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A1. UN-Appointed Palmer Commission, Report on the Gaza Flotilla incident, New York, July 2011 (excerpts).

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DOCUMENTS AND SOURCE MATERIAL

INTERNATIONAL

A1. UN-APPOINTED PALMER COMMISSION, REPORT ON THE GAZA FLOTILLA INCIDENT, NEW YORK, JULY 2011 (EXCERPTS).

On 2 August 2010, in response to the continuing fallout over Israel's 31 May 2010 attack on a humanitarian aid flotilla bound for Gaza that resulted in the death of nine Turkish citizens, the UN Secretary formally established a panel of inquiry into the incident. The six-vessel flotilla, led by the Turkish-owned Mavi Marmara and heading toward Gaza with the stated intention of breaking Israel's siege, was boarded by Israeli forces some seventy-two nautical miles out to sea. The incident further strained Israeli-Turkish relations, which had deteriorated sharply over Israel's Operation Cast Lead in 2008–9.

The panel, which held its first meeting on 10 August 2010, consisted of four members: two appointed by the UN (former New Zealand president Sir Geoffrey Palmer, as chair, and former Colombian president Alvaro Uribe, as vice-chair), and one member each from Israel and Turkey appointed by their respective governments. As spelled out in the report's introductory sections, the panel's work was based primarily on the reports commissioned by the Israeli and Turkish governments, submitted respectively on 23 January and 11 February 2011; additional information deemed necessary by the panel was to be provided via official "points of contact" designated by Israel and Turkey. According to the report's introduction, "the essential logic of the Panel's inquiry is that it is dependent upon the investigations conducted by Israel and Turkey."

The 105-page Palmer Report was completed in (and carries the official date of) July 2011, but its formal release was delayed until 2 September 2011 in a futile attempt to give the two parties additional time to reconcile their differences (see under "Turkey" in this issue's Quarterly Update). When the report was

finally issued, Israel largely welcomed its fairness and balance and the prime minister's office adopted it except for its conclusion on the use of force in the flotilla raid (see excerpts below). Turkey, by contrast, denounced its findings and Turkish president Abdullah Gul declared it "null and void."

Appendix II comprises separate statements by the Israeli and Turkish members, Mr. Joseph Ciechanover Itzbar and Mr. Suleyman Ozdem Sanberk, which confirm their governments' assessments. Mr. Ciechanover's statement begins by adopting the report, expressing Israel's "appreciation" for the "important work of the panel," thanking the chair and vice-chair "for their leadership," and declaring that the report "should send a message to the international community about the need . . . to avoid prejudging an incident before all the facts are known." After enumerating the many points of agreement between Israel and the panel's two UN-appointed members, Mr. Ciechanover notes a single point on which Israel cannot concur—the panel's characterization of Israel's "decision to board the vessels in the manner it did as 'excessive and unreasonable'"—and devotes the rest of his statement to rebutting this finding. Mr. Suleyman's statement, which is reproduced in full below, rejects ten of the numbered points contained in the report's summary section, which is also reproduced in its entirety. The full text is available on the UN's website at www.un.org.

(For purposes of comparison, the reader might refer to the 27 September 2011 report by the international fact-finding mission appointed by the UN Human Rights Council [UNHRC] to investigate the flotilla incident; Doc. A4 in JPS 158.)

Summary

On 31 May 2010 at 4.26 a.m. a flotilla of six vessels was boarded and taken over by Israeli Defense Forces 72 nautical miles from land. The vessels were carrying people and humanitarian supplies. The flotilla had been directed to change

course by the Israeli forces who stated that the coast of Gaza was under a naval blockade. Nine passengers lost their lives and many others were wounded as a result of the use of force during the take-over operation by Israeli forces.

The Secretary-General established the Panel of Inquiry on the 31 May 2010 Flotilla Incident on 2 August 2010. The Panel received and reviewed reports of the detailed national investigations conducted by both Turkey and Israel. Turkey established a National Commission of Inquiry to examine the facts of the incident and its legal consequences, which provided an interim and final report to the Panel along with annexes and related material. Israel provided the report of the independent Public Commission that it had established to review whether the actions taken by the State of Israel had been compatible with international law.

The Panel reviewed these reports and further information and clarifications it received in written form and through direct meetings with Points of Contact appointed by each government. In light of the information so gathered, the Panel has examined and identified the facts, circumstances and context of the incident and considered and recommended ways of avoiding similar incidents in the future. In so doing it was not acting as a Court and was not asked to adjudicate on legal liability. Its findings and recommendations are therefore not intended to attribute any legal responsibilities. Nevertheless, the Panel hopes that its report may resolve the issues surrounding the incident and bring the matter to an end.

The Panel's Method of Work provided that the Panel was to operate by consensus, but where, despite best efforts, it was not possible to achieve consensus, the Chair and Vice-Chair could agree on any procedural issue, finding or recommendation. This report has been adopted on the agreement of the Chair and Vice-Chair under that procedure.

Facts, Circumstances and Context of the Incident

The Panel finds:

- i. The events of 31 May 2010 should never have taken place as they did

and strenuous efforts should be made to prevent the occurrence of such incidents in the future.

- ii. The fundamental principle of the freedom of navigation on the high seas is subject to only certain limited exceptions under international law. Israel faces a real threat to its security from militant groups in Gaza. The naval blockade was imposed as a legitimate security measure in order to prevent weapons from entering Gaza by sea and its implementation complied with the requirements of international law.
- iii. The flotilla was a nongovernmental endeavor, involving vessels and participants from a number of countries.
- iv. Although people are entitled to express their political views, the flotilla acted recklessly in attempting to breach the naval blockade. The majority of the flotilla participants had no violent intentions, but there exist serious questions about the conduct, true nature and objectives of the flotilla organizers, particularly IHH [Turkish Humanitarian Relief Foundation]. The actions of the flotilla needlessly carried the potential for escalation.
- v. The incident and its outcomes were not intended by either Turkey or Israel. Both States took steps in an attempt to ensure that events did not occur in a manner that endangered individuals' lives and international peace and security. Turkish officials also approached the organizers of the flotilla with the intention of persuading them to change course if necessary and avoid an encounter with Israeli forces. But more could have been done to warn the flotilla participants of the potential risks involved and to dissuade them from their actions.
- vi. Israel's decision to board the vessels with such substantial force at a great distance from the blockade zone and with no final warning immediately prior to the boarding was excessive and unreasonable:

- a. Nonviolent options should have been used in the first instance. In particular, clear prior warning that the vessels were to be boarded and a demonstration of dissuading force should have been given to avoid the type of confrontation that occurred;
- b. The operation should have reassessed its options when the resistance to the initial boarding attempt became apparent.
- vii. Israeli Defense Forces personnel faced significant, organized and violent resistance from a group of passengers when they boarded the *Mavi Marmara* requiring them to use force for their own protection. Three soldiers were captured, mistreated, and placed at risk by those passengers. Several others were wounded.
- viii. The loss of life and injuries resulting from the use of force by Israeli forces during the take-over of the *Mavi Marmara* was unacceptable. Nine passengers were killed and many others seriously wounded by Israeli forces. No satisfactory explanation has been provided to the Panel by Israel for any of the nine deaths. Forensic evidence showing that most of the deceased were shot multiple times, including in the back, or at close range has not been adequately accounted for in the material presented by Israel.
- ix. There was significant mistreatment of passengers by Israeli authorities after the take-over of the vessels had been completed through until their deportation. This included physical mistreatment, harassment and intimidation, unjustified confiscation of belongings and the denial of timely consular assistance.

How to Avoid Similar Incidents in the Future

The Panel recommends:

With respect to the situation in Gaza

- i. All relevant States should consult directly and make every effort to avoid a repetition of the incident.
- ii. Bearing in mind its consequences and the fundamental importance

of the freedom of navigation on the high seas, Israel should keep the naval blockade under regular review, in order to assess whether it continues to be necessary.

- iii. Israel should continue with its efforts to ease its restrictions on movement of goods and persons to and from Gaza with a view to lifting its closure and to alleviate the unsustainable humanitarian and economic situation of the civilian population. These steps should be taken in accordance with Security Council resolution 1860, all aspects of which should be implemented.
- iv. All humanitarian missions wishing to assist the Gaza population should do so through established procedures and the designated land crossings in consultation with the Government of Israel and the Palestinian Authority.

General

- v. All States should act with prudence and caution in relation to the imposition and enforcement of a naval blockade. The established norms of customary international law must be respected and complied with by all relevant parties. The San Remo Manual provides a useful reference in identifying those rules.
- vi. The imposition of a naval blockade as an action in self-defense should be reported to the Security Council under the procedures set out under Article 51 of the Charter. This will enable the Council to monitor any implications for international peace and security.
- vii. States maintaining a naval blockade must abide by their obligations with respect to the provision of humanitarian assistance. Humanitarian missions must act in accordance with the principles of neutrality, impartiality and humanity and respect any security measures in place. Humanitarian vessels should allow inspection and stop or change course when requested.
- viii. Attempts to breach a lawfully imposed naval blockade place the

vessel and those on board at risk. Where a State becomes aware that its citizens or flag vessels intend to breach a naval blockade, it has a responsibility to take proactive steps compatible with democratic rights and freedoms to warn them of the risks involved and to endeavor to dissuade them from doing so.

- ix. States enforcing a naval blockade against nonmilitary vessels, especially where large numbers of civilian passengers are involved, should be cautious in the use of force. Efforts should first be made to stop the vessels by nonviolent means. In particular, they should not use force except when absolutely necessary and then should only use the minimum level of force necessary to achieve the lawful objective of maintaining the blockade. They must provide clear and express warnings so that the vessels are aware if force is to be used against them.

Rapprochement

- x. An appropriate statement of regret should be made by Israel in respect of the incident in light of its consequences.
- xi. Israel should offer payment for the benefit of the deceased and injured victims and their families, to be administered by the two governments through a joint trust fund of a sufficient amount to be decided by them.
- xii. Turkey and Israel should resume full diplomatic relations, repairing their relationship in the interests of stability in the Middle East and international peace and security. The establishment of a political roundtable as a forum for exchanging views could assist to this end.

...

Statement by Mr. Sanberk

I hereby register my disagreement with the Chairmanship on the following issues contained in the report:

- The question of the legality of the blockade imposed on Gaza by Israel.

- The actions of the flotilla
- Naval blockades in general
- Appendix: The applicable International legal principles.

This, for the following reasons:

- On the legal aspect of the blockade, Turkey and Israel have submitted two opposing arguments. International legal authorities are divided on the matter since it is unprecedented, highly complex and the legal framework lacks codification. However, the Chairmanship and its report fully associated itself with Israel and categorically dismissed the views of the other, despite the fact that the legal arguments presented by Turkey have been supported by the vast majority of the international community. Common sense and conscience dictate that the blockade is unlawful.
- Also the UN Human Rights Council concluded that the blockade was unlawful. The Report of the Human Rights Council Fact Finding Mission received widespread approval from the member states.
- Freedom and safety of navigation on the high seas is a universally accepted rule of international law. There can be no exception from this long-standing principle unless there is a universal convergence of views.
- The intentions of the participants in the international humanitarian convoy were humanitarian, reflecting the concerns of the vast majority of the international community. They came under attack in international waters. They resisted for their own protection. Nine civilians were killed and many others were injured by the Israeli soldiers. One of the victims is still in a coma. The evidence confirms that at least some of the victims had been killed deliberately.
- The wording in the report is not satisfactory in describing the actual extent of the atrocities that the victims have been subjected to. This includes the scope of the maltreatment suffered by the passengers in the hands of Israeli soldiers and officials.

In view of the above, I reject and dissociate myself from the relevant parts and paragraphs of the report, as reflected in paragraphs ii, iv, v, vii of the findings contained in the summary of the report and paragraphs ii, iv, v, vii, viii and ix of the recommendations contained in the same text.