
Rules of War:

Legality of the Gaza Blockade and Israeli Defence Force Actions Towards Flotilla Vessels and Passengers

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Table of Contents

Chapter 1: Introduction: The Events of 2010	3
Chapter 2: Was the Blockade Legal?	7
<i>Is there ‘Armed Conflict’ between Gaza and Israel?</i>	7
<i>Defining the Status of Gaza and Gaza Waters</i>	8
<i>What is the status of Gaza?</i>	8
<i>Status of Gaza waters</i>	9
<i>Does Israel have authority over the “external security” of the territorial waters off Gaza’s shore? The Oslo Accords, Gaza- Jericho Agreement and Interim Agreement.</i>	10
<i>Is the Conflict between Gaza and Israel International or Non-International?</i>	12
<i>The Conflict is International and Israel Occupies Gaza</i>	13
<i>The Conflict is International: Israel does not Occupy Gaza</i>	14
<i>The Conflict is Non-International</i>	15
<i>Conclusion on the Conflict</i>	16
<i>What laws apply to Israel and the blockade?</i>	17
<i>General Legality of Naval Blockades in International Conflict</i>	17
<i>Limitations of Naval Blockades in International Conflict</i>	19
Chapter 3: Legality of Israel’s Actions on May 31, 2010	24
<i>Stopping, Boarding and Attacking the Ships</i>	24
<i>Attacks on Civilian Objects in International Armed Conflict</i>	24
<i>Proportionality and the Use of Force</i>	26
<i>Enforcing Blockades Against Civilian Vessels Carrying Aid</i>	26

<i>Conclusion</i>	27
<i>Use of Force on Board the Flotilla Vessels</i>	28
<i>Use of Force Against Passengers</i>	28
<i>Detention and Treatment of Passengers</i>	31
<i>Deaths of Passengers</i>	33
<i>Rights of Neutral Third-Party States to Protect their Flagships</i>	34
Chapter 4: Remedies	38
<i>Stopping the Blockade</i>	38
<i>If Israel breached humanitarian law, how can Israel be reprimanded and reparations made to those who were wronged?</i>	40
Chapter 5: Conclusions	43
Bibliography	45

so much depends
upon

a red wheel
barrow

glazed with rain
water

beside the white
chickens.

- *William Carlos Williams*

Chapter 1: Introduction: The Events of 2010

On May 31, 2010, a flotilla of ships, armed with humanitarian provisions for the people of Gaza, slowly crossed an invisible line drawn in international waters. Sixty-four nautical miles off the coast of the Gaza Strip the ships passed through international waters into a zone blockaded and controlled by Israel. By helicopter, patrol boats, rubber bullets and live fire, the ships were intercepted by Israel Defence Forces (IDF) at different times throughout the night.

The name of the *Mavi Marmara* is relatively well known. It was the only ship in the flotilla where the boarding by IDF led to casualties: nine passengers were killed and at least 50 were seriously wounded.¹ Most of those killed were Turkish citizens, although nineteen year old Furkan Dogan was a United States citizen and Turkish resident.²

From a humanitarian perspective, the events on board the other ships are equally worthy of notice, in part because of the consistency of IDF soldiers' actions. While the passengers of the *Mavi Marmara* reacted violently to the IDF, passengers on board the other ships had undergone training in passive resistance techniques and symbolically resisted IDF soldiers by standing "unarmed side-by-side blocking the path of the soldiers".³ On the *Challenger I*, the *Sfendoni* and the *Eleftheri Mesogios*, IDF soldiers fired at passengers with rubber bullets and paintballs, used electroshock weapons and physically assaulted male and female passengers.

Journalists and photographic equipment appeared to be primary targets⁴ and medical doctors attempting to treat wounded passengers were not exempt from rough treatment.⁵ During the 12 hour journey to the port of Ashdod in Israel, passengers were tightly handcuffed with plastic ties, forced to surrender their passports, refused access to the toilet or made to use the toilet while handcuffed and watched by IDF soldiers.⁶ The stories of those detained on board the *Challenger*

¹ Human Rights Council *Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attack on the flotilla of ships carrying humanitarian aid and assistance (HRC Report)* 15th sess, UN HRC, A/HRC/15/21 (2010) at 27-29.

² *Ibid* at 29.

³ *Ibid* at 32.

⁴ *Ibid* at [138]. *Describing events aboard the Challenger I*: "On entering the fly bridge, the soldiers were met with no resistance, but a female journalist sustained burns on her arms from an electroshock weapon fired by an Israeli soldier. Witnesses said that the primary concern of the soldiers seemed to be the confiscation of photographic equipment and media."

⁵ *Ibid* at [146]. *Describing events aboard the Sfendoni*: "The soldiers attempted to stop a medical doctor from treating the passengers... The doctor said that they would have to shoot him to prevent him doing his job."

⁶ *Ibid* at [141]. *Describing events aboard the Challenger I*: "One elderly man was obliged to urinate in his cloths because he was refused access to the toilet."

I, the Sfendoni and the Eleftheri Mesogios were consistent with the experiences of those on board the *Mavi Marmara*.⁷

Legal Analyses of Turkey, Israel, the Human Rights Council and the Secretary General

A few months after these events, Israel released its Turkel Commission Report (Turkel Report), maintaining that the blockade was legal under international law⁸, that armed conflict between Israel and Gaza was “international in character”⁹ and that the force used by IDF on the *Mavi Marmara* was “proportionate force” under international humanitarian law.¹⁰ However, the Turkel Report completely omitted reference to IDF actions on board the other six ships.

On September 27, 2010, the United Nations Human Rights Council (HRC) published its fact-finding report. While the primary purpose of this report was to collate testimony and establish the facts surrounding the incident¹¹, the HRC also gave its opinion on several legal issues. According to the HRC, the blockade around Gaza is illegal under international law¹², the interception of the flotilla by IDF was unlawful¹³ and IDF actions toward the passengers were “disproportionate” and in “grave violation of human rights law and international humanitarian law.”¹⁴

It is unsurprising that Israel and the HRC would hold such different positions on the legality of the blockade and the application of humanitarian law. This dichotomy, however, muddies the waters of international law and could create difficulties for states which would enforce blockades in the future. As is in its power¹⁵, the United Nations Security Council (Security Council) called

⁷ HRC Report above at n 1, at [134], [135].

⁸ The Turkel Commission *The Public Commission to Examine the Maritime Incident of 31 May 2010 (Israeli Report)* (2010) at [44].

⁹ *Ibid.*

¹⁰ *Ibid* at [191].

¹¹ HRC Report above at n1, at p 1.

¹² *Ibid* at [54]. “...the blockade amounts to collective punishment in violation of Israel’s obligations under international humanitarian law.”

¹³ *Ibid* at [163].

¹⁴ *Ibid* at [264].

¹⁵ Charter of the United Nations, art 34.

for an investigation on the events surrounding the flotilla incident¹⁶ and a Panel of Inquiry has reviewed reports from affected states,¹⁷ with the hopes of creating clarity on these issues.

The Report of the Secretary-General's Panel of Inquiry on the 31st of May 2010 Flotilla Incident (Palmer Report) was released in September 2011. The Palmer Report concluded that the blockade was legal¹⁸ but that the force used by IDF on board the *Mavi Marmara* was disproportionate¹⁹ and advised Israel to apologise and make reparations to the families of those killed. Unfortunately the legal analysis provided by the Palmer Report is minimal and it fails to address the proportionality of IDF actions on board the other flotilla vessels.

Furthermore, the Palmer Report has no binding force, nor was it intended to examine legal issues or to give an opinion on international law.²⁰ In this sense, the conclusion on the legality of the blockade has no weight for either Turkey or Israel. Had the Palmer Report concluded that the blockade was illegal, Israel would probably continue to enforce the blockade. And despite the Palmer Report's findings, Turkey continues to maintain that the naval blockade is illegal and has recently offered its military in support of any future aid vessels wishing to breach the Gaza blockade.²¹ True legal certainty in such an instance would require action by the Security Council, such as a formal resolution directing Israel to lift the blockade.²²

Given the current political climate in the Middle East, legal certainty is more important now than it has ever been. In 2011 a 15-boat flotilla made preparations to break the Gaza blockade in honour of the 2010 incident.²³ Most ships were detained at port in Greece although a few boats succeeded in breaching the blockade. In Gaza, fishing boats have also attempted to breach the

¹⁶ UN Security Council *Security Council Condemns Acts Resulting in Civilian Deaths During Israeli Operation Against Gaza-Bound Aid Convoy, Calls for Investigation, in Presidential Statement, SC/9940, 6325th & 6326th Meetings* (2010).

¹⁷ UN Secretary-General *Secretary-General Receives Initial Progress Report from Panel of Inquiry on 31 May Flotilla Incident, SG/SM/13101* (15 September 2010).

¹⁸ The Report of the Secretary-General's Panel of Inquiry Palmer Report on the 31 May 2010 Flotilla Incident (Palmer Report) (September 2011) at. [82].

¹⁹ Ibid at [117].

²⁰ Douglas Guilfoyle "The Palmer Report on the Mavi Marmara Incident and the Legality of Israel's Blockade of the Gaza Strip" (6 September 2011, Blog of the European Journal of International Law) <[http://www.ejiltalk.org/the-palmer-report-on-the-mavi-marmara-incident-and-the-legality-of-israel's-blockade-of-the-gaza-strip/](http://www.ejiltalk.org/the-palmer-report-on-the-mavi-marmara-incident-and-the-legality-of-israel-s-blockade-of-the-gaza-strip/)>.

²¹ Nicole Johnston, "Gaza fishermen defy naval blockade", Al Jazeera English, 20 July 2011. Video found at: <http://english.aljazeera.net/video/middleeast/2011/07/201172063013965193.html>.

²² Charter of the United Nations, art 40.

²³ Associated Press "Activists Prepare new 15 Boat Flotilla to Gaza" *Forbes* (USA, April 26, 2011) at 1.

blockade that prevents them from fishing farther than 3 miles out to sea. The fishermen were fired upon but there were no casualties.²⁴

Additionally, things are not as they were a year ago. “Revolutionary fervour” has swept the Middle East.²⁵ Egypt’s government no longer declares its opposition to the Muslim Brotherhood and the newly-founded Egyptian government has been brokering a previously unlikely peace between Fatah and Hamas.²⁶ This political unity may strengthen the Palestinian Authority’s planned bid for an independent Palestinian state²⁷ or could create friction in diplomacy, since both Israel and the United States view Hamas as a terrorist organization.^{28,29}

Ideally, states would look to the United Nations (UN) and international law for guidance. However, while the purpose of the report was to “resolve the issues surrounding the incident”³⁰, once the report was released it quickly became apparent that Israel and Turkey would only accept the terms of the report that suited them. Turkey continues to maintain that the blockade is illegal and Israel refuses to apologize for the deaths on board the *Mavi Marmara*.

Peace cannot exist when state parties do not agree on the same fundamental rules. Disagreement on the status of Gaza, the status of the conflict between Gaza and Israel and the legality of the blockade stem largely from disagreement on what international law applies and how that law is interpreted. With a potential diplomatic crisis looming in the background, defining the fundamental rules of international conflict and humanitarian law is of paramount importance.

²⁴ Nicole Johnston, “Gaza fishermen defy naval blockade”, Al Jazeera English, 20 July 2011. Video found at: <http://english.aljazeera.net/video/middleeast/2011/07/201172063013965193.html>.

²⁵ Ethan Bronner “In Israel, Time for Peace Offer May Run Out” *The New York Times* (New York City, 2011) 2.

²⁶ Isabel Kershner “Fatah and Hamas Announce Outline of Deal” *The New York Times* (New York City, April 27, 2011).

²⁷ Ethan Bronner “In Israel, Time for Peace Offer May Run Out” *The New York Times* (New York City, 2011) 2. According to Nabil Shaath, leader of foreign affairs department of Fatah, the main party of the Palestinian Authority, “...our goal is membership in the United Nations General Assembly in September.” Israel’s defence minister, Ehud Barak warned, “We are facing a diplomatic-political tsunami that the majority of the public is unaware of and that will peak in September... It is a dangerous situation, one that requires action.”

²⁸ Jim Zanotti “Hamas: Background and Issues for Congress” (Congressional Research Service, 2 December 2010) at p. 24: “Hamas is designated a Foreign Terrorist Organization (FTO) and Specially Designated Global Terrorist (SDGT) under US statute.”

²⁹ Israel Ministry of Foreign Affairs “The Hamas war against Israel: Statements by Israeli Leaders” (2011) <<http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/The+Hamas+war+against+Israel-+Statements+by+Israeli+leaders.htm>> *FM Livni states: “Israel is fighting today against the Hamas terrorist organization that has taken Gaza hostage and continues to target the citizens of Israel.”*

³⁰ Palmer Report above at n 18 at 1, Summary.

Chapter 2: Was the Blockade Legal?

In the absence of armed conflict or self-defence, maritime blockades are generally illegal under international law as they contravene the reservation of the high seas for peaceful purposes, obstruct the right to freedom of navigation of the high seas and prevent the right of innocent passage in territorial waters.³¹

Assessing the legality of the blockade depends on whether there is an armed conflict between Gaza and Israel and whether that conflict is international or non-international in nature. The nature of the conflict largely turns on the status of Gaza and Israel's relationship with Gaza. If Gaza is a territory occupied by Israel, for example, the conflict is likely to be international.

Determining the nature of the conflict is critical because different law applies in international conflict situations than non-international conflict situations. Furthermore, the blockade is more likely to be lawful if the conflict is international.

Is there 'Armed Conflict' between Gaza and Israel?

There is no single agreed definition of "armed conflict". This lack of a definition is not usually problematic, because while armed conflict may be difficult to define, it is easy to identify and "states generally recognize [conflict] when they see it."³²

In the present case, the existence of a conflict between Israel and Hamas has been recognized by international bodies such as the General Assembly³³ and Security Council.³⁴ UN condemnation of the violence is perhaps the clearest way to identify whether armed conflict exists.³⁵ The existence of a state of armed conflict is also acknowledged by Israel's own government. This is evident in recent United States cables, which admit that "since the Hamas takeover, Israel has

³¹ United Nations Convention on the Law of the Sea (UNCLOS), art 17, art 87, art 88 and art 90.

³² Lindsay Moir *The Law of Internal Armed Conflict* (Cambridge Press, 2002) at 33.

³³ Richard Goldstone *Report of the UN Fact Finding Mission on the Gaza Conflict (Goldstone Report)*, UN GOAR and UN HRC, 12th sess, A/HRC/12/48 (2009).

³⁴ United Nations Security Council, S/2009/23, (2009). Expresses "grave concern at the escalation of violence" and Point 5 "Condemns all violence and hostilities directed against civilians and all acts of terrorism."

³⁵ Jean Pictet *Commentary I Geneva Convention* (ICRC, Geneva, 1952) p. 49-50. *Pictet list various ways to identify internal armed conflict, for the purposes of applying General Article 3. These include: 1) the legal government is obliged to have recourse to regular military forces against insurgents organized as a military, 2) the dispute has been admitted to the Security Council or General Assembly of the United Nations as being a threat to international peace, a breach of the peace or an act of aggression.*

designated Gaza as a ‘hostile entity’ and maintained an economic embargo against the territory.”³⁶

Given the history of occupation in Gaza by Israeli forces and the history of violence, bombings and missile attacks between Gaza and Israel, it is evident that a state of conflict exists. What is not as clear is the nature of that conflict.

Defining the Status of Gaza and Gaza Waters

In order to assess the nature of the conflict it is important to establish whether Gaza is occupied or not. If it is occupied, the conflict is much more likely to be international.

Understanding the status of Gaza waters is also important. States are under an obligation to respect ships flying foreign flags. These obligations differ in the territorial seas and the high seas. In general, states are prohibited from detaining, attacking, boarding or preventing movement of foreign ships, except in certain circumstances, such as self-defence. Unless Israel can show that these special circumstances applied, Israel may have contravened the customary rules of the law of the sea.

Israel is not a signatory to the United Nations Convention on the Law of the Sea (UNCLOS) . However, many of the articles in UNCLOS reflect customary international law. For example, the right of innocent passage through territorial seas, as set out in article 17 of UNCLOS, is now well established as a rule of customary international law.³⁷

i. What is the status of Gaza?

The UN, along with other international bodies, views Israel as the “occupying power” of the Palestinian Territories.³⁸³⁹ Israel disagrees and maintains that Gaza has not been occupied since the withdrawal of troops in 2005. I will examine whether or not Gaza is occupied in my assessment of the nature of the conflict.

³⁶ Wikileaks “Cashless in Gaza? SECRET TEL AVIV 002447” (22 October 2008) available at: <http://www.aftenposten.no/spesial/wikileaksdokumenter/article3972840.ece>.

³⁷ USA/USSR Joint Statement on Uniform Acceptance of Rules of International Law Governing Innocent Passage 1989.

³⁸ Conference of High Contracting Parties to the Fourth Geneva Convention: Declaration, Geneva, 5 December 2001, s3. Found online at: <<http://domino.un.org/UNISPAL.NSF/85255a0a0010ae82852555340060479d/8fc4f064b9be5bad85256c1400722951>>.

³⁹ *Peaceful Settlement of the Question of Palestine (S/2008/612)*, UN SCOR, 63rd sess, A/63/368-S/2008/612 (2008) at 7.

ii. Status of Gaza waters

The flotilla ships were stopped sixty-four nautical miles away from the blockaded area off the Gaza coast⁴⁰. This area must be classed either as the high seas⁴¹ or as Israel's exclusive economic zone⁴². Gaza's shoreline is a legally unique situation since Gaza is not a state and therefore cannot have territorial waters⁴³. If Gaza is not occupied, this would mean the high seas lap at the edge of Gaza's shores.

However if Israel occupies Gaza, Israel may be able to claim Gaza's waters as its own territorial seas. Agreements between Israel and the Palestinian Liberation Organisation (PLO) give Israel the responsibility of patrolling Gaza's "territorial waters" and therefore support this view.⁴⁴

Gaza's territorial seas would extend twelve nautical miles out from the coast. Sixty four miles out to sea would be the exclusive economic zone. While some states have contiguous zones,⁴⁵ they must specifically claim them and Israel, along with many other states, has not done so.⁴⁶ Unlike Australia and New Zealand, Israel therefore cannot claim the right to enforce its immigration laws within twenty four nautical miles of Gaza's coast.⁴⁷

States have many of the same freedoms in exclusive economic zones as they have in the high seas.⁴⁸ Most importantly, the freedom of the high seas⁴⁹ and the reservation of the high seas for peaceful purposes⁵⁰ apply equally to exclusive economic zones and the high seas⁵¹.

⁴⁰ Palmer Report above at n 18 at [110].

⁴¹ UNCLOS Article 86: "*all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State...*"

⁴² UNCLOS Article 57: "*The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.*"

⁴³ UNCLOS Article 3: "*Every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles...*"

⁴⁴ Oslo II (Washington, DC, September 28, 1995) (Oslo II), art XII (1).

⁴⁵ UNCLOS Article 33: "*a zone contiguous to its territorial sea... [that] may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial seas is measured.*"

⁴⁶ The World Factbook, CIA "Field Listing: Maritime Claims" (2011) <<https://www.cia.gov/library/publications/the-world-factbook/fields/2106.html>>.

⁴⁷ UNCLOS art 33(1)(a).

⁴⁸ UNCLOS art 58(2).

⁴⁹ UNCLOS art 87.

⁵⁰ UNCLOS art 88.

⁵¹ UNCLOS art 58(1).

Consequently, regardless of whether Gaza is occupied or not, the same law of the sea provisions apply to the area of ocean where the flotilla ships were stopped and boarded.

The freedom of the high seas and the freedom of navigation are accepted as customary international law.⁵²

iii. Does Israel have authority over the “external security” of the territorial waters off Gaza’s shore? The Oslo Accords, Gaza- Jericho Agreement and Interim Agreement.

Meaning of External Security

The Gaza-Jericho Agreement, and later Oslo II, gave Israel authority over “external security”,⁵³ making it one of foundations of the argument that the blockade is legal.⁵⁴

If article V(3)(a) is looked at in isolation, it does indeed seem to give Israel the right to blockade Gaza. However, article V(3)(a) must be looked at in light of the purpose of the Gaza-Jericho Agreements, as set out in the Preamble, which is to establish peace between Israel and the Palestinian people and to implement Security Resolutions 242 and 338.⁵⁵

In that wider context, the blockade is contrary to Security Resolution 242, which condemns the occupation of territories by the Israel armed forces and affirms “the necessity for guaranteeing freedom of navigation through international waterways.”⁵⁶ Security Resolution 338 adds force to Resolution 242 by calling upon Israel and the other states involved to implement Resolution 242 “in all of its parts”.⁵⁷ It has been argued that as a “decision”⁵⁸, Resolution 338 makes

⁵² High Seas Convention (Geneva 1958), Preamble, art 2.

⁵³ Gaza-Jericho Agreement (Cairo, 4 May 1994) (GJA) art V(3)(a) “Israel has authority over the settlements, the Military Installation Area, Israelis, external security, internal security...”

⁵⁴ Elizabeth Samson "Is Gaza Occupied? Redefining the Status of Gaza under International Law" (2010) 25 American University International Law Review 915.

⁵⁵ GJA, above at n 53, Preamble.

⁵⁶ SC Res 242, S/RES/242 (1967).

⁵⁷ SC Res 338, S/RES/338 (1973).

⁵⁸ *Ibid.*

“The Security Council...

2. Calls upon the parties concerned to start immediately after the cease-fire the implementation of Security Council resolution 242 (1967) in all of its parts;

3. Decides that, immediately and concurrently with the cease fire, negotiations shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East.”

Resolution 242 “mandatory under Article 25.”⁵⁹ The more plausible interpretation of Resolution 338, however, is that only the requirement to begin negotiations was a decision, while the implementation of Resolution 242, incorporating the words “calls upon”, was a recommendation.

The Gaza-Jericho Agreement was later superseded by Oslo II which reaffirms Israel’s responsibility for “defense against external threats from the sea and from the air...”⁶⁰ and shares the same purpose as its predecessor. The responsibility conferred on Israel in both agreements must be looked at in light of Resolutions 242 and 338, since both agreements purport to implement these resolutions. Consequently, neither agreement can be seen as condoning a naval blockade around Gaza. This is because the blockade does not allow “freedom of navigation” and is arguably a continuation of occupation by Israel armed forces in the Gaza territory and possibly an act of war.

The Interim Agreement⁶¹ further details the nature of Israel’s role in policing external security and supports a more narrow interpretation of the scope of Israel’s authority. The Interim Agreement gave Israel “full control and sole security authority in the territorial waters” outside Gaza for the purpose of checking vessels for drugs and weapons.⁶²

The policing of territorial waters in this manner is normal state practice. Ships sailing from other states are generally required to identify themselves on radio and submit to inspection once inside territorial waters. Ships are checked by sniffer dogs which are trained to find drugs and other prohibited items such as fruit, plants and animals. In the absence of a contiguous zone, states cannot exercise this power outside the twelve mile territorial zone. This general practice is limited to territorial seas and does not give Israel the ability to interfere with the vessels of other states in the exclusive economic zone.

In all probability, Israel took on the duty to patrol the territorial seas because Gaza lacked the resources to do this without help and, as the occupying power with military forces stationed in Gaza, Israel was obliged to patrol Gaza waters. The Interim Agreement, which restricts Israel’s authority to territorial waters cannot be seen as offering support for a full naval blockade or give it authority to fire at and board ships twenty miles off the Gaza coast. To the contrary, it indicates that the Oslo Accords and Gaza-Jericho Agreement only intended to give Israel limited security authority in the territorial waters.

⁵⁹ Rostow, Eugene V. *The Illegality of the Arab Attack on Israel of October 6, 1973*. The American Journal of International Law, 69(2), 1975, p 275. (Found at: <http://heinonline.org.ezproxy.otago.ac.nz/HOL/Page?collection=fjournals&handle=hein.journals/ajil69&id=281>).

⁶⁰ Oslo II, art XII (1).

⁶¹ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Washington, DC, September 28, 1995) (Interim Agreement), art XIV of Appendix I.

⁶² Israel Report, above at n 8, at [21].

Status of the Agreements

The Oslo Accords, Gaza-Jericho Agreement and Interim Agreement are not true treaties in the strict Vienna Convention sense, since they were not agreements between two states.⁶³ The PLO was not a state and “lacked a true capacity to engage in foreign relations” when it agreed to the Oslo Accords.⁶⁴

However, international law allows for agreements between states and national liberation movements, as can be seen in agreements between Kosovo and Serbia.⁶⁵ Furthermore, the principle of estoppel, as a “general principle of law recognized by civilized nations”⁶⁶ may prevent Israel or the PLO from reneging on their undertakings. The principle that “one should not benefit from his or her own inconsistency” was held in the *Temple of Preah Vihear* case to be found in the legal systems of all civilized nations.⁶⁷

Consequently, the Gaza-Jericho Agreement and Oslo Accords are likely to be legally binding on both Israel and the PLO. While these agreements place the burden of external security on Israel, it is unlikely that they intended to give Israel the ability to declare and enforce a total blockade around Gaza, inconsistent with Resolutions 242 and 338. Even assuming that they did intend to give Israel that power, Israel would still be subject to international law in exercising that power, including international humanitarian law.

Is the Conflict between Gaza and Israel International or Non-International?

It is often difficult to determine whether conflict is international or non-international and there appears to be widespread disagreement on this issue. This is especially the case in the Gaza-Israel conflict. The recent Palmer Report notes that the nature of the conflict is “uncertain” and fails to conclude whether the conflict is international or non-international.⁶⁸ The HRC takes the view that the Gaza-Israel conflict is international, because Israel “effectively occupies” Gaza.⁶⁹ Israel maintains that the conflict is “international in nature”, but that Gaza is not under its occupation.

⁶³ Israel Report, above at n 8, at [21].

⁶⁴ Geoffrey R. Watson *Oslo Accords: international law and the Israeli-Palestinian peace agreements* (Oxford University Press, Oxford, 2000) p. 63.

⁶⁵ Marta Szpala, “*Serbia - Kosovo: an agreement without a future?*” CE Weekly (Centre for Eastern Studies (OSW) 7 September 2011). Found at: <<http://www.osw.waw.pl/en/publikacje/ceweekly/2011-09-07/serbia-kosovo-agreement-without-future>>.

⁶⁶ International Court of Justice (ICJ) Statute, art 38(1).

⁶⁷ *Temple of Preah Vihear (Cambodia v Thailand)(Merits)* [1962] ICJ Rep 6, 39 (Separate Opinion of Judge Alfaro).

⁶⁸ Palmer Report above at n 18, at [72].

⁶⁹ HRC Report above at n 1, at [63].

There seem to be to be three possible scenarios, or three ways the conflict between Gaza and Israel could be classified. Under each classification, different law applies.

i. The Conflict is International and Israel Occupies Gaza

If Israel occupies Gaza the conflict is international. International customary law permits naval blockades of “belligerent” territory, provided the blockade meets certain requirements.⁷⁰

Israel argues that it does not occupy Gaza as it withdrew its troops in 2005.⁷¹ This may seem surprising, since Israel also argues that the blockade is legal because the conflict is international. On further investigation, however, Israel’s position is politically logical. If Israel occupies Gaza, it would be bound by the rules of belligerent occupation. Civilians in a territory subject to belligerent occupation are protected by stricter humanitarian law. For example, the Fourth Geneva Convention and Additional Protocol I, which apply in international conflict, impose greater duties on occupying states to protect civilians than Common Article 3⁷² and Additional Protocol II, which apply in non-international conflict.

Despite the fact that Israeli troops are no longer present in Gaza, Israel still effectively occupies Gaza. This is the view taken by the UN⁷³ and various international organisations.⁷⁴ There are a number of reasons why this is the case. Firstly, Gaza’s current borders and status are the result of conflict and historic occupation by Egypt and later Israel. Israel took the Gaza territories from Egypt in 1967 during the Six Day War and until 1994 Gaza was subject to Israeli military administration. In 2005, Israel removed all its military from Gaza but occupation is more than military presence. Israel still controls Gaza’s borders, airspace, movement of goods and even how much currency is circulated in Gaza⁷⁵.

Pursuant to article 42 of the Hague Regulations, “territory is considered occupied when it is actually placed under the authority of the hostile army.” Although article 42 requires “actual” authority, in practice “authority” has been customarily accepted to mean effective power or

⁷⁰ San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, art 93 to art 104.

⁷¹ Israel Report above at n 8, at [45].

⁷² All four of the Geneva Conventions share the same Article 3. This is generally referred to as “common article 3”.

⁷³ S/2008/612 above at n 39 and Goldstone Report above at n 33.

⁷⁴ HRC Report, above at n 1, at [63].

⁷⁵ Goldstone Report above at n 33, at [278].

control of an area.⁷⁶ Under this view of occupation, which is accepted as customary international law⁷⁷, Israel effectively occupies Gaza.

Finally, the Security Council holds the view that Israel is “the occupying power”, even after the withdrawal of Israeli troops.⁷⁸ Given that all member states (and Israel is a member state) agree to follow the Security Council’s decisions⁷⁹, this must hold some weight. After all, how can states follow Security Council resolutions if they do not agree with the Security Council’s categorization of the conflict?

ii. The Conflict is International: Israel does not Occupy Gaza

A second possibility is that the conflict is international but Israel does not occupy Gaza. This is the official Israeli view of the conflict, based on the Turkel Report and Israeli Supreme Court cases. The argument is that: 1) Hamas is the ruling entity of Gaza; 2) Hamas is an international body; and, 3) the armed conflict is between Hamas and Israel.

In *Al-Bassiouni v Prime Minister*, it was argued that the restriction of fuel and electricity to the Gaza Strip was in breach of Israel’s humanitarian obligations as it severely hampered the ability of hospitals and other utilities to function⁸⁰. However, the Supreme Court of Israel held that by withdrawing military forces, “Israel no longer has effective control over what happens in the Gaza Strip.”⁸¹ The withdrawal of the military essentially meant that Israel no longer had a “general duty to ensure the welfare of the residents of the Gaza Strip... according to the laws of belligerent occupation in international law.”⁸²

The Israel Report bases its conclusion on the nature of the conflict and the legality of the blockade on the findings of these Israel Supreme Court cases.

⁷⁶ Goldstone Report above at n 33 at [275] citing *Prosecutor v Naletilic*, case No. IT-98-34-T, Decision of 31 March 2003 at [219]-[222].

⁷⁷ *Ibid* at [274] citing Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgement of 19 December 2005, I.C.J. Reports 2005 at [172].

⁷⁸ S/2008/612 above at n 39 at 7; SC Res 1860, S/RES/1860 (2009); *Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, to the Occupied Palestinian Territories including East Jerusalem, and the other occupied territories*, 64th sess, GA Res 64/92, A/RES/64/92 (2010) (GA Res 64/92); *Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem*, GA Res 64/94, A/RES/64/94 (2010) (GA Res 64/94); The Goldstone Report above at n 33.

⁷⁹ UN Charter, art 58.

⁸⁰ *Al-Bassiouni v Prime Minister*, HCJ 9132/07, (27 January 2008) at [10] - [11]

⁸¹ *Ibid* at [12].

⁸² *Ibid*.

There are several problems with this alternative characterisation of the conflict. First, the presence of troops does not determine whether a state is occupied, as discussed above. The only way to end occupation is to withdraw completely. Israel continues to occupy Gaza so long as it continues blockading Gaza and controlling imports, exports and money circulation in Gaza.

The second problem is that it attempts to be a sort of “middle ground” between international and non-international conflict. International conflict is between states or between a state and an occupied territory. Conversely, conflict between states and military groups (such as insurgents) is non-international. If there is an international conflict between Hamas and Israel and Hamas governs Gaza, then the conflict is not between Hamas and Israel but between Gaza and Israel.

Simply speaking, governments do not go to war alone. They drag their citizens into war with them. To argue that the conflict is between Israel and Hamas would be akin to saying that, during the Bush era, the United States was not at war with Iraq but that the Republican Party was at war with the Ba’ath Party⁸³.

The Palmer Report appears to partially take this view by concluding that the status of Gaza is “unclear” while simultaneously treating the conflict as international for the purposes of the blockade.⁸⁴ Not only is this conclusion contrary to the Security Council and General Assembly view of Gaza’s status⁸⁵, it places the conflict in a legal no-man’s land. If the conflict is international but Gaza is unoccupied, civilians are not protected by either international or non-international humanitarian law. Additional Protocol I and the Fourth Geneva Convention would not apply, since there would be no civilians in an “occupied territory”. Additional Protocol II and Common Article 3 would not apply, since the armed conflict would be international.

While modes of classifying conflict may be outdated, conflict cannot be defined in such a way that allows states to avoid all responsibility for care of civilians in their territory or in the territory of their opponent. Furthermore, there is no precedent for the conflict being categorized in this way. The UN and its various bodies have never proposed that this type of conflict exists. The only state which does is Israel.

iii. The Conflict is Non-International

A third possibility is that the violence between Hamas and Israel is “protracted armed violence between governmental forces and organized armed groups.”⁸⁶ If this is the case, then the conflict

⁸³ *Saddam Hussein's political party*.

⁸⁴ Palmer Report above at n 18 at [73].

⁸⁵ S/2008/612 above at n 39 at pg 7; SC Res 1860, S/RES/1860 (2009); GA Res 64/92 and GA Res 64/94; The Goldstone Report above at n 33.

⁸⁶ *Prosecutor v Tadic (Appeal on Jurisdiction)* ICTY (1997) at [70].

is non-international and could be likened to the conflict between the Contras and the Nicaraguan government in the 1980's.

The concept that international conflict exists only between states was touched on by the Supreme Court of the United States in *Hamdan v. Rumsfeld*⁸⁷ and reflects the historic view that war could only take place between states. Despite the UN view that the Gaza-Israel conflict is international, some legal scholars also subscribe to this view of international and non-international conflict.⁸⁸ However, several factors make defining the Gaza-Israel conflict as non-international untenable.

Firstly, the Oslo Accords and Gaza Jericho Agreement between Israel and the PLO are based on the premise that the Gaza is self-governing and the relationship between Israel and Gaza is that of territory and occupier. States do not make treaties providing for even partial self-governance with insurgent groups.

Secondly, the existence of the blockade itself lessens the likelihood of the conflict being classed as non-international. As was seen in the *Prize Cases* following the US Civil War, the creation and enforcement of a naval blockade around Gaza could actually equate to a declaration of belligerency.⁸⁹ Under the *Prize Case* assessment of conflict, acts that amount to a declaration of belligerency are enough to change conflict from non-international to international, even between non-state parties.

At the very least, the blockade prevents Gaza from exercising independence and, as such, could be seen as a recent incident of occupation by Israel. As argued above, if Israel occupies Gaza, the conflict is international.

iii. Conclusion on the Conflict

It is not difficult to conclude that the conflict between Gaza and Israel is international, despite the fact that Gaza is not a recognized state. Although Gaza is self-governing, Israel controls all access to and from Gaza. Israel therefore “effectively occupies” Gaza and will continue to do so until it completely withdraws from Gaza. This is the stance taken by various United Nations

⁸⁷ *Hamdan v Rumsfeld*, 548 U.S. 557 (2006) at p.6: “the [Geneva] Conventions do not apply because Hamdan was captured during the war with al Qaeda, which is not a Conventions signatory, and that conflict is distinct from the war with signatory Afghanistan.”

⁸⁸ Douglas Guilfoyle *The Palmer Report on the Mavi Marmara Incident and the Legality of Israel's Blockade of the Gaza Strip* (6 September 2011, Blog of the European Journal of International Law) <[http://www.ejiltalk.org/the-palmer-report-on-the-mavi-marmara-incident-and-the-legality-of-israel's-blockade-of-the-gaza-strip/](http://www.ejiltalk.org/the-palmer-report-on-the-mavi-marmara-incident-and-the-legality-of-israel-s-blockade-of-the-gaza-strip/)>.

⁸⁹ *Prize Cases*, 67 U.S. 635, 666. The US Supreme Court held that blockading the Confederate states equated to a declaration of belligerency and created a state of war or what is known as today as international conflict. The rules of war regarding blockades and neutral state parties applied to the conflict, despite the fact that the conflict was not between states.

bodies, such as the Security Council and the HRC. Under the existing classifications of conflict, this is also the most logical conclusion.

What laws apply to Israel and the blockade?

In general, blockades are illegal. They contravene the right of innocent passage and the reservation of the high seas for peaceful purposes. If New Zealand were to decide to enforce a naval blockade around Niue, for example, it would be contravening UNCLOS.⁹⁰

Although Israel is not a signatory to UNCLOS, many of the UNCLOS provisions fall under customary international law, such as the right of innocent passage⁹¹, the right of navigation⁹² and the freedom of the high seas⁹³. In 1989 the United States and the USSR accepted that the right of innocent passage in territorial seas was part of customary law.⁹⁴ The freedom of the high seas and right of navigation have been accepted as customary law since the 17th century.⁹⁵

An exception to the illegality of blockades is self-defence. International customary law and the UN Charter recognize the right of states to protect themselves against attack, including anticipated armed attack.⁹⁶ In times of conflict, the general law of the sea rules (*lex generalis*) give way to the more specific rules surrounding naval warfare (*lex specialis*).⁹⁷

i. General Legality of Naval Blockades in International Conflict

Naval blockades are a “legitimate method and means of warfare” and self-defence provided they follow certain rules.⁹⁸ The San Remo Manual (SRM), though not a binding convention, is considered a “restatement of international law”,⁹⁹ and is a guiding text referred to by Israel,

⁹⁰ UNCLOS art 17 and art 88.

⁹¹ UNCLOS art 17: *Although this applies to the Territorial seas, Art 17 is an example of how strictly limited states are from interfering with the flagships of other states.*

⁹² UNCLOS art 90.

⁹³ UNCLOS art 87.

⁹⁴ USA/USSR Joint Statement on Uniform Acceptance of Rules of International Law Governing Innocent Passage 1989.

⁹⁵ Hugo Grotius *Mare Liberum* (English: “*The Free Seas*”) (1609), p 7: “*Every nation is free to travel to every other nation, and to trade with it.*”

⁹⁶ UN Charter art 51 - *Jus ad bellum*.

⁹⁷ Leslie C. Green, *The Contemporary Law of Armed Conflict* (3rd ed. 2008) at 191.

⁹⁸ San Remo Manual on International Law Applicable to Armed Conflicts At Sea (SRM) art 97.

⁹⁹ SRM, Introductory Note.

Turkey and the UN in recent reports on the legality of the Gaza blockade. The SRM explains when blockades are legal or illegal and what actions blockading states can and cannot do.

Customary international law surrounding blockades has traditionally been interpreted as applying in international conflict. Historically, naval blockades have been enough to redefine conflict as international since blockades are normally imposed in international conflict¹⁰⁰.

As a restatement of customary international law, the SRM does not distinguish between international or non-international conflict but refers to “war” in the general sense. This suggests that the SRM mainly contemplates blockades in international armed conflict, like the customary international law it reflects. If the conflict between Gaza and Israel is international, the customary international law of blockades, the rules of belligerent occupation and the Fourth Geneva Convention will apply.

Naval Blockades as a Means of Self-Defence

The Charter of the UN prohibits member states from using “force against the territorial integrity or political independence of any state”.¹⁰¹ The naval blockade does restrict Gaza’s ability to trade and prevents residents from traveling. The enforcement of the blockade also prevents Gaza fishermen from having full access to the territorial waters of Gaza. On the face of it, the blockade does amount to “the use of force” against Gaza’s political independence. Furthermore, the blockade also appears to contravene the UNCLOS reservation of the high seas for peaceful purposes.¹⁰²

However, on closer examination, the general prohibition in article 2(4) is not likely to apply to conflict between Gaza and Israel for several reasons. Firstly, Gaza is not a state so cannot be considered “any state” for the purposes of article 2(4). Secondly, as a member state of the UN, Israel has the right of self-defence in the event of an armed attack against it.¹⁰³ Arguably, many of Israel’s actions would qualify as self-defence against attacks from Hamas. Thirdly, if not justifiable as self-defence, many of Israel’s acts would be justified under the law of armed conflict (*jus in bello*) which allow acts of force once armed conflict has commenced. In such cases, *lex specialis* prevails over *lex generalis*.

Finally, due to lack of consensus, article 88 of the UNCLOS, relating to reservation of the high seas for peaceful purposes, probably does not reflect customary international law. In fact there is

¹⁰⁰ Palmer Report above at n 18 at [73].

¹⁰¹ UN Charter, art 2(4).

¹⁰² UNCLOS, art 88.

¹⁰³ UN Charter, art 51.

general agreement that naval warfare is legal on the high seas¹⁰⁴ and even the recent HRC Report accepts that article 88 does not reflect customary international law.¹⁰⁵ Under general international law, there is no prohibition on using blockades as a means of war or self-defence.

However, this right of self-defence is not absolute. A state exercising self-defence must report its actions to the Security Council¹⁰⁶ and follow Security Council decisions on how to handle the situation.¹⁰⁷ If Resolution 338 is indeed a Security Council “decision”, the blockade itself may be evidence of Israel’s failure to exercise self-defence within the rules.

It is arguable that Resolution 338 was not actually a decision or, if it was, the only binding provision was for negotiations to begin between the parties (which did occur). The Security Council has made no substantial effort to enforce Resolution 242 and has not issued further binding decisions on the Gaza-Israel conflict. This indicates that Resolution 338 did not make Resolution 242 binding.

If Resolution 338 did not make Resolution 242 binding on Israel, this does not mean Israel is free to blockade Gaza. It simply means that it is not prohibited from doing so by the Security Council. The rules of armed conflict, the rules of belligerent occupation and international humanitarian law still apply to Israel’s actions. Israel must act in compliance with the “obligations of an occupying power” and follow the laws of war.¹⁰⁸

ii. Limitations of Naval Blockades in International Conflict

Israel’s Obligations as an Occupying Power

As the occupying power in Gaza, Israel is required to “restore and ensure, as far as possible, public order and [civil life].”¹⁰⁹ Whenever Israel’s acts, such as imposing a naval blockade, “impinge on the interests of the people subject to their occupation”, Israel must take Gaza citizens’ interests into account.¹¹⁰ If there were troops or Israeli personnel in Gaza, Israel must

¹⁰⁴ UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, 2004) and SRM

¹⁰⁵ HRC Report above at n 1 at [50].

¹⁰⁶ UN Charter, art 51.

¹⁰⁷ UN Charter, art 25.

¹⁰⁸ Richard Falk, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, UN GOAR, A/65/331 (30 August 2010) at [10].

¹⁰⁹ 1907 Hague Regulations, art 43.

¹¹⁰ Eyal Benvenisti *The International Law of Occupation* (Princeton University Press, 1993) at 213.

also take their interests into account.¹¹¹ However the interests of the occupant state “are deemed irrelevant.”¹¹²

Under the rules of belligerent occupation, Israel cannot impose a blockade if that blockade is detrimental to “civil life” and not outweighed by the benefit to Israeli occupants within Gaza. Since Israel withdrew its troops in 2008 and evacuated Israeli settlements in 2005, it is difficult to argue that the blockade is beneficial to Israelis living in Gaza.

Furthermore, Israel must ensure the occupation of Gaza complies with the standards set out in the Fourth Geneva Convention. Specifically, Israel must allow for the free passage of medicine, essential foodstuffs and clothing¹¹³ and “ensure and maintain” medical establishments.¹¹⁴ If a population is “inadequately supplied”, which Gaza is, then Israel must permit the free passage of humanitarian relief and guarantee its protection.¹¹⁵

As was recently confirmed by the Goldstone Report, Israel is bound by the Fourth Geneva Convention.¹¹⁶ A naval blockade which prevents humanitarian aid from reaching Gaza and which is enforced against aid vessels cannot but contravene those provisions of the Fourth Geneva Convention.

Intention and Proportionality

According to article 102 of the SRM, a blockade is illegal if its “sole purpose” is to starve the civilian population or if the damage to the civilian population is disproportionate to the direct military advantage¹¹⁷. Article 102(a) of the SRM is similar to the Fourth Geneva Conventions prohibition on “collective punishment” of civilians in occupied territories.¹¹⁸

¹¹¹ Eyal Benvenisti *The International Law of Occupation* (Princeton University Press, 1993) at 214.

¹¹² Ibid at 214.

¹¹³ Fourth 1949 Geneva Convention, art 23.

¹¹⁴ Ibid, art 56.

¹¹⁵ Ibid, art 59.

¹¹⁶ The Goldstone Report above at n 33 at [326] “Israel continues to be duty-bound under the Fourth Geneva Convention and to the full extent of the means available to it to ensure the supply of foodstuff, medical and hospital items to meet the humanitarian needs of the population of the Gaza Strip without qualification.”

¹¹⁷ SRM, art 102:

(a) it has the sole purpose of starving the civilian population or denying it other objects essential for 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.

¹¹⁸ Fourth Geneva Convention, Article 33 “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or terrorism are prohibited.”

However, it is unlikely that the blockade could be categorised as collective punishment or as having the sole purpose of starving the civilian population. Whatever the *result* of the blockade may be, one of Israel's purposes is self-defence. Even if depriving civilians of resources was one of the blockade's purposes¹¹⁹, it is not the sole purpose. Israel clearly derives some military advantage from patrolling those waters so the blockade cannot be illegal under the international customary law reflected in SRM Article 102 (a) or under article 33 of the Fourth Geneva Convention.

Nevertheless, good intentions are not enough to make the naval blockade legal under international law. The HRC Report concludes that the blockade is illegal based on article 102(b) of the SRM as the blockade inflicts "disproportionate damage upon the civilian population" in Gaza.¹²⁰ The Israel Report, conversely, holds that the blockade is proportionate.¹²¹

Proportionality in armed conflict forms part of the customary international law of *jus in bello*. The concept of proportionality, which is reflected in the article 102(b) of the SRM and in article 51(5)(b) of Additional Protocol I of the Fourth Geneva Convention (Protocol I),¹²² essentially balances two competing imperatives. One rule allows for the use of force in self-defence or protracted armed conflict. The other rule prohibits harming civilians. In practice, weighing these conflicting rules against one another is difficult. While it is impossible for a state to defend itself without the risk of harming civilians, armed force that is directed at civilians or causes a civilian population disproportionate harm is a repugnant practice prohibited by international law.

Assessing proportionality is a question of fact. One must look at what military advantage Israel gains by enforcing the blockade and what harm the blockade causes the civilian population. That the blockade causes harm to the civilian population is indisputable. Many in Gaza suffer from a shortage of food, medical supplies, construction materials and constrained currency circulation. The situation in Gaza is considered by the Security Council as a "humanitarian crisis"¹²³ and a blockade which prevents the influx of supplies most certainly contributes to that situation.

¹¹⁹ Wikileaks *Cashless in Gaza? SECRET TEL AVIV 002447* (22 October 2008) available at: <http://www.aftenposten.no/spesial/wikileaksdokumenter/article3972840.ece>: "As part of their overall embargo plan against Gaza, Israeli officials have confirmed to econoffs on multiple occasions that they intend to keep the Gazan economy on the brink of collapse without quite pushing it over the edge."

¹²⁰ HRC Report above at n 1 at [53].

¹²¹ Israel Report above at n 8 at [30].

¹²² Protocol I to the Geneva Conventions (Protocol I), art 51(5)(b): *One type of indiscriminate and thus prohibited type of attack is "an attack which may be expected to cause incidental loss to civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."* (emphasis added).

¹²³ HRC Report above at n 1 at para [37] and SC Res 1860, S/RES/1860 (2009).

However, it does not follow that the naval blockade in itself is disproportionate. Israel maintains that the blockade is necessary for self-defence and for preventing Hamas from bringing in materials to build bombs, missiles and rockets.

Furthermore, other policies also contribute to the crisis, such as the limited supply of electricity and fuel to Gaza and a general economic embargo imposed by Israel. If the blockade is looked at in isolation, the negative effects on the civilian population pale against the effects caused by the land blockade and constrained currency circulation.

In assessing proportionality, the Palmer Report attempts to determine the effects of the naval blockade in isolation rather than in conjunction with Israel's other policies. This approach is not dissimilar to the expectation measure for assessing loss in breach of contract: because there is no port in Gaza there could be little expectation of benefit from there not being a blockade, and so the loss caused by the blockade is minimal. On this basis, the Palmer Report concludes that the blockade is not disproportionate, while noting the combined effects of the naval blockade and land blockade are "unsustainable".¹²⁴

There are two problems with the the approach taken in the Palmer Report. Firstly, arguing that goods cannot be transported to the Gaza Strip by sea without a port "inherently contradicts the main purpose of the blockade... since, according to the same logic, it would not be at all possible to transport weapons to the Gaza Strip by sea."¹²⁵ If the lack of a port in Gaza means that Gaza civilians suffer no loss, it likewise means Israel receives no direct military advantage from the naval blockade.

Secondly, while the assessment in the Palmer Report is a simple one, it does not truly represent the proportionality of military benefit when balanced against the damage caused to the civilian population. The damage caused by the land blockade should not lessen the importance of the damage caused by the naval blockade, it should increase it. Simply speaking, if a population is already suffering from a lack of resources, due to the occupying power's practices, the occupying power should have a greater responsibility to ensure that its military policies do not cause further harm to civilians, and not a lesser responsibility.

If the direct military benefits of the naval blockade are compared against the resulting humanitarian crisis in Gaza as a whole, it becomes more difficult to argue that the blockade is proportionate. A policy that exacerbates a lack of medical supplies, building materials and foodstuffs from reaching an already deprived population certainly seems "excessive" compared to the benefit of stopping an unreported number of ships bringing missiles to Gaza.

In light of the Oslo Accords, the blockade could be viewed as an unnecessary measure, since Israel already has the right to patrol Gaza's territorial waters to prevent the importation of

¹²⁴ Palmer Report above at n 18 at [79].

¹²⁵ Israel Report above at n 8 at [62].

missiles.¹²⁶ The direct military advantage Israel receives in imposing a blockade would likely be equal to the advantage of patrolling a small strip of territorial sea. The cost of the latter option to the civilian population in Gaza would be substantially less.

Conclusion

The naval blockade is illegal under the rules of belligerent occupation and under the Fourth Geneva Convention. When the damage to the civilian population is looked at as a whole, it is excessive compared to the military advantage Israel receives in enforcing the blockade. Although blockades are normally acceptable as a means of self-defence, the Gaza blockade is disproportionate and therefore illegal under customary international law as reflected in the SRM article 102 (b).

¹²⁶ Oslo II, art XII (1).

Chapter 3: Legality of Israel's Actions on May 31, 2010

If the blockade is illegal, Israel's acts in stopping the flotilla of ships on the 31st of May 2010 would not be justified under international law. Even if the blockade was legal, Israel's actions on the 31st of May 2010 may still have been illegal. For example, IDF actions would be illegal if they breached international humanitarian law by stopping and boarding the ships or in their treatment of passengers, regardless of the legality of the blockade.

During armed conflict, international law offers special protection to civilians, to humanitarian relief personnel and to journalists in areas of conflict. These rules are slightly different in international conflict and non-international conflict. In assessing whether or not IDF actions were legal, I will proceed from the premise that the conflict is international and that the blockade is legal.¹²⁷

Stopping, Boarding and Attacking the Ships

Whether they are classed as humanitarian aid vessels or activist vessels, the ships were all civilian objects and flying the flags of neutral third-party states. Just like civilians in occupied territories and war zones, as civilian objects these ships have special protection under international law. This protection applies even in the enforcement of naval blockades.

i. Attacks on Civilian Objects in International Armed Conflict

Protocol I prohibits signatory states from making civilian objects "the object of attack"¹²⁸. The ships in the flotilla, whether as aid ships, as passenger ships or as activist ships, had no "military objectives" and were therefore civilian objects.¹²⁹

This prohibition on attacking civilian objects now forms part of customary international law, as reflected in Article 8 of the Rome Statute of the International Criminal Court (Rome Statute). Article 8(2)(e) of the Rome Statute prohibits signatory states from "intentionally directing attacks against civilian objects" in international conflict.¹³⁰ Article 8 of the Rome Statute describes the list of prohibited acts in article 8 as "serious violations of the laws and customs applicable in international armed conflict."

¹²⁷ Although I have concluded that the blockade is disproportionate and thus illegal under customary international law, I will look at legality of IDF actions in the alternative.

¹²⁸ Protocol I, Article 52 (1): "*Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.*"

¹²⁹ Ibid.

¹³⁰ Rome Statute of the International Criminal Court, art 8(2)(e).

Israel is not a signatory to the Rome Statute, and therefore does not accept the International Criminal Court's (ICC) jurisdiction. However, the prohibition on attacking civilian objects in international armed conflict is binding on Israel as customary international law and under Additional Protocol I.

The SRM lists an exception to the general prohibition on attacking civilian objects. This in itself supports the argument that, in general, customary international law prohibits attacking civilian objects. Article 67(a) of the SRM gives blockading states the right to stop, visit, search or capture merchant vessels breaching a blockade.¹³¹ If the merchant ship resists, the ship can be attacked. Article 67 indicates that, in general, stopping, searching, capturing or attacking non-military ships is contrary to international law and the law of the sea. The reason for the exception in article 67(a) is probably to prevent belligerents from receiving military supplies and provisions.

There is no similar exception, in the SRM or elsewhere, that allows the attacking, boarding or stopping of humanitarian aid vessels or passenger vessels, even in the enforcement of blockades. In fact, the SRM exempts *enemy* humanitarian aid vessels and passenger vessels from attack.¹³² If enemy humanitarian aid and passenger vessels are exempt from attack, certainly it must be unlawful to attack neutral third-party humanitarian aid and passenger vessels. Furthermore, blockading states are required to allow the free passage of food and medical supplies to civilian populations in blockaded areas.¹³³ In order for this to happen, humanitarian aid vessels must be protected.

The SRM does not define "attack", leaving it to common sense and factual analysis. In its efforts to stop and board the ships, the IDF used stun and smoke grenades, attempted to board from speedboats, fast-roped armed commandos onto the decks of ships, fired paintballs, bean-bag rounds and even used live fire.¹³⁴ There is little room for IDF actions to be defined as anything but an attack on the flotilla ships.

¹³¹ SRM, art 67(a): "*Merchant vessels flying the flag of neutral States may not be attacked unless... they are believed on reasonable grounds to be... breaching a blockade and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture.*"

¹³² SRM art 47 (c)(i) and art 47 (e).

¹³³ SRM, Article 103: "If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to:

(a) the right to prescribe the technical arrangements, including search, under which such passage is permitted; and
(b) the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross.

¹³⁴ Israel Report above at n 8 at [142]- [166]; Palmer Report above at n 18 at [113].

ii. Proportionality and the Use of Force

The rules of proportionality prohibit the incidental attack of civilians and civilian objects unless a “direct military advantage” outweighs the risk to civilians.¹³⁵ However, this would not be the case with the flotilla vessels. There is no argument made by Israel that it suspected the flotilla vessels were carrying weapons or were in any way a direct military threat. The only threat to Israel was a political one. The rules of proportionality do not extend to allowing states to attack civilian objects for the purpose of forwarding political motives or preventing a political movement from gaining power.

According to the Palmer Report, the flotilla ships were boarded about 64 nautical miles away from the blockaded area, in the darkness of early morning “without warning or consent” and treated as if they were an “immediate military threat”.¹³⁶ With virtually no assessment of proportionality, the Palmer Report concludes that this was “an excessive reaction to the situation.”¹³⁷

Perhaps the reason the Palmer Report does not assess proportionality is that there is no need to. Stopping, boarding and attacking the ships was not “incidental to”¹³⁸ a legitimate military attack as there was no military object to be attacked. Because the flotilla ships posed no military threat to Israel, Israel could therefore derive no “direct military advantage” from stopping, attacking or boarding the ships. Because there was no military gain, any harm caused to civilian objects must be disproportionate.

iii. Enforcing Blockades Against Civilian Vessels Carrying Aid

In order for a blockade to be legitimate it must be effective¹³⁹ and it must be applied to the vessels of all states.¹⁴⁰ On the face of it, the requirement to make a blockade effective would seem to allow the IDF forces to enforce it against the flotilla vessels. However, a state’s right to enforce a legitimate blockade is not absolute.

Blockades can only be enforced using “legitimate methods and means of warfare”.¹⁴¹ The type of enforcement that results in disproportionate use of force or breaches the prohibition on attacking civilian objects is not acceptable under international customary law, as is reflected in

¹³⁵ Protocol I, art 51(5)(b).

¹³⁶ The Palmer Report above at n 18 at [114].

¹³⁷ Ibid at [114].

¹³⁸ Protocol I, art 51(5)(b).

¹³⁹ SRM, art 95.

¹⁴⁰ SRM, art 100.

¹⁴¹ SRM, art 97.

the SRM. By attacking the flotilla vessels, the IDF forces were going beyond what international customary law allows in the enforcement of blockades.

Furthermore, blockading states are required to allow the free passage of certain vessels, such as vessels carrying aid to civilian populations in need.¹⁴² Regardless of whether the flotilla vessels were humanitarian aid vessels or activist vessels, they were carrying food and essential supplies to Gaza. The civilian population of Gaza is inadequately supplied with such basic necessities as food, building supplies, medical supplies and medical equipment.¹⁴³

Article 103 (a) does give Israel the right to search the vessels and “prescribe technical arrangements”. Prior to the flotilla ships attempting to sail for Gaza, Israel had given ships the option to deliver aid to a port in Israel and have the aid distributed from there. However, the right to prescribe technical arrangements cannot be stretched to include having humanitarian aid delivered to Israel, the occupying state.

By failing to allow the flotilla vessels free passage to deliver aid to Gaza, Israel breached customary international law reflected in article 103 of the SRM. The alternative offered by Israel was not a “technical arrangement... under which passage is permitted”¹⁴⁴ because it did not permit passage to Gaza. Blockading states cannot waive the requirement to allow the free passage of ships delivering aid by directing aid to be delivered to their own ports instead.

iv. Conclusion

Preventing the ships from accessing Gaza was contrary to customary international law, as reflected in article 103 of the SRM. The blockade was also enforced using illegitimate methods. The methods used by the IDF to enforce the blockade against the flotilla vessels were disproportionate and breached article 52 of Protocol I and the customary international law prohibition on attacking civilian objects.

¹⁴² SRM, art 103: If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to:

(a) the right to prescribe technical arrangements, including search, under which passage is permitted; and
(b) the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross.

¹⁴³ HRC Report above at n1 at [37] and [40].

¹⁴⁴ SRM, art 103 (a).

Use of Force on Board the Flotilla Vessels

If the blockade was illegal then it would be illegal for the IDF to use force, detain and kill any passengers. However, once again, I will consider whether the IDF actions were legal if the blockade was legal. Regardless of the legality of the blockade, Israel still must comply with international humanitarian law.

i. Use of Force Against Passengers

Civilians as Protected People

Civilians, humanitarian aid personnel and journalists are all afforded special protection under international humanitarian law.¹⁴⁵ Civilians, including journalists, lose this protection and become military objectives if they take part in hostilities.¹⁴⁶ Intentional attacks on civilians are prohibited and incidental attacks are illegitimate unless the loss or damage to civilians is proportionate to the direct military advantage.¹⁴⁷

The Palmer Report assessed the use of force employed by IDF soldiers and commandos on board the *Mavi Marmara* and concluded there was “no adequate explanation” for the nine deaths or level of force used on board the ship.¹⁴⁸ Although the Palmer Report does not go into detail on the applicable law, the Palmer Report’s disapproval of IDF actions is consistent with international humanitarian law.

It has been argued that some of the passengers on the *Mavi Marmara* took part in hostilities and so lost the protection offered by article 51 of Protocol I.¹⁴⁹ The main problem with this argument is that passengers were probably acting in self-defence. There is witness evidence that live shots were fired from the helicopters before IDF soldiers began to board.¹⁵⁰ If this was the case, or if passengers truly believed their lives to be at risk, they would have had a valid reason to take up

¹⁴⁵ Protocol I, art 51(2): “*The civilian population as such, as well as individual civilians, shall not be the object of attack.*” and Protocol I Art 79 paragraph: “*Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.*”

¹⁴⁶ Protocol I, art 51 (3) and Geneva Convention III art 4(4).

¹⁴⁷ Protocol I, art 51(2), art 51(4)(a) and art 51(5)(b).

¹⁴⁸ Palmer Report above at n 18 at [131].

¹⁴⁹ Israeli Report above at n 8 at [187],[188] and [190].

¹⁵⁰ Turkish Commission Interim Report (Turkish Report) (2010) at [114].

kitchen knives and chains¹⁵¹ to defend themselves. Despite the silence of Protocol I on the subject, civilians who take up arms in self-defence do not lose their civilian status.¹⁵²

Furthermore, not all the passengers on board the *Mavi Marmara* took up arms. Those who did not would certainly hold civilian status. On board the other ships, the passengers employed passive resistance techniques. Those passengers would certainly be protected by article 51.

Proportionality

The rules of *jus ad bellum* and Protocol I prohibit the IDF from attacking civilians if damage would be disproportionate to the “concrete and direct military advantage.”¹⁵³ The rule of proportionality applies whenever an attack could result in injury to civilians, even when some of those civilians have lost their civilian status. This raises the question: what was the military advantage for the IDF to attack civilians?

If the *Mavi Marmara* or its passengers had posed a direct military threat to IDF forces or to Israel then some use of force on board that ship may have been legitimate.¹⁵⁴ As it was, three IDF soldiers had been taken hostage after landing on the *Mavi Marmara*¹⁵⁵ and the soldiers landing on the deck feared for their lives.¹⁵⁶ Protecting the lives of soldiers could be viewed as a concrete and direct military advantage to Israel. However, this does not necessarily mean that firing on unarmed, wounded or fleeing civilians¹⁵⁷ were proportionate responses for the purposes of article 51(5)(b).

There might not have been any valid reason for IDF soldiers to be on board the *Mavi Marmara* in the first place. As concluded previously, there was no military advantage in attacking the ships and even stopping them was likely to have been illegitimate. Since Israel could not have

¹⁵¹ Palmer Report above at n 18 at [124].

¹⁵² Hector Olasolo *Unlawful Attacks in Combat Situations* (Martinus Nijhoff, Boston, 2008) at 107-108: “A similar question arises with regard to a group of Rwandan Hutus who decided to throw stones and knives at those members of the Interhamwe militia who are approaching them with machetes and sticks to kill them.”

¹⁵³ Protocol I, art 51(5)(b).

¹⁵⁴ Hector Olasolo *Unlawful Attacks in Combat Situations* (Martinus Nijhoff, Boston, 2008) at 108: “It is generally accepted that the use of arms or any other means to carry out acts of violence against personnel or materiel of the armed forces of the adverse party constitutes an active participation in the hostilities.”

¹⁵⁵ Israel Report above at n 8 at [135].

¹⁵⁶ *Ibid.* at [134]: Solider no. 2 is quoted saying: “I realized my life was in danger and they’re trying to kill me and throw me over in order to wipe me out. I felt that I was fighting for my life and that this was not a game of stopping a ship, but a battle for my life, and so I fought back hard.”

¹⁵⁷ Palmer Report above at n 18 at [126].

derived any military advantage from stopping the ships, boarding the ships or attacking passengers for the purpose of stopping the ships would be disproportionate.¹⁵⁸

Secondly, even if boarding were legitimate, the IDF should not have boarded if it was “clearly foreseeable” that “excessive incidental civilian damage” would be caused.¹⁵⁹ If soldiers had to fire onto the deck of the ship in order to board¹⁶⁰, they should not have boarded. This was also the conclusion of the HRC Report.¹⁶¹

Finally, on board the ships where passive resistance was practised there was no threat to IDF soldiers and therefore no direct military advantage in attacking passengers. In those cases there is no room for an assessment of proportionality. Instead, any use of force would be prohibited as attacks directed at individual civilians,¹⁶² journalists¹⁶³ or attacks with no military objective.¹⁶⁴

It is accepted that force was used against a number of passengers on the other ships.¹⁶⁵ This ranged from burning a female journalist with an electroshock weapon in order to confiscate photographic equipment,¹⁶⁶ firing at unarmed and unmoving passengers with rubber bullets,¹⁶⁷ beating the captain of the *Sfendoni* with the butt of a gun and electro-shocking him¹⁶⁸, punching and kicking men and women who refused to surrender their passports¹⁶⁹ and interrogating and beating a cameraman over a five-hour period because he would not surrender a video tape.¹⁷⁰

¹⁵⁸ Protocol I, art 51(5)(b).

¹⁵⁹ Hector Olasolo *Unlawful Attacks in Combat Situations* (Martinus Nijhoff, Boston, 2008) at 182. Referring to the *Galic Judgement*.

¹⁶⁰ The Palmer Report above at n 18 at [122] “*Photographs show bullet marks on the funnel of the vessel, which appear consistent with firing from above. The wounds of several of the deceased were also consistent with bullets being fired from above.*”

¹⁶¹ HRC Report above at n1 at [113].

¹⁶² Protocol I, art 51(2).

¹⁶³ Protocol I, art 79(1).

¹⁶⁴ Protocol I, art 51(4)(a).

¹⁶⁵ The Palmer Report above at n 18 at [137].

¹⁶⁶ HRC Report above at n1 at [138] (on board the *Challenger I*).

¹⁶⁷ *Ibid* at [137] (on board the *Challenger I*).

¹⁶⁸ *Ibid* at [144] (on board the *Sfendoni*).

¹⁶⁹ *Ibid* at [150] (on board the *Eleftheri Mesogios*).

¹⁷⁰ *Ibid* at [153] (on board the *M.V. Defne Y*).

Each of these incidents would be “indiscriminate” and thus a prohibited attack against civilians or journalists.¹⁷¹

Conclusion

Even if protecting soldiers was a reason for the IDF to use force on board the *Mavi Marmara*, it was disproportionate to fire on civilians and therefore a prohibited attack under article 51(5)(b) of Protocol I. Any attacks on or threats of violence towards the passengers of the other flotilla vessels would also be prohibited under Protocol I.

ii. Detention and Treatment of Passengers

With the exception of the passengers on board the *MV Gazze I* and the *MV Defne Y*, most passengers on board the flotilla vessels were tightly handcuffed with plastic ties and their movements on board restrained, including some that had suffered injuries.¹⁷² Throughout the 12-hour journey to the port of Ashdod, many of these passengers were made to stay on deck¹⁷³, prevented from going to the bathroom¹⁷⁴, restrained from eating and accessing medications¹⁷⁵, denied medical treatment¹⁷⁶ and generally treated with aggression by the IDF soldiers and commandos.

Unfortunately, this treatment of passengers by the IDF appears to reflect common practice. Israel has repeatedly been accused of using the above techniques, including excessively tightening handcuffs¹⁷⁷ and roughly shaking those being interrogated¹⁷⁸, when dealing with

¹⁷¹ Protocol I, art 51(4)(a), art 51(2) and art 79(1).

¹⁷² Palmer Report above at n 18 at [130].

¹⁷³ Ibid at [139]; and, Turkish Report above at n 150, Annex 5/4/ix, at 2 “The helicopter hovered above us for a long time and sprayed that salty Mediterranean sea water on us. The sun was burning us while at the same time we were freezing because of the wind generated by its blades.”

¹⁷⁴ Turkish Report above at n 150, Annex 5/3/vi, at 2 “When more people wanted to go to the toilet, they said they would take us one by one... supposedly they weren’t making any restrictions, however in a room full of 450 men, it was a *de facto* restriction.”; Annex 5/3/x, at 1 “They did not let us go to the bathroom. The elderly soiled themselves.”

¹⁷⁵ Ibid., Annex 5/3/v, at 2 “We asked for some food but we weren’t given any.”; Annex 5/5/xic, at 4 “We were not allowed to eat even though there were food for two months on the *Mavi Marmara*, and there was food cans where we were but we were not allowed to touch them.”

¹⁷⁶ The HRC Report above at n 1 at [141] (On board the Challenger 1) “The woman injured in the face in the initial stage of boarding was left unattended for an extended period, even though there was an army medic on board.” and at [146] (On board the Sfendoni) “The soldiers attempted to stop a medical doctor from treating the passengers’ injuries... the doctor said that they would have to shoot him to prevent him doing his job.”

¹⁷⁷ *Public Committee Against Torture v State of Israel* HCJ 5100/94 at [12].

¹⁷⁸ Ibid at [9].

detained Palestinians suspected of terrorism.¹⁷⁹ It can hardly surprise that IDF soldiers treated passengers in a similar manner on nearly all of the flotilla vessels.

While the Palmer Report concludes that these acts amounted to “significant mistreatment” of the passengers¹⁸⁰, the report does not discuss the international law implications of such mistreatment.

Inhumane and degrading treatment and other measures of brutality

Like the domestic law of many states, international law prohibits states from subjecting people to “torture or to cruel, inhuman or degrading treatment or punishment”¹⁸¹ and from arbitrarily arresting or detaining people.¹⁸² In international armed conflict the prohibition on torture goes a step farther and prohibits “any other measures of brutality” towards protected persons.¹⁸³ Because Israel has signed and ratified the International Covenant on Civil and Political Rights (ICCPR) and is bound by the Geneva Conventions, IDF soldiers would be required to treat civilians in accordance with these obligations.

Determining whether the acts done by the IDF to individual passengers amounted to torture or cruelty would require a close analysis of the facts in each case and an assessment of the reliability of witness statements and other evidence. However, on the face of it, some of the IDF soldier’s treatment of passengers would have breached article 32 of the Fourth Geneva Convention as well as the ICCPR and the Universal Declaration on Human Rights (UDHR). Beating or intentionally injuring passengers would likely constitute “any other measures of brutality”¹⁸⁴ while forcing people to urinate on themselves would probably be defined as “inhumane and degrading treatment”¹⁸⁵ rather than torture.

¹⁷⁹ *Public Committee Against Torture v State of Israel* HCJ 5100/94 at [9].

¹⁸⁰ Palmer Report above at n 18 at [137].

¹⁸¹ International Covenant on Civil and Political Rights (ICCPR), art 7; UN Universal Declaration on Human Rights (UDHR), art 5; and, Fourth Geneva Convention, art 32.

¹⁸² ICCPR, art 9(1).

¹⁸³ Fourth Geneva Convention, art 32.

¹⁸⁴ Fourth Geneva Convention, art 32.

¹⁸⁵ *Ibid*; ICCPR art 7; UDHR art 5.

Torture

Torture requires a specific purpose of inflicting “severe suffering or pain”¹⁸⁶, such as inflicting pain to extract a confession or obtain information. Most of the acts done by the IDF would probably not fall into this category, although some could. In one instance, an IHH Humanitarian Relief Foundation cameraman was detained for five hours in a small room, questioned repeatedly and beaten in order to persuade him to disclose the location of a videotape he had hidden.¹⁸⁷ If the beatings amounted to “severe suffering or pain”, this would be a classic example of torture.

Even if the IHH cameraman’s suffering was only moderate, Israeli law would still hold the interrogation to be illegal. In *Public Committee Against Torture v State of Israel*, the Israeli Supreme Court held that the use of even moderate “physical means” to aid interrogations was illegal¹⁸⁸ and that a “reasonable investigation” was one that was free of torture or “degrading handling whatsoever.”¹⁸⁹ If IDF soldiers were held accountable to their own domestic law, they would probably be found to have acted illegally.

Conclusion

Although an in-depth factual analysis would be required to assess Israel’s liability, it is likely that the acts done by the IDF on board the flotilla vessels breached international humanitarian law and possibly domestic Israeli law. Though most acts would not reach the high threshold of “torture”, many would constitute inhumane or degrading treatment or other measures of brutality.

iii. Deaths of Passengers

Regardless of whether the enforcement of the blockade was legal or not, the deaths of the passengers would still be wrongful under international law. As concluded previously, firing on the passengers of the *Mavi Marmara* was an illegitimate and disproportionate use of force and thus contrary to Protocol I.

International law further protects the lives of civilians. Article 32 of the Fourth Geneva Convention prohibits the “extermination” or “murder” of protected persons¹⁹⁰ and civilians are

¹⁸⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art 1(1). *Although Israel has not signed this convention, the definition is considered customary by the ICRC.*

¹⁸⁷ HRC Report above at n 1 at [153] (on board the *M.V. Defne Y*).

¹⁸⁸ *Public Committee Against Torture v State of Israel* H CJ 5100/94 at [38] “The individual GSS investigator - like any police officer - does not possess the authority to employ physical means which infringe upon a suspect’s liberty during the interrogation, unless these means are inherently accessory to the very essence of an interrogation and are both fair and reasonable.”

¹⁸⁹ *Ibid* at [23].

¹⁹⁰ The Fourth Geneva Convention, art 32.

protected persons. The killing of the nine passengers on board the *Mavi Marmara* would be illegal, excepting incidents of self-defence, such as if an IDF soldier was required to fire upon passengers to protect himself from imminent risk of serious harm. However, any argument that self-defence necessitated the killings seems remote. The Israeli Point of Contact for the Palmer Report does not advance this as an argument and instead notes that, due to the chaotic circumstances, it is difficult to identify how the nine passengers died.¹⁹¹

What can be identified is the location of the bullet wounds. Five of the deceased had been shot from behind, one while lying down, and seven were shot multiple times.¹⁹² All were unarmed.¹⁹³ For most of the deceased, any argument based on necessity or self-defence would seem highly improbable.

Conclusion

Even if the attacks on passengers were not unlawful under Protocol I, the killings of the nine passengers would be prohibited and unlawful under article 32 of the Fourth Geneva Convention.

Rights of Neutral Third-Party States to Protect their Flagships

On September 9, 2011, Turkey's Prime Minister Erdogan spoke with Al Jazeera saying that "Turkish warships will be tasked with protecting the Turkish boats bringing humanitarian aid to the Gaza Strip."¹⁹⁴ This statement highlights an important question. Do neutral third-party states have the right to protect their flagships and to what extent?

Enforcing the Blockade Against Military Vessels of Neutral States

Firstly, if the blockade is illegal, Israel would have no right to enforce it against Turkish ships. Turkish ships would have free passage in the exclusive economic zone¹⁹⁵, or farther than twelve miles away from the shore. At twelve miles away from the coast the territorial sea of Israel would begin, since if Gaza is occupied, its seas are also occupied. At that twelve mile point,

¹⁹¹ Palmer Report above at n 18 at [127].

¹⁹² Ibid at [128].

¹⁹³ Ibid.

¹⁹⁴ Al Jazeera and agencies, "Erdogan: Turkish Navy to Protect Gaza Aid", Al Jazeera English Online, 9 September 2011. Found at: <<http://english.aljazeera.net/news/europe/2011/09/201198225646614806.html>>.

¹⁹⁵ UNCLOS, art 45.

Turkey would have the right of innocent passage, as long as its purpose was not to enter the internal waters of Israel or Gaza.¹⁹⁶ This right of innocent passage applies to warships.¹⁹⁷

However, in all likelihood Israel will continue to enforce the blockade regardless of my conclusion that it is illegal. If it does, or if the blockade is in fact legal, Israel would have the right (or act on belief in the right) to enforce the blockade against foreign military ships. The flotilla vessels had a right of passage in blockaded zones because they were bringing humanitarian aid to the blockaded population.¹⁹⁸ This exception would not apply to any warships, unless those warships were bringing aid.

Self-Defence

The right to use force in self-defence as described in article 51 of the UN Charter is a customary international rule¹⁹⁹ and an exception to the prohibition on the use of force.²⁰⁰ It is possible that this would give Turkey the right to protect its citizens and flagships from attack by the IDF, regardless of the legality of the naval blockade.

In the *Oil Platforms Case* it was held that an attack on a state's flagship could be equivalent to an attack on the state itself.²⁰¹ This means that were Israel to attack a Turkish flagship again, Turkey would have the right to use force to defend itself. However, the right of self-defence would not be limited to fending off an attack on a Turkish flagship. If it was clear that an attack was imminent, the Turkish war ships could use force against Israeli vessels.

Anticipatory self-defence has been widely accepted as justifiable in international law.²⁰² Thus Turkey would not have to wait until its citizens and flagships were being attacked to protect them. For example, intercepting communications indicating that Israel planned to attack incoming flotilla vessels could be enough for Turkey to use force against Israeli vessels.²⁰³

¹⁹⁶ UNCLOS, art 19.

¹⁹⁷ USA/USSR Joint Statement on Uniform Acceptance of Rules of International Law Governing Innocent Passage 1989.

¹⁹⁸ SRM, art 103.

¹⁹⁹ *Caroline Case*, See: Malcom Shaw, *International Law* (6th ed 2008) at 1131.

²⁰⁰ The UN Charter, art 2(4).

²⁰¹ *The Oil Platforms (Iran v US)* case, ICJ Reports, 2003 at 191.

²⁰² Chatham House Principles on the Use of Force by States in Self-Defence (2006) 55 ICLQ, at p. 970: "*State practice in this field, including the recent practice of the Security Council, gives no support to the restriction of self-defence to action against armed attacks imputable to a State; indeed there is state practice the other way.*"

²⁰³ *Security Council Condemns, "In Strongest Terms" Terrorist Attacks on United States*, 4370th Meeting, SC/7143 (2001); SC Res 1386, S/RES/1386 (2001): examples of anticipatory self-defence being accepted by the UN.

However, the threat against Turkish ships would have to be imminent²⁰⁴ and any force used by Turkey would need to be proportionate to the threat, or it would be illegitimate.²⁰⁵

Obligation of Turkey (and Other States) to Intervene in Humanitarian Crisis Situations

Beyond the exception in article 51 of the UN Charter and without a Security Council Resolution, states cannot use force on other states, even for the purpose of intervening in humanitarian crisis situations.²⁰⁶ While states do have a responsibility towards a state that is “manifestly failing” to protect its population from “genocide, war crimes, ethnic cleansing and crimes against humanity”²⁰⁷ this responsibility is limited to using international legal mechanisms and processes provided by the UN. Furthermore, it is unlikely that the humanitarian situation in Gaza has reached a crisis point that would warrant the type of Security Council intervention seen in Libya earlier this year.²⁰⁸

In the absence of a Security Council decision authorising enforcement action by other states in Gaza, any ships sent by Turkey will have to carefully observe the fine line between self-defence and humanitarian intervention. Force used by Turkey can only be for self-defence and cannot be designed to intervene in Gaza or Israel. Diplomatic ties between Israel and Turkey are already strained. The illegitimate use of force could create a conflict between the two states.

Acceptability of Turkey Sending Warships in Light of the Palmer Report

The recent Palmer Report made several recommendations to Israel and other states and appears to be concerned with two competing objectives: protecting the safety of civilians who would breach the blockade and ensuring that humanitarian aid reaches Gaza.

For the first objective, the Palmer Report recommends that states “make every effort to avoid a repetition of the incident”²⁰⁹ and that states warn citizens of the risks of breaching the blockade.²¹⁰ By sending warships alongside aid vessels, Turkey would appear to be condoning rather than dissuading citizens from breaching the blockade. However, if citizens cannot be

²⁰⁴ Chatham House Principles on the Use of Force by States in Self-Defence (2006) 55 ICLQ p 966: “Force may be used in self defence only when this is necessary to bring an attack to an end or to avert an imminent attack.”

²⁰⁵ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)(Merits)* [1986] ICJ at para [176].

²⁰⁶ UN Charter, art 2(4).

²⁰⁷ *Implementing the Responsibility to Protect*, GA Res 63/677, A/63/677 (2009).

²⁰⁸ SC Res 1973, S/RES/1973 (2011): *established a no-fly zone over Libya, froze assets of various Libyan officials and demanded Libya comply with international humanitarian law.*

²⁰⁹ Palmer Report above at n 18 at [156].

²¹⁰ *Ibid* at [164].

stopped from breaching the blockade, Turkey sending warships to protect them would also help prevent a repetition of what happened in March 2010. To that extent, Turkey would be following the recommendations of the Palmer Report.

The Palmer Report also recommends that Israel follow its “obligation with respect to the provision of humanitarian assistance.”²¹¹ This obligation derives from customary international law, reflected in the SRM, that blockading states allow for the free passage of humanitarian aid.²¹² If Turkey did send warships to protect aid vessels, this could again be viewed as following that recommendation. In theory, Turkey sending warships alongside aid vessels could promote the objective of ensuring safety of flotilla passengers and providing Gaza with aid, as long as both Israel and Turkey adhered to international law.

In order to prevent conflict between Israel and Turkey, it would be advisable for aid vessels to treat the blockade as legal and allow Israeli officials to search the ships and prescribe technical arrangements, such as where in Gaza the goods should be delivered and how.²¹³ However, this right to prescribe does not extend to Israel distributing the aid themselves²¹⁴, or to aid being delivered in Israel rather than Gaza. If Israel seemed likely to use force against the aid vessels, the Turkish warships would be there to protect them.

Conclusion

Regardless of the legality of the blockade, Turkey and other states with flagships heading towards Gaza have a limited right of anticipatory self-defence that would allow them to protect their flagships. There is no right for states to intervene unilaterally in humanitarian situations in other states. However, sending warships for the purpose of self-defence could be a practical way to comply with the recommendations of the Palmer Report, to ensure aid reaches Gaza, and to protect civilians bringing humanitarian aid.

²¹¹ Palmer Report above at n 18 at [164].

²¹² SRM art 103: If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to:

(a) the right to prescribe technical arrangements, including search, under which passage is permitted; and
(b) the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross.

²¹³ SRM, art 103(a).

²¹⁴ SRM, art 103(b).

Chapter 4: Remedies

The Palmer Report seeks to heal the diplomatic tensions between Israel and Turkey by analysing the claims made and evidence adduced in the Turkish Report and the Israel Report, coming to a middle-ground and making recommendations. These recommendations are not binding and, as the Palmer Report itself acknowledges, the choice of whether or not to adopt them is left to Turkey and Israel.²¹⁵ Israel and Turkey have selectively adopted those parts of the report that coincide with their positions while disagreement on the legality of the blockade remains.

By taking an arbitration-style approach, the Palmer Report focuses on the disagreement between Turkey and Israel, rather than addressing the real legal issues behind that disagreement. Although steps must be taken to prevent the diplomatic stalemate between Turkey and Israel from escalating to conflict, the humanitarian situation in Gaza also needs to be addressed. The families of those killed on the *Mavi Marmara*, the civilians and journalists on board the flotilla vessels who were mistreated and all those who were illegally deprived of their liberty²¹⁶ deserve a remedy. And the legality or illegality of the blockade needs to be resolved.

Stopping the Blockade

If the blockade is illegal, serious persuasion would be required before Israel would cease enforcing the blockade. The most certain way to end the blockade, if it is illegal, would be for the Security Council to adopt a resolution to that effect. However, not all resolutions are created equal.

A Breach or Threat to the Peace or an Act of Aggression

Firstly, before any resolution can be adopted, the Security Council must determine that there is a threat to the peace, a breach of the peace or an act of aggression.²¹⁷ Article 39 of the UN Charter gives the Security Council the power to “determine” whether there is a threat to the peace. Only once this first step is met can the Security Council invoke articles 40 to 42 of the UN Charter and adopt a resolution.

The situation caused by the naval blockade warrants Security Council attention. If the blockade is unlawful, its enforcement could be a threat to the peace.²¹⁸ Freedom of the high seas is an

²¹⁵ The Palmer Report above at n18 at [165] “It will be up to the nations themselves whether to adopt what we recommend in this regard. No one can make them do so.”

²¹⁶ Many on board the vessels were also deprived of property. However, their remedy would be in private international law or civil remedies, not public international law, which is the focus of this analysis.

²¹⁷ UN Charter, art 39: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations...”.

²¹⁸ UN Charter, art 39.

important principle of customary international law. Acting in defiance of this principle impinges on states' ability to exercise this right. Furthermore, regardless of the blockade's legality, its enforcement in March 2010 outside the blockaded area, well in the area of the high seas, may in itself constitute a threat to the peace. The flotilla incident has largely contributed to a volatile diplomatic tension between Israel and Turkey.

Perhaps most importantly, the Security Council has already determined that the situation in Gaza constitutes a threat to the peace and has issued repeated resolutions in an attempt to achieve peace.²¹⁹ The most recent of these resolutions called for the "unimpeded provision" of humanitarian assistance in Gaza.²²⁰ A naval blockade that prevents aid ships from reaching Gaza only serves to aggravate an already "deepening humanitarian crisis."²²¹ It certainly does nothing to help Israel and Palestine reach a peaceful settlement.

If a threat to the peace is found to exist, the Security Council must make a resolution, although the provisions of a resolution can be recommendatory or mandatory.²²²

Recommendatory Resolution

Past Security Council resolutions regarding the Israel-Gaza conflict have been mostly recommendatory rather than mandatory. Resolutions incorporating such language as "calls for" or "calls upon" indicate that the provision is either recommendatory²²³ or a provisional measure.²²⁴ The purpose of provisional measures is to "prevent the aggravation"²²⁵ of a threat to the peace, while decisions are intended to "maintain or restore" peace and security.²²⁶

The Security Council has already "called for" the unimpeded provision of humanitarian assistance in Gaza and "called upon" member states to support international efforts to alleviate the humanitarian situation in Gaza.²²⁷ These appear to be recommendations rather than

²¹⁹ SC Res 242 (1967); SC Res 338 (1973); SC Res 1397 (2002); SC Res 1515 (2003); and SC Res 1850 (2008).

²²⁰ SC Res 1860, SC/1860 (2009) and SC Res 9567, SC/9567 (2009) found at: <<http://www.un.org/News/Press/docs/2009/sc9567.doc.htm>>.

²²¹ Ibid.

²²² UN Charter, art 39: "...shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

²²³ UN Charter, art 39.

²²⁴ UN Charter, art 40.

²²⁵ UN Charter, art 40.

²²⁶ UN Charter, art 39.

²²⁷ SC Res 1860, SC/1860 (2009) and SC Res 9567, SC/9567 (2009) found at: <<http://www.un.org/News/Press/docs/2009/sc9567.doc.htm>>

provisional measures, since article 39 of the UN Charter only allows for provisional measures to be made regarding “the parties concerned”, not member states in general.

The naval blockade could be seen as an example of Israel failing to comply with the recommendations made by the Security Council since 1967²²⁸ to ensure freedom of navigation, and more recently, to allow for the unhindered provision of aid. Even if the blockade were proportionate and legitimate, the manner in which it is being enforced is contrary to the Security Council’s recommendations.

Since Israel has already failed to comply with Security Council recommendations, it is unlikely that a further recommendatory resolution would have much effect.

Mandatory Resolutions

Article 41 of the UN Charter gives the Security Council the authority to adopt measures not involving the use of force. Failure to follow such decisions gives the Security Council the power to take enforcement action²²⁹, as recently happened in Libya.

A mandatory decision by the Security Council could be framed in such a way to ensure that enforcement of the blockade is stopped, if the blockade is illegal, or at least that it is enforced in a way that allows for humanitarian aid, if the blockade is otherwise lawful.

If Israel breached humanitarian law, how can Israel be reprimanded and reparations made to those who were wronged?

Dismantling the blockade pursuant to a Security Resolution would help prevent the reoccurrence of episodes like the flotilla incident and could serve as a reprimand to Israel. It may even offer some small consolation to those who lost family members on board the *Mavi Marmara*, and soothe the injuries to those wronged on board the other vessels.

²²⁸ SC Res 242 (1967) “2. Affirms further the necessity (a) For guaranteeing freedom of navigation through international waterways in the area.”

²²⁹ UN Charter, art 42.

Reparations

When a state contravenes international humanitarian law, and its acts cause harm, reparations should be made to those who suffered at the hands of the state.²³⁰ These reparations can take the form of restitution, compensation or satisfaction.²³¹

Restitution is only possible if the situation can be “restored” to the status quo as it was before the wrong was committed. For example, restitution would be available if property that was taken from passengers were to be returned to the passengers in undamaged condition.²³² Clearly, no restitution can be made to the passengers who were injured or the families of those who were killed. Instead, in those cases compensation could be paid to cover losses, much like civil law damages,²³³ or Israel could make an official apology for the wrongs done.²³⁴

The Palmer Report recommended that Israel pay compensation to those injured and to the family members of those killed and suggested that Israel make an “appropriate statement of regret”.²³⁵ This has not been done, despite the Turkish Prime Minister demanding that Israel follow the recommendations.²³⁶

If Israel does not voluntarily make reparation, there is little that can be done, save for the Security Council making a recommendation or decision under Chapter VII of the UN Charter, if the Security Council sees that there is a threat to the peace.

The diplomatic tension between Israel and Turkey has increased since the flotilla incident. Recently, the Turkish Prime Minister said in a public speech that the attack on flotilla vessels was “grounds for war”.²³⁷ It is certainly arguable that a threat to the peace exists. If the Security Council is reluctant to make a recommendation or decision that Israel cease the blockade, there are temporary steps that could be taken. The Security Council has the power to make

²³⁰ Permanent Court of International Justice, *Factory at Chorzow (Claim for Indemnity) case, (Germany v Poland), (Merits)*, PCIJ (ser.A) No. 17, 1928, 29.

²³¹ Emanuela-Chiara Gillard, “Reparations for violations of international humanitarian law” (IRRC September 2003) Vol 85 No 851 at 530.

²³² International Law Commission Articles on State Responsibility (ILC on State Responsibility), art 35.

²³³ ILC on State Responsibility, art 36.

²³⁴ ILC on State Responsibility (Satisfaction), art 37.

²³⁵ The Palmer Report above at n 18 at [169].

²³⁶ *Turkish PM says not to normalize ties with Israel until demands over deadly raid met*, Global Times, 26 September 2011, found at: <<http://www.globaltimes.cn/NEWS/tabid/99/ID/677030/Turkish-PM-says-not-to-normalize-ties-with-Israel-until-demands-over-deadly-ship-raid-met.aspx>>.

²³⁷ *Turkish PM: Gaza Flotilla Raid Was “Grounds for War”*, The Jerusalem Post, 12 September 2011, found at: <<http://www.jpost.com/DiplomacyAndPolitics/Article.aspx?id=237659>>

provisional recommendations, which is more of a preliminary measure.²³⁸ Pursuant to article 40 of the UN Charter, the Security Council could recommend that Israel pay compensation and apologise, as this would prevent “an aggravation of the situation.”²³⁹

²³⁸ UN Charter, art 40.

²³⁹ *Ibid.*

Chapter 5: Conclusions

The blockade is disproportionate and therefore illegal under international law. In assessing proportionality, the harm to the civilian population must be looked at as a whole. The combined harm the land blockade and naval blockade cause the civilian population in Gaza greatly outweigh any military advantage Israel derives from the naval blockade. Under the Oslo Accords, Israel already has the power to prevent missiles from being imported. The naval blockade is an unnecessary measure.

Regardless of the legality or illegality of the blockade, attacking and boarding ships and preventing them from accessing Gaza was contrary to international law. States which blockade other states or territories are required by customary international law to allow for the free passage of humanitarian aid to the civilian population, if that population is in need. The Gazan people are certainly in need of many basic essentials, such as food, medicine and building supplies. Israel is thus required to allow aid to enter Gaza directly. Routing aid through Israel, the occupying power, is not a legally acceptable alternative.

The flotilla vessels were protected as civilian objects, yet Israeli forces fired upon and forcibly boarded these ships. Attacking these ships was a prohibited attack under Additional Protocol I that clearly risked civilian life and offered no direct military advantage to Israel.

Once IDF were on board the vessels, illegitimate force was used against many of the passengers, in defiance of international humanitarian law. This force resulted in nine people being killed and many more being injured on the *Mavi Marmara*. On board the other vessels, passengers were illegally detained and mistreated. In some cases, the mistreatment may have constituted torture while many of the acts done to passengers constituted inhumane or degrading treatment.

The people wronged are entitled to reparation. Perhaps more important is that the Security Council make a decision to end or curtail the enforcement of the naval blockade. Doing so would not only ensure that humanitarian aid could reach the people of Gaza but it would also ensure tragedies like the flotilla incident do not reoccur as well as ease tensions between Turkey and Israel.

When it comes to the Gaza naval blockade, the law is uncertain, unenforced and heavily cloaked in political motives. However, if peace is a goal, international law needs to be clear and unequivocal. All parties must know what the rules are. And there needs to be a reason to play by them.

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