au public. Il ne peuvent siéger à huis clos que dans certaines circonstances, par exemple lorsqu'une audience publique compromettrait la sécurité de l'État¹⁹. Les médias peuvent rendre compte et rendent effectivement compte des travaux des tribunaux militaires, et bon nombre de jugements rendus par ces juridictions sont publiés sur le site Web officiel des autorités judiciaires israéliennes, ainsi que dans diverses bases de données librement accessibles en ligne. En général, les règles appliquées par les tribunaux militaires en

¹⁵ Loi relative à la justice militaire, par. 202 et 216.

¹⁶ Loi relative à la justice militaire, par. 184. La Cour suprême israélienne a noté que la participation d'officiers ordinaires aux cours martiales contribue à « souligner la responsabilité commune de tous ceux qui servent dans l'armée à l'égard des événements qui s'y produisent ». *Katz c. le Président de la Cour martiale*, District juridictionnel central, HCJ142/79 par. 6 (10 juin 1979).

¹⁷ Voir loi relative à la justice militaire, par. 187 a).

¹⁸ Voir loi relative à la justice militaire, par. 185 b), 187C.

¹⁹ Voir loi relative à la justice militaire, par. 324.

matière d'administration de la preuve sont quasiment identiques à celles qui sont applicables dans les procédures pénales de droit commun²⁰.

29. Les procureurs ont le droit de faire appel de toute peine qui leur semble trop légère. Les tribunaux militaires se montrent généralement sévères à l'égard des soldats reconnus coupables d'infractions contre des civils. Ainsi, dans l'affaire *Le Procureur militaire c. le sergent Ilin*, la Cour d'appel militaire a aggravé la peine infligée à un soldat reconnu coupable de pillage, faisant observer ce qui suit :

« [Le] soldat qui commet des actes prohibés au cours d'un conflit armé porte atteinte à la dignité humaine des vaincus et contribue à la barbarie des vainqueurs ... Il est donc évident que le fracas de la guerre et le feu de l'action appellent en fait un renforcement et une amplification de la voix de la morale... »²¹.

30. De même, dans l'affaire *Le Procureur militaire c. les caporaux Lior et Roi*, la Cour d'appel militaire a aggravé les peines prononcées à l'encontre de deux soldats membres de la police militaire qui ont été reconnus coupables d'agression contre des détenus palestiniens ayant déclaré ce qui suit :

« Les défendeurs ont gravement violé les obligations qui sont les leurs en tant qu'êtres humains, en tant que citoyens de l'État d'Israël, en tant que soldats et policiers. Ils appartiennent à la société israélienne et sont membres des FDI et de la police militaire. Leurs actes ont été nuisibles pour tous les membres de ces collectivités. Le préjudice qu'ils ont causé n'est pas limité à l'acte peu glorieux qu'ils ont commis. Il se répercute en provoquant des ondes circulaires – comme une pierre jetée dans un étang – sur l'ensemble de l'environnement »²².

B. Supervision civile exercée sur le système de justice militaire

1. Ministère de la justice de l'État d'Israël

31. La décision que prend l'Avocat général des armées d'ouvrir ou non une enquête criminelle, ainsi que sa décision de déposer ou non un acte d'accusation peut être examinée plus avant par le Ministre de la justice de l'État d'Israël, personnalité indépendante qui jouit d'une grande autorité.

32. Par exemple, dans l'affaire *Avivit Atiyah c. Attorney General*, la Cour suprême israélienne a décidé que le Ministre de la justice pouvait donner pour instruction au Bureau de l'Avocat général des armées de modifier sa position sur le point de savoir s'il convenait de déposer un acte d'accusation. La décision de la Cour a été interprétée comme suit :

²⁰ Voir loi relative à la justice militaire, par. 476 (aux termes duquel le droit de la preuve applicable aux procédures pénales pour les tribunaux civils vaut également pour les tribunaux militaires à moins qu'une clause spécifique n'en dispose autrement). Les règles d'administration de la preuve qui sont propres aux tribunaux militaires doivent être interprétées à la lumière de dispositions analogues et des principes du droit général de la preuve. Voir *Isascharov c. le Procureur général des armées*, Cr.A. 5121/98 (4 mai 2006).

²¹ *Le Procureur militaire c. le sergent Ilin*, C/62/03 par. E (23 mai 2003).

²² *Le Procureur militaire c. les caporaux Lior et Roi* C/128/03 et C/146/03, par. 17 (21 août 2003).

« Le pouvoir qu'a le Ministre de la justice d'imposer son opinion à l'Avocat général des armées comprend, dans ces cas, le non-lieu et la mise en accusation auprès d'une cour martiale. En d'autres termes, même si l'Avocat général des armées estime qu'il n'y a pas lieu de déposer un acte d'accusation [...] et que le Ministre de la justice est saisi de l'affaire [...] celui-ci est autorisé à décider qu'un acte d'accusation devrait être déposé et sa décision l'emporte. »²³

33. Tout plaignant ou organisation non gouvernementale peut demander qu'une affaire fasse l'objet d'un examen par le Ministre de la justice simplement en envoyant à ce dernier une lettre demandant un examen plus approfondi de l'affaire considérée.

2. Cour suprême d'Israël

34. L'examen judiciaire civil du système militaire revêt deux formes. Premièrement, la Cour suprême israélienne a la possibilité d'examiner directement les appels concernant des jugements de la Cour d'appel militaire « sur une question juridique importante, difficile ou nouvelle »²⁴. Deuxièmement, la Cour suprême, siégeant en tant que Tribunal de grande instance, peut revoir et invalider une décision de l'Avocat général des armées, du Bureau du Procureur militaire, et/ou du Ministre de la justice sur le point de savoir s'il convient de mener une enquête ou de déposer un acte d'accusation concernant une allégation faisant état d'un écart de conduite de la part de soldats.

35. Toute partie intéressée (notamment les organisations non gouvernementales) ou toute personne (notamment les non-citoyens et les non-résidents) affectés ou susceptible d'être affectée par une décision du Gouvernement peut saisir la Cour suprême, siégeant en tant que Tribunal de grande instance, d'une plainte selon laquelle cette décision va au-delà de la compétence du Gouvernement, est illégale ou déraisonnable. Si cela est justifié, la Cour suprême peut donner des instructions au Gouvernement ou accorder d'autres formes de réparation. Dans le système juridique israélien, tout arrêt rendu par la Cour suprême contre les FDI ou tout autre organisme gouvernemental est final et contraignant.

36. À diverses occasions, des résidents palestiniens, ainsi que les organisations non gouvernementales ou les personnes qui représentent leurs intérêts, qui s'étaient plaints à la Cour de l'exercice par l'Avocat général des armées de la discrétion du ministère public ont obtenu gain de cause. On peut citer à ce titre les exemples ci-après :

- La Cour suprême a invalidé la décision de l'Avocat général des armées de ne pas engager de poursuites criminelles contre un commandant de haut niveau, lequel a en fin de compte été jugé coupable des actes qu'il était accusé d'avoir commis²⁵;
- Au cours d'une audience de la Cour suprême, le Bureau de l'Avocat général des armées a consenti à ouvrir une enquête pénale militaire sur un incident

²³ Finkelstein et Tomer, *supra*, p. 163 [à propos du précédent créé dans *Avivit Atiyah c. Attorney General*, HCJ 4723/96 (29 juillet 1997)].

²⁴ Military Justice Law, par. 440I(a), (b).

²⁵ Voir *Jamal Abed al Kader Mahmoud Zofnan c. Military Advocate General*, HCJ 425/89 (27 décembre 1989).

qui, au préalable, avait uniquement été examiné dans le cadre d'une enquête de commandement²⁶;

- La Cour suprême est intervenue dans la décision prise par l'Avocat général des armées de mettre en accusation un soldat et un commandant pour « conduite indigne » (plutôt que pour des infractions plus graves) suite à l'allégation faisant état de tirs de balles en caoutchouc aux pieds d'un détenu²⁷. Par la suite, le Bureau de l'Avocat général des armées a modifié le chef d'accusation, et le commandant et le soldat ont été accusés d'infractions plus graves²⁸.

37. Dans d'autres affaires, la Cour suprême a confirmé la décision de l'Avocat général des armées de ne pas déposer d'acte d'accusation, corroborant l'autorité de la Cour d'approuver, ou de désapprouver, ces décisions²⁹.

38. Ainsi qu'il est indiqué plus haut, la Cour a veillé au respect de l'obligation qui incombe à l'État et aux FDI de se conformer à la législation applicable, notamment le droit international, et d'appliquer les normes humanitaires, en dépit de la réalité et de la menace constante d'attaques terroristes³⁰. Ainsi, en 2006, la Cour a jugé que :

« Israël n'est pas une île isolée. Israël est membre d'un système international. [...] Les activités de combat des FDI ne sont pas menées dans un vide juridique. Il existe des normes juridiques – dont certaines découlent du droit international coutumier, d'autres du droit international consacré dans les conventions auxquelles Israël est partie, et d'autres des principes fondamentaux de la législation israélienne – qui déterminent les règles qui s'appliquent à la conduite d'activités de combat. »³¹

39. La Cour suprême israélienne a démontré qu'elle peut intercéder dans les hostilités entre les FDI et les organisations terroristes palestiniennes, y compris

²⁶ Voir *Brian c. Military Advocate General*, HCJ 11343/04 (1^{er} mars 2005).

²⁷ *Ashraf Abu Rahma c. Military Advocate General*, HCJ 7195/08 (1^{er} juillet 2009) (« Le système de justice militaire, qui est responsable de l'application des valeurs sur lesquelles est fondée la conduite des FDI, doit faire passer un message résolu sur la défense décisive et systématique des valeurs fondamentales de la société et de l'armée, et l'application rigoureuse à tous les niveaux – éducationnel, commandement et punitif – des principes fondamentaux partagés par la société israélienne et l'armée israélienne et qui leur confèrent leur caractère moral et humain. »).

²⁸ Dans l'acte d'accusation modifié, le commandant était accusé d'avoir eu recours à la menace (sect. 192 du droit pénal israélien) et le soldat de l'infraction consistant à utiliser illégalement une arme à feu (sect. 85 de la loi relative à la justice militaire). Les deux ont également été accusés de conduite indigne. Le Tribunal militaire est toujours saisi de l'affaire.

²⁹ Voir par exemple *Iman Atrash c. Military Advocate General*, HCJ 10682/06 (18 juin 2007).

³⁰ Les traductions officielles en anglais de plus de 25 affaires qui traitent de cette question sont disponibles sur le site de la Cour suprême israélienne à l'adresse : <http://elyon1.court.gov.il/VerdictsSearch/EnglishStaticVerdicts.html>. Voir par exemple *Public Committee Against Torture in Israel c. State of Israel*, HCJ 5100/94 (6 septembre 1999); *Iad Ashak Mahmud Marab c. IDF Commander in West Bank*, HCJ 3239/02 (6 février 2003); *Bei Sourik Village Council c. State of Israel*, HCJ 2056/06 (30 juin 2004); *Zaharan Yunis Muhammad Mara'aba c. Prime Minister of Israel*, HCJ 7957/04 (15 septembre 2005); *Ahmad Issa Abdalla Yassin, Bil'in Village Council Chairman c. State of Israel*, HCJ 8414/05 (15 décembre 2008); *Public Committee Against Torture in Israel c. State of Israel*, HCJ 769/02 (14 décembre 2006); *Adalah – The Legal Center for Arab Minority Rights in Israel c. GOC Central Command, IDF*, HCJ 3799/02 (6 octobre 2005).

³¹ *Public Committee Against Torture in Israel c. State of Israel*, HCJ 769/02, par. 17 (14 décembre 2006) [citant *Physicians for Human Rights c. Commander of IDF Forces in Gaza*, HCJ 4764/04 (30 mai 2004)].

l'Opération de Gaza, et qu'elle le fait. En janvier 2009, alors que les FDI se battaient encore avec le Hamas à Gaza, la Cour a examiné deux requêtes qui lui avaient été présentées par des groupes de défense des droits de l'homme qui mettaient en doute les efforts déployés par les FDI pour respecter les obligations humanitaires à l'égard des civils palestiniens³². La Cour s'est « efforcée d'examiner les plaintes en temps réel, afin de pouvoir accorder une réparation effective ou d'arriver à un règlement concerté »³³. Ce faisant, le Président de la Cour a confirmé la compétence de la Cour pour traiter de telles requêtes, même au milieu des combats.

« Il n'est pas rare que la Cour soit appelée à examiner la légalité d'opérations militaires alors même que celles-ci se déroulent, eu égard à la réalité dans laquelle nous vivons et où nous sommes constamment confrontés au terrorisme dirigé contre la population civile israélienne, et compte tenu de la nécessité d'y faire face tout en nous acquittant des obligations imposées par la loi même en période de combat. [...] La Cour a pour rôle, même en période de combat, de déterminer si, dans le cadre des opérations, l'obligation d'agir en conformité avec les directives juridiques – tant dans le contexte de la législation israélienne que dans celui du droit international humanitaire – est respectée. »³⁴

40. La Cour suprême israélienne a acquis le respect de la communauté internationale pour sa jurisprudence et son indépendance dans l'application du droit international. Elle jouit de l'estime des juristes et des spécialistes du droit international pour ses arrêts, qui établissent un équilibre entre les intérêts de la sécurité et les droits de l'homme et ont été cités de manière favorable par divers tribunaux internationaux, notamment la Cour suprême du Canada, la Chambre des Lords du Royaume-Uni et la Cour européenne de justice³⁵.

³² *Physicians for Human Rights c. Prime Minister of Israel*, HCJ 201/09 et 248/09 (19 janvier 2009). Après avoir examiné les mesures prises par les FDI et le Haut Commandement, la Cour a considéré que le droit international avait effectivement été respecté.

³³ *Ibid.*, par. 13.

³⁴ *Ibid.*, par. 12. Également au cours de l'Opération de Gaza, la Cour suprême a examiné une requête présentée par des journalistes étrangers désireux d'entrer à Gaza aux postes de contrôle militaires. *Foreign Press Association in Israel c. OC Southern Command*, HCJ 9910/08 (2 janvier 2009). La Cour a affirmé que « la liberté d'expression et la liberté de la presse [...] revêtent une importance toute particulière » au cours d'hostilités armées, *ibid.*, par. 5, mais l'Opération de Gaza a pris fin avant que le différent ne soit entièrement réglé. *Foreign Press Association in Israel c. OC Southern Command*, HCJ 643/09 (25 janvier 2009).

³⁵ Voir par exemple *Application Under S. 83.28 of Criminal Code*, 2004 SCC 42, par. 7 (Cour suprême du Canada, 2004) (citant les déclarations « éloquentes » de la Cour suprême israélienne sur l'importance de faire face au terrorisme dans le respect de l'état de droit); *Suresh c. Canada*, [2002] 1 S.C.R. 3, 2002 SCC (« nous notons que la Cour suprême israélienne siégeant en tant que Haute Cour de justice et la Chambre des Lords ont rejeté la torture en tant qu'outil légitime pouvant être utilisé contre le terrorisme et pour protéger la sécurité nationale »); *A and Others c. Secretary of State for Home Department*, 2 A.C. 221 § 150 (soulignant l'importance qu'il y a à ce que le Royaume-Uni « conserve la position de supériorité morale dont jouit une société démocratique ouverte » et « défendant les valeurs consacrées dans l'arrêt de la Cour suprême israélienne dans *Public Committee Against Torture in Israel v. Israel* [...] selon laquelle une démocratie, [bien qu'elle] doit souvent se battre avec une main liée derrière le dos, l'emporte malgré tout ») (citation omise); *Kadi c. Council of European Union*, 3 C.M.L.R. 41, par. AG 45 (Cour européenne de justice 2008) (citant l'ancien Président de la Cour suprême israélienne au sujet de l'importance de la supervision des décisions politiques par l'appareil judiciaire : « c'est

III. Enquête menée sur les allégations faisant état de violations du droit des conflits armés

41. Les FDI ont pour politique systématique de mener des enquêtes sur les allégations faisant état de violations du droit des conflits armés, quelle qu'en soit la source, et à engager des poursuites lorsqu'il existe des preuves crédibles qu'une violation a été commise. Cette politique correspond à l'engagement de traiter les plaintes portées contre des membres des FDI de manière équitable, impartiale et efficace. Le Ministre de la justice d'Israël a confirmé cette politique, qui a été présentée au Tribunal de grande instance pour examen.

42. L'efficacité du système judiciaire israélien a été reconnue par divers organes internationaux. Ainsi, la Chambre pénale de l'Audiencia Nacional espagnole a décidé l'année dernière, à une large majorité, de mettre fin à une enquête menée par des magistrats espagnols sur des allégations faisant état de crimes de guerre commis par les FDI dans la bande de Gaza. Il s'agissait d'un incident qui s'était produit en 2002, au cours duquel les FDI avaient tué le chef de l'aile militaire du Hamas mais également un certain nombre de civils au cours d'une frappe aérienne. Un juge espagnol avait ouvert une enquête sur la question conformément au statut espagnol relatif à la compétence universelle.

43. En mettant fin à l'enquête, la Chambre pénale de l'Audiencia Nacional espagnole a mis l'accent sur la capacité d'Israël à mener lui-même des enquêtes justes et exhaustives sur les accusations portées. Contrairement aux allégations avancées dans le rapport du Conseil des droits de l'homme sur l'établissement des faits, la Cour a déclaré que les procédures et précédents israéliens concernant les frappes défensives, et l'examen judiciaire de cet incident effectué par les autorités militaires et civiles israéliennes étaient conformes aux principes du droit international. Elle a notamment déclaré ce qui suit :

« Contester l'impartialité et la séparation organique et fonctionnelle du pouvoir exécutif et de l'Avocat général des armées israélien, du Ministre de la justice de l'État d'Israël et de la Commission d'enquête constituée par le Gouvernement israélien revient à ignorer l'existence d'un État social et démocratique régi par l'état de droit, dans lequel les membres du pouvoir exécutif et judiciaire sont assujettis aux règles du droit. Dans ce contexte, il ne saurait y avoir le moindre doute quant à l'exercice des poursuites criminelles indiquées lorsque l'existence d'un comportement criminel de la part des individus qui ont ordonné, planifié et mené l'attaque à la bombe est révélée au cours des enquêtes effectuées. »³⁶

quand les canons tonnent que nous avons tout particulièrement besoin des lois [...] C'est là une expression de la différence entre un État démocratique qui lutte pour sa vie et le combat de terroristes qui s'élèvent contre lui. L'État se bat au nom du droit et du respect de la loi. Les terroristes se battent contre la loi, tout en la violant. La guerre contre le terrorisme est également la guerre de la loi contre ceux qui s'y opposent. »

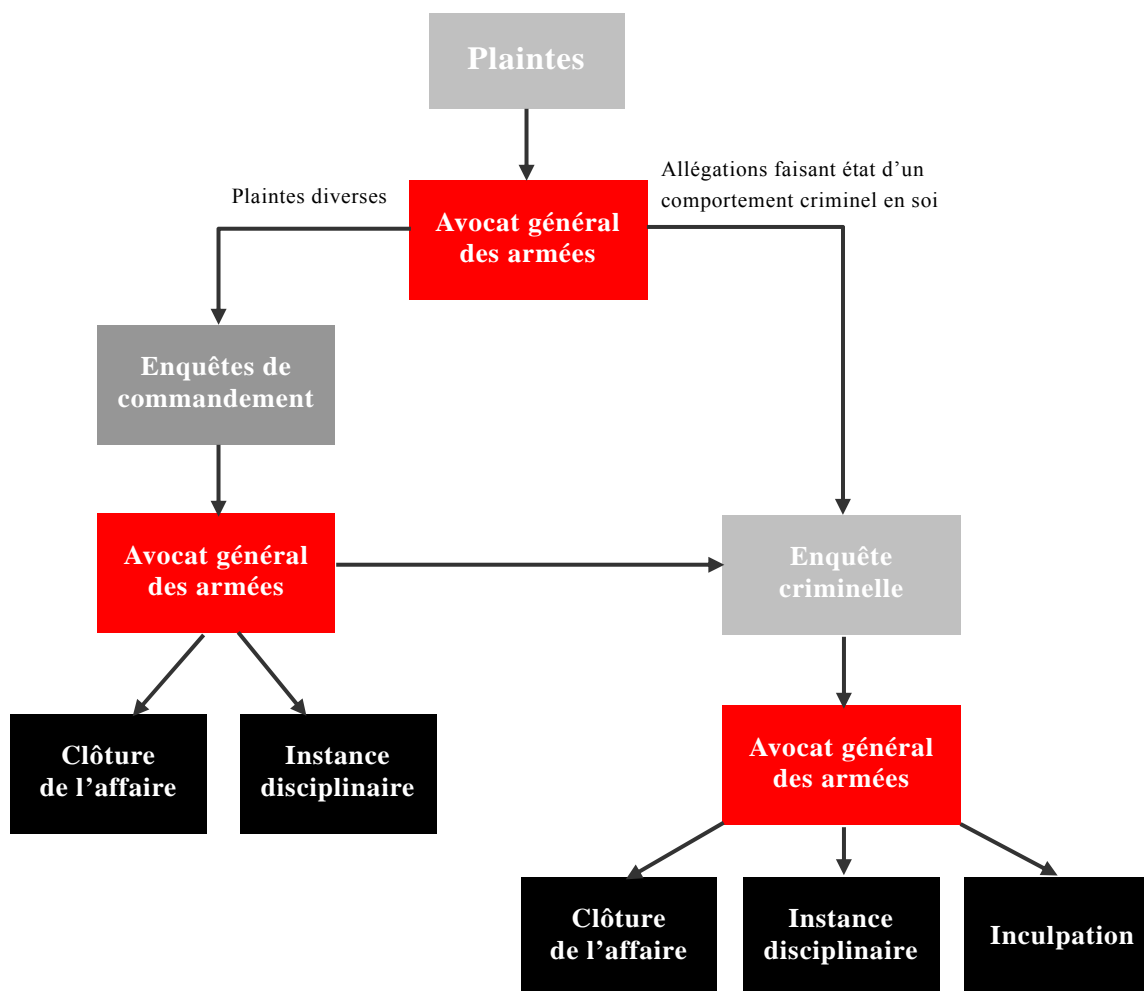
³⁶ Tradition officieuse de la décision n° 1/2009, 17 juillet 2009 (plénière) de la Chambre d'appel de l'Audiencia Nacional espagnole (Sala de lo Penal de la Audiencia Nacional), p. 24 concernant les procédures pénales préliminaires no 154/2008 de la juridiction d'instruction centrale n° 4. Voir également le recours du Procureur chargé de la coordination (Pedro Martinez Torrijos), 6 mai 2009, concernant l'arrêt de l'Audiencia Nacional de Madrid, 4 mai 2009, dans les procédures pénales préliminaires n° 157/2008 (soulignant que le système d'enquête israélien,

44. De manière générale, la politique des FDI en matière d'enquêtes sur les allégations faisant état de violations du droit des conflits armés est la suivante :

- L'Avocat général des armées examine les plaintes émanant de diverses sources;
- L'Avocat général des armées renvoie ces plaintes pour enquête de commandement ou, lorsqu'une allégation porte sur un comportement criminel en soi, pour enquête criminelle;
- Dans le cas des plaintes renvoyées pour enquête de commandement, l'Avocat général des armées examine le dossier et les conclusions de l'enquête, ainsi que les autres pièces disponibles, pour déterminer s'il convient de recommander l'introduction d'une instance disciplinaire et s'il y a lieu de soupçonner un acte criminel, auquel cas la plainte est renvoyée pour enquête criminelle;
- Suite à une enquête criminelle, l'Avocat général des armées examine la totalité des éléments de preuve pour déterminer s'il convient ou non de déposer un acte d'accusation ou de recommander l'institution d'une instance disciplinaire.

45. Le processus décrit ci-dessus est illustré dans le diagramme ci-après :

avec examen de l'Avocat général des armées, du Procureur général et de la Cour suprême, « répond pleinement » aux critères d'un « système judiciaire indépendant et impartial »).



A. Sources de plaintes

46. Les FDI mènent leurs enquêtes sur les allégations faisant état de violations du droit des conflits armés essentiellement de la même façon qu'elles en mènent sur d'autres allégations faisant état de comportements délictueux. Lorsqu'une plainte donne des raisons suffisantes de soupçonner qu'une infraction a été commise, les FDI ouvrent une enquête criminelle. Si cette enquête produit des éléments de preuve suffisants à l'appui de la plainte, elles ouvrent une information pénale ou instituent une instance disciplinaire, selon la gravité de ses conclusions.

47. Les informations relatives à des allégations faisant état d'un comportement délictueux de la part de soldats parviennent aux autorités des FDI sous diverses formes ainsi qu'il est indiqué ci-après :

- Plaintes officielles ou officieuses des victimes présumées elles-mêmes ou de membres de leur famille;
- Plaintes de commandants ou de soldats qui ont été témoins d'un incident;
- Rapports d'organisations non gouvernementales et des médias;

- Plaintes ou lettres d'organisations non gouvernementales, de journalistes, d'ambassades ou d'organes internationaux;
- Plaintes transmises ou présentées directement au Bureau de l'Avocat général des armées par la police israélienne et d'autres organismes de maintien de l'ordre.

48. N'importe qui peut porter plainte à la police militaire, auprès de n'importe quel poste de police civil, au sujet d'un comportement délictueux présumé de la part de soldats des FDI. Les résidents de Gaza peuvent présenter des plaintes directement par écrit (en hébreu, arabe et anglais), par l'intermédiaire d'une organisation non gouvernementale agissant en leur nom, ou par l'intermédiaire du Bureau de liaison militaire qui travaille directement avec la population civile palestinienne.

49. En outre, les FDI identifient indépendamment les incidents qui justifient une enquête plus poussée, notamment les allégations faisant état de comportements délictueux de la part de soldats signalées dans la presse et par d'autres sources. Le Ministère de la justice analyse également ces informations et porte les allégations avancées à l'attention des organes compétents. Quelle que soit la source des allégations, les FDI évaluent chaque plainte sur la base des circonstances de l'affaire et des éléments de preuve disponibles.

B. Examen des plaintes par l'Avocat général des armées et renvoi des affaires aux instances compétentes

50. L'Avocat général des armées et le Bureau du Procureur militaire jouent un rôle majeur dans le système d'enquêtes menées par les FDI sur les allégations faisant état de violation du droit des conflits armés. Ces enquêtes sont considérées comme étant extrêmement importantes, et l'Avocat général des armées participe personnellement à l'examen de nombreuses affaires. Le Bureau du Procureur militaire reçoit toutes les plaintes relatives à un comportement délictueux de la part de membres des FDI pour vérification et examen, et renvoie directement toute plainte relative à un comportement criminel en soi – notamment les allégations faisant état de mauvais traitements infligés à des détenus, de l'utilisation de civils comme boucliers humains, de la prise intentionnelle de civils comme cible et de pillage à la Division des enquêtes criminelles de la police militaire (MPCID) pour enquête criminelle.

51. L'objet d'autres plaintes, par exemple les allégations faisant état de la mort de civils suite à des bombardements ou la destruction de biens civils sur le champ de bataille, peut ou non constituer un crime, selon les circonstances. En cas d'hostilités dans des zones densément peuplées, et lorsque les combattants ennemis cherchent délibérément à se fondre dans la population, les victimes civiles sont malheureusement inévitables. Aux termes du droit des conflits armés, le fait que des biens civils soient endommagés et que des civils soient blessés voire tués au cours d'opérations ne signifie pas nécessairement et n'implique même pas qu'une faute constituant un délit a été commise³⁷. De fait, pour établir la responsabilité pénale

³⁷ Voir par exemple, Lettre ouverte de Luis Moreno-Ocampo, Procureur à la Cour pénale internationale, « Allégations concernant des crimes de guerre », p. 4 et 5 (9 février 2006), disponible à l'adresse <http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB->

d'une violation du droit des conflits armés, il faut avoir la preuve que le personnel militaire avait *l'intention* d'infliger des souffrances à des civils ou prévoyait clairement que les civils subiraient des préjudices excessifs par rapport à l'avantage militaire escompté³⁸.

52. Par conséquent, en ce qui concerne cette deuxième catégorie de plaintes, l'Avocat général des armées, avant d'engager une enquête criminelle, doit déterminer si les éléments de preuve donnent à soupçonner une activité criminelle et justifient le renvoi de l'affaire à la MPCID. Comme on le verra ci-après, en prenant cette décision, l'Avocat général des armées évalue la plainte elle-même, qui peut comprendre des informations de première main des auteurs de la plainte et de témoins, de même que les éléments de preuve découverts au cours des enquêtes de commandement (également connues sous le nom de débriefings opérationnels) et d'autres éléments.

53. Certains critiques d'Israël ont mal interprété la nature de ces deux catégories d'enquête et ont présumé à tort que toutes les plaintes devaient d'abord faire l'objet d'une enquête de commandement, ce qui retarde de plusieurs mois l'ouverture d'une information pénale. Cette interprétation – qui est au cœur du rapport du Conseil des droits de l'homme sur l'établissement des faits³⁹ – est erronée. L'Avocat général des armées et le Bureau du Procureur militaire ont pleine autorité pour ouvrir

B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (« Aux termes du droit international humanitaire et du Statut de Rome, la mort de civils au cours d'un conflit armé, aussi grave et regrettable soit-elle, ne constitue pas en soi un crime de guerre »); Kenneth Watkin, *Assessing Proportionality: Moral Complexity and Legal Rules*, dans *l'Annuaire de droit international humanitaire n° 3, 9* (Timothy L. H. McCormack, éd. 2005) (« Bien que les civils ne doivent pas être directement la cible d'une attaque, le droit humanitaire admet que des civils peuvent être tués ou que des biens civils peuvent être endommagés lors de l'attaque d'un objectif militaire »); W. Hays Parks, *Air War and the Law of War*, 32 A.F.L.Rev. 1, 4 (1990) (« Tant dans la tradition des guerres justes que du droit de la guerre, il a toujours été permis d'attaquer des combattants, même si certains non-combattants risquent d'être blessés ou tués [...] »); Michael N. Schmitt, *The Principles of Discrimination in 21st Century Warfare*, 2 Yale Hum. Rts & Dev.L.J. 143, 150 (1999) (notant que la doctrine juridique internationale de la proportionnalité est appliquée dans les scénarios où des pertes et des dommages incidents sont le résultat prévisible, encore que non désiré, d'attaques dirigées contre une cible légitime); voir également *Bombardements de l'OTAN : Rapport final au Procureur du TPIY*, 51 (« Les civils et les objets civils peuvent subir des pertes ou des dommages incidents pour diverses raisons »).

³⁸ Voir par exemple Yves Sandoz, Christophe Swinarski & Bruno Zimmermann, Commentaires sur les protocoles additionnels du 8 juin 1977 aux Conventions de Genève du 12 juin 1949 (Comité international de la Croix-Rouge, 1987), art. 51(2), 1934 (« En ce qui concerne le droit pénal, le Protocole exige une intention et, de plus, en ce qui concerne les attaques aveugles, l'élément de connaissance préalable du résultat prévisible »); Rüdiger Wolfrum & Dieter Fleck, *Enforcement of International Humanitarian Law*, dans *The Handbook of International Humanitarian Law* 675, 697 (Dieter Fleck éd., 2^e éd. 2008) (« La condition préalable d'une violation grave est l'intention; l'attaque doit être dirigée intentionnellement contre la population civile ou des civils individuels, et l'intention doit englober les conséquences physiques »). Le CPIY a déterminé que, pour qu'une attaque soit considérée comme un crime de guerre, elle doit avoir été menée *de manière intentionnelle* en sachant, ou lorsqu'il était impossible de ne pas le savoir, que des civils ou des biens civils étaient pris comme cible. *Prosecutor c. Galić*, affaire n° IT-98-29-T, Judgement and Opinion, 42 (5 décembre 2003), *cité dans* Watkin, *supra*, p. 38.

³⁹ Voir par exemple le Rapport du Conseil des droits de l'homme sur l'établissement des faits, 1820, 1831 (critiquant le processus d'enquête d'Israël pour des « retards excessifs » du fait que des enquêtes criminelles véritables ne peuvent commencer qu'après le débriefing opérationnel), voir également id. 121, 1798, 1830.

directement une information pénale sur les plaintes faisant état de comportements ayant clairement un caractère délictueux et exercent cette autorité. Ainsi, dans le cas des allégations relatives au tir de balles en caoutchouc aux pieds d'un détenu, l'Avocat général des armées a directement mené une enquête pénale, immédiatement après la publication de l'incident dans les médias, et a déposé un acte d'accusation en moins de deux semaines⁴⁰. Dans le cas des autres plaintes, celles qui font d'abord l'objet d'une enquête de commandement, l'Avocat général des armées ou le Bureau du Procureur militaire ne sont pas tenus d'attendre un rapport final du responsable de l'enquête de commandement avant de renvoyer l'affaire aux autorités pénales. À tout moment, lorsqu'il y a des raisons suffisantes de soupçonner un comportement délictueux, le Bureau du Procureur militaire peut lancer une enquête criminelle⁴¹.

C. Enquêtes de commandement

54. D'après la Loi sur la justice militaire, une enquête de commandement est une enquête menée au sein de l'armée, sur les ordres des FDI, au sujet d'un fait qui est survenu durant la formation ou une activité opérationnelle, ou est en rapport avec la formation ou une activité opérationnelle⁴². Les FDI, comme beaucoup d'autres armées, ont depuis longtemps pour pratique de mener une enquête de commandement sur le terrain après toute opération militaire. L'enquête a normalement pour objet d'examiner le fonctionnement des forces et de déterminer quels aspects de l'opération doivent être préservés ou améliorés, mais peut aussi porter plus particulièrement sur des problèmes précis. Les FDI y voient un moyen de réduire les erreurs opérationnelles, y compris celles qui pourraient faire des victimes civiles.

55. Toutefois, les enquêtes de routine menées après les opérations ne sont pas les seules enquêtes menées par les FDI. Lorsqu'une plainte est introduite auprès de l'Avocat général des armées et qu'elle ne porte pas sur des actes délictueux proprement dits, l'Avocat général des armées fait ouvrir une enquête de commandement en vue de réunir des preuves et de procéder à une appréciation préliminaire de la plainte. Si les circonstances le justifient, des sanctions, par exemple des sanctions disciplinaires (qui peuvent déboucher sur des peines de prison), sont recommandées dans le cadre de l'enquête⁴³.

⁴⁰ *Ashraf Abu Rahma c. Military Advocate General*, HCJ 7195/08 (1^{er} juillet 2009). Cette affaire est examinée dans la partie II.B.2.

⁴¹ Le Rapport du Conseil des droits de l'homme sur l'établissement des faits a conclu à tort que dans la pratique, un délai d'au moins six mois s'écoule entre le moment où les événements se produisent et celui où les enquêtes criminelles commencent ». Rapport du Conseil des droits de l'homme sur l'établissement des faits, 830. Ainsi qu'il est décrit plus loin, l'Avocat général des armées a engagé directement plus de 24 enquêtes criminelles liées à l'Opération de Gaza – toutes dans un délai de six mois. En fait, le Rapport du Conseil des droits de l'homme sur l'établissement des faits examine l'une de ces enquêtes, qui a été achevée moins de deux mois après la fin de l'Opération de Gaza. Id. 1780; voir « Military Police Investigation Concerning Statements Made at the Rabin Center: Based on Hearsay », communiqué de presse des FDI (30 mars 2009), disponible à l'adresse <http://dover.idf.il/IDF/English/Press+Releases/09/03/3001.htm>.

⁴² Loi sur la justice militaire, par. 539A(A).

⁴³ Les instances disciplinaires internes des FDI ne concernent que les infractions peu graves (pour lesquelles la peine maximale est une peine d'emprisonnement de trois ans). Le Bureau de

56. Selon le règlement 2.0702 du Commandement suprême des FDI, le responsable de l'enquête de commandement transmet le rapport d'enquête complet au Bureau de l'Avocat général des armées, à la demande de celui-ci ou automatiquement dans certains cas, par exemple si un civil a été tué ou grièvement blessé. La suite donnée à des plaintes précises dans le cadre des enquêtes de commandement permet donc d'améliorer le fonctionnement de l'armée mais est aussi le point de départ d'enquêtes préliminaires menées au nom de l'Avocat général des armées sur des faits dont il est possible que des militaires se soient rendus coupables.

57. En outre, le chef d'État major général des FDI peut ouvrir des enquêtes de commandement spéciales (parfois qualifiées d'« enquêtes d'expert ») dans des cas exceptionnels ou complexes. Les enquêtes de ce type sont menées par un officier qui ne fait pas partie de la chaîne de commandement concernée. Comme c'est le cas pour les autres enquêtes de commandement, les résultats des enquêtes de commandement spéciales doivent être transmis au Bureau de l'Avocat général des armées dans certaines circonstances, par exemple lorsqu'un civil a été tué ou grièvement blessé.

58. Le règlement 2.0702 du Commandement suprême des FDI énonce les modalités des enquêtes de commandement. Ainsi :

- « Le responsable de l'enquête de commandement n'est pas limité par le règlement de preuve. »
- « Le soldat interrogé dans le cadre d'une enquête de commandement n'est pas représenté par un avocat. »
- « Un soldat ne peut refuser de se plier à l'ordre que lui donne le responsable d'une enquête de commandement de lui fournir des informations, sous forme de témoignage ou par d'autres moyens, même dans le cas où il serait en droit de ne pas fournir ces informations à un organe d'enquête pour ne pas s'accuser lui-même »⁴⁴.

59. Toujours selon le règlement 2.0702 du Commandement suprême des FDI, toutes les preuves réunies dans le cadre d'une enquête de commandement doivent être préservées. Plus précisément, les pièces se rapportant à une enquête de commandement, notamment les documents, cartes, photos, etc., sont préservées par la hiérarchie de l'enquêteur. L'Avocat général des armées dispose donc de l'ensemble du dossier d'enquête pour les affaires qui sont soumises à examen⁴⁵.

l'Avocat général des armées peut approuver, modifier ou annuler un jugement ou une sanction disciplinaire. Le prononcé d'un jugement disciplinaire n'empêche pas l'Avocat général des armées d'approuver des poursuites militaires pour la même infraction. Voir la loi sur la justice militaire, par. 171(B).

⁴⁴ La déclaration faite par un soldat dans le cadre d'une enquête de commandement est versée au dossier comme toutes les autres preuves. L'Avocat général des armées peut ouvrir une enquête criminelle sur la base d'une telle déclaration, laquelle peut aussi être le point de départ à une instance disciplinaire. Toutefois, comme c'est le cas dans les autres pays qui reconnaissent le droit de ne pas témoigner contre soi-même, la déclaration faite par un soldat obligé de la faire dans le cadre d'une enquête de commandement n'est pas admissible par les tribunaux sauf si le soldat est accusé d'avoir présenté de fausses informations ou d'avoir entravé une enquête.

⁴⁵ Ignorant cette réglementation et ne s'appuyant sur aucune preuve, le rapport du Conseil des droits de l'homme sur l'établissement des faits affirme à tort que les enquêteurs « ratissent sans précautions le lieu du crime » et font qu'il est « presque impossible » de mener une enquête

60. Contrairement à ce qui a pu être dit – notamment dans le rapport du Conseil des droits de l’homme sur l’établissement des faits – les enquêtes de commandement ne se substituent ni *de jure*, ni *de facto* à des enquêtes criminelles menées par des enquêteurs professionnels⁴⁶. Elles permettent de constituer un dossier destiné à l’Avocat militaire des armées, qui pourra, de son point de vue central, déterminer s’il y a lieu d’ouvrir une enquête criminelle. C’est l’examen de l’Avocat général des armées, et non l’enquête de commandement, qui se trouve au cœur du système. De nombreux systèmes militaires reposent sur des examens préliminaires, semblables aux enquêtes de commandement, qui servent à apprécier les accusations portées contre des soldats et à déterminer les cas où il semble effectivement y avoir eu conduite délictueuse⁴⁷.

61. La Cour suprême israélienne a déterminé que les enquêtes de commandement sont généralement le moyen le plus approprié d’enquêter sur des faits survenus lors d’une activité opérationnelle⁴⁸. Plus précisément, elle a fait observer qu’une enquête de commandement était généralement menée peu après les faits, alors que ceux qui y avaient été associés les avaient encore en mémoire. Les enquêtes de ce type, directes et rapides, faisaient partie intégrante de l’activité opérationnelle et étaient bien ancrées dans les opérations des FDI depuis les débuts de celles-ci⁴⁹.

62. À l’issue d’une enquête de commandement, l’enquêteur soumet un rapport écrit énonçant ses constatations et ses recommandations éventuelles à l’officier qui a demandé l’enquête et à ses supérieurs. Comme on l’a dit, le rapport final et les preuves réunies doivent aussi être transmis au Bureau de l’Avocat général des armées, sur demande ou automatiquement dans certaines circonstances, par exemple si un civil a été tué ou grièvement blessé.

D. Enquêtes criminelles et poursuites

63. La Division des enquêtes criminelles de la police militaire mène des enquêtes criminelles, notamment lorsque des soldats sont accusés d’avoir enfreint le droit des conflits armés. Comme on l’a vu plus haut, le procureur militaire saisit automatiquement la Division, pour enquête pénale, de toute plainte selon laquelle il y aurait eu conduite délictueuse proprement dite. Pour les autres plaintes, l’Avocat

criminelle. Rapport du Conseil des droits de l’homme sur l’établissement des faits, par. 1817; voir aussi *idem*, par. 1830 (selon lequel, le temps qu’une enquête criminelle soit ouverte, « les éléments de preuve peuvent avoir subi des altérations »). Si certaines enquêtes ont été retardées en raison du grand nombre de plaintes déposées après l’Opération de Gaza, les affirmations selon lesquelles des preuves auraient été perdues ou détruites en raison d’enquêtes de commandement ne reposent sur aucun fait.

⁴⁶ Voir par exemple le paragraphe 1819 du rapport du Conseil des droits de l’homme sur l’établissement des faits (selon lequel les enquêtes de commandement ne sont pas menées selon « les méthodes qui sont normalement celles d’une enquête criminelle – enquête sur place, interrogation des témoins et des victimes, et élaboration de conclusions sur la base de normes juridiques bien établies »).

⁴⁷ Voir la partie III.E ci-après.

⁴⁸ *Mor Haim c. Israeli Defence Forces*, HCJ 6208/96 (16 septembre 1996). L’affaire portait sur la manière appropriée d’enquêter sur les circonstances entourant le décès d’un soldat, survenu lors d’une opération des FDI.

⁴⁹ *Idem*.

général des armées ouvre une enquête pénale s'il détermine qu'il y a de bonnes raisons de penser qu'un acte délictueux a été commis⁵⁰.

64. Pour déterminer s'il y a de bonnes raisons de penser qu'un acte délictueux a été commis, le Procureur militaire se fonde sur la plainte elle-même (y compris les déclarations du plaignant ou de témoins) et sur le rapport et le dossier de l'enquête de commandement. Bien souvent, il examine d'autres éléments, par exemple des rapports d'organisations non gouvernementales et des articles de presse. Il peut demander au responsable de l'enquête de commandement de lui fournir des informations supplémentaires, et notamment de procéder à une enquête complémentaire, et le fait souvent.

65. Le Procureur militaire notifie l'auteur de la plainte de sa décision d'ouvrir ou non une enquête pénale et des raisons qui les motivent. Comme on l'a vu, le plaignant peut faire appel de la décision auprès du Ministre de la justice et de la Cour suprême.

66. Quand une enquête pénale est ouverte, la Division des enquêtes criminelles de la police militaire consulte selon qu'il convient l'Avocat des armées compétent (en cas de plainte pour faute opérationnelle commise contre des Palestiniens, l'Avocat des armées pour les affaires opérationnelles) au sujet des questions professionnelles et juridiques.

67. Quand la Division des enquêtes criminelles de la police militaire achève une enquête, le procureur militaire examine les preuves et décide s'il y a lieu de procéder à une mise en accusation. Le procureur militaire exerce le pouvoir de décider s'il y a lieu de poursuivre que lui accorde la loi israélienne, comme n'importe quel autre procureur d'Israël et des autres pays de *common law*. Ainsi, le procureur militaire ne dépose un acte d'accusation que s'il détermine qu'il y a suffisamment de preuves pour que l'intéressé soit reconnu coupable. Les plaignants peuvent faire appel des décisions du procureur militaire. La manière dont le procureur militaire exerce son pouvoir discrétionnaire en ce qui concerne le déclenchement des poursuites fait l'objet d'un contrôle exercé par le Ministre de la justice et la Cour suprême.

68. Entre janvier 2002 et décembre 2008, 1 467 soldats des FDI ont fait l'objet d'enquêtes criminelles et 140 ont été mis en accusation pour des faits touchant des Palestiniens. En décembre 2008, 103 des défendeurs avaient été déclarés coupables et 10 instances étaient encore en cours. En 2009, 236 enquêtes criminelles ont été ouvertes et 14 officiers et soldats ont été mis en accusation.

69. L'expérience a montré que le Bureau de l'Avocat général des armées poursuit sans hésitation les soldats soupçonnés d'infractions dirigées contre des civils palestiniens. Ainsi, l'an dernier, le bureau du procureur militaire a mis en accusation un lieutenant et un sergent soupçonnés d'avoir fait un usage illégitime de la force au cours d'interrogatoires de civils menés lors d'une opération militaire en Cisjordanie.

⁵⁰ Lorsqu'une enquête criminelle est précédée d'une enquête de commandement, l'Avocat général des armées doit consulter un officier ayant au moins le grade de commandant. Toutefois, il peut de son propre chef décider d'ouvrir une enquête criminelle et aucun officier ne peut s'opposer à sa décision.

Une cour martiale a déclaré le lieutenant coupable de violences graves pour l'usage que lui-même et son subordonné avaient fait de la force⁵¹.

70. Dans l'affaire *Lt. Col. Geva c. Chief Military Prosecutor*, le Bureau de l'Avocat général des armées a formé un recours demandant qu'une peine plus sévère soit prononcée à l'encontre d'un officier supérieur reconnu coupable d'avoir menacé l'enfant d'une personne soupçonnée de terrorisme et utilisé un civil comme bouclier humain. La Cour d'appel militaire est tombée d'accord avec le procureur, affirmant ce qui suit :

« L'obligation pour les officiers des FDI de montrer l'exemple est, depuis des temps immémoriaux, au cœur de la direction de l'armée, qui a fait sienne l'exhortation de Gédéon : “ regardez-moi et faites comme moi ” (Juges, 7). L'exemple donné par le défendeur à ses subordonnés, aux FDI et à la société en général est mauvais et les dégâts causés – chez nous et à l'étranger – sont probablement irréparables. Étant donné la gravité des faits... une prise de position claire et nette s'impose. »⁵²

E. Dispositifs d'enquête similaires établis par d'autres États

71. En droit international, c'est à l'État qu'il incombe au premier chef d'enquêter sur les allégations de violations du droit des conflits armés commises par ses forces militaires et d'en poursuivre les auteurs⁵³.

72. Le droit international ne précise ni comment ni à quel rythme l'État doit enquêter sur de telles violations. Comme l'ont noté certains auteurs, les États semblent jouir d'une grande discrétion (sous réserve de l'obligation d'agir de bonne foi) pour procéder à une enquête après coup sur des situations où il y aurait eu violation des droits de l'homme ou du droit international humanitaire⁵⁴.

73. Les dispositifs d'enquête établis par Israël et d'autres États démocratiques (en particulier les pays de *common law*) semblent présenter plusieurs similitudes. Comme Israël, des pays tels que le Royaume-Uni, les États-Unis, l'Australie et le Canada disposent de procédures permettant de déterminer si une plainte concernant ou non le droit des conflits armés appelle une enquête pénale, et s'appuient notamment à cette fin sur des examens militaires préalables (comparables aux

⁵¹ *Military Prosecutor c. Lt A.M. and Sgt. A.G.*, C/125+126/09. Le lieutenant est en attente d'audience de prononcé de la sentence.

⁵² *Lt. Col. Geva c. Chief Military Prosecutor*, A/153/03, par. 50 (5 août 2004).

⁵³ Voir document de travail intitulé *The Principle of Complementarity In Practice*, p. 3, disponible en ligne à l'adresse <http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf> : « States have the first responsibility and right to prosecute international crimes ».

⁵⁴ Amichai Cohen and Yuval Shany, *A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killing Case*, 5 J. INT'L CRIM. JUS. 310, 318 (2007). Le Rapport du Conseil des droits de l'homme sur l'établissement des faits reconnaît ces principes. Il note que « la responsabilité d'enquêter sur les violations du droit international humanitaire et des droits de l'homme, d'engager des poursuites le cas échéant et de juger les auteurs incombe au premier chef aux autorités et institutions nationales » et que « les mécanismes de justice internationale » ne devraient intervenir que « lorsque les autorités nationales ne sont pas en mesure de le faire ou sont peu disposées à s'acquitter de cette obligation ». Rapport du Conseil des droits de l'homme sur l'établissement des faits, par. 1760.

enquêtes de commandement)⁵⁵. Les dispositifs de justice militaire de ces pays disposent aussi de cours martiales qui examinent les accusations portant sur des violations du droit des conflits armés⁵⁶.

74. Lorsqu'ils enquêtent sur des incidents, médiatisés ou non, lors desquels leurs soldats auraient commis des fautes, ces pays, comme Israël, sont parfois critiqués pour la lenteur de ces enquêtes ou des poursuites.

75. Les enquêteurs doivent certes agir avec diligence mais ils doivent avant tout prendre le temps qu'il faut pour mener une investigation approfondie et professionnelle et découvrir la vérité. Ils ne peuvent s'abstenir d'examiner les faits avec soin et exhaustivité ni de respecter le principe du droit à une procédure régulière.

1. Royaume-Uni

76. Le Royaume-Uni recourt à des enquêtes judiciaires et à des enquêtes indépendantes au sein de l'armée pour examiner les allégations de violations du droit des conflits armés⁵⁷. Traditionnellement, le Bureau de l'Avocat général des armées (Army Prosecuting Authority), récemment renforcé et étendu à l'ensemble des forces armées, examine les affaires qui lui sont renvoyées par la hiérarchie militaire⁵⁸. Par ses conseils juridiques, il aide les commandants et les autorités supérieures à décider quelles affaires sont renvoyées devant l'Avocat général des armées⁵⁹. Le Directeur des Services juridiques de l'armée (Army Legal Services), nommé par la Reine au même titre que l'Avocat général des armées, décide s'il y a lieu de renvoyer ces affaires en jugement et se charge des poursuites devant la cour martiale, la Standing Civilian Court et la Summary Appeal Court, ainsi que des appels devant la Courts-Martial Appeal Court et la Chambre des Lords (House of Lords)⁶⁰.

77. Le Directeur des Services juridiques de l'armée délègue ce pouvoir de décision à des fonctionnaires des Services juridiques nommés procureurs au service de l'Avocat général des armées⁶¹. Comme en Israël, ce dernier est placé sous la supervision générale du Procureur général et, à juste titre, indépendant de la hiérarchie militaire⁶². Le Bureau de l'Avocat général des armées nouvellement renforcé peut décider de ne pas poursuivre devant la cour martiale, de renvoyer

⁵⁵ Voir, par exemple, le Rapport Aitken, *An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004* (Enquête sur des violences et homicides délibérés en Iraq en 2003 et 2004) 25 janvier 2008, disponible en ligne à l'adresse http://www.mod.uk/NR/rdonlyres/7AC894D3-1430-4AD1-911F-8210C3342CC5/0/aitken_rep.pdf (le « Rapport Aitken ») (décrivant les procédures d'enquête relatives sur les violations du droit des conflits armés au Royaume-Uni); et la directive n° 2311.01E du Département de la défense, *Dept. Of Defense Law of War Program*, 9 mai 2006 (décrivant les procédures d'enquêtes sur les « incidents à signaler » concernant le droit des conflits armés aux États-Unis).

⁵⁶ Voir, par exemple, Victor Hansen, *Changes Made in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn From this Revolution*, 16 TUL. J. INT'L & COMP. L. 419 (2008) (décrivant les systèmes de cour martiale des États-Unis, du Royaume-Uni et du Canada).

⁵⁷ Voir, d'une manière générale, le Rapport Aitken.

⁵⁸ Voir *HM Crown Prosecution Inspectorate's Follow-Up Report on the Army Prosecuting Authority*, février 2009, p. 1.

⁵⁹ Rapport Aitken, par. 28.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

l'affaire devant le commandant concerné ou de la renvoyer en jugement devant la cour martiale⁶³. Comme l'Avocat général des armées, le Directeur général des Services juridiques de l'armée est chargé de fournir des conseils juridiques à la hiérarchie militaire et de poursuivre les contrevenants⁶⁴.

78. Les incidents ne justifiant pas de renvoi devant le Bureau de l'Avocat général des armées font l'objet d'une enquête pour faute au sein du dispositif de justice militaire, sous la forme de mesures administratives, d'une enquête informelle ou d'une enquête formelle, sur décision d'une commission d'enquête⁶⁵.

2. États-Unis

79. En cas d'allégation de violation du droit des conflits armés, les États-Unis confèrent un pouvoir d'enquête indépendant à plusieurs agents du Département de la défense et des différentes armes⁶⁶. Les procédures d'enquête des États-Unis suivent en général la même pratique qu'en Israël. Lorsque se produit un « incident à signaler »⁶⁷ relevant du droit des conflits armés, le chef de commandement est tenu d'en aviser immédiatement la chaîne hiérarchique⁶⁸. L'officier supérieur recevant des informations relatives à une allégation de violation du droit des conflits armés procède à une enquête formelle ou plus souvent informelle pour réunir des éléments de preuve, évaluer la crédibilité des allégations et déterminer si une infraction a été commise⁶⁹. Le rapport remonte alors la chaîne hiérarchique jusqu'à l'officier du commandement opérationnel spécialisé et est transmis à l'organisme d'enquête militaire, qui détermine s'il y a lieu de procéder à une enquête pénale, et au Conseil général du Département de la défense⁷⁰.

80. Un exemple récent de cette procédure est l'enquête menée sur l'engagement militaire américain contre des insurgés Taliban en Afghanistan, qui a entraîné des pertes civiles. À cette occasion, les éléments militaires présents en Afghanistan ont effectué une enquête préliminaire sur l'incident⁷¹. À l'issue de cette enquête, le

⁶³ Voir *HM Crown Prosecution Inspectorate's Follow-Up Report on the Army Prosecuting Authority*, cf. note 58 *supra*, p. 1.

⁶⁴ Voir site Web des Services juridiques de l'armée britannique, Army Legal Services, à l'adresse <http://www.army.mod.uk/agc/9935.aspx>.

⁶⁵ Rapport Aitken, par. 36. Les enquêtes formelles ou informelles peuvent être indépendantes de la hiérarchie mais s'effectuent au sein de l'armée.

⁶⁶ Voir directive n° 2311.01E du Département de la défense, *Dept. Of Defense Law of War Program*, 9 mai 2006. Cette directive établit les procédures générales d'enquête concernant les incidents relevant du droit des conflits armés mais, comme on le verra ci-après, les enquêtes sont généralement ordonnées par la hiérarchie militaire ou les organes d'enquête militaires.

⁶⁷ Un « incident à signaler » se définit comme « une violation possible, soupçonnée ou alléguée du droit de la guerre reposant sur des informations crédibles, ou une conduite survenant lors d'opérations militaires en temps de paix qui constituerait une violation du droit de la guerre si elle se produisait durant un conflit armé ». Voir instruction du Président du Comité des chefs d'état-major (CJCSI) 5810.01C, par. 5 b).

⁶⁸ Voir directive n° 2311.01E du Département de la défense, 6.3-6.8; et instruction du Président du Comité des chefs d'état-major (CJCSI) 5810.01C, par. 7 a) à b).

⁶⁹ Voir instruction 5800.7D du Juge-Avocat général du Département de la marine (U.S. Dept. Of Navy, JAG Inst. 5800.7D), *Manual of the Judge Advocate General*, ch. 11 (15 mars 2004); Règle 15-6 du Département de l'armée de terre (U.S. Dept. of Army, Reg. 15-6), *Procedures for Investigating Officers and Boards of Officers* (2 novembre 2006).

⁷⁰ Voir directive n° 2311.01E du Département de la défense, 6.5.1-2 ; et instruction du Président du Comité des chefs d'état-major (CJCSI) 5810.01C, par. 7 c).

⁷¹ Résumé non classifié du commandement central, *US Central Command Investigation into Civilian Casualties in Farah Province, Afghanistan on 4 May 2009*.

commandant du Commandement central américain a ordonné à un général de l'armée de terre américaine basé dans un pays autre que l'Afghanistan de procéder à une enquête complète. Celui-ci a ensuite présenté son rapport final au commandant du Commandement central et aux principaux dirigeants. Ses conclusions et recommandations, selon lesquelles aucune violation du droit des conflits armés n'avait été commise mais il convenait de procéder à des améliorations opérationnelles, ont été approuvées par le commandant du Commandement central.

81. Les enquêtes pénales portant sur la faute d'un soldat américain sont effectuées notamment par le Centre d'enquête judiciaire de l'armée (United States Army Criminal Investigation Command, USACIDC)⁷², qui enquête sur les allégations de crimes de guerre et dans certains cas sur les crimes commis contre les forces de la coalition et le personnel du pays hôte⁷³. Le Centre ne se fixe pas de limite de temps pour ses enquêtes. Comme Israël, il prend le temps de mener une enquête professionnelle :

« Les enquêtes judiciaires durent aussi longtemps qu'il le faut pour établir la vérité et déterminer exactement ce qui s'est passé. Bien que le temps ait son importance, elles répondent davantage à des normes qu'à un calendrier. Le Centre des enquêtes judiciaires mène des enquêtes judiciaires approfondies et professionnelles, aussi longtemps qu'elles prennent »⁷⁴.

82. Si une enquête met au jour des éléments indiquant qu'il y a eu un acte répréhensible, une procédure est engagée devant la cour martiale, comme en Israël. Les procureurs des armées, appelés juges-avocats, sont libres de toute influence de la hiérarchie, même si dans l'organigramme ils sont soumis à son autorité. Ils conseillent l'« autorité convocatrice »⁷⁵, l'aidant à déterminer s'il y a lieu de renvoyer l'affaire en jugement devant une cour martiale, puis d'approuver, de modifier ou de rejeter les conclusions de celle-ci et les peines qu'elle prononce⁷⁶. Contrairement à ce qui se fait en Israël, les avocats généraux des armées américaines ne peuvent déclencher eux-mêmes les poursuites⁷⁷, et le système américain ne prévoit pas d'examen judiciaire indépendant de la décision d'engager ou non une procédure pénale.

⁷² Site Web du Centre d'enquête judiciaire de l'armée (U.S. Army Criminal Investigation Command), à l'adresse <http://www.cid.army.mil/mission.html>.

⁷³ Ibid.

⁷⁴ Foire aux questions du site Web du Centre d'enquête judiciaire de l'armée, disponible à l'adresse <http://www.cid.army.mil/faqs.html>.

⁷⁵ L'« autorité convocatrice » comprend « un officier en service et ses successeurs ». *Manual for Courts-Martial United States* (éd. 2008), Rules for Courts-Martial (Règlement des cours martiales), (« R.C.M. »), 103 6), disponible en ligne à l'adresse <http://www.jag.navy.mil/documents/mcm2008.pdf>.

⁷⁶ *Uniform Code of Military Justice*, art. 34 et 64, disponible en ligne à l'adresse <http://www.army.mil/references/UCMJ>. Comme l'Avocat général des armées, le Juge-avocat est chargé de fournir des conseils juridiques à la chaîne hiérarchique et de poursuivre les contrevenants au Code de justice militaire. Voir site Web du Juge-Avocat général de l'armée de terre, à l'adresse <http://www.goarmy.com/JobDetail.do?id=318> (les fonctionnaires du Juge-Avocat général poursuivent les auteurs d'infractions au Code de justice militaire et conseillent les commandants de tous niveaux sur les questions juridiques qui se posent); Site Web du Juge-Avocat général de l'armée de l'air, à l'adresse <http://www.af.jag.af.mil/shared/media/document/AFD-080502-052.pdf> (disposition similaire).

⁷⁷ Voir art. 401, 504, 505, 601, 1107 du R.C.M.

3. Australie

83. Dans le système juridique australien, en cas de plainte pour faute d'un soldat, le commandant ou supérieur hiérarchique peut ordonner une « évaluation rapide » (*quick assessment*) de l'incident. Comme l'enquête de commandement initiale qui se fait en Israël, celle-ci vise à déterminer si les allégations sont fondées et justifient de poursuivre les investigations⁷⁸.

84. L'officier chargé de l'évaluation rapide (*quick assessment officer*) procède à des entrevues informelles et recueille des éléments de preuve, puis établit un rapport et formule des recommandations. Il peut recommander de clore l'enquête s'il n'a pas suffisamment d'éléments pour considérer qu'il y a eu violation du droit des conflits armés ou d'autres textes juridiques ou, selon la nature de la violation présumée, de constituer une commission d'enquête, de nommer un enquêteur ou de procéder à une simple enquête de routine (le tout au sein de l'armée).

85. Si l'évaluation rapide porte à croire qu'il y a eu un acte répréhensible, l'officier qui en est chargé recommande que le Service d'enquête des forces armées australiennes (Australian Defence Force Inquiry Services, ADFIS) mène une enquête judiciaire. La recommandation est examinée par la chaîne hiérarchique. Si le Service d'enquête est saisi de l'affaire, il peut à son tour enquêter et convoquer une audience devant un magistrat militaire ou un chef de corps, ou encore saisir la police civile.

4. Canada

86. Dans le système canadien, c'est généralement le Service national des enquêtes qui est saisi des allégations concernant une violation *prima facie* du droit des conflits armés commise durant une activité opérationnelle⁷⁹. Le Service national des enquêtes, qui relève du Grand prévôt des Forces canadiennes⁸⁰, a pour mandat d'enquêter sur les « questions graves ou sensibles » touchant les Forces canadiennes au Canada et à l'étranger, notamment les violations présumées du droit des conflits armés⁸¹. S'il a connaissance d'allégations concernant une infraction pénale (qu'il en soit informé par la police militaire ou des membres des forces canadiennes ou d'autres sources), il examine les renseignements reçus et détermine s'il doit procéder à une enquête⁸². Si l'allégation ne semble pas répondre au critère de la question « grave ou sensible », l'enquête peut être menée par la police militaire ou le commandement. Les poursuites concernant des accusations graves sont menées par le Service canadien des poursuites militaires, qui relève du Directeur des poursuites militaires. Ce dernier agit sous la direction générale du Juge-avocat

⁷⁸ Voir instructions administratives du Ministère de la défense relatives à l'évaluation rapide (The Defence Instructions (General) – Quick Assessment (Defence Instructions), Admin 67-2) (7 août 2007), à l'adresse http://www.defence.gov.au/fr/Policy/ga67_02.pdf.

⁷⁹ Voir Service national des enquêtes des Forces canadiennes, Rapport annuel 2007, daté du 11 mars 2008, p. 11, disponible en ligne à l'adresse <http://www.vcds-vcemd.forces.gc.ca/cfpm-gpfc/cfp-ggp/nis-sne/ar-ra/2007/doc/nisar-snera-2007-fra.pdf>.

⁸⁰ Le processus d'enquête du Service national des enquêtes des Forces canadiennes, CFNIS 2009-02, 1^{er} mai 2009, disponible en ligne à l'adresse <http://news.gc.ca/web/article-fra.do?m=/index&nid=446989>.

⁸¹ Le processus d'enquête et d'accusation du système de justice militaire (Défense nationale du Canada), disponible en ligne à l'adresse <http://www.forces.gc.ca/jag/publications/Training-formation/ChargInves-EnqueAccu-fra.pdf>.

⁸² Le processus d'enquête du Service national des enquêtes des Forces canadiennes, CFNIS 2009-02, 1^{er} mai 2009.

général mais exerce ses pouvoirs et fonctions de façon indépendante⁸³. Le Service des poursuites militaires fournit des conseils juridiques à la police militaire du Service national des enquêtes, examine les accusations aux fins du procès devant la cour martiale (déterminant notamment s'il y a suffisamment d'éléments de preuve) et mène les poursuites devant la cour martiale⁸⁴.

87. Les faits qui semblent ne pas comporter d'acte répréhensible font l'objet d'une enquête sommaire s'ils sont mineurs et sans complication ou sont renvoyés devant une commission d'enquête militaire s'ils sont plus complexes⁸⁵. Dans les deux cas, si l'enquêteur reçoit des éléments de preuve qui le portent à croire qu'il y a eu un acte criminel, l'enquête est suspendue aux fins d'une éventuelle enquête pénale⁸⁶. Un soldat peut être cité à comparaître devant une commission d'enquête mais, comme lors des enquêtes de commandement israéliennes, une déclaration auto-incriminatrice ne peut être retenue contre lui devant une cour martiale ou lors d'un procès⁸⁷.

5. Résumé

88. En résumé, ces différents systèmes de justice militaire ont bien des points communs avec le système israélien. Ils comportent des examens de terrain, des enquêtes formelles et informelles, et des poursuites devant des cours martiales ou des juridictions équivalentes. Bien qu'ils diffèrent quelque peu entre eux et avec le système israélien, tous sont reconnus dans le monde entier comme suffisants pour enquêter sur les allégations de violations du droit des conflits armés. Il ressort également de cette étude comparative qu'une enquête sur de telles allégations peut prendre des semaines, des mois, voire des années. La longueur de l'enquête dépend de divers facteurs et le droit international coutumier ne fixe aucune norme concernant la vitesse de ces enquêtes, et encore moins une échéance qu'Israël aurait dépassée.

⁸³ Abrégé du Rapport annuel du Directeur des poursuites militaires, 2006-2007, disponible en ligne à l'adresse <http://www.forces.gc.ca/jag/publications/DMP-DPM/DMP-DPM-AR0607-fra.pdf>.

⁸⁴ Abrégé du Rapport annuel du Directeur des poursuites militaires, 2006-2007.

⁸⁵ Voir Défense nationale et Forces canadiennes, Directive et ordonnance administrative de la Défense (DOAD) 7002-1, 8 février 2002 (modifiée le 7 mai 2007), disponible en ligne à l'adresse <http://www.admfincs.forces.gc.ca/dao-doa/7000/7002-1-fra.asp> (la Commission d'enquête est convoquée pour « examiner un incident dont la signification ou la complexité sont inhabituelles »); DOAD 7002-2, 8 février 2002 (modifiée le 7 mai 2007), disponible en ligne à l'adresse <http://www.admfincs.forces.gc.ca/dao-doa/7000/7002-2-fra.asp> (une enquête sommaire est ordonnée pour « examiner un incident d'ordre mineur, de nature simple et sans complication »).

⁸⁶ DAOD 7002-1 et 7002-2 (disposant que le mandat de la commission d'enquête ou de l'enquête sommaire doit comprendre notamment le paragraphe suivant : « Si la CE [l'enquêteur] reçoit des éléments de preuve qui la portent à croire qu'il y a une allégation d'un acte criminel ou d'une infraction au code de discipline militaire, la CE [l'enquêteur] doit suspendre l'enquête, prévenir l'autorité convocatrice et soumettre l'affaire au représentant du JAG le plus proche pour son avis »). Comme l'Avocat général des armées, le Juge-Avocat général fournit des conseils juridiques à la hiérarchie et poursuit les contrevenants. Voir la page du Juge-Avocat général sur le site Web de la Défense nationale et des Forces canadiennes, disponible en ligne à l'adresse <http://www.forces.gc.ca/jag/office-cabinet/law-droit-eng.asp> (le Juge-Avocat général est le « conseiller juridique [...] des Forces canadiennes » dans divers domaines, notamment « le droit international et opérationnel » et « le droit pénal et les politiques sur la justice militaire », ainsi que le « dépôt des accusations en vue d'un procès devant une cour martiale » et les « poursuites en cour martiale »).

⁸⁷ *Meade c. Canada* [1991] 3 C.F. 365, 81 D.L.R. (4th) 757 (C.F. 1^{re} inst.), par. 9.

IV. Allégations relatives à des violations du droit des conflits armés commises pendant l'Opération de Gaza

89. Israël est conscient des préoccupations soulevées par son intervention à Gaza. Comme expliqué en détail dans le rapport *The Operation in Gaza* et comme mentionné plus haut, la stratégie délibérée du Hamas de se fondre parmi la population civile a compliqué l'objectif des FDI, à savoir atténuer la probabilité d'attaques délibérées menées contre des civils israéliens tout en évitant de faire du mal aux civils palestiniens. Les FDI ont d'ailleurs fait de très gros efforts pour mitiger les dommages qu'elles pouvaient causer. Elles ont fait suivre une formation intensive aux principes du droit des conflits armés à leur personnel; elles ont retardé ou réorienté certaines interventions afin d'épargner des vies humaines et ont même renoncé à certaines attaques; elles ont lancé de nombreux avertissements, sous différentes formes, avant de déclencher des attaques⁸⁸. Toutefois, les mesures prises par Israël pour se conformer au droit des conflits armés n'atténuent en rien les regrets qu'il ressent devant la perte de vies innocentes et les dégâts causés à des biens civils.

90. À la suite de son intervention à Gaza, Israël a pris plusieurs mesures concrètes afin de réaffirmer son engagement à enquêter de façon approfondie sur les allégations faisant état de violations du droit des conflits armés et, le cas échéant, à engager des poursuites :

- Israël a entrepris d'enquêter sur chaque plainte portant sur des allégations faisant état de violations pendant l'Opération de Gaza, indépendamment de la crédibilité de la source;
- L'Avocat général des armées a revu personnellement chaque plainte et, le cas échéant, le dossier de l'enquête ouverte par le commandement avant de décider d'ouvrir une enquête judiciaire;
- De son côté, le chef d'état-major général a ouvert six enquêtes de commandement spéciales afin de faire la lumière sur les allégations les plus graves⁸⁹;
- L'Avocat général des armées a enjoint au Bureau de l'avocat des armées pour les affaires opérationnelles de coopérer étroitement avec la Division des enquêtes criminelles de la police militaire dans le cadre des enquêtes criminelles, y compris avant qu'une décision d'engager des poursuites soit prise.

91. Au moment de l'établissement du présent rapport, les FDI avaient enquêté ou commencé à enquêter sur plus de 150 incidents qui se seraient produits pendant l'Opération de Gaza et qui auraient constitué des violations du droit des conflits armés. Dans de nombreux cas, elles se sont fondées sur leurs propres sources pour décider d'ouvrir une enquête. Dans d'autres, les affaires ont été portées à l'attention des autorités israéliennes par diverses filières, soit directement sous forme de plaintes déposées par des Palestiniens ou des organisations non gouvernementales, soit indirectement à la suite de reportages diffusés par les organes de presse ou de

⁸⁸ Voir *The Operation in Gaza: Factual and Legal Aspects*, par. 262 à 265.

⁸⁹ Cinq enquêtes de commandement spéciales ont été ouvertes dès la fin de l'opération et la sixième l'a été le 10 novembre 2009.

rapports publiés par des organisations non gouvernementales et d'autres sources, dont le rapport du Conseil des droits de l'homme sur l'établissement des faits.

92. La progression de ces enquêtes s'inscrit dans le cadre d'une démarche ordonnée qui vise à faire la lumière sur les faits invoqués et à préserver les droits des civils et du personnel militaire. Dans l'idéal, les enquêtes commenceraient plus tôt, se termineraient plus tôt et donneraient des résultats irréfutables. Toutefois, les conditions dans lesquelles elles se déroulent – situations de combat et situations faisant suite aux combats – ne sont pas idéales, ce qui complique la collecte d'éléments de preuve et la conduite des enquêtes. L'Opération de Gaza s'est terminée il y a un an, mais une enquête approfondie prend du temps.

93. Il ne faut pas sous-estimer les difficultés propres aux enquêtes sur les allégations faisant état de violations du droit des conflits armés sur le champ de bataille, notamment : l'impossibilité de protéger les lieux du crime pendant une bataille ou à l'issue d'une bataille, aux fins de la préservation des preuves scientifiques et physiques, lorsque l'ennemi contrôle le territoire; la possibilité que les éléments de preuve soient détruits pendant les combats ou que l'ennemi altère les lieux du crime; la nécessité de rappeler les soldats de réserve pour les interroger; la difficulté qu'il y a à localiser avec précision le théâtre d'un incident lorsque des appellations locales, populaires ou non officielles sont utilisées; la nécessité de localiser les civils appartenant à la partie adverse qui peuvent servir de témoins et de surmonter leur crainte légitime d'être soumis à des représailles de la part de leurs autorités⁹⁰.

94. Malgré ces difficultés, les FDI ont fait des progrès notables en ce qui concerne les enquêtes et en ont mené plusieurs à terme. À ce jour, quelques enquêtes ont donné lieu à des poursuites pour des manquements à la discipline et des infractions pénales. Dans d'autres cas, les enquêtes de commandement préliminaires ont été menées à terme et l'Avocat général des armées a procédé à son propre examen afin de déterminer si le dossier constitué justifiait une nouvelle enquête. Dans certains cas, il a conclu à l'absence d'actes répréhensibles et a clos l'enquête. Étant donné que différentes instances du système judiciaire israélien – Avocat général des armées, Ministre de la justice et Cour suprême – examineront plus avant nombre de ces dossiers, il est possible que des conclusions différentes se dégagent.

95. Israël publie périodiquement des renseignements détaillés sur l'état d'avancement des enquêtes relatives à l'Opération de Gaza⁹¹. Les sections ci-après font le point des enquêtes.

⁹⁰ Comme décrit plus bas, la Division des enquêtes criminelles de la police militaire a interrogé près de 100 Palestiniens au point de passage d'Erez, principalement en travaillant avec des organisations non gouvernementales qui assuraient la liaison avec la population civile de Gaza.

⁹¹ Voir par exemple *The Operation in Gaza: Factual and Legal Aspects*. Israël publie aussi des informations sur les enquêtes sur le site Web du Ministère des affaires étrangères : <http://www.mfa.gov.il/MFA>.

A. Enquêtes de commandement

1. Ouverture de cinq enquêtes de commandement spéciales au lendemain de l'Opération de Gaza

96. Le 20 janvier 2009 – deux jours à peine après la fin de l'Opération de Gaza –, le chef d'état-major général des FDI, le général de corps d'armée Ashkenazi, a ordonné l'ouverture de cinq enquêtes de commandement spéciales sur une série d'allégations faites par des organisations internationales, des organisations non gouvernementales et divers organes de presse et en a confié la direction à cinq colonels qui avaient une solide expérience du service en campagne et du commandement et qui n'étaient pas directement liés aux incidents faisant l'objet des enquêtes ni ne faisaient partie de la chaîne de commandement directe des opérations à Gaza. Il ne s'agissait pas de simples examens de routine, mais d'enquêtes sur cinq types d'allégations faisant état de violations du droit des conflits armés et regroupant 30 incidents :

- Plaintes concernant des incidents ayant affecté de nombreux civils qui ne participaient pas directement aux hostilités⁹²;
- Plaintes concernant des incidents au cours desquels des installations de l'ONU ou d'autres organisations internationales ont essuyé des tirs ou ont été endommagées lors de l'Opération de Gaza⁹³;
- Incidents faisant intervenir des tirs contre des installations, des établissements, des équipes et des véhicules médicaux⁹⁴;

⁹² Le mandat donné par le chef d'état-major général concernant les allégations sur lesquelles enquêter était sans équivoque. Il s'agissait par exemple d'enquêter sur l'attaque menée contre un haut responsable du Hamas, Nizar Rian, qui aurait provoqué la mort de 15 autres personnes (4 janvier), sur l'attaque contre la mosquée de Beit Lahia, dans laquelle huit personnes auraient trouvé la mort (3 janvier) et sur l'attaque contre la mosquée d'Imad Aq'al, qui aurait fait sept morts, dont quatre mineurs (29 décembre). Le mandat fournissait des détails, lorsqu'ils étaient connus, sur les dates et le lieu des attaques, le nombre de victimes, ainsi que le nom, le sexe et les liens de parenté des victimes supposées. Il prévoyait aussi que toute la lumière soit faite sur les ordres et consignes donnés au sein des FDI (aux différents échelons de la chaîne de commandement avant et pendant l'opération) ainsi que sur les mesures prises pour éviter d'infliger des dommages disproportionnés aux civils qui ne prenaient pas une part active aux hostilités, les distances de sécurité à respecter pour ces civils en différentes circonstances lorsque différentes armes étaient utilisées.

⁹³ Le mandat donné par le chef d'état-major général concernait quatre incidents bien particuliers, tels que les tirs dirigés contre l'école de Fakhura à Jabaliyah (6 janvier) et les dégâts causés à l'école de l'UNRWA comme suite à une frappe des forces aériennes qui aurait provoqué la mort de trois personnes. Les enquêteurs avaient pour consigne de recueillir des renseignements relatifs à l'utilisation délibérée par le Hamas d'installations et de bâtiments de l'ONU afin de s'y abriter ou de s'en servir comme position de tir et de réunir des renseignements sur les ordres et consignes donnés au sein des FDI (aux différents échelons de la chaîne de commandement avant et pendant l'opération) ainsi que sur les mesures prises pour éviter d'infliger des dommages aux équipes, installations, bâtiments et véhicules de l'ONU et d'autres organisations internationales. Le mandat a été élargi par la suite afin de couvrir d'autres incidents survenus dans la bande de Gaza entre le 27 décembre 2008 et le 19 janvier 2009, sur lesquels enquêtait la Commission d'enquête du Siège de l'ONU.

⁹⁴ Le mandat donné par le chef d'état-major général concernait sept incidents bien particuliers, tels que les frappes dirigées contre une équipe médicale qui portait secours à un blessé perdant son sang dans la zone de Jabel Kashef, dans la partie nord-est de la bande de Gaza, et qui ont

- Destruction de biens et d'infrastructures privés par les forces terrestres⁹⁵;
- Utilisation d'armes au phosphore⁹⁶.

97. Les enquêtes ont porté sur l'amélioration des opérations, mais aussi et surtout sur l'évaluation d'incidents ayant touché des civils et des personnes et installations bénéficiant d'une protection spéciale. Les enquêteurs avaient notamment pour mandat de procéder à un examen approfondi des ordres et consignes donnés au sein des FDI (aux différents échelons de la chaîne de commandement avant et pendant l'opération) afin d'éviter d'infliger des dommages, y compris les instructions concernant les mesures à prendre pour éviter d'infliger des dommages disproportionnés aux civils qui ne prenaient pas une part active aux hostilités, les distances de sécurité à respecter pour ces civils en différentes circonstances lorsque différentes armes étaient utilisées.

98. En application des procédures standard des FDI relatives aux enquêtes de commandement, les enquêteurs ont travaillé en toute indépendance, ont eu accès à tous les éléments disponibles et ont pu interroger à leur guise les membres des forces de défense concernés. Ils se sont entretenus avec de nombreux soldats et officiers et ont réuni des documents et d'autres éléments provenant de sources extérieures. Ils ont examiné les journaux des opérations, des séquences vidéo et des photographies prises par des avions, des extraits de rapports d'analyse, les minutes

provoqué la mort d'un médecin, le docteur Ihmad Madhoun, d'un ambulancier, Abu Hesri, et du blessé (31 décembre) et les tirs de mortier dirigés contre la maison de la famille Dababish à Sheik Raduan, alors qu'une équipe médicale était sur les lieux afin d'évacuer des blessés, tirs à l'issue desquels un membre de l'équipe médicale a trouvé la mort (3 janvier). Le mandat prévoyait de recueillir des éléments d'information sur les tirs à l'intérieur ou à proximité d'installations, de bâtiments ou de véhicules médicaux et sur l'utilisation délibérée par le Hamas d'installations, de bâtiments et de véhicules médicaux afin d'engager des actes d'hostilités, de s'en servir comme position de tir ou de faire circuler des armes et des combattants, et de faire la lumière sur les ordres et consignes donnés au sein des FDI (aux différents échelons de la chaîne de commandement avant et pendant l'opération) ainsi que sur les mesures prises pour éviter d'infliger des dommages aux équipes, installations, bâtiments et véhicules médicaux.

⁹⁵ Le mandat donné par le chef d'état-major général portait sur les aspects suivants : a) ordres et consignes donnés à différents échelons de la chaîne de commandement et déterminés par eux (depuis le quartier général jusqu'aux forces déployées sur le terrain, avant et pendant l'opération) concernant la destruction des bâtiments et infrastructures; b) étendue des dégâts infligés aux bâtiments et infrastructures dans les différents secteurs, vue sous les angles suivants : stades de l'opération, unités opérationnelles en cause, types de bâtiments et d'infrastructures endommagés, objet de la destruction, modalités de destruction (intervention du génie, méthodes de destruction, vérification de l'évacuation des résidents), destruction ayant fait l'objet d'un plan ou décidée de façon spontanée sur le terrain; c) informations obtenues par les services de renseignement ou informations opérationnelles concernant la nature des méthodes offensives et défensives de l'ennemi, et les infrastructures de l'ennemi recensées et décrites par nos forces, qui motivent les destructions sur un plan opérationnel.

⁹⁶ Le mandat donné par le chef d'état-major général portait sur les aspects suivants : a) types et quantités d'armes au phosphore allouées aux forces avant et pendant l'opération; b) types et quantités d'armes au phosphore effectivement utilisées pendant l'opération; c) but et utilisations militaires des armes au phosphore (par exemple, écran de fumée, marquage), cibles visées par ces armes (par exemple, zones ouvertes, foyers d'incendie en zones habitées) classées selon le type d'arme; d) consignes relatives aux différents types d'armes; e) consignes d'ouverture du feu applicables à chacune de ces armes, y compris les distances de tir applicables aux armes au phosphore (plus précisément, l'existence de limites concernant l'utilisation de ces armes dans des zones habitées); f) écarts, le cas échéant, par rapport aux consignes et aux ordres concernant l'utilisation d'armes au phosphore et raisons fondamentales les motivant.

de réunions de débriefing militaire, des documents provenant des services de renseignement, les règles d'engagement pertinentes et les plans opérationnels ainsi que beaucoup d'autres éléments. Les militaires interrogés ont été invités à coopérer avec les enquêteurs, ce que chacun a fait.

99. Les enquêtes spéciales ont révélé quelques erreurs opérationnelles ou dues aux services de renseignement. Par exemple, dans le cas d'une enquête spéciale, il est apparu que les FDI avaient visé par erreur le domicile de la famille Al Daiya au lieu de l'endroit voisin où étaient entreposées des armes, provoquant des pertes civiles. Dans un autre cas relatif aux tirs essuyés par la voiture de tête d'un convoi de l'UNRWA, l'enquête a révélé des erreurs de communication lors de la coordination des déplacements du convoi. Afin d'éviter ce type d'erreurs, le chef d'état-major général des FDI, le général de corps d'armée Gabi Ashkenazi, a ordonné de mettre en évidence ou d'explicitier certaines instructions permanentes dans certaines situations de commandement.

100. Les enquêtes spéciales ont également révélé des cas où des soldats et des officiers des FDI avaient enfreint les règles d'engagement. Par exemple, dans un cas, un général de brigade et un colonel ont autorisé des tirs d'obus explosifs qui ont atterri sur une zone habitée, en violation des ordres des FDI qui limitent le recours à des tirs d'artillerie à proximité de zones habitées. Le commandant du Commandement sud a engagé une action disciplinaire contre les deux officiers pour abus d'autorité ayant mis en danger la vie d'autrui.

101. À l'issue de leurs travaux, les enquêteurs ont présenté leurs conclusions au chef d'état-major général, le général de corps d'armée Gabi Ashkenazi, qui a adopté leurs recommandations⁹⁷. Celui-ci a ordonné aux FDI de mettre en application les enseignements touchant une vaste gamme de questions, de faire mieux connaître ou d'explicitier certaines instructions permanentes, d'établir de nouvelles lignes directrices concernant l'emploi de diverses munitions et de prendre des mesures afin d'intensifier la coordination avec les organisations et entités humanitaires.

102. Les conclusions et le dossier des éléments de preuve de chaque enquête spéciale ont été communiqués à l'Avocat général des armées à titre d'information afin de l'aider dans son analyse des allégations. Le 19 janvier 2010, l'Avocat général des armées a rendu publique son opinion et s'est exprimé sur chacune des cinq enquêtes spéciales.

i) *Plaintes concernant des incidents ayant affecté de nombreux civils qui ne participaient pas directement aux hostilités*

103. L'enquête sur les allégations de ce type a porté sur sept incidents. Certaines constatations formulées lors de l'enquête sont expliquées en détail dans le rapport intitulé *The Operation in Gaza*⁹⁸.

104. Dans quatre des sept incidents, l'Avocat général des armées a jugé qu'il n'y avait pas lieu d'ouvrir une enquête judiciaire à l'issue de son enquête et de son

⁹⁷ Voir la déclaration faite par le porte-parole des FDI, *Conclusion of Investigations into Central claims and issues in Operation Case Lead* (22 avril 2009), disponible à l'adresse suivante : <http://idfspokesperson.com/2009/04/22/idfannouncement-findings-from-cast-lead-investigations/>.

⁹⁸ *The Operation in Gaza; Factual and Legal Aspects*, par. 381 à 403.

examen⁹⁹. Dans trois cas, les enquêtes sont encore en cours¹⁰⁰. L'enquête spéciale se poursuit dans le cas de deux affaires, compte tenu de la complexité des circonstances. La troisième affaire a trait à une allégation faisant état d'une frappe dirigée contre la mosquée d'Al Maquadme, affaire que le chef d'état-major général a renvoyée aux fins d'une nouvelle enquête spéciale (voir ci-après).

ii) *Plaintes concernant des incidents au cours desquels des installations de l'ONU ou d'autres organisations internationales ont essuyé des tirs ou ont été endommagées lors de l'Opération de Gaza*

105. L'enquête sur les allégations de ce type a porté sur 13 incidents. Certaines constatations formulées lors de l'enquête sont expliquées en détail dans le rapport intitulé *The Operation in Gaza*¹⁰¹.

106. L'Avocat général des armées a examiné les conclusions et le dossier complet de l'enquête spéciale. Il a également examiné d'autres éléments, tels que les éléments d'information figurant dans le rapport du Conseil des droits de l'homme sur l'établissement des faits et le rapport de la Commission d'enquête du Siège de l'ONU sur certains incidents qui se sont produits dans la bande de Gaza entre le 27 décembre 2008 et le 19 janvier 2009.

107. L'Avocat général des armées a jugé qu'il n'y avait pas lieu d'ouvrir une enquête judiciaire pour l'un quelconque des 13 incidents. S'agissant de deux de ces incidents, il a confirmé les décisions tendant à engager une procédure disciplinaire à l'encontre de membres des FDI.

108. L'un de ces incidents a trait aux dommages qui auraient été infligés aux bâtiments de l'UNRWA à Tej El Hawa¹⁰². L'enquête spéciale a révélé que les FDI avaient procédé à des tirs d'artillerie pendant une opération militaire à Tej El Hawa, en violation des règles d'engagement qui interdisent le recours à des tirs d'artillerie à proximité de zones habitées. Le commandant du Commandement sud a engagé une action disciplinaire contre un général de brigade et un colonel pour abus d'autorité ayant mis en danger la vie d'autrui.

109. Comme noté dans le rapport *The Operation in Gaza*, le Secrétaire général de l'ONU a créé une commission chargée d'enquêter sur un certain nombre d'incidents au cours desquels des installations de l'ONU ont été endommagées. Cette commission a opéré en marge des enquêteurs israéliens et Israël a coopéré pleinement avec elle, lui communiquant le résultat de ses enquêtes internes et des informations détaillées sur les incidents en question. Le Secrétaire général a félicité Israël de sa coopération poussée¹⁰³.

⁹⁹ Attaque qui aurait provoqué la mort d'un haut responsable du Hamas, Nizar Rian, et de 15 autres personnes, attaque contre la mosquée d'Al Rabat, attaque contre un camion transportant des bonbonnes d'oxygène et attaque contre le domicile de la famille du docteur Abu El Eish.

¹⁰⁰ Attaque contre la mosquée d'Imad Aq'al, frappe contre le domicile de la famille Al Daiya et attaque contre la mosquée d'Al Maquadme.

¹⁰¹ *The Operation in Gaza: Factual and Legal Aspects*, par. 330 à 369.

¹⁰² *Ibid.*, par. 341 à 347.

¹⁰³ Voir la lettre adressée par le Secrétaire général au Président du Conseil de sécurité le 4 mai 2009, dans laquelle le Secrétaire général a exprimé sa gratitude au Gouvernement israélien pour l'assistance qu'il avait fournie à la Commission (S/2009/250).

110. Comme suite à l'enquête de la Commission de l'ONU et nonobstant les réserves qu'il nourrit à l'égard de certains aspects du rapport de la Commission, Israël a engagé un dialogue avec l'ONU concernant toutes les questions soulevées lors de l'examen des incidents. Le 22 janvier 2010, le Secrétaire général a remercié Israël de sa démarche coopérative dans le cadre de ces discussions et confirmé que tous les aspects financiers liés à ces incidents avaient été réglés de façon satisfaisante¹⁰⁴.

iii) *Incidents faisant intervenir des tirs contre des installations, des établissements, des équipes et des véhicules médicaux*

111. L'enquête sur les allégations de ce type a porté sur 10 incidents. Certaines constatations formulées lors de l'enquête sont expliquées en détail dans le rapport intitulé *The Operation in Gaza*¹⁰⁵.

112. L'Avocat général des armées a jugé qu'il n'y avait pas lieu d'ouvrir une enquête judiciaire pour l'un quelconque des 10 incidents.

iv) *Destruction de biens et d'infrastructures privés par les forces terrestres*

113. L'enquête a porté sur des allégations générales selon lesquelles les FDI auraient détruit de propos délibéré des biens et infrastructures privés pendant l'Opération de Gaza. Elle n'a pas été axée sur des incidents particuliers faisant l'objet de plaintes ou signalés dans des rapports. Certaines constatations formulées lors de l'enquête sont expliquées en détail dans le rapport intitulé *The Operation in Gaza*¹⁰⁶.

114. L'Avocat général des armées a examiné les conclusions et le dossier complet de l'enquête. Il a noté que le droit des conflits armés interdisait la destruction de biens privés, hormis dans les cas où leur destruction était justifiée par des impératifs militaires. Il a également souligné que les conclusions de l'enquête spéciale montraient qu'Israël avait respecté les obligations découlant du droit des conflits armés. À cet égard, l'Avocat général des armées a noté que l'ampleur des destructions ne suffisait pas en elle-même à établir qu'il y avait eu violation du droit des conflits armés.

115. Étant donné que l'enquête avait une portée limitée et concernait des questions générales, il a été décidé de faire procéder à une enquête de commandement pour les incidents signalés après la clôture de l'enquête spéciale de commandement. L'Avocat général des armées a insisté sur l'importance qu'il y avait à enquêter soigneusement sur chacun des incidents.

116. L'Avocat général des armées a également souligné à quel point il importait de disposer de règlements et d'ordres sans équivoque, ainsi que d'une doctrine de combat claire, s'agissant de la démolition de structures et d'infrastructures. Les FDI se sont déjà dotées de tels règlements et d'une telle doctrine de combat.

¹⁰⁴ Point de presse du porte-parole (22 janvier 2010), disponible à l'adresse suivante : <http://www.unmultimedia.org/radio/english/detail/89687.html>.

¹⁰⁵ *The Operation in Gaza: Factual and Legal Aspects*, par. 370 à 380.

¹⁰⁶ *Ibid.*, par. 436 à 445.

v) *Utilisation d'armes au phosphore*

117. L'enquête a porté sur l'emploi d'armes contenant du phosphore par les FDI pendant l'Opération de Gaza. Elle a été axée sur le nombre et le type d'armes au phosphore utilisées pendant l'opération, les raisons pour lesquelles elles ont été utilisées, les consignes et règles d'engagement pertinentes, et la suite donnée à ces consignes et règles. Certaines constatations formulées lors de l'enquête sont expliquées en détail dans le rapport intitulé *The Operation in Gaza*¹⁰⁷.

118. L'Avocat général des armées a examiné le dossier complet de l'enquête spéciale de commandement. Il a conclu que l'emploi de munitions au phosphore blanc pendant l'opération cadrerait avec les obligations d'Israël découlant du droit international.

119. S'agissant des projectiles fumigènes, l'Avocat général des armées a estimé que le droit international n'interdisait pas l'emploi de projectiles au phosphore. Ces projectiles ne sont pas des armes incendiaires, au sens du Protocole sur l'interdiction ou la limitation de l'emploi des armes incendiaires¹⁰⁸, car ils ne sont conçus ni pour déclencher des incendies ni pour provoquer des brûlures. L'Avocat général des armées a également déterminé que pendant l'Opération de Gaza, les FDI avaient recouru à des projectiles fumigènes uniquement à des fins militaires, par exemple pour camoufler les forces blindées israéliennes derrière un écran de fumée et les protéger ainsi des unités antichars du Hamas.

120. L'Avocat général des armées a jugé qu'il n'y avait pas lieu de prendre des mesures disciplinaires ou autres du fait de l'emploi d'armes contenant du phosphore par les FDI, puisqu'il n'y avait pas eu de violation du droit des conflits armés. Toutefois, dans son opinion, l'Avocat général n'a pas abordé un certain nombre de plaintes reçues après la clôture de l'enquête et qui font l'objet d'une enquête distincte.

vi) *Conclusions*

121. L'Avocat général des armées a conclu son opinion sur les cinq enquêtes de commandement spéciales en soulignant l'engagement des FDI à se conformer au droit des conflits armés et son intention d'enquêter de façon approfondie sur toute allégation de violation par les FDI. Il a noté que les preuves réunies durant les enquêtes spéciales attestaient des efforts faits par les FDI pour veiller au respect du droit et pour réduire au minimum les dommages causés aux civils.

122. L'Avocat général des armées a constaté que les enquêtes avaient révélé des lacunes opérationnelles et des erreurs d'appréciation dans l'exercice du pouvoir discrétionnaire. Toutefois, étant donné la difficulté qu'il y avait à prendre des décisions sous pression, notamment lorsque l'adversaire se retranchait parmi la population civile, ces erreurs ne constituaient pas en elles-mêmes une violation du droit des conflits armés.

¹⁰⁷ Ibid., par. 405 à 435.

¹⁰⁸ Protocole III de la Convention sur l'interdiction ou la limitation de l'emploi de certaines armes classiques qui peuvent être considérées comme produisant des effets traumatiques excessifs ou comme frappant sans discrimination. Israël n'est pas partie au Protocole III.

123. L'Avocat général des armées a également souligné l'importance qu'il y avait à mettre en application les enseignements opérationnels tirés des enquêtes de commandement spéciales.

2. Enquête de commandement spéciale supplémentaire

124. Outre les cinq premières enquêtes de commandement spéciales, l'Avocat général des armées a recommandé de faire prescrire par le Chef d'état-major général une enquête de commandement spéciale supplémentaire afin d'évaluer certains allégations évoquées dans le rapport du Conseil des droits de l'homme sur l'établissement des faits. Le Chef d'état-major général y a souscrit, et le 10 novembre 2009, a nommé pour la mener un autre colonel ayant beaucoup d'expérience du terrain et du commandement, qui n'avait pas de rapport direct avec les incidents en cause.

125. L'enquête spéciale supplémentaire est consacrée à trois séries d'allégations issues du rapport du Conseil des droits de l'homme sur l'établissement des faits. L'une d'entre elles a trait à la résidence Al-Samouni, où une attaque des FDI aurait causé des blessures et la mort de plusieurs douzaines de civils qui y cherchaient refuge¹⁰⁹. Une autre série d'allégations soumise à l'enquête supplémentaire a trait à des détenus palestiniens qui auraient été maltraités par les FDI¹¹⁰. Une troisième concerne une attaque qui aurait été dirigée contre la mosquée Al-Maquadme¹¹¹.

126. L'attaque qui aurait été dirigée contre la mosquée Al-Maquadme a d'abord été examinée au cours de l'une des cinq premières enquêtes spéciales. L'enquêteur chargé de l'enquête de commandement spéciale avait conclu à l'époque que la mosquée n'avait pas été touchée durant une opération militaire. Après avoir examiné les constatations de cette enquête, ainsi que la relation donnée de l'incident dans la presse et les rapports des organisations non gouvernementales (dont certains publiés après la conclusion de l'enquête), l'Avocat général des armées a recommandé de faire réexaminer les allégations au moyen d'une nouvelle enquête de commandement spéciale.

127. Lorsqu'il aura conclu ses investigations, l'enquêteur chargé de l'enquête de commandement spéciale présentera ses constatations à l'Avocat général des armées,

¹⁰⁹ Voir Rapport du Conseil des droits de l'homme sur l'établissement des faits, par. 712 à 722. Il entrerait dans le mandat de l'enquête d'évaluer les allégations selon lesquelles les FDI auraient délibérément tiré sur des civils dans la résidence Al-Samouni à Zeitoun, et empêché l'accès d'équipes médicales ainsi que l'évacuation des blessés, causant la mort de plus de 20 civils. L'Avocat général des armées avait précédemment fait ouvrir une enquête pénale sur d'autres allégations concernant les coups de feu qu'auraient essuyés des membres de la famille Al-Samouni. Voir Rapport, par. 709 à 711.

¹¹⁰ Voir le rapport du Conseil des droits de l'homme sur l'établissement des faits, par. 1107 à 1126. Il entrerait dans le mandat de l'enquête d'évaluer les allégations selon lesquelles les FDI avaient tenu les détenus dans des conditions cruelles, inhumaines et dégradantes, dans des trous dans le sable, exposés au froid et aux intempéries, menottés et les yeux bandés, sans nourriture ni possibilité de se soulager, et pendant la nuit dans des camions, menottés, sans avoir assez de couvertures.

¹¹¹ Voir le rapport du Conseil des droits de l'homme sur l'établissement des faits, par. 822 à 830. Il entrerait dans le mandat de l'enquête d'examiner les allégations selon lesquelles à l'heure de la prière (entre 17 et 18 heures), une explosion se serait produite dans l'entrée de la mosquée, causant la mort de 15 civils.

qui déterminera alors s'il y a des raisons de soupçonner une violation du droit des conflits armés, justifiant de pousser plus loin l'investigation.

3. Autres enquêtes de commandement

128. Outre les enquêtes de commandement spéciales dont il vient d'être question, l'Avocat général des armées a prescrit une enquête de commandement sur des plaintes concernant environ 90 incidents. Il s'agit généralement d'allégations de blessures ou de décès et de destruction de biens civils durant l'Opération de Gaza.

129. Comme il a été expliqué plus haut, des blessures subies par des civils et des biens civils endommagés durant les hostilités ne constituent pas en soi un motif d'ouverture d'une enquête judiciaire sur d'éventuelles violations du droit des conflits armés. Pour qu'il y ait suspicion raisonnable d'une telle violation, il faut des circonstances supplémentaires. Comme il a été également expliqué plus haut, c'est après avoir examiné les constatations et les dossiers d'une enquête de commandement, ainsi que la plainte et les autres informations pertinentes, que l'Avocat général des armées décidera s'il y a ou non lieu de prescrire une enquête judiciaire sur chacun des incidents en cause.

130. Les FDI ont achevé jusqu'à présent 45 des quelque 90 enquêtes de commandement prescrites par l'Avocat général des armées. Comme il est dit plus loin, après avoir examiné les constatations et les dossiers d'une enquête de commandement, ainsi que les autres informations pertinentes, il a fait ouvrir une enquête judiciaire sur 7 de ces incidents. Il a conclu que les autres incidents sur lesquels ont porté les enquêtes achevées ne donnaient pas lieu à une suspicion raisonnable de violation du droit des conflits armés. Les enquêtes concernant les 45 autres incidents se poursuivent.

B. Enquêtes judiciaires

131. L'Avocat général des armées a jusqu'à présent fait ouvrir une enquête judiciaire sur 36 incidents distincts. Il a déterminé que la nature des incidents faisant l'objet des allégations, et/ou les éléments de preuve versés au dossier, pouvaient faire raisonnablement soupçonner qu'il y avait pu avoir comportement délictueux.

132. Des équipes spéciales d'investigation de la Division des enquêtes criminelles de la police militaire ont été nommées à seule fin d'enquêter sur les plaintes concernant l'Opération de Gaza. Le Commandant de la Division encadre ces équipes d'enquêteurs professionnels, avec la participation du Bureau de l'Avocat des armées pour les affaires opérationnelles. Les équipes comprenaient 16 enquêteurs, ainsi que des interprètes parlant arabe.

133. La Division a demandé l'aide d'organisations non gouvernementales (B'Tselem, par exemple) pour retrouver des plaignants et des témoins palestiniens et coordonner leur arrivée au point de passage d'Erez vers Gaza, afin de donner la possibilité d'entretiens et de questions. Les enquêteurs de la Division ont recueilli jusqu'à présent le témoignage de près de 100 plaignants et témoins palestiniens, ainsi que d'environ 500 militaires et commandants des FDI. Ils ont déjà consacré des milliers d'heures de travail à leurs investigations.

134. Des 36 incidents pour lesquels a été ouverte jusqu'à présent une enquête judiciaire, 19 concernaient des coups de feu dirigés contre des civils. Pour la plupart

d'entre eux (12 sur les 19), l'Avocat général des armées a fait ouvrir directement une enquête judiciaire (sans demander une enquête de commandement ou attendre les résultats d'une telle enquête), tandis que certains (7 d'entre eux) ont donné lieu à l'ouverture d'une enquête judiciaire après que l'Avocat général des armées a examiné les constatations et les dossiers réunis au cours d'enquêtes de commandement et conclu qu'il y avait suspicion raisonnable de comportement délictueux des FDI.

135. Les 17 autres incidents font l'objet d'allégations d'utilisation de civils comme boucliers humains, de mauvais traitements infligés à des détenus et des civils, de pillage et de vol. Dans ces cas, l'Avocat général des armées a déterminé que ces allégations, si elles étaient vraies, concernaient des événements qui allaient manifestement au-delà de toute activité opérationnelle légitime, et conclu qu'il y avait lieu de soupçonner raisonnablement un comportement délictueux des FDI.

136. Les allégations sur lesquelles a été ouverte une enquête judiciaire provenaient de sources diverses, dont des articles et des reportages parus dans la presse locale et internationale, des lettres de Palestiniens ou de leurs avocats, des lettres et des rapports d'organisations non gouvernementales (Public Committee against Torture in Israel, Human Rights Watch, Amnesty International, Médecins sans frontières...). Certains de ces incidents sont également décrits dans le rapport du Conseil des droits de l'homme sur l'établissement des faits. L'Avocat général des armées a fait ouvrir directement plusieurs enquêtes judiciaires après avoir eu entendu que des militaires des FDI avaient décrit des comportements (le leur propre ou celui d'autres militaires) qui pouvaient constituer une violation du droit des conflits armés.

137. De ces 36 enquêtes judiciaires, l'une a déjà abouti à la mise en accusation d'un militaire des FDI, qui a été reconnu coupable¹¹². L'Avocat général des armées a usé de ses pouvoirs discrétionnaires pour clore 7 enquêtes judiciaires sans engager de poursuites parce que les plaignants ont refusé de témoigner et/ou qu'il n'y avait pas d'éléments de preuve suffisants d'une violation criminelle¹¹³. Les 28 autres enquêtes se poursuivent.

C. Incidents dont il est question dans le rapport du Conseil des droits de l'homme sur l'établissement des faits

138. Les incidents faisant l'objet d'enquêtes de commandement et d'enquêtes judiciaires dont il est question plus haut comprennent les 34 incidents dont il est

¹¹² Au cours d'une perquisition dans une résidence palestinienne, un soldat israélien a volé une carte de crédit appartenant à l'un des occupants et l'a ensuite utilisée pour retirer l'équivalent de plus de 400 dollars. Ayant reconnu les faits, il a passé sept mois et demi en prison. La cour martiale avait déclaré ce qui suit : « Le délit de pillage est une atteinte au devoir qui est celui de tout militaire des FDI, de préserver la dignité de l'être humain, qui ne dépend ni de l'origine, ni de la religion, ni de la nationalité, ni du sexe, ni de la situation sociale, ni des fonctions. En outre, en commettant le délit de pillage, l'accusé a porté atteinte au code moral de combat, à l'esprit des FDI, en faisant usage de son pouvoir et de ses armes pour d'autres fins que l'exécution de sa mission militaire. » *Military Prosecutor c. Sergeant A.K.*, S/153/09, par. 12 (11 août 2009).

¹¹³ Comme il a été noté plus haut, la décision de l'Avocat général des armées, de classer ces affaires, peut être révisée par le Ministre de la justice et la Cour suprême.

longuement question dans le rapport du Conseil des droits de l'homme sur l'établissement des faits¹¹⁴.

139. Au 15 septembre 2009, date à laquelle a été publié le rapport du Conseil des droits de l'homme sur l'établissement des faits, Israël était déjà en train d'enquêter sur 22 de ces 34 incidents. Le rapport a porté à l'attention des FDI pour la première fois les 12 autres incidents, dont 10 qui concernaient un préjudice qu'auraient subi des civils. L'Avocat général des armées a fait ouvrir sans tarder une enquête sur ces 12 autres incidents¹¹⁵.

140. La situation actuelle des enquêtes sur les incidents mentionnés dans le rapport est la suivante :

- 11 incidents font l'objet d'une enquête judiciaire en cours de la Division des enquêtes criminelles de la police militaire (voir plus haut, IV.B). Deux d'entre elles ont conclu qu'il n'y avait pas de raisons de soupçonner un comportement délictueux;
- 7 incidents ont fait l'objet d'enquêtes entrant dans les enquêtes de commandement spéciales (voir plus haut IV.A.1.2). L'Avocat général des armées a demandé que 2 d'entre eux soient examinés plus avant;
- Les autres incidents ont fait l'objet d'enquêtes de commandement ordinaires (voir plus haut IV.A.3). Certaines de ces enquêtes se poursuivent.

141. S'agissant de certains incidents mentionnés dans le rapport du Conseil des droits de l'homme sur l'établissement des faits, l'Avocat général des armées a examiné l'ensemble du dossier et conclu qu'il n'y avait pas matière à enquête judiciaire. On trouvera ci-après quelques exemples détaillés.

1. Complexe de puits de Namar à Jabaliya, rue Salah ad-Din, au camp de réfugiés de Jabaliya¹¹⁶

142. Lorsque les FDI ont eu connaissance pour la première fois, dans le rapport du Conseil des droits de l'homme sur l'établissement des faits, des allégations concernant les puits de Namar, elles ont cherché à localiser les puits (le rapport ne donnant pas de coordonnées). Le Service israélien de coordination et de liaison (CLA), a demandé au Coastal Municipalities Water Utility (CMWU), l'office des eaux des municipalités de la côte de Gaza de lui communiquer les coordonnées exactes de l'installation.

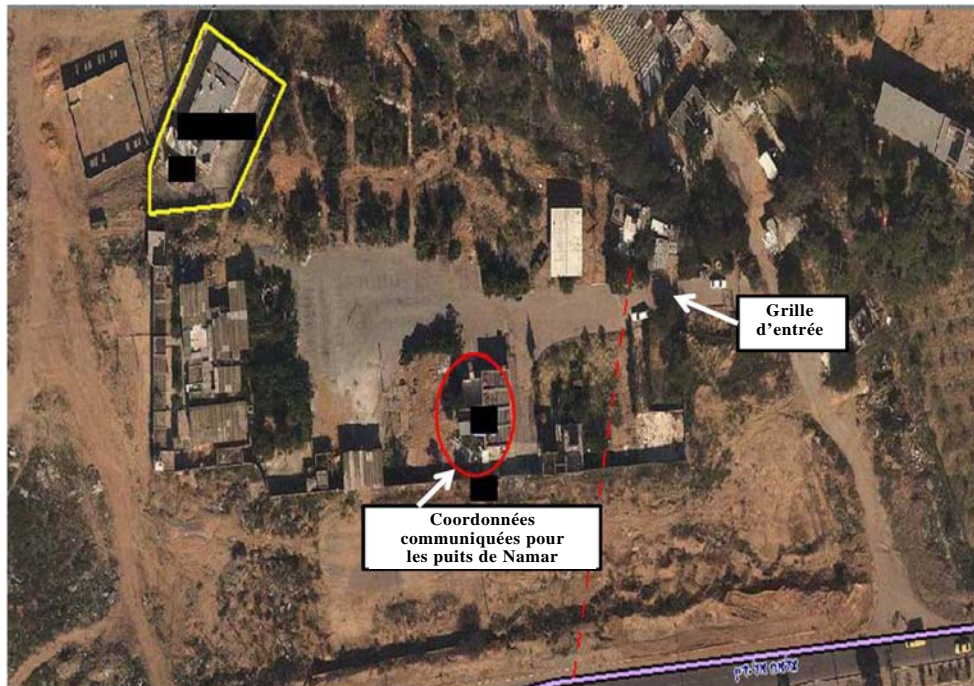
143. Selon les constatations de l'enquête de commandement, le CMWU a communiqué des coordonnées situées dans un camp militaire fermé du Hamas. Ce camp servait de centre régional de commandement et de contrôle et était utilisé pour

¹¹⁴ Le nombre exact d'incidents dont parle le rapport du Conseil des droits de l'homme sur l'établissement des faits n'est pas clair. Il est dit dans le rapport même que la Mission a enquêté sur 36 incidents à Gaza (voir le paragraphe 16 du rapport). Néanmoins, l'État d'Israël a pu identifier 34 incidents distincts à Gaza dont il est question dans le rapport.

¹¹⁵ Comme il a été mentionné précédemment, l'Avocat général des armées a recommandé une sixième enquête de commandement spéciale pour faire évaluer certains incidents dont il était question dans le rapport. De plus, il a fait ouvrir directement une enquête judiciaire sur un incident mentionné dans le rapport (allégation d'utilisation d'un Palestinien comme bouclier humain).

¹¹⁶ Voir le rapport du Conseil des droits de l'homme sur l'établissement des faits, par. 975 à 983.

l'entraînement militaire et le stockage d'armes. Des gardes étaient postés à l'entrée du camp et en interdisaient l'entrée aux civils sans autorisation. Les coordonnées communiquées pour les puits et le point d'entrée gardé du camp sont illustrées dans la photographie ci-dessous, prise avant l'incident faisant l'objet des allégations.



- Camp militaire du Hamas, avec un cercle rouge autour des coordonnées communiquées pour les puits de Namar (Source : FDI).

144. Les FDI ont attaqué le camp le 27 décembre 2008 à 11 h 30. Toutes les frappes ont atteint le but fixé. L'enquête de commandement a déterminé en outre que pour les attaques prévues à l'avance, comme celle-ci, on prenait en compte, pour décider d'attaquer ou non la cible et prévoir les précautions à prendre, l'existence de sites sensibles, y compris d'installations de distribution de l'eau, à l'intérieur ou à proximité de la cible visée. Lorsqu'elle ont planifié l'attaque de cette cible militaire spécifique, les FDI n'avaient connaissance d'aucune installation de distribution d'eau à l'intérieur du camp. Elles avaient repéré un puits à 195 mètres du camp et pris des précautions, de sorte que le puits n'a été ni touché ni endommagé.

145. L'enquête de commandement a révélé que, bien que le CLA demande et reçoive des mises à jour de différentes sources sur les sites sensibles à l'intérieur de Gaza, il n'avait pas d'informations sur les puits d'eau de Namar avant l'opération. Après l'Opération de Gaza, le CMWU a donné au CLA des informations sur l'implantation de 143 puits d'eau. En vertu des procédures et des pratiques des FDI, si le CLA avait reçu ces informations avant l'opération, elles auraient été immédiatement relayées à toutes les unités concernées des FDI.

146. L'Avocat général des armées a examiné les constatations de l'enquête de commandement, avec les informations supplémentaires figurant dans le rapport du Conseil des droits de l'homme sur l'établissement des faits.

147. L'Avocat général des armées a conclu que le camp militaire du Hamas, où étaient situés les puits de Namar, était une cible militaire légitime. Il a conclu que les FDI ignoraient l'existence des puits d'eau dans le camp militaire du Hamas, et n'avaient pas dirigé leur frappe contre les installations de distribution de l'eau.

148. L'Avocat général des armées a pris note du fait que les instructions en vigueur valables pour toute la durée de l'Opération de Gaza interdisaient strictement tout acte endommageant les installations de distribution de l'eau. Il n'a trouvé aucune base crédible de l'allégation selon laquelle la frappe avait pour but de priver d'eau la population civile de Gaza. Au contraire, les FDI avaient fait des efforts appréciables pour veiller à ce que la population de Gaza soit continuellement alimentée en eau, et en quantité suffisante¹¹⁷.

149. En conséquence, l'Avocat général des armées n'a pas trouvé de motifs de prescrire une enquête judiciaire sur cette affaire.

2. Station d'épuration des eaux usées de Gaza, située sur la route n° 10, dans le quartier de Sheikh Ejlin à Gaza¹¹⁸

150. C'est dans le rapport du Conseil des droits de l'homme sur l'établissement des faits que les FDI ont eu connaissance pour la première fois des allégations d'attaques délibérées dirigées contre la station d'épuration des eaux usées du quartier de Sheikh Ejlin de Gaza.

151. Pour l'enquête de commandement sur l'incident, des informations ont été recueillies auprès des commandants et des officiers concernés, et des forces terrestres et aériennes. De plus, les enquêteurs ont reçu des informations du CLA israélien, qui était en contact direct avec M. Munther Shublaq, le Directeur du CMWU.

152. Les premières constatations de l'enquête ont été présentées à l'Avocat général des armées, qui a demandé plusieurs éclaircissements avant de former ses conclusions. Les principales constatations de l'enquête de commandement sont les suivantes :

i) Date de l'incident

153. Une analyse des photographies aériennes de la station d'épuration prises les jours pertinents a permis de déterminer que la station a été endommagée le 10 janvier 2009. Sur une photographie aérienne prise ce jour-là on peut voir pour la première fois les dégâts subis par le mur de l'un des bassins et l'écoulement des eaux usées vers les champs voisins.

¹¹⁷ Au cours des combats proprement dits, les FDI ont à plusieurs reprises coordonné les déplacements des équipes d'entretien de l'office palestinien des eaux (CMWU) pour leur permettre de réparer des infrastructures de distribution de l'eau (en sus des réparations autorisées pendant les cessez-le-feu humanitaires). De plus, cinq camions de matériel pour les infrastructures, dont des pompes, des groupes électrogènes, des pièces détachées et des jeux de matériel d'épuration, ont été conduits dans Gaza à la demande du CMWU.

¹¹⁸ Voir Rapport du Conseil des droits de l'homme sur l'établissement des faits, par. 962 à 972.



- Photographie aérienne de la station d'épuration des eaux usées de Sheikh Ejlun, prise le 9 janvier 2009, ne montrant aucun dégât (Source : FDI).



- Photographie aérienne de la station d'épuration des eaux usées de Sheikh Ejlin, prise le 10 janvier 2009, le point de rupture du bassin supérieur est marqué en rouge (Source : FDI).

154. Le CICR a présenté le 12 janvier 2009 au CLA israélien un rapport préliminaire sur la rupture du bassin. Les jours suivants, le CLA a essayé de coordonner l'arrivée d'équipes du CMWU de Gaza pour arranger la situation, mais sans succès du fait qu'il y avait des combats dans cette zone.

155. Le Directeur du CMWU de Gaza a fait savoir au CLA que 50 000 mètres cubes d'eaux usées s'étaient échappés de la station d'épuration, et que c'était en direction du sud-ouest, vers une zone agricole.

ii) Possibilité d'une frappe aérienne

156. La station d'épuration des eaux usées n'avait pas été définie, ni avant ni pendant l'opération, comme cible d'une frappe aérienne. La frappe aérienne la plus proche, à la date considérée, était à 1,3 kilomètre de la station.

iii) Possibilité d'une attaque terrestre

157. Compte tenu des caractéristiques des dégâts subis par le bassin, il est peu probable qu'ils aient été causés par un tir en trajectoire tendue des FDI. Ces

dernières n'ont pas tiré en trajectoire haute vers la station, et les relevés d'opérations ne font pas apparaître cette cible.

158. Lorsque les troupes blindées sont passés à proximité de la station, pendant l'opération, il y avait déjà une brèche dans le mur du bassin et la zone avoisinante était inondée, limitant le mouvement des forces dans la zone.

iv) Causes possibles des dégâts subis par le bassin

159. L'Avocat général des armées a examiné les constatations de l'enquête de commandement, compte tenu des détails figurant dans le rapport du Conseil des droits de l'homme sur l'établissement des faits et le rapport du CMWU de janvier 2009 intitulé « Rapport sur l'évaluation des dégâts : infrastructures et installations de distribution d'eau et d'évacuation des eaux usées ».

160. Prenant en compte toutes les informations disponibles, l'Avocat général des armées n'a pas été en mesure d'exclure définitivement la possibilité que l'activité des FDI ait causé des dégâts au mur du troisième bassin de la station d'épuration des eaux usées (probablement survenus le 10 janvier). Cependant, il n'a pas été en mesure non plus d'exclure la possibilité que les dégâts subis par le bassin aient résulté d'une action délibérée du Hamas s'inscrivant dans un plan d'action défensive, le but étant de gêner les déplacements des FDI dans cette zone.

161. L'Avocat général militaire a pu déterminer que les dégâts n'étaient pas le résultat d'une attaque intentionnelle et planifiée des FDI. Il a souscrit à cet égard aux conclusions de l'enquête de commandement, selon lesquelles la station d'épuration des eaux usées n'était pas une cible prévue, la rupture du mur du bassin et l'inondation de cette zone par les eaux usées y ayant fortement limité la liberté de manœuvre des forces terrestres des FDI, surtout des véhicules blindés. De plus, l'Avocat général des armées a noté qu'il n'y avait ni éléments de preuve matériels ni témoignage de témoin oculaire pour soutenir la conclusion du rapport du Conseil des droits de l'homme sur l'établissement des faits.

162. En conséquence, l'Avocat général des armées n'a pas trouvé de motif de prescrire une enquête judiciaire sur cette affaire.

3) Minoterie d'el-Bader¹¹⁹

163. S'agissant de l'allégation selon laquelle la minoterie d'el-Bader aurait été délibérément prise pour cible, les FDI ont mené une enquête de commandement qui a permis de réunir des éléments de preuve auprès de nombreuses sources, dont les commandants et les officiers en cause et les forces terrestres et aériennes. De plus, l'enquêteur a reçu des éléments d'information du CLA israélien, qui avait eu des contacts directs avec le propriétaire de la minoterie, M. Rashad Hamada. Les conclusions de l'enquête de commandement sont résumées ci-après.

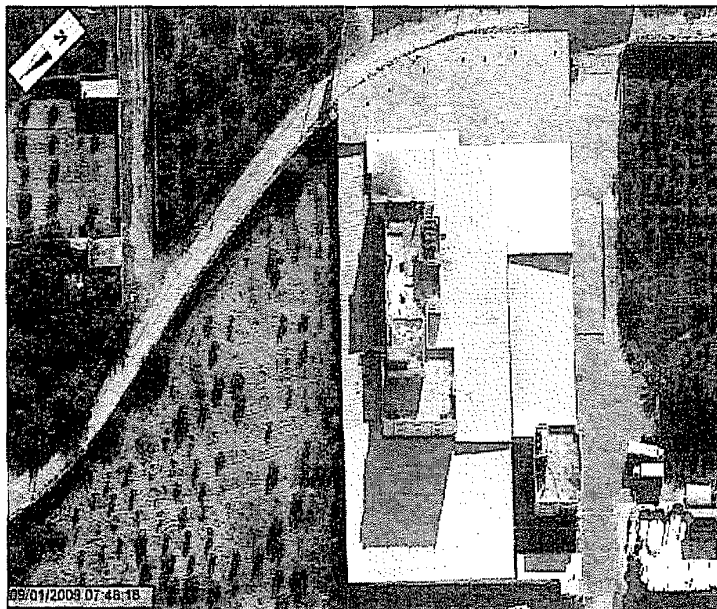
164. Dès le début de l'Opération de Gaza, les environs immédiats de la minoterie ont servi de zone défensive aux forces armées ennemies, en raison de la proximité du fief du Hamas et du camp de réfugiés de Chati. Le Hamas avait fortifié le secteur en creusant des tunnels et en piégeant des habitations et déployé ses forces pour attaquer les FDI qui opéraient dans cette zone. À titre d'exemple, à 200 mètres au sud de la minoterie, un groupe de combat des FDI a été pris en embuscade par cinq

¹¹⁹ Voir Rapport du Conseil des droits de l'homme sur l'établissement des faits, par. 913 à 921.

agents du Hamas dans une maison piégée; à 500 mètres à l'est de la minoterie, un autre groupe de combat a pris à partie les forces ennemies dans une maison qui était également utilisée pour entreposer des armes; enfin, deux maisons piégées adjacentes à la minoterie ont explosé.

165. Les FDI ont lancé leur opération terrestre dans la zone considérée le 9 janvier 2009, dans la nuit. Avant le début de l'opération, elles avaient prévenu les habitants du secteur, notamment par des messages téléphoniques enregistrés les invitant à évacuer. De tels appels téléphoniques ont également été adressés à la minoterie.

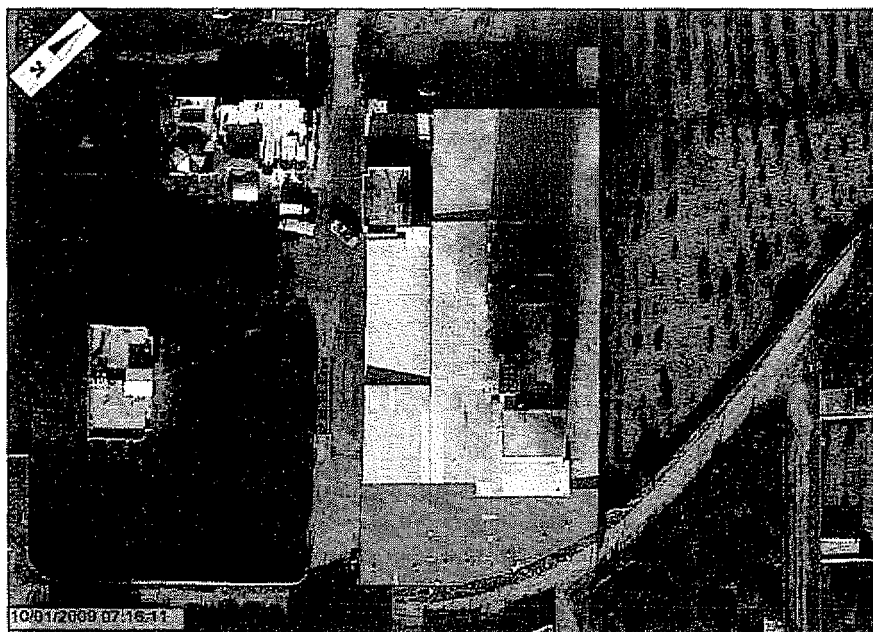
166. Lors de la préparation de l'opération, le commandement avait estimé que la minoterie constituait un « point élevé stratégique », en raison de sa hauteur et parce qu'elle offrait un bon poste d'observation. Toutefois, au cours de la phase de planification, il a été décidé de ne pas lancer d'attaque préemptive contre la minoterie pour épargner autant que possible l'infrastructure civile.



Minoterie d'el-Bader, le 9 janvier 2009, avant l'incident présumé
(Source : FDI)

167. Au cours de l'opération, les FDI ont subi des tirs nourris provenant de différentes positions du Hamas aux environs de la minoterie. Elles ont riposté en direction des tirs ennemis et des positions représentant une menace. Alors que les FDI ripostaient, le dernier étage de la minoterie a été touché par des obus de char. Aucun avertissement téléphonique n'avait été adressé à la minoterie juste avant la frappe puisqu'il ne s'agissait pas d'une cible préétablie.

168. Plusieurs heures après l'incident, et après avoir été informées qu'un incendie s'était déclaré dans la minoterie, les FDI ont coordonné l'arrivée de plusieurs voitures de pompiers pour lutter contre le feu.



Minoterie d'el-Bader, le 10 janvier 2009, après l'incident présumé.
Des camions de pompiers sont visibles sur les lieux du sinistre. (Source : FDI)

169. L'Avocat général des armées a examiné les conclusions et le dossier de l'enquête de commandement, ainsi que d'autres documents. Il a également examiné les éléments d'information figurant dans le Rapport du Conseil des droits de l'homme sur l'établissement des faits, ainsi que la transcription du témoignage public de M. Hamada devant la Mission.

170. Compte tenu de tous les éléments d'information dont il disposait, l'Avocat général des armées a établi que la minoterie avait été frappée par des obus de char pendant les affrontements. Il n'a trouvé aucun élément étayant l'affirmation contenue dans le Rapport selon laquelle la minoterie aurait été attaquée par l'aviation qui aurait utilisé des munitions précises. L'Avocat général des armées a établi qu'aucun élément ne venait appuyer cette allégation, ni dans le Rapport lui-même, ni dans le témoignage de Rashad Hamada, qui avait quitté les lieux avant l'incident après avoir été averti par les FDI. Les photographies de la minoterie prises après l'incident ne font apparaître aucun dégât structurel qui serait la marque d'une attaque aérienne.



Minoterie d'el-Bader, le 11 janvier 2009, après l'incident présumé. (Source : FDI)

171. L'Avocat général des armées a conclu que, dans les circonstances précises du combat et compte tenu de l'emplacement de la minoterie, celle-ci était une cible militaire légitime conformément au droit des conflits armés. L'attaque visait à neutraliser des menaces auxquelles étaient immédiatement exposées les FDI.

172. L'Avocat général des armées a rejeté l'allégation figurant dans le Rapport du Conseil des droits de l'homme sur l'établissement des faits selon laquelle la frappe visait à priver de nourriture la population civile de Gaza. À cet égard, il a noté que peu après l'incident les FDI avaient autorisé des camions de pompiers palestiniens à se rendre dans la zone pour éteindre les flammes et que des quantités importantes de nourriture et de farine étaient entrées dans Gaza via Israël pendant l'Opération de Gaza¹²⁰.

173. Bien que l'Avocat général des armées n'ait pu établir de manière probante que la minoterie était en fait utilisée par les militaires du Hamas, plusieurs éléments de preuve étayaient cette thèse. L'Avocat général des armées a constaté que M. Hamada avait déclaré à la Mission d'établissement des faits avoir trouvé des douilles sur le toit de la minoterie après l'opération. Elles ne pouvaient provenir des tirs des FDI, étant donné que – comme il ressort des conclusions de l'enquête de commandement – les FDI qui occupaient les bâtiments de la minoterie trois jours après l'incident n'occupaient pas le toit, où elles auraient été exposées aux tirs ennemis.

174. Par conséquent, l'Avocat général des armées n'a pas trouvé de motifs de prescrire une enquête judiciaire sur cette affaire.

¹²⁰ Voir *The operation in Gaza: Factual and legal aspects*, par. 266 à 282.

4) La maison de la famille Abu-Askar¹²¹

175. Les FDI ont mené une enquête de commandement au sujet des allégations selon lesquelles la maison de Muhammad Abu-Askar aurait été la cible d'une attaque délibérée. Cette enquête a permis de réunir des éléments de preuve auprès de nombreuses sources, dont les commandants et les officiers en cause et les forces terrestres et aériennes, ainsi que des photographies aériennes.

176. Il ressort des conclusions de l'enquête de commandement que la cave et d'autres parties de la maison de M. Abu-Askar étaient utilisées pour entreposer des armes et des munitions, notamment des roquettes Grad. De plus, la zone où se trouvait la maison était fréquemment utilisée pour lancer des roquettes en direction de villes israéliennes.

177. Avant l'attaque, les FDI avaient prévenu par téléphone le foyer de M. Abu-Askar. L'appel avait été reçu par Muhammad Abu-Askar. Tous les occupants de la maison avaient immédiatement évacué les lieux. De plus, l'attaque a eu lieu de nuit, lorsque moins de civils sont susceptibles de se trouver dans la zone. L'attaque n'a fait aucune victime civile.

178. Peu après l'attaque, deux fils de M. Abu-Askar, tous deux combattants du Hamas, ont été tués alors qu'ils participaient à des tirs de mortiers contre les FDI¹²².

179. L'Avocat général des armées a examiné les conclusions et le dossier complet de l'enquête de commandement, ainsi que d'autres éléments d'information sur l'incident qui figuraient dans le Rapport du Conseil des droits de l'homme sur l'établissement des faits. Il a également examiné le témoignage public de M. Abu-Askar devant la Mission d'établissement des faits.

180. L'Avocat général des armées a conclu qu'étant donné que la maison de Muhammad Abu-Askar servait à entreposer de nombreuses armes et munitions, dont des missiles Grad, elle constituait une cible militaire légitime. L'attaque n'était pas dirigée contre les occupants de la maison, mais visait les armes qui y étaient entreposées¹²³.

181. L'Avocat général des armées a en outre établi que l'attaque avait été menée dans le respect de l'obligation qui incombe aux FDI de prendre des précautions pour réduire au minimum les pertes accidentelles de vies civiles. L'efficacité de certaines précautions – l'heure de l'attaque et les avertissements – est manifeste puisque l'incident n'a fait aucune victime civile. L'avantage militaire recherché en éliminant un important stock d'armes, dont des roquettes à longue portée, était supérieur aux risques que l'opération laissait envisager pour les civils.

182. Par conséquent, l'Avocat général des armées n'a pas trouvé de motifs de prescrire une enquête judiciaire sur cette affaire.

¹²¹ Voir Rapport du Conseil des droits de l'homme sur l'établissement des faits, par. 975 à 985.

¹²² Les circonstances de cet incident sont décrites en détail dans *The operation in Gaza: Factual and legal aspects*, par. 336 à 340.

¹²³ L'assertion présentée dans le Rapport du Conseil des droits de l'homme sur l'établissement des faits selon laquelle la maison en question était une cible civile repose uniquement sur le témoignage de M. Abu-Askar devant la Mission. Or, cette dernière n'a posé à M. Abu-Askar aucune question sur l'éventuelle utilisation de sa maison à des fins militaires.

V. Conclusion

183. L'Opération de Gaza a posé des problèmes complexes à Israël et aux FDI. Si la nécessité et l'obligation de réagir avec efficacité aux milliers de tirs de roquettes et d'obus lancés par le Hamas qui terrorisaient les civils israéliens depuis des années ne faisaient aucun doute, les stratégies adoptées par le Hamas, en particulier son ancrage systématique au cœur des zones civiles, posaient de graves dilemmes sur le plan opérationnel.

184. Ces problèmes n'ont pas pris fin avec l'arrêt des opérations. En matière de respect du droit des conflits armés, il est primordial de s'attacher véritablement à examiner les opérations militaires à la lumière des faits et à mener des enquêtes minutieuses en cas d'allégation faisant état d'activités illicites. Dans le contexte de Gaza, le respect de cet engagement est particulièrement contraignant; il exige de fournir des efforts importants pour recueillir des éléments de preuve sur le théâtre des opérations et de prendre des dispositions pour permettre aux habitants de Gaza de donner leur version des faits. Il exige également de reconnaître que, dans des situations de combat complexes, les erreurs de jugement, même si elles ont des conséquences tragiques, ne constituent pas nécessairement une violation du droit des conflits armés.

185. Un autre problème tient à l'ampleur des enquêtes. Israël a donné suite à chaque allégation, que la source soit neutre, hostile ou amicale, et ouvert des enquêtes sur 150 incidents distincts, dont 36 enquêtes judiciaires à ce jour. Les six enquêtes de commandement spéciales ouvertes par les FDI portaient sur des problèmes plus généraux survenus au cours des combats. Au-delà des procédures disciplinaires et judiciaires, les enseignements tirés de ces enquêtes sur le plan opérationnel ont été intégrés dans les pratiques des FDI.

186. Dans le présent document, Israël s'est efforcé d'exposer ses procédures d'enquête et a décrit les différents mécanismes concernés, y compris ceux qui opèrent de manière indépendante au sein du système militaire, ainsi que le contrôle civil exercé par le Ministre de la Justice et la Cour suprême.

187. Israël reconnaît qu'il importe d'engager le dialogue et de mettre en commun les meilleures pratiques en matière de procédures d'enquête avec d'autres États démocratiques confrontés à des difficultés similaires et attachés au respect de l'état de droit.

Annexe II**Lettre datée du 29 janvier 2010, adressée au Secrétaire général
par l'Observateur permanent de la Palestine
auprès de l'Organisation des Nations Unies**

[Original : anglais]

Comme suite à la note datée du 3 décembre 2009 dans laquelle le Secrétariat de l'Organisation des Nations Unies, en votre nom, a demandé à la Mission permanente d'observation de la Palestine auprès de l'Organisation des Nations Unies de lui communiquer par écrit des informations sur les mesures que la partie palestinienne a pu prendre concernant le paragraphe 4 de la résolution 64/10 de l'Assemblée générale en date du 5 novembre 2009 intitulée « Suite donnée au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza », j'ai l'honneur de vous faire tenir ci-joint le texte d'une lettre datée du 27 janvier 2010 que vous adresse le Premier Ministre Salam Fayyad et par laquelle il vous transmet les documents ci-après soumis par les dirigeants palestiniens :

- Décret présidentiel portant création d'une commission d'enquête indépendante pour le suivi du rapport Goldstone;
- Rapport préliminaire de la Commission d'enquête indépendante pour le suivi du rapport Goldstone.

Comme il est indiqué dans la lettre du Premier Ministre Fayyad, nous continuerons de vous communiquer des informations actualisées et des rapports sur l'évolution des travaux de la Commission d'enquête indépendante pour le suivi du rapport Goldstone. À cet égard, je tiens à vous assurer que la Commission, comme il ressort de son mandat, de sa composition et de son programme de travail, ne ménagera aucun effort pour mener à bien, en toute efficacité et célérité et dans le respect des normes internationales, une enquête indépendante crédible sur les allégations de violations du droit international humanitaire et du droit international des droits de l'homme énumérées dans le rapport de la Mission d'établissement des faits sur le conflit de Gaza, conformément au paragraphe 4 de la résolution 64/10 de l'Assemblée générale.

À ce propos, je réaffirme la ferme position de la Palestine selon laquelle il n'y a ni symétrie ni proportionnalité entre la Puissance occupante et le peuple vivant sous occupation et, par suite, qu'à notre sens il n'y a aucun parallélisme entre l'agression militaire et les crimes commis par Israël, Puissance occupante, et les actes qui ont pu avoir été commis par la partie palestinienne.

Néanmoins, nous prenons très au sérieux les allégations portées dans le rapport Goldstone faisant état de violations commises par des Palestiniens. C'est la raison pour laquelle nous avons créé cette commission d'enquête indépendante, conformément à la résolution 64/10 de l'Assemblée générale, ce qui dit assez notre respect absolu et notre attachement à la primauté du droit et aux résolutions des Nations Unies. En outre, nous nous acquittons de notre responsabilité à cet égard, étant fermement convaincus que le fait, par tous les membres de la communauté internationale, d'œuvrer véritablement à établir les responsabilités permettra en définitive de mettre fin à l'impunité dont Israël, Puissance occupante, n'a que trop

longtemps joi. À terme, cette quête de vérité servira sans nul doute la cause de la paix, qui ne peut être réalisée en l'absence de justice.

L'Ambassadeur,
Observateur permanent de la Palestine
auprès de l'Organisation des Nations Unies
(*Signé*) Riyadh **Mansour**

Appendice

[Original : arabe]

27 janvier 2010

J'ai l'honneur de vous faire tenir ci-joint le texte du décret en date du 25 juin 2010 pris par le Président Mahmoud Abbas et portant commission d'enquête indépendante pour le suivi du rapport Goldstone, chargée de tâches et responsabilités à elle assignées, dont celle de mener une enquête et d'établir un rapport préliminaire sur ses travaux.

Les pièces jointes à la présente lettre font suite au paragraphe 4 de la résolution 64/10 de l'Assemblée générale en date du 5 novembre 2009, qui se lit comme suit :

« [L'Assemblée générale]

Demande instamment, conformément aux recommandations de la Mission d'établissement des faits, que la partie palestinienne procède, dans un délai de trois mois, à des investigations indépendantes, crédibles et conformes aux normes internationales, sur les graves violations du droit international humanitaire et du droit international des droits de l'homme qui ont été signalées par la Mission d'établissement des faits, afin que les responsabilités soient établies et que justice soit faite ».

Ces pièces jointes font également suite à la lettre adressée par le Secrétariat à la Mission permanente d'observation de la Palestine en date du 3 décembre 2009, lui demandant de communiquer au Secrétaire général par écrit des informations sur les mesures prises ou envisagées par la partie palestinienne comme suite à la demande formulée par l'Assemblée générale au paragraphe 4 de sa résolution 64/10.

Le Premier Ministre
de l'Autorité nationale palestinienne
(Signé) Salam **Fayyad**

Pièce jointe I

[Original : arabe]

Décret n° () 2010

portant commission indépendante de suivi du rapport Goldstone

Le Président de l'État de Palestine,
Président du Comité exécutif de l'Organisation de libération de la Palestine,
Président de l'Autorité nationale palestinienne,

En vertu des dispositions de la Loi fondamentale révisée de 2003 et des amendements y relatifs,

Vu la décision du Premier Ministre en date du 14 janvier 2010,

Vu le rapport Goldstone,

En vertu des pouvoirs qui lui sont conférés,

Et compte tenu de l'intérêt général,

Décète ce qui suit :

Article 1

Il est créé une commission indépendante de suivi de l'application des recommandations formulées dans le rapport Goldstone en ce qui concerne l'Autorité nationale palestinienne, ainsi composée :

1. Issa Abu Sharar, Président
2. Zuhair al-Surani, membre
3. Ghassan Farmand, membre
4. Yasser al-Amuri, membre
5. Nasser Rayyes, membre

Article 2

1. La Commission s'acquitte des tâches et responsabilités à elle assignées, dont celle de mener une enquête conformément au rapport Goldstone, et agit dans le respect des délais indiqués dans ledit rapport.

2. La Commission présente ses recommandations et les conclusions de ses travaux à toutes les parties compétentes, chacune en ce qui la concerne.

Article 3

La Commission s'appuie sur les experts et les spécialistes qu'elle juge les mieux à même de l'aider à accomplir sa mission.

Article 4

Toutes les parties compétentes, officielles ou non officielles, sont tenues de coopérer avec la Commission et de lui fournir toutes les facilités et informations nécessaires à l'accomplissement de sa mission.

Article 5

Toutes les parties compétentes sont chargées, chacune en ce qui la concerne, de l'exécution des dispositions du présent décret qui prend effet à compter de sa date de publication au *Journal officiel*.

Fait à Ramallah le 25 janvier 2010

Le Président de l'État de Palestine,
Président du Comité exécutif de l'Organisation
de libération de la Palestine,
Président de l'Autorité nationale palestinienne
(*Signé*) Mahmoud **Abbas**

Pièce jointe II

[Original : arabe]

J'ai l'honneur de vous faire tenir ci-joint le texte d'un rapport préliminaire sur les travaux de la Commission indépendante de suivi de l'application des recommandations formulées dans le rapport Goldstone, aux fins de communication à l'Observateur permanent de la Palestine auprès de l'Organisation des Nations Unies avant le 29 janvier 2010.

Le Président de la Commission indépendante
de suivi de l'application des recommandations
formulées dans le rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Ramallah, le 28 janvier 2010

**Rapport de la Commission indépendante d'enquête créée
en application de la résolution 64/10 de l'Assemblée générale**

Le 25 janvier 2010, le Président de l'État de Palestine, Président du Comité exécutif de l'Organisation de libération de la Palestine et Président de l'Autorité nationale palestinienne, S. E. Mahmoud Abbas, a pris le décret présidentiel n° 105/2010 portant commission d'enquête indépendante comme suite à la recommandation de la Mission d'établissement des faits et au paragraphe 4 de la résolution 64/10 de l'Assemblée générale en date du 5 novembre 2009, qui se lit comme suit :

« [L'Assemblée générale]

Demande instamment, conformément aux recommandations de la Mission d'établissement des faits, que la partie palestinienne procède, dans un délai de trois mois, à des investigations indépendantes, crédibles et conformes aux normes internationales, sur les graves violations du droit international humanitaire et du droit international des droits de l'homme qui ont été signalées par la Mission d'établissement des faits, afin que les responsabilités soient établies et que justice soit faite ».

La Commission est composée comme suit :

1. Le juge Issa Abu Sharar (Président) : 1963-1970 : Procureur général, puis Procureur général adjoint de la Jordanie; 1971-1996 : avocat en Jordanie; 1998 : Président de cour d'appel; 2002 : juge à la Cour suprême palestinienne; 2005 : Président de la Cour suprême palestinienne et Président du Haut Conseil de la magistrature palestinien, fonctions qu'il a exercées jusqu'à son départ à la retraite le 29 novembre 2009.

2. Le juge Zuhair al-Surani (membre) : 1958-1964 : magistrat au Bureau du Procureur général à Gaza; 1964 : juge de tribunal de première instance; 1967 : juge à la Cour suprême; 1999 : Procureur général; 2002 : Ministre palestinien de la justice; 2003 : Président de la Cour suprême et Président du Haut Conseil de la magistrature. Retraité depuis 2005.

3. Ghassan Farmand (membre) : 1981 : titulaire d'un doctorat en droit en France; 1982 : professeur de droit à l'université de Bir Zeit; 1993 : crée et dirige l'Institut de droit de l'Université de Bir Zeit; Président de la Société du Croissant-Rouge palestinien à Ramallah et membre de plusieurs organismes juridiques non gouvernementaux. A participé à de nombreuses conférences internationales, notamment à l'Université de Yale.

4. Yasser al-Amuri (membre) : 2003 : titulaire d'un doctorat en droit public international en Espagne; 2003 : professeur de droit public international à l'Université Al Qods; 2005 : professeur de droit public international à l'Université de Bir Zeit; 2006-2009 : Directeur de l'Institut de droit et Directeur du programme de maîtrise en droit à l'Université de Bir Zeit. Membre de plusieurs organismes juridiques non gouvernementaux. A participé à de nombreuses conférences internationales et contribué à des études diverses sur les droits de l'homme.

5. Nasser Rayyes (membre) : juriste depuis 1997; 1998 : chercheur et consultant à Al-Haq, branche de la Commission internationale des juristes; 2002 : Président du Comité des droits de l'homme de l'Académie palestinienne des sciences et de la technologie; 2003 : crée le Comité national palestinien du droit international humanitaire. Membre de plusieurs organismes juridiques non gouvernementaux. A participé à de nombreuses conférences internationales et contribué à diverses études sur les droits de l'homme. Chef de l'Équipe du droit international humanitaire chargée d'élaborer un manuel de formation sur les dispositions du droit international; formateur spécialisé en droit international des droits de l'homme et en droit pénal.

La Commission a tenu sa première réunion le 28 janvier 2010 à Ramallah conformément à son mandat et au décret présidentiel susmentionné. En application du paragraphe 4 de la résolution 64/10 de l'Assemblée générale en date du 5 novembre 2009, la Commission a adopté une méthodologie de travail conforme aux principes et normes du droit international public, de la Charte des Nations Unies, du droit international humanitaire, du droit pénal international et des décisions et déclarations pertinentes des Nations Unies, ainsi que des dispositions de la Loi fondamentale palestinienne et de la législation nationale. La Commission a examiné le rapport Goldstone et les demandes auxquelles l'Autorité nationale palestinienne doit répondre, et a décidé d'élaborer un plan d'action et une méthode de travail, notamment des règles de procédure et des principes régissant la conduite de l'enquête dont elle est chargée dans le respect des principes de justice, d'équité et d'impartialité. La Commission a également établi les critères de sélection des experts, le profil des enquêteurs et les mécanismes de protection des témoins. Elle a aussi décidé de demander à des experts, des spécialistes et des organisations de la société civile de l'aider à mener à bien son mandat. La Commission informera en temps utile toutes les parties concernées des activités entreprises dans l'accomplissement de son mandat.

Annexe III

**Lettre datée du 29 janvier 2010, adressée au Secrétaire général
par le Chargé d'affaires par intérim de la Mission permanente
de la Suisse auprès de l'Organisation des Nations Unies**

[Original : français]

J'ai l'honneur de vous faire tenir ci-joint le résumé des démarches entreprises jusqu'à présent par la Suisse dans le cadre de la mise en œuvre du paragraphe 5 du dispositif de la résolution 64/10 de l'Assemblée générale des Nations Unies intitulée « Suite donnée au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza ».

Chargé d'affaires a.i.
(*Signé*) Heidi **Grau**

Appendice

État des consultations sur le suivi du paragraphe 5 du dispositif de la résolution 64/10 de l'Assemblée générale des Nations Unies

Le 5 novembre 2009, l'Assemblée générale de l'Organisation des Nations Unies a adopté la résolution 64/10 intitulée « Suite donnée au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza », dont le paragraphe 5 du dispositif « Recommande que le Gouvernement suisse, en sa qualité de dépositaire de la Convention de Genève relative à la protection des personnes civiles en temps de guerre, prenne au plus tôt les mesures nécessaires afin de convoquer à nouveau une conférence des Hautes Parties contractantes à la quatrième Convention de Genève sur les mesures à prendre pour imposer la Convention dans le territoire palestinien occupé, y compris à Jérusalem-Est, et la faire respecter, conformément à l'article 1 commun ».

Faisant suite à cette recommandation, la Suisse, en sa qualité de dépositaire des Conventions de Genève et par le biais de sa Mission permanente auprès de l'Organisation des Nations Unies à Genève, a engagé des consultations préliminaires entre le 9 et le 17 décembre 2009. Pour des raisons de contraintes de temps, ces consultations préliminaires n'ont pu être engagées qu'auprès d'un nombre sélectionné d'acteurs.

La Suisse a consulté Israël et la Palestine en tant que parties directement concernées, l'Égypte, l'Arabie saoudite, la Syrie, le Pakistan (coordonnateur du groupe de l'Organisation de la Conférence islamique sur les questions de droits de l'homme et humanitaires à Genève) et l'Algérie (présidence du Conseil des ambassadeurs arabes à Genève) en tant que parties intéressées de la région; la Chine, les États-Unis d'Amérique, la France, le Royaume-Uni, la Russie, en tant que membres permanents du Conseil de sécurité de l'Organisation des Nations Unies, et la Suède et l'Espagne en tant que présidences sortante et entrante de l'Union européenne.

La Ligue des États arabes, le Comité international de la Croix-Rouge, le Haut-Commissariat aux droits de l'homme, les coordonnateurs en matière de droits de l'homme des cinq groupes régionaux à Genève, l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient ainsi que le Département des affaires politiques du Secrétariat de l'ONU ont été informés de ces démarches.

En outre, la Suisse a reçu les positions de l'Australie et du Canada sur la question et a été approchée par un certain nombre de délégations issues des différents groupes régionaux qui souhaitaient être informées sur le processus en cours.

Ces consultations préliminaires ont été conduites de manière informelle et orale. Les réponses ont suivi ce modèle à l'exception de deux contributions écrites. En ouverture de chaque rencontre, la Suisse a souligné qu'elle considère qu'une conférence des Hautes Parties contractantes doit être inclusive et promouvoir un résultat concret, sans servir de plate-forme pour adresser des récriminations à l'égard de l'une ou l'autre partie au conflit. La Suisse a ainsi sollicité de ses interlocuteurs des réponses sur le contenu, le timing et le niveau de représentation

d'une conférence, ainsi que des suggestions concrètes. Les réactions reçues peuvent se classer en trois catégories :

1. Un premier groupe est favorable à la tenue d'une conférence, de préférence de haut niveau, ayant pour objectif d'identifier des mesures individuelles et collectives en vue d'assurer le respect et la mise en œuvre de la quatrième Convention de Genève dans le territoire palestinien occupé, y compris Jérusalem-Est. Ces États estiment qu'une conférence des Hautes Parties contractantes devrait se tenir en avril 2010, afin d'éviter des collisions de date avec d'autres conférences ou événements majeurs à Genève, tout en reconnaissant l'importance d'une préparation adéquate et appropriée. Ils insistent sur la nécessité de se focaliser sur des questions juridiques. Certains États mènent des réflexions quant à des mesures concrètes, y compris des mécanismes, qu'ils envisagent de soumettre pour considération dans une phase ultérieure.

2. Un deuxième groupe s'oppose fermement à une conférence des Hautes Parties contractantes. Ces États craignent qu'une telle conférence soit une distraction inutile voire une interférence nuisible à la relance des négociations bilatérales entre le Gouvernement d'Israël et l'Autorité palestinienne. Une politisation des débats est perçue comme inévitable. Certains États expriment aussi leur opposition pour des raisons formelles. Ils relèvent l'absence de dispositions spécifiques pour une telle conférence dans les Conventions de Genève. Ils soulignent par ailleurs le caractère de recommandation du paragraphe 5 du dispositif de la résolution 64/10 de l'Assemblée générale.

3. Un troisième groupe ne s'est pas formellement opposé à la convocation d'une conférence des Hautes Parties contractantes, mais a exprimé son absence d'enthousiasme pour une telle conférence dont ces États ne voient ni l'utilité ni l'urgence. Ils sont sceptiques quant à la valeur ajoutée d'une nouvelle conférence, car l'expérience de la Conférence de Hautes Parties contractantes du 5 décembre 2001 ne permet pas d'entrevoir d'impact tangible sur le terrain. Ils ne pourraient pas soutenir une conférence qui serait utilisée pour critiquer un pays en particulier.

En conclusion, ces consultations limitées en nombre n'ont pas permis de dégager de tendance dominante en faveur ou contre l'organisation d'une conférence des Hautes Parties contractantes, ni sur l'apport d'une nouvelle conférence des Hautes Parties contractantes à la quatrième Convention de Genève pour les populations civiles concernées, à savoir quels résultats espérer pour quelles problématiques.

La Suisse a été encouragée à mener ses propres réflexions en la matière et, le moment venu, à les partager. Ces réflexions porteront essentiellement sur le cadre et l'objectif d'une nouvelle conférence des Hautes Parties contractantes. Elles feront partie intégrante d'une deuxième ronde de consultations, ouverte à l'ensemble des Hautes Parties contractantes et autres parties intéressées, que la Suisse entend conduire prochainement. Dans cette entreprise, la Suisse sera guidée par le souci de protéger les populations civiles et de veiller à ce que leurs besoins humanitaires soient satisfaits.



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Informations sur la deuxième suite au rapport de la Mission d'établissement des faits des Nations Unies sur le conflit de Gaza

Rapport du Secrétaire général

Résumé

Le présent rapport est présenté en application de la résolution 64/254 de l'Assemblée générale, en date du 26 février 2010. Le 27 mai 2010, le Secrétaire général a envoyé des notes verbales à la Mission permanente d'Israël auprès de l'Organisation des Nations Unies, à la Mission permanente d'observation de la Palestine auprès de l'Organisation des Nations Unies et à la Mission permanente de Suisse auprès de l'Organisation des Nations Unies, appelant leur attention sur les dispositions pertinentes de la résolution 64/254, et leur demandant de communiquer par écrit, au 12 juillet 2010 au plus tard, des informations au sujet de toutes mesures qui auraient été prises pour appliquer lesdites dispositions.

* Nouveau tirage pour raisons techniques (12 août 2010).



I. Introduction

1. Le présent rapport, qui est soumis en application des dispositions du paragraphe 5 de la résolution 64/254 de l'Assemblée générale en date du 26 février 2010 (deuxième suite au rapport de la Mission d'établissement des faits des Nations Unies sur le conflit de Gaza), par laquelle l'Assemblée générale m'a prié de lui présenter dans un délai de cinq mois un rapport sur l'application de ladite résolution. Pour ce faire, il était nécessaire de déterminer les mesures prises par les parties visées aux paragraphes 2, 3 et 4 de la résolution.

2. Le 27 mai 2010, j'ai appelé l'attention de la Mission permanente d'Israël auprès de l'Organisation des Nations Unies sur la résolution 64/254, lui demandant de fournir par écrit au Secrétariat, au 12 juillet 2010 au plus tard, toute information sur les mesures qu'aurait pris ou qu'était en train de prendre le Gouvernement israélien pour donner suite à la demande formulée par l'Assemblée générale au paragraphe 2 de la résolution.

3. Le 16 juillet 2010, le Secrétariat a reçu du Gouvernement israélien un document intitulé « Enquête sur l'opération à Gaza : deuxième mise à jour ».

4. Le 27 mai 2010, j'ai appelé l'attention de la Mission permanente d'observation de la Palestine auprès de l'Organisation des Nations Unies sur la résolution 64/254, lui demandant de fournir par écrit au Secrétariat, au 12 juillet 2010 au plus tard, toute information sur les mesures qu'aurait pris ou qu'était en train de prendre la partie palestinienne pour donner suite à la demande formulée instamment par l'Assemblée générale au paragraphe 3 de la résolution.

5. Le 12 juillet 2010, j'ai reçu une lettre, datée du même jour, de la Mission permanente d'observation de la Palestine auprès de l'Organisation des Nations Unies, me transmettant une lettre datée du 11 juillet 2010 du Président de l'Autorité palestinienne, Mahmoud Abbas, ainsi que le rapport de la Commission indépendante palestinienne d'enquête sur la suite donnée au rapport Goldstone, y compris une introduction générale au rapport.

6. Le 27 mai 2010, j'ai appelé l'attention de la Mission permanente de Suisse auprès de l'Organisation des Nations Unies sur la résolution 64/254, lui demandant de communiquer par écrit au Secrétariat, au 12 juillet 2010 au plus tard, toute information sur les mesures qu'aurait pris ou qu'était en train de prendre le Gouvernement suisse pour donner suite à la recommandation formulée par l'Assemblée générale au paragraphe 4 de la résolution.

7. Le 12 juillet 2010, j'ai reçu de la Mission permanente de Suisse une note verbale, datée du même jour, me transmettant un rapport intitulé « États des entretiens sur le suivi du paragraphe 4 de la résolution 64/254 de l'Assemblée générale des Nations Unies ».

8. Les communications reçues des parties susmentionnées représentent en tout 382 pages. Pour des raisons techniques, je suis dans l'incapacité de publier dès à présent ces documents ou mes observations. Je ferai à nouveau rapport dès que la traduction de ces documents sera terminée.



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Rapport du Conseil des droits de l'homme

Deuxième suite au rapport de la Mission d'établissement des faits des Nations Unies sur le conflit de Gaza

Rapport du Secrétaire général

Résumé

Le présent rapport est présenté en application de la résolution 64/254 de l'Assemblée générale. Le 27 mai 2010, le Secrétaire général a envoyé des notes verbales à la Mission permanente d'Israël auprès de l'Organisation des Nations Unies, à la Mission permanente d'observation de la Palestine auprès de l'Organisation des Nations Unies et à la Mission permanente de Suisse auprès de l'Organisation des Nations Unies, appelant leur attention sur les dispositions pertinentes de la résolution 64/254 et leur demandant de communiquer par écrit, au 12 juillet 2010 au plus tard, des informations au sujet de toutes mesures prises ou en train d'être prises pour appliquer lesdites dispositions. Le texte complet des documents reçus par le Secrétariat en réponse à ces demandes est reproduit dans des annexes au présent rapport, qui contient aussi les observations du Secrétaire général.



I. Introduction

1. Le présent rapport est soumis en application des dispositions du paragraphe 5 de la résolution 64/254 de l'Assemblée générale, en date du 26 février 2010, intitulée « Deuxième suite donnée au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza », par laquelle l'Assemblée m'a prié de lui présenter dans un délai de cinq mois un rapport sur l'application de ladite résolution. Pour ce faire, il était nécessaire de déterminer les mesures prises par les parties visées aux paragraphes 2, 3 et 4 de la résolution.

2. Le 27 mai 2010, j'ai appelé l'attention de la Mission permanente d'Israël auprès de l'Organisation des Nations Unies sur la résolution 64/254, lui demandant de fournir par écrit au Secrétariat, au 12 juillet 2010 au plus tard, toute information sur les mesures qu'aurait prises ou qu'était en train de prendre le Gouvernement israélien pour donner suite à la demande formulée par l'Assemblée générale au paragraphe 2 de la résolution.

3. Le 16 juillet 2010, le Secrétariat a reçu du Gouvernement israélien un document intitulé « Enquête sur l'opération à Gaza : deuxième mise à jour ». Le texte intégral de ce document est reproduit à l'annexe I du présent document.

4. Le 27 mai 2010, j'ai appelé l'attention de la Mission permanente d'observation de la Palestine auprès de l'Organisation des Nations Unies sur la résolution 64/254, lui demandant de fournir par écrit au Secrétariat, au 12 juillet 2010 au plus tard, toute information sur les mesures qu'aurait prises ou qu'était en train de prendre la partie palestinienne pour donner suite à la demande formulée instamment par l'Assemblée générale au paragraphe 3 de la résolution.

5. Le 12 juillet 2010, j'ai reçu une lettre, datée du même jour, de la Mission permanente d'observation de la Palestine auprès de l'Organisation des Nations Unies, me transmettant une lettre datée du 11 juillet 2010 du Président de l'Autorité palestinienne, Mahmoud Abbas, ainsi que le rapport de la Commission indépendante palestinienne d'enquête sur la suite donnée au rapport Goldstone, y compris une introduction générale au rapport. Le texte intégral de ces lettres, de l'introduction générale au rapport de la Commission indépendante palestinienne d'enquête sur la suite donnée au rapport Goldstone et du rapport lui-même est reproduit à l'annexe II du présent rapport.

6. Le 27 mai 2010, j'ai appelé l'attention de la Mission permanente de Suisse auprès de l'Organisation des Nations Unies sur la résolution 64/254, lui demandant de communiquer par écrit au Secrétariat, au 12 juillet 2010 au plus tard, toute information sur les mesures qu'aurait prises ou qu'était en train de prendre le Gouvernement suisse pour donner suite à la recommandation formulée par l'Assemblée générale au paragraphe 4 de la résolution.

7. Le 12 juillet 2010, j'ai reçu de la Mission permanente de Suisse une note verbale, datée du même jour, me transmettant un rapport intitulé « États des entretiens sur le suivi du paragraphe 4 de la résolution 64/254 de l'Assemblée générale des Nations Unies ».

8. Le présent rapport fait suite au rapport que j'ai présenté à l'Assemblée générale le 26 juillet 2010 (A/64/867) en application du paragraphe 5 de la résolution 64/254, et dans lequel je notais que les communications reçues des parties susmentionnées représentaient en tout 382 pages. J'indiquais que, pour des raisons

techniques, j'étais dans l'incapacité de publier ces documents ou mes observations dans l'immédiat et que je ferais de nouveau rapport dès que la traduction de ces documents serait terminée.

II. Observations

9. Au début de 2009, je me suis rendu à Gaza et dans le sud d'Israël pour aider à faire cesser les combats et pour témoigner mon respect et mes préoccupations vis-à-vis du très grand nombre de personnes qui avaient été tuées ou blessées pendant le conflit à Gaza et dans ses environs. En mars 2010, je me suis une deuxième fois rendu à Gaza et à Israël. J'étais, et je demeure, profondément affecté par l'étendue des morts, des destructions et des souffrances dans la bande de Gaza, et ému par le sort des populations civiles du sud d'Israël qui ont été la cible de tirs aveugles de roquette et de mortier.

10. Je réaffirme la nécessité de respecter pleinement le droit international humanitaire et le droit international des droits de l'homme dans toutes les situations et en toutes circonstances. C'est pourquoi j'ai, à plusieurs occasions, lancé un appel à toutes les parties afin qu'elles diligentent des enquêtes internes crédibles et indépendantes sur la conduite du conflit à Gaza et ses conséquences. Je forme l'espoir que de telles mesures seront prises chaque fois que des allégations crédibles font état de violations du droit international humanitaire et du droit international des droits de l'homme.

11. J'espère sincèrement que la résolution 64/254 a eu pour effet d'encourager le Gouvernement israélien et la partie palestinienne à mener des enquêtes indépendantes, crédibles et conformes aux normes internationales.

12. Je rappelle que, le 25 mars 2010, le Conseil des droits de l'homme a adopté sa résolution 13/9, dans laquelle il a décidé de créer, dans le cadre de la suite donnée au rapport de la Mission internationale indépendante d'établissement des faits, un comité d'experts indépendants du droit international humanitaire et du droit international des droits de l'homme chargé d'examiner et d'évaluer toute procédure judiciaire ou autre engagée devant les juridictions internes, tant par le Gouvernement israélien que par les autorités palestiniennes compétentes, à la lumière de la résolution 64/254 de l'Assemblée générale, y compris l'indépendance, l'efficacité et l'authenticité des enquêtes ouvertes et leur conformité avec les normes internationales. Dans cette même résolution 13/9, le Conseil des droits de l'homme m'a prié de transmettre au comité d'experts indépendants toutes les informations soumises par le Gouvernement israélien et la partie palestinienne conformément aux paragraphes 2 et 3 de la résolution 64/254 de l'Assemblée générale. En conséquence, j'envoie ce jour à la Haut-Commissaire aux droits de l'homme une lettre la priant de transmettre au comité d'experts indépendants les documents reçus du Gouvernement israélien et de la Mission permanente d'observation de la Palestine auprès de l'Organisation des Nations Unies.

Annexe I

Enquête sur l'Opération à Gaza : deuxième mise à jour

[Original : anglais]

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I. Introduction et résumé

1. Le présent document décrit les progrès réalisés et la situation actuelle concernant les enquêtes menées par Israël au sujet des accusations de fautes de comportement et de violations du droit des conflits armés¹ par les Forces de défense israéliennes (« FDI ») au cours de l'opération menée à Gaza du 27 décembre 2008 au 18 janvier 2009 (« l'Opération à Gaza », également appelée « Opération Plomb durci »). Il constitue une mise à jour des informations contenues dans les deux précédents rapports sur la question diffusés en juillet 2009 et en janvier 2010.

2. Le premier rapport d'Israël, qui date de juillet 2009, et qui était intitulé *The Operation in Gaza: Factual and Legal Aspects* (ici après « Rapport sur l'Opération à Gaza »)² décrit les événements qui ont précédé l'Opération. Ces événements sont les tirs de mortiers et de roquettes incessants du Hamas à partir de Gaza contre des civils israéliens (environ 12 000 au cours des huit années qui ont précédé l'Opération) et la portée sans cesse grandissante de ces tirs; l'enlèvement en 2006 du caporal de l'armée israélienne Gilad Shalit, toujours détenu au secret, ainsi que les nombreuses tentatives d'Israël pour écarter cette menace terroriste sans recourir à des moyens militaires, y compris par des initiatives diplomatiques et des appels urgents lancés aux Nations Unies³.

3. Le rapport sur l'Opération à Gaza décrit également les efforts des FDI pour respecter le droit des conflits armés, et ce en dépit des problèmes opérationnels importants posés par les méthodes employées par le Hamas – en particulier le fait de se mélanger à la population civile palestinienne et d'utiliser les infrastructures civiles pour lancer des attaques, abriter ces combattants et cacher des armes, et ce de façon délibérée.

4. Le rapport sur l'Opération à Gaza décrit également le cadre juridique régissant le recours à la force et les règles – y compris les principes de distinction et de proportionnalité – qui s'appliquent à un conflit armé en vertu du droit international⁴. Il présente en détail le système israélien d'enquête en cas d'accusations de violation du droit des conflits armés et contient les premières conclusions (jusqu'en juillet 2009) d'un certain nombre d'enquêtes déjà ouvertes à la suite de l'Opération.

5. En janvier 2010, Israël a publié une première suite à son rapport sur l'Opération à Gaza⁵. Celle-ci fournissait des informations sur les divers mécanismes d'enquête en cas d'allégations faisant état de violations du droit des conflits armés,

¹ Comme dans les deux précédents rapports, l'expression « droit des conflits armés » est utilisée dans tout le présent rapport dans son sens ordinaire, qui renvoie aux obligations que le droit impose aux parties à un conflit armé dans l'exécution de leurs opérations militaires. L'expression « droit international humanitaire » est employée par nombre de commentateurs et de pays comme si elle est interchangeable avec la première. Israël, de même que beaucoup d'autres pays, préfèrent droit des conflits armés.

² *The Operation in Gaza Report: Factual and Legal Aspects* (juillet 2009), consultable à l'adresse suivante : http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_in_Gaza-Factual_and_Legal_Aspects.htm.

³ Ibid., par. 36 à 81.

⁴ Ibid., par. 27 à 35.

⁵ *Gaza Operation Investigation: An Update* (janvier 2010), consultable à l'adresse suivante : <http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-AID2-8B30F64022BE/0/GazaOperationInvestigationUpdate.pdf>.

qu'il compare aux dispositifs d'enquête similaire établis par d'autres démocraties (Royaume-Uni, États-Unis, Canada et Australie)⁶. Elle expliquait également comment Israël avait donné suite à des plaintes précises faisant état de violations du droit des conflits armés pendant l'Opération de Gaza.

6. Le *Rapport de janvier 2010* décrit en détail les multiples phases du dispositif d'enquête israélien, qui en garantissent l'exhaustivité, l'impartialité et l'indépendance. Au cœur du système de justice militaire se trouve l'Avocat général des armées, qui est juridiquement indépendant de la hiérarchie militaire. Lorsque des allégations de violations du droit des conflits armés sont identifiées ou portées à l'attention du Bureau de l'Avocat général des armées, dans des situations qui suggèrent, par elle-même, un comportement criminel, celui-ci ouvre immédiatement une enquête criminelle. Dans d'autres cas, il peut tout d'abord examiner les conclusions d'une enquête de commandement ou, en l'absence d'une telle enquête, demander à ce qu'il y soit procédé. Il étudie les informations collectées lors de l'enquête de commandement ainsi que la plainte reçue et tout autre document public avant de déterminer s'il y a lieu d'ouvrir une enquête criminelle.

7. Le Procureur général d'Israël exerce sur l'Avocat général des armées un contrôle civil car il peut examiner toutes ses décisions d'ouvrir ou non une enquête. Comme indiqué dans le *Rapport de janvier 2010*, la Cour suprême israélienne exerce également un contrôle judiciaire, soit en tant qu'instance d'appel, soit en vertu de son pouvoir de contrôle judiciaire s'étendant à toutes décisions de l'Avocat général des armées ou du Procureur général de la justice civile. Un tel contrôle judiciaire peut être provoqué par une requête de n'importe quelle partie concernée, y compris des Palestiniens qui vivent à Gaza ou des organisations non gouvernementales⁷.

8. Le rapport de 2010 fait le point des progrès réalisés jusqu'en janvier 2010, y compris concernant les cinq enquêtes de commandement spéciales décrites dans le rapport sur l'Opération à Gaza⁸. Il précise qu'une sixième enquête de commandement spéciale a été ouverte en novembre 2009 au sujet de trois allégations spécifiques figurant dans le rapport de la Mission d'établissement des faits sur le conflit de Gaza du Conseil des droits de l'homme, présidée par le juge Richard Goldstone⁹. Israël a ouvert de nombreuses autres enquêtes criminelles et de commandement afin de déterminer la véracité d'allégations en rapport avec l'Opération à Gaza¹⁰.

9. Le présent rapport contient des informations au sujet des nouvelles mesures qu'Israël a prises et continue de prendre en vue d'enquêter au sujet d'allégations en rapport avec l'Opération à Gaza. Il ne reprend pas les très nombreuses informations communiquées dans les deux précédents rapports, pas plus qu'il n'essaie de couvrir l'ensemble des enquêtes. Il décrit en revanche de manière générale les progrès réalisés par les principales enquêtes au cours des six derniers mois, notamment les enquêtes au sujet d'incidents précis examinés dans le rapport de la Mission

⁶ *January 2010 Update*, par. 71 à 88.

⁷ Voir, par exemple, *January 2010 Update*, par. 36.

⁸ *Ibid.*, par. 96 à 123

⁹ *Rapport de la Mission d'établissement des faits du Conseil des droits de l'homme* (25 septembre 2009), consultable à l'adresse suivante :

<http://www2.ohchr.org/french/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>.

¹⁰ *January 2010 Update*, par. 24 à 27.

d'établissement des faits. Il contient en outre un résumé de certaines modifications qu'Israël a apportées ou est en train d'apporter à ses procédures opérationnelles militaires afin de tenir compte des enseignements tirés de l'Opération à Gaza.

10. Les nombreuses enquêtes menées par Israël ont donné des résultats importants, notamment au cours des derniers mois. Depuis le rapport de 2010, la Division des enquêtes criminelles de la police militaire a ouvert 11 nouvelles enquêtes criminelles, soit 47 au total jusqu'à présent au sujet d'incidents précis en rapport avec l'Opération à Gaza. Certaines de ces enquêtes ont débouché sur des inculpations et des procès : deux soldats des FDI ont été récemment condamnés pour avoir obligé un mineur palestinien à les aider d'une façon telle que cela mettait sa vie en danger. Par ailleurs, le Bureau de l'Avocat général des armées a inculpé un soldat des FDI soupçonné d'avoir tué un civil palestinien qui avançait avec un groupe d'autres civils en direction d'une position des FDI. Ces affaires viennent s'ajouter à une précédente inculpation et condamnation d'un soldat des FDI pour pillage, comme indiqué dans le rapport de 2010¹¹.

11. Plusieurs autres enquêtes ont débouché sur des mesures disciplinaires. Un général de brigade et un colonel ont ainsi fait l'objet de mesures disciplinaires pour avoir approuvé l'utilisation d'obus explosifs en violation des distances de sécurité imposées en milieu urbain. Un lieutenant-colonel a de même fait l'objet de mesures disciplinaires pour avoir laissé un civil palestinien pénétrer dans un bâtiment où se trouvaient des terroristes. Par ailleurs, un officier des FDI a été sévèrement réprimandé et deux autres ont été sanctionnés pour ne pas avoir pris la bonne décision lors d'un incident qui a entraîné des pertes civiles à la mosquée Al-Maqadmah.

12. Dans le même temps, le Bureau de l'Avocat général des armées a mené à bien l'examen d'un certain nombre d'enquêtes de la Division des enquêtes criminelles de la police militaire et d'enquêtes de commandement sans prononcer d'inculpation ni engager de mesures disciplinaires, ayant conclu qu'elles ne révélaient aucune violation du droit des conflits armés ou des procédures des FDI. Les enquêtes concernant un certain nombre d'autres allégations de faute se poursuivent.

13. Les FDI ont par ailleurs apporté à leur doctrine concernant les ordres et le combat certaines modifications opérationnelles destinées à limiter davantage encore à l'avenir les pertes civiles et les dommages aux biens à caractère civil. En particulier, elles ont adopté d'importantes procédures destinées à renforcer la protection des civils lors de combats en milieu urbain, en insistant par exemple davantage sur le fait que la protection des civils fait partie intégrante de la mission d'un commandant des FDI. Si la majorité des questions traitées l'étaient déjà dans divers ordres et directives opérationnels en vigueur avant l'Opération, ces nouvelles procédures exigent d'assurer une protection encore plus complète et prévoient par exemple la présence d'un officier chargé des affaires humanitaires au sein de chaque unité combattante à partir du niveau du bataillon. En outre, les FDI ont adopté un ordre définissant de nouvelles procédures concernant la destruction de biens privés en cas de nécessité militaire.

14. Israël a fait de très importants efforts pour enquêter de manière exhaustive et indépendante sur les allégations de faute de comportement par des soldats des FDI lors de l'Opération à Gaza. À cet égard, il a mis en place des mécanismes visant à

¹¹ Ibid., par. 137 et note 112.

surmonter certains des problèmes inhérents à toute enquête sur une activité opérationnelle dans le contexte d'un conflit armé, et notamment les problèmes posés par la localisation de témoins à Gaza et la façon de traiter les accusations générales, et souvent indirectes, de fautes de comportement.

15. Bien que l'État d'Israël ne doute pas de l'exhaustivité, de l'impartialité et de l'indépendance de son système d'enquête au sujet d'allégations de violation du droit des conflits armés, le Gouvernement israélien, au vu des critiques figurant dans certains rapports, a récemment chargé une commission publique indépendante de déterminer si les mécanismes d'enquête sur les plaintes de violation du droit des conflits armés étaient conformes à ses obligations en vertu du droit international. Cette commission, dirigée par l'ancien juge à la Cour suprême, Yaakov Turkel, est composée de trois éminents experts indépendants et de deux observateurs internationaux de renom (Commission Turkel).

16. Le présent rapport se compose comme suit : la section II décrit les progrès des enquêtes depuis le rapport de 2010. La section III décrit les résultats et l'état d'avancement de plusieurs enquêtes précises, notamment des enquêtes au sujet des incidents mentionnés dans le rapport de la Mission d'établissement des faits. La section IV décrit les modifications apportées aux directives militaires opérationnelles sur la base des enseignements tirés de l'Opération de Gaza et la section V, enfin, décrit la création et le mandat de la Commission Turkel.

II. Progrès des enquêtes depuis janvier 2010

17. Au cours des six derniers mois, le système israélien de justice militaire a poursuivi ses enquêtes sur les accusations de mauvaise conduite des FDI au cours de l'Opération à Gaza. Comme indiqué dans le *Rapport de janvier 2010*, Israël a lancé plus de 150 enquêtes, qu'il s'agisse d'enquêtes criminelles menées par la police militaire ou d'enquêtes de commandement. Le présent rapport appelle l'attention sur les conclusions de certaines des enquêtes terminées et les décisions prises par le Bureau de l'Avocat général des armées. Comme expliqué précédemment, ces décisions peuvent être examinées par le Procureur général et par la Cour suprême d'Israël.

18. Les faits décrits dans le présent document démontrent que la portée des enquêtes concernant l'Opération à Gaza est loin d'être limitée au comportement de tel ou tel soldat. Outre les inculpations de soldats des FDI, le Bureau de l'Avocat général des armées n'a pas hésité à prendre des mesures disciplinaires à l'encontre d'officiers supérieurs, dont un général de brigade et un colonel dans une affaire, et un lieutenant-colonel dans une autre affaire. Dans une troisième affaire, un officier a fait l'objet de mesures disciplinaires et deux autres de sanctions de la part du commandement, comme décrit plus en détail à la section III ci-dessous. En outre, les six enquêtes de commandement spéciales, décrites dans les deux précédents rapports, ont porté sur des questions opérationnelles plus générales, telles que l'utilisation d'armes au phosphore blanc, les mesures prises à proximité de sites sensibles et la destruction de biens à caractère privé. Certaines de ces enquêtes ont déjà provoqué d'importantes modifications des procédures des FDI, et d'autres modifications sont en cours d'introduction.

A. Examen par le Bureau de l'Avocat général des armées des enquêtes de commandement

19. Comme décrit dans le *Rapport de janvier 2010*, les enquêtes de commandement sont d'importantes enquêtes d'établissement des faits, dont l'objet n'est pas seulement d'examiner le comportement des FDI lors d'opérations militaires mais également de repérer et de corriger tout problème particulier qui aurait pu se poser. Elles ne se substituent pas aux enquêtes criminelles, mais permettent de constituer un premier dossier que le Bureau de l'Avocat général des armées examine, conjointement avec la plainte et avec d'autres informations pertinentes, afin de déterminer s'il y a lieu d'ouvrir une enquête criminelle. Les enquêtes de commandement peuvent également recommander des mesures correctives, telles que des mesures disciplinaires ou une modification des procédures opérationnelles.

20. L'examen du rapport d'une enquête de commandement par le Bureau de l'Avocat général des armées est une procédure rigoureuse au cours de laquelle sont étudiés les résultats de l'enquête, la plainte reçue et toute autre information fournie par le plaignant ou publique, y compris les rapports d'organisations de défense des droits de l'homme et toute autre source d'information disponible. Il arrive fréquemment que le Bureau de l'Avocat général des armées demande aux enquêteurs des précisions complémentaires, voire de poursuivre leur enquête, avant de prendre une décision quant à la suite à donner à la plainte considérée.

21. Même lorsqu'une enquête est close, l'Avocat général des armées peut rouvrir l'examen d'un incident si des faits ou des événements nouveaux apparaissent. C'est par exemple ce qui s'est passé dans le cas de l'enquête au sujet des événements concernant la minoterie d'el-Bader, décrits dans le *Rapport de janvier 2010*¹² (et examinés à la section III ci-dessous), ainsi que de l'enquête concernant les événements à la mosquée Al-Maqadmah (également décrits à la section III).

22. Depuis janvier 2010, le Bureau de l'Avocat général des armées a mené à bien l'examen factuel et juridique d'un grand nombre d'enquêtes de commandement avec pour résultat soit l'ouverture d'enquêtes criminelles, soit des mesures disciplinaires¹³, soit la clôture lorsqu'il n'était pas démontré que les FDI avaient violé le droit des conflits armés ou leurs procédures.

B. Enquêtes criminelles de la police militaire

23. Depuis le *Rapport de janvier 2010*, la Division des enquêtes criminelles de la police militaire a ouvert 11 nouvelles enquêtes au sujet du comportement des FDI lors de l'Opération à Gaza, portant le nombre total des enquêtes à 47. Les dernières enquêtes ordonnées par le Bureau de l'Avocat général des armées concernent des

¹² Ibid., par. 165 à 174.

¹³ Comme indiqué dans le *Rapport de janvier 2010* (par. 55), les procédures disciplinaires sont réservées aux infractions les moins graves. Elles peuvent toutefois donner lieu à des peines d'emprisonnement pouvant aller jusqu'à trois ans.

accusations figurant dans plusieurs rapports, y compris celui de la Mission d'établissement des faits, et des faits concernant la famille al-Samouni¹⁴.

24. Comme expliqué dans le *Rapport de janvier 2010*, les enquêtes de commandement ne sont pas un préalable indispensable à l'ouverture d'une enquête criminelle et n'entraînent par conséquent pas de retard lorsqu'il existe clairement des éléments suffisants pour caractériser un comportement criminel. En fait, sur les 47 enquêtes criminelles ouvertes jusqu'à présent, 34, c'est-à-dire les trois quarts, l'ont été directement en tant que telles.

25. Un certain nombre d'enquêtes criminelles ont été menées à bien et leurs conclusions ont été examinées par le Bureau de l'Avocat général des armées. Dans plusieurs cas, celui-ci a prononcé l'ouverture de procédures disciplinaires ou une inculpation, comme décrit en détail à la section III ci-dessous.

26. Depuis la fin de l'Opération à Gaza, la Division des enquêtes criminelles de la police militaire a consacré une grande partie de ses ressources aux enquêtes sur les incidents liés à cette opération. Comme indiqué précédemment, en raison du nombre et de la portée de ces enquêtes, une équipe de 16 enquêteurs y a été affectée exclusivement. Elle a à sa disposition quatre traducteurs arabophones et en a employé temporairement sept autres en raison du grand nombre de pages à traduire.

27. Les enquêteurs de la Division des enquêtes criminelles de la police militaire se sont rendus en divers lieux afin de rencontrer des témoins, y compris des Palestiniens et des soldats et des officiers des FDI ayant participé à l'Opération à Gaza. Afin de prendre contact avec des plaignants palestiniens à Gaza et de coordonner les rencontres avec eux, ils ont sollicité l'aide des organisations de défense des droits de l'homme et des avocats israéliens représentant certains des plaignants (certaines de ces réunions se sont déroulées au point de passage d'Erez, et d'autres à des points de passage entre Israël et la bande de Gaza). Si, lors de l'entretien, les plaignants fournissaient les noms d'autres témoins potentiels, les enquêteurs ont également recherché à s'entretenir avec ces nouveaux témoins.

28. Outre la collecte des témoignages, les enquêteurs ont cherché et obtenu diverses preuves physiques, y compris des cartes et des relevés d'opérations des FDI. Ils ont également recueilli les dossiers médicaux d'hôpitaux de Gaza afin d'évaluer les blessures déclarées par les plaignants palestiniens. Dans certains cas, la Division des enquêtes criminelles a fait appel à des experts indépendants pour l'étude des traces d'explosions ainsi que pour essayer d'identifier le type de munition utilisé.

29. Comme indiqué dans le *Rapport de janvier 2010*, la détermination des faits dans des situations de conflits en évolution rapide pose un certain nombre de difficultés importantes¹⁵. La première de ces difficultés est l'identification des unités des FDI opérant dans chaque zone lors du jour en question. Les enquêteurs ont rencontré des représentants du Commandement sud et de la Division Gaza et ont

¹⁴ *Rapport de la Mission d'établissement des faits du Conseil de sécurité* (par. 706 à 744). Comme indiqué aux paragraphes 124 et 125 du *Rapport de janvier 2010*, une enquête de commandement spéciale a été ouverte au sujet de cet incident. Après en avoir examiné les conclusions, le Bureau de l'Avocat général des armées a décidé qu'une enquête criminelle était justifiée. Celle-ci se déroulera parallèlement aux deux autres enquêtes criminelles actuellement en cours et portant sur d'autres aspects de l'incident.

¹⁵ *Ibid.*, par. 93.

soigneusement reporté sur les cartes les mouvements des forces lors de l'Opération. Ils ont également recueilli des témoignages de commandants de bataillons et de compagnies et ont ensuite cherché à déterminer si telle ou telle accusation était compatible avec l'endroit où se trouvaient les forces concernées.

30. Un autre problème tient au fait que certains témoins palestiniens ont refusé de faire des déclarations, même par écrit, à des enquêteurs des FDI. D'autres ont refusé de témoigner en personne. Si une déclaration écrite peut donner aux enquêteurs des informations utiles et servir de point de départ, elle ne peut être admise comme preuve lors d'un procès sans informations complémentaires. Le système israélien, comme celui de nombreux autres pays, exige que le témoin soit prêt à déposer au tribunal afin de permettre à la défense de l'interroger au sujet de questions telles que sa capacité à observer les événements, de déterminer si le témoin a des préjugés ou un parti pris, ou s'il existe d'autres faits pertinents qui ne figurent pas dans la déclaration écrite. Par conséquent, dans certains cas, le fait qu'un plaignant se montre réticent à coopérer peut priver les enquêteurs des preuves les plus importantes.

31. En dépit de ces problèmes, la Division des enquêtes criminelles de la police militaire a mené à bien un nombre significatif d'enquêtes en rapport avec l'Opération à Gaza, dont les conclusions ont été examinées par le Bureau de l'Avocat général des armées qui s'est prononcé sur un grand nombre d'entre elles. Il convient par ailleurs de noter que, lors de l'évaluation de certains des incidents les plus complexes, le Bureau de l'Avocat général des armées a consulté des procureurs de haut rang du Bureau du Procureur général, et notamment le Procureur général adjoint aux affaires spéciales et le Procureur général adjoint aux affaires criminelles.

32. On trouvera à la section III du présent rapport des précisions au sujet d'un certain nombre de décisions prises par le Bureau du Procureur général des armées à la suite de l'examen des conclusions des enquêtes criminelles et des enquêtes de commandement.

C. Contrôle civil du système de justice militaire

33. Comme décrit dans le *Rapport de janvier 2010*¹⁶, les décisions du Bureau du Procureur général des armées peuvent faire l'objet d'un contrôle de la part du Procureur général de l'État d'Israël, personnage indépendant jouissant d'une haute autorité. Un plaignant ou une organisation non gouvernementale peut déclencher un contrôle par le Procureur général en adressant à celui-ci une lettre demandant à ce que la question concernée fasse l'objet d'un nouvel examen. Aux termes d'une décision de la Cour suprême israélienne, le Procureur général peut ordonner au Bureau de l'Avocat général des armées de modifier sa décision d'engager ou non des poursuites pénales¹⁷.

34. Les décisions du Bureau de l'Avocat général des armées comme du Procureur général peuvent faire l'objet d'un examen par la Cour suprême siégeant en tant que Haute Cour de justice¹⁸. Il peut s'agir d'une décision d'ouvrir ou non une enquête criminelle, de prononcer ou non une mise en accusation ou de prendre d'autres

¹⁶ Ibid., par. 31 à 33.

¹⁷ Ibid.

¹⁸ Ibid., par. 34 à 40.

mesures disciplinaires. Dans plusieurs affaires, des résidents palestiniens ou des organisations non gouvernementales qui s'étaient plaints de l'exercice par l'Avocat général des armées de la discrétion du ministère public ont obtenu gain de cause, alors que dans d'autres la Cour suprême a confirmé les décisions du Bureau de l'Avocat général¹⁹.

III. Résultats d'enquêtes spécifiques concernant l'Opération à Gaza

35. Comme indiqué dans le *Rapport de janvier 2010*, Israël a ouvert plus de 150 enquêtes sur des allégations faisant état de comportements fautifs ou de violations du droit des conflits armés en rapport avec l'Opération à Gaza, notamment celles décrites dans le rapport de la Commission d'établissement des faits du Conseil des droits de l'homme. Le *Rapport de janvier 2010* décrivait quatre enquêtes dont l'Avocat général des armées avait achevé l'examen à la date d'établissement dudit rapport. La présente mise à jour rend compte des résultats de plusieurs autres affaires parmi celles que l'Avocat général des armées a examinées.

A. Enquêtes relatives aux allégations de mauvais traitements infligés à des civils et des détenus palestiniens

36. Les consignes opérationnelles des FDI insistent sur le devoir de protéger la dignité des civils dans le cadre d'un conflit armé et de traiter les détenus avec humanité. En conséquence, les instructions données pour l'Opération à Gaza interdisaient expressément l'utilisation de civils comme boucliers humains, ainsi que le fait d'obliger des civils à participer à des opérations militaires, conformément au droit des conflits armés et à un jugement de la Cour suprême sur le sujet²⁰.

37. Israël prend au sérieux tout rapport faisant état de mauvais traitements infligés à des civils ou des détenus palestiniens au cours de l'Opération à Gaza. L'Avocat général des armées a directement transmis aux instances pénales, pour enquête, toutes les allégations selon lesquelles des civils auraient été utilisés comme boucliers humains par les FDI ou obligés de participer à des opérations militaires, ou selon lesquelles des personnes auraient été maltraitées alors qu'elles étaient détenues par les FDI. Comme le montrent les affaires décrites ci-dessous, les faits qui ressortent de certaines enquêtes diffèrent notablement des faits allégués. Cela étant, dans une de ces affaires, l'Avocat général des armées a découvert suffisamment de preuves d'irrégularités pour engager des poursuites contre deux soldats et, dans une autre affaire, il a renvoyé devant les instances disciplinaires un haut gradé des FDI. Par ailleurs, comme indiqué dans le *Rapport de janvier 2010*, les principales questions concernant les conditions de détention des Palestiniens au cours de l'Opération à Gaza font l'objet d'une enquête spéciale ouverte par le

¹⁹ On trouvera aux paragraphes 36 et 37 du *Rapport de janvier 2010* des exemples de telles plaintes.

²⁰ *Adalah – The Legal Center for Arab Minority Rights in Israel c. GOC Central Command, IDF*, HCJ 3799/02 (6 octobre 2005).

commandement et dirigée par un officier supérieur qui ne faisait pas partie de la chaîne de commandement pendant les événements en question²¹.

38. On trouvera ci-après un certain nombre d'exemples de résultats de l'examen par l'Avocat général des armées des enquêtes relatives aux allégations de mauvais traitements infligés à des civils et des détenus palestiniens.

1. M. R.

39. La plainte concernant cet incident figurait dans un rapport du Représentant spécial du Secrétaire général de l'ONU pour les enfants et les conflits armés et il y était allégué qu'un garçon palestinien avait été utilisé comme bouclier humain par les FDI opérant le 15 janvier 2010 dans le secteur de Tel Al-Hawa de la ville de Gaza²². Une allégation similaire avait été formulée par une ONG israélienne. Au vu de ces allégations, l'Avocat général des armées a ordonné directement l'ouverture d'une enquête pénale.

40. La Division des enquêtes criminelles de la police militaire a voulu identifier le plaignant, dont l'identité n'était pas indiquée dans le rapport du Représentant spécial du Secrétaire général pour les enfants et les conflits armés. Les enquêteurs de la police militaire ont pris contact avec l'ONG israélienne afin qu'elle les aide à identifier le plaignant et à organiser un entretien avec lui. Le garçon a été interrogé en présence de sa mère. Les enquêteurs ont aussi réuni d'autres éléments de preuve, notamment les témoignages de soldats impliqués dans cet incident.

41. Il ressort de cette enquête qu'en procédant à la fouille d'un bâtiment à Tel Al-Hawa, deux soldats ont obligé un garçon à ouvrir plusieurs sacs et valises dont ils soupçonnaient qu'elles étaient piégées et contenaient des explosifs. Considérant les faits, l'Avocat général des armées a estimé qu'il y avait suffisamment de preuves que ces soldats avaient désobéi aux ordres interdisant d'utiliser des civils à des fins d'opérations militaires.

42. En mars 2010, l'Avocat général des armées a décidé d'inculper les deux soldats. Leur procès, public²³, se poursuit devant un tribunal militaire de district en Israël. À la date d'établissement du présent rapport, le procureur avait achevé son réquisitoire, qui comportait le témoignage du garçon en question.

2. Majdi Abd-Rabbo

43. Selon la plainte déposée par une ONG israélienne, un habitant de Gaza, le dénommé Majdi Abd-Rabbo, a été obligé d'aider une unité des FDI à obtenir la reddition pacifique de plusieurs individus armés qui se cachaient dans une maison mitoyenne de la sienne. L'Avocat général des armées a renvoyé directement ce dossier à la Division des enquêtes criminelles de la police militaire en juin 2009²⁴. Avec le concours de l'ONG en question, ladite Division s'est entretenue avec le

²¹ Voir *January 2010 Update*, par. 125 et note 110, pour le mandat détaillé de cette enquête spéciale du commandement.

²² *Human Rights Situation in Palestine and Other Occupied Arab Territories*, A/HRC/10/22, annexe, par. 10 (20 mars 2009).

²³ Voir *January 2010 Update*, par. 28.

²⁴ Alors que l'enquête de la Division des enquêtes criminelles de la police militaire était déjà en cours, ces allégations ont été également décrites dans le *Rapport de la Commission d'établissement des faits du Conseil des droits de l'homme*, par. 1033 à 1063.

plaignant et a recueilli sa déposition. La Division a en outre recueilli les témoignages de 15 officiers et soldats de l'unité impliquée dans cet incident ainsi que de plusieurs soldats et officiers d'autres unités opérant dans le secteur au cours de la période indiquée dans la plainte.

44. À l'issue d'une enquête approfondie, plusieurs aspects du témoignage de M. Abd-Rabbo n'ont pas pu être corroborés. Toutefois, les éléments de preuve réunis au cours de l'enquête ont effectivement révélé que le commandant de la force, un lieutenant-colonel qui était en contact radio avec l'unité des FDI tout au long de cet incident, avait à plusieurs reprises autorisé l'unité à permettre à M. Abd-Rabbo de se rendre dans le bâtiment mitoyen à sa maison pour communiquer avec des individus armés qui s'y trouvaient.

45. Bien que l'enquête ait révélé que M. Abd-Rabbo avait demandé à se rendre dans le bâtiment et à communiquer avec des individus qui s'y trouvaient, apparemment pour tenter de résoudre le problème et éviter que sa propre maison ne soit endommagée, l'Avocat général des armées a estimé que le commandant de la force n'aurait pas dû autoriser M. Abd-Rabbo à se rendre dans le bâtiment mitoyen, à ses risques et périls, même s'il était apparemment consentant.

46. L'Avocat général des armées a donc renvoyé l'affaire aux instances habilitées à prendre des sanctions disciplinaires à l'encontre du commandant qui n'avait pas respecté les consignes opérationnelles interdisant toute utilisation de civils à des fins d'opérations militaires. Pour décider d'opter pour une procédure disciplinaire et non une inculpation, l'Avocat général des armées a pris en considération toute une série de facteurs, notamment le fait que le commandant avait estimé qu'en accédant à la demande de M. Abd-Rabbo, il contribuerait à réduire autant que faire se peut le risque que la propriété de ce dernier soit endommagée. Le fait que M. Abd-Rabbo n'a pas été blessé au cours de cet incident a constitué un facteur supplémentaire. L'officier a été par la suite sanctionné.

3. Abbas Ahmad Ibrahim Halawa et Mahmoud Abd Rabbo al-Ajrami

47. Abbas Ahmad Ibrahim Halawa et Mahmoud Abd Rabbo al-Ajrami ont tous deux affirmé, dans deux plaintes distinctes, que, le 5 janvier 2009, des soldats israéliens les ont sortis de leur domicile dans le quartier d'Al-Atatra, les ont maltraités et les ont obligés à faire office de boucliers humains²⁵. M. al-Ajrami a aussi fait état d'un préjudice physique résultant des mauvais traitements qu'il aurait subis de la part des FDI, ainsi que d'actes de vandalisme et de pillage dans sa maison. La Division des enquêtes criminelles de la police militaire a ouvert deux enquêtes pénales distinctes sur ces deux affaires, qui ont été par la suite réunies lorsqu'il est devenu évident qu'elles relevaient d'une même chaîne d'événements.

48. Au cours de l'enquête, la Division susmentionnée a interrogé M. Halawa, M. al-Ajrami et M^{me} Manal al-Ajrami. Les enquêteurs ont ensuite voulu interroger M. Halawa une seconde fois mais celui-ci n'a pas répondu à la convocation. Il a néanmoins fourni aux enquêteurs des informations supplémentaires sous forme d'une déclaration sur l'honneur. La Division a aussi recueilli les témoignages de plus de 20 officiers et soldats, dont des commandants de régiment et de compagnie qui opéraient dans le secteur au cours de la période considérée. Outre les

²⁵ Ces allégations ont été également décrites dans le *Rapport de la Commission d'établissement des faits du Conseil des droits de l'homme*, par. 1064 à 1095.

déclarations de témoins oculaires, la Division a examiné diverses preuves écrites, notamment les certificats médicaux présentés par M. al-Ajrami et établis par l'hôpital Shifa de Gaza.

49. L'enquête a révélé qu'une unité des FDI opérant dans le quartier d'Al-Atatra à la recherche d'armes et de terroristes²⁶ s'est trouvée en présence des familles de M. Halawa et de M. al-Ajrami, qui avaient décidé de rester chez elles malgré les avertissements préalables des FDI appelant les civils à quitter le quartier, pour leur propre sécurité. Les membres de cette unité ont soupçonné M. Halawa et M. al-Ajrami d'être associés à des groupes militants et les ont donc appréhendés pour interrogatoire et transférés de la zone de combat à un poste des FDI situé à environ 1 km de là. Pour des raisons de sécurité, les détenus avaient les yeux bandés pendant leur transfert au poste.

50. Tous les éléments de preuve concordent quant au fait qu'à aucun moment au cours de cet incident, ni l'un ni l'autre de ces deux individus n'a été obligé de marcher devant les soldats ni de servir de bouclier humain. Les deux détenus étaient au contraire entourés de soldats pendant leur transfert, conformément aux procédures opérationnelles des FDI, aussi bien pour les protéger que pour réduire les risques d'évasion.

51. L'enquête n'a fait apparaître aucun élément de preuve susceptible d'étayer l'affirmation des plaignants selon laquelle ils auraient fait l'objet de violences physiques pendant qu'ils étaient sous la garde des FDI. Cette affirmation est même contredite par le certificat médical délivré à M. al-Ajrami par l'hôpital Shifa peu de temps après l'incident. Dans le même ordre d'idée, l'enquête a établi qu'il n'y avait aucun motif valable d'imputer aux FDI les actes de vandalisme et les pillages qui se seraient produits au domicile de M. al-Ajrami. Les enquêteurs ont relevé que M. al-Ajrami leur avait déclaré que sa famille avait refusé de quitter le quartier en partie par peur des vols et des pillages commis par d'autres habitants de Gaza.

52. Ayant examiné les faits tels qu'ils ressortaient de l'enquête, l'Avocat général des armées a estimé qu'il n'y avait aucune raison d'engager d'autres procédures et il a classé l'affaire.

4. AD/03

53. Le rapport de la Commission d'établissement des faits du Conseil des droits de l'homme décrit un incident faisant intervenir un témoin anonyme, AD/03, qui alléguait que lui-même et d'autres personnes avaient été irrégulièrement détenus et obligés d'aider les FDI au cours de l'Opération à Gaza²⁷. En examinant ces allégations et en les recoupant avec d'autres sources d'information disponibles, les enquêteurs israéliens ont pu établir l'identité d'AD/03 et déterminer que son cas avait été déjà signalé aux FDI avant la publication du rapport et faisait déjà l'objet

²⁶ Le quartier d'Al-Atatra, dans lequel cet incident s'est produit, était ce jour là le théâtre de violents combats. Il avait été le théâtre de multiples lancements de roquettes vers Israël, ce qui avait amené les FDI à prendre le contrôle de ce secteur et à fouiller les bâtiments qui s'y trouvaient, à la recherche d'armes et de militants.

²⁷ Rapport de la Commission d'établissement des faits du Conseil des droits de l'homme, par. 1143 à 1163.

d'une enquête pénale ouverte par la Division des enquêtes criminelles de la police militaire²⁸.

54. Dès le début de l'enquête pénale, la Division susmentionnée a pris contact avec l'avocat d'AD/03 pour organiser un entretien avec ce dernier au point de passage d'Erez, où la Division avait recueilli les témoignages de dizaines de plaignants palestiniens dans d'autres affaires liées à l'Opération à Gaza, mais AD/03 a rejeté ces requêtes. Son avocat a affirmé qu'il craignait pour sa sécurité s'il acceptait d'être interrogé.

55. AD/03 a maintenu son refus de coopérer alors même que les enquêteurs israéliens lui avaient expliqué que son témoignage était essentiel à l'enquête pénale. Recueillir le témoignage détaillé du plaignant, et obtenir de lui toutes pièces pouvant être utiles à l'enquête, représentent une composante essentielle du travail d'enquête de la Division. Le témoignage est nécessaire non seulement pour confirmer des allégations mais aussi pour identifier l'unité et les membres des FDI qui auraient été impliqués. Faute de témoignage du plaignant, le parquet militaire peut difficilement constituer un dossier pénal viable, qui exige que la culpabilité soit prouvée au-delà de tout doute raisonnable. Les allégations figurant dans le *rapport de la Commission d'établissement des faits du Conseil des droits de l'homme* ou dont font état des ONG et des médias seraient jugées irrecevables parce que simples preuves par ouï-dire en vertu des règles d'administration de la preuve, et les tribunaux israéliens ne sauraient se fonder sur de telles déclarations pour prouver l'existence d'une activité criminelle.

56. À la date d'établissement du présent document, l'affaire d'AD/03 a été classée mais les FDI souhaitent toujours l'interroger pour en savoir plus sur cet incident et clore l'enquête. Les FDI ont donné des assurances quant au fait que les Palestiniens qui accepteraient de venir au point de passage d'Erez pour apporter leurs témoignages ne seraient interrogés par la Division des enquêtes criminelles de la police militaire que sur les questions en rapport avec leur plainte et ne seraient pas détenus. Ces assurances s'appliquent aussi à AD/03.

57. Il convient de noter que certaines des allégations précises citées dans la plainte d'AD/03, concernant notamment les conditions de détention des Palestiniens pendant l'Opération à Gaza, font l'objet d'une enquête spéciale ouverte par le commandement et décrites dans le rapport de 2010²⁹. Cette enquête est en cours.

B. Enquêtes relatives aux allégations de ciblage d'objets civils et de sites sensibles

58. Le principe de distinction est un élément de base des consignes données par les FDI. Tous les soldats israéliens ont pour instruction que les frappes ne doivent être dirigées que contre des objectifs militaires légitimes, des combattants et des civils participant directement aux hostilités. Les consignes et la doctrine des FDI contiennent une interdiction rigoureuse de cibler intentionnellement des personnes

²⁸ Par l'entremise de son avocat israélien, AD/03 a adressé une plainte concernant cet incident au Procureur général d'Israël. Conformément à la procédure israélienne, cette plainte a été transmise à l'Avocat général des armées, qui a directement ordonné l'ouverture d'une enquête pénale.

²⁹ *January 2010 Update*, par. 124 et 125; voir aussi plus haut, note 21.

ou objets civils. Le principe de proportionnalité est également un élément de base, qui interdit les attaques pouvant occasionner des pertes civiles excessives par rapport à l'avantage militaire escompté. Les consignes des FDI incluent l'obligation de prendre toutes les précautions possibles de manière à réduire autant que faire se peut les pertes incidentes de vies ou de biens civils, par exemple en ajustant le moment, les moyens et la direction d'une attaque, et en interrompant les attaques dans certaines circonstances.

59. Comme décrit dans le rapport sur l'Opération à Gaza³⁰, conformément au droit des conflits armés, les consignes opérationnelles des FDI précisent aussi que les installations médicales doivent bénéficier d'une protection absolue contre les attaques, si elles ne sont pas utilisées par l'ennemi pour des activités militaires. En outre, des précautions particulières doivent être prises lorsque des activités militaires sont menées à proximité de locaux et autres installations des Nations Unies utilisés à des fins humanitaires, par exemple ceux d'organismes médicaux et d'hôpitaux.

60. À l'issue de l'Opération à Gaza, les FDI ont examiné des plaintes contenant des allégations de ciblage d'objets civils, ainsi que des plaintes faisant état de dommages occasionnés à des installations médicales et des locaux des Nations Unies³¹. Ces incidents ont fait l'objet de quatre enquêtes spéciales du commandement (l'une consacrée aux dommages subis par les installations médicales, la seconde aux installations des Nations Unies, la troisième traitant des incidents ayant fait de multiples victimes civiles et la plus récente consacrée à plusieurs incidents complexes)³². Dans deux de ces affaires, cinq officiers ont fait l'objet de sanctions ou autres mesures disciplinaires, deux d'entre eux pour violation des règles d'engagement des FDI et trois autres pour ne pas avoir fait suffisamment preuve de jugement. Dans d'autres affaires, l'examen par l'Avocat général des armées a fait apparaître que les dommages subis ne constituaient pas des violations des principes de distinction et de proportionnalité et qu'il n'y avait aucune raison d'imputer une intention criminelle aux soldats des FDI sur le terrain ou aux principaux acteurs des opérations.

³⁰ *Operation in Gaza Report*, par. 224.

³¹ Dans la bande à forte densité de peuplement de Gaza, il y a au total plus de 750 installations des Nations Unies et près de 1900 installations sensibles. Cela étant, le nombre des plaintes faisant état de dommages causés à de telles installations sensibles est relativement faible. Le rapport de la Commission du Siège de l'ONU chargée d'enquêter sur certains incidents survenus dans la bande de Gaza a fait état de blessés ou de dégâts matériels résultant de l'action des FDI dans sept installations des Nations Unies au cours de l'Opération. Israël a pleinement coopéré avec cette commission d'enquête des Nations Unies, pour partager avec elle les résultats de ses enquêtes internes et lui fournir des renseignements détaillés sur les incidents en question. Le Secrétaire général a félicité Israël de cette large coopération. Après avoir examiné le rapport de la Commission d'enquête, et nonobstant certaines réserves sur certains aspects de ce rapport, Israël a engagé avec l'ONU un dialogue propre à régler toutes les questions soulevées par les incidents examinés. Le 22 janvier 2010, le Secrétaire général a de nouveau remercié Israël de son « approche coopérative » de ces discussions et a confirmé que toutes les questions d'ordre financier en rapport avec ces incidents avaient trouvé un règlement satisfaisant. Point de presse du porte-parole de l'ONU (22 janvier 2010), disponible à l'adresse <http://www.unmultimedia.org/radio/english/detail/89687.html>.

³² *January 2010 Update*, par. 103 à 112 et 124 à 127.

1. Rue Al-Fakhura

61. Le rapport de la Commission d'établissement des faits du Conseil des droits de l'homme fait état d'une attaque au mortier israélienne qui aurait visé la rue al-Fakhura, à Jabalia, à proximité immédiate d'une école de l'Office de travaux et de secours des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient (UNRWA) utilisée comme refuge, attaque qui aurait fait un certain nombre de victimes civiles. Cet incident a été examiné dans le rapport sur l'Opération à Gaza, dans lequel il était expliqué que les forces israéliennes avaient visé et éliminé une équipe d'artilleurs du Hamas qui avait tiré à plusieurs reprises contre les FDI à partir d'un emplacement situé à 80 mètres environ de l'école de l'UNRWA³³. L'Avocat général des armées a achevé l'examen des résultats de cette enquête spéciale du commandement et a estimé que les tirs des FDI ne contrevenaient pas au droit des conflits armés.

62. L'Avocat général des armées a estimé que cette attaque visait un objectif militaire légitime et ne violait pas le principe de proportionnalité selon le critère du « chef militaire raisonnable »³⁴, considérant que les tirs de mortier du Hamas représentaient un danger évident et immédiat pour les forces israéliennes. Les obus de mortier tirés par le Hamas ont atterri à proximité très immédiate des forces israéliennes. La veille même, une attaque au mortier de même nature avait fait 30 blessés dans les rangs des FDI.

63. L'Avocat général des armées a également estimé que le commandant était conscient que les tirs de mortier provenaient d'une zone peuplée à proximité d'une école de l'UNRWA. Pour cette raison, le commandant a pris de multiples précautions, notamment en recoupant par deux moyens indépendants les renseignements sur l'origine des tirs, en utilisant l'arme la plus précise dont il disposait et en laissant une distance suffisante entre le point visé et l'école pour faire en sorte que celle-ci ne soit pas touchée. Ces précautions ont retardé la réaction des forces israéliennes et prolongé leur exposition aux tirs de mortier du Hamas.

64. Enfin, l'Avocat général des armées a considéré que les dommages collatéraux prévisibles avant le début des tirs de mortier des FDI n'étaient pas excessifs au regard de l'avantage militaire escompté, compte tenu de la nécessité militaire manifeste pour les forces israéliennes de se protéger contre les tirs de mortier continus, de la réaction mesurée de ces forces, de la superficie relativement faible de la zone de dispersion et des précautions prises.

65. L'Avocat général des armées a aussi estimé que le choix des armes utilisées par les FDI était judicieux en la circonstance. Les forces israéliennes ont tiré une salve de quatre mortiers de 120 mm « Keshet » tirant à intervalles très rapprochés. Le mortier Keshet est doté de systèmes perfectionnés de ciblage et de navigation et était l'arme la plus précise dont les forces israéliennes disposaient à ce moment-là. L'unité attaquée ne pouvait pas obtenir un appui aérien à ce moment-là et le droit des conflits armés n'exige pas des commandants qu'ils attendent un appui aérien et prolongent l'exposition de leurs soldats aux tirs ennemis.

66. Israël a reconnu que cette frappe était certes efficace pour ce qui était d'éliminer la menace pour les forces israéliennes mais qu'elle avait aussi occasionné

³³ *Operation in Gaza Report*, par. 336 à 340. Cet incident a été décrit dans le *rapport de la Commission d'établissement des faits du Conseil des droits de l'homme*, par. 653 à 690.

³⁴ *Operation in Gaza Report*, par. 120 à 131.

des pertes regrettables parmi les civils. L'Avocat général des armées a estimé que les FDI n'avaient pas violé le droit des conflits armés en ce qui concerne cet incident, dans le cadre des efforts déployés par Israël pour réduire autant que faire se peut et en toutes circonstances le nombre des victimes civiles, mais il a réitéré la recommandation issue de l'enquête spéciale du commandement appelant à établir une définition plus précise dans les consignes militaires régissant les tirs de mortier dans les zones peuplées et à proximité d'installations sensibles. Le chef d'état-major des FDI a ordonné d'entreprendre la rédaction des consignes requises.

2. Mosquée Al Maqadmah

67. Le rapport de la Commission d'établissement des faits du Conseil des droits de l'homme et d'autres sources ont allégué que, le 3 janvier 2009, un tir de missile israélien sur l'entrée de la mosquée Al Maqadmah à Beit Lahiya aurait fait des victimes civiles³⁵. Cet incident a été d'abord examiné dans l'une des cinq premières enquêtes spéciales du commandement dont il a été question dans les précédents rapports israéliens. Cette enquête n'a pas trouvé d'éléments étayant l'allégation selon laquelle la mosquée aurait été touchée par des tirs des FDI au moment cité. Cela étant, compte tenu des informations figurant dans d'autres rapports, le chef d'état-major a suivi la recommandation de l'Avocat général des armées tendant à ce que le dossier soit rouvert et réexaminé dans le cadre d'une nouvelle enquête spéciale du commandement.

68. Cette nouvelle enquête spéciale du commandement a confirmé que les pertes civiles et les dégâts matériels occasionnés à la mosquée le 3 janvier 2009 étaient effectivement le résultat d'un tir de missile des FDI visant deux terroristes qui se trouvaient près de l'entrée de la mosquée.

69. Ces terroristes, qui appartenaient à une brigade terroriste impliquée dans le lancement de roquettes sur le territoire israélien, avaient été d'abord identifiés alors qu'ils se trouvaient à proximité d'un hôpital, et n'avaient pas été ciblés à ce moment-là. Ils ont été par la suite repérés dans un autre lieu à Beit Lahiya. À ce stade, les FDI ont commencé à déployer leurs ressources en vue d'une attaque immédiate contre les deux terroristes.

70. Dans le cadre des préparatifs de cette attaque, le secteur à frapper a été surveillé de près et observé pendant plusieurs minutes, au cours desquelles aucun civil n'a été vu dans les rues environnantes, à l'exception d'une personne qui est entrée dans le bâtiment situé à proximité des terroristes. Étant donné l'absence apparente de civils sur les lieux, la frappe visant les terroristes a été lancée. Le missile visait les terroristes et il a touché le sol près de l'entrée du bâtiment.

71. L'enquête a révélé que les commandants militaires qui ont planifié cette frappe ne savaient pas que le bâtiment près duquel se tenaient les terroristes était une mosquée. Le bâtiment n'avait pas de minaret qui aurait pu le désigner en tant que mosquée et il n'était pas indiqué en tant que tel sur les cartes d'état-major utilisées par ces commandants. Ces derniers ne savaient pas non plus que l'une des portes d'entrée du bâtiment était ouverte, détail que l'observation ne permettait pas de discerner. L'enquête a aussi révélé que, la porte étant ouverte, des éclats de missile

³⁵ Cet incident a été également décrit dans le *Rapport de la Commission d'établissement des faits du Conseil des droits de l'homme*, par. 822 à 843.

sont retombés à l'intérieur de la mosquée, provoquant un grand nombre de victimes à l'intérieur de l'édifice.

72. Partant de ce constat, les enquêteurs ont conclu que les commandants qui avaient autorisé cette attaque ne savaient pas que le bâtiment adjacent à la cible était une mosquée et ils ne s'attendaient pas à ce que cette frappe fasse des victimes civiles.

73. Les enquêteurs ont néanmoins constaté qu'un capitaine des FDI qui avait participé aux préparatifs de la frappe avait appris, juste avant que celle-ci ne soit lancée mais alors qu'elle avait été déjà approuvée, que le bâtiment était peut-être une mosquée. Cet officier a commis une grave erreur de jugement en ne portant pas cette information à l'attention de ses supérieurs afin que ceux-ci puissent réexaminer l'opportunité de cette frappe. Compte tenu de ce constat, l'officier a fait l'objet d'une réprimande grave à titre de sanction disciplinaire, considérant qu'il ne s'attendait pas à ce que des civils soient touchés et compte tenu des contraintes de temps inhérentes à une attaque qui exigeait une intervention rapide dans un contexte de tension extrême. Il a été en outre décidé que cet officier ne serait plus autorisé à occuper à l'avenir des postes de même nature et comportant les mêmes responsabilités.

74. L'enquête du commandement a également permis de déterminer que deux officiers responsables de la sélection des munitions utilisées pour cette frappe aérienne avaient aussi fait preuve de peu de jugement et s'étaient écartés des directives professionnelles en sélectionnant un missile plus puissant que celui qu'ils avaient reçu pour instruction d'utiliser. Ils avaient fait cela parce que les missiles demandés n'étaient pas disponibles tout de suite et l'Opération dépendait beaucoup du facteur temps. Étant donné que ces officiers ne s'attendaient pas à ce que leur frappe puisse faire des victimes civiles, ils ne s'attendaient pas non plus à ce que l'utilisation du missile sélectionné ferait courir un risque supplémentaire à des civils. Ces officiers ont été tous les deux sanctionnés et ont fait l'objet d'une suspension temporaire de participation aux opérations.

75. Ayant examiné ces constatations, l'Avocat général des armées a conclu que cette frappe ne visait ni une idée civile ni des personnes ou des objets civils, puisqu'elle ciblait des terroristes. À ce titre, elle était conforme au principe de distinction.

76. L'Avocat général a aussi conclu que cette frappe ne violait pas le principe de proportionnalité, parce que les décideurs dans cette opération, ayant observé le secteur pendant plusieurs minutes avant la frappe et compte tenu des informations dont ils disposaient quant à la nature du bâtiment, ne pouvaient pas s'attendre à ce que des civils soient touchés. Ils ne savaient pas non plus que la porte du bâtiment était ouverte et ne pouvaient pas discerner ce détail. Dans ces conditions, les pertes civiles incidentes auxquelles ils pouvaient s'attendre étaient faibles au regard de l'avantage militaire escompté, à savoir l'élimination de terroristes impliqués dans le lancement de roquettes en direction d'Israël³⁶. L'Avocat général des armées a en outre conclu que la négligence de certains des officiers participant à l'attaque ne changeait rien au fait que leurs supérieurs s'étaient conformés de bonne foi aux principes fondamentaux de distinction et de proportionnalité.

³⁶ Ce jour-là, 39 roquettes et obus de mortier ont été tirés de Gaza sur des villes israéliennes.

77. L'Avocat général des armées a aussi estimé que les mesures disciplinaires prises à l'encontre du capitaine ainsi que les sanctions prises par le commandement à l'encontre des officiers chargés des munitions étaient suffisantes en la circonstance. Ces officiers ne s'attendaient pas à ce que des civils soient touchés compte tenu de leur observation du secteur et ils avaient agi dans un contexte de tension extrême imputable aux contraintes de temps inhérentes à cette frappe.

78. Bien qu'aucune procédure pénale n'ait été engagée dans cette affaire, l'Avocat général des armées a recommandé de réviser les procédures des FDI et leur mise en œuvre, par un travail supplémentaire de formation propre à assurer que les erreurs qui avaient produit ce résultat ne se renouvelleraient pas.

3. Postes de « police » du Hamas à al-Sajaiyeh et Deir al-Balah

79. La question de la légalité du ciblage de la force de « police » du Hamas a été longuement examinée dans le rapport sur l'Opération à Gaza³⁷. Comme il était dit dans ce rapport, les forces armées du Hamas étaient composées non seulement des brigades Izz al-Din al-Qassam (branche armée officielle du Hamas), mais également des services de sécurité intérieure du Hamas à Gaza qui, outre leur mission régulière d'application des lois, assuraient aussi d'importantes fonctions militaires. L'un de ces services, le plus important en nombre, est constitué par la force de police.

80. De nombreuses informations réunies par les FDI avant l'Opération corroboraient cette fonction militaire de la force de police à Gaza, compte tenu de ses liens et de sa coopération militaires, opérationnelles, logistiques et administratives avec l'aile militaire du Hamas, tant en situation normale que, en particulier, en situation d'urgence, par exemple lors d'une opération militaire israélienne à l'intérieur de la bande de Gaza³⁸. Cette fonction militaire fait de la force de police un objectif militaire légitime.

81. Les renseignements supplémentaires réunis par les FDI aussi bien durant l'Opération³⁹ qu'après l'achèvement de celle-ci – y compris des déclarations publiques de responsables du Hamas – confirment cette interpénétration de la force de police à Gaza et de l'aile militaire du Hamas. Le Ministre actuel de l'intérieur et de la sécurité nationale du régime du Hamas à Gaza – responsable des forces de sécurité intérieure du Hamas, police comprise – a lui-même déclaré, en énumérant les « réalisations » de son prédécesseur, Sayid Siyyam, que :

³⁷ *Operation in Gaza Report*, par. 77 à 81 et 237 à 248.

³⁸ Les activités militaires régulières de la police palestinienne à Gaza comprenaient : la collecte de renseignements sur les activités des FDI, y compris la surveillance; la fourniture d'armes pour renforcer les capacités de l'aile militaire du Hamas; et la participation à divers exercices d'entraînement militaire. En situation d'état d'urgence, la force de police était institutionnellement organisée de manière à participer aux combats contre les forces israéliennes. Des policiers ont été observés alors qu'ils assuraient une fonction militaire lors d'opérations menées précédemment par les FDI dans la bande de Gaza.

³⁹ Selon des renseignements recueillis par les FDI immédiatement avant le début de l'Opération à Gaza, les forces de sécurité intérieure à Gaza ont préparé leur redéploiement en prévision des combats contre les forces israéliennes. Au cours de l'Opération, les services de sécurité intérieure ont partagé les mêmes « salles des opérations » avec l'aile militaire, coopéré avec les unités du renseignement de l'aile militaire et fait passer les fonctions militaires avant les missions relatives à l'application des lois.

« parmi les plus grandes réalisations du ministre, il y a eu l'instauration d'une coopération et d'une coordination entre les services de sécurité actuelle et la résistance palestinienne [...] contre l'ennemi sioniste [...] et, pour cette raison, [l'ennemi] a attaqué le quartier général des forces de sécurité [durant l'Opération à Gaza] » (site Web de la police du Hamas, 7 mai 2009)⁴⁰.

82. L'Avocat général des armées a achevé dernièrement un examen des conclusions des enquêtes du commandement relatives à deux frappes aériennes sur deux postes de police – l'une à al-Sajaiyeh et l'autre à Deir al-Balah – dont il était fait état dans le rapport de la Commission d'établissement des faits du Conseil des droits de l'homme et qui auraient fait des victimes civiles⁴¹. Ces frappes faisaient partie de la campagne aérienne lancée par l'armée de l'air israélienne au début de l'Opération à Gaza dans le but d'affaiblir les places fortes et les capacités terroristes et militaires du Hamas en ciblant son infrastructure opérationnelle. L'Avocat général des armées a conclu que ces frappes étaient dirigées contre des objectifs militaires légitimes et, de ce fait, conformes au principe de distinction.

83. Le poste de police de Deir al-Balah faisait partie de l'appareil de « sécurité intérieure » du Hamas et était occupé par des hommes armés. Il a été frappé au cours de la première journée de la campagne aérienne dans le cadre d'une frappe initiale coordonnée de l'armée de l'air israélienne visant à affaiblir notablement les forces militaires dont le Hamas pourrait disposer au cours de l'Opération en attaquant simultanément plusieurs sites militaires.

84. Selon ces allégations, la frappe visant le poste de Deir al-Balah aurait fait six morts parmi les civils, dont cinq personnes qui se trouvaient dans un marché de légumes à ciel ouvert proche des lieux. L'enquête a permis de constater que l'armée de l'air israélienne ignorait l'existence de ce marché de légumes, dont l'emplacement n'avait pas été signalé aux FDI dans le passé et n'était donc pas indiqué comme « site sensible » sur les cartes de l'armée de l'air israélienne, ce qui aurait pu modifier la planification de cette frappe aérienne. Par ailleurs, les photographies aériennes analysées par les planificateurs de la frappe avant l'Opération ne montraient pas de rassemblement de civils en ce lieu.

85. L'armée de l'air israélienne a pris plusieurs mesures visant à réduire autant que faire se peut les dommages collatéraux, notamment en utilisant des munitions à ogives de taille et de force réduites, équipées de détonateurs à retardement⁴². Les avertissements préalables n'étaient guère possibles compte tenu du positionnement dans le temps de la frappe et du nécessaire élément de surprise.

86. Le poste de police d'al-Sajaiyeh servait de commissariat central de la force de police dans ce secteur et était aussi occupé par des agents armés du Hamas. Il a été attaqué au cours de la deuxième journée de la campagne aérienne destinée à continuer de détruire les infrastructures opérationnelles et de commandement du

⁴⁰ Intelligence and Terrorism Information Center, *Hamas and the Terrorist Threat from the Gaza Strip: The Main Findings of the Goldstone Report Versus the Factual Findings*, p. 271 (mars 2010), consultable à l'adresse suivante : http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/g_report_e1.pdf.

⁴¹ *Rapport de la Commission d'établissement des faits du Conseil des droits de l'homme*, par. 405 à 407.

⁴² À la différence des ogives régulières, qui explosent au moment de l'impact sur un objet, une ogive équipée d'un détonateur à retardement explose à l'intérieur d'une structure, donc dans un espace plus confiné, et projette donc moins de fragments et de shrapnel.

Hamas. Des précautions analogues à celles prises pour la frappe visant le poste de Deir al-Balah ont été également adoptées pour cette frappe. Toutefois, cette seconde frappe aurait fait quatre victimes civiles tuées dans une rue adjacente.

87. L'Avocat général des armées a examiné les conclusions de ces enquêtes du commandement et a conclu que ces deux frappes avaient été planifiées et exécutées conformément au droit des conflits armés. Il a relevé qu'en dépit du fait que des civils sont malheureusement morts dans ces deux cas, les dommages collatéraux auxquels on aurait pu s'attendre en ce qui concerne les civils n'étaient pas excessifs au regard de l'avantage militaire escompté de ses frappes, compte tenu de l'importance stratégique des frappes menées au cours des premiers jours de l'Opération contre les infrastructures opérationnelles et de commandement du Hamas et de leur contribution notable à la capacité des FDI de réaliser les objectifs de l'Opération dans son ensemble. En conséquence, l'Avocat général des armées a décidé de ne renvoyer aucune de ces deux affaires devant une autre instance.

88. En tout état de cause, les conclusions de ces enquêtes du commandement seront étudiées dans le cadre de l'analyse des « enseignements » tirés de l'Opération afin de déterminer les mesures propres à réduire autant que faire se peut le danger couru par la population civile dans les actions militaires futures. À cet égard, l'Avocat général des armées a recommandé un certain nombre d'améliorations concernant la cartographie des « sites sensibles ». À l'heure actuelle, ces sites sont identifiés par les FDI à partir de renseignements émanant de diverses sources concernant certains types d'installations telles que les hôpitaux, les écoles, les mosquées et les installations des Nations Unies. Compte tenu des conclusions de l'enquête sur la frappe visant le poste de Deir al-Balah, l'Avocat général des armées a recommandé d'étendre cette liste à des lieux à forte concentration de civils tels que les marchés à ciel ouvert.

4. Bâtiment des forces de sécurité du Hamas jouxtant la prison principale

89. Les FDI ont enquêté sur des allégations selon lesquelles, le 28 décembre 2008, le bâtiment de la prison principale, à l'intérieur du complexe d'al-Saraya, dans la ville de Gaza, aurait été la cible d'une frappe aérienne délibérée⁴³.

90. L'enquête du commandement sur cet incident a confirmé qu'une frappe de l'armée de l'air israélienne menée le 28 décembre a endommagé le bâtiment de la prison à l'intérieur du complexe d'al-Saraya. Toutefois, les dégâts subis s'expliquent par le fait que la prison jouxte le bâtiment qui sert de caserne aux forces de sécurité intérieure du Hamas. Cette caserne, qui a fait l'objet de la frappe aérienne en question, était un objectif militaire légitime⁴⁴. Plusieurs structures plus petites à l'intérieur de la prison ont subi des dommages incidents qui ont entraîné l'effondrement de plusieurs murs. La structure centrale de la prison tient toujours. Ces dégâts ont aussi fait un mort et plusieurs blessés parmi les gardes. Aucun prisonnier n'a été blessé au cours de cette attaque.

91. Ayant examiné l'affaire, l'Avocat général des armées a estimé que cette attaque ne contrevenait pas au droit des conflits armés. Elle visait une installation militaire spécifique, en prenant les précautions voulues consistant notamment à

⁴³ *Rapport de la Commission d'établissement des faits du Conseil des droits de l'homme*, par. 365 à 370.

⁴⁴ Voir plus haut, par. 79 à 81, et notes correspondantes.

utiliser des technologies de précision. Dans ces conditions, l'Avocat général des armées a décidé d'arrêter là la procédure.

5. Complexe de l'UNRWA à Gaza

92. L'un des incidents qui a fait le plus de bruit au cours de l'Opération à Gaza a trait au complexe de l'UNRWA, à l'intérieur duquel trois personnes ont été blessées et qui a subi d'importants dégâts matériels résultant de l'utilisation de munitions fumigènes contenant du phosphore blanc. D'autres dégâts ont été occasionnés par des obus à forte charge explosive tombés à proximité du complexe⁴⁵.

93. Une enquête spéciale du commandement, consacrée à l'examen des réclamations à raison de dommages occasionnés à des installations des Nations Unies par les FDI portait aussi sur cet incident concernant l'UNRWA et il a été rendu compte des conclusions factuelles de cette enquête dans le rapport sur l'Opération à Gaza.

94. En ce qui concerne l'utilisation d'obus à forte charge explosive au cours de cet incident, compte tenu des conclusions de l'enquête, le Commandant du Secteur sud a sanctionné deux hauts gradés, un général de brigade et un colonel, pour avoir autorisé l'utilisation de ces obus en violation des règles régissant les distances de sécurité dans les zones urbaines inscrites dans les consignes opérationnelles des FDI. L'Avocat général a examiné les résultats de cette enquête et a souscrit à la décision de sanctionner les deux officiers susmentionnés. Il a aussi estimé que, même si le tir d'obus contrevenait aux consignes opérationnelles des FDI, il n'y avait pas lieu d'engager des poursuites pénales, parce que ces tirs visaient des cibles militaires et que des précautions ont été prises et se sont révélées efficaces pour ce qui est d'éviter de faire des victimes parmi les civils.

95. S'agissant de l'utilisation de munitions fumigènes, l'Avocat général a estimé que l'enquête n'avait fait ressortir aucune violation du droit des conflits armés ou des procédures des FDI. Comme il était expliqué dans le rapport sur l'Opération à Gaza, ce type de munitions n'est pas interdit en droit international, y compris dans les zones urbaines⁴⁶. Dans les circonstances particulières de l'espèce, l'Avocat général des armées a conclu que l'utilisation de ces munitions était nécessaire pour protéger les forces israéliennes contre des agents du Hamas armés de missiles antichars⁴⁷ et conforme au principe de proportionnalité, le risque prévisible que leur utilisation ferait courir à des personnes et objets civils n'étant pas excessif au regard de l'avantage militaire escompté.

96. L'enquête a effectivement conclu que les dégâts subis par le complexe par suite de l'utilisation des obus fumigènes étaient plus importants que ce que les FDI avaient prévu. Une fois l'ampleur des dégâts connue, les FDI ont immédiatement révisé les instructions relatives à l'utilisation de munitions fumigènes contenant du phosphore blanc à proximité de sites sensibles (y compris l'instauration d'une zone tampon de plusieurs centaines de mètres). Ces restrictions ont été en vigueur pendant tout le restant de l'Opération à Gaza.

⁴⁵ Cet incident a été également décrit dans le *Rapport de la Commission d'établissement des faits du Conseil des droits de l'homme*, par. 543 à 598.

⁴⁶ *Operation in Gaza Report*, par. 405 à 430.

⁴⁷ *Ibid.*, par. 341 à 347.

97. L'utilisation de munitions fumigènes contenant du phosphore au cours de l'Opération à Gaza était également traitée dans une enquête spéciale du commandement consacrée à cette question. Il ressortait de cette enquête que la politique consistant à utiliser ce type de munitions était conforme aux obligations d'Israël en vertu du droit des conflits armés. Le chef d'état-major a néanmoins, à l'issue de cette enquête, ordonné la mise en œuvre des enseignements tirés de celle-ci, en ce qui concerne principalement l'utilisation de ce type de munitions à proximité de zones peuplées et d'installations sensibles. En conséquence, les FDI sont en train de mettre en place des restrictions à l'utilisation des munitions contenant du phosphore blanc dans les zones urbaines.

C. Enquêtes sur la prise de civils pour cibles dont il est fait état

98. Comme cela a été mentionné plus haut et décrit de façon détaillée dans le rapport *Operation in Gaza*⁴⁸, les consignes permanentes des FDI comprennent le principe de distinction et interdisent la prise pour cible intentionnelle de civils. La présente section discute des constatations de plusieurs investigations d'incidents au cours desquels les opérations militaires des FDI auraient fait des morts parmi la population civile, prétendument en violation du droit des conflits armés et des consignes permanentes des FDI. Dans l'un des cas, un acte d'accusation a été déposé à l'encontre d'un soldat soupçonné d'avoir tué un civil. Dans les autres cas, aucun élément de preuve n'a été mis en évidence qui justifie que des mesures disciplinaires soient prises ou un acte d'accusation déposé, mais néanmoins, cela a permis aux FDI de tirer des leçons et de procéder à des ajustements opérationnels en vue de réduire encore plus les risques que de tels incidents ne se reproduisent à l'avenir.

1. Incident de Juhr ad-Dik

99. À la suite de la communication d'informations par l'Avocat général de l'armée, une enquête criminelle a été ouverte sur un incident durant lequel un soldat a ouvert le feu, tuant un civil qui marchait avec un groupe de civils brandissant des drapeaux blancs dans le village de Juhr ad-Dik le 4 janvier 2009.

100. Selon l'enquête, le soldat a vidé son arme à feu sans se conformer aux ordres qui lui avaient été donnés par son supérieur.

101. Vu le moment et le lieu de l'incident, les enquêteurs pensent que ce cas correspond aux allégations relatives aux décès de Majda et Rayya Hajaj décrits dans le rapport de la Mission d'établissement des faits⁴⁹. Il y a, toutefois, un certain nombre de contradictions entre les deux comptes rendus des événements, qui ont empêché les enquêteurs d'identifier formellement le civil tué.

102. Néanmoins, étant donné que les éléments de preuve réunis durant les investigations impliquent le soldat, indiquant qu'il a ouvert le feu sur un civil en contrevenant aux ordres, l'Avocat général de l'armée a ordonné sa mise en examen pour homicide involontaire, pour avoir tué un civil durant l'Opération à Gaza.

⁴⁸ Ibid., par. 222 et 223.

⁴⁹ Rapport de la Mission d'établissement des faits, par. 764 à 769.

2. Rouhiya al-Najjar

103. Cet incident – au cours duquel Rouhiya al-Najjar est décédée le 13 janvier 2009 dans le village de Khuza'a – a été porté à l'attention des autorités israéliennes par plusieurs organisations de défense des droits de l'homme⁵⁰. Après avoir examiné les constatations d'une enquête du commandement sur cet incident, ainsi que les plaintes qui avaient été reçues, l'Avocat général de l'armée a décidé que les données disponibles donnaient à penser que le décès était dû à un comportement criminel, et il a renvoyé l'affaire à la Division des enquêtes criminelles de la police militaire. Dans le cadre de son enquête, la Division a eu plusieurs entretiens avec huit résidents palestiniens de Gaza, dont des membres de la famille al-Najjar. Les enquêteurs ont aussi interrogé plus de 15 soldats et officiers des FDI concernant l'incident et ont étudié des photographies aériennes et terrestres.

104. Les enquêteurs ont conclu que l'unité des FDI opérant dans la zone de Khuza'a le 12 janvier 2009 participait à des combats contre des terroristes. Les terroristes ont lancé une roquette sur un missile occupé par l'unité des FDI tôt le matin du 13 janvier.

105. Plus tard, ce même matin, les soldats surveillaient la zone proche du bâtiment avec soin afin d'éviter une nouvelle attaque à la roquette. Ils ont observé des activités suspectes dans la rue conduisant au bâtiment : une femme a été vue à plusieurs reprises s'approcher du bâtiment transportant un paquet non identifié, qu'elle a placé près du bâtiment. Immédiatement après son retour, elle a pénétré dans une maison au bout de la rue et un groupe de femmes du quartier ont commencé sans qu'on s'y attende à s'approcher de la position des FDI, et les soldats ont soupçonné une tactique visant à cacher un tireur ou un commando-suicide. Un des soldats a tiré un coup de semonce pour empêcher le groupe d'avancer plus loin. La balle ainsi tirée aurait ricoché et touché Rouhiya al-Najjar, la tuant.

106. L'Avocat général de l'armée a examiné les témoignages recueillis durant l'enquête et a conclu que vu les circonstances, le soldat qui avait tiré le coup de feu n'avait pas commis une infraction. Il a conclu que le soldat avait fait usage de son arme compte tenu de la nécessité, pour des questions de sécurité, d'empêcher le groupe de s'approcher du poste des FDI, et qu'il n'avait pas visé ni blessé intentionnellement des civils. Ainsi, tout en reconnaissant les résultats déplorables de l'incident, l'Avocat général de l'armée a fermé le dossier sans déposer un acte d'accusation à l'encontre du soldat.

107. Toutefois, l'Avocat général de l'armée a constaté qu'une déficience au niveau de la communication entre les unités des FDI avait peut-être concouru à ce que le soldat perçoive le groupe comme une menace. Cela a conduit l'Avocat général de l'armée à recommander que des changements soient apportés aux procédures opérationnelles des FDI, qui pourraient contribuer à améliorer la façon dont les FDI donnent les instructions d'évacuation à la population civile, ainsi qu'à la méthode suivie pour transmettre ces informations aux différentes forces sur le terrain.

⁵⁰ L'incident a aussi été décrit dans le rapport de la Mission d'établissement des faits, par. 780 à 787.

3. Amal, Souad, Samar et Hajja Souad Abd Rabbo et Adham Kamiz Nasir

108. Cet incident, au cours duquel des coups de feu auraient été tirés sur quatre civils palestiniens le 7 janvier 2009 dans le quartier d'Izbat Abd Rabbo, a été signalé aux autorités israéliennes par plusieurs organisations de défense des droits de l'homme⁵¹. L'Avocat général de l'armée a fait effectuer une enquête criminelle directe qui a été achevée récemment. Durant cette enquête approfondie, la Division des enquêtes criminelles de la police militaire a recueilli les témoignages de 11 Palestiniens qui avaient été témoins des événements. Certains d'entre eux ont été incapables ou non désireux de témoigner devant les enquêteurs de la Division, mais ils ont fourni des déclarations écrites détaillées. De plus, les enquêteurs ont examiné les rapports médicaux et les certificats de décès, ainsi que des photographies aériennes fournies par une ONG israélienne, qui ont aidé à identifier les différentes unités impliquées dans l'incident. Plus de 50 commandants et soldats de ces unités ont aussi été interrogés par la Division, certains à plusieurs reprises pour préciser les circonstances de l'incident.

109. Les éléments de preuve recueillis au cours de l'enquête n'ont pas permis de confirmer la description de l'incident faite par les auteurs de la plainte, qui alléguait qu'un soldat se tenant sur un char avait ouvert le feu sur un groupe de civils. Les divergences importantes entre la plainte et les constatations de l'enquête, en particulier l'identité de l'unité et la suite des événements, ont conduit la Division à conclure que les éléments de preuve n'étaient pas suffisants pour engager des poursuites pénales.

110. Un deuxième volet de la plainte alléguait que les FDI avaient ouvert le feu sur un véhicule à cheval utilisé pour tenter d'évacuer les civils blessés durant le premier incident, tuant le cocher.

111. L'enquête a confirmé qu'une unité des FDI opérant dans le quartier d'Izbat Abd Rabbo avait ouvert le feu sur le véhicule à cheval. L'unité en question avait reçu un avertissement précis selon lequel le Hamas comptait faire exploser ce type de véhicule chargé d'explosifs à proximité d'une position des FDI. Les soldats ont tiré des coups de semonce alors que le véhicule s'approchait, chargé de sacs que les soldats ont cru remplis d'explosifs. Lorsque le chauffeur n'a pas réagi aux coups de semonce, continuant à s'approcher, l'unité a ouvert le feu dans la direction du véhicule.

112. Dans ces circonstances, l'Avocat général de l'armée a estimé que les soldats qui avaient tiré sur le véhicule n'avaient pas commis d'infraction. Il a jugé que la décision prise par les soldats d'ouvrir le feu avait été prise du fait qu'ils croyaient à ce moment-là que le véhicule constituait une menace immédiate pour l'unité. (L'enquête a révélé que les sacs ne contenaient pas des explosifs.) Ainsi, malgré les conséquences déplorables de l'incident, l'Avocat général de l'armée a décidé de clore le dossier.

4. Abd al-Dayem

113. Cet incident, au cours duquel une attaque aurait été menée contre les tentes funéraires de la famille Abd al-Dayem le 5 janvier 2009 à Beit Hanoun, au cours de

⁵¹ L'incident a aussi été partiellement décrit dans le rapport de la Mission d'établissement des faits, par. 770 à 779.

laquelle un missile à fléchettes aurait été tiré, qui aurait fait des morts parmi les civils, a été signalé aux autorités israéliennes par plusieurs organisations de défense des droits de l'homme⁵². À l'issue de l'examen des constatations d'une enquête du commandement concernant l'incident et des plaintes qui avaient été reçues, l'Avocat général de l'armée a renvoyé l'affaire à la Division des enquêtes criminelles de la police militaire pour mener une enquête qui a été récemment achevée.

114. Au cours de cette enquête, la Division a recueilli les témoignages de 18 témoins palestiniens et de soldats de l'unité concernée. Les enquêteurs ont aussi obtenu et examiné des éléments de preuve matériels tels que des rapports médicaux et des photographies reçues d'une ONG israélienne. Deux experts techniques ont été consultés concernant les munitions utilisées durant l'incident et leurs effets. Les enquêteurs ont examiné aussi les manuels techniques concernant l'utilisation des munitions.

115. L'enquête a révélé que l'équipage d'un char opérant à Beit Hanoun avait identifié visuellement un groupe de terroristes en terrain dégagé, qui chargeaient une roquette « Grad »⁵³ dans un lance-roquettes. (Un grand nombre de roquettes de ce type ont été tirées sur Israël avant et durant l'Opération.) Durant l'Opération à Gaza, cette zone était souvent utilisée par des terroristes pour lancer des roquettes sur Israël. Le commandant du char a immédiatement commencé à préparer une frappe pour empêcher l'attaque terroriste imminente contre des civils israéliens⁵⁴. Étant donné que les terroristes étaient à une distance d'environ 1 500 mètres de l'unité, utiliser des mitrailleuses aurait été inefficace. Le commandant du char a donc décidé d'utiliser des munitions à fléchettes, ayant évalué qu'elles seraient les plus efficaces en terrain dégagé. L'équipage du char a observé la zone située autour du groupe terroriste et n'a pas vu de civils à proximité. Ensuite, deux missiles à fléchettes ont été tirés sur les terroristes, qui ont été tués.

116. L'enquête a établi que bien que les obus-flèches aient été tirés sur le groupe de terroristes en terrain dégagé, qui ont été touchés, des fléchettes ont pu accidentellement toucher des civils se trouvant près de la tente funéraire de la famille Al-Dayem. Toutefois, l'enquête a confirmé que les soldats n'avaient pas vu de civils à proximité du groupe de terroristes et ne pouvaient donc pas prévoir qu'ils blesseraient des civils près de la tente.

117. L'Avocat général de l'armée a étudié les constatations des enquêtes et décidé que les actes de l'équipage du char ne contrevenaient pas au droit des conflits armés. Les missiles à fléchettes ont été tirés contre une cible militaire en vue de contrer une menace imminente pour les civils israéliens. L'unité a agi en croyant raisonnablement qu'aucun civil n'était présent à proximité immédiate du groupe de terroristes. L'utilisation de ces munitions n'est pas interdite par le droit international, comme cela a été confirmé par la Cour suprême d'Israël et discuté dans le *Operation in Gaza Report*⁵⁵. L'unité a agi conformément aux règles d'engagement applicables, qui autorisent l'utilisation d'obus-flèches contre des cibles militaires situées en terrain dégagé. En conséquence, malgré les conséquences

⁵² L'incident a aussi été partiellement décrit dans le rapport de la Mission d'établissement des faits, par. 867 à 885.

⁵³ Le Grad est un missile de 122 mm de fabrication étrangère, d'une portée de 20 kilomètres.

⁵⁴ Ce jour-là, 32 roquettes et obus de mortier ont été tirés sur Israël.

⁵⁵ *Physicians for Human Rights v. OC Central Command*, H CJ 8990/02 (27 April 2003); *Operation in Gaza Report*, par. 431 à 435.

tragiques de l'incident, l'Avocat général de l'armée a décidé qu'il n'y avait pas lieu d'engager des poursuites.

D. Enquêtes concernant les dommages causés à des biens de caractère civil

118. Comme décrit dans le rapport intitulé *The Operation in Gaza*, les ordres opérationnels des FDI pour l'Opération à Gaza énonçaient que les biens privés devaient être respectés. Conformément au droit des conflits armés, la destruction de biens de caractère civil est interdite, sauf en cas de nécessité militaire impérative, sous réserve dans un tel cas que les dommages soient proportionnels à l'avantage militaire. La destruction de biens aux fins de la dissuasion ou de représailles est strictement interdite⁵⁶.

119. Immédiatement après la cessation des hostilités, Israël a lancé une enquête de commandement spéciale sur la façon dont les FDI s'étaient acquittées de cette obligation durant le conflit⁵⁷. De plus, les FDI ont conduit des enquêtes de commandement particulières pour examiner des incidents donnés relatifs à la destruction de biens. L'Avocat général de l'armée a soigneusement examiné les constatations des enquêtes terminées à ce jour.

120. Les trois affaires ci-après relatives à des dommages importants causés à des biens ont été discutées dans le rapport de la Mission d'établissement des faits. L'Avocat général de l'armée a achevé l'examen des faits et publié un avis final. De plus, une enquête plus approfondie sur l'affaire de la minoterie el-Bader (décrite dans *Le point des enquêtes de janvier 2010*) est présentée ci-dessous.

121. Ces incidents soulignent les difficultés que posent les groupes terroristes qui opèrent dans des zones fortement peuplées et près d'installations commerciales. Durant l'Opération à Gaza, les forces israéliennes ont redoublé d'efforts pour éviter les pertes civiles et les dommages qui n'étaient pas nécessaires aux biens de caractère civil. Même ainsi, les combats contre un adversaire qui utilisait délibérément des bâtiments civils pour entreposer des munitions, préparer des attaques et cacher des combattants, et qui plaçait des pièges à explosifs dans des bâtiments civils sur le passage prévu des forces qui avançaient, ont posé des dilemmes considérables sur le plan opérationnel. Israël a reconnu que des dommages importants avaient été causés aux biens de caractère civil lors des événements de l'Opération à Gaza. Comme décrit plus en détail à la section IV, Israël adapte et révisé ses procédures militaires en vue de réduire encore les dommages causés aux biens de caractère civil à l'avenir.

1. Les élevages de volaille Sawafeary

122. Selon les allégations figurant dans le rapport de la Mission d'établissement des faits⁵⁸, en janvier 2009, les FDI ont détruit plusieurs élevages de volaille de la famille Sawafeary à Zeytoun, prétendument dans le cadre d'une stratégie délibérée de destruction des infrastructures civiles.

⁵⁶ *Operation in Gaza Report*, par. 226.

⁵⁷ *Ibid.*, par. 318, 436 à 445; *Le point des enquêtes de janvier 2010* (A/64/651), par. 113 à 116.

⁵⁸ Rapport de la Mission d'établissement des faits, par. 942 à 961.

123. Les enquêtes de commandement conduites concernant cet incident révèlent que les élevages de volaille de la famille Sawafeary ont été détruits en raison d'une nécessité militaire.

124. Plus précisément, les enquêtes ont révélé que la zone autour des élevages de volaille de la famille Sawafeary a été occupée par une unité d'infanterie des FDI le 4 janvier 2009, dans le cadre d'une manœuvre de l'infanterie, dans l'intention de prendre le contrôle des sites de lancement de roquettes et d'obus de mortier et de réduire le nombre d'attaques terroristes sur le territoire israélien. L'unité a occupé des positions dans plusieurs maisons, dont une adjacente aux élevages de volaille. Ce déploiement était nécessaire pour sécuriser la zone en vue de mener des opérations militaires contre le Hamas et protéger les troupes des FDI durant ces opérations. Le plan de défense des FDI pour cette zone devait tenir compte de trois menaces graves pesant sur la sécurité et la sûreté des troupes des FDI : le tir de roquettes antichars ou autres contre les positions des FDI; les tirs de tireurs embusqués; l'infiltration de terroristes à proximité des forces en vue de placer et de faire exploser des engins explosifs, notamment en recourant à des commandos-suicides.

125. Le terrain dans la zone rendait l'endroit plus dangereux pour les unités des FDI. En effet, la zone, agricole à l'origine, comprenait de nombreux vergers, bosquets et serres situés entre les maisons occupées par les unités et autour de celles-ci. De ce fait, il était difficile pour les FDI d'identifier les positions et les combattants du Hamas. Cette menace n'était pas théorique : le 5 janvier 2009, une roquette a été lancée sur une des positions des FDI dans cette zone. De plus, plusieurs coups de feu avaient été tirés depuis les vergers situés au sud des élevages de volaille.

126. En vue de faire face à ces menaces, les FDI ont décidé de créer une zone de sécurité profonde de 20 à 50 mètres autour de chacune de leurs positions, ce qui permettait à l'unité à chacune des positions d'observer et de tirer à tout moment et d'assurer une protection conjointe des différentes positions des FDI. Ces zones de sécurité ont permis aux FDI de repérer sans délai l'approche des terroristes.

127. Les élevages de volaille de la famille Sawafeary étaient situés à quelques mètres seulement de l'une des positions clés des FDI, qui avait été choisie à cause du terrain à cet endroit. Comme l'enquête de commandement l'a établi, cette position des FDI ne pouvait être dûment sécurisée en maintenant les structures des élevages. Il a fallu les détruire pour assurer une ligne de visée dégagée pour la protection des FDI. L'enquête a établi aussi que la décision de détruire les élevages était compatible avec les exigences du principe de proportionnalité : il était militairement nécessaire de libérer la zone pour assurer la sécurité des FDI et le succès de leurs opérations contre les forces du Hamas opérant dans la zone. Les commandants locaux ont décidé que ces avantages étaient plus importants que les dommages que la destruction causerait aux biens de caractère civil. Les commandants ont évité de détruire les maisons et les autres installations dans la zone lorsque cette destruction n'était pas justifiée par le principe de nécessité militaire ou semblait disproportionnée.

128. L'Avocat général de l'armée a examiné les constatations de l'enquête de commandement et a conclu que la destruction des élevages de volaille était légale, car elle était nécessaire pour protéger les FDI opérant dans cette zone. Elle n'avait pas violé la restriction concernant la destruction de biens de caractère civil car celle-

ci était justifiée par la nécessité militaire. L'Avocat général de l'armée a conclu aussi que la destruction des élevages de volaille ne contrevenait pas à l'interdiction de détruire les biens indispensables à la survie de la population civile. Elle était rendue nécessaire par l'emplacement des opérations ciblant le Hamas et ne faisait pas partie d'une campagne visant à entraver la production de denrées alimentaires à Gaza. L'intention n'était pas de refuser à la population civile à Gaza l'accès à des biens indispensables⁵⁹. Du fait de ces constatations, l'Avocat général de l'armée a décidé qu'il n'y avait pas lieu d'engager des poursuites.

129. Bien que l'Avocat général de l'armée ait considéré qu'il n'y avait pas eu de violation du droit des conflits armés lors de cet incident, il a recommandé d'apporter plusieurs changements aux procédures des FDI dans les cas où il faut détruire des biens de caractère civil, qui sont détaillées ci-dessous à la section IV du présent document. En particulier, l'Avocat général de l'armée a jugé que la décision de détruire les élevages de volaille avait été prise par un officier des FDI d'un rang relativement peu élevé et que ce type de décision était préférablement et habituellement pris par un officier de rang plus élevé. L'Avocat général de l'armée a constaté que le rang de l'officier en question qui avait pris la décision ne faisait pas que le comportement était illicite ou criminel (car ni le droit des conflits armés ni les procédures des FDI à cette époque ne nécessitaient que ce type de décision soit pris par un officier d'un certain rang), et il a recommandé que les procédures des FDI relatives à la destruction de biens de caractère civil soient examinées à plusieurs égards, comme précisé à la section IV ci-dessous.

2. L'usine de conditionnement de ciment d'Abu Jubbah

130. Selon les allégations énoncées dans le rapport de la Mission d'établissement des faits⁶⁰, en janvier 2009, les FDI auraient illégalement détruit une usine de conditionnement de ciment appartenant à M. Atta Abu Jubbah au moyen d'attaques aérienne et terrestre. Cette action s'inscrivait dans une stratégie délibérée de destruction des infrastructures du secteur du bâtiment à Gaza.

131. L'incident a fait l'objet d'enquêtes des forces terrestres des FDI et de la Force aérienne israélienne⁶¹. Ces enquêtes ont conclu que la cimenterie n'était pas visée par des attaques aériennes et qu'elle n'avait pas été prise pour cible par l'artillerie, mais qu'elle avait été endommagée durant des combats intenses se déroulant à proximité immédiate de l'usine, notamment lorsque les FDI s'efforçaient de localiser et de détruire un système complexe de tunnels creusés par le Hamas. Ces tunnels avaient pour objet de renforcer les capacités opérationnelles du Hamas et de l'aider à exécuter les attaques ou les enlèvements qu'il préparait contre des soldats des FDI.

⁵⁹ En particulier, durant l'année 2009, plus de 230 camions transportant des œufs de poule fécondés (en vue de l'éclosion) ont été acheminés par Israël jusqu'à la bande de Gaza, en plus de vaccins et d'aliments pour la volaille. Plus de 130 autres camions transportant des œufs de poule fécondés ont gagné Gaza depuis le début de l'année 2010.

⁶⁰ Rapport de la Mission d'établissement des faits, par. 1012 à 1017.

⁶¹ De telles enquêtes parallèles sont conduites chaque fois que des questions se posent concernant les activités des différentes branches des forces armées dans le cadre d'une enquête. Une double enquête similaire a eu lieu lors de l'enquête sur les dommages infligés à la minoterie Al-Bader, discutés de façon détaillée dans *Le point des enquêtes de janvier 2010* (A/64/651), par. 163 à 174.

132. L'enquête a conclu aussi que les soldats des FDI croyaient que l'usine était utilisée par des agents du Hamas pour se placer en vue d'attaquer et d'enlever des soldats israéliens.

133. Des obus d'artillerie n'ont pas été tirés en prenant pour cible directe l'usine ni ne sont tombés sur celle-ci, mais dans le cadre des opérations menées dans cette zone, des obus d'artillerie ont été tirés sur des cibles militaires proches de l'usine et les éclats de ces obus peuvent avoir causé des dommages structurels à l'usine. De plus, des chars et des bouteurs des FDI sont entrés dans l'usine à la recherche de tunnels, endommageant certains piliers qui soutenaient le toit de l'usine, ce qui a provoqué son effondrement partiel⁶².

134. L'Avocat général de l'armée a examiné les constatations des enquêtes de commandement et a décidé que les dommages causés à l'usine de conditionnement de ciment étaient les conséquences accidentelles des combats menés dans la zone et étaient proportionnels à la nécessité militaire dans la situation en question. Compte tenu de ces constatations, l'Avocat général de l'armée a décidé qu'il n'y avait pas lieu d'engager des poursuites.

3. Usines du groupe al-Wadiyah

135. Selon les allégations formulées dans le rapport de la Mission d'établissement des faits⁶³, les FDI auraient gratuitement détruit les usines appartenant au groupe al-Wadiyah qui fabriquaient des produits de collation variés. Le rapport de la Mission d'établissement des faits présente l'incident comme élément prouvant l'existence d'une stratégie délibérée visant à priver la population de biens indispensables.

136. Cette allégation a fait elle aussi l'objet d'une enquête des FDI. Comme l'enquête de commandement l'avait constaté, les usines se trouvaient dans la zone d'Izbat Abd Rabbo, où le Hamas avait concentré des ressources militaires considérables. Les FDI essayaient constamment un barrage de tirs hostiles provenant de cette zone, reflet du contrôle exercé par le Hamas sur les quartiers environnants. La zone est proche aussi de la frontière entre Gaza et Israël et a servi de base pour les attaques terroristes dirigées contre Israël. Pour cela, cette zone était visée par les opérations des FDI.

137. Comme l'enquête de commandement l'a constaté, les unités des FDI combattant dans cette zone près des usines ont découvert une infrastructure militaire bien préparée, comprenant un réseau de tunnels souterrains utilisés par les agents du Hamas pour lutter contre les unités des FDI. L'infrastructure militaire dans cette zone comprenait également des pièges et des engins explosifs improvisés placés sous les routes principales et dans les bâtiments civils, ainsi que dans les bâtiments civils utilisés par le Hamas comme positions militaires.

⁶² Contrairement à ce qui a été rapporté, l'enquête des FDI a révélé que les dommages causés à l'usine étaient limités. Ainsi, plusieurs sources ont allégué que les FDI avaient détruit un silo contenant de grandes quantités de ciment, mais des photographies aériennes prises par les FDI montrent que le silo se dressait encore à la fin de l'Opération. Cela ne veut pas dire que la structure n'avait pas subi des dommages, mais cela atteste la constatation selon laquelle l'usine n'avait pas été prise pour cible intentionnellement et que les dommages causés à l'usine étaient accidentels.

⁶³ Rapport de la Mission d'établissement des faits, par. 1018 à 1020.

138. Une unité des FDI s'est trouvée confrontée à des militaires qui quittaient une des usines du groupe al-Wadiyah. En réponse à l'attaque et à la préoccupation suscitée par l'utilisation des usines et des tunnels proches qui constituait une menace constante pour les unités des FDI proches, l'unité des FDI a décidé de détruire les bâtiments. L'enquête a établi que les unités des FDI ne savaient pas que les structures étaient utilisées pour produire des denrées alimentaires.

139. L'Avocat général de l'armée a examiné les constatations des enquêtes de commandement et a conclu que la destruction des bâtiments était légale, car elle était nécessaire pour protéger les unités des FDI opérant dans la zone. Il a constaté qu'elle ne violait pas les règles relatives à la protection des biens de caractère civil car elle était justifiée par la nécessité militaire⁶⁴. Il a constaté aussi que la destruction des usines ne visait pas à refuser l'accès de la population civile à Gaza à des biens indispensables à sa survie. Le but de la destruction était de protéger les unités des FDI opérant dans la zone et non d'empêcher la population civile d'avoir accès à des biens essentiels (que les types de produit que les usines produisaient aient ou non cette qualité). Sur la base de ces constatations, l'Avocat général de l'armée a décidé qu'il n'y avait pas lieu d'engager des poursuites.

140. Bien que l'Avocat général de l'armée ait considéré qu'il n'y avait pas eu de violation du droit des conflits armés lors de cet incident, il a recommandé d'apporter plusieurs changements aux procédures des FDI dans les cas où il faut détruire des biens de caractère civil, qui sont détaillées ci-dessous à la section IV.

4. Minoterie El-Bader

141. Le cas de la minoterie El-Bader a été discuté dans *Le point des enquêtes de janvier 2010*. Il s'agit d'allégations selon lesquelles la minoterie aurait été prise pour cible par des armes de précision dans le cadre d'une frappe aérienne planifiée s'inscrivant dans la destruction systématique de l'infrastructure industrielle dans le but de priver la population civile de Gaza de denrées alimentaires. L'enquête des FDI sur ce cas a conclu que la minoterie avait été touchée par un obus de char dans le cadre des hostilités en vue de neutraliser des menaces immédiates pour les unités des FDI.

142. À l'issue de la publication *Le point des enquêtes de janvier 2010*, différents médias ont déclaré en février 2010 que l'ONU était en possession d'éléments de preuve qui contredisaient les constatations de l'enquête des FDI. Plus précisément, il a été dit qu'une bombe de la force aérienne israélienne non explosée avait été trouvée dans la minoterie, alors que l'enquête de commandement avait conclu qu'il n'y avait pas eu de frappe aérienne⁶⁵.

143. Après avoir examiné ces informations, l'Avocat général de l'armée a demandé et reçu de nouveaux éléments de preuve de l'ONU et ordonné à la force aérienne israélienne de rouvrir l'enquête sur l'incident. L'Avocat général de l'armée a aussi organisé une rencontre avec des représentants de l'ONU qui s'étaient rendus sur le site de la minoterie pour discuter de leurs constatations. L'enquête de suivi a confirmé les constatations initiales selon lesquelles la minoterie n'avait pas été prise

⁶⁴ Voir *Operation in Gaza Report*, par. 436.

⁶⁵ Cette divergence était importante, non seulement du fait de ses effets sur la crédibilité de l'enquête de commandement des FDI, mais aussi du fait de la façon dont est perçue une attaque aérienne planifiée visant à détruire la minoterie.

pour cible par la force aérienne israélienne dans le cadre d'une attaque planifiée. Les nouvelles informations, les photographies prises par des responsables de l'ONU et les images vidéo examinées n'étaient pas en harmonie avec une frappe aérienne : on relevait en particulier l'absence d'orifices d'entrée dans le toit de la minoterie, l'absence de traces sur le sol où la bombe aurait été trouvée (on trouve normalement de telles traces lorsqu'une bombe pénètre dans un bâtiment) et le fait que le feu qui avait endommagé les machines dans la minoterie s'était déclaré au premier étage alors que la munition se trouvait au rez-de-chaussée.

144. De plus, la force aérienne israélienne a examiné toutes les attaques aériennes menées à proximité de la minoterie durant l'Opération à Gaza et n'en ont trouvé aucune au cours de laquelle la minoterie aurait pu être touchée. Sur les sept frappes effectuées dans un périmètre d'un kilomètre autour de la minoterie en utilisant la munition identifiée, cinq avaient touché la cible visée (la plus proche se trouvant à 300 mètres environ de la minoterie). Les sites d'impact de deux autres frappes étaient visibles dans les vues aériennes prises par la force aérienne israélienne durant l'opération, et la plus proche des deux a touché le sol à plus de 350 mètres de la minoterie.

145. Après avoir examiné les constatations de cette nouvelle enquête, l'Avocat général de l'armée n'a pas été en mesure d'expliquer comment la munition s'était retrouvée dans la minoterie, mais il a réaffirmé que la minoterie n'avait pas été délibérément prise pour cible par la force aérienne israélienne. Il n'a pas été en mesure non plus d'éliminer l'hypothèse que la munition a été placée délibérément dans la minoterie. En conséquence, l'Avocat général de l'armée a décidé qu'il n'y avait pas lieu d'engager des poursuites.

IV. Résumé des changements apportés aux directives opérationnelles militaires par suite des enquêtes sur l'Opération à Gaza

146. L'Opération à Gaza présentait des problèmes militaires complexes quant à la protection des civils contre les dangers du champ de bataille. La guerre urbaine et le choix cynique fait par le Hamas de déployer des militants agissant de l'intérieur de zones urbaines civiles et d'utiliser les structures civiles comme boucliers ont considérablement compliqué la tâche des forces aériennes et terrestres israéliennes. Les FDI ont pourtant fait des efforts considérables pour éviter de faire des victimes civiles, pour limiter les dommages aux biens privés et pour s'assurer que les activités militaires israéliennes étaient bien conformes au droit des conflits armés et aux rigoureuses exigences éthiques et légales d'Israël.

147. Israël reconnaît qu'en dépit de ces efforts, l'Opération à Gaza a fait de nombreux morts et blessés parmi les civils palestiniens et des dommages considérables aux biens privés. Le Gouvernement israélien ne souhaitait pas ces pertes. Israël est convaincu que le fait que le Hamas ait choisi de mener ses opérations militaires dans des zones urbaines et de mettre ainsi sa propre population civile en danger explique le nombre de victimes et l'étendue des dommages causés aux biens des civils pendant l'Opération.

148. Israël continuera à enquêter de façon approfondie sur toutes allégations de fautes de comportement des membres des FDI durant l'Opération à Gaza. En dehors

de l'examen mené par l'Avocat général des armées sur les aspects juridiques de ces enquêtes, les conclusions factuelles seront précieuses pour dégager les enseignements, dans un auto-examen mené par les FDI en tant qu'armée professionnelle et consciente de ses responsabilités. L'effort fait pour protéger les civils et éviter les dommages aux biens immeubles civils est une préoccupation constante et le restera dans toute future opération militaire.

149. En particulier, les FDI ont publié deux nouvelles instructions conçues pour améliorer encore la protection des civils et de leurs biens durant les conflits armés.

A. Nouvelles procédures écrites concernant la protection des civils dans la guerre urbaine

150. Les FDI ont adopté d'importantes nouvelles procédures écrites et une nouvelle doctrine conçue pour améliorer la protection des civils dans la guerre urbaine, notamment en soulignant une fois de plus que la protection des civils fait partie intégrante de la mission d'un commandant. En outre, les procédures en question font obligation à l'armée de prêter une attention plus grande aux questions civiles dans la planification des opérations. Alors que la protection des civils durant les opérations militaires a toujours fait partie de la doctrine militaire et de l'entraînement des FDI, les nouvelles procédures prescrivent une protection plus complète des civils. Ces procédures révisées découlent de l'interprétation d'ensemble et des enseignements dégagés des opérations de Gaza comme d'autres opérations militaires menées par Israël ces dernières années.

151. La nouvelle doctrine et les nouvelles procédures précisent également les mesures à prendre pour mieux isoler la population civile des hostilités et pour limiter les dommages inutilement infligés aux immeubles et équipements civils, et obligent à intégrer les intérêts des civils dans la planification des opérations. Cela suppose des recherches préalables visant à identifier avec précision et à marquer les infrastructures existantes, notamment les canalisations d'eau, les filières d'approvisionnement alimentaire et de distribution d'électricité, les canalisations d'égouts, les services médicaux, les établissements scolaires, les lieux de culte, les établissements industriels, les usines, les magasins, les moyens de communication et les médias et autres sites sensibles, ainsi que les institutions culturelles.

152. En outre, les nouvelles procédures écrites prévoient plusieurs dispositions supplémentaires visant à protéger la population civile. Parmi celles-ci figurent : des emplacements où les civils peuvent trouver refuge en toute sécurité, des itinéraires d'évacuation des civils afin qu'ils quittent les zones de combat, le traitement médical des civils, les méthodes permettant de communiquer avec la population et de diffuser des instructions, et les dispositions prises pour l'accès humanitaire pendant le couvre-feu et les bouclages, et la limitation de la liberté de mouvement. Enfin, les nouvelles procédures écrites prescrivent le déploiement d'un spécialiste des affaires humanitaires dans chaque unité de combat, depuis le bataillon jusqu'au sommet de la hiérarchie⁶⁶, qui a pour tâche de conseiller l'officier qui commande

⁶⁶ Cela complète les autres mécanismes humanitaires mis en place dans le passé; ces dispositions étaient en vigueur pendant l'Opération à Gaza, notamment l'ouverture d'une salle des opérations 24 heures sur 24 par l'Administration de la coordination et de la liaison à Gaza afin de faciliter les communications entre les FDI et les organisations internationales, comme cela est décrit dans le rapport sur l'Opération à Gaza, par. 266 à 282.

l'unité et d'instruire les soldats au sujet de la protection des civils, des immeubles et équipements civils, de l'organisation de l'aide humanitaire, de la coordination des déplacements des agences humanitaires et des garanties humanitaires appliquées par les FDI.

153. La majorité de ces questions ont déjà été examinées dans les diverses instructions et directives opérationnelles appliquées avant l'Opération à Gaza, mais la nouvelle procédure révisée est importante car elle est exhaustive et s'applique à toutes les étapes des opérations militaires, notamment pendant la phase cruciale de la planification.

B. Nouvelles instructions relatives à la destruction à des fins militaires de biens privés

154. Au lendemain de l'Opération à Gaza, la destruction par les forces terrestres d'immeubles et d'équipements appartenant à des particuliers a fait l'objet de l'une des cinq enquêtes de commandement spéciales ordonnées par le chef d'état-major des FDI. L'un des enseignements tirés de cette enquête est qu'il doit exister un ensemble de règles et de directives bien précises pour aider les commandants à prendre leurs décisions sur cette question.

155. C'est pourquoi, sur ordre du chef d'état-major, une nouvelle instruction permanente sur la destruction à des fins militaires de biens appartenant à des particuliers a été publiée. Cette nouvelle instruction permanente, entrée en vigueur en octobre 2009, précise clairement quand et dans quelles circonstances des immeubles civils et des équipements agricoles peuvent légitimement être détruits en cas de nécessité militaire impérieuse. L'instruction clarifie les critères et règles juridiques applicables et définit expressément les responsabilités du commandement et de l'autorité hiérarchique pour la prise de décisions.

156. Après la publication de cette nouvelle instruction permanente, les FDI continuent à étudier la question de la protection des biens privés et à envisager d'apporter de nouveaux changements à leurs procédures. Par exemple, dans son examen d'un incident particulier où il y a eu destruction de biens privés, l'Avocat général des armées a recommandé d'apporter plusieurs clarifications supplémentaires à la nouvelle instruction : a) il faut identifier avec plus de précision les sites qui sont considérés comme particulièrement « sensibles » et dont la destruction ne doit être décidée qu'à un niveau hiérarchique plus élevé; b) il faut mieux analyser et régler la question de la proportionnalité à appliquer dans différentes situations ; et c) il faut mieux intégrer la nouvelle instruction permanente à tous les niveaux et secteurs de commandement.

157. Les rapports précédents d'Israël sur les enquêtes effectuées sur l'Opération à Gaza ont décrit d'autres changements opérationnels que les FDI envisagent actuellement ou appliquent déjà sur la base des enseignements dégagés des enquêtes de commandement. Ces changements sont les suivants :

a) S'agissant de l'examen des opérations ayant comporté des incidents ayant entraîné des dommages pour les installations des Nations Unies et autres installations internationales, le chef d'état-major a réaffirmé l'importance de mieux indiquer aux unités des FDI, à tous les niveaux, l'emplacement des installations sensibles dans les zones de combat où elles sont déployées. Le chef d'état-major a

ordonné que les règles relatives à la distance de sécurité à respecter au voisinage des installations sensibles soient bien signalées, en particulier en cas d'utilisation de l'artillerie, et il a également ordonné que des mesures soient envisagées pour améliorer la coordination entre l'action des FDI et les organismes des Nations Unies sur le terrain;

b) Le chef d'état-major a ordonné une amélioration de l'entraînement et des procédures suivies, notamment l'accomplissement, par toutes les forces, d'exercices de réaction à des incidents ayant des aspects humanitaires précis ou impliquant la prévention des dommages aux équipes, installations et véhicules médicaux. Il a également ordonné un examen du fonctionnement des couloirs humanitaires ouverts pour la population locale pendant les combats. On s'emploie à préparer une nouvelle instruction sur la question;

c) Le chef d'état-major des FDI a ordonné l'établissement d'une doctrine et d'instructions précises sur la question des diverses munitions contenant du phosphore blanc. Ces instructions sont actuellement appliquées.

V. La Commission Turkel chargée d'examiner le système d'enquête israélien

158. Si l'État d'Israël a toute confiance dans le caractère exhaustif, l'impartialité et l'indépendance de son système d'enquête, en raison des critiques récemment formulées concernant les mécanismes appliqués par Israël pour examiner les plaintes faisant état de violations par Israël du droit des conflits armés, le Gouvernement israélien a créé une commission publique indépendante chargée de s'assurer que ces mécanismes respectent les obligations d'Israël en vertu du droit international, comme on le verra plus loin.

159. Le 14 juin 2010, le Gouvernement israélien a créé une commission publique indépendante chargée d'examiner les questions soulevées par l'incident maritime du 31 mai 2010 comportant une intervention des FDI, et qui est sans rapport avec l'Opération à Gaza. Cette commission est présidée par Yaakov Turkel, juge en retraite à la Cour suprême d'Israël, et comprend aussi le professeur Shabtai Rosenne, spécialiste de droit international, et Amos Horev, ancien général et ancien président de l'Institut israélien de technologie (Technion). En outre, deux observateurs internationaux, le lauréat du prix Nobel de la paix Lord William David Trimble, originaire d'Irlande du Nord, et l'ancien juge et Procureur général canadien, Kenneth Watkin, qui ont été désignés pour participer aux auditions et aux délibérations de la Commission.

160. Indépendamment de ses attributions concernant expressément l'incident maritime, le mandat de la Commission va bien au-delà des événements du 31 mai 2010 et inclut un examen de la question :

de savoir si le mécanisme d'examen et d'enquête sur les plaintes et réclamations déposées faisant état de violations du droit des conflits armés dans le territoire d'Israël en général, et dans le présent incident, est conforme aux obligations qui incombent à l'État d'Israël en vertu du droit international⁶⁷.

161. Ainsi, l'une des principales tâches de la nouvelle commission indépendante est d'examiner et d'évaluer les mécanismes mis en place en Israël pour enquêter sur les allégations de violation du droit des conflits armés. Les mécanismes en question sont les mêmes que ceux qui ont fonctionné dans les enquêtes relatives à l'Opération à Gaza et qui ont été examinés en détail dans le présent document et dans les deux rapports précédents.

162. La décision du Gouvernement israélien précise que tous les organes gouvernementaux pertinents devront coopérer sans réserve avec la Commission et lui remettront information et documents nécessaires à l'accomplissement de sa tâche. En outre, la Commission est habilitée à convoquer les témoins, à les citer à comparaître et à les obliger à témoigner.

163. Une fois sa tâche accomplie, la Commission soumettra un rapport au Gouvernement israélien par l'intermédiaire du Premier Ministre. Ce rapport sera publié.

VI. Conclusions

164. Depuis le *Rapport de janvier 2010*, Israël a sensiblement progressé dans ses enquêtes sur les allégations de faute de comportement par des membres des FDI pendant l'Opération à Gaza. Israël a consacré beaucoup de ressources à l'organisation d'enquêtes complètes et indépendantes comportant des entretiens avec des centaines de soldats israéliens et de civils palestiniens.

165. Les FDI ont mené de nombreuses enquêtes de commandement sur les activités opérationnelles pendant l'Opération. La Division des enquêtes criminelles de la police militaire a ouvert 47 enquêtes criminelles et l'Avocat général des armées a entamé des poursuites criminelles contre quatre soldats impliqués dans différents incidents. Six officiers ont fait l'objet de mesures disciplinaires ou de sanctions du commandement.

166. Dans d'autres affaires, l'Avocat général des armées est parvenu à la conclusion que les actes des FDI ne sont pas contraires au droit des conflits armés non plus qu'au règlement militaire des FDI. Les enquêtes israéliennes se poursuivent et Israël demeure attaché à enquêter sur toutes allégations de violation du droit des conflits armés.

167. Dans le cadre d'un processus continu d'apprentissage, les FDI ont déjà également apporté de nombreux changements à leur doctrine et à leur pratique pour améliorer la protection des civils contre le danger des hostilités et mieux protéger les biens des particuliers pendant les opérations militaires.

⁶⁷ Ministère israélien des affaires étrangères, *Government Establishes Independent Public Commission*, par. 5 (14 juin 2010) que l'on peut consulter au site suivant : http://www.mfa.gov.il/MFA/Government/Communiques/2010/Independent_Public_Commission_Maritime_Incident_31-May-2010.htm.

Annexe II

Lettre datée du 12 juillet 2010, adressée au Secrétaire général de l'Organisation des Nations Unies par l'Observateur permanent de la Palestine auprès de l'Organisation des Nations Unies

J'ai l'honneur de vous faire tenir la lettre ci-jointe dans le cadre des efforts entrepris par l'Assemblée générale des Nations Unies en vue de donner suite au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza, communément appelé « rapport Goldstone », afin que les responsabilités soient établies et que justice soit faite à la suite des violations du droit international humanitaire et des droits de l'homme perpétrés au cours des opérations militaires israéliennes dans la bande de Gaza, de décembre 2008 à janvier 2009.

Suite à la note du 27 mai 2010 dans laquelle le Secrétariat des Nations Unies, se référant à la résolution 64/254 de l'Assemblée générale intitulée « Deuxième suite donnée au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza », en date du 26 février 2010, a demandé en votre nom à la Mission permanente d'observation de la Palestine auprès de l'Organisation des Nations Unies de fournir des informations par écrit au sujet des mesures que la partie palestinienne pourrait avoir prises en réponse à la demande instantane de l'Assemblée, formulé au paragraphe 3 de la résolution 64/254, ainsi qu'au paragraphe 4 de la résolution 64/10, en date du 5 novembre 2009, j'ai l'honneur de vous transmettre les documents ci-après :

1. Une lettre du Président Mahmoud Abbas, datée du 11 juillet 2010;
2. Le rapport de la « Commission indépendante palestinienne d'enquête sur la suite donnée au rapport Goldstone », comprenant une introduction générale au rapport de la Commission.

Conformément à son mandat, la Commission indépendante palestinienne a présenté un rapport détaillé qui constitue le résultat d'une enquête indépendante, crédible et conforme aux normes internationales. Cette information est présentée en application de la résolution 64/254, comme demandé par le Secrétariat, pour aider le Secrétaire général à s'acquitter des responsabilités qui lui incombent au titre de ladite résolution et de présenter un rapport sur l'application de la résolution afin de déterminer quelles nouvelles mesures doivent être prises, le cas échéant, par les organes et organismes compétents de l'Organisation des Nations Unies, dont le Conseil de sécurité.

À cet égard, comme souligné par l'Assemblée générale dans sa résolution 64/254, la Palestine réaffirme qu'il faut exiger des comptes dans tous les cas de violation du droit international humanitaire et des droits de l'homme, afin de lutter contre l'impunité, de garantir la justice, de prévenir de nouvelles violations et de promouvoir la paix. Elle réaffirme son respect du droit international et sa volonté de s'acquitter de ses obligations et de ses responsabilités à cet égard. Dans le même temps, la Palestine lance de nouveau des appels urgents et constants à la communauté internationale pour que celle-ci fasse respecter l'état de droit et honore toutes les obligations juridiques et morales s'agissant de la question de Palestine, et

veille notamment à ce que les responsabilités soient établies et que la justice soit rendue pour les crimes perpétrés par Israël, Puissance occupante, à l'encontre du peuple palestinien dans le territoire palestinien occupé, notamment à Jérusalem-Est, pendant plusieurs décennies d'occupation militaire belligérante.

Pour finir, nous saisissons cette occasion pour réaffirmer combien il est important de parvenir à la vérité et à la justice; cela est absolument nécessaire pour faire aboutir les efforts collectifs que nous déployons afin que la paix devienne une réalité. À cet égard, nous réaffirmons la conviction exprimée à maintes reprises par l'Assemblée générale, notamment dans les résolutions 64/10 et 64/254, selon laquelle un règlement juste, final et global de la question de Palestine, qui est au cœur du conflit arabo-israélien, est indispensable à l'instauration d'une paix et d'une stabilité globales, justes et durables au Moyen-Orient.

L'Ambassadeur,
Observateur permanent de la Palestine
auprès de l'Organisation des Nations Unies
(*Signé*) Riyadh **Mansour**

**Pièce jointe I à la lettre datée du 12 juillet 2010 adressée
au Secrétaire général de l'Organisation des Nations Unies
par l'Observateur permanent de la Palestine auprès
de l'Organisation des Nations Unies**

J'ai l'honneur de vous faire tenir ci-joint le rapport de la Commission indépendante d'enquête qui a été créée à la suite du décret présidentiel daté du 25 janvier 2010, en application de la résolution 64/254 de l'Assemblée générale. Il s'agit de la deuxième suite à donner au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza en date du 26 février 2010, dont le troisième paragraphe énonce ce qui suit :

[L'Assemblée] [...] demande de nouveau instamment que la partie palestinienne procède à des investigations indépendantes, crédibles et conformes aux normes internationales sur les graves violations du droit international humanitaire et des droits de l'homme qui ont été signalées par la Mission d'établissement des faits dans son rapport, afin que les responsabilités soient établies et que justice soit faite.

Le présent rapport a donc été établi comme suite à la lettre du Secrétariat de l'ONU datée du 27 mai 2010 demandant à la Mission permanente d'observation de la Palestine auprès de l'Organisation des Nations Unies de présenter au Secrétaire général le 12 juillet au plus tard des informations par écrit sur les mesures prises par la partie palestinienne, ou encore d'indiquer quelles mesures doivent être prises, le cas échéant, comme suite à la demande formulée par l'Assemblée générale au paragraphe 3 de la résolution précitée.

Le Président de l'État de Palestine,
Président du Comité exécutif
de l'Organisation de libération de la Palestine,
Président de l'Autorité nationale palestinienne
(*Signé*) Mahmoud **Abbas**

**Pièce jointe II à la lettre datée du 12 juillet 2010 adressée
au Secrétaire général de l'Organisation des Nations Unies
par l'Observateur permanent de la Palestine auprès
de l'Organisation des Nations Unies**

**Introduction générale au rapport de la Commission indépendante
palestinienne établie à la suite du rapport Goldstone**

1. Le présent rapport a été soumis par l'Autorité nationale palestinienne en application de la résolution 64/10 de l'Assemblée générale des Nations Unies en date du 5 novembre 2009, intitulée « Suite donnée au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza », ainsi que de la résolution 64/254 de l'Assemblée générale en date du 26 février 2010, intitulée « Deuxième suite donnée au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza ». Dans ces résolutions, les Nations Unies ont engagé les autorités palestiniennes à procéder à des investigations sur les allégations faisant état de violations graves du droit international humanitaire et du droit international des droits de l'homme décrites dans le rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza (également connu sous le nom « rapport Goldstone » et désigné ci-après sous le nom de rapport de la Mission d'établissement des faits). À cet égard, il convient de rappeler que la Mission d'établissement des faits a été créée en application de la résolution S-9/1 du Conseil des droits de l'homme pour mener des investigations sur les violations du droit international humanitaire et du droit international des droits de l'homme perpétrées par Israël, Puissance occupante, contre le peuple palestinien, en particulier dans la bande de Gaza, au cours des opérations militaires qui se sont déroulées du 27 décembre 2008 au 18 janvier 2009.

2. Ce rapport a été établi par la Commission indépendante palestinienne d'enquête sur la suite donnée au rapport Goldstone, qui a été créée en application d'un décret présidentiel publié le 25 janvier 2010 par le Président Mahmoud Abbas en réponse à la demande figurant dans la résolution 64/10 de l'Assemblée générale.

3. Il commence par un examen du mandat de la Mission d'établissement des faits, donne un bref aperçu du contexte historique qui a conduit à l'agression militaire israélienne contre la bande de Gaza (qu'Israël, Puissance occupante, a dénommée l'opération « Plomb durci »), fait brièvement référence au rapport de la Mission d'établissement des faits sur les violations du droit international humanitaire et du droit international des droits de l'homme qui se sont produites au cours de cette opération, examine quelques considérations juridiques pertinentes et rend compte en détail de l'enquête indépendante approfondie et menée par la Commission indépendante palestinienne sur les violations du droit international des droits de l'homme dans le territoire palestinien occupé. Le rapport de la Commission figure, en arabe, à la suite de la présente introduction.

4. Pour commencer, la Commission indépendante palestinienne souhaite rendre hommage à tous les membres de la Mission d'établissement des faits pour la conscience professionnelle, l'intégrité et l'impartialité avec lesquelles ils ont produit leur rapport, qui contribuera aux efforts menés au niveau international pour lutter contre l'impunité dans les conflits et veiller à ce que les responsabilités soient établies et que justice soit faite en ce qui concerne les violations du droit

international humanitaire et d'autres crimes internationaux commis contre le peuple palestinien, qui continue de souffrir de privations sous un régime d'oppression et d'être victime de violations systématiques des droits de l'homme ainsi que de crimes de guerre perpétrés par Israël, Puissance occupante, dans le contexte de son occupation militaire belligérante du territoire palestinien depuis 1967. La Commission indépendante palestinienne tient également à exprimer ses remerciements à la Haut-Commissaire aux droits de l'homme et aux membres dévoués de son bureau pour les efforts qu'ils ont déployés à l'appui de la Mission d'établissement des faits conformément à la résolution S-9/1.

Portée du rapport

5. Conformément aux recommandations de la Mission d'établissement des faits, l'Assemblée générale, dans sa résolution 64/10, a demandé instamment « que la partie palestinienne procède dans les trois mois à des investigations indépendantes, crédibles et conformes aux normes internationales, sur les graves violations du droit international humanitaire et du droit international des droits de l'homme qui ont été signalées par la Mission d'établissement des faits, afin que les responsabilités soient établies et que justice soit faite ». Ceci a été réitéré par l'Assemblée dans sa résolution 64/254.

6. Les termes de cette disposition découlent de l'énoncé du mandat élargi de la Mission d'établissement des faits qui, selon le Président du Conseil des droits de l'homme, était « d'enquêter sur toutes les violations du droit international des droits de l'homme et du droit international humanitaire qui ont pu être commises dans le contexte des opérations militaires menées dans la bande de Gaza du 27 décembre 2008 au 18 janvier 2009, que ce soit avant, pendant ou après cette période ».

7. L'Assemblée générale a par conséquent demandé instamment à la « partie palestinienne » de mener des enquêtes sur les violations graves du droit international humanitaire et du droit international des droits de l'homme signalées par la Mission d'établissement des faits. L'ONU a reconnu l'Organisation de libération de la Palestine (OLP) en tant qu'observateur auprès de l'Organisation des Nations Unies en application de la résolution 3237 (XXIX) de l'Assemblée générale en date du 22 novembre 1974, suite à la décision prise par le Sommet arabe tenu à Rabat en 1974 qui a désigné l'OLP « seul représentant légitime du peuple palestinien ». L'Autorité nationale palestinienne a été créée en application de la Déclaration de principes sur des arrangements intérimaires d'autonomie, signée entre l'OLP et le Gouvernement israélien le 13 septembre 1993 et connue sous le nom d'Accord d'Oslo. En application de cet accord et d'accords ultérieurs, le droit légitime d'administrer le territoire palestinien occupé sous contrôle israélien depuis la guerre de 1967 a été conféré à l'Autorité nationale palestinienne. Il convient donc de souligner que le responsable officiel de la « partie palestinienne » est l'Autorité nationale palestinienne, qui relève en dernier ressort de l'OLP.

Contexte historique

8. Suite à la déclaration d'indépendance de l'État d'Israël le 15 mai 1948 et à la guerre qui a éclaté entre Israël et l'Égypte, la Jordanie, la Syrie, le Liban et l'Iraq, Israël a saisi un territoire plus étendu que celui qui lui avait été attribué par l'Assemblée générale dans sa résolution 181 (II) du 29 novembre 1947, en vertu de laquelle la Palestine sous mandat a été divisée, des centaines de milliers de

Palestiniens ont été expulsés par la force ou se sont enfuis de leurs foyers, tournant tragique dans l'histoire palestinienne connu sous le nom d'*Al-Nakba*. Après la guerre de 1948, le reste du territoire de la Palestine sous mandat, à savoir la Cisjordanie, y compris Jérusalem-Est, et la bande de Gaza, a été placé sous le contrôle de l'administration du Royaume hachémite de Jordanie et de l'Égypte, respectivement. L'Égypte n'a pas revendiqué la souveraineté sur la bande de Gaza, mais juste le droit de l'administrer en attendant son retour dans un futur État palestinien et, en 1969, le Roi Hussein de Jordanie a également renoncé à toute revendication de souveraineté sur la Cisjordanie qu'il a cédée au peuple palestinien, dont le représentant légitime était l'OLP.

9. Dans sa résolution 273 de 1949, admettant l'État d'Israël à l'Organisation des Nations Unies, l'Assemblée générale a rappelé à la fois sa résolution 181 (II), également connue sous le nom de résolution sur le plan de partage, et sa résolution 194 (III), qui affirmait le droit des réfugiés palestiniens à retourner dans leurs foyers dans la Palestine sous mandat. Dans cette résolution, l'Assemblée prenait note également de la déclaration du représentant d'Israël qui affirmait l'intention de son gouvernement de respecter ces deux résolutions. Le but de la référence faite à ces deux résolutions et à la déclaration du représentant d'Israël est de montrer que l'admission d'Israël à l'Organisation des Nations Unies reste subordonnée à la mise en application desdites résolutions.

10. Suite à la guerre de 1967, Israël a occupé les zones restantes de la Palestine en s'appropriant par la force la Cisjordanie, y compris Jérusalem-Est, et la bande de Gaza. Cette occupation militaire étrangère par Israël de la Palestine et d'autres terres arabes qui dure maintenant depuis 43 ans a fait l'objet de nombreuses résolutions du Conseil de sécurité et de l'Assemblée générale des Nations Unies, dont l'une des plus importantes est la résolution 242 du 22 novembre 1967, dans laquelle le Conseil a souligné l'« inadmissibilité de l'acquisition de territoires par la guerre » et appelé au « retrait des forces armées israéliennes des territoires occupés lors du conflit récent ».

11. En dépit des résolutions précitées, Israël a continué à occuper la Cisjordanie, y compris Jérusalem-Est, et la bande de Gaza (qui constituent une entité géopolitique communément désignée sous le nom de territoire palestinien occupé) et y a systématiquement violé le droit international humanitaire et le droit international des droits de l'homme par des politiques et pratiques visant à perpétuer son occupation et à modifier la composition démographique et la carte du territoire palestinien occupé. Dans le cadre de ces politiques, Israël a annexé unilatéralement Jérusalem-Est occupée en 1980, annexion illégale que la communauté internationale ne reconnaît pas à ce jour, a confisqué des milliers de parcelles de terrain appartenant à des Palestiniens, construit des centaines de colonies de peuplement, transféré des milliers de colons israéliens dans le territoire palestinien occupé, et construit un système complexe et discriminatoire de « routes de contournement » pour relier ces colonies illégales dans le cadre d'une campagne massive et illégale de colonisation, qui à l'heure actuelle comprend également la poursuite de la construction illégale par Israël du mur en Cisjordanie, en dehors du tracé de la Ligne verte de 1967, en violation grave du droit international humanitaire et au mépris flagrant de l'avis consultatif de la Cour internationale de Justice en date du 9 juillet 2004.

12. Suite à la mise en train du processus de paix au Moyen-Orient, qui a commencé par la Conférence de paix de Madrid en 1991, sur la base des résolutions pertinentes du Conseil de sécurité et du principe de l'échange de territoires contre la paix, et à la signature de l'Accord d'Oslo de 1993, l'OLP a assumé des responsabilités limitées en ce qui concerne l'administration de certaines zones du territoire palestinien occupé pour ce qui devait être une période intérimaire de cinq ans jusqu'à la conclusion d'un accord de paix global. Toutefois, aux divers stades des négociations du processus de paix, Israël a continué à confisquer de nouvelles terres palestiniennes et à construire un plus grand nombre de colonies pour créer un fait accompli, en violation du droit international, donnant ainsi la preuve de sa mauvaise foi au cours des négociations, puisqu'il faisait tout pour préjuger de l'issue des négociations finales.

13. Suite à l'échec des négociations de paix entre Israël et l'Autorité nationale palestinienne et le début de l'Aqsa Intifada le 28 septembre 2000, le Gouvernement israélien dirigé par le Premier Ministre Ariel Sharon a déclaré qu'il mettrait en œuvre un plan de désengagement unilatéral qui consistait en réalité à imposer aux Palestiniens la vision israélienne d'un règlement. Le démantèlement des colonies israéliennes à Gaza et le redéploiement de troupes d'occupation israéliennes dans les zones à la frontière de la bande de Gaza faisaient partie intégrante de ce plan de désengagement. Contrairement aux affirmations d'Israël qui prétendait que le plan de désengagement et le redéploiement de troupes d'israéliennes de Gaza mettaient fin à l'occupation de cette zone, la position de l'Autorité nationale palestinienne, que la Commission indépendante palestinienne entérine et adopte, est que Gaza demeure un territoire occupé et qu'Israël demeure la Puissance occupante de ce territoire, avec toutes les obligations que cela comporte. L'occupation de la bande de Gaza est confirmée par l'exercice continu par Israël d'un contrôle effectif sur le territoire, qui se manifeste de diverses façons, notamment les suivantes : 1) le contrôle unilatéral exercé par Israël sur l'espace aérien et les eaux territoriales de Gaza; 2) la présence militaire continue d'Israël dans le « corridor Philadelphie » le long de la frontière entre la bande de Gaza et l'Égypte; 3) le contrôle continu exercé par Israël sur tous les postes frontière avec Gaza; 4) les incursions militaires continues d'Israël par voie terrestre et les frappes aériennes et navales contre Gaza; et 5) le fait que l'entrée et la sortie de toute personne ou marchandise de Gaza soient subordonnées au consentement d'Israël.

14. La situation dans la bande de Gaza a encore empiré quand le Mouvement de résistance islamique (Hamas) a pris le contrôle des institutions de l'Autorité nationale palestinienne à Gaza le 12 juin 2007, acte à la suite duquel Israël a déclaré, le 19 septembre 2007, que la bande de Gaza était devenue une « entité ennemie », et imposé sur le territoire un blocus terrestre, aérien et naval, qui constitue une forme de châtement collectif de la population civile palestinienne dans la bande de Gaza, en violation flagrante du droit international. Israël a également intensifié sa politique d'assassinats ciblés de dirigeants politiques à Gaza, que l'on peut assimiler à des exécutions extrajudiciaires commises en violation du droit international humanitaire et du droit international des droits de l'homme. De plus, Israël a sapé le fonctionnement des structures gouvernementales palestiniennes en détendant de nombreux dirigeants palestiniens, notamment des membres du Conseil législatif palestinien.

15. Israël a par ailleurs lancé périodiquement des opérations et des attaques militaires contre la bande de Gaza, prétendument en réponse aux tirs par les groupes

armés de résistance palestiniens de « roquettes artisanales » en territoire israélien. Ces opérations militaires consistaient généralement en frappes aériennes, attaques d'hélicoptères de combat et barrages d'artillerie. Israël a également lancé à l'occasion contre la bande de Gaza des attaques terrestres avec des chars, des véhicules blindés et des unités d'infanterie lourdement armées, qui ont fait des victimes parmi les civils et entraîné la destruction à grande échelle d'habitations et d'infrastructures civiles.

16. À cet égard, Israël a prétendu à maintes reprises qu'en attaquant Gaza il exerçait son droit de légitime défense parce que les groupes armés de résistance palestiniens tiraient des roquettes et des obus de mortier sur son territoire et sa population civile. Il convient de souligner qu'on ne dispose pas d'estimation vérifiable ou fiable du nombre de roquettes ou d'obus de mortier qui ont été tirés, ni d'indication quant à l'endroit d'où ils venaient, à celui où ils ont atterri et aux dommages qu'ils ont causés, le cas échéant, sauf en ce qui concerne un certain nombre de morts signalés par Israël, à savoir un maximum de 13 sur une période allant de quatre à cinq ans (dont trois ou quatre membres du personnel militaire qui seraient considérés comme des cibles militaires légitimes aux termes du droit international humanitaire). Les chiffres rapportés publiquement varient selon leur source. Le Ministère des affaires étrangères israélien a affirmé qu'en 2008, les groupes armés de résistance palestiniens avaient tiré 1 750 roquettes et 1 528 projectiles de mortier alors que le porte-parole israélien a signalé le tir de 1 755 projectiles de mortier, de 1 720 roquettes Qassam et de 75 missiles Grad. À une autre occasion, le porte-parole israélien a annoncé que 7 200 projectiles avaient été tirés contre Israël depuis 2005, sans faire de distinction quant à la nature des projectiles. Le Premier Ministre israélien Benjamin Netanyahu a déclaré lors d'une interview en direct avec Larry King dans l'émission de ce dernier sur CNN le 7 juillet 2010 que « 6 000 roquettes » avaient été tirées contre Israël, vraisemblablement au cours de la même période de 2005 à 2009, qui correspond à la période visée par le rapport israélien. Il convient de noter qu'aucune de ces sources israéliennes n'indique l'endroit où les projectiles qui auraient été tirés ont atterri. Ils peuvent fort bien avoir atterri dans le désert ou dans des zones inhabitées, ou encore dans des zones militaires ou aux alentours de telles zones (ce qui en ferait des objectifs militaires légitimes aux termes du droit international humanitaire).

17. Dans son rapport, la Mission d'établissement des faits cite des sources israéliennes selon lesquelles 3 455 roquettes et 3 742 projectiles de mortier auraient été tirés contre Israël de 2001 jusqu'à la mi-juin 2008, sans indiquer où ils avaient atterri. Comme indiqué ci-dessus, la Mission n'a pu vérifier aucune des déclarations israéliennes périodiquement diffusées par les médias et citées dans son rapport, parce que Israël a refusé de coopérer avec elle.

18. Aucun de ces chiffres estimatifs n'a été vérifié de manière indépendante et impartiale, et la Commission indépendant palestinienne n'a été en mesure ni de vérifier l'exactitude de ces chiffres ni d'examiner la question plus à fond dans le présent rapport. Il aurait été utile qu'Israël mette en place de son côté une commission indépendante pour établir la vérité, au lieu de faire circuler des informations qu'il est impossible de vérifier pour justifier son agression militaire à Gaza et ses actes de répression contre sa population civile, en particulier dans le cadre de l'opération « Plomb durci ».

19. Aucune des observations qui précèdent ne devrait être considérée comme indiquant que le présent rapport rejette ou ne prend pas au sérieux l'impact et les conséquences des tirs de roquettes et de mortier contre la population civile. L'Autorité nationale palestinienne a maintes fois condamné officiellement les tirs de roquettes et demandé qu'il y soit mis fin. Le présent rapport ne reflète pas non plus la responsabilité de ceux qui ont attaqué de manière peut-être délibérée des membres de la population civile. Le point sur lequel il met l'accent concerne l'inexactitude et le caractère non fiable des faits non signalés et le refus d'Israël de mener des enquêtes équitables et impartiales à leur sujet.

20. Pour revenir sur la situation à Gaza avant l'agression militaire lancée par Israël le 27 décembre 2008, il convient de rappeler que l'Égypte avait négocié un cessez-le-feu de six mois entre le Hamas à Gaza et Israël, période connue comme la « période de calme » ou *tahde'a*. À la fin du mois de décembre 2008, cependant, les discussions engagées sous la médiation de l'Égypte, en vue de prolonger la « période de calme » de six mois ont échoué. Israël a alors lancé une offensive militaire de 23 jours contre la bande de Gaza, dénommée opération « Plomb durci », qui, d'après la Mission d'établissement des faits, a provoqué la mort de plus de 1 300 civils palestiniens et fait plus de 6 000 blessés, dont de nombreux femmes et enfants.

Violations du droit international des droits de l'homme par l'Autorité nationale palestinienne et par ceux qui exercent le pouvoir à Gaza

21. La Commission indépendante palestinienne répond de manière très précise aux affirmations de la Mission d'établissement des faits concernant des violations du droit international des droits de l'homme commis par l'Autorité nationale palestinienne et par ceux qui exercent le pouvoir à Gaza, sous le nom de Mouvement de résistance islamique (Hamas), dans la partie du présent rapport publiée en arabe.

Système juridique palestinien : historique et héritage

22. La Palestine est dotée d'un système juridique qui existe de longue date et qui comprend des institutions et des structures juridiques et un appareil judiciaire. On en trouvera ci-après une brève description, fournie strictement à titre d'introduction. L'actuel système juridique fait partie de la structure d'ensemble de l'Autorité nationale palestinienne, telle qu'elle a été établie après la conclusion des Accords d'Oslo de 1993. La nouvelle structure gouvernementale, cependant, est fondée sur son héritage historique, et comprend un pouvoir législatif et un pouvoir juridique distincts, ainsi qu'un pouvoir exécutif chargé de superviser l'application des lois et les poursuites judiciaires. L'histoire de ce système juridique ne peut pas être caractérisée comme étant essentiellement palestinienne, en raison de la succession de puissances extérieures qui ont exercé leur pouvoir sur la Palestine. Cette histoire remonte à l'inclusion de la Palestine en 637 dans l'*Ummah* (nation) musulmane, à laquelle a succédé l'Empire ottoman turc. Celui-ci a préservé les caractéristiques distinctives d'une administration palestinienne qui a duré du XV^e siècle jusqu'en 1917, et a été suivie 1922 par l'établissement du mandat de la Ligue des nations, la Grande-Bretagne devenant Puissance mandataire jusqu'en 1948, quand Israël a déclaré son indépendance et créé un État sur un territoire représentant plus de la moitié du territoire de la Palestine. À l'époque, le territoire connu sous le nom de Cisjordanie, y compris Jérusalem-Est, a été placé sous l'administration du Royaume

hachémite de Jordanie, tandis que Gaza était administrée par l'Égypte. Au cours de cette période, les diverses puissances administrantes ont promulgué des lois qui ont été administrées par un système judiciaire. Au fil des années, ces lois se sont multipliées, et il convient de les examiner à la lumière des besoins actuels de la société palestinienne, y compris la codification de différents domaines du droit. Un grand nombre de ces efforts se poursuivent.

23. De nombreuses réformes sont également en cours dans le système juridique palestinien et de grands progrès ont été accomplis, notamment en ce qui concerne l'importance particulière accordée à la protection et la défense des droits de l'homme ces dernières années, en dépit des difficultés économiques, sociales et politiques qui se poursuivent du fait de l'occupation militaire israélienne et des innombrables politiques et pratiques illégales d'Israël. Ces progrès doivent toutefois être soutenus de manière à renforcer l'état de droit et à améliorer la protection des droits de l'homme, tels qu'ils sont définis dans la Déclaration universelle des droits de l'homme, le Pacte international relatif aux droits civils et politiques et le Pacte international relatif aux droits économiques, sociaux et culturels. D'autres droits de l'homme, normes et principes devraient également être renforcés, tels que ceux énoncés dans la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, la Convention relative aux droits de l'enfant et la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes. Les efforts déployés à l'heure actuelle vont dans ce sens, et c'est dans cet esprit que le rapport de la Commission indépendante palestinienne a axé ses investigations sur les violations des droits de l'homme, démontrant ainsi de manière équitable et impartiale son attachement à l'état de droit en Palestine.

24. Comme il est indiqué dans la partie arabe du rapport de la Commission, la situation à Gaza est différente depuis que le Hamas a pris le pouvoir. Les institutions juridiques ont été sapées et cette situation est à l'origine d'un grand nombre de violations du droit international des droits de l'homme, ce qui a un impact négatif sur la situation des droits de l'homme à Gaza. Conformément aux recommandations de la Mission d'établissement des faits, le rapport de la Commission indépendante palestinienne est axé sur les violations du droit international des droits de l'homme tant en Cisjordanie que dans la bande de Gaza. La situation décrite dans ce rapport ne doit toutefois pas être considérée comme le pendant de celle résultant des violations du droit international humanitaire et du droit international des droits de l'homme commises par Israël à Gaza au cours de la période du 27 décembre 2008 au 18 janvier 2009. Ce sont là deux questions différentes qui ne doivent pas être considérées comme étant équivalentes ou comme se faisant contrepoids. Ce sont deux questions totalement distinctes et séparées, et elles devraient être traitées en conséquence. La Commission indépendante palestinienne souligne qu'il n'y a pas d'équivalence morale entre les violations du droit international humanitaire et du droit international des droits de l'homme commises par Israël à Gaza au cours de la période du 27 décembre 2008 au 18 janvier 2009 et la situation concernant le respect des droits de l'homme à Gaza par le Hamas et la situation différente qui existe en Cisjordanie.

25. La Commission indépendante palestinienne ne réfute pas le rapport de la Mission d'établissement des faits sur la situation concernant le droit international des droits de l'homme à Gaza. En revanche, elle n'accepte pas certaines des critiques concernant la Cisjordanie. La Commission indépendante palestinienne a effectivement constaté l'existence de violations du droit international des droits de

l'homme en Cisjordanie et de lacunes à cet égard, dont un grand nombre sont signalées dans le rapport de la Mission d'établissement des faits. Elle note toutefois que ces violations et lacunes ne tiennent pas à l'absence de lois et d'institutions mais au fait que les institutions en question n'appliquent pas la loi à tous les citoyens de manière juste et équitable comme elle le devraient, problème qui doit également être replacé systématiquement dans le contexte de la situation qui règne en Cisjordanie.

26. La Commission indépendante palestinienne décrit un certain nombre de ces violations et lacunes pour prouver le caractère impartial de son rapport, demandé par l'Assemblée générale dans sa résolution 64/10. De plus, la Commission indépendante palestinienne espère que la description de ces violations et lacunes, que l'Autorité nationale palestinienne a accepté de présenter dans le cadre de son rapport à l'ONU, conformément à la résolution susmentionnée, contribuera à l'amélioration de la situation interne en Cisjordanie. Bien qu'à ce stade, ni la Commission indépendante palestinienne ni l'Autorité nationale palestinienne ne soit ni l'une ni l'autre en mesure d'exercer un pouvoir quelconque à Gaza, la Commission espère que le présent rapport contribuera également à améliorer la situation des droits de l'homme dans cette partie de la Palestine, jusqu'au jour où le Gouvernement pourra exercer son autorité sur l'ensemble du territoire palestinien occupé.

Considérations juridiques

27. Le Gouvernement israélien est partie aux quatre Conventions de Genève de 1949, mais n'a pas adhéré à leurs Protocoles additionnels I et II. L'OLP, pour sa part, a soumis au Gouvernement suisse, le 21 juin 1989, une déclaration indiquant qu'elle se considérait liée par les Conventions de Genève de 1949. Les deux parties sont donc liées par les Conventions de Genève et par la partie des Protocoles additionnels qui relève du droit international coutumier. Il est incontestable qu'au regard aussi bien des Conventions de Genève que du droit international coutumier, les attaques dirigées contre les populations civiles ou des objectifs civils et l'utilisation aveugle et disproportionnée de la force en cas de conflit international constituent des crimes de guerre. De même, les mesures de représailles à l'égard des belligérants sont également interdites.

28. Alors que le Gouvernement israélien a pour position que la quatrième Convention de Genève de 1949 n'est pas applicable à la Cisjordanie et à Gaza, il a été fermement établi que cette convention est applicable au territoire palestinien occupé, y compris Jérusalem-Est. Ceci a été réaffirmé dans des dizaines de résolutions du Conseil de sécurité de même que, tous les ans, dans de nombreuses résolutions de l'Assemblée générale. Ceci a de plus été clairement affirmé dans l'avis consultatif de la Cour internationale de Justice sur les conséquences juridiques de la construction du mur dans le territoire palestinien occupé, où il est précisé que l'intention des auteurs de la Convention était de « protéger les personnes civiles se trouvant d'une manière ou d'une autre au pouvoir de la Puissance occupante », et où l'applicabilité des pactes relatifs aux droits de l'homme au territoire palestinien occupé, y compris Jérusalem-Est, est également affirmé. Israël a cependant reconnu qu'il était lié par les dispositions de la quatrième Convention de Genève. En outre, dans plusieurs résolutions qu'elle a adoptées, notamment à sa dixième session extraordinaire d'urgence, l'Assemblée générale a directement prié les Hautes Parties contractantes à la quatrième Convention de Genève de s'acquitter

des obligations qui leur incombent en vertu de l'article 1 commun aux quatre Conventions de respecter et de faire respecter la Convention dans le territoire palestinien occupé, y compris Jérusalem-Est, ce qui est également dit dans l'avis consultatif de la Cour internationale de Justice et était une recommandation importante de la Mission d'établissement des faits, comme il en ressort des appels lancés à cet égard par l'Assemblée dans ses résolutions 64/10 et 64/254.

29. Il y a également lieu de noter que le Protocole I donne aux peuples « qui luttent contre la domination coloniale et l'occupation étrangère et contre les régimes racistes dans l'exercice de leur droit à disposer d'eux-mêmes », les protections applicables dans un conflit armé international. Si l'on part du principe que le Protocole I est applicable au mouvement de résistance palestinien contre l'occupation continue d'Israël des territoires qu'il a occupés par la force après la guerre de 1967 en violation des résolutions 242 et 338 du Conseil de sécurité, toute violation du droit international humanitaire par quelque partie que ce soit tombe sous le coup de la disposition du Protocole I et de la quatrième Convention de Genève relative aux violations graves.

30. Par ailleurs, la charia interdit spécifiquement les infractions précitées et d'autres exactions dans la conduite des guerres. De fait, l'interdiction par la loi islamique de toutes ces violations remonte à bien avant l'actuel droit international humanitaire. La protection des civils a pour origine la pratique du prophète Mahomet (Paix à son âme) et les instructions qu'il a données aux Musulmans lors de la conquête de La Mecque en 630. Cette pratique a été suivie en 634 par le premier calife de l'Islam Abou Bakr al-sifdik, qui a donné des instructions à l'armée musulmane qui partait en guerre contre l'empire romain dans la région où se trouve actuellement la Syrie. Ces instructions étaient les suivantes : « Ne commettez aucune trahison et ne vous écartez pas du droit chemin. Il est interdit de mutiler ou de tuer une femme, une personne âgée ou un enfant. Il est interdit de détruire un palmier ou de le brûler, et de couper un arbre qui porte des fruits. Il est interdit de tuer le bétail ou les troupeaux de chameaux [de votre ennemi], sauf [dans la mesure où vous en avez besoin] pour votre subsistance. Si vous rencontrez des personnes qui ont consacré leur vie au service monastique, laissez-les faire ce à quoi elles ont consacré leur vie [protection des religieux] ».

31. Pour ce qui est de la limitation des moyens et des méthodes de guerre, la charia a pour principe fondamental de réduire toute peine et souffrance inutile ou excessive, objectif repris de nos jours dans les principes du droit coutumier et du droit international humanitaire traditionnel.

État de l'application des recommandations figurant dans le rapport de la Mission d'établissement des faits

32. Dans ce chapitre, le présent rapport examine dans quelle mesure les recommandations de la Mission d'établissement des faits ont été appliquées. La Commission indépendante palestinienne a jugé bon d'examiner un choix de recommandations adressées à Israël, à l'Autorité palestinienne, aux groupes de la résistance armée palestinienne à Gaza et au Conseil de sécurité de l'ONU. Les recommandations retenues visent la levée du blocus imposé par Israël contre Gaza, la levée des restrictions sur la liberté de circulation dans le territoire palestinien occupé, y compris entre la Cisjordanie et la bande de Gaza, la fin des restrictions imposées par Israël aux secteurs de la pêche et de l'agriculture à Gaza et la

libération de tous les Palestiniens détenus par Israël, y compris les dirigeants politiques palestiniens. Le rapport examine aussi l'application des recommandations demandant à l'Autorité palestinienne d'enquêter sur les allégations faisant état de mauvais traitements infligés aux membres du Hamas en Cisjordanie et de libérer le caporal israélien Gilad Shalit et il étudie en détail la recommandation engageant les groupes de la résistance armée palestinienne à respecter et à appliquer le droit humanitaire international et le droit international des droits de l'homme.

Lever le blocus imposé par Israël sur la bande de Gaza; mettre fin à la fermeture des frontières et aux restrictions imposées au passage des personnes et des biens par les points de franchissement de la frontière avec la bande de Gaza; et permettre le passage des biens et fournitures nécessaires et en quantité suffisante pour répondre aux besoins de la population

33. Cette recommandation concerne une série de mesures prises par le Gouvernement israélien sous le couvert de mesures de sécurité, qui consistent à boucler les points de franchissement de la frontière et à imposer, à ces points de franchissement, des restrictions au passage de personnes et au passage de l'aide humanitaire et des biens nécessaires et en quantité suffisante pour satisfaire les besoins de la population, ce qui constitue indéniablement un blocus de la bande de Gaza, comme l'ont maintes fois reconnu le Gouvernement israélien et les autorités israéliennes elles-mêmes. Qu'elles soient prises ensemble ou séparément, les mesures qui composent cette politique constituent par leur effet désastreux sur tous les secteurs et tous les aspects de la vie palestinienne un châtement collectif d'une ampleur et d'une échelle démesurées, en violation grave du droit humanitaire international et du droit international des droits de l'homme, et se hissent au niveau des crimes contre l'humanité. N'offrant que des arguments vains et des ruses injustifiables, Israël n'a pas encore expliqué pourquoi il s'est engagé dans cette politique illégale, pourquoi il continue de la mener malgré ses effets négatifs indiscutables sur la santé et le bien-être socioéconomique, humanitaire, psychologique et politique du peuple palestinien à Gaza. Qui plus est, Israël n'a toujours pas expliqué pourquoi les autorités responsables, qu'elles soient civiles ou militaires, qui ont défini cette politique et l'ont exécutée n'ont pas eu à répondre de leurs actes. Au contraire, Israël continue de prétendre se justifier par des soi-disant considérations de sécurité, sans faire apparaître le lien entre ce qui constitue de réelles menaces et les dommages qu'il inflige délibérément aux Palestiniens. De plus, les effets néfastes de ce qui s'apparente à une politique de représailles a bien le caractère de sanctions collectives, imposées systématiquement et sans distinction à la population civile, en violation du droit humanitaire international et du droit international des droits de l'homme. Les mesures décrites ci-dessous aux points b) et c) en font partie.

34. Comme le note le rapport de la Mission d'établissement des faits, le blocus imposé par Israël à Gaza est une politique antérieure aux opérations qui ont commencé le 27 décembre 2008. C'est une politique qui s'est intensifiée après la prise de contrôle par le Hamas, le 12 juin 2007, des institutions de l'Autorité palestinienne dans la bande de Gaza.

35. L'objectif implicite de cette politique était d'écarter du pouvoir les autorités du Hamas en exerçant sur la population civile palestinienne des pressions économiques, sociales et bien souvent militaires. Une telle politique est une forme de châtement

collectif, lequel est interdit par le droit humanitaire international aussi bien coutumier que conventionnel. Le blocus imposé par Israël sur Gaza a également entraîné des effets gravement préjudiciables sur la vie de la population civile. De l'avis général, les Palestiniens de Gaza ont subi une baisse catastrophique de leur niveau de vie. Par exemple, selon l'Organisation des Nations Unies pour l'alimentation et l'agriculture (FAO) et le Programme alimentaire mondial (PAM), 76 % des foyers de Gaza sont touchés par l'insécurité alimentaire; pour sa part, le Bureau de la coordination des affaires humanitaires (BCAH) a constaté que les Palestiniens à Gaza subissaient des coupures d'électricité de 8 à 12 heures par jour. En outre, l'OMS a signalé que les opérations militaires israéliennes avaient fortement dégradé la situation sanitaire déjà précaire à Gaza. Enfin, selon le BCAH, le taux de chômage de la population active à Gaza se situait à 20 % pour le premier trimestre de 2009 et 70 % des familles vivaient déjà en mai 2008 avec un revenu inférieur à 1 dollar par jour et par personne.

36. La Commission d'investigation palestinienne affirme qu'une telle politique de châtement collectif qui a abouti à la destruction systématique de tous les aspects de la vie à Gaza, constitue une grave violation du droit international humanitaire, qu'il soit coutumier ou conventionnel, en violation flagrante du droit international des droits de l'homme. En outre, la Commission estime que la situation politique à Gaza et le contrôle de fait exercé par le Hamas ne justifient pas la politique de châtement collectif menée par Israël contre le peuple palestinien, laquelle a été condamnée à l'unanimité par la communauté internationale.

37. À ce propos, depuis qu'il a reçu les recommandations que lui adressait la Mission d'établissement des faits dans son rapport, Israël n'a pas donné suite aux appels lui demandant de lever le blocus, de mettre fin au bouclage des points de franchissement de la frontière avec Gaza et de permettre le passage de l'aide humanitaire et d'autres fournitures et matériels nécessaires pour le rétablissement du niveau de vie à Gaza à son état antérieur, en autorisant notamment la libre entrée des biens qui sont essentiels pour reconstruire et relever Gaza après l'agression militaire israélienne de décembre 2008 à janvier 2009 et remédier à l'effet catastrophique du blocus sur la satisfaction des besoins quotidiens de la population civile palestinienne. L'incident le plus récent dû au blocus par Israël de l'assistance humanitaire à Gaza s'est produit le 31 mai 2010 lorsque Israël a attaqué la « flottille de paix de Gaza » qui tentait d'acheminer par bateau une aide humanitaire à la population palestinienne de Gaza. Du fait de cette attaque, neuf civils turcs qui se trouvaient à bord de l'un des navires de la flottille ont été tués par Israël.

38. Néanmoins, Israël a annoncé récemment son intention de changer cette politique. La Commission prend bonne note de cette annonce. Entre-temps, l'Organisation des Nations Unies et l'ensemble de la communauté internationale devraient continuer de demander systématiquement à Israël de lever le blocus qu'il impose à Gaza et d'ouvrir de manière durable les points autorisant le passage des denrées alimentaires de base, des médicaments, des matériaux de construction et de relèvement, des fournitures scolaires et de carburant, ainsi que les échanges commerciaux indispensables à la reprise économique.

39. En outre, s'agissant du principe de responsabilité, la Commission partage l'opinion de la Mission d'établissement des faits et de bon nombre d'autres sources; elle estime que cette forme de châtement collectif est une violation du droit humanitaire international et du droit des droits de l'homme et qu'au regard du droit

international humanitaire, ceux qui ont imposé cette politique doivent rendre compte de leurs crimes, conformément aux dispositions de la quatrième Convention de Genève de 1949 concernant les violations flagrantes et au droit international coutumier concernant les crimes de guerre.

40. Qui plus est, un comportement de ce type, qui consiste à cibler une population civile d'une telle ampleur pendant une telle durée, constitue un crime contre l'humanité comme le définit le droit international coutumier et la Cour pénale internationale. Les Statuts du Tribunal pénal international pour l'ex-Yougoslavie et du Tribunal pénal international pour le Rwanda sont arrivés à des conclusions similaires.

41. Dans les rapports qu'il a présentés en juillet 2009 et en janvier 2010, intitulés respectivement « The Operation in Gaza: Factual and Legal Aspects » et « Le point des enquêtes sur l'Opération de Gaza », Israël ne traite pas cette question, ce qui est un exemple du caractère sélectif de ces deux rapports et des enquêtes menées par Israël sur d'éventuelles violations du droit humanitaire international et du droit des droits de l'homme qui auraient été commises par les forces d'occupation. Ces rapports, comme d'autres rapports officiels présentés par Israël, semblent conçus non pas pour enquêter sur la conduite des forces armées israéliennes ou pour vérifier des violations possibles du droit international mais plutôt pour tenter de justifier la conduite des forces d'occupation d'Israël.

Mettre fin aux restrictions d'accès à la mer à des fins halieutiques et autoriser la reprise des activités agricoles

42. La côte de Gaza s'étend sur 44 kilomètres le long de la Méditerranée, allant de la frontière nord avec Israël jusqu'à la frontière internationale avec l'Égypte. Selon les Accords d'Oslo, les pêcheurs palestiniens étaient autorisés à pêcher jusqu'à 20 milles nautiques au large des côtes de Gaza. Après le déclenchement, le 28 septembre 2000, de l'Intifada d'Al-Aqsa à Jérusalem-Est occupée, Israël a décidé unilatéralement de ramener cette zone à 12 milles nautiques et a en outre délimité une « zone de sécurité fermée » dite K1, d'une largeur de 1,5 mille nautique, au large de la frontière israélienne, et une zone similaire dite M1, d'une largeur de 1 mille nautique, au large de la frontière égyptienne. Après ses dernières opérations militaires contre Gaza, Israël a ramené encore la zone de pêche à 3 milles nautiques, ce qui a réduit en fait la zone totale de pêche à 1 300 kilomètres carrés. Cette politique a eu pour conséquence de réduire la production annuelle totale de l'industrie halieutique de Gaza, jadis florissante, qui est passée de 3 788 tonnes en 1997 à 1 800 tonnes en 2009, soit une perte d'environ 60 %.

43. Ces limitations ont directement affecté le ravitaillement de 1,5 million de Palestiniens à Gaza; associées à d'autres limitations imposées à l'approvisionnement alimentaire, qui sont examinées ailleurs dans le présent rapport, elles ont eu un effet délétère majeur sur la santé et le bien-être de la population civile, y compris celle des enfants et des femmes en particulier, en violation du droit humanitaire international et du droit des droits de l'homme.

44. À ce jour, Israël n'a pas donné suite à cette recommandation qui figure dans le rapport de la Mission d'établissement des faits. La Commission affirme que l'industrie halieutique est l'un des principaux piliers de l'économie de Gaza et assure la subsistance de bon nombre de familles palestiniennes. Les restrictions

constantes qu'Israël impose à la pêche à Gaza continuent donc de constituer une grave violation du droit des droits de l'homme.

45. Comme le secteur de la pêche, l'agriculture à Gaza a été particulièrement mise à mal par les politiques et pratiques d'Israël. Une des raisons essentielles de la dégradation de la production agricole à Gaza tient au fait que plus de 25 % des terres agricoles sont situés dans des zones limitrophes d'Israël, ce qui signifie que ces zones ont été le champ de prédilection des opérations militaires menées par les forces d'occupation israéliennes pendant l'opération « Plomb durci ». En fait, ces zones ont vu tomber près de 75 % de toutes les ordonnances lancées contre Gaza par la Puissance occupante pendant les opérations militaires qui ont commencé le 27 décembre 2008.

46. Le maintien du siège imposé à Gaza a frustré tous les efforts visant à relever le secteur agricole jadis rentable à Gaza, a contribué à l'élévation du taux de chômage parmi les Palestiniens et a eu un impact catastrophique sur les revenus et le niveau de vie. Israël n'a pas mis en œuvre les recommandations faites à cet égard par la Mission d'établissement des faits et continue, par le blocus et par ses incursions militaires répétées dans Gaza, d'entraver le relèvement du secteur agricole à Gaza, avec les effets que cela peut avoir sur l'économie globale de Gaza et les conséquences sociales et économiques qu'une telle politique fait subir à la population civile.

47. Il convient de noter qu'au cours de ces quelques dernières années, des efforts appréciables ont été tentés par un certain nombre d'organisations pour relever le secteur agricole à Gaza. On peut citer en particulier l'initiative lancée par l'ancien Président de la Banque mondiale, M. James Wolfensohn, pour obtenir les ressources financières nécessaires à l'achat des serres construites par les anciens colons israéliens à Gaza. Les serres ont été remises aux Palestiniens après le soi-disant désengagement d'Israël en 2005, pendant qu'Ariel Sharon, Premier Ministre, était Chef du Gouvernement israélien. Les Palestiniens les ont utilisées avec succès et ont réussi à produire des fruits et légumes destinés à l'exportation. Mais ces produits devaient passer le contrôle des services de sécurité israéliens avant d'être autorisés à sortir de Gaza. À maintes reprises, Israël a bloqué le passage de ces produits agricoles, les laissant pourrir en infligeant de graves préjudices à l'économie de Gaza et compromettant la survie économique de ces projets agricoles.

48. Vu les instances répétées de ces pratiques illégales et leur effet cumulatif, on ne peut que les considérer comme faisant partie d'une politique globale de châtement collectif, laquelle se traduit par ces mesures et par d'autres, telles que l'imposition de limitations à la pêche et le blocage des importations et des exportations à destination ou en provenance de Gaza.

Autoriser la libre de circulation des Palestiniens à l'intérieur du territoire palestinien occupé – en Cisjordanie, y compris Jérusalem-Est, entre la bande de Gaza et la Cisjordanie – et entre le territoire palestinien occupé et le monde extérieur

49. Un aspect fondamental du blocus imposé par Israël à Gaza est le fait que les Palestiniens sont privés de leur droit de circuler librement, en Cisjordanie et à Gaza, et entre ces deux parties du territoire palestinien occupé. Cette politique est, pour l'essentiel, en place depuis l'occupation de la Cisjordanie et de Gaza en 1967, et a été appliquée à différentes périodes avec différents degrés d'intensité. Depuis le

début du processus de paix au Moyen-Orient en 1991 et la conclusion des Accords d'Oslo en 1993 et des accords ultérieurs, la liberté de circulation s'est améliorée alors que des parties limitées de la Cisjordanie et de Gaza revenaient sous contrôle palestinien. Lorsque l'Intifada d'Al-Aqsa a éclaté en septembre 2000, Israël a réoccupé bon nombre des secteurs assignés à l'Autorité nationale palestinienne en vertu des accords que son gouvernement avait signés avec l'OLP et l'Autorité. Depuis, Israël a systématiquement entravé la liberté de circulation sur tous les territoires palestiniens en violation de ses obligations en tant que Puissance occupante telles qu'elles découlent du droit international humanitaire et des droits de l'homme.

50. Depuis le désengagement unilatéral d'Israël de la bande de Gaza en 2005, le Gouvernement israélien a continué de faire entrave à la communication et à la libre circulation entre la Cisjordanie et Gaza en contrôlant les points de passage frontaliers. Les statistiques ci-après, qui indiquent le nombre de jours pendant lesquels les divers points de passage entre Gaza et Israël sont restés fermés, sont particulièrement éloquentes.

<i>Point de passage</i>	<i>2006</i>	<i>2007</i>	<i>2008</i>
Erez	159 jours	57 jours	18 jours
Karni	54 jours	349 jours	225 jours
Sufa	75 jours	203 jours	209 jours
Kerem Shalom	127 jours	251 jours	220 jours

51. Depuis l'agression militaire perpétrée du 27 décembre 2008 au 18 janvier 2009, Israël, fidèle à sa politique, a continué de porter atteinte au droit des Palestiniens de circuler librement entre la Cisjordanie et Gaza, ce qui constitue une grave violation du droit international humanitaire et des droits de l'homme, et enfreint également les accords conclus entre l'Autorité nationale palestinienne et Israël tout au long du processus de paix.

52. Il convient de considérer cette pratique en ayant à l'esprit ses effets pernicieux sur les économies de la Cisjordanie et de Gaza, ainsi que ses conséquences néfastes et traumatisantes sur le tissu social et la situation humanitaire et psychologique de la société palestinienne. Pareille politique vise à isoler la Cisjordanie et Gaza et à permettre à Israël d'imposer plus facilement sur chacun de ces secteurs du territoire palestinien occupé d'autres restrictions abusives qui affectent la vie et le bien-être de leurs populations respectives. Cette politique et son application doivent également être replacées dans le contexte des autres politiques et pratiques susmentionnées, toutes délibérément conçues pour infliger une punition collective au peuple palestinien en violation directe et grave du droit international humanitaire et des droits de l'homme.

Libération des civils palestiniens arbitrairement maintenus dans les prisons et centres de détention israéliens dans le contexte de l'occupation : la libération des enfants doit constituer une priorité absolue, et il doit être mis fin au traitement inhumain, dégradant et discriminatoire des prisonniers et détenus palestiniens. Il est également essentiel qu'Israël cesse de s'ingérer dans les processus politiques nationaux dans le territoire palestinien occupé et, à titre de première mesure, libère tous les membres du Conseil législatif palestinien actuellement détenus et autorise tous les membres du Conseil à circuler entre Gaza et la Cisjordanie

53. Depuis l'occupation du territoire palestinien en 1967, Israël a détenu et emprisonné illégalement près de 800 000 Palestiniens au total, en violation du droit international, et dénié à la population palestinienne les droits qui sont les siens en vertu du Pacte international relatif aux droits civils et politiques et d'autres normes du droit international des droits de l'homme. Parmi ces détenus et prisonniers, 70 000 ont été arrêtés depuis le début de la deuxième intifada en 2000, et 8 200 se trouvent encore dans les prisons et les centres de détention israéliens, parmi lesquels 2 600 n'ont pas été jugés, en violation du Pacte international et des règles et principes en matière de droits de l'homme, et sont détenus dans des conditions déplorables.

54. Qui plus est, beaucoup de ces détenus et prisonniers palestiniens sont exposés à divers traitements dégradants et inhumains, y compris les violences physiques et mentales, le harcèlement et l'humiliation, qui relèvent dans bien des cas de la torture, ce qui constitue, entre autres, une violation de l'article 7 du Pacte international relatif aux droits civils et politiques. Israël n'a pas pris les mesures qui convenaient pour enquêter sur les nombreux rapports documentés faisant état de brutalités de ses services de sécurité, ni pour amener les responsables de ces violations du droit international des droits de l'homme à répondre de leurs actes.

55. Plus scandaleux encore, Israël continue de maintenir en détention plus de 370 enfants âgés de moins de 16 ans, dont certains ont à peine 12 ans, en violation de la Convention relative aux droits de l'enfant, ainsi qu'une centaine de femmes, elles aussi exposées à toutes sortes de mauvais traitements.

56. À cet égard, il est extrêmement regrettable que le Gouvernement israélien soit resté d'une intransigeance totale pendant les négociations engagées par l'entremise de l'Égypte pour obtenir la libération d'un grand nombre de détenus palestiniens en échange de la libération du caporal israélien Gilad Shalit, détenu par des forces de résistance palestiniennes de Gaza. L'attitude d'Israël pendant ces négociations est une source de préoccupation considérable pour la Commission indépendante palestinienne, qui constate que le Gouvernement israélien obéit dans ces négociations à des considérations politiques sans s'inquiéter du coût humain du maintien en détention ou en prison de milliers de civils palestiniens, en violation du droit international des droits de l'homme et du droit international humanitaire. La Commission réaffirme également que, même si un accord était trouvé concernant la libération de détenus palestiniens en échange de la remise du caporal Shalit, Israël n'en serait pas moins tenu par le droit international humanitaire et des droits de l'homme de libérer toutes les personnes encore détenues ou maintenues en prison qui n'ont pas bénéficié d'un procès équitable conformément au droit international des droits de l'homme ni été reconnues coupables d'un crime puni par la loi.

57. En outre, Israël continue de détenir de nombreux dirigeants politiques palestiniens, y compris des membres élus du Conseil législatif palestinien. C'est là une violation du droit international des droits de l'homme, ainsi que des obligations qui incombent à l'État d'Israël en vertu de l'Accord intérimaire israélo-palestinien sur la Rive occidentale et la bande de Gaza signé le 13 septembre 1995. Cette politique créée également de nouveaux obstacles aux efforts en cours pour trouver une solution juste et globale au conflit israélo-palestinien. Tant que les dirigeants politiques du peuple palestinien ne se voient pas reconnus ces droits consacrés par le droit international des droits de l'homme et ne sont pas traités avec dignité et équité, la méfiance subsistera et les négociations de paix continueront de se heurter à de graves difficultés.

58. Israël ne s'est pas non plus conformé aux recommandations de la Mission d'établissement des faits s'agissant de faciliter la circulation des personnalités palestiniennes, y compris les responsables politiques et les membres du Conseil législatif, entre la Cisjordanie et Gaza. Cela a gravement perturbé le travail du Conseil et entravé le fonctionnement d'autres institutions gouvernementales palestiniennes. Plus grave encore, cette politique s'inscrit dans la stratégie plus générale d'Israël tendant à créer un fossé entre les communautés palestiniennes de Cisjordanie et de Gaza, ce qui a également des conséquences négatives sur les efforts de paix. Cette politique est une autre manifestation encore de la punition collective infligée par Israël au peuple palestinien en violation du droit international humanitaire et des droits de l'homme, et représente un nouvel écueil pour un règlement pacifique du conflit.

59. Les rapports officiels israéliens relatifs aux opérations militaires menés à Gaza entre le 27 décembre 2008 et le 18 janvier 2009 passent ces questions sous silence et ne disent mot des conséquences néfastes de ces politiques illégales et agressives d'Israël pour le peuple palestinien et pour les perspectives de paix dans la région.

Les groupes armés palestiniens qui détiennent le soldat israélien Gilad Shalit devraient le relâcher pour des raisons humanitaires. En attendant cette libération, ils devraient reconnaître son statut de prisonnier de guerre, le traiter en tant que tel et l'autoriser à recevoir des visites du CICR

60. La Commission d'enquête a pris note de la recommandation figurant dans le rapport de la Mission d'établissement des faits selon laquelle le caporal Gilad Shalit devrait être libéré pour des raisons humanitaires. La commission chargée d'établir ce rapport n'a pas été en mesure de rencontrer le caporal Shalit ni de s'assurer que ses conditions de détention étaient conformes aux principes du droit international humanitaire. Elle affirme toutefois que le caporal Shalit sert dans les forces d'occupation israélienne, et qu'il est par conséquent un combattant au sens de la troisième Convention de Genève de 1949, de sorte que sa détention n'est pas contraire au droit international. La Commission indépendante palestinienne partage l'avis formulé dans le rapport de la Mission d'établissement des faits selon lequel le caporal Shalit remplit les conditions prévues par la troisième Convention de Genève de 1949 pour être considéré comme un prisonnier de guerre, et doit être traité comme tel. Elle partage aussi l'avis de la Mission selon lequel le caporal Shalit devrait être libéré pour des raisons humanitaires, mais ajoute que cette libération devrait se faire dans le cadre d'un accord prévoyant en échange la libération de Palestiniens détenus ou maintenus en prison par Israël, Puissance occupante. À cet

égard, Israël devrait être tenu de mener ces négociations de bonne foi et d'atténuer les souffrances des détenus palestiniens et de leurs familles, au lieu de laisser ses seules considérations politiques unilatérales dicter le cours des négociations. Dans le même temps, il importe que les droits de tous les civils palestiniens arbitrairement détenus et maintenus en prison par Israël soient pleinement respectés et que soient réitérés sans relâche les appels lancés pour qu'ils soient traités humainement, conformément au droit international humanitaire et des droits de l'homme, et pour qu'ils soient libérés.

La Mission recommande que l'Autorité palestinienne donne des instructions claires aux forces de sécurité sous son commandement afin que celles-ci respectent les normes en matière de droits de l'homme inscrites dans la Loi fondamentale palestinienne et les instruments internationaux, qu'elle mène promptement une enquête indépendante sur toutes les allégations de violations graves des droits de l'homme commises par les forces de sécurité sous son contrôle et cesse de recourir à la justice militaire pour examiner les affaires impliquant des civils :

61. Comme examiné dans la partie en arabe du présent rapport, la Commission indépendante palestinienne s'est pleinement conformée à la recommandation formulée par la Mission d'établissement des faits. Elle a lancé de nombreux appels au public dans les différents organes de presse du territoire palestinien occupé, notamment les journaux et les chaînes de télévision, afin d'inviter toute personne se disant victime de violations des droits de l'homme commises par des fonctionnaires de l'Autorité nationale palestinienne à déposer une plainte auprès de la Commission. Cette dernière n'a pas limité ses appels publics à la Cisjordanie, mais elle s'est efforcée de les étendre à la population civile palestinienne de Gaza par l'intermédiaire de divers organes de presse locaux. Elle n'a toutefois reçu aucune réponse des organes de presse opérant à Gaza.

62. Soucieuse de renforcer l'indépendance et l'intégrité de ses enquêtes, la Commission indépendante palestinienne a tenu également de nombreuses réunions avec des militants des droits de l'homme et des membres d'organisations non gouvernementales s'occupant des droits de l'homme en Cisjordanie. Elle a également organisé une visioconférence avec des militants des droits de l'homme de Gaza en vue de recueillir des informations sur d'éventuelles violations des droits de l'homme commises par les autorités dans ce secteur.

63. Du 4 au 6 mai 2010, la Commission a entendu à huis-clos toutes les personnes qui ont déposé des plaintes en se disant victimes de violations des droits de l'homme commises par des fonctionnaires de l'Autorité nationale palestinienne en Cisjordanie. Du 16 au 18 mai 2010, elle a de même entendu les personnes alléguant avoir été victimes de violations des droits de l'homme à Gaza. Toutefois, la Commission n'a pas été en mesure de vérifier, entre autres choses, si les autorités du Hamas avaient enquêté ou non sur les violations présumées des droits de l'homme commises à l'encontre d'individus membres du Fatah. Le 20 mai, elle a également rencontré des représentants de nombreuses organisations non gouvernementales palestiniennes de Cisjordanie pour recueillir leurs vues concernant la situation des droits de l'homme dans ce secteur.

Les groupes de résistance armée palestiniens devraient s'engager immédiatement à respecter le droit international humanitaire, notamment en renonçant à attaquer les civils et les biens de caractère civil israéliens :

64. Comme indiqué plus haut, la Commission indépendante a été créée par un décret du Président de l'Autorité nationale palestinienne. Celle-ci a toutefois été incapable d'exercer un contrôle effectif sur Gaza depuis que le Hamas y a pris le pouvoir. Bien qu'indépendante, la Commission n'a pu obtenir la coopération du Hamas et s'est donc trouvée dans l'incapacité d'enquêter à Gaza sur l'utilisation de « roquettes artisanales » par des groupes de résistance armée.

65. Néanmoins, la Commission affirme que s'il était reconnu que les groupes de résistance armée de Gaza ont en effet délibérément pris pour cibles des civils israéliens, un tel acte représenterait alors incontestablement une violation du droit international humanitaire. À maintes occasions, l'Autorité nationale palestinienne a condamné les tirs de roquettes et demandé aux groupes de résistance armée de Gaza de respecter le droit international et d'exercer leur droit de légitime défense d'une manière qui ne porte pas atteinte à la haute autorité morale du peuple palestinien et ne nuise pas à sa cause et à ses intérêts nationaux. La Commission entend réaffirmer le principe premier qui inspire le présent rapport, à savoir que le droit international humanitaire interdit les représailles en temps de conflit armé. En conséquence, elle rejette par la présente toute idée de représailles, que celles-ci soient exercées par le Gouvernement israélien ou par les groupes de résistance armée palestiniens.

66. À cet égard, il est avéré que pendant la période allant du 27 décembre 2008 au 18 janvier 2009, un certain nombre de roquettes et d'obus de mortier ont été tirés par des groupes de résistance armée de Gaza et sont tombés sur Israël, causant la mort supposée de trois civils israéliens et la destruction supposée de certains biens de caractère civil dont la nature et l'étendue n'ont pas été communiquées.

67. La Mission d'établissement des faits n'a pas été en mesure de vérifier ces allégations. Le présent rapport ne conteste ni ne confirme ces faits, la Commission n'ayant pas été à même de les vérifier. Toutefois, aux fins du présent rapport, la Commission indépendante palestinienne admet les faits consignés dans le rapport de la Mission, à savoir que trois personnes ont été tuées et que certains biens de caractère civil se trouvant dans la partie sud d'Israël ont été endommagés.

68. Il importe toutefois de comprendre que l'une des caractéristiques marquantes de la dynamique qui oppose les groupes de résistance armée palestiniens et le Gouvernement israélien est son extrême asymétrie. L'écrasante disparité entre les moyens militaires des deux parties est manifeste et n'a pas lieu d'être rappelée. Les moyens limités dont dispose la résistance palestinienne face à tout l'arsenal d'Israël, composé notamment de chasseurs, d'hélicoptères de combat, de chars et de pièces d'artillerie, sans compter les importantes forces terrestres, ne lui permettent tout au plus que des tirs sporadiques de « roquettes artisanales » et d'obus de mortier. Il est cependant non moins impératif de rappeler qu'il s'agit d'une Puissance occupante contre un peuple occupé, lequel constitue une population civile sans défense à laquelle le droit international reconnaît le droit de se protéger.

69. Si des cibles ou des populations civiles ont été touchées par de tels tirs de « roquettes artisanales », c'était essentiellement en raison du caractère rudimentaire de l'arme et de l'impossibilité de maîtriser le point de chute du projectile. Sans vouloir d'aucune façon justifier ainsi un quelconque dommage subi par des civils

innocents, on ne saurait y voir en soi une violation du droit international humanitaire. De plus, chaque cas supposé de dommages à des personnes civiles ou à des biens de caractère civil devrait faire l'objet d'une enquête distincte, que la Commission n'est pas en mesure de mener sans la double coopération du Gouvernement israélien et des groupes de résistance armée de Gaza.

70. Néanmoins, le droit international humanitaire reconnaît en principe le droit à indemnisation pour les dommages causés aux biens et aux personnes lors de telles attaques – c'est la position défendue par la Commission indépendante palestinienne, en particulier si ce droit est exercé dans le cadre d'un accord en vertu duquel les deux parties indemniseront respectivement les victimes palestiniennes ou israéliennes des opérations militaires qui ont eu lieu durant la période allant du 27 décembre 2008 au 18 janvier 2009.

Conclusions sur la mise en œuvre des recommandations figurant dans le rapport de la Mission d'établissement des faits

71. On notera que les commentaires et les réponses par lesquels le Gouvernement israélien a réagi aux recommandations formulées dans le rapport de la Mission et aux préoccupations exprimées par d'autres États, des organisations intergouvernementales, des organisations non gouvernementales et des représentants de la société civile étaient tous destinés à justifier l'agression militaire perpétrée contre Gaza au nom de prétendues considérations de sécurité. Israël n'a jamais abordé la question de la légalité et de l'effet d'ensemble de toutes les mesures, actions et pratiques de répression et de punition collective qu'il met en œuvre dans le territoire palestinien occupé et à l'encontre de la population civile palestinienne. Au contraire, Israël a cherché à cloisonner ces diverses pratiques et à présenter des justifications pour des actes de restriction, agression et destruction pris isolément, sans avoir égard à leur impact juridique, social, économique, humanitaire et politique. À coup sûr, une enquête indépendante et impartiale sur ces pratiques cumulées révélerait une politique de châtiments collectifs délibérés à l'aide de toutes ces différentes mesures. Israël n'a jamais fait d'évaluation approfondie et impartiale de l'effet cumulatif de ses pratiques et de sa politique répressives. C'est de toute évidence parce que, outre cette politique répressive de la Puissance occupante, elle révélerait la responsabilité pénale de ceux qui en sont les architectes ou en dirigent l'exécution pour crimes de guerre et crimes contre l'humanité.

72. D'ordinaire, Israël répond aux graves inquiétudes souvent exprimées par la communauté internationale au sujet des violations du droit international humanitaire et du droit international des droits de l'homme commises par ses forces d'occupation au fil des décennies en signalant un nombre limité d'attentats-suicides et un nombre limité de tirs de « roquettes artisanales » qui produisent un effet dommageable limité et en s'obstinant à tenter de déformer et dénaturer le conflit en le qualifiant de « guerre contre le terrorisme ». Sur ce dernier point, il faut souligner que, d'après les allégations du Gouvernement israélien, il y a eu en quatre ans 13 personnes tuées par ces tirs de roquettes artisanales depuis Gaza, dont quatre militaires, ce qui ramène le dommage global subi par Israël à neuf morts dans la population civile pour cette période.

73. Cette réponse ne trahit pas le moindre souci du nombre des victimes que font les attaques militaires et les représailles, ainsi que la politique et les mesures de punition collective et de colonisation, qui toutes constituent autant de violations

sérieuses du droit international humanitaire et de celui des droits de l'homme, et pour beaucoup des infractions graves. Israël n'a jamais évoqué sa responsabilité à propos de sa politique et de ses pratiques en la matière; il a au contraire essayé d'en faire porter la responsabilité aux Palestiniens et, en particulier, au Hamas. Israël s'efforce aussi de créer l'impression fautive que les Palestiniens, et en particulier le Hamas, sont un peuple qui se consacre exclusivement à l'action terroriste contre lui. Le peuple palestinien, comme d'ailleurs les gens de bonne volonté partout dans le monde, se demande pourquoi le meurtre par le Hamas de neuf civils israéliens du fait d'un tir de « roquette artisanale » sur une période de quatre ans mérite la condamnation du monde entier, alors qu'en même temps le meurtre de plus de 1 300 civils palestiniens (dont plus de 300 enfants et 100 femmes) et les blessures causées à près de 6 000 Palestiniens en l'espace de presque quatre semaines, sans compter la punition collective de 1,5 million de civils évoquée plus haut peuvent être traités avec une aimable indifférence ou qualifiés de « dommages collatéraux » du conflit. La Commission indépendante palestinienne réaffirme que les auteurs de ces crimes à l'encontre du peuple palestinien doivent en répondre conformément au droit international.

Le rôle de la société civile dans la mise au point des violations israéliennes du droit international humanitaire et du droit international des droits de l'homme

74. La Commission note qu'un certain nombre d'organisations de défense des droits de l'homme, parmi lesquelles Amnesty International et Human Rights Watch, et plus particulièrement des organisations palestiniennes et israéliennes telles que B'Tselem, Al-Haq, le Centre Al Mizan des droits de l'homme et le Centre palestinien des droits de l'homme ont régulièrement signalé les violations du droit international humanitaire et de celui des droits de l'homme commises par le Gouvernement israélien et ses forces d'occupation en toute impunité. La Commission profite de l'occasion pour rendre hommage avec gratitude à ces organisations et aux autres organisations et groupes de défense des droits de l'homme, ainsi qu'aux nombreux professionnels des médias qui de par le monde ont attiré l'attention sur les violations criantes de ces droits commises par Israël, Puissance occupante, à l'encontre du peuple palestinien. Ces sources indépendantes viennent étayer encore le rapport de la Mission d'établissement des faits et les constatations et conclusions contenues dans le présent rapport.

Responsabilité

75. Aux termes de la résolution 64/10 de l'Assemblée générale, les investigations auxquelles les deux parties, israélienne et palestinienne, doivent procéder contribueront à ce « que les responsabilités soient établies et que justice soit faite ».

76. L'établissement des responsabilités exige celui de la vérité, ce qui est l'objectif auquel la Mission d'établissement des faits s'est attachée. La demande adressée par l'Assemblée générale aux autorités israéliennes et palestiniennes de procéder séparément à des investigations répond au souci de faire avancer les choses dans le sens de la vérité. Malheureusement, les rapports publiés à ce jour par le Gouvernement israélien ne le font pas. Ils paraissent plutôt destinés à fournir des justifications de caractère douteux au sujet de certaines attaques commises par les forces d'occupation israéliennes pendant la période du 27 décembre 2008 au 18 janvier 2009. Ces rapports ne font pas avancer la cause de la vérité et de la

justice, pas plus qu'ils ne servent l'objectif de l'établissement des responsabilités, n'aident à mettre fin à l'impunité ou ne rapprochent des buts ultimes que sont la réconciliation et la paix.

77. Les personnes dont il aura été établi qu'elles ont ordonné ou commis des violations graves du droit international humanitaire, et plus précisément les incidents qui constituent des crimes de guerre et des crimes contre l'humanité, devraient avoir à en répondre dans les systèmes juridiques appropriés – et cela englobe les dirigeants tant militaires que politiques qui ont usé de leur pouvoir de commandement pour ordonner ces violations, ou qui n'ont pas su les prévenir, ou encore qui, les ayant découvertes, n'en ont pas poursuivi et puni les auteurs.

78. À ce propos, la Commission note que, le 6 juillet 2010, l'Avocat général de l'armée israélienne a annoncé que les enquêtes menées sur quatre incidents qui avaient eu lieu au cours de l'opération « Plomb durci » avaient abouti à des mesures prises à l'encontre d'au moins quatre membres des forces d'occupation israéliennes. C'est certes là un fait nouveau intéressant, mais la Commission engage vivement Israël à donner suite aux appels de la communauté internationale en procédant à une investigation crédible vraiment indépendante et conforme aux normes internationales, comme la Mission d'établissement des faits et l'Assemblée générale l'ont demandé. Israël devrait ouvrir des enquêtes complètes sur les très nombreux autres cas de violations du droit international humanitaire et de celui des droits de l'homme consignés tant dans le rapport de la Mission que dans les nombreux rapports d'organisations non gouvernementales et d'organisations de secours, qui n'ont cessé de confirmer la perpétration, dans la période de décembre 2008 à janvier 2009, de violations sérieuses des droits de l'homme et de graves infractions au droit international humanitaire de la part des forces d'occupation israéliennes à l'encontre de la population civile palestinienne, tout particulièrement dans la bande de Gaza. La Commission espère qu'une telle investigation israélienne indépendante débouchera sur l'établissement de la responsabilité de tous ceux qui ont planifié, ordonné ou commis des violations du droit international humanitaire ou de celui des droits de l'homme durant l'opération « Plomb durci ». Dans le cadre de ces mesures, il faudra aussi envisager les modalités de réparation et d'indemnisation dont Israël, Puissance occupante, est tenu envers les victimes des violations et leur famille.

Conclusions et observations finales

79. La Commission n'ignore pas cette réalité que tout gouvernement est obligé de faire la balance entre les nécessités de la sécurité et la protection des droits de l'homme. Il faut que cet équilibre s'appuie sur les principes établis du droit international, et en particulier les protections et prohibitions consacrées par le droit international humanitaire et celui des droits de l'homme, ainsi que sur la conscience qu'il y a des droits de l'homme auxquels il ne peut être dérogé, tout spécialement le droit à la vie et celui d'être mis à l'abri de la torture et autres peines ou traitements cruels, inhumains ou dégradants.

80. Le Gouvernement israélien n'a que trop souvent cherché à légitimer et justifier ce genre de violations flagrantes perpétrées par ses forces d'occupation en mettant en avant des exigences de sécurité. En revanche, il a rarement tiré du droit international le moindre fondement convaincant pour de telles violations ou vraiment établi l'existence d'un lien de causalité entre ses actions répressives et l'augmentation de la sécurité pour sa propre population. Il s'est plutôt montré porté

à une impunité éhontée et au mépris du droit international et enclin à justifier ses mesures punitives aveugles, disproportionnées et collectives à l'encontre du peuple palestinien, comme si aucune limite ne s'appliquait à Israël, qu'elle procède du droit international humanitaire ou de celui des droits de l'homme. Tous ces actes sont contraires, et constituent un manquement, aux obligations d'Israël au regard du droit international en sa qualité de Puissance occupante et en tant qu'État Membre de la communauté internationale des nations au regard de la Charte des Nations Unies.

81. Cette impunité d'Israël est ancrée dans un exceptionnalisme autoproclamé, mais entretenu par la communauté internationale au fil des décennies, qui ignore ou abroge toutes les dispositions pertinentes du droit international et des résolutions pertinentes de l'ONU et qui non seulement se traduit par des violations systématiques et flagrantes du droit international humanitaire et de celui des droits de l'homme, mais en outre constitue l'obstacle essentiel et le plus difficile à un règlement de paix juste et durable entre Israël et la Palestine. Considérant qu'une perspective de paix exige la justice ainsi que la coexistence pacifique et la coopération entre les deux peuples, il est indispensable que le Gouvernement israélien change d'attitude et abandonne la répression et la punition collective pour une démarche qui respecte et observe les droits du peuple palestinien, lequel continue à endurer tragiquement son occupation militaire.

82. Le droit international humanitaire et celui des droits de l'homme traduisent et représentent les valeurs largement partagées de l'humanité. La communauté internationale s'est engagée à respecter et observer ces valeurs et les normes spécifiques contenues dans les conventions, pactes, statuts et traités internationaux ainsi que celles qui trouvent leur expression dans le droit international coutumier. Les moyens de les faire respecter ont été inscrits dans divers mécanismes conventionnels, que l'on peut assimiler aux mesures administratives et civiles du droit interne et qui ont effectivement été incorporés à la législation nationale de nombreux pays. Beaucoup des atteintes à ces valeurs et à ces normes ont été intégrées dans le droit pénal international. Ce dernier a incriminé un certain nombre de violations des droits de l'homme, notamment celles qui entrent dans la définition des crimes de guerre, du génocide, des crimes contre l'humanité et de la torture. Les sanctions pénales de leur interdiction et les protections qui en découlent s'appliquent sans discrimination à tous les êtres humains, et aucun État ne saurait prétendre à l'exception.

83. Certes, trois civils israéliens ont été tués durant la période du 27 décembre 2008 au 18 janvier 2009 par des « roquettes artisanales » égarées, tirées par des groupes de résistance armée à Gaza, et cela ne saurait se justifier, même si ce n'était pas intentionnel. Dans le même temps, plus de 1 300 civils palestiniens (dont plus de 300 enfants et 100 femmes) étaient tués à Gaza durant l'agression militaire israélienne et plus de 6 000 autres blessés, pour beaucoup gravement et définitivement, sans oublier les milliers de civils déplacés, dont cette agression a réduit la maison et la communauté à l'état de décombres, où elles sont restées à cause du blocus punitif et illicite qu'Israël continue d'imposer à une population civile palestinienne traumatisée. La comparaison de ces chiffres est choquante pour la conscience de tout un chacun. Et pourtant, la Commission reconnaît qu'il est bien établi tant dans le judaïsme que dans l'islam qu'empêcher la mort ne serait-ce que d'un seul être humain est un acte sacro-saint.

84. Hélas, les rapports établis par le Gouvernement israélien pour répondre à la demande de l'Assemblée générale montrent l'ampleur des efforts qu'il a faits pour tenter de présenter des explications spécieuses, sans fondement et forcées, faisant peu de cas des normes et règles du droit international, des raisons de non-recours à une force excessive frappant sans discrimination la population civile palestinienne et causant des dommages sans précédent très succinctement exposés ci-dessus. Parmi les centaines d'incidents ayant aboutis pour la population civile aux pertes en vies humaines, destructions et traumatismes considérables mentionnés dans le rapport de la Mission, ainsi que dans d'autres sources, il n'en est pas un seul à propos duquel les forces et le Gouvernement israéliens aient admis une seule violation. Dans la quasi-totalité des cas qui y sont exposés, les rapports israéliens de juillet 2009 et janvier 2010 invoquent les nécessités militaires, ou prétendent que le feu émanant d'une cible civile et dirigé contre les forces israéliennes justifiait les dommages entraînés par les interventions de leurs forces militaires. Il aurait dû paraître curieux, même à leurs rédacteurs, que tant d'incidents considérés par d'autres comme des violations du droit international humanitaire aient toujours été jugés justifiables ou excusables. Quant au lecteur de ces rapports israéliens, il ne manquera pas non plus de remarquer que les faits rapportés par la Mission et d'autres organisations de défense des droits de l'homme ont été passés sous silence. Néanmoins, il n'est pas inintéressant de noter qu'Israël, dans une action distincte, s'est empressé d'admettre devant une commission d'enquête de l'ONU l'exactitude d'informations faisant état d'attaques militaires israéliennes contre des écoles, des centres de santé et le siège de l'UNRWA à Gaza au cours de l'opération Plomb durci. À l'évidence, admettre d'avoir causé des dégâts à des biens des Nations Unies, et même être prêt à leur fournir 10,5 millions de dollars des États-Unis à titre d'indemnité, n'emporte pas pour Israël les mêmes conséquences juridiques et politiques que d'admettre un comportement illicite à l'encontre des Palestiniens. Même dans ce cas où elles ont admis une responsabilité les obligeant à réparation dans l'attaque contre l'école de l'UNRWA, les forces d'occupation israéliennes n'ont pas admis de responsabilité pénale ni de responsabilité pour leurs violations du droit international humanitaire. La conclusion à en tirer ne peut que revêtir la forme d'une interrogation rhétorique, à savoir : comment se peut-il que tant d'incidents, qui ont fait tant de morts et de blessés parmi des civils innocents et sans défense, y compris des enfants, femmes, personnes âgées et infirmes, et ont causé aussi aveuglément des destructions et des dégâts aux biens, et notamment à des infrastructures civiles vitales comme les hôpitaux, les écoles, et les systèmes d'adduction d'eau, de voirie et d'électricité nécessaires à la vie quotidienne et au bien-être de la société, soient régulièrement justifiés et excusés, tantôt par une « erreur d'appréciation », tantôt par une « innocente erreur de fait »?

85. L'énormité du dommage qui a été infligé au peuple palestinien à Gaza, sans compter celui qu'a subi la population de la Cisjordanie à la même époque, ainsi qu'en d'autres occasions antérieures également tragiques, n'est plus contestée depuis que les faits sont parfaitement connus dans le monde entier. Ce qu'il y a d'ahurissant, c'est que le Gouvernement israélien n'assume pas la responsabilité qui lui incombe de répondre de ce tort incommensurable causé à des êtres humains, sous forme de crimes de guerre et de crimes contre l'humanité, pas plus qu'il n'exprime le moindre souci des dégâts commis par ses forces d'occupation. Au lieu de quoi, nous assistons à une tentative cynique pour justifier le dommage commis et occulter les violations du droit international humanitaire et de celui des droits de l'homme

dont se sont rendus coupables ceux qui les ont directement perpétrées et leurs supérieurs, tant civils que militaires.

86. La seule conclusion à tirer de cette conduite est que les Palestiniens sont considérés par leur occupant comme des êtres humains inférieurs, ou que, quel qu'il soit, si aveugle, si excessif et si disproportionné soit-il, le tort qu'on leur fait est justifiable sur le fondement de l'exceptionnalisme d'Israël et de l'impunité qu'il s'accorde. Israël a prouvé en maintes occasions à quel point il se préoccupe de ses citoyens, tel le caporal Shalit qui, on l'a vu, est détenu par l'un des groupes de résistance armée palestinienne de Gaza (qui n'est pas sous le contrôle de l'Autorité palestinienne). C'est là une position louable de la part d'un gouvernement et d'un peuple qui se soucient de leurs compatriotes. Si le Gouvernement et le peuple israéliens devaient faire preuve d'un souci analogue de la vie et du bien-être des Palestiniens, ce serait le changement le plus fondamental qui pourrait survenir dans la dynamique de cette occupation illégitime et prolongée qui dure depuis 43 ans, et il pourrait sûrement servir de base à la paix et à la réconciliation entre les deux peuples dans l'avenir. Malheureusement, la recherche d'un règlement de paix politique sans une assise humaniste qui reconnaisse authentiquement la valeur de la vie humaine et la dignité de tous les peuples, ainsi que la nécessité de la justice, n'a guère de chances de produire ni la réconciliation, ni une paix durable.

87. L'occasion que l'Assemblée générale a donnée tant à Israël qu'à la « partie palestinienne » de traiter la question des dommages causés dans le cadre des opérations militaires israéliennes entre le 27 décembre 2008 et le 18 janvier 2009 aurait dû être pour le Gouvernement israélien l'occasion d'assumer enfin ses responsabilités, au lieu de chercher à les fuir. Israël aurait dû en profiter pour se déclarer préoccupé, aux niveaux tant national qu'international, par les dommages infligés au peuple palestinien et abandonner son discours de puissance d'occupation militaire supérieure infligeant des dommages à une population civile captive qui est incapable de se défendre, pour tenir des propos empreints du souci de l'être humain, de morale et de justice. Changer ainsi de discours, de perception et de comportement est un préalable indispensable à la paix et à la coexistence dans l'avenir. Il ne saurait y avoir de différence de valeur entre la vie humaine et la dignité d'un Israélien et celles d'un Palestinien. D'ailleurs, dans le cadre du présent rapport, on l'a vu, il ne peut y avoir d'équivalence morale entre la mort de trois civils israéliens et celle de plus de 1 300 civils palestiniens, sans compter plus de 6 000 blessés.

88. Les chiffres et les faits parlent d'eux-mêmes, et il est temps que les nations s'expriment dans le langage de l'humanisme et veillent à l'instauration de la responsabilité et de la justice si elles souhaitent vraiment la paix pour la Palestine et pour Israël et une ère nouvelle pour la région du Moyen-Orient dans son ensemble, où le droit international, les droits de l'homme, la sécurité et la coexistence se voient accorder la préséance sur le conflit, l'agression, la force, la violence, l'instabilité et le mépris des droits de l'homme. L'importance à cet égard de la responsabilité et de la réparation des torts commis est au cœur des trois religions monothéistes dont la Terre sainte est le foyer. C'est ce que souligne un *hadith* du prophète Mahomet (paix à son âme) : « Celui qui d'entre vous aperçoit une chose répréhensible, qu'il la redresse de la main; s'il ne peut pas, de sa langue; s'il ne peut pas, de son cœur, cette dernière attitude constituant le degré le plus faible de la foi. » Au surplus, comme le dit le Talmud, « le monde repose sur trois piliers; il repose sur la vérité, la justice et la paix », et l'on trouve dans un commentaire du

Talmud la proposition suivante : « Si la justice est réalisée, la vérité triomphe, et il en résulte la paix », et toujours dans la même veine, il est bien établi en droit international contemporain comme dans les relations internationales contemporaines, surtout en ce qui concerne la justice après un conflit, que, comme l'a dit le pape Jean Paul II avec autant de simplicité que d'éloquence, il n'y a « pas de paix sans justice ».

**Rapport de la Commission d'enquête indépendante palestinienne,
créée comme suite au rapport Goldstone, sur les violations
qui auraient été commises par des Palestiniens**

Membres de la Commission

Président : M. le juge Issa Abu Sharar, ancien Président de la Cour suprême
et ancien Président du Conseil judiciaire suprême

Membre : M. le juge Zuhair al-Surani, ancien Président de la Cour suprême
et ancien Président du Conseil judiciaire suprême

Membre : M. Ghassan Farmand, professeur de droit à l'Université de Bir Zeit

Membre : M. Yasser al-Amuri, professeur de droit international à l'Université
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Consultants

M. Mahmoud Cherif Bassiouni, expert international

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I. Introduction

1. Le présent rapport est déposé en application de la résolution 64/10 de l'Assemblée générale des Nations Unies, intitulée « Suite donnée au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza ». Dans son rapport, le chef de la Mission, le juge sud-africain Richard Goldstone, fait mention de violations des droits de l'homme qui ont été commises pendant l'attaque menée contre la bande de Gaza par les forces d'occupation israéliennes entre le 27 décembre 2008 et le 17 janvier 2009. Il fait également observer que, pendant la même période, non seulement les forces d'occupation ont commis des violations du droit international humanitaire et du droit international des droits de l'homme qui constituaient des crimes de guerre et des crimes contre l'humanité, mais les Palestiniens aussi ont commis des violations des droits de l'homme. La Mission d'établissement des faits des Nations Unies a recommandé qu'une enquête soit ouverte à cet égard.

2. Compte tenu de ce qui précède, une commission palestinienne indépendante a été constituée le 25 janvier 2010, à savoir la Commission d'enquête indépendante palestinienne créée comme suite du rapport Goldstone, sur décret présidentiel signé par M. Mahmoud Abbas, Président de l'État de Palestine, Président du Comité exécutif de l'Organisation de libération de la Palestine et Président de l'Autorité nationale palestinienne.

3. L'enquête conduite par la Commission a porté principalement sur les violations des droits de l'homme commises par les Palestiniens tant en Cisjordanie que dans la bande de Gaza pendant la période précisée ci-dessus, sur la base des informations fournies dans le rapport Goldstone. Elle a été menée de bonne foi, en toute indépendance et avec professionnalisme, sans chercher d'excuses ni de faux-fuyants.

4. Toutefois, on ne saurait ignorer que toutes les violations qui ont été commises et qui se poursuivent sont manifestement le résultat et l'expression d'une chose et d'une chose seulement : l'occupation des terres palestiniennes par Israël.

5. Au moment où nous rédigeons le présent rapport, nous pensions qu'une nouvelle époque se faisait jour, que nous pouvions désormais espérer que la justice aurait sa place dans cette région du monde et que les criminels qui commettent constamment et systématiquement des crimes internationaux et des violations flagrantes auraient de plus en plus de mal à se soustraire à la justice. Nous pensions que les cris des victimes avaient enfin réussi à trouver un écho dans les institutions judiciaires internationales, lesquelles ont été affaiblies et rendues inefficaces par des considérations politiques étreintes qui l'ont emporté sur les valeurs d'humanité, de justice et d'égalité. La Commission affirme que tant que ceux qui sont victimes de l'injustice, de l'oppression et du crime estiment qu'ils ne sont pas protégés et qu'ils ne peuvent pas véritablement exercer leurs droits fondamentaux, vivre dans la dignité et bénéficier de la justice, la région ne connaîtra pas la paix, la sécurité ou la stabilité. Au contraire, les violations se poursuivront et les souffrances n'auront pas de fin.

6. Selon la Commission, aucune commission d'enquête ou d'établissement des faits ne peut se pencher sur de quelconques violations sans tenir compte des facteurs qui en sont à l'origine, du contexte et du cadre juridique dans lequel elles s'inscrivent. Ainsi, pour replacer les choses dans leur contexte, il faut nécessairement examiner le statut juridique du territoire palestinien occupé.

7. À l'issue de la Première Guerre mondiale, la Société des Nations a confié à la Grande-Bretagne le mandat pour la Palestine entré en vigueur en septembre 1922. Ce mandat respectait les buts du Pacte de la Société des Nations qui, en son article 22 relatif aux mandats sur les pays qui n'ont pas atteint un degré de développement leur permettant d'être autonomes, prévoyait qu'un mandataire leur donne des conseils et son aide pour guider leur administration jusqu'au moment où ils seraient capables de se conduire seuls.

8. En 1947, la Grande-Bretagne a annoncé sa décision de se retirer de la Palestine et précisé qu'elle mettrait fin à ses activités de tutelle au 1^{er} août 1948, date qui a par la suite été avancée au 15 mai 1948.

9. Le 29 novembre 1947, l'Assemblée générale des Nations Unies a adopté la résolution 181 (II) concernant le gouvernement futur de la Palestine, dans laquelle elle a recommandé au Royaume-Uni, en tant que Puissance mandataire pour la Palestine, ainsi qu'à tous les autres États Membres de l'Organisation des Nations Unies, l'adoption et la mise à exécution du Plan de partage selon lequel les États indépendants arabe et juif ainsi qu'un régime international particulier pour la ville de Jérusalem commenceraient d'exister.

10. Le 14 mai 1948, sur le fondement de cette résolution, Israël a proclamé son indépendance et un conflit armé a éclaté entre Israël et plusieurs États arabes. Le Plan de partage n'a jamais été mis à exécution : Israël s'est emparé par la force de vastes territoires de la région, a expulsé et tué un très grand nombre de Palestiniens et détruit des centaines de villages et communautés, d'où le problème des réfugiés de Palestine. Les crimes internationaux de grande envergure qui ont été commis se sont soldés par l'expropriation et le déplacement d'une grande partie de la population palestinienne et par la saisie d'une portion non négligeable de ses terres. Il convient de noter que les organisations sionistes s'en étaient prises aux Arabes palestiniens et à leurs terres bien avant l'adoption de la résolution sur le partage : elles avaient mené de nombreuses opérations hostiles contre les Arabes palestiniens, causant ainsi des centaines de victimes et détruisant des biens et des terres agricoles.

11. Sous l'égide de l'Organisation des Nations Unies, des conventions d'armistice, connues sous le nom d'accords de Rhodes, ont été signées par, d'un côté, Israël et, de l'autre, l'Égypte, la Jordanie, le Liban et la Syrie les 24 février, 3 avril, 23 mars et 20 juillet 1949 respectivement. Des lignes de démarcation de l'armistice ont été établies et baptisées « lignes vertes », en référence à la couleur utilisée pour les tracer sur les cartes. Il a été convenu qu'on ne saurait donner aux dispositions des accords une interprétation susceptible de compromettre tout règlement politique définitif entre les parties. Ces conventions soulignaient également qu'il ne fallait pas préjuger des accords conclus concernant les territoires, les futures frontières et les revendications connexes de toute partie.

12. La résolution 273 (III) de l'Assemblée générale des Nations Unies, qui porte sur l'admission d'Israël à l'Organisation des Nations Unies, rappelait la résolution 181 (II) relative au gouvernement futur de la Palestine et la résolution 194 (III) du 11 décembre 1948 relative au retour des réfugiés de Palestine, et demandait que celles-ci soient mises en œuvre. Au nom de son gouvernement, le représentant d'Israël s'est engagé auprès de la Commission des questions politiques spéciales et de la décolonisation à respecter et à mettre en œuvre les résolutions 181 (II) et 194 (III). L'admission d'Israël à l'Organisation des Nations Unies était donc subordonnée à l'application et au respect des résolutions internationales.

13. Depuis lors, des centaines de résolutions internationales ont été adoptées concernant la Palestine et, ainsi que l'Assemblée générale l'a réaffirmé dans sa résolution 57/107 du 3 décembre 2002, l'Organisation des Nations Unies a une responsabilité permanente à assumer en ce qui concerne la question de Palestine jusqu'à ce qu'elle soit réglée sous tous ses aspects de manière satisfaisante et dans le respect des résolutions internationales. Il faut entendre par là que l'Organisation des Nations Unies restera chargée de la question de la Palestine jusqu'à ce que le peuple palestinien obtienne le droit à l'autodétermination, droit qui est jugé comme une norme impérative du droit international, et qu'il constitue un État indépendant et souverain pour donner corps à ce droit, tel que précisé dans de nombreuses résolutions de l'Assemblée générale et du Conseil de sécurité.

14. Dans le sillage de l'agression israélienne de 1967, Israël a occupé toutes les terres palestiniennes situées à l'est de la Ligne verte. Ainsi, la Cisjordanie, y compris Jérusalem-Est, et la bande de Gaza ont été soumises à l'occupation israélienne. Une série de résolutions internationales ont été adoptées, notamment les résolutions 242 (1967) et 338 (1973) du Conseil de sécurité. La résolution 242 (1967) soulignait l'inadmissibilité de l'acquisition de territoire par la guerre et demandait le retrait des forces armées israéliennes des territoires occupés lors du récent conflit.

15. Les terres palestiniennes qui sont passées sous contrôle israélien après l'agression de juin 1967 sont considérées comme des territoires occupés au sens du Règlement de La Haye de 1907 et de la quatrième Convention de Genève de 1949. En outre, un certain nombre de résolutions du Conseil de sécurité soulignent que l'expression « territoires occupés » s'applique à ces terres.

16. Bon nombre de résolutions de l'Assemblée générale affirment que les dispositions de la quatrième Convention de Genève s'appliquent au territoire palestinien occupé, notamment la résolution 2443 (XXIII) du 19 décembre 1968, par laquelle il a été décidé de créer un Comité spécial chargé d'enquêter sur les pratiques israéliennes affectant les droits de l'homme de la population des territoires occupés. Il s'agissait là de la première résolution de l'Assemblée générale qui demandait instamment à Israël de respecter l'obligation qui lui était faite d'appliquer la quatrième Convention de Genève dans les territoires arabes occupés. De nombreuses autres résolutions de l'Assemblée générale se rapportant à la question ont été reprises chaque année, dont les résolutions 2546 (XXIV) du 11 décembre 1969, 2727 (XXV) du 15 décembre 1970, 3092 (XXVIII) du 7 décembre 1973 et 43/58 A et B du 6 décembre 1988.

17. Du fait de leurs pratiques quotidiennes dans le territoire palestinien occupé, les autorités d'occupation israéliennes ont enfreint les obligations légales qui leur incombaient au regard des dispositions et des principes du droit international humanitaire, du droit humanitaire coutumier et du droit international des droits de l'homme. Les forces israéliennes et l'administration militaire ont notamment commis les crimes suivants : transfert des habitants civils de la Puissance occupante vers le territoire palestinien occupé, construction de centaines de colonies et instauration d'un système administratif chargé de contrôler tous les aspects de la vie de la population palestinienne, en vue de promouvoir le bien-être des colons juifs. En outre, toutes les ressources naturelles sont contrôlées et exploitées au profit des colons. Israël s'est emparé de terres qu'il a annexées en violation des lois régissant le rôle et la présence d'un occupant militaire dans une zone occupée. De surcroît, la population palestinienne a été victime d'exécutions extrajudiciaires et de détentions

arbitraires, les conditions dans lesquelles vivent les populations civiles protégées ont été rendues difficiles, des populations ont été transférées de force et des restrictions leur ont été imposées en matière de circulation en vue de limiter autant que possible leur croissance et d'empêcher le peuple palestinien d'exercer son droit à l'autodétermination.

18. Par ailleurs, les autorités d'occupation israéliennes, au cours de leur occupation prolongée du territoire palestinien, ont modifié le système législatif qui était en place avant l'occupation en délivrant des centaines d'ordonnances militaires visant à consolider l'occupation et à contrôler le statut des habitants et les terres, sans nullement tenir compte du bien-être de la population protégée vivant sous occupation, en violation d'un des principes fondamentaux du droit international humanitaire et des principes et dispositions de la quatrième Convention de Genève de 1949 et du Règlement de La Haye de 1907.

19. En 1980, les autorités d'occupation israéliennes ont promulgué une Loi fondamentale proclamant Jérusalem capitale d'Israël. Conformément à cette loi, la partie occidentale de Jérusalem et la partie orientale qui était occupée en 1967 forment la capitale « entière et réunifiée » de l'État d'Israël. La Loi prévoit en outre que Jérusalem est le siège du Président de l'État, de la Knesset, du Gouvernement et de la Cour suprême. En 2001, la Knesset a ajouté un nouvel article à la Loi, qui prévoit que la souveraineté sur Jérusalem ne passera pas aux mains d'une entité étrangère et que toute autorité touchant au territoire de Jérusalem est conférée selon le droit d'Israël ou la municipalité de Jérusalem.

20. L'annexion par Israël de Jérusalem occupée va à l'encontre des buts et principes de la Charte des Nations Unies, qui prévoient que les Membres de l'Organisation s'abstiennent, dans leurs relations internationales, de recourir à la menace ou à l'emploi de la force, soit contre l'intégrité territoriale ou l'indépendance politique de tout État, soit de toute autre manière incompatible avec les buts des Nations Unies. L'annexion de Jérusalem-Est va également à l'encontre des obligations faites à l'État occupant par les dispositions et les principes des instruments internationaux relatifs aux droits de l'homme, le droit international humanitaire et les normes impératives du droit international, notamment le principe du droit des peuples à l'autodétermination et à la souveraineté permanente sur leurs richesses et ressources naturelles.

21. Dans sa résolution 478 (1980) du 20 août 1980, le Conseil de sécurité confirme l'illégalité de la conduite d'Israël. Par cette résolution, il a décidé de ne pas reconnaître la « Loi fondamentale » et demandé aux États qui ont établi des missions diplomatiques à Jérusalem de les retirer. De nombreuses résolutions de l'Assemblée générale rejettent également cette mesure.

22. Par le biais de leur seul représentant légitime, à savoir l'Organisation de libération de la Palestine, qui avait obtenu en 1974 le statut d'observateur permanent auprès de l'Organisation des Nations Unies en vertu de la résolution 3237 (XXIX) de l'Assemblée générale, les Palestiniens se sont efforcés d'instaurer une paix juste en s'appuyant sur les résolutions de l'Organisation des Nations Unies et, en particulier, la résolution 242 (1967) du Conseil de sécurité et d'autres résolutions applicables du Conseil et de l'Assemblée générale. Leur but est la création d'un État palestinien sur les terres palestiniennes occupées depuis 1967 et le retrait des forces occupantes de ces terres, ainsi que le règlement de la question des réfugiés de Palestine, conformément à la résolution 194 (III) de l'Assemblée générale.

Ces efforts ont amené l'Organisation de libération de la Palestine et Israël à signer la Déclaration de principes d'Oslo le 13 septembre 1993, l'Accord du Caire sur Gaza-Jéricho le 5 mai 1994 et l'Accord intérimaire israélo-palestinien relatif à la Cisjordanie et à la bande de Gaza le 28 septembre 1995.

23. Par suite de ces accords, une autorité nationale palestinienne a été créée en vue d'assurer l'administration autonome de certaines parties du territoire palestinien occupé depuis 1967 et de gérer et faciliter certaines tâches administratives et fonctionnelles. Comme le précisent les accords conclus, cette autorité s'est vu confier certains pouvoirs administratifs, législatifs et judiciaires à titre provisoire, jusque 1999, avant le règlement pacifique du conflit et la conclusion des négociations relatives au statut permanent.

24. Les forces d'occupation israéliennes ont continué de contrôler le territoire occupé et accéléré la colonisation. Israël a continué de bâtir des colonies tout en menant des négociations fictives destinées à gagner du temps pour créer des situations de fait qui compromettraient tout règlement définitif futur. C'est pourquoi les Palestiniens ont perdu tout espoir de connaître un jour la paix et de pouvoir exercer leur droit à l'autodétermination et à la souveraineté sur leurs terres et leurs ressources, droit pourtant consacré dans les résolutions et principes internationaux. C'est cette situation qui a déclenché, en septembre 2000, l'Intifada d'Al-Aqsa, à laquelle les forces d'occupation ont fait face par la répression, le meurtre, les détentions arbitraires, la destruction de biens, différentes formes de sanction collective, des représailles dirigées contre la population civile, la démolition de logements, la prise d'assaut de villes palestiniennes en avril 2002 et la destruction de tous les sièges et centres de l'Autorité nationale palestinienne.

25. L'occupation militaire est jugée illégale au regard du droit international actuel et constitue une forme de violation, par un État, des engagements internationaux qui lui imposent d'interdire la menace ou l'emploi de la force. Les règles de droit international ne peuvent donc raisonnablement pas obliger les habitants d'un territoire occupé à se soumettre à l'intérêt de ceux qui violent leurs propres obligations. Le mouvement palestinien trouve sa légitimité dans le droit inaliénable des peuples à disposer d'eux-mêmes, car il s'agit d'un moyen auquel les peuples peuvent avoir recours pour éliminer les obstacles qui s'opposent à leur libre exercice de ce droit. Il trouve également sa légitimité dans le droit de se défendre, qui est l'un des moyens légaux par lesquels une population peut s'opposer à un occupant qui utilise ses forces armées pour consolider et maintenir l'occupation et le contrôle de la terre. Cette légitimité trouve un fondement dans de nombreuses résolutions internationales, notamment la résolution 2649 (XXV) du 30 novembre 1970, par laquelle l'Assemblée générale a affirmé la légitimité de la lutte que mènent les peuples assujettis à une domination coloniale et étrangère auxquels on a reconnu le droit à disposer d'eux-mêmes, et la résolution 2787 (XXVI) du 6 décembre 1971, par laquelle elle a confirmé la légitimité de la lutte des peuples, notamment du peuple palestinien, qui combattent pour exercer leur droit à disposer d'eux-mêmes et se libérer de la domination coloniale et étrangère. Bon nombre d'autres résolutions de l'Assemblée générale confirment également ce droit.

26. Outre les résolutions des Nations Unies, des instruments internationaux relatifs aux droits de l'homme et, en particulier, les quatre Conventions de Genève de 1949 et le Protocole additionnel I de 1977 consacrent le droit des combattants de la

résistance de bénéficier d'une protection juridique et d'obtenir la qualité juridique de combattant et, partant, d'être traités comme des prisonniers de guerre.

27. De leur côté, les combattants de la résistance doivent, dans le cadre des opérations militaires qu'ils mènent, respecter et appliquer les règles et lois de la guerre ainsi que les autres obligations imposées par le droit international humanitaire.

28. Le 7 juin 1982, la Palestine s'est engagée unilatéralement à appliquer la quatrième Convention de Genève et d'autres instruments internationaux. La Suisse, en sa qualité de dépositaire des Conventions de Genève, a accepté cette déclaration sans affirmer qu'il s'agissait d'un instrument de ratification. La Déclaration d'indépendance publiée en 1988 par le Conseil national palestinien indiquait clairement que l'État de Palestine respecterait les dispositions de la Charte des Nations Unies et de la Déclaration universelle des droits de l'homme.

29. Ce qui nous inquiète le plus dans l'actuelle division fonctionnelle, ce sont ses répercussions sur la nature et le contenu du cadre juridique qui régit la relation entre le peuple palestinien et les deux parties, à savoir, d'un côté, l'Autorité nationale palestinienne et, de l'autre, l'État d'Israël. Du fait de ce chevauchement de pouvoir (l'Autorité palestinienne a été créée pour assurer l'administration autonome de certaines régions du territoire alors même que le territoire restait sous occupation), les Palestiniens sont soumis à un système juridique international à deux niveaux, qui varie selon le système administratif et politique duquel ils dépendent.

30. Les Palestiniens relèvent non seulement du système de droit international relatif aux droits de l'homme qui constitue le cadre juridique régissant la relation entre les citoyens et l'État (dans notre cas, la relation entre les Palestiniens et l'Autorité palestinienne), mais également du système de droit international humanitaire, dont les règles et dispositions régissent la relation entre l'occupant et la population civile dans le territoire occupé. Ce système comprend également le droit international relatif aux droits de l'homme et, en particulier, le Pacte international relatif aux droits civils et politiques et le Pacte international relatif aux droits économiques, sociaux et culturels. Ce système continuera de s'appliquer tant que l'occupant contrôlera le territoire palestinien, même si l'Autorité palestinienne existe. Au paragraphe 78 de son avis consultatif relatif aux conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, la Cour internationale de Justice fait référence à cette situation et affirme que les territoires situés entre la Ligne verte et l'ancienne frontière orientale de la Palestine sous mandat ont été occupés par Israël en 1967 au cours du conflit armé ayant opposé Israël à la Jordanie. Selon le droit international coutumier, il s'agissait donc de territoires occupés dans lesquels Israël avait la qualité de puissance occupante. Les événements survenus depuis lors dans ces territoires n'ont rien changé à cette situation. L'ensemble de ces territoires (y compris Jérusalem-Est) demeurent des territoires occupés et Israël y a conservé la qualité de puissance occupante. Au paragraphe 112, l'avis consultatif confirme qu'Israël, en qualité de puissance occupante, est tenu par les dispositions du Pacte international relatif aux droits économiques, sociaux et culturels. En outre, il est tenu de ne pas faire obstacle à l'exercice de tels droits dans les domaines où compétence a été transférée à des autorités palestiniennes.

31. Toutefois, la façon dont agissent au jour le jour les autorités d'occupation israéliennes ne se limite pas à entraver l'action de l'Autorité nationale palestinienne, loin s'en faut. En effet, Israël sabote le rôle de l'Autorité et bouleverse la vie du

peuple palestinien, comme lorsque l'ancien Président palestinien, M. Yasser Arafat, a été assiégé jusqu'à la veille de sa mort. Les autorités israéliennes entendaient ainsi annihiler toute véritable tentative des Palestiniens d'exercer leurs droits nationaux et continuer de contrôler les terres et les ressources, laissant aux Palestiniens le soin de s'occuper des détails administratifs de leur vie quotidienne. Cet objectif ressort clairement de la réalité de l'occupation.

32. Le 18 décembre 2003, le Premier Ministre israélien de l'époque, Ariel Sharon, a présenté, à l'occasion de la quatrième conférence annuelle d'Herzliya, le « Plan de désengagement » par lequel Israël a entamé la séparation ou le désengagement en Palestine. Ce plan s'est rapidement converti en politique officielle : il a été adopté par le Gouvernement israélien le 6 juin 2004 et par la Knesset le 25 octobre 2004.

33. Comme l'annonçait la version officielle du Plan de désengagement, Israël a décidé unilatéralement que ses forces d'occupation devaient se retirer de la bande de Gaza et de certaines régions palestiniennes du nord de la Cisjordanie. Il a également décidé de démanteler certaines colonies implantées dans la bande de Gaza (Morag, Netzarim, Kfar Darom, Elei Sinai, Dugit et Nisanit ainsi que le bloc de Gush Katif) et quatre colonies implantées dans le nord de la Cisjordanie (Ganim, Kadim, Sa-Nur et Homesh).

34. Le « Plan de désengagement » ne devait à l'évidence pas marquer la fin de l'occupation israélienne des zones desquelles les forces devaient se retirer : il s'agissait plutôt d'un redéploiement des forces armées. Le Plan dispose que, pour préserver la sécurité, Israël a le droit, à l'issue du désengagement, d'adopter une série de mesures de sécurité sur le territoire palestinien :

a) L'État d'Israël continuera de maintenir son autorité exclusive sur l'espace aérien de Gaza et poursuivra ses activités de sécurité au large du littoral de la bande de Gaza;

b) La bande de Gaza sera démilitarisée et les zones de la Cisjordanie desquelles les forces israéliennes se sont retirées seront démilitarisées et désarmées, ainsi que le prévoient les accords israélo-palestiniens;

c) L'État d'Israël se réserve le droit fondamental à l'autodéfense, préventive et défensive, y compris, si besoin est, en faisant usage de la force en cas de menaces émanant de la bande de Gaza et du nord de la Cisjordanie;

d) Dans les autres zones de Cisjordanie, les activités de sécurité en cours se poursuivront;

e) L'État d'Israël s'engage à coordonner l'aide et la formation des forces palestiniennes de sécurité dans le but de combattre le terrorisme et d'assurer l'ordre public;

f) La présence de forces de sécurité étrangères dans la bande de Gaza ou en Cisjordanie devra être coordonnée et approuvée par l'État d'Israël;

g) L'État d'Israël continuera de maintenir une présence militaire le long de la frontière séparant la bande de Gaza et l'Égypte (la « route de Philadelphie »);

h) L'État d'Israël poursuivra l'édification du mur de sécurité, conformément aux décisions prises par le Gouvernement à ce sujet. Son tracé se fera dans le respect des considérations humanitaires;

i) L'achèvement du plan a pour visée de dissiper les revendications portant sur la responsabilité d'Israël à l'égard des habitants palestiniens de la bande de Gaza.

35. La bande de Gaza reste occupée, à l'instar de la Cisjordanie et de la partie orientale de la ville de Jérusalem, région dont les autorités d'occupation israéliennes ont pris le contrôle durant la guerre de juin 1967. Tous ces territoires sont des territoires occupés au sens du Règlement de La Haye de 1907 et de la quatrième Convention de Genève de 1949.

36. Au regard du droit international général, le désengagement unilatéral décidé par Israël dans la bande de Gaza, qui fait incontestablement partie du territoire palestinien, correspondait en fait à un redéploiement des forces d'occupation en dehors de cette zone plutôt qu'à la cessation de l'état d'occupation puisque le retrait ne s'appliquait pas à toutes les composantes de cette zone géographique de Palestine. L'occupation empêche toujours les Palestiniens et leur représentant légitime, à savoir l'Organisation de libération de la Palestine, d'exercer une souveraineté légale et véritable sur la bande de Gaza. En effet, depuis le retrait, les autorités d'occupation israéliennes maintiennent un contrôle absolu sur l'espace aérien et les eaux territoriales ainsi que sur certaines questions administratives.

37. À la 23^e séance plénière de sa dixième session extraordinaire d'urgence, tenue le 8 décembre 2003, l'Assemblée générale a décidé, par sa résolution ES-10/14, de demander à la Cour internationale de Justice de rendre d'urgence un avis consultatif sur les conséquences en droit de l'édification du mur qu'Israël, Puissance occupante, est en train de construire dans le territoire palestinien occupé, y compris à l'intérieur et sur le pourtour de Jérusalem-Est.

38. Le 9 juillet 2004, la Cour internationale de Justice a rendu un avis consultatif sur la question. Elle y affirmait que la quatrième Convention de Genève est applicable dans le territoire palestinien occupé et qu'Israël est tenu par les dispositions du Pacte international relatif aux droits civils et politiques, du Pacte international relatif aux droits économiques, sociaux et culturels, et de la Convention relative aux droits de l'enfant. Elle y affirmait également que parmi les droits légitimes du peuple palestinien figurait le droit à l'autodétermination et que l'acquisition et l'annexion du territoire palestinien par la force par l'État occupant sont illégales. La Cour a conclu que les colonies de peuplement installées par Israël dans le territoire palestinien occupé (y compris Jérusalem-Est) l'ont été en méconnaissance du droit international et que la construction du mur était contraire au droit international.

39. En déclarant que Gaza n'est plus occupée, l'occupant israélien cherche incontestablement à éluder les obligations juridiques qui lui incombent en tant qu'occupant et à considérer qu'il s'agit d'un territoire souverain, ce qui lui permet d'invoquer ce qu'il estime être son droit légitime de se défendre contre ce qu'il appelle des « attaques terroristes ». Israël cherche également à séparer totalement la bande de Gaza de la Cisjordanie, foulant ainsi aux pieds le droit du peuple palestinien d'exercer son droit à l'autodétermination et l'intégrité territoriale du territoire palestinien occupé.

40. Le 19 septembre 2007, en déclarant la bande de Gaza « territoire hostile », Israël a posé les jalons pour assiéger le territoire. De ce fait, et en violation flagrante des règles de droit international et des obligations juridiques incombant à Israël en tant que Puissance occupante, les conditions de vie et la situation humanitaire de plus de 1,5 million de personnes sont devenues extrêmement difficiles. En tant que

Puissance occupante, Israël est tenu par le Règlement de La Haye de 1907 et la quatrième Convention de Genève de 1949 de lever le siège de Gaza et d'y autoriser l'acheminement de fournitures médicales, de vivres et de tous les articles nécessaires pour que ses habitants disposent du minimum vital.

41. Présenter les faits exposés plus haut avait pour but de définir le cadre juridique dans lequel ils s'inscrivent, sans chercher à sous-estimer les obligations juridiques qui incombent aux Palestiniens, représentés par l'Autorité nationale palestinienne, dans le territoire palestinien occupé. Il convient cependant de noter que le fait que le Mouvement de la résistance islamique, le Hamas, se soit emparé de force, le 12 juin 2007, de la bande de Gaza a compromis le respect de ces obligations. Cette prise de pouvoir s'est accompagnée de massacres, de sanctions exemplaires et d'actes de torture, et a anéanti en grande partie les efforts qui avaient été déployés à plusieurs niveaux. Elle s'est notamment traduite par la démolition du fondement du secteur de la justice en Palestine, qui est redevenu un système à deux niveaux. Le système judiciaire a été divisé en deux entités : le Conseil judiciaire suprême et le Conseil suprême de justice qui exercent leur autorité sur la Cisjordanie et sur la bande de Gaza respectivement. Les autorités qui contrôlent de facto la bande de Gaza ont enjoint le Conseil suprême de justice d'assurer et de faciliter l'administration de la justice et de contrôler les nominations et promotions ainsi que d'autres questions. Les tribunaux palestiniens n'ont plus été en mesure de rendre et de faire exécuter leurs jugements. De fait, les services de sécurité font régulièrement fi de ces jugements, en particulier lorsqu'ils ont trait à la libération de personnes détenues arbitrairement. Les jugements s'appliquant dans la bande de Gaza qui ont été rendus par des tribunaux palestiniens en Cisjordanie sont devenus impossibles à faire appliquer, à l'instar de ceux s'appliquant en Cisjordanie qui ont été rendus dans la bande de Gaza.

42. La scission politique a également eu pour corollaire la politisation de l'exercice des droits et libertés, lequel est devenu largement tributaire de l'affiliation politique. Par ailleurs, chaque partie a mis en place une division spéciale chargée de délivrer des « habilitations de sécurité » ou une équipe chargée d'étudier tous les dossiers ou demandes portant sur les nominations à un emploi, les autorisations de constitution d'association ou de société ou toute autre forme d'activité pour laquelle une autorisation et une immatriculation doivent être demandées auprès des autorités compétentes, ce dans le but d'empêcher toute personne perçue comme appartenant à l'autre partie d'obtenir de telles autorisations ou de tels emplois.

43. La scission politique des Palestiniens a provoqué des tensions et s'est traduite, de part et d'autre, par des atteintes aux droits de l'homme, qui se sont produites avant, mais aussi pendant et après l'offensive israélienne contre la bande de Gaza. Il n'est donc pas possible d'affirmer que les violations qui ont été commises en Cisjordanie par les différents services administratifs et de sécurité palestiniens ou que celles qui l'ont été dans la bande de Gaza par les services équivalents de l'autorité de fait étaient liées à l'offensive menée par Israël du 27 décembre 2008 au 17 janvier 2009 et qui a coûté la vie à des centaines de civils, fait des centaines de milliers de sans-abri et détruit des milliers de maisons et de bâtiments publics.

44. La situation palestinienne est rendue exceptionnelle par la poursuite de l'occupation par Israël du territoire palestinien et par la perpétration continue par cet État d'actes constitutifs de crimes de guerre et de crimes contre l'humanité. Parallèlement, une autorité nationale palestinienne est là pour gérer certains aspects de la vie des habitants, ce qui complique l'analyse juridique. Une chose est sûre

néanmoins, c'est que les obligations de la Puissance occupante sont régies par le droit international coutumier et conventionnel. Quant aux responsabilités de la partie palestinienne, qui est soumise à l'occupation, elles sont définies par le droit coutumier relatif, notamment, à la résistance à l'occupation. Cette résistance doit s'exercer dans le respect du droit et des lois de la guerre, qui s'imposent non seulement aux États mais également aux individus engagés dans la résistance.

45. Autrement dit, dans l'exercice des pouvoirs qui lui sont conférés, l'Autorité nationale palestinienne se doit de respecter et d'appliquer le droit international des droits de l'homme et en particulier le « noyau dur » que forment la Déclaration universelle des droits de l'homme, le Pacte international relatif aux droits civils et politiques et le Pacte international relatif aux droits économiques, sociaux et culturels. Cette obligation, tout comme celle de respecter la Charte des Nations Unies ainsi que toutes les déclarations et résolutions relatives aux droits de l'homme prises en son application, découle du statut d'observateur auprès des Nations Unies dont bénéficie l'Organisation de libération de la Palestine. Par ailleurs, dans la déclaration d'indépendance de la Palestine adoptée en 1988 par le Conseil national palestinien, l'État de Palestine proclame son adhésion aux principes et aux buts de la Charte des Nations Unies et à la Déclaration universelle des droits de l'homme. Du fait de la valeur juridique de ce texte, qui servira de base et de cadre ultimes aux principes et aux fondements sur lesquels l'État de Palestine sera créé, il va de soi que l'Autorité nationale palestinienne doit respecter les engagements que l'État de Palestine a pris dans la déclaration et s'abstenir de toute action incompatible avec ces principes ou contraire à ceux-ci.

46. Les instruments internationaux relatifs aux droits de l'homme étant juridiquement contraignants, ceux qui sont chargés de faire respecter le droit international général ont l'obligation de les respecter et de les appliquer. Aussi, la responsabilité et le devoir de respecter et de faire respecter ces instruments incombent à l'Organisation de libération de la Palestine et à l'Autorité nationale palestinienne.

47. Du fait de la scission politique palestinienne et de la séparation totale entre la Cisjordanie et la bande de Gaza, les conditions optimales n'étaient pas réunies pour mener les travaux de la Commission, laquelle n'a donc pas été en mesure d'enquêter sur certaines conclusions du rapport Goldstone relatives aux violations commises par la partie palestinienne, notamment dans la bande de Gaza. En outre, il a été difficile de recueillir certaines informations auprès des témoins et des victimes, soit parce que ceux-ci n'étaient pas en mesure de les fournir, soit parce qu'ils préféraient se taire par peur.

48. Malgré la complexité de la situation juridique et politique, la Commission a été en mesure d'enquêter sur la majorité des cas cités dans le rapport Goldstone et a pu tirer des conclusions et formuler des recommandations précises avec l'impartialité, l'indépendance et la rigueur voulues. Au cours de son enquête, la Commission n'a eu aucune difficulté à obtenir des informations, en particulier en Cisjordanie, même s'il est vrai que la scission politique l'a empêchée d'enquêter sur toutes les violations qui ont été commises dans la bande de Gaza.

49. Dès que son mandat lui a été confié, la Commission a étudié toutes les initiatives similaires menées dans le monde et s'est dotée d'un statut et de règles de fonctionnement conformes aux normes internationales visant à garantir la sincérité, l'impartialité et l'efficacité des enquêtes indépendantes. Elle a notamment été soucieuse de protéger les témoins et les renseignements recueillis. Elle a rencontré

des représentants de la société civile lors de réunions au cours desquelles elle a accueilli des suggestions et donné des explications sur ses travaux et ses pouvoirs. Ces réunions ont été bénéfiques aux travaux de la Commission.

50. La Commission estime que l'attachement de l'Autorité nationale palestinienne et de l'Organisation de libération de la Palestine aux principes des droits de l'homme et aux règles du droit international et que l'utilisation de ces principes comme cadre politique et juridique ne peuvent qu'aider les Palestiniens à concrétiser leurs aspirations nationales, qui ne peuvent l'être sans avoir foi dans les droits collectifs et individuels garantis par le droit international et sans leur donner effet à tous les stades et en toutes circonstances, y compris aux stades de la lutte contre la colonisation et l'occupation et de la création d'un État palestinien. Une société qui ne protège pas la dignité et les droits de ses citoyens et dont les lois ne reposent pas sur les droits de l'homme et la justice ne peut faire face aux menaces extérieures et intérieures ou vivre avec son temps. Ne pas punir les auteurs de crimes, c'est les inviter ouvertement à en commettre de nouveaux.

51. Au fil des auditions des témoins et des victimes, la Commission s'est trouvée confortée dans sa conviction que la déception et la désillusion à l'égard des droits de l'homme, du droit international et de la communauté internationale, nourries par l'incapacité de protéger la population civile soumise à l'occupation, constituaient un risque à long terme pour la société et pour son humanité même. La communauté internationale se doit d'examiner sérieusement cette question en vue d'abrèger les souffrances du peuple palestinien en mettant fin à l'occupation, en appliquant les principes et les règles du droit international, en permettant au peuple palestinien d'exercer son droit à l'autodétermination et de créer un État indépendant, et en permettant aux réfugiés de rentrer chez eux, dans les maisons qu'ils ont été contraints d'abandonner.

52. La crise qui pèse sur les droits et les libertés dans le territoire palestinien est liée à la scission politique entre la Cisjordanie et la bande de Gaza. Ces droits et libertés sont en effet devenus otages de la situation. Si la scission persiste, cette crise perdurera et s'exacerbera. Si au contraire elle cesse, bon nombre de ces violations disparaîtront, puisqu'elles en sont pour une large part la conséquence. La division des Palestiniens a transformé les droits et les libertés en argument de négociation dont chaque partie se sert pour faire pression sur l'autre.

II. Contexte

53. Le 27 décembre 2008, Israël, Puissance occupante, a lancé une offensive militaire contre la bande de Gaza, qui a duré 23 jours pour s'achever le 18 janvier 2009. Lors de cette offensive, baptisée « opération Plomb durci », plusieurs milliers de Palestiniens ont été tués ou blessés et un grand nombre d'infrastructures, de bâtiments et de biens publics et privés ont été détruits.

54. Le 8 janvier 2009, dans la résolution 1860 (2009), le Conseil de sécurité s'est déclaré gravement préoccupé par l'escalade de la violence et la détérioration de la situation, en particulier les lourdes pertes en vies humaines parmi la population civile. Il a également souligné l'urgence et appelé à l'instauration immédiate d'un cessez-le-feu durable et pleinement respecté menant au retrait total des forces israéliennes de Gaza. L'agression s'est néanmoins poursuivie pendant encore 10 jours.

55. Le 3 avril 2009, devant les graves violations commises pendant la guerre, le Conseil des droits de l'homme de l'Organisation des Nations Unies a créé la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza, investie du mandat d'enquêter sur toutes les violations du droit international des droits de l'homme et du droit international humanitaire qui ont pu être commises dans le contexte des opérations militaires menées dans la bande de Gaza du 27 décembre 2008 au 18 janvier 2009, que ce soit avant, pendant ou après cette période. Dirigée par le juge Richard Goldstone, ancien Procureur du Tribunal pénal international pour l'ex-Yougoslavie et du Tribunal pénal international pour le Rwanda et ancien juge de la Cour constitutionnelle d'Afrique du Sud, la Mission était également composée de : M^{me} Christine Chinkin, professeur de droit international à la London School of Economics and Political Science; M^{me} Hina Jilani, avocate à la Cour suprême du Pakistan, ancienne Représentante spéciale du Secrétaire général concernant la situation des défenseurs des droits de l'homme et membre de la Commission internationale d'enquête pour le Darfour; M. Desmond Travers, ancien officier de l'armée irlandaise et membre du Conseil d'administration de l'Institute for International Criminal Investigations (IICI).

56. Le rapport de la Mission d'établissement des faits a été remis au Conseil des droits de l'homme, qui l'a adopté et transmis à l'Assemblée générale. Le 5 novembre 2010, par la résolution 64/10, l'Assemblée générale a demandé instamment, conformément aux recommandations de la Mission d'établissement des faits, que la partie palestinienne procède dans les trois mois à des investigations indépendantes, crédibles et conformes aux normes internationales, sur les graves violations du droit international humanitaire et du droit international des droits de l'homme qui ont été signalées par la Mission d'établissement des faits, afin que les responsabilités soient établies et que justice soit faite.

57. Le rapport demandé n'a pas été remis dans les délais fixés dans cette résolution. Le 26 février 2010, au troisième paragraphe de la résolution 64/254, l'Assemblée générale a de nouveau demandé instamment que la partie palestinienne procède à des investigations indépendantes, crédibles et conformes aux normes internationales sur les graves violations du droit international humanitaire et des droits de l'homme qui ont été signalées par la Mission d'établissement des faits, afin que les responsabilités soient établies et que justice soit faite.

58. Le 25 janvier 2010, M. Mahmoud Abbas, Président de l'État de Palestine, Président du Comité exécutif de l'Organisation de libération de la Palestine et Président de l'Autorité nationale palestinienne, avait pris un décret portant création d'une commission indépendante chargée d'enquêter sur les violations du droit international humanitaire et du droit international des droits de l'homme qui auraient été commises en Cisjordanie et dans la bande de Gaza, conformément aux dispositions de la résolution 64/254 de l'Assemblée générale. Présidée par le juge Issa Abu Sharar, ancien Président de la Cour suprême et ancien Président du Conseil judiciaire suprême, cette commission comptait également parmi ses membres : le juge Zuhair al-Surani, ancien Président de la Cour suprême et ancien Président du Conseil judiciaire suprême; M. Ghassan Farmand, professeur de droit à l'Université de Bir Zeit; M. Yasir al-Amuri, professeur de droit international à l'Université de Bir Zeit; M. Nasser Rayyes, avocat et spécialiste du droit international des droits de l'homme et du droit international humanitaire. Ce dernier a renoncé à faire partie de la Commission en raison d'un conflit d'intérêt : il est consultant juridique auprès de

l'association de défense des droits de l'homme Al-Haq, qui a surveillé les violations relevant du mandat de la Commission et rassemblé des informations sur ces faits.

59. Dès la publication du décret présidentiel, la Commission s'est mise au travail et a pris les dispositions administratives et logistiques nécessaires pour mener son enquête. Une équipe d'enquêteurs a été engagée et des organisations de la société civile spécialisées dans la défense des droits de l'homme ont été sollicitées en vue de recueillir des renseignements et autres informations sur les violations intéressant l'enquête de la Commission.

60. La Commission a rédigé son statut, qu'elle a adopté le 7 février 2010, et installé son siège à Ramallah. Aux termes de son statut, la Commission était chargée d'enquêter sur les violations commises par les Palestiniens cités dans le rapport de la Mission d'établissement des faits créée par le Conseil des droits de l'homme et dirigée par le juge Richard Goldstone. Elle avait pour compétence territoriale l'ensemble du territoire palestinien occupé et était matériellement compétente pour connaître des faits suivants : détention arbitraire et torture, atteintes à la liberté d'association, à la liberté de la presse, à la liberté de réunion pacifique, discrimination professionnelle en Cisjordanie fondée sur l'appartenance politique, exécutions et détentions arbitraires, tortures et mauvais traitements dans la bande de Gaza.

61. S'agissant de la compétence temporelle, la Commission a décidé d'enquêter sur les violations qui auraient été commises par la partie palestinienne avant et après l'agression israélienne contre la bande de Gaza, afin de bien comprendre la situation des droits de l'homme pendant ces deux périodes.

62. Pour lui permettre d'accomplir son mandat dans les meilleures conditions, le statut donne à la Commission la faculté de recueillir les informations, preuves et données intéressant son enquête, de recevoir les accusations et les plaintes relatives aux violations des droits de l'homme relevant de son mandat, et d'entendre les témoignages des plaignants (victimes ou témoins, organisations de défense des droits de l'homme, organismes officiels). Le texte souligne également que la Commission doit respecter le droit international des droits de l'homme, le droit international humanitaire et le droit international pénal, honorer les obligations unilatérales qui découlent pour la Palestine de son adhésion déclarée aux Conventions de Genève, et se conformer aux lois en vigueur en Palestine. Il insiste en outre sur la totale indépendance des membres de la Commission, afin que l'enquête soit menée avec professionnalisme, impartialité et en conformité avec les normes internationales. Interdiction y est faite aux parties d'entraver ou d'influencer le cours de l'enquête. La Commission a préservé la confidentialité des plaintes et autres informations intéressant ses travaux et assuré la protection des plaignants et notamment des victimes et des témoins.

63. La Commission s'est régulièrement entretenue avec des experts indépendants afin de garantir le professionnalisme de ses travaux et de préserver son indépendance. Le 23 février 2010, elle s'est rendue en République arabe d'Égypte pour y rencontrer M. Mahmoud Cherif Bassiouni, spécialiste du droit international. Le 25 février 2010, elle s'est entretenue avec M. Ahmed Ben Helli, Vice-Secrétaire général de la Ligue des États arabes, pour demander à la Ligue de faciliter ses travaux et de l'aider ainsi à mener son enquête.

64. Le 7 avril 2010, à Ramallah, la Commission a rencontré les représentants d'organisations de défense des droits de l'homme et de défense des droits des

Palestiniens, ainsi que des personnalités nationales, afin de leur exposer ses méthodes de travail et son plan de travail, et d'écouter les propositions qu'ils avaient à faire au sujet de l'enquête. Les organisations de défense des droits de l'homme présentes à la réunion en Cisjordanie étaient les suivantes : Al-Haq, Association al-Damir pour les droits de l'homme, Centre de médias pour les droits de l'homme et la démocratie, Centre de Ramallah pour l'étude des droits de l'homme, Centre de Jérusalem pour l'assistance juridique et les droits de l'homme, Centre Insan pour la démocratie et les droits de l'homme, Centre pour la démocratie et les droits des travailleurs en Palestine, Centre pour le développement, Coalition pour l'intégrité et la responsabilité et Commission indépendante des droits de l'homme.

65. Les participants ont été mis au fait des activités les plus récentes de la Commission et informés de la portée matérielle et temporelle de son mandat, après quoi un débat s'est tenu sur les méthodes de travail de la Commission, les éventuelles difficultés qu'elle pourrait rencontrer et la manière de les résoudre, en particulier concernant les communications avec la bande de Gaza, la réalisation de l'enquête sur ce territoire, la protection des plaignants, l'indépendance de la Commission et les efforts déployés pour entrer en contact avec des représentants de l'autorité de fait de la bande de Gaza afin de pouvoir enquêter sur ce territoire. Un certain nombre de recommandations ont été faites lors de la réunion, les plus importantes d'entre elles concernant la nécessité de travailler de concert avec les médias locaux et arabes afin d'encourager les victimes et les témoins oculaires à témoigner devant la Commission, d'organiser des visites sur le terrain pour recueillir les doléances, de faciliter le dépôt des doléances par les citoyens et de maintenir les communications avec la bande de Gaza afin de faciliter la conduite de l'enquête sur ce territoire, et l'importance de présenter un rapport unique.

66. Le même jour, la Commission a tenu une réunion similaire avec des représentants d'organisations de la société civile de la bande de Gaza venues faire part de leurs craintes concernant le respect des droits de l'homme. En raison de l'impossibilité pour la Commission de se rendre dans la bande de Gaza, la réunion s'est tenue par vidéoconférence. Les organisations suivantes étaient présentes lors de la réunion : Association al-Damir pour les droits de l'homme, Centre Al-Mizan pour les droits de l'homme et Commission indépendante des droits de l'homme dans la bande de Gaza. Après avoir été mis au fait des travaux de la Commission par le juge Issa Abu Sharar, les participants ont débattu de plusieurs questions, comme les rivalités entre factions et leurs répercussions sur les travaux de la Commission, la probabilité que le mouvement Hamas autorise la Commission à enquêter dans la bande de Gaza, le renforcement de la coopération avec les médias afin d'atteindre toutes les victimes, et le maintien des communications avec les organisations de défense des droits de l'homme présentes dans la bande de Gaza afin de les associer au travail de la Commission.

67. Le 23 mars 2010, la Commission a demandé à son équipe technique de recueillir et d'analyser les rapports des organisations palestiniennes et internationales de défense des droits de l'homme portant sur les violations entrant dans le cadre du mandat de la Commission afin que cette dernière puisse les consulter dans le courant de l'enquête.

68. En avril 2010, la Commission a décidé de publier des annonces dans les principaux médias de la Cisjordanie et de la bande de Gaza pour inviter les personnes estimant que leurs droits avaient été violés par l'Autorité palestinienne ou

l'autorité de fait de la bande de Gaza à faire part de leurs griefs à la Commission. L'annonce est parue 5 fois dans les journaux locaux (*Al-Hayat*, *Al-Ayyam* et *Al-Quds*) et elle a été diffusée 6 fois à la télévision (Palestine Television et Watan Television) et 24 fois à la radio (Palestine Radio, Ajyal Radio, Ilm Radio et Hurriyah Radio).

69. La Commission a envoyé des lettres aux médias de la presse écrite et audiovisuelle de la bande de Gaza pour leur demander de publier ou de diffuser ses annonces, mais elle n'a jamais reçu de réponse et les annonces sont restées lettre morte. Les médias auxquels des lettres ont été envoyées sont les suivants : Al-Aqsa Radio, Al-Aqsa Satellite Channel, *Al-Risalah* (journal), *Filistin* (journal) et Al-Quds Radio. La Commission a également demandé aux organisations de défense des droits de l'homme présentes dans la bande de Gaza de publier les annonces sur leur site Web.

70. Le 8 avril 2010, la Commission a organisé une conférence de presse à Ramallah, à laquelle ont participé un certain nombre de journalistes et de représentants des médias. L'objectif recherché était de faire connaître la Commission au public et en particulier d'encourager les victimes de violations à venir faire état des infractions dont elles avaient été victimes ou témoins. Les journalistes présents ont été mis au fait des activités les plus récentes de la Commission et priés de diffuser des informations sur les travaux de cette dernière à tous les Palestiniens afin que ceux-ci puissent ensuite venir faire état des infractions dont ils s'estimaient avoir été victimes. Le Président et les membres de la Commission ont souligné que la Commission était indépendante et impartiale, et qu'elle n'était pas affectée par les rivalités politiques palestiniennes actuelles. Ils ont également insisté sur le fait que les plaignants bénéficieraient d'une protection et que les informations resteraient confidentielles.

71. Afin de bien montrer son indépendance, son impartialité et sa transparence, la Commission a veillé à associer toutes les parties en leur exposant l'état d'avancement de ses travaux et en sollicitant leurs commentaires. Le 15 avril 2010, en réponse aux propositions émises par des représentants d'organisations de défense des droits de l'homme, la Commission a rencontré des membres du Conseil législatif palestinien du Bloc du changement et de la réforme affilié au Hamas pour les informer des travaux de la Commission et entendre leurs propositions. Les membres du Bloc présents à la réunion étaient les suivants : M. Omar Abdul Raziq, M. Nasir Abdul Jawad, M. Mahmud Muslih, M^{me} Muna Mansur, M^{me} Samirah al-Halayqah, M. Hassan al-Burini et M. Abdul Rahman Zaydan. Après que le Président de la Commission eut présenté dans les grandes lignes les travaux, les méthodes de travail et le mandat de cette dernière, les participants ont formulé des observations sur l'extension du mandat de la Commission et les contacts noués par des personnalités nationales avec l'autorité de fait de la bande de Gaza afin de pouvoir enquêter sur ce territoire. Les participants ont également insisté sur l'importance de trouver une solution à la question des agents du secteur public ayant été licenciés, d'assurer la protection des plaignants afin de les encourager à déposer devant la Commission, et de préserver l'impartialité et la liberté d'action de cette dernière.

72. Le 18 avril 2010, pour faire suite à sa réunion avec les représentants du Bloc du changement et de la réforme, la Commission a rencontré les coordinateurs d'autres blocs et listes du Conseil législatif palestinien. Elle s'est aussi réunie avec des parlementaires qui n'avaient pas participé à la première réunion, M^{me} Najat al-Astal, M. Qays Abdul Karim, M^{me} Khalidah Jarar et M. Mustafa Barghouti.

Les participants ont estimé qu'il était important de mener une enquête sérieuse et impartiale, de présenter un rapport national unique et de communiquer avec l'autorité de fait de la bande de Gaza pour pouvoir enquêter sur ce territoire.

73. Le 25 avril 2010, l'Équipe technique s'est rendue à Naplouse et Hébron afin de recueillir les doléances des habitants du nord et du sud. Après avoir passé des annonces dans les journaux locaux, la Commission, travaillant de concert avec les groupes locaux de défense des droits de l'homme, a recueilli les doléances des victimes dans les bureaux locaux de la Commission indépendante des droits de l'homme.

74. Déterminée à tirer parti des compétences de spécialistes locaux, régionaux et internationaux, la Commission a invité M. Bassiouni à travailler comme consultant pour bénéficier de ses connaissances et pouvoir publier un rapport de qualité internationale. M. Bassiouni a en conséquence été nommé consultant auprès de la Commission.

75. Conformément au plan de travail adopté par la Commission et son équipe technique, la Commission a commencé par recueillir les doléances des individus et des organisations de défense des droits des Palestiniens qui avaient trait aux violations dont, selon eux, des représentants de l'Autorité nationale palestinienne en Cisjordanie et des représentants de l'autorité de fait de la bande de Gaza se seraient rendus coupables. Du 4 au 18 mai 2010, la Commission a entendu 105 plaignants : 77 de la Cisjordanie et 28 de la bande de Gaza. Ceux de Cisjordanie ont été entendus au siège de la Commission, à Ramallah, alors que ceux de la bande de Gaza ont été entendus par vidéoconférence car les membres de la Commission n'ont pas été autorisés à se rendre dans cette partie du territoire. Chacun d'entre eux a été entendu en privé afin de préserver la confidentialité des informations.

76. La Commission a entendu 51 fonctionnaires au sujet de leur licenciement; 5 personnes au sujet de violations de la liberté de la presse et de violations commises par les services de sécurité de l'Autorité nationale palestinienne en Cisjordanie à l'encontre de journalistes et des médias; 4 personnes au sujet du droit de créer des associations; 16 personnes au sujet d'actes de détention et de torture; et 1 personne au sujet de la violation du droit de rassemblement pacifique.

77. La Commission a entendu 11 personnes alléguant que les services de sécurité de l'autorité de fait de la bande de Gaza avaient commis des actes de détention et de torture. Dix-sept personnes ont été entendues au sujet de meurtres.

78. La Commission a également entendu des représentants d'organisations de défense des droits de l'homme qui lui ont présenté les informations solidement étayées concernant des violations relevant du mandat de la Commission. Du 20 mai au 6 juin 2010, la Commission a entendu les représentants des organisations suivantes : Al-Haq, Association al-Damir pour les droits de l'homme, Centre de Jérusalem pour l'assistance juridique et les droits de l'homme, Centre de traitement et de réadaptation des victimes d'actes de torture, Centre pour la démocratie et les droits des travailleurs en Palestine, Commission indépendante des droits de l'homme, Fondation Samir Kassir et Réseau des organisations non gouvernementales palestiniennes.

79. Afin que l'enquête soit la plus exhaustive possible, la Commission a également entendu des représentants de l'administration publique, au premier rang desquels le Ministre de l'intérieur de l'Autorité nationale palestinienne. La

Commission les a interrogés au sujet de doléances relatives à des actes de détention arbitraire, de torture, de licenciement dans le secteur public, de fermeture d'associations et d'immixtion dans le choix du conseil d'administration d'associations. Le 9 juin 2010, la Commission a entendu le Directeur chargé des relations publiques et des rapports avec les ONG au sein du Ministère de l'intérieur.

80. Le 15 juin 2010, la Commission a entendu le Ministre de l'intérieur. Ce dernier s'est exprimé au sujet des doléances relatives aux actes de détention, de torture, de fermeture d'associations et d'ingérence dans le choix du conseil d'administration d'associations. S'agissant des actes de torture, le Ministre a déclaré que ces pratiques avaient entièrement cessé. Il a mis en place un système pour surveiller et contrôler la manière dont les membres de son administration s'acquittent de leurs fonctions. Il a également déclaré que les groupes de défense des droits de l'homme étaient autorisés à visiter les détenus. S'agissant du défèrement de civils devant des tribunaux militaires, le Ministre a dit que ces derniers étaient compétents pour connaître des infractions de trouble à l'ordre public. Il a ajouté que les décisions des tribunaux étaient toujours respectées et que tout retard dans leur exécution était involontaire. L'interdiction faite aux détenus de recevoir la visite des membres de leur famille dans les premiers jours d'une enquête était conforme à la loi. S'agissant des contrôles de sécurité auxquels sont soumises les personnes souhaitant créer une association, le Ministre a dit qu'ils s'expliquaient par la nécessité de protéger les intérêts des associations et de s'assurer que les personnes remplissaient les conditions pour créer une association. Il a ajouté que son ministère répondait aux demandes de création d'une association dans le délai de deux mois prescrit par la loi. Il a catégoriquement nié que son ministère ne respecte pas les décisions de la Cour suprême relatives aux associations et qu'il nomme des personnes étrangères aux associations aux conseils d'administration de ces dernières. S'agissant des violations de la liberté de la presse, il a expliqué que toute restriction imposée à la liberté des journalistes s'expliquait pour des raisons sans rapport avec leur profession.

81. En ce qui concerne l'analyse et la présentation des violations sur lesquelles porte l'enquête menée en Cisjordanie et dans la bande de Gaza, la Commission a, à l'issue d'un long débat approfondi, décidé que la structure et la présentation de son rapport devrait différer quelque peu de celles des rapports présentés à l'ONU et à d'autres organisations internationales afin de faciliter la tâche à ceux qui l'examineront et leur permettre de facilement comprendre quelles dispositions législatives ont été enfreintes. Aussi, chaque section du présent rapport commence-t-elle par une présentation des lois locales pertinentes.

82. Un certain nombre d'obstacles et de difficultés ont empêché la Commission de s'acquitter de son mandat dans son intégralité. Dès le départ, la Commission a connu des difficultés pour enquêter sur les violations graves du droit international humanitaire et des droits de l'homme internationaux de façon indépendante, crédible et conforme aux normes. Au nombre des difficultés rencontrées figurent l'impossibilité pour la Commission de se rendre dans la bande de Gaza afin d'enquêter sur les violations du droit international humanitaire supposément commises par des groupes armés palestiniens, en particulier le lancement de roquettes artisanales sur les villes et implantations israéliennes.

83. L'impossibilité pour la Commission de se rendre dans la bande de Gaza pour mener une enquête de terrain et recueillir le témoignage et les déclarations des victimes et des témoins oculaires.

84. Malgré ces obstacles, la Commission a pu auditionner une trentaine de plaignants au moyen de vidéoconférences. Les plaignants ont expliqué en détail les violations dont ils avaient été victimes, ce qui a permis à la Commission de se faire une idée crédible des infractions graves aux droits de l'homme qui, selon la Mission d'établissement des faits, ont été commises dans la bande de Gaza par l'autorité de fait de ce territoire, ainsi que par ses services de sécurité et ses groupes armés.

85. La Commission souhaite attirer l'attention sur le fait que ses efforts répétés pour parvenir à entrer dans la bande de Gaza lui ont laissé peu de temps pour s'acquitter de sa mission et établir et présenter son rapport dans le délai fixé. La diffusion des annonces et l'audition des plaignants ont été retardées car la Commission a été obligée d'attendre que les appels lancés par la Ligue des États arabes et les autorités égyptiennes à l'autorité de fait de la bande de Gaza portent leurs fruits et que cette dernière autorise la Commission à mener ses travaux dans ce territoire. En conséquence, la Commission a été obligée de redoubler d'efforts pour honorer ses engagements et soumettre son rapport dans le délai imparti.

86. La Commission estime que les doutes entretenus par les citoyens palestiniens quant à l'utilité des commissions d'enquête et à la sincérité de leurs efforts ont sérieusement fait obstacle à ses travaux et fait qu'elle a reçu moins de doléances et auditionné moins de témoins qu'elle n'aurait dû. Outre les commissions nationales créées pour mener des enquêtes sur des violations à l'échelle locale, les Palestiniens se sont habitués à ce que de temps en temps des commissions internationales d'établissement des faits soient instituées. Malgré tout, aucune enquête n'a été ouverte et personne n'a jamais été poursuivi, ce qui a amené les citoyens à douter de l'utilité et de l'importance de coopérer avec ces commissions. La Commission a perçu ce scepticisme dans les questions que lui posait le public.

87. Par peur des services de sécurité de Cisjordanie et de l'autorité de fait de la bande de Gaza, de nombreuses victimes ont renoncé à prendre contact avec la Commission. Ce fait mérite d'être signalé car de nombreuses violations, comme des actes de détention et de torture, et des licenciements, continuent de se produire.

88. Le lien entre, d'une part, les violations des droits de l'homme et des libertés et, d'autre part, les luttes et les rivalités politiques entre le Fatah et le Hamas, ont convaincu les Palestiniens que seule la réconciliation entre les deux camps sera à même de stopper ou d'empêcher ces violations.

89. Beaucoup pensent que les travaux des commissions d'enquête et des organisations locales de défense des droits de l'homme seront sans effet tant que ces rivalités politiques demeureront. La majorité des personnes estiment que la crise continuera tant que chaque camp continuera à s'en prendre aux activistes et partisans de l'autre camp.

III. Violations, sous forme de tirs de roquettes et d'obus de mortier au sud d'Israël, attribuées aux groupes palestiniens armés

90. Les forces israéliennes d'occupation ont lancé périodiquement de courts assauts militaires contre la bande de Gaza en réponse au tir par les groupes de la résistance armée palestinienne de roquettes artisanales sur le territoire israélien. Ces opérations ont consisté en raids aériens menés au moyen d'avions de chasse, d'hélicoptères militaires et de tirs d'artillerie. Les forces israéliennes d'occupation

ont également lancé de temps à autre de courtes attaques terrestres contre la bande de Gaza au moyen de chars, de véhicules blindés de transport de troupes et d'unités d'infanterie lourdement armées.

91. Israël prétend que les assauts contre la bande de Gaza sont nécessaires et constituent un cas de légitime défense du fait de tir de roquettes et d'obus de mortier par les groupes de la résistance armée palestinienne sur son territoire et sa population civile.

92. Une certaine confusion règne concernant le nombre réel de roquettes et d'obus de mortier qui ont été lancés par les groupes de la résistance armée palestinienne depuis la bande de Gaza. Il n'existe pas d'estimations dignes de foi ou vérifiables sur le nombre de roquettes ou d'obus tirés, les endroits d'où ils ont été tirés et où ils sont tombés, ni sur les victimes, exception faite de 13 décès signalés par Israël dans ses rapports portant sur une période de quatre à cinq ans, dont ceux de trois à quatre soldats. Ces derniers sont considérés comme des cibles militaires légitimes au regard du droit international humanitaire. Les rapports d'enquête interne de l'armée israélienne n'ont pas été publiés et Israël n'a mené aucune enquête indépendante d'établissement des faits.

93. Les statistiques disponibles varient selon les sources. Le Ministère israélien des affaires étrangères affirme qu'il a été tiré contre Israël à partir de Gaza, depuis la mi-juin 2008, 1 750 roquettes et 1 528 obus de mortier¹, tandis que le porte-parole de l'armée israélienne avait déclaré que 1 755 obus de mortier, 1 720 roquettes Qassam et 75 fusées Grad avaient été tirés². Dans un autre rapport, le porte-parole de l'armée israélienne a déclaré que 7 200 roquettes avaient été lancées sur Israël depuis 2005, sans en préciser le type³. Le Premier Ministre Benyamin Netanyahu a déclaré au cours d'une entrevue réalisée le 7 juillet 2010 avec le présentateur Larry King de la chaîne Cable News Network (CNN) que 6 000 roquettes avaient été lancées sur Israël, probablement de 2005 à 2009, la même période sur laquelle porte le rapport de l'armée israélienne. Il est important de rappeler qu'aucune de ces sources ne mentionne le point d'impact de ces roquettes. Ces dernières ont donc pu tomber dans des zones désertiques, des régions où n'habitent pas de civils ou encore des zones militaires et leurs environs, ce qui permet de considérer qu'il s'agissait d'objectifs militaires légitimes au regard du droit international humanitaire.

94. Le rapport de la Mission d'établissement des faits cite des sources israéliennes qui affirment que 3 455 roquettes et 3 742 obus de mortier ont été lancées sur Israël de 2001 à la mi-juin 2008, sans en préciser le point d'impact⁴. La Mission n'a pas été en mesure d'établir les faits ni la véracité des allégations israéliennes qui reviennent périodiquement dans les médias. Le rapport de la Mission cite les chiffres évoqués dans les médias du fait du refus d'Israël de coopérer avec elle.

¹ Ministère israélien de la défense, « The Hamas Terror War Against Israël », disponible à l'adresse suivante : <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Missile+fire+from+Gaza+on+Israeli+civilian+targets+Aug+2007.htm>.

² Blog du porte-parole de l'Armée israélienne, « Rocket Statistics 3 janvier 2009 », disponible à l'adresse suivante : <http://idfspokesperson.com/2009/01/03/rocket-statistics-3-jan-2009/>.

³ Ibid.

⁴ Rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza, par. 183.

95. La véracité d'aucun de ces chiffres estimatifs n'a pu être établie de façon indépendante ou neutre. La Commission d'enquête indépendante palestinienne n'a jamais pu vérifier l'exactitude des chiffres cités plus haut et n'est pas en mesure d'examiner plus en détail cette question dans le présent rapport.

96. Il ne faut absolument pas croire à partir des faits mentionnés ci-dessus que le présent rapport feint d'ignorer ou minimise les conséquences des tirs de roquettes contre la population civile ou nie la responsabilité des personnes qui ont peut-être délibérément pris pour cible des civils. Cette partie du présent rapport vise à mettre en évidence le manque de précision et de crédibilité des données israéliennes et le refus par Israël d'établir les faits de façon objective, professionnelle et impartiale.

97. Comme susmentionné, la Commission d'enquête indépendante palestinienne a été créée par un décret du Président de l'Autorité nationale palestinienne, qui n'exerce plus son mandat sur la bande de Gaza depuis que le mouvement Hamas s'est emparé du pouvoir. C'est la raison pour laquelle la Commission n'a pas pu mener d'enquête à l'intérieur de Gaza à propos de l'utilisation et du tir de roquettes artisanales⁵ par des groupes palestiniens armés.

98. S'il est établi que des groupes palestiniens armés à Gaza ont délibérément et effectivement pris pour cible la population civile, la Commission considère que ces pratiques représenteraient indéniablement une violation du droit international humanitaire. L'Autorité nationale palestinienne a à maintes reprises demandé aux groupes de la résistance armée à Gaza de respecter le droit international et d'exercer leur droit à la légitime défense conformément aux principes de l'éthique et du droit reconnus par la résistance palestinienne.

99. La Commission souhaite donc rappeler l'élément essentiel sur lequel se fonde le présent rapport, à savoir que le droit international humanitaire réprovoe catégoriquement les actes de représailles⁶ au cours des conflits armés, quelle que soit la définition du conflit, que ce dernier ait ou non un caractère international. Par conséquent, le présent rapport rejette toute justification d'actes de représailles, qu'ils aient été commis par les Israéliens ou par les groupes de la résistance palestinienne.

100. À ce propos, il a été établi qu'un certain nombre de roquettes et d'obus de mortier ont été lancés depuis la bande de Gaza du 27 décembre 2008 au 18 janvier 2009 par des groupes de la résistance armée palestinienne, qui ne relèvent pas de l'Autorité nationale palestinienne, depuis la scission politique intervenue entre la Cisjordanie et la bande de Gaza. Ces projectiles qui sont tombés sur Israël auraient fait trois morts parmi la population civile israélienne et des dégâts matériels, sans que l'on ait d'autres détails sur leur nature ou leur ampleur⁷.

101. Cette partie du présent rapport ne réfute ni ne confirme les données fournies par la Mission d'établissement des faits, étant donné que la Commission n'a pas pu

⁵ L'expression « roquettes artisanales » est utilisée dans la résolution S.9/1 du Conseil des droits de l'homme qui a porté création de la mission internationale indépendante d'établissement des faits.

⁶ Voir Kalshoven, Frits, *Belligerent Reprisals (International Humanitarian Law Series)*, 2^e édition, 5 juin 2005, Brill Academic Publishing. Voir également Bassiouni, Mahmoud Cherif, « Al-houroub wa al-azmat al-jadidah fi al-imtihal bi qanun al-nizaat al-musuallah min qibal al-faalin min ghayr al doual », *Sahifat al-qanun al jina'i wa il al-jarimah*, vol. 98, p. 712 à 820.

⁷ Voir par. 73.

vérifier leur véracité. De toute façon, aux fins du présent rapport, la Commission accepte les données figurant dans le rapport de la Mission, à savoir que trois personnes ont été tuées et que des biens civils ont été détruits dans le sud d'Israël.

102. Il est essentiel de garder à l'esprit qu'un des traits saillants du conflit qui oppose les groupes de la résistance armée palestinienne dans la bande de Gaza à Israël est son caractère disproportionné; témoin, l'énorme décalage entre les capacités militaires des deux parties, qui est bien révélateur, sans qu'il soit besoin de le démontrer. Les capacités de riposte de la résistance palestinienne face aux chasseurs, hélicoptères, chars et canons d'Israël, outre ses impressionnantes forces terrestres, se limitent à des tirs par intermittence de roquettes artisanales et d'obus de mortier. Si l'on considère les moyens de destruction sophistiqués et la haute technologie dont disposent les forces israéliennes d'occupation pour frapper des objectifs avec précision et pour établir une nette distinction entre cibles civiles et militaires, le fait qu'elles s'en prennent à des civils palestiniens de façon aussi aveugle peut assurément être considéré comme une violation du droit international humanitaire et du droit international des droits de l'homme.

103. Les dommages subis par les civils à la suite d'un tir de roquettes artisanales sont imputables principalement au caractère grossier de ces dernières et à l'incapacité de pouvoir en contrôler le point d'impact avec précision. Cela ne justifie pas pour autant le fait de s'en prendre à des civils innocents. Bien qu'il soit nécessaire de procéder à une enquête sur un incident à chaque fois qu'il y a des dommages présumés, qu'il s'agisse de personnes ou de biens civils, la Commission ne sera pas en mesure de le faire si elle n'est pas présente sur le terrain.

104. Il faut cependant rappeler, comme une question de principe, que le droit international humanitaire prévoit des indemnisations pour les dommages subis par des biens ou des personnes qui sont l'objet d'attaques : c'est une position qu'appuie la Commission qui estime que l'Autorité nationale palestinienne l'acceptera également, surtout si les deux parties parviennent à un accord sur le versement d'indemnisations aux Palestiniens et aux Israéliens qui ont été victimes des opérations militaires qui se sont déroulées du 27 décembre 2008 au 18 janvier 2009, ou encore aux victimes de toute autre violation et du droit international humanitaire du droit international des droits de l'homme commise par l'Armée israélienne ou les groupes de la résistance armée palestinienne dans la bande de Gaza⁸.

⁸ Voir la résolution 60/147 du 21 mars 2006 de l'Assemblée générale, Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire. Voir également Bassiouni, Mahmoud Chérif, « Al-iitiraf al douali bi huquq al-dahaya », *Murajaa li qanun huquq al-insan*, Vol. 6, p. 79 à 203 (2006). Il faut rappeler également que la religion musulmane aborde concrètement la question de l'indemnisation des victimes dans la « diyah » ou prix du sang et prévoit des règles et des conditions claires à cet égard. Pour citer le Coran : « O vous qui croyez! La loi du talion vous est prescrite en cas de meurtre : l'homme libre pour l'homme libre; l'esclave pour l'esclave; la femme pour la femme. On doit user de procédés convenables envers celui auquel son frère a remis une partie de la dette, et lui-même dédommagera celui-ci de la meilleure façon que cela constitue un allègement et une miséricorde accordés par votre Seigneur » *Sourate de la Vache*, versets 178 et 179.

IV. Arrestations et torture en Cisjordanie

105. Depuis que le Hamas s'est emparé, le 14 juin 2007, du pouvoir dans la bande de Gaza, le territoire palestinien occupé est administré par deux autorités. L'ordre établi palestinien, représenté par l'Autorité nationale palestinienne, ses institutions officielles et ses organes de sécurité, continue de gouverner et d'administrer la Cisjordanie, tandis que la bande de Gaza est sous l'administration et le contrôle du Hamas et des forces et factions qui lui sont subordonnées et qui l'appuient sur les plans militaire, organisationnel et partisan.

106. Au cours de cette phase et surtout au début de ces événements connus des Palestiniens comme la scission politique entre la Cisjordanie et la bande de Gaza, bon nombre de droits et de libertés ont pâti des restrictions qui ont été imposées et des violations qui ont été commises de part et d'autre et qui se sont accompagnées d'arrestations et de détentions généralisées. Chacune des parties affirme agir ainsi en raison de considérations liées au maintien de l'ordre public et à la protection des institutions et des capacités des autorités en place, en Cisjordanie et dans la bande de Gaza, pour éviter que la confrontation et la violence interne palestinienne ne s'étendent de la bande de Gaza à la Cisjordanie.

A. Services chargés du maintien de la sécurité en Cisjordanie en vertu des législations nationales

107. Pour expliquer la réalité de la situation s'agissant des violations commises sur le plan des arrestations et de la torture, il est nécessaire d'apporter des précisions sur les organes chargés d'appliquer la loi en Cisjordanie, ainsi que sur le fond et la teneur des garanties prévues par les législations nationales à cet égard.

1. Services chargés du maintien de la sécurité en vertu des législations nationales

108. Le corpus de lois palestiniennes régissant la structure, les pouvoirs et les fonctions des forces de sécurité en Palestine consiste en un certain nombre de législations dont les plus importantes sont : la Loi fondamentale palestinienne (telle qu'amendée en 2003)⁹; la loi n° 8 de 2005 sur les agents des forces de sécurité; la loi n° 17 de 2005 sur les renseignements généraux; le décret-loi n° 11 de 2007 sur la sécurité préventive; le Code de procédure pénale n° 3 de 2001; la loi n° 6 de 1998 sur les centres de redressement et de réinsertion (prisons), la loi n° 12 de 1998 sur les rassemblements publics; le Code pénal n° 16 de 1960 en vigueur en Cisjordanie et le Code pénal révolutionnaire de l'Organisation de libération de la Palestine de 1979.

109. La loi sur les agents des forces de sécurité, la loi sur les renseignements généraux et le décret-loi sur la sécurité préventive sont considérés comme fondamentaux pour définir la nature, l'autorité et la structure des forces de sécurité,

⁹ L'article 84 de la Loi fondamentale palestinienne stipule ce qui suit : « Les forces de sécurité et de police sont des forces régulières. Ce sont les forces armées du pays. Leurs fonctions se limitent à défendre le pays, servir le peuple, protéger la société et maintenir l'ordre public, la sécurité et la morale publique. Ils accomplissent leurs tâches dans les limites prescrites par la loi, dans le respect total des droits et des libertés ».

tandis que les autres législations énoncent le rôle et les attributions de ces forces dans les domaines où elles sont actives et pour les questions dont elles ont été chargées.

110. Un examen de la loi sur les agents des forces de sécurité, de la loi sur les renseignements généraux et du décret-loi sur la sécurité préventive permet de déterminer que les forces palestiniennes de sécurité se composent des éléments suivants :

a) Les Forces nationales de sécurité et l'Armée de libération nationale de la Palestine : les articles 3 et 7 de la loi sur les agents des forces de sécurité disposent que cette force est un organe statutaire militaire qui exerce ses fonctions et ses compétences sous la présidence du Ministre de la sécurité nationale et sous la conduite du commandant en chef, qui prend les décisions nécessaires à l'administration de ses travaux et à la gestion de ses affaires, conformément aux dispositions et réglementations en vigueur;

b) Les Forces de sécurité intérieure : d'après l'article 10 de la loi susmentionnée, c'est un organe de sécurité statutaire qui exerce ses fonctions et ses compétences sous la direction du Ministère de l'intérieur et sous le commandement du Directeur général de la sécurité intérieure, qui prend les décisions nécessaires à l'administration de ses travaux et à la gestion de ses affaires. En Cisjordanie, cette force est constituée de la force de police palestinienne et de l'appareil de sécurité préventive palestinien;

c) Les renseignements généraux : conformément à l'article 13 de la loi susmentionnée, il s'agit d'un organe de sécurité relevant du Président de l'Autorité nationale palestinienne, qui exerce ses fonctions et ses compétences sous l'égide et le commandement de son chef et prend les décisions nécessaires à l'administration de ses travaux et à la gestion de ses affaires. Les renseignements généraux sont considérés comme l'organe officiellement chargé d'exercer les activités et les fonctions de sécurité hors des frontières géographiques de la Palestine. Ils accomplissent également des tâches de sécurité à l'intérieur des frontières géographiques de l'État de Palestine pour compléter la mise en œuvre des mesures et activités commencées à l'extérieur.

2. Nature et pouvoirs des organes chargés de faire appliquer la loi

111. Les lois en vigueur régissent les pouvoirs des organes de sécurité chargés de faire appliquer la loi et de maintenir la sécurité et l'ordre public. Ces pouvoirs et compétences sont définis comme suit :

a) Force de police palestinienne

112. Conformément aux dispositions des législations palestiniennes et de la loi jordanienne provisoire sur la sécurité publique n° 38 de 1965, dont l'autorité juridique est encore en vigueur en Cisjordanie, on peut définir comme suit les attributions des forces de la police palestinienne :

- Veiller au maintien de l'ordre et de la sécurité et à la protection des personnes, de leur honneur et de leurs biens;
- Prévenir et dépister les infractions, enquêter sur elles, en poursuivre les auteurs et les traduire en justice;
- Administrer les prisons et surveiller les détenus;

- Appliquer les lois, les règlements et les décrets officiels, aider les pouvoirs publics à exercer leurs fonctions, conformément aux dispositions de la loi;
- Surveiller et réglementer le transport routier;
- Superviser les rassemblements et processions publics sur les voies et dans les lieux publics.

b) Renseignements généraux

113. L'article 9 de la loi sur les renseignements généraux palestiniens définit les attributions de cet organe comme suit :

- Adopter les mesures nécessaires pour prévenir les actes susceptibles de mettre en danger la sécurité et la sûreté de la Palestine et sévir contre les auteurs de ces actes, conformément à la loi;
- Découvrir les dangers extérieurs pouvant menacer la sécurité palestinienne dans les domaines de l'espionnage, de la conspiration et du sabotage et déjouer tout autre acte menaçant l'unité, la sécurité, l'indépendance ou les capacités de la patrie;
- Coopérer avec les services de renseignement des pays amis pour lutter contre tout acte qui menace la paix et la sécurité communes, ou la sécurité extérieure, sous réserve de réciprocité.

114. L'article 10 définit les actes auxquels s'applique l'article précédent, à savoir :

1. L'échange de communications avec une puissance étrangère en vue de commettre un acte hostile contre la Palestine;
2. L' enrôlement dans l'armée d'une puissance étrangère qui est en guerre avec la Palestine;
3. La fourniture ou l'aide à la fourniture à une puissance étrangère d'un secret défense relatif à la Palestine portant sur des aspects militaires, politiques, économiques ou sociaux;
4. Tout acte délibéré susceptible d'entraîner la mort, des dommages corporels importants ou la privation de la liberté s'agissant des personnes suivantes :
 - a) Monarques, chefs d'État, leurs conjoints, leurs ascendants ou leurs descendants;
 - b) Héritiers du trône, vice-présidents, premiers ministres, ministres;
 - c) Personnes exerçant des charges ou des fonctions publiques qui sont confrontées à ce type d'acte dans l'exercice de ces fonctions;
 - d) Ambassadeurs et diplomates en poste dans l'État de Palestine;
5. La destruction délibérée ou détérioration des biens publics ou des biens privés utilisés à des fins publiques qui appartiennent ou sont sous le contrôle de pays auxquels la Palestine est attachée par des liens diplomatiques ou d'amitié;
6. La fabrication, la détention ou l'acquisition d'armes, d'explosifs ou de toute substance dangereuse en vue de commettre un des actes cités précédemment dans tout pays;

7. Tout acte de violence ou toute menace de violence, quels qu'en soient les motivations et les buts, visant à réaliser un projet criminel individuel ou collectif et à semer la terreur parmi les personnes, à les épouvanter, à mettre leur vie ou leur liberté en danger, à causer des dommages à l'environnement ou à des biens publics et privés, à occuper ceux-ci ou en prendre possession, à transférer subrepticement des terrains à mettre en danger les ressources nationales.

115. Les dispositions de la loi confèrent aux renseignements le rôle de police judiciaire et le pouvoir d'effectuer une enquête préliminaire sur les incidents imputables à la personne qui a été appréhendée, d'exercer une surveillance et de mener une enquête plus approfondie, une inspection, une fouille, une saisie de biens, d'appréhender des personnes, de les convoquer, de les interroger, d'écouter leurs dépositions, d'exiger et de garder des données, des informations, des documents à quiconque et de prendre les mesures jugées nécessaires aux fins d'application de la loi¹⁰. À cet égard, les articles de la loi disposent que les agents des services de renseignement palestiniens doivent, dans l'exercice de leurs fonctions, respecter tous les droits et toutes les protections prévues par les législations palestiniennes et le droit international y afférent.

c) Sécurité préventive

116. L'article 2 du décret-loi n° 11 de 2007 dispose qu'aux fins de la sécurité préventive¹¹, ces services sont constitués d'une direction générale au sein des Forces de sécurité intérieure qui relèvent du Ministère compétent, sont actives dans le domaine de la sécurité et ont deux sièges provisoires dans les villes de Ramallah et de Gaza et peuvent ouvrir des bureaux dans d'autres villes.

117. L'article 4 du décret-loi définit le mode de désignation du Directeur de la sécurité préventive et prévoit que le Directeur général et son adjoint seront désignés en vertu d'un décret du Président de l'Autorité nationale palestinienne, à la suite d'une décision du ministre compétent, d'une nomination du Directeur général de la sécurité intérieure et sur la recommandation du Comité des officiers, et qu'ils prêteront serment devant le Président avant leur entrée en fonctions.

118. L'article 5 du décret-loi énonce ce qui suit :

1. Le Directeur général est chargé de surveiller les activités du Directeur général de la sécurité préventive et de ses agents et de constituer les comités nécessaires à la bonne marche des opérations. Il peut déléguer quelques-unes de ses fonctions à son suppléant;

¹⁰ Articles 12 et 14 de la loi sur les renseignements généraux.

¹¹ Du fait du blocage du Conseil législatif et de son incapacité d'exercer ses pouvoirs à la suite de la scission entre la Cisjordanie et la bande de Gaza, le Président palestinien s'est mis à exercer les pouvoirs du législatif en prenant des décisions provisoires ayant force de loi, pour combler le vide législatif résultant de cette paralysie, conformément au texte de l'article 43 de la Loi fondamentale palestinienne qui énonce ce qui suit : « Il incombe au Président de l'Autorité nationale dans des cas de nécessité urgente où aucun report n'est possible et pendant les périodes durant lesquelles le Conseil législatif n'est pas en session, de prendre des décisions qui ont force de loi et de les soumettre au Conseil législatif au cours de la première séance que celui-ci tiendra après la publication de ces décisions, pour qu'elles continuent d'avoir force de loi. Si ces décisions sont présentées au Conseil législatif, comme indiqué précédemment, et que ce dernier ne les approuve pas, elles cesseront également d'avoir force de loi. »

2. Le Directeur général qui relève du ministre compétent et du Directeur général de la sécurité intérieure est chargé de veiller au caractère confidentiel et à l'efficacité des activités de la direction générale de la sécurité préventive.

119. L'article 6 du décret-loi définit les attributions de cet organe et énonce que, tant que cela ne s'oppose pas aux lois en vigueur, la Direction générale de la sécurité préventive est considérée comme chargée de ce qui suit :

1. Veiller à protéger la sécurité intérieure palestinienne;
2. Poursuivre les auteurs d'infractions qui menacent la sécurité intérieure de l'Autorité nationale palestinienne et veiller à empêcher la commission de ces infractions;
3. Sanctionner les infractions qui visent les administrations publiques, les institutions publiques, les organisations et leurs agents.

120. L'article 7 de ce même décret-loi octroie à cette force la qualité de police judiciaire et dispose que les officiers et sous-officiers chargés de la sécurité préventive ont des capacités de police judiciaire pour faciliter l'exercice des compétences prévues par le décret-loi.

121. L'article 8 du décret-loi dispose que les membres de cette force et sa direction sont tenus de surveiller les droits et que la Direction de la sécurité préventive s'attache à respecter les droits, les libertés et les protections énoncés dans le droit palestinien ainsi que dans les instruments et traités internationaux.

122. L'article 9 du décret-loi donne aux services de sécurité préventive des pouvoirs pour établir des centres de détention qui seront définis par le ministre compétent, c'est-à-dire le Ministre de l'intérieur, en coordination avec le Directeur général de la sécurité préventive. Ces derniers doivent prévenir le Ministre de la justice et le parquet de la situation de ces centres et de tout changement introduit.

B. Restrictions, champ d'application et règles en matière de détention, au regard du droit palestinien

123. La législation palestinienne – plus précisément la Loi fondamentale palestinienne telle qu'amendée en 2003 et le Code de procédure pénale n° 3 de 2001 – prévoit des règles et des garanties en matière d'arrestation et de détention.

1. Règles en matière de détention, de fouille et de perquisition au regard de la Loi fondamentale palestinienne

124. La Loi fondamentale palestinienne, telle qu'amendée en 2003, l'équivalent de la constitution de l'Autorité nationale palestinienne, reconnaît un ensemble de restrictions et de garanties que sont tenus d'observer et de respecter ceux qui sont chargés de faire appliquer la loi en matière d'arrestation et de détention. Les garanties les plus importantes prévues par la Loi fondamentale palestinienne sont les suivantes :

1. La liberté de la personne est un droit naturel, garanti et inviolable;
2. Nul ne peut être arrêté, fouillé, détenu, subir des restrictions à sa liberté ou se voir interdire de mouvements, qu'en vertu d'une ordonnance judiciaire émise à son encontre, dans le respect des dispositions de la loi, qui définit également la durée de la détention préventive. La détention et l'incarcération ne

sont autorisées que dans des lieux soumis aux lois relatives à l'organisation des établissements pénitentiaires.

125. L'article 12 de la Loi fondamentale dispose ce qui suit : « Tout individu qui se fait arrêter ou qui est mis en détention doit se faire expliquer la raison de son arrestation et de sa détention. Il doit également se faire expliquer rapidement et en des termes clairs la nature de l'accusation portée contre lui, doit pouvoir contacter un conseil et doit être déféré au tribunal sans tarder ».

126. L'article 13 interdit la torture, comme suit :

1. Aucun individu ne peut être soumis à la coercition ou à la torture : aucun individu arrêté et aucun individu privé de liberté ne doit subir de mauvais traitements;
2. Toute déclaration et tout aveu obtenu de manière contraire aux dispositions du premier paragraphe de l'article 1 seront considérés comme nuls et nonavenus.

127. L'article 17 de la Loi fondamentale dispose ce qui suit : « Les domiciles sont inviolables. Il est interdit de les surveiller, d'y pénétrer ou d'y effectuer une perquisition sans mandat judiciaire dûment émis conformément aux dispositions de la loi. La violation de cet article entraînera la nullité de toute conséquence découlant de celle-ci. Quiconque subit un préjudice à la suite d'une violation des dispositions de cet article sera en droit d'être indemnisé équitablement, ce que garantit l'Autorité nationale palestinienne ».

128. L'article 30 de la Loi fondamentale confirme le droit d'ester en justice, comme suit :

1. Ester en justice est un droit garanti à tous. Tout Palestinien a le droit d'introduire un recours au moyen du système judiciaire. La loi prévoit au niveau des procédures des garanties pour que le tribunal statue à bref délai;
2. Les textes législatifs disposent qu'aucune décision administrative n'est à l'abri d'un contrôle judiciaire;
3. En cas d'erreur judiciaire, l'Autorité nationale est tenue de verser des réparations dont la loi détermine les conditions et les modalités.

129. L'article 32 de la Loi fondamentale prévoit l'imprescriptibilité des atteintes aux droits et aux libertés, comme suit :

« Toute atteinte aux libertés individuelles, au respect de la vie privée et à d'autres droits et libertés générales garantis par la Loi fondamentale ou les autres lois constitue une infraction imprescriptible au regard du droit pénal et du droit civil. L'Autorité nationale offrira un dédommagement équitable à toute personne qui subit un tel préjudice. »

2. Règles en matière d'arrestation, de fouille et de perquisition dans les législations nationales et les instruments internationaux

130. Outre les garanties prévues par la Loi fondamentale palestinienne, les législations palestiniennes en vigueur, à l'instar des instruments internationaux en matière de droits de l'homme, ont adopté une série de garanties et de règles pour

veiller au respect des droits et de la dignité des individus qui sont arrêtés ou qui font l'objet d'une enquête.

a) Règles en matière de détention et d'enquête au regard du Code de procédure pénale

131. Le Code prévoit une série de garanties dont les plus importantes se présentent comme suit :

- D'après l'article 29, un individu ne sera arrêté ou détenu qu'en vertu d'une ordonnance judiciaire dûment émise par l'autorité compétente, dans le respect de la loi. L'individu arrêté doit être traité de manière à ce que sa dignité soit préservée et ne doit subir aucun dommage d'ordre physique ou moral.
- D'après l'article 34, l'agent de la police judiciaire doit écouter sur le champ ce que dit l'individu arrêté et si l'agent n'obtient pas de justification pour le relâcher, il est tenu de le déférer dans les 24 heures devant le procureur compétent.
- D'après l'article 39, la perquisition d'un domicile ne peut se faire que sur un mandat décerné par un procureur ou en sa présence, à la suite d'une allégation portée contre l'habitant du domicile selon laquelle il a commis une infraction ou un délit a participé à sa commission ou s'il existe de fortes présomptions selon lesquelles il dissimule des éléments liés à l'infraction. L'article confirme qu'il importe que le mandat de perquisition soit justifié et comporte le nom d'un ou de plusieurs agents de la police judiciaire.
- L'article 48 dispose que les agents compétents ne pourront pénétrer sans mandat dans un domicile que dans les cas suivants :
 1. Une demande d'aide adressée depuis l'intérieur;
 2. Un incendie ou une noyade;
 3. Flagrant délit;
 4. Un individu ayant fait l'objet d'un mandat d'arrêt s'est enfui du lieu où il a été arrêté en toute légalité et s'est réfugié dans ce domicile.
- L'article 55 confie au Procureur général les pouvoirs d'enquête précisés ci-après :
 1. Le Procureur général a une compétence exclusive en matière d'enquête sur une infraction et de l'action à prendre à cet égard;
 2. Le Procureur général ou son substitut peut charger un agent judiciaire compétent de mener une enquête dans des affaires précises, exception faite de l'interrogatoire à faire subir à un accusé dans des affaires de crime;
 3. Les pouvoirs ne peuvent pas être délégués de manière généralisée;
 4. Le mandataire, dans les limites des pouvoirs qui lui sont délégués, bénéficie de l'ensemble des pouvoirs confiés au substitut du Procureur général.
- L'article 99 du Code de procédure pénale dispose que le substitut du Procureur général soumet l'accusé à une inspection physique avant de lui faire subir un interrogatoire et fait état de toute blessure apparente et de ses causes, le cas échéant.

- L'article 102 du même Code énonce ce qui suit :
 1. Tout suspect a le droit de demander l'assistance d'un conseil pendant l'instruction judiciaire;
 2. Le conseil ne peut prendre la parole durant l'instruction qu'après avoir obtenu la permission du substitut du Procureur général. Si la permission n'est pas accordée, cela doit être indiqué dans la minute;
 3. Le conseil a le droit de consulter l'instruction judiciaire préalablement à l'interrogatoire que subira son client;
 4. Le conseil peut présenter une note sur les observations qu'il aura formulées.
- L'article 103 énonce que le substitut du Procureur général dans les affaires de crime et pour les besoins de l'enquête peut décider d'interdire tout contact avec le suspect pour une durée qui ne dépassera pas 10 jours et qui peut être renouvelée une fois. Cette interdiction ne s'applique pas au conseil, que le suspect peut contacter quand bon lui semble, sans restriction et sans surveillance.
- L'article 108 énonce également que le substitut du Procureur général peut faire détenir l'individu après son interrogatoire pendant 48 heures et demander la prolongation de la durée de la détention par le tribunal, en application de la loi. L'agent de la police judiciaire doit immédiatement transférer le détenu au poste de police. Si le chef du poste de police a affaire à un individu qui a été arrêté sans mandat d'arrêt, il doit immédiatement enquêter sur les raisons qui ont entraîné cette détention. La garde à vue ne doit en aucun cas dépasser les 24 heures. Le Ministère public doit être prévenu sur le champ.
- L'article 125 dispose également que nul ne sera arrêté ou incarcéré ailleurs que dans des prisons et les lieux de détention prévus par la loi. Le responsable d'un centre ne peut accepter un détenu qu'en vertu d'une ordonnance émise par l'autorité compétente et ne peut pas le détenir au-delà de la période qui y est précisée. S'il y a une décision de libération sous caution, l'agent qui a procédé à l'arrestation et le directeur de la prison doivent libérer le prisonnier, mettre fin à son incarcération et veiller à ce qu'il ne soit pas arrêté ou détenu pour un autre motif.
- L'article 126 dispose que les prisons seront inspectées par plusieurs organes : le Ministère public et les présidents des tribunaux de première instance et des cours d'appel doivent surveiller les prisons et lieux de détention qui se trouvent dans leur juridiction pour veiller à ce qu'aucun détenu ne soit incarcéré de façon illégale. Ils sont tenus d'examiner les registres du centre ainsi que les mandats d'arrêt, d'en faire des copies, de se mettre en contact avec l'individu incarcéré et d'écouter toute plainte dont il pourrait leur fait part. Les directeurs et les responsables doivent présenter toute l'aide possible aux détenus pour qu'ils obtiennent les renseignements nécessaires.

b) Règles de détention dans le cadre des instruments internationaux relatifs aux droits de l'homme

132. L'article 3 de la Déclaration internationale des droits de l'homme énonce que tout individu a droit à la vie, à la liberté et à la sûreté de sa personne. L'article 5

dispose que « nul ne sera soumis à la torture, ni à des peines ou traitements cruels, inhumains ou dégradants ». L'article 9 dispose que « nul ne peut être arbitrairement arrêté, détenu ou exilé ».

133. Les mêmes garanties sont citées dans le Pacte international relatif aux droits civils et politiques, dont l'article 7 énonce que « nul ne sera soumis à la torture ni à des peines ou traitements cruels, inhumains ou dégradants. En particulier, il est interdit de soumettre une personne sans son libre consentement à une expérience médicale ou scientifique ». L'article 9 énonce :

1. Tout individu a droit à la liberté et à la sécurité de sa personne. Nul ne peut faire l'objet d'une arrestation ou d'une détention arbitraire. Nul ne peut être privé de sa liberté, si ce n'est pour des motifs, et conformément à la procédure prévus par la loi;
2. Tout individu arrêté sera informé, au moment de son arrestation, des raisons de cette arrestation et recevra notification, dans le plus court délai, de toute accusation portée contre lui;
3. Tout individu arrêté ou détenu du chef d'une infraction pénale sera traduit dans le plus court délai devant un juge ou une autre autorité habilitée par la loi à exercer des fonctions judiciaires, et devra être jugé dans un délai raisonnable ou libéré. La détention de personnes qui attendent de passer en jugement ne doit pas être de règle, mais la mise en liberté peut être subordonnée à des garanties assurant la comparution de l'intéressé à l'audience, à tous les autres actes de la procédure et, le cas échéant, pour l'exécution du jugement;
4. Quiconque se trouve privé de sa liberté par arrestation ou détention a le droit d'introduire un recours devant un tribunal afin que celui-ci statue sans délai sur la légalité de sa détention et ordonne sa libération si la détention est illégale;
5. Tout individu victime d'arrestation ou de détention illégale a droit à réparation.

134. L'article 10 du Pacte indique que « Toute personne privée de sa liberté est traitée avec humanité et avec le respect de la dignité inhérente à la personne humaine ».

135. L'ensemble des principes pour la protection de toutes les personnes soumises à une forme quelconque de détention ou d'emprisonnement, qui ont été adoptés par l'Assemblée générale et annexés à la résolution 43/173 de l'Assemblée générale en date du 9 décembre 1988, prévoit des règles pour les procédures de détention ou d'emprisonnement.

136. Les principes les plus importants sur le plan des règles d'emprisonnement et d'instruction judiciaire se présentent comme suit :

- Toute personne soumise à une forme quelconque de détention ou d'emprisonnement est traitée avec humanité et avec le respect de la dignité inhérente à la personne humaine;
- Les mesures d'arrestation, de détention ou d'emprisonnement ne sont appliquées qu'en stricte conformité avec les dispositions de la loi et par les autorités compétentes ou les personnes habilitées à cet effet;

- Toute forme de détention ou d'emprisonnement et toute mesure mettant en cause les droits individuels d'une personne soumise à une forme quelconque de détention ou d'emprisonnement doivent être décidées soit par une autorité judiciaire ou autre, soit sous son contrôle efficace;
- Aucune personne soumise à une forme quelconque de détention ou d'emprisonnement ne sera soumise à la torture ni à des peines ou traitements cruels, inhumains ou dégradants. Aucune circonstance quelle qu'elle soit ne peut être invoquée pour justifier la torture ou toute autre peine ou traitement cruel, inhumain ou dégradant;
- Les États devraient édicter des lois interdisant tous actes qui violeraient les droits et devoirs énoncés dans ces principes, prévoir des sanctions appropriées contre les auteurs de ces actes et enquêter impartialement en cas de plainte;
- Les personnes détenues sont soumises à un régime approprié à leur condition de personnes non condamnées. Elles sont donc, chaque fois que possible, séparées des personnes emprisonnées;
- Les autorités qui arrêtent une personne, la maintiennent en détention ou instruisent l'affaire doivent exercer strictement les pouvoirs qui leur ont été conférés par la loi, et l'exercice de ces pouvoirs doit pouvoir faire l'objet d'un recours devant une autorité judiciaire ou autre;
- Une personne ne sera pas maintenue en détention sans avoir la possibilité effective de se faire entendre sans délai par une autorité judiciaire ou autre. Une personne détenue a le droit d'assurer sa propre défense ou d'être assistée d'un conseil conformément à la loi;
- Toute personne se verra fournir, au moment de l'arrestation et au début de la détention ou de l'emprisonnement ou peu après, par les autorités responsables de l'arrestation, de la détention ou de l'emprisonnement, selon le cas, des renseignements et des explications au sujet de ses droits ainsi que de la manière dont elle peut les faire valoir;
- La communication de la personne détenue ou emprisonnée avec le monde extérieur, en particulier avec sa famille ou son conseil, ne peut être refusée pendant plus de quelques jours;
- Toute personne détenue pourra bénéficier de l'assistance d'un avocat. L'autorité compétente l'informerá de ce droit promptement après son arrestation et lui fournira des facilités raisonnables pour l'exercer;
- Toute personne détenue ou emprisonnée a le droit de recevoir des visites, en particulier de membres de sa famille, et de correspondre, en particulier avec eux, et elle doit disposer de possibilités adéquates de communiquer avec le monde extérieur, sous réserve des conditions et restrictions raisonnables que peuvent spécifier la loi ou les règlements pris conformément à la loi;
- Il est interdit d'abuser de la situation d'une personne détenue ou emprisonnée pour la contraindre à avouer, à s'incriminer de quelque autre façon ou à témoigner contre toute autre personne;
- Toute personne détenue ou emprisonnée se verra offrir un examen médical approprié dans un délai aussi bref que possible après son entrée dans le lieu de détention ou d'emprisonnement; par la suite, elle bénéficiera de soins et

traitements médicaux chaque fois que le besoin s'en fera sentir. Ces soins et traitements seront gratuits;

- Les lieux de détention doivent être inspectés régulièrement par des personnes qualifiées et expérimentées, nommées par une autorité compétente distincte de l'autorité directement chargée de l'administration;
- La personne détenue ou son conseil aura le droit d'introduire à tout moment un recours, conformément au droit interne, devant une autorité judiciaire ou autre afin de contester la légalité de la mesure de détention et d'obtenir sa mise en liberté sans délai, si cette mesure est irrégulière;
- Si une personne détenue ou emprisonnée vient à décéder ou à disparaître pendant la période de sa détention ou de son emprisonnement, une autorité judiciaire ou autre ordonnera une enquête sur les causes du décès ou de la disparition, soit de sa propre initiative, soit à la requête d'un membre de la famille de cette personne ou de toute personne qui a connaissance de l'affaire. Si les circonstances le justifient, une enquête sera conduite dans les mêmes conditions de procédure lorsque le décès ou la disparition survient peu après la fin de la période de détention ou d'emprisonnement. Les résultats ou le rapport d'enquête seront rendus disponibles si la demande en est faite, à moins qu'une telle décision ne compromette une instruction criminelle en cours;
- Toute personne détenue soupçonnée ou inculpée d'une infraction pénale est présumée innocente et doit être traitée en conséquence jusqu'à ce que sa culpabilité ait été légalement établie au cours d'un procès public pour lequel elle aura reçu toutes les garanties nécessaires à sa défense. Toute personne ainsi soupçonnée ou inculpée ne peut être arrêtée ou détenue en attendant l'ouverture de l'instruction et du procès que pour les besoins de l'administration de la justice, pour les motifs, sous les conditions et conformément aux procédures prévues par la loi. Sont interdites les contraintes imposées à une telle personne qui ne seraient pas strictement nécessaires soit aux fins de la détention, soit pour empêcher qu'il ne soit fait obstacle au déroulement de l'instruction ou à l'administration de la justice, soit pour assurer la sécurité et le maintien de l'ordre dans le lieu de détention.

C. Atteintes aux droits de l'homme commises par les services palestiniens de sécurité lors de l'arrestation et de la détention

137. Pour être en mesure de déterminer la nature et l'ampleur des violations citées dans le rapport Goldstone, la Commission a contacté l'ensemble des organisations de défense des droits de l'homme qui surveillent ces violations en Cisjordanie et qui réunissent des informations fiables à leur sujet, telles que Al-Haq, l'Association al-Damir des droits de l'homme, la Commission indépendante des droits de l'homme, le Centre de Jérusalem pour l'assistance juridique et le Centre de soins et de réadaptation des victimes de la torture, l'objectif étant d'obtenir les informations, les rapports, les déclarations et les interventions faites par ces organisations à cet égard.

138. L'ensemble des rapports, témoignages et déclarations recueillis par la Commission indiquent que les agents chargés d'appliquer la loi en Cisjordanie ainsi que les services de sécurité ont bien commis un certain nombre de violations au

cours des procédures liées aux arrestations et aux détentions, qu'on peut résumer comme suit :

1. Les arrestations étaient liées à la situation politique palestinienne, du fait qu'elles visaient en Cisjordanie des membres, des partisans ou des sympathisants du Hamas, ou encore des adhérents de groupes ou de forces politiques alliés au Mouvement ou proches de lui;
2. Les procédures légales en vigueur n'ont pas été respectées par les membres des services de sécurité au cours de la majeure partie des arrestations et des détentions qui ont eu lieu en Cisjordanie;
3. Les personnes arrêtées ou placées en détention ont subi de mauvais traitements et ont été soumises à des pratiques cruelles;
4. Les détenus n'ont pas été déférés devant le Bureau du Procureur dans les délais prescrits, en application du Code de procédure pénale palestinien;
5. Les détenus civils ont été déférés devant un tribunal militaire;
6. Les agents des services des organes de sécurité se sont abstenus, parfois délibérément, d'appliquer les ordonnances de mise en liberté émanant des tribunaux ordinaires, voire ont commis une fraude dans l'exécution d'une décision judiciaire, lorsqu'ils ont procédé dans certains cas à des libérations symboliques;
7. Les détenus ont été soumis à la torture et à d'autres traitements dégradants et humiliants, l'objectif étant d'obtenir d'eux des aveux ou des dénonciations.

1. Plaintes reçues par la Commission en matière de violations liées à la détention

139. La Commission a reçu des associations palestiniennes de défense des droits de l'homme, des blocs parlementaires, des proches des détenus et d'anciens détenus quelque 165 plaintes portant sur les atteintes aux droits de l'homme commises au cours des arrestations et des détentions par les agents chargés de faire respecter la loi et les membres des services de sécurité palestiniens en Cisjordanie, outre les 85 plaintes personnelles directement recueillies en Cisjordanie¹².

140. La Commission d'enquête s'est penchée sur ces plaintes et leurs annexes et estime qu'il y a là matière à corroborer les allégations en matière de violations des droits de l'homme et des libertés commises par les agents chargés de faire appliquer la loi en Cisjordanie dans le cadre des arrestations et des détentions qui ont eu lieu, comme le confirment également les témoignages des personnes qui ont été entendues par la Commission¹³ au sujet des violations qu'auraient commises les agents chargés de procéder à des détentions et à des arrestations en Cisjordanie, violations qui se présentent comme suit :

¹² La liste de toutes les plaintes recueillies par la Commission figure en pièce jointe.

¹³ La Commission a entendu 22 témoins dans le cadre des plaintes liées à la détention.

a) Non-respect par les membres des organes de sécurité des règles de compétence pour ce qui est du pouvoir d'arrestation et de détention

141. Il apparaît d'après la teneur des plaintes et des séances d'audition tenues par la Commission que les services palestiniens de renseignement militaire ont exercé ces compétences aux côtés des membres de la police, ainsi que des services de renseignements généraux et de la sécurité préventive. Les services de renseignement militaire ont fait arrêter des personnes et les ont détenues en leur siège¹⁴, tout en sachant que la loi ne les autorise à placer en détention que des militaires et non pas des civils.

142. La plupart des services de sécurité, qu'ils aient ou pas la qualité d'autorité judiciaire leur permettant de procéder à des arrestations, n'ont pas respecté le Code de procédure pénale palestinien n° 3 de 2001 qui dispose qu'une arrestation ne peut avoir lieu sans l'obtention au préalable d'un mandat judiciaire. D'après les déclarations recueillies par la Commission au cours des auditions, aucun mandat d'arrêt émis par les autorités compétentes n'a été produit. Les personnes recherchées ont été arrêtées chez elles, sur leur lieu de travail ou sur la voie publique et emmenées de force au bureau des forces de sécurité. Les arrestations ont eu lieu au moyen de mesures de répression et de recours à la force. À d'autres occasions, des personnes ont été sommées à la suite d'un coup de téléphone de se rendre au siège de l'organe de sécurité, puis appréhendées et arrêtées sur le champ¹⁵.

143. L'article 125 du Code de procédure pénale énonce que la mise en détention ou l'emprisonnement ne peuvent se dérouler ailleurs que dans un lieu consacré à cet effet, à savoir les centres de redressement et de réinsertion ou les centres d'arrestation et de détention relevant des services qui ont qualité d'autorité judiciaire, c'est-à-dire les services des renseignements généraux palestiniens ou le Service organes de sécurité préventive. Les services de sécurité n'ont pas respecté cette disposition et ont placé en détention des dizaines de personnes qui avaient été arrêtées dans les bureaux des services de renseignement militaire, sachant que ces bureaux ne sont pas considérés au regard des lois palestiniennes comme des lieux consacrés à l'arrestation et la détention de civils.

144. Les services de sécurité n'ont pas respecté l'obligation de montrer un mandat au cours des perquisitions de domicile et bon nombre l'ont été sans que les agents ne présentent un mandat judiciaire, ce qui constitue une nette violation du principe d'inviolabilité des domiciles.

b) Recours à la violence, aux mauvais traitements, aux coups et à l'humiliation lors de l'arrestation

145. Outre le recours à la force et la violence, les agents des services de sécurité ont procédé à nombre d'arrestations de façon dégradante et infamante. Il ressort de l'ensemble des déclarations recueillies par la Commission auprès de personnes

¹⁴ Onze personnes ont témoigné au cours des auditions avoir été détenues et arrêtées par les services de renseignement militaire ou avoir un proche qui s'était retrouvé dans cette situation. Ces déclarations ont été recueillies par la Commission et portent les cotes S-D-3/2010, S-D-4/2010, ayn-t-D-11/2010, ayn-t-D-12/2010, ayn-t-D-13/2010, ayn-t-D-14/2010, ayn-t-D-15/2010, ayn-t-D-17/2010, ayn-t-D-21/2010, ayn-t-D-25/2010 et ayn-t-D-26/2010.

¹⁵ Cette situation a été corroborée par la plupart des déclarations recueillies par la Commission, notamment celles portant les cotes S/D-4/2010, S/D-3/2010, ayn-t-D-12/2010, ayn-t-D-21/2010, ayn-t-D-23/2010 et ayn-t-D-25/2010.

arrêtées ou de leurs proches à propos des faits entourant les arrestations que les services palestiniens de sécurité n'ont dans l'ensemble pas respecté les règles et procédures applicables en matière d'arrestation, en particulier celles qui enjoignent de traiter la personne décemment et d'éviter les coups, les insultes et le recours à la violence.

c) Non-respect par les services susmentionnés des textes législatifs régissant la durée de la garde à vue

146. Comme cité précédemment, sur le fondement des législations palestiniennes en vigueur, l'autorité judiciaire peut placer un individu en garde à vue pendant 24 heures dans des conditions normales, période au terme de laquelle il doit immédiatement être relâché ou déféré devant le parquet ou un tribunal compétent qui statuera sur son sort.

147. Force est de constater qu'au cours de la plupart des arrestations pour lesquelles la Commission dispose de renseignements complets, les organes de sécurité n'ont pas respecté ce délai et n'ont pas appliqué la loi en vigueur, du fait que la durée de la garde à vue de nombre de personnes a dépassé les délais prescrits par la loi et qu'aucune de ces personnes n'a été déférée devant le parquet ou un tribunal compétent, comme cela aurait dû être le cas.

d) Non-respect des décisions des tribunaux liées à la libération des personnes arrêtées

148. D'après 8 des 22 plaignants qui ont été entendus par la Commission, les services de sécurité (service préventive, renseignements généraux et renseignement militaire) n'ont pas exécuté les décisions rendues par les tribunaux s'agissant de la libération des personnes arrêtées ou de leur libération sous caution. Certaines sont donc restées en détention malgré des décisions de justice ordonnant leur libération. Dans d'autres cas, il y a eu fraude par rapport aux décisions portant sur la libération des détenus : certains services de sécurité ont exécuté l'ordonnance du tribunal puis ont appréhendé et placé en détention la personne qui venait d'être relâchée par un autre organe de sécurité. D'autres organes ont appliqué la décision de justice puis, alors que la personne sortait du bureau des services de sécurité, l'ont arrêtée de nouveau, sous un nouveau prétexte. La personne a donc été arrêtée une deuxième fois par le même service, pour un autre chef d'accusation.

149. Dans d'autres cas, la fraude a consisté à faire arrêter de nouveau sur le champ un individu en vertu d'un nouveau mandat d'arrêt décerné par le ministère public ou le chef de la magistrature militaire.

150. Pour démontrer la façon dont les services de sécurité traitent les décisions des tribunaux, notamment celles de la Haute Cour de justice, nous citons ci-après des extraits des déclarations des plaignants qui ont été entendus à cet égard : une des victimes a déclaré ce qui suit : « [...] Le 11 septembre 2008, la Haute Cour de justice a ordonné ma libération. Dès la réception de cette ordonnance, j'ai été effectivement libéré. Lorsque j'ai franchi la porte du centre de détention, une voiture banalisée s'est approchée de moi. Un des passagers m'a montré une carte des renseignements généraux et m'a demandé de monter dans la voiture, qui a effectué un trajet de 15 minutes. J'ai été ensuite transféré dans un centre des renseignements généraux où on m'a demandé de remettre mes effets personnels et où j'ai subi une nouvelle détention de huit jours. J'ai été ensuite relâché après m'être engagé par écrit à

respecter la loi [...] J'ai été détenu par le service de sécurité préventive [...] Le 15 juillet 2009, un ordre de libération a été prononcé en ma faveur par la Haute Cour de justice et j'ai été libéré le 26 juillet 2009 [...] »¹⁶

151. On trouve ce qui suit dans une déclaration : « [...] J'avais fait appel de la décision d'arrestation rendue à mon encontre par la Haute Cour de justice. Le 4 octobre 2009, elle a ordonné ma libération. À peine avais-je franchi la porte de la prison que j'ai été arrêté une deuxième fois. »¹⁷

152. On trouve ce qui suit dans une autre déclaration : « [...] Le 8 avril 2009, mon mari a été arrêté par les renseignements militaires et transféré à la prison de Junaid à Naplouse [...] J'ai été avisée que sa libération avait été ordonnée par la Haute Cour de Justice le 22 novembre 2009, mais la décision n'a toujours pas été appliquée à ce jour. Après l'ordonnance de libération, mon mari a été déféré devant un tribunal militaire et condamné le 19 janvier 2010 à une peine de quatre ans de prison [...] »¹⁸

153. S'agissant de la façon dont les services de sécurité traitent les jugements rendus par les tribunaux civils, un plaignant a déclaré ce qui suit : « [...] Le 2 janvier 2009, j'ai été arrêté par les services de renseignement militaire dans la ville de Salfit et placé en détention pendant 13 mois [...] J'ai déposé un recours auprès de la Haute Cour, qui a ordonné ma libération. J'ai été libéré trois mois après la date de la publication de la décision de la Haute Cour [...] »¹⁹

154. Dans une autre déclaration sur la façon dont les services de sécurité contournent les décisions des tribunaux, le plaignant a déclaré ce qui suit : « [...] La Haute Cour a ordonné ma libération le 2 décembre 2009 mais le service de sécurité préventive n'a pas obtempéré. Je leur avais moi-même porté l'ordonnance de libération, sur les lieux même de ma détention. On m'a envoyé au bureau des renseignements généraux pour qu'ils appliquent la décision, mais après avoir étudié mon cas, ils m'ont dit que la décision ne les concernait pas et qu'elle s'adressait au service de la sécurité préventive [...] »²⁰

e) Torture, coups et autres mauvais traitements pendant l'interrogatoire et l'enquête

155. D'après les déclarations entendues par la Commission, il apparaît que nombre de personnes ont été soumises à des coups, à la torture ou ont subi des traitements dégradants pendant les diverses étapes de la détention en vue de l'obtention d'informations, d'aveux ou de dénonciations.

156. Toutes les déclarations obtenues par la Commission indiquent clairement que les services de sécurité ont recouru à plusieurs moyens de pression pour arracher aux détenus des aveux ou des confessions, comme suit :

¹⁶ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote S/D-4/2010.

¹⁷ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote ayn-t-D-12/2010.

¹⁸ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote ayn-t-D-11/2010.

¹⁹ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote ayn-t-D-15/2010.

²⁰ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote ayn-t-D-21/2010.

- Passages à tabac s’accompagnant de coups de pieds, de coups de poing et de gifles;
- Passages à tabac collectifs;
- Flagellation au moyen de tuyaux d’arrosage;
- Recours à la pratique dite du « shabah » : le détenu a les mains liées derrière le dos puis est tiré vers le haut. Les cordes sont attachées à une porte, une fenêtre ou un autre objet, de manière à ce que le détenu soit pratiquement suspendu en l’air. Il est maintenu dans cette posture pendant de longues périodes, pouvant durer plusieurs jours et n’a que de courts moments de répit;
- Insultes et humiliation;
- Menaces et intimidation;
- Séquestration dans un étroit cachot mesurant 1 mètre de long, 2 mètres de large et 3 mètres de profondeur;
- Privation de lit, de draps et de couvertures;
- Longues séances d’interrogatoire la nuit, jusqu’à l’aube;
- Privation de sommeil;
- Refus d’administrer des soins médicaux;
- Coups de bâton sur la plante des pieds du détenu qui est enchaîné et dont les pieds sont surélevés. Il est donc battu à intervalles irréguliers, puis forcé à marcher pour empêcher toute congestion.

157. S’agissant de la cruauté de ces pratiques et de la torture auxquelles sont soumis les détenus, un plaignant a déclaré ce qui suit : « [...] Le 31 janvier 2009, j’ai été arrêté par le service de sécurité à Hébron et placé en détention jusqu’au 26 février environ, soit 18 jours dans un cachot sans lit ni couverture. J’ai été soumis à la torture, ayant été notamment accroché à une porte et privé de sommeil pendant cinq jours. L’interrogatoire a porté sur mes activités à l’université [...] Il y a lieu de mentionner qu’une semaine avant mon arrestation, j’avais été soigné par un rhumatologue, qui avait conclu à des carences en vitamines B12. J’avais donc reçu une injection par jour pendant trois mois. Pendant ma détention, je n’ai pas pu en obtenir, alors qu’il m’en fallait. Je n’en ai reçu que trois, les derniers jours de ma détention [...] Lorsque je m’étais fait examiner par un médecin au moment de mon arrestation, il avait déterminé que j’avais besoin de ces injections. Mais celui qui m’a soumis aux interrogatoires m’a dit qu’il souhaitait ma mort et que je ne recevrais aucun traitement. Il m’a arraché des aveux en échange d’un traitement [...] À la suite de ma dernière arrestation, faite le 6 septembre 2009 par les services de renseignements généraux à Hébron, j’ai été placé en détention jusqu’au 12 septembre 2009, au cours de laquelle j’ai été torturé, soumis à la pratique du “shabah”, installé sur une chaise, accroché à une porte, battu et soumis à d’autres formes de torture, par exemple ils ont placé un serpent sur mon corps et n’ont cessé de répéter qu’il était affamé et avait besoin de nourriture, et m’ont fait subir une nouvelle forme de torture, qui a consisté à descendre la partie inférieure de mon corps dans un puits, au centre des renseignements généraux, avec la menace de m’y jeter si je n’avouais pas [...] »²¹

²¹ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote ayn-t-D-26/2010.

158. Au cours d'une autre déposition, un plaignant a déclaré à la Commission d'enquête ce qui suit : « [...] J'ai été arrêté par les services de sécurité préventive [...] Quand que je suis entré dans le bureau de l'enquêteur, il m'a demandé pourquoi je ne l'avais pas salué. J'ai répondu que j'avais l'esprit confus. Il m'a répondu : "Je vais te montrer!". Il a appelé un soldat qui m'a immobilisé par l'arrière, tandis que l'enquêteur me rouait de coups. Le soldat m'a escorté dans la cour des tortures où l'enquêteur m'a de nouveau roué de coups, notamment sur la partie inférieure, jusqu'à ce que je m'écroule à terre. J'avais du sang qui coulait de la bouche et du nez, j'ai failli m'évanouir. On m'a obligé à me laver le visage, afin que je reprenne mes esprits. J'ai ensuite été remis dans la position du "shabah". Alors que j'étais torturé, j'ai vu qu'ils torturaient aussi d'autres détenus. La torture a duré un mois, entre le cachot où j'avais été mis au secret et la position du "shabah". J'ai été roué de coups, obligé de me tenir debout pendant quatre jours. Je n'ai eu de répit que pendant la prière et le temps des repas, pendant toute la durée de la détention [...] »²²

159. D'après une autre déclaration : « [...] Le 1^{er} mars 2009, j'ai été arrêté par les renseignements généraux rue Irsal, à Ramallah. L'enquêteur a appelé un soldat et lui a dit : « Emmène Ahmed dans sa suite privée ». Ils m'ont mis dans un sombre cachot d'un mètre sur deux, sans lit ni matelas. J'y suis resté jusqu'au lendemain. J'ai dormi à même le sol, il faisait extrêmement froid. Un soldat m'a ensuite mis des menottes aux mains, qu'il m'a ligotées derrière le dos. Il m'a ensuite attaché à une fenêtre au mur et m'a levé les bras jusqu'à ce qu'ils atteignent la partie supérieure de la fenêtre. J'étais suspendu, mes orteils touchaient à peine le sol. Ils ont poussé mes chaussures, de façon à ce que je sois suspendu. Je suis resté dans cette position du lundi au jeudi. Le samedi, après la pause du vendredi, ils m'ont jeté à terre, m'ont enfoncé un morceau de tissu dans la bouche, ont mis un bandeau sur mes yeux, m'ont attaché les pieds à un Kalachnikov et ont apporté un tuyau rigide en plastique. Deux d'entre eux m'ont soulevé les pieds et l'agent s'est mis à me frapper sur la plante des pieds après m'avoir déchaussé. Cinq personnes s'y sont succédé tour à tour pour m'administrer cette bastonnade, jusqu'à ce qu'elles soient épuisées. Ils ont renversé de l'eau par terre et m'ont demandé de sauter pieds nus. Je n'arrivais plus à le faire, mes pieds étaient bleus. Ils m'ont rossé de coups [...] Une autre fois, ils m'ont fait subir le même sort pendant plus de deux heures. Mes pieds ont tellement enflé que j'en ai perdu les ongles. Cette situation a duré de 20 à 25 jours [...] Une nuit, un soldat, un certain "Rami", a continué à m'assener des coups sur la partie du corps qui était tuméfiée [...] »²³

160. Un autre plaignant a déclaré ce qui suit : « [...] Le 2 avril 2009, j'ai été arrêté dans une école privée, l'Académie du saint Coran, qui relève du Comité Zakat de Naplouse, où je travaillais. J'ai été emmené à la prison de Junaid, où j'ai été placé en détention par les services de sécurité préventive. J'ai été soumis à la torture, au "shabah" de façon persistante, privé de sommeil, roué de coups, à tel point que j'ai eu l'orteil du pied droit fracturé [...] »²⁴.

²² Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote ayn-t-D-23/2010.

²³ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote ayn-t-D-22/2010.

²⁴ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote ayn-t-D-17/2010.

161. Dans une autre déclaration, un plaignant a déclaré : « [...] En juillet 2009, ils m'ont directement mis au cachot sans m'interroger. Ils ont appliqué la torture du "shabah", j'avais un bandeau sur les yeux. Ils m'ont battu à tour de rôle, sept fois, avec des tubes. J'ai hurlé, je leur ai dit que j'étais journaliste, qu'ils n'avaient pas à me traiter de la sorte. Ils m'ont frappé au visage. J'ai réussi à ôter les liens qui me serraient les mains et arraché le masque qui me couvrait le visage. Mon tortionnaire a fait un pas en arrière et a appelé son supérieur. J'ai vu à ce moment là une dizaine de personnes qui étaient en train d'être torturées et soumises à la pratique du "shabah" Deux policiers sont arrivés, m'ont jeté au sol et m'ont roué de coups. J'ai continué de hurler jusqu'à ce que le chef de l'interrogatoire arrive. Il m'a giflé à son tour. Quand j'ai demandé pourquoi j'étais battu, il m'a dit de ne pas discuter et de me taire. Il m'a ensuite attaché les mains et soumis de nouveau à la pratique du "shabah" [...] »²⁵

162. Parmi les dépositions importantes obtenues par la Commission sur les circonstances de l'arrestation, de la détention, ainsi que de la nature des pratiques infligées aux détenus par le service de sécurité, citons la déclaration du docteur Mahmoud Sahwail, Directeur du Centre de soins et de réadaptation des victimes de la torture, une des organisations de défense des droits de l'homme chargée de surveiller et de recueillir des documents sur la torture. Il a déclaré que son organisation avait procédé à une enquête sur le terrain grâce à 50 détenus qui avaient été libérés. Après que toutes les personnes participant à l'enquête ont répondu aux questions qui leur avaient été adressées, le Centre a établi les indicateurs et les conclusions suivants²⁶ :

- 8,9 % des personnes interrogées ont rapporté qu'au moment de leur arrestation, elles avaient été battues devant des membres de leur famille;
- 37,8 % ont déclaré avoir été soumises à des humiliations, des insultes et des menaces pendant leur transfert jusqu'aux lieux d'arrestation et de détention;
- La plupart des personnes interrogées ont déclaré que les arrestations avaient eu lieu au milieu de la nuit, ce qui avaient choqué et effrayé leurs proches;
- 86 % des personnes interrogées disent avoir été relâchées après avoir subi un interrogatoire, mais sans qu'il soit tenu compte des délais prescrits par la loi, ce qui signifie que la libération des détenus n'a pas eu lieu en fonction des délais prescrits par la loi régissant les arrestations, la détention, l'interrogation et l'enquête sur les personnes, mais a été dictée par le temps qu'il a fallu à l'enquêteur pour obtenir des aveux;
- S'agissant de la torture subie, les personnes qui ont participé à l'enquête ont déclaré que les services de renseignement militaire étaient ceux qui y recouraient le plus, suivis par les services des renseignements généraux, et que le service de sécurité préventive venait en troisième position. Il faut néanmoins préciser que la sécurité préventive a usé de méthodes plus sélectives, privilégiant le type de torture plutôt que le volume et la quantité, et a recouru à des méthodes de pression permettant d'obtenir rapidement des aveux et des inculpations.

²⁵ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote S-D-5/2010.

²⁶ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote m/D-32/2010.

163. Types de torture :

- Violents coups et blessures;
- Soumission prolongée à la pratique du « shabah »;
- Torture au moyen de l'eau et des courants d'air froid et chaud;
- Brûlure au moyen de cigarettes;
- Strangulation.

Les détenus ont été soumis aux modes de torture psychologique suivants :

- Mise au secret;
- Privation de sommeil;
- Privation d'eau;
- Interdiction de faire ses besoins;
- Absence de suivi ou de soins médicaux;
- Privation de visites.

164. Le pire, pour les détenus soumis à la torture, a été les coups violents et les traitements dégradants : 48 % d'entre eux ont dit qu'ils souhaitaient se venger de leurs bourreaux tandis que 77 % ont déclaré qu'ils ressentaient de la colère et de la rancune à la suite des mauvais traitements qu'ils avaient subis.

D. Avis de la Commission sur les mesures d'arrestation et de détention appliquées en Cisjordanie

165. Il apparaît clairement d'après les faits établis par la Commission au sujet des arrestations qui ont été faites en Cisjordanie que nombre d'entre elles ont entraîné des violations de la part des organes chargés d'appliquer la loi et qu'elles étaient contraires aux règles applicables et aux garanties prévues par la loi. On trouvera ci-après les points les plus importants dégagés par la Commission à partir des témoignages recueillis à la suite des auditions qu'elle a tenues, ainsi que des données obtenues auprès des organisations palestiniennes de défense des droits de l'homme.

166. La position des organisations de la société civile palestinienne et celle de l'Autorité nationale palestinienne sont divergentes : toutes les organisations entendues par la Commission estiment que les campagnes d'arrestation menées par les organes de sécurité ont entraîné des arrestations arbitraires qui visaient l'ensemble des sympathisants du Hamas et d'autres mouvements islamiques. Les organes officiels réfutent cette allégation et écartent toute suggestion selon laquelle des personnes auraient été arrêtées en fonction de leur appartenance politique; ils affirment que toutes les personnes qui ont été placées en détention en Cisjordanie étaient soupçonnées d'avoir commis des actes illégaux ou mettant en danger la sécurité et l'ordre public.

167. La Commission, sur la base des auditions qu'elle a tenues et des documents qu'elle a obtenus, estime que les arrestations de sympathisants du Hamas et d'autres personnes par les services de sécurité palestiniens ont eu lieu en réaction aux dissensions politiques entre le Mouvement de libération nationale Fatah et le Hamas,

du fait que la majeure partie d'entre elles étaient motivées par l'affiliation politique des personnes, et que ces arrestations peuvent donc être qualifiées d'illégales.

168. Il ressort clairement de l'ensemble des plaintes déposées et des audiences organisées par la Commission que la majeure partie des plaintes pour torture, mauvais traitements et coups concernent le service de sécurité préventive, les services des renseignements généraux et tout particulièrement les services de renseignement militaire.

169. La négligence du Bureau du Procureur apparaît clairement dans le rôle qui est le sien au regard de la loi, du fait qu'au titre de l'article 126 du Code de procédure pénale palestinien n° 3 de 2001, ses membres sont tenus d'enquêter sur les prisons et autres lieux de détention relevant de leur juridiction pour veiller à ce que nul ne soit détenu ou arrêté de manière illégale. Ils doivent également veiller à consulter les registres, les mandats d'arrêt et les ordres de détention, en faire des copies et contacter les détenus et les prisonniers pour écouter toutes leurs plaintes. Les directeurs et les responsables doivent offrir toute l'aide requise aux personnes qui cherchent à obtenir des renseignements.

170. Il appartenait donc au Bureau du Procureur non seulement d'intervenir pour empêcher les arrestations et les détentions qui avaient lieu hors des prisons mais aussi d'engager des poursuites publiques contre quiconque violait cet état de fait et commettait une infraction. Il a également été établi que le Bureau du Procureur n'était pas intervenu pour empêcher les membres des forces de sécurité, notamment du renseignement militaire, d'usurper les pouvoirs des organes qui, au regard de la loi, ont qualité de police judiciaire, surtout si l'on considère que les services palestiniens de sécurité, en vertu du code palestinien régissant les tribunaux militaires, n'ont pas qualité de police judiciaire dans les affaires impliquant des militaires.

171. Pour cette raison, les services du renseignement militaire n'ont pas les compétences requises pour faire office de police judiciaire, qu'il s'agisse d'arrestations, de détentions ou de perquisitions de domicile.

172. Il ressort clairement que les atteintes à la dignité humaine, notamment les mauvais traitements infligés au cours des arrestations, les coups, les insultes, les humiliations et la soumission des personnes arrêtées à la torture ou à une pression physique ou psychologique pour leur arracher des aveux ou les obliger à reconnaître les allégations dont elles faisaient l'objet ne sont pas des cas isolés d'individus se comportant de la sorte dans les centres de détention et d'enquête du service de sécurité préventive, des renseignements généraux et du renseignement militaire.

173. Le fait que ces pratiques se soient produites dans un certain nombre de centres d'arrestation et de détention en Cisjordanie signifie qu'il y a eu des violations claires de la part des services de sécurité des dispositions de l'article 13 de la Loi fondamentale palestinienne, aux termes de laquelle « aucun individu ne peut être soumis à la coercition ou à la torture » et « aucun individu arrêté et aucun individu privé de liberté ne doit subir de mauvais traitements ».

174. Les services de sécurité ont arrêté à plusieurs reprises un même individu, qui n'a été libéré qu'après avoir été détenu successivement par chacun des services jusqu'à être relâché par le dernier d'entre eux; cela dénote d'une part une absence de coordination efficace entre les services de sécurité, de l'autre le non-respect des décisions prises par les autres services à propos de la libération d'un détenu.

175. L'arrestation à plusieurs reprises du même individu par le même organe montre l'absence de garantie réelle en matière de protection de la personne et aussi l'absence de supervision efficace de la part des autorités et des autres services.

176. D'après la Commission, cela constitue une violation grave de l'article 11 de la Loi fondamentale palestinienne amendée de 2003, qui affirme que la liberté de la personne est un droit naturel, garanti et inviolable et que nul ne peut être arrêté, fouillé, détenu, subir des restrictions à sa liberté ou se voir interdire de mouvements, en l'absence d'un ordre judiciaire émis à son encontre, dans le respect des dispositions de la loi, qui définit également la durée de la détention préventive. L'article précise également que la détention et l'incarcération ne sont autorisées que dans des lieux soumis aux lois relatives à l'organisation des établissements pénitentiaires.

Arrestation et détention de civils par le Bureau du Procureur militaire et l'autorité judiciaire militaire

177. Il est indéniable que l'élargissement des compétences exercées par le Procureur militaire de façon à y inclure les civils constitue une violation flagrante des prérogatives de l'autorité judiciaire civile, outre le fait de priver les civils du droit de comparaître devant un juge civil, droit garanti et confirmé par l'article 30 de la Loi fondamentale palestinienne, aux termes de laquelle « *ester en justice* est un droit garanti à tous » et « tout Palestinien a un droit de recours au moyen du système judiciaire ».

178. De même, l'élargissement des compétences de l'autorité judiciaire militaire de façon à y inclure les civils est clairement préjudiciable aux pouvoirs et fonctions de l'autorité judiciaire civile et constitue une violation flagrante de l'esprit de l'article 97 de la Loi fondamentale palestinienne qui dispose que l'autorité judiciaire est indépendante, qu'elle est exercée par divers tribunaux et que la structure, les compétences et les décisions des tribunaux sont régis par les lois en vigueur.

179. La Commission considère également que la Loi fondamentale palestinienne restreint le champ des compétences en matière d'arrestation et de détention des civils au seul Bureau du procureur et à la seule autorité judiciaire civile, comme indiqué à l'article 112 de la Loi qui prévoit que toute arrestation résultant de la proclamation de l'état d'urgence sera soumise aux conditions minimales suivantes :

1. Toute détention qui a lieu dans le cadre de la proclamation de l'état d'urgence sera examinée par le Ministère public ou par un tribunal compétent au cours d'une période d'une durée totale de 15 jours à partir de la date de détention;
2. Le détenu sera en droit de se faire représenter par le conseil de son choix.

180. Dans la mesure où la Loi fondamentale palestinienne restreint le champ des compétences en matière d'examen des mandats d'arrêt à l'encontre de civils en cas de proclamation de l'état d'urgence au seul Bureau du Procureur ou au tribunal compétent, la Commission estime qu'il n'est ni admissible ni légal que le Bureau du Procureur militaire et l'autorité judiciaire militaire s'arrogent des compétences dans des conditions normales qui ne constituent pas un état d'urgence.

181. En outre, le fait que le Bureau du Procureur militaire et l'autorité judiciaire militaire s'arrogent des compétences en matière d'arrestation et de détention des

civils équivaut, d'après la Commission, à laisser le champ libre à l'ensemble des services militaires pour qu'ils exercent les fonctions d'agent de l'autorité judiciaire s'agissant des civils, ce qui porte atteinte aux droits et libertés garantis aux civils par le Code de procédure pénale palestinien n° 3 de 2001 en cas d'arrestation ou de détention, d'autant plus que les normes de procédure du Bureau du Procureur militaire et de l'autorité judiciaire militaire dérivent du Code pénal révolutionnaire de l'Organisation de libération de la Palestine, dont les garanties et les préceptes ne sont pas conformes aux garanties prévues par le Code de procédure pénale en cas d'arrestation.

182. Qui plus est, l'ingérence du Bureau du Procureur militaire et de l'autorité judiciaire militaire et l'exercice des compétences de manière contraire à la Loi fondamentale palestinienne pour des affaires de différends, de contentieux ou d'actes délictueux, qui relèvent de la compétence de l'autorité judiciaire civile, constituent une violation flagrante des droits et des libertés de la personne. L'autorité judiciaire palestinienne, par l'intermédiaire de la Haute Cour, a affirmé dans des dizaines d'ordonnances judiciaires qu'il n'est ni admissible ni légal que des civils palestiniens soient arrêtés ou détenus par le Bureau du Procureur militaire.

183. La prolifération des cas de torture a été facilitée par l'absence de supervision effective des centres d'arrestation et de détention. Il apparaît clairement à la Commission que les centres des services des renseignements généraux et de la sécurité préventive n'ont pas été soumis à une surveillance effective de la part des organes dotés des compétences nécessaires en la matière au regard des législations en vigueur.

184. La Commission estime également que le recours généralisé à la torture dans certains centres d'arrestation et de détention relevant des services de sécurité a été aidé et encouragé par l'absence de textes législatifs spécialisés réglementant et érigeant en infraction ce genre de pratique. Le Code pénal jordanien n° 16 de 1960 qui est en vigueur en Cisjordanie n'évoque la torture qu'à l'article 208, qui énonce ce qui suit :

1. Quiconque inflige à autrui des traitements violents et cruels interdits par la loi dans le but d'obtenir des aveux ou des informations sur la commission d'un crime est passible d'une peine de prison de trois mois à trois ans;
2. Au cas où ces actes de violence entraîneraient des maladies ou des blessures, l'auteur de ces actes est passible d'une peine de prison de six mois à trois ans, sanction qui, le cas échéant, peut être alourdie.

185. Ces dispositions indiquent clairement ce qui suit :

1. Le crime de torture est considéré comme un délit et non une infraction, du fait que la peine d'emprisonnement est de trois mois à trois ans, même si la torture est considérée comme une infraction au regard de la législation pénale de la majeure partie, voire de l'ensemble des États;
2. Le fait de restreindre la définition de la torture aux seules blessures physiques et à la violence exclut toutes les formes de torture psychologique et de stress, qui comprennent ce qui suit : menaces et actes d'intimidation; imposition d'un isolement cellulaire total et injustifié; détention dans des conditions qui font perdre au détenu la notion d'espace et de temps; soumission à des exécutions factices; abandon total; le fait de placer le détenu

dans des lieux équipés d'instruments de torture ou dans des conditions qui donnent l'impression qu'il y sera soumis;

3. Des traitements cruels et dégradants sur le plan physique ou psychologique, sans objectif précis.

186. D'après l'article 13 de la Loi fondamentale palestinienne amendée de 2003 :

1. Aucun individu ne peut être soumis à la coercition ou à la torture : aucun individu arrêté et aucun individu privé de liberté ne doit subir de mauvais traitements;

2. Toute déclaration et tout aveu obtenu de manière contraire aux dispositions du premier paragraphe de l'article 1 sera considéré(e) comme nul(le) et non avvenu(e).

187. Au vu des cas de torture et de traitements cruels et dégradants attribués à l'ensemble des services palestiniens de sécurité, la Commission estime qu'il faut envisager une loi palestinienne spéciale interdisant la torture et toutes les autres formes de traitements dégradants, pour combler les lacunes de la législation pénale en vigueur en Cisjordanie pour ce qui est d'incriminer la torture et les autres formes de traitements dégradants.

188. La Commission souhaite souligner la nécessité d'harmoniser la loi proposée avec les dispositions de la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, de 1987, en tant que référence juridique que tous les sujets de droit international doivent respecter et appliquer, qu'ils aient adhéré à la Convention ou pas.

189. La Commission juge que l'absence de responsabilisation effective et sérieuse à l'égard des auteurs des actes de torture parmi les membres des services de sécurité sur le plan de la violation des règles et procédures en matière de détention et d'arrestation au regard des législations en vigueur a contribué à la prolifération des irrégularités, voire les a encouragées.

190. La Commission estime en conséquence que les organes officiels doivent tenir responsables et poursuivre tous les auteurs de violations de la loi, sur le plan des arrestations arbitraires et illégales, et tous les auteurs d'actes de torture et autres formes de traitements dégradants.

V. Violations du droit d'occuper des fonctions publiques en Cisjordanie

A. Le droit d'occuper des fonctions publiques dans la législation nationale

191. La Loi fondamentale palestinienne telle qu'amendée en 2003 réaffirme le droit des Palestiniens d'occuper des fonctions publiques, sur la base de l'égalité des chances et sans préférences ni distinctions entre eux. L'article 9 de la Loi fondamentale dispose que « les Palestiniens sont égaux devant la loi et les tribunaux, sans distinction fondée sur la race, le sexe, la couleur, la religion, les opinions politiques ou les handicaps ».

192. L'article 26 de la Loi fondamentale se lit comme suit :

Les Palestiniens ont le droit de participer, individuellement et collectivement, à la vie politique et jouissent en particulier des droits suivants :

1. Droit de constituer des partis politiques et d'y adhérer conformément à la loi;
2. Droit de constituer des syndicats, des associations, des ligues, des clubs et des organisations populaires conformément à la loi;
3. Droit de voter et d'être candidat pour désigner en leur sein des représentants élus au suffrage universel conformément à la loi;
4. Droit d'accéder à la fonction publique sur la base de l'égalité des chances;
5. Droit d'organiser des réunions privées sans présence policière et des réunions, cortèges et rassemblements publics dans les limites fixées par la loi.

193. L'article 25 de la même loi réaffirme que « le travail est un droit dont jouissent tous les citoyens, ainsi qu'un devoir et un honneur, et l'Autorité nationale s'emploie à fournir un travail à toute personne apte à l'accomplir ».

194. La réaffirmation par la Loi fondamentale palestinienne du droit d'occuper des fonctions publiques, sur la base de l'égalité des chances, et l'obligation faite à l'Autorité nationale de s'efforcer de fournir du travail à toute personne apte à l'accomplir révèle l'adéquation et la conformité de cette loi aux dispositions et aux principes des conventions internationales relatives aux droits de l'homme, plus précisément au Pacte international relatif aux droits économiques, sociaux et culturels.

195. La Commission considère que l'application du principe de l'égalité des chances dans l'accès à la fonction publique consacré et réaffirmé dans la Loi fondamentale palestinienne implique nécessairement la mise en place de conditions et de critères unifiés pour tous les citoyens afin que ces derniers puissent bénéficier de ces chances et de ce droit, en ce qui concerne aussi bien les aptitudes requises et les exigences des fonctions publiques que les promotions et l'avancement dans la hiérarchie de ces fonctions.

196. Ce principe implique aussi l'obligation pour les services officiels de s'abstenir de tout acte susceptible de constituer une discrimination entre les individus, un traitement spécial ou préférentiel accordé à une catégorie au détriment des autres ou une règle, mesure ou disposition ayant pour effet de priver certains citoyens de chances égales aux autres dans l'accès aux fonctions publiques. Si de tels faits sont avérés, ils constituent des actes discriminatoires et des violations du principe de l'égalité entre les citoyens dans l'exercice des droits qui leur sont reconnus par la constitution et par la loi.

197. La Loi fondamentale palestinienne est également conforme aux dispositions et principes du droit international relatif aux droits de l'homme en ce qui concerne la méthode et les modalités de mise en œuvre du droit d'occuper des fonctions publiques, plus précisément à la Déclaration universelle des droits de l'homme et au Pacte international relatif aux droits civils et politiques, qui réaffirment, en tant que droit et en tant qu'obligation, l'égalité des citoyens dans ce domaine. C'est ainsi que la Déclaration universelle des droits de l'homme, dans son article 21, énonce ce qui suit :

1. Toute personne a le droit de prendre part à la direction des affaires publiques de son pays, soit directement, soit par l'intermédiaire de représentants librement choisis;

2. Toute personne a droit à accéder, dans des conditions d'égalité, aux fonctions publiques de son pays;

3. La volonté du peuple est le fondement de l'autorité des pouvoirs publics; cette volonté doit s'exprimer par des élections honnêtes qui doivent avoir lieu périodiquement, au suffrage universel égal et au vote secret ou suivant une procédure équivalente assurant la liberté du vote.

198. Le Pacte international relatif aux droits civils et politiques réaffirme également ce droit dans son article 25, aux termes duquel :

Tout citoyen a le droit et la possibilité, sans aucune des discriminations visées à l'article 2 et sans restrictions déraisonnables :

a) De prendre part à la direction des affaires publiques, soit directement, soit par l'intermédiaire de représentants librement choisis;

b) De voter et d'être élu, au cours d'élections périodiques, honnêtes, au suffrage universel et égal et au scrutin secret, assurant l'expression libre de la volonté des électeurs;

c) D'accéder, dans des conditions générales d'égalité, aux fonctions publiques de son pays.

B. Droit d'occuper des fonctions publiques dans la législation relative à la fonction publique nationale

199. La loi n° 4 de 1998 relative à la fonction publique, la loi n° 4 de 2005 portant modification de la loi de 1998, la circulaire d'application de la loi n° 4 de 1998, promulguée par le décret du Conseil des ministres n° 45 de 2005, et la circulaire révisée d'application de la loi n° 4 de 2005, promulguée par le décret du Conseil des ministres n° 15 de 2008, constituent les textes régissant le droit d'occuper des fonctions publiques au sens général. Ces textes organisent les relations de travail dans l'administration publique et définissent et organisent les divers aspects et domaines relatifs à ce droit : publicité, définition des parties, définition de la partie détentrice du droit de supervision administrative de la concrétisation et de l'application de ce droit, définition des droits et devoirs des fonctionnaires, mesures administratives et disciplinaires en cas de violation par le fonctionnaire de ses obligations professionnelles, et autres questions relatives à la fonction publique.

1. Procédure de nomination dans la fonction publique au niveau de l'Autorité nationale palestinienne

200. La loi palestinienne sur la fonction publique énonce une série de procédures que les autorités compétentes doivent respecter et appliquer pour les nominations à des postes de la fonction publique, procédures qui sont définies conformément à la loi comme suit :

- Annonce des postes vacants. L'article 19 de la loi sur la fonction publique impose aux services compétents d'annoncer les postes vacants dans les deux

semaines qui suivent le moment où ils deviennent vacants, dans au moins deux quotidiens, en précisant dans l'annonce les caractéristiques et les exigences du poste;

- Nécessité d'organiser des concours. L'article 20 de la loi sur la fonction publique impose aux services compétents, pour les postes nécessitant l'organisation d'un concours de recrutement comportant des épreuves écrites et orales, d'annoncer l'organisation du concours, de publier les noms des candidats ayant réussi aux épreuves écrites puis les noms de ceux qui ont réussi à l'ensemble du concours et leur classement en fonction des notes obtenues;
- Nécessité de publier la liste des personnes admises à passer le concours dans au moins deux quotidiens, deux jours de suite, avec indication du lieu et de la date du concours;
- Obligation de procéder à la nomination après le concours conformément à l'article 22 de la loi sur la fonction publique. Le recrutement se fait dans l'ordre des résultats du concours et, en cas de notes égales, la priorité est accordée à celui qui a le plus de compétence et d'expérience. En cas d'égalité des niveaux de compétence et d'expérience, la priorité est accordée au plus âgé. Les personnes qui ne sont pas recrutées dans un délai d'un an à partir de l'annonce des résultats du concours perdent le bénéfice de celui-ci.

2. Conditions de nomination dans la fonction publique

201. L'article 24 de la loi sur la fonction publique dispose que le futur fonctionnaire doit remplir les conditions suivantes :

1. Être palestinien ou arabe;
2. Être âgé de plus de 18 ans;
3. Être exempt de maladies et de handicaps physiques ou mentaux incompatibles avec l'exercice des fonctions considérées;
4. Jouir de ses droits civils et ne pas être encore sous le coup d'une condamnation pour un crime ou délit constitutif d'atteinte à l'honneur et à la probité.

3. Période probatoire préalable à la nomination

202. L'article 30 de la loi sur la fonction publique habilite l'administration ou les services compétents à instaurer une période probatoire au cours de laquelle la performance du nouveau fonctionnaire est évaluée. Si cette évaluation est négative ou que l'intéressé ne convient pas pour le poste qu'il occupe, l'intéressé reçoit un préavis de licenciement deux semaines avant l'expiration de la période probatoire (un an). À l'inverse, si le nouveau fonctionnaire achève la période probatoire avec succès, le chef du service compétent prend une décision de confirmation du fonctionnaire dans son poste avec effet à sa date de prise de fonctions et cette décision est portée à l'attention du Conseil de la fonction publique.

203. En outre, l'article 36 de la circulaire d'application de la loi sur la fonction publique stipule que le supérieur hiérarchique direct du nouveau fonctionnaire est tenu d'établir pendant la période probatoire des rapports mensuels sur ce dernier à l'intention du chef de service compétent. Un mois avant l'expiration de la période

probatoire, le supérieur hiérarchique direct est tenu d'établir à l'intention du chef du service compétent un rapport final récapitulatif des rapports antérieurs et précisant le degré d'adéquation du nouveau fonctionnaire au poste qu'il occupe. Le même article précise que l'évaluation de la performance du fonctionnaire pendant la période probatoire doit être fondée sur les compétences, la conduite, le sens du devoir, l'assiduité au travail, la moralité, la manière de travailler et les résultats au travail du fonctionnaire.

204. L'article 39 de la circulaire susmentionnée précise la marche à suivre au cas où le nouveau fonctionnaire ne donne pas satisfaction au cours de la période probatoire, à savoir que le chef du service dont il dépend est tenu de lui signifier par écrit, deux semaines avant l'achèvement de la période probatoire, qu'il est mis fin à ses services. L'article 40 de la même circulaire énonce l'obligation pour le chef du service dont dépend le nouveau fonctionnaire qui a donné satisfaction au cours de la période probatoire de confirmer celui-ci dans ses fonctions.

4. Sanctions et autres mesures disciplinaires applicables aux fonctionnaires

205. Tout fonctionnaire qui contrevient aux lois, règlements, instructions et décisions en vigueur dans la fonction publique est passible des sanctions disciplinaires suivantes en vertu de l'article 68 de la loi sur la fonction publique :

1. Avertissement;
2. Blâme;
3. Retenues sur salaire ne pouvant excéder 15 jours de traitement;
4. Refus d'augmentation périodique ou report de six mois maximum de cette augmentation;
5. Refus de promotion conformément à la loi;
6. Suspension avec demi-traitement pour une durée de six mois maximum;
7. Rétrogradation, préavis de licenciement, mise à la retraite, licenciement.

206. L'article 69 de la même loi dispose que l'administration ne peut sanctionner un fonctionnaire avant que celui-ci ne soit passé devant une commission d'enquête qui doit entendre sa défense, un procès-verbal de cette audition doit être établi et la décision prise doit être motivée.

C. Allégations de violation du droit d'occuper des fonctions publiques commises par des entités publiques palestiniennes

207. Pour se faire une idée de la nature, de l'ampleur et de la teneur des violations dans ce domaine alléguées dans le rapport Goldstone, la Commission s'est adressée à toutes les organisations de défense des droits de l'homme palestiniennes qui, de l'avis de la Commission, s'occupent de ces violations, les surveillent et les vérifient en Cisjordanie, notamment Al-Haq, l'Organisation palestinienne de défense des droits de l'homme et le Centre de Jérusalem pour l'assistance juridique, afin qu'elles lui fournissent les renseignements qu'elles ont déjà réunis et vérifiés à propos des atteintes au droit d'occuper des fonctions publiques ou des violations de

ce droit qui auraient été commises par des parties officielles palestiniennes, en sus des rapports, déclarations et interventions qu'elles ont déjà publiés sur le sujet.

208. La Commission a également interpellé les groupes parlementaires palestiniens, à savoir le groupe du Fatah, le Bloc de la réforme et du changement du Hamas, le groupe du Front populaire pour la libération de la Palestine, le Front démocratique et l'Initiative palestinienne, pour connaître leurs avis et points de vue sur ces allégations ainsi que les éléments dont ils disposent qui pourraient les étayer ou les contredire.

209. Les rapports que la Commission a reçus de ces organisations s'accordent sur la réalité d'un certain nombre de violations commises en Cisjordanie par des entités palestiniennes officielles – plus précisément le Conseil de la fonction publique et les directions et cabinets de divers ministères palestiniens –, que l'on peut récapituler comme suit :

a) Annulation de la nomination ou licenciement, par des entités palestiniennes officielles en Cisjordanie, de centaines d'enseignants et autres fonctionnaires pour cause d'appartenance à tel ou tel mouvement politique. Ainsi, le Ministère de l'éducation nationale, par exemple, a pris des centaines de mesures ayant pour effet d'interrompre les procédures de recrutement de certains enseignants, et ce sur la recommandation des services de sécurité palestiniens – Service de sécurité préventive et Service des renseignements généraux – qui ne souhaitaient pas que ces personnes fassent partie de la fonction publique;

b) Refus des autorités officielles palestiniennes de nommer tout nouveau fonctionnaire sans l'accord préalable des services de sécurité, ou en application de mesures dites officiellement de sécurité.

Ainsi, toute nomination, indépendamment de la nature et du rang du poste considéré, est désormais tributaire de l'analyse et de la vérification par les services de sécurité de l'appartenance politique du candidat, ainsi que de leur appréciation de l'opportunité politique de lui accorder ou refuser cette nomination.

D. Plaintes reçues par la Commission alléguant des violations du droit d'occuper des fonctions publiques

210. La Commission a reçu des organisations palestiniennes de défense des droits de l'homme et des groupes parlementaires palestiniens plus de 140 plaintes relatives à des licenciements de la fonction publique, ainsi que 61 plaintes émanant directement des intéressés²⁷.

211. Il ressort de l'examen par la Commission d'enquête du contenu de ces plaintes, ainsi que des réunions au cours desquelles la Commission a entendu les organisations de défense des droits de l'homme, les groupes parlementaires et les plaignants individuels²⁸, que les allégations faisant état de violations par des entités officielles du droit d'occuper des fonctions publiques en Cisjordanie sont fondées.

²⁷ Toutes ces plaintes et la documentation y relative seront conservées par la Commission assorties d'annexes.

²⁸ La Commission a entendu les témoignages de 51 auteurs de plaintes concernant la fonction publique.

212. La Commission constate la réalité de la violation par les entités officielles palestiniennes en Cisjordanie du droit des Palestiniens d'occuper des fonctions publiques, comme elle constate que les décisions des services de sécurité en Cisjordanie relatives à l'annulation ou l'interruption des procédures de nomination dans la fonction publique sont motivées par des considérations et raisons diverses dont les plus importantes sont les suivantes :

1. Appartenance politique du fonctionnaire

213. Pour la Commission d'enquête, il ressort clairement de dizaines de plaintes et des réunions au cours desquelles elle a entendu les plaignants que la plupart des cas d'annulation de nomination visaient des personnes considérées comme appartenant au Mouvement de la résistance islamique ou proches de ce mouvement mais il s'agissait aussi dans certains cas de personnes considérées comme faisant partie du Jihad islamique.

214. La plupart des réunions organisées par la Commission pour entendre les plaignants ont confirmé l'existence d'un lien évident entre le licenciement de ces personnes et leur appartenance politique au Mouvement de la résistance islamique Hamas, qui était aussi la raison pour laquelle elles ont été ensuite interrogées, certaines d'entre elles ayant été licenciées après leur arrestation et leur placement en détention par les services de sécurité sous ce même motif.

215. À l'issue de son audition par la Commission, un plaignant a conclu en ces termes à propos de son licenciement : « [...] Le vingt et unième jour du mois de ramadan de 2008, j'ai été convoqué par le Service de sécurité préventive, qui m'a détenu pendant 10 jours avant de me libérer la veille de l'Aïd sans m'avoir signifié le moindre chef d'accusation. Par la suite, en novembre 2008, j'ai reçu ma lettre de licenciement [...] »²⁹

216. Un autre plaignant a déclaré devant la Commission : « [...] Le 31 décembre 2008, j'ai reçu une lettre m'annonçant qu'il était mis fin à mes services et m'enjoignant de restituer mon contrat. M'étant adressé au Directeur de l'enseignement général, celui-ci m'a dit n'être pour rien dans mon licenciement, qui avait été décidé directement par le Ministère. J'avais déjà été convoqué pour interrogatoire par le Service de sécurité préventive avant mon licenciement et on m'avait alors interrogé sur mon appartenance politique au mouvement Hamas et je suis convaincu que mon licenciement est lié à mon appartenance à ce mouvement [...] »³⁰

217. Un troisième plaignant a déclaré : « [...] Le 8 février 2009, j'ai reçu une lettre m'annonçant l'annulation de ma nomination et m'enjoignant de restituer mon contrat en raison de l'avis négatif des autorités compétentes mais je sais qu'il s'agit de la sécurité préventive et des renseignements généraux et j'ai appris que mon licenciement était motivé par mon appartenance au mouvement Hamas. J'avais déjà été arrêté et détenu pendant un mois pour mes opinions politiques. Professionnellement, j'ai fait l'objet d'une évaluation positive et mon licenciement

²⁹ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote L-F/C-2010/57.

³⁰ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote L-F/C-2010/58.

s'explique par des raisons politiques et non professionnelles. Je pense que mon licenciement pour des raisons politiques est illégal [...] »³¹

218. Dans de nombreuses déclarations, le plaignant affirme que son licenciement s'expliquait par son soutien au Mouvement de la résistance islamique Hamas au cours de la campagne électorale de 2005, par son soutien aux listes du Hamas lors des deuxièmes élections au Conseil législatif palestinien ou par son soutien aux listes estudiantines rattachées au Mouvement de la résistance islamique Hamas lors des élections aux conseils estudiantins des universités de Cisjordanie.

219. Le récit suivant a été fait au cours d'une des auditions organisées par la Commission : « [...] Le 22 avril 2008, j'ai été nommé à titre permanent instituteur dans une école primaire de garçons de la localité de Hawra, relevant administrativement de l'académie de Naplouse-Sud [...] Le 17 décembre 2008, j'ai été surpris d'apprendre mon licenciement par une lettre du Ministère de l'éducation portant la référence FV40/937810406 m'informant qu'en raison du rejet par les autorités compétentes de mon affectation/nomination dans les effectifs du Ministère de l'éducation et de l'enseignement supérieur, j'étais tenu de restituer mon contrat [...] En me remettant un arrêté mettant fin à mes services, le Directeur de l'académie de Naplouse m'a indiqué qu'il fallait que je m'adresse aux services des renseignements généraux et de la sécurité préventive pour obtenir des éclaircissements sur les raisons pour lesquelles ils se sont opposés à ma nomination [...] En ce qui concerne les renseignements généraux, ils n'ont accepté de me recevoir qu'après qu'une de mes connaissances ait intercédé en ma faveur. Au siège des renseignements généraux de Naplouse, j'ai été reçu par un officier dont j'ignore le nom qui, après les vérifications d'usage, m'a expliqué que c'était parce que j'étais un électeur du Hamas et un partisan du Hamas. Après m'avoir demandé quelle était pour moi l'autorité légitime, il m'a dit que l'entretien était terminé, et il en est résulté que les renseignements généraux ont recommandé de ne pas confirmer ma nomination, la raison étant que j'étais un électeur du Hamas [...] »³²

220. Le récit suivant est tiré d'une autre audition organisée par la Commission : « [...] Après cela, je me suis adressé à l'académie de Naplouse, où on m'a conseillé de m'adresser aux services de sécurité. J'ai été convoqué par les Renseignements généraux trois mois environ après ma lettre de licenciement et mon interrogatoire a essentiellement tourné autour des élections législatives [...] »³³

221. Un autre plaignant a déclaré : « [...] Je suis allé voir les Renseignements généraux à Naplouse, qui m'ont dit qu'il n'y avait aucun problème. Je suis diplômé du Département de mathématiques de l'université An-Najah et ils m'ont demandé pour qui j'avais voté aux élections des conseils d'étudiants de cette université. J'ai dit que j'avais voté blanc. Ils m'ont également interrogé sur les élections législatives et j'ai dit que je m'étais abstenu [...] »³⁴

³¹ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote L-F/C-2010/68.

³² Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote L-F/C-2010/50.

³³ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote L-F/C-2010/51.

³⁴ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote L-F/C-2010/52.

222. Un autre plaignant a également déclaré : « [...] Le 15 février 2009, j'ai été informé par la secrétaire de l'école qu'il fallait que je prenne contact avec l'académie d'Hébron-Nord. Je me suis rendu le jour même à l'académie où on m'a remis une lettre me signifiant que, sur la recommandation des autorités compétentes, il était mis fin à ma nomination. Le jour même également, je me suis rendu au Conseil général de la fonction publique et au Ministère de l'éducation, à Ramallah [...] Ils m'ont fait comprendre que je devais m'adresser aux services de sécurité. Je me suis adressé trois jours plus tard au Service de sécurité préventive, où on m'a déclaré qu'il n'y avait aucun problème [...] Je me suis alors adressé aux Renseignements généraux d'Hébron [...] où ils m'ont dit que selon des informations en leur possession, j'étais un militant actif du Hamas [...] En mars 2009, ils m'ont de nouveau interrogé sur des événements qui s'étaient produits à l'université d'Hébron à l'époque où j'y étais étudiant à l'Institut polytechnique, en insistant sur ma participation aux élections au conseil des étudiants [...] Ils m'ont également demandé ce que je pensais du Hamas et pour qui j'avais voté [...] »³⁵

223. Une autre personne entendue par la Commission a déclaré : « [...] Le 1^{er} novembre 2009, j'ai reçu mon arrêté de licenciement et lorsque je me suis adressé au ministère, ils m'ont demandé de m'adresser aux Renseignements généraux et à la Sécurité préventive. Lorsque je me suis adressé à la Direction des Renseignements généraux et à celle de la Sécurité préventive de Jenine [...] où j'ai été interrogé non pas sur mon appartenance politique mais sur le parti pour lequel j'avais voté et sur la sécession à Gaza. Je ne connais toujours pas les raisons de mon licenciement puisque je n'ai fait l'objet d'aucune accusation politique [...] Les services de sécurité m'ont accusé d'avoir travaillé avec le Hamas pendant les élections [...] »³⁶

2. Annulations de nomination pour cause de liens étroits avec le Mouvement de la résistance islamique Hamas

224. La Commission d'enquête a constaté que certaines personnes avaient fait l'objet de recommandations négatives de la part des services de sécurité, se traduisant par un refus de leur nomination, en raison de liens étroits qu'ils auraient avec le Mouvement de la résistance islamique Hamas.

225. Une enseignante entendue par la Commission a déclaré : « [...] Le 28 août 2006, j'ai été nommée à l'école secondaire du Carmel puis j'ai été transférée dans un autre établissement. J'ai travaillé trois années sans nomination à titre permanent et, le 14 mars 2009, j'ai reçu de l'académie d'Hébron-Sud une lettre me signifiant la fin de mon affectation et de mes services et m'enjoignant de restituer mon contrat [...] Je ne me suis pas adressée personnellement aux services de sécurité mais mon père l'a fait à ma place et il a été informé qu'un rapport défavorable avait été établi me concernant [...] Mon licenciement était motivé par des raisons politiques car mes notes professionnelles étaient bonnes et je n'avais fait l'objet d'aucun avertissement ou enquête. J'étais une bonne enseignante en éducation islamique et je crois que le problème tient en fait à mon mari, en prison dans l'État occupant pour cause d'appartenance au Mouvement de la résistance islamique Hamas. C'est pour

³⁵ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote L-F/C-2010/60.

³⁶ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote L-F/C-2010/61.

cela que j'ai été licenciée et non pour manque de compétence ou de professionnalisme [...] »³⁷

226. Une autre plaignante a déclaré : « [...] J'ai été licenciée le 9 septembre 2009 sans en avoir été informée, et je ne l'ai appris que lorsque ma remplaçante est arrivée. Lorsque je me suis adressée à l'académie d'Hébron-Sud, on m'a expliqué que j'avais été licenciée parce que les renseignements généraux et la sécurité préventive n'avaient pas recommandé ma nomination. Lorsque je me suis adressée à ces services, ils ont refusé de me recevoir mais m'ont fait savoir que mon licenciement était dû au fait que mon époux était détenu par la Sécurité préventive sous l'accusation d'appartenance au Hamas [...] Ils m'ont dit que si mon époux quittait le Hamas, ma nomination serait acceptée. On m'a donc clairement indiqué que mon licenciement était dû au fait que mon époux appartient au Hamas [...] »³⁸

227. Le récit suivant est tiré d'une autre audition organisée par la Commission : « [...] Aujourd'hui encore, je ne sais toujours pas pour quelle raison on a mis fin à mes services. Je me suis adressé à l'Organisation indépendante de défense des droits de l'homme (Cabinet des doléances), après avoir contacté l'Union des enseignants, qui m'a informé que la cause de mon licenciement était l'appartenance d'un de mes proches au Hamas [...] »³⁹

E. Opinion de la Commission sur les allégations de violation du droit d'occuper des fonctions publiques en Cisjordanie

228. Partant des auditions qu'elle a organisées pour entendre les plaignants et les organisations de défense des droits de l'homme qui surveillent et vérifient les cas de violation par des entités officielles palestiniennes en Cisjordanie du droit des Palestiniens d'occuper des fonctions publiques, la Commission constate l'existence effective de violations par lesdites entités des dispositions de la Loi fondamentale et de la loi sur la fonction publique de 1998 telle que modifiée relatives au droit d'occuper des fonctions publiques, en ce qui concerne les questions et domaines suivants :

229. Le Ministère de l'éducation, en particulier, et les administrations en général, exigent l'accord des services de sécurité comme condition préalable à la nomination à des fonctions publiques. La Commission estime que cette mesure constitue un acte illégal, voire une violation flagrante par les administrations des dispositions de la Loi fondamentale et de la loi n° 4 de 1998 sur la fonction publique, dans la mesure où l'article 24 de cette dernière loi énonce de manière limitative les conditions exigées des candidats à la nomination, à savoir « être palestinien ou arabe, avoir atteint l'âge de 18 ans, jouir de ses droits civils et ne pas être encore sous le coup d'une condamnation pour un crime ou délit constitutif d'atteinte à l'honneur et à la probité ».

³⁷ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote L-F/C-2010/52.

³⁸ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote L-F/C-2010/56.

³⁹ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote L-F/C-2010/57.

230. La loi et sa circulaire d'application énoncent en outre clairement l'obligation que le fonctionnaire qui est encore en période probatoire soit averti deux semaines avant l'achèvement de cette période – qui dure un an – qu'il est mis fin à ses services, ce qui n'a été fait ni par le Ministère de l'éducation et de l'enseignement supérieur ni par d'autres organismes gouvernementaux officiels.

231. En outre, l'annulation d'une nomination au cours de la période probatoire doit être fondée sur des considérations professionnelles relatives, comme indiqué dans la loi et la circulaire d'application, à la notation de la performance du fonctionnaire au cours de la période probatoire selon des principes et critères de compétence, de comportements professionnels, de performance, d'assiduité, de personnalité, de professionnalisme et de productivité. En revanche, il n'existe aucune condition ni aucun motif d'annulation d'une nomination qui confère aux services de sécurité et à leur analyse un quelconque rôle à cet égard.

232. En conséquence, le fait de mettre fin aux services d'une personne pendant la période probatoire plus d'une année après sa nomination sur la base d'une demande des services de sécurité constitue de la part des organismes officiels un non-respect des dispositions de la loi, et le refus de nommer ou de confirmer l'intéressé dans ses fonctions à partir de critères non prévus dans la loi et dans sa circulaire d'application constitue un abus de pouvoir.

233. Voulant s'assurer des fondements juridiques de cette mesure – qui consiste pour les organismes officiels à exiger du fonctionnaire qu'il obtienne l'accord des services de sécurité avant de procéder à sa nomination –, la Commission a été informée par le Conseil général de la fonction publique que cette mesure avait été adoptée dans la fonction publique en vertu d'une lettre officielle datée du 9 septembre 2007, adressée au président dudit Conseil par le Secrétaire général (de l'époque) du Conseil des ministres, demandant au Conseil général de la fonction publique de considérer que la vérification par les services de sécurité fait partie de la procédure de nomination et faisant obligation au Conseil d'entrer en relation avec les services de sécurité pour l'application de cette mesure.

234. La lettre du Secrétaire général du Conseil des ministres se réfère certes à une décision que ce dernier aurait prise à sa 18^e séance hebdomadaire, le 13 septembre 2007, faisant de la vérification par les services de sécurité un élément de la procédure de nomination, mais la Commission n'a pas pu obtenir concrètement le texte de cette décision et le Secrétaire général actuel du Conseil des ministres l'a informée qu'à ladite 18^e séance hebdomadaire tenue le 13 septembre 2007, le Conseil des ministres avait considéré que l'application des mesures de contrôle de sécurité était l'une des conditions requises pour la nomination des fonctionnaires en application de la loi sur la fonction publique modifiée en vigueur⁴⁰.

235. La Commission estime que ces licenciements et ces annulations de nomination de fonctionnaires n'étaient pas motivés par des raisons professionnelles ou des critères relatifs à l'occupation de fonction publique et que cette mesure s'explique assurément par des facteurs liés à l'appartenance politique des fonctionnaires ou en fonction d'une orientation politique, ce qui fait de cette mesure un acte discriminatoire au sens de la Convention contre la discrimination en matière d'emploi et de profession que la Conférence générale de l'Organisation internationale du Travail a adoptée à sa quarante-deuxième session, le 25 juin 1958,

⁴⁰ Le texte de ces lettres figure à l'annexe 17 au présent rapport.

et qui est entrée en vigueur le 15 juin 1960. Cette convention, dans son article 1, définit la discrimination comme suit :

1. Aux fins de la présente Convention, le terme « discrimination » comprend :

a) Toute distinction, exclusion ou préférence fondée sur la race, la couleur, le sexe, la religion, l'opinion politique, l'ascendance nationale ou l'origine sociale, qui a pour effet de détruire ou d'altérer l'égalité de chances ou de traitement en matière d'emploi ou de profession;

b) Toute autre distinction, exclusion ou préférence ayant pour effet de détruire ou d'altérer l'égalité de chances ou de traitement en matière d'emploi ou de profession, qui pourra être spécifiée par le Membre intéressé après consultation des organisations représentatives d'employeurs et de travailleurs, s'il en existe, et d'autres organismes appropriés.

236. En outre, dans l'Observation générale n° 25 que le Comité des droits de l'homme a adoptée à sa cinquante-septième session (1996) à propos de la participation à la gestion des affaires publiques et du droit de vote, on peut lire ce qui suit : « [...] pour garantir l'accès à ces charges publiques dans des conditions générales d'égalité, les critères et les procédures de nomination, de promotion, de suspension et de révocation doivent être objectifs et raisonnables ».

237. Ce texte aborde également la question de l'accès aux fonctions publiques sur un pied d'égalité et sur la base du mérite et la question de la sécurité de l'emploi, à l'abri « [...] de toute immixtion ou de toute pression d'ordre politique. Il est particulièrement important de veiller à ce qu'aucune discrimination ne soit exercée contre ces personnes dans l'exercice des droits que leur reconnaît l'alinéa c) de l'article 25, pour l'un quelconque des motifs visés au paragraphe 1 de l'article 2 ».

238. Dans l'Observation générale n° 18 adoptée par le Comité des droits de l'homme à sa trente-septième session (1989) et relative à la non-discrimination, on peut lire ce qui suit : « [...] La non-discrimination est un principe fondamental et général en matière de protection des droits de l'homme, au même titre que l'égalité devant la loi et l'égale protection de la loi. Ainsi, conformément au paragraphe 1 de l'article 2 du Pacte international relatif aux droits civils et politiques, les États parties sont tenus de respecter et de garantir à tous les individus se trouvant sur leur territoire et relevant de leur compétence les droits reconnus dans le Pacte, sans distinction aucune, notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique ou de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation. Conformément à l'article 26, toutes les personnes sont égales devant la loi et ont droit à une égale protection de la loi, et, de plus, la loi doit interdire toute discrimination et garantir à toutes les personnes une protection égale et efficace contre toute discrimination, notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique et de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation ». De même, l'article 25 prévoit la participation égale de tous les citoyens aux affaires publiques sans aucune des discriminations visées à l'article 2.

239. Le Comité « considère que le terme discrimination, tel qu'il est utilisé dans le Pacte, doit être compris comme s'entendant de toute distinction, exclusion, restriction ou préférence fondée notamment sur la race, la couleur, le sexe, la langue, la religion, les opinions politiques ou autres, l'origine nationale ou sociale,

la fortune, la naissance ou toute autre situation, et ayant pour effet ou pour but de compromettre ou de détruire la reconnaissance, la jouissance ou l'exercice par tous, dans des conditions d'égalité, de l'ensemble des droits de l'homme et des libertés fondamentales [...] ».

240. En conséquence, la Commission d'enquête indépendante estime que le licenciement de fonctionnaires en raison de leur appartenance politique ou la suspension du droit d'accéder aux fonctions publiques pour cette même raison constitue une discrimination et une distinction entre fonctionnaires fondées sur l'appartenance politique, ce qui contrevient aux dispositions de la Loi fondamentale palestinienne, dont l'article 9 est libellé comme suit : « Les Palestiniens sont égaux devant la loi et devant les tribunaux sans distinction fondée sur la race, le sexe, la couleur, la religion, l'opinion politique ou le handicap ».

241. La Commission d'enquête estime que l'annulation de la nomination de fonctionnaires au motif qu'ils ont voté pour tel ou tel groupe politique constitue une violation flagrante du droit de toute personne de participer à la vie politique prévu et consacré dans la Loi fondamentale palestinienne, dont l'article 26 stipule que « les Palestiniens ont le droit de participer, individuellement et collectivement, à la vie politique et ils jouissent en particulier des droits suivants :

1. Constituer des partis politiques ou y adhérer, conformément à la loi;
2. Constituer des syndicats, des associations, des unions, des ligues, des clubs et autres organisations populaires conformément à la loi;
3. Voter et être candidat aux élections destinées à désigner des représentants élus au suffrage universel conformément à la loi;
4. Occuper des fonctions et postes publics conformément au principe de l'égalité des chances;
5. Organiser des réunions privées sans présence policière et des réunions, cortèges et rassemblements publics dans les limites fixées par la loi.

242. La Commission estime que c'est au Conseil des ministres qu'il incombe, en vertu de l'article 69 de la Loi fondamentale révisée de 2003, de suivre l'application des lois, de veiller au respect de leurs dispositions, de prendre les mesures voulues à cet effet et d'intervenir pour mettre fin à l'application des mesures de contrôle de sécurité en raison de leur contradiction avec les dispositions de la Loi fondamentale, qui stipule expressément que les Palestiniens ont le droit d'occuper des fonctions publiques, ainsi qu'avec la loi sur la fonction publique, qui est exempte de mesures de cet ordre.

243. La Commission estime que pour remédier aux violations des droits et des libertés fondamentales des citoyens résultant de l'application des mesures de contrôle de sécurité, il faut que le Conseil des ministres palestinien abroge toutes les décisions d'annulation de la nomination de fonctionnaires, de réintégrer dans leurs fonctions tous ceux qui ont été lésés par ces décisions et de les indemniser du préjudice subi conformément à l'article 32 de la Loi fondamentale palestinienne, qui dispose que « toute atteinte à l'une quelconque des libertés individuelles, au respect de la vie privée et autres droits et libertés publiques garantis par la Loi fondamentale ou par le Code pénal est imprescriptible au civil comme au pénal et l'Autorité nationale garantit l'indemnisation de quiconque en a été victime ».

244. Il ressort clairement des rapports que la Commission d'enquête a reçus et des auditions qu'elle a organisées que des dizaines de fonctionnaires ont vu leur nomination annulée plus d'une année après leur prise de fonctions, ce qui constitue, de l'avis de la Commission, une violation manifeste par les organes administratifs de l'Autorité nationale palestinienne des dispositions de la loi sur la fonction publique et de ses circulaires d'application.

245. L'article 30 de la loi susmentionnée accorde à l'administration ou autre organe gouvernemental dont dépend le nouveau fonctionnaire le droit d'instaurer une période probatoire d'un an lui permettant d'évaluer la performance de ce dernier. Si cette évaluation est négative ou si le nouveau fonctionnaire ne correspond pas au poste auquel il a été affecté, l'intéressé est avisé deux semaines avant l'expiration de la période probatoire (qui dure un an) qu'il sera mis fin à ses services. Si, au contraire, le fonctionnaire donne satisfaction au cours de la période probatoire, c'est-à-dire sans avoir reçu d'observation négative, le chef du service gouvernemental compétent est tenu d'engager la procédure nécessaire pour le confirmer dans ses fonctions.

246. La Commission estime donc que tous les fonctionnaires qui ont accompli la période probatoire d'une année ont le droit d'être confirmés dans leurs fonctions conformément à la loi. La Commission estime en outre que le fait d'avoir mis fin à leurs services en arguant de leur situation antérieure constitue un licenciement abusif de la fonction publique.

F. Violations par l'autorité de fait dans la bande de Gaza du droit d'occuper des fonctions publiques

247. Le mandat de la Commission concernant le droit d'occuper des fonctions publiques est certes limité à l'enquête sur cet aspect en Cisjordanie, c'est-à-dire dans les zones relevant de l'autorité et de l'administration de l'Autorité nationale palestinienne mais la Commission estime important d'évoquer aussi les violations du droit d'occuper des fonctions publiques et les atteintes à ce droit de la part de l'autorité de fait dans la bande de Gaza.

Nominations liées à l'appartenance politique

248. La plupart – sinon la totalité – des nominations à des fonctions publiques dans la bande de Gaza s'effectuent sur la base de l'appartenance politique de l'intéressé. Si l'on suspecte que ce dernier appartient au Fatah ou à une entité relevant de ce mouvement ou présumée telle, il perd toute possibilité d'obtenir le poste considéré.

249. Les services de sécurité de l'autorité de fait dans la bande de Gaza jouent un rôle analogue à celui des services de sécurité opérant en Cisjordanie pour ce qui est des enquêtes et autres mesures de contrôle de sécurité appliquées aux candidats à la nomination à des fonctions publiques ainsi que pour surveiller et décider qui doit être autorisé à occuper de telles fonctions. Ces services disposent également du pouvoir d'intervenir pour interrompre ou annuler les nominations ou licencier les fonctionnaires.

250. L'autorité de fait dans la bande de Gaza utilise des voies détournées pour écarter les fonctionnaires qui ne relèvent pas de sa mouvance, parce que, comme chacun sait, l'Autorité nationale palestinienne en Cisjordanie continue de prendre en charge et de rémunérer les fonctionnaires qui se trouvent dans la bande de Gaza,

sous réserve qu'ils s'abstiennent de se rendre à leur poste si celui-ci relève d'une structure dirigée par l'autorité de fait à Gaza.

251. Arguant du fait que ces fonctionnaires ne se présentent pas à leur poste, l'autorité de fait dans la bande de Gaza procède à leur licenciement en invoquant les dispositions des articles 90 et 100 de la loi sur la fonction publique. L'article 90 dispose que :

1. Le fonctionnaire perd son poste s'il s'absente sans autorisation ni motif valable pendant plus de 15 jours successifs;
2. Cette période d'absence est rémunérée à taux plein ou non en fonction des exigences de la situation.

252. L'article 100 est libellé comme suit :

Les services du fonctionnaire prennent fin avec la perte de son poste dans l'une ou l'autre des deux cas de figure suivants :

- a) Absentéisme visé à l'article 90 de la présente loi;
- b) Absence sans autorisation ni motif valable pendant plus de 30 jours non successifs par an, auquel cas les services du fonctionnaire prennent fin à la date du trentième jour d'absence, sous réserve que le fonctionnaire ait été averti par écrit au bout de 15 jours d'absence.

253. C'est sur cette base que l'autorité de fait dans la bande de Gaza a écarté des milliers de fonctionnaires et les a remplacés par des personnes membres ou politiquement proches du Hamas. Ainsi, la fonction publique dans les territoires palestiniens est désormais politisée au plein sens du terme, ce qui n'est pas sans conséquences préjudiciables aussi bien pour la fonction publique en Cisjordanie et dans la bande de Gaza que pour toute une série de questions dont les plus importantes sont les suivantes :

- Fidélité du fonctionnaire à un parti politique et non à sa fonction et aux exigences de son travail;
- Utilisation par le fonctionnaire du statut que lui confère son parti, qui le protège de tout questionnement ou observation s'il ne se montre pas à la hauteur des exigences de sa fonction;
- Lien entre les services fournis par le fonctionnaire et son orientation partisane, qui peut l'amener à refuser de fournir des services aux membres présumés d'entités rejetées par son parti.

254. Le droit au travail représente incontestablement l'un des piliers les plus importants sur lesquels repose l'ensemble des droits économiques, sociaux et culturels établis par les instruments internationaux relatifs aux droits de l'homme. Plus encore, ce droit constitue le pilier et le fondement juridique et matériel de l'exercice effectif de tous les autres droits et libertés économiques, sociaux et culturels ainsi que des droits civils et politiques.

255. Les droits de l'homme et les libertés fondamentales, dans leurs différentes composantes, s'interpénètrent et se complètent les uns les autres au point qu'il est impossible de prendre chacun d'entre eux isolément. Il est donc vain de respecter certains droits et de donner aux individus les moyens de les exercer tout en abandonnant ou rejetant d'autres droits. Les droits civils et politiques n'ont ni sens

ni valeur si les droits économiques, sociaux et culturels font défaut, et il en va de même pour les droits économiques, sociaux et culturels, dont l'exercice est impossible en l'absence des droits civils et politiques.

256. Les droits et libertés des individus, dans leurs différents aspects et domaines, sont complémentaires. Ou bien ils sont conférés à l'individu dans leur ensemble, et on peut alors dire que ces droits existent réellement, ou bien ils sont amputés, divisés et séparés en droits et libertés admis et droits et libertés niés et l'on peut alors dire objectivement que ces droits n'existent pas, vu l'absence de réalité et de valeur de la partie de ces droits et libertés qui est admise*.

257. L'indépendance et la complémentarité des droits de l'homme ne sont pas circonscrites aux domaines et principes de ces droits, elles valent aussi pour chacune des branches du droit relatif aux droits de l'homme. Chacune de ces branches est en effet composée d'une série cohérente de droits qui en relèvent et l'abandon ou la disparition de certains de ces droits entraîne sans conteste l'abandon et la disparition des autres. En matière de droits économiques et sociaux, la disparition ou la négation du droit des individus au travail signifie la disparition et la négation de tous les autres droits reconnus à l'individu dans ce domaine pour cause de disparition de leur raison d'être. Quelles peuvent être la réalité et la valeur de droits tels que celui de constituer des syndicats, le droit de grève, le droit à l'égalité devant la loi, le droit à l'égalité des salaires et des prestations, etc., lorsque disparaissent leur fondement et leur raison d'être, à savoir le droit au travail.

258. Il en va de même pour les droits civils dont l'un des éléments et piliers de leur existence les plus importants est le droit à la vie et à la sécurité de la personne. L'abandon ou le non-respect de ce droit entraîne la négation et l'abandon de tous les autres droits pour cause de disparition de leur valeur et de leur raison d'être. Ceci vaut pour le droit à l'éducation, dont tous les droits qui en dépendent n'ont aucun sens en cas de négation du droit à l'égalité et à la non-discrimination, du droit à la liberté d'expression et d'opinion, du droit à un traitement humain et autres droits.

259. En conséquence, la Commission estime que le fait de priver certains citoyens du droit d'occuper des fonctions publiques signifie non seulement la négation du droit de ces personnes à un travail et à un revenu mais également l'abandon et la disparition de leurs autres droits tels que le droit à la sécurité sociale, le droit à un logement approprié, le droit aux soins de santé, le droit de se marier et de fonder une famille, le droit à un niveau de vie suffisant, le droit à la dignité, le droit à l'éducation et autres droits. Une personne qui perd la source de ses revenus se retrouve dans une situation difficile qui l'amène à renoncer malgré elle à bon nombre de droits dont l'exercice et la jouissance ne sont guère favorisés par la perte de revenus.

* L'Assemblée générale des Nations Unies, dans sa résolution 32/130 de 1977, a réaffirmé en ces termes l'unicité et la complémentarité des droits de l'homme :

- « a) Tous les droits de l'homme et toutes les libertés fondamentales sont indivisibles et interdépendants : une attention égale et une considération urgente devront être accordées à la réalisation, la promotion et la protection tant des droits civils et politiques que des droits économiques, sociaux et culturels;
- b) La jouissance complète des droits civils et politiques est impossible sans celle des droits économiques, sociaux et culturels [...] ».

Cette idée a été réaffirmée en ces termes dans la Déclaration sur le droit au développement que l'Assemblée générale des Nations Unies a adoptée par sa résolution 41/128 de 1986 : « Tous les droits de l'homme et toutes les libertés fondamentales sont indivisibles et interdépendants : la réalisation, la promotion et la protection des droits civils, politiques, économiques, sociaux et culturels doivent bénéficier d'une attention égale et être envisagées avec une égale urgence ».

VI. Violations de la liberté de la presse en Cisjordanie

A. La liberté de la presse dans la législation nationale et dans les conventions internationales

260. La Loi fondamentale palestinienne telle qu'amendée en 2003, réaffirme dans plusieurs de ses articles, le droit à la liberté d'opinion, la liberté d'expression et la liberté de la presse. C'est ainsi que l'article 19 de cette loi stipule que :

Nul ne peut toucher à la liberté d'opinion et que chaque être humain a le droit d'exprimer et de diffuser son opinion, par la parole, par l'écrit et par d'autres moyens d'expression y compris artistique, en tenant compte des dispositions de la loi.

261. En outre, l'article 27 de la même loi contient les dispositions suivantes :

1. Chacun a le droit de créer des journaux et d'autres médias; ce droit est garanti par la Loi fondamentale et les sources de financement de ces médias sont soumises au contrôle prévu par la loi.

2. La liberté des médias audiovisuels et écrits, la liberté d'impression, de publication, de distribution et de diffusion de même que la liberté des personnes qui travaillent dans le secteur des médias, sont toutes garanties par la Loi fondamentale palestinienne et par d'autres lois connexes.

3. Il est interdit de censurer les médias, de leur adresser des avertissements, d'en suspendre les activités, de les exproprier, de les supprimer, ou de leur imposer des restrictions, à moins que ces mesures ne soient conformes à la loi et prises en vertu d'une décision judiciaire.

262. La loi n°9 de 1995 sur l'imprimerie et les publications traitent à différents égards de la liberté de la presse. C'est ainsi qu'à son article 2, il est stipulé que :

Les secteurs de la presse et de l'imprimerie sont libres, que la liberté d'opinion est garantie à chaque Palestinien lequel peut exprimer librement son opinion tant oralement que par écrit ou par des moyens d'expression et d'information comme la photographie ou le dessin.

263. L'article 3 de la même loi dispose que :

Les journalistes peuvent exercer librement leur profession qui consiste à présenter des nouvelles, des informations et des commentaires, à contribuer à la diffusion de la pensée, de la culture et des sciences, dans les limites autorisées par la loi et dans le cadre de la préservation des libertés, des droits et des obligations publiques ainsi que du respect de la vie privée d'autrui et de son inviolabilité.

264. En outre, l'article 4 de la même loi stipule que :

La liberté de la presse inclut notamment les éléments suivants :

a) Porter à la connaissance des citoyens les faits, les idées, les tendances et les informations relevées à l'échelle tant locale, qu'arabe, islamique ou internationale;

b) Donner aux citoyens la possibilité d'exprimer leur opinion;

c) Recueillir auprès des sources diverses, des informations, des nouvelles et des statistiques susceptibles d'intéresser les Palestiniens, analyser ces données, les publier, les faire circuler et les commenter dans les limites autorisées par la loi;

d) Garantir le droit qu'ont les organes et les agences de presse, les rédacteurs en chef et les journalistes de tenir secrètes les sources auprès desquelles ils obtiennent leurs nouvelles et leurs informations, à moins que les tribunaux n'en décident autrement, pour connaître d'affaires pénales, protéger la sécurité de l'État, empêcher la commission d'un crime ou obtenir justice;

e) Les citoyens, les partis politiques, les institutions culturelles et sociales et les syndicats ont tous le droit de présenter, par la voie de publications, leurs opinions et leurs idées ainsi que les résultats qu'ils ont obtenus dans leurs domaines d'activité respectifs.

265. À l'article 6 de la loi n° 9 de 1995, il est stipulé que :

Les autorités officielles doivent s'employer à faciliter la tâche des journalistes et des chercheurs en avisant ces derniers de leurs programmes et projets.

266. L'article 7 de la même loi dispose que les journalistes et la presse doivent s'abstenir de publier tout ce qui pourrait porter atteinte à l'ordre public, stipulant notamment ceci :

a) La presse doit s'abstenir de publier tout élément susceptible de contrevenir aux principes de la liberté, de la responsabilité nationale, des droits de l'homme et du respect de la vérité et considérer la liberté de pensée, d'opinion, d'expression et de diffusion comme un droit, aussi bien pour les citoyens que pour elle;

b) Les publications périodiques destinées aux enfants et aux adolescents ne doivent contenir aucune image ni récit ou information contraires à la morale ainsi qu'aux valeurs et traditions palestiniennes.

267. L'article 8 de la loi susmentionnée définit les obligations incombant à la presse ainsi que les règles déontologiques de la profession de journaliste, réaffirmant que les journalistes et tous ceux qui travaillent dans le secteur de la presse, sont tenus de se conformer strictement à la déontologie de leur profession et en particulier aux principes ci-après :

a) Respecter les droits et les libertés constitutionnelles des personnes et ne pas s'ingérer dans leur vie privée;

b) Présenter l'information de façon objective, complète et équilibrée;

c) Faire montre de précision, d'intégrité et d'objectivité, lorsqu'il s'agit de commenter des nouvelles et des événements;

d) S'abstenir de publier toute information susceptible d'attiser la violence, le fanatisme et la haine ou d'inciter au racisme et au confessionnalisme;

e) Ne pas exploiter l'information à des fins de publicité, dans le but de promouvoir un produit commercial ou d'en diminuer la valeur.

268. Pour ce qui concerne les instruments internationaux relatifs aux droits de l'homme, l'article 18 de la Déclaration universelle des droits de l'homme stipule que :

Toute personne a droit à la liberté de pensée, de conscience et de religion; ce droit implique la liberté de changer de religion ou de conviction ainsi que la liberté de manifester sa religion ou sa conviction seule ou en commun, tant en public qu'en privé, par l'enseignement, les pratiques, le culte et l'accomplissement des rites.

269. En outre l'article 19 de la Déclaration et l'article 19 du Pacte internationale relatif aux droits civils et politiques disposent que :

Tout individu a droit à la liberté d'opinion et d'expression, ce qui implique le droit de ne pas être inquiété pour ses opinions et celui de chercher, de recevoir et de répandre, sans considérations de frontières, les informations et les idées par quelque moyen d'expression que ce soit.

270. Par ailleurs, l'article 19 du Pacte international relatif aux droits civils et politiques contient notamment les dispositions ci-après :

1. Nul ne peut être inquiété pour ses opinions.
2. Toute personne a droit à la liberté d'expression : ce droit comprend la liberté de rechercher, de recevoir et de répandre des informations et des idées de toute espèce, sans considération de frontières, sous une forme orale, écrite, imprimée ou artistique, ou par tout autre moyen de son choix.
3. L'exercice des libertés prévues au paragraphe 2 du présent article comporte des devoirs spéciaux et des responsabilités spéciales. Il peut en conséquence être soumis à certaines restrictions qui doivent toutefois être expressément fixées par la loi et qui sont nécessaires :
 - a) Au respect des droits ou de la réputation d'autrui;
 - b) À la sauvegarde de la sécurité nationale, de l'ordre public, de la santé ou de la moralité publiques.

271. Par ailleurs, à l'article II de la Déclaration sur les principes fondamentaux concernant la contribution des organes d'information au renforcement de la paix et de la compréhension internationale, à la promotion des droits de l'homme et à la lutte contre le racisme, l'apartheid et l'incitation à la guerre que la Conférence générale de l'Organisation des Nations Unies pour l'éducation, la science et la culture (UNESCO) a publiée à sa vingtième session, en novembre 1978, dispose que :

1. L'exercice de la liberté d'opinion, de la liberté d'expression et de la liberté de l'information, reconnu comme partie intégrante des droits de l'homme et des libertés fondamentales, est un facteur essentiel du renforcement de la paix et de la compréhension internationale.
2. L'accès du public à l'information doit être garanti par la diversité des sources et des moyens d'information dont il dispose, permettant ainsi à chacun de s'assurer de l'exactitude des faits et de fonder objectivement son opinion sur les événements. À cette fin, les journalistes doivent avoir la liberté d'informer et les plus grandes facilités possibles d'accès à l'information. De même, il importe que les organes d'information répondent aux préoccupations des peuples et des individus, favorisant ainsi la participation du public à l'élaboration de l'information.

3. En vue du renforcement de la paix et de la compréhension internationale, de la promotion des droits de l'homme et de la lutte contre le racisme, l'apartheid et l'incitation à la guerre, les organes d'information, partout dans le monde, en raison du rôle qui est le leur, contribuent à promouvoir les droits de l'homme, notamment en faisant entendre la voix des peuples opprimés qui luttent contre le colonialisme, le néocolonialisme, l'occupation étrangère et toutes formes de discrimination raciale et d'oppression et qui ne peuvent s'exprimer sur leur propre territoire.

4. Pour que les organes d'information soient à même de promouvoir dans leurs activités les principes de la présente Déclaration, il est indispensable que les journalistes et autres agents des organes d'information, dans leur propre pays ou à l'étranger, jouissent d'une protection qui leur garantisse les meilleures conditions pour exercer leur profession.

272. L'article III de la même déclaration stipule que :

1. Les organes d'information ont une contribution importante à apporter au renforcement de la paix et de la compréhension internationale et dans la lutte contre le racisme, l'apartheid et l'incitation à la guerre, ainsi que dans la lutte contre la guerre d'agression, le racisme et l'apartheid ainsi que contre les autres violations des droits de l'homme qui sont, entre autres, le résultat des préjugés et de l'ignorance.

2. Les moyens d'information contribuent, par la diffusion de l'information relative aux idéaux, aspirations, cultures et exigences des peuples, à éliminer l'ignorance et l'incompréhension entre les peuples, à sensibiliser les citoyens d'un pays aux exigences et aux aspirations des autres, à assurer le respect des droits et de la dignité de toutes les nations, de tous les peuples et de tous les individus, sans distinction de race, de sexe, de langue, de religion ou de nationalité, et à attirer l'attention sur les grands maux qui affligent l'humanité, tels que la misère, la malnutrition et la maladie. Ce faisant, ils favorisent l'élaboration par les États des politiques les plus aptes à réduire les tensions internationales et à régler de façon pacifique et équitable les différends internationaux.

B. Violations de la liberté de la presse censées avoir été commises par les autorités officielles palestiniennes

273. Pour se faire une idée de la nature, de l'ampleur et de la teneur des violations dont fait état le rapport Goldstone, la Commission a pris contact avec toutes les instances palestiniennes s'occupant des droits de l'homme dont elle pensait qu'elles s'intéressaient aux violations commises en Cisjordanie, et en assuraient la surveillance et la documentation afin qu'elles lui communiquent les éléments d'informations qu'elles avaient pu recueillir et corroborer, concernant les atteintes à la liberté de la presse ou les violations de ce droit imputables aux autorités officielles palestiniennes dans le territoire palestinien.

274. Tous les rapports émanant des instances qui veillent au respect de la liberté de la presse ainsi qu'à l'exercice par les Palestiniens de leur droit à la liberté d'opinion et d'expression, de même que toutes les données publiées par ces instances et toutes

leurs interventions, montrent que plusieurs violations de la liberté de la presse ont été commises en Cisjordanie, et en particulier que :

a) Des journalistes ont été arrêtés, détenus et interrogés par les services de sécurité palestiniens, en raison de leur appartenance politique ou pour des reportages qui ont été publiés dans presse écrite ou diffusée par les médias audiovisuels⁴¹;

b) Certains de ces journalistes ont été torturés et soumis à des traitements humiliants et dégradants, lors de leur détention ou de leur arrestation par les services de sécurité palestiniens qui n'ont nullement tenu compte des dispositions du Code de procédure pénale n° 3 de 2001 stipulant que les personnes arrêtées doivent être déférées devant le Procureur général civil ou devant une juridiction régulière et que la durée de leur garde à vue ne doit pas dépasser 24 heures;

c) Les services de sécurité ont interdit et entravé d'exercer leur profession, et ce pour des raisons liées à l'appartenance politique de tel ou tel journaliste ou pour leur interdire d'enquêter sur des sujets auxquels les service de sécurité ne voulaient pas que l'on s'intéresse ou de publier le résultat de ces enquêtes;

d) Les services de sécurité ont saisi des outils de travail, des appareils et du matériel de presse, qu'ils ont confisqués pour pouvoir en examiner le contenu ou priver les journalistes des moyens nécessaires à l'exercice de leur métier.

C. Plaintes reçues par la Commission d'enquête au sujet des violations de la liberté de la presse qui auraient été commises en Cisjordanie

275. Se fondant sur les plaintes qu'elle a recueillies, sur les auditions durant lesquelles elle a entendu des journalistes décrire les pratiques contraires à la loi dont ils auraient été victimes en Cisjordanie ainsi que les rapports du Centre palestinien pour le développement et la liberté des médias (MADA) et d'organismes qui s'occupent des droits de l'homme, notamment le Centre palestinien pour les droits de l'homme à Gaza, la Commission indépendante chargée des droits de l'homme et la Fondation Samir Kassir, la Commission a abouti à la conclusion selon laquelle les institutions chargées de veiller à l'application des lois avaient violé la liberté de la presse et fait fi des règles et des garanties prévues par la loi en ce qui concerne l'arrestation et la détention de journalistes. Les principales violations dont la Commission d'enquête a pu établir l'existence à l'issue des auditions de journalistes auxquelles elle a procédé, sont sans doute les suivantes :

- Arrestation et emprisonnement par les services de sécurité, de journalistes dans l'exercice de leurs fonctions;
- Tortures et mauvais traitements infligés aux journalistes emprisonnés;
- Agression de journalistes et entrave à l'exercice de leur profession;
- Confiscation d'outils de travail et de matériel;
- Menaces dirigées contre les journalistes et mesures visant à les terroriser;

⁴¹ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote S-40/2010.

- Pressions exercées sur les journalistes en vue de les contraindre à collaborer avec les services de sécurité;
- Refus des instances compétentes d'appliquer les décisions des tribunaux leur ordonnant de remettre en liberté les journalistes qu'elles maintiennent en détention⁴².

276. En attestation des violations susmentionnées, on a reproduit ci-après certaines des dépositions que la Commission a recueillies lors des auditions qu'elle a tenues avec les journalistes qui s'étaient plaints d'abus et de violations qu'ils affirmaient avoir subis aux mains des services de l'Autorité nationale palestinienne en Cisjordanie.

277. Au nombre des violations de ce type dont la Commission a pu confirmer l'existence, on citera l'arrestation du journaliste Moustapha Ali Abdullah Sabri qui a été arrêté successivement par tous les services de sécurité – le Service des renseignements généraux, les Services de la sécurité préventive et les Services de renseignement militaire –, dans l'exercice de ses fonctions. Dans la déclaration qu'il a faite à la Commission lors de l'audition qui s'est tenue le 8 mai 2010, M. Sabri a déclaré ceci : « Le 14 août 2007, j'ai été arrêté par le Service des renseignements généraux de la ville de Qalqilya, après avoir reçu une convocation téléphonique. Le service susmentionné m'a maintenu en détention pendant cinq jours durant lesquels il m'a interrogé sur mon travail de journaliste. Durant ces interrogatoires, j'ai été torturé, enchaîné et soumis à toutes sortes de traitements durs et humiliants, et en particulier incarcéré pendant toute la durée de ma détention dans une cellule de 1,80 mètre de long et de 90 centimètres de large. J'ai été libéré au bout de cinq jours, après avoir signé un document dans lequel je m'engageais à respecter les lois de l'Autorité nationale palestinienne [...] Le 5 mai 2008, j'ai de nouveau été arrêté par le Service des renseignements généraux de Qalqilya qui m'a gardé en prison pendant trois jours durant lesquels aucune question ne m'a été posée. Le 29 juillet 2008, j'ai de nouveau été convoqué par les services susmentionnés qui m'ont reproché d'avoir publié dans la presse un compte rendu des traitements humiliants qu'ils m'avaient infligés et m'ont maintenu en détention pendant 14 jours avant de me déférer devant le tribunal militaire en m'accusant d'avoir agressé un de leurs officiers, en l'occurrence l'officier que, lors d'un de mes nombreux séjours en prison, j'avais poussé après qu'il m'eut giflé. Je suis resté emprisonné jusqu'au 11 septembre 2008, date à laquelle la police militaire m'a remis en liberté en vertu d'une décision de la Haute Cour de justice palestinienne ordonnant que je sois libéré le même jour. À peine avais-je franchi la porte du siège de la police militaire qu'un groupe d'agents des renseignements généraux s'est emparé de moi et m'a conduit au siège de ce service où j'ai été détenu jusqu'au 19 septembre 2008 [...] Le 21 avril 2009, un groupe d'agents de la sécurité préventive de la ville de Qalqilya m'a arrêté. Cette fois-là, ma maison a été perquisitionnée et mes archives de presse confisquées. Quinze jours après mon arrestation, j'ai dû être transporté à l'hôpital de la ville, suite à l'élévation de ma tension et mon taux de glycémie. Je suis resté hospitalisé pendant deux jours. Avant cela, j'avais été roué de coups, torturé et enchaîné. Quarante-trois jours après mon arrestation, j'ai été transféré au siège de la sécurité préventive de la ville de Ramallah où les conditions étaient bien pires dans la mesure où j'ai dû rester allongé pendant 18 jours, les yeux bandés, les mains ligotées et enchaîné à la fenêtre ou à la porte. Un médecin qui, lors d'une visite, m'a

⁴² Ces violations figurent dans le chapitre sur les arrestations et la torture en Cisjordanie.

trouvé ainsi enchaîné, a demandé mon transfert à l'hôpital de Ramallah où, après avoir été secouru, j'ai été reconduit à la prison. Le 15 juillet 2009, la Haute Cour palestinienne a ordonné ma remise en liberté. Néanmoins, le Service de la sécurité préventive n'a pas immédiatement donné suite à cette décision et a attendu encore 10 jours pour me libérer [...] »⁴³

278. Dans un autre témoignage relatant l'arrestation, la détention et l'interrogatoire par les services de sécurité palestiniens de journalistes dans l'exercice de leurs fonctions, un de ces journalistes a déclaré à la Commission d'enquête que le 11 novembre 2007, alors qu'il achevait de filmer un entretien avec l'épouse du Président du Conseil législatif emprisonné par les forces d'occupation israéliennes, au domicile ce dernier dans la ville d'Hébron, des agents de la sécurité préventive l'ont arrêté lui et son collègue, de façon humiliante, alors qu'ils sortaient de la demeure où l'interview avait eu lieu, et les ont conduits à leur siège à Hébron, où ils leur ont confisqué la bande son de l'interview et les ont interrogés sur la nature de leur travail à la chaîne Al-Aqsa, ont confisqué leur matériel cinématographique et les ont maintenus pendant 20 jours en détention avant de les libérer sous caution.

279. En septembre 2008, le même journaliste a été arrêté par les services de renseignement généraux de la ville de Bethléem puis emprisonné pendant 15 jours au motif qu'il travaillait pour la chaîne satellite Al-Aqsa. En juillet 2009, il a été emprisonné par le Service de la sécurité de la ville de Bethléem, après avoir été convoqué à son siège. Selon les déclarations qu'il a faites devant la Commission d'enquête, durant sa détention, il aurait été enchaîné et fouetté et fait l'objet d'autres sévices et traitements humiliants avant d'être remis en liberté un mois après son arrestation.

280. Dans sa déposition, il a notamment affirmé ceci : « Ils m'ont fait entrer directement dans la cellule sans me poser de questions. Puis ils m'ont enchaîné, m'ont bandé les yeux et ont commencé à me frapper à tour de rôle à l'aide d'un tuyau, et ce, à sept reprises. J'ai crié que j'étais journaliste et qu'ils ne pouvaient me traiter de cette façon. Ils ont recommencé à me frapper sur le visage. Réagissant à ces sévices, je me suis dégagé de mes liens et j'ai arraché la cagoule qui me recouvrait la tête. C'est alors que l'individu qui me frappait s'est jeté sur le côté et a appelé un officier. À ce moment-là, j'ai aperçu une quinzaine de personnes enchaînées en train d'être torturées. Après l'arrivée de l'officier, ils m'ont jeté à terre et battu. J'ai continué de crier jusqu'à ce que le Directeur chargé de l'enquête arrive. Ce dernier m'a à son tour frappé au visage puis m'a ordonné de ne pas discuter et de garder le silence avant de me ligoter et de m'enchaîner de nouveau [...] »⁴⁴

281. Par la suite, le même journaliste a été arrêté le 9 septembre par les services de renseignement militaire qui l'ont emprisonné pendant 15 jours. En outre, en janvier 2010, les services de renseignements généraux l'ont arrêté dans l'exercice de sa profession et l'ont maintenu en détention pendant 10 jours.

282. Lors d'une autre audition, tenue au siège de la Commission le 4 mai 2010, le journaliste Saïd Khoueïri, a déclaré que, le 24 janvier 2009, le Service de la sécurité préventive de la ville de Naplouse l'a arrêté après l'avoir convoqué par téléphone.

⁴³ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote S/D-4/2010.

⁴⁴ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote S/D-5/2010.

283. M. Khoueiri a aussi affirmé qu'après son arrestation, il avait été soumis à des interrogatoires visant essentiellement à recueillir des informations d'ordre privé et d'ordre professionnel en rapport avec son travail de journaliste et les fonctions qu'il exerçait au sein de la chaîne Al-Aqsa, ainsi que sur les liens qu'il entretenait avec la chaîne satellite Al Qods. Le jour suivant son arrestation, il a été transféré à la prison d'Al Juneid à Naplouse où il a dû subir là aussi plusieurs interrogatoires visant à obtenir le même type de renseignements que ceux dont il est fait état ci-dessus, puis il a été libéré le 1^{er} mars 2009. Il a en outre déclaré qu'il avait été emprisonné dans une cellule où les conditions d'hygiène étaient si déplorables qu'elles avaient nécessité son hospitalisation. Il a ajouté qu'on lui avait proposé de clore le dossier de son arrestation, en échange de renseignements sur ses relations avec le Hamas et avec la chaîne de télévision par satellite ainsi que sur les liens entre la chaîne satellite Al Qods et le Hamas. Il a aussi affirmé qu'il avait le sentiment d'être surveillé en permanence par les services de sécurité palestiniens⁴⁵.

284. Le 29 mars 2009, des agents des renseignements généraux de la localité de Deir Istia, dans la province de Salfit, ont arrêté le journaliste Saïd Khoueiri ainsi que les deux équipes de la chaîne satellite Al Qods et de l'agence de presse Ramtan, qui étaient en train d'interviewer la population locale. Les personnes arrêtées ont été conduites au siège des renseignements généraux de Salfit où elles ont été interrogées sur la nature des reportages qu'elles effectuaient à Deir Istia.

285. Lors d'une audition tenue le 4 mai 2010, M. Qays Omar Darwish Omar, journaliste habitant le village de Siniria, dans la province de Qalqilya, dans le nord de la Cisjordanie, et travaillant comme correspondant du journal jordanien *Al Haqiqa Al Dawliya* et le site Web Islamonline, a déclaré que le 21 février 2009, il avait été convoqué par écrit au siège de la sécurité préventive de la ville de Cannes où il s'était présenté le lendemain, 22 février 2009, pour ensuite être arrêté et emprisonné pendant trois jours durant lesquels il a été interrogé sur des sujets en rapport avec la nature de son travail de journaliste.

286. Le 22 juin 2009, le Service de la sécurité préventive de la Cisjordanie a arrêté le journaliste Qays Omar Darwish Omar à son domicile, qui se trouve dans le village de Siniria (province de Qalqilya), dans le nord de la Cisjordanie. M. Qays est demeuré emprisonné pendant 88 jours durant lesquels il a été torturé, fouetté, frappé au visage et enchaîné pendant de longues périodes, a subi des humiliations et fait l'objet de mauvais traitements et de pressions psychologiques telles que la privation de sommeil.

287. Lors de son audition, M. Qays a affirmé que, durant son interrogatoire, il avait été interrogé sur les liens qu'il entretenait avec le Hamas durant ses études universitaires ainsi que sur son travail de journaliste et il lui a été demandé de coopérer avec la sécurité préventive en lui fournissant le nom des habitants de son village membres du Hamas. M. Qays a aussi ajouté que, depuis son arrestation, il était en proie à la frayeur et craignait en permanence d'être maltraité⁴⁶.

288. Durant son audition, un journaliste, qui a réclamé l'anonymat, a déclaré que le 5 mars 2008, la sécurité préventive l'a arrêté dans la ville de Naplouse et il a été

⁴⁵ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote S/D-3/2010.

⁴⁶ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote S/D-2/2010.

maintenu en détention pendant 78 jours durant lesquels il a été interrogé sur la nature de son travail de journaliste. Bien qu'il n'ait été victime d'aucune forme de torture physique, il a subi des tortures psychologiques lorsque ses geôliers l'ont placé en isolement pendant 40 jours.

D. Avis de la Commission concernant les violations alléguées de la liberté de la presse

289. Les auditions durant lesquelles elle a recueilli les témoignages des plaignants et des institutions chargées des droits de l'homme qui s'occupent de la liberté de la presse donnent à penser à la Commission que les autorités officielles palestiniennes ont bel et bien outrepassé et violé les dispositions relatives à la liberté de la presse, de la Loi fondamentale palestinienne telle que modifiée en 2003, de la loi n° 9 de 1995 sur l'impression et la publication et du Code de procédure pénale n° 3 de 2001.

290. En effet, il est apparu à la Commission d'enquête que toutes les arrestations de journalistes portées à sa connaissance lors des auditions sont imputables aux services de sécurité relevant de l'Autorité palestinienne en Cisjordanie qui ont agi à des fins politiques. En effet, ces journalistes ont été arrêtés à cause de leur appartenance ou de leurs opinions politiques et non pas parce qu'ils s'étaient livrés à une activité ou à un acte contraire aux règles d'exercice de leur profession et à la liberté de la presse, qui aurait pu nécessiter leur interrogatoire.

291. Aussi la Commission considère-t-elle comme illégal le fait d'arrêter et d'emprisonner des journalistes en raison de leur appartenance ou de leurs opinions politiques dans la mesure où ce type de pratiques contrevient de manière flagrante aux dispositions de la Loi fondamentale palestinienne qui, à son article 19, dispose que les Palestiniens sont égaux devant la loi et la justice et qu'ils ne peuvent faire l'objet d'une discrimination fondée sur l'origine ethnique, le sexe, la couleur, la religion, leur opinion politique ou le handicap. En outre, à l'article 19 de la même loi, il est stipulé que nul ne peut porter atteinte à la liberté d'opinion que chaque être humain a le droit d'exprimer et de diffuser librement ses opinions, par la parole et par l'écrit ou par d'autres moyens d'expression ou formes artistiques en tenant compte des dispositions de la loi. L'article 27 de la même loi garantit la liberté des médias écrits et audiovisuels, la liberté d'impression, de publication, de distribution et de diffusion, ainsi que la liberté de ceux qui travaillent dans les médias.

292. Les services de sécurité ont arrêté à tour de rôle un même journaliste qui, à peine remis en liberté par l'un d'entre eux, était aussitôt emprisonné par un autre. Ces pratiques montrent, d'une part, qu'il n'y a pas de coordination effective entre ces différents services et, de l'autre, que ceux-ci ne se respectent pas mutuellement, décidant d'arrêter un journaliste qui vient d'être relâché par un de leurs pairs. La Commission d'enquête estime aussi que ce type de mesure accroît les pressions qui s'exercent sur les journalistes et les territoires encore plus, en leur donnant le sentiment d'être constamment poursuivis, ce qui influe sur leurs opinions et les incite à exercer leur métier de manière conforme, aux desiderata et aux orientations des instances officielles.

293. L'impunité dont jouissent ceux qui portent atteinte aux droits de l'homme et aux libertés ainsi qu'à l'immunité des journalistes et à la règle qui interdit de les poursuivre et de leur faire subir des interrogatoires dans l'exercice de leurs fonctions, la Commission estime que le fait que les auteurs de violations des droits

et des libertés de la personne humaine que consacre la Loi fondamentale palestinienne ne soient pas réellement tenus de rendre compte de leurs actes incite certains d'entre eux à passer outre aux dispositions de la législation nationale qui offrent des garanties, une protection ou une immunité aux journalistes.

294. Il est apparu à la Commission d'enquête que le syndicat des journalistes palestiniens qui n'a rien fait pour protéger les journalistes, empêcher qu'ils ne soient poursuivis ou soumis à des interrogatoires dans l'exercice de leurs fonctions, a failli à son rôle en négligeant de défendre ses membres.

295. La Commission d'enquête estime que le fait de déférer un journaliste devant les tribunaux militaires, le Procureur général militaire, ou d'arrêter et de détenir un journaliste en vertu d'un mandat d'arrêt délivré par le Procureur général militaire ou par une instance relevant d'une juridiction militaire, non seulement contrevient aux dispositions de la Loi fondamentale palestinienne telle que modifiée en 2003 et du Code de procédure pénale n° 3 de 2001, mais constitue aussi une violation flagrante de la loi sur l'impression et la publication dont les dispositions en général, et l'article 42 en particulier, stipulent que le Procureur général civil et les juridictions régulières compétentes sont les seuls habilités à enquêter sur les journalistes ayant manqué à leurs obligations professionnelles et enfreint les règles déontologiques de leur profession, et à interroger ces derniers.

E. Violations des libertés de la presse dans la bande de Gaza

296. Bien qu'elle ne soit pas habilitée, en vertu du rapport Goldstone, à enquêter sur les violations de la liberté de la presse survenues dans la bande de Gaza, la Commission d'enquête a jugé bon d'aborder cette question importante, à savoir celle des violations de la liberté de la presse qu'elle a relevées et dont elle a établi l'existence dans la bande de Gaza. Si elle a agi ainsi, c'est parce qu'elle était convaincue que ces violations méritent d'être signalées et qu'il est indispensable que l'autorité de fait dans la bande de Gaza intervienne pour protéger, préserver et garantir l'immunité des journalistes travaillant dans cette partie du monde.

297. On trouvera ci-après le détail de certaines des violations de la liberté de la presse dont la Commission d'enquête a pu établir l'existence dans la bande de Gaza.

298. Le 19 mars 2009, M. Sakhr Medhat Abu Aoun, correspondant de l'Agence France-Presse s'est rendu au siège de la Sécurité interne, un organe de sécurité relevant du Ministère de l'intérieur de l'autorité de fait à Gaza, où il a été interrogé sur son travail de journaliste. Ceux qui ont procédé à son interrogatoire l'ont accusé d'avoir insulté le mouvement du Hamas, l'ont interrogé sur la nature des activités qu'il menait au sein du syndicat des journalistes ainsi que des liens qu'il entretenait avec la Fédération internationale des journalistes et l'Union des journalistes arabes, et ont obtenu de lui qu'il leur communique son adresse électronique et son mot de passe.

299. Le 29 novembre 2008, des agents de police de l'autorité de fait dans la bande de Gaza ont arrêté M. Alaa Salameh, un journaliste habitant la ville de Rafah et travaillant comme correspondant de la station locale Al Qods, alors que celui-ci franchissait le point de passage de Rafah pour rentrer chez lui, après avoir fini de couvrir de récents événements en rapport avec le voyage d'habitants de la bande de Gaza effectuant leur pèlerinage à la Mecque. Après avoir contraint M. Salameh à

monter dans une jeep, les policiers lui ont bandé les yeux et l'ont conduit vers un endroit inconnu, en le rouant de coups pendant toute la durée du trajet.

300. Le 10 juin 2009, M. Mohammad Zouhdi Al Mashharawi, correspondant à Gaza, de la chaîne de télévision par satellite Al Qods, a été agressé par des éléments de la sécurité, alors qu'il couvrait la visite qu'une délégation internationale dirigée par la Cheikha Hessa bint Khalifa bin Ahmed Al-Thani, Rapporteur spécial des Nations Unies sur le handicap, effectuait à l'hôpital Al Shifa.

301. Le 12 août 2009, deux éléments de la garde du site militaire d'Al Ansar qui relève de l'autorité de fait dans la bande de Gaza ont arrêté les membres d'une équipe de la chaîne satellite al Ittijah, qui travaillaient sur la route principale conduisant au site. Les deux agents de sécurité ont obligé les membres de l'équipe, à savoir le correspondant de la chaîne, le journaliste Mazen Al Balbissi, le cameraman Guevara Al Safadi et l'assistant cameraman Abdul Rahman Zaqqout, à entrer à l'intérieur du site où l'un des agents a confisqué puis détruit le film que l'équipe venait de tourner.

302. Le 14 août 2009, le Ministère de l'intérieur de l'autorité de fait a interdit aux journalistes et à tous les médias de couvrir les événements qui se déroulaient alors dans la ville de Rafah, dans le sud de la bande de Gaza, et qui opposaient des agents des services de sécurité et des éléments armés appartenant aux brigades du martyr Ezzeddine Al Kassam à des éléments armés du groupe « Guerriers de Dieu » conduit par le cheikh Abdul Latif Moussa. Ces affrontements ont causé la mort de 28 personnes dont le cheikh Moussa, et fait des dizaines de blessés. Le Ministère de l'information de l'autorité de fait a publié le 18 août 2009 un communiqué de presse dans lequel il affirmait que l'interdiction faite aux médias de filmer les événements de Rafah avait pour but de protéger la vie des journalistes et de ménager les sentiments et la sensibilité de la population.

303. Le 31 août 2009, des membres des services de sécurité intérieure ont arrêté M. Ibrahim Mohammad Qatan et M. Ahmad Ghabayin, respectivement correspondant et photographe de l'Agence de presse Maan, qui travaillaient dans le quartier Al Namssaoui, à l'ouest de la ville de Khan Younis où ils effectuaient un reportage sur les projets de l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient (UNRWA) dont les activités avaient été paralysées par le blocus. Ces deux personnes ont été arrêtées par trois agents de sécurité qui leur ont ordonné de se rendre à bord de leur propre voiture, au quartier général des services de sécurité. Une fois parvenus, ils ont été interpellés par un des officiers qui leur a demandé leur carte de presse et les a interrogés sur la nature de leur travail et des liens qu'ils entretenaient avec la chaîne de télévision de Palestine.

304. Le 10 octobre 2009, M. Ayman Mohaammad Al Cheikh Salameh, correspondant de la chaîne satellite Al Qods, a été sauvagement frappé par un policier, alors qu'il se trouvait dans le quartier Al Amal, à l'ouest de la ville de Khan Younis, dans le sud de la bande de Gaza, où il recueillait des informations concernant la campagne de lutte contre les infractions menée par la municipalité de la ville en collaboration avec la police. Après son agression, M. Salameh a été conduit à l'hôpital Nasser.

VII. Atteintes à la liberté d'association en Cisjordanie

305. La Loi fondamentale palestinienne amendée de 2003 reconnaît aux Palestiniens le droit de s'associer librement et de participer à la vie politique. L'article 26 énonce :

Les Palestiniens ont le droit de participer à la vie politique, à titre individuel ou collectif, et peuvent notamment exercer les droits suivants :

1. Constituer des partis politiques et y adhérer, conformément à la loi;
2. Constituer des syndicats, des corporations, des fédérations, des associations, des clubs et des institutions populaires conformément à la loi;
3. Voter ou se porter candidat aux élections des représentants au suffrage public conformément à la loi;
4. Accéder, sur la base de l'égalité des chances, à des postes dans la fonction publique;
5. Tenir des réunions privées sans la présence d'agents de police, ainsi que des réunions publiques, des rassemblements et des cortèges, dans les limites prescrites par la loi.

306. La loi relative aux associations caritatives et aux organisations de la société civile palestiniennes n°1 de 2000 dispose que les Palestiniens ont le droit légitime de créer et d'établir des associations et organisations de la société civile pour exercer des activités diverses. Son article 1 prévoit ce qui suit : « Les Palestiniens ont le droit d'exercer librement des activités sociales, culturelles, techniques et scientifiques et de constituer des associations et organisations civiles, dans le respect des dispositions de la présente loi ».

307. Pour ce qui des modalités de constitution des associations, les législations palestiniennes ont été harmonisées avec les dispositions et principes du droit international des droits de l'homme, notamment de la Déclaration universelle des droits de l'homme et du Pacte international relatif aux droits civils et politiques, qui reconnaissent explicitement le droit de s'associer librement avec d'autres dans le cadre des libertés publiques et des droits fondamentaux que les États sont tenus de garantir pour chacun.

308. Ce droit qui est confirmé et garanti dans l'article 20 de la Déclaration, qui stipule que « toute personne a droit à la liberté de réunion et d'association pacifiques ». Il est également confirmé à l'article 22 du Pacte, qui dispose que « toute personne a le droit de s'associer librement avec d'autres, y compris le droit de constituer des syndicats et d'y adhérer pour la protection de ses intérêts ».

309. Du fait que le droit de constituer des associations fait partie des droits et libertés publiques consacrés par la Loi fondamentale, il en est venu à accéder au rang – et à être entendu au sens – de libertés publiques, autrement dit il appartient à la catégorie de droits qui poussent les États à agir et intervenir de manière constructive pour les réglementer, reconnaître explicitement leur existence juridique et faire en sorte que tous les membres de la société puissent les exercer effectivement sans distinction ni discrimination.

310. Le fait que ce droit ait été hissé au rang de liberté publique impose plusieurs obligations aux États dont les plus importantes sont le devoir d'intervenir

efficacement pour réglementer ces libertés et légiférer dans ce domaine, de façon à garantir que chacun puisse en jouir et les exercer.

311. Parmi les obligations les plus importantes qu'impose à l'Autorité nationale palestinienne la liberté d'association est l'obligation de s'abstenir de tout acte ou activité susceptible de restreindre ou d'entraver l'exercice effectif par la personne de ce droit ou d'y déroger de manière indue et sans justification sur le plan juridique. Ces obligations comportent également le devoir de s'abstenir d'influencer des personnes ou de les empêcher d'exercer librement ce droit.

A. Organes de l'Autorité nationale compétents en matière d'enregistrement des associations et de surveillance de leurs activités

312. Conformément aux dispositions de la loi relative aux associations caritatives et aux organisations de la société civile, l'enregistrement et la surveillance des activités des associations et des organisations de la société civile dans les territoires palestiniens sont du ressort de deux organes publics, à savoir le Ministère de l'intérieur et le ministère compétent.

1. Ministère palestinien de l'intérieur

313. Le Ministère palestinien de l'intérieur est habilité à enregistrer les associations caritatives et les organisations de la société civile et à les reconnaître comme des personnes morales, après avoir reçu des entités concernées une demande d'enregistrement conformes aux conditions fixées par la loi à savoir :

a) La présentation au service compétent du Ministère palestinien de l'intérieur d'une demande par écrit de l'enregistrement de l'association, accompagnées de trois exemplaires des statuts.

Cette condition est précisée et soulignée au premier paragraphe de l'article 4 de la loi relative aux associations caritatives et aux organisations de la société civile, qui dispose que les membres fondateurs doivent soumettre par écrit au service compétent du Ministère de l'intérieur une demande qui remplit toutes les conditions, signée par au moins trois des membres fondateurs, qui sont habilités à enregistrer l'association ou l'organisation et à signer en son nom. La demande doit être accompagnée de trois exemplaires des statuts de l'association, signés par les membres du comité fondateur;

b) L'intégration des informations suivantes dans les statuts de l'association ou de l'organisation, en application de l'article 5 de la loi :

1. Le nom de l'association ou de l'organisation, son siège social et son objet;
2. Ses ressources financières et leur utilisation;
3. Les différentes catégories de membres, les conditions d'adhésion et de radiation et le montant des cotisations;
4. La structure de l'association ou de l'organisation, les modalités de modification des statuts, ou encore de fusion et d'unification;
5. Les modalités de convocation d'une assemblée générale;

6. Les moyens de contrôle financier;

7. Les règles régissant la dissolution d'une association ou d'une organisation et la dévolution des biens de l'organisation en cas de dissolution;

c) La décision du Ministère de l'intérieur concernant l'enregistrement de l'association.

314. Lorsque les membres fondateurs font une demande d'enregistrement conformément aux conditions prévues par la loi, le Ministère de l'intérieur doit se prononcer sur l'enregistrement de l'association ou de l'organisation dans un délai de deux mois après la date de réception de la demande. Au cas où le Ministère ne prend aucune décision dans les deux mois qui suivent la date de réception de la demande, l'association ou l'organisation est réputée enregistrée au regard de l'article 4 de la loi.

315. Le paragraphe 4 du même article dispose également qu'au cas où le Ministère de l'intérieur décide de rejeter la demande d'enregistrement, les membres fondateurs de l'association ont le droit de contester cette décision auprès d'un tribunal compétent, à savoir la Haute Cour palestinienne, dans un délai de 30 jours suivant la notification du rejet.

a) Loi relative aux associations caritatives et aux organisations de la société civile

316. D'après la loi relative aux associations caritatives et aux organisations de la société civile, les compétences du Ministère de l'intérieur dans ce domaine se limitent à ce qui suit :

- Enregistrer les associations et les organisations de la société civile qui remplissent les conditions requises;
- Procéder à la vérification des comptes de l'association, conformément à l'article 6 de la loi. Le ministère compétent est tenu au regard de la loi d'adresser une lettre d'autorisation au Ministre de l'intérieur, lui demandant de procéder à l'audit financier de l'association pour déterminer si ses fonds ont été utilisés à bon escient, conformément aux dispositions de la loi et aux statuts de l'association ou de l'organisation;
- Obtenir des déclarations sur les modifications concernant l'emplacement des locaux, les statuts, l'objet de l'association ou de l'organisation ou tout remaniement total ou partiel de son conseil d'administration, conformément à l'article 12 de la loi;
- Former des comités provisoires pour gérer l'association, comme précisé à l'article 22 de la loi, qui autorise le Ministre de l'intérieur à désigner un comité provisoire parmi les membres de l'assemblée générale de l'association ou de l'organisation, pour faire office de conseil d'administration pendant un mois; et convoquer une assemblée générale au cours de la même période pour élire un nouveau conseil d'administration.

317. S'agissant de la désignation des comités provisoires, la compétence du Ministre de l'intérieur est limitée et ne peut s'exercer que dans l'un des deux cas suivants :

- Démission de l'ensemble des membres du conseil d'administration de l'association ou de l'organisation;

- Démission de certains des membres du conseil d'administration de l'association ou de l'organisation et incapacité des autres membres du conseil de constituer un comité provisoire, auquel cas le Ministre convoque l'assemblée générale de l'association dans un délai d'un mois à compter de la date des démissions aux fins d'élire un nouveau conseil d'administration.

b) Annulation de l'enregistrement de l'association et dissolution de la personnalité morale

318. La loi susmentionnée confère au Ministère de l'intérieur le pouvoir d'annuler l'enregistrement d'une association et de dissoudre sa personnalité morale si cette dernière n'a pas effectivement entamé ses activités dans un délai d'un an à partir de la date d'enregistrement, sauf cas de force majeure.

c) Dissolution d'une association et de sa personnalité morale

319. Sur la base de l'article 37 de la loi précitée, le Ministre de l'intérieur peut prendre la décision de dissoudre une association ou une organisation si cette dernière contrevient délibérément et fondamentalement à ses propres statuts, en violation des dispositions fondamentales de la loi l'association ou l'organisation doit obligatoirement inscrire dans ses statuts au moment de son enregistrement et qui sont l'élément essentiel qui fonde la décision du Ministère de l'enregistrer et de l'accréditer.

320. Par conséquent, toute transgression ou violation par l'association ou l'organisation des dispositions fondamentales visées à l'article 5 de la loi confère au Ministère de l'intérieur le pouvoir de dissoudre celle-ci.

321. Pour éviter l'arbitraire dans l'exercice du pouvoir exécutif, la loi exige du Ministère qu'il envoie un avertissement par écrit à l'association ou l'organisation concernant la nature de la violation qu'elle aurait commise par rapport à ses statuts avant de prendre une décision sur sa dissolution. La loi oblige également le Ministère à accorder à l'association un délai de grâce de trois mois pendant lequel elle peut remédier à la situation et rétablir le statu quo.

322. Si l'association ou l'organisation tient compte de l'avertissement et remédie à la situation qui a entraîné une violation de ses statuts, l'avertissement peut être considéré non avenu auquel cas il n'y a pas lieu de dissoudre l'association et l'organisation ou de lui retirer sa personnalité morale.

323. Pour veiller à ce que le Ministère de l'intérieur n'utilise pas ses pouvoirs ou compétences de manière arbitraire, l'article 38 de la loi confirme le droit de l'association ou de l'organisation qui s'estime lésée par la décision de dissolution du Ministère de se pourvoir en cassation, auquel cas elle peut poursuivre ses activités en attendant la décision finale.

2. Ministère compétent

324. Le ministère compétent est celui dont les compétences recouvrent le mieux les activités essentielles de l'association et son objet tel qu'il est défini dans ses statuts. Par exemple, les ministères compétents dans le cas des associations actives dans le domaine de la santé ou celles soucieuses de favoriser l'enseignement, d'éliminer l'analphabétisme et de former les enseignants sont respectivement le Ministère de la santé et le Ministère de l'éducation.

325. Conformément à la loi susmentionnée, le ministère compétent est l'organe qui a les compétences nécessaires pour surveiller l'activité des associations et veiller à ce qu'elles s'acquittent de leurs obligations, respectent leurs statuts internes ainsi que les dispositions de la loi relative aux associations.

B. Les droits des associations au regard de la loi palestinienne relative aux associations

326. Le corpus juridique régissant les activités des associations en territoire palestinien comprend la loi relative aux associations et aux organisations de la société civile n° 1 de 2000 et la décision du Conseil des ministres n° 9 de 2003 qui a adopté le texte d'application de la loi précitée.

327. Cette loi comprend neuf sections et 45 articles qui abordent diverses questions juridiques liées aux associations et organisations, notamment la nature du lien juridique avec le pouvoir exécutif.

328. Le texte d'application, qui compte 70 articles, comporte des dispositions qui éclairent la lettre et l'esprit de la loi, ainsi que les procédures et formalités administratives relatives à l'enregistrement et au fonctionnement de ces associations.

329. On peut résumer les droits et obligations liés à l'enregistrement et au fonctionnement des associations comme suit :

1. Une association a le droit de se faire enregistrer si les conditions sont réunies à cet effet. Au regard de cette loi, toute association a le droit de se faire enregistrer si elle satisfait aux conditions requises;
2. Les associations ont le droit d'avoir des sections et de mettre en œuvre des projets générateurs de revenus. L'article 15 dispose que « les associations et organisations ont le droit d'organiser des activités et d'établir des projets générateurs de revenus à condition que ces derniers servent à financer des activités d'intérêt public. Les associations et les organisations ont le droit de créer des sections à l'intérieur de la Palestine »;
3. Les autorités ne peuvent pas s'immiscer dans la constitution des assemblées générales ou dans les modalités de convocation et de tenue des réunions. L'article 46 du texte d'application de la loi souligne que l'association est gérée par son conseil d'administration, conformément aux statuts internes, étant entendu que ces derniers doivent être conformes à la loi. Chaque association est dotée d'un conseil d'administration et d'une assemblée générale. Aucun organe public ne peut intervenir dans la conduite des réunions, des élections et des activités de l'association ou les influencer;
4. Aucune association ne peut faire l'objet d'une dissolution sans en être préalablement informée ou sans avoir obtenu un délai de grâce de trois mois pour mettre de l'ordre dans ses affaires;
5. Les biens d'une association ne sont saisis et ses locaux ne sont fermés ou perquisitionnés que sur ordre d'une autorité juridique compétente, conformément à l'article 41 de la loi relative aux associations, qui interdit la saisie des biens d'une association ou d'une organisation, la fermeture de ses locaux ou la perquisition de son siège, de ses locaux ou de ses sections, en l'absence d'une décision de l'organe judiciaire compétent;

6. Les associations ont le droit de modifier leurs statuts ou leur objet à condition d'en d'informer le service ou le ministère compétent dans un délai d'un mois après la date de modification. L'article 45 du texte d'application dispose que les membres fondateurs d'une association ont le droit d'établir librement ses statuts, sans ingérence aucune de la part d'un organe public;

7. Une association a un droit de recours en justice. Pour protéger les associations et les organisations de tout abus de pouvoir de la part de l'exécutif, la loi relative aux associations dispose qu'une association ou organisation qui fait l'objet d'une décision de dissolution émanant du Ministère ou de révocation de son certificat d'enregistrement a le droit de faire appel de ladite décision auprès de l'organe judiciaire compétent, à savoir la Haute Cour. L'article 38 de la même loi stipule que si le Ministère décide de révoquer le certificat d'enregistrement d'une association ou d'une organisation, les raisons doivent en être précisées par écrit. L'association ou l'organisation a le droit de contester la décision devant un tribunal compétent.

C. Violations présumées par les autorités palestiniennes de la liberté de s'associer librement

330. Pour comprendre l'étendue et la nature des violations présumées de la liberté de s'associer librement, citées dans le Rapport Goldstone, la Commission a contacté toutes les institutions de défense des droits de l'homme palestiniennes qui surveillent ces violations et recueillent des informations à cet égard en Cisjordanie, telles que Al-Haq, la Commission palestinienne indépendante des droits de l'homme, le Réseau des organisations non gouvernementales palestiniennes et le Centre d'assistance juridique et des droits de l'homme Al Qods. Elle a demandé à ces institutions de lui faire part, par écrit, des violations commises par les autorités palestiniennes du droit des Palestiniens de constituer des associations caritatives et des organisations de la société civile.

331. Les rapports communiqués par ces institutions à la Commission s'accordent pour dire que de nombreuses violations du droit de s'associer librement ont été commises par les autorités en Cisjordanie, notamment par le Ministère de l'intérieur et les services de sécurité. Sur la base des rapports et des déclarations reçues, on peut les résumer comme suit :

1. Constitution de comités provisoires et désignation de personnes externes à l'association pour gérer ces organisations à la place des conseils d'administration élus par les membres. D'après le rapport de la Commission palestinienne indépendante des droits de l'homme, 11 comités provisoires ont été désignés en 2009 par le Ministère palestinien de l'intérieur pour remplacer les conseils élus en Cisjordanie⁴⁷;
2. Non-exécution des décisions de la Haute Cour annulant les ordres des autorités concernant la désignation des comités provisoires de direction;

⁴⁷ État des associations sous l'Autorité nationale palestinienne en 2009 : rapport de la Commission palestinienne indépendante des droits de l'homme, Rapport spécial n° 68, p. 13.

3. Interdiction faite par les services de sécurité palestiniens aux associations d'exercer leurs activités et menace d'arrêter les membres des conseils d'administration qui refusent d'obtempérer;
4. Perquisitions effectuées par les services de sécurité palestiniens au siège des associations et saisie de leurs documents et de leur matériel;
5. Fermeture des sections des associations et interdiction d'exercer des activités;
6. Obligation pour les associations de soumettre des rapports administratifs et financiers au Ministère de l'intérieur;
7. Obligation d'obtenir l'accord préalable du Ministère de l'intérieur pour l'ouverture de comptes bancaires;
8. Obligation faite par le Ministère de l'intérieur aux membres fondateurs d'obtenir au préalable l'approbation des services de sécurité pour enregistrer leur association.

D. Plaintes reçues par la Commission au sujet des violations présumées de la liberté de s'associer librement

332. La Commission a reçu cinq plaintes d'atteintes au droit de s'associer librement, qui auraient été commises par le Ministère de l'intérieur⁴⁸. Après les avoir examinées, étudié les documents présentés à l'appui, entendu les plaignants (respectivement les 4 et 8 mai 2010) et tenu des audiences pour les représentants des organisations de défense des droits de l'homme compétentes⁴⁹, elle a estimé disposer des éléments de preuve suffisants pour appuyer les allégations de violations du droit de s'associer librement commises par les autorités en Cisjordanie. Les témoignages qui ont été entendus au cours des audiences tenues par la Commission en Cisjordanie ont confirmé que les autorités avaient commis les violations suivantes.

333. Des comités provisoires avaient été désignés pour gérer certaines associations à la place des conseils d'administration élus par les membres. Bon nombre d'institutions de défense des droits de l'homme interrogées par la Commission ont confirmé que cette violation s'était bien produite⁵⁰. Cela a été également confirmé par le témoignage du Président du Conseil de la société caritative islamique pour les orphelins du village de Yatta dans le gouvernorat d'Hébron. Il a témoigné que bien que son association n'ait reçu aucun avertissement du Ministère de l'intérieur au sujet d'une violation ou d'une procédure illégale de sa part, il a reçu le 19 août 2008, à son grand étonnement, la visite d'un groupe de personnes au siège de son association, dont un représentant du Ministère de l'intérieur et un représentant des services de sécurité préventive et de la police. Ils lui ont présenté un ordre portant le numéro 110 de 2008 émanant du Ministère, l'informant que des personnes externes

⁴⁸ Ces plaintes ont été entendues et recueillies par la Commission et sont énumérées sur une liste qui figure en pièce jointe.

⁴⁹ La Commission a entendu au cours des audiences qui se sont déroulées les 20, 25 et 26 mai 2010 des déclarations des représentants des institutions compétentes, notamment d'Al-Haq, la Commission palestinienne indépendante des droits de l'homme, du Réseau des organisations non gouvernementales palestiniennes et du Centre d'assistance juridique Al-Qods.

⁵⁰ Ces déclarations et la documentation y relative sont conservées par la Commission sous les cotes j/D-35/2010 et j/D-37/2010.

à l'association seraient désignées au sein d'un comité de direction provisoire pour gérer la société à la place du conseil d'administration élu, qui serait ainsi dissous, en vertu du même ordre. Ils ont emporté les clefs des locaux de la société. Par la suite, les membres du Conseil d'administration qui avait été dissous ont fait appel de l'ordre du Ministère de l'intérieur auprès de la Haute Cour palestinienne, qui a décidé le 24 juin 2009 de le révoquer. Mais à la date où le plaignant a été entendu par la Commission, le Ministère n'avait toujours pas appliqué cette décision⁵¹.

334. La Commission a confirmé que les services de sécurité avaient fermé certaines associations, les avaient empêchées d'exercer leurs activités et menacé d'arrêter les membres des conseils d'administration s'ils ne respectaient pas les ordres d'interdiction.

335. Le président d'une association a déclaré que le 29 mai 2008, une unité des renseignements généraux avait fermé le siège de son association et saisi des documents et du matériel. Les services de sécurité préventive avaient également fermé l'atelier d'un tailleur rattaché à l'association et l'avaient vidé de son contenu.

336. D'après cette même déclaration, l'ordre de fermeture venait du siège des renseignements généraux à Ramallah, en date du 28 mai 2008, et avait été exécuté le lendemain. Une unité des renseignements généraux avait fait une descente dans les bureaux de l'association, saisi des biens et des documents et avait informé ses membres que l'association était désormais interdite de toute activités et que tout membre du conseil d'administration qui tenterait de se rendre dans les locaux serait arrêté.

337. Lorsque le président de cette association s'est rendu au Ministère de la culture pour s'enquérir de l'ordre de fermeture, il a appris que son association, qui était munie d'une licence, pouvait poursuivre ses activités, mais que le Ministère ne pouvait pas garantir la sécurité de ses membres. Il a également appris d'un fonctionnaire qui s'occupait du dossier qu'aucun ordre de fermeture n'avait été donné par le Ministère au sujet de son association et que le contentieux venait des forces de sécurité. Ce fonctionnaire a conseillé au président de l'association de régler directement le problème avec les services de sécurité. À la date où le président a été entendu, son association était toujours fermée. Les services de renseignements généraux avaient confisqué ses meubles qui, d'après son président, avaient été transférés dans les bureaux des services des renseignements généraux à Salfit⁵².

338. D'autres témoins ont déclaré que le siège de l'association avait fait l'objet d'une descente, que ses documents avaient été saisis, qu'elle avait été interdite d'activités et que ses membres étaient régulièrement convoqués pour interrogatoire par les services des renseignements militaires et de la sécurité préventive. L'association n'avait reçu aucune notification officielle par écrit au sujet d'une fermeture ou d'une cessation de ses activités et n'en avait été informée que verbalement. À la date de l'audience, elle n'avait toujours pas pu rouvrir son siège ou reprendre ses activités⁵³.

⁵¹ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote j/D-27/2010.

⁵² Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote j/D-30/2010.

⁵³ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote j/D-28/2010. Le même incident est évoqué dans la déclaration et documentation y relative conservées par la Commission sous la cote j/D-29/2010.

339. Certains des représentants d'institutions qui ont été entendus par la Commission ont également rapporté que des agents du Ministère de l'intérieur étaient intervenus de manière flagrante dans les activités et réunions des associations et avaient insisté pour assister aux élections internes, les superviser ou les surveiller, et en faire avaliser les résultats par le Ministère⁵⁴.

E. Conclusions de la Commission sur les violations présumées en Cisjordanie de la liberté de s'associer librement

340. Après les dépositions des plaignants et des représentants des organisations des droits de l'homme au cours des audiences sur les violations de la liberté de s'associer librement, après l'entrevue officielle avec le Directeur général des relations publiques et des affaires des ONG au Ministère de l'intérieur⁵⁵, après la tenue d'une réunion entre le Président de la Commission et le Ministre de l'intérieur et après l'examen du rapport présenté par le Ministère de l'intérieur de l'Autorité nationale palestinienne sur les obligations du Ministère s'agissant des recommandations du rapport Goldstone⁵⁶, la Commission estime qu'il y a réellement eu des violations de la liberté de s'associer librement et que les autorités palestiniennes ont violé les dispositions de la loi relative aux associations caritatives et aux organisations de la société civile et son texte d'application, comme suit :

341. Les ordres émanant du Ministère de l'intérieur sur la désignation de comités préparatoires provisoires au sein de certaines associations n'étaient pas compatibles avec les dispositions de la loi, d'autant que les comités en question étaient constitués de membres externes aux associations et n'étaient pas provisoires, au sens qu'ils n'avaient pas été créés pour une durée d'un mois, délai prévu pour la tenue de nouvelles élections au sein des conseils d'administration des associations, ce qui représente donc une violation du paragraphe 2 de l'article 22 de la loi relative aux associations caritatives et aux organisations de la société civile n° 1 de 2000, qui autorise le Ministre de l'intérieur à désigner un comité provisoire parmi les membres de l'assemblée générale de l'association ou de l'organisation, pour faire office de conseil d'administration pendant un mois; et convoquer une assemblée générale au cours de la même période pour élire un nouveau conseil d'administration.

342. Dans le rapport présenté à la Commission, le Ministère de l'intérieur a reconnu explicitement avoir désigné 20 comités provisoires au sein des associations en 2009, mais la Commission n'a pas pu déterminer dans quelle mesure ces informations étaient fondées.

343. Alors que les sièges de certaines associations avaient été fermés, les services de sécurité ont enfreint les dispositions de la loi, notamment l'article 41, qui interdit la saisie des fonds d'une association ou d'une organisation, sa fermeture ou la perquisition de ses locaux principaux ou secondaires en l'absence d'une décision de l'autorité judiciaire compétente. L'absence de décisions de la part d'une autorité judiciaire compétente au sujet des fermetures, perquisitions et saisies les rend nulles et non avenues, du fait qu'elles étaient manifestement contraires à la loi.

⁵⁴ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote j/D-35/2010.

⁵⁵ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote j/D-31/2010.

344. L'ingérence du Ministère de l'intérieur dans la tenue des réunions de l'association est illégale et constitue une violation du texte d'application de la loi, qui interdit explicitement aux autorités toute immixtion dans la conduite des réunions, des élections et des activités d'une association et toute tentative de les influencer.

345. Le fait d'obliger les membres fondateurs d'une association à obtenir l'autorisation préalable des services de sécurité est une violation des dispositions de la loi et de son texte d'application. Ni la loi ni son texte d'application n'imposent cette exigence pour enregistrer une association. La Commission considère en outre que cette imposition est une violation flagrante du droit des Palestiniens de s'associer librement, un droit garanti par la Loi fondamentale palestinienne amendée de 2003. Il faut donc mettre fin à cette pratique.

346. La demande formulée par le Ministère de l'intérieur d'obtenir les rapports administratifs et financiers annuels constitue également une violation des dispositions de l'article 13 de la loi relative aux associations caritatives, qui définit clairement l'organe public doté des compétences exclusives pour exiger la soumission de ces rapports en tant que « ministère compétent ». Le fait que le Ministère de l'intérieur fasse cette demande est une violation des dispositions de la loi.

347. La Commission a pris note à cet égard de l'article 49 du texte d'application de la loi, qui dispose que les associations doivent soumettre leurs rapports financiers et administratifs au bureau d'enregistrement du Ministère de l'intérieur. Cela constitue une violation flagrante des dispositions de la loi. Cette disposition doit être abandonnée ou amendée pour être conforme à la loi.

348. Pour que les Palestiniens jouissent effectivement du droit de s'associer librement, le Ministère de l'intérieur doit remédier à la situation en mettant fin à toutes les pratiques, mesures ou activités qui outrepassent ses compétences, en vertu de la loi relative aux associations caritatives et à son texte d'application.

VIII. Violation de la liberté de réunion pacifique en Cisjordanie

A. La liberté de réunion pacifique dans les textes législatifs palestiniens

349. L'article 26 de la Loi fondamentale amendée en 2003 énonce que « les Palestiniens jouissent du droit de participer à la vie politique à titre individuel et collectivement et en particulier des droits indiqués ci-après :

1. Constituer des partis politiques et y adhérer conformément à la loi;
2. Constituer des syndicats, des associations, des unions, des amicales, des clubs et des fondations populaires conformément à la loi;
3. Voter et présenter leur candidature lors des élections pour le choix de représentants à la majorité absolue conformément à la loi;
4. Accéder à des fonctions et à des postes publics selon le principe de l'égalité des chances;

⁵⁶ Le rapport a été présenté à la Commission le 20 avril 2010.

5. Tenir des réunions privées sans la présence de membres de la police et tenir des réunions publiques, des processions et des rassemblements dans le respect de la loi.

350. Par ailleurs, la loi palestinienne n° 12 (1998) relative aux réunions publiques, à son article 2, affirme le droit des citoyens de tenir librement des réunions publiques, des colloques et des défilés, et l'interdiction de porter atteinte à cette liberté ou de la limiter, si ce n'est en application des dispositions énoncées dans la loi, telles qu'indiquées ci-après :

- Les organisateurs d'une réunion doivent notifier par écrit le préfet ou le chef de la police au moins 48 heures à l'avance de la tenue de la réunion;
- Les organisateurs de la réunion, qui doivent être au moins trois, doivent signer la notification en précisant le lieu, l'heure et la date de la réunion et son objet;
- Le préfet ou le chef de la police doit établir un règlement fixant la durée ou le parcours de la réunion dans le but d'organiser le mouvement des participants, à condition que les organisateurs reçoivent ce règlement par écrit au plus tard 24 heures après réception de la notification.

351. Les textes législatifs palestiniens s'accordent, s'agissant de la façon dont ils traitent de la liberté de réunion, avec les dispositions et les principes du droit international relatif aux droits de l'homme, plus précisément la Déclaration universelle des droits de l'homme et le Pacte international relatif aux droits civils et politiques, dont les dispositions énoncent expressément le droit de réunion, dans le cadre des lois et libertés fondamentales que les États doivent garantir aux individus.

352. L'article 20 de la Déclaration universelle des droits de l'homme affirme et garantit cette liberté, énonçant que « Toute personne a droit à la liberté de réunion et d'association pacifiques ». De même, l'article 22 du Pacte international relatif aux droits civils et politiques affirme que « Toute personne a le droit de s'associer librement avec d'autres, y compris le droit de constituer des syndicats et d'y adhérer pour la protection de ses intérêts. »

B. Les violations de la liberté de réunion pacifique qu'auraient commises les autorités officielles palestiniennes

353. La Commission, en s'efforçant de se faire une idée de la nature et du volume des violations alléguées dans le rapport Goldstone, a contacté toutes les organisations palestiniennes de défense des droits de l'homme pour savoir si elles avaient remarqué, observé et attesté ces violations en Cisjordanie, afin qu'elles fournissent à la Commission ce qui avait été recueilli par ces institutions concernant les abus ou les violations commis par les autorités officielles palestiniennes à l'encontre de la liberté de réunion pacifique des Palestiniens.

354. Les rapports des associations reçus par la Commission font état de violations par les autorités officielles palestiniennes, plus précisément le Ministère de l'intérieur et les services de sécurité au niveau de la Cisjordanie, concernant la liberté de réunion pacifique, comme précisé ci-après.

355. Le 28 décembre 2008, les services de sécurité de Al-Khalil ont attaqué les participants à une marche de solidarité avec la bande de Gaza après l'agression israélienne. La marche a commencé à midi le lundi 28 décembre 2008 devant le

siège de la Croix-Rouge, avec la participation de toutes les autorités nationales et musulmanes, un certain nombre de manifestants ont brandi le drapeau du mouvement Hamas, ce qui a conduit les services de sécurité à intervenir, des membres de ceux-ci ont tiré en l'air, après que des manifestants eurent lancé des pierres sur la force de sécurité; un certain nombre de personnes ont été blessées ayant été attaquées par les membres des services de sécurité, notamment : l'ancien ministre du Gouvernement d'unité nationale Issa Khayri al-Jaabari et le dénommé Nabil Issa al-Jaabari.

356. Le vendredi 2 janvier 2009, le mouvement Hamas a organisé une marche de solidarité avec la bande de Gaza en réponse à l'agression israélienne contre celle-ci. La marche devait s'élancer après la prière du vendredi depuis la mosquée d'Al-Husayn bin Ali à Al-Khalil. Dès la sortie des prieurs de la mosquée à l'issue de la prière du vendredi, une unité de police militaire est intervenue et a empêché le cortège d'avancer vers la rue principale. Entre-temps, les participants ont lancé des pierres sur la police et les forces de sécurité, faisant plus de 10 blessés parmi ceux-ci. Un certain nombre de participants ont aussi été blessés à coups de bâton par les forces de sécurité qui s'efforçaient de disperser le cortège. De nombreux coups de feu ont été tirés en l'air sans faire de blessés.

357. Le 2 janvier 2009, les familles des personnes détenues par l'Autorité palestinienne dans le district d'Al-Khalil ont organisé une manifestation de masse devant le barrage militaire qui se trouve au nord du centre administratif d'Al-Khalil, vers 11 h 15 du matin. Les manifestants brandissaient des pancartes exigeant la libération de leurs proches détenus par les services de sécurité. À ce moment-là, une unité militaire composée de différents services de sécurité est apparue et une unité militaire féminine a été appelée, les manifestants ont été dispersés à coups de bâton et des gaz ont été envoyés sur eux, un grand nombre d'entre eux ont souffert de suffocation et de coups, et la dénommée Lama Khater a été arrêtée.

358. Le 2 janvier 2009, les forces nationales et islamistes de la ville de Ramallah ont organisé une manifestation pacifique de soutien aux familles de la bande de Gaza en protestation contre l'agression israélienne contre Gaza. Pendant le défilé, un certain nombre de manifestants des deux sexes ont brandi des drapeaux du mouvement Hamas, et durant la manifestation les forces de sécurité palestiniennes sont intervenues; elles ont recouru à la force pour la disperser, blessant un certain nombre de manifestants et arrêtant une vingtaine de personnes.

359. Le 5 janvier 2009, l'association des étudiants de l'université de Bir Zeit a organisé une manifestation pacifique qui est partie du campus universitaire vers le carrefour d'Attara, où se trouve un barrage militaire des forces d'occupation. Lorsqu'au moins 400 étudiants sont arrivés au milieu de la ville de Bir Zeit, les forces de sécurité palestiniennes ont essayé de les empêcher de se rendre au barrage israélien, ce qui a provoqué des affrontements entre les manifestants et les forces de sécurité qui ont recouru à la force pour disperser ce rassemblement, blessant au moins 50 étudiants.

360. Le fait que la Commission n'a reçu qu'une plainte concernant la liberté de réunion, du dénommé Issa al-Jaabari, qui s'est excusé de ne pouvoir assister à la réunion, et vu que les déclarations des représentants des organisations de défense des droits de l'homme qu'elle a entendus ont fait état de comportements et de violations de la part de membres des forces de sécurité, durant des réunions pacifiques, cela a matériellement empêché la Commission de se faire une opinion

certaine à l'égard de la nature des violations portant atteinte à cette liberté. Malgré cela, la Commission considère qu'il est nécessaire d'affirmer que :

- Les autorités officielles palestiniennes doivent respecter la liberté de réunion et permettre aux particuliers d'exercer cette liberté conformément aux règlements et aux procédures opérationnelles que prévoit la loi;
- Les autorités officielles palestiniennes et les membres des services de sécurité doivent coopérer avec la réunion pacifique, du fait qu'il s'agit d'un droit et d'une liberté fondamentale, et les services de sécurité doivent intervenir pour protéger les participants, faciliter leur mouvement et non l'entraver ou l'empêcher;
- Le déni de ce droit par les autorités officielles ou l'entrave par celles-ci de son exercice en recourant à des mesures illégales constitue un abus et une violation de la liberté de réunion pacifique;
- Bien que les organisations de défense des droits de l'homme aient allégué que les services de sécurité avaient commis des abus durant des réunions pacifiques, les autorités officielles n'ont pas effectué des enquêtes effectives sur ces allégations, ce qui montre qu'elles ne sont pas désireuses de donner suite aux rapports, déclarations et observations des organisations de défense des droits de l'homme sur les abus commis.

IX. Emprisonnement et torture dans la bande de Gaza

361. Le territoire palestinien, depuis que le Mouvement de la résistance islamique, le Hamas, a pris par la force le contrôle de la bande de Gaza le 14 juin 2007, est sous le contrôle et l'administration de ce mouvement et des forces et factions armées qui en relèvent, plus précisément les brigades Izz al-Din al-Qassam, dont le rôle est clairement apparu durant les premiers mois où le Hamas s'est efforcé d'imposer et d'assurer son contrôle sur la bande de Gaza. Les brigades ont assumé un rôle clair sur le plan de la sécurité, au point de devenir la force principale chargée de faire exécuter les lois, effectuant les arrestations, les enquêtes, les poursuites, les interrogations et administrant durant cette période une série de centres d'internement et de détention.

362. Le territoire palestinien, après ces événements, c'est-à-dire la prise par la force par le mouvement Hamas, des rênes du pouvoir sur la bande de Gaza, est gouverné et dirigé par deux régimes, étant donné que le régime officiel palestinien représenté par l'Autorité nationale palestinienne et ses institutions officielles et appareil de sécurité a continué à gouverner et administrer la Cisjordanie, c'est-à-dire ce que l'on appelle la Palestine dans les districts du nord, tandis que la bande de Gaza ou ce qu'il est convenu d'appeler les districts méridionaux est soumise à l'administration et au contrôle du Mouvement de la résistance islamique, le Hamas, et aux forces et factions qui lui sont subordonnées sur les plans militaire et organisationnel.

363. La majorité des changements intervenus sur la terre palestinienne depuis que le Mouvement de la résistance islamique, le Hamas, s'est emparé du pouvoir dans la bande de Gaza ont conduit à un recul du respect et de l'application ordonnée des droits et des libertés, à cause de l'ensemble des atteintes et des violations commises par chacune des deux parties durant cette période.

364. Nombre de lois et de libertés ont été soumises à des restrictions et à des attaques des deux parties; ainsi, le droit à la vie, la liberté d'expression et d'opinion, le droit d'occuper des fonctions publiques, le droit de constituer des associations, le droit de réunion pacifique, le droit à la protection de sa vie privée, le droit de tout individu à la liberté et à la sécurité de sa personne, nul ne peut être placé en détention ou être privé de sa liberté de façon arbitraire, nul ne sera l'objet d'immixtions arbitraires ou illégales dans sa vie privée, sa famille, son domicile ou sa correspondance, ni d'atteintes illégales à son honneur et à sa réputation, le droit de recevoir et de répandre des informations, la liberté du journalisme, ainsi que d'autres droits qui ont été souvent violés et attaqués par les deux parties, sous prétexte de conditions anormales que connaît le pays ou du fait que la sécurité exige ces procédures pour préserver l'ordre public dans les zones que chacune des parties contrôle.

365. Les faits et l'ensemble des décisions prises au niveau de la bande de Gaza vont plus loin que la conduite des affaires intérieures. En effet, concrètement, la situation est plus proche de la constitution d'un nouveau régime de gouvernement indépendant dans la bande de Gaza, ce que confirment de nombreuses données, notamment :

- Le refus de l'autorité qui prévaut dans la bande de Gaza de se soumettre aux décisions et aux ordres du président de l'Autorité nationale palestinienne et aux textes administratifs qui lui sont liés;
- L'arrêt par les institutions militaires et de sécurité de l'Autorité nationale palestinienne de leurs activités dans la bande de Gaza et le transfert de leurs pouvoirs aux entités relevant du Hamas, à la force exécutive et aux forces de sécurité intérieure constituées l'une après l'autre et à une nouvelle administration au lendemain de la prise du pouvoir militaire par le Hamas dans la bande de Gaza;
- L'occupation de tous les bâtiments des militaires et forces de sécurité relevant de l'Autorité palestinienne et l'utilisation de ceux-ci pour héberger les brigades al-Qassam;
- Constitution d'une nouvelle direction de la police palestinienne et rupture des liens existant entre celle-ci et la direction officielle se trouvant en Cisjordanie;
- Remplacement des principaux fonctionnaires par des protégés du Hamas, reconfiguration du secteur de la fonction publique, de ses institutions et de ses structures selon les desiderata et les orientations du Mouvement;
- Création d'une nouvelle instance avec la création d'une cour suprême, qui remplace celle se trouvant en Cisjordanie au niveau de l'Autorité nationale palestinienne, et attribution à cette nouvelle cour de l'administration et de la conduite de la justice et de la supervision des nominations et promotions et des autres activités touchant à l'administration et à la conduite de l'appareil judiciaire dans la bande de Gaza, remplacement des juges siégeant dans les tribunaux de la bande de Gaza par de nouveaux juges appartenant au Hamas, et nomination du Président de la Cour suprême à Gaza, étant donné que le Mouvement a une justice indépendante de l'autorité judiciaire qui jouit de la légitimité légale;
- Suspension du Procureur général palestinien de ses fonctions, celui-ci ayant abusé de son autorité dans l'exercice de ses fonctions en constituant notamment un parquet dépendant du Hamas.

A. Les services chargés de la préservation de la sécurité dans la bande de Gaza

366. Après la prise du pouvoir par la force par le Mouvement de la résistance islamique, le Hamas, celui-ci a contrôlé les sièges des services de sécurité, en particulier les services des renseignements généraux et de la sécurité préventive, et a créé un nouveau service baptisé « appareil de sécurité intérieure », auquel a été confiée la tâche de faire appliquer le droit dans la bande de Gaza. Cet appareil, qui relève du Ministère de l'intérieur au plan de l'autorité de fait dans la bande de Gaza, est composé d'éléments des brigades al-Qassam et de partisans du Hamas et de membres de la force exécutive⁵⁷ qui a été intégrée dans l'appareil de sécurité intérieure après la création de celui-ci. Cette force comprend aussi ceux qui souhaitent continuer leur travail parmi les membres des services de sécurité et de la police qui existaient avant la prise du pouvoir par le Hamas dans la bande de Gaza, à condition que les relations avec l'autorité en Cisjordanie soient coupées avant la poursuite du travail avec la nouvelle autorité.

367. Le service de sécurité intérieure se fait aider pour appliquer la loi, comme il ressort clairement des événements survenus dans la bande de Gaza, d'éléments appartenant au Hamas, plus précisément aux brigades Izz al-Din al-Qassam, qui

⁵⁷ Le Ministre de l'intérieur palestinien a décidé le 20 avril 2006 de créer une nouvelle force de sécurité relevant directement de lui, baptisée « force exécutive », en vue de l'aider à s'acquitter de ses fonctions s'agissant de faire face à la situation chaotique et de rétablir la sécurité et l'ordre public. La constitution de cette force a déclenché une crise profonde au niveau des relations entre la présidence et le Gouvernement à cause du refus du Président palestinien d'adopter cette force et de la promulgation par celui-ci d'un décret présidentiel qui refuse franchement de reconnaître cette force et de coopérer avec elle.

Le texte du décret présidentiel est le suivant : décret n° 28 de 2006 :

Le Président du Comité exécutif de l'Organisation de libération de la Palestine
Président de l'Autorité nationale palestinienne
Chef suprême des forces palestiniennes,
Ayant examiné la Loi fondamentale amendée en 2003, ainsi que ses amendements,
et la loi de 2005 relative au service dans les forces de sécurité,
En vertu des pouvoirs qui me sont dévolus et dans l'intérêt général,
J'ai décrété ce qui suit :

Article 1

Annulation de la décision du Ministre de l'intérieur publiée le 20 avril 2006 relative à la création de nouvelles forces de sécurité à partir de factions de la résistance armée et relevant directement de lui parce qu'elle contredit l'article 3 de la loi de 2005 relative au service dans les forces de sécurité, qui énonce que toute création de force se fera dans le cadre de l'une des trois forces stipulées.

Article 2

Annulation de la décision du Ministre de l'intérieur publiée le 20 avril 2006 relative à la promotion et à la nomination d'officiers, car il n'est pas compétent pour promouvoir et nommer conformément aux dispositions des articles 19 et 20 de la loi de 2005 relative au service dans les forces de sécurité, qui énonce que la Commission des officiers est compétente en la matière et que ses décisions ne prennent effet qu'après approbation du Président de l'Autorité nationale palestinienne.

Article 3

Il est demandé à tous les commandants, officiers et sous-officiers et à tous ceux affiliés aux services de sécurité de ne pas donner suite aux décisions mentionnées aux articles 1 et 2 et de les considérer nulles et non avenues.

Tous les services compétents, doivent appliquer le décret à compter de la date de sa parution et de sa publication au *Journal officiel*.

sont considérées comme la principale aile militaire du Hamas, recourant dans certains cas à leur assistance, en particulier lorsque la sécurité et la stabilité de l'autorité sont menacées.

368. Le service de sécurité intérieure dans la bande de Gaza exerce un mandat dans le domaine :

- Du maintien de l'ordre et de la sécurité et de la protection des personnes, des biens et des actifs;
- De la prévention des crimes et des activités visant à les découvrir, à les suivre et à attraper leurs auteurs et à les traduire en justice;
- De l'administration des prisons et de la garde des prisonniers;
- De l'application des lois, règlements et ordres et de l'assistance fournie aux autorités publiques et à ses agents conformément à la loi;
- De la surveillance et de l'organisation de la circulation sur les routes;
- De la supervision des réunions et défilés publics sur les voies et dans les lieux publics.

B. Les textes législatifs qui régissent les attributions et les activités des personnes chargées d'appliquer la loi dans la bande de Gaza

369. L'autorité de fait dans la bande de Gaza a continué à appliquer les textes législatifs en vigueur dans la bande de Gaza avant la séparation. Continuent ainsi d'être appliquées la loi n° 8 de 2005 relative au service dans les forces de sécurité, en tant que loi régissant les activités, les fonctions et les devoirs des forces de sécurité en poste dans la bande de Gaza. De même se poursuit l'application de la loi n° 6 de 1998 concernant les centres de redressement et de réinsertion, de la loi n° 12 de 1998 relative aux réunions publiques, de la loi n° 3 de 2001 relative aux procédures pénales, du Code pénal révolutionnaire de 1979 de l'Organisation de libération de la Palestine, ainsi que du Code criminel du mandat britannique n° 74 de 1936 et de ses amendements.

370. Lors du deuxième semestre de 2008, les membres du bloc Réforme et changement protégé par le Hamas au Conseil législatif de la bande de Gaza ont publié une loi baptisée Code de procédure pénale militaire de 2008, qui a été appliquée par la suite par les tribunaux militaires de la bande de Gaza.

C. Règles de détention et d'arrestation devant être respectées au niveau de la bande de Gaza conformément aux textes législatifs en vigueur et aux instruments internationaux

371. Étant donné la poursuite de l'application par l'autorité de fait dans la bande de Gaza des dispositions de la Loi fondamentale palestinienne et du Code de procédure pénale palestinien n° 3 de 2001, de la loi relative aux centres de redressement et de réhabilitation, de la loi relative au service dans les forces de sécurité, toutes les procédures d'incarcération, d'arrestation et de capture qu'appliquent les éléments des forces de sécurité chargées d'exécuter la loi dans la bande de Gaza sont

soumises aux mêmes règles et prescriptions que celles établies et affirmées par le Code de procédure pénale palestinien.

372. Pour cela, il faut que l'autorité de fait dans la bande de Gaza respecte l'ensemble des règles et prescriptions établies par la Loi fondamentale et le Code de procédure pénale, et plus précisément⁵⁸ :

- Nul ne peut être soumis à la contrainte ou à la torture, et les accusés et les autres personnes privées de leur liberté doivent être bien traités;
- Nul ne peut être arrêté ou incarcéré sans un ordre de la partie compétente;
- Les officiers de la police judiciaire doivent écouter aussitôt ce que dit la personne arrêtée, et si celle-ci n'est pas libérée avec une excuse, elle doit être déférée dans les 24 heures devant le procureur compétent;
- Il est interdit de pénétrer dans les logements et d'y perquisitionner sans mandat du procureur ou en sa présence, en s'appuyant sur une accusation visant une personne qui réside dans le logement devant être perquisitionné pour avoir commis une infraction ou un délit ou avoir participé à sa commission, ou parce qu'il existe de fortes présomptions qu'elle détient des objets liés à l'infraction;
- Seul le procureur a le pouvoir d'enquêter, car seul le parquet est chargé d'enquêter sur les infractions et de s'en occuper. En vertu de l'article 99 du Code de procédure pénale, le procureur doit constater le corps de l'accusé avant son interrogation et enregistrer toutes les blessures apparentes et leur origine;
- Le droit d'être assisté d'un conseil durant l'interrogatoire;
- Le procureur, lors de l'arrestation de l'accusé, après son interrogatoire, doit prendre soin de faire prolonger la détention par le tribunal compétent en application de la loi;
- L'agent chargé de l'arrestation doit immédiatement remettre la personne arrêtée au poste de police, car le responsable du poste de police qui a reçu la personne arrêtée sans mandat d'amener se charge immédiatement d'enquêter sur les raisons de l'arrestation. La personne arrêtée ne peut en aucun cas être gardée plus de 24 heures et le procureur en est informé immédiatement;
- Tout homme ne peut être arrêté ou emprisonné que dans un centre de redressement et de réinsertion (les prisons) et dans les lieux d'arrestation spécialisés prévus par la loi. Il n'est pas possible à un agent de tout centre d'y accepter quelqu'un sans un ordre signé par l'autorité compétente et il ne peut l'y garder au-delà de la durée fixée en la matière;
- Si une personne arrêtée est libérée sous caution, le responsable de l'arrestation et le directeur du centre de redressement et de réinsertion (la prison) doivent relâcher le détenu ou le prisonnier [*nazîl*] jusqu'à ce qu'il soit incarcéré ou arrêté pour autre chose;
- Les centres de redressement et de réinsertion doivent être inspectés, les textes énonçant que les procureurs et les présidents des tribunaux de première instance

⁵⁸ Nous avons traité de ces garanties et règles dans la section consacrée aux arrestations et à la torture en Cisjordanie, et nous nous y référons seulement ici, afin d'éviter des répétitions.

et des cours d'appel doivent inspecter les centres de redressement et de réinsertion (les prisons) et les lieux de détention qui se trouvent dans leurs locaux afin de s'assurer qu'il ne s'y trouve personne détenu illégalement, et qu'ils doivent étudier les dossiers du centre et les mandats d'amener et d'arrêt et les photographier, et entrer en contact avec les détenus et écouter toute plainte que ceux-ci formulent, et les directeurs et agents des centres doivent leur fournir toute assistance nécessaire pour obtenir les informations qu'ils demandent.

373. Les règles établies par les instruments internationaux relatifs aux droits de l'homme, plus précisément celles qui ont été énoncées dans la Déclaration universelle des droits de l'homme, le Pacte international relatif aux droits civils et politiques et la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, s'appliquent aux procédures d'arrestation, de détention et d'incarcération en vigueur dans la bande de Gaza.

374. La Commission considère que l'autorité de fait dans la bande de Gaza est soumise à l'obligation de respecter ces règles et directives pour un certain nombre de raisons, dont les plus importantes sont les suivantes :

- La Loi fondamentale palestinienne réaffirme la majorité de ces règlements et par conséquent nombre de ces garanties et directives ont une valeur juridique contraignante, faisant partie des textes législatifs nationaux en vigueur, ce qui oblige l'autorité qui prévaut dans la bande de Gaza à les respecter et à les appliquer;
- Les principes énoncés dans ces instruments sont des principes juridiques catégoriques, en particulier ceux qui ont trait au droit à la vie et au respect de la personne, à l'interdiction de la torture et autres peines ou traitements cruels, inhumains ou dégradants, ce qui signifie qu'ils s'appliquent à toutes les parties de droit international de tous les pays et aux autres parties, y compris à l'autorité de fait dans la bande de Gaza, qui ne peut faire valoir qu'elle n'est pas partie à ces conventions ou qu'elle n'a pas encore déclaré qu'elle s'y conforme;
- L'Organisation de libération de la Palestine a déclaré que conformément à la déclaration d'indépendance en tant que document constitutionnel elle respectait sincèrement la Déclaration universelle des droits de l'homme, ce qui signifie le caractère obligatoire de cette déclaration pour les Palestiniens, dont le Hamas, qui a participé aux élections législatives conformément à la législation interne et aux dispositions de la Loi fondamentale et de l'Accord d'Oslo et à la Déclaration de principes qu'a signée l'Organisation de libération de la Palestine avec la partie israélienne.

375. Le Hamas ayant pris le pouvoir dans la bande de Gaza et exerçant son autorité effective fondée sur la force, ce qui se passe au niveau de la bande de Gaza selon l'opinion de la Commission relève du droit international des conflits armés internes et des dispositions du deuxième Protocole de Genève de 1977 aux quatre Conventions de Genève, dont l'article I est libellé comme suit :

1. Le présent Protocole, qui développe et complète l'article 3 commun aux Conventions de Genève du 12 août 1949 sans modifier ses conditions d'application actuelles, s'applique à tous les conflits armés qui ne sont pas couverts par l'article premier du Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés

internationaux (Protocole I), et qui se déroulent sur le territoire d'une Haute Partie contractante entre ses forces armées et des forces armées dissidentes ou des groupes armés organisés qui, sous la conduite d'un commandement responsable, exercent sur une partie de son territoire un contrôle tel qu'il leur permette de mener des opérations militaires continues et concertées et d'appliquer le présent Protocole.

2. Le présent Protocole ne s'applique pas aux situations de tensions internes, de troubles intérieurs, comme les émeutes, les actes isolés et sporadiques de violence et autres actes analogues, qui ne sont pas considérés comme des conflits armés.

376. En conséquence, la Commission considère que le Hamas, ayant pris le contrôle et le pouvoir par la force et exerçant une domination effective sur la bande de Gaza, doit, outre les instruments internationaux susmentionnés, respecter et assurer les garanties énoncées dans le deuxième Protocole concernant la protection des civils durant les conflits armés non internationaux, qui font partie de la coutume internationale contraignante.

377. En vertu des dispositions de l'article 4 du Protocole :

1. Toutes les personnes qui ne participent pas directement ou ne participent plus aux hostilités, qu'elles soient ou non privées de liberté, ont droit au respect de leur personne, de leur honneur, de leurs convictions et de leurs pratiques religieuses. Elles seront en toutes circonstances traitées avec humanité, sans aucune distinction de caractère défavorable. Il est interdit d'ordonner qu'il n'y ait pas de survivants.

2. Sans préjudice du caractère général des dispositions qui précèdent, sont et demeurent prohibés en tout temps et en tout lieu à l'égard des personnes visées au paragraphe 1 :

a) Les atteintes portées à la vie, à la santé et au bien-être physique ou mental des personnes, en particulier le meurtre, de même que les traitements cruels tels que la torture, les mutilations ou toutes formes de peines corporelles;

b) Les punitions collectives;

c) La prise d'otages;

d) Les actes de terrorisme;

e) Les atteintes à la dignité de la personne, notamment les traitements humiliants et dégradants, le viol, la contrainte à la prostitution et tout attentat à la pudeur;

f) L'esclavage et la traite des esclaves sous toutes leurs formes;

g) Le pillage;

h) La menace de commettre les actes précités.

3. Les enfants recevront les soins et l'aide dont ils ont besoin et, notamment :

a) Ils devront recevoir une éducation, y compris une éducation religieuse et morale, telle que la désirent leurs parents ou, en l'absence de parents, les personnes qui en ont la garde;

b) Toutes les mesures appropriées seront prises pour faciliter le regroupement des familles momentanément séparées;

c) Les enfants de moins de 15 ans ne devront pas être recrutés dans les forces ou groupes armés, ni autorisés à prendre part aux hostilités;

d) La protection spéciale prévue par le présent article pour les enfants de moins de 15 ans leur restera applicable s'ils prennent directement part aux hostilités en dépit des dispositions de l'alinéa c) et sont capturés;

e) Des mesures seront prises, si nécessaire et, chaque fois que ce sera possible, avec le consentement des parents ou des personnes qui en ont la garde à titre principal en vertu de la loi ou de la coutume, pour évacuer temporairement les enfants du secteur où des hostilités ont lieu vers un secteur plus sûr du pays, et pour les faire accompagner par des personnes responsables de leur sécurité et de leur bien-être.

378. Outre l'article précédent, le Hamas doit observer et respecter les garanties énoncées à l'article 6 du Protocole, qui se lisent comme suit :

2. Aucune condamnation ne sera prononcée ni aucune peine exécutée à l'encontre d'une personne reconnue coupable d'une infraction sans un jugement préalable rendu par un tribunal offrant les garanties essentielles d'indépendance et d'impartialité. En particulier :

a) La procédure disposera que le prévenu doit être informé sans délai des détails de l'infraction qui lui est imputée et assurera au prévenu avant et pendant son procès tous les droits et moyens nécessaires à sa défense;

b) Nul ne peut être condamné pour une infraction si ce n'est sur la base d'une responsabilité pénale individuelle;

c) Nul ne peut être condamné pour des actions ou omissions qui ne constituaient pas un acte délictueux d'après le droit national ou international au moment où elles ont été commises. De même, il ne peut être infligé aucune peine plus forte que celle qui était applicable au moment où l'infraction a été commise. Si postérieurement à cette infraction la loi prévoit l'application d'une peine plus légère, le délinquant doit en bénéficier;

d) Toute personne accusée d'une infraction est présumée innocente jusqu'à ce que sa culpabilité ait été légalement établie;

e) Toute personne accusée d'une infraction a le droit d'être jugée en sa présence;

f) Nul ne peut être forcé de témoigner contre lui-même ou de s'avouer coupable.

3. Toute personne condamnée sera informée, au moment de sa condamnation, de ses droits de recours judiciaires et autres, ainsi que des délais dans lesquels ils doivent être exercés.

4. La peine de mort ne sera pas prononcée contre les personnes âgées de moins de 18 ans au moment de l'infraction et elle ne sera pas exécutée contre les femmes enceintes et les mères d'enfants en bas âge.

D. Violations des droits de l'homme commises par les services de sécurité palestiniens durant les arrestations et les détentions

379. La Commission, en s'efforçant de se faire une idée de la nature et du volume des violations alléguées dans le rapport Goldstone, a contacté toutes les organisations palestiniennes de défense des droits de l'homme pour savoir si elles avaient remarqué, observé et attesté ces violations dans la bande de Gaza et en Cisjordanie, telles que le Centre palestinien des droits de l'homme, le Centre Al-Mizan et l'organisation al-Damir dans la bande de Gaza, ainsi que les organisations de défense des droits de l'homme œuvrant en Cisjordanie qui suivent et observent la situation relative aux droits de l'homme dans la bande de Gaza, telles que Al-Haqq, al-Damir, l'association indépendante pour les droits de l'homme Diwan al-Mazalim, le Centre Al-Qods pour l'assistance juridique, afin qu'elles fournissent à la Commission tout ce qu'elles ont recueilli et documenté, en plus des rapports, déclarations et interventions qui ont été publiés à ce sujet.

380. Tous les rapports et témoignages concordent avec les informations que la Commission a reçues de ces organisations concernant les violations commises par les responsables de l'application des lois au niveau de l'autorité de fait dans la bande de Gaza, lors d'arrestations, de détention et d'incarcérations. Ces rapports et informations ont en effet indiqué la commission par les services de sécurité dans la bande de Gaza d'un ensemble de violations lorsqu'ils suivaient les procédures d'arrestation, de détention et d'enquête, qui peuvent être résumées comme suit :

1. Ces incarcérations sont liées à la situation politique palestinienne, étant donné qu'elles visent dans la bande de Gaza les personnes qui appartiennent au Mouvement de libération nationale palestinien Fatah ou les personnes proches et les partisans de ce mouvement;
2. Non-respect par les responsables de l'exécution de la loi appartenant aux services de sécurité dans la bande de Gaza, dans la plupart des cas d'arrestation et d'incarcération, des règles juridiques en vigueur qui doivent être respectées lors d'une arrestation ou d'une incarcération;
3. Mauvais traitements et recours à la brutalité lors des incarcérations;
4. La personne arrêtée n'est pas déférée au parquet dans les délais fixés par la loi, dans le Code de procédure pénale palestinien;
5. Des civils arrêtés sont déférés devant des juges militaires;
6. Des personnes arrêtées sont soumises à la torture ou à d'autres peines ou traitements cruels, inhumains ou dégradants, comme moyens d'extorquer des aveux concernant ce dont elles sont accusées ou autre chose.

E. Les plaintes que la Commission a reçues concernant les violations commises durant la détention sont les suivantes

381. La Commission a reçu des organisations de défense des droits de l'homme palestiniennes, de groupes parlementaires, de familles de détenus, et de détenus ayant été libérés un ensemble de plaintes relatives aux violations des droits de l'homme commises par les responsables de l'application des lois et par les services de sécurité palestiniens dans la bande de Gaza lors de l'arrestation et de la détention, et elle a recueilli directement 11 plaintes personnelles d'individus se trouvant dans la bande de Gaza⁵⁹.

382. La Commission d'enquête s'est fait une idée claire en passant en revue et en étudiant le contenu de ces plaintes et des pièces jointes à celles-ci d'éléments qui corroborent la véracité des allégations relatives aux violations des droits de l'homme et des libertés fondamentales commises par les responsables de l'application des lois dans la bande de Gaza lors des arrestations et détentions. Ont été recueillies également les déclarations des personnes que la Commission avait entendues dans la bande de Gaza au moyen d'une vidéoconférence⁶⁰ sur le fait que les services chargés de la détention et de l'incarcération dans la bande de Gaza avaient commis les violations suivantes :

383. Les forces de sécurité intérieure ne s'identifient pas et ils sont voilés lorsqu'ils procèdent à des descentes, des fouilles et des arrestations.

384. Ce comportement s'explique par les déclarations de la majorité des personnes qui ont comparu devant la Commission lors des auditions qu'elle a tenues pour entendre les plaignants, que ce soit lors de celles consacrées à la détention et à la torture ou à celles ayant trait aux opérations d'assassinat. Ainsi, un des témoins a déclaré : « J'ai été arrêté le 12 février 2009, ayant été enlevé devant ma maison par des hommes de la sécurité intérieure qui étaient masqués, armés de revolvers. Ils m'ont emmené dans une jeep Magnum de couleur verte, un véhicule militaire [...] »⁶¹

385. De même, un autre a déclaré : « le jour du cessez-le-feu après la guerre contre Gaza, six jeunes voilés ont attaqué un supermarché appartenant à mon frère et ont enlevé celui-ci et ont détruit le magasin. Un quart d'heure plus tard, ils sont arrivés à la maison où mon frère et moi habitons [...] »⁶²

386. Extrait d'un autre témoignage : « Une douzaine d'hommes voilés en civil se sont présentés à mon domicile, je n'y étais pas, mon père les a reçus, qui leur a dit que j'étais sorti. Il a envoyé mon frère, je suis arrivé au domicile, ils m'ont dit que

⁵⁹ Toutes ces plaintes ont été recueillies par la Commission et leur liste est jointe au présent rapport.

⁶⁰ La Commission a écouté les déclarations de 11 personnes faisant état de plaintes relatives à la détention.

⁶¹ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote t-ayn-ghayn-1/2010.

⁶² Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote t-ayn-ghayn-2/2010.

c'est moi qu'ils voulaient, et lorsque mon père leur a demandé de s'identifier, ils ont montré des cartes d'identité de la sécurité intérieure [...] »⁶³

387. Extrait d'un autre témoignage : « Il était à peu près une heure du matin, on a frappé à la porte de façon anormale, je suis sorti et j'ai demandé qui frappait à la porte, on m'a répondu "c'est la police, ouvrez la porte", et lorsque j'ai ouvert la porte, quatre hommes voilés sont entrés, leurs yeux étaient visibles, ils étaient armés de kalachnikovs, l'un d'eux avait un revolver, je leur ai demandé ce qu'ils voulaient, ils m'ont répondu qu'ils voulaient fouiller la maison [...] »⁶⁴

388. Des personnes ont été détenues dans des lieux autres que ceux prévus par la loi, par exemple dans une mosquée, alors que d'autres ont été retenues et interrogées dans des hôpitaux, des maisons et d'autres endroits inconnus.

389. Un des témoins a déclaré : « Le 17 janvier 2009, des éléments de la sécurité intérieure sont venus à ma maison munis d'un mandat de perquisition de la sécurité intérieure [...] ils ont fouillé la maison [...] et après la perquisition, ils m'ont emmené avec eux. Ils ont dit à ma femme : Nous le ramènerons dans une demie heure. J'ai vu que la maison était entourée de plus de 20 personnes, certains en uniforme militaire, d'autre en civil, tous dissimulés sous des foulards noirs [...]. Un homme m'a emmené, me demandant si je savais avec qui j'étais, j'ai répondu "la sécurité intérieure". Ils m'ont emmené à un endroit appelé Ali Ibrahim Wadi. Avant mon arrivée, ils ont recouvert ma tête d'une cagoule et l'interrogatoire a commencé. Ils m'ont accusé d'être un agent de l'autorité de Ramallah, d'être un espion de l'organisation Al-Qassam et de transmettre des rapports à l'Autorité, en me frappant tous de tous les côtés »⁶⁵.

390. Extrait d'un autre témoignage : « Ils m'ont dit Hamada, nous avons besoin de toi pendant cinq minutes. Lorsque mon père a demandé leur identité, ils ont montré leurs cartes de la sécurité intérieure. Ils m'ont emmené à pied jusqu'au chemin du projet, et là, sur le chemin, ils ont relevé mon blouson sur ma tête et m'ont emmené jusqu'à une maison abandonnée, je ne sais pas à qui elle appartient. Ils m'ont dit tu as cinq minutes pour avouer les armes que tu as. Ils ont commencé à me frapper au visage et à me fouetter les jambes, ils ont continué ainsi pendant 30 à 45 minutes sans s'arrêter, puis ils m'ont conduit dehors et m'ont dit que j'étais assigné à résidence pendant trois mois »⁶⁶.

391. Tous les services de sécurité, qu'ils soient ou non légalement autorisés à procéder à des arrestations, n'ont pas respecté le Code de procédure pénale palestinien, qui prévoit qu'aucun mandat d'amener ne peut être exécuté sans ordonnance d'un tribunal. Or, selon les informations obtenues par la Commission, aucune ordonnance n'avait été délivrée par les services juridiques compétents, ce dans tous les cas visés lors des auditions de la Commission, les personnes ont été arrêtées et conduites au siège de la sécurité par la force, ou bien convoquées par

⁶³ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote t-ayn-ghayn-3/2010.

⁶⁴ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote t-ayn-ghayn-6/2010.

⁶⁵ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote t-ayn-ghayn-4/2010.

⁶⁶ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote t-ayn-ghayn-3/2010.

téléphone à un entretien avec le service de sécurité, où elles ont été arrêtées et placées en détention.

392. Les services de sécurité dans la bande de Gaza n'ont pas présenté une ordonnance de tribunal lorsqu'elles sont entrées dans de nombreuses maisons et les ont fouillées, comme cela est exigé, ce qui constitue une violation flagrante de l'inviolabilité de ces domiciles.

393. Ces services ont contrevenu aux dispositions juridiques régissant la durée de la garde à vue. Comme nous l'avons mentionné plus haut, les lois palestiniennes pertinentes autorisent un service compétent à arrêter et retenir une personne pendant 24 heures. Après cette période, la personne arrêtée doit être immédiatement libérée ou transférée au parquet ou au tribunal compétent afin qu'il se prononce sur son statut.

394. Dans la majorité des cas d'arrestation que la Commission a corroborés, elle a trouvé que les services de sécurité ne respectaient pas ces délais ni les dispositions juridiques, nombre de personnes restant détenues plus longtemps que prévu par la loi et aucun des détenus n'étant déféré devant le parquet ou le tribunal compétent.

395. Violences, mauvais traitements, coups et comportements dégradants lors de la détention. Dans de nombreux cas, les services de sécurité de l'autorité de fait dans la bande de Gaza ont traité les prisonniers de façon dégradante, et ils ont eu recours à la force et à la violence. Comme il ressort des déclarations des personnes arrêtées ou de leur famille obtenues par la Commission concernant les arrestations, les services de sécurité palestiniens, de manière générale, ne respectent pas les règles et les normes relatives aux arrestations, en particulier celles concernant la façon appropriée de traiter les personnes arrêtées en s'abstenant de les battre, de les humilier ou de recourir à la violence.

396. Un des témoins a déclaré : « Le 18 janvier 2009, à 21 heures, deux policiers se sont présentés à mon domicile, et ont dit que le chef de la police voulait me voir. Je suis parti avec eux pour aller au commissariat de police, mais j'ai vu qu'ils me conduisaient en fait au siège du Croissant-Rouge à Khan Younis. Avant d'y arriver, ils m'ont dit que le commissariat avait déménagé. Ils m'ont ensuite conduit dans un autre lieu, les nouveaux logements du quartier Al-Amal. Dix minutes plus tard, un groupe d'hommes dont le visage était dissimulé sous un foulard m'ont emmené à une trentaine de mètres des logements. Des hommes ainsi masqués, une quinzaine, se sont mis à me matraquer, sans me parler ni m'accuser de quoi que ce soit. Après m'avoir ainsi battu pendant une demi-heure, ils ont fait venir une ambulance du Croissant-Rouge, qui m'a conduit ainsi qu'une autre personne qui avait été battue, à l'hôpital Nasser. »⁶⁷

397. Extrait d'un autre témoignage : « [...] après la guerre et l'attaque israélienne de janvier 2009, ma maison à Izbet Abd Rabbo, à Jabaliya-Est, a été détruite par les Israéliens. Ils se sont installés dans une partie de la maison. J'étais dans la maison avec ma femme, mon fils handicapé âgé de 25 ans et mes autres enfants. À la fin de la guerre, lorsque la Croix-Rouge m'a laissé sortir, j'ai quitté la maison et suis resté avec mes beaux-parents à Cheikh Radouane. Comme je n'avais pas pu prendre des vêtements pour moi et ma famille, j'en ai emprunté à des volontaires dans le quartier de Cheikh Radouane. Ces vêtements étaient élimés, ce qui me donnait une allure

⁶⁷ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote t-ayn-ghayn-7/2010.

suspecte, différente des locaux. Quatre individus en civil qui ont refusé de s'identifier m'ont abordé. Ils étaient munis de téléphones portables et accompagnés d'un taxi de la marque Skoda. Ils m'ont bandé les yeux et m'ont conduit dans un endroit inconnu, où ils m'ont interrogé pendant cinq jours. Pendant ce temps, ils m'ont accusé de plusieurs choses, notamment de collaborer avec Ramallah et Israël, au motif que mon téléphone portable comprenait des numéros à Umm al-Fahem, Abu Dhabi et Ramallah. J'ai rejeté toutes les accusations durant l'interrogatoire. Un seul type d'aliment m'était apporté; je demeurais les mains attachées et les yeux bandés, ce qui est de la torture. De plus, mes pieds étaient attachés toute la journée sauf durant les repas, et je pouvais aller aux toilettes une fois par jour. La pire des tortures était qu'aucun des membres de ma famille ne savait où j'étais. Toutefois, je n'ai pas été injurié ni frappé, torturé ou traité d'une autre manière humiliante. Le plus surprenant a été d'être libéré après cinq jours et de les entendre s'excuser [...] »⁶⁸

398. La torture entraînant la mort. Il ressort de l'ensemble des déclarations que la Commission a entendues que nombre de personnes ont été soumises à des violences, des tortures ou des comportements humiliants en vue de faire pression sur elles afin d'obtenir des informations ou des aveux concernant leurs actes ou propos ou ceux de tiers.

399. Ces déclarations montrent clairement que les services de sécurité dans la bande de Gaza ont eu recours à des méthodes extrêmement brutales pour obtenir des détenus des informations et des aveux, ce qui a provoqué la mort de nombreux détenus, dont Jamil Nasr. La mère de la victime, Nuha Issa Assaf, du quartier al-Daraj, à Gaza, a fait la déclaration suivante : « Mon fils avait moins de 20 ans. Il travaillait dans les tunnels. Ils l'ont emprisonné le 9 mars 2009. Nous avons un voisin qui s'appelle Muhammad Isam Abu Thurayya; ceux qui l'ont emprisonné étaient les autorités judiciaires enquêtant sur le vol de 130 000 shekels à Muhammad. Ils ont accusé d'autres personnes en sus de mon fils, et ont emmené celui-ci au "café Abou Moussa", un centre de torture dans le quartier al-Daraj. Les enquêteurs l'ont torturé et l'ont fait avouer, en utilisant toutes sortes de tortures. Il a passé quatre jours entre leurs mains. Durant tout ce temps, il a été torturé et privé de manger et de boire. Le 12 mars 2009, il a été transféré au commissariat de police d'Al-Touffah. Mon fils était en très mauvais état. Nous sommes allés lui rendre visite au commissariat de police le vendredi. Ils nous ont laissés le voir pendant 10 minutes. Chaque fois que je le regardais, il cachait son visage d'une main. Il nous a dit qu'il vomissait ce qu'il mangeait et qu'il y avait du sang dans son urine. Nous avons demandé au policier qui était avec lui de le faire conduire à l'hôpital. Mon mari a menacé de demander l'aide de la Croix-Rouge, alors il a appelé un dénommé Abou Ahmad et ils l'ont transporté sous escorte à l'hôpital Al-Shifa à Gaza, où il a été admis dans le service des soins intensifs. Il perdait connaissance; l'hôpital a effectué une dialyse pour cause d'insuffisance rénale. Il est resté ainsi pendant 12 jours, puis il est mort malgré les efforts faits pour le ressusciter. C'est arrivé le lundi à 2 heures du matin. Ils ont pratiqué une autopsie sur ordre du parquet, sans notre consentement. Nous avons obtenu un rapport médical, que je fournirai à la Commission, qui déclare que la cause du décès est la torture [...] »

⁶⁸ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote t-ayn-ghayn-9/2010.

F. Opinion de la Commission concernant les procédures d'arrestation et de détention dans la bande de Gaza

400. Il ressort des cas de détention dans la bande de Gaza que la Commission a corroborés que souvent les responsables de l'application des lois ne respectent pas ou violent les règles et garanties applicables lors de détentions ou d'emprisonnement. Sur la base des auditions qu'elle a tenues et des rapports et informations fournis par les organisations palestiniennes de défense des droits de l'homme, les points les plus importants sont les suivants :

401. Sur la base des auditions que la Commission a tenues et des rapports et des documents qu'elle a obtenus, elle considère que les services de sécurité de l'autorité de fait de la bande de Gaza arrêtaient des sympathisants du Fatah et d'autres personnes en réaction au désaccord politique entre le Fatah et le Hamas. La majorité de ces arrestations sont motivées par des considérations d'ordre politique et sont donc arbitraires et illégales.

402. Il ressort clairement de l'ensemble des plaintes et des auditions que la Commission a tenues que la majorité des plaintes faisant état de mauvais traitements et de violence impliquaient le service de sécurité intérieure dans la bande de Gaza.

403. Il est clair que le Parquet de la bande de Gaza fait preuve de négligence en assumant le rôle que lui confie la loi, étant donné qu'il incombe aux magistrats du Parquet, en vertu de l'article 126 du Code de procédure pénale palestinien, d'inspecter les centres de redressement et de réinsertion (les prisons) et les lieux de garde à vue placés sous sa juridiction pour s'assurer qu'il ne s'y trouve aucun prisonnier détenu illégalement. Ils doivent aussi vérifier les dossiers de ces centres et les mandats d'amener et d'arrêt, les photocopier et contacter tous détenus et prisonniers et écouter toutes les plaintes qui pourraient leur être présentées. De plus, les directeurs et gardes doivent leur fournir toute assistance nécessaire pour obtenir les informations qu'ils souhaitent.

404. En conséquence, il incombait au Parquet de l'autorité de fait de la bande de Gaza non seulement d'intervenir pour empêcher toute arrestation ou détention hors du cadre des centres de redressement et de réinsertion, mais aussi de mettre en mouvement l'action publique à l'encontre de toute personne qui ne respecte pas ces conditions en tant qu'auteur d'une infraction. Il a été établi également que le Parquet n'est pas intervenu comme il aurait dû le faire pour empêcher les membres du service de sécurité et d'autres groupes armés d'usurper les prérogatives des services qui, en vertu de la loi, ont le statut de police judiciaire. Ces pratiques sont courantes.

405. Il est manifeste que les atteintes à la dignité de la personne, y compris les mauvais traitements durant la détention, les coups, les injures, l'humiliation et la soumission des personnes arrêtées à la torture ou à des pressions physiques ou psychologiques en vue d'obtenir des informations ou des aveux n'étaient pas des cas isolés imputables à un comportement individuel dans les centres de détention et d'interrogation de la sécurité intérieure. Ces pratiques se retrouvent dans tous les cas d'arrestation et de détention qui ont été étayés ou pour lesquels la Commission a entendu des témoignages, ce qui indique qu'elles ne se sont pas limitées à une personne ou à un lieu particulier, mais qu'il s'agit bien d'une pratique généralisée pour gérer les détenus, conduire les interrogatoires et obtenir des aveux. Le service de sécurité intérieure a ainsi violé les dispositions de l'article 13 de la Loi fondamentale palestinienne, qui affirme que personne ne sera soumis à des

contraintes ou à la torture et que les accusés et les autres personnes privées de leur liberté seront convenablement traités.

406. Les services chargés de l'application des lois dans la bande de Gaza ont recouru à de nombreuses formes et méthodes de torture, dont les suivantes :

- Coups donnés avec la main, les pieds et des matraques;
- Détenu roué de coups par plusieurs personnes à la fois;
- Flagellation au moyen d'un tuyau d'arrosage;
- Le shabah consiste à attacher les mains du prisonnier derrière son dos et de les relever en les attachant à une porte, une fenêtre ou tout autre objet, de sorte que la personne soumise à cette forme de torture reste pratiquement suspendue en l'air pendant une période variable pouvant durer plusieurs jours, avec quelques courts moments de répit;
- Menaces et intimidation;
- Détention dans de très petites cellules mesurant d'environ 1 mètre de large et 2 ou 3 mètres de long;
- Coups de bâton sur la plante des pieds du détenu, dont les pieds sont attachés et soulevés, battus à l'aide d'un bâton ou d'une matraque pendant des périodes de durée variable, puis que l'on oblige à marcher pour faire disparaître les caillots de sang dus aux coups.

407. Le manque de supervision effective des prisons a contribué à la généralisation de la torture. Il est apparu à la Commission d'enquête que les parties à qui incombait cette supervision en vertu de la loi ne s'acquittaient pas de leur obligation.

408. La Commission considère que le fait que l'on ne demande pas sérieusement aux agents auteurs d'un crime de torture ou aux membres des services de sécurité qui contreviennent aux règles et aux normes applicables à la détention et aux dispositions pertinentes en vigueur du Code pénal de rendre des comptes a encouragé à généraliser ces infractions.

409. Pour cette raison, la Commission considère que l'autorité de fait dans la bande de Gaza doit s'acquitter de ses responsabilités en tenant responsables et en poursuivant tous ceux qui enfreignent la loi s'agissant d'arrestations arbitraires et illégales et du crime de torture et de toutes autres formes de mauvais traitements et d'atteinte à la dignité de la personne.

X. Violations du droit à la vie dans la bande de Gaza

410. La Loi fondamentale palestinienne révisée de 2003 n'accorde pas au droit à la vie la même attention qu'à tous les autres droits et libertés fondamentales énoncés et consacrés dans son chapitre II, précisément consacré aux droits et aux libertés fondamentales, ce qui constitue à notre avis une lacune est l'un des défauts dont pâtit l'ensemble de cette loi, parce que le droit à la vie est une source essentielle de tous les autres droits de l'homme et que sa négation revient donc à priver de réalité et de valeur tous les autres droits.

411. Le droit à la vie et à la sécurité de la personne est un droit essentiel à tout être humain, auquel il ne peut être porté atteinte en aucune circonstance, y compris dans

les situations exceptionnelles et extraordinaires dans lesquelles une société où un pays peuvent se trouver.

412. Le droit à la vie est consacré dans les instruments constitutifs du droit international, notamment la Déclaration universelle des droits de l'homme, dont l'article 3 affirme que « Tout individu a droit à la vie, à la liberté et à la sûreté de sa personne. » Le droit de tout individu à la vie est également réaffirmé dans le Pacte international relatif aux droits civils et politiques, dont l'article 6 stipule que « le droit à la vie est inhérent à la personne humaine. Ce droit doit être protégé par la loi. Nul ne peut être arbitrairement privé de la vie [...] ».

413. Le Comité des droits de l'homme a expliqué, dans l'Observation générale n° 16 qu'il a adoptée à sa 378^e séance, tenue le 27 juillet 1982, que le droit à la vie visé au paragraphe 1 de l'article 6 du Pacte international relatif aux droits civils et politiques est le premier des droits, celui auquel il ne peut être porté atteinte même en situation d'état d'urgence et qui constitue le socle sur lequel reposent tous les autres droits de l'homme.

414. Pour se faire une idée de la nature, de l'ampleur et de la teneur des violations alléguées dans le rapport Goldstone en ce qui concerne les atteintes à la vie des personnes, la Commission a pris contact avec toutes les organisations palestiniennes de défense des droits de l'homme qui suivent, recensent et vérifient ces violations dans la bande de Gaza et en Cisjordanie, notamment le Centre palestinien des droits de l'homme, le Centre « Mizan » et l'organisation « Conscience », dans la bande de Gaza, et les organisations de défense des droits de l'homme de Cisjordanie qui suivent la situation des droits de l'homme dans la bande de Gaza, notamment l'organisation « Al-Haq », l'organisation « Conscience » et l'Organisation indépendante de défense des droits de l'homme (Cabinet des doléances), afin que toutes ces organisations lui fournissent les informations qu'elles ont pu réunir et vérifier, ainsi que les rapports, déclarations et interventions qu'elles ont pu publier à ce sujet.

415. Tous les rapports, témoignages et déclarations que la Commission a reçus de ces institutions s'accordent sur un point, à savoir que des dizaines d'assassinats ont été commis dans la bande de Gaza. Ainsi, l'Organisation indépendante de défense des droits de l'homme, dans son rapport de 2009, fait état de 22 exécutions extrajudiciaires, auxquelles il faut ajouter 23 meurtres commis dans des circonstances plus troubles⁶⁹. L'organisation Al-Haq fait quant à elle état de 33 meurtres commis au cours des quatre premiers mois de 2009⁷⁰.

416. Il ressort des résultats du travail de suivi et de vérification effectué par ces organisations que les atteintes au droit à la vie dans la bande de Gaza prennent diverses formes, dont les suivantes :

- Les assassinats purs et simples et les exécutions extrajudiciaires commis par des entités chargées de l'application des lois ou par des groupes armés relevant de l'autorité de fait dans la bande de Gaza et dont sont victimes des personnes accusées de faits précis ou condamnées par des tribunaux militaires ou civils;

⁶⁹ Rapport annuel de l'Organisation indépendante de défense des droits de l'homme pour 2009, p. 68 et suivantes.

⁷⁰ Rapport spécial contenant les noms des victimes de meurtre présenté à la Commission d'enquête par l'organisation Al-Haq.

- La liquidation physique de personnes arrêtées puis interrogées par les services de l'autorité de fait dans la bande de Gaza.

A. Plaintes recueillies par la Commission et faisant état de violations du droit à la vie

417. La Commission a reçu des organisations palestiniennes de défense des droits de l'homme, des groupes parlementaires et des proches de victimes un ensemble de plaintes faisant état de violations du droit à la vie dans la bande de Gaza qui auraient été commises par les services de sécurité relevant de l'autorité de fait ou par des groupes appartenant au Mouvement de la résistance islamique Hamas dans la bande de Gaza.

418. Ayant étudié la teneur de ces plaintes et entendu les proches des victimes au cours des auditions qu'elle a organisées⁷¹, la Commission a constaté l'existence d'éléments corroborant la véracité des allégations relatives à la violation du droit à la vie par les services de sécurité relevant de l'autorité de fait dans la bande de Gaza. Les déclarations des habitants de la bande de Gaza que la Commission a pu entendre par vidéoconférence⁷² confirment que les services de sécurité de la bande de Gaza et des membres des Brigades Izzdine Al-Qassam et d'autres groupes armés relevant de l'autorité de fait à Gaza ont commis des violations du droit à la vie.

B. Avis de la Commission sur les violations du droit à la vie

419. Ayant analysé les résultats des auditions qu'elle a organisées pour entendre les proches des victimes d'exécutions extrajudiciaires, la Commission estime que les entités chargées de l'application des lois dans la bande de Gaza ont procédé à des exécutions extrajudiciaires, à grande échelle, au cours de l'agression israélienne contre Gaza.

420. Par exécution extrajudiciaire, on entend « l'exécution, par des forces armées, des agents officiels ou des groupes soutenus par des agences gouvernementales, d'opposants politiques ou de personnes soupçonnées d'avoir commis des infractions ». Ces exécutions ne sont précédées d'aucune procédure judiciaire. La notion d'exécution extrajudiciaire comprend aussi les actes d'extermination, par des exécutions à motifs politiques ou des meurtres à motifs religieux ou idéologiques.

421. Il ressort clairement de l'examen des cas de meurtre dont ont été victimes de nombreuses personnes dans la bande de Gaza que la notion d'exécution extrajudiciaire s'applique à ces meurtres.

1. Les meurtres de personnes détenues par les services de sécurité relevant de l'autorité de fait dans la bande de Gaza

422. La réalité de ces faits est confirmée par de nombreux témoignages recueillis par la Commission. Ainsi, le père d'une victime a déclaré : « [...] Akram a été tué pendant l'agression israélienne sur Gaza [...] On nous a demandé de nous rendre à

⁷¹ La Commission a organisé 17 auditions à l'intention de proches de victimes de meurtre.

⁷² La Commission a entendu les témoignages de 11 personnes dont les plaintes avaient trait à des meurtres.

l'hôpital Al-Shafa de Gaza, où j'ai reconnu le corps d'Akram à la morgue. Il avait reçu six balles à la poitrine et à la tête. Je n'ai pas vu qui lui avait tiré dessus mais il était détenu dans la prison du Sérail à Gaza. Il avait été condamné à mort avant la prise de pouvoir du Hamas [...] »⁷³

423. Le père d'une autre victime a déclaré : « [...] le 26 mars 2003, mon fils a été arrêté par les autorités, au motif qu'il aurait commis des meurtres. Il a été effectivement jugé et condamné à mort la même année, pour trois meurtres [...] il a été jugé par le tribunal civil de première instance de Gaza et était détenu à la prison du Sérail en attendant son exécution. Ce jugement a été cassé par la cour d'appel, qui n'avait pas encore publié son jugement. Lors de l'agression sur Gaza, le 28 décembre 2008, le bâtiment du Sérail a été bombardé par les Israéliens et à l'issue de ce bombardement, mon fils est sorti avec d'autres prisonniers et il est rentré à la maison. Quelques jours après, il s'est rendu dans le secteur de Rafah, où il a été arrêté par les forces de sécurité intérieure le 20 janvier 2009 puis exécuté le lendemain, en même temps que le dénommé Saïd Zaghl. Sa dépouille mortelle a été transportée à l'hôpital Al-Shafa [...] Il a été tué d'une seule balle tirée derrière l'oreille et le médecin légiste qui a procédé à l'autopsie a indiqué que la balle qui l'avait tué s'était logée dans son cerveau. Ni le médecin légiste ni le ministère public n'ont accepté de nous délivrer un certificat précisant les causes du décès [...] »⁷⁴

2. Les meurtres de personnes accusées par les autorités de fait dans la bande de Gaza

424. De nombreux témoignages recueillis par la Commission, tels ceux reproduits ci-dessous, corroborent la réalité des meurtres de personnes jugées suspectes par l'autorité de fait dans la bande de Gaza.

425. La veuve d'une victime a déclaré : « [...] Mon mari a été arrêté un an et demi environ avant la guerre, sous l'accusation d'espionnage au profit d'Israël. Il a avoué sous la torture et est resté en prison. Lorsque la guerre contre Gaza a éclaté, il était toujours dans la prison du Sérail. Quand cette prison a été bombardée par les Israéliens, il a été blessé à l'épaule et à la jambe par l'effondrement d'un mur, ce qui a provoqué une hémorragie. Il a été transporté à l'hôpital et, pendant qu'il recevait les premiers secours, trois individus en tenue militaire ont tiré sur lui en visant la tête. L'hôpital était plein de monde et cela s'est passé au vu des policiers qui se trouvaient là. Nous étions à l'accueil de l'hôpital et nous avons entendu les coups de feu. Je me suis dirigée vers les lieux et je l'ai trouvé allongé sur le lit avec une balle en plein front et une autre sous le nez [...] Les auteurs des coups de feu étaient à visage découvert, mais je ne sais pas à quelle faction ils appartenaient [...] »⁷⁵

426. La veuve d'une autre victime a fait le récit suivant : « [...] Un inconnu a téléphoné à mon beau-frère pour lui dire d'aller voir où le corps de son frère avait été jeté. Nous sommes sortis à sa recherche et on nous a dit qu'il y avait un corps à l'hôpital Al-Shafa. À la morgue de l'hôpital, nous avons trouvé le corps de mon mari qui portait les traces de trois balles, à la tête, à la poitrine et au ventre [...] »

⁷³ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote M-G 2010/21.

⁷⁴ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote M-G 2010/18.

⁷⁵ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote M-G 2010/20.

Avant cela, le 29 janvier 2009, j'avais parlé à mon mari au téléphone et il m'avait dit qu'il était en lieu sûr et entre de bonnes mains. Mon mari avait été accusé d'avoir commis un crime mais le tribunal l'avait innocenté en 2008. Le 22 octobre 2008, on l'avait remis en prison. M'étant adressée au Bureau juridique du Sérail, ils m'ont dit qu'ils soupçonnaient mon mari d'être un agent d'Israël. Quatre mois après, j'ai pu rendre visite à mon mari et ils m'ont dit qu'il était un agent d'Israël [...] La justice militaire m'a convoquée et interrogée, avant d'ajouter que mon mari avait des ennemis qui l'avaient tué. Je suis personnellement convaincue que c'est la sécurité intérieure qui l'a tué [...] »⁷⁶

427. L'auteur d'un autre témoignage recueilli par la Commission a déclaré : « [...] Il devait être présenté au tribunal et n'avait encore fait l'objet d'aucune décision de justice. Lorsque le Hamas a pris le pouvoir à Gaza après le coup d'État, il a été innocenté et libéré. Il a été présenté à la télévision en tant que victime d'une injustice et est restée à la maison pendant huit mois. Puis une autre personne qui avait été arrêtée a impliqué mon fils, qui a été arrêté et remis en prison. Puis vint l'agression contre Gaza, au cours de laquelle la prison du Sérail a été bombardée par Israël. Mon fils est alors sorti avec d'autres et est rentré à la maison, avant d'aller à Khan Ypounes chez son grand-père. Arafat Aboureïch et un groupe d'hommes masqués l'ont sorti de chez son grand-père et ont commencé à le tabasser en pleine rue [...] Ils l'ont ensuite emmené en un lieu désert où ils l'ont tué, et ce au vu et au su de tout le monde [...] »⁷⁷

428. Un autre témoignage déroulait le récit suivant : « [...] Mon mari, âgé de 40 ans, a été arrêté le 25 juillet 2008 au motif qu'il aurait été membre du Fatah. Pendant sa détention, il a été torturé et il m'a décrit les différentes méthodes de torture qu'on lui faisait subir. Puis je suis restée trois mois sans nouvelles de lui. Pendant la guerre contre Gaza, des détenus ont été libérés, dont mon mari, qui était détenu à la prison du Sérail à Gaza sans avoir été jugé [...] Mon mari est accusé de complicité dans les explosions qui s'étaient produites à Gaza. Ils l'ont sorti du Sérail et l'ont tué dans le secteur dit du « Tunnel ». Il a été tué de deux balles, une de chaque côté de la tête. J'ai vu mon mari lorsque des personnes m'ont appelée de l'hôpital pour que je vienne prendre sa dépouille. Nous l'avons trouvée à la morgue et aujourd'hui encore je ne sais pas qui l'a tué et je n'ai rien entendu à ce sujet. Le jour où il avait été libéré de prison, des agents de la sécurité intérieure lui ont tiré dans les jambes et il est arrivé à la maison en perdant du sang. J'ai fait venir un médecin qui l'a soigné et a constaté que les os n'étaient pas touchés. Il a continué de se soigner à la maison pendant au moins 20 jours. Des hommes masqués venaient parfois la nuit et terrorisaient les habitants. Je le cachais pendant leur passage mais une fois, des hommes masqués, en civil et armés de pistolets, dont je ne sais ni qui ils étaient ni où ils sont repartis, ont emmené mon mari aux alentours de minuit [...] Ils lui ont tiré dessus à 4 heures du matin. Les hommes masqués étaient venus dans un véhicule militaire. Je suis convaincue que ceux qui ont tué mon mari font partie de la sécurité intérieure. Mon mari était un citoyen ordinaire dont le seul tort était d'appartenir au Fatah [...] »⁷⁸

⁷⁶ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote M-G 2010/22.

⁷⁷ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote M-G 2010/19.

⁷⁸ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote M-G 2010/14.

429. Dans un autre témoignage, on peut lire : « Le jeudi 29 janvier 2009, à 1 heure du matin, alors que mon mari, mes enfants et moi-même dormions, on a frappé à la porte de notre domicile. Mon mari, paix à son âme, s'est levé et a ouvert la porte, se trouvant nez à nez avec un groupe de plus d'une quinzaine d'hommes masqués. Il a tenté de refermer la porte après leur avoir demandé qui ils étaient, ce à quoi ils avaient répondu qu'ils faisaient partie des services de sécurité [...] Il a ensuite cessé de résister et a ouvert la porte. Ils sont tous rentrés dans la maison [...] Puis ils ont emmené mon mari vers une destination inconnue. Au matin, je suis allée au poste de police où j'ai déposé plainte [...] Le 22 février 2009, vers midi, le neveu maternel de mon mari est venu me voir et m'a informée que quelqu'un avait vu mon mari à l'hôpital Kamal Adouan [...] Son corps portait les traces des tortures qu'il avait subies, de même que l'impact d'une balle qui avait pénétré son crâne [...] »⁷⁹

430. En outre, il ressort de l'examen par la Commission des listes de victimes pour le premier trimestre 2009⁸⁰ que 17 civils et autres personnes, jugés suspects ou détenus par les services de sécurité de la bande de Gaza, ont été tués.

3. Meurtre de personnes que l'autorité de fait dans la bande de Gaza considérait comme des adversaires politiques

431. Dans une déclaration recueillie par la Commission, il est dit ce qui suit : « [...] Le mardi 27 mars 2009, un groupe d'individus armés et masqués, venus à bord de trois Jeeps militaires, ont frappé à la porte de mon domicile. Mon époux est arrivé le premier derrière la porte et leur a demandé qui ils étaient. Ils lui ont répondu qu'ils voulaient voir Oussama. Je suis alors sortie et leur ai demandé qui ils étaient et ils m'ont répondu qu'ils étaient de la sécurité intérieure. Je leur ai demandé un mandat du Procureur pour pouvoir leur remettre mon fils. Ils ont refusé et m'ont répété qu'ils étaient de la sécurité intérieure en me montrant leurs cartes. Je leur ai répondu que mon fils ne sortirait pas de la maison même s'ils la détruisaient à coups de missiles, afin de me donner le temps de contacter mon cousin qui est un responsable du Hamas [...] Mon cousin est arrivé et m'a demandé ce qui se passait. Je lui ai répondu qu'il était responsable de cette organisation et que mon fils Oussama serait donc sous sa responsabilité. Il m'a répondu que rien n'était reproché à Oussama et celui-ci est donc sorti et est monté sur l'une des Jeeps. Nous avons appris le lendemain qu'il avait été emmené à la mosquée Bilal bin Rabah, dans le quartier des Oliviers, il était pieds et poings liés sous la garde d'une seule personne non armée. Il a demandé au garde de lui ôter ses liens pour qu'il puisse aller aux toilettes. Il a alors bousculé le garde et s'est enfui en courant. Les deux autres gardes l'ont poursuivi en le sommant de s'arrêter et ont tiré sur lui à trois reprises, la troisième balle l'atteignant à l'épaule. Il a continué de courir en perdant du sang jusqu'à un local commercial. Pendant ce temps la police est arrivée sur les lieux et l'a emmené à l'hôpital Al-Shafa. À l'hôpital, un médecin qui le connaissait est venu et l'a emmené dans la section des opérations chirurgicales. Les médecins ont rassuré les proches d'Oussama et ont emmené celui-ci dans la salle des soins ambulatoires. Les hommes de la sécurité intérieure sont alors arrivés par la section de radiologie en empruntant l'escalier réservé aux médecins et l'ont emmené sur son lit vers l'escalier et, selon le certificat médical qui est encore en ma possession, l'ont

⁷⁹ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote M-G 2010/13.

⁸⁰ La Commission a obtenu cette liste auprès de l'organisation Al-Haq.

étranglé, la strangulation étant la cause de décès indiquée dans le certificat [...] Ils l'ont ensuite abandonné là, non sans avoir au préalable demandé à un employé de l'hôpital de s'assurer qu'il était bien mort [...] La raison de l'interpellation de mon fils est qu'il était un membre important du Fatah et, en 2006, il avait été séquestré pendant trois jours [...] J'ajouterai que vers 11 heures du soir, une personne est venue me voir pour s'excuser de la mort d'Oussama et me demander de ne pas parler aux médias, en échange de quoi mon fils serait considéré comme un martyr. Il s'agit d'une personne bien connue, responsable du Département militaire dénommé Ahmed Atallah [...] J'ai refusé mais ils m'ont envoyé cinq hommes armés et masqués qui m'ont menacée de représailles si je parlais à la télévision [...] Après mon passage sur les télévisions satellitaires, le porte-parole du Hamas, Ihab al-Ghassin, a déclaré au nom de ce mouvement que la mort de mon fils était imputable à une vengeance familiale et qu'une enquête était en cours, propos qui ont été réitérés ensuite par Tahar al-Nounou [...] »⁸¹

C. Les exécutions extrajudiciaires dans la bande de Gaza au regard du droit international relatif aux droits de l'homme

1. Les obligations en matière de lutte contre les exécutions extrajudiciaires

432. Le document du Conseil économique et social relatif aux garanties destinées à protéger les droits des personnes condamnées à la peine capitale, adopté en vertu de la résolution 1984/50 du Conseil en date du 25 mai 1984, réaffirme la nécessité pour les États de respecter et d'appliquer toute une série de garanties juridiques relatives à la peine capitale. Cette résolution stipule en effet que « [...] la peine capitale ne peut être exécutée que lorsque la culpabilité de la personne accusée d'un crime repose sur des preuves claires et convaincantes ne laissant place à aucune autre interprétation des faits.

4. La peine capitale ne peut être exécutée que lorsque la culpabilité de la personne accusée d'un crime repose sur des preuves claires et convaincantes ne laissant place à aucune autre interprétation des faits.

5. La peine capitale ne peut être exécutée qu'en vertu d'un jugement final rendu par un tribunal compétent après une procédure juridique offrant toutes les garanties possibles pour assurer un procès équitable, garanties égales au moins à celles énoncées à l'article 14 du Pacte international relatif aux droits civils et politiques, y compris le droit de toute personne suspectée ou accusée d'un crime passible de la peine de mort de bénéficier d'une assistance judiciaire appropriée à tous les stades de la procédure.

6. Toute personne condamnée à mort a le droit de faire appel à une juridiction supérieure, et des mesures devraient être prises pour que ces appels soient obligatoires.

7. Toute personne condamnée à mort a le droit de se pourvoir en grâce ou de présenter une pétition en commutation de peine; la grâce ou la commutation de peine peut être accordée dans tous les cas de condamnation à mort.

⁸¹ Cette déclaration et la documentation y relative sont conservées par la Commission sous la cote M-G 2010/23.

8. La peine capitale ne sera pas exécutée pendant une procédure d'appel ou toute autre procédure de recours ou autre pourvoi en vue d'obtenir une grâce ou une commutation de peine.

9. Lorsque la peine capitale est appliquée, elle est exécutée de manière à causer le minimum de souffrances possibles [...].

433. Comme on peut le voir, ces principes et dispositions énoncent toute une série de garanties qui doivent être prévues et assurées au bénéfice de l'accusé afin que celui-ci puisse se défendre et faire face aux violations et à l'arbitraire dont ses droits peuvent souffrir.

434. En se référant aux sources et aux dispositions du droit international général, on peut dire que ces sources et dispositions interdisent systématiquement et définitivement aux autorités, que celles-ci soient civiles et régissent des territoires ou États indépendants ou qu'elles soient militaires et régissent des territoires occupés, de procéder à des liquidations physiques, des meurtres délibérés et des exécutions arbitraires et extrajudiciaires, quels que soient les prétextes ou les causes de ces pratiques, c'est-à-dire qu'elles aient pour objet de sanctionner des actes ou des pratiques déterminés ou que leur objet relève des représailles, de la vengeance ou d'une volonté de dissuader et terroriser la population.

435. Par ailleurs, les Principes relatifs à la prévention efficace des exécutions extrajudiciaires, arbitraires et sommaires et aux moyens d'enquêter efficacement sur ces exécutions, que le Conseil économique et social a adoptés par sa résolution du 24 mai 1989, stipulent que : « [...] 1. Les exécutions extrajudiciaires, arbitraires et sommaires seront interdites par la législation nationale et les gouvernements feront en sorte que de telles exécutions soient considérées comme des délits punissables en vertu de leur droit pénal et frappées de peines appropriées tenant compte de la gravité du délit. Des circonstances exceptionnelles, notamment l'état de guerre ou la menace de guerre, l'instabilité politique à l'intérieur du pays ou toute autre situation d'urgence publique, ne pourront être invoquées comme justification de ces exécutions [...] »

436. L'article 2 des Principes précise que, afin « [...] d'empêcher les exécutions extrajudiciaires, arbitraires et sommaires, les pouvoirs publics exerceront un contrôle rigoureux, notamment en veillant strictement au respect de la voie hiérarchique, sur tous les fonctionnaires responsables de l'arrestation, de la détention provisoire et de l'emprisonnement, ainsi que sur tous les fonctionnaires autorisés par la loi à employer la force et à utiliser les armes à feu [...] ».

437. Les Principes énoncent également toute une série d'autres principes, dont les suivants :

- Les pouvoirs publics veilleront à ce que les personnes privées de liberté soient détenues dans des lieux de détention reconnus officiellement comme tels et à ce que des renseignements précis sur leur arrestation et le lieu où elles se trouvent, y compris sur leur transfert, soient immédiatement communiqués à leur famille et à leur avocat ou à d'autres personnes de confiance;
- Des inspecteurs qualifiés, y compris du personnel médical ou une autorité indépendante équivalente, procéderont régulièrement à des inspections sur les lieux de détention et seront habilités à procéder à des inspections inopinées, de leur propre initiative, avec toutes garanties d'indépendance dans l'exercice de

cette fonction. Ces inspecteurs auront accès sans aucune restriction à toutes les personnes détenues ainsi qu'à toutes les pièces de leur dossier;

- Les gouvernements s'appliqueront à empêcher les exécutions extralégales, arbitraires et sommaires, en prenant diverses mesures telles que l'intercession diplomatique, l'amélioration des conditions d'accès des plaignants aux organes intergouvernementaux et judiciaires et l'accusation publique. Il sera fait appel aux mécanismes intergouvernementaux pour enquêter sur les informations relatives à de telles exécutions et prendre des mesures efficaces contre de telles pratiques. Les gouvernements, y compris ceux des pays où l'on suspecte qu'il est procédé à des exécutions extrajudiciaires, arbitraires et sommaires, apporteront un concours total aux enquêtes internationales;
- Une enquête approfondie et impartiale sera promptement ouverte dans tous les cas où l'on soupçonnera des exécutions extrajudiciaires, arbitraires et sommaires, y compris ceux où des plaintes déposées par la famille ou des informations dignes de foi donneront à penser qu'il s'agit d'un décès non naturel dans les circonstances données. Il existera à cette fin des procédures et des services officiels d'enquête chargés d'établir les faits. Toute enquête devra comporter une autopsie adéquate, la collecte et l'analyse de toutes les preuves physiques ou écrites et l'audition des témoins. L'enquête distinguera entre les morts naturelles, les morts accidentelles, les suicides et les homicides.
- L'autorité chargée de l'enquête aura tout pouvoir pour obtenir tous les renseignements nécessaires pour l'enquête et disposera de toutes les ressources budgétaires et techniques dont elle aura besoin pour mener sa tâche à bien. Elle aura aussi le pouvoir d'obliger les fonctionnaires dont on suppose qu'ils sont impliqués dans l'une quelconque des exécutions mentionnées à comparaître et à témoigner. La même règle s'appliquera en ce qui concerne les témoins. À cette fin, elle sera habilitée à citer les témoins – y compris les fonctionnaires en cause – à comparaître et à exiger que des preuves soient fournies;
- L'enquête est effectuée par une commission d'enquête indépendante ou par un organe similaire. Les membres de cette commission seront choisis pour leur impartialité, leur compétence et leur indépendance personnelle. Ils seront, en particulier, indépendants à l'égard de toute institution ou personne qui peut faire l'objet de l'enquête. La commission aura tout pouvoir pour obtenir tout renseignement nécessaire à l'enquête et elle mènera l'enquête en application des Principes;
- Les plaignants, les témoins, les personnes chargées de l'enquête et leurs familles jouiront d'une protection contre les violences, les menaces de violence ou toute autre forme d'intimidation. Les personnes pouvant être impliquées dans des exécutions extrajudiciaires, arbitraires ou sommaires seront écartées de toute fonction leur permettant d'exercer une autorité, directe ou indirecte, sur les plaignants, les témoins et leurs familles, ainsi que sur les personnes chargées de l'enquête;
- Les pouvoirs publics veilleront à ce que les personnes dont l'enquête aura révélé qu'elles ont participé à des exécutions extrajudiciaires, arbitraires ou sommaires sur tout territoire tombant sous leur juridiction soient traduites en justice. Les pouvoirs publics pourront soit traduire ces personnes en justice, soit favoriser leur extradition vers d'autres pays désireux d'exercer leur

juridiction. Ce principe s'appliquera quels que soient et où que soient les auteurs du crime ou les victimes, quelle que soit leur nationalité et quel que soit le lieu où le crime a été commis;

- L'ordre donné par un supérieur hiérarchique ou une autorité publique ne peut pas être invoqué pour justifier des exécutions extrajudiciaires, arbitraires ou sommaires. Les supérieurs hiérarchiques, les fonctionnaires ou autres agents de l'État pourront répondre des actes commis par des agents de l'État placés sous leur autorité s'ils avaient raisonnablement la possibilité de prévenir de tels actes. En aucun cas, y compris en état de guerre, état de siège ou autre état d'urgence, une immunité générale ne pourra exempter de poursuites toute personne présumée impliquée dans des exécutions extrajudiciaires, arbitraires ou sommaires.
- Les familles et personnes à charge des victimes d'exécutions extrajudiciaires, sommaires ou arbitraires ont droit à une indemnisation juste et suffisante, dans un délai raisonnable.

438. La Commission fonde ses constats sur les faits dont elle a eu connaissance à propos des exécutions extrajudiciaires, les résultats des auditions qu'elle a organisées et les principes et critères internationaux relatifs aux garanties de protection des personnes contre de telles pratiques.

2. Carence des autorités de fait dans la bande de Gaza pour ce qui est d'engager des poursuites contre les auteurs d'exécutions extrajudiciaires

439. La tolérance de ces autorités à l'égard de tels actes trouve sa confirmation dans la déclaration suivante recueillie par la Commission auprès d'une plaignante : « [...] Le 14 janvier 2009, pendant la guerre [...] J'ai ouvert la porte et je me suis trouvée face à des individus masqués dont un est entré dans la maison [...] Ils m'ont dit qu'ils cherchaient Zaher. Ma belle-sœur est allée chercher mon mari et elle est redescendue avec lui [...] Ils sont sortis avec mon mari dans la rue et quelques minutes après je suis sortie moi aussi et j'ai vu les individus en question qui s'éloignaient en courant avec mon mari. Je les ai poursuivis en criant [...] Mais ils sont entrés dans le secteur de Biyarat. Je suis retournée chez moi et j'ai immédiatement déposé plainte auprès de la police [...] Le lendemain, nous avons appris qu'on l'avait retrouvé mort, les mains et le cou ligotés, à l'hôpital Kamal Adouane, où nous sommes allés en famille le chercher [...] J'accuse le Hamas d'avoir tué mon mari [...] Deux jours après ces faits, le Hamas a publié une déclaration selon laquelle la mort de mon mari serait due à la guerre et il serait considéré comme un martyr. Nous avons reçu sur notre téléphone portable des menaces nous enjoignant de ne pas parler de cette affaire, mais moi je sais qui a tué mon mari. Ce sont les gens du Hamas. Le Hamas les a mis en prison pendant deux semaines, après nous avoir fait promettre de ne pas les poursuivre [...] »

440. L'absence de poursuites engagées contre les auteurs de telles violations dans la bande de Gaza et le refus de l'autorité de fait d'assumer sa responsabilité de protection des personnes contre de telles violations ont fait que les exécutions extrajudiciaires se sont multipliées et répandues, leurs auteurs étant convaincus de l'impunité que leur confère la protection des autorités.

441. La Commission estime qu'il incombe à l'autorité de fait dans la bande de Gaza d'appliquer une politique de refus de toute impunité ou immunité juridictionnelle pour tout individu, chef ou responsable ayant commis des crimes et autres violations des droits et des libertés.

442. Le fait que le Mouvement de la résistance islamique a pris le pouvoir par la force dans la bande de Gaza ne dégage pas ses membres, ni ceux des organisations ou groupements armés qui en dépendent, de l'obligation qui leur incombe de respecter les droits et libertés des individus, en particulier le respect du droit à la vie et l'inadmissibilité de toute peine ne résultant pas d'un jugement équitable, ainsi que la nécessité d'éviter toute atteinte à la dignité des personnes et tout acte de torture et autres peines ou traitements cruels, inhumains ou dégradants.

XI. Conclusions

443. Ayant passé en revue la situation des droits de l'homme et des libertés fondamentales dans les territoires palestiniens, ayant entendu les déclarations des organisations palestiniennes de défense des droits de l'homme, qui ont vérifié la réalité des violations de ces droits et libertés et fait le bilan des droits de l'homme en Cisjordanie et dans la bande de Gaza, et ayant procédé aux enquêtes voulues auprès des parties liées aux violations alléguées par la Mission d'établissement des faits des Nations Unies, la Commission est parvenue aux conclusions suivantes :

444. La majorité des détentions dans les territoires palestiniens – Cisjordanie et bande de Gaza – sont liées à la situation politique palestinienne. La Commission constate que les arrestations arbitraires sont le résultat de la division politique interpalestinienne et de l'existence de deux autorités distinctes, l'une en Cisjordanie et l'autre à Gaza. Ainsi, la majorité des arrestations qui ont eu lieu en Cisjordanie visaient des personnes liées au Mouvement de la résistance islamique Hamas ou proches ou soutiens de ce mouvement et autres personnes relevant d'entités ou de forces politiques alliées ou favorables au Hamas. Dans la bande de Gaza, en revanche, les arrestations visaient des membres du Mouvement de libération nationale palestinien Fatah, des proches et des partisans de ce mouvement et autres personnes relevant d'entités de forces politiques alliées ou favorables au Fatah.

445. Dans la plupart des cas d'arrestation et de détention, les responsables de l'application des lois – services de sécurité – en Cisjordanie et les services de sécurité rattachés à l'autorité de fait dans la bande de Gaza font fi des règles de procédure juridiques qui doivent être respectées en matière d'arrestation et de détention, carence à laquelle s'ajoutent les mauvais traitements et l'usage de la force au moment de l'arrestation.

446. Les responsables de l'application des lois – services de sécurité – en Cisjordanie et les services de sécurité rattachés à l'autorité de fait dans la bande de Gaza ne respectent pas les dispositions des lois en vigueur imposant de déférer l'accusé au parquet dans les délais prévus par le code de procédure pénal palestinien.

447. Des détenus civils sont présentés à des tribunaux militaires, aussi bien en Cisjordanie que dans la bande de Gaza.

448. Dans la plupart des cas, les services de sécurité en Cisjordanie font fi des décisions de remise en liberté prononcées par les tribunaux réguliers et usent de subterfuges pour ne pas les appliquer.

449. Les personnes arrêtées sont soumises à la torture et autres traitements cruels, inhumains ou dégradants dans le but d'amener la personne concernée à avouer ce qu'on lui reproche ou à accuser d'autres personnes, et ce aussi bien par les services de sécurité de Cisjordanie que par les services de sécurité relevant de l'autorité de fait dans la bande de Gaza.

450. Des meurtres et des exécutions extrajudiciaires ont été commis par les entités chargées de l'application des lois et les groupes armés relevant de l'autorité de fait dans la bande de Gaza, aux dépens de personnes accusées d'avoir commis certains actes et de personnes qui avaient été condamnées par des tribunaux militaires ou civils, et ces mêmes services de sécurité ont arrêté des civils qui ont été ensuite liquidés physiquement après interrogatoire.

451. L'autorité de fait dans la bande de Gaza s'est abstenue d'engager des poursuites contre les auteurs d'exécutions extrajudiciaires et d'obliger les auteurs de telles violations à rendre des comptes, et elle a refusé d'assumer la responsabilité qui lui incombe de protéger les personnes confrontées à de telles violations, qui se sont donc multipliées et répandues, les auteurs d'exécutions extrajudiciaires étant conscients et convaincus que l'autorité de fait leur apportera protection et immunité contre tous interrogatoires ou poursuites.

452. Des entités officielles, plus précisément le Ministère de l'intérieur et les services de sécurité, en Cisjordanie ont commis un certain nombre de violations du droit de constituer des associations, notamment en remplaçant les comités de direction élus par les membres de ces associations par des comités provisoires composés de non-membres, en interdisant à certaines associations de poursuivre leurs activités sous peine d'arrestation des membres de leur comité de direction et autres pratiques contraires à la loi.

453. Des entités officielles de Cisjordanie, plus précisément le Conseil général de la fonction publique et les directions et services de ministères palestiniens compétents, ont commis un certain nombre de violations en rapport avec le droit d'occuper des fonctions publiques, les plus importantes étant des annulations de nomination et des licenciements de centaines d'enseignants et d'autres fonctionnaires, les motifs étant l'appartenance politique des intéressés et l'avis négatif des services de sécurité sur leur nomination. L'on peut dire également que les services de sécurité rattachés à l'autorité de fait dans la bande de Gaza jouent un rôle identique concernant les mesures dites de contrôle de sécurité, en vertu desquelles le licenciement est décidé en fonction de l'appartenance politique de l'intéressé.

454. Des atteintes à la liberté de la presse ont été commises dans les territoires palestiniens, que ce soit en Cisjordanie ou dans la bande de Gaza, les plus importantes étant les assassinats, les détentions et les interrogatoires de journalistes, les motifs étant leurs activités journalistiques, leur appartenance politique ou la publication d'articles écrits ou audiovisuels. Certains d'entre eux ont subi des tortures et autres traitements cruels, inhumains ou dégradants pendant leur détention ou lors de leur arrestation par les services de sécurité. En outre, ces services interdisent ou entravent l'exercice de la profession de journaliste pour des raisons qui tiennent à l'appartenance politique des responsables ou pour empêcher des journalistes de diffuser des nouvelles ou d'enquêter sur des sujets que ces services ne veulent pas voir évoqués.

XII. Recommandations

455. Compte tenu des éléments qui précèdent et à l'issue des travaux qu'elle a menés conformément au mandat juridiquement bien défini qui lui a été confié par la résolution 64/10 de l'Assemblée générale, la Commission présente les recommandations suivantes :

456. Enjoindre au parquet et à la magistrature militaires de cesser de délivrer des mandats d'arrêt ou de détention concernant des civils, empêcher les tribunaux militaires de juger des civils et transférer aux tribunaux civils ordinaires toutes les affaires de civils arrêtés ou incarcérés par la justice militaire.

457. Abroger le protocole d'accord et de coopération entre le ministère public et le parquet militaire conclu le 28 juin 2006, en vertu duquel le Procureur général a habilité le parquet militaire à exercer des compétences que la loi confère au ministère public s'agissant d'engager des poursuites à raison d'infractions visées dans le Code pénal en Cisjordanie et dans la bande de Gaza.

458. Obliger les services de sécurité relevant de l'Autorité nationale palestinienne à respecter leurs attributions en matière d'arrestation, de garde à vue et de détention, à ne procéder à aucune arrestation sans mandat préalablement délivré par le juge, à respecter les délais de garde à vue fixés dans le code de procédure pénale, à s'abstenir de procéder à toute garde à vue ou détention dans des lieux autres que ceux prévus à cet effet, à respecter l'inviolabilité du domicile et des lieux privés et à ne pas y pénétrer ni y perquisitionner sans ordonnance judiciaire motivée. Il incombe en outre aux entités palestiniennes compétentes d'empêcher les services de renseignement militaire d'exercer des fonctions d'arrestation et de garde à vue de personnes extérieures à l'armée.

459. Faire en sorte que le ministère public palestinien exerce ses fonctions d'inspection des centres de réforme et de réadaptation (prisons) et des lieux de garde à vue pour s'assurer que nul n'y est placé ou détenu illégalement; exercice par le ministère public de son rôle d'intervention pour empêcher tout placement en détention en dehors des centres de réforme et de réadaptation. Il incombe en outre au ministère public de s'employer à empêcher des membres des services de sécurité qui n'ont pas de compétence de police judiciaire, en particulier les services de renseignement militaire, d'usurper celle des agents qui détiennent cette compétence en vertu de la loi.

460. Faire en sorte que toutes les entités chargées de l'application des lois respectent et appliquent les décisions des tribunaux réguliers portant remise en liberté de détenus, sachant que certains services de sécurité – notamment le Service de sécurité préventive, les Renseignements généraux et les Renseignements militaires – n'appliquent pas les décisions des tribunaux réguliers prononçant la libération totale ou conditionnelle de détenus qui restent donc privés de liberté malgré une décision de justice contraire.

461. Mettre fin aux arrestations et gardes à vue de civils qui sont ordonnées par le parquet et la magistrature militaires représentent une usurpation flagrante des compétences des tribunaux réguliers et privent les civils du droit d'être jugés par le magistrat normalement prévu par la législation nationale et les conventions internationales relatives aux droits de l'homme. La Commission considère en outre que le fait pour le parquet et la magistrature militaires de s'attribuer eux-mêmes le

pouvoir d'arrêter et de placer en garde à vue des civils revient à laisser à tous les services de sécurité militaires toute latitude d'exercer des fonctions de police judiciaire aux dépens des civils, d'où une limitation des droits et des libertés que confèrent à ces derniers la Loi fondamentale et le code de procédure pénale palestiniens.

462. Faire en sorte que le parquet et la magistrature militaires cessent d'exercer des fonctions d'examen d'affaires relevant de la compétence des tribunaux ordinaires et concernant des personnes dont les affaires, différends et infractions sont normalement examinés par les tribunaux ordinaires, pratique qui constitue une atteinte flagrante aux droits et libertés, et ce d'autant plus que la justice régulière palestinienne, par la voix de sa plus haute instance, la Cour suprême, a réaffirmé dans des dizaines d'arrêtés l'inadmissibilité de l'arrestation et du jugement de civils palestiniens par le parquet et la magistrature militaires.

463. Libérer toutes les personnes qui ont été arrêtées ou détenues par l'Autorité nationale palestinienne en Cisjordanie ou par l'autorité de fait dans la bande de Gaza et qui n'ont pas encore été déférées à une juridiction régulière compétente.

464. Interdire toutes les formes de torture, de tabassage et autres mauvais traitements pendant les phases d'interrogatoire et d'enquête, la Commission ayant constaté que les services de sécurité persistent dans la pratique de toutes les formes de torture et de traitements dégradants qu'elles font subir aux personnes qu'elles arrêtent afin de leur soutirer des informations ou de les contraindre à avouer les actes ou paroles qui leur sont imputés ou qui sont imputés à autrui.

465. Faire en sorte que les entités officielles en Cisjordanie assument la responsabilité qui leur incombe de poursuivre les auteurs de violations des dispositions de la loi et de les obliger à rendre des comptes, qu'il s'agisse d'arrestations arbitraires, d'actes de torture et autres traitements cruels, inhumains ou dégradants ou de violations d'autres droits et libertés, la Commission étant convaincue que l'absence de responsabilisation effective et sérieuse des auteurs d'actes de torture et des membres des services de sécurité qui contreviennent aux principes et aux règles régissant l'arrestation et la garde à vue a contribué à accroître le nombre et l'ampleur de ces violations et à encourager leur perpétration.

466. Exiger de l'Autorité nationale palestinienne qu'elle enquête sur tous les cas de meurtre et d'exécution extrajudiciaire commis dans la bande de Gaza afin que tous ceux qui ont ordonné de commettre, incité à commettre ou commis de tels actes soient poursuivis, rendent des comptes et ne bénéficient d'aucune impunité.

467. Faire en sorte que l'autorité de fait dans la bande de Gaza prenne toutes les mesures d'ordre juridique voulues pour mettre un terme aux descentes, perquisitions et arrestations effectuées en toute illégalité par des individus masqués. Il incombe en outre à cette autorité d'intervenir pour mettre fin aux arrestations et aux gardes à vue dans des lieux autres que ceux prévus à cet effet par la loi.

468. Faire en sorte que l'autorité de fait dans la bande de Gaza respecte les dispositions du code de procédure pénale palestinien interdisant toute arrestation sans la délivrance préalable par la justice d'un mandat à cet effet, instaurant l'inviolabilité du domicile et des lieux privés, sauf délivrance préalable par l'autorité judiciaire d'un mandat à cet effet, et fixant les délais de garde à vue autorisés.

469. Faire en sorte que l'autorité de fait dans la bande de Gaza interdise toutes les formes de torture et autres mauvais traitements pendant l'interrogatoire et l'enquête, la Commission ayant constaté que les services de sécurité relevant de cette autorité persistent dans la pratique de toutes les formes de torture et autres traitements inhumains et dégradants pendant la phase de garde à vue.

470. Faire en sorte que l'autorité de fait dans la bande de Gaza assume les responsabilités qui lui incombent en vertu des lois nationales palestiniennes et du droit international relatif aux droits de l'homme et engage des poursuites contre les auteurs de violations des dispositions de la loi, qu'il s'agisse d'exécutions extrajudiciaires, d'arrestations arbitraires ou d'actes de torture et autres traitements cruels, inhumains ou dégradants.

471. Faire en sorte que l'autorité de fait dans la bande de Gaza cesse de déférer des civils aux tribunaux militaires, ce qui constitue une forme de violation des droits des accusés qui doivent être jugés par des tribunaux ordinaires.

472. Réaffirmer que l'Autorité nationale palestinienne et l'autorité de fait dans la bande de Gaza sont tenues de s'employer à régulariser la situation de tous les fonctionnaires qui ont été licenciés et de les réintégrer dans leurs fonctions en Cisjordanie et dans la bande de Gaza, ainsi que de les indemniser du préjudice qu'ils ont subi, la plupart des licenciements étant motivés par l'appartenance politique des intéressés et non par des raisons professionnelles ou des considérations relatives à leur compétence.

473. Abroger l'obligation – imposée aux fonctionnaires par les entités gouvernementales de Cisjordanie et de la bande de Gaza, d'obtenir l'accord des services de sécurité en tant que condition de leur nomination dans la fonction publique, cette obligation constituant un acte illégal et une violation flagrante des dispositions de la Loi fondamentale palestinienne et de la loi sur la fonction publique en vigueur.

474. Faire cesser les poursuites, interpellations et interrogatoires de journalistes – pour leurs activités professionnelles – par les services de sécurité en Cisjordanie et dans la bande de Gaza, ainsi que les entraves à l'exercice du métier de journaliste imposées par ces services, qui constituent une violation flagrante de la liberté d'opinion et d'expression et de la liberté de la presse telles qu'elles sont inscrites dans la législation nationale et le droit international.

475. Faire cesser les interventions du Ministère de l'intérieur de l'Autorité nationale palestinienne dans les activités des associations de la société civile, consistant notamment à doter ces organisations de comités de direction provisoires composés de personnes non membres de ces organisations, ce qui est illégal.

476. Veiller à ce que le Ministère de l'intérieur de l'Autorité nationale palestinienne respecte et applique les décisions de la Cour suprême palestinienne relatives à l'abrogation des décisions des entités officielles imposant des comités de direction provisoires aux associations.

477. Veiller à ce que les services de sécurité de l'Autorité nationale palestinienne respectent les activités des entités de la société civile, cessent d'intervenir dans leurs affaires et s'abstiennent de les dissoudre, de perquisitionner dans leurs locaux ou de mettre la main sur leurs avoirs sans raisons juridiques valables.

478. Assurer une juste indemnisation par l'Autorité nationale palestinienne et l'autorité de fait dans la bande de Gaza de toutes les victimes de violations des droits de l'homme et des libertés fondamentales, en fonction du niveau et de l'ampleur de ces violations.

479. Veiller à ce que les entités palestiniennes compétentes prennent en considération les carences et les lacunes des lois pénales en vigueur dans les territoires palestiniens en ce qui concerne la lutte contre la torture et autres traitements inhumain et dégradants, et ce en adoptant des textes clairs érigeant ces pratiques en infractions pénales et prévoyant des sanctions correspondant à leur gravité. La Commission estime donc nécessaire que ces lois soient conformes à la Convention internationale contre la torture et autres peines ou traitements cruels, inhumains ou dégradants de 1987, qui constitue la référence juridique qui s'impose à tous les sujets de droit international.

480. Faire en sorte que l'Autorité nationale palestinienne crée une commission palestinienne réunissant les milieux judiciaires, les organisations de la société civile et les organismes officiels et chargée d'assurer le suivi de ces recommandations.

481. Veiller à ce que les combattants palestiniens, dans la lutte armée qu'ils mènent pour recouvrer leurs droits légitimes à disposer d'eux-mêmes, respectent les règles régissant le comportement des combattants dans un conflit armé conformément aux principes fondamentaux et aux dispositions du droit international humanitaire et du droit international général, s'agissant en particulier du respect rigoureux des règles et principes relatifs à la protection des civils dans les conflits armés internationaux.

482. Appeler l'Organisation des Nations Unies à assumer la responsabilité qui lui incombe d'assurer la réalisation effective du droit du peuple palestinien à l'autodétermination et à se libérer de l'hégémonie et de l'occupation israéliennes, cette occupation des territoires palestiniens ayant conduit, outre la négation des droits collectifs du peuple palestinien, à la déliquescence et la disparition des droits de l'homme et des libertés fondamentales des Palestiniens, dont la dignité humaine est à chaque instant bafouée par les actes et pratiques de l'occupant, y compris les meurtres, la torture, les bannissements, les expropriations, les entraves à la circulation et le blocus injuste de la bande de Gaza, entre autres.

**Annexes au rapport de la Commission d'enquête
indépendante palestinienne, créée comme suite
au rapport Goldstone, sur les violations
qui auraient été commises par des Palestiniens**

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Annexe 1

Résolution 64/10 de l'Assemblée générale

64/10. Suite donnée au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza

L'Assemblée générale,

Guidée par les buts et principes énoncés dans la Charte des Nations Unies,

Rappelant les règles et principes pertinents du droit international, notamment humanitaire et des droits de l'homme, en particulier la Convention de Genève relative à la protection des personnes civiles en temps de guerre, du 12 août 1949¹, qui est applicable au territoire palestinien occupé, y compris Jérusalem-Est,

Rappelant également la Déclaration universelle des droits de l'homme² et les autres instruments internationaux relatifs aux droits de l'homme, dont le Pacte international relatif aux droits civils et politiques³, le Pacte international relatif aux droits économiques, sociaux et culturels³ et la Convention relative aux droits de l'enfant⁴,

Rappelant en outre ses résolutions sur la question, notamment sa résolution ES-10/18 du 16 janvier 2009, adoptée lors de sa dixième session extraordinaire d'urgence,

Rappelant les résolutions du Conseil de sécurité sur la question, notamment la résolution 1860 (2009) du 8 janvier 2009,

Rappelant également les résolutions pertinentes du Conseil des droits de l'homme, notamment la résolution S-12/1 du 16 octobre 2009,

Remerciant la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza d'avoir établi un rapport complet sous la direction du juge Richard Goldstone⁵,

Affirmant qu'il incombe à toutes les parties de respecter le droit international humanitaire et le droit international des droits de l'homme,

Insistant sur l'importance que revêtent la sécurité et le bien-être de tous les civils, et réaffirmant l'obligation d'assurer la protection des civils en période de conflit armé,

Profondément préoccupée par les informations relatives aux sérieuses violations des droits de l'homme et aux graves infractions au droit international humanitaire commises pendant les opérations militaires israéliennes lancées dans la bande de Gaza le 27 décembre 2008, notamment celles qui figurent dans les conclusions de la Mission d'établissement des faits et de la Commission d'enquête établie par le Secrétaire général⁶,

¹ Nations Unies, *Recueil des Traités*, vol. 75, n° 973.

² Résolution 217 A (III).

³ Voir résolution 2200 A (XXI), annexe.

⁴ Nations Unies, *Recueil des Traités*, vol. 1577, no 27531.

⁵ A/HRC/12/48.

⁶ A/63/855-S/2009/250.

Condamnant toutes les attaques visant des civils et des installations ou institutions civiles, notamment les locaux de l'Organisation des Nations Unies,

Soulignant que les auteurs de toutes les violations du droit international humanitaire et du droit international des droits de l'homme doivent être comptables de leurs actes afin de lutter contre l'impunité, de garantir la justice, de prévenir de nouvelles violations et de promouvoir la paix,

Convaincue qu'un règlement juste, final et global de la question de Palestine, qui est au cœur du conflit arabo-israélien, est indispensable à l'instauration d'une paix et d'une stabilité globales, justes et durables au Moyen-Orient,

1. *Approuve* le rapport du Conseil des droits de l'homme sur les travaux de sa douzième session extraordinaire, tenue les 15 et 16 octobre 2009⁷;

2. *Prie* le Secrétaire général de transmettre au Conseil de sécurité le rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza⁵;

3. *Demande* au Gouvernement israélien de prendre dans les trois mois toutes les mesures nécessaires en vue de procéder à des investigations indépendantes, crédibles et conformes aux normes internationales, sur les graves violations du droit international humanitaire et du droit international des droits de l'homme qui ont été signalées par la Mission d'établissement des faits, afin que les responsabilités soient établies et que justice soit faite;

4. *Demande instamment*, conformément aux recommandations de la Mission d'établissement des faits, que la partie palestinienne procède dans les trois mois à des investigations indépendantes, crédibles et conformes aux normes internationales, sur les graves violations du droit international humanitaire et du droit international des droits de l'homme qui ont été signalées par la Mission d'établissement des faits, afin que les responsabilités soient établies et que justice soit faite;

5. *Recommande* que le Gouvernement suisse, en sa qualité de dépositaire de la Convention de Genève relative à la protection des personnes civiles en temps de guerre¹, fasse au plus tôt le nécessaire afin de convoquer à nouveau une Conférence des Hautes Parties contractantes à la quatrième Convention de Genève sur les mesures à prendre pour imposer la Convention dans le territoire palestinien occupé, y compris Jérusalem-Est, et la faire respecter, conformément à l'article premier;

6. *Prie* le Secrétaire général de lui présenter dans un délai de trois mois un rapport sur l'application de la présente résolution afin de déterminer les nouvelles mesures qui doivent être prises, le cas échéant, par les organes et organismes des Nations Unies, dont le Conseil de sécurité;

7. *Décide* de rester saisi de la question.

39^e séance plénière
5 novembre 2009

⁷ A/64/53/Add.1.

Annexe 2
Décret du Président de l'Autorité nationale
palestinienne portant création de la Commission

Décret n° () 2010

Portant commission indépendante de suivi du rapport Goldstone

Le Président de l'État de Palestine,
Président du Comité exécutif de l'Organisation de libération de la Palestine,
Président de l'Autorité nationale palestinienne,
En vertu des dispositions de la Loi fondamentale révisée de 2003 et des amendements y relatifs,
Vu la décision du Premier Ministre en date du 14 janvier 2010,
Vu le rapport Goldstone,
En vertu des pouvoirs qui lui sont conférés,
Et compte tenu de l'intérêt général,
Décrète ce qui suit :

Article 1

Il est créé une commission indépendante de suivi de l'application des recommandations formulées dans le rapport Goldstone en ce qui concerne l'Autorité nationale palestinienne, ainsi composée :

1. Issa Abu Sharar, Président;
2. Zuhair al-Surani, membre;
3. Ghassan Farmand, membre;
4. Yasser al-Amuri, membre;
5. Nasser Rayyes, membre.

Article 2

1. La Commission s'acquitte des tâches et responsabilités à elle assignées, dont celle de mener une enquête conformément au rapport Goldstone, et agit dans le respect des délais indiqués dans ledit rapport.
2. La Commission présente ses recommandations et les conclusions de ses travaux à toutes les parties compétentes, chacune en ce qui la concerne.

Article 3

La Commission s'appuie sur les experts et les spécialistes qu'elle juge les mieux à même de l'aider à accomplir sa mission.

Article 4

Toutes les parties compétentes, officielles ou non officielles, sont tenues de coopérer avec la Commission et de lui fournir toutes les facilités et informations nécessaires à l'accomplissement de sa mission.

Article 5

Toutes les parties compétentes sont chargées, chacune en ce qui la concerne, de l'exécution des dispositions du présent décret qui prend effet à compter de sa date de publication au *Journal officiel*.

Fait à Ramallah le 25 janvier 2010

Le Président de l'État de Palestine,
Président du Comité exécutif de l'Organisation
de libération de la Palestine,
Président de l'Autorité nationale palestinienne
(*Signé*) Mahmoud **Abbas**

Annexe 3

Statut de la Commission d'enquête indépendante palestinienne

Statut de la Commission d'enquête indépendante palestinienne créée conformément aux recommandations du rapport Goldstone

La Commission,

En application d'un décret du Président palestinien en date du 25 janvier 2010 portant création d'une commission d'enquête indépendante conformément aux recommandations du rapport Goldstone, ayant pris connaissance de la résolution 64/254 de l'Assemblée générale des Nations Unies et du rapport de la Mission d'établissement des faits créée par le Conseil des droits de l'homme et présidée par le juge Richard Goldstone, chargée d'établir les faits relatifs au dernier conflit à Gaza, et ayant passé en revue les critères et principes qui régissent au plan international les règles et procédures d'enquête sur les violations des dispositions du droit international relatif aux droits de l'homme et du droit international humanitaire,

Adopte le présent Statut :

Chapitre I

Siège et mandat de la Commission

Article 1

Siège de la Commission

1. La Commission a son siège à Ramallah.
2. La Commission se réunit en son siège, à moins qu'elle n'en décide autrement.
3. La Commission exerce ses fonctions et pouvoirs comme stipulé dans le présent Statut à l'intérieur des territoires palestiniens ou à l'extérieur de ces territoires si nécessaire.

Article 2

Langue de travail de la Commission

L'arabe est la langue officielle des travaux de la Commission et de ses groupes de travail.

Article 3

Mandat de la Commission

1. La Commission d'enquête dispose d'une personnalité juridique indépendante et de la capacité juridique nécessaire pour exercer ses fonctions et réaliser ses objectifs.
2. La Commission exerce un mandat d'enquête sur les contraventions et violations palestiniennes mentionnées dans le rapport de la Mission d'établissement des faits créée par le Conseil des droits de l'homme et présidée par le juge Richard Goldstone.

Article 4

Compétence *ratione loci* et compétences *ratione materiae* de la Commission

La Commission exerce ses fonctions et pouvoirs comme stipulé dans le présent Statut sur l'ensemble du territoire palestinien occupé.

Article 5

Limites de la compétence de la Commission

La Commission d'enquête n'a ni fonctions ni compétences s'agissant des matières autres que les contraventions et violations palestiniennes mentionnées dans le rapport de la Mission d'établissement des faits créée par le Conseil des droits de l'homme.

Article 6

Activités de la Commission

Afin de s'acquitter de sa mission, la Commission doit :

1. Enquêter sur les violations imputées aux Palestiniens dans le rapport de la Mission d'établissement des faits;
2. Rassembler les données, éléments de preuve et déclarations en rapport avec sa mission;
3. Recueillir les allégations et plaintes faisant état de violations des droits de l'homme touchant des questions relevant de son mandat;
4. Organiser des auditions;
5. Donner les ordres voulus pour obtenir des autorités officielles tous les documents, pièces justificatives, instructions administratives, dossiers médicaux et autres sources d'information qu'elle juge nécessaires;
6. Convoquer des témoins et autres personnes;
7. Faire des visites de terrain dans les locaux gouvernementaux, les centres de détention et les centres de réforme et de réadaptation;
8. Recueillir des éléments de preuve et des déclarations auprès de témoins et d'organisations se trouvant hors du territoire palestinien occupé;
9. Demander à toute personne ou entité de lui remettre tout document ou autre élément dont elle aurait la propriété, la possession ou le contrôle et qui serait en rapport avec l'objet de l'enquête ou de l'audition;
10. Obtenir tout document ou autre élément en rapport avec l'enquête.

Article 7

Cadre juridique régissant les travaux de la Commission

Dans l'exercice de ses fonctions et activités, la Commission est soumise aux dispositions du droit international relatif aux droits de l'homme et du droit international humanitaire, aux principes inébranlables et impératifs du droit international, aux obligations contractées par la Palestine en vertu de sa qualité de Membre de l'Organisation des Nations Unies, aux obligations contractées

unilatéralement par la Palestine concernant l'application des quatre Conventions de Genève de 1949 et aux lois locales en vigueur dans le territoire palestinien occupé.

Chapitre II

Personnalité juridique de la Commission et conditions de son indépendance

Article 8

Début et fin de la personnalité juridique de la Commission

La personnalité juridique de la Commission d'enquête prend naissance avec la publication du décret présidentiel en vertu duquel elle est créée et prend fin avec la disparition de la raison qui a présidé à sa création ou avec sa dissolution par l'autorité qui l'a créée.

Article 9

Indépendance des travaux de la Commission

1. Les membres de la Commission mènent leurs travaux en toute indépendance et n'ont de maître que la loi.
2. Dans l'exercice de leurs fonctions, les membres de la Commission n'acceptent aucune instruction, directive ou ingérence de quelque pouvoir, entité ou personne que ce soit.

Article 10

Serment

1. Chaque membre de la Commission, au moment de prendre ses fonctions, prête le serment suivant : « Je jure devant Dieu tout-puissant d'exercer mes fonctions de membre de cette commission en toute objectivité, honnêteté et impartialité et de respecter la loi et le Statut de la Commission d'enquête. »
2. Le Président de la Commission prête serment devant les membres présents de celle-ci et les membres de la Commission prêtent serment devant le Président.

Article 11

Engagements des membres

Tout membre de la Commission s'engage à être à tout moment prêt à répondre à l'appel du Président lorsque celui-ci convoque une réunion. Il s'engage en outre à assister à toutes les séances d'enquête et auditions afin d'assurer le bon déroulement des travaux de la Commission, à moins que son absence ne soit due à une raison impérieuse valable selon la loi et la coutume.

Article 12

Obligations des membres

Aucun membre de la Commission ne peut, tant qu'il est membre, exercer un emploi ou une activité contraire à ses fonctions de membre de la Commission. Il est en outre interdit à tout membre de la Commission de faire toute annonce ou déclaration ou de participer à toute activité ou action susceptible de jeter un doute sur son objectivité, son impartialité et son honnêteté.

Article 13

Démission

1. Le membre démissionnaire présente sa démission au Président de la Commission.
2. Le Président informe immédiatement les autres membres de la Commission de toute démission qui lui est présentée.
3. La démission du Président de la Commission est déposée au siège de celle-ci.
4. La démission du Président ou d'un membre de la Commission prend effet à la date de son acceptation par les autres membres, étant entendu que cette date doit être immédiatement portée à la connaissance du membre démissionnaire.

Article 14

Nombre minimum de membres de la Commission

1. Si l'un quelconque des membres de la Commission démissionne, celle-ci poursuit ses activités avec les membres restants.
2. Si le Président de la Commission démissionne, celle-ci se réunit pour élire en son sein un nouveau président.
3. Le nombre minimum de membres de la Commission est fixé à trois membres.
4. Si le nombre des membres de la Commission est inférieur au minimum requis, celle-ci interrompt ses activités jusqu'à ce que ce nombre minimum soit de nouveau atteint.
5. La Commission communique au Président de l'Autorité les noms des membres proposés.

Article 15

Fonctions du Président de la Commission

1. Représenter la Commission au niveau local et international.
2. Assurer le suivi des travaux de la Commission et de ses organes subsidiaires.
3. Veiller au bon fonctionnement administratif de la Commission.
4. Présider la Commission et conduire ses délibérations.
5. Veiller à l'application des dispositions du présent Statut.
6. Ouvrir et clore chaque séance de la Commission.
7. Si nécessaire durant l'examen de tout point de l'ordre du jour, proposer à la Commission de limiter le temps de parole et le nombre de prises de parole de chaque intervenant sur tel ou tel point, et clore la liste des orateurs.
8. Proposer le report ou la clôture du débat ainsi que la suspension ou la levée de la séance.

Article 16

Rapporteur de la Commission

1. La Commission élit en son sein un rapporteur.

2. Si le Président de la Commission cesse d'être membre de celle-ci ou s'il démissionne de ses fonctions de président, le Rapporteur de la Commission assume les fonctions de président jusqu'à ce que la Commission se choisisse un nouveau président.

3. L'élection susmentionnée se déroule à bulletins secrets et le candidat ayant obtenu la majorité des voix de la Commission est élu.

Chapitre III

Séances d'enquête et auditions

Article 17

Quorum

Pour que la Commission puisse valablement délibérer, il faut que la majorité simple de ses membres au moins soient présents à la séance.

Article 18

Règlement intérieur des séances

La Commission peut établir toute directive, ligne directrice ou procédure générale ou particulière relative aux séances d'enquête.

Article 19

Organisation des séances

1. Nul ne peut prendre la parole dans les auditions sans l'avoir d'abord demandée et avoir obtenu l'accord du Président.

2. Le Président ne peut refuser de donner la parole pour des raisons autres que celles prévues dans le présent Statut. En cas de désaccord à ce sujet, la décision est prise à la majorité relative des membres présents de la Commission, sans débat.

3. Si l'intervenant emploie des termes inconvenants ou qu'il se produit quelque fait attentatoire à l'ordre et aux bonnes mœurs, le Président est habilité à appeler son attention sur ce fait, à l'avertir de la nécessité de maintenir l'ordre et la morale et, si nécessaire, à lui retirer la parole.

Article 20

Présence aux séances

1. Les auditions se déroulent à huis clos et seuls les membres de la Commission et la personne qui doit être entendue peuvent y assister.

2. Seuls les membres du secrétariat, les interprètes et les personnes qui fournissent une assistance à la Commission peuvent assister aux séances, à moins que la Commission n'en décide autrement.

Article 21

Impartialité et indépendance des membres de la Commission

Si un membre de la Commission estime que, pour des raisons personnelles, il doit s'abstenir de participer à une enquête, il doit en informer immédiatement le Président, qui est alors habilité à désigner un autre membre à sa place.

Article 22

Convocation des victimes et des témoins

1. La Commission d'enquête convoque les victimes de violations des droits de l'homme mentionnées dans le rapport de la Mission d'établissement des faits afin d'entendre leurs doléances et elle leur demande de présenter des éléments de preuve et pièces justificatives corroborant leurs déclarations.
2. La Commission peut rechercher tout élément de preuve ou déclaration qu'elle juge en rapport avec la matière examinée, comme elle peut, le cas échéant, enquêter sur les lieux des violations.
3. La Commission décide si les éléments de preuve et déclarations présentés par les parties sont recevables et dignes de foi.
4. La Commission fixe les conditions et procédures d'audition des témoins.
5. La Commission tient des séances d'enquête en présence d'au moins deux de ses membres.
6. La Commission d'enquête peut dépêcher un ou plusieurs de ses membres sur les lieux des faits pour procéder à des inspections sur place.
7. Les autorités officielles palestiniennes doivent accorder aux membres de la Commission et aux personnes qui les accompagnent les privilèges et l'immunité nécessaires à l'accomplissement de leur mission.

Article 23

Immunité

L'immunité et les règles de procédure spéciales qui s'attachent à la qualité officielle d'une personne, que ce soit en droit national ou en droit international, ne sauraient empêcher la Commission d'enquête d'exercer ses fonctions au regard de cette personne.

Article 24

Auditions

La Commission est habilitée à entendre toute personne dont elle juge les déclarations importantes et nécessaires à l'accomplissement de sa mission.

Article 25

Convocation et citation à comparaître

La Commission convoque ou cite à comparaître, par voie de notification signée de son président, toute personne dont elle souhaite entendre les déclarations, cette notification devant préciser quand et où la personne doit se présenter devant la Commission.

Article 26

Non-comparution

Si la personne convoquée refuse de se présenter devant la Commission ou de se conformer à la notification qu'elle lui a adressée, le Président de la Commission peut demander aux autorités compétentes de prendre les mesures d'ordre juridique voulues pour l'amener à se conformer à la demande de la Commission.

Article 27**Prestation de serment des témoins et des experts**

La Commission demande aux témoins et aux experts de prêter le serment dont elle est convenue.

Article 28**Plaintes verbales**

Si une personne est, pour cause de handicap ou d'analphabétisme, dans l'impossibilité de soumettre à la Commission une plainte ou une requête écrite, elle peut présenter sa requête, plainte, observation ou communication par des moyens audiovisuels ou sur tout autre support électronique.

Article 29**Procès-verbaux d'enquête**

Les déclarations de la personne entendue par la Commission sont consignées dans un procès-verbal qui est signé par le procès-verbaliste de l'audition, les membres présents de la Commission et la personne entendue. Sont également consignés dans ce procès-verbal la date, l'heure et le lieu de l'audition et les noms de toutes les personnes présentes. Il y est également fait mention de tout refus de signer le procès-verbal et des raisons invoquées à cet effet.

Article 30**Enregistrements audiovisuels**

1. La personne qui comparaît devant la Commission est avertie, dans une langue qu'elle parle et comprend bien, que son audition sera enregistrée en audio ou en vidéo et qu'elle peut refuser d'être enregistrée.
2. Si la personne qui comparaît devant la Commission refuse d'être enregistrée en audio ou en vidéo, ses déclarations sont consignées par écrit.
3. En cas d'interruption de l'audition, ce fait et l'heure à laquelle il survient sont signalés dans l'enregistrement puis celui-ci est interrompu. La reprise de l'audition est également signalée dans l'enregistrement.
4. Avant de clore l'audition et le procès-verbal correspondant, la possibilité est donnée à la personne qui comparaît devant la Commission de clarifier éventuellement ses propos.
5. Si l'audition fait l'objet d'un enregistrement audio ou vidéo, le sceau de la Commission est apposé sur la bande originale de l'enregistrement, en présence de la personne entendue par la Commission, et la bande est signée par cette personne et par les membres présents de la Commission.

Article 31**Documents d'enquête**

Tous les documents relatifs à une enquête sont remis au Rapporteur de la Commission, qui est responsable de leur enregistrement et de leur conservation jusqu'à la fin de l'enquête en question.

Article 32

Experts apportant leur concours à la Commission

1. La Commission d'enquête peut décider de faire appel le cas échéant à des experts et des conseillers.
2. Les personnes apportant leur concours à la Commission sont soumises aux instructions et directives du Président de la Commission.

Article 33

Confidentialité des données et des documents de la Commission

1. Il est interdit à tout membre de la Commission de diffuser tous rapports, documents ou données que la Commission a obtenus dans le cadre de ses enquêtes et auditions.
2. Les membres de la Commission, les enquêteurs, les experts et autres personnes qui apportent leur concours à la Commission sont dans l'obligation, pendant et après la période durant laquelle ils ont exercé leurs fonctions auprès de la Commission, de respecter la confidentialité des faits et données dont ils ont eu connaissance dans l'exercice de leurs fonctions.

Article 34

Confidentialité des éléments de preuve et des documents d'enquête

La Commission conserve en son siège des archives photographiques de tous les documents d'enquête et éléments de preuve qu'elle a pu recueillir et l'accès à ces archives est réservé aux seuls membres en exercice de la Commission.

Article 35

Création d'organes subsidiaires

La Commission peut créer des groupes de travail et comités spécialisés à composition limitée chargés de l'aider dans les procédures d'audition et d'enquête, l'établissement des faits, la collecte des données et documents et autres questions découlant de l'exercice par la commission de ses fonctions.

Article 36

Majorité requise pour l'adoption des décisions de la Commission

1. La Commission prend ses décisions par consensus.
2. Tout membre de la Commission qui a une objection ou une réserve concernant une décision est en droit de faire consigner les causes et raisons de sa réserve ou objection et la réserve elle-même est jointe à la décision.

Chapitre IV

Protection des témoins et des informateurs et mesures de protection

Article 37

Protection des témoins et des informateurs

1. La Commission assure la protection et la sécurité des victimes et des témoins qui lui fournissent des informations et qui peuvent faire l'objet de menaces, avoir

des raisons de penser qu'ils pourraient être menacés ou être interrogés et poursuivis par des parties connues ou inconnues.

2. Par « témoin », on entend toute personne qui a fourni des éléments de preuve ou un témoignage ou qui va le faire, ou encore qui décrit des événements dont elle a été témoin, les mesures de protection étant dans ce cas étendues à tous les membres de la famille de l'informateur ou témoin et aux membres de son ménage.

3. Par « victime », on entend toute personne physique qui subit les conséquences préjudiciables de la perpétration d'une infraction pénale relevant de la compétence de la Commission. On entend également par ce terme les personnes morales qui ont été directement lésées dans leurs biens ou directement ou indirectement empêchées d'exercer leurs fonctions.

Article 38

Mesures de protection

Si la Commission s'inquiète de ce qu'un témoin ou une personne qui pourrait l'être risque de faire l'objet de persécutions, de harcèlement ou de violences, elle :

1. Entend le témoin à huis clos ou en tout lieu dont elle estimerait qu'il remplit les conditions de confidentialité et de sécurité voulues.
2. Garde secrète l'identité des informateurs et des témoins.
3. Évite de divulguer ou d'utiliser des éléments de preuve qui risquent de révéler l'identité d'un témoin.
4. Prend toute mesure qu'elle estime appropriée pour protéger les témoins.

Article 39

Protection des informateurs et des témoins contre les poursuites

Les victimes qui fournissent des informations sur des violations et les témoins ne peuvent pas faire l'objet de poursuites pénales, civiles ou administratives à raison d'événements qu'ils ont signalés ou d'éléments de preuve qu'ils ont fournis.

Article 40

Interdiction de citer à comparaître des informateurs ou des témoins

Aucune entité ne peut citer à comparaître des témoins ou des personnes qui fournissent des informations sur des violations, ni leur demander de témoigner ou de donner des informations concernant leurs déclarations ou la teneur des éléments de preuve qu'ils ont fournis à la Commission.

Chapitre V

Dispositions finales

Article 41

Élaboration du rapport de la Commission

1. À l'issue de l'enquête, la Commission rédige son rapport à partir des résultats des investigations qu'elle a menées.

2. Le Président soumet le rapport aux parties concernées, accompagné de toutes les recommandations que la Commission juge appropriées.

3. Le Président consigne la date à laquelle le rapport est adressé aux parties concernées.

Article 42

Règles d'application

La Commission établit les règles qu'elle jugera nécessaires pour assurer l'application des dispositions du présent Statut. Elle établit également des règles financières et administratives régissant la rémunération, les indemnités et les frais liés à l'exercice des fonctions de la Commission, les modalités de paiement ou de remboursement et les indemnités de transport et de subsistance versées aux personnes qui assistent aux séances d'enquête ou pour couvrir les frais de voyage et de logement des membres de la Commission et des experts et fonctionnaires qui les accompagnent.

Article 43

Documentation de la Commission

1. Immédiatement après avoir remis son rapport, la Commission rassemble, enregistre et archive tous ses documents et dossiers dans des boîtes spéciales qui sont ensuite fermées et marquées du sceau de la Commission.

2. Ces boîtes sont confiées à la garde de la Cour suprême palestinienne pour une période de six mois à compter de la date de présentation du rapport final.

3. À l'expiration du délai susmentionné, les boîtes seront ouvertes et les documents et dossiers de la Commission seront détruits en présence du Président et des membres de la Commission.

Article 44

Modifications du Statut

La Commission peut apporter des modifications au présent Statut si la majorité de ses membres y consent.

Annexe 4

Démission de Nasser Al-Rayyes de la Commission, qui accepte sa démission

Al-Haq
Le 6 février 2010

Son Excellence le Président Mahmoud Abbas,
Président du Comité exécutif de l'Organisation de libération de la Palestine,
Président de l'Autorité nationale palestinienne

Objet : Demande en vue d'être dispensé de faire partie de la Commission d'enquête indépendante palestinienne, créée comme suite au rapport Goldstone, sur les violations qui auraient été commises par des Palestiniens

Je voudrais tout d'abord vous dire combien je vous suis reconnaissant de l'immense confiance que vous me témoignez en me demandant de faire partie de la Commission d'enquête indépendante palestinienne, ce qui me confère une responsabilité juridique et nationale dont je m'enorgueillis. Malheureusement, pour des raisons d'objectivité, d'impartialité et d'indépendance, je ne peux pas faire partie de cette commission, comme il ressort clairement d'une étude des conditions juridiques énoncées dans le protocole type établi par l'Organisation des Nations Unies sur les commissions nationales d'enquête. En effet, lorsque les autorités nationales en créent une, elles doivent veiller à ce qu'aucun membre de la commission n'entretienne de liens étroits avec des membres du Gouvernement, d'organes publics, de partis politiques ou d'organisations qui auraient participé aux violations commises, ou avec toute entité ou groupe lié aux victimes, susceptible de miner la crédibilité de la commission.

Je suis le conseiller juridique d'une organisation palestinienne de défense des droits de l'homme et des libertés fondamentales, qui surveille les violations de ces droits et libertés et recueille des informations sur toute infraction commise à cet égard. J'ai également des liens avec de nombreuses personnes et entités dont les droits et les libertés ont été bafoués et je suis, par l'intermédiaire de l'association Al-Haq et à titre individuel, le représentant juridique de plusieurs d'entre elles. Je fais en outre partie des personnes qui ont participé aux réunions organisées par la Mission d'établissement des faits de l'Organisation des Nations Unies présidée par le juge Goldstone, et présenté des témoignages sur la situation des droits de l'homme et des libertés fondamentales en territoire palestinien occupé.

Pour ces raisons et aux fins de respecter l'impartialité et l'indépendance de la Commission et d'éviter toute critique, mauvaise appréciation, diffamation, accusation de partialité ou d'absence d'indépendance, je vous demande de me dispenser d'être membre de la Commission, tout en étant parfaitement disposé, à titre individuel et en tant que représentant d'une entité, à offrir à la Commission de l'aide, des renseignements, des conseils techniques et tout ce dont elle pourrait avoir besoin à cet égard. L'institution et moi-même sommes persuadés que cet appui pourra aider la Commission à atteindre les objectifs pour lesquels elle a été constituée, qui représentent une responsabilité nationale et juridique.

Je vous prie d'accepter les assurances de ma très haute considération.

Conseiller de l'organisation Al-Haq
(Signé) Nasser **Al-Rayyes**

Annexe 5
Demandes adressées par la Commission aux organisations non gouvernementales suivantes afin qu'elles lui présentent des rapports sur les violations des droits de l'homme, relevant de sa compétence

- Commission indépendante des droits de l'homme
- Association Al-Haq
- Association Al-Damir pour les droits de l'homme
- Centre de Jérusalem pour l'aide juridique et les droits de l'homme
- Centre de la démocratie et des droits des travailleurs

Le 14 mars 2010

Madame Randa Siniora
Directrice générale de la Commission indépendante des droits de l'homme

Objet : La Commission d'enquête indépendante palestinienne, créée comme suite au rapport Goldstone, sur les violations qui auraient été commises par des Palestiniens

Madame,

Le 25 janvier 2010, comme suite de la résolution 64/10 de l'Assemblée générale, et conformément au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza, le Président palestinien a pris un décret portant création, comme suite au rapport Goldstone, de la Commission d'enquête indépendante palestinienne sur les violations qui auraient été commises par des Palestiniens citées dans ledit rapport.

La Commission est présidée par le juge Issa Abu Sharar et comprend les membres suivants : le juge Zuhair Al-Surani, M. Ghassan Farmand et M. Yasser Al-Amuri. Elle enquête sur les violations des droits de l'homme et des libertés fondamentales qui ont été commises par l'Autorité nationale palestinienne en Cisjordanie et par l'autorité de fait à Gaza.

La Commission exercera son mandat pour enquêter sur les violations suivantes commises par les autorités palestiniennes en Cisjordanie dans les domaines suivants :

- Détention arbitraire et torture, c'est-à-dire détention injustifiée, fondée sur l'appartenance politique;
- Violation du droit de s'associer librement, interdiction faite aux associations de la société civile d'exercer leurs activités et non-exécution des décisions des tribunaux s'agissant de ces organisations;
- Violation de la liberté de presse;
- Violation du droit de se réunir;
- Discrimination dans la fonction publique sur la base de l'appartenance politique.

La Commission enquêtera également sur les violations suivantes commises par les autorités palestiniennes à Gaza :

- Assassinat;
- Détention arbitraire;
- Torture et mauvais traitements.

La Commission d'enquête rend hommage à l'éminent rôle que vous jouez dans le domaine de la défense des droits de l'homme et des libertés fondamentales et espère que vous l'aidez à atteindre ses objectifs en lui présentant tout document dont dispose votre organisation au sujet de violations qui relèvent des compétences et du mandat de la Commission et qui auraient été commises entre le 27 décembre 2008 et le 31 mars 2009. La Commission tiendra dans ce cadre avec votre organisation, une audition dont elle vous communiquera ultérieurement la date et le lieu.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission
d'enquête indépendante palestinienne,
créée comme suite au rapport Goldstone
(*Signé*) Issa Abu **Sharar**

Le 14 mars 2010

Monsieur Shawan Jabarin
Directeur général de l'Association Al-Haq

Objet : La Commission d'enquête indépendante palestinienne, créée comme suite au rapport Goldstone, sur les violations qui auraient été commises par des Palestiniens

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Le Président de la Commission
d'enquête indépendante palestinienne,
créée comme suite au rapport Goldstone
(*Signé*) Issa Abu **Sharar**

Le 14 mars 2010

Madame Sahar Francis
Directrice générale de l'Association Al-Damir
pour les droits de l'homme

Objet : La Commission d'enquête indépendante palestinienne, créée comme suite au rapport Goldstone, sur les violations qui auraient été commises par des Palestiniens

Madame,

Le 25 janvier 2010, comme suite de la résolution 64/10 de l'Assemblée générale, et conformément au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza, le Président palestinien a pris un décret portant création, comme suite au rapport Goldstone, de la Commission d'enquête indépendante palestinienne sur les violations qui auraient été commises par des Palestiniens citées dans ledit rapport.

La Commission est présidée par le juge Issa Abu Sharar et comprend les membres suivants : le juge Zuhair Al-Surani, M. Ghassan Farmand et M. Yasser Al-Amuri. Elle enquête sur les violations des droits de l'homme et des libertés fondamentales qui ont été commises par l'Autorité nationale palestinienne en Cisjordanie et par l'autorité de fait à Gaza.

La Commission exercera son mandat pour enquêter sur les violations suivantes commises par les autorités palestiniennes en Cisjordanie dans les domaines suivants:

- Détention arbitraire et torture, c'est-à-dire détention injustifiée, fondée sur l'appartenance politique;
- Violation du droit de s'associer librement, interdiction faite aux associations de la société civile d'exercer leurs activités et non-exécution des décisions des tribunaux s'agissant de ces organisations;
- Violation de la liberté de presse;
- Violation du droit de se réunir;
- Discrimination dans la fonction publique sur la base de l'appartenance politique.

La Commission enquêtera également sur les violations suivantes commises par les autorités palestiniennes à Gaza :

- Assassinat;
- Détention arbitraire;
- Torture et mauvais traitements.

La Commission d'enquête rend hommage à l'éminent rôle que vous jouez dans le domaine de la défense des droits de l'homme et des libertés fondamentales et espère que vous l'aidez à atteindre ses objectifs en lui présentant tout document dont dispose votre organisation au sujet de violations qui relèvent des compétences et du mandat de la Commission et qui auraient été commises entre le 27 décembre 2008 et le 31 mars 2009. La Commission tiendra dans ce cadre avec votre organisation, une audition dont elle vous communiquera ultérieurement la date et le lieu.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission
d'enquête indépendante palestinienne,
créée comme suite au rapport Goldstone
(*Signé*) Issa Abu **Sharar**

Le 14 mars 2010

M. Issam Aruri
Directeur général du Centre de Jérusalem pour l'aide juridique
et les droits de l'homme

Objet : La Commission d'enquête indépendante palestinienne, créée comme suite au rapport Goldstone, sur les violations qui auraient été commises par des Palestiniens

Monsieur,

Le 25 janvier 2010, à la suite de la résolution 64/10 de l'Assemblée générale, et conformément au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza, le Président palestinien a décrété la création de la Commission d'enquête indépendante palestinienne, comme suite au rapport Goldstone, sur les violations qui auraient été commises par des Palestiniens, citées dans le rapport.

La Commission est présidée par le juge Issa Abu Sharar et comprend les membres suivants : le juge Zuhair Al-Surani, M. Ghassan Farmand et M. Yasser Al-Amuri. Elle enquête sur les violations des droits de l'homme et des libertés fondamentales qui ont été commises par l'Autorité nationale palestinienne en Cisjordanie et par l'autorité de fait à Gaza.

La Commission exercera son mandat pour enquêter sur les violations suivantes commises par les autorités palestiniennes en Cisjordanie dans les domaines suivants :

- Détention arbitraire et torture, c'est-à-dire détention injustifiée en fonction de l'appartenance politique;
- Violation du droit de s'associer librement, interdiction faite aux associations de la société civile d'exercer leurs activités et non-exécution des décisions des tribunaux s'agissant de ces organisations;
- Violation de la liberté de presse;
- Violation du droit de se réunir;
- Discrimination dans la fonction publique sur la base de l'appartenance politique.

La Commission enquêtera également sur les violations suivantes commises par les autorités palestiniennes à Gaza :

- Assassinat;
- Détentions arbitraire;
- Torture et mauvais traitements.

La Commission d'enquête rend hommage à l'éminent rôle que vous jouez dans le domaine de la défense des droits de l'homme et des libertés fondamentales et espère que vous l'aidez à atteindre ses objectifs en lui présentant tout document dont dispose le Centre au sujet de violations qui relèvent des compétences et du mandat de la Commission et qui auraient été commises du 27 décembre 2008 au 31 mars 2009. La Commission tiendra dans ce cadre une audience avec votre organisation, dont elle vous communiquera ultérieurement la date et le lieu.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission
d'enquête indépendante palestinienne,
créée comme suite au rapport Goldstone
(*Signé*) Issa Abu **Sharar**

Le 14 mars 2010

M. Hassan Barghouti
Directeur général du Centre de la démocratie et des droits
des travailleurs

Objet : La Commission d'enquête indépendante palestinienne, créée comme suite au rapport Goldstone, sur les violations qui auraient été commises par des Palestiniens

Monsieur,

Le 25 janvier 2010, à la suite de la résolution 64/10 de l'Assemblée générale, et conformément au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza, le Président palestinien a décrété la création de la Commission d'enquête indépendante palestinienne, comme suite au rapport Goldstone, sur les violations qui auraient été commises par des Palestiniens, citées dans le rapport.

La Commission est présidée par le juge Issa Abu Sharar et comprend les membres suivants : le juge Zuhair Al-Surani, M. Ghassan Farmand et M. Yasser Al-Amuri. Elle enquête sur les violations des droits de l'homme et des libertés fondamentales qui ont été commises par l'Autorité nationale palestinienne en Cisjordanie et par l'autorité de fait à Gaza.

La Commission exercera son mandat pour enquêter sur les violations suivantes commises par les autorités palestiniennes en Cisjordanie dans les domaines suivants :

- Détention arbitraire et torture, c'est-à-dire détention injustifiée en fonction de l'appartenance politique;
- Violation du droit de s'associer librement, interdiction faite aux associations de la société civile d'exercer leurs activités et non-exécution des décisions des tribunaux s'agissant de ces organisations;
- Violation de la liberté de presse;
- Violation du droit de se réunir;
- Discrimination dans la fonction publique sur la base de l'appartenance politique.

La Commission enquêtera également sur les violations suivantes commises par les autorités palestiniennes à Gaza :

- Assassinat;
- Détention arbitraire;
- Torture et mauvais traitements.

La Commission d'enquête rend hommage à l'éminent rôle que vous jouez dans le domaine de la défense des droits de l'homme et des libertés fondamentales et espère que vous l'aidez à atteindre ses objectifs en lui présentant tout document dont dispose le Centre au sujet de violations qui relèvent des compétences et du mandat de la Commission et qui auraient été commises du 27 décembre 2008 au 31 mars 2009. La Commission tiendra dans ce cadre une audience avec votre organisation, dont elle vous communiquera ultérieurement la date et le lieu.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission
d'enquête indépendante palestinienne,
créée comme suite au rapport Goldstone
(*Signé*) Issa Abu **Sharar**

Annexe 6
Lettre au Directeur adjoint des services de renseignement
égyptiens, M. Omar Qinawi

Le 3 avril 2010

Le général Omar Qanouni

Monsieur,

Je voudrais tout d'abord vous adresser tous mes remerciements et vous dire combien je vous suis reconnaissant d'avoir accepté de recevoir le 27 février 2010 au Caire le Président et les membres de la Commission d'enquête indépendante palestinienne, créée comme suite au rapport Goldstone, sur les violations qui auraient été commises par des Palestiniens. Nous avons pris note de votre solidarité, de votre intérêt sincère pour la cause et la situation palestiniennes, ainsi que de votre disposition à fournir à la Commission tout l'appui possible, pour l'aider à mener à bien sa tâche.

La Commission vous a fait part des options qui se présentent à elle pour qu'elle puisse s'acquitter de la partie de son mandat qui concerne la bande de Gaza, au cas où l'autorité de fait persisterait dans son refus de l'aider à enquêter sur les violations qui lui sont attribuées. Les options se présentent comme suit :

1. La Commission peut désigner un groupe de travail indépendant constitué d'experts renommés pour leur professionnalisme, leur intégrité et leur impartialité, pour s'acquitter du mandat qui lui a été confié s'agissant de la bande de Gaza. Aux fins de renforcer les compétences professionnelles des membres, nous proposons de désigner à la tête de ce groupe M. Charif Bassiouni, qui jouit d'une grande confiance de la part des acteurs régionaux et internationaux, pour ce qui est de ses compétences et de son expérience dans ce domaine;

2. La Commission peut charger quelques organisations de la société civile palestinienne, qui s'occupent de surveiller ces violations et de recueillir des documents y relatifs, d'enquêter sur les actes attribués aux Palestiniens dans la bande de Gaza;

3. Au cas où ces deux options se verraient opposer un refus, la Commission propose de rencontrer en Égypte des représentants d'organisations actives dans la bande de Gaza pour entendre leurs témoignages, ainsi que ceux des victimes, sur les violations qu'y auraient commises les Palestiniens.

Vous nous avez indiqué que vous étiez disposé à faire part de notre point de vue aux autorités compétentes dans la bande de Gaza. Nous espérons que vous nous communiquerez ce qui aura été fait à cet égard.

Nous vous remercions une fois de plus et apprécions les efforts que vous déployez, et espérons continuer de bénéficier de votre coopération et de votre coordination avec la Commission.

Le Président de la Commission
indépendante palestinienne d'enquête,
créée comme suite au rapport Goldstone
(*Signé*) Issa Abu **Sharar**

Annexe 7
Lettre au Secrétaire général adjoint de la Ligue
des États arabes, Ahmed Ben Helli

Le 3 avril 2010

Monsieur l'Ambassadeur Ahmed Ben Helli
Secrétaire général adjoint de la Ligue des États arabes

Je voudrais tout d'abord vous adresser tous mes remerciements et vous dire combien je vous suis reconnaissant d'avoir accepté de recevoir le 25 février 2010, au siège de la Ligue des États arabes au Caire, le Président et les membres de la Commission d'enquête indépendante palestinienne, créée comme suite au rapport Goldstone, sur les violations qui auraient été commises par des Palestiniens. Nous avons pris note de votre solidarité, de votre intérêt sincère pour la cause et la situation palestiniennes, ainsi que de votre disposition à fournir à la Commission tout l'appui possible, pour l'aider à mener à bien sa tâche.

La Commission vous a fait part des options qui se présentent à elle pour qu'elle puisse s'acquitter de la partie de son mandat qui concerne la bande de Gaza, au cas où l'autorité de fait persisterait dans son refus de l'aider à enquêter sur les violations qui lui sont attribuées. Les options se présentent comme suit :

1. La Commission peut désigner un groupe de travail indépendant constitué d'experts renommés pour leur professionnalisme, leur intégrité et leur impartialité, pour s'acquitter du mandat qui lui a été confié s'agissant de la bande de Gaza. Aux fins de renforcer les compétences professionnelles des membres, nous proposons de désigner à la tête de ce groupe M. Charif Bassiouni, qui jouit d'une grande confiance de la part des acteurs régionaux et internationaux pour ce qui est de ses compétences et de son expérience dans ce domaine;

2. La Commission peut charger quelques organisations de la société civile palestinienne, qui s'occupent de surveiller ces violations et de recueillir des documents y relatifs, d'enquêter sur les actes attribués aux Palestiniens dans la bande de Gaza;

3. Au cas où ces deux options se verraient opposer un refus, la Commission propose de rencontrer en Égypte des représentants d'organisations actives dans la bande de Gaza pour entendre leurs témoignages, ainsi que ceux des victimes, sur les violations qu'y auraient commises les Palestiniens.

Vous nous avez indiqué que vous étiez disposé à faire part de notre point de vue aux autorités compétentes dans la bande de Gaza. Nous espérons que vous nous communiquerez ce qui aura été fait à cet égard.

Nous vous remercions une fois de plus et apprécions les efforts que vous déployez et espérons continuer de bénéficier de votre coopération et de votre coordination avec la Commission.

Le Président de la Commission d'enquête
indépendante palestinienne,
créée comme suite au rapport Goldstone
(*Signé*) Issa Abu **Sharar**

Annexe 8

Annonce publiée par la Commission dans la presse locale au mois d'avril

La Commission d'enquête indépendante palestinienne, créée par décret du Président de l'Autorité nationale palestinienne comme suite au rapport Goldstone, annonce, conformément à la résolution 64/10 de l'Assemblée générale des Nations Unies, qu'elle commence une enquête sur les violations des droits de l'homme et les libertés fondamentales qui auraient été commises par des Palestiniens entre le 28 décembre 2008 et le 31 mars 2009 en Cisjordanie et dans la bande de Gaza.

Le mandat de la Commission recouvre les violations suivantes, qui auraient été commises par l'Autorité nationale palestinienne :

- Détention arbitraire et torture;
- Violation du droit de s'associer librement, interdiction faite aux organisations de la société civile d'exercer leurs activités et non-exécution des décisions des tribunaux pour ce qui est de ces associations;
- Violation des libertés de la presse;
- Violation de la liberté de réunion et d'association pacifiques;
- Discrimination en fonction de l'appartenance politique dans la désignation et le licenciement des fonctionnaires.

La Commission pourra également enquêter sur les violations qui auraient été commises dans la bande de Gaza, comme suit :

- Assassinat;
- Détention arbitraire;
- Torture et mauvais traitements.

Toute personne qui a été victime des violations susmentionnées devra déposer une plainte à titre individuel ou par l'intermédiaire d'un proche ou d'un représentant, auprès de la Commission d'enquête indépendante palestinienne. Elle doit se rendre directement au siège de la Commission pour remplir un formulaire, ou communiquer sa plainte à l'équipe de la Commission par fax, par téléphone ou par courrier électronique.

La Commission garantit à tout plaignant le secret et le traitement confidentiel de sa plainte, ainsi que protection et immunité.

Les plaintes concernent toutes les provinces de la Cisjordanie et de la bande de Gaza et doivent être présentées au siège de la Commission au plus tard le 4 avril 2010, de dimanche à jeudi, de 9 heures à 16 heures.

Adresse de la Commission :

Rue municipale Al-Qods
Immeuble Abraj al-Wataniyah
Rez-de-chaussée
Bireh

Numéro de téléphone : 02 241 0731/02 241 0833

Numéro de fax : 02 241 0732

Courrier électronique : ipalestinecgi@gmail.com


**اللجنة الفلسطينية المستقلة
للتحقيق وفقاً لتقرير غولدمستون**


اعلان

تعلن اللجنة الفلسطينية المستقلة للتحقيق وفقاً لتقرير غولدمستون، وللشكلة بقرار من رئيس السلطة الوطنية الفلسطينية، اعمالاً لقرار الجمعية العامة للأمم المتحدة رقم ٢٠٠٩/٢/٣١، ولغاية ٢٠٠٨/١٢/٢٨ م، حيث ستمارس اللجنة ولايتها في التحقيق بالانتهاكات للدعى بارتكابها طبقاً للتقرير في الضفة الغربية بالجوانب التالية:

- * الاعتقال التعسفي والتعذيب.
- * انتهاك حرية تكوين الجمعيات، واستهداف وعدم تمكين للنظمات الأهلية من ممارسة عملها، وعدم تنفيذ قرارات المحاكم المتعلقة بهذه الجمعيات.
- * انتهاك الحريات الصحفية.
- * انتهاك حرية التجمع السلمي.
- * التمييز على اساس الانتماء السياسي في التعيين وفصل الموظفين لعاملين على خلفية الانتماء السياسي.
- كما ستحقق اللجنة في الانتهاكات للدعى بارتكابها وفقاً للتقرير في قطاع غزة والمتمثلة بالأمور التالية:

 - * القتل.
 - * الاعتقال التعسفي.
 - * التعذيب وسوء المعاملة.

على كل شخص تضرر من الانتهاكات السالفة أن يتقدم بشكوى شخصية أو بواسطة قريب أو وكيل، الى اللجنة الفلسطينية المستقلة للتحقيق وفقاً لتقرير غولدمستون، سواء بالتوجه المباشر الى مقر اللجنة، لتعبئة النماذج الخاصة بذلك، أو عبر ارسال الشكوى بالفاكس أو الاتصال الهاتفي مع طاقم اللجنة أبو عبر البريد الالكتروني.

تقدم الشكاوى في مقر اللجنة، من كافة محافظات الوطن في الضفة الغربية وقطاع غزة، لغاية ٢٠١٠/٤/٢٠ م.

**عنوان اللجنة: مدينة البيرة، شارع القدس (البلدية)، بناهة أبراج الوطنية،
لطاقب الأرضي، هاتف رقم ٠٢٢٤١٠٧٢١ أو ٠٢٢٤١٠٨٢٢. فا كس رقم ٠٢٢٤١٠٧٢٢
البريد الالكتروني:**

Copie de l'annonce mise dans la presse par la Commission en avril 2010

Annexe 9

Conférence et communiqué de presse de la Commission d'enquête indépendante palestinienne

Centre d'information Wattan

Lors d'une conférence de presse tenue au siège du Centre d'information Wattan, la Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone a présenté son programme de travail.

La Commission d'enquête indépendante palestinienne a tenu, au siège du Centre d'information Wattan, une conférence de presse en présence de son président, M. Issa Abu Sharar, et de deux de ses membres, M. Ghassan Farmand et M. Yasser al-Amuri. Cette conférence avait pour but de rendre compte au public palestinien des travaux que la Commission avait accomplis depuis sa création par décret présidentiel, le 25 janvier 2010.

Le juge Issa Abu Sharar, Président de la Commission d'enquête indépendante palestinienne, a réaffirmé l'indépendance, le professionnalisme et l'impartialité de cette instance et souligné que celle-ci rejetait toute forme d'ingérence dans ses travaux ou toute tentative de pression. Il a aussi précisé que la Commission était habilitée, en vertu de son mandat, à recueillir les plaintes et les témoignages de toutes les victimes de violations relevant de son domaine de compétence et à entendre tous les responsables palestiniens impliqués dans ces violations.

M. Abu Sharar a ajouté que les enquêtes seraient axées sur les violations commises par des Palestiniens en Cisjordanie et dans la bande de Gaza, notamment les meurtres, les emprisonnements arbitraires, les actes de torture, les atteintes à la liberté d'association et à la liberté de rassemblement pacifique, et les discriminations liées aux nominations et licenciements de fonctionnaires basées sur des considérations politiques.

M. Abu Sharar a aussi indiqué que, depuis sa création, la Commission d'enquête indépendante palestinienne avait toujours eu le souhait de se rendre dans la bande de Gaza afin d'établir un rapport traitant de la situation palestinienne dans sa totalité, comme le demandait l'Organisation des Nations Unies. À ce propos, il a souligné que le mandat de la Commission s'étendait à tout le territoire palestinien, que cette dernière était une instance indépendante qui se tenait loin des défis et des divisions politiques, et qu'un échec de sa part aurait des conséquences préjudiciables sur les Palestiniens, voire pourrait conduire à la création d'une commission d'enquête internationale.

En outre, M. Abu Sharar a invité toutes les victimes de violations, tant en Cisjordanie que dans la bande de Gaza, à porter plainte devant la Commission, soulignant que tous les dossiers seraient traités de manière confidentielle et que la Commission assurerait la protection des informateurs et des victimes. En outre, il a rendu hommage aux institutions de défense des droits de l'homme, en Cisjordanie et dans la bande de Gaza, qui avaient coopéré avec la Commission en lui communiquant des données et des rapports relatifs à la situation des droits de l'homme durant la période couverte par son mandat.

En conclusion, M. Abu Sharar a réaffirmé que la Commission s'acquitterait de son mandat en toute neutralité et objectivité et qu'à cet effet, elle se fonderait sur les

références juridiques que sont le droit international relatif aux droits de l'homme, le droit humanitaire international, la Loi fondamentale palestinienne et d'autres textes de loi en vigueur en Palestine.

Centre d'information Wattan – Al-Maad Street, Ramallah, Palestine – P.O. Box 859, Ramallah – Téléphone : 02 2980053/02 2987412 – Télécopie : 02 2959253 – Adresse électronique : Wattanmediacenter@wattan.tv

Centre d'information Wattan

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone informe les organisations de la société civile qu'elle est prête à recueillir des plaintes.

Donnant suite à la recommandation qu'elle a formulée à sa treizième réunion, tenue en son siège à Ramallah, le 12 avril 2010, la Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone, a adressé aux organisations de la société civile qui traitent des violations des droits de l'homme des lettres dans lesquelles elle leur demande d'annoncer sur la page d'accueil de leur site Web qu'elle est prête à recueillir des plaintes au sujet de ces violations.

Centre d'information Wattan – Al-Maad Street, Ramallah, Palestine – P.O. Box 859, Ramallah – Téléphone : 022980053/02 2987412 – Télécopie : 02 2959253 – Adresse électronique : Wattanmediacenter@wattan.tv

Le 7 avril 2010

Communiqué de presse

Le 25 janvier 2010, S. E. le Président Mahmoud Abbas a promulgué un décret portant création d'une commission indépendante d'enquête comme suite au rapport de la Mission d'établissement des faits de l'ONU sur le conflit de Gaza (rapport Goldstone), en application de la résolution 64/10 de l'Assemblée générale des Nations Unies, dans laquelle celle-ci demande instamment aux parties concernées de créer des commissions nationales chargées d'enquêter sur les violations qui leur sont imputées.

En réponse à cette demande, le Président palestinien a créé la Commission d'enquête indépendante palestinienne ainsi composée :

Juge Issa Abu Sharar (Président)
Juge Zuhair al-Surani (membre)
Juge Ghassan Farmand (membre)
M. Yasser al-Amuri (membre)
M. Nasser al-Rayyes (membre)

La Commission s'est attachée à définir les tâches et le mandat dont elle devait s'acquitter en application du rapport Goldstone et qui consistent à enquêter sur les violations suivantes réputées avoir été commises en Cisjordanie :

- Arrestations arbitraires et tortures;
- Atteintes à la liberté d'association, mesures prenant pour cibles les organisations de la société civile et visant à empêcher ces dernières de faire leur travail, non-respect des décisions des tribunaux concernant ces organisations;
- Atteintes à la liberté de la presse;
- Atteintes à la liberté de rassemblement pacifique;
- Discrimination fondée sur des motifs politiques et consistant à recruter ou à licencier des fonctionnaires, en fonction de leur appartenance politique.

En outre, la Commission enquêtera sur les violations ci-après dont le rapport affirme qu'elles ont été commises dans la bande de Gaza :

- Meurtres;
- Arrestations arbitraires;
- Torture et mauvais traitements.

En outre, la Commission enquêtera sur les violations du droit international humanitaire qui, selon le rapport, auraient été commises par les Palestiniens dans la bande de Gaza après l'agression israélienne contre ce territoire.

Aussitôt après sa création, la Commission s'est réunie pour examiner ses attributions et son mandat, ainsi que les moyens nécessaires à l'accomplissement de sa tâche, considérant qu'il lui fallait commencer par se doter d'un statut fondé sur les normes et les principes internationaux, notamment les dispositions du modèle de protocole des Nations Unies relatif aux commissions d'enquête nationales, qui visent à garantir l'objectivité, l'indépendance et l'impartialité de ce type d'instances.

Soucieux de garantir la transparence, la crédibilité et l'impartialité de la Commission, M. Nasser al-Rayyes, l'un des membres, s'est récusé, estimant que son appartenance à cette instance contrevenait aux règles du modèle de protocole des Nations Unies relatif aux commissions d'enquête nationales, plus particulièrement à la disposition stipulant qu'aucun membre de la Commission ne doit entretenir de liens étroits avec un individu, une entité gouvernementale, un parti politique ou une autre instance impliqués dans les violations présumées, ni avec une organisation ou un groupe associé à la victime. M. al-Rayyes a été conseiller juridique de l'association Al-Haq, une institution palestinienne de défense des droits de l'homme qui, non seulement surveille et atteste les atteintes à ses droits et libertés, mais a aussi été en relation avec plusieurs personnes et institutions dont les droits et les libertés ont été violés et dont elle a pris la défense. En outre, elle figure au nombre des institutions qui ont rencontré la Mission d'établissement des faits, présidée par le juge Goldstone, qui a interrogé son conseiller juridique sur la situation des droits de l'homme et des libertés dans le territoire palestinien occupé. La démission de M. al-Rayyes a été acceptée et la Commission a poursuivi ses travaux avec le restant de ses membres.

Après avoir élaboré son statut et défini la jurisprudence sur laquelle elle comptait s'appuyer, à savoir les dispositions et principes du droit international relatif aux droits de l'homme, le droit humanitaire international, les dispositions de la loi fondamentale palestinienne et les législations pertinentes en vigueur en Palestine, la Commission a décidé de s'inspirer de la jurisprudence internationale dans ce domaine, en se penchant sur des expériences analogues. C'est ainsi qu'elle a effectué une visite privée au Caire afin d'y rencontrer M. Chérif Bassiouni, un éminent spécialiste du droit humanitaire international ayant présidé plusieurs commissions d'enquête dans l'ex-Yougoslavie, avec lequel elle a discuté de tous les détails liés à sa jurisprudence et des modalités d'exercice de son mandat, ainsi que des moyens de s'acquitter de sa mission dans la bande de Gaza.

En outre, lors de son séjour au Caire, la Commission a examiné avec M. Ahmed Ben Helli, le Secrétaire général adjoint de la Ligue des États arabes, les moyens de mener à bien sa mission dans la bande de Gaza. Elle devra opter pour une des trois options suivantes :

1. Elle serait autorisée à s'acquitter de son mandat dans la bande de Gaza, son statut stipulant clairement qu'elle doit œuvrer avec impartialité et professionnalisme, loin de toute considération politique;

2. Au cas où la première option – qui, à notre avis, est la plus professionnelle et la plus acceptable – serait rejetée, la Commission s'efforcerait de nommer un groupe de travail indépendant composé d'experts connus pour leur intégrité, leur professionnalisme et leur impartialité, qui serait chargé de s'acquitter de ses travaux dans la bande de Gaza. La Commission a proposé que ce groupe soit présidé par M. Bassiouni qui, en raison de son professionnalisme et de son expérience étendue de la question, jouit de la confiance des parties régionales et internationales et est reconnu par celles-ci;

3. La troisième option consisterait pour la Commission à confier à certaines institutions de la société civile palestinienne qui s'occupent de surveiller les violations et d'en établir l'existence, la charge d'enquêter sur les violations censées avoir été commises par des Palestiniens dans la bande de Gaza;

4. Au cas où toutes les options susmentionnées seraient rejetées, la Commission a proposé de rencontrer les institutions susmentionnées en Égypte afin d'entendre leur témoignage au sujet des violations des droits de l'homme que les Palestiniens auraient commises à Gaza et de s'entretenir avec des Palestiniens victimes de violations de cette nature.

La Commission n'ayant reçu aucune réponse aux propositions qu'elle avait formulées, elle a jugé nécessaire de démarrer ses travaux en se conformant aux plans et au calendrier suivants :

a) Le 4 avril 2010, elle a fait paraître dans la presse, pendant deux jours consécutifs, un communiqué dans lequel elle expliquait la nature de ses travaux et des violations sur lesquelles elle était chargée d'enquêter en Cisjordanie ainsi que dans la bande de Gaza. En outre, dans ses déclarations, elle a invité toutes les personnes qui avaient affirmé avoir été victimes de violations relevant de son domaine de compétence, aussi bien en Cisjordanie que dans la bande de Gaza, à élever des plaintes à ce sujet, en personne, ou au cas où cela leur serait impossible, par l'intermédiaire d'un proche ou d'une autre personne mandatée à cet effet. En outre, elle a décidé de donner aux personnes victimes de violations la possibilité d'adresser leurs plaintes par télécopie ou par courrier électronique, et ce pour leur faciliter la tâche et parce qu'elle était consciente des difficultés d'accès auxquelles elles pouvaient être confrontées;

b) La Commission a commencé par rassembler les rapports, communiqués et lettres portant sur des violations relevant de son domaine de compétence et émanant d'institutions qui s'occupent des droits de l'homme, et à en vérifier le contenu. En outre, elle a engagé toutes les institutions palestiniennes qui auraient recueilli de la documentation relative à ces violations à prendre contact avec elle de sorte qu'elle puisse prendre connaissance de tous ces éléments d'information.

- Après avoir recueilli les plaintes individuelles, au plus tard le 20 avril 2010, la Commission commencera à les examiner.
- Elle tiendra une réunion avec les associations palestiniennes qui s'occupent des droits de l'homme et avec les médias locaux afin d'examiner les déclarations et rapports que ceux-ci auront présentés concernant des violations imputées aux autorités, et pour entendre ce qu'ils ont à dire au sujet de certaines questions qui font l'objet d'enquêtes. En outre, elle procédera à l'audition des victimes qui feront leurs dépositions et décriront les faits auxquels elles ont été confrontées.
- Aussitôt que les auditions auront pris fin, la Commission s'entretiendra avec les autorités officielles palestiniennes des violations qui leur sont imputées et écoutera ce qu'elles ont à dire sur certains cas qui font l'objet d'une enquête.
- La Commission établira, en temps voulu, un projet de rapport faisant la synthèse des enquêtes qu'elle aura menées au sujet des violations censées avoir été commises par la partie palestinienne ainsi que des recommandations qu'elle juge appropriées.
- Après cela, elle remettra son rapport final aux instances compétentes.

Calendrier des activités de la Commission dans la bande de Gaza

- Vu qu'il lui est difficile d'avoir accès à la bande de Gaza et compte tenu des obstacles d'ordre politique qui pourraient l'empêcher de s'acquitter de son mandat dans la région, les membres de la Commission ont décidé avant d'établir un plan de travail et un échéancier aux fins de la conduite d'enquêtes sur les violations qu'auraient commises les autorités de la bande de Gaza, d'attendre que la Ligue des États arabes réponde à leur demande.

Annexe 10
Convocation adressée au Bloc de la réforme
et du changement en vue de la tenue d'une réunion
avec les membres de la Commission

Le 13 avril 2010

Les membres du Bloc de la réforme et du changement au Conseil législatif

Objet : Tenue d'une réunion avec les membres du Bloc de la réforme et du changement

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments et, conformément aux recommandations issues de sa treizième réunion, vous convoque à une réunion, aux fins de coordonner ses travaux.

La Commission vous prie de prendre les dispositions nécessaires pour assister à cette réunion, qui aura lieu le jeudi 15 avril 2010, à 10 heures, en son siège.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission d'enquête
indépendante palestinienne créée
comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Annexe 11
Lettre adressée au Secrétaire général du Conseil
législatif sur la tenue d'une réunion
avec les représentants des blocs et listes
et les coordonnateurs des groupes parlementaires

Le 13 avril 2010

M. Ibrahim Khreisheh
Secrétaire général du Conseil législatif palestinien

Objet : Tenue d'une réunion avec les chefs des blocs parlementaires au Conseil législatif

Monsieur,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments et, conformément aux recommandations issues de sa treizième réunion, demande de tenir une réunion avec des représentants des blocs et listes et des coordonnateurs des groupes parlementaires au Conseil législatif, aux fins de faciliter la coordination de ses travaux.

La Commission vous prie de prendre les dispositions nécessaires pour assister à cette réunion, qui aura lieu le dimanche 18 avril 2010, à midi, en son siège.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission d'enquête
indépendante palestinienne créée
comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Annexe 12
Lettres adressées aux organisations ci-après,
pour leur demander de diffuser l'avis de la Commission
sur leurs sites Web

- Centre de santé mentale de Gaza
- Comité de défense des droits et des libertés
- Commission indépendante des droits de l'homme
- Croix-Rouge à Gaza
- Centre Al-Mizan des droits de l'homme
- Bureau des Nations Unies à Gaza
- Centre palestinien des droits de l'homme
- Association Al-Damir des droits de l'homme

Le 13 avril 2010

M. Eyad el-Sarraj
Centre de santé mentale de Gaza

Objet : Diffusion de l'avis

Monsieur,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments et vous demande de bien vouloir diffuser l'avis ci-joint au siège du Centre, ainsi que sur la page d'accueil de votre site Web.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission d'enquête
indépendante palestinienne créée
comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Le 12 avril 2010

M. Adel Abu Jahal
Président du Comité de défense des droits et des libertés
Ordre des avocats palestinien

Objet : Diffusion de l'avis

Monsieur,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments et, se référant à l'objet susmentionné, vous serait reconnaissante de bien vouloir diffuser l'avis ci-joint au plus grand nombre possible d'avocats et autres, étant entendu qu'il y aura lieu de se conformer au texte dans sa teneur actuelle.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission d'enquête
indépendante palestinienne créée
comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Le 13 avril 2010

M^{me} Randa Siniora
Commission indépendante des droits de l'homme

Objet : Diffusion de l'avis

Madame,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments et vous demande de bien vouloir diffuser l'avis ci-joint au siège de la Commission indépendante, ainsi que sur la page d'accueil de votre site Web.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission d'enquête
indépendante palestinienne créée
comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Le 13 avril 2010

La Croix-Rouge à Gaza

Objet : Diffusion de l'avis

Mesdames, Messieurs,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments et vous demande de bien vouloir diffuser l'avis ci-joint au Centre de la Croix-Rouge, ainsi que sur la page d'accueil de votre site Web.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission d'enquête
indépendante palestinienne créée
comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Le 13 avril 2010

M. Issam Younes
Centre Al-Mizan

Objet : Diffusion de l'avis

Monsieur,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments et vous demande de bien vouloir diffuser l'avis ci-joint au siège du Centre, ainsi que sur la page d'accueil de votre site Web.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission d'enquête
indépendante palestinienne créée
comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Le 13 avril 2010

M. Jamal Hamad
Bureau des Nations Unies à Gaza

Objet : Diffusion de l'avis

Monsieur,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments et vous demande de bien vouloir diffuser l'avis ci-joint dans les bureaux de l'Organisation, ainsi que sur la page d'accueil de votre site Web.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission d'enquête
indépendante palestinienne créée
comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Le 13 avril 2010

M. Iyad Alami
Centre palestinien des droits de l'homme

Objet : Diffusion de l'avis

Monsieur,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments et vous demande de bien vouloir diffuser l'avis ci-joint au siège du Centre, ainsi que sur la page d'accueil de votre site Web.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission d'enquête
indépendante palestinienne créée
comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Le 13 avril 2010

M. Khalil Abou Shammala
Association Al-Damir des droits de l'homme

Objet : Diffusion de l'avis

Monsieur,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments et vous demande de bien vouloir diffuser l'avis ci-joint au siège de l'Association, ainsi que sur la page d'accueil de votre site Web.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission d'enquête
indépendante palestinienne créée
comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Annexe 13
Lettre adressée par le Ministre de l'intérieur
de l'Autorité nationale palestinienne,
transmettant un rapport au sujet des allégations
portées contre le Ministère de l'intérieur

Organisation de libération de la Palestine
Autorité nationale palestinienne
Le Ministre de l'intérieur

Le 15 avril 2010

Le juge Issa Abu Sharar
Président de la Commission d'enquête indépendante palestinienne
créée comme suite au rapport Goldstone

Monsieur le juge,

D'ordre du Président Abu Mazen, je vous fais tenir ci-joint le rapport du Ministère de l'intérieur au sujet des allégations portées contre le Ministère de l'intérieur de l'Autorité nationale palestinienne, qui figurent dans le rapport Goldstone.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Ministre de l'intérieur
(*Signé*) Saïd **Abu Ali**

[Ajouté à la main]

Comme suite à la décision de la Commission, nous confirmons que la lettre et le rapport ci-joint font partie des documents de la Commission.

[Signature illisible]

Le 20 avril 2010

Annexe 14
Lettre adressée à la Fondation Samir Kassir pour la prier
de remettre à la Commission des documents à l'appui
des atteintes à la liberté de la presse

Réf. : ICGR/5/57/2010

Le 18 avril 2010

Madame Gisèle Khoury
Présidente du Conseil d'administration
de la Fondation Samir Kassir

Madame,

Le 25 janvier 2010, en application de la résolution 64/10 de l'Assemblée générale, S. E. M. le Président Mahmoud Abbas a décrété la création de la Commission d'enquête indépendante palestinienne comme suite au rapport Goldstone, en vue d'enquêter sur les violations des droits de l'homme et des libertés fondamentales, notamment de la liberté de la presse, qui auraient été commises en Cisjordanie et à Gaza.

Au vu de l'importance que nous accordons à l'enquête sur les atteintes à la liberté de la presse qui auraient été commises par les autorités palestiniennes dans les territoires occupés en Cisjordanie et à Gaza, nous vous serions reconnaissants d'avoir l'obligeance de nous faire tenir tous les rapports et communiqués publiés par votre Fondation sur la liberté dont a bénéficié la presse dans les territoires palestiniens, du 1^{er} janvier 2009 à ce jour. Nous vous prions de noter que dans un souci de transparence, de professionnalisme et d'impartialité, le rapport de la Commission citera dans son rapport votre Fondation comme la source de toutes les citations ou les données qu'elle obtiendra à partir de vos rapports et communiqués.

Pour finir, je tiens à vous exprimer notre vive appréciation pour votre rôle et votre action de pionnière sur le plan de la défense de la liberté de la presse et de la diffusion de la démocratie dans le monde arabe. Nous formulons le vœu que votre fondation continue de travailler en collaboration et coordination avec la Commission pour lui permettre de mener sa tâche à bien.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission
d'enquête indépendante palestinienne
créée comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Annexe 15
Lettre à la Commission indépendante des droits
de l'homme au sujet de la coordination des audiences
des victimes et des témoins de violations impliquant
assassinats, arrestations et torture dans la bande
de Gaza, audiences qui auront lieu par visioconférence
dans les bureaux de la Commission indépendante
des droits de l'homme, à Ramallah et à Gaza

Le 28 avril 2010

Madame Randa Siniora
Directrice exécutive
Commission indépendante des droits de l'homme

Objet : Tenue d'audiences simultanément en Cisjordanie et dans la bande de Gaza

Madame,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments et vous informe qu'elle tiendra des audiences au cours de la première semaine du mois de mai 2010 avec un groupe choisi de personnes qui ont été victimes de violations des droits de l'homme dans la bande de Gaza.

Au vu de l'impartialité et de la crédibilité de la Commission indépendante des droits de l'homme, de son attachement aux normes et autres garanties internationales relatives à la protection des personnes qui sont victimes de violations et au vu de l'impossibilité pour elle de se rendre dans la bande de Gaza, la Commission d'enquête souhaite que ces séances aient lieu simultanément par visioconférence dans les bureaux de la Commission indépendante des droits de l'homme, respectivement à Gaza et à Ramallah, pour pouvoir auditionner les victimes de violations.

Nous vous serions reconnaissants de bien vouloir nous répondre le plus rapidement possible, afin que notre équipe administrative puisse établir un calendrier de réunions, en fonction de vos horaires de travail et de vos obligations.

Je tiens enfin à vous exprimer notre vive appréciation pour votre rôle et votre action de pionnière dans la défense de la liberté de la presse et la diffusion de la démocratie dans le monde arabe. Nous formulons le vœu que votre fondation continue de travailler en collaboration et coordination avec la Commission pour lui permettre de mener sa tâche à bien.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission
d'enquête indépendante palestinienne
créée comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Annexe 16
Lettre adressée au Chef du Conseil général de la fonction publique, en vue de l'obtention d'une copie des instructions en matière de sécurité données par le Conseil des ministres, et la suite qui y a été donnée

Réf. : ICGR/12/76/2010

Le 2 mai 2010

Monsieur Hussein el-Araj
Chef du Conseil général de la fonction publique

Objet : Remise à la Commission d'une copie de la décision relative au contrôle de sécurité

Monsieur,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments et vous demande de bien vouloir lui communiquer une copie des instructions transmises au Conseil général de la fonction publique par le Secrétaire général du Conseil des ministres, sachant que le contrôle de sécurité est un élément capital dans la procédure de nomination des fonctionnaires, en application de la décision n° 18, prise le 9 septembre 2007 par le Conseil des ministres.

Je vous remercie de votre coopération et vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission
d'enquête indépendante palestinienne
créée comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

**Autorité nationale palestinienne
Conseil général de la fonction publique**

Le 6 mai 2010

Le juge Issa Abu Sharar,
Président de la Commission d'enquête indépendante
palestinienne créée comme suite au rapport Goldstone

Objet : Remise à la Commission d'une copie de la décision relative au contrôle de
sécurité

Monsieur le juge,

Le Conseil général de la fonction publique vous présente ses compliments et, en référence à votre lettre datée du 2 mai 2010, dans laquelle vous formulez le souhait d'obtenir une copie des instructions transmises au Conseil général de la fonction publique par le Secrétaire général du Conseil des ministres, étant donné que le contrôle de sécurité est un élément capital de la procédure de nomination des fonctionnaires, nous vous communiquons ci-joint une copie de la lettre datée du 9 septembre 2007 que nous avons reçue du Secrétaire général du Conseil des ministres, en référence à l'objet susmentionné.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Chef du Conseil général
de la fonction publique
(*Signé*) Hussein **al-Araj**

**Autorité nationale palestinienne
Conseil des ministres
Secrétariat du Conseil des ministres**

Réf. : 2007/CSCM/2115

Le 9 septembre 2009

Monsieur Jihad Hamdan
Chef du Conseil général de la fonction publique

Objet : Mesures de sécurité

Monsieur,

Le Secrétariat du Conseil des ministres vous présente ses compliments et vous fait part de la décision n° 18 prise par le Conseil des ministres à sa séance hebdomadaire tenue le 3 septembre 2007, sachant que le contrôle de sécurité est un élément capital de la procédure de nomination. Le Conseil général de la fonction publique est chargé de la procédure de nomination et doit par conséquent se mettre en contact avec les services de sécurité à cet égard.

Je vous prie de prendre les mesures nécessaires à l'application de cette décision.

Je vous remercie de votre coopération et vous prie d'accepter les assurances de ma très haute considération.

Le Secrétaire général du Conseil des ministres,
Chef du cabinet du Premier Ministre
(*Signé*) Saadi **al-Krunz**

Annexe 17
Lettre adressée au Secrétaire général du Conseil
des ministres, le priant de communiquer
à la Commission une copie des décisions prises
en ce qui concerne la sécurité des fonctionnaires,
et la suite qui y a été donnée

Réf. : ICGR/2/75/2010

Le 2 mai 2010

Monsieur Naim Abu Hommos
Secrétaire général du Conseil des ministres palestinien

Objet : Demande de copies des décisions prises par le Conseil des ministres relatives aux travaux de la Commission

Monsieur,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone présente ses compliments et vous prie de bien vouloir lui faire tenir une copie de la décision n° 18, adoptée par le Conseil des ministres au cours de sa séance tenue le 9 septembre 2007, sachant que le contrôle de sécurité est un élément capital de la procédure de nomination des fonctionnaires. Nous vous prions de bien vouloir fournir à la Commission une copie des instructions données par le Secrétaire général du Conseil des ministres, en application de cette décision.

Je vous remercie de votre collaboration et de votre intérêt pour aider la Commission à s'acquitter de ses tâches.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission
d'enquête indépendante palestinienne
créée comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

**Autorité nationale palestinienne
Conseil des ministres
Secrétariat du Conseil des ministres**

Réf. : CSCM/2010/1000

Le 11 mai 2010

Monsieur Issa Abu Sharar
Président de la Commission d'enquête indépendante
palestinienne créée comme suite au rapport Goldstone

Objet : Mesures de sécurité

Monsieur,

Le Secrétariat du Conseil des ministres vous présente ses compliments et, en référence à votre lettre datée du 2 mai 2010 dans laquelle vous indiquez votre souhait d'obtenir une copie de la décision du Conseil des ministres au sujet de la sécurité, nous tenons à préciser qu'au cours de sa 18^e séance, tenue le 9 septembre 2007, le Conseil des ministres a estimé que les mesures de contrôle de sécurité étaient un élément capital de la procédure de nomination, conformément à la loi sur la fonction publique. Il a jugé que cette mesure était normale et a constaté qu'elle était appliquée dans de nombreux pays, eu égard à la nature sensible de l'activité des institutions publiques et au souhait du Gouvernement de préserver la sécurité et la sûreté de ces institutions, aux fins de fournir les meilleures prestations possibles.

Je vous remercie de votre compréhension et de votre collaboration.

Le Secrétaire général
du Conseil des ministres
(Signé) Naim **Abu Hommos**

**Autorité nationale palestinienne
Conseil des ministres
Secrétariat du Conseil des ministres**

Réf. : 2007/CSCM/2115

Le 9 septembre 2009

Monsieur Jihad Hamdan
Chef du Conseil général de la fonction publique

Objet : Applications des mesures de sécurité

Monsieur,

Le Secrétariat du Conseil des ministres vous présente ses compliments et vous communique la décision du Conseil des ministres adoptée au cours de sa 18^e séance hebdomadaire, qui s'est tenue le 3 septembre 2007, d'après laquelle un contrôle de sécurité doit avoir lieu dans le cadre de la procédure de nomination. Le chef du Conseil général de la fonction publique est chargé de cette procédure et doit par conséquent se mettre en contact avec les services de sécurité à cet égard.

Je vous prie de prendre les mesures nécessaires à l'application de cette décision.

Je vous remercie de votre collaboration et vous prie d'accepter les assurances de ma très haute considération.

Le Secrétaire général du Conseil des ministres,
Chef du Cabinet du Premier Ministre
(*Signé*) Saadi **al-Krunz**

Annexe 18
Invitation adressée aux organisations de la société civile
en Cisjordanie pour assister aux audiences au siège
de la Commission

- Réseau des organisations non gouvernementales palestiniennes
- Commission palestinienne indépendante des droits de l’homme
- Association Al-Haq
- Centre de la démocratie et des droits des travailleurs
- Centre de Jérusalem pour l’aide juridique et les droits de l’homme
- Association Al-Damir
- Centre de soins et de réadaptation des victimes de la torture

Le 17 mai 2010

**Comité de coordination du Réseau des organisations
non gouvernementales palestiniennes**

Objet : Tenue d'une audience avec des représentants du Réseau au sujet de violations des droits de l'homme

Mesdames et Messieurs,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments. Ayant conclu ses audiences avec des plaignants qui ont fait état de violations de leurs droits et de leurs libertés, qui entrent dans le cadre de son mandat, la Commission estime nécessaire, pour poursuivre son enquête, de tenir des audiences avec des représentants des organisations de la société civile, afin d'entendre leurs déclarations sur les violations qui auraient été commises par l'Autorité nationale palestinienne en Cisjordanie.

Au regard de l'importance qu'accorde votre organisation à la surveillance et à la collecte d'éléments à l'appui des cas d'arrestations, de torture, de licenciement et d'atteinte à la liberté de réunion et d'association pacifiques, la Commission vous invite à envoyer un représentant en son siège le jeudi 20 mai 2010 à 10 heures, pour entendre votre avis à cet égard. Nous espérons également obtenir de vous des copies de toute correspondance officielle relative à ces violations, ainsi que de la suite qui y a été donnée par les parties intéressées.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission
d'enquête indépendante palestinienne
créée comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Le 17 mai 2010

M^{me} Randa Siniora
Directrice générale de la Commission
palestinienne indépendante des droits de l'homme

Objet : Tenue d'une audience avec des membres de la Commission palestinienne
indépendante au sujet de violations des droits de l'homme

Madame,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments. Ayant conclu ses audiences avec des plaignants qui ont fait état de violations de leurs droits et de leurs libertés, qui entrent dans le cadre de son mandat, la Commission estime nécessaire, pour poursuivre son enquête, de tenir des audiences avec des représentants des organisations de la société civile, afin d'entendre leurs déclarations sur les violations qui auraient été commises par l'Autorité nationale palestinienne en Cisjordanie.

Au regard de l'importance qu'accorde votre Commission à la surveillance et à la collecte d'éléments à l'appui des cas d'arrestation, de torture, de licenciement et d'atteinte à la liberté de réunion et d'association pacifiques, la Commission vous invite à déléguer un représentant en son siège le jeudi 20 mai 2010 à 10 heures, pour entendre votre avis à cet égard. Nous espérons également obtenir de vous des copies de toute correspondance officielle relative à ces violations, ainsi que de la suite qui y a été donnée par les parties intéressées.

Je vous prie d'accepter, Madame, les assurances de ma très haute considération.

Le Président de la Commission
d'enquête indépendante palestinienne
créée comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Le 17 mai 2010

M. Sha'wan Jabarin
Directeur général de l'association Al-Haq

Objet : Tenue d'une audience avec des membres de l'association au sujet de violations des droits de l'homme

Monsieur,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments. Ayant conclu ses audiences avec des plaignants qui ont fait état de violations de leurs droits et de leurs libertés, qui entrent dans le cadre de son mandat, la Commission estime nécessaire, pour poursuivre son enquête, de tenir des audiences avec des représentants des organisations de la société civile, afin d'entendre leurs déclarations sur les violations qui auraient été commises par l'Autorité nationale palestinienne en Cisjordanie.

Au regard de l'importance qu'accorde votre association à la surveillance et à la collecte d'éléments à l'appui des cas d'arrestation, de torture, de licenciement et d'atteinte à la liberté de réunion et d'association pacifiques, la Commission vous invite à déléguer un représentant en son siège le jeudi 20 mai 2010 à 10 heures, pour entendre votre avis à cet égard. Nous espérons également obtenir de vous des copies de toute correspondance officielle relative à ces violations, ainsi que de la suite qui y a été donnée par les parties intéressées.

Je vous prie d'accepter, Monsieur, les assurances de ma très haute considération.

Le Président de la Commission
d'enquête indépendante palestinienne
créée comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Le 17 mai 2010

M. Hassan Barghouti
Directeur général du Centre de la démocratie et des droits des travailleurs

Objet : Tenue d'une audience avec des membres du Centre au sujet de violations des droits de l'homme

Monsieur,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments. Ayant conclu ses audiences avec des plaignants qui ont fait état de violations de leurs droits et de leurs libertés, qui entrent dans le cadre de son mandat, la Commission estime nécessaire, pour poursuivre son enquête, de tenir des audiences avec des représentants des organisations de la société civile, afin d'entendre leurs déclarations sur les violations qui auraient été commises par l'Autorité nationale palestinienne en Cisjordanie.

Au regard de l'importance qu'accorde votre Centre à la surveillance et à la collecte d'éléments à l'appui des cas d'arrestation, de torture, de licenciement et d'atteinte à la liberté de réunion et d'association pacifiques, la Commission vous invite à déléguer un représentant en son siège le jeudi 20 mai 2010 à 10 heures, pour entendre votre avis à cet égard. Nous espérons également obtenir de vous des copies de toute correspondance officielle relative à ces violations, ainsi que de la suite qui y a été donnée par les parties intéressées.

Je vous prie d'accepter, Monsieur, les assurances de ma très haute considération.

Le Président de la Commission
d'enquête indépendante palestinienne
créée comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Le 17 mai 2010

M. Issam Aruri
Directeur général du Centre de Jérusalem pour l'aide juridique
et les droits de l'homme

Objet : Tenue d'une audience avec des membres du Centre au sujet de violations des droits de l'homme

Monsieur,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments. Ayant conclu ses audiences avec des plaignants qui ont fait état de violations de leurs droits et de leurs libertés, qui entrent dans le cadre de son mandat, la Commission estime nécessaire, pour poursuivre son enquête, de tenir des audiences avec des représentants des organisations de la société civile, afin d'entendre leurs déclarations sur les violations qui auraient été commises par l'Autorité nationale palestinienne en Cisjordanie.

Au regard de l'importance qu'accorde votre Centre à la surveillance et à la collecte d'éléments à l'appui des cas d'arrestation, de torture, de licenciement et d'atteinte à la liberté de réunion et d'association pacifiques, la Commission vous invite à déléguer un représentant en son siège le jeudi 20 mai 2010 à 10 heures, pour entendre votre avis à cet égard. Nous espérons également obtenir de vous des copies de toute correspondance officielle relative à ces violations, ainsi que de la suite qui y a été donnée par les parties intéressées.

Je vous prie d'accepter, Monsieur, les assurances de ma très haute considération.

Le Président de la Commission
d'enquête indépendante palestinienne
créée comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Le 17 mai 2010

M^{me} Sahar Francis
Directrice générale de l'Association Al-Damir

Objet : Tenue d'une audience avec des membres de l'Association au sujet de violations des droits de l'homme

Madame,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments. Ayant conclu ses audiences avec des plaignants qui ont fait état de violations de leurs droits et de leurs libertés, qui entrent dans le cadre de son mandat, la Commission estime nécessaire, pour poursuivre son enquête, de tenir des audiences avec des représentants des organisations de la société civile, afin d'entendre leurs déclarations sur les violations qui auraient été commises par l'Autorité nationale palestinienne en Cisjordanie.

Au regard de l'importance qu'accorde votre association à la surveillance et à la collecte d'éléments à l'appui des cas d'arrestation, de torture, de licenciement et d'atteinte à la liberté de réunion et d'association pacifiques, la Commission vous invite à déléguer un représentant en son siège le jeudi 20 mai 2010 à 10 heures, pour entendre votre avis à cet égard. Nous espérons également obtenir de vous des copies de toute correspondance officielle relative à ces violations, ainsi que de la suite qui y a été donnée par les parties intéressées.

Je vous prie d'accepter, Madame, les assurances de ma très haute considération.

Le Président de la Commission
d'enquête indépendante palestinienne
créée comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Le 17 mai 2010

M. Mahmoud Sahwil

Directeur général du Centre de soins et de réadaptation des victimes de la torture

Objet : Tenue d'une audience avec des membres du Centre, au sujet de violations des droits de l'homme

Monsieur,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments. Ayant conclu ses audiences avec des plaignants qui ont fait état de violations de leurs droits et de leurs libertés, qui entrent dans le cadre de son mandat, la Commission estime nécessaire, pour poursuivre son enquête, de tenir des audiences avec des représentants des organisations de la société civile, afin d'entendre ce qu'elles ont à dire des violations qui auraient été commises par l'Autorité nationale palestinienne en Cisjordanie.

Au regard de l'importance qu'accorde votre Centre à la surveillance et à la collecte d'éléments à l'appui des cas d'arrestation, de torture, de licenciement et d'atteinte à la liberté de réunion et d'association pacifiques, la Commission vous invite à déléguer un représentant en son siège le jeudi 20 mai 2010 à 10 heures, pour entendre votre avis à cet égard. Nous espérons également obtenir de vous des copies de toute correspondance officielle relative à ces violations, ainsi que de la suite qui y a été donnée par les parties intéressées.

Je vous prie d'accepter, Monsieur, les assurances de ma très haute considération.

Le Président de la Commission
d'enquête indépendante palestinienne
créée comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Annexe 19
Note verbale de l'Organisation des Nations Unies
relative à la date limite de présentation du rapport

Mission permanente d'observation de la Palestine
auprès de l'Organisation des Nations Unies

New York, le 4 juin 2010

Urgent et important

S. E. M. Salam Fayadh
Premier Ministre

J'ai l'honneur de vous faire tenir ci-joint la note verbale du Secrétariat de l'ONU en date du 27 mai 2010 relative à la résolution 64/254 de l'Assemblée générale, en date du 26 février 2010, intitulée : « Deuxième suite donnée au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza ». Dans cette note, le Secrétariat de l'ONU demande que lui soient présentées par écrit, le 12 juillet 2010 au plus tard, les mesures que la partie palestinienne a prises ou envisage de prendre pour procéder à une enquête indépendante et crédible selon les normes internationales sur les violations graves du droit international humanitaire et du droit international relatif aux droits de l'homme mentionnées par la Mission d'établissement des faits dans son rapport. Afin que les responsabilités soient établies et que justice soit faite et pour que le Secrétaire général de l'ONU puisse établir son rapport sur l'application de la résolution susmentionnée, conformément au paragraphe 5 de celle-ci, je vous saurais gré de bien vouloir donner les instructions et prendre les mesures nécessaires afin que nous puissions répondre à la demande du Secrétariat dans le délai imparti.

Je vous prie d'agréer, Excellence, les assurances de ma très haute considération.

L'Ambassadeur,
Observateur permanent
(*Signé*) Riyadh **Mansour**

– Transmis au Ministre des affaires étrangères

Pièce jointe

Note verbale du Secrétariat de l'ONU

Le 27 mai 2010

Le Secrétariat de l'Organisation des Nations Unies présente ses compliments à la Mission permanente d'observation de la Palestine auprès de l'Organisation et a l'honneur de se référer à la résolution 64/254 de l'Assemblée générale en date du 26 février 2010, intitulée : « Deuxième suite donnée au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza ».

Aux termes du paragraphe 2 de cette résolution, l'Assemblée générale :

« *Demande de nouveau* au Gouvernement israélien de procéder à des investigations indépendantes, crédibles et conformes aux normes internationales sur les graves violations du droit international humanitaire et des droits de l'homme qui ont été signalées par la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza, afin que les responsabilités soient établies et que justice soit faite ».

Aux termes du paragraphe 3 de cette résolution, l'Assemblée générale :

« *Demande de nouveau instamment* que la partie palestinienne procède à des investigations indépendantes, crédibles et conformes aux normes internationales sur les graves violations du droit international humanitaire et des droits de l'homme qui ont été signalées par la Mission d'établissement des faits, afin que les responsabilités soient établies et que justice soit faite ».

Aux termes du paragraphe 4 de cette résolution, l'Assemblée générale :

« *Recommande de nouveau* que le Gouvernement suisse, en sa qualité de dépositaire de la Convention de Genève relative à la protection des personnes civiles en temps de guerre², convoque à nouveau, au plus tôt, une conférence des Hautes Parties contractantes à la quatrième Convention de Genève sur les mesures à prendre pour imposer la Convention dans le territoire palestinien occupé, y compris Jérusalem-Est, et la faire respecter, conformément à l'article premier, en gardant à l'esprit la convocation d'une conférence de ce type et la déclaration adoptée le 15 juillet 1999, ainsi que la reprise de cette conférence et la déclaration adoptée le 5 décembre 2001 ».

Aux termes du paragraphe 5 de cette résolution, l'Assemblée générale :

« *Prie* le Secrétaire général de lui présenter, dans un délai de cinq mois, un rapport sur l'application de la présente résolution afin de déterminer quelles nouvelles mesures doivent être prises, le cas échéant, par les organes et organismes compétents de l'Organisation des Nations Unies, dont le Conseil de sécurité ».

Afin d'aider le Secrétaire général à s'acquitter de la mission qui lui est confiée en vertu du paragraphe qui précède, le Secrétariat demande par la présente à la Mission permanente d'observation de lui fournir, le 12 juillet 2010 au plus tard, des informations écrites concernant les mesures que la partie palestinienne aurait prises, ou qu'elle serait en train de prendre, comme suite aux demandes pressantes formulées par l'Assemblée générale au paragraphe 3 de sa résolution.

Le Secrétariat adresse à la Mission permanente d'Israël et à la Mission permanente de la Suisse auprès de l'Organisation des Nations Unies des notes verbales similaires leur demandant de lui fournir par écrit des renseignements sur les mesures prises pour donner suite à la demande et à la recommandation formulées par l'Assemblée générale aux paragraphes 2 et 4, respectivement de sa résolution.

Le Secrétariat de l'Organisation des Nations Unies saisit cette occasion pour exprimer à la Mission permanente d'observation de la Palestine auprès de l'Organisation les assurances de sa très haute considération.

Annexe 20
Invitation à assister à une audition adressée
à la Directrice générale des relations publiques
et des associations au Ministère de l'intérieur

Le 7 juin 2010

M^{me} Fadwa Shaer
Directrice générale des relations publiques et des associations
Ministère de l'intérieur

Objet : Présence à une audition

Madame,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments et a l'honneur de se référer au décret publié le 25 janvier 2010 par le Président palestinien – en application de la résolution 64/10 de l'Assemblée générale – portant création d'une commission indépendante chargée du suivi du rapport susmentionné, dans le but d'enquêter sur les contraventions et violations mentionnées dans le rapport de la Mission d'établissement des faits présidée par le juge Richard Goldstone.

Cette commission, composée du juge Issa Abu Sharar, Président, du juge Zuheir Sourani, de M. Ghassan Farmand et de M. Yasser Amouri, a été créée afin d'enquêter sur les violations des droits de l'homme et des libertés fondamentales commises par l'Autorité nationale palestinienne en Cisjordanie et par l'autorité de fait dans la bande de Gaza.

La Commission s'acquittera de son mandat d'enquête sur les violations commises dans de nombreux domaines par des organismes palestiniens en Cisjordanie, notamment les violations de la liberté de créer des associations, le ciblage d'organisations non gouvernementales, les entraves à leurs activités et le refus d'exécuter les décisions de justice les concernant.

Considérant que la Commission a reçu un certain nombre de plaintes faisant état de violations par le Ministère du droit de créer des associations et qu'elle a achevé l'audition des plaignants et des organisations de la société civile à ce sujet, nous espérons que, par souci d'assurer la réussite des travaux de la Commission et la réalisation de son objectif, vous vous présenterez au siège de la Commission le mardi 8 juin 2010 à 10 h 30 afin de permettre à la Commission d'entendre vos observations sur les allégations de violations qui auraient été commises par le Ministère.

Je vous prie d'agréer, Madame, les assurances de ma très haute considération.

Le Président de la Commission
d'enquête indépendante palestinienne
créée comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Pour annuler ou modifier ce rendez-vous, prière de contacter M^{me} Maram Masruji (tél. : 059 893 4224).

Annexe 21
Invitation à assister à une audition adressée au Ministre
de l'intérieur

Le 8 juin 2010

M. Said Abu Ali
Ministre de l'intérieur

Objet : Organisation d'une audition au siège de la Commission

Monsieur le Ministre,

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments et a l'honneur de se référer au décret publié le 25 janvier 2010 par le Président palestinien – en application de la résolution 64/10 de l'Assemblée générale – portant création d'une commission indépendante chargée du suivi du rapport susmentionné, dans le but d'enquêter sur les contraventions et violations mentionnées dans le rapport de la Mission d'établissement des faits présidée par le juge Richard Goldstone.

Cette commission, composée du juge Issa Abu Sharar, Président, du juge Zuheir Sourani, de M. Ghassan Farmand et de M. Yasser Amouri, a été créée afin d'enquêter sur les violations des droits de l'homme et des libertés fondamentales commises par l'Autorité nationale palestinienne en Cisjordanie et par l'autorité de fait dans la bande de Gaza.

La Commission s'acquittera de son mandat d'enquête sur les violations commises dans de nombreux domaines par des organismes palestiniens en Cisjordanie, notamment les violations de la liberté de créer des associations, le ciblage d'organisations non gouvernementales, les entraves à leurs activités et le refus d'exécuter les décisions de justice les concernant et la violation de la liberté de la presse et du droit de réunion pacifique.

Considérant que la Commission a reçu un certain nombre de plaintes et entendu les déclarations de personnes et d'organisations concernant la violation par les services de sécurité relevant du Ministère des droits des détenus, dont certains ont été soumis à la torture, et la violation par le Département des organisations non gouvernementales du droit de créer des associations, nous espérons que, par souci d'assurer la réussite des travaux de la Commission et la réalisation de son objectif, vous accepterez de rencontrer les membres de la Commission, au siège de celle-ci, à un moment à convenir avec vous, afin de permettre à la Commission d'entendre vos observations sur les allégations de violations qui auraient été commises par le Ministère.

Je vous prie d'agréer, Monsieur le Ministre, les assurances de ma très haute considération.

Le Président de la Commission
d'enquête indépendante palestinienne
créée comme suite au rapport Goldstone
(*Signé*) Issa **Abu Sharar**

Pour annuler ou modifier ce rendez-vous, prière de contacter M^{me} Maram Masruji (tél. : 059 893 4224).

Annexe 22
Lettre adressée au Gouverneur de l'Autorité monétaire palestinienne, le priant de communiquer à la Commission le cadre juridique régissant l'ouverture de comptes bancaires pour les associations, et réponse à cette lettre

Le 14 juin 2010

S. E. M. Jihad al Wazir
Gouverneur de l'Autorité monétaire palestinienne

Objet : Demande de fourniture à la Commission d'une copie de la décision de l'Autorité monétaire palestinienne faisant obligation aux associations d'obtenir l'accord préalable du Ministère de l'intérieur avant l'ouverture de comptes bancaires

La Commission d'enquête indépendante palestinienne créée comme suite au rapport Goldstone vous présente ses compliments. Comme vous devez le savoir, en application de la résolution 64/10 de l'Assemblée générale des Nations Unies, le Président palestinien a pris le 25 janvier 2010 un décret portant création d'une Commission d'enquête indépendante palestinienne, comme suite au rapport Goldstone, aux fins d'enquêter sur les transgressions et les violations dont fait état le rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza, qui était présidée par le juge Richard Goldstone.

La Commission, présidée par le juge Issa Abu Sharar et qui comprend les membres suivants : le juge Zouheir Al-Surani, M. Ghassan Farmand et M. Yasser Al-Amouri, a été chargée d'enquêter sur les violations des droits de l'homme et des libertés commises par l'Autorité nationale palestinienne en Cisjordanie et par l'autorité de fait à Gaza.

La Commission enquêtera dans le cadre de son mandat sur les violations commises par les autorités palestiniennes en Cisjordanie dans plusieurs domaines, notamment les atteintes à la liberté de former des associations, ce qui est ressorti clairement des déclarations des personnes et des membres des organisations qu'elle a auditionnés. Lorsque nous avons interrogé le Directeur général des relations publiques et des affaires des ONG au Ministère de l'intérieur sur certaines questions liées notamment à l'obligation faite aux associations d'obtenir son accord préalable avant l'ouverture de comptes bancaires, il a répondu que cette formalité avait été imposée à la suite d'une décision de l'Autorité monétaire, qui l'en avait notifié officiellement.

Nous vous prions de bien vouloir nous fournir une copie de la décision susmentionnée, la Commission souhaitant obtenir de l'Autorité monétaire une explication au sujet du fondement juridique de cette procédure, s'il y en a un.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission
d'enquête indépendante palestinienne
créée comme suite au rapport Goldstone
(*Signé*) Issa Abu **Sharar**

Autorité monétaire palestinienne

Le 22 juin 2010

Monsieur le juge Issa Abu Sharar
Président de la Commission d'enquête
indépendante palestinienne
créée comme suite au rapport Goldstone
Ramallah (Palestine)

Objet : Procédures relatives à l'ouverture de comptes bancaires par les associations

Monsieur,

Me référant à l'objet susmentionné et à votre lettre n° 1CGR/12/111/2010 datée du 4 juin 2010, dans laquelle vous demandez à la Commission une copie de la décision de l'Autorité monétaire relative à l'obligation faite aux associations d'obtenir l'accord préalable du Ministère de l'intérieur avant l'ouverture de comptes bancaires, je tiens à vous préciser ce qui suit :

1. Les procédures liées à l'ouverture de comptes bancaires pour l'ensemble des secteurs sont régies par la directive n° 9 de 2009 du 24 décembre 2009, notamment par la clause 8/1/5 relative à l'ouverture de comptes par les associations, conformément à la loi sur les activités bancaires. Il faut en effet l'accord préalable du Ministère de l'intérieur ou du travail, selon qu'il convient, dans le cadre de la réglementation des relations entre les banques et les autorités bancaires, conformément aux dispositions de la loi sur la lutte contre le blanchiment d'argent;

2. Pour ouvrir un compte bancaire, les associations sont tenues d'obtenir l'accord du Ministère de l'intérieur ou du travail, pour les raisons suivantes :

a) Veiller à ce que l'enregistrement de l'association soit toujours valable, qu'elle n'a pas été radiée, que ses statuts n'ont pas été modifiés, d'autant que l'ouverture d'un compte bancaire a lieu quelque temps après l'enregistrement de l'association;

b) S'assurer de l'exactitude des noms des personnes qui ont le pouvoir de signer au nom de l'association et qui ont été agréées par le Ministère, déterminer s'il y a lieu d'introduire des changements et vérifier les limites du pouvoir de signature.

Je vous prie d'accepter les assurances de ma très haute considération.

L'Autorité monétaire palestinienne
[Signatures illisibles]

Commission de lutte contre le blanchiment d'argent
Service de suivi financier
Palestine

N° NALC/121/7/2010

Le 6 juillet 2010

Monsieur le juge Issa Abu Sharar
Président de la Commission d'enquête
indépendante palestinienne créée
comme suite au rapport Goldstone
Ramallah (Palestine)

Objet : Le cadre juridique

Monsieur,

La Commission nationale de lutte contre le blanchiment d'argent vous présente ses compliments et, après l'examen de votre lettre n° ICGR/12/111/2010 du 14 juin 2010, dans laquelle vous vous interrogez sur le cadre juridique régissant l'obtention par les associations d'un accord préalable à l'ouverture de comptes bancaires, tient à vous préciser ce qui suit :

La Loi fondamentale garantit et protège les libertés publiques et les dispositions des législations régissant les droits et obligations des personnes physiques ou morales, ce qui permet d'assurer une stabilité juridique et de concrétiser la notion de cadre juridique régissant les relations dans la société.

Le crime de blanchiment d'argent transcende les frontières, ce qui a poussé la communauté internationale à mettre en place des normes internationales en vue de lutter contre ce crime et de protéger la société de ses effets néfastes. « Connaître son client » est un premier pas dans la lutte contre le blanchiment d'argent et le renforcement de la transparence au début de toute opération bancaire avec un client, qu'il s'agisse d'une personne physique ou morale. Le premier paragraphe de l'article 5 de la loi sur la lutte contre le blanchiment d'argent confère aux autorités compétentes le pouvoir d'enquêter sur le degré de transparence de la personne morale qui s'est enregistrée.

Par conséquent, aux fins d'encourager la transparence, notamment dans le secteur bancaire et conformément aux principes de la jurisprudence et de la règle selon laquelle le champ d'application des dispositions à caractère général est modifié ou limité par des dispositions à caractère spécial, l'article 6 de la loi sur la lutte contre le blanchiment d'argent (loi n° 9 de 2007) dispose que les institutions financières doivent connaître leurs clients et enquêter sur eux, qu'il s'agisse de personnes physiques ou morales, grâce aux données ou documents officiels. Cette obligation figure en détail dans l'instruction n° 1 de 2009 de la Commission nationale de lutte contre le blanchiment d'argent, qui énonce les mesures à adopter s'agissant des personnes physiques ou morales, notamment l'obtention d'une lettre du ministère compétent qui précise les noms des personnes habilitées à signer au nom de l'association, pour veiller à ce qu'un organe officiel reconnu et digne de confiance se porte garant d'elles. Cette mesure est conforme aux dispositions de la loi, outre le fait que l'article 13 de la même loi confère aux autorités de contrôle – dont l'Autorité monétaire palestinienne fait partie, conformément à la loi – des pouvoirs de

réglementation pour donner des instructions sur les règles d'identification et de vérification des personnes physiques ou morales.

Je vous prie d'accepter les assurances de ma très haute considération.

Le Président de la Commission nationale
de lutte contre le blanchiment d'argent
(*Signé*) Jihad **al-Wazir**

Annexe III

Note verbale, datée du 12 juillet 2010, adressée au Secrétariat par la Mission permanente de la Suisse auprès de l'Organisation des Nations Unies

La Mission permanente de la Suisse auprès des Nations Unies présente ses compliments au Secrétariat des Nations Unies et a l'honneur de se référer à sa note du 27 mai 2010 priant la Mission de faire support sur les démarches entreprises par la Suisse en application du paragraphe 4 de la résolution 64/254 de l'Assemblée générale, en date du 26 février 2010, intitulée « Deuxième suite donnée au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza ».

La Mission a l'honneur de transmettre son rapport au Secrétariat en pièce jointe dans les délais qui lui ont été impartis.

Appendice

État des entretiens sur le suivi du paragraphe 4 de la résolution 64/254 de l'Assemblée générale des Nations Unies

1. Le 26 février 2010, l'Assemblée générale de l'Organisation des Nations Unies a adopté la résolution 64/254 intitulée « Deuxième suite donnée au rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza », dont le paragraphe 4 « Recommande de nouveau que le Gouvernement suisse, en sa qualité de dépositaire de la Convention de Genève relative à la protection des personnes civiles en temps de guerre, convoque à nouveau, au plus tôt, une conférence des Hautes Parties contractantes à la quatrième Convention de Genève sur les mesures à prendre pour imposer la Convention dans le territoire palestinien occupé, y compris Jérusalem-Est, et la faire respecter, conformément à l'article premier, en gardant à l'esprit la convocation d'une conférence de ce type et la déclaration adoptée le 15 juillet 1999, ainsi que la reprise de cette conférence et la déclaration adoptée le 5 décembre 2001 ».

2. La Suisse avait reçu une première recommandation de l'Assemblée générale de l'Organisation des Nations Unies le 5 novembre 2009 par la résolution 64/10. Faisant suite à cette recommandation, la Suisse, en qualité de dépositaire des Conventions de Genève de 1949, avait mené une ronde de consultations à Genève en décembre 2009. Le résultat de cette ronde de consultations figure en annexe du rapport du Secrétaire général de l'Organisation des Nations Unies du 4 février 2010 (A/64/651). Ces consultations préliminaires auprès d'un nombre sélectionné d'acteurs n'avaient pas permis de dégager de tendance dominante en faveur ou contre l'organisation d'une conférence des Hautes Parties contractantes, ni sur l'apport d'une nouvelle conférence des Hautes Parties contractantes à la quatrième Convention de Genève pour les populations civiles concernées, à savoir quels résultats espérer pour quelles problématiques. La Suisse avait été encouragée à mener ses propres réflexions sur les possibles thèmes pouvant être abordés dans le cadre d'une telle conférence.

3. Afin de mettre en œuvre les recommandations de l'Assemblée générale des Nations Unies et de faire suite aux conclusions de cette ronde de consultations, la Suisse a nommé un ambassadeur en mission spéciale chargé spécifiquement de conduire ce processus. Elle a aussi mené des réflexions sur les sujets qui pourraient être abordés dans une conférence en gardant à l'esprit qu'une telle conférence doit être inclusive, constructive, consensuelle et promouvoir un résultat concret.

4. À l'issue de ses réflexions, la question de l'accès à Gaza est apparue comme un thème possible et la Suisse a ainsi développé un régime d'accès avec des spécialistes de la branche. Afin de présenter ce régime d'accès, la Suisse a mené des séries d'entretiens à New York, Washington et Bruxelles. Ce qui est ressorti de ces entretiens est que la question de la mise en place d'un régime d'accès à Gaza devait être séparée de celle d'une conférence des Hautes Parties contractantes. L'urgence de la situation à Gaza demandait une réponse rapide de la part de la communauté internationale : par conséquent, une conférence des Hautes Parties contractantes ne semblait pas être l'enceinte appropriée pour traiter de cette question. Il a aussi été relevé que les recommandations adressées à la Suisse par les résolutions de l'Assemblée générale ne concernent pas uniquement la bande de Gaza mais

l'ensemble du territoire palestinien occupé. Prenant en compte ces différentes préoccupations, la Suisse a continué ses réflexions et a identifié deux autres thèmes qui pourraient être traités dans le cadre d'une conférence des Hautes Parties contractantes : l'opérationnalisation de l'article 1 commun aux Conventions de Genève et les questions juridiques liées aux situations d'occupation prolongée.

5. Afin de sonder les Hautes Parties contractantes et les autres parties intéressées sur ces thèmes, d'évaluer si leurs positions avaient évolué et pour les informer des démarches que la Suisse a entreprises depuis février 2010, la Suisse a décidé de mener une nouvelle série d'entretiens à Genève du 25 juin au 6 juillet 2010.

6. Lors de cette nouvelle série d'entretiens, la Suisse s'est entretenue avec les parties directement concernées, les parties intéressées de la région, les membres permanents du Conseil de sécurité de l'Organisation des Nations Unies, les présidences sortante et entrante de l'Union européenne, les coordonnateurs des groupes régionaux ainsi qu'un certain nombre de Hautes Parties contractantes provenant de tous les groupes régionaux. Les organisations suivantes ont été informées : la Ligue des États arabes, l'Organisation de la conférence islamique, le Comité international de la Croix-Rouge et le Haut-Commissariat aux droits de l'homme.

7. Cette série d'entretiens a été conduite de manière informelle et orale. Lors des différents entretiens, la Suisse a rappelé qu'elle considère qu'une conférence des Hautes Parties contractantes doit être inclusive, constructive, consensuelle et ne pas servir de plate-forme pour des accusations politiques. L'objectif d'une conférence doit être de promouvoir une amélioration concrète de la situation de la population civile et contribuer au renforcement du droit international humanitaire. La Suisse a fait part de ces réflexions tout en sollicitant les vues et idées des Hautes Parties contractantes et autres parties intéressées rencontrées. À l'issue de cette série d'entretiens, les positions peuvent se ranger en trois catégories :

- 1) Un premier groupe est favorable à la tenue d'une conférence;
- 2) Un deuxième groupe s'oppose fermement à une conférence;
- 3) Un troisième groupe, composé d'un nombre significatif des Hautes Parties contractantes consultées, n'a pas d'opinion arrêtée pour ou contre la tenue d'une conférence des Hautes Parties contractantes mais a exprimé des réserves quant à la valeur ajoutée d'une nouvelle conférence et a des craintes qu'une conférence soit utilisée pour des motifs politiques.

8. En conclusion, cette série d'entretiens n'a, à nouveau, pas permis de dégager de tendance dominante en faveur ou contre l'organisation d'une conférence des Hautes Parties contractantes, ni de déterminer s'il y avait une position dominante au sein des Hautes Parties contractantes et des autres parties intéressées concernant la substance et les modalités d'une conférence. Par contre, cette série d'entretiens a permis de constater que le troisième groupe ne sera pas en mesure de prendre une décision sur la nécessité de convoquer ou non une conférence avant d'avoir les idées plus claires sur quels en pourraient être l'ordre du jour, les modalités et les résultats.

9. Afin de pouvoir mener des réflexions plus approfondies sur ces questions et d'engager un dialogue avec tous les acteurs concernés, la Suisse a été encouragée à continuer les discussions au sein d'un groupe informel de travail. La Suisse va donc prendre dans les meilleurs délais les dispositions nécessaires à cet effet.



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Promotion et protection des droits humains

Rapport de la Commission internationale indépendante chargée d'enquêter dans le Territoire palestinien occupé, y compris Jérusalem-Est, et en Israël

Note du Secrétaire général**

Le Secrétaire général a l'honneur de transmettre à l'Assemblée générale le rapport présenté par la Commission internationale indépendante chargée d'enquêter dans le Territoire palestinien occupé, y compris Jérusalem-Est, et en Israël, conformément à la résolution [S-30/1](#) du Conseil des droits de l'homme.

* [A/77/150](#).

** Le présent document a été soumis après la date prévue afin que l'information la plus récente puisse y figurer.



Rapport de la Commission internationale indépendante chargée d'enquêter dans le Territoire palestinien occupé, y compris Jérusalem-Est, et en Israël

Résumé

Le présent rapport est le premier que la Commission internationale indépendante chargée d'enquêter dans le Territoire palestinien occupé, y compris Jérusalem-Est, et en Israël soumet à l'Assemblée générale. La Commission y examine l'occupation par Israël de terres palestiniennes, la présumée annexion *de jure* de ces terres et leur annexion *de facto* manifeste, ainsi que les incidences de ces actes sur les droits humains des Palestiniens et leurs conséquences juridiques.

I. Introduction

1. Dans sa résolution [S-30/1](#), le Conseil des droits de l'homme a décidé de créer une commission d'enquête internationale indépendante et permanente chargée d'enquêter dans le Territoire palestinien occupé, y compris Jérusalem-Est, et en Israël sur toutes les violations présumées du droit international humanitaire et sur toutes les violations présumées du droit international des droits de l'homme et toutes les atteintes à ce droit qui auraient été commises jusqu'au 13 avril 2021 et depuis cette date.
2. La Commission se compose de trois membres : Navanethem Pillay (Afrique du Sud), Miloon Kothari (Inde) et Christopher Sidoti (Australie). Le secrétariat est assuré par le Haut-Commissariat des Nations Unies aux droits de l'homme (HCDH).
3. Dans son premier rapport, présenté au Conseil des droits de l'homme à sa cinquantième session ([A/HRC/50/21](#)), la Commission a constaté l'existence de preuves crédibles qui indiquaient de manière convaincante qu'Israël n'avait aucune intention de mettre un terme à l'occupation, qu'il appliquait des politiques claires en vue de prendre le contrôle total du Territoire palestinien occupé et qu'il s'employait à en modifier la démographie en maintenant un environnement répressif pour les Palestiniens et un climat favorable aux colons israéliens. Dans le présent rapport, elle se penche sur ces éléments pour examiner les conséquences de l'occupation prolongée en matière de droits humains et dans le domaine juridique, s'agissant notamment de déterminer si Israël a, à toutes fins utiles, « annexé » tout ou partie du Territoire palestinien occupé dans le cadre de son régime d'occupation, et pour formuler des recommandations concrètes à l'intention des parties prenantes concernées.

II. Méthode et coopération

4. Dans sa résolution [S-30/1](#), le Conseil des droits de l'homme a demandé à toutes les parties concernées de coopérer pleinement avec la commission d'enquête et de faciliter son accès. La Commission remercie le Gouvernement de l'État de Palestine de sa coopération constante. Les autorités *de facto* de la bande de Gaza ont fait part à la Commission de leur volonté de coopérer. Le Gouvernement égyptien a de nouveau fait savoir à la Commission qu'il était disposé à coopérer avec elle, mais n'a pas encore donné suite à sa demande d'autorisation qu'elle lui a présentée pour accéder à la bande de Gaza par le point de passage de Rafah.
5. La Commission regrette le manque de coopération du Gouvernement israélien, qui a refusé de l'autoriser à entrer en Israël et à accéder au Territoire palestinien occupé, malgré la volonté exprimée par l'État de Palestine de lui permettre d'y effectuer une visite.
6. La Commission a élaboré le présent rapport en s'appuyant sur les entretiens qu'elle a menés auprès de sources primaires et secondaires jusqu'au 31 juillet 2022, ainsi que sur ses travaux de recherche, ses échanges en personne et en ligne avec les parties prenantes et les communications qu'elle a reçues à la suite de l'appel à contributions lancé le 22 septembre 2021.

III. Le droit international applicable et le régime d'occupation

7. La Commission a exposé le cadre juridique international applicable dans le Territoire palestinien occupé et en Israël dans son rapport précédent, qu'elle a soumis au Conseil des droits de l'homme¹, ainsi que dans son mandat². Le Territoire palestinien occupé, y compris Jérusalem-Est et la bande de Gaza, ainsi que le Golan syrien occupé sont actuellement sous occupation belligérante israélienne, situation à laquelle s'appliquent le droit international humanitaire et le droit international des droits humains.

8. La pratique et le droit internationaux n'établissent pas clairement le moment où une situation d'occupation belligérante devient illégale. Dans le cas de la Namibie, dont les origines étaient certes différentes de celles de la situation du Territoire palestinien occupé, la Cour internationale de Justice (CIJ) a estimé dans un avis consultatif que la présence continue de l'Afrique du Sud dans ce pays était illégale. En outre, se penchant sur le refus répété de l'Afrique du Sud de se conformer aux résolutions du Conseil de sécurité, elle a déclaré que ce pays encourait des responsabilités internationales pour violation persistante d'une obligation internationale parce qu'il occupait sans titre le territoire de la Namibie³.

9. Selon le droit international humanitaire, l'occupation en temps de guerre est une situation provisoire, qui n'enlève à la Puissance occupée ni sa qualité d'État ni sa souveraineté. L'occupation pour cause de guerre ne saurait comporter un droit quelconque de disposer d'un territoire⁴. Les personnes protégées qui se trouvent en territoire occupé ne doivent pas être privées, du fait d'une tentative d'annexion de tout ou partie du territoire occupé, des droits qui leur sont reconnus en vertu du droit international humanitaire et du droit international des droits humains.

10. Un certain nombre de juristes ont défini un ensemble de principes dont le respect détermine la légalité d'une occupation, à savoir notamment : la puissance occupante ne possède ni souveraineté ni titre sur le territoire occupé ; la puissance occupante est chargée de gérer l'ordre public et la vie civile dans ce territoire et remplit cette mission au bénéfice de la population occupée, dans l'optique du droit de cette population à l'autodétermination ; l'occupation est temporaire⁵.

11. Dans le présent rapport, la Commission se concentre sur deux indicateurs qui peuvent servir à déterminer l'illégalité de l'occupation : la permanence de l'occupation israélienne, déjà notée dans son précédent rapport, présenté à la cinquantième session du Conseil des droits de l'homme⁶, et les actes assimilables à une annexion, y compris toute mesure unilatérale qu'Israël aurait prise pour disposer

¹ A/HRC/50/21, par. 14 à 25.

² Disponible à l'adresse www.ohchr.org/sites/default/files/2022-01/TORs-UN-Independent_ICJ_Occupied_Palestinian_Territories.pdf.

³ *Conséquences juridiques pour les États de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971*, p. 16, par. 108, 109, 111, 115, 117 à 127 et 133.

⁴ Voir Comité international de la Croix-Rouge (CICR), commentaire de 1958 sur l'article 47 de la Convention de Genève relative à la protection des personnes civiles en temps de guerre. Disponible à l'adresse <https://ihl-databases.icrc.org/applic/ihl/dih.nsf/Comment.xsp?action=openDocument&documentId=0ED0967890CBAB01C12563BD002D0B5F>.

⁵ Voir Orna Ben-Naftali, Aeyal Gross et Keren Michaeli, « Illegal occupation: framing the Occupied Palestinian Territory », *Berkeley Journal of International Law*, vol. 23, n° 3 (2005), p. 554 et 555. Le Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967 a recensé les critères d'illégalité suivants : annexion ; permanence de l'occupation ; l'occupant n'agit pas dans l'intérêt supérieur de la population occupée ; l'occupant n'administre pas le territoire de bonne foi (voir A/72/556, par. 28 à 38).

⁶ Voir A/HRC/50/21, par. 69 et 70.

de parties du Territoire palestinien occupé comme s'il possédait la souveraineté sur celui-ci.

12. Selon la Commission, il importe de distinguer annexion *de jure* et annexion *de facto*. L'annexion *de jure* est l'extension formelle de la souveraineté d'un État sur un territoire reconnue dans son droit interne (mais pas nécessairement en droit international). L'expression « annexion *de facto* » a été employée par la Cour internationale de Justice dans son avis consultatif sur les conséquences juridiques de l'édification d'un mur dans le Territoire palestinien occupé⁷ :

La Cour estime que la construction du mur et le régime qui lui est associé créent sur le terrain un « fait accompli » qui pourrait fort bien devenir permanent, auquel cas, et nonobstant la description officielle qu'Israël donne du mur, la construction de celui-ci équivaudrait à une annexion⁸.

13. L'annexion *de facto* résulte d'un processus graduel ou progressif, et il n'est pas toujours évident de déterminer à quel moment le seuil a été franchi. La transition passe par des « faits sur le terrain » qui sont destinés à être irréversibles et permanents, mais qui sont accomplis de manière à éviter toute déclaration formelle et à échapper à toute répercussion diplomatique ou politique⁹.

IV. Nature du contrôle exercé par Israël sur les territoires qu'il occupe¹⁰ et situation à l'intérieur d'Israël

A. Jérusalem-Est

14. Israël applique son droit interne à Jérusalem-Est depuis 1967, au moyen de plusieurs lois spécifiques, et a commencé à transférer la propriété de terres à l'État pour faciliter l'expansion de son contrôle et l'établissement de colonies israéliennes¹¹ sur les terres palestiniennes¹². En 1967, Israël a unilatéralement intégré des terres palestiniennes d'une superficie de 70 000 dounoums¹³ dans la municipalité de Jérusalem¹⁴. Au moyen d'une série de lois, Israël a habilité son gouvernement de transférer à l'État des droits de propriété de Palestiniens de Jérusalem-Est et permis

⁷ *Conséquences juridiques de l'édification d'un mur dans le Territoire palestinien occupé, avis consultatif*, C. I. J. Recueil 2004, p. 136, par. 75 à 78.

⁸ *Ibid.*, par. 121.

⁹ Voir A/73/447, par. 30.

¹⁰ Aux fins du présent rapport, l'expression « les territoires qu'Israël occupe » et les expressions équivalentes désignent Jérusalem-Est, le Golan syrien, Gaza et la Cisjordanie en dehors de Jérusalem-Est.

¹¹ Dans les rapports de l'Organisation des Nations Unies sur le Territoire palestinien occupé, le terme « *settlements* » est utilisé dans les versions anglaises et « colonies » dans les versions françaises. La Commission suit cet usage dans le présent rapport et se penchera sur la terminologie juridique ultérieurement.

¹² Conformément à l'ordonnance sur les terrains (acquisition à des fins publiques) de 1943, telle que modifiée en 1946. Voir Efrat Cohen-Bar et autres, *Trapped by Planning: Israeli Policy, Planning, and Development in the Palestinian neighborhoods of East Jerusalem* (Jerusalem, Bimkom – Planners for Planning Rights, 2014). Voir également Ir Amim, « Settlements and national parks », disponible à l'adresse www.ir-amim.org.il ; Amnon Ramon et Yael Ronen, *Residents, not Citizens: Israeli Policy towards the Arabs in East Jerusalem 1967-2017* (Jerusalem Institute for Policy Research, 2017), p. 49, 50 et 56.

¹³ Les taux de conversion suivants ont été utilisés aux fins du présent rapport :

1 acre = 4,04686 dounoums ; 1 hectare = 10 dounoums ; 1 km² = 999,64 dounoums.

¹⁴ Voir A/HRC/22/63, par. 25. Voir également Cohen-Bar et autres, *Trapped by Planning*, p. 8.

à des organisations de colons israéliens d'engager des procédures d'expulsion¹⁵. En outre, l'établissement de parcs nationaux a servi à étendre les zones contrôlées par Israël et à favoriser la contiguïté de ces zones à des fins stratégiques¹⁶. Plus d'un tiers de la superficie de Jérusalem-Est a été expropriée pour la construction de colonies israéliennes, seulement 13 % de la zone annexée étant actuellement affectée à la construction de bâtiments palestiniens¹⁷. Des faits plus récents, comme la décision 3790 (2018) prise par le Gouvernement israélien, ont suscité des inquiétudes quant à la possibilité que ce dernier prépare l'établissement de nouvelles colonies et l'expropriation d'autres biens palestiniens¹⁸.

15. À ce jour, 14 colonies ont été établies à Jérusalem-Est ; leur population totale est de plus de 229 000 personnes¹⁹. À Jérusalem-Est, les régimes restrictifs d'aménagement du territoire et de zonage, qui entravent l'accès des Palestiniens à des logements, infrastructures et moyens de subsistance adéquats, ont contribué au rétrécissement de l'espace disponible pour la population palestinienne²⁰. Par ses politiques, Israël continue d'empiéter sur l'habitat et l'espace des Palestiniens : au moins 218 ménages palestiniens de Jérusalem-Est courent actuellement un risque imminent d'expulsion forcée en raison de procédures portées devant des tribunaux israéliens, principalement par des organisations de colons israéliens²¹. La Commission note que le choix de l'emplacement de certaines nouvelles colonies, comme Gi'vat Hamatos, réduit encore la probabilité de la fin de l'occupation et viole le droit des Palestiniens à l'autodétermination²². Une ceinture de colonies situées au-delà des frontières municipales de Jérusalem contribue également à rompre la contiguïté géographique entre Jérusalem-Est et le reste de la Cisjordanie occupée. Ainsi, le plan concernant la zone E1 à l'est de Jérusalem (en dehors des frontières municipales) est destiné à renforcer les colonies de la zone de Maalé Adoumim et à les relier à Jérusalem, ce qui aurait pour effet de diviser la Cisjordanie en deux entités distinctes²³.

16. Le Conseil de sécurité et l'Assemblée générale ont fermement rejeté les mesures législatives et administratives prises par Israël depuis 1967. Après l'adoption en 1980 de la Loi fondamentale portant désignation de Jérusalem comme capitale d'Israël, qui a consolidé la présumée annexion *de jure* de Jérusalem-Est, le Conseil de sécurité a réaffirmé que l'acquisition de territoire par la force était inadmissible. Il a en outre

¹⁵ Voir Conseil norvégien pour les réfugiés, « Legal memo: the absentee property law and its application to East Jerusalem », février 2017 ; Amnesty International, *Israel's Apartheid against Palestinians: Cruel System of Domination and Crime against Humanity* (Londres, 2022), p. 114 ; Adalah, « The legal implications of land registration procedures implemented by Israel in East Jerusalem », 14 juillet 2022, disponible en anglais à l'adresse www.adalah.org.

¹⁶ Terrestrial Jerusalem, « The strategic encirclement of Jerusalem's old city – the emergence of a settler-controlled biblical realm », 2022, disponible auprès de la Commission, p. 7 et 8 ; Ir Amim, « Settlements and national parks ».

¹⁷ Voir ONU, Bureau de la coordination des affaires humanitaires, « The planning crisis in East Jerusalem: understanding the phenomenon of "illegal" construction », avril 2009.

¹⁸ Voir www.gov.il/he/departments/policies/dec3790_2018 (en hébreu).

¹⁹ Voir La paix maintenant, « Jérusalem ». Disponible en anglais à l'adresse <https://peacenow.org.il/en/settlements-watch/settlements-data/jerusalem>.

²⁰ Voir A/HRC/49/85, par. 11. Voir également Bureau de la coordination des affaires humanitaires, « West Bank, East Jerusalem: key humanitarian concerns », 21 décembre 2017 ; Cohen-Bar et autres, *Trapped by Planning*, p. 39.

²¹ Voir A/HRC/49/85, par. 25 ; A/76/336, par. 35 ; S/2021/584, par. 6.

²² Voir, par exemple, La paix maintenant, « Givat Hamatos – a new Israeli neighborhood in East Jerusalem », 13 octobre 2011.

²³ A/HRC/49/85, par. 6.

décidé de ne pas reconnaître la Loi fondamentale et les autres actions d'Israël qui, du fait de cette loi, cherchent à modifier le caractère et le statut de Jérusalem²⁴.

B. Le Golan syrien

17. Le Golan syrien, situé dans le sud-est de la République arabe syrienne, a été occupé par Israël pendant la guerre de 1967. Une partie de cette zone, y compris la ville de Qouneïtra, a été restituée à la République arabe syrienne au titre de l'Accord sur le dégageant des forces israéliennes et syriennes de 1974²⁵. Israël a prétendument annexé le Golan syrien occupé en 1981 en adoptant une loi visant à étendre la compétence de ses tribunaux, sa législation et son administration à cette zone²⁶. Le Conseil de sécurité a définitivement rejeté cette mesure, jugée illégale²⁷. Les États-Unis d'Amérique sont le seul pays à avoir reconnu la présumée annexion.

18. Le 1^{er} juin 1967, environ 90 000 Syriens vivaient dans le Golan. Un mois plus tard, il n'en restait plus que 6 396. Une délégation du Comité international de la Croix-Rouge a constaté que la plupart des réfugiés du Golan avaient été expulsés²⁸. À partir de 1967, Israël a établi des colonies dans le Golan pour créer une réalité de terrain qui établirait irréversiblement son contrôle sur le territoire. Aujourd'hui, on compte 34 colonies dans le Golan. En décembre 2021, le Gouvernement israélien a approuvé un plan visant à y mettre en place 7 300 unités de logement supplémentaires au cours des cinq années suivantes afin de doubler le nombre d'habitants, ainsi qu'à y établir deux nouvelles colonies²⁹.

C. Bande de Gaza

19. Israël a occupé la bande de Gaza pendant la guerre de 1967 et a procédé à l'expropriation de terres et à l'établissement de colonies peu après. En 1997, il avait établi 19 colonies s'étendant sur 23 000 dounoums et comptant quelque 5 000 colons³⁰. Bien qu'Israël se soit désengagé de Gaza en 2005, la Commission note qu'il continue d'occuper ce territoire du fait du contrôle qu'il exerce, entre autres, sur son espace aérien et ses eaux territoriales, ainsi que sur les postes frontière terrestres, les infrastructures civiles, notamment l'approvisionnement en eau et en électricité, et des fonctions administratives clés telles que la gestion des registres de l'état civil de la population palestinienne³¹.

20. La bande de Gaza est également soumise à un blocus imposé par Israël et soutenu par l'Égypte depuis que les autorités *de facto* ont assumé certaines fonctions de gouvernance en 2007. Depuis, ce blocus a été resserré ou assoupli à plusieurs reprises. Il restreint la circulation des personnes et des biens vers et depuis le

²⁴ Voir résolution 478 (1980) du Conseil de sécurité. Voir également ONU, Comité pour l'exercice des droits inaliénables du peuple palestinien, « Le statut de Jérusalem » (New York, 1997), p. 24. Disponible à l'adresse <https://unispal.un.org/pdfs/97-24262f.pdf>.

²⁵ S/11302/Add.1.

²⁶ Loi sur le plateau du Golan de 1981. Disponible en hébreu à l'adresse https://fs.knesset.gov.il/10/law/10_Isr_211778.PDF.

²⁷ Voir résolution 497 (1981) du Conseil de sécurité.

²⁸ Voir Akevot Institute, « Displacement in the Heights: how the population of the Golan Heights vanished in 1967 », 19 septembre 2022, image intitulée « Annex to Moreillon's letter ». Disponible à l'adresse www.akevot.org.il/en/article/displacement-in-the-golan/#popup/acfbb382d6c3e88ba2b9e112e710a627.

²⁹ Voir www.gov.il/he/departments/news/spoke_golan261221 (en hébreu).

³⁰ Voir A/52/172-E/1997/71, par. 26.

³¹ Voir A/HRC/50/21, par. 16.

territoire. Il a été condamné à de nombreuses reprises en tant que politique susceptible de constituer une peine collective³².

D. Israël

21. La Commission a constaté plusieurs similitudes entre le traitement qu'Israël a réservé aux Palestiniens à l'intérieur du pays à partir de 1948 et les politiques qu'il applique dans le Territoire palestinien occupé.

22. Entre 1948 et 1966, environ 85 % des Palestiniens d'Israël vivaient dans trois zones soumises à un régime militaire et placées sous l'autorité de trois gouverneurs militaires³³. Israël maintenait qu'il avait établi ce régime pour des raisons de sécurité, puisque chacune des trois zones était limitrophe de « pays ennemis ». D'après une enquête gouvernementale sur le régime militaire, Israël visait à répondre au risque qui existait selon lui que les Palestiniens résidant à l'intérieur d'Israël collaborent avec les pays arabes voisins pour agir contre ses intérêts de sécurité ; un autre objectif consistait à maîtriser et à réduire le nombre de réfugiés de Palestine cherchant à rentrer chez eux³⁴.

23. Le régime militaire a pris fin en 1967, mais ses effets perdurent. En 2022, les Palestiniens citoyens d'Israël restent soumis à des politiques discriminatoires, notamment la confiscation de terres, les démolitions et les expulsions qui touchent en particulier les Bédouins du Néguev et les Palestiniens résidant dans d'autres régions d'Israël. En outre, plusieurs lois israéliennes sont discriminatoires à l'égard des Palestiniens citoyens d'Israël. Par exemple, la loi sur l'État-nation de 2018 réserve aux seuls juifs le droit à l'autodétermination en Israël et retire à l'arabe le statut de langue officielle dont il bénéficiait aux côtés de l'hébreu³⁵. En outre, la loi sur la citoyenneté et l'entrée en Israël (ordonnance temporaire) restreint le regroupement familial et entrave le droit d'épouser la personne de son choix³⁶.

E. La Cisjordanie en dehors de Jérusalem-Est

24. En application des Accords d'Oslo, la Cisjordanie a été répartie en trois zones : A, B et C (à l'exclusion de Jérusalem-Est et de la bande de Gaza). Israël exerce un contrôle quasi exclusif sur la zone C, qui recouvre plus de 60 % de la Cisjordanie³⁷. Les dispositions des Accords, qui ne se substituent pas aux obligations découlant du droit international, attribuent à l'Autorité palestinienne le contrôle sur la zone A en matière civile et dans le domaine de la sécurité, et le contrôle sur la zone B en matière civile. Il était prévu dans les Accords que l'Autorité palestinienne assumerait

³² Voir A/74/468, par. 22, A/73/420, par. 7, et A/72/565, par. 28.

³³ Voir <https://storymaps.arcgis.com/stories/81adbee036594229ac65032b8fb80e07?locale=he> (en hébreu).

³⁴ Akevot Institute, « Security settlements and the question of land: the Ratner Committee report on military rule and its secret annex », 24 février 1956.

³⁵ Voir CERD/C/ISR/CO/17-19, par. 13 à 15, et CCPR/C/ISR/CO/5, par. 10. Voir aussi Adalah, « The discriminatory laws database », 25 septembre 2017 ; Centre des droits de l'homme pour l'aide judiciaire à Jérusalem, « Families divided: Israel passes new citizenship law, fortifies apartheid regime » ; Adalah, « Adalah petitions Israeli Supreme Court against new citizenship law banning Palestinian family unification ».

³⁶ Voir Knesset, « Knesset plenum passes Citizenship and Entry into Israel Bill into law », 10 mars 2022 ; Centre des droits de l'homme pour l'aide judiciaire à Jérusalem, « Families divided » ; Adalah, « Adalah petitions Israeli Supreme Court ».

³⁷ Voir Bureau de la coordination des affaires humanitaires, « Area C of the West Bank: key humanitarian concerns », version mise à jour, août 2014.

progressivement le contrôle de la Cisjordanie, de manière échelonnée, à l'exception des questions à régler dans le cadre des négociations sur le statut permanent³⁸.

L'entreprise de peuplement israélienne

« Vu les négociations en cours sur l'avenir de la Judée-Samarie, il nous faut désormais mener une course contre la montre. Pendant la période en question, tout sera déterminé principalement par les faits que nous établirons dans ces territoires, plutôt que par toute autre considération. C'est donc le meilleur moment pour lancer une campagne de peuplement vaste et complète (...). »

Source : Fédération sioniste mondiale, « Peuplement en Judée et en Samarie : stratégie, politique et plan » (voir A/36/341-S/14566, annexe).

25. Depuis le début de l'occupation, Israël a établi ou aidé à établir des centaines d'implantations civiles dans le Territoire palestinien occupé ; cette entreprise, qui est contraire au droit international, constitue le principal moteur de son occupation prolongée. Israël a dépensé plusieurs milliards de dollars pour construire des colonies et les infrastructures correspondantes : routes, systèmes de distribution et d'assainissement de l'eau, systèmes de communication et d'électricité, systèmes de sécurité et établissements d'enseignement et de soins de santé³⁹. L'un des principes fondamentaux du droit applicable aux occupations belligérantes est que la Puissance occupante doit protéger les intérêts fondamentaux de la population sous occupation, ce qui passe notamment par l'interdiction du transfert de sa propre population civile dans le territoire qu'elle occupe⁴⁰. L'article 49 de la quatrième Convention de Genève vise à empêcher la Puissance occupante de transférer une partie de sa propre population dans un territoire occupé pour des raisons politiques ou raciales ou pour coloniser ce territoire⁴¹.

26. Alors que toutes les colonies israéliennes sont toutes considérées comme illégales au regard du droit international, Israël distingue les colonies « autorisées » et les avant-postes non autorisés, qu'il considère comme illégaux. Pourtant, il fournit à ces avant-postes des services essentiels, notamment en matière d'alimentation électrique et de sécurité, et leur attribue des terres agricoles et pastorales⁴². En avril 2022, le Bureau du Procureur général d'Israël a estimé dans un avis juridique que les avant-postes situés sur des « terres domaniales » pouvaient être reliés au réseau électrique officiel⁴³. À ce jour, le Gouvernement israélien a autorisé rétroactivement 23 avant-postes en les intégrant dans des colonies voisines ou en leur accordant le statut de colonie indépendante. Selon l'organisation La paix maintenant, deux

³⁸ Voir l'Accord intérimaire israélo-palestinien sur la Rive occidentale et la bande de Gaza (A/51/889-S/1997/357, annexe), art. XI, par. 2.

³⁹ Voir TD/B/EX(71)/2, par. 40 et 66. Voir également Kerem Navot, « The Wild West: grazing, seizing and looting by Israeli settlers in the West Bank », mai 2022. Voir également Yesh Din, *Plundered Pastures: Israeli Settler Shepherding Outposts in the West Bank and Their Infringement on Palestinians' Human Rights*, document de position, décembre 2021.

⁴⁰ Quatrième Convention de Genève, art. 27 et 49.

⁴¹ Voir CICR, commentaire de 1958 sur l'article 49 de la Convention de Genève relative à la protection des personnes civiles en temps de guerre. Disponible à l'adresse <https://ihl-databases.icrc.org/applic/ihl/dih.nsf/Comment.xsp?action=openDocument&documentId=D057D712602414BEC12563BD002D0BF8>.

⁴² Voir Kerem Navot, « The Wild West » et Yesh Din, « Plundered pastures ».

⁴³ Disponible auprès de la Commission. Selon l'avis juridique, les villages palestiniens de la zone C peuvent également être reliés au réseau électrique officiel.

avant-postes ont été évacués après leur création, mais le Gouvernement serait sur le point d'en autoriser rétroactivement au moins 12 autres⁴⁴.

27. Israël a tenté d'autoriser des colonies et des avant-postes créées sur des terres palestiniennes privées au moyen de mesures législatives. La loi sur la régularisation de 2017 s'applique aux colonies créées sur des terres palestiniennes privées ou sans autorisation préalable avant l'entrée en vigueur de ce texte⁴⁵. En 2020, la Cour suprême d'Israël a censuré cette loi au motif qu'elle portait atteinte aux droits codifiés dans la Loi fondamentale relative à la dignité et à la liberté de la personne, puisqu'elle entraînerait l'expropriation de terres palestiniennes privées et le transfert de la propriété de ces terres à des colons⁴⁶. La Cour a toutefois décidé que les avant-postes créés sur des terres palestiniennes privées pouvaient être autorisés s'ils avaient été établis « de bonne foi ». En 2022, la Cour suprême a déterminé qu'il n'était pas nécessaire d'évacuer l'avant-poste de Mitzpeh Kramim parce que les propriétaires privés des terres avaient été expropriés conformément au critère de la bonne foi et que les « règles régissant le marché »⁴⁷ s'appliquaient aux avant-postes⁴⁸. De fait, elle a ainsi laissé toute latitude aux autorités pour approuver les avant-postes créés sur des terres palestiniennes privées en Cisjordanie.

28. Entre juin 2021 et juin 2022, six nouveaux avant-postes ont été créés⁴⁹. Au cours de cette période, plusieurs membres du Gouvernement ont explicitement exprimé leur soutien à l'établissement d'avant-postes ainsi qu'à des décisions judiciaires tendant à autoriser rétroactivement des avant-postes⁵⁰. Le 20 juillet 2022, des centaines de colons se sont rassemblés en six endroits différents pour créer de nouveaux avant-postes. Les forces de sécurité israéliennes ont publié une déclaration qualifiant ces actes d'illégaux⁵¹ et déployé d'importantes forces de police militaire et civile.

⁴⁴ Voir La paix maintenant, « West Bank population ». Disponible en anglais à l'adresse <https://peacenow.org.il/en/settlements-watch/settlements-data/jerusalem>.

⁴⁵ Loi sur la réglementation des colonies en Judée-Samarie (2017). Disponible en hébreu sur www.nevo.co.il/law_html/law01/501_553.htm.

⁴⁶ Décision rendue le 9 juin 2020 par la Cour suprême dans les affaires n^{os} 1308/17 et 2055/17. Disponible en hébreu à l'adresse <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts%5C17%5C080%5C013%5Cv48&fileName=17013080.V48&type=2>.

⁴⁷ L'expression « réglementation régissant le marché » concerne les terrains acquis auprès du Commissaire chargé des biens publics et des terres abandonnées en Judée-Samarie et dont la propriété avait été jugée publique au moment de la transaction, alors qu'il s'agissait en fait de biens privés. Voir <https://lawjournal.huji.ac.il/sites/default/files/2020-11/mishpatim-50-2-307.pdf> (en hébreu).

⁴⁸ Décision rendue par la Cour suprême le 27 juillet 2022 dans l'affaire n^o 6364/20. Disponible en hébreu à l'adresse <https://storage.googleapis.com/haaretz-cms-prod/df/d2/89f3ad634b02a194f7aac204a15b/gada.pdf>.

⁴⁹ L'organisation La paix maintenant fait état de quatre cas d'avant-postes qui ont été créés entre juin 2021 et juin 2022 mais dont les colons ont été expulsés immédiatement, ainsi que d'une augmentation des démolitions de petits avant-postes créés par des « jeunes des collines ». Voir La paix maintenant, « The government of unequivocal annexation: deepening of the settlement project, dispossession and oppression – one year of the Israeli government headed by Yair Lapid and Naftali Bennett », juin 2022.

⁵⁰ Voir https://twitter.com/Ayelet__Shaked/status/1549851212199202821 (en hébreu) ; <https://twitter.com/gidonsaar/status/155230355646777537> (en hébreu).

⁵¹ Déclaration conjointe des Forces de défense israéliennes et de la police israélienne en date du 20 juillet 2022. Disponible en hébreu à l'adresse www.idf.il/%D7%9B%D7%AA%D7%91%D7%95%D7%AA-%D7%95%D7%A2%D7%93%D7%9B%D7%95%D7%A0%D7%99%D7%9D/2022/%D7%99%D7%95%D7%9C%D7%99%D7%90%D7%99%D7%95%D7%A9-%D7%9B%D7%95%D7%97%D7%95%D7%AA-%D7%91%D7%99%D7%98%D7%97%D7%95%D7%9F-%D7%A9%D7%98%D7%97%D7%99%D7%9D-%D7%A6%D7%91%D7%90%D7%99%D7%9D-%D7%A1%D7%92%D7%95%D7%A8%D7%99%D7%9D-%D7%97%D7%95%D7%A7-%D7%9E%D7%90%D7%97%97

Cependant, bien qu'ils aient annoncé leurs intentions à l'avance, les colons ont été autorisés à accéder aux sites concernés et ont mis en place des structures temporaires avant que les forces de sécurité n'évacuent les lieux⁵².

29. Le financement des colonies et des avant-postes proviendrait de diverses sources étatiques et non étatiques, de donateurs privés et de fonds collectés par des organismes israéliens et étrangers à but non lucratif⁵³, y compris des organisations privées telles que Nahala et Amana⁵⁴. La Division du peuplement de l'Organisation sioniste mondiale joue un rôle clé dans la création des colonies et des avant-postes, ainsi que dans l'appui qui leur est apporté. Créée en 1971, elle est financée par le Gouvernement israélien, bien qu'elle ne relève pas de l'État. Elle soutient et finance activement les avant-postes. Par exemple, elle facilite leur régularisation en ce qui concerne leur raccordement au réseau électrique et l'établissement des plans de construction⁵⁵.

30. L'établissement, le maintien et l'expansion des colonies israéliennes dans toute la Cisjordanie, y compris Jérusalem-Est, ont fragmenté la population palestinienne et isolé les Palestiniens de leurs terres ainsi que des autres communautés palestiniennes. La Commission souligne que les colonies, où qu'elles soient situées, ont des effets en cascade sur les Palestiniens de l'ensemble de la Cisjordanie. En omettant dans une grande mesure de faire respecter les lois, en continuant d'autoriser rétroactivement la création d'avant-postes de colonies, en négligeant les violences commises par les colons dans ces avant-postes⁵⁶ et en dispensant de sanctions juridiques les colons qui enfreignent les lois, Israël indique clairement aux colons que les avant-postes sont un moyen viable et quasi légal d'établir de nouvelles colonies et d'étendre la présence israélienne en Cisjordanie.

Expropriation et exploitation de terres et d'autres ressources naturelles

31. Depuis le début de l'occupation, Israël invoque des raisons d'ordre militaire pour prendre des mesures permanentes ou temporaires restreignant l'accès à de vastes zones de la Cisjordanie. En pratique, une grande partie des terres en question a été utilisée non pas à des fins militaires, mais pour la création de colonies. Israël a affecté environ 18 % du territoire de la Cisjordanie à des zones militaires d'accès réglementé, notamment dans la zone C⁵⁷. Ces zones couvrent plus de la moitié de la zone C (soit 1,765 million de dounoums). Les colons israéliens ont cultivé plus de 14 000

[D7%96%D7%99%D7%9D-%D7%91%D7%9C%D7%AA%D7%99-%D7%97%D7%95%D7%A7%D7%99%D7%99%D7%9D/](https://www.inn.co.il/news/571834)

⁵² Voir www.inn.co.il/news/571834 (en hébreu). Voir également Hagar Shezaf, « Israeli forces evacuate short-lived outposts set up by West Bank settler movement », *Haaretz*, 21 juillet 2022 ; Hagar Shezaf, « Settlers camp out in six locations across the West Bank, planning to establish new outposts », *Haaretz*, 20 juillet 2022.

⁵³ Uri Blau, « From N.Y.C. to the West Bank: following the money trail that supports Israeli settlements », *Haaretz*, 7 décembre 2015. Voir également http://peacenow.org.il/wp-content/uploads/2020/11/TheCombina_Hebl.pdf, p. 7 et 8 (en hébreu).

⁵⁴ Voir [A/HRC/49/85](https://www.ohchr.org/fr/doc/doc.aspx?lang=fr&docid=32111), par. 42. Voir également Hagar Shezaf, « How a Jewish settler group raised millions to set up illegal outposts », *Haaretz*, 20 juillet 2022.

⁵⁵ Voir www.gov.il/BlobFolder/reports/work_plan290622/he/work_plan290622.pdf, élément n° 7 (en hébreu).

⁵⁶ Voir par. 67 et 68 du présent rapport.

⁵⁷ Voir Bureau de la coordination des affaires humanitaires, « The humanitarian impact of Israeli-declared "firing zones" in the West Bank », août 2012.

dounoums de terres dans les zones militaires d'accès réglementé, dont une partie est constituée de terres palestiniennes privées⁵⁸.

32. Dans une décision rendue en 1979, la Cour suprême d'Israël a déterminé que la pratique consistant à émettre des ordonnances militaires pour exproprier des terres afin d'y établir des colonies était contraire au droit international⁵⁹. Cependant, Israël a continué de créer des zones de tir militaires qui ont ensuite été utilisées à d'autres fins. Dans les années 1980, la région de Massafer Yatta, située dans les collines du sud d'Hébron, a été déclarée zone militaire d'accès restreint (zone de tir n° 918), ce qui a eu des effets sur les dizaines de familles palestiniennes qui y vivaient déjà avant 1948⁶⁰. D'après des procès-verbaux publiés récemment qui rendent compte de réunions entre des responsables du Gouvernement israélien et de la Division du peuplement, Israël a établi des zones militaires pour des raisons non militaires, notamment en vue de l'établissement et de l'expansion de colonies⁶¹. En 1981, Ariel Sharon, qui était alors Ministre de l'agriculture, s'est réuni avec la Division du peuplement et a proposé la création d'une zone de tir dans les collines du sud d'Hébron dans l'objectif explicite de contrer l'expansion des populations des villages arabes du flanc de la montagne vers le désert⁶².

33. Israël a désigné de grandes zones comme terres domaniales, en s'appuyant sur le décret n° 59 de 1967 (5727-1967) relatif aux biens publics en Judée-Samarie, qui établit que l'administrateur du Département des biens des absents peut attribuer des biens à l'État et prendre toutes les mesures qu'il juge nécessaires à cette fin⁶³. Israël a désigné comme terres domaniales plus de 750 000 dounoums de terrain en Cisjordanie en vertu de ce décret⁶⁴. Israël a également utilisé une procédure cartographique, qu'il nomme la « procédure relatives aux terres à cadastrer » et qui est fondée sur le code foncier ottoman, pour déterminer si des terres sont incultes ou insuffisamment cultivées et peuvent donc être classées comme terre domaniales⁶⁵.

34. Des parcelles de terre en Cisjordanie ont été désignées comme réserves naturelles ou comme parcs. À ce jour, Israël a créé environ 48 réserves naturelles d'une superficie totale d'au moins 383 600 dounoums, soit environ 12 % de la zone C

⁵⁸ Voir Kerem Navot, *A Locked Garden: Declaration of Closed Areas in the West Bank*, mars 2015, p. 10 à 15.

⁵⁹ Décision rendue par la Cour suprême le 22 octobre 1979 dans l'affaire n° 390/79. Disponible en hébreu à l'adresse <https://hamoked.org.il/items/1670.htm>. Voir également B'Tselem, *Under the Guise of Legality: Israel's Declarations of State Land the West Bank*, (Jérusalem, février 2012), p. 9 et 12.

⁶⁰ Voir B'Tselem, « Masafer Yatta communities Israel is trying to drive out », 1^{er} janvier 2013. Disponible en anglais à l'adresse www.btselem.org/south_hebron_hills/masafer_yatta.

⁶¹ Voir Yuval Abraham, « Classified document reveals IDF "firing zones" built to give land to settlers », +972 Magazine, 11 juillet 2022.

⁶² Voir Akevot, « Document exposed by Akevot: Ariel Sharon instructed IDF to create training zone to displace Palestinians », 9 août 2020, disponible en anglais à l'adresse www.akevot.org.il/en/news-item/document-revealed-by-akevot-ariel-sharon-instructed-idf-to-create-training-zone-to-displace-palestinians/. Voir également le procès-verbal de la réunion tenue le 12 juillet 1981 entre la commission gouvernementale chargée du peuplement et l'Organisation sioniste mondiale, disponible à l'adresse www.akevot.org.il/wp-content/uploads/2020/08/1981-07-12-%D7%95%D7%A2%D7%93%D7%AA-%D7%A9%D7%A8%D7%99%D7%9D-%D7%9C%D7%94%D7%AA%D7%99%D7%A9%D7%91%D7%95%D7%AA-%D7%A4%D7%A8%D7%95%D7%98%D7%95%D7%A7%D7%95%D7%9C-%D7%9E%D7%9C%D7%90-%D7%9E%D7%9B%D7%95%D7%9F-%D7%A2%D7%A7%D7%91%D7%95%D7%AA.pdf.

⁶³ Voir B'Tselem, *Land Grab: Israel's Settlement Policy in the West Bank* (Jérusalem, mai 2002), p. 52. Voir également B'Tselem, *Under the Guise of Legality*, p. 13.

⁶⁴ Voir Kerem Navot, *Blue and White Make Black: The Work of Blue Line Team in the West Bank*, décembre 2016, p. 6 et 42.

⁶⁵ Ibid, p. 6, 7 et 39.

et environ 7 % de l'ensemble de la Cisjordanie⁶⁶. En janvier 2020, le Ministre israélien de la défense a établi sept nouveaux parcs nationaux d'une superficie de plus de 130 000 dounoums et agrandi 12 réserves existantes. Selon l'organisation La paix maintenant, sur cette surface, 20 000 dounoums de terres appartiennent à des particuliers palestiniens qui n'auront pas le droit de les cultiver ni d'y mener d'activités de construction⁶⁷.

35. En plus d'exproprier des terres, Israël a pris le contrôle de toutes les ressources en eau de la Cisjordanie et en utilise une grande partie pour satisfaire ses propres besoins. Par l'ordonnance militaire n° 92 (1967), il a revendiqué le contrôle des trois principales sources d'eau de Cisjordanie et a interdit aux Palestiniens de construire de nouvelles installations hydriques ainsi que d'entretenir les installations existantes sans autorisation militaire. Dans le même temps, Israël a mis en place ses propres infrastructures hydriques pour ses colonies, de même que sur son propre territoire⁶⁸.

36. Israël a également utilisé des terres pour son activité industrielle et économique en créant des zones industrielles en divers endroits de la Cisjordanie. Il a encouragé les entreprises à transférer leurs activités dans ces zones en leur offrant des incitations financières, des permis et des licences qui sont rarement accordés aux entreprises qui fournissent des services aux Palestiniens⁶⁹. Israël a pris des mesures énergiques pour dissuader les États et les entreprises de distinguer les produits fabriqués en Israël de ceux provenant des colonies⁷⁰.

37. En 2015, Israël exploitait 11 carrières produisant 10 millions à 12 millions de tonnes de matières premières dans la zone C, notamment de la pierre, du gravier et d'autres minéraux. Environ 10 millions de tonnes de ces matières premières ont été transférées en Israël. Source de revenus croissants, les carrières de Cisjordanie sont une composante importante du secteur israélien des matières premières⁷¹. En 2015, Israël a reçu 74 102 235 shekels⁷² de redevances et de droits d'utilisation provenant de ces carrières⁷³.

⁶⁶ Voir La paix maintenant, « The Minister of Defense approved the declaration of the largest nature reserve in 25 years in the West Bank », 24 mai 2022.

⁶⁷ Voir https://twitter.com/naftalibennett/status/1217372351911866369?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1217372351911866369%7Ctwgr%5Edc7765b546f118b60ef9d4da93dbb32b48287d60%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.zman.co.il%2F88980%2F (en hébreu). Voir également Hagar Shezaf, « Israeli defense chief approves new West Bank nature reserves to “develop Jewish settlement” », *Haaretz*, 15 janvier 2020 ; La paix maintenant, « The Minister of Defense approved the declaration of the largest nature reserve in 25 years in the West Bank ».

⁶⁸ Voir A/HRC/48/43, par. 18. Voir également ONU, « Israel's policy on the West Bank water resources », 1980, disponible en anglais à l'adresse www.un.org/unispal/document/auto-insert-206852/ ; Jerusalem Media and Communication Centre, *Israeli Military Orders in the Occupied Palestinian West Bank (1967-1992)*, disponible à l'adresse www.jmcc.org/Documentsandmaps.aspx?id=622 ; Amnesty International, « Israel/Occupied Palestinian Territories: demand dignity: troubled waters – Palestinians denied fair access to water », 27 octobre 2009.

⁶⁹ Voir A/HRC/37/39, par. 43 et 44.

⁷⁰ Voir, par exemple, Middle East Monitor, « Israel threatens Norway with “adverse” impact following change in settlement labels », 13 juin 2022 ; Barak Ravid, « Israel considers suing EU over decision to label settlement products », *Haaretz*, 19 novembre 2015.

⁷¹ Ministère du logement, rapport du Comité d'examen des politiques foncières dans le secteur extractif, avril 2015, p. 10 et 11. Disponible en hébreu à l'adresse www.gov.il/BlobFolder/policy/balnikov/he/balnikov_final_report_26042015.pdf.

⁷² Au 2 septembre 2022, le taux de conversion était de 3,40 shekels pour 1 dollar des États-Unis.

⁷³ Voir <https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/%D7%A0%D7%99%D7%99%D7%A8+%D7%A2%D7%9E%D7%93%D7%94+%D7%9E%D7%97%D7%A6%D7%91%D7%95%D7%AA/38443.pdf> (en hébreu).

38. Des entités quasi gouvernementales ont joué un rôle dans l'expropriation des terres et la gestion de leur attribution aux colonies⁷⁴. Le Fonds national juif, par exemple, a été créé en 1901 pour acheter des terres dans la région et y établir des implantations juives. Après 1967, il a acquis des terres auprès de Palestiniens en Cisjordanie pour faciliter l'établissement de colonies et a étendu ses autres domaines d'activité pour soutenir ces dernières⁷⁵. En août 2022, les médias israéliens ont rapporté que le Fonds national juif avait voté l'allocation d'un montant de 61 millions de shekels à l'acquisition de terres appartenant à des Palestiniens dans la vallée du Jourdain, à l'intérieur d'une zone militaire d'accès réglementé⁷⁶.

39. La terre est une ressource naturelle essentielle, qui fait partie intégrante de l'identité et de l'économie palestiniennes. Actuellement, les Palestiniens peuvent mener des activités de construction sur moins de 1 % des terres de la zone C⁷⁷, du fait des politiques d'aménagement israéliennes et de l'expropriation de plus de 2 millions de dounoums de terres par Israël depuis 1967. Israël a exproprié des propriétaires de leurs terres dans toute la Cisjordanie à des fins diverses, notamment pour mettre en place des colonies, des zones industrielles, des terres agricoles et pastorales pour les colons, ainsi que des routes, en violation du droit international⁷⁸.

40. En vertu du droit international, la Puissance occupante a le droit d'utiliser les ressources naturelles d'un territoire occupé dans une mesure limitée. Au titre de l'article 55 du Règlement concernant les lois et coutumes de la guerre sur terre de 1907 (Règlement de La Haye), la Puissance occupante ne peut agir que comme administrateur et usufruitier des édifices publics, immeubles, forêts et exploitations agricoles. Ce faisant, elle doit sauvegarder le fonds de ces propriétés et les administrer conformément aux règles de l'usufruit. De plus, le pillage est interdit par les articles 28 et 47 du Règlement de La Haye, ainsi que par l'article 33 de la quatrième Convention de Genève. Cette interdiction s'applique à tous les types de biens, que ceux-ci appartiennent à des personnes privées ou à l'État⁷⁹. Le pillage est en outre un crime de guerre au titre du paragraphe 2 b) xvi) de l'article 8 du Statut de Rome de la Cour pénale internationale.

Politiques restrictives en matière d'aménagement, de zonage et développement

41. Au titre des Accords d'Oslo, Israël était temporairement chargé de l'aménagement, du zonage et du développement de la zone C. Cependant, cette responsabilité n'a toujours pas été transférée à l'Autorité palestinienne, chose qui

⁷⁴ Pour plus d'informations sur l'Organisation sioniste mondiale, voir le paragraphe 31 du présent rapport.

⁷⁵ Voir La Paix Maintenant, « Involvement of KKL-JNF and the settlement division in the settlements », p. 2. Disponible à l'adresse http://peacenow.org.il/wp-content/uploads/2020/02/KKL_Settlement-Division-Fact-Sheet.pdf.

⁷⁶ Voir Hagar Shezaf, « Israel recruited the Jewish National Fund to secretly buy Palestinian Land for settlers », *Haaretz*, 15 juillet 2021. Voir également Hagar Shezaf, « JNF approves funds to buy Palestinian-owned Jordan Valley land at Israel's request », *Haaretz*, 3 août 2022 ; <https://peacenow.org.il/jnf-tender-for-land-registration> (en hébreu).

⁷⁷ Voir TD/B/EX(71)/2, par. 33.

⁷⁸ Voir B'Tselem, *State Business: Israel's Misappropriation of land in the West Bank through Settler Violence* (Jérusalem, novembre 2021), p. 7. Voir également B'Tselem, *Land Grab*, p. 47 ; Bureau de la coordination des affaires humanitaires, « Area C of the West Bank: key humanitarian concerns », version mise à jour en août 2014.

⁷⁹ Voir CICR, commentaire de 1958 sur l'article 33 de la Convention de Genève relative à la protection des personnes civiles en temps de guerre. Disponible à l'adresse <https://ihl-databases.icrc.org/applic/ihl/dih.nsf/Comment.xsp?action=openDocument&documentId=B35651ACAD5E6BDAC12563BD002D05DD>.

réduit grandement les possibilités de développement des Palestiniens⁸⁰. Israël s’est servi de son autorité en matière de planification et de zonage pour imposer aux activités de construction des restrictions considérables qui s’appliquent principalement aux Palestiniens, afin de limiter l’utilisation des terres par ces derniers et de soutenir le développement des colonies.

42. Israël a interdit les activités de construction palestiniennes dans 70 % de la zone C par l’établissement de terres domaniales, de réserves naturelles ou de zones militaires ; de plus, il impose d’importantes restrictions de zonage dans les 30 % restants⁸¹. Il rejette la plupart des demandes de permis de construire présentées par des Palestiniens au motif que le zonage ne permet pas les activités de construction, même lorsque le terrain appartient au demandeur⁸². Les Palestiniens obtiennent rarement les permis nécessaires pour construire des structures résidentielles ou des structures destinées à des activités économiques ou pour mettre en place des infrastructures. Pendant la période de 10 ans allant de 2009 à 2018, seulement 2 % environ des demandes de permis de construire ont été approuvées⁸³. En 2019 et en 2020, 32 demandes de permis et plans de construction présentés par des Palestiniens ont été approuvés et 310 autres ont été rejetés, tandis que l’Administration civile d’Israël a approuvé les plans relatifs à 16 098 unités dans les colonies israéliennes⁸⁴.

43. Selon la réglementation israélienne, les projets de construction doivent également être conformes aux plans d’aménagement régionaux du mandat britannique, qui limitent de vastes zones à un petit nombre de destinations : routes, agriculture, développement, réserves naturelles et plages⁸⁵. L’Administration civile et les tribunaux israéliens continuent de s’appuyer sur ces plans obsolètes pour traiter les demandes de permis de construire palestiniens, alors même qu’ils approuvent des centaines de nouveaux plans-cadres visant à modifier le zonage pour permettre les activités de construction des colonies israéliennes⁸⁶.

44. L’Autorité palestinienne est officiellement responsable de la prestation de services éducatifs, médicaux et autres dans la zone C, mais l’Administration civile est chargée de délivrer les permis de construire et d’extension des écoles et des cliniques, ce qui entrave considérablement la capacité des Palestiniens à fournir ces services⁸⁷. Les Palestiniens de la zone C pâtissent donc de l’insuffisance et du caractère inadéquat des possibilités d’aménagement, qui touchent tout particulièrement les groupes de population marginalisés comme les communautés de Bédouins et d’éleveurs palestiniens⁸⁸.

⁸⁰ Voir Programme des Nations Unies pour les établissements humains (ONU-Habitat), *Spatial Planning in Area C of the Israeli Occupied West Bank of the Palestinian Territory, Report of an International Advisory Board*, mai 2015, p. 10.

⁸¹ Voir Bureau de la coordination des affaires humanitaires, *Special Focus*, « Restricting space: the planning regime applied by Israel in Area C of West Bank », décembre 2009. Voir Bureau de la coordination des affaires humanitaires, « Area C of the West Bank: key humanitarian concerns », mise à jour d’août 2014 ; TD/B/EX(71)/2, par. 33.

⁸² Bureau de la coordination des affaires humanitaires, « Humanitarian Bulletin: January-May 2021 ». Disponible à l’adresse <https://www.ochaopt.org/content/humanitarian-bulletin-january-may-2021>.

⁸³ Voir La paix maintenant, « (Dis)approvals for Palestinians in Area C – 2009-2020 », 31 janvier 2021.

⁸⁴ Ibid.

⁸⁵ Voir Bureau de la coordination des affaires humanitaires, « Restricting space ». Voir également Limor Yehuda et autres, *One Rule, Two Legal Systems: Israel’s Regime of Laws in the West Bank*, Association for Civil Rights in Israel, octobre 2014, p. 100.

⁸⁶ Voir ONU-Habitat, *Spatial Planning in Area C*, p. 23.

⁸⁷ Voir Bureau de la coordination des affaires humanitaires, « Restricting space ».

⁸⁸ Voir ONU-Habitat, *Spatial Planning in Area C*, p. 10.

45. Des déclarations faites par des responsables israéliens font apparaître que les activités de construction des Palestiniens sont considérées comme un obstacle aux activités israéliennes de peuplement en Cisjordanie, d'où la nécessité de prendre des mesures de confiscation, de démolition et de déplacement, ainsi que de réduire le nombre de projets d'aide internationale en faveur des infrastructures palestiniennes dans la zone C⁸⁹. Les démolitions sont liées à l'expansion des colonies, étant donné que des ordres de démolition de grande ampleur sont émis lorsque des colonies israéliennes se voient attribuer des terres pour leur expansion⁹⁰. La Commission note que le régime de planification et de zonage appliqué par Israël se caractérise manifestement par une approche discriminatoire, puisqu'il est très restrictif lorsqu'il est appliqué aux projets de construction des Palestiniens alors qu'il est beaucoup moins strict lorsqu'il s'agit de l'aménagement et du zonage dans les colonies.

Extension de la législation israélienne à la Cisjordanie

46. Depuis le début de l'occupation, Israël a étendu l'application de sa législation à la Cisjordanie, d'où des modifications profondes du droit applicable et, dans la pratique, la coexistence de deux législations applicables : la législation militaire et la législation interne israélienne, qui est appliquée extraterritorialement aux seuls colons israéliens. Cette extension, qui a été opérée au moyen d'ordonnances militaires⁹¹, de dispositions législatives⁹² et de décisions de la Cour suprême⁹³, concerne le droit pénal, la législation nationale relative à l'assurance maladie, le droit fiscal et des lois électorales⁹⁴. Il existe en outre des systèmes juridiques distincts pour ce qui est de l'application du code de la route, et on peut constater un dédoublement institutionnel et législatif du régime de l'aménagement et de la construction⁹⁵.

47. Ce double système juridique a pour résultat que les Israéliens jouissent davantage des droits humains que les Palestiniens ; par conséquent, il est discriminatoire. Il fait partie des griefs soulevés dans la communication soumise par l'État de Palestine contre Israël en vertu de la Convention internationale sur l'élimination de toutes les formes de discrimination raciale⁹⁶. Il y a des différences marquées entre les deux systèmes juridiques, en particulier dans le droit pénal, d'où des répercussions importantes sur les droits des Palestiniens. Par exemple, selon le droit militaire, le fait de tenir et d'agiter un drapeau palestinien lors de manifestations

⁸⁹ Voir B'Tselem, « The annexation that was and still is », sans date, p. 4, disponible sur www.btselem.org/sites/default/files/publications/202010_the_annexation_that_was_and_still_is_eng.pdf. Voir aussi <https://main.knesset.gov.il/Activity/committees/ForeignAffairs/News/pages/pr290720.aspx> (en hébreu).

⁹⁰ Voir ONU-Habitat, *Spatial Planning in Area C*, p. 20. Voir également Bureau de la coordination des affaires humanitaires, « Demolitions and forced displacement in the occupied West Bank, January 2012 », 26 janvier 2012 ; Diakonia International Humanitarian Law Resource Centre, « Rule of law: a veil of compliance in Israel and the oPt 2010-2013 », mars 2014, p. 9.

⁹¹ Ordonnance militaire n° 892 concernant l'administration des conseils locaux (Judée-Samarie), 5741-1981, et ordonnance militaire n° 783 concernant l'administration des conseils régionaux (Judée-Samarie), 5739-1979.

⁹² Loi relative à la prorogation du régime d'urgence (Judée-Samarie : compétence des tribunaux et appui judiciaire).

⁹³ Par exemple, décision de la Cour suprême dans l'affaire n° 04/10104, sect. 2 (4), p. 95. Disponible en hébreu à l'adresse https://supremedecisions.court.gov.il/Home/Download?path=PediVerdicts/61/2&fileName=SA2_2_10104-04.pdf&type=4.

⁹⁴ Voir Limor Yehuda et autres, *One Rule, Two Legal Systems*, p. 6. Voir également Yesh Din, *The Israeli Occupation of the West Bank and the Crime of Apartheid: Legal Opinion*, document de position, juin 2020, p. 40 à 42.

⁹⁵ Voir Limor Yehuda et autres, *One Rule, Two Legal Systems*, p. 7 et 8.

⁹⁶ Voir https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/INT_CERD_ISC_9325_E.pdf (en anglais), par. 146 à 156.

ou de rassemblements de Palestiniens est considéré comme une menace contre la sécurité, ce qui limite sévèrement la liberté d'expression et la liberté de réunion pacifique et d'association des Palestiniens⁹⁷.

V. Les objectifs qui sous-tendent le régime d'occupation appliqué par Israël

48. Lorsqu'il expose sa position officielle sur les colonies, Israël rappelle la présence juive plurimillénaire sur le territoire et la reconnaissance dans le mandat pour la Palestine, qui a été adopté par la Société des Nations en 1922, des « liens historiques du peuple juif avec la Palestine »⁹⁸. Les Palestiniens ont dénoncé énergiquement les colonies israéliennes, faisant observer qu'elles n'avaient aucune validité en droit, constituaient des violations flagrantes du droit international, à savoir la quatrième Convention de Genève, et représentaient un obstacle majeur à la paix⁹⁹.

49. Dès le début de l'occupation, Israël a souligné que les menaces extérieures qui pesaient sur sa sécurité étaient un facteur clé de sa politique de colonisation. En 1977, le chef de la Division du peuplement de l'Organisation sioniste mondiale, Mattityahu Drobbless, a établi le plan de colonisation Drobbless pour la Cisjordanie (publié en 1978), dans lequel il a rappelé que le vaste « front oriental du refus » qui réunissait la République arabe syrienne, l'Iraq, la République islamique d'Iran et l'Arabie saoudite constituait une menace clé pour la frontière orientale d'Israël, qui devait donc veiller à ce que cette frontière soit aussi éloignée que possible des grands centres urbains, industriels et économiques de la plaine côtière. La création de colonies était considérée comme un moyen de créer une zone tampon permettant de mobiliser l'armée et de protéger le pays¹⁰⁰. Elle a mis des civils en danger, en violation du droit international¹⁰¹. Depuis, Israël a conclu un traité de paix avec la Jordanie, unique pays frontalier de la Cisjordanie. Les colonies servent aujourd'hui à assurer le contrôle interne et non à répondre à des menaces extérieures.

50. La Commission note que les attaques armées et les incidents de sécurité ont des effets néfastes importants sur les citoyens et résidents israéliens et palestiniens. Par exemple, pendant la deuxième intifada, entre septembre 2000 et août 2007, 1 024 Israéliens ont été tués par des groupes armés palestiniens en Cisjordanie et en Israël, dont 69 % de civils. Pendant la même période, 4 228 Palestiniens ont été tués par les forces israéliennes, dont environ 59 % de civils¹⁰². Israël applique des mesures à son propre territoire pour assurer la sécurité de sa population civile, mais il entreprend une grande partie de son action dans le Territoire palestinien occupé en partant du principe selon lequel les Palestiniens représentent un risque pour sa sécurité et qu'il peut donc légitimement limiter leurs droits¹⁰³. La Commission fait observer qu'Israël a certes le devoir de garantir la sécurité et le bien-être de ses propres citoyens, mais qu'il est également tenu d'assurer, dans le territoire occupé, la protection, la sécurité

⁹⁷ Voir l'ordonnance n° 101 concernant l'interdiction des actes d'incitation et de propagande hostile (Judée-Samarie), 5727-1967.

⁹⁸ Voir note du Secrétaire général sur la question de Palestine : texte du mandat (A/292). Voir également Ministère israélien des affaires étrangères, « Israeli settlements and international law », 30 novembre 2015, disponible en anglais à l'adresse www.gov.il/en/Departments/General/israeli-settlement-and-international-law.

⁹⁹ Voir S/PV.7853.

¹⁰⁰ Voir A/36/341-S/14566, annexe.

¹⁰¹ Voir www.molad.org/images/upload/files/National-security-and-settlements.pdf (en hébreu).

¹⁰² Voir Bureau de la coordination des affaires humanitaires, Special Focus, « Israeli-Palestinian fatalities since 2000 – key trends », août 2007.

¹⁰³ B'Tselem, *Forbidden Roads: Israel's Discriminatory Road Regime in the West Bank* (Jérusalem, août 2004), p. 3.

et le bien-être général de la population vivant sous occupation¹⁰⁴. Le droit international ne peut être appliqué de manière sélective et doit être mis en œuvre intégralement.

51. La Commission note que les gouvernements israéliens successifs, quelle que soit leur composition politique, ont encouragé l'expansion des colonies tout en déclarant officiellement soutenir la « solution des deux États »¹⁰⁵. Bien qu'Israël ait pris, à l'occasion, des mesures pour mettre en œuvre certaines politiques en faveur des Palestiniens – par exemple, pour leur permettre de travailler en Israël ou pour approuver un petit nombre de projets de construction¹⁰⁶ – ces mesures n'ont guère contribué à améliorer la vie des Palestiniens de façon générale, ni à favoriser la fin de l'occupation grâce à une solution réelle et juste. Au contraire, l'expansion continue des colonies et des infrastructures connexes contribue activement à asseoir l'occupation et rend la « solution des deux États » de moins en moins viable. Cette stratégie a permis aux gouvernements israéliens successifs de maintenir un semblant d'accord avec la communauté internationale tout en laissant pratiquement inchangées ses politiques d'occupation permanente et d'annexion *de facto*¹⁰⁷.

52. Les responsables israéliens ont exprimé publiquement l'intention de leur pays de rendre irréversible la présence des colonies et d'annexer tout ou partie de la zone C. Le 10 septembre 2019, M. Netanyahu, qui était alors Premier Ministre, a annoncé qu'il comptait annexer la vallée du Jourdain et le nord de la région de la mer Morte s'il était réélu¹⁰⁸. Ce plan a ensuite été mis de côté, mais M. Netanyahu a affirmé en août 2020 que la question de la souveraineté était toujours sur la table, s'agissant de la souveraineté israélienne sur la Cisjordanie¹⁰⁹.

53. Dans un discours prononcé devant des colons à Elqana le 17 mai 2022, le Premier Ministre, M. Bennet, a souligné le caractère permanent des colonies, qui font déjà partie intégrante de l'État d'Israël :

Avec l'aide de Dieu, nous serons également présents aux célébrations des cinquantième, soixante-quatrième, 100^e, 200^e et 2000^e anniversaires d'Elqana, au sein d'un État juif uni et souverain sur la Terre d'Israël.¹¹⁰

¹⁰⁴ CICR, « Cisjordanie : Israël doit respecter le droit international humanitaire », 13 septembre 2018.

¹⁰⁵ Pour l'exemple le plus récent, voir États-Unis d'Amérique, Maison Blanche, « Remarks by President Biden and Prime Minister Yair Lapid of the State of Israel », 14 juillet 2022.

¹⁰⁶ Voir A/76/433, par. 34.

¹⁰⁷ Akiva Eldar, « Israel's New politics and the fate of Palestine », *The National Interest*, vol. 120 (août 2012), p. 6.

¹⁰⁸ Voir www.kan.org.il/item/?itemid=58577 (en hébreu).

¹⁰⁹ Discours prononcé le 13 août 2020. Disponible en hébreu à l'adresse <https://13tv.co.il/item/news/politics/politics/netanyahu-press-uae-1109997/>.

¹¹⁰ Propos tenus par le Premier Ministre Bennett lors d'une visite effectuée au conseil local d'Elqana à l'occasion de son quarante-cinquième anniversaire, le 17 mai 2022. Disponible en hébreu à l'adresse www.youtube.com/watch?v=LeY_IYNC8ik.

VI. Incidences de l'occupation sur les droits humains¹¹¹

54. La Commission constate avec une vive inquiétude que, malgré les rapports publiés régulièrement par nombre d'organismes des Nations Unies et d'acteurs de la communauté internationale, la gravité des violences et la portée des mesures prises par Israël pour maintenir son occupation ont augmenté au fil du temps, de même que le nombre de personnes qui en pâtissent¹¹². Les nombreuses violations des droits humains et atteintes à ces droits ainsi que les violations du droit international humanitaire dont il est fait état dans ces rapports résultent directement de l'occupation israélienne. Cette section ne couvre pas tous les droits touchés par l'occupation et porte principalement sur la zone C de la Cisjordanie. La Commission souligne que toutes les zones du Territoire palestinien occupé sont touchées par les politiques d'occupation israéliennes, notamment par les incursions et les raids qui sont menés par les forces de sécurité israéliennes dans l'ensemble de la Cisjordanie et à Jérusalem-Est et qui font souvent des victimes parmi les civils, y compris des enfants¹¹³.

A. Environnement coercitif

« Ils viennent la nuit pendant que nous dormons et jettent des pierres à nos portes et à nos fenêtres. Nous restons à l'intérieur, mais ils nous provoquent jusqu'à ce que nous sortions. Ils nous provoquent par des propos très virulents : "Nous allons vous priver de ces terres, vous brûler et vous expulser, cet endroit est à nous et nous allons le récupérer" ».

Femme palestinienne, province d'Hébron

55. Israël a créé et maintient un environnement coercitif complexe¹¹⁴, caractérisé notamment par la destruction d'habitations et de biens, l'emploi excessif de la force par les forces de sécurité, l'incarcération massive, les violences des colons, la restriction des déplacements aux points de contrôle et sur les routes, et les contraintes qui réduisent l'accès aux moyens de subsistance, aux produits de première nécessité, aux services et à l'aide humanitaire¹¹⁵.

56. Les 34 000 Palestiniens qui vivent dans la zone H2 d'Hébron ou à proximité sont séparés du reste de la ville par 22 points de contrôle et vivent au quotidien dans un environnement coercitif¹¹⁶. Ils peinent à accéder aux soins médicaux de base, ce

¹¹¹ Sauf indication contraire, les citations qui suivent dans les encadrés sont issues d'entretiens menés avec des victimes entre mai et juillet 2022. Le présent chapitre se fonde sur des réunions tenues avec divers interlocuteurs et sur des entretiens menés avec des victimes et des témoins pendant la période de mars à juillet 2022.

¹¹² Voir, par exemple, A/HRC/49/87, par. 5.

¹¹³ Haut-Commissariat des Nations Unies aux droits de l'homme, page Facebook intitulée « UN human rights – Palestine », publication du 1^{er} juillet 2022. Disponible à l'adresse www.facebook.com/UNHumanRightsOPT.

¹¹⁴ Par exemple, A/HRC/34/39, par. 41.

¹¹⁵ Voir Conseil norvégien pour les réfugiés, « Impacts of annexation on humanitarian relief and development in the West Bank: frequently asked questions », juin 2020, disponible auprès de la Commission.

¹¹⁶ Voir B'Tselem, « List of military checkpoints in the West Bank and Gaza Strip », 11 novembre 2021. Voir également Médecins sans frontières, « "We are all afraid": Settler attacks against Palestinians in Hebron on the rise », 16 août 2021.

qui porte atteinte à leur droit au meilleur état de santé physique et mentale possible¹¹⁷. Ce problème touche tout particulièrement les femmes enceintes, les personnes âgées et les personnes handicapées qui ont besoin de soins et de traitements d'urgence.

57. Lorsque des personnes quittent leur domicile du fait de cette coercition, celle-ci peut constituer un élément du crime de déportation ou de transfert forcé de population, crime contre l'humanité visé au paragraphe 1 d) de l'article 7 du Statut de Rome. En juillet 2022, 19 ménages palestiniens, soit 100 personnes, ont quitté leur communauté d'éleveurs de Ras el-Tin, dans la zone C. Certaines de ces familles ont expliqué au Bureau de la coordination des affaires humanitaires qu'elles étaient parties parce que leurs conditions de vie étaient devenues intolérables, citant les mesures coercitives qui leur étaient imposées dans le cadre de l'occupation par les autorités israéliennes et par les colons israéliens, qui étaient souvent armés. Certains membres de la communauté ont affirmé que des responsables israéliens leur avaient explicitement ordonné de s'installer dans la zone B¹¹⁸.

58. L'environnement coercitif a des effets particulièrement néfastes sur les enfants palestiniens, dont la vie est marquée par la présence militaire constante, les fréquents affrontements et actes de violence, les restrictions de mouvement et la destruction d'habitations, d'infrastructures et de biens. Vingt enfants ont été tués en Cisjordanie depuis le début de l'année 2022, et 56 ordres de démolition d'écoles sont actuellement en attente d'exécution en Cisjordanie, y compris Jérusalem-Est¹¹⁹. Depuis 1967, des milliers d'enfants ont été déplacés et transférés de force à la suite de la démolition de 28 000 logements palestiniens. Cette situation compromet gravement le droit des enfants au meilleur état de santé mentale et physique possible¹²⁰. Les informations disponibles font état d'un taux élevé d'abandon scolaire et des risques correspondants, à savoir le travail des enfants et les mariages précoces, qui touchent plus particulièrement les garçons et les filles, respectivement. Les filles sont souvent retirées de l'école parce que l'on craint que leur sécurité soit compromise dans le climat coercitif qui règne, tandis que les garçons abandonnent leur scolarité en grande partie parce qu'ils sont incités à contribuer aux ressources financières du ménage. Les garçons sont particulièrement exposés à d'autres violations des droits humains, risquant davantage d'être tués ou blessés par les forces de sécurité israéliennes lors d'affrontements, d'incidents de jets de pierres et de manifestations, ainsi que d'être incarcérés¹²¹.

¹¹⁷ Voir Médecins sans frontières, « Providing mental health care to Palestinians living under occupation », 6 mai 2022. Voir également Idit Avrahami et Noam Sheizaf, *H2: The Occupation Lab*, film documentaire, 2022.

¹¹⁸ Bureau de la coordination des affaires humanitaires, « About 100 Palestinians leave Ras a Tin », 3 août 2022.

¹¹⁹ Organisation des Nations Unies, « Statement of Lynn Hastings, United Nations Resident and Humanitarian Coordinator in the Occupied Palestinian Territory », 28 août 2022.

¹²⁰ Voir Save the Children, « "Danger is our reality": the impact of conflict and the occupation on education in the West Bank of the occupied Palestinian territory », 2020, p. 5. Voir également Save the Children, « "Hope under the rubble": the impact of Israel's home demolition policy on Palestinian children and their families », p. 4 à 6, 12 et 13 ; Occupied Palestinian Territories Education Cluster, *Education Cluster Strategy Palestine 2020-2021*, 2020, p. 9.

¹²¹ Voir Occupied Palestinian Territories Education Cluster, *Education Cluster Strategy Palestine 2020-2021*, p. 8 à 11. Voir également [E/ESCWA/CL2.GPID/2020/TP.29](#), p. 30 et 31 ; [A/HRC/43/67](#), par. 51.

« Un jour où ma fille et moi sommes sorties, les soldats du point de contrôle de Wadi el-Ghrous m'ont dit que ma fille avait du métal sur elle. Ils ont ajouté que le métal se trouvait dans son soutien-gorge et qu'ils voulaient vérifier. J'ai demandé pourquoi ils voulaient la fouiller dans la rue alors qu'il n'y avait aucune femme pour le faire. J'ai refusé de lui faire subir cela, mais ils ne m'ont pas écoutée, et ont fini par refuser de nous laisser passer. »

Femme palestinienne, province d'Hébron

59. Les effets conjugués des différentes pratiques d'occupation, notamment les restrictions des déplacements, pèsent sur l'égalité des droits des deux sexes et entravent l'autonomie des femmes et des filles. Les femmes et les filles sont particulièrement exposées à la violence fondée sur le genre dans le cadre de leurs activités quotidiennes¹²². Les fouilles effectuées par des soldats de sexe masculin et les actes de harcèlement qui sont commis, notamment aux points de contrôle, compromettent les déplacements des femmes et des filles et tendent à les priver d'un accès égal à la vie familiale, à l'éducation, aux soins de santé et à l'emploi¹²³. Les femmes et les filles sont également victimes d'actes de harcèlement et d'attaques violentes perpétrés par des colons¹²⁴. Des victimes et des témoins ont font état de propos racistes et sexistes proférés par des colons et des soldats des deux sexes à leur rencontre ou contre des filles ou des femmes de leur famille, d'où des sentiments d'anxiété, de peur et d'humiliation¹²⁵.

B. Démolitions, expulsions, déplacements forcés et transferts

« La démolition de logements, comme vous le savez, compromet notre existence et notre sécurité en tant qu'êtres humains. Elle a donc un impact psychologique et émotionnel direct et perceptible sur nous, en particulier sur les femmes et les enfants, pour qui le foyer est l'endroit le plus sûr. »

Homme palestinien, province d'Hébron

60. Les politiques d'occupation appliquées par Israël se traduisent par des violations du droit des Palestiniens à un niveau de vie suffisant¹²⁶. Des logements palestiniens sont démolis fréquemment, étant donné que les Palestiniens sont généralement dans

¹²² Voir TD/B/67/5, par. 33 ; A/HRC/46/63, par. 21 ; A/HRC/50/21, par. 61 ; E/ESCWA/CL2.GPID/2020/TP.29, p. 11. Pour une définition de la violence fondée sur le genre, voir Comité pour l'élimination de la discrimination à l'égard des femmes, recommandation générale n° 19, par. 6, et recommandation générale n° 35 (2017), par. 14.

¹²³ Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes, art. 10 à 12. De tels faits ont également été rapportés par de nombreuses autres sources, par exemple B'Tselem, « Occupation routine: soldats detain Palestinian girl, 13, after settlers claim to see her holding knife », 30 juin.

¹²⁴ Voir A/HRC/12/48, note de bas de page n° 713 ; A/HRC/35/30/Add.1, par. 66 et 67 ; A/HRC/46/63, par. 11 ; CEDAW/C/ISR/CO/6, par. 30 et 31.

¹²⁵ Voir B'Tselem, « Sexism, homophobia and harassment by settlers and soldiers: life's routine in Hebron (video) », 11 juillet 2021. Voir également B'Tselem, « "You can take your camera and stick it straight up your big ass" », 29 août 2017 ; Idit Avrahami et Noam Shezaf, *H2: The Occupation Lab*.

¹²⁶ Pacte international relatif aux droits économiques, sociaux et culturels, art. 11. Voir également E/C.12/ISR/CO/4, par. 48 et 49.

l'impossibilité d'obtenir des permis de construire et qu'ils construisent donc sans autorisation. Les autorités israéliennes ont émis près de 20 000 ordres de démolition dans la zone C entre 1988 et 2020¹²⁷. À ce jour, plus de 8 500 structures ont été détruites dans le Territoire palestinien occupé¹²⁸.

61. Le droit international humanitaire établit que la propriété privée dans un territoire occupé doit être respectée et ne peut pas être confisquée¹²⁹. En outre, il interdit à la Puissance occupante de détruire des biens, appartenant individuellement ou collectivement à des personnes privées, à l'État ou à des collectivités publiques, à des organisations sociales ou coopératives, sauf dans les cas où ces destructions seraient rendues absolument nécessaires par les opérations militaires¹³⁰.

62. La démolition et la confiscation de structures de subsistance telles que des commerces, des abris pour le bétail, des murs et des entrepôts, ainsi que d'infrastructures comme des canalisations, des citernes et des routes, réduisent considérablement l'accès des Palestiniens aux moyens de subsistance. Depuis le début de 2022, Israël a démoli 500 structures dans le Territoire palestinien occupé, dont 153 qui étaient liées à l'agriculture et 136 à des moyens de subsistance¹³¹.

63. Les communautés de bédouins et d'éleveurs sont particulièrement exposées au risque de subir des démolitions, des expulsions forcées et des transferts forcés. Les autorités israéliennes ont eu recours à la coercition de manière manifeste pour forcer des membres de ces communautés à quitter leurs foyers pour que des Israéliens puissent utiliser leurs terres. Les communautés d'éleveurs palestiniens de Massafer Yatta, notamment, ont fait l'objet de plusieurs vagues de démolitions et d'expulsions¹³². Le 4 mai 2022, la Cour suprême d'Israël a jugé que le transfert forcé de Palestiniens et la destruction de leurs habitations à Masafer Yatta étaient légaux¹³³. Cette décision est contraire aux dispositions du droit international qui interdisent la destruction de biens et la déportation ou le transfert forcé de la population civile dans les territoires occupés.

C. Colonies et violences

« Des colons ont attaqué des membres de ma famille à plusieurs reprises, mais la police n'a pris aucune de mes plaintes au sérieux. J'ai déposé des plaintes aussi bien auprès de la police israélienne que du bureau de liaison palestinien, mais rien n'a été fait et personne n'a été mis en examen. Personne n'est tenu responsable, et les violences ne cessent pas. »

Homme palestinien, province d'Hébron

¹²⁷ Voir B'Tselem, « Planning Policy in the West Bank », 11 novembre 2017. Voir également Bureau de la coordination des affaires humanitaires, « Demolition orders against Palestinian structures in Area C – Israeli Civil Administration data ».

¹²⁸ Bureau des Nations Unies pour la coordination des affaires humanitaires, « Data on demolition and displacement in the West Bank » (cliquer sur le lien « more breakdowns »). Consulté le 23 août 2022.

¹²⁹ Règlement de La Haye, art. 46.

¹³⁰ Quatrième Convention de Genève, art. 53.

¹³¹ Bureau de la coordination des affaires humanitaires, « Data on demolition and displacement in the West Bank » (cliquer sur le lien « more breakdowns »). Consulté le 23 août 2022.

¹³² A/HRC/49/85, par. 26.

¹³³ Décision de la Cour suprême dans l'affaire n° 413/13 et l'affaire n° 1039/13. Disponible en hébreu à l'adresse <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts%2F13%2F130%2F004%2Fn89&fileName=13004130.N89&type=2&fbclid=IwAR03oMksLjnT2qD1Zk1eEhbmrrFbGhCXm517cdRVh1GQB9B2eR6FmHUKr0>.

64. Les actes de violence des colons sont une manifestation clé de l'environnement coercitif, et leur nombre et leur gravité augmentent au fil des ans. De janvier à juillet 2022, 398 attaques ont été menées par des colons en Cisjordanie, dont 84 qui ont fait des victimes. À titre de comparaison, 496 attaques se sont produites pendant toute l'année 2021 et 358 en 2020¹³⁴. Les attaques sont également devenues plus graves : récemment, des informations vérifiées ont fait état d'attaques commises par des colons alors que les forces de sécurité israéliennes étaient à proximité, ainsi que de cas où les forces de sécurité israéliennes ont attaqué des Palestiniens aux côtés de colons¹³⁵. Le Ministre israélien de la défense aurait réaffirmé en décembre 2021 que l'armée israélienne était responsable d'intervenir lorsque des colons menaient des attaques. Dans la pratique, l'armée autorise les colons à être armés et n'intervient que rarement pour protéger des Palestiniens¹³⁶. La Commission souligne qu'Israël, en sa qualité de Puissance occupante, a la responsabilité de protéger les Palestiniens contre les attaques des colons. Ces attaques violent le droit des Palestiniens à la vie, à la liberté et à la sécurité de la personne. Les victimes des violences des colons ont également droit à un recours effectif et rapide, y compris à des réparations, mais ce droit ne leur est pas garanti¹³⁷.

65. La législation relative à l'occupation belligérante impose à la Puissance occupante de prendre des mesures pour rétablir et assurer, dans la mesure du possible, l'ordre public et la sécurité de la population sous occupation. Le droit international exige expressément que les personnes protégées soient traitées, en tout temps, avec humanité et protégées notamment contre tout acte de violence ou d'intimidation¹³⁸.

66. Les tribunaux israéliens ont mis en examen peu de personnes soupçonnées d'avoir commis des violences contre des Palestiniens, ce qui contribue au climat d'impunité qui règne¹³⁹. Les mesures prises pour établir les responsabilités ont été particulièrement inadéquates dans les cas où des colons ou des militaires les accompagnant ont tué des Palestiniens¹⁴⁰. **Dans l'ensemble, les forces de sécurité civiles et militaires d'Israël protègent rarement les Palestiniens contre les violences des colons. Des éléments indiquent qu'elles ont observé sans intervenir des attaques violentes commises par des colons et, dans certains cas, participé à de telles attaques. Les autorités judiciaires obligent rarement les colons à rendre compte de leurs actes.**

67. Nombre d'actes violents liés aux colons de Cisjordanie sont commis dans le contexte des avant-postes¹⁴¹. Le caractère inadéquat de l'action menée par Israël pour empêcher la construction d'avant-postes ou les démanteler, conjugué à l'absence de responsabilité effective pour les violences commises par les colons, a donné à ces derniers un sentiment général d'impunité et de liberté à l'égard de la loi. Ainsi, le village de Burin, près de Naplouse, a été attaqué à plusieurs reprises par des colons qui paraissaient venir de l'avant-poste de Giv'at Ronin. Dans certains cas, ces colons

¹³⁴ Voir Bureau de la coordination des affaires humanitaires, rapport sur la protection des civils pour la période du 2 au 15 août 2022, 19 août 2022.

¹³⁵ A/HRC/49/85, par. 13.

¹³⁶ Yaniv Kubovich et Amos Harel, « Israeli army and police blame each other as settler violence rages on », *Haaretz*, 7 février 2022.

¹³⁷ Pacte international relatif aux droits civils et politiques, art. 2, par. 3., et art. 6 et 9.

¹³⁸ Quatrième Convention de Genève, art. 27.

¹³⁹ A/HRC/49/85, par. 20.

¹⁴⁰ Ibid., par. 21 et 22.

¹⁴¹ Ibid., par. 40. Voir également La paix maintenant, « Violent settlement: the connection between illegal outposts and settler violence », novembre 2021, disponible en anglais à l'adresse http://peacenow.org.il/wp-content/uploads/2021/12/sattlers_report_eng.pdf.

auraient été escortés par les forces de sécurité israéliennes, qui n'ont pris aucune mesure pour empêcher leurs actes¹⁴².

68. Outre les actes de violence commis par les colons, la création d'avant-postes et de colonies est à l'origine de violences commises contre les Palestiniens qui participent à des manifestations, y compris des cas de recours à la force létale. On peut citer l'exemple de l'avant-poste d'Evyatar, au sud de Naplouse, qui a été établi par des colons le 3 mai 2021. En réaction à sa création, les Palestiniens de la ville de Bayta, où l'avant-poste avait été établi, ont organisé des manifestations presque quotidiennement. Les manifestants ont lancé des pierres et, à certaines occasions, des cocktails Molotov en direction des forces israéliennes. Ces dernières ont riposté par des tirs de balles réelles, de balles en caoutchouc à noyau métallique, de munitions lacrymogènes et de grenade incapacitantes, tuant au moins 10 Palestiniens, dont deux enfants, et en blessant plus de 6 000, selon le Bureau de la coordination des affaires humanitaires¹⁴³.

D. Privation de ressources naturelles, de moyens de subsistance et d'un niveau de vie suffisant

« Nous ne quitterons pas notre terre. Notre terre est notre principale source de revenus, c'est notre terre et celle de nos pères et de nos grands-pères. Où irions-nous et de quoi d'autre pourrions-nous vivre ? »

Homme palestinien, province d'Hébron

69. Les politiques israéliennes décrites dans le présent rapport, notamment celles qui concernent l'expropriation de ressources naturelles et les restrictions dans le domaine du bâtiment, ont des incidences directes sur les droits économiques, sociaux et culturels des Palestiniens, notamment leurs droits au logement, à un niveau de vie suffisant, à l'alimentation, à l'eau et à l'assainissement, aux soins de santé et à l'éducation.

70. Le contrôle total exercé par Israël sur les ressources hydriques est un obstacle clé à l'approvisionnement abordable et adéquat des Palestiniens en eau. Conjugué à l'interdiction de construire de nouvelles installations hydriques et d'entretenir les installations existantes sans permis militaire, ce contrôle accroît le risque de pénurie d'eau qui pèse sur les Palestiniens. Ceux-ci achètent de l'eau auprès de fournisseurs publics ou privés à un coût élevé, environ six fois supérieur au prix national¹⁴⁴. Le prix de l'eau livrée par camion-citerne en Cisjordanie est trois fois plus élevé que le prix national de l'eau courante¹⁴⁵.

¹⁴² B'Tselem, « Burin, Nablus District: settlers attack Israeli activists with stones and clubs and vandalize cars », 2 mars 2022. Voir également B'Tselem, « Israeli settlers escorted by soldiers attack homes with stones in Burin, Nablus District », 18 juillet 2022.

¹⁴³ Bureau de la coordination des affaires humanitaires, base de données « Data on casualties », disponible à l'adresse www.ochaopt.org/data/casualties. Voir également A/HRC/49/85, par. 42 à 49.

¹⁴⁴ A/HRC/48/43, par. 26 à 35 et 43.

¹⁴⁵ Voir Bureau de la coordination des affaires humanitaires, Reliefweb, « Challenges accessing water in the West Bank », 14 avril 2021.

« Les femmes sont la pierre angulaire de notre société. Nous faisons le ménage et la cuisine, nous fabriquons les produits laitiers et nous gardons les moutons. L'occupation nous prive d'électricité, d'eau, de routes, d'éducation : tout cela affecte la vie et le rôle des femmes dans nos communautés. Les hommes travaillent à l'extérieur du village et ne sont pas toujours là. »

Femme palestinienne, province d'Hébron

71. Comme il n'y a pas suffisamment d'eau disponible à un prix abordable, les éleveurs des zones rurales manquent d'eau pour s'occuper de leur bétail. En outre, dans le cadre de ses politiques de démolition, Israël confisque souvent les citernes d'eau appartenant aux communautés d'éleveurs. Par exemple, dans le village d'el-Jouaya, dans les collines du sud d'Hébron, trois citernes d'eau ont été confisquées par l'Administration civile le 19 juillet 2022¹⁴⁶. Les femmes et les filles sont particulièrement touchées par le manque d'eau, parce qu'elles ont des besoins supplémentaires pour leur hygiène et qu'elles sont censées se procurer de l'eau pour la consommation domestique, le nettoyage, la lessive et les soins aux enfants, aux personnes âgées et aux malades, ainsi que pour s'occuper du bétail¹⁴⁷.

72. L'agriculture palestinienne a subi les effets des politiques israéliennes relatives à la gestion de l'eau, à l'expropriation de terres et au déversement de déchets¹⁴⁸. La superficie des terres disponibles pour l'agriculture palestinienne est passée de 2,4 millions de dounoums en 1980 à environ 1 million de dounoums en 2010, tandis que la part de l'agriculture dans le produit intérieur brut palestinien est passée de 35 % en 1972 à seulement 4 % ces dernières années¹⁴⁹.

73. Les femmes ont été particulièrement touchées par le déclin du secteur agricole, faute de nouvelles possibilités d'emploi¹⁵⁰. Alors qu'environ 60 % des femmes palestiniennes travaillaient dans l'agriculture avant l'occupation, elles ne sont plus que 8 % aujourd'hui, ce qui s'explique principalement par la perte de terres et de ressources en eau¹⁵¹. En outre, la plupart des autres emplois en Israël et dans les colonies israéliennes sont moins viables pour les femmes, étant donné qu'ils relèvent du secteur de la construction ou parce qu'il faut passer par des points de contrôle israéliens pour y accéder¹⁵². Le taux d'activité des Palestiniens de Cisjordanie affiche un grand écart entre les femmes et les hommes. Chez les femmes, il est estimé à 17 %, contre 74 % chez les hommes, et compte parmi les 10 taux les plus faibles à l'échelle

¹⁴⁶ B'Tselem, « Israel demolishes home and 2 livestock enclosures and rest tent, and confiscates 3 water containers, al-Jawaya, South Hebron Hills », 19 juillet 2022.

¹⁴⁷ Voir également [E/ESCWA/CL2.GPID/2020/TP.29](https://www.escwa.org/CL2.GPID/2020/TP.29), p. 23 et 35. Voir également Bimkom, « The effect of forced transfer on Bedouin women », 2017 ; Abdel-Rahman Al-Tamimi, *Environmental Challenges in Palestine "Gender Perspectives"*, Palestinian Working Women Society for Development (octobre 2021), p. 16, 26 et 27.

¹⁴⁸ Voir Women's Centre for Legal Aid and Counselling, « WCLAC's shadow report for the Committee on Economic, Social and Cultural Rights, 66th Session – Israel Review », 2019, p. 11. Disponible à l'adresse <http://www.wclac.org/files/library/19/10/yekz3kqu2vf4q0o3xolozc.pdf>.

¹⁴⁹ Voir CNUCED, *The Besieged Palestinian Agricultural Sector*, p. 7 et 8. Voir aussi [TD/B/67/5](https://www.un.org/fr/development/desa/policy/psd/policybriefs/pb675.pdf), par. 31.

¹⁵⁰ Voir [TD/B/67/5](https://www.un.org/fr/development/desa/policy/psd/policybriefs/pb675.pdf), par. 31, et Women's Centre for Legal Aid and Counselling, « WCLAC's shadow report », p. 11.

¹⁵¹ Voir Organisation internationale du Travail (OIT), *La situation des travailleurs des territoires arabes occupés : Rapport du Directeur général – Annexe*, 2021 (document ILC.109/DG/APP/2021), p. 18.

¹⁵² Voir [TD/B/67/5](https://www.un.org/fr/development/desa/policy/psd/policybriefs/pb675.pdf), par. 31.

mondiale¹⁵³. Les femmes voient également leur droit à des moyens de subsistance compromis par les écarts de revenus persistants et par leur manque de contrôle sur d'autres actifs économiques comme les biens fonciers et autres¹⁵⁴.

74. La Commission estime que les politiques appliquées par Israël ont des effets graves sur l'environnement, en violation des obligations faites à la Puissance occupante de préserver les biens publics et privés du territoire occupé, sauf en cas de nécessité militaire¹⁵⁵. C'est notamment le cas des activités de construction, dont l'édification du mur, de la destruction d'oliveraies, de vignobles et d'orangerais au détriment de la biodiversité et des écosystèmes, du transfert de déchets dangereux israéliens vers des usines de traitement en Cisjordanie en violation de la Convention de Bâle sur le contrôle des mouvements transfrontières de déchets dangereux et de leur élimination¹⁵⁶, du transfert de déchets électroniques¹⁵⁷, de la surexploitation des ressources naturelles, notamment de l'eau¹⁵⁸, de l'absence de contrôle de la pollution atmosphérique pour les industries israéliennes en Cisjordanie et des dommages considérables causés aux terres agricoles¹⁵⁹.

VII. Conclusions

A Légalité de l'occupation : permanence et annexion *de facto*

75. **La Commission estime qu'il y a des motifs raisonnables de conclure que l'occupation israélienne du territoire palestinien est aujourd'hui illégale au regard du droit international en raison de sa permanence et des mesures mises en œuvre par Israël pour annexer *de facto* et *de jure* certaines parties de ce territoire. Les mesures prises par Israël pour créer des faits irréversibles sur le terrain et pour étendre son contrôle sur le territoire constituent aussi bien des manifestations que des moteurs de son occupation permanente.** L'entreprise de peuplement est le principal moyen par lequel ces résultats sont obtenus. Les déclarations des responsables israéliens constituent une preuve supplémentaire du fait qu'Israël a prévu que l'occupation sera permanente, tout comme l'absence de mesures visant à mettre fin à l'occupation, notamment en vue de la « solution des deux États » ou de toute autre solution. En continuant d'occuper le territoire par la force, Israël encourt des responsabilités internationales du fait de la violation persistante d'une obligation internationale et reste responsable de toute violation des droits du peuple palestinien.

76. La Commission conclut qu'Israël considère l'occupation comme une situation permanente et qu'il a – à toutes fins utiles – annexé des parties de la Cisjordanie, tout

¹⁵³ En 2019. Voir également [E/ESCWA/CL2.GPID/2020/TP.29](#), p. 32.

¹⁵⁴ Voir État de Palestine, Bureau central palestinien de statistique, communiqué de presse sur les résultats de l'enquête sur la main-d'œuvre, 7 août 2019, p. 24, disponible en anglais à l'adresse http://pcbs.gov.ps/portals/_pcbs/PressRelease/Press_En_7-8-2019-lf_3-en.pdf. Voir également [E/ESCWA/CL2.GPID/2020/TP.29](#), p. 32 et 33.

¹⁵⁵ Quatrième Convention de Genève, art. 53.

¹⁵⁶ Voir Programme des Nations Unies pour l'environnement, *State of Environment and Outlook Report for the occupied Palestinian territory 2020*, Nairobi, 2020, p. 112. Voir également www.basel.int/TheConvention/Overview/tabid/1271/Default.aspx.

¹⁵⁷ Voir [TD/B/EX\(71\)/2](#), par. 48.

¹⁵⁸ Voir [A/HRC/48/43](#). Voir également Haut-Commissariat des Nations Unies aux droits de l'homme, « Israel's exploitation of Palestinian resources is human rights violation, says UN expert », 18 mars 2019.

¹⁵⁹ Voir B'Tselem, « Made in Israel: exploiting Palestinian land for treatment of Israeli waste », décembre 2017, p. 14.

en invoquant pour se justifier le caractère temporaire de la situation, lequel n'est qu'une fiction. **Israël a pris des mesures qui sont constitutives d'une annexion de facto, à savoir notamment : l'expropriation de terres et de ressources naturelles, l'établissement de colonies et d'avant-postes, l'application aux Palestiniens d'un régime d'aménagement et de construction restrictif et discriminatoire et l'application extraterritoriale de la législation israélienne aux colons israéliens en Cisjordanie.** La Cour internationale de Justice avait anticipé cette situation dans son avis consultatif de 2004, dans lequel elle avait déclaré que le mur créait sur le terrain un fait accompli qui pourrait fort bien devenir permanent, auquel cas la construction du mur équivaldrait à une annexion. Il s'agit désormais d'une réalité.

77. **La Commission souligne que l'occupation et les politiques d'annexion de facto d'Israël pèsent lourdement sur la vie des Palestiniens de toute la Cisjordanie, qu'elles constituent de graves violations des droits humains et atteintes à ces droits et qu'elles sont contraires au droit international humanitaire. L'attachement d'Israël à l'entreprise en question s'est traduit par une série de politiques destinées à soutenir et à étendre cette entreprise, qui ont eu des effets négatifs dans tous les domaines de la vie palestinienne.** Il s'agit notamment d'expulsions, de déportations et de transferts forcés de Palestiniens à l'intérieur de la Cisjordanie, de l'expropriation, du pillage et de l'exploitation de terres et de ressources naturelles vitales, de restrictions des déplacements et du maintien d'un environnement coercitif dans le but de fragmenter la société palestinienne, d'inciter les Palestiniens à quitter certaines zones et de faire en sorte qu'ils soient incapables de réaliser leur droit à l'autodétermination. La Commission souligne que les activités des entreprises contribuent à l'expropriation et à l'exploitation par Israël des terres et des ressources palestiniennes et qu'elles facilitent le transfert de colons israéliens dans le Territoire palestinien occupé.

78. Ayant prêté une attention particulière aux violations fondées sur le genre, la Commission constate que les politiques mises en œuvre par Israël dans le Territoire palestinien occupé ont des effets discriminatoires généralisés sur les femmes palestiniennes. Ces politiques ont placé les femmes dans une position de grande vulnérabilité économique et sociale par rapport aux hommes. Les porteurs de devoirs n'agissent pas pour remédier aux raisons structurelles qui rendent les femmes et les filles particulièrement vulnérables aux politiques d'annexion *de facto* appliquées par Israël. **Les victimes de violences fondées sur le genre, notamment les femmes et les filles auxquelles les colons infligent des actes de harcèlement et d'intimidation, ne bénéficient pas de la protection d'Israël ni d'un accès à la justice dans les zones sous contrôle israélien. Tous les porteurs de devoirs, y compris Israël, ont l'obligation de prendre toutes les mesures nécessaires pour éliminer la discrimination et les violences contre les femmes, y compris celles qui sont imputables à des acteurs privés¹⁶⁰.**

79. La Commission considère que les questions de sécurité invoquées par Israël pour justifier nombre de ses politiques ne peuvent être examinées isolément. Israël a certes des préoccupations légitimes en matière de sécurité, mais **la Commission constate que beaucoup de politiques et de mesures qu'il applique en Cisjordanie ne visent pas à répondre à ces préoccupations, la sécurité étant souvent invoquée pour justifier son expansion territoriale.** En outre, malgré les problèmes de sécurité, toutes les mesures prises par Israël doivent être conformes au droit international applicable. La dépossession permanente et le déni des droits

¹⁶⁰ Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes, art. 2. Voir également Comité pour l'élimination de la discrimination à l'égard des femmes, recommandation générale n° 35 (2017), par. 24.

élémentaires du peuple palestinien ne constitueront jamais un moyen de parvenir à une sécurité durable.

80. De plus, certaines politiques de « sécurité » telles que la restriction de l'accès à certaines routes aux seuls colons, les fermetures, les restrictions à la liberté de circulation et les démolitions de logements à caractère punitif sont fondées sur des mesures qui sont discriminatoires ou illicites pour d'autres raisons et semblent constituer une punition collective contre toute une population. La Commission souligne qu'Israël a le devoir, en sa qualité de Puissance occupante, d'assurer la protection, la sécurité et le bien-être des personnes vivant sous son occupation et de garantir qu'elles puissent mener une vie aussi normale que possible, conformément à leurs propres lois, culture et traditions.

81. La présumée annexion *de jure* par Israël de Jérusalem-Est est, sans le moindre doute, illégale, nulle et non avenue, et a été reconnue comme telle par l'Organisation des Nations Unies. La Commission souligne que la situation des Palestiniens continue de se détériorer à Jérusalem-Est à mesure qu'Israël y étend ses colonies et applique des mesures et des politiques visant à réduire encore l'espace dont disposent les Palestiniens et à contraindre ceux-ci à quitter leurs foyers.

82. Israël continue d'occuper la bande de Gaza au moyen du contrôle exercé, entre autres, sur son espace aérien et ses eaux territoriales, sur les points de passages terrestres aux frontières et le fonctionnement des infrastructures civiles, notamment l'approvisionnement en eau et en électricité.

83. En ce qui concerne la situation à l'intérieur d'Israël, la Commission a examiné le traitement des Palestiniens citoyens d'Israël et constaté qu'ils étaient toujours soumis à des lois et à des politiques publiques discriminatoires, notamment dans les domaines de l'éducation, du logement et du bâtiment, et de l'emploi, question qu'elle entend examiner dans un prochain rapport.

84. **Selon la Commission, l'occupation permanente et l'annexion *de facto* par Israël, notamment les mesures examinées dans le présent rapport, ne peuvent pas rester sans réponse.** Il convient de demander à la Cour internationale de Justice de donner son avis sur les conséquences juridiques du refus persistant d'Israël de mettre fin à son occupation et des mesures que ce pays a prises pour asseoir son contrôle et favoriser son expansion dans la zone occupée au moyen d'une annexion *de facto*, ainsi que sur l'obligation incombant aux États tiers et à l'Organisation des Nations Unies de veiller à ce qu'Israël respecte le droit international.

B. Droit pénal international

85. La Commission conclut que certaines des politiques et mesures mises en œuvre par le Gouvernement israélien, qui conduisent à une occupation permanente et donc à une annexion *de facto*, peuvent constituer des éléments de crimes au regard du droit pénal international. En particulier, elle appelle l'attention sur l'établissement de colonies dans le Territoire palestinien occupé, en violation de l'article 49 de la quatrième Convention de Genève. Conformément aux conclusions de l'examen préliminaire de la Procureure de la Cour pénale internationale¹⁶¹, la Commission estime qu'il y a raisonnablement lieu de croire que des crimes de guerre ont été commis au titre du paragraphe 2 b) viii) de l'article 8 du Statut de Rome, compte tenu du transfert en Cisjordanie d'une partie de la population de la Puissance occupante.

¹⁶¹ Bureau de la Procureure de la Cour pénale internationale, « Situation en Palestine : résumé des résultats de l'examen préliminaire ». Disponible à l'adresse <https://www.icc-cpi.int/sites/default/files/itemsDocuments/210303-office-of-the-prosecutor-palestine-summary-findings-fra.pdf>.

86. La Commission estime également que les politiques examinées dans le présent rapport, lesquelles ont contribué au déplacement forcé de la population palestinienne qui vivait dans certaines zones, modifié la composition démographique du Territoire palestinien occupé et abouti à l'encerclement presque total des communautés palestiniennes par des colonies israéliennes, sont susceptibles de constituer le crime de déportation ou de transfert forcé de population, crime contre l'humanité visé au paragraphe 1 d) de l'article 7 du Statut de Rome. Ces politiques semblent relever d'une action intentionnelle, généralisée et systématique dirigée contre la population palestinienne pour la contraindre à quitter certaines parties de la Cisjordanie de façon à en modifier la composition démographique. Ces actes peuvent également constituer le crime de persécution, crime contre l'humanité visé au paragraphe 1 h) de l'article 7 du Statut de Rome.

87. La Commission estime également que le pillage et l'exploitation de ressources naturelles par des particuliers et des entités commerciales à des fins privées ou personnelles, dont il est question au paragraphe 37 du présent rapport, peuvent constituer le crime de pillage, crime de guerre visé au paragraphe 2 b) xvi) de l'article 8 du Statut de Rome.

88. Outre la participation directe à ces crimes et la responsabilité des dirigeants politiques, des chefs militaires et d'autres supérieurs, la Commission entend examiner la responsabilité pénale des personnes qui facilitent les crimes en question par des actes d'aide, d'incitation ou d'assistance.

C. Responsabilité d'États tiers

89. La Cour internationale de Justice a souligné qu'au titre de l'article premier de la quatrième Convention de Genève, tous les États parties étaient dans l'obligation de ne pas reconnaître la situation illicite découlant de la construction du mur dans le Territoire palestinien occupé et de ne pas prêter aide ou assistance au maintien de la situation créée par cette construction. Elle a également estimé que l'Organisation des Nations Unies, et spécialement l'Assemblée générale et le Conseil de sécurité, devait examiner quelles nouvelles mesures devaient être prises afin de mettre un terme à la situation illicite découlant de la construction du mur et du régime qui lui était associé¹⁶².

90. Au titre des articles 146 à 148 de la quatrième Convention de Genève, les États parties doivent en outre fixer des sanctions pénales à appliquer aux personnes ayant commis, ou donné l'ordre de commettre, l'une ou l'autre des infractions graves qui y sont définies. Plusieurs des infractions en question sont recensées dans le présent rapport, à savoir notamment la déportation ou le transfert illégal d'une personne protégée ou la détention illégale d'une telle personne, ainsi que les mesures de destruction et d'expropriation de biens exécutées sur une grande échelle, en l'absence de nécessité militaire et de manière illicite et arbitraire.

¹⁶² *Conséquences juridiques de l'édification d'un mur dans le Territoire palestinien occupé, avis consultatif, C. I. J. Recueil 2004*, p. 136, par. 159 et 160.

VIII. Recommandations

91. La Commission formule les recommandations suivantes à l'intention du Gouvernement israélien :

a) Se conformer pleinement au droit international et mettre fin sans délai à l'occupation de territoires palestiniens et syriens, qui dure depuis 55 ans ;

b) S'acquitter des obligations que lui imposent le droit international humanitaire et le droit international des droits humains, notamment l'obligation de respecter, de protéger et de réaliser le droit du peuple palestinien à l'autodétermination et son droit d'utiliser librement les ressources naturelles, conformément au droit international des droits humains, notamment à l'article premier commun au Pacte international relatif aux droits civils et politiques et au Pacte international relatif aux droits économiques, sociaux et culturels.

92. La Commission recommande à l'Assemblée générale de prendre les mesures suivantes :

a) Adresser d'urgence à la Cour internationale de Justice une demande d'avis consultatif sur les conséquences juridiques du refus persistant par Israël de mettre fin à son occupation du Territoire palestinien occupé, y compris Jérusalem-Est, qui constitue une annexion *de facto*, sur les politiques appliquées pour maintenir cette occupation et sur le refus par Israël de respecter le droit du peuple palestinien à l'autodétermination, ainsi que sur l'obligation incombant aux États tiers et à l'Organisation des Nations Unies de veiller au respect du droit international ;

b) Transmettre le présent rapport au Conseil de sécurité et lui demander d'envisager de nouvelles mesures pour faire cesser la situation illégale résultant de l'occupation permanente imposée par Israël, et demander au Conseil d'exiger qu'Israël mette fin immédiatement à son occupation permanente.

93. La Commission recommande que le Bureau de la Procureure de la Cour pénale internationale accorde un degré de priorité élevé à l'enquête sur la situation dans le Territoire palestinien occupé et qu'elle s'emploie non seulement à identifier les auteurs directs des crimes visés par le Statut de Rome et les supérieurs hiérarchiques responsables, mais également à enquêter sur les personnes qui ont apporté leur aide, leur concours ou toute autre forme d'assistance aux actes en question, y compris en fournissant les moyens employés pour les commettre.

94. La Commission recommande au Conseil de sécurité d'envisager d'adopter d'urgence des mesures pour garantir qu'Israël se conforme immédiatement à ses obligations juridiques internationales et aux dispositions de ses résolutions antérieures, notamment celles dans lesquelles il a demandé qu'il soit mis fin à l'occupation, déclaré que l'acquisition de territoires par la force était inadmissible et estimé que les activités de peuplement constituaient une violation flagrante du droit international.

95. La Commission recommande aux États Membres de l'Organisation des Nations Unies de s'acquitter des obligations que leur impose le droit international, notamment de leurs obligations extraterritoriales en matière de droits humains et des obligations découlant de l'article premier commun aux quatre Conventions de Genève et des articles 146, 147 et 148 de la quatrième Convention de Genève, y compris en engageant des enquêtes et des poursuites visant les personnes soupçonnées d'avoir commis des crimes de droit international dans le Territoire palestinien occupé ou d'avoir apporté leur aide ou leur concours aux personnes qui ont commis ces crimes ou tenté de les commettre.



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Questions relatives aux droits de l'homme :
situations relatives aux droits de l'homme
et rapports des rapporteurs et représentants spéciaux

Question de la violation des droits de l'homme dans les territoires palestiniens occupés, y compris la Palestine

Note du Secrétaire général*

Le Secrétaire général a l'honneur de transmettre aux membres de l'Assemblée générale un rapport sur les violations du droit humanitaire international et des droits de l'homme dans les territoires palestiniens occupés depuis 1967. Ledit rapport a été établi par John Dugard, Rapporteur spécial, en application de la section A de la résolution 1993/2 et de la résolution 2001/7 de la Commission des droits de l'homme et de la décision 2001/246 du Conseil économique et social.

* Note explicative établie en application du paragraphe 10 de la résolution 55/222 de l'Assemblée générale : document présenté le 4 octobre 2001 seulement, dans le souci d'y faire figurer une information aussi actuelle que possible.



**Rapport du Rapporteur spécial de la Commission
des droits de l'homme sur la situation des droits de l'homme
dans les territoires palestiniens occupés par Israël
depuis 1967**

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I. Introduction

1. L'actuel Rapporteur spécial, M. John Dugard (Afrique du Sud), a été nommé en juillet 2001. En août 2001, il a entrepris une mission dans les territoires palestiniens occupés et en Israël et a tenu des réunions avec des organisations non gouvernementales palestiniennes et israéliennes, des organisations internationales intervenant dans la région et des membres de l'Autorité palestinienne. Il n'a malheureusement pas pu rencontrer les autorités israéliennes, celles-ci ayant clairement dit qu'elles ne coopéreraient pas car elles avaient certaines objections vis-à-vis du mandat du Rapporteur. (La question est abordée plus avant dans le présent rapport.) Au cours de sa mission, le Rapporteur s'est entretenu avec des interlocuteurs dans la bande de Gaza, à Jérusalem et en Cisjordanie. Il s'est également rendu à Rafah, Beit Jala et Shu'afat pour prendre la mesure des destructions infligées aux maisons et aux biens, et à Jéricho pour examiner la manière dont la ville avait été isolée au moyen de tranchées rendant les voies d'accès impraticables.

2. En février 2001, le Rapporteur spécial s'est rendu dans la région en qualité de Président de la Commission d'enquête sur les droits de l'homme, laquelle avait été établie en application de la résolution S-5/1 adoptée le 19 octobre 2000 par la Commission des droits de l'homme. La Commission d'enquête a séjourné plus longtemps dans la région, tenu des consultations plus larges avec des personnes au fait de la situation et rédigé un rapport plus complet (E/CN.4/2001/121) que le présent rapport. Elle a condamné le recours excessif à la force par les Forces de défense israéliennes, l'assassinat de personnalités palestiniennes, l'implantation et l'expansion des colonies de peuplement en Cisjordanie et dans la bande de Gaza, les agissements des colons et le bouclage des zones palestiniennes, qui a entraîné de nombreuses violations des droits économiques et sociaux. La Commission a formulé un certain nombre de recommandations visant à mettre un terme à l'occupation militaire des territoires palestiniens et à mettre en place un système de nature à répondre aux attentes légitimes du peuple palestinien concernant l'exercice effectif par celui-ci de son droit à l'autodétermination et les préoccupations non moins légitimes du peuple israélien s'agissant de la sécurité.

3. Le présent rapport est le fruit de deux visites effectuées dans la région en 2001, de consultations et de discussions avec des personnes ne résidant pas dans la région, de l'analyse de documents sur la situation dans les territoires palestiniens occupés et d'une abondante couverture journalistique.

II. Mandat du Rapporteur spécial

4. Le mandat du Rapporteur spécial est défini par deux instruments. À la section A de la résolution 1993/2, la Commission des droits de l'homme a décidé de nommer un rapporteur spécial dont le mandat était le suivant :

« a) Enquêter sur les violations par Israël des principes et des fondements du droit international, du droit humanitaire international et de la Convention de Genève relative à la protection des personnes civiles en temps de guerre, du 12 août 1949, dans les territoires palestiniens qu'il occupe depuis 1967;

b) Recevoir des communications, entendre des témoins et utiliser les procédures qui pouvaient lui paraître nécessaires pour s'acquitter de son mandat;

c) Faire rapport à la Commission des droits de l'homme à ses sessions à venir, en lui présentant ses conclusions et recommandations, jusqu'à la fin de l'occupation de ces territoires par Israël. »

Dans la résolution 2001/17, la Commission des droits de l'homme a accueilli avec satisfaction les recommandations figurant dans le rapport de la Haut Commissaire aux droits de l'homme (E/CN.4/2001/114) ainsi que celles qui figurent dans le rapport de la Commission d'enquête sur les droits de l'homme (E/CN.4/2001/121), a demandé instamment au Gouvernement israélien de donner suite à ces recommandations et a prié le Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés par Israël depuis 1967 – en tant que mécanisme de contrôle – de suivre l'application de ces recommandations et de présenter des rapports à ce sujet à l'Assemblée générale à sa cinquante-sixième session et à la Commission des droits de l'homme à sa cinquante-huitième session.

5. Un certain nombre d'États, notamment Israël, ont émis des objections quant au mandat du Rapporteur spécial, faisant valoir qu'il désignait nommément Israël comme étant un pays violant les droits de l'homme, alors même que depuis l'entrée en vigueur des Accords d'Oslo (A/51/889-S/1997/357) et des accords y relatifs, l'Autorité palestinienne administre plus de 90 % des Palestiniens et contrôle intégralement ce qu'il est convenu d'appeler la zone A, qui englobe la plupart des villes et des localités palestiniennes. Ces objections seraient fondées si le Rapporteur spécial avait reçu pour mandat d'enquêter et de faire rapport sur les violations des droits de l'homme commises par Israël dans les territoires palestiniens occupés, sans que mention soit faite de l'occupation militaire dont ces territoires font l'objet. Cela serait injuste parce que l'Autorité palestinienne a par exemple compétence pour administrer la justice dans la zone A, or dans la plupart des sociétés, c'est dans le domaine de la justice que se produisent le plus grand nombre de violations des droits de l'homme. Le Rapporteur spécial n'a pas cependant reçu mandat pour enquêter sur les violations des droits de l'homme qui se produisent dans les territoires palestiniens occupés en dehors du cadre de l'occupation militaire. La section A de la résolution 1993/2 précise clairement que le Rapporteur spécial a pour mission d'enquêter sur les violations du droit international humanitaire commises par la puissance occupante, c'est-à-dire Israël, jusqu'à la fin de l'occupation des territoires palestiniens par Israël. Il existe une relation évidente entre le droit humanitaire international et les droits de l'homme, relation qui a été réaffirmée par l'Assemblée générale dans la résolution 2675 (XXV). Il est donc impossible d'examiner les violations du droit humanitaire international ou plus généralement du droit international sans faire référence aux textes relatifs aux droits de l'homme, notamment dans des situations d'occupation prolongée comme cela est le cas dans les territoires palestiniens occupés. Il entre donc dans les attributions du Rapporteur d'enquêter sur les violations des droits de l'homme commises par Israël dans les territoires palestiniens occupés, à condition que cela ne sorte pas du cadre de l'occupation militaire. C'est la durée même de l'occupation militaire des territoires palestiniens qui prête un caractère particulier au mandat du Rapporteur spécial et qui fait qu'il ne ressemble pas au mandat des autres rapporteurs nommés par la Commission des droits de l'homme.

III. L'occupation en tant que cause sous-jacente du conflit

6. En 1967, Israël a occupé la Cisjordanie et la bande de Gaza, occupation qui dure toujours 34 ans après. Israël a invoqué un certain nombre d'arguments afin de démontrer que du point de vue juridique la quatrième Convention de Genève relative à la protection des personnes civiles en temps de guerre de 1949 ne s'appliquait pas aux territoires palestiniens occupés depuis 1967 par Israël, y compris Jérusalem-Est. D'une part, il a fait valoir que puisque la souveraineté de la Jordanie sur la Cisjordanie était contestable et que l'Égypte n'avait jamais revendiqué la souveraineté sur la bande de Gaza, Israël n'avait donc pas occupé les territoires en question au détriment d'une puissance souveraine. Par conséquent, bien qu'il soit partie à la quatrième Convention de Genève de 1949, il n'est pas juridiquement tenu de traiter les territoires concernés comme des territoires occupés au sens de la quatrième Convention de Genève. D'autre part, il a déclaré que même si l'argument précédent n'était pas fondé, Israël ne pouvait pas être considéré comme une puissance occupante dans la zone A, laquelle regroupe la majorité de la population palestinienne, puisque l'Autorité palestinienne administrait désormais cette zone.

7. Aucun de ces arguments n'est recevable sur le plan juridique. Le premier, qui repose sur une interprétation abusive de l'article 2 de la Convention de Genève, ne tient pas compte du fait que les principes régissant l'occupation visent à protéger les intérêts de la population d'un territoire occupé et non ceux de la puissance souveraine évincée. Le second qui pose qu'Israël n'est plus une puissance occupante car il n'exerce plus un véritable contrôle sur les territoires palestiniens occupés de la zone A n'est guère plus défendable. Le critère d'application du régime juridique d'occupation n'est pas de savoir si la puissance occupante exerce ou non un véritable contrôle sur un territoire mais si elle a les moyens d'exercer un tel pouvoir, principe qui a été affirmé par le Tribunal militaire des États-Unis à Nuremberg dans l'affaire *List and others* (l'affaire des otages) en 1948. Les Accords d'Oslo ont laissé à Israël le contrôle légal des territoires palestiniens occupés et le fait que, pour des raisons politiques, il ait généralement choisi de ne pas exercer ce contrôle, alors qu'il possède indiscutablement la capacité militaire de l'exercer (comme cela a été démontré en août 2001 par l'intervention militaire israélienne dans la ville de Beit Jala, en zone A), ne saurait le dégager de ses responsabilités en tant que puissance occupante.

8. La communauté internationale réfute donc l'argument selon lequel la quatrième Convention de Genève ne s'applique pas aux territoires palestiniens occupés. Le Conseil de sécurité et l'Assemblée générale ont dans des résolutions successives exhorté Israël à appliquer les dispositions de la Convention et ont rejeté l'annexion voulue de Jérusalem-Est par Israël. Aux yeux de la communauté internationale, la quatrième Convention de Genève est la règle de droit qui doit s'appliquer.

9. Ces derniers mois, la violence dans les territoires palestiniens occupés et en Israël a pu faire oublier que l'occupation militaire constituait la principale cause du conflit que connaît actuellement la région. La presse se focalise tellement sur l'élimination ciblée de dirigeants palestiniens par missiles interposés et sur les attentats suicides en Israël qu'elle en vient à occulter l'occupation elle-même. Dans certains cas, le conflit est dépeint comme un conflit international entre deux États qui se disputent un territoire en employant chacun des techniques de combat différentes. Dans d'autres, il est présenté comme un conflit interne dans lequel les

rebelles feraient de la terreur une stratégie militaire. Le cessez-le-feu négocié par les États-Unis dans le cadre du plan Tenet (*Ha'aretz*, 14 juin 2001) est certes une tentative méritoire pour mettre un terme à la violence dans la région, faire régner la sécurité et sortir de la crise, mais nulle part il n'y est fait mention de l'occupation militaire. Il faut pourtant garder à l'esprit qu'Israël a occupé la Cisjordanie (y compris Jérusalem-Est) et la bande de Gaza par la force en 1967; qu'il faudrait mettre un terme à cette occupation militaire, laquelle par sa nature même est un phénomène temporaire qu'un accord de paix raisonnable permettrait d'éliminer; que tant que l'occupation dure, Israël, puissance occupante, est tenu d'appliquer les dispositions de la quatrième Convention de Genève.

10. Le présent rapport met l'accent sur le fait que l'occupation militaire est la cause profonde du conflit actuel dans les territoires palestiniens occupés et en Israël et des violations des droits de l'homme et du droit humanitaire dans la région. Il vise à replacer la question de l'occupation à sa juste place. On ne peut que déplorer et condamner la violence dans la région, qu'elle soit imputable à des tirs de roquettes israéliens ou à des attentats suicides commis par des Palestiniens. Elle est la cause première des pertes en vies humaines et bafoue le droit à la vie, lequel figure en bonne place dans toutes les conventions relatives aux droits de l'homme. Toutefois, elle n'explique pas sur le fond les violations des droits fondamentaux dont la région est le théâtre. L'explication est à chercher dans l'occupation militaire imposée à un peuple par une puissance occupante.

IV. La violence et les pertes en vies humaines

11. Depuis le début de la deuxième Intifada, en septembre 2000, plus de 530 Palestiniens ont été tués et plus de 15 000 autres blessés. Les Israéliens ont perdu quant à eux plus de 150 des leurs. La plupart des victimes étaient des civils.

12. Les premiers mois de la deuxième Intifada se sont caractérisés par de violents affrontements entre des manifestants palestiniens, armés de pierres et de cocktails Molotov, et les Forces de défense israéliennes. La plupart des tués et des blessés l'ont été par des balles tirées par les Forces de défense israéliennes. Dans son rapport, la Commission d'enquête sur les droits de l'homme a conclu que les Forces de défense israéliennes avaient réagi de manière disproportionnée aux actes des manifestants et avaient fait un usage abusif de la force (E/CN.4/2001/121, par. 44 à 52). Depuis lors, la situation a changé du tout au tout, dans la mesure où les Palestiniens ne se contentent plus de manifester et recourent à la force armée et où les Israéliens ripostent avec des armes lourdes. Actuellement, la plupart des décès parmi les Palestiniens sont imputables à des tirs de missile dirigés contre des individus soupçonnés d'être des terroristes mais qui inévitablement font aussi des victimes innocentes, et à des coups de feu tirés par les soldats et les colons, le plus souvent au cours de fusillades. Du côté israélien, ce sont les attaques terroristes commises en territoire israélien et les tirs dirigés contre les colons sur les routes de contournement ou à proximité des colonies de peuplement qui font le plus de victimes.

13. En février 2001, la Commission d'enquête sur les droits de l'homme hésitait à affirmer que l'on était en présence d'un conflit armé non international, conformément à la définition qui en a été faite par la Chambre d'appel du Tribunal pénal international pour l'ex-Yougoslavie dans l'affaire *Tadic*, à savoir une situation

de « violence armée prolongée entre des autorités gouvernementales et des bandes armées organisées ». Aujourd'hui, au vu des fréquents échanges de coups de feu entre les Forces de défense israéliennes et les combattants palestiniens, il est probable que le seuil de violence a été atteint, même si c'est de manière irrégulière et sporadique. Toutefois, même si les Forces de défense israéliennes disposent d'une plus grande latitude dans l'exercice de leurs pouvoirs en tant que puissance occupante puisqu'elles sont maintenant chargées aussi bien de l'application des lois que des opérations dans le cadre du conflit armé, elles ne sont pas pour autant libérées de toutes les contraintes prévues par le droit international humanitaire et la législation relative aux droits de l'homme. Elles sont toujours tenues de respecter le principe de distinction, en vertu duquel les personnes civiles ne peuvent pas être prises pour cibles «sauf si elles participent directement aux hostilités et pendant la durée de cette participation» [principe qui a été réaffirmé au paragraphe 3 de l'article 51 du Protocole additionnel aux Conventions de Genève (Protocole I)]. En outre, les Forces de défense israéliennes sont soumises au principe de la proportionnalité qui veut que les blessures infligées aux non-combattants ou les dommages causés à des biens civils ne soient pas disproportionnés par rapport aux avantages militaires qui pourraient découler d'une opération. Qui plus est, elles sont soumises à l'article 27 de la quatrième Convention de Genève, qui dispose que « les personnes protégées ont droit, en toutes circonstances, au respect de leur personne [...] et seront traitées, en tout temps, avec humanité et protégées notamment contre tout acte de violence [...] ».

14. Aussi bien les Israéliens que les Palestiniens ont violé des normes importantes relatives au droit humanitaire et au droit international, du fait que leur confrontation n'est plus de même nature. La pratique ouvertement admise par Israël, de l'assassinat de victimes expressément désignées ou des tueries visant des activistes palestiniens, ne saurait être conforme à certaines dispositions de la quatrième Convention de Genève, dont les articles 27 et 32 qui visent à protéger les vies des personnes protégées ne participant pas directement aux hostilités. Elle viole en outre certaines normes relatives aux droits de l'homme qui affirment le droit à la vie et interdisent l'exécution de civils sans mise en jugement et procédure judiciaire équitable. Rien ne justifie le meurtre de personnes protégées au motif qu'on soupçonne qu'elles se sont livrées, ou qu'elles se livreront, à des activités terroristes. De surcroît, de nombreux civils non soupçonnés de se livrer à une activité illégale ont trouvé la mort à la suite de ces meurtres ciblés, du bombardement de villages ou d'échanges de coups de feu, dans des circonstances qui témoignent d'un usage aveugle et disproportionné de la force.

15. La force à laquelle ont recours les Palestiniens est, elle aussi, contraire aux normes du droit international. Rien ne saurait justifier que l'on tire des coups de feu contre des colons. Certes, l'implantation de colonies viole l'article 49 6) de la quatrième Convention de Genève, et la présence des colons dans les territoires palestiniens occupés est illégale, mais il n'en reste pas moins que les colons sont des civils et ne peuvent être considérés comme des combattants, sauf évidemment s'ils sont engagés comme soldats dans les Forces de défense israéliennes. Le fait de poser des bombes dans des lieux publics en Israël, provoquant ainsi la mort de civils innocents, est contraire aux nouvelles normes du droit international, désormais codifié dans la Convention internationale pour la répression des attentats terroristes à l'explosif de 1998 (résolution 52/164 de l'Assemblée générale), dont l'article 2 qualifie de crime de tels agissements. On ne sait pas bien dans quelle mesure ces

actions relèvent de l'Autorité palestinienne. Il ne fait pas de doute que cette dernière pourrait en faire davantage pour empêcher les coups de feu contre les colons et s'opposer à une culture de la violence qui est génératrice de poseurs de bombes suicidaires. D'un autre côté, bien qu'Israël prétende le contraire, il ne semble guère probable que la violence palestinienne relève d'une autorité centralisée quelle qu'elle soit. À cet égard, elle diffère de l'utilisation de la force par Israël.

16. L'échec des tentatives faites pour mettre fin à la violence, soit par des appels provenant des parties au conflit ou d'États tiers (notamment les États-Unis), soit par des arrangements conclus à l'extérieur (plan Tenet, par exemple), amène à conclure que le temps est venu de prévoir une présence internationale dans la région qui serait chargée de surveiller et de réduire l'usage de la violence. Cette conclusion qui s'impose est celle retenue par le G-8 des ministres des affaires étrangères lors de leur réunion à Rome les 18 et 19 juillet 2001. Malgré cela, les tentatives visant à persuader le Conseil de sécurité d'approuver un plan de cette nature ont échoué. Le Rapporteur spécial a de la peine à comprendre pourquoi la communauté internationale n'a pas sérieusement essayé de persuader Israël d'accepter une présence de cette nature (l'Autorité palestinienne l'ayant déjà acceptée). Des missions internationales d'observation ou de maintien de la paix ont été envoyées à travers le monde dans des situations beaucoup moins explosives et il n'y a aucune raison pour qu'il n'en soit pas de même dans les territoires palestiniens occupés.

V. Occupation et deuxième Intifada

17. La cause principale de la deuxième Intifada et de l'escalade de la violence est, de l'avis du Rapporteur spécial, la continuation de l'occupation – une occupation qui se poursuit depuis plus de 34 ans malgré la condamnation par l'Organisation des Nations Unies; une occupation restée identique dans le fond (sinon dans la forme) tout au long de la période de négociations qui a fait suite aux Accords d'Oslo; une occupation qui continue à frustrer et à humilier les Palestiniens. De l'avis du Rapporteur spécial, on ne pourra pas restaurer la paix dans la région tant que l'on n'aura pas une preuve patente que la puissance occupante a l'intention de mettre fin à cette occupation. Or, à l'heure actuelle, il ne semble guère établi que ce soit le cas. Bien au contraire, les signes de l'occupation se sont renforcés depuis le début de la deuxième Intifada. L'extension des colonies, la démolition de maisons et la destruction des biens, les restrictions imposées à la liberté de circulation et le blocus économique rappellent constamment aux Palestiniens que l'occupation continue.

A. Colonies

18. La communauté internationale sans exception s'accorde à penser que les colonies juives en Cisjordanie et à Gaza sont contraires aux dispositions de l'article 49 6) de la quatrième Convention de Genève, dans laquelle il est stipulé que la puissance occupante ne pourra pas procéder à la déportation ou au transfert d'une partie de sa propre population civile dans le territoire occupé par elle. De nombreuses résolutions du Conseil de sécurité et de l'Assemblée générale ont déclaré illégale l'implantation des colonies.

19. Aujourd'hui, on dénombre quelque 190 colonies en Cisjordanie et à Gaza, habitées par près de 380 000 colons, dont 180 000 vivent dans la partie orientale de Jérusalem.

rusalem. Les colonies sont reliées entre elles et à Israël par un vaste système de routes de contournement (interdites aux véhicules palestiniens), longées des deux côtés par une zone tampon de 50 à 75 mètres où toute construction est interdite. Ces colonies et routes, qui séparent les communautés palestiniennes et enlèvent aux Palestiniens des terres agricoles, ont fragmenté et le pays et la population. En effet, ils excluent la possibilité d'un État palestinien, car ils en détruisent l'intégrité territoriale.

20. Les relations entre les colons et les Palestiniens ne sont pas les plus heureuses : on se regarde, de part et d'autre, avec hostilité, colère et méfiance. Protégés par les forces militaires israéliennes et échappant à la juridiction des tribunaux de l'Autorité palestinienne, les colons ont commis de nombreux actes de violence à l'encontre des Palestiniens dont ils ont détruit des terres agricoles et des biens. Depuis le début de la deuxième Intifada, les cas d'actes de violence commis par des colons se sont considérablement multipliés. L'hostilité des Palestiniens à l'encontre des colons a pris des proportions alarmantes depuis le commencement de cette Intifada et la plupart des Israéliens tués lors du présent conflit ont été des colons ou des soldats chargés de protéger les colonies et les routes qui y mènent.

21. La paix est impossible sans un gel complet de toutes les activités liées aux colonies, ainsi que l'a souligné le « Mitchell Report » du 20 mai 2001 (Rapport d'établissement des faits constitué à Charm el-Cheikh). La réponse du Gouvernement israélien à cette recommandation a été loin d'être satisfaisante. Il a déclaré qu'il avait déjà pour politique de ne pas implanter de nouvelles colonies, et par ailleurs qu'il était nécessaire de prendre en compte les besoins actuels et quotidiens du développement de ces colonies. En d'autres termes, « l'extension naturelle » des colonies va se poursuivre.

22. Les preuves de l'extension continue des colonies ne sont que trop patentes. Au cours de son voyage, le Rapporteur spécial en a eu la confirmation au vu d'activités de constructions menées dans les colonies de Har Homa et Pisgat Ze'ev et de l'élargissement des zones tampons jouxtant les routes de contournement dans la bande de Gaza. Il a pu également constater l'augmentation du nombre d'unités de logement, l'élargissement des limites territoriales des colonies par l'installation de postes de caravanes adjacents, ainsi que de l'accroissement du nombre de colons en Cisjordanie et à Gaza, passé de 203 067 en décembre 2000 à 205 015 en juin 2001. Étant donné la générosité des allègements fiscaux accordés et la modicité du coût du logement dans les colonies, on peut être certain que ces dernières continueront à s'étendre.

B. Démolition de maisons et destruction de biens

23. La démolition de maisons dans le territoire palestinien, soit à des fins de sécurité (par exemple à Rafah), soit pour des raisons administratives (par exemple dans le camp de réfugiés de Shu'afat), se poursuit. Depuis septembre 2000, plus de 300 maisons ont été complètement détruites (contre 93 en 1999). Le Rapporteur spécial a pu constater *de visu* que des maisons avaient été démolies à Rafah et à Shu'afat par des bulldozers et à Beit Jala par des missiles. Ces actes commis par les autorités israéliennes ne correspondent guère aux dispositions de l'article 53 de la quatrième Convention de Genève, qui interdit de détruire des biens mobiliers ou immobiliers, sauf dans les cas où ces destructions seraient rendues « absolument nécessaires par les opérations militaires ». Pour Israël, ces actes se justifient par des raisons de né-

cessité militaire, tandis que, pour les Palestiniens, ils font partie d'un plan plus vaste visant à entraver la croissance de la Palestine, à encourager l'émigration de Palestiniens et à humilier le peuple palestinien.

24. La création de zones tampons autour des routes de contournement et des colonies a eu pour résultat que les bulldozers ont « effacé » de vastes superficies de terres agricoles. Au total, 385 808 arbres fruitiers et oliviers ont été déracinés, et des puits et des constructions agricoles détruits.

C. Bouclages et postes de contrôle : restrictions à la liberté de circulation

25. Depuis le 29 septembre 2000, Israël a imposé des restrictions sévères à la liberté de circulation dans les territoires occupés. Les frontières internationales avec l'Égypte et la Jordanie ont été fermées, la bande de Gaza a été définitivement coupée du reste du territoire palestinien et plus de 100 postes de contrôle ont été installés sur les routes de la Cisjordanie. Les Forces de défense israéliennes ont installé des postes de contrôle à l'entrée des villages et, souvent, il n'est possible d'y entrer et d'en sortir que par des pistes, ce qui entraîne d'énormes difficultés. Des déplacements qui, un temps, ne prenaient que 15 minutes durent désormais plusieurs heures. Dans certains villages, essentiellement dans des zones proches des colonies et des routes de contournement, les pistes ont été également fermées par de grands blocs en béton et des piles de matières terreuses, de sorte que les habitants sont emprisonnés dans leur village. Le Rapporteur spécial s'est rendu dans la ville de Jéricho, autour de laquelle on a creusé une tranchée profonde, de sorte que les véhicules ne peuvent y entrer qu'en passant par un poste de contrôle des Forces de défense israéliennes.

26. Les effets cumulés de ces restrictions imposées à la liberté de circulation des personnes et des biens font, comme on peut le comprendre, que les Palestiniens qui en sont les victimes se sentent en état de siège. Il en est résulté de graves difficultés socioéconomiques dans le territoire palestinien. Les bouclages intérieurs ont en fait coupé les agglomérations palestiniennes du reste du pays et entravé toute circulation d'une localité à l'autre. En raison des restrictions imposées à l'entrée des Palestiniens en Israël, on estime que 115 000 Palestiniens se sont vu refuser l'accès à leur lieu de travail en Israël. Les conséquences économiques ont été catastrophiques : les familles de ces travailleurs sont désormais complètement dépourvues de revenus, et menacées d'indigence. Plus de 50 % de la population active palestinienne est aujourd'hui sous-employée. Les conséquences ont été également dommageables sur le plan de la santé et de l'éducation. Des ambulances se sont vu empêcher de transporter des malades vers les hôpitaux et certaines écoles n'ont pas pu fonctionner en raison de couvre-feux et de bouclages.

27. Les contrôles routiers sont devenus un des faits habituels de la vie des Palestiniens. Les Palestiniens sont obligés d'attendre de longues heures, le temps que les soldats israéliens fouillent les voitures et vérifient les documents d'identité. Afin d'éviter ces retards, certains Palestiniens laissent souvent leur voiture ou quittent leur taxi et traversent le poste de contrôle à pied pour prendre un taxi de l'autre côté. Cette pratique montre bien le but de l'opération. Il ne s'agit pas d'empêcher d'éventuels poseurs de bombe suicidaires de traverser les postes de contrôle qui mènent à Israël, car n'importe lequel d'entre eux pourrait contourner à pied le poste de contrôle en portant un bagage lourd. Il s'agit plutôt d'humilier les Palestiniens et de

faire pression sur eux pour qu'ils cessent toute résistance à l'occupation israélienne. Il s'agit donc d'une punition collective du type de celle qui est interdite par l'article 33 de la quatrième Convention de Genève.

D. La Maison d'Orient

28. Le 10 août 2001, les forces de sécurité israéliennes ont envahi et occupé la Maison d'Orient, siège politique du peuple palestinien dans le secteur oriental de Jérusalem-Est, en représailles à une attaque suicidaire à la bombe dans le secteur ouest de Jérusalem. Cette intervention, où l'on peut voir une autre preuve de la détermination du Gouvernement israélien d'imposer son autorité en tant que puissance occupante, a exacerbé une situation déjà tendue et a dressé un nouvel obstacle sur la voie de la paix.

VI. Conclusions

29. Il est à l'évidence nécessaire de mettre fin à la violence qui sévit actuellement dans les territoires palestiniens occupés et en Israël. L'assassinat par missiles guidés de Palestiniens spécialement visés, la pause de bombes en territoire israélien par des terroristes, et les massacres aveugles de civils, commis par l'une et l'autre des deux parties, doivent cesser. Qu'il soit difficile d'y parvenir, c'est ce que confirme l'échec des nombreux cessez-le-feu annoncés ces derniers mois – dont les Israéliens et les Palestiniens doivent reconnaître qu'ils sont les uns comme les autres responsables. Dans ces circonstances, il est évident qu'il faut qu'il y ait une présence internationale de quelque nature que ce soit (observateurs ou soldats de la paix) pour garantir que le cessez-le-feu tienne – ou tout du moins marque une amélioration de la situation actuelle. Il est recommandé qu'Israël et l'Autorité palestinienne donnent leur accord pour une telle présence internationale. Il incombe à la communauté internationale de faire en sorte que cet accord intervienne sous peu.

30. Israël continuant à refuser d'accepter que la quatrième Convention de Genève relative à la protection des personnes civiles en temps de guerre représente le droit applicable en la matière, il est impératif que les Hautes Parties contractantes à la Convention se réunissent dans les meilleurs délais pour étudier l'applicabilité de la Convention et les cas de violation de cette dernière.

31. Le droit humanitaire international et les normes relatives aux droits de l'homme ont été gravement violés pendant le conflit actuel. Israéliens et Palestiniens ne devraient ménager aucun effort pour promouvoir la primauté du droit. La violation par Israël de la liberté de circulation dans les territoires palestiniens occupés mérite d'être tout particulièrement étudiée.

32. Les colonies sont un signe constamment visible et de plus en plus marqué de l'occupation et de la conduite illégale d'Israël en tant que puissance occupante. Il ne suffira tout simplement pas de geler les colonies : des dispositions doivent être prises maintenant pour commencer leur démantèlement.

33. Il est nécessaire de restaurer la confiance des deux côtés, condition essentielle de la reprise de négociations devant aboutir à un règlement permanent de la question. Les Palestiniens pourraient sans aucun doute contribuer à restaurer la confiance en prenant des mesures plus fermes pour empêcher des actes de terrorisme en Israël.

On en attend davantage de la part d'Israël. Tant que le Gouvernement israélien ne prendra pas une initiative qui montre qu'il est disposé à envisager de mettre fin à l'occupation, il n'est guère probable que les Palestiniens croiront à sa bonne foi dans des négociations visant à régler de façon définitive la question. Une telle initiative pourrait prendre la forme d'un début de démantèlement des colonies : par exemple le retrait de toutes les colonies de la bande de Gaza. Le Rapporteur spécial en appelle au Gouvernement d'Israël pour qu'il prenne des initiatives de cette sorte afin de restaurer la confiance dans le processus de paix.



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**Questions relatives aux droits de l'homme :
situations relatives aux droits de l'homme
et rapports des rapporteurs
et représentants spéciaux**

Question de la violation des droits de l'homme dans les territoires arabes occupés, y compris la Palestine

Rapport du Rapporteur spécial de la Commission des droits de l'homme sur la situation des droits de l'homme dans les territoires palestiniens occupés par Israël depuis 1967

Note du Secrétaire général**

Le Secrétaire général a l'honneur de transmettre aux Membres de l'Assemblée générale le rapport intérimaire sur les violations du droit humanitaire international et des droits de l'homme dans les territoires palestiniens occupés depuis 1967, présenté par John Dugard, Rapporteur spécial, en application des résolutions 1993/2, section A, et 2002/8 de la Commission des droits de l'homme et de la décision 2002/243 du Conseil économique et social.

* A/57/150.

** Note explicative établie conformément au paragraphe 10 de la troisième partie de la résolution 55/222 de l'Assemblée générale : le présent rapport est soumis après la date limite du 2 juillet dans le souci d'y faire figurer une information aussi actuelle que possible et la décision du Conseil économique et social.



Résumé

Au cours des derniers mois, l'escalade de la violence n'a fait que s'accroître dans les territoires palestiniens occupés et en Israël. Israël a effectivement réoccupé les territoires palestiniens et le processus de paix est au point mort. Les droits de l'homme et le droit international humanitaire ont énormément souffert de cet état de choses.

Les civils sont les principales victimes du conflit. Israël et la Palestine ont tous deux enfreint les principes fondamentaux de distinction et de proportionnalité dans les actions commises contre les civils ou les concernant. Les groupes palestiniens sont responsables du nombre croissant d'attentats-suicide à la bombe en Israël et du meurtre des colons. Les Forces de défense israélienne (FDI) sont responsables des lourdes pertes en vies humaines occasionnées par les incursions militaires qu'elles ont lancées, en particulier à Naplouse et à Djénine, et les attaques à la roquette menées contre des militants. Bon nombre de personnes tuées en Israël et en Palestine étaient des enfants.

Les incursions des Forces de défense israéliennes en Cisjordanie ont abouti à des arrestations et des détentions sur une grande échelle. Des détenus ont été traités de manière inhumaine et dégradante, qui constituait parfois des actes de torture. Ces incursions ont été marquées par des destructions massives de biens, estimées à 361 millions de dollars par la Banque mondiale.

Les opérations de bouclage, les points de contrôle et les couvre-feux ont annihilé la liberté de mouvement des Palestiniens, entraînant des conséquences désastreuses pour la liberté, la santé, le bien-être et l'éducation.

Les colonies illégales n'ont cessé de s'étendre. En outre, il existe maintenant un plan visant à construire une barrière ou à établir une zone entre Israël et les territoires palestiniens occupés, qui se traduira par une nouvelle annexion de territoires palestiniens.

Les normes fondamentales du droit relatif aux droits de l'homme et du droit international humanitaire ont été violées sur une grande échelle. La destruction et la désintégration de l'administration civile en Cisjordanie ont de graves incidences pour le peuple palestinien comme pour l'état de droit. En droit, Israël, en sa qualité d'occupant, est tenu de se charger lui-même de l'administration civile ou de permettre à l'Autorité palestinienne de s'acquitter convenablement de ses fonctions. Aux termes de la quatrième Convention de Genève, tous les États parties sont tenus de faire qu'il en soit ainsi.

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I. Introduction

1. Le 26 mars 2002, le Rapporteur spécial a fait rapport à la Commission des droits de l'homme à sa cinquante-huitième session sur la situation des droits de l'homme dans les territoires palestiniens occupés par Israël depuis 1967. Le rapport était fondé en grande partie sur la visite qu'il avait effectuée dans la région en février 2002. Depuis lors, bien des événements se sont produits. L'escalade de la violence s'est poursuivie dans les territoires palestiniens et en Israël. Israël a effectivement réoccupé les territoires palestiniens et le processus de paix est au point mort. Le Conseil de sécurité comme l'Assemblée générale ont adopté des résolutions, qui n'ont pas été suivies d'effet¹. Le présent rapport ne cherche pas à donner un compte rendu complet des événements survenus au cours des derniers mois ou des tentatives visant à restaurer la paix dans la région, qui sont de notoriété publique et ont été largement couverts dans les médias (voir aussi A/ES-10/186). Il est axé sur les principales violations des droits de l'homme et du droit international humanitaire. Inévitablement, bien des événements surviendront dans les territoires palestiniens occupés entre la rédaction de ce rapport et sa présentation. Un additif sera donc présenté à une date ultérieure, à l'issue d'une visite dans la région prévue pour la fin du mois d'août.

II. Droits de l'homme et terrorisme

2. Depuis le 11 septembre 2001, la riposte à donner au terrorisme a été au centre des préoccupations mondiales et on a accordé moins d'importance à la protection des droits de l'homme. Ceci est fâcheux, car il est clair que la promotion et la protection des droits de l'homme sont la méthode la plus efficace de lutte contre le terrorisme. Les liens entre terrorisme et droits de l'homme ne sont jamais plus évidents qu'au Moyen-Orient, où la violation de ces droits dans les territoires palestiniens occupés a déclenché des actes de terrorisme en Israël, violant le droit fondamental qu'est le droit à la vie. Ces actes, à leur tour, ont engendré des actes de terreur militaire dans les territoires palestiniens occupés, entraînant inévitablement la suppression des droits de l'homme fondamentaux. Dans une telle situation, chercher à déterminer les culpabilités ne sert à rien. Il est infiniment plus sage de reconnaître que les violations des droits de l'homme sont une conséquence inéluctable de l'occupation militaire et s'efforcer de mettre un terme à la situation afin que le cycle de la violence laisse place à la recherche, de plus en plus difficile, mais de plus en plus nécessaire, de la paix et de la sécurité.

III. Les civils : victimes du conflit

3. Inévitablement, les civils sont les principales victimes des conflits armés et des guerres civiles. Le droit international humanitaire s'efforce de limiter les dommages infligés aux civils en exigeant de toutes les parties au conflit qu'elles respectent les principes de distinction et de proportionnalité. Le principe de distinction codifié dans l'article 48 du premier Protocole additionnel aux Conventions de Genève de 1977 stipule que les parties au conflit « doivent en tout temps faire la distinction entre la population civile et les combattants ainsi qu'entre les biens de caractère civil et les objectifs militaires et, par conséquent, ne diriger leurs opérations que contre des objectifs militaires ». Les actes ou menaces de

violence, dont le but principal est de répandre la terreur parmi la population civile, sont interdits [art. 51 2)]. Le principe de proportionnalité codifié à l'article 51 5) b) interdit les attaques sur une cible militaire dont on peut attendre qu'elles causent incidemment des pertes en vies humaines dans la population civile, des blessures aux personnes civiles, des dommages aux biens de caractère civil qui seraient excessifs par rapport à l'avantage militaire concret et direct attendu. Ce principe qui s'applique aux Israéliens comme aux Palestiniens a été confirmé par les Hautes Parties contractantes à la quatrième Convention de Genève qui, dans une déclaration publiée le 5 décembre 2001, ont appelé les deux parties au conflit à :

« assurer le respect et la protection de la population civile et des biens civils et à opérer en tout temps une distinction entre la population civile et les combattants ainsi qu'entre les biens civils et les objectifs militaires. Elles appellent aussi les parties à s'abstenir de toute brutalité ou violence contre la population civile, qu'elle soit le fait d'agents civils ou d'agents militaires, et de s'abstenir d'exposer la population civile aux opérations militaires ».

Malheureusement, aucune des deux parties au conflit n'a véritablement respecté ces principes tandis que le nombre de victimes ne cesse d'augmenter. Depuis le début de la deuxième Intifada en septembre 2000, 1 700 Palestiniens ont trouvé la mort ainsi que 600 Israéliens, au total. La plupart étaient des civils.

4. En Israël, la plupart des décès ont été causés par des attentats-suicide à la bombe commis dans des autobus ou dans des centres commerciaux très animés par des personnes qui transportaient des armes mortelles. Malgré la condamnation de tels actes par l'Autorité palestinienne et les chefs de la communauté palestinienne – et par la communauté internationale –, ce moyen de terreur, qui ne respecte ni le principe de distinction ni celui de proportionnalité, continue d'être utilisé par des groupes palestiniens paramilitaires.

5. Les Forces de défense israéliennes, censées bien connaître les règles du droit international humanitaire, ont, elles aussi, manifesté peu de respect pour les principes de distinction ou de proportionnalité. Les récentes incursions militaires en Cisjordanie, la réoccupation de villes et de cités palestiniennes, se sont traduites par de lourdes pertes dans la population civile. Ceci était particulièrement apparent dans l'opération Bouclier défensif de mars-avril 2002, au cours de laquelle le camp de réfugiés de Djénine et la ville de Naplouse ont été soumis à d'intensifs bombardements aériens et terrestres avant l'entrée des Forces de défense israéliennes, qui ont utilisé des bulldozers pour faciliter leur mouvement et auraient utilisé des civils palestiniens comme boucliers humains pour se protéger de tireurs isolés. Sur les 80 personnes ayant trouvé la mort à Naplouse, 50 étaient des civils; et sur les 52 personnes tuées à Djénine, 22 étaient des civils. Depuis novembre 2000, les Forces de défense israéliennes ont tué un certain nombre de militants par des bombardements ciblés. De plus, ces assassinats ont été souvent commis sans se soucier des civils proches. Sur les 165 personnes tuées dans ce type d'action, un tiers au moins était des civils. Un incident récent illustre dramatiquement la façon dont ces attaques ont parfois été menées. Le 22 juillet, les Forces de défense israéliennes ont effectué un raid aérien tard dans la nuit, visant un chef militaire du Hamas, Salah Shehada, alors qu'il se trouvait dans une zone résidentielle très peuplée de Gaza, raid au cours duquel 15 personnes (dont neuf enfants) ont été tuées et plus de 150 personnes blessées.

6. Bon nombre des victimes étaient des enfants. En 2002, plus de 100 enfants ont été tués – non à la suite de feux croisés entre forces palestiniennes et israéliennes, comme on le croit généralement – mais principalement parce que les Forces de défense israéliennes avaient ouvert le feu au hasard sur des quartiers civils ou les avaient pilonnés. Plus de 20 enfants ont été tués « accessoirement » au cours de l'assassinat de militants.

IV. Détentions, traitements inhumains et enfants

7. Les attaques lancées contre des villes palestiniennes en mars et avril dans le cadre de l'opération Bouclier défensif, ainsi que les opérations militaires menées par la suite en Cisjordanie, se sont accompagnées d'un très grand nombre d'arrestations et de détentions. Entre le 29 mars et le 5 mai, pour ne mentionner que cette période, quelque 7 000 Palestiniens ont été arrêtés, et 5 400 d'entre eux avaient été relâchés au 5 mai². Dans bien des villes et des camps de réfugiés, tous les hommes âgés entre 16 et 45 ans ont été arrêtés. La plupart d'entre eux ont été détenus pendant quelques jours seulement. Les arrestations de ce type constituent une forme de sanction collective car, dans la majorité des cas, la responsabilité individuelle des personnes arrêtées n'a été nullement prise en compte. Dans de nombreux cas, les personnes arrêtées ont subi un traitement humiliant et inhumain. Menottées, les yeux bandés et ne portant que leurs sous-vêtements, elles ont été traînées devant les caméras de télévision, insultées, battues, (notamment avec les pieds), et détenues dans des conditions insalubres. Ceux qui n'ont pas été libérés sont toujours détenus sans procès et n'ont pas accès à un avocat. Certains font l'objet d'une détention administrative, d'autres sont détenus en vertu de l'ordonnance militaire No 1500 du 5 avril, qui autorise la détention, pendant de longues périodes, des personnes arrêtées depuis le 29 mars. Cette ordonnance autorise également la détention au secret pendant une période maximale de 18 jours, qui peut être renouvelée pour de nouvelles périodes pouvant aller jusqu'à 90 jours. Enfin, de nombreuses allégations ont été faites concernant les tortures que subiraient les détenus (privation de sommeil, passages à tabac, violentes secousses, enchaînement à une petite chaise dans des positions douloureuses, bruits assourdissants, menaces contre des membres de la famille).

8. Dans mon rapport du 6 mars adressé à la Commission des droits de l'homme (E/CN.4/2002/32), j'ai appelé l'attention sur les graves allégations concernant les tortures et les traitements inhumains, tels que ceux qui sont décrits au paragraphe précédent, dont seraient victimes des mineurs détenus et emprisonnés pour avoir commis des infractions politiques, notamment pour avoir jeté des pierres en direction de membres des FDI. J'ai souligné que ces traitements n'étaient pas conformes aux importantes normes du droit international énoncées dans la Convention relative aux droits de l'enfant (art. 37), la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants (art. 1 et 6) et la quatrième Convention de Genève (art. 27, 31, 32 et 76), et j'ai donc demandé aux autorités israéliennes de mener, au sujet de ces allégations (décrites en détail dans les rapports d'organisations non gouvernementales), une enquête approfondie conduite par un organe indépendant sans lien avec l'armée, la police ou les services pénitentiaires. Malheureusement, aucune mesure n'a été prise à cette fin. Au contraire, la situation des enfants s'est encore détériorée. On estime que 10 à 15 % des milliers de personnes récemment incarcérées sont des enfants³. Qui plus est,

certains faits donnent à penser que de nombreux enfants auraient été soumis aux mêmes traitements humiliants et inhumains (qui s'apparentent parfois à la torture) subis par les adultes et décrits plus haut.

V. Couvre-feux, points de contrôle et réoccupation de la Palestine

9. Depuis le début de la seconde Intifada en septembre 2000, Israël contrôle totalement la vie des Palestiniens en restreignant la liberté de circulation. Les autorités israéliennes ont commencé par fermer les frontières internationales et isoler Gaza du reste du territoire palestinien. Elles ont ensuite installé 120 points de contrôle sur les routes de Cisjordanie. Enfin, en 2002, elles ont soumis au couvre-feu, non pas une ville ou un quartier, mais une grande partie de la population. Ces mesures, vigoureusement appliquées par les FDI, ont débouché sur la réoccupation du territoire palestinien.

10. L'opération « Determined Path », lancée par les FDI à la mi-juin, s'est soldée par la réoccupation de sept des huit principaux centres urbains de Cisjordanie, ainsi que des villages et des camps de réfugiés attenants. Entre le 18 et le 25 juin, un couvre-feu a été imposé à Djénine, Qalquiliya, Bethléem, Naplouse, Tulkarem, Ramallah et Hébron. Plus de 700 000 personnes ont été soumises à un régime comparable à l'assignation à domicile, le couvre-feu étant levé pendant quelques heures tous les trois ou quatre jours pour permettre à la population de se procurer des fournitures essentielles. Le couvre-feu était strictement appliqué par les FDI, lesquelles ont tiré sur de nombreux civils qui n'avaient pas respecté le couvre-feu.

11. Cette réoccupation au moyen de bouclages et de couvre-feux a influé sur tous les aspects de la vie des Palestiniens : pénurie de denrées alimentaires de base; perturbation des services médicaux en raison du nonaccès aux médecins et aux hôpitaux; interruption des contacts entre membres d'une même famille; et arrêt des activités des établissements d'enseignement à un moment important, à savoir celui des examens de fin d'année. Les services municipaux, tels que l'eau, l'électricité, le téléphone et l'enlèvement des déchets, ont été annulés ou interrompus, et les FDI ont interdit toute réparation des unités endommagées assurant la prestation de ces services. Cette situation a entraîné un arrêt quasi total des activités de production (secteur manufacturier, construction, commerce, services public et privé), d'où de graves incidences sur les moyens de subsistance de la majeure partie de la population et, partant, une aggravation considérable de la pauvreté. En mai, le Programme alimentaire mondial a estimé que 620 000 Palestiniens de Cisjordanie et de Gaza avaient besoin d'une assistance alimentaire d'urgence.

12. Le couvre-feu s'est appliqué à tous. Le Président Arafat lui-même a été enfermé dans ses locaux à Ramallah et il a été occasionnellement privé d'eau et d'électricité.

VI. Destruction de biens

13. Les attaques lancées contre les villes de Cisjordanie dans le cadre de l'opération Bouclier défensif, entre le 29 mars et le 7 mai, ont eu des effets dévastateurs. À Djénine, 800 habitations ont été détruites et bien d'autres

endommagées, et plus de 4 000 personnes se sont ainsi retrouvées sans domicile. La Banque mondiale a estimé les pertes à 83 millions de dollars. À Naplouse, la vieille ville, y compris des sites religieux et historiques, a subi des dégâts considérables. La Banque mondiale a estimé que les réparations coûteraient 114 millions de dollars. Les réfugiés ont été le groupe le plus durement touché. Pendant les offensives militaires menées entre le 27 février et le 17 mars et entre le 29 mars et le 7 mai, quelque 2 800 unités d'habitation abritant des réfugiés ont été endommagées et 878 habitations ont été détruites ou démolies, laissant 17 000 personnes sans abri ou possédant un logement nécessitant des réparations. La Banque mondiale estime à 361 millions de dollars le montant des dégâts matériels causés par l'opération Bouclier défensif dans l'ensemble de la Cisjordanie, et à 305 millions de dollars celui des dommages imputables aux 15 premiers mois de l'Intifada⁴. Les plus touchés ont été le secteur privé (97 millions de dollars), les habitations (66 millions), les routes (64 millions) et les sites appartenant au patrimoine culturel (48 millions).

14. Dans le passé, la destruction des biens se faisait souvent de manière disciplinée et à des fins strictement punitives. Par exemple, les maisons des militants présumés étaient démolies dans le but d'infliger froidement une sanction collective, une pratique qui se poursuit encore aujourd'hui. La destruction de biens dans le cadre de l'opération Bouclier défensif avait toutefois un caractère gratuit qui a surpris même les détracteurs les plus violents des FDI. Dans bien des maisons où ils ont pénétré, les soldats israéliens ont fait des trous dans les murs pour passer dans les maisons voisines. Des trous ont parfois été faits pour passer d'un appartement à un autre alors que les soldats auraient pu y entrer en passant par un balcon ou une fenêtre. Encore plus grave, des témoignages font état d'actes de pillage, de saccages systématiques des maisons et de destructions aveugles de télévisions et d'ordinateurs dans les maisons, les écoles et les immeubles de bureaux⁵.

VII. Intégrité du territoire palestinien occupé

A. Colonies de peuplement

15. L'ensemble de la communauté internationale considère que les colonies de peuplement juives situées en Cisjordanie et à Gaza constituent une violation de l'article 49 (6) de la quatrième Convention de Genève, qui interdit à une puissance occupante de transférer une partie de sa propre population civile dans le territoire qu'elle occupe. Dans nombre de leurs résolutions, le Conseil de sécurité et l'Assemblée générale ont dénoncé l'existence de ces colonies, qualifiées d'illégales, et, dans leur Déclaration du 5 décembre 2001, les Hautes Parties contractantes à la quatrième Convention de Genève ont réaffirmé cette position.

16. Aujourd'hui, la Cisjordanie et Gaza comptent quelque 190 colonies de peuplement dans lesquelles vivent 390 000 colons environ, dont quelque 180 000 dans la région de Jérusalem-Est. Les colonies sont reliées entre elles, ainsi qu'avec Israël, par un vaste réseau de routes de contournement bordées des deux côtés par une zone tampon de 50 à 75 mètres de large, dans laquelle aucun bâtiment ne peut être construit. Ces colonies et ces routes, qui séparent les communautés palestiniennes et privent les Palestiniens de terres agricoles, ont fragmenté tant le

territoire que la population, et elles suppriment toute possibilité de créer un État palestinien car elles détruisent l'intégrité du territoire palestinien.

17. Les relations entre colons et Palestiniens sont extrêmement tendues, et chaque partie regarde l'autre avec hostilité, colère et suspicion. Protégés par des militaires israéliens et ne relevant pas de la juridiction des tribunaux de l'Autorité palestinienne, les colons ont commis de nombreux actes de violence contre des Palestiniens et détruit des biens et des terres agricoles leur appartenant. Depuis le début de la seconde Intifada, les actes de violence commis par des colons ont considérablement augmenté, l'hostilité des Palestiniens à l'égard des colons s'est intensifiée de manière inquiétante, et bon nombre des Israéliens tués dans le cadre du présent conflit étaient des colons ou des soldats chargés de protéger les colonies de peuplement et les routes menant à ces colonies. Ces derniers mois, les actes de terrorisme dirigés contre des colons se sont multipliés, des militants palestiniens ayant lancé des attaques contre des colonies ou des autobus se dirigeant vers ces colonies.

18. Malgré les menaces qui planent sur la vie et la sécurité des colons, le Gouvernement israélien n'a rien fait pour réduire le nombre des colons. Il a refusé d'aider ces derniers à rentrer en Israël et les a encouragés à rester sur place en continuant à leur offrir des habitations à bas prix, des prêts à des conditions avantageuses et des incitations fiscales⁶.

19. Les assurances du Gouvernement israélien, selon lesquelles celui-ci limiterait l'élargissement des colonies de peuplement sont démenties par les faits. Les colonies ont continué à s'agrandir, principalement par la création d'« avant-postes » informels – officiellement tolérés mais pas officiellement autorisés – à proximité de colonies existantes, ainsi que par la construction de nouvelles unités d'habitation dans ces colonies. D'après *La paix maintenant*, mouvement israélien pour la paix et les droits de l'homme, 44 « avant-postes » ont été construits depuis février 2001. En juillet 2002, des mesures ont été prises pour détruire certains avant-postes parmi les plus petits et les moins peuplés, une décision décriée par YESHA, l'association des colons, comme étant une incitation au terrorisme. Les colons disposent de pouvoirs très étendus dans les milieux politiques israéliens, ce qui leur permet pratiquement de dicter leur loi au Gouvernement.

B. Clôtures et zones tampons

20. Compte tenu de son incapacité à empêcher les auteurs palestiniens d'attentats-suicide d'atteindre leurs cibles en Israël, le Gouvernement israélien envisage une nouvelle stratégie qui consisterait à construire soit une clôture de sécurité de 360 km de long, soit une zone comprenant des tranchées, des barricades, des murs, des clôtures électrifiées et surveillées, et des routes pour effectuer des patrouilles, l'objectif étant de séparer Israël de la Palestine. L'emplacement exact et la largeur de la clôture ou de la zone n'ont pas été arrêtés, mais il ne fait pas de doute que le tracé du nouveau dispositif ne suivra pas scrupuleusement celui de la Ligne verte, qui marque la frontière d'avant 1967 entre Israël et la Jordanie. On assistera donc à un nouvel empiètement sur le territoire palestinien en raison de l'établissement d'une zone tampon de plusieurs kilomètres de large en Palestine et du rattachement à Israël des colonies de peuplement situées près de la Ligne verte. Jérusalem-Est et les colonies avoisinantes, telles que Ma'ale Adumim, seront également rattachées à

Israël. Cette redélimitation unilatérale de la frontière au nom de la sécurité n'est en fait qu'un prétexte pour annexer illégalement le territoire palestinien.

VIII. L'occupation dans l'optique du droit international relatif aux droits de l'homme et du droit international humanitaire

21. Dans sa déclaration au Conseil de sécurité le 12 mars 2002, le Secrétaire général, Kofi Annan, a demandé à Israël de mettre fin à son « occupation illégale » du territoire palestinien. Lorsqu'on lui a demandé d'expliquer pourquoi il avait qualifié d'« illégale » l'occupation du territoire palestinien, le Secrétaire général a répondu que le Conseil de sécurité et l'Assemblée générale avaient tous deux déclaré, en diverses occasions, que certains aspects de l'occupation israélienne étaient illégaux. Il a mentionné en particulier la création de colonies de peuplement, l'annexion de Jérusalem-Est et les événements récents dans la région. Les observations du Secrétaire général mettent en relief le fait que c'est au regard du droit applicable en matière d'occupation qu'il convient de juger la conduite d'Israël et que nombre de ses pratiques portent atteinte aux principes fondamentaux de ce droit.

22. L'ensemble des dispositions applicables en la matière figurent dans le Règlement de La Haye de 1907, dans la quatrième Convention de Genève de 1949 et dans les conventions internationales relatives aux droits civils et politiques, aux droits sociaux, économiques et culturels, et au traitement des enfants, complétées par le droit international coutumier. Le fait que le droit international relatif aux droits de l'homme fait partie du droit applicable en matière d'occupation ressort clairement de l'article 27 de la quatrième Convention de Genève qui prévoit que la puissance occupante doit respecter les droits fondamentaux des personnes protégées. D'après le commentaire du Comité international de la Croix-Rouge sur cette disposition : « Le droit au respect de la personne doit être pris dans son sens le plus large : il couvre l'ensemble des droits de la personnalité, c'est-à-dire les droits et qualités qui sont, comme tels, indissolublement liés à la personne humaine, en raison de son existence et de ses forces physiques et mentales; il s'entend notamment des droits à l'intégrité corporelle, morale et intellectuelle, attributs indispensables de la personne humaine » (p. 201 du texte anglais). Les « droits de la personnalité » ont été proclamés, décrits et interprétés dans de nombreux instruments internationaux relatifs aux droits de l'homme, en particulier dans le Pacte international relatif aux droits civils et politiques et le Pacte international relatif aux droits économiques, sociaux et culturels de 1966, ainsi que dans la jurisprudence des organes chargés d'en surveiller l'application. Ces instruments de défense des droits de l'homme complètent donc la quatrième Convention de Genève en définissant les droits protégés par l'article 27 et en énonçant la teneur de ces droits. Cela est confirmé par la Déclaration de Vienne adoptée par la Conférence mondiale sur les droits de l'homme en 1993, qui a proclamé :

« Il faudrait prendre des mesures internationales efficaces pour garantir et contrôler l'application des normes relatives aux droits de l'homme à l'égard des populations soumises à une occupation étrangère et leur assurer une protection juridique efficace contre la violation de ces droits conformément

aux normes relatives aux droits de l'homme et au droit international, en particulier à la Convention de Genève de 1949 relative à la protection des personnes civiles en temps de guerre et aux autres normes du droit humanitaire applicable. »

A. Violations des droits de l'homme

23. Les droits les plus élémentaires ont été bafoués au cours du conflit, tant dans le territoire palestinien occupé qu'en Israël même. Le droit à la vie, dont dépendent tous les droits, a subi de très graves atteintes en raison des attentats-suicide à la bombe commis par des terroristes en Israël, des attaques lancées contre des colons dans le territoire palestinien occupé et des actes de violence perpétrés par les Forces de défense israéliennes à l'encontre de Palestiniens, notamment des actes terroristes, des assassinats, des incursions militaires et des fusillades visant des civils. Le droit à la dignité humaine, le droit de vivre à l'abri de la torture et des arrestations arbitraires, le droit à un procès équitable ont été massivement violés par les Israéliens lors de leurs interventions militaires en Cisjordanie. La pratique des bouclages, la mise en place de points de contrôle et l'imposition de couvre-feux ont complètement aboli la liberté de circulation des Palestiniens et le droit à la propriété a été gravement compromis par les offensives militaires. De même, les droits économiques, sociaux et culturels ont été bafoués. Les couvre-feux, la mise en place de points de contrôle et la destruction de logements constituent des violations des articles 11, 12 et 13 du Pacte international relatif aux droits économiques, sociaux et culturels de 1966. Ces articles reconnaissent tous le droit à un niveau de vie suffisant, y compris le droit d'être nourri, vêtu et logé convenablement, le droit de toute personne de jouir du meilleur état de santé physique et mentale qu'elle soit capable d'atteindre, et le droit à l'éducation. Malheureusement, il a été porté atteinte à nombre des dispositions de la Convention relative aux droits de l'enfant, notamment à celles concernant le droit à la vie, aux soins de santé et à un niveau de vie suffisant pour assurer le développement physique, mental, spirituel, moral et social de l'enfant, le droit à l'éducation, le droit de vivre à l'abri de la torture, des traitements inhumains et des arrestations arbitraires, et le droit à un procès équitable ainsi que l'obligation des États d'assurer « dans toute la mesure possible la survie et le développement de l'enfant » (art. 6, par. 2). En outre, en vertu de la Convention, les États sont tenus, conformément à l'obligation que leur impose le droit international humanitaire, de prendre toutes les mesures possibles « pour que les enfants qui sont touchés par un conflit armé bénéficient d'une protection et de soins » (art. 38, par. 4).

B. Violations du droit international humanitaire

24. Nombre des principes les plus élémentaires du droit international humanitaire ont également fait l'objet de violations. Comme on l'a vu plus haut aux paragraphes 3 à 6, aucune des parties au conflit n'a respecté les principes de distinction et de proportionnalité dans leurs actions dirigées contre des civils ou touchant des civils. L'interdiction des peines collectives « de même que [de] toute mesure d'intimidation et de terrorisme » énoncée à l'article 33 de la quatrième Convention de Genève a été enfreinte par les forces de défense israéliennes de maintes façons, notamment par la destruction de biens, l'imposition de couvre-feux et l'arrestation

de tous les hommes de 16 à 45 ans. La destruction brutale de biens dans le cadre de l'opération Bouclier défensif, en particulier à Naplouse et à Djénine, est incompatible avec l'article 53 de cette convention interdisant la destruction de biens « sauf dans les cas où ces destructions seraient rendues absolument nécessaires par les opérations militaires ».

C. L'administration civile dans un État d'occupation

25. Le droit régissant l'occupation, qui trouve son expression dans la coutume internationale, le Règlement de La Haye de 1907 et la quatrième Convention de Genève, vise à assurer que, malgré les besoins de la puissance occupante en matière de sécurité, la vie quotidienne des civils dans un territoire occupé se poursuit normalement. Dans le monde contemporain, cela signifie que les civils doivent pouvoir se nourrir, se loger et bénéficier d'un approvisionnement en électricité et en eau, que les services municipaux tels que le ramassage des ordures et l'évacuation des eaux usées sont maintenus, que les malades peuvent recevoir les soins médicaux dont ils ont besoin et que l'enseignement continuera d'être dispensé sans obstacle.

26. Il n'existe pas une seule règle du droit international prévoyant expressément qu'un occupant belligérant est responsable de l'administration civile d'un territoire occupé. Il existe néanmoins deux sources du droit qui créent une telle responsabilité : la première est l'article 43 du Règlement de La Haye et la deuxième se trouve dans les dispositions de la quatrième Convention de Genève. L'article 43 est succinct et n'énonce pas en détail les obligations de la puissance occupante. Il se contente de simplement stipuler que :

« L'autorité de la puissance légitime étant en fait passée aux mains de l'occupant, ce dernier prend toutes les mesures en son pouvoir pour rétablir et assurer, dans la mesure du possible, l'ordre public et la sécurité tout en respectant, à moins qu'il en soit absolument empêché, les lois en vigueur dans le pays ».

Les obligations de l'occupant ne sont pas énoncées parce qu'en 1907 « la mise en place d'un système d'administration par l'occupant était largement acceptée en pratique ... comme obligatoire⁷ ».

27. La quatrième Convention de Genève complète cette disposition en imposant à l'occupant l'obligation d'assurer « l'approvisionnement de la population en vivres et en produits médicaux » et d'« apporter les vivres, les fournitures médicales et tout autre article nécessaire lorsque les ressources du territoire occupé seront insuffisantes » (art. 55); d'assurer et de maintenir « les établissements et les services médicaux et hospitaliers, ainsi que la santé et l'hygiène publiques dans le territoire occupé » (art. 56); et de faciliter le « bon fonctionnement des établissements consacrés aux soins et à l'éducation des enfants » (art. 50). L'obligation de fournir des services postaux ainsi que des services de télécommunication et de transport et de maintenir des établissements de protection sociale peut être déduite de la quatrième Convention de Genève et du Règlement de La Haye⁸. Prises ensemble, les dispositions énoncées dans ces deux instruments constituent pour l'occupant une obligation de mettre en place une administration civile efficace dans un territoire occupé.

28. Aux termes des Accords d'Oslo, la responsabilité de l'administration civile en Cisjordanie et à Gaza a été transférée à l'Autorité palestinienne. Toutefois, l'identité de l'autorité chargée de l'administration civile en Cisjordanie et à Gaza n'est plus aussi claire aujourd'hui. Les opérations militaires de 2002 ont détruit une grande partie de l'infrastructure de l'Autorité palestinienne. L'approvisionnement en électricité et en eau, de même que les services municipaux ont été interrompus, l'accès aux vivres refusé, la prestation de soins de santé entravée et l'enseignement gravement désorganisé. Il convient de se demander si cela signifie qu'Israël est maintenant tenu d'assumer la responsabilité de l'administration civile du territoire palestinien occupé.

29. Bien qu'Israël ait annoncé qu'il prévoyait une occupation prolongée du territoire palestinien, il n'a manifestement pas l'intention d'assumer de nouveau la responsabilité de l'administration civile du territoire⁹. Il envisage plutôt de remettre une partie des 600 millions de dollars qu'il doit à l'Autorité palestinienne au titre des droits de douane et impôts et qu'il refuse de lui verser depuis septembre 2000¹⁰. De même, même si elle se plaint du fait qu'Israël a de facto mis au rebut les Accords d'Oslo, l'Autorité palestinienne n'est évidemment pas disposée à envisager de céder à Israël la responsabilité de l'administration civile.

30. La situation actuelle est intenable. Israël ne peut, conformément au droit international humanitaire, refuser à l'Autorité palestinienne les moyens d'assurer une administration civile efficace et opérationnelle et, dans le même temps, refuser toute responsabilité à cet égard. En droit, il est tenu soit d'assumer cette responsabilité, soit de permettre à l'Autorité palestinienne de fournir les services que suppose une administration civile digne de ce nom. La quatrième Convention de Genève impose à toutes les parties la lourde charge de prendre des mesures pour assurer le rétablissement d'une administration civile convenable dans le territoire palestinien conformément aux obligations qui leur incombent en vertu de l'article premier de la Convention « de faire respecter » la Convention « en toutes circonstances ».

IX. Conclusions

31. Le territoire palestinien occupé est un terrain d'essai pour le droit relatif aux droits de l'homme et le droit humanitaire. Les grands progrès réalisés dans ces deux domaines sont compromis par une situation où le droit relatif aux droits de l'homme et le droit humanitaire sont niés et ignorés sans que la communauté internationale réagisse sérieusement. La primauté du droit fait évidemment les frais du conflit dans le territoire palestinien occupé encore que les principales victimes soient véritablement les peuples palestinien et israélien.

Notes

¹ Résolutions 1397 (2002), 1402 (2002) et 1405 (2002) du Conseil de sécurité et résolution ES-10/10 de l'Assemblée générale.

² Déclaration du Bureau du Procureur général à la Cour suprême israélienne : HCJ 3239/02 *Iyyad Ishaq Mahmud Mar'ab et al c. Commandant des FDI en Judée et Samarie*, réponse, 5 mai 2002, par. 14.

- ³ Voir le rapport sur les pratiques israéliennes à l'égard des enfants palestiniens, présenté par Defense for Children International, Section de la Palestine, au Comité contre la torture, mai 2002.
- ⁴ *International Herald Tribune*, 16 mai 2002.
- ⁵ Amnesty International *Israel and the Occupied Territories: The Heavy Price of Israeli incursions*, 12 avril 2002.
- ⁶ Voir également B'Tselem, *Land Arab: Israeli Settlement Policy in the West Bank*, 2002.
- ⁷ E. Benvenisti, *The International Law of Occupation* (1993), p. 4 et 5.
- ⁸ M. Greenspan, *The Modern Law of Land Warfare* (1959), p. 230 à 235.
- ⁹ Voir les déclarations de M. Ben Eliezer, Ministre de la Défense, et du général Amos Gilad dans l'*International Herald Tribune* du 24 juin 2002.
- ¹⁰ *International Herald Tribune*, 23 juillet 2002.
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Questions relatives aux droits de l'homme :

situations relatives aux droits de l'homme

et rapports des rapporteurs et représentants spéciaux

Question de la violation des droits de l'homme dans les territoires arabes occupés, y compris la Palestine

Rapport du Rapporteur spécial de la Commission des droits de l'homme sur la situation des droits de l'homme dans les territoires palestiniens occupés par Israël depuis 1967

Additif

Note du Secrétaire général

Le Secrétaire général a l'honneur de transmettre aux membres de l'Assemblée générale le rapport du Rapporteur spécial sur la visite que ce dernier a effectuée du 25 au 30 août 2002 dans le territoire palestinien occupé et en Israël.

* A/57/150.



Résumé

1. Comme l'indique le rapport principal (A/57/366) qu'il a présenté à l'Assemblée générale, le Rapporteur spécial rend compte dans le présent document de la visite qu'il a effectuée dans le territoire palestinien occupé à la fin du mois d'août 2002.

2. Le Rapporteur spécial s'est rendu dans le territoire palestinien occupé et en Israël du 25 au 30 août, période au cours de laquelle il est allé à Naplouse et à Djénine, où il a pu constater les dégâts causés par l'Opération bouclier de défense, ainsi qu'à Qalquiliya, où il a vu les premiers travaux de construction du grand mur de séparation entre Israël et la Palestine. Il s'est également rendu à Ramallah, à Bethléem et à Jéricho. Il a rencontré des personnes de tous horizons : le Président Yasser Arafat et le Ministre des collectivités locales de l'Autorité palestinienne, M. Sa'eb Erekat; le Gouverneur de Naplouse ainsi que le Gouverneur par intérim et le maire de Djénine; des représentants d'organisations non gouvernementales palestiniennes, israéliennes et internationales, et des membres d'organisations humanitaires internationales. Cette visite a permis de confirmer la fiabilité des renseignements fournis dans le rapport principal concernant la situation sur le terrain. Le Rapporteur spécial estime cependant que la gravité de la situation a été sous-estimée dans le rapport. Après avoir été confronté aux couvre-feux, vu de ses propres yeux le camp de réfugiés de Djénine dévasté, les dommages importants subis par la vieille ville de Naplouse, les postes de contrôle où les Palestiniens sont humiliés quotidiennement et le complexe du Président Arafat en grande partie détruit et entendu un certain nombre de personnes évoquer leurs souffrances et celles des autres, le Rapporteur spécial a vu sa perception intellectuelle de la crise humanitaire se transformer en une émotion profonde devant la tragédie humaine qui se déroule en Palestine.

3. Le présent additif n'apporte pas d'information supplémentaire sur tous les thèmes évoqués dans le rapport principal. Il met plutôt l'accent sur les couvre-feux, les bouclages et leurs conséquences, les détentions, les peines collectives, les enfants, les colonies et le financement nécessaire pour faire face à la crise humanitaire.

La sécurité et les droits de l'homme

4. Avant d'aborder ces thèmes, il est nécessaire de parler des besoins et des intérêts d'Israël en matière de sécurité. Il ne fait aucun doute que ses préoccupations en la matière sont fondées. Des vagues d'attentats suicides à la bombe perpétrés par des Palestiniens ont causé de profondes blessures au sein de la société israélienne. Israël a le droit et le devoir de protéger son peuple contre d'autres attaques mais il faut se demander si les mesures qu'il a prises, en particulier les couvre-feux et les bouclages, répondent toujours à un besoin de sécurité. Elles apparaissent en effet souvent tellement disproportionnées et éloignées des considérations de sécurité que l'on en vient à se demander si elles ne sont pas en partie destinées à punir, humilier et asservir le peuple palestinien. Israël doit concilier ses besoins de sécurité, parfaitement fondés, avec les besoins humanitaires – tout aussi fondés – du peuple palestinien. Aux yeux du Rapporteur spécial, il semble qu'un tel équilibre n'existe pas. Les droits de l'homme ont été sacrifiés sur l'autel de la sécurité. Il en résulte une menace plus redoutable encore pour la sécurité des Israéliens : le sentiment

d'impuissance né du désespoir, qui conduit inexorablement aux attentats suicides et à d'autres actes de violence dirigés contre les Israéliens.

Les couvre-feux, les bouclages et leurs conséquences

5. Il est difficile de décrire ce que sont les couvre-feux imposés à Naplouse et à Ramallah. Des villes auparavant grouillantes de monde et débordantes d'activité, bruyantes, animées et colorées, sont devenues des villes mortes, le silence n'étant rompu que par le roulement des chars et les tirs sporadiques des soldats. Des villes entières sont emprisonnées derrière des murs. Il s'agit d'un emprisonnement décidé arbitrairement, car personne ne peut prévoir quand le couvre-feu sera levé ou quand il peut être à nouveau décrété, et appliqué de façon brutale, de nombreuses personnes ayant été blessées ou tuées pour n'avoir pas respecté les règles du couvre-feu. Il est moins difficile de décrire un poste de contrôle militaire occupé par un groupe de jeunes soldats ayant l'arrogance qui caractérise l'adolescence, portant des uniformes poussiéreux et des fusils menaçants sur leurs épaules et ayant le pouvoir de décider arbitrairement des mouvements du peuple palestinien. De longues files de véhicules ou de personnes présentant leurs papiers aux soldats postés derrière des blocs de béton attendent, tous conscients que leurs mouvements dépendent entièrement du bon vouloir de ces jeunes soldats étrangers. On constate là l'arrogance de l'occupant et l'humiliation de l'occupé.

6. Il est plus facile de décrire les conséquences des couvre-feux et des bouclages car elles sont étayées par des statistiques. L'assujettissement de plus de 700 000 personnes aux couvre-feux dans les villes principales et le refus de laisser les villageois se rendre dans les villes, se sont traduits par chômage, la pauvreté, la malnutrition et les maladies. Plus de 50 % de la population du territoire palestinien est au chômage. Le taux de pauvreté, qui caractérise ceux qui ont deux dollars ou moins par jour pour vivre, est de 70 % à Gaza et de 55 % en Cisjordanie. Au total, ce sont 1,8 million de Palestiniens qui bénéficient d'une aide alimentaire ou d'autres formes d'assistance humanitaire d'urgence en provenance de multiples sources, notamment l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient, le Programme alimentaire mondial et le Comité international de la Croix-Rouge. Vingt-deux pour cent des enfants de moins de 5 ans souffrent de malnutrition aiguë ou chronique, tandis que 20 % souffrent d'anémie ferriprive. Les problèmes de santé mentale chez les enfants ont augmenté de manière inquiétante. Les soins de santé ont considérablement pâti du manque de médicaments et de l'incapacité de la population à accéder aux centres de soins. Comme toujours, la situation dans les camps de réfugiés est très peu encourageante, ainsi qu'a pu le constater le Rapporteur spécial lorsqu'il s'est rendu dans le camp de réfugiés de Balata près de Naplouse.

Les détentions

7. Le nombre de personnes en détention administrative, c'est-à-dire une détention longue et ne prévoyant pas de jugement, est passé de moins de 100 à 1 860. Sur 7 000 détenus, on compte quelque 300 enfants et 50 femmes (y compris 8 fillettes).

Les peines collectives

8. La démolition des maisons des familles dont un membre a commis un crime contre Israël est une pratique à laquelle les Israéliens ont recours depuis longtemps. En août, la Haute Cour d'Israël s'est prononcée contre l'intervention des tribunaux dans de telles affaires, contrairement à la pratique qui avait été établie, laissant ainsi aux commandants militaires toute latitude pour ordonner la démolition de maisons, et ce, en complète violation de l'article 33 de la quatrième Convention de Genève, qui interdit les peines collectives.

9. Le 3 septembre, la même Haute Cour a rendu une décision autorisant la déportation forcée de deux Palestiniens de leur lieu de résidence à Naplouse vers la bande de Gaza, au motif qu'ils étaient accusés d'avoir aidé leur frère (tué le 6 août dans le cadre d'une exécution extrajudiciaire commise par les forces israéliennes) à commettre des attaques contre des Israéliens. Même si la Cour a limité ces déportations à des « cas extrêmes », il convient de souligner que la décision n'a pas été précédée d'un jugement permettant d'établir la complicité des personnes déportées. Ces mesures contreviennent au droit à un procès équitable et à l'interdiction des peines collectives (art. 33 de la quatrième Convention de Genève) et des transferts forcés (art. 49 de la Convention).

La situation des enfants

10. Les enfants ont énormément souffert des incursions militaires dans le territoire palestinien, des couvre-feux et des bouclages. Nombre d'entre eux ont été tués ou blessés; 300 ont été arrêtés et mis en détention; plus de 2 000 se sont retrouvés sans logis; les deux tiers vivent en dessous du seuil de pauvreté; 22 % des enfants de moins de 5 ans souffrent de malnutrition; au moins 330 000 ont été contraints de rester chez eux en raison des couvre-feux; en Cisjordanie, plus de 600 000 n'ont pas pu se rendre à l'école, et la plupart ont subi des traumatismes graves. Lors de l'Opération bouclier de défense, 11 écoles ont été détruites, 9 vandalisées, 15 transformées en avant-postes militaires, 15 utilisées comme centres de détention et 112 autres endommagées. Les enseignants, tout comme les élèves, n'ont souvent pas été en mesure de se rendre dans leurs écoles à cause des bouclages. Les responsables palestiniens se sont inquiétés auprès du Rapporteur spécial du maintien du couvre-feu alors que les écoles, avaient rouvert leurs portes le 31 août. Ce type de traitement laisse des séquelles à la fois physiques et psychologiques. Pire encore, il alimente la haine de l'occupant, ce qui est de mauvais augure pour l'avenir.

Les colonies

11. Le rapport principal présente un certain nombre de faits sur les colonies. Lors de sa visite, le Rapporteur spécial a pu voir les colonies situées dans les districts de Naplouse et de Djénine, ce qui lui a permis de comprendre ce qui motivait les nombreux bouclages, qui entravent la liberté de circulation des Palestiniens et étranglent la société palestinienne. De petites colonies, situées en haut de collines et composées de plusieurs centaines d'habitants, sont reliées entre elles et à Israël par des routes réservées uniquement aux colons. Les routes palestiniennes qui croisent ces routes sont interdites d'accès, ce qui oblige souvent les villageois à faire de longs détours pour se rendre sur les marchés, dans les magasins, sur leur lieu de

travail, dans les écoles et les hôpitaux situés dans d'autres villages ou villes. Ainsi, à l'extérieur de Djénine, les deux colonies de Gannim (158 habitants) et de Kaddim (148 habitants) sont reliées par une route réservée aux colons. La route principale qui mène de Djénine aux huit villages alentour, où résident quelque 20 000 habitants, et qui traversait auparavant cette route réservée, a été fermée par des bulldozers. Les villageois qui n'étaient auparavant qu'à 10 minutes de Djénine en voiture, doivent maintenant emprunter des routes indirectes traversant les villages et mettent de nombreuses heures pour atteindre Djénine. Les libertés fondamentales de circulation et d'accès à des moyens de subsistance corrects sont donc sacrifiées dans l'intérêt de la sécurité et du bien-être de la communauté étrangère des colons. Il est impossible de mesurer la colère et l'humiliation ressenties par les Palestiniens confrontés à cette situation.

Le paradoxe de l'assistance humanitaire

12. La gravité de la situation est indéniable, tout comme la nécessité d'apporter une aide humanitaire massive. Si cette aide n'arrive pas, les conséquences seront irrémédiables pour le peuple palestinien. Le Rapporteur spécial approuve donc les appels lancés à la communauté internationale pour qu'elle apporte une aide humanitaire, et s'y associe.

13. Il convient toutefois de préciser qu'en apportant une aide de ce type, la communauté internationale des donateurs exonère Israël de la responsabilité qu'il a de fournir cette assistance lui-même et qu'on pourrait l'accuser de participer de cette façon au financement de l'occupation. Comme il est indiqué aux paragraphes 26 et 27 du rapport principal, Israël a le devoir, en vertu des articles 50, 55 et 56 de la quatrième Convention de Genève, d'assurer l'approvisionnement de la population en vivres et en produits médicaux, d'assurer et de maintenir les établissements et les services médicaux, et de faciliter le bon fonctionnement des établissements consacrés à l'éducation des enfants.



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Questions relatives aux droits de l'homme :
situations relatives aux droits de l'homme
et rapports des rapporteurs et représentants spéciaux

Question de la violation des droits de l'homme dans les territoires arabes occupés, y compris la Palestine

Note du Secrétaire général

Le Secrétaire général a l'honneur de transmettre à l'Assemblée générale le rapport sur les violations du droit international humanitaire et des droits de l'homme commises dans le territoire palestinien occupé depuis 1967, qui a été soumis par le Rapporteur spécial, M. John Dugard, en application de la section A de la résolution 1993/2 et de la résolution 2004/10.

* A/59/150.



Rapport du Rapporteur spécial de la Commission des droits de l'homme, sur la situation des droits de l'homme dans les territoires palestiniens occupés par Israël depuis 1967

Résumé

Le présent rapport porte essentiellement sur les conséquences des incursions militaires opérées dans la bande de Gaza, les violations du droit humanitaire international et les droits de l'homme qui découlent de la construction du mur et les restrictions constantes à la liberté de circulation.

Durant ces six derniers mois, les Forces de défense israéliennes (FDI) ont intensifié leurs incursions militaires dans la bande de Gaza. Ces attaques ont été interprétées comme une démonstration de force de la part d'Israël qui voulait ainsi empêcher que son retrait unilatéral du territoire ne soit ultérieurement perçu comme un signe de faiblesse. Durant ces incursions, Israël a procédé à des destructions massives et injustifiées de biens. Des bulldozers ont démolit arbitrairement des habitations et défoncé des routes, déterrants notamment des lignes électriques, des égouts et des conduites d'eau. Lors de l'opération Rainbow, menée du 18 au 24 mai 2004, 43 personnes ont trouvé la mort et 167 bâtiments abritant 379 familles (soit 2 066 personnes) au total ont été détruits ou rendus inhabitables. Ces démolitions ont eu lieu durant l'un des pires mois qu'ait connu Rafah récemment. En mai, 298 édifices abritant 710 familles (soit 3 800 personnes) ont été démolis.

Israël a annoncé qu'il se retirerait unilatéralement de Gaza. Il voudrait présenter ce retrait comme une mesure mettant un terme à l'occupation militaire de la bande de Gaza et le dégageant ainsi des obligations qui, s'agissant de ce territoire, lui incombent en vertu de la Convention de Genève du 12 août 1949 relative à la protection des personnes civiles en temps de guerre (quatrième Convention de Genève). En réalité, il n'a aucunement l'intention de renoncer à son emprise sur la bande de Gaza qu'il prévoit de maintenir sous sa coupe en contrôlant ses frontières, ses eaux territoriales et son espace aérien. Aussi demeurera-t-il sur le plan juridique une puissance occupante toujours soumise aux obligations prévues par la Convention susmentionnée.

Le 9 juillet 2004, la Cour internationale de Justice (CIJ) a jugé que le mur qu'Israël était en train d'édifier dans le territoire occupé était contraire au droits de l'homme et qu'Israël était tenu de cesser immédiatement les travaux de construction de ce mur et de le démanteler sans plus tarder. Dans son avis consultatif, la Cour a rejeté plusieurs des arguments juridiques touchant à l'applicabilité du droit humanitaire et des instruments relatifs aux droits de l'homme qui avaient été invoqués par Israël. Une semaine avant que cet avis ne soit rendu, la Haute Cour d'Israël a rendu une décision portant sur un tronçon du mur long de 40 kilomètres, dans laquelle elle faisait valoir que, si Israël, en tant que puissance occupante, avait le droit de construire le mur pour assurer sa sécurité, de larges portions de ce mur imposaient à la population palestinienne des conditions de vie extrêmement difficiles et qu'il fallait en modifier le tracé.

Israël a annoncé qu'il ne se conformerait pas à l'avis consultatif de la CIJ. Il a indiqué qu'il n'appliquerait le jugement rendu par sa propre Haute Cour qu'aux tronçons qui n'avaient encore pas été construits et non pas à ceux qui étaient achevés.

Israël prétend que le mur a pour objet de le protéger contre les attentats terroristes et que son édification a permis de réduire de plus de 80 % le nombre de ces attentats. Deux observations méritent d'être faites à ce sujet. Tout d'abord, il n'existe aucun élément tendant à prouver de manière irréfutable que le mur n'aurait pas pu empêcher aussi efficacement l'entrée en Israël des auteurs d'attentats-suicide à la bombe s'il avait été construit le long de la Ligne verte (le tracé accepté de la frontière séparant Israël de la Palestine) ou du côté israélien de la Ligne. Deuxièmement, au vu des preuves dont on dispose, il semblerait plutôt que le mur ait été construit aux fins suivantes :

- Incorporer les colonies de peuplement à Israël;
- Confisquer des terres palestiniennes;
- Inciter les Palestiniens à quitter leurs terres et leurs maisons en leur rendant la vie insupportable.

Le tracé du mur montre clairement que ce dernier vise à incorporer le plus grand nombre de colonies de peuplement possible à Israël. En effet, il place près de 80 % des colonies de Cisjordanie en territoire israélien. En outre, M. Benjamin Netanyahu, ancien Premier Ministre et actuel Ministre israélien des finances, a reconnu publiquement dans l'*International Herald Tribune* du 14 juin 2004, que l'objet de ce mur était d'inclure le plus grand nombre de Juifs que possible.

Bien que la CIJ ait été unanime à considérer que les colonies de peuplement étaient illégales, ces colonies ont connu une forte expansion durant l'année écoulée, tandis que les colons redoublaient de violence à l'égard des Palestiniens. Pis encore, Israël est en train d'incorporer la colonie d'Ariel, située à 22 kilomètres à l'intérieur du territoire palestinien. Cette mesure est interdite par la CIJ et va à l'encontre de la décision prise par la Haute Cour israélienne elle-même.

Le mur a également pour objet d'étendre le territoire israélien. De riches terres agricoles et d'abondantes ressources en eau situées le long de la Ligne verte ont été confisquées et incorporées à Israël. Ces confiscations de terres sont exposées dans de précédents rapports ainsi que dans l'avis consultatif de la CIJ. Ces derniers mois, Israël a exprimé ses visées territoriales sur la région de Jérusalem. En effet, le mur est actuellement construit autour d'une Jérusalem-Est élargie devant englober 247 000 colons répartis sur 12 colonies de peuplement et quelque 249 000 Palestiniens. On se souviendra que l'annexion de Jérusalem-Est par Israël en 1980 est illégale et a été qualifiée de mesure n'« ayant aucune validité en droit » par le Conseil de sécurité.

D'un point de vue sécuritaire, la confiscation de terres situées à Jérusalem-Est est absurde dans la mesure où elle aura souvent pour effet de diviser des communautés palestiniennes. En outre, cette mesure aura de graves répercussions sur les Palestiniens vivant à l'intérieur ou à proximité de Jérusalem-Est. Premièrement, elle risque de priver les 60 000 Palestiniens ayant le droit de résider à Jérusalem de ce droit s'ils se retrouvent du côté du mur situé en Cisjordanie. Deuxièmement, elle rendra périlleux et compliqués les contacts entre Palestiniens et institutions palestiniennes situés de part et d'autre du mur. Enfin, elle interdira à plus de 100 000 Palestiniens qui résident dans des quartiers situés en Cisjordanie et dépendent d'infrastructures et de services situés à Jérusalem-Est (hôpitaux, universités, emplois, marchés pour les produits agricoles, etc.), l'accès à cette partie de la ville.

Le mur a pour troisième objectif de contraindre, en leur rendant la vie insupportable, les Palestiniens vivant dans les zones situées entre lui et la Ligne verte et dans celles qui lui sont contiguës, mais qu'il sépare de leurs terres, à quitter leurs foyers pour recommencer leur vie ailleurs en Cisjordanie. Ce sont essentiellement les restrictions à la liberté de circulation dans la « zone d'accès réglementé » située entre le mur et la Ligne verte et le fait que les agriculteurs sont coupés de leurs terres qui obligeront les Palestiniens à déménager. La Haute Cour israélienne a déclaré que certains tronçons du mur ne pouvaient pas être construits lorsqu'ils imposaient des conditions de vie extrêmement difficiles aux Palestiniens. Logiquement, cette décision devrait s'appliquer aux 200 kilomètres de mur déjà construits. Or, le Gouvernement israélien a fait savoir qu'il n'en ferait rien en dépit de la décision prise par sa propre Haute Cour.

En Cisjordanie et dans la bande de Gaza, la liberté de circulation est sérieusement limitée. À Gaza, la population est de fait encerclée par la mer et par un ensemble de murs et de clôtures. Les barrages routiers qui morcellent ce petit territoire restreignent fortement la liberté de circulation. Les habitants de la Cisjordanie sont soumis à un régime de couvre-feu et à un système de points de contrôle qui les empêchent de circuler librement. Pour se déplacer d'une ville à l'autre, ils ont besoin de permis qui sont arbitrairement retirés et rarement délivrés aux propriétaires de véhicules privés. Plusieurs centaines de points de contrôle militaire réglementent la vie des Palestiniens. La partie du mur située dans la région de Jérusalem menace de devenir un véritable cauchemar pour des dizaines de milliers de Palestiniens qui seront contraints de franchir chaque jour un point de contrôle, celui de Kalandiya. Enfin, et comme on l'a déjà vu, l'existence des Palestiniens résidant dans les zones qui se trouvent entre le mur et la Ligne verte et celles qui sont contiguës à ce mur est régie par un système de permis qui est appliqué de manière arbitraire et fantaisiste.

Les restrictions à la liberté de circulation que les autorités israéliennes imposent aux Palestiniens rappellent les lois relatives aux laissez-passer tristement célèbres de l'Afrique du Sud du temps de l'apartheid. Ces lois étaient humiliantes mais elles étaient appliquées uniformément. Les lois israéliennes régissant la liberté de circulation qui sont elles aussi appliquées de façon humiliante, se caractérisent en outre par leur caractère arbitraire et fantaisiste. Israël est allé encore plus loin que les lois de l'apartheid en créant des routes distinctes pour les colons, instituant ainsi un « apartheid routier » que l'Afrique du Sud du temps de l'apartheid n'a jamais connu.

Dans son avis consultatif, qui a été approuvé par l'Assemblée générale, la CIJ indique que le mur a des conséquences juridiques pour les États autres qu'Israël. Il est rappelé aux États qu'ils ont l'obligation de ne pas reconnaître la situation illicite résultant de la construction du mur et de ne pas prêter aide ou assistance au maintien de cette situation. Le mépris affiché par Israël pour le droit international menace non seulement l'ordre juridique international, mais aussi l'ordre international tout court. La communauté internationale n'a pas donc pas lieu, en pareilles circonstances, de se montrer conciliante.

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I. Introduction

1. Le 9 juillet 2004, la Cour internationale de Justice a jugé que l'édification du mur qu'Israël était en train de construire dans le territoire palestinien occupé, y compris à l'intérieur et sur le pourtour de Jérusalem-Est, était contraire au droit international; qu'Israël était tenu de cesser immédiatement les travaux d'édification du mur qu'il était en train de construire dans le territoire palestinien et de démanteler au plus vite cet ouvrage et qu'il était dans l'obligation de réparer tous les dommages causés par la construction du mur dans le territoire palestinien occupé. Pour finir, la Cour a jugé que tous les États avaient l'obligation de ne pas reconnaître la situation illicite découlant de la construction du mur; que tous les États parties à la quatrième Convention de Genève relative à la protection des personnes civiles en temps de guerre, du 12 août 1949 (quatrième Convention de Genève), avaient en outre l'obligation de faire respecter par Israël les dispositions de cette convention; et que l'Organisation des Nations Unies devait examiner quelles nouvelles mesures devaient être prises afin de mettre un terme à la situation illicite découlant de la construction du mur.

2. Dans son raisonnement, la CIJ a réfuté un certain nombre d'arguments juridiques invoqués par Israël, qui constituent des éléments fondamentaux de la politique étrangère israélienne à l'égard du territoire palestinien occupé. La Cour a estimé que la quatrième Convention de Genève s'appliquait à ce territoire et qu'Israël était tenu de se conformer aux dispositions de cet instrument lorsqu'il agissait dans ledit territoire. En formulant cette conclusion, la Cour a souligné que, selon le sixième alinéa de l'article 49 de la quatrième Convention de Genève, les colonies de peuplement installées par Israël dans le territoire palestinien occupé l'avaient été en « méconnaissance du droit international » et que le pacte international relatif aux droits civils et politiques et la Convention des Nations Unies relative aux droits de l'enfant étaient applicables aux actes d'Israël dans le territoire palestinien occupé. La Cour a aussi souligné que le mur dressait « un obstacle grave à l'exercice par le peuple palestinien de son droit à l'autodétermination ». Enfin, elle s'est montrée sceptique quant à l'état de nécessité invoqué par le Gouvernement israélien pour justifier la construction du mur, estimant qu'« Israël ne saurait se prévaloir du droit de légitime défense ou de l'état de nécessité, comme excluant l'illicéité de la construction du mur ».

3. Peu de temps avant que la CIJ ne rende son avis, la Haut Cour israélienne a prononcé un jugement qui portait sur un tronçon du mur. Tout en admettant qu'Israël en tant que puissance occupante avait le droit d'édifier ce mur pour assurer sa sécurité, elle a néanmoins jugé que certains travaux dudit mur imposaient aux Palestiniens des conditions de vie extrêmement difficiles et qu'il fallait en modifier le tracé. Elle a examiné la question en se fondant essentiellement sur le principe de proportionnalité, et s'est posé la question de savoir si le tracé dudit mur causait à la population locale un préjudice disproportionné par rapport aux avantages qu'il procurait sur le plan de la sécurité. La Cour a conclu qu'en certains endroits, le tracé proposé risquait d'infliger des souffrances disproportionnées aux villages palestiniens dans la mesure où il séparait les habitants de ces villages des terres agricoles qui constituaient leur moyen de subsistance.

4. L'illicéité du mur est désormais évidente au regard du droit international tel qu'exposé par la CIJ. En outre, il semblerait que de vastes portions de ce mur puissent être considérées comme illicites au regard du droit israélien tel qu'exposé

par la Haute Cour d'Israël. L'argument selon lequel des impératifs de sécurité conféraient à Israël le droit absolu d'édifier un mur dans le territoire palestinien ne tient plus. Le terrorisme constitue une grave menace pour la société israélienne et il est fort possible que le mur puisse empêcher les auteurs d'attentats-suicide à la bombe de pénétrer en Israël. Néanmoins si tel est le cas, il n'y a pas de raison qu'il ne soit pas édifié le long de la Ligne verte ou sur le côté israélien de cette ligne. S'agissant du rapport qui existe entre le terrorisme et le droit, l'on se contentera de rappeler la déclaration ci-après de la Haute Cour israélienne :

« Nous sommes conscients des pertes en vies humaines et des destructions causées par la terreur dont sont victimes l'État et ses citoyens. À l'instar de tous les autres Israéliens, nous sommes nous aussi convaincus qu'il est nécessaire de défendre le pays et ses citoyens contre les blessures infligées par la terreur. Nous sommes conscients qu'à court terme, le présent jugement ne facilitera pas la lutte que mène l'État contre ceux qui se dressent contre lui. Mais nous sommes des juges. Lorsque nous siégeons pour rendre un jugement, nous sommes nous-mêmes sujets à jugement. Nous agissons avec la plus grande conscience et avec la plus grande sagacité possibles. Nous sommes convaincus qu'au bout du compte, la lutte que mène l'État contre la terreur à laquelle il est confronté gagnera en puissance et en efficacité si elle est conduite dans le respect du droit. Il ne saurait y avoir de sécurité sans droit. » [Voir *Le Conseil de village de Beit Sourik c. le Gouvernement israélien* (Haute Cour de Justice 2056/04, par. 86)].

5. Face aux objections d'Israël, le Rapporteur spécial a réitéré, dans de précédents rapports, certaines positions juridiques. Il n'est désormais plus nécessaire de se livrer à ce genre d'exercice. La loi est on ne peut plus claire et il est maintenant possible de se concentrer sur les conséquences des actes illicites d'Israël et de réfléchir aux moyens de faire appliquer le droit. C'est là une tâche qui incombe à l'Organisation des Nations Unies, agissant par le truchement de l'Assemblée générale et du Conseil de sécurité, ainsi qu'aux États. Le présent rapport sera donc axé sur les actes d'Israël et les conséquences de ces actes.

II. Objet du présent rapport

6. Du 18 au 25 juin 2004, le Rapporteur spécial s'est rendu dans le territoire palestinien occupé. Il a visité Gaza (y compris Rafah) et la Cisjordanie (Jérusalem, Ramallah, Bethléem, Qalqiliya et les villages avoisinants ainsi que Hébron et ses environs). Il s'est surtout intéressé aux conséquences des incursions militaires dans la bande de Gaza, aux violations des droits de l'homme et du droit humanitaire découlant de l'édification du mur et aux très nombreuses restrictions à la liberté de circulation. Le présent rapport témoigne de l'intérêt porté à ces questions. Cela étant, le Rapporteur spécial tient à souligner que dans le territoire palestinien occupé, l'on dénombre une multitude d'autres atteintes aux droits de l'homme qui continuent de détruire le tissu social palestinien telles que :

- Les meurtres et les violences et voies de fait. Depuis septembre 2000, plus de 3 000 Palestiniens (dont plus de 500 enfants) et près d'un millier d'Israéliens ont été tués. Plus de 34 300 Palestiniens et 6 000 Israéliens ont été blessés. La plupart de ces victimes étaient des civils;

- Les assassinats. Israël continue d'assassiner des personnes soupçonnées de militantisme. Ces assassinats sont généralement perpétrés sans le moindre égard pour la vie des civils. Bien au contraire, la mort de civils est simplement rangée dans la catégorie des dommages non intentionnels. Quelque 340 personnes ont été victimes d'assassinats ciblés. Cent quatre-vingt-huit de ces victimes figuraient au nombre des personnes visées, 152 n'étaient que des civils innocents;
- Les incursions. Au cours de l'année écoulée, les Forces de défense israéliennes ont fréquemment procédé à des incursions militaires en Cisjordanie et dans la bande de Gaza dans le but d'assassiner des militants palestiniens. Il est souvent arrivé que des civils soient pris entre deux feux. C'est ainsi que le 28 juin, M. Khaled Salah, professeur enseignant à l'Université Al-Najah et son fils de 16 ans ont été tués par des tirs aveugles lors d'une incursion de l'armée israélienne à Naplouse;
- Les emprisonnements. Quelque 6 000 Palestiniens, dont 350 enfants et 75 femmes, sont actuellement détenus dans des prisons israéliennes ou dans des camps de détention. Seulement le quart environ de ces prisonniers a été jugé. Bon nombre des détenus affirment avoir été soumis à la torture ou à des traitements inhumains et dégradants;
- Les couvre-feux. Bien que, durant l'année écoulée, les Israéliens aient eu moins fréquemment recours à l'arme que constitue le couvre-feu, cette mesure continue d'être imposée et elle a été très souvent appliquée à Naplouse;
- La crise humanitaire. Dans le territoire palestinien occupé, la pauvreté et le chômage sont endémiques. D'après les statistiques de l'Organisation internationale du Travail (OIT), 35 % en moyenne, des Palestiniens seraient au chômage et 62 % vivraient au-dessous du seuil de pauvreté. Selon un rapport de la Banque mondiale en date du 23 juin 2004, la récession qui frappe les Palestiniens est la pire qu'ait connue l'histoire contemporaine tandis que les revenus individuels moyens ont baissé de plus d'un tiers depuis septembre 2000.

III. La bande de Gaza

7. Ces derniers mois, l'armée israélienne a périodiquement procédé à des incursions militaires dans la bande de Gaza. Les villes les plus touchées ont été Rafah et Beit Hanoun. Israël a fait valoir, à titre de justification, que ces opérations devaient servir à démolir, à Rafah, des tunnels empruntés pour passer des armes en contrebande et à détruire, à Beit Hanoun, les moyens utilisés pour lancer des roquettes Qassam en Israël. Ces opérations doivent toutefois être replacées dans une perspective politique plus large. Israël a annoncé son intention de retirer ses colonies de peuplement et ses troupes de Gaza. Comme de toute évidence, il ne veut pas que ce retrait soit perçu comme une marque de faiblesse, il a décidé, avant de se retirer, de faire une démonstration de force à Gaza. En outre, pour maintenir son emprise sur la frontière séparant Gaza de l'Égypte, il a décidé de créer, le long du « couloir Philadelphe », une zone tampon nécessitant la destruction de maisons situées à Rafah. En juin 2004, l'on a annoncé qu'il se proposait de construire un fossé ou une tranchée dans cette zone.

8. En application des politiques décrites ci-dessus, Israël a procédé à des destructions massives de biens à Gaza. Certains de ces biens, par exemple les maisons de personnes soupçonnées d'être des militants, ont été détruits dans le cadre d'expéditions punitives. D'autres, comme les maisons situées le long du « couloir Philadelphi », ont été rasés pour des raisons stratégiques. Toutefois, ces destructions sont souvent aveugles. Certaines habitations ont été démolies absolument sans raison. Des bulldozers ont défoncé des routes, détruisant les lignes électriques, les égouts et les conduites d'eau, dans le cadre d'une démonstration de force brutale. En outre, on ne s'est pas du tout préoccupé du sort des populations touchées. Le 12 juillet 2004, lors d'un raid effectué à Khan Younis, l'armée israélienne a détruit une maison où se trouvait M. Mahmoud Halfalla, âgé de 75 ans et immobilisé sur une chaise roulante. En dépit des appels lancés pour que le vieillard puisse sortir de sa maison, celle-ci a été démolie et il est mort, enseveli sous les décombres.

9. À la suite de l'opération Rainbow menée par l'armée israélienne en mai 2004, le Rapporteur spécial a visité le pâté de maisons « O », le quartier Brazil et le quartier de Tal Es Sultan, situés à Rafah et il a rencontré les familles que l'opération susmentionnée avait chassées de leurs foyers. Au cours de cette opération, 43 personnes ont trouvé la mort, dont 8 lors d'une manifestation pacifique qui a eu lieu le 19 mai. Pendant la période allant du 18 au 24 mai, 167 bâtiments abritant au total 379 familles (2 066 personnes) ont été détruits ou rendus inhabitables. Ces démolitions ont eu lieu durant l'un des pires mois qu'a connus Rafah récemment. En mai, 298 édifices abritant 710 familles (3 800 personnes), ont été rasés à Rafah où, depuis le début de l'Intifada en septembre 2000, 1 497 édifices ont été démolis et plus de 15 000 personnes ont été touchées par ces destructions. Le Rapporteur spécial a été horrifié à la vue des destructions sauvages infligées à la ville de Rafah. Il garde à l'esprit l'article 53 de la quatrième Convention de Genève qui stipule qu'il est interdit à la puissance occupante de détruire des biens mobiliers, sauf dans les cas où ces destructions seraient rendues absolument nécessaires par les opérations militaires, et le non-respect de cette interdiction constitue une violation grave de l'article 147 de ladite convention, dont les auteurs doivent être poursuivis. Le moment est venu pour la communauté internationale d'identifier les responsables de ces destructions sauvages de biens et de prendre les mesures juridiques qui s'imposent à leur encontre.

10. Dans un rapport publié en juin 2004, l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient (UNRWA) a indiqué que près de 45 millions de dollars des États-Unis seraient nécessaires pour reloger les Palestiniens ayant perdu leur toit par la faute de l'armée israélienne. Le Rapporteur spécial espère que la communauté internationale répondra favorablement à l'appel lancé par l'UNRWA. Toutefois, il tient à souligner qu'en vertu de la quatrième Convention de Genève, c'est à la puissance occupante qu'incombe la responsabilité d'assurer des vivres et des fournitures médicales adéquates à la population occupée et de veiller au bien-être de celle-ci. Une puissance occupante qui détruit des maisons, prive les gens de leur logement, crée des besoins en nourriture et en services médicaux, puis refuse de s'acquitter de ses responsabilités envers la population occupée commet une grave violation de la quatrième Convention de Genève.

11. En juillet 2004, les forces israéliennes, accompagnées de leurs bulldozers habituels, ont envahi Beit Hanoun, tuant des militants ainsi que des civils, détruisant

des maisons et arrachant des oliviers et des orangers, en guise de châtimeut supplémentaire. Le 13 juillet, un convoi de l'UNRWA acheminant des vivres vers Beit Hanoun a essuyé des coups de feu tirés par des soldats israéliens.

12. Il arrive souvent que l'armée israélienne procède au « ratissage » de terres et de maisons situées à proximité de colonies de peuplement et de rocaes desservant ces colonies sous le prétexte d'assurer la sécurité de celles-ci. Les destructions matérielles lors de ces opérations paraissent souvent excessives au regard des impératifs militaires invoqués pour les justifier. Le Rapporteur spécial a été témoin d'un tel excès, près d'une rocade située aux alentours de la colonie de Netzarim. Là, les forces israéliennes, après avoir harcelé pendant des années des familles qui occupaient deux maisons proches d'une rocade ont, au moyen d'un bulldozer, empilé de la terre, tout autour de ces maisons et ce, jusqu'au premier étage. L'eau et l'électricité ont été coupées et les occupants ont reçu l'ordre de ne pas utiliser les pièces du premier étage qui donnaient sur la rocade. Ce n'est là qu'un exemple du type de harcèlements auxquels les militaires israéliens soumettent les habitants de Gaza pour assurer la sécurité des colons.

13. La communauté internationale a réagi favorablement à l'annonce faite par Israël de son intention de se retirer unilatéralement de Gaza. Elle a aussi suivi avec intérêt le conflit politique qui, à l'intérieur du territoire, oppose les forces de l'Autorité palestinienne à des groupes militants. Ce type d'événements risque de détourner l'attention des souffrances qu'endurent les habitants de Gaza. Ces derniers, qui sont en réalité prisonniers sur leur propre territoire où de nombreuses restrictions les empêchent de circuler librement, sont touchés de plein fouet par le chômage et par la pauvreté du fait des pratiques israéliennes et se retrouvent souvent sans abri par la faute de l'armée israélienne. Ce sont là des réalités qui ne sauraient être ignorées.

14. Israël est conscient qu'un retrait de Gaza pourrait lui être avantageux sur le plan politique. Il fait valoir qu'une telle mesure lui éviterait d'être qualifié de puissance occupante assujetties à la quatrième Conférence de Genève dans le territoire de Gaza. En réalité il n'a pas l'intention de relâcher son emprise sur la bande de Gaza, dont il entend contrôler les frontières, les eaux territoriales et l'espace aérien afin de maintenir son autorité. Son plan de désengagement d'avril 2004 montre clairement qu'il compte, en dernier ressort, conserver le contrôle de Gaza. Ce plan stipule notamment, en ce qui concerne Gaza que « l'État d'Israël » supervisera et maintiendra l'enveloppe terrestre externe, aura le contrôle exclusif de l'espace aérien de Gaza et poursuivra ses activités militaires dans les eaux territoriales de la bande de Gaza... L'État d'Israël continuera de maintenir une présence militaire le long de la frontière séparant la bande de Gaza de l'Égypte (couloir Philadelphi). Cette présence est vitale pour sa sécurité. En certains endroits, un élargissement de la zone dans laquelle ce type de déploiement devrait s'opérer pourrait se révéler nécessaire. » Un autre moyen de contrôle envisagé consiste en l'installation, dans les principaux édifices de Gaza, de dispositifs d'écoute de pointe devant permettre aux autorités israéliennes de surveiller les communications. Tout ceci signifie qu'Israël restera une puissance occupante au regard du droit international. Le critère qui permet de déterminer si un territoire donné est, sur le plan juridique, soumis à un régime d'occupation est la réponse à la question de savoir non pas si la puissance occupante exerce ou non un contrôle effectif sur ce territoire, mais plutôt si elle a la capacité de le faire, principe qui a été confirmé par le Tribunal militaire des États-Unis dans l'affaire *In Re Liste and others (The*

hostages case) (1948). Il est indispensable que la communauté internationale prenne connaissance de la véritable nature du plan de retrait israélien et des obligations qui continuent d'incomber à Israël en vertu de la quatrième Convention de Genève.

IV. Le mur

15. Le mur est responsable d'une bonne partie des épreuves qu'endure le peuple palestinien et, risque, s'il est maintenu, d'aggraver davantage ses souffrances. Comme l'a indiqué la Cour internationale de Justice, il constitue une violation du droit humanitaire et des instruments relatifs aux droits de l'homme et porte atteinte au droit à l'autodétermination du peuple palestinien. C'est la raison pour laquelle il a fait l'objet d'une attention toute particulière dans deux précédents rapports et continue d'occuper une large place dans le présent rapport. Pour pouvoir mieux comprendre les conséquences qui en découlent du point de vue des droits de l'homme, le Rapporteur spécial a visité les tronçons du mur qui se trouvent dans la région de Jérusalem (A-Ram, Abu Dis, Kalandiya, Beit Sourik et Biddu), à Qalqiliya (villages d'Isla et de Jayyous) et à Bethléem. Auparavant, il s'était rendu dans des villages situés dans la région de Qalqiliya et de Toulkarem.

16. Israël prétend que le mur a pour but de le protéger contre les attentats terroristes. Les autorités israéliennes font remarquer que les statistiques compilées pour le premier semestre de 2004 montrent que le nombre d'attentats terroristes commis à l'intérieur d'Israël a diminué d'au moins 83 % par rapport au premier semestre de 2003. Deux observations pourraient être faites à ce sujet. Tout d'abord, il n'existe aucun élément prouvant de manière irréfutable que le mur n'aurait pas pu être aussi efficace s'il avait été construit le long de la Ligne verte ou du côté israélien de cette ligne. Deuxièmement, l'argument selon lequel le fait que le mur empiète sur le territoire palestinien est rendu nécessaire par certains impératifs de sécurité n'est pas convaincant. C'est ce qui ressort du jugement rendu par la Cour d'Israël dans l'affaire opposant le Conseil de village de Beit Sourik au Gouvernement israélien. Dans ce jugement, la Haute Cour met en balance les impératifs de sécurité invoqués par le commandement militaire israélien pour justifier ce tracé avec les mesures de sécurité moins attentatoires aux libertés individuelles proposées par le Conseil israélien pour la paix et la sécurité, organe indépendant composé d'officiers de l'armée israélienne à la retraite; et a, à plusieurs reprises, manifesté sa préférence pour les propositions avancées par ce conseil. Le fait que la Haute Cour ait examiné des propositions concurrentes concernant le tracé du mur en tenant compte des impératifs de sécurité et en se fondant sur le principe de la proportionnalité, témoigne des difficultés inhérentes à un tel exercice et amène à s'interroger sur les raisons d'ordre militaire invoquées pour justifier ce tracé.

17. Plus convaincantes sont les explications selon lesquelles la construction du mur dans le territoire palestinien occupé aurait été dictée par la volonté d'atteindre les objectifs suivants :

- Incorporer les colonies de peuplement à Israël;
- Confisquer les terres palestiniennes;
- Pousser les Palestiniens à l'exode en leur refusant l'accès à leurs terres et aux ressources en eau et en restreignant leur liberté de circulation.

On trouvera ci-après une analyse plus détaillée de ces objectifs.

A. L'incorporation des colonies de peuplement

18. Le tracé du mur montre clairement que ce dernier a pour but d'incorporer le plus grand nombre possible de colonies de peuplement à Israël. Ce fait est confirmé par les statistiques qui montrent que 80 % des colons de Cisjordanie se retrouveront du côté du mur situé en territoire israélien. Au cas où l'on aurait besoin d'une autre preuve pour s'en convaincre, l'on se reportera à un article de M. Benjamin Netanyahu, actuel Ministre israélien des finances et ancien Premier Ministre d'Israël, qui a été publié dans le *International Herald Tribune* le 14 juillet 2004 et dans lequel on peut lire ceci : « pour obtenir un tracé qui soit réellement fondé sur des considérations de sécurité, il faudrait que la clôture incluse autant de juifs que possible et le moins de Palestiniens possible. C'est précisément ce que fait la clôture construite par Israël. Sur une superficie correspondant à moins de 12 % du territoire de la Cisjordanie, le mur regrouperait une population comprenant 80 % des Juifs et 1 % seulement des Palestiniens qui vivent dans les territoires controversés ».

19. Les colonies de peuplement sont bien entendu illicites au regard du droit international. C'est là l'opinion unanime à laquelle a abouti la Cour internationale de Justice dans son avis consultatif. La Cour a jugé que « les colonies de peuplement installées par Israël dans le territoire palestinien occupé (y compris Jérusalem-Est) l'ont été en méconnaissance du droit international », et que « le tracé choisi pour le mur consacre les mesures illégales prises par Israël en ce qui concerne Jérusalem et les colonies de peuplement » (par. 120 et 122). En outre, le juge Buergenthal, le seul juge dissident, a reconnu que le paragraphe 6 de l'article 49 de la quatrième Convention de Genève s'appliquait aux colonies de peuplement israéliennes en Cisjordanie et que, de ce fait, « les tronçons du mur construit par Israël pour protéger ses colonies constituaient *ipso facto* une violation du droit international humanitaire » (par. 9).

20. Malgré cela, les signes d'expansion des colonies de peuplement en Cisjordanie sont innombrables. Le Gouvernement israélien ne prend même plus la peine de réitérer l'engagement de pure forme qu'il avait pris il y a plusieurs années de procéder au gel des implantations. La construction de nouveaux bâtiments dans les colonies de peuplement israéliennes a augmenté de 35 % en 2003 et, au début de 2004, le Ministre israélien du logement et de la construction a engagé des pourparlers avec des entrepreneurs de travaux publics aux fins de la construction, en 2004, de 2 414 nouveaux logements dans des colonies de peuplement telles que Kiryat Arba, Har Homa, Beitar Illit, Sur Hadar, Ma'aleh Adumim, Givat Zeev et Pisgat Zeev. De nouvelles colonies devraient être créées dans la région de Bethléem et il est prévu de construire deux nouvelles colonies, la colonie de Kidmat Zion à proximité d'Abu Dis et celle de Nof Zahav près de Jabal Mukhaber. En outre, M. Sharon a annoncé qu'en échange du démantèlement des colonies de la bande de Gaza et de quatre petites colonies de peuplement dans le nord de la Cisjordanie (colonies de Ghanim, Khadim, Sa-Nur et Homesh), le Gouvernement israélien renforcerait et élargirait les autres colonies de peuplement qui se trouvent en Cisjordanie. Selon un rapport du Directeur général de l'Organisation internationale du Travail, établi en 2004, « depuis 2000, le nombre de colons a continué de s'accroître rapidement, à un taux annuel de 5,3 % en Cisjordanie et de 4,4 % à Gaza, et il avoisine maintenant les 400 000. Ce chiffre équivaut à 6 % de la population israélienne et à 11,5 % de la population palestinienne en 2002. Le fait que le nombre de colons ait crû à un rythme bien plus rapide que la population d'Israël (où le taux

de croissance démographique a été de 1,4 % par an durant la période allant de 2000 à 2002) est le signe d'un accroissement de la population qui n'est pas simplement imputable à des causes naturelles même si l'on tient compte des taux de fécondité élevés dans les familles de colons ».

21. À l'expansion des colonies de peuplement sont malheureusement venues s'ajouter les actes de violence perpétrés par les colons. De nombreux incidents au cours desquels des colons s'en sont pris à des Palestiniens et à leurs terres ont été signalés et ce type d'agissements auraient augmenté de 20 %. Les colons sont également accusés d'avoir empoisonné des puits. Leur comportement est particulièrement révoltant à Hébron où ils ne cessent de harceler les Palestiniens et d'endommager leurs biens. Le Rapporteur spécial a lui-même fait l'expérience de ce type de comportement lorsque des colons ont craché puis jeté de la peinture sur le véhicule à bord duquel il se déplaçait en compagnie de représentants de la Présence internationale temporaire à Hébron. Les obstacles que ces colons avaient dressés sur la route n'ont pas été retirés bien qu'un représentant de la Présence internationale temporaire à Hébron ait demandé qu'ils soient enlevés. Bien au contraire, certains soldats israéliens ont affirmé en riant qu'ils approuvaient l'action des colons et ont refusé d'intervenir, alors qu'Israël est légalement tenu de coopérer avec la Présence.

22. Des plans visant à incorporer davantage de colonies de peuplement aux territoires délimités par le mur sont en cours d'exécution. Des mesures ont été prises en vue d'incorporer la colonie de peuplement d'Ariel au territoire israélien. En juin 2004, des responsables du Ministère de la défense ont adressé à des Palestiniens résidant dans la ville de Salfit, au sud d'Ariel, des ordres préliminaires d'expropriation de terres sur lesquelles le mur devait être construit. Ces mesures ont été prises alors qu'Israël a donné aux États-Unis l'assurance qu'aucuns travaux de construction de ce type ne seraient entrepris. Bien que dans l'affaire *Beit Sourik* la Haute Cour d'Israël n'ait pas tranché la question de savoir si le mur pouvait être construit de manière à incorporer des colonies de peuplement en territoire israélien, il ressort implicitement de son jugement qu'une telle mesure serait illégale. On citera à ce propos la partie de ce jugement dans laquelle la Cour déclare ce qui suit :

« Nous souscrivons à l'avis selon lequel le commandement militaire ne peut ordonner la construction du mur de séparation pour des raisons politiques. L'édification de ce mur ne peut être motivée par la volonté d'annexer des territoires à l'État d'Israël. Ce mur ne peut avoir pour objet de tracer une frontière politique. Dans une affaire précédente, la présente Cour s'était penchée sur la question de savoir s'il était possible de confisquer des terres pour construire une agglomération civile juive, lorsque cette décision se fondait non pas sur des impératifs de sécurité ou sur la nécessité de défendre la région, mais plutôt sur un projet sioniste visant à établir des colonies de peuplement sur toute la terre d'Israël. À cette question, la présente Cour a répondu par la négative » (par. 27).

B. Confiscation de terres palestiniennes

23. Le mur a aussi pour objet d'élargir le territoire israélien. Le long de la Ligne verte des terres agricoles fertiles et d'abondantes ressources en eau ont été confisquées et incorporées à Israël. Lors de la visite, le Rapporteur spécial a été témoin de la confiscation de terres agricoles aux alentours des villages de Jayyous et

d'Isla. Les paysans de Jayyous sont coupés de leurs terres car le mur passe entre leurs maisons et des terres agricoles fertiles. Il les sépare de 120 serres de 15 000 oliviers et de 50 000 citrus. Les sept puits – de la ville sont tous du côté du mur situé en territoire israélien. Le village d'Isla semble être dans le même cas.

24. Le tracé suivi par le mur dans les colonies situées au sud d'Hébron constitue lui aussi un motif de préoccupation. Le Rapporteur spécial a rendu visite à des habitants de la région de Jimba vivant dans des grottes, qui devaient être chassés des terres qu'ils occupent depuis des générations. L'on ne sait pas très bien si l'armée compte utiliser ces terres pour des manœuvres militaires ou si elle les destine à l'élargissement des colonies de peuplement.

25. Les visées territoriales d'Israël ne sont nulle part plus évidentes qu'à Jérusalem. Israël a occupé Jérusalem-Est en 1967 et l'a illégalement annexée en 1980. Cette annexion a été condamnée au plan international et qualifiée de mesure « n'ayant aucune validité juridique » par une résolution du Conseil de sécurité. Le territoire ainsi annexé représente 1,2 % de la superficie totale de la Cisjordanie occupée et compte 249 000 Palestiniens. Ces derniers sont obligés d'avoir des cartes de résidents pour vivre sur leur propre territoire. Certains avantages (assurance maladie, retraites, liberté de circulation, etc.) sont liés à ces droits de résidence. Les terres qui ont été illégalement incorporées à la municipalité de Jérusalem ont été utilisées pour construire des colonies de peuplement illégales et modifient ainsi la composition démographique de la région où l'on dénombre aujourd'hui 12 colonies de peuplement israéliennes illégales et où le nombre total de colons s'élève à 180 000. À la suite de la création de colonies de peuplement à Jérusalem-Est, les Palestiniens jouissant du droit de résidence à Jérusalem ont été contraints de construire des maisons en dehors de Jérusalem-Est même.

26. Ces derniers mois, le mur a été construit le long de la frontière illégale de Jérusalem-Est, dans des endroits tels qu'Abou Dis, A-Ram et Kalandiya. Ce mur a un certain nombre de conséquences graves. Tout d'abord, il donne effet à une annexion illégale et incorpore une partie de la ville de Jérusalem (y compris les Lieux saints) à Israël. Il convient de souligner qu'il doit s'étendre au-delà des limites de l'actuelle municipalité de Jérusalem et englobe aussi 59 kilomètres carrés situés en Cisjordanie, le tout devant constituer un ensemble connu sous le nom de « Grande Jérusalem ». (Le nombre total de colons installés dans cette « Grande Jérusalem » (247 000) représentera plus de la moitié du total des colons israéliens installés dans le territoire palestinien occupé.) En deuxième lieu, comme le mur sépare les Palestiniens à d'autres Palestiniens, il ne peut en aucun cas se justifier par des impératifs de sécurité. En troisième lieu, il menace de priver de leur droit de résidence quelque 60 000 Palestiniens qui résidaient auparavant dans les limites de la municipalité de Jérusalem. En quatrième lieu, il divisera les familles où certains membres ont des permis de résidence à Jérusalem et d'autres des documents cisjordaniens. En cinquième lieu, il rendra périlleux et compliqués les contacts entre Palestiniens et institutions palestiniennes situés de part et d'autre de son tracé. En sixième lieu, il affectera les 106 000 Palestiniens vivant dans des banlieues situées en Cisjordanie, qui dépendent des infrastructures et des services présents à Jérusalem-Est (hôpitaux, universités, écoles, emplois, marchés pour la vente des produits agricoles, etc.). Le Rapporteur spécial a rencontré de nombreux habitants palestiniens de Jérusalem auxquels la construction du mur dans leur ville causait un grave préjudice. Malheureusement, rares sont ceux qui se soucient du sort de cette population, la communauté internationale s'étant accoutumée à l'annexion illégale

de Jérusalem. Le Rapporteur spécial souligne que les tronçons du mur incorporant des quartiers palestiniens de Jérusalem-Est à Israël ne sont pas différents des autres tronçons qui, en Cisjordanie, incorporent des terres palestiniennes au territoire israélien.

C. Exode forcé

27. Le mur a pour troisième objectif de contraindre, en leur rendant la vie intolérable, les Palestiniens résidant dans la « zone de jointure » située entre le mur et la Ligne verte et ceux qui résident dans la zone contiguë au mur mais que ce dernier sépare de leurs terres, à quitter leurs foyers pour recommencer leur vie ailleurs en Cisjordanie. C'est ce qu'a reconnu la CIJ dans son avis consultatif (par. 122 et 123).

28. Dans la « zone de jointure », les restrictions à la liberté de circulation imposent des conditions de vie particulièrement difficiles aux Palestiniens. Israël a fait de cette zone une zone d'accès réglementé où les Israéliens sont libres de se déplacer à leur gré mais où les Palestiniens n'en ont pas le droit. En outre, plus de 13 500 Palestiniens vivant dans cette zone sont obligés d'avoir des permis pour vivre dans leur propre maison (voir l'ordonnance relative aux règles de sécurité (Judea et Samaria) (n° 378) 5730/1970). Les Palestiniens qui vivent en Cisjordanie et possèdent des exploitations agricoles situées à l'intérieur de la « zone d'accès réglementé » ont besoin de permis pour pouvoir franchir le mur et entrer dans ladite zone, tout comme les autres Palestiniens qui souhaitent s'y rendre pour des raisons personnelles, humanitaires ou pour affaires. Dans une récente étude, le Centre B'Tselem (Centre d'information israélien pour les droits de l'homme dans les territoires occupés) a exposé le caractère arbitraire du système de permis. Ces permis sont accordés pour des périodes qui varient suivant le type de plantes cultivées par le demandeur. C'est ainsi que les propriétaires d'oliveraies devraient se voir délivrer des permis pour les mois d'octobre et novembre, saison de la cueillette, tandis que les propriétaires de serres qui nécessitent des soins tout au long de l'année devraient se voir octroyer des permis de plus longue durée. Toutefois, il ressort des témoignages recueillis auprès des agriculteurs de la région par le Centre B'Tselem que les autorités ne tenaient pas souvent compte du type de plantes cultivées. Il arrive parfois qu'Israël octroie des permis de trois à six mois aux propriétaires d'oliveraies, des permis de plus courte durée aux propriétaires de serres. Dans certains cas, ces permis ne sont accordés que pour deux semaines. En outre, environ un quart des demandes de permis d'entrée dans la « zone d'accès réglementé » sont refusées parfois parce que les demandeurs ne peuvent produire de titre de propriété mais le plus souvent pour des raisons de sécurité. Les motifs de ces refus ne sont jamais indiqués. Les permis autorisent l'entrée dans la « zone d'accès réglementé » en passant par des portes spéciales qui permettent de franchir le mur. Dans la pratique, ces portes ne sont jamais ouvertes aux heures indiquées. Les agriculteurs sont obligés d'attendre pendant des heures avant que les soldats ne daignent les ouvrir. C'est ainsi que les portes situées à Jayyous ne sont ouvertes que pendant une demi-heure, trois fois par jour. Les règles arbitraires régissant l'ouverture de ces portes ont posé des problèmes particuliers pendant la saison des récoltes, lesquelles nécessitent un travail intensif. (Voir *Not All It seems: Preventing Palestinians' Access to their Lands West of the Separation Barrier in the Tulkarem-Qalqiliya Area.*)

29. Dans certains cas, le mur a été construit compte dûment tenu de la présence de maisons palestiniennes. Toutefois, dans d'autres cas, des habitations ont été démolies sous le prétexte qu'elles étaient trop proches de ce mur. C'est ainsi qu'en août 2004, 10 maisons et magasins ont été détruits dans le village d'Azzun Atma en Cisjordanie.

30. La raison principale pour laquelle les Palestiniens veulent quitter la « zone d'accès réglementé » et la zone voisine du mur est que ce dernier sépare leur maison de leurs terres. Les villages de Jayyous et d'Isla dont il est fait mention plus haut ne sont pas des cas isolés. Bon nombre d'autres villages ont été eux aussi touchés.

31. À ce stade, il convient de rappeler le jugement rendu par la Haute Cour d'Israël dans l'affaire opposant le Conseil de village de Beit Sourik au Gouvernement israélien. Dans ce jugement, la Cour a formulé les observations ci-après au sujet de l'emplacement du tronçon du mur situé dans la zone nord-ouest de Jérusalem près de Beit Sourik :

« 82. ... La partie de la clôture de séparation à laquelle ces ordonnances d'expropriation s'appliquent est d'environ 40 kilomètres. Cette clôture nuit à la qualité de vie d'environ 35 000 personnes. Sa construction a nécessité l'utilisation de 4 000 dounams de terres et l'arrachage de milliers d'oliviers. Elle sépare les habitants de huit villages de 30 000 dounams de terres leur appartenant. Dans leur grande majorité, ces terres sont cultivées et contiennent des dizaines de milliers d'oliviers, d'arbres fruitiers et d'autres cultures. Le régime de permis que le commandement militaire souhaite mettre en place ne peut protéger les agriculteurs locaux contre le grave préjudice causé par la clôture, ni en limiter l'ampleur. L'accès aux terres agricoles est gardé par des portes qui sont très éloignées les unes des autres et ne sont pas toujours ouvertes. Des contrôles de sécurité qui risquent d'empêcher le passage des véhicules et qui ne manqueront pas de créer de longues files d'attente seront effectués à l'entrée de ces portes. Tout cela ne facilitera pas la tâche des paysans. Il y aura fatalement des zones où la clôture de sécurité séparera la population locale de ses terres.

...

84. Le préjudice causé par la clôture de séparation ne se limite pas aux terres qui appartiennent aux habitants ou à l'impossibilité d'accéder à ces terres. Il est bien plus vaste car il affecte la vie de toute une population. Dans maints endroits, il passe juste devant les maisons des gens...

85. ... [N]ous sommes d'avis que l'équilibre défini par le commandement militaire est disproportionné. Par conséquent, la seule option qui nous reste est de réexaminer le tracé de la clôture, en nous fondant sur les critères de proportionnalité que nous avons définis. »

32. Le Gouvernement israélien a exprimé son rejet total de l'avis consultatif de la Cour internationale de Justice. Toutefois, il a clairement indiqué qu'il se conformerait à la décision prise par la Haute Cour d'Israël au sujet des parties du mur qui n'avaient pas encore été construites. Le chef du commandement central de l'armée, le général Moshe Kaplinsky, a déclaré le 13 juillet que « les responsables de la sécurité avaient décidé qu'aucune clôture séparant les agriculteurs palestiniens de leurs champs ne serait construite et que les tronçons futurs de la clôture de sécurité ne comporteraient donc aucune porte d'accès aux terres agricoles ». Les

déclarations du Gouvernement israélien montrent que celui-ci n'a aucunement l'intention d'appliquer le jugement susmentionné aux 200 kilomètres de mur déjà construits.

33. En premier lieu, le Rapporteur spécial invite le Gouvernement israélien à donner suite à l'avis consultatif de la CIJ, que l'Assemblée a approuvé le 20 juillet 2004 par 150 voix. La CIJ, qui est l'organe judiciaire de l'Organisation des Nations Unies, s'est prononcée à la quasi-unanimité contre la licéité du mur. Israël est donc juridiquement tenu de démanteler ce mur et de dédommager les Palestiniens du préjudice subi du fait de son édification. Même si le Gouvernement israélien refuse de prendre de telles mesures, il devrait au moins donner effet au jugement rendu par sa propre Haute Cour dans l'affaire de Beit Zourik. Ce jugement laisse clairement entendre que bon nombre des tronçons du mur déjà construits ne sont pas conformes au principe de la proportionnalité tel que l'a exposé la Haute Cour. Il n'y a aucune raison pour que les parties qui sont dans ce cas ne soient pas démantelées.

V. Liberté de circulation

34. La liberté de circulation est un droit reconnu par tous les instruments relatifs aux droits de l'homme. À l'article 12 du Pacte international relatif aux droits civils et politiques, il est stipulé que quiconque se trouve légalement sur le territoire d'un État a le droit d'y circuler librement et d'y choisir librement sa résidence. Malgré cette disposition, de graves restrictions sont imposées à la liberté de circulation de tous les Palestiniens, et ce, tant dans la bande de Gaza qu'en Cisjordanie. Ces restrictions sont, pour chaque Palestinien, une source d'humiliations constantes et de souffrances individuelles et de tracas. En outre, elles sont la cause principale du déclin que connaît l'économie palestinienne.

35. La population de Gaza est de fait retenue prisonnière par la mer et par un ensemble de murs et de clôtures. L'armée israélienne surveille étroitement au moyen de patrouilles les frontières de la bande de Gaza dont elle contrôle strictement les entrées et sorties. Bien que quelques Gazéens soient autorisés à aller travailler en Israël lorsque les conditions de sécurité le permettent et qu'une poignée de personnalités officielles et autres privilégiés aient le droit de quitter Gaza et d'y retourner, la très grande majorité des Gazéens reste confinée à l'intérieur du territoire. En effet, il est pratiquement impossible aux hommes âgés de 16 à 35 ans, y compris les malades et les étudiants, de quitter Gaza par le terminal de Rafah, qui est la seule porte de sortie vers l'Égypte. À Gaza même, des barrages routiers fréquents et étroitement surveillés restreignent la liberté de circulation. Le territoire est de fait coupé en deux par le point de contrôle d'Abou Houli qui se trouve sur la route Salah al-Din, le principal axe routier reliant le nord au sud. En outre, d'autres barrages routiers, tant provisoires que permanents, ont été mis en place dans le nord et le sud de Gaza tandis que plusieurs zones, dont celles d'Al Mawasi et d'Al Sayafa, sont isolées du reste de la bande de Gaza par des patrouilles militaires israéliennes.

36. La population de Cisjordanie est victime de différentes formes de restriction à sa liberté de circulation. Parfois, les résidents d'une ville ne peuvent pas se rendre librement dans une autre ville de Cisjordanie : il leur faut obtenir auprès de l'armée israélienne des permis qui peuvent leur être arbitrairement refusés. Il est rare que des permis de ce type soient accordés aux propriétaires de véhicules privés.

Quiconque souhaite se déplacer à l'intérieur de la Cisjordanie doit passer par des points de contrôle tant temporaires que permanents que l'on retrouve également à l'intérieur des villes et des districts. La Cisjordanie et la bande de Gaza comptent plusieurs centaines de points de contrôle de ce type qui empêchent de circuler entre les villes et les villages ou d'une ville à l'autre et interdisent l'accès à Israël. Ces points de contrôle ne sont pas les seuls à restreindre la liberté de circulation. Bien qu'Israël y ait moins fréquemment recours qu'auparavant, les couvre-feux restent chose courante, comme le montre l'exemple de Naplouse. Ces restrictions à la liberté de circulation des personnes et des marchandises ont aggravé la crise économique qui sévit dans le territoire palestinien occupé, créé un chômage endémique et gravement perturbé les secteurs de l'éducation, de la santé, des services, de l'emploi et du commerce ainsi que la vie familiale et politique.

37. La présence de roades distinctes reliant les colonies de peuplement les unes aux autres ainsi qu'à Israël et qui sont interdites aux Palestiniens rend encore plus difficiles les déplacements, et ce aussi bien dans la bande de Gaza qu'en Cisjordanie.

38. Dans la région de Jérusalem, le mur menace de devenir un véritable cauchemar. Ceux qui se trouvent du côté du mur situé en Cisjordanie et possèdent des documents d'identité cisjordaniens ne pourront avoir accès aux lieux de travail, écoles, hôpitaux et lieux de culte situés du côté israélien. De la même façon, il sera très difficile, voire impossible, à ceux qui résident du côté du mur situé en territoire israélien d'avoir accès à leurs lieux de travail ainsi qu'aux établissements d'enseignement et aux hôpitaux qui se trouvent du côté cisjordanien. En outre, nombre de Palestiniens résidant officiellement à Jérusalem ont des conjoints qui possèdent des documents d'identité cisjordaniens. Il reste maintenant à savoir si ces couples seront autorisés à vivre ensemble. Il est aussi à craindre que les détenteurs de papiers d'identité de Jérusalem, contraints de vivre à l'extérieur du mur en raison de la pénurie de logements à Jérusalem-Est, ne perdent leurs droits de résider dans cette ville. Tous les résidents de la zone, soit plusieurs milliers de personnes, seront obligés de passer par un grand terminal situé à Qalandiya. Certains d'entre eux seront munis de papiers d'identité cisjordaniens et d'autres de permis de résidence à Jérusalem. Bien que l'on n'ait pas d'estimations précises sur le nombre de Palestiniens qui devront chaque jour passer par le terminal de Qalandiya, il est clair que ce total se chiffrera en dizaines de milliers. La plupart de ceux qui franchiront le mur pour se rendre à leur travail ou à l'école arriveront au terminal de Qalandiya aux heures de pointe et l'on peut s'attendre à ce que cet afflux massif de gens cause des problèmes. Au stade actuel, il est tout simplement impossible de prédire l'ampleur des difficultés auxquelles les Palestiniens vivant à l'intérieur et aux alentours de Jérusalem seront confrontés du fait de l'édification du mur.

39. Comme on l'a vu plus haut, les personnes vivant ou exploitant des terres agricoles le long de la « zone de jointure » située entre le mur et la Ligne verte sont soumises à un régime spécial de permis. En effet, pour pouvoir aller et venir entre leur domicile et leurs champs, il leur faut des permis qui leur sont souvent refusés ou qui ne leur sont accordés que pour des périodes limitées. En outre, il arrive souvent que les portes d'entrée à la « zone d'accès réglementé » ne soient pas ouvertes aux heures indiquées. D'une manière générale, le système de permis fonctionne de façon totalement arbitraire. Les effets psychologiques du mur ont récemment fait l'objet d'une étude réalisée par le Palestinian Counselling Centre et datée du 29 juin 2004, montrant que les personnes vivant à proximité du mur, en

particulier celles qui étaient obligées de passer par les portes d'accès, souffraient de graves troubles psychosomatique dus à leur état d'anxiété.

40. Le Rapporteur spécial est malheureusement tenu de comparer les différents systèmes de permis auxquels sont soumis les Palestiniens aux lois sur les laissez-passer de triste mémoire qui, du temps de l'apartheid en Afrique du Sud, régissaient le droit des Africains de circuler dans les zones « blanches ». Ces lois étaient certes humiliantes mais elles s'appliquaient uniformément. Les lois israéliennes sont en fait aussi humiliantes mais leur application n'est ni claire ni uniforme. Leur caractère arbitraire et fantaisiste pèse lourdement sur la population palestinienne pour laquelle les restrictions à la liberté de circulation sont une forme d'humiliation institutionnalisée. L'Afrique du Sud n'a jamais connu d'« apartheid routier ». En créant des routes spécialement réservées aux colons et interdites aux Palestiniens, Israël est allé encore plus loin que l'apartheid en matière de restrictions à la liberté de circulation.

VI. Conclusion

41. **Le présent rapport est centré sur trois questions : la destruction de biens à Gaza, les conséquences de l'édification du mur et les restrictions à la liberté de circulation. Le Rapporteur spécial a appelé l'attention sur les graves violations des droits de l'homme et du droit humanitaire découlant de ces mesures qu'a prises le Gouvernement israélien. Israël est tenu, sur les plans tant juridique que moral, de mettre ses pratiques et politiques en conformité avec le droit. La Haute Cour de justice israélienne a déclaré à juste titre qu'il ne « saurait y avoir de sécurité sans droit » (affaire *Beit Sourik*, par. 86).**

42. **Comme l'indique la Cour internationale de Justice dans son avis consultatif, qui a été approuvé par l'Assemblée générale, le mur a des conséquences pour les États autres qu'Israël. Le Rapporteur spécial rappelle aux États qu'ils ont l'obligation de ne pas reconnaître la situation illicite découlant de la construction du mur et de ne pas prêter aide ou assistance au maintien de cette situation. En outre, tous les États parties à la quatrième Convention de Genève ont l'obligation de faire respecter par Israël le droit international humanitaire incorporé dans la Convention. Le mépris affiché par Israël pour le droit international menace non seulement l'ordre juridique international, mais aussi l'ordre international tout court. Dans ces conditions, la communauté internationale n'a pas lieu de se montrer conciliante.**



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Questions relatives aux droits de l'homme :

situations relatives aux droits de l'homme

et rapports des rapporteurs et représentants spéciaux

Pratiques israéliennes affectant les droits de l'homme du peuple palestinien dans le territoire palestinien occupé, y compris Jérusalem-Est

Note du Secrétaire général

Le Secrétaire général a l'honneur de transmettre à l'Assemblée générale le rapport soumis par John Dugard, Rapporteur spécial de la Commission des droits de l'homme sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, en application des résolutions 1993/2 A et 2005/7 de la Commission.

* A/60/150.



Rapport du Rapporteur spécial de la Commission des droits de l'homme sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967

Résumé

Au cours de l'année écoulée, la décision prise par Israël d'évacuer les colons juifs et ses soldats de la bande de Gaza a focalisé l'attention de la communauté internationale sur Gaza, ce qui a permis à Israël de continuer à construire le mur en territoire palestinien, à étendre les colonies et à faire reculer la présence palestinienne à Jérusalem, sans qu'aucune voix ne s'élève, ou presque. Le présent rapport traite essentiellement de ces questions.

Bien que la portée et les conséquences du retrait israélien de la bande de Gaza ne soient pas pleinement connues, la bande de Gaza restera à l'évidence un territoire occupé assujéti aux dispositions de la Convention de Genève du 12 août 1949 relative à la protection des personnes civiles en temps de guerre (quatrième Convention de Genève), puisque Israël continuera à en contrôler les frontières. Le retrait des colons juifs de la bande de Gaza entraînera la décolonisation d'une partie du territoire palestinien, mais ne mettra pas fin à son occupation.

Dans son avis consultatif du 9 juillet 2004, la Cour internationale de Justice a conclu que l'édification du mur en train d'être construit par Israël dans le territoire palestinien occupé était contraire au droit international. En conséquence, elle a affirmé que les travaux de construction devaient cesser et que les tronçons qui avaient été achevés en territoire palestinien occupé devaient être détruits. Le Gouvernement israélien n'a pas tenu compte de l'avis consultatif et les travaux de construction se poursuivent.

L'existence du mur a de graves répercussions pour les Palestiniens qui vivent à proximité. Plusieurs milliers d'entre eux ne peuvent accéder à leurs terres agricoles, situées de l'autre côté du mur, car le laissez-passer nécessaire ne leur est pas délivré. Même pour ceux qui obtiennent un laissez-passer, les portes ménagées dans le mur restent souvent closes aux heures où elles devraient être ouvertes. Les Palestiniens quittent donc progressivement la terre et les maisons qu'ils occupent depuis des générations.

La plupart des colons juifs de Cisjordanie sont désormais installés entre la Ligne verte (tracé accepté de la frontière séparant Israël du territoire palestinien occupé) et le mur. En outre, dans cette zone, appelée « zone d'accès réglementé », certaines colonies sont en expansion, et d'autres continuent d'apparaître. Enhardis par le soutien que leur manifestent le Gouvernement et les Forces de défense israéliennes (FDI), les colons se sont faits plus agressifs à l'égard des Palestiniens, et de plus en plus violents.

L'édification du mur, la « dépalestinisation » de la zone d'accès réglementé et l'expansion des colonies montrent clairement que l'intention est de faire du mur la frontière de l'État d'Israël et d'annexer la zone d'accès réglementé.

Israël a lancé une vaste campagne de transformation de Jérusalem visant à judaïser la ville. Des colonies juives de Jérusalem-Est sont en train d'être étendues et il est prévu de relier Jérusalem à la colonie de Ma'aleh Adumim, où vivent 35 000 personnes, ce qui aura pour effet de couper la Cisjordanie en deux. Les Palestiniens de Jérusalem-Est sont en train d'être isolés les uns des autres par l'implantation de colonies juives et par la démolition de logements. La construction du mur a entraîné le déplacement de fait en Cisjordanie de quelque 55 000 Palestiniens résidant officiellement dans la commune de Jérusalem-Est. À l'évidence, ces transformations ont pour objet de couper court à l'idée que Jérusalem-Est constitue une entité palestinienne susceptible de devenir la capitale d'un État palestinien.

La communauté internationale a proclamé le droit du peuple palestinien à l'autodétermination et la nécessité de créer un État palestinien vivant côte à côte avec Israël dans la paix et la sécurité, ce qui reste du domaine de l'utopie en l'absence d'un territoire palestinien viable. Or, l'édification du mur, l'expansion des colonies et la dépalestinisation de Jérusalem font obstacle à la viabilité d'un État palestinien.

L'occupation du territoire palestinien continue de donner lieu à de sérieuses violations des droits de l'homme. Les prisons israéliennes comptent environ 8 000 détenus palestiniens, dont le traitement serait loin d'être conforme aux normes internationalement reconnues. La liberté de circulation est sérieusement entravée par la présence de plus de 600 postes de contrôle militaires. Les droits sociaux et économiques ne sont pas respectés. Un quart de la population palestinienne est au chômage et la moitié vit au-dessous du seuil de pauvreté officiel. Les soins de santé et l'enseignement laissent à désirer et il est très difficile pour les Palestiniens de se procurer de l'eau salubre. Le logement reste un grave problème du fait des démolitions auxquelles les FDI ont procédé ces dernières années. Les femmes souffrent davantage de ces violations.

En 2004, la Cour internationale de Justice a rendu un avis consultatif dans lequel elle a déclaré illégales non seulement l'édification du mur mais aussi de nombreux aspects de l'administration par Israël du territoire palestinien occupé. L'Assemblée générale a approuvé cet avis consultatif dans sa résolution ES-10/15 du 20 juillet 2004. Depuis lors, la communauté internationale n'a pas fait grand-chose pour contraindre Israël à s'acquitter des obligations juridiques énoncées par la Cour internationale de Justice. Le Quatuor, composé de l'Organisation des Nations Unies, de l'Union Européenne, des États-Unis d'Amérique et de la Fédération de Russie, préfère visiblement négocier avec Israël sur la base de la Feuille de route sans se préoccuper de l'avis consultatif. Il semble que la Feuille de route envisage l'acceptation de certains tronçons du mur construits en territoire palestinien occupé et le rattachement au territoire israélien des grandes colonies juives qui se trouvent sur ce territoire. L'ONU est donc dans une situation délicate car elle ne peut à l'évidence être partie à des négociations faisant abstraction de l'avis consultatif rendu par son propre organe judiciaire.

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I. Introduction

1. Le 8 février 2005, à Charm el-Cheikh (Égypte), le Président de l'Autorité palestinienne, Mahmoud Abbas, et le Premier Ministre israélien, Ariel Sharon, sont convenus d'un cessez-le-feu, la Palestine consentant à mettre fin aux actes de violence dirigés vers les Israéliens, et Israël à cesser toute activité militaire à l'encontre des Palestiniens. Cet accord a fait naître l'espoir d'une paix qui aboutirait à des négociations en vue de la création d'un État palestinien. Au cours des six derniers mois, la paix a été précaire. Les attentats-suicides n'ont pas cessé en Israël : le 25 février, une opération kamikaze a fait quatre tués et 50 blessés à Tel-Aviv et le 12 juillet, une autre a fait 5 tués et 90 blessés à Netanya. Des agents palestiniens indépendants des autorités ont commis plus de 200 attentats contre des objectifs israéliens, causant toutefois peu de pertes. Les violences envers les Palestiniens se sont poursuivies : les Forces de défense israéliennes (FDI) ont tué plus de 70 Palestiniens, en ont blessé plus de 500 et ont repris leurs assassinats ciblés. Elles ont fait plus de 2 000 incursions dans les villes et villages de Palestine. Ce qui a surtout retenu l'attention pendant cette période, c'est le départ des colons juifs de la bande de Gaza, qui a causé des clivages importants dans la société israélienne. La communauté internationale s'y est bien entendu intéressée de très près, au détriment cependant des graves violations des droits de l'homme et du droit humanitaire commises en Cisjordanie. L'avis consultatif de la Cour internationale de Justice, que l'Assemblée générale a confirmé par sa résolution ES-10/15 du 20 juillet 2004, est, en gros, resté lettre morte, bien que selon un rapport que la Suisse, dépositaire des Conventions de Genève, a fait tenir à l'Assemblée le 30 juin 2005, la très grande majorité des États ait réaffirmé que le droit applicable et les obligations des parties concernées avaient été constatés par la Cour internationale de Justice dans son avis consultatif du 9 juillet 2004 et ne pouvaient pas être remis en cause (A/ES-10/304, annexe, par. 22). Israël a donc pu poursuivre l'édification du mur sur le territoire palestinien, l'expansion des colonies et la dépalestinisation de Jérusalem. Le présent rapport porte principalement sur ces questions.

2. Dans le présent rapport, le terme « mur » a été préféré aux termes plus neutres que sont « barrière » et « clôture ». Le terme « mur » a été soigneusement pesé et délibérément choisi par la Cour internationale de Justice dans son avis consultatif sur les conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé (voir A/ES-10/273 et Corr.1). Le Rapporteur spécial ne voit pas de raison d'y substituer un autre.

II. Visite du Rapporteur spécial

3. Le Rapporteur spécial a passé la période du 26 juin au 3 juillet 2005 dans le territoire palestinien occupé. Il s'est rendu à Gaza, où il a pu visiter le point de passage de Karni et constater les dommages occasionnés à l'aéroport international de Gaza. Du côté palestinien, du point de passage de Rafah, qui sépare Gaza et l'Égypte, il a croisé des résidents de Gaza qui, rentrant chez eux en autocar, avaient attendu trois ou quatre jours du côté égyptien, en plein soleil, pendant que les fonctionnaires israéliens de l'immigration étudiaient leurs papiers. (B'Tselem, dans une récente publication intitulée *One Big Prison*, a qualifié d'arbitraire et démesuré le traitement réservé aux habitants de Gaza par les autorités israéliennes au terminal de Rafah.) Pendant son séjour à Gaza, le Rapporteur spécial a rencontré des

représentants des organismes des Nations Unies et d'ONG palestiniennes, ainsi que des particuliers.

4. Le Rapporteur spécial a ensuite séjourné en Cisjordanie, dont Jérusalem-Est. Il s'est rendu à Ramallah, Hébron, Jérusalem et Bethléem. Il s'est aussi rendu dans des localités adjacentes au mur dans les régions de Qalqiliya (Jayyous), Tulkarem (Ras), Hébron (Imneizel), Jérusalem (Beit Surik, Beit Dukku, Anata, Abou-Dis, A-Ram, Kalandiya) et Bethléem (An Nu'man). Il a rencontré des groupes touchés par la présence des colonies à Hébron, At Tuwani, Bethléem et Jérusalem. À Jérusalem, il s'est rendu dans le quartier de Silwan, où 88 maisons doivent être rasées. Au cours de cette partie de sa visite, il a rencontré des représentants de l'Autorité palestinienne, des organismes des Nations Unies et d'ONG israéliennes et palestiniennes, ainsi que des particuliers, dont beaucoup ont souffert personnellement de la construction du mur et des colonies.

III. Gaza

5. Au moment de la rédaction du présent document, la situation à Gaza était explosive. Des groupes de colons opposés au départ de 8 000 à 9 000 colons avaient eu des affrontements violents avec les FDI. Des militants palestiniens avaient tiré des roquettes sur Israël et les colonies juives et commis des actes de violence à l'encontre de l'Autorité palestinienne. Le retrait des colons doit avoir lieu entre la mi-août et la mi-septembre et il semble qu'il sera inmanquablement accompagné de violences.

6. Du fait de cette situation explosive, un additif au présent rapport risque de devoir être publié. Pour le moment, le retrait des colons et le statut qu'aura Gaza ne suscitent que des questions.

7. Une grande incertitude règne en ce qui concerne les modalités du retrait. On peut certes concevoir que les FDI aient besoin de créer un effet de surprise pour mener à bien l'opération, mais cette incertitude est lourde de conséquences pour les Palestiniens. Il est très probable que le retrait perturbera fortement la circulation routière et réduira la liberté de circulation, ce qui se répercutera sur les possibilités de ravitaillements et l'accès aux hôpitaux, aux écoles et aux lieux de travail. On comprend donc mal pourquoi le Gouvernement israélien n'a pas pris de dispositions, avec l'Autorité palestinienne, pour éviter une catastrophe humanitaire chez les Palestiniens pendant la période de retrait qui durera un mois. On craint par ailleurs qu'il n'ait pas été tenu suffisamment compte de la présence de munitions non explosées et de mines terrestres à proximité des colonies et d'amiante dans les habitations qui doivent être rasées.

8. Le futur statut de Gaza est très flou. Il semble improbable que l'ONU soit en mesure de publier une déclaration proclamant la fin de l'occupation israélienne de Gaza après le départ des colons puisque Israël continuera d'exercer un contrôle sur Gaza. De surcroît, la Cisjordanie et Gaza constituent « une seule unité territoriale » aux termes des Accords d'Oslo et il serait incompréhensible qu'une déclaration proclamant la fin de l'occupation de Gaza n'aborde pas la question de l'occupation de la Cisjordanie, qui se poursuit. Les projets ou intentions d'Israël en ce qui concerne l'avenir de Gaza ne sont pas clairs. Au moment de la rédaction du présent rapport, l'Autorité palestinienne ne savait toujours pas exactement quelle forme de contrôle Israël continuerait d'exercer et ni de quel degré de liberté Gaza jouirait

dans ses rapports avec l'extérieur et avec la Cisjordanie. Israël a affirmé qu'il céderait le contrôle de la route Philadelphi, entre Gaza et l'Égypte, si celle-ci est disposée à patrouiller de son côté de la frontière. Il a annoncé que l'aéroport de Gaza pourrait ne pas rouvrir. Bien qu'il soit disposé à envisager la construction d'un port à Gaza, Israël revendiquera, semble-t-il, le droit de surveiller les eaux territoriales de Gaza. Il est question aussi qu'Israël construise en mer une barrière en béton qui viendrait prolonger sa frontière avec Gaza. La circulation des personnes et des biens entre Gaza et la Cisjordanie reste une inconnue. Jusqu'ici, Israël a rejeté des propositions visant à ce que les personnes puissent circuler librement entre Gaza et la Cisjordanie, la réunification familiale des habitants de Gaza et de la Cisjordanie restant inadmissible à ses yeux. Il n'y aura pas de libre circulation des biens entre Gaza et la Cisjordanie. Le projet de construction, entre Gaza et la Cisjordanie, d'une route mise en déblai, avec une dénivellation de cinq mètres, et entourée d'une clôture, qui permettrait le passage de personnes et de biens, est encore à l'examen. Il est fort possible qu'en ce qui concerne les biens, la méthode du transbordement, lourde à mettre en œuvre et encadrée de façon très stricte, qui est en usage à l'heure actuelle au point de passage de Karni, restera en vigueur. Israël n'est guère enclin à permettre la libre circulation des personnes et des biens entre Gaza et l'Égypte. Il a proposé que le terminal qui se situe actuellement à Rafah, entre Gaza et l'Égypte, soit réinstallé à Kerem Shalom, où les frontières d'Israël, de l'Égypte et de Gaza se rencontrent, ce qui lui permettrait de continuer à exercer un contrôle sur les entrées à Gaza. Les dispositions douanières font encore l'objet de négociations. Dans tous les cas de figure, la conclusion inéluctable est qu'Israël n'est pas disposé à céder le contrôle qu'il exerce sur les frontières de Gaza. En outre, les FDI ont fait savoir qu'elles n'hésiteraient pas à intervenir militairement à Gaza après la départ des colons si la sécurité d'Israël l'exigeait.

9. Il semble donc ne faire aucun doute que Gaza demeurera un territoire occupé assujéti aux dispositions de la Convention de Genève relative à la protection des personnes civiles en temps de guerre du 12 août 1949 (quatrième Convention de Genève). D'après la jurisprudence relative à l'Allemagne d'après guerre, il y a occupation si un contrôle continue d'être exercé. Dans l'affaire des otages (*États-Unis c. Wilhelm List et al.*, 1949), un tribunal militaire a affirmé qu'il n'est pas nécessaire que la puissance occupante exerce un contrôle effectif sur tout le territoire, pourvu qu'elle puisse à tout moment qu'elle choisit exercer un contrôle sur n'importe quelle partie du pays¹.

10. Le retrait des colons juifs de Gaza doit être considéré comme la décolonisation d'une partie du territoire palestinien. Le contrôle qu'Israël exerce sur ce territoire reste toutefois intact. En conséquence, Israël demeurera une puissance occupante en ce qui concerne Gaza, et les règles du droit international humanitaire applicable aux territoires occupés continueront de s'appliquer. La crise humanitaire qui frappe Gaza depuis 2000 ne prendra pas fin avec le départ des colons juifs. Le contrôle qu'Israël continuera d'exercer empêchera toute reprise économique et Gaza restera un territoire prisonnier où les droits économiques et sociaux sont foulés au pied.

11. L'incertitude qui entoure les projets d'Israël pour l'après-retrait a fait dire qu'Israël entendait reporter *sine die* les décisions à prendre sur des questions telles que les douanes, le trafic aérien et maritime et la circulation des personnes et des biens. Si les décisions traînent, l'opinion internationale continuera de ne pas prêter attention à l'expansion territoriale d'Israël en Cisjordanie. Douze mois de

négociations interminables entre le Gouvernement israélien et l'Autorité palestinienne sur ces questions permettront à Israël d'achever l'édification du mur, de consolider les blocs de colonies et de transformer Jérusalem.

IV. Le mur

12. Dans l'avis consultatif qu'elle a rendu le 9 juillet 2004, la Cour internationale de Justice a jugé que l'édification du mur qu'Israël était en train de construire dans le territoire palestinien occupé, y compris à l'intérieur et sur le pourtour de Jérusalem-Est, était contraire au droit international; qu'Israël était tenu de cesser immédiatement les travaux d'édification du mur dans le territoire palestinien et de démanteler au plus vite cet ouvrage; qu'il était dans l'obligation de réparer tous les dommages causés par la construction du mur dans le territoire palestinien occupé; que tous les États avaient l'obligation de ne pas reconnaître la situation illicite découlant de la construction du mur; que tous les États parties à la quatrième Convention de Genève avaient l'obligation de faire respecter par Israël les dispositions de cette convention; et que l'Organisation des Nations Unies devait examiner quelles nouvelles mesures devaient être prises afin de mettre un terme à la situation illicite découlant de la construction du mur. Le 20 juillet 2004, l'Assemblée générale a adopté la résolution ES-10/15, dans laquelle elle exigeait qu'Israël s'acquitte de ses obligations juridiques, telles qu'elles sont énoncées dans l'avis consultatif. Le résultat du vote sur cette résolution était le suivant : 150 voix pour, 6 voix contre et 10 abstentions.

13. Le Gouvernement israélien refuse de se plier à l'avis consultatif de la Cour internationale de Justice. En revanche, il attache une certaine importance au jugement rendu le 30 juin 2004 par la Haute Cour israélienne dans l'affaire opposant le Conseil de village de Beit Sourik au Gouvernement israélien, dans laquelle la Haute Cour faisait valoir que si le mur pouvait être édifié pour des raisons de sécurité, il ne fallait pas qu'il rende les conditions de vie trop difficiles pour les Palestiniens. Malheureusement, ce jugement ne s'est pas appliqué à la plupart des tronçons du mur édifiés avant cette décision de juillet 2004.

14. Le 20 février 2005, le Gouvernement israélien a légèrement modifié le tracé prévu au départ. Une fois achevé, le mur fera 670 kilomètres de long, contre 622 kilomètres auparavant, et suivra la Ligne verte sur 135 kilomètres, contre 48 précédemment. Le nouveau tracé suivra la Ligne verte ou en sera proche dans les hauteurs d'Hébron. Un peu plus au nord, il pénétrera plus profondément dans le territoire palestinien pour englober des colonies du bloc de Goush Etzion près de Bethléem, où vivent plus de 50 000 colons. Il a également été décidé d'incorporer les colonies de Ma'ale Adoumim et d'Ariel du côté israélien du mur. Ce faisant, Israël absorbera environ 10 % des terres palestiniennes. (L'ancien tracé aboutissait à la confiscation de 12,7 % de la Cisjordanie.) Le mur aura pour effet de placer du côté israélien 170 000 colons (sans compter ceux de Jérusalem-Est) et 49 000 Palestiniens, qui vivent dans 38 villages.

15. Jusqu'à présent, 213 kilomètres ont été construits, de la frontière nord de la Cisjordanie près de Toubas jusqu'aux environs d'Elkana au centre, ainsi que deux tronçons à Jérusalem. Les travaux se poursuivent entre Elkana et Jérusalem; autour des colonies d'Ariel et d'Immanuel; à l'intérieur et sur le pourtour de Jérusalem-Est; et de Goush Etzion à Metzudat Yehuda à la frontière sud de la Cisjordanie, dans le

gouvernorat d'Hébron. Malgré la progression rapide des travaux depuis l'avis consultatif rendu par la Cour internationale de Justice, le 6 juillet, le Premier Ministre israélien, Ariel Sharon, a reproché aux autorités militaires de « mettre trop de temps » à construire le mur et leur a ordonné d'accélérer les travaux puisque rien ne s'y opposait sur le plan financier. Les retards pris dans les travaux sont largement attribuables aux requêtes adressées à la Haute Cour contre le tracé du mur. Une ordonnance interdisant l'édification du mur autour de la colonie d'Ariel, qui prolongerait le mur de 22 kilomètres à l'intérieur de la Cisjordanie, a été levée le 17 mai 2005, et les travaux de construction le long de la limite orientale de cette bande de terre qui s'enfonce en territoire palestinien ont déjà commencé. La déclaration faite par M. Sharon le 21 juillet 2005, à l'effet que la colonie d'Ariel « fera partie de l'État d'Israël pour toujours » et « sera toujours un élément indissociable de l'État d'Israël », ne laisse planer aucun doute sur l'intention d'Israël de bâtir le mur autour du bloc de colonies d'Ariel.

16. Le Rapporteur spécial s'est rendu jusqu'au mur en divers endroits et a visité plusieurs sites de construction, notamment près de Jayyous et de Ras dans les secteurs de Qalandiya et de Toulkarem; autour de la tombe de Rachel à Bethléem; à A-Ram, le long de la route qui mène à Qalandiya; sur les collines d'Abou-Dis et d'Anata; et à Mneizel dans le sud des hauteurs d'Hébron. Le mur, ou barrière comme certains préfèrent l'appeler, a été édifié sans souci de l'environnement. Il est laid et a entraîné la destruction d'oliveraies, d'agrumeraies et de pâturages, en plus de défigurer les villes et les villages. Dans ses rapports précédents, le Rapporteur spécial a fait valoir que le mur semblait souvent avoir été construit sans réel souci des questions de sécurité. (Par exemple, à certains endroits, le mur a été édifié dans une vallée surplombée par des villages palestiniens.) Sa dernière visite l'a conforté dans son opinion.

17. La zone située entre le mur et la Ligne verte – la frontière reconnue par la communauté internationale, qui sépare Israël de la Cisjordanie – est appelée « zone fermée » ou « zone charnière ». Y vivent quelque 49 000 Palestiniens. Cependant, un nombre encore plus important de Palestiniens vit du côté cisjordanien du mur alors que leurs terres se trouvent dans la « zone fermée ». Les localités palestiniennes, de part et d'autre, sont gravement touchées par l'édification de ce mur. Pour les résidents de la « zone fermée », les contacts avec la famille, ainsi que l'accès aux hôpitaux, aux écoles, aux marchés et aux emplois en Cisjordanie sont devenus difficiles. Ceux qui vivent du côté cisjordanien du mur ont besoin d'un permis pour se rendre sur leurs propres terres agricoles. Aujourd'hui, il semble que les demandes de permis soient déclinées surtout lorsque le propriétaire ou l'exploitant agricole ne peut pas prouver de façon convaincante qu'il possède un titre de propriété ou un titre foncier, alors que ces dernières années, les permis étaient surtout refusés pour des raisons de sécurité. Un propriétaire foncier qui présente une demande de permis pour avoir accès à ses propres terres doit produire un extrait cadastral. Cependant, le titre de propriété n'existe pas dans le système foncier palestinien traditionnel et les propriétaires fonciers palestiniens s'y opposent depuis de nombreuses décennies. Cela peut s'expliquer en partie par le fait que l'inscription au cadastre sous l'Empire ottoman se faisait très lentement et qu'il y a eu peu de progrès en la matière sous le mandat britannique et pendant l'occupation jordanienne avant 1967. Il n'est donc pas inhabituel que les exploitants ne sachent pas quel est le véritable statut des terrains qu'ils cultivent puisqu'ils n'ont jamais dû produire de titre de propriété. La plupart de ces terres sont dans la famille depuis

plusieurs générations selon le régime foncier traditionnel, où il n'existe pas de cadastre. Dans ces conditions, produire un titre de propriété ou un titre foncier constitue souvent un obstacle insurmontable. Les permis sont refusés pour ce motif ou parce que l'on estime que le demandeur est un parent trop éloigné du propriétaire. Dans le gouvernorat de Toulkarem, pour la période allant du 1^{er} mars au 31 mai 2005, 58 % des 315 demandeurs de 'Attil, de Deir al Ghoussoun et d'Illar ont reçu un permis; 22 % des 900 demandeurs d'Akkaba en ont reçu un, ainsi que 19 % des 1 222 demandeurs de Baqaa ach-Charkiya, de Nazlat Issa et d'Abou Nar. À Qaffin, qui compte 9 000 habitants, 600 familles, soit entre 3 000 et 3 600 personnes, possèdent des terres et des vergers de l'autre côté du mur. En mai 2005, 1 050 villageois ont présenté une demande de permis pour avoir accès à leurs terres. Seuls 70 permis ont été délivrés; 600 personnes ont essuyé un refus; 380 personnes n'ont reçu aucune réponse. La raison invoquée le plus fréquemment pour justifier ces refus était que le demandeur n'était pas un parent assez proche du propriétaire. Des permis ont été refusés à des fils et à des petits-fils de propriétaires car, estimait-on, il s'agissait de « parents éloignés ». Entre janvier et juin 2005, sur les quelque 3 545 demandes présentées dans le secteur de Toulkarem, 2 404 ont été rejetées, surtout en raison de preuves insuffisantes de l'existence d'un lien de parenté avec le propriétaire.

18. D'autre part, l'ouverture et la fermeture des 25 portes sensées permettre d'entrer dans la « zone d'accès réglementé » sont purement arbitraires, ce qui n'arrange rien. Il n'est pas rare que ceux qui ont un permis attendent l'ouverture des portes pendant plusieurs heures, parfois en vain. En mai et juin 2005, des incendies se sont déclarés dans la zone et les FDI n'ont pas autorisé les agriculteurs à accéder à leurs terres pour les éteindre.

19. Il arrive que des maisons situées trop près du mur soient détruites. C'est ce qui s'est passé le 27 juillet 2005 dans les environs d'Al-Khadr.

20. Beaucoup de ceux dont les terres avoisinent la zone d'accès réglementé ne supportent plus que leurs demandes de permis soient refusées, que les portes restent fermées et que leurs habitations soient détruites. C'est pourquoi les Palestiniens quittent peu à peu les terres et les maisons où ils ont vécu pendant des générations. On ne dispose pas de chiffres précis, mais 11 000 personnes environ auraient déjà été déplacées par suite de la construction du mur. Cette nouvelle génération de déplacés crée une nouvelle catégorie de réfugiés palestiniens. En vertu d'une vieille loi ottomane, les autorités israéliennes vont pouvoir saisir les terres laissées à l'abandon et en transmettre la propriété aux colons.

A. Les colonies de peuplement et le mur

21. Les colonies de peuplement juives en Cisjordanie et dans la bande de Gaza sont illégales. Elles contreviennent aux dispositions du paragraphe 6 de l'article 49 de la quatrième Convention de Genève et leur illégalité a été confirmée par la Cour internationale de Justice dans son avis consultatif concernant le mur. Le maintien des colonies de peuplement ne peut donc aucunement être justifié. A fortiori, la communauté internationale doit juger leur expansion totalement inacceptable.

22. La plupart des colons et des colonies de peuplement de Cisjordanie se trouvent du côté israélien du mur. Environ 170 000 colons, soit 76 % de la population de colons de Cisjordanie, vivent dans 56 colonies à l'intérieur de la zone d'accès

réglementé, où de nouvelles implantations et l'expansion de colonies existantes sont prévues. Le Rapporteur spécial a pu le constater dans les environs de Jayyous, où la colonie de peuplement de Zufin est en train d'être agrandie de telle façon qu'elle empiètera encore davantage sur les champs des agriculteurs palestiniens dans la zone d'accès réglementé.

23. L'expansion des colonies de peuplement saute aux yeux de toute personne qui se rend sur les sites concernés. L'horizon est parsemé de grues et les activités de construction sont clairement visibles. Les chiffres confirment le développement et l'expansion des colonies de peuplement. Le 8 juin 2005, le Bureau central israélien de statistique a indiqué qu'Israël avait construit près de deux fois plus de logements destinés aux colons au cours du premier trimestre de 2005 qu'au cours de la même période en 2004. Parallèlement, la construction de nouveaux logements en Israël même a chuté de 6 % par rapport au premier trimestre de 2004.

24. Trois grandes implantations, Gush Etzion, Ma'aleh Adumim et Ariel, qui seront toutes encerclées par le mur, auront pour effet de diviser le territoire palestinien en réserves, ou bantoustans, reliés entre eux par des routes ou des tunnels spéciaux. La contiguïté qui en résultera sera le fait des moyens de transport et non de la géographie. Cela signifie que les Palestiniens pourront accéder aux différentes zones de Cisjordanie mais que l'unité territoriale indispensable à la création d'un État viable fera défaut.

25. La construction du mur, la dépalestinisation de la zone d'accès réglementé et l'expansion et la construction de colonies de peuplement dans cette même zone démontrent clairement que le mur a vocation à marquer la frontière de l'État d'Israël et que le territoire appelé zone d'accès réglementé sera annexé. Les membres des Forces de défense israéliennes informent déjà les représentants de la communauté internationale qui se rendent dans la zone d'accès réglementé que celle-ci fait partie du territoire israélien. Ce point de vue est compréhensible, après tout, puisque les Israéliens peuvent y accéder librement alors que les Palestiniens doivent obtenir des permis spéciaux. Comme preuve supplémentaire du fait qu'Israël considère le mur comme une frontière internationale, on peut citer la construction de postes de contrôle qui ressemblent, de par leur taille et leur structure, à des postes frontière internationaux. D'ailleurs, tout comme le poste frontière de Karni, à Gaza, ces postes appliqueront la procédure de passage avec transbordement. Dans le journal *Ha'aretz* en date du 12 juillet 2005, M. Ran Cohen, membre de la Knesset, a souligné que les Israéliens étaient de plus en plus nombreux à refuser de reconnaître la Ligne verte en tant que frontière entre Israël et la Cisjordanie. Le 28 juillet 2005, M. Sharon, en visite à Paris, a fait entendre clairement les intentions de son pays. S'exprimant lors d'une réunion de la communauté juive, M. Sharon a déclaré que grâce au dégageement de Gaza, Israël avait obtenu des avancées politiques sans précédent, dont la garantie que les principales agglomérations de Judée et de Samarie [c'est-à-dire, de Cisjordanie] continueraient à faire partie d'Israël dans tout accord sur le statut définitif et qu'il n'y aurait pas de retour aux frontières de 1967.

26. En août 2005, les israéliens se retireront de quatre colonies de peuplement du nord de la Cisjordanie : Ganim, Kadim, Homesh et Sa-Nur. Des porte-parole du Gouvernement israélien ont formellement démenti que de nouvelles opérations de retrait de Cisjordanie étaient envisagées.

B. Actes de violence perpétrés par les colons

27. Les statistiques montrent que les actes de violence perpétrés par les colons se multiplient. Soixante-huit incidents ont été signalés en mai 2005, et 67 en juin. Les colons sont rarement l'objet de poursuites, et il semble qu'ils peuvent terroriser les Palestiniens et détruire leurs terres en toute impunité. Comme lors de ses précédentes visites à Hébron, le Rapporteur spécial a été maltraité par les colons. Il a également eu l'occasion de se rendre dans la colonie de Tel Rumeida. Cette colonie située au cœur d'Hébron a récemment été élargie, et les colons y exercent sur leurs voisins palestiniens des pressions de plus en plus fortes visant à les faire partir en les terrorisant. Une visite dans la communauté d'At-Tuwani a apporté d'autres preuves de ces actes de violence de la part des colons. Les écoliers sont passés à tabac et terrorisés par les colons lorsqu'ils se rendent à l'école, et des puits ainsi que des champs ont été empoisonnés. Des cultures ont été détruites, des moutons et des chèvres volés et empoisonnés. La police et les FDI n'interviennent guère pour protéger les habitants des grottes, les paysans et les bergers de la région.

V. Jérusalem

28. Jérusalem-Est ne fait pas partie d'Israël. C'est au contraire un territoire occupé, auquel s'appliquent les règles fixées par la quatrième Convention de Genève. Malheureusement, la tentative d'annexion illégale de Jérusalem-Est par Israël a obscurci cette réalité, et l'opinion publique internationale tend, à tort, à considérer l'occupation de Jérusalem-Est par Israël comme différente de celle de la Cisjordanie et de Gaza.

29. Israël a entrepris d'apporter de grands changements à ce qui fait le caractère de Jérusalem. En substance, ces changements sont destinés à réduire le nombre de Palestiniens dans la ville et à accroître la population juive de la ville, et à saper ainsi les revendications des Palestiniens qui veulent faire de Jérusalem-Est la capitale d'un État palestinien indépendant. C'est là le but de la construction du mur à Jérusalem, et Haim Ramon, Ministre israélien des affaires étrangères, l'a reconnu lorsqu'il a déclaré le 10 juillet que le tracé du mur rendrait Jérusalem « plus juive », ajoutant que « le Gouvernement instaure la sécurité dans la ville et fera de Jérusalem la capitale d'un État d'Israël juif et démocratique ».

30. Les colonies juives à l'intérieur de Jérusalem-Est vont être élargies. Déjà quelque 184 000 colons à Jérusalem-Est se trouveront entre le mur et la Ligne verte. Dans la colonie de Ma'aleh Adumim, qui compte 35 000 personnes, quelque 3 600 logements supplémentaires doivent être construits dans la zone « E1 »; ils accueilleront environ 20 000 colons. De nouvelles colonies sont également en cours de construction près de Walajeh (Nof Yael), Har Homa (Har Homa II), Jabel Mukabbir (Nof Zion), Abu Dis (Kidmat Zion), Binyamin (Geva Binyamin) et Giv'at Ze'ev (Agan ha-Ayalot), en vue de créer une ceinture urbaine juive autour de la ville palestinienne de Jérusalem-Est.

31. La contiguïté du territoire palestinien à Jérusalem-Est sera bouleversée par la démolition d'habitations palestiniennes, l'extension des colonies et la création de parcs. Cela est clairement visible dans la région de Silwan, où 88 habitations ont fait l'objet d'une ordonnance de démolition afin de faire place à un parc. Les colonies juives de Silwan et des zones adjacentes seront ainsi encore rapprochées, et il

n'existera plus de contiguïté entre les quartiers palestiniens. Même dans la vieille ville, les colonies juives gagnent du terrain.

32. Quelque 230 000 Palestiniens vivent à Jérusalem-Est. La construction du mur dans la région de Jérusalem vise à transférer en Cisjordanie un grand nombre de Palestiniens détenteurs d'une carte d'identité de résident à Jérusalem. Cela est particulièrement évident si l'on considère le transfert en Cisjordanie du quartier palestinien de Shuafat (qui compte 11 000 réfugiés) et des quartiers de Salaam et Dar Khamis à Anata, actuellement situés à l'intérieur du périmètre municipal de Jérusalem. Cette opération aura pour résultat le transfert de quelque 55 000 Palestiniens de Jérusalem en Cisjordanie. À ce chiffre, il convient d'ajouter environ 50 000 autres personnes munies de cartes d'identité de résident à Jérusalem qui vivent dans les communautés satellites de Jérusalem-Est situées à l'extérieur du périmètre municipal, à l'instar d'Al-Ram, qui a émigré dans l'une de ces communautés parce qu'il ne pouvait pas trouver de logement dans la ville du fait de l'expropriation des terres et des restrictions du droit de construire. Cela signifie que le mur porte préjudice à plus de 40 % des 230 000 Palestiniens de Jérusalem-Est. L'historien israélien Tom Segev fait observer à cet égard que « ce qui se passe aujourd'hui à Jérusalem va au-delà des besoins liés à la sécurité et reflète l'essence du rêve sioniste original : un maximum de territoire, un minimum d'Arabes ».

33. Dans un récent rapport intitulé *The Jerusalem Powder Keg, International Crisis Group* fait observer que :

« En élargissant le périmètre municipal, en annexant des terres palestiniennes et en construisant de nouvelles colonies et de nouveaux quartiers juifs, Israël a peu à peu créé une zone municipale d'une superficie plusieurs fois supérieure à la superficie originale de Jérusalem. Israël a aussi créé de nouvelles colonies urbaines à l'extérieur du périmètre municipal pour encercler la ville, briser la contiguïté entre Jérusalem-Est et la Cisjordanie et resserrer les liens entre ces colonies, Jérusalem-Ouest et le reste d'Israël » (p. i).

34. Les changements décrits ci-dessus servent peut-être les intérêts politiques d'Israël, mais c'est aux dépens de la population palestinienne. Il n'est pas rare que les membres d'une même famille aient des papiers d'identité différents : une femme et son mari peuvent avoir des papiers d'identité l'une de résidente à Jérusalem et l'autre de résident en Cisjordanie. Il reste à voir s'ils seront autorisés à vivre ensemble. De nombreux détenteurs de cartes d'identité de résident à Jérusalem travaillent actuellement en Cisjordanie, et l'incertitude règne quant à la question de savoir s'ils seront autorisés à se rendre librement en Cisjordanie ou s'ils devront choisir entre la Cisjordanie et Jérusalem. L'accès aux écoles et aux hôpitaux posera également de graves problèmes.

35. Jérusalem est une ville historique d'une grande beauté, que le mur a beaucoup contribué à défigurer. Les responsables du projet de construction et de l'édification du mur à Jérusalem ont agi sans respect aucun pour l'environnement. Tout cela a été fait pour transformer Jérusalem en ville juive.

VI. Le mur, les colonies et l'autodétermination

36. Dans son avis consultatif, la Cour internationale de Justice a souligné le droit des Palestiniens à l'autodétermination. Ces derniers temps, des politiciens de tous bords ont appuyé le règlement du conflit prévoyant deux États, où les États d'Israël

et de Palestine vivraient côte à côte en paix et en sécurité. Cette perspective est irréaliste sans un territoire palestinien viable. L'édification du mur, l'extension des colonies et la dépaletinisation de Jérusalem sont incompatibles avec le règlement prévoyant deux États. Les interlocuteurs du Représentant spécial en Israël comme en Cisjordanie l'ont averti que, la solution prévoyant deux États devenant de plus en plus difficile, voire impossible, il conviendrait d'envisager la création d'un État palestinien binational. La démographie de la région donne de plus en plus à penser qu'il en sera ainsi.

37. Dans son avis consultatif, la Cour internationale de justice a noté « l'assurance donnée par Israël que la construction du mur n'équivaut pas à une annexion et que le mur est de nature temporaire ». La Cour a toutefois estimé que « la construction du mur et le régime qui lui est associé créent sur le terrain un " fait accompli " qui pourrait fort bien devenir permanent, auquel cas, et nonobstant la description officielle qu'Israël donne du mur, la construction de celui-ci équivaudrait à une annexion de facto » (par. 121). L'on peut très certainement soutenir que l'on en est arrivé à ce stade. L'interdiction de l'annexion de territoires par la force est, bien entendu, l'un des principes les plus fondamentaux du droit international.

VII. Autres violations des droits de l'homme

38. Le Rapporteur spécial a privilégié dans son rapport ce qu'il considère comme les principales violations des droits de l'homme. Le mur et les colonies portent gravement atteinte au droit fondamental du peuple palestinien à l'autodétermination, dont dépendent tous les autres droits. Le mur et les colonies sont dans une large mesure une conséquence de l'occupation. Le régime de l'occupation résulte par définition d'une violation des droits de l'homme. Une occupation prolongée telle que celle à laquelle le peuple palestinien est soumis depuis 38 ans représente inévitablement une menace pour les droits de l'homme les plus élémentaires. L'expérience des Palestiniens en est la preuve.

A. Liberté individuelle

39. Au cours de l'année écoulée, Israël a libéré quelque 900 prisonniers palestiniens. Au cours de la même période, plus de 1 000 nouveaux prisonniers ont été incarcérés. Plus de 8 000 prisonniers palestiniens, parmi lesquels 120 femmes, sont encore dans les prisons israéliennes. Plus de 300 enfants de moins de 18 ans se trouvent dans des centres de détention israéliens; 40 % d'entre eux ont été condamnés à une peine d'emprisonnement et 60 % sont en détention provisoire. Plus de 600 de ces prisonniers sont placés en détention administrative, c'est-à-dire qu'ils sont détenus sans avoir été jugés. Les visites des familles restent un grave problème. Étant donné que les prisons sont situées en Israël et que de nombreux Palestiniens ne sont pas autorisés à se rendre en Israël, une majorité de prisonniers ne reçoivent aucune visite de leur famille. Si l'avenir des prisonniers palestiniens originaires de Cisjordanie et de Gaza est examiné de très près en vertu de l'Accord de Charm el-Cheikh, les prisonniers palestiniens originaires de Jérusalem-Est sont laissés pour compte. Les conditions carcérales sont pénibles : les prisonniers vivent dans des cellules surpeuplées et peu aérées dont ils ne sortent que deux heures par jour. Des allégations continuent d'être faites selon lesquelles les détenus et les

prisonniers seraient soumis à des tortures et à des traitements inhumains (passages à tabac, enchaînement dans des positions douloureuses, coups de pieds, bandage prolongé des yeux, privation de l'accès à des soins médicaux, exposition à des températures extrêmes et distribution de nourriture et d'eau en quantités insuffisantes, par exemple).

40. Très peu de soldats des FDI ayant blessé des Palestiniens font l'objet de poursuites, en dépit du grand nombre de personnes qui sont leurs victimes. L'impunité des FDI a été poussée plus loin encore en 2005, avec l'adoption par la Knesset d'une loi prenant rétroactivement effet en 2000, qui restreint considérablement le droit des Palestiniens d'engager une action en réparation pour les préjudices subis pendant l'Intifada. Les Palestiniens ne seront autorisés à se constituer partie civile que dans les affaires liées à des accidents de circulation et lorsqu'un Palestinien a reçu des blessures corporelles dans un centre de détention militaire.

B. Liberté de circulation

41. Les postes de contrôle en Cisjordanie et à Gaza continuent d'entraver gravement la liberté de circulation. En avril 2005, le nombre de ces postes était passé de 680 à 605, mais il est désormais davantage fait recours aux points de contrôle « volants », c'est-à-dire à des postes de contrôle militaires placés sur les routes de manière aléatoire. On a recensé 368 « postes volants » en mai 2005 et 374 le mois suivant. La mise en place de ce système de contrôle est une atteinte à la dignité humaine. La fréquence de son utilisation ressort clairement d'un rapport récemment établi par Machsom Watch intitulé *A counterview: checkpoints 2004*. Machsom Watch est une organisation constituée d'environ 500 Israéliennes de différentes origines qui se sont engagées dans la recherche de la paix dans la région et surveillent, de leur propre initiative, le comportement des FDI aux postes de contrôle. Dans le rapport susmentionné, il est indiqué que :

« Le système des postes de contrôle est arbitraire et aléatoire, et obéit à des règles qui changent constamment, souvent en fonction de l'humeur du soldat en service... Aux postes de contrôle [...] nous avons été témoins de la manière dont l'existence des Palestiniens est méthodiquement gâchée... Quiconque a vu le sourire angoissé d'un homme qui présente sa carte d'identité pour qu'elle soit contrôlée par une femme-soldat indifférente à un poste de contrôle, ne peut ni oublier cette injustice ni l'ignorer. Nous recensons les petites humiliations et les tensions, jour après jour, le mépris de l'humanité de l'Autre Palestinien, et les manifestations de la rage débordante d'un peuple occupé. » (p. 8 à 10)

42. Bien que les couvre-feux soient moins fréquemment imposés que par le passé, cette méthode de restriction de la liberté de circulation a toujours cours. Vingt-trois couvre-feux ont été imposés en mai 2005, et 16 le mois suivant.

C. Discrimination à l'égard des femmes

43. Du fait de l'occupation et de l'existence du mur, les droits des femmes sont bafoués dans une plus large mesure que ceux des hommes : les Palestiniennes sont régulièrement la cible de harcèlements, d'intimidations et de sévices commis par les

soldats israéliens, aux points de contrôle et aux portes. Elles sont humiliées devant leur famille et subissent des violences sexuelles tant de la part de soldats que de celle de colons. On compte environ 120 Palestiniennes en détention, dont 11 sont maintenues en détention administrative, sans avoir été jugées ni même inculpées. Les détenues sont victimes de violence sexiste au cours des enquêtes et pendant leur détention. En outre, la situation dans les prisons ne laisse pas d'être préoccupante pour les conditions de vie et la santé des détenues. Les restrictions à la liberté de circulation par suite de l'occupation entravent gravement l'accès des Palestiniennes à l'éducation et à la santé. Ces mêmes restrictions limitent leurs chances d'être autonomes et font que moins de femmes cherchent à bénéficier d'un enseignement de type scolaire ou à accéder à l'emploi, le modèle culturel de la région voulant que la femme étudie et travaille à la maison. La santé des femmes a décliné parce qu'elles sont dans l'impossibilité de se rendre dans les centres de santé. Les femmes enceintes courent le risque d'attentes interminables aux points de contrôle. Depuis le début de la deuxième Intifada, en mars 2004, 55 Palestiniennes ont accouché à un point de contrôle, et 33 enfants nés à des points de contrôle étaient mort-nés en raison de retards ou d'un refus de laisser accéder à un établissement de soins. Il a été établi que le chômage et la pauvreté consécutifs à l'occupation engendraient des divorces et des violences dans la famille. La loi israélienne de 2003 sur la nationalité et l'entrée en Israël a pour but d'empêcher le regroupement familial lorsqu'un des deux époux est résident du territoire palestinien occupé. Du fait de cette loi, ce sont des milliers de membres des familles concernées qui vivent séparés les uns des autres, sans moyens légaux de rejoindre leurs proches. Le seul moyen de préserver l'unité familiale consiste à résider illégalement en Israël, dans la peur continue d'être contrôlé et expulsé. Tout cela a des effets considérables sur l'état psychologique des Palestiniennes. Cette loi, qui ne s'applique pas aux colons israéliens vivant dans le territoire palestinien occupé ni aux Juifs israéliens ayant épousé un étranger, instaure un régime discriminatoire fondé sur la nationalité, qui pénalise exclusivement les Palestiniens.

D. Crise humanitaire

44. La population du territoire palestinien occupé est de 3,8 millions d'habitants (2,4 millions en Cisjordanie et 1,4 million dans la bande de Gaza), dont 42 % environ (soit 1,6 million) sont immatriculés comme réfugiés. Le taux d'accroissement naturel est de 3,5 %.

45. Les rapports précédents appelaient l'attention sur la crise humanitaire dans le territoire palestinien occupé causée par l'occupation et la construction du mur. Au dernier trimestre 2004, le chômage a atteint le taux de 25 % (34 % dans la bande de Gaza et 23 % en Cisjordanie), ce qui représente 93 000 chômeurs à Gaza et 133 000 en Cisjordanie. L'impossibilité d'accéder aux emplois en Israël est en grande partie responsable du chômage qui sévit. La moitié de la population environ – 1,8 million d'habitants – vit en dessous du seuil de pauvreté officiel, soit avec moins de 2,10 dollars des États-Unis par jour. Le taux d'extrême dénuement – tel qu'on ne parvient pas à assurer sa subsistance – est de 16 %, selon les estimations. Le taux de pauvreté est plus élevé à Gaza (65 %) qu'en Cisjordanie (38 %). Chômage croissant, bouclages, perte des biens résultant des démolitions de logements par les FDI, confiscation des terres et nivellement des terrains en sont à l'origine. Les revenus

agricoles ont considérablement diminué du fait de la destruction des zones de cultures et de l'isolement des terres et des puits de l'autre côté du mur.

46. Les bouclages ont entravé l'accès aux services de santé et d'éducation. La fourniture des services de santé a baissé de façon spectaculaire en raison des restrictions d'accès mises en place. La qualité de l'enseignement a souffert du fait que les écoles ont dû raccourcir la journée d'enseignement pour l'adapter aux heures d'ouverture des portes du mur. En outre, les enfants sont contraints d'abandonner l'école, soit parce qu'ils aident à compenser la perte des revenus de leur famille, soit parce que leurs parents ne peuvent plus assurer la charge financière qu'entraîne leur scolarisation.

47. Les Palestiniens ont rencontré d'énormes difficultés pour accéder à l'eau salubre. Les incursions répétées des FDI ont entraîné la destruction des infrastructures d'approvisionnement en eau et d'assainissement. De plus, les restrictions à la liberté de circulation ont empêché les Palestiniens de parvenir aux sources d'approvisionnement en eau.

48. Bien que les FDI aient cessé de démolir des logements à des fins punitives, et que les six derniers mois n'aient pas connu de démolitions de logement justifiées par un prétendu principe de nécessité militaire, les démolitions opérées les années précédentes par les FDI sont cause d'une pénurie importante de logements. À Gaza, plusieurs milliers de personnes sont encore sans logement. On continue de démolir des logements au prétexte qu'ils ont été construits sans permis. La pratique de cette forme de démolition, dite « administrative », est encore très répandue, en particulier à Jérusalem. Comme il est pratiquement impossible pour les Palestiniens d'obtenir un permis de construire, un grand nombre de logements sont construits sans ce permis, et leurs occupants s'exposent au risque d'une démolition arbitraire.

E. Droit à un environnement non pollué

49. Pour l'essentiel, l'occupation se déroule sans qu'il soit guère prêté attention à l'environnement dans le territoire palestinien occupé. Le mur a défiguré les collines et les villes de Palestine. Le déversement des eaux usées des implantations juives dans les terres palestiniennes pose un problème de taille. Un grand nombre de colonies de peuplement de Cisjordanie ne disposent d'aucune forme de traitement des eaux usées industrielles ou résidentielles, lesquelles s'écoulent dans les vallées palestiniennes voisines sans qu'on se préoccupe de l'impact sur l'environnement. Qui plus est, il est question qu'Israël déverse ses déchets solides dans la carrière d'Abou Choucha, dans le district de Naplouse. Comme indiqué plus haut, les terres du district de Tuwani ont été délibérément empoisonnées par les colons.

VIII. La peine de mort et l'Autorité palestinienne

50. Le mandat du Rapporteur spécial ne couvre pas les violations des droits de l'homme commises par l'Autorité palestinienne. Cependant, il serait irresponsable pour un rapporteur spécial des droits de l'homme de passer sous silence l'exécution de prisonniers palestiniens. Depuis 2002, l'Autorité palestinienne s'était abstenue d'appliquer la peine de mort. Mais, en 2005, cinq prisonniers palestiniens ont été exécutés. Le degré de civilisation d'une société se mesure à l'attitude qu'elle adopte

face à la peine de mort. Le Rapporteur spécial émet l'espoir que ces exécutions ont été des aberrations et que l'Autorité palestinienne s'abstiendra à l'avenir d'appliquer cette forme de peine.

IX. Le territoire palestinien occupé et la communauté internationale

51. Le retrait des colons de Gaza marque une étape décisive : il mettra fin à la colonisation de Gaza, libérera des terres pour les Palestiniens et entraînera le départ des FDI de la région. C'est une mesure positive dont on doit se féliciter. Toutefois, même si elle n'est plus colonisée, Gaza demeurera sous contrôle. La crise humaine ne pourra guère s'atténuer avec la poursuite de la dégradation économique résultant du contrôle exercé par Israël. Le retrait de Gaza ne doit pas détourner l'attention de ce qui se passe en Cisjordanie. La construction du mur et l'expansion des colonies de peuplement menacent gravement le droit à l'autodétermination du peuple palestinien et compromettent les perspectives d'un État palestinien. Selon toute vraisemblance, l'annexion du territoire palestinien est déjà un fait accompli.

52. Après avoir conclu que la construction du mur dans le territoire palestinien occupé et le régime qui lui est associé étaient contraires au droit international, la Cour internationale de Justice a décidé que tous les États étaient dans l'obligation de ne pas reconnaître la situation illicite découlant de la construction du mur et de ne pas prêter aide ou assistance au maintien de la situation créée par cette construction. Les États doivent donc refuser de reconnaître ou de soutenir le système des permis qui donnent accès à la « zone fermée », ou encore d'accepter des marchandises produites dans les colonies de peuplement situées dans la zone comprise entre le mur et la Ligne verte, ce qui a des conséquences en particulier pour les États membres de l'Union européenne, qui importent des produits agricoles du territoire israélien. Ces pays portent l'obligation d'établir avec précision l'origine des produits importés et de refuser ceux qui proviennent de la « zone fermée ».

53. La Cour internationale de Justice a jugé qu'Israël était dans l'obligation de réparer tous les dommages causés par la construction du mur dans le territoire palestinien occupé, y compris à l'intérieur et sur le pourtour de Jérusalem-Est. En application de cette décision, dans sa résolution ES-10/15, l'Assemblée générale a prié le Secrétaire général d'établir un registre des dommages causés à toutes les personnes physiques ou morales qui auraient subi un préjudice matériel quelconque du fait de la construction de ce mur. Le 11 janvier 2005, le Secrétaire général a adressé une lettre au Président de l'Assemblée générale (A/ES-10/294), dans laquelle il décrivait le cadre juridique et institutionnel voulu pour l'établissement du registre en question. Il semble bien que l'on n'ait pas beaucoup progressé dans cette voie, et que le processus se soit noyé dans les méandres de l'ONU. Cela est d'autant plus fâcheux que la Cour internationale de Justice a explicitement attaché une grande importance à l'obligation d'Israël de procéder à l'indemnisation des personnes lésées pour la destruction des habitations, des vergers, des oliveraies et des terres agricoles entraînée par la construction du mur.

54. Il apparaît clairement que le Conseil de sécurité est peu enclin à faire pression sur Israël pour qu'il applique l'avis consultatif de la Cour internationale de Justice. Le 21 juillet, à l'issue d'un exposé sur la situation fait aux membres du Conseil de sécurité par le Coordonnateur spécial pour le processus de paix au Moyen-Orient et

Représentant personnel du Secrétaire général, M. Alvaro de Soto (voir S/PV.5230 et Resumption 1), le Conseil a décidé de ne pas se lancer dans l'examen de la construction du mur et de l'avis consultatif. Les États européens semblent être d'accord avec une telle démarche, comme l'atteste un rapport publié dans *Ha'aretz* le 28 juillet 2005, qui relate dans les termes ci-après une réunion tenue entre MM. Sharon et Chirac : « C'est à peine si la question des relations israélo-palestiniennes a été soulevée lors de la réunion, d'après les participants israéliens. Selon un accord préalablement passé, les Français ont évité toute question qui prête à controverse telle que les constructions dans les implantations de Cisjordanie, l'emplacement de la clôture de séparation et "l'après-désengagement" ».

55. Dans sa résolution ES-10/15, l'Assemblée générale a invité la Suisse, en sa qualité de dépositaire des Conventions de Genève, à mener des consultations et à lui présenter un rapport sur la question, y compris sur la possibilité de reprendre les travaux de la Conférence des Hautes Parties contractantes à la quatrième Convention de Genève. Dans le rapport qu'il a établi – cité au paragraphe 1 – , le Gouvernement suisse a conclu que la majorité des États estime que l'avis consultatif de la Cour internationale de Justice offre le cadre juridique voulu pour s'attaquer à la situation en Palestine. Il a proposé de mettre en place deux groupes de dialogue distincts, l'un associant Israël et l'autre l'Autorité palestinienne, qui feraient rapport au Quatuor (voir A/ES-10/304, annexe, par. 59), ce qui montre bien la confiance qui lui est accordée. La dernière déclaration en date du Quatuor, qui remonte au 23 juin 2005, porte toutefois à se demander si cette confiance est bien placée. Dans sa déclaration, il se dit certes préoccupé par les activités de colonisation, mais il ne fait aucunement mention de la construction du mur, de l'expansion des colonies de peuplement (par opposition aux activités), de la dégradation de Jérusalem, de la violation des droits de l'homme dans le territoire palestinien occupé et de l'autodétermination du peuple palestinien (même si la création d'un État palestinien est bien envisagée). Cela donne à penser que le Quatuor et la feuille de route pour laquelle il s'est engagé ne procèdent pas de la primauté du droit ou du respect des droits de l'homme. S'il en est ainsi, on risque de voir la feuille de route connaître les mêmes erreurs que le processus d'Oslo, dans lequel il n'avait été tenu aucun compte des considérations relatives aux droits de l'homme. Le Rapporteur spécial a pour mandat de signaler les violations du droit international humanitaire et du droit relatif aux droits de l'homme dans le territoire palestinien occupé. Il ne fait aucun doute que ce mandat concerne aussi l'attitude des États et des organisations internationales à l'égard de la situation qui règne dans ce territoire. Le Rapporteur spécial est donc tenu de mettre en cause la démarche adoptée par le Quatuor.

56. L'Organisation des Nations Unies se trouve elle-même dans une position particulièrement délicate : d'un côté, elle fait partie du Quatuor, mais de l'autre, elle est obligée de se conformer à l'avis consultatif de son propre organe judiciaire. Bien qu'il s'agisse d'un avis consultatif présenté aux États, il est strictement conforme au droit qui régit la construction du mur et peut être qualifié de droit de l'ONU. En outre, la Cour internationale de Justice a dit être d'avis que « l'Organisation des Nations Unies, et spécialement l'Assemblée générale et le Conseil de sécurité, doivent, en tenant dûment compte du présent avis consultatif, examiner quelles nouvelles mesures doivent être prises afin de mettre un terme à la situation illicite découlant de la construction du mur et du régime qui lui est associé » (A/ES-10/273, avis consultatif, par. 160). Il est donc clair que l'ONU a l'obligation légale d'agir

pour mettre un terme à la construction du mur, comme l'Assemblée générale l'a confirmé dans sa résolution ES-10/15 en date du 20 juillet 2004.

57. Le Gouvernement israélien est décidé à reporter les négociations sur le statut final aussi longtemps qu'il le pourra afin de se laisser le temps d'établir le plus grand nombre possible de faits sur le terrain avant le début de ces négociations. La communauté internationale devrait prendre conscience de cette évidence, et faire tout son possible pour garantir que les négociations démarrent sur-le-champ. Seul un règlement du conflit mettant fin à l'occupation israélienne du territoire palestinien occupé, à la construction du mur, à l'expansion des colonies de peuplement et à la « dépaletinisation » de la ville de Jérusalem permettra l'avènement d'un climat laissant espérer le respect des droits de l'homme.

Notes

¹ United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. III, 1949, p. 56.



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**Promotion et protection des droits de l'homme :
situations relatives aux droits de l'homme et rapports
des rapporteurs et représentants spéciaux**

Situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967

Note du Secrétaire général*

Le Secrétaire général a l'honneur de transmettre aux membres de l'Assemblée générale le rapport sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, présenté par John Dugard en application de la décision 1/102 du Conseil des droits de l'homme, dans laquelle le Conseil a décidé de reconduire à titre exceptionnel, pour une année, les mandats et les détenteurs de mandats de toutes les procédures spéciales de la Commission des droits de l'homme.

* La présentation du rapport a été retardée de façon à pouvoir y inclure les informations les plus récentes et en raison de consultations.



Résumé

L'essentiel du présent rapport concerne le siège et le conflit de Gaza. Le 25 juin 2006, après la capture du caporal Gilad Shalit par des militants palestiniens et la poursuite des tirs de roquettes artisanales Qassam contre Israël, ce pays a fait de multiples incursions militaires et bombardé systématiquement Gaza, causant de nombreux morts et blessés et la destruction de maisons, de champs et d'ouvrages d'infrastructures, commettant ainsi sur une grande échelle une violation des droits de l'homme et du droit international humanitaire. En particulier, Israël a violé l'interdiction d'utiliser aveuglément la puissance militaire contre des civils et des biens de caractère civil. L'usage de la force a été disproportionné et excessif. Il s'agit là d'un châtement collectif infligé à un peuple occupé en violation de la quatrième Convention de Genève. Il est difficile de ne pas conclure que ceux qui en sont responsables sont coupables de graves crimes de guerre.

La situation en Cisjordanie s'est également nettement dégradée.

Le mur en construction sur le territoire palestinien n'est plus justifié par Israël comme n'étant qu'une mesure de sécurité, il est maintenant présenté par le nouveau Gouvernement israélien comme une mesure politique visant à annexer 10 % du territoire palestinien situé entre la Ligne verte et le mur, où vivent 76 % des colons israéliens. Lorsque l'ouvrage sera achevé, 60 500 Palestiniens de Cisjordanie vivant dans 42 villages et bourgades seront, selon les estimations, enfermés dans la zone comprise entre le mur et la Ligne verte. Les 500 000 Palestiniens qui vivent près du mur doivent avoir un permis pour le franchir et on estime à 40 % la proportion des demandes de permis rejetées.

Israël poursuit sa politique de « dépaletinisation » de Jérusalem. Le mur est ainsi construit qu'il place en Cisjordanie le quart environ de la population palestinienne de Jérusalem-Est (230 000 habitants). Ces personnes devront à l'avenir détenir un permis pour aller au travail, chez des amis, à l'hôpital ou dans les lieux de culte de Jérusalem.

Les colonies continuent de grandir, en infraction avec la quatrième Convention de Genève. Les colons de Cisjordanie et de Jérusalem-Est sont maintenant plus de 440 000.

À cause du « minimur » en construction au sud d'Hébron, les Palestiniens qui vivent entre cet ouvrage et la Ligne verte auront du mal à se rendre sur leurs terres, dans leurs écoles et dans leurs centres médicaux.

Bien qu'ayant renoncé à ses anciens projets de construire le mur le long de la Cisjordanie et d'incorporer pratiquement la vallée du Jourdain en Israël, le Gouvernement israélien a lancé un plan qui consiste à accroître le contrôle sur cette région en limitant les possibilités de circulation des Palestiniens, en détruisant des maisons et en installant des colonies juives.

Le nombre de postes de contrôle a augmenté, passant de 376 en août 2005 à plus de 500. Les permis nécessaires pour se déplacer d'une région de Cisjordanie à l'autre sont accordés au compte-gouttes et les Palestiniens doivent se soumettre à des procédures administratives arbitraires. Naplouse et Djénine, en particulier, ont beaucoup souffert de la présence des postes de contrôle et sont en fait aujourd'hui des villes emprisonnées. Beaucoup de postes de contrôle n'ont apparemment d'autre

objectif que d'empêcher les Palestiniens d'oublier qu'Israël est maître de leur vie et de les humilier du même coup. Depuis la guerre au Liban, le contrôle y est encore plus rigoureux.

La démolition de maisons reste un trait constant de l'occupation. C'est devenu une pratique courante que de détruire des maisons au moment de procéder à des arrestations lors d'une opération de police. La destruction de maisons pour d'autres motifs que la nécessité militaire est interdite par le droit international humanitaire.

La vie familiale des Palestiniens souffre de plusieurs législations et pratiques israéliennes. Récemment, la Haute Cour israélienne a confirmé une loi interdisant aux Arabes israéliens qui épousent des Palestiniens de vivre avec eux en Israël. À Jérusalem, le mur a également séparé des familles.

Plus de 10 000 Palestiniens, dont des femmes et des enfants, sont détenus dans des prisons israéliennes.

L'occupation du territoire palestinien est à l'origine de la plupart des violations des droits de l'homme. Elle est exercée par les autorités israéliennes d'une manière inutilement sévère.

La situation humanitaire est consternante tant en Cisjordanie que dans la bande de Gaza. Au moins 4 Palestiniens sur 10 vivent au-dessous du seuil officiel de pauvreté (2,10 dollars des États-Unis par jour); le taux de chômage est d'au moins 40 %. Une circonstance aggrave la situation, à savoir que le secteur public, qui représente 23 % du total des emplois dans le territoire palestinien, garde ses salariés mais ne peut les payer du fait que le Gouvernement israélien ne verse pas les fonds qu'il doit à l'Autorité palestinienne, notamment des recettes fiscales représentant de 50 à 60 millions de dollars par mois. De plus, les États-Unis et l'Union européenne ont interrompu le financement de l'Autorité palestinienne au motif que le Hamas, parti élu aux affaires en janvier 2006, est inscrit par leur législation sur la liste des organisations terroristes. Des organisations non gouvernementales qui travaillent auprès de l'Autorité palestinienne ont également été touchées par ces restrictions financières.

Le fait est que le peuple palestinien a été soumis à des sanctions économiques, premier exemple d'un tel traitement à l'égard d'un peuple occupé. Cette situation ne change pas, même si Israël est en infraction avec de nombreuses résolutions du Conseil de sécurité et de l'Assemblée générale et s'il n'a pas donné suite à l'avis consultatif de la Cour internationale de Justice du 9 juillet 2004.

Le Quatuor lui-même fait fi de cet avis consultatif, qu'il ne mentionne même pas dans ses déclarations publiques. Cela a considérablement terni l'image de l'Organisation dans le territoire palestinien occupé. Si les Palestiniens tiennent en haute estime les agents de l'ONU qui travaillent sur le terrain avec dévouement et détermination, ils se méfient beaucoup du rôle de l'Organisation à New York et Genève.

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I. Introduction

1. Je me suis rendu dans le territoire palestinien occupé et en Israël du 9 au 17 juin 2006 pour y réunir les informations nécessaires à la rédaction du présent rapport. Peu après mon départ, une grave crise s'est ouverte à Gaza à la suite de la capture par des militants palestiniens d'un soldat israélien, le caporal Gilad Shalit. Ce fait nouveau est décrit et analysé dans le contexte de sources d'information secondaires : articles de presse, rapports d'organisations non gouvernementales (ONG), publications de l'ONU, etc.

2. Au cours de ma mission, je me suis rendu à Jérusalem, à Gaza, dans des villages des environs de Jérusalem gravement affectés par la construction du mur, à Ramallah, Hébron et dans les localités des hauteurs du sud d'Hébron, à Bethléem et au mur près de la tombe de Rachel, dans le village de Wallaja où des maisons ont été démolies, dans la vallée du Jourdain, y compris Jéricho et dans les localités où les droits de l'homme subissent les conséquences des politiques et des pratiques israéliennes, à Naplouse, dans le camp de réfugiés de Balata, au village de Jayyous sur le tracé du mur et dans les localités agricoles proches du mur, ainsi que dans les postes de contrôle situés autour de Naplouse et sur les routes des alentours.

3. Au cours de cette tournée, j'ai rencontré des personnes très diverses, Palestiniens autant qu'Israéliens, avec qui je me suis entretenu des violations des droits de l'homme et du droit international humanitaire. J'ai prononcé une conférence à la Hebrew University de Jérusalem, sous le parrainage du Minerva Centre for Human Rights et du Comité international de la Croix-Rouge (CICR). Dans mon exposé devant plus d'une centaine de personnes, j'analysais les aspects controversés du droit humanitaire liés au conflit dans le territoire palestinien occupé. Malheureusement, je n'ai pas pu entrer en relation avec des officiels israéliens, le Gouvernement israélien ne reconnaissant pas mon mandat. Le Gouvernement était toutefois au courant de ma présence et n'a rien fait pour gêner mon travail.

4. L'éruption de la violence à Gaza après la capture du caporal Shalit et l'arrestation de membres du Conseil législatif palestinien et de l'Autorité palestinienne (voir par. 11 ci-dessous) a été suivie par l'invasion du Liban par Israël et par des violences à grande échelle au Liban, en Israël et à Gaza. Il n'y a pas lieu dans le présent rapport de commenter les événements du Liban et de la frontière nord d'Israël, qui ne relèvent pas de mon mandat. Cependant, j'examinerai de façon approfondie la situation à Gaza. On notera que les événements intervenus au Liban ont dans une large mesure fait oublier les violences dans la bande de Gaza et le long de ses frontières.

5. J'utiliserai ici le terme « mur », au lieu de « barrière » ou « clôture ». Il a été soigneusement et délibérément choisi par la Cour internationale de Justice dans son avis consultatif de 2004 sur les Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé. Je ne vois aucune raison d'en utiliser un autre.

II. La question de l'occupation

6. Avant d'aborder le fond de mon rapport, je tiens à régler une question préliminaire. C'est celle de l'occupation. Le Gouvernement israélien évite de reconnaître que le territoire palestinien occupé – c'est-à-dire la Cisjordanie et la

bande de Gaza, y compris Jérusalem-Est – est un territoire occupé. Il préfère parler de « territoires contestés » et affirmer que le retrait des colons et des Forces de défense israéliennes (FDI) de la bande de Gaza en août 2005 a mis fin à l'occupation de celle-ci. C'est une représentation erronée et sur le plan du droit et sur celui des faits. La Cour internationale de Justice, le Conseil de sécurité et même la Haute Cour israélienne ont affirmé que le territoire palestinien occupé est et demeure un territoire occupé et qu'en tant que tel il est soumis à un régime juridique particulier. Selon ce régime, Israël est tenu de respecter en ce qui concerne les Palestiniens le droit international humanitaire et les droits de l'homme. Il s'agit, il faut le reconnaître, d'une occupation d'un type inhabituel puisqu'elle dure depuis près de quatre décennies. La longueur de la période ne réduit pas pour autant la responsabilité de la puissance occupante. Au contraire, elle l'augmente. La durée de l'occupation a conduit certains auteurs à qualifier celle-ci de colonialisme ou d'apartheid. Bien que la conduite d'Israël ressemble parfois à celle d'une puissance coloniale ou d'un régime d'apartheid, il est plus exact de voir dans Israël une puissance occupante du territoire palestinien occupé et de juger ses actes au regard des règles de droit international qui s'appliquent à une occupation.

III. Gaza

7. En août 2005, Israël a retiré ses colons et ses forces armées de la bande de Gaza. Ses déclarations selon lesquelles ce retrait mettait fin à l'occupation de la bande de Gaza sont très éloignées de la vérité. Même avant le début de l'opération « Pluies d'été », à la suite de la capture du caporal Shalit, ce territoire était soumis à l'emprise effective d'Israël, qui se faisait sentir de plusieurs façons. D'abord, Israël conservait le contrôle de l'espace aérien, de l'espace maritime et des frontières de la bande de Gaza. Des arrangements particuliers avaient été pris pour l'ouverture du passage de Rafah vers l'Égypte sous la surveillance du personnel de l'Union européenne, mais la plupart des autres points de passage restaient fermés. La fermeture de Karni, où le passage des marchandises était interdit pendant de longues périodes, avait des conséquences particulièrement graves pour Gaza car elle signifiait qu'il était impossible de faire venir des denrées, des médicaments et du carburant. Un projet qui devait permettre aux gens de Gaza de rendre visite à leur famille en Cisjordanie par convois d'autocars ne s'est jamais concrétisé. En fait, après le retrait d'Israël, Gaza est devenue une société coupée de l'extérieur, emprisonnée. La réalité du contrôle d'Israël s'est vérifiée une fois encore sous la forme des bangs supersoniques causés par ses avions cherchant à terroriser la population de Gaza, du bombardement périodique des maisons et des champs le long de la frontière et des assassinats ciblés de militants, réalisés comme dans le passé sans grands égards pour les passants civils innocents. Les actions entreprises par les FDI à l'égard de Gaza montrent à l'évidence que la technologie moderne permet à une puissance occupante de s'assurer efficacement d'un territoire sans même être militairement sur les lieux.

8. La question de savoir si la bande de Gaza reste un territoire occupé n'a plus qu'un intérêt théorique. Au cours de l'opération cyniquement intitulée « Pluies d'été », qui a commencé le 25 juin, les FDI y ont fait sentir leur mainmise non seulement en bombardant intensivement le secteur mais aussi en y étant militairement présentes.

9. Le 25 juin 2006, un groupe de militants palestiniens a attaqué une base militaire près de la frontière israélo-égyptienne. En se retirant, le groupe a emmené comme prisonnier le caporal Gilad Shalit. Il a exigé pour le relâcher la libération des femmes et des enfants détenus dans les prisons israéliennes. Cette opération et les tirs constants de roquettes Qassam contre Israël ont déclenché une réaction sauvage de la part du Gouvernement israélien. D'abord, il a fait arrêter huit ministres issus du Gouvernement du Hamas et 26 membres du Conseil législatif palestinien à Ramallah. Au moment de la rédaction du présent rapport, la plupart de ces personnes étaient encore en détention. Israël dit les garder parce qu'elles soutiendraient des activités terroristes, mais il est difficile de chasser l'impression qu'elles sont tenues en otage, en violation de l'article 34 de la (quatrième) Convention de Genève relative à la protection des civils en temps de guerre.

10. L'attaque et le siège de Gaza par Israël dans le cadre de l'opération « Pluies d'été » ont pris de multiples formes, qui seront décrites dans les paragraphes qui suivent.

A. Bombardements d'ouvrages publics

11. Le 28 juin 2006, l'Armée de l'air israélienne a détruit les six transformateurs de la seule usine de production électrique de la bande de Gaza. Cette centrale fournit à Gaza 43 % de sa consommation quotidienne, le reste provenant de l'Israel Electrical Corporation. Sur les 1,4 million d'habitants de Gaza, environ 700 000 se sont retrouvés initialement sans électricité. À l'heure actuelle, la Gaza Electrical Distribution Company (GEDCO) emprunte le reste de l'électricité nécessaire à Israël mais la distribution de courant à tous les foyers de la bande de Gaza est intermittente. Comme la plupart des puits sont raccordés au réseau électrique national maintenant détruit, il faut utiliser des groupes électrogènes pour faire fonctionner les pompes et la ration quotidienne d'eau servie aux ménages a dû être réduite. Cette situation risque de durer encore une année au moins. Les opérations militaires israéliennes ont également détruit les canalisations d'eau et le réseau d'égouts. Enfin, la fermeture fréquente de l'oléoduc de Nahal Oz, le seul à alimenter la bande de Gaza en carburant, a compromis la solution des groupes électrogènes comme moyen d'assurer la distribution de l'eau. D'autres transformateurs électriques ont été également bombardés.

12. La réduction considérable des quantités de courant électrique et de carburant jointe aux interruptions de l'alimentation en eau a eu de graves conséquences pour la vie quotidienne des Palestiniens, qui sont sans lumière la nuit et cuisinent sans électricité. Les égouts menacent de déborder. Les hôpitaux ont été gravement handicapés et forcés par les coupures de courant de recourir à des groupes électrogènes pour faire fonctionner le matériel d'importance vitale.

B. Bombardement d'installations et d'édifices publics

13. Les avions de guerre israéliens ont pris délibérément pour cibles des édifices publics à Gaza. Les immeubles où étaient logés les Ministères de l'intérieur, des affaires étrangères et de l'économie nationale, et le Cabinet du Premier Ministre ont tous été détruits. Ces attaques n'ont aucune finalité en termes de sécurité et on ne peut qu'y voir une tentative de déstabilisation des institutions officielles. Des

établissements d'enseignement ont aussi été démolis. Six ponts reliant la ville de Gaza au centre de la bande de Gaza ont été détruits, ainsi que plusieurs routes. Le 28 juin, les FDI ont occupé l'aéroport international de Gaza et en ont démoli de grandes parties.

C. Fermeture des frontières

14. Depuis le 25 juin, plusieurs écoles ont été gravement endommagées durant les opérations militaires et il sera difficile de les remettre en état avant le début de la nouvelle année scolaire.

15. Bien que le point de passage de Rafah ne soit pas en théorie contrôlé par Israël, les FDI ont empêché les observateurs européens qui doivent le faire fonctionner de s'y rendre. Il est donc fermé depuis le 25 juin et n'a été ouvert que pendant de courtes périodes. La fermeture de ce passage pendant trois semaines en juillet 2006 a laissé abandonnés du côté égyptien de la frontière, dans des conditions difficiles, plus de 3 000 Palestiniens – dont 578 en situation d'« urgence humanitaire » qui étaient allés se faire soigner à l'extérieur. Huit Palestiniens sont morts parce qu'on leur a refusé à la frontière soins médicaux, eau et abri.

16. La fermeture de Rafah a eu des conséquences graves aussi pour les Palestiniens se trouvant du côté de Gaza, notamment ceux qui vivent à l'étranger et qui y étaient venus pour rendre visite à leur famille.

17. Karni, point où passent les marchandises, a été fermé par intermittence. L'importation de certaines denrées et de fournitures médicales a été autorisée vers Gaza, mais l'exportation de marchandises a été sérieusement restreinte.

18. Les navires de guerre israéliens ont empêché les Palestiniens de pêcher le long du littoral ce qui a fait disparaître le poisson des marchés locaux.

D. Victimes

19. Depuis le 25 juin 2006, quelque 260 Palestiniens (des civils pour la moitié au moins) ont été tués, dont 58 enfants. Environ 800 personnes ont été grièvement blessées, y compris des enfants et des femmes. Un soldat israélien a été tué et 26 Israéliens blessés, dont 12 par des roquettes artisanales tirées de Gaza.

E. Incursions militaires provoquant morts et destructions

20. Depuis le 25 juin, les FDI ont fait plusieurs incursions dans la bande de Gaza, tuant des civils et démolissant des maisons. Les incursions les plus graves ont eu lieu à Beit Hanoun, Beit Lahia, Sajiyeh, Deir el-Balah, au camp de réfugiés d'el-Maghazi, à Rafah et à Khan Younis. Au cours de ces opérations menées par des blindés et des bulldozers, des maisons ont été réquisitionnées et transformées en bases militaires. Elles ont été gravement endommagées et plusieurs centaines d'habitations ont été détruites. Des écoles de l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient (UNRWA) ont été attaquées et endommagées. Des oliviers et des arbres à agrumes ont été déracinés et des terres agricoles détruites par les travaux de terrassement. Des

routes, des canalisations d'eau et des poteaux électriques et téléphoniques ont été endommagés. Beaucoup de familles ont dû fuir de chez elles et l'on estime à 3 400 environ le nombre de Palestiniens auxquels l'UNRWA doit actuellement fournir un abri à la suite de ces opérations militaires. Les incursions militaires se sont accompagnées de bombardements massifs et de dynamitages de maisons provoquant la mort de nombreux civils.

F. Bombardements et bangs supersoniques

21. Israël a pilonné sans relâche la bande de Gaza après le 25 juin; plusieurs milliers d'obus ont été tirés, soit 200 à 250 par jour selon les estimations. Son armée de l'air a procédé à plusieurs centaines de bombardements et ses chasseurs ont tiré des missiles air-sol. Ces opérations se sont accompagnées de survols de F-16 à basse altitude et de franchissements du mur du son au-dessus de Gaza, provoquant des bangs supersoniques aussi puissants qu'un véritable bombardement. Ces phénomènes ont causé une panique générale parmi la population, surtout les enfants. Si le mot terrorisme a un sens, c'est sûrement cela qu'il désigne.

22. Les Palestiniens ne sont pas irréprochables pour ce qui est des tirs d'artillerie. Les militants continuent de tirer aveuglément des roquettes artisanales Qassam contre Israël, blessant des civils israéliens, dévastant des ouvrages de caractère civil et semant la peur parmi la population civile qui vit près de la frontière de la bande de Gaza. On estime à huit ou neuf le nombre de roquettes tirées tous les jours.

G. Assassinats ciblés

23. Les assassinats ciblés se sont poursuivis avec d'inévitables « dommages collatéraux » pour les civils.

H. Terrorisme téléphonique

24. L'armée israélienne a trouvé un nouveau procédé pour créer la terreur psychologique. Des Palestiniens sont appelés au téléphone par des agents du renseignement militaire israélien, qui leur annoncent qu'on fera sauter leur maison dans moins d'une heure. Parfois cette menace est mise à exécution, parfois elle ne l'est pas. Cette méthode ne peut que provoquer le désarroi psychologique et la panique. Ceux qui sont forcés de quitter leur maison de cette façon sont devenus des personnes déplacées dans leur propre pays qui doivent vivre dans les établissements scolaires de l'UNRWA.

I. Hôpitaux et services de santé

25. Les hôpitaux continuent de fonctionner, mais avec beaucoup de difficultés. Des groupes électrogènes desservent le service de radiologie et les salles d'opération. Le transfert de patients à l'extérieur de la bande de Gaza a beaucoup souffert de la crise actuelle. Comme on l'a déjà fait observer, les postes de contrôle ont été fermés pour les patients, les autorisations refusées. Des problèmes particulièrement graves sont apparus au point de passage de Rafah vers l'Égypte.

Des médicaments essentiels sont également en rupture de stock. Le 27 juillet, le Ministère de la santé de l'Autorité palestinienne a annoncé que 67 des 473 articles de la liste des médicaments essentiels étaient épuisés.

26. La santé publique est menacée par le manque d'eau salubre et les fuites des égouts; les cas de diarrhée ont augmenté de 163 % par rapport à la même période de l'année passée. Il faut craindre la réapparition de maladies contagieuses comme le choléra et la poliomyélite.

J. Alimentation et pauvreté

27. La proportion de pauvres atteint à Gaza 75 % de la population. Autrement dit, les trois quarts de la population ne peuvent pas se nourrir sans assistance, soit une augmentation de 30 % en un peu plus d'une année. Cette situation est imputable essentiellement au siège. L'insécurité vivrière a en partie pour origine la faiblesse du pouvoir d'achat car peu de gens ont aujourd'hui assez d'argent pour subvenir aux besoins fondamentaux de leur famille. Le prix des denrées a augmenté et l'offre s'est réduite avec les opérations en cours. Comme on l'a dit, on ne trouve plus de poisson à cause du blocus maritime. Les minoteries, les usines alimentaires et les boulangeries ont été forcées de réduire leur production faute de courant. De plus, comme les capacités de conservation des périssables dans le climat chaud de Gaza sont réduites, les pertes sont élevées. Les réserves de sucre, de produits laitiers et de lait sont presque épuisées puisque peu de fournitures commerciales arrivent d'Israël.

28. Comme on l'a dit, les ressources en eau ont été gravement affectées par la destruction de la centrale électrique de Gaza et la rupture des conduites par les explosions. L'eau potable est donc rare. L'UNRWA et le CICR ont été obligés d'en distribuer par camions-citernes.

K. Évaluation juridique de l'action d'Israël

29. Les actions d'Israël doivent être évaluées tant au regard des normes relatives aux droits de l'homme qu'au regard du droit international humanitaire. Selon l'avis consultatif de la Cour internationale de Justice cité ci-dessus, ces deux régimes s'appliquent au comportement d'Israël dans le territoire palestinien occupé.

30. Israël a violé plusieurs des droits consacrés dans le Pacte international relatif aux droits civils et politiques, notamment le droit à la vie (art. 6), le droit de n'être pas soumis à la torture ni à des traitements inhumains ou dégradants (art. 7), le droit de ne pas être arrêté ni détenu arbitrairement (art. 9), le droit de circuler librement (art. 12) et le droit des enfants à des mesures de protection (art. 24). Il a également violé des droits consacrés dans le Pacte international relatif aux droits économiques, sociaux et culturels, dont le droit à un niveau de vie décent pour soi-même et sa famille, y compris à une nourriture, des vêtements et un logement suffisants, le droit d'être à l'abri de la faim et le droit à l'alimentation (art. 11), ainsi que le droit à la santé (art. 12).

31. Israël a violé aussi les règles les plus fondamentales du droit international humanitaire, ce qui constitue un crime de guerre selon l'article 147 de la quatrième Convention de Genève et l'article 85 du Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés

internationaux (Protocole I). Ces violations ont pris diverses formes : attaques lancées directement contre des civils et des biens de caractère civil et attaques lancées sans distinction entre les objectifs militaires et les civils ou les biens de caractère civil (art. 48, 51 4) et 52 1) du Protocole I); recours à une force excessive pour des attaques disproportionnées contre des civils et des biens de caractère civil (art. 51 4) et 51 5) du Protocole I); terreur parmi la population civile (art. 33 de la quatrième Convention de Genève et art. 51 2) du Protocole I); destruction de biens non justifiée par la nécessité militaire (art. 53 de la quatrième Convention de Genève). Enfin et surtout, le Gouvernement israélien a enfreint l'interdiction d'infliger des peines collectives à un peuple occupé, fixée à l'article 33 de la quatrième Convention de Genève. L'emploi de la force avec excès et sans distinction contre des civils et des biens de caractère civil, la destruction d'ouvrages fournissant l'électricité et l'eau, la démolition à l'explosif des édifices publics, les restrictions imposées à la liberté de circulation et les conséquences de toutes ces actions pour la santé publique, l'alimentation, la vie des familles et l'état psychologique du peuple palestinien constituent une punition collective flagrante. La capture du caporal Gilad Shalit et le lancement incessant de roquettes Qassam contre Israël sont sans excuse. Mais rien ne peut justifier qu'un peuple tout entier fasse l'objet d'un châtement draconien comme celui qu'a imposé Israël.

IV. Cisjordanie

32. De nombreuses politiques et pratiques suivies par Israël en Cisjordanie représentent de graves infractions aux droits de l'homme des Palestiniens. Le mur actuellement en construction sur le territoire palestinien, les postes de contrôle et les barrages routiers, les colonies, le régime arbitraire des permis, les démolitions omniprésentes de maisons, les assassinats ciblés, les arrestations et les emprisonnements violent toute une gamme de droits civils et politiques. Les droits économiques et sociaux ont également souffert de la crise humanitaire résultant de l'occupation.

Le mur

33. Le mur qu'Israël est en train de construire en grande partie en territoire palestinien est incontestablement illégal. Dans son avis consultatif du 9 juillet 2004, la Cour internationale de Justice a affirmé qu'il était contraire au droit international et qu'Israël avait l'obligation d'en interrompre la construction et de démanteler les tronçons de l'ouvrage déjà en place. Le 20 juillet 2004, l'Assemblée générale a adopté sa résolution ES-10/15 par 150 voix contre 6, avec 10 abstentions, exigeant qu'Israël accomplisse ses obligations de droit telles que les définissait l'avis consultatif. La Haute Cour de justice israélienne, dans l'arrêt de septembre 2005 rendu en l'affaire *Mara'abe c. le Premier Ministre d'Israël* (HCJ 7957/04), a écarté l'avis consultatif de la Cour internationale de Justice au prétexte que celle-ci n'avait pas tenu compte des considérations de sécurité qui motivaient la construction du mur. Cet arrêt a été fragilisé dans son fondement quand le Gouvernement israélien a admis par la suite que le mur était censé servir un dessein politique et pas seulement à des fins de sécurité. Le fait ayant été reconnu que le mur était en partie construit pour englober des colonies de Cisjordanie dans son enceinte et les mettre sous la protection directe d'Israël, la Haute Cour a réprimandé le Gouvernement pour l'avoir induite en erreur dans l'affaire *Mara'abe* et dans d'autres affaires mettant en

cause la légalité du mur¹. On ne peut plus sérieusement douter du fait que le mur a pour but de capter les terrains environnant les colonies de Cisjordanie et d'inscrire ces colonies elles-mêmes dans les frontières d'Israël : le fait que 76 % des colons de Cisjordanie sont protégés par le mur suffit à le prouver.

34. Le 30 avril 2006, le Gouvernement israélien a redessiné le tracé du mur. Lorsqu'il sera achevé, sa longueur sera dorénavant de 703 kilomètres, et non plus de 670 kilomètres. À l'heure actuelle, l'ouvrage est plus qu'à moitié terminé. On estime qu'à la fin des travaux, 60 500 Palestiniens de Cisjordanie de 42 villages et agglomérations vivront dans la zone fermée entre le mur et la Ligne verte. Plus de 500 000 Palestiniens qui vivent à 1 kilomètre du mur se trouvent du côté est et doivent le traverser pour aller aux champs ou au travail et rester en relation avec leurs familles. Le mur se trouve à 80 % en territoire palestinien et, pour englober le bloc de colonies d'Ariel, il fait une incursion de 22 kilomètres en Cisjordanie. À l'heure actuelle, il compte 73 portes, mais 38 seulement sont accessibles aux Palestiniens, et encore, uniquement à ceux qui détiennent le permis nécessaire.

35. Le mur a des conséquences graves pour les Palestiniens vivant dans la zone fermée (située entre le mur et la Ligne verte). Il les sépare de leur travail, de leurs écoles, de leurs universités et de leurs centres médicaux spécialisés et fragmente considérablement leur vie communautaire. Les Palestiniens qui vivent du côté est du mur, alors que leur terre se trouve dans la zone fermée, se heurtent à de sérieuses difficultés économiques du fait qu'ils ne peuvent pas se rendre sur leur champ pour en récolter le produit ou pour faire paître leurs animaux, s'ils n'ont pas le permis nécessaire. Qui veut obtenir ce permis doit s'attendre à une série de difficultés. Les démarches administratives sont vexatoires et font barrage. Bien qu'on n'ait pas de chiffres précis, il semble que la proportion de permis refusés soit de 40 % au bas mot. Les motifs de refus vont de considérations de sécurité à l'impossibilité pour le requérant d'établir son droit de propriété. Cette dernière raison est maintenant souvent invoquée par les Israéliens parce qu'il est devenu évident que les Palestiniens, dont les propriétés datent d'un régime foncier ottoman chaotique, sont fréquemment incapables d'apporter la preuve de leurs titres, à la satisfaction d'autorités décidées à leur refuser le passage. Les difficultés et les humiliations associées aux demandes de permis dissuadent beaucoup de Palestiniens d'en présenter une. L'ouverture et la fermeture des portes qui donnent sur la zone fermée se font de manière tout à fait arbitraire et rarement à l'heure prévue, ce qui aggrave la situation.

36. Les obstacles qui rendent difficile d'accès la zone fermée y ont gravement compromis les travaux des champs. Alors que beaucoup de Palestiniens retournent à la terre parce que le salaire des fonctionnaires n'est pas payé et que de nombreuses entreprises privées ont dû fermer en ville, le régime des permis a de lourdes conséquences pour l'emploi et les moyens de subsistance des Palestiniens.

37. Près de la moitié de la population palestinienne vivant dans le territoire palestinien occupé est constituée de réfugiés ayant fui de chez eux à l'approche des forces armées israéliennes durant les précédents conflits armés. À présent, à cause du mur, une nouvelle catégorie de personnes déplacées dans leur propre pays est en train de se constituer, du fait de la confiscation de terres et de biens aux fins de la construction de l'ouvrage, de l'interdiction d'accès au travail, aux hôpitaux, aux

¹ *Haaretz*, 14 et 16 juin 2006.

écoles et aux familles en Cisjordanie et du refus d'octroyer des permis pour accéder aux terres agricoles situées dans la zone fermée. Il n'y a pas de statistiques globales à ce sujet. Selon le Bureau central palestinien de statistique, près de 14 500 personnes ont déjà été déplacées à cause du mur et selon B'Tselem, l'organisation israélienne des droits de l'homme, ce nombre devrait atteindre 90 000 environ. Dans d'autres régions, le déplacement forcé de personnes par le biais de violations des droits de l'homme est qualifié de nettoyage ethnique.

V. Jérusalem et le mur

38. Le mur de 75 kilomètres qui fait le tour de Jérusalem (dont 5 kilomètres seulement coïncident avec la Ligne verte) est le moyen qui sert à induire des changements majeurs dans la ville, à laquelle il s'agit de donner un caractère essentiellement juif en affaiblissant ainsi les prétentions des Palestiniens qui veulent en faire la capitale d'un État palestinien indépendant. C'est pourquoi le mur passe à travers les quartiers palestiniens de Jérusalem-Est et les quartiers qui se trouvent sur son côté est sont tenus pour appartenant à la Cisjordanie. Cela a de graves conséquences pour les droits de l'homme des 230 000 Palestiniens qui vivent à Jérusalem.

39. Tout d'abord, si les Palestiniens qui vivent du côté ouest du mur pourront conserver leur qualité d'habitants de Jérusalem, avec certains avantages, notamment en matière de sécurité sociale, ils auront de plus en plus de mal à se rendre dans les villes de la Cisjordanie, par exemple à Ramallah et Bethléem, où beaucoup travaillent. De plus, s'ils choisissent de résider en Cisjordanie pour se rapprocher de leur travail, ils risquent de perdre leur statut d'habitant de Jérusalem et le droit d'y vivre parce que le principe dit du « centre de vie » de la politique israélienne veut que les Palestiniens prouvent qu'ils vivent à Jérusalem-Est pour conserver leur droit de résidence dans la ville. Les droits de résidence peuvent être retirés pour des motifs politiques. Le 2 juillet 2006, le Gouvernement israélien a révoqué les droits de résidence à Jérusalem de quatre hauts responsables du Hamas vivant à Jérusalem-Est.

40. Ensuite, les Palestiniens relégués en Cisjordanie par le mur, soit le quart environ de la population palestinienne de la ville, perdront leur statut d'habitant de Jérusalem et les privilèges qu'il comporte. Il leur faudra également un permis pour entrer en ville et ils ne pourront le faire que par 4 des 12 passages dans le mur, ce qui allongera considérablement leurs allées et retours et les empêchera de se rendre dans les établissements scolaires, les universités, les hôpitaux, les lieux de culte et les lieux de travail. Il est difficile de décrire l'humiliation subie aux passages vers Jérusalem. Au passage principal de Kalandiya, désormais appelé « terminal », la traversée peut prendre de une à deux heures en période de pointe en raison des procédures administratives punitives imposées.

41. La construction du mur pour judaïser Jérusalem est une opération d'ingénierie sociale cynique qui impose des rigueurs considérables à tous les aspects de la vie palestinienne. Comme le dit B'Tselem : « Le tracé de la barrière [dans Jérusalem], censé faire obstacle aux attaques terroristes meurtrières, est en fait dicté par [...] des considérations politiques [...]. La situation qui en résulte va à l'encontre de la raison

d'être même de la barrière en tant que mesure de sécurité et constitue une violation graves des droits fondamentaux »².

VI. Bethléem et le mur

42. La ville historique de Bethléem a connu le même sort que Jérusalem. Elle est entourée d'un enchevêtrement de blocs de ciment, de clôtures de fil rasoir, de tranchées et de miradors abritant des tireurs d'élite qui porte gravement atteinte au caractère historique de la ville. Le mur a créé des ghettos et anéanti le quartier palestinien autour du Tombeau de Rachel, qui est encerclé par un mur visant à protéger les fidèles juifs. La plupart des commerces locaux ont fermé ou ont été contraints de déménager. Le « terminal » de Bethléem est semblable à celui de Kalandiya et limite les mouvements entre Bethléem et Jérusalem.

VII. Colonies

43. Les colonies juives de Cisjordanie sont illégales. Elles violent le paragraphe 6 de l'article 49 de la quatrième Convention de Genève et leur illégalité a été confirmée par la Cour internationale de Justice dans son avis consultatif sur le mur. La Haute Cour israélienne a toujours refusé de se prononcer sur leur légalité, ce qui montre que même la juridiction suprême israélienne ne veut pas leur reconnaître une légitimité.

44. Malgré leur caractère illégal et leur condamnation unanime par la communauté internationale, le Gouvernement israélien continue à laisser les colonies se développer, dans certains cas ouvertement et avec sa pleine approbation. Depuis le début de 2006, le Gouvernement a lancé des appels d'offres pour la construction de 952 logements dans des colonies en Cisjordanie³. Le plus souvent cependant, le développement se fait discrètement, sous le couvert d'une « croissance naturelle », qui atteint pour les colonies un taux moyen de 5,5 %, contre 1,7 % pour les villes israéliennes. Parfois, enfin, les colonies s'étendent illégalement au regard du droit israélien, mais rien n'est fait pour faire respecter la loi. Des postes avancés sont créés fréquemment et, quand on menace de les démanteler, les menaces ne sont pas mises à exécution. En 2006, des colons ont eu l'audace d'emménager dans des appartements de la colonie d'Upper Modi'in, construits sur des terres appartenant au village palestinien voisin de Bil'in malgré l'interdiction formelle de la Haute Cour.

45. Du fait de cette expansion, la population des colons de Cisjordanie atteint environ 260 000 personnes, celle de Jérusalem-Est près de 200 000. Comme indiqué ci-dessus, le mur est actuellement construit en Cisjordanie et à Jérusalem-Est de manière à englober la plupart des colonies dans son enceinte. De plus, les trois grands blocs de colonies de Gush Etzion, Ma'aleh Adumim et Ariel divisent en fait le territoire palestinien en cantons, détruisant ainsi l'intégrité territoriale de la Palestine.

46. Il ressort à l'évidence des déclarations du Gouvernement israélien que les grands blocs de colonies ont vocation à rester en Israël. Le 3 mai 2006, le Premier

² *B'Tselem. A Wall in Jerusalem: Obstacles to Human Rights in the Holy City*, été 2006.

³ *Haaretz*, 21 septembre 2006.

Ministre Olmert a déclaré à la Knesset que « ce qu'a réussi le mouvement de colonisation dans les principaux centres d'établissement restera à jamais partie intégrante de l'État souverain d'Israël, comme Jérusalem, notre capitale unifiée »⁴.

47. La politique de « dégageant unilatéral », de « convergence » ou de « réaligement » du Gouvernement israélien, aujourd'hui en suspens en raison de la guerre au Liban, prévoit clairement l'annexion illégale de vastes portions de territoire palestinien. Les euphémismes utilisés pour qualifier cette politique ne doivent pas masquer cette dure réalité.

48. La violence des colons reste un problème grave. En juin 2006, le Groupe de surveillance de la Palestine a publié un compte rendu mensuel de cas de violences, qui illustre bien le problème :

« Des colons israéliens ont essayé d'enlever une étudiante dans le district de Salfit; ont frappé des civils à Hébron et d'autres civils près de la colonie de Ma'on; ont fermé une route dans le district de Qalqiliya; ont caillassé des maisons de civils dans le quartier de Tel Rumeida à Hébron et volé une pompe à eau dans une maison de ce même quartier. Ils ont incendié deux véhicules civils et un camion à Huwara; ont mis le feu à des récoltes et à des oliviers à Salim, près de Naplouse, et à Al Jab'a près de Bethléem; ils ont fait paître leurs troupeaux de moutons dans des champs cultivés du district d'Hébron ».

VIII. Le sud d'Hébron et le « minimur »

49. Les plans qui prévoyaient la construction du mur au sud d'Hébron ont été abandonnés; selon le nouveau projet, le mur suivra essentiellement la Ligne verte. À la place, Israël construit une barrière routière ou « minimur » le long du côté nord des routes de contournement des colons de la région. Ce mur, d'environ un mètre de hauteur, vise à empêcher les véhicules palestiniens de pénétrer sur la grande route et à donner aux colons libre accès aux routes de contournement. Ce dispositif permettra aux colons de se déplacer en toute sécurité entre les colonies et le reste d'Israël sans avoir à traverser de terres palestiniennes. Vingt-deux localités palestiniennes et plus de 1 900 Palestiniens se trouveront enfermés entre le minimur et le mur lui-même. Le minimur empêchera des bergers palestiniens et leur 24 000 têtes de bétail d'accéder aux pâturages situés de l'autre côté. Il ajoutera aux difficultés que connaissent déjà les localités palestiniennes qui se trouvent au sud d'Hébron, dépourvues de centres de soins, d'écoles et d'installations d'élimination de déchets adéquats. L'eau doit être amenée par camions dès le début de l'été, quand le réseau d'irrigation par eaux pluviales commence à se vider. Le Gouvernement israélien refuse de raccorder les localités palestiniennes à son propre réseau d'adduction, qui n'alimente que les colons. Enfin, il refuse d'émettre des permis de construire pour les maisons.

50. La situation dans le village de Tuwani, où je me suis rendu à plusieurs occasions, témoigne du sort des localités palestiniennes du sud d'Hébron. Ce village n'a ni électricité, ni eau, ni services sanitaires et il est interdit d'y construire de nouvelles maisons. De plus, les villageois subissent des violences de la part des colons de Ma'on. Pour aller à l'école, les enfants doivent être escortés par les FDI,

⁴ *Haaretz*, 4 mai 2006.

qui les protègent des colons. Ces derniers sont également responsables de l'empoisonnement des terres.

IX. Vallée du Jourdain

51. Israël a abandonné le projet qu'il avait de construire le mur le long de l'axe du TPO et de s'approprié formellement la vallée du Jourdain. Il exerce toutefois son autorité sur la région, qui représente 25 % de la Cisjordanie, de la même façon qu'il le fait sur la zone fermée entre le mur et la Ligne verte, à la frontière occidentale de la Palestine. Son intention de rester définitivement dans la vallée du Jourdain transparaît non seulement dans ses déclarations officielles, mais aussi à travers les restrictions imposées aux Palestiniens, par les contrôles exercés et l'augmentation du nombre de colonies dans la vallée.

52. Les Palestiniens qui vivent dans la vallée du Jourdain doivent détenir une pièce d'identité avec une adresse dans la vallée, obligatoire pour pouvoir se déplacer dans la vallée sans permis israélien. Les autres Palestiniens, y compris les propriétaires fonciers et les travailleurs non résidents, doivent demander un permis, lequel en pratique n'autorise pas son détenteur à passer la nuit dans la vallée, ce qui l'oblige à faire des allers et retours quotidiens et à perdre du temps aux postes de contrôle qui relient la vallée du Jourdain au reste de la Cisjordanie. La vallée du Jourdain se trouve donc isolée. Les restrictions imposées aux déplacements font que les agriculteurs de la vallée ont du mal à se rendre sur les marchés de Cisjordanie, les denrées étant fréquemment retenues et se gâtant aux postes de contrôle, notamment à Al Hamra. Les tentatives de vente au bord des routes ont échoué, les FDI ayant détruit les stands.

53. La vallée du Jourdain fait également face à une crise du logement car elle est en grande partie classée en zone C, ce qui signifie que les autorités israéliennes doivent donner leur autorisation avant toute construction d'habitation. J'ai rendu visite à une famille de Bédouins, près de Jéricho, dont la maison « illégale » faisait l'objet d'un ordre de démolition. L'incident amusant, mais révélateur décrit ci-après illustre bien l'enthousiasme vengeur avec lequel les FDI s'acquittent de ce type de tâche. Je me suis rendu dans une maison du village de Zbeidat, en bordure de la zone C. Son propriétaire avait planté une rangée de géraniums qui s'étendait en partie sur la zone interdite. Les FDI l'ont informé qu'il devait déterrer ces géraniums car ils avaient été plantés sans autorisation.

54. La plupart des terres de la vallée du Jourdain sont contrôlées par des colonies juives ou servent de terrains militaires. Seulement 4 % sont accessibles aux 47 000 Palestiniens, pour mise en valeur ou résidence. Environ 8 300 colons vivent dans la vallée et leur nombre continue de croître en raison de la réinstallation des colons de Gaza. Alors que la plupart des localités palestiniennes n'ont ni électricité, ni eau, les colons sont raccordés aux réseaux israéliens. De plus, ces 8 300 colons consomment chaque année plus d'eau que les 47 000 Palestiniens.

X. Démolition de maisons

55. La démolition de maisons est un fait ordinaire de l'occupation, dont le bulldozer est devenu le symbole odieux. Traditionnellement, la puissance occupante

démolit une maison à titre de punition (lorsque l'un de ses habitants a commis un crime contre Israël), en raison de nécessités militaires ou parce que la construction s'est faite sans permis. Ces derniers temps ont vu apparaître des motifs supplémentaires : d'abord, le passage du mur, ensuite l'arrestation de personnes recherchées. On se rappellera que l'an dernier la Haute Cour israélienne a interdit d'utiliser des civils palestiniens comme boucliers humains lors des opérations d'arrestation. Aujourd'hui, si l'on soupçonne qu'une personne recherchée se trouve dans telle ou telle maison et refuse de se rendre, la maison est rasée. J'ai vu de mes propres yeux des maisons détruites de cette façon dans le camp de réfugiés de Balata, près de Naplouse.

56. Il y a des années qu'Israël démolit les maisons construites sans permis, en alléguant qu'il se contente de faire respecter les lois municipales sur le logement, comme le fait toute autre société développée. Cette argumentation néglige deux considérations. D'abord, une puissance occupante n'a pas le droit de démolir l'habitation de personnes protégées par le droit international humanitaire (voir par. g) de l'article 23 du Règlement concernant les lois et coutumes de la guerre sur terre annexé à la Convention IV concernant les lois et coutumes de la guerre sur terre de La Haye, et l'article 53 de la Quatrième Convention de Genève). Cela vaut pour les maisons des Palestiniens de Cisjordanie, de la bande de Gaza et de Jérusalem-Est. Ensuite, les permis de construire sont accordés de façon si arbitraire et refusés de façon si systématique qu'il est devenu pratiquement impossible pour un Palestinien de construire une maison avec autorisation. Le régime des permis à Jérusalem-Est est administré de façon complètement différente pour les Palestiniens et pour les Israéliens. Le caractère discriminatoire de l'application de ce régime à Jérusalem-Est a été récemment mis en lumière par Meir Margalit dans *Discrimination in the Heart of the Holy City* (2006). Lors de mon séjour, je me suis rendu dans le village d'Al Walaja. Bien qu'il ait été annexé à Jérusalem-Est après la guerre de 1967, ses habitants n'ont pas le statut de résidents de Jérusalem et leurs demandes de permis de construire sont systématiquement rejetées. Récemment, la construction du mur à l'intérieur du village a été envisagée, initiative qui semble aujourd'hui avoir été abandonnée. Les autorités israéliennes paraissent néanmoins déterminées à faire pression sur les résidents du quartier Ein-Jweisa d'Al Walaja pour qu'ils déménagent, en menaçant de raser leurs habitations. Vingt-neuf maisons ont été démolies entre 1985 et 2006 et 24 autres font actuellement l'objet d'ordres de démolition.

XI. Postes de contrôle

57. Le nombre de postes de contrôle, barrages routiers, remblais et tranchées compris, est passé de 376 en août 2005 à plus de 500. Ces postes divisent la Cisjordanie en quatre zones distinctes : le nord (Naplouse, Djénine et Tulkarm), le centre (Ramallah), le sud (Hébron) et Jérusalem-Est. À l'intérieur de ces zones, des enclaves ont été créées grâce à la mise en place d'un réseau de postes et de barrages. Les villes sont coupées les unes des autres puisqu'il faut un permis pour passer d'une zone à l'autre et que, là encore, ce permis est difficile à obtenir. Les règles qui en gouvernent l'obtention ne cessent de changer, notamment du point de vue de l'âge des requérants à qui il est refusé. De plus, les démarches administratives à entreprendre pour l'obtenir sont arbitraires et dissuasives. La situation a empiré avec l'arrivée du Hamas aux affaires, dans la mesure où ceux qui ont besoin d'un permis

doivent désormais s'adresser directement à l'Administration civile israélienne, le Gouvernement israélien refusant de coopérer avec quelque autorité officielle de Palestine que ce soit. Ce système de permis explique aussi le déclin économique du TPO puisque la main-d'œuvre et les marchandises ne peuvent circuler librement.

58. En juin 2006, je me suis rendu à Naplouse, ville complètement cernée par des postes de contrôle, au point que la plupart de ses habitants ne peuvent ni y entrer, ni en sortir. Le poste de contrôle d'Hawara, en particulier, est tristement célèbre pour la dureté avec laquelle il est administré. Naplouse est devenue de fait une ville prisonnière.

59. Les Israéliens justifient les postes de contrôle par des considérations de sécurité. Il est difficile d'accepter cette justification pour la plupart d'entre eux. Après tout, le mur constitue une barrière de sécurité efficace entre Israël et le TPO et il existe, le long de la bande de terre où a été installé le bloc de colonies d'Ariel, une ligne de postes de contrôle qui devrait protéger efficacement les Israéliens. Les postes installés ailleurs, par exemple autour de Naplouse, ne répondent apparemment à aucune nécessité du point de vue de la sécurité. On peut en conclure que l'objectif principal de beaucoup d'entre eux est en fait d'empêcher les Palestiniens d'oublier qu'Israël est maître de leurs vies et de les humilier du même coup.

XII. Séparation des familles

60. Le droit à une vie de famille est reconnu par tous les instruments relatifs aux droits de l'homme. Dans le territoire palestinien occupé, Israël en entrave l'exercice de plusieurs façons. Premièrement, le mur élevé entre les quartiers de Jérusalem sépare les Palestiniens selon qu'ils ont des documents d'identité de Jérusalem ou de Cisjordanie. Quand deux époux ont des documents différents, ils n'ont souvent pas d'autre choix que de vivre séparés pour que celui qui a les documents de Jérusalem puisse conserver les avantages qui s'y attachent. Dix-huit pour cent des foyers palestiniens de Jérusalem sont ainsi séparés du père et 12 %, de la mère. Deuxièmement, les autorités appliquent depuis peu une politique qui consiste à refouler les Palestiniens titulaires d'un passeport étranger. Auparavant, ces derniers étaient autorisés à vivre en Cisjordanie à condition de renouveler leur visa tous les trois mois. La nouvelle politique touche environ 50 000 Palestiniens de Cisjordanie, à qui l'on refuse désormais un visa⁵. Troisièmement, une loi israélienne relative à la citoyenneté interdit aux Palestiniens qui épousent des Arabes israéliens de vivre en Israël avec leur conjoint. Cette loi a dernièrement fait l'objet d'un arrêt controversé de la Haute Cour de justice israélienne, celle-ci ayant jugé que le texte, qui ne s'applique pas aux Israéliens juifs épousant des étrangers, était constitutionnel pour des raisons de sécurité. Selon la Cour, l'État a le droit d'empêcher un Palestinien de vivre avec son conjoint israélien en Israël, car des Palestiniens menaçant la sécurité d'Israël pourraient en profiter pour entrer dans le pays.

⁵ *Haaretz*, 10 juillet 2006.

XIII. Administration de la justice

61. Il est clair qu'Israël ne cherche pas à se gagner les cœurs et les esprits lorsqu'il administre la justice; il agit plutôt avec une poigne de fer, pour ce qui est des arrestations et du traitement des individus arrêtés et des détenus. Il semble que la situation se soit encore dégradée depuis que le Hamas a été élu au Gouvernement.

62. Les arrestations s'accompagnent souvent, comme on l'a dit, de la destruction ou du saccage des biens, de voies de fait, d'attaques de chiens lancés dans les logements des civils, de fouilles à corps humiliantes et de descentes au petit matin. Les interrogatoires des personnes arrêtées continuent d'être menés en combinant pressions psychologiques et violences physiques. Le nombre de prisonniers ne cesse de croître. On compte aujourd'hui plus de 10 000 Palestiniens dans les prisons israéliennes, femmes et enfants inclus. La situation des enfants est particulièrement inquiétante, car ils doivent souvent partager leur cellule avec des adultes et n'ont accès ni à l'enseignement, ni à leur famille.

63. L'arrestation de personnalités rappelle aux Palestiniens que nul n'est hors d'atteinte de la puissance israélienne. En mars 2006, Israël a pris d'assaut et détruit en grande partie la prison de Jéricho afin d'arrêter Ahmed Saadat et ses complices, immédiatement après que les responsables britanniques et américains de l'établissement s'étaient retirés en violation d'un accord de 2002 en vertu duquel ils s'étaient engagés à surveiller la détention de Saadat et d'autres prisonniers. En juin 2006, huit membres du Gouvernement du Hamas et 26 membres du Conseil législatif palestinien ont été arrêtés à Ramallah. En août 2006, le porte-parole du Conseil, Aziz Dweik, le Vice-Premier Ministre, Nasser Al-Shaer, et le Secrétaire général du Conseil, Mahmoud Al-Ramahi, ont été arrêtés au cours de raids menés séparément.

XIV. Israël, la sécurité et les droits de l'homme

64. Il est difficile d'accorder la longue liste de violations des droits de l'homme et du droit international humanitaire déroulée dans le présent rapport avec l'engagement d'Israël envers la primauté du droit. Telle est la situation paradoxale dans laquelle se trouve cet État. Il est vrai qu'Israël est doté d'une Cour suprême et d'institutions ayant pour mission de faire respecter l'état de droit. Israël est néanmoins accusé de graves violations des droits de l'homme et du droit international humanitaire, ce à quoi il répond en contestant les faits dans bien des cas ou, lorsque ceux-ci sont incontestables, en invoquant pour se justifier des mesures de sécurité nécessaires.

65. Dans beaucoup de régions du monde, on approuve ce que fait Israël en estimant que ce dernier est engagé dans une guerre contre le terrorisme, ce qui lui permet de s'affranchir des conventions relatives aux droits de l'homme. En outre, compte tenu de son attachement à l'état de droit, Israël est perçu comme un occupant bienveillant qui viole malgré lui les normes relatives aux droits de l'homme et au droit humanitaire, dans l'intérêt de la sécurité. Cette perception est malheureusement fautive. Israël n'occupe pas de façon bienveillante la Cisjordanie, la bande de Gaza et Jérusalem-Est. Comme on a pu le constater, sa réaction à une menace contre la sécurité est souvent très disproportionnée. De plus, les forces israéliennes s'acquittent de leurs tâches de façon arbitraire et vindicative. Ainsi, le

système de permis qui régleme la circulation des Palestiniens est appliqué arbitrairement, ce qui met les demandeurs entièrement à la merci des lubies du bureaucrate israélien chargé d'accorder ou de refuser ces permis. Les soldats qui tiennent les postes de contrôle se comportent de façon humiliante. Il est important de souligner que leur malveillance est encore plus manifeste depuis l'élection du Hamas et le déclenchement de la guerre au Liban. On a maintenant l'impression qu'ils considèrent chaque Palestinien comme un terroriste en puissance à traiter sans respect. Ils manifestent peu de compassion envers les malades et les personnes âgées, et les cas de femmes accouchant à un poste de contrôle parce que des soldats ne les autorisent pas à se rendre à un hôpital ne manquent pas. Les arrestations ne s'accompagnent pas seulement de la destruction des biens, mais aussi de leur saccage (le Rapporteur spécial a visité dans le camp de réfugiés de Balata une école de l'UNRWA qui avait été saisie en février 2006 pour servir de base à des opérations militaires sur place; les biens de cette école avaient été délibérément saccagés et des inscriptions avaient été griffonnées sur les murs d'une façon qui ne pouvait pas être justifiée par des considérations de sécurité). Les maisons construites sans permis sont détruites inutilement, et parfois même alors qu'une action en justice est en cours. Les actes de violence et de vandalisme des colons sont visiblement tolérés par les forces de défense israéliennes. Certains villages se voient refuser l'accès à l'eau et à l'électricité alors qu'il serait facile de le leur fournir en les raccordant aux réseaux d'alimentation des villages voisins. Il n'y a aucune considération pour la vie de famille, ni pour bien d'autres aspects de la vie humaine. Bref, l'occupation ne se déroule pas de façon humaine. Les dissidents israéliens qui ont fait partie du système (comme ces soldats qui, en 2004, ont constitué le groupe dissident « Rompre le silence ») et ceux qui surveillent l'occupation (comme les membres de l'ONG Machsom Watch) ont fait état des conditions impitoyables dans lesquelles elle a lieu.

XV. La crise humanitaire et le financement de l'Autorité palestinienne

66. La crise humanitaire à Gaza est traitée ci-dessus dans la partie consacrée à cette zone. La situation humanitaire consternante qui règne dans cette partie du territoire palestinien occupé ne doit pas détourner l'attention de la grave crise humanitaire que connaît le reste du territoire. Sur 10 Palestiniens, 4 vivent en dessous du seuil officiel de pauvreté, qui est de 2,10 dollars par jour. Il est difficile d'évaluer l'ampleur du chômage. L'Organisation internationale du Travail a estimé qu'il touchait plus de 40 % de la main-d'œuvre palestinienne. Ce taux ne tient cependant pas compte du fait que les fonctionnaires du secteur public, qui offre 23 % du total des emplois sur le territoire, travaillent sans être payés.

67. La crise humanitaire résulte en grande partie de l'interruption du financement de l'Autorité palestinienne après l'élection du Hamas. Premièrement, le Gouvernement israélien s'abstient de verser à l'Autorité les taxes sur la valeur ajoutée et les droits de douane de 50 à 60 millions de dollars par mois qu'il perçoit pour le compte de cette dernière sur les marchandises importées dans le territoire palestinien occupé. En droit, Israël ne peut pas refuser de virer les montants en question, qui appartiennent à l'Autorité en vertu du Protocole de 1994 relatif aux relations économiques entre le Gouvernement d'Israël et l'Organisation de libération de la Palestine (Protocole de Paris). Comme on pouvait le prévoir, Israël

justifie son attitude par des considérations de sécurité. Le déficit financier que connaît ainsi l'Autorité palestinienne s'accompagne d'une réduction considérable de l'aide financière accordée par les institutions et les pays donateurs. Cela a gravement nui aux activités des ONG, qui ont dû suspendre ou annuler leurs projets liés aux travaux de l'Autorité. Le Hamas étant considéré comme une organisation terroriste par les États-Unis et l'Union européenne, le Trésor américain a décidé d'interdire toute opération financière avec l'Autorité. Cette décision a profondément influencé les banques, qui ne sont pas disposées à virer des fonds pour le compte de l'Autorité, des organismes qui en dépendent, des projets qu'elle mène et des ONG engagées dans des projets avec elle. Pour certaines réalisations auxquelles l'Autorité participe, le financement a été maintenu (c'est le cas, notamment, pour les projets de la Banque mondiale). L'Union européenne a quant à elle mis en place un mécanisme international temporaire, approuvé par le Quatuor, afin de venir en aide aux Palestiniens qui travaillent dans le secteur de la santé, d'assurer le fonctionnement ininterrompu des réseaux publics, y compris pour le carburant, et de distribuer des allocations de base permettant aux couches les plus pauvres de la population de subvenir à leurs besoins.

68. Malgré quelques tentatives de financement de cette nature, il est clair que l'économie palestinienne, fortement tributaire des aides financières des donateurs depuis 1994, a énormément souffert des retenues opérées par Israël et par la communauté internationale depuis l'élection du Hamas. Cette asphyxie économique a eu de lourdes conséquences sur le plan des droits économiques et sociaux du peuple palestinien. Un million environ de Palestiniens, sur les 3,5 millions d'habitants que compte la Palestine, sont directement touchés par l'interruption du versement des salaires des quelque 152 000 fonctionnaires, tandis que l'ensemble de la population en souffre indirectement. De plus, comme l'Autorité palestinienne est responsable de plus de 70 % des écoles et de 60 % des services de santé dans le territoire palestinien occupé, l'enseignement et la santé ont subi un sérieux préjudice. En août 2006, les fonctionnaires se sont mis en grève pour réclamer le versement de leur salaire, ce qui a encore aggravé la crise socioéconomique.

69. La question des soins de santé est examinée plus en détail dans la partie consacrée à la bande de Gaza. Il est cependant important de souligner que les restrictions financières ont nui gravement à ces soins dans l'ensemble du territoire palestinien occupé. Faute d'être payés, les professionnels de la santé s'absentent, tout simplement parce qu'ils ne peuvent pas s'offrir les moyens de transport disponibles pour se rendre sur leur lieu de travail. Les stocks de médicaments et de vaccins sont insuffisants. Les hôpitaux ne peuvent prendre en charge convenablement les patients atteints d'un cancer ou dialysés. Le transfert des patients dans d'autres hôpitaux de Cisjordanie, et surtout d'Israël ou d'Égypte, est devenu particulièrement difficile en raison des bouclages et du refus de délivrer des permis.

70. Le fait est que le peuple palestinien est soumis à des sanctions économiques, premier exemple d'un tel traitement à l'égard d'un peuple occupé. Cela est difficile à comprendre. Israël viole les principales résolutions du Conseil de sécurité et de l'Assemblée générale relatives à l'illégalité des modifications territoriales et à la violation des droits de l'homme et n'a pas donné suite à l'avis consultatif rendu en 2004 par la Cour internationale de Justice. Pourtant, il échappe lui-même aux sanctions. C'est en revanche le peuple palestinien, et non l'Autorité palestinienne, qui est soumis aux formes de sanctions internationales les plus dures peut-être

qu'aient connues les temps modernes. Il est intéressant de rappeler à ce propos que les États occidentaux ont refusé d'imposer à l'Afrique du Sud de véritables sanctions économiques pour l'obliger à renoncer à l'apartheid au motif que cela risquait de porter préjudice aux Noirs de ce pays. Ni le peuple palestinien, ni ses droits fondamentaux ne bénéficient des mêmes égards.

XVI. L'avis consultatif de la Cour internationale de Justice et la position de l'Organisation des Nations Unies

71. En 2004, la Cour internationale de Justice a jugé que le mur qu'Israël édifie actuellement en territoire palestinien était illégal et devait être démantelé. Dans son avis consultatif, elle a estimé que plusieurs autres pratiques israéliennes (telles que l'établissement de colonies) étaient contraires au droit international. Deux ans ont passé, mais rien n'a été fait pour donner suite aux conclusions de la Cour. Pis encore, le mur n'est absolument pas mentionné dans les déclarations périodiques du Quatuor. Tout se passe comme s'il n'y avait jamais eu d'avis consultatif.

72. En 2004, dans sa résolution ES-10/15, l'Assemblée générale a prié le Secrétaire général d'établir un registre des dommages causés par la construction du mur. Deux ans plus tard, ce registre n'existe toujours pas, ce qui amène à se demander sérieusement si sa forme, ses objectifs et son mode d'utilisation seront conformes aux termes de l'avis consultatif.

73. L'avis consultatif de la Cour internationale de Justice est un jugement autorisé de l'organe judiciaire de l'Organisation des Nations Unies, auquel l'Assemblée générale a souscrit dans sa résolution ES-10/15. Compte tenu de sa nature, il n'est pas contraignant pour les États. Il dit cependant le droit de façon décisive en ce qui concerne l'Organisation et il doit guider celle-ci de la même façon que l'avis consultatif du 21 juin 1971 (sur les conséquences juridiques pour les États de la présence continue de l'Afrique du Sud en Namibie) a orienté ses organes politiques dans le traitement de la question de la Namibie. En tant que membre du Quatuor, l'Organisation a le devoir de persuader cette instance de faire au moins mention de l'avis de la Cour dans ses déclarations. Si elle n'y parvient pas, elle devra au moins faire part de son mécontentement devant le fait que le Quatuor ne s'inspire pas de l'avis et ne le mentionne pas.

XVII. Conclusion

74. **Le présent rapport n'est pas particulièrement réjouissant. Israël viole des normes importantes des droits de l'homme et du droit international humanitaire. Si l'on admet sans hésitation que la sécurité d'Israël est menacée et que ce pays a le droit de se défendre, il ne faut pas oublier que la cause profonde de cette menace est la poursuite de l'occupation d'un peuple qui souhaite exercer son droit à l'autodétermination dans un État indépendant. Consciente de la nécessité de mettre un terme à cette situation, la communauté internationale a délégué son autorité au Quatuor, composé de l'Organisation des Nations Unies, de l'Union européenne, des États-Unis d'Amérique et de la Fédération de Russie, afin qu'il facilite un règlement pacifique sous la forme de**

la création d'un État palestinien. Malheureusement, il semble que cet objectif ait été perdu de vue dans la mesure où le Quatuor a recours à des mesures punitives visant à obliger le Hamas à changer de position idéologique ou à provoquer un changement de régime, comme l'indique clairement la déclaration du Quatuor du 9 mai 2006. On peut se demander si l'Organisation des Nations Unies est autorisée en droit à participer à la pression économique exercée par le Quatuor sans suivre les procédures qu'elle s'est fixées dans la Charte. Quoi qu'il en soit, la diplomatie a cédé le pas devant la pression.

75. Il serait vain pour le Rapporteur spécial de recommander que le Gouvernement israélien fasse preuve de respect envers les droits de l'homme et le droit international humanitaire. Des organes ayant davantage d'autorité que lui, la Cour internationale de Justice et le Conseil de sécurité en particulier, ont lancé des appels en ce sens avec aussi peu de succès qu'en ont eu les rapports précédents du Rapporteur. Il serait également vain pour ce dernier d'appeler le Quatuor à s'efforcer de rétablir les droits de l'homme, car ni le respect des droits de l'homme, ni celui de l'état de droit ne figurent en bonne place à son ordre du jour, si l'on en croit ses déclarations publiques. Ainsi, le Rapporteur ne peut que lancer un appel à l'ensemble de la communauté internationale pour qu'elle s'intéresse davantage au sort du peuple palestinien.

76. Il est à regretter que l'image et la réputation de l'Organisation des Nations Unies aient souffert dans les territoires palestiniens occupés. Alors que le dévouement et la détermination de ses agents sur le terrain leur valent une grande estime, on ne peut pas en dire autant de l'Organisation à New York et à Genève. Les Palestiniens sont consternés par le fait que le Conseil de sécurité est incapable de prendre des mesures pour protéger les droits de l'homme, comme en atteste le veto opposé le 12 juillet 2006 à un projet de résolution équitable sur Gaza. Les organes politiques de l'ONU doivent se montrer plus soucieux des droits fondamentaux des Palestiniens. Des rapports comme celui-ci font état de violations des droits de l'homme et du droit humanitaire. Il est toutefois indispensable que l'Organisation prenne des mesures concrètes en ces temps difficiles.



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Promotion et protection des droits de l'homme :
situations relatives aux droits de l'homme et rapports
des rapporteurs et représentants spéciaux

Situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967

Note du Secrétaire général

Le Secrétaire général a l'honneur de transmettre aux membres de l'Assemblée générale le rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, que John Dugard a présenté en application de la résolution 5/1 du Conseil des droits de l'homme.

* A/62/150.



Rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967

Résumé

Le droit du peuple palestinien à l'autodétermination, reconnu par les organes politiques de l'Organisation des Nations Unies, la Cour internationale de Justice et Israël, doit s'exercer en Cisjordanie, à Jérusalem-Est et à Gaza, qui forment ensemble l'unité territoriale palestinienne concernée par l'autodétermination. L'exercice de ce droit est menacé par la séparation entre la Cisjordanie et Gaza intervenue du fait que Hamas avait pris le pouvoir à Gaza en juin 2007 tandis que le Fatah avait pris le pouvoir en Cisjordanie. La communauté internationale ne doit ménager aucun effort pour restaurer l'unité palestinienne. Sans cette unité, le droit à l'autodétermination ne pourra se concrétiser pleinement.

Cette année correspond au quarantième anniversaire de l'occupation du territoire palestinien. Les obligations incombent à Israël en tant que puissance occupante ne sont nullement réduites par la longue durée de l'occupation. Au contraire, ces obligations se sont accrues, du fait des actes illicites commis par Israël sur le territoire occupé. Il est proposé de prier la Cour internationale de Justice de rendre un avis consultatif sur les conséquences juridiques d'une occupation prolongée pour le peuple occupé, la puissance occupante et les États tiers.

Israël conserve sa qualité de puissante occupante à Gaza. La thèse selon laquelle Israël aurait mis fin à l'occupation de Gaza en 2005 en évacuant ses colonies de peuplement et en retirant ses troupes ne tient aucun compte du fait qu'Israël maintient un contrôle effectif sur Gaza en maîtrisant ses frontières extérieures, son espace aérien, ses eaux territoriales, le registre de l'état civil, ses recettes fiscales et ses fonctions gouvernementales. Le caractère effectif de ce contrôle est accentué par des incursions militaires et des tirs de roquettes continus. Le comportement d'Israël envers Gaza doit donc être évalué à l'aune des normes du droit international humanitaire et du droit international des droits de l'homme. Au cours de l'année écoulée, Israël a transgressé des principes importants du droit international humanitaire et du droit international des droits de l'homme en menant des opérations utilitaires contre des cibles civiles et en provoquant une crise humanitaire par la fermeture des frontières extérieures de Gaza. Israël est juridiquement tenu de mettre fin à ces mesures. C'est également en violation du droit international humanitaire que d'autres États ont pris part au siège de Gaza.

La situation des droits de l'homme en Cisjordanie pourrait connaître une amélioration à la suite du rapprochement intervenu après la prise de contrôle de Gaza par le Hamas entre le Gouvernement d'urgence du Président Abbas et dirigé par le Premier Ministre Salam Fayyad, Israël, les États-Unis et le Quatuor. On compte déjà 255 prisonniers libérés, 119 millions de dollars des États-Unis de recettes fiscales palestiniennes transférées à l'Autorité palestinienne et 178 militants du Fatah amnistiés. Malgré ces avancées et les promesses d'œuvrer davantage à l'amélioration des conditions de vie des Palestiniens faites par Israël, les États-Unis et le Quatuor, on note encore des violations massives des droits de l'homme et du droit international humanitaire en Cisjordanie et à Jérusalem-Est. La construction du mur

(ou barrière) se poursuit, les colonies de peuplement continuent de s'étendre, les points de contrôle restent opérationnels, la judaïsation de Jérusalem se prolonge et l'annexion de facto de la vallée du Jourdain perdure. Les incursions militaires suivies d'arrestations persistent de plus belle. La destruction de maisons est une réalité quotidienne en Cisjordanie et à Jérusalem-Est.

Le Secrétaire général de l'Organisation des Nations Unies a institué un comité chargé d'enregistrer les demandes d'indemnisation des Palestiniens liées à la construction du mur. D'épineuses questions se posent sur la manière dont ce comité fonctionnera.

Les violations des droits de l'homme et du droit international humanitaire, ainsi que le refus d'Israël de transférer les recettes fiscales qui reviennent à l'Autorité palestinienne et les restrictions bancaires imposées par les États-Unis, ont eu de graves répercussions sur la situation humanitaire en Cisjordanie. La pauvreté et le chômage sont au plus haut, la santé et l'éducation entravées par les incursions militaires, le mur et les points de contrôle, et l'ensemble du tissu social menacé.

Quelque 10 000 prisonniers politiques palestiniens sont détenus dans les prisons israéliennes dans des conditions inhumaines et dégradantes. L'exécution extrajudiciaire de militants présumés par des tirs de roquettes se poursuit sans relâche.

Bien que les organismes des Nations Unies et leurs personnels œuvrent à la promotion et à la protection des droits de l'homme dans le territoire palestinien occupé, le rôle du Secrétaire général au niveau du Quatuor suscite aujourd'hui de sérieuses interrogations. Composé de l'ONU, de l'Union européenne, de la Fédération de Russie et des États-Unis, le Quatuor est devenu un acteur clef du processus de paix dans le territoire palestinien occupé. Cette structure, dirigée en fait par les États-Unis, a manifesté peu d'intérêt pour la promotion des droits de l'homme et du droit international humanitaire et assume indirectement la responsabilité des sanctions économiques imposées au territoire palestinien occupé. En mai 2007, l'ancien Coordonnateur spécial des Nations Unies pour le processus de paix au Moyen-Orient et Envoyé du Secrétaire général auprès du Quatuor, M. Alvaro de Soto, a déclaré que le Quatuor, sous l'influence des États-Unis, avait perdu la confiance du peuple palestinien et il a demandé au Secrétaire général de réexaminer sérieusement la participation de l'ONU au Quatuor.

Le Rapporteur spécial invite le Secrétaire général à user de son influence pour amener le Quatuor à faire du respect des droits de l'homme, du droit international humanitaire, de l'avis consultatif de la Cour internationale de Justice et des considérations de neutralité et d'impartialité, les principes directeurs de son action dans le territoire palestinien occupé. Si cela s'avérerait impossible, l'ONU devrait se retirer du Quatuor.

Enfin, le Rapporteur spécial demande à l'Assemblée générale de prier la Cour internationale de Justice de rendre un nouvel avis consultatif sur les conséquences d'une occupation prolongée pour le peuple occupé, la puissance occupante et les États tiers.

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I. Introduction

1. Le mandat du Rapporteur spécial sur la situation des droits de l'homme dans le territoire palestinien occupé est de faire des enquêtes, des études et des rapports sur le respect des droits de l'homme dans le territoire palestinien occupé, non de rendre compte des politiques qui y sont appliquées. En effet, au vu des précédents rapports, certains États ont mis en garde le Rapporteur spécial contre le dépassement de son mandat. Il est donc pleinement conscient des limites assignées à celui-ci. Il existe cependant une zone intermédiaire entre les droits de l'homme et la politique, à l'intérieur de laquelle ils interagissent, et qui doit relever du présent mandat. Malheureusement, cette zone s'est élargie et continue de s'étendre. Aujourd'hui, la plupart des questions qualifiées de politique ont un lien avec les droits de l'homme. Le clivage politique entre la Cisjordanie et Gaza, l'asphyxie économique de Gaza, la confiscation de terres palestiniennes occasionnée par la construction du mur et l'expansion des colonies de peuplement, les incursions des Forces de défense israéliennes (FDI) à Gaza et en Cisjordanie, l'annexion progressive de la vallée du Jourdain, le traitement des réfugiés, les barrages routiers et les points de contrôle en Cisjordanie et la judaïsation de Jérusalem sont autant de questions politiques qui soulèvent, en même temps, des points importants concernant les droits de l'homme et le droit international humanitaire. Les politiques menées par les organisations internationales, telles que l'ONU et l'Union européenne, ont également des incidences sur les droits de l'homme. Ces questions ne peuvent être négligées lorsqu'on rend honnêtement compte de la situation actuelle des droits de l'homme dans le territoire palestinien occupé.

2. Quatre thèmes constitueront la trame du présent rapport : le droit à l'autodétermination du peuple palestinien; l'occupation israélienne de la Cisjordanie, Gaza et Jérusalem-Est; la violation des droits de l'homme et du droit international humanitaire par la puissance occupante; l'action des organisations internationales en faveur ou au détriment des droits de l'homme. Le Rapporteur spécial, depuis qu'il a pris ses fonctions en 2001, se rend dans le territoire palestinien occupé deux fois par an. Sa dernière visite dans la région remonte à décembre 2006, il n'a malheureusement pas pu y retourner depuis. Il compte toutefois s'y rendre avant la soumission du présent rapport.

II. Autodétermination

3. Que le peuple palestinien ait droit à l'autodétermination est indiscutable. Ce droit a été reconnu par le Conseil de sécurité, l'Assemblée générale, la Cour internationale de Justice et Israël lui-même. Dans son avis consultatif du 9 juillet 2004 sur les *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, la Cour internationale de Justice a constaté que « S'agissant du principe du droit des peuples à disposer d'eux-mêmes, la Cour observera que l'existence d'un "peuple palestinien" ne saurait plus faire débat »¹. Le 1^{er} décembre 2006, l'Assemblée générale a adopté la résolution 61/25, dans laquelle elle a souligné la nécessité de « réaliser les droits inaliénables du peuple palestinien, au

¹ *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, avis consultatif, *CIJ, Recueil 2004*, p. 136, par. 118.

premier rang desquels le droit à l'autodétermination et le droit de créer un État indépendant » (voir aussi la résolution 61/152 du 19 décembre 2006).

4. Le territoire sur lequel doit s'exercer le droit à l'autodétermination s'étend incontestablement à la Cisjordanie, Jérusalem-Est et Gaza. Cela est implicite dans bien des résolutions des organes de l'ONU qui proclament le droit du peuple palestinien à l'autodétermination. L'existence de ce droit ne fait aucun doute, vu qu'il est affirmé dans le cadre de la « solution prévoyant deux États », c'est-à-dire une région « dans laquelle deux États, Israël et la Palestine, vivent côte à côte, à l'intérieur de frontières sûres et reconnues »². En préconisant cette solution, le Conseil de sécurité et l'Assemblée générale envisagent la création d'un État palestinien pour le peuple palestinien. C'est ce qu'on souligne lorsqu'on demande « le raccordement permanent de la bande de Gaza et de la Cisjordanie »³.

5. Depuis bientôt 60 ans, Israël refuse et entrave le droit à l'autodétermination du peuple palestinien. À l'heure qu'il est, ce droit est menacé par la séparation politique entre la Cisjordanie et Gaza, due au fait que le Hamas avait pris le pouvoir à Gaza, en juin 2007, et que le Fatah avait pris le pouvoir en Cisjordanie. Le Gouvernement d'unité nationale palestinien, dont la composition avait été soigneusement négociée, a été emporté par les luttes intestines qui avaient éclaté en mai et juin et qui ont fait quelque 200 victimes palestiniennes, pour la plupart des militants du Fatah. À l'heure où ce rapport est écrit (août), on ne peut espérer une réconciliation immédiate entre le Hamas et le Fatah, ce qui préoccupe profondément le Rapporteur spécial, car le droit à l'autodétermination est un droit de l'homme essentiel et fondamental. Le Quatuor, l'ONU, l'Union européenne et d'autres institutions internationales déterminées à assurer la concrétisation du droit du peuple palestinien à l'autodétermination doivent également s'en préoccuper. L'intérêt porté au problème ne doit toutefois pas être une manifestation de soutien – politique, économique ou militaire – à une faction au détriment de l'autre, il doit plutôt tendre à la réconciliation entre les deux factions de façon à rendre possible l'exercice du droit à l'autodétermination à l'intérieur des frontières de 1967 de l'unité territoriale palestinienne concernée par l'autodétermination, qui comprend la Cisjordanie, Jérusalem-Est et Gaza. Des suggestions tendant à rattacher la Cisjordanie à la Jordanie et Gaza à l'Égypte compromettraient gravement le droit du peuple palestinien à l'autodétermination, tel qu'il a évolué au cours des dernières décennies. Malheureusement, le Quatuor (dont l'ONU est membre) œuvre peu, à l'heure actuelle, à la promotion de l'unité du peuple palestinien. Au contraire, il poursuit une politique séparatiste consistant à préférer une faction à l'autre, à dialoguer avec une et pas l'autre, à traiter avec une en excluant l'autre.

III. L'occupation par Israël du territoire palestinien, en particulier Gaza

6. Le territoire palestinien est occupé depuis si longtemps – 40 ans – que dans certains milieux, on a tendance à perdre de vue cette réalité et à prendre le territoire palestinien occupé pour une entité « non occupée ». Aussi finit-on par avoir l'impression qu'Israël et la Palestine sont deux États qui s'opposent, Israël étant

² Résolution du Conseil de sécurité 1397 (2002) et 1515 (2003); résolution 61/25 de l'Assemblée générale.

³ Résolution 61/25 de l'Assemblée générale.

perçu comme la victime et la Palestine comme un État voisin agressif et terroriste. Bien entendu, rien n'est moins vrai. Le territoire palestinien, qui comprend la Cisjordanie, Jérusalem-Est et Gaza, reste un territoire sous occupation, occupé par Israël. Dans la mesure où il y a une partie « victime », c'est la Palestine, car forcément la partie occupée est victime de l'occupant.

7. La Cour internationale de Justice a réaffirmé qu'Israël, qui occupe le territoire palestinien, est soumis aux obligations imposées par le droit international à la puissance occupante, dans son avis consultatif sur les conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, lorsqu'elle a conclu que les territoires palestiniens (y compris Jérusalem-Est) demeuraient des territoires occupés et qu'Israël y avait conservé la qualité de puissance occupante⁴. Il en résulte, selon la Cour, que la Convention de Genève relative à la protection des personnes civiles en temps de guerre (quatrième Convention de Genève) est applicable au territoire palestinien occupé, tout comme les pactes internationaux relatifs aux droits de l'homme de 1966⁵.

8. L'occupation a beau durer, les obligations d'Israël ne s'en trouvent pas réduites⁶. Au contraire, elles se sont accrues en raison de la nature de l'occupation israélienne qui a amené à considérer que celle-ci étant devenue, au fil des années, entachée d'illégalité⁷. Dans ces circonstances, le Rapporteur spécial a proposé, dans son rapport au Conseil des droits de l'homme en mars 2007 (A/HRC/4/17), que la Cour internationale de Justice soit priée de rendre un nouvel avis consultatif sur les conséquences juridiques d'une occupation prolongée. Il pourrait être demandé à la Cour de se prononcer sur les conséquences juridiques d'une occupation prolongée qui a acquis certaines des caractéristiques de l'apartheid et du colonialisme et qui viole nombre des obligations fondamentales d'une puissance occupante. Cette occupation cesse-t-elle de relever d'un régime licite, eu égard notamment à certaines « mesures visant à garantir les propres intérêts de l'occupant »⁸? S'il en est ainsi, quelles sont les conséquences juridiques pour le peuple sous occupation, la puissance occupante et les États tiers? L'avis en question pourrait non seulement apporter une précision juridique sur les conséquences de l'occupation israélienne des territoires palestiniens mais aussi accentuer la pression sur la communauté internationale pour contraindre Israël à s'acquitter de ses obligations en tant que puissance occupante. Certes, l'avis consultatif de 2004 sur les conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé a eu peu d'effets à ce jour. Toutefois, on ne doit pas oublier que l'ONU avait demandé quatre avis consultatifs à la Cour internationale de Justice pour l'éclairer sur l'attitude à adopter face à l'occupation du Sud-Ouest africain (actuelle Namibie) par l'Afrique du Sud.

9. L'avis consultatif sur les conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé portait sur la construction d'un mur en Cisjordanie et à Jérusalem-Est. N'ayant pas été saisie de la question du statut juridique de Gaza, la Cour semble s'être limitée à confirmer l'application aux deux

⁴ *Avis consultatif*, op. cit., par. 78.

⁵ *Ibid.*, n^{os} 101, 111 et 112.

⁶ Voir A. Roberts, « Prolonged Military Occupation: The Israeli-Occupied Territories since 1967 », *American Journal of International Law*, vol. 84, 1990, p. 55 à 57 et 95.

⁷ O. Ben-Naftali, A. M. Gross & K. Michaeli, « Illegal Occupation: Framing the Occupied Palestinian Territory », *Berkeley Journal of International Law*, vol. 23, 2006, p. 551 à 614.

⁸ E. Benvenisti, *The International Law of Occupation*, Princeton University Press, 1993, p. 216.

entités visées du statut de territoire sous occupation⁹. Ce facteur, conjugué à l'évacuation par Israël de ses colonies de peuplement et le retrait, en 2005, de ses Forces de défense de Gaza où elles étaient stationnées en permanence, accrédite l'idée que Gaza n'est plus un territoire occupé. Le 15 septembre 2005, le Premier Ministre Sharon a déclaré devant l'Assemblée générale que le retrait israélien de Gaza mettait fin aux obligations d'Israël envers ce territoire. Par la suite, dans des interventions devant la Cour suprême israélienne, le Gouvernement israélien a soutenu qu'il n'occupait plus Gaza et qu'il n'était plus lié par le droit international humanitaire dans ses décisions concernant les habitants de ce territoire. Récemment, le 8 juillet, le Comité ministériel israélien aux affaires législatives a approuvé un projet de loi reconnaissant Gaza comme une « entité étrangère ». En substance, la position israélienne est que la responsabilité de la population civile de Gaza, y compris le fonctionnement de son économie, incombe uniquement à l'Autorité palestinienne.

10. La thèse selon laquelle l'occupation israélienne de Gaza a pris fin ne s'appuie sur aucun fondement juridique ou factuel. C'est ce que souligne une étude intitulée *Disengaged Occupiers: The Legal Status of Gaza*, par Sari Bashi et Kenneth Mann, publiée en janvier 2007 par l'ONG israélienne Gisha : Centre juridique pour la liberté de circulation. Cette étude montre de manière convaincante qu'en droit international, le critère pour déterminer si un territoire est sous occupation est moins la présence permanente de l'armée de la puissance occupante sur le territoire occupé que le contrôle effectif qu'elle exerce sur celui-ci¹⁰. Les progrès technologiques permettent à Israël de garder le contrôle sur des aspects importants de la vie quotidienne à Gaza sans y maintenir une présence militaire permanente. Cela passe par :

a) **Un contrôle effectif des six voies d'accès terrestre à Gaza** : le point de passage d'Erez est pratiquement fermé aux Palestiniens voulant se rendre en Israël ou en Cisjordanie. Celui de Rafah reliant l'Égypte à la Cisjordanie et qui est régi par l'Accord réglant les déplacements et le passage, conclu sous l'égide des États-Unis, par Israël et l'Autorité palestinienne le 15 novembre 2005, a été fermé par Israël depuis juin 2006 durant de longues périodes. Le principal point d'entrée de marchandises, à Karni, est strictement surveillé par Israël et depuis juin 2006, il a également fait l'objet de fermetures répétées, ce qui a eu des conséquences désastreuses pour l'économie palestinienne;

b) **Un contrôle effectué par le biais d'incursions militaires, de tirs de roquette et de bangs supersoniques** : certains quartiers de Gaza sont déclarés zones interdites aux habitants qui risquent d'être fusillés s'ils y pénètrent;

c) **Un contrôle total de l'espace aérien de Gaza et de ses eaux territoriales**;

d) **Un contrôle des registres de l'état civil des Palestiniens** : la détermination des statuts de « Palestinien » et de résident de Gaza et de la Cisjordanie est sous le contrôle de l'armée israélienne. Même lorsqu'il est ouvert, le point de passage de Rafah n'offre l'accès à Gaza qu'aux seuls détenteurs d'une

⁹ *Avis consultatif*, op. cit., par. 101.

¹⁰ Voir *États-Unis c. Wilhelm List et al.* (affaire des otages), United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. III, 1949, p. 56; *République démocratique du Congo c. Ouganda*, C.I.J. Recueils 2005, par. 173 et 174.

pièce d'identité palestinienne; ainsi, contrôler les registres de l'état civil palestinien c'est aussi garder le contrôle sur qui peut entrer à Gaza ou en sortir. Depuis 2000 et à quelques exceptions près, Israël n'a pas autorisé de nouvelles inscriptions sur les registres de l'état civil palestinien;

e) **Un contrôle de la capacité d'exercice de fonctions gouvernementales par l'Autorité palestinienne** : Israël contrôle la capacité de l'Autorité palestinienne d'assurer aux habitants de Gaza et de la Cisjordanie l'offre de services et le fonctionnement des organes gouvernementaux, y compris un contrôle sur le transfert des retenues d'impôts évaluées à 50 % des recettes d'exploitation de l'Autorité palestinienne. En outre, Gaza et la Cisjordanie sont deux provinces d'un même segment territorial, avec un système d'institutions civiles unifiées et pareilles sur toute leur étendue, financées par le même budget principal et gouvernées par une autorité centrale unique. C'est dire donc que par le contrôle direct qu'il continue d'exercer en Cisjordanie, Israël continue d'exercer un contrôle indirect à Gaza.

11. Le fait que Gaza demeure un territoire sous occupation signifie que les mesures prises par Israël la concernant doivent être confrontées aux normes du droit international humanitaire et des droits de l'homme.

12. Depuis juin 2006, Israël procède à la fois à des opérations armées de grande envergure et à de brèves incursions militaires dans Gaza.

13. Au cours des opérations « Pluies d'été » et « Nuages d'automne », entre juin et novembre 2006, les Forces de défense israéliennes ont mené 364 incursions militaires à différents endroits de Gaza, appuyées par des tirs continus d'artillerie et de missiles air-sol. Les missiles, les obus et les bulldozers ont détruit ou gravement endommagé des maisons, des écoles, des hôpitaux, des mosquées, des édifices publics, des ponts, des canalisations d'eau et des réseaux d'égouts. Le 27 juin, l'armée de l'air israélienne a détruit les six transformateurs de l'unique centrale produisant de l'électricité à usage domestique de la bande de Gaza, qui fournissait 43 % de l'électricité consommée chaque jour à Gaza. En conséquence, la moitié de la population de Gaza a été privée d'électricité pendant plusieurs mois. Des champs et des plantations d'agrumes ont été rasés au bulldozer, et pendant la première phase de l'opération « Pluies d'été », des F-16 ont survolé Gaza à basse altitude et à une vitesse supersonique, provoquant une terreur générale parmi la population. Les offensives militaires israéliennes ont contraint des milliers de Palestiniens à désertir leur maison.

14. Beit Hanoun, ville de 40 000 habitants dans le nord de la bande de Gaza, a été la cible d'une offensive militaire particulièrement violente en novembre, pendant l'opération « Nuages d'automne ». Au cours d'une incursion qui a duré six jours, les FDI ont tué 82 Palestiniens, dont au moins une moitié de civils (comprenant 21 enfants). Plus de 260 personnes, parmi lesquelles 60 enfants, ont été blessées, et des centaines d'hommes âgés de 16 à 40 ans ont été arrêtés. Les 40 000 habitants ont été confinés chez eux par un couvre-feu tandis que les chars et les bulldozers israéliens saccageaient la ville, détruisant 279 maisons, une mosquée vieille de 850 ans, des édifices publics, des réseaux électriques, des écoles et des hôpitaux, rasant des vergers et défonçant les routes, les canalisations d'eau et les réseaux d'égouts. L'attaque menée par Israël contre Beit Hanoun a atteint son paroxysme le 8 novembre 2006, avec le pilonnage d'une maison où 19 personnes ont péri et 55 autres ont été blessées. Située dans un quartier densément peuplé, la maison était habitée par la famille Al-Athamnah, qui a perdu 16 de ses membres ce jour funeste.

Sur les 19 civils tués, il y avait sept femmes et huit enfants. Malheureusement, Israël a refusé qu'une enquête internationale soit conduite sur cette affaire. Il a refusé l'entrée de son territoire et du territoire palestinien occupé à une mission mandatée par le Conseil des droits de l'homme, que l'archevêque Desmond Tutu aurait dirigée. Le refus d'Israël d'autoriser une enquête internationale sur la tuerie des 19 personnes à Beit Hanoun, ou de conduire lui-même une enquête impartiale, est regrettable puisqu'il paraît indiscutable que le pilonnage aveugle d'un quartier civil n'abritant aucun objectif militaire visible constitue un crime de guerre.

15. Des incursions militaires sporadiques ont été menées à Gaza durant les quatre derniers mois. Au cours de la période du 20 au 27 juin 2007, les FDI ont opéré sept incursions dans Gaza, causant la mort d'au moins 17 Palestiniens (parmi lesquels six civils, dont deux enfants) et en blessant 39 autres. Du 27 juin au 3 juillet, 19 Palestiniens ont été tués : 8 par des obus de chars des FDI (parmi les victimes, un garçon de 10 ans); 7 par des frappes aériennes israéliennes; 3 au cours d'affrontements armés avec les soldats des FDI et le dernier, qui avait été atteint plus tôt, a succombé à ses blessures.

16. Israël a longuement justifié ses attaques et incursions en déclarant qu'il s'agissait d'opérations de défense préventive contre le lancement de roquettes Qassam sur Israël, visant l'arrestation ou l'élimination de militants présumés ou la destruction de passages souterrains. Certes, les tirs de roquettes sur Israël par des milices palestiniennes en dehors de toute cible militaire, qui ont tué et blessé des Israéliens sont intolérables et constituent un crime de guerre¹¹. Il n'en demeure pas moins que des questions préoccupantes se posent au sujet de la proportionnalité de la riposte militaire israélienne qui n'a pas fait de distinction entre les cibles militaires et civiles. On peut fort bien soutenir qu'Israël a transgressé les règles les plus fondamentales du droit international humanitaire, commettant des crimes de guerre au sens de l'article 147 de la quatrième Convention de Genève et de l'article 85 du Protocole additionnel aux Conventions de Genève du 12 août 1949, relatif à la protection des victimes des conflits armés internationaux (Protocole I). Au nombre de ces crimes, des attaques lancées directement contre des civils et des biens de caractère civil et des attaques lancées sans distinction entre les objectifs militaires et les civils ou les biens de caractère civil (art. 48, 51 4) et 52 1) du Protocole I); le recours excessif à la force par des attaques disproportionnées contre des civils et des biens de caractère civil (art. 51 4) et 51 5) du Protocole I); le fait de semer la terreur parmi la population civile (art. 33 de la quatrième Convention de Genève et art. 51 2) du Protocole I); et la destruction de biens non justifiée par la nécessité militaire (art. 53 de la quatrième Convention de Genève).

17. Gaza est devenue un territoire assiégé et coupé du monde sous l'effet conjugué des facteurs suivants : les sanctions économiques imposées par Israël et par l'Occident à la suite du succès électoral du Hamas au scrutin de janvier 2006; la capture du caporal Gilad Shalit en juin 2006; et la prise du pouvoir par le Hamas en juin 2007. Les frontières extérieures sont pour la plupart fermées et ne sont ouvertes que pour permettre un minimum d'importations et d'exportations, et des voyages à l'étranger. Cela a débouché sur une crise humanitaire, soigneusement orchestrée par Israël, qui punit la population de Gaza sans que cela ne déclenche d'alarme en Occident. Il s'agit d'un étranglement maîtrisé qui contrevient gravement aux normes

¹¹ Voir Human Rights Watch, *Indiscriminate Fire: Palestinian Rocket Attacks on Israel and Israeli Shelling in the Gaza Strip*, juillet 2007.

des droits de l'homme et du droit humanitaire et qui semble, malgré tout, s'inscrire dans les limites généreuses de la tolérance internationale.

18. Il existe six portes d'entrée à Gaza, toutes sous contrôle israélien, dont les deux principales sont Rafah, le point de passage emprunté par les habitants de Gaza pour se rendre en Égypte, et Karni, poste commercial pour l'importation et l'exportation de marchandises. Elles sont régies par l'Accord réglant les déplacements et le passage, qui prévoit le libre déplacement des habitants de Gaza vers l'Égypte en passant par Rafah, et une augmentation substantielle du nombre de camions transportant les exportations par le poste de Karni. Depuis le 25 juin 2006, suite à l'arrestation du caporal Shalit et surtout depuis la mi-juin 2007, après la prise du pouvoir par le Hamas, le point de passage de Rafah a été fermé pendant de longues périodes, Israël ayant empêché le personnel de la Mission d'assistance frontalière de l'Union européenne, chargée d'administrer ce poste, de s'acquitter de sa mission. Entre la mi-juin et le début d'août, quelque 6 000 Palestiniens ont été bloqués du côté égyptien de la frontière, sans logement décent ni installations, et privés du droit de retourner chez eux. Plus de 30 personnes ont trouvé la mort durant cette attente. La terrible situation endurée par les civils palestiniens n'a nullement été prise en considération par Israël lorsqu'il a décidé de fermer le passage de Rafah. Le point de passage de Karni a lui aussi été fermé de longues périodes au cours des 18 derniers mois, plus précisément depuis la mi-juin 2007.

19. Le siège de Gaza a eu de lourdes conséquences sur son économie. L'emploi en a énormément souffert. Le 9 juillet 2007, l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient (UNRWA) a annoncé qu'il avait mis un terme à tous ses projets de construction à Gaza parce qu'il n'arrivait plus à trouver des matériaux de construction tels que le ciment. Cela a compromis 121 000 emplois occupés par des personnes travaillant à la construction de nouvelles écoles, de maisons, d'installations de distribution d'eau et de dispensaires. De plus, 80 % des 3 900 usines fonctionnant à Gaza ont été contraintes de fermer faute de matériaux de construction devant être importés par le poste de Karni. Cela a contribué à détériorer les moyens d'existence de 30 000 personnes. La fermeture de la frontière entrave également l'exportation de produits agricoles, privant les agriculteurs de leur revenu. La pêche a pratiquement disparu, conséquence de l'interdiction de pêcher le long de la côte de Gaza, rigoureusement appliquée par les gardes-côtes israéliens. Les fonctionnaires qui conservent, en théorie, leur emploi, ne perçoivent plus de salaire, pénalisés par le refus d'Israël de transférer les retenues fiscales dues à l'Autorité palestinienne. La Banque mondiale a estimé à 3 200 le nombre de sociétés qui ont fermé en juin, laissant derrière elles 65 000 chômeurs.

20. Par ailleurs, l'abrogation du Code des douanes de Gaza par les autorités israéliennes a eu pour effet de bloquer dans des ports israéliens 1 300 conteneurs de biens commerciaux destinés à Gaza, entraînant une pénurie des produits de première nécessité tels que le lait en poudre, le lait pour bébé et l'huile végétale. Des incursions militaires ont obligé des écoles à fermer. Selon le Ministère de la santé palestinien, 81 produits inscrits sur la liste des médicaments de base, du fait de la crise financière, étaient en rupture de stock. La santé mentale constitue un grave problème à cause des traumatismes causés par les incursions militaires.

21. La pauvreté est généralisée. Plus de 90 % de la population vit en dessous du seuil de pauvreté officiellement défini. L'Office de secours et de travaux des

Nations Unies et le Programme alimentaire mondial fournissent une aide alimentaire à 1,1 million d'habitants de Gaza sur une population de 1,4 million. Cette aide alimentaire consiste en rations de farine, de riz, de sucre, d'huile de tournesol, de lait en poudre et de lentilles. Rares sont ceux qui peuvent se permettre d'acheter de la viande, du poisson (quasiment introuvable, de toute façon, à cause de l'interdiction de pêcher), des légumes ou des fruits. Le moral est bas. À Gaza, le tissu même de la société est menacé par le siège.

22. Dans un rapport du 11 juillet 2007, la Banque mondiale a indiqué que la fermeture prolongée des frontières de Gaza pouvait aboutir à l'effondrement économique « irréversible » de Gaza. Le 19 juillet, la Commissaire générale de l'UNRWA, M^{me} Karen AbuZayd, a averti que sans l'ouverture du point de passage de Karni, l'économie locale s'effondrerait.

23. Par son siège de Gaza, Israël a violé toute une série d'obligations qui lui incombent, en vertu tant du droit international des droits de l'homme que du droit international humanitaire. Le Pacte international relatif aux droits économiques, sociaux et culturels dispose que chaque personne a droit « à un niveau de vie suffisant pour elle-même et sa famille, y compris une nourriture, un vêtement et un logement suffisants », le droit d'être à l'abri de la faim et le droit à l'alimentation (art. 11) et que chaque personne a droit à la santé, autant de droits gravement violés. Par-dessus tout, Israël a enfreint l'interdiction d'infliger des châtiments collectifs à une population occupée, énoncée à l'article 33 de la quatrième Convention de Genève. Le recours systématique et excessif à la force contre des civils et des biens de caractère civil, la destruction d'installations de desserte en eau et électricité, le dynamitage d'édifices publics, les restrictions à la liberté de circulation, la fermeture des points de passage et les conséquences de ces mesures sur la santé publique, l'alimentation, la vie des familles et l'état psychologique du peuple palestinien constituent une punition collective flagrante. La capture du caporal Gilad Shalit et le lancement incessant de roquettes Qassam sur Israël ne sauraient être tolérés. Pour autant, ces actes ne peuvent justifier la punition brutale de tout un peuple, comme le fait Israël.

24. Gaza n'est pas un État auquel d'autres États peuvent librement imposer des sanctions économiques en vue de créer une crise humanitaire, ou entreprendre une intervention militaire disproportionnée mettant en péril la population civile au nom de la légitime défense. C'est un territoire sous occupation dont tous les États devraient se préoccuper du bien-être et promouvoir le progrès social. Selon l'avis consultatif de la Cour internationale de Justice sur les conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, c'est une obligation pour tout État partie à la quatrième Convention de Genève « de s'assurer du respect par Israël du droit international humanitaire tel que défini dans cette convention »¹². Israël a enfreint des obligations *erga omnes* dont la violation préoccupe tous les États, qui doivent en conséquence y mettre fin. En premier lieu, la puissance occupante, Israël est tenu de cesser de violer le droit international humanitaire. Mais d'autres États ayant pris part au siège de Gaza ont également porté atteinte à ce droit et doivent cesser leurs faits illicites. Que Gaza soit dirigé par un « groupe terroriste » n'est pas une excuse. La notion de terrorisme est relative, spécialement dans le contexte d'une occupation, puisque la résistance à l'occupation sera toujours vue comme du terrorisme par la puissance occupante et ses complices. Les

¹² Avis consultatif, op. cit. par. 159.

combattants de la résistance française étaient traités de terroristes par l'occupant allemand, et les membres de la South West Africa People's Organization, qui luttait contre l'occupation sud-africaine de la Namibie, étaient des terroristes pour le régime sud-africain. Aujourd'hui, ces résistants sont considérés comme des héros et des patriotes. Telle est la conséquence inévitable de la résistance à l'occupation.

IV. Les droits de l'homme en Cisjordanie et à Jérusalem-Est

25. On peut sans doute noter une amélioration dans la situation des droits de l'homme en Cisjordanie depuis la mi-juin. La prise de pouvoir à Gaza par le Hamas a entraîné un rapprochement entre le Gouvernement d'urgence du Président Abbas conduit par le Premier Ministre Salam Fayyad, et Israël d'une part, et les États-Unis et le Quatuor de l'autre. En voici quelques exemples :

- La libération de 255 prisonniers palestiniens, appartenant principalement au Fatah;
- Le déblocage de 119 millions dollars des États-Unis correspondant aux taxes qu'Israël perçoit pour le compte de l'Autorité palestinienne sur les marchandises importées dans le territoire palestinien occupé et saisies par Israël depuis l'élection du Gouvernement du Hamas en janvier 2006;
- L'amnistie accordée à 178 militants du Fatah recherchés par Israël;
- Les promesses, pour l'instant non tenues, de cesser les incursions militaires en Cisjordanie, de réduire le nombre des points de contrôle et d'éliminer les avant-postes de colons;
- La proposition des États-Unis de fournir une aide d'un montant de 190 millions de dollars;
- La bénédiction du Quatuor qui, le 19 juillet, a déclaré son soutien au gouvernement palestinien de M. Fayyad, et sa position en faveur d'une aide financière directe et rapide à son gouvernement « pour contribuer à réformer, protéger et renforcer les infrastructures et les institutions vitales du pays, et pour apporter un soutien à l'état de droit ».

26. Le soutien prêté récemment au Gouvernement de M. Fayyad en Cisjordanie n'a modifié ni adouci en rien la position idéologique d'Israël qui constitue une violation grave des droits de l'homme en Cisjordanie. La construction du mur (ou barrière) se poursuit et les colonies de peuplement continuent de s'étendre, les points de contrôle sont toujours en vigueur; la judaïsation de Jérusalem se prolonge; et l'annexion de facto de la vallée du Jourdain perdure. En outre, au moment de la rédaction de ce texte, des incursions militaires, certes dirigées principalement contre le Hamas, se poursuivent sans relâche en Cisjordanie, ainsi que les destructions de maisons.

A. Le mur

1. Contexte général

27. Le mur qu'Israël est en train de construire, en grande partie sur le territoire palestinien, est manifestement illégal. Dans son avis consultatif du 9 juillet 2004, la Cour internationale de Justice a affirmé que cette mesure est contraire au droit international et qu'Israël était dans l'obligation d'en cesser l'édification et de démanteler les portions de l'ouvrage déjà en place. Israël ne prétend plus que le mur sert des objectifs de sécurité, et admet à présent que celui-ci a été en partie construit pour englober des colonies de Cisjordanie et les mettre sous la protection d'Israël. Le fait que 76 % des colons de Cisjordanie sont protégés par le mur suffit à le prouver.

28. La longueur prévue du mur est de 721 kilomètres, et 59% en a déjà été terminé. Deux cent kilomètres du mur ont été construits depuis l'avis consultatif de la Cour internationale de Justice qui le déclare illégal. On estime qu'à la fin des travaux, quelque 60 000 Palestiniens de Cisjordanie de 42 villages et agglomérations vivront dans la zone d'accès réglementé située entre le mur et la Ligne verte. Cette zone constituera 10,2 % des terres palestiniennes en Cisjordanie. Plus de 500 000 Palestiniens vivent à moins d'un kilomètre du mur, du côté est, et doivent le franchir pour se rendre dans leurs champs ou sur leur lieu de travail ou maintenir des relations avec leur famille. Quatre-vingt pour cent du mur se trouve en territoire palestinien et il s'avance sur 22 kilomètres en Cisjordanie afin d'englober le bloc de colonies d'Ariel. Dans la zone d'accès réglementé se trouve une bonne partie des ressources en eau les plus précieuses de Cisjordanie. L'achèvement du mur autour du bloc de Ma'aleh Adumim séparera Jérusalem-Est du reste de la Cisjordanie, limitant ainsi l'accès au travail, à la santé, à l'éducation et aux lieux de culte. Plus au sud, le tracé du mur autour du bloc de colonies de Gush Etzion coupera la dernière route entre Bethlehem et Jérusalem et isolera la majorité de l'arrière-pays agricole de Bethléem.

29. Sur le plan humanitaire, le mur a de lourdes conséquences pour les Palestiniens qui vivent dans la zone d'accès réglementé (située entre le mur et la Ligne verte). Il les sépare de leurs lieux de travail, des écoles, des universités et des centres médicaux spécialisés, et fragmente considérablement leur vie communautaire. En outre, il les prive d'un accès permanent aux services médicaux d'urgence. Les Palestiniens qui vivent à l'est du mur alors que leurs champs se trouvent dans la zone d'accès réglementé ont de graves problèmes économiques, parce qu'ils ne peuvent pas y accéder pour faire les récoltes ou faire paître leurs animaux sans autorisation. Or, les permis ne sont pas accordés facilement. Ceux qui veulent en obtenir un se heurtent à de nombreuses difficultés, notamment des démarches administratives vexatoires et délibérément longues ou compliquées. Le Bureau de la coordination des affaires humanitaires a estimé que 60 % des familles d'agriculteurs qui avaient des terres à l'ouest du mur ne pouvaient plus y accéder. En outre, l'ouverture et la fermeture des portes permettant d'accéder à la zone sont réglementées de manière extrêmement arbitraire, ce qui aggrave encore la situation. Une enquête réalisée par le Bureau en novembre 2006 dans 57 localités situées près du mur a montré que les Palestiniens ne pouvaient utiliser pendant toute l'année que 26 des 61 portes, et seulement pendant 64 % de l'horaire d'ouverture officiel. Les difficultés endurées par les Palestiniens qui vivent dans la zone d'accès réglementé

et dans l'enceinte du mur ont déjà poussé environ 15 000 personnes à quitter la région.

2. Jérusalem-Est

30. La construction de 75 kilomètres de mur à Jérusalem-Est est pratiquement terminée aujourd'hui, à l'exception d'une section de 200 mètres entre Dayiyat et Beit Hanina. Ce mur, qui passe à travers les quartiers palestiniens, coupant la population palestinienne en deux, est une mesure d'ingénierie sociale qui vise à judaïser la ville en réduisant le nombre de Palestiniens qui y vivent. Son tracé peut difficilement être justifié par des motifs de sécurité.

3. Indemnisation pour les dommages causés par la construction du mur

31. Dans son avis consultatif de 2004, la Cour internationale de Justice a affirmé qu'Israël avait l'obligation de réparer les dommages occasionnés aux Palestiniens par la construction du mur. Au cas où une restitution en nature s'avérerait matériellement impossible, a déclaré la Cour, Israël « serait tenu [...] d'indemniser, conformément aux règles du droit international applicables en la matière, toutes les personnes physiques ou morales qui auraient subi un préjudice matériel quelconque du fait de la construction du mur »¹³. En 2004, l'Assemblée générale a ordonné la mise en place du Registre de l'ONU concernant les dommages causés par la construction du mur dans le territoire palestinien occupé (Registre des dommages) et la mise en place d'un conseil chargé d'administrer le Registre. Le 15 décembre 2006, soit plus de deux années plus tard, comme ces mesures n'avaient toujours pas été appliquées, l'Assemblée générale a prié le Secrétaire général, lors de la dixième session extraordinaire d'urgence, dans la résolution ES-10/17 de lui présenter, dans un délai de six mois, un rapport sur les progrès accomplis dans ce domaine. C'est en réponse à cette demande que, le 10 mai 2007, le Secrétaire général a nommé Harumi Hori du Japon, Matti Paavo Pellonpää de Finlande et Michael F. Raboin des États-Unis membres du Conseil. Celui-ci s'est réuni du 14 au 16 mai 2007 et prévoit de se réunir à nouveau en août/septembre.

32. La réparation des violations des droits de l'homme des Palestiniens et des violations des règles de droit international humanitaire du fait de la construction du mur est une question relative aux droits de l'homme qui relève du mandat actuel du Rapporteur spécial. Le Rapporteur spécial partage les préoccupations exprimées par les parties prenantes et la société civile sur le Conseil et ses fonctions. Tout d'abord, il faut mentionner la manière opaque avec laquelle le Conseil a été nommé. De nombreux fonctionnaires des Nations Unies qui occupent des postes semblables sont élus, d'autres sont nommés après de larges consultations. Le fait que le Secrétaire général n'ait pas choisi une méthode plus transparente pour nommer le Conseil, et le fait que celui-ci soit composé de ressortissants d'États du nord, qui tout qualifiés qu'ils soient, viennent de pays qui entretiennent des relations étroites avec Israël, signifie inévitablement que les membres du Conseil devront surmonter les réserves des parties prenantes et de la société civile. Ensuite, certains se demandent comment le Conseil va percevoir son rôle. Quels critères va-t-il adopter pour décider si les réclamations sont recevables ou non et pour les vérifier? Prendra-t-il en compte les préjudices non matériels comme les séquelles sur la santé mentale et la vie

¹³ Avis consultatif, op.cit., par. 152 et 153.

familiale? Se limitera-t-il au préjudice matériel? Insistera-t-il pour avoir accès aux territoires palestiniens occupés afin d'évaluer pleinement les dommages en question ou s'en remettra-t-il à Israël quand leur accès lui sera refusé? S'assurera-t-il que les Palestiniens sont informés de leur droit de demander réparation? Y-aura-t-il des consultations avec la société civile?

B. Colonies et colons

33. Il y a quelque 140 colonies juives et 100 « avant-postes de colons » (non autorisés mais parrainés et financés par les ministères d'État) établis en Cisjordanie, y compris Jérusalem-Est. Ces colonies sont illégales car elles constituent une violation du paragraphe 6 de l'article 49 de la quatrième Convention de Genève. Leur illégalité a été confirmée à l'unanimité par la Cour internationale de Justice dans son avis consultatif sur le mur. Malgré leur caractère illégal et leur condamnation unanime par la communauté internationale, le Gouvernement israélien continue à laisser les colonies se développer, dans certains cas ouvertement et avec sa pleine approbation. En 2007, le Comité d'organisation de la municipalité de Jérusalem a approuvé des plans de construction de trois nouvelles colonies à Jérusalem-Est, l'une au sud de Ramallah et deux au nord-ouest de Bethléem. Le plus souvent, cependant, le développement se fait discrètement, sous le couvert d'une « croissance naturelle », qui atteint pour les colonies un taux moyen de 5,5 %, contre 1,7 % pour les villes israéliennes. Parfois, les colonies s'étendent illégalement au regard du droit israélien, mais rien n'est fait pour faire respecter la loi. De nombreux avant-postes, qui sont le prélude à l'implantation de colonies, ont été mis en place, et quand on menace de les démanteler, les menaces ne sont pas mises à exécution. Du fait de cette expansion, la population des colons de Cisjordanie atteint environ 260 000 personnes, celle de Jérusalem-Est près de 200 000. Comme indiqué plus haut, la construction actuelle du mur en Cisjordanie et à Jérusalem-Est vise à englober la plupart des colonies dans son enceinte. De plus, les trois grands blocs de colonies de Gush Etzion, Ma'aleh Adumim et Ariel divisent en fait le territoire palestinien en cantons, détruisant ainsi l'intégrité territoriale de la Palestine.

34. En octobre 2006, l'ONG israélienne La paix maintenant a publié une étude qui montrait, sur la base de cartes et de chiffres établis par le Gouvernement, que près de 40 % des terres occupées par les colonies israéliennes en Cisjordanie appartenaient en bien propre à des citoyens palestiniens. Ces données montrent par exemple que 86 % de la plus grande colonie de Ma'aleh Adumim et 35 % de la colonie d'Ariel se trouvent sur des propriétés privées palestiniennes, et que plus de 3 400 bâtiments situés dans des colonies sont construits sur des terres appartenant en bien propre à des citoyens palestiniens. Le 6 juillet 2007, La paix maintenant a publié une autre étude, basée sur des données officielles publiées par le Gouvernement israélien suite à une décision de justice, qui montre que les colons utilisent seulement 12 % des terres qui leur ont été allouées, mais qu'un tiers du territoire qu'ils occupent en réalité s'étend au-delà. Quatre-vingt-dix pour cent des colonies s'étendent au-delà de leurs frontières officielles malgré la quantité de terres allouées qu'ils n'utilisent pas. D'une part, l'État affecte des terrains gigantesques aux colonies, disproportionnés à la taille de celles-ci, afin de dissuader les constructions palestiniennes dans ces zones. D'autre part, une fois que la zone est

fermée aux Palestiniens, les colons commencent à saisir les terres palestiniennes adjacentes, souvent privées, qui se trouvent en dehors de leur ressort.

C. La vallée du Jourdain

35. Israël a abandonné le projet qu'il avait de construire le mur le long de l'axe du territoire palestinien occupé et de s'approprier formellement la vallée du Jourdain. Il exerce toutefois son autorité sur la région, qui représente 25 % de la Cisjordanie, tout comme il le fait sur la zone fermée entre le mur et la Ligne verte, à la frontière occidentale de la Palestine. Son intention de rester définitivement dans la vallée du Jourdain transparaît non seulement dans ses déclarations officielles, mais aussi à travers les restrictions imposées aux Palestiniens, par les contrôles exercés et l'augmentation du nombre de colonies dans la vallée.

36. Les Palestiniens qui vivent dans la vallée du Jourdain doivent détenir une pièce d'identité avec une adresse dans la vallée, obligatoire pour pouvoir s'y déplacer sans permis israélien. Les autres Palestiniens, y compris les propriétaires fonciers et les travailleurs non résidents, doivent demander un permis, qui dans la pratique n'autorise pas son détenteur à passer la nuit dans la vallée, ce qui l'oblige à faire des allers et retours quotidiens et à perdre du temps aux postes de contrôle qui relient la vallée du Jourdain au reste de la Cisjordanie. La vallée du Jourdain se trouve donc isolée.

D. Postes de contrôle et barrages routiers, obstacles à la liberté de circulation

37. Les postes de contrôle et les barrages routiers constituent une atteinte à la liberté de circulation des Palestiniens en Cisjordanie, et ont des conséquences désastreuses pour leur vie personnelle et l'économie de la région. On dénombre environ 550 de ces obstacles à la liberté de circulation, plus de 80 postes de contrôle gardés et 470 barrages non gardés, constitués de portes verrouillées, de monticules de terre, de blocs de béton et de tranchées. Par ailleurs, des milliers de postes de contrôle temporaires, connus sous le nom de « postes de contrôle volants » sont installés chaque année par les patrouilles armées israéliennes sur les routes qui sillonnent la Cisjordanie, pour des périodes limitées allant d'une demi-heure à plusieurs heures. En 2006, on a enregistré environ 7 000 de ces postes de contrôle volants¹⁴. Il y avait 488 postes de contrôle volants en juin 2007 et 409 en juillet 2007. Ces postes divisent la Cisjordanie en quatre zones distinctes : le nord (Naplouse, Djénine et Tulkarm), le centre (Ramallah), le sud (Hébron) et Jérusalem-Est. À l'intérieur de ces zones, des enclaves ont été créées par la mise en place d'un réseau de postes et de barrages. Qui plus est, les autoroutes réservées aux Israéliens fragmentent le territoire palestinien occupé en 10 petits cantons, ou bantoustans. Les villes sont coupées les unes des autres puisqu'il faut un permis pour passer d'une zone à l'autre et que ce permis est difficile à obtenir. Les postes de contrôle servent essentiellement les intérêts des colons, dans la mesure où ils sont placés près des colonies ou près des routes de contournement réservées aux seuls colons.

¹⁴ Amnesty International, *Une occupation persistante : les Palestiniens de Cisjordanie en état de siège* (juin 2007), p. 16.

38. À cause des postes de contrôle et du mauvais état des routes secondaires que les Palestiniens sont forcés d'utiliser afin de libérer les routes principales pour les colons, des trajets qui auparavant s'effectuaient en 10 à 20 minutes prennent maintenant deux à trois heures. Israël justifie ces mesures ainsi que le comportement de ses soldats aux postes de contrôle par des considérations de sécurité et prétend avoir ainsi réussi à empêcher le passage de nombreux candidats à l'attentat-suicide. L'on peut cependant envisager différemment la question de la sécurité. Les Palestiniens, eux, sont d'avis que ces mesures ont été conçues, en premier lieu, pour simplifier la vie des colons et faciliter leur traversée de la Cisjordanie sans avoir à entrer en contact avec les Palestiniens et, en second lieu, pour humilier les Palestiniens, en les traitant comme des êtres humains inférieurs. Cette situation engendre une colère réprimée qui constitue, à long terme, une menace bien plus grave pour la sécurité d'Israël.

E. Incursions militaires

39. Depuis l'élection du gouvernement du Hamas en janvier 2006, les FDI ont intensifié leurs incursions militaires en Cisjordanie. Ces raids militaires, au nombre de plusieurs centaines par mois (641 en juillet 2007), ont provoqué la mort d'environ 200 Palestiniens, blessé plus d'un autre millier, et des opérations de perquisition ont entraîné des dommages matériels et plusieurs centaines d'arrestations chaque mois. Le Gouvernement israélien a annoncé, à la suite de la prise de contrôle de la Cisjordanie par le Hamas, qu'il mettrait un terme à ses incursions militaires en Cisjordanie en témoignage de bonne volonté. À ce jour, il n'y a aucun signe d'un quelconque arrêt desdites opérations. Les incursions militaires des FDI qui sont la cause de morts, de blessures, de perquisitions et de dommages matériels, restent un élément de la vie quotidienne en Cisjordanie.

F. La situation humanitaire

40. La construction du mur, l'expansion des colonies de peuplement, les restrictions à la liberté de circulation, les destructions de maisons et les incursions militaires ont eu des conséquences désastreuses sur l'économie, la santé, l'éducation, la vie familiale et le niveau de vie des Palestiniens en Cisjordanie. Depuis 2006, la situation s'est détériorée à cause de deux facteurs : tout d'abord, le fait que le Gouvernement israélien refuse de verser à l'Autorité palestinienne les taxes d'un montant de 50 à 60 millions de dollars par mois qu'il perçoit pour le compte de cette dernière sur les marchandises importées dans le territoire palestinien occupé; ensuite le régime de sanctions imposé par les États-Unis, l'Union européenne et les autres pays occidentaux (implicitement approuvé par le Quatuor), qui se traduit par la réduction de l'aide financière et des restrictions bancaires sur le transfert de fonds à l'Autorité palestinienne et les autres institutions palestiniennes. Comme l'a déclaré Karen AbuZayd, la Commissaire générale de l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient (UNRWA) :

« Il y a une ironie stupéfiante dans le contraste entre l'engagement universel pour l'élimination de la pauvreté (exprimé dans la Déclaration du Millénaire pour le développement des Nations Unies) et la décision d'imposer aux

Palestiniens un des régimes de sanctions les plus draconiens de l'histoire récente, laissant ainsi s'installer une misère généralisée. »¹⁵

41. Au cours du mois dernier, Israël a transféré 119 millions de dollars de taxes d'importation qu'il avait illégalement saisis à l'Autorité palestinienne, et les États occidentaux du Quatuor se sont engagés à recommencer à envoyer des fonds à l'Autorité palestinienne (dans la mesure où ils ne servent pas les intérêts du Hamas à Gaza). Au moment de l'établissement du présent document, aucun changement n'est perceptible dans la situation humanitaire en Cisjordanie, du fait d'une occupation persistante, des violations des droits de l'homme décrites dans ce rapport et du refus d'Israël de verser à l'Autorité palestinienne la totalité des taxes qui lui sont dues. La pauvreté et le chômage sont à leur niveau le plus élevé, la santé et l'éducation sont perturbés par les incursions militaires, le mur et les postes de contrôle; et le tissu social de la société est menacé.

Conclusion

42. La situation en Cisjordanie n'est peut-être pas aussi grave qu'à Gaza. Cependant, ce n'est qu'une question de degré. En outre, comme à Gaza, la situation humanitaire préoccupante en Cisjordanie résulte essentiellement des violations du droit international par Israël. Le mur constitue une violation des normes de droit international humanitaire et des droits de l'homme, d'après la Cour internationale de Justice; les colonies, une violation de la Quatrième Convention de Genève; les postes de contrôle, une violation de la liberté de circulation telle que décrite dans les instruments relatifs aux droits de l'homme; les destructions de maisons, une violation de la Quatrième Convention de Genève; la crise humanitaire en Cisjordanie, provoquée par le refus du Gouvernement d'Israël de verser les taxes à l'Autorité palestinienne et d'autres violations du droit international, entraîne le non-respect de droits énoncés dans le Pacte international relatif aux droits économiques, sociaux et culturels. Comme à Gaza, les actions d'Israël en Cisjordanie constituent une politique de châtiments collectifs contre le peuple palestinien tout à fait illégale.

V. Violation des interdictions concernant la détention arbitraire, le traitement inhumain et les exécutions extrajudiciaires

Prisonniers

43. Il y a plus de 10 000 prisonniers politiques palestiniens dans les prisons israéliennes, dont 116 femmes et 380 enfants. En juillet 2007, 255 prisonniers, appartenant principalement au Fatah, ont été libérés. Les Forces de défense israéliennes continuant quotidiennement d'arrêter un grand nombre de Palestiniens au cours de leurs incursions militaires en Cisjordanie et à Gaza, la libération de ces prisonniers ne peut être considérée que comme un tout petit pas dans la bonne voie (en juillet 2007, 391 Palestiniens ont été arrêtés : 354 en Cisjordanie et 37 à Gaza).

¹⁵ Discours prononcé au Woodrow Wilson Institute à Washington (DC) le 22 mai 2007.

Traitement inhumain

44. Des griefs sérieux continuent de se faire entendre à propos du traitement réservé aux prévenus et aux détenus. D'après un rapport sur la torture et les mauvais traitements infligés aux détenus palestiniens, publié en avril 2007 par deux organisations non gouvernementales israéliennes – Hamoked (Centre de défense des particuliers) and B'Tselem (Centre israélien d'information pour les droits de l'homme dans les territoires palestiniens occupés) –, les personnes arrêtées sont soumises à des brutalités et à des actes d'humiliation, leurs besoins élémentaires ne sont pas satisfaits, et celles qui sont soupçonnées de détenir des informations qui pourraient permettre de prévenir des attaques (scénarios dits de la « bombe à retardement ») sont battues et privées de sommeil pendant plus de 24 heures et subissent des mauvais traitements corporels¹⁶. Ces actes constituent sans conteste un traitement inhumain et dégradant, voire la torture.

Exécutions extrajudiciaires et assassinats ciblés

45. Les Forces de défense israéliennes continuent d'assassiner des militants présumés en les attaquant à la roquette. Depuis 2000, quelque 500 Palestiniens, dont de nombreux passants innocents, ont été tués de cette manière. Israël prétend avoir aboli la peine de mort mais cette pratique vide cette affirmation de son sens.

VI. Le rôle de l'Organisation des Nations Unies en matière de protection des droits de l'homme dans les territoires palestiniens occupés

46. L'ONU est l'ultime défenseur des droits de l'homme dans la communauté internationale, puisqu'elle dispose d'organismes, de fonctionnaires et d'institutions politiques qui se consacrent à cette cause. Dans les territoires palestiniens occupés, des organismes tels que l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient, le Bureau de la coordination des affaires humanitaires, le Programme des Nations Unies pour le développement, le Haut-Commissariat des Nations Unies aux droits de l'homme, le Programme alimentaire mondial, la Banque mondiale, le Fonds des Nations Unies pour l'enfance, l'Organisation mondiale de la santé, l'Organisation internationale du Travail et l'Organisation des Nations Unies pour l'alimentation et l'agriculture s'attachent à promouvoir le développement et à défendre les droits de l'homme. Un personnel dévoué fait vivre les idéaux de la Charte des Nations Unies en apportant son aide à un peuple vivant sous occupation. Il est en effet difficile d'imaginer comment les Palestiniens pourraient survivre sans l'aide d'organismes tels que l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient. L'histoire est malheureusement tout autre s'agissant des hautes instances politiques à New York.

47. En ce qui concerne les territoires palestiniens occupés, le Conseil de sécurité a renoncé en grande partie à ses pouvoirs au profit d'un organe amorphe connu sous le nom de Quatuor, qui se compose de l'ONU, de l'Union européenne, des États-Unis et de la Fédération de Russie. Le Quatuor, constitué de manière non officielle en 2003 sans résolution ni mandat du Conseil de sécurité ou de l'Assemblée générale, a

¹⁶ *Utterly Forbidden. The Torture and Ill-Treatment of Palestinian Detainees* (avril 2007).

pour mission de promouvoir la paix conformément à la Feuille de route pour la paix, à laquelle Israël a apposé 14 réserves, et qui est maintenant irrémédiablement dépassée. Dans son rapport de fin de mission établi en mai 2007, Alvaro de Soto, ancien Coordonnateur spécial des Nations Unies pour le processus de paix au Moyen-Orient et Envoyé de l'ONU auprès du Quatuor, a déclaré ce qui suit : « Dans les faits, on peut dire que le Quatuor est un petit groupe d'amis des États-Unis et que ceux-ci ne ressentent le besoin de le consulter étroitement que lorsque c'est dans leur intérêt » (par. 63). Malgré son mandat équivoque et la légalité contestable de ses actions, le Quatuor n'a jamais été remis en question par le Conseil de sécurité ni l'Assemblée générale.

48. Le Quatuor n'estime pas qu'il relève de ses fonctions de promouvoir le respect des droits de l'homme, du droit international humanitaire, de l'avis consultatif de la Cour internationale de Justice, du droit international ou des innombrables résolutions adoptées par l'ONU sur la question des territoires palestiniens occupés. Dans ses déclarations périodiques, il ne fait allusion que de manière à peine critique à l'expansion des colonies et à la situation humanitaire dans les territoires palestiniens occupés et ne condamne jamais la poursuite de l'occupation ni les violations du droit international humanitaire (en particulier de la quatrième Convention de Genève) et des droits de l'homme perpétrées par Israël. Par ailleurs, le Quatuor n'a même jamais évoqué l'avis consultatif rendu par la Cour internationale de Justice. Depuis janvier 2006, les territoires palestiniens occupés subissent des sanctions économiques, notamment l'interruption de l'aide versée par certains donateurs, l'imposition de restrictions bancaires et la saisie de certaines taxes. Si les États-Unis, l'Union européenne et Israël doivent endosser au premier chef la responsabilité de ces actions, le Quatuor doit en endosser la responsabilité indirecte¹⁷. Dernièrement, le Quatuor s'est engagé dans une politique hostile à l'autodétermination palestinienne en apportant son soutien à une faction palestinienne, le Fatah, aux dépens de l'autre, le Hamas, et en ne faisant rien pour restaurer l'unité du peuple palestinien¹⁸. Quant à la bande de Gaza, le Quatuor semble l'avoir purement et simplement abandonnée.

49. Les actions des États-Unis et de l'Union européenne au sein du Quatuor peuvent s'expliquer par leur volonté de ne pas déplaire à leurs électeurs et leurs contraintes d'ordre interne. Pour ce qui est de la Fédération de Russie, elle semble plutôt mal à l'aise dans ce groupe et s'efforce, en vain, d'adopter une approche équilibrée vis-à-vis de la situation dans les territoires occupés. Mais quelle est donc la position de l'ONU, censée protéger la légitimité inscrite dans la Charte des

¹⁷ Dans son rapport de fin de mission de mai 2007, Alvaro de Soto déclare ce qui suit : « *Stricto sensu*, ce n'est pas le Quatuor qui a remis l'aide en question, contourné l'Autorité palestinienne pour la verser à des organismes œuvrant surtout dans l'humanitaire, imposé des restrictions bancaires étouffantes ou privé les Palestiniens de leur principale source de revenus. Ce sont, dans l'ordre, les États-Unis, l'Union européenne et Israël qui doivent assumer la responsabilité de ces actions. Compte tenu des amendements que nos partenaires du Quatuor ont acceptés en janvier 2006, nous pouvons dire qu'aucune de ces mesures n'émane des décisions du Quatuor, et nous en dissocier ou les critiquer ouvertement (le non-versement par Israël de l'argent palestinien à l'Autorité palestinienne). Et c'est ce que nous faisons. Mais pour l'opinion publique palestinienne et arabe, qui a une perspective plus large de la question, tout cela n'est que de la prestidigitation verbale et ne convainc personne. Par association avec tout ce qui a été infligé aux Palestiniens depuis le début de 2006, devant le tribunal de l'opinion publique palestinienne et arabe, nous sommes coupables des faits qui nous sont reprochés » (par. 78).

¹⁸ La déclaration du Quatuor en date du 19 juillet 2007 est très claire à ce sujet.

Nations Unies et représenter non seulement les vues des cinq membres permanents du Conseil de sécurité mais aussi celles de l'ensemble des 192 Membres de l'Organisation? Hélas, l'ONU, par le truchement du Secrétaire général, a fait fi des vues de la majorité de ses Membres et abandonné son rôle de protecteur de la légitimité internationale. Au lieu de favoriser l'autodétermination palestinienne, de s'efforcer de mettre un terme à l'occupation et de s'opposer à la poursuite des violations des droits de l'homme, l'Organisation a choisi de légitimer les déclarations et actions du Quatuor. La situation est bien décrite par Alvaro de Soto dans son rapport de fin de mission :

« [Le Secrétaire général] est instrumentalisé pour donner l'impression d'avaliser les positions du Quatuor au nom de la communauté internationale, ce qui est bizarre puisqu'il participe au Quatuor non pas parce qu'il y a été délégué ou habilité par un organe de l'ONU, encore moins par le Conseil de sécurité, mais pratiquement en sa qualité propre. De vastes pans de la communauté internationale ne sont pas représentés au sein de ce Quatuor autoproclamé, notamment les parties arabes. Quoi qu'il en soit, j'ai pu tolérer ces arrangements jusqu'à ce que le Quatuor commence à adopter des positions qui n'étaient pas susceptibles de rallier la majorité des organes de l'ONU et étaient contraires aux résolutions du Conseil de sécurité ou au droit international ou, si elles ne l'étaient pas expressément, restaient en deçà des critères les plus élémentaires d'équité devant présider à l'action du Secrétaire général. » (par. 69)

50. Ces dernières années, dans ses rapports, le Rapporteur spécial a demandé au Quatuor de faire preuve de davantage d'équité et de respect envers les droits de l'homme et les principes du droit dans ses actions et déclarations. Ces appels n'ont jamais été entendus. Quant à l'ancien Secrétaire général adjoint, Coordonnateur spécial des Nations Unies pour le processus de paix au Moyen-Orient et Envoyé de l'ONU auprès du Quatuor, il s'est exprimé en termes beaucoup plus forts, accusant le Quatuor d'être conduit (et contraint) par les États-Unis à adopter des positions qui sont en contradiction avec les idéaux de la Charte, et invitant le Secrétaire général à envisager sérieusement la possibilité de se retirer du Quatuor. Dans les faits, l'appel est resté sans suite et le message éliminé¹⁹.

VII. Recommandations

51. Les recommandations ou appels suivants sont formulés à l'intention d'Israël, des groupes armés palestiniens, des États Membres des Nations Unies et de l'Organisation elle-même.

À l'intention d'Israël

52. L'occupation par Israël de la Cisjordanie, de Jérusalem-Est et de Gaza est dans sa quarantième année. Cette occupation, qui donne lieu à de nombreuses violations du droit international humanitaire et du droit relatif aux droits de l'homme, entame sérieusement l'intégrité et la réputation de l'État d'Israël. Israël est instamment prié d'engager des négociations sérieuses avec l'Autorité

¹⁹ Voir la déclaration faite par le Secrétaire général Ban Ki-moon lors d'une conférence de presse, le 13 juin 2007.

palestinienne afin de créer un État palestinien dans les frontières de 1967, de mettre un terme à l'occupation du territoire palestinien et de respecter, dans ses rapports avec le peuple palestinien, le droit international humanitaire et le droit relatif aux droits de l'homme.

À l'intention des groupes militants palestiniens

53. Les groupes militants palestiniens sont engagés à mettre fin à leurs attaques contre des civils et à se conformer au droit international humanitaire, dans les territoires palestiniens occupés comme en Israël.

À l'intention des États Membres des Nations Unies

54. Les États Membres des Nations Unies sont instamment priés de faire pression sur le Quatuor pour qu'il agisse avec équité et dans le respect des droits de l'homme et du droit international humanitaire. En tant que parties à la quatrième Convention de Genève, ils sont également engagés à faire respecter par Israël le droit international humanitaire incorporé dans la Convention. (Cette obligation a été réaffirmée par la Cour internationale de Justice dans son avis consultatif sur le mur²⁰.)

**À l'intention de l'Organisation des Nations Unies
(en particulier du Secrétaire général)**

55. Le Secrétaire général est instamment prié, en tant que représentant de l'ONU dans le Quatuor, de veiller à ce que celui-ci :

a) Condamne les violations du droit international humanitaire et du droit relatif aux droits de l'homme commises par Israël (décrites dans le présent rapport) et fasse le nécessaire pour qu'Israël se conforme à ses obligations en la matière;

b) Accepte d'utiliser comme fondement juridique, dans ses rapports avec Israël, l'avis consultatif rendu en 2004 par la Cour internationale de Justice sur les *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*;

c) Exhorte Israël à verser immédiatement à l'Autorité palestinienne tous les droits de douane et toutes les sommes provenant de la taxe sur la valeur ajoutée que ce pays a collectés au nom des Palestiniens afin de parer à la crise humanitaire qui touche les territoires palestiniens occupés;

d) Adopte une approche juste et équitable face aux positions respectives d'Israël et des Palestiniens;

²⁰ *Avis consultatif*, op. cit., par. 159.

e) **Adopte une approche juste et équitable à l'égard des différentes factions de la communauté palestinienne, comme l'Organisation des Nations Unies l'a fait dans des situations de conflit comparables²¹, de sorte que les Palestiniens parviennent à l'autodétermination.**

56. Si le Secrétaire général ne réussit pas à persuader le Quatuor d'agir ainsi qu'il est proposé ci-dessus, l'Organisation des Nations Unies devrait cesser d'avaliser les actions du Quatuor et s'en retirer.

**À l'intention de l'Organisation des Nations Unies
(en particulier de l'Assemblée générale)**

57. L'Assemblée générale est instamment priée de demander à la Cour internationale de Justice de rendre un autre avis consultatif sur les conséquences juridiques de l'occupation prolongée pour le peuple sous occupation, la puissance occupante et les autres États (voir aussi le paragraphe 8 ci-dessus).

²¹ Il convient à cet égard de citer un passage du discours prononcé par Karen AbuZayd, Commissaire générale de l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient, à l'Institut Woodrow Wilson (Washington) le 22 mai 2007 : « Il y a une autre incohérence dans l'approche adoptée par la communauté internationale face au conflit israélo-palestinien. L'impasse dans laquelle se trouve le processus de paix est la conséquence directe de la politique qui consiste à isoler une partie, sans tenir compte du fait qu'elle représente un grand nombre de personnes. On peut soutenir que la politique d'isolement est en contradiction avec la conception de la sécurité collective, inscrite dans la Charte des Nations Unies, qui repose sur le règlement pacifique des différends, le fait de s'abstenir, de part et d'autre, de recourir à la force, et l'action collective pour déjouer les menaces qui pèsent sur la paix et la sécurité internationales. Cette politique qui consiste à exclure l'une des parties est également en contradiction avec l'approche que la communauté internationale a adoptée pour résoudre d'autres conflits armés. Dans des cas bien connus ayant fait date, qui se sont produits récemment en Europe occidentale et en Asie du Sud, ni l'épithète terroriste ni le fait que le conflit armé se poursuive, voire s'aggrave, n'ont empêché les médiateurs d'engager le dialogue avec les protagonistes et de continuer à faire pression pour arriver à une solution [...] De nombreuses négociations de paix ont pu aboutir grâce à plusieurs éléments : la neutralité des médiateurs, la participation de toutes les parties et le fait que l'on s'abstienne de formuler un jugement moral ou politique sur la question de savoir si l'une ou l'autre des parties avait le droit d'être présente à la table des négociations. »



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Promotion et protection des droits de l'homme :

situations relatives aux droits de l'homme

et rapports des rapporteurs et représentants spéciaux

La situation des droits de l'homme dans le territoire palestinien occupé depuis 1967

Note du Secrétaire général**

Le Secrétaire général a l'honneur de transmettre aux membres de l'Assemblée générale le rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Richard Falk, présenté conformément à la résolution 5/1 du Conseil des droits de l'homme.

* A/63/150 et Corr.1.

** La soumission du présent document a été repoussée après la date limite afin que l'actualité la plus récente puisse être prise en compte.



La situation des droits de l'homme dans le territoire palestinien occupé par Israël depuis 1967

Résumé

Le présent rapport, qui est le premier soumis par Richard Falk, porte sur le respect des normes internationales humanitaires et relatives aux droits de l'homme dans les territoires palestiniens occupés par Israël depuis 1967, au cours du premier semestre 2008. Une attention particulière y est accordée aux conséquences d'une occupation prolongée durant laquelle les directives de l'ONU relatives au respect des droits reconnus par la loi ont été systématiquement ignorées.

Il est également pris note de l'entreprise liée à la relance du processus de paix lors du sommet d'Annapolis de décembre 2007, en particulier du fait que l'on comptait qu'Israël gèlerait l'expansion des colonies et assouplirait les restrictions à la circulation imposées en Cisjordanie. Il est décourageant de constater que les faits montrent que les colonies se développent et que de nouvelles restrictions sont imposées en Cisjordanie.

Il est en outre fait état de la violation du droit international humanitaire liée à l'existence du mur de séparation, et des victimes palestiniennes, notamment parmi les enfants, en conséquence du recours excessif des Israéliens à la force pour mettre fin à des manifestations non violentes. L'attention est par ailleurs appelée sur les exactions commises par Israël aux points de passage de la frontière, le harcèlement et les agressions dont sont victimes les journalistes palestiniens étant particulièrement préoccupants. Le rapport porte essentiellement sur la crise en matière de soins de santé, spécialement à Gaza.

Le Rapporteur spécial déplore qu'Israël n'applique pas les recommandations de la Cour internationale de Justice, que l'Assemblée générale a faites siennes, et appelle à une définition plus claire des droits du peuple palestinien en recommandant que l'Assemblée générale recueille un avis juridique sur la mesure dans laquelle l'occupation met en danger la réalisation du droit des Palestiniens à l'autodétermination.

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I. Introduction

1. Le Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967 a été nommé, conformément à la résolution 1993/2A de la Commission des droits de l'homme, le 26 mars 2008, et a pris ses fonctions le 1^{er} mai 2008. Il n'a pas encore été à même de se rendre en Israël et dans le territoire palestinien occupé pour s'acquitter pleinement de son mandat et présenter un témoignage de première main sur la mesure dans laquelle le droit international des droits de l'homme et le droit international humanitaire sont respectés. Le Rapporteur spécial entend n'épargner aucun effort pour obtenir un accès dans l'avenir et cherchera à s'assurer la coopération du Gouvernement israélien à cette fin.

2. Le présent rapport est le premier à paraître depuis que le Rapporteur spécial a pris ses fonctions le 1^{er} mai 2008. Il inclut les faits nouveaux qui se sont produits essentiellement entre le 1^{er} janvier et le 31 juillet 2008 et repose sur des informations fiables réunies par les ONG et les institutions internationales qui s'occupent des droits de l'homme, y compris l'ONU, fortes de leur objectivité et de leur l'expérience de longue date quant aux conditions de l'occupation. Le Rapporteur spécial prend note des changements positifs et négatifs sur le terrain, ainsi qu'aux échelles régionale et mondiale. Il entend, sans que cela ait d'implications politiques, traiter l'administration du Hamas à Gaza comme une « autorité de facto » aux fins de son rapport.

3. Le Rapporteur spécial prend note en particulier du fait que l'occupation militaire du territoire palestinien se poursuit depuis plus de 40 ans et présente les caractéristiques du colonialisme et de l'apartheid, comme l'a fait observer son prédécesseur. Dans un tel contexte, la prolongation de l'occupation est une menace croissante et une atteinte de plus en plus grave au droit de l'homme le plus fondamental de tous : le droit à l'autodétermination du peuple palestinien. Cette considération confère un caractère urgent à une évaluation de la revendication palestinienne d'un droit à la résistance aux fins de l'autodétermination, et à des recommandations tendant à une plus grande expression de la responsabilité de l'ONU s'agissant de résoudre le conflit israélo-palestinien compte pleinement tenu du droit international, et, dans l'intervalle, de prendre des mesures immédiates pour veiller au respect par Israël des obligations que lui impose le droit international humanitaire relatif à l'occupation militaire. Il conviendrait à cet égard de prendre note du refus d'Israël de se conformer à l'avis consultatif de la Cour internationale de Justice sur les *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé* (A/ES-10/273 et Corr.1), cautionné par 14 des 15 juges et massivement approuvé par l'Assemblée générale dans sa résolution ES-10/15. Cette observation générale relative à la poursuite de l'occupation a deux implications pour l'ONU. D'une part, dans le cadre du processus de paix d'Annapolis, une responsabilité spéciale incombe à l'ONU en tant que membre du Quatuor pour ce qui est de veiller à ce que des mesures soient prises afin de convaincre toutes les parties que l'évaluation des intérêts opposés d'Israël et de la Palestine sera fondée sur le droit international durant les négociations sur les questions qui continuent d'être l'objet de controverses. D'autre part, le fait que le mépris d'un message aussi clair et ferme concernant les obligations juridiques internationales liées aux devoirs d'une puissance occupante, associé à d'autres preuves de mépris exposées en détail dans le présent rapport, devraient contribuer à

inciter le Secrétaire général, l'Assemblée générale et les autres organes de l'ONU à reconnaître qu'il faut d'urgence mettre en œuvre les initiatives nécessaires pour garantir les droits de l'homme et, en réalité, la survie du peuple palestinien, et pour amener Israël à respecter les obligations que lui impose le droit international. L'une de ces initiatives, qui va dans le sens de la recommandation du Rapporteur spécial précédent, consisterait pour la Troisième Commission à proposer à l'Assemblée générale une demande visant à obtenir un nouvel avis juridique de la Cour internationale de Justice sur les effets illégaux du refus persistant de respecter le droit à l'autodétermination des Palestiniens, en raison de la prolongation et de la nature de l'occupation, en particulier les atteintes qu'elle porte à la propriété et à l'occupation des terres par les Palestiniens.

4. Le principal instrument juridique pertinent aux fins de l'évaluation des droits et des devoirs d'une puissance occupante est la quatrième Convention de Genève, relative à la protection des personnes civiles en temps de guerre (1949), mais le Protocole additionnel I de 1977 relatif à la protection des victimes des conflits armés internationaux est également pertinent en tant qu'expression du droit international coutumier évolutif et contraignant pour les parties au traité. Les preuves de la violation constante et délibérée de ce traité international universellement contraignant par Israël du fait de son occupation du territoire palestinien revêtent une gravité qui appelle une réaction unanime de la communauté internationale. Il conviendrait de rappeler que l'article 1 de la quatrième Convention de Genève se lit ainsi : « Les Hautes Parties contractantes s'engagent à respecter et à faire respecter la présente Convention en toutes circonstances ». Il est grand temps de répondre à cet appel.

5. Le Gouvernement israélien affirme, depuis l'exécution de son plan de désengagement en 2005, que la bande de Gaza n'est plus sous occupation et que pour cette raison le droit international humanitaire n'est pas applicable. La position officielle d'Israël, maintes fois réaffirmée, est que « l'occupation de guerre de la bande de Gaza » par les Forces de défense israéliennes (FDI) a pris fin le 12 septembre 2005 « avec toutes les incidences politiques, sécuritaires et juridiques qui en résultent ». Israël a explicitement tiré la conclusion générale selon laquelle puisque « les pleins pouvoirs en matière de gouvernement » ont été à cette date « transférés à l'Autorité palestinienne », il n'est plus tenu par les responsabilités juridiques et morales incombant à une Puissance occupante¹. Dans cette perspective, le Gouvernement israélien se fonde sur une décision de la Cour suprême d'Israël dans l'affaire *Albassiouni c. le Premier Ministre*, aux termes de laquelle le Gouvernement « n'a pas pour devoir général d'assurer le bien-être des habitants de la bande de Gaza ». Le Rapporteur spécial conteste cette évaluation de la situation dans la bande de Gaza, en arguant qu'un territoire est occupé s'il est placé sous le « contrôle effectif » d'un État autre que celui du souverain territorial. Israël continue, depuis son désengagement, à exercer un contrôle strict et constant sur les frontières, l'entrée et la sortie, l'espace aérien et les eaux territoriales de Gaza. Il a en outre mené de nombreuses incursions militaires et des attaques meurtrières visant des individus, a soumis la population civile tout entière du territoire à des conditions de siège dès le moment où le Hamas a clairement remporté les élections législatives générales de janvier 2006 à Gaza, et a durci le

¹ Voir la réponse du coordonnateur des activités dans les territoires au rapport de Médecins pour les droits de l'homme relatif aux interrogatoires subis par les patients au point de passage d'Erez, Ministère de la défense de l'État d'Israël, 4 juin 2008.

siège après que le Hamas ait pris le contrôle de Gaza à la mi-juin 2007. L'imposition d'un siège qui fait peser de lourdes contraintes sur les habitants de Gaza, et les tentatives d'y associer la communauté internationale, ont rendu impossible pour les autorités administrantes palestiniennes d'assurer le bien-être minimal de 1,5 million d'habitants. Il est donc plus que certain que, du point de vue du droit international, la bande de Gaza reste sous occupation israélienne – les responsabilités juridiques connexes incombant à la Puissance occupante – et que la Convention de Genève demeure pleinement applicable.

6. De nombreux aspects de la situation au quotidien qui se poursuit dans le territoire palestinien occupé sont pertinents eu égard à une évaluation juridique des droits et devoirs des parties. L'un des principaux objectifs du présent rapport est de faire comprendre, preuves à l'appui, la mesure dans laquelle la situation a continué de se détériorer dans tout le territoire palestinien occupé, à tel point que les souffrances et les traumatismes mentaux et physiques endurés par le peuple palestinien vivant sous l'occupation ont atteint un niveau dangereux et non viable. Cela contredit le point de vue selon lequel de nombreux faits nouveaux, notamment l'accord de cessez-le-feu relatif à Gaza, la relance du processus de paix à Annapolis et la baisse généralisée du taux de décès par mort violente parmi les civils et les militaires israéliens ainsi que de l'incidence du terrorisme, ont rendu moins pesante l'occupation. Il semble vrai, certes, que la situation s'est améliorée économiquement et politiquement pour Israël durant cette période, mais la situation du peuple palestinien a empiré : davantage de terres ont été confisquées au profit des colonies, qui ont été élargies, la crise persiste partout à Gaza, les restrictions à la circulation dans toute la Cisjordanie ont été maintenues ou resserrées et de nouvelles démarches juridiques ont été entreprises pour expulser des Palestiniens vivant à Jérusalem. Suite à la très récente approbation par Israël de la construction de 447 logements supplémentaires dans le secteur de Jérusalem, le négociateur palestinien pour la paix, Saeb Erakat, a déclaré selon une dépêche de l'agence Reuters « J'ignore combien de fois les Israéliens devront faire cela pour que la communauté internationale ouvre les yeux. Le monde ne voit-il donc pas que cela détruit le processus de paix? ». Le thème du présent rapport est que la réalité palestinienne est pire que jamais auparavant, sans que rien ne laisse entrevoir aucune amélioration sensible.

7. Le présent rapport se veut impartial pour ce qui, d'une part, de mettre en lumière les incidents qui illustrent les problèmes d'ordre général plus profonds associés à l'occupation et, d'autre part, d'examiner des modèles de comportement qui semblent violer les droits de l'homme du peuple sous occupation, en tenant dûment compte des droits de la Puissance occupante s'agissant de faire respecter la sécurité durant l'occupation. Le Rapporteur spécial a consacré un chapitre de son rapport au droit à la santé, en privilégiant tout particulièrement Gaza.

II. Évolution de la situation politique et du cadre de l'occupation

8. Il est important de comprendre le cadre de l'occupation pour bien évaluer certains événements ainsi que les politiques d'occupation et les activités de résistance et apprécier la situation générale en matière de droits de l'homme, dans la mesure toutefois où la sécurité de l'occupant le permet. L'importance accordée à ces aspects de l'occupation permet d'appeler l'attention sur la nature essentielle du droit

des Palestiniens à l'autodétermination et de leur lutte à cette fin dans les conditions découlant de la longue occupation de leur territoire. Toute modification du contexte plus large des relations israélo-palestiniennes donne une idée tant de la nature oppressive de l'occupation que de la difficulté d'améliorer les conditions de vie des Palestiniens tant qu'ils vivront sous occupation.

9. Lorsque, le 23 janvier 2008, le Hamas a détruit une partie du mur qui sépare l'Égypte de Gaza en posant des explosifs près du point de passage de Rafah, des dizaines de milliers de personnes vivant dans la bande de Gaza (et peut-être même, selon certaines sources, 500 000) ont franchi la frontière pour se ruer vers la ville de Rafah, en Égypte, principalement pour y faire des provisions de nourriture, de médicaments et de divers biens de consommation auxquels elles n'avaient pas accès à Gaza. Le Président égyptien, Hosni Moubarak, aurait dit aux gardes frontière qui lui demandaient ce qu'ils devaient faire « Laissez-les entrer pour qu'ils puissent manger et se ravitailler avant de rentrer chez eux, à condition qu'ils ne portent pas d'armes »². Un porte-parole du Hamas aurait dit : « Nous créons des événements. Nous devons tenter de faire évoluer la situation; maintenant, nous attendons les résultats. Nous avons prévenu le peuple égyptien que nous avions faim et étions en train de mourir ». Nombre d'habitants de la bande de Gaza sans affiliation politique ont dit, de diverses façons : « C'est ce que le Hamas a fait de mieux. » Un journaliste indépendant, Allan Nairn, a bien résumé la situation en écrivant : « [...] la décision de détruire le mur de Gaza a été facile à prendre : personne n'a été tué, certains ont peut-être même été sauvés et le spectacle de l'exode vers l'Égypte a bien mis en évidence une grossière injustice »³. Par ses propos, Nairn donne une bonne description des principaux faits liés à l'occupation, à savoir l'exode et le spectacle de cet exode. Il était impossible d'être témoin de ces événements sans comprendre le désespoir d'un peuple longtemps écrasé par une occupation déshumanisante qui menace son bien-être, et même sa survie, et à laquelle il faudrait mettre fin. Quelques jours plus tard, les habitants de la bande de Gaza ont dû retourner chez eux, le mur a été réparé et le siège et le confinement ont été rétablis. Il est possible que l'exode et le spectacle de milliers de personnes quittant Gaza aient entraîné quelques subtils changements positifs, les événements ayant mieux fait comprendre à la communauté internationale la situation désespérée de 1,5 million de personnes isolées et confinées de force dans la bande de Gaza.

10. Aucun lien de cause à effet n'a été établi ni reconnu entre les événements associés à la destruction partielle du mur de Rafah et le début de négociations secrètes, au Caire, sous l'égide de l'Égypte, entre les représentants du Gouvernement israélien et ceux du Hamas, aux fins de la conclusion d'un accord de cessez-le-feu qui mettrait fin aux tirs de roquettes contre Israël à partir de la bande de Gaza et aux incursions militaires et assassinats ciblés d'Israël à Gaza. En même temps, il semble difficile de ne pas conclure que la couverture médiatique des événements, surtout les photographies de l'ouverture pratiquée dans le mur, qui ont fait le tour du monde, a incité Israël à se montrer plus réceptif aux propositions faites depuis longtemps par le Hamas de convenir mutuellement d'un cessez-le-feu. Les négociations ont duré relativement longtemps, mais elles ont en fin de compte porté leurs fruits. Le 20 juin 2008, un cessez-le-feu a été décrété et, malgré certains manquements des deux côtés, de façon générale respecté⁴. Les modalités du cessez-

² Voir le *New York Times*, 24 janvier 2008.

³ Allan Nairn, « Justified Violence: Breaking the Gaza Wall », *The Nation*, 29 janvier 2008.

⁴ Pour un examen du cessez-le-feu, voir Uri Avnery, « The Ceasefire », *London Review of Books*,

le-feu n'ont pas été divulguées, mais des observateurs bien informés ont estimé que si le Hamas démontrait sa volonté et sa capacité de faire respecter le cessez-le-feu par ses propres groupes militants, Israël adoucirait les conditions du siège.

11. Israël a reconnu les dispositions prises par le Hamas pour faire en sorte que le cessez-le-feu soit respecté et, en retour, a amélioré les conditions de vie difficiles des habitants de Gaza. Israël prétend avoir augmenté de jusqu'à 50 % l'approvisionnement en vivres et en médicaments et envisage d'adopter d'autres mesures pour atténuer les tensions et les privations. Néanmoins, du fait de la durée et de l'ampleur du siège qui sont venues s'ajouter à la pauvreté et aux difficultés préexistantes, la situation humanitaire dans la bande de Gaza demeure désespérée et pourrait aisément se traduire par de nouveaux événements dramatiques.

12. À ces événements nouveaux s'ajoute la reconnaissance implicite par Israël de la gouvernance de facto par le Hamas de Gaza. Selon Meir Javedanfar, spécialiste respecté du Moyen-Orient vivant à Tel-Aviv, « C'est avec le Hamas qu'Israël doit négocier. Ce n'est pas une reconnaissance diplomatique complète, mais Israël a reconnu que le Hamas jouait un rôle important. Pour certaines questions, il est impossible de ne pas en tenir compte. Israël montre que sa politique passée, qui était de refuser de parler aux organisations militantes [...], ne portait pas toujours ses fruits [...] et a compris que parler à ses ennemis était le moyen le plus rapide et le plus rentable sur les plans militaire, économique et stratégique »⁵. Officiellement, Israël n'a pas modifié sa position qui est que le Hamas est une organisation terroriste et que l'accord de cessez-le-feu doit être considéré comme une proposition de compromis de l'Égypte acceptée par les deux parties. Israël persiste à dire qu'il ne modifiera sa position diplomatique officielle que si le Hamas respecte unilatéralement trois conditions. Ces conditions sont la reconnaissance du droit à l'existence d'Israël en tant qu'État juif, la confirmation des accords conclus entre l'Autorité palestinienne et Israël et la renonciation aux actes de violence.

13. Dans une certaine mesure, ces faits récents sont éloquents : le Hamas a pu conclure un accord de cessez-le-feu et devenir un partenaire d'Israël dans la mise en œuvre d'accords conjoints. Pour Israël, l'accord est une reconnaissance implicite par le Hamas de l'État d'Israël. Il faut souhaiter qu'il s'agisse là d'un indice que le siège de Gaza sera levé, que l'aide économique internationale reprendra et que sera établi un régime d'occupation qui respecte le droit international humanitaire et les droits de l'homme autant que faire se peut, vu la situation en matière de sécurité. Toute nouvelle évaluation du processus portera vraisemblablement sur la question de savoir si les négociations entre l'Égypte et l'Autorité palestinienne concernant la réouverture du point de passage de Rafah aboutiront et si un accord sur un échange de prisonniers prévoyant la libération du caporal Gilad Shalit, le soldat israélien détenu depuis plus de deux ans, pourra être conclu. Encourager ces négociations revient sur le plan pratique à tenter de mieux protéger les droits économiques et sociaux des 1,5 million de Palestiniens vivant à Gaza, même si, sur le plan strictement juridique, les obligations d'Israël en tant que Puissance occupante sont contraignantes et non facultatives, en particulier lorsque les droits fondamentaux de la population générale de Gaza sont concernés.

31 juillet 2008.

⁵ Pour une première analyse du cessez-le-feu, voir l'article de Joshua Mitnick, « As Gaza ceasefire holds, Israel eases economic blockade », *Christian Science Monitor*, 23 juin 2008.

14. Même si les relations tendues entre le Hamas et le Fatah sur le territoire palestinien occupé ne font pas l'objet du mandat actuel, le récent appel aux pourparlers lancé par le Président Mahmoud Abbas en vue de la constitution d'un gouvernement d'unité nationale palestinien va également dans le sens d'une réduction de la violence et devrait renforcer les espoirs de la population civile sous occupation israélienne de voir ses droits de l'homme mieux protégés. Pour que le processus de paix soit viable, il faudra notamment que tous les Palestiniens vivant sous occupation soient représentés par un gouvernement unifié.

15. Certains des événements qui se sont produits dans la région sont également encourageants et pourraient se traduire indirectement par une amélioration du régime d'occupation même si, à ce jour, aucune activité concrète ne permet de croire que ces espoirs sont fondés. La négociation d'un accord entre le Hezbollah et le Gouvernement libanais permet d'espérer une stabilisation de la situation. Les négociations continues entre Israël et la République arabe syrienne, sous l'égide de la Turquie, donnent également à penser que l'approche diplomatique est de nouveau privilégiée pour résoudre les conflits et que l'État d'Israël pourrait être disposé à envisager son retrait du territoire occupé pendant la guerre de 1967. Les initiatives égyptiennes concernant la situation de Gaza font elles aussi partie de l'atmosphère plus constructive qui prévaut dans les pays voisins du territoire palestinien occupé mais jusqu'à maintenant, le sort des Palestiniens qui vivent sous occupation ne s'est guère amélioré et, à bien des égards, a continué de se détériorer.

16. Mettre fin à l'occupation est le seul moyen de permettre au peuple palestinien de pleinement jouir à nouveau de ses droits de l'homme. Selon la doctrine du droit international, Israël doit se retirer de la presque totalité du territoire palestinien occupé, y compris Jérusalem-Est, pour se conformer à la demande symbolique du Conseil de sécurité dans sa résolution 242 (1967), adoptée au lendemain de la guerre arabo-israélienne de 1967. On estime cependant que ce retrait est extrêmement peu probable en l'absence de négociations bilatérales portant sur toutes les questions en suspens entre Israël et l'Autorité palestinienne. De ce point de vue, il a probablement été optimiste de croire que la Conférence d'Annapolis du 27 novembre 2007 qui avait réuni quelque 40 gouvernements concernés constituait une relance du processus de paix se fondant sur les orientations définies par le Quatuor dans la Feuille de route de 2003. À Annapolis, les gouvernements participants sont convenus qu'Israël et l'Autorité palestinienne s'efforceraient de régler l'ensemble des questions en suspens et le Gouvernement américain aurait modifié sa position pour encourager les négociations bilatérales. Par la suite, le Premier Ministre israélien, Ehud Olmert, et le Président de l'Autorité palestinienne, Mahmoud Abbas, se sont rencontrés de nombreuses fois, mais aucun progrès notable sur la question du statut final n'a été enregistré et il est peu probable que ces négociations donnent des résultats concrets. La situation s'explique par la faiblesse du Premier Ministre Olmert face à l'opposition interne, aux attaques dont il fait l'objet et au fait qu'il a annoncé sa démission après les réunions du parti Kadima qui auront lieu en septembre 2008. De manière plus fondamentale, Israël n'a pas réussi les tests déterminants du processus de paix définis à Annapolis qui comprenaient un gel complet des colonies de peuplement (de même que le démantèlement des « avant-postes » établis en Cisjordanie qui sont interdits par le droit israélien) et une diminution des entraves à la liberté de mouvement aux postes de contrôle. Depuis Annapolis, c'est en effet le contraire qui s'est produit, c'est-à-dire que les colonies de peuplement ont continué de prendre de l'expansion à un rythme accéléré, le

démantèlement d'aucun avant-poste n'a été signalé et le nombre de mesures contraignantes associées au réseau de postes de contrôle militaires israéliens a augmenté.

17. Le deuxième test à réussir était une diminution de la violence palestinienne. Le cessez-le-feu de Gaza, s'il n'est pas violé, semble dans ce cas extrêmement pertinent, tout comme la volonté de l'Autorité palestinienne de mettre en œuvre, du mieux qu'elle le peut, une politique visant à abandonner la lutte armée contre l'occupation israélienne. En l'absence d'actions comparables de la part d'Israël pour ce qui est des colonies de peuplement, le processus risque de s'enliser indéfiniment ou d'être abandonné. Aujourd'hui, il n'y a pas lieu de s'attendre à ce que l'initiative d'Annapolis se traduise par la fin, dans les délais prévus, de l'occupation ni la paix ni le respect, par Israël, des droits du peuple palestinien reconnus par le droit international humanitaire et par les normes internationales relatives aux droits de l'homme.

III. Les défis à relever dans le domaine des droits de l'homme : quelques études de cas

A. Liberté d'expression et harcèlement des journalistes : l'affaire Mohammed Omer

18. Mohammed Omer est un journaliste vivant à Gaza qui avait obtenu une autorisation de sortie afin de se rendre en Europe, où il avait été invité à recevoir le prix Martha Gellhorn de journalisme et à donner des conférences. L'autorisation ne lui avait été accordée qu'après qu'un parlementaire néerlandais eut fortement insisté auprès du Gouvernement israélien pour le persuader d'autoriser M. Omer à quitter Gaza. M. Omer est le plus jeune lauréat du prix Gellhorn, décerné à des journalistes ayant fait preuve de courage et montré leur aptitude à faire leur métier dans des zones de conflit. Tant les qualités personnelles que les compétences professionnelles de M. Omer sont apparues clairement lors d'entretiens menés directement avec celui-ci et avec plusieurs personnalités éminentes. Le jeune homme de 24 ans est largement admiré pour les reportages qu'il a effectués au cours des dernières années à Gaza. C'est en rentrant à Gaza que M. Omer a rencontré des difficultés. Il a en effet essayé de passer par Israël et le pont Allenby et lorsqu'il a atteint la frontière jordanienne, le diplomate néerlandais qui devait l'accompagner était en retard. Le journaliste a indiqué que l'engagement avait été pris de le faire escorter par un diplomate lorsqu'il avait été encouragé à quitter Gaza pour recevoir en personne le prix Gellhorn. Ces événements, qui se sont déroulés le 26 juin 2008, ont fait l'objet d'articles dans les journaux du monde entier. Dans une communication privée, l'Ambassadeur des Pays-Bas à Genève a assuré le Rapporteur spécial que l'incident était pris très au sérieux et l'a informé qu'une explication avait été demandée au Gouvernement israélien. J'ai appuyé cette demande en adressant un appel urgent à l'Ambassadeur d'Israël à Genève. À ce jour, ni la demande d'explication ni l'appel urgent n'ont reçu de réponse. Dans sa version personnelle des faits, Mohammed Omer a notamment indiqué ce qui suit : « À mon retour de Londres, j'ai été devêtu sous la menace d'une arme, puis interrogé, roué de coups de pied et battu pendant plus de quatre heures. J'ai, à un moment donné, perdu connaissance, et, lorsque j'ai repris connaissance, j'ai senti des ongles écorcher la chair sous mes yeux. Un agent de l'État a écrasé mon cou sous sa botte et comprimé ma poitrine contre le sol. Sans

cesser de rire, d'autres agents se sont relayés pour me donner des coups de pied et me pincer. Ils m'ont tiré par les pieds, trainant ma tête dans mes propres vomissures. J'ai été informé plus tard qu'ils m'avaient transféré dans un hôpital [...]. Aujourd'hui, j'éprouve des difficultés à respirer. Ma poitrine et mon cou ont été écorchés et griffés. Mon médecin m'a informé qu'un des coups de pied reçus a endommagé des nerfs, ce qui pourrait m'empêcher d'avoir des enfants et m'obliger à subir une opération »⁶. M. Omer est convaincu que cette attaque brutale a été commise par des agents du Shin Bet qui, pleinement conscients du fait qu'on lui avait décerné le prix Gellhorn pendant son séjour à l'étranger, auraient voulu confisquer l'argent du prix mais ont été déçus car cet argent avait été déposé sur un compte en banque. M. Omer aurait perdu conscience après l'incident d'Allenby et été transféré à Jéricho, en Cisjordanie, puis au point de passage d'Erez, d'où il a été emmené à l'hôpital européen du camp de réfugiés de Khan Younis, afin d'y recevoir des soins.

19. Ce déplorable épisode n'est ni un accident ni un événement unique dont seraient responsables des agents des services de sécurité israéliens indisciplinés. Le traitement infligé à M. Omer semble avoir été motivé par la colère des Israéliens face à la reconnaissance internationale du travail de ce journaliste, qui décrit l'occupation de Gaza, au fait que M. Omer ait accepté de décrire la situation à l'étranger et à sa volonté de continuer à témoigner, dans son travail, des excès de l'occupation. Il faut noter que si tous les Palestiniens sont arbitrairement harcelés et soumis à de mauvais traitements aux frontières et aux points de contrôle, l'hostilité est particulièrement marquée envers les journalistes. Pendant son séjour en Europe, M. Omer a décrit à des parlementaires les souffrances que provoquent à Gaza le siège, les bouclages et les pénuries de vivres et de carburant. Il convient de noter que M. Omer n'a été accusé d'aucun crime et ne transportait pas d'articles interdits. Le traitement qui lui a été infligé semble être une violation flagrante des alinéas a) et c) du paragraphe 1) de l'article 3 de la quatrième Convention de Genève, qui dispose que « [...] sont et demeurent prohibés, en tout temps et en tout lieu. [...] » « a) les atteintes portées à la vie et à l'intégrité corporelle [...] » et « c) les atteintes à la dignité des personnes, notamment les traitements humiliants et dégradants ». En outre, aux termes de l'article 5 de la Déclaration universelle des droits de l'homme, nul ne doit être soumis à sera soumis à des peines ou traitements cruels, inhumains ou dégradants. L'article 19 de la Déclaration et l'article 19 du Pacte international relatif aux droits civils et politiques (1966) s'appliquent directement au cas de M. Omer. Le paragraphe 2 de l'article 19 s'appliquerait tout particulièrement aux journalistes qui luttent pour défendre le droit « de recevoir et de répandre des informations de toute espèce, [...] sous une forme écrite [ou] imprimée [...] ou par tout autre moyen de [leur] choix ». En outre, le paragraphe 2 de l'article 13 de la Déclaration universelle des droits de l'homme, qui dispose que « Toute personne a le droit de quitter tout pays, y compris le sien, et de revenir dans son pays », confirme le droit de chacun de retourner sans entraves dans son pays de résidence. Il est incontestable que dans le cas de M. Omer, ce droit a été violé.

20. Bien qu'une seule personne ait été victime de cet incident, ce dernier a forcément eu un effet inhibant et semble s'inscrire dans un cadre d'ingérences punitives commises systématiquement par Israël et contre les journalistes

⁶ Mohammed Omer, « Truth and Consequences Under the Israeli Occupation », *The Nation*, 31 juillet 2008.

indépendants décrivant l'occupation. Lorsque l'équipage d'un char israélien a tué un caméraman de Reuters en avril 2008, Amnesty International a déclaré : « Fadel Shana, un civil, semble avoir été tué volontairement alors qu'il ne participait d'aucune manière à des attaques contre l'armée israélienne ». En août, l'équipage du char responsable de la mort de M. Shana a été officiellement innocenté dans une lettre du Procureur général aux forces armées, le général de brigade Avihai Mendelblit. Le rédacteur en chef de Reuters, David Schlesinger, a réagi par la déclaration suivante : « Je suis extrêmement déçu que cette déclaration [de l'armée israélienne] excuse l'emploi disproportionné d'une force ayant entraîné mort d'homme lors d'événements que l'armée elle-même reconnaît n'avoir pas clairement analysés ». Les violences commises par les Israéliens envers les journalistes palestiniens et étrangers à Gaza et en Cisjordanie ont également été critiquées par des organisations aussi respectées que Reporters sans frontières et le Committee to Protect Journalists. L'incident dont a été victime Mohammed Omer serait en somme la dernière en date des atteintes systématiques à la liberté de la presse commises par Israël dans le cadre de l'occupation, qui privent la population palestinienne de la protection que pourrait représenter l'exposition des abus de pouvoir commis par la Puissance occupante. La responsabilité de l'Organisation des Nations Unies est bien définie : de par sa vocation à défendre les droits de l'homme et le droit international, elle est incontestablement tenue de protéger les journalistes indépendants, en particulier dans les zones de conflit et les zones occupées.

B. Bouclages et opérations militaires des Forces de défense israéliennes en Cisjordanie : violences contre la population civile de Naplouse

21. L'encerclement des principales villes de Cisjordanie se poursuivant du fait de l'extension du mur de séparation et du maintien des postes de contrôle, entrer et sortir du territoire reste difficile et humiliant. Même les pourparlers de paix qui ont actuellement lieu entre le Premier Ministre Olmert et le Président Abbas, les assurances données par le Gouvernement israélien de faciliter la liberté de circulation en Cisjordanie en échange du renoncement par l'Autorité palestinienne à la résistance armée et la nette diminution des actes de violence commis par les Palestiniens à Gaza et en Cisjordanie n'ont pas adouci les épreuves de l'occupation pour les Palestiniens. Les villes et les localités dans lesquelles il est estimé que le Hamas a une forte influence, compte tenu de son succès lors des élections municipales de 2006, subissent des pressions encore plus fortes car les incursions militaires y sont plus fréquentes. Naplouse en est un exemple particulièrement représentatif. Le Rapporteur spécial a reçu d'observateurs non palestiniens des témoignages faits sous serment sur la situation dans cette ville. Il ressort de ces témoignages qu'Israël a régulièrement employé la force contre la population civile de Naplouse sans même la justifier par des activités de résistance antérieures. Du 26 juin jusqu'à la fin du mois de juillet 2008, les Forces de défense israéliennes ont mené plusieurs opérations nocturnes à Naplouse, au cours desquelles elles ont tué au moins deux jeunes Palestiniens, arrêté des dizaines d'hommes, de femmes et d'enfants et confisqué et détruit des biens, instaurant ainsi un climat de peur. De telles opérations militaires sont menées sans qu'aucune accusation n'ait été clairement formulée à l'encontre des habitants de Naplouse. Parmi les dommages causés figure la destruction de biens appartenant à plusieurs organisations de

bienfaisance, dont des écoles, des dispensaires et un orphelinat, qui fournissaient des services nécessaires à la population de cette ville. Ces établissements ont été fermés arbitrairement, tout comme le centre commercial de Naplouse, où se trouvaient certains des établissements commerciaux les plus anciens, respectés et prospères de la ville. Les biens d'importantes entreprises ont été réquisitionnés par les autorités militaires israéliennes, qui n'ont offert ni garantie d'une procédure régulière ni justification crédible sur le plan de la sécurité. Les activités israéliennes ont entraîné une baisse d'au moins 50 % de l'activité économique de la ville, qui était jusque-là considérée comme le centre d'affaires de la Palestine. Outre les pertes matérielles résultant des mesures récemment prises dans le cadre de l'occupation et les souffrances psychologiques causées par les incursions terrifiantes conduites en pleine nuit par des militaires israéliens lourdement armés, les nombreux postes de contrôle et barrages routiers encerclant la ville renforcent l'isolement de Naplouse.

22. Ces derniers mois, d'autres organismes de bienfaisance et institutions civiles ont été fermés par l'armée israélienne dans de nombreuses autres villes de Cisjordanie. Ces fermetures illustrent bien la dégradation des conditions d'occupation dans cette partie du territoire palestinien mais aussi la violation, par la Puissance occupante, à la fois des droits fondamentaux des Palestiniens et des obligations qui lui incombent au titre de la quatrième Convention de Genève. Non seulement Israël ne respecte pas les obligations juridiques qui sont les siennes en tant que Puissance occupante en vertu du droit international humanitaire, mais il fait aussi obstruction aux mesures prises par les Palestiniens pour atténuer l'impact de ces violations sur le bien-être de la population qui subit l'occupation. Au cours de l'année écoulée, la situation a été si grave à Gaza qu'on a véritablement craint l'effondrement des structures sociales, la famine et la propagation des maladies et que les difficultés et les souffrances des populations vivant en Cisjordanie sont, comparativement, passées au deuxième plan.

23. L'Organisation des Nations Unies doit, en toute indépendance, défendre les droits de l'homme de la population occupée, et notamment veiller au respect des droits de tous les groupes de population au lieu de ne s'attacher qu'à ceux qui sont menacés par une catastrophe humanitaire imminente. Les politiques menées par Israël dans le cadre de l'occupation enfreignent l'esprit et la lettre du droit international humanitaire au sens des articles 47 à 78 de la quatrième Convention de Genève. L'article 53 est particulièrement pertinent car il interdit aux puissances occupantes de détruire des biens appartenant aux populations occupées « sauf dans les cas où ces destructions seraient rendues absolument nécessaires par les opérations militaires ». Les opérations militaires de bouclage ont abouti à la destruction de biens appartenant aux habitants de Naplouse. Les articles 64 à 69 de la Convention établissent un cadre juridique pour la détention d'habitants d'un territoire occupé pénalement responsable des infractions qu'ils auraient commises mais la Convention interdit expressément les exécutions extrajudiciaires, les mesures de représailles et tout type de violences collectives punitives. Dans un article publié dans *Ha'aretz* le 20 juillet 2008, le journaliste israélien bien connu, Gideon Levy, a fait remarquer ce qui suit au sujet des Palestiniens habitant en Cisjordanie : « on ne peut à la fois les emprisonner et leur interdire de gagner leur vie alors qu'ils n'ont pas de couverture sociale et, en plus, s'attaquer à ceux qui, pour une raison ou une autre, tentent de les aider. Si Israël veut s'attaquer aux associations caritatives, il lui faut au moins remplacer les services qui étaient offerts.

Sur le dos de qui s'appuie-t-on pour combattre la terreur? Celui des veuves et des orphelins? C'est une honte ». Mairead Maguire (Irlande du Nord), lauréate du prix Nobel de la paix, a été du même avis dans son émouvant rapport sur la fermeture des orphelinats à Hébron.⁷

C. Droit de réunion pacifique : manifestations contre la construction du mur en Cisjordanie

24. Ni'lin est un village situé dans le district de Ramallah en Cisjordanie, à proximité du mur qu'édifie Israël illégalement sur le territoire palestinien occupé au mépris de l'avis consultatif de la Cour internationale de Justice sur le mur de séparation. Il a été le théâtre de nombreuses manifestations non violentes organisées pour protester contre la construction du mur, dressé de manière à confisquer une bonne part des terres du village, chapitre qui s'inscrit dans le cadre d'une longue histoire de spoliation foncière des Palestiniens.

25. On estime que pas moins de 80 % des terres de Ni'lin ont été graduellement confisquées par Israël depuis 1948. Son emplacement à proximité de la Ligne verte lui a valu au lendemain de la guerre de 1967 de nouvelles confiscations de terres au profit des colonies de Cisjordanie (74 dounams pour la colonie de Shalit, 661 dounams pour Mattityahu, 934 dounams pour Hashmonaim, 274 dounams pour Mod'in Illit et 20 dounams pour Menora), soit environ 13 % de ses terres. Lorsqu'Israël a officiellement décidé de confisquer encore 20 % des terres des habitants de Ni'lin pour la construction du mur, des manifestations massives ont eu lieu. Ni'lin est devenu le centre d'inspiration du mouvement d'opposition au mur, et a été, de 2003 à 2004, le théâtre de nombreuses manifestations. Au cours des derniers mois, on a assisté à toute une série de manifestations organisées par des habitants de villages, des sympathisants de villes voisines telles que Ramallah et Tulkarem et également de pacifistes israéliens venus se joindre aux protestations non violentes visant à empêcher la reprise des travaux de construction du mur.

26. Les forces militaires israéliennes et les agents de la police des frontières ont eu recours à divers procédés violents pour disperser les manifestants, notamment à des balles en acier enrobées de caoutchouc et à des balles réelles. Deux jeunes Palestiniens ont succombé à leurs blessures. Ahmed Mousa, garçonnet de 10 ans photographié à la manifestation, a, selon des témoins, été tué au moment où il la quittait. Un Israélien jouissant d'une grande estime, qui participait aux manifestations, Uri Avnery, ancien membre de la Knesset, a dans un article rédigé pour le compte de l'agence de presse Mahan News, en date du 3 août 2008, indiqué qu'un soldat avait visé l'enfant et tiré sur lui à bout portant à balle réelle. Ceux qui ont vu l'enfant ont indiqué que son visage était méconnaissable. Mustafa Barghouti, parlementaire palestinien de renom, aurait déclaré qu'Israël essayait d'inciter des manifestants pacifistes à la violence. Quelques jours plus tard, un deuxième Palestinien, âgé de 19 ans, Yousef Akmada Omaira, devait également succomber des suites de blessures reçues à la tête lors des funérailles d'Ahmed Mousa.

27. Selon le droit international relatif aux droits de l'homme, les résidents de Ni'lin avaient le droit de manifester pacifiquement contre un prolongement

⁷ Rapport sur la destruction par Israël d'établissements caritatifs musulmans à Hébron, 5 juin 2008.

manifestement illégal de l'occupation, la poursuite de la construction sur des terres palestiniennes occupées du mur au mépris de l'avis consultatif de la Cour internationale de Justice et de son entérinement par une majorité écrasante des membres de l'Assemblée générale⁸. Par ailleurs, le recours excessif d'Israël à la force, surtout lorsqu'il semble délibérément chercher à tuer ou à mutiler des manifestants, dont des enfants, remet en cause toutes les affirmations selon lesquelles la police et l'armée avaient dû intervenir pour des raisons de sécurité et d'ordre public. Les populations ont le droit fondamental de défendre leur terre contre des confiscations illégales et ce droit s'applique en cas d'occupation lorsqu'il existe un régime juridique – quatrième Convention de Genève – expressément prévu pour préserver le caractère du territoire occupé et protéger les intérêts des citoyens qui y vivent. Suite à un certain nombre d'initiatives juridiques palestiniennes, les autorités israéliennes ont transférés des pans du mur ailleurs afin de limiter les entraves à l'activité agricole palestinienne à Nil'in et à Qalqilia.

IV. Les implantations de colonies dans le territoire palestinien occupé et leurs conséquences sur la jouissance des droits de l'homme

28. La poursuite de l'expansion des colonies israéliennes illégales en Cisjordanie et à Jérusalem constitue de la part de la Puissance occupante une pratique grave et bien établie qui montre son mépris des engagements internationaux qu'elle a pris de geler l'expansion des colonies et de démanteler les avant-postes établis en Cisjordanie sans autorisation véritable. Par ailleurs, l'ampleur du programme d'implantation, notamment la mise en place de dispositifs de sécurité et la construction de routes, de tunnels et de ponts de contournement, est un obstacle majeur à l'instauration de la paix entre Israël et la Palestine ainsi qu'une source de frictions quotidiennes pour les habitants du territoire occupé. Le caractère illégal des colonies implantées partout dans le territoire palestinien occupé, y compris Jérusalem-Est, a été établi de longue date par un consensus de juristes internationaux et confirmé par des résolutions de l'Assemblée générale et du Conseil de sécurité. Cette conclusion est étayée de façon on ne peut plus manifeste par l'article 49 de la quatrième Convention de Genève qui interdit à la Puissance occupante de transférer « une partie de sa propre population civile dans le territoire qu'elle occupe ».

29. Malheureusement, un échange de correspondance officielle entre Ariel Sharon, alors Premier Ministre d'Israël, et George W. Bush, Président des États-Unis d'Amérique, le 14 avril 2004, largement interprété comme un signe d'acceptation par les États-Unis de l'annexion permanente par Israël des vastes colonies israéliennes situées à proximité des frontières de 1967, abritant 80 % de la population totale des colons, ainsi que des parties occupées de Jérusalem, est venu compliquer la situation diplomatique pour ce qui est des colonies. Il est à noter que cette correspondance peut avoir un poids politique pour les deux gouvernements,

⁸ *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, Cour internationale de Justice, avis consultatif, 9 juillet 2004; l'Assemblée générale a, dans sa résolution ES-10/15 demandé aux parties de s'acquitter de leurs obligations juridiques telles qu'elles sont énoncées dans l'avis consultatif. Israël a refusé de se plier à l'avis consultatif et poursuivi la construction d'autres pans du mur.

mais qu'elle n'a aucune valeur juridique et ne saurait nullement compromettre les droits des palestiniens au regard du droit international humanitaire. Vue strictement sous cet angle, elle n'a rien à voir avec un processus de paix légitime quelconque et la participation de l'ONU doit clairement refléter le fait qu'elle ne peut en aucun cas compromettre des droits palestiniens.

30. Il est intéressant de constater que, même abstraction faite de l'importance juridique ou du poids moral de cette correspondance, la lettre du Premier Ministre Sharon portait déjà sur une initiative israélienne concernant les colonies, qui n'a nullement modifié la situation. Sharon y disait être conscient des responsabilités incombant à l'État d'Israël, s'agissant notamment de la limitation de l'expansion des colonies et du démantèlement des avant-postes non autorisés, responsabilités réaffirmées par l'actuel Gouvernement israélien à Annapolis qui, une fois de plus, ne s'en est aucunement acquitté. L'expansion des colonies, mesurée à l'aune de la population, mais plus encore, à celle de l'acquisition de terres, principalement par voie d'expropriation et de confiscation et du développement, s'est, au contraire, poursuivie à un rythme accéléré.

31. Cette situation et le cantonnement de la vie quotidienne palestinienne qui en est le corollaire sont de plus en plus perçus comme un message adressé aux Palestiniens pour leur signifier que la solution des deux États n'est plus viable même si elle reste la politique déclarée du Quatuor, l'Accord d'Annapolis, et ce qui revient le plus dans les commentaires faits sur les objectifs du processus de paix. Il est notamment troublant de constater que dans sa lettre, le Président Bush souscrit à l'idée de définir les obligations de retrait ultérieur d'Israël en fonction des réalités sur le terrain, notamment les grands centres de population israéliens. Il n'est fait nulle mention des rappels constants adressés au Gouvernement israélien sur l'incompatibilité de sa politique d'implantation avec ses obligations en vertu du droit international humanitaire et des résolutions spécifiques de l'ONU.

32. Le degré d'empiètement des colonies sur le territoire de la Cisjordanie et de Jérusalem-Est est difficile à déterminer avec précision du fait de leur expansion continue. D'après les estimations les plus fiables dont on dispose à l'heure actuelle, les terrains où se sont implantées des colonies faisant l'objet de litiges (auxquels sont venues s'ajouter les terres palestiniennes saisies pour la construction du mur de séparation) représentent 14 % du territoire de la Cisjordanie qui, lui-même, ne représente que 22 % de la Palestine sous mandat britannique d'origine. Selon les chiffres publiés récemment, il existe actuellement quelque 200 colonies, 100 avant-postes et 29 bases militaires israéliennes. Le coût du maintien du réseau de colonies est d'environ 556 millions de dollars par an et le nombre de colons se situe d'après les estimations entre 480 000 et 550 000 personnes. Le taux d'expansion des colonies est d'à peu près 4 % par an, tant pour la superficie que la population. Un certain nombre de problèmes particuliers découlant des colonies alimentent la violence, aussi bien celle des colons envers les Palestiniens que celle de la résistance palestinienne. La ville d'Hébron, où habitent 150 000 Palestiniens, est un point chaud constant et le théâtre de maints incidents violents et de morts tragiques. Sept cents colons y sont protégés par 300 soldats israéliens. Les statistiques les plus éloquentes (établies par le Bureau de la coordination des affaires humanitaires pour le territoire palestinien occupé) concernent peut-être le fait que les terres palestiniennes confisquées par Israël pour l'implantation de colonies, de zones militaires fermées (notamment presque toute la vallée du Jourdain) et de réserves classées naturelles par les Israéliens rendent à présent 40 % de la Cisjordanie

inaccessibles ou inexploitable à des fins résidentielles, agricoles ou commerciales ou pour le développement municipal.

33. L'expansion des colonies a été particulièrement notable à Jérusalem-Est. Le Comité de planification et de construction du district de Jérusalem a récemment approuvé la construction de 1 800 nouveaux logements (920 à Har Homa/Jabal Abu Ghneim et 880 à Pisgat Ze'ev). L'expansion favorise également la politique israélienne visant à faire de Jérusalem-Est un lieu de résidence à majorité juive et s'accompagne d'expulsions de Palestiniens. Par ailleurs, la présence des 250 000 Juifs qui y vivent « illégalement » est passée sous silence.

V. Crise sanitaire dans les territoires palestiniens

34. Tous les observateurs spécialisés s'accordent à reconnaître l'existence à Gaza et en Cisjordanie d'une crise sanitaire persistante, de nature pluridimensionnelle, qui risque fort de provoquer un effondrement total du système de santé de base et d'avoir des conséquences désastreuses pour la population palestinienne.

35. La situation économique et sociale générale dans le territoire palestinien occupé se caractérise par des taux de chômage et de pauvreté extrêmement élevés, surtout à Gaza. Selon l'ONU et la Banque mondiale, le taux de pauvreté moyen pour la Cisjordanie et Gaza s'élève actuellement à 59 % et l'insécurité alimentaire touche au moins 38 % de l'ensemble de la population du territoire palestinien occupé. Le niveau de chômage à Gaza se situe officiellement à 45 %, le taux le plus élevé au monde, mais il s'agit là, pour diverses raisons, du chiffre réel d'une sous-estimation. Quatre-vingt-quinze pour cent des usines de Gaza seraient à présent fermées pour cause de siège. La Banque mondiale a laissé entendre que cette situation risquait de provoquer un effondrement économique « irréversible ».

36. Israël a classé Gaza dans la catégorie des « entités ennemies » depuis que le Hamas en a pris le contrôle à la mi-juin 2007, justifiant ainsi la réduction des approvisionnements en vivres et en combustible à la portion congrue. Selon les statistiques disponibles, Gaza ne reçoit que 30 % des combustibles dont il a besoin chaque semaine et n'est surtout pas suffisamment ravitaillé en huile de cuisine et en combustible diesel. Le classement dans la catégorie des « États ennemis » a également conduit Israël à bloquer le versement des recettes douanières palestiniennes, et l'Europe et les États-Unis ont suspendu leur aide économique à Gaza.

37. Les fournitures médicales et le matériel essentiel font souvent défaut car il est impossible d'importer des pièces détachées ou de rechange. Les habitants de Gaza qui sont malades et ont besoin de soins médicaux spécialisés impossibles à obtenir sur place éprouvent toutes les peines du monde à se faire délivrer des autorisations de sortie pour se faire soigner en Israël et nombre d'entre eux meurent faute d'avoir pu se faire administrer à temps les soins médicaux nécessaires. Les obstacles auxquels se heurtent les Palestiniens de Gaza malades qui se trouvent dans ce cas sont examinés au paragraphe 46. Selon le programme de santé mentale communautaire de Gaza, les effets conjugués de ces facteurs ont eu de graves conséquences sur la santé mentale des Palestiniens, la plupart des civils éprouvant des sentiments de peur, d'anxiété, de panique, de dépression, de frustration et de désespoir découlant des pratiques d'occupation israélienne, du siège et de la pauvreté.

38. La situation en Cisjordanie est moins dramatique du point de vue sanitaire, mais elle reste tout de même encore très en deçà des normes internationales minimales. Le taux de chômage s'élève à 25 %, même avec l'assistance économique dont bénéficie l'Autorité palestinienne, mais les fermetures et le cantonnement font qu'il est difficile, voire impossible, de maintenir une activité économique rémunérée. L'une des difficultés fondamentales tient notamment au fait qu'il existe des postes de contrôle et des barrages routiers et qu'il faut obtenir des permis, ce qui entrave les déplacements à destination et en provenance des centres médicaux, même en Cisjordanie, et surtout des villages et camps de réfugiés ceinturant les grandes villes où se trouvent les hôpitaux et autres établissements médicaux. Les restrictions rendent également l'accès à Israël très difficile, voire impossible, pour la plupart des Palestiniens vivant en Cisjordanie et c'est cette situation qui, de l'avis général, est à l'origine de diverses maladies, en particulier chez les enfants qui souffrent de malnutrition et de traumatismes.

39. Le Gouvernement israélien refuse toute responsabilité en tant que Puissance occupante pour la grave situation sanitaire. S'agissant de Gaza, il estime que depuis le 12 septembre 2005, il n'est plus la Puissance occupante, comme indiqué au paragraphe 5, et n'est par conséquent plus légalement responsable des problèmes auxquels doivent faire face les habitants de Gaza. Israël estime également que depuis la prise de contrôle de la bande par le Hamas, la politique de lutte contre le terrorisme qu'il mène vis-à-vis de Gaza est similaire à une guerre, une « guerre contre la terreur ». Selon le droit international, Israël demeure toutefois la Puissance occupante et est donc soumis à la quatrième Convention de Genève qui, dans ses articles 13 à 25, porte tout particulièrement sur l'obligation juridique qu'a la puissance occupante de protéger la santé de la population soumise à l'occupation.

40. Compte tenu de la nature prolongée de l'occupation et s'agissant de Gaza, des graves incidences supplémentaires qu'ont les politiques israéliennes sur la santé et le bien-être de l'ensemble de la population de la bande, ces obligations concernent tout particulièrement le territoire palestinien occupé. L'article 16, par exemple, est ainsi rédigé : « Les blessés et les malades, ainsi que les infirmes et les femmes enceintes, seront l'objet d'une protection et d'un respect particuliers. » Cette obligation est renforcée par le paragraphe 1 de l'article 25 de la Déclaration universelle des droits de l'homme qui dispose que « toute personne a droit à un niveau de vie suffisant pour assurer sa santé, son bien-être et ceux de sa famille, notamment pour l'alimentation, l'habillement, le logement, les soins médicaux ainsi que pour les services sociaux nécessaires; elle a droit à la sécurité en cas de chômage, de maladie, d'invalidité, de veuvage, de vieillesse et dans les autres cas de perte de ses moyens de subsistance par suite de circonstances indépendantes de sa volonté. »

41. L'articulation peut-être la plus claire du droit international concernant le droit à la santé se trouve au paragraphe 1 de l'article 12 du Pacte international relatif aux droits économiques, sociaux et culturels qui est ainsi en partie rédigé : « Les États parties au présent Pacte reconnaissent le droit qu'a toute personne de jouir du meilleur état de santé physique et mentale qu'elle soit capable d'atteindre. » Le paragraphe 2 de l'article 12 et ses alinéas b) et d) sont également pertinents et ainsi rédigés : « Les mesures que les États parties au présent Pacte prendront en vue d'assurer le plein exercice de ce droit devront comprendre les mesures nécessaires pour assurer : b) l'amélioration de tous les aspects de l'hygiène du milieu et de

l'hygiène industrielle; [...] et d) la création de conditions propres à assurer à tous des services médicaux et une aide médicale en cas de maladie ».

42. Israël est partie à cet instrument et est donc lié par les normes de base qui y figurent et sont, en tout état de cause, une expression des obligations juridiques consacrées par le droit international coutumier. De manière générale, les obligations aux termes du droit international humanitaire et des normes en matière de droits de l'homme sont tout particulièrement applicables lorsqu'une puissance occupante joue un rôle fiduciaire envers une population captive.

43. La démarche adoptée envers Gaza par Israël, les États-Unis d'Amérique et l'Union européenne depuis la victoire électorale du Hamas en janvier 2006 se fonde sur une violation massive et systématique de l'article 33 de la quatrième Convention de Genève qui interdit absolument les peines collectives : « Aucune personne protégée ne peut être punie pour une infraction qu'elle n'a pas commise personnellement. Les peines collectives, de même que toute mesure d'intimidation ou de terrorisme, sont interdites. » De façon plus pratique, les spécialistes médicaux ne cessent d'appeler l'attention sur le fait que le système de santé à Gaza se trouve dans une situation précaire et même « au bord de l'effondrement » ou « non viable ».

44. La situation de la Cisjordanie, qui ne fait pourtant pas l'objet d'un siège systématique et dispose des fonds lui permettant de fournir des services de santé, ressemble par de nombreux aspects à celle de Gaza, même si Israël ne prétend pas ne plus être la Puissance occupante en Cisjordanie. Les politiques du Gouvernement israélien qui, en Cisjordanie, punissent la population palestinienne dans son ensemble, sont régulièrement justifiées comme étant nécessaires à la sécurité de l'occupation, notamment celles des colonies de peuplements et d'Israël même. Ces assertions relatives à la sécurité, quelle que soit leur validité quand elles sont faites indépendamment, doivent être mises en balance avec les effets négatifs causés au peuple occupé. C'est ce qu'a fait la Cour internationale de Justice s'agissant du mur (voir par. 3). Elle a rejeté l'assertion d'Israël, notamment parce que celui-ci avait construit le mur en territoire palestinien occupé et utilisé des terres confisquées pour agrandir les colonies de peuplement, objectif illégal et sans aucun rapport avec un besoin légitime de sécurité. Le traitement des maladies mentales et l'accès aux établissements médicaux, en particulier lors des urgences sanitaires, ont été particulièrement entravés par les restrictions à la liberté de mouvement dans l'ensemble de la Cisjordanie, notamment les points de contrôle, les barrages routiers et les fermetures. Ces restrictions semblent excessives et ont été fréquemment observées, en même temps que toute une gamme de pratiques visant à intimider et à humilier qui découragent le mouvement des Palestiniens en Cisjordanie. Au fil du temps, la situation a gravement porté préjudice à la santé des habitants. Cette politique d'isolement revient à infliger une peine collective et viole le paragraphe 1 de l'article 13 de la Déclaration universelle des droits de l'homme qui dispose que « toute personne a le droit de circuler librement et de choisir sa résidence à l'intérieur d'un État ».

45. Pour résumer, les formes qu'a prises l'occupation à Gaza et en Cisjordanie ont mis à rude épreuve le maintien de la santé physique et mentale des Palestiniens vivant en territoire occupé. Les effets négatifs ont été particulièrement graves pour les enfants. Il convient de noter que compte tenu de la durée de l'occupation, l'écrasante majorité des Palestiniens vivant à Gaza et en Cisjordanie ont passé toute

leur vie sous l'occupation. Lors d'une conférence tenue à Jérusalem-Est, le Rapporteur spécial a été tout particulièrement frappé par l'observation faite par un professeur de Cisjordanie enseignant à l'Université de Bir-Zeit qui a dit « j'ai 43 ans et je n'ai pas eu un seul jour heureux dans ma vie ». Au-delà des statistiques, l'oppression d'une occupation militaire impitoyable et qui dure depuis longtemps ne permet pas de garder une santé mentale et physique minimale.

**A. Autres violations touchant les patients de Gaza :
interrogation par le Shin Bet des patients palestiniens
au passage d'Erez**

46. L'organisation Physicians for Human Rights-Israel (Médecins pour les droits de l'homme-Israël) a publié le 4 août 2008 un rapport contenant le témoignage de 32 patients de Gaza interrogés au point de passage d'Erez. Ce rapport se fonde sur des informations reçues depuis juillet 2007. Ces personnes, qui avaient des problèmes de santé graves mettant souvent leur vie en danger, souhaitaient entrer en Israël pour y recevoir un traitement médical urgent non disponible à Gaza. Elles ont affirmé qu'elles avaient été interrogées avec rudesse et d'une façon inappropriée et faite pour les intimider par des membres du Service général de sécurité israélien (Shin Bet). Il ressort des témoignages recueillis qu'Israël insiste systématiquement auprès des personnes cherchant à obtenir une autorisation de sortie pour qu'elles acceptent de fournir au Service général de sécurité les informations demandées ou de collaborer à l'avenir avec ce service, faute de quoi elles peuvent l'attendre indéfiniment. Le rapport indique également qu'un certain nombre d'habitants de Gaza ont décidé de ne pas se faire soigner plutôt que de se soumettre à un interrogatoire en dépit des conséquences probablement désastreuses de cette décision sur leur santé. Une personne a rapporté ce qui suit : « Ensuite, l'interrogateur m'a dit : "Vous avez le cancer et bientôt celui-ci se propagera vers votre cerveau. Tant que vous ne nous aiderez pas, vous devrez attendre l'ouverture du point de passage de Rafah" ». Cette remarque était typique des autres témoignages recueillis aux fins de l'établissement du rapport.

47. Le Gouvernement israélien a répondu aux allégations figurant dans le rapport de Physicians for Human Rights-Israel affirmant qu'il agissait dans le cadre de ses droits souverains et était raisonnable compte tenu des graves problèmes de sécurité, notamment des attaques lancées par le Hamas contre le point de passage d'Erez où avaient lieu les interrogatoires. Les principales assertions d'Israël sont qu'il n'a plus aucune responsabilité concernant ce qui se passe à Gaza car il a cessé d'être la Puissance occupante le 12 septembre 2005, qu'il a toute discrétion pour refuser l'accès des habitants de Gaza à Israël et les autorités judiciaires israéliennes ont soutenu cette conclusion.

48. Du point de vue du droit international humanitaire, la bande de Gaza (voir par. 5) continue d'être sous occupation israélienne. En conséquence, bien qu'ils ne s'appliquent pas explicitement à la situation examinée, les articles 55 et 56 de la quatrième Convention de Genève disposent que toute puissance a l'obligation juridique générale de prendre toutes les mesures nécessaires pour sauvegarder la santé des personnes protégées.

49. Selon la façon dont on considère ces tentatives d'extorsion d'informations et de collaboration en échange d'autorisations de sortie permettant de recevoir un

traitement médical, il semblerait qu'elles violent l'alinéa c) du paragraphe 1 de l'article 3 qui interdit les traitements cruels et la torture ainsi que l'article 5 de la Déclaration universelle des droits de l'homme. L'instrument juridique qui est peut-être le plus pertinent est la Convention contre la torture qui définit toute une série de conditions permettant d'éviter inférence de « torture et autres traitements cruels, inhumains ou dégradants ». L'article 1 établit un lien entre la torture et les traitements connexes susceptibles d'entraîner des souffrances physiques ou mentales et le comportement d'agents publics au cours d'un interrogatoire visant à obtenir des informations par différentes formes d'intimidation. D'autres dispositions de la Convention contre la torture prévoient toute une gamme d'obligations juridiques par les États et donnent des droits aux personnes lésées.

50. Le Rapporteur spécial conclut que les pratiques israéliennes relatives aux interrogatoires dont fait état Physicians for Human Rights-Israel dans son rapport qui se fonde sur les témoignages d'habitants de Gaza donnent fortement à penser qu'Israël, en tant que Puissance occupante, viole ses obligations juridiques. Les réponses données par Israël ne sont pas satisfaisantes car elles partent de l'hypothèse que la bande de Gaza n'est plus occupée. Selon d'autres nouvelles inquiétantes, six habitants de Gaza gravement malades sont morts en 24 heures pendant qu'ils attendaient la permission de se déplacer. D'après le Free Gaza Movement, 233 patients de Gaza gravement malades sont morts pendant qu'ils attendaient l'autorisation de quitter Gaza afin d'obtenir le traitement médical qui leur était nécessaire au cours du siège.

VI. Recommandations

51. Les recommandations ci-après, tirées du rapport, sont mises en évidence de toute urgence :

a) L'Assemblée générale devrait demander à la Cour internationale de Justice de procéder à une évaluation juridique de l'occupation israélienne du territoire palestinien du point de vue du droit des Palestiniens à l'autodétermination;

b) Il conviendrait d'obtenir l'assistance du Conseil de sécurité concernant la mise en œuvre de l'avis consultatif rendu en 2004 par la Cour internationale de Justice sur les conséquences juridiques de la construction d'un mur dans le territoire palestinien occupé;

c) Compte tenu du fait que les Conventions de Genève ont fait l'objet de graves violations pendant longtemps, il serait bon de se pencher sérieusement sur les obligations juridiques des Parties à ces traités afin de veiller à ce que les engagements de fond mentionnés à l'article premier soient respectés. Il pourrait être envisagé initialement de prier instamment le Gouvernement suisse, dépositaire des Conventions de Genève, de convoquer une réunion des États parties afin d'examiner comment ils peuvent s'acquitter de leurs obligations juridiques, compte tenu du fait qu'Israël persiste à violer son régime juridique d'occupation;

d) Il conviendrait que tous les organismes compétents des Nations Unies prennent dûment note du fait qu'Israël ne respecte pas les engagements qu'il a pris lors du sommet d'Annapolis de mettre un terme à l'expansion des colonies

de peuplement, d'améliorer la liberté de mouvement en Cisjordanie et de satisfaire les besoins humanitaires des Palestiniens qui vivent sous son occupation;

e) L'Organisation des Nations Unies devrait examiner quelle est sa responsabilité propre pour ce qui est du bien-être des Palestiniens vivant sous occupation illégale, en particulier s'agissant des irrégularités concernant le contrôle des frontières, la liberté et l'indépendance des journalistes et la crise sanitaire générale, en particulier à Gaza;

f) Compte tenu de la crise sanitaire à Gaza, les membres de la communauté internationale, et notamment l'Organisation des Nations Unies, devraient reprendre leur assistance économique à titre hautement prioritaire. Face à la menace de catastrophe humanitaire, il importe au plus haut point de faire tout ce qui est possible pour alléger les souffrances humaines. Il s'agit d'une responsabilité envers la population civile de Gaza qui n'a rien à voir avec le respect par le Hamas des conditions politiques définies par Israël ni avec le maintien du cessez-le-feu.



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**Promotion et protection des droits de l'homme :
situations relatives aux droits de l'homme et rapports
des rapporteurs et représentants spéciaux**

Situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967**

Note du Secrétaire général

Le Secrétaire général a l'honneur de transmettre aux Membres de l'Assemblée générale le rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Richard Falk, présenté conformément à la résolution 5/1 du Conseil des droits de l'homme.

* A/64/150.

** Le présent document a été soumis après la date limite afin que des renseignements sur les faits les plus récents puissent y figurer.



Rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés par Israël depuis 1967

Résumé

Le présent rapport porte sur le respect des normes internationales humanitaires et relatives aux droits de l'homme dans les territoires palestiniens occupés par Israël depuis 1967, au cours de la période allant de décembre 2008 à juillet 2009. Il prend note du refus persistant et arbitraire du Gouvernement israélien de coopérer avec le titulaire du mandat. Il s'intéresse particulièrement à la bande de Gaza au lendemain de l'opération militaire israélienne « Plomb durci » et signale que le maintien du blocus met en péril les droits fondamentaux et entrave les travaux de reconstruction et de réparation des infrastructures civiles de base.

Le rapport évalue les crimes qui auraient été commis lors de l'opération « Plomb durci » et la question des responsabilités. Il examine les informations faisant état d'attaques contre des installations de l'ONU et la population civile et en analyse les aspects juridiques. Le rapport relève les témoignages de soldats qui ont pris part à l'opération « Plomb durci », qui confirment un recours constant à des règles d'engagement floues et la destruction systématique de cibles qui ne pouvaient se justifier ni sur le plan militaire ni par souci de sécurité.

Le rapport aborde la question des colonies de peuplement israéliennes en notant que de récentes discussions engagées sur le gel de leur implantation en ont fait des jalons politiques plutôt que des droits des Palestiniens au regard du droit international humanitaire. Enfin, le rapport évoque la question de la poursuite de la construction d'un mur dans les territoires palestiniens occupés et le non-respect par Israël de l'avis consultatif rendu par la Cour internationale de Justice en 2004, qu'il estime porter préjudice au droit international, à la Cour internationale de Justice et à l'Organisation des Nations Unies en général.

Le rapport s'achève sur des recommandations invitant l'Assemblée générale à adresser une demande d'avis consultatif à la Cour internationale de Justice sur l'obligation et le devoir qui incombent aux États Membres de coopérer avec l'Organisation et ses représentants; à encourager les Membres de l'Organisation à user de moyens nationaux, notamment en faisant appel aux tribunaux, pour faire appliquer le droit pénal international aux territoires palestiniens occupés; à faire dorénavant du respect par Israël du droit international et des droits des Palestiniens un élément constitutif des négociations de paix futures; et à envisager de limiter la quantité d'armes fournies aux parties au conflit israélo-palestinien.

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I. Introduction

1. Nommé conformément à la résolution 1993/2 A de la Commission des droits de l'homme, le 26 mars 2008, le Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967 a pris fonction le 1^{er} mai 2008. Richard Falk, Rapporteur spécial titulaire du mandat, a été expulsé d'Israël le 14 décembre 2008, et en dépit de maintes démarches officielles effectuées pour tenter de déterminer les prochaines visites en territoire palestinien occupé, Israël a rejeté toutes ces initiatives sans fournir d'explication.

2. Son rapport prend note en particulier du maintien du refus arbitraire d'Israël de coopérer avec le titulaire dans le cadre de l'accomplissement de son mandat. La mission d'établissement des faits sur le conflit de Gaza dirigée par le juge Richard Goldstone s'est également vu refuser entrée et coopération. Comme il ressort de rapports précédents, cette non-coopération crée un fâcheux précédent dans les relations du Conseil des droits de l'homme de l'ONU et les États Membres et entrave les activités menées dans le cadre du mandat. Comme ce fut le cas précédemment, il est recommandé à l'Assemblée générale ou au Conseil des droits de l'homme de demander des précisions sur les conséquences juridiques de ce manque de coopération en portant l'affaire devant la Cour internationale de Justice en vue de l'obtention d'un avis consultatif. Faute d'avoir pu effectuer des visites d'inspection, le Rapporteur spécial compte beaucoup, pour l'établissement de son rapport, sur le travail des autres, notamment d'un large éventail d'organisations non gouvernementales de défense des droits de l'homme indépendantes et fiables et celui de divers acteurs du système des Nations Unies.

3. Le rapport couvre des événements qui se sont déroulés principalement de décembre 2008 à juillet 2009 et plusieurs questions seront examinées en détail, notamment la crise à Gaza, le non-respect du principe de responsabilité, l'avis consultatif de la Cour internationale de Justice rendu le 9 juillet 2004 sur l'édification d'un mur de sécurité par Israël¹, l'expansion des colonies, l'autodétermination palestinienne et les lacunes du droit international humanitaire. Les sections suivantes donnent un bref aperçu de chacune de ces questions.

4. Pour ce qui est de la crise de Gaza, bien que le cessez-le-feu établi par les parties le 18 janvier 2009 ait généralement tenu, la situation globale a continué à se détériorer au point de révéler des infractions graves et systématiques de la quatrième Convention de Genève et des violations du droit international des droits de l'homme qui ont des incidences sur le droit pénal international. En raison du maintien du blocus sur la bande de Gaza, la population manque de denrées de première nécessité; les conditions sanitaires se sont encore dégradées, allant jusqu'à mettre en danger tous les habitants; les matériaux nécessaires à la réparation et à la reconstruction des maisons et des bâtiments endommagés par les forces de défense israéliennes pendant les 22 jours de la guerre de Gaza n'ont pas pu entrer. Le système des Nations Unies est mis au défi de prendre d'urgence des mesures concrètes pour assurer la protection de la population civile de Gaza.

¹ Voir A/ES-10/273 et Corr.1; voir aussi *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, Avis consultatif, Rapport de la Cour internationale de Justice 2004*, p. 136, et résolution ES-10/15 de l'Assemblée générale.

5. À propos de la responsabilité, plusieurs rapports convergents et complémentaires faisant autorité sont venus à présent confirmer les allégations de crimes de guerre². Il importerait d'ajouter à ces informations dont on dispose le rapport de la mission d'établissement des faits dirigée par le juge Goldstone, attendu le 12 septembre 2009, mais il n'est pas très prématuré de s'interroger sur la suite à lui donner, c'est-à-dire chercher à mettre en place des mécanismes propres à assurer le respect du principe de responsabilité et à éviter l'impunité. La récente décision du Gouvernement britannique d'annuler des contrats de livraison de pièces détachées à la marine israélienne découlait d'objections au sujet de la manière dont Israël avait conduit ses dernières opérations militaires. Il est intéressant de noter qu'Amnesty International a préconisé un embargo total sur les livraisons d'armes à Israël et au Hamas à la faveur de ses conclusions examinées plus haut sur l'opération militaire israélienne à Gaza baptisée opération « Plomb durci ».

6. Le cinquième anniversaire de la publication de l'avis consultatif sur l'édification d'un mur de sécurité par Israël¹ appelle l'attention sur plusieurs facteurs : a) en dépit de l'avis quasi unanime de la Cour internationale de Justice (14 juges contre un) selon lequel le mur situé sur le territoire palestinien occupé était illégal et devrait être démantelé immédiatement, Israël en a poursuivi la construction qui est à présent aux deux tiers achevée; b) le mépris d'Israël à l'égard d'une décision de la Cour internationale de Justice qui fait autorité en matière de droit international constitue une grave violation de ses obligations de Membre de l'Organisation des Nations Unies et d'État souverain; bien que revêtant la forme d'un « avis consultatif », la décision de la Cour représente un avis autorisé du droit international et a été également considérée comme telle par l'Assemblée générale dans une résolution ES-10/15 adoptée le 20 juillet 2004; c) le fait que le système des Nations Unies ne se soit pas mieux employé à appliquer une décision aussi claire et quasi unanime du droit international est une nouvelle indication que les droits des Palestiniens ne sont pas respectés et qu'Israël jouit d'une impunité de fait; d) les manifestations pacifiques que les Palestiniens continuent d'organiser à différents points de construction du mur ont été brutalement réprimées par les forces de sécurité israéliennes, faisant plusieurs morts et de nombreux blessés³.

7. Au sujet de l'expansion des colonies, malgré les nombreux appels lancés en faveur d'un gel, notamment par le Président Obama des États-Unis, des informations font état de leur poursuite à Jérusalem-Est et en Cisjordanie. L'Autorité palestinienne et le Gouvernement des États-Unis ont clairement fait comprendre que l'on ne pourra pas faire avancer la Feuille de route tant qu'Israël ne procédera pas à un gel inconditionnel de l'expansion des colonies. Il conviendrait de noter que même s'il fait l'objet d'un accord, un gel ne résout pas la question de l'illégalité fondamentale des colonies telle que définie à l'article 49 (6) de la quatrième Convention de Genève.

² Voir par. 24 ci-dessous.

³ Mille huit cent quatre Palestiniens ont été blessés lors de manifestations organisées contre la construction du mur entre janvier 2005 et juin 2009, soit 31 % de l'ensemble des traumatismes causés directement par le conflit en Cisjordanie. Voir Bureau de la coordination des affaires humanitaires « Five Years after the International Court of Justice Advisory Opinion: A Summary of the Humanitarian Impact of the Barrier », 10 juillet 2009. Consultable à l'adresse www.ochaopt.org.

8. À propos de l'autodétermination palestinienne, le droit le plus fondamental au regard du droit international dont la réalisation a été entravée par l'occupation israélienne des territoires palestiniens est le droit inaliénable à l'autodétermination tel que consacré par l'article 1 des pactes internationaux relatifs aux droits de l'homme. De l'avis général, l'exercice de ce droit palestinien serait assuré par le biais de négociations bilatérales, renforcées par le rôle des États-Unis, plus récemment par le Quatuor (avec la participation directe de l'ONU) et encouragées par la communauté internationale tout entière. L'exercice de ce droit n'ayant été que trop longtemps retardé et les Palestiniens placés sous occupation étant victimes de multiples formes d'arbitraire, œuvrer pour trouver une solution pacifique et mettre un terme à l'occupation israélienne relèvent de la plus grande urgence.

9. Il importe au titre du présent rapport de relever deux séries de faits contradictoires, d'aucuns négatifs, d'autres apparemment positifs, qui influent sur le droit à l'autodétermination. Le principal élément négatif est le refus apparent du Gouvernement israélien récemment élu d'adhérer clairement au consensus international sur un État palestinien souverain constitué de la Cisjordanie et de la bande de Gaza, avec Jérusalem Est pour capitale; l'incapacité de la partie palestinienne de se doter d'une représentation unifiée et légitime qui semblerait être une condition préalable à de véritables négociations de paix en est un autre.

10. Cette série de facteurs a conduit ces derniers mois à la préconisation d'une solution imposée par des parties externes, souvent appelée le « Plan Solana » en raison de l'importance accordée aux propositions formulées dans ce sens par Javier Solana. À l'heure actuelle, ni l'opinion publique ni les dirigeants israéliens ou palestiniens ne sont favorables à une solution imposée, et sa préconisation doit être perçue comme un élément négatif, incompatible avec le droit à l'autodétermination et comme l'expression d'une frustration découlant de la futilité apparente de négociations directes.

11. Les éléments positifs reposent sur une définition claire de l'importance des progrès devant être réalisés sur le plan de l'autodétermination compte tenu de l'arrêt de l'occupation israélienne et de la création d'un État palestinien. À cet effet, le Président Obama a déclaré en substance le 4 juin 2009 au Caire que la situation du peuple palestinien était intolérable et que l'Amérique ne tournerait pas le dos aux aspirations légitimes du peuple palestinien à la dignité, à un avenir meilleur et à un État propre. Cette position a été réitérée par le Conseil de sécurité dans sa déclaration du 11 mai 2009 et par le Quatuor dans sa déclaration du 26 juin 2009 à Trieste. Il a estimé qu'une paix israélo-arabe et la création d'un État palestinien en Cisjordanie et à Gaza au sein duquel le peuple palestinien peut déterminer son propre destin sont dans l'intérêt suprême de la communauté internationale.

12. S'agissant des lacunes du droit international humanitaire, l'occupation prolongée des territoires palestiniens ainsi que les récentes opérations militaires menées par Israël ont révélé trois lacunes dans le droit qu'il convient de relever et de combler aussitôt que possible : a) le déni du droit des civils de quitter une zone de combat. Ce droit a été nié à tous les civils de Gaza lors de l'opération « Plomb durci » à l'exception de quelques centaines de résidents titulaires de passeports étrangers et de membres d'une communauté chrétienne restreinte de Gaza⁴. Divers

⁴ Voir le rapport d'Amnesty International intitulé « Israel and Gaza: Opération "Cast Lead": 22 days of death and destruction », 2 juillet 2009, consultable à l'adresse suivante : www.amnesty.org/en/library/info/MDE15/015/2009/en.

problèmes semblent se poser ici concernant le devoir qui incombe aux occupants de protéger la population civile comme le stipule très clairement le Protocole additionnel I aux Conventions de Genève, qui est contraignant parce que ses normes sont incorporées dans le droit international coutumier en dépit du fait qu'Israël n'est pas partie à ce traité⁵; b) le refus d'autoriser le passage de matériaux fournis au titre de l'aide à la reconstruction par la communauté internationale pour réparer les dégâts causés par la guerre à Gaza en raison du maintien d'un blocus en violation de l'article 33 de la quatrième Convention de Genève. Ce blocage de l'aide à la reconstruction pourrait être assimilé à un cas de châtement collectif interdit mais qui, parce qu'il soulève une série de problèmes distincts d'après combat qui ne sont pas explicitement abordés par le droit international humanitaire, pourrait mieux être servi par l'adoption d'un autre protocole aux Conventions de Genève; et c) les dislocations poignantes de familles résultant directement de l'occupation prolongée du territoire palestinien occupé, à présent dans sa quarante-deuxième année, alliées aux restrictions de déplacements imposées par la Puissance occupante, sont venues accentuer les souffrances palestiniennes, ce qui semble inadmissible du point de vue du droit international des droits de l'homme.

13. La lauréate du prix Nobel de la paix, Mairead Maguire, qui se rend fréquemment en visite à Gaza et en Cisjordanie, a récemment indiqué qu'il était à juste titre beaucoup question d'accès des populations et de l'aide à Gaza mais que, pour elle, le crime le plus abominable que commet le Gouvernement israélien est de séparer les habitants de Gaza de leur famille et de leurs amis de Cisjordanie et également d'autres Palestiniens à travers le monde. Et de noter que nier aux gens le droit de retrouver leur famille et leurs amis est assurément l'une des pires formes de torture et de châtement collectif imposées à des civils⁶. Ces déclarations ne témoignent manifestement pas de l'existence de droits juridiques, mais signalent celle de lacunes dans la protection par le droit international humanitaire d'une population civile soumise à une occupation prolongée. Dans la situation de la Palestine, où les droits d'entrée et de sortie sont soumis à un contrôle si rigoureux, ces restrictions sont source d'angoisses particulièrement vives. Un autre aspect de l'occupation prolongée est lié au fait que des réfugiés palestiniens vivant à l'étranger aient été coupés de leur famille pendant plus de quatre décennies. Cette profonde lacune observée dans la protection des civils et découlant d'une occupation prolongée semble n'avoir pas du tout été examinée dans le cadre actuel du droit international humanitaire.

II. Gaza après le cessez-le-feu

14. La crise que traverse encore toute la population civile de la bande de Gaza dans des circonstances d'interminable désespoir imputables à divers aspects illégaux de l'occupation israélienne pose un problème au système des Nations Unies et à la communauté internationale. Méconnaître ce problème reviendrait à proclamer que les violations des normes du droit international humanitaire et du droit international des droits de l'homme sont sans importance et qu'un État bénéficiant d'un soutien géopolitique puissant jouit d'une impunité pratiquement illimitée.

⁵ Ibid., voir les articles 51, 52, 57 du Protocole I des Conventions de Genève.

⁶ Lettre adressée à Miguel d'Escoto-Brockamn, Président de l'Assemblée générale, le 17 juillet 2009.

A. Le blocus

15. Le Comité international de la Croix-Rouge (CICR) a publié le 1^{er} juillet 2009 un important rapport intitulé *Gaza: 1.5 Million People Trapped in Despair*. Prenant note de l'immense dévastation humaine et matérielle causée par les 22 jours de l'opération Plomb durci, le CICR écrit ceci : « Six mois plus tard [après le cessez-le-feu], les restrictions aux importations empêchent les habitants de reconstruire leur vie. Les quantités de marchandises qui entrent actuellement à Gaza sont très inférieures à ce qu'il faudrait. En mai 2009, seuls 2 662 camions transportant des marchandises y sont entrés depuis Israël, soit près de 80 % de moins qu'en avril 2007 (11 392 camions), avant que le Hamas reprenne le territoire. »⁷. Selon les estimations d'Amnesty International, cela représente environ 5 % de la moyenne quotidienne des marchandises qui entraient à Gaza avant le blocus, encore que, selon certaines estimations, l'écart serait de 1 à 5.

16. Le rapport du CICR note que les quartiers de Gaza détruits par l'opération militaire continueront de ressembler à l'épicentre d'un vaste séisme sauf si des quantités massives⁷ de matériaux de construction sont admises tant pour construire que pour réparer les dégâts à l'infrastructure. De plus, 340 000 Palestiniens auraient été déplacés par l'opération Plomb durci et, en raison du blocus, beaucoup seraient encore sans abri. Dans sa lettre ouverte à Carl Bildt⁸, le Conseil palestinien des organisations des droits de l'homme affirme ceci : « Les malades, dont certains ont été blessés du fait de l'opération Plomb durci se voient régulièrement refuser la permission de quitter la bande de Gaza afin de recevoir à l'étranger un traitement médical vital, ce qui s'est traduit par plusieurs décès. »

17. Selon le rapport du CICR, « le seul moyen de faire face à cette crise est de lever les restrictions sur les pièces détachées, les conduites d'eau et les matériaux de construction comme le ciment et l'acier [et le verre] afin de pouvoir reconstruire les logements et entretenir ou améliorer l'infrastructure essentielle⁷. Or, en l'état actuel des choses, le maintien du blocus empêche la reconstruction, laisse le système d'évacuation des eaux et des déchets dans l'insalubrité et propage la crise sanitaire déjà décrite dans le rapport précédent du Rapporteur spécial (A/63/326). Bien que 4,5 milliards de dollars aient été promis en mars 2009 en Égypte à la Conférence des donateurs pour la reconstruction de Gaza, cette somme n'y a eu presque aucun effet sur la vie quotidienne ni sur sa population. De son côté, Israël soutient que seules les marchandises « humanitaires » pourront y entrer et qu'il entend strictement par là la subsistance à l'exclusion d'aliments comme le concentré de tomates, les biscuits et le thon en boîte ainsi que tous les matériaux de construction.

18. Ces derniers mois, le blocus a encore aggravé la misère des habitants que, de plus en plus, les spécialistes estiment quasiment irréversible sauf effort massif. Comme le dit le rapport du CICR, la crise est devenue si grave et si invétérée que, même si demain, tous les points de passage étaient ouverts, il faudrait des années pour relancer l'économie⁷. Selon les chiffres récents, le chômage serait de plus de 44 %, la dépendance envers l'aide alimentaire de subsistance de 80 %, le déclin de la production industrielle de 96 % et la pauvreté de plus de 70 %. Dans les débats

⁷ Voir Comité international de la Croix-Rouge, *Gaza: 1.5 Million People Trapped in Despair*, juillet 2009.

⁸ Voir lettre datée du 23 juillet 2009, adressée à Carl Bildt, Ministre suédois des affaires étrangères, par le Conseil palestinien des organisations des droits de l'homme.

sur le blocus, on met généralement l'accent sur les restrictions aux importations mais l'interdiction frappant les exportations a elle aussi été catastrophique pour l'économie et le bien-être de la population de Gaza, anéantissant les exportations industrielles et agricoles qui avaient donné une certaine sécurité matérielle à de nombreux habitants et permis d'espérer que la bande de Gaza finirait par se développer. Il ne suffirait d'ailleurs pas de revenir au statu quo antérieur à l'opération Plomb durci : seule serait acceptable la levée complète du blocus qui permettrait d'importer et d'exporter comme en mai 2007.

19. Un effet pervers du maintien du blocus est qu'il amène les habitants à recourir à des tunnels vers l'Égypte pour obtenir des produits essentiels, ce qui donne lieu à des activités de marché noir et crée de graves dangers. Ainsi, en 2009, 39 personnes seraient mortes du fait d'accidents dans ces tunnels, écrasées dans un éboulement ou asphyxiées par des fuites de carburant. Comme on l'a noté, le siège rigoureux imposé par les forces d'occupation israéliennes à la bande de Gaza a incité à l'emploi des tunnels qui a prospéré face à la grave pénurie de biens essentiels⁹. Or, si les points de passage étaient ouverts, il est probable que les tunnels disparaîtraient ou que leur rôle serait borné à des efforts de contrebande d'armes et d'autres articles. Selon les spécialistes des armements, les roquettes Qassam que le Hamas a surtout utilisées dans ses attaques contre Israël sont fabriquées à Gaza même : il n'y a donc pas lieu de maintenir fermés les points de passage pour des raisons de sécurité. Il serait plus logique qu'Israël surveille le trafic dans les tunnels, dans la mesure où il persisterait, pour déceler la contrebande d'armes.

20. La nocivité de la stricte limitation des déplacements pour les relations familiales et sociales s'inscrit dans la situation qui règne à Gaza et que le CICR résume éloquemment par la formule applicable à toute la population de la bande : « captive du désespoir ». Autre dimension de cette captivité : l'interdiction faite à des centaines de jeunes de poursuivre des études à l'étranger¹⁰, avec des cas cruels et déprimants de Palestiniens qui, après avoir obtenu une bourse d'études dans de grandes universités, se voient refuser un permis de sortie par Israël, Puissance occupante¹¹.

21. On ne saurait trop répéter que le blocus en soi est manifestement et vindicativement illégal vu l'obligation d'éviter sans exception les punitions collectives qu'impose clairement l'article 33 de la quatrième Convention de Genève. Il constitue donc un énorme crime de guerre. Refuser l'entrée des matériaux de reconstruction semble bien être une violation aggravante de l'article 33, d'autant plus sévère qu'à la suite de l'opération Plomb durci, la population est physiquement et psychologiquement vulnérable.

22. Une fois encore, le Free Gaza Movement a cherché à envoyer à Gaza un navire, le *Spirit of Humanity*, chargé de fournitures humanitaires comme expression symbolique du rejet de ce blocus illégal par les militants de la paix. Six navires avaient déjà réussi à accoster à Gaza; un autre, le *Dignity*, percuté en décembre 2008

⁹ Voir Centre Al-Mezan pour les droits de l'homme, communiqué de presse n° 67/2009 du 28 juillet 2009.

¹⁰ Voir Bureau de coordination des affaires humanitaires; *The Humanitarian Monitor*, juin et juillet 2009.

¹¹ Pour la confirmation de ce rôle du point de vue du droit international, voir le rapport d'Amnesty International, p. 80, qui rejette l'affirmation d'Israël selon laquelle l'exécution de son plan de « désengagement » en 2005 l'a dégagé de ses responsabilités de puissance occupante à Gaza.

par un navire de guerre israélien, n'y est pas parvenu. Le but proclamé de cette mission était de livrer à Gaza des fournitures nécessaires mais aussi d'exposer la carence de l'ONU et de la communauté intergouvernementale des États dans l'application du droit international humanitaire qu'exigent les articles 1 et 147 de la quatrième Convention de Genève ainsi que le paragraphe 1 de l'article 86 du Protocole I.

23. Comme auparavant, le navire a été arraisonné dans les eaux internationales, ce qui constitue un acte illégal; les passagers ont été détenus, certains pendant plusieurs jours; parmi eux figurait l'ancienne parlementaire américaine et candidate présidentielle du Parti vert, Cyntia McKinney. Bien que l'affaire se soit déroulée en un lieu international, 20 passagers ont été initialement accusés « d'entrée illégale dans les eaux israéliennes »; ils ont ensuite été relâchés. Le Free Gaza Movement renforce nettement l'impression qu'en l'occurrence la société civile prend plus au sérieux que les gouvernements le droit international humanitaire et le droit pénal international.

B. Crimes de guerre et responsabilité

24. Plusieurs études importantes faites sous des auspices respectés ont confirmé les soupçons issus d'exposés journalistiques et de récits de témoins oculaires concernant les crimes de guerre liés à l'opération Plomb durci : a) une étude complète présentée le 30 avril 2009, élaborée à l'initiative de la Ligue arabe par une équipe de spécialistes du droit international humanitaire dirigés par John Dugard, ancien Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, et intitulée « Rapport à la Commission indépendante d'enquête sur Gaza : nulle part où s'abriter »; le grand rapport sur les crimes de guerre publié en juillet 2009 par Amnesty International : « Israël/Gaza: Operation "Cast Lead": 22 Days of Death and Destruction »; plusieurs rapports de Human Rights Watch¹²; et 3) le rapport du CICR intitulé *Gaza: 1.5 Million People Trapped in Despair*, qui ne fait que confirmer l'ampleur de la dévastation qu'aggrave encore Israël en refusant de lever le blocus. Il existe aussi un grand rapport de la Commission d'enquête de l'ONU sur les dommages infligés aux installations de l'ONU et à son personnel par l'opération Plomb durci. Une série de conclusions relatives à la responsabilité et aux obligations d'Israël sont exposées dans le résumé du rapport; malheureusement, sur l'ordre du Secrétaire général, le texte intégral n'a pas été publié mais sa conclusion principale est que, sans justification militaire suffisante et de propos délibéré, Israël a gravement endommagé plusieurs installations de l'ONU et causé de lourdes pertes parmi ceux qui s'étaient réfugiés dans ses immeubles et ses écoles.

25. Les rapports de John Dugard, d'Amnesty International et de Human Rights Watch sont des plus fiables car ils convergent à deux égards importants : d'abord ils adoptent une démarche impartiale face aux allégations de crimes de guerre liés aux tactiques du Hamas, notamment le tir de roquettes contre le sud d'Israël et les

¹² *Rain of Fire, Israel's Unlawful Use of White Phosphorus in Gaza*, 25 mars 2009; *Precisely Wrong Gaza Civilians Killed by Israeli Drone-Launched Missiles*, 30 juin 2009; *Gaza/Israël : les tirs de roquettes par le Hamas contre la population civile israélienne sont illégaux*, 6 août 2009; *White Flag Deaths, Killings of Palestinian Civilians during Operation Cast Lead*, 13 août 2009 (voir <http://www.hrw.org/en/publications/reports/>).

accusations de recours par ses combattants à des boucliers humains, et ils contiennent un examen détaillé des allégations sur les tactiques israéliennes pendant l'opération Plomb durci; ensuite, leur évaluation des faits et de la cause concordent et amènent à l'incrimination primordiale des tactiques de combat israéliennes comme contrevenant au droit international humanitaire et relevant donc du droit pénal international. Ces conclusions sont encore étayées par le témoignage extraordinaire de 30 soldats des Forces de défense israéliennes (FDI) ayant pris part à l'opération Plomb durci, auquel le Gouvernement israélien a opposé des démentis de pure forme¹³. De plus, les rapports ont dégagé une conclusion subsidiaire selon laquelle les tactiques du Hamas, même sur une base bien plus restreinte, constituaient aussi des violations des lois de la guerre.

26. On l'a dit plus haut, malgré le consensus écrasant lié à la documentation disponible sur les allégations de crimes de guerre visant Israël et le Hamas (autorité gouvernante de fait à Gaza), le rapport de la mission d'enquête du juge Goldstone, attendu avec grand intérêt, portera vraisemblablement sur le même ensemble de questions, tout en comportant aussi l'évaluation des témoignages reçus lors d'une série d'audiences avec des victimes et d'autres participants; il faut noter que les membres de cette mission, décidée par le Conseil des droits de l'homme, se sont aussi vu refuser l'accès à Gaza depuis Israël et ont dû faire appel au concours du Gouvernement égyptien pour y entrer; la coopération demandée à Israël leur a été refusée. Leur rapport est attendu pour septembre 2009.

27. Que ce soit en réponse aux témoignages accablants des soldats israéliens ou en prévision de la parution du rapport du juge Goldstone, le Ministre israélien des affaires étrangères a annoncé le 30 juillet 2009 qu'il allait enquêter sur 100 plaintes concernant l'opération Plomb durci, y compris les allégations relatives à l'utilisation d'obus au phosphore. C'est là une reconnaissance salubre par le Gouvernement israélien qu'il vaut mieux recevoir les allégations de crimes de guerre et enquêter sur elles que les rejeter sommairement. Bien qu'on continue d'espérer que l'objectivité prévaudra, l'annonce officielle de l'enquête par Israël a été jointe à une réaffirmation détaillée et une explication complète de la raison pour laquelle l'opération Plomb durci était, face aux tirs de roquettes et aux attentats-suicides qui ont eu lieu pendant huit ans, une riposte nécessaire et mesurée, menée avec un souci scrupuleux du droit international humanitaire¹⁴.

28. Tout ce qui précède indique que, une fois les faits établis et les recommandations reçues, l'attention se portera sur la question plus difficile de la mise au point d'un mécanisme approprié pour établir la responsabilité des crimes de guerre. Pour des raisons politiques, il ne sera probablement pas créé sous les auspices de l'ONU, qui d'ailleurs en a la capacité juridique, comme on l'a vu dans les années 90 avec la création des tribunaux pénaux spéciaux pour l'ex-Yougoslavie et le Rwanda. De plus, l'Assemblée générale a, selon l'Article 22 de la Charte des Nations Unies, l'autorité constitutionnelle de créer les organes subsidiaires qu'elle juge nécessaires à l'exercice de ses fonctions, bien qu'elle n'ait jamais créé un tribunal pénal, il y a tout lieu de penser qu'elle y est habilitée. Par ailleurs, pour des raisons tant juridictionnelles que politiques, il est presque certain que la Cour pénale

¹³ Voir ci-dessous par. 29 et note 14.

¹⁴ Voir Reuters, « Israel says investigating 100 Gaza war complaints » 30 juillet 2009; le texte intégral du rapport israélien s'intitule : The Operation in Gaza: Factual and Legal Aspects, Ministry of Foreign Affairs, 29 juillet 2009.

internationale ne pourra pas être saisie : Israël n'y est pas partie et lui refuserait à coup sûr sa coopération. La Palestine n'a cherché à en faire partie qu'après l'opération Plomb durci et on estime en général qu'elle ne peut juridiquement pas prétendre actuellement à être admise comme « État ». Il est donc probable qu'on ne pourra faire jouer la responsabilité que par des initiatives de la société civile liées à l'imposition de boycottages sportifs et culturels et au désinvestissement commercial et financier. Là aussi, on s'attend à ce que ni les gouvernements ni l'ONU ne s'acquitteront, le moment venu, de leurs obligations juridiques internationales.

C. Rompre le silence

29. *Breaking the Silence: Operation Cast Lead* (Rompre le silence : l'opération Plomb durci)¹⁵ est une publication qui regroupe les réponses de soldats qui ont participé à l'opération militaire. Elle a suscité un vif intérêt de la part des médias car elle confirme certaines allégations troublantes émanant des Forces de défense israéliennes : l'observation systématique de règles d'engagement par trop souples, ce qui signifie que les normes de droit international humanitaire imposant la retenue dans l'emploi de la force militaire contre les civils et les cibles civiles ne s'appliquaient pratiquement plus et étaient omises des instructions données avant ou pendant les combats; des destructions généralisées de cibles, qui étaient injustifiées du point de vue militaire ou de la sécurité; l'utilisation de phosphore dans des zones à forte densité de population; les entraves aux mouvements de la population civile de Gaza vers des lieux relativement plus sûrs, avec la fragmentation de la bande, ce qui fait que bon nombre de personnes se retrouvaient coincées dans les pires zones de combat; des pressions racistes exercées sur les soldats de la part du « rabinat militaire », qui consistaient à déshumaniser les Arabes et les Palestiniens et à traiter le conflit comme une guerre sainte contre un ennemi démoniaque.

30. Il faut noter que les témoignages de ces soldats israéliens sont d'autant plus crédibles qu'ils ne sont pas systématiquement anti-israéliens ou antisionistes et que bon nombre de soldats avaient accepté le principe fondamental de l'opération Plomb durci comme étant une riposte défensive nécessaire face aux roquettes du Hamas. Par ailleurs, leur condamnation du manque de respect manifesté par les Forces de défense israéliennes à l'égard des civils était assortie de réserves : il a été reconnu que les Forces avaient lancé des avertissements, tiré parfois des coups de semonce pour identifier les suspects ou dissuader les habitants de Gaza de s'approcher d'une zone de déploiement et que certains commandants des Forces faisaient parfois des efforts pour éviter d'infliger autant de dégâts civils qu'il aurait pu y en avoir. Dans l'ensemble, l'impression qui se dégage des témoignages est que bon nombre des tactiques utilisées visaient moins à tuer ou à blesser les civils palestiniens qu'à empêcher les soldats israéliens d'être blessés, tués ou capturés; néanmoins les risques encourus par les civils innocents palestiniens s'en trouvaient accrus. L'ordre suivant donné par un commandant aux soldats traduit un sentiment général issu des témoignages : « Aucun de mes soldats ne perdra un seul cheveu et je ne permettrai à aucun d'entre eux d'avoir une hésitation qui risquerait de lui coûter la vie. Dans le doute, tirez »¹⁵. Ou plus généralement : « Il était clair, et cela ressortait dans chaque

¹⁵ *Breaking the Silence* est une organisation d'anciens combattants israéliens qui recueille les témoignages de soldats qui ont servi dans les territoires occupés au cours la Deuxième Intifada. La publication *Breaking the Silence: Operation Cast Lead* est disponible sur le site www.breakingthesilence.org.il.

témoignage de soldat, que les considérations d'ordre humanitaire n'entraient pas en jeu à l'armée à ce stade. L'objectif était de mener l'opération en faisant le nombre le plus faible de victimes possibles parmi les soldats, sans même se demander quel serait le prix à payer pour l'autre camp »¹⁵.

31. Les témoignages étant anonymes, il a été impossible à ce jour de contacter les soldats pour obtenir des précisions. En même temps, rien n'indique que ces témoignages manquaient de véracité. La plupart des observations formulées dans *Breaking the Silence* soulignaient que les Forces ne respectaient ni les Conventions de Genève ni les restrictions au combat qu'imposait le droit de la guerre. Certains observateurs considèrent également que le rapport donne une description plus fiable de la situation que la réaction officielle des Forces de défense israéliennes et des Israéliens en général aux allégations de crimes de guerre, consistant à tout nier en bloc, en reconnaissant toutefois que certains soldats s'étaient peut-être écartés du code de conduite militaire sous le coup du stress du champ de bataille. Les Israéliens affirment, pour l'essentiel, que leurs Forces ont pris dans l'ensemble des risques exceptionnels pour accorder une protection morale et juridique à la population civile de Gaza au cours de l'opération Plomb durci et ont agi correctement et avec professionnalisme dans des situations de combat difficiles.

32. Bien plus importante que cet autre son de cloche au sujet du comportement des Forces de défense israéliennes au cours de l'opération Plomb durci et du droit international humanitaire est la question de savoir si l'utilisation de la technologie militaire moderne dans la bande de Gaza, zone fortement peuplée, peut dans l'absolu être conforme aux exigences du droit international humanitaire. Un des soldats a exprimé sa préoccupation de la manière suivante : « Dans une guerre urbaine, l'ennemi est partout. Il n'y a pas d'innocents. C'était une guerre urbaine dans tous les sens du terme »¹⁵. Ou « Il n'y a aucun compte à rendre dans cette zone. Quoi qu'on fasse, c'est bien [...] les fils de la lumière contre les fils des ténèbres » et « [...] on suppose que n'importe qui est un terroriste et qu'on peut en toute légitimité faire ce que bon nous semble »¹⁵. Dans cet esprit, par exemple, il était commun de traiter un Gazaoui vu de loin tenant un téléphone portable comme un terroriste. Ce qui transparaît, c'est que le cadre militaire sur le terrain, au cours de l'opération Plomb durci, était tel que les crimes de guerre étaient impossibles à distinguer de la logique des opérations militaires.

33. Il est vrai que des militants de Hamas pouvaient se faire passer pour des civils, qu'il fallait se méfier de tout le monde et qu'il était normal qu'une opération militaire cherche à réduire au minimum ses pertes. Il ressort des témoignages des soldats que ce faisant, elle inflige des dégâts disproportionnés aux civils et ravage le milieu urbain. En d'autres termes, il s'agit moins de l'écart de comportement par rapport aux normes du droit international humanitaire au cours d'opérations militaires que des questions concernant la rupture intrinsèque entre le droit international humanitaire et la guerre urbaine à aussi grande échelle, surtout dans des conditions où la population civile est privée de l'option de fuir ou de s'abriter. Il y a eu toutefois des écarts précis, comme dans le cas de l'utilisation de bombes au phosphore blanc et de fléchettes stockées dans des obus dans des zones à forte densité de population. Ces pratiques sont des attaques aveugles et semblent constituer des violations flagrantes du paragraphe 2 de l'article 35 du Protocole I

additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux : « Il est interdit d'employer des armes, des projectiles et des matières ainsi que des méthodes de guerre de nature à causer des maux superflus »¹⁶.

34. Il existe au minimum la charge de persuasion pour ceux qui ont recours à une telle puissance militaire. D'après Israël, cette opération était nécessaire pour éliminer une grave menace à la sécurité. Ici, on est frappé par le fait que les commandants israéliens ne déployaient relativement aucun effort pour éliminer la menace d'attaques futures à la roquette. Comme l'a fait valoir un rapport antérieur, la diplomatie offrait à Israël un moyen prometteur de résoudre la question des impératifs de sécurité dans le cadre d'une diminution, voire d'une élimination des tirs de roquettes visant le sud d'Israël à partir de la frontière de Gaza. Les commandants s'étaient bornés à dire à leurs soldats que l'opération Plomb durci était en quelque sorte une riposte aux roquettes ou, plus précisément, qu'ils allaient créer les conditions propices à la négociation pour obtenir le retour de Gilad Shalit¹⁵.

35. Le Rapporteur spécial estime que l'opération Plomb durci révèle que la guerre urbaine, menée par voie terrestre, aérienne ou maritime, ne permet pas d'observer les normes en matière de contraintes associées au droit international humanitaire et plus précisément aux exigences spécifiques de la quatrième Convention de Genève et du Protocole I, relatives à la protection des civils, notamment dans des situations d'occupation prolongée. À cet égard, le fait qu'Israël affirme qu'il tient compte des contraintes du droit international n'est guère convaincant, comme en témoignent les pratiques de combat et les consignes d'ouverture du feu de facto; tout aussi peu convaincants sont les arguments selon lesquels l'enquête devrait principalement viser les soldats israéliens qui étaient présents sur le terrain et établir leur responsabilité éventuelle. Il faudrait plutôt s'intéresser au haut commandement militaire et aux dirigeants politiques qui ont conçu une telle opération et, avant tout, aux limites de la puissance militaire.

36. Certains des cadres juridiques les plus célèbres sur la façon de mener une guerre figurent à l'article 22 de l'annexe à la deuxième Convention de la Haye concernant les lois et coutumes de la guerre sur terre : « Les belligérants n'ont pas un droit illimité quant au choix des moyens de nuire à l'ennemi ». Le paragraphe 1 de l'article 35 du Protocole I reflète le même sentiment général : « Dans tout conflit armé, le droit des Parties au conflit de choisir des méthodes ou moyens de guerre n'est pas illimité »¹⁶. La guerre urbaine du type mené à Gaza au cours de l'opération Plomb durci semble dépasser ces limites; bien que la formulation ait semblé vague en 1899, le moment est peut-être venu en 2009 de donner une application concrète à ces limites en tenant compte des conditions de la guerre urbaine moderne. En d'autres termes, il est très important de se concentrer sur la guerre elle-même plutôt que de restreindre l'enquête aux allégations de pratiques et de tactiques illégales.

¹⁶ Nations Unies, *Recueil des Traités*, vol. 1125, n° 17512.

III. Les implantations en territoire palestinien et leur impact sur la jouissance effective des droits de l'homme

37. Les implantations israéliennes en Palestine occupée ont fait l'objet ces derniers temps d'une grande attention, à la suite de l'appel très médiatisé lancé par le Président Barack Obama en faveur d'un gel de l'extension des colonies de peuplement comme mesure essentielle pour relancer les négociations en vue d'une solution au conflit sous-jacent. Le Président Obama a également demandé aux gouvernements arabes de récompenser Israël si ce dernier acceptait d'imposer un gel, laissant entendre qu'Israël, en prenant une mesure politique constructive, mériterait de recevoir des encouragements par voie de réciprocité. Jusqu'à présent, le Premier Ministre israélien, Benjamin Netanyahu, ne s'est résolu qu'à s'opposer à la création de nouvelles colonies ou à l'accroissement des territoires qui sont sous le contrôle des implantations existantes. Il a cependant insisté pour qu'on permette la « croissance naturelle » des implantations en Cisjordanie, ajoutant que les colonies à Jérusalem-Est ne seront pas traitées comme faisant partie d'un gel partiel. Il faut noter que cette polémique bat son plein sans la moindre référence aux droits des Palestiniens au regard du droit international humanitaire, comme si le droit importait peu et si les implantations étaient un problème purement politique entre les parties.

38. Il importe, pour cette raison, de rappeler ce qu'on avait fait valoir dans plusieurs rapports antérieurs du Rapporteur spécial, à savoir que les implantations en tant que telles sont illégales au regard du paragraphe 6 de l'article 49 de la quatrième Convention de Genève, qui énonce clairement que « la Puissance occupante ne pourra procéder à la déportation ou au transfert d'une partie de sa propre population civile dans le territoire occupé par elle »¹⁷. Cette évaluation juridique largement partagée a été confirmée avec autorité par la Cour pénale internationale dans l'avis consultatif qu'elle a rendu le 9 juillet 2004 sur la construction du mur de sécurité : « Les colonies de peuplement israéliennes dans le territoire palestinien occupé, y compris Jérusalem-Est, sont illégales et constituent un obstacle à la paix et au développement économique [...] [et] ont été installées en méconnaissance du droit international »¹. On fait état à l'heure actuelle de 121 implantations en Cisjordanie, dont 12 sur des terres annexées après 1967 par la ville de Jérusalem et une centaine d'« avant-postes » de peuplement, qui sont des présences physiques établies par le mouvement des colons sans autorisation légale du Gouvernement israélien.

39. D'un point de vue juridique, le fait de reconnaître la pertinence des droits des Palestiniens au regard du droit, ainsi que tout accord bilatéral entre les États-Unis d'Amérique et Israël – tel que l'échange de lettres officielles entre MM. Bush et Sharon du 14 avril 2004 ou encore d'assurer à Israël que de grands blocs d'implantations seront incorporés dans les frontières futures de l'État israélien – n'a aucun fondement juridique. Le paragraphe le plus important dans la lettre du Président Bush est le suivant : « Compte tenu des nouvelles réalités sur le terrain et notamment des principaux centres existants de peuplement israélien, il est irréaliste de s'attendre à ce que les négociations sur le statut définitif débouchent sur un retour total aux lignes d'armistice de 1949 ». Cela est encore plus vrai s'agissant de

¹⁷ Nations Unies, *Recueil des Traités*, vol. 75, n° 973.

l'effet d'accords officieux que les États-Unis et Israël auraient conclus sur la croissance naturelle des implantations, malgré les promesses de gel faites officiellement dans la Déclaration d'Annapolis de décembre 2007. D'après les organisations de surveillance, en réalité, les « soumissions pour la construction de nouvelles implantations ont augmenté de 55 % depuis 2007 ». Les constructions réelles de colonies de peuplement ont augmenté de 30 % depuis le début du nouveau cycle de pourparlers de paix. Les constructions de colonies autour de Jérusalem ont été multipliées par 38 »¹⁸.

40. Un principe élémentaire du droit et de la justice est que tout accord entre deux parties ne peut pas modifier les droits juridiques d'une tierce partie. Tout au plus, cet accord, même sous forme de contrat, n'a d'incidence que sur les attentes politiques qui existent entre les deux parties, en l'occurrence Israël et les États-Unis. Il est également vrai qu'en Israël, l'appel américain à un gel des implantations a suscité des formes d'opposition virulente et notamment des efforts renouvelés de la part du mouvement des colons d'établir en Cisjordanie des « avant-postes » qui sont illégaux au regard du droit israélien¹⁹. Le rabbin Ovadia Yosef, chef spirituel du parti ultra-orthodoxe Shas en Israël, qui fait partie de la coalition au pouvoir, a répudié avec colère l'idée d'un gel des implantations, disant : « Les Américains nous disent insidieusement de construire ici et pas là-bas, comme si nous étions des esclaves à leur service ».

41. En fait, pendant toute la période d'occupation, Israël a augmenté la population et le territoire des implantations : « De 1972 à 1993, si l'on exclut Jérusalem, Israël a augmenté le nombre de colons en Cisjordanie, qui sont passés de 800 à 110 600. Au cours des dix années suivantes – qui coïncident en gros avec le processus de paix d'Oslo – leur nombre a augmenté deux fois plus vite, dépassant 234 000 en 2004. À Jérusalem-Est, le nombre de colons est passé de 124 400 en 1992 à près de 176 000 en 2002 »²⁰. D'après les estimations les plus récentes, les colons en Cisjordanie étaient au nombre de 300 000 environ, avec 200 000 de plus à Jérusalem-Est.

42. Hormis la question du gel qui est liée à la reprise des négociations de paix, l'extension des colonies constitue un empiètement constant sur les droits des Palestiniens à l'autodétermination, ainsi qu'une violation manifeste de l'obligation fondamentale qui incombe à l'occupant, aux termes de la quatrième Convention de Genève, de protéger les biens et l'avenir d'une population occupée. Ainsi donc, à un moment où la feuille de route était censée mettre un frein au développement des colonies, les Israéliens ont eu le comportement inverse.

43. Comme le résume la lettre que les organisations palestiniennes de défense des droits de l'homme ont adressée au Ministre suédois des affaires étrangères, Carl Bildt : « Le taux de croissance de la population des colons israéliens en Cisjordanie occupée, y compris à Jérusalem-Est, est de 4,7 %, contre un taux de croissance annuelle de 1,7 % de la population juive dans l'État d'Israël. Ainsi, on recourt à l'écran de fumée de la "croissance naturelle" pour occulter la poursuite de

¹⁸ *Palestine Monitor*, « Israeli Settlements », mis à jour le 17 décembre 2008. À consulter sur le site <http://www.palestinemonitor.org/spip/spip.php?article7>.

¹⁹ Voir Ethan Bronner, « West Bank Settlers Send Defiant Message to Obama », *The New York Times*, 30 juillet 2009.

²⁰ Voir Ali Abunimah, *One Country: A Bold Proposal to End the Israeli-Palestinian Impasse* (Metropolitan Books, novembre 2006).

l'émigration des colons juifs-israéliens en Cisjordanie et essentiellement la création de nouvelles colonies annexées aux colonies existantes »⁸. Certains observateurs font valoir que ce chiffre exagère la menace que fait peser la croissance des colonies, arguant que la majeure partie de la croissance a lieu dans les implantations haredim non sionistes, tels que Modi'in Illit et Beitar Illit, qui comptent actuellement 45 000 habitants qui sembleraient prêts à déménager si on leur fournissait d'autres logements à l'intérieur des frontières israéliennes d'avant 1967 dans le cadre d'une solution au conflit sous-jacent.

44. D'autres s'interrogent sur cette élasticité, et l'aile militante du mouvement des colons s'oppose résolument à tout repli par rapport à la forme actuelle du phénomène de la colonisation, et considère ouvertement et délibérément l'extension des colonies comme la meilleure assurance contre la création dans l'absolu par les Palestiniens de leur propre État ou au moins d'un État viable souverain et indépendant.

45. Les démolitions d'habitations qui ne sont pas liées aux prétentions en matière de sécurité ont servi principalement à étendre le contrôle israélien sur la Cisjordanie tout en portant atteinte aux droits des Palestiniens. Au total, 277 habitations ont été démolies en 2008 à l'intérieur du territoire palestinien occupé, Jérusalem-Est étant la plus touchée. Entre janvier et juillet 2009, le Bureau de la coordination des affaires humanitaires a enregistré la démolition de 221 habitations appartenant à des Palestiniens, ce qui a entraîné le déplacement de plus de 500 personnes²¹. Outre le fait d'être incroyablement inhumaines, ces démolitions portent atteinte aux perspectives d'autodétermination des Palestiniens. Une technique complémentaire utilisée à Jérusalem est le refus d'accorder des permis de construire, même aux Palestiniens qui sont des résidents de longue date, dans le cadre d'un effort persistant visant à modifier la composition démographique de la ville en faveur d'Israël.

46. Les implantations posent également un problème supplémentaire au respect des droits de l'homme et de la quatrième Convention de Genève. Du fait de l'emplacement du mur israélien illégal de sécurité, environ 385 000 colons sont coincés entre celui-ci et la Ligne verte et quelque 93 000 Palestiniens se retrouvent enclavés du côté israélien du mur, voire séparés de leurs terres agricoles et d'une partie de leurs villages, ainsi que de la Cisjordanie en général.

47. Plusieurs questions sont imbriquées, s'agissant du mandat : a) les implantations et toute nouvelle extension des colonies constituent un obstacle illégal grave à la jouissance effective par les Palestiniens de leur droit à l'autodétermination; b) si Israël accepte de geler l'extension illégale des colonies, il semble déraisonnable que les gouvernements arabes fassent un geste réciproque en retour, c'est-à-dire qu'Israël soit récompensé pour ce qu'il est tenu de faire de toute façon sur le plan juridique; c) les accords entre Israël et les États-Unis n'ont pas d'effet juridique en ce qui concerne les colonies, du fait que les Gouvernements d'Israël et de l'Autorité palestinienne sont seuls habilités à en déterminer le statut dans le cadre de négociations de paix; d) Israël, en tant que Puissance occupante, a une obligation juridique fondamentale de démanteler les implantations existantes, y compris celles de Jérusalem-Est, et de ne pas s'immiscer dans la croissance et le

²¹ Voir Bureau de la coordination des affaires humanitaires, « The Humanitarian Monitor », juillet 2009. À consulter à www.ochaopt.org.

développement des Palestiniens. C'est la conclusion à laquelle est également parvenue B'Tselem, organisation israélienne respectée de défense des droits de l'homme, qui recommande un démantèlement « humain » dans le respect des droits des colons tout en préconisant également des dédommagements pour toute perte subie²².

IV. Le mur et ses conséquences juridiques

48. Le 9 juillet 2009 a marqué le cinquième anniversaire de la publication de l'avis consultatif de la Cour internationale de Justice relatif au mur de sécurité, dont la construction se poursuit, principalement en Cisjordanie occupée. En effet, 86 % du mur sera construit sur le territoire cisjordanien. À terme, le mur devrait s'étendre sur 723 kilomètres, soit deux fois la longueur de la Ligne verte, alors que construire le mur de sécurité le long de cette ligne aurait permis à Israël d'économiser 1,7 milliard de dollars des États-Unis. À ce jour, les travaux ne seraient achevés qu'à 60 % environ alors qu'ils durent depuis sept ans. D'après les dernières informations recueillies, les travaux ont été suspendus pour des raisons budgétaires malgré les impératifs de sécurité invoqués. Selon le Ministère israélien de la défense et l'opinion publique israélienne, le mur a contribué au renforcement de la sécurité en Israël; la diminution sensible des actes terroristes observée ces dernières années est mise en avant pour étayer cette conclusion. Les opposants à cette politique, dont les dirigeants de l'Autorité palestinienne, réclament le démantèlement du mur, estimant, d'une part, que cette confiscation de terres ne tient pas à des raisons de sécurité et qu'elle porte grandement préjudice aux Palestiniens vivant à l'ouest du mur ou à proximité, et, d'autre part, que l'emplacement du mur est illégal.

Occupation illégale de territoires par Israël : crise d'autorité du droit international

49. Après avoir examiné les principales questions de droit international soulevées, les 15 juges de la Cour internationale de Justice ont, malgré leurs origines diverses, décidé à 14 voix contre une ce qui suit : « [...] l'édification du mur qu'Israël, puissance occupante, est en train de construire dans le territoire palestinien occupé [...] [est contraire] au droit international. [...] Israël est tenu de cesser immédiatement les travaux d'édification du mur [...], de démanteler immédiatement l'ouvrage situé dans ce territoire [...] de réparer tous les dommages causés par la construction du mur »¹. À la dixième session extraordinaire d'urgence tenue le 20 juillet 2004, l'Assemblée générale a décidé à une écrasante majorité²³ qu'Israël devait donner suite à la décision rendue par la Cour internationale de Justice. Faisant sien l'avis consultatif de la Cour, elle a par ailleurs demandé à l'Assemblée générale et au Conseil de sécurité d'examiner quelles nouvelles mesures devaient être prises afin de mettre un terme à la situation illicite découlant de la construction du mur. Dans sa résolution ES-10/15, l'Assemblée priait également les États Membres de l'Organisation des Nations Unies de s'acquitter de leurs obligations juridiques telles qu'énoncées dans l'avis rendu par la Cour internationale de Justice,

²² Voir « Land Expropriation and Settlements ». À consulter à <http://www.btselem.org/English/settlements>.

²³ 150 États Membres ont voté pour et 6 contre (Australie, Micronésie, Israël, Îles Marshall, Palaos et États-Unis).

organe judiciaire principal de l'Organisation des Nations Unies. Elle appelait plus particulièrement l'attention sur l'obligation qu'ont les États de ne pas prêter aide ou assistance au maintien de la situation créée par cette construction. Bon nombre des résolutions adoptées ensuite à une très large majorité par l'Assemblée générale et le Conseil des droits de l'homme appelaient de nouveau Israël à s'acquitter de ses obligations juridiques, conformément à l'avis consultatif²⁴.

50. Comme nul ne le conteste, Israël a rejeté les conclusions de la Cour internationale de Justice, précisant qu'il n'exécuterait que les décisions rendues par ses juridictions nationales. De fait, il a exécuté plusieurs arrêts de la Cour suprême israélienne lui ordonnant de déplacer le mur de façon à en atténuer les effets néfastes pour la population palestinienne. S'il est vrai que, contrairement aux arrêts, les avis consultatifs de la Cour ne sont pas « contraignants », ils n'en constituent pas moins une interprétation faisant autorité du droit international applicable. De même, ils énoncent un ensemble de conclusions quant aux règles de droit international applicables en l'espèce. Lorsque les conclusions recueillent une aussi large adhésion, on ne saurait contester « le droit » ou le juger non concluant. L'avis consultatif en question est d'autant plus solide que le seul juge dissident, le juge américain, a précisé dans sa déclaration qu'il souscrivait en grande partie à l'analyse juridique exposée par la majorité. Selon lui toutefois, il n'était pas possible de trancher la question définitivement sans examiner plus avant les raisons de sécurité invoquées par Israël pour construire le mur sur le territoire occupé.

51. S'agissant de cas avérés de crimes de guerre, ne pas donner suite aux conclusions de la Cour internationale de Justice porte très gravement atteinte à l'autorité du droit international, de la Cour, et de l'Organisation des Nations Unies en général. Ce que l'on retient de cette situation, c'est malheureusement que l'autorité de la communauté internationale est bafouée par un État Membre de l'Organisation des Nations Unies, que des civils, qui sont censés être protégés par le droit international, sont victimes d'un préjudice, et que ni les États ni les organes de l'ONU ne réagissent. Comme pour d'autres aspects du conflit, le fait que les droits des Palestiniens ne soient pas défendus et que les avis de la Cour restent lettre morte constitue une crise d'autorité et renforce chez les Palestiniens l'idée qu'il ne sert à rien d'avoir le droit international pour soi.

52. Israël peut passer outre à ses obligations juridiques internationales en toute impunité. Les Palestiniens, eux, font face à un dilemme : d'un côté, on leur demande avec insistance de renoncer à toute forme de résistance armée; de l'autre, leurs droits ne sont pas respectés et l'Organisation des Nations Unies ne fait rien pour y remédier. Que peuvent donc faire les Palestiniens? Le chroniqueur israélien Gideon Levy relève le cynisme avec lequel les Israéliens envisagent aujourd'hui les négociations de paix du fait de cette situation. Selon lui, les Israéliens ne paient absolument pas le prix de l'injustice causée par l'occupation. La vie est douce en Israël. Les cafés sont bondés. Les restaurants ne désemplassent pas. Les gens partent

²⁴ Voir, par exemple, résolution 63/97 de l'Assemblée générale (adoptée le 5 décembre 2008 à 171 voix contre 6, et 2 abstentions), par. 6; voir aussi résolution 10/18 du Conseil des droits de l'homme (adoptée le 26 mars 2009 à 46 voix contre une, sans abstention), par. 8.

en vacances. Pourquoi penser à la paix, aux négociations, au retrait des forces – au « prix » qu'il faudrait peut-être payer? L'été 2009 est délicieux. À quoi bon changer²⁵?

53. Il est à noter que la question de l'illégalité procède quasi exclusivement du fait que le mur est bâti sur le territoire palestinien occupé. S'il avait été monté le long de la Ligne verte ou à l'intérieur des frontières israéliennes d'avant 1967, on aurait pu adresser à Israël des critiques d'ordre moral et politique liées à la nature coercitive et hostile de cette forme de séparation, mais pas lui opposer des arguments juridiques. Le mur de Berlin n'était pas contesté sur le plan juridique, mais il montrait à quel point la conception qu'avaient l'Allemagne de l'Est et l'Union soviétique de l'ordre mondial était erronée. Si l'Union soviétique avait osé dépasser la ligne divisant Berlin ne serait-ce que de quelques mètres et élever le mur du côté occidental, cela aurait fort bien pu déclencher une troisième guerre mondiale. Il est intéressant de remarquer que, quoique controversé, le mur que les États-Unis construisent actuellement le long de la frontière mexicaine respecte scrupuleusement la souveraineté territoriale du Mexique. Lorsqu'un État ou une entité politique n'est pas aussi impuissant que la Palestine, la loi et ses droits territoriaux sont généralement respectés.

54. Les Palestiniens continuent de manifester contre le mur dans plusieurs localités de Cisjordanie. Notons en particulier les manifestations organisées chaque semaine près des villages de Bil'in et de Nil'in, auxquelles Israël répond par des tirs de balles en caoutchouc et de gaz lacrymogène, qui ont causé plusieurs morts et de nombreux blessés, et par des arrestations. Il semblerait que les forces de sécurité israéliennes fassent un usage excessif de la force, en violation des obligations fondamentales imposées au pays par le droit international humanitaire en tant que Puissance occupante.

V. Recommandations

55. **Les recommandations formulées ci-après, qui sont extraites du corps du présent rapport, revêtent un caractère d'urgence :**

a) Il conviendrait que l'Assemblée générale adresse à la Cour internationale de Justice une requête pour avis consultatif concernant les obligations et devoirs qui incombent aux États Membres de l'ONU en matière de coopération avec l'Organisation et ses représentants;

b) Il faudrait encourager les États Membres à recourir à leurs instruments nationaux, y compris les tribunaux, pour s'acquitter des obligations que leur imposent les articles 146 à 149 de la quatrième Convention de Genève en matière d'application du droit pénal international en ce qui concerne le territoire palestinien occupé;

c) Il conviendrait que le respect du droit international et des droits des Palestiniens par Israël fasse dorénavant partie intégrante des négociations de paix;

²⁵ Voir Kessel, Jerrold et Klochendler, Pierre, « Mideast: Building Peace on an Incomplete Wall » (Inter Press Service, 27 juillet 2009).

d) Il conviendrait d'envisager d'imposer des restrictions à la fourniture d'armes aux parties au conflit israélo-palestinien;

e) Il conviendrait d'établir le caractère illégal des colonies de peuplement israéliennes et de prendre des mesures en faveur du déblocage de la situation et du démantèlement du mur, dans le respect des droits fondamentaux de toutes les personnes concernées;

f) Il conviendrait d'envisager de demander au Comité international de la Croix-Rouge ou à quelque autre instance désignée d'étudier les problèmes particuliers découlant de l'occupation prolongée et de formuler des recommandations à cet égard.



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Promotion et protection des droits de l'homme :
situations relatives aux droits de l'homme
et rapports des rapporteurs
et représentants spéciaux

Situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967

Note du Secrétaire général**

Le Secrétaire général a l'honneur de transmettre aux Membres de l'Assemblée générale le rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Richard Falk, présenté conformément à la résolution 5/1 du Conseil des droits de l'homme.

* A/65/150.

** Le présent document a été soumis après la date limite afin que des renseignements sur les faits les plus récents puissent y figurer.



Rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés par Israël depuis 1967

Résumé

Le présent rapport examine les faits nouveaux concernant le respect par Israël des obligations que lui impose le droit international, ainsi que la situation des personnes vivant dans les territoires palestiniens occupés. Une importance particulière est accordée aux effets cumulés des politiques d'Israël en Cisjordanie et à Jérusalem-Est, découlant de la poursuite d'une occupation présentant toutes les caractéristiques du colonialisme et de l'apartheid, et tendant à transformer un état d'occupation *de jure* en situation d'annexion de facto.

Ces faits portent atteinte de manière fondamentale au droit inaliénable des Palestiniens à l'autodétermination. Le rapport rend compte des préoccupations habituelles causées par la croissance des colonies en Cisjordanie et à Jérusalem-Est, des problèmes posés par la poursuite de la construction du mur de séparation, des châtiments collectifs et d'autres préoccupations concernant les droits de l'homme. Le rapport se penche notamment sur les préoccupations concernant la santé et d'autres effets néfastes de la poursuite du blocus imposé aux 1,5 million d'habitants de la bande de Gaza, l'examen de l'incident de la flottille de la liberté survenu le 31 mai 2010 et la poursuite des efforts en vue de déterminer si Israël et les autorités palestiniennes responsables ont enquêté de façon satisfaisante au sujet des allégations de crimes de guerre portées dans le cadre du conflit à Gaza en 2008-2009.

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I. Introduction et aperçu général

1. Le Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967 a une nouvelle fois préparé ce rapport sans avoir bénéficié de la coopération du Gouvernement israélien, ce qui ne lui a pas permis d'accéder aux territoires palestiniens occupés et d'entrer en contact avec les Palestiniens vivant sous occupation. Dans les rapports à venir, on cherchera à compenser ce manque en essayant d'accéder à la bande de Gaza grâce à la coopération du Gouvernement égyptien et en rencontrant des personnalités concernées dans les pays bordant les territoires palestiniens occupés. Il faut noter une fois de plus qu'Israël, en tant que Membre des Nations Unies, agit en violation de son obligation de coopérer avec l'Organisation dans l'accomplissement de ses fonctions officielles. Ce manquement est d'autant plus grave, que la Cour internationale de Justice a indiqué, dans son avis consultatif¹ rendu le 9 juillet 2004, que les Nations Unies avaient une responsabilité permanente concernant la résolution pacifique du conflit entre Israël et la Palestine. Le Rapporteur spécial continuera à chercher à obtenir la coopération du Gouvernement israélien, mais il serait également utile que le Conseil des droits de l'homme, l'Assemblée générale et le Secrétariat des Nations Unies s'acquittent de leurs obligations en prenant des mesures visant à obtenir la coopération d'Israël autant que l'y oblige le droit international.

2. Au cours des derniers mois, de nombreux événements ont aggravé le calvaire des Palestiniens vivant sous l'occupation en Cisjordanie, à Jérusalem-Est et dans la bande de Gaza dont certains seront abordés de façon plus détaillée dans les principales sections du présent rapport. Il importe toujours d'appeler l'attention sur les atteintes répétées aux normes internationales fondamentales et inaliénables des droits de l'homme, commises par Israël en particulier sur la dimension du droit des Palestiniens à l'autodétermination se rapportant à l'intégrité territoriale. Le droit à l'autodétermination est la base même de tous les autres droits de l'homme. Il est ainsi consacré dans l'article 1 commun aux deux pactes internationaux relatifs aux droits de l'homme et constitue une norme impérative dans le droit international coutumier. Ce droit inaliénable appartient à tous les peuples, y compris les peuples non autonomes, et on considère qu'il est bafoué dès lors qu'un peuple vit dans les conditions dures, oppressives et qui lui sont étrangères, à travers une domination imposée de l'extérieur, ce qui est le cas de l'occupation militaire de la Cisjordanie, de Jérusalem-Est et de la bande de Gaza depuis 1967. La nature oppressive de l'occupation israélienne pendant plus de 43 ans ressort avec évidence des très nombreuses violations par Israël de la quatrième Convention de Genève et du droit international des droits de l'homme, ainsi que de son mépris de la Cour internationale de Justice et des nombreuses résolutions et décisions de l'Assemblée générale et du Conseil de sécurité.

3. À ces caractéristiques générales d'illégalité attachées à l'occupation s'ajoute la dureté de ses conditions, décrites par mon prédécesseur, John Dugard, dans son rapport au Conseil des droits de l'homme de janvier 2007². Le professeur Dugard a relevé que des « traits distinctifs du colonialisme et de l'apartheid » caractérisaient

¹ Voir A/ES-10/273 et Corr.1; voir également *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, avis consultatif, *C.I.J Recueil 2004*, p. 136, et résolution ES-10/15 de l'Assemblée générale.

² Voir A/HRC/4/17.

l'occupation israélienne, ce qui aggravait les accusations d'illégalité pesant sur elle et créait des obligations et responsabilités supplémentaires pour Israël en tant que Puissance occupante, pour les États tiers, et pour les Nations Unies³. Le colonialisme constitue un déni des droits légaux essentiels à l'intégrité territoriale et à l'autodétermination, et l'apartheid est désormais officiellement reconnu comme un crime contre l'humanité⁴. La gravité de ces affirmations souligne le fait que l'occupation constitue une atteinte grave et sans précédent au droit à l'autodétermination, qui aurait dû, depuis longtemps, être corrigée et réparée d'urgence⁵. L'illégalité du régime colonial et la nature criminelle de l'apartheid ont en outre le statut de normes impératives en droit international⁶. L'opinion du Rapporteur spécial actuel est que la nature de l'occupation en 2010 justifie en fait et en droit les allégations antérieures de colonialisme et d'apartheid encore plus largement que ce n'était le cas il y a trois ans. Les caractéristiques coloniales et d'apartheid de l'occupation israélienne se sont enracinées de façon progressive. Plus l'occupation se perpétuera, plus il sera difficile d'y mettre un terme et plus l'exercice des droits fondamentaux des Palestiniens sera restreint.

4. On comprend mieux que l'occupation par Israël soit taxée de colonialisme si l'on considère le processus généralisé et permanent des implantations qui comptent actuellement les 121 colonies officielles (et les 102 « avant-postes » illégaux au regard de la législation israélienne) ainsi que le vaste réseau de routes, réservées aux juifs seulement, qui relie les colonies de peuplement les unes aux autres et à Israël, de l'autre côté de la Ligne verte⁷. L'empiètement total sur le territoire de la Cisjordanie est estimé à 38 %, si l'on prend en compte toutes les restrictions imposées au contrôle et au développement palestiniens. Cette annexion de fait du territoire palestinien est renforcée par le fait que le mur de séparation est construit à 85 % sur le territoire palestinien occupé d'une manière que l'avis consultatif de la Cour internationale de Justice de 2004 a déclaré illégale à la quasi-unanimité (14-1). Selon une opinion largement répandue, les blocs de colonies et le territoire situé à l'ouest du mur (soit 9,4 % de la Cisjordanie) ont été intégrés de façon permanente à l'État d'Israël, de sorte que la situation est irréversible pour les négociations internationales. Le Gouvernement des États-Unis, principal maître d'œuvre des négociations entre les parties, serait d'avis qu'Israël pourrait garder certaines de ses colonies en Cisjordanie dans le cadre de tout règlement du conflit⁸. Cette position

³ Ibid, par. 62.

⁴ Voir art. 7 du Statut de Rome de la Cour pénale internationale, Nations Unies, *Recueil des Traités*, vol. 2187, N° 38544; et résolution n° 1514 (XV) de l'Assemblée générale « Déclaration sur l'octroi de l'indépendance aux pays et peuples coloniaux », 14 décembre 1960.

⁵ Ces conclusions légales découlent des textes suivants, qui font autorité en matière de doctrine du droit international : Déclaration sur l'octroi de l'indépendance aux pays et peuples coloniaux (1960) et Convention internationale sur l'élimination et la répression du crime d'apartheid, (1973). L'apartheid est un des crimes contre l'humanité visés à l'article 7 du Statut de Rome de la Cour internationale de Justice.

⁶ L'article 53 de la Convention de Vienne sur le droit des traités (1969) définit une norme impérative comme une norme acceptée et reconnue par la communauté internationale des États dans son ensemble en tant que norme à laquelle aucune dérogation n'est permise et qui ne peut être modifiée que par une nouvelle norme du droit international général ayant le même caractère.

⁷ Voir par exemple Canadiens pour la justice et la paix au Moyen-Orient, « Fiche-info : Colonies israéliennes illégales dans les territoires palestiniens occupés », avril 2010, à l'adresse suivante : <http://www.cjpme.org/DisplayDocument.aspx?DocumentID=760&SaveMode=0>.

⁸ Voir Matthew Lee, « US Readies New Mideast Peace Push », Associated Press, 7 janvier 2010.

affiche avec une insistance incessante que les négociations doivent intégrer « les réalités du terrain », alors même que bon nombre de ces réalités sont en violation manifeste du droit international humanitaire. En effet, « la paix » serait fondée non pas sur un retrait inconditionnel des territoires occupés en 1967, comme le prescrit la résolution 242 (1967) du Conseil de sécurité, mais sur un ensemble de conditions illégales créées par la suite qui empiètent sur les droits des Palestiniens au regard du droit international et réduisent les perspectives territoriales d'un éventuel État palestinien. Les ambitions et politiques colonialistes d'Israël se manifestent également par son appropriation des ressources du territoire palestinien occupé, notamment de l'eau, et par la distribution inégale et discriminatoire qu'il fait de cette ressource mise à la disposition des colonies illégales en quantité bien plus abondante que ce qu'il concède aux habitants et réfugiés palestiniens légitimes (les colons reçoivent une quantité d'eau quatre à cinq fois supérieure par personne, pour un prix estimé à un cinquième de ce qui est facturé aux Palestiniens)⁹. Cela signifie que l'occupation est devenue une forme d'annexion colonialiste qui compromet gravement l'intégrité territoriale de toute future entité palestinienne indépendante. Israël a déclaré ses intentions annexionnistes sur Jérusalem-Est et les a mises en pratique dès la fin de la guerre de juin 1967, prenant des mesures pour consolider son contrôle administratif sur une Jérusalem unifiée et agrandie. Ainsi, il s'est efforcé de réduire le nombre de Palestiniens vivant à Jérusalem-Est et a encouragé et subventionné la création et l'expansion d'importantes zones d'installation illégales dans les quartiers de la ville occupés en 1967, qui étaient depuis toujours très majoritairement palestiniens et devaient constituer au plan international la capitale d'un futur État palestinien¹⁰. Ce processus d'implantation, en violation du sixième paragraphe de l'article 49 de la quatrième Convention de Genève, qui interdit à la Puissance occupante de procéder au transfert de sa propre population dans le territoire temporairement occupé par elle, relève d'un effort politique déterminé de la part d'Israël pour transformer un ensemble de conditions qui sont juridiquement et politiquement temporaires en une réalité permanente. Après plus de quatre décennies, il y a lieu de conclure que l'occupation des territoires palestiniens par Israël cesse d'être temporaire et de reconnaître qu'elle est devenue pour ainsi dire permanente.

5. Bien qu'associé aux circonstances particulières de racisme qui ont prévalu en Afrique du Sud jusqu'en 1994, l'apartheid, en vertu de la Convention internationale sur l'élimination et la répression du crime d'apartheid et du fait qu'il est défini comme un crime contre l'humanité par le Statut de Rome, est applicable à d'autres situations dans lesquelles les lois en vigueur imposent à une population réduite à un rôle subalterne des pratiques de discrimination raciale fondées sur un double système de droits et de devoirs. La Convention contre l'apartheid érige en crimes « les actes inhumains commis en vue d'instituer ou d'entretenir la domination d'un groupe racial d'êtres humains sur n'importe quel autre groupe racial d'êtres humains et d'opprimer systématiquement celui-ci »¹¹. Le Statut de Rome criminalise les

⁹ Voir Badil Resource Center for Palestinian Residency and Refugee Rights, *Al Majal*, n° 39/40 (automne 2008/hiver 2009) et Amnesty International, *Troubled Waters – Palestinians Denied Fair Access to Water*, 2009.

¹⁰ Voir résolutions 242 (1967), 338 (1973), 1397 (2002), 1515 (2003) et 1850 (2008) du Conseil de sécurité : Jérusalem-Est est considérée par la communauté internationale comme un territoire palestinien occupé.

¹¹ Voir Convention internationale sur l'élimination et la répression du crime d'apartheid, art. 2 (résolution 3068 (XXVIII), 30 novembre 1973).

« actes inhumains » « commis dans le cadre d'un régime institutionnalisé d'oppression systématique et de domination d'un groupe racial sur tout autre groupe racial ou tous autres groupes raciaux et dans l'intention de maintenir ce régime »¹². C'est cette structure générale d'apartheid, manifeste dans le territoire palestinien occupé, qui rend l'allégation de plus en plus crédible malgré les différences entre les caractéristiques propres à l'apartheid sud-africain et celles du régime imposé dans le territoire palestinien occupé. On peut se poser la question de savoir si les juifs et les Palestiniens sont des « groupes raciaux », au sens où l'entendent ces instruments juridiques. Nous allons exposer quelques traits saillants d'apartheid, même s'il n'est pas possible, faute de place, de donner un compte rendu détaillé de ces caractéristiques de l'occupation. Il existe d'ailleurs un rapport d'experts, fiable et convaincant, qui expose en détail le caractère d'apartheid de l'occupation israélienne¹³. Les traits d'apartheid les plus saillants de l'occupation israélienne sont les suivants : une citoyenneté préférentielle, les perquisitions et des lois et pratiques en matière de lieu de résidence qui empêchent les Palestiniens résidant en Cisjordanie ou à Gaza de recouvrer leurs biens ou d'acquérir la citoyenneté israélienne, alors que le droit des juifs au retour donne à tout juif, où qu'il soit dans le monde et même sans attache préalable avec Israël, le droit de se rendre dans ce pays, d'y résider et de devenir citoyen israélien; des lois différenciées en Cisjordanie et à Jérusalem-Est, favorisant les colons juifs qui relèvent de la justice civile israélienne et jouissent de la protection de la Constitution alors que les résidents palestiniens relèvent de l'administration militaire; des dispositions inégales et discriminatoires appliquées aux déplacements en Cisjordanie et à destination ou en provenance de Jérusalem; des politiques discriminatoires en matière de propriété foncière, d'occupation et d'utilisation des sols; des restrictions considérables imposées aux déplacements des Palestiniens, en particulier des postes de contrôle qui limitent différemment les mouvements des Palestiniens et ceux des colons israéliens, des conditions d'obtention de permis d'entrée et de documents d'identité extrêmement pénibles pour les seuls Palestiniens; des démolitions de maisons en représailles, des expulsions et des restrictions imposées à l'entrée et à la sortie des trois parties du territoire palestinien occupé.

6. Il convient également de noter que les conditions de l'occupation continue de Gaza par Israël reposent sur la réalité opérationnelle d'un contrôle effectif, malgré le « dégageant » israélien de 2005 comprenant le retrait de ses forces terrestres et le démantèlement des colonies. À cet égard, la situation à Gaza, bien que juridiquement et moralement déplorable, n'est caractérisée ni par des ambitions coloniales sur le territoire ou quant à la permanence ni par une structure d'apartheid. Une telle affirmation n'est pas faite pour minimiser l'illégalité et la criminalité apparente du blocus de Gaza, imposé depuis la mi-2007 en violation de l'article 33 de la quatrième Convention de Genève qui interdit les peines collectives, mais plutôt pour la mettre à part. Le Premier Ministre britannique, David Cameron, a récemment qualifié Gaza de « prison à ciel ouvert »¹⁴. La persistance d'une telle situation d'abus systématisés semble relever du niveau de responsabilité de

¹² Statut de Rome de la Cour pénale internationale, art. 7.2 h).

¹³ Human Sciences Research Council of South Africa, « Occupation, Colonialism, Apartheid?: A re-assessment of Israel's practices in the occupied Palestinian territories under international law », Le Cap, 2009.

¹⁴ BBC News, « David Cameron describes blockaded Gaza as a "prison" », 27 juillet 2010, voir www.bbc.co.uk/news/world-middle-east-10778110.

l'Organisation des Nations Unies et de ses États Membres, comme l'a souligné l'ancien Secrétaire général, Kofi Annan. La principale « raison d'être » de chaque État, a-t-il observé, est de protéger sa population « mais si les autorités nationales ne peuvent ou ne veulent pas protéger leurs citoyens, il appartient alors à la communauté internationale » d'utiliser tous les moyens nécessaires « y compris une action coercitive » si des méthodes de moindre envergure s'avèrent insuffisantes¹⁵. Il semblerait que les habitants de Gaza, bien que n'étant pas citoyens de l'État occupant, jouissent du statut de « personnes protégées » en vertu du droit international humanitaire. Ils ont été laissés sans protection pendant bien des années en ce qui concerne leurs droits fondamentaux, en violation de l'esprit et de la lettre de ce que le Secrétaire général Annan a reconnu comme une « nouvelle norme prescrivant une obligation collective internationale de protection »; « nous devons assumer (cette) responsabilité, a-t-il déclaré, et, lorsque c'est nécessaire, prendre les mesures qui s'imposent »¹⁶. Gaza pose depuis longtemps un défi de ce genre, étant dans une situation de souffrances humanitaires aiguës et généralisées qui résultent des politiques appliquées par la Puissance occupante.

7. Il importe de noter la pertinence de l'avis consultatif de la Cour internationale de Justice sur la Conformité au droit international de la déclaration unilatérale d'indépendance du Kosovo¹⁷. La conclusion juridique rendue par une majorité de 10 contre 4 était que la déclaration unilatérale d'indépendance faite par le Kosovo le 17 février 2008 ne constituait pas une violation du droit international. Bien qu'une telle procédure juridique soit formellement considérée comme un « avis consultatif », pour la plupart des juristes, ces avis sont l'appréciation faisant le plus autorité au sein de la communauté internationale quand il s'agit de questions juridiques internationales litigieuses. Une opinion aussi autorisée, émise par le tribunal le plus élevé des Nations Unies, peut présenter un intérêt pour l'exercice par les Palestiniens de leur droit à l'autodétermination. La Cour internationale de Justice a noté que l'échec des négociations entre les représentants gouvernementaux à Pristina et à Belgrade, qui n'avaient pas réussi après des années à trouver un accord acceptable concernant le statut juridique du Kosovo, faisait de la déclaration unilatérale du Kosovo une manière de procéder raisonnable¹⁸. Cette question n'est pas sans incidence sur la situation des droits de l'homme des Palestiniens qui vivent depuis si longtemps sous occupation. Il est généralement accepté que le droit à l'autodétermination est le droit le plus fondamental d'un peuple et s'applique particulièrement à ceux qui sont soumis à toute forme de domination étrangère compromettant leur autonomie, leur développement économique, leurs droits fondamentaux et le contrôle de leur destin collectif. L'existence d'un droit palestinien à l'autodétermination, comme mode d'établissement d'un État indépendant, a été acceptée par un consensus de gouvernements et par l'Organisation des Nations Unies et c'est le principe opérationnel de la « Feuille de route » dont s'inspire le Quatuor¹⁹. Au cours des décennies, les négociations internationales bilatérales n'ont pas réussi à établir un statut définitif pour la Palestine ou à insister pour qu'Israël se retire des territoires palestiniens occupés en

¹⁵ Voir A/59/2005, par. 135.

¹⁶ Ibid.

¹⁷ Voir A/64/881.

¹⁸ Ibid., par. 105.

¹⁹ Voir S/2003/529, où figure le texte intégral de la Feuille de route qui vise à concrétiser la vision de deux États, Israël et la Palestine, vivant côte à côte dans la paix et la sécurité, telle qu'affirmée par le Conseil de sécurité dans sa résolution 1397 (2002).

1967 (comme l'avait prescrit en 1967 la résolution 242 du Conseil de sécurité, inconditionnellement et à l'unanimité), créant ainsi un contexte qui évoque à bien des égards – quand il ne la dépasse pas – la situation à laquelle était confronté le Gouvernement du Kosovo. Il existe des preuves écrasantes, depuis bien des années, que le contrôle par Israël des territoires palestiniens occupés est oppressif au regard du droit international, comme en témoignent les politiques d'occupation illégales, compte tenu des exigences du droit international humanitaire et du droit international des droits de l'homme. Les longues négociations n'ont pas résolu la question du statut de la Palestine et ne permettent guère d'espérer raisonnablement qu'un règlement sera bientôt atteint par la négociation ou par un retrait unilatéral. Dans ces conditions, il semblerait que la seule possibilité qui reste à l'Organisation de libération de la Palestine, qu'elle agisse en son nom propre ou par le biais de l'Autorité palestinienne, serait de proclamer une déclaration unilatérale de statut, demandant l'indépendance, la reconnaissance diplomatique et son adhésion en qualité de membre des Nations Unies. L'avis consultatif sur le Kosovo crée un précédent juridique bien raisonné pour une telle initiative, bien que le Statut de la Cour internationale de Justice stipule clairement à l'article 59 que même dans ses « décisions » plus obligatoires, « la décision de la Cour n'est obligatoire que pour les parties en litige et dans le cas qui a été décidé ». En même temps, la similarité des situations vécues par l'Autorité palestinienne ou l'Organisation de libération de la Palestine d'une part, et le Gouvernement du Kosovo d'autre part, suggère que le résultat serait similaire si la Cour internationale de Justice était consultée. De plus, si l'on adoptait cette ligne de conduite, il serait d'autant plus raisonnable de reconnaître la légalité de la déclaration unilatérale palestinienne qu'il existe le précédent du Kosovo. Ce développement éventuel ne manque pas d'intérêt pour une évaluation des violations des droits de l'homme par Israël dans le territoire palestinien occupé car il touche à l'exercice différé par les Palestiniens de leur droit à l'autodétermination, dans des circonstances extrêmement éprouvantes. Comme l'a déclaré le Premier Ministre de l'Autorité palestinienne, M. Fayyad, à mesure que les Palestiniens « voient ce qui se passe sur le terrain, l'État de Palestine évolue et, de simple notion dont on parle, il rentre dans le domaine du possible – puis dans celui de la réalité »²⁰. L'avis consultatif sur le Kosovo donne à cette aspiration palestinienne un élan vers une réalité politique mais aussi vers une réalité juridique.

II. Politiques d'occupation en Cisjordanie et à Jérusalem-Est

A. Généralités

8. Ces dernières années, l'Organisation des Nations Unies s'est préoccupée, on le conçoit aisément, de la crise humanitaire qu'ont entraînée les attaques israéliennes de fin 2008 contre Gaza (opération « Plomb durci ») et le blocus israélien, ainsi que des initiatives prises par la société civile pour s'opposer à ce blocus en vertu du droit international et de la morale. Ces problèmes et leurs conséquences continuent d'occuper une place importante sur la liste des priorités de l'Organisation des Nations Unies, mais il faut bien comprendre que les événements en Cisjordanie et à Jérusalem-Est peuvent avoir sur l'avenir de l'ensemble du peuple palestinien des

²⁰ *Financial Times*, entrevue avec Salam Fayyad, 30 juillet 2010.

répercussions plus durables que la situation, aussi extrême et difficile soit-elle, des 1,5 million de Palestiniens de Gaza. La bande de Gaza ne suscite pas les craintes d'annexion, de colonialisme et d'apartheid susmentionnées, les violations des droits de l'homme y étant perpétrées par les Israéliens semblant motivées par d'autres raisons. Pour reprendre la formule de l'ancien Commissaire de l'Union européenne, Chris Patten, le but d'Israël est notamment « de paralyser l'économie et de pousser les Gazaouis dans les bras de l'Égypte, bien malgré elle »²¹. Au point de vue de l'autodétermination, une telle politique porte une nouvelle fois atteinte à l'intégrité et à l'unité des Palestiniens en tant que peuple occupé, Gaza étant coupée de la Cisjordanie au mépris de la volonté des Palestiniens (aussi bien de ceux vivant en Cisjordanie et à Jérusalem-Est qu'à Gaza) et en violation de nombreuses résolutions de l'ONU qui consacrent l'intégrité du territoire palestinien occupé en tant qu'entité unique²². Pour l'Autorité palestinienne, la position israélienne exclut une grande partie des territoires palestiniens occupés du bénéfice d'une future politique palestinienne d'ensemble, qui est à la base de la solution reposant sur la création de deux États distincts et de l'application de la résolution 242 (1967) du Conseil de sécurité. Du fait d'un ensemble de politiques adoptées en parallèle par Israël, il est de plus en plus difficile pour les Palestiniens de se déplacer entre Jérusalem et la Cisjordanie, et il leur est quasiment impossible de se rendre à Gaza ou d'en sortir²³. La situation divise le peuple palestinien d'une manière telle qu'il en devient presque impossible d'envisager l'émergence d'un État palestinien viable. Par conséquent, la solution de deux États n'apparaît guère comme un moyen vraisemblable de parvenir à l'autodétermination palestinienne, ce qui amène les commentateurs éclairés à penser que l'avenir de la Palestine est de former un État aux côtés d'Israël – option qui laisse entière la question de savoir s'il s'agira d'un État démocratique et laïque (autre formule possible pour l'autodétermination palestinienne) ou si l'« occupation » israélienne, savant mélange de colonialisme et d'apartheid, continuera de prévaloir, faisant indéfiniment obstacle à l'exercice par le peuple palestinien de son droit à l'autodétermination.

9. Cette orientation se heurte à certaines oppositions, sous l'effet de la nouvelle prise de conscience collective israélienne de la nécessité d'instaurer un nouveau régime légitime pour régir les relations entre Israël et la Palestine. Depuis peu, en Israël, on commence implicitement à reconnaître que l'image donnée par l'occupation n'est plus tenable et qu'il n'est plus possible de prétendre être parvenu à un consensus sur la création de deux États, comme en témoignent les appels à la création unilatérale d'un État unique et unifié qui intégrerait la Cisjordanie et Jérusalem-Est et abandonnerait toute revendication à l'égard de Gaza. D'éminentes personnalités du monde politique israélien, dont Moshe Arens, ancien Ministre de la défense et des affaires étrangères, Reuven Rivlin, membre et actuel Président de la Knesset, Tzipi Hotovely, membre de la Knesset, et Uri Elitzur, ancien Président du Conseil de Yesha des colonies ont, chacun de leur côté, appelé à choisir une telle option. Pour l'essentiel, la solution israélienne d'un état unique implique de légaliser l'annexion de facto du territoire, en continuant de le revendiquer comme un État juif – une citoyenneté israélienne, clairement de seconde classe, étant proposée a posteriori aux Palestiniens vivant actuellement sous occupation. Ce type

²¹ *Financial Times*, « To avert disaster, stop isolating Hamas », 28 juillet 2010.

²² Voir les résolutions 242 (1967), 338 (1973), 1397 (2002) et 1402 (2002) du Conseil de sécurité.

²³ Voir A/HRC/13/54 (rapport du Haut-Commissaire des Nations Unies aux droits de l'homme sur la mise en œuvre des résolutions S-9/1 et S-12/1 du Conseil des droits de l'homme).

de « solution » tente d'édulcorer les réalités actuelles de l'occupation – qui relèvent de l'apartheid et du colonialisme – sans changer la véritable nature de l'oppression. Sa mise en œuvre constituerait un déni total des droits conférés aux Palestiniens par le droit international, en particulier du droit à l'autodétermination. La proposition émise en juillet 2010 par le Ministre israélien des affaires étrangères, Avigdor Lieberman, qui préconise la levée du blocus imposé à Gaza et la création immédiate d'un État gazaoui, va entièrement dans ce sens. Lieberman invoque plusieurs raisons pour justifier une telle proposition, notamment les avantages qu'il y aurait à relâcher les pressions extérieures exercées contre l'expansion des colonies israéliennes en Cisjordanie et à Jérusalem-Est. Il semblerait que son idée ait notamment pour objectif de maintenir le Quatuor et George Mitchell occupés à l'élaboration d'un régime d'indépendance de Gaza dont le fonctionnement ne menacerait pas les intérêts d'Israël en matière de sécurité²⁴. Du côté palestinien, on observe une évolution analogue en faveur de la solution de l'État unique, en particulier parmi les grandes figures de l'exil, mais ces dernières envisagent la création d'un État palestinien/israélien unifié, laïque et démocratique, dans lequel les deux peuples auraient les mêmes droits, et qui n'aurait pas une identité juive. En revanche, d'autres signes montrent que le fait de compter sur la réactivation du « processus de paix » pour parvenir à la résolution du conflit et mettre fin à l'occupation ne constitue pas une option satisfaisante, notamment les appels qui sont lancés aux États-Unis pour qu'ils imposent une solution aux parties. Une telle démarche est compréhensible face à l'échec des négociations, mais une solution imposée reste inacceptable pour les deux parties et a peu de chances de prendre correctement en compte les droits bafoués des Palestiniens. Se pose en outre un problème de crédibilité, étant donné que les États-Unis se sont proclamés alliés inconditionnels d'Israël, celui-ci étant généralement considéré comme ayant illégalement abusé de son rôle de puissance occupante.

B. Pauvreté et enfants en Cisjordanie

10. Il semble que le confort matériel des Palestiniens vivant en Cisjordanie se soit très largement amélioré ces dernières années. Il est vrai que, dans certains secteurs géographiques et économiques de Cisjordanie, l'emploi et l'investissement ont récemment connu une grande expansion, comme le montre la croissance économique globale, qui aurait été de 8,5 % en 2009²⁵. Les efforts d'édification de l'État déployés par le Premier Ministre Fayyad ont par ailleurs reçu un accueil favorable, ceux-ci ayant été perçus comme des avancées concrètes allant dans le sens de la réalisation de l'autodétermination. Salam Fayyad s'est exprimé en ces termes : « l'essence de notre action est de nous préparer, par tous les moyens possibles, à devenir un État – en développant notre capacité de nous gouverner nous-mêmes, en améliorant nos institutions et en disposant des infrastructures adéquates »²⁰. Cependant, sur le plan matériel, les conditions de vie des populations ne sont pas idéales, en particulier pour les habitants qui vivent dans la zone C, entièrement régie par l'administration militaire israélienne, qui couvre 60 % du

²⁴ Voir à ce sujet les remarques intéressantes d'Henry Siegman, « An Immodest and Dangerous Proposal », *The Middle East Channel, Foreign Policy*, 9 août 2010.

²⁵ Fonds monétaire international, « Macroeconomic and Fiscal Framework for the West Bank and Gaza: Fifth Review of Progress », rapport établi par le personnel pour la réunion du Comité de liaison ad hoc, 13 avril 2010, disponible à l'adresse : www.inf.org/wbg.

territoire cisjordanien et abrite environ 40 000 Palestiniens : les démolitions y ont fortement augmenté et des villages palestiniens y ont été détruits²⁶. « Life on the Edge », rapport publié par Save the Children UK en 2009 et récemment mis à jour, brosse un sinistre tableau de la vie dans la zone C²⁷. La principale conclusion à laquelle aboutit le rapport est que les politiques israéliennes de confiscation des terres, l'expansion des colonies, l'absence de services de base – tels que l'approvisionnement en nourriture et en eau –, de logements et d'établissements médicaux ont conduit à une situation critique où les problèmes de sécurité alimentaires sont encore plus graves qu'à Gaza²⁸. D'après le rapport, 79 % des communautés récemment étudiées ne disposent pas de suffisamment d'aliments nutritifs, ce taux étant supérieur à celui de la bande de Gaza soumise au blocus, où il est de 61 %²⁹. Dans ce rapport, Israël est accusée d'avoir créé une situation où les enfants palestiniens qui grandissent dans la zone C souffrent deux fois plus de malnutrition et de retards de croissance que ceux de la bande de Gaza. Quarante-quatre pour cent de ces enfants sont atteints de diarrhée, dont les effets sont souvent mortels. Save the Children UK indique que du fait des restrictions imposées par Israël aux Palestiniens en ce qui concerne l'accès aux terres agricoles et l'exploitation de celles-ci (dans une région où presque toutes les familles s'adonnent à l'élevage), des milliers d'enfants ont faim et sont vulnérables à des maladies mortelles telles que la diarrhée et la pneumonie. Jihad al-Shommali, militant de Défense des enfants International, a récemment évoqué le problème des enfants dans la zone C : « ces enfants sont contraints de traverser les colonies, au risque d'être battus et harcelés par les colons, ou de marcher des heures, simplement pour se rendre à l'école. Nombre d'entre eux perdent tout espoir d'améliorer leur sort »³⁰. Cette situation d'ensemble donne à penser qu'Israël viole systématiquement l'article 55 de la quatrième Convention de Genève et l'article 69 du Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I), adopté en 1977, qui définissent l'obligation d'Israël de garantir la satisfaction des besoins essentiels des personnes vivant sous son occupation, en particulier dans la zone C qu'elle contrôle entièrement. Aux termes de l'article 55, « dans toute la mesure de ses moyens, la Puissance occupante a le devoir d'assurer l'approvisionnement de la population en vivres et en produits médicaux; elle devra notamment importer les vivres, les fournitures médicales et tout autre article nécessaire lorsque les ressources du territoire occupé seront insuffisantes ». Ce devoir fait l'objet d'une description plus détaillée à l'article 69 du Protocole I, intitulé « Besoins essentiels dans les

²⁶ Bureau de la coordination des affaires humanitaires, « Special Focus: Lack of Permit Demolitions and Resultant Displacement in Area C », mai 2008.

²⁷ Save the Children UK, « Life on the Edge: The Struggle to Survive and the Impact of Forced Displacement in High-Risk Areas of the Occupied Palestinian Territory », octobre 2009.

²⁸ Ibid., p. 65.

²⁹ Ibid., p. 24.

³⁰ Jihad al-Shommali, de la section palestinienne de défense des enfants International, *The Electronic Intifada*, « Israeli colonization means life of poverty for West Bank children », 12 juillet 2010; voir <http://electronicintifada.net/v2/article11386.shtml>

territoires occupés »³¹. La protection des enfants vivant sous occupation reçoit une attention particulière à l'article 50 de la quatrième Convention de Genève et aux articles 77 et 78 du Protocole I. En conclusion, Israël ne respecte pas ses obligations de puissance occupante à l'égard des enfants palestiniens vivant dans la zone C.

C. Colonies de peuplement

11. D'après les chiffres les plus récents, il y a 121 colonies de peuplement israéliennes, parfois appelées « colonies » et approximativement 102 « avant-postes » qui ont été établis en violation de la loi israélienne³². Le nombre de colons dépasse aujourd'hui 462 000, dont 271 400 vivent en Cisjordanie et 191 000 dans Jérusalem-Est³³. Fait révélateur, la population des colons s'est accrue au rythme de 4,9 % par an depuis 1990, alors que le taux de croissance démographique en Israël était moins rapide, s'établissant à 1,5 %³⁴. Quelques-unes des grosses colonies de peuplement ont enregistré une croissance démographique encore plus forte³⁵. D'après une étude actualisée de B'Tselem, entre 2001 et 2009, les trois colonies de peuplement les plus importantes en Cisjordanie ont affiché une croissance démographique rapide : 78 % à Modi'in Illit, 55 % à Betar Illit, et 34 % à Ma'ale Adummim³⁶. Comme indiqué dans les rapports précédents, toutes les colonies de peuplement israéliennes en Cisjordanie et à Jérusalem-Est violent le droit international humanitaire, ce que l'Organisation des Nations Unies a maintes fois établi par des avis juridiques et souligné de manière édifiante dans l'avis consultatif de la Cour internationale de Justice sur les conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé : « [...] les colonies de peuplement israéliennes dans le territoire palestinien occupé, y compris Jérusalem-Est, sont illégales et constituent un obstacle à la paix et au développement économique et social [et] ont été installées en méconnaissance du droit international »³⁷. Ce consensus juridique a été récemment réaffirmé par le Secrétaire général Ban Ki-moon, lorsqu'il a déclaré : « Soyons clairs, toute activité en matière de peuplement est illégale où que ce soit dans le territoire occupé et doit cesser »³⁸. Le caractère illégal des colonies de peuplement se fonde sur une interprétation du paragraphe 6 de l'article 49 de la quatrième Convention de Genève, qui énonce que « La Puissance occupante ne pourra procéder à la déportation ou au transfert d'une partie

³¹ L'article 69 du Protocole I est ainsi libellé : « 1. En plus des obligations énumérées à l'article 55 de la quatrième Convention relatives à l'approvisionnement en vivres et en médicaments, la Puissance occupante assurera aussi dans toute la mesure de ses moyens et sans aucune distinction de caractère défavorable la fourniture de vêtements, de matériel de couchage, de logements d'urgence, des autres approvisionnements essentiels à la survie de la population civile du territoire occupé et des objets nécessaires au culte ».

³² Voir B'Tselem, « By Hook and by Crook: Israeli Settlement Policy in the West Bank », juillet 2010, p. 9.

³³ Voir Palestinian Monitor Factsheet, consacré aux colonies de peuplement israéliennes, actualisé le 15 mars 2010, à l'adresse www.palestinemonitor.org/spip/spip.php?article7.

³⁴ *Jerusalem Post*, « Settler population rose 4.9 % in 2009 », 10 mars 2010.

³⁵ Ibid.

³⁶ Voir B'Tselem, « By Hook and by Crook: Israeli Settlement Policy in the West Bank », p. 11.

³⁷ Cour internationale de Justice, *The Wall* (voir note n° 1).

³⁸ *The Times*, « Israel to ask US for bombs in the fight against Iran's nuclear sites », 21 mars 2010; disponible à l'adresse : www.timesonline.co.uk/tol/news/world/middle_east/article7069724.ece.

de sa propre population civile dans le territoire occupé par elle ». Israël conteste le statut de territoire occupé de la Cisjordanie, déclarant qu'il est l'objet de revendications de souveraineté concurrentes et qu'il se situe donc en dehors du champ d'application du droit régissant l'occupation de guerre³⁹. Au détriment de l'autorité du droit international, il existe une certaine ambiguïté concernant le statut qu'occuperaient ces colonies de peuplement dans un processus de paix israélo-palestinien, qui amène à se demander si, malgré leur illégalité, la plupart d'entre elles seront intégrées à Israël dans le cas où les parties conviennent de régler leur différend. Cette possibilité a été évoquée dans une lettre adressée en 2004 par le Président George W. Bush au Premier Ministre Ariel Sharon, dans laquelle il soulignait : « Compte tenu des nouvelles réalités sur le terrain et notamment des principaux centres existants de peuplement israélien, il est irréaliste de s'attendre à ce que les négociations sur le statut définitif débouchent sur un retour total aux lignes d'armistice de 1949; tous les efforts précédemment entrepris pour parvenir à la solution des deux États ont abouti à la même conclusion. Il serait réaliste de s'attendre à ce que tout accord sur le statut final ne pourra être obtenu que sur la base de changements mutuellement convenus qui reflèteraient ces réalités. »⁴⁰ Il est bien entendu que cette lettre est d'une importance politique considérable s'agissant de l'influence qu'elle peut exercer sur les attentes des parties, mais qu'elle n'a aucune valeur juridique puisque le Gouvernement américain ne peut en aucun cas restreindre les droits palestiniens. Au sens large, cela signifie qu'Israël garderait les grands blocs de colonies où vivent la plupart des colons et qu'en échange il donnerait à une entité palestinienne naissante une superficie équivalente de terres afin de compenser la perte de territoire. En fait, c'est devenu une profession de foi implicite, autant dans la feuille de route que pour les Palestiniens – alors que ces derniers demandent encore officiellement le retrait d'Israël de tous les territoires occupés en 1967 – que les Israéliens conservent les blocs de colonies dans tout plan de paix, ce qui légitimerait quelque 385 000 colons illégaux répartis sur 80 colonies. Il s'agit de colonies de peuplement situées entre le mur et la Ligne verte, ce qui, selon bon nombre d'observateurs, indique que l'emplacement du mur a été choisi avec l'objectif explicite d'une intégration territoriale à Israël proprement dit. Cette ambiguïté, associée au fait que les colonies de peuplement, tout en étant illégales créent des attentes légitimes – c'est-à-dire qu'il convient de les faire peser dans la balance éventuelle des négociations – prend d'autant plus d'ampleur que, selon certains rapports, des donations exonérées d'impôts importantes ont servi à la construction de colonies de peuplement illégales au cours de la dernière décennie pour un montant de 200 millions de dollars des États-Unis⁴¹. L'injection de fonds revêt une importance particulière s'agissant des efforts menés dans Jérusalem-Est, qui visent à accroître la présence juive au moyen du financement du déplacement des Palestiniens, souvent par le recours à des stratégies cruelles. Par exemple, la Jewish Reclamation Project of Ateret Cohanim s'emploie à transférer les titres de propriété de maisons arabes à des familles juives dans Jérusalem-Est occupée et

³⁹ La position israélienne est récapitulée dans un texte diffusé par le Ministère des affaires étrangères, intitulé « Israeli Settlements and International Law », 20 mai 2001; disponible à l'adresse : www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+peace+Process/Israel+Settlements+and+International+Law.htm.

⁴⁰ Lettre du Président Bush au Premier Ministre Sharon datée du 14 avril 2004, disponible à l'adresse : <http://georgewbush-whitehouse.archives.gov/news/releases/2004/04/20040414-3.html>.

⁴¹ *New York Times*, « Tax-exempt Funds Aid Settlements in West Bank », 5 juillet 2010.

reçoit 60 % de son financement d'une organisation à but non lucratif établie aux États-Unis d'Amérique⁴². La question fondamentale, notamment pour l'Organisation des Nations Unies, demeure la suivante : comment peut-on remédier par la voie diplomatique à des faits illégaux sur le terrain? Car si ces actions acquièrent un poids politique certain, conformément aux attentes exprimées jusqu'à présent, on aura incité de façon perverse à continuer à bafouer le droit international humanitaire et, ainsi, compromis directement la régulation des agissements d'une Puissance occupante afin de protéger le présent et le futur d'un peuple vivant sous occupation. Israël a agi de manière à créer de nouvelles attentes qui lui sont favorables grâce à des dizaines d'années d'occupation, ce qui a réduit comme une peau de chagrin les attentes raisonnables qu'entretient le côté palestinien au sujet de l'ampleur et de la portée de tout accord de paix, quel qu'il soit, et affaibli progressivement l'autorité du droit international. Car lorsqu'on accorde une légitimité à des « faits » illégaux, ils acquièrent un statut juridique de fait : le droit en est fragilisé, les droits sont bafoués et on aboutit à un processus qui contrevient à la primauté du droit et même à son application.

D. Gel de la construction de colonies

12. Le principe du gel de la construction de colonies souligne toute l'ambiguïté du processus d'établissement des colonies. Le fait de considérer le gel de ces activités comme contribution au processus de paix fait disparaître toute sensibilité à l'illégalité intrinsèque des colonies de peuplement; les parrains du processus de paix, notamment le Gouvernement des États-Unis d'Amérique, l'abordent sous l'angle d'une concession judicieuse faite par Israël, qui doit être suivie d'une concession palestinienne similaire. Israël a accepté à la fin de 2007 le principe d'un « gel de la construction de colonies », mais ne l'a jamais mis en œuvre. La construction de colonies, en particulier à Jérusalem-Est, s'est accélérée et Israël n'a même pas honoré son engagement de démanteler des avant-postes. Au cours des premiers mois de sa présidence, le Président Obama a pesé de tout son poids en faveur du gel total des activités d'expansion et de construction des colonies de peuplement, dont on espérait qu'il durerait au moins le temps d'un processus de paix. Une fois encore, cette prise de position a permis d'éviter de remettre en cause l'illégalité du mouvement des colons israéliens, le but recherché étant de se ménager une pause propice à la reprise des négociations. Il ne faut pas oublier qu'Israël n'a jamais eu à répondre de la violation incessante du droit international humanitaire qu'impliquent la construction et l'expansion de chaque colonie de peuplement. Lorsque Israël a refusé d'accepter un gel complet, l'administration du Président Obama s'est accommodée d'un gel d'une durée de 10 mois qui excluait Jérusalem-Est et a accepté la construction d'unités d'habitation et d'autres bâtiments qui avait commencé avant l'entrée en vigueur du gel⁴³. Plusieurs initiatives autorisant la construction d'unités d'habitation spécifiques ont été prises à la suite du gel : 3 000 de ces unités d'habitation ont bénéficié d'une clause d'exemption dans le cadre d'une autorisation préalable et un certain nombre d'entre elles ont été approuvées à

⁴² Voir *Haaretz*, « US group invests tax-free millions in East-Jerusalem land », 17 août 2009, et *IPS News*, « Anger Rises Over U.S. Tax Dollars for Settlements », 24 juillet 2010.

⁴³ Voir « Remarks with Israeli Prime Minister Binyamin Netanyahu », Hillary Rodham Clinton, 31 octobre 2009; disponible à l'adresse : <http://www.state.gov/secretary/rm/2009a/10/131145.htm>.

la hâte afin de devancer la date limite comme ce fut le cas pour des colonies de peuplement situées dans le nord de la Cisjordanie où le Conseil régional de Shomron a autorisé la construction de 1 600 unités d'habitation, soit 10 fois plus qu'en 2008. Il semblerait, d'après des sources dignes de foi, que la construction se soit poursuivie dans de nombreuses colonies de la Cisjordanie pendant la période de 10 mois susmentionnée. Ethan Bronner indique que « dans de nombreuses colonies de peuplement de la Cisjordanie, la construction se poursuit de manière soutenue. Des dizaines de chantiers, où travaillent des légions d'ouvriers palestiniens, sont en cours »⁴⁴. Le gel devrait normalement prendre fin le 26 septembre 2010 et il semblerait qu'Israël ne le prorogera pas⁴⁵. Le Premier Ministre Nétanyahou a toujours appuyé le gel avec beaucoup de réticence, déclarant qu'il s'agissait d'une mesure « exceptionnelle » et « extraordinaire » qui ne devait être conçue que comme un arrêt temporaire (ce qui, on l'a bien vu, n'a jamais été le cas) des activités d'implantation de colonies de peuplement normales⁴⁴. Il y a eu de nombreux appels réclamant une reprise immédiate et accélérée des activités de construction dès le coucher du soleil le 26 septembre⁴⁶. Un membre du cabinet de M. Nétanyahou, qui est également un colon, M. Youli-Yoël Edelstein, Ministre de l'information et de la diaspora, a déclaré publiquement : « Débarrassons-nous du gel et revenons à la construction [...] Après tout, c'est notre terre »⁴⁷. Comme nous l'avons laissé entendre auparavant, l'expansion des colonies rend pour ainsi dire improbable la réalisation d'un consensus en faveur de la solution des deux États, en expropriant les terres indispensables à l'établissement d'un État palestinien viable. Le retrait de terres par le biais de la confiscation des biens fonciers palestiniens est aggravé par le fait que les colonies de peuplement sont érigées sur les terres agricoles les plus fertiles ou à proximité de sources d'eau (85 % de l'eau de la Cisjordanie est utilisée soit par les colonies, soit pompée par Israël, violant de ce fait l'article 147 de la quatrième Convention de Genève de 1949, qui se réfère à « la destruction et l'appropriation de biens non justifiées par des nécessités militaires et exécutées sur une grande échelle de façon illicite et arbitraire »). Il faut comprendre que les colonies de peuplement représentent quelque 3 à 4 % de la Cisjordanie, mais que si on prend en compte les routes (794 kilomètres), le mur, les zones tampons et les zones de sécurité israéliennes, l'expansion territoriale se chiffre alors à 38 à 40 %; il conviendrait également de se rappeler qu'en cas de retrait complet des Israéliens de la Cisjordanie dans sa totalité, les Palestiniens ne disposeraient toujours que de 22 % seulement de l'ancien territoire de la Palestine, tel qu'il existait à l'époque où il avait été placé sous mandat britannique⁴⁸.

⁴⁴ *New York Times*, « Despite Settlement Freeze, Buildings Rise », 14 juillet 2010.

⁴⁵ Au cours d'une réunion au Conseil des relations étrangères, M. Nétanyahou a déclaré « Je crois qu'on en a assez fait. Poursuivons les pourparlers »; voir à l'adresse : www.reuters.com/article/idUSTRE66709920100708; pour le texte intégral de son allocution, veuillez vous reporter à : www.pmo.gov.il/PMOEng/Communication/PMSpeaks/speechCFR080710.htm.

⁴⁶ Par exemple, un membre de la Knesset, M. Danny Danon, tel que cité par le *Jerusalem Post*, a déclaré : « Les colons commenceront à construire dès que le gel prendra fin », 21 juillet 2010; disponible à l'adresse : www.jpost.com/Israel/Article.aspx?182062.

⁴⁷ M. Youli-Yoël Edelstein, le 6 mai 2010, à la Radio nationale israélienne, tel que cité lors d'une entrevue avec le journaliste d'enquête Max Blumenthal, « Le gel de la construction de colonies : un phénomène qui n'a jamais existé et qui n'existera jamais », à <http://maxblumenthal.com/2010/07/the-settlement-freeze-that-never-was-and-never-will-be/>.

⁴⁸ Comité israélien contre la destruction de maisons, « The Key to Peace: Dismantling the Matrix of Control », disponible à l'adresse : www.icaHD.org/?page_id=79, et B'Tselem, rapport annuel « Human Rights in The Occupied Territories », du 1^{er} janvier 2009 au 30 avril 2010, p. 22 à 25.

E. Actes de violence commis par les colons

13. On a signalé au cours des derniers mois de nombreux actes de violence commis par des colons à l'encontre de Palestiniens, dont quelques-uns sont dus à la colère provoquée par la mise en œuvre du gel partiel et temporaire par le Gouvernement israélien. Les pires incidents, qui relèvent de la politique dite « du prix à payer » ont pris la forme de châtiments collectifs à l'encontre des Palestiniens et de leurs biens par des colons, en réponse à des interventions ponctuelles de l'État à la suite de l'établissement d'avant-postes, alors que, tout bien considéré, les avant-postes sont tolérés et qu'ils disposent souvent de services tels que l'électricité, l'eau et l'assainissement. Fin juillet 2010, dans le cadre de représailles dites du « prix à payer », occasionnées par l'enlèvement d'habitations mobiles implantées dans un nouvel avant-poste du village de Yithar, dans les collines situées au sud d'Hébron, des colons ont détruit les terres agricoles du village bédouin voisin d'Um Al-Kher⁴⁹. Les conséquences ont été catastrophiques pour les 85 personnes vivant dans cette communauté, qui tiraient l'essentiel de leur subsistance des produits de la terre. Dans d'autres cas, des Palestiniens ont été attaqués alors qu'ils cultivaient leurs terres ou lorsqu'ils passaient à proximité d'une colonie sur le chemin de l'école ou du travail. Le village de Saffa, près de Ramallah, a été le théâtre d'incidents en juillet 2010 au cours desquels des colons ont mis le feu à des oliviers plantés sur une propriété privée palestinienne, sous la protection manifeste des soldats israéliens, qui ont empêché les habitants du village et les pompiers de se rendre sur les lieux afin d'éteindre l'incendie. Des organisations indépendantes font état régulièrement du fait que les soldats israéliens n'offrent aucune protection aux Palestiniens face aux actes de violence commis par les colons, même lorsqu'ils sont présents lors de ces incidents et qu'ils s'abstiennent de protéger les Palestiniens même lorsqu'ils sont informés à l'avance d'attaques imminentes⁵⁰. On reproche également aux autorités militaires israéliennes leur manque d'empressement à enquêter sur les réclamations palestiniennes relatives aux dommages causés aux personnes ou aux biens⁵¹. Une telle complicité passive face aux actes de violence commis par les colons contrevient à l'obligation faite à la Puissance occupante de protéger les personnes et les biens de la population civile vivant sous l'occupation de guerre. L'article 53 de la quatrième Convention de Genève interdit expressément « à la Puissance occupante de détruire des biens mobiliers ou immobiliers, appartenant individuellement ou collectivement à des personnes privées, à l'État ou à des collectivités publiques, à des organisations sociales ou coopératives, sauf dans les cas où ces destructions seraient rendues absolument nécessaires par les opérations militaires ». Cet acquiescement face aux actes de violence commis par les colons est particulièrement déplorable si l'on se place sous l'angle du droit international humanitaire, puisque les colons sont déjà présents illégalement sur le territoire occupé et que par l'effet d'un glissement pervers, on persécute ceux qui devraient être protégés (les Palestiniens) tout en offrant une protection à ceux qui enfreignent la loi (les colons).

⁴⁹ Ma'an News Agency, « Report: Settler violence continues in south Hebron hills », 30 juillet 2010, disponible à l'adresse : www.maannews.net/eng/ViewDetails.aspx?ID=303761.

⁵⁰ Voir B'Tselem, « Settler violence »; disponible à l'adresse : www.btselem.org/english/Settler_violence/Index.asp.

⁵¹ B'Tselem, « Human Rights in the Occupied Territories », 1^{er} janvier 2009 au 30 avril 2010, p. 26 à 29.

F. Nettoyage ethnique à Jérusalem-Est occupée

14. Le militant israélien pour la paix et ancien membre de la Knesset, Uri Avnery, a fait la remarque suivante : « Le nettoyage ethnique peut se pratiquer au grand jour (comme ce fut le cas dans ce pays en 1948 et au Kosovo en 1998) ou d'une manière discrète et systématique, selon des méthodes sophistiquées très nombreuses, comme cela se passe en ce moment à Jérusalem-Est. »⁵² Ce qui ressort de ces méthodes, à part l'expansion des implantations, c'est un éventail de procédés pour faire partir les Palestiniens résidents : les expulsions pour cause d'affiliations politiques supposées, les manipulations de titres de propriété et, ce qui est le plus spectaculaire, les démolitions (on relève 15 000 ordres de démolition en attente d'exécution à Jérusalem-Est, et 3 000 en Cisjordanie, aucun d'entre eux n'ayant trait à la sécurité)⁵³. Depuis 1967, Israël rejette la position défendue avec insistance par les Nations Unies, selon laquelle Jérusalem-Est fait partie des territoires palestiniens occupés, et revendique l'appartenance de la ville entière à Israël. Donnant une nouvelle dimension à cette revendication, Israël prévoit d'étendre de manière importante la superficie de Jérusalem en annexant des terres à la ville, notamment les colonies établies sur les collines voisines. L'impression de nettoyage ethnique naît des mesures délibérées prises pour accroître la présence juive à Jérusalem-Est tout en faisant reculer la présence palestinienne, modifiant ainsi l'équilibre démographique de façon à donner corps à l'affirmation selon laquelle Jérusalem dans son ensemble est une ville juive. L'établissement et le développement illicites des implantations constituent la pierre angulaire de cette politique menée par la puissance occupante. L'importance en a été soulignée par le refus d'Israël d'étendre le gel des implantations jusqu'à Jérusalem-Est, même à titre provisoire, en dépit des pressions ouvertes exercées par les États-Unis⁵⁴. Insistant sur ce refus, les autorités municipales de Jérusalem ont pris la décision provocante d'approuver la construction de 1 600 logements supplémentaires dans la colonie de Ramat Shlomo (en vue d'accueillir 20 000 Juifs de plus)⁵⁵. Ce qui s'est passé à Ramat Shlomo est emblématique d'une tendance plus globale. Comme la remarque en a été faite à propos de Ramat Shlomo, « On parle d'une zone qui, au début du processus de paix [en 1993] était une terre délaissée (une colline inhabitée dépendant du village palestinien de Shuafat) – sans Israéliens, appartenant principalement à des Palestiniens et entièrement contiguë à des zones palestiniennes – une terre que quiconque, traçant une délimitation logique, aurait située du côté palestinien. »⁵⁶ La zone de Ramat Shlomo n'est devenue juive et israélienne qu'à la suite des expropriations de 1973, et ce n'est qu'en 1993 que le terrain fut déclaré constructible pour accueillir une nouvelle colonie, l'ironie du sort voulant que cet événement coïncide avec le début du processus de paix d'Oslo. Les défenseurs de la

⁵² Uri Avery, « Rosemary's Baby », 24 juillet 2010.

⁵³ « Israël doit éviter toutes nouvelles violations du droit international à Jérusalem-Est », déclaration à la presse du 29 juin 2010, disponible à l'adresse : www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10189&LangID=E.

⁵⁴ Voir à ce sujet la réaction de l'envoyé spécial américain George Mitchell à l'annonce du gel décidé par Israël : « Israeli Settlement Moratorium Helps Move Talks Forward, U.S. Says », 25 novembre 2009, disponible à l'adresse : www.america.gov/st/peacesec-english/2009/November/20091125151758esnamfuak0.7892725.html.

⁵⁵ Voir le *Jerusalem Post*, « We'll prevent future embarrassments », 14 mars 2010.

⁵⁶ Lara Friedmann et David Seidmann, « Jerusalem, settlements, and the "everybody knows" fallacy », The Middle East Channel, *Foreign Policy*, 19 mars 2010.

colonie arguent que « tout le monde sait » que Ramat Shlomo fera partie d'Israël dans le cadre d'un accord de paix et qu'il est inutile, à ce stade, de faire des histoires autour de son développement⁵⁷. Telle est la logique de la « réalité de terrain » qui rogne les droits des Palestiniens au regard du droit international. Les auteurs de l'article démontrent l'illusion sur laquelle repose cette partialité en faisant ressortir que la démarche du « tout le monde sait » sous-entend qu'il doit y avoir d'autres parties de la ville dont tout le monde sait qu'elles seront palestiniennes, mais qu'en fait, ces autres parties n'existent pas. Au contraire, Israël choisit de manière croissante des quartiers à prédominance palestinienne, surtout autour de la vieille ville tels que Ras al-Amud et Jebel al-Mukabber, pour procéder à la construction de logements juifs parallèlement à la démolition des logements palestiniens et l'expulsion de leurs occupants⁵⁸. Particulièrement provocante a été l'approbation de permis de construire pour 20 logements destinés à des Juifs dans le vieux quartier palestinien de Sheikh Jarrah, sur le site de l'hôtel Sheppherd qui appartenait précédemment à des Palestiniens. Aggravant la situation du point de vue des droits de l'homme, deux grosses familles palestiniennes réunissant 54 personnes au total ont été expulsées sur ordre d'un tribunal israélien, bien qu'elles aient résidé à cet endroit depuis les années 1950. L'ordre d'expulsion a été reconnu judiciairement fondé en vertu du fait que le bien avait été légalement racheté à ses anciens propriétaires dans le but d'y installer des logements juifs. Plusieurs familles palestiniennes ont été forcées de vivre dans la rue pendant des périodes prolongées, ne disposant ni de ressources ni de solutions de rechange pour se loger. Selon certaines informations, des familles palestiniennes victimes d'expulsion ont été ciblées à cette fin par Ateret Conahim, une organisation privée représentant un courant juif ultra-orthodoxe, qui lève des fonds à l'étranger pour racheter des biens palestiniens et mettre en œuvre des stratégies juridiques aboutissant à l'expulsion de familles résidant de longue date à Jérusalem-Est, dans le cadre des efforts déployés pour accentuer le caractère juif des zones situées près de la vieille ville⁵⁹. Ces activités sont facilitées par le système judiciaire et la police d'Israël. L'expérience vécue par les Karresh et les Al-Kurd, deux familles palestiniennes nombreuses, illustre ce procédé consistant à mettre à la rue des Palestiniens vivant dans un quartier musulman, avec l'appui de la police palestinienne, pour installer à leur place des familles de colons⁵⁸. Le Coordonnateur spécial des Nations Unies pour le processus de paix au Moyen-Orient, Robert Serry, a déclaré que ce dernier déplacement de résidents palestiniens de longue date par des colons israéliens armés était « inacceptable » et constituait des « actes provocateurs » encouragés par Ateret Cohanim. M. Serry a demandé à Israël d'« évacuer les colons » occupant neuf bâtiments à proximité de la vieille ville, et de « rétablir la situation antérieure »⁶⁰. Dans le même contexte, le Comité israélien contre la destruction des maisons a appelé l'attention sur un déferlement de démolitions, de dépossession et de révocations du droit de résidence qui s'est abattu dans la Vallée du Jourdain. Fin juillet 2010, ce comité s'est opposé aux activités de démolition massive qui ont provoqué le déplacement de 107 personnes, dont 53 enfants, dans le village

⁵⁷ Ibid.

⁵⁸ Association for Civil Rights in Israel, « Human Rights in East Jerusalem: Facts and Figures », mai 2010, disponible à l'adresse : www.acri.org.il/pdf/eastjer2010.pdf.

⁵⁹ Voir Palestinian Centre for Human Rights, Weekly Report on Israeli Human Rights Violations in the Occupied Palestinian Territory (29 juillet-4 août 2010).

⁶⁰ Ma'an News Agency, news release, 30 juillet 2010.

d'Al-Farisyeh⁶¹. Ce sont au total 74 structures qui ont été détruites par les bulldozers israéliens, dont 26 tentes d'habitation, 22 refuges pour animaux, 7 fours en argile, 8 cuisines, 10 salles de bain et 1 abri agricole, sans compter 4 citernes à eau, des logis, des possessions diverses et de grandes quantités de nourriture⁶².

G. Le mur

15. Comme de précédents rapports l'ont souligné, le mur de séparation, construit à 85 % sur territoire palestinien, est à la fois une entorse au devoir fondamental d'Israël de respecter l'intégrité territoriale de la surface occupée depuis 1967 et une violation grave du droit des Palestiniens à l'autodétermination⁶³. Ce jugement a été confirmé par l'avis consultatif rendu en 2004 par la Cour internationale de Justice, puis accepté à une forte majorité dans une résolution de l'Assemblée générale et il est étayé par l'avis indépendant de la plupart des spécialistes du droit international⁶⁴. Le tracé du mur a été visiblement conçu pour ouvrir la voie à une annexion future du territoire occupé situé entre le mur et la Ligne verte et, parallèlement, à incorporer à Israël les implantations les plus importantes, regroupant jusqu'à 98 % de la population des colons de Cisjordanie ainsi que les principaux aquifères. En 2010, pour le sixième anniversaire du jugement de la Cour internationale de Justice, Saeb Erakat, le négociateur en chef de l'Autorité palestinienne, a déclaré : « Pour dire les choses simplement, le mur fait partie intégrante de la politique d'un régime résolu à s'engager dans la voie de l'apartheid. »⁶⁵ Le mépris du droit international manifesté par Israël à l'égard du mur est flagrant et continu, et le fait que les Nations Unies ne prennent pas les mesures qui conviennent pour assurer la mise en œuvre de la conclusion essentielle de la Cour internationale de Justice ne fait que saper l'autorité de la Cour et des Nations Unies et bafouer le droit international en général. En de nombreux endroits, le mur coupe l'accès des Palestiniens à leurs propres terres, sauf là où ils peuvent passer par des barrières contrôlées par les Israéliens, ce qui nécessite des permis délivrés par l'administration militaire en Cisjordanie, ceux-ci s'étant révélés excessivement difficiles à obtenir. La construction du mur demeure incomplète, n'étant achevée que sur 434 des 707 kilomètres prévus (61,4 %)⁶⁶. Elle s'est ralentie au cours des dernières années, apparemment en raison de son coût. Des manifestations non violentes organisées chaque semaine en divers points du chantier, principalement dans les villages de Bil'in, Nil'in et Nabi Saleh, sont

⁶¹ ICAHD, « Mass demolitions in the Jordan Valley », 22 juillet 2010, disponible à l'adresse : www.icahd.org/?p=5179.

⁶² Stephen Lendman, « In Palestine, Demolitions and Disposessions », *Palestine Chronicle*, 31 juillet 2010.

⁶³ Bureau de la coordination des affaires humanitaires : « West Bank Movement and Access », juin 2010, p. 2.

⁶⁴ Voir la résolution ES-10/14 de l'Assemblée générale, et « Par un vote massif, l'Assemblée générale des Nations Unies exige qu'Israël respecte l'avis de la Cour internationale de Justice », 20 juillet 2004, disponible à l'adresse : www.un.org/apps/newsFr/storyF.asp?NewsID=8501&Cr=middle&Cr1=east.

⁶⁵ Voir Organisation de libération de la Palestine (OLP), Département des affaires de négociations, communiqué de presse du 8 juillet 2010, disponible à l'adresse : www.nad-plo.org/view_area_page.php?view=news-updates_080710&css=1.

⁶⁶ Bureau de la coordination des affaires humanitaires, « West Bank Barrier Route Projections », juillet 2010, disponible à l'adresse : www.ochaopt.org/documents/ocha_opt_route_projection_july_2010.pdf.

dispersées par les forces militaires et de police israéliennes usant d'une force excessive, à l'aide de gaz lacrymogène, de bombes à percussion, de bombes à gaz et de balles en caoutchouc qui ont causé de nombreuses blessures ainsi que plusieurs morts⁶⁷. Par ailleurs, au cours des derniers mois, des organisateurs de manifestations, des journalistes et des observateurs internationaux ont été arrêtés et détenus, souvent selon des procédés conçus pour terrifier non seulement la personne appréhendée mais également des membres de sa famille, ce qui se traduit par des incursions de nuit dans les foyers et par l'humiliation des personnes. Des responsables très respectés de la Campagne populaire contre le mur, dont Jamal Juma, Mohammed Othman et Abdallah Abu Rahmah, ont été arrêtés de cette façon, soit sans motif, soit sur des accusations montées de toutes pièces⁶⁸. C'est ainsi que Rahmah a été accusé d'être « en possession d'armes », les armes en question étant finalement des munitions lacrymogènes usées qui avaient été tirées contre les manifestants. Juma a été accusé de provocation. Ces atteintes aux droits civiques des Palestiniens sous occupation sont une entorse à l'obligation fondamentale qui incombe à Israël de défendre les droits d'un peuple occupé. La sécurité ne peut être raisonnablement invoquée dans le cas de manifestations palestiniennes non violentes contre le mur qui est manifestement illégal et envahissant.

III. Gaza

A. Observation générale

16. Bien que le blocus ait été quelque peu assoupli, la population civile de Gaza continue d'être persécutée de diverses manières illégales par un régime d'occupation qui lui impose systématiquement des sanctions collectives en contravention de l'article 33 de la quatrième Convention de Genève. Tzipi Livni, qui était la Ministre israélienne des affaires étrangères au moment de la guerre de Gaza de 2008-2009, a récemment déclaré que le blocus ne visait pas à punir le peuple palestinien. Selon elle, le blocus de Gaza a été établi non pas pour punir le peuple palestinien mais pour ôter sa légitimité au Hamas⁶⁹. Indépendamment de l'objectif visé, en imposant un blocus pour ôter sa légitimité à un opposant politique, on fait inévitablement souffrir la population et cet objectif ne pouvait en aucun cas justifier sur le plan juridique qu'on ait interdit à une population démunie, qui vivait sous une occupation de guerre, de s'approvisionner en nourriture, en carburants et en matériaux de construction et de mener des activités normales en temps de paix. En outre, au nom de la sécurité, Israël fait un usage excessif de la force pour étouffer dans l'œuf toute velléité d'agitation et de résistance et oblige toute la population de la bande de Gaza à vivre dans une atmosphère de terreur et d'appréhensions. Le fait d'enfermer 1,5 million d'habitants de Gaza et de ne leur accorder de permis de sortie que dans de rares cas est une atteinte à leurs droits fondamentaux dans les domaines de la santé et de l'éducation et les empêche d'avoir des relations sociales normales avec la famille et les amis. Le blocus a entraîné

⁶⁷ Les organisations non gouvernementales locales telles que Palestinian Centre for Human Rights, rendent compte chaque semaine des violents incidents intervenant à la suite des manifestations contre le mur.

⁶⁸ Voir Jonathan Cook, « Israel's war on protest », agence Ma'an News Agency, 13 février 2010.

⁶⁹ Deborah Solomon, « Questions for Tzipi Livni », *New York Times*, 24 juin 2010; cet article peut être consulté à l'adresse www.nytimes.com/2010/06/27/magazine/27FOB-Q4-t.html.

l'écroulement de l'économie de Gaza, accroissant ainsi sa dépendance vis-à-vis de l'aide humanitaire fournie par les Nations Unies et aggravant la pauvreté et le chômage. Dix lauréats israéliens de distinctions académiques et des universitaires israéliens ont lancé, dans une lettre adressée au Ministère israélien de la défense, un appel lui demandant de mettre fin à l'interdiction de voyager, en vigueur depuis 2000, visant les étudiants palestiniens de Gaza qui étudient en Cisjordanie⁷⁰. Rédigée sous les auspices de l'organisation Gisha : Centre juridique pour la liberté de mouvement, cette lettre attirait l'attention sur le fait que la Puissance occupante n'avait pas respecté une décision de la Haute Cour de justice datant de 2007, selon laquelle les étudiants de Gaza souhaitant étudier en Cisjordanie devraient être autorisés à le faire sous la seule réserve qu'il soit tenu compte des préoccupations légitimes d'Israël en matière de sécurité⁷¹. Cette lettre soulignait qu'une formation académique et professionnelle était indispensable au bien-être et au développement de la société palestinienne et de chacun des individus, hommes et femmes, la composant qui souhaitaient évoluer⁷². Dans une affaire très médiatisée, la Haute Cour de justice a décidé en juin 2010 que Fatma Sharif, une avocate de Gaza âgée de 29 ans, pouvait ne pas être autorisée à préparer un master dans le domaine des droits de l'homme à l'Université Bir Zeit⁷³. Sa demande de permis de voyager a été rejetée car, en vertu de la stricte réglementation relative au blocus, seuls les besoins humanitaires spéciaux ou les besoins médicaux urgents sont considérés comme des raisons valables d'autoriser une personne à sortir de Gaza. À l'unanimité, la Haute Cour de justice a présenté son avis juridique comme suit : « Nous ne sommes pas convaincus que, dans la situation qui prévaut sur les plans de la politique et de la sécurité, la situation personnelle [de la requérante] justifie une intervention quant à la décision du défendeur, [le Ministère de la défense] ». Ainsi, même après un prétendu assouplissement du blocus de Gaza à la suite de l'incident de la flottille, cette demande d'autorisation de voyage à des fins éducatives a été rejetée par l'administration, puis confirmée par la justice. Même en tenant compte des rigueurs de l'occupation, refuser d'autoriser tout déplacement visant à établir des rapports sociaux et ayant Gaza comme destination ou point de départ revient à entraver cruellement un développement personnel sain et des conditions de vie normales. Sur le plan de la sécurité, rien ne justifie un tel déni des droits fondamentaux de l'homme relatifs au voyage et à l'éducation. De fait, Israël ne semble pas accorder de l'intérêt à l'amélioration de la situation en matière de sécurité. Ces dernières années, il n'a manifesté aucune volonté d'étudier les possibilités de négocier un cessez-le-feu durable avec les autorités de facto de Gaza. C'est décevant, compte tenu du fait qu'un cessez-le-feu temporaire instauré au second semestre de 2008 avait réduit les violences transfrontières à presque zéro et avait duré jusqu'à ce qu'Israël lance, le 4 novembre 2008, une attaque meurtrière contre Gaza, tuant six

⁷⁰ *Jerusalem Post*, « Israel Prize winners to Barak: Let Gazans study in West Bank », 29 avril 2010.

⁷¹ Gisha : Centre juridique pour la liberté de mouvement, « Held Back: Students Trapped in Gaza », juin 2008; disponible à l'adresse <http://www.gisha.org/UserFiles/File/Students%20report%20Eng%20-%20Online%20Version.pdf>.

⁷² Gisha : Centre juridique pour la liberté de mouvement, « 10 Israel Prize laureates and dozens of academics urge the Defense Minister »; 28 avril 2010, disponible à l'adresse www.gisha.org/index.php?intLanguage=2&intItemId=1745&intSiteSN=113.

⁷³ Gisha : Centre juridique pour la liberté de mouvement, « Israel refuses to allow a lawyer to leave Gaza to reach her studies in democracy and human rights in the West Bank », 1^{er} juillet 2010; disponible à l'adresse www.gisha.org/index.php?intLanguage=2&intItemId=1832&intSiteSN=113.

Palestiniens⁷⁴. La partie palestinienne a proposé à maintes reprises de lier des prorogations à long terme du cessez-le-feu à la levée du blocus et à l'ouverture des frontières, mais Israël n'en a pas tenu compte. Il y a également lieu de s'interroger sur l'emploi du terme « blocus ». Depuis la première occupation, en 1967, Israël a toujours surveillé les entrées d'armes à Gaza et, à cet égard, les mesures qui ont été imposées au second semestre 2007 s'inscrivaient dans une action globale destinée à empêcher les biens, les services et les personnes d'entrer à Gaza ou d'en sortir. Ces mesures, loin de constituer un blocus traditionnel, visaient donc davantage à faire de Gaza une vaste prison ou à instituer ce qu'on appelait l'état de siège au Moyen Âge.

B. Incident de la « flottille pour la liberté »

17. Le 31 mai 2010, les Forces de défense israéliennes ont attaqué six navires de la « flottille pour la liberté de Gaza »⁷⁵. La flottille avait été réunie à l'initiative des sociétés civiles du monde entier. Sous la direction du Free Gaza Movement et d'une organisation turque, la Foundation for Human Rights and Freedoms and Humanitarian Relief, ces navires transportaient 10 000 tonnes de produits humanitaires à la population de Gaza. À leur bord, se trouvaient 718 personnes ressortissantes de 37 pays⁷⁶. En pleine nuit, alors qu'ils se trouvaient dans les eaux internationales, les navires ont été violemment interceptés, entre autres, par 13 commandos d'opérations spéciales des Forces de défense israéliennes, qui, depuis des hélicoptères, ont pris d'assaut le premier navire, qui battait pavillon turc. Lors des combats, neuf militants de la paix ont été tués et des dizaines ont été blessés, puis des centaines de militants ont été arrêtés⁷⁷. Il est clair que le droit maritime international interdit toute intervention militaire contre une opération humanitaire dans les eaux internationales, en particulier si elle est menée avec une telle violence, mais, pour disposer d'évaluations fiables, il faudra attendre le résultat de plusieurs enquêtes qui sont en cours. S'agissant de la manière dont les violences ont éclaté, les faits n'ont pas encore été établis et sont étudiés par plusieurs commissions d'enquête, créées notamment par le Président du Conseil des droits de l'homme⁷⁸ et par le Secrétaire général de l'ONU⁷⁹. Israël fait partie de la commission d'enquête établie par le Secrétaire général et a nommé un Israélien pour l'y représenter. Comme l'ont souligné à maintes reprises les organisateurs de cette opération de secours humanitaire, qui avait été menée pour venir en aide à la population de Gaza victime du blocus, leur objectif symbolique était de fournir des

⁷⁴ *The Guardian*, « Gaza truce broken as Israeli raid kills six Hamas gunmen », 5 novembre 2008; disponible à l'adresse www.guardian.co.uk/world/2008/nov/05/israelandthepalestinians.

⁷⁵ « Gaza aid convoy killings: Those responsible must be held accountable », communiqué de presse, 31 mai 2010; disponible à l'adresse www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10080&LangID=E.

⁷⁶ On peut lire des récits des participants aux adresses www.freegaza.org/ et www.ihh.org.tr/.

⁷⁷ Pour un point de vue israélien, lire la déclaration du Premier Ministre Netanyahu datée du 1^{er} juin 2010 à l'adresse www.pmo.gov.il/PMOEng/Communication/Spokesman/2010/06/spokehatshara010610.htm; pour un échantillon des articles parus dans la presse internationale, lire l'article du *New York Times* intitulé « Israel intercepts Gaza Flotilla; Violence reported », 30 mai 2010.

⁷⁸ Voir résolution 14/1 du Conseil des droits de l'homme, 2 juin 2010.

⁷⁹ Centre d'actualités de l'ONU, « Flottille pour Gaza : les membres israélien et turc du panel annoncés », 7 août 2010; disponible à l'adresse www.un.org/apps/newsFr/storyF.asp?NewsID=22640&Cr=gaza&Cr1=&Kw1=flottille&Kw2=&Kw3=.

denrées alimentaires, du matériel médical, des matériaux de construction et du matériel pédagogique. Leur principal objectif de fond était de mettre fin au blocus en lançant un appel à l'opinion publique mondiale. De ce point de vue, bien que les navires n'aient pas été autorisés à se rendre à leur port de destination et que les citoyens militants qui se trouvaient à leur bord aient payé un lourd tribut, l'opération a été une réussite spectaculaire sur le plan politique. Pour la première fois depuis sa mise en place, il y a trois ans, le blocus a été au centre de l'attention au niveau mondial en raison des souffrances graves et illégales sur le plan humanitaire qu'il inflige à la population civile de Gaza. Face à ces réactions, les autorités israéliennes ont accepté de limiter le blocus⁸⁰. Il est trop tôt pour savoir si cet assouplissement du blocus atténuera la crise humanitaire à Gaza. À ce jour, rien n'indique qu'Israël permettra le retour à des conditions de vie humaines à Gaza, ce qui supposerait d'autoriser le libre passage des habitants souhaitant étudier ou travailler à l'extérieur de Gaza et d'autoriser les journalistes et les parents et amis de ces habitants à se rendre à Gaza sans être obligés d'obtenir une autorisation ni d'attendre longtemps ou de subir des procédures de sécurité contraignantes. Selon certaines sources, la constitution d'une deuxième flottille d'aide humanitaire serait envisagée⁸¹ dans le cadre d'une mission organisée et financée par des citoyens de différents pays, l'objectif étant d'acheminer de l'aide directement à Gaza. Israël a prévenu qu'il empêcherait tout navire de forcer le blocus et, dans un communiqué officiel, le Secrétariat des Nations Unies a également appelé la société civile à ne pas tenter de contourner la législation israélienne relative à l'occupation de Gaza. En même temps, de nombreux signes montrent que, dans le monde entier, le soutien aux actions de solidarité avec le peuple palestinien a augmenté, sous la forme notamment de boycottage, de cession de certains actifs et d'une campagne de sanctions⁸². Les comparaisons avec la campagne de lutte contre l'apartheid menée dans les années 80 et au début des années 90, qui avait pesé de façon décisive sur la manière dont l'Afrique du Sud envisageait le règlement du conflit entre le maintien du droit constitutionnel et le racisme dans ce pays, sont de plus en plus fréquentes.

C. Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza (« rapport Goldstone »)

18. Comme je l'avais souligné dans mon précédent rapport, les informations figurant dans le rapport Goldstone étayaient fortement les allégations de crimes de guerre commis pendant le conflit de Gaza de 2008-2009 et les conclusions qui y sont formulées méritent le plus grand respect. Il est recommandé dans le rapport Goldstone que, dans une première étape, Israël et les autorités palestiniennes

⁸⁰ Voir la décision du Cabinet de sécurité israélien du 17 juin 2010; disponible à l'adresse www.mfa.gov.il.

⁸¹ Voir Press TV, « Activists planning new Gaza flotilla », 4 août 2010, à l'adresse www.presstv.com/detail.aspx?id=137483§ionid=351020202; et *New York Times*, « American activists plan Gaza Flotilla ship named for Obama book », 20 juillet 2010, à l'adresse <http://thelede.blogs.nytimes.com/2010/07/20/american-activists-plan-gaza-flotilla-ship-named-for-obama-book/>.

⁸² Voir U.S. Campaign for the Academic and Cultural Boycott of Israel, « Global boycotts of Israel intensify after bloody Flotilla attack », 5 juin 2010; disponible à l'adresse <http://usacbi.wordpress.com/2010/06/05/global-boycotts-of-israel-intensify-after-bloody-flotilla-attack/>.

concernées, assumant leurs responsabilités respectives, aient la possibilité d'enquêter eux-mêmes sur ces allégations et de prendre des mesures conformes aux normes internationales⁸³. Il existe bien des raisons de mettre en doute la capacité d'un État, quel qu'il soit, d'enquêter sur des agissements qui sont reprochés à sa propre armée. Renforçant l'importance qu'il accorde au principe de responsabilité, le Conseil des droits de l'homme a créé un comité d'experts indépendants dont les membres ont été nommés par la Haut-Commissaire aux droits de l'homme, conformément à la résolution 13/9 du Conseil⁸⁴. La Haut-Commissaire, Navi Pillay, a indiqué que le Comité d'experts indépendants veillerait en priorité à ce que les auteurs de toutes les violations du droit international humanitaire commises pendant le conflit de Gaza soient comptables de leurs actes afin de lutter contre l'impunité, de garantir la justice, de prévenir de nouvelles violations et de promouvoir la paix⁸⁵. Il importera de prendre au sérieux les conclusions du Comité d'experts indépendants, qui doivent être présentées à la quinzième session du Conseil des droits de l'homme, car elles s'inscrivent dans l'action menée pour faire respecter l'obligation de rendre des comptes. Si le Comité d'experts indépendants conclut que les deux parties ont mené des enquêtes donnant satisfaction, il y aura des raisons d'aller de l'avant et d'encourager Israël et les autorités palestiniennes concernées à appliquer les recommandations issues de leurs enquêtes nationales respectives. Toutefois, s'il conclut que l'une ou l'autre des parties n'a pas mené des enquêtes satisfaisantes, il appartiendra à la communauté internationale de prendre des mesures conformes aux recommandations formulées dans le rapport Goldstone. On notera que, dans un deuxième rapport, le Ministère israélien des affaires étrangères reconnaît plusieurs des conclusions les plus graves du rapport Goldstone, concernant notamment les tirs d'obus au phosphore blanc dans des zones où la présence de civils était connue, l'utilisation de civils palestiniens comme boucliers humains et les attaques menées contre des civils et des cibles prohibées⁸⁶. Selon certaines déclarations, les Forces de défense israéliennes auraient l'intention de prendre des mesures disciplinaires motivées par quatre incidents qui ont attiré leur attention⁸⁷. Ces faits permettent de penser qu'Israël a effectivement pris des mesures pour donner suite au rapport Goldstone, mais n'indiquent en rien que les autorités israéliennes se soient intéressées aux crimes les plus graves, dus à un plan de bataille qui reposait sur un recours excessif et aveugle à la force; or, si tel est le cas et que seuls les soldats qui appliquaient divers plans de guerre sur le terrain ont été tenus pour responsables, les principaux responsables des crimes de guerre et des violations du droit international humanitaire jouissent de l'impunité.

⁸³ Voir A/HRC/12/48.

⁸⁴ Voir « Progress report of the High Commissioner on the follow-up to the report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict » (A/HRC/14/CRP.4).

⁸⁵ Centre d'actualités de l'ONU, « L'ONU désigne trois experts pour contrôler les enquêtes sur le conflit de Gaza », 14 juin 2010.

⁸⁶ Ministère israélien des affaires étrangères, « Gaza Operation Investigations: Second Update », juillet 2010.

⁸⁷ Voir Yaniv Reich, « New Israeli report on Operation Cast Lead confirms Goldstone report's main findings », 22 juillet 2010; à l'adresse www.hybridstates.com/2010/07/new-israeli-report-on-operation-cast-lead-confirm-goldstone-reports-main-findings/.

IV. Recommandations

19. Il faudrait que le Conseil des droits de l'homme entreprenne une étude des effets de l'occupation prolongée sur les plans juridique, politique, social, culturel et psychologique, éventuellement en concertation avec le Gouvernement suisse, qui envisagerait de mener une étude sur cette question.

20. Il faudrait que toutes les tentatives de règlement pacifique du conflit entre les deux peuples respectent pleinement et appliquent les droits juridiques des Palestiniens, dont le droit à l'autodétermination.

21. Il faudrait que les recommandations formulées dans le rapport Goldstone soient appliquées sans plus tarder, en se conformant aux conclusions du Comité d'experts indépendants créé en application de la résolution 13/9 du Conseil des droits de l'homme.

22. Il faudrait que l'Organisation des Nations Unies appuie les actions de boycottage et de cession d'actifs et la campagne de sanctions qui sont menées dans le monde entier aussi longtemps qu'Israël occupera illégalement les territoires palestiniens et qu'elle reconnaisse qu'une « guerre non violente pour la légitimité » est une solution à la fois à l'échec des négociations de paix et aux conflits armés, car il s'agit de la meilleure stratégie dont on dispose pour promouvoir les droits de la population civile du territoire palestinien occupé, comme le prévoit le droit international humanitaire.



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Promotion et protection des droits de l'homme :
situations relatives aux droits de l'homme
et rapports des rapporteurs et représentants spéciaux

Situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967

Note du Secrétaire général

Le Secrétaire général a l'honneur de transmettre aux membres de l'Assemblée générale le rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Richard Falk, présenté conformément à la résolution 5/1 du Conseil des droits de l'homme.

* A/66/150.



Rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967

Résumé

Dans le présent rapport, soumis en application de la résolution 5/1 du Conseil des droits de l'homme, une attention particulière est accordée au droit des Palestiniens à l'autodétermination, à la situation des prisonniers palestiniens détenus par Israël, aux colonies de peuplement israéliennes dans le territoire palestinien occupé, à la violence qu'exercent les colons israéliens contre les Palestiniens et leurs biens, à la situation particulièrement vulnérable des enfants dans les territoires palestiniens occupés et aux effets du blocus israélien de Gaza.

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I. Introduction

1. Le Rapporteur spécial n'est toujours pas parvenu à obtenir le concours d'Israël dans l'accomplissement des tâches qui lui incombent en vertu de son mandat. Il continue de penser qu'à cet égard, Israël ne s'acquitte pas de ses obligations d'État Membre de l'Organisation des Nations Unies. Il rappelle que lorsqu'il a tenté d'entrer en Israël le 14 décembre 2008, aux fins de l'application de son mandat, il a été détenu dans un établissement pénitentiaire proche de l'aéroport, s'est vu refuser l'entrée sur le territoire israélien et été expulsé. Comme le seul moyen d'accéder régulièrement à la Cisjordanie, y compris Jérusalem-Est, consiste à passer par l'aéroport Ben Gourion à Tel-Aviv et par les points de franchissement de la frontière avec la Jordanie qui sont contrôlés par les forces israéliennes, il ne dispose pas des mêmes moyens que ses prédécesseurs pour se rendre dans les zones susmentionnées du territoire palestinien occupé.

2. Les changements survenus en Égypte ont créé la possibilité d'accéder à Gaza par le point de franchissement de la frontière de Rafah, que les autorités officielles égyptiennes ont affirmé vouloir maintenir ouvert à la circulation des personnes tant à l'entrée qu'à la sortie. Autre fait nouveau encourageant, le Comité spécial chargé d'enquêter sur les pratiques israéliennes affectant les droits de l'homme du peuple palestinien et des autres Arabes des territoires occupés a pu entrer à Gaza pour la première fois depuis sa création il y a 43 ans.

3. C'est dans ce contexte qu'une mission au titre du mandat du Rapporteur spécial avait été prévue pour la période allant du 25 avril au 3 mai 2011. Malheureusement, le Rapporteur spécial a été contraint d'annuler sa visite à Gaza en raison des conclusions formulées par l'Organisation des Nations Unies sur la situation en matière de sécurité qui régnait dans le territoire. Le Rapporteur spécial prévoit de tenter de nouveau de se rendre à Gaza. Bien qu'il n'ait pu visiter le territoire occupé durant sa mission, il a poursuivi celle-ci en se rendant en Égypte et en Jordanie où il s'est entretenu avec des responsables officiels, des universitaires, des représentants d'organisations de la société civile ainsi que d'organismes des Nations Unies, des défenseurs des droits de l'homme et des journalistes qui connaissent bien la situation dans le territoire occupé. Même si sa mission portait sur l'ensemble des problèmes de droits de l'homme soulevés par la poursuite de l'occupation israélienne, le Rapporteur spécial s'est tout particulièrement intéressé à la façon dont la perpétuation de l'occupation, le blocus imposé à Gaza et la situation à long terme des réfugiés portaient atteinte aux droits fondamentaux des enfants. Le présent rapport accorde une place de premier plan à ces préoccupations. La mission a permis de recueillir des informations qui, même si elles ne peuvent remplacer les renseignements de première main obtenus lors de visites sur le terrain dans le territoire palestinien occupé, ont été très utiles dans l'établissement de tous les chapitres du présent rapport.

II. Questions concernant la non-application des recommandations

4. Comme toujours, les graves préoccupations en matière de droits de l'homme que suscite l'occupation israélienne sont bien plus nombreuses que celles qui peuvent être traitées dans le présent rapport, lequel, en vertu des directives de

l'Organisation des Nations Unies, ne peut dépasser une certaine longueur. Pour éviter de donner l'impression que les préoccupations précédemment exprimées n'ont plus lieu d'être, le Rapporteur spécial tient à insister sur le caractère persistant des violations du droit international humanitaire et du droit relatif aux droits de l'homme, qui découle notamment des problèmes examinés ci-après.

5. Les recommandations contenues dans le rapport de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza¹ (le « Rapport Goldstone »), n'ont pas été appliquées, en dépit des rapports de suivi établis par le Comité d'experts indépendants². Ces rapports prennent note en particulier du fait qu'Israël n'a pas enquêté sur les allégations de crimes de guerre de manière conforme aux normes internationales.

6. Les conclusions et recommandations de la mission d'établissement des faits sur l'incident de la flottille humanitaire du 31 mai 2010³, au cours duquel Israël a lancé, dans les eaux internationales, des attaques navales qui ont causé la mort de neuf militants pour la paix à bord du *Mavi Marmara*, un navire turc, n'ont pas encore donné lieu à l'adoption de mesures appropriées⁴. On notera que le fait de ne pas donner suite aux initiatives recommandées par des experts internationaux compétents agissant sous les auspices de l'Organisation des Nations Unies, revient en quelque sorte à se dégager de toute responsabilité pour ce qui concerne les graves allégations de crimes de guerre et de violations des droits de l'homme. Cette attitude est particulièrement regrettable vu l'impact qu'elle a sur ceux qui, depuis des années, vivent sous un régime d'occupation belliqueux qui les a systématiquement privés des droits et des recours auxquels peuvent normalement prétendre les membres d'une société respectueuse des lois. Sans protection internationale résolue et efficace, ceux qui vivent sous un régime d'occupation prolongé sont exposés aux excès et aux abus de l'occupant, comme en attestent de multiples façons les faits réels qui se déroulent dans le territoire palestinien occupé.

7. L'inquiétude que suscite le refus de donner suite aux recommandations est d'autant plus vive qu'Israël a rejeté l'avis consultatif concernant la construction du mur de séparation dans le territoire palestinien occupé⁵ que la Cour internationale de Justice a rendu à la quasi-unanimité en 2004. Cette interprétation judiciaire des obligations internationales incombant à Israël, qui fait autorité et que l'Assemblée générale a entériné dans sa résolution ES-10/15, a été rejetée par Israël sans susciter la moindre réaction internationale concrète. Bien que les avis consultatifs n'aient pas force obligatoire au sens propre du terme, ils ont des effets juridiques importants car ils donnent une interprétation juridique des questions à l'examen qui fait autorité et qui est fondée sur le raisonnement juridique du plus haut organe judiciaire traitant

¹ A/HRC/12/48.

² A/HRC/15/50 et A/HRC/16/24.

³ A/HRC/15/21. Voir également A/HRC/16/73 et A/HRC/17/47.

⁴ On notera que le groupe que le Secrétaire général a chargé d'enquêter sur ces mêmes incidents a reporté à la fin d'août 2011 la date de publication de son rapport.

⁵ *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif*, C.I.J., rapports 2004 (voir également A/ES-10/273 et Corr.1)]. Dans son avis consultatif, la Cour internationale de Justice a conclu que la quatrième Convention de Genève était applicable dans les territoires palestiniens qui étaient avant le conflit de 1967 à l'est de la Ligne verte et qui ont, à l'occasion de ce conflit, été occupés par Israël.

du droit international dans le monde⁶. L'avis consultatif est particulièrement important dans le cas qui nous intéresse dans la mesure où il a été adopté par 14 voix contre une, vote qui reflète un rare consensus entre des juges issus des principaux systèmes juridiques et horizons culturels du monde. On notera que le juge dissident était lui-même d'accord sur le fond avec une grande partie du raisonnement juridique formulé dans l'avis consultatif, dont les conclusions deviennent de ce fait quasi unanimes. Tout en refusant de reconnaître l'autorité des avis et opinions formulés, à l'échelle internationale, à propos de ce qui devait être considéré comme illégal, le Gouvernement israélien a accepté de se conformer aux dispositions du droit israélien applicables à la construction du mur. Dans la pratique cependant, Israël tarde à se conformer aux décisions judiciaires pertinentes des juges israéliens qui lui ordonnent de démanteler certains segments du mur et de les transférer ailleurs. Dans certains cas, ces directives judiciaires sont restées lettre morte pendant des années, imposant de très vives souffrances aux communautés palestiniennes qui sont isolées de leurs terres agricoles ou interdites d'accès à ces terres⁷. Les manifestations hebdomadaires contre le mur se sont poursuivies, en particulier dans certains villages palestiniens proches de Naplouse, notamment les villages de Ni'lin et de Bil'in. Comme pour toutes les autres questions touchant aux violations du droit international commises par Israël, il continue d'y avoir, au sein de l'Organisation des Nations Unies et plus particulièrement parmi ses États Membres, une absence de volonté de remettre en question l'existence du mur et la poursuite de la construction de cet édifice qui empiète de façon si préjudiciable sur l'existence de nombreux Palestiniens vivant sous occupation en Cisjordanie, et plus particulièrement à Jérusalem-Est.

8. À l'heure présente, deux problèmes conjoints se posent : le refus d'Israël de s'acquitter des obligations en matière d'administration du territoire palestinien occupé qui lui incombent en vertu du droit international et le fait que l'Organisation des Nations Unies n'a pas pris de mesures efficaces face aux violations persistantes, flagrantes et systématiques des droits fondamentaux des Palestiniens vivant sous l'occupation. Il semblerait toutefois que de telles mesures se voient accorder une importance accrue, le Conseil de sécurité ayant fait sien le principe de la responsabilité de protéger en adoptant la résolution 1624 (2006), principe qu'il a récemment appliqué par la voie de sa résolution 1973 (2011), qui prescrit la protection des civils en Lybie.

9. Il convient de rappeler les termes de la Déclaration Balfour du 2 novembre 1917 – laquelle, même aujourd'hui, près de 100 ans après sa publication, demeure le fondement de l'État d'Israël –, qui insistent sur les notions de réciprocité et de droits, stipulant notamment ceci : « ...étant clairement entendu que rien ne sera fait qui puisse porter atteinte [...] aux droits civils et religieux des collectivités non juives existant en Palestine ». La proclamation expresse de soutien, dans la déclaration contestée, à la création de ce que l'on appelait alors « un foyer national pour le peuple juif » constitue le fondement de la revendication de droit qui fonde la

⁶ Voir Bekkar, « The United Nations General Assembly Requests a World Court Advisory Opinion on Israel's Separation Barrier », *Insights*, décembre 2003.

⁷ En juin 2011, Israël a commencé à démanteler une partie du mur située à proximité du village de Bil'in en Cisjordanie, en application d'une décision rendue quatre ans auparavant par la Haute Cour de justice israélienne. Voir Bureau de la coordination des affaires humanitaires « Protection of Civilians, Weekly report, 8-21 June 2011 », 24 juin 2011. Consultable à l'adresse suivante : <http://unispal.un.org>.

création, la reconnaissance et l'admission à l'ONU en qualité d'État Membre de l'État d'Israël en 1948. Bien que la Déclaration Balfour constitue un empiètement colonialiste sur le droit à l'autodétermination qui a été ultérieurement reconnu par le droit international, les passages de ce texte qui insistent sur la nécessité de respecter les droits réciproques des communautés non juives touchées, en particulier des Palestiniens, devraient continuer de guider, sur les plans tant politique que moral, la recherche d'une solution pacifique et juste du conflit.

III. Le droit des Palestiniens à l'autodétermination

10. Comme cela a été souligné dans les rapports antérieurs, de tous les droits de l'homme compromis en raison de l'occupation prolongée du territoire palestinien par Israël, le plus fondamental est le droit à l'autodétermination. Il s'agit d'un droit inaliénable du peuple palestinien, comme de tout autre peuple dans le monde. Cependant, depuis 1967, Israël lui dénie la réalisation de ce droit dans le territoire palestinien occupé. En outre, divers événements survenus pendant l'occupation ont entraîné des atteintes qui diminuent la portée de l'autodétermination plus encore que ne l'avaient envisagé les Palestiniens lors de leur acceptation historique de la dimension territoriale d'un règlement du conflit fondé sur la coexistence de deux États, acceptation qui a pris la forme de la décision de 1988 du Conseil national palestinien, par laquelle celui-ci acceptait les paramètres des résolutions 267 (1969) et 338 (1973) du Conseil de sécurité. Il faut bien peser le fait que ce compromis territorial représentait une concession importante de la part de la direction palestinienne, car il réduisait à 22 % de la Palestine historique les quelque 45 % attribués aux Palestiniens par l'Assemblée générale de l'Organisation des Nations Unies dans sa résolution 181 (II), alors que cette formule de partition avait été rejetée en 1947 à la fois par les dirigeants de la population résidente palestinienne et par les gouvernements arabes voisins, qui la jugeaient injuste et inacceptable. Une grande partie de la communauté internationale continue de se représenter l'autodétermination palestinienne comme devant être fondée sur l'établissement d'un État viable et d'un seul tenant comprenant l'ensemble des territoires délimités par les frontières d'avant 1967, sous réserve d'ajustements mineurs et d'échanges de territoires équivalents mutuellement consentis. Cette position a été réaffirmée en mai 2011 par le Président des États-Unis d'Amérique, Barack Obama⁸. Les échecs successifs d'innombrables tentatives visant à transformer ce consensus en une solution, par voie de négociations directes entre les parties, ont alimenté chez les Palestiniens et leurs dirigeants une profonde déception. Il faut en outre faire observer que la lenteur mise à trouver une solution n'a cessé d'éroder, pour les Palestiniens, la perspective d'aboutir à un État viable, notamment en raison de l'expansion des colonies israéliennes et de la construction du mur ainsi que du réseau de routes réservées aux colons israéliens qui les accompagne.

11. C'est dans ce contexte qu'il faut apprécier plusieurs événements récents en rapport avec la recherche intergouvernementale d'une solution pacifique et négociée, car ils sont liés à la lutte pour la protection et la réalisation des droits des

⁸ Barack Obama, Président des États-Unis, « Remarks by the President on the Middle East and North Africa », conférence de presse tenue à la Maison-Blanche, Washington, 19 mai 2011. Consultable sur la page Web www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-middle-east-and-north-africa.

Palestiniens en application du droit international. La signature, à la fin du mois d'avril 2011, d'un accord de réconciliation ou d'union entre l'Autorité palestinienne et les autorités de facto de Gaza a entériné la création d'un gouvernement intérimaire chargé d'organiser des élections générales dans un avenir prochain sur tout le territoire palestinien. Cet accord entre Palestiniens a été critiqué par les Gouvernements d'Israël et des États-Unis comme compromettant les perspectives de négociations directes, en raison de leurs objections à inclure dans celles-ci des représentants appartenant à ce qu'ils désignent comme une « organisation terroriste ». Lors d'une réunion du Quatuor pour le Moyen-Orient qui s'est tenue à Washington le 11 juillet 2011, un appel général à la reprise de négociations directes entre Israël et les Palestiniens a été lancé, mais aucun accord sur les conditions préalables à ces négociations n'a pu être atteint⁹. Le Président Mahmoud Abbas a réitéré à plusieurs reprises sa position selon laquelle les négociations ne reprendraient pas sans un arrêt complet de l'expansion des colonies israéliennes, y compris à Jérusalem-Est. Il semble qu'il n'y ait aucune chance que le Gouvernement d'Israël satisfasse à cette condition. Au contraire, l'expansion accélérée des colonies de peuplement en Cisjordanie, y compris à Jérusalem-Est, a fait l'objet d'annonces régulières au cours des derniers mois¹⁰, et le Président Abbas a annoncé que l'Autorité palestinienne avait l'intention de s'adresser à l'Assemblée générale dans le but d'obtenir la reconnaissance de l'État palestinien sur la base des frontières d'avant 1967, et peut-être aussi de solliciter son adhésion à l'Organisation des Nations Unies par l'intermédiaire du Conseil de sécurité. Ce projet d'initiative diplomatique est présenté comme une solution de rechange à des négociations directes, et pour cette raison, entre autres, est condamné comme une démarche « unilatérale » par les Gouvernements d'Israël et des États-Unis, qui s'y opposent vigoureusement.

IV. Protection de la population civile vivant sous occupation

12. Il est malheureusement nécessaire de rappeler les obligations fondamentales d'Israël en vertu du droit international humanitaire en tant que Puissance occupante de la Cisjordanie, y compris Jérusalem-Est, et de la bande de Gaza. La plupart de ces obligations figurent dans la Convention de Genève relative à la protection des personnes civiles en temps de guerre (quatrième Convention de Genève), à laquelle Israël est partie, et en particulier dans sa section III (art. 47 à 78), qui aborde les questions relatives aux territoires occupés. Un document plus détaillé et plus récent est le Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I), entré en vigueur en 1978, et en particulier son titre IV, qui établit la législation applicable à la population civile. Cent soixante et onze États sont parties au Protocole I. Israël n'en fait pas partie, mais il est lié par ses dispositions, car elles sont désormais ancrées dans le droit international coutumier, qui n'a pas besoin, pour être contraignant, du consentement explicite des États. D'autres instruments juridiques internationaux particulièrement pertinents relativement à la situation dans le

⁹ Voir Bureau du Représentant du Quatuor, « Quartet principals meet with Tony Blair in Washington, D.C., to promote direct negotiations », 11 juillet 2011. Consultable sur la page Web : www.tonyblairoffice.org/quartet/news-entry/quartet-meet-in-washington-dc-to-promote-direct-negotiations.

¹⁰ Voir A/66/364.

territoire palestinien occupé sont la Convention relative aux droits de l'enfant, à laquelle sont parties 193 États (y compris Israël), et la Convention internationale sur l'élimination et la répression du crime d'apartheid, à laquelle sont parties 107 États. Il n'est pas possible d'examiner en détail l'applicabilité de ces différents instruments juridiques, et n'en seront décrits ici que quelques traits saillants.

13. L'un des objectifs essentiels du droit international humanitaire, qu'il procède de traités ou de la coutume, est de garantir que la population civile n'ait pas à souffrir inutilement d'une occupation de guerre – une situation présumée temporaire –, et que la Puissance occupante ne profite pas de la situation d'occupation pour en tirer des avantages pour son gouvernement et sa société. La législation concernée a été négociée par les États, notamment des diplomates expérimentés et des conseillers militaires, et tient la balance égale entre les considérations de sécurité et ces objectifs humanitaires. Ayant ces considérations à l'esprit, on peut observer que les violences systématiques à l'encontre des civils, en tant qu'individus ou dans leur identité communautaire, constituent des atteintes particulièrement graves contre le régime juridique international de l'occupation, ce qui fait du projet de colonisation israélienne en Cisjordanie, y compris à Jérusalem-Est, un sujet de préoccupation constant, d'autant plus qu'il va de pair avec des tentatives incessantes, de la part d'Israël et des États-Unis, de modifier les frontières d'avant 1967 pour incorporer à Israël des blocs de colonies, en dépit de la reconnaissance presque universelle de leur illégalité.

14. De nombreux autres sujets de préoccupation illustrent la violation de la législation par la politique d'occupation israélienne. On mentionnera par exemple l'annexion – et ce que même des sources israéliennes appellent la « judaïsation » – de Jérusalem-Est¹¹; la prétendue expansion géographique des limites de la ville de Jérusalem¹²; l'incapacité de plus de 10 000 enfants palestiniens à se faire enregistrer légalement à Jérusalem-Est, ce qui oblige des familles palestiniennes à choisir entre rester ensemble, au risque de perdre leur permis de résidence à Jérusalem, ou accepter une séparation forcée de leurs membres¹³; l'appropriation des ressources en eau de plus en plus rares des aquifères de Gaza pour les utiliser en Israël ou au bénéfice des colons israéliens; l'imposition et l'application d'un blocus pendant plus de quatre ans à l'ensemble de la population de Gaza, limitant dramatiquement les droits fondamentaux de celle-ci à l'éducation, au logement et à la santé; la perpétuation, en Cisjordanie, d'un double système juridique et administratif privilégiant les colons israéliens et défavorisant ouvertement les Palestiniens; et les mauvais traitements systématiques à l'encontre des Palestiniens – y compris de jeunes enfants – arrêtés et détenus par les forces de sécurité israéliennes¹⁴.

¹¹ Voir, par exemple, Nir Hasson, « The Orthodox Jews Fighting the Judaization of East Jerusalem », *Haaretz* (Tel-Aviv), 24 juin 2010. Consultable à l'adresse : www.haaretz.com/weekend/magazine/the-orthodox-jews-fighting-the-judaization-of-east-jerusalem-1.298113.

¹² Voir les résolutions 252 (1968), 446 (1979) et 478 (1980) du Conseil de sécurité.

¹³ Cette information a été fournie au cours de la mission par l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient et le Bureau de la coordination des affaires humanitaires. Voir aussi Bureau de la coordination des affaires humanitaires, *Special Focus: East Jerusalem: Key Humanitarian Concerns*, mars 2011.

¹⁴ Voir, par exemple, Défense des enfants International – Section de Palestine, « In their own words: a report on the situation facing palestinian children detained in the Israeli military court system », février 2011. Consultable à l'adresse : http://www.dci-pal.org/English/Doc/Press/EastJerusalem_JANUARY2011.pdf.

15. Tout autant que les formes de violations du droit international humanitaire mises en évidence au paragraphe précédent, il est important, d'un point de vue moral, de prendre en compte les effets de la dimension temporelle sur les fondements mêmes de la santé psychologique et physique du peuple subissant l'occupation. Comme il a été indiqué, une occupation de guerre est censée être de courte durée et être menée de façon à n'avoir qu'un impact limité, suivant les modèles que constituent, à l'époque moderne, les occupations de l'Allemagne et du Japon après la Seconde Guerre mondiale, où les peuples occupés ont été restaurés dans leurs droits souverains le plus rapidement possible, et, surtout, où les civils ont été protégés avec diligence pendant toute la durée de l'occupation. Ici, sans s'engager dans une explication de la prolongation de l'occupation, qui a pris une dimension de plus en plus annexionniste, la durée de l'occupation, plus de 44 ans, est un motif urgent et indépendant de préoccupation et d'action. Cette préoccupation est aggravée par l'absence de toute perspective prévisible de fin de l'occupation à court terme.

16. Israël a prétendu que son « désengagement » de Gaza en 2005 avait mis fin à l'occupation de la bande de Gaza, et donc aux responsabilités israéliennes en tant que Puissance occupante. Cette affirmation est généralement rejetée dans les milieux du droit international, étant donné la poursuite du contrôle israélien sur les frontières, l'espace aérien et les eaux territoriales de Gaza, contrôle qui, de pair avec le blocus (qui limite gravement l'industrie de la pêche gazaouie), a provoqué une crise des droits de l'homme persistante. Même s'il n'y avait pas les menaces de violences transfrontalières israéliennes, le calvaire que représente de vivre, de nombreuses années durant, dans des conditions d'enfermement, de surpeuplement, d'appauvrissement et d'impuissance totale sur son propre destin serait incompatible avec l'objectif fondamental du droit international, qui est de protéger la dignité et le bien-être des populations civiles occupées. Vivre sous un régime d'état de siège a des effets délétères démontrés sur les enfants et les jeunes¹⁵. Entre autres privations, les étudiants sont empêchés d'exercer leur droit à l'éducation en dehors des limites de la bande de Gaza, où ne leur sont offertes que des possibilités restreintes. Comme cela a été souligné dans les rapports précédents, le droit international humanitaire doit être réexaminé de façon à prendre en compte la détresse particulière dans laquelle une occupation prolongée plonge la population civile, ce qui demande des dispositions spéciales afin de permettre aux civils une vie décente en termes d'éducation, de déplacements, d'emploi et de normalité sociale. Depuis trois générations, à des degrés divers, le peuple palestinien a été privé de ces éléments de la dignité humaine. Il est temps que l'Organisation des Nations Unies, le Comité international de la Croix-Rouge et les principaux États Membres relèvent ce défi.

V. Détention et emprisonnement

17. Une question lourde de conséquences du point de vue des droits de l'homme est le non-respect par Israël des droits fondamentaux – définis par le droit international – des personnes qu'il détient dans le territoire palestinien occupé, dont beaucoup sont ensuite emprisonnées en Israël. Selon des rapports datant de mars

¹⁵ Voir, par exemple, Fonds des Nations Unies pour l'enfance, « UNICEF oPt monthly update », juillet-août 2011. Consultable à l'adresse : http://www.unicef.org/oPt/UNICEF_Monthly_Update_July_and_August2011.pdf.

2009, 8 171 Palestiniens se trouvaient en détention à cette date. Parmi eux, 1 052 étaient détenus à la base militaire d'Ofer, au sud de Ramallah, en Cisjordanie. Les 7 119 autres prisonniers et détenus palestiniens sont actuellement détenus sur le territoire israélien. Le nombre des prisonniers est variable, mais, bien que leur nombre total ait actuellement légèrement baissé, des milliers de Palestiniens sont encore détenus par Israël dans des conditions qui violent le droit international. Selon l'organisation non gouvernementale Addameer-Prisoner Support and Human Rights Association, en juin 2011 Israël détenait 5 554 prisonniers politiques palestiniens, dont 229 étaient maintenus en détention administrative sans avoir été reconnus coupables d'aucun délit. Parmi ces prisonniers se trouvaient 211 enfants, dont 39 avaient moins de 16 ans.

18. La politique israélienne consistant à transférer des prisonniers palestiniens en territoire israélien viole les obligations d'Israël en tant que Puissance occupante. L'article 76 de la quatrième Convention de Genève est sans équivoque : « Les personnes protégées inculpées seront détenues dans le pays occupé et si elles sont condamnées, elles devront y purger leur peine ». Il ne s'agit pas seulement d'une disposition technique; elle procède aussi de la souffrance qu'endure une personne emprisonnée pendant une longue durée. Il est accordé très peu de droits de visite aux membres de leur famille, et la plupart de ceux qui sont officiellement accordés sont inutilisables en raison du système onéreux d'autorisations et de permis imposé par Israël. Les jeunes hommes palestiniens se voient presque toujours refuser l'entrée en Israël, et n'ont donc pratiquement jamais la possibilité de visiter leurs proches emprisonnés. En conséquence, les prisonniers palestiniens perdent souvent tout contact pendant des années avec les membres de leur famille¹⁶.

19. L'article 74 du Protocole I, qui est consacré à la situation particulière des « familles dispersées », impose à Israël l'obligation de « faciliter dans toute la mesure du possible le regroupement des familles dispersées en raison de conflits armés », et demande instamment de coopérer avec les organisations humanitaires qui tentent de favoriser les relations familiales dans les conditions difficiles de l'occupation. Israël continue de violer cette obligation.

20. La question importante de savoir si les Palestiniens qui sont membres d'organisations de résistance armée devraient avoir droit au statut de prisonnier de guerre demeure inexplorée. La Convention de Genève relative au traitement des prisonniers de guerre ne semble applicable que si le territoire palestinien occupé peut être considéré comme un État, ce qui pourrait être une des conséquences de l'octroi, par l'Assemblée générale, du statut d'État à la Palestine, même si, en raison de la large reconnaissance diplomatique dont bénéficie l'Organisation de libération de la Palestine, il est possible de soutenir que la Palestine jouit déjà du statut d'État¹⁷.

¹⁶ Pour un exposé utile des profondes souffrances que provoque la séparation des prisonniers d'avec leur famille pendant de longues périodes, voir l'article de l'avocat israélien Michael Sfar, « Devil's Island: the transfert of Palestinian detainees into prisons within Israel », in Abeer Barker et Anat Matar, éd., *Threat: Palestinian Political Prisoners in Israel* (Londres, Pluto Press, 2011). Ce livre, qui contient un précieux aperçu de ces problèmes, présente les résultats d'une conférence qui s'est tenue en Israël, un hommage aux libertés démocratiques qu'Israël réserve à ses propres citoyens.

¹⁷ Voir John Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge University Press, 2010).

21. De plus, il a été soutenu que, en vertu du Protocole I, les membres de groupes de la résistance armée palestinienne pourraient, en principe, avoir droit au statut de prisonnier de guerre sans avoir à prouver qu'ils appartiennent à un État, dans la mesure où il s'agit d'un combat mené par un groupe organisé luttant contre une occupation étrangère dans l'exercice de son droit à l'autodétermination¹⁸. S'il fallait accorder le statut de prisonnier de guerre aux personnes détenues pour des raisons de sécurité qui se trouveraient appartenir à des milices de résistance armée, les Palestiniens engagés dans la résistance depuis le début de l'occupation israélienne devraient bénéficier de toute une série de protections qu'Israël leur a jusqu'ici refusées.

VI. Colonies de peuplement israéliennes

22. Même si cela a été écrit à de nombreuses reprises dans des rapports précédents, il ne faut pas oublier que toutes les activités israéliennes d'implantation sont illégales. Cette affirmation se fonde sur l'interprétation acceptée du sixième alinéa de l'article 49 de la quatrième Convention de Genève, qui stipule que : « [l]a Puissance occupante ne pourra procéder à la déportation ou au transfert d'une partie de sa population civile dans le territoire occupé par elle ». Cette obligation s'applique indépendamment du fait que la Palestine bénéficie ou non du statut d'État. Le texte est rédigé d'une manière qui est loin d'être parfaite et permet à Israël de prétendre qu'il ne procède ni à la déportation ni au transfert d'Israéliens vers les colonies de peuplement mais qu'il se contente tout au plus d'aider à la concrétisation de décisions volontaires fondées sur des motifs religieux et économiques divers. Mais les subventions que le Gouvernement israélien accorde depuis de nombreuses années (pour les constructions, l'eau, l'électricité, les écoles et autres) et qui encouragent les colons et les implantations de colonies montrent bien l'implication de l'État. Israël maintient que la Cisjordanie est un territoire « contesté » plutôt qu'un territoire « occupé » et donc que le droit international humanitaire ne s'applique pas *de jure*, alors qu'Israël a ouvertement annexé Jérusalem-Est en 1967 et refuse depuis lors de qualifier cette partie de la ville d'« occupée ». Le Gouvernement israélien a récemment cherché à obtenir de la part du Président américain Barack Obama la confirmation d'une lettre d'avril 2004 adressée par son prédécesseur, George W. Bush, au Premier Ministre d'alors, Ariel Sharon, dans laquelle il indiquait que le Gouvernement américain espérait que les blocs de peuplement israéliens (« les grands centres de population israélienne » à l'est des frontières d'avant 1967) seraient considérés comme faisant partie intégrante d'Israël dans tout accord de règlement du conflit qui pourrait être négocié dans l'avenir¹⁹. Nous n'examinerons pas ces questions dans le détail, mais il existe un fort consensus international, renforcé par d'innombrables résolutions du Conseil de sécurité et de l'Assemblée générale ainsi que par un avis consultatif de la Cour internationale de Justice de 2004 concernant l'édification du mur, qui estime que la

¹⁸ Les aspects juridiques sont utilement explorés par Smadar Ben-Natan, « Are there prisoners in this war? », in Barker et Matar, op. cit.

¹⁹ Lettre du Président George W. Bush au Premier Ministre Ariel Sharon datée du 14 avril 2001, consultable à l'adresse suivante : <http://georgewbush-whitehouse.archives.gov/news/releases/2004/04/20040414-3.html>. Voir aussi Ethan Bronner, « Netanyahu responds icily to Obama remarks », *New York Times*, 19 mai 2011, consultable à l'adresse : www.nytimes.com/2011/05/20/world/middleeast/20mideast.html?_r=1.

Cisjordanie et Jérusalem-Est sont « occupés » et que le droit international humanitaire s'applique. En outre, il semble évident que la lettre du Président George W. Bush sur les colonies peut avoir un certain poids politique mais, du point de vue des droits des Palestiniens découlant du droit international, cette lettre n'a aucune valeur. Elle enfreint également les principes fondamentaux d'équité du droit international coutumier, qui ne permet pas que des tiers réduisent la portée juridique des demandes des parties sans leur participation et leur consentement²⁰.

23. Dans le contexte des objectifs globaux du droit international humanitaire visant la protection des droits d'une population occupée, il est évident que l'implantation de plus de 100 colonies de peuplement israéliennes et plus de 500 000 colons s'appropriant certains des meilleurs terrains et des meilleures ressources en eau, qui plus est à l'emplacement de la capitale qu'ils revendiquent, est une violation manifeste des droits des Palestiniens et a des incidences négatives sur les aspirations de ceux-ci à un État souverain viable. Un certain nombre de responsables politiques européens et américains considèrent que l'expansion des colonies par Israël fait reculer la perspective de parvenir à un règlement pacifique du conflit. Le 5 avril 2001, William Hague, Ministre des affaires étrangères du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, a publié un communiqué de presse pour répondre à l'annonce faite par Israël de son intention de poursuivre le développement d'une grande colonie de peuplement à Jérusalem-Est, dans lequel il déclarait : « Je condamne la décision prise par Israël d'approuver la construction de plus de 900 logements à Gilo (banlieue de Jérusalem-Est) et l'accord rétroactif qui a été donné à la construction de cinq colonies en Cisjordanie. »²¹ Les dirigeants de l'Autorité palestinienne ne cessent de répéter que sans un gel complet des implantations, ils ne reprendront pas les négociations directes, et ont expressément lié leur décision de demander la reconnaissance de l'État palestinien à l'ONU à la politique de colonisation d'Israël.

24. Il faut également souligner que les manifestations vigoureuses de la société civile israélienne contre l'envolée des prix de l'immobilier en Israël ont accentué la pression sur le Gouvernement israélien pour qu'il propose plus de logements abordables. Or, une des manières pour y parvenir, comme l'ont largement suggéré les médias israéliens, consiste à développer les colonies²². Rien ne permet de dire avec certitude que c'est la voie que choisira Israël mais tout laisse à penser que l'opinion publique israélienne et certains responsables considèrent les colonies de peuplement comme une soupape de sécurité essentielle face à la situation sociale et politique explosive qui grandit en Israël.

²⁰ Il est noté que même les traités, qui sont une forme plus contraignante d'accord que cet échange de lettres entre les dirigeants israélien et américain, ne peuvent affecter les droits des Palestiniens au regard du droit international. Ce principe est clairement exposé dans l'article 34 de la Convention de Vienne sur le droit des traités, selon lequel : « Un traité ne crée ni obligations ni droits pour un État sans son consentement. » Même si la Palestine ne devenait pas un État, elle n'en est pas moins une partie et elle a été considérée comme telle par tous les gouvernements concernés.

²¹ Déclaration consultable en ligne à l'adresse suivante : www.fco.gov.uk/en/news/lastest-news/?view=News&id=579904682.

²² Voir, par exemple, Martin Sherman, « Into the fray: come to the carnival, comrade! », *Jerusalem Post*, 8 mai 2011. Consultable à l'adresse suivante : www.jpost.com/Opinion/Columnists/Article.aspx?id=232543.

25. L'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient (UNRWA) a souligné que les restrictions de zonage en vigueur à Jérusalem-Est entravent sérieusement le développement de la Palestine. Les autorités israéliennes ont autorisé l'implantation de colonies de peuplement juives sur 35 % de la partie arabe occupée de la ville, alors que les constructions palestiniennes sont autorisées sur seulement 13 % de la zone arabe²³.

26. Il est largement admis que l'on ne peut espérer la fin de l'occupation de la Cisjordanie, y compris Jérusalem-Est, tant que le développement des colonies d'occupation israéliennes se poursuivra. Plus cette dynamique persistera et plus les chances de voir la solution à deux États se concrétiser s'amenuiseront.

A. Violence des colons

27. En 2011, on a observé une forte hausse du nombre d'actes de violence commis par les colons. Le Bureau de la coordination des affaires humanitaires signale une augmentation de près de 50 % des incidents visant des Palestiniens en Cisjordanie, avec des blessures documentées sur 178 Palestiniens pendant le premier semestre de 2011 contre 176 pour l'ensemble de l'année 2010²⁴. Selon l'UNRWA, 12 enfants ont été blessés lors d'affrontements avec les colons pendant le seul premier trimestre de 2011, victimes de jets de pierres, d'attaques et de tirs de la part de colons israéliens. Toutefois, ces incidents ne sont qu'une partie des problèmes. Presque chaque jour sont rapportés des actes de vandalisme commis par les colons contre des terres agricoles et des villages appartenant aux Palestiniens, et certains incidents ont été filmés par des personnes travaillant avec B'Tselem, la très réputée organisation israélienne de défense des droits de l'homme²⁵. De nombreuses terres agricoles et oliveraies ont été incendiées, notamment dans les villages autour de Naplouse²⁶. Parmi les derniers faits inquiétants, les forces de sécurité et la police des frontières israéliennes semblent soutenir passivement les activités des colons, notamment en procédant à des tirs de gaz lacrymogène et de grenades étourdissantes en direction des Palestiniens tout en n'intervenant pas pour stopper les actes de violence et de vandalisme commis par les colons. Ces faits ont également été filmés par B'Tselem²⁷. Les actes de violence prennent aussi souvent la forme d'actes de harcèlement commis contre des enfants palestiniens sur le chemin de l'école, contre lesquels les forces israéliennes ne font rien. De nombreux enfants ont ainsi renoncé à aller à l'école ou leur famille ont décidé de ne plus les y envoyer, ce qui constitue une forme de violation de leur droit à l'éducation. Dans certaines zones, le plus souvent à Hébron, où les violences commises par les colons sont fréquentes et graves, des organisations internationales de la société civile telles que Christian

²³ Information fournie par l'UNRWA et le Bureau de la coordination des affaires humanitaires pendant la mission. Voir également la publication *Special focus: East Jerusalem* du Bureau de la coordination des affaires humanitaires.

²⁴ Information fournie par le Bureau de la coordination des affaires humanitaires pendant la mission.

²⁵ Les vidéos sont disponibles à l'adresse suivante : www.btselem.org/video/search/22. Voir également Mundi Nadder, éd., *An Unjust Settlement: A Tale of Illegal Settlements in the West Bank* (Geneva, Ecumenical Accompaniment Programme in Palestine and Israel, 2010).

²⁶ Information fournie par l'UNRWA et le Bureau de la coordination des affaires humanitaires pendant la mission.

²⁷ Voir, par exemple, www.btselem.org/video-channel/east-jerusalem-six-voices.

Peacemaker Teams et Ecumenical Accompaniment Programme in Palestine and Israël ont tenté d'intervenir, protégeant directement les jeunes écoliers quand les forces israéliennes faillent à empêcher les violences²⁸. Globalement, le fait qu'Israël manque à empêcher et à punir les actes de violence commis par les colons demeure une violation grave et permanente de son obligation la plus fondamentale en vertu du droit international humanitaire de protéger une population civile vivant sous occupation et d'accorder une protection spéciale aux enfants, comme il est prévu à l'article 77 du Protocole I.

B. L'avenir des colonies de peuplement israéliennes

28. Plusieurs explications ont été données à cette intensification des actes de violence et de harcèlement commis à l'égard de civils palestiniens. Elle pourrait être une réaction à un incident sanglant s'étant produit dans la colonie d'Itamar, au cours duquel cinq colons israéliens, dont trois enfants, ont été tués pendant leur sommeil²⁹; une tentative de la part de colons ayant des motivations religieuses d'inciter le Gouvernement israélien à appuyer une politique de nettoyage ethnique, notamment à Jérusalem-Est, et la revendication de droits bibliques imprescriptibles sur l'ensemble de la Cisjordanie³⁰; un signal à l'intention du Gouvernement qu'à l'avenir, toute mesure hostile aux colons prise par Tel-Aviv, comme la fermeture des avant-postes de colonies implantés sans autorisation officielle, serait suivie par des représailles, que les colons nomment eux-mêmes le « prix à payer », contre les Palestiniens et leurs biens³¹. Maher Ghoneim, le Ministre de l'Autorité palestinienne chargé du suivi des activités d'implantation de colonies, a déclaré : « Il s'agit d'un gouvernement de colons et son programme est un programme de colonisation, ce qui incite naturellement cette arrogance et ces attaques. »³². Les responsables politiques israéliens désignent la Cisjordanie sous le nom de « Judée-Samarie », ce qui encourage indirectement les colons religieux à persister dans l'idée que ce territoire devrait être incorporé à Israël dans sa totalité ou annexé par Israël, et que ce sont les Palestiniens les usurpateurs des droits historiques et religieux des colons juifs.

29. Il se peut que la violence accrue des colons israéliens soit la conséquence des divergences entre la vision des colons et celle des Palestiniens quant à l'avenir, qui ont atteint leur paroxysme. Nabil Abu Rudaineh, porte-parole de l'Autorité palestinienne, a déclaré le 8 juillet 2011 que « toutes les colonies de peuplement

²⁸ Voir Mundi Nadder, ed., *An Unjust Settlement: A Tale of Illegal Settlements in the West Bank* (Geneva, Ecumenical Accompaniment Programme in Palestine and Israel, 2010).

²⁹ Voir « Terror attack in Itamar: 5 family members murdered », *Jerusalem Post*, 12 mars 2011. Consultable à l'adresse : www.jpost.com/NationalNews/Articles.aspx?id=211780.

³⁰ Voir, de manière générale, B'Tselem, « By book and by crook: Israeli settlement policy in the West Bank », juillet 2010; et B'Tselem, « Dispossession and exploitation: Israel's policy in the Jordan Valley and northern Dead Sea », mai 2011. Consultables à l'adresse suivante : www.btselem.org/publications.

³¹ Voir, par exemple, YNet, « Settlers: We're launching "price tag" policy across the West Bank », 4 décembre 2008. Consultable à l'adresse suivante : www.ynetnews.com/articles/0,7340,L-3633599,00.html.

³² Tom Perry, « In West Bank, settler violence seen on the rise », *Reuters*, 14 juillet 2011. Consultable à l'adresse suivante : <http://uk.mobile.reuters.com/article/worldNews/idUKTRE76D30220110714>.

sont illégales et doivent être détruites.»³³. Pendant la même période, des responsables des colons ont répété qu'aucun colon ne quitterait la Cisjordanie, peu importe les accords que le Gouvernement israélien passerait.

30. Au cours des derniers mois, des visions très polarisées des relations futures ont ainsi été exprimées, allant de la destruction inconditionnelle des colonies comme élément du retrait israélien et de la fin de l'occupation à l'intégration complète de la Cisjordanie dans Israël pour former un « grand Israël » d'un seul État comme alternative à la proposition de deux États. Bien entendu, les résultats d'un tel débat ont une incidence directe sur la question de savoir si le droit des Palestiniens à l'autodétermination sera reconnu comme faisant partie intégrante du processus de résolution du conflit.

VII. Enfants palestiniens, droits de l'homme et droit international humanitaire

31. Au cours d'une série de réunions avec des représentants de l'Autorité palestinienne, des institutions des Nations Unies s'occupant du territoire palestinien occupé et d'un certain nombre d'organisations non gouvernementales de défense des droits de l'homme tenues pendant la mission du Rapporteur spécial prévue à Gaza, puis redirigée vers Le Caire et Amman, une attention toute particulière a été accordée aux incidences de l'occupation prolongée sur les droits et le bien-être des enfants palestiniens. Les résultats de ces consultations, renforcés par des informations obtenues auprès de diverses sources secondaires, étaient préoccupants pour trois raisons principales :

a) L'occupation prolongée exerce une contrainte pesante sur les civils, et celle-ci est encore plus marquée pour les enfants, dont le développement est perturbé par des privations ayant des conséquences sur la santé, l'éducation et la sécurité de manière générale. L'insécurité des enfants palestiniens est aggravée en Cisjordanie, y compris Jérusalem-Est, par les actes de violence commis par les colons et les raids nocturnes des forces d'occupation israéliennes, les destructions de maisons, les menaces d'expulsion, et de nombreuses autres pratiques. Par ailleurs à Gaza, les civils subissent un blocus, des incursions périodiques violentes et traumatisantes et des bangs soniques résultant du survol par des avions de chasse, et les camps de réfugiés, les quartiers résidentiels et les bâtiments publics détruits par les forces israéliennes pendant l'opération Plomb durci n'ont pas encore été remis en état;

b) Les renseignements disponibles montrent une augmentation de la violence, non seulement à cause des conditions difficiles sous occupation, mais aussi à cause de politiques qui entraînent des violations plus graves et systématiques des droits des enfants, pourtant garantis par les normes du droit international humanitaire;

c) Les spécialistes du développement de l'enfant s'accordent pour dire que les enfants souffrent plus des violations de leurs droits que les adultes, et que la communauté internationale devrait se préoccuper tout particulièrement de leur

³³ « EU: New settlement building units are obstacle to peace », *Jerusalem Post*, 9 juillet 2011. Consultable à l'adresse suivante : www.jpost.com/DiplomacyAndPolitics/Article.aspx?id=230096.

protection. Dans un rapport de l'UNRWA sur les conséquences des destructions de maisons en date du 12 juin 2011, il est écrit que « Les destructions des maisons peuvent avoir sur les enfants un impact particulièrement dévastateur. De nombreux enfants concernés par des destructions montrent des signes de troubles post-traumatiques, de dépression et d'anxiété. »³⁴.

32. Le sort des enfants palestiniens est en fin de compte lié à la recherche d'une solution au conflit qui apporterait la paix aux deux peuples et reconnaîtrait leurs droits fondamentaux. Comme le disait Gandhi : « Si nous voulons instaurer la paix véritable dans le monde, c'est par les enfants qu'il faut commencer ». Selon les renseignements qui sont disponibles et ce que nous avons appris pendant la mission, toute tentative de parvenir à une paix durable dans ce conflit devrait accorder la priorité au respect des droits des enfants palestiniens, notamment en leur permettant de se développer normalement et de progresser malgré les contraintes imposées par l'occupation.

33. Pour illustrer les négations des droits des enfants, le présent rapport évoque les procédures d'arrestation et de détention appliquées aux enfants en Cisjordanie et à Jérusalem-Est et les conséquences néfastes de l'insalubrité de l'eau à Gaza sur la santé des enfants.

A. Arrestation et détention d'enfants palestiniens

34. La Convention relative aux droits de l'enfant, qui de tous les instruments de droit international est le plus largement ratifié, constitue un cadre détaillé pour la protection particulière que les parties sont tenues en droit d'accorder aux enfants, et notamment aux enfants vivant sous occupation militaire. Au paragraphe 1 de l'article 3, la Convention exprime l'approche générale adoptée dans cet instrument, et qui est à présent inscrite dans le droit international des droits de l'homme : « [d]ans toutes les décisions qui concernent les enfants, qu'elles soient le fait des institutions publiques ou privées de protection sociale, des tribunaux, des autorités administratives ou des organes législatifs, l'intérêt supérieur de l'enfant doit être une considération primordiale ». En son article 38, la Convention stipule, au paragraphe 1, que « [l]es États parties s'engagent à respecter et à faire respecter les règles du droit humanitaire international qui leur sont applicables en cas de conflit armé et dont la protection s'étend aux enfants ». En son article 40, elle énonce, au paragraphe 1, l'obligation, en cas de poursuites pénales engagées contre un enfant, de reconnaître que celui-ci a « droit à un traitement qui soit de nature à favoriser son sens de la dignité et de la valeur personnelle, qui renforce son respect pour les droits de l'homme et les libertés fondamentales [...] et qui tienne compte de son âge ainsi que de la nécessité de faciliter sa réintégration dans la société et de lui faire assumer un rôle constructif au sein de celle-ci ». Cette approche s'inspire du principe général retenu à l'article 77 du Protocole I aux Conventions de Genève, qui stipule, au paragraphe 1, que « [l]es enfants doivent faire l'objet d'un respect particulier ». Dans ce contexte, l'on peut affirmer que le type de traitement néfaste qui est réservé aux enfants palestiniens vivant sous occupation – que confirment de nombreux témoignages entendus à l'occasion de la mission du Rapporteur spécial ainsi que les rapports publiés par des organisations non gouvernementales respectées – constitue

³⁴ UNRWA, « Demolition watch », 12 juin 2011. Consultable en ligne à l'adresse suivante : http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_1154.pdf.

une violation persistante par Israël du droit international en général, et du droit international humanitaire en particulier.

35. Les arrestations d'enfants palestiniens font très souvent suite à des allégations les accusant d'avoir jeté des pierres aux forces de sécurité ou aux colons israéliens en Cisjordanie³⁵. Contrairement aux enfants israéliens vivant en Cisjordanie, les accusés tombent sous le coup du droit militaire israélien, qui offre aux mineurs une protection bien moindre que celle que leur accorde le droit pénal israélien. En particulier, le droit militaire ne permet pas la présence d'un parent aux séances d'interrogatoire, ne régleme pas les horaires des interrogatoires et ne garantit pas non plus le respect de la dignité de l'enfant lors de son arrestation. Des organismes des Nations Unies et des organisations de défense des droits de l'homme dignes de foi rapportent, documents à l'appui, que des enfants sont arrêtés en pleine nuit sans préavis, enlevés à leurs parents à des fins d'interrogatoire et victimes de mauvais traitements en détention et d'inculpations entachées d'un parti pris de culpabilité. Au cours de notre mission, on nous a souvent dit que ces procédés semblaient systématiquement conçus pour effrayer et humilier les personnes arrêtées et pour les inciter à collaborer avec l'occupant en dénonçant les dirigeants des manifestations et à s'abstenir, à l'avenir, de se livrer à des actes de contestation.

36. Entre 2005 et 2010, 835 enfants – 34 âgés de 12 ou 13 ans, 255 âgés de 14 ou 15 ans et 546 âgés de 16 ou 17 ans – ont été poursuivis pour jets de pierres³⁶. Depuis 2007, le nombre de poursuites n'a cessé d'augmenter chaque année. La longueur des peines tenait compte de l'âge de l'accusé : de quelques semaines pour les plus jeunes à plus d'une année pour les plus âgés. Israël a instauré en 2010 un tribunal militaire pour mineurs qui a toujours prononcé, jusqu'ici, des peines plus légères pour les enfants âgés de 12 ou 13 ans – la sanction la plus longue qui ait été infligée étant une peine de neuf jours, ce qui est bien inférieur à celles qui étaient prononcées avant cette date. Cela dit, l'existence même d'un tribunal militaire pour mineurs est incompatible avec l'obligation fondamentale, énoncée en droit international humanitaire, de favoriser le « sens de la dignité et de la valeur personnelle » de l'enfant, comme le prescrit, au paragraphe 1 de son article 40, la Convention relative aux droits de l'enfant. L'organisation B'Tselem conclut dans son rapport sur la question, en particulier, que « [...] les droits des mineurs sont gravement violés, que le droit militaire n'assure pratiquement pas la protection de leurs droits, et que les rares droits qui leur sont reconnus en droit ne sont pas respectés »³⁶. Ce traitement réservé aux jeunes Palestiniens accusés d'infractions se traduit, notamment, par un déni de leur droit à l'éducation lorsqu'ils sont en garde à vue ou en prison, et par la distension du lien familial, et ce en violation des règles du droit international. Ce traitement abusif est également source d'inquiétude et de souffrances pour les parents et autres proches qui assistent à ces arrestations et qui ne sont pas même informés du lieu de détention de l'enfant.

37. Les récits faisant état de maltraitements lors d'interrogatoires et d'arrestations d'enfants ne manquent pas³⁷. Le Programme de protection de l'enfance dans les

³⁵ Voir, en général, B'Tselem, « No minor matter: violation of the rights of Palestinian minors arrested by Israel on suspicion of stone-throwing », juillet 2011, et B'Tselem, « Caution: children ahead: the illegal behavior of the police towards minors in Silwan suspected of stone-throwing », décembre 2010. À consulter à l'adresse suivante : www.btselem.org/publications.

³⁶ B'Tselem, « No minor matter: violation of the rights of Palestinian minors arrested by Israel on suspicion of stone-throwing », juillet 2011.

³⁷ Voir, par exemple, Défense des enfants International – Section Palestine, « In their own words ».

territoires palestiniens occupés, du Fonds des Nations Unies pour l'enfance (UNICEF), recoupe et confirme, dans son résumé, de nombreux autres récits dignes de foi, dénonçant des séances d'interrogatoire qui donneraient lieu à des pratiques telles que la prise d'empreintes digitales, des examens hématologiques, des actes d'humiliation ou l'utilisation de chiens pour effrayer les enfants; de même, les parents seraient contraints de s'agenouiller dans la rue, des garçons et des filles seraient arrêtés, et des femmes âgées et des personnes handicapées seraient soumises à des interrogatoires. La même source rapporte des cas extrêmes qui seraient survenus dans le village d'Awarta. Ainsi, une fillette de 3 ans aurait été emmenée hors de chez elle, sous la menace d'une arme à feu, à 3 heures du matin. On lui aurait dit qu'elle serait tuée et son foyer familial détruit si elle n'indiquait pas où se trouvait son frère. Depuis, comme l'a expliqué sa mère, elle souffre d'insomnies et d'énurésie. Une autre fillette, âgée de 9 ans, aurait tenté de suivre son père lorsqu'il avait été arrêté; saisie par le cou, elle en souffrait encore et craignait de sortir dans la rue³⁸.

38. L'Association for Civil Rights in Israel explique, dans un rapport, que la loi israélienne sur la protection des mineurs est souvent violée lorsque des enfants palestiniens sont arrêtés à Jérusalem-Est et interrogés. L'Association est très précise dans ses propos. Selon elle, des enfants ont été détenus pendant de longues heures, menottes aux poings; ils ont subi, pendant leur interrogatoire, des menaces, des cris et des actes de coercition destinés à leur faire révéler des informations sur des faits survenus dans leur quartier. À ce propos, il importe de préciser que l'enfant qui subit de tels traitements est d'autant plus susceptible aux traumatismes et aux troubles psychiques qu'il est jeune³⁹. L'expansion des colonies israéliennes à Jérusalem-Est bénéficie de l'encadrement d'agents de sécurité privés, qui s'octroient, à l'égard des enfants palestiniens, encore plus de libertés que ne le fait la police israélienne. Cet encadrement est particulièrement présent dans le quartier de Silwan, où les ambitions des colons ont violemment mis à mal la sécurité des Palestiniens qui y habitaient depuis longtemps. Selon Sahar Francis, Directrice générale de l'association de soutien aux prisonniers et de protection des droits de l'homme Addameer, les arrestations d'enfants sont censées intimider et effrayer les jeunes afin de décourager le « militantisme politique en général »⁴⁰ – ce qui constitue un déni par Israël du droit, reconnu par l'Assemblée générale, de résister face aux politiques d'occupation illégale, qui ne peut que susciter la perplexité.

39. L'on ne s'étonnera donc guère, face à cette situation, que l'organisation Médecins sans frontières et l'UNICEF aient récemment signalé une augmentation considérable du nombre d'enfants souffrant de troubles post-traumatiques⁴¹. Le colonel Desmond Travers, membre de la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza, qui est à l'origine du fameux « rapport Goldstone », a déclaré dans une interview récente que « si les Anglais [dans l'Ulster] avaient traité les enfants qui leur lançaient des pierres de la

³⁸ Ibid., « Awarta Update », 18 avril 2011.

³⁹ Association for Civil Rights in Israel, « Violations of the "Youth Law (Adjudication, Punishment Methods of Treatment)" – 1971 by the Israeli Police in East Jerusalem », mars 2011. À consulter à l'adresse suivante : www.acri.org.il/en/?p=2428.

⁴⁰ J. Kestler-D'Amours, « The tactic of arresting Palestinian children »; *Al Jazeera*, 8 juillet 2011.

⁴¹ Voir « Trauma of Palestinian children increasing, say health groups »; *The Electronic Intifada*, 27 juillet 2011. À consulter à l'adresse suivante : <http://electronicintifada.net/content/trauma-palestinian-children-increasing-say-health-groups/10212>.

manière dont les enfants de Cisjordanie sont généralement traités par les forces de sécurité israéliennes – c'est-à-dire subissant des rafles en pleine nuit, emmenés dans des lieux de détention, encagoulés, battus et parfois torturés – le conflit en Irlande du Nord ne serait toujours pas réglé à ce jour, et la région serait encore le théâtre d'affrontements »⁴².

40. Pour lutter contre ces formes de violations, l'organisation B'Tselem recommande, dans son rapport susmentionné, les mesures suivantes :

1. Aligner sans tarder l'âge de la minorité en droit militaire sur l'âge de la minorité fixé en Israël et dans le reste du monde;
2. Interdire les arrestations nocturnes de mineurs;
3. Réserver les séances d'interrogatoire aux heures de la journée, y autoriser la présence des parents et permettre aux mineurs de s'entretenir avec un avocat, en bonne et due forme, dans le respect des droits de l'enfant;
4. Interdire l'emprisonnement des enfants de moins de 14 ans;
5. Promouvoir des solutions autres que la détention et l'emprisonnement;
6. Mettre en place des programmes d'éducation dans toutes les prisons et offrir des possibilités d'étudier toutes les matières pour réduire au minimum le préjudice subi dans leur formation par les mineurs détenus et emprisonnés;
7. Faciliter l'octroi d'autorisations de visite des mineurs détenus et emprisonnés³⁶.

B. Blocus de Gaza, punition collective et enfants palestiniens

41. Comme il est souligné d'un bout à l'autre du rapport, les enfants sont les victimes les plus vulnérables et les plus cruellement touchées par les violations par Israël des dispositions du droit international humanitaire conçues pour protéger les populations civiles sous occupation. Le blocus de Gaza durant depuis plus de quatre ans et l'occupation dans son ensemble depuis plus de 44 ans, les effets de ces violations s'accroissent considérablement. L'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient (UNRWA), qui d'ordinaire s'interdit de commenter la nature de l'occupation, a publié le 14 juillet 2011 un communiqué de presse dans lequel il exprime une inquiétude accrue et appelle l'attention sur la situation critique des enfants de Gaza en ces termes : « Aujourd'hui, la vie à Gaza est difficile dans tous ses aspects. En matière d'éducation, il est nécessaire de construire 100 nouvelles écoles en trois ans pour ces enfants. »⁴³ Le porte-parole de l'Office, Chris Gunness, a noté que « depuis que le blocus a été imposé, le nombre de personnes vivant dans une misère noire, avec à peine plus d'un dollar par jour, a triplé pour atteindre 300 000 et, compte tenu des

⁴² Philip Weiss, « Col. Travers: Israel's treatment of Palestinian children shows that it does not seek peace », 11 juillet 2011. À consulter à l'adresse suivante : <http://mondoweiss.net/2011/07/col-travers-israels-treatment-of-palestinian-children-shows-that-it-does-not-seek-peace.html>.

⁴³ UNRWA, « A goal for Gaza: at 2011 Summer Games, 2,011 children set football world record », 14 juillet 2011. À consulter à l'adresse suivante : <http://unispal.un.org/UNISPAL.NSF/0/E014A7DE55B9E6B0852578CD0065C530>.

nombreux projets de reconstruction en attente d'approbation, l'avenir reste sombre »⁴⁴. Plus de la moitié des habitants de Gaza étant âgés de moins de 18 ans, ceux qui sont confrontés à cet avenir sombre sont dans leur immense majorité des enfants. L'Office rappelle la condamnation du blocus par le Comité international de la Croix-Rouge, qui le qualifie de « sanction collective en violation flagrante [...] du droit international humanitaire » et exhorte la communauté internationale à « faire en sorte que les appels répétés des États et des organisations internationales visant à lever le blocus soient enfin entendus ». Le communiqué de presse de l'Office se concluait par l'appel suivant : « Nous approuvons ces appels à la responsabilité car il est nécessaire de lever le blocus pour donner aux enfants de Gaza une chance de réaliser leur véritable potentiel. »⁴⁵ Illustrant l'aspect multidimensionnel de la crise que subit Gaza, l'Office lui-même connaît une pénurie de fonds qui affecte sa capacité de continuer de pourvoir, même au niveau actuel, aux besoins de 80 % de la population de Gaza, toujours dépendante de l'aide internationale pour sa survie, et ne lui permet pas de satisfaire les autres besoins des familles gazaouies ni, bien sûr, ceux des enfants.

42. La situation de Gaza est à peine plus grave que celle de la Cisjordanie, y compris Jérusalem-Est, où l'épreuve d'une occupation prolongée pèse lourdement sur l'avenir des enfants, qui vivent dans une atmosphère de peur et d'intimidation depuis leur naissance. Les récents événements survenus dans la zone C, qui représente 60 % de la Cisjordanie, ont d'une certaine façon des effets aussi graves en matière de privation des droits que ceux produits par la situation à Gaza. En particulier, l'expulsion des Bédouins de leurs villages et leur déplacement a suscité peur et appréhension, en particulier chez les enfants⁴⁵. Selon le personnel de l'Office que le Rapporteur spécial a rencontré durant sa mission, les 155 communautés pastorales restées dans la zone C, qui est entièrement contrôlée par Israël, comprennent de nombreux réfugiés bédouins en situation de déplacement forcé. Ces communautés, qui comptent de nombreux enfants désormais privés pour la plupart d'une scolarité régulière, ont connu une dégradation dramatique de leurs conditions de vie depuis 2000, la moitié de leurs membres ayant été forcés à quitter les pâturages de Cisjordanie et à abandonner leurs troupeaux pour aller s'installer, contre leur gré, dans des villages et de petites villes. Ce déplacement et cette urbanisation forcés résultent en partie de la politique israélienne de démolition systématique des dispositifs traditionnels d'approvisionnement en eau par citerne, sans lesquels la population bédouine ne peut plus pratiquer ni le nomadisme ni l'agriculture, que la Puissance occupante juge non autorisés et s'emploie donc à faire disparaître. Les enfants bédouins, dont les familles ont déjà connu la condition de réfugié dans le passé, se retrouvent dans une situation particulièrement difficile en perdant à la fois leur foyer et leur mode de vie du fait de l'abandon forcé de leurs traditions pastorales, et en étant privés de la protection inhérente à la citoyenneté qui va de pair avec le respect de la dignité et des droits individuels.

⁴⁴ UNRWA, « Gaza blockade anniversary report », 13 juin 2011. À consulter à l'adresse suivante : <http://www.unrwa.org/etemplate.php?id=1007>.

⁴⁵ Voir Harriet Sherwood, « Bedouin children hope their West Bank school will be spared Israel's bulldozers », *Guardian*, 12 juin 2011.

C. Santé des enfants palestiniens et pollution de l'eau à Gaza

43. Les enfants sont particulièrement vulnérables à l'insalubrité de l'eau qui sévit à Gaza. On estime à 54 % la proportion d'enfants et de jeunes âgés de moins de 18 ans dans la population civile gazaouie, qui compte 1,6 million de personnes; 20 % d'entre eux sont âgés de moins de 5 ans. Dans cette tranche d'âge, près de 300 000 enfants sont en très grand danger. Les tout-petits enfants sont les plus vulnérables aux maladies dont l'eau est le vecteur, et représentent 90 % des décès annuels causés par les maladies diarrhéiques, choléra y compris⁴⁶. Des études ont montré que les différences observées en matière de santé et de survie (mortalité infantile) entre les enfants vivant à Gaza et ceux vivant en Cisjordanie s'expliquent principalement par l'insalubrité de l'eau à Gaza. L'étude susmentionnée éclaire ce constat en indiquant que la seule source d'eau à Gaza est un aquifère contaminé chimiquement par des chlorures, des nitrates et d'autres substances polluantes dont les taux dépassent parfois les seuils fixés par l'Organisation mondiale de la Santé. La rareté de l'eau aggrave le problème. Près des deux tiers de la population gazaouie interrogée a indiqué que l'eau était de mauvaise qualité car trop salée et polluée, notamment à cause de la contamination par les eaux usées. La Banque mondiale et la Compagnie de distribution d'eau des municipalités côtières ont déclaré que « 5 à 10 % seulement de l'aquifère était propre à la consommation humaine et que les réserves pourraient être épuisées d'ici cinq à 10 ans si les contrôles n'étaient pas renforcés »⁴⁶.

44. La qualité de l'eau consommée à Gaza est au cœur du droit à la vie et à la santé des enfants. Les effets du blocus illégal imposé par Israël, en empêchant l'importation des outils et des matériaux nécessaires à la réparation et à la restauration du système de purification de l'eau partiellement détruit lors de l'opération Plomb durci, exacerbent la crise.

VIII. Recommandations

45. **Compte tenu de ce qui précède, le Rapporteur spécial recommande au Gouvernement israélien de prendre les mesures ci-après :**

a) **Adopter immédiatement, dans les politiques et dans la pratique, les directives établies par B'Tselem en ce qui concerne la protection des enfants vivant sous le régime d'occupation qui sont arrêtés ou détenus, afin de se conformer, sur une base minimale, au droit international humanitaire et aux normes fixées par le droit international en matière de droits de l'homme;**

b) **Autoriser d'urgence l'entrée dans Gaza des matériaux nécessaires à la réparation des équipements de distribution de l'eau et de l'électricité afin d'éviter que la situation déjà critique de la population civile, et particulièrement des enfants, en matière de santé ne se détériore encore;**

c) **Élaborer et mettre en œuvre des politiques et des pratiques de détention et d'emprisonnement applicables à la population palestinienne qui soient appropriées, notamment respecter strictement l'interdiction de**

⁴⁶ Voir UNICEF, « Protecting children from unsafe water in Gaza: strategy, action plan and project resources », mars 2011. À consulter à l'adresse suivante : http://www.unicef.org/oPt/FINAL_Summary_Protecting_Children_from_unsafe_Water_in_Gaza_4_March_2011.pdf.

transférer des prisonniers du territoire palestinien occupé vers le territoire israélien;

d) Lever immédiatement le blocus illégal imposé à Gaza, en considération de ses effets préjudiciables sur tous les aspects de la vie civile, des atteintes qu'il porte aux droits fondamentaux de la population qui vit sous occupation et de ses graves répercussions sur les enfants.

46. Le Rapporteur spécial recommande que l'Assemblée générale demande à la Cour internationale de Justice de publier un avis consultatif sur la légalité de l'occupation prolongée, qui est aggravée par le transfert interdit d'un grand nombre de personnes par la Puissance occupante et par l'assujettissement à un double système administratif et juridique discriminatoire en Cisjordanie, y compris Jérusalem-Est.



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Promotion et protection des droits de l'homme : situations relatives aux droits de l'homme et rapports des rapporteurs et représentants spéciaux

Situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967

Note du Secrétaire général

Le Secrétaire général a l'honneur de transmettre aux membres de l'Assemblée générale le rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Richard Falk, présenté conformément à la résolution 5/1 du Conseil des droits de l'homme.

* A/67/150.

** La présentation tardive du présent rapport est due à la mise à jour des informations capitales reçues d'interlocuteurs se trouvant en Israël ou dans les territoires palestiniens occupés. À cet égard, le Rapporteur spécial note que le Gouvernement israélien persiste à refuser de coopérer avec lui, l'empêchant ainsi de rencontrer directement ses interlocuteurs dans les territoires palestiniens occupés.



Rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967

Résumé

Le présent rapport traite du respect par Israël des obligations que lui impose le droit international en ce qui concerne la situation dans les territoires palestiniens qu'il occupe. Le Rapporteur spécial met en lumière la responsabilité juridique des entreprises, sociétés et acteurs non étatiques prenant part à des activités liées aux colonies de peuplement israéliennes dans les territoires palestiniens occupés.

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I. Introduction

1. Le Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967 sollicite à nouveau la coopération du Gouvernement israélien pour pouvoir s'acquitter des obligations découlant du mandat que lui a confié l'Organisation des Nations Unies. Cette coopération constitue une obligation juridique fondamentale attachée au statut de Membre de l'Organisation et doit permettre au Rapporteur spécial d'engager un dialogue constructif avec le Gouvernement israélien, les victimes, les témoins et les acteurs de la société civile susceptibles de présenter un intérêt aux fins de l'exécution de son mandat.

2. L'Article 104 de la Charte des Nations Unies dispose que l'Organisation « jouit, sur le territoire de chacun de ses Membres, de la capacité juridique qui lui est nécessaire pour exercer ses fonctions et atteindre ses buts ». Selon le paragraphe 2 de l'Article 105, les personnes représentant l'Organisation jouissent, sur le territoire de chacun des États Membres, des privilèges et immunités qui leur sont nécessaires pour exercer en toute indépendance leurs fonctions en rapport avec l'Organisation. Ces dispositions ont été développées dans la Convention sur les privilèges et immunités des Nations Unies, adoptée par l'Assemblée générale le 13 février 1946. La section 22 de l'article VI de l'Accord intitulé « Experts en missions pour l'Organisation des Nations Unies » est particulièrement pertinent car il énonce les obligations qu'ont les Membres de coopérer avec les représentants de l'ONU, tels que les rapporteurs spéciaux, et d'éviter de faire obstacle à leur indépendance.

3. Il convient de souligner que le Gouvernement israélien n'a pas apporté sa coopération dans le cadre de maintes autres initiatives importantes prises récemment par l'Assemblée générale et par le Conseil des droits de l'homme concernant les territoires palestiniens occupés, notamment la Mission d'établissement des faits de l'Organisation des Nations Unies sur le conflit de Gaza, le Comité d'experts indépendants chargé de donner suite au rapport de la mission internationale indépendante d'établissement des faits sur le conflit de Gaza, la mission internationale indépendante d'établissement des faits concernant l'incident de la flottille humanitaire, la Mission de haut niveau chargée d'établir les faits à Beit Hanoun, la Commission d'enquête sur le Liban et le Comité spécial chargé d'enquêter sur les pratiques israéliennes affectant les droits de l'homme du peuple palestinien et des autres Arabes des territoires occupés. Face à cette attitude de non-coopération à l'égard des initiatives officielles de l'Assemblée générale et du Conseil des droits de l'homme, les États Membres, l'Assemblée générale, le Conseil de sécurité et le Secrétaire général devraient faire des efforts concertés pour obtenir la coopération du Gouvernement israélien.

4. Le Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967 a mené des recherches, pour établir le présent rapport, en partant du principe fondamental selon lequel les entreprises doivent respecter le droit international humanitaire et les droits de l'homme, et doivent s'abstenir de porter atteinte aux droits humains d'autrui et remédier aux incidences négatives sur les droits de l'homme dans lesquelles elles ont une part¹. Le Rapporteur spécial serait heureux de pouvoir compter sur la collaboration du

¹ Principes directeurs relatifs aux entreprises et aux droits de l'homme (A/HRC/17/31, annexe).

Gouvernement israélien, ainsi que des entreprises et sociétés opérant à l'intérieur des colonies israéliennes dans le territoire palestinien occupé ou traitant avec elles, sur les questions soulevées dans le présent rapport.

5. Le Rapporteur spécial appelle l'attention sur la situation dramatique du peuple palestinien, qui vit sous occupation prolongée et n'a aucune perspective réaliste d'en voir la fin dans un avenir proche, et rappelle que, dans ces conditions, il incombe au premier chef à l'ONU de tout mettre en œuvre pour éviter l'exploitation économique, politique et culturelle des Palestiniens ainsi que la confiscation de leurs ressources naturelles.

II. Méthode de travail employée pour établir le présent rapport

6. En dépit de ses demandes répétées adressées au Gouvernement israélien, le Rapporteur spécial n'a pas été autorisé à se rendre dans le territoire palestinien occupé; il a donc établi le présent rapport sur la base des renseignements communiqués, à sa demande, par des acteurs de la société civile, des organismes des Nations Unies, des entreprises et sociétés, des entités non étatiques et d'autres parties prenantes, en particulier celles qui sont bien renseignées sur la participation des entreprises à la construction et à la vie des colonies de peuplement israéliennes. Le Rapporteur spécial mentionne un certain nombre d'entreprises qui sont implantées à l'intérieur de colonies israéliennes dans le territoire palestinien occupé, qui traitent avec elles ou en tirent des gains quelconques. Il formule des recommandations préconisant que les entreprises ayant des liens avec des colonies de peuplement israéliennes prennent rapidement des mesures pour mettre leurs activités en conformité avec le droit international et les règles et normes applicables, y compris le droit international des droits de l'homme. Le Rapporteur spécial note que, depuis l'élaboration du présent rapport, il en a porté le contenu à l'attention des entreprises dont il est question ici. Il demande des précisions et de plus amples informations au sujet des allégations contenues dans le présent rapport, pour poursuivre en particulier la mise en œuvre rapide des recommandations qui y figurent.

III. Situation générale dans les colonies

7. Entre 1967 et 2010, Israël a implanté environ 150 colonies de peuplement en Cisjordanie. S'y ajoutent une centaine d'implantations « sauvages » – des colonies construites sans autorisation officielle israélienne, mais avec la protection, le soutien en équipement et l'aide financière du Gouvernement israélien. Ces implantations non autorisées sont depuis peu l'objet de débats dans le Gouvernement israélien pour savoir s'il y a lieu ou non de les légaliser en droit israélien. C'est là une grave accélération du mouvement de colonisation, incompatible avec le discours politique d'Israël, qui dit appuyer les négociations tendant à instaurer un État palestinien viable, indépendant, souverain et d'un seul tenant.

8. Jérusalem compte 12 colonies, implantées avec l'aide financière et l'assistance du Gouvernement sur des terres illégalement annexées par Israël et intégrées à la ville. Les colonies ont la mainmise sur plus de 40 % de la Cisjordanie, y compris

des ressources agricoles et hydriques essentielles. De nombreuses implantations sont très étendues et forment des grands lotissements fermés ou des petites localités. Israël n'autorise pas les Palestiniens – sauf s'ils ont un permis de travail – à y pénétrer ou à en utiliser les terres.

9. Les colonies de peuplement israéliennes dans le territoire palestinien occupé comptent de 500 000 à 650 000 habitants, dont quelque 200 000 vivant à Jérusalem-Est. Les statistiques révèlent que le nombre de colons (à l'exclusion de la population de Jérusalem-Est) a augmenté, au cours de la dernière décennie, à un rythme annuel moyen de 5,3 %, contre 1,8 % pour la population israélienne en général. Au cours des 12 derniers mois, cette population a augmenté de 15 579 personnes. Le Gouvernement israélien offre aux colons des prestations et des incitations dans les domaines de la construction, du logement, de l'éducation, de l'industrie, de l'agriculture et du tourisme, ainsi que des routes à usage exclusif et un accès privilégié à Israël. L'effort financier, juridique et administratif déployé par Israël dans son entreprise de colonisation a transformé de nombreuses colonies en opulentes enclaves pour citoyens israéliens, et cela dans une zone où les Palestiniens vivent sous régime militaire et dans des conditions de pauvreté généralisée.

10. Cette aide financière, juridique et administrative apportée aux zones de peuplement offre aux colons des privilèges qu'ils n'auraient pas en tant que citoyens israéliens vivant sur le territoire israélien. Ces privilèges ajoutent un contexte éloquent aux grandes manifestations qui ont rassemblé librement à Tel-Aviv, à Jérusalem et à Haïfa, des centaines de milliers d'Israéliens descendus dans la rue pour exiger la justice sociale, la baisse du coût de la vie et l'action du Gouvernement face à la détresse économique des classes moyennes israéliennes.

11. L'implantation de colonies constitue une violation patente du droit international humanitaire au sens de la Convention de Genève relative à la protection des personnes civiles en temps de guerre (quatrième Convention de Genève) et du règlement figurant en annexe de la quatrième Convention de La Haye de 1907. La quatrième Convention de Genève interdit, en son article 49, les déportations hors du territoire occupé dans le territoire de la Puissance occupante. Le Règlement de La Haye interdit à toute puissance occupante d'entreprendre des changements à caractère permanent dans le territoire qu'elle occupe, à moins que ces changements répondent à des besoins militaires au sens étroit du terme ou qu'ils soient entrepris au profit de la population locale.

12. En implantant des colonies et leurs infrastructures, Israël viole en outre le droit international en ce qu'il s'approprie des biens palestiniens sans nécessité militaire et qu'il restreint fortement la liberté de circulation des Palestiniens. Ces restrictions violent les droits de l'homme qui sont tributaires de la liberté de circulation, tels que le droit à la santé, à l'éducation, à la vie de famille, au travail et à la liberté de culte. En outre, le projet de colonies de peuplement israéliennes, associé aux investissements financiers massifs dont il bénéficie, a pris des proportions telles qu'il semble confirmer l'intention d'Israël de conserver la mainmise sur les zones visées, contrevenant ainsi au principe fondamental de la Charte des Nations Unies, figurant au paragraphe 4 de l'Article 2, qui interdit l'acquisition de territoire par le recours à la force. Qui plus est, les colonies morcellent la Cisjordanie, y compris Jérusalem-Est, en en faisant une série d'enclaves isolées, limitant fortement la possibilité pour le peuple palestinien d'avoir un territoire d'un seul tenant et de

disposer librement de ses ressources naturelles – conditions pourtant essentielles à l'exercice véritable de son droit fondamental et inaliénable à l'autodétermination.

13. Israël a créé un régime de séparation et de discrimination appliquant deux régimes de droit différents dans le territoire palestinien : l'un, qui s'applique aux colons, considère les colonies comme des extensions de facto d'Israël, et accorde aux colons les droits des citoyens et les protections d'un État quasi démocratique. Avec l'autre, les Palestiniens sont soumis à un régime d'administration militaire qui les prive de protection juridique et du droit de participer à l'élaboration des politiques concernant la terre sur laquelle ils vivent. Cette dualité ne fait que renforcer un système dans lequel les droits dépendent de l'identité nationale et de la citoyenneté. Un double réseau de routes – l'un pour les colons, l'autre pour les Palestiniens – vient encore accentuer la séparation discriminatoire entre les deux communautés.

14. Le mur construit en Cisjordanie est un des aspects les plus notables de l'entreprise de colonisation. Une grande partie de son tracé se situe à l'intérieur de la Cisjordanie et prend en compte les nouvelles visées expansionnistes des communautés de colons. Les restrictions d'accès aux terres agricoles palestiniennes situées à proximité des colonies israéliennes construites à l'est du mur sont nombreuses. Si, dans certains cas, ces restrictions sont établies et appliquées unilatéralement par les colons, dans d'autres, les militaires israéliens érigent des clôtures autour des colonies et déclarent que la zone en question est une « zone de sécurité spéciale ». Dans son avis consultatif quasiment unanime – par 14 voix contre 1 – rendu en 2004, la Cour internationale de Justice a déclaré sans équivoque que le mur de séparation était contraire au droit international, et qu'il fallait le démanteler et indemniser les Palestiniens pour le préjudice subi.

15. Dans la zone C, constituée de 60 % de la Cisjordanie, le régime de zonage appliqué par Israël est encore plus bénéfique à l'implantation et à l'expansion de colonies alors qu'il empêche le développement des communautés palestiniennes. Il interdit en effet aux Palestiniens de construire dans quelque 70 % de la zone C, soit environ 44 % de la Cisjordanie. Dans les 30 % qui restent, tout un arsenal de restrictions fait qu'il est quasiment impossible aux Palestiniens d'obtenir un permis de construire. En fait, les autorités israéliennes n'autorisent les constructions palestiniennes que dans les limites d'un plan approuvé par Israël, qui couvre moins de 1 % de la zone C. Les Palestiniens n'ont donc d'autre choix que de construire illégalement et de s'exposer aux ripostes inhumaines des Israéliens, telles que les démolitions et les déplacements.

16. Depuis qu'Israël prétend avoir annexé Jérusalem-Est, le Gouvernement israélien a créé des conditions démographiques et géographiques destinées à contrecarrer les propositions de paix faisant de Jérusalem la capitale de la Palestine. Israël a cherché à accroître la population israélienne et à réduire la présence palestinienne dans la ville. Il a pour ce faire cherché à isoler physiquement Jérusalem-Est du reste de la Cisjordanie, notamment en y construisant le mur, opéré des discriminations dans les expropriations de terres, les plans et les constructions ainsi que les démolitions de maisons, supprimé les allocations-logement et les prestations sociales versées aux Palestiniens et a affecté des parts inégales du budget municipal aux deux parties de la ville. L'expulsion forcée des Palestiniens de leur foyer par des colons soutenus par le Gouvernement, a contribué à changer la donne démographique de la ville. Des Palestiniens ont perdu leur maison et beaucoup

d'autres restent sous la menace constante d'une expulsion, d'une dépossession ou d'un déplacement forcé. Le Gouvernement soutient les actions des colons, notamment en leur donnant des vigiles privés, en envoyant des policiers pour accompagner les confiscations de maisons palestiniennes et en finançant des projets de développement israéliens dans les colonies de Jérusalem.

IV. Cadre juridique

A. Généralités : droit des droits de l'homme et droit international humanitaire

17. L'État d'Israël est partie à la plupart des principales conventions internationales relatives aux droits de l'homme et présente régulièrement des rapports aux organes conventionnels des droits de l'homme². Une situation de conflit armé ou d'occupation ne dispense pas un État de ses obligations en matière de droits de l'homme. La Cour internationale de Justice, les organes conventionnels des droits de l'homme, les hauts-commissaires aux droits de l'homme successifs, les procédures spéciales de la Commission des droits de l'homme et le Conseil des droits de l'homme qui lui a succédé ont régulièrement indiqué que le droit international relatif aux droits de l'homme et le droit international humanitaire s'appliquaient l'un et l'autre dans l'ensemble du territoire palestinien occupé.

18. Israël est tenu de respecter le droit international humanitaire inscrit dans les traités qu'il a ratifiés ainsi que dans le droit international coutumier. Dans le territoire palestinien occupé, il est notamment tenu de respecter les dispositions du droit international ayant trait aux territoires occupés. Les règles du droit international humanitaire qui concernent l'occupation militaire, en particulier la Convention de Genève relative à la protection des personnes civiles en temps de guerre (quatrième Convention de Genève³), et le Règlement de La Haye annexé à la Convention de 1907 concernant les lois et coutumes de la guerre sur terre⁴, doivent être appliquées par Israël, en tant que Puissance occupante, en Cisjordanie, y compris Jérusalem-Est, et dans la bande de Gaza. Bien qu'Israël ait contesté l'application formelle de la Convention de Genève, et n'ait accepté d'en appliquer que les dispositions « humanitaires » qu'elle a déterminées elle-même, la situation demeure celle d'une occupation militaire hostile, ainsi que l'ont reconnu le Conseil de sécurité, l'Assemblée générale, le Conseil des droits de l'homme et, de façon éminemment concluante, la Cour internationale de Justice dans son avis consultatif de 2004 sur l'édification du mur. Outre la quatrième Convention de Genève, le Règlement de La Haye, considéré comme relevant du droit international coutumier, s'applique également⁵.

19. En tant que Puissance occupante, l'État israélien est tenu de faire respecter et d'appliquer le droit des droits de l'homme et le droit international humanitaire dans

² <http://tb.ohchr.org/default.aspx?country=il>.

³ Nations Unies, *Recueil des Traités*, vol. 75, n° 973.

⁴ Règlement concernant les lois et coutumes de la guerre sur terre, adopté le 18 octobre 1907, entré en vigueur le 26 janvier 1910. Voir Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915).

⁵ Voir A/HRC/12/37.

le territoire palestinien occupé. Il lui incombe également de veiller à ce que les sociétés privées opérant dans le territoire palestinien occupé soient tenues responsables de toute activité dont les conséquences nuiraient aux droits fondamentaux du peuple palestinien.

B. Obligations et principes relatifs aux droits de l'homme et au droit international humanitaire applicables aux sociétés privées dans le territoire palestinien occupé

1. Principes directeurs relatifs aux entreprises et aux droits de l'homme

20. Le 16 juin 2011, dans sa résolution 17/4, le Conseil des droits de l'homme a entériné à l'unanimité les Principes directeurs relatifs aux entreprises et aux droits de l'homme⁶ pour mettre en œuvre le cadre de référence « protéger, respecter et réparer » des Nations Unies, ces principes imposant pour la première fois une norme mondiale de respect des droits de l'homme dans le cadre de l'activité industrielle et commerciale. Ces principes ont été élaborés par John Ruggie, ancien Représentant spécial du Secrétaire général chargé de la question des droits de l'homme et des sociétés transnationales et autres entreprises. Ils fournissent un cadre normatif faisant autorité, précisent les rôles et les responsabilités des entreprises au regard des droits de l'homme ainsi que les mesures juridiques et les politiques que doivent instituer les États en raison de leurs obligations en matière de droits de l'homme. Il s'agit du premier document normatif concernant les entreprises et les droits de l'homme à être adopté par un organe intergouvernemental spécialisé dans les droits de l'homme.

21. Le Principes directeurs dégagent les mesures que les États doivent prendre afin de promouvoir le respect des droits de l'homme dans les entreprises. Ils offrent un cadre dans lequel les entreprises doivent démontrer qu'elles respectent les droits de l'homme et réduisent les risques de violation. Ils constituent également un ensemble de critères permettant de déterminer dans quelle mesure les entreprises respectent les droits de l'homme. Les Principes directeurs sont organisés selon les trois piliers du cadre :

a) L'obligation faite à l'État d'offrir une protection, au moyen de politiques, de réglementations et de procédures judiciaires, contre les atteintes aux droits de l'homme commises par des tiers, dont les entreprises;

b) La responsabilité qu'ont les entreprises de respecter les droits de l'homme, ce qui signifie qu'elles doivent prendre, avec la diligence voulue, les mesures nécessaires pour ne pas porter atteinte aux droits d'autrui et pour remédier aux effets nuisibles qu'elles contribuent à produire;

c) La nécessité d'offrir aux victimes de violations commises par des entreprises un meilleur accès aux recours, tant judiciaires qu'extrajudiciaires.

22. Les Principes directeurs contiennent des recommandations concrètes et pratiques pour la mise en œuvre du cadre. Ils ne créent pas de nouvelles obligations au regard du droit international mais précisent et articulent les implications des normes existantes, notamment celles du droit international des droits de l'homme, ainsi que des pratiques, tant pour les États que pour les entreprises, en les intégrant

⁶ A/HRC/17/31, annexe.

dans un cadre cohérent⁷. Outre qu'ils font partie des obligations actuelles des États en matière de droit international des droits de l'homme, des éléments importants des Principes directeurs sont de plus en plus présents dans les lois nationales, et dans les normes et initiatives non contraignantes existant à l'échelle mondiale, régionale et dans les branches industrielles, ainsi que dans les obligations contractuelles.

23. Selon la situation et le contexte de leurs activités, les entreprises peuvent avoir une influence sur l'ensemble des droits de l'homme. Il est donc impératif qu'elles mettent en place, avec la diligence voulue, des procédures visant à évaluer les risques et les conséquences possibles et réelles de leurs activités au regard des droits de l'homme, qu'elles intègrent les conclusions de ces évaluations et en tiennent compte dans leurs activités, fassent un suivi de l'efficacité des solutions apportées et communiquent tant sur les évaluations que sur les solutions. Elles doivent par ailleurs prendre des engagements publics clairs de responsabilité en matière de droits de l'homme, d'action corrective pour toute conséquence nuisible de leurs activités ou de coopération à toute solution apportée aux dommages qu'elles ont causés.

24. Les droits de l'homme sont peut-être plus menacés dans certaines industries ou certains contextes, notamment les situations humanitaires difficiles, et devraient par conséquent y faire l'objet d'une attention plus soutenue, mais dans tous les cas les entreprises doivent être encouragées à procéder à un examen périodique de tous les droits de l'homme mis à mal par leurs activités. Les normes internationales des droits de l'homme, notamment la Charte internationale des droits de l'homme⁸, et les huit conventions fondamentales de l'Organisation internationale du Travail (OIT), définies dans la Déclaration de l'OIT relative aux principes et droits fondamentaux au travail, constituent un corpus de textes faisant autorité pour évaluer l'impact des activités des entreprises sur les droits de l'homme. Selon les circonstances, les évaluations doivent aussi tenir compte d'autres normes, concernant par exemple les droits des peuples autochtones, des femmes, des minorités nationales, ethniques, religieuses et linguistiques, des enfants, des personnes handicapées et des travailleurs migrants et de leur famille, s'il y a lieu. Les entreprises doivent respecter les normes du droit international humanitaire quand elles opèrent dans des situations de conflit armé. Les États doivent mieux surveiller les entreprises qu'ils possèdent ou dirigent.

25. Les Principes directeurs font converger les normes et initiatives mondiales relatives aux entreprises et aux droits de l'homme, comme il ressort des rapports du Groupe de travail sur la question des droits de l'homme et des sociétés transnationales et autres entreprises et de l'ancien Représentant spécial du Secrétaire général⁹. Parmi les initiatives régionales, on compte notamment les suivantes : a) l'Organisation internationale de normalisation (ISO) a inclus un chapitre sur les droits de l'homme dans ses principes directeurs relatifs à la responsabilité d'entreprise, qui sont alignés sur le cadre de référence « protéger, respecter et

⁷ A/HRC/17/31, par. 14.

⁸ La Déclaration universelle des droits de l'homme, le Pacte international relatif aux droits civils et politiques et le Pacte international relatif aux droits économiques, sociaux et culturels.

⁹ L'application du cadre et des Principes directeurs des Nations Unies a été documentée par le Groupe de travail dans ses premiers rapports au Conseil des droits de l'homme (A/HRC/20/29) et à l'Assemblée générale (A/67/285), par le Secrétaire général dans son rapport au Conseil des droits de l'homme (A/HRC/21/21 et Corr.1) et par l'ancien Représentant spécial du Secrétaire général; voir www.business-humanrights.org/media/documents/applications-of-framework-jun-2011.pdf.

réparer » des Nations Unies sur lequel sont fondés les Principes directeurs; b) la Commission européenne a fait une communication sur la responsabilité sociale des entreprises, dans laquelle elle indique que toutes les entreprises doivent assumer leurs responsabilités en matière de droits de l'homme, dans le respect des Principes directeurs¹⁰. Elle a aussi annoncé son intention de publier des rapports périodiques sur l'avancement de la mise en œuvre des Principes directeurs dans l'Union européenne et a invité les États membres de l'Union européenne à élaborer des plans nationaux de mise en œuvre des Principes directeurs d'ici à la fin 2012¹¹; c) l'Association des nations de l'Asie du Sud-Est (ASEAN) a annoncé que le premier examen thématique effectué par la nouvelle Commission intergouvernementale des droits de l'homme serait axé sur l'entreprise et les droits de l'homme, conformément aux Principes directeurs¹²; et d) les Principes directeurs pour les entreprises multinationales de l'Organisation de coopération et de développement économiques (OCDE), mis à jour en 2011, sont à présent pleinement harmonisés avec les Principes directeurs de l'ONU concernant la responsabilité des entreprises en matière de droits de l'homme.

2. Pacte mondial

26. Le Pacte mondial¹³ est la principale initiative volontaire mondiale concernant la responsabilité sociale des entreprises qui traite aussi de la question de l'entreprise et des droits de l'homme. Elle a été lancée par le Secrétaire général en l'an 2000 en vue de convaincre les chefs d'entreprise de promouvoir et d'appliquer volontairement dans leurs secteurs d'activité respectifs les 10 principes relatifs aux droits de l'homme, aux normes de travail, à l'environnement et à la lutte contre la corruption. Sept organismes des Nations Unies travaillent en collaboration permanente avec le Bureau du Pacte mondial du Secrétaire général, à savoir le Haut-Commissariat des Nations Unies aux droits de l'homme, l'Office des Nations Unies contre la drogue et le crime, le Programme des Nations Unies pour le développement, le Programme des Nations Unies pour l'environnement, ONU-Femmes, l'Organisation internationale du Travail et l'Organisation des Nations Unies pour le développement industriel. Il a été indiqué que le premier principe du Pacte mondial était inspiré des Principes directeurs relatifs aux entreprises et aux droits de l'homme, qui faisaient donc partie de l'engagement souscrit par les quelque 8 700 entreprises ayant adhéré au Pacte dans plus de 130 pays¹⁴.

¹⁰ Consultable à l'adresse : http://ec.europa.eu/entreprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm.

¹¹ http://ec.europa.eu/enterprise/newsroom/cf/_getdocument.cfm?doc_id=7010.

¹² Observations de Rafendi Djamin, représentant de l'Indonésie auprès de la Commission intergouvernementale des droits de l'homme de l'Association des nations de l'Asie du Sud-Est, au forum Asie-Pacifique des institutions nationales de protection des droits de l'homme, Conférence régionale sur les entreprises et les droits de l'homme, Séoul, du 11 au 13 octobre 2011.

¹³ Voir www.unglobalcompact.org/.

¹⁴ Pacte mondial et Haut-Commissariat des Nations Unies aux droits de l'homme, « The UN 2011 Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments », juillet 2011; consultable à l'adresse www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf.

27. Le Pacte mondial vise deux grands objectifs complémentaires :

a) Inscrire les 10 principes dans les activités des entreprises dans le monde entier;

b) Catalyser les mesures prises à l'appui des objectifs plus généraux des Nations Unies, dont les objectifs du Millénaire pour le développement. Les 10 principes universellement acceptés couvrent des questions relatives aux droits de l'homme, aux conditions de travail, à l'environnement et à la lutte contre la corruption. Les deux principes qui concernent le respect des droits l'homme sont particulièrement pertinents :

Principe 1 : Les entreprises sont invitées à promouvoir et à respecter la protection du droit international relatif aux droits de l'homme dans leur sphère d'influence; et

Principe 2 : Les entreprises doivent veiller à ne pas se rendre complice de violations des droits de l'homme.

28. Le Pacte mondial contient une politique de transparence et responsabilité appelée Communication sur les progrès réalisés. La publication annuelle d'une communication sur les progrès réalisés représente une preuve importante de l'attachement du participant au Pacte mondial et à ses principes. Il est demandé aux entreprises participantes d'appliquer cette politique, car la volonté de transparence et de communication est fondamentale pour la réussite de l'initiative. Le fait de ne pas appliquer cette règle peut entraîner un déclassement du participant, voire son expulsion.

29. À la suite de l'adoption des Principes directeurs par le Conseil des droits de l'homme, le Pacte mondial a fait savoir à ses membres que l'engagement souscrit par les entreprises au titre du premier principe correspond aux obligations en matière de responsabilité d'entreprises figurant dans les Principes directeurs. Tous les outils et documents d'orientation sur les droits de l'homme destinés aux entreprises participant au Pacte mondial seront harmonisés avec les Principes directeurs.

3. Entreprises opérant dans les situations de conflit armé et d'occupation

30. Dans les situations de conflit armé, les normes du droit international humanitaire s'appliquent aux entreprises comme aux autres entités¹⁵. Le droit international humanitaire protège le personnel de l'entreprise, à condition qu'il ne participe pas directement aux combats armés, ainsi que les biens et les équipements. Il impose également au personnel et à leurs entreprises d'en respecter les dispositions, sous peine de poursuites pénales ou civiles. Le Comité international de la Croix-Rouge (CICR) a élaboré un guide des droits et obligations des entreprises au titre du droit international humanitaire¹⁶.

31. Les graves violations des droits de l'homme impliquant des entreprises se produisent souvent dans des conflits autour du contrôle de territoires, de ressources

¹⁵ Voir www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf, p. 12.

¹⁶ Entreprise et droit international humanitaire : introduction aux droits et obligations des entreprises au titre du droit international humanitaire (Comité international de la Croix-Rouge, 2006). Voir aussi Éric Mongelard, « Responsabilité civile des entreprises privées en cas de violations du droit international humanitaire », *Revue internationale de la Croix-Rouge*, vol. 88, n° 863, septembre 2006.

ou d'un État, là où les mécanismes de protection et de respect des droits de l'homme ne fonctionnent pas comme ils le devraient. Les entreprises qui cherchent à éviter de se rendre complices de violations des droits de l'homme sollicitent de plus en plus les conseils des autorités des pays dans lesquels elles opèrent.

32. L'exploitation d'une entreprise dans une région en proie à un conflit peut s'avérer hautement risquée et les autorités doivent par conséquent mettre en garde contre l'éventualité que l'activité soit contraire aux droits de l'homme. Les États devraient examiner leurs politiques, lois, réglementations et mesures de mise en œuvre afin de vérifier si elles sont efficaces face à ces risques accrus, et notamment encourager les entreprises à faire preuve de la diligence qui s'impose pour évaluer leur propre situation. Ils doivent prendre les mesures appropriées pour remédier aux lacunes observées, à savoir par exemple étudier les responsabilités civiles, administratives et pénales des entreprises domiciliées ou opérant dans leur territoire et/ou leur juridiction qui se rendent responsables ou complices de violations du droit international.

33. Les entreprises et sociétés qui ne respectent pas le droit international humanitaire payent un prix considérable, comme par exemple la détérioration de leur image publique et les conséquences sur les décisions des actionnaires et la valeur des actions, sans compter l'incrimination pénale de leurs employés pour atteinte aux droits de l'homme. Selon le CICR, le droit international humanitaire dispose que les auteurs, mais aussi leurs supérieurs hiérarchiques et leurs complices, peuvent être tenus pénalement responsables pour la commission de crimes de guerre. Pour ce type de crimes, la complicité est très probablement l'incrimination la plus pertinente en ce qui concerne les entreprises¹⁷.

34. Les employés d'une entreprise ne peuvent pas demander l'immunité au seul motif qu'ils agissent au nom de leur employeur. Ils peuvent faire l'objet d'enquêtes et de poursuites pour violations des droits de l'homme, quel que soit le lieu où ces violations ont été commises. Les États sont par conséquent tenus de prendre les mesures qui s'imposent. Le CICR avertit ainsi les entreprises qu'elles ne devraient pas écarter la possibilité de faire l'objet de procédures judiciaires du simple fait que les pays où elles opèrent n'ouvriront probablement pas d'enquête criminelle ou sont incapables de le faire. Lorsqu'elles évaluent les risques liés à leurs activités en situation de conflit armé, elles doivent donc tenir de plus en plus compte du fait qu'elles-mêmes ou leurs employés sont passibles de poursuites pour les crimes commis dans ce contexte¹⁸.

35. Le recours à la responsabilité civile est également un moyen de mettre en évidence les violations des droits de l'homme et du droit international humanitaire commises par les entreprises, et d'offrir de réelles indemnisations aux victimes. Les entreprises collaborent parfois avec les auteurs étatiques, dont les forces militaires, pour protéger et/ou extraire les ressources naturelles, donnant lieu à ce qu'on appelle une « action conjointe ».

36. L'affaire *Doe v. Unocal* est un exemple de procédure civile pour violations graves des droits de l'homme, notamment la torture, le viol, le travail forcé et le déplacement de population¹⁹. La Cour d'appel des États-Unis pour le neuvième

¹⁷ www.icrc.org/eng/assets/files/other/icrc_002_0882.pdf, p. 26.

¹⁸ Ibid.

¹⁹ www.icrc.org/eng/assets/files/other/irrc_863_mongelard.pdf, p. 15.

circuit²⁰ a retenu une théorie de la complicité tirée du droit pénal (aide et assistance), et a donc jugé qu'il existait des preuves suffisantes de la culpabilité d'Unocal, notamment au vu du fait qu'Unocal avait connaissance des violations des droits de l'homme commises avant de devenir partie à l'activité. L'affaire du conseil de village de Bil'in²¹ contre la société canadienne Green Park International est une affaire portée devant les tribunaux canadiens. Les plaignants reprochaient à Green Park International de participer à la construction et à la promotion d'une colonie implantée sur les terres de la communauté de Bil'in. Les tribunaux canadiens ont accepté le fait que les entreprises étaient tenues d'éviter de participer, même indirectement, aux infractions commises par Israël au regard de ses obligations au titre de la quatrième Convention de Genève, et que les obligations découlant de la quatrième Convention ne liaient pas seulement les États parties. La Cour supérieure a cependant refusé de poursuivre l'examen du dossier au motif que les tribunaux israéliens étaient une juridiction plus appropriée (doctrine du *forum non conveniens*²²). Le Rapporteur spécial fait observer, au sujet de cette affaire, la longue liste de décisions de l'appareil judiciaire israélien en défaveur des plaignants palestiniens, qui équivaut à une impunité presque totale d'Israël et des colons israéliens en Cisjordanie, y compris à Jérusalem-Est. Dans ce contexte, il remet en question la validité de la décision de la Cour supérieure.

V. Études de cas

37. Le Rapporteur spécial note que les entreprises citées dans le présent rapport ne représentent qu'un petit échantillon du large éventail d'entreprises dont les activités sont liées aux colonies de peuplement israéliennes dans le territoire palestinien occupé. Le Rapporteur spécial ayant reçu des parties prenantes une grande quantité d'informations au sujet des pratiques commerciales des entreprises qui traitent avec les colonies israéliennes, des recherches plus poussées seront faites pour savoir si ces allégations sont fondées et justifient que des rapports futurs les examinent de plus près. Les entreprises en question sont notamment des détaillants et des chaînes de supermarchés, des prestataires de services de restauration rapide, des producteurs de vins et des fabricants de produits qui, bien que souvent étiquetés « produits d'Israël », sont en fait produits dans le territoire palestinien occupé ou extraits de son sol; il s'agit de petites, moyennes et grandes entreprises appartenant à des Israéliens et de sociétés multinationales. Le Rapporteur spécial n'a choisi qu'un certain nombre de cas ayant valeur d'exemple, car il a fallu, à ce stade, exclure un grand nombre d'informations dignes de foi à cause, surtout, de la limite imposée par l'Organisation des Nations Unies au nombre de mots que doit contenir le présent rapport.

1. Caterpillar Incorporated

38. Caterpillar²³, l'un des principaux fabricants mondiaux d'équipement de construction et d'extraction minière et le plus grand fabricant au monde de moteurs au gazole et au gaz naturel et de turbines à gaz industrielles, a affirmé contribuer au

²⁰ Cour d'appel des États-Unis pour le neuvième circuit, société *Doe v. Unocal*, arrêt du 18 septembre 2002.

²¹ Le Conseil de village de Bil'in est l'autorité municipale du village palestinien de Bil'in.

²² www.eilfe.com/online-courses/doc.../282-yassin-v-greenpark.html.

²³ www.caterpillar.com/home.

développement durable sur tous les continents²⁴. À la fin du deuxième trimestre de 2012, il employait 132 825 personnes dans le monde entier et, le 25 juillet 2012, il annonçait un bénéfice trimestriel record de 2,54 dollars par action, les ventes et recettes s'établissant à 17,37 milliards de dollars, autre record historique, et les bénéfices réalisés au cours du même trimestre s'élevant à 1,699 milliard de dollars²⁵. Le Président-Directeur général de Caterpillar, Doug Oberhelman, s'est dit très satisfait des résultats de l'entreprise au deuxième trimestre, lesquels avaient battu tous les records, et a déclaré que ses salariés, ses concessionnaires et ses fournisseurs de par le monde exécutaient la stratégie de l'entreprise de main de maître.

39. Caterpillar a été publiquement critiqué par divers intervenants, notamment des organisations religieuses, des organisations non gouvernementales (ONG) et certains mécanismes des Nations Unies, pour avoir fourni au Gouvernement israélien du matériel, tel que bulldozers et engins de chantier, utilisé pour démolir ou détruire des maisons, des écoles, des vergers, des oliveraies et des cultures palestiniens. Amnesty International a fait état de ces violations²⁶ en 2004 et a relevé que les produits fabriqués par Caterpillar servaient à construire le mur, jugé contraire au droit international par la Cour internationale de Justice²⁷. Human Rights Watch dénonce régulièrement l'utilisation de produits fabriqués par Caterpillar dans des actes attentatoires aux droits de l'homme et l'ONG War on Want a établi un rapport consacré exclusivement aux relations de l'entreprise avec le Gouvernement israélien²⁸. Morgan Stanley Capital International (MSCI) a récemment radié Caterpillar de plusieurs des indices²⁹ relatifs à l'environnement, à la société et à la gouvernance d'entreprise (indices World ESG, MSCI USA ESG et MSCI USA IMI ESG) qu'il a mis au point en expliquant son geste par la dégradation, le 1^{er} mars 2012, de la note attribuée à l'entreprise dans ces domaines à la suite de l'examen qui a eu lieu en février³⁰. Faisant observer que Caterpillar était depuis longtemps « impliqué dans la controverse suscitée par l'utilisation de ses bulldozers par les Forces de défense israéliennes dans les territoires palestiniens occupés », MSCI a déclaré que son service des études, qui s'occupe des questions d'environnement, de société et de gouvernance d'entreprise, avait pris la mesure de cette controverse autour des droits de l'homme depuis 2004 et qu'il en était depuis lors tenu compte dans la note qui lui était attribuée, mais que cela n'avait pas, en soi, provoqué l'abaissement de celle-ci en février 2012. MSCI a ajouté que la note attribuée à Caterpillar sur le plan communautaire et social, laquelle comporte une évaluation des résultats dans le domaine des droits de l'homme et représente 10% de la note qu'elles obtiennent en matière d'environnement, de société et de gouvernance, tenait compte de cette controverse.

²⁴ www.energyst.fr/france/a-propos-d-energyst-nos-partenaires.aspx.

²⁵ www.caterpillar.com/cda/files/3801914/7/Final%20%20Q2%202012%20Cat%20Inc%20Release%20V2.pdf, p. 1

²⁶ www.amnesty.org/fr/library/asset/MDE15/033/2004/fr/24cc1bb1-d5f6-11dd-bb24-1fb85fe8fa05/mde150332004fr.html.

²⁷ www.icj-cij.org/docket/index.php?pr=71&code=mwp&p1=3&p2=4&p3=6&case=131&k=5a.

²⁸ www.waronwant.org/campaigns/justice-for-palestine/hidden/inform/17109-caterpillar-the-alternative-report.

²⁹ www.aljazeera.com/news/middleeast/2012/06/201262711732387905.html.

³⁰ www.msci.com/resources/pdfs/ESG_Indices_General_QA_July_2012.pdf.

40. Le 28 mai 2004, le Rapporteur spécial sur le droit à l'alimentation de l'époque a écrit à Caterpillar en insistant sur les observations qu'il avait pu faire au cours d'une récente mission dans le territoire palestinien occupé³¹ et en faisant part de ses préoccupations concernant l'utilisation de bulldozers blindés fournis par l'entreprise pour détruire des exploitations agricoles, des serres, de très vieilles oliveraies et des champs cultivés ainsi que de nombreuses habitations, voire parfois des vies palestiniennes. Le Rapporteur spécial notait en outre que le nombre de plus en plus élevé de Palestiniens sans abri et privés de moyens de subsistance limitait leurs possibilités de se procurer de la nourriture, droit consacré à l'article 11 du Pacte international relatif aux droits économiques, sociaux et culturels. La mort, le 16 mars 2003, de Rachel Corrie, militante pour la paix âgée de 23 ans et originaire des États-Unis, dont la presse s'est largement fait l'écho, a mis en évidence l'utilisation qui était faite des produits Caterpillar et a appelé l'attention du monde entier sur la destruction des biens palestiniens. M^{me} Corrie manifestait en effet pour empêcher la démolition d'une habitation palestinienne à Gaza et, bien qu'elle eut revêtu une tenue orange vif très visible, elle a été tuée quand le bulldozer de Caterpillar l'a renversée, lui fracturant les bras, les jambes et le crâne³².

41. Malgré de nombreux rapports, déclarations et plaidoyers concernant Caterpillar, l'entreprise continue de faire fi des conséquences pour les droits de l'homme de ses activités en territoire palestinien occupé. Il y a quelques années, le Mission Responsibility through Investment Committee de l'Église presbytérienne, après avoir tenté d'entrer en contact avec Caterpillar³³, a dit que ses dirigeants lui avaient clairement fait comprendre que l'entreprise n'était en rien responsable de l'usage qui était fait de ses produits, même par ses concessionnaires (les seuls à être considérés comme des clients), qu'elle n'avait aucune procédure en place pour assurer le suivi ou le respect de ses attentes déclarées, même dans une situation où le recours à un tel matériel pour perpétrer des violations des droits de l'homme est historiquement attesté, et qu'elle ne souhaitait aucunement mettre au point une telle procédure. Ces mêmes dirigeants avaient en outre indiqué que, bien qu'étant une entreprise mondiale active dans la quasi-totalité des pays, sauf là où la loi en vigueur aux États-Unis l'interdit, Caterpillar n'était pas en mesure d'évaluer si ses actions étaient conformes aux conventions relatives aux droits de l'homme ou au droit international humanitaire³⁴.

42. Caterpillar a un code de conduite détaillé³⁵ et affirme que : « notre entreprise est en perpétuel changement, à l'image de la société. Mais s'il est une chose véritablement immuable, c'est bien notre engagement à défendre les valeurs éthiques les plus strictes. Notre réputation est l'une de nos plus grandes richesses. Il est de la responsabilité de chacun d'entre nous de la protéger au quotidien »³⁶. Dans l'énoncé de sa mission, il affirme en outre que « notre valeur se mesure à notre réaction à l'adversité. Nos décisions et les actes qui en découlent sont le reflet de ce que nous sommes ».

³¹ Documents-dds-ny.un.org/doc/UNDOC/GEN/G03/164/90/pdf/G0316490.pdf?OpenElement.

³² <http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=12470&LangID=FR>.

³³ www.pcusa.org/media/uploads/mrti/pdfs/2012-mrti-report-9-9-11.pdf.

³⁴ www.pcusa.org/media/uploads/mrti/pdfs/2012-mrti-report-9-9-11.pdf, p. 5 et 6.

³⁵ www.caterpillar.com/cda/files/3028042/7/French_OVIA_v05.pdf.

³⁶ www.caterpillar.com/cda/files/3028042/7/French_OVIA_v05.pdf, p. 2.

2. Veolia Environnement

43. Veolia Environnement est une multinationale française active dans les secteurs de l'eau, de la gestion des déchets, des services énergétiques et du transport. L'entreprise a été créée sous le nom de Compagnie Générale des Eaux le 14 décembre 1853³⁷. Dans son Rapport d'activité et de développement durable 2011, Veolia fait état d'une croissance de 3,1 % de son chiffre d'affaires, ce qui en a porté le montant à 29,6 milliards d'euros. L'entreprise emploie 331 266 personnes dans le monde et est présente dans 77 pays³⁸.

44. Veolia détient 5 % du consortium CityPass par l'intermédiaire de sa filiale Connex Israel, chargée par Israël de gérer le projet de tramway mis en place à Jérusalem pour relier cette ville aux colonies israéliennes illégales. Veolia possède environ 80 % de Connex Jerusalem, l'entreprise qui exploite les services de tramway³⁹. En outre, par le biais de la filiale du groupe en Israël, Veolia Environmental Services Israël⁴⁰, elle possède et exploite la décharge Tovlan dans la vallée du Jourdain, en territoire palestinien occupé, qui accueille les déchets israéliens provenant d'Israël et de ses colonies. Veolia exploite également des services d'autocar reliant Modi'in à Jérusalem par la route 443 et desservant par voie de conséquence les colonies israéliennes de Giva'at Ze'ev et Mevo Horon.

45. En 2011, Veolia a publié son Cahier de la performance RSE (responsabilité sociale des entreprises) 2011, document dans lequel l'entreprise déclare sans ambiguïté : « Quel que soit le contexte géographique, le métier de Veolia Environnement doit s'exercer dans le respect des normes nationales et des recommandations des organisations internationales telles que l'OIT et l'OCDE, notamment pour ce qui concerne les principes fondamentaux, la prise en compte des diversités culturelles et la préservation de l'environnement. »⁴¹

46. Veolia est membre du Pacte mondial et met en avant les 10 principes qu'il renferme dans son Cahier de la performance RSE, notamment les deux qui ont trait aux droits de l'homme.

3. Group4Security

47. Group4Security (G4S) est une multinationale britannique qui offre des services de sécurité. G4S est spécialisé dans les processus opérationnels et les services aux entreprises là où les risques en matière de sûreté et de sécurité sont jugés élevés. L'entreprise, qui se targue d'avoir des compétences dans l'évaluation et la gestion de ce type de risque appliqué aux bâtiments, aux infrastructures, aux matériels, aux objets de valeur et aux personnes, est le plus gros employeur (avec plus de 657 000 salariés et des activités dans plus de 125 pays) coté à la Bourse de Londres. En 2011, l'entreprise a affiché un chiffre d'affaires de 7,5 milliards de livres sterling, dont 30 % réalisés sur les marchés des pays émergents.

48. G4S Israel (Hashmira), la filiale de G4S en Israël, fournit des ressources et du matériel aux postes de contrôle israéliens ainsi que des services de sécurité aux

³⁷ www.veolia.com/fr/groupe/historique/.

³⁸ www.veolia.com/veolia/ressources/documents/2/11872,RA_VEOLIA_2011_FR_72dpi.pdf, p. 5.

³⁹ Who Profits: Exposing the Israeli Occupation Industry (www.whoprofits.org/company/veolia-environnement).

⁴⁰ www.veolia-es.co.il/he/.

⁴¹ veolia.com/veolia/ressources/files/3/11911,Cahier-de-la-Performance-RSE-2011.pdf.

entreprises implantées dans les colonies, y compris du matériel et des agents de sécurité destinés aux magasins et aux supermarchés des colonies cisjordaniennes de Modi'in Illit, Ma'ale Adumim et Har Adar ainsi que des colonies de peuplement de Jérusalem-Est. De plus, elle a racheté Aminut Moked Artzi, compagnie de sécurité privée israélienne et a repris l'intégralité de ses activités dont la prestation de services de sécurité aux entreprises installées dans la zone industrielle de Barkan, près de la colonie d'Ariel⁴².

49. En 2002, Lars Nørby Johansen, alors administrateur⁴³, a déclaré que l'entreprise se retirait de Cisjordanie en expliquant que, dans certains cas, d'autres critères entraient en ligne de compte et que pour éviter de susciter le moindre doute quant au respect par Group 4 Falck [G4S]⁴⁴ des conventions internationales et des droits de l'homme, elle avait décidé de quitter la Cisjordanie. Hashmira a toutefois poursuivi ses activités dans le domaine de la sécurité en créant une autre entreprise appelée Shalhevet. Lars Nørby Johansen a ajouté que le partenariat de Hashmira et Group 4 Falck n'accepterait aucun nouveau contrat dans le domaine de la sécurité en Cisjordanie mais qu'en tant que partenaire à égalité dans Hashmira, l'entreprise devait bien admettre que les actionnaires israéliens avaient un fort sentiment de responsabilité vis-à-vis des citoyens israéliens, qu'elle était tenue par contrat de protéger⁴⁵.

50. En mars 2011, G4S a fait une déclaration publique à propos de ses activités dans les colonies israéliennes⁴⁶ déclarant notamment être parvenu à la conclusion que, pour garantir à l'avenir la conformité de ses pratiques commerciales avec sa propre politique en matière d'éthique des affaires, il s'emploierait à mettre fin à plusieurs contrats d'entretien et de réparation de matériel de sécurité destiné aux postes de contrôle, aux prisons et aux commissariats de Cisjordanie⁴⁷. L'entreprise concluait en ajoutant que plusieurs de ses contrats passés avec le secteur privé dans le domaine des services traditionnels de sécurité et de surveillance d'installations d'alarme n'étaient ni discriminatoires ni sujets à controverse et contribuaient en fait à la sûreté et à la sécurité des membres du public quelle que soit leur origine⁴⁸, et que, par conséquent, elle ne mettrait pas fin à toutes ses activités dans les colonies israéliennes.

51. G4S s'est affilié au Pacte mondial, ce qui a donné à son administrateur, Nick Buckles, l'occasion de déclarer que les principes énoncés dans le Pacte étant déjà très largement mis en œuvre dans les grandes orientations suivies par l'entreprise, « le moment était venu de s'engager publiquement en faveur de cette excellente initiative ». Il a ajouté que cela serait un stimulant supplémentaire pour G4S qui prendrait encore plus soin de mener toutes ses activités de par le monde dans le respect des droits de l'homme, de l'environnement et de l'éthique⁴⁹.

⁴² www.whoprofits.org/company/g4s-israel-hashmira.

⁴³ En 2005, Nick Buckles a succédé à Lars Nørby Johansen en tant qu'administrateur.

⁴⁴ En 2004, la fusion de Securicor avec Group 4 Falck (activités dans le domaine de la sécurité) a donné naissance à Group 4 Securicor, qui a commencé à être coté à la Bourse de Londres et à celle de Copenhague.

⁴⁵ <http://politiken.dk/erhverv/ECE54474/falck-forlader-vestbredden/> (en danois).

⁴⁶ <http://corporateoccupation.files.wordpress.com/2011/03/g4s-israel-statement-march-11-1-1.pdf>.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ www.g4s.com/en/Media%20Centre/News/2011/02/23/G4S%20joins%20the%20UN%20Global%20Compact%20for%20responsible%20business/.

4. Groupe Dexia

52. Le groupe Dexia est un groupe bancaire européen qui, en 2011, a exercé ses activités dans les domaines de la banque de détail et commerciale, de l'offre de prêts et de services au secteur public, de la gestion d'actifs et des services aux investisseurs. Dexia SA, sa société mère, est une société anonyme de droit belge dont l'action est cotée sur Euronext Bruxelles et Paris et à la Bourse de Luxembourg⁵⁰.

53. Dexia Israel Bank Limited est une société anonyme cotée à la Bourse de Tel-Aviv. Le groupe Dexia, qui détient 65 % de ses actions, en est l'actionnaire majoritaire. Dexia Israel Bank Limited a son siège social à Tel-Aviv et a régulièrement octroyé des prêts aux Israéliens vivant dans des colonies illégales⁵¹. Son administrateur, David Kapah, a indiqué quelles colonies du territoire palestinien occupé en ont bénéficié : il s'agit d'Alfei Menasheh, d'Elkana, de Beit-El, de Beit Aryeh, de Giva'at Ze'ev et de Kedumim, situées dans les régions de la vallée du Jourdain, d'Hébron et de la Samarie⁵². L'entreprise a consenti des prêts hypothécaires à un certain nombre de colonies. Grâce à ses contacts avec la loterie israélienne, Dexia Israel a mis à disposition des fonds pour la construction et l'expansion de colonies⁵³.

54. Le groupe Dexia est membre du Pacte mondial depuis février 2003. D'après le site Web du Pacte, il lui a été demandé, au début de l'année 2012, de présenter une communication sur ses progrès réalisés dans l'application des critères fixés par les membres du Pacte, ce qui aurait maintenant dû être fait il y a déjà plusieurs mois⁵⁴.

5. Ahava

55. Ahava⁵⁵ est une société israélienne de cosmétique spécialisée dans les produits de beauté haut de gamme élaborés à partir de ressources naturelles provenant de la mer Morte. Elle a été fondée en 1988 et son chiffre d'affaires annuel serait de 142 millions de dollars. Elle est détenue à 37 % par la colonie de Kibboutz Mitzpe Shalem, à 37 % par Hamashbir Holdings⁵⁶, à 18,5 % par Shamrock Holdings⁵⁷ et à 7,5 % par la colonie de Kibboutz Kalia. Son usine et son centre d'accueil des visiteurs se trouvent à Kibboutz Mitzpe Shalem, colonie installée dans la vallée du Jourdain. Ahava exporte ses produits dans 32 pays et une région administrative spéciale⁵⁸.

⁵⁰ www.dexia.com/FR/le_groupe/profil/Pages/default.aspx.

⁵¹ www.knesset.gov.il/mmm/data/pdf/m01630.pdf (en hébreu).

⁵² www.knesset.gov.il/protocols/data/rtf/ksafim/2007-06-19-02.rtf (en hébreu).

⁵³ www.whoprofits.org/sites/default/files/WhoProfits-IsraeliBanks2010.pdf.

⁵⁴ www.unglobalcompact.org/Languages/french/communication_progres.html.

⁵⁵ www.ahava.co.il/ et www.ahava.com/.

⁵⁶ www.whoprofits.org/company/hamashbir-holdings.

⁵⁷ Société d'investissements établie aux États-Unis, qui vaut plusieurs millions de dollars; www.shamrock.com/.

⁵⁸ Afrique du Sud, Albanie, Allemagne, Australie, Autriche, Azerbaïdjan, Belgique, Canada, Croatie, Chypre, Estonie, États-Unis d'Amérique, Finlande, Fédération de Russie, France, Géorgie, Grèce, Hongrie, Italie, Japon, Kirghizistan, Lituanie, Maurice, Norvège, Pays-Bas, Philippines, République tchèque, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, Singapour, Slovaquie, Suisse, Ukraine et Hong Kong (Chine).

56. Ahava est critiquée par des gouvernements, des organisations non gouvernementales et des acteurs de la société civile, qui accusent les colonies propriétaires de l'entreprise d'exploiter les ressources naturelles palestiniennes et d'utiliser les bénéfices tirés de leur activité commerciale pour se financer et se maintenir sur place. La société Ahava est aussi accusée de publicité mensongère et de tromperie puisque ses produits portent la mention « produit d'Israël » alors qu'ils proviennent en réalité du territoire palestinien occupé. Plusieurs pays européens commencent à prendre des mesures contre Ahava. Les Gouvernements néerlandais⁵⁹ et britannique⁶⁰ ont ouvert des enquêtes sur l'étiquetage trompeur des produits Ahava. Des militants des droits de l'homme ont engagé une action en justice contre la société française Séphora⁶¹, qui commercialise les produits Ahava.

57. Le rapport d'avril 2012 de la Coalition des femmes pour la paix intitulé « Ahava : retracer la filière commerciale des produits des colonies de peuplement »⁶² examine la chaîne logistique de ces produits et explique comment des ressources naturelles palestiniennes sont exploitées au profit de colons israéliens.

6. Groupe Volvo

58. Le groupe Volvo⁶³ est l'un des principaux constructeurs mondiaux de camions, d'autocars, d'engins de chantier, de systèmes de propulsion pour la marine et l'industrie et de pièces pour l'aéronautique. Il propose aussi des services de financement et autres. Il emploie environ 100 000 personnes, a des usines dans 20 pays et est présent sur plus de 190 marchés. En 2011, les ventes du Groupe ont progressé de 17 %, pour s'établir à 310 367 millions de couronnes suédoises contre 264 749 millions en 2010.

59. Du matériel et des engins Volvo sont utilisés pour démolir des maisons palestiniennes et construire le mur et les colonies israéliennes. Volvo détient en outre 27 % des parts de la société israélienne Merkavim⁶⁴, qui fabrique des autocars servant à transporter des prisonniers politiques palestiniens du territoire palestinien occupé aux prisons israéliennes. Les 73 % de parts de Merkavim restants sont détenus par le concessionnaire exclusif de Volvo en Israël, Mayer's Cars and Trucks.

60. En juillet 2007, Mårten Wikforss, Vice-Président de Volvo chargé des relations médias et de la communication, a répondu⁶⁵ comme suit aux critiques formulées au sujet de la démolition d'une maison palestinienne à Beit Hanina (Jérusalem-Est)⁶⁶ : « Bien entendu, nous déplorons et regrettons que nos engins soient utilisés à des fins de destruction. Nous n'approuvons pas ces actes, mais nous n'avons aucune prise sur l'utilisation de nos produits hormis notre volonté de promouvoir dans notre activité commerciale un code de bonne conduite qui condamne les comportements contraires à l'éthique. Une pelleuse peut servir aussi bien à construire une maison

⁵⁹ www.ynetnews.com/articles/0,7340,L-3806790,00.html.

⁶⁰ www.westendextra.com/news/2010/aug/pro-palestinian-protesters-claim-covent-garden-storeahava-are-mislabelling-products.

⁶¹ www.sephora.com/.

⁶² www.whoprofits.org/sites/default/files/ahava_report_final.pdf.

⁶³ www.volvogroup.com/group/global/en-gb/Pages/group_home.aspx.

⁶⁴ www.whoprofits.org/company/merkavim-transportation-technologies.

⁶⁵ www.business-humanrights.org/Links/Repository/553890.

⁶⁶ <http://electronicintifada.net/content/volvo-symbol-safety-or-human-rights-abuses/7040>.

qu'à la détruire⁶⁷ [...] Volvo ne peut absolument pas contrôler l'utilisation finale de ses engins [...] exception faite seulement quand l'acheteur est un État visé par des sanctions commerciales impératives décidées par des organisations gouvernementales internationales [...]. Comme les autres multinationales, nous comptons sur les gouvernements et certaines organisations gouvernementales internationales pour apprécier la situation. »

61. Volvo produit des rapports d'évaluation de ses activités commerciales au regard des principes de responsabilité économique, sociale et environnementale. Son code de conduite insiste sur trois domaines jugés particulièrement importants : les questions sociales et les droits de l'homme, le respect de l'environnement et l'éthique des affaires. L'entreprise est membre du Groupe du Pacte mondial depuis 2001 et déclare vouloir s'engager « à respecter et intégrer 10 principes concernant les droits de l'homme, les conditions de travail et l'environnement dans ses activités, à les promouvoir et à encourager d'autres entreprises à soutenir le Pacte mondial »⁶⁸.

7. Groupe Riwal Holding

62. Le groupe Riwal Holding, fondé en 1968 et établi aux Pays-Bas, est spécialisé dans la location internationale de nacelles élévatrices. Il emploie 800 personnes et est présent dans 16 pays. C'est l'une des principales entreprises européennes de location et de vente de flèches télescopiques, de plates-formes ciseaux, de chariots télescopiques, de nacelles élévatrices et autre matériel d'accès. Le groupe a des activités et des coentreprises en Europe, en Amérique du Sud, au Moyen-Orient et en Asie centrale.

63. En mars 2010, l'ONG palestinienne des droits de l'homme Al-Haq⁶⁹ a engagé une action pénale contre les autorités néerlandaises, accusant Riwal d'être complice de crimes de guerre et de crimes contre l'humanité en raison de l'utilisation de son matériel et de ses activités liées à la construction du mur et aux colonies de peuplement israéliennes⁷⁰. L'ONG United Civilians for Peace⁷¹ a aussi mené une enquête sur les activités de Riwal et lui a demandé instamment de cesser toutes activités dans le territoire palestinien occupé. En octobre 2010, à la suite de ces accusations, la brigade nationale néerlandaise de lutte contre la criminalité a perquisitionné les bureaux de Riwal⁷². Riwal a également été critiquée par des parlementaires néerlandais et surtout par le Ministre des affaires étrangères de l'époque, qui a indiqué que la participation d'une entreprise néerlandaise à la construction du mur n'était pas souhaitable⁷³.

⁶⁷ www.reports-and-materials.org/Volvo-response-to-Israel-OT-article-6-Jul-2007.doc (intégralité de la déclaration).

⁶⁸ www.volvogroup.com/group/global/en-gb/responsibility/Pages/responsibility.aspx.

⁶⁹ www.alhaq.org/.

⁷⁰ www.alhaq.org/images/stories/PDF/accountability-files/Complaint%20-%20English.pdf.

⁷¹ www.unitedcivilians.nl/.

⁷² <http://electronicintifada.net/content/dutch-company-raided-over-involvement-occupation/9076>.

⁷³ www.haaretz.com/news/dutch-gov-t-warns-company-to-stop-work-on-w-bank-fence-1.225134.

8. Elbit Systems

64. Elbit Systems⁷⁴ est une société israélienne spécialisée dans l'électronique de défense. Ses activités portent sur les systèmes aérospatial, terrestre et naval (commandes, contrôle, communications, ordinateurs et suivi et reconnaissance d'informations), les systèmes d'avion sans pilote, l'électro-optique avancée, les systèmes d'électro-optique spatiale, les systèmes d'alerte aéroportés, la surveillance électronique des signaux, la liaison télématique et les systèmes de communication et radio militaires. En 2010, Elbit employait 12 317 personnes dans le monde et son chiffre d'affaires annuel s'élevait à 2 670 millions de dollars⁷⁵.

65. Elbit est critiquée non seulement parce qu'elle vend des drones et autres armes au Gouvernement israélien⁷⁶, mais aussi parce qu'elle a mis au point le dispositif de surveillance électronique du mur⁷⁷ et qu'elle a fourni du matériel de surveillance utilisé dans des colonies israéliennes⁷⁸. En 2009, le Ministère norvégien de la défense⁷⁹ a exclu Elbit du fonds de pension norvégien, sur la recommandation du Conseil d'éthique du Gouvernement norvégien⁸⁰. Cette recommandation était fondée sur l'avis consultatif de la Cour internationale de Justice relatif au mur. Kristin Halvorsen, Ministre norvégienne des finances, a déclaré que la Norvège ne souhaitait pas « financer des entreprises qui contribuent si directement aux violations du droit international humanitaire ». En 2010, la Deutsche Bank et les fonds de pension suédois AP-funds⁸¹ ont vendu toutes les parts d'Elbit Systems⁸² qu'ils détenaient, à l'exemple du Ministère norvégien de la défense⁸³.

66. Dans son rapport intégral de responsabilité sociale, Elbit Systems affirme « veiller à être une entreprise citoyenne et à défendre la responsabilité sociale et environnementale »⁸⁴.

9. Hewlett Packard

67. Hewlett Packard (HP)⁸⁵ est le plus gros fournisseur mondial de matériel, logiciels et services informatiques⁸⁶. HP est une société d'informatique américaine dont le siège social se trouve en Californie⁸⁷. En 2011, l'entreprise affichait un chiffre d'affaires net de 127 245 millions de dollars et employait environ 349 600

⁷⁴ www.elbitsystems.com/elbitmain/default.asp.

⁷⁵ www.media.corporate-ir.net/media_files/IROL/61/61849/20_F.pdf, p. 11.

⁷⁶ www.grassrootsonline.org/; www.bdsmovement.net/; www.amnesty.org.uk/news_details.asp?NewsID=18004.

⁷⁷ www.bdsmovement.net/files/2011/08/STW-research-green-paper-consultation.pdf.

⁷⁸ www.globalexchange.org/economicactivism/elbit/why; <http://wedivest.org/learn-more/elbit/>; www.bdsmovement.net/files/2011/08/STW-research-green-paper-consultation.pdf; www.stophthewall.org/divest-elbit.

⁷⁹ www.regjeringen.no/en/dep/fin/press-center/Press-releases/2009/supplier-of-surveillance-equipment-for-t.html?id=575444.

⁸⁰ www.regjeringen.no/pages/2236685/Elbit_engelsk.pdf.

⁸¹ www.stophthewall.org/divest-elbit.

⁸² www.reuters.com/article/2010/05/30/us-deutsche-elbit-idUSTRE64T10W20100530.

⁸³ www.israelnationalnews.com/News/News.aspx/137762#.UCOBVlaTspo.

⁸⁴ www.elbitsystems.com/elbitmain/pages/FullReport.asp.

⁸⁵ www8.hp.com/us/en/home.html.

⁸⁶ Rapport annuel 2011, p. 2 : <http://h30261.www3.hp.com/phoenix.zhtml?c=71087&p=irol-reportsAnnual>.

⁸⁷ www8.hp.com/us/en/hp-information/about-hp/headquarters.html.

personnes dans le monde⁸⁸. Elle compte plus d'un milliard de clients dans 170 pays et s'est classée en cinquième position dans la liste Fortune 500 en 2012⁸⁹.

68. HP a signé des contrats avec les Ministères israéliens de la défense et de l'intérieur pour la fourniture du système de surveillance et d'identification biométrique⁹⁰ dit de Bâle, du système de cartes d'identité israélienne (cartes d'identité biométriques introduites en vertu de la loi sur les fichiers biométriques) mis en place dans les colonies de peuplement et aux postes de contrôle⁹¹, et est prestataire de services et de technologies pour l'armée israélienne. Le système de Bâle est un système de contrôle automatisé des accès par lecture biométrique⁹².

69. On a accusé les systèmes technologiques fournis par HP de donner lieu à des violations des droits de l'homme, en restreignant par exemple la liberté de circulation des Palestiniens. Des ONG comme Who Profits⁹³ se sont renseignées en détail sur les produits fournis par HP au Gouvernement israélien et sur leur rôle dans les violations commises, et le Bureau de la coordination des affaires humanitaires⁹⁴ a analysé les répercussions humanitaires de la construction du mur. HP a également été critiqué pour avoir fourni des services de sécurité et des technologies aux colonies de Modi'in Illit et Ariel.

70. En 2010, HP a pourtant été désigné par l'Ethisphere Institute comme l'une des sociétés d'informatique les plus éthiques au monde⁹⁵. La même année, l'entreprise a été numéro deux du « classement vert » des 500 entreprises américaines et 100 multinationales les plus écologiques établi par *Newsweek*⁹⁶. HP participe activement au Pacte mondial depuis 2002⁹⁷.

71. HP indique dans sa déclaration de responsabilité sociale intitulée « Citoyenneté mondiale »⁹⁸ que « chaque individu doit se voir accorder un certain nombre de droits fondamentaux, de libertés et de normes de traitement. Respecter ces droits humains est au cœur des valeurs partagées de HP et fait partie intégrante de notre manière de travailler »⁹⁹. Dans le cadre de sa « politique mondiale pour les droits de l'homme »¹⁰⁰, l'entreprise se dit déterminée à intégrer le respect des droits de l'homme dans ses activités et à « respecter les lois et règlements et les normes internationales ».

10. Mehadrin

72. Mehadrin est l'un des géants israéliens de l'agro-industrie. L'entreprise produit des agrumes, des fruits et des légumes qu'elle exporte dans le monde entier. Elle détient 4 184 hectares de vergers et utilise 11 948 autres hectares appartenant à des

⁸⁸ Rapport annuel 2011, p. 23 (*en anglais*).

⁸⁹ www8.hp.com/us/en/hp-information/facts.html.

⁹⁰ www.whoprofits.org/sites/default/files/hp_report_final_for_web.pdf.

⁹¹ <http://abna.ir/data.asp?lang=3&Id=331748>.

⁹² www.whoprofits.org/company/hewlett-packard-hp.

⁹³ www.whoprofits.org/sites/default/files/hp_report_final_for_web.pdf.

⁹⁴ www.ochaopt.org/documents/Pages1-23_Jerusalem_30July2007.pdf.

⁹⁵ <http://ethisphere.com/past-wme-honorees/wme2010/>.

⁹⁶ www.hp.com/hpinfo/newsroom/hp360_wv.pdf.

⁹⁷ www.unglobalcompact.org/participant/4833-Hewlett-Packard-Company.

⁹⁸ www.hp.com/hpinfo/globalcitizenship/.

⁹⁹ www.hp.com/hpinfo/globalcitizenship/society/ethics.html.

¹⁰⁰ www.hp.com/hpinfo/globalcitizenship/humanrights.html.

clients extérieurs¹⁰¹. Elle possède 50 % de STM Agricultural Export Limited (exportation de légumes) et 50 % de Mirian Shoham (exportation de mangues). Elle a également racheté Agrexco, l'un des principaux exportateurs vers l'Europe. Le groupe Mehadrin a des succursales en France, aux Pays-Bas, au Royaume-Uni et en Suède.

73. Alors qu'ils proviennent dans leur grande majorité de colonies de peuplement implantées dans le territoire palestinien occupé, les produits Mehadrin sont étiquetés « origine Israël ». De plus, Mehadrin participe à l'application des mesures discriminatoires imposées dans le domaine de l'eau par Israël, qui fournit des millions de mètres cubes d'eau aux agriculteurs israéliens mais refuse d'en donner des quantités suffisantes aux Palestiniens¹⁰².

74. La société Mehadrin déclare qu'elle entend par qualité « les pratiques écoresponsables, les critères rigoureux d'assurance qualité, la responsabilité sociale de l'entreprise et l'amélioration permanente par la recherche et l'innovation »¹⁰³ et que « la transparence est pour Mehadrin une valeur de base qu'elle applique en mettant ses connaissances et ses données à la libre disposition de ses clients »¹⁰⁴.

11. Motorola Solutions Inc.

75. Motorola Solutions Inc. est une multinationale américaine d'électronique et de télécommunication. Elle compte plus de 23 000 employés dans 65 pays, vend ses produits et services dans 100 pays et a réalisé un chiffre d'affaires de 2,1 milliards de dollars au deuxième trimestre 2012¹⁰⁵.

76. Motorola Solutions Israël, première filiale de Motorola à l'extérieur des États-Unis, a engrangé au total 505 millions de dollars en 2010. La société se spécialise dans « la commercialisation et la vente de solutions et de systèmes de communication pour les forces armées, les services de sécurité, les services d'urgence et les forces de l'ordre, les gouvernements, les établissements publics et les entités commerciales privées »¹⁰⁶.

77. Motorola Israël fournit des systèmes de surveillance aux colonies de peuplement israéliennes et aux postes de contrôle établis le long du mur. Il semblerait que Motorola Solutions Inc. a livré en 2005¹⁰⁷ des radars de détection aux colonies israéliennes d'Hébron, Karnei Tzur et Bracha. Le système de radars de détection MotoEagle Surveillance et un système de communication par téléphone cellulaire baptisé Mountain Rose auraient été fournis à des colonies israéliennes. S'ils aident les colonies de peuplement, ces systèmes de sécurité limitent pourtant un peu plus la liberté de circulation des Palestiniens dans leur territoire.

78. Motorola Solutions Inc. a une politique de responsabilité d'entreprise très détaillée¹⁰⁸, et une section de son rapport annuel de responsabilité sociale pour 2011, consacrée aux droits de l'homme, précise : « notre politique en matière de

¹⁰¹ www.whoprofits.org/content/mehadrin-group-update.

¹⁰² www.blueplanetproject.net/documents/RTW/RTW-Palestine-1.pdf.

¹⁰³ www.mehadrin.co.il/docs/P124/.

¹⁰⁴ www.mehadrin.co.il/docs/P200/.

¹⁰⁵ <http://investing.businessweek.com/research/stocks/earnings/earnings.asp?ticker=99186>.

¹⁰⁶ http://duns100.dunb.co.il/ts.cgi?tsscript=comp_eng&duns=600020978.

¹⁰⁷ www.whoprofits.org/company/motorola-solutions-israel.

¹⁰⁸ <http://responsibility.motorolasolutions.com/>.

droits de l'homme est fondée depuis toujours sur notre attachement sans faille aux valeurs d'intégrité et de respect constant de la personne, et elle cadre avec les préceptes fondamentaux des grandes conventions de l'Organisation internationale du Travail et de la Déclaration universelle des droits de l'homme »¹⁰⁹. L'entreprise insiste par ailleurs sur sa volonté de travailler avec la communauté des ONG, qualifiée de « partie prenante essentielle », et d'exercer son devoir de diligence.

12. Mul-T-Lock/Assa Abloy

79. Mul-T-Lock est une entreprise israélienne créée en 1973¹¹⁰. En 2000, elle a été rachetée par la société suédoise Assa Abloy, qui est membre du Pacte mondial. Mul-T-Lock se décrit comme « un leader mondial dans la conception, la fabrication, la commercialisation et la distribution de solutions de haute sécurité pour les applications institutionnelles, commerciales, industrielles, résidentielles et automobiles ».

80. Mul-T-Lock fabrique des serrures et des produits de sécurité. Son usine se trouve dans la zone industrielle de Barkan, située dans la colonie israélienne d'Ariel¹¹¹.

81. Dans un rapport conjoint, l'Église de Suède et les ONG Diakonia et SwedWatch ont signalé quelques activités d'Assa Abloy et ont accusé l'entreprise d'être complice du torpillage du processus de paix en raison de son investissement massif dans son usine, construite sur des terres palestiniennes confisquées.

82. Assa Abloy a révisé son code de conduite en janvier 2007 en y intégrant des considérations sur la liberté d'association, la discrimination, les pratiques environnementales, la santé et la sécurité. La version révisée du Code s'appuie sur la Déclaration universelle des droits de l'homme et les conventions des Nations Unies pertinentes, la Déclaration de principes tripartite sur les entreprises multinationales et la politique sociale adoptée par l'OIT, les Principes directeurs de l'OCDE à l'intention des entreprises multinationales, le Pacte mondial et la norme ISO 14001. Assa Abloy a une politique de code de conduite depuis 2004 et est devenue membre du Pacte mondial en mai 2008.

83. Assa Abloy relève que certaines circonstances peuvent appeler des prescriptions en matière de droits de l'homme autres que celles qui figurent dans le Code : « Même si de telles circonstances sont très peu courantes, Assa Abloy n'ignore pas qu'elles ont potentiellement des répercussions sur les droits de l'homme et agit en fonction du droit international ou des lois locales applicables. Si les textes officiels font défaut, l'entreprise cherchera d'autres sources afin de choisir la meilleure approche compte tenu des circonstances en question. »¹¹².

¹⁰⁹ Ibid., p. 11.

¹¹⁰ www.mul-t-lock.com/87.html.

¹¹¹ www.diakonia.se/documents/public/IN_FOCUS/Israel_Palestine/Report_Illegal_Ground/Report_Mul-T-lock_081021.pdf.

¹¹² Assa Abloy Code of Conduct, sect. 3.9; www.diakonia.se/documents/public/IN_FOCUS/Israel_Palestine/Report_Illegal_Ground/Report_Mul-T-lock_081021.pdf.

13. Cemex

84. La société mexicaine Cemex¹¹³ est un leader mondial de l'industrie des matériaux de construction. Elle fabrique, distribue et vend du ciment, du béton, des agrégats et autres matériaux. Son chiffre d'affaires annuel est de 15,1 milliards de dollars. Elle emploie 44 104 personnes dans le monde¹¹⁴.

85. Cemex est propriétaire de Readymix Industries. Cette entreprise israélienne, qui possède des usines en Cisjordanie (Mevo Horon et zones industrielles d'Atarot et Mishor Edomim)¹¹⁵, a fourni des éléments pour construire les habitations des colonies de peuplement¹¹⁶. Elle a également fourni du béton à Israël pour la construction du mur et des postes de contrôle militaires en Cisjordanie.

86. À travers ReadyMix Industries, Cemex est également propriétaire à 50 % de la carrière de la colonie israélienne de Yatir, où l'industrie israélienne des matériaux de construction extrait et exploite les ressources naturelles palestiniennes. En 2009, l'ONG Yesh Din a saisi la Haute Cour israélienne pour dénoncer ce qu'elle a appelé « l'exploitation coloniale des terres » et « le pillage » et demander à la Cour d'intervenir. Les juges ont décidé en décembre 2011 de ne pas suspendre les activités étant donné qu'elles emploient des Palestiniens. Ils ont toutefois recommandé qu'Israël s'abstienne de mettre de nouvelles carrières en exploitation en Cisjordanie¹¹⁷.

87. Le Code de déontologie de Cemex¹¹⁸ stipule ce qui suit : « Nous devons nous employer à parfaire notre réputation d'entreprise responsable et durable soucieuse d'attirer et de fidéliser ses employés, ses consommateurs, ses fournisseurs et ses investisseurs, et entretenir de bonnes relations avec les communautés au sein desquelles nous conduisons notre activité. »

VI. Conclusion

88. L'incapacité de mettre fin à 45 ans d'occupation accentue l'obligation faite à la communauté internationale de défendre les droits du peuple palestinien, privé de facto de la protection de l'état de droit. Dans ce contexte, le Rapporteur spécial rappelle que, dès 1982¹¹⁹, l'Assemblée générale a demandé aux États Membres d'appliquer des sanctions économiques contre l'État d'Israël en raison de ses activités de colonisation illégales.

89. Les Principes directeurs relatifs aux entreprises et aux droits de l'homme exigent que toutes les entreprises respectent les droits de l'homme, ce qui signifie en premier lieu qu'elles doivent s'abstenir de porter atteinte aux droits humains d'autrui et lutter contre les violations de ces droits. Le Rapporteur spécial demande aux États ainsi qu'aux entreprises de veiller à l'application pleine et entière des

¹¹³ Ibid.

¹¹⁴ www.cemex.com/AboutUs/CompanyProfile.aspx.

¹¹⁵ www.whoprofits.org/sites/default/files/cemex_corporate_watch_may_2011.pdf.

¹¹⁶ www.whoprofits.org/company/cemex.

¹¹⁷ www.whoprofits.org/content/israeli-high-court-justice-legalizes-exploitation-natural-resources-opt.

¹¹⁸ www.cemex.com/AboutUs/files/HighlightsCoE.pdf.

¹¹⁹ Résolution ES-9/1 (5 février 1982); voir également résolution 38/180 A (19 décembre 1983).

Principes directeurs dans le cadre de leurs opérations industrielles et commerciales liées aux colonies de peuplement israéliennes dans le territoire palestinien occupé.

90. Le Rapporteur spécial réitère que les entreprises mentionnées dans le présent rapport ne représentent qu'une petite fraction des nombreuses sociétés qui traitent avec les colonies israéliennes implantées dans le territoire palestinien occupé. Il est déterminé à chercher des éclaircissements auprès des entreprises citées dans son rapport et à continuer de suivre leurs activités. Parallèlement, il réunira d'autres informations et fera rapport sur la participation d'entreprises aux activités de colonisation israéliennes.

91. Le Rapporteur spécial considère en outre que toutes les entreprises qui opèrent dans les colonies de peuplement israéliennes ou traitent avec elles d'une manière ou d'une autre devraient être boycottées jusqu'à ce que leurs activités soient pleinement conformes aux normes et pratiques du droit international humanitaire. À cet égard, les efforts faits par la société civile pour poursuivre l'application des Principes directeurs établissent un espace particulier entre mesure volontaire et mesure obligatoire dans la lutte engagée pour protéger les personnes vulnérables aux violations des droits de l'homme.

VII. Recommandations

92. **Le Rapporteur spécial demande au Gouvernement israélien de s'abstenir d'implanter ses populations dans le territoire palestinien occupé, de commencer à démanteler ses colonies de peuplement et de réinstaller les citoyens israéliens dans leur propre territoire, à savoir du côté israélien de la Ligne verte, conformément au droit international, à de nombreuses résolutions du Conseil de sécurité et de l'Assemblée générale et à l'avis consultatif rendu par la Cour internationale de Justice au sujet du mur.**

93. **Le Rapporteur spécial demande au Gouvernement israélien d'informer publiquement toutes les entreprises opérant dans ses colonies de peuplement ou traitant avec elles des ramifications juridiques internationales de leurs opérations, y compris en termes de responsabilité civile dans des pays tiers.**

94. **Le Rapporteur spécial demande au Gouvernement israélien de procéder immédiatement à l'indemnisation du peuple palestinien – par l'octroi de terres, des réparations financières ou autres moyens – en consultant pleinement et dans la transparence les Palestiniens lésés, en dédommagement de toutes les activités liées à son entreprise de colonisation depuis 1967, et de s'assurer également que les terres utilisées par les entreprises sont restituées dans leur état antérieur, à moins qu'elles aient été améliorées.**

95. **Le Rapporteur spécial demande aux entreprises mentionnées dans le présent rapport de prendre de toute urgence et dans la transparence les mesures qui s'imposent pour appliquer les Principes directeurs relatifs aux entreprises et aux droits de l'homme, le Pacte mondial, le droit international et les normes existantes en ce qui concerne leurs activités ayant un lien avec le Gouvernement d'Israël, ses colonies de peuplement et le mur dans le territoire palestinien occupé, y compris Jérusalem-Est. Elles devraient pour commencer suspendre immédiatement toutes leurs opérations, y compris la fourniture de**

produits et services, qui contribuent à la création et au maintien des colonies de peuplement israéliennes.

96. Le Rapporteur spécial demande aux entreprises mentionnées dans le présent rapport qui ont déjà souscrit au Pacte mondial de se familiariser pleinement avec les principes d'intégrité qui y figurent, notamment en cas d'allégations d'utilisation abusive systématique ou flagrante¹²⁰. Les plans d'entreprise pour le retrait du territoire palestinien occupé devraient identifier et traiter tout effet adverse sur les droits de l'homme découlant de ces départs et de la fin de l'activité.

97. Le Rapporteur spécial demande à toutes les entreprises mentionnées dans son rapport et qui maintiennent une activité dans le territoire palestinien occupé de renforcer leur devoir de diligence conformément aux Principes directeurs et au droit international humanitaire. Elles devraient être à même de prouver qu'elles font des efforts pour atténuer tout effet adverse et être préparées à assumer toute conséquence – en termes réputationnels, financiers ou juridiques – de la poursuite de leurs opérations.

98. Le Rapporteur spécial demande à la société civile d'engager activement des actions judiciaires et politiques à l'encontre des entreprises en infraction, si nécessaire en s'adressant aux institutions judiciaires et politiques nationales, surtout si des activités de colonisation se prêtent à des allégations de crimes de guerre et de crimes contre l'humanité.

99. Le Rapporteur spécial demande à la société civile de mener dans le cadre national de vigoureuses campagnes de boycottage, de désinvestissement et de sanctions à l'encontre des entreprises mentionnées dans le présent rapport, jusqu'à ce qu'elles alignent leurs politiques et leurs pratiques sur les normes et le droit internationaux, ainsi que sur le Pacte mondial.

100. Le Rapporteur spécial demande à la société civile de mutualiser ses ressources et ses informations, y compris en créant des réseaux de collaboration transnationaux et par d'autres initiatives, de manière à promouvoir la transparence et la responsabilité des entreprises ayant des liens avec le programme de colonisation israélien.

101. Le Rapporteur spécial demande aux membres de la communauté internationale d'enquêter dans la transparence sur les activités des entreprises enregistrées dans leurs pays respectifs, notamment celles qui sont mentionnées dans le présent rapport et qui font commerce avec les colonies de peuplement israéliennes, et de veiller à l'indemnisation appropriée des Palestiniens lésés.

102. Le Rapporteur spécial demande à la communauté internationale d'envisager de solliciter l'avis consultatif de la Cour internationale de Justice au sujet de la responsabilité des entreprises impliquées dans les activités économiques des colonies de peuplement établies en violation de l'article 49 de la quatrième Convention de Genève.

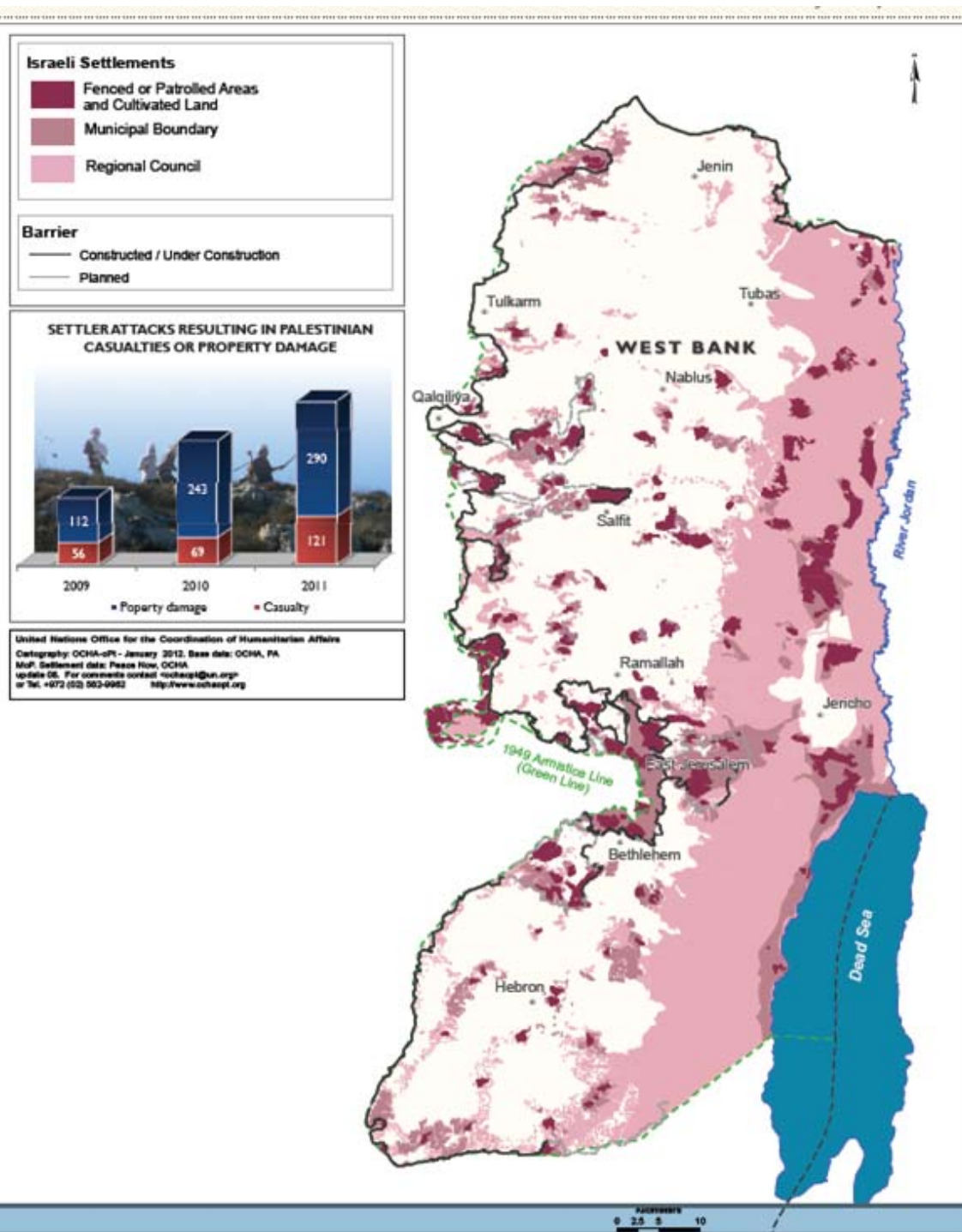
103. Le Rapporteur spécial demande à la communauté internationale d'exhorter l'Assemblée générale à produire un document articulant l'application des Principes directeurs du Pacte mondial avec le droit

¹²⁰ www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html.

international des droits de l'homme dans les situations d'occupation hostile, en prêtant attention aux obligations morales, politiques et juridiques associées aux activités industrielles et commerciales dans le territoire palestinien occupé.

Annexe I

Terres allouées aux colonies de peuplement israéliennes, janvier 2012



Source : Bureau de la coordination des affaires humanitaires.

Annexe II**Conséquences humanitaires des politiques de colonisation israéliennes, janvier 2012****Les faits en bref**

- Depuis 1967, Israël a établi environ 150 colonies (résidentielles et autres) en Cisjordanie, y compris à Jérusalem-Est, auxquelles viennent s'ajouter une centaine d'implantations sauvages créées par des colons sans autorisation officielle.
- Il y aurait environ 500 000 colons; leur nombre a augmenté en moyenne de 5,3 % par an (sauf à Jérusalem-Est) dans la dernière décennie, contre 1,8 % pour l'ensemble de la population israélienne (Bureau central des statistiques israélien).
- Alors que les colonies de peuplement fermées par des clôtures ou gardées par des patrouilles couvrent 3 % de la Cisjordanie, 43 % du territoire cisjordanien est hors limite pour les Palestiniens parce qu'il est alloué au conseil local ou régional des colonies.
- Pratiquement toutes les terres considérées par Israël comme des terres publiques ou « terres de l'État » (27 % de la superficie de la Cisjordanie) ont été allouées aux colonies de peuplement et non pas au profit de la population locale (B'Tselem).
- Environ un tiers des terres situées en bordure des colonies sont des propriétés privées appartenant à des Palestiniens, selon le registre foncier officiel d'Israël (La paix maintenant).
- Plus de 60 % des constructions appartenant à des Palestiniens démolies en 2011 pour défaut de permis étaient situées dans les zones allouées aux colonies.
- En 2011, cinq Palestiniens (dont deux enfants) ont été tués et plus d'un millier ont été blessés (près d'un cinquième étaient des enfants) par des colons ou des agents de sécurité israéliens lors d'incidents directement ou indirectement liés aux colonies de peuplement, y compris dans des manifestations.
- Plus de 90 % des enquêtes de la police israélienne au sujet des violences commises par les colons dans les six dernières années (2005-2010) ont été closes sans mise en examen (Yesh Din).
- Plus de 500 postes de contrôle intérieurs, barrages routiers et autres obstacles physiques entravent la circulation des Palestiniens en Cisjordanie, en particulier l'accès des enfants aux écoles; ils ont surtout pour fonctions de protéger les colons et de faciliter leurs déplacements, notamment les allers et retours entre les colonies et Israël.

– L'emplacement des colonies a été la considération majeure ayant dicté la décision de dévier le tracé du mur par rapport à la Ligne verte; une fois que la déviation sera faite, environ 80 % des colons vivront dans des colonies situées du côté ouest (israélien) du mur.

Source : Bureau de la coordination des affaires humanitaires.



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Promotion et protection des droits de l'homme :
situations relatives aux droits de l'homme
et rapports des rapporteurs
et représentants spéciaux

Situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967

Note du Secrétaire général

Le Secrétaire général a l'honneur de transmettre aux membres de l'Assemblée générale le rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Richard Falk, présenté conformément à la résolution 5/1 du Conseil des droits de l'homme.

* A/68/150.



Rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés par Israël depuis 1967

Résumé

Le présent rapport développe les arguments exposés dans le précédent rapport du Rapporteur spécial à la soixante-septième session de l'Assemblée générale, qui mettait l'accent sur les entreprises qui réalisent des gains grâce aux colonies de peuplement israéliennes et décrivait l'implication de 13 entreprises dans les activités menées par Israël dans le Territoire palestinien occupé en se référant aux Principes directeurs relatifs aux entreprises et aux droits de l'homme. Il fixe les contours d'un modèle d'analyse juridique en étudiant les cas de deux entreprises représentatives choisies pour les façons particulières dont leurs activités peuvent les impliquer dans des infractions internationales. Le rapport aborde aussi d'autres questions, notamment la question urgente des droits relatifs à l'eau et à l'assainissement.

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I. Introduction

1. Comme pour les précédents rapports que le Rapporteur spécial a établis en cette qualité, il n'a pas pu bénéficier de la coopération du Gouvernement israélien, qui notamment ne l'a pas autorisé à entrer sur le territoire de l'État de Palestine. Il a bien pu tirer parti d'une mission effectuée à Gaza en décembre 2012, qui a été facilitée par le Gouvernement égyptien d'alors qui lui a fait emprunter le point de passage de Rafah. Cette visite a été extrêmement utile en ce sens qu'elle a permis d'avoir un accès direct à la population vivant sous occupation. En effet, rien ne remplace ce type de contact direct sur le terrain pour évaluer les allégations faisant état de violations des droits de l'homme commises par Israël en qualité de Puissance occupante. Ce rapport à l'Assemblée générale étant le dernier qu'il établit durant son mandat, le Rapporteur spécial souhaite souligner qu'il importe de ne pas laisser cette tendance à ne pas coopérer devenir la norme, car cela entraverait les efforts déployés par les prochains rapporteurs spéciaux pour enquêter le plus efficacement possible sur les prétentions relatives à la situation des droits de l'homme. J'ai été déçu par le fait que l'Organisation des Nations Unies n'ait pas fait plus pour obtenir des États Membres qu'ils s'acquittent de l'obligation qui leur incombe en vertu du droit international de coopérer avec l'Organisation.

2. Le mandat du Rapporteur spécial a été institué en 1993 lorsqu'il était encore approprié de désigner la Cisjordanie, Jérusalem-Est et la bande de Gaza par l'expression « territoires occupés ». Continuer d'utiliser cette expression à l'heure actuelle semble de nature à induire en erreur. Le 29 novembre 2012, la présence palestinienne au sein du système des Nations Unies a été élevée par la résolution 67/19 au statut d'État observateur non membre. Il semble donc plus approprié en parlant des territoires administrés par Israël d'utiliser le terme « Palestine » tout en réaffirmant les responsabilités qui continuent d'incomber à Israël en tant que Puissance occupante en vertu du droit international humanitaire, en particulier la Convention de Genève relative à la protection des personnes civiles en temps de guerre (quatrième Convention de Genève). Outre cette question de statut, il y a des questions de fond. Le processus cumulatif de la construction et de l'expansion de colonies de peuplement illégales a atteint le point où une annexion rampante en partie irréversible s'est produite, qui doit être reconnue comme telle et qui sape le postulat central d'« occupation militaire » constituant une réalité temporaire. Cette modification des territoires occupés avec le temps a été reconnue de façon perverse, voire validée à titre provisoire, par la présupposition largement partagée selon laquelle les blocs de colonies israéliens ne seront pas démantelés même si un accord de paix est conclu entre l'Autorité palestinienne et Israël.

3. Il est plus important que jamais d'insister sur les responsabilités qui incombent à Israël en qualité de Puissance occupante en vertu du droit international. Les Conventions de Genève et les Protocoles facultatifs I et II, ainsi qu'un grand nombre d'instruments internationaux relatifs aux droits de l'homme, sont indispensables pour identifier et évaluer les diverses allégations faisant état de pratiques touchant à l'administration par Israël de la vie quotidienne en Cisjordanie, à Jérusalem-Est et dans la bande de Gaza. Ce cadre juridique est important pour évaluer des politiques et pratiques telles que celles liées à la construction du mur sur des terres palestiniennes, l'appropriation illicite de ressources en eau palestiniennes, la confiscation de terres, les procédures d'arrestation et de détention, les violations des droits des enfants, la violence des colons qui s'exerce avec la complicité des forces

de sécurité israéliennes, les démolitions de maisons et les châtiments collectifs sous forme de blocages, de couvre-feux et de restrictions à la circulation. Toutes ces politiques et pratiques méritent l'attention de la communauté internationale, mais le Rapporteur spécial appelle l'attention dans le présent rapport sur l'utilisation illicite de ressources en eau, aspect de l'occupation israélienne qui a été quelque peu négligé.

4. La reprise de négociations directes ayant pour objectif de régler le conflit entre Israël et la Palestine appelle particulièrement l'attention en ce moment sur l'accent qu'il convient de mettre sur la protection des droits du peuple palestinien au cours d'un processus diplomatique qui depuis 20 ans nie la pertinence du droit international. Cela est particulièrement vrai du droit inaliénable des Palestiniens à l'autodétermination qui n'est même pas mentionné dans le cadre convenu dans la Déclaration de principes sur des arrangements intérimaires d'autonomie de 1993. Ce mandat aura été vain si la solution à laquelle aboutiront les voies diplomatiques ne fait pas respecter le droit collectif à l'autodétermination et les droits individuels de ceux qui vivent privés de leurs droits sous l'administration militaire israélienne depuis 1967. D'autres sujets de préoccupation concernent la population de Gaza, dont l'autorité exécutive de facto depuis 2007 ne participe pas aux négociations relancées, ce qui amène à se demander si les droits et intérêts des Palestiniens à Gaza sont dûment représentés.

5. La situation dans la bande de Gaza est particulièrement difficile, ses habitants, au nombre de 1,7 million, étant contraints de vivre dans une situation de blocus depuis 2007. La bande de Gaza semble être menacée de subir des épreuves encore plus difficiles pour sa population du fait de l'évolution récente de la situation en Égypte. Alors qu'Israël est la Puissance occupante et qu'à ce titre des obligations juridiques continuent de lui incomber à l'égard des Palestiniens dans la bande de Gaza, la population – à l'heure actuelle – doit pouvoir continuellement utiliser le point de passage de Rafah pour se rendre en Égypte et en revenir, et aussi, pour assurer sa survie, doit pouvoir accéder au réseau de tunnels grâce auquel la bande de Gaza a pu être approvisionnée en produits de première nécessité. Il convient de rappeler qu'un rapport de l'ONU publié il y a un an, avant les récents faits nouveaux qui compliquent la situation, a conclu que l'on peut se demander si la bande de Gaza sera habitable après 2020¹. Durant la mission du Rapporteur spécial, plusieurs spécialistes des infrastructures menacées de la bande de Gaza ont fait remarquer qu'une telle prédiction, aussi noire fût-elle, était trop optimiste et qu'il était plus réaliste de considérer 2016 comme échéance. Ce qui est en jeu ici dans cette situation de total dénuement, ce sont les droits économiques et sociaux de la population de la bande de Gaza, qui sont consacrés dans le Pacte international relatif aux droits économiques, sociaux et culturels auquel Israël est partie et qui subissent une attaque généralisée. Le maintien du blocus est une violation persistante de l'article 33 de la quatrième Convention de Genève, qui interdit les peines collectives de façon absolue.

6. Le présent rapport, comme celui présenté à la soixante-septième session de l'Assemblée générale, en 2012 (A/67/379), sur les questions de responsabilité des entreprises et de l'obligation éventuelle pour elles de rendre des comptes en ce qui

¹ Équipe de pays des Nations Unies, « Gaza in 2020: a liveable place? » (Jérusalem, Bureau du Coordonnateur spécial des Nations Unies pour le processus de paix au Moyen-Orient, août 2012).

concerne les colonies de peuplement israéliennes, donne suite à la recommandation formulée à l'issue de la mission d'établissement des faits menée sur les colonies de peuplement sous les auspices du Conseil des droits de l'homme². Il constitue aussi une réponse au refus d'Israël de respecter l'obligation qui lui incombe en vertu de l'article 49 6) de la quatrième Convention de Genève, qui interdit à la Puissance occupante de procéder au transfert d'une partie de sa propre population civile dans le territoire occupé par elle. Cette disposition a été largement interprétée comme étendant explicitement les colonies de peuplement qu'Israël construit et étend sans discontinuer depuis 1967 au mépris de ce consensus et du droit international. Lorsqu'il n'est pas possible d'assurer la conformité au droit international au moyen de l'autoréglementation ou de la persuasion, il est approprié de recourir à des moyens coercitifs non violents pour assurer celle-ci et contribuer ce faisant à la protection des droits des victimes, en l'occurrence les Palestiniens.

7. Depuis l'adoption des résolutions [242 \(1967\)](#) et [338 \(1973\)](#) du Conseil de sécurité, il est largement admis dans la communauté internationale que le conflit entre Israël et la Palestine ne peut être réglé que par la création d'un État palestinien viable et indépendant à l'intérieur des frontières de facto de 1967, quelque peu modifiées par accord mutuel. Il ne fait pas de doute que la portée territoriale de l'autodétermination pour le peuple palestinien qu'aurait ce scénario prévoyant deux États a été continuellement diminuée par l'activité illégale d'implantation de colonies de peuplement. Cela fait longtemps qu'il incombe à la communauté internationale, en particulier à l'ONU, de prendre des mesures pour préserver les droits territoriaux palestiniens. L'étendue globale des colonies de peuplement dispersées met de plus en plus en danger l'idée même de création d'un État palestinien souverain qui soit indépendant et viable.

8. Il existe de nombreuses formes d'abus qui appellent une attention et une condamnation urgentes. Le Rapporteur spécial tient à en souligner trois à titre prioritaire : les abus commis par les membres des services de sécurité, qui prennent la forme d'arrestations et de détentions auxquelles ils procèdent en faisant un usage excessif de la force et en recourant à l'humiliation, y compris à l'encontre des enfants; la violence des colons ciblant les Palestiniens, qui touche également leurs biens et leur milieu; et la complicité dont font preuve les Forces de défense israéliennes à l'égard de la violence des colons, protégeant ces derniers lorsqu'ils se livrent à des actes de violence au lieu de les arrêter, tout en imposant des sanctions aux Palestiniens qui sont les victimes de ces actes, manquant ainsi à la responsabilité première qui leur incombe en vertu de la quatrième Convention de Genève. Le Rapporteur spécial, en collaboration avec cinq autres rapporteurs spéciaux, a publié un communiqué de presse concernant les mauvais traitements et le harcèlement dont a été victime Issa Amro, un défenseur des droits de l'homme à Hébron qui, après avoir participé à la table ronde du Conseil des droits de l'homme consacrée à la Palestine occupée en juin 2013, a été détenu et frappé à son retour, apparemment à titre de représailles³.

² A/HRC/22/63.

³ « Israel must stop harassment, intimidation and abusive treatment of rights defender Issa Amro », 13 août 2013. Disponible à l'adresse : ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13626&LangID=E.

II. Méthodologie

9. Il est reconnu quasi universellement que la création et l'expansion de colonies de peuplement en Cisjordanie et à Jérusalem-Est constituent des violations du droit humanitaire et du droit international des droits de l'homme. De plus, l'expansion continue des colonies s'est avérée être un obstacle essentiel aux négociations de paix et à un règlement négocié entre Israéliens et Palestiniens.

10. À ce jour, Israël a refusé de se conformer au droit international en ce qui concerne ses activités de colonisation, et les initiatives de l'ONU visant à amener Israël à respecter le droit en condamnant ces activités n'ont pas eu d'effet perceptible. Entre-temps, les colonies de peuplement, du fait de leur nature et de leur expansion, portent atteinte de façon quasi permanente aux droits fondamentaux des Palestiniens. C'est dans ce contexte que nous examinons les responsabilités juridiques internationales des entreprises non israéliennes qui tirent profit de l'existence des colonies de peuplement et les conséquences éventuelles pour ces entreprises.

11. Le rapport du Rapporteur spécial à la soixante-septième session de l'Assemblée générale a soulevé des questions relatives aux droits de l'homme qui découlent du fait que des entreprises tirent profit des affaires qu'elles font avec les colonies. Il a pris note de l'utilité des Principes directeurs relatifs aux entreprises et aux droits de l'homme⁴ et, à titre d'illustration concrète, a décrit la participation de 13 entreprises aux activités d'Israël en Palestine. Le présent rapport développe des arguments exposés dans le rapport précédent et présente un modèle possible d'analyse juridique en mettant l'accent sur deux sociétés qui ont été choisies pour les façons particulières dont leurs activités pourraient les mettre en cause dans des violations du droit international qui, dans certains cas, semblent constituer des crimes internationaux. Le rapport est présenté dans l'espoir que l'analyse juridique qui y figure encouragera les entreprises qui tirent profit à l'heure actuelle des colonies de peuplement à changer leur politique. Le Rapporteur spécial s'est continuellement déclaré prêt à travailler avec les responsables des entreprises pour veiller à ce qu'ils respectent les principes de responsabilité des entreprises. Le Rapporteur spécial souhaite au premier chef inciter à agir volontairement, et ce n'est que si cette démarche n'aboutit pas qu'il est recommandé de prendre des initiatives plus contraignantes telles que des boycottages, des désinvestissements et des sanctions.

12. Le rapport a été établi par le Rapporteur spécial sur la base des renseignements communiqués, à sa demande, par des acteurs de la société civile, des organismes des Nations Unies, des entreprises et sociétés, des entités non étatiques et d'autres parties prenantes. Le Rapporteur spécial formule une série de recommandations pour encourager les entreprises qui tirent profit des colonies de peuplement d'Israël à prendre des mesures sans tarder pour mettre leurs activités en conformité avec le droit international pertinent et les règles et normes connexes. Le Rapporteur spécial fait observer que depuis l'achèvement du présent rapport, il en a porté le contenu à l'attention des entreprises dont il est question ici. Il demandera des précisions et de plus amples informations au sujet des prétentions pertinentes exposées dans le présent rapport en vue d'obtenir des réponses rapides et effectives à ses recommandations.

⁴ A/HRC/17/31, annexe.

III. Cadres normatifs

13. Le présent rapport vise à porter la question de la responsabilité des entreprises à l'attention du monde des affaires qui entretient ou pourrait entretenir à l'avenir des relations commerciales avec les colonies de peuplement. Il a été solidement établi que le droit international reconnaît la personnalité juridique des sociétés⁵. L'analyse de la responsabilité des entreprises mettra l'accent sur les cadres normatifs pertinents, dont le droit international humanitaire, le droit international des droits de l'homme et le droit pénal international. La création de colonies de peuplement constitue une violation des devoirs d'une puissance occupante en vertu du droit international humanitaire et porte atteinte aux droits fondamentaux des Palestiniens. Le droit pénal international établit la responsabilité pénale individuelle de l'auteur principal ainsi que de ses complices dans la commission de crimes internationaux. Le Rapporteur spécial espère que la prise en compte du droit pénal international peut faire avancer le débat sur les entreprises et les droits de l'homme, en particulier du fait des mécanismes judiciaires matériels qui existent, tels que la Cour pénale internationale, et de la compétence universelle qu'exercent les juridictions nationales, et que cela contribuera à orienter la prise de décisions par les dirigeants d'entreprise. En expliquant un modèle d'analyse juridique, le Rapporteur spécial espère que celui-ci sera utilisé par d'autres entreprises qui rencontrent les mêmes problèmes et qu'il leur sera utile.

A. Droit international humanitaire

14. Le droit international humanitaire s'applique aux situations de conflit armé et d'occupation, comme énoncé à l'article 2 commun aux quatre Conventions de Genève du 12 août 1949. Les règles qui régissent l'occupation de guerre, en particulier le Règlement concernant les lois et coutumes de la guerre sur terre de 1907 (Règlement de La Haye) et la quatrième Convention de Genève, sont universellement acceptées comme reflétant le droit international coutumier et par conséquent comme s'appliquant à Israël en qualité de Puissance occupante. Cela a été reconnu et confirmé par le Conseil de sécurité, l'Assemblée générale et le Conseil des droits de l'homme, ainsi que la Cour internationale de Justice dans l'avis consultatif qu'elle a rendu en 2004 sur le mur⁶.

15. La quatrième Convention de Genève interdit à une puissance occupante de procéder au transfert d'une partie de sa propre population civile dans le territoire occupé par elle. Il est largement admis que cette interdiction inclue l'installation volontaire de ressortissants de la Puissance occupante dans le territoire occupé⁷. Le

⁵ Voir, par exemple : *Barcelona Traction, Light and Power Company, Limited*, arrêt, C.I.J. Recueil 1970, p. 3, et *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo)*, exceptions préliminaires, arrêt, C.I.J. Recueil 2007, p. 582.

⁶ Voir les résolutions 6 (XXIV), 6 (XXV) et 2001/7 de la Commission des droits de l'homme; les résolutions 7/18, 10/18 et 19/17 du Conseil des droits de l'homme; les résolutions 271 (1969), 446 (1979), 641 (1989), 681 (1990) et 799 (1992) du Conseil de sécurité; et les résolutions 2546 (XXIV), ES-10/2, 36/147 C, 54/78, 58/97, ES-10/18 et 66/225 de l'Assemblée générale; l'avis consultatif du 9 juillet 2004 rendu par la Cour internationale de Justice sur les *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé* (voir A/ES-10/273 et Corr.1), par. 109 à 113.

⁷ Voir résolution 446 (1979) du Conseil de sécurité et l'avis consultatif de la Cour internationale de Justice du 9 juillet 2004, par. 120.

Règlement de La Haye interdit à toute puissance occupante d'entreprendre des changements à caractère permanent dans le territoire qu'elle occupe, à moins que ces changements répondent à des besoins militaires ou qu'ils soient entrepris au profit de la population locale. Le caractère prolongé de l'occupation israélienne qui perdure depuis 46 ans semble être incompatible avec l'interprétation juridique acceptée selon laquelle une occupation a un caractère temporaire. Le Rapporteur spécial a précédemment souligné les limites du droit humanitaire international dans le contexte d'une occupation prolongée, en particulier eu égard au fait que ce droit n'a pas bien rendu compte de la mesure dans laquelle il est porté atteinte aux intérêts permanents et au bien-être de la population civile⁸. La réunion d'experts sur l'occupation et d'autres formes d'administration de territoires étrangers, organisée par le Comité international de la Croix-Rouge (CICR), a discuté du fait que ni le Règlement de La Haye ni la quatrième Convention de Genève ne fixe des limites à la durée effective du contrôle exercé sur un territoire étranger et elle a noté que de nombreux participants avaient fait valoir qu'une occupation prolongée nécessitait des règles particulières pour orienter les réponses à apporter aux problèmes concrets qui découlent d'une occupation de longue durée⁹. Le Rapporteur spécial est d'avis que de telles règles sont nécessaires, y compris des mesures visant à établir des régimes juridiques reconnaissant des droits lorsqu'une occupation dure plus de cinq ans.

16. Malgré les insuffisances du droit existant face à l'occupation prolongée, l'accent mis sur le caractère temporaire et l'objectif conservatoire sous-jacent du droit relatif à l'occupation établissent clairement et indiscutablement que le cadre juridique applicable rend illégales la création et l'expansion des colonies de peuplement israéliennes. Les modifications permanentes apportées de façon délibérée en Cisjordanie et à Jérusalem-Est vont à l'encontre de l'objectif fondamental du droit international humanitaire qui est de préserver les droits de tout peuple occupé.

17. Les obligations qui naissent du droit international humanitaire sont contraignantes non seulement pour les États mais aussi pour les entités non étatiques, comme énoncé dans les Conventions de Genève du 12 août 1949 et le Protocole II (relatif à la protection des victimes des conflits armés non internationaux) et réaffirmé par les tribunaux militaires internationaux de Nuremberg (Allemagne) et pour l'Extrême-Orient (Tribunal de Tokyo). En conséquence, les entreprises commerciales qui sont directement ou indirectement impliquées dans des conflits armés peuvent être tenues responsables de violations du droit international humanitaire. Selon le CICR :

Le droit international humanitaire est contraignant non seulement pour les États, les groupes armés organisés et les soldats, mais aussi pour tous les autres acteurs dont les activités sont étroitement liées à un conflit armé. En conséquence, bien que les États et les groupes armés organisés portent la responsabilité la plus lourde dans l'application du droit international humanitaire, une société commerciale qui mène des activités étroitement liées

⁸ A/HRC/23/21.

⁹ Voir CICR : « Occupation and other forms of administration of foreign territory: expert meeting » (Genève, 2012). Disponible à icrc.org/eng/assets/files/publications/icrc-002-4094.pdf.

à un conflit armé doit aussi respecter les dispositions du droit international humanitaire¹⁰.

L'obligation de rendre des comptes pour les violations du droit international humanitaire ressort clairement de la lecture du droit pénal international, une branche du droit qui comprend de graves violations du droit international humanitaire.

B. Droit international des droits de l'homme

18. En vertu du droit international des droits de l'homme, l'obligation est faite aux États de protéger les droits des individus et des groupes. L'application extraterritoriale des droits de l'homme a été avalisée par différentes instances¹¹. La création de colonies de peuplement en Palestine occupée entraîne de nombreuses violations du droit international des droits de l'homme. Les colons portent atteinte notamment au droit de la propriété, au droit à l'égalité, au droit à un niveau de vie adéquat et au droit à la liberté de circulation¹². Les colonies de peuplement entravent directement l'exercice par Israël de sa responsabilité de protéger les droits de l'homme de la population civile palestinienne.

19. Les obligations incombant aux États comprennent le devoir de protéger la population contre les atteintes aux droits de l'homme commises par des tiers. Les États sont tenus de prendre les mesures voulues pour prévenir les atteintes par des acteurs privés et, lorsque celles-ci se produisent, enquêter à leur sujet et punir les auteurs, et faire en sorte que les victimes obtiennent réparation. De plus, des normes ont été élaborées qui étendent l'applicabilité du droit des droits de l'homme aux entités non étatiques, y compris les entreprises¹³. En conséquence, l'obligation qui incombe aux États et aux entreprises, ainsi qu'à ceux qui agissent au nom de ces entités, de respecter les normes du droit pénal constitue une responsabilité sociale essentielle des entreprises dans le cadre juridique en faveur du respect des droits de l'homme, qui évolue.

20. Des mécanismes d'autorégulation ont été incorporés par de nombreuses entreprises pour assurer le respect des normes éthiques et du droit international¹⁴. L'Organisation des Nations Unies prend des initiatives pour amener les entreprises à prendre en compte les droits de l'homme, par exemple le Pacte mondial, qui a été lancé par le Secrétaire général en 2000. Le Pacte mondial encourage les entreprises

¹⁰ « Business and international humanitarian law » (2006). Disponible à icrc.org/eng/assets/files/other/icrc_002_0882.pdf (en anglais).

¹¹ Voir, par exemple, l'avis consultatif de la Cour internationale de Justice du 9 juillet 2004, par. 109 à 113; « La nature de l'obligation juridique générale imposée aux États parties au Pacte », Observation générale n° 31, CCPR/C/21/Rev.1/Add.13, par. 15 et 18; et Commission publique pour l'examen de l'incident maritime du 31 mai 2010 (la Commission Turkel), « Israel's mechanisms for examining and investigating complaints and claims of violations of the laws of armed conflict according to international law » (février 2013), p. 64. Disponible à turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf.

¹² Voir résolution 2200 A (XXI) de l'Assemblée générale, annexe.

¹³ Voir, par exemple, le Pacte international relatif aux droits civils et politiques, le Pacte international relatif aux droits économiques, sociaux et culturels et la résolution 60/147 de l'Assemblée générale.

¹⁴ Voir, par exemple, OCDE (2011), *Les principes directeurs de l'OCDE à l'intention des entreprises multinationales*, éd. OCDE, disponible à <http://www.oecd.org/fr/daf/inv/mne/48004355.pdf>.

à l'échelle mondiale à volontairement promouvoir et respecter les 10 principes touchant aux droits de l'homme, aux normes du travail, à l'environnement et à la lutte contre la corruption. De plus, en 2011, le Conseil des droits de l'homme a approuvé à l'unanimité les Principes directeurs relatifs aux entreprises et aux droits de l'homme qui donnent des conseils concernant les responsabilités des entreprises commerciales et les mesures nécessaires que les États doivent prendre du fait des obligations qui leur incombent en matière de droits de l'homme.

21. Les Principes directeurs relatifs aux entreprises et aux droits de l'homme sont utiles en tant que cadre d'analyse parce qu'ils « soulignent les mesures que les États doivent prendre pour inciter les entreprises à respecter les droits de l'homme; pour fournir aux entreprises un schéma directeur pour gérer le risque d'incidence négative; et enfin pour offrir une série de repères à l'intention des acteurs afin d'évaluer le respect des droits de l'homme par les entreprises »¹⁵. Une notion essentielle dans les Principes directeurs est celle de diligence raisonnable, qui décrit une procédure de gestion continue, qu'une entreprise raisonnable et prudente se doit de réaliser pour s'acquitter de sa responsabilité en matière de respect des droits de l'homme. Les Principes directeurs décrivent aussi les obligations correspondantes des États, qui comprennent le respect des droits de l'homme (s'abstenir de s'opposer à la jouissance des droits de l'homme, ou de la restreindre); la protection des droits de l'homme (protéger les individus et les groupes contre les violations des droits de l'homme, notamment par des entreprises commerciales) et la mise en œuvre des droits de l'homme (prendre des mesures de discrimination positive pour faciliter l'exercice des droits de l'homme élémentaires)¹⁶. Les Principes directeurs ont été et continueront d'être une référence qui fait autorité pour les gouvernements et les entreprises qui s'intéressent aux droits de l'homme. À ce propos, le Groupe de travail sur la question des droits de l'homme et des sociétés transnationales et autres entreprises a été créé par le Conseil des droits de l'homme¹⁷. Il joue un rôle central pour ce qui est d'élaborer des conseils opérationnels concernant les Principes directeurs, de promouvoir et d'appuyer les efforts déployés pour les appliquer, de faire des recommandations, de conduire des visites de pays et de travailler en étroite coopération avec les organismes compétents des Nations Unies.

C. Droit pénal international

22. Le droit pénal international établit la responsabilité pénale individuelle pour les crimes de guerre, les crimes contre l'humanité et les actes de génocide. Les crimes internationaux prennent en considération la dimension collective de l'infraction, ce qui peut aider à en attribuer certains aspects aux individus impliqués. L'attribution de la responsabilité a été étendue aux entreprises multinationales compte tenu de leur capacité de perpétrer de telles violations. Les entreprises qui investissent dans des gouvernements ou groupes qui sont actifs dans des zones de conflit, qui sont en relation d'affaires avec ceux-ci ou sont impliquées avec ceux-ci d'une autre manière peuvent se retrouver à commettre un crime international ou à faciliter la commission de celui-ci. À ce jour, seules des personnes physiques ont été

¹⁵ Haut-Commissariat des Nations Unies aux droits de l'homme, « La responsabilité des entreprises de respecter les droits de l'homme : Guide interprétatif » (2012); disponible à http://www.ohchr.org/Documents/Publications/HR_PUB_12_2_fr.pdf.

¹⁶ A/HRC/17/31, annexe, par. 1 à 10.

¹⁷ Voir A/HRC/17/4.

poursuivies pour complicité pour crime international¹⁸. Il convient d'être prudent lorsqu'on envisage d'étendre la responsabilité pénale individuelle aux responsables ou employés d'une entreprise. Appliquer le droit pénal international aux entreprises est une nouvelle tendance en droit international¹⁹.

1. Tribunaux spéciaux

23. La jurisprudence des tribunaux pénaux internationaux est utile pour comprendre la notion de complicité. L'affaire *Furundzija* jugée par le Tribunal pénal international pour l'ex-Yougoslavie a fait jurisprudence pour ce qui est d'établir la complicité par aide et assistance. L'assistance apportée doit avoir un effet important sur la perpétration du crime, et la personne aidant ou encourageant doit avoir connaissance que l'assistance fournie contribue à la perpétration d'un crime, même si elle ne partageait pas un objectif commun avec les auteurs²⁰. Le Tribunal a récemment changé la façon dont il aborde la question de la complicité dans l'affaire *Procureur c. Momčilo Perišić*, dans laquelle elle a fait valoir que « le fait que l'aide vise précisément » à faciliter les crimes est à présent un élément constitutif de la complicité par aide et assistance, même s'il n'est pas clairement établi dans quelle mesure cette décision constitue un précédent pour des affaires analogues dont d'autres tribunaux seraient saisis²¹.

2. Cour pénale internationale

24. En vertu de l'article 25 1) du Statut de Rome, la Cour pénale internationale est compétente à l'égard des personnes physiques. Elle n'a pas compétence à l'égard des personnes morales. Toutefois, la Cour pourrait connaître de la participation d'entreprises à des crimes internationaux en jugeant les personnes qui agissent au nom d'une entreprise. Lorsqu'un État devient partie au Statut de Rome, il relève de sa compétence pour les crimes énoncés dans le Statut. La Cour peut exercer sa compétence dans les situations où l'auteur présumé est un ressortissant d'un État partie ou lorsque le crime a été commis sur le territoire d'un État partie. Un État qui n'est pas partie au Statut de la Cour peut accepter la compétence de celle-ci, comme énoncé à l'article 12 3) du Statut de Rome. La Palestine l'a fait en janvier 2009, mais le Procureur alors en exercice a déclaré que la Cour était compétente uniquement à l'égard des États et s'est référé aux décisions de l'Assemblée générale relatives au statut d'État pour déterminer quelles entités constituent un État. Il n'est pas établi clairement si le fait que l'Assemblée ait accordé depuis à la Palestine le statut d'État non membre observateur auprès de l'ONU changera le statut de la Palestine auprès de la Cour²². Israël n'est pas partie au Statut de Rome.

¹⁸ Voir, par exemple, *United States of America v. Carl Krauch et al. (the I. G. Farben case)*, affaire, 29, 30 juillet 1948, *Trials of War Criminals before the Nuernberg Military Tribunals*, United States Government Printing Office, 1952, vol. VIII.

¹⁹ Voir Antje K.D. Heyer, « Corporate complicity under international criminal law: a case for applying the Rome Statute to business behaviour », *Human Rights and International Legal Discourse*, vol. 6 (2012).

²⁰ Tribunal pénal international pour l'ex-Yougoslavie, *Procureur c. Furundzija*, affaire n° IT-95-17/1-T, Chambre de première instance II, 10 décembre 1998, par. 249.

²¹ Tribunal pénal international pour l'ex-Yougoslavie, *Procureur c. Momčilo Perišić*, Chambre d'appel, affaire n° IT-04-81-A, 28 février 2013.

²² Résolution 67/19 de l'Assemblée générale.

25. Le Statut de Rome est la meilleure source d'autorité pour les éléments de complicité dans les crimes internationaux. Les alinéas c) et d) de l'article 25 3) décrivent la responsabilité pour complicité par aide et assistance, aux termes desquels toute personne qui apporte son aide, son concours ou toute autre forme d'assistance à la commission ou à la tentative de commission de crimes visés dans le Statut est individuellement responsable de ces crimes. Une double condition doit être remplie : 1) une contribution substantielle au crime; 2) il faut qu'il y ait eu connaissance de cause et un dessein.

26. En conséquence, les possibilités d'attribuer une responsabilité pénale internationale à des entreprises sont limitées. Selon le Tribunal pénal international pour l'ex-Yougoslavie et la Cour pénale internationale, cette responsabilité doit être attribuée à une personne et non à une entreprise, et cette personne doit savoir que ses actes, du fait du lien de causalité avec le crime international, ont contribué à la perpétration de celui-ci. L'assistance en connaissance de cause (c'est-à-dire la connaissance par une personne du fait que ses actes aident à perpétrer un crime donné) est nécessaire.

27. Le Statut de Rome interdit « le transfert, direct ou indirect, par une puissance occupante d'une partie de sa population civile, dans le territoire qu'elle occupe »²³. Cela fait longtemps que cette information est dans le domaine public, par exemple dans les rapports et résolutions de l'ONU, argument convaincant pour établir que les entreprises menant des activités commerciales avec les colonies de peuplement devraient à présent être pleinement conscientes du fait que les colonies israéliennes violent le droit international. L'argument qu'il convient de développer est la mesure dans laquelle il y a un lien de causalité entre les activités des entreprises et les crimes internationaux perpétrés. Le Tribunal pénal international pour l'ex-Yougoslavie a introduit la notion selon laquelle les activités en question doivent viser expressément à aider à perpétrer un crime. Si l'on décide de suivre la jurisprudence du Tribunal en matière de complicité en ce qui concerne les colonies de peuplement israéliennes, les questions pertinentes concernant une partie des entreprises visées dans le présent rapport et dans le rapport précédent du Rapporteur spécial à l'Assemblée générale sont les suivantes : est-ce que la fourniture de matériel ou de matières premières devant expressément servir à construire des colonies et/ou les infrastructures connexes établit un lien de causalité suffisant avec le transfert de civils israéliens vers la Palestine occupée? Est-ce que l'octroi de prêts ou des transactions financières analogues qui doivent servir expressément à la construction, la rénovation ou l'achat de colonies établit un tel lien de causalité? Est-ce que la publicité, la promotion de la vente et/ou l'identification d'acheteurs de logements dans une colonie établit un tel lien? On ne sait pas à l'heure actuelle si la conception de la complicité que le Tribunal a énoncée dans l'affaire *Perišić* fera autorité dans d'autres affaires à l'avenir.

28. Ce qui est clair, c'est que poursuivre des entreprises pour complicité au niveau international offrirait un moyen d'obtenir réparation. Bien sûr, les conditions de compétence doivent être remplies. Ainsi, l'État à partir duquel l'entreprise et ses employés mènent leurs activités doit être partie au Statut de Rome pour que le tribunal puisse connaître de l'affaire. La notion de complicité ne se limite pas toutefois au droit pénal international. D'autres mécanismes judiciaires tels que les

²³ L'article 8 2) b) viii) du Statut de Rome interdit un éventail d'actes plus large que l'article 49 6) de la quatrième Convention de Genève.

juridictions internes pourraient éventuellement poursuivre les entreprises ou leurs employés pour leur implication dans des crimes internationaux.

3. Responsabilité civile

29. Le droit interne peut constituer un moyen d'obliger les entreprises à rendre des comptes pour des violations du droit international. La responsabilité civile est conforme au principe de complémentarité, qui souligne le rôle des régimes juridiques internes dans le respect du droit international. La responsabilité civile des entreprises présente l'avantage d'offrir réparation et compensation aux victimes des violations²⁴. Nonobstant le fait que les procédures judiciaires devant les juridictions internes ont de manière générale peu progressé dans le domaine de la complicité des entreprises, notamment en ce qui concerne les colonies de peuplement, il est établi que la responsabilité civile des entreprises peut être engagée pour le comportement illicite des agents de sociétés²⁵. Il ne fait aucun doute qu'à l'avenir les juridictions nationales connaîtront d'affaires sur cette question²⁶. Le Haut-Commissaire des Nations Unies aux droits de l'homme a énoncé plusieurs raisons pour lesquelles la responsabilité civile est un moyen important d'engager la responsabilité d'une entreprise pour complicité :

Premièrement, le droit international oblige les États à fournir un recours effectif aux victimes de violations des droits de l'homme. Deuxièmement, la responsabilité civile des entreprises contribue à faire respecter le principe juridique international de responsabilité en assurant que les auteurs de violations des droits de l'homme rendent compte de leurs actes. Troisièmement, conformément au principe de complémentarité, le droit international s'appuie nécessairement sur des mécanismes juridictionnels internes pour assurer la protection effective des droits de l'homme. Enfin, engager la responsabilité civile des entreprises qui sont complices de graves violations des droits de l'homme est un moyen qui permet de régler les griefs de façon ordonnée. Sans des mécanismes juridiques efficaces permettant aux victimes de graves violations des droits de l'homme d'obtenir réparation, ces victimes seraient susceptibles de recourir à des mesures extrajudiciaires pour régler des torts perçus, menaçant ce faisant l'ordre juridique et social établi²⁷.

4. Tribunaux de la société civile

30. Des initiatives de la société civile contribuent grandement à informer le public du non-respect par Israël du droit international. Ainsi, le Tribunal Russell sur la Palestine a consacré sa session de 2010 tenue à Londres à la responsabilité des

²⁴ Commission internationale de juristes, *Complicité des entreprises et responsabilité juridique*, vol. 3 (2008), p. 4.

²⁵ Concernant des actions en justice récentes, voir Cour suprême des États-Unis, *Kiobel v. Royal Dutch Petroleum*, 569 U.S. ____ (2013) pour les limitations du *Alien Tort Statute*; le classement sans suite par le bureau du Procureur général des Pays-Bas de l'action intentée contre Riwal; et la décision de la Cour d'appel de Versailles qui a rejeté la responsabilité des sociétés françaises participant à la construction du tramway traversant la ville de Jérusalem, disponible à www.volokh.com/wp-content/uploads/2013/04/French-Ct-decision.pdf.

²⁶ Les sociétés et autres personnes morales peuvent être poursuivies pour génocide et crimes contre l'humanité en vertu de l'article 213-3 du Code et de la loi canadienne sur les crimes contre l'humanité et les crimes de guerre.

²⁷ Exposé d'*amicus curiae* Navi Pillay, p. 3, in *Kiobel c. Royal Dutch Petroleum*.

entreprises. De telles initiatives permettraient d'exercer des pressions de façon constructive en vue de faire respecter les normes relatives à la responsabilité des entreprises si les modes préférés de respect volontaire ne permettent pas de faire respecter les normes juridiques et morales²⁸.

D. Conclusions relatives à un cadre normatif

31. Il convient de noter que les voies de recours qu'offrent le droit pénal et le droit civil n'exigent pas que la responsabilité de l'auteur principal soit engagée avant qu'un auteur secondaire puisse être poursuivi. Les difficultés rencontrées pour engager la responsabilité des gouvernements ou des groupes armés pour de graves violations du droit international font que l'entreprise, dans la plupart des affaires d'implication présumée d'entreprises dans ces violations, est poursuivie indépendamment de l'acteur principal²⁹.

32. Une grande partie de l'analyse juridique a abouti à une discussion portant sur le droit pénal international et son concept de complicité des entreprises³⁰. L'importance de la complicité, toutefois, transcende la justice pénale internationale. Elle a été étendue au respect de la responsabilité sociale des entreprises et des normes relatives aux droits de l'homme. Les Principes directeurs relatifs aux entreprises et aux droits de l'homme se réfèrent au droit pénal international en ce qu'il traite de la complicité des entreprises du fait des violations des droits de l'homme. Ce type d'initiative contribue à traduire les normes relatives à la responsabilité pénale internationale par des directives à l'intention des entreprises visant à ce qu'elles mènent leurs activités de façon à éviter que leur responsabilité ne soit engagée du fait de violations et d'atteintes, par exemple en exerçant une diligence raisonnable.

IV. Études de cas

33. Comme noté dans le rapport précédent du Rapporteur spécial sur cette question, des entreprises fort diverses opèrent dans les colonies de peuplement. Le Rapporteur spécial a enquêté sur 13 entreprises, dont plusieurs israéliennes et d'autres internationales, certaines liées à l'occupation de manière générale, d'autres aux colonies de peuplement en particulier. Dans le présent rapport, le Rapporteur spécial met l'accent sur deux domaines distincts qui touchent aux colonies, le premier étant les institutions bancaires qui sont impliquées dans les transactions financières telles que l'octroi de prêts pour construire ou acquérir des colonies de peuplement israéliennes. L'entreprise que le Rapporteur spécial a étudiée est le groupe Dexia, un groupe bancaire européen. Cette étude s'appuie sur l'analyse du groupe Dexia que le Rapporteur spécial a présentée dans son précédent rapport. Le second domaine sur lequel le Rapporteur spécial appelle l'attention, ce sont les sociétés immobilières qui font de la publicité pour des biens immobiliers dans les

²⁸ www.russelltribunalonpalestine.com/en/sessions/london-session.

²⁹ Commission internationale des juristes, *Complicité des entreprises et responsabilité juridique*, vol. 1 (Genève, 2008), p. 22.

³⁰ Afin de respecter la taille limite des rapports, la présente analyse se limite à la responsabilité des entreprises du fait des activités liées aux colonies de peuplement. Cependant, l'analyse pourrait être étendue à tous les aspects de l'occupation.

colonies et qui vendent ces biens. Les activités de Re/Max International, une entreprise basée aux États-Unis, sont l'objet d'une analyse dans le présent rapport. Ces deux études de cas visent à déterminer si le groupe Dexia et Re/Max International, en octroyant des crédits et des prêts hypothécaires et en faisant de la publicité pour des biens immobiliers dans les colonies et en vendant ces biens, fournissent une assistance en connaissance de cause qui revient à aider à commettre des crimes internationaux liés au transfert de ressortissants de la Puissance occupante dans le territoire occupé. Le Rapporteur spécial réitère que les entreprises retenues le sont à titre d'exemple et qu'il existe d'autres entreprises qui tirent profit des activités de colonisation israéliennes, tant dans le secteur des services économiques dans lequel le groupe Dexia et Re/Max International travaillent que dans d'autres secteurs liés aux biens et services.

A. Groupe Dexia

34. Le groupe Dexia mène ses activités dans les domaines de la banque de détail et commerciale, du financement du secteur public et des activités bancaires de gros, de la gestion d'actifs et des services aux investisseurs. Le Rapporteur spécial a déjà parlé des activités de Dexia Israël Bank Limited (Dexia Israël), dont le groupe Dexia est l'actionnaire majoritaire, qui consistent à octroyer des prêts aux Israéliens qui vivent dans des colonies situées en Cisjordanie.

35. Depuis le rapport précédent du Rapporteur spécial, le groupe Dexia a continué d'appliquer son plan révisé de résolution ordonnée, qui a été mis en place du fait de la crise de la dette souveraine en Europe. En janvier 2013, la Belgique, la France et le Luxembourg ont signé une convention de garantie de liquidité tripartite en faveur de Dexia Crédit Local. Le capital du groupe Dexia est à présent détenu à hauteur de 94 % par la Belgique et la France (50,02 % par la Belgique et 44,38 % par la France)³¹. En 2012, le groupe Dexia a déclaré que sa participation dans Dexia Israël devrait être cédée dans les 12 mois suivant une décision définitive sur les différentes actions judiciaires engagées contre Dexia Israël et Dexia Crédit Local en tant qu'actionnaires³². Il est déclaré dans un communiqué de presse publié en mai 2013 qu'aucun développement important n'était survenu dans ce dossier, et dans le rapport sur le premier semestre que les litiges opposant les actionnaires minoritaires et Dexia Israël ne sont pas réglés, mais les activités bancaires de celle-ci ne sont pas mentionnées³³.

36. Le Rapporteur spécial a déjà noté que le groupe Dexia était membre du Pacte mondial et qu'au début de l'année 2012, il n'avait pas présenté une communication sur ses progrès réalisés dans l'application des critères fixés par les membres du Pacte. Le Rapporteur spécial a appris qu'en avril 2013, le groupe Dexia s'était retiré

³¹ Communiqué de presse du groupe Dexia du 3 juillet 2013, disponible à www.dexia.com/FR/Journaliste/communiques_de_presse/Documents/20130703_CP_Dexia_emission_dette_garantie_FR.pdf.

³² Groupe Dexia, « Rapport annuel 2012 » (Bruxelles, 2012), p. 76. Disponible à www.dexia.com/FR/actionnaires_investisseurs/actionnaires_individuels/publications/Documents/RA_2012_FR.pdf.

³³ Communiqué de presse du groupe Dexia du 8 mai 2013. Disponible à www.dexia.com/FR/Journaliste/communiques_de_presse/Documents/20130508_CP_resultats_1T_FR.pdf; communiqué de presse du groupe Dexia du 7 août 2013. Disponible à <http://hugin.info/152020/R/1721539/573366.pdf>.

du Pacte, fait inquiétant dans l'optique des efforts déployés pour assurer l'application des directives du Pacte³⁴.

37. Depuis plusieurs années, l'ancien président et le président en exercice du groupe Dexia (Jean-Luc Dehaene et Karel De Boeck) déclarent qu'aucun nouveau contrat touchant aux colonies de peuplement n'a été signé. L'organisation non gouvernementale belge Intal, mouvement de solidarité internationale, remet en question l'exactitude de cette position. Il ressort des recherches effectuées par Intal que de nouveaux prêts continuent d'être accordés aux fins de la construction et de l'expansion de colonies de peuplement, portant le montant total des prêts à 35 millions d'euros³⁵. Selon Intal, en novembre 2012, Dexia Israël a réalisé un audit financier positif pour les colonies Elkanah et Karnai Shomron et continue à fournir des services pour faciliter le développement des colonies. Ainsi, les colonies Ariel et Kedumim peuvent ouvrir des comptes auprès de Dexia Israël pour recevoir les subventions de la Loterie nationale israélienne (Mifal Hapais)³⁶. Mifal HaPais utilise les recettes tirées de la loterie pour apporter un appui à différents projets publics dans les domaines de la santé, de l'éducation et des arts. Les colonies sont un de ces projets publics et reçoivent à ce titre des subventions de la loterie qui sont transférés par l'intermédiaire de Dexia Israël. Who Profits, une organisation non gouvernementale israélienne, a elle aussi effectué des recherches sur Dexia Israël. Selon leurs conclusions, Mifal HaPais a accordé des subventions en 2012 à des municipalités et des conseils régionaux israéliens, qui visaient expressément à fournir un appui à la construction d'installations dans les colonies, telles que des écoles et des centres communautaires, fonds qui ont dans leur totalité été transférés par l'intermédiaire de Dexia Israël³⁷. Il convient de noter que les activités de Dexia Israël ont aussi compris la gestion de comptes bancaires de particuliers et de prêts hypothécaires accordés à des acheteurs de logements³⁸.

38. La responsabilité du groupe Dexia peut-elle être engagée pour les prêts hypothécaires et les crédits accordés par Dexia Israël à des colonies de peuplement israéliennes? En tant que filiale du groupe Dexia (le groupe Dexia possède la totalité des actions de Dexia Crédit Local, qui possède 65 % de Dexia Israël), il existe de solides arguments pour imputer les activités de Dexia Israël au groupe Dexia. La méthodologie de l'analyse juridique énoncée plus haut sera appliquée à cette étude de cas en vue d'évaluer si cette argumentation est fondée. L'analyse en question considèrerait les entreprises de manière générale, mais on constate qu'il est accepté que la responsabilité pénale des fournisseurs de services financiers soit engagée pour aide et assistance à la commission de crimes. La Commission internationale des juristes a déclaré que :

La responsabilité pénale d'un financier va dépendre de ce qu'il savait sur la manière dont ses services et prêts allaient être utilisés et de l'influence effective de ces services sur la commission du crime. La responsabilité pénale d'un banquier ou d'un financier qui soutient de manière générale un projet ou

³⁴ Voir unglobalcompact.org/participant/2887-Dexia-Group.

³⁵ Voir intal.be/files/20101121_written_statement_RToP_Dexia_-_mario_franssen.pdf et intal.be/fr/article/dexia-et-son-principal-actionnaire-la-belgique-se-portent-garant-pour-couvrir-un-projet-de-l.

³⁶ Voir intal.be/files/20101121_written_statement_RToP_Dexia_-_mario_franssen.pdf.

³⁷ Rapport de recherche de Who Profits communiqué au Rapporteur spécial, juillet 2013.

³⁸ Who Profits, « Financing the Israeli occupation » (2010). Disponible à whoprofits.org/content/financing-israeli-occupation.

son organisation risque moins d'être engagée que celle d'un financier qui facilite des activités criminelles en connaissance de cause, en les finançant ou en gérant les bénéfices tirés de ces crimes³⁹.

1. Droit international humanitaire

39. Les transactions de Dexia Israël avec les colonies de peuplement israéliennes font du groupe Dexia une entreprise commerciale impliquée dans l'occupation de la Palestine et sa responsabilité peut donc être engagée pour violation du droit international humanitaire. Les colonies sont illégales parce qu'elles sont construites sur des terres occupées. Elles sont étroitement liées au conflit qui perdure et à l'occupation de guerre. Les activités de Dexia Israël facilitent la croissance des colonies, ce qui prouve que le groupe Dexia, actionnaire majoritaire, est complice d'une violation du droit international parce qu'en transférant des éléments de la population israélienne en Palestine occupée, Israël viole l'article 49 6) de la quatrième Convention de Genève, ce qui, du fait de son échelle et de l'intention, constitue un crime de guerre à première vue.

40. De plus, en tant qu'États parties aux Conventions de Genève, il incombe à la Belgique et à la France de respecter et de faire respecter les Conventions. À l'heure actuelle, elles sont les actionnaires majoritaires d'une entreprise qui accorde des crédits et des prêts hypothécaires à des colonies de peuplement en Palestine occupée et, en tant que telles, manquent à leur obligation de faire respecter les Conventions.

2. Droit international des droits de l'homme

41. Dexia Israël, par les transactions avec les colonies, est complice par aide et assistance de la commission d'atteintes aux droits de l'homme touchant au droit à la propriété, au droit à l'égalité, au droit à un niveau de vie suffisant, au droit à la liberté de circulation, entre autres droits de l'homme. Les Principes directeurs relatifs aux entreprises et aux droits de l'homme traitent du rapport qui existe entre la complicité et la notion de diligence raisonnable : « Il peut y avoir complicité lorsque l'entreprise commerciale contribue, ou paraît contribuer, à des incidences négatives sur les droits de l'homme causées par des tiers⁴⁰. » Le groupe Dexia étant actionnaire majoritaire, sa responsabilité est engagée. La Belgique et la France assument aussi la responsabilité de prendre des mesures pour prévenir et sanctionner les activités d'acteurs privés au sein du groupe Dexia qui ont violé la loi¹⁶. De plus, en tant que propriétaires du groupe Dexia, la Belgique et la France ont expressément le devoir de prendre les mesures nécessaires en réponse aux atteintes aux droits de l'homme, y compris concernant les activités de sa filiale Dexia Israël qui apporte un appui à la croissance des colonies. En manquant à ce devoir, ces États n'exécutent pas les obligations qui leur incombent en vertu des traités relatifs aux droits de l'homme, tels que le Pacte international relatif aux droits civils et politiques et le Pacte international relatif aux droits économiques, sociaux et culturels. Ce devoir est reconnu par les Principes directeurs, qui soulignent que lorsqu'un État contrôle une entreprise, une violation commise par celle-ci peut constituer aussi une violation par l'État des obligations qui lui incombent en vertu du droit international⁴¹. Si un État

³⁹ Commission internationale de juristes, *Complicité des entreprises et responsabilité juridique*, vol. 2 (Genève, 2008), p. 45.

⁴⁰ A/HRC/17/31, annexe, par. 17.

⁴¹ A/HRC/17/31, annexe, par. 4.

possède ou contrôle une entreprise, il a les moyens directs de veiller à ce que les politiques, législations et règlements concernant le respect des droits de l'homme soient appliqués⁴².

42. Les mécanismes d'autorégulation au sein des entreprises sont utiles pour évaluer la responsabilité qui pourrait être engagée du fait de violations éventuelles des droits de l'homme⁴³. Il est regrettable que le groupe Dexia se soit retiré du Pacte mondial. L'observation du Rapporteur spécial mentionnée dans son rapport précédent faisant état du fait que le groupe était en retard dans la présentation de ses informations visait à l'inciter à se conformer à ses obligations, mais il semblerait que le groupe ait malheureusement choisi une ligne de conduite opposée.

3. Droit pénal international

43. La responsabilité pénale individuelle du fait d'activités de Dexia Israël pourrait s'étendre à des employés du groupe Dexia. La Belgique et la France étant parties au Statut de Rome, leurs nationaux relèvent de la compétence de la Cour pénale internationale. En conséquence, les employés du groupe Dexia pourraient faire l'objet de poursuites pour complicité des crimes de guerre consistant en la création de colonies de peuplement dans le territoire occupé de Palestine. À titre d'exemple, considérons la proposition de Dexia Israël d'accorder un prêt d'un montant de 2,5 millions de shekels à la colonie Ariel. Ariel est l'une des colonies les plus anciennes et les plus connues de Cisjordanie. Si Dexia Israël octroie des prêts hypothécaires aux acheteurs de logements ou au conseil régional, ou si elle offre des services pour des dons effectués par Mifal HaPais, ces formes d'assistance contribuent directement à la croissance de la colonie et, partant, facilitent matériellement le transfert de citoyens israéliens dans le territoire occupé. Sur la base des informations dont dispose le Rapporteur spécial, il y a une base raisonnable pour conclure que les activités de Dexia Israël fournissent une assistance financière aux fins de la construction, de la viabilité et de l'entretien de colonies telles qu'Ariel et Kedumim. Il est raisonnable de supposer que Dexia Israël est pleinement consciente des activités pour lesquelles elle fournit un appui financier et en conséquence elle aide en connaissance de cause à créer et à entretenir des colonies. À son tour, on peut considérer qu'en étant propriétaire de la banque à hauteur de 65 %, le groupe Dexia a connaissance des prêts accordés par sa filiale, et par conséquent la responsabilité pénale individuelle des employés du groupe qui ont connaissance des activités de la filiale en Israël peut être engagée.

4. Responsabilité de l'État

44. Outre la responsabilité pénale individuelle, la question de la responsabilité de l'État se pose dans le cadre de la présente analyse. Lorsqu'un État commet un acte internationalement illicite (complicité d'un crime de guerre), il est obligé de mettre fin à cet acte et d'offrir des assurances de non-répétition. En l'occurrence, il semblerait que la Belgique et la France devraient veiller à ce que Dexia Israël cesse d'accorder ces prêts et de transférer les subventions du Gouvernement israélien aux colonies et aux activités liées aux colonies. En outre, l'État responsable est tenu de

⁴² Haut-Commissariat des Nations Unies aux droits de l'homme, « La responsabilité des entreprises de respecter les droits de l'homme : guide interprétatif » (2012), p. 25; voir aussi A/HRC/17/31, annexe, par. 14.

⁴³ A/HRC/17/31, annexe, par. 15 et 16.

réparer intégralement le préjudice causé par le fait illicite. Dans ce cas précis, la Belgique et la France pourraient devoir réparer le préjudice subi par les Palestiniens résultant de la réception par les colonies de peuplement de crédits et de prêts hypothécaires accordés par Dexia Israël. La réparation du préjudice prend la forme de restitution, d'indemnisation et de satisfaction. Le fait qu'à présent Dexia appartienne à des États signifie que la responsabilité de l'État et la responsabilité pénale individuelle sont des formes de responsabilité à envisager. Vu l'inquiétude et les objections exprimées par l'Union européenne à l'égard des activités de peuplement, l'exercice de pressions par le monde politique et la société civile sur les Gouvernements belge et français pour les inciter à vendre la participation de l'État dans Dexia Israël pourrait être la mesure la plus appropriée à prendre pour obtenir le respect tardif des règles⁴⁴.

5. Responsabilité civile

45. Des actions ont été intentées auprès des juridictions internes contre des institutions financières, mais elles ont abouti à des verdicts différents⁴⁵. Dans la plupart des juridictions, il faut prouver que les banques étaient au courant de l'activité illicite de l'emprunteur qu'elles finançaient et qu'elles pouvaient prévoir les effets du prêt et les conséquences préjudiciables qui résulteraient de la transaction⁴⁶. Il serait par conséquent possible d'engager la responsabilité civile du groupe Dexia en tant qu'institution, de particuliers travaillant au sein de la société et/ou de la Belgique et/ou de la France en qualité de propriétaires. La récente décision de la cour d'appel de Versailles concernant le tramway traversant la ville de Jérusalem indique qu'il est difficile, en France au moins, d'établir la responsabilité civile devant une juridiction. Toutefois, l'acceptation par les juridictions belges de la notion de compétence universelle donne à penser que la Belgique est mieux à même de répondre favorablement à une telle initiative⁴⁷.

46. S'agissant de la responsabilité civile, certaines entités financières ont fait preuve d'une prise de conscience accrue de la responsabilité sociale de l'entreprise et des ramifications juridiques potentielles liées aux colonies de peuplement israéliennes. Le Fonds de pension gouvernemental-Étranger norvégien a retiré de son portefeuille d'investissements l'entreprise de construction Shikun & Binui à cause de la participation de celle-ci à la construction de colonies de peuplement. Le Conseil d'éthique de quatre des principaux fonds de pension suédois a retiré ses investissements de la société Elbit Systems du fait de son implication dans la construction et l'entretien du mur. La caisse de retraite néo-zélandaise a retiré ses

⁴⁴ Voir Union européenne, « Statement by the Spokesperson of the High Representative Catherine Ashton on renewed plans for Israeli settlements in and around East Jerusalem », 31 mai 2013. Disponible à consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/137350.pdf.

⁴⁵ Voir, par exemple, *South African Apartheid Litigation*, 617 F. Supp. 2d 228, p. 260 à 262 (S.D.N.Y. 2009) et *Almog c. Arab Bank*, 471 F. Supp. 2d at 257 (E.D.N.Y. 2007).

⁴⁶ Voir Juan Pablo Bohoslavsky et Veerle Openhaffen, « The past and present of corporate complicity: financing the Argentinean dictatorship », *Harvard Human Rights Journal*, vol. 23 (2010).

⁴⁷ Il convient de noter que du fait de questions soulevées dans le cadre de l'affaire *Sharon* (arrêt de la Cour de Cassation du 24 septembre 2003), dont la Cour était alors saisie, les législateurs en Belgique ont abrogé la loi belge du 16 juin 1993 et adopté une nouvelle loi concernant la répression des infractions graves au droit humanitaire (loi du 5 août 2003), qui nécessite un lien de rattachement direct avec la Belgique pour que les juridictions belges soient compétentes pour connaître d'une affaire.

investissements des sociétés Elbit Systems, Africa Israel et sa filiale Danya Cebus, et Shikun & Binui, à cause de leur participation à la construction de colonies de peuplement ou du mur⁴⁸.

47. Des comités d'investissement ont recommandé que les grandes banques européennes refusent d'accorder une assistance financière aux entreprises israéliennes qui fabriquent, construisent ou vendent des produits en Palestine et aux banques qui accordent des prêts hypothécaires aux constructeurs ou aux acheteurs de logements qui y sont situés. Dexia rentrerait dans cette dernière catégorie. Selon le journal israélien *Ha'aretz*, ces recommandations ont été suspendues à la suite des pressions exercées par Israël dans le cadre d'une initiative conduite par les États-Unis⁴⁹. Néanmoins, les recommandations, la réaction du Gouvernement israélien et les articles parus dans la presse israélienne indiquent que les institutions financières sont de plus en plus préoccupées par leurs responsabilités juridiques et éthiques liées aux transactions ayant un lien avec les colonies de peuplement.

B. Re/Max International

48. Re/Max International est une société immobilière privée sise aux États-Unis qui est dotée d'un réseau international d'agences détenues et exploitées par des franchisés. Re/Max International perçoit 1 % des revenus et un montant forfaitaire par associé⁵⁰. Re/Max International fournit au titre de franchises l'affiliation à sa marque internationale et la reconnaissance de celle-ci, une formation au démarrage, une formation continue, des ressources technologiques et un appui en matière de publicité et de marketing⁵¹. Re/Max Israël est une franchise de Re/Max International. Elle a ouvert en 1995 et compte plus de 100 agences, y compris dans des colonies de peuplement situées en Cisjordanie. Les agences israéliennes font de la publicité pour des biens immobiliers et se chargent de la vente de logements dans les colonies en Cisjordanie⁵². L'agence à Jérusalem de la franchise Re/Max Israël, appelée Re/Max Vision, cible les clients internationaux susceptibles de vouloir acheter un logement à l'intérieur et autour de Jérusalem⁵³. Re/Max International assure la promotion des mêmes biens sur son site Web. Une recherche effectuée en juin 2013 sur son site Web a révélé que 51 habitations situées dans neuf colonies faisaient ainsi l'objet d'une annonce⁵⁴.

49. Re/Max International peut-elle être tenue responsable des biens immobiliers situés dans des colonies de peuplement vendus par Re/Max Israël? En fournissant l'affiliation à sa marque internationale et la reconnaissance de celle-ci, une formation au démarrage, une formation continue, des ressources technologiques et

⁴⁸ Jan Willem van Gelder, Barbara Kuepper et Ewoud Nijhof, « Dutch economic links with the occupation », research paper prepared for Cordaid (Amsterdam, Profundo, 2013), p. 17. Disponible à cordaid.org/media/publications/Report_Dutch_economic_links_with_the_occupation_1.pdf; voir également Norwegian People's Aid, « Dangerous liaisons: Norwegian ties to the Israeli occupation » (2012). Disponible à npaid.org/Media/20_Files/Om-oss/Annual-reports/Dangerous-liaisons.

⁴⁹ « Danger ahead: an Israel boycott », éditorial de *Ha'aretz*, 14 juillet 2013.

⁵⁰ Voir remax-franchise.com/fs/home/general_content/faqs.

⁵¹ Voir emax-franchise.com/fs/helping-you-succeed/training-and-support.

⁵² Voir remax-israel.com/OfficeProfile.aspx?OfficeID=5012.

⁵³ Voir remax-capital.com/new/html/project_2_about.php.

⁵⁴ <http://global.remax.com>.

un appui en matière de publicité et de marketing, ainsi qu'en tirant profit de ces ventes, Re/Max International entretient des relations constantes avec ses franchises et exerce une influence continuelle sur celles-ci. Comme pour l'étude de cas concernant le groupe Dexia, la méthodologie utilisée dans le cadre de l'analyse juridique énoncée ci-dessous visera à évaluer si l'argumentation est fondée du point de vue juridique.

1. Droit international humanitaire

50. Promouvoir la vente, par exemple en faisant de la publicité, de biens immobiliers qui sont situés sur une colonie de peuplement ou en font partie, ou vendre ces biens contribue à la commission du crime international qui consiste à transférer des citoyens d'une puissance occupante dans le territoire occupé. En fait, faire de la publicité sur ces biens ou les vendre à des nationaux de la puissance occupante constituent par excellence des cas de participation à ces transferts.

2. Droit international humanitaire

51. La responsabilité de respecter les droits de l'homme exige des entreprises qu'elles évitent de contribuer à des incidences négatives sur les droits de l'homme et qu'elles atténuent ces incidences si elles sont directement liées à leurs activités⁵⁵. Re/Max International, en vendant des biens immobiliers situés sur des terres palestiniennes, contribue directement à des incidences négatives sur les droits de l'homme, telles que les restrictions imposées à la liberté de circulation qui entravent l'accès des Palestiniens aux terres, qui sont souvent utilisées à des fins agricoles, et des immixtions arbitraires et illégales dans la vie privée, la famille et le domicile des Palestiniens⁵⁶. Les États parties au Pacte international relatif aux droits civils et politiques sont tenus de réglementer la conduite des groupes privés et de veiller à ce que cette conduite n'entraîne pas des violations des droits de l'homme et, lorsque cela se produit, d'assurer l'accès à un recours effectif.

52. Le code déontologique de Re/Max International énonce que ses affiliés s'engagent à éliminer toute pratique suivie par des professionnels de l'immobilier dans leur communauté susceptible de porter préjudice au public⁵⁷. Cette déclaration révèle deux choses. Premièrement, si la population palestinienne est considérée comme faisant partie du public en Israël (étant donné qu'Israël exerce le contrôle effectif de la population), alors la création de colonies de peuplement porte clairement préjudice à ce segment du public. Deuxièmement, le code déontologique s'étend aux affiliés de Re/Max International, qui font partie de sa « communauté », ce qui confirme une fois encore le lien existant entre la société internationale et ses franchises locales.

3. Droit pénal international

53. Ni les États-Unis ni Israël ne sont parties au Statut de Rome, donc il serait difficile de porter plainte contre un employé de Re/Max International pour complicité, sauf si ledit employé est un ressortissant d'un État partie au Statut de

⁵⁵ A/HRC/17/31, annexe, par. 13.

⁵⁶ Voir résolution 2200 A (XXI) de l'Assemblée générale, annexe, art. 12 et 17, et la plainte individuelle déposée par le Conseil norvégien des réfugiés au Comité des droits de l'homme le 28 février 2013.

⁵⁷ Voir, par exemple, remax.lu/agence-immobiliere-qualite/.

Rome. S'agissant du lien de causalité entre Re/Max International et ses franchises, le fait que sur son site Web sont affichées des annonces concernant la vente de ces biens immobiliers qui sont situés dans les colonies de peuplement prouve que l'entreprise est au courant de ces ventes et qu'elle perçoit 1 % des revenus tirés de chaque vente. Une fois encore, en fournissant l'affiliation à sa marque internationale et la reconnaissance de celle-ci, une formation au démarrage, une formation continue, des ressources technologiques et un appui en matière de publicité et de marketing, Re/Max International entretient des relations constantes avec ses franchises et exerce une influence continue sur celles-ci. Le Rapporteur spécial considère qu'il est possible de solidement argumenter que cela constitue une assistance en connaissance de cause à la commission d'un crime. De plus, le lien explicite existant entre différents vendeurs et la promotion et la vente des logements situés dans les colonies de peuplement israéliennes accroît fortement les chances d'engager la responsabilité individuelle de ces personnes pour les crimes considérés.

4. Responsabilité civile

54. La responsabilité civile des entreprises pour complicité pourrait s'avérer être un moyen plus difficile d'obtenir réparation dans ce cas. La décision de la Cour suprême des États-Unis dans l'affaire *Kiobel c. Royal Dutch Petroleum Co.* entrave l'engagement de poursuites judiciaires contre des entreprises sur le fondement de l'*Alien Tort Statute*, qui avait constitué un mécanisme précieux pour engager la responsabilité des entreprises pour violation du droit international⁵⁸. Il serait donc difficile de poursuivre Re/Max International aux États-Unis pour complicité des entreprises. Toutefois, il serait possible d'intenter une action en justice afin d'engager la responsabilité civile de personnes au sein de l'entreprise Re/Max International pour le rôle qu'elles jouent en fournissant une aide en connaissance de cause à la commission d'un crime sous forme de publicité et d'autres formes d'appui administratif aux fins de la vente par Re/Max Israël de biens immobiliers situés en Cisjordanie, y compris Jérusalem-Est. En outre, les Principes directeurs relatifs aux entreprises et aux droits de l'homme soulignent que les États doivent prendre des mesures appropriées pour assurer, par le biais de moyens judiciaires, administratifs ou législatifs, l'accès à un recours effectif⁵⁹.

55. Les agents immobiliers qui promeuvent ou vendent des biens immobiliers situés dans les colonies de peuplement en Palestine à des citoyens de la Puissance occupante peuvent être tenus responsables pour complicité dans la commission du crime consistant à faciliter les activités de colonisation dans un territoire occupé. La présente étude de cas a porté sur Re/Max International, mais la même analyse s'appliquerait à d'autres sociétés immobilières. L'inexistence à l'heure actuelle d'une voie de recours devant un tribunal des États-Unis ne signifie pas qu'il n'en n'existe pas dans d'autres systèmes juridiques nationaux.

⁵⁸ L'*Alien Tort Statute* est un instrument juridique qui permet aux plaignants d'intenter une action civile auprès de tribunaux fédéraux de première instance (tribunaux de district) des États-Unis contre des personnes, y compris des étrangers qui ont agi en dehors du territoire américain, pour avoir violé le droit international.

⁵⁹ A/HRC/17/31, annexe, par. 25 et 26.

C. Conclusions sur les études de cas

56. Le présent rapport a proposé un modèle d'analyse juridique en mettant l'accent sur deux entreprises retenues pour les raisons particulières pour lesquelles leurs activités pourraient engager leur responsabilité dans des crimes internationaux. Ce modèle juridique peut s'appliquer à d'autres situations et à d'autres entreprises. Le Rapporteur spécial souligne une fois encore que les entreprises dont il est question ici ne sont que des exemples; toutefois, il est possible de tirer des conclusions de ces études.

57. Les institutions financières et les agents immobiliers peuvent être tenus responsables pour les liens qu'ils entretiennent avec des colonies de peuplement en Palestine occupée. Les pressions exercées par la communauté internationale en vue de faire respecter le droit international ne se limitent plus aux États en tant que responsables au premier chef. Les entreprises, les particuliers et les groupes peuvent être impliqués pour un comportement qui contribue à la commission d'actes illicites. Le groupe Dexia et Re/Max International, chacun à sa façon, contribuent à la croissance des colonies de peuplement : Dexia en fournissant des services financiers liés aux colonies, Re/Max International en vendant des biens immobiliers. Quant à l'évaluation du lien de causalité avec la politique et la pratique suivies par Israël consistant à transférer des nationaux en Palestine, elle doit être largement fondée sur le lien entre les entreprises internationales et les activités de peuplement. Est-ce que les activités des entreprises internationales contribuent directement aux violations du droit international que constituent les colonies de peuplement? Jouer volontairement un rôle causal dans la commission d'un crime peut dans certains cas suffire pour établir la complicité du crime.

V. Eau et assainissement en Cisjordanie et dans la bande de Gaza

58. Au cours de la mission effectuée par le Rapporteur spécial dans la bande de Gaza en décembre 2012, un certain nombre d'interlocuteurs se sont déclarés gravement préoccupés par le manque d'eau potable et d'installations d'assainissement adéquates dans la bande de Gaza. Une partie de ces questions ont été traitées brièvement dans le précédent rapport du Rapporteur spécial au Conseil des droits de l'homme⁸. Eu égard au contrôle quasi exclusif qu'exerce Israël sur l'ensemble des ressources en eau souterraine et en eau de surface en Palestine, le Rapporteur spécial se déclare à nouveau préoccupé par la crise de l'eau et de l'assainissement engendrée par l'occupation.

La situation dans la bande de Gaza

59. Dans la bande de Gaza, 90 % de l'eau située dans l'aquifère côtier sous la bande de Gaza est impropre à la consommation humaine du fait de la pollution causée par les eaux brutes d'égouts et à l'infiltration d'eau de mer. En 2012, l'ONU a indiqué que l'aquifère côtier, dont la bande de Gaza dépend presque complètement, pourrait devenir inutilisable dès 2016, cette détérioration devenant irréversible d'ici à 2020. L'eau de distribution polluée a contraint de nombreuses familles à acheter de l'eau coûteuse à des vendeurs extérieurs ou à recourir à de l'eau de mer dessalée fournie par la Compagnie de distribution d'eau des

municipalités côtières, ce qui constitue un fardeau déraisonnable vu le revenu moyen des ménages, qui sont déjà en difficulté à un niveau de subsistance ou en dessous. Dans ces circonstances, la plupart des Gazaouis consomment en moyenne 70 à 90 litres d'eau par personne et par jour, soit nettement moins que la norme mondiale de l'Organisation mondiale de la santé¹.

60. Le blocus israélien de la bande de Gaza a aggravé la pénurie d'eau et l'insuffisance des installations d'assainissement. Les retards et les restrictions qui touchent l'entrée des matériaux par le point de passage Kerem Chalom contrôlé par les Israéliens ont ralenti l'exécution d'un certain nombre de projets d'infrastructure dans le secteur de l'eau et de l'assainissement. De plus, non seulement Israël tire une part disproportionnée de l'eau provenant de l'aquifère côtier pour son propre usage, mais il empêche la population gazaouie d'accéder à l'eau du Wadi Gaza, un cours d'eau naturel qui a sa source dans les montagnes d'Hébron et se jette dans la mer Méditerranée.

61. La pénurie d'eau à Gaza a été aggravée par la destruction répétée des infrastructures hydriques et d'assainissement lors des opérations militaires israéliennes⁶⁰. Israël a détruit au moins 306 puits dans les zones d'accès restreint depuis 2005⁶¹. Dans ce contexte, le Rapporteur spécial condamne vigoureusement le fait que les installations d'approvisionnement en eau et d'assainissement ont été ciblées lors des opérations militaires israéliennes, ce qui est injustifiable d'un point de vue militaire et ne peut s'expliquer comme étant dû à des accidents.

La situation en Cisjordanie

62. Les Palestiniens en Cisjordanie se voient refuser la part qui leur revient de l'eau provenant de l'aquifère de la montagne et l'accès à l'eau du Jourdain, l'un et l'autre étant classés comme des ressources en eau partagées qui doivent être partagées équitablement conformément au droit international coutumier⁶². Les colons israéliens vivant en Cisjordanie et à Jérusalem-Est, dont le nombre est estimé à 500 000, consomment environ six fois plus d'eau que l'ensemble des Palestiniens, qui sont 2,6 millions⁶³. Les colons israéliens bénéficient de larges volumes d'eau directement acheminée jusqu'aux colonies de peuplement, ce qui leur permet d'irriguer les terres agricoles et de cultiver des cultures à forte utilisation d'eau. Par contre, les agriculteurs palestiniens dépendent largement de l'eau acheminée dans des camions-citernes ou recueillie dans des citernes, ce qui accroît le coût des cultures et réduit la majeure partie de l'agriculture palestinienne à de petites exploitations non rentables qui s'adonnent aux cultures pluviales, qui sont en moyenne 15 fois moins rentables que les cultures irriguées. Ainsi, seulement 6,8 % des terres cultivées par des Palestiniens en Cisjordanie sont irriguées⁶⁴.

⁶⁰ Voir A/HRC/22/35/Add.1 (en anglais).

⁶¹ Emergency Water and Sanitation-Hygiene Group, « Fact sheet 13: Water and sanitation in the Access Restricted Areas of the Gaza Strip » (décembre 2012). Disponible à [ewash.org/files/library/factsheet%20jan%2021\[1\].pdf](http://ewash.org/files/library/factsheet%20jan%2021[1].pdf).

⁶² Régie palestinienne des eaux, « Palestinian water sector: status summary report », rapport établi pour la réunion du Comité de liaison ad hoc (septembre 2012). Disponible à <http://reliefweb.int/sites/reliefweb.int/files/resources/Water%2520summary%2520for%2520AH%2520report%2520FINAL.pdf>.

⁶³ Elizabeth Koek, *Water for One People Only: Discriminatory Access and « Water-Apartheid » in the OPT*, (Ramallah, Al-Haq, 2013).

⁶⁴ Emergency Water and Sanitation-Hygiene Group, « Fact sheet 14: Water for agriculture in the West Bank » (mars 2013). Disponible à [ewash.org/files/library/WB%20factsheet%20final%20march%2009\[1\].pdf](http://ewash.org/files/library/WB%20factsheet%20final%20march%2009[1].pdf).

63. La répartition inégale des ressources en eau a été maintenue par le Comité mixte de l'eau qui a été créé en application de l'Accord intérimaire israélo-palestinien sur la Rive occidentale et la bande de Gaza. Ce comité, chargé d'accorder les autorisations de forage et de remise en état de puits et des réseaux d'égouts, fixe aussi les quotas d'extraction d'eau. Le droit de veto dont Israël peut faire usage lors de la prise de décisions par le Comité lui a permis de limiter le développement des infrastructures hydriques pour les communautés palestiniennes, en particulier dans la zone C de la Cisjordanie. De plus, tous les projets hydriques palestiniens situés dans la zone C doivent obtenir l'approbation de l'administration civile israélienne. Le Rapporteur spécial juge alarmant qu'entre 1995 et 2008, le Comité ait approuvé des propositions israéliennes pour trois puits et 108 réseaux d'approvisionnement et rejeté seulement l'une des 24 propositions de projet d'évacuation des eaux usées tandis qu'il n'a approuvé que la moitié de tous les projets relatifs à des puits présentés par les Palestiniens⁶³.

64. La perte de rares ressources en eau palestiniennes se produit non seulement du fait des démolitions opérées par les autorités israéliennes des installations « illicites » de collecte de l'eau, y compris des puits et des citernes de collecte de l'eau, mais aussi du fait des activités de forage en eau profonde effectuées par des entreprises israéliennes. Le Rapporteur spécial juge inquiétants aussi les actes de violence commis par des colons proches de communautés palestiniennes; plusieurs cas ont été signalés où des colons avaient pris le contrôle de sources palestiniennes et les avaient clôturées⁶⁵.

65. Israël bloque systématiquement le développement du secteur palestinien de l'évacuation des eaux usées et de l'assainissement au moyen de contraintes administratives imposées par le Comité mixte de l'eau et l'administration civile israélienne. Entre 1995 et 2011, seules 4 des 30 propositions relatives à une station d'épuration des eaux usées ont été approuvées par le Comité et leur construction a été retardée à de multiples reprises. Le Rapporteur spécial juge fort préoccupant qu'il n'y ait qu'une station d'épuration qui fonctionne en Cisjordanie, dont la capacité de traitement est inférieure à 3 % des besoins⁶².

66. Entre-temps, les autorités israéliennes tirent parti de la crise induite par l'occupation pour traiter jusqu'à 21 % des eaux usées palestiniennes dans des stations situées en Israël et financées par les recettes fiscales palestiniennes retenues par Israël. Les eaux usées ainsi traitées sont recyclées pour le profit exclusif du secteur agricole israélien⁶². Le contraste existant entre les difficultés rencontrées par les localités palestiniennes pour obtenir des installations d'épuration des eaux et la situation des colonies qui bénéficient de stations d'épuration rend ridicule le rôle que joue le droit international humanitaire dans la protection d'un peuple occupé.

Le droit des Palestiniens à l'eau et au développement

67. Considérant les politiques et pratiques illégales d'Israël qui engendrent une crise dans le secteur de l'eau et de l'assainissement en Palestine occupée, le Rapporteur spécial souligne que l'Autorité palestinienne n'a pas été en mesure de faire respecter le droit à l'eau des Palestiniens ni le droit à la création d'installations

⁶⁵ Voir A/HRC/22/63 et Oxfam, *On the Brink: Israeli Settlements and Their Impact on Palestinians in the Jordan Valley* (Oxford, 2012).

de traitement de l'eau et d'assainissement⁶⁶. L'appui de la communauté internationale des donateurs en faveur de solutions ponctuelles, telles que le financement d'usines de dessalement de l'eau et d'assainissement pour répondre aux besoins immédiats de la population palestinienne doit aller de pair avec l'exercice de pressions sur les autorités israéliennes pour les amener à mettre fin à leurs politiques discriminatoires. En un mot, les pratiques discriminatoires systématiques dont il est fait état sont aggravées par le fait que tandis que les Palestiniens se voient dénier leur droit à accéder aux ressources situées en Palestine, les colonies de peuplement bénéficient de ces politiques israéliennes. Dans les faits, à l'illégalité s'ajouter l'illégalité, le résultat étant le risque de rétrodéveloppement qui menace les Palestiniens dans la bande de Gaza et dans une moindre mesure en Cisjordanie.

VI. Recommandations

68. Si les négociations diplomatiques en cours ne débouchent pas sur un règlement du conflit sous-jacent, le Rapporteur spécial recommande que l'Assemblée générale sollicite un avis consultatif de la Cour internationale de Justice sur les conséquences juridiques de l'occupation prolongée de la Palestine.

69. Le Rapporteur spécial recommande que le Gouvernement israélien cesse d'étendre et de créer des colonies de peuplement en Palestine occupée, qu'il commence à démanteler les colonies existantes et à assurer le retour de ses nationaux du côté israélien de la Ligne verte et qu'il indemnise de façon adéquate pour les dommages dus aux colonies et aux activités connexes depuis 1967.

70. Le Rapporteur spécial recommande que le Gouvernement israélien informe les entreprises israéliennes qui sont des franchises ou des filiales d'entreprises internationales tirant profit d'activités menées dans les colonies de leurs responsabilités en tant qu'entreprises et des ramifications juridiques internationales de ces activités commerciales, en particulier de leur responsabilité pour complicité qui pourrait être engagée par des juridictions internes à l'étranger.

71. Le Rapporteur spécial recommande que la Belgique et la France indemnisent les Palestiniens qui ont été directement lésés par les colonies auxquelles Dexia Israël a accordé des prêts hypothécaires ou pour lesquelles elle a géré des subventions.

72. Le Rapporteur spécial recommande qu'un exemplaire du présent rapport soit communiqué à Robert de Metz (Président du conseil d'administration du groupe Dexia) et à David L. Liniger (Président et fondateur de Re/Max International). Il est vivement recommandé que chacune de ces entreprises entreprenne sans délai un examen de la situation de façon à rendre ses

⁶⁶ Le Pacte international relatif aux droits économiques, sociaux et culturels, la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes, la Convention relative aux droits de l'enfant et la Convention relative aux droits des personnes handicapées créent des obligations à la charge des États parties concernant l'accès à l'eau potable et à l'assainissement. Israël a ratifié les Conventions susmentionnées sauf la Convention relative aux droits des personnes handicapées, dont il est signataire.

politiques et pratiques ainsi que celles de ses affiliés et employés pleinement conformes aux lois et normes énoncées dans le présent rapport.

73. Le Rapporteur spécial recommande que le groupe Dexia et Re/Max International acceptent d'adopter et de respecter des directives claires relatives à la responsabilité sociale de l'entreprise fondées sur les Principes directeurs relatifs aux entreprises et aux droits de l'homme.

74. Le Rapporteur spécial recommande que la société civile en Belgique et en France soit invitée à exercer des pressions sur son gouvernement pour qu'il vende sa participation dans le groupe Dexia et encourage la société civile à exiger que toutes les entreprises cessent leurs activités qui ont trait aux colonies de peuplement et insistent dorénavant pour que les entreprises agissent conformément aux Principes directeurs relatifs aux entreprises et aux droits de l'homme.

75. Le Rapporteur spécial recommande que toutes les entreprises entretenant des relations avec les colonies de peuplement comparables à celles du groupe Dexia et de Re/Max International révisent leurs engagements en vue d'assurer le respect du droit international et des Principes directeurs relatifs aux entreprises et aux droits de l'homme.

76. Le Rapporteur spécial recommande qu'Israël mette fin immédiatement à ses politiques et pratiques discriminatoires qui ont pour objet de dénier aux Palestiniens la part des ressources qui leur revient dans les ressources en eau en Cisjordanie et dans la bande de Gaza. En particulier, Israël doit cesser de démolir les installations de collecte d'eau, y compris les puits et les réservoirs d'eau sous prétexte qu'ils ont été mis en service sans autorisation valable.



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Promotion et protection des droits de l'homme :
situations relatives aux droits de l'homme et rapports
des rapporteurs et représentants spéciaux

Situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967

Note du Secrétaire général

Rectificatif

Paragraphe 33

La dixième phrase doit *se lire comme suit* :

Ces deux études de cas visent à déterminer si le groupe Dexia et Re/Max, en octroyant des prêts et en faisant de la publicité pour des biens immobiliers dans les colonies et en vendant ces biens, fournissent une assistance en connaissance de cause qui revient à aider à commettre des crimes internationaux liés au transfert de ressortissants de la Puissance occupante dans le territoire occupé.

Paragraphe 34

La dernière phrase doit *se lire comme suit* :

Le Rapporteur spécial a déjà parlé des activités de Dexia Israël Bank Limited (Dexia Israël), dont le groupe Dexia est l'actionnaire majoritaire, qui consistent à octroyer des prêts aux colonies situées en Cisjordanie.

Paragraphe 37

La dernière phrase doit être supprimée.

Paragraphe 38

La première phrase doit *se lire comme suit* :

La responsabilité du groupe Dexia peut-elle être engagée pour les prêts accordés par Dexia Israël à des colonies de peuplement israéliennes?



Paragraphe 40

Le paragraphe doit *se lire comme suit* :

De plus, conformément à l'article premier commun aux Conventions de Genève, il incombe à la Belgique et à la France, en tant qu'États parties, de respecter et de faire respecter les Conventions. À l'heure actuelle, elles sont les actionnaires majoritaires d'une entreprise qui accorde des prêts à des colonies de peuplement en Palestine occupée et, en tant que telles, manquent à leur obligation de faire respecter les Conventions.

Paragraphe 43

La sixième phrase doit *se lire comme suit* :

Si Dexia Israël octroie des prêts au conseil régional, ou si elle offre des services pour des dons effectués par Mifal HaPais, ces formes d'assistance contribuent directement à la croissance de la colonie et, partant, facilitent matériellement le transfert de citoyens israéliens dans le territoire occupé.

Paragraphe 44

La cinquième phrase doit *se lire comme suit* :

Dans ce cas précis, la Belgique et la France pourraient devoir réparer le préjudice subi par les Palestiniens résultant de la réception par les colonies de peuplement de prêts accordés par Dexia Israël.

Paragraphe 47

La deuxième phrase doit être supprimée.

Paragraphe 71

Le paragraphe doit *se lire comme suit* :

Le Rapporteur spécial recommande que la Belgique et la France indemnisent les Palestiniens qui ont été directement lésés par les colonies auxquelles Dexia Israël a accordé des prêts ou pour lesquelles elle a géré des subventions.



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**Promotion et protection des droits
de l'homme : situations relatives
aux droits de l'homme et rapports
des rapporteurs et représentants spéciaux**

Situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967

Note du Secrétaire général

Le Secrétaire général a l'honneur de transmettre à l'Assemblée générale le rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Makarim Wibisono, présenté conformément à la résolution 5/1 du Conseil des droits de l'homme.

* A/69/150.



Rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967

Résumé

Le présent rapport est le premier présenté à l'Assemblée générale par Makarim Wibisono, Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967. Dans ce rapport technique succinct, élaboré à la suite de consultations tenues avec les États concernés et d'autres parties prenantes à Genève en juin 2014, le Rapporteur donne un aperçu des étapes à venir dans l'accomplissement des tâches prescrites dans la résolution 1993/2 de la Commission des droits de l'homme et dans la résolution 5/1 du Conseil des droits de l'homme.

I. Introduction

1. Le Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Makarim Wibisono, a été nommé le 8 mai 2014, en application de la résolution 1993/2 de la Commission des droits de l'homme et de la résolution 5/1 du Conseil des droits de l'homme, et a pris ses fonctions le 2 juin 2014. Il est le sixième à se voir confier ce mandat.

2. Ce rapport technique succinct a été élaboré sur la base de consultations tenues avec les États concernés et d'autres parties prenantes à Genève en juin 2014. Le Rapporteur spécial a l'intention d'effectuer une mission en Israël et dans le Territoire palestinien occupé dès que possible en vue de préparer son premier rapport de fond, qui sera présenté au Conseil des droits de l'homme à sa vingt-huitième session, en mars 2015.

II. Mandat

3. Le mandat du Rapporteur spécial, décrit dans la résolution 1993/2 de la Commission des droits de l'homme, a été renouvelé par le Conseil des droits de l'homme dans sa résolution 5/1.

4. Plus précisément, le Rapporteur spécial est chargé des tâches suivantes :

a) Enquêter sur les violations, par Israël, des principes et des fondements du droit international, du droit international humanitaire et de la Convention de Genève relative à la protection des personnes civiles en temps de guerre, du 12 août 1949, dans les territoires palestiniens qu'il occupe depuis 1967;

b) Recevoir des communications, entendre des témoins et utiliser les procédures qui peuvent lui paraître nécessaires pour s'acquitter de son mandat;

c) Faire rapport à la Commission des droits de l'homme à ses sessions à venir, en lui présentant ses conclusions et recommandations, jusqu'à la fin de l'occupation de ces territoires par Israël.

5. Le Conseil des droits de l'homme¹ a donc clairement pour mission d'enquêter sur les violations du droit international humanitaire et du droit international des droits de l'homme qui auraient été commises par Israël en tant que Puissance occupante dans le cadre de son occupation prolongée des territoires palestiniens depuis 1967.

III. Coopération

6. Par le passé, Israël a pleinement coopéré avec le titulaire du mandat. En 1993, le Rapporteur spécial a été invité par le Ministre des affaires étrangères alors en poste, Shimon Pérès, à se rendre en Israël et dans le Territoire palestinien occupé en 1994, et a donc effectué deux visites au cours de son mandat. À chaque fois, il a rencontré des responsables israéliens et palestiniens, des représentants

¹ En application de la résolution 60/251 de l'Assemblée générale, le Conseil des droits de l'homme assume le rôle et les responsabilités de la Commission des droits de l'homme vis-à-vis des activités du Haut-Commissariat des Nations Unies aux droits de l'homme.

d'organisations non gouvernementales et d'organismes des Nations Unies dans le Territoire palestinien occupé, ainsi que des victimes et des témoins de violations présumées des droits de l'homme. Au cours de ses missions, il a bénéficié d'une entière liberté de mouvement et a notamment pu se rendre dans un centre de détention israélien dans le but de conduire des entretiens non surveillés avec des détenus palestiniens (voir E/CN.4/1994/14 et E/CN.4/1995/19).

7. En raison de ses réserves concernant le mandat, Israël a cessé de coopérer avec les Rapporteurs spéciaux suivants, mais il a continué à les autoriser, à l'exception du cinquième, à se rendre dans le pays et dans le Territoire palestinien occupé². Cette situation est regrettable car la pleine coopération et la participation du Gouvernement israélien sont nécessaires à la mise en œuvre efficace, juste et équitable du mandat. Les autorités palestiniennes ont toujours apporté leur pleine coopération au titulaire actuel.

8. En tant qu'ancien journaliste et diplomate, le Rapporteur spécial est bien conscient que toute histoire se compose de deux éléments : les faits et l'interprétation qu'on en fait. Les informations contenues dans des rapports de seconde, voire de troisième main font forcément l'objet d'une interprétation et peuvent être influencées par le point de vue de la personne ou de l'organisation qui en est l'auteur, et ne sont jamais aussi fiables que les témoignages ou les renseignements recueillis lors de rencontres en personne avec des particuliers, des représentants de la société civile et des représentants des gouvernements palestinien et israélien.

9. Le Rapporteur spécial estime que la crédibilité des rapports soumis au Conseil des droits de l'homme et à l'Assemblée générale serait également renforcée s'il pouvait transmettre comme il se doit et de façon objective les points de vues et les positions officiels concernant la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967. Il juge donc essentiel, lors de chaque visite de pays, de pouvoir s'entretenir avec des responsables israéliens et palestiniens.

10. Le Rapporteur spécial demandera officiellement aux Gouvernements d'Israël et de l'État de Palestine de faciliter une visite dans les deux pays avant la fin de l'année 2014 dans le but de préparer son premier rapport de fond, qui doit être présenté au Conseil des droits de l'homme à sa vingt-huitième session, en mars 2015.

11. Il faut espérer qu'Israël, en toute bonne foi, offrira au Rapporteur spécial actuel le même niveau de coopération qu'il a offert au premier et, plus récemment, au Rapporteur spécial sur le logement convenable (2012) et au Rapporteur spécial sur la promotion et la protection du droit à la liberté d'opinion et d'expression (2011) dans le cadre de leurs visites respectives en Israël et dans le Territoire palestinien occupé (voir A/HRC/22/46/Add.1, A/HRC/20/17/Add.2, E/CN.4/1994/14 et E/CN.4/1995/19). Le Rapporteur spécial compte que les Gouvernements israélien et palestinien prendront les mesures nécessaires à cet égard.

² Israël a expulsé le Rapporteur spécial en poste de 2008 à 2014 à son arrivée à l'aéroport Ben Gourion, en décembre 2008, alors qu'il essayait de se rendre dans le pays dans le cadre d'une mission, et a refusé tout contact avec lui par la suite (voir A/HRC/25/67).

12. Le Rapporteur spécial attend également avec intérêt des réponses constructives de la part du Gouvernement israélien sur les conclusions et recommandations qu'il formulera dans les rapports de fond qui seront présentés au Conseil des droits de l'homme et l'Assemblée générale au cours de son mandat.

IV. Consultations à Genève

13. Du 23 au 27 juin 2014, le Rapporteur spécial a effectué une mission à Genève pour tenir des consultations avec les États concernés. Le principal objectif de cette visite était d'établir des contacts et d'examiner la question de l'exécution du mandat avec le Représentant permanent d'Israël et l'Observateur permanent de l'État de Palestine auprès de l'Office des Nations Unies à Genève.

14. Le Rapporteur a rencontré l'Observateur permanent de l'État de Palestine et le Représentant permanent d'Israël les 24 et 26 juin respectivement, et s'est entretenu avec eux de façon ouverte et franche, dans un esprit de transparence et de confiance mutuelle. La réunion avec le Représentant israélien était particulièrement remarquable, puisque cela faisait six ans que son gouvernement avait cessé tout contact avec le prédécesseur du Rapporteur spécial. Le Représentant permanent a indiqué au Rapporteur spécial que son pays avait des réserves concernant la formulation partielle et la nature indéterminée du mandat qui, selon Israël, dispose que les violations doivent faire l'objet d'enquêtes du Rapporteur spécial. L'Observateur permanent de l'État de Palestine a affirmé qu'il appuyait sans réserve le Rapporteur spécial dans l'accomplissement de son mandat.

15. Le Rapporteur spécial a également rencontré d'autres interlocuteurs concernés, y compris le Président du Conseil des droits de l'homme, la Haut-Commissaire adjointe des Nations Unies aux droits de l'homme et d'autres membres du personnel du Haut-Commissariat ainsi que des représentants d'organisations non gouvernementales, afin de s'informer de la situation dans le Territoire palestinien occupé et de demander conseil sur la façon de s'acquitter efficacement de son mandat. Il a aussi participé à un débat tenu au titre du point 7 de l'ordre du jour de la vingt-sixième session du Conseil des droits de l'homme, intitulé « La situation des droits de l'homme en Palestine et dans les autres territoires arabes occupés », afin d'en observer le déroulement.

16. Au cours de ces entretiens, le Rapporteur spécial a fait part de son souhait d'engager un dialogue constructif et de commencer à travailler avec les mécanismes relatifs aux droits de l'homme dont disposent les titulaires de mandat relevant des procédures spéciales, y compris par le biais de communications confidentielles, afin de mieux faire connaître les problèmes relatifs à la situation des droits de l'homme dans le Territoire palestinien occupé. Il a réaffirmé que son unique objectif était d'effectuer une évaluation objective de la situation des droits de l'homme dans le Territoire palestinien occupé et de faire des recommandations en vue d'améliorer cette situation pour les Palestiniens qui continuent de vivre sous l'occupation militaire d'Israël. Il a noté que la possibilité de se rendre en Israël et dans le Territoire palestinien occupé serait un bon point de départ et manifesté son vif désir d'effectuer au plus tôt une visite de pays.

17. Plusieurs interlocuteurs ont informé le Rapporteur spécial, au cours de ses consultations à Genève, qu'Israël avait transmis les assurances de sa coopération et de son engagement, y compris pour ce qui était de l'autoriser à effectuer une visite de pays.

V. Exécution du mandat et étapes à venir

18. Pour le présent rapport, le Rapporteur spécial a pour objectif de donner un aperçu de son mandat, d'examiner la question de la coopération et de rendre compte brièvement des consultations tenues avec les parties concernées à Genève en juin 2014. Il lui faut plus de temps pour réfléchir aux questions qui se posent et pour collecter, de première main, des informations crédibles et suffisantes dans le cadre d'une visite de pays avant de pouvoir élaborer un rapport de fond.

19. Le Rapporteur est toutefois gravement préoccupé par la tragédie qui se déroule dans la bande de Gaza. Depuis le début de l'opération militaire « Bordure protectrice », lancée par Israël dans la nuit du 7 juillet 2014, le nombre de civils palestiniens, y compris des enfants, tombés sous les frappes aériennes, les obus de char et les obus navals lancés par Israël sur les logements, les hôpitaux et les écoles de la bande de Gaza, y compris ceux dirigés par l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient (UNRWA), et d'autres infrastructures civiles, n'a cessé d'augmenter³. Le nombre de morts a continué de s'accroître encore plus rapidement avec le début de l'offensive terrestre, le 17 juillet.

20. Des milliers de familles dans l'ensemble de Gaza ont vu leur maison détruite. Des centaines de milliers de personnes ont dû fuir de chez elles et se réfugier dans des écoles, des bâtiments administratifs, des hôpitaux ou chez des membres de leur famille. Le nombre de déplacés hébergés par l'UNRWA serait déjà plus important que celui relevé lors de l'opération militaire « Plomb durci », menée par Israël du 27 décembre 2008 au 18 janvier 2009, épisode le plus meurtrier enregistré à Gaza depuis 1967. La gravité de la situation dans la bande de Gaza est exacerbée par le fait que la population civile manque de carburant, d'électricité, d'eau, de fournitures médicales et autres produits de première nécessité.

21. Le Rapporteur spécial a reçu des douzaines de rapports faisant état de violations du droit international des droits de l'homme et du droit international humanitaire qu'aurait commises Israël, élaborés sur la base des activités de suivi et de documentation menées par de courageux défenseurs des droits de l'homme gazaouis, qui travaillent sans relâche et font face à des risques considérables pour appeler l'attention de la communauté internationale sur ces atrocités.

22. Au vu de la gravité de la situation, le Rapporteur spécial a effectué une mission spéciale à Genève, le 23 juillet, afin d'assister à la vingt et unième session extraordinaire du Conseil des droits de l'homme sur la situation des droits de l'homme dans le Territoire palestinien occupé, y compris Jérusalem-Est. Il a prononcé une déclaration au nom du Comité de coordination des procédures spéciales et demandé que des enquêtes approfondies, indépendantes et efficaces

³ Bureau de la coordination de l'assistance humanitaire, compte rendu de la situation dans le Territoire palestinien occupé au 7 août 2014. Disponible à l'adresse www.ochaopt.org/documents/ocha_opt_sitrep_07_08_2014_.pdf.

soient menées rapidement sur tous les cas de morts et de blessures survenus parmi les civils ainsi que sur les destructions de logements civils et d'infrastructures essentielles causés par l'opération militaire israélienne à Gaza et par les tirs de roquettes lancés par des groupes armés palestiniens en Israël.

23. Le Rapporteur spécial est conscient des défis auxquels il devra faire face afin de s'acquitter de son mandat. Néanmoins, il fera tout ce qui est en son pouvoir pour enquêter en toute impartialité et objectivité sur les violations qu'aurait commises Israël et pour en rendre compte, en évitant tout préjugé et en comparant les faits aux dispositions du droit international des droits de l'homme et du droit international humanitaire.

24. Dans ses prochains rapports, le Rapporteur spécial présentera des conclusions et recommandations qui pourront apporter un éclairage sur les violations présumées de droits de l'homme dans le Territoire palestinien occupé. Il espère que ces rapports contribueront, sous une forme ou sous une autre, à ce que les auteurs de ces violations en soient tenus responsables de façon à éviter qu'elles ne se reproduisent. Il est fermement convaincu que l'instauration d'une paix durable passe nécessairement par le respect des droits de l'homme et de la dignité humaine.

25. Le Rapporteur spécial prend note de la résolution S-21/1 du Conseil des droits de l'homme, adoptée le 23 juillet 2014, et compte pouvoir se rendre librement en Israël et dans le Territoire palestinien occupé et bénéficier de la pleine coopération des autorités des deux États dans le cadre de la réalisation de son mandat.



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Situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967

Note du Secrétaire général

Rectificatif

Paragraphe 5

Remplacer le texte actuel par ce qui suit :

5. La mission¹ est donc claire : enquêter sur les violations du droit international humanitaire et du droit international des droits de l'homme qui auraient été commises par Israël en tant que Puissance occupante dans le cadre de son occupation prolongée des territoires palestiniens depuis 1967.

¹ En application de la résolution 60/251 de l'Assemblée générale, le Conseil des droits de l'homme assume le rôle et les responsabilités de la Commission des droits de l'homme vis-à-vis des activités du Haut-Commissariat des Nations Unies aux droits de l'homme.





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des rapporteurs et représentants spéciaux

Situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967

Note du Secrétaire général

Le Secrétaire général a l'honneur de transmettre à l'Assemblée générale le rapport présenté par le Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Makarim Wibisono, conformément à la résolution 5/1 du Conseil des droits de l'homme.



Rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967

Résumé

Le présent rapport est le deuxième présenté à l'Assemblée générale par Makarim Wibisono, Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967. Il est basé essentiellement sur les informations communiquées par des victimes, témoins, représentants de la société civile, représentants des Nations Unies et responsables palestiniens à Amman lors de la mission effectuée par le Rapporteur spécial dans la région en juin 2015. Il traite d'un certain nombre de problèmes en relation avec la situation des droits de l'homme en Cisjordanie, y compris Jérusalem-Est, et à Gaza.

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I. Introduction

1. Le présent rapport est le troisième établi par Makarim Wibisono, Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, et le deuxième qu'il présente à l'Assemblée générale des Nations Unies.

2. Comme l'accès au Territoire palestinien occupé demeurait impossible, le Rapporteur spécial a effectué sa deuxième mission dans la région à Amman, où du 9 au 12 juin 2015, il s'est entretenu avec des victimes, des témoins, des organisations non gouvernementales, des représentants des Nations Unies, des responsables palestiniens et d'autres parties intéressées, afin de recueillir des informations sur la situation des droits de l'homme dans le Territoire palestinien occupé. Le Rapporteur spécial exprime sa gratitude envers le Gouvernement jordanien pour l'appui que celui-ci a apporté à sa mission.

3. Des communications écrites ont été reçues, outre des informations recueillies oralement depuis la présentation des rapports précédents du Rapporteur spécial (A/HRC/28/78, A/69/301 et Corr.1). Le Rapporteur spécial est très reconnaissant pour tous les informations, témoignages et documents qui lui ont été fournis et qui, dans une large mesure, constituent les bases du présent rapport. Les effets des activités commerciales sur les droits de l'homme dans le Territoire palestinien occupé, y compris dans les implantations, demeurent préoccupants mais ne peuvent être traités dans le présent rapport, faute de place.

4. En ce qui concerne la mission, en raison de la restriction des déplacements imposée par le Gouvernement israélien, certains membres des organisations non gouvernementales palestiniennes n'ont pas pu rencontrer le Rapporteur spécial. Plusieurs entretiens se sont déroulés par visioconférence, notamment avec les représentants d'organisations non gouvernementales palestiniennes se trouvant à Gaza. Ces difficultés sont un exemple typique des obstacles auxquels se heurtent les Palestiniens qui souhaitent aller à l'étranger, ou seulement se déplacer entre Gaza et la Cisjordanie, y compris Jérusalem-Est.

5. Le Rapporteur spécial tient à remercier le Gouvernement de l'État de Palestine qui a coopéré sans réserve à l'exécution de son mandat, notamment en acceptant de faciliter l'accès au Territoire palestinien occupé.

6. Malgré certains échanges positifs qui ont eu lieu par l'intermédiaire de la Mission permanente d'Israël auprès de l'Office des Nations Unies à Genève, notamment des réponses à quelques-unes des communications qu'il avait adressées au Gouvernement israélien au sujet de problèmes relatifs aux droits de l'homme, le Rapporteur spécial n'a pas obtenu la coopération et l'accès au Territoire palestinien occupé auxquels il s'attendait. Il engage Israël à participer plus activement au dialogue bilatéral, notamment au moyen de communications.

7. Le Rapporteur spécial est prêt à se rendre dans le Territoire palestinien occupé, et demande encore une fois à Israël de lui ménager un accès sans entrave, ainsi que la possibilité de rencontrer les responsables israéliens compétents. En coopérant avec le Rapporteur spécial, Israël servirait ses propres intérêts tout en permettant au Rapporteur spécial d'accomplir sa tâche en toute efficacité et impartialité. Le Rapporteur spécial rappelle qu'à sa nomination des assurances lui ont été données en matière d'accès. Il est fort regrettable de constater que, plus d'un an plus tard,

ces promesses n'ont pas été tenues. Il incombe à Israël, tout comme à n'importe quel État Membre de l'Organisation des Nations Unies, de coopérer avec les titulaires de mandat des Nations Unies. S'il est toujours impossible d'obtenir l'accès au Territoire, le Rapporteur spécial sera obligé d'envisager d'autres moyens de s'acquitter au mieux de son mandat.

8. Comme on le verra dans le présent rapport, le Rapporteur spécial estime que pour bien rendre compte des allégations concernant des violations du droit international des droits de l'homme et du droit international humanitaire commises par Israël dans le Territoire palestinien occupé, comme le veut son mandat, il doit parfois prendre en compte des facteurs contextuels, comme le rôle joué par des acteurs autres qu'Israël. Le Rapporteur spécial réaffirme sa ferme intention de rendre compte des faits en toute indépendance et objectivité aussi longtemps qu'il est titulaire du mandat.

9. Le Rapporteur spécial souhaite tout d'abord faire deux observations générales concernant la situation des droits de l'homme dans le Territoire palestinien occupé. Il s'agit premièrement de la situation extrêmement précaire qui règne à Gaza à la suite de l'escalade des hostilités qui a duré du 7 juillet au 26 août 2014. Durant cette période, Israël a lancé sur Gaza des milliers d'attaques aériennes et les Forces de défense israéliennes ont mené une opération terrestre du 17 juillet au 5 août¹. Le Rapporteur spécial est informé que le Hamas et d'autres groupes armés palestiniens ont tiré des milliers de roquettes et de mortier en direction d'Israël durant l'escalade des hostilités². L'opération militaire israélienne a causé d'immenses dégâts et de nombreux morts et blessés et a aggravé une situation humanitaire déjà fragile, ce qui a eu des répercussions en matière de droits de l'homme. La situation actuelle résulte des effets cumulatifs d'une lente asphyxie de l'économie et des sources de revenus en raison du blocus maintenu par Israël depuis plus de huit ans; de la détérioration de l'état de bien-être physique et psychologique de la population survivante de Gaza, après trois vagues d'hostilités successives en six ans; et de la dévastation de l'infrastructure, y compris des équipements collectifs essentiels comme les réseaux de distribution d'eau et d'électricité, ainsi que des logements³.

10. Plusieurs organisations de défense des droits de l'homme à Gaza ont estimé que la situation désespérée à Gaza était un terreau fertile de l'extrémisme et de la violence. Une nouvelle dégradation des conditions de vie et de la situation des droits de l'homme à Gaza ne fera que rendre la situation encore plus instable. Des améliorations rapides doivent être faites au regard du droit international, et des droits de l'homme en particulier, afin de parer à cette menace à la sécurité des Palestiniens et des Israéliens⁴.

11. Deuxièmement, l'existence et l'extension des implantations israéliennes en Cisjordanie, y compris Jérusalem-Est, continuent d'avoir de graves répercussions

¹ Voir le rapport de la Commission d'enquête internationale indépendante créée en vertu de la résolution S-21/1 (A/HRC/28/79 et A/HRC/29/CRP.4).

² Israël a fait état de la mort de six civils en Israël. *The 2014 Gaza Conflict (7 July–26 August 2014): Factual and Legal Aspects*, résumé, mai 2015, par. 31 à 36.

³ En contravention des dispositions du droit international des droits de l'homme, dont les articles 6, 11, 12 et 13 du Pacte international relatif aux droits économiques, sociaux et culturels, et les articles 6, 9 et 12 du Pacte international relatif aux droits civils et politiques.

⁴ « We must not fail in Gaza », déclaration commune de 30 organismes d'aide internationaux, publiée le 26 février 2015.

sur les droits de l'homme des Palestiniens. Il s'agit notamment de l'expulsion et du transfert forcés de Palestiniens en relation avec la confiscation des terres; des atteintes aux droits au logement, à l'eau, à la santé et à la libre circulation; de la commission d'actes de violence par les colons et de l'emploi abusif de la force par les forces de sécurité israéliennes⁵.

12. Selon plusieurs représentants du Gouvernement et de la société civile palestiniens, 2014 a été une année catastrophique pour les Palestiniens. Beaucoup ont souligné l'augmentation du nombre de morts et de blessés chez les Palestiniens. L'escalade dramatique des hostilités à Gaza a entraîné une hausse exponentielle des chiffres, mais le nombre de morts et de blessés a aussi fortement augmenté en Cisjordanie, notamment à la suite des affrontements avec les forces de sécurité israéliennes.

13. En ce qui concerne le droit à l'autodétermination consacré à l'article 1 des Pactes internationaux relatifs aux droits de l'homme, d'après les informations reçues par le Rapporteur spécial, il y a tout lieu de craindre que l'incidence des implantations, notamment sur la continuité des terres palestiniennes occupées et sur l'environnement et les ressources naturelles, est arrivée à un point tel que beaucoup des dégâts causés risqueraient d'être irréversibles.

14. Dans le contexte du conflit israélo-palestinien qui dure depuis longtemps, l'inaction relative de la communauté internationale risque fort de favoriser la poursuite désastreuse des violations des droits de l'homme et des violences. En se fondant sur les informations reçues, le Rapporteur spécial pense pouvoir affirmer que la situation dans le Territoire palestinien occupé ne fait qu'empirer et que les violations des droits de l'homme des Palestiniens vivant sous l'occupation israélienne deviennent constantes.

15. L'impunité générale pour les violations des droits de l'homme et du droit international humanitaire commises par le passé dans le Territoire palestinien occupé est une indication troublante que l'inaction ne peut que donner lieu à de nouvelles injustices. D'innombrables résolutions et de rapports des Nations Unies témoignent d'une situation caractérisée par un mépris persistant du droit international, y compris du droit international des droits de l'homme. Il est impossible d'accepter tacitement que cette réalité perdure, avec toutes les conséquences qu'elle peut avoir pour les générations futures.

II. La situation des droits de l'homme à Gaza

A. Vue d'ensemble

16. La lenteur des travaux de reconstruction à Gaza se voit dans le fait qu'au mois de juin 2015, pas une seule des maisons complètement détruites lors des hostilités de 2014 n'avait encore été reconstruite, en dépit du Mécanisme pour la reconstruction de Gaza qui a été mis en place grâce à la médiation de l'ONU. Un an après que quelque 19 000 logements avaient été complètement détruits ou gravement endommagés, environ 100 000 personnes étaient toujours déplacées⁶. En

⁵ Voir note 3 plus haut.

⁶ Antenne du Bureau de la coordination des affaires humanitaires dans le Territoire palestinien occupé, « Internal displacement in the context of the 2014 hostilities », Gaza One Year On:

juillet 2015, le Coordonnateur spécial pour le processus de paix au Moyen-Orient a signalé une reprise de la coordination israélo-palestinienne visant à permettre aux Palestiniens de Gaza d'acheter les matériaux nécessaires à la reconstruction des logements détruits et à la construction de nouveaux logements⁷.

17. Beaucoup des annonces de contribution faites à la Conférence internationale sur la Palestine, intitulée « Reconstruire Gaza », tenue au Caire en octobre 2014, ne sont toujours pas concrétisées. Or, il est indispensable que les 3,5 milliards de dollars des États-Unis promis soient effectivement versés afin de soulager la situation à Gaza et d'améliorer l'accès aux services collectifs essentiels comme l'alimentation en eau et en électricité et l'assainissement, grâce à la reconstruction des logements et de l'infrastructure civile.

18. Compte tenu des effets du blocus, les hostilités de 2014 ont aggravé l'état déjà catastrophique de l'infrastructure de distribution d'eau et d'assainissement et rendu l'alimentation en électricité encore plus aléatoire⁸. Comme une organisation basée à Gaza l'a décrit, les habitants de Gaza se lèvent tous les jours pour se laver à l'eau salée et se couchent le soir sans électricité. Selon plusieurs interlocuteurs, Gaza se trouve dans un état de non-développement. Le taux de chômage déjà important a monté en flèche après la fin des hostilités pour atteindre 43 % à la fin de l'année⁹. Chacun a droit à un niveau de vie suffisant, mais les habitants de Gaza ont toutes les peines du monde à se procurer des articles de première nécessité et sont sans espoir ni perspectives d'avenir.

19. Les zones d'accès restreint imposées par Israël compromettent les moyens d'existence et les informations reçues font fréquemment état de l'emploi abusif de la force par les forces israéliennes qui contrôlent ces zones. Les limites exactes de ces zones d'accès interdit, qui sont contiguës à la frontière avec Israël et à la mer au large des côtes de Gaza, sont mal définies¹⁰. Les terres agricoles, les écoles et les maisons situées à des centaines de mètres de la clôture délimitant la frontière avec Israël en subissent le contrecoup. Il est interdit aux pêcheurs de pousser au-delà de six milles marins bien que de nombreux accrochages se soient produits en deçà de cette limite¹¹. Selon le Groupe de la protection, le nombre d'accrochages qui se sont soldés par la mort ou la détention arbitraire de pêcheurs a augmenté en 2014 par rapport à l'année précédente¹².

Humanitarian Concerns in the Aftermath of the 2014 Hostilities, juillet 2015. Disponible à l'adresse : gaza.ochaopt.org.

⁷ Exposé au Conseil de sécurité sur la situation au Moyen-Orient, 23 juillet 2015.

⁸ La centrale électrique de Gaza fournissait environ un tiers de l'électricité à Gaza avant d'être frappée par plusieurs attaques israéliennes en juillet 2014 (A/HRC/29/52/CRP.4, par. 450 à 455 et 580 à 584).

⁹ Fonds monétaire international, « West Bank and Gaza: Report to the Ad Hoc Liaison Committee », 18 août 2015, p. 5.

¹⁰ Antenne du Bureau de la coordination des affaires humanitaires dans le Territoire palestinien occupé, *Humanitarian Bulletin: Monthly Report*, mai 2015, p. 10.

¹¹ Les Accords d'Oslo accordent aux Palestiniens le droit de pêcher jusqu'à une distance de 20 milles marins.

¹² « Update on access restricted areas in the Gaza Strip », janvier-décembre 2014, publié par le Haut-Commissariat des Nations Unies aux droits de l'homme (HCDH) au nom du Groupe de la protection.

20. Les effets des hostilités de 2014 sur le droit à l'éducation continuent de se faire sentir à Gaza¹³. Le Ministère palestinien de l'éducation a signalé que des centaines d'écoles – écoles publiques et écoles de l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient (UNRWA) – ainsi que des établissements d'enseignement supérieur et des écoles maternelles étaient endommagés. De nouveaux travaux de réparation et de reconstruction sont nécessaires. Le Rapporteur spécial a appris avec soulagement que les graves difficultés financières de l'UNRWA avaient été suffisamment allégées pour permettre aux écoles de l'Office à Gaza d'accueillir la rentrée des classes le 24 août 2015¹⁴.

B. Le blocus

21. Le blocus imposé par Israël en 2007 a eu des effets fortement préjudiciables sur les droits de l'homme des Palestiniens de Gaza, notamment les droits à l'éducation, à la santé, au travail, au logement et à la libre circulation. Dans ses déclarations faites au moment de l'imposition du blocus, le Gouvernement israélien a invoqué le contrôle du Hamas à Gaza et des tirs de roquettes sur Israël depuis Gaza¹⁵. En maintenant le blocus, Israël continue d'invoquer des problèmes d'insécurité. Le blocus restreint fortement les importations et exportations et la circulation des biens entre la Cisjordanie et Gaza et vise explicitement à réduire l'approvisionnement en carburant et en électricité¹⁶. De plus, Israël a restreint encore les déplacements des Palestiniens à l'intérieur et en provenance de Gaza.

22. Le blocus constitue un châtement collectif de la population de Gaza et contrevient à l'article 33 of de la Convention de Genève relative à la protection des personnes civiles en temps de guerre (quatrième Convention de Genève) (voir A/69/327 et A/HRC/28/78). Par ailleurs, en termes de sécurité pour les Israéliens et les Palestiniens, alors même que le blocus était en vigueur, il y a eu trois flambées d'hostilités. Il est clair que le blocus a surtout compromis les droits fondamentaux des habitants de Gaza et intensifié leurs souffrances. Le Rapporteur spécial n'est pas convaincu par les arguments sécuritaires invoqués contre la levée du blocus, au vu des conséquences préjudiciables inadmissibles et contraires au droit international que son maintien fait subir à Gaza. Israël devrait recourir à d'autres mesures, qui sont conformes à ses obligations au regard du droit international, comme le contrôle des marchandises, pour résoudre les problèmes d'insécurité sans porter gravement atteinte aux droits de l'homme des Palestiniens et, comme la CNUCED l'a noté, sans mettre en danger la viabilité de Gaza (TD/B/62/3, par. 60).

23. Au moment de l'imposition du blocus, Israël a déclaré qu'il s'attachait à prendre en compte les problèmes humanitaires dans la bande de Gaza et à éviter une crise humanitaire¹⁷. Il est à présent évident que le blocus est un des principaux facteurs contribuant à enfoncer Gaza dans la crise humanitaire actuelle, avec un

¹³ Antenne du Bureau de la coordination des affaires humanitaires dans le Territoire palestinien occupé, « Repair and reconstruction of schools in Gaza », Gaza One Year On, avril 2015.

¹⁴ Déclaration de l'UNRWA, 19 août 2015. Disponible à l'adresse : www.unrwa.org/newsroom/official-statements/unrwa-declares-school-year-open.

¹⁵ Ministère israélien des affaires étrangères, « Security Cabinet declares Gaza hostile territory », 19 septembre 2007.

¹⁶ Ibid.

¹⁷ Voir note 15 plus haut.

grand nombre de personnes déplacées en 2014 toujours sans foyer, une pénurie d'électricité avec des coupures de 12 à 16 heures par jour¹⁸, plus de 90 % de l'eau impropre à la consommation, environ 80 % de sa population recevant de l'aide et un taux de pauvreté de 39 %. Les efforts de coordination israélo-palestinienne en faveur de la reconstruction existent certes mais ils sont insuffisants pour régler les problèmes. Seul Israël peut soulager cette situation en levant le blocus et le Rapporteur spécial l'engage instamment à le faire.

C. Le droit à la santé

24. Environ 2 250 Palestiniens ont été tués à Gaza durant les hostilités de 2014, et deux tiers d'entre eux étaient des civils (A/HRC/29/52, par. 20). Selon les estimations, 10 % des 11 200 et quelques Palestiniens blessés, dont un millier d'enfants, seront handicapés à vie (A/69/926-S/2015/409, par. 88). Un membre d'une organisation médicale internationale a signalé au Rapporteur spécial que, au lendemain des hostilités, de nombreux civils blessés ont essayé désespérément de reconstruire leur vie mais ont été confrontés à la dure réalité de l'immobilisation totale (du moins temporairement jusqu'à ce que le traitement et la physiothérapie aient été terminés), sans logement et sans source de revenus.

25. La vague d'hostilités de 2014 a été sans précédent par sa durée et par le nombre de morts et de blessés et l'ampleur de la destruction causée à Gaza. Cela étant, son incidence sur l'état de santé de la population ne peut pas être dissociée de celle des vagues d'hostilités antérieures, les opérations militaires lancées par Israël en 2008/09 et 2012 ayant fait des milliers de victimes à Gaza et détruit ou endommagé des logements et l'infrastructure civile. La situation sanitaire se ressent aussi fortement des effets paralysants du blocus sur l'économie et sur l'état de l'infrastructure essentielle à Gaza. Un médecin palestinien d'un grand hôpital de Gaza a estimé que la situation sanitaire à Gaza empirait de jour en jour, ce qu'il a attribué notamment au blocus, à la pauvreté et au chômage, en signalant la détérioration de la plupart des indicateurs de la santé, voire de tous¹⁹.

26. Un représentant du Ministère palestinien de la santé a parlé des effets imperceptibles de la répétition des hostilités sur la population, en particulier sur les enfants. Selon une organisation médicale internationale, même avant les événements de 2014, beaucoup d'enfants à Gaza étaient déjà en état de stress post-traumatique à cause des attaques et des affrontements politiques antérieurs. Après les événements de 2014, près de 425 000 enfants auraient besoin d'un soutien psychosocial immédiat après avoir connu la guerre, échappé ou survécu aux attaques lancées contre leur maison, reçu des blessures et perdu des proches et des amis²⁰. Les collectivités à Gaza qui doivent aider ces enfants victimes de traumatismes physiques et psychologiques à recouvrer la santé sont elles-mêmes dévastées.

¹⁸ Antenne du Bureau de la coordination des affaires humanitaires dans le Territoire palestinien occupé, « The humanitarian impact of Gaza's electricity and fuel crisis », Gaza One Year On, juillet 2015.

¹⁹ Interview menée par une organisation médicale internationale environ un an après les événements de 2014.

²⁰ Bureau de la coordination des affaires humanitaires, *Humanitarian Bulletin: Monthly Report*, octobre 2014.

27. De graves problèmes de santé publique sont engendrés par les conditions dans lesquelles vivent un grand nombre de personnes déplacées, notamment le déversement de l'eau contaminée, de l'eau d'égout et des eaux usées dans l'environnement en raison d'une infrastructure d'assainissement déficiente et endommagée, ce qui aggrave les risques de maladies²¹. De plus, des milliers de restes explosifs de guerre gisent dans les débris des maisons et autres infrastructures détruites et sont de véritables menaces larvées (A/HRC/29/CRP.4, par. 575).

28. Le Groupe sectoriel pour la santé dans le Territoire palestinien occupé a noté que dès le premier jour du conflit (de 2014), les équipements sanitaires n'avaient pas échappé à la destruction²². Treize équipements sanitaires, publics et privés, ont été détruits et 104 autres, dont des hôpitaux, des cliniques et des pharmacies, ont été endommagés durant l'intensification du conflit²³. Le Rapporteur spécial a reçu des informations détaillées sur plusieurs cas de violation par Israël du droit international humanitaire et du droit international des droits de l'homme lors des attaques dirigées contre des hôpitaux et des ambulances, et d'obstruction d'évacuations médicales. La remise en état des installations médicales a été ralentie par le manque de matériaux de construction et de fonds. Rien que pour le secteur de la santé, les pertes en infrastructure et en matériel se sont chiffrées à 23 983 168 dollars des États-Unis²⁴.

29. La pénurie d'eau salubre fait qu'il est difficile de stériliser les instruments médicaux et l'alimentation électrique aléatoire abîme le matériel médical sensible. Environ 50 % du matériel médical ne fonctionne pas pour des raisons diverses, notamment l'impossibilité de se procurer des pièces de rechange ou d'entretenir correctement le matériel. Le Ministère palestinien de la santé a indiqué au Rapporteur spécial qu'il s'efforçait de fournir chaque mois des milliers de litres de carburant pour faire fonctionner le matériel permettant de sauver des vies, comme les appareils de dialyse. Des pénuries chroniques de produits médicaux ont été signalées vers la fin du premier semestre de 2015, y compris le manque d'environ 30 % de médicaments essentiels et de près de 40 % d'articles médicaux jetables, notamment des gants et des aiguilles. Selon l'article 55 de la quatrième Convention de Genève, en tant que Puissance occupante, Israël « a le devoir d'assurer l'approvisionnement de la population [...] en produits médicaux [...] lorsque les ressources du territoire occupé sont insuffisantes ».

30. C'est avec des installations endommagées ou détruites et un manque cruel de matériel et de médicaments que le secteur de la santé à Gaza doit faire face à un nombre accru de cas de traumatismes physiques et mentaux causés par les hostilités. L'aide internationale²⁵ et la ténacité du personnel de santé palestinien sont ce qui maintient le secteur de la santé de Gaza à flot. Le manque de produits médicaux et le non-paiement des traitements de plus de 4 500 agents sanitaires à Gaza, qui en

²¹ Groupe sectoriel de la santé, *Gaza Strip: Joint Health Sector Assessment Report*, septembre 2014, section 5.8.

²² Ibid., section 4.1 concernant la coordination dans le Groupe sectoriel pour la santé.

²³ Antenne du Bureau de la coordination des affaires humanitaires dans le Territoire palestinien occupé, « Reconstruction of health sector facilities impaired by shortages of materials and funding », Gaza One Year On, avril 2015.

²⁴ Exposé de l'Organisation mondiale de la Santé, juin 2015, renvoyant à la Stratégie d'analyse détaillée des besoins et de relèvement, avril 2015.

²⁵ OMS, « Report of a field assessment of health conditions in the occupied Palestinian territory », document WHO-EM/OPT/006/E, p. 15 et 16.

général ont continué à travailler, sont liés à la situation financière et politique des autorités palestiniennes en Cisjordanie et à Gaza, qui est affaiblie par le blocus et d'autres politiques d'occupation, notamment la retenue des recettes fiscales par Israël²⁶. S'il est vrai que la coordination – notamment de l'aide étrangère, des traitements et des fournitures – pose aussi des problèmes aux autorités palestiniennes, le Groupe sectoriel de la santé dans le Territoire palestinien occupé estime néanmoins qu'il ne sera pas possible de remettre sur pied le secteur de la santé de Gaza si Israël maintient le blocus²⁷.

31. L'état du secteur de la santé de Gaza oblige le Ministère palestinien de la santé et les hôpitaux de Gaza à aiguiller les patients qui ont besoin de soins spécialisés vers la Cisjordanie, y compris Jérusalem-Est, et vers Israël, ainsi que vers l'étranger. Les efforts faits par les coordinateurs israéliens (Groupe de coordination des activités gouvernementales dans les territoires) pour faciliter les transferts de patients au point de passage d'Erez vers Israël ont été notés²⁸. Les chiffres fournis par l'Organisation mondiale de la Santé (OMS) montrent que le nombre de demandes de permis de sortie du territoire pour des raisons médicales a augmenté de 33 % entre 2013 et 2014²⁹. Cela étant, la proportion des demandes de permis d'emprunter le point de passage d'Erez pour des raisons médicales qui ont été approuvées par les autorités israéliennes a diminué, passant de 88,7 % en 2013 à 82,4 % en 2014 et 81,6 % en 2015. Le Rapporteur spécial est préoccupé par le pourcentage relativement élevé de personnes qui n'ont pas pu recevoir des soins adéquats en dehors de Gaza en raison de la restriction des déplacements imposée par Israël, d'autant plus que la détresse dans laquelle se trouve le secteur de la santé à Gaza est due dans une large mesure à des décisions prises par Israël.

32. Si aussi bien les Palestiniens que les Israéliens ont subi des pertes tragiques lors des flambées d'hostilités de ces dernières années, le peuple qui est indéniablement le plus gravement touché en termes de nombre de morts et de blessés et d'ampleur des destructions n'est pas près d'être en voie de guérison. C'est un fait que le blocus rend le secteur de la santé de Gaza tributaire de l'aide de la communauté internationale.

III. Situation des droits de l'homme en Cisjordanie, y compris à Jérusalem-Est

A. Les implantations israéliennes et leurs incidences

33. Les politiques et pratiques d'Israël en matière d'implantations demeurent à l'origine de la plupart des violations des droits de l'homme dont sont victimes les Palestiniens en Cisjordanie, y compris à Jérusalem-Est, et elles les poussent à abandonner leurs maisons et leurs terres, tout particulièrement dans la zone C et à Jérusalem-Est, où se concentrent la majorité des implantations. Ainsi, en 2014, la construction de quelque 1 300 logements aurait débuté. Même si ce chiffre est

²⁶ Susan Power et Nada Kiswanson van Hooydonk, *Divide and Conquer: A Legal Analysis of Israel's 2014 Military Offensive Against the Gaza Strip* (Ramallah, Al-Haq, 2015).

²⁷ *Gaza Strip: Joint Health Sector Assessment Report*, p. 4.

²⁸ WHO-EM/OPT/006/E, p. 9.

²⁹ Un des facteurs est que le nombre de patients orientés vers l'Égypte a diminué depuis que l'accès par le point de passage de Rafah a commencé à être restreint ou interdit en 2013.

inférieur à celui des années précédentes, le nombre d'appels d'offres lancés en 2014 pour la construction de nouvelles implantations (près de 4 500 logements) est en augmentation par rapport aux années précédentes, ce qui indique que l'expansion va se poursuivre³⁰.

34. Selon les dispositions de l'article 49 de la quatrième Convention de Genève, la Puissance occupante ne peut procéder au transfert de sa propre population civile dans le territoire qu'elle occupe. De même, les transferts forcés, en masse ou individuels, de personnes protégées sont interdits, sauf si leur sécurité ou d'impérieuses raisons militaires exigent leur évacuation à l'intérieur du territoire occupé. Par conséquent, le caractère illégal des implantations israéliennes et des transferts forcés des Palestiniens au regard du droit international humanitaire est bien établi.

35. Le découpage de la Cisjordanie en zones A, B et C en application des Accords d'Oslo s'est accompagné de différents niveaux de contrôle israélo-palestinien, d'un contrôle principalement palestinien dans la zone A à un contrôle israélien total dans la zone C, qui recouvre plus de 60 % de la Cisjordanie. Le Ministère palestinien de l'intérieur a informé le Rapporteur spécial que dans certaines situations d'urgence, telles que des incendies ou des accidents de la circulation, les autorités israéliennes n'étaient pas intervenues et avaient empêché la défense civile palestinienne d'intervenir, principalement quand ces événements se produisaient dans la zone C.

36. On ne connaît pas le nombre exact de colons implantés en Cisjordanie, mais ils seraient selon les estimations entre 500 000 et 600 000, dont environ un tiers à Jérusalem-Est. À titre de comparaison, les Palestiniens seraient environ 320 000 à Jérusalem-Est et 300 000 dans la zone C, où Israël exerce un contrôle presque exclusif sur le maintien de l'ordre, l'urbanisme, l'allocation de l'eau et la construction. On ne peut que constater la vulnérabilité des Palestiniens vivant dans ces secteurs.

37. La destruction des maisons et des structures utilisées dans les activités de subsistance est l'une des raisons qui incitent les Palestiniens à partir et à déménager dans les zones A et B, où le contrôle d'Israël est moindre. Les pratiques israéliennes en matière d'urbanisme et de zonage sont largement critiquées pour leur caractère discriminatoire envers les Palestiniens. La majorité des terrains situés dans la zone C sont réservés à la construction d'implantations ou ont été déclarés domaine de l'État, zones militaires fermées, réserves naturelles ou autres. Alors que les Palestiniens pourraient construire sur 30 % des terrains restants, les chantiers doivent recevoir l'autorisation d'Israël et, dans les faits, moins de 1 % des terrains est disponible. Par conséquent, de nombreux Palestiniens n'ont d'autre choix que de construire sans permis

38. L'existence ou non d'un permis de construire ne change rien au fait qu'Israël n'a pas le droit de détruire des propriétés privées palestiniennes³¹. Certaines informations indiquent qu'entre juin 2014 et juin 2015, 524 structures

³⁰ Informations extraites du rapport du bureau local du Bureau de la coordination des affaires humanitaires dans le territoire palestinien occupé, reprenant les chiffres du Bureau central israélien de statistique sur les ouvertures de chantiers et du mouvement La paix maintenant, sur les appels d'offres.

³¹ Cette interdiction s'applique sauf dans le cas où les destructions seraient rendues absolument nécessaires par les opérations militaires (art. 53 de la quatrième Convention de Genève).

palestiniennes, y compris des maisons, des écoles, des citernes à eau et des enclos pour animaux, ont été démolies par les autorités israéliennes dans la zone C et à Jérusalem-Est. Au premier trimestre de 2015, les destructions de structures financées par des donateurs au bénéfice des Palestiniens dans le cadre de l'assistance humanitaire auraient connu une augmentation de 37 %. Ces démolitions constituent des atteintes aux droits de l'homme, y compris le droit à un niveau de vie suffisant, à l'alimentation, au logement, au travail et à l'éducation.

39. Malheureusement, les Palestiniens dont les biens font l'objet d'un ordre de destruction semblent bénéficier d'une protection juridique minimale. Le village de Soussiya, dans le gouvernorat de Hébron, est un bon exemple. Les 170 structures situées dans la zone C³², qu'il s'agisse de maisons, d'abris pour animaux, d'écoles ou même de latrines, sont sous le coup d'un ordre de démolition. Alors que le projet d'extension de l'implantation voisine de Soussiya a été approuvé, tous les projets de construction présentés aux autorités israéliennes par les villageois palestiniens en vue d'obtenir des permis de construire ont été rejetés. Bien que la Haute Cour de justice israélienne n'ait pas encore rendu de décision concernant une requête déposée contre le rejet du plan d'urbanisation du village, la Cour a refusé de prononcer une injonction provisoire de suspendre les démolitions.

40. Les disparités entre les quantités d'eau allouées aux Palestiniens et celles qui sont allouées aux colons restent l'une des principales raisons expliquant l'extension des implantations et le déplacement des Palestiniens. En moyenne, les colons israéliens consomment 369 litres par personne et par jour pour leur usage domestique, contre 70 litres pour les Palestiniens (A/68/513, par. 38). Certains interlocuteurs ont souligné le fait que les implantations étaient généralement situées à proximité des points d'eau. Un groupe de jeunes de la vallée du Jourdain a expliqué qu'Israël contrôlait la majorité des ressources en eau, y compris les formations aquifères et les puits de Cisjordanie, et qu'il utilisait des pompes puissantes pour puiser de l'eau en profondeur, asséchant les puits et les sources palestiniens. Selon l'organisation non gouvernementale Monitor, l'allocation de l'eau est conforme aux Accords d'Oslo et les projets hydriques sont soumis à l'approbation de la Commission mixte de l'eau. Toutefois, comme l'a signalé le Secrétaire général, malgré l'existence de cette commission, « dans la pratique, le système de gestion de l'eau et les politiques existantes d'Israël sont discriminatoires à l'égard des Palestiniens » (A/68/513, par. 38). Cette constatation recoupe les informations reçues selon lesquelles les implantations, en particulier celles de la vallée fertile du Jourdain, sont amplement alimentées en eau et peuvent pratiquer des cultures exigeant beaucoup d'eau, alors que les récoltes palestiniennes dans le même secteur souffrent du manque d'eau. Par ailleurs, le Ministère palestinien de l'agriculture a informé le Rapporteur spécial que des colons et les autorités israéliennes avaient détruit ou démoli certaines installations agricoles, dont des puits et des systèmes d'irrigation.

41. Dans un rapport précédent (A/HRC/28/78) et un communiqué de presse³³, le Rapporteur spécial a souligné que les Bédouins de la zone C constituaient un groupe particulièrement vulnérable. L'Administration civile israélienne prévoit l'expulsion d'individus et de familles appartenant aux quelque 46 communautés implantées

³² Une partie du village se trouve dans la zone B.

³³ « UN human rights expert urges Israel to abandon plans to transfer Bedouins in the occupied West Bank », 5 juin 2015.

dans le centre de la Cisjordanie, y compris en périphérie de Jérusalem-Est, et leur transfert vers trois sites imposés par le Gouvernement dans les gouvernorats de Jérusalem et de Jéricho, à Fasayil, à Noueima et à el-Jabal, ce dernier site présentant des risques sanitaires du fait de sa proximité avec une décharge. Le 5 mai 2015, des représentants de l'Administration civile israélienne sont entrés dans le village d'Abou Nawar et ont essayé de convaincre ses habitants de signer un accord de transfert à el-Jabal, tout en les informant qu'ils seraient déplacés, qu'ils signent ou non.

42. Le 19 août 2015, des fonctionnaires des Nations Unies ont appelé à la suspension immédiate des démolitions en Cisjordanie après que 22 structures eurent été démolies dans 4 des 46 villages concernés par le projet, soulignant les implications stratégiques et le lien avec le projet d'implantation E1 : « Ces démolitions interviennent parallèlement au développement des implantations. L'application du plan de réinstallation de ces communautés aurait pour effet de réduire la présence palestinienne dans et autour du site prévu pour le projet d'implantation E1 »³⁴.

43. Un représentant de Khan el-Ahmar, un village touché par les démolitions d'août 2015, a expliqué au Rapporteur spécial qu'en avril un drone avait été aperçu en train d'effectuer des survols de surveillance au-dessus du village plusieurs fois par semaine. Certains résidents ont également eu le sentiment d'être épiés par des colons qui entraient dans le village et parfois dirigeaient les projecteurs de leurs voitures vers des maisons en pleine nuit. La conjugaison du projet de transfert, de l'absence de réelles consultations, des menaces de démolition et de leur mise à exécution, des restrictions imposées aux déplacements, de la surveillance et des violences exercées par les colons, participe à créer un environnement coercitif qui incite les Palestiniens à partir. Bien que les expulsions et les transferts forcés soient contraires au droit international, les villageois se rendent compte que, dans la réalité, toute résistance aux exigences israéliennes se traduit par des violations de leurs droits à la sécurité, à la santé, à la protection de leur vie privée, à avoir une famille et un foyer, à se déplacer et à choisir leur lieu de résidence librement, et à avoir un niveau de vie satisfaisant pour eux-mêmes et leur famille, y compris à un logement, à l'accès à l'eau et à l'assainissement.

44. Malgré les appels clairs, répétés et sans équivoque de la communauté internationale, y compris du Secrétaire général (A/69/348), demandant à Israël de ne pas violer le droit international humanitaire ni le droit international des droits de l'homme, le Rapporteur spécial se déclare profondément choqué qu'Israël ait refusé d'obtempérer et ait mis ses plans à exécution, avec des conséquences terribles pour les communautés concernées.

45. Le Rapporteur spécial a également entendu un exposé sur l'expansion des implantations dans le secteur de Gush Etzion et ses incidences pour plusieurs villages de la région de Bethléem. Le tracé prévu pour le mur de séparation, déclaré illégal par la Cour internationale de justice³⁵, pénètre dans le gouvernorat de Bethléem sur 56 kilomètres. Au cours de sa visite, le Rapporteur spécial a été abasourdi de constater qu'en 2015 la construction du mur menace de couper à

³⁴ UNRWA, « UN officials call for an immediate demolitions freeze in the West Bank », 19 août 2015.

³⁵ *Conséquences juridiques de l'édification d'un mur dans le Territoire palestinien occupé, avis consultatif, C.I.J., Rapports 2004*, p. 136.

travers le village de Wadi Foukine, situé dans les zones B et C, et dont la population est composée en majorité de réfugiés. En 2014, les autorités israéliennes ont confisqué 1 500 dounoums de la superficie de ce village agricole connu pour son système d'irrigation, soit la moitié de ce qui lui restait.

46. Les 22 000 habitants palestiniens de Wadi Foukine et de trois autres villages sont concernés par les trois implantations voisines, qui comptent au total quelque 50 000 colons. Selon l'UNRWA, les travaux préparatoires pour la construction de 218 logements ont débuté sur les terres confisquées à Wadi Foukine. Le Rapporteur spécial a vu des photographies montrant l'implantation de Betar Illit qui domine désormais Wadi Foukine situé plus bas dans la vallée, alors qu'en 2000 la colline était encore nue. Il a également vu des photographies et des vidéos montrant les eaux usées de l'implantation se déverser dans le village, et le maire du village lui a expliqué que les terres et les sources d'eau avaient été polluées, polluant de ce fait les récoltes devenues invendables. La pollution serait en outre responsable de maladies chez les habitants du village. L'UNRWA a signalé plusieurs cas de harcèlement visant des habitants de Wadi Foukine, y compris de la part de colons armés se rendant sur les bassins d'irrigation pour les intimider. L'Office a noté que « les autorités israéliennes étaient incapables de prévenir ou de réduire » ces incidents.

47. La violence des colons est un autre facteur incitant les Palestiniens à partir. Le Rapporteur spécial sait que les relations entre colons et Palestiniens sont très tendues et il abhorre tout acte de violence. Le 31 juillet 2015, dans le village cisjordanien de Douma, la maison de la famille Dawabsha a été volontairement incendiée, causant la mort d'un enfant et de ses parents et laissant un petit garçon de 4 ans orphelin. Cette tragédie semble être la conséquence de l'expansion d'une implantation et de l'impunité dont bénéficient les colons commettant des actes violents, ainsi que du comportement illégal de son responsable.

48. Au cours des six premiers mois de 2015, on a dénombré en moyenne chaque mois 7 victimes palestiniennes et 11 propriétés endommagées du fait des violences commises par des colons. En 2014, 331 actes de violence envers des personnes ou des biens avaient été commis par des colons³⁶.

B. Usage excessif de la force

49. Courant 2014, l'intensification des tensions et des affrontements en Cisjordanie, y compris à Jérusalem-Est, ont accentué les préoccupations au sujet de l'usage excessif de la force contre les Palestiniens de la part des forces de sécurité israéliennes (A/HCR/28/78, par. 41 à 47). On a pu observer une montée de la violence à la suite des meurtres de jeunes Palestiniens et Israéliens en juin et juillet 2014 et dans le contexte de l'escalade des hostilités à Gaza. En 2014, 56 Palestiniens auraient été tués et près de 6 000 autres blessés lors d'affrontements avec les forces israéliennes en Cisjordanie, particulièrement violents pendant les mois de juin, juillet et août³⁷. En 2014, il y a eu deux fois plus de morts qu'en 2013 et six fois plus qu'en 2012. Pour le premier trimestre de 2015, les chiffres semblent

³⁶ Bureau local du Bureau de la coordination des affaires humanitaires dans le territoire palestinien occupé, *Humanitarian Bulletin: Monthly Report*, juillet 2015, annexe.

³⁷ Ibid.

comparables à ceux des années précédentes, bien que de graves préoccupations subsistent quant aux morts et aux blessés graves du fait des actions menées par les forces de sécurité israéliennes, y compris du nombre croissant de tirs à balles réelles pendant les manifestations, dans des circonstances ne paraissant pas poser de menace imminente³⁸.

50. Il a été expliqué au Rapporteur spécial qu'au cours d'affrontements survenus le 27 février 2015 lors de la manifestation non violente organisée chaque année à Hébron, « Open Shuhada Street », les forces de sécurité israéliennes auraient utilisé des munitions réelles ainsi que du gaz lacrymogène, des grenades étourdissantes et des balles de caoutchouc. Parmi les blessés se trouvaient six Palestiniens atteints par des balles réelles. L'UNRWA a fait savoir qu'il « continuait de recenser régulièrement les cas de manifestants palestiniens blessés par les munitions réelles utilisées par les forces de sécurité israéliennes ». Les camps de réfugiés situés à proximité d'implantations et du mur, des zones où les forces israéliennes sont très présentes, sont particulièrement exposés. L'Office a exprimé son inquiétude concernant les accrochages intervenus dans le camp de réfugiés de Jalazone, au cours desquels des adolescents ont été grièvement blessés par des balles réelles tirées par les forces de sécurité israéliennes. Le 18 mars 2015, au cours d'une manifestation dans le camp de réfugiés de Jalazone, le jeune Ali Safi (21 ans) a été atteint par des balles réelles qui auraient été tirées par un soldat israélien situé à environ 70 mètres. Le jeune homme a fini par succomber à ses blessures.

51. Le Rapporteur spécial s'inquiète également de l'utilisation des armes dites « moins létales », qui peuvent être et ont été utilisées avec des effets létaux. Plusieurs interlocuteurs ont mentionné le cas du médecin palestinien à Abu Dis, décédé en mai 2014 après avoir inhalé du gaz lacrymogène qui aurait été utilisé par les forces de sécurité israéliennes.

52. Selon l'Association for Civil Rights in Israel, les militaires israéliens utilisent depuis juin 2014 un nouveau type de balles dites « éponge » au cours des émeutes et des manifestations à Jérusalem-Est. Les témoignages recueillis sur 10 incidents de ce type intervenus entre juillet 2014 et mai 2015 font état de blessures graves. Bien que la réglementation interdise l'usage des balles éponge contre les mineurs, six enfants figurent parmi les victimes, dont un âgé seulement de 6 ans. Ils souffriraient de fractures faciales et l'un d'eux a perdu un œil.

53. L'un de ces accidents s'est produit en mars 2015 à Jérusalem-Est, un jeune garçon d'environ 12 ans ayant été pris pour cible par les forces de sécurité israéliennes tirant avec des balles éponge alors qu'il rentrait de l'école. Dans la déposition transmise par Al-Haq, le jeune garçon raconte qu'il s'est caché entre des voitures et que des militaires israéliens auraient tiré à au moins 25 reprises pour empêcher les écoliers d'approcher des parties du mur en cours de construction. Après être sorti de sa cachette, il a été atteint à l'œil gauche et a dû subir une ablation chirurgicale.

54. Le Rapporteur spécial recommande une nouvelle fois fermement à Israël de respecter les Principes de base sur le recours à la force et l'utilisation des armes à feu par les responsables de l'application des lois de 1990. L'usage excessif de la force ne doit bénéficier d'aucune impunité.

³⁸ Concernant le recours accru aux munitions réelles, y compris dans le cadre du maintien de l'ordre, voir également A/HRC/29/52, par. 70.

55. Le recours à l'eau « puante » en Cisjordanie, y compris Jérusalem-Est, a des incidences préoccupantes sur les droits à la santé et au travail, la liberté d'expression et le droit de réunion pacifique³⁹. Ce liquide à l'odeur fétide composé d'eau, de levure et de carbonate de sodium, peut provoquer des irritations oculaires et cutanées, des nausées et des douleurs abdominales⁴⁰. L'odeur stagnante, qui rappelle celle des égouts, est également une source de gêne pour les personnes ou les propriétés arrosées. Bien qu'elle soit destinée à l'origine à disperser la foule en l'aspergeant à distance, certaines sources expliquent que les forces de sécurité israéliennes aspergent l'eau puante directement sur les maisons et les commerces à des fins semble-t-il punitives. Au cours des périodes de tension entre juillet et décembre 2014, l'Association for Civil Rights in Israel a expliqué que « les rues de presque chaque quartier de Jérusalem-Est avaient été arrosées de grandes quantités de liquide puant, les épandages visant principalement les résidences, des voitures et des boutiques ».

C. Le droit à la santé

56. Les restrictions à la liberté de mouvement imposées par Israël constituent le principal obstacle rencontré par les Palestiniens qui souhaitent accéder aux services de santé dans les centres urbains, notamment à Jérusalem-Est où se trouvent plusieurs hôpitaux. La zone A, où les déplacements sont particulièrement difficiles du fait de la présence de points de passage, de barrières ou de barrages, entoure souvent des « poches » des zones A et B.

57. Les Palestiniens de la zone C, principalement des membres de tribus bédouines rurales qui connaissent un niveau de pauvreté élevé et ne disposent pas d'installations sanitaires sur place, sont particulièrement vulnérables aux conséquences négatives sur leur droit à la santé. Le problème est particulièrement marqué dans la vieille ville de Hébron, où les Palestiniens vivent en étroite proximité avec une nombreuse population de colons. En 2011, une enquête menée par l'OMS auprès de 102 foyers de la vieille ville de Hébron a montré que 63 % de ceux-ci devaient passer les points de contrôle israéliens pour accéder aux services de santé. Un habitant de Hébron a raconté au Rapporteur spécial ses expériences personnelles, les ambulances palestiniennes étant soit empêchées de pénétrer dans la zone pour intervenir en urgence, soit retardées le temps d'obtenir une autorisation d'accès d'Israël.

58. L'accès à la santé ne se heurte pas uniquement à des barrières physiques, mais également à des barrières administratives. Après avoir été orientés vers un médecin, les Palestiniens doivent déposer une demande auprès des bureaux palestiniens de coordination afin d'obtenir d'Israël l'autorisation d'accéder aux services de santé, souvent situés à Jérusalem-Est. Selon l'OMS, quelque 20 % des patients se voient refuser cet accès, soit parce que leur demande est rejetée, soit parce qu'ils ne reçoivent aucune réponse. Une étude de 2014 a révélé que pour 4 patients sur 10, ainsi que leurs accompagnants, la demande avait été rejetée par les autorités israéliennes pour « raisons de sécurité » ou sans motif. Les autres victimes de ce système sont les quelque 1 000 travailleurs sanitaires palestiniens qui travaillent à

³⁹ Who Profits Research Center, *Proven Effective: Crowd Control Weapons in the Occupied Palestinian Territories* (Tel Aviv, avril 2014).

⁴⁰ Voir http://www.skunk-skunk.com/image/users/121755/ftp/my_files/MSDS_Skunk.pdf?id=3225191.

Jérusalem-Est mais habitent ailleurs en Cisjordanie, et qui doivent régulièrement renouveler leur demande de permis pour accéder à leur lieu de travail.

59. Parmi les autres incidences des politiques et pratiques de la Puissance occupante sur le droit à la santé des Palestiniens, on peut citer les blessures et les décès provoqués par les colons ou résultant des affrontements avec les forces de sécurité israéliennes. Des préoccupations ont également été exprimées concernant les incidences sanitaires de la pollution des cultures palestiniennes par les déchets non traités des implantations et des usines israéliennes. Le Ministère palestinien de l'environnement a particulièrement insisté sur les déchets dangereux, y compris les produits chimiques et les déchets électroniques provenant d'Israël et des implantations, et qui étaient « déversés » en Cisjordanie.

60. Depuis près d'un demi-siècle, les pratiques de la Puissance occupante, qui sont une source d'humiliation et de perte de contrôle sur les activités de la vie quotidienne, ont également des répercussions négatives sur la santé mentale et le bien-être de la population palestinienne. Les personnes vivent dans un climat d'insécurité entretenu par l'expansion des implantations, les menaces de destruction de leurs maisons et la mise à exécution de ces menaces, la violence des colons, l'usage excessif de la force de la part des forces israéliennes, la présence du mur de séparation, les restrictions imposées à la liberté de mouvement et à l'accès à l'éducation, au travail, à la terre et à l'eau, ainsi que le pouvoir exercé par la justice militaire israélienne sur les enfants et les adultes.

D. Jérusalem-Est

61. Pour les Palestiniens, Jérusalem-Est incarne l'espoir d'une capitale pour l'État de Palestine et la concrétisation de leur droit à l'autodétermination. Bien qu'Israël ait annexé Jérusalem-Est, en violation du droit international (résolutions 476 (1980) et 478 (1980) du Conseil de sécurité), des représentants du Département des affaires relatives aux négociations de l'Organisation de libération de la Palestine ont désigné Jérusalem-Est, dans le cadre de la solution des deux États, comme le cœur politique, socioéconomique, culturel et spirituel de la Palestine, faisant le lien géographique entre les parties nord et sud des Territoires palestiniens occupés.

62. La capacité des Palestiniens à conserver leur statut de « résident permanent » à Jérusalem-Est est continuellement remise en question. Selon les représentants palestiniens, la population palestinienne de Jérusalem-Est représentait 36 % de la population totale de la ville à la fin de 2014. Plusieurs interlocuteurs ont expliqué que la politique démographique d'Israël consistait à maintenir un ratio d'environ 70 % de Juifs et 30 % de Palestiniens à Jérusalem. Le plan directeur de la ville, appelé « Jérusalem 2000 », prévoit un ratio de 60/40. Ce plan, proposé à l'origine en 2004, présente notamment les politiques pour l'ensemble de Jérusalem. Il est révélateur des intentions troublantes de l'administration israélienne en ce qu'il ne comporte aucune référence aux Palestiniens ni à Jérusalem-Est, mais mentionne uniquement les « habitants arabes de la partie est de la ville »⁴¹.

63. Depuis 1967, Israël aurait retiré le statut de résident permanent à plus de 14 000 Palestiniens, dont environ la moitié entre 2007 et 2013. Aux termes de la politique « centre de vie », les Palestiniens doivent régulièrement fournir des

⁴¹ Voir http://pcc-jer.org/arabic/Publication/jerusalem_master_plan/engchapt/Intro.pdf.

justificatifs de domicile et présenter par exemple des avis de taxes foncières ou des factures d'eau et de téléphone au Ministère israélien de l'intérieur pour conserver leur statut. Selon le Ministère palestinien chargé des affaires relatives à Jérusalem, de nombreux habitants de Jérusalem-Est connaissent de gros problèmes financiers, Israël imposant 72 taxes différentes aux Palestiniens. Par ailleurs, le statut de résident ne s'obtient pas automatiquement par le mariage et il n'est pas non plus accordé d'office aux enfants de résidents permanents. Ainsi, de nombreux Palestiniens vivent à Jérusalem-Est sans statut officiel et ne bénéficient donc d'aucun avantage. Selon Al-Haq, entre 2002 et juin 2015, le Ministère israélien de l'intérieur a rejeté plus de 3 300 demandes de regroupement familial à Jérusalem-Est sur les 11 000 reçues. En outre, environ un quart des demandes concernant des enfants ont été rejetées par les autorités israéliennes entre 2002 et mars 2005, et plusieurs milliers d'enfants palestiniens se retrouvent sans statut de résident.

64. À cause des implantations israéliennes, du mur de séparation et du régime de permis, Jérusalem-Est est de plus en plus isolée du reste de la Cisjordanie. Quelque 140 kilomètres du mur auraient été construits dans la municipalité de Jérusalem. De ce fait, des quartiers de certains villages se trouvant à Jérusalem-Est se retrouvent isolés du reste de la ville, du côté cisjordanien du mur, et leurs habitants sont obligés de passer les points de contrôle israéliens pour accéder à des services essentiels tels que la santé et l'éducation. Plusieurs villages cisjordanien et certaines banlieues de Jérusalem-Est, auparavant reliés à la ville, se trouvent désormais « de l'autre côté du mur ».

65. Les politiques israéliennes en matière d'urbanisation et de zonage restreignent les possibilités des Palestiniens à construire à Jérusalem-Est. Dans les limites de la municipalité de Jérusalem, telles que définies par Israël, seulement 13 % de la surface de Jérusalem-Est peuvent être utilisés par les Palestiniens, 35 % étant réservés aux implantations, 30 % étant non urbanisés et 22 % étant réservés pour des « zones vertes ». Même si des terrains sont disponibles, le prix des permis de construire ou d'agrandir sont trop chers pour la majorité des Palestiniens. Nombre d'entre eux se voient obligés de construire sans permis et risquent donc être sous le coup d'un ordre de démolition des autorités israéliennes. Selon les représentants palestiniens, environ 220 000 colons israéliens vivent dans les quelque 55 000 logements construits à Jérusalem-Est, tandis que 321 000 Palestiniens vivent dans quelque 50 000 logements. La présence d'implantations israéliennes à Jérusalem-Est participe à exacerber les tensions et le risque d'actes de violence commis par les colons.

66. Les maisons palestiniennes risquent non seulement d'être démolies mais elles peuvent également être confisquées au bénéfice des colons. Ainsi, le Rapporteur spécial, dans un communiqué commun du 30 avril 2015 (voir A/HCR/30/27, affaire n° ISR 1/2015), a fait part de ses préoccupations au Gouvernement israélien concernant la situation d'une famille palestinienne risquant être expulsée de sa maison située dans la vieille ville de Jérusalem-Est. L'ordre d'expulsion avait été délivré à la suite d'une procédure engagée par des colons, selon lesquels la famille avait abandonné sa propriété. Or, la famille n'a pas bénéficié d'une procédure régulière qui lui aurait permis de réfuter ces allégations et a été victime de plusieurs tentatives d'expulsion de force, en violation du droit international humanitaire et du droit international des droits de l'homme. Le Rapporteur spécial regrette de n'avoir toujours pas reçu de réponse à ce jour et il prie instamment le Gouvernement israélien de cesser les expulsions forcées.

67. Du fait de l'urbanisme et du zonage discriminatoires, il manque environ 1 500 classes pour accueillir les élèves palestiniens, ce qui oblige les écoles palestiniennes à louer des appartements pour faire la classe⁴². La loi israélienne garantit l'éducation gratuite aux enfants résidant à Jérusalem-Est, mais plusieurs milliers d'enfants ne sont inscrits dans aucune école. Certains parents paient des écoles privées, les écoles palestiniennes étant surpeuplées et les installations de mauvaise qualité. D'autres inscrivent leurs enfants dans des écoles israéliennes où ils doivent suivre les programmes israéliens. Bien qu'aux termes de l'article 50 de la quatrième Convention de Genève et de l'article 13 du Pacte international relatif aux droits civils et politiques, Israël soit dans l'obligation d'assurer un accès à l'éducation, plusieurs écoles et installations palestiniennes, telles que des terrains de jeux, sont sous la menace d'ordres de démolition ou ne peuvent être construites faute d'avoir obtenu le permis nécessaire.

68. Le Rapporteur spécial est gravement préoccupé par les politiques relatives aux implantations israéliennes et par les mesures visant à atteindre un ratio démographique précis à Jérusalem, qui participent à ralentir la croissance de la population palestinienne de Jérusalem-Est, à éliminer les possibilités de s'y installer pour la plupart des Palestiniens et les incitent à partir. Tous les aspects de la vie des Palestiniens sont ainsi concernés, y compris leurs droits à la liberté de mouvement, à un logement suffisant, à l'accès à l'éducation et aux services de santé, au respect de la vie de famille et leur droit de ne pas être discriminés.

IV. Prisonniers et détenus

69. Selon Addameer, une association de défense des droits de l'homme et de soutien aux prisonniers, en avril 2015, 414 Palestiniens se trouvaient placés en détention administrative, sans inculpation ni jugement, en vertu d'ordonnances de détention administrative valables pour six mois et pouvant être reconduites indéfiniment. Au nombre de ces détenus, figuraient sept membres du Conseil législatif palestinien dont Khalida Jarrar qui, selon plusieurs organisations non gouvernementales, aurait été placée en détention en raison de ses activités politiques et de son rôle important dans la défense des droits humains des Palestiniens. À la date à laquelle le présent rapport a été établi, à savoir le 15 avril 2015, M^{me} Jarrar était toujours détenue mais avait été inculpée bien que l'on continue d'avoir des doutes quant au respect de ses droits à une procédure régulière⁴³.

70. Il convient d'appeler l'attention sur deux mesures législatives israéliennes qui concernent la situation des prisonniers et des détenus palestiniens. Le 30 juillet 2015, bien qu'averti par plusieurs experts indépendants⁴⁴ notamment, que ce type de mesures était incompatible avec les normes en matière de droits de l'homme, la Knesset a adopté une loi autorisant les autorités pénitentiaires à alimenter par la

⁴² Chiffres fournis par le Ministère palestinien de l'éducation. Voir également <http://www.acri.org.il/en/wp-content/uploads/2015/05/Jerusalem-Infographic-Acri-English-3.png>.

⁴³ Amnesty International, communiqué de presse, 28 août 2015. Peut être consulté à l'adresse suivante : www.amnesty.org/download/Documents/MDE1523502015FRENCH.pdf.

⁴⁴ Haut-Commissariat aux droits de l'homme, « UN experts urge Israël to halt legalization of force-feeding of hunger-strikers in detention », communiqué de presse du 28 juillet 2015 et « Force-feeding is cruel and inhuman – UN experts urge Israel not to make it legal », communiqué de presse du 25 juin 2014.

force les prisonniers et détenus qui font la grève de la faim. Cette mesure qui devrait toucher les prisonniers palestiniens, notamment les détenus administratifs, constitue une forme de traitement cruel et inhumain dans la mesure où elle prive de leur autonomie personnelle ceux qui risquent leur vie en protestant pacifiquement.

71. En vertu d'un amendement au Code pénal adopté le 20 juillet 2015, les personnes convaincues d'avoir jeté des pierres ou d'autres projectiles⁴⁵ sur des véhicules en mouvement risquent jusqu'à 20 ans de prison⁴⁶. Bien qu'il réprovoie le lancement de pierres, tant par les colons que par les Palestiniens, le Rapporteur spécial est d'autant plus préoccupé par la sévérité des peines encourues qu'il y a tout lieu de s'interroger sur le degré d'adhésion aux principes du droit à un procès équitable et sur les garanties de procédure régulière offertes aux accusés Palestiniens traduits devant les tribunaux militaires israéliens. Même lorsqu'il n'est pas prouvé que les pierres ont été lancées dans l'intention de nuire, la loi telle qu'amendée prévoit des peines pouvant aller jusqu'à 10 ans d'emprisonnement. Le Rapporteur spécial craint les effets que ces nouvelles dispositions pourraient avoir sur les mineurs, dans la mesure où la plupart des personnes inculpées pour avoir lancé des pierres sont des enfants. Dans les deux dispositions susmentionnées, il semblerait que l'on ait invoqué de manière générale des considérations de sécurité pour justifier la consécration, sur le plan juridique, de dispositions qui conduisent à des violations des droits humains des Palestiniens.

72. Le Rapporteur spécial s'est entretenu avec un jeune homme de 19 ans originaire d'Hébron, qui affirme avoir été injustement accusé d'avoir jeté des pierres et soutient que les forces israéliennes ont refusé de visionner un enregistrement fait par les caméras de surveillance qui pourrait corroborer la véracité de ses dénégations. Le Rapporteur spécial a été touché par la situation apparemment désespérée de ce jeune homme qui n'a aucune possibilité réelle de réfuter les charges portées contre lui et dont l'avenir risque d'être ainsi compromis. Ce jeune homme était membre du groupe Youth Against Settlements, qui prône le recours à des méthodes non violentes pour protester contre l'occupation et les colonies de peuplement. Dans l'exposé qu'ils ont fait au Rapporteur spécial, d'autres membres de ce groupe ont souligné qu'ils croyaient au droit à la vie des Israéliens et des Palestiniens et étaient opposés à toutes les attaques violentes quels qu'en fussent les auteurs.

73. En juin 2015, plus de 5 400 Palestiniens étaient détenus par Israël⁴⁷. La majorité d'entre eux étaient incarcérés dans des prisons situées à l'intérieur d'Israël et non dans le Territoire palestinien occupé, ce qui est contraire à l'article 76 de la quatrième Convention de Genève, ce qui complique encore les visites familiales, déjà soumises à de nombreuses restrictions. Si la plupart des prisonniers et des détenus sont des hommes adultes, les femmes et les enfants sont eux aussi touchés, soit parce qu'ils sont eux-mêmes placés en détention parce qu'un des membres de leur famille est incarcéré. On a constaté que la rareté ou l'absence de contacts avec

⁴⁵ Knesset, « Knesset passes law to prevent damages caused by hunger strikes », communiqué de presse du 30 juillet 2015.

⁴⁶ Knesset, « Knesset approves harsher punishments for stone throwers », communiqué de presse du 21 juillet 2015.

⁴⁷ Personnes emprisonnées et détenues pour « raisons de sécurité ». En outre, près d'un millier de Palestiniens étaient incarcérés pour séjour illégal en Israël. Statistiques obtenues en août 2015 auprès de l'organisation B'tselem et pouvant être consultées à l'adresse suivante : www.btselem.org/statistics/detainees_and_prisoners

des parents, des proches et des amis nuisait sensiblement à la santé mentale des prisonniers⁴⁸. Selon Addameer, depuis 1967, jusqu'à 20 % de la population palestinienne a été à un moment ou un à autre détenue par les autorités israéliennes.

74. Les rapports relatifs au traitement des Palestiniens emprisonnés et détenus par Israël appellent l'attention sur le fait que la torture ou les traitements cruels, inhumains ou dégradants sont interdits par le droit international, et font état de l'infliction de différents types de sévices (obligation de conserver des postures douloureuses, passages à tabac, isolement cellulaire, privation de sommeil, etc.). Les informations relatives aux prisonnières et détenues palestiniennes exposent en détail les agressions physiques et verbales dont ces captives sont victimes. En outre, il a été allégué que les autorités israéliennes soumettaient, à titre de mesure punitive, les prisonnières et détenues à des fouilles à nu intégrales ou partielles.

75. Le Rapporteur spécial demeure préoccupé par la façon dont sont traités les centaines d'enfants palestiniens qui, chaque année, sont arrêtés, détenus et emprisonnés par Israël (A/HRC/28/78), et il rappelle qu'en vertu de l'article 37 de la Convention relative aux droits de l'enfant, un enfant ne peut être privé de sa liberté qu'à titre de mesure de dernier ressort. Le Rapporteur spécial reconnaît qu'Israël a coopéré avec le Fonds des Nations Unies pour l'enfance (UNICEF) au sujet des recommandations contenues dans le rapport publié en février 2013 par le Fonds et dans lequel celui-ci concluait que les mauvais traitements infligés aux enfants soumis au système de détention militaire étaient généralisés, systématiques et institutionnalisés⁴⁹. Toutefois, le Rapporteur spécial déplore que si peu de progrès aient été accomplis, le nombre d'allégations selon lesquelles des enfants auraient subi des mauvais traitements lors de leur arrestation, de leur transfert, de leur interrogatoire et de leur détention n'ayant pas diminué de façon sensible en 2013 et 2014⁵⁰. Il est regrettable que le plan pilote introduit en février 2014, qui prévoyait d'adresser des citations à comparaître aux enfants au lieu de procéder à des arrestations nocturnes, qui ont pour effet de les terrifier, ait été abandonné au début de 2015. Ce plan n'a semble-t-il fait l'objet d'aucune évaluation qui aurait permis de déterminer s'il était possible de remplacer la pratique nuisible des arrestations de nuit par des citations à comparaître devant être délivrées, durant le jour, aux enfants⁵¹.

V. Établissement des responsabilités

76. Nombreux sont les rapports qui rendent compte chaque année des préoccupations que suscitent les violations par Israël du droit international dans le Territoire palestinien occupé. Ces documents font le point de l'expansion des colonies de peuplement illégales, et fournissent des informations sur la démolition d'habitations, les violences commises par les colons et l'usage excessif de la force par les forces de sécurité israéliennes, de même qu'ils décrivent les effets du blocus, le mur, et les violations perpétrées lorsqu'il y a escalade de la violence. Le Rapporteur spécial, bien qu'il se concentre sur son mandat, a connaissance des

⁴⁸ Organisation mondiale de la Santé (OMS), document WHO-EM/OPT/006/E, p. 11.

⁴⁹ *Children in Israeli Military Detention: Observations and Recommendations* (Jérusalem, février 2013), résumé analytique.

⁵⁰ Ibid., Bulletin n° 2, février 2015, p. 2.

⁵¹ Military Court Watch, « Pilot study to end night arrests suspended », 29 janvier 2015.

rapports établis par la société civile⁵² et par l'Organisation des Nations Unies, notamment le rapport de la Commission d'enquête internationale indépendante créée en vertu de la résolution S-21/1 du Conseil des droits de l'homme en 2014 (A/HRC/29/52 et A/HRC/29/CRP.4), le résumé du rapport de la commission du Siège de l'Organisation des Nations Unies chargée d'enquêter sur certains faits survenus dans la bande de Gaza entre le 8 juillet et le 26 août 2014 (S/2015/286), et le rapport du Haut-Commissaire des Nations Unies aux droits de l'homme relatif à l'application des résolutions S-9/1 et S-12/1 (A/HRC/28/80 et Add.1), qui rendent compte des allégations de violations du droit international commises par des acteurs tant israéliens que palestiniens.

77. Après les périodes d'escalade des hostilités survenues en 2008/09 ainsi qu'en 2012, il y a eu manquement général à l'obligation d'établir les responsabilités. Le Rapporteur spécial rappelle qu'au lendemain de son opération militaire à Gaza en 2014, Israël s'était engagé à enquêter sur les allégations de comportement répréhensible et à ce que les auteurs de tels comportements fassent l'objet de poursuites judiciaires ou de mesures disciplinaires⁵³. Le Rapporteur spécial sait que certaines organisations de la société civile ont soumis des allégations de violations et ont parfois été tenues régulièrement informées des décisions relatives aux enquêtes, mais constate un manque général de confiance dans le processus.

78. Selon les informations publiées en juin 2015 plus de la moitié des 190 dossiers d'allégations de violations avaient été examinés puis déférés à l'Avocat général de l'armée pour décision. Dix-neuf de ces dossiers ont été classés sans suite, faute de « motifs raisonnables de soupçonner qu'il y avait eu comportement criminel ». Sur les 22 enquêtes ouvertes, 7 l'ont été après des examens préliminaires effectués par le mécanisme d'examen aux fins de l'établissement des faits et 15 sur la base de commencements de preuve.

79. Deux des 22 enquêtes ouvertes ont été classées sans suite. L'une portait sur l'attaque du 16 juillet 2014 ayant entraîné la mort de quatre garçons âgés de 9 à 11 ans, qui jouaient sur la plage. Selon Israël, cette attaque aurait visé un complexe naval du Hamas exclusivement utilisé par des militants. Les autorités israéliennes soutiennent en outre qu'il était impossible aux unités des Forces de défense israéliennes de déterminer que « les figures humaines qu'elles avaient repérées par surveillance aérienne étaient celles d'enfants », et affirment que la présence de ces figures dans la zone du complexe naval laissait supposer qu'il s'agissait de militants⁵⁴. Plusieurs journalistes internationaux séjournant dans des hôtels surplombant la plage ont été témoins de l'attaque. La présence même de correspondants de presse sur les lieux atteste que la zone ciblée n'était pas utilisée exclusivement par des militants. En outre, le Rapporteur spécial constate que les articles de presse consacrés à l'incident ne donnent pas l'impression que cette zone

⁵² Par exemple, B'tselem, « Black Flag: The Legal and Moral Implications of the Policy of Attacking Residential Buildings in the Gaza Strip, Summer 2014 » (Jérusalem 2015); Breaking the Silence: This is How We Fought in Gaza: Soldiers' Testimonies and Photographs from Operation « Protective Edge » (2014); Amnesty International, *Attaques illégales et mortelles : des tirs de roquettes et d'obus par des groupes armés palestiniens lors du conflit Gaza/Israël en 2014* (Londres .2015).

⁵³ State of Israel, *The 2014 Gaza Conflict: Factual and Legal Aspects, 7 July-26 August 2014: Factual and Legal aspects*, mai 2015, résumé analytique, par. 59

⁵⁴ Israel Defense Forces Military Advocate General, « Decisions regarding exceptional incidents that allegedly occurred during Operation "Protective Edge" », Update n° 4, 11 juin 2015, par. 7.

était un complexe militaire fermé au public. Un journaliste et témoin oculaire de l'attaque a fait observer qu'une petite baraque en tôle sans électricité ni eau courante posée sur une jetée brûlée par le soleil ne paraissait pas être le type d'endroit que fréquentaient les militants du Hamas et que des enfants, en tenue d'été, dont la taille avoisinait 1,20 mètre et qui couraient pour échapper à une explosion ne correspondaient pas vraiment à l'image que l'on se faisait des combattants du Hamas⁵⁵.

80. Le Rapporteur spécial juge préoccupant le fait que l'Avocat général de l'armée ait accepté l'argument selon lequel la qualité des images aériennes n'avait pas permis de faire la distinction entre des groupes de jeunes enfants jouant sur la plage et des groupes armés se livrant à des activités militaires. La Commission d'enquête internationale indépendante créée en vertu de la résolution S-21/1 du Conseil des droits de l'homme a estimé que, comme le complexe se trouvait dans le centre-ville, entre une plage publique et une zone utilisée par les pêcheurs locaux, on ne pouvait y exclure la présence de civils, y compris d'enfants (A/HRC/29/CRP.4, par. 630 à 633). De même que la Commission, le Rapporteur spécial est préoccupé par le fait que les Forces de défense israéliennes aient inversé la présomption de caractère civil en s'appuyant simplement sur le fait que les personnes prises pour cibles se trouvaient dans la zone pour affirmer qu'il s'agissait de militaires, et que l'Avocat général de l'armée ait validé cette application incorrecte du droit international humanitaire lorsqu'il a décidé que l'affaire serait classée sans suite.

81. Le Rapporteur spécial craint que cette affaire n'ait des incidences sur les perspectives d'ensemble en matière d'établissement des responsabilités qu'offrent les enquêtes internes menées par Israël. Il est peu probable que les enquêtes portant sur d'autres cas moins bien connus de violations présumées imputables aux Forces de défense israéliennes soient examinées de manière aussi approfondie. Jusqu'en juin 2015, seuls trois soldats avaient été inculpés dans une affaire de pillage survenu dans la région de Shuja'iyya le 20 juillet 2014.

82. Le Mécanisme d'enquête aux fins de l'établissement des faits se limite à l'examen des « incidents exceptionnels », ce qui peut s'interpréter comme supposant en préalable que l'opération israélienne a respecté de manière générale les règles du droit international. Pour la Commission d'enquête internationale indépendante créée en vertu de la résolution S-21/1 du Conseil des droits de l'homme, le fait qu'Israël n'ait pu modifier sa stratégie de frappes aériennes, même lorsque ses effets désastreux sur la population civile sont devenus apparents, amenait à se demander si ces frappes ne participaient pas d'une politique plus générale approuvée, au moins tacitement, aux échelons les plus hauts du Gouvernement⁵⁶.

83. En réponse au rapport de la Commission d'enquête, le Ministre israélien des affaires étrangères a déclaré que l'armée israélienne respectait les normes internationales les plus strictes, ce qui avait été confirmé par un examen détaillé effectué par des experts militaires et juridiques israéliens ainsi que par des rapports

⁵⁵ Tyler Hicks, « Through lens, 4 boys dead by Gaza shore », *New York Times*, 16 juillet 2014.

⁵⁶ Haut-Commissariat des Nations Unies aux droits de l'homme, « UN Gaza Inquiry finds credible allegations of war crimes committed in 2014 by both Israel and Palestinian armed groups », communiqué de presse du 22 juin 2015. Voir également A/HRC/29/52, par. 44.

établis par des spécialistes militaires de renommée internationale⁵⁷. Le Rapporteur spécial constate que ces affirmations ne sont guère étayées par les communications reçues ni par les rapports publiés par l'Organisation des Nations Unies ou par des organisations de la société civile. Néanmoins, il invite Israël à prouver son attachement au principe de responsabilité en adhérant au Statut de Rome de la Cour pénale internationale. Cette dernière n'intervient, entre autres cas, que lorsque les mécanismes internes sont dans l'incapacité ou n'ont pas la volonté d'enquêter sur les crimes les plus graves et d'en poursuivre les auteurs⁵⁸.

84. Comme l'a fait remarquer la Commission d'enquête internationale indépendante à propos des actions au civil suite à des violations du droit international, les victimes palestiniennes se heurtent à des obstacles de taille qui les empêchent d'exercer leur droit à des recours efficaces, notamment à des réparations (A/HRC/29/52, par. 72). Un de ces obstacles consiste en l'ensemble des dispositions qui, en vertu de la loi sur la responsabilité de l'État, dispensent l'État de l'obligation de réparer les préjudices causés par les mesures qu'il aurait prises dans le cadre de la lutte contre la terreur, les actes hostiles ou les insurrections (A/HRC/29/CRP.4, par. 646 à 649). En outre, les frais de procédure élevés, les restrictions à la liberté de mouvement et les délais de prescription font que les victimes n'ont pratiquement aucune possibilité de demander réparation. En décembre 2014, la Cour suprême israélienne a rejeté une requête contre la politique israélienne qui consistait à refuser l'accès aux tribunaux israéliens aux plaignants et témoins originaires de Gaza visant à obtenir réparation en cas de décès, blessures et dommages matériels causés par les opérations militaires d'Israël⁵⁹. Selon les informations reçues, cette décision, qui soulève des problèmes de conflits d'intérêts évidents, reconnaît que l'État a toute latitude pour interdire, en invoquant des raisons de sécurité, l'entrée sur le territoire israélien à des plaignants ayant intenté des actions en réparation contre lui. De ce fait, l'organisation Adalah (centre juridique pour la défense des droits de la minorité arabe en Israël) a affirmé que pour ces plaignants les moyens de recours étaient pour ainsi dire inexistantes.

85. En Cisjordanie également, et d'une manière générale lorsque les actes dont ils ont été victimes ont été commis en dehors de périodes d'hostilités actives, les Palestiniens ont très difficilement accès aux tribunaux israéliens et au système de justice militaire. De nombreuses sources font état de l'impunité dont jouissent les colons qui se livrent à des actes de violence. De même, les forces de sécurité israéliennes qui font un usage excessif de la force sont rarement tenues de répondre de leurs actes et plusieurs interlocuteurs ont indiqué que les victimes étaient soit convaincues qu'elles n'obtiendraient jamais justice, soit trop effrayées pour porter plainte. Comme l'a indiqué l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient (UNRWA) : « Les familles des victimes et des survivants s'abstiennent généralement de déposer des plaintes officielles auprès des autorités israéliennes, craignant des représailles. Les enquêtes internes sur les décès de Palestiniens que mènent les Forces de sécurité israéliennes

⁵⁷ Ministère des affaires étrangères d'Israël, « Israeli response to the UNHRC Commission of Inquiry », communiqué de presse du 22 juin 2015, par. 5.

⁵⁸ Statut de Rome de la Cour pénale internationale, art. 1 et 17.

⁵⁹ Al Mezan Center for Human Rights, Palestinian Centre for Human Rights et Adalah, « Israeli Supreme Court approves regulations that ban Palestinians from Gaza from entering Israel for their compensation cases against the Israeli military », communiqué de presse du 18 décembre 2014.

[...] sont classées sans suite dans l'écrasante majorité des cas [...] ». Qu'il s'agisse d'élever des plaintes contre les violences perpétrées par les colons ou contre l'usage excessif de la force par les Forces de sécurité israéliennes, de se défendre contre certaines allégations comme le lancement de pierres ou de contester la légalité des menaces d'expulsion forcée, des ordres de démolition, des confiscations de terres ou de la construction du mur, le sentiment qui prévaut est celui du caractère profondément injuste d'un système qui apparaît comme irrémédiablement hostile à la population qu'il est censé protéger⁶⁰.

VI. Conclusions et recommandations

86. **Les effets cumulés des politiques et pratiques suivies par l'occupant israélien, notamment de l'expansion des colonies de peuplement et des conséquences qui en découlent, du blocus, des entraves à la liberté de circulation, et du système de justice militaire pèsent lourdement sur la société palestinienne. Pour éviter que la situation ne devienne encore plus instable, il est essentiel de remédier aux violations régulières des droits humains de la population palestinienne vivant sous occupation. En effet, 48 ans d'occupation ont montré que les politiques et pratiques israéliennes qui contreviennent au droit international des droits de l'homme et au droit international humanitaire perdureront tant que les responsables de ces politiques et pratiques ne seront pas tenus de répondre de leurs actes.**

87. **En conséquence, le Rapporteur spécial réitère les recommandations qu'il a précédemment formulées (A/HRC/28/78) et adresse au Gouvernement israélien les recommandations ci-après sur lesquelles il tient à mettre l'accent :**

a) Lever le blocus imposé à Gaza qui constitue l'un des principaux obstacles à la reconstruction, porte atteinte aux droits de l'homme et constitue une forme de châtement collectif;

b) Veiller à ce que les enquêtes menées au niveau interne établissent les responsabilités, et notamment à ce qu'elles s'étendent à l'examen de la légalité au regard du droit international des décisions ayant guidé l'action des Forces de défense israéliennes lors de l'opération menée contre Gaza en 2014;

c) Mettre fin à l'expansion des colonies de peuplement et s'abstenir de procéder à des démolitions en Cisjordanie, y compris Jérusalem-Est. En particulier, renoncer définitivement au plan qui prévoit l'expulsion et le transfert forcés de communautés bédouines dans la zone C;

d) Veiller au respect des Principes de base sur le recours à la force et l'utilisation des armes à feu par les responsables de l'application des lois adoptés par l'Organisation des Nations Unies en 1990, et enquêter pleinement sur les cas où les forces de sécurité israéliennes auraient fait un usage excessif de la force ainsi que sur les allégations de violences commises par des colons;

e) Supprimer les obstacles de caractère procédural et de nature physique, dont le mur, qui empêchent les Palestiniens de la bande de Gaza et de la Cisjordanie, y compris Jérusalem-Est, d'avoir accès aux services de santé;

⁶⁰ Voir les articles 2 et 14 du Pacte international relatif aux droits civils et politiques.

f) Faire en sorte que tous les enfants palestiniens de Jérusalem-Est en âge d'être scolarisés aient accès à l'éducation, notamment en leur permettant de suivre le programme d'enseignement mis en place par le Ministère palestinien de l'éducation et en remédiant à la pénurie de salles de classe;

g) Mettre fin à la pratique des détentions administratives et respecter le droit des prisonniers et détenus palestiniens de protester pacifiquement, en s'abstenant d'alimenter par la force ceux qui font la grève de la faim;

h) Redoubler sans plus attendre d'efforts en vue d'appliquer les recommandations de l'UNICEF relatives à la détention des enfants, et en particulier de s'assurer que ces derniers ne soient détenus qu'à titre de mesure de dernier ressort;

i) Coopérer avec le Rapporteur spécial et avec tout organe mandaté par les Nations Unies, ainsi qu'il incombe à chaque État Membre de l'ONU, et faciliter l'accès au Territoire palestinien occupé.



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**Promotion et protection des droits de l'homme : situations
relatives aux droits de l'homme et rapports des rapporteurs
et représentants spéciaux****Situation des droits de l'homme dans les territoires
palestiniens occupés depuis 1967*****Note du Secrétaire général**

Le Secrétaire général a l'honneur de transmettre à l'Assemblée générale le rapport présenté par le Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Michael Lynk, conformément à la résolution 5/1 du Conseil des droits de l'homme.

* Le présent rapport a été présenté après la date limite afin de prendre en compte l'évolution récente de la situation.



Rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967

Résumé

Le présent rapport est le premier présenté à l'Assemblée générale par Michael Lynk, Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967. Il a été établi principalement à partir d'informations communiquées par des victimes, des témoins, des représentants de la société civile, des représentants d'organismes des Nations Unies et des responsables palestiniens à Amman lors de la mission effectuée par le Rapporteur spécial dans la région en juillet 2016. Il analyse un certain nombre de problèmes touchant à la situation des droits de l'homme en Cisjordanie, y compris Jérusalem-Est, et à Gaza.

I. Introduction

1. Le Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Michael Lynk, a été nommé le 24 mars 2016, en application de la résolution 1993/2 de la Commission des droits de l'homme et de la résolution 5/1 du Conseil des droits de l'homme, et a pris ses fonctions le 1^{er} mai 2016. Il est le septième à se voir confier ce mandat.

2. Le présent rapport est le premier présenté par le Rapporteur spécial. Ce dernier souhaite attirer l'attention sur le fait que, s'il se tient prêt à effectuer une mission dans le Territoire palestinien occupé, il n'a pas été autorisé à le faire par les autorités israéliennes. Après avoir pris ses fonctions, le Rapporteur spécial a officiellement demandé aux autorités israéliennes et aux autorités palestiniennes le 3 juin 2016 l'autorisation de se rendre dans le Territoire palestinien occupé. À la date de l'établissement du présent rapport, cette demande n'avait reçu aucune suite de la part des autorités israéliennes. Le Rapporteur spécial relève que ses deux prédécesseurs se sont heurtés au même refus. Il a rencontré l'Observateur permanent de l'État de Palestine auprès de l'Organisation des Nations Unies le 7 juin lors de sa première visite à Genève. Il a également demandé à s'entretenir avec le Représentant permanent d'Israël, mais sa demande est restée sans réponse. Ce défaut systématique de coopération avec le Rapporteur spécial est très préoccupant. Une compréhension complète et exhaustive de la situation fondée sur l'observation directe serait extrêmement utile aux travaux du Rapporteur spécial¹.

3. Le présent rapport repose principalement sur des communications écrites ainsi que sur des consultations menées avec des représentants de la société civile, des victimes, des témoins, des responsables palestiniens et des représentants d'organismes des Nations Unies à Amman lors de la première mission du Rapporteur spécial dans la région en juillet 2016.

4. La Commission des droits de l'homme a chargé le Rapporteur spécial d'enquêter sur les violations, par Israël, des principes et des fondements du droit international, du droit international humanitaire et de la Convention de Genève du 12 août 1949 relative à la protection des personnes civiles en temps de guerre, dans les territoires palestiniens qu'il occupe depuis 1967². En conséquence, le présent rapport est axé sur les violations commises par Israël au cours de près de 50 ans d'occupation. Israël étant tenu en qualité de Puissance occupante de faire respecter et de protéger les droits des Palestiniens se trouvant sous son contrôle³, le mandat du Rapporteur spécial se concentre sur les responsabilités israéliennes. Il convient néanmoins de préciser que les violations des droits de l'homme commises par tout État ou toute organisation non étatique sont condamnables et ne font que compromettre les perspectives de paix.

5. Le Rapporteur spécial tient à remercier le Gouvernement de l'État de Palestine de la coopération sans réserve qu'il lui a apportée dans le cadre de l'exécution de son mandat. Il souhaite également adresser ses remerciements à tous ceux qui sont venus à sa rencontre à Amman ainsi qu'à tous ceux qui n'ont pas pu faire le déplacement mais qui lui ont fait parvenir des observations écrites ou orales. Il salue

¹ A/HRC/23/21 par. 1.

² Voir résolution 1993/2 de la Commission des droits de l'homme.

³ Convention de Genève relative à la protection des personnes civiles en temps de guerre, 12 août 1949 (quatrième Convention de Genève), art. 47.

l'action essentielle que mènent les groupes qui cherchent à instaurer un environnement propice au respect des droits de l'homme et à faire en sorte que les violations des droits de l'homme et du droit humanitaire ne soient pas commises avec impunité et sans témoin. Le Rapporteur spécial entend bien apporter son soutien à ce travail dans toute la mesure possible.

6. Le Rapporteur spécial tient à souligner que plusieurs groupes ont été empêchés de venir le rencontrer à Amman par des restrictions de déplacement imposées par les autorités israéliennes. Ces mesures ayant tout particulièrement visé les personnes venant de Gaza, tous les groupes y opérant ont été consultés par vidéoconférence.

7. Le présent rapport est divisé en deux parties. La première partie est consacrée à la situation dans le Territoire palestinien occupé, y compris Jérusalem-Est. Le Rapporteur spécial y analyse les problèmes actuels liés aux droits de l'homme en les replaçant dans le contexte de près de 50 années d'occupation. Par conséquent, cette partie ne se limite pas aux faits intervenus pendant une période donnée, même si l'accent est mis sur les questions revêtant une importance particulière à la date de l'établissement du rapport à la lumière des informations recueillies par le Rapporteur spécial lors de ses conversations avec les personnes et les organisations rencontrées dans le cadre de sa mission en juillet 2016.

8. Dans la deuxième partie du rapport, le Rapporteur spécial revient sur la situation dans le Territoire palestinien occupé sous l'angle du droit au développement, en particulier du développement comme droit de l'homme, et examine les répercussions que les violations des droits de l'homme ont sur le développement dans le Territoire palestinien occupé.

II. Situation actuelle des droits de l'homme

9. Plusieurs évolutions et tendances inquiétantes se sont fait jour depuis le début de la flambée de violence qui a commencé en octobre 2015 en Cisjordanie, y compris à Jérusalem-Est. Plus de 230 Palestiniens et au moins 32 Israéliens ont été tués en 2015 et en 2016 dans le cadre de manifestations organisées par des Palestiniens, d'agressions commises ou présumées commises par des Palestiniens et d'interventions souvent mortelles des forces de sécurité israéliennes⁴. Si le nombre d'actes de violence a reculé ces derniers mois⁵, la poursuite du recours aux détentions administratives, aux démolitions punitives, aux restrictions de mouvement et autres mesures continue de porter atteinte aux droits de l'homme du peuple palestinien.

10. Toute agression violente, quelle qu'en soit la forme et quel qu'en soit l'auteur, est inacceptable. Le fait que les agressions commises ou présumées commises par des Palestiniens contre des Israéliens donnent lieu, bien souvent, à un emploi disproportionné et meurtrier de la force n'a pour effet que d'aggraver les violences. Bon nombre des attaques en question ont été commises par des mineurs, ce qui est particulièrement inquiétant compte tenu du désespoir que ces actes semblent

⁴ Bureau de la coordination des affaires humanitaires, rapport hebdomadaire sur la protection des civils, 16 au 22 août 2016. Consultable à l'adresse : www.ochaopt.org/content/protection-civilians-weekly-report-16-22-august-2016.

⁵ Gili Cohen, « After six months of terror wave, attacks decreasing, says Israeli army », *Haaretz*, 1^{er} avril 2016. Consultable à l'adresse : www.haaretz.com/israel-news/premium-1.712123.

manifester. Un nombre remarquable de personnes travaillant dans le Territoire palestinien occupé que le Rapporteur spécial a rencontrées au cours de sa mission ont systématiquement rapporté avoir relevé un sentiment de désolation et de désespoir chez les enfants, sentiment qui se manifeste non seulement par des accès de violence mais également par des souffrances physiques et psychologiques (énurésie, anxiété, dépression). La détresse des enfants est souvent un symptôme de la gravité d'une situation. Malheureusement, dans les circonstances actuelles, les enfants qui naissent aujourd'hui dans le Territoire palestinien occupé grandissent sans l'espoir d'un avenir pacifique.

A. Violence et impunité

11. Le nombre de victimes de la flambée de violence observée en 2015 est le plus élevé chez les Israéliens et les Palestiniens en Cisjordanie depuis 2005⁶. La grande majorité des personnes tuées sont des Palestiniens, les forces de sécurité israéliennes ayant souvent fait un usage disproportionné et meurtrier de la force. Selon des représentants de la société civile, sur l'ensemble des personnes tuées en Cisjordanie entre octobre 2015 et janvier 2016, 88 étaient des Palestiniens soupçonnés par les autorités israéliennes d'être les auteurs d'agressions ou de tentatives d'agression. Ces cas soulèvent deux problèmes. Le premier tient au fait qu'ils se soient produits et que la force létale soit si souvent utilisée et fréquemment sans justification⁷; le second au fait que, dans la majorité des cas où un agent des forces de sécurité israéliennes a fait un usage meurtrier de la force, aucune enquête n'ait été ouverte ou que l'enquête menée n'ait donné lieu à aucune sanction.

12. Dans plusieurs affaires dont les circonstances sont bien établies, il apparaît clairement que les personnes tuées ne présentaient pas, au regard des normes internationales, une menace justifiant un emploi disproportionné de la force. Selon les Principes de base sur le recours à la force et l'utilisation des armes à feu par les responsables de l'application des lois⁸, les armes et la force létale ne doivent être utilisées qu'en dernier recours⁹. Les organisations de défense des droits de l'homme ont recensé un certain nombre de cas où cette condition n'était à l'évidence pas remplie¹⁰.

13. L'un des exemples les plus emblématiques, dont les médias ont beaucoup parlé, est le meurtre de Abd al-Fatah al-Sharif à Hébron le 24 mars 2016. Après

⁶ Bureau de la coordination des affaires humanitaires, « Israel opened 24 criminal investigations into the killing and injury of Palestinians since October 2015, leading to one indictment », Monthly Humanitarian Bulletin (juillet 2016). Consultable à l'adresse : www.ochaopt.org/content/israel-opened-24-criminal-investigations-killing-and-injury-palestinians-october-2015.

⁷ Voir Haut-Commissariat des Nations Unies aux droits de l'homme (HCDH), « Principes de base sur le recours à la force et l'utilisation des armes à feu par les responsables de l'application des lois ». Consultable à l'adresse : www.ohchr.org/FR/ProfessionalInterest/Pages/UseOffForceAndFirearms.aspx.

⁸ Voir *Huitième Congrès des Nations Unies pour la prévention du crime et le traitement des délinquants, La Havane, 27 août-7 septembre 1990 : rapport établi par le Secrétariat* (publication des Nations Unies, numéro de vente : F.91.IV.2), chap. I, sect. B.

⁹ Voir HCDH, « Principes de base sur le recours à la force et l'utilisation des armes à feu par les responsables de l'application des lois ».

¹⁰ Betsalem, « Unjustified use of lethal force and execution of Palestinians who stabbed or were suspected of attempted stabbings », 16 décembre 2015. Consultable à l'adresse : www.btselem.org/gunfire/20151216_cases_of_unjustified_gunfire_and_executions.

avoir semble-t-il poignardé et blessé un soldat israélien, Al-Sharif a été abattu par un soldat israélien alors qu'il était couché au sol, blessé¹¹. La scène a été filmée et la vidéo, mise en ligne sur YouTube par l'organisation de défense des droits de l'homme Betsalem, a fait la une de la presse internationale. Le Rapporteur spécial sur les exécutions extrajudiciaires, sommaires ou arbitraires a déclaré que les faits montrés par la vidéo présentaient tous les signes d'une exécution extrajudiciaire¹².

14. Il ne s'agit là que d'un exemple de ce qui semble constituer une tendance alarmante. Comme l'a déclaré le porte-parole du Haut-Commissaire des Nations Unies aux droits de l'homme, ce n'est pas le premier incident filmé qui soulève des problèmes d'emploi excessif de la force¹³. Ces quelques cas ne rendent pas compte de l'ampleur réelle du phénomène. Par ailleurs, les règles d'ouverture du feu mises à jour en décembre 2015 qui ont été récemment publiées par les autorités israéliennes abaissent le seuil du recours à la force meurtrière à un niveau contraire aux normes internationales¹⁴. Alors que les Principes de base sur le recours à la force et l'utilisation des armes à feu par les responsables de l'application des lois disposent que les armes à feu ne doivent être utilisées qu'en cas de « menace imminente de mort ou de blessure grave », les nouvelles règles encadrant l'ouverture du feu autorisent l'usage de balles réelles contre les personnes qui semblent lancer ou sont sur le point de lancer des bombes incendiaires, des feux d'artifice ou des pierres. Cette évolution donne à penser que le Gouvernement cherche à créer un environnement dans lequel le recours à la force meurtrière est moins mis en question et plus accepté. Il y a donc tout lieu de craindre que l'usage excessif de la force va augmenter.

15. Le problème est encore aggravé par le fait que, dans la majorité des cas, rien ou presque n'a été fait pour établir les responsabilités. Entre octobre 2015 et juin 2016, les autorités israéliennes ont ouvert 24 enquêtes judiciaires pour faire la lumière sur les actes des forces de sécurité israéliennes ayant porté atteinte à l'intégrité physique ou à la vie de Palestiniens¹⁵. Jusqu'à présent, seul le meurtre d'Abd al-Fatah al-Sharif à Hébron a débouché sur la mise en examen d'un soldat et son renvoi devant la justice. Alors que le procès se poursuit, le Ministre israélien de la défense, Avigdor Lieberman, s'exprimant sur l'affaire, aurait déclaré qu'Israël ne pouvait pas en arriver au point où un soldat ait besoin de consulter un avocat avant de partir en mission, avant d'ajouter que toute personne avait droit à la présomption d'innocence¹⁶. De telles déclarations ont pour effet implicite de favoriser le laxisme

¹¹ Voir www.youtube.com/watch?v=S8WK2TgruMo.

¹² HCDH, « Hebron killing: "All the signs of an extrajudicial execution" – United Nations expert expresses outrage », 30 mars 2016. Consultable à l'adresse : www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18544&LangID=E.

¹³ HCDH, « Comment by the Spokesperson for the United Nations High Commissioner for Human Rights, Rupert Colville, on the killing of a Palestinian man in Hebron », 30 mars 2016. Consultable à l'adresse : www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18540&LangID=E.

¹⁴ « Israeli police reveal new open-fire regulations in response to Adalah's court petition », Adalaha, 5 juillet 2016. Consultable à l'adresse : www.adalah.org/en/content/view/8845.

¹⁵ Bureau de la coordination des affaires humanitaires, « Israel opened 24 criminal investigations into the killing and injury of Palestinians since October 2015, leading to one indictment ».

¹⁶ Isabel Kershner, « Israeli military investigating soldier's killing of unarmed Palestinian », *The New York Times*, 29 août 2016. Consultable à l'adresse : www.nytimes.com/2016/08/30/world/middleeast/israeli-military-investigating-soldiers-killing-of-unarmed-palestinian.html.

à l'égard des soldats qui font un usage meurtrier de la force et, partant, de compromettre l'action menée pour sanctionner les responsables.

16. Le problème de l'impunité est loin d'être nouveau. On en trouve une illustration récente et éclatante dans la décision annoncée en mai 2016 par l'organisation Betsalem de ne plus collaborer avec la police judiciaire militaire israélienne¹⁷. Au bout de 25 ans de travail, l'organisation est arrivée à la conclusion qu'il ne servait plus à rien de chercher à obtenir justice et de défendre les droits de l'homme en collaborant avec un système dont la fonction véritable se mesure à son aptitude à camoufler des actes illicites et à en protéger les auteurs¹⁸. Selon Betsalem, sur les 739 affaires que l'organisation a portées à la connaissance de l'avocat général de l'armée depuis 1989, les autorités n'ont ouvert aucune enquête dans 182 cas et ont classé l'enquête sans suite dans près de la moitié des cas (343). En 25 ans, seules 25 affaires ont débouché sur l'engagement de poursuites contre les soldats mis en cause. Début 2015, l'organisation de défense des droits de l'homme Yesh Din a publié des chiffres sur les inculpations prononcées en 2014 et constaté que la part des enquêtes ayant débouché sur une mise en examen était de 8 sur 229 en 2014 et de 9 sur 199 en 2013. Dans son analyse, Yesh Din a observé que ces statistiques faisaient apparaître une incapacité profonde de mener des enquêtes exhaustives débouchant sur des poursuites. Il s'ensuit une quasi-impunité judiciaire pour les soldats des forces de défense israéliennes¹⁹.

17. L'impunité est un problème systémique et profondément enraciné. Elle contribue à alimenter le cycle des violences : tandis que les soldats paraissent pouvoir agir en toute impunité et que s'installe dans les esprits l'idée que la vie des Palestiniens est sans importance, la peur et le désespoir montent au sein de la population palestinienne.

B. Détention

18. La montée des violences s'accompagne d'une augmentation des arrestations et du nombre de Palestiniens incarcérés dans les centres de détention israéliens et notamment du nombre de placements en détention administrative. Le mois d'octobre 2015 a été marqué par une forte hausse du nombre de Palestiniens en détention, lequel se maintient à un niveau inédit en près de 10 ans. À la date de l'établissement du présent rapport, si l'on en croit les chiffres recueillis par Betsalem et l'organisation de défense des droits de l'homme Addameer, plus de 6 000 personnes se trouvaient détenues pour des raisons de sécurité, dont environ 700 en détention administrative. Ces chiffres sont stupéfiants et semblent

¹⁷ Betsalem, *The Occupation's Fig Leaf: Israel's Military Law Enforcement System as a Whitewash Mechanism* (mai 2016). Consultable à l'adresse:

www.betsalem.org/publications/summaries/201605_occupations_fig_leaf.

¹⁸ Ibid.

¹⁹ Yesh Din, « December 2015 data sheet: law enforcement on IDF soldiers suspected of harming Palestinians – Summary of 2014 data », 12 février 2015. Consultable à l'adresse : www.yesh-din.org/en/december-2015-data-sheet-law-enforcement-on-idf-soldiers-suspected-of-harming-palestinians-summary-of-2014-data/.

révélateurs d'une politique générale visant à intimider et à restreindre considérablement les libertés des Palestiniens²⁰.

Détention administrative

19. L'augmentation du nombre de personnes placées en détention administrative est particulièrement alarmante. Environ 700 Palestiniens font actuellement l'objet d'une mesure de détention administrative²¹. Il s'agit du nombre de personnes en détention administrative le plus élevé depuis 2008²². Comme l'a relevé le Comité contre la torture en 2016 lors de l'examen du cinquième rapport périodique d'Israël, ces détenus sont souvent privés des garanties juridiques fondamentales : placés en détention sur le fondement d'éléments de preuve secrets auxquels ni eux ni leurs avocats n'ont accès, ils ne sont ni inculpés ni jugés²³. Les mesures de détention administrative pouvant être renouvelées indéfiniment, certains militants des droits de l'homme estiment que l'angoisse psychologique causée par l'incertitude peut être constitutive de torture²⁴.

20. Pour justifier le recours généralisé aux détentions administratives, Israël invoque des raisons de sécurité. Le Gouvernement israélien s'est ainsi prévalu de l'article 78 de la quatrième Convention de Genève, aux termes duquel : « Si la puissance occupante estime nécessaire, pour d'impérieuses raisons de sécurité, de prendre des mesures de sûreté à l'égard de personnes protégées, elle pourra tout au plus leur imposer une résidence forcée ou procéder à leur internement. » En droit international, l'internement se définit comme la détention non pénale d'une personne présentant par son activité une menace grave pour la sécurité des autorités détentrices dans le cadre d'un conflit armé²⁵. Il résulte de cette définition que l'internement ne peut être utilisé que dans un cadre non pénal et ne saurait se substituer à une condamnation pénale ou à une forme de sanction²⁶. Le fait que les mesures de détention administrative soient souvent prononcées contre des individus que les autorités israéliennes ont d'abord tenté de poursuivre sans succès semble indiquer qu'un grand nombre de ces arrestations sont contraires à cette règle²⁷. Selon le commentaire de la quatrième Convention de Genève, cet article doit être

²⁰ Un grand nombre de règlements militaires encadrent les conditions d'arrestation et de détention des Palestiniens dans le Territoire palestinien occupé. Voir Addameer Prisoner Support and Human Rights Association, « Palestinian political prisoners in Israeli prisons », juin 2016. Consultable à l'adresse : www.addameer.org/sites/default/files/briefings/general_briefing_paper_-_june_2016_1.pdf.

²¹ Addameer, Statistics, août 2016. Consultable à l'adresse : www.addameer.org/statistics.

²² Betsalem, Statistics on administrative detention, 12 septembre 2016. Consultable à l'adresse : www.btselem.org/administrative_detention/statistics.

²³ CAT/C/ISR/CO/5, par. 22.

²⁴ Addameer, « Induced Desperation: The Psychological Torture of Administrative Detention », 26 juin 2016. Consultable à l'adresse : www.addameer.org/publications/induced-desperation-psychological-torture-administrative-detention.

²⁵ Comité international de la Croix-Rouge, « Internment in armed conflict: basic rules and challenges », prise de position, novembre 2014.

²⁶ Voir Commentaire (1958) de l'article 78 de la quatrième Convention de Genève : « Les personnes faisant l'objet de ces mesures sont théoriquement hors du combat; aussi les précautions prises à leur égard ne sauraient-elles avoir le caractère de sanctions. »

²⁷ Voir, par exemple, Amnesty International, « Israel/OPT: Human rights defender administratively detained: Hasan Ghassan Ghaleb Safadi », 4 juillet 2016. Consultable à l'adresse : www.amnesty.org/en/documents/mde15/4376/2016/en/.

interprété comme ne s'appliquant que dans des circonstances très limitées²⁸. L'internement est l'une des mesures les plus graves qu'une puissance occupante puisse prendre à l'égard de la population civile d'un territoire occupé.

21. Le recours par Israël à la détention d'individus sur le fondement de preuves secrètes constitue une violation manifeste non seulement du droit international humanitaire mais également du droit international des droits de l'homme et excède les limites de l'internement envisagées par la quatrième Convention de Genève. Lors de l'examen du rapport d'Israël, le Comité contre la torture a exhorté l'État israélien à mettre fin à la pratique des détentions administratives, au motif que les détenus peuvent être privés des garanties juridiques fondamentales dans la mesure notamment où ils peuvent être maintenus indéfiniment en détention sans inculpation sur la base d'éléments de preuve secrets auxquels ni eux ni leurs avocats n'ont accès^{23,29}.

22. Le cas de Hasan Safadi, journaliste et coordonnateur pour les médias de l'organisation Addameer qui œuvre en faveur de la protection et de la promotion des droits des détenus, est un exemple caractéristique des défaillances du système israélien. Arrêté le 1^{er} mai 2016, Hassan Safadi se trouvait, à la date de l'établissement du présent rapport, en détention administrative depuis cinq mois. Selon les renseignements fournis par Addameer, le journaliste a été arrêté puis interrogé pendant 40 jours. Aucun élément de preuve susceptible de justifier son maintien en détention n'ayant été trouvé, il devait être remis en liberté le 10 juin en application d'une décision du tribunal de police. Le jour où Hasan Safadi devait être remis en liberté, le Ministre de la défense a ordonné son placement en détention administrative pour une période de six mois. Pour Addameer, cet exemple met en évidence comment la détention administrative est utilisée pour maintenir une personne en détention en l'absence de preuves à charge³⁰.

Enfants en détention

23. Le nombre d'enfants actuellement détenus par les autorités israéliennes est particulièrement préoccupant. À la date de l'établissement du présent rapport, Addameer avait recensé au moins 350 mineurs palestiniens en détention³¹. À la fin de 2015, ce chiffre était de 422, dont au moins 116 mineurs âgés de 12 à 15 ans³². La majorité de ces mineurs avaient été arrêtés pour avoir jeté des pierres³³. Dans le

²⁸ Voir <https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=D794403E436F0823C12563CD0042CF9A>.

²⁹ L'article 43 de la quatrième Convention de Genève dispose que toute personne internée « aura le droit d'obtenir qu'un tribunal ou un collège administratif compétent [...] reconsidère dans le plus bref délai la décision prise à son égard ». L'article 78 prévoit un droit d'appel. Voir également Pacte international relatif aux droits civils et politiques (art. 9, par. 2), dans la résolution 2200 A (XXI) de l'Assemblée générale, annexe.

³⁰ Information publiée par Addameer, consultable à l'adresse : www.addameer.org/prisoner/hasan-safadi.

³¹ Addameer, Statistics, août 2016. Consultable à l'adresse : www.addameer.org/statistics.

³² Defense for Children International – Palestine, « No way to treat a child: Palestinian children in the Israeli military detention system », avril 2016. Consultable à l'adresse : www.dci-palestine.org/palestinian_children_in_the_israeli_military_detention_system.

³³ Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient (UNRWA), « Children in distress: raising the alarm for 2016 and beyond », note d'information, avril 2016. Consultable à l'adresse : www.unrwa.org/sites/default/files/content/resources/children_in_distress_briefing_note.pdf.

cadre du système juridique mixte en vigueur dans le Territoire palestinien occupé, les enfants palestiniens arrêtés en Cisjordanie sont passibles de la législation militaire israélienne (tout comme les adultes palestiniens), tandis que les colons israéliens vivant dans la même zone géographique sont du ressort de la justice civile et pénale israélienne. Malgré les nombreux appels lancés pour attirer l'attention sur les protections devant être accordées aux enfants, le recours à l'arrestation et au placement en détention des mineurs demeure extrêmement problématique. Il ressort des informations recueillies et des documents consultés que les parents ne sont souvent informés de l'arrestation de leurs enfants qu'au bout de plusieurs jours. Dans bien des cas, les aveux sont obtenus sous la contrainte et souvent rédigés en hébreu, langue que la plupart des enfants palestiniens ne savent pas lire. Les mineurs sont souvent privés d'accès à un avocat au stade de l'arrestation et beaucoup déclarent avoir été victimes de mauvais traitements³⁴. Des enfants ont rapporté avoir eu les yeux bandés, les mains menottées ou ligotées, et avoir été battus et mis à l'isolement³⁵.

24. Ces pratiques ne sont pas seulement contraires aux normes juridiques fondamentales; elles ne tiennent pas non plus compte de l'état d'extrême vulnérabilité des jeunes enfants. La vulnérabilité des enfants est une notion bien admise par la communauté internationale et les protections spéciales accordées aux enfants sont consacrées par un certain nombre d'instruments juridiques, à commencer par la Convention relative aux droits de l'enfant. Selon un rapport établi en 2012 par une équipe d'avocats indépendants, l'argument avancé par les autorités israéliennes selon lequel la Convention ne s'applique pas au-delà des frontières d'Israël est factuellement et juridiquement sans fondement³⁶. Dans son avis consultatif sur les conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, la Cour internationale de Justice a jugé que la Convention, le Pacte international relatif aux droits civils et politiques et le Pacte international relatif aux droits économiques, sociaux et culturels étaient en réalité applicables³⁷. Seules 2,5 % des recommandations formulées dans le rapport « Children in military custody » avaient été mises en œuvre en juillet 2016³⁸.

C. Punitions collectives

25. Les autorités israéliennes ont couramment recours à un certain nombre de mesures qui constituent souvent une forme de punition collective. Ces mesures, prises au nom de la sécurité et généralement en réponse aux agissements d'une seule

³⁴ Defense for Children International – Palestine, « No way to treat a child: Palestinian children in the Israeli military detention system », avril 2016.

³⁵ Département d'État des États-Unis d'Amérique, rapport 2015 sur les pratiques en matière de droits de l'homme en Israël et dans les territoires occupés, consultable à l'adresse : www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic_load_id=252929&year=2015#wrapper.

³⁶ « Children in military custody », juin 2012, par. 30. Consultable à l'adresse : www.childreninmilitarycustody.org.uk/.

³⁷ *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif du 9 juillet 2004, C.I.J. Recueil 2004*, par. 102 à 113.

³⁸ Military Court Watch, Monitoring the treatment of children in Israeli military detention, note d'information, juillet 2016. Consultable à l'adresse : www.militarycourtwatch.org/files/server/MCW%20BRIEFING%20PAPER%20-%20JUL%202016.pdf.

personne ou d'un seul groupe de personnes, ont une incidence considérable sur le quotidien de la quasi-totalité des Palestiniens à un moment ou à un autre. La fermeture des routes et l'installation de points de contrôle et de barrages ont pour effet de restreindre la liberté des Palestiniens de se rendre au travail et à l'école, de rendre visite à leur famille et de voyager pour raisons médicales. La démolition des maisons prive de logement des familles entières à raison des actes présumés d'une seule personne.

26. La pratique des peines collectives consiste à punir un groupe entier pour les actes d'un seul individu. Posée par l'article 33 de la quatrième Convention de Genève, l'interdiction des peines collectives a été déclarée insusceptible de dérogation par le Comité des droits de l'homme³⁹.

Démolitions punitives

27. En 2014, les autorités israéliennes ont repris la pratique des démolitions punitives de maisons⁴⁰. Depuis, le nombre de démolitions ne fait qu'augmenter. En 2015, 11 maisons ont été démolies, entraînant le déplacement de 85 personnes. En juillet 2016, 16 maisons avaient déjà été détruites, provoquant le déplacement de 92 personnes⁴¹. Les démolitions punitives, dont le but est de causer du tort aux membres de la famille d'une personne soupçonnée d'une infraction, constitue une violation flagrante des principes fondamentaux du droit international⁴².

28. Lors de l'examen du quatrième rapport périodique d'Israël en 2014, le Comité des droits de l'homme a également engagé l'État israélien à mettre fin à sa politique de démolitions punitives, la déclarant incompatible avec les obligations mises à sa charge par le Pacte⁴³. En plus de constituer une forme de châtement collectif interdit, les démolitions punitives sont une violation de l'interdiction de la destruction de biens de caractère civil⁴⁴.

Fermetures, points de contrôle et permis

29. Le droit à la liberté d'aller et venir est régulièrement compromis par les fermetures de routes, les points de passage et les lourds régimes de permis qui touchent des villes et des villages entiers. Ces pratiques sont de plus en plus utilisées dans les villages et les régions dont sont originaires les personnes soupçonnées d'attaques⁴⁵. À la fin de 2015, le Bureau de la coordination des affaires humanitaires a recensé 543 fermetures de routes au total en Cisjordanie. Hébron est particulièrement visé par ce type de mesures. Les restrictions y ont été considérablement renforcées après une série de manifestations et d'affrontements

³⁹ Voir observation générale n° 29 (CCPR/C/21/Rev.1/Add.11).

⁴⁰ HCDH, « Punitive demolitions destroy more than homes in occupied Palestinian territory », 28 décembre 2015. Consultable à l'adresse : www.ohchr.org/EN/NewsEvents/Pages/PunitiveDemolitionsinOPT.aspx.

⁴¹ Betsalem, Statistics on punitive house demolitions, 31 août 2016. Consultable à l'adresse : www.btselem.org/punitive_demolitions/statistics.

⁴² Al-Haq, « Punitive house demolitions », 31 octobre 2015. Consultable à l'adresse : www.alhaq.org/advocacy/topics/population-transfer-and-residency-right/983-punitive-house-demolitions.

⁴³ Voir CCPR/C/ISR/CO/4.

⁴⁴ Quatrième Convention de Genève, art. 53.

⁴⁵ Voir Bureau de la coordination des affaires humanitaires, « Fragmented lives: humanitarian overview 2015 », juin 2016.

ainsi qu'à la suite des agressions qui auraient été commises dans la région en novembre 2015. Ainsi, aux 109 obstacles existants, 53 nouveaux ont été ajoutés au total⁴⁶. Israël affirme qu'il s'agit là de mesures de sécurité. Toutefois, le caractère général de ces obstacles et leur incidence majeure sur l'ensemble de la population palestinienne de plusieurs villes et agglomérations en font non seulement une violation du droit à la liberté de mouvement⁴⁷ mais également, dans de nombreux cas, une forme de punition collective.

30. Un incident récent offre un exemple particulièrement illustratif. Le 8 juin 2016, quatre Israéliens ont été tués dans un attentat odieux commis dans un centre commercial très fréquenté de Tel-Aviv. Après l'attentat, la police a identifié deux suspects palestiniens originaires d'Hébron⁴⁸. Les autorités israéliennes ont alors révoqué les 83 000 permis accordés aux résidents de la Cisjordanie et de Gaza pour leur permettre de voyager pendant le Ramadan, suspendu 204 permis de travail délivrés à des personnes appartenant à la famille élargie des suspects et bouclé toute la ville dont ces derniers étaient originaires⁴⁹.

31. Le blocus de Gaza constitue actuellement la plus longue peine collective infligée au peuple palestinien⁵⁰. Imposé en 2007, le bouclage empêche la grande majorité du 1,8 million d'habitants de Gaza de partir. Cette mesure a été qualifiée de punition collective par le Secrétaire général et le Comité international de la Croix-Rouge⁵¹.

32. Une annonce faite récemment par le Ministre de la défense donne tout lieu de craindre que ce type de mesures va se poursuivre. Dans la logique de la méthode dite « de la carotte et du bâton », le Ministre propose de continuer à employer des mesures rigoureuses (fermetures, présence renforcée des forces de sécurité, démolitions) dans les régions où vivent les suspects, tout en construisant des infrastructures dans les zones qui, de l'avis des autorités israéliennes, recherchent la coexistence. Il convient de noter que c'est principalement avec les implantations illégales qu'il s'agit de coexister. Le Ministre aurait déclaré que cette politique

⁴⁶ Ibid.

⁴⁷ Pacte international relatif aux droits civils et politiques, art. 12, Déclaration universelle des droits de l'homme, art. 13, quatrième Convention de Genève, art. 27 et commentaire de cet article, et *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif du 9 juillet 2004, C.I.J. Recueil 2004*, par. 135 à 137.

⁴⁸ Peter Beaumont, « Four dead in Tel Aviv market shooting », *The Guardian*, 8 juin 2016. Consultable à l'adresse : www.theguardian.com/world/2016/jun/08/tel-aviv-market-shooting-sarona-complex.

⁴⁹ HCDH, Press briefing note on Yemen and Israel/Occupied Palestinian Territory, 10 juin 2016. Consultable à l'adresse : www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=20082&LangID=E.

⁵⁰ A/HRC/24/30, par. 21 à 23.

⁵¹ Centre d'actualités de l'ONU, « In Jerusalem and Gaza, Ban urges "courageous steps" for lasting two-State solution », 28 juin 2016, consultable à l'adresse : www.un.org/apps/news/story.asp?NewsID=54341#.V81iTJN95E4, et Comité international de la Croix-Rouge, « Gaza closure: not another year! », communiqué de presse n° 10/103, 14 juin 2010, consultable à l'adresse : www.icrc.org/eng/resources/documents/update/palestine-update-140610.htm.

visait à continuer de donner des avantages à ceux qui aspirent à la coexistence tout en compliquant la vie de ceux qui cherchent à s'en prendre aux Juifs⁵².

D. Environnement coercitif et transferts forcés

33. Au cours des derniers mois, les activités d'implantation de colonies se sont fortement intensifiées : multiplication des permis de construire, autorisation rétroactive de constructions considérées illégales au regard même du droit israélien, démolition de maisons palestiniennes, poursuite des pratiques et des politiques discriminatoires de planification urbaine qui rendent extrêmement difficile la construction par les Palestiniens. Ces politiques et pratiques sont particulièrement employées dans la zone C et à Jérusalem-Est, au point que le Bureau de la coordination des affaires humanitaires a qualifié la situation d'environnement coercitif compromettant la présence physique des Palestiniens et exacerbant le risque de transferts forcés individuels et en masse⁵³.

34. Le transfert forcé est clairement interdit par l'article 49 de la quatrième Convention de Genève. Ce même article fait également interdiction à la puissance occupante de procéder au transfert de sa propre population dans le territoire occupé. Le transfert forcé est également érigé en crime de guerre et en crime contre l'humanité par le Statut de Rome de la Cour pénale internationale⁵⁴. Dans le contexte du Statut de Rome, le terme « de force » ne se limite pas à la force physique et peut comprendre « un acte commis en usant à l'encontre de ladite ou desdites ou de tierces personnes de la menace de la force ou de la coercition, telle que celle causée par la menace de violences, contrainte, détention, pressions psychologiques, abus de pouvoir, ou bien à la faveur d'un climat coercitif »⁵⁵.

35. Les communautés bédouines de Cisjordanie sont particulièrement vulnérables, car elles sont souvent l'objet de plans de réinstallation établis par les autorités israéliennes. Pour justifier ces mesures, les autorités israéliennes font notamment valoir que les structures et les emplacements existants ne seraient pas « viables »⁵⁶. Dans le cadre de la mise en œuvre de ces plans de réinstallation, les autorités ont démoli des maisons et autres constructions palestiniennes en se prévalant souvent du fait que ces structures sont construites sans permis délivrés par Israël. Toutefois, il est notoire que ces permis sont difficiles à obtenir en raison du coût élevé des demandes, des rejets fréquents et de la lourdeur des procédures, autant d'éléments qui, ensemble, constituent une forme de régime de permis discriminatoire qui rend quasi impossible toute construction « légale » par les Palestiniens. Le 8 janvier

⁵² Yossi Melman, « Liberman unveils new “carrot and stick” policy for West Bank Palestinians », *Jerusalem Post*, 17 août 2016. Consultable à l'adresse : www.jpost.com/Arab-Israeli-Conflict/Liberman-unveils-new-carrot-and-stick-policy-for-West-Bank-Palestinians-464360.

⁵³ Bureau de la coordination des affaires humanitaires, « Fragmented lives: humanitarian overview 2015 », juin 2016.

⁵⁴ Statut de Rome de la Cour pénale internationale, art. 8.2) a) vii) et 7.1) d), Nations Unies, *Recueil des Traités*, vol. 2187, n° 38544.

⁵⁵ Cour pénale internationale, *Éléments des crimes* (La Haye, 2011). Consultable à l'adresse : www.icc-cpi.int/NR/rdonlyres/7730B6BF-308A-4D26-9C52-3E19CD06E6AB/0/ElementsOfCrimesFra.pdf.

⁵⁶ Bureau de la coordination des affaires humanitaires, « At risk of forcible transfer », *Monthly Humanitarian Bulletin* (mai 2016). Consultable à l'adresse : www.ochaopt.org/content/risk-forcible-transfer.

2016, l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient (UNRWA) a noté, au sujet de la démolition de maisons de Bédouins menée par les autorités israéliennes en Cisjordanie le 6 janvier, que la démolition de structures résidentielles exacerbe un climat déjà coercitif et a pour effet de chasser les communautés bédouines de terres où elles habitent depuis des dizaines d'années⁵⁷.

36. Le Bureau de la coordination des affaires humanitaires a également observé que la situation en Cisjordanie, y compris à Jérusalem-Est, exposait de nombreuses familles et communautés palestiniennes au risque de transfert forcé, dans la mesure où l'environnement coercitif créé par les pratiques israéliennes, et notamment la quasi-impossibilité d'obtenir des permis de construire, les pousse à partir⁵⁸. Dans une lettre, les Ambassadeurs en Israël de l'Allemagne, de la Belgique, de l'Espagne, de l'Irlande, de l'Italie, de la Norvège, de la Suède et de la Suisse ont reproché aux forces israéliennes de confisquer les abris appartenant à la communauté bédouine de Cisjordanie et déclaré que ces confiscations et les démolitions antérieures, ajoutées à l'impossibilité pour les organismes humanitaires d'acheminer des articles de secours aux familles touchées, créaient un environnement coercitif susceptible de les pousser à partir contre leur gré⁵⁹.

37. La destruction des maisons et des biens ne se limite pas aux structures construites par les Palestiniens mais s'étend également, et de plus en plus souvent, aux constructions financées grâce à l'aide humanitaire internationale. Ainsi, le 16 mai 2016, les autorités israéliennes ont démoli sept maisons et confisqué les matériaux de trois autres constructions qui avaient été fournis par les organismes humanitaires, laissant sans abri 49 réfugiés palestiniens, dont 22 enfants⁶⁰. Depuis le début de 2016, selon les chiffres de la société civile, 187 des structures détruites ou saisies par les autorités israéliennes avaient été fournies dans le cadre de l'assistance humanitaire financée par les donateurs, contre 108 sur l'ensemble de 2015. La destruction d'infrastructures essentielles fournies par le biais de l'aide humanitaire constitue une violation directe des obligations imposées à Israël par le droit international. Aux termes de l'article 59 de la quatrième Convention de Genève, la puissance occupante doit, « dans toute la mesure de ses moyens », faciliter les actions de secours faites en faveur d'une population dans le besoin. Le premier alinéa de l'article 55 fait en outre obligation à la puissance occupante d'assurer l'approvisionnement de la population civile en vivres et en produits

⁵⁷ UNRWA, « UNRWA condemns demolition of the homes of Palestine refugee bedouins families at risk of forcible transfer; decries desperate humanitarian consequences », 8 janvier 2016. Consultable à l'adresse : www.unrwa.org/newsroom/official-statements/unrwa-condemns-demolition-homes-palestine-refugee-bedouins-families.

⁵⁸ Bureau de la coordination des affaires humanitaires, « At risk of forcible transfer », Monthly Humanitarian Bulletin (mai 2016). Consultable à l'adresse : www.ochaopt.org/content/risk-forcible-transfer#_ftn3.

⁵⁹ Peter Beaumont, « Ambassadors protest at Israel's confiscation of West Bank shelters », *The Guardian*, 18 juillet 2016. Consultable à l'adresse : www.theguardian.com/world/2016/jul/18/ambassadors-protest-israel-confiscation-west-bank-bedouin-shelters.

⁶⁰ Bureau de la coordination des affaires humanitaires, « Humanitarian Coordinator calls on Israeli authorities to stop destruction of humanitarian aid and respect international law », 18 mai 2016. Consultable à l'adresse : www.ochaopt.org/content/humanitarian-coordinator-calls-israeli-authorities-stop-destruction-humanitarian-aid-and.

médicaux⁶¹. Si elle n'est pas mesure de s'acquitter de cette obligation, la puissance occupante a l'obligation inconditionnelle d'accepter les actions de secours faites en faveur de la population⁶².

III. Le droit au développement et le Territoire palestinien occupé

38. Il y a 30 ans, l'Assemblée générale adoptait la Déclaration sur le droit au développement⁶³. La Déclaration, et les instruments adoptés par la suite, dispose que tous les êtres humains et tous les peuples ont le droit inaliénable à bénéficier d'un développement économique et social qui soit équitable et juste, durable, participatif, inclusif, non discriminatoire, fondé sur l'état de droit et pleinement respectueux de tous les droits de l'homme et des libertés. Il a été reconnu que le droit au développement est un droit de l'homme en soi, ce qui lui confère une portée universelle et le rend inviolable⁶⁴. Si la Déclaration n'est pas en soi juridiquement contraignante, elle comporte bon nombre des droits et des obligations juridiques – civils, politiques, économiques, sociaux et culturels – qui sont contraignants pour tous les États parties du fait des divers instruments relatifs aux droits de l'homme qui ont été adoptés par la communauté internationale au cours des soixante-dix dernières années⁶⁵. Il a été tenu compte de la Déclaration dans le Programme de développement durable à l'horizon 2030⁶⁶.

39. La Déclaration sur le droit au développement est un instrument particulièrement utile pour comprendre la situation des droits de l'homme qui règne dans le Territoire palestinien occupé. Elle énonce expressément, entre autres droits, les droits de l'homme ayant force obligatoire en droit international, à savoir :

- a) Le droit des peuples à disposer d'eux-mêmes (art. 1);
- b) L'élimination de la domination et de l'occupation étrangères (art. 5);
- c) L'interdiction de la discrimination et des atteintes flagrantes aux droits de l'homme (art. 6);

⁶¹ Felix Schwendimann, « The legal framework of humanitarian access in armed conflict », in *International Review of the Red Cross: The future of Humanitarian Action*, vol. 93, n° 884 (Cambridge et New York, Cambridge University Press, décembre 2011), p. 1001.

⁶² Ibid., p. 1002.

⁶³ Résolution 41/128, annexe. Ce droit a été réaffirmé dans les instruments internationaux relatifs aux droits de l'homme qui ont été adoptés par la suite, notamment la Déclaration et le Programme d'action de Vienne (1993).

⁶⁴ Déclaration sur le droit au développement, art. 1, par. 1; Arjun Sengupta, « On the theory and practice of the right to development », *Human Rights Quarterly*, vol. 24, n° 4, p. 837 (Baltimore, Johns Hopkins University Press, 2002).

⁶⁵ La Déclaration sur le droit au développement repose sur le Pacte international relatif aux droits économiques, sociaux et culturels (Nations Unies, *Recueil des Traités*, vol. 993, n° 14531) et le Pacte international relatif aux droits civils et politiques (Nations Unies, *Recueil des Traités*, vol. 999, n° 4668). Le Haut-Commissariat des Nations Unies aux droits de l'homme propose sur son site un tableau établissant un lien entre les droits énoncés dans la Déclaration et les instruments contraignants en vertu du droit international. Voir le document d'information 37 sur la page du Haut-Commissariat consacrée aux questions fréquemment posées sur le droit au développement (Genève, 2016).

⁶⁶ Résolution 70/1, paragraphe 10.

- d) La pleine jouissance de tous les droits de l'homme et de toutes les libertés fondamentales, y compris les droits socioéconomiques (art. 6 et 8);
- e) La pleine souveraineté sur ses ressources naturelles (art. 1);
- f) La participation à la prise de décision publique (art. 2 et 8).

Ces droits sont au cœur des obligations contraignantes imposées par le droit des droits de l'homme et le droit international humanitaire qui s'appliquent pleinement au Territoire palestinien occupé⁶⁷. Elles établissent non seulement des droits pour le peuple palestinien, mais créent également des obligations pour Israël, Puissance occupante, qui doit respecter et protéger ces droits. Le droit du peuple palestinien à l'autodétermination est largement accepté par la communauté internationale⁶⁸. La Cour internationale de Justice a déclaré ce qui suit : « Israël doit observer l'obligation qui lui incombe de respecter le droit à l'autodétermination du peuple palestinien et les obligations auxquelles il est tenu en vertu du droit international humanitaire et du droit international relatif aux droits de l'homme »⁶⁹. Si la question du développement est forcément complexe dans un contexte d'occupation, il est essentiel que le droit des droits de l'homme et le droit humanitaire soient interprétés d'une manière qui soit compatible avec le droit au développement, quelle que soit la durée de l'occupation.

40. La Déclaration sur le droit au développement établit une approche privilégiant les droits de l'homme en faveur de la croissance économique et du progrès social. Les droits de l'homme doivent faire partie intégrante de tous les aspects du développement économique et social et constituer une condition préalable à la réalisation de progrès réels et durables et au développement des capacités et des libertés pour l'ensemble de la population. Tout le monde a le droit de jouir de ces droits, à titre individuel ou collectif, et les États parties ont la responsabilité de créer les conditions qui permettent d'assurer la jouissance de ces droits et de lever les obstacles qui pourraient l'entraver. Le droit au développement suppose à la fois l'application de procédures transparentes et participatives ainsi que la réalisation effective de l'égalité des chances pour tous en ce qui concerne l'accès aux ressources de base et aux droits socioéconomiques⁷⁰.

A. Développement économique et social du Territoire palestinien occupé

41. L'économie palestinienne n'est comparable à aucune autre économie du monde moderne. Ses composantes territoriales – la Cisjordanie, y compris Jérusalem-Est, et Gaza – sont séparées physiquement l'une de l'autre. Sa plus

⁶⁷ *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif, C.I.J. Recueil 2004*, par. 86 à 114 et par. 149. Ces droits sont également énoncés dans des instruments contraignants relatifs aux droits de l'homme, notamment la Déclaration universelle des droits de l'homme, le Pacte international relatif aux droits civils et politiques et le Pacte international relatif aux droits économiques, sociaux et culturels.

⁶⁸ Résolution 70/141.

⁶⁹ *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif, C.I.J. Recueil 2004*, par. 149.

⁷⁰ Résolution 41/128, annexe, art. 8, par. 1; Paul Gready et al., « What do human rights mean in development? », dans *The Palgrave Handbook of International Development*, Jean Grugel et Daniel Hammett, eds. (Palgrave Macmillan UK, 2016), p. 453.

grande entité géographique – la Cisjordanie – a été divisée par Israël en un archipel d'îlots densément peuplés, isolés les uns des autres par le mur ou par des colonies de peuplement; les routes les contournent pour relier les colonies de peuplement les unes aux autres d'une part et au système de transport israélien d'autre part et il y a des barrages routiers. L'occupation des sols est régie par des lois restrictives et il y a des zones d'accès réservé et des zones militaires d'accès interdit. Dans ces zones occupées par Israël, les autorités politiques locales sont elles aussi morcelées : l'Autorité palestinienne exerce un pouvoir limité sur une partie de la Cisjordanie fragmentée; Gaza est régie par une autorité politique distincte qui ne relève pas de l'Autorité palestinienne et Israël a annexé illégalement Jérusalem-Est⁷¹, sans compter qu'Israël impose un blocus complet – terrestre, maritime et aérien – sur Gaza depuis 2007. À l'intérieur de la Cisjordanie, Israël a pleine autorité civile et assure la sécurité sur la « zone C », qui représente plus de 60 % de cette partie du territoire et qui entoure complètement et divise l'archipel de villes et villages palestiniens, une situation hybride qu'un groupe de défense des droits de l'homme a appelé « occunexion »⁷². Le Territoire palestinien occupé n'a aucun accès sûr vers le monde extérieur, que ce soit par voie terrestre, maritime ou aérienne. Toutes ses frontières, à une exception près, sont contrôlées par Israël⁷³. Aucune autre société dans le monde ne fait face à une telle accumulation de difficultés; elle connaît en effet une occupation de guerre, un morcellement de son territoire, des différends politiques et administratifs et un isolement à la fois géographique et économique.

42. Les Accords d'Oslo de 1993 et le Protocole relatif aux relations économiques entre le Gouvernement de l'État d'Israël et l'Organisation de libération de la Palestine (Protocole de Paris de 1994) devaient être des dispositions transitoires; la Palestine les considérait comme la voie diplomatique et économique vers son indépendance, qui devait intervenir au plus tard en 1999. Au cours de cette période de transition, les Accords d'Oslo n'ont pas touché au vaste projet de colonies de peuplement israéliennes et ont d'autre part laissé à Israël toute latitude sur les mesures à prendre face aux problèmes d'insécurité dans l'ensemble du Territoire palestinien occupé. Le Protocole de Paris a créé un cadre économique reposant fortement sur Israël (devises, dispositions commerciales établies sur le modèle d'une union douanière, modalités de change et capacités de perception des impôts) qui, dans les faits, a instauré une dépendance palestinienne à l'égard d'Israël. Il n'y a jamais eu d'accord de paix définitif entre Israël et la Palestine, et ces dispositions transitoires sont désormais solidement établies. L'Autorité palestinienne a développé une grande partie des capacités administratives et institutionnelles nécessaire à la gouvernance nationale, mais elle manque des ressources

⁷¹ Le Conseil de sécurité a déclaré que l'annexion par Israël de Jérusalem-Est était contraire au droit international et que Jérusalem-Est était réputée faire partie du Territoire palestinien occupé. Voir résolutions 476 (1980) et 478 (1980) du Conseil de sécurité.

⁷² Association for Civil Rights in Israel, « 49 years of control without rights: human rights of the Palestinians in the West Bank and East Jerusalem – what has changed? », 1^{er} juin 2016. Disponible sur le site suivant: www.acri.org.il/en/wp-content/uploads/2016/06/49years2016-en.pdf.

⁷³ Le seul poste-frontière qui n'est pas directement contrôlé par Israël est le point de passage de Rafah entre Gaza et l'Égypte. Rafah est utilisé presque exclusivement comme point de passage pour les civils, pas comme carrefour commercial. L'Égypte a maintenu ce point de passage fermé pendant la majeure partie des trois dernières années.

économiques qui pourraient lui permettre de se développer de manière souveraine⁷⁴. Depuis 2000, l'économie palestinienne a connu une croissance économique instable. Lorsqu'il y a eu croissance, elle a été jugée non viable car a) elle était fortement tributaire de l'aide étrangère et des importations pour la consommation des particuliers⁷⁵; b) l'occupation israélienne a éloigné de plus en plus les différentes régions du territoire palestinien et en a réduit la taille, créant ainsi une base économique dysfonctionnelle privée de capacité de développement autonome⁷⁶.

43. Tenter de bâtir une économie souveraine sous une occupation prolongée sans aucune perspective de voir se réaliser une véritable autodétermination dans un avenir prévisible comporte des contradictions manifestes. Une économie palestinienne étouffée et dysfonctionnelle offre une base non viable pour le développement social équitable et durable du Territoire palestinien occupé. Certes, la Palestine n'a cessé de faire des progrès dans plusieurs domaines sociaux importants, notamment la mortalité maternelle, les niveaux d'alphabétisation et d'enseignement, et les taux de vaccination. Cependant, d'autres indicateurs clefs témoignent d'une situation grave et montrent que la situation sociale et les conditions de vie stagnent ou empirent :

a) L'économie palestinienne n'a pas progressé. En 2014, le produit intérieur brut (PIB) réel par habitant était pratiquement au même niveau qu'en 1999, le PIB réel par habitant de Gaza s'établissant à 71 % du niveau auquel il se situait en 1999⁷⁷;

b) Le chômage est devenu un véritable fléau social. En 2016, il s'établissait à 27 % dans le Territoire palestinien occupé, contre 12 % en 1999; à Gaza, la crise du chômage est particulièrement grave, puisque les taux de chômage et de chômage des jeunes (âgés de 15 à 29 ans) y sont parmi les plus élevés dans le monde, soit 42 % et 58 % respectivement⁷⁸;

c) La pauvreté de la population palestinienne ne cesse de s'accroître depuis 2012 : 26 % des Palestiniens sont maintenant jugés pauvres et, selon les estimations, 13 % souffrent d'extrême pauvreté⁷⁹. L'insécurité alimentaire est endémique : on

⁷⁴ Banque internationale pour la reconstruction et le développement/Banque mondiale, « West Bank and Gaza: Towards Economic Sustainability of a Future Palestinian State – promoting private sector-led growth » (Washington) (Groupe de la Banque mondiale, 2012).

⁷⁵ La Banque mondiale a estimé que l'aide des bailleurs de fonds extérieurs au Territoire palestinien occupé avait diminué, passant de 32 % du PIB en 2008 à 6 % en 2015, et indiqué que ce modèle de croissance impulsée par les donateurs était intenable. Voir Banque mondiale, « Economic monitoring report to the ad hoc liaison committee » (Washington, Groupe de la Banque mondiale, avril 2016).

⁷⁶ Voir Banque internationale pour la reconstruction et le développement/Banque mondiale, « West Bank and Gaza: towards economic sustainability of a future Palestinian State — promoting private sector-led growth » et UNCTAD/APP/2016/1.

⁷⁷ En 2014, le PIB réel par habitant dans le Territoire palestinien occupé (Cisjordanie et Gaza, à l'exception de Jérusalem-Est) était de 1 737 dollars. En 1999, il était de 1 723 dollars. En 2014, le PIB réel par habitant de Gaza était de 971 dollars, contre 1 372 dollars en 1999. Tous les chiffres sont en dollars constants de 2004; le PIB par habitant en valeur nominale est plus élevé. Voir les données publiées par le Bureau central palestinien de statistique, disponibles à l'adresse suivante : www.pcbs.gov.ps/Portals/_Rainbow/Documents/e-napcapitacon-1994-2014.htm.

⁷⁸ Banque mondiale, « Economic monitoring report to the ad hoc liaison committee » (Washington, Groupe de la Banque mondiale, septembre 2016).

⁷⁹ Organisation des Nations Unies pour l'éducation, la science et la culture (UNESCO), document de programme pour la Palestine (2014-2017).

estime que, en 2016, 2,4 millions de personnes en Cisjordanie et à Gaza (57 % de la population) auront besoin d'une aide humanitaire, sous une forme ou une autre⁸⁰;

d) La part qu'occupent les secteurs de l'industrie, de l'agriculture et des ressources naturelles dans l'économie et en termes d'emploi ne cesse de diminuer, notamment en raison des restrictions imposées par Israël à l'accès aux marchés; du manque de confiance des investisseurs potentiels qui s'explique par l'incertitude politique; des pertes importantes de terres arables prises par la Puissance occupante; de l'absence de pouvoir véritable de planification économique; du manque de contrôle palestinien sur les ressources naturelles importantes (eau, sols, carrières de pierre et réserves de pétrole et de gaz); de l'accès limité aux ressources halieutiques⁸¹. L'économie s'est désindustrialisée et sa capacité d'exportation a été mise à mal par le déclin des secteurs agricole et manufacturier⁸²;

e) Le Territoire palestinien occupé continue d'être un marché captif pour Israël, comme il l'est depuis le début de l'occupation: ces dernières années, quelque 85 % de ses exportations étaient destinées à Israël et 70 % de ses importations provenaient d'Israël. Les restrictions et les déséquilibres dans les relations commerciales ont contribué à maintenir le déficit chronique de la balance commerciale palestinienne, à savoir 5,2 milliards de dollars en 2015, soit environ 41 % du PIB⁸³;

f) Du fait des accords de partage et de perception des recettes conclus avec Israël, des recettes budgétaires considérables partent vers Israël et ne bénéficient jamais au Gouvernement palestinien ni à l'économie palestinienne, élément symptomatique de la précarité du pouvoir que le Gouvernement palestinien exerce sur la gestion économique. La Banque mondiale et la CNUCED estiment que ces arrangements font perdre à l'économie palestinienne au moins 640 millions de dollars par an (soit 5 % du PIB)⁸⁴;

g) La CNUCED a estimé que, si le Territoire palestinien n'était pas occupé, son PIB passerait du simple au double, le chômage et la pauvreté diminueraient considérablement et les déficits commerciaux et budgétaires chroniques se réduiraient⁸⁵.

44. Israël, Puissance occupante, contrôle effectivement le développement économique et social du territoire palestinien, mais elle le fait de différentes

⁸⁰ Bureau de la coordination des affaires humanitaires, « Humanitarian dashboard: 2nd quarter 2016 », 18 août 2016. Disponible à l'adresse suivante: www.ochaopt.org/content/humanitarian-dashboard-2nd-quarter-2016. L'UNRWA a indiqué que, en mars 2016, 70 % de la population réfugiée à Gaza – plus de 930 000 personnes – étaient tributaires de l'aide alimentaire, ce qui représente une augmentation spectaculaire, puisqu'en 2000, elle s'établissait à 10 %. Voir www.unrwa.org/newsroom/emergency-reports/gaza-situation-report-137.

⁸¹ Voir UNCTAD/APP/2016/1. La Banque mondiale a constaté, en 2015, que la compétitivité de l'économie palestinienne s'était réduite progressivement depuis la signature des Accords d'Oslo, en particulier celle de l'industrie et de l'agriculture. Voir Banque mondiale, « Economic monitoring report to the ad hoc liaison committee » (Washington, Groupe de la Banque mondiale, septembre 2015).

⁸² Banque mondiale, « Economic monitoring report to the ad hoc liaison committee » (Washington, Groupe de la Banque mondiale, septembre 2016).

⁸³ Voir UNCTAD/APP/2016/1. Tous les montants sont exprimés en dollars des États-Unis.

⁸⁴ Voir Banque mondiale, « Economic monitoring report to the ad hoc liaison committee » (Washington, Groupe de la Banque mondiale, avril 2016) et UNCTAD/APP/2016/1.

⁸⁵ Voir UNCTAD/APP/2016/1.

manières dans chaque région. Les mesures qui constituent des violations du droit au développement, notamment le blocus de Gaza et l'effondrement subséquent de son économie, la fragmentation et la partition de la Cisjordanie, y compris la séparation et l'abandon de Jérusalem-Est concernant les services, l'exploitation et l'appropriation des ressources naturelles palestiniennes, le régime de dépendance économique, le contrôle unilatéral exercé sur les frontières extérieures de la Palestine, les entraves à la mobilité personnelle et professionnelle, les restrictions imposées à l'utilisation des terres agricoles, les restrictions imposées aux pêches, le caractère inéquitable des accords de partage des recettes et de collecte des impôts, et les arrangements commerciaux déséquilibrés. La nature particulière de la domination israélienne est décrite région par région dans les sections ci-après.

Gaza

45. Israël poursuit son occupation de Gaza et impose un blocus militaire, économique et social de grande ampleur qui maintient le territoire isolé du monde et du reste du Territoire palestinien occupé. Or, ce blocus est contraire aux dispositions du droit international en ce qu'il impose une forme de peine collective à toute une population⁸⁶. En 2007, lorsque Israël a imposé le blocus complet, l'économie gazaouie était déjà affaiblie par les fermetures qui avaient commencé au début des années 90. Elle s'est depuis complètement effondrée, de même que le niveau de vie dans le territoire. La misère dans laquelle le blocus a plongé la population a été accentuée par les trois épisodes d'escalade de la violence entre Israël et Gaza – en 2008-2009, 2012 et 2014 – au cours desquels quelque 2 500 civils palestiniens ont été tués et des dizaines de milliers blessés, et les infrastructures de Gaza ont été lourdement endommagées. L'entrée de tous les matériaux de reconstruction dans la bande de Gaza doit recevoir l'autorisation d'Israël, qui a soit limité, soit interdit l'importation de béton, de bois et d'autres matériaux pourtant indispensables, rendant les tentatives de reconstruction lentes, compliquées et coûteuses⁸⁷. En 2016, soit deux ans après la fin des plus récents affrontements, seuls 45 % des besoins en énergie de Gaza sont satisfaits, ce qui se traduit par des coupures d'électricité pendant 16 à 18 heures chaque jour. Par ailleurs, 70 % de la population gazaouie est approvisionnée en eau courante pendant seulement 6 à 8 heures tous les 2 à 4 jours, et 65 000 Gazaouis déplacés depuis les événements violents de 2014 n'ont toujours pas pu reconstruire leur maison. On estime que 80 % de la population dépend dans une certaine mesure de l'aide humanitaire pour survivre. Il est toutefois encourageant de souligner que de nombreux hôpitaux et de nombreuses écoles endommagés ou détruits par les événements les plus récents ont pu être réparés ou reconstruits grâce à l'aide financière de la communauté internationale⁸⁸.

⁸⁶ A/69/347, par. 30 à 34 et A/HRC/25/40, par. 24 à 30. Le Rapporteur spécial prend note de la conclusion de la Commission d'enquête du Secrétaire général sur les événements du 31 mai 2010 concernant la flottille (« rapport Palmer ») (septembre 2011), pour laquelle le blocus est légal, mais il est d'avis que les observations formulées par le groupe d'experts indépendants des droits de l'homme des Nations Unies, qui a critiqué la conclusion du rapport Palmer, constituent une interprétation plus convaincante du droit international.

⁸⁷ Gisha : Centre juridique pour la liberté de mouvement, « Two years later: the long road to reconstruction and recovery » (2016). Consultable en ligne à l'adresse suivante : www.gisha.org/UserFiles/File/publications/2_years_later/Reconstruction_EN.pdf (en anglais).

⁸⁸ Bureau de la coordination des affaires humanitaires, « Gaza: two years after », 26 août 2016. Consultable en ligne à l'adresse suivante : www.ochaopt.org/sites/default/files/gaza_war_2_years_after_english.pdf (en anglais).

46. Au cours des dix dernières années, Israël a imposé à Gaza un « dé-développement », suivant une politique consistant à répondre essentiellement aux besoins humanitaires de base⁸⁹. Une étude de premier plan réalisée en 2012 par l'ONU posait la question de savoir si, dans les conditions d'alors, il serait toujours possible de vivre durablement à Gaza en 2020⁹⁰. En 2015, la Banque mondiale a étudié ce qu'elle a appelé « le coût incommensurable de la violence et du blocus sur l'économie et le niveau de vie de Gaza ». Après avoir constaté des niveaux de chômage et de pauvreté peu encourageants, la Banque mondiale a expliqué que les quelque 70 % de Palestiniens qui travaillent dans le secteur privé réduit de Gaza gagnent en moyenne 174 dollars par mois, soit moins que le salaire minimum légal fixé à 400 dollars. Bien qu'Israël ait récemment autorisé la vente en Cisjordanie et en Israël de quantités limitées de marchandises produites à Gaza, les exportations de Gaza ne représentent que 11 % de leur niveau d'avant 2007 et l'imposition du blocus. Selon la Banque mondiale, le PIB de Gaza aurait été de 51 % supérieur à ce qu'il a été entre 2007 et 2012 sans les effets combinés du blocus et du conflit armé. Aujourd'hui, l'économie dépend pour environ 90 % de son PIB des dépenses du Gouvernement palestinien, des Nations Unies et d'autres envois de fonds de l'étranger ou de projets financés par des donateurs⁹¹.

47. En ce qui concerne l'agriculture, Israël a décrété unilatéralement qu'une bande de terre de 300 mètres sur le territoire de Gaza, le long de la clôture marquant la frontière, serait une zone tampon et que son accès serait interdit ou limité, interdisant de ce fait l'utilisation de quelque 35 % des terres arables de la bande. Israël a également imposé des limitations très strictes à la zone maritime dans laquelle les pêcheurs gazaouis sont autorisés à travailler, ne leur laissant que 3 milles nautiques. Même dans cette zone limitée, les pêcheurs font régulièrement l'objet d'arrestations arbitraires, leur équipement est confisqué et ils essuient parfois des tirs⁹². Ces restrictions ont bridé les capacités des deux secteurs économiques précités de générer croissance économique et emploi⁹³.

48. La précarité de la situation économique est une source d'angoisse pour les Palestiniens de Gaza. Selon un rapport publié par la Banque mondiale en mai 2015, « la qualité de vie de la grande majorité des habitants de Gaza est à peine supportable »⁹⁴. Très peu de Gazaouis obtiennent l'autorisation d'Israël ou de l'Égypte de sortir de la bande, que ce soit pour des raisons professionnelles, familiales, sanitaires ou encore pour étudier. Dans le même rapport, la Banque mondiale a expliqué que compte tenu de la situation de confinement et des affrontements armés, même les taux très élevés de pauvreté et de chômage « ne pouvaient rendre compte des souffrances endurées par les habitants de Gaza résultant de l'insuffisance des réseaux d'alimentation en électricité et en eau ou des

⁸⁹ Sara Roy, *The Gaza Strip: The Political Economy of De-development*, 3^e éd. (Washington, Institute for Palestine Studies, 2016).

⁹⁰ UNRWA, « Gaza in 2020: A Liveable Place? » (Jérusalem, Bureau du Coordonnateur spécial des Nations Unies pour le processus de paix au Moyen-Orient, 2012).

⁹¹ Banque mondiale, rapports de suivi économique au comité ad hoc de liaison (Washington, Groupe de la Banque mondiale, mai 2015, septembre 2015 et avril 2016).

⁹² Centre Al-Mezan pour les droits de l'homme, « Israeli violations against Palestinian fishermen in the naval part of the access restricted area », rapport du premier trimestre, 2016, p. 11.

⁹³ Voir: Gisha, features.gisha.org/ten-years-later/; Diakonia, *Within Range: An Analysis of the Legality of the Land « Buffer Zone » in the Gaza Strip* (2011).

⁹⁴ Banque mondiale, « Rapport de suivi économique au comité ad hoc de liaison » (Washington, Groupe de la Banque mondiale, mai 2015).

réseaux d'assainissement, du traumatisme psychologique dû à la guerre, des restrictions imposées à la liberté de mouvement, et des autres conséquences délétères des guerres et du blocus ». Les nappes aquifères, qui alimentent Gaza en eau, sont surexploitées et seuls 5 % à 10 % de l'eau est encore potable. Le peu de fiabilité du réseau électrique est non seulement préjudiciable pour l'économie mais également pour la qualité de vie. Du fait des dommages non réparés occasionnés aux usines d'épuration, de l'absence d'électricité pour les faire fonctionner correctement, et des infrastructures défectueuses, une grande partie des eaux usées de Gaza sont déversées directement dans la Méditerranée, ce qui représente quelque 100 millions de litres chaque jour et augmente le risque de maladies infectieuses⁹⁵. La qualité des services de santé continue de se détériorer : les médicaments et fournitures de base viennent à manquer, les équipes soignantes sont peu ou pas payées, et la pénurie de carburant compromet la prestation des soins. Cette situation est particulièrement inquiétante dans la mesure où des milliers de Gazaouis souffrent de handicaps physiques graves et que l'on estime que 20 % de la population présenterait des troubles psychologiques du fait des récents conflits⁹⁶. Face à la détérioration des conditions de vie à Gaza, une grande organisation de défense des droits de l'homme a déclaré que « Vivre à Gaza, c'est comme vivre dans un pays du Tiers-Monde qui s'effondre – une situation qui ne résulte pas d'une catastrophe naturelle mais qui est entièrement d'origine humaine »⁹⁷.

La Cisjordanie

49. L'économie de la Cisjordanie n'est pas aussi catastrophique que celle de Gaza, mais elle n'en est pas florissante pour autant. Entre 1999 et 2014, elle a connu une croissance de seulement 14 % en valeur réelle, en grande partie du fait du découpage du territoire sous occupation et de l'incertitude politique et économique généralisée planant sur l'avenir du Territoire palestinien occupé⁹⁸. Le découpage actuel de la Cisjordanie remonte à 1995 et à l'Accord intérimaire israélo-palestinien sur la Rive occidentale et la bande de Gaza (Oslo II) qui a prévu trois zones (et annexé illégalement Jérusalem-Est) :

a) Zone A : regroupe les principales grandes villes et villes de taille moyenne de Palestine (à l'exception de certaines parties de Hébron) et représente 18 % de la Cisjordanie. L'Autorité palestinienne assure la gouvernance de la vie civile et de la sécurité, mais Israël fait régulièrement des intrusions pour des raisons de sécurité, sans nécessairement s'être coordonnée avec l'Autorité palestinienne;

b) Zone B : comprend quelque 400 villages palestiniens et les terres arables adjacentes, et représente 22 % de la Cisjordanie. Elle est placée sous l'autorité

⁹⁵ Ibid.

⁹⁶ Voir Office pour la coordination des affaires humanitaires, « Humanitarian dashboard: 2nd quarter 2016 », 18 août 2016, consultable en ligne à l'adresse www.ochaopt.org/content/humanitarian-dashboard-2nd-quarter-2016 (en anglais), et « Gaza two years on: the impact of the 2014 hostilities on the health sector », Monthly Humanitarian Bulletin (juin 2016), consultable en ligne à l'adresse www.ochaopt.org/content/gaza-two-years-impact-2014-hostilities-health-sector (en anglais).

⁹⁷ Betsalem – Centre israélien d'information pour les droits de l'homme dans les territoires occupés, « Reality check: almost fifty years of occupation », 5 juin 2016. Consultable à l'adresse www.btselem.org/publications/201606_reality_check (en anglais).

⁹⁸ En 2014, la part réelle du PIB par habitant de la Cisjordanie s'élevait à 2 269 dollars, contre 1 948 dollars en 1999. Bureau central palestinien de statistique, Rapport statistique sur la Palestine.

civile palestinienne mais sous le contrôle exclusif d'Israël en ce qui concerne la sécurité. La vaste majorité des 2,4 millions de Palestiniens de Cisjordanie vivent dans les zones A et B;

c) Zone C : représente 60 % de la Cisjordanie et Israël assure entièrement le contrôle de la vie civile et de la sécurité. La zone C englobe quelque 225 zones de peuplement israéliennes dans lesquelles habitent de 370 000 à 400 000 colons, et quelque 180 000 Palestiniens. La zone C ceinture complètement les villages palestiniens des zones A et B.

50. Au cours des vingt années qui se sont écoulées depuis Oslo II, la division n'a cessé de s'accroître. Tous les Palestiniens souhaitant passer d'une zone à l'autre, pour voyager ou commercer, soit pour se rendre en Israël, soit pour aller dans d'autres pays, doivent se soumettre aux dispositions en matière de sécurité imposées par Israël. Bien que l'Autorité palestinienne exerce, dans une certaine mesure, une juridiction civile sur les zones A et B, toutes les grandes décisions relatives aux forces armées, à la sécurité et à l'économie concernant le Territoire occupé sont prises par Israël. Dans le même temps, Israël a confié l'aspect financier et administratif de presque toutes les fonctions de gouvernance économique et sociale de la Cisjordanie à l'Autorité palestinienne, qui est financée en partie par la communauté des donateurs.

51. La zone C est essentielle à la santé économique de la Palestine car elle possède des sites d'extraction de minéraux, des carrières, des terres arables productives, des zones à potentiel touristique, des infrastructures de télécommunications, des logements récents, et sa situation géographique, au voisinage d'un autre territoire, est propice à la liberté et au mouvement en Cisjordanie. Selon les estimations de la Banque mondiale, le PIB de la Palestine aurait pu être de 35 % supérieur à ce qu'il est actuellement – soit 3,4 milliards (en dollars des États-Unis de 2011) – et le taux d'emploi pourrait également être de 35 % supérieur si Israël ne limitait pas l'accès des Palestiniens à la zone C⁹⁹. Or, plutôt que d'intégrer la zone C au reste de la Cisjordanie pour préparer la Palestine à une indépendance durable, Israël la considère comme sa base arrière économique et politique, et comme le principal espace géographique où implanter ses colonies illégales. Bien que les dispositions du droit international humanitaire interdisent clairement à la Puissance occupante de piller la zone occupée, Israël exploite pour son propre compte les ressources naturelles de la zone C, y compris les carrières, les minéraux de la mer Morte et l'eau¹⁰⁰.

52. Israël a décidé unilatéralement de destiner 70 % de la zone C à l'implantation de ses colonies de peuplement ainsi qu'aux terres adjacentes et à leur infrastructure routière, militaire et de sécurité dense – autant de zones où la Palestine ne peut se développer. Il a également élaboré un système d'aménagement complet pour faciliter la confiscation des terrains situés en Cisjordanie et favoriser l'expansion des colonies. Ce système exclut la participation des Palestiniens ou le moindre égard pour leurs intérêts. En conséquence, dans la zone C, moins de 1 % du

⁹⁹ Orhan Niksic, Nur Nasser Eddin et Massimiliano Cali, *Area C and the Future of the Palestinian Economy* (Washington, Banque internationale pour la reconstruction et le développement/Banque mondiale, 2014) (en anglais).

¹⁰⁰ Quatrième Convention de Genève, art. 33 (2), 47 et 53; Betsalem – Centre israélien d'information pour les droits de l'homme dans les territoires occupés, *Acting the Landlord: Israel's Policy in Area C, the West Bank* (Jérusalem, 2013) (en anglais).

territoire est disponible à la construction pour les Palestiniens; la grande majorité des demandes de permis de construire déposées par les Palestiniens, que ce soit pour des logements ou pour l'infrastructure, sont refusées; les démolitions de maisons palestiniennes par les militaires israéliens sont fréquentes et se multiplient; et des milliers de Palestiniens, pour la plupart des Bédouins, sont chassés de leurs maisons et de leurs terres ancestrales¹⁰¹. Comme l'a fait observer une organisation de défense des droits de l'homme : « des dizaines de milliers d'hectares, y compris des pâturages et des terres arables, ont été confisquée aux Palestiniens au fil des ans et généreusement donnés aux colonies... Toutes les terres ainsi données aux zones de peuplement sont considérées comme étant des zones militaires fermées dans lesquelles les Palestiniens ne peuvent pénétrer sans autorisation »¹⁰². Ce développement indépendant et inégal de la Cisjordanie, en particulier de la zone C, a favorisé la création de deux univers obéissant à des normes juridiques, économiques et politiques différentes à l'intérieur d'un même territoire, les colons israéliens bénéficiant de conditions nettement plus favorables par rapport à celles des Palestiniens de Cisjordanie parmi lesquels ils vivent, s'agissant aussi bien du système légal, routier et juridique que de la possibilité de se déplacer, des conditions de sécurité, des possibilités économiques, des droits civiques et politiques et de niveaux de vie nettement supérieurs. Certains observateurs informés se demandent si Israël ne prépare pas l'annexion officielle de la zone C¹⁰³, le Gouvernement israélien ayant de toute évidence déjà préparé le fondement juridique d'une telle revendication¹⁰⁴.

Jérusalem-Est

53. Ces dernières années, Jérusalem-Est a perdu peu à peu les liens naturels qu'elle entretenait sur le plan économique et social avec le reste de la Cisjordanie, en raison de la construction, par Israël, de blocs de colonies qui l'ont encerclée et du mur. Elle pâtit également de ce que la municipalité israélienne de Jérusalem la néglige de longue date. À la suite de son annexion de Jérusalem-Est et de zones adjacentes de Cisjordanie en 1967, Israël a construit 12 colonies sur les terres confisquées, de façon à ériger une barrière physique entre la ville et le reste de la Cisjordanie et à créer de toutes pièces les bases de la revendication de sa souveraineté sur Jérusalem-Est dont la population, en 2014, se composait de 315 000 Palestiniens et de 210 000 colons israéliens. Les organisations de défense

¹⁰¹ Voir Orhan Niksic *et al.*, *Area C and the Future of the Palestinian Economy*; Diakonia, « Planning to fail: the planning regime in Area C of the West Bank — an international law perspective » (Jérusalem, Diakonia International Humanitarian Law Resource Centre, 2013) (en anglais); Bureau pour la coordination des affaires humanitaires, « Increase in West Bank demolitions during July-August », *Monthly Humanitarian Bulletin* (août 2016). Consultable en ligne à l'adresse www.ochaopt.org/content/increase-west-bank-demolitions-during-july-august (en anglais).

¹⁰² Betsalem – Centre israélien d'information pour les droits de l'homme dans les territoires occupés, « Reality Check: almost fifty years of occupation ».

¹⁰³ Al-Monitor, « Is Israel annexing West bank Area C? », 14 août 2016. Consultable en ligne à l'adresse www.al-monitor.com/pulse/originals/2016/08/oslo-accords-area-c-annexation-economic-development-settlers.html (en anglais).

¹⁰⁴ Voir « Report on the Legal Status of Building in Judea and Samaria » (Jérusalem, juin 2012). Consultable en ligne à l'adresse <http://israelipalestinian.procon.org/sourcefiles/The-Levy-Commission-Report-on-the-Legal-Status-of-Building-in-Judea-and-Samaria.pdf> (en anglais); Ministère israélien des affaires étrangères, *Israeli Settlements and International Law*, consultable à l'adresse www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20settlements%20and%20international%20law.aspx (en anglais).

des droits de l'homme ont fait observer qu'Israël avait cherché à freiner la croissance de la population palestinienne à Jérusalem en usant de toute une série de mesures discriminatoires dans le domaine de la planification, des services sociaux et du droit de résidence¹⁰⁵.

54. Du fait de son isolement géographique, Jérusalem-Est a vu sa position de centre marchand et commercial en Cisjordanie considérablement décliner. En 2013, il a été noté dans une étude réalisée par la CNUCED que les pertes économiques subies par les habitants palestiniens de Jérusalem depuis la construction du mur, avaient été estimées à plus d'un milliard de dollars, et que le préjudice découlant de la perte de débouchés économiques avait été évalué à 200 millions de dollars par an. Comme la CNUCED l'indique, l'occupation nuit de multiples façons à l'économie de Jérusalem-Est, touchant le marché du travail, le marché des produits, le commerce et les investissements, ce qui fait baisser la contribution de la ville au PIB palestinien. Seuls 13 % de la superficie de Jérusalem-Est sont prévus pour le logement des Palestiniens, alors qu'un espace trois fois plus étendu est réservé aux colons israéliens¹⁰⁶.

55. Sur le plan social, la partie palestinienne de Jérusalem-Est a été largement ignorée par les autorités municipales, d'où des conditions de vie qui sont nettement en-dessous de celles prévalant à Jérusalem-Ouest et dans les colonies israéliennes de Jérusalem-Est. Les infrastructures, négligées d'année en année, sont en mauvais état, et des défaillances et insuffisances affectent la voirie, les parcs publics, les transports dont le réseau est très insuffisant, les services d'urgence, l'eau, la collecte des déchets, la police et l'éclairage public; il est à noter que certains quartiers ne sont toujours pas raccordés au réseau municipal d'égouts¹⁰⁷. Fait très préoccupant, en 2014, 82 % des habitants palestiniens de Jérusalem vivaient au-dessous du seuil de pauvreté, soit trois fois plus que les habitants israéliens et un taux supérieur de 6 % à celui de 2013¹⁰⁸. La construction du mur a relégué quelque 80 000 Palestiniens dans la partie est de la ville, les contraignant à franchir des points de contrôle à l'intérieur du périmètre urbain pour accéder à leur lieu de travail et aux services sociaux. Bien que continuant à payer des impôts municipaux, la plupart d'entre eux ne bénéficient que d'un nombre très restreint de services de base, voire d'aucun¹⁰⁹.

¹⁰⁵ Voir Betsalem – Centre israélien d'information pour les droits de l'homme dans les territoires occupés, « Reality check: almost fifty years of occupation »; voir aussi Jerusalem Institute for Israeli Studies, *Statistical Yearbook* (2016), tableau III/4, consultable à l'adresse www.jiis.org.il/.upload/yearbook/2016/shnaton_C0416.pdf.

¹⁰⁶ CNUCED, « L'économie palestinienne de Jérusalem-Est : face à l'annexion, à l'isolement et au risque de désintégration » (Genève, 2013).

¹⁰⁷ Voir Association for Civil Rights in Israel, « East Jerusalem 2015: facts and figures », consultable à l'adresse www.acri.org.il/en/wp-content/uploads/2015/05/EJ-Facts-and-Figures-2015.pdf (en anglais); voir également Jerusalem Institute for Israeli Studies, « Explosive reality and proposals for de-escalation », consultable à l'adresse [www.jiis.org/.upload/East Jerusalem summary_Sept24_2015_Final.pdf](http://www.jiis.org/.upload/East%20Jerusalem%20summary_Sept24_2015_Final.pdf) (en anglais).

¹⁰⁸ Jerusalem Institute for Israel Studies, *Statistical Yearbook* (2016), tableau 6.1.

¹⁰⁹ Voir CNUCED, « L'économie palestinienne de Jérusalem-Est: face à l'annexion, à l'isolement et au risque de désintégration »; voir également Association for Civil Rights in Israel, « Ten years of unfulfilled promises in East Jerusalem », consultable à l'adresse www.acri.org.il/en/2015/08/09/ej-10years/ (en anglais).

B. Évaluation du respect par Israël du droit au développement dans le Territoire palestinien occupé

56. Une puissance occupante administrant un territoire occupé dans le respect du droit au développement s'assurerait qu'elle se conforme aux divers obligations et principes juridiques internationaux découlant de ce droit. En particulier, elle respecterait et encouragerait le droit à l'autodétermination et considérerait le territoire comme une entité à part entière. Sa mission consisterait à faire en sorte que celui-ci soit intégralement restitué à la puissance souveraine, c'est-à-dire à sa population, une fois la sécurité et l'ordre rétablis. Elle aiderait activement à la mise en place d'une administration souveraine à même d'exercer son autorité et ne revendiquerait pas sa souveraineté sur quelque partie du territoire pas plus qu'elle ne procéderait au transfert de sa population civile dans ledit territoire. Sous le régime d'occupation, elle administrerait le territoire de bonne foi et dans l'intérêt de la population placée sous sa protection, en tant que dépositaire et usufruitière, et elle en respecterait les lois, les bâtiments et infrastructures publics, l'ordre politique, l'économie, le régime de propriété, les coutumes culturelles et la structure sociale. Elle encouragerait le développement économique autonome du territoire en favorisant la pleine valorisation de son potentiel, et elle s'abstiendrait d'imposer toute pratique économique discriminatoire ou barrière inutile. Elle ne se livrerait pas au pillage, ne viserait pas à s'enrichir et ne créerait pas de dépendance économique. Elle considérerait que les ressources naturelles du territoire occupé appartiennent à la puissance souveraine, agirait en vue de les préserver et utiliserait seulement celles qui sont vraiment utiles à l'administration efficace du territoire tout au long du régime d'occupation. Elle garantirait et favoriserait le plein exercice des droits de l'homme, sous réserve des restrictions s'imposant pour protéger la sécurité et la vie publique. Elle ne tolérerait pas la souffrance sur le plan humanitaire et serait encore moins disposée à l'infliger. Elle interdirait les lois et pratiques discriminatoires et tout traitement de même nature. En outre, elle encouragerait, autant que faire se peut, la prise de décisions participative de la population placée sous sa protection en tant que mesure essentielle à la restauration du pouvoir politique de la puissance souveraine.

57. Durant quarante-neuf années d'occupation, Israël a failli gravement au respect des principes et obligations juridiques découlant du droit au développement. Par une série de mesures, il a fondamentalement fait obstruction au droit du peuple palestinien à l'autodétermination; il a illégalement annexé Jérusalem-Est; il a transféré quelque 570 000 civils israéliens dans des colonies construites aux frais de l'État dans le territoire occupé; il a isolé l'économie et la population gazaouies du reste du Territoire palestinien occupé; il s'est approprié une grande partie de la Cisjordanie à des fins de développement économique et d'expansion démographique. La durée de l'occupation est allée bien au-delà de la limite raisonnable que toute puissance occupante agissant de bonne foi ne s'autoriserait pas à dépasser. La portion diminuée de territoire qui échoit aux Palestiniens résulte directement du projet de colonisation à grande échelle mené par Israël dont le réseau autoroutier, les terres adjacentes et le vaste dispositif militaire et de sécurité sont des composantes; sans ce projet, il ne fait pas de doute qu'il n'y aurait plus aucune raison de poursuivre l'occupation.

58. Qui plus est, l'occupation, du fait de son enracinement et du déni d'autodétermination qui lui est intrinsèque, a créé des conditions favorables à une

multitude d'autres violations des droits de l'homme telles qu'une insécurité alimentaire généralisée, le refus de délivrer des permis de construire et la destruction de logements, la confiscation de biens, l'imposition permanente de peines collectives, la conduite d'attaques aériennes arbitraires, la création d'une juridiction et d'un système pénitentiaire répressifs et une situation de crise humanitaire à Gaza. L'une des plus graves violations des droits fondamentaux dont Israël s'est rendu coupable a consisté à instituer dans le Territoire palestinien occupé un régime de type colonial fonctionnant selon deux systèmes distincts et inégaux pour ce qui est de la législation, du réseau routier, des régimes juridiques, de l'accès à l'eau, des services sociaux, de la liberté de mouvement, des droits politiques et civils, de la sécurité et du niveau de vie. Dans l'ensemble, Israël a ignoré l'obligation qui lui incombait de respecter le droit au développement et le droit du peuple palestinien de jouir pleinement et sur un pied d'égalité de tous les droits fondamentaux.

59. Bien que le Gouvernement palestinien soit investi d'une certaine autorité en matière de planification et d'investissement, ses pouvoirs dépendent de la capacité sans restriction d'Israël de contrôler les principales mesures économiques prises dans le Territoire palestinien occupé ou d'y opposer son veto. Le régime de planification discriminatoire instauré par Israël à Jérusalem-Est et dans la zone C réduit au minimum la participation palestinienne quand il ne l'exclut pas. L'économie ne donne pas la pleine mesure de ses capacités et de son potentiel et demeure largement dépendante du financement des donateurs internationaux. De nombreux organismes internationaux imputent la faiblesse de l'économie palestinienne essentiellement à l'occupation et aux multiples barrières qui vont de pair avec elle. Les conséquences sociales de l'asphyxie de l'économie palestinienne sont d'une extrême gravité : taux de chômage très élevé, pauvreté quasi généralisée, délitement des infrastructures, grave pénurie de logements, conditions de vie précaires et, à Gaza, misère omniprésente. Au lieu de développer une économie viable comme voie nécessaire à la réalisation de l'autodétermination et à l'exercice du droit au développement, l'occupation s'ancre toujours plus profondément et la perspective de voir naître une économie autonome s'éloigne.

IV. Recommandations

60. Le Rapporteur spécial demande au Gouvernement israélien de mettre un terme à l'occupation longue de presque cinquante ans du Territoire palestinien occupé qui dure depuis 1967. Il lui recommande également de prendre immédiatement les mesures suivantes :

a) Faire en sorte que la législation interne soit conforme aux normes internationales telles que mentionnées dans les Principes de base sur le recours à la force et l'utilisation des armes à feu par les responsables de l'application des lois, et soit appliquée strictement selon ces règles;

b) Conduire des enquêtes approfondies, efficaces, indépendantes et impartiales dans tous les cas où les forces de sécurité israéliennes auraient eu recours à la force meurtrière ou auraient fait un usage excessif de la force ou auraient commis des actes illégaux, de sorte que les responsabilités soient véritablement établies;

c) Mettre immédiatement fin à la pratique de la détention administrative et à l'utilisation de preuves secrètes, et relâcher ou inculper les détenus;

d) Prendre des mesures efficaces pour réduire le nombre d'enfants placés en détention et s'assurer que les conditions de détention respectent pleinement les dispositions relatives à la protection qui figurent dans la Convention relative aux droits de l'enfant et les autres instruments juridiques applicables en la matière;

e) Mettre fin immédiatement à la pratique de la peine collective sous toutes ses formes, notamment les démolitions punitives et les restrictions non fondées à la liberté de mouvement;

f) Mettre immédiatement fin à la pratique du transfert forcé de population et à la destruction d'habitations et de biens, dont ceux des groupes de Bédouins palestiniens;

61. En ce qui concerne les obligations internationales figurant dans la Déclaration sur le droit au développement, le Rapporteur spécial recommande au Gouvernement israélien :

a) De permettre la libre circulation des personnes et des biens dans tout le Territoire palestinien occupé;

b) De mettre un terme au blocus de Gaza et de lever toutes les restrictions aux importations et aux exportations, compte dûment tenu des préoccupations justifiables sur le plan de la sécurité;

c) De permettre à l'Autorité palestinienne de prendre en charge le contrôle de la sécurité dans la zone B et ce même contrôle ainsi que le contrôle civil dans la zone C, afin que le Territoire palestinien occupé ne soit plus géographiquement divisé;

d) De prendre des mesures propres à favoriser une relation commerciale équilibrée avec le Territoire palestinien occupé, à savoir des dispositions visant à renforcer la capacité productive de l'industrie manufacturière palestinienne et le développement des ressources;

e) De cesser immédiatement d'utiliser les ressources naturelles du Territoire palestinien occupé pour son bénéfice propre;

f) De faire tomber le mur et de réparer intégralement le préjudice économique qu'il a causé;

g) De mettre fin à la pratique punitive consistant à ne pas verser les impôts indirects collectés au bénéfice du Gouvernement palestinien;

h) De s'acquitter pleinement des obligations juridiques internationales sur le droit au développement.



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**Promotion et protection des droits de l'homme :
situations relatives aux droits de l'homme
et rapports des rapporteurs et représentants
spéciaux**

Situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967*

Note du Secrétaire général

Le Secrétaire général a l'honneur de transmettre à l'Assemblée générale le rapport présenté par le Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Michael Lynk, conformément à la résolution 5/1 du Conseil des droits de l'homme.

* Le présent document a été soumis après la date limite afin que des renseignements sur les faits les plus récents puissent y figurer.



Rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967

Résumé

Le présent rapport est le deuxième soumis à l'Assemblée générale par Michael Lynk, Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967. Il a été établi principalement à partir d'informations communiquées par des victimes, des témoins, des représentants de la société civile, des représentants d'organismes des Nations Unies et des responsables palestiniens à Amman lors de la mission effectuée par le Rapporteur spécial dans la région en mai 2017. Il analyse un certain nombre de problèmes touchant à la situation des droits de l'homme en Cisjordanie, y compris Jérusalem-Est, et à Gaza.

I. Introduction

1. Dans le présent rapport, le Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967 donne un bref aperçu des préoccupations qui lui sont apparues, à l'issue de ses conversations et rencontres avec des représentants de la société civile, comme étant les plus pressantes en matière de droits de l'homme dans le territoire palestinien occupé au moment de la présentation du rapport. Il fait ensuite une analyse détaillée du contexte juridique international d'une occupation qui est entrée dans sa 51^{ème} année.

2. Le Rapporteur spécial souhaite attirer l'attention sur le fait qu'il se tient prêt à effectuer une mission dans le territoire palestinien occupé mais qu'il n'y a pas été autorisé par les autorités israéliennes. Il a demandé à plusieurs reprises à accéder depuis Israël au Territoire palestinien occupé, sa dernière demande en date remontant au 24 mars 2017. Au moment de l'établissement du présent rapport, il n'avait pas encore reçu de réponse. Il rappelle que ses deux prédécesseurs les plus récents à ce poste n'avaient pas non plus eu accès au Territoire palestinien occupé. Il souligne en outre qu'un libre dialogue entre toutes les parties est essentiel à la protection et à la promotion des droits de l'homme et qu'il est tout disposé à y participer. Il fait par ailleurs remarquer que l'accès au territoire est important pour une compréhension globale de la situation, que le défaut systématique de coopération avec le Rapporteur spécial est très préoccupant et qu'une compréhension complète et exhaustive de la situation fondée sur l'observation directe est extrêmement utile à ses travaux.

3. Le présent rapport repose principalement sur des communications écrites ainsi que sur des consultations menées avec des représentants de la société civile, des victimes, des témoins, des responsables palestiniens et des représentants d'organismes des Nations Unies à Amman lors de la mission annuelle du Rapporteur spécial dans la région en mai 2017.

4. Dans le présent rapport, le Rapporteur spécial met l'accent, comme le prévoit son mandat¹, sur les violations des droits de l'homme et du droit humanitaire commises par Israël. Il affirme que les violations des droits de l'homme par tout État partie ou acteur non étatique sont déplorables et ne peuvent qu'entraver les perspectives de paix.

5. Le Rapporteur spécial tient à remercier le Gouvernement de l'État de Palestine pour la coopération sans réserve qu'il lui a apportée dans le cadre de l'exécution de son mandat. Il souhaite également adresser ses remerciements à tous ceux qui sont venus à sa rencontre à Amman ainsi qu'à tous ceux qui n'ont pas pu faire le déplacement mais qui lui ont fait parvenir des observations écrites ou orales. Il salue le travail essentiel accompli par les défenseurs des droits de l'homme et la société civile et s'engage à faire tout son possible pour soutenir cette action.

6. Le Rapporteur spécial tient à souligner que plusieurs groupes ont été empêchés de venir le rencontrer à Amman par des restrictions de déplacement imposées par les autorités israéliennes. Ces mesures ayant tout particulièrement visé des personnes venant de Gaza, tous les individus et organisations concernés ont été consultés par vidéoconférence.

¹ Comme il est précisé dans le mandat du Rapporteur spécial énoncé dans la résolution E/CN.4/RES/1993/2.

II. Situation actuelle des droits de l'homme

7. Alors que l'occupation est entrée dans sa cinquante et unième année, la situation des droits de l'homme dans le Territoire palestinien occupé s'est gravement détériorée. Les violations du droit humanitaire et des droits de l'homme liées à l'occupation ont des répercussions sur tous les aspects de la vie des Palestiniens vivant en Cisjordanie, y compris Jérusalem-Est, et dans la bande de Gaza. Dans le présent rapport, le Rapporteur spécial ne dresse pas de tableau exhaustif de l'ensemble des sujets de préoccupation mais insiste plutôt sur certaines des questions qui sont à l'heure actuelle les plus pressantes.

A. La bande de Gaza

8. Depuis avril 2017, Gaza est confrontée à une sévère crise en matière d'alimentation électrique, qui s'est encore aggravée au cours du mois de juin. Au moment de l'établissement du présent rapport, aucune solution durable n'avait été trouvée et la population devait bien souvent se contenter de quatre heures d'électricité par jour². Gaza a continué de subir des coupures de courant pendant 18 à 20 heures par jour, ce qui a nui à la fourniture des services de base³. Cette crise soulève la question particulièrement préoccupante du droit des Palestiniens à la santé, les hôpitaux et structures médicales étant gravement touchés par le manque d'électricité. Les hôpitaux diffèrent les interventions chirurgicales non indispensables et sont contraints de renvoyer prématurément les patients chez eux. L'approvisionnement en eau est en outre menacé, puisque la plupart des logements sont alimentés par le biais du réseau de canalisations quelques heures seulement tous les trois à cinq jours et que les installations de dessalement ne fonctionnent qu'à 15 % de leur capacité. Plus de 108 millions de litres d'eaux usées non traitées seraient déversés dans la Méditerranée chaque jour⁴. L'Organisation mondiale de la Santé (OMS) a fait remarquer que les interventions humanitaires ciblées prévenaient « l'effondrement complet du secteur de la santé » pendant la crise⁵.

9. Il est à noter que la crise humanitaire à Gaza, qu'il s'agisse de la brutale dégradation de la situation ces derniers temps ou des difficultés que connaît ce territoire depuis 10 ans, est entièrement causée par l'homme. Les actuels problèmes de courant, qui découlent de la réduction par Israël de son approvisionnement en électricité de Gaza suite à une décision de l'Autorité palestinienne motivée par la fracture politique interne entre le Hamas et le Fatah, étaient tout à fait évitables. En tant que Puissance occupante (A/HRC/34/38, par. 10 à 12), Israël est en outre tenu de veiller à ce que des normes d'hygiène et de santé publique adéquates s'appliquent dans le territoire occupé, ainsi que d'assurer la fourniture de nourriture et de soins médicaux à la population occupée⁶. Le Rapporteur spécial demande à toutes les parties de remplir les obligations qui sont les leurs à l'égard de la

² Voir www.haaretz.com/middle-east-news/palestinians/1.800735.

³ Bureau de la coordination des affaires humanitaires « Humanitarian Bulletin : Occupied Palestinian Territory » (août 2017). Consultable à l'adresse www.ochaopt.org/sites/default/files/hummonitor_august_2017_2.pdf.

⁴ Bureau de la coordination des affaires humanitaires, « Gaza crisis : urgent funding appeal » (juillet 2017). Consultable à l'adresse www.ochaopt.org/sites/default/files/gaza_urgent_humanitarian_funding_v5_3july2017_10am_1.pdf.

⁵ Organisation mondiale de la Santé (OMS), « WHO situation report : Gaza, Occupied Palestinian Territory–July to August 2017 ». Consultable à l'adresse www.emro.who.int/images/stories/palestine/WHO-Special-Situation-Report-on-Gaza_July_-_August_.pdf?ua=1

⁶ Convention de Genève du 12 août 1949 relative à la protection des personnes civiles en temps de guerre (quatrième Convention de Genève), art. 55 et 56.

population de Gaza en vertu du droit international des droits de l'homme et du droit international humanitaire.

10. Les difficultés croissantes rencontrées par les patients qui cherchent à sortir de Gaza par le point de passage d'Erez pour recevoir un traitement médical ajoutent aux problèmes de santé causés par le manque d'électricité. Le taux de demandes de permis rejetées ou ajournées par Israël a augmenté pendant le deuxième semestre de 2016 (A/HRC/34/70, par. 21). En juillet 2017, la situation restait préoccupante. Sur les 787 demandes de permis déposées au mois de juillet, 42,6 % ont été rejetées ou ajournées⁷. Les délais de réponse prolongés peuvent conduire certains patients à manquer des rendez-vous et à retarder des soins vitaux. En août 2017, cinq patients atteints d'un cancer sont décédés alors qu'ils attendaient l'autorisation de voyager pour recevoir les soins nécessaires⁸.

B. La Cisjordanie

11. Dans son précédent rapport, le Rapporteur spécial soulignait la forte augmentation des annonces de nouvelles création de colonies observée au début de l'année 2016 (A/HRC/34/70, par. 9 à 12). D'après le mouvement La paix maintenant, des appels d'offres ont été passés pour la construction de 2 858 logements depuis le début de 2017, ce qui représente une augmentation importante par rapport à l'année 2016 (42 logements) et un chiffre inégalé au cours des dix dernières années au moins⁹. Le Premier Ministre israélien Benjamin Nétanyahou a en outre annoncé, pour la première fois depuis 25 ans, la création d'une nouvelle colonie, dont le premier coup de pioche a été porté en juin¹⁰.

12. Parallèlement aux annonces évoquées ci-dessus, plusieurs dirigeants politiques ont appelé à la poursuite de l'expansion des colonies et, dans bien des cas, à des annexions¹¹. Au début de l'année, M. Nétanyahou aurait déclaré, lors d'une réunion avec les principaux membres du cabinet de sécurité israélien, qu'il avait levé toutes les restrictions relatives aux constructions à Jérusalem-Est et qu'il allait poursuivre les constructions dans les colonies de Cisjordanie¹².

13. Ces déclarations, qui s'ajoutent à la réalité objective de l'expansion des colonies et aux nombreuses annonces de nouvelles constructions, mettent gravement en péril la solution des deux États et conduisent à la poursuite des violations des droits de l'homme associées aux colonies, y compris les restrictions à la liberté de

⁷ OMS, « Health access for referral patients from the Gaza Strip », rapport mensuel (juillet 2017). Consultable à l'adresse http://www.emro.who.int/images/stories/palestine/documents/WHO_monthly_Gaza_access_report_July_2017.pdf?ua=1.

⁸ Ibid., (août 2017). Consultable à l'adresse www.emro.who.int/images/stories/palestine/documents/WHO_monthly_Gaza_access_report_Aug_2017_Final.pdf?ua=1.

⁹ Voir <http://peacenow.org.il/en/settlements-watch/settlements-data/construction>.

¹⁰ Peter Beaumont, « Israel begins work in first settlement in 25 years as Jared Kushner flies in », *The Guardian*, 20 juin 2017. Consultable à l'adresse www.theguardian.com/world/2017/jun/20/israel-new-settlement-benjamin-netanyahu-jared-kushner-amichai-amona; et Maayan Lubell, « Israel cabinet approves first West Bank settlement in 20 years », Reuters, 30 mars 2017. Consultable à l'adresse www.reuters.com/article/us-israel-palestinians-settlement/israeli-cabinet-approves-first-west-bank-settlement-in-20-years-idUSKBN1711K6.

¹¹ Amnesty International, « Israël/Territoires palestiniens occupés : Cesser de soutenir les colonies illégales », déclaration publique, 7 juin 2017. Consultable à l'adresse www.amnesty.be/infos/actualites/article/israel-territoires-palestiniens-occupes-cesser-de-soutenir-les-colonies.

¹² Barak Ravid, « Netanyahu pledges unrestricted construction in East Jerusalem, settlement blocs », *Haaretz*, 22 janvier 2017. Consultable à l'adresse www.haaretz.com/israel-news/.premium-1.766796.

circulation qui limitent l'exercice des droits à l'éducation et à la santé, le risque accru d'arrestation et de détention arbitraire, l'utilisation de terres et de ressources naturelles limitant ainsi le droit des Palestiniens au développement, et de nombreuses autres violations. En outre, comme le souligne le Rapporteur spécial dans son rapport au Conseil des droits de l'homme en 2017, les Palestiniens et Israéliens qui tentent d'appeler l'attention sur ces violations sont de plus en plus pris pour cible, que ce soit en Cisjordanie avec les arrestations et détentions arbitraires ou en Israël avec des campagnes et des lois visant à délégitimer les activités des organisations de défense des droits de l'homme (voir A/HRC/34/70).

C. Jérusalem-Est

14. À Jérusalem-Est comme dans le reste de la Cisjordanie, les colonies de peuplement ainsi que la démolition de logements et le déplacement de Palestiniens sont sources de profonde préoccupation. Le 2 octobre 2017, M. Nétanyahou a annoncé son soutien au projet de loi dit du Grand Jérusalem qui, selon certaines sources, prévoirait l'expansion de la municipalité de Jérusalem pour y englober un certain nombre de colonies¹³. Parallèlement à ce type d'initiatives, les démolitions et les expulsions d'habitants palestiniens de Jérusalem-Est se poursuivent à un rythme soutenu, avec 116 démolitions complètes répertoriées entre janvier et mi-septembre 2017 qui ont entraîné le déplacement de 202 personnes¹⁴. La puissance occupante justifie les démolitions à Jérusalem-Est par des motifs d'ordre administratif (lorsque les bâtiments sont construits sans une autorisation en bonne et due forme, même si cette dernière est pratiquement impossible à obtenir pour les Palestiniens) (A/HRC/34/38, para. 26) ou les présente comme des mesures punitives contre les familles d'agresseurs réels ou supposés (A/HRC/34/36, par. 31, et A/HRC/34/38, par. 30 à 33).

III. Le contexte juridique de l'occupation

15. Le mois de juin 2017 a marqué le cinquantième anniversaire de l'occupation par Israël du territoire palestinien (Cisjordanie, y compris Jérusalem-Est, et Gaza). Il s'agit de l'occupation militaire continue la plus longue de l'histoire moderne¹⁵. Alors que la communauté internationale affirme avec insistance, comme elle l'a encore fait en 2016, que l'occupation israélienne doit prendre totalement fin¹⁶, que beaucoup de ses caractéristiques constituent de graves violations du droit international¹⁷ et que sa perpétuation dresse un obstacle grave à l'exercice par le peuple palestinien de son droit fondamental à l'autodétermination¹⁸ et met en péril la solution des deux États¹⁹, cette occupation est plus enracinée et plus dure que

¹³ Peter Beaumont, « Netanyahu backs annexation of 19 West Bank settlements », *The Guardian*, 3 octobre 2017. Consultable à l'adresse www.theguardian.com/world/2017/oct/03/netanyahu-backs-annexation-of-west-bank-settlements.

¹⁴ Bureau de la coordination des affaires humanitaires, Territoire palestinien occupé « Protection of civilians, reporting period : 12-25 September 2017 ». Consultable à l'adresse www.ochaopt.org/content/protection-civilians-report-12-25-september-2017.

¹⁵ Comité international de la Croix-Rouge (CICR), 2 juin 2017. Consultable à l'adresse www.icrc.org/fr/document/cinquante-ans-doccupation-et-maintenant.

¹⁶ Voir la résolution 71/23 de l'Assemblée générale.

¹⁷ Ibid. Voir également la résolution 71/97.

¹⁸ Voir la résolution 71/184 de l'Assemblée générale.

¹⁹ Voir la résolution 2334 (2016) du Conseil de sécurité.

jamais. L'occupation israélienne est en effet devenue un oxymore juridique et humanitaire : une occupation illimitée dans le temps²⁰.

16. Lorsque ces résolutions ont été adoptées par le Conseil de sécurité et l'Assemblée générale en 2016, la communauté internationale s'était déjà exprimée à maintes reprises, de manière pressante, sur la fin de l'occupation israélienne. Il y a 37 ans, en juin 1980, le Conseil, alarmé par la durée et la gravité de l'occupation et le mépris par Israël des résolutions antérieures, a adopté la résolution 476 (1980). À l'époque, l'occupation durait depuis déjà 13 ans. Dans cette résolution, le Conseil réaffirmait la nécessité impérieuse de mettre fin à l'occupation prolongée des territoires arabes occupés par Israël et déplorait vivement le refus continu d'Israël de se conformer aux résolutions pertinentes du Conseil de sécurité et de l'Assemblée générale.

17. L'incapacité à mettre fin à l'occupation israélienne constitue un échec cuisant pour la diplomatie internationale, une tache sombre sur l'efficacité du droit international et la source de maintes promesses non tenues au peuple palestinien. La perpétuation de cette occupation n'est pas non plus dans l'intérêt des Israéliens, en ce qu'elle mine leur société et leurs institutions qui se voient impliquées dans la volonté du Gouvernement d'hypothéquer toute solution juste et viable à un demi-siècle d'occupation et à un siècle de conflit, et fait d'eux, qu'ils le veuillent ou non, les bénéficiaires d'une relation profondément inégale et injuste.

18. En 1980, l'occupation du territoire palestinien par Israël avait déjà été prolongée, constituait déjà une situation à laquelle il fallait absolument mettre fin et Israël avait déjà montré sa réticence à respecter les orientations explicites de la communauté internationale. Dès lors, comment qualifier cette occupation en 2017? La démarche qui a prévalu au sein de la communauté internationale a consisté à traiter Israël en occupant légitime du territoire palestinien, et ce malgré les graves violations du droit international qu'a entraîné sa conduite de l'occupation, y compris les activités de peuplement²¹, l'édification du mur²², l'annexion de Jérusalem-Est²³ et les violations systématiques des droits de l'homme des Palestiniens²⁴. De l'avis du Rapporteur spécial, si le concept de l'occupant légitime était peut-être la représentation diplomatique et juridique adéquate de l'occupation dans ses premières années, il est depuis devenu totalement inapproprié à la fois comme qualification juridique de ce qu'est devenue l'occupation et comme catalyseur politique, diplomatique et juridique viable pour inciter Israël à enfin mettre un terme à l'occupation, conformément à ses obligations juridiques internationales.

19. Dans le présent rapport, le Rapporteur spécial examine la question de savoir si le rôle d'Israël en tant qu'occupant inflexible et provocateur du territoire palestinien a maintenant atteint le stade de l'illicéité en vertu du droit international. Pour tenter d'y répondre, il recense les principes fondamentaux qui régissent le déroulement licite d'une occupation en vertu des principes pertinents du droit international et, à la lumière de ces principes, examine l'administration par Israël du territoire

²⁰ John Kerry, Secrétaire d'État des États-Unis d'Amérique, dans ses remarques sur la paix au Moyen-Orient le 28 décembre 2016, a mis en garde contre « l'occupation permanente », « l'occupation perpétuelle » et « l'occupation apparemment sans fin » du territoire palestinien par Israël; voir <https://2009-2017.state.gov/secretary/remarks/2016/12/266119.htm>.

²¹ Voir la résolution 2334 (2016) du Conseil de sécurité.

²² Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif, CIJ, &&&&Recueil 2004, p. 136, par. 142.

²³ Voir la résolution 478 (1980) du Conseil de sécurité; voir également la résolution 71/25 de l'Assemblée générale.

²⁴ Voir la résolution 71/98 de l'Assemblée générale.

palestinien occupé et détermine si le rôle d'Israël en tant que puissance occupante demeure légal ou non.

A. Principes généraux du droit international et de l'occupation

20. Près de 20 ans après le début du XXI^{ème} siècle, la norme qui guide notre communauté mondiale veut que les gens soient citoyens, et non sujets, de l'État qui les régit. Ils ont en conséquence le droit d'exprimer leur identité juridique et leurs droits inaliénables par le biais d'un État souverain. Le colonialisme, l'occupation et les autres formes de domination étrangère font exception à cette norme et ne peuvent se justifier, du point de vue du droit et de la pratique internationale, que comme une situation transitoire anormale avant une marche résolue vers l'autodétermination ou la souveraineté. La plupart des autres formes de domination étrangère seraient, ipso facto, contraires à l'ordre juridique.

21. Dans notre monde moderne, les protections et droits fondamentaux, y compris les protections en vertu du droit international humanitaire, les droits civils et politiques tels que le droit à l'autodétermination, et les droits économiques, sociaux et culturels, doivent faire l'objet d'une interprétation large fondée sur l'objet visé et d'une application libérale. Ils incarnent en effet les droits et libertés qui touchent les aspects fondamentaux de notre humanité et doivent être universellement accessibles et concrètement applicables pour chacun d'entre nous²⁵. Inversement, les exceptions à ces droits fondamentaux, comme les nécessités militaires, de graves menaces contre la sécurité nationale ou des dangers publics exceptionnels, doivent être interprétées et appliquées de manière étroite et mesurée afin de ne pas entraver indûment le champ de ces droits fondamentaux ni leur accessibilité et leur jouissance par tous les peuples²⁶.

22. Créé au lendemain des tragiques expériences de guerre totale et d'extrême souffrance des civils au cours des XIX^e et XX^e siècles, le droit international humanitaire est inscrit, entre autres instruments, dans le Règlement annexé à la Convention concernant les lois et coutumes de la guerre sur terre de 1907 (Règlement de La Haye), la Convention relative à la protection des personnes civiles en temps de guerre du 12 août 1949 (quatrième Convention de Genève) et le Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux de 1977 (Protocole I), ainsi que dans les pratiques du monde moderne. Trois des objectifs fondamentaux du droit international humanitaire moderne relatifs à l'occupation militaire étrangère sont les suivants : a) régler étroitement une occupation pour faire en sorte que le territoire atteigne ou retrouve une situation de souveraineté, b) empêcher que le territoire devienne un objet de conquête et c) sauvegarder les personnes protégées sous occupation. Comme d'autres domaines du droit international, le droit international humanitaire évolue constamment, au sein du champ naturel de ses instruments, principes et objectifs fondateurs, pour relever les nouveaux défis auxquels est confrontée la protection humanitaire dans les situations pour lesquelles

²⁵ Pacte international relatif aux droits civils et politiques et Pacte international relatif aux droits économiques, sociaux et culturels.

²⁶ Pacte international relatif aux droits civils et politiques, art. 4 [« (...) les États parties au présent Pacte peuvent prendre, dans la stricte mesure où la situation l'exige, des mesures dérogeant aux obligations prévues dans le présent Pacte ... »]; et Pacte international relatif aux droits économiques, sociaux et culturels, art. 4.

les réponses ne sont pas toujours expressément énoncées dans ces documents initiaux²⁷.

23. L'une des plus importantes évolutions du droit international de ces dernières années réside dans la reconnaissance du fait que le droit international des droits de l'homme, y compris le droit fondamental à l'autodétermination, fait partie intégrante de l'application du droit de l'occupation. La Cour internationale de Justice a affirmé que le droit international des droits de l'homme continuait de s'appliquer en temps de conflit et pendant une occupation²⁸. Dans la pratique, cela signifie que le droit humanitaire et le droit des droits de l'homme sont complémentaires et ne s'excluent pas mutuellement lorsqu'ils s'appliquent à une occupation²⁹, et que les populations protégées sous occupation jouissent de l'ensemble des droits de l'homme, sous réserve uniquement de dérogations légitimes pleinement justifiées par des situations d'urgence ou par les prescriptions du régime militaire dans le cadre de l'occupation³⁰.

24. Autre grande évolution récente : le droit des peuples à disposer d'eux-mêmes, reconnu en droit international comme un droit opposable à tous³¹, s'applique à tous les peuples vivant sous occupation ou sous une autre forme de domination étrangère³². La Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les États conformément à la Charte des Nations Unies prévoit que « Tout État a le devoir de s'abstenir de recourir à toute mesure de coercition qui priverait les peuples ... de leur droit à disposer d'eux-mêmes, de leur liberté et de leur indépendance »³³. Dans son avis consultatif sur les conséquences juridiques de l'édification d'un mur dans le Territoire palestinien occupé, la Cour internationale de Justice a expressément affirmé que le peuple palestinien avait droit à l'autodétermination, qu'Israël avait le devoir de respecter ce droit et qu'un certain nombre de caractéristiques de l'occupation israélienne dressaient un obstacle grave à l'exercice de ce droit³⁴. En outre, avec l'évolution du droit de l'occupation et l'application à ce droit à l'autodétermination, la souveraineté revient désormais au peuple qui vit sur le territoire occupé et non à son gouvernement. La puissance occupante est donc tenue de respecter les intérêts politiques du dépositaire de la souveraineté populaire : le peuple³⁵.

²⁷ Eyal Benvenisti, *The International Law of Occupation* (Princeton, New Jersey, Princeton University Press, 2004) (... il ne s'agit pas simplement de rechercher les articles pertinents dans le Règlement de La Haye ou dans la quatrième convention de Genève. Le droit international a largement évolué depuis l'époque où ces deux instruments ont été élaborés.).

²⁸ Conséquences juridiques de l'édification d'un mur dans le Territoire palestinien occupé, avis consultatif, par. 106 à 113; Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), arrêt de la CIJ, Recueil 2005, p. 168, par. 178 et 179.

²⁹ Vaios Koutroulis, « The application of international humanitarian law and international human rights law in situations of prolonged occupation : only a matter of time? », *Revue internationale de la Croix-Rouge*, vol. 94, n° 885 (printemps 2012).

³⁰ Noam Lubell, *Les obligations relatives aux droits de l'homme dans le cadre de l'occupation militaire*, *Revue internationale de la Croix-Rouge*, vol. 94, n° 885 (Sélection française, printemps 2012/1).

³¹ Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif, par. 88. Tout État est donc tenu de faire tout ce qui est en son pouvoir pour assurer l'autodétermination du peuple sous domination étrangère.

³² Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif, par. 88.

³³ Voir la résolution 2625 (XXV) de l'Assemblée générale.

³⁴ Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif, par. 122.

³⁵ Benvenisti, (1967).

25. Israël occupe le territoire palestinien (Cisjordanie, y compris Jérusalem-Est, et Gaza) depuis juin 1967. La quatrième Convention de Genève s'applique donc dans son intégralité. Ce point de vue a été exprimé par le Conseil de sécurité de manière constante et régulière dès le premier mois de l'occupation³⁶ et réaffirmé, encore tout récemment, en décembre 2016³⁷. C'est également la position exprimée lors d'une Conférence des Hautes Parties contractantes à la quatrième Convention de Genève, en 2014 (A/69/711-S/2015/1, annexe, par. 4). Les Palestiniens vivant sur le territoire occupé sont donc des « personnes protégées » en vertu du droit international humanitaire et ont droit à toutes les protections prévues par la quatrième Convention de Genève³⁸. Israël refuse l'application de cette Convention et ne reconnaît pas le territoire palestinien comme étant occupé³⁹, position que la communauté internationale a largement rejetée⁴⁰.

26. Partant de ces principes et observations, quatre critères d'appréciation sont proposés en vue de déterminer si un occupant administre l'occupation de manière conforme au droit international et au droit de l'occupation, ou s'il outrepassa sa capacité juridique et si sa domination est illicite.

B. Critères tendant à déterminer si un belligérant occupant demeure un occupant légal

27. Étant donné la durée de l'occupation du territoire palestinien par Israël, qui a été jugée à bien des égards contraire au droit international, certains spécialistes du droit international se sont demandé s'il existait un seuil au-delà duquel une occupation autrefois considérée comme licite pouvait cesser de l'être. Eyal Benvenisti considère ainsi qu'un occupant qui, par mauvaise foi, fait échec aux efforts de paix visant à mettre un terme à son autorité doit être considéré comme un agresseur, ce qui rendrait illicite ladite autorité. MM. Ben-Naftali, Gross et Michaeli soutiennent plus généralement que toute occupation exercée en violation de l'une des règles juridiques fondamentales en la matière, telles qu'énumérées ci-dessous, se trouve de ce fait entachée d'illicéité⁴¹. Plus récemment, M. Gross a élargi la portée de l'argument en faisant valoir qu'il importait d'autant plus de savoir si une occupation indéfinie ou permanente devenait de ce fait illicite, que celle-ci risquait autrement, sous couvert d'une durée fictive, de dissimuler une conquête ou une nouvelle forme de colonialisme⁴². Les critères proposés ci-après s'inspirent des travaux de ces juristes.

³⁶ Voir la résolution 237 (1967) du Conseil de sécurité.

³⁷ Voir la résolution 2334 (2016) du Conseil de sécurité.

³⁸ Quatrième Convention de Genève, art 4.

³⁹ Israël, Ministère des affaires étrangères : « Israel settlements and international law », 30 novembre 2015 (« Juridiquement parlant, la Cisjordanie doit être considérée comme un territoire faisant l'objet de revendications concurrentes qui devraient être résolues grâce aux négociations du processus de paix »). Consultable à l'adresse <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20settlements%20and%20international%20law.aspx>. Voir également Conséquences juridiques de l'édification d'un mur dans le Territoire palestinien occupé, avis consultatif, par. 90 et 93.

⁴⁰ Voir la résolution 71/96 réaffirmant l'applicabilité de la quatrième Convention de Genève au Territoire palestinien occupé, adoptée par un vote de 168 voix contre 6 et 6 abstentions. Voir également Aeyal Gross, *The Writing on the Wall : Rethinking the International Law of Occupation* (Cambridge : Cambridge University Press, 2017).

⁴¹ Orna Ben-Naftali, Aeyal Gross et Keren Michaeli, « Illegal occupation : framing the Occupied Palestinian Territory », *Berkeley Journal of International Law*, vol. 23, no 3 (2005).

⁴² Gross, *The Writing on the Wall*. Voir également Ardi Imseis, « Prolonged occupation of Palestine : The case for a second advisory opinion of the International Court of Justice », conférence donnée le 7 octobre 2015. Consultable à l'adresse www.youtube.com/watch?v=X2ijqm1m2Ak.

28. Les quatre critères de licéité d'une occupation sont les suivants:

a) L'occupant belligérant ne peut annexer aucune partie du territoire occupé.

29. Aucune circonstance ne confère à l'occupant belligérant le droit de conquête ou d'annexion ni aucun droit souverain ou autre sur aucune partie du territoire qui lui est soumis. C'est l'un des principes les mieux établis du droit international moderne, et il est universellement admis. Il découle du paragraphe 4 de l'article 2. de la Charte des Nations Unies, en vertu duquel les Membres « s'abstiennent de recourir à la menace ou à l'emploi de la force, soit contre l'intégrité territoriale ou l'indépendance politique de tout État ». Les plus éminents spécialistes du droit international s'accordent à reconnaître que le principe de non-annexion fait partie des règles contraignantes admises par la doctrine⁴³. L'Assemblée générale, s'exprimant d'une voix unanime, a interdit l'acquisition d'un droit territorial fondé sur la conquête dans la Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les États.

30. La puissance occupante ne peut imposer des conditions ou modifier la situation sur le terrain pour étayer sa prétention à un titre sur le territoire. Ce principe se fonde sur la prescription bien établie en droit international humanitaire qui interdit à la puissance occupante de procéder au transfert de civils dans le territoire qu'elle occupe, conformément à la quatrième Convention de Genève et du Protocole additionnel I (article 85). Un tel acte constitue en outre un crime de guerre au titre du Statut de Rome de la Cour pénale internationale de 1988 (A/CONF.183/9, art. 8, par. 2 b) viii). Cet interdit strict a pour but d'éviter qu'un occupant ne modifie la démographie d'un territoire pour en revendiquer la souveraineté et, en même temps, pour empêcher la population protégée de jouir de son droit à l'autodétermination⁴⁴.

31. En ce qui concerne en particulier l'occupation par Israël, en juin 1967, des territoires arabes, y compris le territoire palestinien, le Conseil de sécurité a entériné, dans sa résolution 242 de novembre (1967), le principe de « l'inadmissibilité de l'acquisition de territoire par la guerre ». Il a depuis lors réaffirmé ce principe à au moins sept reprises concernant les annexions par Israël du territoire arabe⁴⁵. C'est également en ce sens que se prononce de longue date l'Assemblée générale⁴⁶. La Cour internationale de Justice a jugé que l'« illicéité de toute acquisition de territoire résultant de la menace ou de l'emploi de la force » ressortissait désormais au droit international coutumier⁴⁷. La proscription absolue de toute acquisition de territoire par la force ne fait aucune distinction entre les

⁴³ Malcolm N. Shaw, *International Law*, 8^e éd., (Cambridge, Cambridge University Press, 2017) (« Il est toutefois clair aujourd'hui que l'acquisition d'un territoire par la seule force est illégale au regard du droit international »); et Antonio Cassese, *International Law*, 2^e éd. (Oxford, Oxford University Press, 2005) (« ...la conquête, même suivie d'une occupation de fait et de l'exercice de l'autorité sur le territoire, ne vaut pas transmission du droit de souveraineté. »).

⁴⁴ Rapport à la Sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités de la Commission des droits de l'homme (E/CN.4/Sub.2/1993/17), par. 17, (« Certains transferts de populations ont pour but ou pour effet de modifier la composition démographique d'un territoire en fonction d'objectifs politiques ou d'une idéologie dominante, surtout si cette politique ou cette idéologie affirment la dominance de tel ou tel groupe sur un autre. »).

⁴⁵ Voir résolutions du Conseil de sécurité 2334 (2016), 497 (1981), 478 (1980), 476 (1980), 298 (1971), 267 (1969) et 252 (1968).

⁴⁶ Voir, de manière générale, la résolution 71/23 de l'Assemblée générale.

⁴⁷ Conséquences juridiques de l'édification d'un mur dans le Territoire palestinien occupé, avis consultatif.

territoires occupés lors d'une guerre en légitime défense ou lors d'une guerre d'agression; l'annexion est interdite dans toutes les circonstances⁴⁸.

b) L'occupation belligérante est de nature provisoire; elle ne saurait s'étendre de manière permanente ou indéfinie. L'occupant est tenu de chercher à mettre fin à l'occupation et à remettre le territoire au dépositaire de sa souveraineté qu'il est raisonnablement possible de le faire.

32. L'occupation belligérante est par nature un état de fait provisoire et exceptionnel, dans lequel la puissance occupante assume *de facto* l'administration du territoire jusqu'à ce que les circonstances permettent de le remettre au dépositaire de sa souveraineté⁴⁹, à savoir son peuple. En raison de l'interdiction absolue d'acquérir un territoire par la force, il est défendu à la puissance occupante d'exercer son autorité sur le territoire de manière permanente ou même indéfinie, ou de tenter de le faire⁵⁰. Comme le note Aeyal Gross, c'est la notion de durée, outre les principes d'autodétermination et de non-acquisition de territoire par la force, qui distingue l'occupation de la conquête, distinction qui s'évanouirait si l'on voulait donner à l'occupation un caractère indéfini⁵¹.

33. Le droit de l'occupation ne conditionne la licéité de l'occupation à aucune durée spécifique. Il découle toutefois de la règle générale selon laquelle l'occupation est une forme de domination étrangère faisant provisoirement exception aux principes d'autodétermination et de souveraineté que la puissance occupante est tenue de remettre le territoire à la puissance souveraine dans un délai aussi raisonnable et bref que possible⁵², sous réserve uniquement des éléments suivants: a) la sûreté et la sécurité publiques du territoire; b) l'instauration ou la restauration des institutions publiques et la bonne marche de l'économie et c) la sécurité de l'armée d'occupation. La puissance occupante, étant tenue d'œuvrer de bonne foi à la réalisation de ces objectifs dans le respect des principes du droit de l'occupation, ne serait pas légitimement fondée à demeurer sur le territoire occupé une fois les conditions réunies pour que le territoire soit intégralement remis à la puissance souveraine⁵³. En effet, plus l'occupation dure, plus la puissance occupante est sommée de justifier la prolongation de sa présence.

c) Pendant la durée de l'occupation, l'occupant belligérant agit dans l'intérêt de la population sous occupation.

34. La puissance occupante doit pendant toute la durée de l'occupation gouverner dans l'intérêt de la population sous occupation, sous réserve uniquement des

⁴⁸ Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford, Clarendon Press, 1996) (De nombreux avis s'accordent à tenir pour illicite l'incorporation par Israël de Jérusalem-Est, au motif que l'acquisition de territoires par la guerre, qu'il s'agisse d'une guerre de défense ou d'agression, est inadmissible...).

⁴⁹ Jean S. Pictet, dir. publ., *Convention de Genève relative à la protection des personnes civiles en temps de guerre: Commentaire* (Genève, CICR, 1958) (« L'occupation de guerre, [...], est un état de fait essentiellement provisoire, qui n'enlève à la Puissance occupée ni sa qualité d'État, ni sa souveraineté; elle entrave seulement l'exercice de ses droits. »).

⁵⁰ Ben-Naftali Gross et Michaeli « Illegal occupation » (« L'occupation est provisoire. Elle ne saurait s'étendre de manière permanente ou indéfinie. »).

⁵¹ Gross, *The Writing on the Wall*.

⁵² Dans sa résolution 1483 (2003) concernant l'occupation de l'Iraq en 2003, le Conseil de sécurité a pris acte du fait que les puissances occupantes s'étaient engagées à rendre aux Iraquiens le contrôle de leur pays « le plus tôt possible ».

⁵³ Ben-Naftali, Gross and Michaeli, « Illegal occupation » (« La nature provisoire de l'occupation, par opposition à une durée indéfinie, est donc l'élément le plus déterminant du régime réglementaire de l'occupation, puisque c'est d'elle que dépend le sens et l'effet, en fait comme en droit, des libertés et du droit à l'autodétermination. »).

conditions de sécurité légitimes de l'autorité militaire occupante. Ce principe a été comparé à une relation de tutelle ou de fiducie en droit interne ou international, relation dans laquelle l'autorité dominante est tenue d'agir en tenant compte avant toute chose des intérêts de la personne ou entité protégée⁵⁴. Ce principe interdit donc à l'autorité en place d'exercer sa tutelle à son propre avantage ou à des fins d'accaparement, et va de pair avec la stricte obligation, de la part de la puissante occupante, de respecter dans toute la mesure possible les droits fondamentaux de la population sous occupation.

35. Le principe du respect de l'intérêt supérieur de la population est inscrit dans les normes sous-jacentes du droit de l'occupation, en particulier dans les dispositions du Règlement de La Haye et de la quatrième Convention de Genève, qui garantissent les droits des personnes protégées et réglementent strictement les actes de la puissance occupante. Ce constat va de pair avec l'évolution dudit droit, qui était principalement axé sur les droits des États et des élites politiques, mais qui, sous sa forme contemporaine, en est venu à s'intéresser davantage à la protection des populations sous occupation⁵⁵. L'article 43 du Règlement de La Haye fait obligation à la puissance occupante « de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays ». La quatrième Convention de Genève a élargi ces prescriptions en imposant sur de nombreux plans à la puissance occupante un devoir de protection, notamment celui de protéger les enfants, de maintenir les hôpitaux, de préserver les ressources naturelles et de fournir des médicaments et des vivres. Elle interdit également à l'occupant les peines collectives, le pillage, les sévices corporels ainsi que les transferts forcés, en masse ou individuels, et les déportations⁵⁶. Ces protections et interdictions, prises conjointement avec le droit international des droits de l'homme, montrent bien que le respect de l'intérêt supérieur de la population est un principe primordial et que les responsabilités de la puissance occupante relèvent d'un rapport de tutelle.

d) L'occupant belligérant doit administrer de bonne foi le territoire occupé, dans le plein respect de ses devoirs et obligations découlant du droit international et de sa qualité de Membre de l'Organisation des Nations Unies.

36. La bonne foi est un principe fondamental de l'ordre juridique international et fait partie intégrante de presque tout rapport juridique en droit international moderne⁵⁷. Cette « règle d'or de l'interprétation des traités », comme elle a parfois été décrite, domine et sous-tend l'ensemble du processus d'interprétation⁵⁸. Elle suppose que l'État s'acquitte de ses devoirs et obligations de manière honnête, loyale, raisonnable, diligente et équitable, dans le souci de respecter l'objet sous-jacent de sa responsabilité juridique, y compris celle contractée au titre d'un accord

⁵⁴ Gross, *The Writing on the Wall*.

⁵⁵ E. Benvenisti, *The International Law of Occupation* (Lorsque le Conseil de sécurité a jugé que la situation de l'Iraq en 2003 ressortissait au droit de l'occupation, il a dû adapter un droit fondé à l'origine sur la souveraineté du monarque et la protection de ses possessions en temps de guerre en vertu du droit international, pour y intégrer une nouvelle doctrine – le droit international *humanitaire* – fondée au contraire sur la souveraineté du peuple et la protection de ses droits fondamentaux.).

⁵⁶ On trouvera dans Gross, *The Writing on the Wal*, un résumé des droits et interdictions prévus dans la quatrième Convention de Genève.

⁵⁷ Andreas R. Ziegler et Jorun Baumgartner, « Good faith as a general principle of (international) law », dans Andrew D. Mitchell, M. Sornarajah et Tania Voo (dir. publ.), *Good Faith and International Economic Law* (Oxford, Oxford University Press, 2015).

⁵⁸ Eirik Bjorge, *The Evolutionary Interpretation of Treaties*, (Oxford, Oxford University Press, 2014).

ou traité⁵⁹. Ce principe interdit aux États de prendre part à tout acte contraire au but et à l'objet de l'obligation, ou de commettre tout abus de droit masquant un acte illicite ou le manquement à une obligation⁶⁰.

37. Le devoir d'agir de bonne foi est inscrit dans une bonne partie des textes fondateurs du droit international, notamment la Charte (art. 2, par. 2), la Convention de Vienne sur le droit des traités et la Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les États. Ainsi, dans l'affaire des essais nucléaires, en 1974, la Cour internationale de Justice a reconnu la primauté de la bonne foi en droit international en estimant que « l'un des principes de base qui présid[ai]ent à la création et à l'exécution d'obligations juridiques, quelle qu'en soit la source, [était] celui de la bonne foi ».⁶¹

38. Ainsi, le droit international fait obligation à l'occupant belligérant de gouverner de bonne foi le territoire qu'il occupe. Cette bonne foi peut être appréciée en fonction du respect par la puissance occupante des trois principes essentiels régissant l'occupation, tels qu'énoncés ci-dessus : a) non-annexion du territoire occupé; b) exercice de l'autorité à titre provisoire uniquement; c) gouvernance dans l'intérêt des personnes protégées. Par ailleurs, un occupant belligérant qui gouverne de bonne foi doit également : d) se conformer à toute orientation spécifique de l'Organisation des Nations Unies ou autre autorité compétente en ce qui concerne l'occupation⁶² et e) respecter les préceptes du droit international, y compris du droit humanitaire et du droit des droits de l'homme, régissant l'occupation.

C. Applicabilité de l'avis consultatif de la Cour internationale de Justice sur la Namibie (Sud-Ouest africain)⁶³

39. En juin 1971, la Cour internationale de Justice a rendu un avis consultatif sur requête du Conseil de sécurité au sujet des conséquences juridiques de la présence continue de l'Afrique du Sud en Namibie. La Cour a estimé que l'administration sud-africaine du territoire namibien sous mandat avait été assurée de manière contraire à plusieurs obligations fondamentales au titre du droit international, que l'Organisation des Nations Unies avait bien mis fin audit mandat et que la présence continue de l'Afrique du Sud sur ce territoire était donc illégale. L'avis consultatif de la Cour sur les conséquences juridiques pour les États de la présence continue de l'Afrique du Sud en Namibie contient un certain nombre de précédents qui

⁵⁹ Markus Kotzur, « I Good faith (bona fide), dans Rüdiger Wolfrum (dir. publ.) *Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, 2009).

⁶⁰ Steven Reinhold, « I Good faith in international law », *UCL Journal of Law and Jurisprudence*, vol.2, (2013).

⁶¹ *Essais nucléaires (Australie c. France)*, arrêt, CIJ, Recueil 1974, p. 253, par. 46.

⁶² L'Article 25 de la Charte des Nations Unies dispose que « les Membres de l'Organisation conviennent d'accepter et d'appliquer les décisions du Conseil de sécurité conformément à la présente Charte ».

⁶³ Conséquences juridiques pour les États de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, CIJ, Recueil 1971, p. 16. Le rapporteur spécial est intellectuellement redevable dans son interprétation de la décision sur la Namibie aux ouvrages suivants : John Dugard, « A tale of two sacred trusts : Namibia and Palestine », dans Tiyanjana Maluwa (dir. publ.), *Law, Politics and Rights : Essays in Memory of Kader Asmal*, (Leyde, Pays-Bas, Martinus Nijhoff Publishers, 2014); Norman Finkelstein, *Gaza : An Inquest into its Martyrdom* (Oakland, University of California Press, 2018) (à paraître); et Stephanie Koury, « I Legal strategies at the United Nations : a comparative look at Namibia, Western Sahara and Palestine », dans Susan Akram et collaborateurs (dir. publ.), *International Law and the Israeli-Palestinian Conflict : A Rights-Based Approach to Middle East Peace*, (Abingdon, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, Routledge, 2011).

corroborent les quatre critères de licéité proposés et l'analyse de la licéité du rôle continu d'Israël en tant qu'occupant.

40. Après la Première Guerre mondiale, la Société des Nations avait investi l'Afrique du Sud d'un mandat sur le Sud-Ouest africain sous le régime de l'article 22 du Pacte de la Société des Nations. Au titre du paragraphe 1 de l'article 22, l'Afrique du Sud était chargée, au nom d'une « mission sacrée de civilisation », d'administrer le territoire jusqu'à ce que celui-ci soit prêt à l'indépendance. En tant que mandataire, l'Afrique du Sud était tenue d'administrer le Sud-Ouest africain dans l'intérêt du territoire et de sa population. Le mandataire devait rendre compte de son administration devant la Société des Nations.

41. Après la Seconde Guerre mondiale, l'Organisation des Nations Unies a repris la responsabilité du régime de mandats, rebaptisé régime international de tutelle. L'Afrique du Sud a refusé de placer le Sud-Ouest africain sous la tutelle de l'Organisation des Nations Unies et y a procédé à une forme d'apartheid ainsi qu'à l'annexion de fait du territoire. En 1966, l'Assemblée générale a révoqué le mandat de l'Afrique du Sud sur le Sud-Ouest africain et déclaré que l'Afrique du Sud n'avait aucun autre droit d'administrer le territoire⁶⁴. En janvier 1970, le Conseil de sécurité a déclaré « illégale » la présence continue de l'Afrique du Sud en Namibie et a jugé que l'« attitude de défi » de l'Afrique du Sud envers les décisions du Conseil « sap[ait] l'autorité de l'Organisation des Nations Unies »⁶⁵. En juillet 1970, le Conseil de sécurité a demandé à la Cour internationale de Justice un avis consultatif⁶⁶.

42. L'avis consultatif de la Cour internationale de Justice sur la Namibie est un précédent solide et pertinent concernant l'occupation continue par Israël du territoire palestinien. Alors que la Namibie était un territoire sous mandat dans le cadre du régime international de tutelle, régi par l'article 22 du Pacte, dans le cas du territoire palestinien, l'administration relève du droit de l'occupation; il n'en demeure pas moins que ces deux situations sont voisines. L'Afrique du Sud (en tant que puissance mandataire) et Israël (en tant que puissance occupante) sont deux exemples clairs de domination étrangère; dans les deux cas, la puissance administrante est garante du droit des personnes protégées à l'autodétermination et, aujourd'hui comme alors, l'annexion est strictement interdite, les puissances sont tenues de gouverner dans l'intérêt des personnes protégées et de s'abstenir de toute pratique favorisant au contraire leur propre intérêt, et la communauté internationale est chargée de surveiller étroitement la domination étrangère et d'œuvrer à l'extinction du mandat.

43. Dans son avis consultatif, la Cour internationale de Justice a abouti aux sept conclusions et principes juridiques exposés ci-après au sujet du territoire sous mandat de la Namibie. Le Rapporteur spécial estime que ces conclusions et principes sont directement applicables à l'appréciation de la licéité dans le temps de l'occupation par Israël.

a) **L'annexion est interdite; le mandataire se voit confier une tutelle qu'il est tenu d'exercer au profit des populations du territoire, celles-ci étant appelées, à l'issue du mandat, à exercer leur droit à l'autodétermination et à l'indépendance**⁶⁷.

⁶⁴ Voir la résolution 2145 (XXI) du Conseil de sécurité.

⁶⁵ Voir la résolution 276 (1970) du Conseil de sécurité.

⁶⁶ Voir la résolution 284 (1970) du Conseil de sécurité.

⁶⁷ Conséquences juridiques pour les États de la présence continue de l'Afrique du Sud en Namibie, avis consultatif, par. 45 à 47, 50, 53 et 83.

b) **Toutes les puissances mandataires doivent se conformer de bonne foi à leurs obligations. Tout manquement aux obligations fondamentales du mandat signifierait un manquement à l'obligation de bonne foi**⁶⁸.

c) **Les garanties strictes imposées par la communauté internationale au mandataire visent à éviter que les territoires sous mandat ne deviennent « l'objet de cessions déguisées ».** Le mandataire ne peut invoquer aucun des droits dont il est le dépositaire pour motiver un retard ou un ajournement de l'établissement d'un rapport de tutelle. De même, la puissance mandataire ne saurait se prévaloir d'une occupation prolongée pour revendiquer l'annexion de tout ou partie du territoire sous mandat⁶⁹.

d) **Le droit international n'est pas statique mais évolutif et son interprétation doit tenir compte de l'évolution que le droit a connue dans le cadre de la Charte des Nations Unies et du droit international coutumier.** Dès lors qu'un droit fait partie des principes juridiques généraux, il peut être présumé faire partie intégrante de tout traité ou accord⁷⁰.

e) **La violation délibérée et persistante de ses obligations par une partie détruit l'objet même et le but du rapport établi ou du pouvoir qui lui était confié, et la partie ne saurait revendiquer les droits qu'elle prétend tirer de ce rapport**⁷¹.

f) **La violation par un mandataire de ses obligations fondamentales au titre du droit international peuvent frapper d'illégalité le maintien de sa présence sur le territoire sous mandat.** Il convient de mettre fin à toute situation illicite, et les États Membres, qui ont l'obligation de reconnaître l'illégalité et le défaut de validité de la situation, ont à cet égard un devoir de non-reconnaissance⁷².

g) **Le constat d'une violation fondamentale, par une puissance mandataire, de ses obligations internationales, de la révocation de son mandat et de l'illégalité de son maintien sur le territoire sous mandat est sans incidence sur l'application des garanties juridiques protégeant la population sous mandat.** Le mandataire demeure donc responsable de toute violation de ses obligations internationales et assujetti au devoir de protéger les droits de la population sous mandat.⁷³

44. L'avis consultatif de 1971 sur la Namibie conserve toujours sa pertinence et sa force de raisonnement. En 2004, la Cour internationale de Justice, dans son avis consultatif sur les conséquences juridiques de l'édification d'un mur dans le Territoire palestinien occupé, s'est appuyé sur l'avis rendu au sujet de la Namibie pour conclure à l'applicabilité du droit à l'autodétermination aux territoires non autonomes, y compris au Territoire palestinien occupé⁷⁴. Le rapprochement entre ces deux situations similaires – une puissance étrangère qui, sous couvert d'un régime de supervision international, s'assure un contrôle permanent dans le cadre d'un rapport de tutelle – suppose que les principes juridiques applicables au maintien illégal d'un mandat par son mandataire valent aussi, *mutatis mutandis*, pour la question de savoir si le maintien d'une occupation par la puissance occupante est devenu illégal.

⁶⁸ Ibid, par. 53, 84, 90, 115, 116 et 128.

⁶⁹ Ibid, par. 54, 55, 66, 82 et 83.

⁷⁰ Ibid, par. 52, 53, 96, 98, 100 et 133.

⁷¹ Ibid, par. 84, 91, 95, 96, 98, 100 et 102.

⁷² Ibid, par. 108, 109, 111, 115, 117, 122 et 123.

⁷³ Ibid., par. 118 et 125.

⁷⁴ Conséquences juridiques de l'édification d'un mur dans le Territoire palestinien occupé, avis consultatif, par. 88.

D. Application des critères de licéité à l'occupation israélienne

L'interdiction de l'annexion

45. L'annexion officielle par Israël de Jérusalem-Est en 1967 et 1980 et son annexion de facto de parties importantes de la Cisjordanie sont destinées à consolider ses revendications de souveraineté. Cela constitue une violation flagrante de l'interdiction absolue de l'annexion et des obligations d'Israël en vertu du droit international.

46. Après s'être emparé des territoires palestiniens (la Cisjordanie, y compris Jérusalem-Est, et Gaza) durant la guerre de juin 1967, Israël a annexé Jérusalem-Est et certaines parties de la Cisjordanie à la fin de juin 1967 par décision du Gouvernement. En juillet 1967, l'Assemblée générale a unanimement dénoncé l'annexion et appelé Israël à rapporter les mesures tendant à modifier le statut de Jérusalem⁷⁵. Par la suite, en juillet 1980, la Knesset a adopté la Loi fondamentale sur Jérusalem, proclamant Jérusalem capitale « entière et réunifiée » d'Israël. En août 1980, le Conseil de sécurité a « censuré dans les termes les plus énergiques » l'adoption par Israël de la Loi fondamentale, et affirmé que la loi constituait une violation du droit international, et que l'annexion israélienne était « nulle et non avenue » et devait « être rapportée immédiatement »⁷⁶. Israël ne respecte toujours pas l'ensemble des résolutions de l'ONU sur la question de Jérusalem. Quelque 210 000 colons israéliens vivent actuellement à Jérusalem-Est occupée qu'Israël a déclaré n'avoir aucune intention de quitter⁷⁷.

47. En dehors de Jérusalem, Israël s'emploie activement à établir l'annexion de facto de certaines parties de la Cisjordanie occupée. La Cour internationale de Justice, dans son avis consultatif de 2004 concernant l'édification du mur, a averti que la réalité du mur et le régime de colonisation créaient sur le terrain un « fait accompli » et une annexion de facto⁷⁸. L'Association for Civil Rights in Israel a qualifié le régime en Cisjordanie d'« occupation-annexion »⁷⁹. M. Omar Dajani a fait observer que, vu l'interdiction absolue du principe de l'annexion inscrite dans le droit international, les États annexants sont incités à occulter la réalité de l'annexion⁸⁰. En Cisjordanie, Israël exerce un contrôle total de la zone C (qui représente 60 % de la Cisjordanie), où 400 000 colons sont établis dans quelque 225 colonies. Ces colons vivent conformément à la loi israélienne dans des colonies peuplées uniquement d'israéliens, conduisent sur un système routier destiné uniquement aux israéliens, et bénéficient largement des énormes sommes d'argent public dépensées par Israël pour consolider, défendre et étendre les colonies. Peu de ces avantages bénéficient aux Palestiniens de la zone C, si ce n'est indirectement. Seul 1 % de la zone C est attribué aux Palestiniens, bien qu'ils soient quelque

⁷⁵ Voir les résolutions 2253 (ES-V) et 2254 (ES-V) de l'Assemblée générale.

⁷⁶ Voir la résolution 478 (1980) du Conseil de sécurité. Voir également la résolution 476 (1980) du Conseil.

⁷⁷ Le Premier Ministre israélien, Benjamin Nétanyahou en 2015 : « il y a quarante-huit ans, la division de Jérusalem a pris fin et nous sommes revenus à l'unité [...] Nous maintiendrons Jérusalem unie sous autorité israélienne ». Consultable à l'adresse www.cnn.com/2015/05/17/middleeast/israel-netanyahu-united-jerusalem/.

⁷⁸ Conséquences juridiques de l'édification d'un mur dans le Territoire palestinien occupé, avis consultatif, par. 121.

⁷⁹ Association for Civil Rights in Israel, « 49 years of control without rights : human rights of the Palestinians in the West Bank and East Jerusalem—what has changed? », consultable à l'adresse www.acri.org.il/en/wp-content/uploads/2016/06/49years2016-en.pdf.

⁸⁰ Omar M. Dajani, « Israel's creeping annexation », *American Journal of International Law Unbound*, vol. 111 (2017).

300 000 à y vivre⁸¹. Quel pays investirait aussi lourdement pendant tant d'années pour créer autant de réalités immuables dans un territoire occupé s'il n'avait l'intention d'y demeurer en permanence⁸² ?

Les occupations doivent être temporaires et non permanentes ou de durée indéfinie

48. L'occupation israélienne dure depuis maintenant cinquante ans. La durée de cette occupation est sans précédent ni parallèle dans le monde d'aujourd'hui⁸³. M. Adam Roberts a déclaré qu'une occupation devenait prolongée si elle durait plus de cinq ans et présentait de grandes ressemblances avec la situation en temps de paix, en période d'hostilités réduites⁸⁴. Les occupations du monde moderne qui ont largement respecté les stricts principes applicables en ce qui concerne la durée, la non-annexion, la tutelle et la bonne foi n'ont pas dépassé 10 ans, y compris l'occupation américaine du Japon, l'occupation de l'Allemagne de l'Ouest par les Alliés et l'occupation de l'Iraq par la coalition dirigée par les États-Unis d'Amérique⁸⁵.

49. Si l'on part du principe que plus l'occupation est longue, plus la puissance occupante doit justifier la situation, l'on peut conclure qu'Israël n'a aucune raison convaincante, après 50 années, de maintenir cette occupation. Le pays a signé avec l'Égypte (1981) et la Jordanie (1994) des traités de paix qui ont résisté à l'épreuve du temps, et l'absence d'accords de paix avec ses deux autres voisins (la République arabe syrienne et le Liban), ne peut être invoquée pour justifier son occupation continue du territoire palestinien. Contrairement aux déclarations répétées de nombreux dirigeants israéliens, l'Autorité palestinienne est acceptée par la communauté internationale comme partenaire de négociations légitimes en faveur de la paix. Le principal moteur de la poursuite de l'occupation israélienne, qui est l'entreprise de colonisation, loin de renforcer la sécurité d'Israël, l'affaiblit⁸⁶. M. Gershon Shafir a écrit : Israël utilise ici une logique circulaire, en invoquant le caractère temporaire de l'occupation pour modifier durablement la situation au motif que sa sécurité serait exposée à de grands risques, dont beaucoup sont en fait le résultat de violations du droit de l'occupation⁸⁷.

50. La seule explication crédible de la poursuite de l'occupation israélienne et du renforcement du régime de colonisation est la volonté d'Israël d'ancrer ses revendications de souveraineté sur une partie ou la totalité du territoire palestinien, ambition coloniale par excellence. Depuis 1967, tous les gouvernements israéliens

⁸¹ Orhan Niksic, Nur Nasser Eddin et Massimiliano Cali *Area C and the Future of the Palestinian Economy* (Washington, Banque mondiale, 2014); et Diakonia International Humanitarian Law Resource Centre, « Planning to fail : the planning regime in Area C of the West Bank ».

⁸² Le Premier Ministre israélien Benjamin Nétanyahou en août 2017 : « Nous sommes ici pour y rester pour toujours. Les colonies sur les terres d'Israël ne seront plus démantelées. C'est notre terre ». Consultable à l'adresse www.latimes.com/world/middleeast/la-fg-israel-netanyahu-settlements-20170828-story.html.

⁸³ Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge, Cambridge University Press, 2009).

⁸⁴ Adam Roberts, « Prolonged military occupation : the Israeli-Occupied Territories since 1967 », *American Journal of International Law*, vol. 84, n° 1 (janvier 1990).

⁸⁵ Ces trois occupations sont parfois citées comme exemples d'occupations « transformatrices », ce qui soulève des questions juridiques distinctes qui ne sont pas traitées dans le présent rapport. Voir, de manière générale : Gregory H. Fox, « Transformative occupation and the unilateralist impulse », *International Review of the Red Cross*, vol. 94, n° 885 (printemps 2012).

⁸⁶ Conseil israélien de paix et de sécurité (juin 2012), cité dans Gershon Shafir, *A Half Century of Occupation : Israel, Palestine, and the World's Most Intractable Conflict* (Oakland, University of California Press, 2017) par. 98.

⁸⁷ Shafir, *A Half Century of Occupation*.

ont continué à développer les colonies, et l'importance des ressources financières, militaires et politiques allouées à cette entreprise dément toute intention de rendre l'occupation temporaire⁸⁸. Depuis 1967, le nombre de colons vivant dans les territoires occupés a toujours augmenté entre la prise de fonction et la cessation de fonction de chacun des gouvernements ayant assumé le pouvoir en Israël. (certes, lors de différents cycles de négociation de paix dans les années 1990 et 2000, des dirigeants israéliens ont proposé de se retirer d'une partie de la Cisjordanie, mais même dans les plus avancées de ces négociations, sous le gouvernement d'Ehud Olmert entre 2006 et 2008, Israël a insisté dans tous les accord finals pour conserver un grand nombre de ses colonies à Jérusalem-Est et en Cisjordanie⁸⁹). Le Gouvernement israélien actuel est fermement résolu à approfondir les activités de colonisation⁹⁰. M. Shafir fait observer que l'aspect temporaire reste un subterfuge israélien pour créer des réalités de terrain permanentes. En effet Israël peut mettre à profit le caractère apparemment indéterminé de la fin de l'occupation pour créer une situation temporaire « permanente » qui empêche intentionnellement les Palestiniens d'exercer véritablement leur droit à l'autodétermination et à l'indépendance⁹¹.

51. L'occupation israélienne a depuis longtemps outrepassé le principe du droit international concernant le caractère temporaire d'une occupation. Israël n'a pas agi conformément à l'obligation de prendre toutes les mesures nécessaires pour mettre un terme à l'occupation dans un délai aussi raisonnable et rapide que possible. Loin de là. Que l'on dise de l'occupation qu'elle est permanente ou de durée indéfinie, l'absence de justification convaincante expliquant cette durée exceptionnelle fait qu'Israël, en tant que puissance occupante, viole le droit international.

Le principe de l'intérêt supérieur/de la confiance

52. En vertu du droit international, Israël doit administrer le territoire palestinien occupé dans l'intérêt supérieur du peuple palestinien, à savoir le peuple protégé sous occupation, et doit nécessairement justifier ses préoccupations en matière de sécurité. Il lui est interdit d'administrer le territoire occupé de manière acquisitive ou intéressée. Ignorant ces exigences, Israël a agi dans son propre intérêt expansionniste, en négligeant la plupart des responsabilités incombant à un belligérant occupant.

53. Les répercussions sociales et économiques de l'occupation sur les Palestiniens vivant dans le territoire occupé, qui avaient toujours été dommageables, sont devenues de plus en plus désastreuses au cours des dernières années. D'après des rapports récents de la Banque mondiale⁹² et de l'Organisation des Nations Unies⁹³, l'entreprise d'expansion des colonies israéliennes et le dispositif d'appui à l'occupation ont aggravé les conditions économiques et les conditions de vie de la

⁸⁸ Idith Zertal et Akiva Eldar, *Lords of the Land : the War Over Israel's Settlements in the Occupied Territories, 1967-2007* (New York, Nation Books, 2007).

⁸⁹ Dajani, « Israel's creeping annexation ».

⁹⁰ Samantha Power, Représentante permanente des États-Unis d'Amérique auprès de l'Organisation des Nations Unies, « Intervention après l'abstention des États-Unis concernant le vote contre l'implantation de colonies », New York, 23 décembre 2016 : « le Premier Ministre israélien a récemment dit que son gouvernement était plus attaché aux colonies qu'aucun autre gouvernement de l'histoire d'Israël ». Consultable à l'adresse www.timesofisrael.com/full-text-of-us-envoy-samantha-powers-speech-after-abstention-on-anti-settlement-vote/.

⁹¹ Shafir, *A Half Century of Occupation*.

⁹² Banque mondiale, « West Bank and Gaza : Area C and the future of the Palestinian economy » rapport n° AUS2922 (2013).

⁹³ Bureau de la coordination des affaires humanitaires, territoire palestinien occupé – « Fragmented lives : humanitarian overview 2106 » (2017).

population, déjà distinctes et nettement inférieures à celles des Israéliens, imposées aux Palestiniens en Cisjordanie. Les Palestiniens sont soumis à un système juridique arbitraire et sévère, très différent de celui dont bénéficient les colons israéliens⁹⁴. La plus grande partie de la Cisjordanie est interdite aux Palestiniens, et ceux-ci font régulièrement l'objet de restrictions importantes à leur liberté de circulation en raison de bouclages, de barrages routiers et de l'obligation de posséder une autorisation de déplacement, au demeurant difficile à obtenir⁹⁵.

54. Les colons israéliens bénéficient d'un accès aux ressources naturelles du territoire occupé, en particulier à l'eau, de manière disproportionnée⁹⁶. De même, le système de planification administré par la puissance occupante en matière de logement et de développement commercial dans l'ensemble de la Cisjordanie, y compris Jérusalem-Est, est profondément discriminatoire et favorise la construction de colonies, tout en créant de gros problèmes aux Palestiniens⁹⁷, comme en témoignent notamment la poursuite des confiscations de terres⁹⁸, la démolition de maisons et les refus de permis de construire⁹⁹. Israël emploie des pratiques qui peuvent dans certains cas être qualifiées de transfert forcé de Palestiniens, en particulier ceux vivant dans les zones rurales, afin de confisquer des terres pour y implanter des colonies, des zones militaires pour l'entraînement aux armes et d'autres utilisations servant exclusivement les intérêts de la puissance occupante et qui n'ont que peu ou pas de lien avec ses besoins légitimes en matière de sécurité¹⁰⁰.

55. Pour ce qui est de Jérusalem-Est, l'occupation l'a de plus en plus détachée de ses liens traditionnels nationaux d'ordre économique, culturel et familial avec la Cisjordanie, en raison du mur, de son encerclement croissant par des colonies et les points de contrôle qui y sont associés et du régime de permis discriminatoire. Elle est négligée par la municipalité en termes de services et d'infrastructures¹⁰¹, l'occupation a épuisé son économie, et les Palestiniens ne disposent que d'une faible superficie pour construire leurs logements¹⁰².

56. Dans la bande de Gaza, Israël a mis fin à sa présence officielle en 2005, mais conserve ses responsabilités en tant que puissance occupante du fait de son contrôle effectif sur les frontières terrestres et maritimes de ce territoire et sur son espace aérien. Tamir Pardo, ancien chef du Mossad, a récemment déclaré qu'Israël était responsable de la situation humanitaire dans la bande de Gaza, et que c'était là que

⁹⁴ Limor Yehuda et collaborateurs, « One rule, two legal systems : Israel's regime of laws in the West Bank » (Association for Civil Rights in Israel, 2014).

⁹⁵ Voir Human Rights Watch, *World Report 2017 : Events of 2016*. Consultable à l'adresse www.hrw.org/world-report/2017/country-chapters/israel/palestine.

⁹⁶ Amnesty International, « Troubled waters – Palestinians denied fair access to water » (Londres, 2009).

⁹⁷ Human Rights Watch, « Separate and unequal : Israel's discriminatory treatment of Palestinians in the Occupied Palestinian Territories » (19 décembre 2010). Consultable à l'adresse www.hrw.org/report/2010/12/19/separate-and-unequal/israels-discriminatory-treatment-palestinians-occupied.

⁹⁸ Adam Aloni, *Expel and Exploit : The Israeli Practice of Taking Over Rural Palestinian Land* (B'Tselem, 2016).

⁹⁹ Bureau de la coordination des affaires humanitaires, « Fragmented Lives ».

¹⁰⁰ Simon Reynolds, *Coercive Environments : Israel's Forcible Transfer of Palestinians in the Occupied Territory* (Badil Resource Centre for Palestinian Residency and Refugee Rights, 2017).

¹⁰¹ Association for Civil Rights in Israel, *East Jerusalem, facts and figures*, 2017, 21 mai 2017. Consultable à l'adresse <http://www.acri.org.il/en/wp-content/uploads/2017/05/Facts-and-Figures-2017-1.pdf>.

¹⁰² Conférence des Nations Unies sur le commerce et le développement (CNUCED), *L'économie palestinienne de Jérusalem-Est : face à l'annexion, à l'isolement et au risque de désintégration*, document UNCTAD/GDS/APP/2012/1.

se posait le plus grand problème dans le monde d'aujourd'hui¹⁰³. Depuis 2007, Israël maintient un blocus étouffant sur l'économie et les voyages, qui a renvoyé la bande de Gaza à l'ère de l'obscurantisme. Plus de 60 % de la population de Gaza est tributaire de l'aide humanitaire, n'est pas en mesure d'obtenir plus d'un tiers de l'électricité dont elle a besoin, ses sources d'eau potable seront bientôt épuisées et, situation pratiquement unique au monde, son produit intérieur brut est inférieur à ce qu'il était en 2006¹⁰⁴.

57. Toutes ces restrictions dans la vie civile et commerciale des Palestiniens ont disloqué l'espace économique, d'où une économie fortement dépendante et étranglée, une paupérisation croissante, des pressions et humiliations quotidiennes, et un recul de l'espoir d'un réel retournement de situation dans un avenir prévisible¹⁰⁵.

58. Comme il ressort à l'évidence, Israël, puissance occupante a administré le territoire palestinien comme une colonie interne, s'attachant avec détermination à exploiter ses terres et ressources pour son propre bénéfice, tout en restant profondément indifférent, dans le meilleur des cas, aux droits et à l'intérêt supérieur des personnes protégées¹⁰⁶. Israël enfreint donc son obligation d'administrer l'occupation comme un mandataire pour le bien-être des personnes protégées sous occupation.

Bonne foi

59. Pour qu'une puissance occupante administre un territoire occupé en toute bonne foi, elle doit non seulement respecter les trois principes énoncés ci-dessus, mais également se conformer pleinement aux orientations spécifiques de l'Organisation des Nations Unies ou d'autres autorités compétentes concernant l'occupation. Elle doit en outre respecter les préceptes du droit international, y compris du droit humanitaire et du droit des droits de l'homme, qui s'appliquent à une occupation.

60. Depuis 1967, le Conseil de sécurité a adopté, dans un langage clair et direct, plus de 40 résolutions concernant l'occupation du Territoire palestinien par Israël. S'agissant des colonies, le Conseil a déclaré à diverses reprises que ces dernières n'avaient aucune validité légale, qu'elles devaient être démantelées, qu'elles constituaient une violation flagrante du droit international, que les activités de peuplement devaient être arrêtées immédiatement et complètement, et qu'elles mettaient gravement en péril la viabilité de la solution des deux États¹⁰⁷. De même, le Conseil a affirmé, en se référant expressément à l'occupation israélienne, que

¹⁰³ Gili Cohen, « Ex-Mossad chief says occupation is Israel's only existential threat », *Haaretz*, 22 mars 2017. Consultable à l'adresse www.haaretz.com/israel-news/1.778650.

¹⁰⁴ Équipe de pays des Nations Unies dans le Territoire palestinien occupé. « Gaza ten years later », juillet 2017. Consultable à l'adresse https://unsco.unmissions.org/sites/default/files/gaza_10_years_later_-_11_july_2017.pdf.

¹⁰⁵ CNUCED, « Rapport sur l'assistance de la CNUCED au peuple palestinien : évolution de l'économie du Territoire palestinien occupé », document UNCTAD/APP/2016/1. Dans ce rapport, la CNUCED estime que l'économie palestinienne aurait à ce jour doublé de volume s'il n'y avait pas eu l'occupation israélienne.

¹⁰⁶ D. Kretzmer, *The Occupation of Justice : The Supreme Court of Israel and the Occupied Palestinian Territories* (Albany, State University of New York Press, 2002) (« Sur le plan politique, le Gouvernement fait référence aux Territoires occupés comme s'il s'agissait de colonies, avec tout ce que cela implique : l'exploitation de leurs ressources et marchés dans l'intérêt de la mère patrie et de ses citoyens, et une nette distinction entre le statut des " autochtones " et celui des colons. »).

¹⁰⁷ Voir les résolutions du Conseil de sécurité 2334 (2016), 465 (1980), 452 (1979) et 446 (1979).

l'acquisition de territoires par la guerre ou par la force était inadmissible¹⁰⁸. Il a censuré « dans les termes les plus énergiques » l'annexion par Israël de Jérusalem-Est, déploré qu'Israël « persiste à modifier le caractère physique, la composition démographique [...] et le statut de la Ville sainte de Jérusalem », qualifié ces modifications de « violation flagrante » de la quatrième Convention de Genève, et déclaré que ces changements devaient être annulés¹⁰⁹. Il a affirmé à plusieurs reprises que la quatrième Convention de Genève s'appliquait au Territoire palestinien occupé et a appelé Israël à la respecter « scrupuleusement »¹¹⁰.

61. Face au refus persistant d'Israël d'accepter et d'appliquer l'une quelconque de ces résolutions, le Conseil de sécurité a vivement déploré « le refus continu d'Israël, puissance occupante, de se conformer aux résolutions pertinentes du Conseil de sécurité et de l'Assemblée générale »¹¹¹. Immédiatement après l'adoption par le Conseil, en décembre 2016, de la résolution 2334 (2016), condamnant l'entreprise de colonisation et le fait qu'Israël n'appliquait pas la quatrième Convention de Genève, M. Nétanyahou a vivement critiqué la résolution, et annoncé qu'Israël ne s'y soumettrait pas¹¹². En octobre 2017, le Coordonnateur spécial des Nations Unies pour le processus de paix au Moyen-Orient a informé le Conseil qu'Israël ne se conformait pas à ladite résolution et que, de fait, ses activités de colonisation se poursuivaient à un rythme soutenu¹¹³.

62. On considère qu'Israël a violé bon nombre des grands préceptes du droit international humanitaire et du droit international des droits de l'homme. Son entreprise de colonisation a été qualifiée d'illégale par le Conseil de sécurité¹¹⁴. Les peines collectives, dont l'usage est interdit, ont été régulièrement employées par Israël, comme en témoignent la démolition de maisons appartenant à des familles palestiniennes de personnes soupçonnées de terrorisme ou d'atteintes à la sécurité, et le bouclage prolongé de communautés palestiniennes (qui a repris en 2014, après un moratoire qui durait depuis 2006)¹¹⁵. Les communautés bédouines de Cisjordanie et de Jérusalem-Est sont les dernières communautés palestiniennes exposées à un risque de transfert forcé fomenté par la puissance occupante¹¹⁶. Le droit à la liberté, et le droit qui en découle de ne pas être soumis à une arrestation arbitraire, est violé par les nombreuses détentions arbitraires, y compris administrative, et la révocation du droit de résidence de nombreux milliers de Palestiniens¹¹⁷. La liberté de circulation est entravée par un système complexe de contraintes administratives,

¹⁰⁸ Voir les résolutions du Conseil de sécurité 2334 (2016), 497 (1981), 478 (1980), 476 (1980), 298 (1971), 267 (1969), 252 (1968) et 242 (1967).

¹⁰⁹ Voir les résolutions du Conseil de sécurité 2334 (2016), 478 (1980) et 476 (1980).

¹¹⁰ Voir les résolutions du Conseil de sécurité 2334 (2016), 478 (1980), 476 (1980), 471 (1980), 465 (1980), 452 (1979) et 446 (1979).

¹¹¹ Voir les résolutions du Conseil de sécurité 478 (1980), 476 (1980) et 446 (1979).

¹¹² Isabel Kershner, « Netanyahu promises retribution for 'biased' U.N. resolution », *New York Times*, 24 décembre 2016. Consultable à l'adresse <https://www.nytimes.com/2016/12/24/world/middleeast/israel-benjamin-netanyahu-united-nations.html>

¹¹³ Nickolay Mladenov, Coordonnateur spécial pour le processus de paix au Moyen-Orient, exposé sur la situation au Moyen-Orient présenté au Conseil de sécurité : rapport sur la résolution 2334 (2016) du Conseil, 25 septembre 2017. Consultable à l'adresse <https://reliefweb.int/report/occupied-palestinian-territory/nickolay-mladenov-special-coordinator-middle-east-peace-3>

¹¹⁴ Voir les résolutions du Conseil de sécurité 2334 (2016), 478 (1980), 476 (1980), 471 (1980), 465 (1980), 452 (1979) et 446 (1979).

¹¹⁵ Voir www.btselem.org/topic/punitive_demolitions.

¹¹⁶ Bureau de la coordination des affaires humanitaires, « Demolition and seizure of service infrastructure in Palestinian communities in Area C exacerbates risk of forcible transfer », 11 octobre 2017. Consultable à l'adresse www.ochaopt.org/content/demolition-and-seizure-service-infrastructure-palestinian-communities-area-c-exacerbates.

¹¹⁷ Human Rights Watch, « Israel : 50 years of occupation abuses », 4 juin 2017. Consultable à l'adresse www.hrw.org/news/2017/06/04/israel-50-years-occupation-abuses.

bureaucratiques et physiques qui touche pratiquement tous les aspects de la vie quotidienne des Palestiniens¹¹⁸. Mais surtout, l'occupation persistante et irresponsable, qui traduit le refus de reconnaître l'intégrité territoriale, une véritable autonomie, une économie durable et une voie viable vers l'indépendance, sape et viole gravement le droit des Palestiniens à l'autodétermination, droit de base qui permet la réalisation de nombreux autres droits.

63. Qu'il s'agisse du respect des résolutions de l'Organisation des Nations Unies ou du respect de ses obligations en tant que puissance occupante dans le cadre du droit international, Israël n'a pas administré le territoire palestinien occupé de bonne foi. En tant qu'État Membre de l'ONU tenu à certaines obligations, Israël a défié à maintes reprises l'autorité de surveillance de la communauté internationale concernant l'occupation. En tant qu'occupant, Israël a délibérément manqué à bon nombre des grands préceptes du droit international humanitaire et du droit international des droits de l'homme qui régissent une occupation.

IV. Conclusion

64. Le droit international est la promesse que les États se font mutuellement, et font à leur peuple, de respecter les droits, d'honorer les protections, de se conformer aux accords et obligations et de rechercher la paix et la justice. Il est tout à l'honneur de la communauté internationale d'avoir maintenu cette vision du droit international tout au long de sa supervision de l'occupation du territoire palestinien par Israël. Mais il n'est pas honorable, alors que l'occupation s'aggravait, que les intentions de l'occupant devenaient parfaitement claires et que celui-ci se montrait de plus en plus provocateur, que la communauté internationale, malgré les solides outils que lui donnaient le droit international et la diplomatie, ait rechigné à faire face à l'éclatement du territoire palestinien provoqué par Israël et à ses violations du droit de l'occupation. Le droit international, ainsi que les peuples de Palestine et d'Israël, ont tous souffert de cette situation.

65. Les États qui administrent un autre territoire sous supervision internationale, que ce soit comme occupant ou puissance mandataire, franchissent la ligne rouge de l'illégalité s'ils violent leurs obligations fondamentales en tant que dirigeants étrangers. Dans son avis consultatif sur la Namibie, la Cour internationale de Justice a confirmé cette conclusion. Le Rapporteur spécial affirme qu'Israël a franchi cette ligne dans son rôle d'occupant. Aujourd'hui, le défi que doit relever la communauté internationale consiste à évaluer cette analyse et, si elle est acceptée, à élaborer et appliquer les mesures diplomatiques et juridiques appropriées qui permettront, peu à peu, de mettre complètement et définitivement fin à l'occupation. Comme l'a écrit Amos Schocken, éditeur de Ha'aretz, au sujet des dirigeants de son propre pays, la pression internationale est précisément la force qui les pousse à faire ce qui est juste¹¹⁹.

66. La reconnaissance du fait que le rôle d'Israël en tant qu'occupant est désormais illégal servirait plusieurs objectifs importants. Premièrement, cela encouragerait les États Membres à prendre toutes les mesures raisonnables pour empêcher ou décourager les institutions, organisations et sociétés nationales relevant de leur juridiction de se livrer à des activités qui investissent dans

¹¹⁸ Haut-Commissariat des Nations Unies aux droits de l'homme, « Freedom of movement : human rights situation in the Occupied Palestinian Territory, including East Jerusalem » (février 2016). Consultable à l'adresse www.ohchr.org/Documents/Countries/PS/SG_Report_FoM_Feb2016.pdf; (voir également en français le document A/HRC/31/44).

¹¹⁹ Amos Schocken, « Only international pressure will end Israeli apartheid », *Haaretz*, 22 janvier 2016. Consultable à l'adresse <https://www.haaretz.com/opinion/premium-1.698874>.

l'occupation ou la maintiennent. Deuxièmement, cela encouragerait les tribunaux nationaux et internationaux à appliquer les lois appropriées relevant de leur compétence, qui permettraient d'empêcher ou de décourager la coopération avec des entités qui investissent dans l'occupation ou la maintiennent. Troisièmement, cela inciterait la communauté internationale à revoir ses diverses formes de coopération avec la puissance occupante tant qu'elle continue d'administrer l'occupation de manière illégale. Quatrièmement, cela fournirait un précédent solide à la communauté internationale pour porter un jugement sur d'autres occupations de longue durée. Mais surtout, une telle décision confirmerait l'importance morale du respect de l'état de droit international dans l'aide aux peuples assiégés et vulnérables.

V. Recommandations

67. Le Rapporteur spécial demande au Gouvernement israélien de mettre un terme à l'occupation longue de cinquante ans des territoires palestiniens dans un délai aussi rapide que possible, sous supervision internationale.

68. Le Rapporteur spécial recommande à l'Assemblée générale :

a) De faire réaliser une étude des Nations Unies sur la licéité de la poursuite de l'occupation du territoire palestinien par Israël;

b) D'examiner s'il y aurait intérêt à demander à la Cour internationale de Justice un avis consultatif sur la question de la licéité de l'occupation;

c) D'envisager de faire réaliser une étude juridique sur les moyens par lesquels les États Membres peuvent et doivent s'acquitter de leurs obligations et devoirs pour assurer le respect du droit international, y compris le devoir de non reconnaissance, le devoir de coopérer pour mettre fin à une situation illégale et le devoir d'enquêter et de poursuivre les infractions graves aux Conventions de Genève;

d) D'envisager d'adopter, conformément à la résolution 377 (V) de l'Assemblée générale intitulée "L'union pour le maintien de la paix", une résolution relative à la question de Palestine, au cas où il serait établi que le rôle d'Israël en tant qu'occupant n'est plus légal.



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Promotion et protection des droits de l'homme :
questions relatives aux droits de l'homme, y compris
les divers moyens de mieux assurer l'exercice effectif
des droits de l'homme et des libertés fondamentales

Situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967*

Note du Secrétaire général

Le Secrétaire général a l'honneur de transmettre à l'Assemblée générale le rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Michael Lynk, présenté en application de la résolution 5/1 du Conseil des droits de l'homme.

* Le présent rapport a été soumis après la date limite afin que puissent y figurer les faits les plus récents.



Rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967

Résumé

Le présent rapport est le troisième soumis à l'Assemblée générale par le Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Michael Lynk. Il se fonde principalement sur les informations communiquées par des victimes, des témoins, des membres de la société civile, des représentants d'organismes des Nations Unies et des responsables palestiniens à Amman, lors de la mission effectuée par le Rapporteur spécial dans la région en juin 2018. Ce dernier y analyse un certain nombre de problèmes ayant trait à la situation des droits de l'homme en Cisjordanie, y compris Jérusalem-Est, et à Gaza.

I. Introduction

1. Dans le présent rapport, le Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967 donne un bref aperçu des problèmes les plus pressants en matière de droits de l'homme qu'il a recensés à l'issue de ses conversations et rencontres avec des membres de la société civile dans le Territoire palestinien occupé au moment de l'établissement du rapport. Il procède ensuite à une analyse détaillée de la question de l'annexion en examinant les contextes juridiques pertinents ainsi que la situation dans le Territoire palestinien occupé, en particulier la Cisjordanie, y compris Jérusalem-Est.

2. Le Rapporteur spécial tient une nouvelle fois à souligner qu'en dépit de ses requêtes, il n'a pas encore reçu l'autorisation d'Israël de se rendre dans le Territoire palestinien occupé. Sa dernière demande d'accès au Territoire remonte au 24 avril 2018 et au moment de l'établissement du présent rapport, le Gouvernement israélien n'y avait pas donné suite. Le Rapporteur souligne de nouveau qu'un dialogue ouvert entre toutes les parties est essentiel à la protection et à la promotion des droits de l'homme et rappelle à Israël qu'il est prêt et résolu à y participer. Il souligne une fois encore que l'accès au Territoire palestinien occupé serait essentiel pour comprendre la réalité fondamentale de la situation des droits de l'homme sur le terrain. Le défaut systématique de coopération avec le Rapporteur suscite une vive préoccupation et contrevient aux obligations qui sont celles d'Israël en tant qu'État Membre de l'Organisation des Nations Unies.

3. Le présent rapport se fonde principalement sur des communications écrites ainsi que sur les consultations menées avec des représentants de la société civile, des victimes, des témoins, des responsables palestiniens et des représentants d'organismes des Nations Unies à Amman, à l'occasion de la mission annuelle effectuée par le Rapporteur spécial dans la région en juin 2018. Ce dernier tient à souligner que plusieurs groupes n'ont pas pu se rendre à Amman pour l'y rencontrer en raison des restrictions de déplacement imposées par les autorités israéliennes. Ces mesures ayant tout particulièrement visé les Gazaouites, toutes les personnes et organisations basées à Gaza ont été consultées par visioconférence.

4. Dans le présent rapport, le Rapporteur spécial met l'accent, comme le prévoit son mandat¹, sur les obligations qu'imposent à Israël le droit international des droits de l'homme et le droit international humanitaire. Il souligne également que ces obligations ne se limitent nullement à Israël, exhorte tous les acteurs à assurer le respect du droit international des droits de l'homme et du droit international humanitaire, conformément à leurs obligations, et réaffirme que les violations de ces droits par quiconque sont déplorables et ne peuvent que compromettre les perspectives de paix.

5. Le Rapporteur spécial tient à remercier le Gouvernement de l'État de Palestine de la coopération sans réserve qu'il lui a apportée dans l'exécution de son mandat. Il souhaite également adresser ses remerciements à toutes les personnes qui se sont rendues à Amman pour le voir ainsi qu'à toutes celles qui n'ont pas pu faire le déplacement mais qui lui ont fait parvenir des observations oralement ou par écrit. Il remercie une nouvelle fois la Jordanie de son appui et de l'offre de tenir des réunions à Amman.

¹ Comme énoncé dans la résolution 1993/2 de la Commission des droits de l'homme.

6. Le Rapporteur spécial redit son appui aux organisations palestiniennes, israéliennes et internationales de défense des droits de l'homme ainsi que son admiration pour le travail vital qu'elles accomplissent. Ces activités qui sont indispensables à l'exécution de son mandat profitent également à la communauté internationale tout entière. Il importe de reconnaître l'action qu'elles mènent pour faciliter l'accès à des informations exactes et complètes sur la situation dans le Territoire palestinien occupé. Comme le Rapporteur l'a souligné dans le rapport qu'il a présenté au Conseil des droits de l'homme en mars 2017 (A/HRC/34/70), ces organisations rencontrent souvent des obstacles considérables dans l'exercice de leurs activités. Il note que, depuis son dernier rapport, les difficultés qu'elles connaissent ont augmenté et se sont exacerbées. Il demande à la communauté internationale de veiller à ce que les droits des personnes entreprenant ce dur exercice, parfois périlleux, soient respectés et protégés et que toute tentative visant à discrédibiliser ou à discréditer de quelque manière le travail de ces organisations soit condamnée.

II. Situation actuelle des droits de l'homme

7. Depuis le précédent rapport présenté par le Rapporteur spécial à l'Assemblée générale (A/72/556), la situation des droits de l'homme dans le Territoire palestinien occupé n'a cessé de se dégrader, en particulier à Gaza. Dans la déclaration qu'il a publiée à l'issue de sa mission dans la région en juin 2018, le Rapporteur a noté, à l'occasion de cette troisième visite, que jamais la situation des droits de l'homme dans le Territoire ne lui avait été décrite de manière aussi sombre². Parmi les principales difficultés répertoriées dans le cadre de cette mission figuraient la poursuite de l'extension et du développement des implantations, la proposition de loi visant à officialiser l'annexion de certaines parties de la Cisjordanie, le risque de transfert forcé de populations bédouines vulnérables, la persistance d'un climat d'oppression un peu partout en Cisjordanie, y compris à Jérusalem-Est, au moyen de points de contrôle, de bouclages, de révocations de permis de résidence et de restrictions à la liberté de circulation, la dégradation constante des conditions de vie à Gaza dans pratiquement tous les domaines ainsi que l'emploi d'une force manifestement excessive contre des manifestants gazaouites, qui s'est soldé par un grand nombre de morts et de blessés.

8. Dans le présent rapport, le Rapporteur spécial ne dresse pas la liste exhaustive de l'ensemble des préoccupations, faute de place, mais insiste sur certaines des questions qui étaient les plus pressantes, au moment de l'établissement du présent rapport. Cet état des lieux sera suivi d'une analyse approfondie de la question de l'annexion, pour examiner à la fois le cadre juridique applicable et la situation actuelle dans le Territoire palestinien occupé.

Gaza

9. La situation humanitaire et des droits de l'homme à Gaza continue de se dégrader progressivement. La crise de l'électricité, qui s'était aggravée l'an dernier, a perduré sans changement notable et a fortement restreint l'accès de la population

² Haut-Commissariat des Nations Unies aux droits de l'homme (HCDH), « Occupied Palestinian Territory: bleakest picture yet, says UN expert after regional visit », 29 juin 2018. D. Disponible à l'adresse suivante : www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23298&LangID=E.

palestinienne à des soins médicaux, à l'éducation et à des moyens de subsistance. Depuis le début de 2018, la population gazaouite n'a eu accès qu'à six heures d'électricité par jour au plus. La majeure partie du temps, le courant n'était disponible que quatre ou cinq heures par jour³. Ces derniers mois, l'ONU a demandé à maintes reprises que du carburant soit fourni à Gaza pour parer aux urgences et éviter l'effondrement complet et catastrophique des services essentiels, en particulier après l'imposition par Israël de restrictions à l'entrée de carburant sur le territoire⁴. La Banque mondiale a signalé que l'économie était en « chute libre » à Gaza, avec une croissance négative de 6 % au premier trimestre de 2018, estimant que le blocus était au cœur du problème mais que d'autres facteurs avaient également concouru à cette situation, notamment la réduction importante du budget de l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient (UNRWA) et la décision prise par l'Autorité palestinienne de réduire les salaires à Gaza⁵.

Manifestations et emploi de la force

10. Lors des manifestations qui ont débuté le 31 mars 2018 le long de la clôture d'enceinte de Gaza, les Palestiniens ont revendiqué le droit de retour dans leur foyer et réclamé la fin du blocus dans le cadre d'une « Grande Marche du retour ». La majeure partie de la population y est constituée de personnes qui ont été expulsées par la force de leur foyer et de leur terre à partir de 1948. Gaza est soumise depuis 11 ans à un blocus terrestre, maritime et aérien complet, et nombreux sont les habitants qui n'ont jamais eu la possibilité de sortir du territoire. L'accès à des moyens de subsistance ainsi qu'à des services essentiels en matière de santé et d'éducation est fortement restreint. La réduction sans précédent des contributions au budget de l'UNRWA, qui fournit des services recouvrant aussi bien les soins médicaux que la protection et l'éducation, aura des conséquences dévastatrices pour la population gazaouite⁶. Face à ces difficultés, les habitants se réunissent devant la barrière séparant Gaza d'Israël, chaque vendredi depuis le 30 mars, en nombre variable, pour dénoncer ces conditions.

11. Au moment de l'établissement du présent rapport, plus de 200 personnes avaient été tuées par les forces de sécurité israéliennes à Gaza, dont 150 dans le cadre des manifestations. Parmi les victimes figuraient 38 enfants. Le 14 mai, 42 personnes au

³ Organisation des Nations Unies, Bureau de la coordination des affaires humanitaires, base de données de l'approvisionnement en électricité dans la bande de Gaza. Disponible à l'adresse suivante : www.ochaopt.org/page/gaza-strip-electricity-supply.

⁴ Voir, par exemple, Organisation des Nations Unies, Bureau de la coordination des affaires humanitaires, « Funding for emergency fuel needed immediately to avoid catastrophic breakdown in essential services », 5 septembre 2018. Disponible à l'adresse suivante : www.ochaopt.org/content/funding-emergency-fuel-needed-immediately-avoid-catastrophic-breakdown-essential-services ; « Entry of emergency fuel urgently needed to avoid closure of hospitals and overflow of sewage in Gaza streets », 8 août 2018. Disponible à l'adresse suivante : www.ochaopt.org/content/entry-emergency-fuel-urgently-needed-avoid-closure-hospitals-and-overflow-sewage-gaza.

⁵ Banque mondiale, « Cash-strapped Gaza and an economy in collapse put Palestinian basic needs at risk », communiqué de presse du 25 septembre 2018. Disponible à l'adresse suivante : www.worldbank.org/en/news/press-release/2018/09/25/cash-strapped-gaza-and-an-economy-in-collapse-put-palestinian-basic-needs-at-risk.

⁶ Stéphane Dujarric, Porte-parole du Secrétaire général, déclaration faite au nom du Secrétaire général au sujet de l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient, 31 août 2018. Disponible à l'adresse suivante : www.un.org/sg/en/content/sg/statement/2018-08-31/statement-attributable-spokesman-secretary-general-unrwa.

moins, dont 6 enfants, ont trouvé la mort dans ces circonstances⁷. Outre le nombre élevé de décès, plus de 21 000 personnes ont été blessées, dont plus de 5 300 par balles réelles, soit un bilan extrêmement lourd. Les autres blessures ont notamment été provoquées par des balles en métal recouvertes de caoutchouc et l'inhalation de gaz lacrymogène. Durant la même période, on déplorait 1 mort et 37 blessés du côté israélien⁸. Les manifestations se poursuivent et le nombre de victimes ne cesse de croître. À titre d'exemple, le 28 septembre 2018, sept Palestiniens, dont deux enfants, ont été tués par les forces de sécurité israéliennes⁹. On ne saurait trop insister sur les préjudices subis par les enfants qui continuent d'être tués et blessés en dépit des appels lancés par la communauté internationale en faveur du respect de ces droits¹⁰.

12. Si ces manifestations ont été largement pacifiques, des incidents se sont produits du côté palestinien, des cocktails Molotov ayant été lancés en direction de la frontière et des cerfs-volants enflammés ayant mis le feu aux récoltes en territoire israélien. Des manifestants auraient également tenté de forcer la barrière entre Gaza et Israël. Tous les actes de violence sont déplorables et doivent être condamnés. Le fait que certains manifestants se soient livrés à de tels actes ne diminue cependant en rien les graves préoccupations que suscite la réaction d'Israël face à ces manifestations¹¹. Conformément au cadre juridique applicable, le critère n'est pas le recours à la violence mais le fait de se demander si la vie des agents de l'ordre est immédiatement menacée. Comme l'a noté le Haut-Commissaire des Nations Unies aux droits de l'homme, il est difficile de concevoir que des pneus en flamme et des jets de pierres, voire des cocktails Molotov lancés en direction de forces de sécurité lourdement protégées et en position défensive, situées à une grande distance, soient perçus comme constituant une menace¹².

13. Le Gouvernement israélien a qualifié les manifestations de « campagne d'affrontement » lancée par le Hamas, auquel il a imputé la responsabilité des morts provoquées par les forces israéliennes¹³. Il a également établi un lien entre les

⁷ Jamie McGoldrick, Coordonnateur des Nations Unies pour les activités humanitaires et le développement dans le Territoire palestinien occupé, déclaration sur le nombre de victimes à Gaza, 29 septembre 2018. Disponible à l'adresse suivante : www.ochaopt.org/content/statement-humanitarian-coordinator-occupied-palestinian-territory-mr-jamie-mcgoldrick ; voir également <https://www.ochaopt.org/content/fifty-five-palestinians-killed-and-thousands-injured-gaza>.

⁸ Pour tous les chiffres mentionnés dans le présent paragraphe, voir Organisation des Nations Unies, Bureau de la coordination des affaires humanitaires, « Humanitarian snapshot: casualties in the context of demonstrations and hostilities in Gaza », 30 mars-4 octobre 2018. Disponible à l'adresse suivante : www.ochaopt.org/content/humanitarian-snapshot-casualties-context-demonstrations-and-hostilities-gaza-30-march-4.

⁹ McGoldrick, déclaration sur le bilan des morts et des blessés dans la bande de Gaza.

¹⁰ Jamie McGoldrick, Coordonnateur des Nations Unies pour les activités humanitaires et le développement dans le Territoire palestinien occupé, James Heenan, Chef du HCDH dans le Territoire palestinien occupé, et Genevieve Boutin, Représentante spéciale du Fonds des Nations Unies pour l'enfance dans l'État de Palestine, communiqué de presse conjoint, 1^{er} août 2018. Disponible à l'adresse suivante : www.ochaopt.org/content/children-s-rights-must-be-put-first.

¹¹ Sari Bashi, « Don't blame Hamas for the Gaza bloodshed », Human Rights Watch, 22 mai 2018. Disponible à l'adresse suivante : www.hrw.org/news/2018/05/22/dont-blame-hamas-gaza-bloodshed.

¹² HCDH, « Gaza deaths: Israel must address excessive use of force, Zeid says », 27 avril 2018. Disponible à l'adresse suivante : <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22995&LangID=E>.

¹³ Israël, Ministère des affaires étrangères, « Hamas launches confrontation campaign on Israel's border », 6 avril 2018. Disponible à l'adresse suivante : <http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Hamas-launches-confrontation-campaign-on-Israel's-border.aspx> ; Noa Landau, « Netanyahu on Gaza protesters: Israel tried non-lethal methods, but Hamas wants them to die »,

événements en cours à Gaza et la précédente escalade de violence en Cisjordanie, qui avait débuté en octobre 2015 et s'était prolongée plusieurs mois, qualifiant la période écoulée depuis 2015 de « vague de terreur »¹⁴. Le Rapporteur spécial note que nombre des préoccupations qu'il avait exprimées dans le rapport présenté à l'Assemblée générale en 2016 (A/71/554), dans lequel il avait également examiné la recrudescence des violences en Cisjordanie, sont plus que jamais d'actualité, notamment en ce qui concerne l'emploi apparemment excessif de la force par des agents israéliens. Comme le Rapporteur l'a signalé dans le rapport susmentionné, plus de 230 Palestiniens ont été tués en Cisjordanie, y compris à Jérusalem-Est, durant une période d'un an environ, dans le cadre des manifestations ou à la suite d'agressions avérées ou présumées par des Palestiniens contre des Israéliens (voir A/71/554, par. 9 à 14). Le nombre de morts enregistré à Gaza, ces derniers mois, est tout aussi important, et celui des blessés très élevé. La pratique consistant à réprimer les manifestations en faisant usage d'une force létale est totalement contraire au droit international des droits de l'homme et aux droits à la liberté d'expression, de réunion et d'association, valeurs reconnues internationalement.

14. Selon les Principes de base sur le recours à la force et l'utilisation des armes à feu par les responsables de l'application des lois, les armes et la force létales ne doivent être utilisées qu'en dernier recours, et uniquement en cas de menace imminente de mort ou de blessure grave. Ces Principes sont utiles dans le cas qui nous occupe, puisque les forces israéliennes postées le long de la clôture entre Israël et Gaza agissent en qualité d'agents de maintien de l'ordre. Les manifestants palestiniens font face à des forces de sécurité israéliennes bien équipées et lourdement armées, qui tiennent des positions défensives souvent situées à des centaines de mètres. D'après les nombreux éléments de preuve réunis par plusieurs organisations de défense des droits de l'homme et examinés par le Rapporteur spécial, les personnes ayant jeté des pierres ou des cocktails Molotov ou s'étant approchées des forces israéliennes ne semblaient pas, dans la plupart des cas, représenter une menace crédible pour la vie de ces agents lourdement armés, ou leur faire courir un risque de blessure grave pouvant justifier le recours à la force létale aux termes des dispositions applicables du droit international des droits de l'homme¹⁵. En effet, la plupart des victimes étaient apparemment désarmées et auraient été tuées par des balles réelles dans le dos, à la tête ou au thorax.

15. Dans ce contexte, un message plus inquiétant encore (supprimé par la suite), posté sur le réseau social Twitter depuis le compte officiel du porte-parole des Forces de défense israéliennes le 31 mars, au début des manifestations, affirmait que rien n'avait été laissé au hasard ; que tout était précis et mesuré, et qu'elles savaient où

Haaretz, 7 juin 2018. Disponible à l'adresse suivante : www.haaretz.com/israel-news/netanyahu-on-gaza-protesters-hamas-wants-them-to-die-1.6156392.

¹⁴ Israël, Ministère des affaires étrangères, « Wave of terror 2015–2018 », 17 octobre 2018. Disponible à l'adresse suivante : <http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Palestinian/Pages/Wave-of-terror-October-2015.aspx>.

¹⁵ Voir, par exemple, Human Rights Watch, « Israël : Les tirs mortels à Gaza ont été illégaux et planifiés », 3 avril 2018. Disponible à l'adresse suivante : <https://www.hrw.org/fr/news/2018/04/03/israel-les-tirs-mortels-gaza-ont-ete-illegaux-et-planifies> ; B'Tselem, « If the heart be not callous, on the unlawful shooting of unarmed demonstrators in Gaza », note d'information, avril 2018. Disponible à l'adresse suivante : www.btselem.org/publications/summaries/201804_if_the_heart_be_not_callous ; Al Mezan Center for Human Rights, « Child killed and 112 protestors injured on the 16th Friday of demonstrations », communiqué de presse, 15 juillet 2018. Disponible à l'adresse suivante : www.mezan.org/en/post/23073/Child+Killed+and+112+Protesters+Injured+on+the+16th+Friday+of+Demonstrations.

chaque balle avait atterri¹⁶. Il convient de noter que, dans une situation d'occupation comme à Gaza, les meurtres résultant de l'emploi illicite de la force pourraient être considérés comme des homicides intentionnels constituant une violation grave de l'article 147 de la Convention de Genève relative à la protection des personnes civiles en temps de guerre (quatrième Convention de Genève). À l'article 8 du Statut de Rome de la Cour pénale internationale, les infractions graves aux Conventions de Genève sont assimilées à des crimes de guerre¹⁷.

Restrictions d'accès et de circulation dans le cadre des manifestations

16. Outre l'emploi de la force, Israël a réagi aux manifestations en imposant des restrictions d'accès et de circulation qui ont eu des conséquences extrêmement préjudiciables pour la population gazaouite. Comme je l'ai souligné dans mon rapport au Conseil des droits de l'homme en mars 2018 (voir [A/HRC/37/75](#), par. 36 à 60), les habitants se heurtent à de graves difficultés pour ce qui est d'exercer leur droit à la santé, en raison du délabrement des infrastructures résultant de 11 années de blocus et du bouclage imposés par Israël, ainsi que du refus des autorités de délivrer des visas de sortie permettant aux malades de se faire soigner hors de Gaza, ou des retards constatés dans la délivrance de ces documents. Ces difficultés persistent et ont été encore exacerbées par les besoins de plus en plus pressants en la matière, compte tenu du grand nombre de blessés durant les manifestations. En juin 2018, le Bureau de la coordination des affaires humanitaires et l'Organisation mondiale de la Santé ont appelé l'attention sur la situation désespérée dans laquelle se trouvait le secteur de la santé de Gaza, citant la pénurie d'électricité et de médicaments essentiels ainsi que la réduction des salaires des fonctionnaires parmi les problèmes qui avaient le plus affaibli le secteur durant les années et les mois précédents¹⁸. Outre le nombre élevé de blessés, il a également été signalé que la complexité du traitement des blessures par balle aurait des effets majeurs sur la récupération de nombreux patients à plus long terme¹⁹.

17. Compte tenu du grand nombre de blessés et de la complexité des besoins, beaucoup de victimes ont nécessité des soins médicaux qui n'étaient pas disponibles à Gaza. Toutefois, les difficultés liées à l'obtention de permis ou à leur délivrance en temps et en heure se sont révélées très préoccupantes. En cas de blessure par balle, un traitement rapide s'impose souvent pour éviter l'amputation. Dans un cas, deux jeunes âgés de 17 et 20 ans se sont vu refuser des visas de sortie et ont dû subir une amputation de la jambe. Les autorités israéliennes ont indiqué que les visas leur

¹⁶ Hazem Balousha et Oliver Holmes, « The Gaza Strip mourns its dead after protest is met with bullets », *The Guardian*, 31 mars 2018. Disponible à l'adresse suivante : www.theguardian.com/world/2018/mar/31/weary-angry-gazans-bury-dead-after-deadly-border-conflict.

¹⁷ Voir également Fatou Bensouda, Procureure de la Cour pénale internationale, déclaration relative à la dégradation de la situation à Gaza, en date du 8 avril 2018, dans laquelle celle-ci a noté que « les violences perpétrées contre des civils dans une situation comme celle qui [régnait] à Gaza pourraient constituer des crimes visés au Statut de Rome de la Cour pénale internationale [...] à l'instar de l'utilisation de civils pour protéger des activités militaires ». Disponible à l'adresse suivante : www.icc-cpi.int/Pages/item.aspx?name=180408-otp-stat&ln=fr.

¹⁸ Organisation des Nations Unies, Bureau de la coordination des affaires humanitaires, « Gaza's health sector struggles to cope with massive influx of casualties amid pervasive shortages », *Humanitarian Bulletin: Occupied Palestinian Territory*, mai 2018. Disponible à l'adresse suivante : www.ochaopt.org/content/gaza-s-health-sector-struggles-cope-massive-influx-casualties-amid-pervasive-shortages.

¹⁹ Médecins sans frontières, « Gaza: a long ordeal awaits hundreds of wounded from the march of return », 8 août 2018. Disponible à l'adresse suivante : www.msf.org/gaza-long-ordeal-awaits-hundreds-wounded-march-return.

avaient été refusés du fait de leur participation aux manifestations²⁰. Le 8 avril, deux organisations de défense des droits de l'homme, Adalah et Al Mezan, ont déposé une requête au nom de ces patients devant la Haute Cour de justice d'Israël. Tous deux ont été amputés tandis qu'ils attendaient la décision de la Cour. Le 16 avril, celle-ci a jugé que l'un d'eux (Youssef Kronz) devait être autorisé à sortir de Gaza pour subir une nouvelle intervention chirurgicale, son autre jambe risquant également d'être amputée²¹. Le déni d'accès à des traitements médicaux est injustifiable et contrevient aux obligations d'Israël découlant du droit international des droits de l'homme et à ses obligations en tant que Puissance occupante au regard du droit international humanitaire.

18. Outre les restrictions imposées à la circulation des personnes, Israël a également limité, ces derniers mois, l'entrée de biens essentiels à Gaza. Les autorités israéliennes ont clairement indiqué que ces mesures avaient été prises à la suite de l'utilisation de cerfs-volants enflammés au-dessus du territoire israélien, lesquels avaient considérablement endommagé les cultures²². Ces restrictions ont entraîné de graves pénuries, notamment de carburant destiné à parer aux urgences. Comme susmentionné, l'ONU a signalé à plusieurs reprises que les services essentiels risquaient de s'effondrer totalement si l'entrée de carburant n'était pas autorisée à Gaza. Le fait que l'ensemble de la population gazaouite puisse voir ses conditions de vie se dégrader encore davantage en raison d'actes commis par une minorité porte à croire qu'il pourrait s'agir là d'une peine collective interdite aux termes de l'article 33 de la quatrième Convention de Genève.

Établissement des responsabilités

19. Dès le début des manifestations, le Secrétaire général a demandé que les faits susmentionnés fassent l'objet d'enquêtes indépendantes et transparentes²³. Cet appel a été repris à maintes occasions par le Haut-Commissariat des Nations Unies aux droits de l'homme et plusieurs titulaires de mandats relevant des procédures spéciales du Conseil des droits de l'homme, y compris le Rapporteur spécial²⁴. Sachant que l'application du principe de responsabilité est indispensable à toute initiative visant à

²⁰ Jack Khoury, « Israel denied passage for medical treatment to two Palestinians who protested in Gaza – and their legs were amputated », *Haaretz*, 12 avril 2018. Disponible à l'adresse suivante : www.haaretz.com/israel-news/two-gazan-protesters-legs-amputated-after-israel-denies-entry-1.5993161.

²¹ Al Mezan Center for Human Rights, « Israel Supreme Court rules on Adalah-Al Mezan petition: Israel must let Palestinian youth wounded by Israeli gunfire at protests leave Gaza for urgent care », communiqué de presse, 16 avril 2018. Disponible à l'adresse suivante : www.mezan.org/en/post/22707.

²² BBC, « Israel closes main Gaza goods crossing in response to arson attacks », 10 juillet 2018. Disponible à l'adresse suivante : www.bbc.com/news/world-middle-east-44777297.

²³ Farhan Haq, Porte-parole adjoint du Secrétaire général, déclaration faite au nom du Secrétaire général concernant la situation à Gaza, 30 mars 2018. Disponible à l'adresse suivante : www.un.org/sg/en/content/sg/statement/2018-03-30/statement-attributable-spokesman-secretary-general-situation-gaza.

²⁴ HCDH, « UN human rights experts condemn killings of Palestinians near Gaza fence by Israeli security forces », 17 avril 2018, « UN rights experts condemn Israel's response to Palestinian protests in Gaza », 6 avril 2018, « Press briefing note on Gaza and Guatemala », 17 avril 2018, « Gaza deaths: Israel must address excessive use of force, Zeid says », 27 avril 2018. Disponibles aux adresses suivantes, respectivement : www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22950, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22924, www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22925&LangID=E et www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22995&LangID=E.

instaurer la paix et à prévenir de nouvelles violations du droit international, le Rapporteur spécial se félicite de la décision prise par le Conseil des droits de l'homme, dans sa résolution S-28/1, de créer une commission d'enquête indépendante, comme un moyen important de lutter contre l'impunité et de permettre aux victimes d'accéder à des voies de recours plus efficaces.

20. Dans la résolution susmentionnée, le Conseil a décidé de dépêcher cette commission, notant « le refus systématique d'Israël de mener, comme l'exige le droit international, de véritables enquêtes impartiales, indépendantes, rapides et efficaces sur les violences et les exactions perpétrées contre des Palestiniens par les forces d'occupation, et de soumettre à un examen judiciaire ses opérations dans le Territoire palestinien occupé, y compris Jérusalem-Est ».

21. En avril 2018, le Ministre de la défense israélien, Avigdor Lieberman, a déclaré qu'aucune enquête ne serait ouverte sur les meurtres commis le long de la frontière avec Gaza²⁵. En août, le Général de brigade Sharon Afek a décidé d'ouvrir une enquête sur le décès de deux jeunes Palestiniens : un garçon de 15 ans, dont les images vidéo montrent qu'il a reçu une balle dans le dos à proximité de la clôture en mars, et un autre de 18 ans, qui a été tué pendant les manifestations près de la clôture en juillet.

22. En avril, des organisations de défense des droits de l'homme israéliennes et palestiniennes ont déposé deux requêtes devant la Haute Cour de justice d'Israël pour lui demander de se prononcer sur la légalité des règles d'ouverture du feu appliquées par les Forces de défense israéliennes²⁶. En mai, la Cour a rendu une décision s'appuyant largement sur l'analyse des faits communiquée par l'État et renvoyé les questions juridiques devant le mécanisme d'enquête interne des Forces de défense sans avoir examiné les règles d'engagement et de comportement de ces dernières²⁷. Cette décision a suscité de graves préoccupations, notamment parmi les juristes, quant au laxisme du contrôle exercé par l'appareil judiciaire sur la conduite de l'armée israélienne, la Cour semblant accepter les arguments avancés par l'État pour justifier l'utilisation potentielle de la force létale contre des manifestants ne représentant aucune menace pour la vie ou l'intégrité physique des membres des Forces de défense²⁸. Cela provoque de nouvelles inquiétudes quant à la possibilité d'obtenir que les responsabilités soient établies dans le système de justice militaire.

²⁵ Loveday Morris et Hazem Balousha, « No inquiry into Gaza border deaths, says Israeli defense minister », *Washington Post*, 1^{er} avril 2018. Disponible à l'adresse suivante :

www.washingtonpost.com/world/middle_east/no-inquiry-into-gaza-border-deaths-says-israeli-defense-minister/2018/04/01/f2562ca2-352d-11e8-b6bd-0084a1666987_story.html?utm_term=.cdab7561d170.

²⁶ Adalah, « Adalah and Al Mezan petition supreme court: order Israeli army to stop using snipers, live ammunition against Gaza protests », 24 avril 2018. Disponible à l'adresse suivante :

www.adalah.org/en/content/view/9488 ; Gisha, « HCJ petition: revoke open-fire regulation permitting live fire on demonstrators not endangering human life », 15 avril 2018. Disponible à l'adresse suivante : <http://gisha.org/updates/8804> ; Yesh Din, « HCJ petition: revoke rules of engagement permitting live fire at non-dangerous demonstrators near Gaza fence », 15 avril 2018. Disponible à l'adresse suivante : www.yesh-din.org/en/hcj-petition-revoke-rules-engagement-permitting-live-fire-non-dangerous-demonstrators-near-gaza-fence/.

²⁷ Yesh Din, « HCJ petition: revoke rules of engagement permitting live fire at non-dangerous demonstrators near Gaza fence ».

²⁸ Voir, par exemple, Eliav Lieblisch, « Collectivizing threat: an analysis of Israel's legal claim for resort to force on the Gaza border », *Just Security*, 16 mai 2018. Disponible à l'adresse suivante : www.justsecurity.org/56346/collectivizing-threat-analysis-israels-legal-claims-resort-force-gaza-border/ ; Elena Chachko et Yuval Shany, « The Supreme Court of Israel dismisses a petition

23. L'existence d'un système dans lequel les affaires peuvent être soumises à l'examen de l'avocat général de l'armée est nécessaire mais insuffisante pour faire appliquer le principe de responsabilité. Encore faut-il établir que ce système fonctionne de façon indépendante, impartiale, transparente et dans le respect des normes internationales. Le Rapporteur spécial partage le sentiment du Haut-Commissaire, selon lequel les manquements de l'Avocat général de l'armée à ses obligations en la matière compromettent les efforts actuels ou futurs visant à établir les responsabilités en ce qui concerne ces faits en « donnant la fausse impression que ces affaires ont effectivement été traitées par le système de justice militaire » (voir [A/HCR/37/41](#), par. 14).

III. Annexion

24. L'annexion de territoire est strictement interdite dans le droit international moderne. Cette interdiction a en effet acquis le statut de norme de *jus cogens* en droit international ; la communauté internationale l'accepte donc comme principe de droit fondamental n'admettant aucune exception ni dérogation²⁹. On considère aujourd'hui les conquêtes et annexions de territoire comme des fléaux intolérables de périodes plus sombres de notre histoire, puisqu'elles provoquent inmanquablement des guerres dévastatrices, une instabilité politique, la ruine économique, des discriminations systématiques et des souffrances humaines à grande échelle³⁰. Bien que des annexions de territoire subsistent dans le monde actuel, elles sont nettement plus rares depuis la création de l'ONU, la communauté internationale ayant dans de nombreux cas refusé d'admettre toute revendication en la matière.

25. Toutefois, l'annexion de territoire demeure une question brûlante dans le conflit israélo-palestinien. Par deux fois, Israël, Puissance occupante, a officiellement annexé des territoires qu'il tenait : Jérusalem-Est (en 1967 et en 1980) et le plateau du Golan syrien en 1981³¹. Son refus d'y renoncer malgré la condamnation générale de la communauté internationale a concouru à l'instabilité régionale et gravement entravé l'efficacité du droit international. Tout au long des années d'occupation, depuis la guerre de juin 1967, Israël n'a cessé de consolider son annexion de facto de la Cisjordanie en imposant sciemment aux territoires occupés des changements irréversibles, qui sont proscrits au regard du droit international humanitaire : établissement de 230 implantations peuplées de plus de 400 000 colons israéliens ; confinement physique et politique des 2,6 millions de Palestiniens de Cisjordanie ; extension des lois israéliennes à la Cisjordanie et mise en place d'un régime juridique discriminatoire ; inégalité d'accès aux ressources naturelles, aux services sociaux, à la propriété et à la terre pour les Palestiniens de la Cisjordanie occupée ; et appels explicites, de la part d'un large cercle de dirigeants politiques israéliens de haut rang, à l'annexion officielle de la Cisjordanie, en partie ou en totalité. Cette propension à l'annexion de territoire n'a fait que s'accroître ces deux dernières années. Ainsi, comme l'a récemment affirmé un avocat israélien des droits de l'homme, le

against Gaza rules of engagement », Law Fare, 26 mai 2018. Disponible à l'adresse suivante : www.lawfareblog.com/supreme-court-israel-dismisses-petition-against-gaza-rules-engagement.

²⁹ Rainer Hofmann, « Annexation », in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2013), par. 21 et 38.

³⁰ Robert Yewdall Jennings, *The Acquisition of Territory in International Law* (Manchester, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, Manchester University Press, 1963, 2017).

³¹ Annexions *de jure* condamnées par le Conseil de sécurité dans ses résolutions 478 (1980) et 497 (1981).

Gouvernement israélien abandonne progressivement le peu qu'il lui restait d'attachement à la notion d'occupation comme étant provisoire et à l'obligation de négocier avec les Palestiniens. Et de conclure : l'objectif est clair : un seul État où vivent deux peuples, dont l'un seulement possède la citoyenneté et jouit de droits civils³².

26. Ainsi, la deuxième partie du présent rapport est essentiellement axée sur les tendances relatives à l'annexion *de jure* de Jérusalem-Est et à celle, de facto, de la Cisjordanie par Israël, sur l'incompatibilité de ces actes avec les normes juridiques internationales et sur leur effet, à savoir priver le peuple palestinien de son droit à l'autodétermination.

A. L'annexion au regard du droit international moderne

27. Après 1945 et l'expérience amère de plusieurs décennies de guerres à l'échelle planétaire, alimentées par des velléités d'expansionnisme territorial, la communauté internationale a décidé de proscrire la guerre, les conquêtes et les annexions comme instruments de politique nationale. Aux alinéas 3 et 4 de son Article 2, la Charte des Nations Unies impose aux États Membres de l'ONU de régler leurs différends par des moyens pacifiques, rendant de fait toute annexion illicite³³. Adoptée à l'unanimité par l'Assemblée générale en 1970, la Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les États conformément à la Charte des Nations Unies (Déclaration sur les relations amicales) dispose que nulle acquisition territoriale obtenue par la menace ou l'emploi de la force ne sera reconnue comme légale. À au moins huit occasions depuis 1967, le Conseil de sécurité a expressément affirmé l'inadmissibilité de l'acquisition de territoire par la guerre ou par la force³⁴. Qui plus est, l'Assemblée générale et le Conseil des droits de l'homme ont, à plusieurs reprises, réaffirmé le principe de l'inadmissibilité³⁵, dont la Cour internationale de Justice a déclaré en 2004 qu'il avait acquis le statut de règle de droit international coutumier³⁶. Nombre d'éminents spécialistes du droit international s'accordent à voir dans l'interdiction des conquêtes et des annexions une des pierres angulaires du droit international contemporain³⁷. L'annexion de territoire est incompatible avec les principes fondateurs du droit de l'occupation, selon lesquels la puissance occupante, dont le mandat est par définition provisoire et non permanent ou de durée indéterminée, doit administrer le territoire occupé non pas à des fins d'expansion mais dans l'intérêt de la population qui y vit et qu'elle protège³⁸. De plus, l'annexion porte gravement atteinte au droit fondamental

³² Michael Sfard, « Israel and annexation by lawfare », *The New York Review of Books*, 10 avril 2018. Disponible à l'adresse suivante : www.nybooks.com/daily/2018/04/10/israel-and-annexation-by-lawfare/.

³³ Hofmann, « Annexion », par. 14.

³⁴ Le cas le plus récent est l'adoption de la résolution 2334 (2016) par le Conseil de sécurité.

³⁵ Le plus récemment, dans la résolution 72/14 de l'Assemblée générale et la résolution 37/36 du Conseil des droits de l'homme.

³⁶ *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif, C.I.J. Recueil 2004*, par. 87.

³⁷ Par exemple, Malcolm N. Shaw, *International Law*, 8^e éd. (Cambridge, Royaume-Uni, Cambridge University Press, 2017), p. 372. « No territorial acquisition resulting from the threat or use of force shall be recognized as legal » ; Jennings, *The Acquisition of Territory in International Law*, p. 56 : « Conquest as a title to territorial sovereignty has ceased to be a part of the law. ».

³⁸ Orna Ben-Naftali, Michael Sfard et Hedi Viterbo, *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge, Cambridge University Press, 2018), p. 399. Ce cadre normatif limite les pouvoirs de la puissance occupante dans l'espace et le

à l'autodétermination, dont le respect relève d'une obligation qui s'applique à tous au regard du droit international³⁹.

B. Efficacité de l'interdiction

28. Des spécialistes ont récemment affirmé que l'interdiction, sur les plans juridique et diplomatique, des conquêtes et annexions de territoire avait permis d'en réduire sensiblement la fréquence depuis 1945. De 1816 à 1928, date de la signature du Traité général de renonciation à la guerre comme instrument de politique nationale (Pacte Briand-Kellogg), en moyenne 1,21 conquête territoriale a été consignée par an, s'accompagnant de l'annexion de 295 486 kilomètres carrés. De 1928 à 1948, durant la période ayant suivi la conclusion du Pacte, un léger fléchissement de la tendance aux conquêtes et aux annexions a été observé, la moyenne annuelle s'élevant alors à 1,15 conquête par an pour 240 739 kilomètres carrés de territoire. Cependant, grâce à la création de l'ONU et au renforcement des interdictions imposées par le droit international, ces chiffres ont enregistré depuis 1948 une baisse spectaculaire, avec une moyenne annuelle de seulement 0,26 conquête portant sur 14 950 kilomètres carrés de territoire. Qui plus est, beaucoup de ces conquêtes et annexions en l'époque moderne n'ont pas été reconnues par les États. Par conséquent, si elle permet encore d'obtenir une victoire militaire, la guerre aboutit rarement à une victoire juridique durable⁴⁰.

C. Qu'entend-on par annexion de facto ?

29. En droit international, on parle communément d'annexion *de jure* lorsqu'un État revendique officiellement la souveraineté permanente sur un territoire qu'il a acquis par la force aux dépens d'un autre État⁴¹. Par annexion de fait, on décrit généralement les mesures prises par un État pour s'attacher, souvent indirectement et par des mesures progressives, à renforcer un cadre législatif, politique, institutionnel et démographique dont il entend se prévaloir par la suite pour revendiquer la souveraineté sur un territoire acquis par la force ou la guerre, mais sans déclaration officielle d'annexion.

30. Au vu du large consensus international entourant le caractère illicite des annexions, les États expansionnistes désireux d'annexer des territoires ont tout intérêt à occulter la véritable nature de leur projet⁴². En général, ils s'emploient donc assidûment à créer, sur le terrain, une situation irréversible susceptible d'étayer une revendication de souveraineté, remettant à plus tard toute déclaration officielle par crainte de la réaction diplomatique et politique de la communauté internationale. Compte tenu de ce qui précède, le Rapporteur spécial estime que l'interdiction des annexions, notamment s'agissant du territoire palestinien occupé, ne peut être logique et efficace que si le droit international garantit l'interdiction totale des annexions au

temps en lui interdisant d'agir dans l'intention d'obtenir des résultats permanents. L'occupation ne confère aucun titre de propriété sur le territoire. Sa gestion s'apparente à un régime de fiducie. Elle est temporaire.

³⁹ *Conséquences juridiques de l'édification d'un mur*, C.I.J. Recueil 2004, par. 88 et 155.

⁴⁰ Oona Hathaway et Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York : Simon et Schuster, 2017), chap. 13.

⁴¹ Hofmann, « Annexion », par. 1.

⁴² Omar M. Dajani, « Israel's creeping annexation » (2017), *American Journal of International Law*, vol. n° 111, p. 52.

regard des mesures progressives mais néanmoins concrètes que prennent certains États en violation du droit international humanitaire afin d'ouvrir la voie à une future revendication de souveraineté sur un territoire conquis, occupé ou les deux⁴³.

31. Fort de l'argumentation juridique élaborée par Omar Dajani, le Rapporteur propose d'utiliser les critères ci-après pour déterminer si un État qui se livre à une annexion de fait a franchi la limite au-delà de laquelle son action devient illicite :

a) Contrôle effectif : l'État exerce un contrôle effectif sur le territoire d'un autre État, acquis par la force⁴⁴ ;

b) Exercice de la souveraineté : l'État a pris des mesures concrètes confortant sa présence permanente et sa revendication de souveraineté sur tout ou partie du territoire occupé, ou apporté des modifications proscrites en droit international à la législation locale en y appliquant par exemple ses propres lois, transformé la composition démographique du territoire ou procédé à des transferts de population, prolongé son occupation ou attribué sa citoyenneté aux habitants du territoire⁴⁵ ;

c) Manifestations d'intention : on entend par là notamment les déclarations émanant de hauts responsables politiques ou d'institutions publiques, dans lesquelles est évoquée ou prônée l'annexion permanente du territoire occupé, en partie ou en totalité⁴⁶ ;

d) Droit international et voie indiquée par la communauté internationale : l'État a refusé l'application du droit international, y compris les lois de l'occupant, dans le territoire ou ne suit pas les orientations données par la communauté internationale concernant le statut actuel et futur du territoire⁴⁷.

32. Cet exercice vise à déterminer, au vu des caractéristiques propres à chaque conquête ou occupation particulière, si le comportement de l'État justifie que l'on parle d'annexion et d'infraction au droit à l'autodétermination et aux principes fondamentaux de l'occupation, parmi lesquels son caractère temporaire ainsi que le rapport de tutelle et la bonne foi de la puissance occupante (voir A/72/556). Si tel est le cas, l'État viole l'interdiction internationale de l'annexion de territoire, même s'il n'a pas fait de déclaration officielle à ce sujet.

33. Ayant ce fondement juridique à l'esprit, nous pouvons à présent examiner la conduite d'Israël, Puissance occupante, à l'égard de Jérusalem-Est et de la Cisjordanie.

⁴³ Ibid. p. 53. Si un acte formel d'annexion est une incontestable preuve d'intention, on ne saurait tirer aucune conclusion de l'absence d'un tel acte.

⁴⁴ Ibid. p. 52, ce critère était autrefois utilisé en droit international pour déterminer si une annexion avait eu lieu.

⁴⁵ Ibid. p. 53. A moins d'une déclaration en ce sens, on conçoit difficilement une mesure qui trahirait davantage l'intention d'un État d'annexer un territoire que l'implantation de colonies civiles sur ce dernier. Voir Ben-Naftali, Sfard et Viterbo, *The ABC of the OPT*.

⁴⁶ Dajani, « Israel's creeping annexation », p. 52, ce critère était autrefois utilisé en droit international pour déterminer si une annexion avait eu lieu. Voir également Shaw, *International Law*, p. 371: « Intention to annex was a crucial aspect of the equation. ».

⁴⁷ Dajani, *ibid.*, p. 53. Il semblerait que le refus de la puissance occupante de reconnaître l'applicabilité du droit de l'occupation justifie cette conclusion [qu'elle agit en souveraine], de même que son refus de s'acquitter des obligations que lui impose ce droit en ce qui concerne notamment la distinction entre les droits d'une puissance occupante et ceux d'une puissance souveraine.

D. Annexion : le cas de Jérusalem-Est

34. Plusieurs semaines après avoir occupé militairement, entre autres territoires, Jérusalem-Est et la Cisjordanie lors de la guerre de juin 1967, Israël a officiellement commencé d'administrer, en y appliquant sa loi, Jérusalem-Est et 28 villages palestiniens alentours, en Cisjordanie, agrandissant ainsi considérablement la municipalité de Jérusalem. À l'issue de l'annexion de 1967, Israël avait absorbé non seulement Jérusalem-Est (6 400 dounoums), jusqu'alors sous administration jordanienne, mais également 65 000 dounoums en Cisjordanie, qui se sont ajoutés à Jérusalem-Ouest (38 000 dounoums). Par les résolutions 2253 (ES-V) et 2254 (ES-V) de l'Assemblée générale, la communauté internationale a immédiatement et massivement rejeté cette annexion *de jure*. Refusant de se conformer à ces résolutions, Israël a entrepris de créer, sur le terrain, une situation démographique, structurelle et institutionnelle irréversible en vue d'étayer sa revendication de souveraineté.

35. Par la suite, en juillet 1980, la Knesset israélienne a promulgué la Loi fondamentale, quasi-constitutionnelle, faisant de Jérusalem « entière et unifiée » la capitale d'Israël. Là encore, la communauté internationale a, par l'entremise cette fois du Conseil de sécurité, condamné cette annexion dans les termes les plus énergiques et déclaré que cette loi constituait une violation du droit international et une menace contre la paix et la sécurité. Dans sa résolution 478 (1980), le Conseil de sécurité a considéré en outre que toutes les mesures et dispositions législatives et administratives prises par Israël, la Puissance occupante, qui avaient modifié ou visaient à modifier le caractère et le statut de Jérusalem étaient nulles et non avenues et devaient être rapportées.

36. Dans la résolution 2334 (2016) du Conseil de sécurité et la résolution ES-10/19 de l'Assemblée générale, l'ONU a récemment réaffirmé ces déclarations, qui établissent le caractère illicite de l'annexion officielle de Jérusalem-Est par Israël.

37. S'employant à garantir l'irréversibilité de son annexion *de jure* de Jérusalem-Est, Israël a, pendant le demi-siècle écoulé, étendu sa législation nationale et son autorité civile à la partie occupée de la ville, proclamé sa souveraineté permanente à de multiples occasions, transformé l'aspect physique et le caractère historique de Jérusalem-Est, transféré certaines de ses institutions nationales, dont le Ministère de la justice, et lancé un programme intensif d'implantation et d'extension de colonies israéliennes⁴⁸. Deux tendances en particulier, nées de la volonté d'Israël d'inscrire son annexion de Jérusalem-Est dans la durée, se dessinent clairement.

38. Premièrement, Israël a toujours eu pour politique, depuis 1967, d'installer des colons et de procéder à des manœuvres démographiques afin d'assurer la présence d'une écrasante majorité de Juifs israéliens à Jérusalem. Dès les premiers temps de l'occupation, les responsables israéliens ont officiellement pris, aux niveaux national et municipal, deux orientations pour pérenniser l'annexion de Jérusalem-Est : étendre les limites de la ville afin d'accroître sa capacité d'absorption de colonies juives israéliennes⁴⁹ ; parvenir à un « équilibre démographique » dans la ville, avec 70 % de

⁴⁸ En novembre 2000, le Premier Ministre Ehud Barak a déclaré que le maintien de la souveraineté d'Israël sur Jérusalem et le renforcement de sa majorité juive étaient ses principaux objectifs et que c'était à cette fin qu'Israël avait édifié, dans la partie est de la ville, de vastes quartiers juifs comptant 180 000 habitants, ainsi que de grandes colonies en périphérie de Jérusalem, telles que la ville de Maalé Adoumim et Giv'at Ze'ev. Voir : <http://mfa.gov.il/MFA/PressRoom/2000/Pages/Address%20by%20PM%20Barak%20on%20the%20Fifth%20Anniversary%20of%20th.aspx>.

⁴⁹ Bimkom – Planners for Planning Rights, *Trapped by Planning: Israeli Policy, Planning and Development in the Palestinian Neighbourhoods of East Jerusalem* (2014).

Juifs israéliens et 30 % de Palestiniens⁵⁰. Ils ont rajouté à ces deux orientations une troisième, dans les années 2000 : empêcher la mise en place d'institutions nationales palestiniennes à Jérusalem afin de tempérer les ardeurs nationalistes palestiniennes. Malgré tous ses efforts, Israël n'est pas entièrement parvenu à ses fins. Aucun État n'a officiellement reconnu comme légitime la revendication de souveraineté d'Israël sur Jérusalem-Est. D'un point de vue démographique, Jérusalem comptait en 2016 38 % de Palestiniens contre 28 % en 1980⁵¹. Une enquête de 2018 indique en outre que 97 % des résidents palestiniens de Jérusalem-Est sont fermement opposés à l'idée selon laquelle Israël devrait maintenir son annexion de Jérusalem-Est⁵². Et pourtant, depuis 1967, Israël a pris, pour appuyer sa revendication de souveraineté sur Jérusalem-Est, plusieurs mesures importantes détaillées ci-après.

39. Depuis 1967, 15 implantations juives israéliennes officielles, comptant en tout 210 000 colons, ont été construites à l'intérieur des frontières élargies de Jérusalem-Est et elles constituent une violation grave du droit international humanitaire⁵³. L'objectif est que le nombre de colons devienne tel qu'aucun Gouvernement israélien ne puisse sur le plan politique s'opposer à leur présence ou les déloger. Outre le mur de séparation et les implantations israéliennes situées aux alentours, non loin derrière les frontières municipales actuelles, l'établissement de ces colonies a eu pour effet d'amputer la Cisjordanie de Jérusalem-Est, où bat le cœur de la vie palestinienne, distendant ainsi considérablement tout lien d'interdépendance économique, sociale, familiale et politique entre les deux territoires⁵⁴. Récemment, la municipalité de Jérusalem a autorisé des colons israéliens à exproprier des Palestiniens des quartiers de Cheik Jarrah et de Silwan, entraînant fréquemment des frictions et des violences⁵⁵.

40. Les lois et l'autorité nationale israéliennes s'appliquent dans l'ensemble de Jérusalem-Est, tout en introduisant une discrimination systématique à l'égard des habitants palestiniens⁵⁶, comme pour ce qui a trait à l'urbanisme⁵⁷. Depuis 1967, Israël a exproprié plus de 38 % des terrains de Jérusalem-Est afin d'y construire uniquement des implantations et n'en a réservé que 15 %, soit 8,5 % de la superficie totale de la ville, à la construction de logements destinés aux Palestiniens. Il en a résulté une crise du logement et de l'urbanisme : seuls 8 % de l'ensemble des permis de construire délivrés par la municipalité de Jérusalem le sont pour des quartiers palestiniens de Jérusalem-Est, alors que la densité démographique des quartiers palestiniens est deux fois plus élevée que celle des quartiers israéliens⁵⁸. Selon l'Association for Civil Rights in Israel, les autorités chargées de l'urbanisme au niveau local et national n'ont pas présenté un seul avant-projet pour les quartiers palestiniens ces 10 dernières

⁵⁰ B'Tselem, *A Policy of Discrimination: Land Expropriation, Planning and Building in East Jerusalem* (1995).

⁵¹ Jerusalem Institute for Policy Research, *Statistical Yearbook of Jerusalem*, n° 32 (2018), tableau III/4.

⁵² Udi Shaham, « Poll: 97% of east J'lem residents oppose Israeli control over entire city », *Jerusalem Post*, 11 mai 2018. Disponible à l'adresse suivante : <https://www.jpost.com/Arab-Israeli-Conflict/Poll-97-percent-of-east-Jlem-residents-oppose-Israeli-control-over-entire-city-556147>.

⁵³ Résolution 478 (1980) du Conseil de sécurité.

⁵⁴ Voir www.btselem.org/jerusalem.

⁵⁵ Civic Coalition for Palestinian Rights in Jerusalem, *Forced Eviction in Occupied East Jerusalem* (à paraître).

⁵⁶ Voir Society of St. Yves, *Everyone Pays the Price: Case Study of Jerusalem* (2017).

⁵⁷ Bimkom, *Trapped by Planning*.

⁵⁸ Voir www.btselem.org/jerusalem. La densité mesurée correspond au nombre moyen de personnes par pièce pour chaque population.

années, ce qui a conduit à un gel des constructions⁵⁹. Conséquence inquiétante de cette discrimination en matière d'urbanisme, les autorités israéliennes ont ordonné, ces 10 dernières années, la démolition de plusieurs centaines d'habitations palestiniennes construites sans le permis requis, dont l'obtention est pratiquement impossible : 123 habitations ont ainsi été démolies en 2016, et plus de 15 000 logements abritant 100 000 Palestiniens, soit un tiers de la population palestinienne de Jérusalem-Est, sont menacés de destruction⁶⁰. Par ailleurs, beaucoup de Palestiniens de Jérusalem-Est ne peuvent pas faire enregistrer les terrains qu'ils possèdent par les autorités nationales, ce qui les met en situation d'insécurité foncière et fait baisser la valeur de leur bien⁶¹. Cette crise de l'urbanisme tient en partie à la négligence dont la municipalité de Jérusalem fait depuis longtemps preuve à l'égard des quartiers palestiniens de Jérusalem-Est, qui enregistrent des taux de pauvreté nettement plus élevés qu'à Jérusalem-Ouest, se voient allouer une part bien moindre du budget municipal, doivent se satisfaire de services sociaux et de services de santé de piètre qualité et pâtissent du délabrement de leurs infrastructures publiques⁶². Bien que Jérusalem-Est ait été annexée de force par Israël, ses habitants palestiniens demeurent exclus de la relative prospérité du reste de la ville.

41. En outre, la loi israélienne confère à presque tous les Palestiniens de Jérusalem le statut de « résidents permanents », au même titre que les ressortissants étrangers résidant en Israël. Les résidents permanents palestiniens paient des impôts et ont droit aux mêmes prestations sociales et services publics que les citoyens israéliens, mais aucun droit ne leur garantit, comme à ces derniers, la possibilité de demeurer à Jérusalem. Si les Palestiniens de Jérusalem sont des « personnes protégées » au regard du droit de l'occupation, Israël ne leur reconnaît pas ce statut. Depuis 1967, plus de 14 500 Palestiniens de Jérusalem-Est ont été déchus de leur statut de résident. Depuis 1995, les résidents palestiniens de Jérusalem-Est doivent prouver que leur « centre de vie » est dans la ville pour conserver leur statut de résident permanent. À défaut, ils risquent de le perdre et de ne plus pouvoir retourner dans leurs résidences à Jérusalem-Est. Sans statut de résident permanent, les Palestiniens vivant dans d'autres parties du Territoire palestinien occupé ne peuvent pas légalement résider à Jérusalem, ni même s'y rendre temporairement. De plus, la loi israélienne restreint drastiquement le droit au regroupement familial en empêchant de nombreux Palestiniens de Jérusalem d'étendre leur statut de résident permanent à leur conjoint et à leurs enfants, lesquels ne sont pas reconnus comme résidents de la ville⁶³.

42. L'autre tendance notable est la posture plus agressive qu'adoptent depuis plusieurs années les dirigeants politiques israéliens pour contrer la croissance démographique palestinienne à Jérusalem-Est et étayer la revendication de souveraineté d'Israël sur Jérusalem-Est. Elle a pris deux formes. Premièrement, le mur érigé dans les années 2000 autour de Jérusalem a été tracé délibérément de

⁵⁹ Association for Civil Rights in Israel, « East Jerusalem: facts and figures 2017 », 21 mai 2017. Disponible à l'adresse suivante : <https://law.acri.org.il/en/2017/05/24/east-jerusalem-facts-and-figures-2017/>.

⁶⁰ Ir Amim et Bimkom – Planners for Planning Rights, *Deliberately Planned: A Policy to Thwart Planning in the Palestinian Neighbourhoods of Jerusalem* (2017).

⁶¹ « East Jerusalem is the double-edged sword of Israel's capital », *Haaretz*, 10 avril 2018. Disponible à l'adresse suivante : www.haaretz.com/opinion/editorial/east-jerusalem-is-the-double-edged-sword-of-israel-s-capital-1.5988771.

⁶² CNUCED, *L'économie palestinienne de Jérusalem-Est : Face à l'annexion, à l'isolement et au risque de désintégration*, CNUCED/GDS/APP/2012/2 (New York et Genève, 2013).

⁶³ Civic Coalition for Palestinian Rights in Jerusalem, *Israel's Occupation: 50 Years and Counting* (2018).

manière à placer un certain nombre de quartiers palestiniens du côté cisjordanien. Deuxièmement, la Knesset a adopté plusieurs textes de loi et examine d'autres propositions législatives visant à rendre irréversible l'annexion de Jérusalem-Est.

43. Le mur, dont Israël affirme qu'il a vocation à être une barrière de sécurité mais qui, en maints endroits, avance profondément dans le territoire occupé, ne longe pas les frontières élargies de la municipalité de Jérusalem. Il a permis d'absorber une partie du territoire de la Cisjordanie situé aux alentours de Jérusalem tout en mettant unilatéralement de côté plusieurs grands quartiers palestiniens de la ville, tels que Kafr Aqab et Chouafat. Les Palestiniens de Jérusalem vivant au-delà du mur, dont le nombre oscille entre 120 000 et 140 000, vivent encore officiellement à Jérusalem, conservent leur statut de « résident permanent », continuent de verser des impôts à la municipalité et certains, travaillant à Jérusalem, doivent franchir les postes de contrôle israéliens pour entrer dans la ville⁶⁴. Toutefois, les autorités israéliennes ont largement abandonné ces quartiers. Même comparés aux quartiers palestiniens que le mur n'a pas exclus mais où les services municipaux sont négligeables, ces quartiers sont presque entièrement livrés à eux-mêmes : leurs habitants sont privés de services sociaux et d'infrastructures de base tels que la distribution de l'eau, le ramassage des déchets, la construction de routes et le traitement des eaux usées ; les écoles et les organismes d'aide sociale font cruellement défaut ; le taux de criminalité y demeure élevé ; ils souffrent d'une pénurie de logements et de la surpopulation et, faute d'un système efficace d'octroi de permis, presque tous les bâtiments y sont construits sans autorisation officielle⁶⁵. Le Ministre des affaires de Jérusalem au Gouvernement israélien, Ze'ev Elkin, a proposé en octobre 2017 que les quartiers palestiniens détachés ne fassent plus partie de la municipalité de Jérusalem et soient administrés par un nouveau conseil⁶⁶. Force est de conclure que le tracé du mur de séparation autour de Jérusalem, en incluant toutes les implantations israéliennes de Jérusalem-Est et plusieurs colonies environnantes de Cisjordanie, tout en excluant environ un tiers des Palestiniens de Jérusalem, obéit à des considérations d'ordre démographique, afin de maximiser la population israélienne à Jérusalem et d'y réduire sensiblement la présence palestinienne⁶⁷.

44. Plusieurs initiatives législatives ont récemment vu le jour à la Knesset pour consolider la souveraineté israélienne sur Jérusalem-Est et rétablir l'« équilibre démographique » de la ville⁶⁸. Deux d'entre elles qui se distinguent en particulier sont décrites ci-après.

45. **Loi fondamentale faisant de Jérusalem la capitale d'Israël.** En janvier 2018, la Knesset a modifié cette loi de sorte que toute proposition émise dans le cadre de négociations sur le statut final de la ville en vue de transférer « à une entité étrangère » l'autorité sur le territoire de Jérusalem ne puisse être autorisée que si elle est approuvée par une majorité qualifiée de 80 de ses 120 députés (la Loi fondamentale

⁶⁴ Association for Civil Rights in Israel, « East Jerusalem: facts and figures 2017 ».

⁶⁵ Rachel Kushner, « 'We are orphans here': life and death in East Jerusalem's Palestinian refugee camp », *New York Times*, 1^{er} décembre 2016. Disponible à l'adresse suivante : www.nytimes.com/2016/12/01/magazine/we-are-orphans-here.html.

⁶⁶ Nir Hasson et Jonathan Lis, « Israeli Minister to push plan aimed at reducing number of Arabs in Jerusalem », *Haaretz*, 29 octobre 2017. Disponible à l'adresse suivante : www.haaretz.com/israel-news/premium-israeli-minister-proposes-plan-to-reduce-number-of-arabs-in-jerusalem-1.5461071.

⁶⁷ Al-Haq, « A legal analysis of bills and legislation to revoke the permanent residencies of Palestinians and alter the status of Jerusalem », avis juridique, 7 mars 2018. Disponible à l'adresse suivante : www.alhaq.org/en/wp-content/uploads/2018/03/LegalBriefJerusalem.pdf.

⁶⁸ Ir Amim, « Destructive unilateral measures to redraw the borders of Jerusalem » (janvier 2018).

disposait jusqu'alors qu'une majorité simple suffisait). Outre qu'il compliquerait l'obtention de l'appui de la Knesset à un éventuel accord de paix reconnaissant la souveraineté palestinienne sur Jérusalem-Est, ce changement permet de redessiner en toute légalité les frontières administratives de Jérusalem de façon à en exclure les quartiers palestiniens détachés, situés du côté cisjordanien du mur.

46. **Le projet de loi sur le « Grand Jérusalem ».** Tout au long de 2017, la Knesset a examiné une proposition de loi visant à rattacher à Jérusalem cinq colonies israéliennes de Cisjordanie (Beitar Elit, Maalé Adoumim, Giv'at Ze'ev, Gush Etzion et Efrat), qui deviendraient alors des sous-municipalités de la ville tout en conservant leur autonomie locale. L'annexion « souple » prévue dans ce projet de loi aurait accru de 120 000 colons israéliens la population de Jérusalem, renforçant ainsi la majorité juive de la ville. Ce projet de loi avait le soutien du député Yoav Kish (Likoud), lequel estimait qu'il « affaiblirait l'emprise arabe sur la capitale » et « consacrerait la majorité juive »⁶⁹. Son examen a été repoussé par le Premier Ministre israélien, au motif qu'il fallait « coordonner » avec les États-Unis d'Amérique le programme législatif sur ce texte⁷⁰.

47. Au moment de l'établissement du présent rapport, le village bédouin palestinien de Khan el-Ahmar, situé en Cisjordanie, à l'est de Jérusalem, risque d'être démoli par les autorités israéliennes. D'après le Rapporteur spécial et d'autres, l'expulsion des habitants de Khan el-Ahmar qui s'ensuivrait se solderait inmanquablement par un transfert forcé, qui constitue un crime de guerre en droit international⁷¹. La destruction de ce village viserait notamment à déloger les habitants palestiniens de la zone de 12 kilomètres carrés connue sous le nom de « couloir E1 », ce qui permettrait d'assurer la continuité territoriale entre Jérusalem et la grande colonie de Maalé Adoumim, en Cisjordanie. La concrétisation de projets d'aménagement de longue date consistant à construire dans cette zone davantage de colonies israéliennes permettrait à Israël d'atteindre plusieurs objectifs d'annexion : a) renforcer sa souveraineté territoriale et sa domination démographique dans le Grand Jérusalem ; b) porter atteinte à la contiguïté territoriale de la Cisjordanie en achevant de séparer sa partie nord de sa partie sud, éteignant ainsi la faible lueur d'espoir que suscite encore la perspective d'une solution des deux États viable ; c) isoler plus avant les quartiers palestiniens de Jérusalem-Est de la Cisjordanie⁷².

⁶⁹ Yossi Verter, « Israeli ministers set to vote annexing West Bank settlements to Jerusalem », *Haaretz*, 26 octobre 2017. Disponible à l'adresse suivante : www.haaretz.com/israel-news/ministers-to-vote-on-annexing-west-bank-settlements-to-jerusalem-1.5460310.

⁷⁰ Jonathan Lis et Amir Tibon, « Netanyahu: Israel must coordinate Jerusalem annexation bill with U.S », *Haaretz*, 29 octobre 2017.

⁷¹ Amnesty International, « Israel/OPT: demolition of Palestinian village of Khan al-Ahmar is cruel blow and war crime », 30 septembre 2018. Disponible à l'adresse suivante : www.amnesty.ca/news/israelopt-demolition-palestinian-village-khan-al-ahmar-cruel-blow-and-war-crime ; Noa Landau, « European Parliament warns: eviction, demolition of Khan al-Ahmar would be war crime », *Haaretz*, 13 septembre 2018. Disponible à l'adresse suivante : <https://www.haaretz.com/israel-news/premium-european-parliament-warns- eviction-demolition-of-khan-al-ahmar-would-be-war-crime-1.6469916>.

⁷² Zena Agha, « Israel's annexation crusade in Jerusalem: the role of Ma'ale Adumim and the E1 corridor », *Al-Shabaka*, 26 mars 2018. Disponible à l'adresse suivante : <https://al-shabaka.org/briefs/israels-annexation-crusade-in-jerusalem-the-role-of-maale-adumim-and-the-e1-corridor/>.

E. L'annexion et la Cisjordanie

48. Israël n'a pas encore officiellement déclaré avoir annexé quelque partie que ce soit de la Cisjordanie occupée, étant donné qu'une telle proclamation ne bénéficierait actuellement d'aucun appui politique sur le plan international⁷³. Face au reste du monde, Israël se dit toujours disposé à négocier avec les Palestiniens le statut futur de la Cisjordanie, tout en niant que le territoire qu'il désigne sous le nom de « Judée-Samarie » soit occupé et en rejetant l'applicabilité de la quatrième Convention de Genève⁷⁴. En pratique, cependant, peu de temps après le début de l'occupation en juin 1967, Israël a commencé à prendre de nombreuses mesures allant dans le sens d'une revendication de souveraineté sur la Cisjordanie, qui se sont considérablement intensifiées ces dernières années.

49. Les premières implantations civiles israéliennes en Cisjordanie, qui avaient initialement l'apparence de camps militaires, ont été établies dans le courant de l'été 1967⁷⁵. Depuis, Israël a construit et incité à construire environ 230 implantations en Cisjordanie, où vivent plus de 400 000 colons. Aucun pays ne crée d'implantations civiles dans un territoire occupé sans avoir de visées annexionnistes. La communauté internationale a donc qualifié ces pratiques de crimes de guerre⁷⁶. Les activités israéliennes de peuplement ont toujours visé à établir sur le terrain une situation de souveraineté irréversible et à faire obstacle à l'autodétermination des Palestiniens. D'après le plan Drobles de 1978, dans lequel était formulée la raison d'être des activités d'implantation, qui n'en étaient alors qu'à leurs débuts, les terres domaniales et les terres non cultivées devaient être immédiatement saisies afin d'établir des implantations entre les zones dans lesquelles la population minoritaire [c'est-à-dire, les Palestiniens de Cisjordanie] était concentrée et aux alentours, afin de réduire au minimum les possibilités d'édification d'un autre État arabe dans ces régions⁷⁷.

50. Pendant un demi-siècle d'occupation, Israël n'a cessé de renforcer sa présence souveraine dans l'ensemble de la Cisjordanie⁷⁸. Les infrastructures du territoire – les égouts, les systèmes de communication et le réseau électrique – ont été complètement intégrées au système national israélien. Le système hydrologique de la Cisjordanie, doté d'abondants aquifères montagneux, est depuis 1982 la propriété de Mekorot, compagnie nationale des eaux, et profite principalement à Israël⁷⁹. Le réseau routier qui, avant 1967, reliait principalement le nord et le sud, a été transformé en système d'est en ouest pour relier les colonies entre elles ainsi qu'avec les villes israéliennes, perturbant ainsi les transports palestiniens⁸⁰. L'économie de la Cisjordanie fait l'objet d'un seul accord d'union douanière avec Israël, ce qui permet à l'économie la plus puissante des deux de dominer et de prospérer, tandis que l'autre se détériore du fait

⁷³ Noa Landau *et al.*, « White House strongly denies as "false" Netanyahu's claims of talks with U.S. on annexing West Bank settlements », *Haaretz*, 12 février 2018. Disponible à l'adresse suivante : www.haaretz.com/israel-news/.premium-netanyahu-settlement-annexation-being-discussed-with-u-s-1.5810741.

⁷⁴ Voir www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20settlements%20and%20international%20law.aspx.

⁷⁵ Idith Zertak et Akiva Eldar, *Lords of the Land: The War over Israel's Settlements in the Occupied Territories, 1967-2007* (New York, Nation Books, 2007).

⁷⁶ Statut de Rome de la Cour pénale internationale, art. 8 2) b) viii).

⁷⁷ David Kretzmer, « Settlements in the Supreme Court of Israel » (2017), *American Journal of International Law*, vol. 111 (2017), p. 42.

⁷⁸ « Regularization law », in Ben-Naftali, Sfard et Viterbo, *The ABC of OPT*.

⁷⁹ Voir www.btselem.org/water.

⁸⁰ Dajani, « Israel's creeping annexation », p. 54.

de la régression du développement et de la dépendance⁸¹. Les ressources naturelles de la Cisjordanie sont en grande partie contrôlées par Israël et principalement exploitées dans l'intérêt de ce dernier⁸². Les lois israéliennes ont été étendues par le commandement militaire israélien aux colons de Cisjordanie au cas par cas ou par zone, tandis qu'une version dénaturée du droit d'occupation, privée de bon nombre de ses protections et garanties, s'applique aux Palestiniens⁸³. En Cisjordanie, les « terres domaniales » affectées à différents usages ont été attribuées presque exclusivement à des colons israéliens (dans 99,76 % des cas), bien que ceux-ci ne représentent que 12 % de la population de la Cisjordanie⁸⁴.

51. Surtout, Israël contrôle intégralement, sur les plans civil et de la sécurité, la zone C de la Cisjordanie, qui représente plus de 60 % du territoire. Vestige du processus d'Oslo aujourd'hui caduc, la zone C est administrée par Israël qui en a fait l'assise territoriale de ses implantations de Cisjordanie. La Banque mondiale a noté que 68 % de la zone C sont affectés aux implantations israéliennes, 21 % à des zones militaires d'accès réglementé et 9 % à des réserves naturelles⁸⁵. Dans le 1 % qui reste aux Palestiniens, dont le nombre s'échelonne de 180 000 à 300 000, l'Administration civile israélienne a imposé un régime de planification très restrictif qui rend pratiquement impossible l'obtention d'un permis de construire à des fins résidentielles ou commerciales⁸⁶. Si les colons israéliens jouissent des mêmes droits et libertés économiques que les Israéliens vivant en Israël, les Palestiniens de la zone C souffrent d'une pénurie d'infrastructures collectives essentielles, d'une économie au bord de l'asphyxie, de l'omniprésence de postes de contrôle militaires, de restrictions d'accès à leurs ressources naturelles et du rejet systématique de la presque totalité des plans directeurs présentés⁸⁷, autant de facteurs qui, d'après l'ONU, s'apparentent à un climat coercitif contraignant les Palestiniens à partir⁸⁸. Depuis la modification en 2015 d'une ordonnance militaire de 2003 portant sur les constructions non autorisées, le chef du commandement central peut expulser de la zone C des communautés palestiniennes entières sans même avoir à obtenir d'ordre de démolition pour chaque structure, comme cela était auparavant nécessaire⁸⁹.

52. Auparavant qualifiée de « latente » par les organisations de la société civile, l'annexion israélienne de la Cisjordanie est décrite maintenant comme « avançant à

⁸¹ CNUCED, « Rapport sur l'assistance de la CNUCED au peuple palestinien : évolution de l'économie du Territoire palestinien occupé », TD/B/64/4, septembre 2017.

⁸² Shawan Jabarin, « Business and human rights in Palestine: a case study on the illegal exploitation of Palestinian natural resources », Al-Haq, 30 janvier 2014.

⁸³ Yehuda et al., *One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank* (Association for Civil Rights in Israel, 2014).

⁸⁴ Americans for Peace Now, « Land Allocation in the West Bank – For Israelis Only », juillet 2018.

⁸⁵ Banque mondiale, *West Bank and Gaza: Area C and the Future of the Palestinian Economy* (Washington, D.C., 2013).

⁸⁶ Voir www.btselem.org/topic/planning_and_building.

⁸⁷ Ahmad El-Atrash, « Israel's stranglehold on Area C: development as resistance », Al-Shabaka, 27 septembre 2018. Disponible à l'adresse suivante : <https://al-shabaka.org/commentaries/israels-stranglehold-on-area-c-development-as-resistance/>.

⁸⁸ Tovah Lazaroff, « UN: Israel policies forcing Palestinians to leave Area C of the West Bank », *Jerusalem Post*, 27 juillet 2016. Disponible à l'adresse suivante : www.jpost.com/Arab-Israeli-Conflict/UN-Israel-policies-forcing-Palestinians-to-leave-Area-C-of-the-West-Bank-462569.

⁸⁹ Peace Now (Settlement Watch), « Mentality of annexation: changes in the interpretation of the laws regarding occupation », janvier 2018.

grands bords »⁹⁰ et comme une « annexion-occupation »⁹¹. Les dirigeants politiques israéliens considèrent que la conjoncture internationale actuelle – et en particulier leurs relations avec le Gouvernement en place aux États-Unis – favorise leur ambition de consolider leur mainmise permanente sur la Cisjordanie, malgré l'absence de soutien en faveur d'une annexion officielle. Les mesures législatives d'annexion indirecte se sont par conséquent multipliées depuis le début de l'année 2017, ce qui semble établir le fondement de lois à venir qui institueraient une annexion pure et simple. Dans un récent éditorial, *Ha'aretz*, le plus grand quotidien progressiste israélien, a déclaré que le Gouvernement procédait à une annexion sur le plan juridique en faisant appliquer, depuis peu, de plus en plus de lois de la Knesset en Cisjordanie, tout en gommant la Ligne verte, instituant ainsi deux systèmes juridiques différents et inégaux pour les deux peuples vivant sur le territoire. Il énonçait que ce phénomène avait un nom et qu'Israël ne pourrait plus réfuter la réalité et nier devant la communauté internationale qu'il était un État d'apartheid, avec tout ce que cela impliquait⁹².

53. Ces deux dernières années, la Knesset israélienne a adopté ou examiné un certain nombre de lois qui étendent le droit israélien à la Cisjordanie ou établissent les fondements d'une future annexion sous une forme ou une autre⁹³. On trouvera ci-après certains des principaux textes ou projets de loi et autres mesures qui témoignent de cette tendance récente de la législation.

54. La loi sur la régularisation des implantations de « Judée-Samarie » permet de légaliser a posteriori des avant-postes construits sur des terres palestiniennes appartenant à des particuliers. Elle accorde des indemnités aux propriétaires palestiniens mais les prive de tout droit à la restitution de leurs biens. Adoptée par la Knesset en février 2017, son application a été retardée dans l'attente de l'issue qui sera donnée à une requête déposée devant la Haute Cour de justice israélienne par des organisations de défense des droits de l'homme qui en ont contesté la légalité. Devant la Haute Cour de justice, le Gouvernement israélien a fait valoir que la Knesset n'était pas soumise au droit international et que les lois à appliquer dans le territoire palestinien occupé émanaient d'elle. Malgré son opposition à cette loi, le Procureur général israélien a déclaré que les lois existantes permettaient déjà de légaliser les constructions israéliennes établies sur des terres palestiniennes appartenant à des particuliers en Cisjordanie (voir [A/HRC/37/43](#), par. 16 et 17).

55. La loi sur l'enseignement supérieur étend la compétence du Conseil israélien de l'enseignement supérieur, qui régit les établissements d'enseignement supérieur israéliens, aux établissements universitaires des implantations de Cisjordanie. Il accorde ainsi à ces établissements (notamment, l'Université d'Ariel, située dans la colonie d'Ariel) le même statut qu'à toutes les autres universités israéliennes. Cette loi, promulguée en février 2018, est un exemple de l'application directe du droit interne israélien au territoire occupé, ce qui est pourtant interdit en droit international et constitue un pas manifeste vers l'annexion.

⁹⁰ Americans for Peace Now, « From creeping to leaping: annexation in the Trump-Netanyahu era », avril 2018.

⁹¹ 11.11.11, « Occup'annexation: the shift from occupation to annexation in Palestine », Bruxelles, 2017.

⁹² « The Knesset wants apartheid », *Haaretz*, 1^{er} juin 2018. Disponible à l'adresse suivante : www.haaretz.com/opinion/editorial/the-knesset-wants-apartheid-1.6137367.

⁹³ Foundation for Middle East Peace, « Israel's "Creeping Annexation" Policies – Tables » (septembre 2018) donne un précieux aperçu des mesures d'annexion récentes prises par la Knesset. Voir également : <https://goo.gl/c9DK3L>.

56. La loi sur l'État-nation juif est une loi fondamentale quasi-constitutionnelle, ce qui signifie qu'elle a la primauté sur la législation ordinaire de la Knesset. Adoptée en juillet 2018, elle dispose que seul le peuple juif a droit à l'autodétermination en Israël. L'une des grandes préoccupations que suscite la nouvelle loi fondamentale, du fait de l'emploi de l'expression « terre d'Israël », tient au fait qu'elle pourrait être appliquée à Jérusalem-Est et à la Cisjordanie pour justifier la protection des implantations israéliennes et les autres tendances à l'annexion. L'article 7 de la Loi fondamentale dispose que l'État considère le développement d'implantations juives comme un principe national et s'emploiera à favoriser et promouvoir leur mise en place et leur consolidation.

57. La loi (modifiée) sur les tribunaux administratifs, adoptée en juillet 2018, a pour effet d'étendre la compétence du Tribunal administratif israélien afin que celui-ci soit investi de vastes pouvoirs lui permettant de statuer sur les requêtes de multiples et diverses natures déposées par des Palestiniens de Cisjordanie, portant notamment sur les questions de planification et de construction dans la zone C, l'interdiction faite à des individus de pénétrer dans certaines zones de la Cisjordanie et la délivrance de permis de voyage. La Haute Cour de justice israélienne n'est ainsi plus compétente pour ces questions. Il est principalement reproché à cette modification de la loi d'étendre à la zone C la compétence d'un tribunal de droit interne israélien et de constituer ainsi une autre avancée dans l'extension progressive de la législation israélienne à la Cisjordanie occupée.

58. La direction politique israélienne hésite beaucoup moins, depuis deux ans, à dire haut et fort ce que les actions du Gouvernement israélien signalent déjà depuis des années. L'annexion est dans l'air, et les intentions sont maintenant clairement exprimées par des paroles autant que par des actes. La décision, adoptée à l'unanimité le 31 décembre 2017 par les 1 000 membres du comité central du Likoud, le parti au pouvoir, d'appuyer une résolution non contraignante visant à annexer officiellement la Cisjordanie témoigne parfaitement de l'évolution de la situation. Dans cette résolution, les élus du Likoud sont appelés à permettre la libre construction et à appliquer les lois d'Israël et sa souveraineté à toutes les zones des implantations juives libérées en Judée-Samarie⁹⁴. De plus, ces derniers mois, plusieurs ministres du Gouvernement israélien ont ouvertement exprimé leur adhésion à l'annexion officielle de tout ou partie de la Cisjordanie :

- Le Premier Ministre, Benjamin Nétanyahou : Ceci est la terre de nos pères, c'est notre terre. Nous sommes ici pour y rester indéfiniment. Il n'y aura pas de déracinement de populations sur la terre d'Israël⁹⁵.
- Le Ministre de la technologie, Ofir Akunis : La terre d'Israël nous appartient dans son intégralité, et ne peut être contestée ou divisée. La notion de « blocs de colonies » n'est plus d'actualité car il n'y a pas plus d'Arabes avec qui négocier⁹⁶.

⁹⁴ Chaim Levinson, « Netanyahu's party votes to annex West Bank, increase settlements », *Haaretz*, 1^{er} janvier 2018. Disponible à l'adresse suivante : www.haaretz.com/israel-news/.premium-netanyahu-s-party-votes-to-annex-west-bank-increase-settlements-1.5630099.

⁹⁵ Breaking Israel News, « Netanyahu: Israel will stay in Judea and Samaria forever », 29 août 2017. Disponible à l'adresse suivante : www.breakingisraelnews.com/93927/netanyahu-israel-will-stay-judea-samaria-forever/.

⁹⁶ Peter Beaumont, « On a rocky ridge over Ramallah, settlers put their faith in Trump », *The Guardian*, 11 février 2017. Disponible à l'adresse suivante : www.theguardian.com/world/2017/feb/12/israel-settlers-put-their-faith-in-trump-netanyahu-visit-white-house.

- Le Ministre de l'éducation, Naftali Bennett : Aujourd'hui, la Knesset israélienne a cessé de viser la création d'un État palestinien et envisage désormais la souveraineté en Judée-Samarie ... Le projet de loi de régularisation des avant-postes n'est que la partie visible des efforts visant à établir cette souveraineté⁹⁷.
- Le Ministre des transports, Yisrael Katz : Aujourd'hui, je vais proposer au cabinet de sécurité d'adopter « la loi sur le grand Jérusalem », qui consiste notamment à étendre la souveraineté israélienne aux communautés voisines du grand Jérusalem : Maalé Adoumim, Giv'at Ze'ev, Beitar Elit et Gush Etzion, en les associant à la ville de Jérusalem et en la renforçant par l'ajout de territoire et de population juive⁹⁸.
- Le Ministre de la justice, Ayelet Shaked : Je pense que nous devrions appliquer la loi israélienne aux villes et villages [implantations] israéliens, et y normaliser la vie, et à long terme, appliquer le droit israélien dans la zone C de la Cisjordanie occupée, qui compte un demi-million d'Israéliens [des colons] et 100 000 Palestiniens ; ils seront citoyens à part entière, bien sûr, comme moi-même. Et les zones A et B feront partie d'une confédération avec Gaza, avec la Jordanie⁹⁹.
- Le Ministre de la sécurité publique, Gilad Erdan : Le moment est maintenant venu d'étendre la souveraineté à des zones dont il est établi qu'elles continueront à appartenir à Israël dans un accord sur le statut final¹⁰⁰.
- Le Ministre chargé des affaires de Jérusalem, Ze'ev Elkin : Khalas [« assez » en arabe] de l'histoire des deux États. L'État d'Israël est la seule possibilité ; assurément entre le Jourdain et la Méditerranée, il y aura un seul État¹⁰¹.
- Le Vice-Ministre de la défense, Eli Ben-Dahan : Nous devons nous concentrer sur l'essentiel. Nous sommes en Judée-Samarie, car c'est notre terre et nous sommes ici pour ne jamais en partir. La souveraineté doit s'appliquer en Judée-Samarie dès que possible¹⁰².

⁹⁷ Jewish Link of New Jersey, « Jewish Home's Bennett Says Outpost Bill Paves Way for Annexation of Judea and Samaria », 8 décembre 2016. Disponible à l'adresse suivante : www.jewishlinknj.com/world-us/16063-jewish-home-s-bennett-says-outpost-bill-paves-way-for-annexation-of-judea-and-samaria.

⁹⁸ *Times of Israel*, « Challenging Netanyahu, senior minister floats annexation of Jerusalem-area settlements », 22 janvier 2017. Disponible à l'adresse suivante : www.timesofisrael.com/challenging-netanyahu-senior-minister-floats-annexation-of-jerusalem-area-settlements/.

⁹⁹ Entretien avec Ayelet Shaked, Ministre de la justice israélien, AIPAC Policy Conference, Washington, D.C., 7 mars 2018. Disponible à l'adresse suivante : <http://hamodia.com/2018/03/07/exclusive-interview-justice-minister-ayelet-shaked/>.

¹⁰⁰ Marissa Newman, « Build in settlements to punish Palestinians, top minister urges », *Times of Israel*, 13 février 2017. Disponible à l'adresse suivante : www.timesofisrael.com/build-in-settlements-to-punish-palestinians-top-minister-urges/?link_id=12&can_id=beb87055f757f06618a29df863283e75&source=email-what-were-reading-what-to-expect-from-the-netanyahu-trump-meeting&email_referrer=what-were-reading-what-to-expect-from-the-netanyahu-trump-meeting&email_subject=what-were-reading-what-to-expect-from-the-netanyahu-trump-meeting.

¹⁰¹ Tovah Lazaroff, « Elkin: start preparing for one million settlers in the West Bank », *Jerusalem Post*, 14 novembre 2017. Disponible à l'adresse suivante : www.jpost.com/Israel-News/Elkin-Start-preparing-for-one-million-settlers-in-the-West-Bank-514251.

¹⁰² Israel National News, « The quiet war against terrorism continues », 30 mai 2002. Disponible à l'adresse suivante : www.israelnationalnews.com/News/News.aspx/24370.

- Le Ministre du logement, Yoav Galant : D'un point de vue stratégique, la vallée du Jourdain est la zone de sécurité à l'est de l'État d'Israël ; la région montagneuse est la zone d'attente, et Jérusalem-Ashdod-Hadera et Dan le lieu de vie essentiel de plus de 5 millions d'Israéliens ... nous devons continuer à contrôler entièrement Yehouda, Shomron et la vallée du Jourdain et à renforcer les implantations de ces régions¹⁰³.

59. Ces déclarations d'intention politique, ainsi que la réalité de la colonisation d'Israël sur le terrain, ses activités législatives, et son refus de se plier aux obligations solennelles qui lui incombent au regard du droit international ou de se conformer à la volonté de la communauté internationale en ce qui concerne ses 51 ans d'occupation, apportent la preuve qu'Israël a effectivement annexé une part importante de la Cisjordanie et traite ce territoire comme le sien. Bien qu'Israël n'ait pas encore officiellement déclaré sa souveraineté sur quelque partie que ce soit de la Cisjordanie, le Rapporteur spécial considère que la stricte interdiction de l'annexion en droit international ne s'applique pas seulement à une déclaration officielle, mais aussi aux actes d'appropriation territoriale d'Israël, qui concourent aux efforts de celui-ci visant à revendiquer officiellement à l'avenir la souveraineté sur le territoire palestinien occupé.

IV. Conclusion

60. La maxime *ex turpi causa non oritur actio* est l'un des principes fondamentaux du droit international moderne : la personne qui enfreint la loi ne peut tirer profit d'un acte illicite¹⁰⁴. En 1967, puis de nouveau en 1980, la communauté internationale a déclaré sans équivoque que l'annexion de Jérusalem-Est par Israël était contraire au droit international et nulle et non avenue¹⁰⁵. Elle s'est également exprimée de façon décisive sur le caractère illicite des activités de peuplement d'Israël¹⁰⁶, moteur politique et démographique par lequel il transforme en annexion son occupation. Malgré ces condamnations répétées des activités annexionnistes d'Israël, la communauté internationale n'a pris aucune mesure véritable pour amener celui-ci à rendre compte de ses actes. Bien qu'Israël n'ait pas suivi les injonctions de la communauté internationale, il a rarement eu à en payer véritablement le prix et sa volonté de pérenniser ses ambitions annexionnistes à Jérusalem-Est et en Cisjordanie ne s'est heurtée à pratiquement aucun frein. Ce n'est pas le manque de clarté du droit international, mais la réticence de la communauté internationale à faire appliquer ce qu'elle a proclamé, qui est au cœur du problème, dans ce conflit. Comme l'a déclaré un universitaire, le problème ne tient pas au droit international en tant que tel, mais au fait qu'il ne soit pas appliqué ; et au fait qu'au Moyen-Orient, le droit international est plus proche du pouvoir que de la justice¹⁰⁷. La meilleure façon de réfuter cette

¹⁰³ The Yeshiva World, « Galant: to keep Yehuda, Shomron and the Jordan Valley », 22 mars 2018. Disponible à l'adresse suivante : www.theyeshivaworld.com/news/israel-news/1495709/galant-to-keep-yehuda-shomron-and-the-jordan-valley.html?utm_source=General+Mailing+List&utm_campaign=bd366ef597-EMAIL_CAMPAIGN_2018_03_30&utm_medium=email&utm_term=0_586030c60d-bd366ef597-82754635.

¹⁰⁴ Lasa Oppenheim, *International Law: A Treatise*, 8^e éd., vol. 1, *Peace* (Londres, Longmans, Green and Company, 1955), p. 574.

¹⁰⁵ Résolution 2334 (2016) du Conseil de sécurité, résolution 72/14 de l'Assemblée générale et résolution 37/36 du Conseil des droits de l'homme.

¹⁰⁶ Résolution 2334 (2016) du Conseil de sécurité.

¹⁰⁷ V. Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891-1949* (Londres, Pluto Press, 2009), p. 4.

affirmation est de faire en sorte que la communauté internationale prenne les mesures qui s'imposent au vu des preuves accablantes qui lui ont été présentées et insiste pour qu'Israël annule complètement son annexion et renonce à toute occupation, ou se tienne sinon prêt à pleinement assumer les conséquences de son mépris du droit international.

V. Recommandations

61. **Le Rapporteur spécial recommande que le Gouvernement israélien respecte pleinement le droit international et mette complètement fin à ses 51 années d'occupation du territoire palestinien. Il recommande également que le Gouvernement israélien s'emploie immédiatement à :**

a) **Mettre fin au blocus et au bouclage de Gaza, lever toutes les restrictions sur les importations et les exportations ainsi que sur les déplacements de population, et faciliter le plein accès aux soins médicaux, conformément aux véritables préoccupations d'Israël en matière de sécurité ;**

b) **Veiller à ce que les règles régissant l'emploi de la force par les forces de sécurité israéliennes soient strictement conformes aux normes internationales, en accordant une attention particulière à l'utilisation de la force létale ;**

c) **Veiller à ce que les responsables des violations du droit international humanitaire et du droit international des droits de l'homme qui auraient été commises par les forces de sécurité israéliennes aient à rendre compte de leurs actes, en accordant une attention particulière aux manifestations de Gaza ;**

d) **Prendre des mesures pour répondre aux préoccupations exprimées quant à l'indépendance, l'impartialité et la transparence du système de justice militaire.**

62. **En ce qui concerne les préoccupations relatives à l'annexion de territoire, le Rapporteur spécial recommande qu'Israël :**

a) **Se conforme à toutes les résolutions pertinentes du Conseil de sécurité et de l'Assemblée générale relatives à Jérusalem-Est et à la Cisjordanie et renonce à toute revendication de souveraineté sur le territoire ;**

b) **Assure la liberté de circulation dans le Territoire palestinien occupé, notamment entre la bande de Gaza et la Cisjordanie, y compris Jérusalem-Est ;**

c) **Respecte pleinement la résolution 2334 (2016) du Conseil de sécurité relative aux colonies de peuplement ;**

d) **Adopte une approche fondée sur la bonne foi en ce qui concerne l'administration de la Cisjordanie, y compris Jérusalem-Est et Gaza en tant que territoire occupé, dans le respect des principes du droit international des droits de l'homme et du droit international humanitaire, en vue de mettre complètement fin à l'occupation dans un délai raisonnable et de permettre l'autodétermination palestinienne.**

63. **Le Rapporteur spécial recommande en outre que la communauté internationale :**

a) **Prenne, conformément à l'article premier commun aux Conventions de Genève, toutes les mesures nécessaires pour respecter et faire respecter par**

Israël et toutes les autres parties intéressées les obligations solennelles qui leur incombent au regard du droit international humanitaire ;

b) S'efforce d'appliquer à Israël les normes internationales qui doivent s'appliquer à tous les États, y compris l'interdiction de l'annexion ;

c) Veille à ce que les personnalités politiques et les militaires israéliens qui sont responsables de violations graves du droit international dans le territoire palestinien occupé aient à rendre pleinement compte de leurs actes ;

d) Fasse réaliser une étude des Nations Unies sur la licéité de l'annexion et de la poursuite de l'occupation du territoire palestinien par Israël.



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Promotion et protection des droits de l'homme :
situations relatives aux droits de l'homme et rapports
des rapporteurs et représentants spéciaux

Situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967*

Note du Secrétaire général

Le Secrétaire général a l'honneur de transmettre à l'Assemblée générale le rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Michael Lynk, présenté en application de la résolution 5/1 du Conseil des droits de l'homme.

* Le présent rapport a été soumis après la date limite afin que puissent y figurer les faits les plus récents.



Rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967

Résumé

Le présent rapport est le quatrième soumis à l'Assemblée générale par Michael Lynk, Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967. Il se fonde principalement sur les informations communiquées par des victimes, des témoins, des membres de la société civile, des représentants d'organismes des Nations Unies et des responsables palestiniens à Amman, lors de la mission effectuée par le Rapporteur spécial dans la région en juillet 2019. Ce dernier y analyse un certain nombre de problèmes ayant trait à la situation des droits de l'homme en Cisjordanie, y compris Jérusalem-Est, et à Gaza.

I. Introduction

1. Dans le présent rapport, le Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967 donne un bref aperçu des problèmes les plus pressants en matière de droits de la personne qu'il a recensés à l'issue de ses conversations et rencontres avec des membres de la société civile dans le Territoire palestinien occupé au moment de l'établissement du rapport. Il procède ensuite à une analyse détaillée du principe de responsabilité, du phénomène d'impunité et de la responsabilité de la communauté internationale de mettre fin à l'occupation du Territoire palestinien occupé et aux autres pratiques israéliennes constituant des violations du droit international humanitaire et du droit international des droits de l'homme.

2. Le Rapporteur spécial tient une nouvelle fois à souligner qu'en dépit de ses requêtes, il n'a pas encore reçu l'autorisation d'Israël de se rendre dans le Territoire palestinien occupé. Sa dernière demande d'accès au Territoire remonte au 20 mai 2019 et, au moment de l'établissement du présent rapport, il n'avait pas encore reçu de réponse. Le Rapporteur souligne de nouveau qu'un dialogue ouvert entre toutes les parties est essentiel à la protection et à la promotion des droits de l'homme et rappelle à Israël qu'il est prêt et résolu à y participer. Le défaut systématique de coopération d'Israël avec le Rapporteur suscite une vive préoccupation. Une compréhension complète et exhaustive de la situation fondée sur l'observation directe serait extrêmement utile aux travaux de ce dernier.

3. Le présent rapport se fonde principalement sur des communications écrites, ainsi que sur les consultations menées avec des représentants de la société civile, des victimes, des témoins, des responsables palestiniens et des représentants d'organismes des Nations Unies à Amman, à l'occasion de la mission annuelle effectuée par le Rapporteur spécial dans la région en juillet 2019. Ce dernier tient à souligner que plusieurs groupes n'ont pas pu se rendre à Amman pour l'y rencontrer en raison des restrictions de déplacement imposées par les autorités israéliennes. Par conséquent, toutes les personnes et organisations basées à Gaza ont été consultées par visioconférence.

4. Dans le présent rapport, le Rapporteur spécial met l'accent, comme le prévoit son mandat, sur les obligations qu'imposent aux tierces parties le droit international des droits de l'homme et le droit international humanitaire¹. Il exhorte tous les acteurs à assurer le respect du droit international des droits de l'homme et du droit international humanitaire et réaffirme que les violations de ces droits par quiconque sont déplorables et ne peuvent que compromettre les perspectives de paix.

5. Le Rapporteur spécial tient à remercier le Gouvernement de l'État de Palestine de la coopération sans réserve qu'il lui a apportée dans le cadre de l'exécution de son mandat. Il souhaite également adresser ses remerciements à toutes les personnes qui se sont rendues à Amman pour le voir, ainsi qu'à toutes celles qui n'ont pas pu faire le déplacement mais qui lui ont fait parvenir des observations écrites ou orales. Il remercie une nouvelle fois la Jordanie de son appui et de l'offre de tenir des réunions à Amman.

6. Le Rapporteur spécial redit son appui aux organisations palestiniennes, israéliennes et internationales de défense des droits de la personne, qui accomplissent un travail vital. Ces activités, qui sont indispensables à l'exécution de son mandat, profitent également à la communauté internationale tout entière. Le Rapporteur rappelle que ces organisations rencontrent souvent des obstacles considérables dans l'exercice de leurs activités ; il note que, depuis l'an dernier, les difficultés qu'elles

¹ Comme énoncé dans la résolution 1993/2 de la Commission des droits de l'homme.

connaissent ont augmenté et se sont exacerbées. Il demande à la communauté internationale de protéger les droits des organisations de défense des droits de l'homme ainsi que de soumettre à un examen critique toute tentative visant à décrédibiliser ou à discréditer de quelque manière leur travail et de s'y opposer.

II. Situation actuelle des droits de l'homme

7. Depuis le précédent rapport présenté par le Rapporteur spécial à l'Assemblée générale (A/73/447), la situation des droits de l'homme dans le Territoire palestinien occupé est demeurée extrêmement grave, en particulier à Gaza. Le rétrécissement constant de l'espace civique, la non-application généralisée du principe de responsabilité, notamment en ce qui concerne les enquêtes et les poursuites relatives aux actes commis lors des hostilités qui ont eu lieu à Gaza en 2014, la démolition d'habitations en Cisjordanie, en particulier à Jérusalem-Est, la poursuite du recours à l'internement administratif et à la détention d'enfants et les incidences de diverses pratiques sur l'environnement comptent parmi les principales difficultés qui ont été répertoriées dans le cadre de cette mission².

8. Dans le présent rapport, le Rapporteur spécial ne dresse pas la liste exhaustive de l'ensemble des préoccupations, faute de place, mais insiste sur certaines des questions qui étaient les plus pressantes au moment de l'établissement du présent rapport. Cet état des lieux sera suivi d'une analyse approfondie de la responsabilité des États tiers.

A. Gaza

9. Gaza subit sa douzième année d'un blocus terrestre, maritime et aérien qui restreint drastiquement les importations et les exportations, les déplacements de populations à destination ou au départ de Gaza et l'accès à des soins de santé, à une éducation et à des moyens de subsistance adéquats, notamment aux terres agricoles et aux zones de pêche³. Invoquant des préoccupations en matière de sécurité, Israël a fortement durci les restrictions à la liberté de circulation du personnel humanitaire depuis 2018. Le blocus imposé à Gaza constitue un déni des droits fondamentaux de la personne et une peine collective⁴. L'économie de Gaza demeure proche de l'effondrement, comme la Conférence des Nations Unies sur le commerce et le développement l'a déterminé, en juillet 2019 (voir TD/B/EX(68)/4). La situation financière incertaine de l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient (UNRWA) et la réduction de ses programmes ont contribué à cet état de fait. En juillet 2019, l'Office avait réussi à lever 110 millions de dollars, mais il lui manquait encore des fonds pour atteindre son budget annuel de 1,2 milliard de dollars⁵. Ce problème est exacerbé par le fait que certains pays ont annoncé qu'ils allaient surseoir au paiement des sommes promises

² Haut-Commissariat des Nations Unies aux droits de l'homme, « Occupied Palestinian Territory: United Nations human rights expert says Israel bent on further annexation », 12 juillet 2019.

³ Organisation des Nations Unies, Bureau de la coordination des affaires humanitaires, « Humanitarian situation in the Gaza Strip », fiche d'information, octobre 2011.

⁴ Organisation des Nations Unies, Bureau de la coordination des affaires humanitaires, « Increased restrictions on the movement of humanitarian staff in and out of Gaza », *Humanitarian Bulletin*, juillet 2019.

⁵ James Reinl, « United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) raises \$110m but still cash-strapped after US cuts », *Al-Jazeera*, 25 juin 2019.

jusqu'à ce que des clarifications soient apportées concernant des allégations de corruption⁶.

10. Bien que, dans l'ensemble, la situation humanitaire soit alarmante, l'approvisionnement en électricité s'est nettement amélioré à Gaza. Le Gouvernement qatari a apporté une aide de 60 millions de dollars en octobre 2018, ce qui a permis de fournir plus de combustible à Gaza et, ainsi, d'améliorer immédiatement l'approvisionnement en électricité, qui est passé de moins de 7 à 14-15 heures par jour. Toutefois, l'approvisionnement en électricité a répondu à moins de la moitié des besoins en électricité à Gaza au premier semestre de 2019 et les interruptions d'alimentation électrique continuent d'entraver considérablement le fonctionnement des hôpitaux et autres établissements de santé⁷.

Manifestations et emploi de la force

11. À ce jour, 207 Palestiniens ont été tués et 33 828 ont été blessés lors de la Grande Marche du retour et des manifestations qui ont eu lieu dans ce contexte⁸. La commission d'enquête établie par la suite a conclu que l'utilisation de balles réelles par les forces de sécurité israéliennes contre les manifestants était illégale dans tous, sauf deux, des cas (A/HRC/40/74, par. 94). Elle a également déterminé que des manifestants avaient essuyé des tirs en violation de leur droit à la vie et du principe de distinction au titre du droit international humanitaire (ibid., par. 97). En effet, dans la vaste majorité des cas, les victimes se trouvaient loin de la clôture et les forces israéliennes, positionnées derrière des buttes de terre, bénéficiaient d'une protection suffisante. Israël n'a pour l'essentiel pas répondu de ces actes, bien que la communauté internationale et la société civile aient demandé que ces faits fassent l'objet d'enquêtes indépendantes et transparentes⁹.

12. Des Palestiniens continuent de manifester, tous les vendredis depuis mars 2018, contre le blocus et pour leur droit de rentrer dans leurs foyers. Le 6 septembre 2019, par exemple, les forces de sécurité israéliennes ont tué par des tirs à balles réelles deux enfants qui manifestaient près de la clôture¹⁰. Selon des organisations de défense des droits de l'homme, la plupart des blessés ont été atteints par des balles réelles ; d'autres ont été directement touchés par des munitions lacrymogènes¹¹.

13. Il demeure difficile pour le secteur de la santé à Gaza de faire face au nombre considérable de blessés, dont la majorité par balle. Submergé par l'afflux massif de nouvelles blessures à traiter, qui vient s'ajouter aux restrictions à la circulation des personnes et du matériel et à la pénurie d'électricité et de certains biens et équipements dont il souffrait déjà, le système de santé de Gaza est au bord de l'effondrement¹². Ces deux facteurs – débordement du système de santé de Gaza et

⁶ Jewish Telegraphic Agency et Cnaan Lipshiz, « Swiss and Dutch suspend funding for United Nations aid agency for Palestinians over graft scandal », *Haaretz*, 31 juillet 2019.

⁷ Organisation des Nations Unies, Bureau de la coordination des affaires humanitaires, « Improvements to Gaza electricity supply », *Humanitarian Bulletin: Occupied Palestinian Territory*, juin 2019.

⁸ Organisation des Nations Unies, Bureau de la coordination des affaires humanitaires, base de données sur les pertes, consultable à l'adresse suivante : www.ochaopt.org/data/casualties.

⁹ Farhan Haq, porte-parole adjoint du Secrétaire général, Déclaration attribuable au porte-parole adjoint du Secrétaire général sur la situation à Gaza, 30 mars 2018.

¹⁰ Michelle Bachelet, Haute-Commissaire des Nations Unies aux droits de l'homme, déclaration prononcée à la quarante-deuxième session du Conseil des droits de l'homme, le 9 septembre 2019.

¹¹ Al Mezan Centre for Human Rights, « 71th Friday of demonstrations in Gaza, 161 wounded, including 56 children, one woman and six paramedics », communiqué de presse, 25 août 2019.

¹² Organisation mondiale de la Santé et Health Cluster – Occupied Palestinian Territory, *Emergency Trauma Response to the Gaza Mass Demonstrations 2018–2019: A One-Year Review of Trauma Data and the Humanitarian Consequences* (2019).

multiplication des manifestants blessés nécessitant des soins spécialisés – ont contribué à une augmentation du nombre de personnes demandant l'autorisation de quitter Gaza pour aller se faire soigner dans un hôpital extérieur ; la plupart des demandes ont été refusées.

Violations des droits de l'homme par le Hamas à Gaza

14. En mai 2019, les forces du Hamas ont réprimé dans la violence, à Gaza, des manifestations liées à la situation économique. Selon des informations reçues, le Hamas a brutalisé et arrêté des dizaines de Palestiniens qui manifestaient contre les hausses de prix décrétées dans le territoire et les conditions de vie extrêmement difficiles qui y règnent. Des manifestations de faible ampleur ont été organisées dans plusieurs localités de la bande de Gaza par un groupe d'activistes qui a choisi pour nom « We want to live »¹³. Ce dernier épisode de répression survient après de précédentes manifestations tenues en mars 2019, lors desquelles des centaines de personnes avaient subi des brutalités, des arrestations et détentions arbitraires, des tortures et des mauvais traitements¹⁴. Ces actes du Hamas sont alarmants et constituent une violation flagrante des droits des Palestiniens à la liberté d'expression et d'association ainsi qu'un déni de leur droit d'être à l'abri de détentions arbitraires et de leur droit à l'intégrité physique. Le Hamas a le devoir de veiller à ce que les Palestiniens de Gaza soient libres d'exercer leurs droits sans être victimes de menaces, d'actes d'intimidation ou de violences.

B. Cisjordanie

15. Dans un contexte où le Premier Ministre israélien¹⁵ et des hauts responsables de son Gouvernement multiplient les appels à l'annexion de tout ou partie de la Cisjordanie, la violence exercée par les colons s'exacerbe. Des actes de violence ont été enregistrés dans plusieurs villes de la Cisjordanie, dont Hébron, Naplouse et Ramallah. Le Bureau de la coordination des affaires humanitaires a recensé sept décès de Palestiniens attribuables à la violence exercée par les colons en 2019¹⁶. La fréquence des attaques s'est particulièrement accrue dans des régions de la vallée du Jourdain, surtout dans le nord du district de Toubas, où des bergers ont été à plusieurs reprises pris pour cible par des colons israéliens¹⁷. Ces violences ont forcé de nombreux habitants palestiniens à quitter les zones touchées tandis que l'extension de l'implantation israélienne se poursuit, encerclant de fait les populations palestiniennes et réduisant l'espace dont elles disposent pour vivre.

16. En parallèle, le rythme des démolitions d'habitations et la saisie de structures appartenant à des Palestiniens a connu une nette accélération en 2019 par rapport aux années précédentes. En juillet 2019, 362 structures au total avaient été détruites par les autorités israéliennes, ce qui avait entraîné le déplacement de plus de 481 Palestiniens. Il s'agit d'une hausse de 64 % comparativement à la même période en 2018¹⁸. Les zones les plus touchées étaient Hébron, Toubas et Naplouse. Les

¹³ Oliver Holmes, « Hamas violently suppresses Gaza economic protests », *Guardian*, 21 mars 2019.

¹⁴ Amnesty International, « Gaza. Le Hamas doit cesser la répression brutale contre les manifestants et les défenseurs des droits humains », 18 mars 2019.

¹⁵ Oliver Holmes, « Netanyahu vows to annex large parts of occupied West Bank », *Guardian*, 10 septembre 2019.

¹⁶ Organisation des Nations Unies, Bureau de la coordination des affaires humanitaires, base de données relative aux victimes.

¹⁷ B'Tselem, « Israeli settlers and military intensify attacks against Palestinian shepherds in the village of al-Farisiyah in the northern Jordan Valley », 15 mai 2019.

¹⁸ Organisation des Nations Unies, Bureau de la coordination des affaires humanitaires, « West Bank demolitions and displacement: an overview », juillet 2019.

autorités israéliennes ont invoqué de nombreuses raisons, comme des menaces à la sécurité ou l'absence de permis de construire, concernant notamment des bâtiments situés dans la « zone tampon », à proximité du mur de séparation. Le rejet des demandes de permis de construire est une politique israélienne.

17. Les forces de sécurité israéliennes ont également intensifié leurs incursions et leurs descentes dans diverses localités de Cisjordanie, prenant pour cible des organisations de la société civile et des résidences palestiniennes, avec, à la clé, détentions et arrestations arbitraires. Ainsi, le 19 septembre, les forces de sécurité israéliennes ont procédé à une perquisition dans les locaux de l'association Prisoner Support and Human Rights (Addameer) et d'autres organisations, procédant à la saisie de matériel informatique et de documents. Cette recrudescence des descentes s'inscrit dans l'objectif de réduire au silence les organisations de la société civile et les défenseurs des droits de la personne, en particulier ceux qui travaillent sur la question du principe de responsabilité.

Restrictions à la liberté d'expression et d'association imposées par l'Autorité palestinienne

18. L'Autorité palestinienne a continué d'imposer des restrictions à la liberté d'expression, d'association et de réunion pacifique en Cisjordanie. En 2018, plusieurs journalistes ont été arrêtés, accusés d'avoir violé des dispositions de la loi de 2017 sur la cybercriminalité (A/HRC/40/39, par. 60, et A/HRC/40/43, par. 46). Bien que la loi ait récemment été modifiée, la poursuite des procédures intentées avant cette modification, dont les arrestations susmentionnées, a été autorisée. Un journaliste palestinien, par exemple, a été arrêté et accusé de diffamation et de calomnie au titre de cette loi (A/HRC/40/39, par. 60).

C. Jérusalem-Est

19. Depuis 2018, le Gouvernement israélien cherche, par plusieurs moyens, à renforcer et promouvoir sa revendication de souveraineté sur Jérusalem-Est : ainsi, il a pris des mesures législatives, multiplié les démolitions et les ordres d'expulsion de résidents palestiniens, intensifié la construction d'implantations et annoncé un plan visant à étendre à Jérusalem-Est la municipalité de Jérusalem¹⁹.

20. Des chiffres récents indiquent une augmentation du nombre de démolitions d'habitations palestiniennes à Jérusalem-Est et sont révélateurs de la multiplication des constructions d'implantations et de leur expansion. Au 30 avril 2019, 111 structures appartenant à des Palestiniens avaient été détruites à Jérusalem-Est depuis le début de l'année, soit directement par les autorités israéliennes, soit par leur propriétaire pour éviter d'avoir à payer une amende, à la suite d'ordres de destruction motivés par l'absence de permis de construire. Parmi celles-ci, 57 % ont été démolies en avril²⁰. Cette augmentation, tant des démolitions d'habitations palestiniennes que de la construction d'implantations, stimulée par le sentiment qu'a Israël d'avoir le feu vert des États-Unis d'Amérique, ne peut s'interpréter que comme une volonté de

¹⁹ Informations communiquées par une organisation humanitaire internationale. Voir également Al-Haq, « The occupational annexation of Jerusalem through Israeli bills and laws », 5 mars 2018 [Error! Hyperlink reference not valid.](#)

²⁰ Organisation des Nations Unies, Bureau de la coordination des affaires humanitaires, « United Nations officials call for an immediate halt to demolitions in East Jerusalem and respect for international law amidst rise », 3 mai 2019.

modifier la structure démographique de Jérusalem-Est en y réduisant la présence palestinienne et en y renforçant la majorité juive²¹.

21. Le 4 octobre 2018, la municipalité de Jérusalem a annoncé un plan visant à étendre son contrôle sur l'ensemble de Jérusalem, y compris Jérusalem-Est, et à remplacer les services de l'UNRWA par des services municipaux. À cette occasion, le maire de Jérusalem de l'époque, Nir Barkat, s'est expressément engagé à démanteler les installations de l'UNRWA à Jérusalem-Est, déclarant que la municipalité entendait retirer l'autorisation accordée à l'UNRWA de fournir des services médicaux, éducatifs et sanitaires pour en assurer elle-même la prestation²². Par la suite, les forces israéliennes ont pénétré dans un dispensaire de l'UNRWA à Jérusalem-Est et ont demandé à voir un permis²³. L'UNRWA a depuis indiqué ne pas avoir été avisé des décisions de la municipalité et s'opposer fermement à cette tentative de modification de sa zone d'intervention. Dans une déclaration faite en janvier 2019, l'Office a rappelé à Israël son obligation de protéger les installations de l'UNRWA dans les zones relevant de son autorité²⁴. Comme je l'ai souligné dans mon précédent rapport à l'Assemblée générale, Israël s'est employé à garantir l'irréversibilité de son annexion *de jure* de Jérusalem-Est en étendant sa législation nationale et son autorité civile à la partie occupée de la ville (A/73/447, para. 37).

22. À un moment où la municipalité multiplie ses démonstrations de contrôle, la police israélienne a intensifié, en juin et juillet 2019, ses incursions dans le quartier palestinien d'Issaouïyé, y procédant à environ 340 arrestations. La plupart des personnes arrêtées ont été libérées peu après. Selon des sources, cinq suspects ont été mis en accusation²⁵. Cette multiplication des opérations de police s'est traduite, notamment, par la mise en place de barrages de contrôle de la circulation sur des routes menant au village, des inspections poussées de véhicules automobiles, l'installation de postes de contrôle de nuit à l'intérieur du village et de perquisitions et d'arrestations faites en pleine nuit. La présence policière accrue et la colère des résidents ont donné lieu à des affrontements dans le village, au cours desquels de nombreux résidents auraient été blessés, principalement par des tirs de balles souples. Au moins un Palestinien a été tué par la police à la fin du mois de juin²⁶.

23. Enfin, l'ingérence d'Israël dans le droit à l'éducation des enfants palestiniens de Jérusalem-Est est également préoccupante. En mai 2018, le Gouvernement israélien a annoncé qu'il investirait 1,85 milliard de shekels dans l'infrastructure et les services à Jérusalem-Est. Cependant, selon l'organisation non gouvernementale Ir Amim, 43,4 % de ce budget, qui doit être consacré à la réduction des disparités entre Jérusalem-Ouest et Jérusalem-Est dans le domaine de l'éducation, ne le sera qu'à la condition que le programme d'enseignement israélien soit adopté au lieu de celui de l'Autorité palestinienne²⁷. Les Palestiniens de Jérusalem-Est se retrouvent pris entre deux feux, contraints de choisir une éducation qui ouvrirait à court terme plus de portes à leurs enfants, au prix de l'érosion de leur identité et de leur autonomie. Pris ensemble, la tentative d'Israël de faire pression sur les écoles pour les amener à

²¹ Jerusalem Legal Aid and Human Rights Centre, « Annual report 2018 », 2018.

²² Al-Jazeera, « Jerusalem to remove UNRWA to “end lie of Palestine refugees” », 4 octobre 2018.

²³ Nir Hasson, « UNRWA says Israeli inspectors tried to raid its East Jerusalem clinic », *Haaretz*, 8 octobre 2018.

²⁴ UNRWA, « UNRWA was not notified of any decision to close down schools it operated in East Jerusalem », 21 janvier 2019.

²⁵ Nir Hasson, « 340 arrests and only five indictments: summer-long police sweep strikes fear in Isawiyah », *Haaretz*, 28 août 2019.

²⁶ Ibid.

²⁷ Ir Amim, « The state of education in East Jerusalem: budgetary discrimination and national identity », août 2018, consultable à l'adresse suivante : http://www.ir-amim.org.il/sites/default/files/The%20State%20of%20Education_2018_1.pdf.

modifier leur programme d'enseignement et l'intention de la municipalité de faire cesser les activités de l'UNRWA peignent le tableau préoccupant d'une action visant à restreindre davantage encore l'autonomie et l'identité palestiniennes à Jérusalem-Est²⁸.

D. Droits fondamentaux des enfants

24. Les enfants représentent près de 48 % de la population palestinienne en Cisjordanie et à Gaza : 1,3 million d'enfants vivent en Cisjordanie et 1 million dans la bande de Gaza²⁹. Dans ces deux régions, les enfants continuent de souffrir des effets néfastes sur leur santé physique et mentale de leur exposition constante à la violence, notamment dans le contexte de la Grande Marche du retour et d'autres manifestations. Selon le rapport du Secrétaire général sur le sort des enfants en temps de conflit armé, les chiffres confirmés par l'ONU en 2018 indiquent le nombre d'enfants palestiniens tués (59) ou blessés (2 756) le plus élevé depuis 2014 (A/73/907-S/2019/509, par. 84).

25. À Gaza, les enfants continuent de voir entravé leur accès à des soins de santé adéquats, notamment lorsque les demandes d'entrée sur le territoire israélien à des fins de traitement médical sont rejetées ou lorsqu'elles ne sont pas traitées dans les délais. Le taux d'approbation de ces demandes est notablement plus bas pour les enfants palestiniens blessés lors des manifestations de Gaza (22 % en 2018) que pour ceux blessés dans d'autres circonstances (en moyenne, 75 % en 2018) (ibid., par. 94). Les autorités israéliennes continuent de rejeter les demandes d'autorisation de voyager à titre d'accompagnateur avec un enfant requérant des soins spécialisés, ou d'en retarder le traitement³⁰.

26. L'accès des enfants à l'éducation est gravement restreint dans les territoires occupés de Cisjordanie et de Gaza. Selon le rapport du Secrétaire général sur le sort des enfants en temps de conflit armé, 118 cas d'atteinte à l'éducation, concernant 23 188 enfants, ont été confirmés en 2018, dans le Territoire palestinien occupé. Dans plus de la moitié de ces cas, les forces israéliennes ont tiré des balles réelles, lâché des gaz lacrymogènes ou lancé des grenades assourdissantes dans des écoles ou autour d'écoles (ibid., par. 91). À Gaza, la pénurie de salles de classe a motivé la mise en place d'un système de « roulement ». Les élèves sont scolarisés dans 274 écoles de l'UNRWA, qui comptent 8 676 agents de l'éducation dans la bande de Gaza ; 84 d'entre elles n'appliquent pas le système des classes alternées, 177 l'appliquent pour accueillir 2 groupes d'élèves et 13 l'appliquent pour accueillir 3 groupes d'élèves³¹.

27. Les enfants palestiniens et leurs familles souffrent également de l'anxiété que provoque la menace de démolition pesant sur leur habitation. Ils se retrouvent ainsi exposés à des niveaux croissants de stress du fait de l'augmentation du nombre d'ordres d'expulsion et de destruction, en particulier à Jérusalem-Est³². En 2019, la démolition d'habitations palestiniennes par les forces israéliennes a très souvent entraîné, entre autres, le déplacement de familles entières, au détriment du bien-être des enfants. Ainsi, le 25 avril 2019, les autorités israéliennes ont démoli, à des fins

²⁸ Nir Hasson, « Israel promises “revolution” for East Jerusalem schools. Palestinians say it’s “brainwashing” », *Haaretz*, 29 août 2018.

²⁹ Fonds des Nations Unies pour l'enfance, « Children in the State of Palestine », novembre 2018.

³⁰ Organisation mondiale de la Santé, « Health access: barriers for patients in the Occupied Palestinian Territory », juin 2019.

³¹ Voir <https://www.unrwa.org/activity/education-gaza-strip>.

³² Palestinian Counselling Centre, Save the Children and Welfare Association, « Broken homes: addressing the impact of house demolitions on Palestinian children and families », avril 2009 **Error! Hyperlink reference not valid..**

punitives, une maison dans le village de Zaouiya, situé dans la zone B de la Cisjordanie, entraînant le déplacement de cinq enfants et de leurs parents³³. Or, un déplacement est un événement traumatisant aux conséquences durables, *a fortiori* lorsqu'il touche les plus vulnérables, comme, en l'espèce, les enfants.

III. Obligation de rendre compte, impunité et responsabilité de la communauté internationale

28. L'obligation de rendre compte – le principe de responsabilité dans l'exercice du pouvoir – est une des pierres angulaires de l'état de droit et de l'ordre international fondé sur des règles. Nul système juridique, national ou international, ne peut acquérir et conserver une légitimité populaire s'il n'est pas en mesure d'imposer des sanctions efficaces et d'offrir des recours réparateurs en cas de violation de ses lois. Sans ce principe, la force l'emporte sur le droit, la justice n'est plus qu'une vaine promesse et les dépossédés du pouvoir n'ont plus qu'à souffrir, ou alors à tenter de se faire justice par des moyens extrajuridiques irréguliers, voire violents. Un droit privé de voies de recours n'est, en fin de compte, pas un droit.

29. Les ennemis du principe de responsabilité sont l'impunité et l'exceptionnalisme. Comme il a été déclaré récemment au Conseil de sécurité, « le droit international n'est pas un menu à la carte »³⁴. Quiconque affirme pouvoir se soustraire aux directives de l'ordre juridique et diplomatique international défie l'état de droit et échoue au test du réalisme politique. En effet, aucun pays ne peut maintenir longtemps sa position et son influence au sein de la communauté des nations s'il s'autorise des particularités interdites aux autres, et aucun ordre international fondé sur des règles ne peut faire respecter ses lois et ses directives s'il tolère le défi et l'exceptionnalisme, sans une remise en question³⁵. L'impunité à l'échelon local est un danger pour la justice à l'échelon mondial.

30. Dans le monde d'aujourd'hui, ce n'est pas l'absence de lois, mais le défaut de volonté politique internationale qui est un problème majeur. Comme l'a souligné le Représentant permanent adjoint du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, Jonathan Allen, lors d'une séance d'information du Conseil de sécurité consacrée au droit international humanitaire, tenue en avril 2019, « [c]e n'est pas la loi qui nous fait défaut, mais son application ainsi que le principe de responsabilité »³⁶. Trop souvent, sur de nombreuses questions graves, la communauté internationale n'a appliqué l'obligation de rendre des comptes que de manière sélective et partisane, reflet effarant d'une action tantôt prise à dessein ou dans l'indifférence, tantôt fruit de la collusion ou de l'apathie. Trop souvent, on a fermé les yeux sur le mépris qui était fait du droit, lui trouvant des excuses, ou dans un souci de conciliation. Or, ce déficit de responsabilité érode la confiance des populations dans l'efficacité du droit international, mettant ainsi en péril un bien commun précieux.

³³ Organisation des Nations Unies, Bureau de la coordination des affaires humanitaires, « Protection of civilians », *Biweekly Highlights*, du 23 avril au 6 mai 2019.

³⁴ Christoph Heusgen, Représentant permanent de l'Allemagne auprès de l'Organisation des Nations Unies, déclaration faite lors du débat public du Conseil de sécurité consacré au Moyen-Orient, le 23 juillet 2019.

³⁵ Benjamin R. Barber, *Fear's Empire: War, Terrorism and Democracy* (New York, W.W. Norton and Company, 2003).

³⁶ Jonathan Allen, Représentant permanent adjoint du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord auprès de l'Organisation des Nations Unies, « International humanitarian law: we lack enforcement and accountability », déclaration faite lors de la séance d'information du Conseil de sécurité consacrée au droit international humanitaire, le 1^{er} avril 2019.

31. Les 52 années d'occupation par Israël du territoire palestinien – Gaza et la Cisjordanie, y compris Jérusalem-Est – sont une amère illustration de l'absence de responsabilité internationale face aux violations systémiques des droits des Palestiniens au regard du droit des droits de l'homme et du droit humanitaire. L'obligation de rendre compte est le levier qui permet de soulever la chape de plomb que représente l'occupation permanente, et l'application de ce principe est la meilleure voie vers un règlement juste et durable. Pays relativement exigu du point de vue géographique et démographique, et particulièrement tributaire de la communauté internationale pour le commerce, les investissements et la coopération diplomatique, Israël n'aurait pu maintenir jusqu'ici une occupation à ce point répressive, en violation flagrante du droit international, sans le soutien actif, ou la négligence malveillante, de nombreux pays du monde industrialisé. Si la communauté internationale a publié de nombreuses résolutions et déclarations critiques à l'égard de l'occupation sans fin d'Israël et de ses projets constants d'annexion, ces critiques ont rarement eu des conséquences significatives. L'ancien représentant spécial de l'Union européenne pour le Moyen-Orient, Miguel Moratinos, avait déclaré, à propos de l'occupation israélienne : « Nous autres Européens sommes très forts pour les déclarations ; cela compense notre indolence »³⁷.

32. Dans la partie suivante du rapport, on examine l'obligation qui incombe à la communauté internationale de mettre fin aux violations graves des droits de la personne et de réglementer étroitement l'occupation de guerre, tout comme le devoir qu'elle a de veiller à ce que ses membres obéissent à ses directives. Dans un deuxième temps, on évalue le degré d'impunité dont jouit Israël. Enfin, on passe en revue les diverses mesures de responsabilisation que la communauté internationale a adoptées et appliquées dans certains conflits et dans certaines zones face aux violations des droits de la personne, afin de déterminer lesquelles pourraient être appliquées de manière significative pour mettre un terme à l'occupation israélienne.

A. Responsabilités juridiques de la communauté internationale

33. Depuis 1945, la communauté des nations a codifié un corpus impressionnant de règles de droit international, dans lequel elle a établi la responsabilité pour les États de vivre selon un ordre international fondé sur des règles et de le faire respecter. La promesse de faire respecter le principe de responsabilité – soit la mobilisation de la volonté collective et la prise de contre-mesures efficaces pour défendre la justice – est au cœur de l'ordre international. Le Rapporteur spécial a recensé trois sources importantes d'obligations juridiques qui astreignent la communauté internationale à mobiliser son autorité politique pour contraindre Israël à mettre fin, une fois pour toutes, à son occupation illégale et à lever les obstacles qui entravent l'autodétermination du peuple palestinien, à savoir :

- a) Article premier commun aux quatre Conventions de Genève de 1949 ;
- b) Articles sur la responsabilité de l'État pour fait internationalement illicite, de 2001 ;
- c) Article 25 de la Charte des Nations Unies.

Article premier commun aux quatre Conventions de Genève de 1949

34. La quatrième Convention de Genève de 1949 s'applique intégralement à l'occupation israélienne du territoire palestinien. Le Conseil de sécurité l'a déclaré

³⁷ Akiva Eldar, « Israel can't afford to postpone Mideast peace much longer », *Haaretz*, 12 novembre 2010.

pour la première fois dans les jours qui ont suivi l'occupation, dans sa résolution 237 (1967), et l'a reconfirmé à maintes reprises depuis lors, la dernière fois dans sa résolution 2334 (2016). D'autres grands organes des Nations Unies ont souscrit à cette déclaration, notamment l'Assemblée générale (par exemple, dans sa résolution 73/97), le Conseil des droits de l'homme (par exemple, dans sa résolution 40/23) et la Cour internationale de Justice³⁸. Bien qu'il ait ratifié les Conventions le 6 juillet 1951, et que le Conseil de sécurité lui ait demandé, dans sa résolution 446 (1979), de les respecter scrupuleusement, Israël conteste que la quatrième Convention de Genève s'applique au conflit et ne se reconnaît pas en tant que Puissance occupante du territoire palestinien³⁹. Toutefois, sa position n'a guère trouvé de soutien au sein de la communauté internationale ou parmi les spécialistes du droit international.

35. Aux termes de l'article premier commun aux quatre Conventions de Genève, « [l]es Hautes Parties contractantes s'engagent à respecter et à faire respecter la [...] Convention en toutes circonstances »⁴⁰.

36. Cette obligation solennelle est au cœur de l'application des droits garantis par les quatre Conventions de Genève et par le droit international humanitaire. Selon les juristes contemporains, l'article premier commun a acquis un « caractère quasi-constitutionnel »⁴¹, c'est-à-dire un statut juridique élevé qui exige des États non seulement qu'ils respectent les Conventions elles-mêmes, mais également qu'ils prennent toutes les mesures en leur pouvoir pour amener les autres États à s'acquitter des obligations qui leur incombent au titre du droit international humanitaire⁴². L'article premier reflète également le droit international coutumier, en lui conférant un caractère universel⁴³.

37. Le commentaire sur les quatre Conventions de Genève qui fait autorité a été publié par le Comité international de la Croix-Rouge (CICR) en 2016⁴⁴. En ce qui concerne l'article premier commun et l'obligation de faire respecter, le CICR a noté, dans le commentaire, « qu'il ne s'agit pas d'une vague promesse, mais d'un engagement ayant force juridique »⁴⁵. Interprétant cette disposition, la Cour internationale de Justice a déclaré que le terme « s'engagent » ne revêtait pas « un caractère purement incitatif » et ne se limitait pas « à l'énoncé d'une finalité », et qu'il ne visait pas simplement à introduire des obligations ultérieures, mais qu'il signifiait, en fait, « accepter une obligation »⁴⁶. Le CICR explique en outre, dans son commentaire, qu'« [e]n prenant l'engagement de “respecter et faire respecter” les Conventions, les États ont également reconnu l'importance que revêt le fait d'adopter toutes les mesures raisonnables afin de prévenir que des violations se produisent »⁴⁷.

³⁸ *Conséquences juridiques de l'édification d'un mur dans le Territoire palestinien occupé, avis consultatif, C.I.J. Recueil 2004*, p. 177, par. 101.

³⁹ Comité international de la Croix-Rouge (CICR), « Le droit international humanitaire, le CICR et le statut d'Israël dans les territoires », 31 décembre 2012.

⁴⁰ Voir <https://www.icrc.org/fr/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>.

⁴¹ Laurence Boisson de Chazournes et Luigi Condorelli, « Common article 1 of the Geneva Conventions revisited: protecting collective interests », CICR, 31 mars 2000.

⁴² Knut Dörmann et Jose Serralvo, « Common article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations », CICR, 21 septembre 2015.

⁴³ *Conséquences juridiques de l'édification d'un mur dans le Territoire palestinien occupé, avis consultatif, C.I.J. Recueil 2004*, p. 136, par. 158.

⁴⁴ Voir <https://ihl-databases.icrc.org/applic/ihl/dih.nsf/Comment.xsp?action=openDocument&documentId=9FDA19119E4EB59AC1257F7D005ED435>, par. 118 à 191.

⁴⁵ *Ibid.*, par. 170.

⁴⁶ *Application de la Convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, C.I.J. Recueil 2007*, p. 43, par. 162.

⁴⁷ Voir <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD>, par. 121.

En cas de violation des Conventions, les Hautes Parties contractantes ne se seront acquittées de leurs obligations juridiques au sens de l'article premier commun qu'« aussi longtemps qu'elles [aur]ont fait tout ce qui était raisonnablement en leur pouvoir pour faire cesser les violations »⁴⁸.

38. Le CICR souligne, dans son commentaire, que les obligations énoncées dans les Conventions sont « d'une importance si fondamentale » pour la communauté internationale qu'elles créent des obligations *erga omnes partes*, c'est-à-dire des obligations qui s'imposent à toutes les autres Parties contractantes, en tout temps⁴⁹. En ce qui concerne l'article premier commun, celui-ci crée deux grandes obligations interdépendantes : a) chaque Haute Partie contractante est tenue envers toutes les autres Hautes Parties contractantes de respecter toutes les obligations qui lui incombent au titre des Conventions (obligation négative de ne pas violer) ; b) toutes les Hautes Parties contractantes ont le devoir, individuellement et collectivement, de veiller à ce que toutes les autres Hautes Parties contractantes respectent toutes les obligations qui leur incombent au titre des Conventions (obligation positive de faire respecter)⁵⁰.

39. Il importe, par conséquent, de se demander quel type de violations du droit international humanitaire ferait naître l'obligation pour les autres Hautes Parties contractantes de faire respecter les Conventions. L'article premier commun doit être lu au sens large et délibéré⁵¹. Des considérations politiques, telles que l'inertie nationale ou le refus d'affronter un allié, ne sont pas des raisons suffisantes pour s'abstenir de remplir l'obligation de faire rendre des comptes. Comme l'ont déclaré Théo Boutruche et Marco Sassòli, experts en droit international, dans leur avis juridique sur ce sujet :

« Par définition, l'existence d'un devoir en droit, sous la forme d'une obligation de faire respecter, exige une évaluation objective et empêche un État d'invoquer de simples considérations politiques pour prétendre qu'aucune mesure ne puisse être prise au titre de cette obligation. Le fait que l'exécution d'une obligation internationale puisse se révéler politiquement difficile ne saurait servir de motif pour se soustraire à toute mesure qui viserait à la mise en œuvre de ladite obligation »⁵².

40. Si les États ont l'obligation de faire respecter les Conventions « en toutes circonstances » et pour toutes les violations, il est on ne peut plus clair que les violations flagrantes des Conventions et les atteintes graves à leurs dispositions de la part d'un État imposent à toutes les autres Hautes Parties contractantes l'obligation internationale particulièrement impérieuse d'utiliser tous les moyens en leur pouvoir pour mettre un terme à ces violations et atteintes⁵³. En droit international humanitaire, des exemples de violations flagrantes et d'atteintes graves seraient, notamment : l'homicide intentionnel ; la destruction et l'appropriation de biens exécutées sur une grande échelle ; la peine collective ; la déportation ou le transfert illégal ou la détention illégale ; le fait de lancer une attaque sans discrimination atteignant la population civile ; le transfert par la Puissance occupante d'une partie de sa

⁴⁸ Ibid., par. 165.

⁴⁹ Ibid., par. 119.

⁵⁰ Ibid., par. 153 à 173.

⁵¹ Robin Geiß, « The obligation to respect and to ensure respect for the Conventions », in Andrew Clapham, Paolo Gaeta and Marco Sassòli, dir., *The 1949 Geneva Conventions: A Commentary* (Oxford University Press, Oxford, Royaume-Uni, 2015), p. 113.

⁵² Théo Boutruche and Marco Sassòli, « Expert opinion on third states' obligations vis-à-vis IHL violations under international law, with a special focus on common article 1 to the 1949 Geneva Conventions », 8 novembre 2016.

⁵³ Obligation renforcée par la quatrième Convention de Genève, art. 146, et Protocole I, art. 86.

population civile dans le territoire occupé ; les pratiques de ségrégation et de discrimination raciales⁵⁴. Toutes ces violations graves ont été soit alléguées quant au fond, soit établies pendant la conduite de l'occupation israélienne⁵⁵.

41. Dans son avis consultatif de 2004 sur les conséquences juridiques de l'édification d'un mur dans le Territoire palestinien occupé, la Cour internationale de Justice a expressément déclaré qu'il appartenait aux Hautes Parties contractantes de veiller à ce qu'Israël – la Puissance occupante – s'acquitte des obligations que lui impose la quatrième Convention de Genève⁵⁶.

42. La place particulière qu'occupe le droit international humanitaire dans le droit international, l'avis de la Cour internationale de Justice selon laquelle les responsabilités de la communauté internationale au titre des Conventions de Genève sont des obligations juridiques et non des sentiments moraux, et l'accent mis par le CICR dans son commentaire sur le fait que les Conventions consacrent des obligations contraignantes et cumulatives s'associent pour créer, pour toutes les Hautes Parties contractantes, l'obligation juridique impérieuse de prendre toutes les mesures en leur pouvoir pour mettre un terme, rapidement et une fois pour toutes, à l'occupation israélienne et à ses multiples violations du droit. Si les déclarations occasionnelles des Hautes Parties contractantes concernant les principes humanitaires applicables à l'occupation et au conflit sont les bienvenues, il reste encore beaucoup à faire pour satisfaire à l'obligation de faire respecter les Conventions⁵⁷.

Articles sur la responsabilité de l'État pour fait internationalement illicite

43. En août 2001, au terme de cinq décennies de codification, la Commission du droit international a adopté les articles sur la responsabilité de l'État pour fait internationalement illicite. L'Assemblée générale a entériné ces articles en décembre 2001 (voir résolution 56/83, annexe). Une norme fondamentale du droit international veut que tous les États respectent le droit international en tout temps, conformément aux obligations qui leur incombent au titre de l'ordre international fondé sur des règles. Il est établi dans les articles, en tant que principe fondamental, que tous les États assument la responsabilité juridique de veiller à ce que les autres États respectent le droit international en tout temps. En ce sens, tous les États ont la responsabilité de ne pas reconnaître comme licite toute situation créée par une violation grave, par un autre État, d'une obligation découlant d'une norme impérative de droit international général. Ces articles sont largement considérés comme reflétant le droit international coutumier en matière de responsabilité de l'État⁵⁸.

44. Selon l'article 40 des articles sur la responsabilité de l'État pour fait internationalement illicite,

le chapitre III des articles « s'applique à la responsabilité internationale qui résulte d'une violation grave par l'État d'une obligation découlant d'une norme impérative du droit international général » et « [l]a violation d'une telle

⁵⁴ Quatrième Convention de Genève, art. 33, 49 et 147, et Protocole additionnel, art. 85.

⁵⁵ Human Rights Watch, Amnesty International, Al-Haq, Al Mezan, B'Tselem et Gisha, entre autres.

⁵⁶ *Conséquences juridiques de l'édification d'un mur dans le Territoire palestinien occupé, avis consultatif, C.I.J Recueil 2004*, p. 136, par. 159.

⁵⁷ La Conférence des Hautes Parties contractantes a publié des allocutions et des déclarations concernant les principes humanitaires applicables à l'occupation israélienne du territoire palestinien en 1999, 2001 et 2014 ; consultables à l'adresse suivante : <https://unispal.un.org/UNISPAL.NSF/0/E7B8432A312475D385257DB100568AE8>.

⁵⁸ James Crawford, *State Responsibility: The General Part* (Cambridge University Press, New York, 2013), p. 435 à 455.

obligation est grave si elle dénote de la part de l'État responsable un manquement flagrant ou systématique à l'exécution de l'obligation ».

45. Une norme impérative (de *jus cogens*) du droit international général est une obligation juridique acceptée par la communauté internationale en tant que norme à laquelle aucune dérogation ou exception n'est permise⁵⁹. Selon le commentaire de fond sur les articles publiés par l'ONU en 2008⁶⁰, les normes impératives du droit incluraient le respect des règles fondamentales du droit international humanitaire et du droit des peuples à disposer d'eux-mêmes, ainsi que l'interdiction de la discrimination raciale, de l'apartheid, du génocide, de l'annexion, de l'agression et de la torture⁶¹. Une violation systématique, telle que mentionnée au paragraphe 2 de l'article 40, est celle qui a été commise « de façon organisée et délibérée », tandis que le terme « violation flagrante » « dénote des violations manifestes qui représentent une attaque directe contre les valeurs protégées par la règle »⁶².

46. Selon l'article 41 des articles sur la responsabilité de l'État pour fait internationalement illicite, « [l]es États doivent coopérer pour mettre fin, par des moyens licites, à toute violation grave au sens de l'article 40 » et « [a]ucun État ne doit reconnaître comme licite une situation créée par une violation grave au sens de l'article 40, ni prêter aide ou assistance au maintien de cette situation ».

47. Conformément à l'article 41, les États assument trois obligations fondamentales dans le cadre de leur responsabilité de veiller à ce que les autres États respectent le droit international : a) ils ne peuvent reconnaître comme licite une situation créée par une violation grave au sens de l'article 40 ; b) ils ne peuvent prêter aide ou assistance au maintien de cette situation ; c) ils ont le devoir positif de coopérer pour mettre fin à une telle violation grave⁶³. L'objectif de ces responsabilités spéciales à l'égard de tiers est de contrecarrer les effets qu'ont de telles violations graves sur l'ordre juridique, politique et moral de la communauté internationale dans son ensemble.

48. L'obligation de non-reconnaissance face à une situation illicite résultant d'une violation grave d'une norme impérative est d'empêcher que la validation d'un fait accompli illégal ne se cristallise, dans le temps, en un fait générateur de droit⁶⁴. Elle est fondée sur le principe juridique *ex injuria jus non oritur*, qui signifie qu'un droit ne peut naître d'un fait illicite. Selon ces articles, il est interdit aux États d'accorder à un État transgresseur une reconnaissance qui lui permettrait d'acquérir, entre autres, la souveraineté sur un territoire annexé, ou qui reviendrait à tolérer légalement ses pratiques de discrimination raciale ou d'apartheid ou à accepter légalement, de par le caractère continu de sa violation et de par l'écoulement du temps, son déni du droit des peuples à disposer d'eux-mêmes⁶⁵.

49. L'obligation de ne pas prêter aide ou assistance au maintien d'une violation grave du droit international est fondée sur les principes d'interdépendance et de solidarité qui sous-tendent la Charte des Nations Unies et d'autres obligations en droit

⁵⁹ Convention de Vienne sur le droit des traités, art. 53.

⁶⁰ *Annuaire de la Commission du droit international, 2001*, vol. II, deuxième partie [publication des Nations Unies, numéro de vente : F.04.V.17 (Part 2)], chap. IV, sect. E.2 (Projet d'articles sur la responsabilité de l'État pour fait internationalement illicite et commentaires y relatifs).

⁶¹ *Ibid.*, commentaire sur l'article 40.

⁶² *Ibid.*

⁶³ *Ibid.*, commentaire sur l'article 41.

⁶⁴ Martin Dawidowicz, « The obligation of non-recognition of an unlawful situation », in James Crawford, Alain Pellet et Simon Olleson, dir., *The Law of International Responsibility* (New York, Oxford University Press, 2010).

⁶⁵ Projet d'articles et commentaires y relatifs, commentaire sur l'article 41.

inhérentes à l'ordre international fondé sur des règles⁶⁶. Cette obligation fait que les États doivent refuser individuellement d'offrir toute forme d'appui à l'État contrevenant qui persiste à commettre une violation grave. Les États qui, sciemment, fournissent à l'État contrevenant une assistance qui contribue à la violation commise deviennent eux-mêmes responsables des effets néfastes de leur action⁶⁷. Dans sa résolution 465 (1980), le Conseil de sécurité a chargé la communauté internationale d'appliquer ce principe aux colonies de peuplement israéliennes.

50. L'obligation de coopération créée, pour tous les États, le devoir positif de participer conjointement, au nom de la communauté internationale, à des actions licites visant à mettre fin aux violations graves de l'État contrevenant⁶⁸. Sans entrer dans les détails sur les formes de coopération qui peuvent être requises, l'obligation établit néanmoins le devoir de prendre des mesures collectives en cas de violations graves. Elle s'appuie sur l'obligation de coopération énoncée dans la Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les États conformément à la Charte des Nations Unies, adoptée par l'Assemblée générale dans sa résolution 2625 (XXV), en octobre 1970.

Article 25 de la Charte des Nations Unies

51. L'Article 25 de la Charte des Nations Unies dispose que :

« [l]es Membres de l'Organisation conviennent d'accepter et d'appliquer les décisions du Conseil de sécurité conformément à la [...] Charte ».

L'opinion qui prévaut en ce qui concerne la portée de l'Article 25 est que les résolutions adoptées par le Conseil de sécurité qui comportent une décision, plutôt qu'une simple recommandation, constituent des décisions ayant force obligatoire pour tous les Membres de l'ONU et doivent être respectées et appliquées⁶⁹. Ce caractère contraignant des décisions du Conseil découle du fait que tous les États, en acceptant de devenir Membres de l'Organisation des Nations Unies, ont consenti à être liés par les dispositions de la Charte⁷⁰.

52. L'interprétation judiciaire la plus importante du sens et de la portée de l'Article 25 a été donnée par la Cour internationale de Justice dans son avis consultatif sur la Namibie, de 1971. Dans son commentaire sur l'article 25, la Cour s'est prononcée sur trois grandes questions. Premièrement, elle a rejeté l'argument avancé par le régime d'apartheid de l'Afrique du Sud selon lequel l'Article 25 ne s'appliquait qu'aux cas où une résolution du Conseil de sécurité mentionnait expressément le Chapitre VII (le chapitre de la Charte sur l'action en cas de menace contre la paix ou de rupture de la paix)⁷¹. Dans cette conclusion, elle a confirmé que le Conseil était habilité à prendre des décisions juridiquement contraignantes qui ne concernaient pas le Chapitre VII, ce qui lui permettait de garantir l'efficacité de son action s'agissant de faire respecter toute une série de ses résolutions relatives à un ensemble de crises, de violations du

⁶⁶ Nina H.B. Jørgensen, « The obligation of non-assistance to the responsible State », in Crawford, Pellet et Olleson, dir., *The Law of International Responsibility*.

⁶⁷ Projet d'articles et commentaires y relatifs, commentaire sur l'art 41.

⁶⁸ Nina H.B. Jørgensen, « The obligation of cooperation », in Crawford, Pellet et Olleson, dir., *The Law of International Responsibility*.

⁶⁹ Bruno Simma et al., *The Charter of the United Nations: A Commentary*, 3^e éd. (New York, Oxford University Press), 2013, p. 454.

⁷⁰ Hisahi Owada, « Problems of interaction between the international and domestic legal orders », *Asian Journal of International Law*, vol. 5, n° 2 (juillet 2015).

⁷¹ *Conséquences juridiques pour les États de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971, p. 16, par. 113.*

droit international et d'actes de non-respect de décisions antérieures prises par des organes des Nations Unies.

53. Deuxièmement, dans son avis consultatif sur la Namibie, la Cour a établi un critère juridique viable pour déterminer quand le libellé d'une résolution du Conseil de sécurité constituait une décision et avait, de ce fait, force obligatoire pour les États Membres de l'ONU. Elle a déclaré qu'il fallait soigneusement analyser le libellé d'une résolution du Conseil de sécurité avant de pouvoir conclure à son effet obligatoire, compte tenu :

- Des termes de la résolution à interpréter ;
- Des débats ayant précédé son adoption ;
- Des dispositions de la Charte invoquées ;
- De toutes autres circonstances pertinentes⁷².

Dans son avis consultatif sur la Namibie, la Cour a revu le libellé de la résolution [276 \(1970\)](#) du Conseil sur le mandat, expiré, du régime d'apartheid de l'Afrique du Sud en Namibie. Elle en a conclu que les paragraphes 2 et 5 de la résolution étaient juridiquement obligatoires pour tous les États Membres de l'Organisation des Nations Unies, « qui sont ainsi tenus de les accepter et de les appliquer »⁷³ :

- Au paragraphe 2 de la résolution [276 \(1970\)](#), le Conseil « déclare » que la présence continue de l'Afrique du Sud en Namibie est illégale ;
- Au paragraphe 5, il « demande à tous les États » de s'abstenir de toutes relations avec l'Afrique du Sud qui sont incompatibles avec le paragraphe 2.

Le Rapporteur spécial adopte la position selon laquelle le libellé employé par le Conseil dans une résolution pour faire une déclaration, exiger une action d'un État Membre ou se prononcer sur l'illégalité d'une situation est susceptible de constituer une décision au sens de l'Article 25.

54. Troisièmement, dans son avis consultatif sur la Namibie, la Cour a expressément abordé la question de la responsabilité juridique de la communauté internationale. Elle a déclaré que, lorsque le Conseil de sécurité adopte une décision aux termes de l'Article 25 de la Charte, celle-ci est juridiquement contraignante pour tous les États Membres⁷⁴. La Cour a ensuite développé le devoir de responsabilité de la communauté internationale lorsqu'un organe compétent des Nations Unies constate d'une manière obligatoire qu'une situation est illégale. Elle a jugé que « cette constatation ne peut rester sans conséquence » et que les Membres de l'ONU auraient « une obligation [...] de mettre fin à cette situation ». Elle a poursuivi en déclarant que « [c]ette décision entraîne une conséquence juridique, celle de mettre fin à une situation irrégulière »⁷⁵.

55. Les débats récemment tenus au Conseil de sécurité sur le caractère contraignant de ses résolutions indiquent que certains de ses membres principaux admettent que ces résolutions créent des obligations juridiques pour les États Membres de l'ONU. Lors d'une session extraordinaire du Conseil consacrée au Moyen-Orient, tenue en juillet 2019, le Représentant permanent de l'Allemagne a fait expressément allusion, comme suit, au caractère contraignant des résolutions adoptées par le Conseil sur l'occupation par Israël du territoire palestinien, en particulier de la résolution [2334 \(2016\)](#) :

⁷² Ibid., par. 114.

⁷³ Ibid., par. 115.

⁷⁴ Ibid., par. 116.

⁷⁵ Ibid., par. 117.

« Nous croyons dans les résolutions du Conseil de sécurité ; pour nous, ce sont des dispositions contraignantes du droit international. Comme je l'ai dit, nous croyons en la force du droit international et nous ne croyons pas dans le droit du plus fort. Pour nous, la résolution 2334 (2016) – pour citer la plus récente résolution du Conseil de sécurité – a force de loi et reflète le consensus international. »⁷⁶

56. S'exprimant après le Représentant permanent de l'Allemagne, la Représentante permanente du Royaume-Uni a exprimé en ces termes son accord avec lui sur le caractère contraignant des résolutions du Conseil de sécurité :

« Je voudrais revenir sur une chose qu'a dite le représentant de l'Allemagne concernant le droit international. Nous convenons avec lui que le Conseil de sécurité a la responsabilité du maintien de la paix et de la sécurité internationales et nous reconnaissons tous que le conflit arabo-israélien pose une menace à la paix et à la sécurité internationales. Il est donc normal que nous ayons adopté des résolutions à cet égard. Nous sommes tenus de respecter ces résolutions et de les mettre en œuvre, comme nous le faisons dans d'autres domaines. Cela constitue en effet la base des travaux du Conseil. »⁷⁷

57. De l'avis du Rapporteur spécial, toutes les résolutions du Conseil de sécurité dans lesquelles celui-ci conclut à l'illégalité des colonies de peuplement israéliennes, à l'illégalité de l'annexion israélienne de Jérusalem-Est et au non-respect par Israël des obligations juridiques que lui impose le droit international, ou dans lesquelles il fait des déclarations sur tout aspect de l'occupation israélienne, ont force obligatoire et doivent être respectées par Israël. Le non-respect par Israël de toute décision de ce type fait peser sur tous les autres États Membres la responsabilité de faire respecter ces obligations dans le cadre de la Charte.

B. Occupation du territoire palestinien et impunité d'Israël

58. L'occupation du territoire palestinien par Israël, qui dure depuis plus de 52 ans et peut, de ce fait, être considérée comme la plus longue occupation de guerre du monde moderne, présente deux grandes particularités. Premièrement, elle a été marquée, à de très nombreuses reprises, par de graves violations intentionnelles du droit international, notamment du droit humanitaire et du droit des droits de l'homme. L'annexion d'un territoire occupé, *de jure* ou *de facto*, est illégale (A/73/447, par. 24 à 59). L'implantation de colonies de civils sur un territoire occupé est une violation grave de la quatrième Convention de Genève⁷⁸ et un crime de guerre au sens du Statut de Rome de la Cour pénale internationale⁷⁹. De par son emplacement, sa pérennité et son immuabilité, la construction du mur de séparation dans le Territoire palestinien occupé peut être considérée comme étant contraire au droit international⁸⁰. Comme mentionné dans divers rapports de l'ONU, il est possible qu'Israël ait commis des crimes de guerre dans le cadre de ses opérations militaires menées à Gaza (voir A/HRC/12/48, A/HRC/29/CRP.4 et A/HRC/40/74). L'ONU ainsi que des défenseurs

⁷⁶ Heusgen, déclaration faite lors du débat public du Conseil de sécurité consacré au Moyen-Orient.

⁷⁷ Karen Pierce, Représentante permanente du Royaume-Uni auprès de l'Organisation des Nations Unies, « Political and economic progress in Israel and the Occupied Palestinian Territories », allocution prononcée lors de la séance d'information du Conseil de sécurité consacrée à la situation au Moyen-Orient, le 23 juillet 2019.

⁷⁸ Quatrième Convention de Genève, art. 49 et Protocole additionnel, art. 85 4) a).

⁷⁹ Statut de Rome de la Cour pénale internationale, art. 8 2) b) viii).

⁸⁰ *Conséquences juridiques de l'édification d'un mur dans le Territoire palestinien occupé, Recueil des arrêts, avis consultatifs et ordonnances de la Cour internationale de Justice, 2004*, p. 136, par. 142.

internationaux, israéliens et palestiniens des droits de la personne ont par ailleurs fait état, informations crédibles à l'appui, de nombreuses violations systématiques de ces droits (voir [A/HRC/40/43](#)). Le Rapporteur spécial a déjà fait savoir par le passé que, du fait des violations flagrantes des principes fondamentaux du droit moderne de l'occupation qui avaient été commises, l'occupation elle-même était devenue illégale (voir [A/72/556](#)).

59. Deuxièmement, la communauté internationale se montre très réticente à l'idée de prendre de véritables sanctions à l'encontre d'Israël pour son occupation permanente du territoire palestinien et les graves violations du droit international dont il est l'auteur. En dépit des nombreuses résolutions adoptées par divers organes de l'ONU l'exhortant à renoncer à l'occupation, à mettre fin à ses activités de colonisation, à annuler l'annexion de Jérusalem-Est, à respecter toutes les obligations qui lui incombent en matière de droits de la personne, à enquêter sur les crimes de guerre présumés, à faciliter le retour des réfugiés palestiniens dans leurs foyers et à cesser d'entraver le droit à l'autodétermination du peuple palestinien, l'État d'Israël refuse encore et toujours de se plier à ces directives émanant de la communauté internationale. Il a en effet bien compris que la communauté des nations – en particulier celle des pays industrialisés occidentaux – n'avait pas la volonté politique de mettre fin à son impunité et que son comportement agressif n'entraînait que rarement de véritables conséquences. Comme le rapporte le journaliste israélien Gideon Levy, aucun pays ne dépend autant du soutien de la communauté internationale qu'Israël qui, pourtant, se permet de défier le monde comme peu osent le faire⁸¹.

Résolutions du Conseil de sécurité

60. L'occupation du territoire palestinien par Israël va directement à l'encontre d'un certain nombre de résolutions et de décisions du Conseil de sécurité.

61. **Jérusalem-Est.** En août 1980, le Conseil de sécurité a considéré, dans sa résolution [478 \(1980\)](#), que l'annexion *de jure* de Jérusalem-Est par Israël cette année-là était nulle et non avenue et devait être rapportée immédiatement. Il a ainsi décidé de ne pas reconnaître la loi fondamentale et les autres actions d'Israël qui, du fait de cette loi, cherchaient à modifier le caractère et le statut de Jérusalem. En décembre 2016, le Conseil a réaffirmé les dispositions de cette résolution en adoptant sa résolution [2334 \(2016\)](#). Pourtant, près de quarante ans après l'adoption de la résolution [478 \(1980\)](#), Israël continue d'en violer les dispositions et poursuit de plus belle son occupation et son annexion de Jérusalem-Est.

62. **Colonies de peuplement.** Le Conseil de sécurité a affirmé, dans ses résolutions [446 \(1979\)](#), [452 \(1979\)](#) et [465 \(1980\)](#), que la construction de colonies de peuplement par Israël était contraire au droit international. Dans sa résolution [2334 \(2016\)](#), il a par la suite ajouté que celles-ci constituaient une violation flagrante du droit international et de nouveau exigé d'Israël qu'il arrête immédiatement et complètement toutes ses activités de peuplement dans le Territoire palestinien occupé, y compris Jérusalem-Est, et respecte pleinement toutes les obligations juridiques qui lui incombent à cet égard. Auparavant, en 2013, la mission internationale indépendante d'établissement des faits nommée par le Conseil des droits de l'homme pour étudier les effets des colonies de peuplement israéliennes avait constaté que,

« malgré toutes les résolutions pertinentes de l'Organisation des Nations Unies dénonçant le caractère illégal des colonies de peuplement et demandant la cessation des activités de peuplement israéliennes et de la planification de

⁸¹ Gideon Levy, « Netanyahu's right: the occupation can actually go on forever », Haaretz, 25 septembre 2016.

travaux de construction et d'expansion des colonies, ces dernières continuaient d'exister tandis que de nouvelles structures étaient créées » (A/HRC/22/63, par. 100).

Dans chacun des trois derniers rapports trimestriels qu'il a présentés au Conseil concernant la mise en œuvre de la résolution 2334 (2016), le Coordonnateur spécial des Nations Unies pour le processus de paix au Moyen-Orient et Représentant personnel du Secrétaire général auprès de l'Organisation de libération de la Palestine et de l'Autorité palestinienne a déclaré, s'agissant de l'exigence faite par le Conseil à Israël d'arrêter toutes ses activités de peuplement, qu'aucune mesure n'avait été prise dans ce sens au cours de la période considérée. Il a indiqué, comme il l'avait déjà fait par le passé, que le Gouvernement israélien avait au contraire continué d'annoncer d'importants plans de construction de logements dans les colonies et le lancement de chantiers⁸². En 1983, on comptait 99 000 colons israéliens en Cisjordanie et à Jérusalem-Est⁸³ ; aujourd'hui, ceux-ci sont au nombre de 650 000, soit une augmentation de plus de 550 %⁸⁴.

63. **Annexion.** Le Conseil de sécurité a rappelé à au moins huit reprises – y compris, et ce pour la dernière fois, dans sa résolution 2334 (2016) – la règle juridique selon laquelle l'acquisition de territoires par la force était inadmissible. Bien que le Conseil ait qualifié d'illégale l'annexion par Israël de Jérusalem-Est, en 1980, et du plateau du Golan syrien, en 1981, force est de constater que le pays n'a pas renoncé à ces annexions *de jure* et que rien ni personne n'a empêché ses dirigeants politiques d'intensifier l'annexion *de facto* de la Cisjordanie par la confiscation continue de terres et la poursuite d'une colonisation tous azimuts. Les dirigeants politiques israéliens continuent en outre d'exprimer régulièrement leur adhésion à l'annexion officielle de tout ou partie de la Cisjordanie (A/73/447, par. 58). En septembre 2019, le Premier ministre israélien, Benjamin Nétanyahou, a annoncé qu'en cas de retour au pouvoir, son gouvernement annexerait la vallée du Jourdain et d'autres « espaces vitaux »⁸⁵.

64. **Non-respect des règles par Israël, Puissance occupante.** En 1980, le Conseil de sécurité a réaffirmé, dans sa résolution 476 (1980), la nécessité impérieuse de mettre fin à l'occupation prolongée des territoires arabes occupés par Israël depuis 1967 et déploré vivement le refus continu d'Israël, Puissance occupante, de respecter ses résolutions pertinentes ainsi que celles de l'Assemblée générale. Deux mois plus tard, dans sa résolution 478 (1980), il a noté qu'Israël ne s'était pas conformé à la résolution 476 (1980) et réaffirmé sa détermination d'examiner, en application des dispositions pertinentes de la Charte des Nations Unies, des moyens pratiques en vue d'assurer l'application intégrale de sa résolution 476 (1980) au cas où Israël ne s'y conformerait pas. Près de quarante ans plus tard, Israël continue d'afficher le même mépris à l'égard du Conseil de sécurité, alors que rien n'est fait pour mettre un terme

⁸² Nickolay Mladenov, Coordonnateur spécial des Nations Unies pour le processus de paix au Moyen-Orient, propos tenus lors de la séance d'information du Conseil de sécurité sur la situation au Moyen-Orient, le 20 juin 2019, et Nickolay Mladenov, Coordonnateur spécial des Nations Unies pour le processus de paix au Moyen-Orient, propos tenus lors de la séance d'information du Conseil de sécurité sur l'application de la résolution 2334 (2016), le 20 septembre 2019.

⁸³ Foundation for Middle East Peace, « Comprehensive settlement population, 1972–2011 », disponible à l'adresse suivante : <https://fmep.org/resource/comprehensive-settlement-population-1972-2010/>.

⁸⁴ Peace Now, « Population », base de données « Settlement Watch », disponible à l'adresse suivante : <https://peacenow.org.il/en/settlements-watch/settlements-data/population> ; Peace Now, « Jerusalem », base de données « Settlement Watch », disponible à l'adresse suivante : <https://peacenow.org.il/en/settlements-watch/settlementsdata/jerusalem>.

⁸⁵ *Times of Israel*, « Netanyahu: after Jordan Valley and settlements, I'll annex other 'vital areas' », 16 septembre 2019.

aux violations continues du droit international dont il est l'auteur et que les appels et avertissements diplomatiques qui lui sont adressés en vue de mettre fin à l'occupation demeurent purement et simplement ignorés.

Obligation de rendre compte

65. L'ONU a demandé à de multiples occasions que la communauté internationale veille à faire appliquer le principe de responsabilité et mette fin au climat d'impunité entourant l'occupation israélienne.

66. Dans quatre grands rapports indépendants établis depuis 2009 à la demande du Conseil des droits de l'homme, il est invariablement question des graves violations du droit des droits de l'homme et du droit humanitaire commises par Israël, de la nécessité de faire répondre Israël de ses actes et de la notion d'exceptionnalisme s'appliquant à ce pays⁸⁶. Dans le rapport sur le conflit de Gaza pour 2008 et 2009, on a ainsi expliqué que la justice et le respect de l'état de droit constituaient le fondement indispensable de la paix et que la situation d'impunité qui perdurait avait créé dans le Territoire palestinien occupé une crise de la justice exigeant l'adoption des mesures voulues (A/HRC/12/48, par. 1958). Par ailleurs, dans son rapport de 2013 sur les effets des colonies de peuplement israéliennes, la mission internationale indépendante d'établissement des faits a exhorté Israël à garantir l'établissement de toutes les responsabilités s'agissant de l'ensemble des violations et à mettre fin à la politique d'impunité (A/HRC/22/63, par. 114), tandis que les auteurs du rapport établi au sujet du conflit, en 2014, se sont inquiétés de l'impunité totale dont jouissaient les forces israéliennes pour les violations du droit international humanitaire et du droit international des droits de l'homme qu'elles auraient commises et ont indiqué qu'Israël devait obliger les auteurs de violations à rendre compte de leurs actes, coupant ainsi court à la déplorable tendance observée récemment en la matière (A/HRC/29/CRP.4, par. 664). Enfin, on peut voir, dans le rapport de 2019 sur les manifestations survenues à Gaza en 2018, qu'à ce jour, le Gouvernement israélien n'a jamais mené de véritable enquête sur les crimes et violations commis contre des Palestiniens ni poursuivi de commandants ou de soldats, et que l'insuffisance des mesures d'établissement des responsabilités prises à la suite des opérations « Plomb durci » et « Bordure protectrice » jettent le doute quant à la volonté de l'État de contrôler les actions des dirigeants militaires et civils (A/HRC/40/74, par. 111).

67. Ces dernières années, tant l'Assemblée générale que le Conseil des droits de l'homme ont davantage insisté sur la nécessité de veiller à ce qu'Israël, Puissance occupante, soit astreint à rendre des comptes. Ainsi, dans une de ses résolutions relatives aux colonies de peuplement israéliennes, l'Assemblée a demandé que l'on envisage de prendre des mesures de responsabilisation, comme le prescrivait le droit international, étant donné que les exigences en vue d'un arrêt immédiat et complet de toutes les activités de peuplement n'avaient pas été satisfaites par Israël (résolution 73/98 de l'Assemblée générale, par. 6). De même, en mars 2019, le Conseil des droits de l'homme a fait part de son inquiétude et souligné la nécessité pour les États d'enquêter sur les violations graves des Conventions de Genève de 1949 et d'autres violations graves du droit international humanitaire et d'engager des poursuites afin de mettre un terme à l'impunité, de s'acquitter de l'obligation qui leur incombait d'assurer le respect de ces instruments et de promouvoir l'obligation de rendre des comptes sur le plan international (voir la résolution 40/13 du Conseil des droits de l'homme).

⁸⁶ Alessandro Tonutti, *International Commissions of Inquiry and Palestine: Overview and Impact – Study Analysis* (Ramallah, Al-Haq Centre for Applied International Law, 2016).

68. L'impunité dont jouit Israël et le fait que cet État puisse poursuivre son occupation sans être inquiété ont aussi suscité des réactions de la part du Secrétaire général. Ainsi, en 2010, Ban Ki-Moon, alors à la tête de l'ONU, a déclaré que

l'inexistence de progrès significatifs sur la voie d'un règlement politique et la poursuite des violations du droit international des droits de l'homme et du droit international humanitaire étaient aggravées par l'impunité entourant les violations commises par le passé et que les parties devaient placer la lutte contre l'impunité en tête de leurs priorités (A/71/364, par. 6).

69. La non-application du principe de responsabilité est également au cœur des préoccupations du Haut-Commissariat des Nations Unies aux droits de l'homme. Dans un rapport détaillé sur l'établissement des responsabilités publié en juin 2017 (A/HRC/35/19), le Haut-Commissaire de l'époque, Zeid Ra'ad Al Hussein, a examiné 551 recommandations formulées depuis 2009 par les mécanismes compétents du Conseil des droits de l'homme pour déterminer dans quelle mesure Israël respectait les obligations lui incombant en matière de droits de la personne dans le Territoire palestinien occupé. Il a ainsi constaté que, sur les 178 recommandations relatives à l'établissement de responsabilités et à l'accès à la justice, Israël en avait appliqué deux complètement et huit partiellement, les 168 (90 %) restantes n'ayant quant à elles pas du tout été suivies. Dans le même ordre d'idées, il s'est aperçu que 91 % des recommandations relatives à l'arrestation et à la détention de Palestiniens (pour 8 % de recommandations appliquées partiellement), 100 % de celles portant sur les colonies de peuplement et 97 % de celles ayant trait à la liberté de circulation n'avaient pas non plus été appliquées. Au total, Israël avait donc pleinement mis en œuvre moins de 0,5 % des recommandations relatives aux droits de l'homme qui lui avaient été adressées. Dans ses conclusions, le Haut-Commissaire a rappelé à la communauté internationale que l'ensemble des parties prenantes devaient reconnaître que l'observation du droit international était une condition *sine qua non* de la paix (ibid., par. 81).

70. Dans un rapport sur l'établissement des responsabilités publié en mars 2019 (A/HRC/40/43), la Haute-Commissaire actuelle, Michelle Bachelet, a décrit en détail le climat d'impunité caractérisant depuis longtemps l'occupation israélienne.

- S'agissant de l'escalade des hostilités à Gaza en 2014, elle a par exemple appelé l'attention sur le nombre d'affaires classées par le Procureur général militaire d'Israël sans avoir fait l'objet d'une enquête pénale alors qu'elles concernaient de graves allégations de violations du droit international et qu'il existait un commencement de preuve.
- En ce qui concerne la situation à Gaza en 2018 et en 2019, elle a constaté que les forces de sécurité israéliennes avaient souvent fait un usage excessif de la force, tuant ou blessant un grand nombre de manifestants palestiniens en dehors des hostilités.
- Elle a par ailleurs noté que les défenseurs des droits de l'homme et les acteurs de la société civile étaient souvent victimes d'actes d'intimidation, de menaces et d'arrestations de la part d'Israël.

Dans son rapport, la Haute-Commissaire a évoqué la responsabilité qui incombait à la communauté internationale d'adopter des mesures visant à inciter les États à se conformer au droit international humanitaire et conclu que le non-établissement des responsabilités compromettrait les possibilités d'instaurer durablement la paix et la sécurité et que les parties devaient placer la lutte contre l'impunité en tête de leurs priorités (ibid., par. 54).

71. Paradoxalement, l'absence d'obligation de rendre compte est aussi frappante que tragique. Si la communauté internationale a, à d'innombrables occasions et avec beaucoup de discernement, voté en faveur de résolutions dans lesquelles diverses instances des Nations Unies reconnaissaient le non-établissement des responsabilités d'Israël et l'impunité dont celui-ci bénéficiait depuis une cinquantaine d'années ou accepté des rapports publics émanant de commissions d'enquête indépendantes et de hauts fonctionnaires de l'ONU allant dans le même sens, elle a par ailleurs fait preuve d'une indolence extraordinaire lorsqu'il s'est agi d'appliquer ses propres lois et décisions et de remplir les obligations que lui imposaient le droit humanitaire et ses précédents politiques. On est donc en droit de se demander s'il nous faut tout simplement accepter que, dans le cas de l'occupation de la Palestine par Israël, le droit international soit davantage du côté du pouvoir que de celui de la justice.

C. Des contre-mesures pour remédier à l'impunité

72. En politique internationale et dans la diplomatie, les contre-mesures sont couramment utilisées pour contraindre, par des voies légitimes et efficaces, les organisations et les États récalcitrants à se plier au droit international et à mettre un terme à des actions qui causent un dommage significatif à des tiers. Le recours à des contre-mesures vise à mettre fin à un fait illicite survenu antérieurement, celles-ci ne devant pas être envisagées comme une forme de châtement ou de répression d'un comportement illicite. Les contre-mesures doivent cibler l'État offensé, être réversibles sous réserve que l'État en question adopte un changement de comportement notable, respecter la Charte des Nations Unies (y compris toutes les obligations découlant du droit humanitaire et du droit des droits de l'homme) et être proportionnées et efficaces⁸⁷. Face à une violation grave, par un État ou une organisation, d'une obligation due à la communauté internationale, les autres États ont non seulement le droit mais aussi l'obligation de prendre des contre-mesures. On entend, notamment, par « violations graves » les atteintes aux normes impératives du droit international, y compris les violations graves du droit international humanitaire, qui sont légion dans le Territoire palestinien occupé.

73. Parmi les contre-mesures couramment mises en œuvre dans le monde moderne, on peut citer : a) les démarches diplomatiques et les déclarations publiques ; b) les sanctions diplomatiques ; c) les sanctions commerciales ; d) la réduction ou l'interruption de la coopération et de l'aide fournie ; e) les sanctions financières et économiques ; f) les interdictions de vol ; g) l'application d'embargos sur les armes ; h) la restriction des déplacements. Ces dernières années, des contre-mesures ont été adoptées pour promouvoir la démocratie et les droits de la personne, faire avancer l'État de droit, lutter contre les annexions et les agressions, combattre le terrorisme, faire face aux menaces contre la paix et la sécurité internationales, remédier aux crises humanitaires graves, protéger les minorités vulnérables et mettre fin aux conflits et aux guerres civiles.

74. D'après les spécialistes de la question, les contre-mesures et les sanctions répondent à trois objectifs principaux, à savoir : a) contraindre une organisation ou un État à modifier son comportement ; b) empêcher une organisation ou un État de se livrer à une activité interdite ; c) appeler l'attention sur une organisation ou un État pour ses violations des lois ou normes internationales. Il est par ailleurs

⁸⁷ Voir Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (New York, Cambridge University Press, 2007).

particulièrement important de tenir compte, dans leur application, des critères ci-après⁸⁸ :

- **Les contre-mesures et les sanctions sont extrêmement efficaces lorsque les parties entretiennent une relation cordiale ou un partenariat commercial étroit.** En effet, celles-ci ont plus à perdre que si leurs relations étaient distantes ou conflictuelles, ce qui explique que les États faisant partie d'une vaste alliance sont plus enclins à céder devant leurs alliés, dans l'intérêt supérieur de leur relation.
- **Les contre-mesures sont plus efficaces sur les démocraties que sur les autocraties.** Les dirigeants démocratiques sont obligés de se soucier de l'opinion de la population et des institutions nationales indépendantes, qui accordent souvent une grande valeur à la qualité des relations internationales.
- **Plus les retombées sont grandes, plus la sanction est efficace.** Si un véritable changement de comportement est le but recherché, les contre-mesures et les sanctions entraînant des coûts économiques élevés sont les plus efficaces. Des sanctions de moindre portée peuvent également être utilisées à titre de mise en garde, mais il faudra en élargir rapidement la portée si elles n'entraînent pas une modification du comportement répréhensible.
- **Si une bonne coopération internationale est importante, elle n'est pas forcément gage de succès.** La participation d'une organisation internationale dont l'alliance de pays concernée et l'État fautif sont membres augmente les chances de succès.
- **Il est essentiel de choisir des contre-mesures appropriées.** Toutes les sanctions ne sont pas adaptées à n'importe quelle situation. Ainsi, la clé du succès est de repérer les faiblesses de l'organisation ou de l'état visé.
- **L'objectif des sanctions doit être clair.** Cette condition permet de s'assurer un meilleur soutien du public, de préciser les contre-mesures à utiliser et d'expliquer quand l'objectif recherché a été atteint ou quand un changement de cap doit être opéré.

75. Dans ses commentaires de 2016 sur les Conventions de Genève, le Comité international de la Croix-Rouge a recensé une série de mesures non exhaustives pouvant être prises, individuellement ou collectivement, par les Hautes Parties contractantes pour faire respecter le droit international humanitaire⁸⁹ :

- Aborder les questions de respect des obligations dans le cadre d'un dialogue diplomatique ;
- Exercer des pressions diplomatiques au moyen de protestations confidentielles ou de dénonciations publiques ;
- Subordonner les opérations conjointes au respect par un partenaire de la coalition des obligations qui lui incombent en vertu des Conventions ou prévoir des opérations conjointes visant à prévenir les violations de ces obligations ;
- Intervenir directement auprès des commandants en cas de violation, par exemple une attaque illégale imminente contre des civils, commise par un partenaire de la coalition ;

⁸⁸ Gary Clyde Hufbauer et consorts, *Economic Sanctions Reconsidered*, 3^e éd. (Washington, D.C., Peterson Institute for International Economics, 2007).

⁸⁹ Voir https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD#_Toc452378926, par. 181.

- Renvoyer, le cas échéant, une situation à la Commission internationale humanitaire d'établissement des faits ;
- Demander la tenue d'une réunion des Hautes Parties contractantes ;
- Appliquer des mesures de rétorsion, telles que l'arrêt de négociations en cours ou le refus de ratifier des accords déjà signés, le non-renouvellement de privilèges commerciaux et la réduction ou la suspension de l'aide publique volontaire ;
- Adopter des contre-mesures légales telles que des embargos sur les armes, des restrictions commerciales et financières, des interdictions de vol et une réduction ou une interruption de l'aide fournie et des accords de coopération ;
- Encadrer, restreindre ou interrompre les transferts d'armes ;
- Renvoyer la question à une instance internationale compétente, telle que le Conseil de sécurité ou l'Assemblée générale ;
- Renvoyer, dans la mesure du possible, certains problèmes spécifiques à la Cour internationale de Justice ou à un autre organe de règlement des différends ;
- Avoir recours à des mesures pénales pour réprimer les violations du droit humanitaire ;
- Appuyer l'action engagée aux niveaux national et international en vue de traduire en justice les auteurs présumés de violations graves du droit international humanitaire.

76. Il reste beaucoup à dire sur la gamme de contre-mesures dont dispose la communauté internationale pour faire appliquer efficacement le principe de responsabilité et mettre fin à l'impunité en ce qui concerne l'occupation du territoire palestinien par Israël, le Rapporteur spécial se réservant, au demeurant, la possibilité de s'attarder sur cette question dans un prochain rapport. On peut néanmoins faire remarquer à ce stade que la communauté internationale est particulièrement bien équipée pour trouver une solution positive, durable et juste à l'occupation – laquelle qui ne prendra fin que si la communauté internationale agit résolument, en défense du droit international et de ses valeurs communes, pour contraindre Israël à s'acquitter de ses obligations. Comme l'a déclaré Hagai El-Ad, directeur exécutif de B'Tselem (importante organisation israélienne de défense des droits de l'homme), au Conseil de sécurité en 2016, Israël ne va pas se réveiller un jour et, prenant conscience de la brutalité de sa politique, abandonner son régime d'oppression : la communauté internationale doit intervenir⁹⁰.

IV. Conclusion

77. Dans le monde moderne, jamais une occupation n'a-t-elle été menée de la sorte, face à une communauté internationale pleinement consciente des nombreuses violations graves du droit international commises, parfaitement au fait de l'intention manifeste et déclarée de l'occupant d'annexer un territoire et d'y établir sa souveraineté permanente, et particulièrement informée de l'ampleur des souffrances et des dépossessions infligées à une population protégée vivant sous occupation, mais si peu disposée à user des outils juridiques et politiques concrets et nombreux dont

⁹⁰ Hagai El-Ad, directeur exécutif de B'Tselem, déclaration faite au Conseil de sécurité, le 18 octobre 2018.

elle dispose pour faire cesser une injustice dont les preuves, écrasantes, ne manquent pourtant pas.

78. Si la communauté internationale prenait au sérieux les responsabilités juridiques qui lui incombent de condamner et de faire cesser tout fait internationalement illicite, elle aurait depuis longtemps conclu qu'Israël, Puissance occupante, ne cherche pas réellement à mettre un terme à l'occupation. Elle aurait tiré les vraies leçons des nombreuses résolutions, jamais appliquées, du Conseil de sécurité et de l'Assemblée générale, de la durée excessive de l'occupation, des innombrables preuves recueillies sur le terrain et des cycles de négociations inutiles. Elle aurait reconnu que cette occupation et cette annexion n'en finiraient jamais sans une intervention décisive de sa part, en raison du déséquilibre flagrant du rapport de forces présent sur le terrain. Elle accepterait que son devoir n'est pas de superviser l'occupation, mais d'y mettre fin. Elle prendrait les mesures raisonnables et nécessaires pour dresser collectivement une liste de contre-mesures efficaces, proportionnées et adaptées aux circonstances et, en cas d'obstination de la Puissance occupante, appliquerait et intensifierait ces contre-mesures jusqu'à ce que celle-ci s'acquitte de ses obligations. Enfin, elle noterait que la prise de mesures fermes et sa détermination à faire respecter le principe de responsabilité dans ce cas précis décourageraient fortement les vellétés d'occupation de tout autre État, qui s'exposerait, lui aussi, à être rappelé à l'ordre.

V. Recommandations

79. **Le Rapporteur spécial recommande que le Gouvernement israélien s'acquitte pleinement des obligations qui lui incombent au titre du droit international, mette fin à ses 52 années d'occupation dans un délai raisonnable et permette la réalisation du droit à l'autodétermination du peuple palestinien.**

80. **Le Rapporteur spécial recommande que la communauté internationale :**

a) **Prenne, conformément à l'article premier commun aux Conventions de Genève, aux articles sur la responsabilité des États pour fait internationalement illicite et à l'Article 25 de la Charte des Nations Unies, toutes les mesures nécessaires, y compris des contre-mesures et des sanctions, pour garantir le respect par Israël et toutes les autres parties concernées de l'obligation de mettre fin à l'occupation qui leur incombe en vertu du droit international ;**

b) **S'efforce de faire respecter par Israël les normes internationales auxquelles tous les États sont tenus de se conformer ;**

c) **Veille à ce que les personnalités politiques et les militaires israéliens qui sont responsables de violations graves du droit international dans le Territoire palestinien occupé aient à rendre pleinement compte de leurs actes ;**

d) **Adopte la recommandation formulée, en juin 2017, par le Haut-Commissaire aux droits de l'homme de l'époque, tendant à ce que l'Assemblée générale use des pouvoirs que lui confère l'alinéa a) de l'Article 96 de la Charte des Nations Unies pour demander un avis consultatif à la Cour internationale de Justice sur l'obligation juridique d'Israël de mettre fin à l'occupation et sur les obligations juridiques de la communauté internationale et les pouvoirs dont celle-ci dispose pour obliger Israël à répondre de ses actes et en finir avec son impunité ;**

e) **Fasse réaliser une étude des Nations Unies sur la licéité de l'annexion et de la poursuite de l'occupation du territoire palestinien par Israël.**



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Promotion et protection des droits de l'homme :
situations relatives aux droits de l'homme et rapports
des rapporteurs et représentants spéciaux

Situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967*

Note du Secrétaire général

Le Secrétaire général a l'honneur de transmettre à l'Assemblée générale le rapport présenté par le Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Michael Lynk, conformément à la résolution 5/1 du Conseil des droits de l'homme.

* Le présent rapport a été soumis après la date limite, afin de prendre en compte l'évolution récente de la situation.



Rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Michael Lynk

Résumé

Le présent rapport est le cinquième soumis à l'Assemblée générale par Michael Lynk, Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967. Il a été établi principalement à partir d'informations communiquées par des victimes, des témoins, des représentants de la société civile et des organismes des Nations Unies. Il analyse un certain nombre de problèmes touchant à la situation des droits de l'homme en Cisjordanie, y compris à Jérusalem-Est, et à Gaza, et est le deuxième rapport à porter tout particulièrement sur les questions de responsabilité.

I. Introduction

1. Dans le présent rapport, le Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967 donne un bref aperçu des préoccupations qui lui sont apparues, à l'issue de ses conversations et rencontres avec des représentants de la société civile, comme étant les plus pressantes en matière de droits de l'homme dans le territoire palestinien occupé au moment de la présentation du rapport. Il fait ensuite une analyse détaillée des derniers problèmes en date touchant les droits de l'homme dans le territoire palestinien occupé, en mettant tout particulièrement l'accent sur le principe de responsabilité.

2. Le Rapporteur spécial tient à souligner une fois de plus que, malgré ses demandes répétées, il n'a pas encore été autorisé par Israël à accéder au territoire palestinien occupé. Il fait à nouveau valoir qu'un libre dialogue entre toutes les parties est essentiel à la protection et à la promotion des droits de l'homme et rappelle à Israël qu'il est tout disposé à y participer. Il continue par ailleurs de faire remarquer que l'accès au territoire palestinien occupé est déterminant pour comprendre la réalité de la situation des droits de l'homme dans le territoire. Le défaut systématique de coopération d'Israël avec le Rapporteur spécial est très préoccupant.

3. Le Rapporteur spécial n'a pas pu se rendre dans la région, y compris à Amman, en raison des restrictions de voyage liées à la propagation de la maladie à coronavirus (COVID-19). Toutefois, il a pu communiquer activement avec des membres de la société civile et des organismes des Nations Unies et recueillir des informations importantes sur le sujet, soumises notamment sous la forme de communications.

4. Dans le présent rapport, le Rapporteur spécial se concentre sur deux questions. Tout d'abord, il passe en revue les responsabilités qui incombent au Conseil de sécurité s'agissant de faire respecter les décisions qu'il prend et des directives qu'il donne sur l'occupation israélienne. Il évalue ensuite la responsabilité des entreprises privées qui mènent des activités dans les colonies israéliennes ou tirent profit de l'occupation israélienne, que ce soit directement ou indirectement.

5. Le Rapporteur spécial souhaite remercier le Gouvernement de l'État de Palestine d'avoir pleinement coopéré avec lui dans le cadre de son mandat.

6. Le Rapporteur spécial réitère son soutien au travail essentiel qu'accomplissent les organisations palestiniennes, israéliennes et internationales de défense des droits de l'homme. Ce travail est indispensable non seulement au Rapporteur dans l'accomplissement de son mandat, mais aussi à la communauté internationale dans son ensemble. Les efforts que les organisations de défense des droits de l'homme déploient pour garantir la disponibilité d'informations précises et complètes sur la situation dans le territoire palestinien occupé ne doivent pas passer inaperçus.

II. Situation actuelle des droits de l'homme

A. Incidences de la COVID-19

7. La propagation de la pandémie de COVID-19 dans le territoire palestinien occupé a accentué certaines des répercussions négatives durables de l'occupation israélienne. À certains égards, elle a encore plus mis en évidence les lacunes structurelles constatées dans certains secteurs essentiels, notamment le secteur de la santé en Cisjordanie et à Gaza, en raison des pratiques israéliennes adoptées sur le terrain. Elle a également clairement montré qu'en période de grave crise sanitaire traversant les frontières et touchant toutes les populations, un régime d'occupation à deux vitesses renforçait les inégalités en matière de droits et en particulier de droit à

une santé adéquate. Malgré les conditions sur le terrain, dans la phase initiale de la pandémie, plus précisément aux mois de mars et d'avril 2020, les responsables concernés ont appliqué des mesures préventives strictes qui ont permis de freiner efficacement la propagation du virus. À l'époque, l'Autorité palestinienne et Israël ont fait preuve d'une certaine coordination, bien qu'elle n'ait été que de courte durée¹. Toutefois, on observe une augmentation exponentielle du nombre de cas depuis la fin juin, date à laquelle on ne comptait que 2 765 cas confirmés au total². Le 13 octobre, le nombre total de cas confirmés atteignait 52 292 en Cisjordanie et 4 175 à Gaza.

8. Cette augmentation exponentielle a mis à rude épreuve un secteur de la santé déjà affaibli et surchargé, en particulier à Gaza. Cette tension supplémentaire a de surcroît été aggravée par la suspension, le 19 mai, de la coordination de l'Autorité palestinienne et d'Israël en matière de sécurité, qui a fait suite à l'annonce par Israël de son projet d'annexion de certaines parties de la Cisjordanie et de la vallée du Jourdain³. Cette situation a considérablement nui à l'accès des Palestiniens aux soins de santé, et a dans l'ensemble réduit l'aide humanitaire apportée et fait baisser les revenus mensuels de l'Autorité palestinienne de plus de 80 %, limitant gravement sa capacité à payer ses employés, en particulier le personnel de santé. Israël a retenu les recettes fiscales de l'Autorité palestinienne à de nombreuses reprises dans le passé. Depuis décembre 2019, ces recettes sont à nouveau retenues. Dans son exposé au Conseil de sécurité, le Coordonnateur spécial des Nations Unies pour le processus de paix au Moyen-Orient a indiqué qu'il était également préoccupé par le fait que le niveau de coordination soit largement en deçà de celui qui existait au début de l'année, lorsque la première vague du virus a déferlé, car cela pourrait avoir de graves conséquences sur la capacité à maîtriser la propagation du virus et à atténuer son incidence sur la vie des personnes (voir S/2020/736, annexe 1).

9. Au-delà des conséquences de cette suspension, les données recueillies sur le terrain démontrent qu'en imposant un certain nombre de mesures, Israël, Puissance occupante, a considérablement réduit l'accès des Palestiniens aux soins de santé et à l'aide humanitaire. Ces mesures comprennent la mise en place d'une vaste infrastructure de colonisation dotée de zones de sécurité et de routes de contournement, du mur de séparation, de politiques d'aménagement et d'un vaste réseau de points de contrôle fixes et mobiles qui divisent de fait la Cisjordanie en zones séparées, fragmentées et déconnectées. S'agissant de l'accès à des soins de santé adéquats, et notamment à des hôpitaux mieux équipés et plus spécialisés, les Palestiniens continuent de faire face à des restrictions de mouvement non seulement en Cisjordanie mais aussi lorsqu'ils tentent de recevoir des soins à Jérusalem-Est. En outre, des retards continuent d'être signalés en ce qui concerne la réception de matériel médical vital, notamment les kits de dépistage et autres équipements nécessaires à la prévention⁴.

10. Le contrôle qu'Israël continue d'exercer sur le maintien de l'ordre, les politiques d'urbanisme et la reconstruction dans la zone C, qui représente plus de 60 % de la Cisjordanie occupée, a également entravé les efforts déployés pour lutter contre la pandémie. Les Palestiniens vivant dans la zone C, dont le nombre est actuellement estimé à près de 300 000, font face à des complications supplémentaires pour accéder à des soins de santé adéquats. On empêche ainsi les Palestiniens de prendre des

¹ Voir : <https://www.un.org/press/fr/2020/sc14167.doc.htm>.

² Voir : Organisation mondiale de la Santé, <https://app.powerbi.com/view?r=eyJrJjoiODJlYWM1YTEtNDIxZS00OTFILThkZjktNDAlODY2OGQ3NGJkIiwidCI6ImY2MTBjMG13LWJkMjQlNGZlOS04MTBiLTNkYzI4MGFmYjU5MCIslmMiOj9>.

³ Voir : <https://reliefweb.int/report/occupied-palestinian-territory/end-palestinian-authority-coordination-israel-response>.

⁴ Voir : <https://mondoweiss.net/2020/09/palestinians-faces-consistent-testing-kit-shortages-during-covid-19/>.

initiatives pour freiner la propagation du virus, alors que, bien souvent, les autorités israéliennes compétentes ne leur proposent aucune alternative. Les tentatives menées pour coordonner l'entrée de la police palestinienne dans la zone H2 à Hébron et ainsi renforcer les mesures de prévention avec les Palestiniens qui y vivent ont jusqu'à présent échoué. Une dynamique similaire a pu être observée à Jérusalem-Est. En avril, les forces de sécurité israéliennes ont fait une descente dans une clinique de test COVID-19 dans le quartier palestinien de Silwan sous prétexte qu'elle était gérée et soutenue par l'Autorité palestinienne⁵. Alors que les taux d'infection étaient en nette augmentation pendant cette période, les Palestiniens de Jérusalem-Est n'avaient pas un accès adéquat aux installations médicales, aux services de santé et aux kits de dépistage. Le fait qu'Israël ne fournisse pas de données agrégées sur les cas de contamination entrave également l'action menée contre la pandémie. Depuis lors, les autorités israéliennes ont ouvert un autre centre dans le quartier. Avec la récente augmentation du nombre de cas, les activités des professionnels de la santé à Jérusalem-Est restent soumises à de sévères restrictions, la Puissance occupante continuant de saper les efforts de développement sanitaire.

11. Un autre élément inquiétant est l'augmentation du taux de contamination parmi les Palestiniens placés dans les centres de détention israéliens, un enfant ayant notamment été atteint⁶. En avril, le Rapporteur spécial avait demandé la libération des détenus les plus vulnérables, notamment les enfants, les femmes, les personnes âgées et les personnes présentant des pathologies préexistantes. L'augmentation du nombre de détenus palestiniens contaminés montre à nouveau qu'il est absolument nécessaire de libérer les prisonniers politiques palestiniens ou de leur proposer des conditions de détention permettant d'assurer leur sécurité.

12. Comme les taux de contamination augmentent considérablement dans le territoire palestinien occupé, les incidences des problèmes structurels résultant directement de l'occupation et des pratiques israéliennes pèseront de plus en plus sur la population. L'ensemble complexe de mesures que la Puissance occupante applique dans différentes zones, qui se traduit souvent par des pratiques discriminatoires, ne peut qu'aggraver les répercussions de l'occupation, a fortiori dans le contexte d'une crise sanitaire aussi grave. Même en plein milieu d'une grave pandémie, des démolitions de maisons palestiniennes et des cas de recours excessif à la force continuent d'être enregistrés et ont même augmenté dans certains cas. À la lumière des taux actuellement alarmants de contamination par la COVID-19, il est impératif qu'Israël, en tant que Puissance occupante, mette fin à ces pratiques et assure aux Palestiniens une meilleure protection et un meilleur accès aux services de santé. En l'absence de telles mesures, les Palestiniens, qui font déjà face au fléau de l'occupation, verront inévitablement leurs conditions sanitaires empirer.

B. Projet d'annexion et expansion illégale des colonies par Israël

13. Le 20 avril, dans le cadre d'un accord d'unité, le Premier ministre israélien, Benjamin Nétanyahou, et le chef du parti Bleu Blanc, Benjamin Gantz, ont convenu d'engager officiellement un processus d'annexion de certaines parties de la Cisjordanie et de la vallée du Jourdain⁷. Le projet d'annexion aurait touché un tiers de la Cisjordanie s'il avait été mis en œuvre. Le Rapporteur spécial a souligné qu'en

⁵ Voir : www.middleeastmonitor.com/20200416-israel-closes-coronavirus-testing-centre-in-occupied-east-jerusalem/.

⁶ Voir : www.dci-palestine.org/palestinian_child_detainee_tests_positive_for_coronavirus_in_israeli_prison.

⁷ Voir : <https://www.amnesty.org/fr/latest/news/2020/07/israelopt-10-things-you-need-to-know-about-annexation/>.

plus d'entraîner une cascade de violations des droits de l'homme, toute annexion, même partielle, constituerait une grave violation du droit international et de la Charte des Nations Unies et créerait un dangereux précédent pour l'ordre international, fondé sur des règles⁸. La Haute-Commissaire des Nations Unies aux droits de l'homme, Michelle Bachelet, a également déclaré le 29 juin que l'annexion était illégale et qu'elle aurait des conséquences désastreuses non seulement pour les Palestiniens mais aussi pour Israël lui-même⁹.

14. Si les plans officiels d'annexion semblent avoir été retardés pour le moment, il est impératif de souligner que l'annexion de facto du territoire palestinien par Israël est en cours et s'est intensifiée en 2020, notamment par l'expansion illégale des colonies. Rien qu'en 2020, Israël a approuvé ou avancé la construction de plus de 12 150 logements, le chiffre le plus élevé jamais enregistré depuis 2012, date à laquelle de tels chiffres ont commencé à être enregistrés par Peace Now¹⁰. Plus de 5 000 de ces logements ont été approuvés rien qu'à la mi-octobre. Les colonies et la construction de colonies sont illégales au regard du droit international et constituent l'un des principaux obstacles à la paix. Parallèlement, les démolitions de structures appartenant à des Palestiniens ont augmenté de manière significative au cours de l'année passée. Rien qu'en 2020, plus de 560 structures ont été détruites, entraînant le déplacement de 747 Palestiniens¹¹. Le Rapporteur spécial souligne que, s'il est important de contrer les plans officiels d'annexion israéliens, il est également impératif de contrer toutes les mesures qu'Israël met en œuvre sur le terrain au vu et au su de la communauté internationale et qui équivalent à une annexion de facto et conduisent à de graves violations des droits humains des Palestiniens au quotidien.

C. Gaza

15. Le blocus terrestre, maritime et aérien qu'Israël impose à Gaza est entré dans sa quatorzième année, sans qu'aucune fin ne soit en vue. En conséquence, les 2 millions d'habitants de Gaza, dont environ 1 million d'enfants, continuent de subir une crise humanitaire grave et qui empire à de multiples niveaux. Les habitants de Gaza ont vu pratiquement tous leurs droits fondamentaux bafoués sous le poids du blocus, car ils n'ont toujours pas accès à des logements, à une éducation, à une eau et à un assainissement adéquats. L'insécurité alimentaire est endémique. Gaza connaît l'un des taux de chômage les plus élevés au monde (estimé à environ 45 %), avec des niveaux de pauvreté qui dépassaient les 53 % à la fin de l'année 2019¹². L'économie de Gaza est à l'agonie, avec une croissance du produit intérieur brut pratiquement nulle en 2019 et des exportations qui ont presque disparu en raison du bouclage et des restrictions sévères (voir TD/B/67/5, par. 2 et 13).

16. Les étudiants de Gaza continuent de manquer d'infrastructures éducatives adaptées et d'outils d'enseignement à distance, en particulier dans le contexte de la pandémie actuelle. Plus de 575 000 enfants et adolescents n'ont accès ni à un équipement informatique, ni à une source d'alimentation fiable, ni à Internet¹³. On estime que seuls 30 % des ménages de Gaza ont accès à Internet, alors que les réseaux Internet tombent en panne plus de dix fois par heure en moyenne¹⁴. Malgré leur

⁸ Voir : www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25857&LangID=E.

⁹ Voir : www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26009&LangID=E.

¹⁰ Voir : www.aljazeera.com/news/2020/10/15/israels-settlement-approvals-hit-record-high-watchdog.

¹¹ Voir : www.ochaopt.org/data/demolition.

¹² Voir : <https://reliefweb.int/report/occupied-palestinian-territory/increase-gaza-s-unemployment-rate-2019>.

¹³ Voir : <https://gisha.org/en-blog/2020/10/13/remote-learning/>.

¹⁴ Voir : <http://pngoportal.org/en/3049.html>.

disponibilité depuis plus de 15 ans, Gaza ne dispose toujours pas de réseaux 3G, ce qui signifie que les temps de chargement des données sont considérablement ralentis. Dans le cadre de son blocus complet, Israël empêche l'entrée d'équipements nécessaires à l'amélioration de l'infrastructure de réseaux de données. Touchés par les limitations préexistantes des réseaux et par les mesures de confinement, les étudiants de Gaza se retrouvent confrontés à des difficultés insurmontables pour accéder à l'enseignement et à l'une des seules ouvertures qu'ils ont sur le monde extérieur. Tout cela porte atteinte à leur droit fondamental à l'éducation.

17. Le système de santé à Gaza est au bord de l'effondrement total, lequel provoquerait une véritable catastrophe humanitaire. Après la détection des premières contaminations intracommunautaires à Gaza le 25 août 2020, les cas confirmés ont augmenté de manière exponentielle, mettant à rude épreuve un système de santé déjà malmené¹⁵. Au 14 octobre, il y avait 4 285 cas confirmés à Gaza, ce qui représente une nette augmentation par rapport au 1^{er} juillet, date à laquelle on ne comptait que 11 cas. Des mesures préventives strictes ont été mises en œuvre par les autorités de facto, notamment l'imposition de couvre-feux complets et partiels et la création de centres de quarantaine. Ces mesures ont permis d'atténuer les effets et la propagation du virus, mais elles n'ont pas pu remédier aux carences structurelles fondamentales du secteur de la santé qu'entraîne le blocus.

18. L'interdiction des matériaux vitaux et à double usage – ceux qu'Israël considère comme pouvant être utilisés à la fois à des fins militaires et civiles, notamment le ciment et l'acier – ou les restrictions sévères à leur entrée, les pénuries d'électricité récurrentes et la contamination de plus de 90 % de l'approvisionnement en eau potable à Gaza ont compliqué les activités des hôpitaux avant même le début de la pandémie actuelle. Les statistiques actuelles sont extrêmement déroutantes : on estime qu'il n'y a que 93 ventilateurs et 110 lits disponibles dans les unités de soins intensifs à Gaza pour couvrir une population de 2 millions d'habitants¹⁶. À la fin du mois de septembre 2020, l'Organisation mondiale de la Santé estimait que 47 % des médicaments essentiels étaient en rupture de stock, alors que l'approvisionnement de moins d'un mois met en danger la vie de plus de 350 patients en oncologie et entraîne la suspension de plus de 13 000 opérations chirurgicales non urgentes. Plus de 50 % du personnel de soins de santé primaires à Gaza a été réaffecté pour soutenir la réponse apportée à la COVID-19, ce qui nuit gravement à la possibilité d'apporter une réponse et un traitement adéquats aux maladies non liées à la COVID-19. Le Rapporteur spécial avait spécifiquement averti début septembre que « si la pandémie COVID-19 prenait racine à Gaza, les conséquences seraient probablement très graves »¹⁷.

19. N'ayant que peu d'options pour recevoir un traitement, les Palestiniens de Gaza, en particulier ceux dont l'état de santé est critique, continuent de subir des retards arbitraires et d'essuyer des refus de permis de sortie délivrés par Israël, qui sont pourtant nécessaires pour recevoir des soins de santé essentiels et souvent vitaux en dehors de Gaza. La suspension de la coordination entre Israël et l'Autorité palestinienne en matière de sécurité, intervenue en mai 2020 dans le contexte de l'annonce des projets d'annexion d'Israël en Cisjordanie, a compliqué et retardé davantage le processus de demande de permis de sortie. Depuis septembre 2020, l'Organisation mondiale de la Santé a mis en place un mécanisme de coordination pour aider les patients palestiniens à demander des permis de sortie israéliens afin

¹⁵ Voir : www.aljazeera.com/news/2020/8/25/gaza-in-lockdown-after-first-covid-19-community-transmission.

¹⁶ Voir : www.icrc.org/en/document/icrc-donates-vital-intensive-care-equipment-gaza.

¹⁷ Voir : www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26201&LangID=E.

d'atténuer l'incidence de la suspension de la coordination¹⁸. Le Rapporteur spécial réaffirme qu'il incombe d'abord à Israël, en tant que Puissance occupante, d'assurer le respect, la protection et la réalisation du droit à la santé des Palestiniens de Gaza dans la pleine mesure de leur contrôle effectif, tandis que l'Autorité palestinienne et les autorités de facto à Gaza ont également des responsabilités dans la mesure de leur contrôle effectif sur la population.

20. Le blocus imposé par Israël à Gaza est contraire au droit international, en particulier à l'article 33 de la Convention de Genève relative à la protection des personnes civiles en temps de guerre (quatrième Convention de Genève), et équivaut à une punition collective de toute la population civile de Gaza. Le 1^{er} septembre, le Rapporteur spécial a déclaré ce qui suit : « Gaza est sur le point de devenir invivable. Il n'existe pas de situation comparable dans le monde où une population entière subit un tel verrouillage permanent, se retrouvant largement incapable de voyager ou de commercer et sous le contrôle d'une puissance occupante qui viole les obligations internationales solennelles qui lui incombent en matière de droits de l'homme et d'aide humanitaire. Nos standards internationaux en matière de dignité et de moralité ne tolèrent pas de telles expériences du désespoir humain »¹⁹. Le 14 septembre, la Haute-Commissaire a également noté dans son intervention que « le blocus, qui enfreint le droit international, [n'avait] pas réussi à apporter la sécurité ni la paix aux Israéliens et aux Palestiniens, et devrait être levé immédiatement »²⁰. Plus que jamais et après 14 ans, la logique sécuritaire israélienne du blocus a été minée par la réalité du terrain, laquelle montre que la population civile de Gaza continue de subir le plus gros du blocus.

21. La dernière escalade asymétrique des hostilités entre Israël et les groupes armés à Gaza, qui s'est terminée par un cessez-le-feu négocié fin août, montre que l'instabilité persistera tant que les droits fondamentaux des Palestiniens ne seront pas réalisés et protégés. Les solutions à court terme ne feront qu'aggraver la crise humanitaire provoquée par le blocus et accroître la frustration d'une population qui vit déjà dans des conditions extrêmement difficiles. Les Palestiniens de Gaza ont de toute urgence besoin de mesures immédiates pour atténuer les effets du blocus. Le Rapporteur spécial demande de prendre un ensemble de mesures spécifiques, notamment la reconstruction du port maritime de Gaza, la construction de nouvelles centrales électriques et stations de traitement de l'eau potable et des eaux usées, l'autorisation de faire entrer dans la bande de Gaza des quantités beaucoup plus élevées de matériaux de construction et la liberté de mouvement des habitants. La crise à Gaza est d'origine humaine et ce n'est que par l'exercice d'une volonté politique concertée de la part de ceux qui détiennent le pouvoir qu'une véritable catastrophe humanitaire peut être évitée.

D. Enfants

22. Les enfants palestiniens continuent chaque jour de subir les effets particulièrement négatifs de la poursuite de l'occupation et de leur exposition à la violence. Selon le rapport du Secrétaire général sur le sort des enfants en temps de conflit armé, en 2019, 32 enfants palestiniens (29 garçons, 3 filles) et 1 fille israélienne ont été tués en Cisjordanie occupée, y compris à Jérusalem-Est. La plupart des morts d'enfants palestiniens ont été attribuées aux forces israéliennes et ont été causées par le tir de balles réelles ou par des frappes aériennes. La même année,

¹⁸ Voir : www.ochaopt.org/content/covid-19-emergency-situation-report-18.

¹⁹ Voir : www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26201&LangID=E.

²⁰ Voir : <https://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=26226&LangID=F>.

1 539 enfants palestiniens (1 460 garçons, 79 filles) et 8 enfants israéliens (5 garçons, 3 filles) ont été mutilés (voir [A/74/845-S/2020/525](#), par. 85-86). Dans ce rapport, le Secrétaire général a exhorté Israël à faire cesser tout usage excessif de la force contre des enfants et à établir les responsabilités dans tous les cas de meurtre et d'atteinte à l'intégrité physique d'enfants. Il a en outre exhorté les groupes armés palestiniens à garantir la sécurité des enfants, notamment en empêchant qu'ils soient exposés au risque de violence ou en s'abstenant de les instrumentaliser à des fins politiques (ibid., par. 91-92).

23. L'accès des enfants palestiniens aux soins de santé continue d'être gravement entravé. Le système complexe de restrictions de circulation en place en Cisjordanie, y compris à Jérusalem-Est, et le blocus de Gaza exercé par Israël depuis 14 ans ont rendu l'accès aux établissements de soins de santé et aux traitements médicaux spécialisés très compliqués pour les enfants. À Gaza, les enfants continuent de se voir refuser ou retarder l'accès aux établissements de santé ou aux traitements spécialisés en dehors de la bande.

24. Le Rapporteur spécial reste également très préoccupé par les informations faisant état de mauvais traitements infligés aux enfants lors de leur arrestation, de leur interrogatoire ou de leur détention. En 2019, l'ONU ont reçu des témoignages d'enfants qui ont fait état de violations des droits de la défense et de mauvais traitements par les forces israéliennes dans le cadre de leur détention, y compris des violences physiques (ibid., par. 84). Les enfants détenus en Israël font état de mauvais traitements systématiques, tels que l'utilisation de bandeaux pour les yeux ou d'attaches pour les mains ou les jambes et le refus de donner de la nourriture et de l'eau ou d'accorder l'accès aux toilettes. Les enfants disent également s'être vu refuser l'accès à un avocat ou à leurs parents pendant leur interrogatoire, avoir été contraints de signer des documents en hébreu, que nombre d'entre eux ne comprennent pas, et ne pas avoir été correctement informés de leurs droits (voir [A/75/336](#), par. 20). Les pratiques et les politiques israéliennes continuent donc à donner la priorité à la punition et à la criminalisation des enfants palestiniens plutôt qu'à leur réhabilitation.

E. Autorité palestinienne et autorités de facto à Gaza

25. Des cas d'arrestation et de détention arbitraires par les autorités de facto à Gaza, notamment de journalistes, de militants des droits de l'homme et d'activistes politiques, continuent d'être signalés. Beaucoup continuent d'être arrêtés en raison de leur affiliation politique et de leur opposition présumée aux autorités du Hamas. De sérieuses restrictions à la liberté d'expression persistent, notamment dans le contexte de l'élaboration de rapports sur les effets socioéconomiques de la pandémie de COVID-19. Des rapports font également état de l'usage excessif de la force contre celles et ceux qui violent les couvre-feux mis en place dans le cadre des mesures préventives imposées.

26. Pendant la crise de COVID-19, il a été rapporté que l'Autorité palestinienne avait libéré certains prisonniers afin d'essayer de contenir la pandémie. Pourtant, un certain nombre d'arrestations effectuées par les forces de sécurité palestiniennes continuent d'être signalées en Cisjordanie. Nombre des personnes arrêtées ont été accusées d'utiliser les plateformes de médias sociaux pour critiquer l'Autorité palestinienne ou pour exprimer des opinions politiques divergentes²¹. Les limitations de la liberté d'expression restent un sujet de préoccupation pour les journalistes. Un

²¹ Voir : <https://www.amnesty.org/fr/latest/news/2020/05/palestine-end-arbitrary-detention-of-critics-in-west-bank-and-gaza/>.

certain nombre d'allégations de mauvais traitements des personnes arrêtées continuent également à être reçues.

III. Obligation de rendre compte, impunité et responsabilité de la communauté internationale

27. L'obligation de rendre compte – le contrôle institutionnel de l'exercice du pouvoir public et privé au nom du bien commun – est la composante indispensable de l'état de droit. Lorsqu'elle est utilisée efficacement et à bon escient, elle consacre l'équité et l'égalité, favorise la guérison et la résolution des différends, rend justice aux victimes comme aux auteurs des faits, atténue les conflits en cours et en empêche d'autres de se déclencher, et coud les 10 000 fils de la réconciliation qui nourrissent la confiance sociale.

28. Sans obligation de rendre compte, les systèmes de droit et de gouvernance humaine les mieux conçus dépériront parce qu'ils ne seront pas suffisamment appliqués et respectés. Sans obligation de rendre compte, il n'est pas possible de parvenir à une réconciliation politique, et encore moins de favoriser la prospérité qui doit en découler. Et sans obligation de rendre compte, les blessures sociales se métastasent : on cherche alors à résoudre les injustices du passé et du présent par des représailles non contrôlées plutôt que par une compensation mesurée. Comme l'a fait remarquer le Haut-Commissariat des Nations Unies aux droits de l'homme, « l'absence d'état de droit et d'obligation de rendre compte en matière de violations des droits de l'homme entraîne l'échec de la justice et l'impunité des crimes, le déclenchement de conflits pour des torts non résolus et l'instauration d'un régime oppressif qui ne rend pas de comptes »²².

29. Le principe d'obligation de rendre compte s'applique à toutes les parties prenantes, publiques et privées, qui ont la capacité, par leur autorité ou leur pouvoir, d'influer sur le bien commun. Dans un rapport présenté au Conseil de sécurité en 2004, l'ancien Secrétaire général de l'ONU, Kofi Annan, approuvant cette large application du principe, a ainsi déclaré que l'état de droit désignait un principe de gouvernance en vertu duquel l'ensemble des individus, des institutions et des entités publiques et privées, ont à répondre de l'observation de lois promulguées publiquement, appliquées de façon identique pour tous et administrées de manière indépendante, et compatibles avec les règles et normes internationales en matière de droits de l'homme (voir [S/2004/616](#), par. 6).

30. L'étendue de ce principe garantit non seulement que celles et ceux qui violent les normes internationales en matière de droits de l'homme et les règles humanitaires doivent mettre fin à leurs transgressions et être tenus pour responsables, mais aussi – et c'est tout aussi important – que celles et ceux qui ont la capacité individuelle et collective d'influencer le comportement de ces auteurs d'exactions doivent également utiliser, dans la mesure du possible, leur influence pour sanctionner utilement les violations et les crimes et y mettre fin.

31. La supervision internationale de l'occupation israélienne de la Palestine, vieille de 53 ans, illustre le fait que s'agissant du droit international et de l'obligation de rendre compte, il existe un fossé immense entre promesses et résultats. Le paradoxe tragique est que l'ONU n'a jamais, à l'époque moderne, pris part à un tel conflit et contribué de manière aussi décisive au développement du droit international dans un aussi grand nombre de domaines importants – en élargissant et en renforçant les droits des réfugiés, en définissant l'occupation belligérante et en l'encadrant, en imposant

²² Voir : <https://bangkok.ohchr.org/rule-of-law-accountability/>.

la stricte interdiction de l'annexion de territoires occupés, en définissant le statut juridique des colonies civiles dans les terres occupées et en insistant sur la centralité du droit à l'autodétermination, entre autres tout en offrant dans les faits aussi peu de protections aux nombreuses victimes de l'occupation²³.

32. L'ONU et d'autres institutions internationales faisant autorité ont évoqué, souvent avec lucidité et perspicacité, l'incompatibilité de l'occupation israélienne avec le droit international et les principes élémentaires fondés sur les droits. À plusieurs reprises, elles ont mis Israël en garde contre son mépris et son non-respect des résolutions du Conseil de sécurité, de l'Assemblée générale et du Conseil des droits de l'homme. Cependant, elles n'ont que rarement pris de véritables mesures – par exemple, des contre-mesures et des sanctions efficaces – pour tenir Israël responsable de ses politiques et pratiques d'obstruction concernant l'occupation.

33. L'objectif de cet appel à la reddition de comptes est évident : Voilà des décennies qu'Israël exerce une occupation, dans l'ensemble sans rendre de comptes, et tous les indicateurs disponibles – qu'il s'agisse de l'augmentation continue de la population présente dans les colonies, de la confiscation croissante de terres palestiniennes publiques et privées pour les colonies et l'armée israélienne, des proclamations répétées des dirigeants politiques israéliens selon lesquelles les terres occupées sont israéliennes de droit, ou du refus d'Israël de reconnaître que sa domination sur le territoire palestinien est régie par les lois de l'occupation – indiquent que cette occupation est incessante. L'ancien chef du Shin Bet israélien (l'agence de sécurité intérieure du pays), Carmi Gillon, a récemment observé, avec regret, que « le statu quo [était] bon pour Israël, car Israël obtient tout ce qu'il veut sans en payer le prix »²⁴.

34. Israël est un acteur rationnel, qui comprend que, si ses incitations à renforcer son occupation sont fortes et que les moyens de dissuasion de la communauté internationale sont pratiquement inexistant, il peut continuer à dévorer sans entrave le territoire destiné à accueillir un État palestinien. Si l'impunité continue d'être tolérée et même récompensée par la communauté internationale, il est chimérique de penser qu'une puissance occupante cupide fera tout sauf poursuivre son entreprise de colonisation, préparer encore plus assidûment une future demande d'annexion de jure, condamner les Palestiniens à un avenir sans espoir et écrire la nécrologie de la solution des deux États.

35. Dans le rapport du Rapporteur spécial d'octobre 2019 (A/74/507), la section sur l'obligation de rendre compte était axée sur les responsabilités de la communauté internationale. Le présent rapport traite des responsabilités de deux autres acteurs majeurs et influents dans le contexte de l'occupation : le Conseil de sécurité de l'ONU et les entreprises privées. Le Conseil de sécurité est le gardien de la paix et de la sécurité internationales et a le pouvoir d'imposer des sanctions internationales et de prendre d'autres mesures pour protéger le droit international lorsque la paix et la sécurité sont menacées. Les entreprises privées contribuent de manière considérable au maintien de la viabilité économique des colonies israéliennes illégales et, de ce fait, conduisent inextricablement les entreprises à prendre part aux violations des droits de l'homme commises dans le cadre de l'occupation.

²³ Susan Akram et al., eds., *International Law and the Israeli-Palestinian Conflict: A Rights-Based Approach to Middle East Peace* (Abingdon, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, Routledge, 2011).

²⁴ Voir : www.haaretz.com/middle-east-news/palestinians/.premium-the-palestinians-got-screwed-they-are-now-a-non-issue-1.8968748.

A. Conseil de sécurité et occupation israélienne

Introduction

36. Au cours des cinquante dernières années, le Conseil de sécurité a approuvé à plusieurs reprises et sans ambiguïté trois principes fondamentaux en ce qui concerne l'occupation israélienne du territoire palestinien (Cisjordanie, y compris Jérusalem-Est, et Gaza). Premièrement, Israël est la Puissance occupante, la quatrième Convention de Genève de 1949 s'applique intégralement et Israël est tenu de remplir toutes les obligations qui lui incombent au titre de la Convention²⁵. Deuxièmement, l'acquisition de territoire par la force ou la guerre est inadmissible²⁶. Troisièmement, la création et l'expansion des colonies israéliennes constituent une violation grave de l'interdiction absolue pour la puissance occupante de transférer une partie de sa population civile dans le territoire occupé, conformément au droit international²⁷. Ces trois principes ont été expressément réaffirmés par le Conseil dans sa résolution 2334 (2016). Ils comptent parmi les principes les mieux établis et les plus largement acceptés du droit international moderne.

37. À aucun moment un seul de ces trois principes n'a été accepté ou appliqué par Israël. Le Conseil de sécurité s'est parfois exprimé de manière très virulente sur l'attitude de défi d'Israël, mais n'a pris aucune sanction contre l'obstruction continue d'Israël. Aucune situation internationale grave en matière de droits de l'homme ni aucun acteur étatique insubordonné ne fait aujourd'hui l'objet d'autant de discussions et de critiques si claires de la part du Conseil de sécurité, mais aussi de si peu de mesures²⁸. Et pourtant, alors même qu'Israël a fait montre d'une obstination accrue ces dernières années, le Conseil de sécurité n'a ni agi, ni continué à s'exprimer sur la question avec la régularité dont il avait fait preuve auparavant : depuis janvier 2009, il n'a adopté que deux résolutions critiquant l'occupation israélienne²⁹, alors même que les conditions des droits de l'homme sur le terrain se sont progressivement dégradées.

Principe 1 : Quatrième Convention de Genève

38. La quatrième Convention de Genève a été promulguée au lendemain de la Seconde Guerre mondiale pour offrir une vaste protection aux civils pris dans la guerre, les civils étant les personnes les plus vulnérables au cours de tout conflit armé. S'agissant de son applicabilité, Israël – et pratiquement lui seul dans le monde – a fait valoir que la Convention ne s'appliquait pas au territoire palestinien, et donc que le territoire n'était pas occupé. En effet, selon lui, aucun autre État n'avait de revendication souveraine valable sur ces terres lorsqu'il les a prises en 1967³⁰. Le Conseil de sécurité a constamment rejeté cette position, confirmant dans au moins 22 résolutions prises depuis 1967, la dernière en date étant celle de 2016, que la

²⁵ Le Conseil de sécurité a fait pour la première fois référence à l'applicabilité de la quatrième Convention de Genève à l'occupation israélienne dans sa résolution 237 (1967), adoptée dans la semaine suivant la fin de la guerre de juin 1967.

²⁶ Voir la résolution 242 (1967) du Conseil.

²⁷ Voir la résolution 446 (1979) du Conseil.

²⁸ Dans ses mémoires, Kofi Annan observe que « la position agressive du Conseil contre la présence syrienne au Liban contraste fortement avec sa passivité concernant l'occupation des terres arabes par Israël [...] l'impression d'une politique de deux poids deux mesures au Moyen-Orient mine l'Organisation des Nations Unies ». Voir Kofi Annan, avec Nader Mousavizadeh, *Interventions* (New York, Penguin Books, 2012), p. 298.

²⁹ Résolutions 1860 (2009) et 2334 (2016).

³⁰ Voir : <https://mfa.gov.il/MFA/MFA-Archive/2003/Pages/DISPUTED%20TERRITORIES-%20Forgotten%20Facts%20About%20the%20We.aspx>.

Convention s'appliquait pleinement à l'occupation israélienne³¹. À diverses occasions, le Conseil de sécurité a « vivement déploré » le refus persistant d'Israël de se conformer aux résolutions prises précédemment et lui enjoignant de respecter la Convention³², a exigé qu'Israël se conforme « immédiatement et scrupuleusement » à la Convention³³ et a noté qu'en cas de non-respect, il examinerait « les moyens pratiques » d'assurer « l'application intégrale » par Israël des résolutions antérieures sur l'application de la Convention³⁴.

39. Par deux fois en 1980 – 13 ans après le début de l'occupation – le Conseil de sécurité a affirmé la « nécessité primordiale de mettre fin à l'occupation prolongée des territoires arabes occupés par Israël depuis 1967, y compris Jérusalem »³⁵. Pourtant, en 2020, l'occupation israélienne – désormais quatre fois plus longue qu'elle ne l'était en 1980 – s'est renforcée et étendue de manière exponentielle³⁶. Israël a rejeté l'applicabilité de la quatrième Convention de Genève depuis le début de l'occupation³⁷, et tant l'ONU que de nombreuses organisations de défense des droits de l'homme respectées ont déterminé qu'il avait violé à plusieurs reprises un certain nombre de protections garanties par la Convention (voir [A/HRC/43/67](#))³⁸.

Principe 2 : Annexion d'un territoire occupé

40. L'annexion d'un territoire occupé par une puissance occupante est non seulement strictement interdite par le droit international³⁹, mais elle est désormais considérée comme un crime d'agression en vertu du Statut de Rome de la Cour pénale internationale⁴⁰. Dans le contexte de l'occupation israélienne, le Conseil de sécurité a expressément approuvé le principe de l'inadmissibilité de l'acquisition de territoire par la guerre, par la force ou par la conquête militaire à au moins onze reprises⁴¹. En ce qui concerne l'annexion en deux étapes de Jérusalem-Est par Israël (en juin 1967 par décision du Cabinet et en juin 1980 par la Knesset), le Conseil de sécurité a déclaré à plusieurs reprises que Jérusalem-Est restait occupée et que la proclamation de souveraineté d'Israël était « nulle et non avenue », constituait « une violation

³¹ Voir, en général, les résolutions [446 \(1979\)](#) et [2334 \(2016\)](#).

³² Voir la résolution [476 \(1980\)](#) du Conseil.

³³ Voir la résolution [592 \(1986\)](#) du Conseil.

³⁴ Voir la résolution [478 \(1980\)](#) du Conseil.

³⁵ Résolutions [471 \(1980\)](#) et [476 \(1980\)](#) du Conseil.

³⁶ Ardi Imseis, « Negotiating the illegal: on the United Nations and the illegal occupation of Palestine, 1967-2020 », *European Journal of International Law* (septembre 2020) ; et Michael Sfard, *The Wall and the Gate: Israel, Palestine, and the Legal Battle for Human Rights* (New York, Metropolitan Books, 2018).

³⁷ Theodor Meron, « The West Bank and international humanitarian law on the eve of the fiftieth anniversary of the Six-Day War », *American Journal of International Law*, vol. 111, n° 2 (avril 2017).

³⁸ Voir également les pages d'Amnesty International (www.amnesty.org/fr/countries/middle-east-and-north-africa/israel-and-occupied-palestinian-territories/) et de Human Rights Watch (www.hrw.org/fr/middle-east/north-africa/israel/palestine) consacrées à Israël et à la Palestine.

³⁹ Voir *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé]*, avis consultatif, *Rapports de la C.I.J.*, 2004, p. 136, par. 87 (p. 171), où la Cour internationale de Justice a déclaré que le principe selon lequel « aucune acquisition territoriale résultant de la menace ou de l'emploi de la force ne sera reconnue comme légale » avait désormais le statut de droit international coutumier.

⁴⁰ Statut de Rome de la Cour pénale internationale (modifié en dernier lieu en 2010), 17 juillet 1998, article 8 bis, par. 2 « Les actes suivants sont des actes d'agression [...] : a) [...] l'annexion par la force de la totalité ou d'une partie du territoire d'un autre État ».

⁴¹ Voir la résolution [2334 \(2016\)](#), dans laquelle le Conseil a réaffirmé l'inadmissibilité de l'acquisition de territoire par la force.

flagrante de la quatrième Convention de Genève » et n'avait « aucune validité juridique »⁴².

41. Face au refus persistant d'Israël de mettre fin à son annexion de Jérusalem-Est, le Conseil de sécurité a « vivement déploré » la violation par Israël des résolutions de l'ONU, lui a demandé « d'urgence » « de rapporter toutes les mesures de cette nature » et a exigé qu'Israël « renonce immédiatement » à toute nouvelle action visant à modifier le statut de Jérusalem⁴³. En d'autres occasions, le Conseil a confirmé « dans les termes les plus énergiques » que l'annexion était « totalement invalide » et a déploré « qu'Israël n'ait tenu aucun compte des résolutions de l'Assemblée générale et du Conseil de sécurité »⁴⁴.

42. En réponse, Israël a continué à intensifier son annexion de Jérusalem-Est en créant et en étendant 12 colonies civiles, en assurant la présence de 215 000 colons juifs, en construisant un mur séparant Jérusalem-Est de la Cisjordanie, et en consolidant l'intégration politique et infrastructurelle de Jérusalem-Est et de Jérusalem-Ouest⁴⁵. Israël n'a jamais montré le moindre signe qu'il avait commencé à se conformer ou avait l'intention de se conformer à l'une des directives du Conseil de sécurité sur Jérusalem-Est, le Premier ministre israélien ayant proclamé en février 2020 que le Gouvernement avait réussi son annexion de Jérusalem-Est malgré une forte opposition de la communauté internationale⁴⁶.

Principe 3 : Colonies israéliennes

43. Le droit international interdit strictement à une puissance occupante de tenter de modifier la composition démographique d'un territoire occupé en y installant sa population civile⁴⁷. Le but de cette interdiction est de préserver le droit à l'autodétermination de la population autochtone⁴⁸, d'empêcher une puissance occupante cupide de faire valoir une revendication d'annexion inadmissible au moyen de la colonisation territoriale⁴⁹, et d'éviter l'immense souffrance humaine qui découle inévitablement du processus d'installation de colons⁵⁰. Depuis 2002, l'installation de colons est considérée comme un crime de guerre au regard du Statut de Rome⁵¹.

⁴² Voir les résolutions 471 (1980), 476 (1980) et 478 (1980).

⁴³ Voir les résolutions 252 (1968), 476 (1980) et 478 (1980).

⁴⁴ Voir la résolution 267 (1969) ; voir également les résolutions 298 (1971) et 478 (1980).

⁴⁵ Meir Margalit, *The City of Jerusalem: the Israeli Occupation and Municipal Subjugation of Palestinian Jerusalemites* (Brighton, Royaume-Uni, Sussex University Press, 2020).

⁴⁶ Oren Liebermann et Andrew Carey (Cable News Network), « As election looms, Netanyahu announces new construction in East Jerusalem », 20 février 2020 : « Nous y sommes parvenus malgré une forte opposition de la communauté internationale. Nous avons surmonté tous les obstacles et nous y sommes parvenus, et voyez ce que nous avons accompli à Jérusalem, a déclaré M. Nétanyahou. Nous relient toutes les parties de la Jérusalem unie, de la Jérusalem reconstruite. C'est une source de grande fierté et une grande nouvelle pour tout le peuple d'Israël ».

⁴⁷ Voir la quatrième Convention de Genève, article 49, sixième paragraphe.

⁴⁸ Voir : E/CN.4/Sub.2/1993/17 et E/CN.4/Sub.2/1993/17/Corr.1, par. 202 : « Les transferts de populations, en théorie et en pratique, peuvent viser spécifiquement à empêcher que s'exerce véritablement le droit à l'autodétermination, par exemple en altérant l'entité appelée à s'autodéterminer par le biais d'une manipulation démographique ou de politiques ayant cet effet ».

⁴⁹ Voir le commentaire de 1958 du Comité international de la Croix-Rouge sur le sixième paragraphe de l'article 49 de la quatrième Convention de Genève, disponible à l'adresse suivante : www.icrc.org/ihl.nsf/COM/380-600056?OpenDocument.

⁵⁰ Voir : E/CN.4/Sub.2/1997/23 et E/CN.4/Sub.2/1997/23.Corr.1, par. 16 : « Vu le vaste éventail des droits de l'homme auxquels portent atteinte les transferts de population et l'implantation de colons, ces phénomènes sont classés dans la catégorie des violations systématiques ou massives ».

⁵¹ Statut de Rome de la Cour pénale internationale (modifié en dernier lieu en 2010), 17 juillet 1998, article 8, par. 2), al. b) viii).

44. Depuis 1979, le Conseil de sécurité a déclaré à au moins six reprises que l'établissement par Israël de colonies civiles dans les territoires occupés n'avait « aucune validité juridique » et, de façon plus frappante, constituait une « violation flagrante du droit international »⁵². En 1980, il a « vivement déploré » le refus d'Israël de coopérer et son rejet des résolutions antérieures sur l'installation de colons⁵³. En 2016, il a déterminé que l'entreprise de colonisation d'Israël mettait gravement en péril ce qui restait de la solution des deux États et a exigé qu'Israël « arrête immédiatement et complètement toutes ses activités de peuplement »⁵⁴. En 2020, pourtant, Israël a créé, à Jérusalem-Est et en Cisjordanie, environ 250 colonies prospères comptant plus de 650 000 colons, et a continué à approuver un nombre record de nouveaux logements dans les colonies au cours de l'année passée⁵⁵. Dans les 14 rapports trimestriels qu'il a présentés au Conseil de sécurité depuis 2017 sur la question de la mise en œuvre par Israël de la directive claire contenue dans la résolution 2334 (2016), à savoir l'arrêt absolu de toutes ses activités de peuplement, le Coordonnateur spécial pour le processus de paix au Moyen-Orient a indiqué, à chaque fois, qu'Israël n'avait pris aucune mesure pour satisfaire à cette obligation⁵⁶.

Conseil de sécurité et obligation de rendre compte

45. Conformément au paragraphe 1 de l'article 24 de la Charte des Nations Unies, il incombe au Conseil de sécurité de maintenir la paix et la sécurité internationales. En vertu de l'article 41, cette responsabilité s'accompagne du pouvoir de mettre en œuvre un large éventail de mesures – n'impliquant pas la force armée – afin de contraindre les États et les acteurs fautifs à se conformer au droit international (comme dans le cas de l'invasion du Koweït par l'Iraq en 1991), de contenir une menace perçue à la paix et à la sécurité internationales (comme la prolifération nucléaire régionale) ou de faire face aux actes malveillants de certains acteurs internationaux, nationaux ou infranationaux (comme l'État islamique d'Iraq et du Levant, Al-Qaida ou les Talibans)⁵⁷. Depuis 1966, le Conseil de sécurité a mis en place 30 régimes de sanctions et en maintient actuellement 14. Si ces sanctions ont eu des résultats variables en termes d'efficacité et ont parfois été critiquées pour leurs effets négatifs d'un point de vue humanitaire⁵⁸, l'histoire plus récente a démontré que, lorsqu'elles étaient appliquées avec précision, dans un but précis, dans un esprit d'unité et avec la souplesse nécessaire pour moduler l'intensité les mesures visant à faire respecter le principe de responsabilité, les sanctions mises en œuvre par l'ONU pouvaient produire des changements significatifs dans le comportement des États et d'autres acteurs⁵⁹.

⁵² Voir les résolutions 446 (1979) et 465 (1980).

⁵³ Voir les résolutions 465 (1980) et 471 (1980).

⁵⁴ Voir la résolution 2334 (2016).

⁵⁵ Voir : Peace Now, « 4,948 settlement units advanced at October 2020 Higher Planning Council sessions », 15 octobre 2020 : « Ces approbations font officiellement de 2020 l'année qui a enregistré le plus grand nombre de projets de logements de peuplement depuis que Peace Now a commencé à enregistrer ces projets en 2012 ».

⁵⁶ Voir, par exemple, la déclaration faite par le Coordonnateur spécial pour le processus de paix au Moyen-Orient, Nickolay Mladenov, au cours de l'exposé sur la situation au Moyen-Orient qu'il a présenté au Conseil de sécurité le 29 septembre 2020 (voir S/PV.8762).

⁵⁷ Larissa Van Den Herik, *Research Handbook on UN Sanctions and International Law* (Cheltenham, Royaume-Uni, Edward Elgar Publishing, 2017).

⁵⁸ Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge, Royaume-Uni, Cambridge University Press, 2007).

⁵⁹ Enrico Carisch, Loraine Rickard-Martin et Shawna W. Meister, *The Evolution of UN Sanctions: from a Tool of Warfare to a Tool of Peace, Security and Human Rights* (New York, Springer, 2017).

46. L'attitude de défi – comme la qualifie le Conseil de sécurité⁶⁰ – qu'Israël affiche vis-à-vis des instructions de la communauté internationale pose un sérieux problème à l'ordre international fondé sur des règles. Les résolutions et décisions du Conseil de sécurité, ainsi que celles de l'Assemblée générale, sont le fondement du consensus juridique international relatif à l'occupation israélienne de la Palestine. Pour être admis à l'ONU, les États doivent s'engager solennellement à accepter et à appliquer les décisions et les directives du Conseil de sécurité⁶¹. L'état de droit est important, mais l'obligation de rendre compte l'est tout autant. Si l'on veut que le Conseil de sécurité affirme son autorité, toute désobéissance à ses directives doit avoir des conséquences.

47. De même, l'inertie dont fait preuve le Conseil de sécurité pour répondre de manière manifeste au non-respect par Israël de ses résolutions et directives – portant en particulier sur les trois principes fondamentaux qu'il a si fréquemment approuvés – est également un coup dur porté à l'efficacité du droit international⁶². Dans ses mémoires, Kofi Annan est troublé par « l'occupation prolongée et parfois brutale » d'Israël, et déplore la timidité de la réponse du Conseil de sécurité : « Même lorsque le Conseil a pris position, il n'a pas établi de mécanismes pour faire respecter sa volonté »⁶³. Il a également identifié une source majeure de la paralysie du Conseil : la « possessivité malsaine » dont font preuve les États-Unis d'Amérique vis-à-vis « du processus de paix au Moyen-Orient »⁶⁴. Depuis 1973, les États-Unis ont, au Conseil de sécurité, opposé 31 vetos à des projets de résolution critiquant l'occupation israélienne ; dans chaque cas, ils ont été le seul membre du Conseil à exprimer un vote négatif. Aucun autre membre permanent du Conseil de sécurité n'a opposé son veto à une résolution du Conseil critiquant l'occupation israélienne⁶⁵.

B. Entreprises privées et colonies israéliennes

Introduction

48. En 2011, le Conseil des droits de l'homme a adopté à l'unanimité les Principes directeurs relatifs aux entreprises et aux droits de l'homme (A/HRC/17/31, annexe). Les Principes directeurs constituent un ensemble de normes non contraignantes visant à influencer la prise de décision des entreprises en leur faisant intégrer les principes relatifs aux droits de l'homme dans leurs activités quotidiennes. Ils ont vocation à s'appliquer à tous les secteurs commerciaux et à toutes les entreprises de toutes les régions géographiques. Ils font partie d'une initiative mondiale plus large – comprenant des déclarations majeures du Comité international de la Croix-Rouge⁶⁶ et de l'Organisation de coopération et de développement économiques⁶⁷ – visant à intégrer une culture des droits de l'homme dynamique dans le monde des entreprises. Ils définissent trois piliers compatibles avec le cadre de référence « protéger, respecter

⁶⁰ Voir les résolutions 608 (1988), 636 (1989) et 641 (1989).

⁶¹ Voir l'Article 25 de la Charte des Nations Unies.

⁶² En 2020, l'ancien Ambassadeur des États-Unis d'Amérique, Peter Mulrean, a fait remarquer que les « paroles de la communauté internationale [n'avaient] cependant jamais été suivies d'effet, notamment parce que les États-Unis [avaient] fait en sorte, en exerçant une pression sur d'autres pays et en usant de leur droit de veto au Conseil de sécurité de l'ONU, qu'Israël ne soit jamais véritablement puni ni même sévèrement critiqué dans cette enceinte potentiellement influente » (voir : www.justsecurity.org/69925/trumps-deal-of-the-century-is-bibis-dream-come-true/).

⁶³ Annan, *Interventions*, p. 256.

⁶⁴ *Ibid.*, p. 290.

⁶⁵ Voir : <https://research.un.org/fr/docs/sc/quick>.

⁶⁶ Voir : www.icrc.org/en/doc/resources/documents/misc/business-ihl-150806.htm.

⁶⁷ Voir : www.oecd.org/corporate/mne/responsible-business-conduct-matters.htm.

et réparer » de l'ONU pour améliorer les pratiques relatives aux droits de l'homme et renforcer le respect de ces droits :

- a) le devoir qu'ont les États de protéger les droits de l'homme, y compris contre les violations commises par des entreprises ;
- b) la responsabilité qu'ont les entreprises de respecter les droits de l'homme, notamment en agissant avec la diligence requise pour éviter de violer les droits d'autrui ;
- c) la nécessité d'assurer aux victimes de violations liées aux entreprises un meilleur accès à des recours efficaces.

49. Les Principes directeurs n'ont pas force de loi, et la plupart des traités internationaux sur les droits de l'homme ne contiennent pas d'obligations spécifiques à l'égard des entreprises⁶⁸. Néanmoins, un certain nombre d'États ont étendu la responsabilité pénale ou civile aux entreprises domiciliées sur leur territoire par l'intermédiaire de leurs législations nationales respectives, dont beaucoup reflètent les normes internationales en matière de droits de l'homme (voir [A/HRC/17/31](#), annexe, commentaire du Principe n° 12). Certains États ont également élaboré des politiques nationales d'orientation et publié des avis à l'intention des entreprises au sujet de leur conformité aux normes internationales en matière de droits de l'homme. Le riche ensemble d'instruments juridiques internationaux modernes qui existent en matière de droits de l'homme – s'agissant notamment du droit au travail, des droits environnementaux et des droits des groupes vulnérables tels que les minorités, les femmes, les enfants et les personnes handicapées – constitue l'étoile qui peut orienter les entreprises sur la manière dont elles peuvent satisfaire à leurs responsabilités en matière de droits de l'homme.

50. Parmi les Principes directeurs qui s'avèrent pertinents pour l'activité des entreprises dans les colonies israéliennes et sous l'occupation, on peut citer les suivants :

- a) **Principe 7** : Les États devraient aider les entreprises opérant dans des zones touchées par des conflits à définir, à prévenir et à atténuer les risques qui existent en matière de droits de l'homme, et devraient refuser l'accès aux entreprises prenant part à des violations flagrantes des droits de l'homme ;
- b) **Principe 11** : Les entreprises devraient éviter de porter atteinte aux droits de l'homme d'autrui et remédier aux incidences sur les droits de l'homme dans lesquelles elles ont une part ;
- c) **Principe 12** : La responsabilité de respecter les droits de l'homme porte sur les droits de l'homme internationalement reconnus, ce qui comprendrait la Charte internationale des droits de l'homme et les normes fondamentales du travail, mais engloberait également tous les autres instruments de l'ONU relatifs aux droits de l'homme ;
- d) **Principe 13** : La responsabilité de respecter les droits de l'homme exige des entreprises qu'elles évitent d'avoir des incidences négatives sur les droits de l'homme ou d'y contribuer, et qu'elles s'efforcent de prévenir ou d'atténuer les incidences négatives sur les droits de l'homme qui sont directement liées à leurs relations commerciales ;

⁶⁸ Il convient de noter que les négociations menées en vue d'élaborer un traité international juridiquement contraignant sur les entreprises et les droits de l'homme sont bien avancées (voir www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf).

e) **Principe 23** : Dans tous les contextes, les entreprises devraient se conformer à tous les droits de l'homme internationalement reconnus et applicables et parer au risque de commettre des atteintes caractérisées aux droits de l'homme ou d'y contribuer sous l'angle du respect de la légalité.

51. Outre le droit international des droits de l'homme, les entreprises sont censées intégrer les principes du droit international humanitaire et du droit pénal international dans leurs responsabilités opérationnelles⁶⁹. Le droit international humanitaire s'applique aux zones touchées par un conflit et aux territoires occupés et exige que les États et les individus adhèrent aux obligations juridiques de référence en matière de droit humanitaire qui figurent principalement dans les Conventions de Genève de 1949 et dans les textes juridiques qui en ont découlé. Alors que les entreprises opérant dans une zone de conflit ou sous occupation pourraient contribuer au bien-être économique et social de la population touchée, leurs activités risquent, au contraire, de contribuer à la commission de violations de droits de l'homme et d'exactions humanitaires ou d'aider la puissance occupante à maintenir sa domination étrangère une fois qu'il sera devenu évident qu'elle gouverne en violation des lois de l'occupation.

52. Le droit pénal international est axé sur les individus (plutôt que sur les États ou d'autres acteurs institutionnels) qui mènent, instiguent, ordonnent ou planifient des activités interdites par le Statut de Rome de la Cour pénale internationale, telles que les crimes de guerre et les crimes contre l'humanité, ou qui se rendent complices de telles activités. Les décideurs individuels des entreprises pourraient être tenus responsables en vertu du droit pénal international. De sérieuses questions relatives au droit international humanitaire et au droit pénal international peuvent se poser dans les cas d'occupation où la puissance occupante procède au transfert d'une partie de sa population civile vers le territoire occupé. Les Principes directeurs relatifs aux entreprises et aux droits de l'homme exigent des entreprises opérant dans des zones de conflit et dans des territoires occupés qu'elles fassent preuve de davantage de précaution, d'un « soin accru », pour s'assurer que leurs activités sont conformes à leurs responsabilités légales. Toutefois, dans certaines circonstances, aucun degré de diligence raisonnable ne saurait empêcher les entreprises de se rendre complices de violations des droits de l'homme dans une zone de conflit ou d'occupation.

Entreprises et colonies israéliennes

53. Les colonies israéliennes constituent une profonde violation du droit international, comme l'ont déterminé les principaux organes délibérants et judiciaires de l'ONU, notamment le Conseil de sécurité⁷⁰, l'Assemblée générale⁷¹, le Conseil des droits de l'homme⁷² et la Cour internationale de Justice⁷³. Un avis partagé par d'autres organismes internationaux influents tels que l'Union européenne⁷⁴, le Comité

⁶⁹ On trouvera des commentaires très utiles dans : D. Hughes, « Differentiating the Corporation: Accountability and International Humanitarian Law », *Michigan Journal of International Law*, vol. 41, n° 1 (2020) ; et Marya Farah, *Business and Human Rights in Occupied Territory: Guidance for Upholding Human Rights* (Ramallah, Al-Haq, 2019).

⁷⁰ Voir la résolution 2334 (2016).

⁷¹ Voir la résolution 71/97 de l'Assemblée générale.

⁷² Voir la résolution 43/31 du Conseil de sécurité.

⁷³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé]*, avis consultatif, *Rapports de la C.I.J.*, 2004, par. 120.

⁷⁴ Conseil de l'Union européenne, « Conclusions du Conseil sur le processus de paix au Proche-Orient » (18 janvier 2016).

international de la Croix-Rouge⁷⁵ et les Hautes Parties contractantes à la quatrième Convention de Genève⁷⁶. Plus grave encore, les colonies constituent un probable crime de guerre au regard du Statut de Rome⁷⁷.

54. Les terribles répercussions qu'ont les colonies sur les droits humains des Palestiniens à Jérusalem-Est et en Cisjordanie sont omniprésentes. La Haute-Commissaire des Nations Unies aux droits de l'homme a établi que les violations des droits de l'homme commises dans les colonies prenaient, entre autres, les formes suivantes : confiscation et aliénation de terres, violence de la part des colons, lois de planification discriminatoires, appropriation des ressources naturelles, démolition de logements, transfert forcé de population, exploitation par le travail, expulsions et déplacements forcés, enfermement physique, application discriminatoire de la loi et imposition d'un système à deux niveaux de droits politiques, sociaux et économiques inégaux fondés sur l'origine ethnique. Par-dessus tout, les colonies servent l'objectif plus large du Gouvernement israélien de revendiquer une souveraineté inadmissible sur certaines parties du territoire occupé tout en refusant l'autodétermination des Palestiniens (voir [A/HRC/43/67](#) et [A/HRC/22/63](#)). Selon l'ONU, les colonies israéliennes et le rétrécissement de l'espace laissé aux Palestiniens qu'elles impliquent ont créé un « environnement coercitif » dans le territoire palestinien occupé⁷⁸.

55. La Conférence des Nations Unies sur le commerce et le développement a constaté que les restrictions territoriales imposées dans les colonies – les systèmes routiers séparés pour les colons et les Palestiniens, les centaines de barrages routiers, points de contrôle et obstacles mis en place dans l'ensemble de la Cisjordanie, la violence des colons et les fermetures de zones et couvre-feux réguliers – avaient disloqué l'espace économique dans le territoire palestinien occupé. Il en résulte une économie palestinienne prisonnière et très dépendante, un appauvrissement croissant, l'imposition quotidienne de contraintes et d'expériences humiliantes et une tendance accélérée au non-développement économique⁷⁹. En 2018, la fuite d'un mémorandum élaboré par des diplomates de l'Union européenne présents à Jérusalem a mis en évidence que l'occupation israélienne et son entreprise de colonisation imposaient une « discrimination juridique systématique » à l'égard du peuple palestinien⁸⁰.

56. Les entreprises et les activités commerciales contribuent de manière significative à la viabilité économique du projet de colonisation israélienne⁸¹. Ce sont

⁷⁵ Peter Maurer, « Challenges to international humanitarian law: Israel's occupation policy », *International Review of the Red Cross*, vol. 94, n° 888 (2012), p. 1503.

⁷⁶ Déclaration de la Conférence de Hautes Parties contractantes à la quatrième Convention de Genève, 17 décembre 2014, disponible à l'adresse suivante : https://unispal.un.org/pdfs/GENCONDEC_1214f.pdf.

⁷⁷ Ghislain Poissonier et Eric David, « Les colonies israéliennes en Cisjordanie, un crime de guerre ? », *La Revue des droits de l'homme*, n° 17 (2020). Voir également : www.amnestyusa.org/lets-be-clear-israels-long-running-settlement-policy-constitutes-a-war-crime/.

⁷⁸ Voir : www.un.org/unispal/document/ocha-2019-humanitarian-needs-overview/.

⁷⁹ *The Economic Costs of the Israeli Occupation for the Palestinian People: Cumulative Fiscal Costs* (publication des Nations Unies, numéro de vente E.20.II.D.6).

⁸⁰ Andrew Rettman, « No EU cost for Israeli "apartheid" in West Bank », *EUobserver*, 1^{er} février 2019.

⁸¹ Les paragraphes 56 à 58 s'inspirent des tableaux complets dressés sur les dimensions de l'économie des colonies israéliennes liées aux entreprises, que l'on retrouve dans les documents suivants : Amnesty International, *Think Twice* (2019) ; Amnesty International, *Destination: Occupation* (2019) ; Farah, *Business and Human Rights in Occupied Territory* ; Profundo et 11.11.11, *Doing Business with the Occupation* (2018) ; Human Rights Watch, *Bankrolling Abuse* (2018) ; Human Rights Watch, *Occupation, Inc.* (2016) ; et Diakonia, *The Unsettling Business of Settlement Business* (2015). Voir également les travaux de Who Profits, disponibles à l'adresse suivante : www.whoprofits.org.

les entreprises privées qui, par l'intermédiaire des appels d'offres lancés par les agences gouvernementales israéliennes qui administrent la colonisation, bâtissent les colonies et construisent et entretiennent les routes et les infrastructures publiques qui les desservent. Les entreprises opérant dans les colonies et les parcs industriels – en particulier dans les industries manufacturières, les secteurs de service et les établissements vinicoles – créent des emplois et favorisent une activité commerciale qui soutient économiquement les colonies, tout en payant des impôts aux municipalités des colonies. Des sociétés de sécurité privées gardent de nombreuses colonies et fournissent, avec des entreprises de haute technologie, des équipements de surveillance et d'identification. Les banques et les institutions financières facilitent la mise en place de l'infrastructure fiscale qui permet d'organiser des prêts hypothécaires immobiliers et de prêter des capitaux aux entreprises opérant dans les colonies. Les cabinets d'avocats proposent des services juridiques aux colonies, aux colons et aux entreprises participant à la colonisation. Les agences immobilières coordonnent la vente et l'achat de biens résidentiels et commerciaux dans les colonies. Les entreprises agricoles produisent une gamme de denrées alimentaires destinées aux marchés intérieurs et aux exportations, en utilisant l'agriculture à grande échelle ainsi que des technologies modernes. Le tourisme national et international est un secteur émergent pour les colonies, au même titre que les hôtels et la location de logements. Des chaînes de magasins de détail opèrent dans les colonies. Les compagnies de transport relient les colonies aux zones situées à l'intérieur d'Israël mais aussi entre elles. Les entreprises d'extraction exploitent les ressources naturelles du territoire palestinien occupé, notamment les minéraux et l'eau. Les entreprises d'équipement fournissent les machines lourdes nécessaires à la construction de logements et de bâtiments commerciaux. Les sociétés de gestion des déchets desservent à la fois les municipalités et les entreprises industrielles situées dans les colonies. La construction et l'entretien du mur de séparation à travers le territoire occupé contribuent à consolider une situation illégale.

57. Nombre des sociétés et entreprises fournissant des services commerciaux dans les colonies ou contribuant à leur économie sont des sociétés israéliennes. Cependant, un certain nombre d'entreprises internationales contribuent également à l'économie des colonies et en tirent profit. Les banques et les institutions financières internationales accordent des prêts à des entreprises ayant des activités dans les colonies ou investissent dans ces entreprises. D'autres entreprises vendent des biens et des services aux colonies, tels que des matériaux de construction, des machines lourdes et des technologies solaires, ou bien puisent des ressources naturelles non renouvelables. De grandes sociétés internationales de transport ont participé à la construction du système de métro léger de Jérusalem (qui relie un certain nombre de colonies illégales de Jérusalem-Est à Jérusalem-Ouest) et de la liaison ferroviaire à grande vitesse entre Tel-Aviv et Jérusalem (qui traverse une partie du territoire occupé). Les grandes sociétés internationales de réservation de logements font de la publicité pour des locations de logements situées dans les colonies israéliennes. Les biens et services des colonies israéliennes, notamment les produits manufacturés, les vins et les denrées alimentaires, sont exportés en quantité vers le marché international.

58. Sans cette participation importante des entreprises, les colonies, qui sont le moteur de l'occupation, représenteraient un fardeau économique insoutenable pour le Gouvernement israélien. Ces entreprises nationales et internationales tirent grandement profit de la confiscation illégale par Israël des terres et des ressources naturelles palestiniennes, du système israélien à deux vitesses en matière de droits, discriminatoire, d'avantages et de possibilités entre les colonies et le peuple palestinien, ainsi que de l'appauvrissement des Palestiniens (et de l'emploi de main-d'œuvre palestinienne à bas prix qui en résulte dans les colonies), lequel est la

conséquence inévitable d'une entreprise d'implantation de colonies⁸². La question est de savoir si les entreprises peuvent commencer à opérer ou continuer d'opérer dans les colonies israéliennes tout en honorant leurs engagements en matière de droits de l'homme.

Diligence accrue ou abstention totale de la part des entreprises ?

59. En 2014, le Groupe de travail sur la question des droits de l'homme et des sociétés transnationales et autres entreprises a publié une déclaration détaillée sur les implications des Principes directeurs relatifs aux entreprises et aux droits de l'homme dans le contexte des colonies israéliennes⁸³. Il y a souligné l'illégalité des colonies et les nombreuses violations des droits de l'homme qui y sont associées. Dans sa conclusion, le Groupe de travail a émis une mise en garde contre l'implication des entreprises dans les colonies israéliennes, déclarant ce qui suit :

Les entreprises commerciales qui font des affaires ou qui cherchent à en faire dans les colonies israéliennes situées dans le territoire palestinien occupé ou qui sont liées à celles-ci doivent pouvoir démontrer qu'elles ne soutiennent pas la poursuite d'une situation illégale internationale ni ne sont complices de violations des droits de l'homme, qu'elles peuvent effectivement prévenir ou atténuer les risques en matière de droits de l'homme et qu'elles sont en mesure de rendre compte des efforts qu'elles déploient à cet égard.

60. En 2018, le HCDH a publié un rapport intérimaire portant sur les progrès accomplis dans la création d'une base de données des entreprises impliquées dans les colonies israéliennes. Dans sa conclusion, le HCDH a exprimé des doutes considérables quant à la possibilité pour une entreprise de prendre part à des activités commerciales avec les colonies israéliennes et, en même temps, de se conformer à ses responsabilités en matière de droits de l'homme (voir [A/HRC/37/39](#), par. 41) :

Au vu de l'ampleur du consensus juridique international concernant la nature illégale des colonies elles-mêmes, et du caractère systémique et généralisé de leurs incidences sur les droits de l'homme, on imagine difficilement qu'une entreprise puisse prendre part aux activités énumérées tout en respectant les Principes directeurs et le droit international.

61. En 2019, Amnesty International a publié une étude de fond sur les droits de l'homme et sur les implications juridiques des entreprises faisant des affaires avec les colonies israéliennes⁸⁴. L'organisation a conclu que, compte tenu de leurs graves répercussions sur les droits de l'homme, seule une abstention totale de leur part conviendrait :

Une entreprise ne peut pas endosser la responsabilité qui lui incombe de respecter les droits de l'homme et les principes du droit international humanitaire lorsqu'elle fait des affaires avec les colonies. En effet, les colonies ont été établies et consolidées en violation des règles du droit international régissant ce que les États peuvent et ne peuvent pas faire en cas d'occupation militaire. En tant que telles, elles constituent des crimes de guerre et donnent lieu à des violations graves, systématiques et généralisées des droits de l'homme.

62. Le Rapporteur spécial estime que toute forme d'implication des entreprises israéliennes ou internationales dans les colonies israéliennes, qu'elle soit directe ou

⁸² Yael Ronen, « Responsibility of businesses involved in the Israeli settlements in the West Bank », janvier 2015.

⁸³ Voir : <https://www.ohchr.org/Documents/Issues/Business/OPTStatement6June2014.pdf>.

⁸⁴ Voir Amnesty International, *Think Twice*, p. 25.

indirecte, intentionnelle ou fortuite, est totalement incompatible avec les obligations qui incombent aux entreprises en matière de droits de l'homme, avec les Principes directeurs et avec toute définition utile de la diligence raisonnable accrue. Et ce, pour trois raisons. Premièrement, les colonies israéliennes constituent une violation flagrante et grave de la quatrième Convention de Genève et un probable crime de guerre en vertu du Statut de Rome. Il s'agit de l'une des plus graves infractions au droit international des droits de l'homme, au droit international humanitaire et au droit pénal international. Deuxièmement, les sociétés et les entreprises qui opèrent dans les colonies ou qui en tirent profit fournissent l'oxygène économique indispensable à leur croissance. Quelles que soient les retombées positives que les entreprises avancent pour défendre leur activité dans les colonies – souvent, l'emploi de main-d'œuvre palestinienne ou le paiement d'impôts locaux⁸⁵ –, elles ne font guère le poids, du point de vue des droits de l'homme, contre l'ampleur des violations flagrantes inhérentes à l'entreprise de colonisation. Troisièmement, les colonies sont le principal instrument politique – les « faits observés sur le terrain » sans cesse évoqués – utilisé par le Gouvernement israélien pour faire avancer ses revendications d'annexion de facto et de jure et pour refuser l'autodétermination palestinienne. L'annexion est un crime d'agression⁸⁶ et l'autodétermination est le premier des droits de l'homme⁸⁷.

63. Dans les conditions actuelles, la seule forme d'engagement que les entreprises pourraient adopter dans le territoire palestinien occupé pour respecter leurs responsabilités en matière de droits de l'homme consisterait à : a) faire en sorte que leurs activités bénéficient directement à la population protégée sous l'occupation ; b) refuser d'accorder des avantages aux colonies israéliennes et de faire affaire avec elles ; et c) contribuer à la revendication de souveraineté inhérente du peuple palestinien sur son territoire.

Base de données du Conseil des droits de l'homme

64. En février 2020, le HCDH a publié la base de données des entreprises impliquées dans certaines activités concernant les colonies de peuplement israéliennes (voir [A/HRC/43/71](#)), conformément à la demande formulée par le Conseil des droits de l'homme dans sa résolution 31/36. Des bases de données portant sur les activités des entreprises avaient déjà été commandées par l'ONU pour d'autres zones de conflit, notamment la République démocratique du Congo (voir [S/2003/1027](#)) et le Myanmar (voir [A/HRC/42/CRP.3](#)). Le Rapporteur spécial se félicite de la publication de la base de données, car elle fournit un éclairage important sur l'activité des entreprises tant israéliennes qu'internationales dans les colonies et permet au public et aux entreprises de mieux comprendre l'environnement défavorable aux droits de l'homme qui règne dans les colonies⁸⁸. En même temps, il reconnaît que la base de données avait un mandat restrictif (elle ne cherchait pas à couvrir toutes les activités commerciales liées aux colonies qui pourraient soulever des préoccupations en matière de droits de l'homme), qu'elle était interprétée de manière étroite (un certain nombre d'entreprises ayant des relations d'approvisionnement importantes avec les colonies ou le processus d'occupation n'y étaient pas incluses) et qu'elle ne

⁸⁵ Maha Abdullah and Lydia de Leeuw, *Violations Set in Stone* (Amsterdam, Somo, et Ramallah, Al-Haq, 2020).

⁸⁶ Statut de Rome de la Cour pénale internationale (modifié en dernier lieu en 2010), 17 juillet 1998, article 8 bis, par. 2, al. a).

⁸⁷ L'autodétermination est le tout premier droit de l'homme cité à la fois dans le Pacte international relatif aux droits économiques, sociaux et culturels et dans le Pacte international relatif aux droits civils et politiques.

⁸⁸ Valentina Azarova, « Business and human rights in occupied territory: the UN database of business active in Israel's settlements », *Business and Human Rights Journal*, vol. 3, n° 2 (juillet 2018), p. 187.

contenait pas de mécanisme juridictionnel⁸⁹. Il convient de répondre à ces préoccupations tout en renforçant la capacité de la base de données à être un outil vivant.

IV. Conclusions

65. En 1970, le Conseil de sécurité a dû faire face à une crise internationale qui présente des similitudes frappantes avec celle qui touche le territoire palestinien occupé : la domination prolongée de l’Afrique du Sud de l’apartheid sur la Namibie⁹⁰. Comme la Palestine, la Namibie était gouvernée dans le cadre d’une relation de confiance supervisée par l’ONU – dans un cas, il s’agit d’une occupation, dans l’autre, d’un mandat – par une puissance étrangère qui exploitait sa position et avançait une revendication de souveraineté illégale. Comme dans le cas de la Palestine, la domination sud-africaine sur la Namibie a été favorisée par l’importante présence d’entreprises régionales et internationales. Et comme dans le cas de la Palestine, la puissance étrangère présente en Namibie défiait les directives données depuis longtemps par le Conseil pour mettre fin à son règne abusif et ouvrir la voie à l’indépendance. En réponse, le Conseil avait autorisé un ensemble complet de sanctions et de contre-mesures pour mettre fin à la domination sud-africaine sur la Namibie. Ces mesures de responsabilisation – que l’on trouve, entre autres, dans la résolution 283 (1970) du Conseil et dans l’avis consultatif rendu par la Cour internationale de Justice sur la Namibie de 1971⁹¹ – ont jeté les bases des mesures prises par la communauté internationale contre le régime illégal de l’Afrique du Sud et en faveur de l’indépendance de la Namibie en 1990.

66. Sans les mesures globales de responsabilisation élaborées et appliquées par le Conseil de sécurité à l’égard de l’Afrique du Sud, l’indépendance de la Namibie n’aurait jamais eu lieu au moment où elle a eu lieu. Et sans l’élaboration et l’application de mesures globales de responsabilisation par la communauté internationale contre l’occupation israélienne, elle se poursuivra à l’avenir. Cette occupation ne mourra pas de vieillesse. Elle ne s’effritera pas non plus devant les appels au respect lancés par l’ONU, lesquels ne promettent pas l’inéluctabilité de répercussions néfastes en cas de désobéissance. Les droits prévus par le droit international sont évidents, mais ils ne s’exécutent pas d’eux-mêmes.

67. Dans ses résolutions 465 (1980) et 471 (1980), le Conseil de sécurité a demandé à tous les États « de ne fournir à Israël aucune assistance qui serait utilisée spécifiquement pour les colonies de peuplement des territoires occupés » et à Israël « de mettre fin à l’occupation prolongée ». Quarante ans plus tard, il est grand temps que le Conseil dirige la communauté internationale en s’inspirant de ses propres précédents concernant la Namibie et d’autres régimes de sanctions modernes pour honorer les directives qu’il émet en vue de mettre fin à l’aide fournie aux colonies et à l’occupation. Comme l’a déclaré la Cour internationale de Justice dans son avis consultatif :

⁸⁹ Voir : www.haaretz.com/israel-news/.premium-why-the-un-s-settlement-database-doesn-t-go-far-enough-1.8589282.

⁹⁰ John Dugard, *Confronting Apartheid: A Personal History of South Africa, Namibia and Palestine* (Johannesburg, Afrique du Sud, Jacana Media, 2018).

⁹¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970) [Conséquences juridiques pour les États de la présence continue de l’Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité]*, avis consultatif, *Rapports de la C.I.J.*, 1971, p. 16.

Ce serait une interprétation insoutenable d'affirmer que, lorsque le Conseil de sécurité fait une telle déclaration en vertu de l'article 24 de la Charte au nom de tous les États Membres. Ceux-ci sont libres de ne faire aucun cas de l'illégalité ni même des violations du droit qui en résultent⁹².

V. Recommandations

68. Le Rapporteur spécial recommande que le Gouvernement israélien se conforme pleinement aux obligations que lui impose le droit international, mette complètement fin à 53 ans d'occupation avec toute la célérité voulue et permette la réalisation de l'autodétermination palestinienne.

69. Le Rapporteur recommande que le Conseil de sécurité, ou l'Assemblée générale si le Conseil n'agit pas, adopte, conformément à la procédure prévue par sa résolution 377 (V) intitulée « Union pour le maintien de la paix », des résolutions contenant les directives suivantes :

a) Demander à tous les États qui entretiennent des relations diplomatiques ou consulaires avec Israël d'adresser une déclaration officielle au Gouvernement israélien indiquant qu'ils ne reconnaissent au pays aucune autorité sur le territoire palestinien occupé et considèrent que la présence continue d'Israël dans le territoire est illégale ;

b) Demander à tous les États de s'abstenir d'entretenir avec Israël toute relation – notamment sous la forme d'accords diplomatiques, consulaires, commerciaux et autres – impliquant la reconnaissance de l'autorité du Gouvernement israélien sur une quelconque partie du territoire palestinien occupé ;

c) Demander à tous les États de veiller à ce que l'ensemble des entreprises relevant de leur juridiction cessent toute activité commerciale, opérationnelle ou d'investissement ainsi que toute transaction commerciale de quelque nature que ce soit en lien avec les colonies israéliennes et les zones d'activités industrielles israéliennes ou avec des entreprises contrôlées par le Gouvernement israélien et opérant dans le territoire palestinien occupé ;

d) Demander à tous les États d'entreprendre, sans délai, une étude et un examen détaillés de l'ensemble des traités bilatéraux qu'ils ont conclus avec Israël, le but étant de déterminer si ces traités contiennent des dispositions susceptibles de s'appliquer aux colonies israéliennes situées dans le territoire palestinien occupé ;

e) Appeler tous les États à décourager la promotion du tourisme et l'émigration vers les colonies israéliennes ;

f) Appeler également tous les États à refuser l'entrée de biens produits et de services proposés, en tout ou en partie, dans les colonies israéliennes ou par des entreprises commerciales contrôlées par Israël et présentes dans le territoire palestinien occupé ;

g) Demander à tous les États de faire rapport chaque année au Secrétaire général sur les mesures qu'ils ont prises pour donner effet aux dispositions énoncées par le Conseil de sécurité et l'Assemblée générale.

70. Le Rapporteur recommande que le Conseil de sécurité veille à ce que la base de données des entreprises impliquées dans certaines activités concernant les

⁹² Ibid., par. 112 (p. 52).

colonies de peuplement israéliennes devienne un outil vivant, qu'il en clarifie et en élargisse le mandat et qu'il la dote de ressources suffisantes pour qu'elle puisse faire bien ressortir la mesure dans laquelle lesdites entreprises sont impliquées dans des activités relatives aux colonies et à l'occupation.



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**Promotion et protection des droits humains :
situations relatives aux droits humains et rapports
des rapporteurs et représentants spéciaux**

Situation des droits humains dans les territoires palestiniens occupés depuis 1967*

Note du Secrétaire général

Le Secrétaire général a l'honneur de transmettre à l'Assemblée générale le rapport présenté par le Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Michael Lynk, en application de la résolution 5/1 du Conseil des droits de l'homme.

* Le présent document est soumis après la date prévue pour que l'information la plus récente puisse y figurer.



Rapport du Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Michael Lynk

Résumé

Le présent rapport est le sixième soumis à l'Assemblée générale par Michael Lynk, Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967. Il a été établi principalement à partir d'informations communiquées par des victimes, des témoins, des représentants de la société civile et des organismes des Nations Unies. Il fait état d'un certain nombre de préoccupations liées à la situation des droits humains en Cisjordanie, y compris à Jérusalem-Est, et à Gaza, et comprend une analyse détaillée de la responsabilité et la performance des acteurs internationaux.

I. Introduction

1. Dans le présent rapport, le Rapporteur spécial sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Michael Lynk, donne un bref aperçu des problèmes les plus pressants en matière de droits humains qu'il a recensés à l'issue de ses conversations et rencontres avec des membres de la société civile dans le Territoire palestinien occupé au moment de l'établissement du rapport. Il propose ensuite une analyse détaillée des préoccupations les plus récentes liées aux droits humains dans le Territoire palestinien occupé, en mettant tout particulièrement l'accent sur les responsabilités et la performance des acteurs internationaux.

2. Le Rapporteur spécial tient à souligner une fois de plus qu'en dépit de ses demandes répétées, Israël ne l'a pas encore autorisé à accéder au Territoire palestinien occupé. Il fait à nouveau valoir qu'un libre dialogue entre toutes les parties est essentiel à la protection et à la promotion des droits humains et rappelle à Israël qu'il est tout disposé à y participer. Il continue par ailleurs de faire remarquer que l'accès au Territoire palestinien occupé est déterminant pour comprendre la réalité de la situation des droits humains dans le territoire. Le défaut systématique de coopération d'Israël avec le Rapporteur spécial est très préoccupant.

3. Le Rapporteur spécial n'a pas pu se rendre dans la région, y compris à Amman, en raison des restrictions de voyage liées à la propagation de la maladie à coronavirus 2019 (COVID-19). Toutefois, il a pu communiquer activement avec des membres de la société civile et des organismes des Nations Unies et recueillir des informations importantes sur le sujet, en grande partie grâce à des communications.

4. Dans le présent rapport, le Rapporteur spécial s'applique à proposer une analyse détaillée des responsabilités et de la performance des acteurs internationaux.

5. Le Rapporteur spécial tient à exprimer sa gratitude au Gouvernement de l'État de Palestine pour sa pleine coopération à son mandat.

6. Le Rapporteur spécial réitère son soutien au travail essentiel qu'accomplissent les organisations palestiniennes, israéliennes et internationales de défense des droits humains. Ce travail est indispensable non seulement au Rapporteur dans l'accomplissement de son mandat, mais aussi à la communauté internationale dans son ensemble. Les efforts que les organisations de défense des droits humains déploient pour garantir la disponibilité d'informations précises et complètes sur la situation dans le Territoire palestinien occupé ne doivent pas passer inaperçus.

II. Situation actuelle des droits humains

A. Usage excessif de la force par Israël

7. Selon le Bureau de la coordination des affaires humanitaires (OCHA), 55 Palestiniens ont été tués par les forces israéliennes en Cisjordanie en 2021, tous par des tirs à balles réelles¹. Lors de l'un des derniers incidents en date, survenu le 15 août, cinq Palestiniens ont été tués par les forces israéliennes lors d'opérations de perquisition et d'arrestation dans le camp de Jénine. Ils auraient été tués à la suite d'un affrontement armé entre des Palestiniens et une unité d'infiltration israélienne, qui était entrée dans le camp pour arrêter un Palestinien supposément affilié au Hamas². Le 28 juillet, un garçon de 11 ans a été tué à Beït Oumar. Il était dans une

¹ Voir Nations Unies, Bureau de la coordination des affaires humanitaires, « Protection of civilians: Occupied Palestinian Territory », 10-23 août 2021 (1e 27 août).

² Ibid.

voiture qui s'éloignait lentement des soldats lorsque certains d'entre eux ont commencé à courir après le véhicule et ont ouvert le feu. Lors de ses funérailles, qui ont eu lieu le 29 juillet, pendant les manifestations pour condamner son meurtre, des Palestiniens ont jeté des pierres et les forces israéliennes ont ouvert le feu, tuant un autre homme³.

8. De nombreux Palestiniens ont été tués ou blessés à la suite de manifestations et d'affrontements entre manifestants et forces de sécurité, dont beaucoup avaient été organisées pour protester contre les implantations et leur expansion. Le 6 août par exemple, lors d'une manifestation à Beïta, des Palestiniens ont jeté des pierres sur les forces israéliennes, qui ont tiré à balles réelles et avec des balles en caoutchouc et lancé des grenades lacrymogènes, tuant un Palestinien⁴.

9. Les journalistes palestiniens qui rendent compte des violations des droits humains dans le Territoire palestinien occupé ont fait l'objet d'actes de harcèlement et de violence ayant pour but de les intimider et d'empêcher que les manifestations pacifiques palestiniennes reçoivent une couverture médiatique. Le 27 août 2021, les forces de sécurité israéliennes ont arrêté sept journalistes palestiniens qui couvraient une manifestation pacifique contre l'établissement de nouveaux avant-postes de colonies et contre la violence des colons dans les collines du sud d'Hébron. Les journalistes ont été arrêtés et leur matériel a été confisqué alors qu'ils regagnaient leurs voitures peu après la fin de la manifestation, bien qu'ils se soient identifiés comme journalistes auprès des soldats. Ils ont été menottés, laissés assis sous le soleil brûlant pendant une heure, puis emmenés au poste de police de Qiryat Arba' où ils ont été interrogés. Deux d'entre eux ont affirmé avoir été agressés et battus par les soldats lors de l'arrestation⁵.

B. Gaza

10. Durant l'escalade des hostilités à Gaza qui a duré 11 jours en mai 2021, 260 Palestiniens ont été tués, dont 66 enfants. Au total, 129 d'entre eux étaient des civils. Plus de 2 200 Palestiniens ont été blessés au cours des hostilités, dont 685 enfants et 480 femmes. Il est possible que certains d'entre eux souffrent d'un handicap à long terme nécessitant une réadaptation⁶. En raison de l'escalade des hostilités, 113 000 personnes déplacées ont cherché refuge et protection dans les écoles gérées par l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient (UNRWA) ou chez leurs proches⁷. Au cours de cette escalade, 290 infrastructures liées à l'eau, à l'assainissement et à l'hygiène ont été endommagées ou détruites, notamment des puits d'eau, des stations de pompage et des réseaux de distribution⁸. En juillet 2021, la plupart des lignes électriques avaient été rétablies et le carburant financé par le Qatar est à nouveau entré dans la bande de Gaza, qui a alors pu bénéficier de 14 heures d'électricité par jour en moyenne⁹.

³ Nations Unies, Bureau de la coordination des affaires humanitaires, « Protection of civilians: Occupied Palestinian Territory », 27 juillet-9 août 2021.

⁴ Ibid.

⁵ Nouvelle information relayée par Human Rights Defenders Fund, le 30 août 2021 (dans le dossier).

⁶ Nations Unies, Bureau de la coordination des affaires humanitaires, « Response to the escalation in the Occupied Palestinian Territory: situation report No. 8 », 8-28 juillet 2021.

⁷ Ibid.

⁸ WASH Cluster–State of Palestine, « Gaza WASH sector damage assessment », 28 juin 2021.

⁹ Nations Unies, Bureau de la coordination des affaires humanitaires, « Response to the escalation in the Occupied Palestinian Territory: situation report No. 8 ».

11. En août 2021, les manifestations ont repris le long de la clôture de Gaza et Israël y a répondu par la force. Le 21 août, un « jour de rage » a été annoncé et des centaines de Palestiniens ont manifesté en masse devant la clôture d'enceinte de Gaza. Au cours de la manifestation, des participants ont lancé des pierres et d'autres objets en direction des forces israéliennes, qui ont tiré à balles réelles et lancé des grenades lacrymogènes. Une autre manifestation a suivi le 23 août. Un homme de 31 ans et un enfant de 12 ans ont été tués par des tirs israéliens lors de ces manifestations et plus de 100 Palestiniens ont été blessés¹⁰.

12. Le travailleur humanitaire de Gaza, Mohammad el-Halabi, qui a été accusé de détourner les fonds de World Vision au profit de groupes armés, est toujours détenu par les autorités israéliennes. Son procès s'est terminé en août et il attend le verdict de la cour de district. L'accusation s'est appuyée sur des éléments de preuves confidentiels et ne lui a pas permis, dans un premier temps, d'avoir accès à un avocat. À de nombreuses reprises, M. el-Halabi aurait subi des pressions pour accepter une procédure de jugement sur reconnaissance préalable de culpabilité en échange d'une réduction de la liste de ses chefs d'accusation et d'un allègement de sa peine, ce qu'il a sans cesse refusé. Selon les informations reçues, son avocat s'est vu imposer de lourdes restrictions, la décision de la cour concernant l'admissibilité des aveux présumés obtenus sous la contrainte a été classée confidentielle et toutes les audiences se sont tenues à huis clos. Le Rapporteur spécial exprime une nouvelle fois de sérieuses inquiétudes estimant que M. el-Halabi n'a pas bénéficié d'un procès équitable (A/HRC/47/27, par. 17)¹¹, et demande à Israël de le libérer immédiatement.

C. Liberté de circulation

13. Les restrictions à la liberté de circulation ont été maintenues dans l'ensemble du Territoire palestinien occupé en tant que méthode permettant à Israël de faire respecter son régime d'occupation. Des restrictions ont été imposées aux déplacements des Palestiniens entre la Cisjordanie, y compris Jérusalem-Est, et la bande de Gaza, ainsi qu'aux déplacements à l'étranger. Quelque 593 points de contrôle et barrages routiers israéliens continuent d'entraver effectivement l'accès des Palestiniens à leurs droits et services, notamment en matière de santé, d'éducation et de travail. En outre, les Palestiniens en Cisjordanie n'ont pas le droit d'utiliser les routes construites pour les colons israéliens¹². Les personnes qui tentent de franchir les points de contrôle font régulièrement l'expérience d'actes de harcèlement et de difficultés, ce qui entrave gravement leur liberté de mouvement. Par exemple, le 5 juillet 2021, deux palestiniennes ont fait le trajet d'un rendez-vous médical au domicile de l'une d'elles à Hébron. Quelque 200 mètres avant d'y parvenir, les deux femmes ont été arrêtées et la police des frontières israélienne a refusé d'ouvrir la barrière et de les laisser passer. Alors que les deux femmes étaient retenues au poste de contrôle, des colons sont arrivés et ont attaqué l'une d'elles, qui a ensuite été emmenée à l'hôpital pour soigner ses blessures. La patrouille de police des frontières israélienne ne serait pas intervenue lors de cet incident¹³. Cet exemple est révélateur de la situation à Hébron

¹⁰ Nations Unies, Bureau de la coordination des affaires humanitaires, « Response to the escalation in the Occupied Palestinian Territory: situation report No. 9 », août 2021.

¹¹ Voir aussi : Haut-Commissariat des Nations Unies aux droits de l'homme, « Gaza aid worker must be given fair trial or released, say UN experts », 12 novembre 2020.

¹² Amnesty International, *Amnesty International Rapport 2020/21 : La situation des droits humains dans le monde* (Londres, 2021).

¹³ B'Tselem, « Border police and settlers attack family in Hebron during argument over crossing a checkpoint, arrest member and demand he not complain against a settler in exchange for releasing him », 8 août 2021.

en particulier, qui est truffée de postes de contrôle limitant considérablement la circulation des Palestiniens, et en Cisjordanie de manière générale.

14. Des Palestiniens ont également été tués ou blessés lors d'incidents qui se sont produits à des postes de contrôle et des barrages routiers. Un incident particulièrement choquant s'est produit dans la nuit du 6 avril 2021 : les forces de sécurité israéliennes ont installé un poste de contrôle temporaire entre Bir Nabala et Jib, au nord de Jérusalem. Elles y ont arrêté la voiture d'un couple palestinien, parents de cinq enfants, qui rentrait chez lui après un rendez-vous médical. Les soldats ont ouvert le feu sur la voiture alors que le couple s'éloignait, tuant l'homme et blessant sa femme¹⁴. Selon B'Tselem, les forces de sécurité israéliennes ont annoncé que la police militaire ouvrait une enquête sur cet incident. Cependant, étant donné l'impunité généralisée qui caractérise ce genre d'incident, les organisations de défense des droits humains ont exprimé la crainte de voir cette affaire connaître le même dénouement¹⁵.

15. Il est toujours très difficile pour les Palestiniens de quitter la bande de Gaza, et bien plus encore depuis l'escalade des hostilités de mai 2021. Début juillet, plus de six semaines après le cessez-le-feu, Israël continuait à restreindre sévèrement les déplacements en provenance ou à destination de Gaza via le passage d'Erez¹⁶. Les mesures relatives à la COVID-19 ont également contribué au renforcement des restrictions. En mars 2020, Israël a annoncé qu'il réduirait encore le nombre déjà restreint de personnes autorisées à quitter Gaza pour des raisons médicales. Au fur et à mesure de l'évolution de la pandémie, Israël a supprimé certaines des restrictions de mouvement imposées en Cisjordanie (et a par exemple octroyé des permis de travail à des Palestiniens pour l'entrée en Israël), mais les restrictions imposées à Gaza sont majoritairement restées en vigueur¹⁷. Le fait que l'Autorité palestinienne ait mis fin en mai 2020 à sa coordination avec Israël en matière de sécurité – en réponse à l'intention d'Israël d'annexer certaines parties de la Cisjordanie – a également contribué à l'apparition de nouvelles restrictions. En conséquence, les demandes de permis ont chuté et, en mars 2021 par exemple, la circulation au point de passage d'Erez a considérablement diminué, jusqu'à atteindre environ 6 % de ce qu'elle avait été les mois précédents¹⁸. Au cours du mois de mai 2021, 1 000 personnes ont quitté la bande de Gaza, soit le plus faible nombre de sorties pour toute l'année¹⁹. Bien que des informations indiquent que les autorités israéliennes ont assoupli certaines restrictions de mouvement pour les patients palestiniens depuis le cessez-le-feu, deux patients sur trois qui demandent de tels permis les attendent toujours au moment de leur rendez-vous²⁰.

D. Actes de violence commis par des colons

16. Malgré l'élection d'un nouveau gouvernement israélien en juin 2021, qui comprend des politiciens plus « centristes », dont certains ont pris position par le

¹⁴ B'Tselem, « Not an attack or a car-ramming: soldiers at checkpoint shoot and injure Palestinian parents of five, killing father », 27 avril 2021.

¹⁵ Ibid.

¹⁶ Gisha, « Israel's restrictions at Gaza crossings are impairing civilian infrastructure, crushing the economy, and violating human rights », 12 juillet 2021.

¹⁷ B'Tselem, « Since pandemic, has Israel allowed almost no Palestinians out of Gaza for medical treatment », 3 mai 2021.

¹⁸ Ibid.

¹⁹ Nations Unies, Bureau de la coordination des affaires humanitaires, base de données Gaza Crossings. Disponible à l'adresse suivante : www.ochaopt.org/data/crossings.

²⁰ Nations Unies, Bureau de la coordination des affaires humanitaires, « Response to the escalation in the Occupied Palestinian Territory: situation report No. 8 ».

passé contre l'entreprise de colonisation²¹, l'expansion des implantations s'est poursuivie et la violence des colons ne semble pas baisser d'intensité. Des cas de plus en plus flagrants ont été recensés en 2021, ainsi que des cas impliquant un soutien et une collaboration actifs entre les colons et les forces de sécurité israéliennes. Au 24 septembre 2021, le Bureau de la coordination des affaires humanitaires avait recensé 246 actes de violence commis par des colons ayant entraîné des dommages matériels et 93 autres incidents ayant fait des blessés²². Cette violence est principalement motivée par des raisons idéologiques et a pour but de terroriser les Palestiniens et de les empêcher d'accéder à leurs terres. Aux violences physiques contre les Palestiniens s'ajoutent de nombreux incidents lors desquels leurs moyens de subsistance sont pris pour cible dans les zones rurales, où le bétail, les terres agricoles, les arbres et les maisons²³ font notamment l'objet d'actes de vandalisme.

17. Lors d'un incident particulièrement odieux qui s'est déroulé le 17 août 2021, des colons auraient percuté un jeune garçon de 15 ans avec leur véhicule près du village de Silat el-Zahr, sur la route reliant Naplouse à Jénine, puis l'auraient enlevé pour le conduire dans l'implantation israélienne de Homesh, précédemment évacuée, l'auraient attaché à un arbre puis battu et lui auraient brûlé les pieds jusqu'à ce qu'il perde connaissance. Une jeep de l'armée israélienne a trouvé le garçon deux heures plus tard et l'a confié à une ambulance. Le garçon a été transporté à l'hôpital où il a été soigné pour des contusions et des brûlures et souffre encore d'un grave traumatisme psychologique²⁴.

18. Il a été fait état de plusieurs incidents lors desquels les forces de sécurité israéliennes ont activement aidé les colons dans leurs attaques. Selon B'Tselem, lors de deux incidents distincts, le vendredi 14 mai 2021, des colons et des soldats ont fait irruption dans deux villages, Ourif et Iskaka. Les colons, dont certains étaient armés, ont jeté des pierres sur des habitations et des habitants. Colons et soldats ont ouvert le feu ensemble, faisant 12 blessés et 2 morts parmi les Palestiniens²⁵.

19. L'atmosphère d'impunité qui entoure les attaques de colons est très préoccupante et laisse entendre à ceux-ci que leurs actes illégaux et scandaleux contre les Palestiniens n'auront aucune conséquence. L'organisation non gouvernementale israélienne de défense des droits humains Yesh Din a analysé 63 incidents de violence commise par des colons ayant eu lieu entre 2017 et 2020, notamment des infractions violentes, des dommages matériels et la profanation de mosquées. Des plaintes ont été déposées pour 60 de ces incidents, mais la police n'a conclu son enquête que dans 38 cas. Aucun de ces incidents n'a abouti à une mise en examen²⁶. La violence des colons a un impact inéluctable sur la vie des Palestiniens en Cisjordanie et crée un sentiment persistant de terreur et d'intimidation.

²¹ Par exemple : voir Walla News, « *Michaeli v. Yachimovich*: there is nothing more to build in the settlements », 23 décembre 2012. Disponible à l'adresse suivante : <https://news.walla.co.il/item/2599418>. En hébreu.

²² Nations Unies, Bureau de la coordination des affaires humanitaires, « Protection of civilians: Occupied Palestinian Territory », 7-20 septembre 2021.

²³ Haut-Commissariat des Nations Unies aux droits de l'homme (HCDH), « Israel/OPT: UN experts warn of rising levels of Israeli settler violence in a climate of impunity », 14 avril 2021.

²⁴ Gideon Levy et Alex Levaq, « Shacked, beaten, strung up on a tree: Palestinian teen brutally attacked by settlers », *Haaretz*, 26 août 2021.

²⁵ B'Tselem, « May 2021: two Palestinians were fatally shot in two joint attacks by settlers and soldiers in the villages of Iskaka and Urif – Awad Harb and Nidal Safadi », 24 août 2021.

²⁶ Yesh Din, « Settler crime and violence inside Palestinian communities, 2017–2020 », mai 2021.

E. Autorité palestinienne et autorités de facto de Gaza

20. Le 24 juin 2021, Nizar Banat, critique de longue date de l'Autorité palestinienne, est mort sous la garde des forces de sécurité palestiniennes. Depuis le meurtre de M. Banat fin juin, des manifestations ont eu lieu à Hébron, Bethléem et Ramallah, auxquelles les forces de sécurité palestiniennes, déployées en uniforme ou en habits civils, ont répondu par un usage excessif de la force²⁷. Le 21 août 2021 à Ramallah, les forces de sécurité palestiniennes ont arrêté 23 Palestiniens au motif qu'ils tenaient une manifestation publique. Les personnes arrêtées participaient à une manifestation organisée pour exiger que les responsables du meurtre de Nizar Banat en juin soient poursuivis en justice. La majorité des personnes arrêtées l'ont été avant même le début de toute manifestation. Les autorités avaient préalablement été informées de la tenue de cette manifestation, comme l'exige la loi²⁸. Il semblerait que d'autres arrestations soient en cours. La plupart des personnes arrêtées ont été accusées de participation à un rassemblement illégal ainsi que d'incitation au conflit sectaire et de diffamation des autorités supérieures. Plusieurs d'entre elles sont des défenseurs des droits humains et des militants politiques bien connus. Ces arrestations ont suscité une vague de condamnations de la part de l'ONU, de l'Union européenne et d'organisations de défense des droits humains, qui ont mis en garde contre un dangereux recul des droits et des libertés publiques. Le Rapporteur spécial tient à réaffirmer que l'obligation de respecter, protéger et réaliser les droits humains incombe à l'autorité compétente qui exerce le pouvoir. Nonobstant la dureté de l'occupation israélienne, la société civile palestinienne a tout à fait le droit d'exiger de ses propres dirigeants politiques et responsables de la sécurité qu'ils respectent la promesse solennelle qu'ils ont faite de se conformer aux engagements internationaux en matière de droits humains.

21. La colère a également été alimentée par la décision de reporter indéfiniment des élections qui étaient prévues pour mai et juillet 2021, et qui auraient été les premières élections palestiniennes depuis 15 ans²⁹. Le Président de l'État de Palestine, Mahmoud Abbas, a annoncé le 29 avril 2021 que les élections seraient reportées à une date indéterminée car il était possible que les Palestiniens ne soient pas en mesure de voter à Jérusalem-Est. Le Rapporteur spécial a noté que les élections palestiniennes offraient l'occasion de renouveler le processus démocratique, de faire face à des divisions politiques internes de longue date, de renforcer les institutions responsables et de faire un pas important vers la réalisation des droits nationaux et individuels fondamentaux du peuple palestinien. Pour que les élections aient lieu, il est important qu'Israël déclare clairement qu'il autorisera la pleine participation démocratique des Palestiniens de Jérusalem-Est. En tant que puissance occupante, il doit interférer le moins possible avec les droits et la vie quotidienne des Palestiniens³⁰.

22. Le 22 juillet, une explosion a eu lieu dans un bâtiment de trois étages situé dans un marché populaire du secteur de Zaouiya. Elle a tué un homme de 68 ans et blessé 14 autres personnes, dont 6 enfants. Le comité de suivi des autorités de facto a annoncé qu'il avait demandé au Ministère de l'intérieur d'enquêter sur cette affaire. Un certain nombre d'organisations de défense des droits humains ont demandé une enquête rapide sur l'incident et se sont inquiétées de l'augmentation du nombre

²⁷ HCDC, « Occupied Palestinian Territory: attacks against critics must stop, those responsible arrested – UN experts », 6 juillet 2021.

²⁸ Amira Hass, « The Palestinian authority is quashing legal protests – again », *Haaretz*, 22 août 2021.

²⁹ Al-Jazeera, « UN, EU condemn Palestinian authority over activist arrests », 24 août 2021.

³⁰ HCDC, « Palestinian election: free, fair, democratic and credible vote must include East Jerusalem – UN experts », 26 July 2021.

d'explosions touchant des civils dans les zones résidentielles³¹. Au moment de la rédaction du présent rapport, l'enquête se poursuit.

III. Responsabilité et performance des acteurs internationaux

23. La communauté internationale – Nations Unies en tête – a accepté depuis longtemps la responsabilité particulière qui est la sienne lorsqu'il s'agit de superviser la question de Palestine, mettre un terme définitif à l'occupation israélienne, réaliser l'autodétermination palestinienne et veiller à ce que toutes les questions liées au conflit soient réglées de façon juste et durable³². Ces questions ont naturellement pris une immense ampleur politique, juridique et populaire, qui se répercute bien au-delà du Levant. Kofi Annan, l'ancien Secrétaire général de l'ONU, a rappelé dans ses mémoires que le conflit israélo-palestinien n'était pas simplement un problème non résolu parmi d'autres. Selon lui, aucune autre question ne porte une charge symbolique et émotionnelle aussi puissante qui touche des personnes vivant loin de la zone de conflit³³.

24. Ce sont les Nations Unies qui ont voté la partition de la Palestine et permis la création de l'État d'Israël³⁴, pris en charge des millions de réfugiés palestiniens pendant sept décennies³⁵, entrepris de multiples missions de maintien de la paix dans la région³⁶ et surveillé de près le conflit et l'occupation qui se poursuivent en adoptant des centaines de résolutions et en publiant une myriade de rapports³⁷. La communauté internationale est intimement associée à ce conflit du fait des nombreuses initiatives diplomatiques de cessez-le-feu et de paix, des ventes massives d'armes et du volume considérable de l'aide, des échanges commerciaux, des subventions et des investissements. Cette zone de conflit est depuis longtemps la plus largement couverte et étudiée au monde. Chaque fois que le conflit entre Israéliens et Arabes sur la question de la Palestine a atteint un point critique, l'ONU a servi de poste de pilotage diplomatique pour résoudre la crise. Ce conflit est devenu, à bien des égards, le plus international des conflits internationaux, et il restera presque certainement au premier plan ou parmi les priorités du programme politique de la communauté internationale jusqu'à l'avènement d'une paix juste.

25. Compte tenu de cette responsabilité particulière, comment pouvons-nous évaluer l'efficacité réelle des efforts déployés par la communauté internationale pour mettre un terme définitif à l'occupation israélienne ? Cela est particulièrement important étant donné la durée démesurée de cette occupation – la plus longue de l'ère moderne – et le fait que les principaux acteurs internationaux semblent s'être résignés à l'idée que la fin de l'occupation n'est pas pour demain, et qu'ils sont à court d'idées et d'énergie pour contrecarrer la stratégie de patience d'Israël et permettre à la Palestine d'atteindre à une véritable autodétermination.

³¹ Al Mezan Center for Human Rights, « Al Mezan calls for investigation into house explosion in Gaza that killed one person and injured 14 others », 22 juillet 2021.

³² Voir résolution 75/23 de l'Assemblée générale des Nations Unies (« Réaffirmant que l'Organisation des Nations Unies est investie d'une responsabilité permanente en ce qui concerne la question de Palestine ... »).

³³ Kofi Annan, *Interventions : Une vie dans la guerre et dans la paix* (Odile Jacobs, 2013).

³⁴ Voir résolution 181 (II) de l'Assemblée générale. Voir généralement Avi Shlaim, *Le mur de fer : Israël et le monde arabe* (Buchet-Chastel, 2008).

³⁵ Francesca P. Albanese et Lex Takkenberg, *Palestinian Refugees in International Law* (2^e éd.) (Oxford, Oxford University Press, 2020).

³⁶ Karim Makdisi et Vidjay Prashad, éd., *Land of Blue Helmets: The United Nations and the Arab World* (Oakland, University of California Press, 2017).

³⁷ Ardi Imseis, *The United Nations and the Question of Palestine* (Cambridge, Royaume-Uni, Cambridge University Press, à paraître).

26. Dans un rapport daté du 21 octobre 2019 (A/74/507), le Rapporteur spécial a abordé la question des obligations tenant à la responsabilité internationale, en soulignant les devoirs juridiques et politiques découlant de la Convention de Genève relative à la protection des personnes civiles en temps de guerre (quatrième Convention de Genève), des articles sur la responsabilité de l'État pour fait internationalement illicite adoptés en 2001 et de l'Article 25 de la Charte des Nations Unies. Dans son rapport du 22 octobre 2020 (A/75/532), le Rapporteur spécial a examiné d'un œil critique le rôle du Conseil de sécurité dans la supervision de l'occupation, en faisant valoir que le Conseil n'a pas réussi à imposer des contraintes significatives à Israël en réponse au renforcement de son occupation de la Palestine au mépris de ses propres résolutions et du droit international. Dans le présent rapport, il s'intéresse à quatre acteurs internationaux – les États-Unis d'Amérique, l'Union européenne, la Banque mondiale et le Quatuor – qui ont joué divers rôles influents en tant que médiateurs, bailleurs de fonds ou facilitateurs ou ont supervisé tout ou partie du processus Madrid-Oslo relatif à l'occupation israélienne.

A. Responsabilité de la communauté internationale dans l'aggravation de l'occupation

27. Ces dernières années, l'occupation israélienne de la Palestine, qui dure déjà depuis 54 ans, toujours répressive, toujours insatiable, s'est métastasée en quelque chose de bien plus dur et profondément ancré : la domination étrangère permanente d'un peuple sur un autre, encadrée par un système à deux vitesses de lois et de droits politiques inégalitaires. Plus de 680 000 colons israéliens vivant dans des implantations ségréguées et privilégiées au milieu de 5 millions de Palestiniens apatrides ; des guerres asymétriques ; une fragmentation géographique ; une économie étouffée et fortement dépendante de l'aide extérieure ; des réseaux distincts de routes et de services ; des ghettos appauvris et clôturés uniques en leur genre dans le monde moderne ; un environnement coercitif ; le recours accru à la violence nécessaire au maintien de l'occupation ; le déni du droit des peuples à disposer d'eux-mêmes ; l'accès profondément inégal aux droits sociaux et aux droits relatifs à la propriété, à la santé et à l'emploi. Le tout entièrement fondé sur la nationalité et l'appartenance ethnique³⁸. Tout cela devrait être impensable au XXI^e siècle.

28. Des juristes, parmi lesquels des universitaires israéliens, ont confirmé qu'en vertu du droit international : a) une occupation doit être de courte durée et temporaire ; b) une occupation doit impérativement être établie de bonne foi et dans l'intérêt de la population occupée ; c) la puissance occupante n'acquiert absolument aucun droit d'installer une partie de sa population civile dans le territoire occupé ou d'annexer une portion de celui-ci ; d) le territoire doit être restitué en totalité au souverain – le peuple occupé – dès que cela est raisonnablement possible³⁹. Israël viole depuis longtemps tous ces principes fondamentaux, et son occupation a franchi de manière flagrante une ligne rouge marquant l'illégalité au regard du droit international (voir A/72/556)⁴⁰.

³⁸ Voir les rapports récents de Al-Haq, B'Tselem, Human Rights Watch, Amnesty International et le West Bank Protection Consortium.

³⁹ Orna Ben-Naftali, Michael Sfard et Hedi Viterbo, *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge, Royaume-Uni, Cambridge University Press, 2018) ; et Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge, Royaume-Uni, Cambridge University Press, 2017).

⁴⁰ Voir aussi Ardi Imseis, « Negotiating the illegal: on the United Nations and the illegal occupation of Palestine, 1967–2020 », *European Journal of International Law*, vol. 31, n° 3 (août 2020).

29. Cependant, la communauté internationale s'est montrée étonnamment peu encline à s'opposer véritablement aux changements considérables qu'Israël a générés sur le terrain, et encore moins à agir pour les annuler. Il s'agit là d'un échec politique de premier ordre. Cette même communauté internationale – s'exprimant par l'intermédiaire des principaux organes politiques et juridiques des Nations Unies – a établi le cadre détaillé et fondé sur les droits largement accepté qui régit la supervision et le règlement de la question de l'occupation israélienne de la Palestine⁴¹. En conséquence, la longue occupation israélienne doit purement et simplement cesser⁴². Tant les Palestiniens que les Israéliens doivent pouvoir vivre en paix et en sécurité et jouir du droit des peuples à disposer d'eux-mêmes, y compris en formant des États souverains, sûrs et viables, dans les limites du territoire de la Palestine sous mandat, sur la base de la frontière de 1967⁴³. L'annexion d'un territoire occupé est illégale⁴⁴. Chacune des plus de 280 implantations israéliennes à Jérusalem-Est et en Cisjordanie constitue une violation flagrante du droit international⁴⁵. Jérusalem-Est a été illégalement annexée par Israël et demeure un territoire occupé⁴⁶. Les Palestiniens qui sont devenus des réfugiés suite aux guerres de 1948 et 1967 ont le droit de choisir de retourner dans leur patrie⁴⁷. Gaza fait partie intégrante de la Palestine, elle demeure occupée et le blocus israélien est une forme prohibée de peine collective⁴⁸. Le devoir politique et juridique de responsabilité signifie qu'il incombe à la communauté internationale de s'opposer aux violations graves du droit international et des droits humains et d'y mettre fin⁴⁹ : elle dispose pour cela de nombreux pouvoirs politiques et juridiques lui permettant de sanctionner les contrevenants jusqu'à ce qu'ils se conforment à leurs obligations⁵⁰.

30. Ce n'est pas fuir la réalité ni dresser un obstacle insurmontable sur la voie de la diplomatie active que d'insister pour que la supervision et la cessation de l'occupation israélienne, ainsi que la création d'une solution juste et durable pour les Palestiniens comme pour les Israéliens, s'appuient sur le droit international et sur un cadre fondé sur les droits. Ce dernier établit au contraire les limites politiques claires entre les comportements admissibles et inadmissibles que tous les États et acteurs internationaux – grands et petits, forts et faibles, démocratiques et autoritaires – se sont engagés à respecter en ratifiant les traités, conventions et pactes modernes et en devenant membres de l'Organisation des Nations Unies⁵¹. Se conformer au droit international est non seulement un devoir pour les acteurs internationaux, mais aussi

⁴¹ Kofi Annan a déclaré en 2002 qu'il n'y avait aucun conflit dans le monde aujourd'hui dont la solution soit aussi claire, emporte un aussi large consensus et soit aussi nécessaire à la paix mondiale que le conflit israélo-palestinien. Voir UN News, « At Arab summit, Annan urges Sharon, Arafat to lead their peoples "back from brink" », 27 mars 2002.

⁴² Résolution 476 (1980) du Conseil de sécurité (« Réaffirme la nécessité impérieuse de mettre fin à l'occupation prolongée des territoires arabes occupés par Israël depuis 1967, y compris Jérusalem »).

⁴³ Résolution 1850 (2008) du Conseil de sécurité.

⁴⁴ Résolution 2334 (2016) du Conseil de sécurité.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Résolutions 73/92 et 73/93 de l'Assemblée générale.

⁴⁸ Résolution 1860 (2009) du Conseil de sécurité. Voir aussi Ban Ki-Moon, Secrétaire général de l'Organisation des Nations Unies, commentaires lors d'un point presse, 28 juin 2016.

⁴⁹ Voir résolution 56/83 de l'Assemblée générale, annexe (Articles sur la responsabilité de l'État pour fait internationalement illicite, art. 40 et 41). Voir également James Crawford, *State Responsibility: The General Part* (Cambridge, Royaume-Uni, Cambridge University Press, 2013).

⁵⁰ Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge, Royaume-Uni, Cambridge University Press, 2009). Voir aussi Comité international de la Croix-Rouge, « Geneva Conventions of 1949 and Additional Protocols and their Commentaries », base de données du DIH coutumier, disponible à l'adresse suivante : <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>.

⁵¹ Zaha Hassan *et al.*, « Breaking the Israel-Palestine status quo », 2021.

une pratique largement répandue parmi les États, comme en témoignent les flux d'investissements et de commerce internationaux, le respect des frontières et de la souveraineté, la prolifération des institutions internationales qui surveillent le respect des obligations et encouragent la coopération, et la réglementation d'aspects aussi ordinaires de la vie quotidienne que les voyages, les services de messagerie, les droits de garde et la technologie⁵².

31. En ce qui concerne l'occupation de la Palestine, il y aurait de nets avantages à ce que la communauté internationale exige qu'Israël respecte ses obligations juridiques internationales, du fait que cela permettrait :

a) Premièrement, d'aplanir une partie des immenses disparités de pouvoir entre Israël et les Palestiniens qui ont entravé l'intégralité du processus de paix, et rendrait ainsi plus probable la conclusion d'un accord durable et équitable⁵³ ;

b) Deuxièmement, d'établir des règles fondamentales bien définies pour déterminer ce qui est légitimement négociable (comme le commerce, la sécurité, la migration de main-d'œuvre et les modifications équitables des frontières de 1967) et ce qui ne l'est pas (comme le maintien des implantations, la poursuite de l'annexion et l'abus de souveraineté), conformément à la norme juridique adoptée de longue date selon laquelle *ex turpi causa non oritur actio*⁵⁴ ;

c) Troisièmement, d'accroître les chances qu'un accord visant à mettre fin à l'occupation et à créer une paix définitive soit durable, étant donné que l'ordre international fondé sur des règles apporterait à la fois la prévisibilité et des mécanismes d'application du principe de responsabilité permettant de faire face à toute difficulté ultérieure ;

d) Quatrièmement, d'indiquer clairement à de potentiels occupants illégitimes que la communauté internationale ne saurait tolérer l'existence de « zones interdites » en matière de droits humains, de droit humanitaire et de droit pénal. Dans le monde moderne, on ne peut pas traiter le droit international comme un menu à la carte et choisir les règles que l'on respecte et celles que l'on méprise.

32. Malheureusement, la remarquable tolérance de la communauté internationale à l'égard de l'exceptionnalisme qui caractérise la gestion israélienne de l'occupation a permis à la *realpolitik* de prendre le pas sur les droits, au pouvoir de supplanter la justice et à l'impunité de saper le principe de responsabilité. C'est l'évolution visible du processus de paix Madrid-Oslo, qui a débuté en 1991. Israël, sans rencontrer trop de résistance de la part des principaux acteurs internationaux, a réussi à faire en sorte que les négociations avec les Palestiniens soient menées en dehors du cadre du droit international en vigueur et du consensus international existant⁵⁵, et ce en dépit des impératifs liés à l'ordre international fondé sur des règles. Cela a permis à Israël de rester intraitable dans ses négociations, son objectif final étant de faire reconnaître formellement ses revendications sur Jérusalem-Est et sur la plupart, voire l'intégralité, de ses implantations de Cisjordanie, tout en consentant à la création d'un minuscule simulacre d'État pour les Palestiniens, qui ne jouirait ni d'un territoire

⁵² Harold Hongju Koh, « Why do nations obey international law? », *Yale Law Journal*, vol. 106, n° 8 (1997).

⁵³ Susan Akram *et al.*, éd., *International Law and the Israeli-Palestinian Conflict: A Rights-Based Approach to Middle East Peace* (Londres, Routledge, 2011).

⁵⁴ Les droits ne peuvent pas découler d'actes illégaux.

⁵⁵ Khaled Elgindy, *Blind Spot: America and the Palestinians from Balfour to Trump* (Washington, D.C., Brookings Institution, 2019).

digne de ce nom ni d'aucune souveraineté⁵⁶. Pour la communauté internationale, cela a donné lieu à un paradoxe troublant : alors que l'ONU s'est exprimée plus régulièrement et de façon plus détaillée au sujet du cadre de règlement de ce conflit que pour n'importe quelle autre zone de conflit au monde, ce cadre n'a eu que très peu d'influence sur les diverses initiatives liées au processus de paix d'Oslo – comme la Déclaration de principes sur des arrangements intérimaires d'autonomie de 1993, les Accords d'Oslo II de 1995, les négociations de Camp David de 2000, les paramètres de Clinton de 2001, les principes arrêtés par le Quatuor en 2003, la formule issue de la Conférence d'Annapolis de 2007, l'initiative de paix proposée par Kerry en 2013-2014 et le plan intitulé « De la paix à la prospérité » établi par Trump en 2020 – qui ont échoué les uns après les autres faute de pouvoir prendre appui sur un échafaudage juridique solide et sur une véritable volonté politique de soutenir une résolution fondée sur les droits.

33. La communauté internationale n'est pas parvenue à faire respecter son propre cadre fondé sur les droits ni à faire appliquer ses nombreuses résolutions ; la conséquence de cet échec est que les rares possibilités restantes de parvenir à une véritable solution des deux États se réduisent comme peau de chagrin. Au lieu de cela est apparu ce que l'Union européenne a reconnu comme étant la réalité d'un État unique où les droits sont inégaux⁵⁷, et que les groupes régionaux et internationaux de défense des droits humains ont déclaré être un apartheid⁵⁸. En 2016, le Conseil de sécurité a mis en garde contre le fait que les activités de peuplement israéliennes mettaient gravement en péril la viabilité de la solution des deux États fondée sur les frontières de 1967⁵⁹. L'ancien Secrétaire général Ban Ki-Moon a déclaré en juin 2021 qu'Israël avait poursuivi une politique d'annexion progressive de facto dans les territoires qu'il occupait depuis 1967, au point que la perspective d'une solution des deux États avait pratiquement disparu⁶⁰. Les lignes roses minimalistes que la communauté internationale a tracées pour Israël – pas de nouvelles annexions *de jure*, pas de nouvelles implantations, pas de destruction de communautés palestiniennes – n'ont guère ralenti la croissance de sa population de colons, l'expansion des infrastructures de transport et de services publics reliant ses implantations entre elles, l'inextricable claustration qu'il impose à Gaza ou la régularité avec laquelle nombre de ses dirigeants politiques déclarent que Jérusalem-Est et la Cisjordanie appartiennent de droit à Israël et ne seront jamais cédées. Les déclarations rituelles dans lesquelles les principaux acteurs internationaux jurent qu'ils restent attachés à une solution des deux États sont devenues une pantomime diplomatique, une façade pour masquer la paralysie plutôt qu'une proclamation de détermination, et cela se produit alors que tout le monde est parfaitement au courant de la réalité dynamique sur le terrain.

34. Les tendances politiques de l'été 2021 ont été décourageantes, mais sans surprise. Le nouveau Premier Ministre israélien, Naftali Bennett, a expressément

⁵⁶ Seth Anziska, *Preventing Palestine: A Political History from Camp David to Oslo* (Princeton, New Jersey, Princeton University Press, 2018) ; et Jeremy Sharon, « Netanyahu calls for Palestinian “state-minus” », *The Jerusalem Post*, 24 octobre 2018.

⁵⁷ Barak Ravid, « EU foreign policy chief: Israel's land-grab law entrenches one-State reality of unequal rights », *Haaretz*, 7 février 2017.

⁵⁸ Human Rights Watch, *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution* (2021) ; Susan Power, « The legal architecture of apartheid », *Al-Haq*, 12 avril 2021 ; et B'Tselem, « A regime of Jewish supremacy from the Jordan River to the Mediterranean Sea: this is apartheid », janvier 2021.

⁵⁹ Résolution 2334 (2016) du Conseil de sécurité.

⁶⁰ Ban Ki-Moon, « US should back a new approach to the Israeli-Palestinian conflict », *The Financial Times*, 29 juin 2021.

déclaré en septembre qu'il était opposé à la création d'un État palestinien⁶¹. Le Ministre israélien de la défense, Benny Gantz, a déclaré que les négociations de paix étaient impossibles en raison de l'opposition de l'Autorité palestinienne aux implantations israéliennes à Jérusalem-Est et en Cisjordanie. Il a affirmé qu'Israël ne démantèlerait pas les implantations⁶². Le nouveau Ministre israélien des affaires étrangères, Yair Lapid, a déclaré lors d'une réunion des ministres des affaires étrangères de l'Union européenne en juillet qu'il n'y avait aucune perspective actuelle pour un processus de paix⁶³. Rien de tout cela n'a suscité de réelle réaction internationale⁶⁴. Au lieu de cela, avec l'apparente bénédiction des principaux acteurs internationaux⁶⁵, le nouveau gouvernement s'applique à « réduire le conflit »⁶⁶ et à faire disparaître certains sujets de mécontentement pour les Palestiniens, en autorisant par exemple la construction d'un petit nombre de maisons palestiniennes dans la zone C, en augmentant le nombre de Palestiniens autorisés à travailler en Israël et en créant des réseaux de téléphonie mobile plus modernes⁶⁷. Les dirigeants politiques israéliens perçoivent cette paix économique non pas comme une voie vers la création d'un véritable État palestinien⁶⁸, mais comme un substitut permettant de maintenir le statu quo⁶⁹. Mairav Zonszein, de l'International Crisis Group, a fait valoir qu'il était impossible d'avoir une paix ou une stabilité économique sous occupation, car l'occupation fait passer les intérêts, les ressources et l'expansionnisme israéliens avant tout le reste⁷⁰.

35. Le présent rapport porte principalement sur l'efficacité de quatre des acteurs internationaux influents impliqués dans le processus de paix au Moyen-Orient et la supervision de l'occupation israélienne. Il s'agit, en se concentrant sur les États-Unis, l'Union européenne, la Banque mondiale et le Quatuor, d'évaluer s'ils ont assidûment œuvré à la réalisation de l'objectif déclaré de la communauté internationale, à savoir mettre fin à l'occupation, permettre l'autodétermination des Palestiniens et assurer la

⁶¹ Bennett a déclaré qu'il était opposé à un État palestinien. Selon lui, ce serait une terrible erreur qui transposerait en Judée-Samarie la terrible situation à Gaza. Voir Tovah Lazaroff, « Palestinian statehood would be a "terrible mistake" – Bennett », *The Jerusalem Post*, 15 septembre 2021.

⁶² Neri Zilber, « Israel can live with a new Iran nuclear deal, Defense Minister says », *Foreign Policy*, 14 septembre 2021.

⁶³ Jonathan Lis, « Israel's Lapid to EU's top diplomats: two-state solution is unfeasible », *Haaretz*, 12 juillet 2021.

⁶⁴ Anshel Pfeffer, « Israel's Prime Minister now pretends the Palestinians don't exist. It's a brilliant move », *Haaretz*, 30 septembre 2021. (Au cours des trois derniers mois, depuis qu'il est devenu Premier Ministre, Bennett a remarqué à quel point il est rare que la question de Palestine soit évoquée lors de ses conversations avec des dirigeants étrangers, et à quel point ils manquaient d'enthousiasme lorsqu'ils en parlaient.)

⁶⁵ Le Président des États-Unis, Joseph Biden, lors de remarques à la soixante-seizième session de l'Assemblée générale, le 21 septembre 2021, a affirmé qu'il croyait encore à une solution des deux États, mais que le but était encore loin.

⁶⁶ Patrick Kingsley, « "Shrinking the conflict": what does Israel's new mantra really mean? », *The New York Times*, 30 septembre 2021.

⁶⁷ Adam Rasgon, « In reversal, Israel's new government engages with Palestinian authority », *The New York Times*, 25 septembre 2021.

⁶⁸ Après avoir exprimé son opposition à un État palestinien, le Premier Ministre Bennett a déclaré que sa perspective était centrée sur le commerce. Il a ajouté que si plus d'entreprises étaient créées, si l'économie était renforcée et les conditions de vie de tous améliorées en Judée-Samarie, ce serait une bonne chose. Voir Lazaroff, « Palestinian statehood would be a "terrible mistake" – Bennett ».

⁶⁹ En rendant compte de cette nouvelle approche du gouvernement israélien, le *New York Times* a noté que même si le gouvernement israélien prenait des mesures pour améliorer l'économie et la sécurité des Palestiniens, il s'était engagé à poursuivre l'expansion des colonies en Cisjordanie ; il avait également continué à démolir des habitations palestiniennes construites sans permis dans des zones où les permis sont rarement délivrés, et à employer la manière forte avec les Palestiniens lors des manifestations et des affrontements. Voir Rasgon, « In reversal ».

⁷⁰ Kingsley, « Shrinking the conflict ».

paix, la sécurité et un avenir prospère et partagé aux Israéliens et aux Palestiniens, ou s'ils l'ont en réalité freiné.

36. Pour évaluer leur efficacité, le Rapporteur spécial propose cinq critères fondamentaux permettant de mesurer le rôle de ces acteurs de premier plan. Il est important de mettre ces critères en exergue, car ils sont au cœur de la relation disparate entre Israël et la Palestine. Tout effort collectif ou individuel de la communauté internationale visant à créer un cadre pour superviser l'occupation et y mettre fin qui ne placerait pas ces critères immédiatement ou quasiment au cœur de son entreprise échouera presque certainement sur les hauts-fonds de la réalité moyen-orientale :

a) **En raison de l'immense asymétrie de pouvoir entre Israël et les Palestiniens, une intervention internationale active est indispensable.** Sur le plan militaire, Israël dispose des forces armées les plus puissantes de la région. Sur le plan économique, Israël affiche un produit intérieur brut par habitant comparable à ceux des pays européens et 12 fois supérieur à celui des Palestiniens. Sur le plan diplomatique, Israël compte sur le soutien durable d'acteurs internationaux de premier plan. Sur le plan territorial, Israël jouit d'une liberté d'action militaire totale entre la mer Méditerranée et le Jourdain. Ce n'est que sur le plan démographique que les Palestiniens ont l'avantage : ils constituent désormais une légère majorité de la population entre la mer Méditerranée et le Jourdain. Sans mesures internationales d'application du principe de responsabilité actives et décisives pour contrer l'abus de ce pouvoir écrasant, les vastes avantages d'Israël continueront à dicter ce qui se passe sur le terrain et à toute table de négociation ;

b) **Le cadre destiné à mettre fin à l'occupation doit recourir à une approche fondée sur les droits, ancrée dans le droit international et les droits humains.** La stratégie sur laquelle le processus de paix reposait hier – qui s'appuyait sur la *realpolitik* des « faits accomplis » israéliens, la faiblesse palestinienne et l'absence de droit – n'a conduit qu'à des impasses diplomatiques répétées, tout en permettant la poursuite presque sans entrave des violations des droits humains et d'une occupation sans fin⁷¹. Le fait d'ignorer le cadre international établi eu égard à l'occupation et aux droits ne fait qu'accélérer la détérioration de la situation⁷². Seule une approche fondée sur les droits peut mobiliser les puissants outils que constituent le principe de responsabilité et le corpus déjà largement approuvé du droit international, y compris le droit des droits humains et le droit humanitaire, pour mettre fin à l'impunité et promouvoir les intérêts des Palestiniens et des Israéliens ;

c) **L'objectif final doit être la réalisation de l'autodétermination palestinienne. Israël existe déjà, et ce depuis 1948.** La clé manquante pour une paix durable a toujours été le déni de l'autodétermination des Palestiniens⁷³. Mais l'annexion de facto et *de jure* du territoire occupé par Israël, réalisée principalement au moyen de l'implacable expansion de ses implantations, a sapé tout exercice digne de ce nom du droit à l'autodétermination sur ce qui reste des terres palestiniennes. L'autodétermination est au cœur des droits humains modernes et constitue la condition *sine qua non* d'une paix juste et définitive. L'autodétermination palestinienne doit être fondée sur les frontières de 1967 et la réalisation d'une

⁷¹ « Editorial: Israel's final warning from the ICC », *Haaretz*, 22 décembre 2019. (L'article explique qu'il est encore plus difficile de comprendre la position selon laquelle la question du conflit israélo-palestinien doit seulement être traitée par le dialogue et les négociations et que le processus juridique ne fera que lui nuire, alors qu'il est clair aux yeux de tous qu'aucun processus de ce genre n'est envisagé parce que le Gouvernement israélien ne s'y intéresse pas.)

⁷² Dimitris Bouris et Nathan J. Brown, « The Middle East Quartet's quest for relevance », *Carnegie Europe*, 20 juillet 2016.

⁷³ Résolution 75/172 de l'Assemblée générale.

souveraineté authentique si une véritable solution des deux États est toujours possible. Si ce n'est pas le cas, alors l'autodétermination doit être axée sur les droits à l'égalité individuels et collectifs pour toutes les personnes qui vivent entre la mer Méditerranée et le Jourdain ;

d) **Israël est un occupant de mauvaise foi.** Telle est l'inévitable conclusion que l'on peut tirer de la façon dont il a mené son occupation du territoire palestinien depuis 54 ans. Son non-respect de centaines de résolutions des organes de l'ONU émanant du Conseil de sécurité, de l'Assemblée générale et du Conseil des droits de l'homme concernant l'occupation, et son refus d'appliquer la quatrième Convention de Genève, n'expriment pas une divergence politique de bonne foi avec le reste du monde, mais une imperturbable attitude de défi destinée à préserver les fruits de sa conquête. Supposer qu'Israël est un occupant responsable, dont les intentions ne sont entachées que par un malheureux égarement politique à l'endroit des Palestiniens, revient à céder à la pensée chimérique qui a conduit aux échecs diplomatiques du passé ;

e) **L'occupation doit prendre fin avec toute la célérité voulue.** Les occupations sont conçues par le droit international pour être temporaires : elles ne doivent durer que le temps nécessaire pour que la puissance occupante rétablisse les institutions étatiques et sociales et la vie civique dans le territoire occupé et que ce dernier soit ensuite rendu au souverain déplacé (le peuple sous occupation)⁷⁴. Au XXI^e siècle, une domination étrangère ne peut se justifier que dans des circonstances exceptionnelles et obéissant à des conditions extrêmement spécifiques. Il est inconcevable au regard du droit international moderne et dans la perspective d'une bonne gestion des affaires internationales que l'injustice prenne fin à une date indéterminée, en particulier lorsqu'il s'agit d'une occupation cupide qui s'est affranchie depuis longtemps des frontières de la légitimité.

B. Les quatre acteurs internationaux

États-Unis d'Amérique

37. Au cours des 50 dernières années, les États-Unis ont joué un rôle démesuré dans le processus de paix au Moyen-Orient, en menant pratiquement toutes les initiatives de paix internationales d'envergure, tout en fournissant à Israël une aide militaire de pointe colossale et en agissant comme son protecteur diplomatique à l'ONU et dans d'autres instances internationales. Ce double rôle des États-Unis dans le processus de paix est l'une des raisons principales pour lesquelles l'occupation israélienne reste inchangée et la quête d'autodétermination palestinienne inachevée. Kofi Annan a parlé de la possessivité malsaine des États-Unis à l'égard du processus de paix et de leur réticence à réellement travailler de façon conjointe à son élaboration⁷⁵. Ban Ki-Moon a déploré la protection politique accordée à Israël par les gouvernements successifs des États-Unis, qui est en partie responsable de ce non-établissement des responsabilités⁷⁶. À bien des égards, le rôle des États-Unis dans la défense d'Israël a été de permettre à l'occupation israélienne de se poursuivre, ternissant par là même leur propre réputation dans le monde. Dans ses mémoires, l'ancien Président des États-Unis Barack Obama a fait observer que pour son pays, le fait de soustraire Israël

⁷⁴ Voir la résolution 1483 (2003) du Conseil de sécurité, dans laquelle celui-ci saluait l'engagement des puissances occupant l'Iraq à rétablir la souveraineté du peuple iraquien « le plus tôt possible », et disait que ce jour devait « venir rapidement ». Voir également la résolution 75/172 de l'Assemblée générale (« Soulignant la nécessité impérieuse de mettre un terme immédiatement à l'occupation israélienne »).

⁷⁵ Annan, *Interventions*.

⁷⁶ Ban, « US should back a new approach ».

à la responsabilité des violations du droit international commises signifiait que les diplomates américains s'étaient retrouvés dans la position inconfortable consistant à intercéder en faveur d'Israël pour des actions auxquelles ils étaient eux-mêmes opposés⁷⁷.

38. En mai 2021, les tensions à Jérusalem se sont aggravées lorsque des colons israéliens ont tenté de déloger des Palestiniens de leurs domiciles, ce qui a conduit le Hamas à tirer des roquettes sur des cibles civiles israéliennes et Israël à répondre par un usage disproportionné de la force militaire. La situation a abouti à 11 jours de violence intense qui ont causé de lourdes pertes civiles et la destruction massive de biens à Gaza. Au cours de ces violences, les États-Unis ont joué un rôle diplomatique d'une prévisibilité décourageante : au Conseil de sécurité, ils ont successivement bloqué un projet de résolution visant à obtenir un cessez-le-feu et la publication d'une déclaration à la presse, arguant que cela ne ferait qu'aliéner Israël⁷⁸. Cette intercession a permis à Israël de poursuivre son assaut sur Gaza jusqu'à ce qu'il ait atteint la plupart de ses objectifs militaires, alors que la sphère diplomatique et l'opinion publique souhaitaient mettre fin à la violence bien plus tôt. Depuis le début de l'occupation israélienne en juin 1967, les États-Unis ont régulièrement permis au Conseil d'adopter des résolutions critiques à l'égard d'Israël – 77 au total – mais ils ont également eu recours à la menace du veto pour contrecarrer la capacité du Conseil – la plus puissante instance politique internationale – de faire appliquer l'une quelconque de ces résolutions. En outre, ils ont opposé leur veto à 32 résolutions critiquant Israël depuis 1973.

39. Les États-Unis ont développé une relation militaire extraordinaire avec Israël, lui apportant une aide annuelle inégalée par toute autre relation bilatérale dans le monde. Depuis le début des années 1950, ils lui ont fourni plus de 100 milliards de dollars d'aide militaire (ainsi que 35 milliards de dollars d'aide économique)⁷⁹. Cette aide militaire a permis aux forces armées israéliennes de devenir l'une des armées les plus sophistiquées au monde sur le plan technologique. Grâce à l'aide américaine, Israël a également pu mettre en place une importante industrie de défense nationale, qui lui a permis de devenir l'un des principaux exportateurs mondiaux d'armes et de technologies liées à la cybersécurité. En effet, les observateurs ont noté que la prouesse d'Israël en tant qu'exportateur d'armes et de cybersécurité de première importance est due en très grande partie aux essais d'armement et de sécurité rendus possibles par sa longue expérience d'occupant qui régit la vie de 5 millions de Palestiniens⁸⁰. Les États-Unis fournissent cette aide militaire en dépit du fait que les lois du Congrès régissant les exportations d'armes depuis les États-Unis stipulent que les pays destinataires ne peuvent pas être associés à des violations flagrantes et systématiques des droits humains⁸¹. Un récent sondage de l'opinion publique américaine a indiqué qu'une faible majorité (50 % pour et 45 % contre) était favorable à la restriction de l'aide militaire à Israël afin d'éviter qu'elle ne soit utilisée dans des opérations militaires contre les Palestiniens⁸².

40. Compte tenu de la relation *sui generis* entre la seule superpuissance du monde et une petite puissance régionale, on peut se demander, comme l'a fait Shibley

⁷⁷ Barack Obama, *Une terre promise* (Fayard 2020).

⁷⁸ International Crisis Group, *Beyond Business as Usual in Israel-Palestine*, Middle East report No. 225 (Bruxelles, 2021).

⁷⁹ Congressional Research Service, États-Unis, « US foreign aid to Israel », novembre 2020.

⁸⁰ Matt Kennard, « The cruel experiments of Israel's arms industry », Centre Pulitzer, 28 décembre 2016).

⁸¹ Josh Ruebner, Salih Booker et Zaha Hassan, « Bringing assistance to Israel in line with rights and U.S. laws », Carnegie Endowment for International Peace, 12 mai 2021.

⁸² Chicago Council on Global Affairs, « Americans split on military aid to Israel, say political status quo unacceptable », 25 août 2021.

Telhami, professeur à l'Université du Maryland, quel espoir il peut y avoir de réussir ailleurs si un président américain ne peut pas tirer parti de ce soutien extraordinaire et sans précédent pour faire avancer les valeurs américaines fondamentales⁸³. Les États-Unis ont joué un rôle fondamental dans l'élaboration du droit international moderne et de l'ordre international fondé sur des règles, mais ils ont entaché cette réussite en excluant systématiquement ces éléments du processus de paix israélo-palestinien. Ils se prononcent régulièrement en faveur de la solution des deux États, mais insistent également sur le fait que les pratiques israéliennes qui ont rendu cet objectif impossible ne doivent avoir aucune conséquence. Ils proclament que les droits humains sont la pierre angulaire de leur politique étrangère, mais n'appliquent pas ce critère à la conduite d'Israël. L'inquiétante réalité du Territoire palestinien occupé va à l'encontre de tout ce que les États-Unis affirment défendre, mais l'étroite proximité que ceux-ci entretiennent avec l'occupation israélienne dit le contraire.

Union européenne

41. En 1980, la Communauté européenne, qui comptait alors neuf membres, a publié son influente Déclaration de Venise, qui reconnaissait le droit du peuple palestinien à disposer pleinement de lui-même. Au début des années 1990, la Commission européenne a participé activement au processus de Madrid-Oslo, et a déclaré qu'une paix durable entre Israël et les Palestiniens était d'une importance vitale pour l'Europe. Tout au long des années 1990 et 2000, l'Union européenne a apporté un soutien politique et économique considérable au processus de paix (et a notamment financé de façon substantielle l'Autorité palestinienne), a émis des critiques parfois acerbes sur le comportement d'Israël et, à partir de 1999, a encouragé la création d'un État palestinien démocratique, viable et pacifique. Toutefois, lorsqu'elle a rejoint le Quatuor et s'est associée à ses mesures relatives à la feuille de route et aux élections palestiniennes de 2006, ses propres politiques et déclarations concernant l'occupation sont devenues plus prudentes, même si ses financements ont continué d'être aussi substantiels⁸⁴.

42. Au cours de la dernière décennie, cinq caractéristiques ont dominé l'approche de l'Union européenne vis-à-vis de l'occupation israélienne. Premièrement, elle procure toujours des fonds considérables à l'Autorité palestinienne, à l'UNRWA et à d'autres grandes organisations qui fournissent des services de renforcement des capacités et des services sociaux dans le territoire occupé. Deuxièmement, elle a maintenu des relations politiques et économiques étroites avec Israël, même si des points de tension sont apparus occasionnellement. Israël est membre de plusieurs accords de coopération scientifique et économique importants initiés par l'Union européenne, qui est son principal partenaire commercial et dont plusieurs des principaux membres lui fournissent de grandes quantités d'armes. Troisièmement, l'Union européenne a élaboré une politique de « différenciation » à l'égard des implantations israéliennes dans le territoire occupé. Cette politique stipule que les accords entre l'Union européenne et Israël sont inapplicables au-delà de la ligne verte de 1967, mais qu'à titre individuel les États membres conservent la liberté de décider comment appliquer la politique de différenciation dans leurs relations bilatérales avec Israël. Quatrièmement, ces dernières années, des dissensions de plus nombreuses sont apparues dans le discours de l'Union européenne sur l'occupation israélienne, dont le ton s'est par ailleurs adouci, du fait que certains États membres d'Europe de l'Est ont développé des relations étroites avec Israël et qu'il est à présent plus difficile de

⁸³ Shibley Telhami, « Biden's bungled response on the Israel-Palestinian conflict », *Boston Globe*, 19 mai 2021.

⁸⁴ Anders Persson, *EU Diplomacy and the Israeli-Arab Conflict, 1967-2019* (Edinburgh University Press, 2020).

parvenir à une position européenne commune sur l'occupation⁸⁵. Lors des récentes violences israéliennes à Gaza en mai 2021, l'Union européenne a le plus clair du temps été spectatrice, incapable de publier une déclaration commune du Conseil de l'Union européenne en raison de sa « règle de l'unanimité ».

43. La cinquième et plus importante caractéristique de la politique contemporaine de l'Union européenne est son aversion à utiliser sa considérable influence économique et politique pour imposer des contraintes substantielles à Israël en réponse au non-respect de ses obligations internationales et pour n'avoir pas mis complètement fin à son occupation⁸⁶. À son crédit, l'opposition diplomatique de l'Union européenne aux projets d'annexion *de jure* d'Israël en 2020 a largement contribué à ce que les propositions contenues dans le plan De la paix à la prospérité, présenté par l'ancien Président des États-Unis Donald Trump, soient mises au placard. Il s'est agi là d'un acte de résistance appréciable, qui n'a toutefois guère perturbé l'expansion de l'occupation et la réalité de l'annexion de facto. Pour le reste, l'Union européenne s'est montrée très peu encline au risque. Parmi ses principaux accords impliquant Israël figure l'accord d'association Union européenne-Israël de 1995, qui énonçait des obligations en matière de droits humains et de respect des valeurs communes dont le non-respect autoriserait l'Union européenne à suspendre l'accord, mais elle n'a pris aucune mesure en ce sens. La lacune la plus flagrante de la politique de l'Union européenne est sa passivité à l'égard des implantations israéliennes. La politique de différenciation engendre des contraintes limitées dont Israël est disposé à s'accommoder, mais aucun changement notable concernant la permanence de l'occupation ou la croissance des implantations. Ces dernières, qui constituent un probable crime de guerre au regard du Statut de Rome, sont le produit de la politique de l'État israélien, et il n'y a aucun espoir de les démanteler tant que les mesures européennes d'établissement des responsabilités ne viseront pas expressément Israël lui-même (voir [A/HRC/47/57](#)).

44. La politique de l'Union européenne à l'égard de l'occupation est en fin de compte entravée par deux tendances interdépendantes : l'engagement envers l'étoile éteinte qu'est le processus Madrid-Oslo, et le refus de se séparer des États-Unis, quelque partielle et inefficace que soit la politique américaine. Quelle qu'ait été sa promesse initiale, le processus Madrid-Oslo sert à présent de justification pour maintenir l'occupation et éviter de prendre des décisions difficiles. Avec de l'imagination et du courage, la diplomatie européenne pourrait créer une approche qualitativement nouvelle pour garantir la paix au Moyen-Orient, fondée sur les droits et le droit international⁸⁷. Pour cela, il faudrait accepter de faire entrer l'intransigeance israélienne et la domination américaine dans l'équation. Si elle ne parvenait pas à s'y résoudre, l'Europe continuerait à être impliquée dans l'un des plus grands échecs diplomatiques du dernier demi-siècle.

Banque mondiale

45. La Banque mondiale a activement participé au développement de la politique économique en Palestine depuis l'aube du processus Madrid-Oslo. En 1993, elle a publié une importante étude en six volumes – *Developing the Occupied Territories: An Investment in Peace* – qui définissait une stratégie visant à réformer, réorganiser

⁸⁵ Omar Dajani et Hugh Lovatt, *Rethinking Oslo: How Europe Can Promote Peace in Israel-Palestine* (Londres, Conseil européen des relations internationales, 2017) ; et Hugh Lovatt et Mattia Toaldo, *EU Differentiation and Israeli Settlements* (Londres, Conseil européen des relations internationales, 2015).

⁸⁶ Beth Oppenheim, « Can Europe overcome its paralysis on Israel and Palestine? », Centre for European Reform, février 2020.

⁸⁷ Hugh Lovatt, *The End of Oslo: A New European Strategy on Israel-Palestine* (Londres, Conseil européen des relations internationales, 2020).

et renforcer les capacités économiques et sociales du territoire palestinien. Son objectif déclaré était de nature technique : privilégier le renforcement des institutions palestiniennes, les investissements du secteur privé et une planification économique optimale, tout en laissant à la sphère politique le soin de débattre des questions de sécurité, de droit international et de statut final. Le côté inquiétant du rapport ainsi établi tient notamment à la description qui y est faite du délabrement de l'économie palestinienne en 1993 – chômage élevé, revenus stagnants, extrême pauvreté, institutions et services publics surchargés, dépendance profonde de l'économie israélienne, vulnérabilité aux représailles politiques israéliennes et énormes disparités économiques entre Israéliens et Palestiniens –, qui n'a rien perdu de son exactitude aujourd'hui, même après 28 ans d'un renforcement conséquent des institutions et une aide financière se montant à des milliards de dollars.

46. Depuis 1993, la Banque mondiale a publié des dizaines de rapports sur l'économie palestinienne. Beaucoup d'entre eux sont des examens très techniques de secteurs spécifiques, et certains contiennent de subtiles observations sur les innombrables façons dont Israël freine et asphyxie l'économie palestinienne. En particulier, la Banque mondiale présente des rapports économiques complets deux fois par an au Comité spécial de liaison pour la coordination de l'assistance internationale aux Palestiniens, un organe composé d'États et d'institutions (dont les États-Unis et l'Union européenne) qui coordonne l'aide internationale à l'Autorité palestinienne et dont la Banque mondiale assure le secrétariat.

47. Les rapports les plus convaincants de la Banque mondiale décrivent les systèmes contraignants de contrôle économique et social imposés par Israël en Cisjordanie et à Gaza, comme les enceintes exigües, les restrictions de la liberté de circulation, la rétention des taxes et des recettes fiscales et douanières, la croissance des implantations, le blocus de Gaza, la restriction des produits à double usage et celles qui touchent les télécommunications palestiniennes⁸⁸. En outre, certains de ces rapports – en particulier ceux publiés dans les années 2000 – ont établi un lien entre ces nombreuses contraintes et des phénomènes de détresse de plus grande envergure au sein de la société palestinienne, notamment le déclin de la scolarisation, l'insécurité alimentaire, la dépression parmi les écoliers et la fragmentation de la cohésion sociale⁸⁹. En 2013, la Banque mondiale a publié l'un de ses rapports les plus percutants, consacré à la zone C (les 61 % de la Cisjordanie entièrement sous contrôle sécuritaire et civil israélien, où se trouvent toutes les implantations d'Israël). Dans ce rapport, la Banque mondiale a expliqué de manière convaincante comment le fait de priver les Palestiniens de cette ressource foncière essentielle paralysait leur économie, entravait leur liberté de circulation personnelle et commerciale et leur interdisait tout développement indépendant⁹⁰.

48. Mais même lorsqu'elle est la plus convaincante, l'approche technocratique de la Banque mondiale se concentre sur l'arbre qui cache la forêt. Les aspects punitifs du contrôle étouffant qu'Israël impose à l'économie palestinienne ne résultent pas d'une politique israélienne regrettable, et sont susceptibles d'être ajustés dès lors que la Banque mondiale publie des données empiriquement plus fournies et des recommandations plus complètes. Le renforcement des capacités institutionnelles des Palestiniens ne modifiera pas non plus de manière significative l'enlaidissement de la réalité sur le terrain. Les rapports mettent l'accent sur les symptômes préoccupants

⁸⁸ Voir, par exemple, Banque mondiale, « West Bank and Gaza update », juin 2008 ; Banque mondiale, « Economic monitoring report to the Ad Hoc Liaison Committee », 27 septembre 2018 et 2 juin 2020.

⁸⁹ Voir, par exemple, Banque mondiale, « West Bank and Gaza update », novembre 2004, novembre 2007 et mars 2008.

⁹⁰ Banque mondiale, « West Bank and Gaza: Area C and the Future of the Palestinian Economy », Report No. AUS2922 (Washington, D.C., 2013).

d'une économie et d'une société enfermées dans une occupation ossifiée, tout en ignorant la morbidité à plus grande échelle. Ce diagnostic erroné est aussi fatal dans le cadre d'une situation politique désespérée qu'il l'est en médecine. Le terme « occupation » n'apparaît dans aucun des rapports de la Banque mondiale. Chose plus troublante encore, les rapports de la Banque mondiale sur les « territoires palestiniens » ne font référence qu'à la Cisjordanie et à Gaza ; bien que Jérusalem-Est soit depuis longtemps désignée par l'ONU comme un territoire occupé et illégalement annexé par Israël, elle n'est jamais incluse dans les comptes-rendus de la Banque mondiale, apparemment parce que cela obligerait celle-ci à préjuger de son statut, ce qui n'est guère une position neutre⁹¹. La Banque mondiale n'attribue pas non plus les politiques et pratiques israéliennes à l'égard des Palestiniens à une stratégie d'annexion de facto et de contrôle permanent du territoire palestinien, en dépit des nombreuses preuves économiques et politiques.

49. Mais il peut en être autrement. Par rapport à l'approche *sotto voce* de la Banque mondiale, les rapports semestriels de la Conférence des Nations Unies sur le commerce et le développement (CNUCED) font une analyse beaucoup plus acérée, attribuant les ravages de l'économie palestinienne directement à l'occupation israélienne. Ces dernières années, la CNUCED a publié des rapports de fond sur les coûts économiques cumulés de l'occupation israélienne⁹², les obstacles que celle-ci pose pour la réalisation du potentiel de la Palestine en matière d'exploitation du pétrole et du gaz naturel⁹³, la relation entre la croissance des implantations et l'aggravation de la pauvreté de la population palestinienne (voir TD/B/67/5) et l'effondrement économique de Gaza, soumise à un blocus hermétique (voir TD/B/EX(68)/4). En nommant les faits sans détour, les rapports de la CNUCED offrent une compréhension plus juste de la réalité économique en Palestine et permettent de mieux comprendre pourquoi les milliards d'aide internationale et le renforcement des capacités institutionnelles des Palestiniens ont, par un jeu pervers, produit l'exact opposé – ou peu s'en faut – des objectifs déclarés de la communauté internationale : non pas un État en devenir, mais un territoire brisé baignant dans le formaldéhyde.

Quatuor

50. Le Quatuor – composé des États-Unis, de l'Union européenne, de l'ONU et de la Fédération de Russie – a été créé en 2002 pour que la recherche d'une paix durable entre Israël et les Palestiniens soit davantage multinationale. Il a été créé au lendemain de la deuxième intifada palestinienne et de l'échec du processus de paix de Camp David de 2000. Lors de sa création, les avantages d'une organisation aussi unique étaient perçus comme tenant à l'influence de ses quelques membres, à son adaptabilité et à son caractère informel, à sa capacité de prendre des décisions rapides et à l'adhésion politique d'Israël et des Palestiniens⁹⁴.

51. Aujourd'hui, le Quatuor n'est plus que l'ombre de lui-même. Il n'a plus d'envoyé politique de premier plan depuis la démission de l'ancien Premier Ministre du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, Tony Blair, en 2015. Il mène des projets d'amélioration technique et économique de faible envergure pour

⁹¹ Banque mondiale, *Developing the Occupied Territories: An Investment in Peace*, vol. 1 (Washington, D.C., 1993), note 45, et tableau 1.1. Dans ce rapport de 1993, la Banque mondiale a reconnu l'importance économique centrale de Jérusalem-Est pour l'économie palestinienne.

⁹² *The Economic Costs of the Israeli Occupation for the Palestinian People: The Impoverishment of Gaza under Blockade* (publication des Nations Unies, 2019).

⁹³ *The Economic Costs of the Israeli Occupation: Unrealized Oil and Natural Gas Potential* (publication des Nations Unies, 2019).

⁹⁴ Khaled Elgindy, *The Middle East Quartet: A Post-Mortem*, document d'analyse n° 25 (Washington, D.C., Brookings Institution, 2012).

les Palestiniens, notamment dans les domaines de l'eau, de l'énergie, de la circulation et du commerce, des télécommunications et de la primauté du droit⁹⁵. Sa dernière déclaration, publiée en mars 2021 par les envoyés des quatre membres (qui ne s'étaient pas réunis depuis plus de quatre ans), était brève et aseptisée, exprimant des inquiétudes quant à la disparité économique intenable entre Israéliens et Palestiniens et exhortant les parties à s'abstenir de toute action unilatérale⁹⁶. La stratégie publiée par le Quatuor pour la période 2021-2023 n'utilise pas une seule fois le terme « occupation », ne fait jamais référence aux implantations et à leur rôle destructeur, ne fournit aucune analyse critique de la dureté du contrôle exercé par Israël sur les Palestiniens et n'explique nullement comment les projets d'amélioration économique du Quatuor peuvent prospérer dans une économie étouffée par des barrières, des murs, des tarifs douaniers et des points de contrôle et dont la géographie ne permet aucun accès commercial au monde extérieur⁹⁷.

52. L'inefficacité du Quatuor remonte à deux tournants importants et fatidiques au début de son existence. En 2003, il a publié sa feuille de route pour la paix au Moyen-Orient, avec pour objectif déclaré de mettre fin à l'occupation et de permettre une solution des deux États pour 2005, en s'appuyant sur des mesures détaillées axées sur des résultats. Si la feuille de route formulait des exigences à l'intention des deux parties, les plus importantes ont été endossées par les Palestiniens (fin de l'intifada, élections, nouvelles institutions, gouvernement réformé, acceptation de frontières provisoires). Les questions relatives au statut final devaient être négociées par les parties, mais aucune référence n'était faite au droit international (notamment en ce qui concernait les implantations et l'annexion de Jérusalem) et il n'était pas tenu compte des immenses disparités de pouvoir. Israël a ostensiblement accepté la feuille de route, mais les membres du Quatuor l'ont autorisé à émettre 14 réserves, ce qui en a effectivement sapé la viabilité. Selon l'évaluation la plus complète des performances du Quatuor, les États-Unis ont abandonné la feuille de route en 2005 pour soutenir Israël dans son retrait unilatéral de Gaza, avec l'acquiescement réticent des trois autres membres⁹⁸.

53. Le deuxième tournant fatidique pour le Quatuor a été la décision, en 2006, de boycotter le Gouvernement palestinien à la suite de l'élection du Hamas. On peut considérer que le Hamas est une organisation qui a commis des actes odieux par le passé, voire assez récemment, tout en reconnaissant que les élections palestiniennes de 2006 ont été libres et équitables et qu'en imposant ses exigences au nouveau gouvernement, sans parallèlement exiger qu'Israël se conforme à ses nombreuses obligations internationales, le Quatuor a affaibli sa propre autorité et compromis son objectif. Certains membres du Quatuor se sont prononcés en faveur de sanctions économiques contre le nouveau gouvernement palestinien, chose qui n'avait jamais été envisagée pour les graves violations d'Israël. Cette décision a contribué à la division de la politique palestinienne qui persiste aujourd'hui. Le Coordonnateur spécial des Nations Unies pour le processus de paix au Moyen-Orient et Représentant personnel du Secrétaire général auprès de l'Organisation de libération de la Palestine et de l'Autorité palestinienne de l'époque a par la suite noté que cette prise de position après les élections avait effectivement transformé le Quatuor, qui, de quartette guidé par la feuille de route et fait pour promouvoir les négociations, est devenu un organe qui allait presque jusqu'à imposer des sanctions au gouvernement librement élu d'un

⁹⁵ Office of the Quartet, « Annual report: January–December 2020 », décembre 2020.

⁹⁶ Coordonnateur spécial des Nations Unies pour le processus de paix au Moyen-Orient, « Statement by the Middle East Quartet envoys », 23 mars 2021.

⁹⁷ Office of the Quartet, « Strategy 2021–2023 », décembre 2020.

⁹⁸ Elgindy, *The Middle East Quartet*.

peuple sous occupation et fixait des conditions préalables au dialogue qui étaient irréalisables⁹⁹.

54. La situation délicate dans laquelle s'est trouvé le Quatuor offre un enseignement d'importance : le fait que les trois autres membres aient accepté la domination américaine signifie que, dans ces circonstances, les positions du Quatuor reflètent fréquemment le plus petit dénominateur commun : la position des États-Unis. D'où la boutade : « le Quatuor sans trois »¹⁰⁰. Compte tenu de l'extraordinaire relation politique, diplomatique et militaire qu'entretiennent les États-Unis et Israël, le droit international n'avait pas sa place dans les politiques du Quatuor ; les États-Unis se sont occupés seuls de contrôler qu'Israël respectait la feuille de route, et le Quatuor a rarement pris des positions critiques à l'égard du rôle joué par Israël en tant qu'occupant avide, ce qui, fut un temps, aurait pu maintenir en vie la solution des deux États¹⁰¹. Ce déséquilibre a non seulement sérieusement diminué toute efficacité potentielle du Quatuor, mais également terni l'image et le rôle de l'ONU, dont la responsabilité première est de faire respecter le droit international et les résolutions de ses organes.

IV. Conclusions et recommandations

55. **La communauté internationale porte une responsabilité importante dans la persistance de l'occupation israélienne de la Palestine et l'incapacité à garantir une paix juste et durable dans la région. L'occupation est plus ancrée que jamais. Les conditions de vie des Palestiniens, sans parler de leur avenir politique, sont devenues encore plus précaires. Israël a continué d'afficher son mépris quasiment sans rencontrer d'opposition. Le processus de paix est moribond, pour ne pas dire plongé dans le coma, et il n'est pas sérieusement question de le ranimer. En cette ère post-coloniale, dans la troisième décennie du XXI^e siècle, le monde tolère l'intolérable : l'imposition d'une réalité coloniale en Palestine. Tout cela joue en faveur de l'insatiable occupant. Tout cela va à l'encontre des droits des personnes subjuguées, qui auraient dû être restituées il y a bien longtemps.**

56. **À l'aune des cinq critères proposés dans le présent rapport, aucun des quatre acteurs internationaux, qui ont tous une influence sur l'occupation israélienne de la Palestine, n'est en voie d'intégrer ce qui est nécessaire à la création d'une nouvelle base viable pour un véritable rétablissement de la paix au Moyen-Orient. La porte reste cependant ouverte. Les États-Unis peuvent tenir la promesse qu'ils ont faite de défendre les droits humains partout dans le monde¹⁰². L'Union européenne peut faire preuve de courage diplomatique en traçant une voie indépendante ancrée dans une approche fondée sur les droits¹⁰³. La Banque mondiale peut aborder la réalité économique de l'occupation à travers le prisme des droits humains afin de livrer de bien meilleures recommandations de politique générale. Et le Quatuor peut renforcer son influence en mettant l'accent sur le cadre international établi pour la paix et la justice au Moyen-Orient.**

⁹⁹ Álvaro de Soto, *End of Mission Report* (2007).

¹⁰⁰ Patrick Müller, « Informal security governance and the Middle East Quartet », *International Peacekeeping*, vol. 21, n° 4 (août 2014).

¹⁰¹ De Soto, *End of Mission Report*.

¹⁰² Agence France-Presse à Washington, D.C., « Antony Blinken says the US will “stand up for human rights everywhere” », *The Guardian*, 30 mars 2021.

¹⁰³ Lovatt, *The End of Oslo*.

57. Il devrait être clair que la stratégie de realpolitik sur laquelle reposait le processus de paix au Moyen-Orient a largement dépassé sa date de péremption. Il ne sert et ne servira à rien de continuer sur la même lancée. Les droits et la légalité doivent être au cœur de la nouvelle stratégie diplomatique. Même si elles sont nécessaires, ces conditions préalables sont, à elles seules, insuffisantes. Il est également indispensable que se développe une diplomatie créative et courageuse, et que l'on se demande sans détour pourquoi cette occupation vieille de cinq décennies a fini par ressembler en tout point à une annexion et un apartheid. Tous ces éléments, ainsi que l'application à l'échelle internationale du principe de responsabilité, pourraient enfin permettre aux Palestiniens et aux Israéliens de jouir ensemble de la prospérité d'un avenir commun.

58. Le Rapporteur spécial recommande que le Gouvernement d'Israël se conforme pleinement aux obligations que lui impose le droit international et mette un terme définitif à l'occupation du territoire palestinien avec toute la célérité voulue.

59. Le Rapporteur spécial recommande que la communauté internationale, notamment les acteurs internationaux qui participent activement à la supervision de l'occupation :

a) Élabore une liste complète de mesures d'application du principe de responsabilité à Israël jusqu'à ce que celui-ci se conforme à toutes les résolutions pertinentes des organes de l'ONU et se plie à la tendance internationale concernant l'administration et la fin de l'occupation ;

b) Appuie pleinement le travail du Bureau du Procureur de la Cour pénale internationale dans le cadre de son enquête sur la situation en Palestine ;

c) Adopte les cinq critères énoncés dans le présent rapport pour guider ses travaux futurs en vue de superviser la question de Palestine sous tous ses aspects.



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**Promotion et protection des droits humains :
situations relatives aux droits humains et rapports
des rapporteurs et représentants spéciaux**

Situation des droits humains dans les territoires palestiniens occupés depuis 1967*

Note du Secrétaire général

Le Secrétaire général a l'honneur de transmettre à l'Assemblée générale le rapport présenté par la Rapporteuse spéciale sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Francesca Albanese, en application de la résolution 5/1 du Conseil des droits de l'homme.

* Le présent rapport a été soumis après la date limite afin que puissent y figurer les informations les plus récentes.



Rapport de la Rapporteuse spéciale sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Francesca Albanese

Résumé

Dans le présent rapport, la Rapporteuse spéciale sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Francesca Albanese, soulève un certain nombre de préoccupations relatives aux droits humains, notamment s'agissant du droit du peuple palestinien à l'autodétermination dans le contexte – emprunt d'un colonialisme de peuplement – de l'occupation prolongée par Israël.

I. Introduction

1. Dans le présent rapport, la Rapporteuse spéciale sur la situation des droits de l'homme dans les territoires palestiniens occupés depuis 1967, Francesca Albanese, se penche sur un certain nombre de problèmes ayant trait à la situation des droits humains en Cisjordanie, y compris Jérusalem-Est, et à Gaza, et présente une analyse détaillée du droit du peuple palestinien à l'autodétermination. Elle y apporte des clarifications sur les principes juridiques, la signification et la portée de ce droit, dont le peuple palestinien reste privé, alors même qu'il se trouve au cœur de la mission que les États Membres de l'Organisation des Nations Unies se sont promis d'accomplir au lendemain des atrocités commises et observées pendant la Seconde Guerre mondiale¹.

2. La Rapporteuse spéciale n'a pas été en mesure de se rendre dans le territoire palestinien occupé, y compris Jérusalem-Est, (ci-après appelé « territoire palestinien occupé ») avant la soumission du présent rapport, bien qu'elle y ait été invitée par l'Observateur permanent de l'État de Palestine auprès de l'Office des Nations Unies et des autres organisations internationales à Genève. Ces visites étant essentielles à l'exécution de son mandat, la Rapporteuse spéciale entend s'atteler à obtenir l'accès à ce territoire. Sa demande de rencontre avec la Représentante permanente d'Israël auprès de l'Office des Nations Unies et des autres organisations internationales à Genève ayant été rejetée, la Rapporteuse spéciale souligne que le défaut systématique de coopération d'Israël vis-à-vis de son mandat est très préoccupant. Un dialogue ouvert entre toutes les parties étant essentiel à la protection et à la promotion des droits humains, elle rappelle à Israël qu'elle est toute disposée à y participer.

3. Reposant sur des recherches et des analyses juridiques, le présent rapport est en outre riche d'informations obtenues dans le cadre de consultations ainsi que de données présentées par d'autres parties. Ainsi, la Rapporteuse spéciale a tenu des consultations avec d'autres rapporteurs et rapporteuses spéciaux et certains de leurs prédécesseurs, de même qu'avec la Commission internationale indépendante chargée d'enquêter dans le Territoire palestinien occupé, y compris Jérusalem-Est, et en Israël, et elle a rencontré, lors de réunions organisées en personne ou à distance, des représentant(e)s d'États, des personnalités du monde universitaire et des représentant(e)s d'organisations non gouvernementales du territoire palestinien occupé, d'Israël et d'ailleurs. Elle a par ailleurs examiné divers rapports soumis par des organisations locales et internationales de défense des droits humains, actives en particulier dans le territoire palestinien occupé et en Israël.

4. En raison des restrictions géographiques et temporelles du mandat confié à la Rapporteuse spéciale, l'enquête menée a eu une portée limitée, notamment s'agissant d'évaluer la manière dont les violations abordées dans le présent rapport affectaient le peuple palestinien qui se trouvait en dehors du territoire occupé. Cette situation n'empêche toutefois pas d'examiner la façon dont ce droit collectif est appliqué aux Palestiniens détenteurs de la citoyenneté israélienne, ainsi qu'aux réfugiés palestiniens de 1948 et 1967, lesquels bénéficient également des droits largement reconnus au retour, à la restitution et à l'indemnisation. Compte tenu des liens existant entre l'occupation israélienne commencée en 1967 et les événements qui l'ont précédée, la Rapporteuse spéciale revient sur certains points de l'histoire susceptibles d'aider à la compréhension de la situation actuelle.

¹ Charte des Nations Unies, Art. 55 et 56.

II. Fondements de l'enquête sur le droit à l'autodétermination

A. Situation actuelle et sujets prédominants

5. Cela fait 55 ans que les Palestiniens du territoire palestinien occupé, soit trois générations, grandissent sous occupation israélienne. Environ 40 % d'entre eux sont des réfugiés (ou leurs descendants) ayant fui la violence qui a accompagné la création de l'État d'Israël, lequel a commencé à procéder à des expulsions en 1948². La plupart des résidents de Gaza, ainsi que de nombreuses autres personnes actuellement victimes d'un transfert forcé en Cisjordanie, y compris à Jérusalem-Est, sont des réfugiés originaires de Galilée, Haïfa, Jaffa, Ramlé et Lod ainsi que du Néguev. Lors de la guerre de 1967, la majorité d'entre eux a de nouveau été forcée de se déplacer, en raison de la destruction et du dépeuplement de villages palestiniens, ces réfugiés se voyant ensuite refuser le retour chez eux, comme en 1947-1949³. Les Palestiniens qui, en 1967, ont réussi à « rester » ne pouvaient pas savoir que, 55 ans plus tard, ils se réveilleraient encore sous le joug de la domination étrangère, privés de leurs droits, les réfugiés parmi eux n'ayant en outre aucune idée de quand ils pourraient regagner leurs terres ancestrales.

6. Depuis 1967, la situation des droits humains dans le territoire palestinien occupé n'a cessé de se dégrader, principalement en raison de violations flagrantes du droit international par Israël, Puissance occupante, telles que la ségrégation raciale et l'assujettissement. Cette détérioration de la situation se manifeste sous diverses formes : imposition de restrictions draconiennes à la circulation des Palestiniens à l'intérieur et à l'extérieur du territoire palestinien occupé ; répression de la participation politique et citoyenne ; refus du droit de résidence, du statut et du regroupement familial ; dépossession des Palestiniens de leurs terres et de leurs biens ; transferts forcés ; homicides illicites ; généralisation des arrestations et détentions arbitraires, y compris d'enfants ; obstruction à l'aide et à la coopération humanitaires et interdiction de celles-ci ; refus de la propriété et de l'accès aux ressources naturelles ; commission d'actes de violence par des colons ; répression violente de la résistance opposée par le peuple à l'occupation. Ces pratiques dans leur ensemble constituent un châtement collectif infligé au peuple palestinien⁴.

7. Malgré la gravité de la situation, l'occupation par Israël du territoire palestinien continue d'être abordée principalement, et parfois exclusivement, sous trois grands angles :

a) *Un angle humanitaire.* Bien que particulièrement graves et résultant d'une occupation violente, les conditions économiques et humanitaires régnant dans la région sont traitées comme un problème (chronique) d'ordre humanitaire qu'il importe de maîtriser, plutôt que comme une question politique devant être réglée conformément au droit international ; dans nombre de cas, les réactions aux violations commises par Israël ne visent qu'à « améliorer » certains aspects de la vie sous occupation ;

b) *Un angle politique.* La Question de Palestine est souvent présentée comme un « conflit » entre parties pouvant être résolu par des négociations. Selon ce postulat, la fin de l'occupation ne pourra se faire que dans le cadre d'un « accord de paix

² Benny Morris, *The Birth of the Palestinian Refugee Problem Revisited*, édition révisée (Cambridge, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, Cambridge University Press, 2004).

³ Tom Segev, *1967: Israel, the War, and the Year that Transformed the Middle East*, 1^{re} édition (New York : Metropolitan Books, 2007).

⁴ A/HRC/44/60 (2020), par. 24 et 27.

négocié » ; c'est alors que les urgences humanitaires et économiques se posant dans le territoire palestinien occupé seront résolues ;

c) *L'angle du développement économique.* Ces dernières années, les partisans d'une solution ont mis l'accent sur une approche privilégiant le développement du territoire palestinien et le soutien artificiel de son économie, dans laquelle aucune solution politique ne serait apportée aux causes profondes du « conflit », notamment les nombreuses violations des droits et libertés des Palestiniens. Selon cette approche, le conflit serait résolu grâce à l'avancement des entreprises et aux possibilités entraînées par la croissance et le développement durable, et non en veillant à faire respecter les droits humains fondamentaux.

8. Les personnes se plaçant dans ces perspectives semblent croire que l'occupation prendra fin lorsque les parties, dont la puissance est nettement inégale, parviendront à une solution négociée. Il est malheureusement fait abstraction, dans ces approches, du contexte plus large caractérisant les urgences sans fin, les défis politiques et les déboires économiques. Mettant de côté des aspects pourtant cruciaux et primordiaux de l'occupation israélienne, on y confond ainsi causes profondes et symptômes, en considérant le non-respect du droit international par Israël comme un phénomène isolé plutôt que comme une composante structurelle de longue date de la privation prolongée des droits des Palestiniens sous occupation.

9. Ces dernières années, plusieurs universitaires et organisations de renom ont conclu que les politiques et pratiques discriminatoires généralisées couramment employées par Israël à l'égard des Palestiniens constituaient un crime d'apartheid au regard du droit international⁵. Bien que la communauté internationale n'ait pas encore pris de mesures en conséquence, l'idée selon laquelle l'occupation israélienne est légalement de l'ordre du crime d'apartheid gagne du terrain. Cette évolution de la pensée pourrait contribuer à renverser la tendance selon laquelle les violations commises par Israël, souvent de façon individuelle et décontextualisée, sont envisagées du point de vue d'organes spécifiques du droit international plutôt que de celui du système même utilisé par Israël pour régner sur les Palestiniens.

10. Par ailleurs, le concept d'apartheid, lorsqu'on le considère isolément plutôt que dans le cadre plus global de la situation du peuple palestinien dans son ensemble, présente certaines limites :

a) Premièrement, les rapports réalisés récemment sur l'apartheid israélien mettent principalement l'accent, à quelques exceptions près⁶, sur l'aspect « territorial » de la question, faisant peu de cas de l'expérience des réfugiés palestiniens. Il importe pourtant, pour qualifier ce régime, de tenir compte de l'expérience du peuple palestinien dans son ensemble et de considérer celui-ci comme un tout, en y incluant les personnes déplacées, dénationalisées et dépossédées en 1947-1949 (dont beaucoup vivent dans le territoire palestinien occupé) ;

⁵ A/HRC/49/87 (2022) (version préliminaire non éditée) ; Amnesty International, *L'apartheid israélien envers le peuple palestinien : Un système cruel de domination et un crime contre l'humanité* (2022) (disponible à l'adresse <https://www.amnesty.org/en/documents/mde15/5141/2022/fr/>) ; Human Rights Watch, *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution* (2021) ; B'Tselem, « A regime of Jewish supremacy from the Jordan River to the Mediterranean Sea: This is apartheid » (12 janvier 2021) ; Al-Haq et al. *Joint Parallel Report to the UN Committee on the Elimination of Racial Discrimination on Israel's Seventeenth to Nineteenth Periodic Reports* (10 novembre 2019) ; Commission économique et sociale pour l'Asie occidentale (CESAO), *Israeli Practices towards the Palestinian People and the Question of Apartheid: Palestine and the Israeli Occupation*, n° 1 (E/ESCWA/ECRI/2017/1) (2017).

⁶ Amnesty International, Al-Haq et al., *Joint Parallel Report to the United Nations Committee on the Elimination of Racial Discrimination*, et E/ESCWA/ECRI/2017/1 (voir note de bas de page 5).

b) Deuxièmement, en ne se concentrant que sur l'apartheid israélien, on passe à côté du fait que l'occupation du territoire palestinien, y compris Jérusalem-Est, par Israël est déjà en elle-même illégale. L'illégalité de cette occupation tient au fait qu'il a été prouvé qu'elle n'était pas temporaire, et que celle-ci vise délibérément à nuire aux meilleurs intérêts de la population sous occupation, a entraîné l'annexion du territoire occupé et constitue une violation de la plupart des obligations imposées à la Puissance occupante⁷. Son illégalité découle également de la violation systématique d'au moins trois normes impératives du droit international, à savoir : l'interdiction de l'acquisition de territoires par la force ; l'interdiction de soumettre des peuples à des régimes de subjugation, de domination et d'exploitation étrangères, auxquels appartiennent la discrimination raciale et l'apartheid ; l'obligation qui incombe aux États de respecter le droit des peuples à l'autodétermination⁸. De ce fait, l'occupation israélienne constitue également un emploi injustifié de la force et un acte d'agression⁹. Ces agissements sont clairement interdits par le droit international et contraires aux valeurs, buts et principes inscrits dans la Charte des Nations Unies ;

c) Troisièmement, le concept d'apartheid ne couvre pas les « causes profondes » de l'ensemble de lois, ordonnances et politiques de discrimination raciale régissant la vie quotidienne dans le territoire palestinien occupé depuis 1967, ni l'*animus* (intention) d'Israël de s'emparer de terres en subjuguant et en déplaçant les populations autochtones pour les remplacer par ses ressortissants. C'est là la marque même du colonialisme de peuplement, ces actions constituant en outre un crime de guerre au sens du Statut de Rome.

11. En d'autres termes, on ne retrouve pas, dans le concept de l'apartheid tel qu'il est actuellement appliqué, de trace de la question – cruciale – de la reconnaissance du droit fondamental du peuple palestinien de déterminer son statut politique, social et économique et de se développer en tant que peuple, libre de toute occupation, domination et exploitation étrangères. Bien que nécessaire, la fin de l'apartheid israélien dans le territoire palestinien occupé ne résoudra pas automatiquement la question de la domination d'Israël sur les Palestiniens, ni ne rétablira la souveraineté permanente des Palestiniens sur les terres occupées par Israël et les ressources naturelles qui s'y trouvent, et elle ne suffira pas non plus, à elle seule, à répondre aux aspirations politiques des Palestiniens.

B. Développement d'un nouvel esprit

12. Il fut un temps où les discussions sur l'autodétermination du peuple palestinien se limitaient au thème de l'avenir de la Palestine et de son peuple, dans le cadre de la lutte pour la décolonisation. Le processus de paix au Moyen-Orient, qui a commencé au début des années 1990, a changé la donne, en laissant paraître que la réalisation de l'autodétermination de ce peuple passait par l'obtention du statut d'État. Le fait pour le peuple palestinien de jouir du droit à l'autodétermination, dans le contexte d'un État politiquement indépendant s'étendant sur tout le territoire palestinien occupé, est un critère minimal de justice pour celui-ci ; la réalisation de cet objectif est pourtant plus illusoire que jamais, en grande partie à cause des efforts de colonisation de

⁷ A/72/556 (2017).

⁸ Ardi Imseis, « Negotiating the illegal: on the United Nations and the illegal occupation of Palestine, 1967-2020 », *European Journal of International Law*, vol. 31, n° 3 (2020), p. 1055 à 1085.

⁹ Ralph Wilde, « Using the master's tools to dismantle the master's house: international law and Palestinian liberation », *The Palestine Yearbook of International Law* (Pays-Bas : Brill, 2021), p. 7.

peuplement que déploie Israël dans le cadre de son occupation prolongée du territoire palestinien.

13. Démarche souvent travestie en « projet de civilisation » et, dans le passé, imposée par les « pays occidentaux » aux pays du « tiers monde », le colonialisme se concrétise par la subordination culturelle des indigènes, ainsi que par l'exploitation économique de leurs terres et de leurs ressources et par l'étouffement de leurs revendications politiques¹⁰. La notion de colonialisme « de peuplement » s'utilise pour désigner une colonisation dont l'objectif est également d'éliminer le « caractère indigène de la terre colonisée »¹¹. Ce type de colonialisme se manifeste par la création et la promotion de colonies¹², à savoir des zones de peuplement de personnes étrangères aménagées parmi la population indigène dans le but de soumettre cette dernière et de la déposséder de ses biens et de « s'assurer de façon permanente » la mainmise sur des secteurs spécifiques¹³. La violation du droit des peuples à l'autodétermination est inhérente au colonialisme de peuplement.

14. L'aspect normatif du concept de l'autodétermination, en particulier tel qu'il apparaît dans le contexte de la décolonisation, permet de (ré)examiner sous un autre jour, ainsi que de résoudre, les revendications légitimes d'émancipation du peuple palestinien après des décennies d'occupation israélienne, tout en respectant les droits de tous les Palestiniens et de tous les Israéliens de la région.

III. L'autodétermination externe : un cadre indispensable

A. Fondement juridique

15. Droit collectif par excellence, le droit à l'autodétermination est également un « droit plateforme » nécessaire à la réalisation de nombreux autres droits¹⁴. Si un groupe de population n'est pas libre de déterminer son statut politique et de poursuivre son développement économique, social et culturel en tant que peuple¹⁵, il est presque certain que d'autres de ses droits ne seront pas reconnus.

16. Mis en avant par le mouvement de décolonisation qui s'est étendu de la fin des années 1950 aux années 1970, le droit à l'autodétermination a été universellement codifié en 1966, avec l'adoption du Pacte international relatif aux droits civils et politiques et du Pacte international relatif aux droits économiques, sociaux et culturels. Auparavant simple principe général des Nations Unies¹⁶, le concept d'autodétermination s'est ainsi transformé en un véritable cadre normatif permettant aux peuples d'exercer leur libre arbitre en tant que « groupes nationaux cohésifs »¹⁷,

¹⁰ Antony Anghie, « Colonialism and the birth of international institutions: sovereignty, economy, and the mandate system of the League of Nations », *New York University Journal of International Law and Politics*, vol. 34, n° 3 (2002), p. 513 à 634.

¹¹ Patrick Wolfe, « Settler colonialism and the elimination of the native », *Journal of Genocide Research*, vol. 8, n° 4 (2006), p. 387.

¹² S'agissant du territoire palestinien occupé, le terme « colonies » est plus approprié que celui de « zones de peuplement », en ce que ce dernier ne rend pas compte du caractère illégal de cette activité (voir, par exemple, l'utilisation privilégiée qui est faite de « colonies » dans la résolution 2334 (2016) du Conseil de sécurité).

¹³ Lorenzo Veracini, « Introduction: The Settler Colonial Situation », dans *Settler Colonialism* (Londres : Palgrave Macmillan, 2010).

¹⁴ A/72/556, par. 62.

¹⁵ Pacte international relatif aux droits civils et politiques et Pacte international relatif aux droits économiques, sociaux et culturels, alinéas 1 et 2 de l'article premier (commun aux deux textes).

¹⁶ Charte des Nations Unies, Art. 55 et 56.

¹⁷ Ian Brownlie, *Principles of Public International Law*, 5^e édition (Oxford, Royaume-Uni, Clarendon Press, 1998), p. 599.

de décider de façon indépendante comment s'organiser sur le plan politique et de choisir la voie de leur développement culturel et socioéconomique¹⁸. On retrouve à cet égard deux composantes étroitement liées :

a) *Une composante politique.* Capacité d'un peuple à choisir son propre gouvernement et à se gouverner sans interférence. Cette composante est, elle aussi, divisée en deux dimensions : i) la dimension interne de l'autodétermination, à savoir le droit d'un peuple à se gouverner lui-même, au moyen de processus constitutionnels et politiques permettant l'exercice démocratique du droit dans la pratique, dans le cadre d'un État existant¹⁹, et ii) la dimension externe de l'autodétermination, à savoir le droit, à plus large échelle, d'un peuple d'avoir sa volonté propre et de déterminer son propre statut politique sans contrôle extérieur ni domination étrangère²⁰ ;

b) *Une composante économique.* Droit collectif d'un peuple de jouir de ses richesses et ressources naturelles, lequel incarne sa souveraineté permanente sur celles-ci²¹. Cette composante est essentielle pour assurer et préserver l'existence indépendante d'un peuple grâce à ses propres moyens de subsistance.

17. Ce sont ces deux composantes interconnectées qui permettent aux peuples d'exister de façon indépendante, tant sur le plan démographique (en tant que peuple) que territorial (dans une région donnée), et de se développer aux niveaux culturel, économique et social grâce à ce que leur offrent leur territoire et les ressources s'y trouvant²².

18. La jouissance effective des composantes politique et économique du droit à l'autodétermination est intrinsèquement liée à la dimension externe de celui-ci. Comment un gouvernement pourrait-il fonctionner de manière indépendante tout en restant assujéti à une autre entité, sans exercer sa pleine juridiction sur l'ensemble de son territoire, de ses citoyens et de ses ressources ? La domination et l'occupation étrangère sont donc incompatibles avec le « droit à l'autodétermination externe » en tant que cadre réglementaire²³.

19. En substance, le droit à l'autodétermination est le droit de vivre et de se développer en tant que peuple au sein d'une communauté politique individuelle, généralement un État indépendant. En découle le droit de résister aux actes de domination, de subjugation et d'exploitation étrangères pouvant faire obstacle à sa réalisation²⁴, lequel a été sanctionné en 1977 dans le Protocole additionnel I aux Conventions de Genève, où est reconnue la lutte des peuples « contre la domination coloniale et l'occupation étrangère et contre les régimes racistes dans l'exercice du droit des peuples à disposer d'eux-mêmes »²⁵. Ponctué de luttes pour la libération et la décolonisation, l'histoire a montré en quoi le droit d'exister en tant que peuple et le droit de résister à la domination étrangère étaient interconnectés. Elle a également révélé qu'il était vital, aux fins de l'affranchissement des peuples, que les luttes anticoloniales soient soutenues sur le plan international, en particulier par les

¹⁸ Antonio Cassese, *Self-determination of peoples: a legal reappraisal*, vol. 12, (Cambridge, Cambridge University Press, 1995), p. 53.

¹⁹ James Crawford, *The Creation of States in International Law*, 2^e édition (Oxford, Oxford University Press, 2007).

²⁰ Hurst Hannum, « Rethinking self-determination », *Virginia Journal of International Law*, vol. 34, n° 1 (1993), p. 1 et 33.

²¹ Catriona Drew, « The East Timor story: international law on trial », *European Journal of International Law*, vol. 12, n° 4 (2001), p. 651 et 663.

²² Hannum, « Rethinking self-determination » (voir note de bas de page 20).

²³ Wilde, « Using the master's tools to dismantle the master's house » (voir note de bas de page 9).

²⁴ Antonio Cassese, « Terrorism and human rights », *American University Law Review*, vol. 31, n° 4 (1982), p. 945 à 958.

²⁵ Protocole additionnel I aux Conventions de Genève (1977), alinéa 4 de l'article premier.

gouvernements et les décideurs. La décolonisation est rentrée dans le domaine du possible lorsque les mouvements anticolonialistes et les États sont parvenus à un consensus, à l'ONU, sur l'illégitimité de la domination coloniale, la question du respect des droits humains fondamentaux ayant joué un rôle essentiel en la matière²⁶.

20. Dans les années 1960, l'autodétermination est devenue le cadre normatif sous-tendant l'avancement de la décolonisation. Dans le contexte du processus « irrésistible et irréversible » de libération auquel tous les peuples avaient droit, le colonialisme et toutes les pratiques de ségrégation et de discrimination dont il s'accompagnait ont été totalement bannis²⁷. La valeur normative de l'autodétermination trouve sa source dans la Charte des Nations Unies, signée en 1945, dans laquelle le principe de « l'égalité des droits et de l'autodétermination des peuples » a été érigé au rang de priorité, au même titre que le maintien de la paix et de la sécurité internationales. Pour parvenir à la décolonisation, l'Assemblée générale a donc reconnu ce qui suit :

Tous les peuples ont un droit inaliénable à la pleine liberté, à l'exercice de leur souveraineté et à l'intégrité de leur territoire national. Tous les peuples ont le droit de libre détermination ; en vertu de ce droit, ils déterminent librement leur statut politique et poursuivent librement leur développement économique, social et culturel²⁸.

21. Les tentatives de colonisation se poursuivant, l'Assemblée générale a explicitement interdit les actes susceptibles de saper les efforts d'accession à l'indépendance des peuples colonisés, ainsi que le recours à la menace ou à l'emploi de la force par des États contre l'intégrité territoriale ou l'indépendance politique de tout autre État et la violation de frontières internationales existantes ou de lignes d'armistice établies par un accord international ou en vertu d'un tel accord, lesquels pouvaient avoir pour effet de priver les peuples de leur « droit à l'autodétermination, à la liberté et à l'indépendance »²⁹.

22. L'Assemblée générale a également précisé que le territoire d'un État donné ne pouvait faire l'objet d'une occupation militaire ou d'une acquisition par un autre État à la suite du recours à la menace ou à l'emploi de la force³⁰. Cette disposition s'est vue renforcée en 1974, lorsque, au moment de définir le terme « agression », l'Assemblée générale a interdit « le recours à l'emploi de la force armée pour priver les peuples de leur droit à l'autodétermination, à la liberté et à l'indépendance, ou pour porter atteinte à l'intégrité territoriale »³¹.

23. L'inviolabilité du droit à l'autodétermination découle du fait qu'il présente un caractère *erga omnes* et relève du *jus cogens*. L'expression *Erga omnes* signifie que tous les États ont un intérêt inhérent à la réalisation du droit à l'autodétermination et une obligation de le respecter ; il s'agit donc d'un droit qui est dû à la fois par et à la communauté internationale dans son ensemble³². Cette obligation, qui s'impose aux États non seulement à l'égard de leurs propres peuples, mais aussi à l'égard de tous les peuples qui ont été privés de la possibilité d'exercer leur droit à l'autodétermination³³, tient au caractère de *jus cogens* (norme impérative) du droit à l'autodétermination, qui ne peut être violé et auquel il n'est pas possible de déroger

²⁶ Roland Burke, *Decolonization and the Evolution of International Human Rights* (Philadelphie, University of Pennsylvania Press, 2011).

²⁷ Résolution 1514 (XV) de l'Assemblée générale (1960).

²⁸ Ibid.

²⁹ Résolution 2625 (XXV) de l'Assemblée générale (1970).

³⁰ Ibid.

³¹ Résolution 3314 (XXIX) de l'Assemblée générale (1974).

³² Cassese, *Self-determination of peoples* (voir note de bas de page 19).

³³ Comité des droits de l'homme, observation générale 12, par. 6.

(sauf au moyen d'une autre norme impérative)³⁴. La communauté internationale est tenue de veiller à ce que tous les peuples ayant droit à disposer d'eux-mêmes y parviennent effectivement et à ce que rien n'entrave ce processus³⁵.

24. La pratique internationale regorge d'exemples, tirés de situations allant de l'occupation de la Namibie dans les années 1950 à celle de l'Ukraine en 2022, qui montrent comment la communauté internationale – que ce soit par l'intermédiaire de tribunaux internationaux, tels que la Cour internationale de Justice³⁶, la Cour pénale internationale (CPI)³⁷ ou des tribunaux spéciaux³⁸, ou par l'intermédiaire de l'Assemblée générale³⁹ et du Conseil de sécurité⁴⁰ – et des États individuels – en passant par des juridictions nationales et au moyen de sanctions⁴¹ – ont fait usage des dispositions prévues au titre du droit international pour mettre un terme à des situations d'occupations illégales et d'assujettissement. En vertu du droit à l'autodétermination externe, le peuple palestinien a le droit de bénéficier – et doit bénéficier – d'un appui international comparable et d'une intervention déterminée.

B. Le cas du peuple palestinien dans le territoire palestinien occupé

25. Le droit à l'autodétermination est un « droit inaliénable » du peuple palestinien, comme l'a affirmé l'Assemblée générale⁴². Les origines de ce droit pour les Palestiniens remontent à plus d'un siècle, soit avant même sa première codification dans la Charte des Nations Unies. Les peuples de Palestine (musulmans, chrétiens et juifs)⁴³, à l'instar des autres peuples du Levant, ont vu leur droit à l'autodétermination reconnu par le Pacte de la Société des Nations de 1919. Ainsi, il a été prévu, à l'article 22 de cet instrument, que certaines communautés [mandats de « classe A » (Irak, Liban, Palestine, Transjordanie et Syrie)] pourraient voir leur existence comme nations indépendantes reconnue provisoirement, jusqu'au moment où elles seraient capables de se conduire seules⁴⁴, les « vœux » de ces communautés devant être pris « d'abord en considération pour le choix du Mandataire »⁴⁵.

26. Après des siècles d'antisémitisme – dont le paroxysme a été atteint avec la persécution des Juifs d'Europe lors de l'Holocauste, cauchemar génocidaire – le sionisme politique a pu compter sur un soutien accru. Dans cette idéologie, la

³⁴ Commission du droit international (CDI), [A/CN.4/L.960/Add.1](#) (2022), conclusions 3 et 17.

³⁵ Avis consultatif sur les conséquences juridiques de l'édification d'un mur dans le Territoire palestinien occupé donné par la Cour internationale de Justice (CIJ) le 9 juillet 2004.

³⁶ CIJ, Conséquences juridiques pour les États de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité.

³⁷ Cour pénale internationale (CPI), « La Présidence de la CPI assigne la situation en Ukraine à la Chambre préliminaire II » (2 mars 2022).

³⁸ Résolution 827 (1993) du Conseil de sécurité.

³⁹ Résolution 43/106 de l'Assemblée générale (1988).

⁴⁰ Résolution 264 (1969) du Conseil de sécurité.

⁴¹ Gouvernement des États-Unis, Comprehensive Anti-Apartheid Act of 1986, Public Law, n° 99-440 (1986).

⁴² Résolutions 3236(XXIX) (1974) et 2672(XXV)(C) (1970) de l'Assemblée générale.

⁴³ Au début des années 1900, les communautés les plus importantes étaient composées de 81 % de musulmans, 11 % de chrétiens et 8 % de juifs. Voir Sergio Della Pergola, « Demographic trends in Israel and Palestine: Prospects and policy implications », *American Jewish Yearbook* vol. 103 (2003), p. 3 à 68.

⁴⁴ Pacte de la Société des Nations (1919), article 22. Le système de mandats a été mis en place après la Première Guerre mondiale pour gérer les territoires qui auparavant appartenaient à l'Empire ottoman ou à des colonies allemandes. Les mandats étaient classés en catégories A, B et C, en fonction de ce que l'on estimait être l'état de préparation des zones concernées à l'autoadministration.

⁴⁵ Ibid.

Palestine est vue comme la terre sur laquelle concrétiser l'idée d'un « État pour les Juifs », par l'implantation de zones de peuplement et de colonies⁴⁶. On n'y tient toutefois pas compte du fait que, sur cette même terre, une population arabe palestinienne indigène a résidé pendant des millénaires. En 1947, les Nations Unies ont décidé de concilier les revendications, du peuple palestinien autochtone d'une part et des colons juifs – majoritairement européens – et des réfugiés d'Europe⁴⁷ d'autre part, sur cette terre, en recommandant la partition du mandat sur la Palestine, confié à la Grande-Bretagne, en un « État arabe » et un « État juif »⁴⁸. Peu après, la création de l'État d'Israël sur la majeure partie du territoire de la Palestine mandataire s'est accompagnée de massacres et d'expulsions massives, ainsi que de la dénationalisation de la plupart des Arabes de Palestine, qui se sont en outre vus dépossédés de leurs terres et de leurs biens. Ces derniers continuent d'être privés de leur droit à l'autodétermination, tout comme leurs descendants, les réfugiés de 1967 et les autres Palestiniens non réfugiés.

27. La guerre de 1967, qui a marqué le début de l'occupation israélienne, représente un tournant majeur. Dans sa résolution [242 \(1967\)](#), le Conseil de sécurité des Nations Unies souligne « l'inadmissibilité de l'acquisition de territoires par la guerre » et appelle au « retrait des forces armées israéliennes » des territoires occupés, soulignant en outre le droit de toute personne dans la région « de vivre en paix à l'intérieur de frontières sûres et reconnues à l'abri de menaces ou d'actes de force »⁴⁹. Ces propos sont du même ordre que ceux tenus par l'Assemblée générale, qui a condamné tout emploi de la force susceptible de priver les peuples de leur liberté et de leur indépendance, ces agissements constituant une marque claire et incontestable de colonialisme⁵⁰.

28. Depuis 1967, l'ONU, tenant compte du caractère sensible que revêt la question du postcolonialisme au vu de la diversité de ses membres, a adopté des résolutions dans lesquels elle a non seulement réaffirmé le droit du peuple palestinien à l'autodétermination, mais également estimé qu'il était justifié d'opposer une résistance aux actes de domination étrangère⁵¹. En 1974, face à l'occupation israélienne, qui déjà durait de longue date et n'était pas justifiée, l'Assemblée générale a reconnu le droit inaliénable à l'autodétermination sans ingérence extérieure du peuple palestinien, ainsi que le droit inaliénable des réfugiés palestiniens de retourner dans leur foyer⁵².

29. En 1982, Israël continuant de faire fi des obligations lui incombant, l'Assemblée générale a affirmé que « le déni des droits inaliénables du peuple palestinien à l'autodétermination, à la souveraineté, à l'indépendance et au retour en Palestine et les agressions répétées d'Israël contre les peuples de la région constitu[ent] une grave menace à la paix et à la sécurité internationales »⁵³. Dans la même résolution, elle a par ailleurs prié instamment « tous les États, les organismes compétents des Nations Unies, les institutions spécialisées et autres organisations internationales de donner leur appui au peuple palestinien par l'intermédiaire de son seul représentant

⁴⁶ Theodor Herzl, *Der Judenstaat* (Leipzig et Vienne, Breitenstein, 1896).

⁴⁷ Documents officiels de l'Assemblée générale, deuxième session, supplément n° 11 (A/364) (Rapport de la Commission spéciale des Nations Unies pour la Palestine), vol. I (1947).

⁴⁸ Résolution [181 \(II\)](#) de l'Assemblée générale (1947).

⁴⁹ Résolution [242 \(1967\)](#) du Conseil de sécurité ; voir également les résolutions [298 \(1971\)](#), [476 \(1980\)](#) et [2334 \(2016\)](#) du Conseil de sécurité.

⁵⁰ Résolution [2625 \(XXV\)](#) de l'Assemblée générale (1970).

⁵¹ [A/CONF.32/41](#) (1968).

⁵² Résolution [3236 \(XXIX\)](#) de l'Assemblée générale (1974).

⁵³ Résolution [37/43](#) de l'Assemblée générale (1982).

légitime, l'Organisation de libération de la Palestine, dans la lutte qu'il men[ait] pour recouvrer son droit à l'autodétermination et à l'indépendance »⁵⁴.

30. La reconnaissance, par l'Assemblée générale, de la lutte menée par le peuple palestinien pour « recouvrer » son droit à l'autodétermination et à l'indépendance dans un contexte mondial de décolonisation a été un signe fort de la prise de conscience concernant la résistance nationale palestinienne, avec à sa tête l'Organisation de libération de la Palestine (OLP), laquelle, à compter des années 1970, fédérait les principales forces politiques palestiniennes, principalement en exil. À l'époque, il était clair que le droit à l'autodétermination constituait un motif légitime pour les Palestiniens de résister, compte étant tenu de la violence et de l'incommensurabilité de l'occupation israélienne, à laquelle ceux-ci s'efforçaient tant bien que mal d'échapper.

31. En 1983, l'Assemblée générale avait déjà dénoncé les « agressions répétées » d'Israël contre les Palestiniens⁵⁵. Au cours des dernières décennies, les Nations Unies ont réaffirmé le droit des Palestiniens à l'autodétermination dans des dizaines de résolutions, appelant à un retrait d'Israël du territoire occupé en 1967 et à la fin de l'occupation.

32. En 2016, le Conseil de sécurité lui-même – dont la capacité d'action sur cette question est pourtant très limitée en raison du soutien apporté par les États-Unis d'Amérique à Israël – a déclaré que « la création par Israël de colonies de peuplement dans le Territoire palestinien occupé [...], y compris Jérusalem-Est, n'a[vait] aucun fondement en droit », et condamné fermement ces agissements, les qualifiant de « violation flagrante du droit international »⁵⁶.

IV. Sous nos yeux : 55 ans de limitation du droit des Palestiniens à l'autodétermination

A. Retour sur les faits

33. En tant que Puissance occupante, Israël n'a aucune souveraineté sur le territoire palestinien occupé. Même si cette occupation avait pour seul et honnête motif d'assurer la sécurité d'Israël (ce qui, en soi, est une aberration, étant donné ses retombées néfastes sur les droits et libertés fondamentaux des Palestiniens), sur quelles bases Israël s'appuie-t-il pour continuer de saisir des terres palestiniennes afin d'y construire des colonies en Cisjordanie, en exploitant des ressources en eau et en énergie qui appartiennent aux Palestiniens ? Quelle est son excuse pour détruire des infrastructures civiles essentielles de la population occupée ?

34. Au mépris des nombreuses résolutions des Nations Unies dans lesquelles il a été reconnu qu'Israël, Puissance occupante, violait ses obligations et au titre desquelles le pays a été enjoint à se retirer du territoire palestinien occupé⁵⁷, cet État a continué d'asseoir sa domination et sa présence militaire, celle-ci devenant toujours plus flagrante et pénible pour les Palestiniens, tout en faisant prévaloir ses propres intérêts⁵⁸. La façon dont Israël administre le territoire palestinien occupé est typique des pratiques coloniales, à savoir qu'il cherche à tout prix à exploiter les terres et les

⁵⁴ Ibid., par. 23.

⁵⁵ Résolution 38/17 de l'Assemblée générale (1983).

⁵⁶ Résolution 2334 (2016) du Conseil de sécurité.

⁵⁷ Ibid. et résolution 242 (1967) du Conseil de sécurité.

⁵⁸ Yehuda Z. Blum, « The missing reversioner: reflections on the status of Judea and Samaria » *Israel Law Review*, vol. 50 (2017), p. 276.

ressources pour son propre bénéfice et ne manifeste, dans le meilleur des cas, qu'une profonde indifférence pour les droits et les intérêts du peuple protégé⁵⁹.

35. Ce qui rend la situation dans le territoire palestinien occupé profondément illégale est le déplacement illégal et intentionnel des palestiniens autochtones (et réfugiés) y habitant, associé à l'altération du statut juridique, du caractère géographique et de la composition démographique du territoire occupé, par la fragmentation des terres, la saisie et l'exploitation des ressources naturelles, et l'entrave au développement économique palestinien, par et pour une minorité coloniale (grandissante). En réalité, l'installation forcée de colons, de zones de peuplement et d'infrastructures de colonisation sur le terrain et l'espace des Palestiniens a servi à empêcher les Palestiniens de jouir de leur droit à l'autodétermination et constitue une violation de plusieurs normes impératives du droit international, au titre duquel les activités de ce type sont absolument interdites⁶⁰.

36. On trouvera dans les sections ci-après des preuves que l'occupation n'est pas seulement belliqueuse mais qu'elle relève également du colonialisme de peuplement, Israël ayant empêché le peuple palestinien de jouir de son droit à l'autodétermination et violé chaque aspect de ce droit en poursuivant délibérément ses efforts de « dé-palestinisation » du territoire occupé. En substance, ces agissements témoignent d'une intention de coloniser le territoire palestinien occupé, dans la continuité de ce qui avait été envisagé par le mouvement sioniste pour l'Israël moderne il y a plus d'un siècle⁶¹. Parallèlement, cela fait plus de 55 ans que la communauté internationale manque systématiquement à son devoir en n'exigeant pas d'Israël qu'il réponde de ses actes, permettant ainsi à ce pays de continuer d'agir en toute impunité et de poursuivre ses efforts de colonisation.

B. L'occupation à son commencement : préparation du terrain

37. Lorsque, en 1967, Israël a envahi ce qui restait de la Palestine sous mandat britannique – que contrôlaient jusqu'alors l'Égypte (bande de Gaza) et la Jordanie (Cisjordanie, y compris Jérusalem-Est) – nombreux sont ceux, en Israël et à l'étranger, à s'être réjouis au plus haut point de la prise de la Cisjordanie, de la bande de Gaza et de la vieille ville de Jérusalem⁶². Encouragés par leur prise de contrôle rapide sur de vastes étendues de terres, les dirigeants israéliens ont imaginé des plans pour consolider de façon permanente l'hégémonie de leur pays sur le territoire qu'il venait tout juste d'occuper⁶³. Depuis le début de l'occupation, les gouvernements israéliens se succédant agissent comme si le territoire « conquis » était une *terra nullius*, une attitude qui n'est pas sans rappeler celle adoptée par les dirigeants du mouvement sioniste envers la Palestine depuis l'époque de l'Empire ottoman.

38. Ce qui avait été prévu par les stratèges israéliens de l'époque était que le territoire occupé serait à l'avenir lié à la création d'un Grand Eretz Yisrael (Terre d'Israël), d'un point de vue stratégique, ainsi que d'un État juif, d'un point de vue

⁵⁹ A/72/556 (2017).

⁶⁰ Résolution 478 (1980) du Conseil de sécurité ; résolution 3314 (XXIX) de l'Assemblée générale (1974). Résolution 267 (1969) du Conseil de sécurité.

⁶¹ Rashid Khalidi, *The Hundred Years' War on Palestine: A History of Settler Colonialism and Resistance: 1917-2017* (New York, Metropolitan Books, 2020).

⁶² Seth Anziska, *Preventing Palestine: A Political History from Camp David to Oslo* (Princeton, New Jersey, Princeton University Press, 2018), p. 7.

⁶³ Segev, *1967: Israel, the War, and the Year that Transformed the Middle East* (voir note de bas de page 3).

démographique⁶⁴. Conformément au plan Allon, élaboré en 1967, un État juif unitaire s'étendant de la vallée du Jourdain à la Méditerranée serait créé, grâce à l'annexion complète de la vallée du Jourdain et à la création de Bantoustans palestiniens démilitarisés en son sein⁶⁵. Au titre de ce projet, la carte d'Israël serait revue dans son intégralité, abstraction étant faite dans le résultat final tant de la Ligne verte que des autres lignes d'armistice⁶⁶. La vieille ville de Jérusalem, située dans la partie est de la ville, serait annexée et il était prévu que les Palestiniens qui y vivaient reçoivent un « statut de résident conditionnel »⁶⁷. Du reste, la priorité serait donnée aux zones de faible densité démographique ; les basses terres situées le long du Jourdain, jugées essentielles pour la défense d'Israël, de même que la péninsule du Sinaï et Bethléem et Hébron, seraient annexées. Le reste du territoire, plus densément peuplé par les Palestiniens, serait placé sous le contrôle de la Jordanie⁶⁸.

39. Le plan Allon est resté d'actualité et a continué de progresser grâce aux actions entreprises par les gouvernements israéliens successifs. En 1973, Moshe Dayan, Ministre israélien des affaires étrangères et architecte parmi d'autres de l'occupation de 1967, a avancé l'idée d'un nouvel État d'Israël plus étendu, fort et solide, dans lequel l'autorité du Gouvernement s'étendrait du fleuve Jourdain au canal de Suez⁶⁹. En 1979, le Premier Ministre israélien Menachem Begin a déclaré que la Ligne verte n'existait plus et avait disparu à jamais⁷⁰. Comme l'a révélé l'ancien politicien israélien Matityahu Droblès en 1980, l'intention avait toujours été de conserver à jamais les territoires de Judée-Samarie, le meilleur moyen et le plus efficace pour ce faire étant d'accélérer la colonisation dans ces régions⁷¹. Citons pour exemple particulièrement probant l'annexion, par Israël, de Jérusalem-Est occupée depuis 1967, laquelle a été formellement cimentée en 1980 par l'adoption de mesures administratives et législatives⁷² ayant conduit à la modification du statut et du caractère de la vieille ville, lesquelles, comme l'a confirmé à plusieurs reprises le Conseil de sécurité des Nations Unies, n'avaient aucune validité en droit⁷³.

40. L'évolution de la situation sur le terrain témoigne de l'exécution du plan Allon, bien que celui-ci n'ait jamais été officiellement adopté. Israël s'attendant depuis des décennies à créer des faits accomplis sur le terrain pour consolider l'annexion de grandes parties du territoire palestinien occupé, en 2019, le Premier Ministre israélien de l'époque, Benjamin Netanyahu, a déclaré que la création d'un État palestinien mettrait en danger l'existence d'Israël et qu'il ne diviserait pas Jérusalem ni n'évacuerait aucune communauté, ajoutant qu'il s'assurerait qu'Israël contrôle le territoire situé à l'ouest de la Jordanie⁷⁴. De multiples gouvernements et dirigeants

⁶⁴ Commandant israélien (Premier Ministre par intérim, 1969) Yigad Allon, cité par Robert Friedman, *Zealots for Zion: Inside Israel's West Bank Settlement Movement* (New York : Random House, 1992).

⁶⁵ Geoffrey Aronson, *Creating Facts: Israel, Palestinians and the West Bank* (Washington, D.C. : Institute for Palestine Studies, 1987).

⁶⁶ Cité dans Gershom Gorenberg, *The Unmaking of Israel*, 1^{re} édition Harper Perennial (New York : Harper Perennial, 2012).

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Abba Eban, Ministre israélien des affaires étrangères, cité par Abba Eban, *Abba Eban: An Autobiography* (New York : Random House, 1977).

⁷⁰ « Foreign Minister Dayan on the Future of Settlements in Judea, Samaria and Gaza », 24 avril 1979.

⁷¹ Matityahu Droblès, « Settlement in Judea and Samaria – Strategy, Policy and Programmes », dans *World Zionist Organization, Settlement Section* (Jérusalem, 1980).

⁷² Knesset, « Basic Law: Jerusalem, Capital of Israel » (1980).

⁷³ Résolution 478 (1980) du Conseil de sécurité, par. 3.

⁷⁴ « Netanyahu says will begin annexing West Bank if he wins Israel election », *Haaretz*, 7 avril 2019.

politiques et militaires israéliens ont réaffirmé ces positions⁷⁵. En raison de la présence de « colons » et de kahanistes à la Knesset israélienne, il est difficile de séparer le colonialisme de la politique publique israélienne.

41. Depuis 1967, Israël installe sa population civile dans les 22 % de la Palestine mandataire qui étaient censés devenir (en raison de pressions politiques et d'analyses pragmatiques) le territoire où les Palestiniens réaliseraient leur droit à l'autodétermination, sous la forme d'un État indépendant (alors qu'en 1947, l'Assemblée générale avait délibéré que le territoire de l'« État arabe » correspondrait à 45 % du territoire occupé par la Palestine sous mandat britannique).

42. Tragique ironie, les Palestiniens ont commencé à subir un colonialisme de peuplement intense à un moment de l'histoire où le reste du monde progressait lentement vers la décolonisation. Dans le monde entier, des mouvements de résistance nationaux, bénéficiant du soutien symbolique des Nations Unies, se sont dressés contre leurs colonisateurs et sont parvenus à se libérer de leur domination, tandis que, dans le territoire palestinien occupé, y compris Jérusalem-Est, l'expansionnisme d'Israël se transformait en un régime d'apartheid caractérisé par la plus longue période d'occupation de l'histoire moderne.

C. Entrave à l'unité : la fragmentation territoriale

43. La souveraineté territoriale, composante essentielle de l'« unité d'autodétermination » palestinienne⁷⁶, est au centre de l'action menée par Israël depuis les premiers jours de l'occupation. La « fragmentation stratégique », qui consiste notamment à limiter la liberté de circulation des Palestiniens à l'intérieur et à l'extérieur du territoire occupé, à les priver d'accès à de vastes étendues de terre et à installer de nombreux barrages routiers, points de contrôle et déviations ainsi qu'un mur de séparation, fait partie des méthodes employées par le pays pour contenir et contrôler le peuple palestinien⁷⁷. Celle-ci constitue un douloureux rappel de la destruction et de la tentative d'anéantissement de centaines de villages palestiniens situés dans l'ancienne Palestine mandataire britannique au moment de la création de l'État d'Israël, qui s'est accompagnée d'une dénaturation des paysages, d'une reconfiguration des terres destinée à servir les intérêts d'Israël et de l'installation de séparation visant à contenir et à isoler le peuple palestinien à travers les zones sous contrôle. La surveillance accrue de la population palestinienne, dont la principale manifestation est le siège de la bande de Gaza, est désormais caractéristique des politiques de domination d'Israël.

44. La fragmentation et la séparation entre la Cisjordanie, Jérusalem-Est et la bande de Gaza ont été méticuleusement planifiées et exécutées. L'application, à partir de 1967, de régimes administratifs et militaires distincts pour la bande de Gaza et la Cisjordanie – se traduisant par exemple par l'utilisation de cartes d'identité et de plaques d'immatriculation différentes – a été le principal vecteur de cette fragmentation⁷⁸. Depuis les premiers jours de l'occupation, celle-ci a été exacerbée par l'expropriation sans limites de terres destinées à accueillir des colonies israéliennes⁷⁹. La création de colonies, qui déjà en 1967 constituait une grave

⁷⁵ Tovah Lazaroff, « Michaeli: no one thinks half a million settlers will be evacuated », *Jerusalem Post*, 9 mars 2021 ; « Benny Gantz, Netanyahu rival, gives campaign launch speech: full English transcript », *Haaretz*, 30 janvier 2019 ; Gil Stern Hoffman, « Lapid: US helped Iran fund its next war against Israel », *Jerusalem Post*, 26 janvier 2016.

⁷⁶ Crawford, *The Creation of States in International Law* (voir note de bas de page 19), p. 428.

⁷⁷ E/ESCWA/ECRI/2017/1 (2017) (voir note de bas de page 5).

⁷⁸ Jean-Pierre Filiu, *Gaza: A History* (Oxford : Oxford University Press, 2014).

⁷⁹ Ordonnance militaire 58 (1967).

violation du droit international⁸⁰, est le signe de la mise à exécution des plans élaborés par les dirigeants israéliens pour s'installer de manière permanente dans ces régions⁸¹. Cela est particulièrement visible à Jérusalem-Est, qu'Israël traite illégalement comme s'il l'avait « annexée » depuis des décennies⁸². Dans plus de 40 de ses résolutions, le Conseil de sécurité a rappelé à Israël la non-validité de toute modification du statut, du caractère et de la composition démographique de Jérusalem⁸³. Et pourtant, l'annexion et la dé-palestinisation de Jérusalem et de la majeure partie de la Cisjordanie ont progressé.

45. Au titre des accords d'Oslo, signés par Israël et l'Organisation de libération de la Palestine entre 1993 et 1995, la Cisjordanie a été divisée en « zones » A, B et C, ce qui a entraîné une fragmentation encore plus profonde du territoire disponible pour les Palestiniens. La fragmentation de la Cisjordanie a facilité la construction et la « protection » de colonies exclusivement juives dans le territoire occupé. Parallèlement, des milliers de structures palestiniennes ont été détruites et des dizaines de milliers de Palestiniens ont été déplacés de force depuis 2009. Les communautés pastorales et bédouines de la zone C, composées à 70 % de réfugiés, sont les plus exposées à cet « environnement coercitif »⁸⁴.

46. La transformation de la bande de Gaza en une enclave à haute densité de population particulièrement appauvrie, contrôlée par Israël au moyen d'un blocus maritime, terrestre et aérien étouffant, fait partie intégrante de ce même projet colonial. Le confinement de la population coloniale dans des réserves soumises à une supervision accrue est au cœur de l'objectif de colonisation de peuplement de garantir la suprématie démographique et d'empêcher le peuple palestinien d'exercer son droit à l'autodétermination⁸⁵. À l'inverse, l'obligation de considérer la bande de Gaza et la Cisjordanie, y compris Jérusalem-Est, comme une seule unité territoriale est ancrée dans le droit de l'occupation, le principe d'autodétermination des peuples et un certain nombre de traités bilatéraux conclus par Israël et l'OLP⁸⁶.

D. Lutte contre la prospérité économique : l'exploitation des ressources naturelles

47. La souveraineté permanente sur les ressources naturelles est un élément essentiel du développement économique des peuples, consacré par le droit à l'autodétermination⁸⁷. En raison du complexe système de contrôle et de restrictions qu'Israël applique dans le territoire palestinien occupé au profit exclusif de ses colonies, les Palestiniens voient réduites à néant leurs chances de poursuivre librement leur développement économique et de disposer de leurs richesses et ressources naturelles comme bon leur semble⁸⁸.

⁸⁰ Convention de Genève relative à la protection des personnes civiles en temps de guerre (quatrième Convention de Genève) du 12 août 1949, art. 147 ; Comité international de la Croix-Rouge, commentaire de 1958.

⁸¹ CIJ, Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif (2004) (voir note de bas de page 35).

⁸² Ordonnance sur les lois et l'administration (modification n° 11), loi de 1967.

⁸³ Résolution 2334 (2016) du Conseil de sécurité.

⁸⁴ A/HRC/31/43.

⁸⁵ Tareq Baconi, « Gaza and the One-State Reality », *Journal of Palestine Studies*, vol. 50, n° 1 (2020), p. 77 à 90.

⁸⁶ Marco Longobardo, « The Legality of Closure on Land and Safe Passage between the Gaza Strip and the West Bank », *Asian Journal of International Law*, vol. 11, n° 1 (2021).

⁸⁷ Drew, « The East Timor story: international law on trial » (voir note de bas de page 22).

⁸⁸ Pacte international relatif aux droits civils et politiques et Pacte international relatif aux droits économiques, sociaux et culturels, alinéa 2 de l'article premier (commun aux deux textes).

48. Les communautés palestiniennes, qui, par le passé, étaient capables de subvenir à leurs propres besoins grâce à l'agriculture, à l'élevage et à la pêche (à Gaza), ainsi qu'aux revenus générés par la vente de leur production, se retrouvent maintenant piégées dans un cercle vicieux de dépendance, vis-à-vis tant de l'économie israélienne que de l'aide internationale⁸⁹. L'accès aux moyens de subsistance, à l'eau, à la terre et aux routes est en permanence perturbé par les restrictions israéliennes.

49. Dans la zone C de la Cisjordanie, où se trouvent la plus grande partie des ressources naturelles et presque toutes les terres arables de la région, Israël exerce un monopole complet sur les sources d'eau⁹⁰ et n'a réservé que 1 % des terres à l'usage des Palestiniens⁹¹. Le « système de coordination » mis en place en grande pompe par le pays pour faciliter l'accès des Palestiniens à leurs terres est alambiqué et inefficace⁹². Le contrôle exercé par Israël sur les ressources palestiniennes entrave la production et menace l'autosuffisance des Palestiniens, mettant particulièrement en danger la survie des Bédouins et des autres communautés pastorales palestiniennes de la région. Selon les estimations de l'ONU, si la Cisjordanie ne se trouvait pas sous occupation israélienne, le PIB par habitant en 2019 y aurait été supérieur de 44 % aux chiffres enregistrés⁹³.

50. Dans la bande de Gaza assiégée, la situation économique est plus que désastreuse⁹⁴. En 2021, le taux de chômage y a dépassé les 50 %, 80 % de la population dépendant par ailleurs de l'aide fournie⁹⁵. Les offensives militaires israéliennes répétées de grande envergure, associées aux coupures d'électricité imposées par Israël, ont aggravé les difficultés auxquelles fait face la population palestinienne de Gaza, qui ne peut que rêver d'une vie dans la dignité⁹⁶. Grâce à son blocus illégal de la bande de Gaza, laquelle constitue une forme de peine collective, Israël est également en mesure d'exploiter les réserves de gaz naturel et de pétrole situées au large de celle-ci⁹⁷.

51. Dans le même temps, un réseau d'entreprises nationales et internationales opère dans le territoire palestinien illégalement occupé⁹⁸. Ces entreprises procèdent à des essais de matériel militaire sur les Palestiniens⁹⁹, exploitent les ressources en eau dont sont privés ces derniers¹⁰⁰, cultivent les terres et les utilisent à des fins d'élevage, exploitent des carrières de pierre, extraient des minéraux, forment des puits de pétrole et de gaz naturel et allouent des ressources presque exclusivement aux colonies et à

⁸⁹ B'Tselem, « Expel and exploit: the israeli practice of taking over rural palestinian land » (2016).

⁹⁰ Voir [A/HRC/37/39](#) (2018).

⁹¹ Orhan Niksic *et al.*, *Area C and the Future of the Palestinian Economy* (Banque mondiale, 2014), p. 13.

⁹² Voir B'Tselem, « Expel and exploit » (voir note de bas de page 89).

⁹³ Voir Conférence des Nations Unies sur le commerce et le développement (CNUCED), *Les coûts économiques de l'occupation israélienne pour le peuple palestinien : Arrêt du développement et pauvreté en Cisjordanie* (UNCTAD/GDS/APP/2021/2) (2021).

⁹⁴ CNUCED, *Les coûts économiques de l'occupation israélienne pour le peuple palestinien : l'appauvrissement de Gaza sous le blocus* (UNCTAD/GDS/APP/2020/1) (2020).

⁹⁵ Banque mondiale, *Assistance Strategy for the West Bank and Gaza for the Period FY22-25* (156451-GZ) (2021).

⁹⁶ Ibid.

⁹⁷ CNUCED, *Les coûts économiques de l'occupation israélienne pour le peuple palestinien : le potentiel gazier et pétrolier inexploité* (UNCTAD/GDS/APP/2019/1) (2019).

⁹⁸ Wesam Ahmad, « Business and human rights, conflict and the converging legacies of colonialism in the Palestinian present », *Cambridge Core*, mai 2021.

⁹⁹ Maryam Farah, « Business and human rights in Occupied Territory: guidance for upholding human rights » (Al-Haq, 2020).

¹⁰⁰ Al-Haq, « Water for one people only: discriminatory access and 'water apartheid' in the OPT » (2013).

la Puissance occupante¹⁰¹. Les produits finis, qui sont commercialisés dans le monde entier comme « provenant d'Israël », sont généralement exportés vers le territoire d'États tiers, parfois en exonération de droits de douane¹⁰². L'obligation d'étiqueter ces produits de la colonisation comme provenant du territoire occupé ne résout pas l'illégalité de leur commerce¹⁰³ ; tout au plus, elle ne fait que transférer la responsabilité aux consommateurs des États destinataires de décider des produits qu'ils estiment ne pas devoir être autorisés sur les territoires des Hautes Parties contractantes aux Conventions de Genève.

52. Le refus délibéré de l'accès des Palestiniens à leurs ressources naturelles et de leur contrôle sur celles-ci fait de toute perspective de développement économique un simple substitut de prospérité¹⁰⁴. Le « dé-développement » imposé par Israël au territoire palestinien occupé a causé d'irréparables dommages à l'économie palestinienne et est aux antipodes du principe d'autodétermination auquel ont adhéré les Nations Unies dans leur rejet du colonialisme¹⁰⁵.

E. Privation d'une identité propre : l'effacement des droits culturels et civils des Palestiniens

53. Dans un contexte colonial et un régime d'apartheid, toute manifestation d'identité collective et tentative du peuple assujéti de revendiquer, une seule fois ou à plusieurs reprises, sa souveraineté représente une menace pour le régime en place. Le 13 mai 2022, des porteurs de cercueils palestiniens ont été attaqués par les forces israéliennes alors qu'ils arboraient le drapeau national lors des funérailles de la journaliste palestinienne Shireen Abu Akleh, tuée deux jours auparavant (voir par. 58). Les « symboles » palestiniens, tels que le drapeau palestinien, sont en réalité systématiquement pris pour cibles et détruits, que ce soit dans les lieux publics ou lors de manifestations publiques, de rassemblements et même de funérailles, tout affichage de l'identité nationale palestinienne étant de facto interdit. Dans le territoire palestinien occupé, les mesures visant à empêcher le peuple palestinien d'exprimer son identité collective sur sa propre terre prennent de nombreuses formes.

54. Ces interdictions s'inscrivent dans un effort plus large et plus important de « déconstruction et de remplacement » de la Palestine dans l'imaginaire collectif par une combinaison d'appropriation culturelle et d'effacement d'entités culturelles clefs¹⁰⁶. Le quartier marocain de la vieille ville de Jérusalem, rasé au début de l'occupation pour faire place à l'esplanade du Mur des lamentations, est l'un des premiers cas enregistrés de lieux palestiniens à avoir été détruits ou saisis et convertis en sites culturels israéliens peu après juin 1967. Les tentatives visant à effacer le caractère palestinien des vestiges de la terre palestinienne ancestrale comprennent : l'élimination de l'histoire palestinienne des programmes de cours dans les écoles de Jérusalem-Est¹⁰⁷, la révocation des licences des écoles palestiniennes qui

¹⁰¹ Al-Haq, « Palestinian human rights organizations submit file to ICC prosecutor: investigate and prosecute pillage, appropriation and destruction of Palestinian natural resources », 26 octobre 2018.

¹⁰² Accord de libre-échange entre le Canada et Israël (2014).

¹⁰³ Cour de justice de l'Union européenne, affaire C-363/18 (12 novembre 2019).

¹⁰⁴ Al-Haq et Groupe d'intervention d'urgence pour l'eau, l'assainissement et l'hygiène, « Israel's violations of the International Covenant on Economic, Social and Cultural Rights with regard to the human rights to water and sanitation in the Occupied Palestinian Territory » (2011).

¹⁰⁵ Sara Roy, « De-development revisited: Palestinian economy and society since Oslo », *Journal of Palestine Studies*, vol. 28, n° 3 (1999), p. 64 à 82.

¹⁰⁶ Wolfe, « Settler colonialism and the elimination of the native » (voir note de bas de page 11).

¹⁰⁷ Musa Ismael Basit, « The Israeli curriculum and the Palestinian national identity in Jerusalem », *Palestine-Israel Journal*, vol. 22, n° 4 (2017).

n'adhéreraient pas aux politiques préconisées par Israël en matière de programmation scolaire¹⁰⁸, et la conversion ou la fermeture de sites représentatifs de l'identité culturelle, politique et religieuse de la Palestine¹⁰⁹.

55. Les attaques perpétrées à l'encontre de biens culturels importants dans le but d'éliminer toutes traces et manifestations de l'existence palestinienne, de même que les tentatives de réécrire l'histoire pour justifier des revendications (sans fondements) de souveraineté dans le territoire palestinien occupé, sont la preuve de l'intention de l'occupant de dépouiller définitivement la terre de son identité d'origine.

F. Opposition à l'existence (et à la résistance) politique

56. La survie de tout peuple, en tant que collectivité et qu'entité politique, repose sur le respect de son droit à l'autodétermination. Depuis 1967, Israël ne cesse, pour maintenir sa domination, de perpétrer des violations des droits humains, procédant notamment à des exécutions extrajudiciaires, des détentions et des emprisonnements arbitraires (y compris de représentants élus), des révocations de résidence et des expulsions massives, y compris de personnalités politiques se trouvant hors du territoire palestinien occupé. Ces violations entravent la formation organique et le bon fonctionnement d'une entité politique de direction palestinienne cohésive et, partant, l'exercice, par les Palestiniens, de leur droit à l'autodétermination.

57. Décrits comme des terroristes, de nombreux dirigeants politiques palestiniens et des défenseurs de leur cause auraient été tués pour les messages qu'ils cherchaient à faire passer et leur effet potentiel sur la formation d'une idéologie politique palestinienne¹¹⁰. Ce qui avait commencé, dans les années 1960, comme des manœuvres de sécurité destinées à enrayer des « opérations terroristes » s'est transformé, au fil des ans, en une politique d'assassinats visant non seulement les auteurs d'attaques de ce type, mais aussi les dirigeants politiques d'organisations désignées par Israël comme terroristes¹¹¹. De nombreux membres de l'OLP ont notamment été visés, alors même que l'ONU et, par la suite, Israël avaient reconnu l'organisation comme étant le « représentant légitime du peuple palestinien », en 1974 pour la première et en 1993 pour le second. Il semblerait qu'Israël commette des assassinats ciblés – exécutions extrajudiciaires – comme stratégie politique lui permettant d'éviter les négociations¹¹². C'est là l'approche qui aurait été suivie lors de la seconde intifada, durant laquelle 300 Palestiniens accusés de terrorisme ont été tués délibérément, faisant 150 victimes civiles supplémentaires¹¹³.

58. Personnel humanitaire et journalistes figurent régulièrement parmi les victimes du recours généralisé à la force létale par Israël et l'impunité demeure omniprésente. L'assassinat de la journaliste palestinienne Shireen Abu Akleh, alors qu'elle couvrait

¹⁰⁸ « Education minister revokes licences of 6 East Jerusalem schools for incitement », *Times of Israel*, 28 juillet 2022.

¹⁰⁹ Luma Zayad, « Systematic cultural appropriation and the Israeli-Palestinian conflict », *DePaul Journal of Art Technology and Intellectual Property Law*, vol. 28, n° 2 (2018), p. 81 ; Mahmoud Hawari, « Capturing the castle: archaeology, architectural history and political bias at the Citadel of Jerusalem », *Jerusalem Quarterly*, n° 55 (2013); Mahmoud Hawari, « The Citadel of Jerusalem: a case study in the cultural appropriation of archaeology in Palestine », *Present Pasts* vol. 2, n° 1 (2010) ; Tom Abowd, « The Moroccan Quarter: a history of the present », *Jerusalem Quarterly*, n° 7 (2000).

¹¹⁰ Eyal Weizman, *Hollow Land: Israel's Architecture of Occupation* (Londres : Verso Books, 2012).

¹¹¹ Ronen Bergman, *Rise and Kill First: The Secret History of Israel's Targeted Assassinations* (New York : Random House Publishing Group, 2019).

¹¹² Weizman, *Hollow Land: Israel's Architecture of Occupation* (voir note de bas de page 110).

¹¹³ Noura Erakat, « Extrajudicial executions from the United States to Palestine », *Just Security*, 7 août 2020.

un raid israélien mené dans le camp de Jénine, le 11 mai 2022, reste impuni, en dépit des nombreuses enquêtes ayant mené à la conclusion que la journaliste avait été touchée par des tirs de soldats israéliens¹¹⁴.

59. Israël continue d'emprisonner des ministres de l'Autorité palestinienne, des maires, des enseignants, des défenseurs des droits humains et des représentants de la société civile. Dix membres du Conseil législatif palestinien auraient ainsi été incarcérés au cours de la seule année 2020. Cette pratique d'arrestations arbitraires massives, se traduisant notamment par des internements administratifs sans inculpation ni jugement, s'est encore accentuée depuis que les Palestiniens se sont mis à protester contre la construction illégale du mur de séparation en Cisjordanie et à Jérusalem-Est¹¹⁵. Près de 4 500 Palestiniens se trouvent actuellement en détention, dont 730 n'ont fait l'objet d'aucune inculpation et ont été arrêtés en grande partie sur la base d'éléments de preuves confidentiels. Des enfants âgés d'à peine 12 ans sont victimes d'arrestations et de détentions arbitraires ; ainsi, entre 500 et 700 mineurs sont détenus chaque année¹¹⁶. De nombreuses personnes accusées d'être des chefs de file de la résistance, telles que des fonctionnaires, des chefs et des militants religieux, des avocats, des journalistes et des étudiants engagés dans des activités politiques, ont été expulsées vers la bande de Gaza¹¹⁷. La déportation des élus, le fait d'empêcher les Palestiniens de voter et l'ingérence dans la politique palestinienne sont autant de facteurs entravant la prise d'initiatives et la manifestation d'une volonté politique indépendante de la part de la Palestine, qui seraient susceptibles de mettre à mal les intérêts coloniaux d'Israël¹¹⁸.

60. Les organisations de la société civile et les défenseurs des droits humains sont également la cible de la répression exercée par Israël. S'appuyant sur l'utilisation de logiciels espions à grande échelle pour surveiller les dispositifs de militants et défenseurs des droits humains, au moyen notamment du programme Pegasus, désormais exporté et utilisé dans le monde entier, Israël a réduit la marge de manœuvre politique des Palestiniens¹¹⁹. En 2021, six organisations de bonne réputation de la société civile palestinienne, œuvrant en première ligne pour la justice internationale et l'application du principe de responsabilité dans le territoire palestinien occupé, ont été désignées par Israël, sans preuve aucune, comme des « organisations terroristes ». En août 2022, les locaux de ces organisations ont été fouillés et ont fait l'objet d'un ordre de fermeture de la part d'Israël, tandis que plusieurs des principaux dirigeants de ces entités étaient convoqués et menacés. Il semble s'agir là d'une tentative de limiter encore davantage, voire de les réduire à néant, les possibilités de surveillance du respect des droits humains et d'opposition légale à l'occupation israélienne dans le territoire palestinien¹²⁰, au moyen d'une interprétation abusive de la législation antiterroriste¹²¹. Les organisations concernées étant pleinement engagées dans l'affaire de la Cour pénale internationale relative à la situation dans l'État de Palestine, il est possible qu'Israël, en s'attaquant à elles et à leurs travaux, détruise ou falsifie des éléments de preuve de crimes de guerre et de

¹¹⁴ Voir, par exemple, HCDH, « Meurtre d'une journaliste dans le territoire palestinien occupé », 24 juin 2022.

¹¹⁵ Addameer, Administrative detention fact sheet 2022 (20 janvier 2022).

¹¹⁶ Defense for Children International Palestine, « Number of Palestinian children (12-17) in Israeli military detention », 14 juin 2022. Disponible à l'adresse www.dci-palestine.org/children_in_israeli_detention.

¹¹⁷ Miftah, fiche d'information, « The Palestinian Exodus » (2002).

¹¹⁸ Ibid.

¹¹⁹ Front Line Defenders, « Six Palestinian human rights defenders hacked with NSO Group's Pegasus Spyware », 8 novembre 2021.

¹²⁰ Michael Kearney, « Lawfare, legitimacy and resistance: the weak and the law », *Palestine Yearbook of International Law*, vol. 16, n° 1 (2010).

¹²¹ A/HRC/40/52 (2019).

crimes contre l'humanité, faits absolument interdits par le droit pénal international, ou entrave le rassemblement de tels éléments¹²², ce qui constituerait une atteinte à l'administration de la justice par la Cour pénale.

61. La perpétration d'attaques contre des défenseurs et défenseuses des droits humains et des humanitaires est bien trop fréquente dans le territoire palestinien occupé. Salah Hammouri, un avocat franco-palestinien de Jérusalem, est par exemple soumis à des actes de harcèlement et fait l'objet d'arrestations et de détentions arbitraires depuis l'âge de 16 ans. Placé en détention sans chef d'inculpation ni procès le 7 mars 2022, au motif d'allégations de terrorisme, Hammouri risque de perdre son droit de résidence à Jérusalem pour manquement à l'allégeance envers Israël¹²³. Ce scénario créerait un dangereux précédent, car ce serait la première fois qu'un Jérusalémite se verrait privé de sa résidence sur la base de preuves confidentielles ayant trait à la protection de la sécurité nationale. On retiendra également le cas de Mohammed al-Halabi, travailleur humanitaire œuvrant pour le compte de World Vision dans la bande de Gaza, qui a été condamné, après six ans et plus de 160 audiences au tribunal, pour avoir détourné des fonds de l'organisation au profit du Hamas et pour d'autres crimes relevant du terrorisme, une condamnation reposant en grande partie sur des éléments de preuve tenus secrets et prononcée alors même qu'une enquête externe n'avait conduit à la découverte d'aucune preuve de méfaits¹²⁴.

62. Les attaques incessantes dont sont victimes les Palestiniens, de même que l'opposition à toutes manifestations politiques voire à toute résistance légale de leur part, ont été jugées comme s'apparentant à des actes de persécution¹²⁵, lesquels limitent *in fine* la capacité de ces personnes à se développer en tant que peuple.

G. Refus du statut d'État – « Négocier l'illégal » ?

63. En vertu du droit de la responsabilité des États, la violation d'une obligation internationale par un État constitue un fait internationalement illicite¹²⁶, auquel l'État responsable est avant tout tenu de mettre immédiatement fin, tout en offrant des assurances de non-répétition et en réparant le préjudice causé¹²⁷. Il s'ensuit qu'une violation du droit international ne devrait pas faire l'objet de négociations, car cela reviendrait à légitimer quelque chose d'illégal¹²⁸. Ainsi, l'occupation israélienne étant – de par sa nature prolongée, inextinguible et entachée de mauvaise foi – illégale, l'obligation d'y mettre fin ne peut en aucun cas faire l'objet de négociations¹²⁹.

64. Depuis le début du processus de paix au Moyen-Orient, marqué par la Conférence de Madrid de 1991, les principaux acteurs politiques concernés (en particulier le Quatuor pour le Moyen-Orient) plaident pour la tenue de négociations bilatérales en faveur de la paix. Dans la Déclaration d'indépendance de la Palestine de 1988, l'OLP avait déjà dû céder à l'inévitabilité d'une solution basée sur le compromis, son acceptation des résolutions 242 (1967) et 338 (1973) du Conseil de sécurité étant vue comme un consentement à l'idée que les revendications de

¹²² Statut de la CPI (1998), alinéa 1) c) de l'article 70.

¹²³ Addameer, « Salah Hammouri », 8 septembre 2022.

¹²⁴ Amnesty International, « Israël et territoires palestiniens occupés. La condamnation du travailleur humanitaire Mohammed al Halabi doit être annulée » (16 juin 2022).

¹²⁵ Human Rights Watch, *A Threshold Crossed* (voir note de bas de page 5), p. 170.

¹²⁶ CDI, projet d'articles sur la responsabilité de l'État pour fait internationalement illicite, alinéas a) et b) de l'article 2.

¹²⁷ Ibid. alinéas a) et b) de l'article 30 et 1) et 2) de l'article 31.

¹²⁸ Imseis, « Negotiating the illegal: on the United Nations and the illegal occupation of Palestine, 1967-2020 » (voir note de bas de page 8), p. 1068.

¹²⁹ Ibid.

souveraineté du peuple palestinien étaient limitées au seul territoire palestinien occupé¹³⁰. Les Accords d'Oslo, que beaucoup considèrent comme la référence pour ce qui est de résoudre le conflit israélo-palestinien par la reconnaissance du statut d'État, dans le respect des lignes d'armistice de 1949, n'ont permis ni de réaliser le droit du peuple palestinien à l'autodétermination ni d'avancer sur la question. Ces accords, qui faisaient de la réalisation du droit à l'autodétermination – après une période d'autonomie provisoire – l'objectif final des efforts de rétablissement de la paix, reposaient sur la reconnaissance mutuelle de l'État d'Israël et de l'OLP (et non de l'État de Palestine, tel qu'il avait été déclaré en 1988)¹³¹, mais l'autonomie palestinienne n'y était prévue que dans certaines parties de la Cisjordanie et de la bande de Gaza, tandis que les « droits légitimes et politiques » des Palestiniens ne seraient reconnus que dans le territoire palestinien occupé¹³². Dans la pratique, ceux-ci laissaient ouverte la possibilité d'étendre à perpétuité un système dans lequel la Palestine bénéficiait d'une certaine autonomie sans pour autant que son indépendance soit reconnue et, point essentiel, ils permettaient à Israël de conserver un contrôle total sur 61 % de la Cisjordanie¹³³.

65. Le droit à l'autodétermination demeure une norme fondamentale du droit international, dont le respect doit être garanti par la communauté des États dans son ensemble. En vertu du droit international, les accords spéciaux, au sens de la IV^e Convention de Genève, ne sauraient ni violer des droits impératifs, ni déroger aux droits des « personnes protégées » sous occupation ou les nier¹³⁴. Compte tenu du caractère impératif de cette norme, les Accords d'Oslo ne peuvent pas limiter le droit à l'autodétermination des Palestiniens. Il est inacceptable qu'une norme impérative de droit international général de ce type soit remise en question dans le cadre de négociations, surtout si l'on considère l'asymétrie du pouvoir de négociation entre l'occupant et l'occupé (c'est-à-dire entre le colonisateur et le colonisé)¹³⁵. Toute interprétation des Accords d'Oslo qui conduirait à nier le droit à l'autodétermination du peuple palestinien rendrait cet instrument discutable, voire invalide¹³⁶.

66. En réalité, toute solution permettant la poursuite de l'occupation et dans laquelle ne sont pas reconnues les différences de pouvoir entre les Palestiniens, peuple assujéti, et l'État d'Israël, Puissance occupante, et qui ne s'attaque pas une fois pour toutes au colonialisme de peuplement israélien, représente une violation du droit des Palestiniens à l'autodétermination, entre autres dispositions essentielles du droit international.

¹³⁰ Conseil national palestinien, « Déclaration d'indépendance de la Palestine », Algérie, 15 novembre 1988.

¹³¹ Échange de lettres entre le Président de l'OLP, Yasser Arafat, le Premier Ministre israélien, Yitzhak Rabin, et le Ministre norvégien des affaires étrangères, Johan Holst (1993). Disponible à l'adresse www.un.org/unispal/document/auto-insert-205528/.

¹³² Israël et OLP, « Déclaration de principes sur des arrangements intérimaires d'autonomie (Oslo I) » (1993).

¹³³ Au titre des Accords d'Oslo, la Cisjordanie a été divisée en une zone A (placée sous le contrôle civil et sécuritaire exclusif de l'Autorité palestinienne), une zone B (placée sous le contrôle civil de l'Autorité palestinienne et sous contrôle sécuritaire conjoint israélo-palestinien) et une zone C (placée sous le contrôle civil et militaire complet d'Israël).

¹³⁴ ICC-01/18(2021), par. 25.

¹³⁵ Imseis, « Negotiating the illegal: on the United Nations and the illegal occupation of Palestine, 1967-2020 » (voir note de bas de page 8), p. 1065.

¹³⁶ CPI, *Asem Khalil and Halla Shoaibi*, affaire n° ICC-01/18-73 (2020), par. 71.

V. Changement de paradigme

67. Cela fait plus de 55 ans qu'Israël, de par son occupation militaire du territoire, empêche la réalisation du droit des Palestiniens à l'autodétermination, tentant de « dé-palestiniser » le territoire occupé (c'est-à-dire d'y réduire la présence, l'identité et la résilience des Palestiniens) et d'en transformer la majeure partie en une extension permanente de son territoire métropolitain, dans laquelle vivraient le moins de Palestiniens possible. Ces tentatives, qui rappellent un passé colonial fermement condamné dans le monde entier il y a plusieurs décennies, ont pris de plus en plus d'ampleur, la communauté internationale y consentant tacitement et n'obligeant pas Israël à répondre de ses actes.

68. Le respect du droit du peuple palestinien à l'autodétermination, élément essentiel de la lutte pour la décolonisation, n'est presque plus jamais mentionné sur la scène politique et humanitaire internationale, surtout dans le contexte de la « normalisation » des relations diplomatiques avec Israël, et ce malgré les appels que continuent de lancer des défenseurs et défenseuses des droits humains, des universitaires et des représentants de la société civile. Il semblerait que, pour certains, la mention de ce droit s'apparente plus à un slogan idéologique qu'à une réalité juridique s'accompagnant de responsabilités précises.

69. Dans le même temps, l'occupation s'est encore aggravée, avec la modification systématique et forcée par Israël du statut juridique, du caractère et de la composition démographique du territoire palestinien occupé. En ne remettant pas en question ces agissements, les approches adoptées à des fins « humanitaires », « politiques » et « de développement économique » du territoire palestinien occupé ont en réalité pour effet de normaliser l'occupation¹³⁷ et portent atteinte à la pertinence des fonctions de régulation et de réparation du droit international.

70. Il faut que les choses bougent. Seul un changement de paradigme, à savoir la mise en place d'une solution fondée sur le respect de l'histoire et du droit international, permettra de surmonter cette situation. Cette dernière ne pourra être résolue qu'en assurant le respect de la norme fondamentale qu'est le droit des peuples à l'autodétermination et en reconnaissant l'illégalité absolue du colonialisme de peuplement et de la situation d'apartheid dans laquelle ont été plongés les Palestiniens en raison de l'occupation prolongée du territoire palestinien occupé. Compte tenu des visées de colonisation de l'occupation, celle-ci doit être considérée tout autrement, la communauté internationale devant par ailleurs revoir son discours.

71. Pour ce faire, il importe avant tout de reconnaître que le territoire palestinien occupé est actuellement soumis à un régime intentionnellement acquisitif, ségrégationniste et répressif, qui, depuis 55 ans, permet à Israël de priver les Palestiniens de leurs droits, les enfermant dans des Bantoustans avec pour seule compagnie de douloureux souvenirs de liens brisés et d'espairs envolés, l'objectif ultime étant d'asseoir la domination d'Israël, minorité, sur des terres usurpées à une majorité autochtone par la force, l'adoption de politiques abusives et discriminatoires, et le pillage des ressources. Le maintien d'une situation d'occupation sans fin, pour de prétendues « raisons de sécurité » dissimulant un dessein colonial de la part d'Israël et une volonté de supprimer le droit à l'autodétermination du peuple palestinien et de s'appropriier le territoire, toujours plus réduit, de celui-ci – objectifs dont ne se cachent pas les personnalités politiques israéliennes –, est quelque chose que la communauté internationale ne peut plus tolérer. Il s'agit d'une question devant être abordée de manière globale.

¹³⁷ Daniela Huber, « The EU and 50 years of occupation: resistant to or complicit with normalization », *Middle East Critique*, vol. 27, n° 4 (2018), p. 351 à 364.

72. Cette occupation en elle-même supposant un emploi illégal de la force, elle peut être considérée, au regard du droit à l'autodétermination externe, comme un acte d'agression. Or, les actes d'agression constituent une violation du *jus ad bellum* et ne peuvent donc être justifiés, comme le fait souvent Israël, au motif qu'il s'agit d'actes de légitime défense « préventive ». Ces actions entraînent des conséquences en vertu de la Charte des Nations Unies et du droit de la responsabilité des États. Au vu de ces graves violations du droit international, il est a) impératif et non négociable que les forces israéliennes se retirent immédiatement du territoire occupé, afin que le peuple palestinien autochtone puisse recouvrer sa souveraineté, et b) nécessaire que les mesures de réparations voulues soient prises en vue d'avancer sur la voie de la justice et de la paix, tant pour les Palestiniens que pour les Israéliens.

VI. Observations finales

73. **Les violations dont il est fait état dans le présent rapport mettent en lumière la nature de l'occupation israélienne, à savoir celle d'un régime intentionnellement acquisitif, ségrégationniste et répressif, conçu pour empêcher la réalisation du droit du peuple palestinien à l'autodétermination.** Depuis 1967, Israël viole, de façon délibérée et intentionnelle, le droit à l'autodétermination des Palestiniens présents dans le territoire palestinien occupé, en les empêchant d'exercer leur souveraineté territoriale sur les ressources naturelles, en gommant leur identité culturelle et en réprimant leurs tentatives d'affirmation politique et de résistance. En bref, les agissements d'Israël dans les territoires palestiniens occupés sont indissociablement liés au colonialisme de peuplement. Le fait qu'Israël se soit emparé du territoire occupé, l'ait annexé et fragmenté et y ait transféré sa population civile constitue une violation de la souveraineté territoriale palestinienne ; l'extraction et l'exploitation des ressources des Palestiniens au bénéfice de parties tierces, dont les « colons », violent la souveraineté de ce peuple sur les ressources naturelles nécessaires au développement d'une économie indépendante ; l'élimination de symboles représentatifs de l'identité palestinienne ou leur appropriation par la Puissance occupante met en danger l'existence culturelle du peuple palestinien ; la répression, par la Puissance occupante, de l'activité politique et des efforts de plaidoyer et de militantisme des Palestiniens entrave la capacité de ces personnes à s'organiser en tant que peuple, sans contrôle extérieur ni domination étrangère.

74. **Pour permettre au peuple palestinien de réaliser son droit inaliénable à l'autodétermination, il est absolument nécessaire de mettre fin, une bonne fois pour toutes, à l'occupation coloniale israélienne et aux pratiques d'apartheid.** Le droit international ne laisse place à aucun doute sur cette question. Le seul moyen de parvenir à une solution qui soit juste, équitable et efficace est de mettre l'accent sur la décolonisation, afin de permettre au peuple palestinien de décider librement de la trajectoire qu'il souhaite prendre et de se développer sur les plans social, économique et culturel, en même temps que ses voisins israéliens. La communauté internationale doit reconnaître la véritable nature de l'occupation israélienne dans le territoire palestinien occupé, à savoir celle d'une colonisation de peuplement, et honorer les obligations que lui impose le droit international en aidant le peuple palestinien à réaliser pleinement son droit à l'autodétermination.

75. **Le « processus de paix » au Moyen-Orient et les tentatives de rétablissement de la paix menées ensuite auprès des deux parties n'ont pas porté leurs fruits, les approches adoptées n'étant pas axées sur le respect des droits humains, en particulier le droit à l'autodétermination, et ne tenant pas compte des motifs coloniaux à l'origine de l'occupation israélienne.** Comme l'a montré le processus d'Oslo, aucune négociation de paix engagée sur une base politique ne pourra aboutir à moins de permettre aux Palestiniens de se soustraire à leur statut de

subordination, ce qui suppose d'entraver les efforts de colonisation d'Israël. La fin de l'occupation coloniale est la condition *sine qua non* pour que les Palestiniens n'aient plus à négocier les conditions de leur assujettissement et puissent jouir de leur droit à l'autodétermination dans le territoire palestinien occupé.

76. Norme impérative du droit international créant des obligations *erga omnes*, le droit à l'autodétermination ne peut faire l'objet d'aucune dérogation, quelle qu'elle soit. Le refus de laisser au peuple palestinien le droit de décider lui-même de sa trajectoire étant intentionnel et inhérent à l'occupation coloniale israélienne, l'application inébranlable du droit à l'autodétermination externe et du droit relatif à l'emploi de la force doit être la pierre angulaire de toute solution. En vertu du droit international, force dont le rôle est de garantir l'exercice de la justice, Israël a le devoir de libérer le peuple palestinien du joug qu'elle lui a imposé et est tenu de renoncer à chercher à exercer, de façon illégale, sa souveraineté sur des portions du territoire palestinien occupé. En découle une obligation pour Israël de se retirer sans condition ni réserve. Les États tiers ne peuvent reconnaître comme légitime la situation illégale créée par les actes internationalement illicites d'Israël, ni y contribuer ou l'encourager. Le fait de permettre à Israël de faire fi du droit international et de son obligation de rendre des comptes ne l'incite pas à mettre fin à ses agissements et favorise une culture de l'impunité. L'exceptionnalisme manifesté à l'égard d'Israël non seulement sape l'efficacité du droit international, mais ternit également l'image, la fiabilité et le rôle de la communauté internationale et de l'Organisation des Nations Unies, y compris ses organes judiciaires.

VII. Recommandations

77. La Rapporteuse spéciale recommande au Gouvernement israélien de se conformer aux obligations qui lui incombent en vertu du droit international et de cesser d'entraver la réalisation du droit à l'autodétermination du peuple palestinien, en mettant fin immédiatement et sans condition à son occupation coloniale du territoire palestinien et en se rachetant pour les infractions commises.

78. La Rapporteuse spéciale recommande à tous les États :

a) De condamner les violations intentionnelles par Israël du droit des Palestiniens à l'autodétermination, y compris par des pratiques de colonisation de peuplement. À cette fin, il est nécessaire que :

i) Les États exigent qu'il soit immédiatement mis fin à l'occupation israélienne illégale et que toutes les terres et ressources dont le peuple palestinien a été dépossédé, notamment dans le cadre d'expulsions, lui soient restituées, en veillant à ce que la question du retrait d'Israël ne puisse être considérée comme un sujet devant faire l'objet de négociations entre les deux parties ;

ii) L'Assemblée générale élabore un plan pour mettre fin à la politique israélienne d'occupation coloniale et d'apartheid ;

iii) Les États soient disposés à prendre les mesures diplomatiques, économiques et politiques prévues dans la Charte des Nations Unies en cas de non-respect de ses obligations par Israël ;

b) De déployer une force internationale de protection dans le territoire palestinien occupé pour y limiter les actes de violence, qui sont monnaie courante, et défendre la population palestinienne, conformément au rapport du

Secrétaire général sur la protection de la population civile palestinienne (A/ES-10/794) ;

c) De prendre les mesures voulues pour garantir la tenue d'une enquête approfondie, indépendante et transparente sur toutes les violations du droit international des droits humains et du droit international humanitaire commises dans le territoire palestinien occupé, notamment celles qui constituent des crimes contre l'humanité ou des crimes de guerre potentiels ou qui se rapportent au crime d'agression. La Rapporteuse spéciale recommande en outre à la communauté internationale de faire en sorte que les auteurs de ces crimes aient à répondre de leurs actes, à la fois par l'intermédiaire de la CPI, dans le cadre de son enquête en cours sur la situation en Palestine, et au moyen de mécanismes de compétence universelle ;

d) De prendre les mesures requises pour prévenir la commission de violations des droits humains par toutes les entreprises domiciliées sur leur territoire ou placées sous leur juridiction, et dans le cas où des tels actes se produisent, pour enquêter à leur sujet et réparer les préjudices causés, en adoptant les politiques nécessaires pour régler la conduite des entreprises dans le territoire palestinien occupé, notamment en ce qui concerne le désengagement des colonies et l'offre d'un recours effectif aux victimes.

79. La Rapporteuse spéciale recommande au Haut-Commissaire aux droits de l'homme de publier sans délai la base de données actualisée des entreprises mêlées aux colonies (résolution 31/36 du Conseil des droits de l'homme).

80. La Rapporteuse spéciale appuie sans réserve la Commission internationale indépendante chargée d'enquêter dans le Territoire palestinien occupé, y compris Jérusalem-Est, et en Israël, et l'encourage à enquêter sur le statut du droit à l'autodétermination et sur les efforts de colonisation de peuplement déployés par Israël de manière plus approfondie que ce qu'elle-même est en mesure de le faire dans les limites territoriales et géographiques de son mandat.



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**Questions relatives aux droits de l'homme : situations
relatives aux droits de l'homme et rapports des rapporteurs
et représentants spéciaux**

Rapport du Haut Commissaire des Nations Unies aux droits de l'homme – question des femmes palestiniennes enceintes accouchant aux points de contrôle israéliens**

1. Le présent rapport est soumis en application de la résolution 2005/7 de la Commission des droits de l'homme en date du 14 avril 2005, intitulée « Pratiques israéliennes affectant les droits de l'homme du peuple palestinien dans le territoire palestinien occupé, y compris Jérusalem-Est », dont le paragraphe 4 se lit comme suit :

« La Commission des droits de l'homme,

...

4. *Prie* la Haut Commissaire des Nations Unies aux droits de l'homme de se pencher sur la question des femmes palestiniennes enceintes accouchant aux points de contrôle israéliens du fait du refus par Israël d'autoriser leur accès aux hôpitaux, dans le but de mettre fin à cette pratique israélienne inhumaine, et d'en rendre compte à l'Assemblée générale à sa soixantième session et à la Commission à sa soixante-deuxième session; »

2. Le 21 juillet 2005, le Secrétaire général a adressé à la Mission permanente d'Israël et à la Mission permanente d'observation de la Palestine auprès de l'Office des Nations Unies à Genève des notes verbales dans lesquelles il indiquait qu'il souhaiterait recevoir toute information concernant l'application de la résolution susmentionnée. Au moment de la rédaction du présent rapport, aucune réponse n'avait été reçue.

3. En outre, le Haut Commissariat aux droits de l'homme a adressé le 21 juillet 2005 des lettres aux entités et institutions spécialisées des Nations Unies suivantes,

* A/60/150.

** La publication du présent rapport a été retardée de manière à présenter des informations aussi actualisées que possible.



présentes dans le territoire palestinien occupé : le Bureau de la coordination des affaires humanitaires, le Fonds des Nations Unies pour la population (FNUAP), le Fonds des Nations Unies pour l'enfance (UNICEF), le Fonds de développement des Nations Unies pour la femme (UNIFEM), l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient (UNRWA), le Bureau du Coordonnateur spécial des Nations Unies pour le processus de paix au Moyen-Orient, le Programme alimentaire mondial (PAM) et l'Organisation mondiale de la santé (OMS).

4. Le Haut Commissariat aux droits de l'homme a reçu en août 2005 des informations du FNUAP, de l'UNRWA et de l'OMS. Cette dernière citait des statistiques du Ministère palestinien de la santé selon lesquelles 61 femmes avaient accouché aux points de contrôle de septembre 2000 à décembre 2004, ce qui avait entraîné la mort de 36 nouveau-nés. Le détail de ces chiffres par année est le suivant : en 2000-2001, 31 femmes ont accouché aux postes de contrôle et 17 nouveau-nés sont morts; en 2002, 16 femmes ont accouché dans les mêmes conditions et 11 nouveau-nés sont morts; ces chiffres sont descendus en 2003 à 8 accouchements aux points de contrôle et à 3 décès à la naissance, et en 2004 à 6 accouchements aux points de contrôle et à 5 décès.

5. Selon les chiffres de l'UNRWA, qui ne sont pas encore clôturés pour l'année en cours, dans la bande de Gaza, sur huit femmes enceintes transportées à l'hôpital, une a accouché dans une ambulance de la Société du Croissant-Rouge palestinien bloquée au point de contrôle. Une autre, que l'on emmenait à l'hôpital à cause de problèmes au sixième mois de sa grossesse, a avorté dans une ambulance de la Société du Croissant-Rouge palestinien retenue pendant une heure à un point de contrôle avant d'être autorisée à poursuivre sa route.

6. Selon les mêmes sources, 15 femmes enceintes en 2004 et huit autres en 2005 ont été retardées aux points de contrôle de la bande de Gaza alors qu'on les emmenait à l'hôpital dans une ambulance de la Société du Croissant-Rouge palestinien. Ces retards allaient d'une heure à deux heures et demie et s'allongeaient lors des évacuations des cas d'urgence des zones fermées telles que Seafa et Mahata; ces patientes étaient d'abord emmenées en ambulance jusqu'aux points de contrôle puis transférées dans une seconde ambulance qui attendait de l'autre côté. Selon certaines sources, ces transferts devaient être coordonnés au préalable avec les Forces de défense israéliennes (FDI) après les heures d'ouverture des points de contrôle.

7. Pour sa part, le FNUAP a indiqué qu'en raison du renforcement des procédures de sécurité aux points de contrôle et de la construction de la barrière de séparation, les Palestiniens avaient beaucoup plus difficilement accès aux hôpitaux et autres établissements médicaux. Depuis 2001, le Fonds a enregistré plus de 70 cas de femmes en couches retardées aux points de contrôle et parfois contraintes à un accouchement non accompagné et risqué au bord de la route, ce qui a entraîné la mort de mères et de nouveau-nés.

8. Le Ministère palestinien de la santé a signalé que les accouchements à domicile avaient augmenté de 7,9 % en Cisjordanie en 2005 (contre 0,5 % dans la bande de Gaza), ce qui indique que les femmes palestiniennes préfèrent accoucher chez elles et ne pas prendre le risque d'être retardées aux points de contrôle avec les conséquences éventuelles. Cette information a été confirmée par le FNUAP.

9. Plusieurs témoignages de femmes palestiniennes enceintes qui auraient été retenues à des points de contrôle par des militaires israéliens ont été portés à l'attention du Haut Commissariat aux droits de l'homme. Un de ces témoignages concernait la mort d'une nouveau-née survenue en août 2003 à un point de contrôle près du village de Salem, dans le gouvernorat de Naplouse. La mère avait accouché avec l'aide du père, qui avait dû couper le cordon ombilical à l'aide d'une pierre, alors qu'ils attendaient de l'autre côté du point de contrôle une seconde ambulance qui devait les emmener à l'hôpital.

10. Selon certaines informations, même si les ambulances étaient autorisées à franchir les points de contrôle pendant le couvre-feu à condition d'en avoir averti au préalable les Forces de défense israéliennes, elles étaient souvent retardées et contraintes d'emprunter des routes secondaires et lorsque les ambulances n'étaient pas autorisées à passer, les femmes enceintes devaient être transférées dans une seconde ambulance de l'autre côté du point de contrôle.

11. Selon plusieurs sources, beaucoup de femmes enceintes du territoire palestinien occupé craignent de ne pas pouvoir atteindre l'hôpital à temps pour accoucher. Le problème est plus grave encore dans les zones rurales, en particulier pour les femmes vivant dans des villages séparés des villes où se trouvent les hôpitaux par des points de contrôle. Le trajet pour aller à l'hôpital peut durer plusieurs heures même s'il n'y a que quelques kilomètres à parcourir. Il est impossible de le faire de nuit, durant les couvre-feux ou les incursions militaires. D'autres sources indiquent que plus de 30 % des femmes accouchent chez elles, ce qui augmente le risque de complications et de décès de mères ou de nouveau-nés. De plus en plus de femmes palestiniennes demandent une césarienne parce qu'elles éprouvent de l'appréhension et par crainte de ne pas pouvoir bénéficier d'un traitement médical approprié.

12. Le Haut Commissariat aux droits de l'homme et son bureau en Palestine continueront à recueillir des informations sur la question des femmes palestiniennes enceintes accouchant aux points de contrôle israéliens, en collaboration avec les organismes représentés dans l'équipe de pays des Nations Unies.