Freedom Thwarted: Israel's Illegal Attack on the Gaza Flotilla

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INTRODUCTION

In the early morning hours of May 31, 2010, Israeli paratroopers descended by ropes from hovering helicopters to the deck of the *Mavi Marmara*, sailing through the black waves of the Eastern Mediterranean Sea. The ship was the largest of six comprising the "Gaza Freedom Flotilla" that had departed some days earlier from a rendezvous point near Turkey for the Gaza Strip. Flotilla organizers hoped their attempt to deliver humanitarian goods to Gaza Palestinians would draw publicity to Israel's siege of the Gaza Strip, and would highlight the claimed inhumanity and illegality of that policy. A melee ensued, in which nine civilian ship passengers were killed and numerous others—both ship passengers and Israeli soldiers—were wounded. Controversy immediately erupted over the propriety and legality of Israel's actions.

Israel steadfastly maintains that the raid on the ship was legitimate. It further maintains that its soldiers, who allegedly faced provocation by the *Mavi Marmara's* passengers,[1] acted in self-defense and in compli-

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1. *See, e.g.*, *Seizure of the Gaza Flotilla: Press Conference with Dep FM Ayalon*, ISR. MINISTRY OF FOREIGN AFFAIRS ("MFA") (May 31, 2010), *available at* http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2010/Gaza_flotilla_Press_conference_DepFM_Ayalon_31-May-2010.htm?DisplayMode=print;

Full Text—Statement by Israel's Netanyahu on Flotilla Deaths, REUTERS, May 31, 2010, *available at* http://in.reuters.com/article/idINIndia-48947620100531.

ance with international law.[2] We disagree. Our position is that Israel's use of force was illegal, owing both to the nature of the raid itself and to the raid's purpose, which was to enforce the ongoing illegal siege of the Gaza Strip, of which the naval blockade was an integral part. An analysis of the facts of the raid, the siege, and the relevant international law demonstrates the illegality of the raid and establishes that Israel's storming of what was in fact a humanitarian convoy traveling in international waters cannot be justified as self-defense. This conclusion holds, we believe, despite the resistance to Israeli forces offered by some of the passengers of the *Mavi Marmara*.

Following this introduction, in Part I, we review the facts of the incident, as best they can be reconstructed from press reports, government investigations, video evidence, and other sources. Part II probes the legality of the raid, considering first Israel's violations under the law of the sea, then under the law of armed conflict, and lastly the purpose for which the raid was launched: to enforce an illegal siege that was imposing a terrible human cost on the civilian population of the Gaza Strip. A brief conclusion follows.

I. BACKGROUND: THE EVENTS OF MAY 31, 2010

A. Flotilla's Engagement with Israeli Forces

In late May 2010, a six-ship flotilla bound for the Gaza Strip set sail from various ports in the Mediterranean Sea, carrying ten thousand tons of humanitarian aid[3] and hundreds of individuals from several countries, including human rights activists, members of the European Parliament, and an Irish Nobel Peace Prize laureate.[4] A number of groups, including the Free Gaza Movement and the Turkish humanitarian organization İnsan Hak ve Hürriyetleri Insani Yardım Vakfı (İ.H.H.), organized the flotilla to challenge the three-year siege of Gaza[5] that Israel imposed after

2. *See, e.g., Statement by Prime Minister Netanyahu:"No Love Boat,"* ISR. MFA (June 2, 2010), *available at* http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2010/Statement_PM_Netanyahu_2-Jun-2010.htm.

3. Avi Issacharoff et al., *Freedom Flotilla Sets Sail for Gaza*, HA'ARETZ (May 30 2010), http://www.haaretz.com/news/diplomacy-defense/freedom-flotilla-sets-sail-for-gaza-1.293021.

4. James Hider, *Deadly Clashes at Sea as Israel Intercepts Gaza-Bound Aid Ships*, TIMES ONLINE (London) (May 31, 2010), http://www.timesonline.co.uk/tol/news/world/middle_east/article7140957.ece.

5. Isabel Kershner, *Israel Intercepts Gaza Flotilla; Violence Reported*, N.Y. TIMES

Hamas gained control of the Strip in June 2007. The challenge was to be issued through an attempt to deliver humanitarian aid and supplies to the people of Gaza, in defiance of Israel's claimed authority to enforce the siege.[6] The ships converged at a rendezvous point in international waters south of Cyprus on Sunday, May 30, 2010.[7]

On Wednesday, May 26, 2010, several days before the flotilla left port, Israel's top ministers met to consider Israel's response to the planned dispatch.[8] According to Israeli Defense Minister Ehud Barak, all ministers present at this meeting supported a plan put forward by the Army's chief of staff to raid and take control of the flotilla vessels.[9] The ministers, however, did not only discuss the logistics of the raid. The *central* focus of the May 26 meeting, according to Prime Minister Benjamin Netanyahu, was the anticipated media and diplomatic backlash of the planned operation.[10]

An Israeli military convoy left Haifa to intercept the flotilla at approximately 9 p.m. on May 30.[11] Israeli military vessels approached the flotilla in international waters around 11 p.m. As Israeli forces approached, the flotilla radioed the Israeli ships with requests not to attack, and traveled deeper into international waters.[12] Shortly after 4 a.m., Is-

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(May 30, 2010), http://www.nytimes.com/2010/05/31/world/middleeast/31flotilla.html.

6. U.N. 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, ¶ 79, U.N. Doc. A/HRC/15/21 (Sep. 27, 2010) [hereinafter U.N. Report], *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.21_en.PDF.

7. U.N. Report, *supra* note 6, ¶ 91.

8. Isabel Kershner, *Barak Says 'Friction' Was Expected in Flotilla Raid*, N.Y. TIMES (Aug. 10, 2010), http://www.nytimes.com/2010/08/11/world/middleeast/11flotilla.html.

9. *Id.*

10. *Id.* When the raid was executed, Israel took actions to ensure that available information about the raid was tightly controlled. To this end, Israeli commandos appear to have made it a high priority to seize cameras and recording equipment from journalists on the ship, at least two of whom maintain that this was the first action taken by Israeli forces when they boarded their ship. *See* Amy Goodman, *Framing the Narrative: Israeli Commandos Seize Videotape and Equipment from Journalists After Deadly Raid*, DEMOCRACY NOW (June 9, 2010), http://www.democracynow.org/2010/6/9/framing_the_narrative_israeli_commandos_seizes.

11. Kershner, *supra* note 8.

12. Alexander Christie-Miller & Raf Sanchez, *Returned British Activists Describe Israeli 'Massacre,'* TIMES ONLINE (June 3, 2010), http://www.timesonline.co.uk/tol/

raeli commandos initiated a raid on the flotilla's ships. Throughout the raid, the flotilla remained in international waters,[13] between seventy and ninety miles off the coast of Israel.[14]

B. The Mavi Marmara

The raid of the largest of the convoy's ships, the *Mavi Marmara*, resulted in the deaths of nine of its passengers. The *Mavi Marmara* had embarked from Turkey and carried nearly six hundred passengers of primarily Turkish origin.[15] Accounts vary as to exactly how the raid began. A lieutenant colonel in the Israeli commando unit Flotilla 13 (which took part in the raid) informed the *Jerusalem Post* that Israeli forces fired warning shots and threw several stun grenades before boarding the *Mavi Marmara*.[16] Israeli commandos also fired a barrage of rubber bullets from the air.[17] According to Sarah Colborne, a passenger on the *Mavi Marmara*, Israeli troops appeared to be firing from a hovering helicopter.[18] Ms. Colborne was unable to determine whether or not the shots the Israelis fired from above consisted of live ammunition.[19] According to a *New York Times* report published on June 4, "The crack of an Israeli sound grenade and a hail of rubber bullets from above were supposed to disperse activists, but instead set them in motion."[20] The stun grenade (or grenades) and the firing of rubber bullets, according to witnesses, caused

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news/uk/article7143029.ece.

13. Hider, *supra* note 4; Kershner, *supra* note 8.

14. LAWYERS FOR PALESTINIAN HUMAN RIGHTS (LPHR), THE ATTACK ON THE GAZA FREEDOM FLOTILLA AND INTERNATIONAL LAW (2010), http://www.lphr.org.uk/FlotilliaIL_QA/LPHR_FlotilliaIL_QA.pdf (stating the flotilla was "approximately 90 miles" from the Gaza coast); Glen Kessler, *Turkish Foreign Minister: Israeli Raid on Gaza Aid Flotilla 'Like 9/11' for His Country*, WASH. POST (June 1, 2010),http://www.washingtonpost.com/wp-dyn/content/article/2010/06/01/AR2010060101506.html (reporting that the flotilla was seventy-two miles from the coast).

15. THE PUBLIC COMM'N TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010 (THE TURKEL COMM'N), REPORT | PART ONE 113 (2011), *available at* http://www.turkel-committee.com/files/wordocs/8808report-eng.pdf [hereinafter TURKEL COMM'N REPORT].

16. Yaakov Katz, *"We Had No Choice,"* JERUSALEM POST (June 4, 2010), http://www.jpost.com/Israel/Article.aspx?id=177445.

17. Sabrina Tavernise & Ethan Bronner, *Days of Planning Led to Flotilla's Hour of Chaos*, N.Y. TIMES (June 4, 2010), http://nyti.ms/xs4oa3.

18. Christie-Miller & Sanchez, *supra* note 12.

19. *Id.*

20. Tavernise & Bronner, *supra* note 17.

several passengers on the *Mavi Marmara* to believe they were being shot with live ammunition.[21]

An initial attempt to board the ship was unsuccessful, as passengers hurled items such as plates and chairs at the soldiers.[22] Minutes later, an Israeli helicopter hovering close above the top deck of the ship shot live ammunition, and then Israeli soldiers descended onto the deck.[23] As the soldiers descended, the *Mavi Marmara* passengers attacked them,[24] and the scene quickly descended into chaos. "A man was shot in the head, I saw him being dragged back from the deck. I saw him being tended to and then he died," Ms. Colborne told the *Times of London*, "People were dying all over the place. It was horrific."[25] Paul McGeough, Chief Correspondent of the *Sydney Morning Herald*, was a passenger on another ship in the flotilla and witnessed events as they unfolded. He reported that as the Israeli commandos attempted to board the *Mavi Marmara*, the passengers were "throwing things, rubbish, down on them. They were throwing bits and pieces of the boat. There was a lot of yelling and screaming."[26]

As part of its investigation, the UN Human Rights Council found that live ammunition fired from three helicopters and by soldiers who landed on deck resulted in fatal injuries to four passengers, as well as many other non-fatal injuries. Evidence also suggests that Israeli soldiers shot live ammunition at individuals not engaged in the melee and at others who were already injured or incapacitated.[27] Four others were killed when soldiers entered the bridge deck and opened fire.[28] In addition, several injured Israeli soldiers were taken captive by the ships' passengers and given medical attention. The passengers subsequently released the soldiers.[29] When the smoke cleared, nine flotilla passengers were dead, and nine Israeli soldiers were injured.[30] Following the raid, Israeli soldiers handcuffed passengers and commandeered the vessels to the Is-

21. *Id.*
22. U.N. Report, *supra* note 6, ¶ 113.
23. *Id.* ¶ 114.
24. *Id.*
25. Christie-Miller & Sanchez, *supra* note 12.
26. Goodman, *supra* note 10.
27. U.N. Report, *supra* note 6, ¶¶ 117–18.
28. *Id.* ¶ 120.
29. *Id.* ¶¶ 125–26.
30. TURKEL COMM'N REPORT, *supra* note 15, at 114.

raeli port of Ashdod.[31]

C. International Reaction

Israel drew widespread international condemnation for the flotilla raid and the civilian deaths that resulted.[32] On Monday, May 31, the UN Security Council "expressed deep regret at the loss of life and injuries resulting from the use of force during the Israeli military operation early on Monday in international waters against the convoy sailing to Gaza, and condemned those acts which had killed at least ten civilians and wounded many more."[33] The Council of Europe passed a resolution stating that:

> [The Parliamentary Assembly] considers the Israeli raid, which took place in international waters, an illegal act constituting a breach of international law, in particular customary law of the sea and international human rights and humanitarian law . . . It shares, in this respect, the positions of condemnation taken by the United Nations, the Quartet, the European Union and the majority of the international community.[34]

Israel has offered a number of explanations for its actions during the May 31 raid. Speaking shortly after the raid, Israeli Deputy Foreign Minister Danny Ayalon asserted that the organizers of the flotilla are "well-known" for their ties to Al-Qaeda and that their "intent was violent, their method was violent, and unfortunately, the results were violent."[35] Mr. Ayalon also stated that the flotilla's organizers have a "history" of "deadly terror." [36] But these assertions are difficult to reconcile with later claims that Israeli military officials expected primarily passive resistance during the raid.[37] Mr. Ayalon also stated Israeli forces found weapons

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31. U.N. Report, *supra* note 6, ¶ 133.

32. *See*, *e.g.*, Council of Europe, Parliamentary Assembly Resolution 1748 (2010): Flare-up of Tension in the Middle East (June 24, 2010), *available at* http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/eRES1748.htm [hereinafter Resolution 1748]; *Ban Ki-moon: 'Shocked by raids,'* JERUSALEM POST (May 31, 2010), http://www.jpost.com/MiddleEast/Article.aspx?id=176966.

33. Press Release, Security Council, Security Council Condemns Acts Resulting in Civilian Deaths During Israeli Operation Against Gaza-Bound Aid Convoy, Calls for Investigation, in Presidential Statement, U.N. Press Release SC/9940 (May 31, 2010), http://www.un.org/News/Press/docs/2010/sc9940.doc.htm.

34. Resolution 1748, *supra* note 32.

35. *Seizure of the Gaza Flotilla*, *supra* note 1.

36. *Id.*

37. Tavernise & Bronner, *supra* note 17 ("That the military was expecting mainly passive resistance is being seen in Israel as an intelligence failure. It could be viewed as a strange assumption given that Israel's defense minister, Ehud Barak, later characterized

"prepared in advance and used against [Israeli] . . . forces" on board the *Mavi Marmara*.[38] When asked by a reporter if he could provide the press with "details, even if not in pictures, about the weapons" allegedly discovered on the ship, Mr. Ayalon responded: "the event is still ongoing: it has not yet ended, and so until it's over—we are currently not at liberty to provide more details."[39]

D. Were the Passengers Armed?

The two sides dispute whether the passengers were armed at the time of the boarding. Turkish authorities inspected the flotilla's ships for weapons before the ships set sail. In the aftermath of the raid, Turkish Prime Minister Recep Tayyip Erdogan stated that the convoy's ships were "checked in a strict way under the framework of the rules of international navigation and were only loaded with humanitarian aid."[40] Nevertheless, the passengers were not unarmed when they resisted the raid. The passengers engaged Israeli soldiers with wooden and metal rods, and stabbed at least one commando.[41] Many of the passengers' weapons appear to have been parts of the ship that they pried loose.[42] Indeed, the Human Rights Council's report on the flotilla raid stated that "the fact that some passengers engaged in last minute efforts to fashion rudimentary weapons shortly prior to the interception confirms the findings of the Mission that no weapons were brought on board the ship."[43]

Israel, however, claims that its forces were met with gunfire,[44] and at least one Israeli soldier reportedly suffered a gunshot wound.[45] But there is little evidence to suggest that the ships' passengers brought firearms on board with them, or that the passengers ever used any firearms.[46] Instead, many reports indicate that early in the raid, passengers seized several Israeli firearms and threw them overboard to prevent their

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the Turkish group as a dangerous Islamic organization with terrorist links—a charge the organization rejects.").

38. *Seizure of the Gaza Flotilla*, *supra* note 1.

39. *Id.*

40. *Id.*

41. Tavernise & Bronner, *supra* note 17.

42. *Id.*

43. U.N. Report, *supra* note 6, ¶ 101.

44. *See, e.g.*, Katz, *supra* note 16.

45. Ari Rabinovitch, *Israel Wasn't Ready for Flotilla Resistance—General*, REUTERS, Aug. 11, 2010, http://uk.reuters.com/article/idUKTRE67A1NX20100811.

46. U.N. Report, *supra* note 6, ¶ 116.

use by the commandos.[47] On the other hand, at least one Israeli soldier was thrown from an upper deck to a lower deck of the ship.[48]

Israel did ultimately discover knives, clubs, and slingshots on board the *Mavi Marmara*, as well as bulletproof vests and gas masks.[49] Such rudimentary weaponry does not seem consistent with a well-coordinated plan to resist Israeli military might. In any case, we believe that the Mavi Marmara's crew and passengers had rights of self-defense against Israel's illegal boarding of their vessel, and were entitled to use force proportional to that which they perceived they were facing. Reasonably believing that they were confronting lethal force from Israeli commandos, the ship's crew and passengers would have been legally entitled to use firearms to repel the attack, had they been available to them. In fact, they used less powerful weapons than were legally permissible given the circumstances they were facing at the time of the attack.

II. THE LEGALITY OF THE MAY 31, 2010 RAID

Despite Israel's self-defense claims, the May 31 raid was illegal for three primary reasons: (1) *where* the raid occurred—in international waters and in violation of the law of the sea; (2) *how* Israeli forces conducted the raid—in a manner that violated international law governing armed conflict; and (3) *why* Israel undertook the raid—to enforce its illegal blockade of the Gaza Strip.

A. Violations of the Law of the Sea

Israel's raid of the *Mavi Marmara* occurred in international waters[50] approximately seventy to ninety miles off the coast of Israel.[51] The U.N. Convention on the Law of the Sea (UNCLOS)—the primary international treaty delineating the maritime rights and obligations of states—codifies much of the customary international law regarding the sea.[52]

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47. *See, e.g.*, Reuters, *Activists "Threw Israeli Guns into Sea,"* IRISH TIMES (June 6, 2010), http://www.irishtimes.com/newspaper/breaking/2010/0603/breaking24.html.

48. Ron Ben-Yishai, *A Brutal Ambush at Sea*, Y NET NEWS (May 31, 2010), http://www.ynetnews.com/articles/0,7340,L-3896796,00.html.

49. Ron Friedman, *Wheelchairs as Well as Weapons Found on Board Aid Ships*, JERUSALEM POST (June 3, 2010), http://www.jpost.com/Israel/Article.aspx?id=177342.

50. Security Council Press Release, *supra* note 33; Resolution 1748, *supra* note 32.

51. LPHR, *supra* note 14; Kessler, *supra* note 14.

52. United Nations Convention on the Law of the Sea art. 85, Dec. 10, 1982, 1833 U.N.T.S. 3, 432, *available at*

One hundred and sixty nations have ratified the UNCLOS. Israel is not a party to the treaty, but many of its provisions reflect customary international law.[53]

1. Freedom of the High Seas

UNCLOS defines several major maritime zones in which states exercise varying degrees of sovereignty. Article 86 of UNCLOS defines the high seas negatively, or as "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 . . . ."[54] UNCLOS thus designates as the high seas those areas that do not qualify as one of the other three types of maritime zones specifically referenced in Article 86. Taken from last to first, the three maritime zones (which do not constitute the high seas) entail decreasing sovereignty rights for the states to which they belong, with states entitled to exercise complete sovereignty over their internal waters, comparable sovereignty over territorial seas, and "extensive rights in relation to *natural resources*"[55] in their exclusive economic zones.[56]

States generally enjoy complete and exclusive sovereignty over their internal waters,[57] and international law provides no right for one state's vessels to enter another state's internal waters.[58] Seaward from the internal waters, a state's territorial sea lies immediately adjacent to its shoreline. Article 2(1) provides that the "sovereignty of a coastal State extends . . . beyond its land territory and internal waters" to the outer edge of its territorial sea.[59] A state's sovereignty over its territorial sea is limited only by other provisions of the UNCLOS and international law,[60]

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http://treaties.un.org/doc/publication/UNTS/Volume%201833/v1833.pdf [hereinafter UNCLOS].

53. SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 340 (2006).

54. UNCLOS, *supra* note 52, art. 86.

55. MURPHY, *supra* note 53, at 348 (emphasis added).

56. *Id.* at 348–49.

57. All waters internal of a state's baseline comprise that state's internal waters. Article 5 of the United Nations Convention on the Law of the Sea provides: "the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." UNCLOS, *supra* note 52, art. 5; *see also* MURPHY, *supra* note 53, at 341.

58. MURPHY, *supra* note 53, at 342–43.

59. UNCLOS, *supra* note 52, art. 2(1); *see also* MURPHY, *supra* note 53, at 344.

60. UNCLOS, *supra* note 52, art. 2(3); *see also* MURPHY, *supra* note 53, at 344.

"such as rules on sovereign and diplomatic immunity."[61]

UNCLOS allows states to declare a territorial sea of up to twelve nautical miles.[62] Beyond the territorial sea lies an area a state may declare as an "exclusive economic zone." Within a state's exclusive economic zone, that state enjoys

> sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.[63]

Additionally, a state enjoys jurisdiction within its exclusive economic zone with regard to scientific research; artificial islands, installations, and structures; and "the protection and preservation of the marine environment."[64] UNCLOS provides that a state may claim an exclusive economic zone of not more than two hundred nautical miles from its coast.[65]

Israel claims a territorial sea of twelve nautical miles, the maximum allowable breadth under UNCLOS, but does not claim an exclusive economic zone.[66] Thus, according to Article 86, the waters beyond Israel's territorial sea—that is, beyond twelve nautical miles of Israel's shoreline—are high seas.[67] The principle that a state's territorial sea may not

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61. MURPHY, *supra* note 53, at 344.

62. Article 2(3) of the Convention provides that "[e]very State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention." UNCLOS, *supra* note 52, art. 2(3). Article 5 provides: "Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." *Id.* art. 5; *see also* MURPHY, *supra* note 53, at 341, 343–44.

63. UNCLOS, *supra* note 52, art. 56(1)(a); *see also* MURPHY, *supra* note 53, at 348.

64. UNCLOS, *supra* note 52, art. 56(1)(b); *see also* MURPHY, *supra* note 53, at 348.

65. Article 57 provides that "[t]he exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." UNCLOS, *supra* note 52, art. 57. The Convention gives a definition of baseline in Article 5. *Id.* art. 5.

66. *Field Listing :: Maritime Claims*, U.S. CENT. INTELLIGENCE AGENCY, http://1.usa.gov/z7m3Lu (last visited Jan. 22, 2012) [hereinafter CIA, *Maritime Claims*].

67. Article 33 allows a state to declare a contiguous zone of up to twenty-four miles beyond its baseline (i.e., twelve miles beyond the maximum declarable breadth of the territorial sea). Within this zone, a state may exercise jurisdiction over certain offenses occurring *within a state's territory* or that state's *territorial sea*, but not for offenses committed in the exclusive economic zone or on the high seas. UNCLOS, *supra* note 52, art. 33; *see also* MURPHY, *supra* note 35, at 345–46. We do not address the issue of contigu-

extend beyond twelve miles of its coastline is customary international law.[68] Even if Israel claimed an exclusive economic zone beyond its territorial sea, the rights it could exercise in that zone would relate primarily to natural resources and would not impact the legality of the raid on the *Mavi Marmara*.[69]

Article 87 of UNCLOS guarantees all states "freedom of the high seas" and provides that this freedom includes the rights of navigation and overflight.[70] "Every state," Article 90 declares, "has the right to sail ships flying its flag on the high seas."[71]

2. Exclusive Flag Jurisdiction

Having established that according to UNCLOS Article 86 and customary international law, the *Mavi Marmara* was on the high seas at the time of the raid, the next question is whether it was nevertheless legal for Israel to exercise its jurisdiction over the ship in conducting the raid. The concept of exclusive flag jurisdiction, established in Articles 87 through 90 provides one method of analyzing this question.[72] Article 89 states: "No State may validly purport to subject any part of the high seas to its sovereignty." In the absence of any state's sovereignty over the high seas

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ous zones at length because (1) the definition of "high seas" contained in Article 86 of the UNCLOS contains no reference to contiguous zones; (2) the *Mavi Marmara* was at no time present within Israel's internal waters or territorial sea and thus was not subject to Israel's jurisdiction for activities within those areas; and (3) the raid which is the subject of this paper occurred well beyond twenty-four miles off the coast of Israel.

68. *See, e.g.*, CIA, *Maritime Claims*, *supra* note 66 (documenting the territorial sea claims of every state on Earth). The vast majority of these extend twelve nautical miles, and the few that extend some other distance are less than twelve miles, generally three to four nautical miles. *See id.*

69. Within a state's exclusive economic zone, "vessels of other states generally enjoy the same navigational freedoms that they have on the high seas." MURPHY, *supra* note 53, at 348–49; *see also* UNCLOS, *supra* note 52, art. 58(1) ("In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.").

70. UNCLOS, *supra* note 52, art. 87.

71. *Id*. art. 90.

72. Simply stated, this principle means that, "as a general matter, the flag state has the exclusive right to exercise jurisdiction over its vessels on the high seas." MURPHY, *supra* note 53, at 350.

themselves, customary international law provides that vessels upon the high seas are subject only to the jurisdiction of their flag state. As the Permanent Court of International Justice observed in 1927, "a ship is placed in the same position as national territory. . .[W]hat occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies."[73] Accordingly, ". . .[V]essels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them."[74]

The principle of exclusive flag jurisdiction is long-established customary law.[75] Israel's raid of the *Mavi Marmara*, a vessel flying a Comoros Islands flag (although Turkish-owned) in international waters, violated this law. Though Israel maintains that its raid conformed with international law, it is well-established that "a ship on the high seas is assimilated to the territory of the State of the flag of which it flies," and that "failing the existence of a permissive rule to the contrary, [a state] may not exercise its power in any form in the territory of another state."[76]

There are two potentially applicable exceptions to the general principle of exclusive flag jurisdiction. The 1958 Geneva Convention on the High Seas, to which Israel is a party[77] and which reflects customary law,[78] provides that a military vessel that encounters a foreign merchant ship on the high seas "is not justified in boarding her unless there is a reasonable ground for suspecting" that the foreign vessel is engaged in piracy, the slave trade, or is "of the same nationality as the warship."[79] A

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73. JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH (quoting the S.S. Lotus (Fr. v. Turk.)), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7), *available at* http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm)

74. *S.S. Lotus*, 1927 P.C.I.J. at 64; *see also* LPHR, *supra* note 14.

75. LPHR, *supra* note 14 (citing *S.S. Lotus*, 1927 P.C.I.J. (Sept. 7)).

76. *S.S. Lotus*, 1927 P.C.I.J. at 45; *see also* LPHR, *supra* note 14.

77. *Status of the Convention on the Territorial Sea and the Contiguous Zone of 29 April 1958*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XXI-1&chapter=21&lang=en#Participants (last visited Jan. 22, 2012) (indicating that Israel signed the Treaty on Apr. 29, 1958 and ratified on Sept. 6, 1961).

78. MURPHY, *supra* note 53, at 339.

79. Geneva Convention on the High Seas art. 22(1), Apr. 29, 1958, 450 U.N.T.S. 82,

similar article is found in UNCLOS.[80] The *Mavi Marmara*, however, was not engaged in any of the activities enumerated in these exceptions, and Israel had no reasonable ground for suspecting that the *Mavi Marmara* was so engaged. Moreover, Israel has at no time claimed that it believed the *Mavi Marmara* was engaged in such activities or that it was an Israeli ship. Accordingly, neither the 1958 Geneva Convention on the High Seas nor UNCLOS provide Israel with a justification for its raid. In the absence of any such justifications, Israel was not entitled to exercise its power in any form on the *Mavi Marmara*, which was, as a matter of international law, the equivalent of Comoran territory.

A second possible exception to the principle of exclusive flag jurisdiction is the enforcement of a blockade, although exactly when and where this exemption applies is an unresolved issue of international law[81]. Israel claims that its actions on the high seas were justified because it was enforcing its lawful blockade against the Gaza Strip.[82] A party to an armed conflict who has imposed a lawful blockade *may* enforce that blockade on the high seas.[83] Therefore, the legality of Israel's actions rests largely on a determination of whether the blockade itself was lawful. This issue will be discussed below, in Part II.C.

B. Violations of the Law Governing Armed Conflict

As a preliminary matter, it is useful to consider the legal framework applicable in this circumstance. The principle of *jus in bello*[84] governs

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available at http://treaties.un.org/doc/publication/UNTS/Volume%20450/v450.pdf; *see also* LPHR, *supra* note 14.

80. Article 110(1) of the Convention on the Law of the Sea provides that a "warship which encounters on the high seas a foreign ship . . . is not justified in boarding it unless there is reasonable ground for suspecting" that the foreign vessel is engaged in piracy, the slave trade, unauthorized broadcasting, is without nationality, or is of the same nationality as the warship. UNCLOS, *supra* note 52, art. 110(1). For further discussion, see MURPHY, *supra* note 53, at 350; LPHR, *supra* note 14.

81. Article 1 of the Declaration of London states that "[a] blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy." Declaration Concerning the Laws of Naval War art. 1, 208 Consol. T.S. 338 (1909). The Declaration of London, though "never formally ratified . . . came to be accepted as generally expressing, save for some minor exceptions, the existing international law of blockade." 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 409 (Peter MacAlister-Smith ed., 2000).

82. Roni Sofer, *Cabinet: Navy Raid Clear Act of Self-Defense*, Y NET NEWS (June 1, 2010), http://www.ynetnews.com/articles/0,7340,L-3897631,00.html.

83. U.N. Report, *supra* note 6, ¶ 51.

84. ICRC: Jus en Bello & Jus Ad Bellum, http://www.icrc.org/eng/war-and-law/ihl-other-legal-regmies/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm;

the conduct of belligerents *within* an armed conflict, without regard to the legality of the conflict itself. In contrast, the *jus ad bellum*[85] framework governs the legality of *initiating* an armed conflict, rather than how the conflict is conducted once begun.

The first framework, *jus in bello*, is relevant in the present case because either: (1) Gaza was occupied by Israel,[86] meaning an armed conflict already existed,[87] or (2) hostilities commenced with either the institution of the blockade (an act sufficient to give rise to a state of war)[88] or with the firing of rockets from Gaza into Israel.[89] Accordingly, for the purposes of this Section we will first assume the legality of the blockade[90] and therefore analyze the raid of the *Mavi Marmara* under the *jus in bello* standard.[91] We will now consider the primary way in which we

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See Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(5), June 8, 1977, 1125 U.N.T.S. 3, *available at* http://treaties.un.org/doc/publication/UNTS/Volume%201125/v1125.pdf [hereinafter Protocol I].

85. ICRC: Jus en Bello & Jus Ad Bellum, http://www.icrc.org/eng/war-and-law/ihl-other-legal-regmies/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm

86. We believe that the Gaza Strip is still occupied as a matter of international law. For a detailed analysis of this issue, *see infra* Section 2; *infra* note 163; *see also* Carey James, *Mere Words: The 'Enemy Entity' Designation of the Gaza Strip*, 32 HASTINGS INT'L & COMP. L. REV. 643 (2009) (discussing Israel's relationship to the Gaza Strip after the 2005 "disengagement").

87. "There is an inextricable tie between. . . [belligerent]. . .occupation and interstate war. . .Belligerent occupation may constitute the sole manifestation of a state of war between State A and State B. Once a territory belonging to State A is coercively seized by State B, there is automatically a state of war in the material sense between these two Parties. . .Just as belligerent occupation may be fomented by war, war can be ignited by belligerent occupation. . . If the occupation of the territory of State A (in whole or in part) by State B is suffused with coercion, the occupation is belligerent and the relationship between States A and B shifts from peace to war (even in the absence of hostilities)." YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 31–35 (2009).

88. 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 81, at 409.

89. It is arguable that rockets from Gaza constitute an "armed attack" and thus give rise to a right of self-defense under both customary law and Article 51 of the United Nations Charter. Note that even if rocket attacks are of the requisite intensity to qualify as an armed attack, they may not give rise to an Israeli right of self-defense, owing to the possible ongoing occupation of Gaza by Israel. *See* Legal Consequences of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9). However, regardless of this question, we believe it is established that Israel was already engaged in an armed conflict at the time the May 31 raid on the flotilla occurred.

90. We consider the legality of the blockade itself, a *jus ad bellum* consideration, *infra* Section C.

91. We believe the *jus ad bellum* standard could also be relevant in considering the unlikely scenario that the raid of the *Mavi Marmara* was an act of self-defense *against*

find that Israel's raid violated it. Specifically, the force used was disproportionate.

1. Disproportionality

The requirement of proportionality is a well-established principle of customary international humanitarian law.[92] It is important to note that proportionality is not a matter of counting and comparing the number of casualties or amount of damage on each side. Rather, the basic standard for proportionality in a *jus in bello* context appears in Article 51 of the First Additional Protocol to the Geneva Conventions, which prohibits indiscriminate attacks.[93] Indiscriminate attacks are those "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[94] Therefore, a proportionate attack must not (1) cause excessive civilian harm (2) in relation to the military advantage sought.

Proportionality is a notoriously difficult principle to apply in practice.[95] There is no concrete standard for what constitutes excessive harm to civilians or civilian objects, and the permissible level of "incidental" civilian harm increases with the degree of the military advantage anticipated in a particular attack. There is a significant amount of latitude in interpreting the proportionality rule, and is often applied in favor of the military.[96] However, this latitude has its limits. In deciding on a military action, combatants must analyze proportionality on several levels: first in determining the target itself, then the method of attack, and finally, how the attack is to be carried out.[97] Despite the inherent ambiguity in the proportionality principle, Israel's raid of the *Mavi Marmara* appears to have been categorically disproportionate.

Regarding the first proportionality calculus in determining the target, Article 51 of Protocol I requires that the anticipated military advantage

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Turkey, with which Israel is not engaged in an ongoing conflict.

92. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 46–50 (Jean-Marie Henckaerts et al. eds., 2005).

93. Protocol I, *supra* note 84, art. 51(4).

94. *Id*. art. 51(5)(b).

95. *See* Judith G. Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 406, 407 (1993); *see also* William J. Fenrick, *Attacking the Enemy as a Punishable Offense*, 7 DUKE J. COMP. & INT'L L. 539, 545–46 (1997).

96. Gardam, *supra* note 95, at 407.

97. *Id.*

of an attack be "concrete and direct."[98] One scholar argues that the language "concrete and direct" in Additional Protocol I implies that the advantage must be analyzed for each instance of military action, rather than assessed cumulatively.[99] Supporting this view are the *travaux preparatoires* of Additional Protocol I, which interprets the "direct and concrete" language in the text to mean "substantial and relatively close" and directing that "hardly perceptible" and "long-term" advantages be disregarded.[100] Israel conducted the May 31 raid to enforce its blockade of the Gaza Strip, which Israel instituted, *inter alia*, to reduce rocket fire emanating from Gaza.[101] However, there is very little conceivable connection between depriving Gaza's population of basic necessities and combating rocket fire. Potential or indeterminate military advantages are insufficient to satisfy the proportionality standard.[102] Therefore, given the tenuous connection between raiding the *Mavi Marmara* and stopping rocket fire from Gaza, even slight risk to civilians or civilian infrastructure would make the raid disproportionate.

The second calculus requires an analysis of the method used to attack the target. In the case of Israel's neutralization of the *Mavi Marmara*, the analysis also supports the conclusion that its May 31 raid was disproportionate. As noted, even if one assumes that the military advantage gained by diverting the *Mavi Marmara* was nominal, that operation could still be considered proportionate if it had resulted in a very low level of civilian harm. In the days leading up to the raid, Israel considered at least two other options to prevent the *Mavi Marmara* from reaching Gaza.[103] To Israel's credit, it reportedly abandoned one of these options—disabling the ships by sabotaging their engines or propellers—

98. Protocol I, *supra* note 84, art. 51(5)(b).

99. Gardam, *supra* note 95, at 407.

100. William J. Fenrick, *Riding the Rhino: Attempting To Develop Usable Legal Standards for Combat Activities*, 30 B.C. INT'L & COMP. L. REV. 111, 124 (2007).

101. This has been the only justification for the blockade put forward by Israel which is even *arguably* legal. The reasoning set out in this Section thus assumes the scenario most favorable to Israel. For an analysis of the legal status of the blockade, see *infra* Section C.

102. International Committee of the Red Cross, Commentary on the First Additional Protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949 636, ¶ 2024, (Yves Sandoz, Christophe Swinarski, & Bruno Zimmermann eds., 1987): "Finally, destruction, capture or neutralization must offer a definite military advantage in the circumstances ruling at the time. In other words, it is not legitimate to launch an attack which only offers potential or indeterminate advantages."

103. Tavernise & Bronner, *supra* note 17.

because it believed this plan could result in the sinking of a large vessel like the *Mavi Marmara*.[104] Israel appears to have abandoned the other option, however—that of diverting the ships by attaching ropes or chains and towing them to shore—because it believed the operation was "impractical".[105] Israel instead stormed the flotilla's vessels, fired rubber and live ammunition, and threw stun grenades as Israeli commandos descended onto ships crowded with confused, frightened and hostile civilians. The civilian harm likely to follow from such an operation should have been obvious to Israel's military leaders. The fact that this method of attack resulted in the deaths of nine civilians was entirely foreseeable, and an unacceptable level of harm in relation to the military objective achieved.

Finally, even assuming Israel's targeting of the flotilla was an appropriate military objective, and further assuming its plan of using armed commandos to storm the ships was also appropriate, we must still analyze the way the attack was carried out to complete the proportionality analysis. As Gardam notes, "even if these requirements [of target and method] are met, the conduct of the attack itself must not be negligent and involve unnecessary civilian casualties."[106] We can even assume, for the sake of argument, that Israel intended its commandos to conduct the raid without using deadly force, perhaps indicated by the claim that the commandos were provided with paint-ball guns and were instructed to only use their pistols as a "last resort."[107] However, according to witnesses, the soldiers themselves appeared frightened and disoriented when they boarded the ships.[108] The initial attempts to board were thwarted by passengers and were unsuccessful.[109] Soldiers then used plastic bullets and sound bombs, terrifying and confusing passengers, who believed they were being shot at with live ammunition.[110] The helicopter above the ship used live ammunition to clear an area on the ship for the soldiers.[111] It was in the midst of this chaotic and frantic scene that passengers began arming themselves with whatever they could find and resisting the soldiers. While it may be that the soldiers themselves had no

104. *Id.*
105. *Id.*
106. Gardam, *supra* note 95, at 407.
107. Tavernise & Bronner, *supra* note 17.
108. *Id.*
109. *Id.*; U.N. Report, *supra* note 6, ¶ 113.
110. Tavernise & Bronner, *supra* note 17.
111. U.N. Report, *supra* note 6, ¶ 114.

intention of harming any of the passengers, the trapped passengers had no way of knowing that. From their perspective, armed commandos boarded their ship and began firing on them. It should have been obvious to anyone planning this operation that the soldiers' actions would likely frighten passengers and quickly create a chaotic and unmanageable situation. As the U.N. Human Rights Council stated plainly

> The conduct of the Israeli military and other personnel towards the flotilla passengers was not only disproportionate to the occasion but demonstrated levels of totally unnecessary and incredible violence. It betrayed an unacceptable level of brutality. Such conduct cannot be justified or condoned on security or any other grounds. It constituted a grave violation of human rights law and international humanitarian law.[112]

C. Illegality of the Raid Owing to Its Goal of Furthering an Illegal Purpose—The Blockade of Gaza

The raid on the Gaza-bound flotilla was executed in order to enforce Israel's ongoing blockade of the Gaza Strip and must be considered within this context. Proving the illegality of the blockade is critical in rejecting the argument that the fact of the blockade constituted an exception to the customary international law rules against violation of exclusive flag jurisdiction (see Section II.A.2.). Moreover, the blockade itself violates several provisions of international law, including those governing Israel as an occupying power in the Gaza Strip. As such, the raid was illegal not only because the blockade did not constitute a valid exception to exclusive flag jurisdiction, and thus render illegal Israel's attack on a ship flying a Turkish flag on the high seas, but also because Israel conducted it to further an illegal purpose. When a blockade is conducted to further an illegal purpose, then any actions taken to enforce that blockade are themselves illegal. If the blockade itself is illegal, as we demonstrate, *infra*, then any raid of a ship on the high seas is inherently illegal, regardless of proffered justification.

1. The Blockade As Intrinsically Illegal

If undertaken outside a context of an ongoing armed conflict, a blockade is an act of war[113] and thus a violation of Article 2(4) of the

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112. U.N. Report, *supra* note 6, ¶ 264.

113. "If war has not previously been declared or commenced, the imposition of a blockade would seem to constitute in itself an act of war and would thus give rise to a state of war if it is applied and enforced against all vessels, and not merely against those of the blockaded state." 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 81,

United Nations Charter if instituted (1) against a non-belligerent and (2) not in self-defense or with the Security Council's authorization. In such a circumstance, the blockade must be analyzed under the *jus ad bellum* framework to determine whether the resort to military action was justified. Israel claims it imposed the blockade in self-defense in response to rocket fire from Gaza into Israel in 2007.[114] Likewise, a blockade imposed *within* the context of an ongoing armed conflict is not inherently illegal.[115] Under current international law, a blockade is a legitimate method of warfare if undertaken in compliance with certain rules.[116]

i. Illegal Purpose

A blockade may not prohibit the free passage of relief consignments,[117] and blockades intended to starve civilian populations are unlawful.[118] Blockades intended to "weaken" populations are also prohibit-

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at 409.

114. TURKEL COMM'N REPORT, *supra* note 15, at 30.

115. An in-depth analysis of the legal status of Israel's blockade of Gaza is presented *infra* Section C.

116. In addition to the principles discussed below, the "essential requirements for a legally binding blockade are threefold: (1) a state of war must exists between the blockading and the blockaded States; (2) the blockade must have been duly declared and notified; and (3) the blockade must be effective." 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 81, at 408. In regard to the first requirement, as already indicated,

> [i]f war has not previously been declared or commenced, the imposition of a blockade would seem to constitute in itself an act of war and would thus give rise to a state of war if it is applied and enforced against all vessels, and not merely against those of the blockaded state.

Id. at 409.

117. Int'l Comm. of the Red Cross (ICRC), *Commentary to Article 59 of Convention (IV) (1949)—Relief: Collective Relief (1)*, para. 3, in ICRC, *1949 Conventions & Additional Protocols & Their Commentaries*, ICRC, *available at* http://www.icrc.org/ihl.nsf/COM/380-600066?OpenDocument (last visited Jan. 22, 2012) [hereinafter *Red Cross Commentaries*] ("[R]elief consignments for the population of an occupied territory must be allowed to pass through the blockade; they cannot under any circumstances be declared war contraband or be seized as such by those enforcing the blockade. The obligation to authorize the free passage of relief consignments is accompanied by the obligation to guarantee their protection. It will not be enough merely to lift the blockade and refrain from attacking or confiscating the goods. More than that will be required: all the States concerned must respect the consignments and protect them when they are exposed to danger through military operations.").

118. Protocol I, *supra* note 84, art. 54(1); 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 92, at 188.

ed.[119] However, as the ICRC has observed, "the prohibition of starvation as a method of warfare does not prohibit the imposition of a naval blockade as long as the purpose is to achieve a *military objective* and not to starve the civilian population."[120]

The requirement that states impose blockades only to meet military objectives establishes Israel's blockade as intrinsically illegal. Israel instituted its closure of the Gaza Strip in response to a political event—i.e., Hamas' seizure of power in 2007.[121] Despite statements asserting that the blockade is in place to combat rocket fire, there is little demonstrable nexus between denying basic goods to Gaza's population and reducing rocket attacks. Israel has argued that the nexus lies in the possibility of goods that can be used to make weapons being smuggled into Gaza through aid and other shipments.[122] However, statements by Israel have belied this proffered justification and have implied or explicitly confirmed that the blockade's purpose is to pressure Hamas by limiting its ability to provide services to the population of Gaza[123] or to deprive the population itself.[124] We believe that the continued imposition of the

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119. ICRC, *Commentary to Article 54 of Protocol I (1977): Protection of Objects Indispensable to the Survival of the Civilian Population, in Red Cross Commentaries, supra* note 117, *available at*

http://www.icrc.org/ihl.nsf/COM/470-750069?OpenDocument.

120. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 92, at 189 (emphasis added).

121. *See, e.g.*, *Behind the Headlines: Israel Designates Gaza a "Hostile Territory,"* ISR. MFA (Sept. 24, 2007),

http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Gaza+designated+a+%E2%80%9CHostile+Territory%E2%80%9D+24-Sep-2007.htm.

122. *See Statement by Prime Minister Netanyahu*, *supra* note 2. Prime Minister Netanyahu stated that there are boats trying to smuggle weapons and "war material" into Gaza from Iran and other places. *Id.*; *see also* TURKEL COMM'N REPORT, *supra* note 15, at 53–54.

123. *See* Mazal Mualem, *Ministers Slam AG for Prohibiting Punitive Power Cuts to Gaza*, HA'ARETZ (Nov. 11, 2007), http://www.haaretz.com/news/ministers-slam-ag-for-prohibiting-punitive-power-cuts-to-gaza-1.232997.

124. *See, e.g.*, *Behind the Headlines*, *supra* note 121 ("When has a state under constant attack, supplied a hostile *population* with the provisions necessary to carry out these attacks.") (emphasis added). Beyond this statement's implication that Israel is targeting Gaza's population, Israel has failed demonstrate how, e.g., seeds, nuts, biscuits, sweets, potato chips, dried fruit, canned fruit, fruit preserves, fruit juice, plaster, fishing rods, fresh meat, and chocolate constitute "provisions necessary to carry out . . . attacks." *See also* U.N. Report, *supra* note 6, ¶ 30 (mentioning Israel's rationale for restricting movement of goods into and out of Gaza as intended to apply pressure on the Hamas government). It is important to note here that the Palmer Report, commissioned by the U.N. Sec-

blockade, even when rocket fire has eased or ceased entirely, demonstrates the primacy of the blockade's illegal purposes.[125]

ii. Disproportionality

Even if the blockade was instituted for a legitimate purpose, this in itself does not make it legal. Any action taken in the context of an armed conflict must follow the rule of proportionality. Recalling our discussion of *jus in bello* and *jus ad bellum*, the applicable standard depends on whether Israel instituted the blockade as part of an ongoing armed conflict (as would be the case if Israel remains an occupying power in Gaza) or in response to an initial armed attack (as would be the case if rocket fire from Hamas initiated aggression in the absence of an ongoing armed conflict).

According to Israel, it instituted the blockade in response to rocket attacks launched from Gaza.[126] If we accept this claim and assume, for a moment, that Israel no longer occupied Gaza and that such rocket attacks constituted an "armed attack"[127] giving rise to a right of self-defense, a blockade may be a legitimate exercise of that right.[128] However, the in-

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retary-General's Panel of Inquiry, found Israel to have no illegal purpose in implemented the official blockade in 2009. SIR GEOFFREY PALMER ET AL., REPORT OF THE SECRETARY-GENERAL'S PANEL OF INQUIRY ON THE 31 MAY 2010 FLOTILLA INCIDENT ¶ 77 (2011), *available at* http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf) [hereinafter PALMER REPORT]. However, the Report defined the blockade in the narrowest terms possible: Israel's formal declaration of the blockade in January of 2009. We, in contrast, consider the blockade to be the entire policy of closure that Israel has imposed on Gaza with incremental increases in severity, since Hamas gained control of the Gaza Strip in 2007, as will be discussed *infra* Section C.

125. Nancy Kanwisher et al., *Reigniting Violence: How Do Ceasefires End?*, HUFFINGTON POST (Jan. 6, 2009), http://www.huffingtonpost.com/nancy-kanwisher/reigniting-violence-how-d_b_155611.html; *Uneasy Gaza Truce Comes into Effect*, AL JAZEERA (June 19, 2008), http://english.aljazeera.net/news/middleeast/2008/06/200861912292538 5372.html.

126. *See, e.g.*, Steven Erlanger & Helene Cooper, *As Rice Arrives, Israel Calls Gaza 'Hostile Territory,'* N.Y. TIMES (Sept. 19, 2007), http://www.nytimes.com/2007/09/19/world/africa/19iht-mideast.5.7572524.html; Avi Issacharoff et al., *Cabinet Declares Gaza 'Hostile Territory,'* HA'ARETZ (Sept. 2, 2007), http://www.haaretz.com/print-edition/news/cabinet-declares-gaza-hostile-territory-1.229665.

127. As indicated above, Article 51 of the United Nations Charter provided that states are entitled to act in self-defense upon being the subject of an "armed attack." U.N. Charter art. 51.

128. PALMER REPORT, *supra* note 124, ¶ 72.

quiry does not end there. The applicable standard of proportionality, *jus ad bellum*, requires that any use of force by Israel be proportionate to the armed attack which provoked it.[129] Tied into the evaluation of proportionality regarding the use of force in a purported act of self-defense (as Israel has asserted here), the response must also be *necessary*. Thus, as the ICJ observed in its 2003 *Oil Platforms* case, the "criteria of necessity *and* proportionality must be observed if a measure is to be qualified as self-defence."[130]

The criteria of necessity and proportionality reflect customary international law,[131] and it is extremely doubtful that Israel's blockade satisfies them. In examining the necessity of a particular military action, the possibility of peaceful alternatives is a relevant consideration.[132] As noted above, Israel was able to bring rocket fire from Gaza to a near-total halt by concluding a ceasefire with Hamas in June of 2008.[133] Israel kept its blockade intact even during the period of relative calm resulting from this truce.

Even if one assumes necessity for the sake of discussion, Israel's blockade of Gaza cannot qualify as proportionate. As of May 2009, rockets launched from the Gaza Strip had killed fifteen Israeli civilians.[134] Despite this death toll, which undoubtedly reflects a high number of civilian causalities under any objective standard, Israel's institution of its blockade—which has deprived Gaza's 1.5 million inhabitants of basic goods and had devastating effects on nearly every facet of life in the Strip[135]—appears a manifestly disproportionate response to rocket attacks emanating from Gaza. The blockade, making no distinction be-

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129. MURPHY, *supra* note 53, at 446.

130. Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 9 (Nov. 6).

131. Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J 11, ¶ 176 (June 27) (emphasis added].

132. MURPHY, *supra* note 53, at 446–47.

133. Kanwisher et al., *supra* note 125.

134. HUMAN RIGHTS WATCH, ROCKETS FROM GAZA: HARM TO CIVILIANS FROM PALESTINIAN ARMED GROUPS' ROCKET ATTACKS (2009), *available at* http://www.hrw.org/en/reports/2009/08/06/rockets-gaza-0. It should be noted that this figure includes deaths from rocket attacks occurring between 2001 and August 2005, when Israel was indisputably occupying the Gaza Strip. Rocket attacks taking place during this period could not legitimately be used to support a claim of *jus ad bellum* self-defense. Even with the inclusion of these attacks, however, we believe that Israel's blockade of the Strip fails to satisfy *jus ad bellum* proportionality.

135. For an in-depth illustration of the harm caused by Israel's closure policy, see U.N. Report, *supra* note 6, ¶¶ 37–43.

tween militants and civilians, is a measure that has affected the entire population of the Strip, resulting in "mass unemployment, extreme poverty and food price rises caused by shortages,"[136] and leaving "four in five Gazans dependent on humanitarian aid."[137] This damage greatly exceeds the benefit of the stated aim of combating rocket attacks which kill an average of two Israeli civilians a year.

The Palmer Report, commissioned by the U.N. Secretary-General's Panel of Inquiry, reached the opposite conclusion. [138] This was in large part, however, because the Report applied a strict differentiation between the formal blockade imposed by Israel in January of 2009, and the siege of Gaza, defined by a general and extended policy of closure on the Strip. This closure began when Hamas gained control in Gaza in June of 2007.[139] At that time, Israel declared the Gaza Strip "hostile territory"[140] and announced its intention to restrict movement of goods into and out of Gaza.[141] Shortly afterward, restrictions on fuel and electricity entering the Strip were imposed.[142] Israel closed or severely restricted travel of people and goods through the only three land access points into and out of Gaza: the Rafah, Erez and Karni crossings.[143] Restrictions on sea access increased in 2008.[144] Gaza's only airport was first closed, then bombed by Israel in 2001, and remains inoperable.[145] A full naval blockade was only imposed on January 3. 2009.[146]

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136. *Suffocating Gaza*, AMNESTY INT'L (June 1, 2010), http://www.amnesty.org/en/news-and-updates/suffocating-gaza-israeli-blockades-effects-palestinians-2010-06-01.

137. *Id.*

138. PALMER REPORT, *supra* note 124, ¶ 72.

139. Conol Urquart, *Hamas Takes Control of Gaza*, GUARDIAN (London) (June 15, 2007), http://www.guardian.co.uk/world/2007/jun/15/israel4.

140. *Behind the Headlines*, *supra* note 121.

141. U.N. Report, *supra*, note 6, ¶ 30.

142. *Id.* ¶ 30–31.

143. *See Gaza Closure Defined: Collective Punishment*, GISHA: LEGAL CTR. FOR FREEDOM OF MOVEMENT, 2 (Dec. 2008), http://www.gisha.org/UserFiles/File/publications/GazaClosureDefinedEng.pdf; *see also* United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *Gaza Closure: Situation Report* (Jan. 29, 2008), http://unispal.un.org/UNISPAL.NSF/0/72472C5E4B6F9703852573E20050B9CB.

144. U.N. Report, *supra* note 6, ¶ 32.

145. *Scavengers Collect Rubble of Gaza's Bombed Airport*, Y NET NEWS (Aug. 30, 2010), http://www.ynetnews.com/articles/0,7340,L-3939241,00.html.

146. U.N. Report, *supra* note 6, ¶ 34.

Despite these facts, the Palmer Report states that "it is wrong to impugn the blockade's legality based on another, separate policy [of land closure]."[147] We disagree. In assessing proportionality, even the Report acknowledges that "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."[148] Analyzing the incidental civilian harm must be considered in this context. The 2009 blockade cannot be considered entirely separate from Israel's closure policy.[149] Indeed, when Israel imposed its full blockade in 2009, the sea was the last available access point for Gazans to receive necessary goods in sufficient quantities. Therefore, the blockade did not merely deny ships the option of delivering humanitarian aid and other supplies by sea, but rather, it effectively served as the final act that sealed Gazans into a territory with no way out and no means of importing necessary goods. While preventing weapons from being smuggled into enemy-controlled territory is certainly a valid military objective, a method denying substantial quantities of necessary supplies and humanitarian to a captive, poverty-stricken population of 1.5 million people through a general closure policy creates an undue amount of "incidental" civilian harm and cannot be considered proportionate.

This conclusion remains unchanged under the *jus in bello* standard of proportionality. As discussed above, this standard prohibits the use of force which may be "expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[150] This standard would apply if we assume Gaza has remained occupied by Israel even after the 2005 disengagement, and therefore an on-going armed conflict can be said to exist. First, it is uncertain that *any* "concrete and direct" military advantage can be obtained from denying the population of Gaza food, medical supplies, and other basic necessities; prohibiting exports; or preventing Gaza's inhabitants from leaving the Strip. Second, even if one assumes that these activities are reasonably related to stopping rocket fire, it seems clear that Israel's siege of a territory inhabited by 1.5 million people has caused injury to civilians and damage to civilian objects which greatly exceeds any military advantage achieved. Indeed, as the Human Rights Council conclud-

147. PALMER REPORT, *supra*, note 124, ¶ 78.

148. *Id.*

149. *See* U.N. Report, *supra*, note 6, ¶¶ 28–38.

150. Protocol I, *supra* note 84, art. 51(5)(b).

ed in its 66-page report to the U.N. General Assembly:

> a humanitarian crisis existed on the 31 May 2010 in Gaza. . . Any denial of this cannot be supported on any rational grounds. One of the consequences flowing from this is that for this reason alone the blockade is unlawful and cannot be sustained in law. This is so regardless of the grounds on which one seeks to justify the legality of the blockade.[151]

iii. Collective Punishment

Finally, the blockade violates several other provisions of international humanitarian and human rights law, including those prohibiting the use of collective punishment. The prohibition of collective punishment contained in Article 33, according to the official ICRC commentary, prohibits "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."[152] A number of international organizations and institutions, including, among many others, the International Committee of the Red Cross,[153] Oxfam International,[154] Human Rights Watch,[155] Amnesty International,[156] B'Tselem,[157] and the European Union Institute for Security Studies,[158] have recognized Israel's blockade of the Gaza Strip as collective punishment. This reflects the fact that none of the justifications Israel has offered in support of its

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151. U.N. Report, *supra* note 6, ¶ 261.

152. ICRC, *Commentary to Article 33—Individual Responsibility of Convention (IV) (1949)*, in *Red Cross Commentaries*, *supra* note 117, *available at* http://www.icrc.org/ihl.nsf/com/380-600038?opendocument.

153. News Release, ICRC, Gaza Closure: Not Another Year! (June 14, 2010), http://www.icrc.org/eng/resources/documents/update/palestine-update-140610.htm.

154. *Gaza: "Frontline of Collective Punishment,"* OXFAM (July 2, 2009), http://www.oxfam.org.uk/applications/blogs/pressoffice/2009/07/02/gaza-frontline-of-collective-punishment/.

155. *Israel/Gaza: Weak Mandate Undermines Flotilla Inquiry*, HUMAN RIGHTS WATCH (June 16, 2010), http://www.hrw.org/en/news/2010/06/16/israelgaza-weak-mandate-undermines-flotilla-inquiry.

156. *Israel Gaza Blockade Must Be Completely Lifted*, AMNESTY INT'L (June 17, 2010), http://www.amnesty.org/en/news-and-updates/israel-gaza-blockade-must-be-completely-lifted-2010-06-17.

157. *The Siege on the Gaza Strip: 1.5 Million People Imprisoned*, B'TSELEM, http://www.btselem.org/English/Gaza_Strip/20100531_The_Siege_on_Gaza.asp (last visited Jan. 22, 2012).

158. Esra Bulut & Carolin Goerzig, *The EU and the Gaza Blockade: Dismantling Collective Punishment; Reviving Representative Peacemaking*, EUROPEAN INST. FOR SEC. STUDIES (EUISS) (2010), http://www.iss.europa.eu/uploads/media/EU_and_the_Gaza_blockade.pdf.

blockade—whether to combat rocket attacks, pressure Hamas, or secure the release of Israeli soldier Galid Shalit—arise from actions that can be attributed to the civilian population of Gaza, which, by definition, cannot be the target of military actions.[159] As Amnesty International has observed: "Whatever its stated justification, the blockade is collectively punishing the entire population of Gaza, the majority of whom are children, rather than targeting the Hamas administration or armed groups."[160]

2. The Blockade Violates Israel's Duty as an Occupier

Beyond the foundational illegality established by the blockade's illegal purpose and disproportionality, the blockade also contravenes a number of other important principles of international law stemming from Israel's role as an occupying power in the Gaza Strip. The primary significance of establishing a state of occupation is that international law imposes legal obligations on an occupying power vis-à-vis the population of the occupied territory. Currently, Israel maintains that its 2005 "withdrawal" from Gaza was sufficient to end its occupation of that territory,[161] and that, accordingly, it owes no responsibilities to the population of the Strip.[162] This position has not been widely accepted, and the prevailing consensus is that Gaza remains occupied as a matter of international law.[163] The test for determining the existence of an occupation

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159. Protocol I, *supra* note 84, art. 48 ("In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."). Article 48 reflects a well-established principle of customary international law.

160. *Israel Gaza Blockade Must Be Completely Lifted*, *supra* note 136.

161. *The Disengagement Plan—General Outline*, ISR. MFA (Apr. 18, 2004), http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Disengagement+Plan+-+General+Outline.htm.

162. *The Cabinet Resolution Regarding the Disengagement Plan*, ISR. MFA (June 6, 2004), *available at*

http://www.strategicassessments.org/library/Disengagement/Revised_Disengagement_Plan_-_Cabinet_Approval_June_2004.pdf [hereinafter *Revised Disengagement Plan*].

163. *See, e.g.*, DINSTEIN, *supra* note 87, at 279 ("The proposition that the Israeli occupation in the Gaza Strip is over has gained some support by commentators. Yet that is not the prevalent opinion, and the present writer cannot possibly accept it.") (references omitted); U.N. Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, ¶ 6, U.N. Doc. A/HRC/4/17 (Jan. 29, 2007), *available at*

is that of "effective control."[164] Israel's continuing occupation of Gaza is established by its ongoing effective control of that territory. This effective control arises from, *inter alia*, Israel's reservation[165] and exercise of the "right" to conduct military operations in the Strip;[166] exclusive control of Gaza's airspace and territorial waters;[167] control over all but one crossing into Gaza;[168] control of Gaza's electricity system, telecommunications network and sewage system; and control over Gaza's population registry,[169] giving it the authority to determine legal residency in Gaza, and prevent the entrance into Gaza of individuals it chooses not to

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http://www.unhcr.org/refworld/docid/461e52b12.html ("In August 2005, Israel withdrew its settlers and armed forces from Gaza. Statements by the Government of Israel that the withdrawal ended the occupation of Gaza are grossly inaccurate."); Human Rights Watch, *Israel: Threatened Sanctions on Gaza Violate Laws of War* (Sept. 20, 2007), http://www.hrw.org/news/2007/09/19/israel-threatened-sanctions-gaza-violate-laws-war ("Israel remains an occupying power in the Gaza Strip even though it withdrew its military forces and illegal civilian settlers in August and September 2005. . .").

164. Convention Respecting the Laws and Customs of War on Land, annex art. 42, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277, *available at* http://avalon.law.yale.edu/20th_century/hague04.asp [hereinafter Hague IV] ("Territory is considered occupied when it is actually placed under the authority of the hostile army.").

165. *Revised Disengagement Plan*, *supra* note 162.

166. DINSTEIN, *supra* note 87, at 279 (stating that continuing military operations in the Strip are, "perhaps, the crux of the matter. Despite the unilateral withdrawal from the Gaza Strip, Israel still believes that it is free (on an equally unilateral basis) to send back its armed forces into the area whenever such a move is deemed vital to its security. In point of fact, Israeli military incursions into various parts of the Gaza Strip (as well as air and naval strikes) have occurred relentlessly subsequent to the unilateral withdrawal, in response to intermittent missile fire and occasional other attacks originating from within the Strip. . . . The insistence by Israel on its liberty to retake militarily (at its discretion) any section of the Gaza Strip—and even to bring to Israel for detention or prosecution suspected saboteurs—is the most telling aspect of the non-termination of the occupation . . . . After all, as noted . . . , belligerent occupation is not contingent on maintaining a fixed garrison and it is enough for the Occupying Power to have the capacity to send detachments of troops, as and where required, 'to make its authority felt.' ").

167. *Revised Disengagement Plan*, *supra* note 162.

168. *The Scope of Israeli Control in the Gaza Strip*, B'TSELEM, *available at* http://www.btselem.org/english/Gaza_Strip/Gaza_Status.asp (last visited Jan. 30, 2012). Additionally, despite Egypt's technical control over the Rafah crossing, that crossing has largely remained closed since 2007. *Gaza Strip: Rafah Crossing*, B'TSELEM, http://www.btselem.org/gaza_strip/rafah_crossing (last visited Jan. 30, 2012).

169. Press Release, Human Rights Watch, Gaza: Israel's Fuel and Power Cuts Violate Laws of War (Oct. 29, 2007), http://hrw.org/english/docs/2007/10/29/isrlpa17198_txt.htm.

register.[170]

The duties of an occupier arise because the occupying force has prevented the functioning of the indigenous government, and therefore it must assume some degree of responsibility for the population of that territory. Because Israel has retained much of the authority that would ordinarily reside with any indigenous government of Gaza, Israel must "provide or at least allow for provision of the kinds of services ordinarily to be expected from a government."[171] It is from this duty that many facets of the illegality of Israel's blockade arise.

As the de facto power in Gaza, Israel has an affirmative duty to ensure that the basic needs of Gazans are met,[172] that health care infrastructure remains in place,[173] and, if there is an inadequate provision of basic needs or health care infrastructure, to allow relief into the territory.[174]

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170. Human Rights Watch, "Forget About Him, He's Not Here": Israel's Control of Palestinian Residency in the West Bank and Gaza, p. 8, http://www.hrw.org/reports/2012/02/05/forget-about-him-he-s-not-here

171. *Dunoff supra note 73*. at 590; *see also Israel Gaza Blockade Must Be Completely Lifted*, *supra* note 156 ("As the occupying power, Israel bears the foremost responsibility for ensuring the welfare of the inhabitants of Gaza.").

172. The International Committee of the Red Cross observed in June 2011 that "[u]nder international humanitarian law, Israel must ensure that the basic needs of Gazans, including adequate health care, are met." ICRC News Release, *supra* note 153. Furthermore, Article 55 of the Fourth Geneva Convention provides: "To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate." Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 55, Aug. 12, 1949, 75 U.N.T.S. 287, 322, *available at* http:// http://treaties.un.org/pages/showDetails.aspx?objid=0800000280158b1a [hereinafter Geneva IV]. The official ICRC Commentary to Article 55 states: "The rule that the Occupying Power is responsible for the provision of supplies for the population places that Power under a definite obligation to maintain at a reasonable level the material conditions under which the population of the occupied territory lives" and that "the duty of ensuring supplies is reinforced by an obligation to bring in the necessary articles when the resources of the occupied territory are inadequate." ICRC, *Commentary to Article 55 of Convention (IV) (1949)—Food and Medical Supplies for the Population (1)*, *in Red Cross Commentaries*, *supra* note 117, *available at* http://www.icrc.org/ihl.nsf/COM/380-600062?OpenDocument.

173. Article 56 of the Fourth Geneva Convention states: "To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory . . . ." Geneva IV, *supra* note 172, art. 56.

174. As the occupying power in Gaza, Israel is bound by Article 59 of the Fourth Geneva Convention, which provides that if "the population of an occupied territory is inade-

Additionally, Article 43 of the 1907 Hague regulations requires that an occupying power "take all the measures in his power to restore, and ensure, as far as possible, public order and safety" in the occupied territory.[175] With its blockade, Israel has not only failed to ensure these things, but has taken positive steps which ensure that the population of Gaza is *not* provided with basic needs or adequate medical care.[176] Rather than permitting and facilitating the free passage of aid, Israel has, with its blockade, placed severe restrictions on the entry of aid into the Strip and prevented entrance of many products entirely.[177] The blockade has not only been a dereliction of Israel's duty to ensure public order and safety but was undertaken in a conscious effort to ensure the *deterioration* of these conditions.[178] The dire situation caused by the blockade in this regard has been made worse by a "standstill in cooperation" between Hamas and the Palestinian Authority, leaving the population of the Gaza Strip to fend for itself.[179]

Israel, as the occupying power in Gaza, is also required by Article

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quately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal." *See id.* art. 59. Article 59 also requires that Israel permit the free passage of aid and guarantee its protection. *See id.* Furthermore, the ICRC Commentary on this Article states: "The obligation on the Occupying Power to accept such relief is unconditional. In all cases where occupied territory is inadequately supplied the Occupying Power is bound to accept relief supplies destined for the population." ICRC, *Commentary to Article 59*, *supra* note 117, para. 1.

175. Hague IV, *supra* note 164, annex art. 43.

176. Amnesty International, for example, has reported: "Gaza's health sector has been plagued by shortages in equipment and medical supplies during the blockade. Following the Israeli closure of crossings, people with medical conditions that cannot be treated in Gaza have been required to apply for permits to leave the territory to receive treatment in either foreign hospitals or Palestinian hospitals in the West Bank. The Israeli authorities frequently delay or refuse these permits; some Gazans have died while waiting to obtain permits to leave the territory for medical treatment elsewhere. World Health Organization (WHO) trucks of medical equipment bound for Gazan hospitals have repeatedly been turned away, without explanation, by Israeli border officials." *Suffocating Gaza*, *supra* note 136.

177. B'TSELEM, THE SIEGE ON THE GAZA STRIP: 1.5 MILLION PEOPLE IMPRISONED, *available at* HTTP://WWW.BTSELEM.ORG/ENGLISH/GAZA_STRIP/20100531_THE_SIEGE_ON_GAZA.ASP.; Gregg Carlstrom, *Gaza's Real Humanitarian Crisis*, ALJAZEERA ENGLISH, June 3, 2010, at http://www.aljazeera.com/focus/2010/05/20105319333613851.html

178. *See* Gisha, *Gaza Closure Defined*, *supra note 144*, detailing the history of Israel's closure policy in response to political events and concluding that "Israel's restrictions on movement in and out of Gaza constitute a closure undertaken for purposes of collective punishment."

179. ICRC News Release, *supra* note 153.

59 of the Fourth Geneva Convention to agree to relief schemes on behalf of the population of the Strip, facilitate these relief schemes by "all means at its disposal," permit the free passage of these consignments, and guarantee their protection.[180] These relief schemes, according to the Convention, "shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing."[181] An important qualification to these duties is established by Article 59 in that

> A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.[182]

As the Official ICRC Commentary to this article states, however, these safeguards "must in no case be misused in order to make the rule itself inoperative or unduly delay the forwarding of relief."[183] Any reliance by Israel on rights established by Article 59 as a justification for its flotilla raid would appear to run afoul of this principle. Given the dire situation in Gaza,[184] it would be difficult for Israel to claim that Israeli actions are not causing "undue delay" in relief. Since the imposition of Israel's closure police in 2007, Israel has imposed such severe restrictions, that the amount of supplies allowed to enter Gaza has been severely reduced.[185] The 1.5 million person population of Gaza has had to do with a third of supplies they received in 2005.[186] Certain basic goods are not allowed in at all.[187] While some goods are allowed through the various land crossings, these are allowed solely at Israel's discretion and are often closed or severely restricted, limiting the amount of goods allowed to enter Gaza.[188] Accordingly, we argue that Israel did not legiti-

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180. Geneva IV, *supra* note 172, art. 59.

181. *Id.*

182. *Id.*

183. ICRC, *Commentary to Article 59*, *supra* note 117, para. 4.

184. *See, e.g.*, U.N. Report, *supra* note 6, ¶ ¶ 37-44; *Suffocating Gaza*, AMNESTY INT'L (June 1, 2010), http://www.amnesty.org/en/news-and-updates/suffocating-gaza-israeli-blockades-effects-palestinians-2010-06-01

185. *Guide: Gaza Under Blockade*, BBC NEWS (July 6, 2010), http://news.bbc.co.uk/2/hi/middle_east/7545636.stm.

186. *Id.*

187. *Id.*

188. *Id.*

mately invoke its privileges under Article 59 on May 31, but instead engaged in the simple contravention of its legal duty to permit the free passage of relief schemes, protect those consignments, and facilitate them by all available means.

CONCLUSION

When Israel raided the flotilla, it violated international law in three essential ways: (1) it intercepted on the high seas a series of ships flying the flags of several sovereign nations; (2) the raid was conducted in a manner that violated several provisions of the international humanitarian law governing armed conflict; and (3) it was done to enforce a blockade against the Gaza Strip which is wholly illegal.

Israel's arguments in its defense, that its interception of the flotilla was necessary in order to enforce its blockade of the Gaza Strip, and that it acted in self-defense fail as well. As the U.N. Human Rights Council states unconditionally in its report, "Certain results flow from this conclusion [that the blockade is unlawful]. Principally, the action of the Israel Defense Force in intercepting the *Mavi Marmara* on the high seas in the circumstances and for the reasons given was clearly unlawful. Specifically, the action cannot be justified in the circumstances even under Article 51 of the Charter of the United Nations."