Israel's Attack on the Mavi Marmara and the Illegal Blockade of Gaza

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The Mavi Marmara, May 22, 2010 (Free Gaza Movement/CC BY-SA 2.0)

Israel's attack on the Mavi Marmara on May 31, 2010, as the ship was attempting to break Israel's illegal blockade of Gaza, was a war crime.

Nine years ago today, on May 31, 2010, Israeli military forces intercepted a humanitarian flotilla intent on breaking Israel's illegal blockade of the Gaza Strip, attacked the flagship *Mavi Marmara* in international waters, and killed nine civilians on board — a war crime. This action was naturally defended by the Israeli government and its supporters, but the arguments put forth to try to justify the crime demonstrate the extraordinary dishonesty required to do so.

The key arguments made to justify the attack were usefully summarized in an article published by the Jerusalem Center for Public Affairs on July 18, 2010. It was titled "The Legal Basis of Israel's Naval Blockade of Gaza" and written by Ruth Lapidoth, Professor Emeritus of International Law at the Hebrew University of Jerusalem.

Lapidoth began by arguing that "the rules of the laws of armed conflict apply" to the "armed conflict" between Israel and Hamas, the organization ruling the Palestinian territory of the Gaza Strip, whose residents have suffered under a crippling blockade imposed by Israel.

From this premise, Lapidoth drew the conclusion that "Israel may control shipping headed for Gaza — even when the vessels are still on the high seas."

She arrived at that conclusion by arguing, "The rules on blockade are based on customary international law, as there is no comprehensive international treaty on this subject. . . . The customary rules on blockade can be found in the manuals of the laws of war issued by certain Western countries such as the United States and Britain. In addition, there is a manual prepared by an international group of experts in 1994 called the San Remo Manual."

But by claiming that we must depend upon *customary* international law to decide whether or not a blockade is legal or not, Lapidoth implied that the body of *formal* international law is somehow irrelevant and inapplicable; and thus Lapidoth was able to ignore, for example, Article 2 of the UN Charter, which states: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. . . . All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Article 33 of the Charter prescribes the proper course for seeking remedy to an international dispute or grievance: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

For Member states, without prejudice to their inherent right to self-defense, it is up to the UN Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression", and to "make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security" (Article 39).

If the Security Council finds that such a situation exists, it may authorize the use of force "as may be necessary to maintain or restore international peace and security", including the implementation of a "blockade" (Article 42).

Thus, Israel had a legal obligation to bring any grievances it had to the UN Security Council, which could authorize a blockade if deemed necessary. Yet Israel rather implemented its blockade unilaterally, without UN authorization.

This is not to say that a naval blockade may not be implemented under any circumstances without UN authorization. Again, nations have an inherent right to self-defense, and a blockade may be implemented as a legitimate measure to defend against an "armed attack"; but any such measures "shall be immediately reported to the Security Council" (Article 51).

Simply announcing a blockade, though, which Israel did not formally do until 2009, is not enough to make it lawful. Even if it may be considered an act of self-defense against armed aggression, it must

still comply with the rules of international law; furthermore, Israel had additional obligations as the Occupying Power in Gaza.

Far from receiving UN sanction for its imposed blockade, Israel continued it in *violation* of Security Council Resolution 1860 of January 2009, which called for "the unimpeded provision and distribution throughout Gaza of humanitarian assistance, including of food, fuel and medical treatment".

Israel is also a party to the Fourth Geneva Convention, which prohibits any acts constituting collective punishment of a civilian population: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited" (Article 33).

After Hamas won legislative elections in 2006, Israel and the US conspired with Palestinian Authority President Mahmoud Abbas and his Fatah party to overthrow the new Hamas government. The coup attempt failed in Gaza, however, where Hamas expelled Fatah and consolidated its rule. In response, Israel implemented a policy of blockading Gaza in order to punish its residents for having Hamas as their governing authority.

The purpose of the blockade was described by Prime Minister Ariel Sharon's senior adviser Dov Weissglass as being "like an appointment with a dietician. The Palestinians will get a lot thinner, but won't die."

"Israeli officials have confirmed to Embassy officials on multiple occasions", a 2008 State Department cable to US Secretary of State Condoleezza Rice informed, "that they intend to keep the Gazan economy functioning at the lowest level possible consistent with avoiding a humanitarian crisis."

The cable reiterated, "As part of their overall embargo plan against Gaza, Israeli officials have confirmed to econoffs [US embassy economic officers] on multiple occasions that they intend to keep the Gazan economy on the brink of collapse without quite pushing it over the edge".

It is Israel's intent with its blockade to collectively punish the civilian population of Gaza, and regardless of intent, that is the blockade's effect. Therefore, the blockade is a violation of international law.

Continuing, Israel is legally obligated under the Fourth Geneva Convention to allow humanitarian shipments into Gaza: "To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate" (Article 54).

Additionally, "If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all means at its disposal", including "consignments of foodstuffs, medical supplies and clothing." Israel is obligated to "permit the free passage of these consignments" and to "guarantee their protection" (Article 59).

There is no allowance under international law for the types of restrictions that Israel still continues to impose on Gaza that harm the general economy, such as restrictions on the importation of cement needed for construction projects or the movement of other goods and people in and out of the Strip.

Lapidoth acknowledged that "A blockade has to permit the passage of humanitarian assistance if needed"; but, she argued, "the San Remo Manual includes two conditions (in Article 103): first, the blockading party may decide where and when and through which port the assistance should reach the coast. In addition, the state may require that a neutral organization on the coast should control the distribution of the items."

However, these conditions would only apply in cases where there was a legitimate and lawful blockade to begin with and thus didn't apply to Israel's unilateral blockade, which the International Committee of the Red Cross and other international bodies and human rights organizations had authoritatively declared to be an illegal act of collective punishment.

Examining what the San Remo Manual actually has to say about the matter is revealing.

It applies to "armed conflict at sea" (Article 1). Yet there was no armed conflict at sea in this case. Gaza had no navy (nor an army or air force, for that matter). Attacks against Israel were limited to rockets and mortars fired by militant groups from land against targets on land. But for the sake of argument let's just assume that the San Remo Manual was applicable.

It explicitly states that the "principles of necessity and proportionality apply equally to armed conflict at sea" (Article 3) and that "Parties to the conflict shall at all times distinguish between civilians or other protected persons and combatants and between civilian or exempt objects and military objectives" (Article 39).

It defines "military objectives" as "those which . . . make an effective contribution to military action" (Article 40).

Any attacks must be "limited strictly to military objectives", and merchant vessels not making a military contribution "are civilian objects" (Article 41).

Any attacks that "are of a nature to cause superfluous injury or unnecessary suffering" or that "are indiscriminate" because they "are not, or cannot be, directed against a specific military objective" are strictly "forbidden" (Article 42).

A further obligation is to "take all feasible precautions in the choice of methods and means in order to avoid or minimize collateral casualties or damage". Also forbidden is any attack that "may be expected to cause collateral casualties or damage which would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole" (Article 46).

Additionally, among the vessels that "are exempt from attack" are "vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations", as well as "passenger vessels when engaged only in carrying civilian passengers" (Article 47).

Finally, any blockade that "has the sole purpose of starving the civilian population or denying it other objects essential for its survival", or which causes "damage to the civilian population" that "is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade", is strictly "prohibited" (Article 102).

It is eminently clear that according to the very document Lapidoth cited to justify Israel's actions, the attack on the *Mavi Marmara* was illegal, as is Israel's ongoing blockade of the Gaza Strip.

Lapidoth did acknowledge in passing that "there is the condition that a state may not starve the civilian population", but she offered no further comment. Even if one could argue that blocking humanitarian supplies was not Israel's "sole" purpose, the fact remained that the continued suffering of the civilian population was a known consequence of the blockade, which was by any rational measure indiscriminate, disproportionate, and otherwise excessive in relation to any possible military objective.

Ignoring all of the above, Lapidoth argued further that a "merchant ship may be visited, searched, or captured", and that "it may be attacked" if it "resists". She asserted that any ship "that clearly intends to breach" a lawful blockade could be "dealt with while it is still on the high seas." From this, she concluded that Israel's capture of the flotilla ships "in international waters" was "legal".

But, again, this wrongly assumes a lawful blockade to begin with, and, furthermore, the San Remo Manual explicitly states that the "visit and search" of "merchant vessels" may occur only when "there are reasonable grounds for suspecting that they are subject to capture" (Article 118).

No such grounds existed with regard to ships Lapidoth acknowledged were "engaged in humanitarian missions" and which were thus exempt from attack regardless of the lawfulness of the blockade itself.

Furthermore, the flotilla ships were forcibly redirected to Israel, while the San Remo Manual specifically states that only "with its consent" may a merchant vessel "be diverted from its declared destination" (Article 119).

Lapidoth cited previous blockades, such as during the Korean War and the Iran-Iraq War, without explaining what relevance those instances had to this case. She again proclaimed that Israel "acted in compliance with international law because it has fulfilled all the conditions for a lawful blockade", including having "notified the relevant authorities of its blockade in Gaza".

In fact, Israel had *not* fulfilled all the conditions for a legal blockade, as we've just seen. When Lapidoth said "all the conditions", she just meant those she had cherry-picked to support her case, the obvious reason for her omission of all the *other* conditions being that Israel *hadn't* met them; hence to mention them would have proved problematic for the conclusion she desired to arrive at.

Finally, Lapidoth addressed the question of whether Israel was the legal Occupying Power in Gaza. "Some say that since Israel is still in control of Gaza's airspace and adjacent sea, Israel is still the occupier", she wrote, without bothering to identify who "Some" were — i.e., UN bodies, the ICRC, human rights organizations, etc.; essentially, the entire international community.

"According to another opinion," she wrote — i.e., Israel's — "under the Hague Regulations of 1907 (Respecting the Laws and Customs of War on Land), occupation has to include full control of the area. ('Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.' — Article 42), and of course Israel does not control the whole territory of Gaza. Therefore, it is not responsible for what happens there."

She concluded, "In my opinion, since Israel is not in control of Gaza, it is not the occupier, but in those areas in which Israel still has control — which means sea and airspace — Israel is responsible."

Yet all one must do to recognize the fallacy of this argument is to read what Article 42 of the Hague Regulations of 1907 actually says, which she conveniently quoted for us. It simply does *not* say that a country must "control the whole territory" for it to be considered occupied.

It is extraordinary that Lapidoth could proclaim that Israel was in control "only" of Gaza's sea and airspace, as if there was no sign of its blockade policy at Gaza's *borders*. Israel cannot on one hand place Gaza's land, sea, and airspace under its military control while on the other maintaining that the conditions of occupation do not exist, that "it is not responsible for what happens there."

Apologists for the Israeli attack on the *Mavi Marmara* have claimed that the nine activists were killed in an Israeli act of "self-defense" against passengers aboard the ship who attacked Israeli commandos with clubs and knives. However, it must be recognized that: (a) the inherent right to self-defense against armed aggression belongs not to commandos illegally storming peaceful vessels on humanitarian missions in international waters, but to the civilian passengers aboard; and (b) the Israeli attack, being against a civilian and not a military target and in enforcement of an unlawful blockade of Gaza, was a war crime in and of itself, with the murder of nine peace activists being an additional crime for which there is no justification under international law.

To illustrate the absurdity of the logic of Israeli apologists, we may contemplate a simple thought experiment: an armed robber who has broken into a home and killed the homeowner argues before the court that he committed no crime because the homeowner attacked him with a knife, and therefore his act of killing was an exercise of his right to self-defense. Would any self-respecting judge or jury member take this legal defense seriously?

Likewise, the arguments used to defend Israel's criminal blockade and murderous attack on the *Mavi Marmara* cannot be taken seriously. They are not intended to be taken seriously. They are intended only to fool those who *wish* to be fooled and blinded, as anyone with eyes to see can see.

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