LAWYERS FOR PALESTINIAN HUMAN RIGHTS

Lawyers for Palestinian Human Rights' submission for accountability study being conducted by the UN Special Rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967, Michael Lynk

May 2020

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About Lawyers for Palestinian Human Rights (LPHR)

LPHR is a lawyer-based charity in the UK that works on projects to protect and promote Palestinian human rights. We distinctly provide a legal and human rights perspective on issues affecting Palestinians. Our trustees include leading human rights lawyers, Sir Geoffrey Bindman QC, Fiona McKay and Tessa Gregory.

1. This submission collates substantive and concise LPHR publications materially relevant to the 'call for submissions on accountability' made by UN Special Rapporteur for the situation of human rights in the Palestinian territory occupied since 1967, Michael Lynk.

2. LPHR attaches paramount importance to the topic of accountability in recognition that critically required progress in human rights protection will not be realised without effective accountability for serious violations.

3. The LPHR publications within this submission are grouped under the following topics:

- ***Application of international law duties owed by states in response to a serious breach, including suggested substantive recommendations in the context of imminent annexation and ongoing settlement expansion, and a review of the bill going through the Irish parliament that has the object of banning the import into Ireland of settlement products, the provision of a settlement service and the extraction of resources from occupied territory***

- ***Individual criminal responsibility, including corresponding responsibilities on states in the context of universal jurisdiction, immunities, and the International Criminal Court***

- ***Pursuing accountability and compliance in the context of business and human rights, including the UN database, LPHR's use of a 'soft law' complaint mechanism provided by the OECD, and responsibilities of local government as an organ of the state to adhere to international law obligations and to protect and promote human rights***

- ***Responsibilities of international organisations involved in internationally wrongful conduct, with critical legal and human rights scrutiny on the role of the United Nations as a party to the Gaza Reconstruction Mechanism which is materially relevant from an accountability perspective***

4. The LPHR publications and submission were prepared by LPHR Executive Committee members, Alamara Khwaja Bettum, Angelina Nicolaou, Natalie Sedacca, Rebecca Nguyen van Thuy, Claire Jeffwitz, Emma Fullerton and LPHR Director, Tareq Shrourou. LPHR hope this submission might usefully assist UN Special Rapporteur Michael Lynk during preparation of his very important and timely follow-up report on accountability.

5. The ten LPHR publications incorporated within this submission are:

- LPHR briefing on the urgent imperative for the UK government to ensure application of international law in response to Israel's imminent illegal annexation of parts of the occupied West Bank and its policy of illegal settlement expansion – including suggested substantive recommendations (*pages 4-8*)

- LPHR Q&A: Ireland's Control of Economic Activity (Occupied Territories) Bill (*pages 9-12*)

- LPHR briefing on Universal Jurisdiction (*pages 13-17*) (*including a focus on limitations on the application of universal jurisdiction arising from political considerations of states*)

- LPHR legal Q&A: Immunities and Gaza Accountability (*pages 18-22*) (*including a focus on the role of states in discretionary granting immunity from investigation and prosecution*)

- Statement: A seminal step towards legal accountability and justice for victims, survivors and their families: ICC Prosecutor Fatou Bensouda's decision that she is ready to open an investigation into the situation in Palestine (*pages 23-27*) (*the statement ends with links to a series of LPHR publications on legal accountability and justice in the context of use of force in Gaza and the necessity of recourse to the International Criminal Court*)

- Joint NGO letter to Rome Statute states parties calling for support to the International Criminal Court in the face of threats to its independence and mandate (*pages 28-32*)

- Statement on the release of the UN database of businesses involved in illegal Israeli settlements: UK organisations urge UK Government to take action to end businesses' involvement in illegal settlements in the occupied Palestinian territory (*pages 33-34*)

- Statement: LPHR files OECD Guidelines complaint against JCB for involvement in human rights breaches in the occupied Palestinian territory (*pages 35-38*) (*an example of civil society use of the OECD Guidelines for Multinational Enterprises 'soft law' complaints mechanism to ensure a company's compliance with its human rights responsibilities*)

- Overview of LPHR briefing to local authorities on pensions investment and public procurement decision-making relating to companies involved in human rights violations in the occupied Palestinian territory (*pages 39-43*) (*exploring the responsibilities of local government, as an organ of the state, to act compatibly with international law obligations owed by the state and to protect and promote human rights*)

- LPHR briefing on the Gaza Reconstruction Mechanism: its ineffectiveness, its incompatibility with international humanitarian and human rights law obligations, and its future (*pages 44-50*)

LAWYERS FOR PALESTINIAN HUMAN RIGHTS

LPHR briefing on the urgent imperative for the UK government to ensure application of international law in response to Israel's imminent illegal annexation of parts of the occupied West Bank and its policy of illegal settlement expansion – including suggested substantive recommendations

April 2020

1. This short briefing emphasises the urgent imperative for the UK government to ensure application of international law in response to Israel's imminent illegal annexation of parts of the occupied West Bank and its policy of illegal settlement expansion.

2. Condemnatory statements are insufficient to deter, or exact a cost, for ongoing and anticipated flagrantly illegal acts with grave human rights impacts for Palestinians in the occupied Palestinian territory.

3. Lawyers for Palestinian Human Rights outlines below the tangible actions that must be urgently implemented by the UK government to fulfil necessary compliance with its international law obligations and human rights responsibilities.

Annexation

4. According to reporting on the agreement signed by Benjamin Netanyahu and Benny Gantz to form a unity government on 20 April 2020, the Israeli government can begin to proceed with formal annexation of parts of the occupied West Bank, including all illegal Israeli settlements and the Jordan Valley, on 1 July 2020.

5. This is consistent with the terms of the 'Trump Plan' of 28 January 2020, and the subsequent formation of the US-Israel Joint Mapping Committee comprising of high-level officials to decide which parts of the occupied West Bank will be annexed to Israel.

6. The formal (de jure) annexation of parts of the occupied West Bank to Israel, should it occur, will constitute a serious breach of a fundamental principle of international law.

7. There are precise international law obligations on all states that arise from a serious breach of a fundamental principle of international law. There is a legal duty on all states to cooperate to bring the breach to an end through lawful means, and complementary duties of non-recognition, non-aid and non-assistance in relation to the illegal situation.

8. A clear and compelling precedent for the implementation of these international law duties in an analogous situation is the concerted action taken by EU Member States in response to Russia's illegal annexation of Crimea and Sevastopol in March 2014. Actions taken pursuant to these legal duties, and which are extant, include: substantial restrictions on economic exchanges with Crimea, visa bans, and asset freezes. (*See Appendix A at the foot of this briefing for a list of the restrictive measures in force*)

9. The EU states: "*The EU policy of non-recognition consists of a broad range of measures. The goal is to demonstrate that the EU does not accept the illegal annexation, using tangible measures in addition to regular political and diplomatic action*."

10. Foreign Secretary Dominic Raab has published two statements this year (here and here) that underscores the UK government's continuing commitment to applying tangible measures against Russia in response to its illegal annexation, emphasising that "*that we do not and will not accept its illegal annexation of Crimea and Sevastopol.*"

11. **This represents a model response to an illegal annexation, grounded in necessary recognition of and compliance with relevant international law duties. It provides the UK government with a clear precedent for concrete action in conformity with international law duties, should the Israeli government proceed with its serious threat to illegally annex parts of the occupied West Bank**.

Settlements

12. Supplementing the threat of imminent annexation, in February 2020 Israel announced thousands of new housing units in illegal settlements in the occupied West Bank, including in East Jerusalem. The UK government expressed condemnation following these announcements.

13. History has however shown that declaratory statements of condemnation, although necessary, are insufficient to deter the Israeli government from continuing to breach international law.

14. The building of settlements and their expansion, including the associated infrastructure (the Barrier, military checkpoints and settler-only by-pass roads), has continued apace for decades, shrinking the space available for Palestinians to develop livelihoods and build essential housing and infrastructure. There is a well-recognised tight nexus between home demolitions and settlement expansion. Settling civilians from the occupying country into territories that it occupies violates international humanitarian law and constitutes a war crime under international criminal law.

15. Further, the presence of settlements and their associated infrastructure severely impedes the exercise by the Palestinian people of its right to self-determination. This has specific legal significance because the right to self-determination is an elevated norm of international law, equivalent to the prohibition on annexation, which consequently engages a range of legal duties (aforementioned at paragraph 7) that all states are required to implement when a serious breach occurs.

16. The UN Special Rapporteur on human rights in the occupied Palestinian territory, Professor Michael Lynk, recently published a statement calling on the international community to ensure there is a cost to defying international law in the context of settlement expansion, and we agree.

17. There are two key steps, to be enacted through legislation, that the UK should immediately take when it comes to settlements:

- **Ban settlement goods from entering the UK marketplace. This is a requirement anchored by third-party state duties under international law. It should not inaccurately or misleadingly be interpreted as a call for a boycott against Israel, as settlements are not recognised as part of Israel under international law.**
- **Prevent companies from operating in and trading with settlements, or otherwise from contributing to their maintenance and/or expansion.** The regulations should capture the three UK based companies listed in the recently published UN database for their "*material and substantial*" involvement in settlement-related activity: JCB, Opodo and Greenkote. The database's publication on 12 February 2020 provides an opportunity for the UK to implement its commitment to foster corporate respect for human rights, as already called for in a recent statement by LPHR, Amnesty International UK, Quakers in Britain, War and Want and Christian Aid.

18. The UK government should also immediately give an undertaking that settlements are to be expressly excluded from all future trade agreements with Israel.

19. Settlements "*have no legal validity and are a flagrant violation of international law*" as reaffirmed by UN Security Council resolution 2334; are inherently discriminatory; violate international criminal law; result in pervasive and systemic human rights violations against Palestinians on a daily basis; and settlement expansion "*promotes the effective annexation of the West Bank*" as recognised by Foreign Secretary Dominic Raab in August 2019. Despite this, Israel's settlement policy has alarmingly not changed.

20. We cannot afford to wait any longer: statements opposing illegal settlement expansion must be matched with concrete actions in necessary conformity with international law obligations and human rights responsibilities. At this extremely critical juncture, we urge the UK government to demonstrate needed international leadership and ensure the necessary application of international law, rather than inertia to the trampling of the rules-based international order with far-reaching consequences.

Tareq Shrourou, Rebecca Nguyen van Thuy

Appendix A

Below is an excerpt from the European Commission Information Note to EU business on operating and/or investing in Crimea/Sevastopol, dated 25 January 2018, which lists the range of restrictive measures in force

"[…] In general terms restrictive measures in force affect businesses operations in Crimea/Sevastopol in the following way:

a) It is prohibited to acquire any new or extend any existing participation in ownership of real estate located in Crimea or Sevastopol.

b) It is prohibited to acquire any new or extend any existing participation in ownership or control of an entity in Crimea or Sevastopol.

c) It is prohibited to provide investment services related to investment activities to any entity in Crimea and Sevastopol.

d) It is prohibited to grant any loan, credit or provide financing to any entity in Crimea or Sevastopol.

e) It is prohibited to create any joint venture in Crimea or Sevastopol.

f) It is prohibited to sell, supply, transfer or export equipment and technology related to the sectors of transport, telecommunications, energy, the prospection, exploration and production of oil, gas and mineral resources.

The prohibited equipment and technology is listed in Annex II to Council Regulation (EU) No 692/2014.

g) It is prohibited to provide directly or indirectly technical assistance, brokering services, financing or financial assistance related to the goods and technology as defined in Annex II to Council Regulation (EU) No 692/2014. It is also prohibited to provide technical assistance, or brokering, construction or engineering services directly relating to infrastructure in Crimea or Sevastopol in the above sectors.

h) It is prohibited to provide services directly related to tourism activities in Crimea or Sevastopol, in particular cruise ship services.

I) Due to the asset freezing measures (see point 3), all funds and economic resources belonging to listed persons and entities should be frozen. The terms 'funds', 'economic resources', 'freezing of funds', 'freezing of economic resources' are defined in Article 1

of Regulation (EU) No 269/2014. It should be noted that the freezing measures do not involve a change in ownership of the frozen funds and economic resources.

j) Due to the prohibition on making funds or economic resources available directly or indirectly to listed persons and entities, economic operators must not establish or maintain economic relations with listed persons or entities. In addition, economic operators are prohibited from making funds or economic resources available indirectly to listed persons or entities. Specific guidelines on the implementation of the prohibition on making indirectly available of funds and economic resources to listed persons and entities can be found here.

k) In certain cases derogations from the above restrictions (for example, in order to satisfy the basic needs of the listed persons) are allowed by the respective legal basis. Such derogations require prior authorisation by the competent authorities of the relevant Member State. The list of competent authorities of Member States can be found in Annex II to Council Regulation (EU) No 269/2014. The list of exemptions can be found in Council Regulation (EU) No 269/2014 (derogations from the asset freezing measures and the prohibition on making funds and economic resources available to listed persons and entities) and Council Decision 2014/145/CFSP (derogations from restrictions on admission to the EU).

l) Due to restrictions on admission (travel ban), in principle no meetings with listed persons and entities can be held in the EU.

m) On 23 June 2014 the Council has adopted Council Decision 2014/386/CFSP and Council Regulation (EU) No 692/2014 prohibiting the import into the European Union of goods originating in Crimea or Sevastopol. As of 25 June 2014, goods originating – in accordance with the non-preferential EU rules of origin – in Crimea and Sevastopol may no longer be imported into the European Union. In addition, it will be prohibited to provide financial and insurance services related to the import of such goods. Goods originating in Crimea or Sevastopol accompanied by a certificate of preferential origin issued by the Ukrainian authorities may, however, still be imported into the EU. Goods from countries other than Ukraine are not affected by the import prohibition, even where they enter the European Union via Crimea or Sevastopol.

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LPHR legal Q&A: Ireland's Control of Economic Activity (Occupied Territories) Bill

May 2020

In the context of the imminent annexation of significant parts of the occupied West Bank from 1 July 2020, and ongoing settlement expansion, it is timely to provide specific focus on legislation before the Irish parliament which has the very significant object of banning specific economic activity in relation to occupied territory.

The Irish Bill, if passed, would be a landmark moment in the domestic application of international law duties in the context of Israel's ongoing fifty-three-year military occupation of Palestinian territory. It will demonstrate that a state is willing and able to fully implement its international law duties to ensure that it is not directly, or indirectly, involved in providing economic support to illegal settlements in occupied territory.

What is the Control of Economic Activity (Occupied Territories) Bill?

The Control of Economic Activity (Occupied Territories) Bill 2018 (**the Bill**) is currently before the Irish parliament, having first been introduced in the Irish Senate in January 2018. The Bill makes a criminal offence of (i) the importation or sale of goods produced in settlements illegally established in an occupied territory; (ii) the provision of certain services; and (iii) the extraction of resources from an occupied territory.

For the purposes of the Bill, the 'relevant occupied territory' is defined under Section 3 as a territory which is occupied within the meaning of the Fourth Geneva Convention, and which has been confirmed as such by the International Court of Justice, the International Criminal Court, or an International Tribunal; or which has been designated as such for the purposes of the Act in a regulation made by the Irish Minister of Foreign Affairs & Trade, subject to the approval of both Houses of the Irish Parliament.

What offences are created under the Bill?

Sections 6 to 9 of the Bill provide for a range of criminal offences. Under Section 6, it is an offence for a person to import or attempt to import settlement goods or otherwise to assist another person in doing so. Section 7 provides for a ban on the sale or an attempt to sell settlement goods either directly or in assisting another person to do so. Section 8 makes it an offence to provide or attempt to provide a settlement service or to assist another in doing so. Finally, Section 9 makes it an offence for a person to engage or attempt to engage in the extraction of resources from a relevant occupied territory or its associated territorial waters, or otherwise to assist another in doing so.

Who does the Bill apply to?

Section 5 of the Bill provides that the bill applies to acts or omissions outside the state, and that it applies to, a) a person who is an Irish citizen or ordinarily resident in the State; b) a company incorporated under the Companies Act 2014; c) an unincorporated body whose centre of control is exercised in Ireland. A person or entity in one of these categories who commits an offence under the Bill is guilty of an offence and liable upon conviction to the relevant penalty.

What are the penalties imposed under the Bill and are there defences available?

Section 10 (1) provides for the penalties to which a person or corporate entity is liable.
A person who is found guilty of an offence under the Bill is liable (a) on summary conviction to a class A fine or to imprisonment for a term not exceeding 5 years or to both, and (b) on conviction on indictment to a fine not exceeding €250,000 or imprisonment for a term not exceeding 5 years or both.

Under Section 11 of the Bill, it shall be a defence for a person charged with an offence under the Bill where they can show that the alleged offence was carried out with the consent of an entity or form of authority recognised by the State as being the legitimate authority over the relevant occupied territory. Where it is possible to show that the goods or service in question were not produced within a relevant occupied territory or by an illegal settler, this shall also be considered a defence. Finally, it shall be a defence if it can be shown that the natural resources in question do not originate within a relevant occupied territory.

What stage is the Bill at presently?

The Bill has now passed eight out of ten stages required for the approval of legislation in the Oireachtas. It has passed by majorities in both the upper and lower house of Parliament. However, the Bill has lapsed in the wake of the 2020 Irish general election, and it is currently uncertain whether it will be part of the programme of the new government of Ireland.

Is the Bill compatible with EU law and international law?

Under the Treaty of the Functioning of the EU (**TFEU**), trade rules are generally uniform across all EU Member States: the EU is granted exclusive competence on trade policy. However, Article 36 of the TFEU provides for exceptions to "*prohibitions or restrictions on imports, exports or goods in transit*" where they can be "*justified on grounds of public morality, public policy or public security, and the protection of health and life of humans.*" EU Regulation 2015/478, which specifically applies detailed regulations to EU Member States for imports of products originating in third countries, provides for the same range of exceptions at its Article 24.

One of the leading authorities on EU law, Professor Takis Tridimas of King's College London, has concluded that both the promotion of respect for international law, and the protection of fundamental rights, fall within the concept of "public policy" as that term is understood in EU law. Accordingly, insofar as the Bill seeks to promote both of these objectives, it is compatible with this exceptional basis provided by EU law for unilateral interference with trade by a Member State.

The legal basis of the bill was provided by two pre-existing legal opinions published in 2012: one by Michael Lynn, Senior Counsel in Ireland, and one by Professor James Crawford, currently a judge at the International Court of Justice. Both legal opinions assert it is legally permissible for a state to ban products originating from settlements. Michael Lynn SC has subsequently provided evidence to the Irish parliament in a submission dated 24 May 2019, concluding:

"In summary, for the reasons outlined above and in my opinion attached, and drawing on the opinion of Professor Tridimas, in my view it would be permissible for the State to take the unilateral step of prohibiting the import of produce from the illegal settlements on the ground of 'public policy', in compliance with EU law. Similarly, were the Occupied Territories Bill 2018 to become law, the potential for fines and damages claims would only reasonably arise should the [European] Court of Justice take a different view, finding the Bill incompatible with EU law, and the Government failed to take the necessary corrective action."

Michael Lynn SC also materially addresses the significant interplay between international law obligations owed by States and permissible acts under EU law, quoting from his 2012 opinion:

"[…] there is a duty in international law on Ireland, and all EU Member States, not to render aid or assistance in maintaining the illegal settlements. The EU's commitment to the "strict observance" of international law is such that "public policy" […] would permit the prohibition of the import of produce which originates from the illegal settlements. A Member State would be justified, as a consequence of its determination to uphold international law (to which the EU is committed) by not acquiescing in any way with the continuation of the illegal settlements, by banning the import of produce from there [...]

"[W]hilst the Court of Justice has held that the "public policy" exception should be narrowly construed in respect of the free movement of goods within the Union, as permitted by Article 36 of the Treaty on the Functioning of the European Union, this relates to intra-Union movement which is one of the four great freedoms of the Union (the free movement of goods). I do not think such a restrictive interpretation would apply to Regulation 260/2009, which concerns imports from outside the Union but, in any event, even if a restrictive approach did apply, it would still, in my opinion, permit a ban on produce from illegal settlements because of the Member States' and the EU's commitment to the strict observance of international law."

On the other hand, Ireland's Attorney General has provided legal advice to the government of Ireland that asserts the Bill is contrary to EU law. According to Foreign Minister, Simon Coveney, the Attorney General's legal advice anticipates that the legislation would be met by legal challenge by either the European Commission or a private legal action, and that the aforementioned 'Article 36 exception' will not be broadly interpreted by the European Court of Justice to permit encroachment on the European Commission's exclusive competence on trade.

What are the strengths and challenges of the Bill in regard to criminalising offences?

The Bill notably establishes criminal offences for the prohibited acts. No *mens rea* (mental element) is specified for any of the offences, suggesting that even the accidental import of settlements goods will constitute a criminal offence.

Criminalising an offence provides an important deterrent signal to the public that an act is of sufficient gravity to merit strong punishment. However, there can be consequences from an enforceability perspective that should be noted.

A criminal offence requires a higher standard of proof "*beyond reasonable doubt*" than the civil offence standard of proof "*on the balance of probabilities*". The higher standard of proof may inhibit maximal enforcement due to the increased resources required by investigating authorities to bring a successful investigation and prosecution. This could potentially undermine the practical effectiveness of the Bill to achieve its objective.

The Bill can be viewed as significantly one of few examples of legislative activity to emerge in the nascent area of *business and human rights*. The evolution of application of international human rights standards, such as the UN Guiding Principles on Business and Human Rights, has importantly began to prompt legislative implementation of civil measures, in contrast to criminal sanctions, to achieve effective full compliance from corporate actors.

The French Corporate Duty of Vigilance Law, adopted in 2017, is one such recent example. The law imposes a civil penalty or civil liability action against companies that fail to identify and prevent adverse human rights and environmental impacts resulting from their activities (both direct and indirect). The French legislation thus adopts a civil law approach to achieve its objective of promoting effective corporate compliance with social responsibilities.

The Duty of Vigilance law is one of few examples that could be considered analogous to the Bill in so far as both laws aim to regulate conduct and maintain compliance with certain standards. However, the French law in contrast to the Bill has implemented civil penalties, in partial recognition, perhaps, of the relative benefits which may foreseeably arise from an effective enforcement and compliance standpoint.

Alamara Khwaja Bettum, Tareq Shrourou

LAWYERS FOR PALESTINIAN HUMAN RIGHTS

LPHR Briefing on Universal Jurisdiction

May 2020

The Principle of Universal Jurisdiction

1. A further avenue to seek accountability is that of Universal Jurisdiction (UJ). The principle of UJ allows (and indeed often obliges) States to prosecute crimes that have been allegedly committed in another territory, through their own national criminal jurisdictions. This is an international convention preserved for only the most heinous crimes, including war crimes and torture. Prosecutions brought under UJ enable States to comply with their own international obligations under various treaties.

2. The precise definition of UJ, and the manner in which it is implemented, varies somewhat between different States. However, the fundamental purposive approach is that in the case of the gravest crimes under international law, accountability (in the form of individual criminal responsibility) should be provided for, regardless of the territory in which the offences were committed in or the nationality of the alleged offender. The UK gives effect to the principle of UJ through statutory law. Section 1(1) of the Geneva Conventions Act 1957 provides:

*"Any person, whatever his nationality, who, **whether in or outside the United Kingdom,** commits, or aids, abets or procures the commission by any other person of a grave breach of any of the scheduled conventions, the first protocol or the third protocol shall be guilty of an offence".* (emphasis added)

3. Similar wording in relation to the offence of torture is found in S134 of the Criminal Justice Act 1988 which provides that:

*"A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture **if in the United Kingdom or elsewhere** he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties".* (emphasis added)

4. Pursuing a prosecution under UJ does not require an exercise akin to determining whether the 'gravity threshold' has been met as is necessary with the ICC. Given the dates of the respective statutes which apply, it is also possible to bring a prosecution for events which occurred before 13 June 2014 (the commencement of the ICC's retroactive jurisdiction in the occupied Palestinian territory). Unlike the International Criminal Court Act 2001, the principle of UJ operates so that the UK can exercise jurisdiction over individuals who commit crimes even if they are not nationals or residents at the time of prosecution.

5. A general principle which underpins UJ is the presumption in favour of territoriality. The general position is that criminal offences are most likely to be effectively investigated and prosecuted in the territory where they have been allegedly committed. This is owing to the geographical constraints that may sometimes exist with conducting an investigation, bringing a prosecution and attempting to secure a conviction at trial in a country many miles away, with potential language and cultural differences. However, the need for UJ arises out of an acknowledgement that without such a mechanism there would be a large and unacceptable risk of impunity for international crimes in circumstances where States may demonstrate a reticence to pursue justice and legal accountability.

Universal Jurisdiction at work in the UK

6. Whilst these types of cases are exceptional, there have been some occasions of UJ arrests and prosecutions in the UK. On 18 July 2005, an Afghan warlord named Faryadi Sarwar Zardad was found guilty of torture and hostage taking in what was thought to be the first successful conviction in the UK for a crime committed abroad. These offences were committed at Afghan checkpoints between 1991 and 1996. The trial followed an investigation which involved UK police officers visiting Afghanistan to identify and take accounts from victims. Witnesses gave evidence at the trial at the Old Bailey via video link from the UK embassy in Kabul. Upon conviction Mr Zardad was sentenced to a 20 year custodial sentence. As explained by the then Attorney General Lord Goldsmith, the offences alleged were so "*merciless*" and such an "*affront to justice*" that they could be tried in any country.

7. In January 2013, a Nepalese Colonel, Kumar Lama was arrested in East Sussex and charged with two counts of torture under section 134 of the Criminal Justice Act 1988 relating to incidents that had allegedly occurred in 2005. A description which sums up some of the potential limitations in respect of how consistently the principle of UJ can be applied, is found in the words of Associate Professor of Public International Law, Devika Hovell, who referred to this arrest as "*the result of a sensible wager on the UK's part, bargaining relatively low diplomatic cost for diplomatic credit in fulfilling its obligation under the Torture Convention".* This arrest and prosecution did not ultimately lead to a conviction. In August 2016 a jury acquitted Colonel Lama in respect of one of the counts on the indictment, and a hung jury was returned for the second count on the indictment. In respect of the second count, the Crown Prosecution Service could have sought to prosecute Colonel Lama a second time, but decided instead to offer no evidence in respect of this case on the basis that there was no realistic prospect of conviction.

Actual and potential limitations on application of Universal Jurisdiction

8. Whilst the examples above demonstrate that UJ can be applied by States to seek accountability for crimes committed in the occupied Palestinian territory, the implementation of UJ in the UK (and in other States) is undoubtedly influenced by political considerations.

9. In the UK, in cases of State prosecutions, a decision to prosecute offences under UJ is made by the Crown Prosecution Service, applying the ordinary two-part test of whether (i) there is a realistic prospect of conviction based on the prosecutor's assessment of the evidence and (ii) whether it is in the public interest to prosecute. If this test is satisfied, in most cases of UJ, the Attorney General's involvement then becomes necessary. The 'consent' of the Attorney General is required before proceedings can be instituted. In evaluating whether or not to provide consent, the Attorney General may undertake the *'Shawcross exercise'*, which is a consultation with Government Ministers on public interest issues. These public interest issues include matters of international relations and national security. Whilst the Attorney General makes a decision independently of the Government, the requirement of consent, and the operation of the Shawcross principle undoubtedly has the effect of rendering UJ a blunter instrument than it otherwise could be.

10. Notwithstanding this structural layer of potential political obstruction, even in cases where the process is adhered to and an arrest is sought, political interference of other forms still prevails. This reality is best illustrated through the following three cases that relate to alleged serious international crimes committed by individuals in the occupied Palestinian territory:

I) The frustration of an attempt to arrest Israeli General Doron Almog in 2005

ii) The reflexive response of the UK government in restricting the circumstances in which private prosecutions can be pursued, following the attempted arrest of former Israeli Minister Tzipi Livni in 2009

iii) The impromptu and recurrent granting of special mission immunity to former Israeli Minister Tzipi Livni in 2016.

11. In September 2005 an arrest warrant was issued at Bow Street Magistrates Court in London, for former General Doron Almog in connection with alleged war crimes committed in Gaza in 2002. The alleged offences related to a time in which he was the Commanding Officer of the Israeli Defence Force's Southern Command. The allegations included that he ordered the destruction of 59 homes in revenge for the death of Israeli soldiers. Mr Almog was attending the UK in September 2005 in order to speak at an

event at Solihull Synagogue. He was not covered by any form of immunity. British police officers awaited Mr Almog's plane to land at Heathrow Airport where they intended to arrest him in accordance with the lawful warrant. Mr Almog appears to have been informed of the intention to arrest him, and as a result he did not leave the plane and enter British territory in order for a lawful arrest to be effected. Mr Almog remained on the plane until its return to Israel. Despite the legal mechanisms being implemented according to the appropriate standards and processes, ultimately political interference appears to have prevented an arrest.

12. In 2009, at Westminster Magistrates court in London, an arrest warrant was issued for the former Foreign Minister Tzipi Livni. This arrest warrant was not issued as part of a State prosecution, but as a result of a private prosecution brought about by individuals, as was the case for the issuing of the arrest warrant for former General Doron Almog. The arrest warrant was issued in relation to alleged offences committed during Operation Cast Lead, when Ms Livni was a member of the war cabinet. The arrest warrant was subsequently cancelled when Ms Livni did not arrive in the UK. As a result of this arrest warrant having been issued, the UK government sought to change the law in order to place restrictions on private persons (as opposed to the State) obtaining arrest warrants for UJ crimes, by now requiring the consent of the Director Of Public Prosecutions, before an arrest warrant can be issued. The consequences of this change of law, which came into effect in September 2011, are best demonstrated by an attempted application of a private arrest warrant against Ms Livni in October 2011 when she visited the United Kingdom. A private arrest warrant for Ms Livni had prior been issued by a senior district judge in London in December 2009, and was extant at the time of her October 2011 visit. The Director of Public Prosecutions was invited by legal representatives of the private individual to consent to Ms Livni's arrest. However, the matter was taken out of his hands by a retrospective grant of diplomatic immunity from the UK government, on the grounds that Ms Livni was on a 'Special Mission'. This controversial practice stymying the application of universal jurisdiction has since been repeated by the UK government, as noted immediately below and in LPHR's legal Q&A on Immunities and Gaza Accountability.

13. In 2016 Ms Livni visited the UK in a private capacity to participate in a conference organised by an Israeli newspaper. In the week preceding this visit, the War Crimes Unit of the Metropolitan Police provided a letter to the Israeli Embassy inviting Ms Livni to attend a (voluntary) police interview under caution in relation to her role alleged offences committed during Operation Cast Lead. Media reports state that upon receiving this interview, senior Israeli officials contacted their British counterparts in an attempt to classify Ms Livni's visit as a 'Special Mission' involving diplomatic contacts. This step was taken notwithstanding the fact that Ms Livni at this time was not a holder of an official position other than being a member of the Israeli Parliament. The British Foreign and Commonwealth Office made a decision to recognise Ms Livni's visit as a

Special Mission. A meeting was scheduled with Government officials in the UK only after Ms Livni was invited to the police interview. The granting of special mission immunity prevented any arrest from being able to take place in circumstances where Ms Livni refused to attend the police interview voluntarily.

14. Whilst the principle of UJ indeed has promise in terms of the steps that can be taken to pursue accountability for war crimes, there is no doubt that in practice its success has been stymied by political influences. This is incredibly problematic for the UK in the context of the legal obligations that it clearly has under the Geneva Conventions and Associated Protocols, and the United Nations Convention Against Torture.

15. The UK is not alone in having imposed certain obstructions to the effectiveness of the principle of UJ. In March 2014, Spain passed a law reforming the principle of UJ, effectively making it harder to pursue such cases. This followed what had been a significant period in which Spain appeared to be demonstrating extremely strong leadership in this area. The shrinking of the application of UJ within Spain was and is regrettable.

16. The demonstrable political influence which arises within the UK context of application of UJ has the effect of undermining the international rule of law and allows legal accountability and justice to be accessible only to some, in a discriminatory fashion. States should be encouraged to show courage and leadership in upholding these critical legal obligations, by pursuing UJ prosecutions where possible and appropriate, without fear or favour.

Angelina Nicolaou

LAWYERS FOR PALESTINIAN HUMAN RIGHTS

LPHR legal Q&A: Immunities and Gaza Accountability

September 2015

"Under UK and international law, visiting heads of foreign governments, such as Prime Minister Netanyahu, have immunity from legal process, and cannot be arrested or detained. The British Government has invited Prime Minister Benjamin Netanyahu, as head of the Israeli Government, to visit the UK in September. Under UK and international law, certain holders of high-ranking office in a State, including Heads of State, Heads of Government and Ministers for Foreign Affairs are entitled to immunity, which includes inviolability and complete immunity from criminal jurisdiction."

> **British government response to a public petition calling for the arrest of Israel's Prime Minister, Benjamin Netanyahu – September 2015.**

Does international law provide for immunities for serious crimes?

International law does provide for immunities for specific classes of state officials in regards to crimes including genocide, crimes against humanity, war crimes and torture. These immunities covers any form of legal process, including immunity from arrest, detention and prosecution. The primary justification for such immunities is that they ensure the smooth conduct of international relations.

Why are immunities currently receiving public attention?

The availability of legal immunities is under the spotlight due to the visit this week to the United Kingdom of Israel's Prime Minister, Benjamin Netanyahu. A public petition calling for Mr Netanyahu's arrest 'for war crimes upon arrival in the U.K for the massacre of over 2000 civilians in 2014', has collected over 100,000 signatures. The petition has elicited a formal response from the British government, stating that Mr Netanyahu has 'complete immunity from criminal jurisdiction' under international law due to his status as 'head of the Israeli government'.

Why is Mr Netanyahu being accused of war crimes?

Mr Netanyahu was Prime Minister of Israel during last summer's large-scale Israeli military offensive on Gaza. Israel's military attacks on Gaza caused massive civilian loss of life and pervasive destruction and damage to civilian homes and infrastructure.

In June 2015, the UN Commission of Inquiry on the Gaza Conflict 2014 (Commission) published its considered findings concerning serious violations of international humanitarian law and human rights law, including the possible commission of war crimes. Its report carefully states:

"[T]he commission was able to gather substantial information pointing to serious violations of international humanitarian law and international human rights law by Israel and by Palestinian armed groups. In some cases, these violations may amount to war crimes." (Paragraph 668)

What did the UN Commission of Inquiry's report say in relation to Israel's political leadership?

Key excerpts of the Commission's report raises very serious questions concerning the role of Israel's political leadership in suspected serious international law violations that 'may amount to war crimes':

- "The commission's investigations also raise the issue of why the ***political and military leadership*** did not revise their policies or change their course of action, despite considerable information regarding massive death and destruction in Gaza, ***which in turn raises questions as to potential violations of international humanitarian law and criminal law by these officials***." (Paragraph 640 – bolded and italicised for emphasis)

- "The commission is concerned that impunity prevails across the board for violations of international humanitarian and human rights law allegedly committed by Israeli forces, whether it be in the context of active hostilities in Gaza or killings, torture, and ill-treatment in the West Bank. Israel must break with its recent lamentable track record in holding wrong-doers accountable, not only as a means to secure justice for victims but also to ensure the necessary guarantees for non-repetition. ***Those responsible for suspected violations of international law at all levels of the political and military establishments must be brought to justice***." (Paragraph 664 – bolded and italicised for emphasis)

- "The commission's investigations also raise the issue of why the Israeli authorities failed to revise their policies in Gaza and the West Bank during the period under review by the commission. Indeed, ***the fact that the political and military leadership did not change its course of action, despite considerable information regarding the massive degree of death and destruction in Gaza, raises questions about potential violations of international humanitarian law by these officials, which may amount to war crimes. Current accountability mechanisms may not be adequate to address this issue.***" (Paragraph 672 – bolded and italicised for emphasis)

These excerpts, individually and cumulatively, underscore the Commission's considered concern that Israel's political leadership be investigated, and potentially held accountable, for suspected violations of international law during Israel's military offensive on Gaza last summer.

The last excerpt pointedly also expresses the Commission's concern that Israel's current mechanism for providing accountability 'may not be adequate' to address the issue of the significant role of Israel's political leadership.

This latter concern focuses attention on whether international justice mechanisms may properly have to be utilised against Israel's political leadership, including Mr Netanyahu, in relation to examining their role in the suspected commission of international crimes.

What is universal jurisdiction and how does it relate to immunities?

All states may assert universal jurisdiction to investigate and prosecute crimes under international law. This is the most wide-reaching form of jurisdiction, and one that is recognised as necessary to close the impunity gap that continues to exist for crimes under international law.

A significant limitation against the application of universal jurisdiction is the availability of immunities to protect specific individuals from legal process, including arrest, detention and prosecution. Of particular relevance to Mr Netanyahu's planned visit to the UK is the availability of 'personal immunity'.

What is 'personal immunity'?

Courts have held that individuals can claim personal immunity, which covers any act that some classes of state officials perform while in office, including acts carried out in a private capacity. It is based on the justification that the activities of high-ranking officials be immune from foreign jurisdiction to avoid foreign states either infringing the sovereign prerogatives of states or interfering with the official functions of their agents.

In relation to serious international crimes, the International Court of Justice (ICJ) held in the Arrest Warrant case in 2002, that this type of immunity may only be available to a very limited category of high-ranking officials who are serving in an official position (and does not apply to former officials). The ICJ held that this can include current heads of state, heads of government and foreign ministers. The decision was controversial, with some pointing out that the Court's consideration of personal immunities should have been led by the nature of the crime as opposed to the nature of level of the court in which prosecution was sought.[1]

It is on this legal basis that the UK government has unequivocally stated that Mr Netanyahu has immunity for legal process and cannot be arrested or detained.

1 Amnesty International, Bringing Power to Justice: Absence of Immunity for Heads of State before the International Criminal Court, IOR 53/017/2010, pp. 25-30

Are any other immunities potentially relevant?

Special mission immunity is another form of immunity claim that may be invoked to protect certain officials from the criminal and civil jurisdiction of another state. This form of immunity was controversially granted by the UK government to Israel's former Foreign Minister, Tzipi Livni, when she visited the UK in 2011 and 2014. The Crown Prosecution Service confirmed at the time of Mrs Livni's visit in 2014 that the granting of special immunity status 'means that a magistrates court would be bound to refuse any application for an arrest and as such the Director of Public Prosecutions is not able to consider any application in relation to this individual.'

A 'special mission' is defined as a temporary mission sent by one state to another with the consent of the host state to deal with specific matters or issues that are agreed in advance. The UN Convention on Special Missions limits the application of immunities to specified individuals who are members of such missions. Only 38 states – less than 20 per cent of all UN member states - have ratified the UN Convention and are therefore bound by its provisions. In interpreting the law of special mission immunity, courts in the United Kingdom, Germany and Austria have emphasised that the consent of the host state must be obtained prior to receiving a foreign official on a special mission, and that the host state has the right to object to the inclusion of individual members in the special mission.[2]

The granting of special mission immunity raises serious concerns about its incompatibility with state's international law obligations to ensure individuals do not enjoy impunity for serious crimes.

Are immunities available to prevent the prosecution of individuals before the International Criminal Court?

The short answer is no. Article 27 of the Rome Statute of the International Criminal Court provides that “official capacity.. shall in no case exempt a person from criminal responsibility under this Statute.”

What is LPHR's position on accountability and Gaza?

LPHR has extensively worked on the crucial issue of legal accountability for Israel's military offensive on Gaza last year. In partnership with the Al Mezan Center for Human Rights (based in Gaza), we submitted two comprehensive complaints to the UN Commission of Inquiry. Both our complaints can be seen here.

Our first complaint focused on the critical issue of the deliberate and pervasive military targeting of civilian homes in Gaza that resulted in massive loss of civilian life. This extremely

2 http://www.redress.org/downloads/statement-to-the-eu-network-of-contact-points-final.pdf

serious issue raised very significant legal questions regarding the targeting of civilian infrastructure. We presented our legal analysis in our complaint and subsequently had the valuable opportunity to present it in person with staff of the Commission in Geneva. Our critical legal analysis was shared by the Commission in its report.

Our second complaint focused on the deliberate or reckless military targeting of medical infrastructure and personnel. We were joined on this complaint with Medical Aid for Palestinians, and co-produced a public report version of our complaint which can be seen here.

Both our complaints presented evidence and legal analysis indicating that serious violations of international humanitarian and human rights law were committed which may amount to war crimes, and in respect of the widespread targeting of family homes, may also amount to crimes against humanity.

LPHR has subsequently written and met with the UK Foreign Office to request their necessary action in ensuring that legal accountability is fully and credibly pursued for alleged serious violations of international humanitarian law. It is our grave concern that continued impunity and absence of effective deterrence for the perpetration of alleged serious international crimes will only serve to encourage the horrific recurrence of a large-scale Israeli military offensive on Gaza.

Tareq Shrourou

LAWYERS FOR PALESTINIAN HUMAN RIGHTS

A seminal step towards legal accountability and justice for victims, survivors and their families: ICC Prosecutor Fatou Bensouda's decision that she is ready to open an investigation into the situation in Palestine

24 December 2019

ICC Prosecutor Fatou Bensouda's announcement that she is ready to open a criminal investigation into the situation in Palestine is a seminal step towards achieving legal accountability and justice for the many victims, survivors and their families of alleged serious international crimes perpetrated by Israeli forces and their military and political leadership.

The potential for the investigation to effectively prevent or deter the commission of ongoing and future crimes, by countering the systemic impunity that has prevailed until now, is also very significant.

Last Friday, the ICC Prosecutor stated she is, "satisfied that there is a reasonable basis to proceed with an investigation into the situation in Palestine", having concluded that all the statutory criteria under the Rome Statute have been met.

Her statement summarises: "I am satisfied that (i) war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip; (ii) potential cases arising from the situation would be admissible; and (iii) there are no substantial reasons to believe that an investigation would not serve the interests of justice."

LPHR notes, however, the ICC prosecutor's concurrent announcement that before opening an investigation, she has requested a ruling from Pre-Trial Chamber I of the International Criminal Court in which she seeks: "confirmation that the "territory" over which the Court may exercise its jurisdiction, and which I may subject to investigation, comprises the West Bank, including East Jerusalem, and Gaza."

In her accompanying 112-page Prosecutor's Request to the Pre-Trial Chamber, Fatou Bensoda states that although it is her view that a determination on the scope of territorial jurisdiction is not required at this stage, and that the ICC "does indeed have the necessary jurisdiction in this situation", she has decided that it is the prudent and transparent course to take given that "she is aware of the contrary views".

These "contrary views" appear to principally derive from the Office of the Israeli Attorney General. At the same time as the ICC Prosecutor's announcement, the Israeli Attorney General released a detailed memorandum to explain why the ICC has no jurisdiction over Palestine. The memo argues that Palestine has failed to meet the necessary precondition of possessing criminal jurisdiction over its territory by asserting that a sovereign Palestinian state does not exist at this time.

The Prosecutor's Request includes a thorough, clear and compelling factual and legal analysis supporting her unequivocal position that the “territory” over which the Court may exercise its jurisdiction under the Rome Statute comprises the West Bank, including East Jerusalem, and Gaza. It is LPHR's position that it appears inconceivable that the Pre-Trial Chamber could reach a contrary conclusion based on the comprehensive analysis by the Prosecutor in her Request.

LPHR also notes with interest paragraphs 93-100 of the Prosecutor's Request. These specific paragraphs underpin her finding that the relevant statutory criteria for opening an investigation have been met. LPHR outlines the key points below:

- Paragraph 93 is succinct and very significant: “The Prosecution has conducted a preliminary examination into the situation of Palestine. After a thorough analysis, the Prosecutor is satisfied that there is a reasonable basis to initiate an investigation into the situation in Palestine pursuant to article 53(1) of the Statute.”

- Paragraph 94 provides substantive analysis in relation to the 2014 hostilities in Gaza. It begins by stating: “On the basis of the available information, there is a reasonable basis to believe that war crimes were committed in the context of the 2014 hostilities in Gaza. In particular, there is a reasonable basis to believe that members of the Israel Defense Forces committed the war crimes of: intentionally launching disproportionate attacks in relation to at least three incidents which the Office has focussed on; wilful killing and wilfully causing serious injury to body or health; and intentionally directing an attack against objects or persons using the distinctive emblems of the Geneva Conventions.”

- LPHR notes that these specific incidents could include military attacks against homes leading to large numbers of civilian casualties – which was a key and endemic feature of the 2014 hostilities in Gaza. It may also encompass documented attacks against specific areas, civilian shelters, hospitals, ambulances and paramedics.

- LPHR also notes that the opening part of Paragraph 94 should be read alongside Paragraphs 98, 99 and 100 of the Prosecutor's Request, which emphasise that the investigation “will not be limited only to the specific crimes that informed her assessment at the preliminary examination stage”, and that “the Prosecution will be able to expand or modify the investigation with respect to the acts identified above or other alleged acts, incidents, groups or persons”. This leaves open the possibility of a wide-ranging investigation covering many specific incidents that can potentially lead to charges of crimes against humanity, in addition to potential charges of war crimes.

- Paragraph 94 also provides an important caveat that the Prosecutor's decision to open an investigation has been made without making a crucial determination on the genuineness and scope of Israel's investigative processes vis-a-vis the 2014 hostilities in Gaza. It states that its admissibility assessment “remains ongoing at this stage and will need to be kept under review”, due to “limited accessible information in relation to

proceedings that have been undertaken and the existence of pending proceedings in relation to other allegations". In April this year, LPHR published a short report on this issue in specific relation to attacks against family homes during the 2014 hostilities in Gaza. The eleven key points made within this analysis appear to remain very relevant.

- Paragraph 95 focuses on the West Bank, including East Jerusalem. The Prosecutor asserts: "there is a reasonable basis to believe that in the context of Israel's occupation of the West Bank, including East Jerusalem, members of the Israeli authorities have committed war crimes in relation, inter alia, to the transfer of Israeli civilians into the West Bank since 13 June 2014." The use of the term, "inter alia", indicates that other war crimes allegedly committed on the territory of the West Bank, possibly including demolitions of private property and the forcible transfer of protected persons, could also have informed the Prosecutor's decision.

- Paragraph 95 also significantly states, "The Prosecution has further concluded that the potential case(s) that would likely arise from an investigation of these alleged crimes would be admissible pursuant to article 17(1)(a)-(d) of the [Rome] Statute." Therefore, unlike its decision in relation to the actions of Israeli forces in Gaza during the 2014 hostilities, the Prosecutor is making clear that the admissibility assessment in the context of the West Bank is already fully satisfied in her view. This is presumably because there are no investigative proceedings for the Prosecutor to assess in regard to alleged crimes committed by members of Israeli authorities vis-a-vis the West Bank.

- Paragraph 96 states that alleged crimes committed against protesters in Gaza by Israeli forces are within the purview of the pending investigation: "The Prosecution further considers that the scope of the situation could encompass an investigation into crimes allegedly committed in relation to the use by members of the IDF of non-lethal and lethal means against persons participating in demonstrations beginning in March 2018 near the border fence between the Gaza Strip and Israel, which reportedly resulted in the killing of over 200 individuals, including over 40 children, and the wounding of thousands of others."

- This is particularly relevant in light of the substantial findings made by the UN independent Commission of Inquiry into the 2018 Gaza Protests. The Commission found in its report, published in March this year, that it has reasonable grounds to believe that all 189 fatalities it had investigated were caused by unlawful use of force – with the possible exception of two incidents – and that medical workers, journalists, some children and some people with visible disabilities were shot intentionally.

- Paragraph 97 asserts, "The Prosecution has identified no substantial reasons to believe that an investigation into the situation would not be in the interests of justice." This is particularly important to note in light of the judgment earlier this year by Pre-Trial

Chamber II of the International Criminal Court in which it controversially ruled that the 'interests of justice' statutory criterion had not been satisfied in relation to a decision of the Prosecutor to open an investigation into the situation in Afghanistan.

The Prosecutor's statement requests the Pre-Trial Chamber to "rule expeditiously" and "without undue delay so that my Office can take the appropriate next steps accordingly". The last paragraph of the Prosecutor's Request requests a timeline of no longer than 120 days (18 April 2020) for a ruling, subject to accommodating requests by any participants.

LPHR similarly encourages an expeditious ruling by the Pre-Trial Chamber, and one which indeed confirms that the territory over which the Court may exercise its jurisdiction, and which the Prosecutor may subject to investigation, comprises the West Bank, including East Jerusalem, and Gaza.

It is an imperative for the due rights of victims, survivors and their families; for the upholding of the international rule of law; and for the prevention or deterrence of ongoing and future atrocities; that the long moral arc is not damagingly deviated or disproportionately delayed at a critical juncture as it bends towards justice.

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For more on LPHR's work in this area, please see the following:

- LPHR Q&A: Current progress of the International Criminal Court's preliminary examination into the situation in Palestine and potential next steps (published July 2019)

- LPHR Report: Eleven key points relevant to the complementarity assessment being undertaken by the Office of the Prosecutor of the International Criminal Court on the grave issue of targeted airstrikes against family homes in Gaza (published April 2019)

- LPHR and Al Mezan Centre for Human Rights Complaint Submission made to the United Nations Commission of Inquiry on the 2014 Gaza Conflict concerning large-scale destruction and damage to family houses in the Gaza Strip, with associated profound loss of life and injury to Palestinian residents, during Israel's military operation between 7 July 2014 and 26 August 2014 (published September 2014)

- LPHR and Al Mezan Centre for Human Rights Joint Report: Justice Denied: Gaza human shield survivors and the systemic failure of Israel's military investigation system to provide accountability (published September 2018)

- LPHR, Al Mezan Centre for Human Rights and Medical Aid for Palestinians Complaint Submission to the United Nations Commission of Inquiry on the 2014 Gaza Conflict

concerning destruction and damage to medical infrastructure, and loss of life and injury to civilians and medical personnel, in Gaza, during Israel's military operation between 7 July 2014 and 26 August 2014 (published February 2015)

- LPHR, Al Mezan Centre for Human Rights and Medical Aid for Palestinians Joint Report: No More Impunity: Gaza's Health Sector Under Attack (June 2015)

- LPHR Evidence Submission to the UN independent Commission of Inquiry on the 2018 Protests in the Occupied Palestinian Territory: Israel's Supreme Court judgment on the legality of Israel's rules of engagement in the context of use of force against Gaza protesters (December 2018)

(*This statement is updated below for LPHR's May 2020 submission to the UN Special Rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967 to include the following report*)

- LPHR, Al Mezan Centre for Human Rights and Medical Aid for Palestinians Joint Report: Chronic Impunity: Gaza's Health Sector Under Repeated Attack (March 2020)

LAWYERS FOR PALESTINIAN HUMAN RIGHTS

Joint NGO letter to Rome Statute states parties calling for support to the International Criminal Court in the face of threats to its independence and mandate

New York, 28 April 2020

Your Excellency,

We, the undersigned organizations, call on your State and all States Parties to the Rome Statute to show support for the Rome Statute system and the International Criminal Court (ICC), especially in the face of threats to its independence and mandate. Although threats to the pursuit of international justice, including in the context of the ICC, are not new, protecting the ICC is particularly important today in the face of escalating hostility towards the Court.

The ICC's crucial role in complementing the primary role of national courts cannot be overstated. We acknowledge that the ICC would benefit from changes to strengthen its performance, but ensuring a fair, effective, and independent Court depends on support from States Parties. We welcome the reaffirmation of ICC States Parties to "uphold and defend the principles and values enshrined in the Rome Statute and to preserve its integrity undeterred by any threats against the Court." We urge States Parties to uphold the Rome Statute system by making strong, concrete expressions of support and to defend it by unequivocally condemning threats. The challenges faced by the Court require nothing less.

As you know, on 20 January 2020, one month after the ICC Prosecutor announced that the situation in Palestine merits investigation, Israeli Prime Minister Benjamin Netanyahu called for "sanctions against the international court, its officials, its prosecutors, everyone." On 17 March 2020, U.S. Secretary of State Michael R. Pompeo threatened to impose punitive measures against two named senior ICC staffers, other ICC staffers, and their families. His remarks came after the ICC authorized an investigation into the situation in Afghanistan. These are among the latest in a series of attacks that undermine the Court itself and intimidate its staff in order to protect political interests at the expense of international justice.

This combination of threats and the U.S. visa ban policy seeks to undermine the Court's ability to deliver justice to victims whenever States are unwilling or unable to genuinely investigate and prosecute crimes under the Rome Statute. The ICC must be free to carry out its mandate, without fear or favour, on the basis of the legal requirements delineated in the Rome Statute—not on the basis of political considerations.

As a State Party to the Rome Statute, your country has clearly committed to ending impunity for crimes within the ICC's jurisdiction, regardless of the perpetrator's nationality. Defending the Court's independence is key to fulfilling that pledge. We urge you to act with your fellow

States Parties to champion the Court's mandate and independence and uphold the Rome Statute's integrity by:

1. Expressing your government's strong and continued commitment to the ICC and its prosecutorial and judicial independence in bilateral, multilateral, and public forums at the domestic, regional, and international levels;

2. Calling on the U.S. government to repeal its ICC visa ban policy and to refrain from attacking the Court, its staff, or their families in any way;

3. Calling on the Israeli government to repudiate its call for sanctions against the Court and its staff;

4. Publicly expressing your government's determination to cooperate fully with the Court across its work;

5. Calling on all relevant actors to cooperate with the investigation into the situation in Afghanistan and any possible investigation into the situation in Palestine;

6. Ratifying, if not previously done, the Agreement on the Privileges and Immunities of the International Criminal Court (APIC);

7. Domesticating, if not previously done, the Rome Statute; and

8. Signing, if not previously done, all relevant cooperation agreements with the ICC (for example, on the protection of witnesses and victims; the release of persons, including interim release; and the enforcement of sentences).

Thank you for your commitment and support for the Rome Statute system and the ICC.

Sincerely,

ACAT-Burundi
ACAT-Switzerland
Action Humaine pour le Développement Intégré au Sénégal (AHDIS)
Africa Center for International Law and Accountability
Africa Legal Aid (AFLA)
African Development and Peace Initiative
AL Ensan Center for think individual development
Al-Haq
Amman Center for Human Rights Studies
Anfal Storys Organization

Arry Organization for Human Rights
Asociación Pro Derechos Humanos de España
Associaion Française pour la promo?on de la Compétence Universelle (AFPCU)
Australian Centre for International Justice
Avocats Sans Frontières
Bema Organization for Economic and Social Rights
Center for Civil Liberties
Center for Constitutional Rights
Center for Justice and Accountability
Civil Association Democracia Global – Movimiento por la Unión Sudamericana y el Parlamento Mundial
Civil Rights Defenders (CRD)
Coalition Ivoirienne pour la CPI
Coalition Malienne pour la CPI/CM-CPI
Comisión Mexicana de Defensa y Promoción de los Derechos Humanos
Comision por la Carta Democratica Interamericana
COMPPART Foundation for Justice and Peacebuilding – Nigeria
Congo Peace Initiative
Culture pour la Paix et la Justice (CPJ)
Defence of Human Rights – Pakistan
Documenta – Center for Dealing with the Past
Dr. Denis Mukwege Foundation
EuroMed Rights
Fédération internationale pour les Droits Humains (FIDH)
Femmes et Droits Humains
Fundacion Federalista Dominicana
Fundacion Nacional para la Democracia
Global Centre for the Responsibility to Protect
Housing and Land Rights Network – Habitat International Coalition
Human Rights Center (HRIDC) – Georgia
Human Rights Center of Azerbaijan
Human Rights Center ZMINA
Human Rights Concern – Eritrea (HRCE)
Human Rights Defenders Solidarity Network Uganda
Human Rights Watch
Humanitarian Law Center – Belgrade
International Commission of Jurists – Norway
Initiatives for Peace and Human Rights (iPeace)
Institute for Environmental Security, Green Transparency and Ecological Defence Integrity
International Association of Lawyers Against Nuclear Arms
International Coalition Against Impunity-HOKOK
International Coalition for the Responsibility to Protect

International Commission of Jurists – Kenya
International Platorm of Jurists for East Timor (IPJET)
Iranian Center for International Criminal Law (ICICL)
Justice International
Kenya Human Rights Commission
Kurdish Organizations Network Coalition for the International Criminal Court (KON-CICC)
Kurdistan without Genocide
La Comisión de Derechos Humanos de El Salvador (CDHES)
La Ligue Burundaise des droits de l'homme Iteka
Lawyers for Justice in Libya
Lawyers for Palestinian Human Rights
Le Center Marocain de la Paix et la Loi
Le Club des amis du droit du Congo
Le Groupe LOTUS – RDC
MADRE
Mission for Establishment of Human Rights (MEHR)
MOM Organization
Mouvement Panafricain de la Jeunesse Féminine pour la paix
National Centre for Human Rights and Development (NACFOHRD)
Norwegian Helsinki Committee
Nuba Women Organization for Development
Observatoire Centrafricain des Droits de l'Homme (OCDH)
Odhikar
Open Society Justice Initiative
Organization Against Weapons of Mass Destruction in Kurdistan
Organization of the Justice Campaign
Palestinian Centre for Human Rights (PCHR)
Parliamentarians for Global Action
REDRESS
Regional Centre for Human Rights – Ukraine
Reporters sans frontières / Reporters Without Borders (RSF)
Réseau Equitas Côte d'Ivoire (REQCI)
Rights for Peace
Rights International Spain (RIS)
Robert F. Kennedy Human Rights
SACCORD
Sahayta
Society for Threatened Peoples – Switzerland
SOS-Torture/Burundi
Southern Africa Litigation Centre (SALC)
StoptheDrugWar.org
Students for Global Democracy – Uganda

Sudanese Women Human Rights Defenders Project
Sudanese Women Rights Action
Swedish Foundation for Human Rights
The Arab Center for the Independence of the Judiciary and Legal Profession (ACIJLP)
Transitional Justice Coordination Group
Transitional Justice Working Group of Liberia
TRIAL International
Tunisian Coalition for the ICC
Union for Civil Liberty – Thailand
United Church of Christ, Justice and Witness Ministries
United Nations Association – Sweden
United Nations Association of Greater Philadelphia
Voluntary Aid Association – India
WITNESS
Women's Initiatives for Gender Justice
World Citizens Association of Australia
World Federalist Movement – Institute for Global Policy (WFM-IGP)
World Renewers Organization
World Without Genocide at Mitchell Hamline School of Law

LAWYERS FOR PALESTINIAN HUMAN RIGHTS

Statement on the release of the UN database of businesses involved in illegal Israeli settlements

UK organisations urge UK Government to take action to end businesses' involvement in illegal settlements in the occupied Palestinian territory.

25 February 2020

Amnesty International UK, Lawyers for Palestinian Human Rights, Quakers in Britain, War on Want and Christian Aid welcome the release of the UN database of businesses involved in illegal Israeli settlements in the occupied Palestinian territory (oPt). The long-awaited publication of this database represents a landmark step towards justice and accountability for those affected by corporate involvement in human rights violations. The database prepared by the UN Office of the High Commissioner for Human Rights is a powerful mechanism to assist states in identifying companies domiciled in their territory, and/or under their jurisdiction, that conduct activities in or related to the settlements. In addition, civil society acting on behalf of those affected by human rights violations now have a clear and authoritative reference to assist their engagement with companies and governments to bring about compliance with their respective human rights responsibilities and obligations.

Business activity in or with settlements unavoidably contributes to sustaining an illegal situation. Land has been seized from Palestinians across the oPt and allocated to regional settlement councils for settlement building and their future expansion. This has shrunk the space available for Palestinians to develop livelihoods and build essential housing and infrastructure, forcing many into poverty. Settling civilians in occupied territories violates international humanitarian law and amounts to a war crime under international criminal law. The companies engaged in settlement activities are profiting from and contributing to systemic human rights violations against Palestinians.

We are therefore concerned to see three UK based companies listed on the UN database. We urge JC Bamford Excavators (JCB), Opodo and GreenKote to fulfil their responsibility to respect human rights by immediately ending involvement in "substantial and material" settlement-related business activity that contributes to their maintenance and expansion.

The UK Government should ensure that it is adhering to its own duty to protect human rights arising from the UK's treaty obligations and articulated, with regard to companies, in the UN Guiding Principles on Business and Human Rights (UNGPs). In keeping with this, the UK should ensure that these three companies urgently end their involvement in settlement-related activities.

It is therefore regrettable that the UK Government previously objected to the publication of the UN database. It justified this position by stating that the UN Human Rights Council should focus on States, rather than on companies; and also by suggesting that the resolution mandating the creation of the database did not expressly provide for it to be made public. We believe these reasons do not amount to an adequate basis for opposing the database, do not align with the transparency principle of the UNGPs, and should be reconsidered.

The UK helped establish the normative framework under which this issue has been analysed. The UK supported and participated fully in the mandate of the Special Representative of the UN Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, created by the UN Human Rights Council. In 2011, the UK was one of the States that led the call for the UNGPs to be adopted by the Human Rights Council and was the first State to develop a National Action Plan to give effect to this global standard.

We note that the UK Government has repeatedly called on Israel to stop its "counterproductive" settlement expansion, and that it has recently expressed concern regarding the possible annexation of parts of the West Bank. In light of its stated commitment to international law and the UNGPs, the UK Government should now take commensurate action to prevent UK companies from conducting business with illegal Israeli settlements. The UK should also support initiatives, including those within the UN, that draw attention to the involvement of companies in human rights violations. The database's publication provides an opportunity for the UK and other States to demonstrate a commitment to foster corporate respect for human rights and to counter illegal settlement expansion.

Accordingly, we urge the UK Government to take effective action to end the involvement in illegal Israeli settlements of any UK company thus engaged.

The UN database as it stands does not provide a complete picture of companies involved in illegal Israeli settlements, as acknowledged in the report of the UN High Commissioner for Human Rights. The mandate to produce the database set out by the UN Human Rights Council is restricted to ten well-defined activities. It does not cover all business activity in the occupied Palestinian territory that may raise human rights concerns. In addition, non-business enterprises are excluded from consideration. We suggest that these issues could be addressed in future iterations of the database.

We urge the UN Office of the High Commissioner for Human Rights and the UN Human Rights Council to work together to ensure that this initiative is sufficiently resourced, and updated annually through regular reporting, both to allow new companies to be added when they begin listed activities in settlements, and to remove such companies if they cease their activities. It is crucial for the database to be a living and transparent instrument that promotes the accountability of companies where there is sufficient evidence of their involvement in settlement activity.

LAWYERS FOR PALESTINIAN HUMAN RIGHTS

LPHR files OECD Guidelines complaint against JCB for involvement in human rights breaches in the occupied Palestinian territory

10 December 2019

The UK charity, Lawyers for Palestinian Human Rights (LPHR), has today filed a comprehensive evidence-based human rights complaint against JCB, a world-leading construction equipment company headquartered in Britain, to the UK National Contact Point for the OECD Guidelines for Multinational Enterprises (situated in the Department of International Trade). The complaint is being brought under the OECD Guidelines for Multinational Enterprises.

LPHR has gathered credible, clear and compelling video, photographic and written contemporaneous evidence that substantiates the material and prolific use of JCB products in a number of specific demolition and displacement incidents, and in settlement-related construction. The primary sources of our evidence are the prominent Palestinian human rights organisation, Al-Haq; the leading Israeli human rights organisation, B'Tselem; and the UK charity, EyeWitness to Atrocities.

One of the items of video evidence submitted with LPHR's complaint can be viewed here. The video footage, taken on 11 September 2019 in the South Hebron Hills, shows a JCB vehicle, identifiable as the model 3CX, demolishing structures that are likely to be the six family homes reported in the B'Tselem commentary that accompanies the video.

The primary evidence submitted with our complaint that substantiates the material use of JCB products in demolitions, relates to incidents in ten villages or areas in the occupied Palestinian territory, covering a time period of 2016 to 2019. In total, 89 homes are identified as having been demolished, resulting in the displacement of at least 484 individuals, including children and the elderly. One school (*Khirbet Tana Elementary School*) is among other property documented to have been demolished, as are water tanks.

The evidence demonstrates that vulnerable Palestinian Bedouin communities in Area C of the occupied West Bank are frequently affected by demolitions and displacement, with associated human rights breaches that include the violation of the right to adequate housing under international human rights law.

LPHR submits JCB is in breach of five human rights responsibilities under the OECD Guidelines

LPHR sets out detailed submissions that JCB is in current breach of five provisions of the human rights chapter of the OECD Guidelines. They are summarised here:

1. JCB is in breach of the general obligation under Chapter 4, paragraph 1 of the OECD Guidelines to respect human rights. This specific submission is made as a consequence of our submissions that the company is in breach of specific human rights obligations at paragraphs 2-5 of Chapter 4 of the OECD Guidelines (the following four listed below).

2. JCB has failed to avoid contributing to adverse human rights impacts and to address impacts where they do occur, through: i) its action of selling products that facilitates another entity (Israeli authorities/private contractors) to cause adverse human rights impacts; and/or ii) its omission of failing to stop sales of products that facilitates another entity (Israeli authorities/private contractors) to cause adverse human rights impacts, when having actual or constructive knowledge of such adverse impacts.

3. JCB has not sought ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations and products by virtue of the use of its machinery by Israeli authorities and private contractors, that it is linked to via a supply chain.

4. JCB has failed to develop a human rights policy that: has been approved by its Board; benefits from internal and/or external expertise; sets out the company's expectations from its staff; is publicly available; and is embedded across the business.

5. JCB has failed to carry out human rights diligence as appropriate to its size, nature and context of operations and the severity of the risks of adverse human rights impacts.

LPHR requests three actions for JCB to resolve its involvement in human rights violations

As a consequence of our submissions that JCB is in breach of its human rights responsibilities under the OECD Guidelines, LPHR concludes its complaint by requesting that JCB:

1. immediately suspend supply of products to Comasco (an Israeli company which is the exclusive dealer of JCB products in Israel) that could be identified as being part of the supply chain that results in demolitions or settlement-related construction, and to permanently cease supply to Comasco should it not be able to provide credible and verifiable guarantees that such products will not be involved in the violation of Palestinian human rights;

2. develops and publishes on its website a human rights policy which specifically sets out the due diligence methodology it applies to ensure that its products are not at risk of contributing and/or being directly linked in a business relationship to the violation of human rights; and

3. agrees to participate with LPHR and other appropriate stakeholders in establishing an effective grievance mechanism to enable remediation. Such a mechanism would be administered in accordance with the core criteria for a remediation process as specified in the OECD Guidelines, and incorporate appropriate financial and/or non-financial remedies for individuals in respect of damages suffered through the known uses of JCB products in the demolition of their homes and property, including those identified in this complaint.

The demolition of the entire Palestinian village of Khan al-Ahmar is urgent at the time of submission of LPHR's complaint

LPHR's complaint is being submitted to coincide with the 'mid-December at the earliest' timeline reportedly given by the government of Israel at an Israeli Supreme Court hearing in June this year, to proceed with the long-planned demolition of the entire Palestinian village of Khan al-Ahmar in Area C of the Occupied West Bank. This will result in the permanent displacement of its 188 residents.

The issue received prominent attention in July 2018, when JCB products were photographed alongside reports that Israeli authorities had commenced the paving of an access road to Khan al-Ahmar. This was viewed as a facilitating step towards undertaking the impending demolition of the whole Palestinian village. The government of Israel subsequently paused the planned demolition amidst significant diplomatic pressure, including from the UK government.

Tareq Shrourou and Claire Jeffwitz of Lawyers for Palestinian Human Rights, said:

"LPHR's OECD Guidelines complaint presents credible, clear and compelling evidence that substantiates the material and prolific involvement of JCB heavy machinery products in specific demolition and displacement incidents that significantly impacts Palestinian families, including children and the elderly, and also its use in settlement-related construction.

"JCB's facilitating of these tightly connected policies and practices that result in human rights violations against Palestinians must cease immediately. Furthermore, a remediation mechanism should be established to provide adequate remedy for individuals who have suffered damages as a result of JCB's material contribution to violations.

"We hope that JCB will do the right thing and shall now take all necessary measures to fully meet its human rights responsibilities under the OECD Guidelines for Multinational Enterprises. LPHR's objective of ending JCB's unacceptable involvement in human rights violations against Palestinians should be a shared one."

NOTES TO EDITORS

1. Lawyers for Palestinian Human Rights (LPHR) is a UK legal charity that works on projects to protect and promote Palestinian human rights. Our trustees include the senior human rights lawyers, Sir Geoffrey Bindman QC, Fiona McKay, Tessa Gregory and Nusrat Uddin.

2. LPHR's OECD Guidelines complaint comprises 11 sections and is 30 pages long. Its first appendix includes links to video evidence. The second and third appendices outlines the photographic and written evidence submitted in an accompanying 205 page evidence bundle. The fourth appendix to the complaint provides a commentary on the urgent case of the impending demolition of the entire Palestinian village of Khan al-Ahmar.

3. The UK National Contact Point considers complaints that a multinational enterprise based or operating in the UK, is in breach of the OECD Guidelines for Multinational Enterprises. The human rights chapter of the OECD Guidelines reflects the principles within the United Nations Guiding Principles on Business and Human Rights. The UK National Contact Point is funded by the UK government and is based in the Department for International Trade.

4. The OECD Guidelines constitute the only government-backed international instrument on responsible business conduct with an in-built grievance mechanism. Once a complaint is submitted, the National Contact Point will initially assess whether or not to accept it. If it does, it will offer a platform for mediation. In the absence or failure of mediation, the National Contact Point will fully examine the complaint and then publish its decision.

5. LPHR previously submitted a comprehensive human rights complaint to the UK National Contact Point regarding the activities of G4S in the occupied Palestinian territory and Israel. The complaint resulted in adverse human rights findings being made against G4S by the UK National Contact Point in June 2015. Nine months later, G4S announced it had commenced a process to sell its subsidiary, G4S Israel. In June 2017, G4S announced the completion of the sale of G4S Israel to FIMI Opportunity Funds (an Israel private equity fund).

6. The parliamentary Joint Committee on Human Rights expressly referred to LPHR's written evidence when recommending in its 'Human Rights and Business 2017: Promoting responsibility and ensuring accountability' report that, "*the [UK] Government gives clear guidance to procurement officers that large public sector contracts, export credit, and other financial benefits should not be awarded to companies who have received negative final statements from the [UK] National Contact Point and who have not made effective and timely efforts to address any issues raised*."

LAWYERS FOR PALESTINIAN HUMAN RIGHTS

Overview of LPHR briefing to local authorities on pensions investment and public procurement decision-making relating to companies involved in human rights violations in the occupied Palestinian territory

1. This is an overview of a July 2017 LPHR briefing which confirms that:

   - Local Authority Pension Funds' (**LAPFs**) are lawfully permitted to make investment decisions to choose not to invest in individual companies, or to divest from individual companies, on the basis of involvement in human rights violations against Palestinians in the occupied Palestinian territory; and

   - Local authorities are lawfully permitted to exclude a company from participation in a procurement procedure on the basis of involvement in human rights violations against Palestinians in the occupied Palestinian territory.

2. The July 2017 briefing made specific recommendations to LAPFs and local authorities on essential actions to be adopted to better protect and promote Palestinian human rights.

3. This overview concludes with two excerpts from authoritative bodies underpinning our position that local authorities, as an organ of the state, are expected to adhere to legal duties under international law not to recognise as lawful a situation resulting from the violation of a serious breach of a fundamental principles of international law, nor to render aid or assistance to maintain the illegal situation. The excerpts are taken from:

   - *International Law Commission Draft Articles on Responsibilities of States for Internationally Wrongful Acts (2001)*; and

   - *Role of local government in the promotion and protection of human rights – Final report of the United Nations Human Rights Advisory Committee (A/HRC/30/49) (2015)*.

Overview of Part I: Investment in companies involved in human rights violations in the occupied Palestinian territory

4. Relevant and significant non-financial considerations that may therefore be permissibly taken into account by LAPFs in the context of protecting and promoting Palestinian human rights, include acting compatibly with: international humanitarian and human rights law; the UN Guiding Principles on Business and Human Rights; the OECD Guidelines for Multinational Enterprises; the UK National Action Plan on Business and Human Rights; and the UK's foreign policy position and Overseas Business Risk advice in relation to Israeli illegal settlement activities in the occupied Palestinian territory.

5. LPHR suggests these non-financial considerations are fundamentally relevant for LAPFs to consider when making investment decisions in relation to companies operating in the occupied Palestinian territory.

6. Israel's settlements in the occupied Palestinian territory have been established in clear violation of international humanitarian law. UN Security Council Resolution 2334, passed on 23 December 2016, reaffirmed the illegality of Israeli settlements. The establishment of illegal settlements and their related infrastructure, which include the illegal separation barrier, military checkpoints and settler-only bypass roads, also infringe a wide range of basic human rights. These include serious and pervasive infringements against basic human rights to land and housing, equality, the right to water and sanitation, freedom of movement, and the right to education and to health.

7. Illegal settlements further severely impede the Palestinian people from being able to exercise their fundamental right to self-determination. The right to self-determination is a norm of significant status under international law, in that it places a separate and additional legal obligation on all states, including the United Kingdom, to respect and promote this specific right. This fundamental legal obligation encompasses a duty not to recognise as lawful a situation resulting from a serious breach of the right to self-determination, and a duty not to render aid or assistance to maintain the illegal situation. Local authorities, as an organ of the state (**for analysis on which, see Appendix A below**), crucially share these legal duties.

8. Our resulting position is:

    a. LAPFs should incorporate into their Investment Strategy Statement a policy of necessarily taking into account their international law obligations, and business and human rights responsibilities under the United Nations Guiding Principles and the UK National Action Plan, when making investment or divestment decisions.

    b. In accordance with the above recommended legal and human rights-based policy, LAPFs should, on a case-by-case basis, decide whether or not to divest from, or to invest in, a particular company on the basis of genuine and substantiated concerns about the adverse human rights impacts that are linked to that company's activities.

    c. There is nothing preventing or restricting LAPFs from applying this above recommended policy specifically in the context of the occupied Palestinian territory.

Overview of Part II: Public procurement decisions relating to companies involved in human rights violations in the occupied Palestinian territory

9. LPHR has considered the UK Government's Procurement Policy Note (2016), in tandem with the UK Public Contract Regulations 2015. It has also been in direct written correspondence with the then Minister for the Cabinet Office, Matthew Hancock MP on the issue.

10. Our resulting position is:

a. Pursuant to the UK Public Contract Regulations 2015, where a contracting authority can demonstrate by appropriate means that a company is guilty of grave professional misconduct (which arguably includes involvement in human rights violations) which renders its integrity questionable, that company may be excluded from participation in a procurement procedure. The February 2016 Procurement Policy Note does not, in our view and as confirmed by the then Minister for the Cabinet Office, alter this legal position.

b. The UK Parliament Joint Committee on Human Rights has recently recommended that the UK Government makes it mandatory that companies found to be involved in violations of human rights should be excluded from public procurement processes, and so the direction of travel on this issue may be towards greater regulation and enforcement in the future (rather than the current voluntary exclusion process).

Tareq Shrourou, Claire Jeffwitz

Appendix A

(All emphasis added)

International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)

Chapter 2, Commentary

"….[T]he conduct of certain institutions performing public functions and exercising public powers…is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government."

…

Article 4 "(1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the state. (2) An organ includes any person or entity, which has that status in accordance with the internal law of the State."

Commentary

…

"(6) …[T]he reference to a State organ in article 4 is intended in the most general sense….It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level…'

…

(8) Likewise, the principle in article 4 applies equally to organs of the central government and to those of regional or local units…'

…

(12) The term "person or entity" is used in article 4...in a broad sense to include any natural or legal person, including…[any] other body exercising public authority, etc. The term "entity" is used in a similar sense…"

…

Role of local government in the promotion and protection of human rights – Final report of the United Nations Human Rights Advisory Committee (A/HRC/30/49) (2015)

…
(17) As a matter of international law, the State is one single entity, regardless of its unitary or federal nature and internal administrative division. In this regard, only the State as a whole is bound by obligations stemming from international treaties to which it is a party. Thus by becoming a party to an international human rights treaty, a State assumes obligations to respect, protect and fulfil human rights…Furthermore, a State appearing before an international human rights complaints mechanism cannot defend itself by claiming that the alleged violation was committed by a local authority.

(21) It is the central government which has the primary responsibility for the promotion and protection of human rights, while local government has a complementary role to play….[T]he central government might need to take necessary measures at the local level, in particular, to establish procedures and controls in order to ensure that the State's human rights obligations are implemented. Local authorities are obliged to comply, within their local competences, with their duties stemming from the international human rights obligations of the State. Local authorities are actually those who are to translate national human rights strategies and policies into practical applications….Institutionalized cooperation on human rights between the central and local governments can have a positive impact on the level of implementation of the international human rights obligations of the State.' …

(27) Human rights duties of local government follow the classical tripartite typology of States' human rights obligations, namely, the duty to respect, the duty to protect, and the duty to fulfil. The duty to respect means that local officials must not violate human rights through their own actions. …

(34)…Every person in charge of the local government must be aware of the obligations imposed by human rights. Often this awareness lacks a well-founded knowledge about the content and the scope of human rights. As a result, many local governments fail to understand and incorporate human rights into local policy and practice.' …

LAWYERS FOR PALESTINIAN HUMAN RIGHTS

LPHR briefing on the Gaza Reconstruction Mechanism: its ineffectiveness, its incompatibility with international humanitarian and human rights law obligations, and its future

July 2018

1. This briefing outlines why LPHR urges the UK government to use its influence to ensur significant improvements to the Gaza Reconstruction Mechanism (**GRM**) and make its future support for it conditional on such improvements. The GRM was established by an agreement made between the Government of Israel, the Palestinian Authority and the United Nations in September 2014.

2. It is a pertinent time to highlight this critical issue following the announcement on 15 February 2018 by the UN Special Coordinator for the Middle East Peace Process, Nickolay Mladenov, that the GRM is to be subject to 'a joint review by the three parties to the GRM agreement to improve its functionality, predictability and transparency'. No date, however, has been disclosed as to when this review will take place.

3. At the time of its establishment in 2014, the GRM was stated to be a 'temporary access mechanism'. However, nearly four years on, it troublingly appears to be entrenched. There is no indication that the review will include the formation of a timetable for ending the GRM.

4. We are deeply concerned that the GRM effectively perpetuates and gives tacit approval to the illegal closure imposed on Gaza by successive Israeli Governments since June 2007. We are also seriously concerned that the GRM agreement is incompatible with fundamental legal obligations under international humanitarian law, human rights law and UN law, that are relevant to meeting the humanitarian needs of the people of Gaza.

5. Our concerns are based on analysing a confidential January 2015 legal opinion (‘**the Legal Opinion**’) by Nigel White, Professor of Public International Law at Nottingham University, commissioned by Diakonia International Humanitarian Law Resource Centre, and made public in 2016. It provides a detailed legal analysis raising significant concerns about the legality of the GRM, and how it effectively consolidates the illegal closure imposed on Gaza which has created a catastrophic humanitarian cost for its population.

The GRM has largely not been effective in providing for the reconstruction of Gaza

6. Crucially, the GRM has largely not been effective in relation to its stated aim of reconstruction following the immense damage caused by Israel’s 2014 military bombardment of the Gaza Strip.

7. During the Israeli military offensive between 7 July 2014 and 26 August 2014, over 19,000 family homes in Gaza were destroyed or severely damaged, meaning that reconstruction of homes became an urgent and critical post-conflict issue. However, the UN reported in September 2017 that of the 100,000 people internally displaced at the end of the conflict, an estimated 29,000 (over 5,500 families) remained internally displaced three years on, due to access restrictions on basic construction materials and a lack of funding. Furthermore, the overall housing shortage in Gaza had increased to 120,000 housing units, from 71,000 in 2012.

8. There is also a severe water and waste-water crisis in Gaza, where 97 per cent of its water is unfit to drink. In this regard, the UN reported in July 2017 that construction of three Short Term Low Volume (**STLV**) desalination plants, which will produce an additional 13 Million Cubic Metres of water, as well as of sewage treatment plants in both the North, Middle and South areas of Gaza, 'have been delayed in large part due to restrictions on imports of the necessary dual-use material, and only 23% of the planned STLV interventions forecast to be completed by 2016 were achieved'. The UN reports that the completion date for the remainder is now expected in 2019 at the earliest.

9. In relation to the current electricity crisis, which causes ongoing suffering for the residents of Gaza, the UN reported in July 2017 that the functioning of Gaza's sole power plant is, in part, 'impaired by Israeli restrictions on imports of spare parts and equipment'. In its May 2018 Early Warning Indicators bulletin, the UN revealed that in both April and May 2018, Gaza received on average only 4 hours of electricity per day, and that between May 2017-May 2018, residents of Gaza have not received more than an average of 6 hours of electricity per day.

The GRM consolidates and serves to legitimise the illegal closure of Gaza

10. The GRM agreement starts by setting out its five overarching parameters, of which the first is 'to satisfy Israeli security concerns related to the use of construction and dual use material', signalling that such concerns are prioritised over all other considerations. It then goes on to detail more specific requirements.

11. The GRM crucially ensures that control over the supply of materials into Gaza remains firmly in the hands of the Israeli government. Meanwhile, the Palestinian Authority and UN bear the burden of ensuring sufficient resources are in place to meet the GRM's extensive monitoring requirements.

12. Basic construction materials such as cement and steel bars have been classified by Israel as being dual civilian and military use in specific relation to Gaza. This is an overly broad and harmful classification that is not replicated in the international standard for

classification of dual-use goods, the Wassenaar Arrangement, of which the participating states include the UK, all other EU member states, the United States and Russia.

13. Israel's definition of basic civilian items such as construction materials as “dual use” is not challenged by the GRM agreement, which accordingly permits extremely onerous restrictions on the entry of such materials under the GRM, and allows for blanket bans at any point.

14. The core feature of the GRM agreement thus ensures the control over the supply of materials into Gaza remains firmly with the Israeli government, in addition to failing to mandate that a certain amount of materials must be allowed through to meet the humanitarian needs of the people of Gaza. This led the Legal Opinion to strikingly find:

'[The GRM] *is designed to complement the closure to ensure that a protracted humanitarian crisis in Gaza is maintained.... [it also] serves to legitimate the closure which is... illegal under international law, and, further, to occasion a number of violations of specific human rights and humanitarian law obligations*'.

The GRM is incompatible with International human rights law

15. The Legal Opinion details that the 'severe scarcity of building supplies caused by the GRM, by reason of its severe restriction of building supplies entering into Gaza', places the following fundamental human rights in jeopardy of violation: the right to life; the right to self-determination of the Palestinian people; freedom from inhuman or degrading treatment; liberty of movement and freedom to choose residence; the right to an adequate standard of living, including food, clothing and housing; the right to health; and the right to education.

16. While the Israeli government is directly responsible for any such violations as a consequence of being an occupying power and maintaining the illegal closure of Gaza through the GRM, the Legal Opinion finds that the UN is potentially involved with and/or complicit in them through becoming a party to the GRM agreement and assisting in implementing it.

The GRM is incompatible with International humanitarian law

17. The Legal Opinion notes that 'under international humanitarian law, Israel, as an occupier, has the obligation to agree to “relief schemes” if the whole or part of the population of an occupied territory is “inadequately” supplied and further, it shall facilitate such schemes “by all the means at its disposal”'.

18. The Legal Opinion also notes that international law on occupation does allow for search and regulation of relief supplies for 'imperative reasons of security', and references the Government of Israel claims that building materials are 'dual use' because they may be used to build tunnels for the purpose of launching attacks on Israeli territory.

19. However, the Legal Opinion concludes that, on the assumption that this fear is well-founded, the control-over-relief provision in international humanitarian law 'would only allow it to restrict those supplies that it has "serious reason" to believe will be used in this way, and would not justify the assertion of control rights over all building supplies'.

20. The Legal Opinion accordingly concludes that the 'Government of Israel is in breach of its obligation to provide humanitarian relief' by allowing control over access to humanitarian relief through the GRM that is so onerous that the basic requirements of alleviating suffering in Gaza cannot be met. It further asserts that the GRM's prioritisation of control above the need for humanitarian relief efforts means that it 'in effect, is a continuation, in a different form and in relation to specific supplies, of Israel's blockade [closure] of Gaza, which is in clear violation of international humanitarian law'.

The GRM is incompatible with UN Law

21. The Legal Opinion identifies that the UN's role under the GRM is incompatible with the UN Guiding Principles on Humanitarian Assistance, which require that humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality, and in ways that are supportive of recovery and long-term development. Far from allowing for the provision of desperately needed building materials which supports long-term recovery and development, the Legal Opinion states that the GRM effectively facilitates the continuation of the Israeli government's closure of the Gaza Strip by limiting building materials to much lower quantities than needed.

22. It also finds that in light of the numerous duties placed on the UN under the GRM that effectively serve the Israeli government, by becoming a party to the GRM agreement, the UN has agreed to undertake a partial role in violation of its own principles.

The GRM is an internationally wrongful act and the UN did not perform adequate human rights due diligence in becoming a party to the GRM

23. The Legal Opinion contends that the GRM amounts to an internationally wrongful act that entails the international responsibility of the Government of Israel, the Palestinian Authority and the UN for acting in breach of international law obligations. This is because the GRM manifests the illegal closure of the Gaza Strip and facilitates the Israeli government's commission of wrongful acts, namely the violations of international human rights and international humanitarian law caused by inadequate availability of

reconstruction materials. International law requires the cessation of the internationally wrongful act and the provision of remedies to those harmed by the act.

24. The Legal Opinion also finds that the UN did not meet its human rights due diligence obligations to protect human rights and uphold international law in all its operations, by not doing enough to ensure that the GRM contained enough (indeed any) substance on human rights protection and a minimum level of compliance with humanitarian law. The UN's human rights due diligence obligations are to ensure that its involvement does not directly violate the rights of individuals affected, and also that its engagement does not enable the Government of Israel to violate rights.

25. To ensure the UN fulfils its international law obligations, to desist from internationally wrongful conduct, and further to meet its due diligence obligations that require it not to be implicated in any internationally wrongful conduct and to prevent enabling the Government of Israel from continuing its internationally wrongful conduct of its closure of Gaza, the Legal Opinion recommends that the UN should:

- Urgently seek to amend the GRM agreement to include guarantees that it meets basic human rights and humanitarian law obligations, and that Israel should not be able to block imports that are necessary to meet this objective; or,

- Withdraw from the GRM and seek to set up a UN-led mechanism for the delivery of building materials (and humanitarian relief more broadly) in which its role as a neutral and impartial organisation is regained, and in which it is empowered to deliver humanitarian assistance free from Israeli security controls.

The GRM has created a black market which directly undermines its cited security purpose

26. The controlled shortage of construction materials allowed by the GRM, due to the Government of Israel's citing of security concerns over possible use for building tunnels, has been admitted by Israel's military as being one of the causes for the emergence of a black market for construction materials. As reported by the Israeli human rights organisation, Gisha, in 2015, Col. Grisha Yakubovich, head of the Civil Department of the Coordinator of Government Activities in the Territories told Israeli TV news:

'Because of the situation in Gaza, the same people who are found eligible to receive construction materials prefer to sell them in the black market, and now there is, unfortunately, a black market in the Gaza Strip, and all the people who aren't supposed to buy, do so from the black market'.

27. Gisha further stated in July 2015 that 'Israel's senior security officials have repeatedly claimed that allowing Gaza's reconstruction is more than just a humanitarian gesture; in fact, that it is in Israel's interest from a security perspective'.

28. Gisha's considered position on the GRM, also stated in July 2015, is that it 'should be ended and restrictions must be removed on the entrance of basic construction materials which serve no one'.

Minister Alistair Burt's evidence on the GRM before a parliamentary committee in June 2018

29. As confirmed by Minister Alistair Burt on 19 June 2018 in oral evidence before the International Development Committee's inquiry on the humanitarian situation in Gaza, the UK Government has supported the GRM since its inception and has provided £1.6m funding towards it. The Minister further stated the UK will continue to support it.

30. However, the Minister's oral evidence did not address the compatibility of the GRM with fundamental international human rights and humanitarian law obligations. We are also concerned that by continuing to provide backing to the GRM, the important ministerial statements of support that Burt provided during his oral evidence on Gaza's urgent infrastructure needs in areas such as electricity, water and sanitation are directly undermined; the intensification of reconstruction and economic development is not compatible with the UK's ongoing support for the GRM in its current form.

Three urgent actions for the UK government to consider in relation to the future of the GRM:

31. Against the context above, we make the following recommendations to the UK government in regard to the future of the GRM so as to ensure that its continued position on the GRM is consistent with its duty to uphold respect for international law:

i) Work with all parties to urgently revise the GRM so as to: a) include guarantees that sufficient levels of humanitarian relief in the form of construction materials are expeditiously delivered to Gaza by specified time deadlines to meet basic human rights and humanitarian law obligations; b) provide flexibility in the operation of the GRM and independent expert oversight to ensure the rights and humanitarian needs of the people of Gaza are being progressively realised, c) prevent Israel from blocking imports that are necessary to meet these objectives, and d) provide a clear timeframe for ending the GRM and the ending of restrictions on the entrance of basic construction materials.

ii) If the above cannot be agreed, the UK should support a UN withdrawal from the GRM and the establishment of a UN-led alternative mechanism for the delivery of building materials and other humanitarian relief in which a) the UN's role as an impartial organisation is regained, and b) it is empowered to deliver humanitarian assistance free

from overly broad and harmful Israeli security controls and possible prohibited involvement in international wrongful conduct.

iii) Urge Israel to bring its definition of “dual use” items in line with international standards, such as the Wassenaar Arrangement, to enable it to meet its international humanitarian and human rights law obligations owed to the people of Gaza.

Tareq Shrourou, Natalie Sedacca