

October 23, 2006

To:
Brigadier General Avihai Mandelblit
Military Advocate General



By fax

Dear Sir,

Re: **Closure of the Office of Legal Advisor at Erez DCO**

1. On September 19, 2006, we received notification from Lieut-Col. David Binyamin, Head of Civilian and International Branch, International Law Division, who was formerly the Military Legal Advisor to the Gaza Strip, that the office of the legal advisor in the Erez DCO had been closed as part of the implementation of the "disengagement plan" and the end of the Israeli occupation of the Gaza Strip. Below is the position of HaMoked – Center for the Defence of the Individual on this matter.
2. Cancelling the office of the legal advisor is yet another of Israel's attempts to distract attention away from the human rights violations it carries out in the Gaza Strip and shirk its duties and responsibilities, under humanitarian and international law, toward the protected residents therein.
3. The closure of the legal advisor's office is but a "cosmetic" act designed to strengthen Israel's claim that the Gaza Strip is indeed no longer under military rule. The practical functions of the office of the legal advisor have not been cancelled, nor has the need for a counselling body ceased – this is due to Israel's continued control of the Gaza Strip. The responsibilities of the advisory office have been distributed among several military offices, according to subject matter. This attests to the fact that the move was formal, lacking any real substance and reflecting no substantial change.
4. It is customary that an occupying state officially proclaims a certain area as occupied territory. However, occupation is possible without such a proclamation when the state in question has effective control of that territory.

5. Over one year ago Israel removed all its settlements and military facilities from the Gaza Strip. The question remains whether the removal of the settlements and the lack of constant Israeli physical presence in the Gaza Strip signify the end of Israeli occupation in the Gaza Strip or retreat and redeployment only?

When is a Territory Considered under Occupation according to International Conventions?

6. The conditions for the existence of occupation are laid out in article 42 of the Hague Convention,¹ according to which a "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." This convention now forms part of customary international law as well as part of the statute of the International Court of Justice.²
7. In view of the above, the convention has been applied to all states, including those which did not exist at the time of signing. It applies to Israel also. Israel's Supreme Court has also acknowledged the applicability of this convention to Israel in a series of judgments.
8. Following World War II and in light of the importance of and necessity for accuracy in defining occupation, article 2 of the Fourth Geneva Convention was reframed and extended. According to this article: "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."
9. Article 1(4) of the first Protocol Additional to the Geneva Conventions of 12 August 1949, (1977), establishes that "[t]he situations referred to in the preceding paragraph [which deals with article 2 of the Convention] include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

¹ Convention Respecting the Laws and Customs of War on Land, (Hague) 1907, article 42.

² Statute of the International Court of Justice, Article 38.

10. The advisory opinion of the International Court of Justice regarding the separation wall, unequivocally established that the Gaza Strip and the West Bank were occupied territories and that the laws of occupation applied to them.
11. The aforementioned definitions indicate that the existence of occupation is not conditional upon the physical presence of the occupying power in each and every part of the occupied territory, nor is such presence a condition for the applicability of the laws of occupation to that territory. It suffices that the power has influence and control over a territory in a significant and conspicuous manner for that territory to be under occupation. The size of the occupying forces is also irrelevant, as the legal test is one of control of and effective influence in said territory.

Has the Disengagement Plan indeed Severed Israeli control of the Gaza Strip

12. After August 2005, Israel unilaterally announced the termination of the military government in the Gaza Strip, claiming that it no longer controlled the Strip as it had no physical presence therein.
13. At the same time, Israel continued to control the Palestinian population registry, the border crossings, free movement of civilians to and from the Strip, the Palestinian economy and tax system, land, air and sea space. This in addition to conducting extensive military activity in the Strip.

Border Crossings following Implementation of the Disengagement Plan

14. Border crossings have always been symbols of stability, prosperity, development and economic security for any state or other political entity. There is a positive correlation between the stability of a state or other political entity's border crossings and their independence from the situation inside it and the general economic situation of said entity. Border crossings are considered one of the foremost dimensions of the independence of a state or any other political entity.
15. On September 8, 2005, Israel announced the closure of the Rafah crossing until further notice. Later, on November 14, 2005, following the intervention of the American Foreign Secretary, the Israeli and Palestinian sides reached the Agreement on Movement and Access which was to regulate the operation of the crossing points in the Gaza Strip, the Beit Hanon-Erez crossing, the safe passage between the West Bank and Gaza Strip and the crossings used for import and export of goods –the Karni and Kerem Shalom crossings.
16. Israel's control over the Gaza Strip crossings did not cease. In practice, it is Israel that determines when each crossing opens or closes and who passes through it. The closure of the crossings correlates to the general

state of security in Israel with no regard for the needs of the Palestinian people, the residents of the Gaza Strip among them.

17. Israel periodically declares the sweeping closure of an essential Gaza crossing point "until further notice". This constitutes collective punishment of the Palestinian people. The press often reports of the death of Palestinian residents after they had waited for days and weeks for Israel to open the Rafah crossing.
18. Below is data collected by the United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA)³ for the week of September 13 to 19, 2006:

Crossing	Sept. 13	Sept. 14	Sept. 15	Sept. 16	Sept. 17	Sept. 18	Sept. 19
Erez ^t			closed		closed	closed, except medical cases	
Rafah ^o	closed	closed	closed	closed	closed	closed	closed
Sufah	open	open	open	open	closed (Saturday)	open	open
Karni	open	open	open	open	closed (Saturday)	open	open
Kerem Shalom	open	open	closed	closed	closed	open	open
Nahal Oz	open	open	open	open	closed (Saturday)	open	open

19. The closure of the crossings is a function of the general political situation in Israel and is used as a tool for collective punishment of the Palestinian people in the Gaza Strip. Israel continues to control the crossings as a means of putting pressure on Palestinian residents and controlling their lives.

Israel's Control over the Gaza Strip Air and Sea Space

20. Dozens of fishing boats are currently docked on the shores of the Gaza Strip, yet no one can use them. This is a result of Israel's control of the Gaza Strip sea space. The UNOCHA report states:

³ <http://www.humanitarianinfo.org/opt/docs/UN/OCHA/WBN173.pdf>

⁴ According to the report, the Erez crossing was closed for Palestinian workers as of March, 12th and was open only for humanitarian cases and members of the international community.

⁵ On September 24, 2006, Al Quds newspaper published a report according to which the crossing had become operational again, but that the number of passengers to Egypt was much lower than that of those returning to the Gaza Strip. This was "due to the citizens' fears of leaving the Gaza Strip and not being able to return because of the closure of the crossing for long periods of time." Indeed on September 26, 2006, Al Quds reported the crossing was closed once again.

Palestinians also continued to be prevented from fishing off the Gaza Strip. The fishing industry is estimated to support 35,000 Palestinians.⁶

Israeli management of the shores of the Gaza Strip is constant. Its control is absolute.

21. Israel also exclusively controls the air space of the Gaza Strip and continues to use sonic booms in it. These are not isolated incursions into the Gaza Strip skies: Israeli planes have full, constant, exclusive and intensive control of the air space of the Gaza Strip.

Israel's Control of the Palestinian Population Registry

22. The interim agreement of 1995 established that Israel would only maintain a copy of the population registry and update it as per the notifications of the Palestinian side. Israel, however, continues to control the Palestinian population registry. The Palestinian side is deterred from taking any action regarding the population registry which does not have the approval of the Israeli side. Moreover, Israel does not respect any updates made by the Palestinian side which it had not approved. In many other areas (visitor permits and granting of residency status) Israel maintains its authority, not just in practice, but also in accordance with the agreements.

Prisoners

23. According to article 77 of the Geneva Convention, "[p]rotected persons who have been accused of offences or convicted by the courts in occupied territory shall be handed over at the close of occupation, with the relevant records, to the authorities of the liberated territory." If the occupation has ended, Israel is obligated under international law to release Palestinian prisoners from the Gaza Strip. Instead, Israel continues to hold the prisoners within its territory, thus through its own actions, lending support to the legal conclusion that the occupation has not terminated. Indeed, there is a proposed bill before the Knesset designed to bypass the Geneva Convention, but for the time being, the sole reason for holding the prisoners is the continuation of the occupation.

Criticism of Israel's Actions in the Gaza Strip

24. Israel still has an impact over the lives of Palestinians in the Gaza Strip. It influences their quality of life, their economy and their freedom of movement. Mr. John Dugard, the UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967, has stated that the Gaza Strip is a large prison the key to which Israel has thrown away. He maintains that after the implementation of the disengagement plan:

⁶ <http://www.humanitarianinfo.org/opt/docs/UN/OCHA/WBN173.pdf>

Gaza may no longer be colonized, but it is still controlled by Israel. Israel controls the borders of Gaza, its territorial sea and its airspace. Its residents are denied free access to the West Bank and neighbouring countries. Israel strictly controls the traffic of goods into and out of the territory. In the weeks following the withdrawal Israel subjected Gaza to intensive bombardment and sonic booms and it has revived its practice of targeted killings of militants. Over 650 Palestinian prisoners from Gaza are still detained in Israeli jails. In these circumstances, and in the light of the fact that Gaza is a component of the Palestinian territory that remains largely physically occupied by Israel, it is impossible to seriously suggest that Israel has ceased to be an occupying power. Israel therefore remains subject to the obligations of international humanitarian law, including the obligation to promote the welfare of the people of Gaza.⁷

25. The situation in the Gaza Strip deteriorated following the capture of the soldier Gilad Shalit. On June 26, 2006, Israel began massive military activity in the Gaza Strip, over the course of which, it has harmed Palestinian residents of the Strip – their lives, property and civilian infrastructure.⁸
26. Israel continues to claim that its activity in the Gaza Strip is anchored in its right to defend itself and constitutes a response to the launching of Kssam rockets by Palestinian groups and/or to the capture of the soldier Shalit. Yet Israel ignores international rules as well as the ICJ's ruling regarding the ways in which the right to self defense may be exercised.⁹ This right is subject to norms of necessity and proportionality. It is difficult to view Israel's military activity in the Gaza Strip today as proportional or as necessary for self defense. It is, rather, a sweeping collective punishment of the Palestinian people.

Conclusion

27. Indeed, Israel does not maintain constant physical presence in the Gaza Strip. It does, however, have frequent physical presence in it and continual effective control of it.

⁷ Dugard, Statement By Mr. John Dugard, Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967. item 71(c), 28 Oct 2005.

⁸ Recently, the UNDP published a report which reviews the damages caused by Israel in the Gaza Strip between June 26, 2006 and August 28, 2006, as a result of a military operation named "Summer Rains." More than 200 Palestinians were murdered during this operation. 44 of them (22% of the total number of casualties) were children. Within two months alone, the damage done to homes, infrastructure, agriculture, energy and industry reached up to 46 million dollars.

⁹ ICJ, Advisory Opinion on the Legality of the Threat of Nuclear Weapons, 18 July 1996.

28. Israel currently controls all resources in the Gaza Strip: its border crossings, the quantities of medicine and essential supplies going into it, the quantity of diesel currently used for operating the generators which supply electricity to the Strip, the Palestinian population registry and the tax system and has a crucial impact on the daily lives of the Palestinian residents.
29. Recent military activity in the Strip, dubbed "Summer Rains", proved beyond doubt, that Israel can enter the Strip at any given moment and carry out extensive military activity in it. According to a UN report published in May 2006, the number of Palestinian dead and wounded as a result of frequent military activity in the Gaza Strip has risen after the implementation of the disengagement plan and reached new heights, relative to the numbers before the implementation of the plan.¹⁰
30. In light of the above, Israel still controls the Gaza Strip, operates in it and is still considered an occupying power. The fact that it is more convenient for Israel to control the Gaza Strip through external closures and varying degrees of physical presence does not exempt it from its responsibilities and duties toward the protected population therein. It is Israel's duty to safeguard the lives of Palestinian residents of the Gaza Strip, care for their needs and maintain normative public life.

Respectfully,

Adv. Abeer Jubran

CC:

Adv. Menachem Mazuz, Attorney General

Adv. Osnat Mendel, Director, High Court of Justice Department, State Attorney's Office

Colonel Pnina Sharvit Baruch, Head of International Law Division

Lieutenant Colonel David Binyamin, Head of Civilian and International Branch, International Law Division

¹⁰ UN, The Humanitarian Monitor – occupied Palestinian territory, May 2006.