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HUMAN RIGHTS SITUATION IN PALESTINE AND OTHER OCCUPIED ARAB TERRITORIES

**Joint written statement* submitted by Al-Haq, Law in the Service of Man, and
Defence International (DCI), non-governmental organizations in special consultative
status**

The Secretary-General has received the following written statement which is
circulated in accordance with Economic and Social Council resolution 1996/31.

[20 February 2008]

* This written statement is issued, unedited, in the language(s) received from the
submitting non-governmental organization(s).

Israeli High Court of Justice strips civilians in the Gaza Strip of status as protected persons under occupation and sanctions the siege

As Palestinian, Israeli and international human rights organisations, we the undersigned, would like to draw the attention of the members of the Human Rights Council (the Council), to the recent decision of the Israeli High Court of Justice (HCJ) in relation to the follow-up to Council resolution A/HRC/S-6/L.1, which demanded that Israel, the Occupying Power, lift the siege imposed on the Gaza Strip.

A petition (case number: HCJ 9132/07) was submitted on 28 October 2007 to the HCJ by 10 Israeli and Palestinian human rights organisations calling for an injunction against the State's plans to cut electricity and fuel supplies to the occupied Gaza Strip. On 30 January 2008 the HCJ rejected the petition. In a vague statement in the ruling, arguably setting a judicial precedent, the HCJ declared an end to Israel's "effective control" of the Gaza Strip and thus the end of Israel's occupation of the Gaza Strip. As a result of this conclusion and an incomplete and erroneous factual analysis of the impact of the cuts in fuel and the then proposed cuts in electricity, the HCJ then declared that the implementation of reductions in fuel and electricity supplies to the resource dependent Gaza Strip, were lawful according to Israel's "humanitarian" obligations under international law. The HCJ accepted the State's assertion that under the law of armed conflict, such obligations require no more than "the minimum humanitarian needs" and applied the State's extremely narrow interpretation of the requirements of "the minimum." By unilaterally declaring an end to the Israeli occupation of the Gaza Strip, Israel and its highest judicial body have effectively stripped the civilian population of the protection provided under international humanitarian law for civilians under occupation and limited Israel's obligations exclusively to those rules related to ongoing hostilities through distortion of the applicable legal norms.

The HCJ's professionally negligent legal findings

The "end of the occupation" of the Gaza Strip

During the hearing, the Court declined to engage in discussion with the parties about the relevant international legal framework for considering the lawfulness of the fuel and electricity cuts. Instead, the Court stated in its ruling:

"[W]e note that since September 2005 Israel no longer has effective control over what takes place within the territory of the Gaza Strip [...] Under these circumstances, the State of Israel bears no general obligation to concern itself with the welfare of the residents of the Strip or to maintain public order within the Gaza Strip, according to the international law of occupation."

In a superficial interpretation of "effective control," the test established under international law to determine the existence of a situation of occupation, the HCJ ruling asserts that the fact that "the military government that previously existed in the territory was abolished" and "Israeli soldiers are not present in that area on an ongoing basis and do not direct what goes on there" is sufficient to show that Israel is not in "effective control" of the Gaza Strip. However, "effective control" exists in a territory or country if the military forces of an adversary could, "at any time they desired assume physical control of any part of the country." The parameters of this test have been reiterated by various courts, including the

International Criminal Tribunal for the former Yugoslavia, which ruled that one of the guidelines for determining occupation was whether “the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt.” Numerous large scale ground incursions, air strikes and artillery attacks inside the Gaza Strip since Israel’s so-called disengagement in September 2005 have demonstrated Israel’s ability to assume physical control of any part of the area at any time it desires.

Further, it is well recognised that the concept of “effective control” encompasses both military and administrative control over the occupied territory. Israel retains control over Gaza’s airspace, territorial waters and land borders, in addition to the civil population registry, meaning that Israel, rather than the Palestinian National Authority or any other authority, has the power to grant citizenship and issue identity cards. The HCJ did not acknowledge that the exercise of these administrative powers is constitutive of “effective control.” The Court’s ruling therefore betrays a wilfully incomplete analysis of the elements of “effective control.”

Implications of the “end of the occupation” on Israel’s humanitarian obligations

The result of the denial of Israel’s occupation of the Gaza Strip is the lessening of its obligations towards the civilian population. The Court has allowed a dangerous precedent in permitting the Israeli government to limit its obligations towards the civilian population of the occupied Gaza Strip exclusively to those of a combating party during hostilities. The HCJ, for example, accepted the State’s argument that Israel’s humanitarian obligations under customary international law are derived from Article 23 of the Fourth Geneva Convention and Article 70 of Additional Protocol I. These articles are not part of the specific rules related to occupation and require only a passive obligation by one party to an armed conflict to permit a third party to provide a certain limited basket of consignments and relief to the enemy civilian population.

By contrast, as an Occupying Power, under the Fourth Geneva Convention Israel’s obligations toward the people of the Gaza Strip include not only a duty to not hinder the supply of relief and consignments to the civilian population but also a positive duty to “bring in the necessary foodstuffs, medical stores and other articles...,”¹ of “ensuring and maintaining, with the cooperation of the national and local authorities, the medical and hospital establishments and services, public health and hygiene...”² and “agree to relief schemes...and facilitate them by all the means at its disposal...[s]uch schemes...shall consist, in particular, of the provision of consignments of food stuffs, medical supplies and clothing”³. It is noted that under the law of occupation, the provision of relief for the civilian population of the Gaza Strip through third party intermediaries does not relieve Israel, the Occupying Power, of the above obligations.⁴

¹ Article 55, Fourth Geneva Convention.

² Article 56, Fourth Geneva Convention.

³ Article 59, Fourth Geneva Convention.

⁴ Article 60, Fourth Geneva Convention.

The HCJ correctly accepted the State's obligations under Article 54 of Additional Protocol I, which codifies the customary prohibition on "removing or rendering useless objects indispensable to the survival of the civilian population." This norm applies during international armed conflict irrespective of occupation. However, the HCJ failed to find that the cut in fuel and ostensibly electricity supplies would so affect objects indispensable to the survival of the civilian population. The HCJ disregarded evidence, including documentation issued by UN agencies, which clearly indicated that the fuel cuts already underway, even before a cut in electricity was imposed, were gravely impacting upon the functioning of essential civilian infrastructure, including hospitals and water and sanitation services.

The HCJ ignored the absolute prohibition on collective punishment and reprisals and failed to uphold the principle of humanity

The HCJ's ruling recognised some of Israel's customary international law obligations while ignoring others. Pre-eminent among those customary international law obligations that the HCJ chose to ignore are the absolute prohibitions on collective punishment and reprisals against protected persons.⁵ Yet, the punitive intention behind the fuel and electricity cuts was never masked by the Israeli government. Even while awaiting the HCJ's decision, Israeli Prime Minister Ehud Omert asserted that the relentless attacks on the Gaza Strip serve, in part, the purpose of "signalling to the population in Gaza that it cannot be free from responsibility to the situation." While we condemn any indiscriminate attacks on Israeli civilians by Palestinian armed groups in the Gaza Strip, these illegal acts provide no justification in law for reprisals against or collective punishment of the civilian population of the Gaza Strip. Moreover, the HCJ should have interpreted Israel's obligations towards the civilian population in light of the customary international law norm that protected persons must be treated humanely at all times. These three norms of customary international law apply during international armed conflict, irrespective of occupation, and they admit to no exceptions for military necessity.

The failure of the HCJ to interpret international law in good faith and the Council's role

As this last decision highlights, the Israeli HCJ continues to show itself to be incapable of acting as an independent and critical examiner of Israeli government policy or of interpreting Israel's international legal obligations in relation to the Occupied Palestinian Territory (OPT) in good faith. While we recognise that Israel has thus far proven to be impervious to the measures taken by the Council to hold it accountable for violations of these obligations, we urge the Human Rights Council to publicly address this urgent development in the full realisation of the future it portends for the civilian population of the occupied Gaza Strip. To this end, we would welcome a statement from the Council reiterating the applicability of the law of occupation to the Gaza Strip as part of the OPT.

⁵ The customary prohibitions on reprisals and collective punishment are codified in Article 33 of the Fourth Geneva Convention.