

**REPORT ON THE ISRAELI ATTACK  
ON THE HUMANITARIAN AID CONVOY TO GAZA  
ON 31 MAY 2010**

**TURKISH NATIONAL COMMISSION OF INQUIRY**

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## **EXECUTIVE SUMMARY**

Israeli military forces on the early hours of 31 May 2010 attacked in international waters an international and multi-faith convoy of six ships organized by a coalition of NGOs from 37 countries transporting certified humanitarian aid to the Gaza Strip. The attack took place 72 nautical miles from the nearest coast, and 64 nautical miles from the zone declared unlawfully, as will be seen, blockaded by Israel. As a result of the attack, eight Turkish citizens and one US citizen of Turkish descent were killed. Over 70 passengers from a host of nationalities were wounded. One of these remains in a coma to this day.

The vessels that set sail from Turkey had been duly inspected for security, immigration and customs. The passengers on board, their personal belongings and the large volume of humanitarian aid had also been thoroughly checked. It was firmly established that there were no firearms or any sort of weapon on board the vessels. Those Turkish ports from where the ships in the convoy set sail are duly certified under the International Ship and Port Facility Security Code (ISPS) of the International Maritime Organization.

The Israeli forces mounted a full-fledged and well-planned attack with frigates, helicopters, zodiacs, submarines, and elite combat troops heavily armed with machine guns, laser-guided rifles, pistols and modified paintball rifles. The Israeli soldiers shot from the helicopter onto the Mavi Marmara using live ammunition and killing two passengers before any Israeli soldier descended on the deck. During the attack, excessive, indiscriminate and disproportionate force was used by the Israeli soldiers against the civilians on board. The Israeli military action was of excessive disproportion to such magnitude that the United Nations Human Rights Council Fact-Finding Mission used the terms “totally unnecessary and incredible violence...unacceptable level of brutality”. The

passengers only exercised a lawful right of self-defense, without any firearms, against the armed attack of the Israeli forces.

Once the Israeli forces took over the vessel, instead of exercising caution and restraint, they continued to brutalize and terrorize the passengers, abusing them physically, verbally and psychologically. The passengers were beaten, kicked, elbowed, punched, deprived of food and water, handcuffed, left exposed to sun, sprayed with sea-water for hours, and denied toilet access.

During and after the ten hours of sailing to the port of Ashdod in Israel, most of the passengers were kept handcuffed. Some of them were stripped and searched; women were subjected to sexually humiliating treatment; one of them, a journalist, was forced to strip multiple times and a metal detector was placed between her legs.

All passengers were forced to sign incriminatory statements in Hebrew which most did not even understand; they were not allowed access to legal assistance, or to consular officials, nor provided with proper and timely medical care. They were denied adequate food and were confined to restricted spaces with extreme temperatures.

The Israeli officials confiscated all property belonging to the passengers. Aside from the unlawful seizure of personal property, evidences of critical importance to shed light on the attack was destroyed, tampered with or despoiled.

The severe abuse against the passengers continued throughout their stay in Israel, including their transport to prison/hospital and therefrom to the Ben Gurion Airport which was the scene to the second most brutal episode in this tragedy. The passengers who arrived at the airport, exhausted by the ordeal they were subjected to, were taunted, paraded as terrorists and enemies, verbally

abused, spat on, bullied, pushed around and manhandled just to spark the slightest reaction which would be countered with massive retribution, resulting in mass beatings where officers brutalizing the passengers were shielded from view by their colleagues.

The bodies of the deceased were completely washed and repatriated to Turkey without any accompanying medical and autopsy reports. The Mavi Marmara itself, when returned after being held for 66 days in Ashdod, had been scrubbed down thoroughly, blood stains completely washed off, bullet holes painted over; ship records, Captain's log, computer hardware, ship documents seized, CCTV cameras smashed, all photographic footage seized and presumably destroyed or withheld.

The unlawfulness of the attack put aside, the killing of nine civilian passengers on the Mavi Marmara was first and foremost a violation of the right to life enshrined in the Universal Declaration of Human Rights, and also in the International Covenant on Civil and Political Rights (ICCPR) to which Israel has been a party since 1991. International law was also violated as a result of mistreatment of injured and other passengers on board of the Mavi Marmara and in Ashdod by the Israeli forces and officials.

Furthermore, the fact that the Israeli forces committed torture, engaged in degrading and inhuman treatment; forcibly deprived passengers of their human rights and fundamental freedoms, including the right to privacy, physical security and due process; and abused them physically and psychologically constitutes clear violations of the prohibition of torture and ill-treatment under Article 7 of the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to which Israel has been

a party since 1991. These acts also constitute a breach of Article 3 of the European Convention on Human Rights (ECHR).

The Israeli attack on the humanitarian aid convoy in international waters constitutes a violation of freedom of navigation and safety of navigation on the high seas. Freedom of navigation on the high seas is a long-standing rule of customary international law. The 1958 High Seas Convention and the 1982 United Nations Law of the Sea Convention codify what widely recognized to be the customary international rules of the freedom of the high seas. One of the components of freedom of the high seas is the exclusive jurisdiction of the flag State.

The Law of the Sea restricts the right of warships to seize a foreign ship, and its property and arrest the persons on board only in the case of *pirate ships* or aircraft.

Israel's failure to recognize its armed conflict with Hamas as one of international character precludes it from establishing any lawful naval blockade off the Gaza Strip. Since Israel's naval "blockade" on the Gaza Strip is unlawful, any act it performs as a function of this "blockade" is also unlawful *par excellence*.

Israel's naval "blockade" against the Gaza Strip, as it existed on 31 May 2010, was also in violation of the principles of international law governing blockade, as laid down in the San Remo Manual.

Even assuming, *in arguendum*, the validity of the basis of Israel's "blockade", its implementation would render it unlawful. It was excessive, unreasonable, and disproportionate to any military advantage to be achieved in relation to its

impact on the civilian population. This has been documented by numerous UN agencies and the international community at large.

Numerous *official* statements acknowledged that Israel's blockade was "illegal" and had to be lifted, describing the blockade as "collective punishment on civilians."

The blockade failed to meet the other requirements of a lawful naval blockade under international law, such as specifying the duration and extent of the blockade.

Israel retains effective control over the Gaza Strip and is generally recognized by the international community and the UN as the occupying power there. As a result, Israel cannot lawfully impose a blockade on the Gaza Strip. From this perspective also, the Israeli blockade is illegal and any interdiction based on such blockade is, by definition, unlawful.

Finally, it is a central principle of international law that when a state violates its international obligations, it has a duty to make reparations for the wrongs committed and provide for compensation.

This case is a critical litmus test for the international community in upholding the rule of law. No State should be allowed to act above the law. Impunity must give way to accountability. Israel must acknowledge its responsibility and accordingly convey a public apology to the Republic of Turkey and provide compensation for all damages and losses resulting from its unlawful attack.

The condemnation of Israel's attack is also crucial for the future of the right of navigation on the high seas. Otherwise, a dangerous precedential derogation



from that paramount right will be established—with far-reaching ramifications that may not be accurately estimated today.

## INTRODUCTION

On 11 August 2010, a Turkish National Commission of Inquiry was established to examine the Israeli military attack in international waters against the international aid convoy on 31 May 2010 which resulted in the killing of nine civilians and injury of many others. The Commission investigated the factual background of the attack, the ensuing violence and mistreatment endured by the passengers, as well as the legal implications and consequences of these acts.

The Turkish National Commission of Inquiry included senior officials from the Board of Inspectors in the Office of the Prime Minister, the Ministry of Justice, the Ministry of Interior, the Ministry of Foreign Affairs and the Under-Secretariat for Maritime Affairs. The Commission examined pertinent international legal instruments as well as numerous depositions made and complaints lodged by survivors to Turkish judicial authorities upon their return to Turkey, solicited verbal and written testimonies from key witnesses, met with relevant authorities, consulted international law experts of renown, and carried out an on-site inspection in the Port of Iskenderun on those vessels in the convoy which had set sail from Turkish ports.

The Turkish Commission of Inquiry was also tasked to prepare a report for consideration by the Panel of Inquiry set up by the UN Secretary-General on 2 August 2010 on the matter, in accordance with the Presidential Statement issued by the UN Security Council on 1 June 2010 which called for a “prompt, impartial, credible and transparent investigation conforming to international standards”.

The text of the abovementioned Presidential Statement is presented hereby to provide a full view of the basis of the UN inquiry process.

*“The Security Council deeply regrets the loss of life and injuries resulting from the use of force during the Israeli military operation in international waters against the convoy sailing to Gaza. The Council, in this context, condemns those acts which resulted in the loss of at least ten civilians and many wounded, and expresses its condolences to their families.*

*“The Security Council requests the immediate release of the ships as well as the civilians held by Israel. The Council urges Israel to permit full consular access, to allow the countries concerned to retrieve their deceased and wounded immediately, and to ensure the delivery of humanitarian assistance from the convoy to its destination.*

*“The Security Council takes note of the statement of the UN Secretary-General on the need to have a full investigation into the matter and it calls for a prompt, impartial, credible and transparent investigation conforming to international standards.*

*“The Security Council stresses that the situation in Gaza is not sustainable. The Council re-emphasizes the importance of the full implementation of Resolutions 1850 and 1860. In that context, it reiterates its grave concern at the humanitarian situation in Gaza and stresses the need for sustained and regular flow of goods and people to Gaza as well as unimpeded provision and distribution of humanitarian assistance throughout Gaza.*

*“The Security Council underscores that the only viable solution to Israeli-Palestinian conflict is an agreement negotiated between the parties and re-emphasizes that only a two-State solution, with an independent and viable Palestinian State living side by side in peace and security with Israel and its other neighbours, could bring peace to the region.*

*“The Security Council expresses support for the proximity talks and voices concern that this incident took place while the proximity talks are underway and urges the parties to act with restraint, avoiding any unilateral and provocative actions, and all international partners to promote an atmosphere of cooperation between the parties and throughout the region.”*

This final report is a follow-up to the Interim Report submitted to the Panel on 1 September 2010, in pursuance of the abovementioned task.

The Commission remains committed to the fullest possible cooperation with the UN Panel of Inquiry. It accordingly stands ready and willing to furnish further information and clarification, wherever and whenever required.

## I. STATEMENT OF THE FACTS

*“In international law, as in internal law, the ends do not justify the means. The state’s power is not unlimited. Not all of the means are permitted.” “It is when the cannons roar that we especially need the laws.”*

*The Israeli Supreme Court, 11 December 2005*

### A. The international humanitarian aid convoy

In order to fully grasp the context and circumstances under which the tragedy unfolded in international waters on 31 May 2010, it is essential to have a clear understanding of the background which led to the organization of an international humanitarian aid convoy for the Gaza Strip and Israel’s subsequent attack thereon.

Israel was in full occupation of the Gaza Strip between 1967 and 2005. Under the disengagement in 2005, Israel withdrew its military and civilian components from the Gaza Strip, while still maintaining effective control over this area.

Hamas’ success at the legislative elections in 2006 prompted Israel to adopt policies aimed at delegitimizing Hamas. These policies picked up pace in 2007, as Hamas gained the upper hand against Fatah in the internecine struggle in the Gaza Strip.

While the makeshift rockets and mortars fired from the Gaza Strip to the southernmost areas of Israel caused few casualties and little material damage,

they provided Israel with a pretext to take action. Israel disproportionately responded with strict measures suffocating the Gaza Strip's entire population of approximately 1.5 million, half of which are children. These measures were aimed at the movement of persons, goods and capital in and out of the Gaza Strip, as well as the provision of electricity and fuel. Meanwhile Israel also sustained its punitive military actions against the Gaza Strip, which included systematic air, naval and land operations causing many civilian deaths since 2005.

It was against such a backdrop that Israel also imposed air, maritime, and land “blockades” against the Gaza Strip.

At the end of 2008, Israel launched a full-scale military assault on the Gaza Strip. The attack caused some 1,400 deaths, mostly women and children, as well as the destruction of a substantial portion of the already weak infrastructure. The devastation was so great that an international donors' conference was convened to help Gazans rebuild their livelihoods. Despite pledges amounting to 4.5 billion USD, Israel's prohibitive policies against the Gaza Strip prevented any meaningful improvement on the ground, even bringing the United Nations projects to a standstill.

The continuing deterioration of the situation and the Gazans' plight caused ever increasing alarm and concern within the international community. As it became evident that Israel's policies would continue to hinder the provision of adequate supplies from land, attention was turned to the idea of bringing in the assistance via the sea. Ultimately, Mr. John Ging, UN Relief and Works Agency's then-

Director of Operations in Gaza had to make a public call to the international community to bring aid to Gaza by sea.<sup>1</sup>

Attempts to assist Gaza by sea were not a novelty. The grim situation in Gaza had already led to the organization of various humanitarian missions. Following Israel's above-mentioned military operation, these attempts found a new source of inspiration in United Nations Security Council Resolution 1860 where the Council, expressing grave concern at the deepening humanitarian crisis in Gaza, and emphasizing the need to ensure sustained and regular flow of goods and people through the Gaza crossings, called for the unimpeded provision and distribution throughout Gaza of humanitarian assistance, including of food, fuel and medical treatment; welcomed the initiatives aimed at creating and opening humanitarian corridors and other mechanisms for the sustained delivery of humanitarian aid; and called on Member States to support international efforts to alleviate the humanitarian and economic situation in Gaza.<sup>2</sup>

It is within such a context that a multitude of NGO's from a variety of countries came together in a coalition to help alleviate the alarming humanitarian crisis in Gaza. The principal Turkish NGO within the coalition was "İnsan Hak ve Hürriyetleri Vakfı" (the "Foundation for Human Rights and Freedoms"—IHH), which enjoys consultative status within the UN ECOSOC and performs humanitarian activities in over 120 countries worldwide since 1992.

The coalition organized an international and multi-faith convoy of ships laden with certified humanitarian aid. The ships set sail in May 2010 from different

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<sup>1</sup> See John Ging's statements, Israel wants clarification about UNRWA Gaza Director's call to break the siege, *The Middle East Monitor*, 4 May 2010, <<http://www.middleeastmonitor.org.uk/news/middle-east/980-israel-wants-clarification-about-unrwa-gaza-directors-call-to-break-the-siege>> 3 February 2011

<sup>2</sup>Security Council, United Nations, Resolution on the Situation in the Middle East, including the Palestinian question, S/RES/1860 (2009)

countries. The convoy consisted of passenger vessels “*Mavi Marmara*” (Comoros), “*Sfendoni*” (Togo) (referred to in some instances as the “8000”), “*Challenger I*” (US) and cargo vessels “*Gazze I*” (Turkish), “*Eleftheri Mesogeio*” (Greek) (also referred to in some instances as the “*Sofia*”), “*Defne-Y*” (Kiribati).<sup>3</sup> The total cargo on the six ships was in excess of 10,000 tons.<sup>4</sup>

The passengers included Members of Parliaments from different European countries as well as a Member of the Knesset, academics, journalists, former diplomats including a retired US ambassador, religious leaders, elderly people, women, and the one-year-old son of the *Mavi Marmara*’s Chief Engineer.<sup>5,6</sup> These passengers, who came from different walks of life and backgrounds, had united behind the humane goal of helping other persons in distress.

## **B. The vessels that departed from Turkish ports**

The *Mavi Marmara* left Istanbul on 22 May 2010 with a crew of 29 and a cleaning and maintenance personnel of 42.<sup>7</sup> The Port of Zeytinburnu (Istanbul), as all Turkish ports used by the vessels in the convoy, has an International Ship and Port Facility Security (ISPS) Certificate under the Convention on Safety of Life at Sea (SOLAS).<sup>8</sup> All crew members and passengers were subjected to x-ray checks, and customs and passport controls conforming to the pertinent international standards.<sup>9</sup> On 25 May 2010, the vessel docked at the Port of Antalya which it left on 28 May 2010 with a total of 546 passengers and 29 crew

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<sup>3</sup>For photographs of the vessels, see: The Foundation for Human Rights and Freedoms and Humanitarian Relief, *Palestine Our Route Humanitarian Aid Our Load Convoy Campaign Summary Report*, p.12

<[http://www.ihh.org.tr/uploads/2010/insaniyardim-filosu-ozet-raporu\\_en.pdf](http://www.ihh.org.tr/uploads/2010/insaniyardim-filosu-ozet-raporu_en.pdf)>, (Accessed 14 July 2010)

<sup>4</sup>For a comprehensive description of the cargo, see Annex 3 (Section 1-4).

<sup>5</sup>For the crew and passenger lists of the vessels *Mavi Marmara*, *Gazze* and *Defne-Y*, see Annex 3 (Section 1-4).

<sup>6</sup>A video footage of the said baby is in Annex 7 (Clip19).

<sup>7</sup>For the testimony of Captain Mahmut Tural, see Annex 5 (Section1/i)

<sup>8</sup>For the Statement of Compliance Documents (ISPS) of the Ports of Istanbul, Antalya, Iskenderun and Zeytinburnu, see Annex 3 (Section 5)

<sup>9</sup>For the customs records of the passengers and crew of the *Mavi Marmara*, see Annex 4 (Section 2 & 7)

members.<sup>10</sup> Again, all the passengers and crew were subjected to the same stringent x-ray checks as well as customs and passport controls. All personal belongings and cargo were also thoroughly inspected and cleared.<sup>11, 12, 13</sup>

The Gazze-I left the Port of Iskenderun on 22 May 2010 with a crew of thirteen and five passengers, while the Defne-Y departed the Port of Zeytinburnu, Istanbul, on 24 May 2010 with a crew of thirteen and seven passengers. Both vessels underwent similar rigorous checks and controls.

On 28 May 2010, the Mavi Marmara sailed towards the meeting point south of the island of Cyprus where all the vessels in the convoy were expected to get together. At the meeting point, Challenger-II was discovered to have become unfit to complete the rest of the planned journey. As a result, its 14 passengers were transferred to the Mavi Marmara.<sup>14</sup> The personal effects of the new arrivals were thoroughly checked by the crew of the Mavi Marmara.

The convoy sailed from the meeting point on 30 May 2010 at 16.00 on a bearing of 222°.<sup>15</sup>

### **C. Diplomatic contacts prior to the departure of the convoy**

A number of diplomatic representations were carried out by Israeli authorities in Tel Aviv, Jerusalem and Ankara, demanding that Turkish authorities deny the convoy departure from Turkish ports, also insisting that, should the convoy sail on as planned, the aid be routed to Israel for inspection and subsequent delivery to its destination.

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<sup>10</sup> For the customs records of the passengers and crew of the Mavi Marmara, see Annex 4 (Section 2 & 7)

<sup>11</sup> For the written deposition of First Captain Mr. Mahmut Tural, see Annex 5 (Section 1/i)

<sup>12</sup> For the Statement of Compliance Documents of the Port of Antalya, see Annex 3 (Section 5)

<sup>13</sup> For the Port Authority Records of Mavi Marmara, see Annex 3 (Section 1 & 2)

<sup>14</sup> For a list the passengers who boarded the Mavi Marmara from the Challenger-II, see Annex 3 (Section 8)

<sup>15</sup> For the map of the coordinates of the vessels during the time of journey see, Annex 3 (Section 5)



In reply, the Turkish authorities stressed the difficulties, in an open and democratic society, in preventing an NGO endeavor from lawfully departing Turkish ports. Nonetheless, the Turkish authorities pledged to inform the convoy's Turkish participants about the messages conveyed by Israel and to try to convince them to take the aid to Ashdod in Israel or to Al-Arish in Egypt. All these steps were taken prior to the departure of the convoy. The Turkish authorities also urged Israel repeatedly to act with maximum restraint and to avoid using force to intercept the vessels.

On 28 May 2010, the Undersecretary of the Turkish Ministry of Foreign Affairs told the US Ambassador in Ankara that contacts with the convoy's Turkish participants were starting to bear fruit, and that the IHH representatives agreed to eventually dock at Al-Arish. But the convoy would first try to approach the Gaza Strip and, if necessary, alter its course to Al-Arish. The Undersecretary also cautioned that Israel should act with maximum restraint and avoid using force by any means. He asked the US Ambassador to pass this message on to Israel. A few hours later, the Director General of the Israeli Ministry of Foreign Affairs called the Undersecretary to express their accord to the above.

#### **D. The Israeli attack**

Israeli forces, undermining the above-mentioned understanding, attacked the convoy in the early hours of 31 May 2010. The attack took place in international waters, 72 nautical miles from the nearest coast and 64 nautical miles from the so-called blockaded naval zone off the Gaza Strip.<sup>16</sup> The Israeli soldiers were heavily armed with machine guns, laser-guided rifles, stun grenades, tasers, pistols and modified paintball rifles.<sup>17,18,19</sup> The Israeli forces mounted a full-

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<sup>16</sup> For the coordinates of the area in international waters where the Mavi Marmara was attacked, see Annex 3 (Section 7)

<sup>17</sup> For witness accounts of weapons deployed by Israeli military personnel, see Annex 5

<sup>18</sup> For video footage of Israeli soldiers during the attack, see Annex 7 (Clip 6 & 9)

fledged military attack with frigates, helicopters, zodiac inflatable military boats and submarines.<sup>20,21</sup>

The attack on the Mavi Marmara resulted in the death of nine passengers, of whom eight were Turkish citizens and one was a US national of Turkish descent.<sup>22</sup> Moreover, several dozen civilians were injured in the attack, some with serious bullet wounds and one still in a state of coma from which he is not expected to emerge.<sup>23</sup> Other vessels in the convoy were not spared from the premeditated military attack by Israeli forces, either.

## **i. Timeline of the attack**

### **30 May 2010**

**22.00** - Israeli interference on the satellite communications of the Mavi Marmara<sup>24</sup>, as it sails at a south-southwesterly bearing of 222°. <sup>25,26,27</sup>

**22.30** - The Mavi Marmara receives the first communication from Israeli naval forces, but no visual contact is established yet. The Israeli Navy demands the ship *“to report the ship’s identity and destination”*. Captain Mahmut Tural responds by *“identifying the ship, stating the number of passengers on board, describing the humanitarian mission of the ship and notifying the port of destination as Gaza”*. The Israeli forces caution the Captain that a naval

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<sup>19</sup> For the testimonies of Barış Oktay, Cengiz Kandilci, Ahmet Abdülazizoğulları, Dilaver Kutluay, Michael Curt, Alper Mutlu, Ekrem Çetin, Yaşar Kutluay, Cenk Süha Tatlıses, Abdullah Keskin, Fatma Kanlıoğlu, Halis Akıncı, Musa Üzer, Nilüfer Ören, Garoğlan Guruyev, Musa Çiftçi, Ersin Esen, Hakkı Aygün, see Annex 5 (Section 4)

<sup>20</sup> For video footage of Israeli naval vessels used during the attack, see Annex 7 (Clip 2, 3 & 7)

<sup>21</sup> For the testimonies of Yaşar Kutluay, Ekrem Çetin, Cenk Süha Tatlıses, Abdullah Keskin, Barış Oktay, Halis Akıncı, Musa Üzer, Nilüfer Ören, Garoğlan Guruyev, Musa Çiftçi, İllas Yıldız, Ersin Esen, Mathias Gardell, and Gene St. Onge, see Annex 5 (Sections 4&5)

<sup>22</sup> For autopsy reports of those killed in the attack, see Annex 1

<sup>23</sup> For treatment reports of those injured and treated in Turkey, see Annex 2

<sup>24</sup> For the testimony of Mr. Ümit Sönmez see, Annex 5 (Section 1/v)

<sup>25</sup> For the testimony of First Captain Mr. Mahmut Tural, see Annex 5 (Section 1/i)

<sup>26</sup> For the coordinates and position of the Mavi Marmara during its trip beginning from 29 May 2010, see the Maps obtained from Undersecretariat for Maritime Affairs, see Annex 3 (Section 7)

<sup>27</sup> For the coordinates and position of the Mavi Marmara during its trip beginning from 29 May 2010, see the Maps obtained from Republic of Turkey Undersecretariat for Maritime Affairs, see Annex 3 (Section 7)

blockade exists off the coast of the Gaza Strip and that, approaching an area of hostilities, the ship should change course. The Captain insists that “*the convoy is in international waters and Israel cannot demand a vessel on the high seas to change course.*”

Other ships in the convoy receive similar calls from the Israeli navy.<sup>28,29</sup> On board Challenger-I, Israeli citizen Huwaida Arraf, begins answering the Israeli Navy on behalf of the entire convoy, with the Captains’ consent. Arraf repeatedly states the illegality of Israel’s blockade, that they are unarmed civilians carrying only humanitarian aid, not constituting any threat to Israel, and that Israel should therefore refrain from using any violence against them.<sup>30</sup> Some passengers maintain that later Israeli communications contained expletives.<sup>31</sup> Arraf reports that the Israeli Navy stopped communicating with her at around 01.00-01.30.<sup>32</sup> In any event, no demand was ever made by the Israeli forces to “stop, visit and search” the vessel. Fear spreads among passengers. On the Mavi Marmara, passengers don their life jackets.<sup>33</sup>

**23.30** - The vessel adopts a course at a bearing of 185°, the final destination of which would have been a point between Al-Arish and the Suez Canal; radar spots the first Israeli naval craft about three or four miles away.<sup>34</sup> Israeli warnings continue in international waters, almost 100 nautical miles off the shores of Israel.

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<sup>28</sup> For the testimony of First Captain Mr. Mahmut Tural, see Annex 5 (Section 1/i)

<sup>29</sup> rabbletv, 9 July 2010; *Gaza Freedom Convoy: Farooq Burney’s eyewitness report (1/3)*.

<http://www.youtube.com/watch?v=gAbm-0yWZzw&feature=related> (Accessed 6 August 2010)

<sup>30</sup> For the testimony of Huwaida Arraf, see Annex 5 (Section 5/x)

<sup>31</sup> For the testimonies of Cengiz Kandilci and Dilaver Kutluay, see Annex 5 (Section 4)

<sup>32</sup> For the testimony of Huwaida Arraf, see Annex 5 (Section 5/x)

<sup>33</sup> For the testimony of Mr. Abdülhamit Ateş, see Annex 5 (Section 5/xi)

<sup>34</sup> For the testimony of Captain Mahmut Tural, see Annex 5 (Section 1/i); for the coordinates and position of the Mavi Marmara during its trip beginning from 29 May 2010, see the Maps obtained from Republic of Turkey Undersecretariat for Maritime Affairs, see Annex 3 (Section 7)

## **31 May 2010**

**02.00** - Lights from several craft sailing behind the convoy are spotted.<sup>35</sup> The last Israeli communication calls, specifically addressed to the captain of the Mavi Marmara, come to an end.<sup>36</sup>

**02.00 - 04.30** - No further communications from the Israeli Navy. Pursuit by the Israeli craft continues.

**04.00** - Israeli forces impose a total blackout on the vessels' satellite communication.<sup>37</sup> Panic among passengers sets in.

**04.32 and onwards** - Without any immediate prior warning, Israeli forces launch a massive attack on the Mavi Marmara in international waters, at 32° 43' North and 33° 31' East. Israeli forces, deployed in various categories of naval vessels and helicopters, employ laser guided automatic rifles, stun and sound grenades, tear gas canisters, as well as high powered paintball guns modified to shoot a variety of projectiles. An initial attempt to board the Mavi Marmara from zodiacs, employing fire, is unsuccessful. The first firing of shots which thus took place causes the passengers to genuinely fear for their lives and repel the boarding attempt. Israeli forces then open fire on the Mavi Marmara with live ammunition from both zodiacs and helicopters, resulting in numerous civilian casualties. Israeli commandos fast-rope down to the ship from helicopters. Bloodshed continues after the descent of airborne Israeli commandos. Even after white flags of surrender are raised and multi-lingual announcements to the same effect are made over the ship's PA system, Israeli

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<sup>35</sup> For the testimony of Muhammet Cihat Ülkü, see Annex 5 (Section 4/xxxii)

<sup>36</sup> For the testimony of Captain Mahmut Tural, see Annex 5 (Section 1/i)

<sup>37</sup> For the testimony of Mr. Hüseyin Oruç, see Annex 5 (Section 1/vi)

forces continue to use live ammunition. They also carry on shooting at already wounded and incapacitated civilians.<sup>38,39</sup>

As soon as the attack commences, the captain changes the vessel's course to a bearing of 270° heading West, in opposite direction to the Israeli coast, increasing power to full speed. This change of course has been verified by the Turkish Search and Rescue Center. Israeli frigates approach from the starboard bow and close in, forcing the convoy to turn to the direction of Israel.<sup>40, 41</sup>

**Appr. 05.30 onwards** - Israeli forces seize full control of the convoy and re-route it on a bearing of 130° towards Ashdod. The vessels reach Ashdod around noon. Throughout this period, Israeli forces commit numerous acts of brutality, inhumane and degrading treatment and taunting against the civilian passengers.

## **ii. Accounts of witnesses of the Israeli attack on the Mavi Marmara**

As corroborated by eyewitness accounts and supported by forensic data, Israeli soldiers used excessive and indiscriminate force while and after boarding the Mavi Marmara.

The Israeli zodiacs, warships and helicopters concentrated at first on the Mavi Marmara. Witness accounts report sounds of machine guns coming from the zodiacs as these approached the ship. At this stage, extensive use of tear gas, stun and sound grenades is reported by numerous eye witnesses on board the Mavi Marmara as well as the other vessels.<sup>42</sup>

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<sup>38</sup> For various accounts that verify the timing and the conduct of the attack, see Annex 5

<sup>39</sup> For a video footage of the moment of attack, see Annex 7(Clip 1)

<sup>40</sup> For the testimony of First Captain Mr. Mahmut Tural, see Annex 5 (Section 1/i)

<sup>41</sup> See Annex 3 (Section 7) for the Maps and Date obtained from Turkish Republic Undersecretariat for Maritime Affairs.

<sup>42</sup> For various accounts, see Annex 5 (Sections 1, 3,4,5)

There was also widespread use of paintball guns by soldiers on the zodiacs. While Israel minimizes the impact of paintballs, these are military variants specifically adapted for use in close quarter assaults by Special Forces. The pellets contain not only ‘paint’ but are usually filled with compressed gases and other chemical irritants to debilitate human targets. They are intended to sting sharply and shock the recipient, so as to give assailants the initiative.<sup>43</sup> Reports were given that the Israeli soldiers used the largest size pellets to inflict the greatest injury. Evidence further shows the magnitude of actual injuries received from paintballs.<sup>44</sup>

Once the passengers saw the hostile approach of the Israeli forces, they panicked and, in fear for their lives, attempted to dissuade the Israeli soldiers in the zodiacs from boarding, by throwing plastic bottles, waste bins and boxes, by swinging chains and by spraying jets of water.<sup>45</sup> Many passengers expressed their belief and fear that, once on board, the Israeli soldiers would kill them.<sup>46</sup>

Following the failure of the boarding attempt from zodiacs, helicopters appeared on the scene. Eyewitness accounts converge on the fact that, at this stage, Israeli forces began firing live ammunition onto the Mavi Marmara from helicopters and zodiacs.<sup>47</sup> For example, news producer Jamal Elshayyal saw live fire from the helicopter before the first Israeli soldier descended and said that one of the passengers killed was clearly shot from above.<sup>48</sup> Another journalist, the Spaniard Manuel Tapial recounts that “*real bullets started being shot from the zodiac*

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<sup>43</sup> Counterfeet, Israel vs. Turkey – Hanin Zoabi UNCENSORED, Youtube, 1 June 2010  
<<http://www.youtube.com/watch?v=ZkFnNss490&feature=related>> (27 July 2010)

<sup>44</sup> For the testimony of Doctor Hasan Hüseyin Uysal, see Annex 5 (Section 1/x)

<sup>45</sup> For a video footage of the moment of attack, see Annex 7 (Clip 1)

<sup>46</sup> For the testimony of Elif Akkuş, see Annex 5 (Section 1/ix)

<sup>47</sup> For a sample, see the testimonies of Kenneth O’Keefe, Anne de Jong and Mehmet Ali Zeybek, see Annex 5 (Section 3/xvi & xii and Section 1/xii)

<sup>48</sup> Jamal Elshayyal, “Kidnapped by Israel, forsaken by Britain,” The Middle East Blog, 6 June 2010  
<<http://blogs.aljazeera.net/middle-east/2010/06/06/kidnapped-israel-forsaken-britain>> (27 August 2010)

*boats and helicopters that appeared above the ship, and thus the first injuries prior to their boarding the ship occurred*".<sup>49</sup> Mattias Gardell testified that *"before the first Israeli soldier came on board, two passengers were shot dead from the helicopter"*<sup>50</sup>, while Aydan Bekar recollected how *"without landing on the ship, they started to shoot with guns, using real bullets. Several friends were shot and fell down."*<sup>51</sup>. Elshayyal also recalled that soldiers pointed their guns down through some sort of hatch in the helicopter and fired live ammunition indiscriminately<sup>52</sup>. Kuwaiti MP Waleed Al-Tabtabaei said that it was the killing of two unarmed Turkish men which provoked the resistance against the first three soldiers rappelling onto the vessel, while Kuwaiti lawyer Mubarak Al-Mutawa said that the soldiers opened fire from above without giving any warning, killing a number of volunteers before even boarding the ship.<sup>53,54</sup> A video footage taken during the attack that shows red-laser beams from rifles being directed from above supports these accounts.<sup>55</sup>

The Turkish Commission of Inquiry, which thoroughly inspected the Mavi Marmara, encountered bullet marks that were clearly the result of fire from above.<sup>56</sup> Forensic evidence also incontrovertibly established that a significant number of bullets penetrated victims' bodies from above. It is therefore not surprising that the UN Human Rights Council International Independent Fact Finding Mission *"concluded that live ammunition was used from the helicopter onto the top deck prior the descent of the soldiers"*.<sup>57</sup>

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<sup>49</sup> For the testimony of Manuel Espinar Tapial, see Annex 5 (Section 5/xiii)

<sup>50</sup> For the testimony of Mattias Gardell, see Annex 5 (Section 5/xvi)

<sup>51</sup> For the testimony of Aydan Bekar, see Annex 5 (Section 4/x)

<sup>52</sup> Jamal Elshayyal, "Kidnapped by Israel, forsaken by Britain," The Middle East Blog, 6 June 2010 <<http://blogs.aljazeera.net/middle-east/2010/06/06/kidnapped-israel-forsaken-britain>> (27 August 2010)

<sup>53</sup> Abdullah Al-Qattan, "Gaza heroes' welcomed home", Kuwait Times, 3 June 2010 <[http://www.kuwaittimes.net/read\\_news.php?newsid=NDg0MzQ1OTYy](http://www.kuwaittimes.net/read_news.php?newsid=NDg0MzQ1OTYy)> (8 June 2010)

<sup>54</sup> For the testimony of Mehmet Ali Zeybek see Annex 5 (Section 1/xii)

<sup>55</sup> For the said video footage, see Annex 7 (Clip 9)

<sup>56</sup> For the relevant photos, see Annex 6 (Section 1)

<sup>57</sup> UN Document A/HRC/15/21, Annex 8, paragraph 114

The UN Fact Finding Mission, after its on-site inspection of the Mavi Marmara and conducting interviews of witnesses found no evidence to suggest that any of the passengers used firearms or that any firearms were taken on board the ship. The Mission stated in its report that, despite requests, it had not received any medical records or other substantiated information from the Israeli authorities regarding any firearm injuries sustained by soldiers participating in the raid.<sup>58</sup> Moreover, the doctors who examined the three soldiers taken below decks did not notice any firearm injuries.<sup>59</sup>

Once having landed on the upper deck of the Mavi Marmara, the Israeli soldiers began what can only be called a shooting spree. Ahmad Luqman Talib, who was already wounded from gunfire apparently from the helicopters, says “*soldiers were very aggressive and intentionally kicked and stepped on me, especially on my wounded leg*”.<sup>60</sup> Ryad Bustanji recounts how armed soldiers rappelled from the helicopter “*began firing at the people before them... one of the Israeli soldiers shot at me from nearby with a rubber bullet that landed above my ear... I fell to the ground... This was followed by three more bullets to my back.*”.<sup>61</sup> Halis Akıncı describes those moments with the following: “*The Israeli soldiers ruthlessly sprayed their bullets at us. They were shooting as if in a battlefield. Some of them were throwing bombs to the lower decks. I got two gunshot wounds...They were livid...They started shooting at people lying motionless on the floor...They were kicking and hitting with their rifle-butts those wounded who called for medical attention...*”.<sup>62</sup> Medet Kan testified that “*Two Israeli soldiers appeared in the area in front the bridge. They started shooting at us...They were shooting at everyone made visible by projector lights. When*

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<sup>58</sup> See paragraph 116 of the Report of the Fact Finding Mission, Annex 8

<sup>59</sup> For the testimony of Doctor Hasan Hüseyin Uysal, see Annex 5 (Section 1/x)

<sup>60</sup> For the testimony of Ahmed Luqman Muttalib, see Annex 5 (Section 5/iii)

<sup>61</sup> For the testimony of Ryad Bustanji, see Annex 5 (Section 5/xv)

<sup>62</sup> For the testimony of Halis Akıncı, see Annex 5 (Section 4/xxv)



*Fatih Kavaktan attempted to throw a teargas canister overboard, he was sprayed with bullets coming from above. Hit by four bullets, he was heavily injured.*”.<sup>63</sup> Abdullah Özkaya, on board Gazze-I, recounts how he was shocked when he looked at the Mavi Marmara with his binoculars: *“They were shooting at people.”*<sup>64</sup> One last recount about this stage of the attack calling for mention is by Ayetullah Tekin, who claims *“I was shot in my abdomen, in the left side, with a bullet. I was first shot with a real bullet. But, I and the other wounded were shot one after the other with rounds of plastic bullets. I think they did this to claim later that they first fired rubber bullets, and then resorted to using live ammunition.”*<sup>65</sup> There were several reports of Israeli soldiers beating people with batons. Moroccan MP Abdelqader Amara said that the soldiers hit victims with their rifle butts before shooting them dead.<sup>66</sup> Video footage shows Israeli soldiers beating and shooting at point blank an unidentified passenger (apparently the 19-year-old Furkan Doğan) who was clearly lying on the deck.<sup>67</sup> Rifat Audeh was thrown onto the lower deck by four Israeli soldiers, blindfolded and had his hands tied behind his back while a soldier’s knee was digging in his ribs.<sup>68</sup>

Once having boarded, the soldiers also began firing towards the lower decks with indiscriminate as well as targeted shooting at everyone who was visible.<sup>69</sup> One man was shot in the leg just in front of Kevin Ovenden and another man

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<sup>63</sup> For the testimony of Medet Kan, see Annex 5 (Section 4/xxix)

<sup>64</sup> For the testimony of Abdullah Özkaya, see Annex 5 (Section 4/iii)

<sup>65</sup> For the testimony of Ayetullah Tekin, see Annex 5 (Section 4/xi)

<sup>66</sup> Abdullah Al-Qattan, Gaza heroes welcomed home, The Kuwait Times, 3 June 2010 <[http://www.kuwaittimes.net/read\\_news.php?newsid=NDg0MzQ1OTYy](http://www.kuwaittimes.net/read_news.php?newsid=NDg0MzQ1OTYy)> (8 June 2010)

<sup>67</sup> For the said video footage, see Annex 7 (Clip 4)

<sup>68</sup> Rifat Audeh, Israeli terror then and now: Rifat Audeh experienced first-hand what the sailors on the US warship experienced 43 years ago, Uruknet.info, 10 July 2010 <<http://www.uruknet.info/?p=67783>> (27 August 2010)

<sup>69</sup> Mavi Marmara attack: Exclusive first interview with Gaza Convoy activist Kevin Neish”, Rabble.ca, 3 Jun 2010 <<http://rabble.ca/podcasts/shows/rabble-radio/2010/05/106-interview-gaza-peace-activist-kevin-neish>> (27 August 2010)

immediately to his right was shot in the abdomen. He said that the shots came from above, and that the victims could not have posed any threat to the shooter.<sup>70</sup> Kevin Neish witnessed about 20 dead or wounded aid workers being carried towards the ship's stairway. Two of these bodies had twin bullet holes in the sides of their heads, appearing to have been shot in execution style killing.<sup>71</sup>

The bridge was taken over when ten Israeli soldiers, who tried to shatter the windows without success, gunned down the door and rushed in with guns ready and aimed to shoot. All the crew members were made to lie down on the floor littered with shards of glass, and handcuffed. Some of those lying were stomped upon.<sup>72</sup> All documents including the ship's certificates were seized.<sup>73</sup>

A very large number of testimonies all state that Israeli soldiers continued with their deadly shooting even after white flags were flown by a number of the passengers and a multi-lingual surrender announcement was made over the ship's loudspeakers.<sup>74</sup>

### **iii. Fatalities**

Turkish autopsy reports concluded that five of the deceased were shot in the head at close range, as detailed in Annex 1. The said reports also indicate that residues around the wounds had been deliberately cleansed prior to their repatriation to Turkey for the purpose of suppression of ballistic evidence. The following passengers lost their lives:

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<sup>70</sup> Mavi Marmara Report: Ovenden, Doares and the Vile Zionists, [Youtube](https://www.youtube.com/watch?v=d5q1CVS3D6o), 21 June 2010 < <http://www.youtube.com/watch?v=d5q1CVS3D6o>> (18 July 2010)

<sup>71</sup> Mavi Marmara attack: Exclusive first interview with Gaza Convoy activist Kevin Neish", [Rabble.ca](http://rabble.ca), 3 Jun 2010 < <http://rabble.ca/podcasts/shows/rabble-radio/2010/05/106-interview-gaza-peace-activist-kevin-neish>> (27 August 2010)

<sup>72</sup> For the testimony of Ali Mert Şahin, see Annex 5 (Section 4/v)

<sup>73</sup> For the testimony of First Captain Mahmut Tural, see Annex 5 (Section 1/i)

<sup>74</sup> For the testimonies of Nilüfer Ören, Ali Yunusoğlu, Ali Şahin Özdemir, Medet Kan, see Annex 5 (Section 4)

- Furkan Doğan received five gunshot wounds in the back of his head, nose, left leg, left ankle and in the back, all from close range. A citizen of the United States, Mr. Doğan was a 19-year-old high school student with ambitions of becoming a medical doctor.<sup>75,76</sup> Mr. Doğan's motionless, wounded body was kicked and shot upon, execution-style by two Israeli soldiers.<sup>77</sup>
- Cengiz Akyüz received four gunshot wounds, in the back of his head, right side of his face, the back and the left leg.<sup>78</sup> Mr. Akyüz was married and a 41-year-old father of three.
- Ali Haydar Bengi received a total of six gunshot wounds, in the left side of his chest, belly, right arm, right leg and twice in the left hand. Mr. Bengi was married, a 39-year-old father of four.<sup>79</sup>
- İbrahim Bilgen received four gunshot wounds, in the right temple, right chest, right hip and back.<sup>80</sup> Mr. Bilgen was married, 61-year-old father of six, who worked as an electrical engineer.
- Cevdet Kılıçlar, a photographer, was killed by a single distant shot to the middle of the forehead.<sup>81</sup> He was shot most probably with a laser-pointer rifle.<sup>82</sup> Mr. Kılıçlar was married, 38-year-old father of two.
- Cengiz Songür was killed by a single gunshot wound in the front of the neck.<sup>83</sup> He was a 47-year-old textile worker, married and the father of seven.

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<sup>75</sup> Roger Cohen, *The Forgotten American*, 26 July 2010, [The New York Times](http://www.nytimes.com/2010/07/27/opinion/27iht-edcohen.html?_r=2), <[http://www.nytimes.com/2010/07/27/opinion/27iht-edcohen.html?\\_r=2](http://www.nytimes.com/2010/07/27/opinion/27iht-edcohen.html?_r=2)> (19 January 2011)

<sup>76</sup> For Furkan Doğan's autopsy report, see Annex 1 (Section 7)

<sup>77</sup> For the testimonies of Ekrem Sezer and Muharrem Güneş, see Annex 5 (Section 4/xviii and xxxiv respectively); for the related video footage, see Annex 7 (Clip 4)

<sup>78</sup> For Cengiz Akyüz's autopsy report, see Annex 1 (Section 2)

<sup>79</sup> For Ali Haydar Bengi's autopsy report, see Annex 1 (Section 1)

<sup>80</sup> For İbrahim Bilgen's autopsy report, see Annex 1 (Section 8)

<sup>81</sup> For Cevdet Kılıçlar's autopsy report, see Annex 1 (Section 4)

<sup>82</sup> For the testimonies of Erol Çıtır Barış Oktay, Musa Üzer, see Annex 5 (Section 3/ii, Section 4/xxxvi)

<sup>83</sup> For Cengiz Songür's autopsy report, see Annex 1 (Section 3)

- Necdet Yıldırım received two gunshot wounds in the right shoulder and left back.<sup>84</sup> He was 32-years-old, married, father of one.
- Çetin Topçuoğlu was killed by three gunshot wounds in the back of the head, the hip and the belly.<sup>85</sup> He was 54-years old, married and a father of one.
- Fahri Yıldız was killed by four gunshot wounds: left chest, left leg and twice in the right leg.<sup>86</sup> He was 43 years-old, married and father of four, and worked as a fire-fighter.

At least one witness claims that Mr. Topçuoğlu and Mr. Yıldız were shot upon and killed after the passengers had waved the white flag of surrender.<sup>87</sup>

Numerous testimonies also indicate that at least three of the deaths occurred because Israeli soldiers denied timely medical attention to the wounded.<sup>88</sup> Sümeyye Ertekin and Halis Akıncı testified that the Israeli soldiers hit those doctors trying to help the wounded with the butts of their rifles.<sup>89</sup> Edda Manga says *“They did not allow the medics to treat the people; the doctors and nurses were forced at gunpoint to leave the wounded.”*<sup>90</sup>

Ali Buhamd’s testimony contains a grim mixture of some of the points made above: *“I saw a soldier shooting a wounded Turk in the head. There was another Turk asking for help, but he bled to death.”*<sup>91</sup>

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<sup>84</sup> For Necdet Yıldırım’s autopsy report, see Annex 1 (Section 9)

<sup>85</sup> For Çetin Topçuoğlu’s autopsy report, see Annex 1 (Section 5)

<sup>86</sup> For Fahri Yıldız’s autopsy report, see Annex 1 (Section 6)

<sup>87</sup> For the testimony of Salim Seyyar, see Annex 5 (Section 4/xli)

<sup>88</sup> See for example the testimonies of Kevin Neish and Jamal Al-Shayyal, see Annex 5 (Section 5/xii & xvii)

<sup>89</sup> For the testimonies of Sümeyye Ertekin and Halis Akıncı, see Annex 5 (Section 4/xliii and xxv respectively)

<sup>90</sup> For the testimony of Edda Manga, see Annex 5 (Section 5/xiv)

<sup>91</sup> Israeli attack written into history with chilling survivor accounts, *Today’s Zaman*, 5 June 2010, < [http://www.todayzaman.com/newsDetail\\_getNewsById.action;jsessionid=05CA12501D73BA0358BBD61F9B3FAA5E?newsId=212265](http://www.todayzaman.com/newsDetail_getNewsById.action;jsessionid=05CA12501D73BA0358BBD61F9B3FAA5E?newsId=212265) > (15 January 2011)

#### **iv. Injuries caused by gunshots**

The Israeli soldiers' widespread indiscriminate shooting also wounded over 50 of the Mavi Marmara's passengers:

- Uğur Süleyman Söylemez has been in a coma ever since the attack as a result of the wounds he sustained.<sup>92</sup>
- Abdülhamit Ateş reported that he collapsed on the deck upon being shot in the knee. Soldiers hit him in the forehead and his right eye, then turned him over and shot him with a plastic bullet in the chest. He barely survived.<sup>93</sup>
- Muharrem Güneş was lying on the deck when soldiers wielding laser-guided rifles approached him and shot him at close range in the left cheek. The bullet exited through his lower right jaw.<sup>94,95</sup>
- Mustafa Batırhan was shot in the lower abdomen from a range of about one meter.<sup>96</sup>
- Sadreddin Furkan, who was in the control centre on the bridge at the time, said that the soldiers were shooting in all directions, and that he felt a strong pain in his leg which began bleeding. He was shot from behind, three times in the leg and once in the foot.<sup>97</sup>
- Osman Çalık was shot in the knee.<sup>98</sup>
- Alper Mutlu was wounded by fire coming from above, the bullet entering his body at the level of his kidney and coming out of his leg.<sup>99</sup>

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<sup>92</sup> For the treatment report of Uğur Süleyman Söylemez, see Annex 2 (Section 24)

<sup>93</sup> For the testimony of Abdülhamit Ateş, see Annex 5 (Section 1/xi).

<sup>94</sup> For the interview of Muharrem Güneş, see Annex 7 (Clip 27)

<sup>95</sup> For Muharrem Güneş's medical report, see Annex 2 (Section 13)

<sup>96</sup> For Mustafa Batırhan's medical report, see Annex 2 (Section 6)

<sup>97</sup> For Sadreddin Furkan's medical report, see Annex 2 (Section 11)

<sup>98</sup> For Osman Çalık's medical report, see Annex 2 (Section 10)

<sup>99</sup> For the testimony of Alper Mutlu, see Annex 5 (Section 4/viii)

- Musa Çiftçi was shot upon from behind and wounded by an Israeli soldier as he was trying to help wounded passengers.<sup>100</sup>
- Erkan Bayfidan says he was shot and injured by the very soldier he was trying to photograph.<sup>101</sup> Unlike his colleague Cevdet Kılıçlar, who was shot upon under identical circumstances, he survived.

The above are just a few examples selected to illustrate the frenzied atmosphere aboard the Mavi Marmara during the Israeli attack. The magnitude and nature of the force used by Israeli soldiers has been depicted as follows in the report of the UN Human Rights Council Fact Finding Mission: *“a large number of injured passengers received wounds to critical areas of the body containing vital organs [...]. Furthermore, a number of passengers who were clearly not engaged in any activities to resist the boarding by the Israeli forces, including a number of journalists and persons who had been sheltering from the fire, received injuries, including fatal injuries. It is apparent that no effort was made to minimize injuries at certain stages of the operation and that the use of live fire was done in an extensive and arbitrary manner. It is difficult not to conclude that once the order to use live fire had been given, no one was safe. Under the circumstances, it seems a matter of pure chance that there were not more fatalities as a result.”*<sup>102</sup>

Israeli soldiers’ prevention of timely first aid to the injured was mentioned earlier as a cause for a number of fatalities. It should not go unmentioned that when the captain asked an Israeli officer several times for medical assistance for the wounded, the response he got was: *“I don’t care how many dead people you*

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<sup>100</sup> For the testimony of Musa Çiftçi, see Annex 5 (Section 4/xxxv)

<sup>101</sup> For the testimony of Erkan Bayfidan, see Annex 5 (Section 4/xix); see Annex 2 (Section 7) for his medical treatment report and photos at the hospital.

<sup>102</sup> See paragraph 169 of the Report of the Fact Finding Mission, Annex 8

*[will] have, now alter your course to Ashdod*".<sup>103</sup> Once the soldiers took full control of the ship, Dr. Hasan Hüseyin Uysal, who had treated the lightly wounded Israeli soldiers, was handcuffed tightly and made to kneel for three hours like the rest of the passengers.<sup>104</sup>

#### **v. Attacks on the other ships**

The brutal and tragic nature of the Israeli attack on the Mavi Marmara has overshadowed the raid on the remaining ships that were part of the humanitarian aid convoy. Contrary to repeated claims by Israel that the remaining ships were boarded peacefully, Israeli soldiers used force on the other vessels as well, and subjected their passengers to violent treatment.

The Sfondoni was sailing about 300-400 meters astern of the Mavi Marmara. The two ships were attacked simultaneously from zodiacs on either side.<sup>105</sup> The Captain disabled the engines and stopped the ship.<sup>106</sup> About 15 to 20 masked Israeli soldiers boarded the vessel and resorted to violence against the passengers who were engaged in passive resistance.<sup>107</sup>

Eyewitness reports are as follows:

- Bilal Abdulazziz witnessed soldiers using stun grenades and batons against activists who were merely locking arms. He was tasered in the head, legs and back. He also witnessed elderly people being beaten.<sup>108</sup>

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<sup>103</sup> For the testimonies of Captain Mahmut Tural and Ali Mert Şahin, see Annex 5 (Section 1/i & Section 4/v)

<sup>104</sup> For the written deposition of Doctor Hasan Hüseyin Uysal, where he also describes how he attended to the wounded Israeli soldiers, see Annex 5 (Section 1/x)

<sup>105</sup> See paragraph 143 of the Report of the Fact Finding Mission, Annex 8

<sup>106</sup> TrishMaryHill, Dr Hasan Nowrah Convoy Massacre Survivor Clip of 1/3, [YouTube](http://www.youtube.com/watch?v=BNfq12_PLxk&feature=related), 10 June 2010, <[http://www.youtube.com/watch?v=BNfq12\\_PLxk&feature=related](http://www.youtube.com/watch?v=BNfq12_PLxk&feature=related)> (9 July 2010)

<sup>107</sup> Mikael Stengård and Josefine Hökerberg, Teologen Ulf Carmesund tillbaka från Israel, [Aftonbladet](http://www.aftonbladet.se/nyheter/article7231718.ab), 2 June 2010 <<http://www.aftonbladet.se/nyheter/article7231718.ab>> (7 July 2010)

<sup>108</sup> Adycousins, Gaza Flotilla Testimony of Bilal Abdulazziz, [YouTube](http://www.youtube.com/watch?v=1FJh91mCbKI&feature=related), 9 June 2010. <<http://www.youtube.com/watch?v=1FJh91mCbKI&feature=related>> (1 July 2010)

- Dimitris Gielalis saw Israeli soldiers using plastic bullets and tasers and beating people.<sup>109</sup> He witnessed a cameraman getting hit in the eye with a rifle butt.<sup>110</sup>
- Al Mahdi Alharati was hit with rubber bullets in the leg, beaten in the groin and over the head, hit with the back of a gun in the eye and hit with the butt of a machine gun on the back of the head.<sup>111,112</sup>
- Gene St. Onge was kicked and hit with a ‘rifle or something’ suffering a gash on his head. He was then restrained with handcuffs. He said their captain, who was pulled and hit, sustained a punctured eardrum along with neck and back injuries.<sup>113</sup>
- Youssef Benderbal said that the Captain’s ear was torn and that he suffered injuries to his neck and leg.<sup>114</sup>
- Retired US Ambassador, the octogenarian Edward Peck said that as a result of the non-violent resistance outside the bridge, the Israeli soldiers roughly treated some people. Some ended up needing crutches, bandages and arm slings, and the Captain was in need of a neck brace.<sup>115</sup>
- Dr. Hasan Nowarah was hit by a rubber bullet. He saw Edward Peck knocked down by an Israeli soldier, and the captain lying on the floor with his face covered in blood and his arms full of cuts.<sup>116</sup>

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<sup>109</sup> Robert Booth et. al., Gaza convoy raid: We heard gunfire – then our ship turned into lake of blood, [guardian.co.uk](http://www.guardian.co.uk), 2 June 2010 <<http://www.guardian.co.uk/world/2010/jun/02/gaza-flotilla-raid-gunfire-ship-blood>> (5 June 2010)

<sup>110</sup> Elena Becatoros and Suzan Fraser, Troops boarded and ship turned into a lake of blood, [independent.ie](http://www.independent.ie), 2 June 2010 <<http://www.independent.ie/national-news/troops-boarded-and-ship-turned-into-a-lake-of-blood-2203364.html>> (5 July 2010)

<sup>111</sup> Genevieve Carbery, Irish citizen ‘beaten’ by Israeli forces, [theirishtimes.com](http://www.irishtimes.com), 9 June 2010 <<http://www.irishtimes.com/newspaper/world/2010/0609/1224272122281.html>> (12 June 2010)

<sup>112</sup> For the medical report of Almahdi Abdulhameed Alharati, see Annex 2 (Section 2)

<sup>113</sup> Testimony of Gene St. Onge, [The Free Gaza Movement](http://www.freegaza.org), 7 June 2010 <<http://www.freegaza.org/en/testimonies-from-israeli-jail/1221-in-their-own-words-survivor-testimonies-from-flotilla-31-may-2010>> (27 August 2010)

<sup>114</sup> “We were unarmed and didn’t provoke anybody” – aid convoy member, [RT](http://rt.com), 6 June 2010 <[http://rt.com/Top\\_News/2010-06-06/gaza-aid-convoy-eyewitness.html](http://rt.com/Top_News/2010-06-06/gaza-aid-convoy-eyewitness.html)> (5 July 2010)

<sup>115</sup> Interview with Edward Peck, *Democracy Now, War and Peace Report*, 2 June 2010, <[http://www.democracynow.org/2010/6/2/israels\\_explanation\\_for\\_deadly\\_gaza\\_aid](http://www.democracynow.org/2010/6/2/israels_explanation_for_deadly_gaza_aid)> (19 January 2011)

<sup>116</sup> For the testimony of Hasan Nowarah, see Annex 5 (Section 5/ii)



- Television journalist Manolo Luppichini saw two people hurt by tasers.<sup>117</sup>
- Manuel Zani recounted how the soldiers used tasers, truncheons, sound bombs etc. against unarmed civilians. He reported the captain being badly beaten with blood coming from his ear.<sup>118</sup>

Once the Israeli raid on the Mavi Marmara began, Challenger-I attempted to flee the scene and transmit reports about the attack to the outside world. This attempt was unsuccessful because of the telecommunications blackout executed by the Israeli forces. Moreover, the ship had to slow down due to loss of oil pressure in its engines. Eyewitnesses on the ship said rubber bullets were fired before they were boarded, and many passengers were hit.<sup>119</sup>

Witnesses recounted later that Israeli soldiers used stun grenades and high-powered paintball guns, hit people with their rifle butts, pushed people onto the deck and stomped on them.

- Fintan Lane had a gun pointed in his face. He genuinely feared for his life. He saw Fiachra Ó Luain dragged around the deck.<sup>120</sup>
- Photographer Kate Geraghty was trying to take photographs when she was tasered on the upper arm, which caused her to be thrown a meter and a half and collapse vomiting on the deck.<sup>121</sup>
- Huwaida Arraf told CNN that her head was banged on the deck after she was handcuffed and hooded.<sup>122</sup> She said soldiers beat many passengers.<sup>123</sup>

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<sup>117</sup> Dimi Reider, Italian convoy journalist: My credit card was used after IDF confiscated it, [Haaretz.com](http://www.haaretz.com), 11 June 2010 <<http://www.haaretz.com/print-edition/news/italian-flotilla-journalist-my-credit-card-was-used-after-idf-confiscated-it-1.295493>> (12 June 2010)

<sup>118</sup> For the testimony of Manuel Zani, see Annex 5 (Section 5/xviii)

<sup>119</sup> For the testimony of Anne de Jong, see Annex 5 (Section 1/xii)

<sup>120</sup> Shane Hickey and Anita Guidera, *'I tried to reason with them, but they attacked us'*, [Independent](http://www.independent.ie) <<http://www.independent.ie/service/about-us-24072.html>> (19 January 2011)

<sup>121</sup> Abdullah Al-Qattan, Gaza heroes welcomed home, [The Kuwait Times](http://www.kuwaittimes.net), 3 June 2010

<[http://www.kuwaittimes.net/read\\_news.php?newsid=NDg0MzQ1OTYy](http://www.kuwaittimes.net/read_news.php?newsid=NDg0MzQ1OTYy)> (15 January 2011)

<sup>122</sup> CNN Wire Staff, Eyewitnesses recount Israel convoy raid, [CNN](http://www.cnn.com), 1 June 2010.

- Theresa McDermott saw a Belgian woman named Margarita (apparently, Griet Deknopper) hit in the face by a projectile which burst her nose causing heavy bleeding. She also saw Huwaida Arraf and Anne de Jong, who tried to block the stairs, thrown to the ground, their hands cuffed with plastic ties that cut into their wrists, and their faces pushed on to the deck covered with broken glass. When Theresa shouted and tried to get to the two women, a soldier put his pistol to her head and said he would shoot her if she did not do as she was told.<sup>124</sup>
- Anne de Jong recalls how they were shot at from 2-4 meters and how she was hit by 6 rubber bullets on the back, the doctor in the Israeli port of Ashdod labeling the resulting bruises as “insect bites”.<sup>125</sup>
- Ewa Jasiewicz saw Huwaida Arraf held by soldiers in stress positions. Jasiewicz was insulted and had her life threatened on more than one occasion by Israeli soldiers.<sup>126</sup>
- An 80-year-old man was not allowed to go to the toilet, forcing him to soil his clothes.<sup>127</sup>

Israeli vessels closed in on the Eleftheri Mesogios at around 05.30 and warned the ship to make a starboard turn or be shot upon. The Israeli soldiers boarded the ship and shot a number of Greek passengers with rubber bullets and paintballs. Tasers were also used against a number of passengers. A few passengers were knocked to the floor by the soldiers. Dror Feiler testified he was wrestled down with his arms bent and hit. He recollects being thrown on the

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<<http://edition.cnn.com/2010/WORLD/meast/06/01/gaza.raid.eyewitnesses>> (1 June 2010)

<sup>123</sup> axis4 peace2, Convoy Survivor says Israeli marines boarded unarmed American ship throwing grenades, [YouTube](http://www.youtube.com/watch?v=cfn_bScn08E&feature=related), 2 June 2010 <[http://www.youtube.com/watch?v=cfn\\_bScn08E&feature=related](http://www.youtube.com/watch?v=cfn_bScn08E&feature=related)> (6 June 2010)

<sup>124</sup> Fear, pain and propaganda: an activist’s story, [The Herald Scotland](http://www.heraldsotland.com/news/world-news/fear-pain-and-propaganda-an-activist-s-story-1.1033113), 6 June 2010  
<<http://www.heraldsotland.com/news/world-news/fear-pain-and-propaganda-an-activist-s-story-1.1033113>> (29 August 2010)

<sup>125</sup> For the testimony of Anne De Jong, see Annex 5 (Section 1/xii)

<sup>126</sup> Emine Saner, Gaza Convoy: protesters’ story, [guardian.co.uk](http://www.guardian.co.uk), 5 June 2010

<<http://www.guardian.co.uk/theguardian/2010/jun/05/gaza-flotilla-protesters-story>> (5 June 2010)

<sup>127</sup> For the testimony of Anne de Jong, see Annex 5 (Section 1/xii)

floor and being kicked in the ribs, an Israeli soldier standing with his boot on his face, and being kicked even more after being handcuffed. Other passengers told him he was bleeding from his ear.<sup>128</sup> Famous author Henning Mankell also recounts soldiers shooting passengers with rubber bullets and tasing them. Mankell sarcastically recalls how an Israeli soldier, claiming to have found a weapon on board, brandished Mankell's disposable razor blade.<sup>129</sup>

Zodiacs and helicopters surrounded the Gazze-I at around 06.00 and fully armed Israeli troops came aboard shortly thereafter. Bayram Kalyon was hit with rifle butts on his back and his arm.<sup>130</sup> The detainees were searched and taken for individual questioning. They remained in the galley until the ship reached Ashdod.<sup>131</sup>

The attack against the Defne-Y occurred at 06.10 when helicopters landed soldiers on the ship. Everyone was transferred to the galley. The 20 persons were kept in a 15-square-meter unventilated area until the ship reached Ashdod.<sup>132</sup>

## **E. Mistreatment of passenger victims including journalists**

### **i. Mistreatment on the way to Ashdod**

Israeli soldiers committed crimes not only during the attack phase. Once they assumed control of the convoy, they continuously subjected the passengers to a variety of mistreatment, which amount to no less than torture and cruel, inhuman

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<sup>128</sup> For the testimony of Dror Feiler, see Annex 5 (Section 5/vi)

<sup>129</sup> For the testimony of Henning Mankell, see Annex 5 (Section 5/vii)

<sup>130</sup> For the testimony of Bayram Kalyon, see Annex 5 (Section 4/xiii)

<sup>131</sup> The Foundation for Human Rights and Freedoms and Humanitarian Relief, Palestine Our Route Humanitarian Aid Our Load Convoy Campaign Summary Report, p. 29.

<sup>132</sup> The Foundation for Human Rights and Freedoms and Humanitarian Relief, Palestine Our Route Humanitarian Aid Our Load Convoy Campaign Summary Report, p. 27.

or degrading treatment under the pertinent international conventions. The acts described below continued throughout the journey to Ashdod, which took some 12 hours.

Virtually all passengers, including the wounded and elderly, were handcuffed with plastic cords so tightly that these quickly caused swelling, discoloration and numbing in their hands. It should be noted that these cuffs cannot be loosened. Most passengers who complained of agonizing pain caused by the cuffs were either ignored or punished by having these even further tightened instead. The tightness of the cuffs was of such proportion that, as expressed in the Fact Finding Mission's report, over 50 passengers still suffered from medical problems months after the ordeal.<sup>133</sup>

Handcuffed passengers, including even the wounded, particularly on board the Mavi Marmara were beaten and forced to remain kneeling on the decks, exposed not only to the sun, but also to continuous seawater spray and wind gusts caused by the rotors of interchanging helicopters hovering nearby. Their already dire situation was further aggravated by almost constant physical and verbal abuse, as well as threats. Even the Chief Engineer's wife and her one year old baby were not spared<sup>134</sup>. Passengers with chronic illnesses requiring regular medication, such as diabetes and heart condition, were deprived of their medicine. Dogs were used to intimidate and taunt the passengers with at least one instance of biting. Some passengers were blindfolded while a number of others had hoods put on their heads. Many passengers also complained about not being given food and water. A number of passengers also report being filmed

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<sup>133</sup> See paragraph 135 of the Report of the Fact Finding Mission, Annex 8

<sup>134</sup> For the testimony of Chief Engineer Ekrem Çetin, see Annex 5 (Section 1/iii)

despite their protests. Some eyewitnesses also reported that the Israeli soldiers treated the passengers with discrimination based upon their complexion.<sup>135</sup>

A general practice warranting special mention was the denial of toilet access to the passengers. Some passengers ended up publicly wetting themselves and thus humiliated. In one extreme case, one kneeling passenger who tried to move away from urine coming from his neighbour had his face pressed down into the puddle.<sup>136</sup> Those who were ultimately permitted to use the toilets were kept handcuffed and watched while in the water closet.

Below are references to just a few testimonies to illustrate the gravity of the Israeli soldiers' misconduct en route to Ashdod. These testimonies represent a mere fraction of the passengers' ordeal. Other eyewitness accounts corroborating these abound in the annexes.

Mattias Gardell described how an elderly man apparently lost an eye due to the dire circumstances on the decks of the Mavi Marmara and the lack of medical attention.<sup>137</sup>

When Musa Üzer, a passenger with a severe kidney condition, wanted to take his medication out of his pocket, he was badly beaten and was deprived of his pills until he returned to Turkey days later<sup>138</sup>.

The Spanish reporter Manuel Tapial describes how another passenger was beaten up, hooded and forced to stay *“on his knees on top of two metal cylinders; because of the wind that the helicopter was causing, it was impossible*

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<sup>135</sup> For the testimonies of Manuel Tapial and Henning Mankell, see Annex 5 (Section 5)

<sup>136</sup> For the testimony, see Annex 5 (Section 4/xxxii)

<sup>137</sup> For the testimony of Mattias Gardell, see Annex 5 (Section 5/xvi)

<sup>138</sup> For the testimony of Musa Üzer, see Annex 5 (Section 4/xxxvi)

*for him to stay in that position. He kept falling over, and each time he would be violently beaten up.”*<sup>139</sup>

Hüseyin Mutlu, already suffering from a gunshot wound to the leg, recounts, “*I was forced to wait under the sun for some 5 hours, as a result of which first degree burns developed on my arms, head, face and wounded leg. Throughout this period, I asked for painkillers and antibiotics, but these were not given.*”<sup>140</sup>

Selim Özkabakçı recalls “*After asking for my handcuffs to be loosened, an Israeli soldier put his handgun against my head and mockingly cursed to me in English. Then he hit me on the head with his gun’s barrel. At that moment I thought that he was going to shoot me.*”<sup>141</sup>

Muhammet Latif Kaya reports that he saw one of the German shepherd dogs used by the Israeli soldiers to intimidate the passengers bite a friend of his in the abdomen.<sup>142</sup>

Anne de Jong on board Challenger-I reports how she was beaten, handcuffed and hooded, denied her asthma medication, and how an elderly American man was refused toilet access and ended up wetting himself. She also reports that when asked why such treatment was being done, an Israeli soldier replied “*Shut up! Your boat has been lucky.*”<sup>143</sup>

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<sup>139</sup> For the testimony of Manuel Tapial, see Annex 5 (Section 5/xiii)

<sup>140</sup> For the testimony of Hüseyin Mutlu, see Annex 5 (Section 4/xxvii)

<sup>141</sup> For the testimony of Selim Özkabakçı, see Annex 5 (Section 4/xlii)

<sup>142</sup> For the testimony of Muhammet Latif Kaya, see Annex 5 (Section 4/xxxiii)

<sup>143</sup> For the testimony of Anne de Jong, see Annex 5 (Section 1/xii)

Again on Challenger-I, Inge Neefs recounts how the wounded were denied treatment for a long time, the hoodings, the cuffing of hands and feet, and how she was watched while in the toilet.<sup>144</sup>

Henning Mankell is one of the eyewitnesses referring to Israeli soldiers filming the passengers against their will on the way to Ashdod. In his testimony, Mankell expresses suspicion that parts of these footages where passengers are shown with food, would be used to misrepresent the real circumstances on board.<sup>145</sup> Abdullah Özkaya supports this argument by stating that “*they [Israeli soldiers] put food and water in front of us, then took pictures and filmed us.*”<sup>146</sup>

## **ii. Mistreatment at the Port of Ashdod**

Following a journey, which lasted about 12 hours, the convoy was brought to the Israeli port of Ashdod where, some days prior to the attack, the Israeli authorities had already established a specifically designed processing center for the detained passengers.<sup>147</sup>

The passengers were subjected to severe humiliation throughout the disembarkation process. Some witnesses recount being brought ashore at gunpoint.<sup>148</sup> Some others were beaten up.<sup>149</sup> No preferential treatment was accorded to the wounded. Hüseyin Mutlu, who had been shot in the leg, had to wait about 9 hours to disembark. He ultimately got off the ship unaided.<sup>150</sup>

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<sup>144</sup> For the testimony of Inge Neefs, see Annex 5 (Section 5/ix)

<sup>145</sup> For the testimony of Henning Mankel, see Annex 5 (Section 5/vii)

<sup>146</sup> For the testimony of Abdullah Özkaya, see Annex 5 (Section 4/iii)

<sup>147</sup> For the relevant footage, see Annex 7 (Clip 20)

<sup>148</sup> For the testimonies of Inge Neefs, Barış Oktay and Hayrullah Küçükaytekin, see Annex 5 (Section 5/ix & Section 4/xxvi)

<sup>149</sup> For the testimonies of Henning Mankell, Griet Deknopper and Ewa Jasiewicz, see Annex 5 (Section 5)

<sup>150</sup> For the testimony of Hüseyin Mutlu, see Annex 5 (Section 4/xxvii)

All the passengers were paraded before jeering hostile crowds as well as the media. At least one witness reports that Israeli soldiers had their photographs taken with the captives in what appears to be “trophy poses”.<sup>151</sup>

Once ashore, the passengers were taken to the processing center composed of numerous tents. In several cases, groups of female passengers were taken into the same tent and forced to remove all their clothes in front of military personnel including men, in a move that was clearly intended to cause severe embarrassment and humiliation.<sup>152</sup> In at least one instance, soldiers pushed a metal detector between the legs of a Turkish female passenger.

Fiachra Ó Luain recollects having been threatened with cavity search in Ashdod. He was lucky to get away with threat only.<sup>153</sup> Not all were so fortunate, as they were subjected to this inhuman treatment.<sup>154</sup>

Apart from being meticulously searched, the passengers were finger-printed, photographed and repeatedly interrogated. They were not provided any information whatsoever of their rights, nor were they offered the possibility of obtaining legal counsel or consular support. In fact, one witness who protested this unlawful treatment was told by an Israeli officer: “*You are in Israel now; you have no rights.*”.<sup>155</sup>

With regard to the interrogations, it should also be noted that the edited footage of the secretly filmed interrogation of Mahmut Tural, First Captain of the Mavi Marmara, was later released to the media. The footage was edited in a manner to misrepresent and distort the events that had transpired on the Mavi Marmara

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<sup>151</sup> For the testimony of Abullah Özkaya, see Annex 5 (Section 4/iii)

<sup>152</sup> For the testimony of Elif Akkuş, see Annex 5 (Section 1/ix)

<sup>153</sup> For the testimony of Fiachra O’Luain, see Annex 5 (Section 5/viii)

<sup>154</sup> For pertinent testimonies see Annex 5 (Section 4/xxx and ix)

<sup>155</sup> See paragraph 192 of the Report of the Fact Finding Mission, Annex 8



with a view to misguiding the public opinion. Captain Tural's recount of the events taken in an interview without duress portrays an entirely different flow of events.<sup>156,157</sup> The same must be said also with respect to the testimony of the Second Captain, Gökhan Kökkıran.<sup>158</sup>

Passenger victims were required to sign statements to the effect that "they regretted attacking the State of Israel"<sup>159</sup> and that they "willingly entered Israel illegally", in Hebrew, which most did not know.<sup>160</sup> People who refused to sign were threatened with prosecution that would result in years in Israeli prisons. Nilüfer Ören states that although she did not intend on signing the papers, she eventually did so after receiving threats related to her baby.<sup>161</sup>

Some Israeli officers went as far as to coerce passengers into signing the forms. A few passengers capitulated, while others were beaten or physically abused for still refusing to sign. Efforts to persuade passengers to sign the forms continued almost up to the moment of departure.<sup>162</sup>

### **iii. Mistreatment during transportation to prison**

The transfer of the passengers to the Ella Prison, near Beersheva, also took place under severe circumstances. In certain vehicles used to transfer the passengers the cooling systems were turned on excessively, while passengers in other vehicles were made to wait under the scorching sun without any air conditioning, which caused some passengers to lose consciousness. Though the distance between Ashdod and the prison would normally take two hours at most, the passengers had to wait much longer in the vehicles, with at least one

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<sup>156</sup> For the testimony of First Captain Mr. Mahmut Tural, see Annex 5 (Section 1/i)

<sup>157</sup> İnsani Yardım Vakfı, Captain of The Mavi Marmara Recounts Attack On Convoy. <<http://www.ihh.org.tr/mavi-marmara-nin-kaptani-konustu/en/>> (30 July 2010)

<sup>158</sup> For the testimony of Gökhan Kökkıran, see Annex 5 (Section 1/ii)

<sup>159</sup> For the testimony of Ümit Sönmez, see Annex 5 (Section 1/v)

<sup>160</sup> For the testimony of Anne de Jong, see Annex 5 (Section 1/xii)

<sup>161</sup> For the testimony of Nilüfer Ören, see Annex 5 (Section 4/xxxix)

<sup>162</sup> See paragraph 189 of the Report of the Fact Finding Mission, Annex 8

passenger stating that he remained inside for 20 hours.<sup>163</sup> Throughout this period, the passengers had no access to water, food or toilets. Some passengers were subjected to particularly harsh treatment on the way to the prison. Dror Feiler was taken on a prisoner bus, but not allowed to sit with the others and instead “*was placed in a small barred metal cage that had small holes in it, it was like a small box, about 1x1 meters.*”<sup>164</sup> Huwaida Arraf underwent physical violence in the van that was supposed to take her to prison. The violence, which also included of her being literally thrown out of the van, was of such extent that she needed to be taken to a hospital in Ashkelon instead.<sup>165</sup>

#### **iv. Mistreatment in prison / hospital**

The mistreatment of the passengers continued in prison / hospital in different forms. At the Ella Prison, the passengers were subjected to further interrogations “*centering on any connections [...] with organizations like Al Qaeda or Hamas.*”<sup>166</sup> Some stated that they were interrogated with their clothes stripped down and subjected to degrading and humiliating searches.<sup>167</sup>

A number of passengers reported that they were kept in isolation and did not meet with other passengers until they left the prison. The access given to consular officers to contact their citizens was not only late, but also below the standards prescribed in international law. This was duly reflected also in the Presidential Statement adopted by the UN Security Council on 1 June 2010.<sup>168</sup>

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<sup>163</sup> See paragraph 195 of the Report of the Fact Finding Mission, Annex 8

<sup>164</sup> For the testimony of Dror Feiler, see Annex 5 (Section 5/vi)

<sup>165</sup> For the testimony of Huwaida Araf, see Annex 5 (Section 5/x)

<sup>166</sup> For the testimony of Gene St. Onge, see Annex 5 (Section 5/xi)

<sup>167</sup> For pertinent testimonies, see Annex 5 (Section 4/ii and xlv)

<sup>168</sup> See the UN Security Council Presidential Statement S/PRST/2010/9,

<<http://domino.un.org/unispal.nsf/0/e74146ac22d2d71f8525773600528edb?OpenDocument>>

The passengers were generally denied making phone calls to their relatives; those who were allowed could speak only English and their lines were cut as soon as they switched to their mother tongues.

Some passengers report they were forced to remove construction rubble from their cells.<sup>169</sup> This calls forced labor into question.

The presence of cameras in the showers and toilets caused discomfort among some passengers, particularly women.<sup>170</sup>

Virtually all passengers report that they were deliberately deprived of sleep. The Israeli authorities achieved this through a variety of means that included, but were not limited to, regular bangings on the doors and lights that were perpetually on.

Witnesses recount that beatings happened also in prison.<sup>171</sup>

Some passengers requiring regular medication for such conditions as diabetes were continued to be deprived of their medicine<sup>172</sup>. A number of passengers complained of inadequate water and food, with Israeli prison officials telling those asking for water to drink from the toilets<sup>173</sup>.

Moreover, as stated in the UN Fact Finding Mission's report: *"No foreign national detained at Beersheva was charged with any offence or brought before a judge. One passenger was, however, taken, after he had protested his right to*

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<sup>169</sup> For the testimonies of Murat Palavar, Barış Oktay, Musa Uzer, Hakkı Aygün, see Annex 5 (Section 4)

<sup>170</sup> For the testimonies of Dilaver Kutluay, Cenk Suha Tatlıses, Barış Oktay, Gönül Memiş, Şahin Uzun, Abdullah Camioğlu, see Annex 5 (Section 4)

<sup>171</sup> For the testimony of Gene St. Onge, see Annex 5 (Section 5/xi)

<sup>172</sup> For the testimony of Selim Özkabakçı, see Annex 5 (Section 5/xi)

<sup>173</sup> For the testimonies of Bayram Kalyon and Uğur Akan, see Annex 5 (Section 4/xiii and xlv respectively)

*appear before a judge, before what he considered to be a “sham court” close to the airport to have his deportation confirmed.”<sup>174</sup>*

On the other hand, Lubna Masarwa, an Israeli citizen, states she was held in isolation and subjected to strip searches four times a day. She was taken to court in a small metal box inside a police car in which she was held for eight hours with her hands and legs shackled<sup>175</sup>.

With regard to maltreatment in hospitals, Ahmed Luqman Talib recounts being interrogated immediately after undergoing surgery, being cuffed to his hospital bed and subjected to verbal abuse, including threats of violence and long-term imprisonment<sup>176</sup>. The restraints imposed on the wounded, including Ahmed Luqman Talib and Mustafa Şimşek mentioned above, was done needlessly and in utter disregard and indifference to their injuries, as mentioned in the Fact Finding Mission’s report<sup>177</sup>.

#### **v. Mistreatment on the way to the Airport**

The transportation of the passengers to the airport took place under similar circumstances with the journey between Ashdod and Ella prison. Again were instances of long, unwarranted delays with passengers waiting in extremely hot or cold vehicles. Michael Curt states that an elderly man suffocated from the extreme heat in the bus; Israeli soldiers ignoring their calls, finally giving half a bottle of water.<sup>178</sup> Dror Feiler and some others were forced once again into a 1x1

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<sup>174</sup> See paragraph 200, of the Report of the Fact Finding Mission, Annex 8

<sup>175</sup> Lubna Masarwa, *Time to break the siege on Gaza: A survivor’s account of Mavi Marmara*; [International Solidarity Movement](http://palsolidarity.org/2010/06/12704/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+palsolidarity+(International+Solidarity+Movement)), 7 June 2010,

[<http://palsolidarity.org/2010/06/12704/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed:+palsolidarity+\(International+Solidarity+Movement\)>](http://palsolidarity.org/2010/06/12704/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+palsolidarity+(International+Solidarity+Movement)) (7 June 2010)

<sup>176</sup> For the testimony of Ahmed Luqman Muttalib, see Annex 5 (Section 5/iii)

<sup>177</sup> See paragraph 212 through to 214 of the Report of the Fact Finding Mission, Annex 8

<sup>178</sup> For the testimony of Michael Kurt, see Annex 5 (Section 4/xxxi)

meter metal cage<sup>179</sup>, Theresa McDermott was crammed into a tiny cell in a high-security vehicle with two other women. They were kept in the vehicle for five hours. One of the women in the cell was pregnant<sup>180</sup>. One woman, overcome by the oppressive conditions in her vehicle, said that she was refused access to a toilet despite making clear that she was menstruating<sup>181</sup>. In another instance, Edda Manga states *“We were placed in a small kind of transport box with little space and were locked in there for several hours. One person needed to use the toilets and we started to knock at the walls and started screaming so that they would allow her; but they did not. In the end, she had no choice but to urinate on herself and she was crying when she did it and for some time. It was very humilia[ting] and she was just crying. The guard that was outside told us that we were nothing but animals.”*<sup>182</sup>

## **vi. Mistreatment and violence at Ben Gurion Airport**

The second most violent episode of this entire saga took place at the Ben Gurion Airport. The incidents contain an entire range of unprovoked, violent, cruel and criminal behavior including humiliation, taunting, threats, as well as brutal and ruthless beatings by many uniformed officers. It must be emphasized that while officers were mercilessly beating the passengers, their colleagues, far from intervening to stop them, formed shields to hide those acts from view. It is apparent from the testimonies that the unusually high number of security personnel present at the airport was there only to engage in violence against the passengers.<sup>183</sup> This is further corroborated by the fact that the officers immediately began their provocations directed against the passengers without

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<sup>179</sup> For the testimony of Dror Feiler, see Annex 5 (Section 5/vi)

<sup>180</sup> Fear, pain and propaganda: an activist's story, [The Herald Scotland](http://www.heraldsotland.com/news/world-news/fear-pain-and-propaganda-an-activist-s-story-1.1033113), 6 June 2010

<<http://www.heraldsotland.com/news/world-news/fear-pain-and-propaganda-an-activist-s-story-1.1033113>> (29 August 2010)

<sup>181</sup> See paragraph 162 through to 173 of the Report of the Fact Finding Mission, Annex 8

<sup>182</sup> For the testimony of Edda Manga, see Annex 5 (Section 5/xiv)

<sup>183</sup> For the testimony of Gülden Sönmez and Ewa Jasiewicz, see Annex 5 (Section 5/iv) & (Section 1/iv) respectively

exception. The passengers were paraded to little children as terrorists and enemies, verbally abused, spat on, bullied, pushed around and manhandled just to spark the slightest reaction which would be countered with massive retribution.<sup>184</sup>

It is also essential to note that this ferocity was directed against an utterly harmless group of people. This fact finds its full expression in the following excerpt from the UN Human Rights Council Fact Finding Mission's report "*All passengers had been subjected to multiple searches and were completely under the control of the Israelis by this stage.*".<sup>185</sup> The only act of protest coming from the passengers was their continued refusal to sign the deportation documents that were being imposed upon them.

Eyewitness testimonies are so consistent and vivid, to use the terms employed in the UN Human Rights Council Fact Finding Mission's report, that they defy being summarized in a manner that does them justice. Numerous incidents, including collective beatings, took place at the airport. In virtually all these cases, one or more members from the group of victimized passengers were then isolated from the rest to be subjected to further physical violence. Women and medical doctors were not spared from the Israeli officers' abusive behavior either. An aggressive fully armed soldier began hitting one of the women while grabbing her hair.<sup>186</sup> While some underwent physical violence, at least one passenger records being subjected to vaginal and rectal search at the airport.<sup>187</sup> There were even cases where some passengers were removed from the terminal,

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<sup>184</sup> For the examples of passengers being paraded to little children, see the testimonies of Mustafa Bulut & Gönül Memiş; verbal abuses and bullying, see the testimonies of Inge Neefs and Cengiz Kandilci; spitting on passengers, see the testimony of Murat Palavar and for manhandling of passengers, see the testimonies of Barış Oktay and Halis Akıncı, on Annex 5 (Sections 4&5)

<sup>185</sup> See paragraph 201 of the Report of the Fact Finding Mission, Annex 8

<sup>186</sup> İnsani Yardım Vakfı, I am just waiting for an announcement to go back to Gaza again, <<http://www.ihh.org.tr/yeniden-gazze-ye-gitmek-icin-sadece-bir-duyuru-bekliyorum/en/>> (30 July 2010)

<sup>187</sup> For the relevant testimony, see Annex 5 (Section 4/xxxix)

taken elsewhere to be battered and brought back covered in blood.<sup>188</sup> Those who had drip or drainage bags were left unassisted.<sup>189</sup> Many who had been wounded in the feet were denied assistance. Anyone trying to help them was shouted at, pulled away and beaten. Some people were slapped in the back of the head as they went up a staircase.<sup>190</sup>

When a Greek passenger with signs of severe beating and torture refused to sign the deportation document, he was slapped by an officer, who then attempted to drag him out of sight. A few passengers tried to intervene. At this moment, over a dozen uniformed officers charged all the passengers in that area. Muhammet Latif Kaya recounts that *“some of the officers pressed me onto the floor while pulling my hair whereas another soldier squeezed my head between his legs to prevent me from screaming. The other officers began kicking me mercilessly. Two officers twisted my arms. Another stepped on my upper leg to immobilize me. Yet another officer was trying to break my fingers.”* Apparently, Muhammet Latif Kaya lost consciousness for a while. When he regained his senses, he was handcuffed and was subjected to further beatings and verbal abuse, including repeated insults of *“filthy Turk”*. Muhammet Latif Kaya was in this situation when he was taken to the bus for the airplane, where he saw *“an Irishman with blood gushing from his head”*.<sup>191</sup>

That Irishman was most probably Fiachra Ó Luain. Ewa Jasiewicz witnessed *“around 10 soldiers jump on top of Fiachra and hold him in stress positions as*

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<sup>188</sup> For the testimony of Gülден Sönmez, see Annex 5(Section 1/iv)

<sup>189</sup> Fear, pain and propaganda: an activist’s story, *The Herald Scotland*, 6 June 2010 <<http://www.heraldscotland.com/news/world-news/fear-pain-and-propaganda-an-activist-s-story-1.1033113>> (29 August 2010)

<sup>190</sup> Free Gaza Team, “Testimonies from Passengers begin to come in”, *The Free Gaza Movement*, 3 June 2010 <<http://www.freegaza.org/en/boat-trips/passenger-lists/75-ninth-trip-to-gaza-in-may-2010/1200-testimonies-from-passengers-begin-to-come-in>>

<sup>191</sup> For the testimony of Muhammet Latif Kaya, see Annex 5 (Section 4/xxxiii)

*he screamed in pain”.<sup>192</sup> Manuel Tapial saw Israeli officers “*hit an Irish volunteer [...] on the head and saw the blood gushing out.*”<sup>193</sup> Fiachra Ó Luain himself recounts “*we were baton-charged for expressing dismay at how Paul Larudee was being manhandled [...] I saw the IDF use batons, rifle butts, boots and fists to break people’s limbs and concuss men of all ages [...] On the third occasion one of them grabbed my left arm and straight away I felt hands all over me. I was wrested to the ground where 17 of them assaulted me in plain view of a CCTV camera. I stayed limp and repeated ‘OK, OK, OK’, but they kept on beating me, giving me at least three head wounds [...] Then they put their guns on me and threatened to shoot me in the head. I asked once again to see a Rabbi and was told that I would only see a Rabbi at my funeral.*”<sup>194</sup>*

In case the Irishman described by Muhammet Latif Kaya was not Fiachra Ó Luain, then it would have to be Ken O’Keefe. Ewa Jasiewicz had this to say about Ken O’Keefe’s fate at the airport: “*Israeli soldiers beat Ken O’Keefe over the head with a baton—we heard a loud crack and saw his face streaming with blood.*”<sup>195</sup>

## **vii. Mistreatment of journalists**

At least 60 journalists were covering the convoy.<sup>196</sup> As mentioned earlier in the report, Cevdet Kılıçlar, a photographer, was killed on board the Mavi Marmara. Indonesian cameraman Sura Fachrizaz was shot in the chest, while Issam Za’atar was hit with a stun gun while filming and suffered a broken arm. Despite his injury, he had to endure a long and exhausting interrogation.<sup>197</sup>

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<sup>192</sup> For the testimony of Ewa Jasiewicz, see Annex 5 (Section 5/iv)

<sup>193</sup> For the testimony of Manuel Tapial, see Annex 5 (Section 5/xiii)

<sup>194</sup> For the testimony of Fiachra Ó Luain, see Annex 5 (Section 5/viii)

<sup>195</sup> For the testimony of Ewa Jasiewicz, see Annex 5 (Section 5/iv)

<sup>196</sup> For the testimony of Anne de Jong, see Annex 5 (Section 1/xii)

<sup>197</sup> Journalists on raided convoy speak out; one journalist killed in attack, International Freedom of Expression Exchange, 9 June 2010 <[http://www.ifex.org/israel/2010/06/09/speak\\_out/](http://www.ifex.org/israel/2010/06/09/speak_out/)> (5 July 2010)



Cameraman Valentin Vassilev's medication for hyper-tension was taken from him.<sup>198</sup>

Journalists on the Mavi Marmara were identifiable by their press vests so they were grouped, searched, handcuffed and left in the sun for five hours.<sup>199</sup> Marcello Faraggi was forced to undress, which he found humiliating. He was squeezed into a truck with other prisoners in which they had to wait for more than an hour in the sun without air conditioning.<sup>200</sup> Mario Damolin complained about surveillance cameras in the showers and toilets in the Ella Prison.<sup>201</sup> At the airport, an Israeli official called Jan Líněk a '*fucking Russian*'.<sup>202</sup>

All journalists' personal belongings were confiscated and no receipts were issued.<sup>203</sup> Of those confiscated electronic media equipment, some were later returned without any memory units or memory cards.<sup>204</sup>

Apart from photographic equipment, many passengers also reported the confiscation of money, credit cards, mobile phones, computers, electronic goods<sup>205</sup> and clothes.<sup>206</sup> Some electronic equipment was returned irreparably damaged.<sup>207</sup>

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<sup>198</sup> Bulgarian Gaza Reporter: Turkish Ship Was Provocation for Israel, [novinite.com](http://www.novinite.com), (3 June 2010)

<[http://www.novinite.com/view\\_news.php?id=116792](http://www.novinite.com/view_news.php?id=116792)> (5 July 2010)

<sup>199</sup> Interview with convoy journalist, [Reporters without Borders](http://en.rsf.org/israel-interview-with-flotilla-journalist-07-06-2010,37682.html), 7 June 2010, <<http://en.rsf.org/israel-interview-with-flotilla-journalist-07-06-2010,37682.html>> (9 June 2010)

<sup>200</sup> Marcello Faraggi, As Turkish photographer is buried, other journalists aboard flotilla speak out, [International Freedom of Expression Exchange](http://www.ifex.org/israel/2010/06/10/kiliclar_buried), 9 June 2010, <[http://www.ifex.org/israel/2010/06/10/kiliclar\\_buried](http://www.ifex.org/israel/2010/06/10/kiliclar_buried)> (13 July 2010)

<sup>201</sup> Mario Damolin, Eyewitness report from the Gaza fleet, [Frankfurter Allgemeine Zeitung](http://www.faz.net/s/RubB30ABD11B91F41C0BF2722C308D40318/Doc~E08164C9F915B4356A59A4A028667A884~ATpl~Ecommon~Scontent.html), (7 June 2010) <<http://www.faz.net/s/RubB30ABD11B91F41C0BF2722C308D40318/Doc~E08164C9F915B4356A59A4A028667A884~ATpl~Ecommon~Scontent.html>> (29 August 2010)

<sup>202</sup> Czech camera man describes beating of Irish activist in Israeli prison, [Workers Solidarity Movement](http://www.wsm.ie/c/beating-irish-activist-israeli-prison), 2 June 2010 <<http://www.wsm.ie/c/beating-irish-activist-israeli-prison>> (7 July 2010)

<sup>203</sup> Interview with convoy journalist, [Reporters without Borders](http://en.rsf.org/israel-interview-with-flotilla-journalist-07-06-2010,37682.html), 7 June 2010, <<http://en.rsf.org/israel-interview-with-flotilla-journalist-07-06-2010,37682.html>> (9 June 2010)

<sup>204</sup> For the testimony of Elif Akkuş, see Annex 5 (Section 1/ix)

<sup>205</sup> Robert Booth, Gaza convoy attack: British activists arrive in Turkey, [guardian.co.uk](http://www.guardian.co.uk), (3 June 2010)

<<http://www.guardian.co.uk/world/2010/jun/03/gaza-flotilla-attack-british-activists-return-turkey>> (5 June 2010)

The missing items included approximately 600 mobile phones, 400 video cameras, 350 laptops and cash raised for charities in Gaza. There are no reports of any detainees being allowed to keep money or of any money being subsequently returned. Some activists have reported that their stolen credit cards have since been used.<sup>208</sup> There were recent articles in the media reporting that were selling property such as laptops confiscated from the passengers.

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<sup>206</sup>Kate Connolly, Henning Mankell on Gaza convoy attack: 'I think they went out to murder'. [guardian.co.uk](http://www.guardian.co.uk), 3 June 2010 <<http://www.guardian.co.uk/world/2010/jun/03/gaza-flotilla-attack-henning-mankell>> (5 June 2010)

<sup>207</sup> Stanley Heller, Grand Theft Convoy, [OpEdNews.com](http://www.opednews.com), (17 June 2010)

<<http://www.opednews.com/articles/Grand-Theft-Flotilla-by-Stanley-Heller-100616-410.html>> (17 June 2010)

<sup>208</sup> Encryptereality, \$3.5mn stolen form Gaza convoy survivors by Israeli pirates, [YouTube](http://www.youtube.com/watch?v=HBqorI059xI), (11 June 2010), <[http://www.youtube.com/watch?v=HBqorI059xI&feature=player\\_embedded](http://www.youtube.com/watch?v=HBqorI059xI&feature=player_embedded)> (1 July 2010)

## II. STATEMENT OF THE LAW

### A. The right to freedom of navigation on the high seas

The high seas are governed under the rules of the law of the sea at all times. The law of the sea and the rights of freedom of navigation on the high seas was developed over the centuries and is one of the areas of international law that remains uncontested. Any derogation from this fundamental freedom must be of equal weight or greater to justify what would otherwise constitute a violation of international law.

Under the rule of *pacta sunt servanda*, a State is bound by a treaty to which it has consented and must perform its obligations in good faith.<sup>209</sup> Israel, although not a party to the 1982 United Nations Convention on the Law of the Sea (UNCLOS), has signed and ratified the 1958 Geneva Convention on the High Seas. UNCLOS, by its express terms, replaces the 1958 Convention between State Parties, but the 1958 Convention remains in force for those countries, such as Israel, that have not ratified the 1982 Convention.<sup>210</sup>

Freedom of the high seas is a long-standing rule of customary international law. As widely acknowledged, the 1958 Convention is declaratory of customary international law as are the provisions of UNCLOS on freedoms of the high seas, which are almost identical to the parallel provisions in the 1958 Convention. The burden is thus on Israel to provide legal justification under international law of an exception to the freedom of the high seas.

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<sup>209</sup> Vienna Convention on the Law of Treaties, 1969. Article 26

<sup>210</sup> Article 311(1) of the 1982 Convention provides that “This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958.”

As one of the pillars of international law, freedom of the high seas has been zealously guarded over the centuries.<sup>211</sup> It is a right that belongs to all States.<sup>212</sup> One of the components of freedom of the high seas is the exclusive jurisdiction of the flag State, which was expounded in the well-known *S.S. Lotus Case*.<sup>213</sup>

Article 2 of the 1958 Convention establishes the universal character of freedom of the high seas and provides a non-exhaustive list, including freedom of navigation, that was reaffirmed and expanded under UNCLOS.<sup>214</sup> The exercise of these freedoms is subject to the conditions provided in the Conventions and by other rules of international law. Furthermore, both Conventions require that “these freedoms, and others which are recognized by the general principle of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of freedom of the high seas.”<sup>215</sup> Moreover, the high seas are to be “reserved for peaceful purposes.”<sup>216</sup>

The instant case, where the humanitarian aid convoy was attacked on the high seas, is subject to the laws of peace time, in particular the law of the sea.

## **B. Exceptions to freedom of navigation and the exclusivity of flag State jurisdiction**

### **i. Right of visit**

A state does not have any authority or jurisdiction to interfere in peacetime with the passage of a foreign vessel on the high seas, except in limited cases. The

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<sup>211</sup> RR. Churchill and A.V. Lowe, *The Law of the Sea (Third Edition)*, (Manchester University Press 1999), p.204.

<sup>212</sup> Article 89

<sup>213</sup> *S.S. Lotus Case (Fr. v. Turk.)*, 1927 P.C.I.J.

<sup>214</sup> The other enumerated freedoms are freedom of fishing, freedom to lay submarine cables and pipelines, and freedom of overflight.

<sup>215</sup> Article 87 (2)

<sup>216</sup> Article 88

“right of visit”, which permits a warship to stop and board a foreign vessel on the high seas, is a narrowly-drawn exception to the right of freedom of navigation and the flag exclusivity rule. Codifying customary international law, both the 1958 Convention and UNCLOS limit the right of visit to a set of well-defined and exhaustive circumstances. The grounds allowing a right of visit found in Article 22 of the 1958 Convention and Article 110 of UNCLOS are identical *mutis mutandis* and limit the competence of a warship to stop and board a foreign-flagged vessel on the high seas.

These grounds arise when:

- there is bilateral treaty in force;
- a ship is engaged in piracy;
- a ship is engaged in the slave trade; or
- though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

UNCLOS has added two more exceptions:<sup>217</sup>

- a ship engages in unauthorized broadcasting subject to Article 109, and
- a ship is without nationality.

Both Conventions, reflecting customary international law, provide in identical language clear procedural limitations on how to stop and board a foreign merchant vessel on the high seas. The warship should first “proceed to verify

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<sup>217</sup> Examples of permissible acts of interference derived from powers conferred by treaty include the 1995 *United Nations Convention on Straddling Fish Stocks and Highly Migratory Fish Stocks* under which the Contracting parties agree to have fishing vessels under their flag subject to boarding and inspection on the high seas; and the 1969 *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*, which allows Parties to the Convention to take the necessary measures on the high seas following a maritime accident to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, which may reasonably be expected to result in major harmful consequences. However, unless there is extreme urgency the Convention requires prior notification and consultation with the flag State. Measures that exceed what is allowed under the Convention creates liability in the Party who must provide compensation for any losses and damages.

the ship's right to fly the flag," and *this should be done by sending a single boat*, (the language in Article 110 (2) of UNCLOS is in the singular), under the command of an officer to make an initial inspection of the ship's flag. Only if, after this initial inspection of the documents, suspicion remains as to the flag of the ship, may the warship engage in further inspection on board the ship "which must be carried out with *all possible consideration*." (Article 110 (2)).

This procedure applies in the cases of suspected slavery transport, piracy or when there are questions as to the flag of the ship. The provision is silent as to the right of the warship to seize the ship, property or persons on board. This procedural limitation is identical in both the 1958 Convention and UNCLOS. Both Conventions stipulate that, if the suspicions are unfounded, the seizing State is obliged to pay compensation for any losses or damages sustained.<sup>218</sup>

The 1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) was adopted by the International Maritime Organization (IMO) following the 1985 *Achille Lauro* terrorist attack which took place on the high seas and resulted in the death of a US citizen.

The 2005 Protocol to the SUA Convention adopted a set of well-defined procedures for boarding a ship in international waters suspected of violating its provisions. It is significant that the participating Parties at the diplomatic conference were extremely cautious to maintain the primary jurisdiction of the flag State in line with codified and customary international law. The Protocol subjects the right to board a vessel suspected of committing violation of the acts provided under the Convention to the express consent of the flag State.

It stands to reason that if international consensus existed for expanding the right

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<sup>218</sup> Article 110 (3)

to interdict foreign vessels in international waters, certainly the 2005 Protocol which deals with the prevention of international terrorism would have provided the right legal forum. The strong will of States to maintain flag State jurisdiction over a vessel on the high seas was reaffirmed by the international community under the 2005 Protocol. This provides further evidence of State practice in limiting the exceptions allowed to interfere with the right of freedom of navigation on the high seas.

Immediately following the terror attack against the United States on 11 September 2001, IMO convened and amended Chapter XI of the International Convention for the Safety of Life at Sea (SOLAS) 1974, as well as adopting the Special Measures to Enhance Security, and the new International Ship and Port Facility Security Code (ISPS Code) which went into effect 1 July 2004.<sup>219</sup> Its objectives include establishing an international framework involving cooperation to detect security threats and take preventive measures.<sup>220</sup> The ISPS Code introduced for the first time measures intended to prevent the occurrence of a terror incident against a ship or a port facility. With some 80 percent of the world's trade carried by sea, the security of shipping is of the utmost concern for international trade and military security. The ISPS Code was the first international regulation designed to detect and prevent terror at sea.

The “clear grounds” standard is found in the provisions of UNCLOS Article 220 for enforcement by the coastal State of any violations of its rules and regulations adopted under the Convention itself or in accordance with applicable international rules and standards for the prevention, reduction and control of vessel-sourced pollution. According to the same Article, if there are clear grounds for the coastal State to believe that the vessel has violated such rules in

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<sup>219</sup> The IMO Doc. MSC 78/7 Annex (Proposed Draft Amendment to SOLAS XI-2 Measures to Enhance Maritime Security) < <http://www.iaphworldports.org/new/MSC78-7Add.1.pdf>>

<sup>220</sup> Article 1.2.1, ISPS Code, Part A.

either its territorial waters or exclusive economic zone (and has refused to provide information when requested under subsection 3), the State can detain, inspect and institute proceedings against the ship.

Both Turkey and Israel are Parties to SOLAS and have accepted the ISPS Code. This means that when the ships set sail from Turkish ports, in addition to undergoing Turkish customs inspection, all cargo was shipped from ports that have been recognized internationally, under the ISPS Code, as secure.<sup>221</sup>

Israel should, therefore, have accepted the internationally recognized assurances resulting from both the possession of the ISPS Codes by the ports of departure as well as the regular detailed checks conducted by the Turkish authorities on the ships, that the cargo contained no arms, munitions or other material that would constitute a threat to its security.

## **ii. Right of seizure and arrest on the high seas**

Customary international law does not recognize a general right of visit and seizure of vessels on the high seas.<sup>222</sup> As explained in the previous section, there are only limited situations when a warship may visit or seize a foreign ship in international waters.

The restricted scope of the existing lawful grounds for seizing a vessel on the high seas was demonstrated by the conduct of the United States during the *Soan* incident on 10 December 2002. Following a request from the United States, the Spanish naval forces intercepted and boarded a ship on the high seas some 600 miles from the coast of Yemen. The ship was not flying a flag and its name had been painted over. However, it was discovered that the ship was

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<sup>221</sup>For the Statement of Compliance Documents (ISPS) of the Ports of Istanbul, Antalya, İskenderun and Zeytinburnu, see Annex 3 (Section 5)

<sup>222</sup> Ian Brownlie, Principles of Public International Law 5<sup>th</sup> Edition, (Oxford University Press, 1999)



registered to Cambodia. During the search of the vessel, fifteen Scud missiles, not listed in the ship's manifest, were discovered beneath a cargo of cement. Upon verifying that Yemen had purchased the missiles, the United States Administration decided to release the vessel and its cargo. The US found that, although the lack of a flag gave legal grounds for the initial boarding of the vessel, there was no 'clear authority' for seizing the missiles under international law. No provision under UNCLOS or other sources of international law prohibits the maritime transport of missiles.<sup>223</sup>

### **iii. Hot pursuit**

One other exception that permits a State to interfere with a foreign ship on the high seas is in the case of hot pursuit. The provisions for hot pursuit, identical in both the 1958 Convention<sup>224</sup> and UNCLOS,<sup>225</sup> stipulate the following:

“The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted.”

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<sup>223</sup> Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, Harvard International Law Journal 131 (2005), p. 153

<sup>224</sup> Article 23

<sup>225</sup> Article 111 is adopted *mutis mutandis* from Article 23 of the 1958 Convention, with the addition of the Exclusive Economic Zone.

### **C. The concept of self-defence under the UN Charter**

The right of self-defence is the only exception to the prohibition against the use of force by States under the Charter of the United Nations and customary international law. Article 51 of the UN Charter expressly limits the right of States to exercise self-defence to situations of armed attack. The extension of the right of self-defence to include anticipatory self-defence to justify the interdiction of a foreign ship on the high seas has extremely limited support in international law. Even accepting *in arguendum* the right of anticipatory self-defence, the widely accepted criteria that must be fulfilled are those that were famously stated by Daniel Webster in the *Caroline* incident where “necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation” and furthermore, that “the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”<sup>226</sup> In short, acts of self-defense must be based on necessity and be proportionate to the threat.

A review of State practice reveals the general rejection by the international community and the judiciary of anticipatory self-defence as an exception to the right of freedom of the high seas and the rule of flag State exclusivity. The proposal to allow a warship the right to visit a vessel on the high seas, based on suspicions that the vessel is hostile to or poses an imminent threat to the security of the State of the warship, was rejected by the UN International Law Commission during the negotiations on the Draft Articles of the 1958 Convention.

There has been a systematic rejection of the invocation of anticipatory self-defence by a State to interdict ships on the high seas.

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<sup>226</sup>Letter from Daniel Webster, Secretary of State, to Lord Ashburton, British Plenipotentiary, 6 August 1842, in John B. Moore, *Digest of International Law* 412 (1906)

In the case of *Nicaragua v. United States of America (Merits)*, the International Court of Justice rejected the claims of the United States to exercise the right of self-defence under Article 51 of the Charter and customary international law.<sup>227</sup> The Court clearly stated that Article 51 could be invoked only against an armed attack and that “whether the response to an attack is lawful depends on the observance of the criteria of the necessity and the proportionality of the measures taken in self-defence.” In defining the substance of what would constitute an “armed attack” the court rejected the argument that an armed attack would include assistance to rebels in the form of the provision of weapons or logistical or other support. According to the Court, an “armed attack” that would justify the exercise of self-defence “is to be understood as meaning not merely action by regular armed forces across an international border, but also the sending by a State of armed bands on to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack had it been carried out by regular armed forces.”<sup>228</sup> The Court noted in *dictum* that the “normal purpose of an invocation of self-defence is to justify conduct which would otherwise be wrongful.”<sup>229</sup>

The general international opposition to expanding the limited right to visit and board a foreign vessel on the high seas on grounds of anticipatory self-defence is borne out by several other examples. One is the decision of the United States to adopt the Proliferation Security Initiative (PSI) based on flag State consent instead of relying on the questionable right of anticipatory self-defence as grounds for boarding ships on the high seas suspected of transporting weapons of mass destruction (WMD) to hostile States or terrorists. As part of the PSI, the

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<sup>227</sup> Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America, (Merits)*), ICJ Reports, (1986)

<sup>228</sup> *Ibid.* Para. 195, p. 93 The Court also noted that Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law.

<sup>229</sup> *Ibid.* p 45

United States concluded bilateral treaties with flag States granting the US the right to board and inspect their vessels while on the high seas. A considerable volume of literature was penned following the adoption of the PSI by the United States. Collectively, the common view was that the US recognized the strength of freedom of the high seas and sought to conclude bilateral agreements in order to obtain the consent of flag States. These agreements could be considered as falling within the provision of “[e]xcept where acts of interference derive from powers conferred by treaty” found in both the 1958 Convention and UNCLOS, constituting customary international law.<sup>230</sup>

#### **D. Israel is estopped from reliance on the San Remo Manual provisions on naval blockades**

##### **i. Naval blockade under international law**

Naval blockades have been used as a military tactic throughout history, and have continued to be used in a number of contemporary international armed conflicts. Recent blockades include UN Security Council approved “military intercept” operations against Iraq (1999)<sup>231</sup> and against Yugoslavia (1991-1992)<sup>232</sup>. State practices, including UN authorized blockades, have contributed to establish the current principles governing naval blockade. Past efforts to develop rules governing naval blockades were abandoned during World Wars I and II. Since then there has been no codification by governments of an agreed set of rules on naval blockades in international armed conflicts. The San Remo Manual is the

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<sup>230</sup> Article 110

<sup>231</sup> U.N. Security Council Resolution 665 (1990); Lois E. Fielding, *Maritime Interception: Centerpiece of Economic Sanctions in the New World Order*, 53 Louisiana Law Review 1191, 1194 (1993); *supra* note 14, at 1214.

<sup>232</sup> U.N. Security Council Resolutions 713 (1991) and 757 (1992); Richard Zeigler, *Ubi Sumus? Quo Vadimus?: Charting the Course of Maritime Interception Operations*, 43 Naval Law Review 1, 15 (1996), *supra* note 30, at 31-33; William Drozdiak, *NATO Agrees to Impose Blockade of Serbia*, WASHINGTON POST, Nov. 19, 1992, at A31.

only non- governmental developed set of principles on international armed conflicts at sea.

## **ii. The inapplicability of San Remo Manual provisions to the Israeli naval blockade**

The San Remo Manual is accepted as the reflection of the existing customary international law applicable to inter-state armed conflicts at sea. It was prepared by a group of independent international law and naval experts to provide guidance for developing national naval manuals. The Manual was intended to present a compilation of existing state practice and progressive law. The *travaux préparatoires* clearly demonstrate that the rules and state practice on naval blockade are applicable to *international* armed conflicts at sea and not those of a non-international character. This fact has been confirmed by the recognized authority and the editor of the San Remo Manual, who was also the head co-ordinator of the drafting work, Prof. Louise Doswald-Beck.

Prof. Doswald-Beck unequivocally states that the San Remo Manual is intended to apply to international armed conflicts.<sup>233</sup> Furthermore, she stresses in particular that those rules allowing activities that affect third party States, such as naval blockade, reflect treaty and other practice that is categorized as customary law only for inter-state conflicts. Consequently, the provisions of the San Remo Manual that authorize the enforcement of a blockade such as capture of neutral vessels on the high seas cannot be seen as customary international law applicable to non-international armed conflicts.

Prof. Doswald Beck underscores the following, which is critical to correctly understand the scope of application of the Manual:

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<sup>233</sup> For the Testimony of Prof. Louise Doswald Beck on the SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, see Annex 9

*“...the commentary to the Manual states (in Section 1.1 of the Explanation to the Manual, p.73 of the CUP publication) that, although the Manual is primarily intended to apply to international conflicts, the lack of mention of scope of application is to avoid an understanding that the Manual cannot apply to non-international ones. However, it is crucial that this statement is read together with the statement in Section 1.3 of the commentary on p.74 of the CUP publication. This states that activities that affect third States (the term “neutral” was used for any State not party to the conflict (para.13 (d)) on the high seas reflect treaty and other practice that had sufficiently solidified to be categorised as customary law only for inter-State conflicts. These relate to special rules on belligerent or neutral vessels or aircraft in their respective territories (paras. 18-22), to the establishment of a blockade (paras.93-104), and to the interception, visit, search, diversion or capture of vessels or aircraft outside national jurisdiction (paras. 118-158). It follows that the parts of the San Remo Manual that authorise interception of neutral vessels on the high seas cannot be seen as customary law applicable to non-international armed conflicts.”<sup>234</sup>*

In conclusion, naval blockades apply in international/inter-state armed conflicts, as re-stated as a customary norm in the San Remo Manual.

### **iii. Israel’s inconsistent and inequitable position on the nature of the conflict**

The State of Israel has denied recognition of statehood to Palestine and does not accept the characterization of its armed conflict with Hamas and other groups in Gaza as international. On the other hand, Israel asserts international law applicable to international armed conflicts to justify its naval blockade on the Gaza Strip, and its ensuing acts of high seas interception. These two variant positions are legally irreconcilable. Israel cannot deny rights to the Palestinians

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<sup>234</sup> For the Statement of Prof. Louise Doswald Beck on the SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, see Annex 9

based on the argument that international law does not apply, while at the same time claim belligerent rights under the law of international armed conflict. Not only is this inconsistent but creates an unacceptable inequitable legal result to the detriment of the Palestinians.

It is also essential to highlight at this juncture that the nature of the armed conflict can not be retroactively re-characterized in order to conveniently bestow belligerent rights which did not actually exist at the time of the event. In other words, given that Israel has never recognized Palestine as a State, and its conflict with Hamas as an international one, including the denial of Prisoner of War status to captured Hamas elements, it can not invoke international humanitarian law applicable to international armed conflicts to serve its own purposes in this particular case. Even if Israel now recognized its conflict with Hamas as “international”, this would have no retroactive effect on the law applicable to the attack on the international humanitarian convoy.

#### **E. The naval “blockade” of the Gaza Strip by Israel was unlawful also in practice and implementation**

As stated above, the “blockade” was unlawful *par excellence* due to its lack of legal basis. Even if, for the sake of argument, the “blockade” had lawful grounds, it would still have failed because of the manner in which it was established and implemented.

##### **i. Israeli “blockade” of the Gaza Strip did not comply with notification requirements**

The law governing naval blockades is based on customary international law, which has been reflected in the San Remo Manual on International Law

Applicable to Armed Conflict at Sea (San Remo Manual).<sup>235</sup> One of the requirements for a naval blockade to be lawful under customary international law is that explicit notice be given of the nature and limits of each blockade.<sup>236</sup> Article 94 of the Rules in the San Remo Manual requires that blockades be formally declared, providing “the commencement, duration, location, *and extent* of the blockade” (emphasis added).<sup>237</sup> Between 2005<sup>238</sup> and 2008,<sup>239</sup> Israel notified mariners of its maritime policy, which restricted the movements of vessels surrounding the Gaza coast. The current “blockade” against Gaza was officially declared on 3 January 2009.<sup>240</sup>

The Israeli position that a declaration of duration of the blockade was not possible because of the so-called open-ended nature of the conflict with Hamas lacks credibility as all conflicts are of an open-ended nature. It is the duty on the blockading state to establish a clear time period and to extend it if necessary. This customary rule of international law as restated in Rule 94 of the San Remo Manual employs the conjunctive and not disjunctive where all elements are required for a lawful blockade and not simply those chosen as convenient. The vague formulation of ‘until further notice’ is not acceptable. The purpose for

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<sup>235</sup> SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, 12 JUNE 1994 (Institute of International Humanitarian Law, 1995), <<http://www.icrc.org/IHL.nsf/webPrint/560-FULL?OpenDocument>>

<sup>236</sup> Notice has always been an essential requirement of blockade law, and is still required. See Michael G. Fraunces, Note, *The International Law of Blockade: New Guiding Principles in Contemporary State Practice*, 101 YALE LAW JOURNAL 893-908 (1992). at 913-17

<sup>237</sup> San Remo Manual, Article 94.

<sup>238</sup> Marian Houk, Free Gaza" Ships Set Off from Cyprus on Expedition to "Break Siege" of Gaza Strip, American Chronicle, 22 August 2008 <<http://www.americanchronicle.com/articles/printFriendly/72046>> (20 August 2010)

<sup>239</sup> Admiralty Notices to Mariners, 20 October 2008, <[http://nms.ukho.gov.uk/2008/Week40\\_5327-5486/40snii08.pdf](http://nms.ukho.gov.uk/2008/Week40_5327-5486/40snii08.pdf)>; Notice to Mariners (2008) <[nms.ukho.gov.uk/2008/Week40\\_5327-5486/Wk40-magnote.pdf](http://nms.ukho.gov.uk/2008/Week40_5327-5486/Wk40-magnote.pdf)>.

<sup>240</sup> Cargo Boat Attempting Illegal Entry to Gaza Intercepted, Israel Ministry of Foreign Affairs, 5 February 2009, <[http://www.mfa.gov.il/MFA/Government/Communiques/2009/Cargo\\_boat\\_illegal\\_entry\\_Gaza\\_waters\\_intercepted\\_5-Feb-2009.htm?DisplayMode=print](http://www.mfa.gov.il/MFA/Government/Communiques/2009/Cargo_boat_illegal_entry_Gaza_waters_intercepted_5-Feb-2009.htm?DisplayMode=print)> (20 August 2010); Carol Migdalovitz, Israel's Blockade of Gaza, the Mavi Marmara Incident, and Its Aftermath, Congressional Research Service, 23 June 2010 <<http://www.fas.org/sgp/crs/mideast/R41275.pdf>> (20 August 2010)



requiring an express time limit is to allow for periodic reviews to assess the impact of the blockade. For example, whether the military advantage is being achieved or not, or assess the impact on the civilian population. An open-ended time frame left to the discretion of the blockading authorities risks arbitrariness which is not consistent with international law.

In addition, since 2007, Israel has not made clear the “extent” of the “blockade”, namely, which products were actually being banned.<sup>241</sup> The UN Fact Finding Mission on the Gaza Conflict, led by Justice Richard Goldstone, (hereinafter referred to as the “Goldstone Report”, to avoid confusion with the Fact Finding Mission established following the attack against the humanitarian aid convoy) stated that “[n]either the list of items allowed into the Gaza Strip, nor the criteria for their selection are made known to the public.”<sup>242</sup> According to a 3 May 2010 report on BBC:

Israel has never published a list of banned items, saying it approves requests on a case-by-case basis. Items allowed have changed over time, which has left humanitarian organizations and commercial importers constantly attempting to guess what will be approved.<sup>243</sup>

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<sup>241</sup> According to reports of observers, Israel allowed only 81 items into Gaza, and prohibited dual-use items such as steel pipes, concrete, cement, and fertilizer.

<sup>242</sup> Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories*, at 97, ¶316, A/HRC/12/48, 15 September 2009.

<sup>243</sup> Details of Gaza Blockade Revealed (citing Israeli Supreme Court documents), *BBC NEWS*, 3 May 2010 <[http://news.bbc.co.uk/2/hi/middle\\_east/8654337.stm](http://news.bbc.co.uk/2/hi/middle_east/8654337.stm)> (20 August 2010)

In fact, Israel itself decided to adjust the terms of the “blockade” after the attack, and on 6 July 2010 it began to allow many more items into Gaza.<sup>244</sup> This revision is, indeed, a recognition of the wrongfulness of the listing of goods method that was in application at the time of the attack.

Reports from early in the “blockade”’s enforcement mention that goods entering into Gaza were subject to ministerial review. No comprehensive list of banned items had been published as of 31 May 2010.<sup>245</sup> Even under the recently relaxed policy,<sup>246</sup> Israel remains far from meeting the established notification norms.<sup>247,</sup>  
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Furthermore, the actual blockade that was enforced on 31 May 2010 went far beyond what was required for the actual security needs of Israel, and Israeli officials have acknowledged that the punitive restrictions sharply limiting the goods allowed into Gaza were designed also to be "economic sanctions" to put pressure on Hamas. Such a blockade, which interferes with trade from neutral nations and shipments of humanitarian aid, is excessive and is inconsistent with international law principles.

The Israeli Government states that the naval blockade is part of Israel’s wider effort not to give legitimacy to the Hamas’s (*sic*) rule over the Gaza Strip, to

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<sup>244</sup> State of Israel Ministry of Defense Coordinator of Government Activities in the Territories, *The Civilian Policy Towards the Gaza Strip – The Implementation of the Cabinet Decision (June 2010)* (listing items that would continue to be prohibited from importation into Gaza); *Guide: Eased Gaza Blockade*, BBC NEWS, 19 July 2010, <<http://www.bbc.co.uk/news/world-middle+east=10520844>>

<sup>245</sup> See List of commercial goods allowed for import into Gaza, April 2010, BBC NEWS, <[http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/05\\_05\\_10\\_gazaimports.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/05_05_10_gazaimports.pdf) >.

<sup>246</sup> On July 6, 2010, Israel adjusted the terms of the blockade and began to allow many more items into Gaza.

<sup>247</sup> CIVILIAN POLICY TOWARDS THE GAZA STRIP, Ministry of Defense, June 2010, *at* <<http://www.pmo.gov.il/NR/rdonlyres/EBDB36CF-2BA0-4719-B532-F723C7CF2456/0/gazaENG.pdf>. >

<sup>248</sup> The list of items banned from Iraq during the Second Gulf War, for instance, was extensive and specific compared to the list published by Israel’s Ministry of Defense. S. C. Res, S/2002/515 (May 31, 2002) (describing specific chemical compounds, including diagram of molecular structure, prohibited from entering Iraq). See also S.C. Res, 1454, U.N. Doc. S/RES/1454 (Dec. 30, 2002) (describing how list of banned goods is subject to review for humanitarian purposes).

isolate it in the international arena, and to strengthen the Palestinian authority. This is clearly a political objective, which evidently is the overriding goal of the Israeli government. Since Hamas' election in 2006 it has been the policy and goal of Israel to overthrow Hamas. Israel's reliance on military security needs cannot serve as a disguise for what is in truth the ultimate objective of undermining popular support for Hamas by strangulating the livelihood of the Gazans.

This further raises the question of abuse of right under international law by Israel. This is evidenced by the Israeli government's continued insistence to knowingly allow the Palestinian people in Gaza to live under extreme inhumane conditions and depriving them of their human dignity. It is particularly inequitable for Israel to attempt to shroud the humanitarian crisis in Gaza in the artificial confusion of statistical data, when the magnitude of this crisis has been documented by independent international organizations. The historical reality is that the Palestinian Territories have been under the long-term control by "occupation" of Israel creating what has been described as a state of dependency on Israel.<sup>249</sup> Israel cannot claim pre-existing economic problems, and then use these as a pretext to avoid its legal obligations under international law of blockade—particularly when Israel was the very cause of those pre-existing economic problems. More importantly, the facts all support a direct relationship between the escalation of the humanitarian crisis in Gaza with the imposition of the "blockade".

What the Israeli Government admits as an 'economic warfare' is actually a "political warfare" where civilians are condemned to suffer in the cross-fire aimed at Hamas.

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<sup>249</sup> Human Rights Council, Report of the United Nations Fact Finding Mission on the Gaza Conflict (Goldstone Report), ¶ 74, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009), *at* <[http://www2.ohchr.org/english/bodies/hrcouncil/.../UNFFMGC\\_Report.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/.../UNFFMGC_Report.pdf)>, p.96

## **ii. Israeli “blockade” of the Gaza Strip was not reasonable, proportional or necessary**

The San Remo Manual identifies situations where blockades would be legally impermissible, specifically when “(a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.”<sup>250</sup>

On the question of “starvation” there is no litmus test and certainly the general lack of access to food and nutrition should be considered to constitute a level of unacceptable starvation. To place 1.5 million civilians on “diet” as justification for a blockade would be tantamount to an intent to “starve” people.<sup>251</sup> In terms of assessing the level of nutrition of 1.5 million people, it is clear that the vast majority of the population of Gaza is suffering from lack of adequate food. Under contemporary standards it is difficult to envision an international legal system that would condone a blockade that punished 1.5 million people with hardships and malnourishment for so-called military advantage.

As “the [San Remo Manual] suggests a balancing test weighing the means and methods of warfare against potential collateral damage,” belligerents must consider “potential damage beyond that expected” and should also “continue to monitor for collateral damage and to cease that activity as soon as it is apparent

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<sup>250</sup> San Remo Manual, Article 102.

<sup>251</sup> Dov Weissglas, an Israeli advisor to former Prime Minister Sharon is reported to have stated in relation to the blockade that “The idea is to put the Palestinians on a diet, but not to make them die of hunger.”  
<<http://www.guardian.co.uk/world/2006/apr/16/israel>> (2 February 2011)

that the balance has shifted.”<sup>252</sup> In addition to these requirements, the San Remo Manual makes it clear that belligerents employing naval blockades must also adhere to the principle of proportionality, and exercise restraint by taking precautions in enforcement of the blockade.<sup>253</sup>

Dr. Stephen C. Neff, of the University of Edinburgh School of Law, has explained that “[a]ccording to the principle of necessity, blockades would only be permissible under certain restricted circumstances (*i.e.*, when necessity was actually present) - it would not be an automatic right . . . .”<sup>254</sup> The principle of proportionality, he has explained, “would imply that only certain types of trade could be stopped (*i.e.*, trade in goods that furthered the aggression). . . . [and] would furthermore imply that the self-defending state would only be entitled to divert neutral ships away from the blockaded area, not to capture and confiscate them.”<sup>255</sup> The principles of proportionality and necessity are also central to the rules found in the San Remo Manual, as discussed below.<sup>256</sup>

The principle of reasonableness, which could replace “traditional principles of establishment, effectiveness, and respect for neutral rights,” might consider factors such as size of blockade, proportionality, probability of severe damage, rights of neutrals, method of enforcement, and accommodation.<sup>257</sup> Under the principle of reasonableness, states can tailor their blockade policy to meet their specific needs because “the law retains flexibility to guide state practice in the

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<sup>252</sup> Matthew L. Tucker, *Mitigating Collateral Damage to the Natural Environment in Naval Warfare: An Examination of the Israeli Naval Blockade of 2006*, 57 NAVAL L. REV. 161, 176 (2009). See *supra* note 146, at 177.

<sup>253</sup> See SAN REMO COMMENTARY, p. 179 (stating that Article 102(b) “reflects the impact of the rules of proportionality and precautions in attack on blockade”).

<sup>254</sup> Stephen C. Neff, *Towards a Law of Unarmed Conflict: A Proposal for a New International Law of Hostility*, 28 *Cornell International Law Journal* 1 (1995), p. 19

<sup>255</sup> *Ibid.*

<sup>256</sup> See generally Matthew L. Tucker, *Mitigating Collateral Damage to the Natural Environment in Naval Warfare: An Examination of the Israeli Naval Blockade of 2006*, 57 NAVAL L. REV. 161, 176 (2009).

<sup>257</sup> Michael G. Fraunces, Note, *The International Law of Blockade: New Guiding Principles in Contemporary State Practice*, 101 YALE LAW JOURNAL 893-908 (1992), at 913-17

varied environment of modern conflict.”<sup>258</sup> The present law on naval blockades is thus based on the principles of proportionality, necessity, and reasonableness.

The existing humanitarian crisis in Gaza was severe to the point that on 8 January 2009, just five days following the Israeli declaration of the 2009 blockade in Gaza, it compelled the UN Security Council to adopt Resolution 1860, which brought attention to the “deepening humanitarian crisis in Gaza” and further emphasized “the need to ensure sustained and regular flow of goods and people through the Gaza crossings.” This situation did not abate but, in fact, deteriorated during the one and a half year period that lapsed between the adoption of Res. 1860 and the attack on the international humanitarian aid convoy on 31 May 2010.

This is supported by the conclusions of the UN Fact Finding Commission in its detailed analysis of the incident in which it found that Israel’s “blockade” against Gaza as it existed on 31 May 2010 violated the requirements of proportionality and reasonableness. In its report, the Mission stated that “the blockade was inflicting disproportionate damage upon the civilian population in the Gaza Strip and that as such the interception could not be justified and therefore has to be considered illegal.”

The view of the disproportionate impact of the blockade is shared by multiple official sources. Various UN agencies and the international community at large, such as OCHA, the World Food Programme, the ICRC, the UN High Commissioner for Human Rights, the World Bank, the UNHCR and the UNDP have all described the humanitarian situation in Gaza as a result of the blockade as *dire, unacceptable and unsustainable*.

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<sup>258</sup> *Ibid.* p.913.

OCHA and the UNHRC reported that “... the blockade exacerbated the already existing difficulties of the population in Gaza in terms of livelihoods and brought to new peaks the severe human dignity crisis resulting from the deteriorated public services, widespread poverty, food insecurity, over 40 per cent unemployment and 80 per cent aid dependence (i.e. some 80 per cent of the population receives humanitarian assistance, mainly food). People’s lives were reduced to a daily struggle in an attempt to secure the most basic needs. Abject poverty among refugees has tripled since the imposition of the blockade from 100.000 to 300.000 and 61 per cent of households are food insecure. There has been a shift in diet (from protein rich to low cost and high carbohydrate foods), triggering concerns over mineral and vitamin deficiencies.”<sup>259</sup>

The IMF observed that the blockade has had a direct negative impact on the economy of Gaza. It notes that “output had been highly suppressed in the first half 2009 by the exceptionally tight blockade...” The output per capita is only 60 per cent of what it had been in 1994 and unemployment remains at over 35 per cent, one of the highest in the world. More importantly, the report stated that “for a growth to be sustained, it is essential that the remaining restrictions on economic activity be lifted.”<sup>260</sup>

The “blockade”’s public health impact on the civilian population of Gaza has also been severe. On 14 June 2010 the International Committee of the Red Cross (ICRC) reported that as a result of the blockade imposed on the Gaza Strip “the quality of Gaza’s health care system has reached an all time low.”<sup>261</sup>

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<sup>259</sup> See paragraph 40-41 of the Report of the Fact Finding Mission, Annex 8

<sup>260</sup> Macroeconomic and fiscal framework for the West Bank and Gaza: Sixth Review of Progress Staff Report for the Meeting of the Ad Hoc Liaison Committee New York Sep 21, 2010, IMF

<<http://unispal.un.org/UNISPAL.NSF/0/729B065A70854337852577A8006A5CE8>> (3 February 2011)

<sup>261</sup> ICRC Geneva/Jerusalem 14 June 2010, *Gaza closure: not another year!*; News release 10/103.

The principle of proportionality and the duty to protect civilians require that Israel ban only items that can be utilized against Israel,<sup>262</sup> and the principle of reasonableness requires Israel to implement a policy that maintains an “acceptable balance between belligerent and neutral interests.”<sup>263</sup> As of 31 May 2010, Israel’s blockade policy banned consumer items that had no relationship to the ability of Hamas to attack Israel, and Israel’s blockade policy had not struck a reasonable balance between its military objectives and the humanitarian needs of the civilian population of Gaza. None of the ordinary consumer items banned by Israel would constitute military contraband that could be used in armed conflict against Israel. It is difficult to see what possible legitimate military tactical advantage would be achieved by prohibiting one type of food stuff that is clearly not of dual-purpose over another.

For the past three years, goods flowing into Gaza sharply declined,<sup>264</sup> and until the recent relaxation on July 6, 2010,<sup>265</sup> ordinary items were banned,<sup>266</sup> apparently, for punitive purposes.<sup>267</sup> For example, canned meat and tuna were allowed, but not canned fruit; mineral water was allowed, but not fruit juice; sesame paste (tahini) was permitted but not jam; tea and coffee were permitted

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<sup>262</sup> Stephen C. Neff, *Towards a Law of Unarmed Conflict: A Proposal for a New International Law of Hostility*, 28 *Cornell International Law Journal* 1, 24 (1995) p. 19

<sup>263</sup> Michael G. Fraunces, Note, *The International Law of Blockade: New Guiding Principles in Contemporary State Practice*, 101 *YALE LAW JOURNAL* 893-908 (1992). at 913-17

<sup>264</sup> The 1.5 million people of Gaza “have relied on less than a quarter of the volume of imported supplies they received in December 2005.” *Guide: Gaza under Blockade*, [BBC](http://news.bbc.co.uk/2/hi/middle_east/7545636.stm), July 6, 2010, <[http://news.bbc.co.uk/2/hi/middle\\_east/7545636.stm](http://news.bbc.co.uk/2/hi/middle_east/7545636.stm)>

<sup>265</sup> As of July 6, 2010, Israel’s blockade has been relaxed. “Israeli authorities will allow more civilian goods to enter, including all food items, toys, stationery, kitchen utensils, mattresses and towels. Construction materials for civilian projects will be allowed in under international supervision.” *Guide: Gaza under Blockade*, [BBC](http://news.bbc.co.uk/2/hi/middle_east/7545636.stm), July 6, 2010, <[http://news.bbc.co.uk/2/hi/middle\\_east/7545636.stm](http://news.bbc.co.uk/2/hi/middle_east/7545636.stm)>; Israel eases blockade of cargo to Hamas-ruled Gaza, [Reuters News Service](http://uk.reuters.com/article/idUKL21817222.CH_24202007062), June 21, 2007, <[http://uk.reuters.com/article/idUKL21817222.CH\\_24202007062](http://uk.reuters.com/article/idUKL21817222.CH_24202007062)>

<sup>266</sup> “Among the large range of goods currently forbidden [as of May 3, 2010] are jam, chocolate, wood for furniture, fruit juice, textiles, and plastic toys.” *Details of Gaza Blockade Revealed*, [BBC](http://news.bbc.co.uk/2/hi/middle_east/8654337.stm), May 3, 2010, <[http://news.bbc.co.uk/2/hi/middle\\_east/8654337.stm](http://news.bbc.co.uk/2/hi/middle_east/8654337.stm)>

<sup>267</sup> See infra iv of this report.



but not chocolate; cinnamon was permitted, but not coriander.<sup>268</sup> Commentators have criticized Israel's review process, stating that the problem "is not just the shortages themselves, but the unpredictability and changing nature of what is permitted for import."<sup>269</sup> These ever continuing changes were not the result of methodical revisions, but rather of an arbitrary nature. Needless to say, exports from Gaza were banned altogether.

These are all tactics to create political dissatisfaction against Hamas and not enhance military security. Israel has acknowledged that one purpose of its naval "blockade" has been to put pressure on and to isolate Hamas, currently in government in Gaza.<sup>270</sup> The Israeli Supreme Court has confirmed this as one of the reasons for the "blockade": "The limitation on the transfer of goods is a central pillar in the means at the disposal of the State of Israel in the armed conflict between it and Hamas." This fact was confirmed by the Goldstone Report.<sup>271</sup>

Food and fuel shortages have been common in Gaza, requiring people to ration these resources.<sup>272</sup> Israel has banned cement from Gaza because it is viewed a dual-use item; although necessary to rebuild buildings destroyed during Israel's Operation Cast Lead (Dec. 2008- Jan. 2009).<sup>273, 274</sup>

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<sup>268</sup> This partial list describes banned goods as of May 2010. Details of Gaza Blockade Revealed, BBC, 3 May 2010 <[http://news.bbc.co.uk/2/hi/middle\\_east/8654337.stm](http://news.bbc.co.uk/2/hi/middle_east/8654337.stm)> (20 August 2010). The partial list was published again in July 2010. Guide: Gaza under Blockade, BBC, 6 July 6 2010 <[http://news.bbc.co.uk/2/hi/middle\\_east/7545636.stm](http://news.bbc.co.uk/2/hi/middle_east/7545636.stm)> (20 August 2010)

<sup>269</sup> Details of Gaza Blockade Revealed, BBC News, 3 May 2010, <[http://news.bbc.co.uk/2/hi/middle\\_east/8654337.stm](http://news.bbc.co.uk/2/hi/middle_east/8654337.stm)>

<sup>270</sup> *Ibid.*

<sup>271</sup> Human Rights Council, Report of the United Nations Fact Finding Mission on the Gaza Conflict (Goldstone Report), ¶ 74, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009), *at* <[http://www2.ohchr.org/english/bodies/hrcouncil/.../UNFFMGC\\_Report.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/.../UNFFMGC_Report.pdf). > , p.369

<sup>272</sup> Details of Gaza Blockade Revealed, BBC, 6 July 2010 <[http://news.bbc.co.uk/2/hi/middle\\_east/8654337.stm](http://news.bbc.co.uk/2/hi/middle_east/8654337.stm)> (15 January 2011)

<sup>273</sup> Cement is also necessary to repair the water and sewage system destroyed during Operation Cast Lead. Access to adequately treated water is below UN standards, and "Gaza's sewage treatment body estimates that at

Critics have condemned the “blockade”, stating that it “has contributed to a humanitarian crisis, deepened poverty and ruined the economy [of Gaza],”<sup>275</sup> and the United Nations says “the blockade has caused the economy ‘irreversible damage’.”<sup>276</sup> The UN Security Council’s Presidential Statement of 1 June 2010 reiterated the Council’s “grave concern at the humanitarian situation in Gaza and stress[ed] the need for sustained and regular flow of goods and people to Gaza as well as unimpeded provision and distribution of humanitarian assistance throughout Gaza.”<sup>277</sup> The economic-political warfare Israel has been waging against Gaza is illegal not only because it is not proportional or reasonable, but in addition “[t]here is a very strong argument that in most cases punitive measures are ineffective and may even harm chances for a peaceful settlement.”<sup>278</sup>

### **iii. Israeli enforcement of the naval “blockade” was arbitrary, erratic and partial**

Israel’s enforcement of the “blockade” has also been arbitrary, erratic and partial, making it difficult for vessels to understand what was expected of them. In 2008, prior to the 3 January 2009 formal declaration of the “blockade”, at

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least 50m litres of raw or poorly-treated sewage is released into the sea daily.” *Guide: Gaza under Blockade*, BBC NEWS, July 6, 2010, [http://news.bbc.co.uk/2/hi/middle\\_east/7545636.stm](http://news.bbc.co.uk/2/hi/middle_east/7545636.stm).

<sup>274</sup> Sheera Frenkel, *Pressure Mounts On Israel To Ease Gaza Blockade*, NPR, June 16, 2010, <<http://www.npr.org/templates/story/story.php?storyId=127886050>>.

<sup>275</sup> Sarah Leah Whitson, *Letter to Olmert: Stop the Blockade of Gaza*, HUMAN RIGHTS WATCH, Nov. 20, 2008, <<http://www.hrw.org/en/news/2008/11/20/letter-olmert-stop-blockade-gaza>>.

<sup>276</sup> Details of Gaza Blockade Revealed, *BBC*, 6 July 2010 <[http://news.bbc.co.uk/2/hi/middle\\_east/8654337.stm](http://news.bbc.co.uk/2/hi/middle_east/8654337.stm)> (15 January 2011)

<sup>277</sup> Statement by the President of the U.N. Security Council, 1 June 2010, S/PRST/2010/9, <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/382/79/PDF/N1038279.pdf?OpenElement>>

<sup>278</sup> Encyclopedia of the Nations, *The Security Council – Maintaining International Peace and Security*, <<http://www.nationsencyclopedia.com/United-Nations/The-Security-Council-MAINTAINING-INTERNATIONAL-PEACE-AND-SECURITY.html>>

least six voyages from Cyprus to Gaza occurred without naval interception.<sup>279</sup> After January 2009, enforcement seems to have increased, with one report stating that the Israeli Navy deliberately rammed the *Dignity*, as it was attempting to break the “blockade” in April 2009.<sup>280</sup> At least two other attempts to break the “blockade” occurred in 2009: (1) on 5 February 2009, the *Tali* attempted to enter the “blockaded” zone,<sup>281</sup> and (2) on 30 June 2009, the *Spirit of Humanity* tried to break the Gaza “blockade”.<sup>282</sup>

Israel, arguably, has had a form of a naval “blockade” of Gaza since the 1995 Interim Agreement on the West Bank and the Gaza Strip when the currently enforced 20 nautical-mile (“nm”) zone was established. Under the Agreement, Israel maintained exclusive control over the air space and marine area of Gaza. One example of the “blockade” aspect of this 20-nm zone established in 1995 is the 2002 *Karin-A* incident when Israel interdicted in the Red Sea in international waters a merchant vessel suspected of transporting arms to Gaza.

Conflict between Gaza and Israel escalated following Israeli disengagement from the Occupied Territories of Gaza in 2005 and the election of Hamas in 2006. In response Israel declared Gaza, including the 20 nm maritime zone, a “hostile zone” in 2007, a “combat zone” in 2008 and finally, as part of its Operation Cast Lead, a “military enclosure” in 2009. The “humanitarian flotilla” phenomenon emerged in 2008 as a direct consequence of Israel’s increasingly severe economic “blockade” on Gaza. The ships carrying humanitarian aid

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<sup>279</sup> Nathan Morley, *Gloomy Mood as Mercy Mission Leaves Cyprus for Gaza*, CYPRUS MAIL, Dec.30, 2008, available at 2008 WLNR 24903958. <<http://famagusta-gazette.com/israeli-navy-pulls-in-humanitarian-aid-boat-p9114-69.htm>>

<sup>280</sup> Pat McDonnell, *Free Gaza*, MIDDLE E., May 1, 2009, at 78, available at 2009 WLNR 9919095.

<sup>281</sup> Israel Ministry of Foreign Affairs, *Cargo Boat Attempting Illegal Entry to Gaza Intercepted*, Feb. 5, 2009, <[http://www.mfa.gov.il/MFA/Government/Communiques/2009/Cargo\\_boat\\_illegal\\_entry\\_Gaza\\_waters\\_intercepted\\_5-Feb-2009.htm?DisplayMode=print.>](http://www.mfa.gov.il/MFA/Government/Communiques/2009/Cargo_boat_illegal_entry_Gaza_waters_intercepted_5-Feb-2009.htm?DisplayMode=print.>)

<sup>282</sup> Yaakov Katz, *Navy Stops Ship on Way to Gaza*, JERUSALEM POST, July 1, 2009, at 3, available at 2009 WLNR 12809496.

created a “public relations” problem for Israel. Defense Minister Ehud Barak explained that, during the latter half of 2008 various convoys of ships began sailing in the direction of Gaza presumably to breach the siege imposed on the Gaza Strip. On 11 August 2008 a notice to mariners was issued declaring the defined area as a “combat zone” so that Israeli navy could act against vessels. Even then, however, Israel did not fully enforce the “blockade” and allowed vessels to pass. Defense Minister Barak has acknowledged that the Israeli navy lawyers warned that the naval “blockade” was not on solid grounds as ships had been allowed to pass through the “blockade”.<sup>283</sup> To remedy this situation, the Israeli government imposed another “maritime enclosure”, or in other words, a “blockade”, on 3 January 2009.

Although Israel has frequently characterized the “blockade” as an element of its “economic warfare” it has at other times asserted that the naval “blockade” is for security reasons only, primarily to prevent the delivery of armaments and supplies that could be used as such by Hamas. According to Israel, the land “blockade”, on the other hand, has three purposes:

- 1) limitation of the flow of goods to Gaza,
- 2) security,
- 3) restriction on the movement of people.

Yet, in the actual implementation, one cannot distinguish between the two “blockades”. All shipments must be unloaded in Ashdod and can only then be transported to Gaza by land. Consequently, the naval “blockade” is an integral part of the land blockade and the two must be examined in tandem. This becomes clear by understanding that all shipments brought to the port of Ashdod

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<sup>283</sup> Public Commission for Examining the Naval Incident of 31 May 2010 (The Turkel Commission), Session Three, 10.08.2010, <<http://www.mfa.gov.il/NR/rdonlyres/0427E10C-01BB-4330-A60E-54D265AE6496/0/BarakTurkelAug10.pdf>> (15 January 2011)

must go through land crossings and are not given expedited and priority delivery to Gaza. Ships are not permitted to land at Gaza, and also cannot depart. This would entail a restriction on the export of goods and movement of people as well. Thus the purpose of the naval “blockade” is economic and constitutes a restriction on the freedom of movement of civilians in the Gaza area.

And by Israel’s own admission, Israel has not systematically and uniformly applied the “blockade”, including in 2008. Defense Minister Barak admitted that the naval blockade in force until the 2009 revised military enclosure was legally defective.<sup>284</sup> Although Israel issued in 2009 a new notice to mariners, it has been operating the same defective “blockade”, at least since 2007. The Gaza naval “blockade” must be examined and assessed in its entirety, as a single unbroken continuum and not in fragmentation as Israel is attempting to do.

One cause of the erratic enforcement of the “blockade” lies in Israel’s concerns with managing its public relations internationally. Ehud Barak has explained that in the discussions in 2008 on how to handle the aid ships seeking to enter Gaza, the question of public relations and media coverage was important. The Chief of the Israeli General Staff, Gabi Ashkenazi, has explained that when the “protest convoy phenomenon” emerged in 2008, a directive was adopted to exclude vessels from Gaza “as long as it would be achieved with the minimum possible international and public relations damage that could be caused by it.”<sup>285</sup> Likewise, in the deliberations over how to handle the aid convoy in May 2010, the Government weighed the impact on public relations and media. This is the reason why they chose to interdict the convoy at night, some ten hours away

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<sup>284</sup> Public Commission for Examining the Naval Incident of 31 May 2010 (The Turkel Commission), Session Three, 10.08.2010, <<http://www.mfa.gov.il/NR/rdonlyres/0427E10C-01BB-4330-A60E-54D265AE6496/0/BarakTurkelAug10.pdf>> (15 January 2011)

<sup>285</sup> Public Commission for Examining the Naval Incident of 31 May 2010 (The Turkel Commission), Session Three, 10.08.2010, <<http://www.mfa.gov.il/NR/rdonlyres/0427E10C-01BB-4330-A60E-54D265AE6496/0/BarakTurkelAug10.pdf>> (15 January 2011)

from the coast of Israel and also to engage in electronic warfare. The concerns of Israel in stopping the convoy very much included political protection against negative media coverage. As testified to by Ashkenazi, before the attack on the Mavi Marmara, the Israeli forces employed electronic warfare blockages to “prevent the entry of ships at a low-as-possible media profile.”<sup>286</sup>

Political and public relations concerns are not legitimate grounds for enforcement of a blockade in international waters.

#### **iv. Israeli “blockade” of the Gaza Strip is collective punishment**

Collective punishment is prohibited under international law. Persons cannot be punished for acts that they did not commit. The prohibition against collective punishment is one of the fundamental guarantees provided by Geneva Conventions and their protocols, specifically Article 33 of the Fourth Geneva Convention. What are actually reprisals against Hamas cannot be cloaked in the language of “security” when the facts show they are punitive in intent and impact upon the entire Gazan population of 1.5 million.

The “economic warfare” waged by Israel against the Gaza population has been described by many observers as a form of collective punishment.<sup>287</sup> For example, Israel had not published a list of which items would be permitted and which would be prohibited, but monitoring organizations reported that Israel permitted only 81 items to enter Gaza, compared to the 6,000 items deemed

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<sup>286</sup> Public Commission for Examining the Naval Incident of 31 May 2010 (The Turkel Commission), Session Three, 10.08.2010, <<http://www.mfa.gov.il/NR/rdonlyres/0427E10C-01BB-4330-A60E-54D265AE6496/0/BarakTurkelAug10.pdf>> (15 January 2011)

<sup>287</sup> “Israel’s continuing blockade of the Gaza Strip is depriving its population of food, fuel, and basic services, and constitutes a form of collective punishment.” Sarah Leah Whitson, *Letter to Olmert: Stop the Blockade of Gaza*, HUMAN RIGHTS WATCH, Nov. 20, 2008, <<http://www.hrw.org/en/news/2008/11/20/letter-olmert-stop-blockade-gaza>>; “EU Warns against collective punishment in Gaza,” *Reuters*, 29 October 2007

appropriate for normal human existence.<sup>288</sup> Clearly the intent was to “punish” the civilian population for having elected Hamas. The “vindictive” intent for the blockade was expressed by Deputy Prime Minister Haim Ramon in 2007, after the election of Hamas, where he stated “We will set a price tag for every Qassam, in terms of cutting off infrastructure and water.”<sup>289, 290</sup>

Numerous authoritative commentators have stated that Israel’s “blockade” as of 31 May 2010 was “illegal” and had to be lifted. UN High Commissioner for Human Rights Navi Pillay said repeatedly that the “blockade” was “illegal,” stating that “[i]nternational humanitarian law prohibits starvation of civilians as a method of warfare,” and has described it as “collective punishment on civilians.”<sup>291</sup> Her predecessor as High Commissioner, Louise Arbour, also

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<sup>288</sup> The European Parliament’s Resolution of June 17, 2010 on the Israeli Military Operation Against the Humanitarian Flotilla and the Gaza Blockade, ¶E, P7\_TA-PROV(2010)0235, says that only 81 products are allowed into Gaza, although “the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) estimates that 6,000 products are required to meet basic humanitarian needs.” See *List of Commercial Goods Allowed for Import Into Gaza, April 2010*, BBC NEWS, May 5, 2010, <[http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/05\\_05\\_10gazaimports.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/05_05_10gazaimports.pdf)>.

Israel greatly expanded the items permitted into Gaza on July 6, 2010. “Israeli authorities will allow more civilian goods to enter, including all food items, toys, stationery, kitchen utensils, mattresses and towels. Construction materials for civilian projects will be allowed in under international supervision.” *Guide: Gaza under Blockade*, BBC NEWS, July 6, 2010, <[http://news.bbc.co.uk/2/hi/middle\\_east/7545636.stm](http://news.bbc.co.uk/2/hi/middle_east/7545636.stm)>; Israel eases blockade of cargo to Hamas-ruled Gaza, *Reuters*, 21 June 2007, [http://uk.reuters.com/article/idUKL21817222.CH\\_.242020070621](http://uk.reuters.com/article/idUKL21817222.CH_.242020070621). See Israel’s List of Banned Goods into Gaza, *MA’AN NEWS AGENCY*, 31 July 2010, <<http://www.maannews.net/eng/Print.aspx?ID=297438>>; Gisha – Legal Center for Freedom of Movement, Partial List of Items Prohibited/Permitted into the Gaza Strip – June 2010, *GISHA WEBSITE*, <[www.gisha.org](http://www.gisha.org)>.

<sup>289</sup> “Cabinet likely to back ‘punishing’ Gaza civilians over Qassams” <<http://www.haaretz.com/news/cabinet-likely-to-back-punishing-gaza-civilians-over-qassams-1.228787>> 4 September 2007 (last visited on 3 February 2011),

<sup>290</sup> Dov Weissglas, an Israeli advisor to former Prime Minister Sharon is reported to have stated in relation to the blockade that “The idea is to put the Palestinians on a diet, but not to make them die of hunger.” <<http://www.guardian.co.uk/world/2006/apr/16/israel>> (2 February 2011)

<sup>291</sup> Gaza Blockade Illegal, Must Be Lifted – UN’s Pillay, *Reuters*, 5 June 2010,

<<http://www.alertnet.org/thenews/newsdesk/LDE65407X.htm>>. Ms. Pillay (a South African who previously served as a judge on the High Court of South Africa and on the International Criminal Court) had made similar statements frequently in previous years. See, e.g., *UN Human Rights Chief Calls for End to Israeli Blockade of Gaza Strip*, UN News Centre, Nov. 18, 2008,

<<http://www.un.org/apps/news/story.asp?NewsID=28983&Cr=palest>>... (stating that the blockade was “in direct contravention of international human rights and humanitarian law” and that “[i]t must end now); U.N. Human Rights Chief: Israel’s Blockade of Gaza Strip Is Illegal, *foxnews.com*, 14 August 2009, <[http://www.foxnews.com/printer\\_friendly\\_story/0,3566,539363,00.html](http://www.foxnews.com/printer_friendly_story/0,3566,539363,00.html)> (describing a 34-page report in which

condemned the “blockade” of Gaza, stating that it violated “international human rights and humanitarian law obligations and in particular the prohibition of collective punishment.”<sup>292</sup> The UN Human Rights Council has also repeatedly called upon Israel to reduce the harsh restrictions caused by its “blockade”.<sup>293</sup> The Goldstone Report characterized the “blockade” as a form of collective punishment.<sup>294</sup> Specifically, the report noted that “The conditions of life in Gaza, resulting from deliberate actions of the Israeli forces and the declared policies of the Government of Israel – as they were presented by its authorized and legitimate representatives - with regard to the Gaza Strip before, during and after the military operation, cumulatively indicate the intention to inflict collective punishment on the people of the Gaza Strip in violation of international humanitarian law.”<sup>295</sup>

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Navi Pillay “said the Gaza blockade amounts to collective punishment of civilians, which is prohibited under the Geneva Conventions on the conduct of warfare and occupation). Agreeing that the blockade is “collective punishment” is the U.N Office for the Coordination of Humanitarian Aid. Statement of John Holmes, USG for Humanitarian affairs and Relief Coordinator on the ‘Free Gaza’ Flotilla Crisis, 2 June 2010, <<http://www.ochaopt.org>>.

<sup>292</sup> Human Rights Council, Human Rights Situation in Palestine and Other Occupied Arab Territories, 14 March 2008, UNGA A/HRC/7/76, at 16 ¶61. This report by High Commissioner Arbour (previously a member of the Canadian Supreme Court) referred to the condemnation of collective punishment in Article 33 of the Fourth 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (“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.” *Id.*, at 9 ¶ 28. See also European Parliament Resolution of June 17, 2010 (“whereas according to previous statements by UN organs, the blockade on the Gaza Strip represents collective punishment in contravention of international humanitarian law”); Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories*, at 369-70, ¶1325, A/HRC/12/48, Sept. 15, 2009 (because “the conditions resulting from the deliberate actions of the Israeli armed forces and the declared policies of the Israeli Government... cumulatively indicate the intention to inflict collective punishment on the people of the Gaza Strip[,] [t]he Mission.

Israel argues that it no longer “occupies” Gaza, because it withdrew its military forces and settlers from the territory in 2005 and because Hamas now controls the government and access to information in Gaza. Israel still, however, exercises control over Gaza’s airspace, sea space, and land borders, and over its electricity, water, sewage and telecommunications networks, and population registry.

<sup>293</sup> See, e.g., *Sixth Special Session of Human Rights Council Concludes with Call on Israel to End Siege Imposed on Occupied Gaza Strip*, UN Press Release, Jan. 24, 2008 (describing a resolution adopted 30-1 with 15 abstentions that called upon Israel to “lift immediately the siege it had imposed on the occupied Gaza Strip, restore continued supply of fuel, food and medicine and reopen the border crossings”).

<sup>294</sup> Human Rights Council, Report of the United Nations Fact Finding Mission on the Gaza Conflict (Goldstone Report), ¶ 74, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009), at

<[http://www2.ohchr.org/english/bodies/hrcouncil/.../UNFFMGC\\_Report.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/.../UNFFMGC_Report.pdf). >

<sup>295</sup> Goldstone Report supra at para. 74



The Report further drew attention to statements made by Israeli officials who indicated the intention of maintaining the blockade as a response to the Gilad Shalit incident and was of the view this would also constitute collective punishment of the civilian population of the Gaza Strip.<sup>296</sup>

The Fact Finding Mission reconfirmed the view that the blockade constituted collective punishment as prohibited under article 33 of the Fourth Geneva Convention. The Mission report concluded that “one of the principal motives behind the imposition of the blockade was a desire to punish the people of the Gaza Strip for having elected Hamas” and that the “combination of this motive and the effect of the restrictions on the Gaza Strip leave no doubt that Israel’s actions and policies amount to collective punishment as defined by international law.”<sup>297</sup>

The ICRC has also concluded that the blockade imposed on the Gaza Strip constitutes collective punishment in violation of Israel’s obligations under International Humanitarian Law.<sup>298</sup>

#### **v. Israeli “blockade” of the Gaza Strip is unlawful because Israel remains the occupying power in Gaza**

The international community considers Israel as the “occupying power” in the Gaza Strip, and this has not changed with the disengagement in 2005.<sup>299</sup> This view has been reflected in virtually every single UN Document relating to the situation in the Middle East. This is valid to the extent that even the pertinent UN meetings have agenda items regularly referring to “Occupied Palestinian Territory”; not to mention the existence of a “Special Rapporteur on the

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<sup>296</sup> Id. At para. 78

<sup>297</sup> See paragraph 54 of the Report of the Fact Finding Mission, Annex 8

<sup>298</sup> ICRC Geneva/Jerusalem 14 June 2010, *Gaza closure: not another year!*; News release 10/103.

<sup>299</sup> Security Council, United Nations, Resolution on the Situation in the Middle East, including the Palestinian question, S/RES/1860 (2009)

situation of human rights in the Palestinian territories occupied since 1967” under the UN Human Rights Council. The imposition by a State of a blockade over territories under its occupation is a legal nullity. Therefore, the enforcement of such a blockade as well as any other act or practice linked thereto would be unlawful.

The factors of Israel’s continuing occupation of the Gaza Strip are manifold. Israel exercises effective control over the Gaza Strip including its borders, airspace and territorial sea as well as trade activities. Moreover, Israel continues to control the entry of workers from Gaza to Israel, the entry and exit of goods between the Gaza Strip, the West Bank, Israel and abroad, the monetary regime, population registry, tax and customs arrangements as well as post and telecommunications.

Furthermore, Israel’s Supreme Court in *Jaber al Bassouini Ahmed et al v. Prime Minister and Minister of Defense* confirmed that Israel is obliged to supply fuel and electricity to the Gaza Strip.<sup>300</sup> Only an occupier bears the responsibility of supplying commodities such as fuel and electricity.

One other important evidence of Israel’s continued effective occupation of the Gaza Strip is that despite the disengagement, Israel still feels free to send back its armed forces back into the area at will.

In conclusion, withdrawal of permanent military installations from the Gaza Strip is a change in degree but not of kind, and the “facts on the ground...leave

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<sup>300</sup> Decision (HCJ 9132/07) of the Supreme Court sitting as High Council on petition by *Jaber al Bassouini Ahmed et al v Prime Minister and Minister of Defense*, 27 January 2008, <<http://www.mfa.gov.il/NR/rdonlyres/938CCD2E-89C7-4E77-B071-56772DFF79CC/0/HCJGazaelectricity.pdf>>

no room for questioning the status of Israel in the Gaza Strip: it remains the Occupying Power.”<sup>301</sup>

## **F. The enforcement of the naval “blockade” was in violation of international law**

### **i. Vessels transporting humanitarian aid cannot be attacked under international law**

According to the San Remo Manual, when a blockade is in place, the belligerent state is required to allow humanitarian aid to be delivered to those in the area being blockaded,<sup>302</sup> and belligerents may not attack ships loaded with medical supplies and humanitarian aid.<sup>303</sup> Given that vessels carrying humanitarian aid are exempt from seizure, the passengers on board the *Mavi Marmara* were within their rights to resist the Israeli attempts to stop, seize and search the ship.

The actions taken by Israel against the *Mavi Marmara* and the killing and wounding of many of its passengers were unreasonable because the vessel carried civilians and humanitarian aid and did not pose any legitimate security threat to Israel.

According to the basic rules of the San Remo Manual, parties to the conflict shall at all times distinguish between civilians or other protected persons and combatants and between civilian or exempt objects and military objectives.<sup>304</sup> This rule goes beyond simply reflecting customary international law but

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<sup>301</sup> M. Mari, “The Israeli Disengagement from the Gaza Strip: an end of the occupation?”, 8 Yearbook of International Humanitarian Law (2005) p. 356, 366-367

<sup>302</sup> See San Remo Manual, page 103-104

<sup>303</sup> *Id.*, art. 47(ii) lists “vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations” as being exempt from attack.

<sup>304</sup> San Remo Manual, Article 39.

constitutes *jus cogens*. Furthermore, attacks are to be limited strictly to military objects and that merchant vessels are considered as civilian objects unless they are military objectives according to the principles and rules of San Remo Manual.<sup>305</sup> The humanitarian aid convoy was not transporting any contraband of a military nature that could cause any legitimate security concerns for Israel and, for this reason, could not be considered as a military objective.

Moreover, the San Remo Manual recognizes specifically an exemption from attack of vessels engaged in humanitarian missions including vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations.<sup>306</sup>

## **ii. The legal right to “self-defense” belongs to the passengers, and not to the Israeli soldiers**

As a general principle of law, an unlawful attack gives rise to a right to self-defence. When the Israeli forces unlawfully attacked the Mavi Marmara and other ships in the convoy, the civilians on board had the right to defend themselves.

Yet, the IDF attempts to justify the use of live fire and lethal weapons with so-called self-defense against alleged attack by the passengers. Self-defense is an affirmative defense to what would otherwise be an unlawful act. In this case, the Israeli soldiers attacked a civilian humanitarian convoy, in international waters, ostensibly trying to enforce a blockade which is illegal. The enforcement of the unlawful Gaza blockade is an unlawful attack and cannot serve as legal grounds for the IDF to claim self-defense. On the other hand, it does give rise to self-defense by the passengers on board.

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<sup>305</sup> San Remo Manual, Article 41.

<sup>306</sup> San Remo Manual, Article 47(c)(ii).

The aggressor cannot claim self-defense when he was the initial attacker. In assessing the situation on 31 May 2010, at approximately 04.30 one must look at the totality of events as they unfolded, taking into account the different status of the parties involved. On the one side there was the highly trained and fully equipped professional Israeli IDF combat force who determined the time and manner of the attack. On the other side, there was a group of untrained, unarmed civilians who were taken by surprise and in an evident state of fear for their lives. The IDF came very well prepared as they had conducted military exercises conceived especially for this operation they named “Winds of Heaven 7”. Therefore, the IDF soldiers must be held to much higher standards of conduct than the ordinary civilian person.

The facts show, more importantly, that the Israeli soldiers were the first to fire at the passengers before boarding the ship. No prior warning had been given to the passengers to alert them about the imminent possible use of force.

The disproportionate use of force by Israel continued and increased once aboard the Mavi Marmara. The incontestable evidence provided by the location of the bullet wounds of the nine casualties as well as the injuries sustained by dozens of other passengers show “execution style killing” as well as indiscriminate shooting including from above, most certainly from helicopters. The 19-year old Furkan Doğan was shot in the back of head as well as in his back, nose, left leg and left ankle all from less than 50 cm range. Cevdet Kılıçlar, who was trying to take a photograph of the helicopter, was shot sniper-style from a distance right in the centre of his forehead, in manner which suggests a trained shooter fired at him. Cengiz Akyüz was shot four times in the back of his head, the right side of his face, the back and his left leg. The mode of killing of these victims can in no way be reconciled with the concept of self-defense.

The facts show that the IDF raid was designed to maximize fear by attacking without notice, and in the dark. The so-called resistance by the passengers was in fact self-defense to a reasonable perception of an imminent threat of possible death by the IDF. The argument that the IDF with its full military panoply pointed against unarmed and fearful passengers was acting in self-defense is not supported by these facts. Once the IDF saw the passengers' reaction, they should have withdrawn, and should have sought alternative ways to defuse the situation. There was also plenty of time, given that the convoy was still some ten travel hours away from the blockaded area.

In sum, the Israelis initiated the confrontation by attacking and boarding the ships in the first instance and exercised unlawful use of force that cannot be justified by self-defense. In view of this picture, the passengers on board had the right to defend themselves and the ships against an unlawful attack. If there is one party to rely on self-defence on this incident, it should be the people on board.

### **iii. Israeli military used excessive force against the Mavi Marmara**

Even if, *in arguendum*, Israel were justified in establishing a limited blockade to restrict rocket-related materials from being brought into Gaza, the military force the Israeli Defense Force applied to intercept the *Mavi Marmara* well exceeded what was appropriate and necessary. "[I]n the arrest of ships, international law...requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in

the circumstances.”<sup>307</sup> Using force must be viewed as a “measure of last resort.”<sup>308</sup>

The location of the attack upon the humanitarian aid convoy 64 nm away from the outer border of the blockaded area is itself in violation of the San Remo Manual, Rule 96, which states that the ‘force maintaining the blockade may be stationed at a distance determined by military requirements.’ It is evident that this rule is of a limiting nature. The explanation to the provision clarifies the “military requirement” as what would be necessary to prevent foreign vessels from actually entering into the blockaded area. There is scarce military justification to deploy a full-fledged military force almost 100 nm outside the blockaded area, and to do so against vessels that were carrying civilian passengers and humanitarian aid. The distance in terms of travel time to Gaza was approximately 10 hours, which is a significant period of time during which Israel could have engaged in continued peaceful and non-violent alternative measures to stop the vessels. Israel’s claim that the enforcement action was necessary after diplomatic efforts had been exhausted is undermined by the distance at which they attacked. There were still many hours available to explore non-violent options. The distance of the vessels from the blockaded area and Israel defeats any claim of imminent threat to the security interests of the Israel. Once again, this is another example of abuse of rights under international law by Israel.

Any military operation against the neutral vessel must be limited by the “basic rules in paragraphs 38-46” of the San Remo Manual,<sup>309</sup> which require the

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<sup>307</sup> *The M/V Saiga Case (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, July 1, 1999, Para. 155, <[http://www.itlos.org/case\\_documents/2001/document\\_en\\_68.pdf](http://www.itlos.org/case_documents/2001/document_en_68.pdf)> (15 January 2011)

<sup>308</sup> Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* 282 (Cambridge University Press, 2009) p.271.

<sup>309</sup> San Remo Manual, Article 68.

attacking state to “take all feasible precautions in the choice of methods and means in order to avoid or minimize collateral casualties or damage.”<sup>310</sup>

Furthermore:

(d) an attack shall not be launched if it may be expected to cause collateral casualties or damage which would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole; an attack shall be cancelled or suspended as soon as it becomes apparent that the collateral casualties or damage would be excessive.<sup>311</sup>

The final phrase in this provision is particularly important, because the Israeli forces had the capacity to change its tactics when they realized as the operation unfolded that civilian casualties would be inevitable unless they adopted a different approach. When the Israeli forces understood the reaction they faced, before they had managed to place any soldiers on board, they must have recognized that the risk of civilian casualties had increased significantly from the original plan. As a result, the attack should have been suspended until a better strategy could be devised.

In this context, the criticism directed by Retired Israeli Admiral Ze’ev Almog towards the handling of the intervention of the IDF against the convoy deserves attention. Almog, who served as the Head of the Israeli Naval Commandos between 1968-1972 and Commander of Naval Forces from 1979-1985,

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<sup>310</sup> San Remo Manual, Article 46.

<sup>311</sup> San Remo Manual, Article 46(d)



suggested that he would have done things differently and alternative plans should have been ready to prevent fatalities.<sup>312</sup>

In the *M/V Saiga Case*, a Guinean fast-moving patrol boat attacked (with live, large-caliber rounds), boarded, and seized a slow-moving oil tanker, “fully laden and...low in the water at the time,” alleged to be violating Guinean customs law.

<sup>313</sup> Guinea argued that the "public interest" was at stake, and that a "state of necessity" justified its actions. The International Tribunal for the Law of the Sea did not agree with Guinea's interpretation of public interest and found that a state of necessity did not exist, explaining the "state of necessity" defense can be asserted only if "the act was the only means of safeguarding an essential interest of the State against *a grave and imminent peril*."<sup>314</sup>

Israel would argue that a state of necessity had been created by the missiles fired by Hamas in Gaza. But they would have a hard time establishing imminency. The Mavi Marmara was travelling at a speed of eight knots (about nine miles per hour).<sup>315</sup> The ships were intercepted 72 miles from the nearest coast, and 64 miles outside of the blockade area. Israel thus had approximately 10 hours until the Mavi Marmara reached the “blockade” area. The Israeli Defense Force had ample time to develop a strategy to engage the vessel without loss of life.

Even in a case where a state of necessity exists, the Tribunal in the *Saiga Case* stated that "the normal practice used to stop a ship at sea is first to give an

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<sup>312</sup> Undercover, underwater and underrated, Abraham Rabinovich, [The Jerusalem Post Magazine](#), 4 February 2011, p.20-27.

<sup>313</sup> The *Saiga*'s maximum speed was 10 knots. *The M/V Saiga Case (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, 1 July 1999, Para. 157. <[http://www.itlos.org/case\\_documents/2001/document\\_en\\_68.pdf](http://www.itlos.org/case_documents/2001/document_en_68.pdf)> (15 January 2011)157.

<sup>314</sup> *Ibid.* Para.133 (emphasis added).

<sup>315</sup> Eiland Video Report, Israeli Defense Forces, 13 July 2010 < <http://idfspokesperson.com/2010/07/15/videos-timeline-of-flotilla-incident-as-presented-by-eiland-team-of-experts-english-version-13-july-2010/>> (15 January 2011)

auditory or visual signal to stop... [and] [w]here this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force."<sup>316</sup> The Tribunal criticized the Guineans not only for firing at the *Saiga*, but also for using firearms once on board the vessels, saying "the Guinean officers appeared to have attached little or no importance to the safety of the ship and the persons on board."<sup>317</sup>

#### **iv. Israel had an obligation to use non-lethal modes of interdiction against the humanitarian aid convoy**

Israel argues that the military operation against the Mavi Marmara was conducted to protect the people of Israel. But attacking a ship carrying humanitarian aid and civilians on the purported grounds that it may contain contraband is not sufficient related to that goal, especially given the fact that non-lethal options were available. As Professor Michael Byers has explained, "[t]o say that this blockade would be jeopardized by the flotilla and that sometime down the road weapons might come into Gaza as a result, and thereby pose a threat to Israel, is to stretch the definition of self-defence way further than anyone ever countenanced."<sup>318</sup>

The Israeli forces had the choice of using methods to engage the vessel without causing loss of life. At various points during the operation, they could and should have reassessed their strategy and adopted a different approach. Their

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<sup>316</sup> *The M/V Saiga Case (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, July 1, 1999, Para. 156.

<sup>317</sup> *The M/V Saiga Case (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, July 1, 1999, Para. 158.

<sup>318</sup> Quoted in Patrick Martin, *Was Seizing the Flotilla Legal?*, The Globe and Mail, 1 June 2010, <<http://www.theglobeandmail.com/news/world/africa-mideast/who-was-behind-the-seized-flotilla/article1587638/>>

military operation must, therefore, be viewed as disproportionate and in violation of international law.

The San Remo Manual Rules in Part V enumerates measures short of attack that include interception, visit, search, diversion and capture. According to Rule 118 when there are reasonable grounds for suspecting that a vessel may be subject to capture, the belligerent warships can visit and search merchant vessels outside neutral waters. The Israeli force made no effort to request from either the captain or the flag State to visit and search the vessels. Instead there is presumptive conclusion that such request would have been refused. But this does not justify a failure to make the attempt before proceeding to other alternatives. Rule 119 also provides for diversion of the neutral merchant vessel from its declared destination with its consent. Again, no information is provided that any such request was made by Israel. Capturing the vessel should have been viewed as a final resort, particularly given that there were passengers on board. It is important to make a distinction at this point between merchant vessels carrying no other than trained crew, and passenger vessels with ordinary civilians not prepared in any way for such possibilities.

An incident during the blockade employed during the First Gulf War provides an example of how a vessel seeking to penetrate a blockade can be stopped without bloodshed. In December 1990, the Iraqi merchant vessel *Ibn Khaldun* traveling through the Arabian Sea carrying some 250 passengers as well as medicines and food supplies on a "peace mission" was intercepted by two US destroyers and an Australian vessel. The captain of the *Ibn Khaldun* ignored requests to stop, and so the Navy sent a boarding party by helicopter, which persuaded the captain to stop the ship, and then additional navy personnel arrived by boat. The ship's crew and its passengers made a human chain to obstruct the passage of the boarding party, who numbered about 20, and sought

to grab the weapons of the Navy personnel, but the boarding party was able to control the crowd and the boat with the use of smoke and noise grenades, and by firing warning shots in the air. No injuries occurred, and this incident was the only incident in the interception operations during the First Gulf War that a boarding team fired weapons during a boarding. After inspectors located cargo which violated sanctions, the vessel was escorted by US and Australian ships to Muscat, Oman.<sup>319</sup>

Military officers have a duty to suspend operations when it becomes clear that the damage to civilians is not justified by the military advantage being sought, or when alternative methods of achieving the goal with less damage to civilians are available.

Israel, however, did not make any effort to resort to measures short of attack. The facts show that the final communication between the IDF and the captain took place at 02.00 on 31 May 2010. However, the Israeli forces appeared out of the dark at 04.00 without any prior effective warning of the intent to stop, divert or capture the vessels that would give sufficient time to react to the warning and explain what they should do to avoid harm. Established practice would require the warships to give effective warning close in time with a deadline for the intended action against the vessel to prevent panic, such as what happened on board the Mavi Marmara.

According to the video timeline created by General Eiland, when the Israeli commandos first attempted to board the Mavi Marmara in rubber boats, they

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<sup>319</sup> Guy Gugliotta, *U.S. Sailors, Crew Scuffle on Iraqi Ship*, WASHINGTON POST, Dec. 27, 1990, at A20 <<http://www.highbeam.com/doc/1P2-1165871.html>>; *Severing Saddam's Lifeline*, ALL HANDS, at 13 (Special Ed., No. 892).

were met with resistance and were unable to board from the sides of the ship.<sup>320</sup> According to press reports, General Eiland stated that the decision to continue to attempt to board the boat was a mistake.<sup>321</sup> Upon meeting resistance, the Israeli forces should have regrouped and formulated a new plan to stop the boats.<sup>322</sup> Proceeding to land on a boat whose occupants were prepared to resist is what ultimately led to unnecessary bloodshed.

This moment was not the only time when the IDF should have regrouped to formulate a new strategy. The helicopters attempted to clear the roof with live fire, but some passengers remained on the deck and resisted against the attempt to board the ship. Given the fact that the Mavi Marmara and the rest of the convoy were still quite a distance away from the blockade zone (64 miles) and were travelling slowly, the IDF had time to formulate an alternate strategy.

Instead, Israeli soldiers descended into a group of passengers resisting with make-shift weapons. The use of lethal force in this situation was excessive because other options were available. According to Professor Douglas Guilfoyle, “[e]nforcement action must be both necessary and proportionate. Going aboard a civilian vessel with the intention of using lethal force against civilians would clearly be disproportionate and unlawful.”<sup>323</sup>

It is not reasonable to think “that arrival of Israeli soldiers would convince the crew and passengers to submit.” The use of naval commandos, “an elite unit,

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<sup>320</sup> Eiland Video Report, Israeli Defense Forces, 13 July 2010 <<http://idfspokesperson.com/2010/07/15/videos-timeline-of-flotilla-incident-as-presented-by-eiland-team-of-experts-english-version-13-july-2010/>> (15 January 2011)

<sup>321</sup> Yaakov Katz, IDF Probe: Army Didn't Have 'Plan B', Jerusalem Post, 12 July 2010 <<http://www.jpost.com/Israel/Article.aspx?id=181182>>

<sup>322</sup> Article 46(d) of the San Remo Rules says explicitly that “an attack shall be cancelled or suspended as soon as it becomes apparent that the collateral casualties or damage would be excessive.”

<sup>323</sup> Douglas Guilfoyle, Gaza Fleet Raid Raises Questions over Legality of Israel's Blockade, The Times (London), 1 June 2010, <<http://business.timesonline.co.uk/tol/business/law/article7142055.ece>>.

trained for daring operations,” was inappropriate in a situation requiring personnel who had “training in crowd control and self-restraint.”<sup>324</sup>

Israel could have stopped the vessels from reaching Gaza without landing commandoes onto the vessel. Israel did not fire a shot across the bow of the Mavi Marmara, the normal way of making it clear that force would be used to stop a vessel.<sup>325</sup> Other Israel should have considered using included maneuvering a vessel in front of the Mavi Marmara to block its passage and force a change in direction.

Israel’s failure to warn the convoy of an imminent use of force has had another crucial repercussion on the manner in which the tragedy unfolded. As mentioned earlier, an understanding between the Undersecretary of the Turkish Ministry of Foreign Affairs and the Israeli Foreign Ministry’s Director General had been reached whereby the convoy would first try to arrive at Gaza, but if necessary, alter its course to Al-Arish. The actual Israeli attack gave the convoy no chance to change its course as per the above-mentioned understanding: the IDF gave no indication of an imminent use of force, such as a warning shot across the bow.

Under these circumstances, the Mavi Marmara’s captain acted as soon as the Israeli attack began. He went as far as to alter the ship’s course to 270°, heading West, away from Israel, the Gaza Strip and even Al-Arish.<sup>326, 327</sup>

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<sup>324</sup> Gershon Gorenberg, *A Brief History of the Gaza Folly*, The American Prospect, 1 June 2010, <[http://prospect.org/cs/articles?article=a\\_brief\\_history\\_of\\_the\\_gaza\\_folly](http://prospect.org/cs/articles?article=a_brief_history_of_the_gaza_folly)>

<sup>325</sup> Professor Guilfoyle has said that the rule “that warning shots shall be used in cases other than self-defence, is universally accepted.” Douglas Guilfoyle, *Gaza Fleet Raid Raises Questions over Legality of Israel's Blockade*, The Times (London), 1 June 2010, <<http://business.timesonline.co.uk/tol/business/law/article7142055.ece>>

<sup>326</sup> For the testimony of Captain Mahmut Tural, see Annex 5 (Section 1/i & Section 3/xv)

<sup>327</sup> For the relevant maps and data obtained from Undersecretariat for Maritime Affairs, see Annex 3 (Section 7)

It is to be assumed that the convoy would have altered its course as per the earlier understanding, had the Israelis given a clear warning about imminent use of force.

#### **v. Naval blockades and state practice**

State practice provides important standards to be followed by States in enforcing blockades. The San Remo Manual Rules are for the most part considered to be a restatement of customary international law, which is based on widespread State practice and *opinio juris*. It should be underlined that an example of one country based on national naval manuals without the required *opinio juris* does not establish customary international law.

Among those blockades recognized as lawful according to customary international law is the example of the Cuban Missile Crisis, which has been viewed by most commentators as a carefully calibrated and proportionate use of force appropriate for the situation. Interdiction was accomplished by firing shots across the bow of the ships, searching the ships sailing towards Cuba and allowing them to pass after such searches. The Cuban Quarantine was effective in deterring the “offending conduct” and in limiting the “flow of targeted trade into and out of the target state, and controlled escalation of the crisis,” and it demonstrated that blockades can be “effective without the use of actual force.”

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Another example is provided by UN approved “Military Intercept” Operations. Operating within the framework of comprehensive economic sanctions, the Security Council authorized member states to use force,<sup>329</sup> including through the

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<sup>328</sup> Richard Zeigler, *Ubi Sumus? Quo Vadimus?: Charting the Course of Maritime Interception Operations*, 43 *Naval Law Review* 1, 15 (1996).

<sup>329</sup> Lois E. Fielding, *Maritime Interception: Centerpiece of Economic Sanctions in the New World Order*, 53 *Louisiana Law Review* 1191, 1194 (1993); at 1217-18.

establishment of these intercept operations.<sup>330</sup> The resolution enacted prior to the First Gulf War called upon:

“those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations and to insure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990)...”<sup>331</sup>

Resolution 661 (1990) banned the transfer of “any commodities or products, including weapons or any other military equipment, whether or not originating in their territories, but not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs, to any person or body in Iraq or Kuwait.”<sup>332</sup> This provision was carefully crafted to conform to the requirements of the Fourth Geneva Convention. Although the prohibition is broadly worded,<sup>333</sup> the naval operations they authorized were “limited and less intrusive” compared to earlier blockades.<sup>334</sup> The military intercept operation inspected all cargo vessels in the Gulf bound for or departing from Iraq through Iraqi ports and in the Red Sea for cargo entering Iraq through the port of Aqaba, Jordan.

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<sup>330</sup>Richard Zeigler, *Ubi Sumus? Quo Vadimus?: Charting the Course of Maritime Interception Operations*, 43 *Naval Law Review* 1, 15 (1996). *Supra* note 30, at 31.

<sup>331</sup> U.N. Security Council Resolution 665, Para. 1 (1990).

<sup>332</sup> U.N. Security Council Resolution 661, Para. 3(c) (1990).

<sup>333</sup> Lois E. Fielding, *Maritime Interception: Centerpiece of Economic Sanctions in the New World Order*, 53 *Louisiana Law Review* 1191, 1194 (1993); at 1217-18. See *supra* note 220 at 1217-18.

<sup>334</sup> *Ibid.*



During 1990 and 1991, “multinational forces intercepted over 17,800 vessels, boarding approximately 7,400 and diverting 410 of them.”<sup>335</sup> Similar to US practice in the Cuban Quarantine, shots would be fired, where needed, across the bow before the ship would stop. The interception policy used during the Iraq naval operations was viewed as effective and uncomplicated, as “[c]ontrols were built into the process to allow the minimum possible application of force needed.”<sup>336</sup>

The multinational forces carrying out this military intercept operation “made it very clear from the outset of the interception operations that only the ‘minimum force necessary’ would be used.”<sup>337</sup> If force were required, it began “with warning shots across the bow,” and if necessary escalated “to disabling fire aimed at the rudders or sternpost.”<sup>338</sup> This approach, with “disabling shots” as the *final military option* is designed to ensure that the ship can be intercepted “if at all possible without risk to human lives.”<sup>339</sup>

These recent examples of State practice and United Nations authorizations help to establish the current principles governing naval blockades. Notice is required, as discussed earlier, and all blockades are governed by the requirements of proportionality, necessity,<sup>340</sup> and reasonableness. Dr. Stephen C. Neff, of the University of Edinburgh School of Law, has explained that “[a]ccording to the

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<sup>335</sup> J. Astley III & Michael N. Schmitt, *The Law of the Sea and Naval Operations*, 42 *Air Force Law Review* 119, 139 (1997) at 146 n. 110

<sup>336</sup> Lois E. Fielding, *Maritime Interception: Centerpiece of Economic Sanctions in the New World Order*, 53 *Louisiana Law Review* 1191, 1194 (1993); at 1217-18. See *supra* note 231, at 1218.

<sup>337</sup> Jane Gilliland Dalton, *The Influence of Law on Seapower in Desert Shield / Desert Storm*, 41 *Naval Law Review* 27, 33 (1993) p. 58. See *supra* note 220, at 58.

<sup>338</sup> *Ibid.*

<sup>339</sup> Rob McLaughlin, *United Nations Mandated Naval Interdiction Operations in the Territorial Sea?*, 51 *International & Comparative Law Quarterly* 249, 261 (2002).

<sup>340</sup> Lois E. Fielding, *Maritime Interception: Centerpiece of Economic Sanctions in the New World Order*, 53 *Louisiana Law Review* 1191, 1194 (1993); at 1217-18. See *supra* note 231, at 1203 (stating that the principles of necessity, humanity, and proportionality are part of the law of armed conflict).

principle of necessity, blockades would only be permissible under certain restricted circumstances (*i.e.* when necessity was actually present), it would not be an automatic right . . .”<sup>341</sup> The principle of proportionality, he further stated, “would imply that only certain types of trade could be stopped (*i.e.*, trade in goods that furthered the aggression). . . . [and] would furthermore imply that the self-defending state would only be entitled to divert neutral ships away from the blockaded area, not to capture and confiscate them.”<sup>342</sup> The principles of proportionality and necessity are also central to the rules found in the San Remo Manual discussed next.<sup>343</sup>

According to the San Remo Manual, when a blockade is in place, the belligerent state is required to allow humanitarian aid to be delivered to those in the area being blockaded,<sup>344</sup> and belligerents may not attack ships loaded with medical supplies and humanitarian aid.<sup>345</sup> Given that vessels carrying humanitarian aid are exempt from attack and presumably capture, the passengers on board the

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<sup>341</sup> Stephen C. Neff, *Towards a Law of Unarmed Conflict: A Proposal for a New International Law of Hostility*, 28 *Cornell International Law Journal* 1, 24 (1995). See *supra* note 158, at 19.

<sup>342</sup> *Ibid.*

<sup>343</sup> Stephen C. Neff, *Towards a Law of Unarmed Conflict: A Proposal for a New International Law of Hostility*, 28 *Cornell International Law Journal* 1, 24 (1995). See *supra* note 144 and 146.

The SAN REMO MANUAL permits blockades as a "method of warfare," but Article 94 requires that they be formally declared, providing "the commencement, duration, location, and extent of the blockade." Article 98 says merchant ships "breaching a blockade may be captured" and those "which, after prior warning, clearly resist capture may be attacked." Article 102 says blockades are prohibited if their "sole purpose" is to "starv[e] the civilian population or deny[] it other objects essential for its survival" and if "the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade." Article 67(a) permits attacks on neutral-flag ships if they "are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture." See also Article 146 (same). San Remo Manual Article 103 requires blockading party to permit "food and other objects essential for its survival" to pass through. San Remo Articles 39, 40, 41, 42, and 46 require protection of civilians and proportionality.

<sup>344</sup> San Remo Manual, Articles. 103-104. But these provisions also provide some support for Israel's position that the belligerent state can control the way in which the aid is disbursed and can search the shipment for contraband. Israel thus argues that it was within its rights to order the Convoy to travel to Ashdod, and to board the ships after they refused.

<sup>345</sup> San Remo Manual, Article. 47(c)(ii) lists "vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations" as being exempt from attack.

Mavi Marmara were within their rights to resist the Israeli attempts to stop, divert or seize the ship.

## **G. The legal implications of the Israeli attack**

### **i. The disproportionate nature of the attack**

Israel's claim that it was entitled to interdict the vessels in the humanitarian aid convoy rests on its argument that it was acting in self-defence to enforce a legitimately-established blockade. First and foremost, as explained earlier, the "blockade" itself is unlawful and, therefore, any action taken within the ambit of such a "blockade" is devoid of legitimacy. Consequently, Israel can only legally justify what is otherwise an unlawful blockade on grounds of reasonable suspicion that the humanitarian convoy

- i) was making an effective contribution to the opposing forces' war effort, such as by carrying weaponry or was otherwise closely integrated into the enemy war effort (belligerent right of capture);  
or
- ii) posed an imminent and overwhelming threat to Israel and there was no alternative but to use force to prevent it (self-defence under Article 51 of the United Nations Charter).

Based on Prime Minister Netanyahu's statements, the Fact Finding Mission found that the decision to stop the flotilla was not because the vessel presented any immediate security threat to Israel, and concluded that the interception was motivated by concerns about the possible propaganda victory that might be claimed by the organizers of the flotilla.<sup>346</sup>

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<sup>346</sup> See paragraph 56 of the Report of the Fact Finding Mission, Annex 8

Moreover, the actions taken by Israel against the Mavi Marmara and the wanton killing and wounding of many of its passengers were unreasonable because the latter did not pose any legitimate security threat to Israel.<sup>347</sup> The Rules in the San Remo Manual allow blockades as a military tactic in certain circumstances, but Article 47(c)(ii) does not permit attacks on civilians or on vessels carrying humanitarian goods.<sup>348</sup> The Israeli forces had the choice of using methods to engage the vessel without causing loss of life. At various points during the operation, it could and should have reassessed its strategy and adopted a different approach. Its military operation must, therefore, be viewed as disproportionate and in violation of international law.

## **ii. Excessive use of force and misconduct**

Applying the principles of reasonableness, proportionality, and necessity to evaluate the actions of the Israeli forces on 31 May 2010 leads to the conclusion that the Israeli military operation violated governing principles of international law. The decision to send “a handful of Israeli soldiers to seize the ship -- a decision approved by Prime Minister Netanyahu and his inner circle of ministers” not only “shows hubris, poor intelligence work, and determined inability to learn from experience,” but also demonstrates the unreasonableness of the Israeli interception of the Mavi Marmara.<sup>349</sup> It is not reasonable to think that “arrival of Israeli soldiers would convince the crew and passengers to submit.” The use of Shayetet 13, “an elite unit, trained for daring operations,” was inappropriate in a situation requiring personnel who had “training in crowd control and self-restraint.”

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<sup>347</sup> The Mavi Marmara was located well outside Israel’s 12-mile territorial sea when Israel’s military operation against it began on May 31, 2010. Israel has not yet declared an exclusive economic zone (EEZ) but is apparently contemplating doing so. Neither Turkey nor Israel has ratified the 1982 UN Law of the Sea Convention, but most parts of the Convention are thought to reflect binding customary international law.

<sup>348</sup> San Remo Manual, Article 47(c)(ii)

<sup>349</sup> See *supra* note 302

The Israeli soldiers were armed with a range of lethal force, including machine guns and grenades approached a passenger vessel with over 600 civilians under the cover of darkness and after severing the convoy's links with the outside world clearly with the intent of a covert operation the goal of which was the creation of intimidation and fear, which they succeeded in generating.

As mentioned earlier, Israel could have stopped the vessels from reaching Gaza without landing commandoes onto the vessel. Israel did not fire a shot across the bow of the Mavi Marmara, the normal way of making it clear that force would be used to stop a vessel.<sup>350</sup> Other methods Israel should have considered using included maneuvering a vessel in front of the Mavi Marmara to block its passage and force a change in direction. General Giora Eiland, in his report prepared for the Israeli Defence Forces, has indicated that a ship was available that could have directed powerful streams of water at the activists, but acknowledged that this approach was not used.<sup>351</sup> Another option would have been “disabling fire aimed at the rudders or sternpost” as used in the military intercept operations during the First Gulf War. It is not clear why this option was not acted upon.

The decision to use live ammunition was also clearly irresponsible, since other non-lethal options were available.<sup>352</sup> Upon meeting initial resistance, the IDF forces should have reassessed their strategy to save lives, rather than to persist with their original plan.<sup>353</sup> The question which must be asked is why these

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<sup>350</sup> Professor Guilfoyle has said that the rule “that warning shots shall be used in cases other than self-defence, is universally accepted.” Douglas Guilfoyle, *Gaza Fleet Raid Raises Questions over Legality of Israel's Blockade*, *The Times (London)*, June 1, 2010, <<http://business.timesonline.co.uk/tol/business/law/article7142055.ece>> (15 January 2011)

<sup>351</sup> Eiland Video Report, Israeli Defense Forces, 13 July 2010 < <http://idfspokesperson.com/2010/07/15/videos-timeline-of-flotilla-incident-as-presented-by-eiland-team-of-experts-english-version-13-july-2010/>> (15 January 2011)

<sup>352</sup> The commandos were armed with paintball guns and percussion grenades as well as firearms.

<sup>353</sup> Yaakov Katz, *IDF Probe: Army Didn't Have 'Plan B'*, *JERUSALEM POST*, July 12, 2010 <<http://www.jpost.com/Israel/Article.aspx?id=181182>>.

highly trained military Israeli soldiers continued to spread fear among civilians by firing at them from the Zodiacs, before boarding the vessel, when the fearful and disoriented resistance of the civilians was obvious.

Defence Minister Barak recounted that the decision to stop the convoy was taken by himself and six other Ministers of the inner cabinet after deliberating the option to allow it to pass or interdict it on the high seas despite the “high probability that violent friction” would occur.<sup>354</sup> The likelihood of violence and the negative media exposure for Israel were discussed at great length. Alternative measures were also discussed. Defence Minister Barak recounts that during high level meetings, questions were asked on how the forces would react to different forms of resistance such as “protest” resistance or “terror” resistance. During the Ministerial meeting, a prescient question anticipating in eerie detail the events that would actually transpire on the deck of the Mavi Marmara, was posed to Minister Barak as “could a situation be created that you will be in the minority and out of weakness, because of crowding on the deck, you will find yourselves in the position that you will have to open fire?” and “What happens if 30 of the rioters will block your way to the bridge, and it will not be possible to get there easily.” Minister Barak has acknowledged that the decision to stop the convoy was taken after “prolonged deliberation”, but has stubbornly insisted that “one had to stop the convoy, with all the attendant risks and developments that were clearly presented by the chief of staff and other.”

More than deliberating, the Israeli forces actually conducted an exercise at sea as part of the preparation for interdicting the aid convoy, similar to a war exercise. There is no question that the Israeli forces had studied carefully every

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<sup>354</sup> Public Commission for Examining the Naval Incident of 31 May 2010 (The Turkel Commission), Session Three, 10.08.2010, <<http://www.mfa.gov.il/NR/rdonlyres/0427E10C-01BB-4330-A60E-54D265AE6496/0/BarakTurkelAug10.pdf>> (15 January 2011)

aspect of the interdiction and knew that they probably would meet resistance. They chose the path of violence and were fully prepared for its consequences.

When the Israeli forces attacked the Mavi Marmara and other ships in the aid convoy, the civilians on board had the right to defend themselves. The Israeli approach to the Mavi Marmara following the severance of the convoy's communications with the rest of the world before daybreak and the presence of Zodiacs, frigates, submarines and helicopters created a reasonable apprehension of danger and terror by the passengers and entitled them to exercise their right of self-defence. Specifically, the Israeli soldiers descended from the first helicopter fully cognizant that the crowd was already agitated by the circumstances and fire from the Zodiacs. The Israeli forces approached with guns, grenades, paintball guns and laser-guided weapons against passengers, who therefore had to employ whatever objects came to hand. Upon meeting resistance, the Israeli forces should have developed a new plan to stop the boats.<sup>355</sup>

Consistent with this view, the UN Fact Finding Mission concluded in its report dated 22 September 2010 that “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.”<sup>356</sup>

## **H. Additional violations of international law by Israel**

### **i. Targeting of civilians**

The April 1996 Text of Ceasefire Understanding, which Israel accepted during the Lebanese conflict, includes the provision that “Israel and those cooperating

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<sup>355</sup> San Remo Manual, Article 46(d) explicitly says that “an attack shall be cancelled or suspended as soon as it becomes apparent that the collateral casualties or damage would be excessive.”

<sup>356</sup> See also paragraph 162 through to 173 of the Report of the Fact Finding Mission, Annex 8

with it will not fire any kind of weapon at civilians or civilian targets in Lebanon.”<sup>357</sup> This principle is codified in Articles 51(5)(b) and 57(2)(b) of the First Additional Protocol (1977) to the 1949 Geneva Conventions<sup>358</sup>, which prohibit attacks that are expected to cause civilian casualties that “would be excessive in relation to the concrete and direct military advantage anticipated.”

The Israeli Supreme Court has recognized “the duty to do everything possible to minimize collateral damage to the civilian population during the attacks on ‘combatants’ ”<sup>359</sup> and has also ruled that, pursuant to the principle of proportionality, even civilians taking a direct part in hostilities may not be physically attacked if less harmful means could be employed against them, such as arrest, interrogation, and trial.<sup>360</sup> This conclusion was based on the decision of the European Court of Human Rights in *McCann v. United Kingdom*, where the court decided that the United Kingdom had deprived three IRA terrorists in Northern Ireland of their right to life under Article 2 of the European Convention on Human Rights by using lethal force without taking steps that “would have avoided the deprivation of life of the suspects without putting the lives of others at risk.”<sup>361</sup>

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<sup>357</sup> W. Michael Riesman, *The Lessons of Qanna*, 22 *Yale Journal of International Law* 381, 382 n. 1(1997).

<sup>358</sup> Protocol Additional (No.1) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

<sup>359</sup> *Public Committee Against Torture in Israel v. Government of Israel*, Supreme Court of Israel Sitting as the High Court of Justice, H CJ 769/02 (Dec. 13, 2006), p. 19.

<[http://elyon1.court.gov.il/files\\_eng/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf)> (15 January 2011)

<sup>360</sup> *Ibid.* p. 29.

<sup>361</sup> *McCann v. United Kingdom*, 21 ECHR 97 GC p. 235 (1995).

<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695820&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>> (15 January 2011)



## **ii. Violations of fundamental human rights and mistreatment of passenger victims**

Many violations of the applicable peacetime law were committed by Israeli soldiers during the attack against the Mavi Marmara and the other vessels of the convoy.

The Israeli soldiers shot nine unarmed civilians on board, violating their right to life. The right to life is enshrined in the Universal Declaration of Human Rights and also in the International Covenant on Civil and Political Rights (ICCPR) to which Israel has been a party since 1991. The General Comment (No. 6) by the Human Rights Committee underscores that States Parties to ICCPR should “take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces.”

Israel purports to have applied the principle of distinction in the treatment of the passengers. Yet, the facts show that all passengers were deprived of human rights and human dignity while on board the vessels and throughout their detention in Israel.

Israeli soldiers mistreated all passengers through physical violence by kicking and beating them. Passengers were forced to sit or kneel in the same position for hours. When they attempted to stand up, they were beaten down with batons. As detailed earlier, passengers were subjected to extreme physical and psychological abuse by the soldiers. Although many passengers suffered from injuries, Israeli soldiers did not allow the ship doctor to treat the wounded.

Such unlawful conduct constitutes clear violations of the prohibition of torture and ill-treatment under Article 7 of the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

(CAT) to which Israel has been a party since 1991, and also a breach of Article 3 of the European Convention on Human Rights (ECHR).

The same conclusion was reached by the UN Fact Finding Mission which qualified the Israeli forces' treatment of the passengers as "cruel, inhuman and degrading treatment and, insofar as the treatment was additionally applied as a form of punishment, torture. This represents a violation of articles 7 and 10, paragraph 1, of the International Covenant on Civil and Political Rights and of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." <sup>362</sup>

Human rights violations by the Israeli officials continued during the 10-hour journey to the Port of Ashdod and while the passengers were in captivity in Israel. Israeli doctors treated one victim's injured leg without sedating him. <sup>363</sup> Many of those hospitalized passengers reported maltreatment from the soldiers. Again, such conduct constitutes a violation of the prohibition of torture and the right to health under CAT, ICCPR and the European Convention on Human Rights.

The UN Fact Finding Commission found cases of abuse of rights and acts of torture committed by Israeli officials against passengers while detained in Ashdod in violation of Article 1 of the Convention against Torture, and articles 7 and 10 of the International Covenant on Civil and Political Rights. Furthermore, the Commission also concluded that humiliation of the passengers by Israeli officials constituted cruel, inhuman or degrading treatment or punishment under the terms of article 16 of the Convention against Torture. <sup>364</sup> Overall the Commission noted other serious violations of human rights law and

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<sup>362</sup> See paragraph 181 of the Report of the Fact Finding Mission, Annex 8

<sup>363</sup> For the testimony of Abdülhamit Ateş, see Annex 5 (Section 1/xi)

<sup>364</sup> See paragraph 220 of the Report of the Fact Finding Mission, Annex 8

humanitarian law resulting from the physical abuse and treatment of passengers that would constitute a violation of right to security of person and human dignity.

Some passengers were forced to strip naked and searched multiple times. The temperature was kept excessively cold like “a cold storage”. One woman journalist was forced to remove all her clothes and the soldiers forcibly inserted a metal detector between her legs. She stated to our Commission that she had never been subjected to such degrading treatment in her life. Another passenger reported that she was touched inappropriately after she was bound and handcuffed by Israeli commandos. Such practices amount to torture, degrading or inhuman treatment under ICCPR, CAT and the European Convention on Human Rights.

The passengers were not allowed to fulfill their most basic needs. They were not permitted to use the restrooms for hours and as a result elderly people and a pregnant woman wetted themselves and soiled their clothes.<sup>365</sup> When, finally, passengers were allowed to use the restrooms in the ship only two were made available for 600 passengers. The passengers were given insufficient water and food. As such, Israeli soldiers acted in breach of the prohibition of torture, degrading and inhuman treatment according to ICCPR, CAT and the European Convention on Human Rights.

One woman passenger of Israeli citizenship was brought to court in a small metal box inside a police car, in which she was held for eight hours with her hands and legs shackled.<sup>366</sup> Again, this treatment would amount to torture and

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<sup>365</sup> For the testimony of Anne de Jong see Annex 5 (Section 1/xii)

<sup>366</sup> Lubna Masarwa, *Time to break the siege on Gaza: A survivor's account of Mavi Marmara*; International Solidarity Movement, 7 June 2010,

degrading treatment under ICCPR, CAT and the European Convention on Human Rights.

Passengers' money, credit cards, camera, laptops, mobile phones were confiscated. This is a clear violation of property rights under article 1 of the First Protocol to the European Convention of Human Rights and article 17 (2) of the Universal Declaration of Human Rights.

Israeli soldiers forced the passengers to fill out forms in Hebrew without translation. Soldiers explained that the forms were admissions that the participants had entered Israel without permission. Passengers were required to sign Hebrew-only statements which most did not understand, saying they regretted attacking the State of Israel. The people who refused were beaten and threatened with prosecution. Such conduct is a violation of the right to liberty and security of persons under Article 9 of ICCPR and Article 5 of the European Convention on Human Rights. Again, beatings and physical violence would amount to torture and ill treatment under ICCPR, CAR and the European Convention on Human Rights.

Passengers were interrogated without the presence of their lawyers. They were denied the right to legal aid. Consular access was both limited and restricted. Passengers were allowed to use the telephone on the condition that they spoke in English, which excluded many. They were subject to unlawful deportation instead of repatriation. These are clear examples of violations of the right to liberty and security of persons under Article 9 of ICCPR and Article 5 of the European Convention on Human Rights.

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<[http://palsolidarity.org/2010/06/12704/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed:+palsolidarity+\(International+Solidarity+Movement\)](http://palsolidarity.org/2010/06/12704/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+palsolidarity+(International+Solidarity+Movement))> (7 June 2010)

Member of the Knesset, Haneen Zoabi was subjected to racist and sexist remarks. Some Westerners noticed a clear distinction in the treatment of “white” and “brown” passengers. Most western women were not handcuffed. Such discrimination is a breach of the ban on discrimination according to Article 2 of ICCPR and article 14 of the European Convention on Human Rights.

The UN Fact Finding Mission also considered the attack on the Mavi Marmara and its aftermath as constituting, in addition to breaching international human rights, violations of international humanitarian law provisions that may not be derogated from under any circumstances.<sup>367</sup>

### **I. Entitlement to compensation**

It is a central principle of international law that when a State violates its international obligations, it has a duty to make reparations for the wrongs committed. This principle has been codified by the International Law Commission in its Draft Articles on the Responsibility of States for Internationally Wrongful Acts<sup>368</sup>.

Article 31 of the Draft Articles reads as follows:

*“Reparation:*

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”

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<sup>367</sup> See paragraph 182 of the Report of the Fact Finding Mission, Annex 8

<sup>368</sup> UNGA A/CN.4/L.602/Rev. 1 (26 July 2001).

Article 36 *Compensation* further states that:

- “1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”

The Permanent Court of International Justice (PCIJ) in the *Factory at Chorzów Case* stated that “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”<sup>369</sup> When direct restitution or restoration of the prior conditions is impossible (as when individuals are killed or wounded) compensation becomes the appropriate remedy.

The ICJ recognized in the *Gabcikovo Case* that “[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.”<sup>370</sup> This rule was later reaffirmed by the International Tribunal for the Law of the Sea in its first full opinion, *The M/V Saiga Case*.<sup>371</sup> When addressing the question of damages, the Tribunal quoted from the venerable

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<sup>369</sup> *Factory at Chorzów, (Germany v. Poland)*, 1928 P.C.I.J., Series A, No. 17, at 47-48 (Sept. 13).

<sup>370</sup> *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, 1997 I.C.J. 7, 80 ¶ 152 (Sept. 25). See also *Genocide Convention (Bosnia v. Serbia)*, 2007 I.C.J. ¶460; *Construction of a Wall*, Advisory Opinion, 2004 I.C.J. 136, 198; *Democratic Republic of the Congo v. Uganda*, 2005 I.C.J. 168, 257.

<sup>371</sup> *The M/V Saiga Case (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, July 1, 1999, Para. 170 <[http://www.itlos.org/case\\_documents/2001/document\\_en\\_68.pdf](http://www.itlos.org/case_documents/2001/document_en_68.pdf)> (15 January 2011)

*Factory at Chorzów Case* for the proposition that every wrong requires a remedy:

“It is a well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act and that “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed”<sup>372</sup>

Pursuant to this framework, the Tribunal awarded 2,123,357 USD to Saint Vincent and the Grenadines for damages resulting from the detention of the *Saiga*, the damage to the vessel, and the injury to the crewmembers.<sup>373</sup>

In the *Rainbow Warrior* case, mediated by the U.N. Secretary-General in 1986, France paid New Zealand the sum of 7 million USD “for all the damage it has suffered” which also included the “moral damage” as well as compensation.<sup>374</sup> France paid a further 2.3 million French francs to the widow, children, and parents of Fernando Pereira, who had perished, and 8.1 million USD to Greenpeace.<sup>375</sup>

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<sup>372</sup> *Factory at Chorzów, (Germany v. Poland)*, 1928 P.C.I.J., Series A, No. 17. Page. 47

<sup>373</sup> *The M/V Saiga Case (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, July 1, 1999, Para. 175 <[http://www.itlos.org/case\\_documents/2001/document\\_en\\_68.pdf](http://www.itlos.org/case_documents/2001/document_en_68.pdf)> (15 January 2011)

<sup>374</sup> *Rainbow Warrior (New Zealand v. France)* France-New Zealand Arbitration Tribunal. 30 April 1990 <[http://untreaty.un.org/cod/riaa/cases/vol\\_XX/215-284.pdf](http://untreaty.un.org/cod/riaa/cases/vol_XX/215-284.pdf)>

<sup>375</sup> Mark W. Janis & John E. Noyes, *International Law* 280 (3d ed. 2006) (citing Philip Shabecoff, *France Must Pay Greenpeace \$8 Million in Sinking of Ship*, N.Y. TIMES, Oct. 3, 1987, at A2).

These examples of State practice illustrate that it has become an accepted practice by the international community to provide compensation, and this obligation now extends even to civilian victims of military action, because such payments serve the goal of ensuring proportionality by forcing military forces to internalize the real costs of failing to properly assess the impact of a military operation on civilians. Israel should, therefore, be required to pay compensation and issue a formal apology for those killed and wounded during the IDF's military operation against the Mavi Marmara on 31 May 2010.



### III. CONCLUSIONS

In light of the foregoing, the Commission has reached the following factual and legal conclusions:

1. The international humanitarian aid convoy was a civilian initiative. Its aims were peaceful. It constituted no threat to Israel.
2. All the Turkish ports used by the convoy possessed ISPS Certificates. All participants, ships and cargo departing from Turkish ports were subjected to the entire range of border and boarding checks, in a manner consistent with international standards.
3. There were no firearms on board the ships.
4. Prior to the convoy's departure, an understanding was reached among Turkish, Israeli and American officials that the convoy would eventually steer towards the Egyptian port of Al-Arish, when faced with compelling opposition. Events demonstrated that Israel did not abide by this understanding.
5. No attempt was made by the Israeli forces to visit and search the vessels before taking any other action.
6. Israeli forces severed the ships' communication capabilities. This put the vessels, passengers and crew at risk.
7. The Israeli forces launched an attack against the convoy approximately 2 hours after the last communication with the vessels.
8. The attack took place in international waters, 72 nautical miles from the nearest shore.
9. When the Israeli forces took control of the ship, nine passengers had been killed. Israel seriously breached the fundamental right of a human being, namely the "Right to Life"

10. Five of the deceased were shot in the head at close range. Furkan Doğan received 5 gunshot wounds, three of them in the head. After he fell down receiving the first bullet in his foot, two Israeli soldiers kicked and shot him in execution style. Cevdet Kılıçlar, a photographer, was killed by a single distant shot to the middle of the forehead. The nine dead passengers suffered a total of 30 bullet wounds.
11. As a result of the attack over 50 had sustained wounds of varying gravity. One wounded passenger remains in coma.
12. The attack was carried out by an overwhelming Israeli force comprising frigates, zodiacs, helicopters, submarines, and fully-equipped elite commando units.
13. Prior to their attack, the Israeli forces did not proceed with standard warning practices, i.e. firing across the bow, to indicate an imminent use of force.
14. Israeli forces initially tried to board the Mavi Marmara from zodiacs. At this stage, the Israeli forces fired the first shots.
15. The nature and magnitude of the Israeli attack caused panic among the passengers who, in fear for their lives, reacted in self-defence.
16. The Israeli military did not at any time pause to re-assess the situation with a view to consider the least violent options in face of the passengers' self-defence.
17. The Israeli forces opened fire with live ammunition from the zodiacs and helicopters onto the passengers on deck, resulting in the first casualties.
18. As soon as the attack started, the Captain changed the course of Mavi Marmara to a bearing of 270° heading West, in opposite direction of the Israeli coast. However, Israeli frigates approached from the starboard bow and closed in, forcing the convoy to turn to the direction of Israel.

19. Israeli soldiers fast-roped down to the Mavi Marmara from helicopters. Three were subdued by the passengers. They were taken to the lower decks where they were treated for their non-lethal injuries.
20. Israeli soldiers shot indiscriminately, killing and wounding passengers, once on the upper deck.
21. The shooting spree of the Israeli soldiers continued in spite of the white flags waved by the passengers and multilingual surrender announcements made over the ship's PA system.
22. The Israeli forces attacked the other ships as well. Violence by Israeli soldiers occurred on all the ships of the convoy.
23. The total number of wounded on the convoy exceeded 70 from a host of nationalities.
24. On no occasion did the passengers use firearms against their Israeli assailants.
25. Once the Israeli military assumed control of the entire convoy, the vessels were diverted to the Israeli port of Ashdod.
26. Throughout the hours-long journey to Ashdod, the passengers aboard the Mavi Marmara, including the Captain, and some on the other ships were subjected to severe physical, verbal and psychological abuses.
27. These abuses continued at Ashdod, during the transfer to prisons/hospitals, en route to the Ben Gurion Airport until the passengers boarded the airplanes for departure.
28. Throughout the ordeal, passengers from virtually all the nationalities represented in the convoy were indiscriminately and brutally victimized by Israeli forces.
29. Freedom of navigation on the high seas is a long-standing universally accepted rule of international law.
30. The high seas are governed by the laws of peace time.
31. The law of naval blockade applies only in international armed conflicts.

32. Israel does not recognize Palestine as a State. Israel has, therefore, consistently treated its conflict with Hamas as a non-international armed conflict.
33. The international community and the UN continue to regard Israel as an occupying power of the Palestinian Territory, which includes the Gaza Strip.
34. The “naval blockade” imposed by Israel off the Gaza Strip is unlawful under international law and its enforcement is therefore unlawful.
35. The “blockade” was also unlawful in its implementation and practice.
36. The “blockade”’s “open-ended” nature did not comply with mandatory notification requirements under customary international law, particularly those relating to duration and extent.
37. The “blockade” was unlawful as it was not reasonable, proportional or necessary.
38. The “blockade” was excessive in the damage it inflicted on the population of the Gaza Strip in comparison to the expected military advantage.
39. The “blockade” was unlawful as it constituted collective punishment of the entire civilian population of the Gaza Strip.
40. Israel’s ultimate objective through its “blockade” has been to punish the people of the Gaza Strip for supporting Hamas. This is why Israel chose in 2007 to impose a “blockade” although there were other options, and to persistently maintain it even though it did not yield its purported military objectives.
41. The international community has condemned the Israeli “blockade” of the Gaza Strip as a form of collective punishment.
42. Under customary international law, vessels carrying humanitarian aid cannot be lawfully attacked.
43. As a consequence of its attack on 31 May 2010, Israel has violated *inter alia* the right to life, the right to liberty and security of the person,

freedom from arbitrary arrest or detention, prohibition of torture and other cruel, inhuman or degrading treatment or punishment of the passengers.

44. Israel is liable for compensating the damages and losses it caused.

45. Israel's attack must be condemned as unlawful. Any other disposition would establish a dangerous precedential derogation from the paramount right of freedom of navigation on the high seas.