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HUMAN RIGHTS SITUATION IN PALESTINE AND OTHER OCCUPIED ARAB TERRITORIES

**Written statement* submitted by Al-Haq, Law in the Service of Man,
a non-governmental organization 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.

[31 August 2009]

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

**Call for the immediate establishment of an international Tribunal or referral to the
ICC for crimes committed during ‘Operation Cast Lead’ – an offensive
by Israel against the Palestinian people in the Gaza Strip**

On the morning of 27 December 2008, Israel launched its offensive attack, ‘Operation Cast Lead’, on the Palestinian people confined in the Gaza Strip. 80 warplanes carried out a devastating surprise campaign whose scale and intensity inflicted widespread destruction throughout the Gaza Strip. Operation Cast Lead lasted for 22 days, during which time the Palestinian people suffered aerial attacks and an intensive ground invasion. Israel’s offensive resulted in the killing of more than 1,400 Palestinians and left more than 5,000 Palestinians wounded. Over 83 per cent of those killed were civilians and included 342 children.¹ The large scale deprivation of civilian lives was coupled with extensive property destruction. 11, 154 civilian homes were damaged or destroyed during the offensive, affecting more than 100,000 Palestinian residents, half of which are children.²

Operation Cast Lead occurred in the context of the persistent occupation by Israel of the Occupied Palestinian Territory (OPT). Israel, as an Occupying Power, is concurrently bound by international humanitarian law and human rights law with regards to the Palestinian people living in the OPT, which includes the Gaza Strip. Despite Israel’s claim that, following their disengagement in 2005, the Gaza Strip is no longer occupied, Israel retains effective control over the territory under international law. This is demonstrated by Israel’s ability to assume physical control of the Gaza Strip during the offensive. Furthermore, Israel continues to have military and administrative control over Gaza’s external borders, restricting the movement of goods and people. As such, Israel is precluded from justifying its actions during Operation Cast Lead on the basis of self defense; the state of occupation has already triggered the exclusive applicability of laws regulating the means and methods of armed conflict and the question of whether the initial aggression was justified or otherwise is therefore irrelevant. The relevant legal framework falls under the ambit of *jus in bello*, and the principles of military necessity, distinction and proportionality must be adhered to by Israel.³

It has been widely acknowledged that Israel has not adhered to its obligations under international law. In the words of the United Nations High Commissioner for Human Rights, “significant prima facie evidence indicates that serious violations of international humanitarian law as well as gross human rights violations occurred during the military operations of 27 December 2008 to 18 January 2009, which were compounded by the blockade that the population of Gaza endured in the months prior to Operation Cast Lead and which continues.”⁴ Furthermore, former Human Rights Council Special Rapporteur, Professor John Dugard, as part of the Independent Fact Finding Committee on Gaza to the League of Arab States concluded that the Israeli defence forces, as well as Palestinian militants, had committed war crimes, that the

¹ Al-Haq, “‘Operation Cast Lead’: A Statistical Analysis”, August 2009, pages. 2-3, also available at: <http://www.alhaq.org/pdfs/gaza-operation-cast-Lead-statistical-analysis%20.pdf> (accessed 26 August 2009)

² *Ibid.*, page. 8.

³ For more information relating to the applicability of Art 51 UN Charter, see Al-Haq, “Operation Cast Lead and the Distortion of International Law”, available at <http://www.alhaq.org/pdfs/OperationCastLeadandtheDistortionofInternationalLaw.pdf>.

⁴ United Nations High Commissioner for Human Rights Navanethem Pillay, of the United Nations High Commissioner for Human Rights on the implementation of the Human Rights Council resolution S-9/1, 13 August 2009 (A/HRC/12/37).

Israeli defence forces had committed crimes against humanity and that individual soldiers may have met the legal requirement of intent (*mens rea*) for genocide during Operation Cast Lead.⁵

The only appropriate resolution of the crimes committed during Operation Cast Lead is to ensure that the perpetrators are brought to justice. However, justice cannot be achieved within the Israeli domestic legal system due to the lack of effective legal remedies for Palestinians. This is illustrated by Israel's flawed judicial and investigatory apparatus. In a recent judgment, concerning a Palestinian attempt to challenge Israeli blockades on the supply of fuel and electricity in the Gaza, the Israeli High Court of Justice found that international humanitarian law applying to Occupying Powers is not applicable to Israel, and that Israel has no effective capability to enforce order and manage civil life in the Gaza Strip.⁶ The High Court of Justice accepted that Israel was under an obligation to 'fulfill the basic humanitarian needs of the Gaza Strip',⁷ but concluded that the obligation was being fulfilled, in spite of the dire situation in Gaza in which power outages in hospitals lasted for 6-12 hours every day and for 8 hours a day in central Gaza.

Israel has also conducted its own investigations into Operation Cast Lead, in which they presented a death toll of 1,166 Palestinians killed. Out of these, the report cited that 709 persons were ' Hamas terror operatives', and that only 295 Palestinians were 'uninvolved'.⁸ These numbers conflict with Al-Haq's human rights report on Operation Cast Lead,⁹ and reveals a deliberate misrepresentation by Israel of the number of Palestinian civilians killed.

Consequently, justice can only be served by the establishment of an independent, impartial, credible and transparent international Tribunal to preside over the crimes committed during Operation Cast Lead or a referral by the Security Council to the International Criminal Court. Israel, as an Occupying Power is not relieved from its obligations under international humanitarian law and human rights law and the international community is under a legal duty to ensure compliance with these obligations. Palestinian factions who committed international crimes during the offensive must also be held accountable. As such, the undersigned to this submission call for the perpetrators of war crimes and crimes against humanity to be held to account by an international Tribunal. The serious allegations that genocide may have been committed by individual soldiers in the Gaza Strip must also be investigated.

International law, similar to domestic law, cannot be expected to operate in a theoretical vacuum without recourse to enforceability through accountability and it hence depends on concrete actions. The undersigned do consider that international humanitarian law and human rights law must be upheld regardless of the nationality of the perpetrator and the position of the perpetrator within his/her own State or government. Hence, were a Tribunal established it must

⁵ Independent Fact Finding Committee on Gaza to the League of Arab States, Report of the Independent Fact Finding Committee on Gaza: No Safe Place, 30 April 2009.

⁶ HCJ 9132/07, *Jaber al Bassiouni Ahmed v. The Prime Minister*, High Court of Justice Judgment, para. 12.

⁷ *Ibid.*, para. 22.

⁸ Israel Ministry of Foreign Affairs Communication, "Vast majority of Palestinians killed in Operation Cast Lead terror initiatives", 26 March 2009, also available at: http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Vast_majority_Palestinians_killed_Operation_Cast_Lead_terror_operatives_26-Mar-2009.htm (accessed 26 August 2009)

⁹ Al-Haq, "'Operation Cast Lead': A Statistical Analysis", August 2009, pages. 2-3, also available at: <http://www.alhaq.org/pdfs/gaza-operation-cast-Lead-statistical-analysis%20.pdf> (accessed 26 August 2009)

be granted complete personal, territorial and subject-matter jurisdiction in order to effectively administer justice for the victims of the crimes committed and to create a body of law guaranteeing that legal duty bearers maintain respect for international peace and security.

The Human Rights Council plays a significant role in promoting justice in the international arena and in ensuring respect for international law. Endorsing the establishment of a Tribunal by a Security Council resolution or encouraging a referral of the situation by the Security Council to the International Criminal Court is the only suitable action that can be taken for the crimes committed during Operation Cast Lead. Should the Security Council fail in its duties, the undersigned call upon the Human Rights Council to set in motion a unilateral action by the General Assembly on the basis of General Assembly Resolution 377 to establish an international Tribunal. Due to an outcry by the international community, accountability has previously been sought, and hence been proven possible, by the creation of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Special Tribunal for Lebanon.

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