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## LEGAL QUESTIONS AND ANSWERS ON ISRAEL'S ACTION RELATING TO THE FREE GAZA FLOTILLA

*This document was drafted in order to provide assistance to those wishing to understand the international legal position relating to Israel's blockade of the Gaza Strip, and the recent attack on the Free Gaza Movement Flotilla, as well as to ships that are sent to the Gaza Strip in the future.*

### Is Israel entitled to intercept and board ships in international waters?

All ships sailing in the high seas come under the international law principle of *exclusive flag jurisdiction*, which states that vessels on the high seas are subject to no authority except that of the State whose flag they fly<sup>1</sup>. The basic position is that unless an exception applies, Israel has no right to intercept or board ships flying the flag of another State in the high seas.

### Does the existence of the blockade on the Gaza Strip allow Israel to capture ships in international waters?

There are several exceptions to the rule of exclusive flag jurisdiction. Merchant vessels believed on reasonable grounds to be breaching a blockade may be captured and attacked, even in international waters.<sup>2</sup> The power to capture ships in such circumstances, however, presupposes the existence of a lawful blockade. Actions that seek to enforce an unlawful blockade are, by definition, unlawful. Central to the question of the legality of Israel's actions is therefore the question of the legality of the blockade itself.

### Is the blockade on the Gaza Strip legal?

Blockades, including naval blockades, are permitted during armed conflict, subject to international humanitarian rules on the protection of civilians. In order to be legal a

<sup>1</sup> Identified as part of customary international law by the Permanent Court of International Justice in 1927 in the *Lotus Case* and in Art 11 of the High Seas Convention of 1958.

<sup>2222</sup> See Article 98 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, ('San Remo Manual'), which is reflective of customary international law.

blockade must have the concrete military objective of depriving a military adversary of supplies in a time of conflict.<sup>3</sup> The supplies that can be prevented from entering a territory are narrowly construed to include only the 'supplies needed to conduct hostilities.'<sup>4</sup> The starvation of the civilian population as a method of warfare is prohibited, and the establishment of a blockade that causes excessive damage to the civilian population, in relation to the concrete and direct military advantage anticipated from the blockade, is not permitted.<sup>5</sup>

According to United Nations estimates, only a quarter of required basic humanitarian provisions are allowed into the Gaza Strip under the blockade. Goods such as fresh meat are restricted, in spite of the impossibility of their constituting military supplies. The result is a severe humanitarian crisis. It is very unlikely, given the damage to the civilian population caused by the blockade, that the blockade could be considered to be a proportionate measure. It is therefore be considered illegal.

Other factors, aside from the question of proportionality, also suggest that the blockade is illegal. On Israel's own admission, the blockade has a primarily political, as opposed to military objective, which is to put pressure on the civilian population of the Gaza Strip in order to influence Hamas. See for instance the following comment that equates the closure of Gaza with the achievement of changes in Hamas' behaviour:

Deputy Defense Minister M.K. Matan Vilnai: " we will need to reduce the scope of goods and thus create pressure on the Hamas organization, which is deliberately failing to take steps to advance the negotiations ..."<sup>6</sup>

The deliberate creation of conditions calculated to cause suffering to the civilian population, and the use of coercion, in order to achieve political or military goals, is illegal.<sup>7</sup>

Furthermore, collective punishment, which is the punishment of persons for an offence they have not personally committed, as well as collective penalties, is prohibited.<sup>8</sup> The blockade effectively penalises the civilian population for the actions of political and military actors outside of their control. The position of both the United

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<sup>3</sup> See ICRC commentary to Additional Protocol I on the Geneva Conventions of 1949 ('API'), paras 2093-2097 (reflective of customary international law). In addition a blockade must also adhere to the criteria of being impartially imposed, effective and it must be properly notified.

<sup>4</sup> ICRC commentary on API, para. 2095 (reflective of customary international law).

<sup>5</sup> San Remo Manual, para 102.

<sup>6</sup> Hanan Greenberg, "Israel Considering Reducing the Passage of Goods to the Strip", Ynet, September 23, 2008, available (in Hebrew) at: <http://www.ynet.co.il/articles/0,7340,L-3600973,00.html> as cited in 'Gaza Closure Defined: Collective Punishment' by Gisha, available at <http://gisha.org/UserFiles/File/publications/GazaClosureDefinedEng.pdf>

<sup>7</sup> A cardinal principle of international humanitarian law is that civilians will not be the object of attack. See also Art 31 Fourth Geneva Convention ('GCIV') for the prohibition on the use of coercion against protected persons.

<sup>8</sup> Art 33 GCIV.

Nations<sup>9</sup> and the International Committee of the Red Cross ('ICRC')<sup>10</sup> is that Israel's blockade is illegal because it amounts to collective punishment.

The illegality of the blockade means that Israel cannot justify its actions in capturing the flotilla on the basis that it reasonably believed the flotilla to be attempting to breach the blockade.

Does the existence of an international armed conflict mean that Israel is entitled to intercept ships in the high seas?

The parties to an international armed conflict are entitled to capture neutral merchant vessels in the high seas if they have substantial grounds to believe that the ships are making an effective contribution to the enemy's military actions.<sup>11</sup> An effective military contribution is something, the destruction of which, offers a *distinct and substantial military advantage* according to the circumstances existing at the time.<sup>12</sup> For instance, carrying military supplies to the enemy, or transporting persons to fight in the conflict, might amount to making an effective military contribution. Military supplies are those that are distinctly military in nature, such as weapons. Humanitarian supplies do not fall within the definition.

The question of whether Israel had substantial grounds to believe the flotilla was making a military contribution to the armed conflict is a question of fact. It can only be properly answered after a full investigation into the reasons the Israeli navy was ordered to intercept the ships.

However, on the basis of that which is known to date, it is highly unlikely any such grounds existed. The flotilla was a well-publicised humanitarian mission, the aims of which were made clear to the Israeli authorities before and during the voyage.<sup>13</sup> Each ship was subjected to a security check in the countries of departure, and past flotilla missions have been wholly humanitarian in nature.

Indeed, Israel's actions appear to have been motivated by political rather than military concerns. For example, when the Israeli authorities discovered the ships were only carrying humanitarian aid, they were not allowed to continue their passage, as would

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<sup>9</sup> See for instance statement of Special Rapporteur on the Occupied Palestinian Territories at <http://www.unhcr.ch/hurricane/hurricane.nsf/0/183ED1610B2BCB80C125751A002B06B2?opendocument>

<sup>10</sup> See ICRC statement of 14 June 2010, available at [www.icrc.org/web/eng/siteeng0.nsf/html/palestine-update-140610](http://www.icrc.org/web/eng/siteeng0.nsf/html/palestine-update-140610)

<sup>11</sup> San Remo manual paras 67, 118, 146 read together.

<sup>12</sup> See Art 24 API and paras 39- 40 San Remo manual which state that attacks shall be strictly limited to military objectives, namely, to those objectives which are, by their nature, purpose or use, recognized to be of military interest and whose total or partial destruction, in the circumstances ruling at the time, offers a distinct and substantial military advantage.

<sup>13</sup> Whilst formal representations about the mission were not made to authorities on this occasion, press conferences were held, video footage of the preparations were made available to the public, comment was given to Israeli journalists and the Israeli authorities were communicated with over radio during the voyage.

be expected if the interception were driven by purely military considerations. Furthermore, to date the Israeli authorities have not made any substantive claim that they had reason to believe the flotilla was carrying materials that would make a contribution to enemy military activity. Official Israeli comment has instead centered around political concerns, which do not provide legal justification for the capture of the flotilla. See the following statements about Israeli loss of face and the belief that the flotilla represented a 'provocation' against Israeli sovereignty:

"We can't win on this one in terms of PR, Yigal Palmor, a foreign ministry spokesman, said. 'If we let them throw egg at us, we appear stupid with egg on our face. If we try to prevent them by force, we appear as brutes.'"<sup>14</sup>

"Israel's deputy Foreign Minister Danny Ayalon... accused the convoy of a 'premeditated and outrageous provocation', describing the flotilla as an 'armada of hate.'"<sup>15</sup>

" 'The aid convoy is violent propaganda against Israel, and Israel will not allow its sovereignty to be threatened in any way, in any place - land, air or sea,' Lieberman said during a foreign ministry briefing on the aid convoy's progress towards the shores of Gaza.'"<sup>16</sup>

Al Haq's position is that, on the basis of what is known to date, Israel's actions in capturing the flotilla were unlawful.

#### Do the Israeli allegations that the flotilla has 'links with terrorism' justify its capture?

The 'security-related' allegations that Israel has made about the flotilla - that the Turkish organisation, the IHH, has links with 'terrorism' - do not amount to grounds under international law to believe the vessels were contributing to the armed conflict.<sup>17</sup> Even if the allegations were true, they would only justify the capture of the flotilla if the Israeli authorities genuinely and reasonably believed the flotilla to be making an effective contribution to the conflict on this occasion. The fact that all the ships in the flotilla, including those Israel did not allege had any links with terrorism, were captured, is inconsistent with the existence of such a belief as the reason for the operation. The prevalence of official Israeli comment about the political, as opposed

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<sup>14</sup> See <http://english.aljazeera.net/news/middleeast/2010/05/201052791958545391.html>

<sup>15</sup> See [http://news.bbc.co.uk/2/hi/middle\\_east/10195838.stm](http://news.bbc.co.uk/2/hi/middle_east/10195838.stm)

<sup>16</sup> See <http://www.haaretz.com/news/diplomacy-defense/hamas-flotilla-shows-whole-world-opposes-gaza-siege-1.292789.stm>

<sup>17</sup> See for instance, Israeli Prime Minister Netanyahu's statement, 'No Love Boat' at [http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2010/Statement\\_PM\\_Netanyahu\\_2-Jun-2010.htm](http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2010/Statement_PM_Netanyahu_2-Jun-2010.htm)

to the military, threat posed by the flotilla (see above), suggests that the operation was motivated by political concerns.<sup>18</sup>

The allegations that there were items on board the flotilla, such as kitchen knives and hammers, that were turned on Israeli commandos when they boarded the ship, are irrelevant with respect to the legality of the capture of the ships. Ordinary items that were used as weapons against those boarding the ships, are not military materials. Their presence on the ships could not have justified the interception of the flotilla.

If Israel believed the flotilla was contributing militarily to the armed conflict, how should it have conducted the raid?

In the event that Israel had substantial grounds to believe the flotilla was making an effective military contribution to the armed conflict, the measures taken in capturing the boats would still need to be commensurate with the aim of ensuring the ships did not make the effective military contribution suspected. The operation should have been conducted according to the rules of warfare: force should only be used if necessary, the force should have been proportionate, and civilians should not have been the target of attack.<sup>19</sup> In order to adhere to these principles, the operation should have been guided by a proper assessment of the factual situation. Israel should have exhausted all means available to it to warn the ships, including the use of diplomatic channels, in order to avert the need for force. It is not clear that Israel used all the means available to it to avoid the use of force.

Furthermore, even if it is assumed that Israel acted on the basis of genuine intelligence that suggested some of the ships in the flotilla were carrying weapons or combatants, it must, at the same time, have been obvious to the Israeli authorities that the ships were ordinary merchant vessels, carrying at least a certain number of civilians who had no connection to fighting, or to the transportation of arms. All possible measures should have been taken to protect the lives of those civilians. The fact that the ships were stormed by the navy, and in the manner undertaken, would appear to have been a disproportionate and inappropriate response to the situation at hand, causing unnecessary harm to and loss of civilian life.

In addition, once it was ascertained that the boats were only carrying humanitarian supplies, they should have been allowed to continue their passage. The seizure of the goods by Israel, as well as the prevention of further passage by the ships, and the deportation of those on board, was unlawful.

Was Israel's use of force on board the flotilla excessive?

If it is determined that Israel's actions in taking control of the boats was unlawful, those on board the vessel were entitled to use reasonable force to defend themselves. Israel's use of any force, on the other hand, was unlawful. The use of improvised

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<sup>18</sup> The lack of evidence provided about the links between the Turkish organization, the IHH, and terrorism, as well as the fact that the organisation is a recognized charity in Turkey, should also cast doubt on the veracity of the assertion.

<sup>19</sup> San Remo manual, paras 38-46.

weapons against Israeli navy commandos armed with, and displaying, guns loaded with live ammunition is likely to be judged as a reasonable use of force by those on the boat.

If Israel's actions in capturing the boat are considered to be lawful, the force used to capture the boats must still be proportionate with the aim (see above). The question of whether the use of force was proportionate is one of fact. The apparent lack of readiness to use techniques to spare civilian life suggests a disproportionate use of force.

### What are Israel's power and duties once ships reach Gazan territorial waters?

Israel's power over ships in Palestinian territorial waters, (which include Gazan waters) is similar to those in international waters. As the Occupying Power in the Occupied Palestinian Territories, Israel has the right to search ships, to ensure they do not constitute a security threat.<sup>20</sup> This power however must be exercised in conformity with the duty to provide for the essential humanitarian needs of the civilian population under occupation. Israel must provide sufficient food and medical supplies to the occupied population, treat the civilian population humanely, and facilitate the rapid and unimpeded passage of humanitarian aid, even across a blockade line.<sup>21</sup> Israel should not abuse its powers of stop and search in order to obstruct or unduly delay the passage of humanitarian aid.<sup>22</sup> Action by Israel to capture the ships and to divert any humanitarian aid over land likely violates these obligations: substantial delay is caused, many items are confiscated, and the stringent conditions placed by Israel on the items that are allowed to pass into Gaza, means that the effort to deliver aid is frustrated.

### Did Israel's killing of persons on board the flotilla amount to war crimes?

The war crime of willful killing is defined as the killing of one or more protected persons, in the context of and associated with an international armed conflict.<sup>23</sup> In order for the killings to have been a war crime, those killed must have been protected civilians in an international armed conflict. Protected persons are all those who, at a given moment and in any manner whatsoever, find themselves in the hands of the Occupying Power of which they are not nationals. This includes persons of neutral states that have signed the Fourth Geneva Convention, such as Turkey, and who are

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<sup>20</sup> Israel remains in occupation in Gaza in spite of the 'disengagement' of 2005 because of it retains effective control there, in that it "has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt." For more information see Al Haq's statement "Enemy Entity": A Deliberate Attempt by Israel to Obscure its Continued Occupation of the Gaza Strip at <http://www.alhaq.org/etemplate.php?id=334>

<sup>21</sup> See for instance Art. 17 GCIV, Art 23 GCIV Art. 32 GCIV, Article 27 GCIV, Article 55 GCIV, Article 5B GCIV, article 59 IGVC, and article 70 IAP which reflects international customary law, US Naval Handbook (1995) article 7.7.3 - "neutral vessels and aircraft engaged in the carriage of qualifying relief supplies for the civilian population...should be authorized to pass through the blockade cordon."

<sup>22</sup> See ICRC commentary to article 59 GCIV.

<sup>23</sup> See ICC elements of crime.

not within the territory of the belligerent power (i.e. who are not in Israel's territory). It excludes those of Israeli nationality.<sup>24</sup>

Those killed on board the flotilla were all Turkish nationals, including one person of dual American-Turkish nationality, in international waters, who 'found themselves in the hands of Israel' in that Israel had attacked the ships to prevent them entering occupied Palestinian territory (in this case, the Gaza Strip). They were therefore protected persons.

There is an international armed conflict in the sense that Israel is in occupation of the West Bank and the Gaza Strip.<sup>25</sup> The killings on the flotilla are likely to be viewed as being 'in the context of and associated with' the armed conflict, because the killings on the boats were connected with preventing the flotilla reaching the Gaza Strip due to the imposition of the blockade.

Those killed were civilians.<sup>26</sup> Were it decided that Israel targeted them or used an excessive degree of force that resulted in their deaths, the deaths might be considered to amount to the war crime of willful killing.<sup>27</sup> Some of Israel's actions in the aftermath of the raid, including the ill-treatment in detention of persons, their deportation, and the confiscation of property belonging to them, including the humanitarian aid itself, might, according to the same principles also constitute war crimes.<sup>28</sup>

#### What legal remedies are available with respect to Israel's action towards the flotilla?

There are several possible legal remedies in respect of the flotilla incident. They include the following:

- The establishment of an international investigation into the events surrounding the flotilla under the auspices of the United Nations. The findings of the investigation could lead to the criminal prosecution, by an international tribunal, of those responsible for committing war crimes and other breaches of international law;
- A referral to the International Criminal Court of the situation by a State on whose vessel the raid occurred. The Court would, amongst other things, need to be satisfied that Israel was unwilling or unable to investigate the incident, and that the crimes allegedly committed were sufficiently grave.

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<sup>24</sup> See Art 4 GCIV, and ICRC commentary to Art 4 GCIV.

<sup>25</sup> See footnote 34 of the ICC Elements of Crime, reflective of customary international law.

<sup>26</sup> Arguably civilians that are transporting weapons or going to a territory to join the armed forces there are civilians taking a direct participation in hostilities, who lose their immunity against direct attack (see ICRC's Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law available at [www.icrc.org](http://www.icrc.org)). It would appear those killed were ordinary civilians transporting humanitarian aid; Israel has to date not made any specific allegation to the contrary, with respect to those killed.

<sup>27</sup> Art 146 GCIV, Art 52, 57 API (reflective of customary international law).

<sup>28</sup> See war crimes listed in Article 8 of the Rome Statute of the ICC.

- An investigation and prosecution of those involved by Turkey. This would depend on Turkey being able to obtain Israel's cooperation with respect to the retrieval of evidence and the summoning of witnesses. In the absence of international action, such as a binding United Nations Security Council resolution ordering Israel to cooperate with Turkey, it is unlikely that any such action by Turkey alone could succeed.
- The exercise by States of universal or extraterritorial jurisdiction to try, in their domestic courts, those suspected of committing international crimes in connection with the flotilla.

Is Israel's Commission of Inquiry into the flotilla an adequate investigation for the purposes of international law?

Israel's inquiry is inadequate for several reasons. It is not independent, impartial or transparent. Its findings need not be made public. It is not empowered to compel witnesses to give evidence, and is not allowed to hear testimony from the soldiers involved in the operation. Those that do testify before the panel will be immune from subsequent legal action. Furthermore, the findings of the inquiry appear to have been pre-determined at its inception. According to Prime Minister Netanyahu, the main purpose of the inquiry is "to prove to the world that the Israel Navy operation on the Gaza-bound aid ship was appropriate and met international standards."<sup>29</sup> Taking into account all of these factors, it cannot be supposed that the inquiry meets the required international standards.

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<sup>29</sup> See Haaretz article of 14.06.2010 available at <http://www.haaretz.com/news/diplomacy-defense/netanyahu-gaza-flotilla-probe-will-show-the-world-israel-acted-lawfully-1.296074>