Strictly Confidential

Report of the Secretary-General's Panel of Inquiry

on the 31 May 2010 Flotilla Incident

July 2011

Sir Geoffrey Palmer, Chair

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1 Summary

On 31 May 2010 at 4.26 a.m. a flotilla of six vessels was boarded and taken over by Israeli Defense Forces 72 nautical miles from land. The vessels were carrying people and humanitarian supplies. The flotilla had been directed to change course by the Israeli forces who stated that the coast of Gaza was under a naval blockade. Nine passengers lost their lives and many others were wounded as a result of the use of force during the take-over operation by Israeli forces.

The Secretary-General established the Panel of Inquiry on the 31 May 2010 Flotilla Incident on 2 August 2010. The Panel received and reviewed reports of the detailed national investigations conducted by both Turkey and Israel. Turkey established a National Commission of Inquiry to examine the facts of the incident and its legal consequences, which provided an interim and final report to the Panel along with annexes and related material. Israel provided the report of the independent Public Commission that it had established to review whether the actions taken by the State of Israel had been compatible with international law.

The Panel reviewed these reports and further information and clarifications it received in written form and through direct meetings with Points of Contact appointed by each government. In light of the information so gathered, the Panel has examined and identified the facts, circumstances and context of the incident and considered and recommended ways of avoiding similar incidents in the future. In so doing it was not acting as a Court and was not asked to adjudicate on legal liability. Its findings and recommendations are therefore not intended to attribute any legal responsibilities. Nevertheless, the Panel hopes that its report may resolve the issues surrounding the incident and bring the matter to an end.

The Panel's Method of Work provided that the Panel was to operate by consensus, but where, despite best efforts, it was not possible to achieve consensus, the Chair and Vice-Chair could agree on any procedural issue, finding or recommendation. This report has been adopted on the agreement of the Chair and Vice-Chair under that procedure.

Facts, Circumstances and Context of the Incident

The Panel finds:

i. The events of 31 May 2010 should never have taken place as they did and strenuous efforts should be made to prevent the occurrence of such incidents in the future.

ii. The fundamental principle of the freedom of navigation on the high seas is subject to only certain limited exceptions under international law. Israel faces a real threat to its security from militant groups in Gaza. The naval blockade was imposed as a legitimate security measure in order to prevent weapons from entering Gaza by sea and its implementation complied with the requirements of international law.

iii. The flotilla was a non-governmental endeavour, involving vessels and participants from a number of countries.

iv. Although people are entitled to express their political views, the flotilla acted recklessly in attempting to breach the naval blockade. The majority of the flotilla participants had no violent intentions, but there exist serious questions about the conduct, true nature and objectives of the flotilla organizers, particularly IHH. The actions of the flotilla needlessly carried the potential for escalation.

v. The incident and its outcomes were not intended by either Turkey or Israel. Both States took steps in an attempt to ensure that events did not occur in a manner that endangered individuals' lives and international peace and security. Turkish officials also approached the organizers of the flotilla with the intention of persuading them to change course if necessary and avoid an encounter with Israeli forces. But more could have been done to warn the flotilla participants of the potential risks involved and to dissuade them from their actions.

vi. Israel's decision to board the vessels with such substantial force at a great distance from the blockade zone and with no final warning immediately prior to the boarding was excessive and unreasonable:

a. Non-violent options should have been used in the first instance. In particular, clear prior warning that the vessels were to be boarded and a demonstration of dissuading force should have been given to avoid the type of confrontation that occurred;

b. The operation should have reassessed its options when the resistance to the initial boarding attempt became apparent.

vii. Israeli Defense Forces personnel faced significant, organized and violent resistance from a group of passengers when they boarded the *Mavi Marmara* requiring them to use force for their own protection. Three soldiers were captured, mistreated, and placed at risk by those passengers. Several others were wounded.

viii. The loss of life and injuries resulting from the use of force by Israeli forces during the take-over of the *Mavi Marmara* was unacceptable. Nine passengers were killed and many others seriously wounded by Israeli forces. No satisfactory explanation has been provided to the Panel by Israel for any

of the nine deaths. Forensic evidence showing that most of the deceased were shot multiple times, including in the back, or at close range has not been adequately accounted for in the material presented by Israel.

ix. There was significant mistreatment of passengers by Israeli authorities after the take-over of the vessels had been completed through until their deportation. This included physical mistreatment, harassment and intimidation, unjustified confiscation of belongings and the denial of timely consular assistance.

How to Avoid Similar Incidents in the Future

The Panel recommends:

With respect to the situation in Gaza

i. All relevant States should consult directly and make every effort to avoid a repetition of the incident.

ii. Bearing in mind its consequences and the fundamental importance of the freedom of navigation on the high seas, Israel should keep the naval blockade under regular review, in order to assess whether it continues to be necessary.

iii. Israel should continue with its efforts to ease its restrictions on movement of goods and persons to and from Gaza with a view to lifting its closure and to alleviate the unsustainable humanitarian and economic situation of the civilian population. These steps should be taken in accordance with Security Council resolution 1860, all aspects of which should be implemented.

iv. All humanitarian missions wishing to assist the Gaza population should do so through established procedures and the designated land crossings in consultation with the Government of Israel and the Palestinian Authority.

General

v. All States should act with prudence and caution in relation to the imposition and enforcement of a naval blockade. The established norms of customary international law must be respected and complied with by all relevant parties. The San Remo Manual provides a useful reference in identifying those rules.

vi. The imposition of a naval blockade as an action in self-defence should be reported to the Security Council under the procedures set out under Article 51 of the Charter. This will enable the Council to monitor any implications for international peace and security.

vii. States maintaining a naval blockade must abide by their obligations with respect to the provision of humanitarian assistance. Humanitarian missions must act in accordance with the principles of neutrality, impartiality and humanity and respect any security measures in place. Humanitarian vessels should allow inspection and stop or change course when requested.

viii. Attempts to breach a lawfully imposed naval blockade place the vessel and those on board at risk. Where a State becomes aware that its citizens or flag vessels intend to breach a naval blockade, it has a responsibility to take pro-active steps compatible with democratic rights and freedoms to warn them of the risks involved and to endeavour to dissuade them from doing so.

ix. States enforcing a naval blockade against non-military vessels, especially where large numbers of civilian passengers are involved, should be cautious in the use of force. Efforts should first be made to stop the vessels by non-violent means. In particular, they should not use force except when absolutely necessary and then should only use the minimum level of force necessary to achieve the lawful objective of maintaining the blockade. They must provide clear and express warnings so that the vessels are aware if force is to be used against them.

Rapprochement

x. An appropriate statement of regret should be made by Israel in respect of the incident in light of its consequences.

xi. Israel should offer payment for the benefit of the deceased and injured victims and their families, to be administered by the two governments through a joint trust fund of a sufficient amount to be decided by them.

xii. Turkey and Israel should resume full diplomatic relations, repairing their relationship in the interests of stability in the Middle East and international peace and security. The establishment of a political roundtable as a forum for exchanging views could assist to this end.

2 Introduction

1. On 31 May 2010 at 4.26 a.m. a flotilla of six vessels was boarded and taken-over by Israeli Defense Forces 72 nautical miles from land. The vessels were carrying people and humanitarian supplies. The flotilla had been directed to change course by the Israeli forces on the grounds that the coast of Gaza was under a naval blockade. Nine passengers lost their lives and many others were wounded during the take-over operation.

2. The Secretary-General established the Panel of Inquiry on the 31 May 2010 Flotilla Incident on 2 August 2010. The Panel was formally convened in New York and received from the Secretary-General its Terms of Reference and Method of Work on 10 August 2010.

3. The tasks to be performed by the Panel were laid down by the Secretary-General in the Terms of Reference. They are:

> 2. The panel:
>
> (a) will receive and review interim and final reports of national investigations into the incident;
>
> (b) may request such clarifications and information as it may require from relevant national authorities.
>
> 3. In the light of the information so gathered the panel will:
>
> (a) examine and identify the facts, circumstances and context of the incident; and
>
> (b) consider and recommend ways of avoiding similar incidents in the future.
>
> 4. The panel will prepare a report including its findings and recommendations and submit it to the Secretary-General.

4. The manner in which the Panel was to carry out its task was set out in the Method of Work established by the Secretary-General. The Panel was to operate by consensus and the findings of the report and any recommendations it may contain were to be agreed by consensus. However, the Method of Work also provided that where, despite the best efforts of the Chair and Vice-Chair, it was not possible to achieve consensus among the members of the Panel, the Chair and Vice-Chair would agree. This report has been adopted on the agreement of the Chair and Vice-Chair under that procedure.

5. It needs to be understood from the outset that this Panel is unique. Its methods of inquiry are similarly unique. The Panel is not a court. It was not asked to make determinations of the legal issues or to adjudicate on liability.

6. In particular, the Panel's means of obtaining information were through diplomatic channels. The Panel enjoyed no coercive powers to compel witnesses to provide evidence. It could not conduct criminal investigations. The Panel was required to obtain its information from the two nations primarily involved in its inquiry, Turkey and Israel, and other affected States. The position is thoroughly understandable in the context of the Panel's inquiry but the limitation is important. It means that the Panel cannot make definitive findings either of fact or law. But it can give its view.

7. Nevertheless, the Panel had in front of it a range of material, including statements from 93 individuals that were appended to the Turkish report,[1] and excerpts of statements by IDF personnel engaged in the incident that were included in the Israeli report. In this regard, we stress again that the Panel is not a court. We have not personally heard the witnesses whose statements we have read. Nor are we able to make definite findings on each statement's reliability and credibility. They are more plausible on some aspects than others. But in certain areas, when viewed as a whole, we regard them as useful material for the purposes of the Inquiry.

8. The first stage in the Panel's work was to receive and review interim and final reports of the national investigations into the incident. The Government of Turkey provided an *Interim Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010*[2] to the Panel on 1 September 2010 with annexes and related material. This was the work of the Turkish Commission of Inquiry. The Government of Israel provided its final report on 23 January 2011. This comprised part one of the report of the *Public Commission to Examine the Maritime Incident of 31 May 2010 – The Turkel Commission*.[3] On 11 February 2011, the Government of Turkey submitted to the Panel the final report from its Commission of Inquiry, *Report of Turkish National Commission of Inquiry, February 2011*.[4]

9. The information for the Panel's work came primarily through its interactions with the Points of Contact designated by Israel and Turkey. It had no mandate to summon individuals nor was it empowered to approach individuals or organizations directly. It could only do so through the Points of Contact. The Points of Contact designated by Israel and Turkey were:

For Israel: Ambassador Yossi Gal, Director-General of the Ministry of Foreign Affairs of the State of Israel (up to 2 January 2011)

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1 *See* Turkish Commission Report, Annex 5.

2 Hereinafter "Turkish Commission Interim Report"; available online at http://www.mfa.gov.tr/data/Turkish%20Interim%20Report.pdf.

3 Hereinafter "Israeli Commission Report"; available online at http://www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf.

4 Hereinafter "Turkish Commission Report"; available online at http://www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf.

Mr. Rafael Barak, Acting Director General, Ministry of Foreign Affairs of the State of Israel (as of 3 January 2011)
Mr. Ehud Keinan, Legal Adviser, Ministry of Foreign Affairs of the State of Israel (as of 6 April 2011)
Mr. Daniel Taub, Principal Deputy Legal Adviser, Ministry of Foreign Affairs of the State of Israel (as of 12 April 2011)

For Turkey: Ambassador Mithat Rende, Director General for Multilateral Economic Affairs at the Ministry of Foreign Affairs of Turkey

10. After reviewing the reports of both national investigations, the Panel addressed a series of questions to each Point of Contact identifying further information or clarifications that it required. The Panel received written responses and additional material on 11 April 2011[5] and met with the Points of Contact for Turkey and Israel on 26 and 27 April 2011 respectively.[6]

11. It will be clear from the above that the essential logic of the Panel's inquiry is that it is dependent upon the investigations conducted by Israel and Turkey. Those two countries have quite separate and distinct legal systems and different methods of conducting their domestic inquiries into the present subject matter. Turkey established a National Commission of Inquiry in accordance with its domestic procedures that operated within the Turkish governmental system with prosecutors, governmental officials, police and others bringing together the material that has been put in front of us. Israel established an independent Public Commission headed by a retired Supreme Court Judge, Justice Turkel, with three other members and two distinguished foreign observers. Both investigations sought advice from specialist legal consultants.

12. What the Panel has done is to review the two national reports and identify where the differences over what happened arise. Where possible, we have tried to set out what is accepted as established by both Israel and Turkey, and where the areas of dispute lie. We set out what the Panel considers happened as far as that can be done on the information with which the Panel has been provided.

13. In relation to the relevant legal principles of public international law the position is similar. The Chair and Vice-Chair in the Appendix to this report set out their own account of what they believe to be the state of public international law as it applies to the incident. Both national investigations did the same. They differ as widely on the applicable law as they do on what actually happened.

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5 Hereinafter "Turkish POC Response of 11 April 2011" and "Israeli POC Response of 11 April 2011".

6 Hereinafter "Turkish POC Response of 26 April 2011" and "Israeli POC Response of 27 April 2011".

14. We observe that the legal views of Israel and Turkey are no more authoritative or definitive than our own. A Commission of Inquiry is not a court any more than the Panel is. The findings of a Commission of Inquiry bind no one, unlike those of a court. So the legal issues at large in this matter have not been authoritatively determined by the two States involved and neither can they be by the Panel.

15. The Panel will not add value for the United Nations by attempting to determine contested facts or by arguing endlessly about the applicable law. Too much legal analysis threatens to produce political paralysis. Whether what occurred here was legally defensible is important but in diplomatic terms it is not dispositive of what has become an important irritant not only in the relationship between two important nations but also in the Middle East generally. The Panel has been entrusted with some policy responsibilities and that was not the case with the domestic investigations whose reports we have received.

16. We are asked to make recommendations on how to avoid such incidents in the future. It is for this reason we travel in some broader directions than the national investigations. Both were directed to a limited set of issues. Those issues in the reports submitted to the Panel revolve primarily around the legality of the conduct judged against the standards of public international law and what the facts were. But the legal issues, while a necessary element of the Panel's analysis, alone are not sufficient. We must probe more widely. Were the actions taken prudent? Were there practical alternatives? In the wider context of the situation in the Middle East, are there steps that could be taken to improve the situation that the blockade deals with so that the existence of the blockade is no longer necessary? These are issues of importance to the wider international community.

17. The Panel has searched for solutions that will allow Israel, Turkey and the international community to put the incident behind them. The situation within the Middle East has been dramatically transformed within the short life of this Inquiry. A new diplomatic paradigm must be developed in order to move on. The Panel is particularly conscious of what the Secretary-General told us at the outset of our task. He told us that he counted on our leadership and commitment to achieve a way forward. Such is the purpose of everything that follows.

18. Beyond the question of the incident itself lies the wider set of issues of how to bring a lasting solution to the situation in Gaza and to grant its people and those of Israel the promise of normal daily lives. That is the ultimate prize upon which a sustainable future must rest for international peace and security.

TERMS OF REFERENCE
of the
Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident

Establishment of panel

1. In the light of the Statement of the President of the Security Council dated 1 June 2010 (S/PRST/2010/9), the Secretary-General has established a panel of inquiry on the incident that occurred on 31 May 2010.

Tasks

2. The panel:

(a) will receive and review interim and final reports of national investigations into the incident;
(b) may request such clarifications and information as it may require from relevant national authorities.

3. In the light of the information so gathered, the panel will:

(a) examine and identify the facts, circumstances and context of the incident; and
(b) consider and recommend ways of avoiding similar incidents in the future.

4. The panel will prepare a report including its findings and recommendations and submit it to the Secretary-General.

Composition of the panel

5. The panel, to be appointed by the Secretary-General, will be composed of a Chair, a Vice-Chair and one member each from Israel and Turkey, with recognized and relevant expertise.

Time Frame

6. The panel will hold its first meeting on 10 August 2010 at United Nations Headquarters in New York. It will hold such further meetings at United Nations Headquarters in New York as required. The panel will strive to submit its final report to the Secretary-General within six months taking into account the progress of the national

investigations. This timeline may be adjusted by the Secretary-General depending on the progress of the panel's work.

Location

7. The panel will be based at United Nations Headquarters in New York.

Secretariat

8. The UN Secretariat will provide secretariat services for the panel.

Dated: 10 August 2010
Place: New York

Vijay Nambiar
Chef de Cabinet
Executive Office of the Secretary-General
United Nations

METHOD OF WORK
of the
Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident

1. The panel will receive and review copies of the national investigations into the incident from Israel and Turkey.

2. Where the panel considers that it requires further information, clarifications or meetings from Israel and/or Turkey, it will make such request to the points of contact designated by those States.

3. Where the panel considers it necessary to obtain information from other affected States, it may request such information through appropriate diplomatic channels.

4. The Panel will conduct its work in a prompt, impartial, credible and transparent manner, in conformity with international standards.

5. The panel is to operate by consensus and the findings of the report and any recommendations it may contain are to be agreed by consensus. Where the members of the panel are unable to reach agreement on a procedural issue or on any finding or recommendation, the Chair and Vice-Chair will use their best efforts to try to secure consensus among the members of the panel on the procedural issue, finding or recommendation. Where, despite the best efforts of the Chair and Vice-Chair, it is not possible to achieve consensus among the members of the panel on a particular procedural issue, finding or recommendation, the Chair and Vice-Chair will agree on that procedural issue, finding or recommendation.

6. The UN Secretariat will provide secretariat services to the panel and will arrange for the provision of necessary administrative, logistic and security support, including transportation and accommodation.

7. The Archives and Records Management Section will provide records-management support to the panel.

8. The report of the panel shall be designated unclassified. The panel may attach confidential annexes to its report.

9. The panel shall take the necessary steps to ensure that all documents and materials provided to it on the understanding of confidentiality are marked "third party confidential' and that all necessary measures are taken to safeguard their confidentiality.

3 Summary of the Interim and Final Reports of Turkey's National Investigation

19. This chapter summarizes the central conclusions reached in the interim and final reports of the Turkish National Commission of Inquiry ("Turkish Commission") and outlines the material provided to the Panel in support of those conclusions.[7] The Turkish Commission included senior officials from the Office of the Prime Minister, the Ministries of Justice, Interior, Foreign Affairs, and the Under-Secretariat for Maritime Affairs. It reviewed verbal and written testimonies and other material including forensic evidence, carried out an on-site inspection of the vessels, and consulted with relevant authorities and international legal experts.[8]

The Blockade

20. The Turkish Commission does not accept that Israel's naval blockade is lawful and puts the term in quotation marks throughout its reports. Its conclusions with respect to the issue of the blockade can be summarized as follows. The restrictions imposed by Israel on goods entering Gaza by land, and the naval blockade over the waters off Gaza constitute a single "blockade".[9] The blockade has been continuously in force in fact at least since 2007, despite the changing descriptions given to it by Israel.[10]

21. The blockade was intended as a form of economic and political warfare.[11] It was not restricted to items that could be used against Israel, but also included ordinary consumer items with no security purpose.[12] As such, it has a disproportionate and punitive impact on the civilian population and has aggravated the humanitarian crisis in Gaza.[13]

22. The blockade has not been applied with any transparency or consistency. There is no accessible list specifying those items that are prohibited and those that are permitted to enter Gaza.[14] Apparently illogical distinctions have been drawn; for example, canned meat has been permitted, but canned fruit not.[15] There has also been an erratic approach

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7 The full text of the Turkish Commission Report and the Turkish Commission Interim Report are available online. *See supra* notes 2, 4.
8 Turkish Commission Report, at 10.
9 Turkish Commission Interim Report, at 39 and 68; Turkish Commission Report, at 64, 76-77.
10 Turkish Commission Interim Report, at 40 and 67; Turkish Commission Report, at 75-77.
11 Turkish Commission Interim Report, at 37; Turkish Commission Report, at 66-67, 74.
12 Turkish Commission Interim Report, at 36; Turkish Commission Report, at 72-73.
13 Turkish Commission Interim Report, at 37-38; Turkish Commission Report, at 68, 70-74.
14 Turkish Commission Interim Report, at 34-35; Turkish Commission Report, at 65-66.
15 Turkish Commission Interim Report, at 36, Turkish Commission Report, at 72-73.

to the interception of vessels, particularly prior to 2009, with at least six vessels entering Gaza without interception.[16]

23. On that basis, the Turkish Commission concludes that Israel's blockade is illegal, on the grounds that:[17]

(a) A blockade may only be imposed in a situation of international armed conflict and the State of Israel has never recognized Palestine as a State or its armed conflict with Hamas as an international one.[18]

(b) It did not comply with customary international law requirements regarding notification and enforcement set out in the San Remo Manual on International Law Applicable to Armed Conflicts at Sea[19] ("San Remo Manual"), because:

i. Israel did not adequately notify the "duration and extent" of the blockade. No list of the goods that were prohibited has been made publicly available and no end date has been specified;[20] and

ii. The blockade was not consistently enforced.[21]

(c) It was not reasonable, proportional or necessary, in breach of principles of international humanitarian law.[22] In this respect, the Turkish Commission relies on the rules set out in the San Remo Manual[23] and subsequent academic writings,[24] as well as data relating to the humanitarian situation in Gaza.[25]

(d) It amounts to the collective punishment of civilians in Gaza, in breach of Article 33 of the Fourth Geneva Convention.[26] In support of this conclusion, The Turkish Commission relies on statements by the United Nations High

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16 Turkish Commission Interim Report, at 38-39; Turkish Commission Report, at 75.
17 Turkish Commission Interim Report, at 33-43, 67-68; Turkish Commission Report, at 60-81, 116.
18 Turkish Commission Report, at 61-63.
19 SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995).
20 Turkish Commission Interim Report, at 33-35, 67; Turkish Commission Report, at 63-65.
21 Turkish Commission Interim Report, at 38-41; Turkish Commission Report, at 74-78.
22 Turkish Commission Interim Report, at 35-38, 51-53, 68; Turkish Commission Report, at 66-74.
23 *E.g,* Turkish Commission Report, at 68-69.
24 The Turkish Commission cites to the following articles: Michael G. Fraunces, *The International Law of Blockade: New Guiding Principles in Contemporary State Practice*, 101 YALE L.J. 893 (1992); Stephen C. Neff, *Towards a Law of Unarmed Conflict: A Proposal for a New International Law of Hostility*, 28 CORNELL INT'L L.J. 1 (1995); Matthew L. Tucker, *Mitigating Collateral Damage to the Natural Environment in Naval Warfare: An Examination of the Israeli Naval Blockade of 2006*, 57 NAVAL L. REV. 161.
25 Turkish Commission Report, at 74.
26 Turkish Commission Interim Report, at 41-42; Turkish Commission Report, at 78-81.

Commissioner for Human Rights, the United Nations Human Rights Council, and the International Committee of the Red Cross.[27]

(e) Israel is the Occupying Power in Gaza, and cannot blockade the borders of territory it occupies.[28] The Turkish Commission supports its conclusion that Israel remains the Occupying Power in Gaza by reference to various United Nations resolutions and documents,[29] decisions of Israel's Supreme Court[30] and academic opinion.[31]

The Flotilla

24. The Turkish Commission's account of the organization and purpose of the flotilla, which the Turkish Commission refers to as a "convoy", can be summarized as follows. The convoy had a purely humanitarian purpose and represented no security threat to Israel.[32] Its intention was to deliver humanitarian aid to the people of Gaza, responding to the call made by the United Nations Security Council in its resolution 1860 (2009) and a statement by a senior UNRWA official.[33] The convoy consisted of six vessels: *Mavi Marmara* (Comoros); *Sfendoni* (Togo); *Challenger I* (USA); *Gazze I* (Turkey); *Eleftheri Mesogeio* (Greece); *Defne-Y* (Kiribati).[34] Three of the vessels departed from Turkish ports: the *Mavi Marmara* left the Port of Istanbul on 22 May 2010, docked at the Port of Antalya on 25 May 2010, and departed on 28 May 2010 with a crew of 29 and 546 passengers; the *Gazze I* departed the Port of Iskenderun on 22 May 2010 with a crew of 13 and five passengers; and the *Defne-Y* departed the Port of Zeytinburnu, Istanbul, on 24 May 2010 with a crew of 13 and seven passengers.[35]

25. Those on board the vessels were civilians, including politicians, academics, journalists and religious leaders.[36] The vessels were carrying in excess of 10,000 tonnes of humanitarian supplies.[37] There were no guns or other weapons on board.[38] All passengers and baggage were thoroughly screened prior to boarding, and the ports that

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27 *See* Turkish Commission Interim Report, at 41-42, nn.187-190; Turkish Commission Report, at 78-81, nn.287-298.

28 Turkish Commission Interim Report, at 42-43; Turkish Commission Report, at 81-83.

29 Turkish Commission Report, at 81-82.

30 Turkish Commission Interim Report, at 42-43, nn.191-192; Turkish Commission Report, at 82, n.300.

31 The Turkish Commission cites to the following article: Mustafa Mari, *The Israeli Disengagement from the Gaza Strip: An End of the Occupation?*, 8 Y.B. INT'L HUMANITARIAN L. 356 (2005).

32 Turkish Commission Report, at 113.

33 Turkish Commission Interim Report, at 9; Turkish Commission Report, at 14.

34 Turkish Commission Interim Report, at 9; Turkish Commission Report, at 15, n.1.

35 Turkish Commission Interim Report, at 10; Turkish Commission Report, at 15-16.

36 Turkish Commission Interim Report, at 9; Turkish Commission Report, at 15.

37 Turkish Commission Interim Report, at 9; Turkish Commission Report, at 15.

38 Turkish Commission Interim Report, at 4; Turkish Commission Report, at 4, 113.

the vessels departed from were certified under the IMO International Ship and Port Facility Security Code.[39]

26. In support, Turkey has provided the Panel with:

- Cargo manifests for the *Mavi Marmara, Gazze I* and *Defne-Y*.[40]
- Passenger lists for the *Mavi Marmara, Gazze I* and *Defne-Y*.[41]
- Letters from the Governorships of Antalya and Istanbul Provincial Directorates for Security attesting to the screening procedures deployed at Turkish departure ports.[42]
- ISPS Code compliance certificates for the Turkish departure ports.[43]
- Written testimonies of 93 passengers and crew.[44]

27. In the Turkish Commission's account, there was a diplomatic understanding reached between Turkey and Israel that the vessels in the convoy would not force a breach of the blockade and would change their destination to the port of Al-Arish if necessary, and that Israel would refrain from using force against the vessels.[45] The Turkish Commission describes the exchange as follows:

> A number of diplomatic representations were carried out by Israeli authorities in Tel Aviv, Jerusalem and Ankara, demanding that Turkish authorities deny the convoy departure from Turkish ports, also insisting that, should the convoy sail on as planned, the aid be routed to Israel for inspection and subsequent delivery to its destination.
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> In reply, the Turkish authorities stressed the difficulties, in an open and democratic society, in preventing an NGO endeavor from lawfully departing Turkish ports. Nonetheless, the Turkish authorities pledged to inform the convoy's Turkish participants about the messages conveyed by Israel and to try to convince them to take the aid to Ashdod in Israel or to Al-Arish in Egypt. All these steps were taken prior to the departure of the convoy. The Turkish authorities also urged Israel repeatedly to act with maximum restraint and to avoid using force to intercept the vessels.
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> On 28 May 2010, the Undersecretary of the Turkish Ministry of Foreign Affairs told the US Ambassador in Ankara that contacts with the convoy's Turkish participants were starting to bear fruit, and that the IHH representatives agreed to eventually dock at Al-Arish. But the convoy would first try to approach the Gaza Strip and, if necessary, alter its course to Al-Arish. The Undersecretary also cautioned that Israel should act with maximum restraint and avoid using force by all means. He asked the US Ambassador to pass this message on to Israel. A few hours later,

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39 Turkish Commission Interim Report, at 4, 10; Turkish Commission Report, at 4, 15, 113.
40 Turkish Commission Report, Annexes 3/1-3/4.
41 Turkish Commission Report, Annexes 3/8, 4.
42 Turkish Commission Report, Annex 3/10.
43 Turkish Commission Report, Annex 3/6.
44 Turkish Commission Report, Annexes 5/1, 5/3-5/5.
45 Turkish Commission Interim Report, at 10-11; Turkish Commission Report, at 16-17.

the Director General of the Israeli Ministry of Foreign Affairs called the Undersecretary to express their accord to the above.[46]

28. The Turkish Commission concludes that the vessels in the flotilla were "humanitarian vessels" and so protected from attack under international humanitarian law.[47] On this point, the Turkish Commission relies primarily on the rules set out in the San Remo Manual.[48]

The Boarding and Take-Over of the Vessels

29. The Turkish Commission's account of the interception of the vessels, which it describes as an "attack", is as follows. In support of this account, Turkey has provided the Panel with:

- Written testimonies of 93 passengers and crew;[49]
- Autopsy reports of those killed;[50]
- Medical reports of 24 persons injured;[51]
- Report of forensic inspection of the *Mavi Marmara, Gazze I* and *Defne-Y*;[52]
- Unattributed video footage recorded by persons on board the vessels.[53]

30. The vessels were in international waters, 72 nautical miles from the coast and 64 nautical miles (approximately 5 hours sailing) from the blockade zone at the time of the attack.[54] The *Mavi Marmara* and other vessels received the first communication from the Israeli navy at approximately 10.30 p.m. on 30 May 2010 asking the vessels to identify themselves and their destination. The vessels responded by confirming the identity of the vessels and that their destination was Gaza. The vessels advised the number of passengers on board, and explained that they were unarmed civilians carrying only humanitarian aid not constituting any threat to Israel. Israeli naval forces then

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46 Turkish Commission Report, at 16-17.
47 Turkish Commission Interim Report, at 43-44, 53, 68; Turkish Commission Report, at 83-84, 100.
48 *Id.*
49 Turkish Commission Report, Annexes 5/1, 5/3-5/5.
50 Turkish Commission Report, Annex 1.
51 Turkish Commission Report, Annex 2.
52 Turkish Commission Report, Annexes 6, 10. However, the report notes that the *Mavi Marmara*, when returned after being held in Ashdod for 66 days, had been scrubbed down thoroughly, blood stains completely washed off, bullet holes painted over, ship records, Captain's log, computer hardware, ship documents seized, CCTV cameras smashed and all photographic footage withheld, *see* Turkish Commission Report, at 6.
53 Turkish Commission Interim Report, Annexes 7, 11.
54 Turkish Commission Interim Report, at 11; Turkish Commission Report, at 17, 113; Written testimony (Annexes 5/1/i, 5/3/xv); Positions on ship's chart (Annex 3/7).

cautioned the Captain and other vessels that the coast of Gaza was under a blockade zone, and directed them to change course.[55] The vessels responded that the convoy was in international waters and could not be directed to change course.[56]

31. At approximately 11.30 p.m., however, the Mavi Marmara did change course to a bearing of 185° directed towards the coast of Egypt.[57] The Mavi Marmara and other vessels continued to receive warnings from the Israeli navy but no demand was made to "stop, search and visit" the vessels.[58] From approximately 2.00 a.m. on 31 May 2010, Israeli naval vessels began to shadow the convoy.[59] Communications from Israeli authorities ceased from this point.[60] From approximately 4.00 a.m. satellite communications to and from the convoy vessels were blocked by Israeli authorities.[61] The report describes the passengers as subject to an ever-growing anxiety and fear during this period.[62]

32. At 4.32 a.m., Israeli forces launched the attack without prior warning when several speedboats drew alongside the *Mavi Marmara* and IDF personnel commenced an attempt to board the vessel.[63] The speedboats were shortly followed by combat helicopters. IDF personnel began firing on the *Mavi Marmara* from both the speedboats and helicopters before boarding had commenced.[64] This included the use of live fire (including automatic and semi-automatic weapon fire) as well as stun and smoke grenades, paintball guns and rubber bullets.[65] Two passengers were killed by shots from

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55 Turkish Commission Interim Report, at 12; Turkish Commission Report, at 18-19; Written testimony (Annexes 5/1/i, 5/3/xv, 5/4/v, 5/4/xxii, 5/5/iv, 5/5/v, 5/5/vi, 5/5/x, 5/5/xi).

56 Turkish Commission Interim Report, at 12; Turkish Commission Report, at 19; Written testimony (Annexes 5/1/i, 5/3/xv, 5/4/v, 5/4/xxii, 5/5/iv, 5/5/v, 5/5/vi, 5/5/x, 5/5/xi).

57 Turkish Commission Interim Report, at 12; Turkish Commission Report, at 19; Written testimony (Annexes 5/1/i, 5/3/xv, 5/4/v, 5/4/xliii, 5/4/xlv); Positions on ship's chart (Annex 3/7).

58 Turkish Commission Interim Report, at 12; Turkish Commission Report, at 19 and 113.

59 Turkish Commission Interim Report, at 12-13; Turkish Commission Report, at 20; Written testimony (Annexes 5/1/i, 5/3/xv, 5/4/v, 5/4/viii, 5/4/xviii, 5/4/x, 5/4/xii, 5/4/xiii, 5/4/xiv, 5/4/xl, 5/4/xli, 5/4/xlii, 5/4/x/xliii, 5/4/xliv, 5/4/xlv, 5/4/xvi, 5/4/xvii, 5/4/xx, 5/4/xxii, 5/4/xxiii, 5/4/xxix, 5/4/xxv, 5/4/xxviii, 5/4/xxxii, 5/4/xxxv, 5/4/xxxvi).

60 Turkish Commission Interim Report, at 13; Turkish Commission Report, at 20; Written testimony (Annexes 5/1/i, 5/3/xv, 5/4/xxviii, 5/5/x).

61 Turkish Commission Interim Report, at 13; Turkish Commission Report, at 20 and 113; Written testimony (Annexes 5/1/vi, 5/4/viii, 5/4/xix, 5/4/xxxii).

62 Turkish Commission Report, at 19.

63 Turkish Commission Interim Report, at 13; Turkish Commission Report, at 20; Written testimonies (Annexes 5/1/i, 5/1/vi, 5/1/viii, 5/3/xv, 5/4/vi, 5/4/xxviii, 5/4/xxxv, 5/4/xl, 5/5/ix); Video footage of zodiacs approaching the *Mavi Marmara* (Annex 7/1).

64 Turkish Commission Interim Report, at 13-15; Turkish Commission Report, at 20-23; Written testimonies (Annexes 5/1/i, 5/1/ii, 5/1/iv, 5/1/v, 5/1/vi, 5/1/viii, 5/1/xii, 5/3/i, 5/3/ii, 5/3/iii, 5/3/iv, 5/3/v, 5/3/vii, 5/3/viii, 5/3/x, 5/3/xv, 5/3/xvi, 5/3/xviii, 5/3/xxiii, 5/4/vii, 5/4/ix, 5/4/x, 5/4/xii, 5/4/xv, 5/4/xviii, 5/4/xxvi, 5/4/xxix, 5/4/xxxi, 5/4/xxxiii, 5/4/xxxv, 5/4/xxxvi, 5/4/xxxvii, 5/4/xxxix, 5/4/xl, 5/4/xli, 5/4/xlv, 5/5/xv, 5/5/xvi, 5/5/xvii); Video footage (Annexes 7/1, 7/3, 7/6-7/7).

65 Turkish Commission Interim Report, pages 13-15; Turkish Commission Report, at 20-23; Written testimonies (Annexes 5/1/i, 5/1/ii, 5/1/iv, 5/1/v, 5/1/vi, 5/1/xii, 5/1/viii, 5/3/i, 5/3/ii, 5/3/iii, 5/3/iv, 5/3/v, 5/3/vii, 5/3/viii, 5/3/x, 5/3/xv, 5/3/xvi, 5/3/xviii, 5/3/xxiii, 5/4/vii, 5/4/ix, 5/4/x, 5/4/xii,

the helicopters before the first soldiers had boarded the vessel.[66] The Captain immediately changed the vessel's course to the open sea on a bearing of 270°, but Israeli naval frigates approached the vessel from the starboard bow and forced the convoy to turn back towards Israeli waters.[67] Passengers on board the *Mavi Marmara* panicked and acted in self-defence to prevent the IDF personnel from boarding the vessel. Passengers threw plastic bottles, waste bins and chairs at IDF personnel attempting to board from the speedboats, and physically overpowered the first three soldiers to rappel onto the vessel from the helicopters but no guns or other weapons were used.[68]

33. The Turkish Commission concludes that IDF personnel used excessive force both before and after boarding.[69] There was indiscriminate shooting, including from the helicopters. There were also targeted attacks on individuals who did not represent a threat to IDF personnel, including injured. The attacks continued even after attempts were made to surrender and a multilingual surrender announcement was made over the ship's public address system.[70] Disproportionate weaponry was used, including widespread use of paintball guns and live fire from automatic and semi-automatic weapons.[71]

5/4/xv, 5/4/xviii, 5/4/xxvi, 5/4/xxix, 5/4/xxxi, 5/4/xxxiii, 5/4/xxxv, 5/4/xxxvi, 5/4/xxxvii, 5/4/xxxix, 5/4/xl, 5/4/xli, 5/4/xlv, 5/5/xv, 5/5/xvi, 5/5/xvii); Video footage (Annexes 7/1, 7/3, 7/6-7/7).

66 Turkish Commission Interim Report, at 14, 64; Turkish Commission Report, at 23; Written testimonies (Annexes 5/1/iv, 5/3/iii, 5/5/xiii, 5/5/xvi, 5/5/xvii).

67 Turkish Commission Interim Report, at 13; Turkish Commission Report, at 21; Written testimony (Annexes 5/1/i, 5/3/xv).

68 Turkish Commission Interim Report, at 14; Turkish Commission Report, at 22; Written testimonies (Annexes 5/1/i, 5/1/ii, 5/1/iv, 5/1/vi, 5/1/viii, 5/3/i, 5/3/ii, 5/3/iii, 5/3/x, 5/3/xi, 5/3/xvi, 5/3/xxii, 5/4/vii, 5/4/x, 5/4/xxvii, 5/4/xxviii, 5/5/xii, 5/5/xvi, 5/5/xvii).

69 Turkish Commission Interim Report, at 13, 64; Turkish Commission Report, at 21-26.

70 Turkish Commission Interim Report, at 13-16, 64; Turkish Commission Report, at 25-26, 28; Written testimonies (Annexes 5/1/i, 5/3/iii, 5/1/iv, 5/1/v, 5/1/vi, 5/1/x, 5/1/xi, 5/3/i, 5/3/ii, 5/3/iv, 5/3/v, 5/3/vi, 5/3/vii, 5/3/viii, 5/3/ix, 5/3/x, 5/3/xiii, 5/3/xxi, 5/4/vi, 5/4/vii, 5/4/viii, 5/4/x, 5/4/xv, 5/4/xvii, 5/4/xviii, 5/4/xix, 5/4/xxvi, 5/4/xxix, 5/4/xxxi, 5/4/xxxiv, 5/4/xxxv, 5/4/xxxvi, 5/4/xxxvii, 5/4/xli, 5/4/xlii, 5/4/xliii, 5/5/xv, 5/5/xvii); Unattributed video interviews (Annex 7/26-7/27); Video footage (Annex 7/4); Report of physical inspection of *Mavi Marmara*, *Gazze I* and *Defne-Y* (Annexes 5/2, 6).

71 Turkish Commission Interim Report, at 13-16, 64; Turkish Commission Report, at 21-26; Written testimonies (Annexes 5/1/i, 5/1/iv, 5/1/v, 5/1/vi, 5/1/x, 5/1/xi, 5/3/i, 5/3/ii, 5/3/iii, 5/3/iv, 5/3/vi, 5/3/vii, 5/3/viii, 5/3/ix, 5/3/x, 5/3/xiii, 5/3/xxi, 5/4/ii, 5/4/iv, 5/4/v, 5/4/vi, 5/4/vii, 5/4/viii, 5/4/ix, 5/4/x, 5/4/xi, 5/4/xii, 5/4/xv, 5/4/xvii, 5/4/xviii, 5/4/xix, 5/4/xxiv, 5/4/xxv, 5/4/xxvi, 5/4/xxvii, 5/4/xxix, 5/4/xxxi, 5/4/xxxii, 5/4/xxxiii, 5/4/xxxv, 5/4/xxxvi, 5/4/xxxvii, 5/4/xxxix, 5/4/xl, 5/4/xli, 5/4/xlii, 5/4/xlv, 5/5/iii, 5/5/xv, 5/5/xvii); Unattributed video interviews (Annexes 7/26-7/27); Video footage (Annex 7/4); Report of physical inspection of *Mavi Marmara*, *Gazze I* and *Defne-Y* (Annexes 5/2, 6).

34. As a consequence nine passengers were killed. Turkish autopsy reports concluded that five of the deceased were shot in the head at close range.[72] The Turkish Commission describes those killed as follows:

- Furkan Doğan received five gunshot wounds in the back of his head, nose, left leg, left ankle and in the back, all from close range. A citizen of the United States, Mr. Doğan was a 19-year-old high school student with ambitions of becoming a medical doctor. Mr. Doğan's motionless, wounded body was kicked and shot upon, execution-style by two Israeli soldiers.

- Cengiz Akyüz received four gunshot wounds, in the back of his head, right side of his face, the back and the left leg. Mr. Akyüz was married and a 41-year-old father of three.

- Ali Haydar Bengi received a total of six gunshot wounds, in the left side of his chest, belly, right arm, right leg and twice in the left hand. Mr. Bengi was married, a 39-year-old father of four.

- İbrahim Bilgen received four gunshot wounds, in the right temple, right chest, right hip and back. Mr. Bilgen was married, 61-year-old father of six, who worked as an electrical engineer.

- Cevdet Kılıçlar, a photographer, was killed by a single distant shot to the middle of the forehead. He was shot most probably with a laser-pointer rifle. Mr. Kılıçlar was married, 38-year-old father of two.

- Cengiz Songür was killed by a single gunshot wound in the front of the neck. He was a 47-year-old textile worker, married and the father of seven.

- Necdet Yıldırım received two gunshot wounds in the right shoulder and left back. He was 32-years-old, married, father of one.

- Çetin Topçuoğlu was killed by three gunshot wounds in the back of the head, the hip and the belly. He was 54-years old, married and a father of one.

- Fahri Yaldız was killed by four gunshot wounds: left chest, left leg and twice in the right leg. He was 43 years-old, married and father of four, and worked as a fire-fighter.[73]

35. In addition, there were widespread injuries to other passengers from different nationalities, many serious, including broken bones, and internal injuries requiring surgery.[74] One passenger remains in a coma.[75] IDF personnel deliberately prevented passengers from providing first aid to the injured despite repeated requests, resulting in additional casualties.[76]

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72 Turkish Commission Interim Report, at 16; Turkish Commission Report at 26-28, 114 and Autopsy reports (Annex 1).

73 Turkish Commission Report, at 27-28.

74 Turkish Commission Interim Report, at 17-18; Turkish Commission Report, at 29-31; Medical reports of injured passengers on return to Turkey (Annex 2).

75 Turkish Commission Report, at 29.

76 Turkish Commission Interim Report, at 18; Turkish Commission Report, at 30; Written testimonies (Annexes 5/1/i, 5/1/iii, 5/1/vi, 5/1/x;, 5/1/xi, 5/3/iv, 5/3/vi, 5/3/xiii, 5/3/xv, 5/3/xxii,

36. Although the Turkish Interim Report focuses primarily on the boarding of the *Mavi Marmara*, it also briefly addresses the take-over of the other vessels in the convoy. In the Turkish Commission's account, there was also disproportionate force used in boarding those vessels, particularly the *Sfendoni* and *Challenger-I*, also resulting in injuries.[77]

37. The Turkish Commission concludes that Israel's actions in boarding the vessels were illegal under international law[78] on the grounds that:

(a) They breached the principle of the freedom of the high seas and its component that a foreign flagged vessel may not be boarded on the high seas without the consent of the flag State.[79] In this respect, the Turkish Commission relies on rules of customary international law reflected in the 1958 High Seas Convention and the 1982 UN Convention on the Law of the Sea.

(b) They breached the fundamental prohibition on the use of force by States, which the Turkish Commission asserts does not permit the interdiction of vessels on the high seas unless a State is under imminent threat or actual armed attack.[80] In this respect, the Turkish Commission relies on Article 51 of the United Nations Charter, the decision of the International Court of Justice in the *Nicaragua* case,[81] and customary international law.

(c) Israel's blockade was illegal under the rules of international humanitarian law and therefore did not provide a legal basis for Israel to board the vessels.[82]

(d) The vessels in the convoy were "humanitarian vessels" and so protected from attack under international humanitarian law.[83] On this point, the Turkish Commission relies on the rules set out in the San Remo Manual.[84]

(e) The force used to take over the vessels was unnecessary, disproportionate and failed to take account of the fact that those on board the vessels were civilians.[85] IDF personnel did not attempt to stop the vessels by non-lethal

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5/3/xxiv, 5/4/ii, 5/4/vi, 5/4/xxiii, 5/4/xxv, 5/4/xxvi, 5/4/xxvii, 5/4/xxxi, 5/4/xxxiii, 5/4/xxxvii, 5/4/xxxix, 5/4/xlii, 5/5/xii, 5/5/xiv, 5/5/xvii); Unattributed video interview (Annex 7/26).

77 Turkish Commission Interim Report, at 18-21; Turkish Commission Report, at 31-35; Written testimonies (Annexes 5/4/iii, 5/4/xiii, 5/4/xiv, 5/4/xvi, 5/4/xxii, 5/5/i, 5/5/ii, 5/5/iv, 5/5/v, 5/5/vi, 5/5/vii, 5/5/viii, 5/5/ix, 5/5/x, 5/5/xi and Annex 5/5/xviii).

78 Turkish Commission Interim Report, at 66-68; Turkish Commission Report, at 117.

79 Turkish Commission Interim Report, at 26-31, 66-67; Turkish Commission Report, at 51-57.

80 Turkish Commission Interim Report, at 31-33, 67; Turkish Commission Report, at 58-60.

81 Turkish Commission Interim Report, at 32, n.139; Turkish Commission Report, at 59, n.227.

82 Turkish Commission Interim Report, at 33-43, 67-68; Turkish Commission Report, at 60-83; *see also supra* at ¶ 23.

83 Turkish Commission Interim Report, at 43-44, 53; Turkish Commission Report, at 83-84, 98.

84 *Id.*

85 Turkish Commission Interim Report, at 44-57, 63-64; Turkish Commission Report, at 86-87, 99-104.

means.[86] Once the risk to civilians on board the vessels became clear, IDF personnel were under an obligation to abort the boarding attempt and to consider alternative options.[87] In this respect, the Turkish Commission relies upon principles of international humanitarian law,[88] the decision of the International Tribunal for the Law of the Sea in the *M/V Saiga* case,[89] the San Remo Manual,[90] State practice in relation to the enforcement of blockades,[91] and academic opinion.[92]

38. On the grounds that the boarding of the vessels was illegal, the Turkish Commission also concludes that "as a general principle of law" any physical resistance shown by passengers on the *Mavi Marmara* was in the legitimate exercise of the legal right of self-defence.[93]

The Treatment of those Detained

39. The Turkish Commission's account of the incident after IDF personnel had seized control of the vessels in the convoy can be summarized as follows. In support of this account, Turkey has provided the Panel with the written testimonies of 93 passengers and crew as well as unattributed video footage.[94]

40. There was significant mistreatment of those on board the vessels in the aftermath of the take-over.[95] Passengers were detained on board the vessels and subjected to physical mistreatment and psychological abuse, including:[96]

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86 Turkish Commission Interim Report, at 46-49, 68-69; Turkish Commission Report, at 90-95.

87 Turkish Commission Interim Report, at 44-46 and 56-57; Turkish Commission Report, at 88-90.

88 In particular the prohibition against the targeting of civilians.

89 Turkish Commission Interim Report, at 44, n.197; Turkish Commission Report, at 87, n.307.

90 Turkish Commission Interim Report, at 44-45; Turkish Commission Report, at 88-89.

91 Turkish Commission Interim Report, at 49-53; Turkish Commission Report, at 95-99.

92 The Turkish Commission cites the following book: DOUGLAS GUILFOYLE, SHIPPING INTERDICTION AND THE LAW OF THE SEA (2009).

93 Turkish Commission Interim Report, at 55-56; Turkish Commission Report, at 84-86.

94 Turkish Commission Report, Annexes 5/1, 5/3-5/5, 7, 11.

95 Turkish Commission Interim Report, at 21-25, 57-60, 64-66; Turkish Commission Report, at 35-50, 115.

96 Turkish Commission Interim Report, at 57-60, 64-65; Turkish Commission Report, at 35-39, 109, 115; Written testimonies (Annexes 5/1/i, 5/1/ii, 5/1/iii, 5/1/iv, 5/1/v, 5/1/vi, 5/1/vii, 5/1/viii, 5/1/ix, 5/1/x, 5/1/xi, 5/1/xii, 5/3/ii, 5/3/iii, 5/3/v, 5/3/vi, 5/3/vii, 5/3/viii, 5/3/ix, 5/3/x, 5/3/xi, 5/3/xii, 5/3/xiv, 5/3/xvi, 5/3/xvii, 5/3/xviii, 5/3/xx, 5/3/xxi, 5/3/xxii, 5/3/xxiii, 5/3/xxiv, 5/4/ii, 5/4/iv, 5/4/v, 5/4/vi, 5/4/vii, 5/4/viii, 5/4/ix, 5/4/x, 5/4/xi, 5/4/xii, 5/4/xiii, 5/4/xv, 5/4/xvii, 5/4/xviii, 5/4/xix, 5/4/xx, 5/4/xxi, 5/4/xxii, 5/4/xxiii, 5/4/xxiv, 5/4/xxv, 5/4/xxvi, 5/4/xxvii, 5/4/xxviii, 5/4/xxix, 5/4/xxx, 5/4/xxxi, 5/4/xxxii, 5/4/xxxiii, 5/4/xxxv, 5/4/xxxvi, 5/4/xxxvii, 5/4/xxxix, 5/4/xl, 5/4/xli, 5/4/xlii, 5/4/xliii, 5/4/xliv, 5/4/xlv, 5/5/i, 5/5/ii, 5/5/ix, 5/5/x, 5/5/xi, 5/5/xxii, 5/5/xiv, 5/5/xv, 5/5/xvi, 5/5/xvii, 5/5/xviii); Video footage showing handcuffed passengers, including injured passenger on stretcher (Annexes 7/20, 7/22).

- Indiscriminate and overly-tight handcuffing of passengers, including the injured.
- Pushing, shoving, kicking and beating;
- Denial of bathroom access, including to sick and elderly;
- Verbal harassment and intimidation;
- Prolonged and unnecessary exposure to elements on deck of *Mavi Marmara*.

41. The mistreatment continued once the vessels had docked at the Israeli port of Ashdod and passengers had been disembarked. Passengers were taken to a specially prepared detention area for processing, with some also transferred to prison facilities prior to deportation. During this period up until their deportation, in the Turkish Commission's account, passengers were:[97]

- Pushed, shoved, kicked and beaten, with numerous cases of severe beatings at Ben Gurion airport;
- Subjected to verbal and physical harassment, intimidation and humiliation;
- Interrogated, with interrogations secretly filmed without consent. Edited video footage was released, providing a distorted picture of what was said;
- Forced to sign incriminating statements to the effect that they had illegally entered Israel, such statements often provided only in Hebrew without translation;
- Strip-searched or inappropriately frisked, including strip-searching of women in front of male personnel;
- Exposed to crowded and very hot or very cold conditions when transported to/from prison detention;
- Provided with limited food and water and subjected to sleep deprivation when in prison detention;

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97 Turkish Commission Interim Report, at 21-25, 45-48, 60; 64-66; Turkish Commission Report, at 39-50, 115; Written testimonies (Annexes 5/1/i, 5/1/ii, 5/1/iii, 5/1/iv, 5/1/v, 5/1/vi, 5/1/vii, 5/1/viii, 5/1/ix, 5/1/x, 5/1/xi, 5/1/xii, 5/1/xiii, 5/3/ii, 5/3/iii, 5/3/iv, 5/3/v, 5/3/vi, 5/3/vii, 5/3/viii, 5/3/ix, 5/3/x, 5/3/xi, 5/3/xii, 5/3/xiv, 5/3/xvi, 5/3/xvii, 5/3/xviii, 5/3/xx, 5/3/xxi, 5/3/xxii, 5/3/xxiii, 5/3/xxiv, 5/4/ii, 5/4/iii, 5/4/iv, 5/4/v, 5/4/vi, 5/4/vii, 5/4/ix, 5/4/xi, 5/4/xii, 5/4/xiii, 5/4/xiv, 5/4/xv, 5/4/xvi, 5/4/xvii, 5/4/xviii, 5/4/xix, 5/4/xx, 5/4/xxi, 5/4/xxii, 5/4/xxiii, 5/4/xxiv, 5/4/xxv, 5/4/xxvi, 5/4/xxvii, 5/4/xxviii, 5/4/xxix, 5/4/xxx, 5/4/xxxi, 5/4/xxxii, 5/4/xxxiii, 5/4/xxxv, 5/4/xxxvi, 5/4/xxxvii, 5/4/xxxix, 5/4/xl, 5/4/xli, 5/4/xlii, 5/4/xliii, 5/4/xliv, 5/4/xlv, 5/5/i, 5/5/ii, 5/5/iii, 5/5/iv, 5/5/v, 5/5/vi, 5/5/vii, 5/5/viii, 5/5/ix, 5/5/x, 5/5/xi, 5/5/xii, 5/5/xiv, 5/5/xv, 5/5/xvi, 5/5/xvii, 5/5/xviii).

- Placed in dirty and overcrowded detention facilities, with some also placed in isolation;
- Denied access to consular or legal representatives;
- With discriminatory treatment shown towards Muslim and Arab passengers.

42. Passengers' belongings were searched and personal property was seized, particularly cameras, video-cameras, cell-phones, laptops, MP3 players and other recording devices,[98] in a deliberate attempt to destroy evidence.[99] Some passengers also reported seizure of cash, watches, jewelry and clothing.[100] Only some of the goods seized have been returned, and much of that which has been returned was damaged or incomplete.[101]

43. The Turkish Commission concludes that there were a series of human rights violations on the part of Israeli authorities, including:[102]

(a) Right to liberty and security and freedom from arbitrary arrest or detention as set out in Article 9 of the International Covenant on Civil Political Rights ("ICCPR") and Article 5 of the European Convention on Human Rights ("ECHR");

(b) Torture or cruel, inhuman or degrading treatment as prohibited by Article 7 of the ICCPR, the Convention Against Torture, and Article 3 of the ECHR;

(c) Right to property as set out in Article 17 of the Universal Declaration of Human Rights and Article 1 of the ECHR First Protocol;

(d) Due process, including access to legal and consular assistance and the right not to be compelled to confess guilt as set out in Article 14 of the ICCPR;

(e) Discrimination on the grounds of race, religion, or national origin as prohibited by Article 2 of the ICCPR and Article 14 of the ECHR.

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98 Turkish Commission Interim Report, at 25; Turkish Commission Report, at 49; Written testimonies (Annexes 5/1/i, 5/1/ii, 5/1/iv, 5/1/v, 5/1/vi, 5/1/vii, 5/1/viii, 5/1/ix, 5/1/x, 5/1/xi, 5/3/ii, 5/3/iii, 5/3/iv, 5/3/v, 5/3/vi, 5/3/vii, 5/3/ix, 5/3/x, 5/3/xi, 5/3/xii, 5/3/xiv, 5/3/xv, 5/3/xvi, 5/3/xvii, 5/3/xviii, 5/3/xix, 5/3/xx, 5/3/xxi, 5/3/xxii, 5/3/xxiii, 5/4/iii, 5/4/iv, 5/4/vi, 5/4/vii, 5/4/viii, 5/4/ix, 5/4/xi, 5/4/xii, 5/4/xiii, 5/4/xiv, 5/4/xvi, 5/4/xvii, 5/4/xviii, 5/4/xx, 5/4/xxi, 5/4/xxii, 5/4/xxiv, 5/4/xxv, 5/4/xxvi, 5/4/xxvii, 5/4/xxviii, 5/4/xxix, 5/4/xxx, 5/4/xxxi, 5/4/xxxii, 5/4/xxxiii, 5/4/xxxv, 5/4/xxxvi, 5/4/xxxvii, 5/4/xxxix, 5/4/xl, 5/4/xlii, 5/4/xliii, 5/4/xliv, 5/4/xlv, 5/5/i, 5/5/v, 5/5/x, 5/5/xi, 5/5/xii, 5/5/xv, 5/5/xvii, 5/5/xviii).

99 Turkish Commission Interim Report, at 5, 65; Turkish Commission Report, at 5.

100 Turkish Commission Interim Report, at 25; Turkish Commission Report, at 49; *see also supra* note 98.

101 Turkish Commission Interim Report, at 25; Turkish Commission Report, at 49-50; *see also supra* note 98.

102 Turkish Commission Interim Report, at 57-60, 65-66; Turkish Commission Report, at 105-109.

44. Finally, the Turkish Commission concludes that as a consequence of these, and the other alleged violations of international law, Israel has a duty to make reparations for the wrongs committed, including through the provision of compensation to the families of the victims.[103] In support, the Turkish Commission relies on the work of the International Law Commission[104] and decisions of the Permanent Court of International Justice,[105] the International Court of Justice,[106] and the International Tribunal for the Law of the Sea[107] and other international tribunals.[108]

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103 Turkish Commission Interim Report, at 60-62; Turkish Commission Report, at 109-112.
104 Turkish Commission Interim Report, at 60, n.266; Turkish Commission Report, at 109, n.368.
105 Turkish Commission Interim Report, at 61, n.267; Turkish Commission Report, at 110, n.369.
106 Turkish Commission Interim Report, at 61, n.268, 270; Turkish Commission Report, at 110, n.370.
107 Turkish Commission Interim Report, at 61, n.269; Turkish Commission Report, at 110, n.371.
108 Turkish Commission Interim Report, at 62, n.273; Turkish Commission Report, at 111, n.374.

4 Summary of the Report of Israel's National Investigation

45. This chapter summarizes the central conclusions reached in the report of the independent Public Commission to Examine the Maritime Incident of 31 May 2010 appointed by the Israeli Government ("Israeli Commission").[109] The Israeli Commission was headed by a former Supreme Court Justice, with three other members and two international observers, and received advice from several experienced legal consultants. It was granted powers pursuant to Israel's Commissions of Inquiry Law.[110] These included the authority to summon witnesses and compel their testimony, as well as the provision of documents. It issued a public invitation to receive any relevant information or documents and invited foreign nationals to provide testimony, although this was not taken up.[111] The Israeli Commission received direct oral testimonies (some in public and some *in camera*) from senior political and military officials, as well as a number of Israeli human rights organizations and Israeli participants in the flotilla. It also received written testimonies from IDF personnel, video and audio recordings, and other various documents provided by Israeli government agencies and others.[112] Transcripts of the testimonies that were heard in public were uploaded to the Israeli Commission's website.[113] The original material considered by the Israeli Commission was not annexed to the report or provided to the Panel.

The Blockade

46. The Israeli Commission's conclusions on Israel's naval blockade can be summarized as follows. Since the beginning of 2001, thousands of rockets and mortars have been fired into Israel in ever growing numbers from the Gaza Strip.[114] Against this background, Israel declared that an armed conflict was taking place between it and Palestinian terrorist organizations, and that the normative framework to be applied to the activities of the IDF were the principles and rules of the law of armed conflict.[115] In this context, the Government of Israel imposed a naval blockade on the coast of the Gaza Strip on 3 January 2009[116] in order to prevent weapons, terrorists and money from entering or exiting the Gaza Strip by sea.[117] Notification of the blockade was published on the websites of relevant Israeli agencies, issued through a formal Notice to Mariners and broadcast on maritime radio, and conveyed to relevant flag States directly.[118] The naval blockade was imposed only after other options were considered and it was

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109 The full text of the Israeli Commission Report is available online. *See supra* note 7.
110 Israeli Commission Report, at 16-17.
111 Israeli Commission Report, at 22.
112 Israeli Commission Report, at 19-23.
113 Israeli Commission Report, at 20.
114 Israeli Commission Report, at 27-31.
115 Israeli Commission Report, at 27-28.
116 Israeli Commission Report, at 36.
117 Israeli Commission Report, at 53-58, 111.
118 Israeli Commission Report, at 36, 62-63, 111.

determined that a naval blockade provided the most efficient and comprehensive legal tool to confront the prevailing security threat.[119]

47. The Israeli Commission concluded that the imposition of the naval blockade was lawful and complied with the conditions of international law, in view of the security circumstances and Israel's efforts to fulfil its humanitarian obligations.[120] That conclusion was based on the following:

(a) The conflict between Israel and the Gaza Strip is an "international armed conflict" for the purposes of international law.[121] In this respect, the Commission relies upon decisions of the Supreme Court of Israel[122] and statements by various United Nations organizations and humanitarian and human rights organizations.[123]

(b) Israel's effective control of the Gaza Strip ended when disengagement was completed in 2005.[124] In this respect, the Commission relies upon a decision of the Supreme Court of Israel[125] and an analysis that Israel does not exercise "effective control" within its meaning at international law.[126]

(c) The blockade satisfied the customary international law requirements for the imposition of a blockade, including the requirements of notification, effectiveness and enforcement.[127] In this respect, the Commission relies upon the 1909 London Declaration, the San Remo Manual, military manuals[128] and other commentaries.[129]

(d) Israel is complying with its humanitarian obligations, including the prohibition on starving the civilian population or preventing the supply of objects essential for the survival of the civilian population and medical supplies, and the requirement that the damage to the civilian population is not excessive in relation to the concrete and direct military advantage anticipated from the blockade.[130] In making this assessment the Commission also examined the humanitarian impact of Israel's land crossing policy.[131] It found no evidence to the effect that Israel is trying to deprive the population of the Gaza Strip of food or to weaken it by starvation[132] and concluded that Israel

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119 Israeli Commission Report, at 58-61.
120 Israeli Commission Report, at 111, 280.
121 Israeli Commission Report, at 46-50, 111.
122 Israeli Commission Report, at 47, nn.138-140.
123 Israeli Commission Report, at 48, n.143.
124 Israeli Commission Report, at 50-53, 111.
125 Israeli Commission Report, at 50, nn.150-152.
126 Israeli Commission Report, at 51-53.
127 Israeli Commission Report, at 62-64, 111.
128 Israeli Commission Report, at 63, nn.203-205.
129 Israeli Commission Report, at 63, n.202.
130 Israeli Commission Report, at 82-102, 111.
131 Israeli Commission Report, at 66-68.
132 Israeli Commission Report, at 84.

allows the passage of objects essential for the survival of the civilian population and provides humanitarian aid in those areas that human rights organizations identify as a source of concern.[133] In this respect, the Commission relies upon paragraphs 102-104 of the San Remo Manual, the Fourth Geneva Convention, Protocol I to the Geneva Conventions, military manuals, and commentaries.[134]

(e) The blockade did not constitute collective punishment of the civilian population of the Gaza Strip; there is no evidence that Israel deliberately imposed restrictions on bringing goods into Gaza with the sole or main purpose of denying them to the civilian population.[135] In this respect, the Commission relies upon the Fourth Geneva Convention, Protocol I to the Geneva Conventions and international jurisprudence[136] and commentaries.[137]

(f) The imposition of the naval blockade was governed by the *lex specialis* of international humanitarian law. Issues regarding the human rights implications of the naval blockade were addressed under those rules. In making this assessment the Israeli Commission considered that nothing in the evidence suggested that concerns raised regarding the realization of human rights norms were sufficient to render the naval blockade and accompanying land closure disproportionate and contrary to international law.[138]

The Flotilla

48. The Israeli Commission's views with respect to the flotilla can be summarized as follows. In May 2010 a flotilla of six ships whose stated destination was the Gaza Strip left ports in Ireland, Turkey and Greece and joined together at a meeting point approximately 30 miles south of Cyprus.[139] The main goal of the flotilla participants was to bring publicity to the humanitarian situation in Gaza by attempting to breach the blockade.[140] The flotilla was organized by a coalition of a number of organizations, of which the leading organization was the IHH.[141] The Commission describes the IHH as a "humanitarian organization with a radical-Islamic orientation"[142] which provides support

133 Israeli Commission Report, at 86.
134 *E.g.*, Israeli Commission Report, at 82-83, nn.280, 282, 285.
135 Israeli Commission Report, at 104-109, 111.
136 Israeli Commission Report, at 108, n.386.
137 Israeli Commission Report, at 108, n.389.
138 Israeli Commission Report, at 103-104.
139 Israeli Commission Report, at 113.
140 Israeli Commission Report, at 278.
141 Israeli Commission Report, at 197, 201-205.
142 Israeli Commission Report, at 197.

to radical-Islamic and anti-Western terrorist organizations, including Hamas,[143] and has been declared an "impermissible association" in Israel.[144]

49. There were approximately 700 passengers from 40 countries on board the vessels.[145] These comprised IHH and other NGO activists as well as other volunteers (including journalists and members of Parliament).[146] The largest vessel in the flotilla, the *Mavi Marmara*, was carrying approximately 590 passengers and crew, primarily of Turkish nationality but including passengers from 34 countries.[147] The majority on board were "peace activists" but a "hardcore group" of about 40 IHH activists boarded the *Mavi Marmara* separately without any security checks in the port of Istanbul.[148] These passengers marked themselves out throughout the voyage as a separate group, and made preparations to resist any boarding of the vessel by the IDF.[149]

50. There were humanitarian supplies and construction materials on board three of the vessels in the flotilla (the *Defne Y*,[150] Sofia[151] and the *Gazze I*).[152] No humanitarian supplies were found on the remaining vessels.[153] Weapons and combat equipment were found on board the *Mavi Marmara*, including flares, rods, axes, knives, tear gas, gas masks, protective vests and night-vision goggles.[154] No firearms were found on the *Mavi Marmara*,[155] although the Israeli Commission was not convinced that pre-boarding security measures ensured that firearms were not brought on board.[156]

51. Significant diplomatic efforts were made by Israel at various levels and to various countries to prevent the departure of the flotilla.[157] Efforts to intervene with the countries from which the flotilla ships departed were not fruitful, except with respect to Cyprus which did not permit the flotilla's vessels to anchor in its ports.[158] Several proposals were made to Turkey but these were not accepted:[159]

> We tried every possible channel to prevent the flotilla from departing . . . . In each of the very many conversations, the Minister of Defense and the Turkish Foreign Minister, from me to my Turkish counterpart, the embassies in Washington and Ankara, and all of the other contacts, there

143 Israeli Commission Report, at 198.
144 Israeli Commission Report, at 200.
145 Israeli Commission Report, at 205.
146 Israeli Commission Report, at 206.
147 Israeli Commission Report, at 205.
148 Israeli Commission Report, at 142, 206-208.
149 Israeli Commission Report, at 208-216, 218.
150 Israeli Commission Report, at 182-183.
151 Israeli Commission Report, at 184.
152 Israeli Commission Report, at 183.
153 Israeli Commission Report, at 179, 181-182.
154 Israeli Commission Report, at 179, 206-207, 278.
155 Israeli Commission Report, at 178.
156 Israeli Commission Report, at 252.
157 Israeli Commission Report, at 121-124.
158 Israeli Commission Report, at 123.
159 Israeli Commission Report, at 123-124.

was a clear attempt to propose a solution for the ships, to propose a solution for the equipment on the ships, and at no stage was a positive response received.[160]

52. The Israeli Commission concludes that the flotilla participants did not have the right under international law to ignore the blockade, even if they did not consider it to be lawful.[161]

The Boarding and Take-Over of the Vessels

53. The Israeli Commission's conclusions with respect to the boarding of the vessels in the flotilla can be summarized as follows. Preparations were made at the intelligence, political and military levels for the operation.[162] Military preparations were integrated with legal advice and included the development of detailed operation orders and rules of engagement.[163] The planning and organization of the mission did not include anticipation that there would be significant violent opposition to the boarding, which had direct impact on the operational tactics, rules of engagement, and training carried out before the operation.[164]

54. Between 10.40 p.m. on 30 May and 12.41 a.m. on 31 May a series of warnings were communicated to the vessels in the flotilla.[165] These stated that the vessels were approaching an area under naval blockade and requested them to turn back.[166] Subsequent warnings stated that if the vessels did not comply, the Israeli navy would "adopt all of the measures at its disposal in order to enforce the blockade."[167] The Captain of the *Mavi Marmara* responded that he would not stop because the flotilla had a humanitarian purpose and Israel did not have authority to direct the vessel outside of its territorial waters.[168] The vessels in the flotilla did not change course.[169] No warnings were given after 12.41 a.m. on 31 May because of operational needs for a covert take-over of the vessels.[170]

55. At 4.26 a.m. a military operation was started to take control of the vessels when the vessels had reached a distance of approximately 70 nautical miles from the Israeli

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160 Closed Door Testimony of the Director General of the Ministry of Foreign Affairs, *cited in* Israeli Commission Report, at 124.
161 Israeli Commission Report, at 109-111.
162 Israeli Commission Report, at 116-121, 124-138.
163 Israeli Commission Report, at 124-138.
164 Israeli Commission Report, at 270-274, 279.
165 Israeli Commission Report, at 138-139.
166 Israeli Commission Report, at 138-139.
167 Israeli Commission Report, at 114.
168 Israeli Commission Report, at 139.
169 Israeli Commission Report, at 140.
170 Israeli Commission Report, at 141.

coast.[171] The take-over of the *Mavi Marmara* began at 4.26 a.m. with an attempt to board from two speedboats.[172] This failed because of violent resistance on the part of some of the flotilla participants.[173] At 4.29 a.m. soldiers descended onto the roof of the vessel from a helicopter.[174] Three "flash bang" stun grenades were thrown from the helicopter before and during the descent,[175] but no shots were fired.[176] The soldiers from the first helicopter were met with an extreme level of violence from a group of passengers on the vessel. They were shot at[177] and attacked with clubs, iron rods, slingshots and knives.[178] Three soldiers were wounded and taken to the hold of the ship.[179] At 4.36 a.m. soldiers began to descend from a second helicopter,[180] and at 4.46 a.m. from a third helicopter.[181] They partially secured the roof and lower decks, restrained and handcuffed the passengers, and completed a take-over of the bridge.[182] At 5.07 a.m. further soldiers boarded the vessel from the speedboats.[183]

56. The violence against the soldiers was carried out in an organized manner by a group of passengers armed with weapons, including firearms.[184] Suggestions that the passengers were acting in legitimate self-defence were not supported by the evidence.[185] In response to the violent resistance faced, the soldiers resorted to shooting with less-lethal and lethal weapons.[186] Nine soldiers were wounded in the course of the operation,[187] including two who received bullet wounds.[188] Nine passengers were killed,[189] and approximately 55 were wounded.[190] The Israeli Commission describes four of the deceased as "IHH activists or volunteers," and four as "activists in other Turkish Islamic organizations."[191] The findings of external examinations carried out on the bodies of the deceased were summarized as follows:[192]

> Body no. 1: Bullet wounds: two in the abdomen-chest on the left side, one tangential wound on the left side of the abdomen, on the back from the right, on the right elbow, in

171 Israeli Commission Report, at 141.
172 Israeli Commission Report, at 141-142.
173 Israeli Commission Report, at 142-146.
174 Israeli Commission Report, at 142, 147.
175 Israeli Commission Report, at 147-148.
176 Israeli Commission Report, at 261-262.
177 Israeli Commission Report, at 149, 154.
178 Israeli Commission Report, at 142, 149-157.
179 Israeli Commission Report, at 142, 151-154, 158-162.
180 Israeli Commission Report, at 164.
181 Israeli Commission Report, at 165.
182 Israeli Commission Report, at 164-166.
183 Israeli Commission Report, at 167-168.
184 Israeli Commission Report, at 210-215, 247-256.
185 Israeli Commission Report, at 240.
186 Israeli Commission Report, at 142, 150.
187 Israeli Commission Report, at 142, 154-157, 192.
188 Israeli Commission Report, at 154-155.
189 Israeli Commission Report, at 191-192.
190 Israeli Commission Report, at 192.
191 Israeli Commission Report, at 216.
192 Israeli Commission Report, at 191-192.

the right arm, on the left hand, two on the left thigh. Superficial lacerations on the face, abrasions and scratches.

Body no. 2: Bullet wounds: on the right side of the head, on the right side of the back of the neck, on the right cheek, underneath the chin, on the right side of the back, on the left thigh. A bullet was palpated on the left side of the chest. Abrasion on the right arm.

Body no. 3: Bullet wound on the right side of the back of the neck, two bullet wounds on the right side of the back of the neck, a bullet wound on the right side of the abdomen, a bullet wound on the right side of the lower back, a bullet wound on the left back-buttock.

Body no. 4: Bullet wounds: on the left breast, the left buttock, the right shoulder, the right thigh, the right calf, two in the left thigh. Subcutaneous bleeding on the right side of the forehead. Lacerations on the forehead. Various additional abrasions.

Body no. 5: Two bullet wounds in the left shoulder, bullet wound in the right side of the chest, bullet wound in the right shoulder, bullet wound in the right thigh.

Body no. 6: Bullet wounds in the forehead and the back of the neck. Abrasion wounds on the right side of the forehead, the nose, the right knee.

Body no. 7: Bullet wounds on the left side of the chest, subcutaneous bleeding on the back, the left calf, and right elbow joint.

Body no. 8: Bullet wounds on the front of the right ear, bullet palpated under the skin of the torso on the left side, two bullet wounds on the right side of the back, bullet wound on the right buttock, various abrasions.

Body no. 9: Bullet wounds in the area of the right temple/back of neck, bullet wound in the left nipple, bullet wound in the area of the scalp-forehead on the left side, bullet wound on the face (nose), bullet wound on the left torso, bullet wound on the right side of the back, two bullet wounds in the left thigh, two bullet wounds as a result of the bullet passing through toes four and five on the left foot.

57. After the take-over of the vessel was completed at around 5.17 a.m., evacuation of the wounded was commenced.[193] Medical attention was prioritized on the basis of objective medical criteria.[194] Some of the wounded passengers resisted receiving medical attention.[195]

58. IDF forces also took control of the other vessels in the flotilla.[196] In the take-over of some of these vessels soldiers were required to make use of force, although at a

193 Israeli Commission Report, at 172-175.
194 Israeli Commission Report, at 172.
195 Israeli Commission Report, at 174.
196 Israeli Commission Report, at 180-184.

significantly lower level than the force used on the *Mavi Marmara*.[197] No significant injury or loss of life occurred on these vessels.[198]

59. The Israeli Commission's report concluded:

(a) The vessels participating in the flotilla attempted to breach the blockade and IDF forces were therefore justified to capture them in order to enforce the blockade.[199] In reaching this conclusion the Israeli Commission relies upon the San Remo Manual and other commentaries.[200]

(b) The take-over of the vessels in international waters was lawful given their location and announced destination, the public pronouncements of the flotilla organizers and participants regarding their intention to breach the blockade, and the refusal of the vessels to change course.[201] In this respect, the Israeli Commission relies upon the San Remo Manual, the 1909 London Declaration, and military manuals.[202]

(c) The means chosen for the take-over were fully consistent with established international naval practice[203] and other methods would have been dangerous and likely unsuccessful.[204] In this respect, the Israeli Commission relies upon various academic writings.[205] The Israeli Commission also concluded that the planning and organization of the operation did not anticipate that there would be significant violent opposition to the boarding, which had a direct impact on the operational tactics, rules of engagement and training but did not lead to a breach of international law.[206]

(d) The participants in the flotilla were predominantly civilians, although both the Captain of the *Mavi Marmara* and the group who participated in the violence were civilians taking a direct part in hostilities.[207] The use of force against

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197 *Id.*
198 Israeli Commission Report, at 180.
199 Israeli Commission Report, at 219, 221-223, 278.
200 The Israeli Commission cites to the following article: Wolf Heintschel van Heinegg, *Blockade*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum, ed., 2010).
201 Israeli Commission Report, at 220-223, 278.
202 *E.g.*, Israeli Commission Report, at 220, n.752.
203 Israeli Commission Report, at 223-228, 278.
204 Israeli Commission Report, at 224-225.
205 The Israeli Commission cites to the following articles: Craig Allen, *Limits on the Use of Force in Maritime Operations in Support of WMD Counter-Proliferation Initiatives, in* INTERNATIONAL LAW CHALLENGES: HOMELAND SECURITY AND COMBATING TERRORISM 77 (Thomas McK. Sparks & Glenn M. Sulmasy eds., 2006) (81 U.S. NAVAL WAR C. INT'L L. STUD.); D.P. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER (1975); Wolff Heintschel von Heinegg, *Maritime Interception/Interdiction Operations, in* THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 375 (2010); INTERNATIONAL INSTITUTE FOR HUMANITARIAN LAW, RULES OF ENGAGEMENT HANDBOOK (2009).
206 Israeli Commission Report, at 270-274, 279.
207 Israeli Commission Report, at 233-242, 278.

civilians was governed by the principles of necessity and use of proportional force associated with the use of self-defence in law enforcement operations.[208] The use of force against civilians taking a direct part in hostilities was governed by the applicable rules of international humanitarian law.[209] In reaching these conclusions the Commission relies upon a decision of the Israeli Supreme Court[210] as well as the Third Geneva Convention, Protocol I to the Geneva Conventions and commentaries.[211] In practice, the Commission examined all instances of use of force by IDF soldiers under both the applicable rules of international humanitarian law and the principles governing the use of force in self-defence in law enforcement operations.[212]

(e) The actions of Israeli forces during the take-over were governed by international humanitarian law rather than the norms of human rights law.[213] Human rights jurisdiction applies on the high seas only where a State has "full and exclusive control" of the vessel, and Israeli forces did not have such control until after the bridge had been secured. In any event, the *lex specialis* of international humanitarian law would apply to the enforcement of a naval blockade.

60. On that basis, the Israeli Commission examined 133 incidents in which force was used during the take-over of the vessels and concluded that 127 were in conformity with international law.[214] In six cases, the Israeli Commission had insufficient information to be able to make a determination.[215] Three of those cases involved the use of live fire, and three involved physical force.[216]

The Treatment of those Detained

61. The Israeli Commission Report summarizes the events following the take-over of the *Mavi Marmara* and other vessels as follows. Once the take-over had been completed and wounded had been evacuated, passengers were ordered to leave the halls and were searched.[217] Those passengers that represented a potential security threat were

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208 Israeli Commission Report, at 232-233, 278.
209 Israeli Commission Report, at 228-233, 278.
210 Israeli Commission Report, at 236.
211 The Israeli Commission cites *inter alia* to the following writings: NILS MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009); COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTION OF 12 AUGUST 1949 (Yves Sandoz et al. eds., 1987); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflicts*, 98 AM. J. INT'L L. 1 (2004).
212 Israeli Commission Report, at 263-264.
213 Israeli Commission Report, at 230.
214 Israeli Commission Report, at 247-269.
215 Israeli Commission Report, at 269, 279.
216 *Id.*
217 Israeli Commission Report, at 176-178.

handcuffed.[218] After the searches had been completed, the passengers were returned to the halls where they remained until the vessel arrived in the port of Ashdod.[219] Passengers were provided with food and water and escorted to the bathroom on request.[220] Some of those passengers who had been handcuffed had their restraints loosened or removed during this time.[221]

62. The vessels arrived in Ashdod from 11 a.m. on 31 May.[222] Passengers were disembarked and underwent security screening, issuance of a detention order, medical examination and taking of fingerprints and a photograph.[223] In general physical searches were not conducted; where they were, they were carried out by male or female personnel as appropriate.[224] Some of the passengers refused to cooperate and had to be physically dragged through the screening process by security staff.[225]

63. After screening had been completed, passengers were transferred to prison facilities, where they were kept in open cells, given food and personal effects and permitted to meet with legal counsel and consular officials.[226] Passengers were not handcuffed during transfer[227] and reasonable force was only used on one occasion in order to control a passenger who had confronted security staff.[228]

64. Following a decision not to proceed with any criminal investigations with respect to the incident, passengers were transferred to Ben Gurion airport and repatriated on 1 June.[229] Reasonable force was used to control a clash between a group of passengers and police officers at the airport, as a result of which six passengers required medical treatment.[230] The bodies of the deceased were repatriated to Turkey after an external examination had been completed.[231] No autopsies were performed in light of a request by the Turkish Government.[232]

65. Passengers were instructed to leave their personal belongings on board the vessels on arrival in Ashdod.[233] These were examined, sealed, documented and later returned to

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218 Israeli Commission Report, at 177-178.
219 Israeli Commission Report, at 179.
220 *Id.*
221 *Id.*
222 Israeli Commission Report, at 184.
223 Israeli Commission Report, at 185-187.
224 Israeli Commission Report, at 185.
225 Israeli Commission Report, at 187.
226 Israeli Commission Report, at 188-189.
227 Israeli Commission Report, at 188.
228 Israeli Commission Report, at 189.
229 Israeli Commission Report, at 189-190.
230 Israeli Commission Report, at 190.
231 Israeli Commission Report, at 190-191.
232 Israeli Commission Report, at 191.
233 Israeli Commission Report, at 184, 194.

Turkey.[234] Photographic equipment was later returned to a representative of the journalists, but other magnetic media was retained in Israel for further investigation.[235] IDF Military Police later initiated seven criminal investigations for various incidents of theft of property by IDF soldiers.[236]

66. On this basis, the Israeli Commission did not find any wrong-doing on the part of Israeli authorities with respect to the treatment of the flotilla passengers during this period. It generally concluded that the actions carried out by Israel to enforce the naval blockade were legal pursuant to the rules of international law.[237]

234 *Id.*
235 Israeli Commission Report, at 194.
236 Israeli Commission Report, at 195-197.
237 Israeli Commission Report, at 280.

5 Facts, Circumstances and Context of the Incident

Introduction

67. This part of our report presents our conclusions on the facts, circumstances and context of the incident under review by the Panel. These conclusions have been reached against the backdrop of the exposition of the principles of public international law set out in the Appendix prepared by the Chair and Vice-Chair. Yet we must stress we are not asked to determine the legality or otherwise of the events. The Panel is not a court; its report is not an adjudication. What we express are our views on what took place. We have attempted to keep them and our reasoning succinct.

68. We address the incident by considering the following matters:

i. The validity of the naval blockade imposed by Israel;

ii. The actions of the flotilla and its organizers;

iii. The diplomatic efforts prior to the flotilla's departure;

iv. The Israeli boarding and take-over operation;

v. The use of force on the *Mavi Marmara;*

vi. The treatment of the passengers after the take-over of the vessels had been completed.

The Naval Blockade

69. The first issue we consider is the legality of the naval blockade imposed by Israel. Both Turkey and Israel in their reports to us stress the prime importance of this issue and devote extensive attention to it.[238] Turkey considers that the naval blockade was illegal and that the interception of the flotilla vessels on the high seas was therefore in breach of the international legal principle of the freedom of navigation. Israel, on the other hand, asserts that the naval blockade and its enforcement against the flotilla complied with all relevant rules of international law. As such, a consideration of the issue necessarily forms part of the Panel's task of reviewing the reports it has received. Further, it forms an intrinsic element of the context of the incident, as well as the backdrop against which the Panel must carry out its task of identifying ways to avoid similar incidents in the future.

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238 *See* Israeli Commission Report, at 25-111; Turkish Commission Report, at 60-83.

70. At this juncture, a word of clarification is necessary. The naval blockade is often discussed in tandem with the Israeli restrictions on the land crossings to Gaza. However, in the Panel's view, these are in fact two distinct concepts which require different treatment and analysis. First, we note that the land crossings policy has been in place since long before the naval blockade was instituted.[239] In particular, the tightening of border controls between Gaza and Israel came about after the take-over of Hamas in Gaza in June 2007.[240] On the other hand, the naval blockade was imposed more than a year later, in January 2009.[241] Second, Israel has always kept its policies on the land crossings separate from the naval blockade. The land restrictions have fluctuated in intensity over time[242] but the naval blockade has not been altered since its imposition. Third, the naval blockade as a distinct legal measure was imposed primarily to enable a legally sound basis for Israel to exert control over ships attempting to reach Gaza with weapons and related goods.[243] This was in reaction to certain incidents when vessels had reached Gaza via sea.[244] We therefore treat the naval blockade as separate and distinct from the controls at the land crossings. This is not to overlook that there may be potential overlaps in the *effects* of the naval blockade and the land crossings policy.[245] They will be addressed when appropriate. Likewise, the restrictions on the land crossings to Gaza are part of the context of our investigation, and our recommendations in Chapter 6 address the situation there.[246] But the legal elements of the naval blockade are analyzed on their own.

71. The United Nations Charter, Article 2 (4) prohibits the use of force generally, subject to an exception under Article 51 of the Charter for the right of a nation to engage in self-defence. Israel has faced and continues to face a real threat to its security from militant groups in Gaza. Rockets, missiles and mortar bombs have been launched from Gaza towards Israel since 2001.[247] More than 5,000 were fired between 2005 and January 2009, when the naval blockade was imposed.[248] Hundreds of thousands of Israeli civilians live in the range of these attacks.[249] As their effectiveness has increased,

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239 *See* Israeli Commission Report, at 30.

240 *Id.*

241 Israeli Commission Report, at 36.

242 See Israeli Commission Report, at 30-31.

243 *See* Israeli Commission Report, at 54-55.

244 *See* Israeli Commission Report, at 53-54.

245 *See* Israeli Commission Report, at 65-68.

246 *See infra* ¶¶ 147-156.

247 Israeli Commission Report, at 15, 27, 29-30, 70, n.224, 81, 92-93; Israeli POC Response of 11 April 2011, at 52; HUMAN RIGHTS WATCH, ROCKETS FROM GAZA: HARM TO CIVILIANS FROM PALESTINIAN ARMED GROUPS ROCKET ATTACKS ["HRW REPORT"] 10 (2009).

248 For a (not wholly complete) month-by-month account, *see* Briefings by the Secretary-General or his representatives to the Security Council between 31 January 2005 and 6 January 2009, available at http://www.un.org/Depts/dhl/resguide/scact.htm (The situation in the Middle East, including the Palestinian question); *see also* Israeli Commission Report, at 92.

249 *See* Briefing by Mr. Ban Ki-Moon, Secretary-General of the United Nations, to the Security Council on the situation in the Middle East, including the Palestinian question, U.N. SCOR, 63th Sess., 6060th mtg. at 3, U.N. Doc. S/PV.6060 (Dec. 31, 2008); *see* Israeli POC Response of 11 April 2011, at 55 (providing a figure of more than 950,000 potentially affected civilians); *see*

some rockets are now capable of reaching Tel Aviv.[250] Since 2001 such attacks have caused more than 25 deaths and hundreds of injuries.[251] The enormity of the psychological toll on the affected population cannot be underestimated.[252] In addition, there have been substantial material losses.[253] The purpose of these acts of violence, which have been repeatedly condemned by the international community,[254] has been to do damage to the population of Israel. It seems obvious enough that stopping these violent acts was a necessary step for Israel to take in order to protect its people and to defend itself. Actions taken by Israel in turn have had severe impacts on the civilian population in Gaza, which we discuss further in Chapter 6.

72. The Panel notes in this regard that the uncertain legal status of Gaza under international law cannot mean that Israel has no right to self-defence against armed attacks directed toward its territory.[255] The Israeli report to the Panel makes it clear that the naval blockade as a measure of the use of force was adopted for the purpose of defending its territory and population,[256] and the Panel accepts that was the case. It was designed as one way to prevent weapons reaching Gaza by sea and to prevent such attacks to be launched from the sea.[257] Indeed there have been various incidents in which ships carrying weapons were intercepted by the Israeli authorities on their way to Gaza.[258] While the attacks have not completely ceased since the time of the imposition

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also HRW REPORT, *supra* note 247, at 20, n.52 (estimating a figure of 800,000 potentially affected civilians.)

250 Briefing by Mr. Haile Menkerios, Assistant Secretary-General for Political Affairs, to the Security Council on the situation in the Middle East, including the Palestinian question, U.N. SCOR, 64th Sess., 6223th mtg. at 4, U.N. Doc. S/PV.6223 (Nov. 24, 2009).

251 *See* Israeli POC Response of 11 April 2011, at 54; Briefings to the Security Council, *supra* note 248; *see also* HRW REPORT, *supra* note 247, at 11-12, 17.

252 *See* Israeli POC Response of 11 April 2011, at 54-56; HRW REPORT, *supra* note 247, at 17.

253 *See* Israeli POC Response of 11 April 2011, at 54-55; HRW REPORT, *supra* note 247, at 21-22.

254 *See, e.g.*, U.N. Secretary-General, *Peaceful Settlement of the question of Palestine: Rep. of the Secretary-General*, ¶ 21, U.N. Doc. A/63/368-S/2008/612 (Sept. 22, 2008): "I condemn the indiscriminate rocket and mortar firing from the Gaza Strip towards Israeli civilian population centres and against crossing points, which is totally unacceptable and has detrimental effects on humanitarian conditions."; *see also* Press Release, United Nations, Office for the Coordination of Humanitarian Affairs, UN Humanitarian Chief: Only a just and lasting peace can end human suffering in Israel and Palestine (Feb. 17, 2008): "'The people of Sderot and the surrounding area have had to live with these unacceptable and indiscriminate rocket attacks for seven years now. There is no doubt about the physical and psychological suffering these attacks are causing. I condemn them utterly and call on those responsible to stop them now without conditions,' said Mr. Holmes."

255 *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, 2004 I.C.J. 136, 207 ¶ 33 (July 9) (Separate Opinion of Judge Higgins); *see also id.* at 240, ¶¶ 5-6 (Declaration of Judge Buergenthal); *see also* U.N. Secretary-General, *Peaceful Settlement of the question of Palestine: Rep. of the Secretary-General*, ¶ 11, U.N. Doc. A/62/344-S/2007/553 (Sept. 2, 2007), "fully acknowledging the right to self-defence of Israel."

256 *See* Israeli Commission Report, at 91-93.

257 *See* Israeli Commission Report, at 53-54.

258 *See* Israeli Commission Report, at 33. Most recently, Israel intercepted the *Victoria*, a vessel on its way from Syria to Egypt, which carried 25 tonnes of weapons and ammunition suspected to be destined for Gaza, *see* Briefing by Mr. Oscar Fernandez-Taranco, Assistant Secretary-General for Political Affairs, to the Security Council on the situation in the Middle East, including the

of the naval blockade,[259] their scale and intensity has much decreased over time.[260] While this decrease might also be due to other factors,[261] a blockade in those circumstances is a legitimate exercise of the right of self-defence. Although a blockade by definition imposes a restriction on all maritime traffic, given the relatively small size of the blockade zone and the practical difficulties associated with other methods of monitoring vessels (such as by search and visit),[262] the Panel is not persuaded that the naval blockade was a disproportionate measure for Israel to have taken in response to the threat it faced.

73. The Panel now turns to consider whether the other components of a lawful blockade under international law are met. Traditionally, naval blockades have most commonly been imposed in situations where there is an international armed conflict. While it is uncontested that there has been protracted violence taking the form of an armed conflict between Israel and armed groups in Hamas-controlled Gaza, the characterization of this conflict as international is disputed.[263] The conclusion of the Panel in this regard rests upon the facts as they exist on the ground. The specific circumstances of Gaza are unique and are not replicated anywhere in the world. Nor are they likely to be. Gaza and Israel are both distinct territorial and political areas. Hamas is the de facto political and administrative authority in Gaza and to a large extent has control over events on the ground there.[264] It is Hamas that is firing the projectiles into Israel or is permitting others to do so.[265] The Panel considers the conflict should be treated as an international one for the purposes of the law of blockade. This takes foremost into account Israel's right to self-defence against armed attacks from outside its territory. In this context, the debate on Gaza's status, in particular its relationship to Israel, should not obscure the realities. The law does not operate in a political vacuum, and it is implausible to deny that the nature of the armed violence between Israel and Hamas goes beyond purely domestic matters. In fact, it has all the trappings of an international armed conflict. This conclusion goes no further than is necessary for the Panel to carry out its mandate. What other implications may or may not flow from it are not before us, even though the Panel is mindful that under the law of armed conflict a State can hardly rely on some of its provisions but not pay heed to others.

Palestinian question, U.N. SCOR, 66th Sess., 6501st mtg. at 4, U.N. Doc. S/PV.6501 (Mar. 22, 2011).

259 *See* U.N. Secretary-General, *Peaceful Settlement of the question of Palestine: Rep. of the Secretary-General*, ¶ 38, U.N. Doc. A/65/380-S/2010/484 (Sept. 17, 2010).

260 *See* Israeli Commission Report, at 92.

261 *See* Israeli Commission Report, at 93.

262 *See* Israeli POC Response of 11 April 2011, Annexes L and M.

263 *See* Israeli Commission Report, at 45-50; Turkish Commission Report, at 62-63.

264 *See* Israeli Commission Report, at 27-30.

265 *See* Israeli Commission Report, at 30: "After the Hamas seized control of Gaza, the rocket and mortar attacks on Israeli towns increased dramatically."; *see also* Briefing by Mr. Michael C. Williams, Special Coordinator for the Middle East Peace Process and Personal Representative of the Secretary-General to the Palestine Liberation Organization and the Palestinian Authority, to the Security Council on the situation in the Middle East, including the Palestinian question, U.N. SCOR, 62nd Sess., 5723th mtg. at 3, U.N. Doc. S/PV.5723 (July 25, 2007).

74. Israel was entitled to take reasonable steps to prevent the influx of weapons into Gaza. With that objective, Israel established a series of restrictions on vessels entering the waters of Gaza. These measures culminated in the declaration of the naval blockade on 3 January 2009. There were a number of reasons why the previous restrictions were inadequate, primary among them being the need for the measures to be legally watertight.[266]

75. As required, the naval blockade was declared and notified. The Israeli authorities issued a "Notice to Mariners" through the appropriate channels, setting out the imposition of the blockade and the coordinates of the blockaded area. In addition, the notice was broadcast twice a day on an emergency radio channel for maritime communications.[267] There is no contest about this.[268] The suggestion that because the blockade was stated to be imposed "until further notice" means that the notification's content is insufficient and the blockade thus invalid[269] does not seem to us to be persuasive. The notice does specify a duration. Given the uncertainties of a continuing conflict, nothing more was required. Likewise, a limitation to certain groups of prohibited items[270] in the blockade's notification was not necessary. It lies in the nature of a blockade that it affects all maritime traffic, given that its aim is to prevent any access to and from a blockaded area.

76. There is nothing before the Panel that would suggest that Israel did not maintain an effective and impartial blockade. Ever since its imposition on 3 January 2009, Israeli authorities have stopped any vessel attempting to enter the blockaded area.[271] At the same time, there is no suggestion that Israel has hindered free access to the coasts and ports of other countries neutral to the conflict.

77. Important humanitarian considerations constrain the imposition of a naval blockade. For one, it would be illegal if its imposition was intended to starve or to collectively punish the civilian population. However, there is no material before the Panel that would permit a finding confirming the allegations[272] that Israel had either of those intentions or that the naval blockade was imposed in retaliation for the take-over of Hamas in Gaza or otherwise. On the contrary, it is evident that Israel had a military objective. The stated primary objective of the naval blockade was for security. It was to prevent weapons, ammunition, military supplies and people from entering Gaza and to stop Hamas operatives sailing away from Gaza with vessels filled with explosives.[273] This is regardless of what considerations might have motivated Israel in restricting the

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266 *See* Israeli Commission Report, at 54-56.
267 Israeli Commission Report, at 36, 62-63
268 *See* Turkish Commission Report, at 64.
269 *See* Turkish Commission Report, at 64-65.
270 *See* Turkish Commission Report, at 65.
271 *See* Israeli Commission Report, at 37; Turkish Commission Report, at 75.
272 *See* Turkish Commission Report, at 68, 78-81.
273 *See supra* notes 256, 257.

entry of goods to Gaza via the land crossings,[274] an issue which as we have described above is not directly related to the naval blockade.[275] It is also noteworthy that the earliest maritime interception operations to prevent weapons smuggling to Gaza predated the 2007 take-over of Hamas in Gaza.[276] The actual naval blockade was imposed more than one year after that event.[277] These factors alone indicate it was not imposed to punish its citizens for the election of Hamas.

78. Perhaps a more difficult question is whether the naval blockade was proportional. This means to inquire whether any damage to the civilian population in Gaza caused by the naval blockade was excessive when weighed against the concrete and direct military advantage brought by its imposition. As this report has already indicated, we are satisfied that the naval blockade was based on the need to preserve Israel's security. Stopping the importation of rockets and other weapons to Gaza by sea helps alleviate Israel's situation as it finds itself the target of countless attacks, which at the time of writing have once again become more extensive and intensive. On the other hand, the specific impact of the naval blockade on the civilian population in Gaza is difficult to gauge because it is the land crossings policy that primarily determines the amount of goods permitted to reach Gaza. One important consideration is the absence of significant port facilities in Gaza.[278] The only vessels that can be handled in Gaza appear to be small fishing vessels.[279] This means that the prospect of delivering significant supplies to Gaza by sea is very low. Indeed, such supplies were not entering by sea prior to the blockade.[280] So it seems unrealistic to hold the naval blockade disproportionate as its own consequences—either alone or by compounding the restrictions imposed by Israel on the entry of goods to Gaza via its border crossings—are slight in the overall humanitarian situation. Smuggling weapons by sea is one thing; delivering bulky food and other goods to supply a population of approximately 1.5 million people is another. Such facts militate against a finding that the naval blockade itself has a significant humanitarian impact. On the contrary, it is wrong to impugn the blockade's legality based on another, separate policy.

79. This is not to deny or ignore the consequences of the land crossings policy and the state of the humanitarian situation in Gaza. We have reached the view that the naval blockade was proportionate in the circumstances. While we are unable to conclude that the *combined* effects of the naval blockade and the crossings policy rendered the naval blockade disproportionate, we can make the policy judgment that the procedures applied

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274 Several international organizations and institutions, including the U.N. High Commissioner for Human Rights and the ICRC, have declared that the land restrictions constitute collective punishments, *see* Turkish Commission Report, at 79-81.

275 *See supra* ¶ 70.

276 *See* Israeli Commission Report, at 33.

277 *See supra* ¶ 70.

278 *See* Israeli Commission Report, at 32-33, 54; *see also* 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 attacks on the flotilla of ships carrying humanitarian assistance, ¶ 80, U.N. Doc. A/HRC/15/21 (Sep. 27, 2010).

279 *See* Israeli Commission Report, at 32.

280 *See* Israeli Commission Report, at 54.

by Israel in relation to land access to Gaza are unsustainable and need to be changed. This we will discuss in Chapter 6.

80. As a final point, the Panel emphasizes that if necessary, the civilian population in Gaza must be allowed to receive food and other objects essential to its survival. However, it does not follow from this obligation that the naval blockade is per se unlawful or that Israel as the blockading power is required to simply let vessels carrying aid through the blockade. On the contrary, humanitarian missions must respect the security arrangements put in place by Israel. They must seek prior approval from Israel and make the necessary arrangements with it. This includes meeting certain conditions such as permitting Israel to search the humanitarian vessels in question. The Panel notes provision was made for any essential humanitarian supplies on board the vessels to enter Gaza via the adjacent Israeli port of Ashdod,[281] and such an offer was expressly made in relation to the goods carried on the flotilla.[282]

81. The Panel therefore concludes that Israel's naval blockade was legal. In this regard, the Panel reaches a different conclusion to that of the Turkish investigation into the incident. The legal arguments in the Turkish report were also clearly and extensively put to the Panel by the Turkish Point of Contact,[283] and were supported by the Turkish member of the Panel. Those arguments differed from the conclusions of the Panel on several key matters of interpretation on the facts, most significantly: whether there can be considered to be an international armed conflict between Israel and Hamas; whether the extent and duration of the naval blockade were adequately notified; whether the naval blockade was a proportionate military measure, and in particular whether it had a disproportionate impact on civilians in Gaza; and whether it amounted to collective punishment. On these two latter points, the conclusions reached in the Turkish report mirror those of the fact-finding mission established by the Human Rights Council.[284] The Panel notes, however, that the reasoning of both reports rested on an analysis that the naval blockade formed an indivisible part of Israel's land restrictions policy, a factual conclusion that the Panel does not share for the reasons described above. In addition, the Panel notes that the Human Rights Council fact-finding mission did not receive any information from Israel and did not have the opportunity to consider the Israeli report or the additional material that has been made available to the Panel. In reaching its conclusion, the Panel emphasizes, however, the fundamental importance of the principle of the freedom of navigation, particularly in areas such as the eastern Mediterranean, and

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281 *See* Israeli Commission Report, at 36-37, 67, n.216, 113, n.400. We accept that this approach would have made some of the cargo liable to be stopped from proceeding to Gaza on account of its potential usefulness for the attacks against Israel, *see* Israeli Commission Report, at 68.

282 *See* Israeli Commission Report, at 110, 121, 139.

283 *See* Turkish POC Response of 26 April 2011.

284 *See* 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 attacks on the flotilla of ships carrying humanitarian assistance, ¶¶ 51-54, U.N. Doc, A/HRC/15/21 (Sept. 27, 2010).

recommends that this be borne in mind by Israel with respect to the ongoing application and enforcement of its naval blockade.

82. The fundamental principle of the freedom of navigation on the high seas is subject to only certain limited exceptions under international law. Israel faces a real threat to its security from militant groups in Gaza. The naval blockade was imposed as a legitimate security measure in order to prevent weapons from entering Gaza by sea and its implementation complied with the requirements of international law.

The Actions of the Flotilla

83. The flotilla consisted of six vessels: *Mavi Marmara* (Comoros); *Sfendoni* (Togo); *Challenger I* (USA); *Gazze I* (Turkey); *Eleftheri Mesogeio* (Greece); *Defne-Y* (Kiribati).[285] Three of the vessels departed from Turkish ports: the *Mavi Marmara* left the Port of Zeytinburnu (Istanbul) on 22 May 2010, docked at the Port of Antalya on 25 May 2010, and departed on 28 May 2010; the *Gazze I* departed the Port of Iskenderun on 22 May 2010; and the *Defne-Y* departed the Port of Zeytinburnu (Istanbul) on 24 May 2010.[286] They met with the remaining vessels at a meeting point south of Cyprus, and set sail late in the afternoon of 30 May 2010.[287] A seventh vessel, the *Challenger II*, was prevented from sailing by mechanical problems and its passengers were transferred to the *Mavi Marmara* while the vessels were at the meeting point.[288]

84. Although there had been previous attempts to deliver aid to Gaza by sea,[289] none were on this scale. The vessels of the flotilla carried 10,000 tonnes of supplies[290] and approximately 700 passengers.[291] The *Mavi Marmara* alone had 546 passengers on board.[292] The flotilla passengers carried the passports of 40 different countries, with the majority being from Turkey.[293]

85. It is common ground and the Panel accepts that the majority of the flotilla participants were motivated purely by a genuine concern for the people in Gaza.[294] They

285 Turkish Commission Report, at 15.
286 Turkish Commission Report, at 15-16.
287 Turkish Commission Report, at 16.
288 Turkish Commission Report, at 16.
289 *See* Turkish Commission Report, at 14, 75.
290 Turkish Commission Report, at 15, n.4.
291 Israeli Commission Report, at 205.
292 Turkish Commission Report, at 15, Annexes 4/2-4/3.
293 Israeli Commission Report, at 205; Turkish Commission Report, at Annex 4/1.
294 *See* Turkish Commission Report, at 15; Israeli Commission Report, at 206.

came from a range of backgrounds, including members of non-governmental organizations, academics, journalists, religious leaders and Members of Parliament.[295]

86. However, the Panel seriously questions the true nature and objectives of the flotilla organizers, a coalition of non-governmental organizations.[296] The leading group involved in the planning of the flotilla was the Turkish NGO "İnsan Hak ve Hürriyetleri Vakfi" (IHH), a humanitarian organization.[297] It owned two of the ships; the *Mavi Marmara* and the *Gazze I*.[298] There is some suggestion that it has provided support to Hamas,[299] although the Panel does not have sufficient information to assess that allegation. IHH has special consultative status with ECOSOC,[300] a status which in the Panel's view raises a certain expectation with respect to the way in which it should conduct its activities.

87. On the basis of public statements by the flotilla organizers[301] and their own internal documentation, the Panel is satisfied that as much as their expressed purpose of providing humanitarian aid, one of the primary objectives of the flotilla organizers was to generate publicity about the situation in Gaza by attempting to breach Israel's naval blockade. The purposes of the flotilla were clearly expressed in a document prepared by IHH and signed by all flotilla participants as follows:

> Purpose: Purposes of this journey are to create an awareness amongst world public and international organizations on the inhumane and unjust embargo on Palestine and to contribute to end this embargo which clearly violates human rights and delivering humanitarian relief to the Palestinians.[302]

88. In that regard, flotilla passengers committed that they would "not obey by the decisions, warnings or demands of the governments of countries in the region regarding this ship."[303] Further, the organizers recognized that the flotilla's actions could have

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295 Turkish Commission Report, at 15; Israeli Commission Report, at 206.

296 Turkish Commission Report, at 14; Israeli Commission Report, at 197.

297 Turkish Commission Report, at 14; Israeli Commission Report, at 197, 201-203.

298 Israeli Commission Report, at 201; Turkish Commission Report, Annexes 3/1, 3/4.

299 *See* Israeli Commission Report, at 198; Israeli POC Response of 11 April 2011, Annex N.

300 United Nations, Econ. & Soc. Council, List of non-governmental organizations in consultative status with the Economic and Social Council as of 1 September 2010, U.N. Doc. E/2010/INF/4 (Sep. 1, 2010).

301 *See* Israeli Commission Report, at 117, 209; *see also, e.g.*, Turkish Commission Report, Annex 5/1/iv, at 1 ("Every year, ship voyages are organized to Gaza by certain European non-governmental organizations (NGOs) to penetrate the Gaza embargo and draw the attention of world public opinion towards lifting this unfair embargo."); Annex 5/1/viii, at 5 ("If Israel prevented the delivery of this aid, we would then attract attention to this illegal blockade and make live broadcasting for a while through media correspondents aboard and then we would return back.").

302 Turkish POC Response of 11 April 2011, Appendix 1, Palestine Our Route, Humanitarian Aid Our Load: Gaza Flotilla Individual Participation Form, Principles ["Principles"], ¶ 1.

303 Turkish POC Response of 11 April 2011, Appendix 1, Palestine Our Route, Humanitarian Aid Our Load: Gaza Flotilla Individual Participation Form, Guarantee ["Guarantee"], ¶ 12.

"legal and punitive consequences," and all flotilla participants were required to accept individual responsibility for those potential outcomes.[304] However, there was no warning of the physical risk entailed.

89. Other elements also raise questions concerning the objectives of the flotilla organizers. If the flotilla had been a purely humanitarian mission it is hard to see why so many passengers were embarked and with what purpose. Furthermore, the quality and value of many of the humanitarian goods on board the vessels is questionable. There were large quantities of humanitarian and construction supplies on board the *Gazze 1*, *Eleftheri Mesogeio* and *Defne-Y*.[305] There were some foodstuffs and medical goods on board the *Mavi Marmara*,[306] although it seems that these were intended for the voyage itself.[307] Any "humanitarian supplies" were limited to foodstuffs and toys carried in passengers' personal baggage.[308] The same situation appears to be the case for two other of the vessels: the *Sfendoni*,[309] and the *Challenger I*.[310] There was little need to organize a flotilla of six ships to deliver humanitarian assistance if only three were required to carry the available humanitarian supplies. The number of journalists embarked on the ships gives further power to the conclusion that the flotilla's primary purpose was to generate publicity.

90. There is a further issue. No adequate port facilities exist in Gaza capable of receiving vessels of the size of the *Mavi Marmara*.[311] It appears that arrangements had been made to offload the cargo onto smaller vessels at sea,[312] which no doubt would be awkward and inefficient. Yet the flotilla rejected offers to unload any essential humanitarian supplies at other ports and have them delivered to Gaza by land.[313] These offers were made even during the voyage.[314] The conclusion that the primary objective of the flotilla organizers was to generate publicity by attempting to breach the blockade is further reinforced by material before the Panel that suggests that a reception for the flotilla had been arranged by Hamas.[315]

91. It should be noted that flotilla passengers specifically committed not to bring weapons on the journey.[316] Nevertheless, it is alleged that the IHH participants on board the *Mavi Marmara* included a "hardcore group" of approximately 40 activists, who had

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304 Principles, *supra* note 302, ¶ 9; Guarantee, *supra* note 303, ¶¶ 7, 12.
305 Israeli Commission Report, at 182-183; Turkish Commission Report, Annexes 3/3-3/4.
306 Turkish Commission Report, Annex 3/1; *see also* Israeli Commission Report, at 179.
307 *See* Turkish POC Response of 11 April 2011, at 11, n.5.
308 *Id.*
309 *See* Israeli Commission Report, at 181.
310 *See* Israeli Commission Report, at 182.
311 *See supra* ¶ 78.
312 Israeli POC Response of 11 April 2011, Annex O, at 2-3.
313 *See* Turkish Commission Report, at 17; *see also* Israeli Commission Report, at 123.
314 Israeli Commission Report, at 139.
315 Israeli POC Response of 11 April 2011, Annex O, at 2-3.
316 Guarantee, *supra* note 303, ¶ 1.

effective control over the vessel during the journey and were not subjected to security screening when they boarded the *Mavi Marmara* in Istanbul.[317] The Turkish report refers to 42 volunteers who acted as "cleaning and maintenance personnel" who boarded the *Mavi Marmara* in Istanbul and asserts that these individuals were subject to security screening.[318] The Panel notes in this regard that all participants agreed to follow the decisions of the IHH organizers during the voyage [319] and that at least one witness described himself as working for IHH "like a security guard."[320]

92. People may, of course, freely express their views by peaceful protest. But to deliberately seek to breach a blockade in a convoy with a large number of passengers is in the view of the Panel a dangerous and reckless act. It involves exposing a large number of individuals to the risk that force will be used to stop the blockade and people will be hurt.

93. It was foreseeable to the flotilla organizers as it was to the Turkish Government that there was a possibility of force being used against the ships to enforce the blockade. While the level of lethal force that was actually used may have been unforeseen, the organizers did anticipate that there would be an altercation with Israeli forces. The Panel is concerned that not enough was done to inform the participants in the flotilla (including the almost 600 passengers on the *Mavi Marmara*) of the risks of personal injury that the journey may have involved. While the document the passengers signed before embarking on the ship did indicate some of the risks involved, such as arrest, there was no indication that violence was a risk despite the fact that the possibility of it was reasonably foreseeable.[321] From this experience lessons can be learned and we will expand on this point in the next chapter where we analyse how to avoid such occurrences in the future.

94. The flotilla was a non-governmental endeavour, involving vessels and participants from a number of countries.

95. Although people are entitled to express their political views, the flotilla acted recklessly in attempting to breach the naval blockade. The majority of the flotilla participants had no violent intentions, but there exist serious questions about the conduct, true nature and objectives of the flotilla organizers, particularly IHH. The actions of the flotilla needlessly carried the potential for escalation.

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317 Israeli Commission Report, at 206-208; Israeli POC Response of 11 April 2011, at 29-30, Annex C.

318 Turkish Commission Report, at 15, Annex 3/1; Turkish POC Response of 11 April 2011, at 13.

319 Principles, *supra* note 302, ¶ 6.

320 Turkish Commission Report, Annex 5/3/xvi, at 2 ("As part of the organization of the ship, I was working like a security guard.").

321 *See* Guarantee, *supra* note 303, ¶ 12.

Diplomatic Efforts

96. It is clear from both national reports that both Israel and Turkey were aware of the departure of the flotilla well in advance.[322] As noted above, if the flotilla attempted to run the blockade it was reasonably foreseeable that it could be stopped by force and that casualties could occur. There were clear risks if decisions were made by the flotilla organizers to run the blockade and it was necessary for the States concerned to do all they could to minimize or eliminate those risks.

97. There are well established principles of international law that can provide a framework for considering what the reciprocal obligations of nations are in such a circumstance. It is fundamental that States should co-operate with other States in the maintenance of international peace and security. Further, it is a clear and established premise of international law that "States shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[323] States also have a duty to promote universal respect for and observance of fundamental human rights and freedoms.[324] These rights include the right to life to which the people on board the ships of the flotilla were entitled. These reciprocal obligations suggest that Turkey and Israel had a duty to co-operate over the flotilla to try to ensure that confrontation did not occur and that lives were not lost.

98. Thus, both Turkey and Israel attempted to resolve the problem posed by the flotilla by diplomatic means.[325] This was both sensible and necessary. Extensive discussions were held before the departure of the flotilla beginning as early as March 2010.[326] They were intensive, at the highest levels of government, and involved a number of nations.[327]

99. Israel began its efforts to avert the flotilla on 16 March 2010 when a dialogue on the issue was opened with Greece. There were discussions with Cyprus in April 2010. During this period Israel also engaged in diplomatic efforts with Turkey, the United Kingdom, Ireland, Egypt and the United States.[328]

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322 *See* Israeli Commission Report, at 116; Turkish Commission Report, at 16.

323 Article 2(3) of the United Nations Charter; *see also* Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970).

324 Article 2(2) of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; *see also* G.A. Res. 2625 (XXV), *supra* note 323.

325 *See* Israeli Commission Report, at 121-124; Turkish Commission Report, at 16-18.

326 *See* Israeli Commission Report, at 121-124; Israeli POC Response of 11 April 2011, at 11-14; Turkish Commission Report, at 16-18; Turkish POC Response of 11 April 2011, at 3.

327 *See* Israeli POC Response of 11 April 2011, at 10-11.

328 *See* Israeli POC Response of 11 April 2011, at 10-11.

100. The exchanges between Israel and Turkey were particularly intense. There were at least twelve diplomatic discussions, including at ministerial levels, that were aimed at reaching a solution.[329] The Panel is satisfied that extensive and genuine efforts were made by Israel to facilitate the delivery of humanitarian supplies from the flotilla to Gaza thus obviating the need to challenge the blockade and thereby avoiding the prospect of violence.

101. In the course of the diplomatic dialogue Turkey made two points repeatedly. First, that force must not be used against the flotilla. Second, in view of democratic rights and freedoms, Turkey could not ban people from legally leaving the country.[330] The Panel accepts that was the case. It seems, however, that Turkish officials passed on the nature of Israel's concern to the Turkish organizers of the flotilla.[331] Turkey also made it clear that this was an international effort by a number of NGOs, many of which were not based in Turkey.[332]

102. Despite the exhaustive diplomatic discussions there remains a fundamental disagreement between Turkey and Israel as to the outcome. It is a disagreement that the Panel feels unable to resolve on the evidence in front of it. Turkey's position is that it conducted discussions with the Turkish organizers of the flotilla and tried to convince them to take the aid to Ashdod in Israel or Al-Arish in Egypt, and that they eventually agreed they would divert their course to Al-Arish if necessary.[333] Israel on the other hand denies that any diplomatic agreement was reached because Turkish officials had made it clear to Israel that the organizers of the flotilla in Turkey would not agree to the diversion.[334] The Panel is surprised that after such an extensive diplomatic dialogue there is such a basic difference on what the result was but such is clearly the case.

103. The incident and its outcomes were not intended by either Turkey or Israel. Both States took steps in an attempt to ensure that events did not occur in a manner that endangered individuals' lives and international peace and security. Turkish officials also approached the organizers of the flotilla with the intention of persuading them to change course if necessary and avoid an encounter with Israeli forces. But more could have been done to warn the flotilla participants of the potential risks involved and to dissuade them from their actions.

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329 *See* Israeli POC Response of 11 April 2011, at 11-15.

330 *See* Turkish Commission Report, at 1; Turkish POC Response of 11 April 2011, at 5; Israeli POC Response of 11 April 2011, at 12-14.

331 *See* Turkish POC Response of 11 April 2011, at 4-5.

332 *See* Turkish POC Response of 11 April 2011, at 6; Israeli POC Response of 11 April 2011, at 13.

333 *See* Turkish Commission Report, at 17; Turkish POC Response of 11 April 2011, at 3.

334 *See* Israeli Commission Report, at 122; Israeli POC Response of 11 April 2011, at 14-15.

The Israeli Boarding and Take-over Operation

104. We have made it clear that we consider that Israel was entitled to impose the naval blockade. It follows that Israel was also entitled to enforce it. The manner of its enforcement, however, raises serious issues of concern.

105. Although it has been suggested that an understanding was reached through diplomatic channels that the flotilla would, if necessary, divert to the Egyptian port of Al-Arish[335] any such understanding was not reflected in the port records or the responses the Israeli Navy received from the ships of the flotilla when they were challenged. Port Authority Records supplied by Turkey state that the intended destination of the vessels was Gaza.[336] Material in both national reports confirms that repeated messages were transmitted from the flotilla that they were sailing to Gaza and that the Israeli Navy had no power to stop or order them to change course while they were in international waters.[337]

106. The first warning radioed by the Israeli Navy to the flotilla invited the vessels to head for Ashdod port where the humanitarian supplies could be delivered.[338] The second warning requested them to change course and not enter the blockade area.[339] Two subsequent warnings were delivered emphasizing that "all necessary measures" would be taken to enforce the blockade, including through the boarding of the vessels.[340]

107. Material before the Panel indicates that between 10.58 p.m. and 11.58 p.m. on 30 May 2010 the *Mavi Marmara* changed course from a bearing of 222° to one of 185°.[341] However, there is dispute about the significance of this. The Turkish report states that this course was directed towards a point between Al-Arish and the Suez Canal;[342] while Israel maintains it in fact turned the vessels more directly towards Gaza.[343] Given the distance of the vessels from shore, it is hard to draw a firm conclusion as to their intention from their course alone. Significantly, although the Israeli Navy continued to

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335 *See* Turkish Commission Report, at 17.

336 Turkish Commission Report, Annexes 3/1-3/4.

337 *See* Israeli Commission Report, at 139; *see, e.g.*, Turkish Commission Report, Annex 5/1/i, at 1 ("I again told them that we were in international waters and our route was directed towards Israel and that they could not ask us to change our route."); Annex 5/5/x, at 2 ("I proceeded to communicate to the Israeli Navy over the VHF radio on behalf of the Freedom Flotilla, stating . . . that we were unarmed civilians aboard six vessels carrying only humanitarian aid headed for the Gaza Strip.").

338 Israeli Commission Report, at 130.

339 Israeli Commission Report, at 131; Turkish Commission Report, at 19.

340 Israeli Commission Report, at 131, 138; Israeli POC Response of 11 April 2011, Annex Y.

341 Turkish Commission Report, at 19, 120, Annex 5/1/i, at 2 ("We shifted to route 185 at 11.30 p.m."); Israeli POC Response of 11 April 2011, at 23.

342 Turkish Commission Report, at 19.

343 Israeli POC Response of 11 April 2011, at 23.

issue warnings, no radio message was transmitted by the flotilla indicating that its course or intended destination had been changed.

108. On the best view we can form of the matter we believe it was reasonable in the circumstances for the Israeli Navy to conclude that the vessels of the flotilla intended to proceed to Gaza. That is what they repeatedly said. That intention was consistent with an intention to breach the blockade.

109. For Israel to maintain the blockade it had to be effective, so it must be enforced. That is a clear legal requirement for a blockade.[344] Such enforcement may take place on the high seas and may be conducted by force if a vessel resists. To this point in the analysis no difficulty arises. But the subsequent steps taken raise serious questions as to whether the enforcement was executed appropriately in the circumstances.

110. The Panel questions whether it was reasonable for the Israeli Navy to board the vessels at the time and place that they did. There are several factors to be weighed in that equation. The boarding commenced at approximately 4.30 a.m., before dawn had broken.[345] The distance from the blockade zone was substantial—64 nautical miles.[346] There were several hours steaming before the blockade area would be reached. Then there is the fact that the boarding attempt was made by surprise, without any immediate prior warning.[347] The last radio warning had been transmitted at some point between 12.41 a.m. and 2.00 a.m.—at least two and a half hours prior to the boarding commencing.[348] The vessels were never asked to stop or to permit a boarding party to come on board. No efforts were made to fire warning shells or blanks in an effort to change the conduct of the captains. While it must have been clear to the flotilla captains that the Israeli Navy had been shadowing them for some time, nothing was communicated about the immediate intentions of the IDF to board the vessels by force.

111. The Israeli naval operation order set out a series of warnings and permitted the force commander to employ various measures to stop the vessels, including firing "skunk bombs" or water from water cannons, forcing the vessels to change their course or stop by means of missile ships, crossing bows, firing warning shots into the air and "white lighting".[349] No use was made of these lesser measures but rather boarding without direct warning or consent was carried out while the ships were in motion. Although four warnings had been issued to the vessels, the fifth and final warning set out in the operation order stating that the navy "[was] obliged to take all necessary measures" was never issued.[350] The Israeli Point of Contact emphasized the comments in the Israeli

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344 *See infra* Appendix I, ¶¶ 43-51.
345 Israeli Commission Report, at 141; Turkish Commission Report, at 20.
346 Turkish Commission Report, at 4; *see also* Israeli Commission Report, at 141.
347 Turkish Commission Report, at 20; *see also* Israeli Commission Report, at 141.
348 Israeli Commission Report, at 138; Turkish Commission Report, at 20.
349 Israeli Commission Report, at 130.
350 *See* Israeli Commission Report, at 132, 141.

report that "the possibilities for performing a 'cold stop' of the vessels had proven to be impractical" given the size of the *Mavi Marmara* and the number of passengers and vessels in the flotilla.[351] However, some of the measures outlined in the operational order have been used successfully by the Israeli Navy subsequent to the incident,[352] and the Panel remains unconvinced that it was necessary or appropriate to skip these steps.

112. It seems that the decision to commence the take-over operation by surprise just before dawn was motivated by the desire to avoid publicity[353] as much as by operational considerations.[354] This was reinforced by the communication blackout imposed against the *Mavi Marmara*.[355]

113. The reports in front of the Panel from both Israel and Turkey are broadly consistent as to the general nature of the boarding operation. Boarding commenced with an attempt to board from speedboats, followed by the fast-roping of armed commandoes from helicopters, use of stun and smoke grenades, paintballs, bean-bag rounds and (in the case of the *Mavi Marmara*) live fire.[356] In that sense, the overall nature of the enforcement operation is not in dispute. The key differences between the reports are as to when live fire was first employed and the nature of resistance encountered on the *Mavi Marmara*. We will return to these points later.

114. The resort to boarding without warning or consent and the use of such substantial force treated the flotilla as if it represented an immediate military threat to Israel. That was far from being the case and is inconsistent with the nature of the vessels and their passengers, and the finding contained in Israel's report that significant violent resistance to boarding was not anticipated.[357] It seems to us to have been too heavy a response too quickly. It was an excessive reaction to the situation.

115. The decision made to board the vessels in the way that was done was a significant causative factor in the consequences that ensued. The Panel shares the view expressed in the Israeli report that "clear warnings and the controlled and isolated use of force may have helped avoid a wider and more violent confrontation such as the one that occurred."[358] An explicit prior warning that force would be used to board the vessels if they did not stop immediately and a show of dissuading force—such as a shot across the

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351 Israeli Commission Report, at 119; *See* Israeli POC Response of 11 April 2011, at 19-20; Israeli POC Response of 27 April 2011.

352 *See* "Israel Fires Warning Shots at Malaysian Aid Ship", 16 May 2011, at http://news.yahoo.com/s/afp/20110516/wl_afp/israelpalestiniansconflictgazamalaysia

353 *See* Israeli Commission Report, at 120-121; Israeli POC Response of 11 April 2011, at 18.

354 Israeli Commission Report, at 141; Israeli POC Response of 11 April 2011, at 17-18, 22.

355 *See* Israeli Commission Report, at 141; Turkish Commission Report, at 20.

356 Israeli Commission Report, at 142-166; Turkish Commission Report, at 20-23.

357 *See* Israeli Commission Report, at 271-273, 279.

358 Israeli Commission Report, at 273.

bow—would have been prudent in light of the number of passengers on board the flotilla vessels, particularly the *Mavi Marmara*.

116. The Panel concludes that the operation should have been better planned and differently executed. It was foreseeable that boarding in the manner that was done could have provoked physical resistance from those on board the vessels. In such a case there was a real risk of casualties resulting, as turned out to be the case. Such a scenario should have been specifically addressed in the planning of the operation.[359] The Panel also concurs with the comment in the Israeli report that the operation should have withdrawn and reassessed its options when the resistance to the initial boarding from the speedboats occurred.[360] Having an alternate plan when clear resistance was first shown might have avoided the events that subsequently unfolded.[361] Given the outcome, it is highly regrettable that the operation continued despite the evident circumstances.

117. Israel's decision to board the vessels with such substantial force at a great distance from the blockade zone and with no final warning immediately prior to the boarding was excessive and unreasonable:

a. **Non-violent options should have been used in the first instance. In particular, clear prior warning that the vessels were to be boarded and a demonstration of dissuading force should have been given to avoid the type of confrontation that occurred;**

b. **The operation should have reassessed its options when the resistance to the initial boarding attempt became apparent so as to minimize casualties.**

The Use of Force on the *Mavi Marmara*

118. In this segment of the chapter we explore what conclusions and findings are possible concerning the violent confrontation that occurred when Israel boarded the *Mari Marmara*. In the Panel's view, having reviewed the two national reports there is conflicting material on many of the key points. It unfortunately may never be possible to fully establish precisely what occurred.

119. The general outline of events that emerges from the two investigations is as follows. The take-over began with an attempt to board from two speedboats.[362] These withdrew when faced with resistance from *Mavi Marmara* passengers.[363] IDF naval

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359 *See* Israeli Commission Report, at 273.
360 *Id.*
361 *See* Israeli Commission Report, at 274.
362 Israeli Commission Report, at 142; Turkish Commission Report, at 20.
363 Israeli Commission Report, at 143-146; Turkish Commission Report, at 22.

commandoes were then landed on the vessel by fast-roping from three helicopters.[364] Starting at 4.29 a.m. 15 IDF personnel began to fast-rope onto the roof of the vessel from the first helicopter[365] and met with violent resistance from a group of passengers.[366] At 4.36 a.m., a further 12 IDF personnel began to land on the roof from the second helicopter,[367] and at 4.46 a.m., 14 began to land from the third.[368] The bridge was secured and at 5.07 a.m. further personnel were landed from the speedboats.[369] The take-over was completed at approximately 5.17 a.m.[370]

120. Significant difference lies as to when live fire was first used and why. The Turkish report asserts that live fire was used from both the speedboats and helicopters before any IDF personnel had landed on the vessel, and that this prompted passengers to panic and to defend themselves.[371] The Israeli report alleges in contrast that the IDF personnel were attacked as they began to land from the first helicopter, and three of the first to land were taken captive, requiring the resort to the use of live fire in self-defence in order to secure the vessel.[372]

121. It is clear from both reports that stun and smoke grenades were fired onto the deck from the speed boats and helicopters before boarding had commenced in order to dispel resistance by the passengers.[373] The Israeli report also confirms that beanbags and paintball rounds were fired from the speedboats during the initial boarding attempt.[374] This is consistent with passengers' witness accounts which describe firing from the speed boats prior to the IDF personnel boarding the vessel.[375] But we are unable to conclude whether this included live fire during the initial stages of the boarding attempt. However, live fire was used from speedboats once the boarding operation was underway.[376]

122. The two investigations reached opposite conclusions as to whether live rounds were fired from the helicopters.[377] Several witness statements refer to live fire from the

364 Israeli Commission Report, at 142; Turkish Commission Report, at 22.
365 Israeli Commission Report, at 147.
366 Israeli Commission Report, at 149; Turkish Commission Report, at 114.
367 Israeli Commission Report, at 164.
368 Israeli Commission Report, at 165.
369 Israeli Commission Report, at 166-168.
370 Israeli Commission Report, at 172.
371 Turkish Commission Report, at 20, 22, 114.
372 Israeli Commission Report, at 275.
373 *See* Israeli Commission Report, at 143-144, 147-148; Turkish Commission Report, at 20.
374 Israeli Commission Report, at 143-144.
375 *See, e.g.*, Turkish Commission Report, Annex 5/1/iv, at 3 ("The first two of the torpedo boats came up to the stern of our ship and, drawing very close to the first-level deck, starting [*sic*] shooting."); Annex 5/1/v, at 1 ("The soldiers on the assault boat started to fire at the ship. They also started to throw sound, smoke and gas bombs into the ship.").
376 *See* Israeli Point of Contact Response of 11 April 2011, Annex Z (containing CCTV footage from the *Mavi Marmara* showing a passenger being killed by live fire shot from an (off-camera) speedboat.)
377 *See* Israeli Commission Report, at 261; Turkish Commission Report, at 114.

helicopters, although these vary as to whether the rounds were fired before or after boarding or by soldiers during their descent from the helicopters.[378] Available limited video footage shows soldiers descending by fast-rope but not with weapons drawn and there is no audible sound of gunfire at that point.[379] Photographs show bullet marks on the funnel of the vessel, which appear consistent with firing from above.[380] The wounds of several of the deceased were also consistent with bullets being fired from above.[381] The explanation given in the Israeli report that these shots were fired from the roof or as victims were bending over is not dispositive on this point.[382] The Panel considers it unlikely that the soldiers fired as they descended, but does not rule out the possibility that live fire was directed from the helicopters once the altercation on board the vessel had begun.

123. It is clear to the Panel that preparations were made by some of the passengers on the *Mavi Marmara* well in advance to violently resist any boarding attempt.[383] The description given in the Israeli report is consistent with passenger testimonies to the Turkish investigation that describe cutting iron bars from the guard rails of the ship, opening fire hoses, donning life or bullet proof vests and gas masks, and assuming pre-agreed positions in anticipation of an attack.[384] Witness reports also describe doctors and medical personnel coordinating before the boarding in anticipation of casualties.[385] Furthermore, video footage shows passengers wearing gas masks, life or bullet proof

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378 *See, e.g.*, Turkish Commission Report, Annex 5/1/viii, at 7 ("Soldiers coming down from helicopters were also firing."); Annex 5/3/i, at 1 ("After dropping the bombs, the soldiers first started shooting from the helicopters, and then they came down on the ship."); Annex 5/4/xx, at 1-2 ("I saw the scuffle between the soldiers coming down from the helicopter and our colleagues and an Israeli soldier's [sic] jumping down to the lower floor, to the place where we were. The Israeli soldiers started to fire at the ship from the torpedo boats and helicopter.").

379 Turkish Commission Report, Annexes 7/3, 7/7.

380 Turkish Commission Report, Annexes 6, 10.

381 Turkish Commission Report, at 23; Annex 1.

382 *See* Israeli Commission Report, at 261-262.

383 Israeli Commission Report, at 210-215; *see also* Turkish POC Response of 11 April 2011, at 9, Israeli POC Response of 11 April 2011, Annex Z (containing CCTV footage from the *Mavi Marmara* showing passengers carrying iron bars and commencing preparations to resist boarding as early as 9.30 p.m. on 30 May 2010).

384 *See, e.g.*, Turkish Commission Report, Annex 5/1/i, at 3 ("Some of the passengers cut guard rails (bulwark stanchion) using stone cutters."); Annex 5/1/ii, at 1 ("Passengers cut some parts of the guard rails (bulwark stanchions) using stone cutters . . ."); Annex 5/3/x, at 1 ("Downstairs, some friends were cutting the iron bars of the ship that weren't in use. The fire hoses were opened. Some were wearing gas masks. . . . I found myself a gas mask and a bullet-proof vest which indicated that I was a press member."); Annex 5/4/x, at 1 ("At around 21.00, we went to our designated positions on board and started waiting.").

385 Turkish Commission Report, Annex 5/3/vi, at 1 ("I made an announcement requesting all the medical personnel to voluntarily gather in the infirmary . . . ."); Annex 5/3/xiii, at 1 ("We the doctors gathered together regarding the health problems which may occur against the potential Israel attack and talked about what can be used in such a case for the first aid. Directions regarding the application and usage of gas masks were told and showed to all the crew.").

vests, and carrying metal bars, slingshots, chains and staves.[386] That information supports the accounts of violence given by IDF personnel to the Israeli investigation.[387]

124. The Panel accepts, therefore, that soldiers landing from the first helicopter faced significant, organized and violent resistance from a group of passengers when they descended onto the *Mavi Marmara*. Material before the Panel confirms that this group was armed with iron bars, staves, chains, and slingshots,[388] and there is some indication that they also used knives.[389] Firearms were taken from IDF personnel and passengers disabled at least one by removing the ammunition from it.[390] Two soldiers received gunshot wounds.[391] There is some reason to believe that they may have been shot by passengers,[392] although the Panel is not able to conclusively establish how the gunshot wounds were caused. Nevertheless, seven other soldiers were wounded by passengers, some seriously.[393]

125. Both reports concur that three soldiers were overpowered by the passengers as they descended from the first helicopter and were taken below the deck of the vessel.[394] The Panel is not persuaded that claims that the three were taken below merely to receive medical assistance[395] are plausible, although it accepts that once below deck other passengers intervened to protect them and ensure that assistance was provided.[396] It is established to the Panel's satisfaction that the three soldiers in question were captured,

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386 Turkish Commission Report, Annexes 7/5, 7/13, 7/15 (all video footage of passengers carrying what appear to be iron bars), Israeli POC Response of 11 April 2011, Annex Z (containing CCTV footage from the *Mavi Marmara* of passengers carrying iron bars, chains, slingshots, and short wooden clubs or staves).

387 *See* Israeli Commission Report, at 142, 149-157.

388 *See* Israeli Commission Report, at 213, Israeli POC Response of 11 April 2011, Annex Z (containing CCTV footage from the *Mavi Marmara* of passengers carrying iron bars, chains, slingshots, and short wooden clubs or staves); *see, e.g.*, Turkish Commission Report, Annexes 5/1/i, 5/1/ii, 5/3/x, 7/5, 7/13, 7/15

389 *See, e.g.*, Israeli Commission Report, at 144, *citing* testimony of the Commander of the Take-over Force; *id.* at 150, *citing* testimony of "Soldier No.1"; Israeli POC Response of 11 April 2011, at 29-30.

390 Israeli Commission Report, at 254, Israeli POC Response of 11 April 2011, Annex Z (containing CCTV footage from the *Mavi Marmara* showing passenger removing ammunition from a handgun); Turkish Commission Report, Annex 5/1/iv, at 3 ("The humanitarian relief volunteers immediately intervened and seized the long-barrel weapons of these terrorist/pirates."); Annex 5/3/xvi, at 2 ("We took their guns from their hands and when we looked at the cartridge clip we saw that there were real bullets. We took the cartridges out and kept the empty guns, we didn't give them back."); Annex 5/4/vii, at 2 ("[M]y friends and I, in an attempt to protect ourselves and at least prevent them from firing directly at us, tried to capture the soldiers' guns.").

391 Israeli Commission Report, at 255; Israeli POC Response of 11 April 2011, Annex S.

392 *See* Israeli Commission Report, at 253.

393 Israeli Commission Report, at 142, 153-157.

394 Israeli Commission Report, at 142, 151-154, 158-163; Turkish Commission Report, at 115.

395 *See* Turkish Commission Report, at 115.

396 *See* Israeli Commission Report, at 162; *see, e.g.*, Turkish Commission Report, Annex 5/1/x, at 1 ("We made sure that we put the soldier in a seat, thus not leaving him unattended. Some tried to attack him; we stopped them.").

mistreated and placed at risk during the incident.[397] In the face of such a response, the IDF personnel involved in the operation needed to take action for their own protection and that of the other soldiers.

126. The Israeli report concluded that IDF personnel acted professionally in response, and switched back and forth between lethal and "less-lethal" weapons as appropriate during the incident, consistent with their rules of engagement and the exercise of self-defence.[398] This point was also emphasized to the Panel by the Israeli Point of Contact.[399] Nevertheless, the Panel is struck by the level of violence that took place during the take-over operation. Many witness statements describe indiscriminate shooting, including of injured,[400] with some referring to shooting even after attempts had been made to surrender.[401] By the IDF's account, 308 live rounds, 87 bean bags and 264 paint ball rounds were discharged.[402] Seventy-one fully armed naval commandoes were deployed during the take-over,[403] which lasted for over 45 minutes.

127. The material before the Panel does not contest the fact that nine passengers were killed and many others seriously wounded by Israeli forces during the take-over of the *Mavi Marmara*. However, despite the investigation and conclusions reached in Israel's report, no satisfactory explanation has been provided to the Panel for how the individual deaths occurred.[404] The Israeli Point of Contact sought to explain to the Panel that the chaotic circumstances of the situation, made it "difficult to identify specific incidents described by soldiers as related to a specific casualty from among the nine activists who died during the takeover."[405] This is greatly to be regretted.

128. The information contained in the two reports largely coincides with respect to the wounds received by the nine deceased.[406] In the Panel's view the following facts are of particular concern and have not been adequately answered in the material provided by

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397 *See* Israeli POC Response of 11 April 2011, Annex Z (containing CCTV footage from the *Mavi Marmara* showing obviously injured IDF personnel).

398 Israeli Commission Report, at 279.

399 *See* Israeli POC Response of 11 April 2011, at 28.

400 *See, e.g.*, Turkish Commission Report, Annex 5/4/xxix, at 2 ("These soldiers were directly pointing the light of their projectors and firing at anyone who fell into their light."); Annex 5/4/xxv, at 2 ("They were very angry, furious even and they started shooting at people who were lying near me doing nothing."); Annex 5/1/xiii, at 2 ("They first shot [name redacted], who was lying on his side, in the back, and then they took him by the arm, turned him over, and shot him in the chest.").

401 *See, e.g.*, Turkish Commission Report, Annex 5/4/xv, at 1-2 ("The friend who was next to me, [name redacted], was shot and wounded as a result of shots fired by Israeli soldiers after we had shouted out that we were surrendering."); Annex 5/1/xiii, at 2 ("Some of the volunteers were waving their white shirts, but the soldiers continued to fire.").

402 Israeli Commission Report, at 260.

403 Israeli POC Response of 11 April 2011, at 25.

404 *See* Israeli POC Response of 11 April 2011, at 66; Israeli POC Response of 27 April 2011.

405 Israeli POC Response of 11 April 2001, at 28.

406 *See* Israeli Commission Report, at 191-192; Turkish Commission Report, at 26-28; Annexes 1, 2.

Israel. Although the Israeli Point of Contact provided a general response to these points,[407] he was unable to provide the Panel with more detailed information, particularly with respect to the death of the passenger described below:[408]

- Seven of the nine persons killed received multiple gunshot wounds to critical regions of the body: Ali Bengi,[409] Cengiz Akyüz,[410] Çetin Topçuoğlu,[411] Fahri Yaldız,[412] Furkan Doğan,[413] İbrahim Bilgen[414] and Necdet Yıldırım.[415]

- Five of those killed had bullet wounds indicating they had been shot from behind: Cengiz Akyüz,[416] Çetin Topçuoğlu,[417] Necdet Yıldırım,[418] Furkan Doğan[419] and İbrahim Bilgen.[420] This last group included three with bullet wounds to the back of the head: Cengiz Akyüz,[421] Çetin Topçuoğlu[422] and Furkan Doğan.[423] İbrahim Bilgen was killed by a shot to the right temple.[424]

- Two people were killed by a single bullet wound: Cevdet Kılıçlar was killed by a single shot between the eyes;[425] and Cengiz Songür was killed by a shot to the base of the throat.[426]

- At least one of those killed, Furkan Doğan, was shot at extremely close range.[427] Mr. Doğan sustained wounds to the face, back of the skull, back and left leg. That suggests he may already have been lying wounded when the fatal shot was delivered, as suggested by witness accounts to that effect.[428]

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407 *See* Israeli POC Response of 11 April 2011, at 27-28.
408 *See* Israeli POC Response of 27 April 2011.
409 Turkish Commission Report, Annex 1/1.
410 Turkish Commission Report, Annex 1/2.
411 Turkish Commission Report, Annex 1/5.
412 Turkish Commission Report, Annex 1/6.
413 Turkish Commission Report, Annex 1/7.
414 Turkish Commission Report, Annex 1/8.
415 Turkish Commission Report, Annex 1/9.
416 Turkish Commission Report, Annex 1/2.
417 Turkish Commission Report, Annex 1/5.
418 Turkish Commission Report, Annex 1/9.
419 Turkish Commission Report, Annex 1/7.
420 Turkish Commission Report, Annex 1/8.
421 Turkish Commission Report, Annex 1/2.
422 Turkish Commission Report, Annex 1/5.
423 Turkish Commission Report, Annex 1/7.
424 Turkish Commission Report, Annex 1/8.
425 Turkish Commission Report, Annex 1/4.
426 Turkish Commission Report, Annex 1/3.
427 Turkish Commission Report, Annex 1/7.
428 *See, e.g.*, Turkish Commission Report, Annex 5/4/xviii, at 2 ("On the upper level, a friend who I couldn't identify was on the floor being kicked and shot at by two Israeli soldiers. Later I saw on television that this friend was Furkan Doğan."); Annex 5/4/xxxiv, at 1 ("Furkan Doğan was shot in the head. . . . He was shot again by Israeli soldiers when he was lying on the ground.").

- No evidence has been provided to establish that any of the deceased were armed with lethal weapons.[429] Video footage shows one passenger[430] holding only an open fire hose being killed by a single shot to the head or throat fired from a speedboat.[431]

129. Some of the witness accounts appended to the Turkish report say that two passengers on board were killed by shots from the first helicopter prior to the actual boarding taking place,[432] although by no means all the witnesses say this. On the material before it, the Panel cannot conclude whether the deaths occurred in this way.

130. As far as the injured are concerned the medical reports show that extensive serious injuries were sustained by other passengers including bullet wounds, broken bones and internal injuries requiring multiple surgeries.[433] One passenger remains in a coma at the time of writing.[434]

131. The Panel concludes that there has been no adequate explanation provided for the nine deaths or why force was used to the extent that it produced such high levels of injury.

132. The Panel further notes that the boarding of the remaining vessels in the flotilla was also conducted by the use of force. There is no suggestion that live fire was used, but both reports and witness accounts describe the use of stun grenades, paintballs, beanbag rounds and tasers even though there was no armed violent resistance on any of these vessels.[435] Injuries were sustained by some passengers, but there were no fatalities.[436]

133. Israeli Defense Forces personnel faced significant, organized and violent resistance from a group of passengers when they boarded the *Mavi Marmara*

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429 *See* Israeli POC Response of 11 April 2011, at 66.

430 Believed to be Mr. Cengiz Songür.

431 *See* Israeli POC Response of 11 April 2011, Annex Z (containing CCTV footage from the *Mavi Marmara* showing passenger being shot in the head while directing an open fire hose at what appears to be an Israeli Navy speedboat (off-camera)); Israeli POC Response of 27 April 2011.

432 Turkish Commission Report, at 23; *see also, e.g.*, Annex 5/1/iv, at 3 ("In that first fire, a few of our friends fell . . . ."); Annex 5/5/xvi, at 1 ("Before the first Israeli soldier came onboard, two passengers were shot dead from the helicopter."); Annex 5/5/xvii, at 1 ("Two unarmed civilians were killed just metres away from me. They were killed by bullets shot from above, from soldiers in the helicopter hovering above.").

433 Turkish Commission Report, at 29-30, Annex 2; *see also* Israeli Commission Report, at 192.

434 *See* Turkish Commission Report, at 29.

435 *See* Israeli Commission Report, at 180-184; Turkish Commission Report, at 31-35; *see also, e.g.*, Annex 5/5/v, at 4 ("They immediately started to throw sound bombs and fire rubber or paintball bullets."); Annex 5/5/ix, at 2 ("[name redacted] was attacked with a teaser [sic] pistol and is ill; she shows me a nasty blue-red hemorrhage on her upper arm of some 10 cm.").

436 Israeli Commission Report, at 180-184; Turkish Commission Report, at 31-35.

requiring them to use force for their own protection. Three soldiers were captured, mistreated, and placed at risk by those passengers. Several others were wounded.

134. The loss of life and injuries resulting from the use of force by Israeli forces during the take-over of the *Mavi Marmara* was unacceptable. Nine passengers were killed and many others seriously wounded by Israeli forces. No satisfactory explanation has been provided to the Panel by Israel for any of the nine deaths. Forensic evidence showing that most of the deceased were shot multiple times, including in the back, or at close range has not been adequately accounted for in the material presented by Israel.

Treatment of the Passengers After the Take-Over Was Completed

135. The Panel next addresses the serious allegations of mistreatment of passengers by Israeli authorities after the take-over of the vessels had been completed, through until their deportation.[437] There was a series of steps taken to process the passengers.[438] Passengers were searched, brought onto deck, and returned to the vessel halls or cabins until disembarkation at Ashdod. On disembarkation, passengers underwent security screening before being transferred to detention facilities where they were held for up to 48 hours before the majority of them were repatriated on 2 June 2010.[439]

136. There is a radical difference as to how the two reports characterize the behaviour of Israeli officials during this period. On the basis of testimony and material from relevant Israeli authorities, the Israeli report concludes that reasonable treatment was provided throughout.[440] The Turkish report draws on testimony to conclude that passengers were "subjected to severe physical, verbal and psychological abuses" and were "indiscriminately and brutally victimized" from the taking-over of the vessels up until the departure of the passengers from Israel.[441]

137. The Panel's view is that there are good grounds to believe that there was significant mistreatment of passengers by Israeli authorities after completion of the take-over of the vessels. Although not all the passengers allege mistreatment, in none of the events to which the statements of the 93 witnesses relate are the witnesses generally more consistent than upon this matter.[442] We note Israel's position that its "treatment of the

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437 *See* Turkish Commission Report, at 35-50.

438 *See* Israeli Commission Report, at 176-190.

439 Israeli Commission Report, at 189-190.

440 *See* Israeli Commission Report, at 176-190.

441 Turkish Commission Report, at 115.

442 We note the allegation that a small number of statements appear to be heavily edited (*see* Israeli POC Response of 11 April 2011, Annex A) but are not convinced that this was done on purpose given the complexity involved in obtaining statements through various means and the subsequent translation process.

flotilla participants was in accordance with its obligations under both international and domestic standards."[443] However, in our view the more general explanations offered by the Israeli report and subsequently by the Point of Contact[444] do not answer all the specific allegations made in the witness statements.

138. There are a number of matters that the Panel considers to be established. They will be described in the following paragraphs, accompanied where useful by reference to relevant witness statements that we consider particularly persuasive on account of their internal consistency and the extent they corroborate other information before the Panel. We stress once again that the Panel is not a court. We have not personally heard the witnesses whose statements we have read. We acknowledge that they represent only a fraction of all those present on the *Mavi Marmara* and the other ships. Nor are we able to make definite findings on each witness' reliability and credibility. However, even when considered with an utmost degree of caution, [445] the statements viewed as a whole provide us with a plausible description of the nature of the events as they unfolded after the take-over of the vessels.

139. Many passengers were subjected to overly tight handcuffing for extended periods while on the vessels, including of people who were injured.[446] Passengers in many instances were also denied bathroom access,[447] access to medication,[448] and were given only limited access to food and drink[449] during the period when the vessels were being

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443 Israeli POC Response of 11 April 2011, at 69.

444 *See* Israeli POC Response of 11 April 2011, at 69-73.

445 We note for example that before setting sail all flotilla passengers undertook not to "speak against this activity of the Freedom Flotilla Platform, in a way that will stop or negatively affect similar activities, prior to the journey or afterwards." (Guarantee, *supra* note 303, ¶ 10).

446 *See, e.g.*, Turkish Commission Report, Annex 5/1/i, at 2 ("Hands of some of the passengers were turning purple because their handcuffs were too tight."); Annex 5/1/viii, at 10 ("They had tightly handcuffed all the people with their hands behind their back, including the injured."); Annex 5/3/xiii, at 2 ("For two hours, we laid down as we are cuffed from back with the plastic handcuffs."); Annex 5/3/xviii, at 2 ("They tied my hands with handcuffs so tightly that it almost stopped the circulation. My hands stayed handcuffed for one hour. I was in extreme stress in this position."); Annex 5/3/xxiii, at 2 ("During the time we were on the ship, I stayed handcuffed for eight hours."); Annex 5/5/xvi, at 1 ("[T]he commandos handcuffed all passengers except the most elderly, some of the women, the European journalists, and the VIP passengers of West European descent, and forced them to kneel on the floor, out on sun deck, hands cuffed behind their backs."); *see also* Annexes 7/20, 7/22 (both video footage showing handcuffed passengers taken off the *Mavi Marmara* at Ashdod).

447 *See, e.g.*, Turkish Commission Report, Annex 5/3/vi, at 2 ("When more people wanted to go to the toilet, they said they would take us one by one. When 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 *de facto* a restriction."); Annex 5/3/x, at 3 ("I could see people wanting to go to the toilet. They didn't let them."); Annex 5/4/xi, at 1 ("[T]hey … did not let us go to the bathroom. The elderly soiled themselves.").

448 *See, e.g.*, Turkish Commission Report, Annex 5/3/ix, at 3 ("I wanted to take my asthma medicine from my bag. They didn't let me."); Annex 5/4/xxxvi, at 2 ("I wanted to take my medicine from my pockets. Not only did they not let me, they also struck me.").

449 *See, e.g.*, Turkish Commission Report, Annex 5/3/v, at 2 ("Downstairs, because they kept all of us in the same room and it was very hot, we started to feel faint. We asked for some food but we

taken to the port at Ashdod. Large numbers of passengers were left on the deck of the *Mavi Marmara* and other vessels for a period of several hours, exposed to the elements.[450] Many passengers also allege that they were subjected to physical and verbal harassment throughout including pushing, shoving and kicking and other physical intimidation.[451] The mistreatment was not restricted to those individuals that could be considered to have represented a direct threat to the IDF or other personnel.[452] The Panel notes that the Israeli report does not address any of these matters in great detail.[453] To a degree its conclusions are not inconsistent with some of the descriptions offered by the witness accounts.[454]

140. Many passengers allege that harassment, intimidation and physical mistreatment continued as they were being processed after landing in the port of Ashdod throughout their detention and up to the point of deportation.[455] Invasive physical body searches

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weren't given any."); Annex 5/4/xi, at 1 ("We were thirsty but they did not give us water."); Annex 5/4/xii, at 2 ("The whole time we were kept in the lounge they would not give any food or water to anyone."); Annex 5/5/xiv, at 4 ("We were not allowed to eat even though there were [sic] food for two months on the Mavi Marmara, and there was [sic] food cans where we were but we were not allowed to touch them.").

450 *See, e.g.*, Turkish Commission Report, Annex 5/3/iv, at 2 ("[T]he helicopters were flying on top of us, and we got cold and weak because of the cold water coming from the pressure of the propeller."); 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."); *see also* Annex 5/5/i, at 1 ("We were herded together on deck [of the *Elefiheri Mesogeio*] for eleven hours under an inadequate piece of tarpaulin which offered hardly any protection at all from a scorching sun.)"

451 *See, e.g.*, Turkish Commission Report, Annex 5/1/v, at 2 ("They made me go to the top deck by pushing and tripping me. There, they kicked my knees and they made me fall down."); Annex 5/3/ix, at 2 ("They took us to the deck of the ship by yelling at us and pushing us. . . . They took us downstairs by pushing us."); Annex 5/5/iv, at 3 ("I . . . was immediately blocked . . . by a masked [Israeli commando] who put the end of his machine gun in my face and said, 'Shut the fuck up, shut the fuck up you fucking bitch, I'll fucking kill you'. He was incredibly aggressive."); Annex 5/5/xiv, at 3 ("I saw how they treated these people very differently. Some were treated almost friendly while others were kicked and the soldiers also used the back of their weapons to hit some of the passengers. I saw . . . one man who had been hit with the back of the rifle and fell down and could not walk . . . .").

452 *See, e.g.*, Turkish Commission Report, Annex 5/4/xxxix, at 2 ("They also did not let an elderly passenger pull up his pants [after he had gone to the bathroom]. They took that old man next to the women with his pants down. The old man could not open his eyes from shame."); Annex 5/5/i, at 1 ("I saw three Greek passengers which were brutally dragged across the deck, over sharp-edged stairs and pipes — just because they didn't want to hand over their passports."); Annex 5/5/xiv, at 3 ("[Some passengers] were treated very badly and for no apparent reason.").

453 *See* Israeli Commission Report, at 178-179, 181-183.

454 *See, e.g.*, Israeli Commission Report, at 179 ("[H]andcuffs were removed from *some* of the participants who had been handcuffed earlier.", emphasis added.).

455 *See, e.g.*, Turkish Commission Report, Annex 5/1/v, at 2 ("They continuously used foul language when we were at the prison and when they were taking us to the airport. We were treated very badly at the airport. They kicked and slapped us at the airport."); Annex 5/1/viii, at 11 ([At Ashdod] they made me enter the tent. They were pushing and pulling me around."); Annex 5/4/xiv, at 2 ("They made us wait for hours. The male and female soldiers around the vehicle had gone into action. They were looking at us, pushing us around, hitting us on the shoulder, and harassing us non-stop."); Annex 5/5/viii, at 2 ("[At the airport] I was wrested [sic] to

were conducted, including strip-searches—often repeated multiple times including at the airport prior to departure.[456] While we accept that usual protocols were generally followed and that women were not strip-searched in front of men, we regard the necessity for so many repeated searches as dubious. We also note with concern the serious allegations regarding the beating of passengers at Ben Gurion Airport just before their departure.[457] Although the Israeli report refers to a "clash" between passengers and police forces, which resulted in six passengers requiring medial treatment,[458] no further information about the incident was provided by Israel.[459]

141. At least some passengers were presented with documents in Hebrew and placed under pressure to sign them.[460] While the Panel has been presented with evidence that translations of certain documents, such as custody orders, were provided,[461] it is still concerned that not all passengers received them or were given the opportunity to sign translated versions as opposed to the Hebrew originals.

142. Moreover, testimony from several witnesses, including a Turkish consular officer, supports the allegation that passengers were denied timely consular or legal assistance.[462]

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the ground where 17 of them assaulted me in plain view of a CCTV Camera. I stayed limp and repeated 'OK, OK, OK,-- .. ' but they kept on beating me for a few more minutes giving me at least three head wounds."); Annex 5/5/i, at 1 ("At Tel Aviv Airport they kept us waiting in the bus for hours - and refused some prisoners to go to the toilet. One Czech journalist was recommended to urinate in his trousers. One Italian was beaten because he protested that his passport was getting lost by the military.").

456 *See, e.g.*, Turkish Commission Report, Annex 5/1/viii, at 11 ("They searched everything except for my underwear and they also took my clothes outside and x-rayed them. They searched me thoroughly when I was wearing only my underwear. . . . I was taken to another tent to be searched. They searched me again in a rude manner. . . . [At the airport] I was once more searched . . . in a detailed and degrading manner."); Annex 5/4/vii, at 2 ("We were searched at various check-points numerous times."); Annex 5/4/xiii, at 2 ("They stripped us until our whole bodies were exposed and searched every part of us."); Annex 5/4/xlii, at 3 ("They stripped some of us naked.").

457 *Id.*

458 Israeli Commission Report, at 190.

459 *See* Israeli POC Response of 27 April 2011.

460 *See, e.g.*, Turkish Commission Report, Annex 5/3/viii, at 2 ("They interrogated me in the tent. They asked me to sign a paper [that] consists of 3 pages in Hebrew. Its content was incomprehensible."); Annex 5/4/xvi, at 2 ("I was asked to sign some papers in a foreign language I could not understand."); Annex 5/4/xvii, at 2 ("At the port, they took me to an interrogation tent. There they tried to make me sign some papers in Hebrew. But I told them that I would not sign something that was not in English or Turkish.").

461 *See* Israeli POC Response of 11 April 2011, at 65-66, Annexes P, W, X.

462 *See, e.g.*, Turkish Commission Report, Annex 5/5/xii, at 2 ("In Ashdod I immediately started demanding my right to see a lawyer and to contact my embassy (I continued these requests with no effect, until I was deported)."); Annex 5/5/xiv, at 4 ("I asked to speak to my consul, she (the woman in one of the stations that questioned me) just laughed and said -What is your consul, what are you talking about."); Turkish POC Response of 11 April 2011, Appendix 3, Testimony of Ms. Gizem Sucuoğlu, Second-Secretary at the Turkish Embassy in Tel Aviv ("It was not possible to obtain a list of our citizens that were kept [at Beer Sheva Prison], nor was it possible to get information about who was kept in which cell. . . . [T]he main problems were the lack of official

However, this is not a consistent feature of all the witness accounts and several acknowledged that they did receive such assistance once they had been transferred to prison facilities after processing.[463] But the Panel notes that a diplomatic note, sent on behalf of the European Union Heads of Mission in Israel to the Israeli Foreign Minister, also deplored the lack of consular access to their countries' nationals.[464]

143. Many personal belongings were taken from the passengers by the Israeli authorities and not returned.[465] The Israeli report states that "magnetic media" (such as laptops, cell phones, MP3 players, memory sticks and DVDs) were confiscated[466] and retained for further investigation.[467] However, attempts to properly record and itemize confiscated items were not sufficient and failed to ensure that they were returned to their owners.[468] We regard this as significant not least given the potential monetary and evidentiary value of many of the items involved. The seizure of some of the belongings, such as cash, jewellery and clothing, served no military purpose and took place without any legitimate grounds. The Panel notes that the IDF military police have initiated seven criminal investigations into specific incidents of theft of property,[469] but considers that the problems relating to the seizure of belongings were more widespread.

144. The Panel notes the allegations that wounded passengers were deliberately denied medical treatment or were deliberately mistreated.[470] However, it finds that the Israeli report provides a detailed and plausible description of the steps that were taken by the Israeli forces to ensure that all wounded were treated in a timely and properly manner.[471] While there might have been initial delays due to the chaotic situation on board of the

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information we experienced from the first day, the general disorder . . . and not having access to some of our citizens.")

463 *See, e.g.*, Turkish Commission Report, Annex 5/1/viii, at 12 ("[While in detention] they took everyone out of the wards and in a short while officers from embassies of all countries arrived, except for the Turkish embassy. Jordan consulate came for the countries that did not have any diplomatic mission in Israel."); Annex 5/5/iii, at 2 ("[E]ventually [I] was allowed to meet with the Australian embassy.").

464 *See* Israeli POC Response of 11 April 2011, Annex E.

465 *See, e.g.*, Turkish Commission Report, Annex 5/4/xiii, at 2 ("My laptop, cell phone, TL 300 in cash, my ID card, driver's license, Marine License and personal belongings were taken from me. None of my belongings were returned to me."); Annex 5/4/xiv, at 2 ("My cell phone, 1000 EUROS in cash, my ID, driver's license, credit cards, backpack and other personal belongings were taken but never returned to me.").

466 Israeli Commission Report, at 178.

467 Israeli Commission Report, at 194.

468 *See* Israeli POC Response of 11 April 2011, at 34-35.

469 *See* Israeli Commission Report, at 195-197.

470 *See* Turkish Commission Report, at 28.

471 *See* Israeli Commission Report, at 172-175; *see also* Israeli POC Response of 11 April 2011, at 42-43.

Mavi Marmara,[472] the Panel accepts that appropriate medical treatment was provided as soon as circumstances allowed.

145. There was significant mistreatment of passengers by Israeli authorities after the take-over of the vessels had been completed through until their deportation. This included physical mistreatment, harassment and intimidation, unjustified confiscation of belongings and the denial of timely consular assistance.

472 *See* Israeli Commission Report, at 172: "After the take-over of the vessel was completed, at around 5.17 a.m., the stage of treating and evacuating the wounded in a more organized manner commenced." (footnote omitted).

6 How to Avoid Similar Incidents in the Future

Introduction

146. In this chapter, the Panel deals with the Secretary-General's instruction to consider and recommend ways of avoiding incidents similar to the flotilla from arising in the future. This discussion is divided into two parts. First, we set out our views on the specific situation with respect to Israel's policy of restricting access of goods and people to Gaza, which has led to substantial international concern. Second, we address how to prevent difficulties arising in general from the imposition of a naval blockade.

The Situation in Gaza

147. The Panel recognizes that the situation in Gaza provides the overarching context for the incident. The security threat posed to Israel by militant groups in Gaza provides the foundation for its naval blockade. On the other hand, concern for the humanitarian situation in Gaza provides a motivation for more flotillas in the future.

148. There have been a number of attempts to send ships to Gaza as a way to deliver supplies to the inhabitants and to draw attention through publicity to the unfortunate plight of people in Gaza. It is important that such events are not repeated in the interests of the peace and stability of the region. Adverse consequences can flow from situations where violence occurs and lives are lost. Public opinion can be inflamed and further violent events can result.

149. The Secretary-General has discouraged new flotillas to Gaza for exactly the reasons given here. In his personal diplomacy the Secretary-General has been actively involved in discouraging any such efforts. He has asked all concerned to use their influence in that regard. He has argued that there exists the need to avoid incidents that may provoke further destabilization of the regional climate and he has stressed the need for caution and prudence. The Quartet[473] has made similar calls in its 21 June 2010 statement and other United Nations officials have stressed that "such convoys are not helpful in resolving the basic economic problems of Gaza" and that "they needlessly carry the potential for escalation."[474] In this regard nations involved are under a duty to

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473 The Middle East Quartet is comprised of the United Nations, the United States, the European Union, and Russia.

474 Briefing by Mr. B. Lynn Pascoe, Under-Secretary-General for Political Affairs, to the Security Council on the situation in the Middle East, including the Palestinian question, U.N. SCOR, 65th Session, 6363th mtg. at 3, U.N. Doc. S/PV.6363 (July 21, 2010); *See also* Briefing by Mr. Robert

actively co-operate to avoid endangering both individual lives and the security of the region. It is important that States consult directly to this end and to make every effort to avoid a repetition of the incident.

150. A naval blockade may only be maintained so long as it remains proportionate and a situation of armed conflict persists. Although a blockade represents a legitimate exception to the freedom of navigation in situations of armed conflict, that principle nonetheless remains of central importance to the peaceful order of the oceans, particularly in areas such as the eastern Mediterranean. The Panel therefore recommends Israel keep the naval blockade under regular active review, in order to assess whether it continues to be necessary.

151. The Panel underlines the reaffirmation by the Quartet on 21 June 2010, shortly after the flotilla incident, that the situation in Gaza, including the humanitarian and human rights situation of the civilian population, was unsustainable, unacceptable and not in the interests of any of those concerned. That appears also to be a widespread view in the international community. It is clear that the restrictions Israel has placed on goods and persons entering and leaving Gaza via the land crossings continue to be a significant cause of that situation.[475] In his statement of 1 June 2010 consecutive to the flotilla incident,[476] the President of the Security Council stated that the Council reiterated its grave concern at the humanitarian situation in Gaza and stressed the need for sustained and regular flow of goods and people to Gaza as well as unimpeded provision and distribution of humanitarian assistance throughout Gaza. At a briefing immediately after the 31 May 2010 incident, a senior United Nations official noted that the loss of life could have been avoided if Israel had responded to repeated calls to end its closure of Gaza.[477]

152. In this context, the Panel also recalls that Security Council resolution 1860 (2009)[478] called for the unimpeded provision and distribution throughout Gaza of humanitarian assistance, including of food, fuel and medical treatment. It also called on Member States to support international efforts to alleviate the humanitarian and economic situation in Gaza. In its paragraph 6, the resolution specifically called on States to prevent illicit trafficking in arms and ammunition and ensure the sustained reopening of

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Serry, Special Coordinator for the Middle East Peace Process and Personal Representative of the Secretary-General, to the Security Council on the situation in the Middle East, including the Palestinian question, U.N. SCOR, 66th Sess., 6540th mtg. at 4, U.N. Doc. S/PV. 6540 (May 19, 2011).

475 *See* United Nations Office for the Coordination of Humanitarian Affairs, occupied Palestinian territory, *Easing the Blockade: Assessing the Humanitarian Impact on the Population of the Gaza Strip March 2011*, available at www.ochaopt.org (March 23, 2011).

476 S.C. Pres. Statement 2010/9, U.N. Doc S/PRST/2010/9 (June 1, 2010).

477 *See* Briefing by Mr. Oscar Fernandez-Taranco, Assistant Secretary-General for Political Affairs, to the Security Council on the situation in the Middle East, including the Palestinian question, U.N. SCOR, 65th Sess., 6325th mtg. at 3, U.N. Doc. S/PV. 6325 (31 May 2010).

478 S.C. Res. 1860, U.N. Doc. S/RES/1860 (Jan. 8, 2009).

the crossing points on the basis of the 2005 Agreement on Movement and Access between the Palestinian Authority and Israel. The resolution also encouraged tangible steps towards intra-Palestinian reconciliation.

153. Gaza occupies an area of 360 square kilometres and contains a population of 1.43 million, of whom one million are refugees—that is to say 70 percent of the population. It has a high population density, 3,881 persons per square kilometre. A high percentage of the population is young—54 percent are under the age of 18. The unemployment rate is very high, 39 percent.[479] This is one of the highest unemployment rates in the world. Similarly, the poverty rate is high and the area is heavily dependent upon foreign aid. Furthermore, socio-economic conditions in Gaza have deteriorated badly in the aftermath of the Hamas take-over and the Israeli-imposed restrictions on goods entering Gaza via the land crossings.[480] Since these restrictions began in 2007, most private businesses have closed. The functioning of hospitals has been severely affected. The provision of electricity has been reduced and is intermittent. There has been a deterioration of water supply and sanitation services. The demand for housing and social services is climbing. Israel's report admits Israel's land crossings policies have an adverse impact on the daily life of the civilian population,[481] and that they were designed to weaken the economy in order to undermine Hamas's ability to attack Israel.[482]

154. The Panel recognizes that the Government of Israel has taken significant steps to ease the restrictions on goods entering Gaza since the 31 May 2010 incident.[483] On 20 June 2010 it announced a package of measures aimed at those restrictions. The Quartet welcomed this announcement. On 5 July 2010, in a step which was welcomed by the Secretary-General, the Government of Israel switched from a positive list of goods allowed into Gaza to a negative list of goods whose entry is prohibited or restricted. On 8 December 2010, Israel decided to allow exports from Gaza, consistent with security conditions. United Nations agencies have received approval to complete construction projects in Gaza. Those steps have seen an improvement in import levels, but the depressed economic situation and continuing impact of the closure measures remain of serious concern.[484] The Panel notes the calls by senior United Nations officials that efforts should be made to scale up both import and export levels, within the framework of Security Council resolution 1860 (2009).[485] The United Nations also recommended that the Government of Israel should continue its efforts to ease restrictions on movement of

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479 Office of the United Nations Special Coordinator for the Middle East Peace Process, *Socio-economic Report January 2011*, available at www.unsco.org (Jan. 30, 2011).

480 Briefing by Mr. Robert Serry, Special Coordinator for the Middle East Peace Process, and Personal Representative of the Secretary-General to the Palestine Liberation Organization and the Palestinian Authority, to the Security Council on the situation in the Middle East, including the Palestinian question, U.N. SCOR, 66th Sess., 6488th mtg. at 4, U.N. Doc. S/PV.6488 (Feb. 24, 2011).

481 *See* Israeli Commission Report, at 108.

482 *See* Israeli Commission Report, at 94.

483 *See* Israeli Commission Report, at 71-72.

484 Briefing by Mr. Robert Serry to the Security Council, *supra* note 480, at 4.

485 *Id.*

goods and persons to and from Gaza, towards ending the closure of Gaza, within the framework of Security Council resolution 1860 (2009).[486]

155. At the same time, all relevant responsible agencies and institutions should co-operate to effectively identify the humanitarian needs of the population and to ensure that assistance is provided in a timely and effective way. Those wishing to provide assistance should work through established procedures, using the designated land crossings. Where non-governmental organizations or other private groups wish to provide assistance they should consult with relevant authorities in Israel and the Palestinian Authority to ensure that such assistance can best be delivered to its recipients without incident.

156. The Panel's recommendations in respect to Gaza are as follows:

- **All relevant States should consult directly and make every effort to avoid a repetition of the incident.**
- **Bearing in mind its consequences and the fundamental importance of the freedom of navigation on the high seas, Israel should keep the naval blockade under regular review, in order to assess whether it continues to be necessary.**
- **Israel should continue with its efforts to ease its restrictions on movement of goods and persons to and from Gaza with a view to lifting its closure and to alleviate the unsustainable humanitarian and economic situation of the civilian population. These steps should be taken in accordance with Security Council resolution 1860, all aspects of which should be implemented.**
- **All humanitarian missions wishing to assist the Gaza population should do so through established procedures and the designated land crossings in consultation with the Government of Israel and the Palestinian Authority.**

Naval Blockades in General

157. Naval blockades are not common, but they are imposed from time to time and it is probable that others will be imposed in the future. Because they are not common, there tends to be a lack of general knowledge in the international community about their characteristics and features. This lack of knowledge can lead to misunderstandings as to

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[486] Briefing by Mr. B. Lynn Pascoe, Under-Secretary-General for Political Affairs, to the Security Council on the situation in the Middle East, including the Palestinian question; U.N. SCOR, 66th Sess., 6520th mtg. at 3, U.N. Doc. S/PV.6520 (April 21, 2011); Briefing by Mr. Robert Serry, *supra* note 474, at 4.

what the true situation is when a blockade is declared. The law of blockade is established primarily by rules of customary international law. The 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea ("San Remo Manual") provides a useful reference in identifying those rules.

158. From a practical point of view, therefore, if difficulties arising from blockades are to be prevented in the future it is necessary to accept that international law does in certain limited circumstances allow for blockades to be imposed and enforced including by the use of force. It is important, however, that all relevant States act with prudence and caution with respect to the imposition and enforcement of a blockade. A blockade by definition has serious implications for the fundamental principle of the freedom of navigation and for those vessels that seek to enter the blockade zone. The consequences of breaching a blockade are clearly set out in international law, as reflected, for example, in paragraphs 10, 67, and 146 of the San Remo Manual. Once a blockade has been lawfully established, it needs to be understood that the blockading power can attack any vessel breaching the blockade if after prior warning the vessel intentionally and clearly refuses to stop or intentionally and clearly resists visit, search or capture. There is no right within those rules to breach a lawful blockade as a right of protest. Breaching a blockade is therefore a serious step involving the risk of death or injury.

159. Given that risk, it is in the interests of the international community to actively discourage attempts to breach a lawfully imposed blockade. Such attempts place the lives of those involved at risk. That fact places an obligation on States to ensure their nationals are aware of the risks of engaging in such a hazardous activity, and to actively discourage them from attempting it. In the view of the Panel it is a particular lesson to be learned from the incident under review that there is a need for governments to warn their citizens of the risk of travelling on vessels that are intending to challenge a blockade. Many activists who may wish to engage in such journeys will neither know of the principles of international law that govern blockades nor of the risks that may be involved in attempting to breach them. It is also clear that reliance cannot be placed upon NGOs organizing such efforts to warn the participants adequately of the risks. Thus we think States have a duty to take active steps to warn their citizens of the risks involved in running a blockade and to endeavour to dissuade them from doing so, even though they may not have the legal power to stop the conduct. Such warnings are consistent with the travel warnings many governments issue as a matter of course regarding hazards that may be encountered at a particular destination and offering advice to their citizens on the risks involved.[487]

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487 *See* for example, the travel warning issued by the United Kingdom Foreign and Commonwealth Office in respect of Gaza, available at www.fco.gov.uk (last visited July 7, 2011): "In the early hours of 31 May 2010, members of the Israeli security forces boarded and forcibly took control of a number of ships in international waters as they were heading towards Gaza with the intention of breaking the naval blockade currently in place. Nine people died and dozens more were injured.

160. The imposition of a blockade involves the use of force, which can only be employed in the exercise of a right of self-defence. Measures taken by States in the exercise of their right of self-defence are required under Article 51 of the United Nations Charter to be notified to the Security Council. Such notification enables the Security Council to monitor any implications of a naval blockade for international peace and ultimately security and to take action if it reaches the view that is necessary.

161. It is readily foreseeable that the imposition of a blockade may in some circumstances attract humanitarian missions who wish to provide assistance to people who may be adversely affected by the blockade. The Panel fully respects that intention and notes that the blockading power has an obligation to allow for such assistance to be provided where necessary. Such missions need to appreciate, however, that there are established rules as to how such assistance may be provided and these need to be followed. International humanitarian law generally requires that humanitarian personnel must respect any security requirements in force. Protection is provided for humanitarian vessels entering a blockade zone where they have been granted safe conduct by agreement between the belligerent parties. Such protection requires that the vessels allow inspection and stop or change course when requested. Any attempt to breach a blockade to deliver humanitarian assistance without such agreement recklessly endangers the security of the vessel and those on board. It is important that humanitarian missions act consistently with the principles of neutrality, impartiality and humanity recognized by the UN General Assembly[488] and avoid such action.

162. At the same time, the manner in which a blockade is enforced requires particular attention if similar incidents are to be avoided in the future. The basic norms of international humanitarian law, including precaution and proportionality must be respected.[489] When the direct use of force is contemplated against a non-military vessel carrying large numbers of passengers, military commanders and planners must consider their legal obligations, and also act with prudence and caution in light of those facts. It is advisable that efforts should first be made to stop the vessels by non-violent means. In such circumstances warnings should be given in a variety of ways, and they should be repeated, so there is no possibility of misunderstanding. If force is going to be used and the use of that force is imminent, that fact must be plainly communicated and indicated to those against whom it is proposed to act. There should be nothing vague about it. The people must be given ample warning of the dangers that will result if they do not comply with a request to change course or to stop. This way they have an opportunity to change their behaviour and avoid the danger. Force once used must be kept to the minimum necessary, proportional and carefully weighed against the risk of collateral casualties. In such circumstances where the magnitude of the risk is great, it is important that the level of force is not escalated too quickly. Indications of what is going to occur will generally

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Participating in a convoy of this kind brings a real risk of injury or death. We strongly advise against anyone attempting to break the naval blockade in this way."

488 *See* Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations, G.A. Res. 46/182, Annex ¶ 2, U.N. Doc. A/RES/46/182 (Dec. 19, 1991)

489 *See, e.g.*, §§ 38-46 San Remo Manual.

be a better deterrent than employing the force without giving an opportunity first to change behaviour.

163. All passengers and crew members detained when breaching a blockade must be treated respectfully and with all the necessary protection provided by the principles of human rights and International Humanitarian Law. The Panel also notes the provisions in the San Remo Manual describing the appropriate treatment of detainees.[490]

164. In relation to the part of this chapter dealing with the prevention of incidents in the future relating to blockades generally, the Panel makes the following recommendations:

- **All States should act with prudence and caution in relation to the imposition and enforcement of a naval blockade. The established norms of customary international law must be respected and complied with by all relevant parties. The San Remo Manual provides a useful reference in identifying those rules.**

- **The imposition of a naval blockade as an action in self-defence should be reported to the Security Council under the procedures set out under Article 51 of the Charter. This will enable the Council to monitor any implications for international peace and security.**

- **States maintaining a naval blockade must abide by their obligations with respect to the provision of humanitarian assistance. Humanitarian missions must act in accordance with the principles of neutrality, impartiality and humanity and respect any security measures in place. Humanitarian vessels should allow inspection and stop or change course when requested.**

- **Attempts to breach a lawfully imposed naval blockade place the vessel and those on board at risk. Where a State becomes aware that its citizens or flag vessels intend to breach a naval blockade, it has a responsibility to take pro-active steps compatible with democratic rights and freedoms to warn them of the risks involved and to endeavour to dissuade them from doing so.**

- **States enforcing a naval blockade against non-military vessels, especially where large numbers of civilian passengers are involved, should be cautious in the use of force. Efforts should first be made to stop the vessels by non-violent means. In particular, they should not use force except when absolutely necessary and then should only use the minimum level of force necessary to achieve the lawful objective of maintaining the**

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490 §§ 161–167 San Remo Manual.

blockade. They must provide clear and express warnings so that the vessels are aware if force is to be used against them.

Rapprochement

165. The Panel hopes that this report may resolve the outstanding issues relating to the incident and bring the matter to its end. However, the Panel recognizes that there are steps to be taken between Turkey and Israel before the sad saga of the flotilla can be put behind them. Such measures are best described as rapprochement. It will be up to the nations themselves whether to adopt what we recommend in this regard. No one can make them do so.

166. It seems to the Panel that both Turkey and Israel recognize the value of their relationship and share a desire to normalize relations between them. In the Panel's view, their goal should be the resumption of full diplomatic relations. However, the Panel recognizes that as a first step the incident must be acknowledged and addressed so that the parties may move beyond it. The establishment of a political roundtable as a forum for exchanging views could assist to this end.

167. The Panel considers it important that an appropriate statement of regret be made by Israel in respect of the incident in light of its consequences. It is important too that a concrete gesture should be made to heal the hurt that has been caused and to address the losses of the victims and their families. To that end, the Panel recommends that Israel should make payment for the benefit of the deceased and injured victims and their families. Such payment could be administered through the establishment by the two governments of a joint trust fund of a sufficient amount to be decided by them.

168. In making these suggestions we are not making judgments about legal obligations or liability. We are of the view that what we propose will be a practical but important symbol that the matter is at an end. Our recommendations are made to advance the interests of stability in the Middle East, an area in which there has been much political upheaval in the short life of this Panel. The good relationship between Turkey and Israel has contributed to the stability of the area in the past and it is the hope and expectation of the Panel that it will do so again in the future.

169. The Panel recommends that:

- **An appropriate statement of regret should be made by Israel in respect of the incident in light of its consequences.**

- **Israel should offer payment for the benefit of the deceased and injured victims and their families, to be administered by the two governments through a joint trust fund of a sufficient amount to be decided by them.**

- **Turkey and Israel should resume full diplomatic relations, repairing their relationship in the interests of stability in the Middle East and international peace and security. The establishment of a political roundtable as a forum for exchanging views could assist to this end.**

Appendix I: The Applicable International Legal Principles

Introduction

1. In this Appendix, the Chair and Vice-Chair provide our own account of the principles of public international law that apply to the events under review. Those principles arise from three separate streams of international law: the law of the sea, the law of armed conflict at sea, including the law of blockade, and human rights law. We prefer to provide our own analysis of the relevant law rather than accept those provided in the reports before the Panel. In preparing this account we have examined carefully the legal points that have been made to us. As has been made clear earlier, the Panel is not a court and cannot adjudicate. But in arriving at the findings and recommendations we are asked to make, it is important to rest these on a secure legal foundation.

Law of the Sea

2. The most influential instrument setting out the law of the sea is the 1982 United Nations Convention on the Law of the Sea ("UNCLOS").[1] UNCLOS followed a series of four conventions concluded in 1958.[2] While not universally adopted,[3] it is now generally admitted that many of the provisions of UNCLOS are either declaratory of international customary law or have become such.[4]

3. Custom[5] has the force of law and is binding on States where it reflects the general practice of States, and the recognition by States that this general practice has become law (known as the *opinio juris* requirement). The general practice element requires a demonstrable pattern of unambiguous and consistent State practice, which must be widespread but does not need to be universal.[6]

4. One of the important principles of the law of the sea is the freedom of the high seas.[7] That is, the principle that the high seas are open to all States and unable to be subjected to the sovereignty of any State.[8] This principle of free use is part of customary

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1 Dec. 10, 1982, 1833 U.N.T.S. 3.
2 Among them the Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11.
3 As of July 7, 2011, UNCLOS had 162 State parties (*see* http://www.treaties.un.org).
4 *See* MALCOLM SHAW, INTERNATIONAL LAW 555-556 (6th ed. 2008).
5 "International custom, as evidence of a general practice accepted as law" is one of the sources of international law stated in Article 38(1) of the Statute of the International Court of Justice. *See also* SHAW, *supra* note 4, at 70.
6 *See* SHAW, *supra* note 4, at 72-93.
7 According to Article 86 UNCLOS, the high seas are comprised of "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, or in the archipelagic waters of an archipelagic State."
8 Article 2 High Seas Convention; Articles 87-89 UNCLOS.

international law.[9] Intrinsic to it is the freedom of navigation and the right of every State to sail ships flying its flag on the high seas.[10] Such ships are considered to be under the exclusive jurisdiction of their flag State.[11]

5. As a corollary of these principles, the rights of a State to board a foreign flagged ship on the high seas are very closely confined. Generally, such a vessel cannot be boarded without the consent of its flag State.[12] Specific provision is made for a foreign flagged vessel to be boarded in certain limited circumstances where the vessel is suspected of carrying out particular activities, commonly known as the "right of visit."[13]

6. This, however, is not the end of the issue. It is clear that the freedom of the high seas is not absolute. This is expressed in almost identical terms in both UNCLOS and the preceding 1958 High Seas Convention. In the words of Article 87(1) UNCLOS "[f]reedom of the high seas is exercised under the conditions laid down by this Convention *and by other rules of international law.*"[14] The latter would logically include the laws of armed conflict at sea.[15]

7. Article 88 of the UNCLOS stipulates that "[t]he high seas shall be reserved for peaceful purposes." On its face, Article 88's straightforward language could imply that the high seas are exempt from all military activities and that States are prohibited from using force—even in self-defence—in this part of the world's oceans. Such an interpretation would have a profound effect on the law of naval warfare, given that "[t]he history of the military use of the sea is measured in millennia."[16] Indeed, during the series of conferences leading up to the final negotiation of UNCLOS, some States expressed the position that the term "peaceful purposes" should be interpreted as barring all military activities on the high seas.[17]

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9 *See* Preamble, Article 2 High Seas Convention.

10 Article 2 High Seas Convention; Articles 87, 90 UNCLOS.

11 Article 6 High Seas Convention; Article 92(1) UNCLOS; *see also* SS "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 25 (Sept. 7).

12 D.P. O'CONNELL, 2 THE INTERNATIONAL LAW OF THE SEA 802 (I.A. Shearer ed., 1984): "[A] right of boarding exists only under the law of the flag." There is also the emerging view, supported by a number of States, that consent by the master of the vessel suffices where flag State consent is not possible or practical. *See* David G. Wilson, *Interdiction on the High Seas: The Role and Authority of a Master in the Boarding and Searching of His Ship by Foreign Warships*, 55 NAVAL L. REV. 157, 198-205.

13 Article 22 High Seas Convention; Article 110 UNCLOS.

14 Emphasis added.

15 *See e contrario* O'CONNELL, *supra* note 12, at 801: "Except in connection with the Laws of War, there can be no interference with the right of free navigation on the high seas."

16 Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 809, 831 (1984).

17 *See* 3 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA – A COMMENTARY ["UNCLOS COMMENTARY"] 88-91 (Satya N. Nandan & Shabtai Rosenne eds., 1995).

8. However, most legal commentators agree that Article 88 UNCLOS has not changed the legal regime applicable to warfare on the high seas but merely "represents the explicit application to the law of the sea of some basic principles of general international law and of the principles of the United Nations Charter (particularly Art. 2, para. 4)."[18] This view is supported by several arguments.

9. Even during the drafting process of UNCLOS, there was no agreement on the precise meaning of the "peaceful purposes" clause. "[O]ne of the primary motivations of the major maritime powers in negotiating a new Convention was to protect the broadest possible freedom to conduct military activities at sea."[19] Indicative is the stance of the United States which stated during the negotiations that "[a]ny specific limitation on military activities would require the negotiation of a detailed arms control agreement."[20] Indeed, the Convention primarily aims to regulate the use of the seas in peace time,[21] and the participants in the drafting conferences "consciously avoided negotiation of the rules applicable to military operations on the seas."[22]

10. Other international treaties with "peaceful purposes" clauses, such as the Antarctic Treaty[23] and the Outer Space Treaty,[24] have additional specific provisions prohibiting military activities.[25] UNCLOS does not contain such prohibitions. Given the high level of detail and complexity in the Convention's other provisions, it appears unlikely that the "laconic stipulation"[26] of Article 88 was meant to have such a far-reaching result as the complete demilitarization of the high seas.[27]

11. There are a number of provisions elsewhere in UNCLOS that militate against an expansive interpretation of Article 88. For instance, there is an explicit prohibition of certain military activity in relation to the innocent passage of warships in territorial

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18 A HANDBOOK ON THE NEW LAW OF THE SEA ["NEW LAW OF THE SEA"] 1239 (René-Jean Dupuy & Daniel Vignes eds., 1991).

19 Oxman, *supra* note 16, at 832; *see also* Wolff Heintschel von Heinegg, *The United Nations Convention on the Law of the Sea and Maritime Security Operations*, 48 GERMAN Y.B. OF INT'L L. 151 (2005).

20 *Cited in* UNCLOS COMMENTARY, *supra* note 17, at 89.

21 *See* R.R. CHURCHILL & V.A. LOWE, THE LAW OF THE SEA 421 (3rd ed. 1999); SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, EXPLANATION ["SAN REMO MANUAL EXPLANATION"] 93 (Louise Doswald-Beck ed., 1995); Heintschel von Heinegg, *supra* note 19, at 160; NEW LAW OF THE SEA, *supra* note 18, at 1321; Oxman, *supra* note 16, at 811.

22 CHURCHILL & LOWE, *supra* note 21, at 421.

23 The Antarctic Treaty, Dec. 1, 1959, 402 U.N.T.S. 71.

24 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205.

25 For a detailed comparison *see* Rüdiger Wolfrum, *Military Activities on the High Seas: What are the Impacts of the U.N. Convention on the Law of the Sea?, in* THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 501, 502-503 (Michael N. Schmitt & Leslie C. Green eds., 1998) (71 US NAVAL WAR C. INT'L L. STUD.); *see also* Oxman, *supra* note 16, at 830-831.

26 YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 23 (4th ed. 2005).

27 *Id.*; *see also* Oxman, *supra* note 16, at 831.

waters,[28] while there is no such provision in relation to the high seas. Similarly, Article 298(1)(b) UNCLOS mentions "military activities" as one of the subjects which States can exempt from established dispute settlement procedures, indicating that such activities are permissible unless explicitly outlawed by the Convention.[29]

12. While not explicitly linked to Article 88, Article 301 UNCLOS—which applies to the Convention as a whole and "can be used for interpretative purposes with regard to [A]rticle[] 88"[30]—prescribes the following:

> In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

This language mirrors Article 2(4) of the United Nations Charter: The use of force (on the high seas and elsewhere under the scope of the Convention) is prohibited, unless explicitly permitted under the "principles of international law" as contained in the U.N. Charter. These principles include the right to self-defence.[31] In light of Article 301, Article 88's content can be understood to be limited to a repetition of the applicable standards of the U.N. Charter.[32]

13. Moreover, State practice in maritime hostilities since the drafting of UNCLOS indicates that Article 88 "need [not] be taken at face value."[33] The restriction of hostilities to territorial waters in some recent conflicts is not a widespread or uniform practice.[34] In addition, there are no indications that "[S]tates felt obliged to refrain from committing acts of naval warfare on the high seas."[35] "Certainly the major naval powers do not regard any of these articles [of UNCLOS] as imposing restraints upon routine naval operations."[36] This is also reflected in countries' military manuals, which treat the high seas as a legitimate area of military operations.[37] In the same vein, the drafters of the San Remo Manual[38] "did not accept the proposition that Articles 88 and 301

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28 Article 19(2) UNCLOS.

29 *See* NEW LAW OF THE SEA, *supra* note 18, at 1238; Wolfrum, *supra* note 25, at 504; UNCLOS COMMENTARY, *supra* note 17, at 91.

30 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA – A COMMENTARY 155 (Shabtai Rosenne & Louis B. Sohn eds., 1989).

31 *See infra* ¶ 40.

32 *See* Wolff Heintschel von Heinegg, *The Law of Armed Conflict at Sea, in* HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW ["IHL HANDBOOK"] 487 (Dieter Fleck ed., 2009).

33 DINSTEIN, *supra* note 26, at 23.

34 *See* Heintschel von Heinegg, *supra* note 32, at 486.

35 *Id.*

36 CHURCHILL & LOWE, *supra* note 21, at 431.

37 *See, e.g.*, MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ["UK MANUAL"] § 13.6 (2004); OFFICE OF THE JUDGE ADVOCATE-GENERAL, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVEL: JOINT DOCTRINE MANUAL ["CANADIAN MANUAL"] § 804 (2003); FEDERAL MINISTRY OF DEFENCE, HUMANITARIAN LAW IN ARMED CONFLICTS: MANUAL ["GERMAN MANUAL"] § 1010 (1992).

38 *See infra* ¶ 17.

[UNCLOS] excluded naval warfare on the high seas."[39] Such appears to be the position as a matter of customary international law.

14. In light of the above, it is generally accepted that the provisions of UNCLOS do not go beyond the regulations on the use of force contained in the U.N. Charter.[40] This view was also supported by the Secretary-General of the United Nations: "[M]ilitary activities [on the high seas] which are consistent with the principles of international law embodied in the Charter of the United Nations, in particular with Article 2, paragraph 4, and Article 51, are not prohibited by the Convention on the Law of the Sea."[41]

15. It follows from this that the traditional laws of naval warfare, including blockade, continue to be applied on the high seas.[42] During an armed conflict, the peacetime provisions of UNCLOS are not applicable, and the law of armed conflict at sea prevails.[43] This is because UNCLOS primarily regulates the peacetime activities of States on the oceans,[44] and its provisions dealing with law enforcement[45] are subsidiary to the laws of naval warfare in a situation of armed conflict on the high seas: *lex specialis derogat lex generalis*.[46]

Background to the Law of Blockade

16. Blockade has been one of the traditional methods of naval warfare for many centuries.[47] As such, its definition in customary international law is relatively uncontroversial: "Blockade is the naval operation (of surface ships and, with qualifications, aircraft) denying to vessels and aircraft of all nations ingress and egress to

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39 SAN REMO MANUAL EXPLANATION, *supra* note 21, at 110; *see also id.* at 82.

40 Wolfrum, *supra* note 25, at 485; UNCLOS COMMENTARY, *supra* note 17, at 91; Oxman, *supra* note 16, at 831-832; CHURCHILL & LOWE, *supra* note 21, at 431; Michael Bothe, *Neutrality in Naval Warfare, in* HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 402 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991).

41 U.N. Secretary-General, *General and Complete Disarmament: Study on the Naval Arms Race: Rep. of the Secretary-General*, ¶ 188, U.N. Doc. A/40/535 (Sept. 17, 1985).

42 Christopher Greenwood, *Scope of Application of Humanitarian Law, in* IHL HANDBOOK, *supra* note 32, at 59; *see also* § 10(b) San Remo Manual.

43 *See* Heintschel von Heinegg, *supra* note 32, at 475-476.

44 *See supra* ¶ 9.

45 *See, e.g.*, Articles 110 (right of visit), 111 UNCLOS (right of hot pursuit).

46 *See* LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 191 (3rd ed. 2008). For example, the U.S. Navy Manual distinguishes between the right of visit pursuant to Article 110 UNCLOS and the belligerent right of visit and search to be applied during armed conflict, DEPARTMENT OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ["U.S. NAVY MANUAL"] § 3.4 (2007): "The procedure for ships exercising the right of approach and visit [in maritime law enforcement] is similar to that used in exercising the belligerent right of visit and search during armed conflict." *See also id.* § 7.6.

47 For a detailed historical overview *see* Wolff Heintschel von Heinegg, *Blockade, in* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ["MPEPIL"] 6-22 (Rüdiger Wolfrum ed., 2010) online edition, [www.mpepil.com, article updated Apr. 2009].

and from the coast of an enemy or port thereof."[48] The purpose of a blockade is thus to prevent all enemy and neutral ships from entering or leaving the blockaded territory. This is in contrast to the law of contraband, which only concerns the shipment of certain cargoes destined primarily for use in war.[49] While States can draw up lists of goods they consider contraband and accordingly give notice to enemies and neutrals,[50] a blockade is a blanket prohibition on *all* maritime traffic. As such, a blockade "avoids the need to distinguish between the cargoes carried by neutral ships, and so overrides the law of contraband."[51] Moreover, the law of contraband only concerns the shipment of goods into an enemy-controlled territory while a blockade also affects enemy exports.[52]

17. The view advanced by some scholars in the past that the concept of blockade has fallen into desuetude[53] does not find support in customary international law.[54] This is confirmed by the inclusion of blockade in the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea ("San Remo Manual").[55] The Manual was prepared by international legal and naval experts following a series of meetings[56] under the auspices of the International Institute of Humanitarian Law in San Remo, Italy,[57] and with the cooperation of the International Committee of the Red Cross.[58] Its 183 paragraphs comprehensively address the law applicable to armed conflicts at sea, drawing on State practice, writings of legal commentators and relevant judicial decisions.[59] "[T]he most important contribution of the Manual is the reaffirmation and updating of international humanitarian law, taking into account the four Geneva Conventions of 1949 and Additional Protocol I of 1977."[60] While not an international legal instrument, the Manual is widely considered to be "authoritative,"[61] providing a "reliable restatement of the law [of naval warfare]."[62] This view has been explicitly endorsed by some States.[63]

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48 O'CONNELL, *supra* note 12, at 1150.

49 For a detailed overview *see* Christian Schaller, *Contraband, in* MPEPIL, *supra* note 47, at 1-6 [article updated Aug. 2009].

50 *See* Schaller, *supra* note 49 , at 16.

51 O'CONNELL, *supra* note 12, at 1150; *see also* U.S. NAVY MANUAL, *supra* note 46, § 7.7.1.

52 Heintschel von Heinegg, *supra* note 47, at 2.

53 *See, e.g.*, Frits Kalshoven, *Commentary, London Declaration, in* THE LAW OF NAVAL WARFARE 274 (Natalino Ronzitti ed., 1988).

54 SAN REMO MANUAL EXPLANATION, *supra* note 21, at 176.

55 §§ 93-104 San Remo Manual.

56 For a detailed description of the process *see* SAN REMO MANUAL EXPLANATION, *supra* note 21, at 61-67.

57 International Institute of Humanitarian Law, http://www.iihl.org (last visited July 7, 2011): "The International Institute of Humanitarian Law is an independent, non-profit humanitarian organisation founded in 1970. . . . The main purpose of the Institute is to promote international humanitarian law, human rights, refugee law and related issues."

58 SAN REMO MANUAL EXPLANATION, *supra* note 21, at 62.

59 SAN REMO MANUAL EXPLANATION, *supra* note 21, at 67.

60 Louise Doswald-Beck, *San Remo Manual on International Law Applicable to Armed Conflict at Sea*, 77 INT'L REV. OF THE RED CROSS 583, 589 (1995).

61 DINSTEIN, *supra* note 26, at 23; *see also* Doswald-Beck, *supra* note 60, at 587: "The Manual is not a binding document. In view of the extent of uncertainty in the law, the experts decided that it was premature to embark on diplomatic negotiations to draft a treaty on the subject. The work

18. Moreover, State practice with respect to blockade since World War II has shown that "States will continue to make use of that method of warfare at least in cases in which they dispose of superior naval and air forces, and aerial reconnaissance capabilities."[64] Consequently, States' military manuals provide for regulation on the law of blockade.[65]

The Legal Requirements of a Blockade

19. Ever since the Paris Declaration of 1856,[66] there have been various efforts to codify the law of blockade. The London Declaration of 1909[67]—negotiated during the London Naval Conference of 1908 and 1909—contains 21 articles on the subject. Even though it was not ratified, it is regarded as an authoritative statement on the law of blockade.[68] Likewise, the Oxford Manual of 1913[69] makes mention of the concept of blockade. Most recently, the 1994 San Remo Manual includes the provisions of the Paris and London Declaration in modernized form.[70] Military manuals also contain relevant regulations. It is thus "possible to establish the customary rules and principles governing naval . . . blockades."[71] There are a number of requirements in order for a blockade to be legally binding. While some of them are positive in nature, such as the duty to notify all belligerents and neutral States, others assume the absence of certain factors, such as excessive harm caused to civilians.

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therefore concentrated on finding areas of agreement as to the present content of customary law, which were far more numerous than initially appeared possible. As a second step the experts discussed controversial issues with a view to reaching an agreed compromise on innovative proposals by way of progressive development. However, although the Manual was to contain provisions of this latter type, most of them were always meant to be an expression of what the participants believed to be present law."

62 FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR 181 (3rd ed. 2001); *see also* GREEN, *supra* note 46, at 45.

63 *See, e.g.*, CANADIAN MANUAL, *supra* note 37, § 801: "[T]he San Remo Manual is the most up to date version of the law." *See also* UK MANUAL, *supra* note 37, § 13.2: "The San Remo Manual is a valuable reference work and much of the present chapter [on maritime warfare] reflects its content."

64 Heintschel von Heinegg, *supra* note 47, at 27.

65 *See, e.g.*, CANADIAN MANUAL, *supra* note 37, § 844-851; GERMAN MANUAL, *supra* note 37, §§ 1051-1053; UK MANUAL, *supra* note 37, §§ 13.65-13.76; US NAVY MANUAL, *supra* note 46, § 7.7.

66 Declaration respecting Maritime Law, Apr. 16, 1856, 115 Consol. T.S. 1: "Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy."

67 Declaration concerning the Laws of Naval War, Feb. 26, 1909, 208 Consol. T.S. 338.

68 Heintschel von Heinegg, *supra* note 47, at 8.

69 The Laws of Naval War Governing the Relations Between Belligerents – Manual adopted by the Institute of International Law, Aug. 9, 1913, reprinted in THE LAW OF NAVAL WARFARE, *supra* note 53, at 277.

70 SAN REMO MANUAL EXPLANATION, *supra* note 21, at 176.

71 Heintschel von Heinegg, *supra* note 47, at 24.

20. Traditionally, blockade is a method of warfare recognized to apply in international armed conflicts.[72] An armed conflict "exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[73] This test is used to distinguish "an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law."[74] Whether an armed conflict exists is a matter of fact and needs to be determined on a case-by-case basis.[75] It becomes international "if it takes place between two or more States"[76] or if it "takes place between an Occupying Power and rebel or insurgent groups—whether or not they are terrorist in character—in occupied territory."[77]

21. Given the fact that "[n]aval operations are not as frequent during a non-international armed conflict,"[78] there are only few examples where a blockade has been instituted in a conflict that did not involve two or more States. One of them is the blockade imposed by the United States of America against the secessionist Confederate States of America. The United States did not recognize the Confederacy as an

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72 Heintschel von Heinegg, *supra* note 47, at 25; *see also* Heintschel von Heinegg, *supra* note 32, at 476.

73 Prosecutor v. Tadić, Case No. IT-94-1-AR72, App. Ch., Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the former Yugoslavia Oct. 2, 1995).

74 Prosecutor v. Tadić, Case No. IT-94-1-T, Tr. Ch., Judgement, ¶ 562 (Int'l Crim. Trib. for the former Yugoslavia May 7, 1997).

75 *See, e.g.*, Prosecutor v. Boškoski & Tarčulovski, Case No. IT-04-82-T, Tr. Ch., Judgement, ¶ 175 (Int'l Crim. Trib. for the former Yugoslavia July 10, 2008).

76 Prosecutor v. Tadić, Case No. IT-94-1-A, App. Ch., Judgement, ¶ 84 (Int'l Crim. Trib. for the former Yugoslavia July 15, 1999); *id.*: "In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State."

77 ANTONIO CASSESE, INTERNATIONAL LAW 420 (2nd ed. 2005), arguing that three reasons support this proposition: "(1) internal armed conflicts are those between a central government and a group of insurgents belonging to the *same State* (or between two or more insurrectional groups belonging to that State; (2) the object and purpose of international humanitarian law impose that in case of doubt the protection deriving from this body of law be *as extensive as possible*, and it is indisputable that the protection accorded by the rules in international conflicts is much broader than that relating to internal conflicts; (3) as belligerent occupation is governed by the Fourth Geneva Convention and customary international law, it would be *contradictory* to subject occupation to norms relating to international conflict while regulating the conduct of armed hostilities between insurgents and the Occupant on the strength of norms governing internal conflict" (emphases in the original). *See also* Andreas Zimmermann, *Article 8, War Crimes – Preliminary Remarks on para. 2(c)-(f) and para. 3*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 484 (Otto Triffterer ed., 2nd ed. 2008); *see also* HCJ 769/02 Public Committee Against Torture in Israel et al. v. Government of Israel et al., ¶ 18 [Dec. 16, 2006] (Isr.).

78 Natalino Ronzitti, *Naval Warfare, in* MPEPIL, *supra* note 47, at 35 [article updated June 2009].

independent State. Nor did any other country. Yet, at the same time, a blockade was declared and enforced against it.[79]

22. The U.S. Supreme Court in the *Prize Cases* recognized this unique situation. After establishing that a blockade is governed by the law of nations and subject to the existence of war (in today's terms to be understood as an international armed conflict), it found that it "is not necessary to constitute war that both parties should be acknowledged as independent nations or sovereign States."[80]. The Court stressed that what counted was whether the parties to the conflict accord to each other belligerent rights.[81] In fact, various European countries had issued proclamations of neutrality without recognizing the Confederacy as a State. The Court found that "[a]fter such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals.[82]

23. The *Prize Cases* decision therefore suggests that in addition to an international armed conflict, the law of blockade would also be applicable in non-international armed conflicts in which the parties and/or neutral countries recognize each other as belligerents.[83]

24. Beyond such situations, it should be noted that the San Remo Manual—which has a number of provisions on the law of blockade—does not expressly limit its scope to international armed conflicts: "The parties to an *armed conflict* at sea are bound by the principles and rules of international humanitarian law from the moment armed force is used."[84] The Explanation states that

> although the provisions of [the San Remo] Manual are primarily meant to apply to international armed conflicts at sea, this has intentionally not been expressly indicated in paragraph 1 [of the Manual] in order not to dissuade the implementation of these rules in non-international armed conflicts involving naval operations.[85]

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79 *See* Guido Acquaviva, *Subjects of International Law: A Power-Based Analysis*, 38 VAND. J. TRANSNAT'L L. 345, 365-367 (2005).

80 The Prize Cases, 67 U.S. 635, 666.

81 *Id.* at 667: "The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars." *Id.* at 669: "It is not the less a civil war, with belligerent parties in hostile array, because it may be called an 'insurrection' by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties."

82 *Id.* at 669.

83 *See also* Ronzitti, *supra* note 78, at 36.

84 § 1 San Remo Manual (emphasis added).

85 SAN REMO MANUAL EXPLANATIONS, *supra* note 21, at 73:

In respect of those provisions relating to the duties of neutral States, the Explanation notes that

> the rules considered in paragraphs . . . 93-104 [law on blockade] . . . have not generally been treated as automatically applicable to any conflict, irrespective of its scale or duration. However, it is clear that once measures of economic warfare against neutral shipping or aircraft are carried out by a belligerent, the rules indicated in this document must be respected.[86]

Furthermore, while many other provisions of the manual refer to 'belligerent States',[87] in the specific provisions on blockade, mention is broadly made of 'belligerents'.[88]

25. When imposing a blockade, a State must declare this fact and notify both the belligerents and all neutral States.[89]

> The declaration is the act of the blockading State, or of the competent commander, stating that a blockade is, or is about to be, established. The notification is the means by which that fact is brought to the knowledge of neutral States and, if necessary, of the authorities in the blockaded area or of individual aircraft and vessels.[90]

The rationale behind the notification requirement is to ensure that all potentially concerned parties are informed because a blockade must be enforced against all vessels,[91] and its intentional breach has significant consequences.[92]

26. The declaration must notify the commencement of the blockade and its duration. There is nothing that would suggest a blockade must be limited in time, *i.e.* that an end date must be provided.[93] It can be maintained as long as the international armed conflict exists, like the blockades of World War I and II, which each lasted several years.[94] There is similarly a duty to notify States when a blockade is terminated, providing the necessary clarity to all concerned parties.[95]

27. The location and extent of the blockade must also be declared and notified. This ensures in particular that both belligerents and neutral vessels are aware of the blockade in order to avoid the blockaded area or to leave it in time.[96] It is somewhat unclear what

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86 SAN REMO MANUAL EXPLANATIONS, *supra* note 21, at 74.
87 *See, e.g.*, § 10 San Remo Manual.
88 *See, e.g.*, § 93 San Remo Manual.
89 Articles 8-13 London Declaration; §§ 93-94, 101 San Remo Manual.
90 Heintschel von Heinegg, *supra* note 47, at 29.
91 *See infra* ¶ 31.
92 *See infra* ¶ 43.
93 *See* GERMAN MANUAL, *supra* note 37, § 1052, referring to Article 12 London Declaration: "A declaration of blockade shall contain the following details: - day on which the blockade begins. . . ."
94 *See* Heintschel von Heinegg, *supra* note 47, at 11-14.
95 Heintschel von Heinegg, *supra* note 47, at 32.
96 Heintschel von Heinegg, *supra* note 32, at 556. There is usually a grace period to grant neutral vessels the opportunity to leave. *See also* U.S. NAVY MANUAL, *supra* note 46, § 7.7.2.1.

is meant by the term "extent" in addition to the term "location". As set out above, a blockade aims at preventing all access of ships to the blockaded area. An interpretation of "extent" as referring to specification of the kind of goods that are encompassed by the blockade thus fails to acknowledge the distinction made by international law between the concepts of blockade and contraband.[97] It seems most plausible that while "location" means the geographical specifics of the blockaded area, "extent" is a reference to the modalities of the blockade's enforcement measures.[98]

28. Finally, while traditionally notification had to be submitted through diplomatic channels, "a 'Notice to Mariners' ('NOTMAR') as a most effective and timely means of conveying the information necessary will, in most cases, be sufficient."[99]

29. A blockade must be effective,[100] that is, it must be enforced. States are barred from imposing "paper" blockades, with no intention or possibility to enforce them.[101] This requirement "respond[s] to the unwillingness of neutrals to suffer interruptions in trade" unless belligerents are ready to commit the necessary resources such as employing warships off the coast of the blockaded area.[102] Moreover, it is significant because there is a "need to distinguish between legitimate blockading activity and other activities (including visit and search) that might be carried on illegitimately on the high seas under the guise of blockade."[103]

30. Whether a blockade is effective must be decided on a case-by-case basis and depends on the circumstances. "The question whether a blockade is effective is a question of fact."[104] Given technological advances in weaponry (*e.g.*, submarines), absolute effectiveness is not required. "The essence of effectiveness is that sufficient force is available 'to render ingress and egress dangerous.'"[105]; that is, the means

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97 *See supra* ¶ 16.

98 The Explanation to the San Remo Manual is not helpful on this point. *See* SAN REMO MANUAL EXPLANATION, *supra* note 21, at 177 on § 94(1) San Remo Manual ("The declaration shall specify the commencement, duration, location, and extent of the blockade . . . ."): "This paragraph is self-explanatory." Both the British and Canadian Manuals are silent on the meaning of "extent" even though they refer to it, *see* BRITISH MANUAL, *supra* note 37, § 13.66; CANADIAN MANUAL, *supra* note 37, § 845. The German Manual and the U.S. Naval Manual do not mention the term "extent". Neither does the London Declaration.

99 Heintschel von Heinegg, *supra* note 47, at 31; *see also* SAN REMO MANUAL EXPLANATION, *supra* note 21, at 172, 177.

100 Articles 2-4 London Declaration; § 95-97 San Remo Manual.

101 Heintschel von Heinegg, *supra* note 47, at 33.

102 Michael G. Fraunces, *The International Law of Blockade: New Guiding Principles in Contemporary State Practice*, 101 YALE L.J. 893, 897 (1992).

103 UK MANUAL, *supra* note 37, § 13.67.

104 Article 3 London Declaration; § 95 San Remo Manual.

105 O'CONNELL, *supra* note 12, at 1151; *see also* Heintschel von Heinegg, *supra* note 32, at 557; for more details on the maintenance of a blockade *see* Heintschel von Heinegg, *supra* note 47, at 34-37 and SAN REMO MANUAL EXPLANATION, *supra* note 21, at 177-178.

mobilized for its enforcement are actually used. Temporary withdrawal of forces due to bad weather does not render the blockade ineffective.[106]

31. A blockade must apply to all vessels without distinction.[107] There are two reasons for this requirement. One is to avoid mere commercial blockades that favour certain parties.[108] The other flows from the requirement of effectiveness:

> If a blockade is to effectively prevent access to, and egress from, the blockaded area by vessels or aircraft that purpose would not be achieved if the blockading power discriminated between vessels and aircraft of different nationalities. The enemy could make use of aircraft [or vessels] not covered by the declaration and would thus be in a position to evade the consequences of blockade altogether.[109]

Accordingly, all neutral and belligerent shipping—including the blockading power's own merchant vessels—is barred from entering or leaving the blockaded area unless otherwise authorized by the blockading power in specific, exceptional cases.[110]

32. A blockade may not bar access to neutral ports and coasts.[111] Neutral States continue to enjoy their right of access to their own territory.[112]

33. In contrast to the practice in the two World Wars,[113] customary international law makes it now illegal to impose a blockade if the only purpose is to starve the civilian population or to deny the civilian population other objects essential for its survival.[114] The imposition of a blockade must have a lawful military objective.[115] This is in line with the general prohibition of Article 54(1) of Additional Protocol I[116]—"[s]tarvation as

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106 Article 4 London Declaration; *see also* GERMAN MANUAL, *supra* note 37, § 1053; U.S. NAVY MANUAL, *supra* note 46, § 7.7.2.3.

107 Article 5 London Declaration; § 100 San Remo Manual.

108 *See* Fraunces, *supra* note 102, at 897.

109 Heintschel von Heinegg, *supra* note 47, at 40.

110 *See* SAN REMO MANUAL EXPLANATION, *supra* note 21, at 178; Heintschel von Heinegg, *supra* note 32, at 554.

111 Article 18 London Declaration; § 99 San Remo Manual.

112 *See* Heintschel von Heinegg, *supra* note 47, at 38.

113 *See* ELMAR RAUCH, THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS FOR THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: REPERCUSSIONS ON THE LAW OF NAVAL WARFARE 83-90 (1984).

114 § 102(a) San Remo Manual.

115 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES ["ICRC STUDY"] 189 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2006) (Rule 53: The use of starvation of the civilian population as a method of warfare is prohibited).

116 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

a method of warfare is prohibited"[117]—which can be characterized as a rule of customary international law.[118]

34. It is important to note that a "blockade, in order to be of itself illegal, must have the *sole purpose* of starving the population."[119] In practice, there can be difficulties in ascertaining whether this was the intention of the State imposing the blockade.[120]

35. "Practice further indicates that a party that imposes a . . . blockade . . . which has the effect of starving the civilian population has an obligation to provide access for humanitarian aid for the civilian population in need."[121] This obligation is derived from Article 70 of Additional Protocol I.[122] It applies when the starvation of the civilian population is a side effect, even if not the intention, of the blockade. In particular, the blockading power must allow for free passage of foodstuffs and other essential objects if the civilian population of the blockaded territory is inadequately provided with food and other objects essential to its survival.[123] However, passage of these goods is subject to the blockading power making the necessary technical arrangements, which includes conducting searches of any relief consignments.[124] In addition, the blockading power may demand that supplies be contributed under the supervision of a Protecting Power or by humanitarian organizations[125] that offer "guarantees of impartiality."[126] "[H]umanitarian

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117 There has been some debate whether Article 54 applies to the law of naval warfare. However, a good faith interpretation of Additional Protocol I, in particular Article 49, suggests it does: *see* RAUCH, *supra* note 113, at 57-60; *see also* Heintschel von Heinegg, *supra* note 32, at 554-555.

118 ICRC STUDY, *supra* note 115, at 186 (Rule 53), which also makes explicit reference to naval blockades.

119 SAN REMO MANUAL EXPLANATION, *supra* note 21, at 179 (italics added for emphasis).

120 *Id.*, noting nevertheless that "clear enunciation of the rule is of value."

121 ICRC STUDY, *supra* note 115, at 197 (Rule 55: The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control).

122 SAN REMO MANUAL EXPLANATION, *supra* note 21, at 180.

123 §§ 103-104 San Remo Manual; *see also* Article 69 Additional Protocol I: "[C]lothing, bedding, means of shelter, other supplies essential to the survival of the civilian population . . . ."; *see also* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTION OF 12 AUGUST 1949 ["ADDITIONAL PROTOCOLS COMMENTARY"] ¶ 2794 (Yves Sandoz et al. eds., 1987): "The need for a relief action and the extent of its urgency must be assessed in every case individually, depending on the real requirements. It is the 'essential' character of such requirements that must be the determining factor. This is a matter of common sense which cannot be formulated in precise terms."

124 *See* Heintschel von Heinegg, *supra* note 47, at 50-52.

125 *See* SAN REMO MANUAL EXPLANATION, *supra* note 21, at 180: "The mentioning of humanitarian organisations in [§ 103(b) San Remo Manual] reflects modern developments in the field of humanitarian aid."

126 § 103(b) San Remo Manual. In this context, *see also* Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations, G.A. Res. 46/182, Annex ¶ 2, U.N. Doc. A/RES/46/182 (Dec. 19, 1991), referring to the provision of humanitarian assistance "in accordance with the principles of humanity, neutrality and impartiality."

relief personnel must respect domestic law on access to territory and must respect the security requirements in force."[127]

36. Further, a blockade as a method of warfare is illegal if the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage obtained by the imposition of the blockade.[128] Any damage to a civilian population must thus be weighed against the military advantage to be secured.

37. Finally, it would also appear that a blockade is illegal if its imposition runs counter to other fundamental rules of international humanitarian law. Of importance in this regard is the prohibition of collective punishments, provided in the Fourth Geneva Convention,[129] as well as Additional Protocols I[130] and II,[131] and by now an accepted part of customary international law.[132]

38. While the idea behind the prohibition is based on the principle that "penal liability is personal in character,"[133] the term "collective penalties" must be understood in the broadest sense:

> This does not refer to punishments under penal law, *i.e.* sentences pronounced by a court after due process of law, but penalties of any kind inflicted on persons or entire groups of persons, in defiance of the most elementary principles of humanity, for acts that these persons have not committed.[134].

Collective punishment could thus consist of "sanctions and harassment of any sort, administrative, by police action or otherwise."[135]

39. In relation to the war crime of collective punishment, it has been held that it "occurs in response to the acts or omissions of protected persons, whether real or

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127 ICRC STUDY, *supra* note 115, at 197 (Rule 55, *see supra* note 121).

128 § 102(b) San Remo Manual.

129 Article 33 Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited."

130 Article 75(2)(d) Additional Protocol I: "The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: . . . collective punishments . . . ."

131 Article 4(2)(b) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609: "[T]he following acts against [persons not taking direct part in hostilities] are and shall remain prohibited at any time and in any place whatsoever: . . . collective punishments . . . ."

132 ICRC STUDY, *supra* note 115, at 374 (Rule 103: Collective punishments are prohibited).

133 4 THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY ["FOURTH GENEVA CONVENTION COMMENTARY"] 225 (Jean S. Pictet ed., 1960).

134 *Id.*

135 ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 123, ¶ 3055; *see also id.* ¶ 4536.

perceived"[136] and "requires proof of an intention to punish collectively."[137] In a broader sense, the illegality of oppressive measures as collective punishments thus depends to a certain extent on their purpose in the specific circumstances. A blockade would consequently be illegal if imposed with the intention to collectively punish the civilian population.

Blockade in the Context of the United Nations Charter

40. The provisions of the United Nations Charter erected a new legal regime governing both the use of force and disputes that are likely to endanger the peace. For the Charter peace is paramount. The duty to refrain from the use of force under Article 2(4) is broad indeed. As one leading commentator puts it:

> The use of force in general is prohibited, rather than only war. Furthermore the prohibition is not confined to the actual use of force, but extends to the mere threat of force. Finally the prohibition is, at least in theory, safeguarded by a system of collective sanctions against any offender (Arts 39-51).[138]

The Charter itself specifies only three exceptions to the prohibition, the most important being the right of self-defence under Article 51 and Security Council enforcement actions.

41. While these provisions may seem relatively plain on their face, ambiguities lurk beneath. This holds particularly true for the concept of self-defence. Although a recognized principle of customary international law,[139] its precise contours are the subject of disagreement.[140] The founding case in this regard relates to the *Caroline* incident of 1837[141] and stands for the proposition that self-defence is confined to cases where there is "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[142] This formulation has been widely accepted

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136 Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-A, App. Ch., Judgment, ¶ 223 (May 28, 2008).

137 Prosecutor v. Fofana & Kondewa, supra *note* 136, ¶ 225; *see also id.* ¶ 224. While the statements by the Special Court for Sierra Leone were given in the context of trials for war crimes, they are nevertheless useful because the Court based its observations on the relevant provisions of international humanitarian law.

138 Albrecht Randelzhofer, *Article 2(4)*, in THE CHARTER OF THE UNITED NATIONS 117 (Bruno Simma ed., 2nd ed. 2002).

139 *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 176 (June 27); *see also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8).

140 *See* for an overview: CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE (3rd ed. 2008).

141 *See* SHAW, *supra* note 4, at 1131.

142 Correspondence between Great Britain and the United States, respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat Caroline, Mar., Apr. 1841, Letter from Mr. Webster to Mr. Fox, Apr. 24, 1841, 29 B.F.S.P. 1126, 1138.

since.[143] The test embraces the concept that an imminent armed attack allows some element of anticipation. The circumstances of the *Caroline* case[144] and recent practice further suggest that self-defence can also be used against non-State actors.[145]

42. Any force employed in self-defence must be proportional, that is, in exercising the right to self-defence once the hurdle of necessity has been cleared the actors employing force in self-defence should do nothing unreasonable or excessive. Actions must be confined to those necessary for the occasion. The principle is clear but its application in any set of particular facts is far from simple.

Enforcement of a Blockade

43. Vessels suspected on reasonable grounds of breaching[146] a blockade may be captured.[147] Capture is the taking of such vessels as a prize for adjudication.[148] It is "effected by securing possession of the vessel through the captor sending an officer and some of his own crew on board."[149]

44. In this context, it should be noted that a vessel's motive for breaching the blockade is irrelevant. In particular, humanitarian vessels are not exempted from capture, unless they have entered into a prior agreement with the blockading power in line with the relevant provisions of the San Remo Manual.[150]

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143 *See, e.g.*, International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, 41 AM. J. INT'L L. 172, 205 (1945).

144 The British had destroyed the Caroline, an American vessel, because it had helped supply rebels against British rule in Canada, albeit without the consent of the American government; *see* Christopher Greenwood, *The Caroline*, *in* MPEPIL, *supra* note 47, at 1, 10 [article updated Apr. 2009].

145 *See* SHAW, *supra* note 4, at 1134-1137 and fn. 94; Dinstein, *supra* note 26, at 204-208; *but see* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9). However there is no extensive reasoning by the Court on the point and no analysis of the customary law or State practice, and two Judges did not support this conclusion (*see* Separate Opinion of Judge Higgins, *id.* at 207, ¶ 33; Declaration of Judge Buergenthal, *id.* at 240, ¶¶ 5-6).

146 This includes "travelling to or from a blockaded area." SAN REMO MANUAL EXPLANATION, *supra* note 21, at 160; *see also infra* ¶ 48.

147 Article 20 London Declaration; §§ 98, 146(f) San Remo Manual.

148 *See* § 146 San Remo Manual; *see* also Heintschel von Heinegg, *supra* note 32, at 489: "Capture is exercised by sending a prize crew on board another vessel and assuming command over the ship."

149 L. OPPENHEIM, 2 INTERNATIONAL LAW: DISPUTES, WAR AND NEUTRALITY ¶ 184 (H. Lauterpacht ed., 7th ed. 1952); *see also id.* ¶ 429.

150 *See supra* ¶ 35; The provisions of the San Remo Manual that exempt vessels engaged in humanitarian missions from capture apply to enemy vessels and not to neutral vessels. This is because "enemy vessels of any category (irrespective of their cargo and destination) and their cargo are liable to capture if not specifically protected" (SAN REMO MANUAL EXPLANATION, *supra* note 21, at 205). On the other hand, "neutral merchant vessels may not be captured, condemned or

45. Intrinsically linked to the right of capture is the right of the blockading power to search and visit a vessel if "there are reasonable grounds for suspecting"[151] that the ship is breaching or attempting to breach the blockade. The right of search and visit therefore serves to address uncertainties about a vessel's intended journey.[152] "Otherwise, belligerents would be unable effectively to control and enforce the . . . institution of a blockade."[153] The right to visit and search may not be exercised arbitrarily. However, certainty about the breach or attempted breach is not required; it suffices that there are reasonable grounds to believe such activity occurs.[154]

46. If a vessel resists interception or capture, it may be attacked.[155] At that moment, the vessel becomes a military object.[156]

> 'Clear resistance' presupposes that they act in a manner that has, or may have, an impeding or similar effect on the intercepting forces. Therefore, a mere change of course in order to escape is not sufficient. An act of clear resistance against interception or capture is to be considered an effective contribution to enemy military action by purpose or use. Hence, such vessels and aircraft lose their civilian status and become legitimate military objectives whose destruction offers a definite military advantage because, thus, the effectiveness of the blockade is preserved.[157]

47. Following the principle of precaution, warnings must be given to the vessel prior to any attack.[158] The attack itself must be carried out in line with the basic rules of naval warfare,[159] including the principle of distinction between combatants and civilians[160] and the principles of precaution[161] and proportionality.[162] This means that civilians[163] may

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destroyed" unless there are "exceptional cases" (*id.* at 213). Such a case would be the breach of a blockade, regardless of the purpose of the neutral vessel's journey (*see* §§ 135, 136, 146 San Remo Manual). The same considerations apply to the exemption of vessels engaged in humanitarian missions from attack (*see* §§ 47, 48-52, 59-60, 67 San Remo Manual).

151 § 118 San Remo Manual.

152 *See* OPPENHEIM, *supra* note 149, ¶ 414: "[The right of search and visit] is indeed the only means by which belligerents are able ascertain whether neutral merchantmen intend to bring assistance to the enemy and to render him unneutral services."

153 SAN REMO MANUAL EXPLANATION, *supra* note 21, at 196.

154 *Id.* As an alternative to search and visit, and in the interests of both the blockading power and the vessel, § 119 San Remo Manual provides for a right of the blockading power to order the diversion of the vessel to another destination. However, this requires the consent of the vessel's master.

155 §§ 67(a) and 98 San Remo Manual; *see also* Wolff Heintschel von Heinegg, *Visit, Search, Diversion, and Capture in Naval Warfare: Part I, The Traditional Law*, 29 CAN.Y.B. INT'L L. 282, at 318.

156 *See* § 40 San Remo Manual.

157 Heintschel von Heinegg, *supra* note 47, at 47.

158 *See* § 67(a) San Remo Manual; *see also* SAN REMO MANUAL EXPLANATION, *supra* note 21, at 214; *see also* Heintschel von Heinegg, *supra* note 47, at 47.

159 § 68 San Remo Manual, referring to §§ 38-46 San Remo Manual.

160 § 39 San Remo Manual.

161 § 46(a-c) San Remo Manual.

162 § 46(d) San Remo Manual.

163 ICRC STUDY, *supra* note 115, at 17 (Rule 5: Civilians are persons who are not members of the armed forces); *see also* Article 50(1) Additional Protocol I.

not be targeted,[164] unless they take active part in hostilities.[165] Moreover, the military advantage of the attack needs to be weighed against the collateral casualties. If the latter are excessive, the attack would be illegal.[166] As a consequence, when deciding on the measure of force employed to enforce the blockade, the blockading power must take into account the effects on any civilians on board. The precise determination depends on the facts and has to be made on a case-by-case basis.[167]

48. In this regard, there is some debate as to when a merchant vessel can be regarded as breaching or attempting to breach a blockade. Traditionally, there were two different approaches:

> Anglo-American policy has been to treat the whole voyage [to a blockade area] as a breach of blockade, so putting the ship in peril between its port of sailing to the blockaded port and its port of return, while the Continental policy has been based upon an analogue of the right of hot pursuit after breaking the cordon.[168]

49. The London Declaration of 1909 specified a compromise: "Neutral vessels may not be captured for breach of blockade except within the area of operations of the war-ships detailed to render the blockade effective."[169] According to this, what can be considered the "area of operations" is a matter of fact, because "it is intimately connected with the effectiveness of the blockade and also with the number of ships employed on it."[170]

> The area of operations of a blockading naval force may be rather wide, but as it depends on the number of ships contributing to the effectiveness of the blockade and is always limited by the condition that it should be effective, it will never reach distant seas where merchant vessels sail

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164 ICRC STUDY, *supra* note 115, at 3 (Rule 1: The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians); *see also* Article 48 Additional Protocol I.

165 ICRC STUDY, *supra* note 115, at 19 (Rule 6: Civilians are protected against attack, unless and for such time as they take a direct part in hostilities); *see also* Article 51(3) Additional Protocol I; *see also* NILS MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009).

166 *See* in particular § 46(c) San Remo Manual.

167 For instance, there is debate whether civilians who place themselves purposefully in harm's way ("human shields") figure at all when determining the proportionality: *see* U.S. NAVY MANUAL, *supra* note 46, § 8.3.2; *see also* Stefan Oeter, *Method and Means of Combat, in* IHL HANDBOOK, *supra* note 47, at 187.

168 O'CONNELL, *supra* note 12, at 1157 (footnote omitted).

169 Article 17 London Declaration.

170 Louis Renault, *General Report Presented to the Naval Conference on Behalf of its Drafting Committee*, reprinted in THE DECLARATION OF LONDON FEBRUARY 26, 1909 – A COLLECTION OF OFFICIAL PAPERS AND DOCUMENTS RELATING TO THE INTERNATIONAL NAVAL CONFERENCE HELD IN LONDON DECEMBER, 1908-FEBRUARY, 1909, at 144 (James Brown Scott ed., 1919).

> which are, perhaps, making for the blockaded ports, but whose destination is contingent on the changes which circumstances may produce in the blockade during their voyage.[171]

50. It is somewhat unclear what the status of the law on this issue is today. According to one commentator:

> An attempt of breach of blockade occurs if a vessel departs from a blockaded port, or if an aircraft takes off from an airport in the blockaded area, and if they are on a course set into the direction of the outer limit of the blockade. The same holds true if vessels or aircraft are on a course destined to such ports or airports, or if a vessel is anchoring outside the blockaded area or hanging about ('hovering') so that it could easily 'slip in.'[172]

51. Likewise, the explanations on the San Remo Manual state that "a vessel may breach a blockade by travelling to or from a blockaded area."[173] These interpretations are somewhat broader than Article 17 of the London Declaration of 1909. It could be argued, however, that they merely take into account the technical advancements of the past 100 years that make it possible to maintain a blockade even without a strong local presence of force.[174]

Individuals detained in the Enforcement of a Blockade

52. Once people have been detained in the course of the enforcement of a blockade, the question arises as to how they should be treated. This requires consideration of their status under international humanitarian law, as well as the potential application of human rights law.

53. As a matter of international humanitarian law—and in accordance with similar provisions in the four Geneva Conventions[175] reflecting "the general humanitarian law provision that persons in the power of an authority are to be respected and protected"[176]— the San Remo Manual specifies that

> [p]ersons on board vessels and aircraft having fallen into the power of a belligerent or neutral shall be respected and protected. While at sea and thereafter until determination of their status, they shall be subject to the jurisdiction of the State exercising power over them.[177]

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171 Renault, *supra* note 170, at 145.

172 Heintschel von Heinegg, *supra* note 47, at 43.

173 SAN REMO MANUAL EXPLANATION, *supra* note 21, at 160; *see also* U.S. NAVY MANUAL, *supra* note 46, § 7.7.4: "Attempted breach of a blockade occurs from the time a vessel . . . . leaves a port . . . . with the intention of evading the blockade. "

174 *See* § 96 San Remo Manual.

175 *See, e.g.*, Articles 4 and 27 Fourth Geneva Convention.

176 SAN REMO MANUAL EXPLANATION, *supra* note 21, at 224.

177 § 161 San Remo Manual.

54. "'Respect' and 'protection' are complementary notions. 'Respect', a passive element, indicates an obligation not to harm, not to expose to suffering and not to kill a protected person; 'protection', as the active element, signifies a duty to ward off dangers and prevent harm."[178]

55. As a minimum, the treatment afforded must accord with the "elementary considerations of humanity"[179] expressed in Common Article 3 of the Geneva Conventions, applicable to both internal and international armed conflicts.[180] This means that detainees cannot be subjected to "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture"[181] and "outrages upon personal dignity, in particular humiliating and degrading treatment."[182]

56. Even broader in its application,[183] Article 75 (1) of Additional Protocol I prohibits any adverse discrimination[184] and the commission of any of the following acts:[185]

> (a) violence to the life, health, or physical or mental well-being of persons, in particular
>
> (i) murder;
>
> (ii) torture of all kinds, whether physical or mental;
>
> (iii) corporal punishment; and
>
> (iv) mutilation
>
> (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault.
>
> (c)-(e) . . .

57. In addition, other sub-paragraphs of Article 75[186] contain specific provisions relating to the conditions of arrest and detention, including the right to be informed of the reasons why such measures were taken. There are strong indications that the guarantees

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178 KALSHOVEN & ZEGVELD, *supra* note 62, at 53.

179 Military and Paramilitary Activities in and Against Nicaragua, *supra* note 139, ¶ 218.

180 *See* for an overview Prosecutor v. Karadžić, Case No. IT-95-5/18-AR72.5, App. Ch., Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, ¶¶ 23-26 (Int'l Crim. Trib. for the former Yugoslavia July 9, 2009).

181 Common Article 3(1)(a) of the Geneva Conventions.

182 Common Article 3(1)(c) of the Geneva Conventions.

183 The application of Common Article 3 of the Geneva Conventions is limited to "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*." Article 75 of Additional Protocol I covers all "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol."

184 Art. 75(1) Additional Protocol I.

185 Art. 75(2) Additional Protocol I.

186 *See* Art. 75(3-6) Additional Protocol I.

offered by Common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol I are also part of customary international law.[187]

58. Accordingly, individuals who have "fallen into the power of a belligerent"[188] when attempting to breach or breaching a blockade have to be treated humanely:

> [T]hey may not be ill-treated in any way and . . . the authority is under an obligation to assure that officials treat the persons correctly and that they are kept in healthy conditions. Further, if any of these persons are in need of medical treatment, this should be given in accordance with the needs of the individuals concerned and without any adverse discrimination.[189]

As mentioned above, *all* persons at sea in the power of a belligerent are protected. Unlike the Fourth Geneva Convention,[190] the San Remo Manual does not exempt neutral nationals from the group of protected persons. The reason for this could lie in the specific circumstances of persons while on the high seas, who are obviously not in a practical position to appeal to the protection of their State of nationality[191].

59. "The respect and protection of these persons [*e.g.*, individuals detained during the enforcement of a blockade] is to continue once on land and it is clear that the determination of their status should take place as speedily as possible . . . ."[192] This is because the status of the detainees ultimately determines whether they can be interned as prisoners of war, or whether they are civilians who in principle have to be released. The detainees' status in turn depends on their nationality, their function on board the captured ship and their personal involvement in hostilities during the enforcement of the blockade by the belligerent.[193]

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187 *See* ICRC STUDY, *supra* note 115, at 306 (Rule 87: Civilians and persons *hors de combat* must be treated humanely); *see also id.* at 308 (Rule 88: Adverse distinction in the application of international humanitarian law based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria is prohibited); *id.* at 311 (Rule 89: Murder is prohibited); *id.* at 315 (Rule 90: Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment are prohibited); *id.* at 344 (Rule 99: Arbitrary deprivation of liberty is prohibited).

188 § 161 San Remo Manual.

189 SAN REMO MANUAL EXPLANATION, *supra* note 21, at 224.

190 Article 4: "Nationals of a neutral State who find themselves in the territory of a belligerent State . . . shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are." Note that this limitation does not apply to neutral nationals in occupied territory.

191 The situation on land is different: "In the territory of the belligerent States the position of neutrals is still governed by any treaties concerning the legal status of aliens and their diplomatic representatives can take steps to protect them." GENEVA CONVENTIONS COMMENTARY, *supra* note 133, at 49.

192 SAN REMO MANUAL EXPLANATION, *supra* note 21, at 224.

193 *See* §§ 161-167 San Remo Manual and the relevant provisions of the Third (Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135) and Fourth Geneva Convention.

60. The treatment of persons detained in the enforcement of a blockade may also be subject to the application of human rights law. While international humanitarian law "covers all the rules protective of potential or actual victims of armed conflicts," human rights law "encompasses all fundamental freedoms and all basic social, economic and cultural rights recognized to each individual independently of nationality."[194] There has been considerable legal debate on the precise nature of the relationship between these two legal regimes. Positions taken in academic writing range from complete separation to complementarity and even fusion.[195] It is true that given their different historical development, both areas of the law were traditionally kept separate.[196] However, in light of the rising prominence of human rights law in international relations, this strict dichotomous approach can no longer be maintained. "From a situation of segregation and mutual disinterest, there has been a move towards a situation of progressive interpenetration, if not merger."[197]

61. The application of international humanitarian law depends on the existence of an armed conflict. On the other hand, human rights law first and foremost binds States in peacetime.[198] Indeed, there are provisions in many human rights treaties that allow for derogation from certain rights in situations of armed conflict.[199] However, these provisions do not allow derogation from fundamental principles of human rights law, such as the right to life and the prohibition of torture.[200] Moreover, in the case of the ICCPR any measures in derogation of rights under the treaty must be proportional and not inconsistent with other obligations under international law. "One is particularly reminded in this context of the minimum guarantees of the rule of law contained in Art. 3 of the Geneva Conventions of 1949 as well as in the two Additional Protocols of 1977."[201] Accordingly, the position of the Human Rights Committee[202] is that

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194 Robert Kolb, *Human Rights and Humanitarian Law, in* MPEPIL, *supra* note 47, at 1 [article updated Oct. 2010].

195 *See* Kolb, *supra* note 194, at 27-31.

196 *See* for an extensive historical overview Kolb, *supra* note 194, at 4-26.

197 Kolb, *supra* note 194, at 44.

198 *See* Dario Campanelli, *The Law of Military Occupation Put to the Test of Human Rights Law*, 90 INT'L REV. OF THE RED CROSS 653 (2008); *see also* Greenwood, *supra* note 42, at 74.

199 *See, e.g.*, Article 4(1) of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 ("ICCPR"): "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."; Article 15 of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222 ("ECHR") contains a similar provision.

200 *See, e.g.*, Article 4(2) ICCPR; Article 15 ECHR specifies that no derogation from the right to life is possible, "except in respect of deaths resulting from lawful acts of war."

201 MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS – CCPR COMMENTARY 99 (2nd ed. 2005).

202 The Human Rights Committee is the body of independent experts that monitors the implementation of the ICCPR by its State parties.

> the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.[203]

This view is supported by the "constant practice" of the United Nations.[204] For example, the General Assembly affirmed that "[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflicts."[205]

62. The International Court of Justice has also repeatedly confirmed the continued application of human rights provisions in armed conflict. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court observed

> that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[206]

This wording could be construed as implying a *lex generalis* (human rights law) / *lex specialis* (international humanitarian law) relationship between the two legal fields in a technical sense. Such an approach would result in the practical exclusion of human rights law considerations in situations of armed conflict.[207] However, the Court in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* provided further explanation:[208]

> [T]he Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law;

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203 Human Rights Comm., General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

204 *See* Campanelli, *supra* note 198, at 658 with exhaustive references.

205 G.A. Res. 2675 (XXV), ¶ 1, U.N. Doc. A/8178 (Dec. 9, 1970).

206 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8).

207 *See* Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INT'L REV. OF THE RED CROSS 737, 738 (2005).

208 The Court's view has been criticized as somewhat vague. One observer expressed the wish "that the Court might have been a little more candid and a bit more specific." Iain Scobbie, *Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict*, 14 J. CONFLICT & SECURITY L. 449, 452 (2010).

> others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.[209]

It further endorsed this interpretation in a subsequent case.[210]

63. As a result, it could be argued that the content of human rights law is informed by the specific provisions of international humanitarian law, and that *vice versa* international humanitarian law may make reference to human rights law.[211] This 'renvoi approach' would be applied "in the area of rights protected by both sources, *i.e.* in the area of overlapping."[212] For example, when international humanitarian law allows for the detention of individuals, human rights law may be consulted to specify the conditions and the rights and duties of the involved State and the detainees in this situation. Conversely, when interpreting the right to life under human rights law during an armed conflict, recourse must be had to the principle of international humanitarian law which sanctions the killing of combatants.[213] "It is thus not so much a matter of putting one source in the place of the other – which is the traditional meaning of the *lex specialis* rule – but rather of complementing both with each other in the context of a proper interpretation."[214]

64. In light of the above, it is important to stress that it is difficult to make generalized statements on the exact nature of the relationship between human rights law and international humanitarian law. Rather, the application of specific provisions of either legal area depends heavily on the factual context of the situation and has to be assessed accordingly.[215] In any case, there cannot be gaps in the law. In line with the rationale expressed in the Martens Clause[216]—now a part of customary law[217]—it must be assured that minimum standards of humanitarian/human rights protection are observed at all times.

65. We observe in this regard that there is significant overlap between many of the protections provided under international humanitarian law and their counterparts under human rights law. In particular:

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209 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, *supra* note 145, ¶ 106.

210 Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. Reports 168, ¶ 216 (Dec. 19).

211 *See* Christopher Greenwood, *supra* note 42, at 75.

212 Kolb, *supra* note 194, at 37.

213 *See* in more detail Lubell, *supra* note 207, at 744-746.

214 Kolb, *supra* note 194, at 36; *see also* Greenwood, *supra* note 42, at 74-75.

215 *See* Campanelli, *supra* note 176, at 657.

216 Preamble of Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, 187 Cons. T.S. 429: "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."

217 Legality of the Threat or Use of Nuclear Weapons, *supra* note 206, ¶ 84.

- Both international humanitarian law and human rights law prohibit any form of discrimination in providing protection.[218]
- Both prohibit murder / the arbitrary deprivation of the right to life.[219]
- Both prohibit any form of torture.[220]
- Both prohibit humiliating and degrading treatment.[221]
- Both require that detained individuals are granted due process rights with regard to their detention.[222]

66. The issue of the enforcement of a blockade further raises the question of the extraterritorial application of human rights law to a vessel on the high seas. In this context, it should be noted that the reach of human rights treaties has been the subject of much debate.[223] Some States are generally in favour of a narrow interpretation[224] while human rights bodies and courts have interpreted the treaties' jurisdiction clauses somewhat more broadly.[225] This is despite the seemingly narrow language of those provisions.[226] With regard to the ICCPR, the Human Rights Committee has held that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the State Party's territory, including those within the power or effective control of the forces of a

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218 *Compare* Common Article 3(1) of the Geneva Conventions, *with* Article 75(1) Additional Protocol I with Article 2(1) ICCPR.

219 *Compare* Common Article 3(1)(a) of the Geneva Conventions, *with* Article 75(2)(a)(i) Additional Protocol I with Article 6(1) ICCPR.

220 *Compare* Common Article 3(1)(a) of the Geneva Conventions, *with* Article 75(2)(a)(ii) Additional Protocol I with Article 7 ICCPR and Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 ("CAT").

221 *Compare* Common Article 3(1)(c) of the Geneva Conventions, *with* Article 75(2)(b) Additional Protocol I with Article 7 ICCPR and Article 16 CAT.

222 *Compare* Article 75(3)-(4) Additional Protocol I, *with* Articles 9-10 ICCPR.

223 For an overview, *see* Lubell, *supra* note 207, at 739-741.

224 *See, e.g.*, Human Rights Comm., Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, United States of America, ¶ 3 and Annex 1, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005), expressing the view that "the obligations assumed by a State Party to the International Covenant on Civil and Political Rights (Covenant) apply only within the territory of the State Party."

225 *See, e.g.*, Human Rights Comm., Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, United States of America, ¶ 10, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006): "The State party should review its approach and interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of its object and purpose. The State party should in particular (a) acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory, as well as its applicability in time of war; . . . ."

226 For example, Article 2(1) ICCPR speaks of a State's obligation to recognize all individuals' rights "within its territory and subject to its jurisdiction." Article 2(1) CAT limits a State's obligations to "any territory under its jurisdiction."

State Party acting outside its territory.[227] That interpretation is echoed by the Committee against Torture[228] with respect to the Torture Convention.[229]

67. Most recently, the International Court of Justice held in relation to occupied territories "that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."[230] In its conclusions, it relied heavily on the practice of the Human Rights Committee.[231]

68. Similarly, the European Court of Human Rights has addressed the question in the context of law enforcement actions on the high seas. The Court found that the European Convention on Human Rights applied to a Cambodian ship boarded by French forces on the basis that France exercised full and exclusive de facto control over the vessel from the time of its interception so that the applicants were effectively within France's jurisdiction.[232] A similar finding was reached by the Committee Against Torture when it concluded that de facto control over the individuals on a refugee ship in international waters triggered Spain's responsibilities under the Torture Convention.[233]

69. In sum, there is a clear tendency in international law supporting an expansive view with respect to the applicability of human rights treaties outside the territory of States parties to the relevant conventions. What is important is the State's exercise of effective control in a specific situation. This would include the situation of the capture of a foreign-flagged vessel on the high seas in the enforcement of a blockade. The human rights obligations of the State enforcing the blockade would therefore come into play once it asserts physical control over the vessel and its passengers, regardless of the ship's

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227 Human Rights Comm., General Comment No. 31 [80], *supra* note 203, ¶ 10.

228 The Committee Against Torture is the body of 10 independent experts that monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties.

229 Comm. Against Torture, General Comment No. 2, Implementation of article 2 by States parties, ¶ 7, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

230 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, *supra* note 145, ¶ 111.

231 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, *supra* note 145, ¶¶ 109-110.

232 Medvedyev et al. v. France, App. No. 3394/03, Grand Chamber, ¶ 67 (Mar. 29, 2010); *see also* Banković and Others v. Belgium and 16 other Contracting States., App. No. 52207/99, Grand Chamber, ¶¶ 61, 71 (Dec. 12, 2001), where the Court limited the extraterritorial application of the ECHR to cases where a State party would have "effective control" of a territory, expressly referring to its "ordinary and essentially territorial understanding of jurisdiction."

233 Comm. Against Torture, Decision, Communication No. 323/2007, ¶ 8.2, U.N. Doc. CAT/C/41/D/323/2007 (Nov. 10, 2008).

position on the high seas.[234] In such a case, the relevant human rights obligations are those of the State exercising effective control over the vessel, rather than the flag State.

Summary

70. There is nothing in international customary law, or in the United Nations Convention on the Law of the Sea (UNCLOS), that would generally prohibit the use of force on the high seas, as long as force is only used in self-defence, in line with Articles 2(4) and 51 of the U.N. Charter and Articles 88 and 301 UNCLOS (*ius ad bellum*). Moreover, once an armed conflict has commenced, the traditional laws of naval warfare apply (*ius in bello*). Those rules would apply in place of the general provisions of the law of the sea otherwise applicable in peacetime. They include provision for the imposition of a blockade.

71. A blockade as a method of naval warfare aims at preventing any access to and from a blockaded area, regardless of the type of cargo. A blockade must be declared and notified to all States. The blockading power is required to maintain an effective and impartial blockade. Free access to neutral ports and coasts must be granted. The blockade is illegal if imposed with the sole aim to starve a civilian population or if its effects on the civilian population are in excess of the achieved military advantage. If necessary, the civilian population must be allowed to receive food and other objects essential to its survival. Such humanitarian missions must respect the security arrangements put in place by the blockading power.

72. The blockading power is entitled to board a neutral merchant vessel if there are reasonable grounds to suspect that it is breaching a blockade. The blockading power has the right to visit and search the vessel and to capture it if found in breach of a blockade. Breach could occur outside the blockade zone, including on the high seas where there is evidence of the vessel's intention. If there is clear resistance to the interception or capture, the blockading power may attack the vessel, after giving a prior warning. The level of force used to enforce the above-mentioned rights must be proportionate; in particular, it must be limited to the level necessary to achieve the military objective.

73. Individuals detained in the enforcement of a blockade are protected by the provisions of international humanitarian law. At the same time, they have complementary protection under human rights law. This is regardless of their location on the high seas, outside the detaining State's territory.

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234 § 161 San Remo Manual also supports this view: "While at sea and thereafter until determination of their status, they shall be subject to the jurisdiction of the State exercising power over them." However, it is unclear whether this provision of international humanitarian law could be understood to make reference to the application of human rights treaties.

Appendix II: Separate Statements from Mr. Ciechanover and Mr. Sanberk

Statement by Mr. Ciechanover

As the Representative of Israel to this Panel, I join the Chairman and Vice Chairman in adopting this report. Israel appreciates the important work of the Panel and thanks Sir Geoffrey Palmer and Mr. Alvaro Uribe for their leadership. Their efforts should send a message to the international community about the need to engage with all sides to a dispute and to avoid prejudging an incident before all of the facts are known.

Israel has reservations to a few aspects of the report, which are expressed below, but appreciates that the report concurs with Israel's view that the "*naval blockade was legal*," that it "*was imposed as a legitimate security measure in order to prevent weapons from entering Gaza by sea,*" that the blockade's implementation "*complied with the requirements of international law,*" and that Israel had a "*right to visit and search the vessel and to capture it if found in breach of a blockade*", including in international waters. The Report rightly finding serious questions about "*the conduct, true nature and objectives of the flotilla organizers, particularly IHH,*" notes that they planned "*in advance to violently resist any boarding attempt*" *and* classifies the decision to breach the blockade of Gaza as a "*dangerous and reckless act,*" which "*needlessly carried the potential for escalation.*" Israel also notes the importance of the Panel's support for Israel's long-standing position that "*all humanitarian missions wishing to assist the Gaza population should do so through established procedures and designated land crossings in consultation with the Government of Israel and the Palestinian Authority.*"

At the same time, Israel does not concur with the Panel's characterization of Israel's decision to board the vessels in the manner it did as "excessive and unreasonable." The Panel was provided evidence of the repeated warnings it gave the vessels regarding its intent to board them. Israel feels that the Panel gave insufficient consideration to the operational limitations which determined the manner and timing of the boarding of the vessels and to the operational need for a covert takeover in order to minimize the chances for resistance on board.

As to the actions of Israel's soldiers, given the panel's conclusions regarding the resistance that they encountered when boarding the Mavi Marmara, it is clear that the soldier's lives were in immediate danger. For example, the Panel notes that "*Israeli Defense Forces personnel faced significant, organized and violent resistance from a group of passengers when they boarded the Mavi Marmara.*" The Panel confirmed that video footage showed that passengers were wearing "*bullet proof vests, and carrying metal bars, slingshots, chains and staves*" and that this information "*supports the accounts of violence given by IDF personnel to the Israeli investigation.*" The Panel further confirms that "*two soldiers received gunshot wounds,*" "*three soldiers were captured, mistreated, and placed at risk*" and that "*seven soldiers were wounded by passengers, some seriously.*"

Given these circumstances, Israel's soldiers clearly acted in self-defense and responded reasonably, proportionally and with restraint, including the use of less-lethal weapons where feasible. The Panel's characterization of the circumstances which led to the nine deaths on board the Mavi Marmara does not adequately take into account the complexities of what was clearly a chaotic combat situation. In such a situation, reconstructing the exact chains of events is extremely difficult, if not impossible. Given the close range combat that clearly took place aboard the vessel, wounds sustained at close range do not in themselves suggest wrongdoing by Israeli soldiers.

Israel's treatment of the hundreds of participants following the takeover of the ships was reasonable and compatible with international standards. Reliance on some passenger statements presented in the Turkish National Report as evidence of wrongdoing was particularly problematic. Israel raised serious concerns regarding the veracity and credibility of some of these statements.

Still, Israel cherishes the shared history and centuries old ties of strong friendship and cooperation between the Jewish and Turkish peoples and hopes that the Panel's work over the past few months will assist Israel and Turkey in finding a path back to cooperation.

Strictly Confidential

Statement by Mr. Sanberk

I hereby register my disagreement with the Chairmanship on the following issues contained in the report:

- The question of the legality of the blockade imposed on Gaza by Israel.
- The actions of the flotilla
- Naval blockades in general
- Appendix: The applicable International legal principles.

This, for the following reasons:

- On the legal aspect of the blockade, Turkey and Israel have submitted two opposing arguments. International legal authorities are divided on the matter since it is unprecedented, highly complex and the legal framework lacks codification. However, the Chairmanship and its report fully associated itself with Israel and categorically dismissed the views of the other, despite the fact that the legal arguments presented by Turkey have been supported by the vast majority of the international community. Common sense and conscience dictate that the blockade is unlawful.

- Also the UN Human Rights Council concluded that the blockade was unlawful. The Report of the Human Rights Council Fact Finding Mission received widespread approval from the member states.

- Freedom and safety of navigation on the high seas is a universally accepted rule of international law. There can be no exception from this long-standing principle unless there is a universal convergence of views.

- The intentions of the participants in the international humanitarian convoy were humanitarian, reflecting the concerns of the vast majority of the international community. They came under attack in international waters. They resisted for their own protection. Nine civilians were killed and many others were injured by the Israeli soldiers. One of the victims is still in a coma. The evidence confirms that at least some of the victims had been killed deliberately.

- The wording in the report is not satisfactory in describing the actual extent of the atrocities that the victims have been subjected to. This includes the scope of the maltreatment suffered by the passengers in the hands of Israeli soldiers and officials.

In view of the above, I reject and dissociate myself from the relevant parts and paragraphs of the report, as reflected in paragraphs ii, iv, v, vii of the findings contained in the summary of the report and paragraphs ii, iv, v, vii, viii and ix of the recommendations contained in the same text.

RELEASE IN FULL

READ ITEMS SENT IN POUCH ON 6/6/10

INFO MEMOS

NR

3) NEA, EUR – U.S. Government Contact Regarding the Free Gaza Flotilla Prior to its Interdiction by the Israeli Navy

NR

NOTES

NR

CABLES

NR

REVIEW AUTHORITY: Sharon Ahmad, Senior Reviewer

NR

IHH (Turkish Humanitarian Relief Foundation)

What is the U.S. assessment of the IHH (İnsan Hakve Hürriyetleri İnsani YardımVakfı) -the group that formed the Free Gaza Flotilla? What do we know about them? For example, is IHH a member of the Hamas umbrella group Union of Good? Has it ever been associated with terrorist groups? Is it a designated Foreign Terrorist Organization (FTO)? What is the way forward in regards to IHH and its related entities? What about multilateral cooperation?

- The IHH has neither been designated as a Foreign Terrorist Organization nor designated under Executive Order 13224. We are fully committed to taking appropriate action against foreign groups engaging in terrorist activity in order to prevent such groups from obtaining the resources and support needed to undertake terrorist activity.

- We've been very aggressive in taking on the Hamas umbrella organization, the Union of Good (UoG), with which IHH and many other Hamas-affiliated "charities" have ties. Like you, we continue to have serious concerns about IHH. In fact, our concerns about this organization preceded the May 2010 Gaza flotilla incident. The USG continues to look closely at this organization and consider appropriate courses of action.

[redacted]

Remarks With Philippines Foreign Secretary Albert del Rosario After Their Meeting
Remarks
Hillary Rodham Clinton
Secretary of State
Treaty Room
Washington, DC
June 23, 2011

RELEASE IN FULL

NON-RESPONSIVE PORTIONS REDACTED

NR

REVIEW AUTHORITY: Sharon Ahmad, Senior Reviewer

1

NR

MS. NULAND: Okay. Kirit Radia with ABC.

NR

And also, Madam Secretary, there's reports that another flotilla may be headed to Gaza within the next couple days. What is your message to the organizers and participants in that? Thank you.

NR

NR

[redacted]

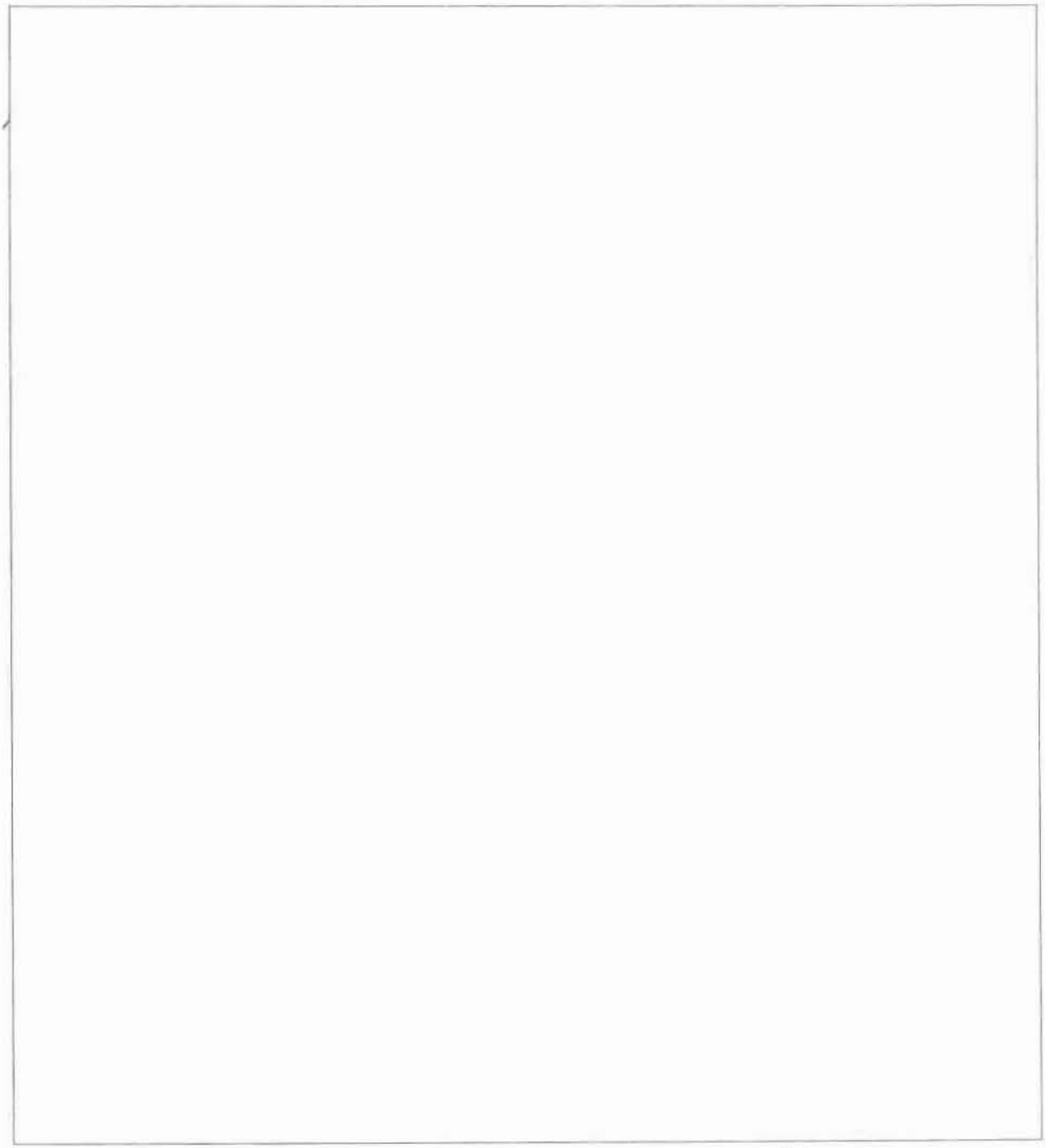
QUESTION: (Inaudible) flotilla (inaudible)?

SECRETARY CLINTON: Well, we do not believe that the flotilla is a necessary or useful effort to try to assist the people of Gaza. Just this week, the Israeli Government approved a significant commitment to housing in Gaza. There will be construction materials entering Gaza and we think that it's not helpful for there to be flotillas that try to provoke actions by entering into Israeli waters and creating a situation in which the Israelis have the right to defend themselves.

[redacted]

Remarks With South Korean Foreign Minister Kim Sung-Hwan After Their Meeting
Remarks
Hillary Rodham Clinton
Secretary of State
Benjamin Franklin Room
Washington, DC
June 24, 2011

NR



NR

MODERATOR: We will now have one question from the American side and one question from the Korean side. From the American side, Jill Dougherty, CNN.

QUESTION: Okay. Thank you very much. Madam Secretary, I have another issue which is out there. That is this flotilla that says that it will be moving toward Israel.

The Americans who are in that say that the State Department actually should not be condemning them, that it should be supporting them and protecting them because they are American citizens. What is your message to them, and potentially how serious could this be if there were violence?

Thank you.

SECRETARY CLINTON: Well, first, Jill, we have made our views very clear about the flotilla that is currently heading toward Gaza and any others that might consider doing the same. We don't think it's useful or productive or helpful to the people of Gaza. We believe that a far better approach is to support the work that is being done through the United Nations that the United States is supporting to ensure that the people of Gaza get access to materials and humanitarian assistance in a safe and timely way.

So we have certainly encouraged that American citizens not participate in the flotilla, and we are urging that all precautions be taken to avoid any kind of confrontation.

RELEASE IN FULL

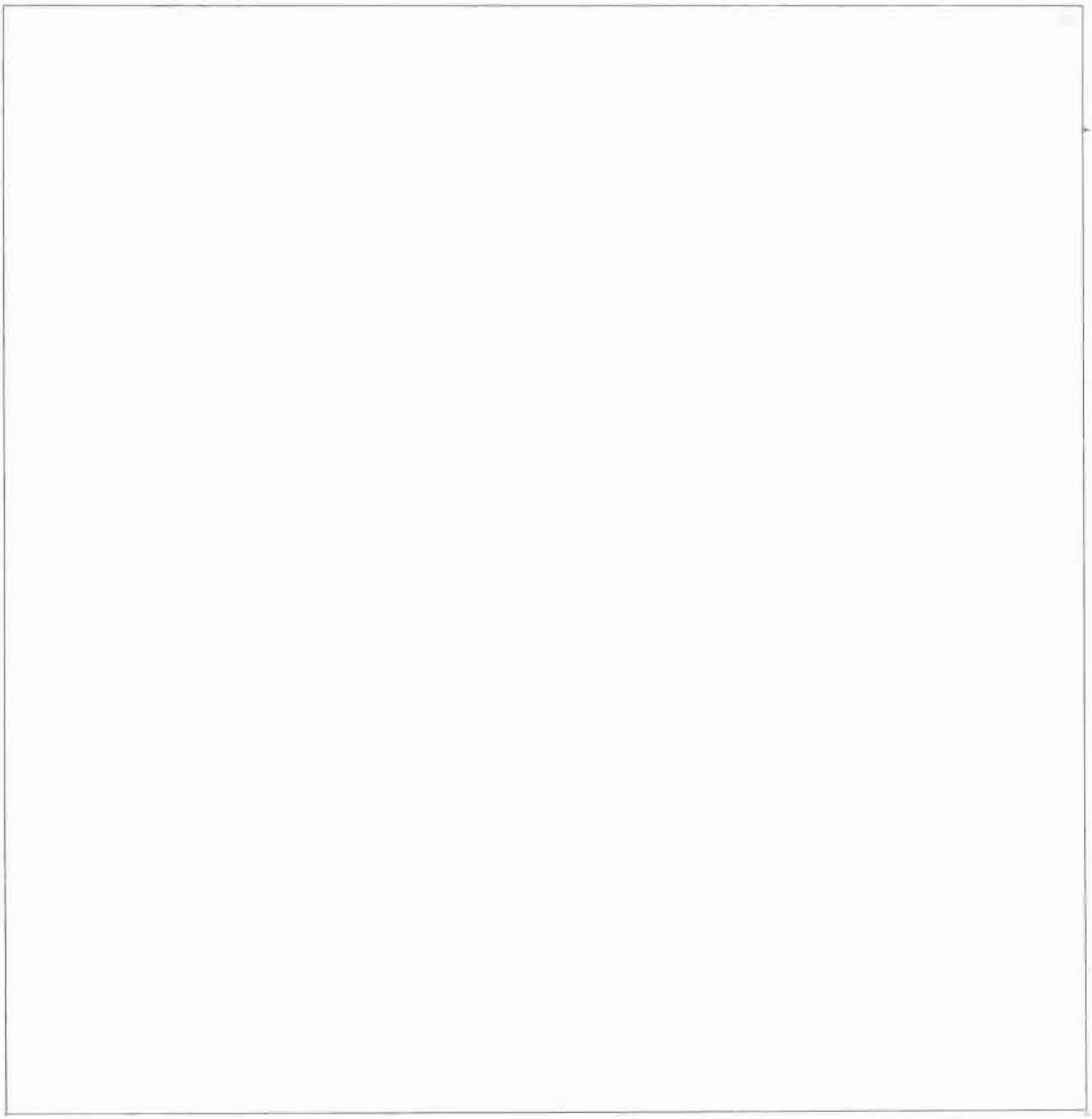
Remarks With Indian Minister of External Affairs S.M. Krishna After Their Meeting
Remarks
Hillary Rodham Clinton
Secretary of State
Treaty Room
Washington, DC
June 3, 2010

NON-RESPONSIVE PORTIONS REDACTED

NR

REVIEW AUTHORITY: Sharon Ahmad, Senior Reviewer

NR



MR. CROWLEY: We have time for two questions on each side. We'll begin with Jill Dougherty from CNN.

QUESTION: Thank you very much. Thank you, Madam Secretary. I have a question on the flotilla clash. What can you tell us about the Turkish American who was killed in that clash? Does his death make it more likely that an American will participate in any investigation? And also, Prime Minister Netanyahu is now saying that he is willing to evaluate new ideas on the blockade of Gaza. Do you have – does the United States have any new ideas in this regard?

SECRETARY CLINTON: Well, Jill, we can confirm that a U.S.-Turkish dual national, Mr. Furkan Dogan, was among those killed in the raid on the flotilla. Our ambassador to Turkey, Ambassador Jim Jeffrey, has been in contact with the family. We've offered not only our heartfelt condolences but any kind of consular assistance that the family might need at this time. We are still gathering information about what happened. We know that there was another American citizen injured on one of the ships. There is also a third American who was injured during a subsequent protest and remains hospitalized.

Protecting the welfare of American citizens is a fundamental responsibility of our government and one that we take very seriously. We are in constant contact with the Israeli Government, attempting to obtain more information about our citizens. We have made no decisions at this point on any additional specific actions that our government should take with respect to our own citizens.

But as we have stated continuously, we expect the Israeli Government to conduct a prompt, impartial, credible, and transparent investigation that conforms to international standards and gets to all the facts surrounding this tragic event. We are open to different ways of assuring that it is a credible investigation, including urging appropriate international participation.

With respect to Gaza, we are evaluating ways of expanding the flow of humanitarian assistance to the people of Gaza while protecting Israel's legitimate security interests. There's a great deal of consultation going on as well as work in our own government to determine ideas that we would share with the Israelis and other international partners, because as I have said before, we have to deal with the situation in Gaza in a way that both protects Israel's legitimate security interests and fulfills the needs of the people of Gaza. And that is what we're seeking.

QUESTION: Could I just ask one clarification? When you talk about international participation in that investigation, again, do you believe that a U.S. – an American should be part of that investigation?

SECRETARY CLINTON: Well, Jill, we haven't made any decision on that. That was part of the presidential statement that came out of the United Nations Security Council on Monday night, and we are engaged in broad-based discussions with the Israelis and others.

NR

The Secretary's Call Sheet for Quartet Representative Tony Blair
Friday, June 4, 2010

Purpose of Call: Quartet Representative Blair has asked to speak with you about the fallout from the incident with the Gaza-bound flotilla and the investigation called for in the June 1 UN Security Council presidential statement.

- **Investigation:** We deeply regret the loss of life and injuries resulting from the use of force during the Israeli military operation against the convoy sailing to Gaza. **We have called for a credible and transparent investigation, have urged the Israeli government to investigate the incident fully, and are open to ideas for how such an investigation can meet the standards set by the Security Council, including international participation through the Quartet.** We are actively discussing these ideas with the Israelis and our international partners, and we need to ensure that we have time to work this issue.

1.4(D) B1

- **Gaza Access:**

NR

NR

Approved: NEA A/S Jeffrey Feltman

Drafted: NEA/IPA, S/SEMEP: Payton Knopf, 7-1481

Cleared:

NEA/FO: RSchlicher ok
NEA/FO: MConnelly ok
S/SEMEP: MRudman ok
NEA/IPA: TGoldberger ok
NEA/IPA: THolmstrom ok
P: ECatalano ok
S/P: DRand ok
D(S): GRana ok
NEA/IPA: ALentz ok
IO
USUN/W
DRL
G

SECRET/NOFORN
DECL: 07/05/2021

S/ES 201111602, Rev. 1

RELEASE IN PART
1.4(B),B1,1.4(D),NR,B6

The Secretary's Call Sheet for
Turkish FM Ahmet Davutoglu [dah-VOOT-oh-loo]

Purpose of Call: FM Davutoglu met with Ambassador Ricciardone on July 6 and requested an urgent call with you to discuss the Turkey-Israel talks currently taking place in New York [redacted] NR

[redacted]

- **(SBU) Turkey-Israel:** [redacted]

[redacted] NR

[redacted] 1.4(D) B1

[redacted]

[redacted] NR

SECRET/NOFORN

Classified by: EUR Assistant Secretary Philip H. Gordon
E.O. 13526, Reasons: 1.4 (b) and (d)

REVIEW AUTHORITY: Sharon Ahmad, Senior Reviewer

Classified by Director A/GIS/IPS, Acting, DoS on 04/07/2016 ~ Class: SECRET ~ Reason: 1.4(D)~ Declassify on: [illegible]

NR

NR

Background:

1.4(B)
1.4(D)
B1

1.4(B)
1.4(D)
B1

NR

Approved: EUR A/S Philip H. Gordon

Drafted: Meghan Gregonis, EUR/SE, ext 7-9749; cell [redacted] B6

Cleared:		
	EUR/FO: TKaidanow	ok
	EUR/FO: LDibble	ok
	EUR/SE: RJRiley	ok
	NEA/FO: Sanderson, Walles	ok
	D(S): JKowalski	ok
	D(N): BHeath	ok
	P: LZahner	ok
	S/P: TNavratil	ok
	NEA/MAG: WRoebuck,	info
	NEA/IPA: PSutphin, JDout.	info

BACKGROUND

NR

NR

On the UN front, and the March HRC session, which will feature at least six Israel-related resolutions and likely will follow-up on Israel's release of its report on the Gaza flotilla incident.

NR

Drafted: DRL/MLGA SJohnston-Gardner, 7-0293, 7-3031

Approved: DRL DAS Baer, Acting

Cleared:
DRL/MLGA: DGalindo/JCassidy OK
IO/HR: MHonigstein OK
NEA/IPA: JDoutrich OK
SEMEP: JReed OK
EUR: IWeinstein Info
USUN/W: WBass OK
USUN/NY: KRazzouk/BMasilko/EGermain OK
IO/Mission Geneva/MKhanna: Info
L/HRR: M Banos OK
L/PM: RIngber OK
D(S): JWiegert/ACook OK
D(N): SCarl-Yoder OK
P: DNgutter OK
S/P: WBurke OK
NSC: SBusby Info
NSC: PKumar Info
G:

SECRET/NOFORN
DECL: 06/14/2021

The Secretary's Call Sheet for Turkish Foreign Minister Ahmet Davutoglu

Purpose of Call: To congratulate Davutoglu on his and the Justice and Development Party's (AKP) election victories and to raise key priorities including: [redacted] the need to prevent another flotilla incident; and [redacted] NR [redacted]

[redacted]

SECRET/NOFORN
Classified by: EUR A/S Nancy McEldowney, Acting
E.O. 13526, Reasons: 1.4 (b) and (d)

NR

- **Relations with Israel and Gaza Flotilla:**

1.4(B)
1.4(D)
B1

NR

NR

1.4(D)
B1

The Turkey-based NGO Foundation for Freedom and Humanitarian Relief (IHH), which sponsored the ship involved in the deadly May 31, 2010 confrontation with the Israeli Defense Forces, is planning to participate in an "anniversary" flotilla, notionally scheduled for the end of June.

Davutoglu publicly recommended on June 6 that before launching a flotilla, flotilla organizers evaluate whether Egypt's easing at the Rafah Border Crossing and potentially better relations between Israel and a new Palestinian government in Gaza will improve the situation for the residents of Gaza. Davutoglu's suggestion could provide an opening to stall an anniversary flotilla.

Call Notes:

Approved: EUR A/S Nancy McEldowney, Acting

Drafted: Homeyra Mokhtarzada, EUR/SE, ext 7-5972; cell [redacted] B6

Cleared:
EUR/FO: EGoldrich ok
EUR/SE: RJRiley ok
D(S): JKowalski ok
D(N): TMancinelli ok
P: LZahner ok
S/P: TNavratil ok
T: JErath ok
EUR/RPM: CShirtz ok
EUR/PRA: MZiemke ok
NEA/MAG: PTillou ok
NEA/IPA: JDoutrich ok
S/SEMEP: SKhoury-Kincannon ok
AVC/MDSP: RCiarrocchi ok

From: Davis, Timmy T </O=CLASSSTATE/OU=CANBERRA AG/CN=RECIPIENTS/CN=DAVISTT>
Sent: Monday, May 31, 2010 1:00 PM
To: Mills, Cheryl D <MillsCD@state.sgov.gov>; Sullivan, Jacob J <SullivanJJ@state.sgov.gov>; Macmanus, Joseph E <MacmanusJE@state.sgov.gov>
Cc: S_SpecialAssistants <S_SpecialAssistants@state.sgov.gov>
Subject: Call Notes: S-Israeli FM Barak

Secretary's Call with Israeli Defense Minister Barak

Please Note: This is not a transcript of this call

Call UP: 05/31 @ 1207

Secretary Clinton: Hello Ehud

Israeli Defense Minister Barak: How are you?

S: Ehud, what's going on?

[redacted]

1.4(B)
1.4(D)
B1

1.4(B)
1.4(D)
B1

Barak: I'll try to do this. Let's stay in touch.

S: Thank you. I'm available any time.

Call DOWN: 1216

SECRET/NOFORN
DECL: 09/07/2010

September 7, 2010

MEMORANDUM FOR THE PRESIDENT

FROM: Hillary Rodham Clinton

SUBJECT: [redacted] NR

[redacted] NR

Turkey's [redacted] NR
[redacted] and its reaction to the Gaza Flotilla incident – is driven by a number of factors. [redacted] 1.4(D) B1

[redacted]

[redacted] NR

SECRET/NOFORN
Classified by: Hillary Rodham Clinton
E.O. 12958, Reasons 1.4 (b) and (d)

NR

SECRET/NOFORN
Classified by: Hillary Rodham Clinton
E.O. 12958, Reasons 1.4 (b) and (d)