

# Torpedoing the Law: How the Palmer Report Justified Israel's Naval Blockade of Gaza

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## ABSTRACT

*On May 31<sup>st</sup>, 2010, Israeli commandos killed nine passengers aboard a humanitarian flotilla destined for Gaza. Eight of the nine were Turkish citizens, while one was a dual U.S.-Turkish citizen. On August 2<sup>nd</sup>, 2010, U.N. Secretary-General Ban Ki-moon appointed a Panel of Inquiry (POI) to “examine and identify the facts, circumstances and context of the incident,” and to “consider and recommend ways of avoiding similar incidents in the future.” In September 2011, the POI’s final report was unofficially released. In a finding that shocked the international community, the report concluded that Israel’s naval blockade of Gaza was legal. Moreover, the report vilified the passengers aboard the humanitarian flotilla because they sought to publicize the illegality and inhumanity of Israel’s blockade. A careful analysis of the POI report shows that it is probably the most mendacious and debased document ever issued under the aegis of the United Nations.*

On May 31<sup>st</sup>, 2010, Israeli commandos killed nine passengers aboard a humanitarian flotilla destined for Gaza. (Eight of the nine were Turkish citizens, one was a dual U.S.-Turkish citizen.) On August 2<sup>nd</sup>, 2010, U.N. Secretary-General Ban Ki-moon appointed a Panel of Inquiry (POI) to “examine and identify the facts, circumstances and context of the incident,” and to “consider and recommend ways of avoiding similar incidents in the future.” After the Secretary-General selected singularly corrupt and criminal Colombian ex-president Alvaro Uribe as Vice-Chair, it was predictable—and predicted at the time—that the panel would produce a white-wash.<sup>1</sup> In this respect the POI’s final report did not disappoint.<sup>2</sup>

The Turkish government was seemingly less invested in the POI report than in eliciting a formal Israeli apology for the killing of its citizens. As it turned out, not only did Israel not issue an apology but the POI also vindi-

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cated Israel's claim that the naval blockade of Gaza was legal. (Nevertheless, the POI did additionally find that Israel's killing of the nine passengers could not be justified.) Turkey reacted in fury to the double diplomatic setback by drastically reducing relations with Israel and threatening an array of further actions. However, because the content of the POI

report was not subject to close scrutiny, it quickly became the received wisdom that the Israeli naval blockade of Gaza was legal. If the people of Gaza have not suffered enough, now the Secretary-General's office has lent the U.N.'s imprimatur to a prime instrument of their on-going torture. In fact the POI report is probably the most mendacious and debased document ever issued under the aegis of the United Nations.

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The POI alleges that Israel had a right to impose a naval blockade on Gaza in order to defend itself against Hamas rocket and mortar attacks. "Israel has faced and continues to face a real threat to its security from militant groups in Gaza," the POI observes. "Rockets, missiles and mortar bombs have been launched from Gaza towards Israel... Since 2001 such attacks have caused more than 25 deaths and hundreds of injuries."<sup>3</sup> Strangely, the POI devotes not a single syllable to Israeli attacks on Gaza. Since 2001, Israeli assaults have killed some *four thousand five hundred* Gazans, overwhelmingly civilians.<sup>4</sup> According to the POI, "the purpose of these [Hamas] acts of violence, which have been repeatedly condemned by the international community, has been to do damage to the population of Israel."<sup>5</sup> Yet, a comprehensive National Academy of Sciences study found that Palestinian violence directed at Israel "reveals a pattern of retaliation."<sup>6</sup> The POI cannot conceive that Palestinian violence might be retaliatory because—in its account—the initial Israeli assaults did not happen. The POI is apparently also unaware that Israel's attacks on Gaza likewise "have been repeatedly condemned by the international community."

The POI states, "it seems obvious enough that stopping these violent [Hamas] acts was a necessary step for Israel to take in order to protect its people and to defend itself."<sup>7</sup> If Palestinian deaths had also registered, it would perhaps have been "obvious enough" that Hamas also had a right to impose a naval blockade on Israel in order to protect the people of Gaza and defend their territory. Indeed, Amnesty

International has pointed out that under international law it is illegal to transfer weapons to a consistent violator of human rights, and that accordingly an “immediate, comprehensive arms embargo” should be imposed on both Hamas *and* Israel.<sup>8</sup> The POI perhaps ignored these “obvious enough” facts because Vice-Chair Uribe, in one of his periodic rants against human rights organizations, denounced the “blindness” and “fanaticism” of Amnesty.<sup>9</sup>

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The POI finds that the Israeli naval blockade of Gaza constituted a “legitimate security measure...and its implementation complied with the requirements of international law.”<sup>10</sup> The oddity of this conclusion will immediately be noticed in light of the POI’s repeatedly stated caveat that it was “not asked to make determinations of the legal issues,” “not asked to determine the legality or otherwise of the events.”<sup>11</sup> The POI’s exoneration of Israel is also the single legal verdict it delivers in the report. It finds that Israel’s land blockade of Gaza and its killing of nine passengers aboard the *Mavi Marmara* were both “unacceptable,” but not illegal let alone criminal acts.<sup>12</sup> In other words, the one and only potentially consequential verdict the POI reaches was favorable to Israel, whereas its negative judgments of Israel amount to little more than rhetorical slaps on the wrist.<sup>13</sup> In contrast, Amnesty deemed the Israeli blockade a “flagrant violation of international law,”<sup>14</sup> while the U.N. Human Rights Council’s Fact-Finding Mission on the flotilla assault found that “the circumstances of the killing of at least six of the passengers were in a manner consistent with an extra-legal, arbitrary and summary execution.”<sup>15</sup>

The argument fabricated by the POI to justify the Israeli naval blockade consists of a sequence of interrelated propositions:

1. The Israeli naval blockade of Gaza was unrelated to the Israeli land blockade;
2. Israel confronted a significant security threat from Gaza’s coastal waters;
3. Israel imposed the naval blockade in response to this security threat;
4. The naval blockade was the only means Israel had at its disposal to meet this security threat;
5. The Israeli naval blockade achieved its security objective without causing disproportionate harm to Gaza’s civilian population.

It is of equal import that the Turkel *Report* did not contest that the naval blockade was *integral* to the strategy of achieving the twin goals

To pronounce the naval blockade legal, the POI had to sustain each and every one of these propositions. If even one were false, its defense of the blockade would collapse. The astonishing thing is that they are *all* false. I will address each of them in turn.

**The Israeli naval blockade of Gaza was unrelated to the Israeli land blockade.** The critical first premise of the POI is that the Israeli naval blockade was both conceptually and practically distinct from the land blockade. In fact, however, in design as well as implementation, the Israeli land and naval blockades constituted complementary halves of a unified whole: both served identical functions; the success of each was essential to the success of the other; the enforcement of each redounded on the enforcement of the other. The Israeli government itself acknowledged these points.

Since the inception of its occupation in 1967, Israel has regulated passage of goods and persons along Gaza's land and coastal borders. After Hamas gained full control of Gaza in 2007, Israel imposed a yet more stringent blockade on it.<sup>16</sup> The blockade was conceived to perform a twofold function: (a) a *security* goal of preventing weapons from reaching Gaza, and (b) a *political* goal of "bringing Gaza's economy to the brink of collapse"—as Israeli officials repeatedly put it in private—in order to punish Gazans for electing Hamas and to turn them against it. The list of items Israel barred from entering Gaza—such as chocolate, chips, and baby chicks—pointed to the irreducibly *political* aspect of the blockade.<sup>17</sup> Respected human rights and humanitarian relief organizations overwhelmingly deplored the blockade as a form of collective punishment that constituted a flagrant violation of international law.

Even the quasi-official Israeli Turkel Commission, which vindicated Israel on all key points regarding the flotilla assault, did not contest the dual security-political purpose of the naval blockade. For example, its final *Report* cited testimony by Tzipi Livni, who was Foreign Minister when the naval blockade was imposed, as well as a document delineating the purposes behind imposing the blockade written by Major-General (res.) Amos Gilad, head of the Political, Military and Policy Affairs Bureau at the Ministry of Defense:

Tzipi Livni said that the imposition of the naval blockade was done in a wider context, as part of Israel's comprehensive strategy (which she referred to as a "dual strategy") of delegitimizing Hamas on the one hand and strengthening

the status of the Palestinian Authority vis-à-vis the Gaza Strip on the other... According to her approach, the attempts to transfer [humanitarian] goods to the Gaza Strip by sea give legitimacy to the Hamas regime in the Gaza Strip. Livni also stated that *it would be a mistake to examine the circumstances of imposing the naval blockade from a narrow security perspective only.*

...

The document [by Gilad] contains two considerations [behind the blockade]: one...is to prevent any military strengthening of the Hamas; the other...is to “isolate and weaken Hamas.” In this context, Major-General (res.) Gilad stated that the significance of opening a maritime route to the Gaza Strip was that the Hamas’s status would be strengthened significantly from economic and political viewpoints. He further stated that opening a maritime route to the Gaza Strip, particularly while it is under Hamas control,...would be tantamount of [sic] a “very significant achievement for Hamas”...Major-General (res.) Gilad concluded: “In summary, the need to impose a naval blockade on the Gaza Strip arises from security and military considerations...and also *to prevent any legitimization and economic and political strengthening of Hamas and strengthening it in the internal Palestinian arena* [vis-à-vis the Palestinian Authority in the West Bank].”

The Turkel Report itself concluded: “It would therefore appear that even though the purpose of the naval blockade was fundamentally a security one in response to military needs, *its imposition was also regarded by the decision makers as legitimate within the concept of Israel’s comprehensive ‘dual strategy’ against the Hamas in the Gaza Strip.*”<sup>18</sup>

It is of equal import that the Turkel Report did not contest that the naval blockade was *integral* to the strategy of achieving the twin goals. Indeed, it explicitly maintained that the land and sea blockade must be treated as a seamless whole:

Both the naval blockade and the land crossings policy were imposed and implemented because of the prolonged international armed conflict between Israel and the Hamas....[O]n the strategic level...the naval blockade is regarded by the Government as part of Israel’s wider effort not to give legitimacy to the Hamas’s rule over the Gaza Strip, to isolate it in the international arena, and to strengthen the Palestinian Authority.

Additionally, the Turkel Report pointed out that “the naval blockade is also connected to the land crossings policy on a tactical level,” because whenever cargo

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aboard vessels headed for Gaza was re-routed through the land-crossings, it was subject to the land restrictions blocking passage of critical goods such as “iron and cement.”<sup>19</sup> “Therefore,” the *Turkel Report* concluded, “it is possible that the enforcement of the naval blockade in addition to the implementation of the land

crossings policy has a humanitarian impact on the population, at least in principle”; “The approach of the Israeli Government...created, in this sense, a connection regarding the humanitarian effect on the Gaza Strip between the naval blockade and the land crossings policy.”<sup>20</sup>

Because the *Turkel Report* held that the land and naval blockades “in principle” formed an integral whole, it could only defend the legality of the Israeli naval blockade by simultaneously upholding the propriety of the land blockade and treating each “in conjunction”<sup>21</sup> with the other. “Given the Commission’s approach that regarded the naval blockade and the land restrictions as inter-linked,” a pair of Israeli scholars observed, “it could only justify the former by defending the legality of the latter.”<sup>22</sup> In the event the *Turkel Report* found—albeit by using tortuous reasoning and eliding critical facts<sup>23</sup>—that the land-naval blockade passed legal muster.

The POI was consequently confronted with a dilemma. If it retraced the *Turkel Report’s* line of argumentation, it would have to pass judgment on Israel’s blockade policy as a whole. But if it passed such a comprehensive judgment, the POI could only vindicate Israel by defying the near-unanimous authoritative opinion that declared such a blockade illegal.<sup>24</sup> The POI accordingly resolved on an altogether novel strategy. It severed the land blockade from the naval blockade, relegated the land blockade to a secondary and side issue, and proceeded to focus in its legal analysis exclusively on the naval blockade as if it were a thing apart.<sup>25</sup>

It cannot be overstressed how radical a surgical procedure the POI performed. Not only did none of the human rights or humanitarian organizations conceive such a bypass operation; not even the *Turkel Report* did.<sup>26</sup> In his dissenting letter appended to the POI report, the Turkish representative took the POI to task because it “fully associated itself” with Israel’s legal analysis, while it ignored the legal analysis in the Turkish report, despite the fact that the legal finding of the Turkish report—i.e., that the blockade was illegal—was supported by the “vast majority of the international community.”<sup>27</sup> Although clearly a legitimate grievance, he missed



Photo: REUTERS, Ali Hashisho

*Respected human rights and humanitarian relief organizations overwhelmingly deplored the blockade as a form of collective punishment that constituted a flagrant violation of international law.*

the most important point: in order to vindicate Israel, the POI ventured on a legal terrain that was alien even to the Israeli Turkel Commission.

The POI purports that the Israeli land blockade and naval blockade constituted “two distinct concepts which require different treatment and analysis.” It “therefore treat[s] the naval blockade as separate and distinct from the controls at the land crossings,” which are “not directly related to the naval blockade.”<sup>28</sup> In order to sustain this anomalous contention, the POI points to the facts that, chronologically, imposition of the land blockade (in 2007) preceded imposition of the naval blockade (in 2009); that the “intensity” of the land blockade “fluctuated” over time whereas the naval blockade “has not been altered since its imposition”; and that the naval blockade “was imposed primarily to enable... Israel to exert control over ships attempting to reach Gaza with weapons and related goods.”<sup>29</sup>

The POI confuses and conflates the broad purposes behind Israel’s border policy with the practical modalities of its enforcement. Since 2007, Israel has imposed a suffocating blockade on all of Gaza’s borders. This comprehensive blockade has been designed to achieve the dual goals of preventing weapons from reaching Gaza and politically isolating Hamas. Although Israel periodically adjusted its

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blockade policies to accommodate new political contingencies, the dual security-political goals stayed constant. It is disingenuous to pretend that, as against the security *and* political dimensions of the Israeli land blockade, the purpose of the coastal blockade was “primarily”—in fact, in its legal analysis the POI effectively argues that it was *exclusively*—to prevent weapons from reaching Gaza. It is also perfectly obvious why the POI

maintains this untenable pretense: to sidestep an assessment of the legality of the political aspect of the blockade; in other words, to avoid passing judgment on whether Israel was legally within its right to block passage of chocolate, chips, and chicks. An assessment of the legality of, respectively, the land and naval blockade of course requires a differentiated analysis because the relevant bodies of law do not fully overlap.<sup>30</sup> But until the POI came along, no commentary, not even the *Turkel Report*, suggested that the broad purposes of the land blockade were fundamentally different from those of the naval blockade. Only the POI dared to purport that the naval blockade had no political dimension. The ultimate irony is that, *senso stricto*, the naval blockade did serve only one of the two purposes, but it was *not* the military one; its purpose was narrowly political. The POI is thus doubly wrong: the naval blockade was not “distinct from” the land blockade, and the purpose of the naval blockade was not “primarily” security.

**Israel confronted a significant security threat from Gaza’s coastal waters.** “The fundamental principle of the freedom of navigation on the high seas,” the POI observes, “is subject to only certain limited exceptions under international law.”<sup>31</sup> A State party attempting to restrict it hence bears a heavy legal burden of justification. It follows from these basic propositions that the greater the impediment a State places on freedom of navigation, the heavier its legal burden. If a fundamental freedom is at stake, then infringements on it must be graduated: an extreme restriction would not be justified if a lesser restriction would meet the perceived threat. In the case at hand, if the “visit and search” of a vessel (where there are “reasonable grounds” for suspicion) is an effective means of preventing contraband<sup>32</sup> from reaching Gaza, then it cannot be justified to impose the more restrictive measure of a naval blockade that indiscriminately bars passage of all goods, military and non-military, thereby obstructing commercial traffic and potentially inflicting harm on the civilian population.<sup>33</sup>



The POI purports that Israel confronted a significant security threat from Gaza's coastal waters that could only be met by a naval blockade. However, the evidence it brings to bear in support of this contention underwhelms. It cites, on the basis of the *Turkel Report*, three alleged instances of attempted weapons smuggling into Gaza from the sea, the last of which, in 2003, had occurred *six years before* Israel's imposition of the naval blockade.<sup>34</sup> It further alleges, citing the *Turkel Report*, that after its 2005 Gaza "disengagement," Israel had to find a new legal basis for preventing weapons from reaching Gaza. Even if true, it still would not explain why the visit and search method apparently proved effective after the Gaza "disengagement" until sometime in mid-2008, when it abruptly presented what the POI, following the *Turkel Report*, calls "practical difficulties."<sup>35</sup> It is not as if Israel was suddenly beleaguered by a rash of weapons smuggling operations such that visit and search became too cumbersome a procedure. The POI, citing the *Turkel Report*, also alleges that only a naval blockade provided a legal basis for preventing Hamas from smuggling weapons out of Gaza to launch attacks from the sea.<sup>36</sup> But it cites no instances—none apparently exists—of Hamas attempting such a maneuver. It does cite Israeli concerns that Hamas might attempt such a maneuver in the unbounded future. But insofar as such a maneuver had not been attempted in the past; and insofar as Israel apparently did not harbor any such fear before 2009 (otherwise it would have imposed the blockade earlier); and insofar as Israel cited no new evidentiary basis for its claim that such a maneuver might be attempted by Hamas at some point in the nebulous future—this alleged Israeli fear would appear to be a rather flimsy justification for so restrictive a curb on freedom of navigation. In effect, it would make a mockery of the already highly restrictive right of "anticipatory" self-defense.

**Israel imposed the naval blockade in response to this security threat.** The POI alleges, on the basis of the *Turkel Report*, that Israel imposed the naval blockade "in order to prevent weapons, terrorists and money from entering or exiting the Gaza Strip by sea."<sup>37</sup> But, although Israel formally gestured to this threat as its rationale for imposing the naval blockade, the POI does not present a persuasive case for crediting this official Israeli testimony. In its legal analysis of the naval blockade, the POI's modus operandi amounts to, *if Israel says so, it must be true*: "The Israeli report to the Panel makes it clear that the naval blockade... was adopted for the purpose of defending its territory and population, and the Panel accepts that was the case"; "[I]t is evident that Israel had a military objective. The stated primary objective of the naval blockade was for security. It was to prevent weapons, ammunition, military supplies and people from entering Gaza and to stop Hamas operatives sailing away from Gaza with vessels filled with explosives."<sup>38</sup>

The imposition of a draconian blockade on the basis of a speculative future contingency would be yet more difficult to justify in the face of the potential humanitarian harm it entailed in the here and now

Still, one might reasonably wonder, If it wasn't to prevent weapons smuggling, why *did* Israel impose the naval blockade? In fact, the explanation is right there in the *Turkel Report*. Beginning in July 2008, the *Report* observed, "various flotillas whose stated destination was the Gaza Strip were organized. In view of the fact that the ships concerned were neu-

tral, the IDF [Israel Defense Forces] had relatively limited options, which mainly included the power of visit and search, a power that can be used, inter alia, on condition that there are reasonable grounds for suspecting that a ship is subject to capture"—i.e., that it was carrying contraband. The quandary confronting Israel, however, was that the flotillas did *not* carry weapons, and therefore it lacked a legal basis for stopping them. Initially Israel let a succession of vessels pass into Gaza, *not even bothering to search them*, in the hope that the flotilla phenomenon would peter out.<sup>39</sup> When the boats kept coming, Israel responded with escalating violence—but still they kept coming.<sup>40</sup> It was "in these circumstances, on January 3, 2009," the *Turkel Report* continued, that "the Minister of Defense ordered a naval blockade....The significance of imposing a naval blockade according to the rules of international law is that it allows a party to an armed conflict to prevent entry into the prohibited area of any vessel that attempts to breach the blockade (*even without it being established that the vessel is assisting terrorist activity*)."<sup>41</sup>

In testimony quoted by the *Turkel Report* that the POI again prudently does not cite, Israel's Military-Advocate General stated that the naval blockade was imposed specifically in order to prevent the humanitarian flotillas from reaching Gaza:

The Military Advocate-General testified before the Commission that the IDF was compelled to find a suitable operational solution for the maritime zone *in view of the increase in the phenomenon of flotillas*. A naval blockade was regarded as the best operational method of dealing with the phenomenon because other solutions, such as the use of the right of visit and search, were proved to be problematic and other sources of authority were regarded as weaker.

....[T]he Military Advocate-General apprised the Chief of Staff...that he had spoken with the Attorney-General, who also expressed the position that the declaration of a naval blockade on the Gaza Strip gave the "optimal legal-operational solution to preventing the entry of foreign shipping vessels into the

Gaza Strip, and gave the Navy all of the tools and powers required to prevent the passage of shipping vessels. The sources of authority that allow action to be taken against shipping vessels, in the absence of a declaration of a 'naval blockade,' are weaker, and their practicability is doubtful.”

....On December 30, 2008, the Military Advocate-General once again contacted the Chief of Staff and said that in the early hours of the morning the Navy forces were required to contend with the yacht *Dignity* [one of the earlier humanitarian ships] that left Cyprus for the Gaza Strip and that the incident highlighted the legal difficulty of dealing with foreign civilian vessels trying to reach the coast of the Gaza Strip. He once again asked the Chief of Staff to bring his recommendation of a naval blockade before the political echelon.

....On January 3, 2009, after the security establishment's legal advisor gave his opinion on the subject, the Minister of Defense signed an order to impose the blockade.<sup>42</sup>

The complication for Israel was obviously not the *type* of vessel—civilian-commercial versus military-naval—per se because weapons could be transported in either and, if they were being smuggled in, would almost certainly be secreted in a civilian vessel. Rather, the problem was with the vessel's *contents*: Israel lacked legal authority to stop humanitarian ships unless it imposed a naval blockade. In the POI's disingenuously opaque language, the blockade was imposed not because of weapons smuggling but “in reaction to certain incidents when vessels had reached Gaza via sea.”<sup>43</sup> What Israel dreaded was the *political* victory that Hamas might score if a maritime route were eventually opened allowing humanitarian vessels to reach Gaza and—perhaps more important—that, in the process of opening a maritime route, these flotillas would spotlight Israel's illegal and inhumane blockade. The irony is that the POI falsely separated out the land from the naval blockade in order to justify the naval blockade on security grounds, whereas not even senior Israeli officials—in their more candid moments—alleged that the naval blockade was imposed to meet a security threat. Indeed, Israel imposed the naval blockade *because* it did not confront a security threat: if it resorted to the visit and search procedure, it legally could only seize contraband, but would otherwise have to let vessels pass;<sup>44</sup> it was imposition of a naval blockade that enabled Israel to legally prevent passage of vessels transporting humanitarian cargo. It might of course still be contended that if the succession of humanitarian flotillas eventually opened a maritime passage to Gaza, it might potentially create a security threat to Israel sometime in the unbounded future. But even if such a contingency were real, it still remains that the blockade was not imposed because of an actual security

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threat to Israel. It would be hard to justify so restrictive a curb on the fundamental right to freedom of navigation on the basis of a threat that might—and, for all anyone knows, might not—materialize in the near or distant future. The imposition of a draconian blockade on the basis

of a speculative future contingency would be yet more difficult to justify in the face of the potential humanitarian harm it entailed in the here and now.

**The naval blockade was the only means Israel had at its disposal to meet this security threat.** The purpose of the naval blockade was not to meet a security threat but rather to preempt the political fallout if the siege of Hamas-controlled Gaza were breached. Even if, for argument’s sake, the claim were credited that, as a practical matter and setting aside the law, no country at war would permit a convoy of ships—even a declared humanitarian convoy that had been carefully searched—to pass freely into enemy territory, Israel still had another ready option. The POI itself alludes, if only in passing and in another context, to this alternative. It reports, “at a briefing immediately after the May 31, 2010 incident, a senior United Nations official noted that the loss of life could have been avoided if Israel had responded to repeated calls to end its closure of Gaza.”<sup>45</sup> Thus, if Israel wanted to stop the humanitarian convoys headed for Gaza, all it needed do was lift the illegal economic blockade that was causing a humanitarian crisis. Revealingly, this obvious option did not figure in the POI’s analysis of the blockade’s legality. Was it because, in the face of this option, Israel’s only conceivable justification for the naval blockade crumbled and, consequently, the POI could only vindicate Israel by defending a patently indefensible policy of collective punishment?

**The Israeli naval blockade achieved its security objective without causing disproportionate harm to Gaza’s civilian population.** Unlike the *Turkel Report*, which defended the legality of the siege as a whole, the POI endeavored to sanitize its task by redefining the naval siege as a thing apart, the legality of which rose and fell on its own merits. Thus, according to the POI, even if one of the purposes of the land blockade was to prevent humanitarian goods from reaching Gaza, it did not necessarily make the naval blockade illegal. The POI’s audacious surgical procedure did not, however, salvage Israel’s case. In fact it—no doubt unwittingly—rendered Israel’s case yet more untenable.

The POI contends that, given the “absence of significant port facilities in Gaza,” the harm caused by the naval blockade to Gaza’s civilian population was “slight,”

and therefore not disproportionate to the military gain.<sup>46</sup> But if, as the evidence unambiguously shows, the Israeli naval blockade did not serve the purpose of self-defense but rather was imposed with a political objective in mind, then the proportionality test is wholly irrelevant.

As the POI observes, “The imposition of a blockade must have a lawful military objective.”<sup>47</sup> Put otherwise, even if the humanitarian value of the maritime point of entry were limited, the naval blockade would still cause proportionally greater harm because its military value was nil—or, at any rate, whatever military objective it met could also have been met by a visit and search procedure that did not hinder the passage of humanitarian goods.

Furthermore, even if the naval blockade did serve a military objective, it would still be hasty to conclude that it did not cause disproportionate collateral damage. The *Turkel Report* itself cautioned against being too dismissive of Gaza’s potential for maritime traffic: if goods could just barely enter Gaza by sea, then weapons too could just barely enter—which in turn would render a naval blockade redundant, and any justification for it unsustainable.<sup>48</sup> The furthest the *Turkel Report* would go was, “in the absence of information and records, it is difficult to determine the effect of the naval blockade alone on the humanitarian situation in the Gaza Strip.”<sup>49</sup> It cannot but perplex how the POI knew the potential harm of the naval blockade was “slight” when even the egregiously apologetic *Turkel Report* pleaded agnosticism. In fact, if a humanitarian crisis existed in Gaza, and if the maritime passageway was the last and only remaining point of entry to Gaza’s besieged population, then the collateral damage of the naval blockade would have to be reckoned severe, while the likelihood of Israel passing a proportionality test would consequently be drastically reduced. The POI rejects this proportionality test,<sup>50</sup> and instead opts for a version that vindicates Israel, although it also condemns the Gaza civilian population to a hermetically-sealed blockade as it suffers a humanitarian crisis.

Still, one should not make too much of this point because, however large the breach in the naval blockade, it could not have solved Gaza’s humanitarian crisis. Moreover, all sides agree that the overarching purpose of the flotillas was not to deliver humanitarian cargo but rather to shine a light on the illegality and inhumanity of the blockade. The POI found this purpose if not legally then certainly morally culpable. It is to this argument that we now turn. Before doing so, however, it is worth recapitulating our findings thus far. The POI presented a sequence

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of interrelated propositions to legally justify Israel's naval blockade of Gaza. If any of these propositions proved to be false, the POI could not have sustained its defense of the blockade. In fact, each and every one of the propositions has been shown to be false. It would be hard to exaggerate the sheer mendacity of the rationale contrived by the POI to justify the naval blockade.

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Having proven that the Israeli naval blockade was legal, the POI unsurprisingly condemns the flotilla passengers for having committed a “dangerous and reckless act” by attempting to breach it.<sup>51</sup> It then repeatedly urges that States should actively intervene to prevent such irresponsible undertakings in the future: “It is important that such events are not repeated”; “It is important that States...make every effort to avoid a repetition of the incident”; “It is in the interests of the international community to actively discourage attempts to breach a lawfully imposed blockade.”<sup>52</sup> The fate of Gaza and its people, the POI suggests, would be better handled by and should be the exclusive preserve of States, not ordinary citizens. It merits contemplating what would have transpired had this advice been heeded.

In 2007, Israel imposed a blockade on Gaza that constituted a form of collective punishment and consequently a flagrant violation of international law. The international community did not lift a finger. Journeying to Gaza around this time, former High Commissioner for Human Rights Mary Robinson declared that Gaza's “whole civilization has been destroyed, I'm not exaggerating.” The international community still did not lift a finger. In November 2008, Israel exacerbated the blockade, bringing Gaza's infrastructure—in the words of an Israeli human rights organization—“to the brink of collapse.” The international community still did not lift a finger. “The breakdown of an entire society is happening in front of us,” Harvard political economist Sara Roy wrote in the *London Review of Books*, “but there is little international response.”<sup>53</sup>

In late December 2008, Israel invaded Gaza and, in the course of what Amnesty called “22 days of death and destruction,” it massacred the Gazan civilian population and laid waste the civilian infrastructure. In January 2009, the U.N. Security Council finally reacted to popular international outrage at Israel's crimes by passing a resolution (1860) that expressed “grave concern...at the deepening humanitarian crisis in Gaza,” and called for “the unimpeded provision and distribution throughout Gaza of humanitarian assistance, including of food, fuel and medical treatment.” Israel nonetheless persisted in its strangulating blockade, and

the international community still did not lift a finger. It was only *after* the martyrdom of the *Mavi Marmara* passengers, as the POI itself effectively concedes,<sup>54</sup> that the world's leaders suddenly came to the realization that the Israeli blockade was “unacceptable” and “unsustainable,” and some—albeit grossly insufficient—relief was granted to Gaza's desperate civilian population.<sup>55</sup> But if the POI had had its way, and the Freedom Flotilla had not taken the initiative to commit a “dangerous and reckless act” that infringed on the prerogatives of states, Israel would have been left undisturbed and the people of Gaza left to languish, and expire.

Although the POI deemed Israel's killing of the nine passengers “unacceptable,” it strove hard to “balance” this assessment by also casting doubt on the passengers' character. Here again, it confronted a dilemma. The *Turkel Report* alleged that the organizers of the flagship *Mavi Marmara* were *jihadis* hell-bent on killing Israelis. It had some difficulty sustaining this charge, however, because the most lethal weapons “smuggled” on board by these would-be *jihadis*, according to the *Report* itself, were slingshots and glass marbles, while it was hard to explain why these young, burly, fanatical *jihadis* did not manage to kill even a single Israeli commando, not even the three who were being held captive by them.<sup>56</sup>

Just as the POI adopted a novel strategy to prove the legality of the blockade, so it also conjured a creative proof that the *Turkel Report's* condemnation of these alleged *jihadis* was on the mark. The POI “seriously questions the true nature and objectives of the flotilla organizers,” because it discovered that they intended not only to deliver humanitarian relief, but also “to generate publicity about the situation in Gaza.” To clinch its indictment, the POI reproduces with a great flourish this incriminating document “prepared by” the organizers:

Purpose: Purposes of this journey are to create an awareness amongst world public and international organizations on the inhumane and unjust embargo on Palestine and to contribute to end this embargo which clearly violates human rights and delivering humanitarian relief to the Palestinians.<sup>57</sup>

The POI then adduces yet more evidence of this sinister and nefarious plot: “The number of journalists embarked on the ships gives further power to the con-

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clusion that the flotilla's primary purpose was to generate publicity."<sup>58</sup> It is to be noted that not even the *Turkel Report* dared impugn the passengers' motive of publicizing the blockade's dire impact.<sup>59</sup> It must be a first, and surely marks a nadir, in the annals of the United Nations that a report bearing its imprimatur vilifies the *victims* of a murderous assault because they sought to cast light on a crime against humanity.<sup>60</sup>

## Endnotes

1. Norman G. Finkelstein, *"This Time We Went Too Far": Truth and Consequences of the Gaza Invasion* (New York: 2010; expanded paperback edition, 2011), pp. 195-96.

2. *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident* (July 2011). (Hereafter: POI)

3. *Ibid.*, pp. 39-40, para. 71; see also *ibid.*, p. 43, para. 78.

4. B'Tselem (Israeli Center for Human Rights in the Occupied Territories), *Statistics* (<http://old.btselem.org/statistics/english/>).

5. POI, p. 40, para. 71.

6. Johannes Haushofer, Anat Biletzki and Nancy Kanwisher, "Both Sides Retaliate in the Israeli-Palestinian Conflict," *Proceedings of the National Academy of Sciences of the United States* (October 4, 2010).

7. POI, p. 40, para. 71.

8. Amnesty International, *Fueling Conflict: Foreign Arms Supplies to Israel/Gaza* (London: February 2009).

9. Amnesty International, "Colombian President Should Stop False Accusations Against Human Rights Group," (November 28, 2008).

10. POI, p. 45, para. 82.

11. *Ibid.*, p. 7, para. 5, p. 38, para. 67. The POI also states that it "will not add value for the United Nations...by arguing endlessly about the applicable law" (*ibid.*, p. 10, para. 15). Nonetheless, it devotes the vast preponderance of the report (including a 25-page appendix) to legal analysis of the blockade.

12. *Ibid.*, p. 4 (viii), p. 61, para. 134, p. 68, para. 151.

13. The POI also *undoes* the law when it suits Israel's purposes. Thus, it refers (p. 40, para. 72) to the "uncertain legal status of Gaza under international law," although the overwhelming international consensus is that, even after Israel's 2005 "disengagement," Gaza has remained "occupied" territory. See Finkelstein, *"This Time,"* pp. 21-22.

14. Amnesty International, "Suffocating Gaza: The Israeli blockade's effects on Palestinians," (June 1, 2010).

15. U.N. Human Rights Council, *Report of the International Fact-Finding Mission to Investigate Violations of International Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance* (September 27, 2010), para. 170.

16. Israel's closure policy in Gaza was first imposed in 1991, and was incrementally tightened as time elapsed, entering its most egregious phase in 2007. See Gisha (Legal Center for Freedom of Movement), *A Guide to the Gaza Closure: In Israel's Own Words* (Tel Aviv: September 2011).



17. The POI, citing the *Turkel Report*, concedes that Israel's blockade policies were "designed to weaken the economy" of Gaza—but then qualifies—"in order to undermine Hamas's ability to attack Israel" (p. 69, para. 153). One can only tremble at the potency of Hamas's military arsenal if Israel had allowed bonbons to enter Gaza.

18. Public Commission to Examine the Maritime Incident of 31 May 2010, *The Turkel Commission Report, Part One* (January 2011) pp. 56-58, my emphases.

19. *Ibid.*, pp. 66-67. It continues: "In other words, as long as the land crossings are subject to Israeli control, there is prima facie a possibility that the opening of an additional route to the Gaza Strip, such as a maritime route that is not controlled by the State of Israel, will affect the humanitarian situation in the Gaza Strip."

20. *Ibid.*, pp. 67-68.

21. *Ibid.*, p. 108.

22. Amichai Cohen and Yuval Shany, "The Turkel Commission's Flotilla Report (Part One): Some critical remarks," *EJIL: Talk!* (January 28, 2011; <http://tinyurl.com/3kh2a52>).

23. Finkelstein, "*This Time*," pp. 210-14.

24. For a recent restatement of this consensus opinion, see "Flotillas and the Gaza Blockade," *Diakonia* (July 2011).

25. The POI's legal strategy recalls the approach of the Israel High Court in the Wall case. In July 2004, the International Court of Justice (ICJ) delivered an advisory opinion that found Israel's construction of a wall inside occupied Palestinian territory illegal. When the Israel High Court subsequently heard the case, it sought to avoid a ruling that frontally contradicted the ICJ. Taking issue with the ICJ's comprehensive finding, the High Court instead proposed that the legality of the Wall should be assessed on a segment-by-segment basis. The High Court also alleged that it possessed data mitigating Israeli culpability that was unavailable to the ICJ. Likewise, the POI alleged (p. 44, para. 81) that it possessed "additional material" unavailable to the U.N. Human Rights Council Fact-Finding Mission, which had found the Israeli blockade illegal. For a juxtaposition of the ICJ advisory opinion and Israel High Court rulings, see Norman G. Finkelstein, *Beyond Chutzpah: On the Misuse of Anti-Semitism and the Abuse of History* (Berkeley: 2005; expanded paperback edition, 2008), pp. 227-70.

26. In a highly misleading footnote, the POI states (p. 43n274 ) that "several international organizations and institutions, including the U.N. High Commissioner for Human Rights and the ICRC, have declared that the land restrictions constitute collective punishments." But in reality these organizations declared not just the "land restrictions" but the whole of Israel's border policy—the land *and* naval blockade—illegal. It was the POI that cooked up the idea that the naval blockade existed independently of the "land restrictions." Revealingly the *Turkel Report* itself acknowledged (p. 75) that "various human rights and humanitarian organizations...conclude that the collapse of the economy of the Gaza Strip derives from the naval blockade imposed by Israel and its land crossings policy"—not just from "land restrictions."

27. POI, p. 105.

28. *Ibid.*, p. 39, para. 70, pp. 42-43, para. 77.

29. *Ibid.*, p. 39, para. 70, p. 43, para. 77.

30. Many of the pertinent criteria on the naval blockade are collected in the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*.

31. POI, p. 45, para. 82.

32. *Contraband* denotes "goods which are ultimately destined for territory under the control of the enemy and which may be susceptible for use in armed conflict" (UK Ministry of Defense, *The Manual of the Law of Armed Conflict* (Oxford: 2005), p. 350).

33. The *Turkel Report* was at pains to argue that the visit and search procedure did not meet the challenge Israel confronted and was replaced by a naval blockade “only” as a last resort. Still, the *Report* alleged (p. 58)—without authoritative citation and against common sense—that “during an armed conflict, it is lawful to impose a naval blockade, without considering alternatives.”

34. POI, p. 40, para. 72, citing *Turkel Report*, p. 33. The three named attempts occurred in, respectively, 2001 (*Santorini*), 2002 (*Karine A*), and 2003 (*Abu Hassan*). The 2002 attempt has been disputed. The *Turkel Report* (p. 37) also alleged a fourth attempt in 2009 (*Tali*), but the POI does not cite it, and not even the Israeli Ministry of Foreign Affairs alleged that this vessel was carrying weapons (<http://tinyurl.com/aqdb7h>). The POI also notes that, “Most recently, Israel intercepted... a vessel on its way from Syria to Egypt, which carried 25 tons of weapons and ammunition suspected to be destined for Gaza” (p. 40n258). Would the POI also sustain an Israeli naval blockade imposed on Egypt?

35. POI, pp. 40-41, para. 72, p. 42, para. 74, citing *Turkel Report*, pp. 54-56. The *Turkel Report* (p. 58) alleged that visit and search was impracticable because of the “virtual certainty that consent for search would not be granted by the Masters of the ships bent on reaching Gaza,” and “it was not certain that the consent of the flag State would actually be obtained.” The *Turkel Report* provided no basis—because none existed—for its “virtual certainty,” while in fact Israel’s real problem—more on which presently—was the “virtual certainty” that it would not find any weapons after such a search and consequently had to let the ships pass. In another desperate iteration, the *Turkel Report* alleged (p. 60) that “a key requirement is that such a right [of visit and search] cannot be arbitrarily exercised. The challenge that confronted the Israeli authorities was to obtain sufficient information regarding the cargo and/or personnel on board the vessels in order to find a ground for suspicion that the vessel is engaged in transporting contraband, enemy combatants.” But the *Report* provided no example or illustration of how such a requirement in practice proved a hindrance. Other countries have exercised the right of visit and search on the basis of reasonable suspicion in wartime; why did it work elsewhere? Additionally, the *Turkel Report* alleged (p. 59) that Israel could not resort to the lesser measure of declaring Gaza’s coastal waters an “exclusion zone” because “there is a lack of clarity in the law as to whether such a zone provides an authority to *only* search for contraband” (my emphasis). In other words, the problem was that declaring an “exclusion zone” did not explicitly allow Israel to turn back vessels *not* carrying contraband.

36. POI, p. 40, para. 72, citing *Turkel Report*, pp. 53-54 (see also *Turkel Report*, pp. 60, 91).

37. POI, p. 27, para. 46, citing *Turkel Report*, pp. 53-58, 111 (see also *Turkel Report*, pp. 91-92).

38. POI, p. 40, para. 72, p. 42, para. 77. The POI also appears to allege, copying from the *Turkel Report*, that the recent decrease in Hamas rocket and mortar attacks on Israel has somehow been related to the naval blockade (pp. 40-41, para. 72, citing *Turkel Report*, pp. 92-93). The basis for this claim is, to put it charitably, on the thin side, not least because the POI adduces no evidence that weapons *ever* reached Gaza by sea.

39. Between August and December 2008 Israel let six vessels pass into Gaza (*Turkel Report*, pp. 35, 59).

40. Finkelstein, “*This Time*,” p. 184.

41. *Turkel Report*, p. 36; my emphasis.

42. *Ibid.*, pp. 54-56; my emphasis.

43. POI, p. 39, para. 70.

44. *San Remo Manual* (1994), “Section II: Visit and Search of Merchant Vessels.”

45. POI, p. 68, para. 151.

46. *Ibid.*, p. 43, para. 78 (see also *ibid.*, p. 41, para. 72).

47. *Ibid.*, p. 87, para. 33. See also International Committee of the Red Cross, *Customary International Humanitarian Law, Volume I, Rules* (Cambridge: 2005), p. 189.

48. *Turkel Report*, p. 66:

The absence of a commercial port is not a decisive factor, since it is clear that it is possible to find other ways of transporting goods arriving by sea, such as by means of unloading the goods with the help of fishing boats. Moreover, the assumption that goods cannot be transported into the Gaza Strip in the absence of a commercial port inherently contradicts the main purpose of the blockade, i.e., preventing the passage of weapons to the Gaza Strip, since, according to the same logic, it would not be at all possible to transport weapons to the Gaza Strip by sea.

49. *Ibid.*

50. Downplaying the humanitarian potential of a maritime passageway to Gaza, the POI states (p. 43, para. 78): "Smuggling weapons by sea is one thing; delivering bulky food and other goods to supply a population of approximately 1.5 million people is another." It can just as easily be said, "Smuggling bulky weapons by sea is one thing, delivering desperately needed medicines and other goods to supply a population...."

51. *Ibid.*, p. 48, para. 92.

52. *Ibid.*, p. 49, para. 96, p. 67, para. 148, pp. 67-68, para. 149, p. 71, para. 159.

53. Finkelstein, "*This Time*," p. 53.

54. POI, p. 68, para. 151, p. 69, para. 154.

55. Finkelstein, "*This Time*," p. 166.

56. *Ibid.*, pp. 222-25.

57. POI, p. 46, paras. 86-87.

58. *Ibid.*, p. 47, para. 89.

59. The *Turkel Report* flatly says (p. 66): "The goal of the Flotilla was obviously not just to break the blockade, but also to bring international pressure to bear in a bid to end the land based restrictions."

60. Compounding obscenity by imbecility, the POI (p. 47, para. 88, p. 48, para. 93) also condemns this clique of publicity-plotters for not sufficiently warning the other passengers of the dangers that lurked in the event that they attempted to breach the blockade. As if the other activists who joined the flotilla hadn't a clue that Israel was capable of committing violence.

