

THE FLOTILLA INCIDENT FROM THE PERSPECTIVE OF INTERNATIONAL LAW AND THE JUDICIAL RIGHTS OF THE VICTIMS

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Abstract: The Mavi Marmara flotilla, which sailed for a humanitarian mission and aimed to break the Israeli blockade to Gaza, was intercepted by the Israeli soldiers on high sea on 31st May 2010. In this raid, nine civilians have lost their lives on the spot and 55 others were wounded. States and their agents can be held accountable if they commit crimes. Therefore, the Mavi Marmara victims have the right to sue at national and international level the Israeli officers who took part in the operation. Some victims have filed criminal and civil cases before the Turkish courts against Israel and its officers. Besides these judicial cases brought before the national courts, a referral was also made by the Union of the Comoros, flag country of the Mavi Marmara vessel, to the International Criminal Court. Meanwhile, Turkey and Israel have signed a bilateral agreement for the compensation of the bereaved families. This compensation agreement clears Israel and its officers off all legal responsibilities arising from the flotilla incident before the Turkish courts. This bilateral agreement is a legal obstruction imposed to the victims in their quest of justice. The Turkish Court of Cassation, in its recent decisions, has requested the courts of first instance to take into consideration the provisions of the said agreement. Despite the above mentioned agreement, the victims shall have still the right to sue the Israeli officials responsible for the flotilla incident before national, foreign and international courts, on the grounds of crime against humanity, provided that the necessary requirements are fulfilled.

Keywords: Compensation Agreement, International Criminal Court, International Law, Mavi Marmara flotilla, San Remo Manual

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1. INTRODUCTION

The main objective of the Mavi Marmara flotilla was to draw the attention of the international community to the Israeli blockade on Gaza and, if possible, to break

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symbolically this blockade. In this respect, the Mavi Marmara and the other accompanying vessels were transporting food and medicine for Gazan people. The passengers on these vessels were volunteers and human rights defenders from several countries.

Although the Israeli authorities were aware of the flotilla's mission and the nature of cargo it was transporting, they have intervened the Mavi Marmara and other accompanying vessels on 31st May 2010, on high seas. During the raid, nine persons were killed and many volunteers were wounded.

The disproportional intervention of the Israeli forces against unarmed civilians on high seas has caused outrage of the international community. Due to the intensifying pressure of the international public opinion, the Israeli authorities were compelled to alleviate the blockade against Gaza. Along with this modest step, the Israeli authorities tried to justify their military intervention to the flotilla from the perspective of international law, while the Turkish government accused the Israeli authorities for violating basic principles of the international law and for killing Turkish citizens in international waters.

In the first part of this article, the legality of the Israeli blockade against Gaza will be discussed from the perspective of international law and the "San Remo Manual on International Law Applicable to Armed Conflicts at Sea"² (hereinafter, San Remo Manual). In the second part, the legality of the Israeli military intervention to the flotilla on high sea will be examined from the perspective of international law. In the third part, the international reports regarding the Mavi Marmara flotilla incident and their contradictory conclusions will be analyzed. In the fourth section, the legal responsibility of the Israeli authorities in the incident and the victims' rights to sue Israel and its officers at international and national levels will be treated. In this respect, the referral of the Union of the Comoros (hereinafter, Comoros), flag state of the Mavi Marmara vessel, against Israel before the International Criminal Court (ICC) will be treated. Subsequently, the agreement between Turkey and Israel regarding the compensation of the Mavi Marmara victims will be examined article by article; and consequently, the recent decisions of the Turkish Court of Cassation regarding the indemnity claims of the Mavi Marmara victims, upon the conclusion of the said agreement, will be explored.

2. ISRAEL'S BLOCKADE AGAINST GAZA FROM THE PERSPECTIVE OF INTERNATIONAL LAW

The blockade imposed to Gaza since 2007 by the Israeli authorities³ has deprived the civilians from food, medicine and sufficient access to public services, such as electricity,

² "San Remo Manual on International Law Applicable to Armed Conflicts At Sea", a reference for international customary law, was drafted between 1987 and 1994 by military experts, former diplomats and academics specialized on maritime issues. The San Remo Manual sets the conditions and limits of the use of force in conflicts at seas and oceans. This Manual, which is not binding as an international legal document, is a reference point for the international customary law to determine the rules of engagement and the rules to respect during the conflicts at seas and oceans.

³ Israel claims that the naval blockade was imposed in 2009 and not in 2007. Before that date, land and air blockades were already in force. In the Israeli national report regarding the flotilla incident, it is read that

clean water, health services etc. It is widely accepted by the international community that the Gaza people is denied from essential humanitarian needs and that their daily lives have become unsustainable (Amnesty International, 2017).

Israeli authorities have pretended that the objective of the naval blockade was to deny the access of weapons to Gaza and therefore the blockade was legitimate (Israeli National Report-1, para. 48). In fact, Israel could prevent arms trafficking to Gaza by regular border controls and did not need to impose a complete and severe blockade. Meanwhile, some Israeli politicians have declared that the objective of the blockade was to punish Gaza people for their support to Hamas in 2006 elections, and expected that, thanks to the blockade, the Gaza people will blame Hamas for their sufferings and eventually the latter will lose popularity and support on the ground (The Independent, 2014). It is clear that such a political reasoning cannot justify a blockade from the perspective of international law.

According to the San Remo Manual, a blockade in conformity with international law shall:

- be declared and notified to all belligerents and neutral States (article 93)
- the commencement, duration, location, and extent of the blockade and the period within which vessels of neutral States may leave the blockaded coastline be declared (article 94)
- not have the sole purpose of starving the civilian population or denying it other objects essential for its survival. The damage to the civilian population shall not be excessive in relation to the concrete and direct military advantage anticipated from the blockade (article 102)
- permit the passage of adequate food and other objects essential for the survival of the civilian population living in the blockaded territory. The blockading party must provide for free passage of such foodstuffs and other essential supplies (article 103).

In contradiction with article 94 of the San Remo Manual, the decade-long blockade of Israel on Gaza seems to be permanent.⁴ A blockade cannot last for an indefinite period and shall cease at the earliest possible. It is largely accepted by the international public opinion that the Gaza people do not have access to basic humanitarian needs and suffer severely from the blockade (Reuters, 2010; UN Radio, 2010), which shows that the articles 102 and 103 of the San Remo Manual are ignored.

“After the Hamas terrorist organization seized control of the Gaza Strip in June 2007, the Government adopted various measures. Later, on January 3, 2009, a naval blockade was also imposed on the Gaza Strip.”, (Israeli National Report-1, para. 1).

⁴ Israeli authorities have not envisaged any deadline for the naval blockade. In the Israeli national report regarding the flotilla incident, it is stated that *“The NOTMAR of January 3, 2009, states that ‘Gaza maritime area is closed to all maritime traffic and is under blockade imposed by the Israeli Navy until further notice.’”*, (Israeli National Report-1, para. 59.)

On the other hand, according to the international law, the Palestinian territories are under occupation and the occupier has obligations, such as protecting civilians, ensuring basic humanitarian needs like food, medicine etc., towards the population of the occupied lands. Due to the blockade, the occupying force, namely Israel, fails to fulfill its responsibilities towards Palestinians. Israel pretends that with its withdrawal from Gaza in 2005, its responsibilities stemming from international humanitarian law as an occupier force have ceased (Israeli National Report-1, para. 23).

Despite the Israeli withdrawal from Gaza in 2005, Israel continued to control land, aerial and naval entry-exit points to and from Gaza; checked customs and cargos; controlled communication and even collection of taxes. Therefore it is hard to assess that the responsibilities arising from the occupier status have terminated. “The Report of the United Nations Fact-Finding Mission on the Gaza Conflict”⁵ underlines that,

“Given the specific geopolitical configuration of the Gaza Strip, the powers that Israel exercises from the borders enable it to determine the conditions of life within the Gaza Strip. Israel controls the border crossings (including to a significant degree the Rafah crossing to Egypt, under the terms of the Agreement on Movement and Access) and decides what and who gets in or out of the Gaza Strip. It also controls the territorial sea adjacent to the Gaza Strip and has declared a virtual blockade and limits to the fishing zone, thereby regulating economic activity in that zone. It also keeps complete control of the airspace of the Gaza Strip, inter alia, through continuous surveillance by aircraft and unmanned aviation vehicles (UAVs) or drones. It makes military incursions and from time to time hit[s] targets within the Gaza Strip. No-go areas are declared within the Gaza Strip near the border where Israeli settlements used to be and enforced by the Israeli armed forces. Furthermore, Israel regulates the local monetary market based on the Israeli currency (the new sheqel) and controls taxes and custom duties.” (UN Human Rights Council Report, 25 September 2009, para. 278).

Israel argues also that it is in an armed conflict with Hamas and therefore the blockade against Gaza is legal and legitimate (Israeli National Report-1, paras. 41 and 171). Despite the above mentioned arguments of the Israeli authorities, it is hard to consider the blockade as legal since article 33 of the Fourth Geneva Convention prohibits collective punishment.⁶ UNHRC Report characterized the blockade as a form of “collective punishment” and made the following observation: *“The conditions of life in Gaza, resulting from deliberate actions of the Israeli armed forces and the declared policies of the Government of Israel – as they were presented by its authorized and legitimate representatives – with regard to the Gaza*

⁵ The United Nations Fact-Finding Mission on the Gaza Conflict was headed by Justice Richard Goldstone, former judge of the Constitutional Court of South Africa and former Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda.

⁶ *“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. Pillage is prohibited. Reprisals against protected persons and their property are prohibited.”*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Article 33.

Strip before, during and after the military operation, cumulatively indicate the intention to inflict collective punishment on the people of the Gaza Strip in violation of international humanitarian law.” (UN Human Rights Council Report, 25 September 2009, para. 74).

3. ISRAELI MILITARY INTERVENTION TO THE MAVI MARMARA FLOTILLA FROM THE PERSPECTIVE OF INTERNATIONAL LAW

Articles 41 and 42 of the San Remo Manual stipulate that the attacks at seas shall be limited strictly to military targets and civilians not be targeted. In addition to this, article 47 exempts “vessels engaged in humanitarian missions” and “passenger vessels” from attacks⁷ and article 136 exempts them from capture. On the other hand, according to the articles 67, 98 and 146 of the San Remo Manual, “merchant vessels” trying to breach a blockade can be captured and, if they resist, can be attacked. Israeli authorities have referred to these articles of the Manual with a view to justifying their military intervention to the flotilla (Israeli National Report-1, paras. 176-177).

The Israeli armed forces have intervened the flotilla on high seas at 72 nautical miles (approximately 133 km) far from the coast. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by the United Nations Convention on the Law of the Sea (UNCLOS).⁸ Any unfounded, unjustified intervention to vessels sailing on the high seas is therefore a violation of freedom of navigation.⁹

To justify the military intervention to the flotilla, the Israeli authorities have claimed also that the flotilla passengers had arms (Ministry of Foreign Affairs of Israel, 2010). By arms, the latter in fact referred to clubs, iron rods, slingshots and knives used by the attacked passengers. It should be noted that the vessels and their passengers were

⁷ According to the article 47 of the San Remo Manual, the following classes of enemy vessels are exempt from attack:

(a) hospital ships;...
 (i) cartel vessels, e.g., vessels designated for and engaged in the transport of prisoners of war;
 (ii) 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;... See. “*San Remo Manual on International Law Applicable to Armed Conflicts at Sea*”. Available at <http://www.icrc.org/Eng/Resources/Documents/Misc/57jmsu.Htm> (Accessed: 06 November 2019).

⁸ See. *United Nations Convention on the Law of the Sea*, 1982, Article 87.

⁹ The following articles of the UNCLOS envisage exceptionally the detention, seizure or arrest of vessels on high seas:

- Detention of a vessel by its flag state upon collision or any other incident of navigation on high seas (article 97)
- Detention, seizure or arrest of a vessel engaged in transportation of slaves (article 99)
- Seizure of a pirate ship or aircraft (article 105)
- Detention, seizure or arrest of vessels engaged in illicit trafficking of narcotic drugs or psychotropic substances (article 108)
- Arrest or seizure of vessels engaged in unauthorized broadcasting from high seas (article 109)
- Stop or arrest of vessels upon the right of hot pursuit (article 111) See. *United Nations Convention on the Law of the Sea*, 1982.

subject to the relevant security checks at customs and maritime border gates before their departure (Uluslararası Hak İhlalleri İzleme Merkezi-International Center for Watching Violations of Rights, 2010).

Taking into account that the Mavi Marmara flotilla passengers were unarmed civilians; that it was transporting food and medicines; that it had a humanitarian mission and this was declared to the international community; that the Israeli military intervention took place on high seas and has resulted with the death of nine civilians and the injury of 55 persons (UNSG Panel of Inquiry Report, para. 56) it is hard to argue that the military intervention to the flotilla was in conformity with international law.¹⁰

4. INTERNATIONAL REPORTS REGARDING THE MAVI MARMARA INCIDENT

In the aftermath of the Israeli attack to the Mavi Marmara flotilla, the United Nations Security Council (UNSC) gathered in an urgent meeting on 1st June 2010. The UNSC condemned the military intervention and called for the initiation of an impartial, reliable and transparent international investigation of the incident (The Guardian, 2010). The United Nations Human Rights Council (UNHRC) for its part has adopted on 2nd June 2010 its decision no:14/1 and condemned the Israeli attack on high seas. The UNHRC has also requested the investigation of the incident on the basis of international law, international humanitarian law and human rights violations (UN Human Rights Council Resolution, 2 June 2010).

Upon the request of the United Nations Secretary General, Mr. Ban-Ki Moon, a *Panel of Inquiry* has been established to investigate the incident. In addition to this, as per the decision of the UNHRC, a *fact-finding mission* has been commissioned to investigate the same issue. These two separate commissions have prepared their own reports and shared the below observations and conclusions with the international community.

It should also be noted that apart from these international reports, Turkey¹¹ and Israel¹² have also drafted their own national reports reflecting their opposing views with regard to the flotilla incident.

¹⁰ Israel's military intervention is also in contradiction with the "*Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*" which was signed on 10 March 1988 in Rome. For further information see, www.imo.org/en/About/Conventions/ListofConventions/Pages/SUA-Treaties.aspx. (Accessed: 19 September 2019).

¹¹ The Turkish government has disclosed its national report in February 2011. For further information see, *Turkish National Commission of Inquiry, Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010*, Ankara, February 2011, Available at <http://www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf> (Accessed: 14 September 2019).

¹² The Israeli government has disclosed its national report regarding the flotilla incident in January 2011. The Israeli government has disclosed in February 2013 a second report titled "*The Public Commission to Examine the Maritime Incident of 31 May 2010, The Turkel Commission, Second Report, Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law*", February 2013, Available at www.gov.il/BlobFolder/generalpage/downloads_eng1/ENG_turkel_eng_b1-474.pdf (Accessed: 28 February 2020). For an extensive analysis of the Israeli national report of January 2011, see Norman Finkelstein. (2014) "What Happened on the Mavi

4.1. UN Human Rights Council, Fact Finding Mission's Report

UNHRC Fact-Finding Mission¹³ submitted its report on 27 September 2010. In its report, the Mission underlined that the naval blockade of Israel was unlawful and illegal (UN Human Rights Council Report, 27 September 2010, para. 261). It stressed that the Israeli military intervention to the flotilla on high seas was a flagrant violation of international law and could not be considered as a legitimate self-defense act in accordance with article 51 of the UN Charter (Ibid., 27 September 2010, para. 262). The report also states that the Israeli blockade has turned into a collective punishment of the civilian population in Gaza (Ibid., 27 September 2010, para. 263) and concluded that the military intervention to the flotilla was disproportional and has caused severe human rights breaches (Ibid., 27 September 2010, para. 264).

4.2. Report of the Secretary-General's Panel of Inquiry (Palmer Report)

The Secretary-General's Panel of Inquiry,¹⁴ which launched its investigation on 10 August 2010, has disclosed its report in July 2011. The conclusions of the Panel of Inquiry¹⁵ contradict largely the conclusions of the UNHRC Fact-Finding Mission's report.

In the Palmer report, it is stated that *"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."* (UNSG Panel of Inquiry Report, July 2011, p. 4). The Panel has considered that the conflict between Hamas and Israel should be treated as an international one for the purposes of the law of blockade (Ibid., para. 73). According to the Panel, through the blockade, Israel has exerted its right to self-defense in compliance with article 51 of the UN Charter (Ibid.,

Marmara? An Analysis of the Turkel Commission Report", *Türkiye Ortadoğu Çalışmaları Dergisi (Turkish Journal of Middle Eastern Studies)*, Vol: 1, Issue: 2, pp. 31-53.

¹³ Members of the UN Human Rights Council Fact Finding Mission:

1. - Karl T. Hudson-Phillips (Retired Judge of the International Criminal Court and former Attorney General of Trinidad and Tobago),

2. - Sir Desmond de Silva (Former Chief Prosecutor of the United Nations-backed Special Court for Sierra Leone),

3. - Ms. Mary Shanthi Dairiam (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), See. (UN Human Rights Council Report, 27 September 2010, para. 2).

¹⁴ Members of the Secretary-General's Panel of Inquiry:

1. - Sir Geoffrey Palmer (Former Prime Minister of New Zealand), as Chair,

2. - Sir Alvaro Uribe (Former President of Colombia), as Vice-Chair,

3. - Mr. Joseph Ciechanover Itzhar (Representative of Israel), as Member,

4. - Mr. Süleyman Özdem Sanberk (Representative of Turkey), as Member. See. (UNSG Panel of Inquiry Report, July 2011, p11).

¹⁵ It should be noted that the Panel's working method 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. The report was adopted on the agreement of the Chair and Vice-Chair under that procedure. See, UNSG Panel of Inquiry Report, July 2011, p. 3; The Turkish and Israeli representatives in the Panel of Inquiry have expressed their reservations to the conclusions of the report through separate statements attached to the said report. See. (Ibid., pp. 104-105).

para. 71). The Panel has thus concluded that the blockade was legal from the perspective of international law (Ibid., paras. 81-82).

With regard to the Israeli military intervention to the flotilla, the Panel asserts that “*For Israel to maintain the blockade it had to be effective, so it must be enforced. That is a clear legal requirement for a blockade. Such enforcement may take place on the high seas and may be conducted by force if a vessel resists...*” (Ibid., para. 109). Thus, the Panel considers that a military intervention, even on high seas, is legitimate in order to enforce a blockade.¹⁶

In the report, it is also stated that the Israeli military operation which resulted with the killing of nine civilians and injury of many people was excessive and unreasonable (Ibid., para. 117). Therefore, the Israeli government shall present its regret and offer payment for the benefit of the deceased and injured victims and their families (Ibid., para. 167). And finally in the report, the parties are invited to resume full diplomatic relations, to repair their relationship in the interests of stability in the Middle East and international peace and security (Ibid., para. 169).

5. THE LEGAL RESPONSIBILITY OF ISRAEL AND ITS OFFICERS IN THE FLOTILLA INCIDENT AND THE JUDICIAL RIGHTS OF THE VICTIMS

States have always been the main actors of international law. Real persons remain largely vulnerable against the abuses and human rights violations of the states. Particularly after the WWII, international mechanisms were sought to protect human rights against the states’ mal practices. In this regard, real and legal persons have appeared as emerging actors of international law and appropriate international human rights law mechanisms were developed to protect their rights and freedoms (Cançado Trindade, 2008, pp. 11-26). In modern international law, states can be held accountable for the prejudices they caused to real or legal persons through their actions or inactions.

The Israeli authorities have deliberately attacked the Mavi Marmara flotilla in international waters: the flotilla was sailing for a humanitarian mission to Gaza; the passengers were unarmed civilians and human rights defenders; nine civilians¹⁷ were killed on the spot by real bullets. In this incident, many persons have suffered prejudice due to

¹⁶ This observation of the Panel arises a simple question: Where and what is the limit for any military intervention seeking the enforcement of a blockade? See, Yusuf Aksar. (Spring 2012) ‘Birleşmiş Milletler Palmer (Mavi Marmara) Raporu ve Uluslararası Hukuk’ (United Nations Palmer (Mavi Marmara) Report and International Law), *Uluslararası İlişkiler Dergisi (Journal of International Relations)*, Vol: 9, Issue: 33, pp. 26-30.

¹⁷ Nine civilians have lost their lives in the Israeli raid onto the flotilla on 31st May 2010. One injured person has lost his life in the aftermath of the incident. In total, ten persons have lost their lives. Nine of them were Turkish citizens and one person had Turkish-American dual citizenship. The names of the deceased are as below:

1. -Çetin Topçuoğlu, 2-Fahri Yıldız, 3-Ali Haydar Bengi, 4-Cengiz Akyüz, 5-Cengiz Songür, 6-Furkan Doğan (Turkish-American citizen), 7-İbrahim Bilgen, 8-Necdet Yıldırım, 9-Cevdet Kılıçlar, 10-Uğur Süleyman Söylemez. See. (UN Human Rights Council Report, 27 September 2010, para. 128 and Table - Deaths of flotilla participants).

the acts of a state and its agents. The state's responsibility and individual responsibilities of its agents for their actions require in the first step a judicial investigation and, if the evidences are sufficient, a trial in the next step. The judicial process against the relevant state and its agents can be initiated by the victims or through their representatives before the courts of their countries, or before the courts of the wrongdoing state, or before a third country's court or before an international court, provided that the necessary requirements are fulfilled for each option.

In this respect, the Comoros, as the flag state of the Mavi Marmara vessel,¹⁸ has the right to submit an application against Israel before the ICC. Besides this,¹⁹ the injured victims and the family members of the deceased victims have also the right to sue the Israeli authorities and officers before the Israeli courts, before the national courts of their respective countries or before the courts of foreign countries which are vested with *universal jurisdiction*²⁰ competence on crimes against humanity.

5.1. Decision of the Office of the Prosecutor (OTP) of the International Criminal Court Regarding the Mavi Marmara Incident

As a state party to the Rome Statute, the Comoros²¹ has referred on 14 May 2013 the flotilla incident to the ICC (Letter of Referral, 2013). Upon this referral, the OTP of the ICC, taking into account the potential of the commission of war crimes and crimes against

¹⁸ Vessels in the Mavi Marmara flotilla and their flag countries are as below: 1- Mavi Marmara (The Comoros), 2-Defne (Kyribati), 3-Gazze I (Turkey), 4-Eleftheri Mesogios (Greece), 5-Sfendoni (Togo), 6-Challenger 1 (US), 7-Challenger 2 (US), 8-Rachel Corrie (Cambodia). See. (Ibid., 27 September 2010, Annex III).

¹⁹ Referring the Mavi Marmara incident to the International Court of Justice (ICJ) could be another possible option. As per the Statute of the ICJ, "*only States may be parties in cases before the Court*" (Article 34 of the Statute of the ICJ, 26 June 1945). Turkey and Israel, if they could have succeeded to reach an agreement, could have brought the case before the ICJ, in conformity with article 40 of the Statute of the ICJ. Or, they could have asked an advisory opinion on the incident from the ICJ, in conformity with article 65 of the mentioned Statute. Even if the parties were not able to agree to bring the case before the ICJ, one of the parties could have procedurally made, in order to exert legal, diplomatic and political pressure on the other side, a unilateral application to the ICJ, bearing in mind that the ICJ would probably defer the application for incompetency. Apart from Turkey and Israel, the flag states of the vessels in the flotilla could have also opted to refer the incident unilaterally to the ICJ for the same motives.

²⁰ The term "*universal jurisdiction*" refers to the idea that a national court may prosecute individuals for serious crimes against international law, such as crimes against humanity, war crimes, genocide, and torture, based on the principle that such crimes harm the international community or international order itself, which individual States may act to protect. National courts can exercise universal jurisdiction when the State has adopted legislation recognizing the relevant crimes and authorizing their prosecution. The definition and exercise of universal jurisdiction vary around the world. A national or international court's authority to prosecute individuals for international crimes committed in other territories depends on both the domestic legal framework and the facts of each particular case. See. International Justice Resource Center, Available at <https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/> (Accessed: 24 February 2020).

²¹ The Union of the Comoros has been party to the Rome Statute since 18 August 2006. Cambodia, flag state of Rachel Corrie, and Greece, flag state of Eleftheri Mesogios, are also party to the Statute. Israel and Turkey are not party to the Statute. For further information on member states party to the Rome Statute, See. www.icc-cpi.int/.

humanity by the Israeli military forces on high seas during the said incident, has initiated a preliminary examination.

The OTP has assessed the referral from the perspectives of jurisdictional competence of the Court, and the type and density of the alleged crimes. On 6 November 2014, the OTP terminated its preliminary examination and issued a report. The Prosecutor was of the opinion that there was a reasonable basis to believe that war crimes under the Court's jurisdiction have been committed in the context of the interception and takeover of the *Mavi Marmara* by IDF (Israel Defense Forces) soldiers on 31 May 2010. Within this framework, the Prosecutor observed that willful killing under article 8(2)(a)(i); willfully causing great suffering, or serious injury to body and health under article 8(2)(a)(iii); committing outrages upon personal dignity under article 8(2)(b)(xxi); and, if the blockade of Gaza by Israel is to be deemed unlawful, also intentionally directing an attack against civilian objects under article 8(2)(b)(ii) of the Rome Statute were violated (ICC-OTP Report, 6 November 2014, para. 19). However, according to the Prosecutor, "*the potential case(s) that would likely arise from an investigation into the situation would not be of sufficient gravity to justify further action by the Court and would therefore be inadmissible pursuant to articles 17(1)(d) and 53(1)(b) of the Statute*" (Ibid., 6 November 2014, para. 150). Thus, the OTP considered the application of the Comoros inadmissible and decided to close the file (Ibid., 6 November 2014, para. 151).

The "sufficient gravity" criterion to which the OTP has referred is highly controversial as it is a non-objective notion. The *gravity* term²² is not defined neither in the "Statute" nor in the "Rules of Procedure and Evidence" of the ICC. Thus, the gravity criterion appears to be subject to interpretation, depending on the case, conjuncture, and even the personality of the prosecutor. As seen above, the OTP, on the one hand, asserts that there is a reasonable basis to believe that war crimes under the Court's jurisdiction have been committed during the flotilla incident; on the other hand, concludes that these are not of *sufficient gravity* to initiate an investigation. The *relativity of gravity* (Longobardo, September 2016, pp. 1011-1030) needs to be questioned and clarified for the sake of justice and ICC mechanisms' efficiency and credibility.²³

An important feature of the *Mavi Marmara dossier* before the ICC is that, following a referral of a state party, the ICC Prosecutor has decided *for the first time* not to initiate an investigation. As Meloni underlines correctly, the OTP's discretion to initiate or not to initiate an investigation, one of the most debated issues in recent international criminal law

²² The *gravity* term has been used eleven (11) times in the ICC Statute and just once in the ICC Rules of Procedure and Evidence.

²³ The ICC organs, namely OTP, PTC and Appeals Chamber, have tried to interpret the statutory gravity threshold through jurisprudence within the time (Longobardo, November 2016, pp. 21-41). Regulations of the Office of the Prosecutor, adopted on 23 April 2009, have tried to determine basic principles to assess the gravity threshold and thus ensure a convergence on the issue. Article 29(2) of the said Regulations reads as follow: "*In order to assess the gravity of the crimes allegedly committed in the situation the Office shall consider various factors including their scale, nature, manner of commission, and impact.*" The *Mavi Marmara* flotilla case confirms once again that there is still no convergence on the gravity assessment among OTP and other ICC organs.

commentaries, is crucial; and any improper exercise of this discretionary power can spoil the credibility of and confidence to the ICC mechanisms (Meloni, 2016, p. 5).

Upon the refusal decision of the OTP to initiate an investigation, the Comoros has submitted, on 29 January 2015, to the “Pre-Trial Chamber I” (PTC-I) a petition of objection against the said decision (Union of the Comoros, 29 January 2015). The PTC-I has considered the objection reasonable and, on 16 July 2015, asked the OTP to reconsider its decision of deferral (ICC-PTC-I, 16 July 2015, paras. 50-51). This act of PTC-I is crucial in the sense that it has exercised *for the first time* its review power, under Article 53(3) of the Statute, of a Prosecutor’s decision *not to open* an investigation (Meloni, 2016, p. 4). On the other side the OTP, which considered this as an interference to its sphere of discretion, has filed without delay an appeal against the PTC-I’s afore-mentioned decision (ICC-OTP, 27 July 2015, para. 31).

On 6 November 2015, the Appeals Chamber of the ICC decided by majority to dismiss, in limine and without discussing its merits, the Prosecutor’s appeal against the decision of the PTC-I requesting the Prosecutor to reconsider the decision (ICC-Appeals Chamber, 6 November 2015, paras. 66-67). However, the OTP has maintained its previous decision and declared on 29 November 2017 that the conditions to initiate an investigation were still not present (ICC-OTP, 29 November 2017, Annex 1, paras. 332-334).

On 23 February 2018, the legal representatives of the Comoros have filed a second “Application for Judicial Review by the Government of the Union of the Comoros” before the PTC-I (Union of the Comoros, 23 February 2018). Upon this new application, the PTC-I has requested once again, on 15 November 2018, the OTP to revise its decision not to initiate an investigation regarding the flotilla incident (ICC- PTC-I, 15 November 2018, para. 117).

The OTP has once more appealed the decision of the PTC-I (ICC-OTP, 21 November 2018, para. 25). On 2 September 2019, the Appeals Chamber of the ICC has delivered its judgment and rejected the appeal of the Prosecutor against the decision of the PTC-I (ICC-Appeals Chamber, 2 September 2019, para. 96). The Appeals Chamber’s judgment was taken by majority and requested the Prosecutor to reconsider its decision on the Comoros’ referral, by 2 December 2019, in light of the specific directions of the PTC-I’s 16 July 2015 decision and the directions of the Appeals Chamber (Ibid, para. 96; ICC, Press Release, 2019). But the OTP insisted on its previous decisions and closed the file for a second time for the ICC arguing that “*there is no reasonable basis to conclude that any potential case arising from the situation would be of sufficient gravity to be admissible before the Court*” (ICC-OTP, 2 December 2019, Annex 1, para. 97).

The legal representatives of the Comoros have submitted on 2 March 2020 to PTC-I, for the third time, an “Application for Judicial Review by the Government of the Comoros”. In this third application, the Comoros criticizes harshly the attitude of the Prosecutor and accuse her for not being impartial on the *dossier* (Union of the Comoros, 2 March 2020, paras. 105-111); requests the PTC-I to impose sanctions on the OTP for its repeated failure to comply with the directions of the Chamber (Ibid., para. 125); and finally proposes the appointment of an *independent amicus prosecutor* (Ibid., paras. 126-129) to proceed promptly with the file.

As seen, the OTP's interpretation of the *sufficient gravity* criterion seems insufficient to satisfy the plaintiffs, the PTC-I and the Appeals Chamber. Therefore, the Mavi Marmara *dossier* continues to be an unresolved issue for the OTP and the ICC.

5.2. Procedural Agreement on Compensation Between the Republic of Turkey and the State of Israel

The "*Procedural Agreement on Compensation Between the Republic of Turkey and the State of Israel*"²⁴ (hereinafter, the Procedural Agreement) was signed on 28 June 2016 in Ankara and Jerusalem.²⁵ The signatories, respectively on behalf of Turkey and Israel, were Mr. Feridun H. Sinirlioğlu, Ambassador and Secretary General of Ministry of Foreign Affairs, and Mr. Dore Gold, Ambassador and Secretary General of Ministry of Foreign Affairs.

The Procedural Agreement, which was published in the Official Journal of the Republic of Turkey on 9 September 2016, consists of six articles in total:

- In the first article of the agreement, the issue has been named as "*the flotilla (Mavi Marmara) incident*". By defining the case as an "incident", the Israeli authorities imply that this was not an "attack" and "not illegal".

Again in the first article, it is stated that "*...The Government of Israel shall make an ex gratia payment of 20 million US dollars ... to compensate the bereaved families...*"

"*Ex gratia payment*" is a type of payment which is not compulsory in legal terms but made on the basis of the good will of the paying party.²⁶ Thus, the Israeli authorities do not accept to pay "indemnity" or "reparation" which may have legal implications or consequences; and in this way, reject any legal responsibility in the incident.

In the first article, the expression of "*the bereaved families*" implies the payment of compensation to the families who lost their relatives in the incident and excludes the payment of compensation to the wounded persons. Moreover, the issue of those who and how were responsible for the loss of lives is not mentioned in the article. Thus, again the Israeli authorities refuse any kind of responsibility in the loss of human lives resulting from the flotilla incident.

²⁴ It would be more appropriate to label such a document as a "Memorandum of Understanding" or as a "Protocol" instead of an "Agreement". It can be presumed that during the diplomatic negotiations, this issue of labeling has been discussed between the parties and the Israeli side has insisted on and convinced the Turkish side to sign the text as an "Agreement". Furthermore, from the spirit and the letter of the said agreement -in particular from the fourth and fifth articles- it can be deduced that during the negotiation process the Israeli side has paid a particular attention to the Turkish internal legal requirements and made clear its expectation regarding the ratification of the said agreement by the Turkish parliament to enable its flawless implementation.

²⁵ This shows that the text is signed separately by the relevant persons in different locations and the parties did not convene to sign the text.

²⁶ "An ex gratia payment is not necessary, especially legally, but is made to show good intentions." See. dictionary.cambridge.org, (Accessed: 7 November 2019).

- In the second article, it is read that “... *Israel will transfer the money to this account twenty five business days following the entry into force of the Agreement.*”

It is observed that the Israeli side has acted extremely vigilant regarding the transfer of the money. The signing of the agreement and even its ratification by the Turkish Parliament are not considered sufficient for the transfer of money. The Israeli authorities transferred the money only after the entry into force of the said agreement.

- In the third article, it is stipulated that “*The distribution of the above amount falls within the exclusive competence of the Government of Turkey in accordance with such methods of distribution as it may choose to adopt, without any responsibility arising therefrom for the Government of Israel.*”

According to this article, once the total amount is transferred to the Turkish Government, Israel cannot be held accountable, in any case, for the method, timing and amount of the compensation payment to be distributed to the victims’ relatives.

- In the fourth article, it is stated that “...*In any event, should any claims be made, this agreement will constitute full release from any liability of Israel, its agents and citizens with respect to any and all claims, civil or criminal, that have been or will be filed against them in Turkey, direct or indirect, by the Republic of Turkey or Turkish real and legal persons, in relation to the flotilla incident.*”

This article is so comprehensive that all Israeli authorities and citizens receive full “*immunity and amnesty*” before the Turkish courts regarding the flotilla incident.

- In the fifth article, it is stipulated that “*Should any claim of money against the Government of Israel or its natural and juridical persons be advanced or maintained by or on behalf of any Turkish natural or juridical person, notwithstanding the aforesaid provisions, the Government of Israel, its agents and/or citizens, shall be indemnified by the Government of Turkey against all loss, costs, damages, and/or expenses.*”

As seen, this article is also very comprehensive and protective for the Israeli authorities and citizens. Israel secures that it will not pay any money except the 20 million US dollars. If the Turkish real or legal persons sue the Israeli authorities or its citizens before the Turkish courts or even before the foreign or international courts; and if any court decides payment of indemnity to the victims or their relatives, the Turkish government will assume to pay these indemnities on behalf of the Israeli authorities and citizens. Moreover, it is understood from the article that any attorney expenses, travel and lodging expenses and other potential expenses of the Israeli authorities and citizens stemming from the cases that might be filed in the future by Turkish real or legal persons regarding the flotilla incident will be claimed by Israel from the Turkish government.

The articles of the Procedural Agreement treated above show that the Israeli authorities and officers are cleared off all responsibilities before the Turkish jurisdiction with regard to the flotilla incident. Another important issue concerning the said

agreement is the difference between the terms preferred in the English and Turkish texts. The Procedural Agreement was signed in Turkish, Hebrew and English. As per the agreement, *“In case of divergence of interpretation the English text will prevail”*. Therefore, the English text is determinant to interpret the agreement. In this regard, some legal terms used in the Turkish text differ significantly from the terms used in the English text and thus cause legal controversies and misunderstandings. For instance, in the English version of the agreement, the *“compensation”* term is preferred while in the Turkish version the term *“tazminat”* which means *“indemnity”* is used. The term *“compensation”* corresponds to the term *“telafi”* in Turkish, which can be interpreted as substitution, correction due to a prejudice. However, the Turkish term *“tazminat”* (*indemnity*) has extensively a legal connotation and is commonly used in legal texts and disputes. But this term is not used in the English text of the Procedural Agreement. In this sense, the Turkish translation is misleading. It can be supposed that the Turkish authorities, to avoid internal criticism, have resorted to such a translation ruse. A similar misleading term used in the Turkish text is *“ex gratia”*. The Turkish word which corresponds to *“ex gratia”* (in Turkish *“lütuf”*) is not used and the Latin expression itself is preferred in the Turkish text.

During the Turkish Parliament’s Foreign Affairs Commission meeting, Mr. Ekmeleddin Mehmet İhsanoğlu, a member of Parliament, has criticized the conclusion of the said agreement and expressed his reservations regarding the terms used in the agreement:

“...Now, after six years of controversies, we have reached to an amount of 20 million US dollars and this is shown as an “indemnity”. I ask you. Why “ex gratia” term in foreign language is used in the first article? Is not there a Turkish equivalent of this term? The meaning of “ex gratia” in Turkish is “lütuf” (favor, good will payment). This kind of payment means that the paying party is not obliged to pay anything but in order to demonstrate his good will, he accepts to make a payment. Why did not you use the Turkish equivalent of this word in the agreement? This is the first issue....Secondly, Mr. President, when you read article 4 and 5, it is understood that perpetrators are us, the Turks and not Israel...With these articles, our citizens who lost their lives are considered as assailants and their heirs are deprived from their rights to sue and claim any reparation. I really have difficulties in understanding these articles and there is not any explanation for this in the reasoned text submitted to the Commission by the Government.” (Turkish Parliament, Foreign Affairs Commission, 17 August 2016, p. 16).

The articles examined above illustrate that the agreement between Turkey and Israel is in fact a legal obstruction imposed intentionally to the relatives of the victims by the contracting parties. It is a legal obstruction in the sense that the family members of the victims, some of whom are economically in distress, are requested to renounce²⁷ from all

²⁷ Those who fall within the scope of the Procedural Agreement concluded between Turkey and Israel, in order to receive a payment from the 20 million US dollars, are requested to sign a document in which they

criminal and civil referrals in return for a compensation to be paid. Moreover, with regard to the persons injured in the incident, not only they are excluded from the compensation agreement, but also are deprived implicitly from their inherent right to sue the Israeli authorities or citizens responsible for their sufferings. Even if they file a case, the Israeli authorities and citizens will not be liable for criminal claims before the Turkish courts, as per the articles four and five of the said agreement, and, in case, if any court decides to the payment of indemnity to them, it is incumbent on the Turkish government to pay this amount.

It should also be noted that the will and opinions of the victims and their relatives were not taken into consideration during the negotiation process of the said agreement. The victims and their relatives have expressed on many occasions their objection to and dissatisfaction for the signing of the agreement (T24, 2016; Karar, 2018). Freedom to claim rights before courts is inherent in the Turkish constitution²⁸ but, through this agreement, the Mavi Marmara victims are deprived from this essential right. Therefore, the relevant Turkish courts can consider this agreement as “incompatible”²⁹ with the Turkish constitution and decide to proceed with the “criminal” file of the Mavi Marmara incident.

5.3. Verdicts of the Turkish Court of Cassation Regarding the Mavi Marmara Victims’ Claims In the Aftermath of the Signing of the Procedural Agreement Between Turkey and Israel

Prior to the conclusion of the Procedural Agreement, the lawsuits filed³⁰ before the relevant Turkish courts regarding the Mavi Marmara incident were rejected on the grounds that the contention was not of a private litigation between the parties and that the courts did not have jurisdictional competence on a foreign state’s actions deriving from its sovereignty.³¹ These decisions of the courts of first instance were also approved by the 4th Civil Chamber of the Court of Cassation (Turkish Court of Cassation, Fourth Civil Chamber. File no: 2018/3128, Decision no and date: 2018/6193, 15.10.2018). After the signing of the said agreement, these verdicts were appealed before the Turkish Court of Cassation. The 4th Civil Chamber of the Court of Cassation which examined these appeals has modified its previous decisions in accordance with the provisions of the Procedural Agreement.

declare that they accept the amount proposed, that they renounce to current lawsuits and that they will not file any new cases in the future (MeclisHaber-Turkish Parliament’s News Website, 2016).

²⁸ “Freedom to claim rights, Article 36 - (As amended on October 3, 2001; Act No. 4709) Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures.”, See. Turkish Constitution, English text available at www.tbmm.gov.tr/docs/constitution, (Accessed: 24 February 2020).

²⁹ The aforementioned agreement cannot be declared as “unconstitutional”, due to the fact that it was concluded, ratified and has entered into force in conformity with the provisions of the Turkish constitution.

³⁰ According to the Turkish press, the number of civil and criminal proceedings before the Turkish courts against Israel with regard to the flotilla incident is 32. See. (T24, 2016) (Online Turkish newspaper), available at www.t24.com.tr/haber/milli-gazete-mavi-marmara-mutabakati-anayasaya-aykiri,357522 (Accessed: 26 February 2020).

³¹ Istanbul 7th Civil Court, File no: 2012/661 in Turkish Court of Cassation, 4th Civil Chamber, File no: 2018/5365, Decision no and date: 2019/3544, 25.06.2019.

The 4th Civil Chamber, in its recent decisions, stated that a Procedural Agreement on Compensation Between Turkey and Israel has been signed; that this agreement has been approved by the Council of Ministers on 20 August 2016 and has entered into force on 9 September 2016; that, according to the article 90 of the Turkish constitution, a international agreement concluded, ratified and entered into force in conformity with the legal provisions in force, is equal to the Turkish laws and that therefore the Procedural Agreement between Turkey and Israel can be applied to the cases brought before the Turkish courts (Turkish Court of Cassation, Fourth Civil Chamber, File no: 2017/5003, Decision no and date: 2019/3543, 25.06.2019; Turkish Court of Cassation, Fourth Civil Chamber, File no: 2018/5365, Decision no and date: 2019/3544, 25.06.2019; Turkish Court of Cassation, Fourth Civil Chamber, File no: 2019/105, Decision no and date: 2019/3545, 25.06.2019; Turkish Court of Cassation, Fourth Civil Chamber, File no: 2018/3474, Decision no and date: 2019/3560, 25.06.2019; Turkish Court of Cassation, Fourth Civil Chamber, File no: 2019/2989, Decision no and date: 2019/6283, 26.12.2019; Turkish Court of Cassation, Fourth Civil Chamber, File no: 2019/2153, Decision no and date: 2019/6284, 26.12.2019; Turkish Court of Cassation, Fourth Civil Chamber, File no: 2019/2899, Decision no and date: 2019/6285, 26.12.2019; Turkish Court of Cassation, Fourth Civil Chamber, File no: 2019/2815, Decision no and date: 2019/6286, 26.12.2019).

The 4th Civil Chamber stated also that the relevant Turkish courts of first instance which will examine the cases against the Israeli government for the flotilla incident shall include the Turkish government as liable for the indemnity claims, in line with the articles four and five of the Turkish-Israeli agreement, and take into consideration the provisions of the procedural agreement in their verdicts (T24, 2019).

As can be seen from the recent decisions of the Court of Cassation, the persons injured in the flotilla incident have the right to claim indemnity and these claims will be directed to the Turkish government. But per the provisions of the Procedural Agreement, the victims cannot file a criminal case against Israel and its officers before the Turkish judicial system.

CONCLUSIONS

The Mavi Marmara flotilla had a humanitarian mission and aimed to break the blockade imposed to Gaza by Israel. The military intervention of the Israeli forces on high seas to the flotilla and the killing of nine unarmed civilian passengers have provoked outrage in the international fora. This act of aggression pushed the international community to question the blockade and its legality along with its legitimacy (The Guardian 2010; UN News, 2010).

From the perspective of international law, the legality of the blockade and of the military intervention to the flotilla is highly controversial and divisive. The existence of two contradictory UN reports on the same issue confirms already this observation.

Intentional abstention from declaring a definite time limitation for the blockade contradicts not only good will and common sense but also international customary rules. On the other hand, any military intervention on high seas to unarmed civilians constitute a flagrant violation of international and humanitarian law.

The Israeli soldiers who took part in the flotilla incident and those who gave the orders of intervention abstained from travelling abroad due to the international arrest warrants issued for them (Haaretz, 2014). The fear of a potential arrest had a psychological and dissuasive effect on the Israeli soldiers and commanders who took part in the incident. However, the Procedural Agreement between Turkey and Israel has exempted the Israeli authorities and officers from any civil and criminal liabilities before the Turkish courts.

Despite the immunity granted by the Turkish government, through the Procedural Agreement, to the Israeli authorities and citizens regarding the flotilla incident, the victims and the legal heirs of the deceased persons can still claim their rights, and file criminal and civil lawsuits against the perpetrators. In this respect, three options are “theoretically” possible: Firstly, the Turkish courts can consider the Procedural Agreement “incompatible” with the Turkish constitution which guarantees the right to seek justice, and proceed with a full fledged judicial examination of the flotilla incident. Secondly, the Turkish Parliament can annul the Procedural Agreement at any time. Such a demarche was initiated by the Turkey’s main opposition party, People’s Republican Party, in May 2018. The latter has proposed a draft law to annul and nullify the compensation agreement between Turkey and Israel, but this law proposal was rejected by the governing alliance in the parliament (Karar, 2018). Thirdly, it is always possible for the victims and their legal representatives to seek justice before foreign and international courts on the grounds of crimes against humanity, a type of crime which is not subject to prescription (Cohen and Mimran, 2016).

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