

The International Humanitarian Fact-Finding Commission and Gaza – How is it Involved?

lieber.westpoint.edu/international-humanitarian-fact-finding-commission-gaza-involved

July 29, 2024

by [Charles Garraway](#) | Jul 29, 2024



On 20 June 2024, the government of the Republic of Poland signed a [Memorandum of Understanding](#) with the International Humanitarian Fact-Finding Commission (IHFFC) regarding the incident on April 1, 2024 in the Gaza Strip during which seven people working with the non-governmental organization World Central Kitchen (WCK) were killed, including a Polish citizen. What is the IHFFC and what mandate does it have to investigate such matters?

The International Humanitarian Fact-Finding Commission

The IHFFC is a treaty body established in accordance with [Article 90](#) of Additional Protocol I of 1977 to the 1949 Geneva Conventions (AP I). It is competent to “enquire into any facts alleged to be a grave breach . . . or other serious violations of the Conventions or [Protocol I].” It can also “facilitate through its good offices, the restoration of an attitude of respect” for the Conventions and the Protocol. Whilst the IHFFC has automatic competence in regard to

allegations made between “Parties to the Commission,” where that is not the case, the IHFFC can institute an inquiry at the request of a party to the conflict only with the consent of the other party or parties concerned.

The IHFFC is made up of 15 independent experts nominated by and voted on by those States who have accepted the competence of the Commission. Ratification of AP I by itself is not enough; States must enter a separate declaration to accept the competence of the Commission. As of July 2024, 76 of the 174 States Parties to the Protocol have made such a declaration.

More important than the makeup of the IHFFC is its ethos. It is a product of its time and, as such, was designed as a peace building initiative. This is made plain in the second of its competences. With this in mind, Article 90(5)(c) states, “The Commission shall not report its findings publicly, unless all the Parties to the conflict have requested the Commission to do so.” Its work is thus conducted under a cloak of confidentiality.

For the IHFFC to come into existence, twenty declarations were required, and thus the establishment of the Commission was delayed until 1991—by which time the world had changed. The Cold War had ended, and a new focus was beginning to emerge. Throughout the 1990s, the “buzzword” was “accountability” with the establishment of the International Tribunals for the Former Yugoslavia and Rwanda and the adoption of the Statute of the International Criminal Court. The emphasis was now moving away from peacebuilding and, as fact-finding became a key element of the new focus, the aim was to bring to light violations of international law and to bring perpetrators to account. It was hard to see where a body operating confidentially would fit into this brave new world. Thus, despite the eminence of the experts elected to the Commission by States (including Fritz Kalshoven, Luigi Condorelli, Sir Kenneth Keith, and Ove Bring), the IHFFC fell out of favour and was never called into action.

In the early part of this century, the IHFFC sought to make itself more relevant by agreeing that, although designed for international armed conflict, it would offer its services to parties to non-international armed conflicts as well. This was controversial and not accepted by all States, even some parties to the Commission, as in accordance with the strict treaty interpretation of Article 90 AP I. However, it was becoming obvious that in the new world order, the IHFFC would have to reinvent itself if it was to find a role.

The original concept as laid down in 1977 whereby the IHFFC had the competence to adjudicate confidentially in disputes between parties to the Commission was no longer feasible. There never was a conflict between two parties to the Commission during that time and offers by the IHFFC to non-parties were not accepted, due partly to the issue of confidentiality. Propaganda and public denunciation had become key weapons of war. There were occasions when the IHFFC came close to becoming involved, but it was not to be. Initially, even approaches by the IHFFC were kept confidential but that merely exacerbated

the situation by indicating that the Commission was moribund, which it was not. The various calls over the years from non-governmental organizations such as Doctors without Borders (MSF) for intervention by the IHFFC showed that there was a need for such a body but the problem lay in activation.

A Change of Direction for the IHFFC

In recent years, the IHFFC has realized that it is unlikely that the formal procedures envisaged under Article 90 would ever be practicable in the twenty-first century. However, it remains the only permanent body designed to investigate violations of the Geneva Conventions and AP I. Was it possible to find a way to use the IHFFC, operating perhaps outside the strict treaty framework but within the concept of “good offices”? This would require some “out of the box” thinking.

This came to fruition when, in May 2017, the IHFFC was asked by the Organization for Security and Co-operation in Europe (OSCE) to lead an independent forensic investigation (IFI) in relation to an incident that occurred in Eastern Ukraine and caused the death of a paramedic and the injury of two monitors of its Special Monitoring Mission to Ukraine. The aim of the independent forensic investigation was to establish the facts of the incident by conducting a post-blast scene forensic investigation and technical assessment against the background of international humanitarian law. The mission was carried out successfully and the IFI’s report was presented to the Permanent Council of the OSCE on September 7, 2017.

Whether this inquiry fell outside the treaty provisions of Article 90 AP I is a matter of discussion, but every effort was made to bring this initiative within the concept of “good offices” and thus give it a basis within the terms of the treaty. It should be noted that the team was described as an “Independent Forensic Investigation (IFI) team,” not as the IHFFC, although the IHFFC was credited with assembling and deploying the team. The report was delivered to the OSCE and it was for the OSCE to decide on what should be published.

The IHFFC has been keen to follow up on this success. Although it has continued to offer its services in accordance with its treaty remit in suitable circumstances—and such offers are now published on the IHFFC website—opportunities have also been explored as to other ways in which the expertise offered by the IHFFC can be made available. Such an opportunity has now arisen in relation to the WCK incident in Gaza on April 1, 2024.

World Central Kitchen

On April 1, 2024, a convoy of vehicles in Gaza carrying aid workers employed by WCK was struck by missiles fired by Israel. Seven aid workers were killed, of various nationalities but including a Polish national, Damian Sobol. An Israel Defense Forces (IDF) inquiry concluded that one of the aid workers had been “misidentified” as a gunman. It seemed also that,

although WCK claimed that they had coordinated the movements of the convoy with the IDF, this information had not been passed to the drone operators who were tracking the convoy. Two senior military officers were dismissed and two more reprimanded.

Poland is a State Party to the IHFFC and indeed, a Polish expert, Dr Elżbieta Mikos-Skuza, has been a member of the Commission since 2002, and is currently the 1st Vice President. On 20 June 2024, the President of the IHFFC, Thilo Maruhn, and the Minister of Foreign Affairs of Poland, Radosław Sikorski, signed a Memorandum of Understanding in respect of the WCK incident. The Polish Government website states “Poland believes that the Commission’s work can contribute to explaining the circumstances of the incident in an expeditious and fair manner and facilitate restoration of respect for the provisions of international humanitarian law. Under the Memorandum of Understanding, the Commission will establish the circumstances of the attack . . . on 1 April 2024.”

The phrase in the Polish statement on “restoration of respect for the provisions of international humanitarian law” carries echoes of Article 90(2)(c)(ii) of AP I. This provides that the Commission has competence to “facilitate through its good offices, the restoration of an attitude of respect” for the Conventions and the Protocol. However, Poland is not a party to the conflict in Gaza, nor is there any indication that the parties to the conflict have agreed to the involvement of the IHFFC, and so it is hard to interpret this initiative as falling within the strict treaty terms of Article 90. It should be noted that whilst Palestine has been a party to the IHFFC since 2018, Israel has never been a party and indeed is not a party to AP I.

What to Expect

Although I have not been able to see a copy of the Memorandum of Understanding, it is likely that this initiative will be along the lines of that undertaken in 2017 on behalf of the OSCE. This has distinct advantages in that the strict treaty provisions in Article 90 as to the makeup of the inquiry team (referred to under Article 90 as a “Chamber”) will not be applicable and thus there will be greater freedom on both structure and procedure. This would be dealt with in the Memorandum and agreed between Poland and the IHFFC. It will not be necessary to appoint two “*ad hoc*” members to the Chamber, “one to be appointed by each side.”

The format of the inquiry will be laid down in the Memorandum. Based on the experience in Ukraine in 2017, it is likely to consist of a small team, led by one of the Vice Presidents, who would “establish the facts of the incident and reaffirm applicable international humanitarian law.” How this is done will depend on the degree of cooperation that can be achieved with the parties involved. The basic facts of the incident do not appear to be in dispute but the procedures leading up to the attack may be more difficult to establish. However, this is a problem that faces many fact-finding bodies in conflict situations, particularly when dealing with the conduct of hostilities.

Concluding Remarks

The IHFFC has been described by some as an “ugly duckling.” It is sometimes seen as a twentieth century construct trying to answer twenty first century problems. However, it remains the only permanent body specifically designed to look at violations of the Geneva Conventions and by extension the laws of war in general. The attempt to reinvent it as an independent body available to investigate incidents of this nature is to be welcomed. The success of the OSCE mission illustrates that there is room for such initiatives, and we can hope for similar success in this most challenging of environments.

Charles Garraway is a Fellow at the Human Rights Centre, University of Essex.

Photo credit: Unsplash

SUBSCRIBE