From Fact Finding to Ending Impunity

Diakonia International Humanitarian Law Resource Centre
November 2015
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The Report of the UN Commission of Inquiry on the 2014 Gaza Conflict and the Experience of Commissions of Inquiry/Fact-Finding Missions in the oPt

Legal Brief – Diakonia International Humanitarian Law Resource Centre

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November 2015

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I. Introduction


The Commission, established on 23 July 2014 by UN HRC resolution A/HRC/RES/S-21/1, required the Commission to

“...investigate all violations of international humanitarian law and international human rights law in the Occupied Palestinian Territory, including East Jerusalem, particularly in the occupied Gaza Strip, in the context of the military operations conducted since 13 June 2014, whether before, during or after, to establish the facts and circumstances of such violations and of the crimes perpetrated and to identify those responsible, to make recommendations, in particular on accountability measures, all with a view to avoiding and ending impunity and ensuring that those responsible are held accountable”.1

The 2014 Gaza CoI is the latest of a number of international independent investigations that have addressed violations of international humanitarian law (IHL) and human rights law (IHRL) in the occupied Palestinian territory (oPt) during the last decade. These have included, among others, the following: the Human Rights Inquiry Commission (2000), established by the UN Human Rights Commission (hereinafter UN HRC);2 the High-Level Fact-Finding Mission to Beit Hanoun, established by the UN HRC (2006);3 the Fact-Finding Mission on the Gaza Conflict (2009) (hereinafter 2009 Gaza FFM), established by the UN HRC;4 the panels of inquiry to investigate the Flotilla incident, as well as attacks on UN schools and facilities in the 2009 and 2014 Gaza wars, established by the UN Secretary-General (2009, 2010; 2014);5 the fact-finding mission on the flotilla, established by the UN HRC (2010);6 and the fact-finding mission to investigate the implications of the Israeli settlements on the rights of the Palestinian people, established by the UN HRC (2012).7

Each of these investigations shed significant light on a number of violations of IHL and IHRL perpetrated in different situations during the prolonged occupation of the Palestinian territory. They each include recommendations to the parties to the conflict, as well as third parties, to take necessary actions towards compliance with international law and to counteract the continuous violence resulting from the climate of impunity and lack of accountability for international law violations.

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7 Human Rights Council, Report of the independent international fact–finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Palestinian Territory, including East Jerusalem, A/HRC/22/63 (7 February 2013).
Thus, this brief aims to:
- Define international commissions of inquiry/fact-finding missions\(^8\) as instruments under international law and evaluate their relevance in the context of Palestine by assessing the substance and impact of previous investigations.
- Assess the weight and scope of the findings of the 2014 Gaza CoI report, with a particular focus on the issue of accountability.
- Shed light on the implications and foreseeable impact of the 2014 Gaza CoI report, including on the current International Criminal Court (ICC) preliminary examination into the situation in Palestine.

It will examine actions third States and parties should undertake to comply with the conclusions and recommendations set forth in different reports to ensure accountability, break the cycle of impunity and avoid renewed spirals of violence that jeopardize any future peaceful solution to the conflict.

In particular, third States are obliged to ensure accountability measures vis-à-vis Common Article 1 of the Geneva Conventions to take measures against parties violating IHL and to apply the principle of universal jurisdiction, which empowers third States to prosecute individuals responsible for international crimes. Full cooperation with and support for the current ICC preliminary examination also is a pivotal step toward ensuring accountability. Existing tools within the UN framework, including the possibility of the Security Council or the General Assembly establishing an international monitoring presence in the oPt, should also be explored to prevent continuing conflict, further recurrences of violence and a chronic pattern of international law violations.

II. Commissions of Inquiry/Fact-Finding Missions as Instruments under International Law

As pointed out by legal commentators, UN organs traditionally have resorted to fact-finding “as a means to receive information about situations of international concern which would enable the recipient organ to determine the best course of action to respond to the situation”.\(^9\) These commissions originally were intended as tools to be used only with the consent of the States party to a dispute. However, fact-finding mission and commission of inquiry mandates have evolved over time to include legal determinations concerning violations of international law, in addition to fact-finding.

Over the past twenty years, commissions of inquiry established under the UN framework (via the Security Council, the UN Secretary General and the UN HRC) have investigated IHL and IHRL violations in Rwanda, the former Yugoslavia, Sudan, Syria, North Korea and Eritrea, among others. These commissions often have operated without the consent of the affected countries. The scope of their findings have encompassed legal obligations and violations, identification of perpetrators, determinations on State and individual (criminal) responsibility, recommendations and recommended follow–up measures for key actors, including measures to ensure accountability.\(^10\)


This evolution has corresponded with the recognition, included in the Responsibility to Protect (R2P) framework, of fact-finding as a tool available for the international community to respond to situations in which a State has engaged in serious IHRL and IHL violations.\(^{11}\)

Despite the expansion of their scope, commissions of inquiry do not substitute for the role traditionally played by courts of law or other judicial bodies. They have not been imbued with judicial powers and have based the credibility of their findings on standards of proof inevitably lower than those applied in judicial proceedings. This is why commissions of inquiry have reiterated their inability to make final judgments of criminal guilt.\(^{12}\) However, as we will see below, this does not mean that commissions of inquiry cannot play an important role in paving the way for international criminal investigations.

III. Commissions of Inquiry/Fact-Finding Missions in the occupied Palestinian territory

A. Background: Impunity and Lack of Accountability for Violations of International Law in the oPt

Authoritative international bodies have, on numerous occasions, raised concerns about the deficiencies of domestic mechanisms entrusted with accountability in Israel and the oPt. For example, the 2009 Gaza FFM determined that Israeli investigations and prosecutions did not comply with universal international law principles. According to the report, “the system is not effective in addressing the violations and uncovering the truth”,\(^{13}\) and the prolonged situation of impunity has “created a justice crisis in the [oPt] that warrants action”.\(^{14}\)

The UN HRC has echoed these findings, arguing that “long–standing systemic impunity for international law violations has allowed for the recurrence of grave violations without consequence” and stressing “the need to ensure accountability for all violations of [IHL] and [IHRL] in order to end impunity, ensure justice, deter further violations, protect civilians and promote peace”.\(^{15}\) Unfortunately, certain permanent UN Security Council members and the bloc of western States have expressed the view that efforts aimed at ensuring accountability in Palestine may prejudice peace negotiations.\(^{16}\)

Lack of accountability originates from the unwillingness or inability to genuinely conduct independent and impartial investigations. With specific regard to Israel, such unwillingness or inability is inherent in a domestic judicial system that has progressively marginalised international law and its basic tenets when dealing with oPt–related issues.\(^{17}\) Hence, international independent investigation mechanisms such as commissions of inquiry/fact-finding missions have evolved into an essential tool for monitoring impunity and seeking to ensure accountability and compliance with international law in the oPt.

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\(^{11}\) UN General Assembly, Implementing the Responsibility to Protect, Report of the Secretary–General, A/63/677, (12 January 2009), para 52.


\(^{13}\) Report of the 2009 Gaza FFM (n 4), para 1613.

\(^{14}\) Ibid, para 1755.

\(^{15}\) Human Rights Council, Ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory, including East Jerusalem, A/HRC/29/L.35 (1 July 2015).


B. Previous Commissions of Inquiry/Fact-Finding Missions in the oPt

Since 2000, and prior to the 2014 Gaza Col, a number of independent commissions were established at the international level with the professed aim of shedding light on the human rights situation in the oPt.

The 2000 Human Rights Inquiry Commission (hereinafter 2000 HRIC) was mandated by the HRC “to gather and compile information on violations of human rights and acts which constitute grave breaches of international humanitarian law” in the oPt during the Second Intifada.\(^\text{18}\) The 2000 HRIC highlighted a “disguised link between the modality of Israeli occupation as a result of changes brought about by the Oslo process and the subsequent intifada, with its escalating spiral of violence”.\(^\text{19}\) It also analysed a number of patterns, including excessive use of force against demonstrators, targeted killings, settlement expansion and socio-economic rights violations. Overall, the report determined that the IDF “engaged in the excessive use of force at the expense of life and property in Palestine”.\(^\text{20}\) It further defined the practice of targeted killings as a violation of the right to life and a grave breach of the Fourth Geneva Convention invoking individual criminal responsibility.\(^\text{21}\)

The 2006 High-Level Fact-Finding Mission to Beit Hanoun’s (hereinafter 2006 Beit Hanoun Mission) mandate empowered it “to assess the situation of victims, address the needs of survivors, and make recommendations on ways and means to protect Palestinian civilians against any further Israeli assaults” after the Israeli shelling of Beit Hanoun on 8 November 2006 in the aftermath of Israeli military operation ‘Autumn Clouds’, which left 19 civilians dead and over 50 people injured.\(^\text{22}\) The 2006 Beit Hanoun Mission strenuously challenged the methods of warfare employed by Israel in the Gaza Strip, emphasizing how “the use of artillery in urban areas, especially in densely populated urban settings such as Gaza, is wholly inappropriate and likely contrary to international humanitarian and human rights law”.\(^\text{23}\)

The unprecedented magnitude of Israel’s 2008–9 ‘Operation Cast Lead’ in the Gaza Strip led to the UN HRC’s establishment of a fact-finding mission\(^\text{24}\) – the 2009 Gaza FFM. Led by Richard Goldstone, a former South African Supreme Court Judge and International Criminal Tribunal for the former Yugoslavia (ICTY) Prosecutor, its mandate was to “investigate all violations of [IHRL] and [IHL] that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period between 27 December 2008 and 18 January 2009, whether before, during or after”.\(^\text{25}\) The investigation was not limited to the context of the three-week military campaign in the Gaza Strip, but also encompassed the background of the prolonged oPt military occupation, including policies such as the Gaza Strip blockade, the impact on Israeli civilians of rockets and mortar attacks, the excessive use of force against West Bank demonstrators, restrictions on freedom of movement, appropriation of property and settlement expansion in the West Bank and the conditions of Palestinian prisoners in Israeli jails.

The 2009 Gaza FFM determined that both sides were responsible for war crimes and possibly crimes against humanity during Operation Cast Lead. The report specifically pointed to the use of indiscriminate and deliberate attacks against civilians and civilian property, failures to take feasible and effective precautions, and practices of persecution in both the Gaza Strip and the West Bank. Most importantly, the report highlighted that “disproportionate destruction and violence against civilians were part of a deliberate policy” designed and implemented at the highest political and military level on the Israeli side and “what occurred in just over three


\(^{19}\) Report of the human rights inquiry commission (n 2), para 20.

\(^{20}\) Ibid, para 50.

\(^{21}\) Ibid, paras 61, 119.

\(^{22}\) Report of the high-level fact-finding mission to Beit Hanoun (n 3), para 7.

\(^{23}\) Ibid, para 42.


weeks at the end of 2008 and the beginning of 2009 was a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population”.26

Following from its detailed analysis, the report also found that “the Israeli system presents inherently discriminatory features that have proven to make the pursuit of justice for Palestinian victims very difficult”, while also noting no tangible efforts undertaken by Palestinian authorities to investigate allegations of indiscriminate launching of rockets and mortars into Israel.27 Thus, the 2009 Gaza FFM recommended that the UN HRC establish a committee of independent experts tasked with monitoring and assessing actions undertaken by Israeli and Palestinian authorities to investigate alleged violations. Absent positive accountability developments, the report requested the Security Council to refer the situation to the ICC.28

Despite the fact that the sections of the report concerning the overall scope of the Gaza military campaign became the object of a heated debate after Richard Goldstone’s unilateral and partial retraction in a 2011 Washington Post editorial,29 relevant UN bodies did not amend the report.30 More substantially, Richard Goldstone’s belated partial retraction and its rationale cannot alter the report’s findings about the possible commission of war crimes and crimes against humanity, the elements of which would be satisfied, or not, irrespective of whether Operation Cast Lead had been designed by Israel to serve specific strategic objectives.

In relation to the Mavi Marmara incident, in which Israeli forces killed nine boat passengers of Turkish nationality and seriously injured or otherwise mistreated a number of others, the UN HRC established another fact–finding mission “to investigate violations of international law, including international humanitarian law and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance” to the Gaza Strip.31

In the course of assessing the incident’s context, the mission determined the illegality of the naval blockade imposed by Israel on the Gaza Strip as a measure inflicting disproportionate damage upon the civilian population that could amount to a form of collective punishment under Article 33 of the Fourth Geneva Convention.32 The report then determined that “the circumstances of the killing of at least six of the passengers were in a manner consistent with an extra–legal, arbitrary and summary execution”.33 Violations amounting to torture, inhuman and degrading treatment were recorded also in relation to the passengers’ transfer to Israel and subsequent deportation from Ben Gurion airport.34 The mission underlined that such conduct could not “be justified or condoned on security or any other grounds. It constituted a grave violation of human rights law and international humanitarian law”.35

Finally, following a resolution by the UN HRC condemning continuous settlement expansion in the West Bank, a UN fact–finding mission was established “to investigate the implications

26 Ibid, paras 1191–1193, 1215, 1893.
27 Ibid, para 122.
30 In reaction to Goldstone’s editorial, the other three members of the Mission released a statement in which they made clear that “there is no justification for any demand or expectation for reconsideration of the report as nothing of substance has appeared that would in any way change the context, findings or conclusions of that report with respect to any of the parties to the Gaza conflict. […] The report of the fact–finding mission contains the conclusions made after diligent, independent and objective consideration of the information related to the events within our mandate, and careful assessment of its reliability and credibility. We firmly stand by these conclusions”. See, H. Jilani – C. Chinkin – D. Travers, ‘Goldstone Report: Statement issued by members of UN mission on Gaza war’, The Guardian (11 April 2011), available at http://www.theguardian.com/commentisfree/2011/apr/14/goldstone-report-statement-unc-gaza.
33 In this regard, the Mission argued how “much of the force used by the Israeli soldiers on board the Mavi Marmara and from the helicopters was unnecessary, disproportionate, excessive and inappropriate and resulted in the wholly avoidable killing and maiming of a large number of civilian passengers”. Ibid, paras 170–172.
of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the [oPt], including East Jerusalem”. 36

Given its broad mandate, the mission was empowered to focus on overall policy aspects, as well as to highlight governmental policies behind the strengthening of the West Bank settlement infrastructure, such as the governmental scheme of subsidies and incentives encouraging Israeli population movement into settlements as well as the role of the Israeli government’s master plans in enabling settlement expansion. 38 In particular, in relation to the creation of a different legal systems applicable to Israeli settlers and Palestinians in the oPt, the report argued that this “legal regime of segregation” resulted in a “stark inequality before the law…[and] the creation of a privileged legal space for settlements and settlers [resulting] in daily violations of a multitude of the human rights of the Palestinians”. 39 In light of these policies, the report concluded that “the establishment of the settlements in the West Bank including East Jerusalem is a mesh of construction and infrastructure leading to a creeping annexation that prevents the establishment of a contiguous and viable Palestinian State and undermines the right of the Palestinian people to self-determination”. 40

C. Obstacles Faced by Commissions of Inquiry/Fact-Finding Missions

When assessing the work conducted by commissions of inquiry in the oPt, several trends emerge.

One distinctive feature has been Israel’s consistent refusal to engage or cooperate. With the exception of the 2000 HRIC (which was granted access to the territory but not cooperation) and the UN Secretary–General panels of inquiry, Israel consistently has refused to cooperate or admit any UN HRC–mandated investigations into Israel and the oPt.

Israel’s rationale for this refusal relies on the argument that the appointment of numerous international fact–finding missions focused on the oPt reflects the UN’s – particularly the UN HRC’s – bias against Israel. Three points should be noted in this regard. Firstly, although it is true that many commissions have been set up to investigate events in Israel and the oPt, these commissions covered different aspects and trends related to the situation of prolonged occupation and the conduct of hostilities. Moreover, each has impacted on different areas related to the applicability of international law and consequently entail a complex and multi–level analysis. Secondly, it should be noted that the oPt has not been the only case subject to various international investigations. 41 Thirdly, while certain concerns have turned around perceptions of one–sided language contained in some of the resolutions establishing these commissions, 42 each investigation has been conducted with scrupulous adherence to international standards of independence and impartiality. 43

With the exception of the 2006 Beit Hanoun Mission, commissioners consistently have interpreted their mandates to ensure that their investigations examine alleged violations committed by all sides. For example, despite its founding resolution specifically referring to violations committed by Israel, 44 the 2000 Human Rights Inquiry Commission interpreted its
mandate as requiring it “to investigate violations of human rights and humanitarian law in the occupied Palestinian territories after 28 September 2000” without specifically pointing at one of the sides.45 Similarly, the 2009 Gaza FFM unilaterally amended the initial mandate it received in order to encompass violations committed by all parties. The mission expanded its mandate to enable it to “to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza” (emphasis added).46

In addition, in the selection of sources and evidence, fact–finding missions have been mindful of the need to reflect the views and information presented by all parties. For example, the 2009 Gaza FFM based its findings on a multitude of sources, including consultations with different actors, including Palestinian authorities in both the West Bank and the Gaza Strip, UN bodies and former political and military officials of the Government of Israel.47 Although Israeli authorities refused to engage or cooperate, the mission nevertheless gathered a wide range of information portraying Israeli views of the events. The mission reviewed a number of documents, including official statements of Israeli authorities, exchanges with persons familiar with Israeli military operations planning, as well as testimonies provided by Israeli soldiers to the NGO Breaking the Silence.48 The UN fact–finding missions on the flotilla incident and on the settlements applied a similar approach. These missions combined first–hand sources, including interviews with Turkish and Palestinian witnesses and officials, with public statements from Israeli governmental representatives, findings from Israel’s internal inquiries and the testimonies of former public officials.49 The 2014 Gaza Col undertook the same approach.50

Although certain far–reaching conclusions reached by these investigations have sparked criticism because of these constraints in available information,51 two factors should be taken into account. Firstly, Israel often has denied international inquiries access to the territory. Although this refusal to cooperate has impacted certain findings reached by investigators negatively in the past, responsibility for any resulting inaccuracies cannot be ascribed to the investigations themselves. For example, it has proven extremely challenging for international fact–finding missions to assess a number of Israeli military attacks in the Gaza Strip without access to the intelligence information at Israel’s disposal at the time of the attacks. While recognizing “the dilemma that Israel faces in releasing information that would disclose in detail the targets of military strikes, given that such information may be classified and jeopardize intelligence sources”, the most recent, 2014 Gaza Col, commissioners nonetheless determined that “security considerations do not relieve the authorities of their obligations under international law” and that “[t]he onus remains on Israel to provide sufficient details on its targeting decisions to allow an independent assessment of the legality of the attacks conducted by the Israel Defense Forces and to assist victims in their quest for the truth”.52

Secondly, fact–finding missions and commissions of inquiry cannot be equated with international courts and tribunals. Their findings by no means carry the same conclusive weight as a court’s ruling, reached at the conclusion of a legally established judicial process. This is mainly because of the less stringent burden of proof that commissions apply, but it also relates to the absence of a number of fundamental guarantees for defendants that are granted in criminal trials. Commissions reach findings when there are “reasonable grounds

47 Ibid, para 137.
50 In relation to the views provided by Israeli soldiers in their interviews with Breaking the Silence, see Report of the detailed findings of the independent commission of inquiry (n 12), paras 284, 292, 391, 400.
51 In particular, looking at the report of the 2009 Gaza FFM, those sections related to ‘deliberate attacks against the civilian population’ and ‘objectives and strategy of Israel’s military operations in Gaza’ have raised controversies due to the clear–cut conclusions reached vis–à–vis the amount and quality of information available. See Report of the 2009 Gaza FFM (n 4), paras 704–885, 1177–1216.
to believe” that a certain event took place. Fact-finding missions have used this standard, also known as the “balance of probabilities”, in a number of cases, including commissions of inquiry charged with investigating events in Eritrea, Gaza, North Korea, Syria, Libya and Darfur. It is a significantly lower burden of proof than the “responsibility beyond reasonable doubt”, the very high burden of proof that criminal courts require to reach a finding of criminal guilt.

As a consequence, conclusions reached by commissions of inquiry are not as determinative as courts’ decisions. This does not mean that such findings are baseless or unlikely, as these findings do point with authority and credibility toward conduct that should command future State or other judicial action, such as launching criminal investigations. While specific incidents may be disputed, given the absence of relevant intelligence information from the Israeli side, for example, the value of the policy implications highlighted in the range of oPt commissions of inquiry reports is undisputable. These policy implications, in particular, should inspire international community political and diplomatic action and intervention to ensure accountability and avoid repetition of offences.

Finally, and perhaps most importantly, it bears noting that the “reasonable grounds to believe” standard is the very standard required by Article 58 of the ICC Statute should the Prosecutor wish to indict and request the issuance of an arrest warrant by the Pre-Trial Chamber. As a result, the work of commissions of inquiry may play an extremely relevant role during the preliminary examination and investigation stages of criminal prosecutions, where the lower “reasonable grounds to believe” burden of proof guides investigative efforts. A noteworthy example is the invaluable role played by the UN Mission on the flotilla incident findings in the subsequent ICC preliminary examination.

Thus, the history of commissions of inquiry established in the oPt clearly has shown that, despite an apparent lack of significant, positive on the ground achievements, their findings and conclusions have gone to great lengths to remain objective and legally sound. Third States and international organizations have failed to comply, so far, with the commissions’ recommendations to protect civilians from further violations, conflict and violence. These failures reflect negatively on existing third State obligations to ensure respect for IHL and to seek accountability for suspected grave breaches. Most importantly, given the collapse of numerous rounds of peace talks during this same period, this third State inaction vividly illustrates the costs of persistent international community failure to address accountability and respect for international law. Arguably, only more forceful efforts toward ensuring respect

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55 For similar reflections, see Wilkinson (n 53), at 21–22, 56; C. Stahn – D. Jacobs, ‘Human Rights Fact-Finding and International Criminal Proceedings: Towards a Polycentric Model of Interaction’, Grotius Centre Working Paper 2014/017–ICL (2014), at 11, 13, 14. The 2005 Commission of Inquiry on Darfur is a telling example. In its report, the commission – after finding that there were reasonable grounds to believe that war crimes and crimes against humanity had been committed in the context of the Sudanese government’s counterinsurgency campaign in Darfur – recommended that the UN Security Council refer the situation to the ICC. This recommendation was later endorsed by the Council in its resolution 1593 (2005). The report of the commission then played an extremely relevant role as a source of information during the ICC preliminary examination and investigation into the situation. Both the ICC Prosecutor and Pre-Trial Chamber extensively referred to it in their requests for and decisions issuing warrants of arrest. See Prosecutor v. Bashir (Prosecutor Application) ICC–02/05–157–AnxA (14 July 2008), paras 52, 68, 79, 88.

56 The Mavi Marmara case was brought before the ICC through a referral by the Union of the Comoros, the registered State of the Mavi Marmara vessel and a State Party to the ICC Statute. The ICC Prosecutor, after opening a preliminary examination, concluded in 2014 that there was no basis to proceed with a formal investigation based on the lack of the ‘gravity’ requirement. After an appeal for review of the Prosecutor’s decision was made by the Union of Comoros, the ICC Pre-Trial Chamber requested the Prosecutor to reconsider its decision, referring to a number of ‘material errors’ in her gravity assessment. See, Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010 Gaza Freedom Flotilla situation (14 May 2013), available at http://www.icc–cpi.int/nr/rdonlyres/e51d410e–0e9c–4e0d–97b0–462a8096be3e/0/icc_reconsideration.pdf. As stated in 2015, the recommendation to protect civilians from further violations, conflict and violence. These failures reflect negatively on existing third State obligations to ensure respect for IHL and to seek accountability for suspected grave breaches. Most importantly, given the collapse of numerous rounds of peace talks during this same period, this third State inaction vividly illustrates the costs of persistent international community failure to address accountability and respect for international law. Arguably, only more forceful efforts toward ensuring respect

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for international law can outline a workable baseline for a successful peace initiative, which must tackle the root causes of the Israeli–Palestinian conflict if it is to achieve a sustainable and just solution.

IV. The Commission of Inquiry on the 2014 Gaza Conflict

The 2014 Gaza CoI received an unprecedented accountability mandate compared with previous oPt fact–finding exercises.\(^{57}\) Israel immediately made clear it would not cooperate with the investigation and denied the commission any access to its territory and the oPt. The commission subsequently sought access to the Gaza Strip via Egypt, but the Egyptian authorities denied that request based on asserted security concerns. In another setback, as the commission was nearing completion of its draft report, Chairperson William Schabas resigned from his post in February 2015 amid accusations of bias by Israel.\(^{58}\)

The 2014 Gaza CoI undertook its eight–month investigations based on a variety of sources. It conducted more than 280 interviews with victims and witnesses and received more than 500 written submissions and other documentation from wide ranging sources, including eyewitness testimony, affidavits, medical reports and injury documentation, expert weapons analyses, satellite imagery, video film footage and other photographic evidence from incident sites, as well as expert legal opinions.\(^{59}\)

It is important to stress that in its assessment concerning the violations committed during the military campaign referred to as ‘Protective Edge’ by Israel, the 2014 Gaza CoI especially focused on those that suggested clear patterns and policies.\(^{60}\) The 2014 Gaza CoI linked violations perpetrated on the ground with the actors allegedly responsible for planning, organizing and implementing the operation at the highest political and military levels. Notably, it repeatedly highlighted the policy implications of these actors’ alleged conduct.

For example, with regard to attacks against residential buildings and people gathered in the streets, the 2014 Gaza CoI emphasized how such strikes “may have constituted military tactics reflective of a broader policy, approved at least tacitly by decision–makers at the highest levels of the Government of Israel”.\(^{61}\) In the report’s conclusions, the 2014 Gaza CoI raised questions “regarding the role of senior officials who set military policy in several areas examined by the commission….In many cases, individual soldiers may have been following agreed military policy, but it may be that the policy itself violates the laws of war”.\(^{62}\)

The 2014 Gaza CoI examined additional practices, such as the effects of Israel’s ground operations in areas such as Khuza’aa, Rafah and Shuja’iyya and attacks against shelters and ambulances. It also analysed the effects on Israeli communities of rocket and mortar fire into Israeli territory by Palestinian armed groups, as well as tunnelling activities and the issue of placing military objectives in densely populated areas. It also assessed events that occurred in the West Bank, including East Jerusalem, during, as well as immediately before and after, the 2014 Gaza Strip hostilities.


\(^{59}\) Report of the detailed findings of the independent commission of inquiry (n 12), para. 14.

\(^{60}\) Report of the independent commission of inquiry (n 52), para. 26.

\(^{61}\) Ibid, para 44.

\(^{62}\) Ibid, para 77.
The 2014 Gaza Col report presents a remarkable analysis of Israeli and Palestinian conduct during the hostilities. According to the Col, the parties' conduct appeared to be entirely at odds with fundamental IHL principles, including distinction, proportionality and the requirement to take all feasible precautions before launching an attack. For example, with regard to the launching of mortars and rockets by Palestinian armed groups into Israel, the 2014 Gaza Col noted that the use of these weapons constituted indiscriminate attacks. It dismissed the argument that the Palestinian armed groups’ military arsenal limitations could be advanced as justification for their failure to precisely attack military targets. With regard to intent, despite noting that the Al-Qassam Brigades’ official policy was to focus on military, rather than civilian, targets, the report determined that in many instances, Palestinian armed groups publicly announced that they intended to attack population centres in Israel. This suggested an intent to direct those attacks against civilians and led the Mission to qualify them as possible war crimes.

In relation to Israeli attacks against residential buildings, while the 2014 Gaza Col noted indications of possible military objectives in nine of the fifteen cases it examined, it also stated that mere affiliation with an armed group did not render a person a legitimate military target. In particular, the 2014 Gaza Col noted a statement by an IDF General suggesting that the objective of these strikes was to exercise pressure on the Gaza Strip social elite. According to the commission, an attack undertaken with such a motive may not, in any way, be considered as having been undertaken to secure a legitimate military advantage under IHL. Furthermore, this stated objective raised serious concerns as to Israel’s interpretation of what constitutes a military objective under IHL.

With regard to ground operations, the 2014 Gaza Col focused on the IDF policy of declaring entire neighbourhoods or villages “sterile combat zones”. This policy was applied in areas such as Khuza’a, Rafah and Shuja’iyya. The report noted that while the IDF had delivered initial warnings directing civilians to abandon those areas, parts of the civilian population could not move for a variety of reasons. When the Israeli forces subsequently commenced military operations, their manner of deployment suggested a presumption that civilians were no longer present in these areas. Moreover, people who attempted to leave these areas after the commencement of these operations were prevented from doing so by Israeli forces. Consequently, Israeli forces may have treated entire densely populated areas as one single military object instead of distinguishing between civilians and combatants in each of the incidents occurring in affected areas.

This policy contravenes the most fundamental IHL tenets. IHL clearly dictates that the failure of civilians to adhere to warnings to leave certain locations does not end or otherwise alter their civilian and protected status. Warnings, while welcome, in no way absolve warring parties of their responsibilities under IHL. The 2014 Gaza Col duly pointed out that “the issuing of warnings does not signify that the subsequent attack will be lawful. The stated effort to create a ‘sterile combat zone’ and to consider everyone in an area that has been the object of...”.

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63 Report of the detailed findings of the independent commission of inquiry (n 12), para 97.
64 Ibid, paras 60, 78, 86, 88. In this regard, the Commission acknowledged that, in a certain number of incidents, Israeli authorities had placed military installations alongside civilian communities.
65 Ibid, para 90.
66 Ibid, para 98.
67 Ibid, para 220.
68 Ibid, para 222.
69 Ibid, para 223.
70 Several statements and declarations from IDF officials on the goals and tactics of Israel’s ground operation support this observation. As an example, the commission reported the statement from Israeli Major Amitai Karanik, who suggested that the IDF “try to create a situation whereby the area where we are fighting is sterile, so any person seen there is suspected of engaging in terrorist activity”. Head of the Doctrine Desk at the Infantry Corps HQ, Major Amitai Karanik in BaYabasha, Ground Forces Journal, October 2014, No. 29, at 62 (unofficial translation). See Report of the detailed findings of the independent commission of inquiry (n 12), para 400. This stance was confirmed by testimony later given by soldiers to Breaking the Silence, which, explained that “[t]he soldiers were briefed by their commanders to fire at every person they identified in a combat zone, since the working assumption was that every person in the field was an enemy...”. See, Breaking the Silence, ‘This is how we fought in Gaza’, at 18, available at http://www.breakingthesilence.org.il/testimonies/database/?tzuk=1. See Report of the detailed findings of the independent commission of inquiry (n 12), para 401.
71 Report of the detailed findings of the independent commission of inquiry (n 12), para 337.
a warning as engaging in ‘terrorist activity’, could be construed as an attempt to use warnings to justify attacks against individual civilians’. Therefore, the commission suggested that these operations may qualify as direct attacks against civilians or civilian objects and thereby amount to war crimes.

With regard to the declaration of “sterile combat zones”, the 2014 Gaza CoI went further, adding that instances where Israeli forces prevented civilians from leaving active combat areas may amounted to a form of collective punishment.

Furthermore, the commission assessed the application by Israeli forces of the so-called ‘Hannibal Doctrine’ in contexts such as Rafah and Shuja’iyya against IHL obligations. In particular, the Commission noted how “the protection of IDF soldiers was a major consideration for the IDF, overruling and, at times eliminating, any concern for the impact of its conduct on civilians”. While acknowledging that the notion of “direct and concrete military advantage” can encompass the protection of soldiers, the report argued that this qualified prerogative should not be seen as an overriding factor but, rather, one that must be balanced with the need to spare civilians in accordance with the proportionality principle. On the contrary, the 2014 Gaza CoI found that “the proposed interpretation of the anticipated military advantage...would have the consequence of emptying the proportionality principle of any protective element”. Thus, the 2014 Gaza CoI determined that the manner in which this policy had been implemented in Rafah and Shuja’iyya clearly contravened the core IHL principles of distinction, proportionality and precautions, resulting in a number of deliberate attacks against civilians and civilian objects that may amount to war crimes.

The report also highlighted the appearance of alarming new “enemy civilians” terminology in the IDF code of ethics. In this regard, the 2014 Gaza CoI clearly pointed out “that the concept of ‘enemy civilians’ does not exist in international law” and that “[o]ne of the most elementary principles of international humanitarian law is the obligation to distinguish between combatants and civilians [and] a civilian is a civilian regardless of nationality, race or the place where he or she lives”.

Overall, and especially significant, is the 2014 Gaza CoI report’s analysis of a number of policies that appear to portray a culture that disregarded the basic principles regulating conduct of hostilities under IHL, and international law more generally. The most serious 2014 Gaza CoI conclusions not only state that these Israeli policies were designed and implemented at the highest political and military levels, but also note that no attempt appears to have been made to change these policies once their devastating effects on the civilian Gaza Strip population became clear. In this regard, the 2014 Gaza CoI report concluded that “indeed, the fact that the political and military leadership did not change its course of action, despite considerable information regarding the massive degree of death and destruction in Gaza, raises questions about potential violations of international humanitarian law by these officials, which may amount to war crimes”.

This conclusion raises questions regarding the current state of accountability mechanisms. The 2014 Gaza CoI engaged in a detailed review of Israeli and Palestinian domestic accountability mechanisms and potential remedies. In particular, while noting the inability of the Palestinian Authority to access the Gaza Strip and the absence of any genuine investigations by the de facto Gaza Strip authorities into mortar and rocket attacks launched into Israel, the 2014 Gaza CoI report highlighted concerns “about a number of procedural, structural and substantive shortcomings, which continue to compromise Israel’s ability to adequately fulfil its duty to investigate”.

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72 International Committee of the Red Cross, Customary International Humanitarian Law Rules, ‘Rule 20’.
73 Report of the detailed findings of the independent commission of inquiry (n 12), para 404.
74 Ibid, para 341. Collective punishment is absolutely prohibited under article 33 of the Fourth Geneva Convention.
75 Ibid, para 392.
76 Ibid, para 370.
78 Ibid, para 395.
80 Report of the detailed findings of the independent commission of inquiry (n 12), para 672.
The 2014 Gaza CoI further noted how the Israeli investigation and prosecution system is characterized by structural, and substantial, flaws when confronted with international standards. As cited by the 2014 Gaza CoI, a full year after the outbreak of hostilities, only three indictments had been issued by Israel’s Military Attorney General (MAG), and these only concerned ordinary offences such as looting. In this regard, the 2014 Gaza CoI report raised doubts over the dual-role accorded to the MAG, namely involvement in policy decisions concerning the conduct of hostilities while simultaneously bearing the responsibility to carry out independent and impartial investigations “particularly with regard to cases where soldiers may be following commands authorised by the MAG and his subordinates”.

However, the most prominent fault highlighted in the Commission’s analysis is the failure of the Israeli system to scrutinize policy decisions and the role of political and military leaders in actions resulting in IHL and IHRL violations. These conclusions closely echo the 2011 findings of the Committee of Independent Experts mandated by the UN HRC to monitor domestic accountability efforts after Israel’s 2008 – 09 Operation Cast Lead. That committee emphasized how it found no indication that Israel had opened investigations into the actions of those who designed, planned, ordered and oversaw Operation Cast Lead, while the de facto Gaza Strip authorities similarly had not conducted relevant investigations or pursued legal action relating to the launching of rockets and mortar attacks against Israel.

This repeating sequence of armed confrontations, rife with serious IHL violations, appears to demonstrate that the absence of effective accountability measures or independent policy review rapidly leads to further rounds of hostilities marked by egregious IHL violations. For the 2014 Gaza CoI “there is therefore a need to look into the various stages of decision-making, notably in the design, planning, ordering and oversight of the military operations”.

On the contrary, according to the report, “no action is known to have been taken by the MAG, in the case of military commanders, and by the Attorney General, with respect to military and civilian leadership, to initiate investigations into the role of senior officials”.

V. Follow-up by the International Community and ICC Prospects

The 2014 Gaza CoI report arrived at a critical time for efforts to ensure accountability in Israel and Palestine, and as new prospects for securing accountability emerge in the international arena.

Most notably, following Palestine’s accession to the Rome Statute and its declaration under Article 12(3) accepting the jurisdiction of the ICC over alleged crimes committed in the oPt since 13 June 2014, the ICC Prosecutor opened a preliminary examination into the oPt.

The preliminary examination is the first stage of the Court’s involvement in a specific situation. It can lead to the opening of a formal investigation if the Prosecutor and the Pre-Trial Chamber consider that there is a reasonable basis to proceed with an investigation. In order to make such a determination, three elements should be assessed: jurisdiction, admissibility and the interests of justice.
Jurisdiction relates to the prima facie applicability of the temporal, territorial and material jurisdiction of the Court to the situation in question. Admissibility involves assessments regarding the two requirements set forth in Article 17 of the Rome Statute, namely complementarity and gravity. The principle of complementarity means that the ICC will refrain from intervening if an investigation is being, or has been, credibly investigated or prosecuted in a national jurisdiction. The ICC will declare a case admissible where “the State is unwilling or unable genuinely to carry out investigation or prosecution” and the case is of sufficient gravity to justify further action by the Court.90 Finally, the Prosecutor will look at whether there are “substantial reasons to believe that an investigation would not serve the interest of justice”.91

At least three aspects of the 2014 Gaza CoI report are expected to influence the current ICC preliminary examination.

Firstly, the 2014 Gaza CoI determined that there are reasonable grounds to believe that war crimes (crimes that are within the jurisdiction of the Court)92 were committed by both sides during the summer 2014 Gaza Strip hostilities.

Secondly, the 2014 Gaza CoI acknowledged that violations committed by Israeli forces may have been, in many instances, the implementation of specific policies designed and approved at the highest levels of the Israeli government. This is of crucial importance in the context of the ICC’s present involvement, given the pledge by the ICC Prosecutor to ultimately aim (through a building upwards strategy that first investigates mid- and high-level perpetrators) at “those most responsible” for designing, organizing and overseeing the implementation of actions resulting in the commission of international crimes.93

Thirdly, in shedding light on a number of structural and substantial flaws in the Israeli and Palestinian investigation and prosecution systems, the 2014 Gaza CoI report’s conclusions appear likely to inform the ICC Prosecutor and Pre-Trial Chamber’s assessments of whether, after assessing the admissibility hurdles, to proceed with a full investigation.

The 2014 Gaza CoI report’s impact in advancing the rule of law in Palestine may largely depend on the response of relevant international community actors to its findings and recommendations. While addressing its main recommendations to the parties directly involved in the conflict, the commission acknowledged that “the persistent lack of implementation of recommendations [from previous reports] lies at the heart of the systematic recurrence of violations in Israel and the [oPt]”,94 thereby implying an urgent need for the international community to assume a more proactive role.

Hence, the 2014 Gaza CoI urged third States to promote compliance with IHRL and to ensure respect for IHL in the oPt and Israel, in accordance with third State obligations codified in Common Article 1 of the Geneva Conventions. The 2014 Gaza CoI report also called upon States to provide active support to the ICC’s activities in relation to the oPt and to exercise universal jurisdiction to prosecute international crimes in national courts.95 These recommendations appear to target European States in particular. While EU member States always have enthusiastically supported the ICC as a pivotal instrument in the combat impunity and widely advocated for the ratification of the Rome Statute,96 the EU has not yet formally welcomed Palestine’s ICC accession.97

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90 Rome Statute of the International Criminal Court (n 54), Article 17.
91 Ibid, Article 53(1)(c).
92 Ibid, Article 5.
94 Report of the independent commission of inquiry (n 52), para 82.
95 Ibid, para 89.
Similar language to the Commission report was incorporated in the UN HRC resolution endorsing the report, which was adopted on 1 July 2015 with 41 votes in favour, including those of all EU member States sitting on the Council. The HRC resolution emphasized the need for all States to enforce practical steps towards accountability, including cooperation with the ICC and High Contracting Parties’ compliance with their Geneva Convention obligations to ensure respect for IHL and investigate and punish grave breaches of the conventions. It also called for implementation of the 2014 Gaza CoI report’s recommendations in conjunction with the prior recommendations from the 2009 Gaza FFM report.

More generally, the 2014 Gaza CoI emphasized the importance of linking the latest report with previous fact-finding exercises. Thus, it did not elaborate an exhaustive (and repetitive) list of recommendations. Rather, in the commission’s view, in addition to its own 2015 report, all duty bearers also should implement the recommendations made by previous fact-finding bodies without delay in order to avert a future crisis similar to the summer 2014 hostilities.

This last recommendation sheds light on the inadequate follow-up so far provided by the international community in response to independent oPt fact-finding investigations. In this legal brief, Diakonia has referred to nine UN independent investigations recently established regarding the oPt. All of them, to different degrees, have shed light on grave violations of IHL and IHRL. The fact that there have been so many investigations should not raise doubts over the impartial role of the UN but rather make the international community wonder why after each of these investigations nothing was done to prevent the recourse to violence (and subsequent triggering of yet another investigation). These commissions of inquiry have not only presented the facts, but also formulated clear recommendations to enforce the law and justice to deter further violence and conflict. These clear recommendations, however, have remained largely unfulfilled, with the consequence that impunity has flourished.

It is now imperative for the international community to give proper meaning to these fact-finding exercises by putting an end to impunity and by enforcing the law through political action. It should come as no surprise that fact-finding has been included in instruments and norms such as the Geneva Conventions, the UN Charter and R2P. These frameworks contain specific obligations for all States and for the international community to use them to react to contexts of flagrant violations of international law. In these frameworks, commissions of inquiry, through their fact-finding and truth-seeking functions, perform an alerting function. With regard to the oPt, this alert has been made repeatedly. It is now time for the international community to finally expand its efforts beyond fact-finding and display its seriousness by taking concrete actions to ensure compliance and an end to impunity.

It will remain impossible for third State actors to adequately fulfil their obligations “to ensure respect” via Common Article 1 of the Geneva Conventions or for the UN Security Council to maintain and secure peace under the UN Charter without devising and implementing policies that specifically aim to support and promote accountability. Arguably, genuine accountability lies at the heart of resolving longstanding conflicts rife with systematic IHL and IHRL violations. In this regard, the Israeli–Palestinian conflict may provide one of the most vivid examples of how a long-standing pattern and overall culture of impunity serves to perpetuate a continuous cycle of violence. International independent commissions of inquiry and fact-finding missions have done well to credibly document the devastating effects that such a climate of impunity has wrought in the oPt. The fact that these commissions’ and missions’ calls for action largely have gone unheeded should be viewed less as a sign of ineffectiveness and more as a standing admonition to prompt relevant international community actors to firmly comply with their recommendations without further delay.

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100 Ibid, paras 7–8.
101 Report of the independent commission of inquiry (n 52), para 82.
VI. Recommendations

On 31 October 2015, the United Nations Secretary-General, Ban Ki-Moon, and the President of the International Committee of the Red Cross (ICRC), Peter Maurer, issued an unprecedented joint appeal warning about the impact of today’s armed conflicts on civilians and urging concrete action to address human suffering and humanitarian emergencies. In particular, they called on Third States to use every means to exercise influence over parties to armed conflicts to respect the law, including carrying out effective investigations into grave breaches of international humanitarian law such as deliberate attacks on civilians and use of heavy-explosive weapons in populated areas, holding perpetrators accountable and developing concrete mechanisms to improve compliance.  

As the experiences of commissions of inquiry clearly show, tracking and recording violations and decrying impunity are, by themselves, insufficient to bring positive change. The international community needs to provide stronger and principled support to follow-up on the fact-finding work that has been produced so far. This should be undertaken with the clear aim of ending the continuing spiral of violence.

The following recommendations seek to fill precisely these gaps:

To Third States

Third States should respect the commitment undertaken with the adoption of the UN HRC resolution A/HRC/29/L.35, and comply with their existing obligations under international law. In particular, third States should:

- Respect, and ensure respect for, international humanitarian law in the oPt and Israel, in accordance with Common Article 1 of the Geneva Conventions, in particular by terminating any trade of weapons or cooperation in the field of security with those parties to the conflict that allegedly have committed grave IHL violations.
- Promote compliance with IHRL obligations in the oPt, given the erga omnes character of obligations stemming from respect for human rights and freedoms.
- Fulfil their obligations under Articles 146, 147 and 148 of the Fourth Geneva Convention to enact any legislation necessary to provide effective penal sanctions for persons committing grave breaches of the Geneva Conventions and ensure universal jurisdiction by investigating and prosecuting or extraditing those allegedly responsible for having committed such grave breaches in the context of the oPt and Israel.
- Actively support and provide full cooperation to the ICC’s preliminary examination into the situation in Palestine.
- Agree upon and support, in the framework of the UN HRC, the establishment of a mechanism entrusted with ensuring effective implementation of the recommendations included in the UN HRC commissions of inquiry and fact-finding missions’ reports.
- Within the framework of the UN General Assembly, request the Government of Switzerland to convene a conference of the high contracting parties to the Fourth Geneva Convention of 1949 on measures to enforce the Convention in the oPt, in accordance with high contracting parties’ Common Article 1 obligations.
- Ensure that respect for international law and accountability play a central role in any future peace initiative, including within the framework of the Quartet, regional organizations and any future formal or informal international platform for the support of peace negotiations.

To the UN Human Rights Council

- Based on the results of the comprehensive review by the UN High Commissioner for Human Rights on the status of the implementation of the numerous recommendations included in the reports of the 2009 Gaza FFM and 2014 Gaza CoI, set up an ad hoc
mechanism aimed at ensuring effective implementation of the recommendations contained in the reports of fact-finding missions and commissions of inquiry set up in relation to Israel and the oPt.

To the **UN Security Council**
- Based on its responsibility under the UN Charter, use its powers under Chapter VI and VII of the UN Charter to establish an international monitoring force with the purpose of deterring further rounds of conflict and hostilities and to impede further alterations of the demographic and territorial status of the oPt, which add to the root causes of the protracted situation of conflict and instability at the detriment of peace and security.

To the **UN General Assembly**
- In case appropriate action has not been taken by the UN Security Council, the General Assembly should consider additional action within its powers in the interest of peace, security, justice and accountability, under its resolution 377 (V) (1950) ‘Uniting for Peace.’
See other Diakonia IHL Resource Center briefs:

Accountability for violations of International Humanitarian Law: An introduction to the legal consequences stemming from violations of international humanitarian law

International Crimes and Accountability: A beginner’s introduction to the duty to investigate, prosecute and punish

The forced transfer of Bedouin communities in the oPt

Israel’s Administrative Destruction of Cisterns in Area C of the West Bank

The Gaza Strip: Status under international humanitarian law

Jerusalem light rail IHL analysis

The maritime blockade of the Gaza Strip
Diakonia’s IHL Resource centre seeks to increase awareness of IHL among:

- The international community present in the oPt – international NGOs, international agencies such as United Nations and European Union bodies, international media and diplomatic missions as well as decision makers visiting the area;
- Israeli and Palestinian civil society, media, lawyers and the general public in Israel and Palestine;
- EU and UN bodies based in Brussels and Geneva;
- International corporate actors active in the oPt.
- Where possible, the disseminated IHL information and work with partner organisations also includes a gender perspective.

**How we work**

The IHL Resource Centre consists of four interlinked components:

- Legal research and briefings to civil society and the international community;
- Education and information, including through the creation of an IHL Helpdesk and work with local partners;
- Monitoring of and reporting on IHL violations;
- Advocacy from Diakonia’s Head Office in Stockholm.
What is Diakonia?
Diakonia is a Swedish development organisation working together with local partners for a sustainable change for the most vulnerable people in the world. We support more than 400 partners in nearly 30 countries and believe in a rights-based approach that aims to empower discriminated individuals or groups to demand what is rightfully theirs. Throughout the world we work toward five main goals: human rights, democratisation, social and economic justice, gender equality and sustainable peace.

**Diakonia International Humanitarian Law Resource Centre**

The goal of Diakonia International Humanitarian Law Resource Centre is to increase the respect for and further implementation of international law, specifically international humanitarian law (IHL), in the Israeli–Palestinian conflict. We believe that addressing violations of IHL and international human rights law tackle the root causes of the humanitarian and protection crisis in the oPt, in a sustainable manner. Our Centre makes IHL expertise available by providing:

- Briefings to groups and organisations on IHL and its applicability to Israel and the oPt;
- Tailored in-depth trainings on specific issues and policies relating to IHL;
- Legal analyses and ongoing research on current IHL topics; and
- Legal advice, consultation and legal review of documents for other actors in the oPt, to support policy formulation and strengthen advocacy with an IHL perspective.

Do you or your organisation want to learn more about IHL and its applicability to the oPt? Visit our website ‘An Easy Guide to International Humanitarian Law in the occupied Palestinian territory’ at: www.diakonia.se/en/IHL/ or contact us to set up a general or specialised legal briefing by our legal advisors.

Contact us at: ihl@diakonia.se