Joint written statement to Tenth Session of UN Human Rights Council by Al-Haq and Defence for Children International (DCI)

"*Accountability must be ensured*": Fact-Finding Mandate Must Enable Prosecutions as a Form of Reparations for Victims [1]

AL-HAQ INTERVENTION
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Al-Haq and DCI would like to express their concerns relating to the goals and mandate of the fact-finding mission established by the Human Rights Council (the Council) pursuant to resolution A/HRC/S-9/L.1. The goals and mandate appear to preclude the mission's usefulness in any eventual reparations scheme involving criminal investigations and, where evidence directs, prosecutions, for serious violations of international human rights and humanitarian law.

Reparations Goals Should Be Reflected in the Mandate

By the time the Council convened for the Ninth Special Session on 9 January 2009, fourteen days after the escalation in hostilities between the Israeli Occupying Power and Palestinian armed groups in the Gaza Strip began, reputable international, Palestinian and Israeli human rights organisations and UN agencies were widely reporting alleged violations of the laws and customs of war, including war crimes, many of which were likely to amount to grave breaches of the Fourth Geneva Convention. Nonetheless, the response at the UN level was minimal. The day previous to the special session, the Security Council passed a resolution that was limited to demanding a ceasefire by the parties to the conflict, while the General Assembly had yet to be seized of the matter.

The victims' high expectations for justice were therefore left in the hands of the Council. The UN High Commissioner for Human Rights (the High Commissioner), Ms. Navanethem Pillay, opened the Special Session of the Council by characterising its responsibility:

> "Accountability must be ensured for violations of international law. As a first step, credible, independent, and transparent investigations must be carried out to identify violations and establish responsibilities. Equally crucial is upholding the right of victims to reparation. I remind this Council that violations of international humanitarian law may constitute war crimes for which individual criminal responsibility may be invoked."[2]

Indeed the Council called for an investigation as a first step to ensuring victims' rights to reparations. However, the questions of concern to Al-Haq and DCI are two-fold:

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[1] Defence for Children International – Palestine Section also shares the views expressed in this statement.
[2] Statement of Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights to the Ninth Special Session of the Human Rights Council on the Grave Violations of Human Rights in the Occupied Palestinian Territory including the recent aggression of the occupied Gaza Strip, 9 January 2009. Available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/D78B7DAC697D3060C1257539003B5F3A?opendocument .

1) What is the scope of reparations envisioned by the Council; and
2) Does the mandate for the investigation reflect such a scope?

The mandate provided by the Council is "to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory." Al-Haq and DCI would welcome any recommendations for reparations resulting from this fact-finding mission, including restitution, compensation, rehabilitation or guarantees of non-repetition. However, where certain serious violations of international human rights law and violations of the laws and customs of war are alleged, international law and the interests of justice also require the contemplation of prosecutions, as a form of reparations.

Al-Haq and DCI are concerned that the current mandate of the fact-finding mission does not reflect an understanding of this obligation and precludes factual and legal findings useful to eventual reparations in the form of prosecutions. Any mandate which does not anticipate the possibility of eventual prosecutions would not adequately fulfil the responsibilities of the Council as expressed by the High Commissioner, namely accountability and reparations.

Reflections on Previous UN Investigations Reveal Faults in the Current Mandate

The mandate of the Human Rights Council's 2006 High-Level Commission of Inquiry on Lebanon (the Commission), was three-fold: 1) investigate the systematic targeting and killings of civilians by Israel, 2) examine the types of weapons used by Israel and their conformity with international law, and 3) assess the extent and deadly impact of Israeli attacks on human life, property, critical infrastructure and the environment. Regrettably, very little resulted from the good faith efforts of the members of the Commission.

There were two key issues related to the Commission's mandate which undermined the usefulness of its report, both generally, and specifically in relation to reparations in the form of prosecutions. First, the scope of envisioned reparations appears unclear from the mandate. Second, despite the *prima facie* evidence of serious violations of the laws and customs of war entailing individual criminal responsibility by the parties to the conflict in Lebanon, the mandate was not crafted to facilitate outcomes useful for reparations in the form of prosecutions.

The members of the Commission were forced to accept that in effect, the jurisdiction *ratione personae* of the mandate (only allowing for consideration of the actions of the Israeli military) barred an "investigation into a particular conduct during the course of hostilities [because an investigation] must of necessity be with reference to all the belligerents involved."[3] With such an analysis precluded, it is unsurprising that among the reparations-related recommendations of the Commission none explicitly call for criminal investigations. Instead, the Commission concludes that "[i]n order to establish responsibility for human rights violations, some aspects of the conduct of the IDF need more legal inquiry […]."[4] To Al-Haq and DCI's knowledge, no form of reparations to victims have been initiated as a result of the Commission's report and no further independent, impartial legal inquiry has been conducted. Further the usefulness of the

[3] Human Rights Council, *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1*, 23 November 2006, (A/HRC/3/2), para. 5.
[4] Ibid, para. 23.

Commission's report for any eventual litigious purposes remains limited by the aforementioned inchoate legal analysis resulting from the problems of the original mandate.

It is telling to compare the mandate of the Commission to that which was provided for the Commission of Experts (the Experts) established in 1992 by the Security Council in relation to hostilities in the Former Yugoslavia. The task of the Experts was singular: "examine and analyse information submitted […] with a view to providing […] conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia."[5] In both Lebanon and the former Yugoslavia, *prima facie* evidence of violations of the laws and customs of war warranted the intervention by the respective UN bodies, yet the language of the mandates given to the respective investigative commissions was decidedly different. The acute legal focus of the language in the Security Council mandate clearly indicates that it was drafted with a view towards the possibility of reparations in the form of prosecutions. Indeed, the Security Council established the International Criminal Tribunal for the Former Yugoslavia (the ICTY), in part, on the basis of findings and recommendations of an interim report of the Experts, with the Experts' reports subsequently turned over to the ICTY for evidentiary purposes. Based on the outcome of the Council's Commission on Lebanon, an inquiry arguably with a more defined mandate, Al-Haq and DCI anticipate similarly disappointing results in terms of reparations for victims of violations of international law committed during the recent hostilities between the Israeli Occupying Power and Palestinian armed groups in the Gaza Strip.

What the Interests of Justice and International Law Require of the Council

During the Ninth Special Session of the Council, mindful of both the gravity of alleged crimes and the failure of the other United Nations bodies to adopt concrete measures towards reparations for victims, Council members should have considered what both international law and the interests of justice required of them. International law requires that prosecutions be envisioned as a form of reparations. If the mission's outcome is to be useful to this end, particular expertise, rigorous analysis and sufficient financial resources are required, all of which must be understood from the outset and built into the mandate of the fact-finding mission. The dispatch of another fact-finding mission which is likely to be handicapped in its ability to conduct factual and legal analysis, similar to the problems faced by the Lebanon Commission, is clearly incompatible with the requirements of international law. In relation to what justice requires of the Council, Al-Haq and DCI are reminded of the words of the members of the Commission for the Former Yugoslavia who, in their interim report to the Security Council, stated:

> "It is particularly striking to note the victims' high expectations that this Commission will establish the truth and that the International Tribunal will provide justice. All sides expect this. Thus, the conclusion is inescapable that peace in the future requires justice, and that justice starts with establishing the truth."[6]

Al-Haq and DCI urge Council Member States to:

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[5] Security Council Resolution 780, 6 October 1992, (S/RES/780), para, 2.

[6] Security Council, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992),* 27 May, 1994, (S/1994/674), Section V - General Conclusions and Recommendations.

- Amend the mandate of the fact-finding mission to explicitly reflect the goals of a) establishing the truth and b) reparations which make take the form of prosecutions; and
- Create a terms of reference for the fact-finding mission which states that all evidentiary materials gathered during the course of investigations be collected and stored in such a manner that does not impede their use for possible future prosecutions.