

**Submission regarding Implementation of
the European Neighbourhood Policy in 2013, EU-Israel**

October 2013

1. Introduction

In the context of the European Neighbourhood Policy (ENP) Progress Report covering developments in 2013 relevant to the relationship between the European Union and Israel, Diakonia would like to contribute the below submission. The submission will focus on the importance of ensuring that Israel's adherence to international law in the Occupied Palestinian Territory (OPT), and international humanitarian law (IHL) in particular, is systematically monitored and assessed by the European Union (EU).

The comments are made in the context of the “common values” defined by the partners, which also set the basis for the so called “Action Plan”. The most relevant common values for our submission are the respect for human rights and fundamental freedoms, democracy, good governance and IHL.¹ The context of the comments is also defined by the common goals to promote stability, security and well-being² and to, in *the Middle East context*, improve economic and social conditions for all populations, facilitate the implementation and delivery of humanitarian and other forms of assistance, and facilitate the reconstruction and rehabilitation of infrastructure.³

Given that the Progress Reports will be given increasing importance in assessing a potential upgrade in the Neighbourhood Policy, it is of utmost importance that IHL norms are properly identified, in order for them to inform recommendations and guide assessment of compliance well in advance of any potential upgrade.⁴

Our concrete recommendations are summarized at the end of this document (p. 15).

¹ EU/ISRAEL ACTION PLAN, Section 2

http://ec.europa.eu/world/enp/pdf/action_plans/israel_enp_ap_final_en.pdf

² Ibid. Section 1

³ Ibid. Section 2.1,

⁴ The 2013 Progress Report for Israel covering 2012 states: “the two sides identified potential areas for future cooperation, where discussions on implementation could begin as soon as the conditions for the upgrade were met”. The nature and concrete scope of these areas remains unspecified. See also Delivering on a new European Neighborhood Policy, JOIN (2012) 14 final).

While the 2013 Progress Report contains a section on “Israel in the oPt”, an inclusion that is to be welcomed, this section currently lacks a systematic assessment and logical approach to IHL compliance and as of yet has had no impact on the recommendations. Given that IHL, in complementarity with international human rights law, forms the main legal framework that Israel must abide by, it is imperative that the EU continues to develop its practice of assessing Israel’s compliance with this body of law. This importance has been previously highlighted by the “EU guidelines on the promotion of compliance with international humanitarian law”⁵ (the IHL Guidelines), which state the need for the EU “to distinguish between international human rights law and IHL [...as...] distinct bodies of law”.⁶ In addition, the Guidelines outline the EU’s commitment to “monitor situations within their areas of responsibility where IHL may be applicable [...]. Where appropriate, [the EU] should identify and recommend action to promote compliance with IHL in accordance with these Guidelines.”⁷ The IHL Guidelines call upon States to adhere to, and fully implement, important IHL instruments. The ENP Progress Report should therefore reflect on Israel’s policies and practices that impede the full implementation of IHL.

Israel is different from the other states falling under the European Neighbourhood Policy in that it occupies a foreign territory. It is also different from other situations of armed conflicts that the EU deals with, in that Israel enjoys a very privileged relationship with the EU, both in terms of cooperation and trade. Further, in most situations of armed conflicts that the EU deals with, IHL violations are committed by military commanders and those in uniform. In a situation of prolonged occupation, many violations of IHL are planned by the administration, such as settlement development, and enforced by the Courts in addition to being executed by the military forces. This requires a more comprehensive and long-term monitoring mechanism from the EU, with a thorough early warning system, to detect IHL violations as part of its relationship with Israel. As a minimum, it requires that the ENP Progress Report refers explicitly to norms set by IHL (i.e. destruction of property, forcible transfer of protected persons, and transfer of parts of the Occupying Power’s own civilian population into the territory it occupies), just as it does with those norms set by Human Rights Law (e.g. freedom of expression). A proper assessment will also help EU to “ensure the respect of EU positions and commitments in conformity with international law

⁵ Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL) [Official Journal C 303 of 15.12.2009].

http://europa.eu/legislation_summaries/human_rights/human_rights_in_third_countries/ah0004_en.htm

⁶ Ibid. Para. 12,

⁷ Ibid. Para. 15.a

on the non-recognition by the EU of Israel's sovereignty over the territories occupied by Israel since June 1967".⁸

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In this context, we would like to highlight the following policies and/or practices:

1. Settlements and the Israeli planning regime;
2. The judiciary's independence in relation to the OPT; and
3. Other policies and/or practices that, in addition to those mentioned above, must be reflected in the ENP Progress Report in the light of IHL norms, including;
 - a) destruction of private or public property;
 - b) forcible transfer of the protected population;
 - c) impediment to humanitarian and development aid;
 - d) collective punishment; and
 - e) detention of prisoners from the oPt in Israel.

2. The Settlements and the planning regime

In the previous Progress Report, settlements were approached in terms of the political process and the decisions on whether to approve and build settlements. Crucially, it is important to note that the IHL violations do not start or end with the establishment of or extension to a settlement, nor with the political decision to legalise an outpost. Settlements are illegal under international law and do indeed undermine the two-state-solution, which the EU is committed to. Most importantly, however, the policies leading to the settlements violate the Palestinians' rights (both under human rights law and international humanitarian law) on a day-to-day basis and each violation must be monitored and reacted to in and of itself. For example, the establishment of settlements often entails the destruction of private property, the appropriation of private lands and the use of public lands inconsistent with the notion of usufruct. In the context (ENP common values and EU's commitments) of this submission therefore, the EU must systematically assess the relationship with Israel and its settlements in light of its land planning policies; demolitions of private property; forcible transfer; denial of access to natural resources in addition to the transfer of settlers to the OPT.

Practically speaking, the denial of planning permits for Palestinian construction and the demolition of existing structures go hand in hand with the unrelenting development and expansion of Israeli settlements and the Wall across the West Bank, including East

⁸ Para 1. Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards. (2013/C 205/05)

Jerusalem. The Israeli planning institutions, policies and practices, which include Special Local Planning Committees for settlements that coordinate with the Israeli Civil Administration (ICA), are in character and in effect settlement promoting mechanisms.

In the first half of 2013, Israel began the construction of 1,000 new settlement units in the West Bank, with another 15,000 or so in the process of planning, approval or development.⁹ In approximately the same period, the Israeli military demolished 377 Palestinian structures, usually under the pretext of lack of building permit.¹⁰ These included residential buildings, emergency tents and livelihood and water infrastructure, and resulted in the forcible displacement of 630 people. In January of this year alone, 139 Palestinian structures were destroyed, representing close to a three-fold increase in the monthly average of demolitions in 2011 and 2012.¹¹ In total, some 27,000 Palestinian structures have been demolished since the beginning of the occupation.¹² Deputy Defence Minister Danny Danon (Likud) highlighted the link between the planning process and the Israeli settlement enterprise in a recent interview with the settler-affiliated media outlet Arutz 7, when he declared that “[e]veryone interested in legally approving construction in Judea and Samaria [official Israeli term for the occupied West Bank] is invited to me personally and directly, and we will promote construction in Judea and Samaria [...]. Our commitment to Judea and Samaria is clear, and we are committed to continued construction in Judea and Samaria”.¹³

In addition, Israel’s policies and practices in the Jerusalem periphery, in particular the construction of settlements and the Wall as well as the associated restrictions on freedom of movement and denial of access to natural resources, lead to the displacement and fragmentation of Palestinian communities. This, in turn, contributes directly to the entrenchment of the illegal annexation of East Jerusalem.¹⁴

⁹ ‘While Israel Is Talking About Peace...’ (PLO Negotiation Affairs Department, July 2013), <<http://www.nadplo.org/userfiles/file/Factsheet%202013/Report%20on%20Israel%20activities%20in%20Occupied%20East%20Jerusalem%20January%20-%20June%202013.pdf>> Since 1967, some 250 settlements have been established by the Government of Israel (GOI) in the West Bank, including East Jerusalem, on 27% of the land mass of the West Bank. The number of settlers is estimated at 520,000 (200,000 in East Jerusalem and 320,000 in the rest of the West Bank).

¹⁰ OCHA Protection of Civilians Weekly report, 07 August 2013, <http://www.ochaopt.org/documents/ocha_opt_protection_of_civilians_weekly_report_2013_08_07_english.pdf>

¹¹ AIDA FAC paper ‘Failing To Make The Grade’, (AIDA 2013) 6

¹² ICAHD, <<http://www.icahd.org/the-facts>>

¹³ Channel 7 News report, 13 May 2013, <<http://www.inn.co.il/News/News.aspx/255928>> (Hebrew)

¹⁴ See report by the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk of 19 September 2012: <<http://unispal.un.org/UNISPAL.NSF/0/4B2DE5243EBCE35685257AA200487927>>, Section 16.

Having conducted a legal analysis of the Israeli planning regime and associated practices, we concluded that the planning regime in Area C is unlawful both in design and application.¹⁵ The establishment of a long-term Israeli planning regime based upon significant changes to the Jordanian Planning Law denies Palestinian communities any ownership of or representation in the planning and decision-making process. Such amendments¹⁶ constitute a violation of Israel's obligation as an Occupying Power to respect existing local laws in place prior to occupation, and represent an unnecessary transgression into the civilian affairs of the protected population.

These changes, which facilitate unlawful policies such as settlements, the Wall, and the annexation of east Jerusalem, furthermore fail to meet Israel's obligations to ensure public order, safety and civil life; to respect, protect and fulfill the human rights of the protected population and to protect private property. The planning regime also puts protected persons at risk of being forcibly transferred and systematically impedes the delivery of humanitarian and development aid to Area C. Collectively, the planning regime infringes upon the right of the Palestinian people to self-determination. Crucially, the unlawful characteristics of the Israeli planning regime cannot reasonably be justified by the demands of military necessity. Nor are the legal obligations that are contravened by the planning regime superseded or rendered invalid by the Oslo Agreements.

The overall consequence is a restrictive, discriminatory and unlawful planning regime that obstructs Palestinian development in Area C, and that prevents the maintenance of order and safety. We conclude that Israel is under the obligation to cease the violations of international law facilitated by its unlawful planning regime, and provide guarantees for non-repetition and reparations to the victims. In order for full ownership of the planning regime to lie with the Palestinian population, including genuine representation in the decision making process, Israel must end the prolonged occupation of the West Bank, including East Jerusalem, and the Gaza Strip, and respect, protect and fulfill Palestinians right to self-determination. In the meantime, Israel must transfer full authority over the planning process to the Palestinian population, allowing genuine representation in the decision-making process.

¹⁵ Planning to Fail, The Planning Regime in Area C of the West Bank: An International Law Perspective, Diakonia, 2013.

<http://www.diakonia.se/documents/public/ihl/publications/Planning-to-fail-reportsept2013.pdf>

¹⁶ Encapsulated by Military Order 418 (1971).

3. The judiciary's independence

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a. Jurisprudence of the Supreme Court

While the 2013 Progress Report concludes that the judiciary independence in Israel is guaranteed, it does not reflect on the judiciary independence in relation to the OPT. Nor does it assess the impact of the Israeli Military Court's jurisdiction over civilians in the OPT. While this section will address the former issue, It is imperative that the latter issue also be addressed in the ENP Progress Report in order for it to be comprehensive.

Having recently undertaken a major analysis endeavor focusing on the oversight of the Israeli Judiciary of policies and practices regarding the OPT, including a legal analysis under international law, we find that the inadequacy of judicial review and lack of independence of the judiciary from political considerations and limitations, perpetuates policies and practices that violate Israel's obligations under international law. Israel claims that Palestinians enjoy access to the Israeli Supreme Court sitting as the High Court of Justice (HCJ), which provides judicial oversight of the Israeli Military Commander of occupied territory, and that they are served justice in the Court."¹⁷ Nevertheless, effective access to the court is dependent on the fact that remedies available are "genuinely capable of meeting the desired objective. It is not just a matter of guaranteeing entry to the judicial process."¹⁸

Contrary to the depiction of the Court as a bastion of Israeli democracy and rule of law, the facts show that the protraction of occupation is exploited by the Court to expand the powers of the occupier beyond the remit of international law, to the point that the distinction between sovereign and Occupying Power has been blurred. In a 2011 ruling on the legality of Israeli-owned quarries in the West Bank, allowing for the economic exploitation of OPT in the form of pillage of natural resources, the Court held that the unique characteristics of Israel's five-decade long occupation of the OPT required "the adjustment of the law to the reality on the ground [...] Therefore, the traditional occupation laws require adjustment to the prolonged duration of the occupation [...]".¹⁹ This ruling ignored the fact that the mining of natural resources for the economic benefit of the Occupying Power or its citizens constitutes a violation of customary international law and may amount to the war crime of pillage. As such, the Court extends the privileges outside of what IHL provides for, but side steps the most basic obligations of the Occupying Power towards the occupied people.

¹⁷ CERD/C/SR.1794

¹⁸ A/HRC/8/4

¹⁹ HCJ 2164/09, Yesh Din v The Commander of the Israeli Forces in the West Bank et al.



The Court further entrenches the notion that the prolonged nature of Israel's belligerent occupation grants additional planning powers and rights to the Occupying Power under international humanitarian law. This is particularly notable in relation to spatial planning and related policies and practices of territorial administration. The Court allows the occupant, in conjunction with settlers illegally present in occupied territory, to extend their powers unchecked; to disenfranchise Palestinian communities and individuals; to undertake wide-spread appropriation of land and wanton destruction of property; while at the same time maintaining a façade of rule of law, and imparting an aura of legality to acts in clear violation of international law.

Broadly, the Court acknowledged that customary international law is embedded in Israel's domestic legislation, unless contradictory to expressed provisions of Israeli domestic law.²⁰ However, since 1967 the Court has upheld the supremacy of domestic legislation (notably, orders of the Israeli Military Commander) "which trumps the provisions of the [Fourth Geneva] Convention".²¹ Therefore, when an express legal provision in Israeli domestic law conflicts with the principles of international law, even when it is customary law, Israeli law supersedes."²²

The Court will however refer in its ruling to certain provisions of IHL, as stipulated by both the Hague Regulations and the Geneva Conventions, but only in a way that the Court depicts as "corresponding to the special circumstances and characteristics dictated by the need to apply the laws of occupation in conditions that match the way the Area is held [...] considering the protracted period of the holding, the geographic conditions and the possibility of maintaining contact between Israel and the Area."²³ As such, the Court has made the application of international customary law dependent on a broad set of arbitrarily-defined circumstances, as opposed to making adherence to international law the foundation of its policies and practices in the OPT.

The Government of Israel officially declares that it applies customary international law to the OPT. However, the jurisprudence demonstrates that by this the Court refers to particular provisions of the Hague Regulation of 1907. In respect

²⁰ HCJ 302/72 Hilo v. The Government of Israel (also HCJ 306/72).

²¹ For example: HCJ 253/88 Sajdyia v. Minister of Defense; Eichman v. Attorney General, IsrSC 16 2033, 2040-2041 (1962); HCJ 256/01 Rabakh v. Municipal Court in Jerusalem, IsrSC 56(2) 930, 934 (2002)0; HCJ 591/88 Taha v. Minister of Defense IsrSC 45(2) 45, 52-53 (1991).

²² HCJ 2690/09, Yesh Din et al. v. Commander of the IDF Forces in the West Bank et al. Judgment

²³ Ibid.

to the Fourth Geneva Convention, the Court has set out the following;

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Firstly, according to the Court, while the Hague Regulations are customary international law, and thus applicable to Israeli domestic law, the Geneva Conventions are contractual international law. Former Chief Justice Barak stated that “the Fourth Geneva Convention [...] even if applicable to Israel’s belligerent occupation of Judea and Samaria – a question which is extremely controversial and which we will not address – constitutes above all else a constitutive convention which does not adopt existing international customs, but generate new norms whose application in Israel demands an act of legislation”.²⁴

Secondly, the Court interprets the applicability of the Fourth Geneva Convention to the occupation of the territories of a High Contracting Party to the Convention, and not to all territories held under belligerent occupation. For example, in the *Elon Moreh* ruling, the Court upheld the position taken by the Attorney General, confirming that “in respect to the Fourth Geneva Convention; no reproach could be lodged against the authorities for transferring land to settlers for their settlement.”²⁵ However, the Court has allowed certain provisions of the Fourth Geneva Convention to be heard, including those that relate to the “protection of human life, health, liberty or dignity.”²⁶ These provisions are nevertheless applied only if the Attorney General permits them to be heard, and on a case by case basis, and as such providing no legal precedence.

b. Jurisprudence on specific practices

The judiciary is tasked with the promotion of rights and fundamental freedoms, and in the case of belligerent occupation with the safeguarding of humanitarian protections,²⁷ through:

- monitoring of the conformity of policies, executive acts and practices undertaken by the Military Commander of occupied territory with international humanitarian law and international human rights law, through the judicial review of the legality of such acts;
- elaborating on a body of case law that incorporates international law and standards for the administration of justice, human rights and humanitarian protections, and

²⁴ HCJ 393/82. *Jam'iat Iscan Al-Ma'aloun v. Commander of the IDF Forces in the Area of Judea and Samaria*.

²⁵ HCJ 390/79, *Duweikat et al. v. Government of Israel et al.*

²⁶ *Ibid.*

²⁷ E/CN.4/2004/60

clarifying the scope and content of rights and fundamental freedoms of the protected population, and the obligations of the Occupying Power under international law.

The Israeli judiciary, as substantiated hereafter, has consistently failed to successfully accomplish these duties.

i. Settlements and the Wall:

Between 1968 and 1979 the Israeli Military Commander issued dozens of orders for the requisition of 47,000 dunam of Palestinian privately owned land in the West Bank, claiming that it was required for essential and urgent military needs.²⁸ The following settlements were among those subsequently established on this land: *Bet El, Kokhav Hashahar, Alon Shvut, Efrat, Har Gilo, Migdal Oz, Gittit, Yitav* and *Qiryat Arba*. In numerous cases, Palestinians petitioned the Court against the seizure of their land, claiming that the use of this land for the purpose of establishing settlements is contrary to the requirements of IHL. The Court rejected all of these petitions and accepted the Government of Israel (GOI) argument that the land seizure was legal because “there can be no questioning that the presence in the administered territory of settlements – even “civilian” – of the citizens of the administering power makes a significant contribution to the security situation in that territory, and facilitates the army’s performance of its function.”²⁹ The Court has refrained from ruling on the legality of Israeli settlements in occupied territory, and rather attributed their establishment to the actions of the Israeli Military Commander in appropriating lands for their eventual use.

The position of the Court was temporarily reversed by the *Elon Moreh* ruling,³⁰ which limited land expropriation to military needs. However since 2002, Israel again made extensive use of military requisition orders to build the Wall and its associated regime of bypass roads and checkpoints, appropriating tens of thousands of dunams of privately-owned Palestinian land. Substantial portions of the Wall were routed so as to facilitate the appropriation of land allocated for the expansion of settlements. The Court accepted the GOI position that military requisition orders may be used to build the Wall even though 85% of the route³¹ runs through the OPT.³² In some cases, the Court even upheld GOI position that the route may include land intended for settlement future expansion: “One route passes through the area intended for expansion of the town of Giv’at Ze’ev known by the

²⁸ http://www.btselem.org/settlements/seizure_of_land_for_military_purposes

²⁹ HCJ 606/78, Awib v. Minister of Defence [1979] IsrSC 33(2) 113.

³⁰ HCJ 390/79, Duweikat et al. v. Government of Israel et al.

³¹ UNOCHA, The Humanitarian Impact of the Barrier, July 2013.

³² HCJ 2056/04, Beit Surik Village Council et al. v. Government of Israel et al.

nickname of —The Gazelles’ Basin, where a new neighborhood is already being built [...] and needs defense just like the rest of that town.”³³

Ultimately, the Court has been reluctant to entertain arguments relating either to Article 49 of the Fourth Geneva Convention or Regulation 55 of the Hague Regulations, as that would have necessarily resulted in a Court ruling declaring all settlements in occupied territory illegal.

ii. Forcible Transfer:

On numerous occasions the Court has ruled that the actions of the Israeli Military Commander should not be examined in light of the Fourth Geneva Convention. Even when discussing Article 49(1) of the Fourth Geneva Convention – which stipulates an absolute ban on forcible transfer of protected persons – the Court ruled that they do not apply to deportation of individuals, despite the fact that the word is specifically used in the treaty text. Moreover, the Court ruled that the Occupying Power’s own security concerns grants a right to employ measures of forcible transfer.³⁴

While individual or mass forcible transfer, pursuant to Article 49 of the Fourth Geneva Convention, is prohibited regardless of their motive, the Court established that in addition to the Fourth Geneva Convention not constituting customary international law (and thus, not a part of Israeli domestic law), Article 49 was introduced to address mass deportation, tantamount to the occurrences of World War II, and was not appropriate to regulate the specific transfer of Palestinian individuals. Additionally, the Court ruled that forcible transfer was consistent with The Defence (Emergency) Regulations Section 112, first promulgated by the British authorities in mandatory Palestine in 1945, and integrated into Israeli law.³⁵

iii. Destruction of Property:

In 2012, close to 12,000 Palestinians were provided with legal assistance through the “Legal Task Force”, largely in relation to demolitions in the West Bank.³⁶ The CAP further reports that “approximately 95% of people subject to stop-work, demolition or evictions orders who received legal representation from Legal Task Force lawyers were able to remain in their homes following the temporary suspension of such orders”.³⁷ While legal assistance

³³ Ibid.

³⁴ HCJ 97/79, Abu Awad v. Commander of Judea and Samaria

³⁵ HCJ 698/80, Kawasma v. Minister of Defence [1981]

³⁶ According to the 2013 UN led Consolidated Appeal Process (CAP).

³⁷ The 2013 CAP provided an excess of 7 million USD to legal assistance (out of a total of 374 million USD), with the goal of promoting access to justice through legal representation, counselling and information services.

provides documented short-term benefits in the form of provisional protection of property, it serves to highlight the temporal nature of the intervention.

It is best exemplified by the jurisprudence of the HCJ on destruction of property owned or inhabited by Palestinians. When hearing Palestinian plaintiffs challenging demolition orders issued by the Israeli Military Commander to their property, the Court will initially award injunction orders or *order nisi* limited to the duration of time required for the State to argue in favour of the demolition order, despite the fact that under IHL the only exception to the prohibition on demolitions is during the conduct of hostilities and with absolute military necessity to do so. While these proceedings may be protracted due to the volume of demolition orders, and the back-log in the Court, ultimately, the position of the State is unequivocally upheld and demolition orders are sanctioned by the Court, despite being in clear contradiction of international law.

Consequently, the Court has consistently legitimised house demolitions while developing a limited and flawed jurisprudence regarding the right of owners to be heard in advance of demolitions. Access to justice, limited to standing (*locus standi*) in the Court is not an adequate remedy. There are no clear guidelines for the appeal process, and the Court invariably defers to GOI invocation of “military necessity.” Occasionally, the GOI announces that it has no intention of demolishing the homes in question for the time being, leaving residents to live under the constant and prolonged threat of demolition. It is important to note that in declaring that it can carry out some demolitions at a later time, the GOI undermines any argument for the “absolute” military necessity of such destruction.

The recent destruction of Khirbet Makhul in the north Jordan Valley exemplifies the growing trend of wanton and extensive destruction of Palestinian communities, in the absence of effective judicial review of the actions of the Military Commander.

iv. Annexation:

In 2000 the Israeli legislature amended the 1980 Basic Law: Jerusalem the Capital of Israel which confirmed the boundaries of the city to include East Jerusalem, and stipulated exclusive Israeli control. Nevertheless, long before 1980, the High Court ruled that the law, jurisdiction, and administration of Israel had replaced the law, jurisdiction, and administration of Jordan, and that since 1967 a unified Jerusalem was an integral part of Israel.”³⁸ Several subsequent High Court rulings reiterated the

³⁸ See: HCJ 171/68 Hanzalis v. The Court of the Greek-Orthodox Patriarchal Church et al,

same position.³⁹ In such rulings, the HCJ has repeatedly ignored the inadmissibility of annexation, tantamount to acquisition of territory by force, in defiance of international law. The report should reflect on Israel's policies and practices of annexation, including political attempts to achieve a de jure annexation of Area C or other parts of the West Bank.⁴⁰

4. Other Israeli practices and policies that, if violating international humanitarian law, must be reported on in the ENP Progress Report.

a. Policies and/or practices of, and resulting in, destruction of private property

International Humanitarian Law applying to occupation safeguards private property. "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons...is prohibited, except where such destruction is rendered absolutely necessary by military operations."⁴¹ This rule is part of customary international law, binding on all.⁴² Destruction, also for "administrative reasons" by the occupier is only allowed where it is absolutely necessary for the Occupying Power in military operations to gain a concrete and direct military advantage. Any "administrative" destruction could only be considered if it was strictly for the benefit of the local population, coupled with construction in the same location and part of a lawful planning regime. In the administration of occupation, extensive destruction and appropriation of property is a grave violation of IHL if carried out unlawfully, wantonly and not justified by military necessity.⁴³ It could therefore be prosecuted as war crime.

³⁹ See: HCJ 283/69, Ravid and Maches v. Military Court, Hebron District and HCJ 282/88, Awad v. Yitzhak Shamir, Prime Minister and Minister of Interior et al

⁴⁰ Deliberations on a draft bill to formally annex Area C were ultimately postponed by the Prime Minister, but are likely to resume following its re-tablement in March 2013 in the original language, or in the form of draft bill targeting particular areas of the West Bank. In July 2012 an Israeli parliamentary caucus tabled a draft bill calling for the de jure annexation of the vast majority of the Jordan Valley. The bill, based on the Israeli government's position that the region will remain part of Israel in any final status agreement, calls for the application of Israeli sovereignty over "all Israeli settlements...and...areas except non-Jewish villages" in the Jordan Valley. The explanatory note for the draft bill cites the Palestinian "statehood initiative" as the pretext for annexation, stating that the "Palestinian declaration [...] does not genuinely pursue peace [...] thus the Jewish character of settlements in Judea and Samaria should be retained."

See: Ministerial Committee on Legislative Affairs called to vote on bill to impose Israeli law on Jewish settlements in West Bank: <http://www.ynetnews.com/articles/0,7340,L-4228574,00.html>

⁴¹ Fourth Geneva Convention Article 53 prohibits destruction of property that is not justified by military necessity.

⁴² International Committee of the Red Cross (ICRC) Customary IHL Database, Rule 50: The destruction or seizure of the property of an adversary is prohibited, unless required by imperative military necessity.

⁴³ Fourth Geneva Convention, Article 147



b. Policies and/or practices that lead to, or risk leading to, forcible transfer of the protected population.

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Forcible transfer of Palestinian individuals or communities is prohibited, regardless of the motive.⁴⁴ All civilians in the occupied Palestinian territory (oPt), who are not Israeli, are protected persons according to international humanitarian law. They are entitled to respect for their person, their honour, their family rights, religious convictions, and traditions. They shall be treated humanely and never be discriminated against.⁴⁵ The prohibition on forced transfer and destruction of property are for the benefit of the entire protected population, i.e. of each inhabitant. They are in no way tied to any technicality like “permanent residency”. Whether the individual was a permanent resident of the area where his or her property happened to be located is irrelevant.

According to international case law 'forcibly' is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons, or by taking advantage of a coercive environment. Thus, in monitoring policies and practices, the report must assess and address the conditions creating such a coercive environment, including but not limited to, the lack of protection from settler violence, the legality of the planning regime (addressed above), the access to an independent judiciary (addressed above), access to water and confiscation of aid (see below). Deportation or transfer of a protected person is a grave violation of IHL. It, too, could therefore be prosecuted as a war crime.⁴⁶

c. Policies and/or practices that impede humanitarian aid

The ENP Progress Report must reflect on Israel’s compliance with the legal obligations regarding humanitarian aid; to provide for the basic needs of the local community⁴⁷ and where it is unable or unwilling to do so, to *facilitate effectively* the work of humanitarian relief schemes.⁴⁸ This prescribes Israel’s primary responsibility for the welfare of the occupied population, including through the rapid, unimpeded, and effective delivery of aid by international actors.

⁴⁴ Ibid., Article 49

⁴⁵ Ibid., Article 27

⁴⁶ Ibid., Article 147

⁴⁷ Fourth Geneva Convention, Article 55; Rule 55 ICRC Customary International Law Study.

⁴⁸ Fourth Geneva Convention, Article 59. The United Nations General Assembly and Security Council have consistently underlined the importance of safe and unhindered access of humanitarian personnel to civilians in armed conflict, including refugees and internally displaced persons, and the protection of humanitarian assistance to them.

The compliance of Israel with these obligations must be assessed in the context of the above described planning regime, regulating the delivery of aid projects within Area C. All confiscation of aid delivered to affected communities should also be evaluated in the context of how it contributes to the forcible transfer of the communities (see above).

d. Policies and/or practices that amount to collective punishment

IHL prohibits collective punishment, i.e. the punishment of protected persons for acts that they are not personally responsible for, simply because of their connection with the person that is held responsible.⁴⁹ The report must reflect on Israeli policies and/or practices that amount to collective punishment, particularly but not only in the Gaza Strip, for example the practice of limiting fishing persons' (protected persons under international humanitarian law) access to fishing water in response to rockets.⁵⁰

e. Detention of prisoners outside of the oPt:

The Report must consider and reflect on information about the Israeli practice of transferring Palestinian detainees and convicted persons to Israel. Palestinians detained or convicted by the Israeli authorities must be detained and serve their sentence in the OPT.⁵¹ To transfer them to centres in Israel violates international humanitarian law. The Israel Prison Service (IPS) facilities of Ktziot, Meggido, Damon, Abu Kabir, Kishon ('Al Jalameh'), and Jerusalem ('Russian Compound'), incarcerate Palestinian detainees including minors.⁵² All of these facilities are inside Israel, contrary to an expressed protection against the transfer of civilians outside of the OPT.⁵³

⁴⁹ Fourth Geneva Convention, Article 33: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited." And 1907 Hague Regulations Article 50 "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible".

⁵⁰ Maan News: "Israel to limit Gaza fishing zone after rocket fire", <http://www.maannews.net/eng/ViewDetails.aspx?ID=577589>

⁵¹ Fourth Geneva Convention Article 76

⁵² UK Foreign Common Office; 'Children in Military Custody', June 2012. Permanently available at <http://alturl.com/c23o6> (Last accessed 5/7/2013).

⁵³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, Article 49.

5. Recommendations

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Based on the above, Diakonia makes the following recommendations regarding the ENP Progress Report:

- Israel's adherence to international law in the Occupied Palestinian Territory (OPT), and international humanitarian law (IHL) in particular, must be systematically monitored and assessed by the ENP Progress Report;
- The IHL compliance assessment must have an impact on the recommendations;
- Applicable IHL norms must be properly identified and included, in order for them to inform recommendations and guide assessment of compliance well in advance of any potential upgrade;
- The nature of the *prolonged* occupation requires an in-depth analysis of Israel's policies, practices and jurisprudence, in particular:
 - the settlements policy and the Israeli planning regime; as well as
 - the judiciary's independence in relation to the OPT
- Other policies and/or practices that must be monitored and assessed in the Progress Report, include;
 - destruction of private or public property;
 - forcible transfer of the protected population;
 - collective punishment;
 - impediment to humanitarian and development aid; and
 - detention of prisoners from the OPT in Israel.

For further information, please contact:

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Annex: Background on Diakonia

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Diakonia is a Swedish non-governmental development organisation, created in 1966 by five Christian denominations. Diakonia works in partnership with over 400 civil society organisations in more than 30 countries in Africa, Asia, the Middle East and Latin America. We work with a long-term and rights-based perspective to advance democracy and human rights, social and economic justice, gender equality, and peace and justice. Diakonia's vision is for every human being to live in dignity in a just and sustainable world, free from poverty. Together with our partners, our mission is to change unfair political, economic and social structures that generate poverty, oppression and violence.

We work in strong partnership with local organisations to empower people to demand their rights and hold duty bearers to account. This strategy provides the legal framework and tools to pursue change and empowers the rights holders to be agents of change. Our motto is therefore "People changing the world". Diakonia uses a holistic perspective of long-term development, humanitarian work and advocacy, and all three components are interlinked.

Diakonia has long experience as a humanitarian actor in various parts of the world, guided by the principles of "Do no Harm" and "good humanitarian donorship". International law, including IHL and IHRL, is part of our identity and core mandate, being the central component in one of our thematic areas; Conflict and Justice.

Diakonia's IHL Resource Centre

Diakonia started implementing the International Humanitarian Law programme in 2004 with the aim to increase respect for and further implementation of international law, specifically IHL, in the Israel-Palestinian conflict. By raising awareness of IHL within Israeli and Palestinian societies and the International Community and by advancing IHL's implementation in this conflict, we hope to contribute to the improvement of the humanitarian situation in the occupied Palestinian territory and promote peace. This includes promoting knowledge and respect for IHL toward a change of policies among decision makers regarding IHL and to improve accountability for the benefit of society and victims