

S Bosch

Israel attacks an ‘aid’ flotilla bound for Gaza: A dark day for international law

Summary

This paper examines the Israeli raid on six aid vessels bound for Gaza on 31 May 2010, in light of customary International Humanitarian Law (IHL). In exploring the international law implications of these events, the concepts of a legal maritime blockade and the use of force by the civilians on board the vessels amounted to ‘direct participation in hostilities’, and whether either side might have a legitimate claim to have acted in self-defence. Lastly, the obligations placed upon belligerents when they detain civilians are examined, in light of the fundamental guarantees of humane treatment enshrined in IHL.

Israel val ’n noodlenigingskonvooi op pad na Gaza aan: ’n Donker dag vir volkereg

Hierdie artikel ondersoek die Israeliese aanval op ’n noodlenigingskonvooi op pad na Gaza op 31 Mei 2010 met verwysing na die gewoonteregtelike humanitêre-volkereg (GHV). In die ondersoek na die volkeregtelike implikasies van hierdie gebeure, word die begrippe van ’n regmatige maritieme blokkade en die gebruik van geweld om die blokkade af te dwing, uitgepak. Hierdie artikel oorweeg of die gebruik van geweld deur burgerlike persone aan boord die vaartuie neerkom op ‘direkte deelname aan vyandelikhede’, en of beide partye moontlik die reg het om in selfverdediging op te tree. Laastens, word die verpligtinge ondersoek wat op die oorlogvoerende geplaas word, indien hulle burgerlike persone aanhou in die lig van die fundamentele waarborge van humanitêre behandeling verskans in die GHV.

1. Introduction

At 04h00 on Monday 31 May 2010, an Israeli military operation – supported by naval ships and helicopters – targeted an aid convoy of 6 ships, 40 nautical miles off the coast of Gaza, in international waters. Among the vessels targeted were the *Mavi Marmara* (registered in the Comores); the *Eleftheri Mesogios* (registered in Greece); the *Defne Y* (registered in Kiribati); the *Sfendoni* (registered in Togo); the *Gazze 1* (registered in Turkey), and the *Challenger 1* (registered in the United States of America).¹ The convoy was staffed with 700 civilians from 40 nation states, including members of parliament from several countries.² Those on board the six-ship convoy – which was reportedly loaded with educational, medical and construction materials bound for Gaza –

1 SC 9940, 2010; HRC Report 2010:16.

2 SC 9940, 2010; HRC Report 2010:20.

maintained that their stated purpose was to “deliver humanitarian aid to Gaza and to break the Israeli blockade on Gaza”, in accordance with United Nations (UN) Security Council resolutions 1850 (2008) and 1860 (2009).³

The Israeli blockade had restricted all access of goods to the Gaza Strip to a “humanitarian minimum”, permitting only “those goods that are considered essential to the survival of the civilian population”.⁴ According to the Israeli authorities, their naval forces had communicated directly with the convoy – both publicly and through diplomatic channels – that if the convoy tried to reach Gaza, it would be diverted to an Israeli port (Ashdod), where the cargo would be inspected, and the permitted goods would be processed for onward transmission to Gaza, in accordance with the blockade.⁵ The organisers of the convoy rejected Israel’s offer to bring the aid in through the Israeli port, maintaining that they would deliver the full consignment to a committee of persons which had been formed to receive the convoy by the *de facto* Hamas authorities in Gaza.⁶

The world watched in horror as media reports replayed images of civilians fending off black-clad Israeli Defence Force soldiers, as they rappelled onto the vessels. There are competing reports of how the events played out. While the official Israeli position is that its armed forces responded in self-defence after its boarding party was attacked by civilians wielding metal bars and knives,⁷ evidence gathered by the UN Fact-Finding Mission supports the allegations that live ammunition was fired onto the deck of the *Mavi Mamara* from an Israeli helicopter, prior to the Israeli soldiers descending onto the deck.⁸

What is not debated, however, is that in the ensuing scuffle, 10 civilians were killed, 30 others were injured, and at least 6 Israeli military personnel were injured, before the Israeli forces managed to gain full control over the convoy and its cargo.⁹ The civilians on board the vessels were detained by Israeli forces and their transmission equipment was confiscated, however not before those on board the *Challenger I* broadcast the shocking images around the world via their internet satellite connection.¹⁰ Of the 6 vessels, 5 were escorted by the Israeli forces into the Israeli port of Ashdod, and the seriously injured were evacuated to Israeli hospitals by helicopter.¹¹ As for the rest, the

3 SC 9940, 2010.

4 Both the United Nations Relief and Works Agency and Amnesty International maintain that 80 per cent of the population remains dependent on humanitarian aid for even the most basic necessities like food and clean drinking water (Iliopoulos 2010).

5 SC 9940, 2010.

6 SC 9940, 2010.

7 Iliopoulos 2010.

8 HRC Report 2010:26.

9 SC 9940, 2010.

10 HRC Report 2010:4.

11 SC 9940, 2010.

Israeli Ministry of Foreign Affairs announced that “all international persons from the vessels would be deported”.¹²

In their defence, the Israeli Government maintained that the “operation had begun as a preventive measure to counter the illegal breakage of the blockade”.¹³ It stated that when their forces were set upon with knives and clubs, a weapon was wrestled from an Israeli soldier.¹⁴ Some reports suggested that the Israeli forces were armed with paintball rifles and pistols.¹⁵ The Israeli representative before the UN Security Council maintained that “the [civilian’s] intention had been to lynch Israeli soldiers”, and that “without any doubt, the soldiers acted in self-defence”.¹⁶ The Israeli Government argued that the mission of the convoy was primarily to violate the Israeli blockade on Gaza, and was not really about delivering humanitarian supplies to Gaza.¹⁷

The UN Security Council was swift to respond with a non-binding presidential statement on 1 June 2010, which denounced the sustained blockade of Gaza, as well as the restrictions placed upon the distribution of humanitarian assistance to the civilian population of Gaza.¹⁸ The SC statement called for “a prompt, impartial, credible and transparent investigation [into the incident] conforming to international standards”,¹⁹ including whether those who ordered and participated in the incident might face prosecution before the International Criminal Court (ICC) for their actions.²⁰ Pursuant to the Security Council’s Presidential Statement, the UN Human Rights Council established a committee to investigate the incident, and appointed a panel of three pre-eminent experts, Judge Karl T. Hudson-Phillips,²¹ Sir Desmond de Silva,²² and Mary Shanthi Dairiam,²³ to head the investigation.²⁴ The speed with which this was accomplished, speaks to the seriousness with which the international community views attacks on civilians. On 27 September 2010, this UN-appointed Fact-Finding Mission produced their report after conducting “interviews with more than 100 witnesses in Geneva, London, Istanbul and Amman”. Regretfully, the Israeli Government’s response to the Mission was one of non-recognition and non-cooperation.

12 SC 9940, 2010.

13 SC 9940, 2010.

14 SC 9940, 2010.

15 ABC News 2010.

16 SC 9940, 2010.

17 SC 9940, 2010.

18 SC 9940, 2010.

19 SC 9940, 2010.

20 SC 9940, 2010.

21 A retired Judge of the International Criminal Court and former Attorney General of Trinidad and Tobago.

22 Former Chief Prosecutor of the United Nations-backed Special Court for Sierra Leone.

23 The Founding member of the Board of Directors of the International Women’s Rights Action Watch Asia Pacific, and former member of the Committee on the Elimination of Discrimination against Women.

24 United Nations 2010.

This article will endeavour to unpack the international legal questions raised by this event. The article will begin by setting out the legal parameters applicable to this incident, given its link to the conflict situation currently characterising the Israeli-Palestinian relationship. It is then considered whether Israel was legally entitled to refuse access to the convoy on the basis of a legal maritime blockade. Next, the questions about how Israel went about boarding the vessels and enforcing the blockade against vessels staffed entirely by civilians, and the IHL implications that result from a civilian face-off with armed combatants, will be explored. It is then discussed whether the civilians on board the vessels could be accused of participating unlawfully in hostilities when they attempted to repel the Israeli forces as they boarded the vessels. At the heart of the incident are competing claims by both parties involved that they were responding in self-defence, and these competing arguments in light of the international law requirements for self-defence are explored. Lastly, this article discusses the obligations which exist under IHL in respect of parties who detain civilians in situations of armed conflict.

2. The law applicable to the incident

Israel has always maintained that the events of 31 May 2010 were inextricably linked to the situation of armed conflict which characterises the Israeli relationship with Hamas in the Gaza Strip. The incident which took place on board the *Mavi Marmara* and her 5 sister ships was part of an ongoing Israeli maritime blockade in force off the Gaza coast.²⁵ There is much debate around how the Arab-Israeli conflict should be characterised in terms of International Humanitarian Law (IHL), and it is not the intention of this article to contribute further to this debate. Most legal experts agree that, no matter how one characterises the conflict, the Geneva Convention,²⁶ which applies to occupied territories, is applicable to the Gaza Strip,²⁷ along with any IHL which has attained customary status. While Israel is party to all four of the 1949 Geneva Conventions,²⁸ it is not party to either of the first two Additional Protocols (AP I and AP II).²⁹ Consequently, this article focuses on the provisions in GC IV and

25 Iliopoulos 2010; HRC Report 2010:11-17.

26 GC IV 1949.

27 Dennis 2010:9; Israel resists this classification, claiming that its military forces and settlers withdrew from the territory in 2005. That being said, Israel continues to maintain effective control over the territory through its “control over Gaza’s airspace; sea space; land borders; electricity; water; sewage; telecommunications networks and population registry” (Iliopoulos 2010). It is for this reason that many academics would argue that there is a strong case for a conclusion that Israel is an Occupying Power in the Gaza Strip (Iliopoulos 2010). The International Court of Justice (ICJ) has in fact rejected the position held by Israel that GC IV only applies to occupied Palestine territories *de facto* (Shaw 1997:260). The ICJ concluded that the Palestinian territories were under Israeli military occupation and subject to GC IV (ICJ Reports 2004:paragraphs 90-101).

28 GC I-IV.

29 Additional Protocol I and II 1979.

the IHL principles which have acquired customary international law status,³⁰ including the provisions of IHL which permit naval forces to conduct hostile actions “across any maritime zone, including the high seas”.³¹

While international human rights law remains applicable even in situations of armed conflict (subject to any derogations proclaimed by the state), this article, for reasons of brevity, focuses on the IHL conventions applicable in this scenario, as they are especially relevant and offer special protection in situations of armed conflict.³²

Since this incident occurred while the vessels were in international waters, the body of law which regulates armed conflicts at sea³³ is also of particular relevance, as well as the customary international law of the sea,³⁴ and the related topics of jurisdiction over vessels in international waters.

3. Blockading humanitarian aid

Under IHL, states are obliged to facilitate the care of civilians in situations of armed conflict or occupation. To this end it is a recognised principle of customary IHL that those offering humanitarian relief have the legal right to demand access to the theatre of armed conflicts, in order to provide food,

30 This position is supported by the UN Fact-Finding Mission which concluded that “the relevant international humanitarian law standards binding on Israel as the occupying power in the occupied Palestinian territory are set out in the Fourth Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War. In addition, Israel is bound by customary rules of international humanitarian law” (HRC Report 2010:14; Dennis 2010:9).

31 UN Convention of the Law of the Sea 1982. It is worth stating that despite the principle of the freedom of the high seas, as codified in the UNCLOS, it is accepted (and reflected in the military manuals of many states) that a lawful naval blockade may be enforced on the high seas. In fact, this situation is endorsed by both the United Nations Secretary General and the majority of scholarly opinion (HRC 2010:12).

32 The Human Rights Committee and the ICJ have endorsed the ‘extra-territorial applicability’ of the International Covenant on Civil and Political Rights “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory” (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004:paragraph 111; Human Rights Committee 2010:paragraph 11; Human Rights Committee 2008:paragraph 5; HRC Report 2010:16). Beyond that, the Fact-Finding Mission also singled out as applicable the “United Nations human rights standards applicable to member States of the United Nations, including the Code of Conduct for Law Enforcement Officials; the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions” (HRC Report 2010:18).

33 Both the London Declaration 1909 and the San Remo Manual 1994 can be said to codify the customary international law applicable to blockades (Henckaerts & Doswald-Beck 2005:xxxvi; Lapidoth 2010).

34 As codified in the UN Convention of the Law of the Sea (UNCLOS) 1982.

medical supplies, and articles necessary to preserve life.³⁵ In situations of occupation, GC IV specifically demands that the occupying powers ensure “access to basics such as adequate food, water, shelter and medical facilities”.³⁶ These provisions have crystallised into customary international law and are reflected in rule 55 of the International Committee for the Red Cross’s (ICRC) restatement on customary IHL.³⁷ Furthermore, rule 53 confirms that customary IHL prohibits the starvation of the civilian population as a lawful method of warfare.³⁸ What is clear from all of this, is that there can be no doubt of the obligation upon states that are engaged in armed conflicts to afford humanitarian workers the necessary access, in order to provide aid to the civilian population.

While the law seems clear on the obligation on states to permit humanitarian assistance, its application to this particular incident is contingent upon those on board the vessels satisfying the international law’s definition of a relief worker.³⁹ The International Court of Justice (ICJ) in *Nicaragua v United States of America* 1986 defined “humanitarian assistance” as aid that is given “without discrimination to all in need ... to prevent suffering ... and to protect life and health and ensure respect for the human being”.⁴⁰ What emerges from this definition is that in order to attain ‘relief worker’ status, those offering such assistance must not associate themselves with either side in an armed conflict, and they must restrict their actions to those which exhibit complete neutrality⁴¹ and independence.⁴²

Since relief workers enjoy no special status in terms of IHL, they fall by default within the IHL classification of civilians.⁴³ As is the case with any civilians, relief workers are not authorised to participate directly in hostilities.⁴⁴ If they observe this prohibition, they can never be the legitimate targets of direct

35 White 2006:2020; Henckaerts & Doswald-Beck 2005:rule 55.

36 GC IV 1949:article 55; Iliopoulos 2010.

37 Henckaerts & Doswald-Beck 2005.

38 Henckaerts & Doswald-Beck 2005:rule 53.

39 For more on the subject of the IHL status of relief workers, see Bosch 2010.

40 *Nicaragua v United States of America* 1986:paragraph 243; Mackintosh 2007:116. A more extensive definition was provided by the Institute of International Law 2003:article 1, which defines humanitarian assistance as “all acts, activities and the human and material resources for the provision of goods and services of an exclusively humanitarian character, indispensable for the survival and the fulfillment of the essential needs of the victims of disasters”.

41 The ICRC in its constitutional documents uses the term “impartiality” and defines it as making “no discrimination as to nationality, race, religious beliefs, class or political opinions” (White 2006:2029).

42 Mackintosh 2007:129. This definition would include organisations like the ICRC and numerous NGOs working in this sphere.

43 Henckaerts & Doswald-Beck 2005:24.

44 Gasser 1995:210.

military attacks.⁴⁵ Instead, they are afforded respect,⁴⁶ shielded from attack,⁴⁷ and may not be taken prisoner without sufficient justification.⁴⁸ Civilians who do play a direct part in hostilities lose the right to claim these protections,⁴⁹ and are susceptible to a defensive response from the armed forces, for as long as they continue to actively participate in hostilities.⁵⁰ It would seem then, that in terms of IHL, those claiming to be offering humanitarian assistance must not only do so in a manner that exhibits complete neutrality, but they must also observe the IHL limitations which apply to civilians – in particular refraining from direct participation in hostilities.

Where those claiming to be offering humanitarian aid are using maritime means of delivery, there is a further issue – that of the laws applicable to a maritime blockade. The purpose of a maritime blockade is to block all commerce to a defined enemy coastline.⁵¹ This purpose is recognised by customary IHL as a legitimate method of warfare during an armed conflict.⁵² Having said that, before a blockade is deemed legitimate, five conditions must be met:

45 Gasser 1995:212.

46 GC I 1949:article 27(1), GC IV 1949:article 27(1) and the rules set out in chapter 32 (Fundamental Guarantees) of the ICRC's codification of customary IHL endorse that, as a matter of customary law, civilians are entitled to respect for their persons, their honour, their family rights, their religious convictions, their manners and customs, and their property (Henckaerts & Doswald-Beck 2005:360-375). This obligation demands not only that armed forces refrain from acts which would cause harm to civilians, but also requires that steps be taken to ensure the safety of civilians (Gasser 1995:212).

47 Customary IHL acknowledges that any attacks on military objects must first be assessed to establish that the loss caused to civilian life is not excessive in relation to the "concrete and direct military advantage anticipated", and in every attack precautions must be taken to ensure that civilian losses are kept to a minimum, civilians are warned of imminent attacks, and – where feasible – removed from the vicinity of the military objective (Gasser 1995:210; Henckaerts & Doswald-Beck 2005:64-8; AP I 1977:articles 51(b), 57 and 58(a); GC IV 1949:article 27(1)).

48 AP I 1977:article 51(2); AP II 1977:article 13(2); Henckaerts & Doswald-Beck 2005:405-412.

49 AP I 1977:article 51(3); Henckaerts & Doswald-Beck 2005:rule 6.

50 AP I 1977:article 51(8); Henckaerts & Doswald-Beck 2005:rule 6.

51 Von Heinegg 1995:470; HRC 2010:12.

52 The San Remo Manual 1994:articles 93-104, all of which are recognised as having achieved customary IHL status (Henckaerts & Doswald-Beck 2005:xxxvi). However, Professor Kevin Jon Heller argues that the non-international nature of the Arab-Israeli armed conflict renders the blockade unlawful "because there seems to be little, if any, state practice to support the idea that a blockade is legally permissible in a non-international armed conflict" (Heller 2010). Without a clear prohibition on blockades in non-international armed conflicts, and acceptance that blockades are a recognised part of customary IHL, this article argues from the stance that Israel may well have a legitimate claim in law to enforce a blockade over Gaza, provided it fulfills the legal requirements for such a blockade.

1. There must be proper declaration and published notification of exactly what goods are considered to be contraband;⁵³
2. The blockade must be effective;⁵⁴
3. The blockade must be applied impartially;⁵⁵
4. The blockade may not prevent access to the ports of states not involved in the conflict;⁵⁶
5. The blockade must facilitate humanitarian passage.⁵⁷

Once a blockade has satisfied all five of the international law criteria for lawfulness, those enforcing the blockade are permitted to stop all vessels entering the blockaded area, and search, verify and seize any contraband found on board the vessel.⁵⁸ A state claiming a legitimate blockade must ensure that the blockade does not have the effect of starving the enemy's civilian population, or denying the access of objects essential to civilian survival, where the resultant damage to the civilian population is expected to be "excessive in relation to the concrete and direct military advantage anticipated from the blockade".⁵⁹ According to the ICRC's codification of customary IHL (rule 55), if a blockade causes "the civilian population to be inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage for such essential supplies".⁶⁰

However, what are we to make of the claims by those on board the flotilla that they are 'relief workers' engaged in the delivery of humanitarian relief supplies? This article argues that their refusal to hand over the aid to anyone but Hamas-appointed personnel, and their stated aim being "to break the Israeli blockade on Gaza", seriously undermines the legitimacy of their claims to complete neutrality. Upon completion of their fact-finding investigations, the official UN stance was that while the "flotilla constituted a serious attempt to bring essential humanitarian supplies into Gaza, it seems clear that the primary objective was political".⁶¹ As for the requirement that – as civilians – those concerned should refrain from any direct participation in hostilities, this is explored further later in the article.

53 The San Remo Manual 1994:articles 93-94, all of which are recognised as customary IHL (Von Heinegg 1995:472; Henckaerts & Doswald-Beck 2005:xxxvi).

54 The San Remo Manual 1994:article 95 (recognised as codifying customary IHL by Henckaerts & Doswald-Beck 2005:xxxvi).

55 The San Remo Manual 1994:article 100 (recognised as codifying customary IHL by Henckaerts & Doswald-Beck 2005:xxxvi).

56 The San Remo Manual 1994:article 99 (recognised as codifying customary IHL law by Henckaerts & Doswald-Beck 2005:xxxvi).

57 The San Remo manual 1994:article 193 (recognised as codifying customary IHL law by Henckaerts & Doswald Beck 2005:xxxvi); Von Heinegg 1995:471.

58 San Remo Manual 1994:article 67(a) (recognised as codifying customary IHL law by Henckaerts & Doswald Beck 2005:xxxvi).

59 Henckaerts & Doswald-Beck 2005:rule 53; HRC 2010:13.

60 Von Heinegg 1995:471.

61 HRC Report 2010:19.

While there are some doubts as to whether those on board the flotilla can legitimately claim to be relief workers (as understood by IHL), there are also doubts as to whether Israel's blockade was lawful. While Israel seems to have satisfied the first four conditions for a lawful blockade, it has over a period of time persistently refused access to humanitarian assistance.⁶² Customary international law does make allowances for relief operations to be restricted by a lawful blockade, provided consent for access is not withheld on arbitrary grounds.⁶³ The free passage of relief supplies – essential for civilian survival – can only be denied temporarily “for reasons of overwhelming security concerns”.⁶⁴ Even after the incident on 31 May 2010 drew widespread international condemnation, Israel continued to enforce the blockade against vessels carrying humanitarian aid, as it detained the *Rachel Corrie* laden with medical supplies and construction materials on 5 June 2010.⁶⁵ This persistent refusal of access to humanitarian assistance (even in other instances where it may well have been truly neutral assistance) places Israel in breach of the customary IHL requirements for a lawful blockade, and the obligations of occupying powers set out in GC IV (to which Israel is a signatory). The ICRC, the Special Rapporteur on the situation of human rights in the Palestinian territories (Richard Falk⁶⁶); the United Nations Fact-Finding Mission on the Gaza Conflict,⁶⁷ and the Human Rights Council (HRC) have all concluded that more than starving the civilian population, the blockade is also an economic form of collective punishment⁶⁸ imposed “to punish the people of the Gaza Strip for having elected Hamas”.⁶⁹ Given the hugely detrimental effect that the blockade is having on the civilian population in Gaza, and the consistent Security Council resolutions⁷⁰ calling for an end to the blockade, this article argues that Israel has forfeited its right to claim that the blockade is a legitimate method of warfare. This position is supported by the International Committee for the Red Cross who, since the raid, have stated publicly that the blockade “constitutes a collective punishment imposed in clear violation of Israel's obligations under international humanitarian law”.⁷¹ The HRC Fact-Finding

62 According to the UN, “only 1 quarter of the necessary aid is able to reach those who need it” (Iliopoulos 2010).

63 Von Heinegg 1995:471.

64 Von Heinegg 1995:471.

65 Von Heinegg 1995:471.

66 General Assembly 2010:paragraph 34.

67 General Assembly 2009:paragraph 1878.

68 In contravention of GC IV, Article 33 and Rule 103 of the ICRC's restatement of the principles of customary IHL (Henckaerts & Doswald-Beck 2005). In a public statement issued on 14 June 2010, the ICRC emphasised that “the closure constitutes a collective punishment imposed in clear violation of Israel's obligations under international humanitarian law” (HRC 2010:11).

69 HRC 2010:13.

70 SCR (1850) 2008; SCR (1860) 2009 expressed “grave concern ... at the deepening humanitarian crisis in Gaza”, emphasised “the need to ensure sustained and regular flow of goods and people through the Gaza crossings”, and called for the “unimpeded provision and distribution throughout Gaza, of humanitarian assistance, including food, fuel and medical treatment”.

71 Reuters 2010.

Mission share this sentiment, reporting that they were “satisfied that the blockade was inflicting disproportionate damage upon the civilian population in the Gaza Strip, and that as such, the interception could not be justified and therefore has to be considered illegal”.⁷²

While this might render the blockade illegitimate, it does not solve the problem of the questionable neutrality of those on board the flotilla. If those on board lose their relief worker status – for lack of neutrality – they nevertheless remain civilians in a situation of armed conflict. This then questions whether Israel’s use of force – pursuant to a potentially illegitimate blockade – against a vessel manned by civilians is defensible in terms of international law.

4. The use of force to implement a maritime blockade

It is a fundamental principle of customary international maritime law that no vessel can be stopped or boarded without the consent of the captain or flag state,⁷³ unless those on board a vessel are suspected of committing an “international legal offence such as piracy or slave trading”.⁷⁴ During a conflict, however, where a blockade is regarded as a legitimate means of warfare, vessels supplying humanitarian aid may be stopped where overwhelming security concerns exist. However, the blockading power is nevertheless obliged to process the legitimate humanitarian aid for onward transmission to its intended destination.⁷⁵ If a vessel disregards a blockade, or disregards an order to stop, force can be used to ensure compliance with the blockade, provided any injury caused to civilians on board is not disproportionate.⁷⁶

In times of armed conflict, IHL places restrictions on the means and methods of warfare, in order to limit civilian casualties. Similarly, any attempt to enforce a legal blockade against a vessel staffed by civilians must observe the customary IHL principles of distinction, military necessity, proportionality and advance warning.⁷⁷ Since it is prohibited to attack civilians and civilian objects, one of the foundational principles of IHL is that civilians and civilian objects are to be distinguishable from military objects and personnel.⁷⁸ It is this principle of distinction which demands that combatants wear an identifying mark, carry their weapons openly,⁷⁹ and avoid locating military objectives near areas populated by civilians.⁸⁰ Furthermore, it is this principle of distinction which prohibits the use of weapons that might endanger civilians indiscriminately.⁸¹

72 HRC 2010:13.

73 Shaw 1997:422.

74 Iliopoulos 2010.

75 Iliopoulos 2010.

76 Iliopoulos 2010.

77 Henckaerts & Doswald-Beck 2005:rules 1, 7, 14 and 20.

78 Henckaerts & Doswald-Beck 2005:rules 1 and 7.

79 Anderson 2010.

80 Henckaerts & Doswald-Beck 2005:rule 7.

81 Henckaerts & Doswald-Beck 2005:rule 11 and 12; Greenwood 1995:54.

Alongside the principle of distinction is the IHL requirement of "military necessity".⁸² This stipulates that only those weapons and means of combat that are strictly necessary to attain the military purposes of overpowering the enemy armed forces, are permitted.⁸³ Any unnecessary suffering or superfluous injury, and the targeting of objects that are not "military objectives",⁸⁴ would fall foul of IHL.⁸⁵

The third principle, proportionality, attempts to strike a balance between the competing concerns of humanity and military necessity. In short, all decisions regarding the means and methods of warfare must be assessed on the basis that the damage caused to the adversary must be proportionate to the military advantage sought.⁸⁶ Any attacks that have manifestly disproportionate collateral⁸⁷ impact on either the civilian population; facilities necessary for civilian survival; the environment, or cultural heritage sites will fail to satisfy the requirement of proportionality and will be deemed illegitimate.⁸⁸ Lastly, customary⁸⁹ IHL demands that when an attack might have an impact on the

82 Hague Regulations 1907:article 22 is endorsed by the ICRC's statement in customary IHL as having achieved customary status (Henckaerts & Doswald-Beck 2005:rule 50).

83 This principle is summarised as follows: "only those objects which by their nature, location, purpose or use make an effective contribution to military action, and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage" may justifiably satisfy the requirements of military necessity when attacked (Oeter 1995:157). It is not legitimate to launch an attack that offers only potential or indeterminate advantages. This definition of a military objective as set out in AP I 1977:article 52 is widely regarded as having achieved customary status, and consequently is binding on even those states (like Israel) which have not signed up to the AP I (Oeter 1995:112).

84 Traditionally this included all buildings normally used by the armed forces, such as barracks, staff headquarters, and communications centres (Human Rights Watch 2003).

85 Oeter 1995:106 and 119.

86 Oeter 1995:106 and 119.

87 Rule 14 of the ICRC's statement on customary IHL states that "launching an attack 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, is prohibited" (Henckaerts & Doswald-Beck 2005).

88 Oeter 1995:119.

89 The duty of advanced warning was implemented, notably during the Spanish Civil War (1936-1939), the Second World War (1939-1945), the Iraq-Iran conflict (1980-1989), the Falklands War (1982), the Israeli operation 'Peace in Galilee' (1982), the Gulf War (1991), and the civil war in Rwanda (1993) (Balguy-Gallois 2003:449-452).

civilian population, effective⁹⁰ and advanced warning must be given so as to afford civilians the opportunity to evacuate.⁹¹

From the initial reports of the incident, it would appear that the Israeli armed forces were clearly aware that they were taking on a civilian target when they rappelled onto the deck of the first vessel, the *Mavi Marmara*. Those on board were dressed as civilians, and had no gunfire capabilities. At best, a few were armed with knives and rudimentary weapons fashioned from metal bars scavenged from the ship's deck.⁹² Customary IHL requires that the Israeli forces, dressed as combatants and carrying their arms openly, only engage in acts of warfare that can be motivated by absolute military necessity. According to the principle of military necessity, the use of live ammunition by Israeli forces may well be considered excessive, when attempting to enforce a blockade against civilians. It seems that the Israeli government seems to concede this point, as some of their accounts suggest that the Israeli forces were armed with paintball rifles. However, an inexperienced civilian, unable to distinguish a paintball gun from a live ammunition rifle, would be justified in concluding that they were entitled to respond in self-defence, because superfluous injury would result from the use of such a weapon. If the sole purpose of the Israeli forces in boarding the vessels was to enforce the blockade, the only real military advantage that could be sought would be to process the aid through alternative avenues, in accordance with the blockade. According to this article, attacking civilians with live ammunition, therefore, would cause harm which would be manifestly disproportionate to the military advantage sought (enforcing the blockade). Finally, customary IHL demands that when an attack might have an impact on the civilian population, effective and advanced warning must be given, to give civilians the opportunity to evacuate.⁹³ It is reported that the Israeli authorities had notified the vessels that they were not going to permit them to proceed to the Gaza coastline. Whether that is deemed sufficient warning for the civilians on board is questionable, since – being at sea – there was no real opportunity for the civilians to evacuate the vessel, once it became clear that the Israeli forces were intending to use military force in order to enforce what they perceived to be a lawful blockade.

90 Henckaerts & Doswald-Beck 2005:rule 20 does not require that the warning be provided to the authorities concerned. A direct warning to the population (for example by leaflets dropped from the air, radio messages, loudspeaker announcements), asking civilians to stay away from certain zones or types of facilities, is deemed effective (Balguy-Gallois 2004:18).

91 Lieber Code 1863:article 19; Balguy-Gallois 2004:16; Henckaerts & Doswald-Beck 2005:rule 20.

92 Evidence gathered by the UN Fact-Finding Mission confirmed that “during the night of 30 to 31 May, some passengers took electric tools from the ship’s workshop, which was not kept locked, and sawed sections of railings into lengths of approximately one and a half meters, apparently for use as weapons. Lengths of metal chains from between the railings were also removed”. This was the extent of the weapons which those on board the vessels had at their disposal, as “no weapons were brought on board the ship” (HRC Report 2010:23).

93 Henckaerts & Doswald-Beck 2005:rule 20.

All this assumes that the blockade was/is legitimate, insofar as it meets the five legal requirements set out in the 1994 San Remo Manual, which is regarded as a restatement of customary IHL as applied to maritime warfare.⁹⁴ When a blockade is in contravention of international law, the accompanying right to use force to enforce it falls away. Without the authority of a lawful blockade, international law only permits the naval interception of a vessel when the vessel is assisting “opposing forces’ war effort” (i.e. by carrying weapons),⁹⁵ or where intercepting the vessel can be justified on grounds of self-defence.⁹⁶ However, at no time did Israel assert either of these grounds in their justification for intercepting the aid flotilla, and as a result the UN-appointed Fact-Finding Mission concluded that “the flotilla presented no imminent threat” and the Israeli “interception was illegal”.⁹⁷

In instances where a blockade is illegal and the vessel is in international waters, the right to board such a vessel is subject to the customary international law principle of the freedom of the high seas. According to this principle, no vessel can be stopped or boarded without the consent of the captain or flag state, unless they are suspected of committing an international legal offence.⁹⁸ It is clear from the events of 31 May 2010 that the Israeli government did not obtain this consent before rappelling onto the vessels. In the face of a hostile invasion on the part of the Israeli armed forces, in contravention of the principle of the freedom of the high seas, we are left questioning whether there might be a case to be made that the civilians on board were entitled to use force – in self-defence – against the Israeli armed forces.

5. Were the civilians on board the flotilla participating unlawfully in hostilities?

IHL grants civilians special protection from the effects of armed conflict, for so long as they refrain from anything which might be perceived as unlawful direct participation in hostilities. This principle has evolved from the fundamental IHL drive to balance “military necessity and humanitarian considerations”.⁹⁹ In instances where civilians are directly participating in hostilities, IHL permits their civilian immunity to be withdrawn in favour of concerns of military necessity.¹⁰⁰ With the growing involvement of civilian relief workers in post-conflict reconstruction, has come a great deal of controversy over what actions might compromise their impartiality and amount to direct participation in hostilities without authorisation.¹⁰¹

94 Henckaerts & Doswald-Beck 2005:xxxvi.

95 San Remo Manual 1994:paragraphs 67 and 146.

96 United Nations 1945:article 51.

97 HRC Report 2010:13.

98 Shaw 1997:422. Examples of such offences might include suspicion of piracy; slave trading; unauthorized high seas broadcasting; ships sailing without nationality; suspected narcotics smuggling (HRC 2010:12).

99 St Petersburg Declaration 1868.

100 Schmitt 2010:713.

101 For a more comprehensive discussion of this issue, see Bosch 2010.

The phrase “direct participation in hostilities” refers to “specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict”.¹⁰² The ICRC has – after six years of expert discussions and research – published an interpretive guide on the notion of direct participation in hostilities under IHL. What emerged from this process is an interpretation which concludes that in order to qualify as direct participation in hostilities,

a specific act must meet three cumulative criteria:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict, or, alternatively, to inflict death, injury or destruction of persons or objects protected against direct attack (threshold of harm);¹⁰³
2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation);
3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict, and to the detriment of another (belligerent nexus).¹⁰⁴

The Interpretive Guide stipulates that, where doubt exists, an individual must be presumed to be civilian, and moreover he/she must be presumed not to be participating directly in hostilities.¹⁰⁵ While the interpretive guide is long overdue, this article must concede that there are some aspects of the ICRC’s Interpretive Guide that have proved ‘highly controversial’, despite hopes that the drafting process would produce a “consensus document”.¹⁰⁶

Schmitt for one criticises the ‘threshold of harm’ requirement as being under-inclusive. He argues that while the criteria are inclusive in interpreting “military harm to include any consequence adversely affecting military operations or military capacity of a party to the conflict”,¹⁰⁷ it unnecessarily excludes acts that benefit the opposing armed force. He argues that if civilian

102 ICRC’s Interpretive Guide 2009.

103 Some uncontroversial examples cited by the Interpretive Guide include “armed or unarmed activities restricting or disturbing deployments, logistics and communications”; “capturing or otherwise establishing or exercising control over military personnel, objects and territory to the detriment of the adversary” including “denying the adversary military use of certain objects, equipment and territory, [and] guarding captured military personnel for the adversary to prevent them being forcibly liberated”; clearing mines placed by the adversary”; “[e]lectronic interference with military computer network attacks or computer network exploitation”, and “wiretapping the adversary’s high command or transmitting tactical targeting information for an attack” (ICRC’s Interpretive Guide 2009:48).

104 ICRC’s Interpretive Guide 2009:47.

105 Melzer 2010:857. Schmitt in his critique rejects the presumption of non-participation, arguing that a liberal interpretation of grey areas as participation would incentivise civilians to refrain from anything remotely connected to the conflict, and would serve to enhance the protection afforded civilians under IHL (Schmitt 2010:738).

106 Schmitt 2010:698.

107 ICRC’s Interpretive Guide 2009:47. This definition goes beyond only the infliction of death, injury or destruction on military personnel and objects.

actions benefit one side in an armed conflict (as would be the case for support activities), they would normally adversely affect the opponent, although “the causal relationship between such support and the resulting harm [to the opponent] may not always be direct”.¹⁰⁸ According to Melzer, Schmitt favours the lowering of the threshold of harm requirement “so as to extend the loss of protection to a potentially wide range of support activities, regardless of whether they are likely to cause any harm to the enemy or the civilian population”.¹⁰⁹ Melzer, in response to this critique, maintains that Schmitt is unable to demonstrate legal support for his position, and is unable to prove the alleged under-inclusiveness of this criterion in practice.¹¹⁰ Moreover, he says any lowering of the threshold undermines the long-standing recognised distinction between “direct participation in hostilities and mere involvement in the general war effort”.¹¹¹

As for the direct causation requirement, Schmitt argues that the fact that the “harm must be caused in a single causal step” and “result from a physical act” fails to take cognisance of the “nature of modern combat operations”¹¹² and gives rise to an “under-inclusive” result.¹¹³ Schmitt would prefer to include within the ambit of direct participants, those that engage in capacity-building and play an “integrated part” in the resulting harm,¹¹⁴ rather than the single causal step interpretation. In response to this critique, Melzer argues that relaxing the causal link requirement would expose civilians to “targeting policies prone to error, arbitrariness and abuse”, and there is not *opinio juris* to suggest that states favour such a broad interpretation of acts as direct participation, however remotely linked to the resultant harm.¹¹⁵

As for the belligerent nexus requirement, Schmitt once again rejects the need for the “act to be in support of a party to the conflict *and* to the detriment of another”, speculating that it is possible for participating civilians to oppose both sides in a conflict.¹¹⁶ He recommends that this criterion only requires “support of one party to the conflict” or “in opposition of one party”.¹¹⁷ Melzer, in response to the critiques raised by Schmitt, concludes that his proposals are “almost exclusively driven by military necessity” to the detriment of the equally important balancing consideration of humanity.¹¹⁸

Whether one aligns oneself with the Schmitt or the Melzer camp in the debate, the fact remains that at present the only interpretive guide available to us is that drafted by the ICRC. For the most part civilians, going about a

108 Schmitt 2010:719; Melzer 2010:858.

109 Melzer 2010:877.

110 Melzer 2010:860.

111 Melzer 2010:877.

112 Schmitt 2010:725.

113 Schmitt 2010:726.

114 Schmitt 2010:729.

115 Melzer 2010:878.

116 Schmitt 2010:736.

117 Schmitt 2010:736.

118 Melzer 2010:914.

humanitarian mission, are unlikely to ever satisfy the three accumulative criteria for 'direct participation in hostilities'. In fact, some writers have suggested that by categorising relief workers as civilians, "states implicitly agree that the offering of humanitarian assistance can never amount to unlawful direct participation in hostilities".¹¹⁹ That said, video footage of the Israeli forces boarding the *Mavi Marmara* confirms that some of the civilians on board did respond with force. The question which we must unpack is whether these civilians – by their use of force – were unlawfully participating in hostilities, or whether they legitimately could claim to have been acting in self-defence.

It is clear that setting upon the Israeli armed forces does amount to "harm of a specifically military nature", sufficient to satisfy the threshold of harm criteria.¹²⁰ The ICRC's Interpretive Guide specifically lists "committing acts of violence against human and material enemy forces", or causing "physical or functional damage to military objects, operations or capacity",¹²¹ as satisfying the threshold of harm requirement.¹²² Once an action has reached the required threshold of harm, it will only amount to direct participation in hostilities if the action "additionally satisfies the requirements of direct causation and belligerent nexus".¹²³ According to the ICRC's Interpretive Guide, "direct causation should be understood as meaning that the harm in question must be brought about in one causal step".¹²⁴ Here too, the video footage corroborates claims that some of the civilians' actions may "reasonably [have been] expected to directly – in one causal step – cause harm that reached the required threshold".¹²⁵ The final requirement for directly participating in hostilities is termed the belligerent nexus. In short, this leg of the test requires that "an act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another".¹²⁶ In other words, "in order to amount to direct participation in hostilities, an act must not only be objectively likely to inflict harm that meets the first two criteria, but it must also be specifically designed to do so in support of a party to an armed conflict and to the detriment of another".¹²⁷ Here it is interesting to note that the ICRC's

119 Dörmann 2007.

120 The degree of harm includes "not only the infliction of death, injury, or destruction of military personnel and objects, but essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict" (Dörmann 2007).

121 ICRC's Interpretive Guide 2009:48.

122 ICRC's Interpretive Guide 2009:47.

123 ICRC's Interpretive Guide 2009:50.

124 The act must not only be causally linked to the harm, but it must also cause the harm directly. For example "the assembly and storing of an improvised explosive device (IED) in a workshop, or the purchase or smuggling of its components, may be connected with the resulting harm through an uninterrupted causal chain of events, but, unlike the planting and detonation of that device, do not cause that harm directly" (ICRC's Interpretive Guide 2009:54 and 55).

125 ICRC's Interpretive Guide 2009:58.

126 ICRC's Interpretive Guide 2009:58.

127 ICRC's Interpretive Guide 2009:58. As a general rule, "harm caused (a) in individual self-defence or defence of others against violence prohibited under

Interpretive Guide states specifically that an act “causing harm in individual self-defence or defence of others, while it does meet the required threshold of harm, it fails to meet the belligerent nexus test and the use of necessary and proportionate force in such situations cannot be regarded as direct participation in hostilities”.¹²⁸ This conclusion is supported by the UN-appointed Fact-Finding Mission which, after considering the evidence, concluded that the aid workers on board the flotilla, could not be said to be “participating actively and directly in combat activities”.¹²⁹ This leaves one facing the crucial question: Could the actions of the civilians on board the flotilla legitimately claim to be motivated by self-defence or the defence of others?

6. Were the civilians acting in self-defence?

International law has always recognised the right of individuals to respond in self-defence to an armed attack.¹³⁰ What would otherwise be classified as unlawful direct participation in hostilities by a civilian can be excused if it can be shown that the civilian was acting in self-defence. For this defence to be successful it must be shown that the individual responded to an armed attack and their actions did not go beyond this purpose.¹³¹ In the words of the ICJ in the *Nicaragua*¹³² case: “self defence only warrants measures which are proportionate to the armed attack and necessary to respond to it”. From this we can conclude that civilians responding in self-defence must agree that: (1) they are under an armed attack; (2) they will only use the amount of force strictly necessary and proportionate to repel the attack; (3) they will observe the rules of IHL in so far as they limit their aggression to legitimate military targets; (4) the use of force in self-defence will cease as soon as the UN Security Council steps in, and (5) the justification for using force in self-defence will cease as soon as the goal of repelling the initial attack has been achieved.¹³³

There are competing accounts of the events which transpired on board the *Mavi Marmara* on Monday 31 May 2010. It does appear that some of the civilians on board – armed with knives and metal bars – attempted to fend off Israeli defence force soldiers as they rappelled onto the vessel. A number of civilians on board the vessel claimed that the Israeli troops opened fire on them before boarding the *Mavi Marmara*, while the Israeli soldiers maintain that they only responded with force after its boarding party was attacked by activists wielding metal bars and knives.¹³⁴ If the case can be made that the Israeli

IHL, (b) in exercising power or authority over persons or territory, (c) as part of civil unrest against such authority, or (d) during inter-civilian violence lacks the belligerent nexus required for a qualification as direct participation in hostilities” (ICRC’s Interpretive Guide 2009:64).

128 ICRC’s Interpretive Guide 2009:62.

129 HRC 2010:16.

130 Shaw 1997:788.

131 Cassese 2005:355.

132 *Nicaragua v United States of America* 1986:14-150 at section 176.

133 Cassese 2005:355.

134 Iliopoulos 2010.

forces were violating the fundamental principle of freedom of the high seas by boarding the vessel pursuant to an unlawful blockade, as argued above, then the civilians were entitled to perceive the armed Israeli forces who attempted to board the vessel as an armed attack, whether the Israeli forces fired upon them before or after boarding the vessel. Certainly, if investigations reveal that Israeli forces fired upon the civilians before boarding, as was reported by the UN-appointed Fact-Finding Mission,¹³⁵ then the case for claiming self-defence on the part of the civilians is all the more persuasive. Either way, by virtue of their reliance on an unlawful blockade as a reason to board the vessel, or as a result of Israeli forces firing upon them, it is clear that the civilians on board perceived the situation to be one of an armed attack, even if the Israelis claimed that they were only armed with paintball rifles.

The next requirement which must be satisfied in order to claim self-defence is that the civilians only used the amount of force strictly necessary and proportionate to repel the attack. Clearly those on board were not prepared to use excessive force against highly trained and armed soldiers. They fashioned makeshift weapons out of objects found on board the vessel, and only managed a few minutes of engagement before being overpowered by Israeli fire power and expertise. The only conclusion to draw, based on the fact that only 6 Israeli soldiers were injured, as opposed to the 10 civilians who were killed¹³⁶ and about 30 other civilians injured, is that those on board only used necessary and proportionate force in self-defence. As for the allegations made by the Israeli forces that they had been fired upon, the UN-appointed Fact-Finding Mission rejected these claims because they were not presented with “any medical records or other substantiated information from the Israeli authorities regarding any firearm injuries sustained by soldiers participating in the raid”.¹³⁷ Moreover, the Fact-Finding Mission concluded that the Israeli accounts were “so inconsistent and contradictory with regard to evidence of alleged firearms injuries to Israeli soldiers that it has to reject it”.¹³⁸

Since the civilians directed their aggression towards the Israeli soldiers who constituted a legitimate military target, the third requirement (that of observing the rules of IHL) is satisfied. Moreover, since the civilians failed to repel the Israeli attack, and the Israeli forces took charge of the convoy, the fourth and fifth requirements become irrelevant. The civilians on board the aid flotilla had long been detained, by the time the UN Security Council stepped in to issue its public statement.¹³⁹

Thus, this article argues that a solid case can be made for the claim that the civilians were entitled to perceive the Israeli advance as an attempt by the Israeli armed forces to enforce an illegal blockade. As such, they were

135 HRC Report 2010:26.

136 The UN's Fact-Finding Mission reported that “forensic analysis demonstrated that two of the passengers killed on the top deck received wounds compatible with being shot at close range while lying on the ground” (HRC Report 2010:27).

137 HRC Report 2010:26.

138 HRC Report 2010:26.

139 Cassese 2005:355.

justifiable in responding with force to protect themselves and their fellow workers, especially when after indicating their intent to surrender, the Israeli forces continued to fire upon them.¹⁴⁰ Moreover, a finding that the civilians acted in self-defence will negate any argument that they were participating unlawfully in hostilities, when they set upon the Israeli soldiers.

7. Were the Israeli forces responding in self-defence?

The Israeli government, for its part, has always maintained that the blockade in place along the Gaza coast was a lawful one, despite widespread international condemnation. If they are able to make a case for the fact that they had peaceful intentions, and were merely attempting to board the *Mavi Marmara* to check¹⁴¹ that it carried legitimate humanitarian relief supplies, then they could argue that the hostile response they received forced them to use force in self-defence. They could argue that in attempting to resist the lawful blockade, the civilians on board were participating unlawfully in hostilities. If those on board the vessels were unlawfully disobeying a legal blockade, then their hostile response cannot be classed as self-defence. Without a defence of self-defence, the civilians' actions would satisfy the three requirements for unlawful direct participation in hostilities. This would render them unable to claim the protections¹⁴² set out in IHL, and susceptible to a defensive response from the armed forces, for as long as they continued to actively participate in hostilities.¹⁴³ It seems, therefore, that the legitimacy of claims by the Israeli armed forces that they acted in self-defence turns entirely on whether those on board were entitled by law to respond to the Israeli forces, using force in self-defence. If the civilians cannot claim self-defence, then it allows the Israeli forces to make that claim, provided they too can meet the five criteria for self-defence as set out in international law.

International law permits the use of force in self-defence, provided one uses only the "amount of force strictly necessary and proportionate to repel the attack".¹⁴⁴ Here the Israeli forces are found wanting. They boarded a vessel, manned only by civilians, armed with live ammunition and superior fire power. They chose to fire upon civilians who held knives and metal bars. What is particularly distressing is that the report generated by the UN-appointed Fact-Finding Mission concluded that "a large number of injured passengers received wounds to critical areas of the body containing vital organs ... including a number of passengers who were clearly not engaged in any activities to resist

140 The Fact-Finding Mission's report reveals that when "it became apparent that a large number of passengers had become injured, Bulent Yildirim, the President of IHH and one of principal organisers of the flotilla, removed his white shirt which was then used as a white flag to indicate a surrender. This does not appear to have had any effect and live firing continued on the ship" (HRC Report 2010:28).

141 The Fact-Finding Mission's report concluded that "at no stage was a request made by the Israeli navy for the cargo to be inspected" (HRC Report 2010:24).

142 Henckaerts & Doswald-Beck 2009:rule 6.

143 Henckaerts & Doswald-Beck 2009:rule 6.

144 *Nicaragua v United States of America* 1986:paragraphs 187-201.

the boarding by the Israeli forces” (including journalists) and “at least six of the passengers were killed in a manner consistent with an extra-legal, arbitrary and summary execution”.¹⁴⁵ A more proportionate response, within the definition of what would have been strictly necessary to repel the attack, would have been the use of stun grenades, rubber bullets or tazer guns. This sentiment was shared by the Fact-Finding Mission, which concluded that “throughout the operation to seize control of the *Mavi Marmara* ... lethal force was employed by the Israeli soldiers in a widespread and arbitrary manner, which caused an unnecessarily large number of persons to be killed or seriously injured”.¹⁴⁶ Moreover, international law demands that those claiming self-defence observe the rules of IHL, insofar as they limit their aggression to legitimate military targets. Once again, the Israeli forces are found wanting in respect of this requirement. Civilians are never deemed a legitimate military target. This would demand that, in fending off aggression from civilians, combatants must at least try to observe the IHL principles of distinction, military necessity, proportionality and advance warning. As argued in the article, the Israeli response was disproportionate and not in line with absolute military necessity. It is common cause that the acts of aggression had ceased by the time the UN Security Council handed down its presidential statement on the attack. However, at that stage many of the civilians were already – arguably wrongfully – in detention on Israeli soil. As to whether the Israeli combatants had stopped using force in self-defence, once the goal of repelling the initial attack had been achieved, there are accounts by those on board the vessels that they were further assaulted whilst in detention, in order to coerce them to sign deportation orders.¹⁴⁷ In conclusion, it would seem that the Israeli forces will be hard pressed to defend their actions based on self-defence.

8. The detention of civilians

Whether or not it can conclusively be shown, whether those on board have a valid claim of self-defence, the Israeli forces must still adhere to IHL in their treatment of the detained civilians. If civilians are found to have participated directly in hostilities,¹⁴⁸ they would not on account of that acquire combatant status,¹⁴⁹ but remain classified as civilians, albeit participating illegally in hostilities.¹⁵⁰ Should they fall into enemy hands after such resistance, they should still be treated humanely as civilians, held to account for their

145 HRC Report 2010:37.

146 HRC Report 2010:36.

147 Cassese 2005:355.

148 By satisfying the three requirements set out in the ICRC's Interpretative Guide 2009.

149 Once they are *hors de combat*, or fall into enemy hands, they may be held to account for their unauthorised actions, but at all times they must be afforded the “regular and fair judicial guarantees extended to civilians” (Henckerts & Doswald-Beck 2005:rules 87 and 101; GC IV 1949:article 5(3); Gasser 1995:211). It is only the civilian *levée en masse* who acquire secondary POW status upon capture, despite their primary civilian status (Geneva Convention (III) 1949:article 4A(6)).

150 Gasser 1995:233.

unauthorised actions, and afforded the “regular and fair judicial guarantees extended to civilians”.¹⁵¹

Whether or not civilians are active in the theatre of operations, it is entirely possible that they might be subjected to detention. Their civilian status under IHL has a direct impact upon how they can expect to be treated if detained while allegedly offering humanitarian assistance. Civilians who are “aliens in the territory of conflict” are protected by the “detailed rules regarding their treatment in the hands of the enemy”.¹⁵² To this end alien civilians enjoy diplomatic protection as a result of diplomatic relations between their nation state and the state on whose territory they find themselves.¹⁵³ Over and above that, IHL protects all civilians against military operations by virtue of their civilian status. Consequently all detained relief workers remain protected by GC IV articles 13-26 (to which Israel is signatory), and enjoy the additional rights as set out in GC IV article 38.¹⁵⁴ Any detaining power is obliged to report the identity of captured civilians to their state of origin, within two weeks after capture,¹⁵⁵ and they may only intern civilians in exceptional cases where it is necessary for reasons of security¹⁵⁶ or as a penalty imposed on civilians.¹⁵⁷ All “decisions regarding such internment shall be made according to regular procedure and subject to regular review”,¹⁵⁸ and interned civilians enjoy the protections afforded by GC IV article 79-135,¹⁵⁹ which corresponds with the treatment of prisoners of war.

151 Henckaerts & Doswald Beck 2005:rule 101; GC IV 1949:article 5(3); Gasser 1995:211.

152 GC IV 1949:part III section II.

153 Gasser 1995:281.

154 “[T]he following rights shall be granted to them:

- a. they shall be enabled to receive the individual or collective relief that may be sent to them;
- b. they shall, if their state of health so requires, receive medical attention and hospital treatment to the same extent as the nationals of the State concerned;
- c. they shall be allowed to practise their religion and to receive spiritual assistance from ministers of their faith;
- d. if they reside in an area particularly exposed to the dangers of war, they shall be authorised to move from that area to the same extent as the nationals of the State concerned;
- e. children under fifteen years, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned.”

155 GC IV 1949:article 136(2); Henckaerts & Doswald-Beck 2005:rule 117.

156 GC IV 1949:articles 41-43 and 78(1), and endorsed by Henckaerts & Doswald-Beck 2005:rule 99, provided the security concerns cannot be addressed by less severe measures (Gasser 1995:288).

157 GC IV 1949:article 68; Henckaerts & Doswald-Beck 2005:rule 136.

158 GC IV 1949:articles 43 and 78(2); Henckaerts & Doswald-Beck 2005:rule 99.

159 For a comprehensive discussion of these duties which Israel (as a signatory to the four Geneva Conventions) is obliged to observe, see Gasser 1995:288-292.

The UN-appointed Fact-Finding Mission confirmed the allegations by the 700 passengers and crew members¹⁶⁰ that they were handcuffed and left to kneel on the deck of the vessel, and subjected to physical and verbal abuse for a further 12 hours without explanation of the reasons for their detention. The Fact-Finding Mission concluded that the conditions of their detention on board the vessels constituted cruel and inhumane treatment, which violated the IHL prohibitions against “willful killing, torture or inhuman treatment and willfully causing great suffering or serious injury to body or health within the terms of article 147 of the Fourth Geneva Convention” and in the end constituted a violation of the fundamental guarantees of humane treatment.¹⁶¹ When the detainees were eventually allowed to disembark, many claimed “they found the experience of being ‘paraded’ before the media and the sometimes hostile crowds unsettling and humiliating”.¹⁶² This act in itself constitutes a clear violation of article 13 of GC III, which protects POWs from “insults and public curiosity”.¹⁶³ After they were processed, the detainees reported that they were not only kept in overcrowded conditions at Ella Prison (near Beersheva), but they were also held *incommunicado*, denied access to a lawyer or consular representative, translator or family, and made to sign papers they did not understand.¹⁶⁴ Thereafter, those who refused to provide fingerprints or identify themselves were beaten and imprisoned.¹⁶⁵ The Fact-Finding Mission reported that the manner in which detainees were subjected to arbitrary bodily searches was degrading,¹⁶⁶ and many detainees were arbitrarily deprived of their possessions (including passports and medications, but especially any photographic or recording devices).¹⁶⁷ Some activists are bringing legal charges against the Israeli government for their “illegal detention, torture and deportation”.¹⁶⁸ These allegations, if substantiated, show that Israel is in breach of its customary IHL obligations to extend the fundamental guarantees of humane treatment to all those detained during armed conflicts.

160 HRC Report 2010:38.

161 The HRC’s report confirms that the injured were denied access to medical treatment, those with chronic medical conditions were denied their medications, during their on-board detention they were refused access to the use of toilets, and many suffered severe sunburn and injuries to their wrists from being inappropriately handcuffed with plastic ties for long periods of time (HRC Report 2010:31-40).

162 HRC Report 2010:41.

163 HRC Report 2010:47.

164 Middle East Online 2010. The Fact-Finding Mission concluded that most detainees were presented with papers admitting to having entered Israel illegally, consenting to their immediate deportation, and agreeing to a blanket ban on their re-entering Israel for a 10-year period (HRC Report 2010:41).

165 Middle East Online 2010.

166 Some male detainees were “subjected to or threatened with internal cavity searches”, searches were “accompanied by taunts, provocative and insulting language and physical abuse”, and searches were performed “multiple times, long after such searches could serve a useful security purpose” (HRC Report 2010:41).

167 In clear violation of Article 97 of GC IV which states: “Internees shall be permitted to retain articles of personal use” (HRC Report 2010:51).

168 Turkish Weekly 2010.

Of course, if a case can be made that the civilians were actively participating in hostilities, and that the defence of self-defence was invalid, they would then be grouped with unlawful combatants, and can be prosecuted for their actions.¹⁶⁹ Whatever the final analysis might reveal, one thing is clear: IHL demands that civilians who are captured are to be treated humanely in accordance with basic fundamental guarantees of humane treatment, enshrined in rules 87-105 of the ICRC's statement of customary IHL.¹⁷⁰ Moreover, the "regular and fair" judicial guarantees extended to those who are captured during armed conflict, must be extended to those on board the vessels who face prosecution.¹⁷¹

9. Conclusion

The 31st of May 2010 was a dark day for international law. The widespread international condemnation that followed the incident even had some international lawyers suggesting that Turkey exercise its jurisdictional power over the alleged crimes that were committed on board the *Mavi Marmara*, by assigning jurisdiction to the ICC in terms of article 12(3) of the Rome Statute.¹⁷² There have been calls for the Israeli forces to face prosecution for "intentionally directing attacks against ... civilians not taking direct part in hostilities";¹⁷³ "intentionally directing attacks against civilian objects",¹⁷⁴ and "wilfully impeding relief supplies as provided for under the Geneva Conventions".¹⁷⁵ The united international response, which saw some states recalling their Israeli Diplomatic and Consular staff, speaks to the seriousness with which international law views these sorts of violations.

Without entering the debate around how the Palestinian-Israeli conflict is to be characterised, and applying only the customary IHL which regulates armed conflicts at sea, one can reach the following conclusions: Israel's persistent refusal of access to humanitarian assistance, and the hugely detrimental effect that the blockade is having on the civilian population in Gaza, renders Israel's blockade unlawful. In attempting to enforce the blockade, Israel's actions can only be described as disproportionate, in violation of the principle of distinction,

169 In terms of GC IV 1949:article 38: "aliens accused of violations of the laws of war or engaging in hostilities without authorization can be criminally prosecuted provided that all the international human rights conventions applicable to the prosecuting state are observed in respect of the proceedings brought against aliens".

170 Mackintosh 2007:121.

171 GC IV 1949:5(3); Henckaerts & Doswald Beck 2005:rule 100; Gasser 1995:211.

172 Iliopolis 2010.

173 Rome Statute 1998:article 8(2)(b)(i).

174 Iliopolis 2010; Rome Statute 1998:article 8(2)(b)(ii).

175 Rome Statute 1998:article 8.2.b (xxv), defining war crimes in international armed conflict, reads: "Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions". This is also prohibited by AP I 1977:article 54(1) and AP II 1977:article 14, although not designated there as a war crime. The ICRC customary law study confirms this as part of customary IHL applicable to all conflicts (Henckaerts & Doswald-Beck 2005:rule 53).

and not justifiable as a military necessity. Without a legitimate claim to a lawful blockade, when faced by heavily armed Israeli forces rappelling onto the vessels, the civilians on board were within their rights to act in self-defence without violating the prohibition on direct participation in hostilities.

As for the averment by the Israeli forces that they were only responding in self-defence when they were met with a hostile response from the civilian activists, this article argues that their means of responding was not only disproportionate, but also not strictly necessary to repel the attack. The treatment by Israeli forces of those civilians, who were detained, is evidence of Israeli forces flouting those IHL principles which demand that “regular and fair judicial guarantees be extended to civilians”.¹⁷⁶ There are accounts of those on board being assaulted and made to sign confessions and deportation orders: a clear violation of the customary IHL principles on detention of civilians. Although this article is not focused on the international human rights law aspects of this incident, it is telling that the UN-appointed Fact-Finding Mission concluded that the actions of the Israeli soldiers and officials amounted to inhumane treatment in violation of the International Covenant on Civil and Political Rights,¹⁷⁷ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁷⁸

If a case could be made for a lawful blockade, and the civilians concerned were found to be participating directly in hostilities without a legitimate claim to self-defence, then those individuals might be prosecuted. Regardless of this fact, however, they must still be treated humanely in accordance with basic fundamental guarantees of humane treatment, as enshrined in Rule 87 and GC IV article 27.¹⁷⁹

Just one month after the incident drew widespread international condemnation, an Israeli military probe “commended the actions of the soldiers and their commanders, who exhibited ‘correct decision making’ and justifiably resorted to the use of their firearms”, concluding that no punishment was necessary.¹⁸⁰ Three months later, the UN-appointed Fact-Finding Mission, however, concluded in its report – after thorough evidentiary hearings – that the “facts established give rise to a series of violations in law”, spanning IHL, the law of the sea, customary international law and international human rights law, and giving rise to judicial remedies (including reparations, compensation

176 GC IV n 22 above at article 5(3); Henckaerts & Doswald-Beck 2005:rule 100; Gasser 1995:211.

177 In violation of the right to life (article 6); the right not to be subjected to torture or other cruel inhumane or degrading treatment (article 7); the right to security of person (article 9); the right to be informed about the reasons for arrest and detention (article 9(2)); the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (article 10), and in instances where the journalists on board were dispossessed of their cameras a violation of the right to freedom of expression (article 19(2) HRC Report 2010:54; United Nations 1966).

178 HRC Report 2010:40, United Nations 1984.

179 Henckaerts & Doswald-Beck 2005; Mackintosh 2007:121.

180 Jurist 2010.

and individual criminal responsibility).¹⁸¹ Sadly, the 31st of May 2010 marked a dark day indeed for international law. The events of this day will forever be recalled because of a few brave and selfless civilians who had the presence of mind to record and transmit the events as they unfolded on the sister ships in the flotilla, via the *Challenger 1's* satellite internet connection – before the vessel was seized. International law should have guaranteed the protection of Cevdet Kiliçlar, a 38-year-old Turkish citizen, on board the *Mavi Marmara* in his capacity as a photographer, who “at the moment he was shot he was ... attempting to photograph Israeli soldiers on the top deck”.¹⁸² He died instantly from “a single bullet to his forehead between the eyes”.¹⁸³ Sadly, international law also failed to protect Furkan Doğan, “a 19-year-old with dual Turkish and United States citizenship”, who received “five bullet wounds, to the face, head, back, thorax, left leg and foot. All of the entry wounds were on the back of his body, except for the face wound which entered to the right of his nose ... at point blank range”.¹⁸⁴ For the families of these men, and the others on board the flotilla, we can only hope that international law can provide the necessary judicial remedies to ensure that we do not witness scenes like these again.

181 HRC Report 2010:52.

182 HRC Report 2010:29-30.

183 HRC Report 2010:29-30.

184 HRC Report 2010:29.

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