



Australian Federation
of Islamic Councils

Parliamentary Joint Committee on Intelligence and Security

A Review of the listing and re-listing of eight organisations as terrorist organisations

Submission made by the Australian Federation of Islamic Councils (AFIC) regarding the proposed listing of Hamas

May 2022

Parliament House

CANBERRA ACT 2600

Australian Federation of Islamic Councils

*The peak body for Australian Muslims representing
State and Territory Islamic Councils and Societies*



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The Australia Federation of Islamic Councils (AFIC) is Australia's internationally acclaimed peak Muslim body. Established in 1964, AFIC serves and inspires the Australian Muslim community to build a society free of discrimination, where all people are empowered to fulfill their potential as Australians while enriching the community with great Islamic values. We advocate for the oppressed and weak; build pathways and opportunities for the young to succeed; provide services that meet the needs of our ethnically diverse community, and educate Muslims and non-Muslims on the true beauty of Islam.

AFIC Values

- Accountability
- Trust
- Respect
- Justice
- Mercy
- Sincerity

AFIC values all lives and wants a safer and more inclusive Australia.

Acknowledgment of Country

AFIC acknowledges the Traditional Owners of the land we work on. We recognize the continuous Cultural History of the land, water, and community.

We pay respect to Elders, past, present and emerging; their memories, dreams and hopes.



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General Comments

1. Your invitation dated 31 March 2022 advised that
 - 1.1. Under the *Criminal Code Act 1995* (Criminal Code), your Committee has commenced a review of regulations listing
 - 1.1.1. Hamas,
 - 1.1.2. National Socialist Order,
 - 1.1.3. Hurras al-Din and Hay-at Tahrir al-Sham; and
 - 1.1.4. re-listing Abu Sayyaf Group, al-Qa'ida, al-Qa'ida in the Lands of the Islamic Maghreb, and Jemaah Islamiyah as terrorist organisations
 - 1.2. The listings were made in February and March and tabled in Parliament on 28 and 29 March 2022.
 - 1.3. The listing of these organisations triggers the application of a number of offences under the Criminal Code relating to membership of, support for or associating with the organisations.
2. Our submission relates to the Australian Government's proposed listing of Hamas.

Background to this listing

3. Division 102 of the Criminal Code Act 1995 (the Criminal Code) provides that for an organisation to be listed as a terrorist organisation, the Minister must be satisfied on reasonable grounds that the organisation:
 - 3.1. is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or
 - 3.2. advocates the doing of a terrorist act.
4. Hamas Izz al-Din al-Qassam Brigades was first listed as a terrorist organisation on 5 November 2003 and most recently re-listed on 4 August 2021.
5. Australia has listed Hamas as a terrorist entity in 2001 for financial sanctions under part 4 of the Charter of the United Nations Act 1945, as part of implementing United Nations Security Council Resolution 1373.
6. We wrote to your Committee on 18 October 2021 to express our extreme disappointment that public hearings did not include Palestinian, international law and humanitarian aid perspectives.

Request to not list Hamas in its entirety

7. It is submitted that your Committee recommends that the Australian Government not list Hamas for the following reasons, which should be read together.



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Insufficient grounds

- 7.1. In its entirety, including the civilian social services arm of Hamas, Hamas cannot be properly characterised as a terrorist organisation.
 - 7.1.1. No evidence has been tendered that establishes, on a balance of probabilities or to a *Bridgenschaw* standard, that
 - 7.1.1.1. the broader Hamas organisation has directly or indirectly engaged in, prepared, planned, assisted in or fostered the doing of a terrorist act,
 - 7.1.1.2. as defined by Australia's terrorism law or international law on terrorism.
 - 7.1.2. This decision relates to criminal conduct or moral wrongdoing, which may lead to grave consequences for accused persons and many others who will suffer human rights consequences. Thus, the decision-making process should involve closer scrutiny of the evidence (extending the principles of *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336).
 - 7.1.3. AFIC calls for the depoliticization of our listing processes to instil greater community confidence. Judicial consideration of the evidence to a *Briginshaw* standard should be required.

Insufficient legal basis – Constitutionality

- 7.2. It is submitted that the Commonwealth Government of Australia may not be authorised to list Hamas in its entirety as such a decision would lack a constitutional basis. In particular,
 - 7.2.1. The *Constitution* does not give federal Parliament express power to criminalise or regulate terrorist violence. Instead, support is drawn from a 'patchwork' of the enumerated legislative powers in s 51, including the defence power, the external affairs power (s 51(xxix)), and matters referred under the referral power (s 51(xxvii)). The federal Government has predominately relied upon the defence power at s 51(vi) of the *Constitution* to support Commonwealth national security laws.
 - 7.2.2. The listing of Hamas is not necessary to the naval or military defence of the Commonwealth.
 - 7.2.3. No substantiated evidence of a threat to the Commonwealth of Australia posed by Hamas was recorded in previous PJCIS reports.
 - 7.2.4. Hamas is not comparable to Al Qaeda or ISIL-inspired international terrorism (differing from the facts in *Thomas v Mowbray* (2009) 233 CLR 307).
 - 7.2.5. Further, we query whether the listing of Hamas would be constitutionally protected under the external affairs power and whether it would, in fact, breach Australia's obligations under international law.
 - 7.2.6. Australia may violate Article 3 of the Geneva Conventions (I-IV), which states that "Persons taking no active part in the hostilities... shall in all circumstances be treated humanely".



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- 7.2.7. Further, Australia ratified the International Convention for the Suppression of the Financing of Terrorism (9 December 1999) on 26 September 2002.
- 7.2.8. This convention only includes persons within the terrorism act definition who are not taking an active part in the hostilities in a situation of armed conflict.
- 7.2.9. As detailed further below, any violence by any arm of Hamas occurs in armed conflict. Therefore, it is subject to the rules of war, not international law on terrorism.
- 7.2.10. Therefore, we contend that the listing of Hamas in its entirety could be an ultra-vires application of the Government's constitutional powers as
- 7.2.10.1. the sources of international law that inform the external affairs power do not support terrorism listing of armed groups in armed conflict situations or penalising civilians.
- 7.2.10.2. the defence power is not enlivened by the facts.

Damaging precedent to the international rules-based order and national security

- 7.3. It is submitted that such a decision would fundamentally dilute and erode the international rules-based order and Australia's reliance on having standing as a nation that purports to uphold this order.
- 7.3.1. The collective right to self-determination is enshrined in human rights law (see Article 1.1 ICCPR and Article 1.1 of ICESCR), and some self-determination movements use violence. If that violence is deemed to be used in "armed conflict" by the International Committee of the Red Cross (ICRC), then humanitarian laws of war apply, and this is not treated as extremism or terrorism.¹
- 7.3.2. The ICRC clearly treats any violent arm of Hamas as an 'armed group' in an armed conflict situation and is, therefore, subject to the rules of war.
- 7.3.3. Armed groups may exercise self-defense, considering principles such as self-determination, duress, necessity, proportionality, or on the balance of other fundamental human rights.²
- 7.3.4. Israel prefers to characterise Hamas as a terrorist organisation. This fundamentally alters the applicable legal framework and subverts their obligations at a legal level. Moreover, it assassinates the 'character' of any armed Palestinian resistance at a public discourse level.
- 7.3.5. Australia's subversion of international humanitarian law, rejecting the International Red Cross classifications, the United Nations, and international legal consensus, diminishes Australia's national security.
- 7.3.6. Recently, the Australian Government was at pains to communicate with Russia about the need to uphold the international rules-based order.
- 7.3.6.1. The Prime Minister iterated that the erosion of this rules-based order would have national security implications for Australia in the Asia Pacific. ["What happens

¹ See the categorization of armed conflict as proposed by UNODC: [link](#)

² Ben Saul, "Defending 'Terrorism': Justifications and Excuses for Terrorism in International Criminal Law," Australian Yearbook of International Law 25 (2008).



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in Ukraine does not just affect Europe. As we're seeing here in Australia, it affects, of course, the rules-based order upon which our own region depends.”]

7.3.6.2. The Australian Prime Minister referred to Ukraine’s “independence and territorial integrity” as “the bedrock principles of a rules-based world order.”³

Therefore it stands to reason that Palestinian independence and territorial integrity, in the face of debilitating impacts of an extended blockade on Gaza, are ‘bedrock principles’ worth defending by nation-states across the globe.

7.4. It is submitted that such a decision would create an environment of impunity for Israel, incentivising and encouraging Israel to continue violating international law and removing any incentive to progress justice-based mechanisms and negotiations.

7.4.1. Such a decision to list Hamas entirely builds on the Australian Government’s advocacy on behalf of Israel to the International Criminal Court – arguing it does not have jurisdiction to review alleged war crimes and crimes against humanity by Israel and Hamas.

7.4.2. These measures are highly harmful to the prospects of justice and peace in the region by removing justice-based mechanisms that may guide improvements in behaviour.

7.4.3. This approach abandons Australia’s ratified commitments under the Rome Statute to pursue and prosecute war crimes, crimes of aggression and crimes against humanity.

7.4.4. Further information on relevant international humanitarian law is contained in **Annexure C**.

The survival of Palestinian people living under occupation

7.5. It is submitted that such a decision could lead to significant humanitarian impacts for Palestinian people living in highly impoverished and precarious conditions.

7.5.1. The Australia Palestine Advocacy Network (APAN) “strongly disagrees” with the listing since there was no advancement for the cause of peace. APAN has indicated the listing will cause “more suffering for the 2 million people currently surviving under a 15-year Israeli blockade.” APAN president Bishop George Browning wanted equal rules to apply to Israel and Palestine.

7.5.2. Existing sanctions have had a devastating effect, as outlined in **Annexure A**.

7.5.3. The impact on their human rights is outlined in **Annexure B**.

Damaging the prospects for a just resolution

7.6. The Australian Government may believe that terrorism listing is an essential step in degrading Hamas, but in reality, it will have a little real effect on the movement’s operations. The group, which has no formal presence in Australia, has been under many sanctions for more than two

³ Statement by the Prime Minister, 24 February 2022, <https://www.pm.gov.au/media/statement-russias-invasion-ukraine>



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decades. Above all, though, such a move would hurt conflict resolution efforts. We highlight this analysis by Senior Policy Fellow with the European Council of Foreign Relations, Hugh Lovatt, following the UK's decision to list Hamas. His analysis equally applies to Australia:

- 7.6.1. Violent arms of Hamas have a long history of indiscriminately firing rockets against the Israeli population, which constitutes a war crime under international law. In the blockaded Gaza Strip, where Hamas has ruled since 2007, the group has relied on authoritarian methods to preserve its power, carrying out torture, arrests, and other repressive acts to crush dissent among its own Palestinian population. Listing Hamas in its entirety as a terrorist organisation will not assist with this problem.
- 7.6.2. The question external countries should be asking is how best to deal with the group to prevent future armed violence and advance genuine peacemaking efforts.
- 7.6.3. Decades of international sanctions, targeted assassinations, and a choking blockade by Israel have failed to achieve this, nor have they decisively weakened Hamas.
- 7.6.4. Hamas remains an integral part of the Palestinian political system with a large popular support base despite what the Australian Government and Israel may prefer.
- 7.6.5. Even as it has come under international and regional pressure, Hamas's domestic standing has remained strong, bolstered by its latest war with Israel in May and the dismal performance of its secular rival Fatah in the West Bank. The group is also the de facto governing power in the Gaza Strip and thus an unavoidable interlocutor in any effort to prevent a renewed slide to war and to rehabilitate the strip – a reality underscored by Israel's own indirect negotiations with the group.
- 7.6.6. The aim of international engagement should be to incentivise and test Hamas's claims to moderation.
- 7.6.7. Listing Hamas will place the burden of mediation efforts and dialogue with Hamas on civil society organisations in countries where there is no terrorism listing.
- 7.6.8. Australian diplomats will have even less valuable insights into Hamas's strategic thinking.
- 7.6.9. In parallel to this, organisations operating on the ground have provided crucial humanitarian aid in response to Gaza's deepening socio-economic crisis. These crucial activities will now be under increasing pressure and legal risk in the wake of Australia's terrorism listing.
- 7.6.10. Existing sanctions have been in place for two decades and have not worked to bring peace, justice or stability to the region.
- 7.6.11. Economic growth for Palestine will never happen without foreign aid. While fiscal stability will constantly be undermined by ongoing violence, occupation and blockade, acquiescing to Israel's characterisation of Hamas as a 'terrorist organisation' brings the region no closer to resolution. In fact, it creates the conditions for an escalating environment by granting Israel even further impunity and denying normative frameworks for resolution by international humanitarian law.
- 7.6.12. Some claim that Palestinian children born under occupation are born to a fate worse than death because their suffering and deprivation of life are indefinite and normalised. From the moment they are born, Palestinians are robbed of having basic life aspirations and subjected to protracted control, surveillance and brutality by Israel. Palestinian



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suicide attacks have been linked to a prevailing sense of hopelessness and desperation amongst a generation with simply nothing to live for.

Australia's terrorism laws are not fit for this purpose

7.7. It is submitted that such a decision would be a perversion of the legislative intent of Australia's terror laws.

7.7.1. The Australian terrorist definition (Part 5.3- Terrorism s100.1 Criminal Code) explicitly protects advocacy, protest, dissent, or industrial action not intended to cause serious physical harm, death, or endangerment to another person. This means that other forms of advocacy, protest, dissent, or industrial action that disrupt electronic, telecommunication, transport, financial, and government service systems are not deemed terrorism.

7.7.2. However, some terrorism offences are strictly status offences.⁴ The listing of an entity as a terrorist organisation enlivens the offences in Division 102 of the Criminal Code. Those offences cover all range of *interactions* with a terrorist organisation, including association, membership, participation in training, recruitment, direction, and the provision of funds and material support. These offences are variously punishable by maximum penalties that generally range from 10 to 25 years' imprisonment.⁵

7.7.3. Status offences are easier to prove. The Law Council has written:

It is important to recognise the extraordinary nature of 'status offences', which target the nature of the organisation with which the defendant engaged, rather than requiring proof of a defendant's specific intention to further the terrorism-related objectives of the organisation. This is compounded by the fact that, when a person is prosecuted for a terrorist organisation offence in relation to their engagement with a listed terrorist organisation, the prosecution is relieved of the requirement to prove that the organisation was, in fact, engaged in terrorism-related activities. Rather, all that must be established is the fact of the listing at the time of the alleged offence, and the defendant's knowledge or recklessness in relation to that circumstance at that time.

⁴ See, for example: Law Council of Australia, Submission to the COAG Review of Counter-Terrorism Legislation, (September 2012), 28-29. See further: Bernadette McSherry, Terrorism Offences in the Criminal Code: Broadening the Boundaries of Australian Criminal Laws, [2004] UNSWLJ 26.

⁵ [3953 - PJCIS extremism and radicalisation inquiry.pdf \(lawcouncil.asn.au\)](#) p.3



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7.7.4. Suppose the entirety of Hamas is listed. Any Australian who might ordinarily be protected under the 'advocacy carveout' for their protests against Israel will lose the benefit of that protection if charged with a status-based terrorism offence.

7.7.5. Moreover, Australians may begin to fear donating to Palestinian causes, out of a concern that they may inadvertently be connected to Hamas as the governing administrator for Gaza.

7.7.6. This underscores how approaching international armed conflicts through terrorism laws is misplaced, creating further human rights losses.

The human rights of Palestinian Australians

7.8. It is submitted that such a decision would breach Australia's obligations under the International Covenants on Civil and Political Rights, Cultural, Social and Economic Rights. In particular, Palestinian Australians would be discriminatorily affected by such a decision.

7.9. The scope for discrimination is heightened by the intrusive and extensive scope of Australia's state surveillance and law enforcement powers under counterterrorism.

7.10. We contend the following human rights would be restricted, upon which we would be pleased to provide further submissions.

7.10.1. Freedom of association

7.10.2. Freedom of expression

7.10.3. Right of return

7.10.4. Right to self-determination

7.10.5. Right to cultural and social development

7.10.6. Right to non-discrimination

7.10.7. Equality before the law

7.11. It would have a demonstrable chilling effect on free criticism of Israel's actions and policies, particularly for Palestinian Muslims, Christians and Jews who oppose Israeli policies, because their religion and their political views will position them squarely in the sights of ASIO, which

7.11.1. are already affected by historical social bias against Muslims,

7.11.2. have a track record of surveilling those with a suspected motive, even in the absence of evidence of intent,

7.11.3. can now obtain authorisation to produce intelligence on a whole class of persons (however they choose to define that class of persons) with a single ministerial decision,⁶ and

7.11.4. can work collaboratively with Israeli 'counterterrorism' to exchange intelligence on Palestinian Australians.

7.12. Moreover, it will dissuade the broader Australian community from speaking out or donating for fear of being labelled a terrorist sympathiser or apologist.

⁶ National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021; Law Council of Australia, Submission to PJCIS on this Bill, 1 February 2022.



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- 7.13. This will contribute to a further distortion of public and political discourse that will further impair the human rights of Palestinians abroad and in Australia. There are significant human rights at stake.

Fracturing Australian social cohesion and heightening divisions

- 7.14. It is submitted that such a decision will worsen national security by leading to a re-escalation of mainstream media stories that dehumanise and demonise Palestinians and Muslims. This will:

7.14.1. repeat fundamental errors from the period of ISIL media coverage, where ISIL propaganda was glorified and amplified to domestic audiences and routinely presented as a 'religious' cause to Australian Muslims. The prospects for a repeat of this media behaviour are greatly enhanced because:

7.14.1.1. Most Australian press is owned or influenced by an entity that holds corporate interests in the region in question, including illegal settlement areas, such a listing would give them greater freedom to further demonise all Palestinians.

7.14.1.2. Such media discourse can offer political benefits to particular political agendas and wedge tactics.

7.14.2. Facilitate a large expansion of wedge politics on Israel and Palestine, including 'terrorism' label language being used indiscriminately towards Palestinians, Palestine and their supporters.

7.14.3. Diminish faith in Australia's ability to apply international law and respect for the rule of law without bias.

7.14.4. Fragment and sever social cohesion.

7.14.5. Bring unnecessary turmoil to Australia.

Conclusion

8. AFIC is concerned that the Australian Government's position on listing Hamas adopts Israel's characterisation at the expense of achieving lasting justice, peace and stability in the region. The proposed listing appears to be politically motivated rather than based on evidence of Australians' best interests.
9. As Justice Kirby said, National security in a country like Australia ultimately rests not on fear or restrictive laws. It lies in the loyalty of the people, their love of the country and their respect for its



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institutions, including those that safeguard the rule of law, due process of law and equal justice under law for all.⁷

10. We urge the Committee to withdraw support for the terrorism listing of Hamas based on legal, policy and humanitarian reasons, following Australia's commitment to
 - 10.1. international humanitarian law and the Rome Statute,
 - 10.2. international human rights, including the preservation of life and dignity in Palestinian occupied territories,
 - 10.3. a two-state solution
 - 10.4. the human rights of Australians,
 - 10.5. the human rights of Palestinian Australians, and
 - 10.6. preserving our national security and social cohesion.
11. The Australian Government should receive proper advice about the roots and causes of violence in that region, including the ethnic cleansing attempts made by Israel and expansions of illegal settlements onto Palestinian land. The cycle goes on without attention being turned to the root cause, which is the belligerent occupation and ongoing support for Israel to act with impunity.
12. **Finally, in this submission, AFIC does not seek to support or attack either of the parties to the conflict. The intention of this submission is to protect the basic human rights of innocent civilians who are subject to the conditions of occupation.**

Authorised by:

Dr Rateb Jneid

President

(For any further information, please contact the AFIC CEO on ceo@afic.com.au)

⁷ https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_12mar05.html



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Annexure A

A HUMANITARIAN CRISIS CREATED BY SANCTIONS

Exclusion of aid and work in this area due to sanctions only gives rise to hate and frustration within people that are already suffering, giving rise to greater radicals which can lead to greater violence. Continuation of their charity work is what will ease tensions in the area. Keeping peaceful relations is essential at all times. Breaking the cycle and patterns of the past must be made if progress is to be made. Having sanctions imposed does not ease any tensions and has been futile since Gaza is becoming more dependent on humanitarian aid.

The Gaza Strip is now undergoing a humanitarian crisis which includes the widespread denial of economic, social and cultural rights. This has been precipitated by sanctions imposed.

[The Unbreakable Relationship: Hamas and the Humanitarian Aid in Gaza | HuffPost Latest News](#)

Aid Sanctions have contributed to the weakening of the Hamas-led government but lead to the rather public solidarity with Hamas and strengthening its base of support. Dollars and Diplomacy: Foreign Aid and the Palestinian Question. USIPeace Briefing by Scott Lasensky, the Center for Conflict Analysis and Prevention at the United States Institute of Peace. The views expressed here are not those of USIP, which does not advocate specific policies.

https://www.usip.org/sites/default/files/resources/palestinian_aid.pdf

The problems are not new, but the COVID-19 pandemic has led to greater scrutiny of the impact of sanctions. Greater awareness is beginning to lead to some encouraging developments in the inclusion of safeguards for humanitarian operations. This alone, is a reason for revision of Hamas' listing to be revised. PAGE 3, PARA 3 CHATHAM HOUSE
https://www.chathamhouse.org/sites/default/files/2021-09/2021-09-03-ihl-impact-counterterrorism-measures-gillard_0.pdf

The area, which is today the Gaza Strip, was once considered an area of great strategic importance as the first source of freshwater north of the Sinai Desert. Kelly, K & Homer-Dixon, T, 'Environmental Scarcity and Violent Conflict: The Case of Gaza', (1995), available at <http://www.library.utoronto.ca>. The Arab-Israeli war of 1948 incorporated two-thirds of mandate Gaza into Israel and led to the mass-



influx of refugees into the Gaza Strip, increasing its population by more than 300 percent and placing huge stress on water resources. *Jarrar, A, Water from Conflict to Cooperation, Palestine and Israel Case, How to Promote Cooperation, Palestinian Water Authority, (2003), p.1.*

The European Union (EU), United States (US) and other western countries suspended the provision of direct financial assistance to the PA, while continuing to provide humanitarian and emergency aid directly to the Palestinian population through other mechanisms. This was based on the Principles set by the Quartet (United States, United Nations, European Union and Russia) which called on donors to reconsider aid to the PA if the Palestinian government refused to recognize Israel's right to exist, to renounce violence and/or to adhere to previous agreements, key elements of the peace process. In a confidential report leaked to a British newspaper, Alvaro de Soto, the United Nation's former Special Co-ordinator for the Middle East Peace Process, condemned the boycott of the Palestinian government saying it: ... effectively transformed the Quartet from a negotiation-promoting foursome guided by a common document [the road map for peace] into a body that was all but imposing sanctions on a freely elected government of a people under occupation as well as setting unattainable preconditions for dialogue. (McCathy, R, & Williams, I, 'Secret UN Report Condemns US for Middle East Failures', The Guardian, 13 June 2007, <http://www.theguardian.co.uk>.)

The closure of border crossing points has led many human rights organisations to declare that Gaza has become, in effect, an open air prison. (See, for example, B'Tselem, The Gaza Strip-One Big Prison, (May 2007), <http://www.btselem.org> (click on 'Publications'). The blockade of Gaza keeps people poor and denies them their rights.

Australia needs to manage the conflict and not allow another escalation to occur between Israel and Hamas, as well as help facilitate for an agreement for a lasting ceasefire if it values human sanctity.

The UN Committee on the Elimination of Racial Discrimination has also expressed that it is "deeply concerned that the severe restrictions on the freedom of movement in the Occupied Palestinian Territories, targeting a particular national or ethnic group ... have created hardship and have had a highly detrimental impact on the enjoyment of human rights by Palestinians, in particular their rights to freedom of movement, family life, work, education and health." United Nations Committee on the Elimination of Racial Discrimination, Concluding observations of the Committee on the Elimination of Racial Discrimination', (2007), UN. Doc.CERD/C/ISR/CO/13, para. 34 available at <http://www.ohchr.org>, (click on 'Treaty Bodies'> 'Committee on the Elimination of Racial Discrimination'> 'Sessions'> 'Israel'> 'Concluding Observations'). There are more than 100,000 displaced children whose homes had been destroyed. 47% of Gaza's population don't have enough food. <https://www.oxfam.org/en/timeline-humanitarian-impact-gaza-blockade>



Both humanitarian and human rights organisations are expressing increasing concern about the deteriorating situation in the Gaza strip and the impact that these punitive sanctions and the blockade have had on the life of the 1.5 million persons who reside there, creating a humanitarian crisis on a scale unprecedented in forty years of Israeli occupation. According to John Dugard, the UN Special Rapporteur for the Occupied Territories: Gaza has become a besieged and imprisoned territory as a result of economic sanctions imposed by Israel and the West ... External borders have been mainly closed ... It is a controlled strangulation that seriously violates norms of human rights law and humanitarian law but which apparently falls within the generous limits of international toleration. (Dugard, J, Report of the Special Rapporteur on the situation of human rights in the Palestinian Territories occupied since 1967, (August 2007), UN Doc.A/62/275, para.17, <http://www.ohchr.org>, (click on 'Special Procedures' > 'Country Mandates').

Due to a lack of funds, the Gaza administration is unable to provide basic public services and many public sector employees, including teachers and health workers, have not received their salaries in full or on a regular basis. (The PA has recently provided an emergency contribution for salaries amounting to one month's payment. Many workers had not been paid since the beginning of the year. There are also reports that whilst many public sector workers received full salaries from the PA in Ramallah, a large number of Hamas affiliated employees received no pay.)

Unemployment has reached an all-time high. Almost half of the working-age population is unemployed and ranked as one of the highest in the world. <https://www.oxfam.org/en/timeline-humanitarian-impact-gaza-blockade> . Palestinians can no longer cross to Israel for work and current import/export restrictions have led to the suspension of 90% of Gaza's industrial activity.(World Bank, Two years after London: Restarting Palestinian Economic Recovery, (Sept 2007), p.3, <http://www.worldbank.org>, ('Publications', > 'Documents and Reports').

Farmers and fishermen are also unable to export their produce. Fishing zones have been reduced from 6 to 3 nautical miles (preventing fishermen from accessing 85% of the fishing waters agreed under the Oslo Accords). <https://www.oxfam.org/en/timeline-humanitarian-impact-gaza-blockade>

The United Nations Development Programme reports that, in Gaza, 70% of households live below the poverty line and 42% of households live in extreme poverty (below \$1.38 per person, per day). (United Nations Development Programme (UNDP), Development Times, Issue No.1: Poverty in the Occupied Palestinian Territory, (July 2007), p.2, <http://www.undp.ps>.)

Around 85% of Gazans are now dependent on partial food aid. (Oxfam, 'Continued commercial closure of Gaza will cause complete humanitarian dependency, groups warn in advance of Middle East Quartet meeting', Press release, 15 July 2007, <http://www.oxfam.org>, (click on 'More News' > 'Press Releases 2007'). It is since the humanitarian impact of the Gaza blockade that more than one million



Palestinians in Gaza did not have enough food to feed their families, despite receiving food and assistance. <https://www.oxfam.org/en/timeline-humanitarian-impact-gaza-blockade>

The blockade has prevented hundreds of students from travelling to educational institutions abroad. (Human Rights Watch, 'Gaza: Israel Blocks 670 Students from Studies Abroad', Press Release, 20 November 2007, <http://www.hrw.org>, (click on 'News Releases').

Even as medical supplies in Gaza's hospitals were, as of December 2007, running out, the Israeli authorities have denied Palestinians in need of urgent life-saving treatment from accessing hospitals outside of the Gaza Strip. (See press releases by Physicians for Human Rights Israel available at <http://www.phr.org.il>, (click on 'English' > 'Updates/Press Releases').

Vital services, dependent on fuel and electricity to operate, are on the brink of collapse. The economic and social rights of Gazans have been dramatically eroded, including their right to water and sanitation.

As a result of the blockade, equipment and supplies needed for construction and maintenance of water and sanitation facilities (spare parts, water pipes, pumps, and fuel) have been denied entry to the Gaza Strip. The Coastal Municipal Water Utility (CMWU) responsible for the provision of water supply and sewage services in Gaza is struggling to maintain the 135 water wells, 33 sewage pumping stations and three waste-water treatment plants under its control. In June 2007 Oxfam reported that the CMWU had been waiting for over three months for US\$500,000 worth of equipment. (Oxfam International, 'Oxfam condemns the caging of Gaza', Press release, 25 June 2007, <http://www.oxfam.org>, (click on 'More News' > 'Press Releases 2007').

Due to financial and economic sanctions, the blockade preventing spare parts from entering Gaza and the fuel restrictions, water provision has been intermittent in certain areas for a number of months, with some people facing cuts of up to eighteen hours per day.

Gaza is reliant on Israel for the majority of its fuel and petrol and over 60% of its electricity. The Gaza power station is completely dependent on Israel for fuel in order to operate. The international community has voiced its concern over the impact fuel and electricity sanctions may have on the civilian population and criticised the Government of Israel's decision. UN Secretary General Ban Ki Moon stated that the "punitive measures taken by Israel ... harm the well-being of the entire population of the Gaza Strip", and as such are "unacceptable". *Israel's Gaza fuel cuts alarm UN*, BBC News, 29 October 2007, <http://www.news.bbc.co.uk>. There are limited amounts of fuel and cooking



gas reaches hospitals, homes and business. <https://www.oxfam.org/en/timeline-humanitarian-impact-gaza-blockade>

Israel and Western states must cease without delay all actions undermining the economic and social rights of the people of Gaza.

Israel must immediately lift the blockade on the Gaza Strip and allow the free flow of essential goods and equipment into Gaza.

Israel must cease its policy of restricting fuel supplies to Gaza in reprisal for rocket attacks and withdraw proposals to limit electricity supplies to Gaza.

Donor countries and agencies should immediately resume funding to the water and waste-water sectors in Gaza and send immediate assistance to the waste-water treatment facilities in Beit Lahia, Khan Younis and Gaza City to prevent a humanitarian catastrophe from occurring. Governments that have not previously assisted the Palestinian Authority should consider doing so.

All states must lift banking sanctions imposed on the Gaza administration in order to permit the funding of necessary public services.

The government must provide necessary funding to the agencies in Gaza responsible for water and sanitation and other basic services, including making salary payments for all public service workers.

The Gaza administration must allocate all available resources to ensuring that public services, including water supply and sanitation are maintained, in spite of the constraints placed by Israel and donors.

The Gaza administration must allocate maximum available resources to ensure the progressive realisation of economic, social and cultural rights of the people of Gaza.

The European Union should immediately suspend the EU-Israel Association Agreement in line with Article 2 which makes clear that economic cooperation among the parties shall be based on a respect for human rights and democratic principles.

Hostage to Politics: The impact of sanctions and the blockade on the human right to water and sanitation in Gaza Centre on Housing Rights and Evictions Position Paper 23 January 2008



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Annexure B

A VIOLATION OF THE COMMITMENT OF ALL STATES TO THE REALISATION OF ECONOMIC AND SOCIAL RIGHTS

General Comment No. 8 issued by the UN Committee on Economic, Social and Cultural Rights (ICESCR) states “the inhabitants of a given country do not forfeit their basic economic, social and cultural rights by virtue of any determination that their leaders have violated norms relating to international peace and security” and that “lawlessness of one kind should not be met by lawlessness of another kind”. It further states that “In considering sanctions, it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of the country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country.”(General Comment No. 8, para. 4. See also the Annex, Section 5.2 relating to international human rights law in the context of economic sanctions)

Funding is provided in furtherance of a legal obligation in the ICESCR, rather than as a purely charitable donation, donors are responsible for ensuring that decisions to withdraw funding are justified and related to the objectives of the ICESCR, rather than motivated solely by political considerations. (Hostage to Politics COHRE page 17 2 para)

The right to water and sanitation is also essential in order to safeguard people from potentially fatal diseases such as diarrhoea and cholera. Access to water and sanitation is therefore implicit in the right to life, which is recognised in the International Covenant on Civil and Political Rights (ICCPR).⁹⁵ According to the United Nations Human Rights Committee, the treaty body for the ICCPR, the right to life requires States to implement measures to eliminate epidemics. (See Human Rights Committee, ‘General Comment 6, Right to Life UN Doc. HRI/GEN/1/7, para. 5.)

The blockade and restrictions on monetary transfers are therefore leading to a violation of international human rights law and international humanitarian law. As long as the supplies necessary for water purification, and the necessary resources, both financial and human, are not reaching the Gaza Strip, the health of Gazans can only be expected to deteriorate over the coming months. (See Human Rights Committee, ‘General Comment 6, Right to Life UN Doc. HRI/GEN/1/7, para. 5.)

International humanitarian law strictly prohibits attacks to civilian infrastructure and indiscriminate and excessive use of force.¹⁰⁵ Moreover, all State parties to the ICESCR have the duty to respect the right to water and sanitation. General Comment No. 15 states: “The obligation includes, inter alia, refraining from engaging in any practice or activity that denies or limits equal access to adequate water ... or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law.”¹⁰⁶ Physical security must be guaranteed



when accessing water amenities and services.¹⁰⁷ The sanctions and blockade, addressed in Section 2.1 above, have hindered investment into rehabilitation of damaged water and sewage infrastructure. (Hostage to Politics COHRE page 21 para 2)

This humanitarian disaster is made possible by the lack of will displayed by the international community to intercede and is complicit in the damage and harm done. Several countries including Australia, and the United Nations (as part of the Quartet), have exacerbated the crisis through the imposition of banking sanctions and the withdrawal of desperately needed assistance for public services in Gaza. This is a fundamental disregard for the human rights of the people of Gaza. As such, Australia has also undermined their commitment to fundamental human rights and respect for the dignity and worth of the human person. ((Hostage to Politics COHRE page 25 para 2)

Israel has failed to respect, protect and fulfil the human rights of persons residing in Gaza. This is supposed to have been guaranteed by the legally binding instruments it has ratified, including the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. It further failed to ratify international treaties in favour of the safety of civilians. The Geneva Conventions and additional protocols guarantee all prisoners of war and other detained persons access to drinking water, water for personal hygiene and sanitation. They further prohibit attacks to civilian infrastructure, indiscriminate and disproportional use of force and state that an occupying power must allow relief supplies to reach the occupied population. Furthermore, grave breaches of the Geneva Conventions include wilfully causing great suffering or serious injury to body or health. The Conventions also prohibit punishment for an offence a person has not committed, collective penalties and all measures of intimidation against protected persons including civilians taking no part in hostilities. Indeed, such grave breaches as well as collective punishment are considered war crimes. *Hostage to Politics: The impact of sanctions and the blockade on the human right to water and sanitation in Gaza Centre on Housing Rights and Evictions Position Paper page 26.*

The violations of the right to water and sanitation also rise to violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). This is because Israel has intentionally instigated acts that cause cruel, inhuman or degrading treatment or punishment resulting in severe suffering. Article 16 (1) of CAT states: "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...". The European Court of Human Rights, the arbiter of the European Convention on Human Rights and Fundamental Freedoms, in examining the Article 3 ban on torture and other forms of cruel or degrading treatment or punishment, has held that the enforcement of extreme living conditions can rise to the level of degrading treatment within the sense of Article 3. This is particularly true, where, as in the case in Gaza, the enforcement of such degrading conditions is undertaken for



reasons of or influenced by racial discrimination. See *Moldovan and Others v. Romania, Applications nos. 41138/98 and 64320/01, Judgement of 12 July 2005*.

House demolitions of innocent persons which includes pregnant women, violate Article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT). *UN Committee Against Torture, 'Summary record of the 496th meeting: Israel. 29/11/2001', UN Doc. CAT/C/SR.496, para. 28, www.ohchr.org, (click on 'Treaty Bodies' > 'CAT')*. This is most certainly if the intention behind the blockade is to punish, intimidate or coerce those inflicted with severe suffering.

Israel's blockade of Gaza may also rise to the level of torture, as defined in CAT: For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. The protections guaranteed in Articles 1 and 16 of CAT are applicable as Israel's policies are not designed to deal with security needs, but rather to inflict severe suffering on the people of Gaza in order to put pressure on them to remove Hamas as the governing authority. Israel is required to investigate and act on such acts of torture or other forms of cruel, inhuman or degrading treatment or punishment. Furthermore, all States parties to the CAT should investigate any officials from Israel responsible for the blockade when such officials visit their countries in order to determine whether that official has been responsible for acts of torture or other acts banned under the CAT. The international community, including high contracting parties to the Geneva Conventions and State parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the United Nations Charter, has failed in its duty to safeguard the residents of Gaza from 'inhuman treatment' and the violation of their 'inherent dignity' by the State of Israel. The Fourth Geneva Convention relative to the Protection of Civilians calls on the parties to provide effective penal sanctions against those committing grave breaches against the civilian population (as is the case here), the ICESCR calls for international co-operation to realise the rights in the covenant, the CRC directs State parties to undertake, 'with regard to economic, social and cultural rights' measures for the implementation of these rights, within 'the framework of international cooperation'. ICERD calls upon states 'to prohibit and eliminate racial discrimination in all its forms' including in particular the right to freedom of movement and the enjoyment of economic, social and cultural rights. With all of these commitments to human dignity and human rights, the response of the international community to the humanitarian catastrophe in Gaza has been woefully inadequate and clearly an embarrassment to the motivations for these instruments. Western states are therefore complicit in the violations of the right to water and sanitation by contributing or acquiescing to Israel's blockade of Gaza and further economic and financial... 138 UN Committee Against Torture, 'Summary record of the 496th meeting: Israel. 29/11/2001', UN Doc. CAT/C/SR.496, para. 28, www.ohchr.org, (click on 'Treaty Bodies' > 'CAT').



139 Ibid. 140 CAT, Article 1 (1). 141 Such 'universal jurisdiction' is provided for in Article 5 (2) of CAT. 28 sanctions.

Victims of gross violations of international human rights law and serious violations of international humanitarian law have the right to remedy and reparation, and this has been affirmed by the UN General Assembly (GA). States have the duty to investigate those responsible for such violations and prosecute and punish those found responsible.¹⁴² The GA has stated that: reparation includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹⁴³ Those who have suffered prolonged and continuous violations of their rights as a result of the Israeli occupation including the over abstraction and pollution of underground water resources, the damage and destruction of water and sanitation amenities and discriminatory treatment in access to water as well as the violations caused by the current crisis have the right to both remedy and reparation. (Hostage to Politics pages 27-28) *UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, (2006), UN Doc. GA/RES/60/147, para.4, www.un.org/English, (click on 'Documents, Maps'> 'General Assembly Resolutions'> '60th – 2005').*



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Annexure C

RELEVANT INFORMATION ABOUT INTERNATIONAL HUMANITARIAN LAW

The **Geneva Conventions prohibit attacks on civilians and civilian objects**. Every belligerent party must distinguish military objects from civilian objects and direct their attacks only towards the former. Violations of international humanitarian law by either Hamas or Israel, do not justify violations by the other.

Due to the escalation of the humanitarian crisis and breakdown of water and sewage services that the sanctions have caused, the Government of Israel's policy is tantamount to punishment measures being applied to a collective group of people with its imposition of intolerable living conditions in reprisal for the actions of individuals for which they cannot be regarded as responsible. (Hostage to Politics COHRE report page 14 para 3)

In addition, Israel has maintained that its occupational forces in Gaza have been withdrawn. However, John Duggard, a UN Special Rapporteur for the Occupied Territories has stated, "In deciding on this matter regard must be had to whether Israel retains effective control over the territory as this is the test for occupation recognized by international humanitarian law. Whilst ... the absence of a military occupying power in Gaza has removed many of the features of occupation, it is wrong to suggest that the occupation has ended." *Dugard, J Question on the violation of Human Rights in the Occupied Arab Territories, including Palestine: Report of the Special Rapporteur of the Commission on Human Rights, (2006), UN Doc. E/CN.4/2006/29, para. 8, <http://www.ohchr.org>, (click on 'Special Procedures' > 'country mandates')*.

He further cited that targeted assassinations of militants (and innocent bystanders), Israel's control over airspace, territorial waters and external borders, Israeli administration of the Gaza population register allowing it to control the issue of identity documents necessary for movement, and Israel's holding of a large number of Gazan prisoners all lead to the conclusion that Israel still maintains effective control over Gaza. *Dugard, J Question on the violation of Human Rights in the Occupied Arab Territories, including Palestine: Report of the Special Rapporteur of the Commission on Human Rights, (2006), UN Doc. E/CN.4/2006/29, para. 8, <http://www.ohchr.org>, (click on 'Special Procedures' > 'country mandates')*.

From this extends the argument that as an occupying power, Israel is obliged to conform to the requirements of international humanitarian law including the Fourth Geneva Convention,



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relative to the Protection of Civilian Persons in Time of War (1949). While Israel has ratified the Geneva Conventions it has neither signed, nor ratified Additional Protocols I and II (1977) and is not a signatory to the Hague Convention and Regulations (1907). Israel has refused to apply the fourth Geneva Convention to the Occupied Palestinian Territories but has accepted The Hague Regulations of 1907 as de jure applicable. The Israeli Supreme Court of Justice in *Ayyoub v. Minister of Defence* ruled that the Hague Regulations are customary law and become municipal law and judiciable in Israel. See *Supreme Court of Israel, Suleiman Tawfic Ayyoub et. al. v. Minister of Defence et. al, (Beit El case), H.C. 606/78, H.C. 610/78, in Piskei Din, Vol. 33 (2), p.133.*

An occupying power is further obliged to respect the existing legal and civil systems in the occupied territory. International humanitarian law makes clear that; “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” See Henckaerts, J.M, Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict, (2005), International Review of the Red Cross, Vol. 87, <http://www.icrc.org>, (click on ‘Publications’> ‘Humanitarian Law’).

The International Committee of the Red Cross has argued that many of the provisions of international humanitarian law are considered customary international law.¹⁴⁹ Likewise a recent ruling by the International Court of Justice found that “the provisions of the Hague Regulations have become part of customary law” and, along with the fourth Geneva Convention, are applicable to Israel. *International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Advisory Opinion of 9 July 2004, (2004), p.40, para. 89, www.icj-cij.org, (click on ‘Cases’> ‘Advisory Proceedings’).*

As an occupying power, under international humanitarian law, Israel is responsible for the welfare of the civilian population and must ensure that Palestinians are provided with or allowed to secure the basics for survival including food, water, medical supplies and shelter. Prisoners of war and/or protected persons are guaranteed access to drinking water, water for personal hygiene and sanitation under the Geneva Conventions. *Third Geneva Convention, Articles 20, 26, 29, 46. All the Geneva Conventions and Additional Protocols can be found at <http://www.icrc.org>, (click on ‘Humanitarian Law’> ‘The Geneva Conventions’).*

The fourth Geneva Convention, under the Protection of Civilian Persons in Time of War (1949) states “If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population.” Additional Protocol I to the Geneva Conventions states “It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works”. *Article 54. See Section 5.1 above for the legal status of the Protocol in customary law.*



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Denying the civilian population of primary needs of their survival in Palestine by Israel is a war crime and is recognized as such by The Rome Statute of the International Criminal Court (1998). Article 8 (2), <http://www.un.org>, (click on 'International Law'> 'International Criminal Court'> 'Rome Statute of the International Criminal Court').

DISTINCTION AND PROPORTIONALITY IN A CONFLICT IS KEY

There is a difference in those who participate directly in conflict such as combatants versus those who do not. Australia will be complicit in its inhumane treatment and in violation of Article 3 of the Geneva Conventions (I-IV) which states that "Persons taking no active part in the hostilities... shall in all circumstances be treated humanely". Combatants are a handful in comparison to the large population of peaceful citizens.

The principle of proportionality in international humanitarian law makes clear that any reaction to an attack may not be excessive causing harm to civilians or civilian property which outweighs the expected military advantage. Unselective attacks on civilians, and civilian property and infrastructure is prohibited. Both Israel and Hamas must cease unlawful attacks immediately, as they risk being held accountable for war crimes.

The right of each person to water and sanitation is recognised in several international human rights treaties, and is necessary to ensure universally held values such as freedom, equality and dignity for all. *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, ratified by 157 States as of October 2007.

Furthermore, the Convention on the Elimination of All Forms of Discrimination Against Women, states that women have the right "To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications." It is safe to say that the majority of women and children are not combatants and require fulfillment of their rights. *Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981)*, Article 14 (h), <http://www.ohchr.org>, (click on 'Your Human Rights'> 'What are Human Rights'> 'International Human Rights Law'). *Israel is a State party.*