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The Mavi Marmara Trial: Politicising the Turkish Justice System

Robert Weston Ash

THE MAVI MARMARA TRIAL: POLITICISING THE TURKISH JUSTICE SYSTEM

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"He who justifies the wicked,
and he who condemns the righteous,
Both of them alike are an abomination to the LORD"[1].

"Right is right, even if everyone is against it,
and wrong is wrong, even if everyone is for it"[2].

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[1] *Proverbs* 17:15 (NASB).

INTRODUCTION

On or about 6 November 2012, the 7th High Criminal Court in Istanbul began a trial against four senior Israeli military officers[3]. The four Israelis were on trial for alleged offences committed by Israeli forces during and after the 31 May 2010 clash on the high seas between Israeli commandos and passengers on board the Mavi Marmara, a Comoros-flagged vessel, seeking to breach the Israeli naval blockade of the Gaza Strip. Because the ship's Turkish Master refused either to change course away from the Gaza Strip when directed to do so by the Israeli Navy or to accept the Israeli offer to deliver the vessel's humanitarian goods to Gaza over land, Israeli military forces ultimately boarded the ship to enforce the blockade[4]. Israeli forces boarding the ship were met with deadly force from a significant number of the ship's passengers[5]. The ensuing melee resulted in the deaths of nine passengers[6] and serious injury to other

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[2]*Quotes About Justice*, http://www.goodreads.com/quotes/tag/justice?page=2 (quoting William Penn).

[3]The four senior Israeli officers are: Gabi Ashkenazi, Eliezer Marom, Amos Yadlin, and Avishai Levi. *Trial of Israeli Generals Over Mavi Marmara Raid Begins*, TODAY'S ZAMAN (6 Nov. 2012), http://www. todayszaman.com/diplomacy_trial-of-israeli-generals-over-mavi-marmara-raid-begins_297274.html.

[4]San Remo Manual on International Law Applicable to Armed Conflicts at Sea, arts. 98, 100, 12 June 1994, [hereinafter San Remo Manual], *available at* https://www.icrc.org/ihl/INTRO/560.

[5]TURKISH NAT'L COMM'N OF INQUIRY, REPORT ON THE ISRAELI ATTACK ON THE HUMANITARIAN AID CONVOY TO GAZA ON 31 MAY 2010, 93 (Feb. 2011) [hereinafter TURKISH REPORT], *available at* http://www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf ("Israeli soldiers descended into a group of passengers *resisting with make-shift weapons*" (emphasis added)); U.N. Human Rights Council, Report on the International Fact-finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting From the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance, U.N. Doc. A/HRC/15/21, at 23 (27 Sept. 2010) [hereinafter UNHRC Report] (passengers had fashioned weapons out of wood and chains and had been provided with gas masks), 26 (they were armed with sticks, metal rods, knives, and handheld catapults), 37 (they were armed with sticks and knives); REPORT OF THE SECRETARY-GENERAL'S PANEL OF INQUIRY ON THE 31 MAY 2010 FLOTILLA INCIDENT (Sept. 2011) [hereinafter PALMER REPORT] at ¶¶ 50 (weapons found on Mavi Marmara included flares, rods, axes, knives, tear gas, gas masks, protective vests, and night vision goggles), 55 (reporting that Israeli soldiers had been attacked with clubs, iron rods, slingshots, and knives), 123–24 (reporting that passengers fashioned and used metal bars, slingshots, chains, and knives).

[6]Eight of the nine killed were Turkish nationals, and one was an American citizen of Turkish descent. *See* PALMER REPORT, *supra* note 5, ¶ 34. A tenth passenger, also a

passengers as well as to Israeli commandos[7]. Both prior to the commencement of the Mavi Marmara trial and since the trial began in November 2012, there have been a number of significant legal and procedural irregularities involving the trial, all of which establish that the trial is nothing more than a political show trial motivated by Turkish politics rather than by any claimed fidelity to the principles of justice and the rule of law[8].

The issues surrounding the Mavi Marmara clash and subsequent trial will be discussed in four sections, followed by the conclusion. Section I provides a quick review of pertinent facts about the clash between Israeli forces and vessels of the Free Gaza Flotilla, with emphasis on what transpired on the Comoros-flagged Mavi Marmara. Section II discusses which law applied to the naval clash and the legal implications that flow from the differing conclusions made by Israel and Turkey. Section III discusses the numerous misapplications of international law, Turkish criminal law, and Turkish criminal procedure in trying the Israeli military officers for acts that Turkish law

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Turk, recently died of injuries sustained in the 31 May 2010 clash. *Mavi Marmara Death Toll Rises to 10*, AL JAZEERA (25 May 2014), http://www.Aljazeera.com/humanrights/2014/05/mavi-marmara-death-toll-rises-102014525145911267813.html.

[7]PALMER REPORT, *supra* note 5, ¶ 56; TÜRKEL COMM'N, THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010, REPORT PT. 1 ¶¶ 142, 149–57 (Jan. 2010) [hereinafter TÜRKEL REPORT], *available at* http://www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf.

[8]The Mavi Marmara trial appears to be another in a long line of political trials in Turkey. *See, e.g.*, *Turkey Must Abandon 'Show Trial' Against Gezi Park Protest Organizers*, AMNESTY INTERNATIONAL (12 June 2014), https://www.amnesty.org/en/articles/news/2014/06/turkey-must-abandon-show-trial-against-gezi-park-protest-organizers/ (condemning politically motivated show trial of group of peaceful activists); *Turkey Ergenekon Case: Ex-army Chief Basbug Gets Life*, BBC (5 Aug. 2013), http://www.bbc.com/news/world-europe-23571739 (accusing current Turkish government of trying to silence its secularist opponents by arresting and trying hundreds of military officers); Owen Bowcott, *Kurdish and Turkish Lawyers on Trial for Representing Imprisoned Leader*, THE GUARDIAN (9 Jan. 2013), http://www.theguardian.com/law/guardian-law-blog/2013/jan/09/kurdish-turkish-lawyers-trial (reporting on mass trial of lawyers for defending Kurdish leader Abdullah Ocalan); Dexter Filkins, *Show Trials on the Bosphorus*, THE NEW YORKER (13 Aug. 2013), http://www.newyorker.com/news/daily-comment/show-trials-on-the-bosphorus (discussing the prosecution of Turkey's military and political leaders in the so-called "Ergenekon case" and noting the following about one of the accused: "The evidence against Şirin was not merely thin; it was preposterous, as though it had been assembled by a group of schoolchildren—or by a prosecutor who never imagined that an independent observer would examine it".).

would excuse with respect to its own public servants, thereby establishing the political nature of the ongoing trial in Istanbul. Section IV discusses the Mavi Marmara Master's criminal recklessness in seeking to breach the Israeli naval blockade as well as the Turkish Prosecutor's notable lack of interest in prosecuting such criminal activity, once again suggesting a political motivation to go after Israelis while giving a pass to the one individual on the Mavi Marmara who had the responsibility, the authority, and the opportunity to avoid subjecting his passengers, ship, and crew to the danger of death and serious bodily injury. Given the theatrics surrounding the trial and the Prosecutor's and the Court's obvious failure to follow their own law and procedures, this paper concludes that the Mavi Marmara trial is a political show trial that neither comports with the minimal requirements for a fair trial nor seeks to ascertain the truth and do justice with respect to the Mavi Marmara matter.

I. FACTUAL SUMMARY

For a number of years, there has been an ongoing armed conflict between the State of Israel and Hamas and other Palestinian Islamist groups located in, and firing rockets and mortars into Israel from, the Gaza Strip[9]. Because of the ongoing attacks directed at its people and territory from Gaza, Israel has opted to exercise its inherent right under international law to defend itself and its citizens[10]. Exercising Israel's inherent right to self-defence requires that Israeli forces comply with the Law of Armed Conflict (LOAC)[11]. Establishing a naval blockade during an armed conflict to interdict delivery of war materiel to one's adversaries is permitted under international law[12]. Once Israel had established its naval blockade, Israel not only had the

[9]*See New Gaza War 'Only a Question of Time,'* BBC (23 Dec. 2010), http://www.bbc.com/news/world-middle-east-12064775; Tim Butcher, *Hamas Ends Ceasefire with Israel*, TELEGRAPH (18 Dec. 2008), http://www.telegraph.co.uk/news/worldnews/middleeast/palestinianauthority/3834450/Hamas-ends-ceasefire-with-Israel.html; *The Hamas Terror War Against Israel*, ISR. MINISTRY OF FOREIGN AFF. (Mar. 2011), http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/missile%20fire%20from%20gaza%20on%20israeli%20civilian%20targets%20aug%202007.aspx.

[10]U.N. CHARTER art. 51.

[11]*See, e.g.*, PALMER REPORT, *supra* note 5, ¶¶ 47(f), 59(e). Note that the Law of Armed Conflict (LOAC) is also referred to as the Law of War and International Humanitarian Law (IHL).

[12]San Remo Manual, *supra* note 4, arts. 93–104.

right *but also the duty* to inspect cargoes bound for enemy-controlled territory, including the right to take ships into a nearby port for such inspection[13]. The so-called "Free Gaza Flotilla" (which included the Mavi Marmara plus five other vessels) was composed of self-described human rights activists who disputed the legality of the Israeli blockade and who made no secret of their intent to breach the Israeli blockade and sail to Gaza[14]. Israel warned the Turkish government (and other governments whose nationals were participating in the flotilla) in advance that Israel would enforce its blockade[15]. Nevertheless, in an attempt to avoid a confrontation with the Flotilla, Israel publicly offered to allow the Flotilla's humanitarian cargo to be unloaded at the Israeli port of Ashdod for subsequent delivery to the Gaza Strip over land under the auspices of UN personnel[16]. The Israeli offer was summarily rejected by Flotilla participants[17].

The Flotilla set sail for Gaza on or about 30 May 2010[18]. On 31 May 2010, as the Flotilla continued to approach waters affected by the blockade, the Israeli Navy queried the ships by radio as to their destination and warned them that they were approaching restricted waters[19]. The ships responded that they were bound for Gaza and refused either to alter course away from Gaza or to divert to the port of

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[13]*Id*. arts. 97, 98.

[14]Michal Zippori, *Convoy of Ships Heads to Gaza in Attempt to Break Blockade*, CNN (27 May 2010), http://edition.cnn.com/2010/WORLD/meast/05/27/gaza.aid.convoy/index.html?iref=allsearch ("'The objective of the boats is to break Israel's siege on Gaza, to break Israel's blockade on Gaza,'. . . said Greta Berlin, co-founder of Free Gaza movement"); *see also* Paul McGeough, *Humanitarian Flotilla Heads to Israel*, SYDNEY MORNING HERALD (24 May 2010), http://www.smh.com.au/multimedia/world/humanitarian-flotilla-heads-to-israel/20100523-w3wt.html (containing video footage of a passenger who states her purpose is to "breach Israel's Naval blockade of Gaza").

[15]*See* TÜRKEL REPORT, *supra* note 7, ¶ 118; *Gaza Aid Fleet Undeterred as Israel Steps Up Warnings*, WAZA (27 May 2010), https://wazaonline.com/en/archive/gaza-aid-fleet-undeterred-as-israel-steps-up-warnings.

[16]Isabel Kershner, *Defying Blockade, Cargo and Passenger Vessels Head for Gaza*, N.Y. TIMES, (27 May 2010), *available at* http://www.nytimes.com/2010/05/28/world/middleeast/28mideast.html?fta=y.

[17]*Id*.; *see also* TÜRKEL REPORT, *supra* note 7, ¶ 124.

[18]*TIMELINE–Main Events in the Gaza Flotilla Affair*, REUTERS (7 June 2010), http://in.reuters.com/article/2010/06/07/idINIndia-49106720100607 [hereinafter *TIMELINE*].

[19]*Id*.; TÜRKEL REPORT, *supra* note 7, ¶¶ 123–25; *see also* Israel Defense Forces, *Unedited Radio Transmission Between Gaza Flotilla and Israeli Navy*, YOUTUBE (4 June 2010), http://www.youtube.com/watch?v=9dE2StbDL_Q.

Ashdod[20]. Following the ships' refusal to comply with Israeli Navy instructions concerning the blockade, Israeli military personnel ultimately boarded the vessels to enforce the blockade[21]. On five of the six vessels, there was no armed resistance to the boarding, and no serious casualties occurred on either side[22]. On the sixth ship, the Comoros-registered vessel, Mavi Marmara, a group of passengers took up arms—metal rods, knives, chains, and other weapons—and physically attacked the Israeli commandos attempting to board the ship[23]. The Israelis boarding the Mavi Marmara had not expected such resistance and, hence, had been armed primarily with non-lethal paintball guns[24]. Only when Israeli assault personnel had begun to sustain life-threatening injuries inflicted by armed passengers did they resort to lethal weaponry in self-defence[25]. Further, some of the passengers on board the Mavi Marmara had publicly stated, prior to sailing, that they had hoped to become martyrs (i.e., *shaheed*)[26]. Such statements clearly indicated that at least some passengers aboard the Mavi Marmara were planning to engage in activities that they considered likely to result in their deaths. In the melee that ensued on the Mavi Marmara during the resisted boarding operation, nine of the 581 passengers aboard the ship were killed[27]. Nine Israeli military

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[20]*TIMELINE*, *supra* note 18; TÜRKEL REPORT, *supra* note 7, ¶ 124.
[21]*TIMELINE*, *supra* note 18.
[22]*Id*.; TÜRKEL REPORT, *supra* note 7, ¶¶ 147–51.
[23]Isabel Kershner, *Deadly Israeli Raid Draws Condemnation*, N.Y. TIMES (31 May 2010), http://www.nytimes.com/2010/06/01/world/middleeast/01flotilla.html [hereinafter Kershner, *Deadly*]; *see also* TÜRKEL REPORT, *supra* note 7, ¶¶ 127–40.
[24]Dan Williams, *Paintballs to Pistols, Israel Admits Ship Blunders*, REUTERS (1 Jun. 2010), http://www.reuters.com/article/idUSLDE650280; *see also* TÜRKEL REPORT, *supra* note 7, ¶¶ 121, 127–140, 214, 227.
[25]Kershner, *Deadly*, *supra* note 23; *see also* TÜRKEL REPORT, *supra* note 7, ¶¶ 127–40.
[26]Anath Hartmann, *Activists Aboard Gaza-bound Flotilla Wanted to be 'Martyrs,'* WASH. TIMES BLOG (3 June 2010), http://www.washingtontimes.com/blog/watercooler/2010/jun/3/activists-aboard-gaza-bound-flotilla-wanted-be-mar/. This news story includes a video of a passenger stating, "When I went on the first convoy, I wanted to be a shaheed [martyr]. I wasn't that lucky. Second time, I wanted to be a shaheed. Didn't work. Third time, lucky, [with the help of God] I will be a shaheed." *Id.*; *see also* Richard Spencer, *Gaza Flotilla Attack: Turkish Activists Killed in Raid 'Wanted to Be Martyrs,'* TELEGRAPH (2 June 2010), http://www.telegraph.co.uk/news/worldnews/europe/turkey/7798493/Gaza-flotilla-attack-Turkish-activists-killed-in-raid-wanted-to-be-martyrs.html. *Seeking martyrdom* is hardly a convincing indication of peaceful intent on the part of such passengers.
[27]*Factbox: Details of Activists Aboard Gaza Flotilla*, REUTERS (1 June 2010), http://www.reuters.com/article/2010/06/01/us-israel-flotilla-passengers-idUKTRE650

personnel were injured, some seriously, by passengers on board the Mavi Marmara who attacked them[28]. Once the Mavi Marmara had been brought under Israeli control, injured Israeli commandos and ship's passengers were triaged by medical personnel and given medical treatment priority based on the seriousness of their respective injuries, irrespective of their nationality[29]. Once all Flotilla vessels were under Israeli control, they were sailed to Israel[30].

Despite the violence that occurred during the attempted breach of the blockade, once the Flotilla vessels reached the Israeli port of Ashdod, Israel nonetheless unloaded the humanitarian cargo and attempted to deliver it to the Gaza Strip[31]. The Turkish group that had organised the Flotilla, the Foundation for Human Rights and Freedoms and Humanitarian Relief (commonly referred to by the initials, IHH), is a group known (by the Turkish government and others) to have ties to Islamist terrorist groups opposed to Israel[32]. Those ties include ties to Hamas (a Palestinian group whose sworn goal is to destroy Israel[33]). A

4L020100601; *see also* TÜRKEL REPORT, *supra* note 7, ¶ 155. A tenth passenger recently died of injuries sustained in the 31 May 2010 clash. *See Mavi Marmara Death Toll Rises to 10*, AL JAZEERA (25 May 2014), http://www.aljazeera.com/human rights/2014/05/mavi-marmara-death-toll-rises-10-20145251459112678 13.html. Despite the obvious fact that all such deaths are regrettable, in this matter, they were also wholly avoidable. Israel had offered Flotilla participants a good faith alternative to deliver their humanitarian goods to the Gaza Strip, i.e., by unloading them at the Israeli port of Ashdod and allowing them to be delivered over land under the auspices of UN personnel. *See, e.g.*, PALMER REPORT, *supra* note 5, ¶ 100; TÜRKEL REPORT, *supra* note 7, ¶¶ 3, 110. Unfortunately, the offer was refused, and the Flotilla attempted to breach the blockade instead, thereby triggering the need for the boarding operation.

[28]TÜRKEL REPORT, *supra* note 7, ¶ 157.

[29]PALMER REPORT, *supra* note 5, ¶ 144; TÜRKEL REPORT, *supra* note 7, ¶¶ 141, 142.

[30]*See, e.g.*, TURKISH REPORT, *supra* note 5, at 39; TÜRKEL REPORT, *supra* note 7, ¶ 152.

[31]Bill Varner, *UN to Deliver Aid Flotilla's Cargo to Gaza Strip Under Accord With Israel*, BLOOMBERG (15 June 2010), http://www.bloomberg.com/news/2010-06-15/un-to-deliver-aid-flotilla-s-cargo-to-gaza-strip-under-accord-with-israel.html. Gaza authorities refused to accept the goods. Harriet Sherwood, *Hamas Refuses Flotilla Aid Delivered By Israel*, THE GUARDIAN (3 June 2010), http://www.the guardian.com/world/2010/jun/03/hamas-flotilla-aid-israel.

[32]*Turkish Charity Behind Flotilla Had 'Ties to Terrorism and Jihad,'* FOX NEWS (2 June 2010), http://www.foxnews.com/world/2010/06/02/french-judge-says-turkish-charity-gaza-flotilla-terror-ties/ (quoting Jean-Luis Bruguiere, the former French lead anti-terrorism investigating judge, regarding IHH's "clear, long-standing ties to terrorism and Jihad").

[33]*See, e.g.*, Hamas Charter pmbl., 18 Aug. 1988, *available at* http://avalon.law.yale.edu/

significant number of IHH members was aboard the Mavi Marmara when it attempted to breach the blockade[34]. The IHH members had brought onto the ship with them, *inter alia*, gas masks and protective vests[35], unusual items when planning for and anticipating a peaceful humanitarian voyage. Accordingly, it is evident that at least some of the passengers aboard the Mavi Marmara were not simply "peaceful human rights activists" but rather active supporters and allies of the terrorist group Hamas, who fashioned weapons and were prepared to resist by force any attempted Israeli boarding[36]. Further, the Flotilla had been bound for the Gaza Strip, a territory controlled and dominated by Hamas, a group recognised as an international terrorist organisation by the United States, Canada, and others.[37]

Once the Flotilla vessels had been brought into the Israeli port of Ashdod, Flotilla participants were turned over to, and processed by,

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20th_century/hamas.asp ("Israel will exist and will continue to exist until Islam will obliterate it . . .". (quoting Hassan al-Banna)). Moreover, the current Turkish government has allowed Hamas to establish an office in Istanbul, and Hamas leaders have been invited guests at the ruling party's convention, *Turkey Provides Hamas with New Headquarters*, ISRAEL TODAY (27 Nov. 2014), http://www.israeltoday.co.il/NewsItem/tabid/178/nid/25579/Default.aspx, a further indication that the current Turkish government has taken sides and is not objective in pursuing the trial against Israeli military leaders.

[34]UNHRC Report, *supra* note 5, ¶ 99; PALMER REPORT, *supra* note 5, ¶¶ 86, 91; TÜRKEL REPORT, *supra* note 7, ¶ 127.

[35]PALMER REPORT, *supra* note 5, ¶ 50; TÜRKEL REPORT, *supra* note 7, ¶¶ 179, 206–07, 278.

[36]PALMER REPORT, *supra* note 5, ¶¶ 93, 96, 119; TÜRKEL REPORT, *supra* note 7, ¶ 176 & n.733.

[37]*See, e.g.*, OFF. OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2008 *passim* (2009), *available at* http://www.state.gov/documents/organization/122599.pdf (detailing the United States' categorisation of Hamas as a terror organisation); Regulations Establishing a List of Entities, SI/2008-143 (Can.), *available at* http://laws-lois.justice.gc.ca/eng/regulations/SI-2008-143/FullText.html (listing Canada's classification of Hamas as an entity that "has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity or is knowingly acting on behalf of, at the direction of or in association with such an entity"); Council Common Position (EC) No. 67/2009 of 27 Jan. 2009, pmbl., arts. 1–4, annex, 2009 O.J. (L 23) 37, 41, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:023:0037:0042:EN:PDF (noting the European Union's classification of Hamas as an entity that employs terrorism as a tactic).

Israeli police officials[38]. Since all Flotilla participants were aboard vessels that had sought to breach a properly established and announced naval blockade in violation of the LOAC[39], they were dealt with by Israeli authorities as lawbreakers[40]. Nonetheless, consistent with requirements of international law, non-Israeli Flotilla passengers were permitted visits by diplomats from their respective countries[41], and, despite Israel's absolute right to try Flotilla participants for violating the LOAC, Israel opted instead to forego such trials and to deport all foreign passengers from Israeli soil[42]. Accordingly, Israeli police officials placed the passengers in temporary confinement until they could be expelled from Israel. All foreign Flotilla participants were, in fact, deported from Israel within a matter of days[43].

Following their deportation from Israel, some of the Flotilla passengers sought to bring legal action in Turkey against Israel for what had occurred on the Mavi Marama and other Flotilla vessels. Since the vessel on which the Turkish nationals had been killed was a Comoros-flagged vessel[44], Comoran courts had primary jurisdiction over what transpired aboard that ship with respect to the passengers and crew, not Turkish courts[45]. Further, although not one of the four accused Israeli officers had been present on the Mavi Marmara at any time during which the events complained of by passengers took place, the Turkish prosecutor nonetheless prepared—and a Turkish court

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[38]TÜRKEL REPORT, *supra* note 7, ¶ 152 (noting that upon arrival in Ashdod, responsibility passed from the Israeli armed forces to the counter-terrorism force of the Israeli Border Police).

[39]*See, e.g.*, San Remo Manual, *supra* note 4, art. 98 ("Merchant vessels believed on reasonable grounds to be breaching a blockade may be captured. Merchant vessels which, after prior warning, clearly resist may be attacked".).

[40]*See* TÜRKEL REPORT, *supra* note 7, ¶ 152.

[41]*See id.* ¶ 153.

[42]*See id.* ¶ 154.

[43]*Id.*

[44]*See, e.g.*, TURKISH REPORT, *supra* note 5, at 15; UNHRC Report, *supra* note 5, ¶ 81 & n.64; PALMER REPORT, *supra* note 5, ¶ 83.

[45]*See, e.g.*, *Indictment Seeks Life for Israeli Commanders for Mavi Marmara Raid*, WEEKLY ZAMAN (26 May 2012), http://www.weeklyzaman.com/en/newsDetail_openPrintPage.action?newsId=5756. The fact that the Union of Comoros declined to conduct an investigation of the 31 May incident that took place aboard one of its flagged ships does not mean that Turkey had jurisdiction to do so. *See, e.g.*, TURKISH REPORT, *supra* note 5, at 52 n.213 (citing the S.S. Lotus Case (Fr. v. Turk.), 1927 P.C.I.J., as establishing the *exclusive jurisdiction of the flag State* (emphasis added)). Having made that argument, Turkey has nonetheless asserted jurisdiction over what occurred on the non-Turkish-flagged vessel Mavi Marmara on the high seas.

approved—a criminal indictment accusing the four Israeli military officers of *personal responsibility* for alleged "crimes" they clearly did not commit and, indeed, could not have committed, since they were neither present aboard the ship when the alleged crimes took place nor were they in charge of the civilian police officers who processed and controlled the passengers and crew once they arrived at Ashdod.

Among the alleged crimes charged in the indictment are the following: "wilful killing; torture or inhuman treatment; willfully causing great suffering or serious injury to body or health; arbitrary detention and arrest; violation of the freedom of expression; qualified robbery; illegal seizure of personal items; [and] illegal capture of a sea vehicle"[46]. Moreover, despite the four accuseds' absence from the scene of the alleged crimes, the indictment called for sentences against them *exceeding* 18,000 years imprisonment[47]. Such sentences are totally outlandish and reveal the sensational, political nature of the trial.

Yet, equally, if not more, remarkable, is the fact that Turkish prosecutors have failed to indict the Turkish Master of the Mavi Marmara for his criminal dereliction of duty as ship's Master and for his criminally reckless actions, actions that recklessly rejected two alternatives *known to him at the time* that would have altogether avoided the possibility of a military confrontation with Israeli armed forces as well as actions that recklessly and inexorably led to the deaths of nine passengers on board his ship, injuries to many others, and a serious diplomatic rift between Turkey and Israel, States that had hitherto enjoyed good diplomatic relations[48].

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[46]*F.A.Q.*, IHH, http://www.ihh.org.tr/en/main/pages/sik-sorulan-sorular-ve-cevaplari/303 (last visited 14 May 2015).

[47]Rick Gladstone, *Turkey May Indict Senior Israeli Officers Over Deadly Gaza Flotilla Raid*, N.Y. TIMES (23 May 2012), http://www.nytimes.com/2012/05/24/world/middleeast/turkey-may-indict-israeli-generals-over-flotilla-raid.html. Seeking sentences of so many years strongly implies that the Turkish prosecutor has charged the four Israeli officers criminally for all alleged offences against all complainants, including non-Turks aboard the ship. If that is true, the prosecutor (with the court's concurrence) has improperly assumed jurisdiction over offences which should have been dealt with exclusively by the Union of the Comoros, since the Mavi Marmara was a Comoros-flagged ship when the alleged crimes occurred on board the ship.

[48]*See* Part IV, *infra*, for more thorough discussion.

II. THE LAW OF ARMED CONFLICT VS. PEACETIME MARITIME LAW: WHICH LAW GOVERNED THE 31 MAY 2010 CLASH ON THE HIGH SEAS & WHO MAY DETERMINE THE ANSWER?

One of the fundamental, ongoing disagreements regarding the 31 May 2010 clash between the Israeli armed forces and the so-called Free Gaza Flotilla concerns what "law" governed the situation on that fateful day—the Law of Armed Conflict (LOAC) or peacetime maritime law. The Israeli government, based on its ongoing armed conflict with Hamas and other Palestinian terrorist groups in the Gaza Strip, had determined that the LOAC governed[49], whereas Flotilla participants claimed that peacetime maritime law applied[50]. Turkish authorities agreed with the view of the Flotilla participants[51]. Following the clash, both the Israeli and Turkish governments formed commissions[52] to investigate the incident and, not surprisingly, each commission reached a different conclusion[53].

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[49]PALMER REPORT, *supra* note 5, ¶ 46; TÜRKEL REPORT, *supra* note 7, ¶ 31.

[50]PALMER REPORT, *supra* note 5, ¶ 105 & n.337.

[51]*See generally* TURKISH REPORT, *supra* note 5.

[52]*See id.*; TÜRKEL REPORT, *supra* note 7. It is interesting that Turkey created a Commission to assess what transpired aboard the Mavi Marmara, since the Mavi Marmara was not a Turkish-flagged vessel at the time and, hence, jurisdiction over what transpired aboard the vessel belonged to the Union of the Comoros. *See supra* note 44. Because Turkish nationals were killed and injured, Turkey could lawfully assert jurisdiction based on the passive personality principle in international law vis-à-vis its own nationals, which recognises a State's jurisdiction over those who injure its nationals. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 comment g (1987). Foreign nationals injured during the incident, however, would fall outside normal Turkish jurisdiction, since the incident occurred outside Turkey on a foreign-flagged vessel. Yet, Turkey's right to choose which international law principles to apply obligates it to recognise that Israel enjoys the same right to choose applicable international law principles, as well. Hence, Israel can rely on principles of the LOAC in defence of its actions, since Israel had determined that the LOAC applied and acted accordingly.

[53]Interestingly, the Union of the Comoros initiated no investigation despite the fact that the Mavi Marmara was a Comoros-flagged vessel and, hence, a Comoros national for purposes of investigating any criminal liability that occurred on board the ship in the days surrounding the incident. *See supra* note 44. Further, it was a Turkish law firm actively involved in the Istanbul trial that encouraged Comoros to file a complaint with the International Criminal Court (ICC) over what had transpired aboard the Mavi Marmara on 31 May 2010. This conduct once again suggests how

Both Israel and Turkey are sovereign States which routinely make sovereign determinations concerning which law to apply in various circumstances. Concerning the so-called Free Gaza Flotilla and its claimed humanitarian mission, both States came to radically different conclusions. Those differing conclusions are significant because they have affected (and continue to affect) how each side has reacted (and continues to react) to the clash at sea as well as to what legal consequences flowed therefrom. If, as Israel concluded, the LOAC applied, then Israel acted lawfully in establishing and enforcing the blockade. In fact, under the LOAC, Israel was *duty-bound* to enforce a lawfully constituted blockade against all neutral ships[54], including ships on self-proclaimed, humanitarian missions. Hence, when the Master of the Mavi Marmara refused to comply with repeated Israeli instructions to either change course away from the Gaza Strip or divert to the Israeli port of Ashdod to unload its humanitarian cargo, that fateful decision compelled Israel to act and inexorably led to the Israeli use of force to enforce the blockade (as was its duty under the LOAC[55]), which, in turn, led to the deaths and other injuries sustained by passengers aboard his ship when some passengers resorted to deadly force in resisting the Israeli boarding.

If, however, as Turkey has claimed, peacetime maritime law applied, then Israel overstepped its authority and acted unlawfully under international law. Yet, given the ship's Comoran nationality, it is the Union of the Comoros (Comoros) which possessed sole authority to press such a claim, not Turkey. Moreover, *even if one were to conclude that Israel had been wrong in applying the LOAC*, the Israeli decision (*even if wrong*) did not relieve the Master of the Mavi Marmara from his well-established legal duty under customary international law to ensure the safety of his ship, crew, passengers, and cargo. The Master was fully aware *at the time* that the Israelis had established a naval blockade, that the Israelis believed that their blockade was lawful, that the Israelis had stated their intention to enforce it, *and* that the Israelis had offered a peaceful alternative to deliver the Flotilla's humanitarian

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political the entire incident is. *See Referral of the* "Union of the Comoros" *With Respect to the 31 May 2010 Israeli Raid on the Humanitarian Aid Flotilla Bound for the Gaza Strip*, ICC, http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf (last visited 14 May 2015) [hereinafter *Comoros Referral*].

[54]San Remo Manual, *supra* note 4, arts. 95, 98, 100.

[55]*Id.*

goods to Gaza[56]. Accordingly, the Master had it within his hands to wholly avoid any confrontation with the Israelis. Despite two alternatives offered by Israel which would have avoided a confrontation altogether—i.e., to change course away from Gaza *or* to divert to the port of Ashdod to unload his cargo for subsequent delivery to Gaza over land—the Master knowingly, deliberately, and recklessly assumed the risk of attempting to breach the blockade and thereby placed his passengers, ship, and crew in grave danger. The Master's assumption of the risk placed his ship and passengers in so much danger, in fact, that nine of his passengers were ultimately killed and other passengers were severely injured because of his reckless decisions.

Two investigations of the clash were also initiated by the UN—one by the UN Secretary-General[57] and one by the UN Human Rights Council[58]. The resulting UN commissions also reached opposite conclusions as to which law applied and the legal implications that flowed therefrom[59]. As a result, there is no consensus at either the State or international levels regarding which law applied at the time of the clash. As sovereign States, each State made its own determination, as was its right, and, based on the principle of the sovereign equality of States, neither State can legitimately force its decision on the other[60]. Having said that, *one must acknowledge that the ongoing Turkish trial is, in fact, an attempt by Turkey to impose its conclusion of criminal wrongdoing on Israel by trying the four Israeli officers in a Turkish court*, despite the fact that both the Israeli Türkel and the UN Palmer Commissions concluded that the Israeli naval blockade was lawful under international law[61], that the Israelis had a duty to enforce it against all neutral ships[62], and that the Mavi Marmara was wrong to have sought to breach the blockade and to resist Israeli enforcement of it[63]. Further, trying Israeli officers before a Turkish court is also

[56]The implications of such knowledge and the legal duty that flows therefrom are discussed more thoroughly in Section IV, *infra*.
[57]PALMER REPORT, *supra* note 5.
[58]UNHRC Report, *supra* note 5.
[59]PALMER REPORT, *supra* note 5; UNHRC Report, *supra* note 5.
[60]*See, e.g.*, U.N. Charter art. 2.1. (noting that the UN "is based on the principle of the sovereign equality of all its Members".).
[61]*See, e.g.*, PALMER REPORT, *supra* note 5, ¶ 75; TÜRKEL REPORT, *supra* note 7, ¶¶ 26, 58.
[62]San Remo Manual, *supra* note 4, art. 100.
[63]*See, e.g.*, PALMER REPORT, *supra* note 5, ¶ 158.

significantly presumptuous on Turkey's part, given that the Mavi Marmara was not a Turkish-flagged vessel at the time of the clash[64]. Any legal injury to the ship, its passengers, crew, and cargo was a legal injury to Comoros, not Turkey, given the ship's nationality.

One must also recognise that certain legal principles apply in the Israeli-Hamas context. Although the UN Charter clearly forbids "aggressive war"[65], Article 51 of the Charter explicitly recognises a State's inherent right of self-defence: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . . ."[66] Customary international law also recognises the right of self-defence against non-State actors[67]. Moreover, when acting in self-defence, international law "does not require a defender to limit itself to actions that merely repel an attack; *a State may use force in self-defense to remove a continuing threat to future security*"[68]. Thus, a State has full authority to act unilaterally or collectively in its self-defence. That includes, when appropriate, establishing and enforcing a naval blockade[69].

It is essential to note that Article 51 of the UN Charter *does not create* the right of self-defence; it is an inherent right of all States under customary international law.

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[64]*See supra* note 44.

[65]*See, e.g.*, U.N. Charter art. 2.4 ("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".). In these circumstances, it is the Palestinian groups like Hamas in the Gaza Strip that are engaging in aggressive war. As such, they are the ones to be condemned and prosecuted for war crimes.

[66]U.N. Charter art. 51 (noting that such self-defence is conditioned in the Charter as follows: self-defence is recognised as legitimate under the Charter "until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.").

[67]*See, e.g.*, Armed Activities on the Territory of the Congo (Dem. Rep. Congo. v. Uganda), 2005 I.C.J. ¶ 11 (17 Dec.) (separate opinion of Judge Simma), *available at* http://www.icj-cij.org/docket/files/116/10467.pdf.

[68]SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 447 (2006) (emphasis added).

[69]*See, e.g.*, San Remo Manual, *supra* note 4, arts. 10, 67(a), (f), 93–100.

> Article 51 neither creates, nor abolishes, a right of self-defense. Nor, for that matter, does it purport to define one. In fact, by its own terms it appears to be nothing more than a rule of construction—making clear that nothing else in the Charter purports to eliminate the right of self-defense in the face of armed attack . . .[70].

While the UN Charter and customary international law both recognise the inherent right of self-defence, the responsibility for determining when self-defence is appropriate lies, as it always has, with the government of each State. Under the UN Charter, however, the UN Security Council is specifically charged with the responsibility to lift the burden of individual national self-defence and to take appropriate steps internationally to restore international peace and security[71]. Having said that, it must be readily admitted that the muscular Security Council originally envisioned in the UN Charter has never materialised, and, hence, the Security Council has failed repeatedly in fulfilling its responsibilities in such circumstances. As such, threatened States are almost always required to make their own decisions and bear their own burdens when threatened. Such is the current case with Israel; it must defend itself against repeated Palestinian terrorist, rocket, and mortar attacks from the Gaza Strip[72]. Accordingly, the LOAC permits the use of a naval blockade to stanch the flow of war materiel to Israel's enemies in the Gaza Strip[73].

As a sovereign State, Israel has the inherent authority and right to determine when it must take steps in its national self-defence. Given the frequent attacks against Israeli territory originating from the Hamas-controlled Gaza Strip, Israel acted consistent with the principles of the LOAC in establishing its naval blockade of Gaza to interdict military, and militarily-useful, supplies bound for its enemies.

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[70]David B. Rivkin Jr. et al., *Preemption and Law in the Twenty-First Century*, 5 CHI. J. INT'L L. 467, 476 (2005).

[71]Geoffrey Corn & Dennis Gyllensporre, *International Legality, the Use of Military Force, and Burdens of Persuasion: Self-Defense, the Initiation of Hostilities, and the Impact of the Choice Between Two Evils on the Perception of International Legitimacy*, 30 PACE L. REV. 484, 507 (2010) (noting that the Security Council maintains the authority to critique the state's judgement and to "take actions to reverse an unjustified assertion of the inherent right of self-defence").

[72]*See, e.g.*, PALMER REPORT, *supra* note 5, ¶¶ 46 (noting that thousands of rockets and mortar shells have been fired at Israel from the Gaza Strip) & 71 (same).

[73]San Remo Manual, *supra* note 4, arts. 10, 48, 67(a), (f), 93–100.

Israel notified the proper maritime authorities about the blockade, putting neutral States and their flagged ships on notice[74]. Although Turkish authorities may believe that the Israeli naval blockade is not lawful, that does not give Turkish-flagged ships or ships flagged by other States with Turkish Masters and crews (like the Comoros-flagged Mavi Marmara at the time of the clash) any authority to take the law into their own hands and attempt to breach such a blockade. Neutral ships attempting to breach such a naval blockade do so at their own risk[75]. The Masters of such ships bear full legal responsibility for the reckless decisions they make in such circumstances. With respect to the 31 May 2010 clash, the Turkish Master assumed the risk and lost. *But for* the Master's failure to timely alter course away from Gaza or accept the good faith Israeli offer to unload the goods at the port of Ashdod and send them to Gaza under UN supervision via land routes, there would have been no need for Israeli forces to board the vessel, and no injuries to persons on either side would have occurred.

In summary, *because the Master of the Mavi Marmara rejected Israel's good faith offer to deliver the humanitarian goods over land to Gaza and precipitated the Israeli military response by attempting to breach a lawfully established and announced blockade, he bears primary responsibility for what transpired as a result of his unlawful and reckless conduct*, not Israeli commanders or soldiers who, pursuant to the LOAC, had an internationally-recognised, legal duty to respond to the attempted breach and enforce the blockade[76]. *The Master of the Mavi Marmara held the key to a fully peaceful resolution of the crisis regarding his ship, yet he knowingly and deliberately decided to reject the peaceful alternatives offered by Israel and thereby assumed the risk of injury to life and limb occasioned by the forced boarding of his vessel by Israeli armed forces to enforce the blockade*. For his criminal dereliction of duty as Master of the Mavi Marmara which resulted in the deaths of, and serious bodily injuries to, his passengers, he should be investigated, indicted, and brought before a court of justice to answer for his knowing and willful criminal recklessness.

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[74]*See, e.g.*, PALMER REPORT, *supra* note 5, ¶¶ 46, 75; *see also* San Remo Manual, *supra* note 4, art. 93.
[75]*See, e.g.*, San Remo Manual, *supra* note 4, art. 98.
[76]*Id.* art. 100.

III. TURKISH JUDICIAL OFFICIALS ARE OPENLY & NOTORIOUSLY MISAPPLYING TURKISH CRIMINAL LAW & CRIMINAL PROCEDURE IN THE MAVI MARMARA MATTER FOR POLITICAL ENDS

Turkish criminal courts are bound by both the Turkish Penal Code[77] (Penal Code) and the Turkish Criminal Procedure Code[78] (Criminal Procedure Code). Together, these Codes are intended to govern what occurs in the Turkish criminal justice process. In accordance with the Penal Code, the Turkish criminal process takes place in two phases: the *investigation phase* and the *prosecutorial phase*. According to the Criminal Procedure Code, when a public prosecutor is made aware of a report "creat[ing] an impression that a crime has been committed", he must immediately investigate the factual truth of that report to make a decision as to whether to bring public charges[79]. As part of the investigative process, the prosecutor *may* issue a subpoena to the suspect or accused to appear for an interview or interrogation[80]. Further, when a subpoena is issued, the Criminal Procedure Code requires that "[a] copy of the subpoena *shall be handed to* the suspect or accused"[81]. Where it is impossible to serve the subpoena, the reason must be documented for the record[82]. If, at the end of the investigation phase, the prosecutor concludes that he has obtained enough evidence to constitute sufficient suspicion that a crime has been committed, he shall prepare an indictment[83].

To begin the prosecutorial phase, the prosecutor must prepare and file an indictment[84]. The indictment must be addressed to the court

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[77]VAHIT BIÇAK & EDWARD GRIEVES, TÜRK CEZA KANUNU [TURKISH PENAL CODE] (2007) [hereinafter Penal Code].
[78]CEZA MUHAKEMESI KANUNU [TURKISH CRIMINAL PROCEDURE CODE] 2009 [hereinafter Criminal Procedure Code], *available at* http://www.legislationline.org/documents/id/17788.pdf.
[79]*Id.* art. 160(1).
[80]*Id.* art. 146(1). An interview is the "[q]uestioning of the suspect by the law enforcement authorities or by the public prosecutor about the crime, which is under investigation." *Id.* art. 2(g). An interrogation is "[a] hearing of the suspect or the accused by the judge or the court about the crime, which is under investigation or prosecution." *Id.* art. 2(h).
[81]*Id.* art. 146(3) (emphasis added).
[82]*Id.* art. 146(6).
[83]*Id.* art. 170(1).
[84]*Id.* art. 170.

with appropriate subject matter jurisdiction and venue, and it must present, *inter alia*, the identity of the suspect, the identity of the victims, the crimes charged and the related articles from the Criminal Code, the evidence of the crime, the factual events that constitute the crime, a *conclusion stating the issues that are both favourable and unfavourable to the suspect*, and a clear statement of the punishment sought[85]. The court must examine the indictment within fifteen days[86]. If the court finds the indictment to be insufficient, it may return it to the prosecutor for correction[87]. However, if the court approves the indictment, the prosecutorial phase begins, and the court must set a trial date and send out summonses for those required to be at the main hearing of the trial[88]. The court is required to send out a copy of the indictment together with a summons to the accused[89]. If it is not possible to serve a summons on the accused, the public prosecutor may seek the issue of an apprehension order or an arrest warrant[90].

Before the trial, the accused is permitted to request the ability to collect evidence and present it at trial[91]. As a general rule, it is necessary for the accused to be present at the main hearing of the trial[92]. After the court establishes the identity of the accused, explains the charges against him, and informs him of his rights, it then proceeds

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[85]*Id.* art. 170(3) (emphasis added). One of the issues favourable to the four accused Israelis is the fact that Israeli *political authorities* had determined that the LOAC was the applicable law. Hence, the Turkish prosecutor should have considered that fact when preparing the indictment, since, under the LOAC, naval blockades are not only lawful, but they must be enforced impartially, i.e., all neutral ships must be treated alike. As such, Israeli soldiers were obeying lawful orders of their superiors when they were sent to board the Mavi Marmara to enforce the blockade, something that Turkish law recognises as releasing a public officer from criminal liability and something that Turkish courts would doubtless recognise as appropriate if Turkish soldiers had been ordered to perform a similar act (such as to enforce a naval blockade of war materials bound for the PKK). *See* Penal Code arts. 6(1)(c) (defining "public officer") & 24(2) ("A person who carries out an order given by an authorized body as part of his duty, and the execution of his duty is compulsory[,] he shall not be held culpable for such act".).

[86]*Id.* art. 174(1).

[87]*Id.*

[88]*Id.* art. 175.

[89]*Id.* art. 176.

[90]*Id.* arts. 98(1) & 100(1). Note, however, that, although such a document would have no authority except in Turkey, Turkey might seek to enforce its national warrant via INTERPOL.

[91]*Id.* art. 177.

[92]*Id.* arts. 191 & 193. *See also* notes 109–14, 137–47 and accompanying text, *infra*.

to interrogate[93] the accused[94]. The judge will ask the accused questions related to his personal and economic status, but the accused is not required to give any account about the crime charged[95]. At the conclusion of the interrogation, the prosecutor begins the presentation of evidence[96]. The accused may also present witnesses and evidence at the appropriate time[97]. At the conclusion of the main hearing, the court then determines and pronounces a judgment[98]. The court must read the judgment *to the individual who was accused* and inform him of his rights[99].

The Penal Code outlines, *inter alia*, what actions are considered criminal if committed in Turkey. Article 8 of the Penal Code establishes the general territorial jurisdiction of Turkish law. Article 8(1) reads that "Turkish law shall apply to all criminal offenses committed *in Turkey*"[100]. Article 8(2)(b) extends the presumption of Turkish territorial jurisdiction to "on the open sea . . . *and* in, or by using, Turkish sea . . . vessels"[101]. Hence, a criminal act perpetrated on the high seas *in a Turkish ship* would qualify as having been committed "in Turkey" for purposes of criminal jurisdiction[102]. Article 12 of the Penal Code generally deals with offences committed by non-Turkish citizens. In subsections (1) and (2) of Article 12, the non-citizen criminal offender "shall be subject to penalty under Turkish law" if he "is *present in Turkey*"[103]. Article 20(1) of the Penal Code mandates that "[c]riminal responsibility is personal. *No one shall be*

[93]It is important to note that an interrogation is distinct from an interview. An interrogation is "[a] hearing of the suspect or the accused by the judge or the court about the crime, which is under investigation or prosecution." *Id.* art. 2(h). An interview is the "[q]uestioning of the suspect by the law enforcement authorities or by the public prosecutor about the crime, which is under investigation." *Id.* art. 2(g).
[94]*Id.* art. 191. Note that such actions presume the accused's presence before the court.
[95]*Id.* art. 147.
[96]*Id.* art. 206.
[97]*Id.* arts. 177–179.
[98]*Id.* art. 223.
[99]*Id.* art. 231. Once again, the presumption is that the accused is present before the court.
[100]Penal Code art. 8(1) (emphasis added).
[101]*Id.* art. 8(2)(b).
[102]Note, however, that the Mavi Marmara was a Comoros-flagged vessel at the time of the clash. *See supra* note 44. Accordingly, Turkish *territorial jurisdiction* did not extend to the Mavi Marmara.
[103]Penal Code art. 12(1), (2) (emphasis added).

deemed culpable for the conduct of another"[104]. Further, in accordance with Article 21 of the Penal Code, "[t]he existence of a criminal offence depends upon the presence of intent"[105]. Intent is further defined as "knowingly and willingly conducting the elements in the legal definition of an offence"[106].

Article 13 of the Penal Code deals with "Miscellaneous Offences" and appears to be a universal jurisdiction provision for dealing with very serious crimes such as genocide, other crimes against humanity, and torture. Article 13 reads, in pertinent part: "Turkish law shall apply to the following *offences committed in a foreign country whether or not committed by a citizen or non-citizen of Turkey*: [followed by a list of crimes]"[107]. Given the list of crimes reportedly set forth in the indictment[108], it is possible that the Turkish prosecutor has charged the Israeli officers with violations of Penal Code Articles 77 (Other Offences Against Humanity), 94 (Torture), and 223(3) (Seizure of a Sea Vessel)[109].

In order to enforce these Codes, the Criminal Procedure Code articulates the proper procedure that must be undertaken to prosecute an accused. According to the Penal Code, a person may not be punished "for any act which did not constitute a criminal offence *under the law in force* at the time it was committed"[110]. Further, the general rule concerning an accused's presence at trial is that "[t]he main hearing *shall not be conducted* about the *accused who fails to appear*"[111]. Hence, the general rule prohibits *in absentia* trials. There are two exceptions to the general rule. *First*, a trial may be held in the absence of the accused when "the crime requires as punishment a judicial fine or confiscation,"[112] i.e., it is a relatively minor crime not allowing imprisonment. That is clearly not the case in the Mavi Marmara trial—there, the Turkish prosecutor is seeking jail sentences

[104]*Id.* art. 20(1) (emphasis added).
[105]*Id.* art. 21.
[106]*Id.*
[107]*Id.* art. 13 (emphasis added).
[108]*See supra* note 46 and accompanying text.
[109]*See supra* note 46.
[110]Penal Code art. 7(1) (emphasis added). Once again, this appears to be a significant factor in the LOAC versus peacetime maritime law debate.
[111]Criminal Procedure Code art. 193(1) (emphasis added).
[112]*Id.* art. 195(1).

totaling *more than 18,000 years* for the four accused Israeli officers[113]. *Second*, "[t]he main trial may be concluded in the absence of the accused, even if he has not been interrogated as to the merits of the case, *if the collected evidence is sufficient to give a judgment other than conviction*,"[114] i.e., when the evidence indicates that no conviction is warranted. The phrase, "even if he has not been interrogated as to the merits of the case", demonstrates the general requirement under the Criminal Procedure Code that *the accused must be interrogated about the case before he can be tried*. An interrogation is a "hearing of the suspect or the accused by the judge or the court about the crime, which is under investigation or prosecution"[115].

The Criminal Procedure Code does outline special adjudication procedures for persons, dubbed as either "defaulters" or "fugitives", who do not appear when summoned or subpoenaed by a court. Yet, neither procedure allows for a trial *in absentia* which *ends in conviction*. The Criminal Procedure Code defines a "defaulter" as an "accused, whose whereabouts are not known, or *who is outside of the country and cannot be brought in*, or it is not appropriate to bring him before the competent court"[116]. No main hearing may be opened against a defaulter, although the court may take steps to "obtain[] or protect[] evidence"[117]. A "fugitive", on the other hand, is an "individual who hides himself within the country in order to invalidate a pending prosecution against him, or is in a foreign country and for this reason the court cannot reach him"[118]. Hence, a fugitive is a person over whom the court already had jurisdiction but who actively seeks to evade his trial, either by hiding from authorities within Turkey or by leaving the country. As such, the trial of a fugitive may proceed. Yet, *even then*, *if a fugitive has not already been interrogated by a judge*, a judgment of conviction may not be rendered[119]. As such, whether an

[113]Gladstone, *supra* note 47.
[114]Criminal Procedure Code art. 193(2) (emphasis added).
[115]*Id.* art. 2(h).
[116]*Id.* art. 244(1) (emphasis added).
[117]"There shall be no main hearing opened against a defaulter; the court shall conduct necessary interactions with the aim of obtaining or protecting evidence". *Id.* art. 244(2).
[118]*Id.* art. 247(1).
[119]"The prosecution may be conducted against the fugitive accused. However, if he has not been priorly interrogated by a judge, a judgment concerning his conviction *shall not* be rendered". *Id.* art. 247(3) (emphasis added).

accused is designated as a defaulter or as a fugitive, *absent a valid interrogation*, no conviction may lawfully be rendered.

Analysis of the Prosecutor's and the Court's Actions Against the Israeli Accuseds in Light of the Requirements Set Forth in the Penal Code & Criminal Procedure Code

There are numerous, significant, obvious deviations from the Penal Code and the Criminal Procedure Code in the prosecution of the four Israeli officers, deviations which clearly establish that the trial is a political show trial. One of the most obvious is a violation of Article 20(1) of the Penal Code, which states that "[c]riminal responsibility is personal. *No one shall be deemed culpable for the conduct of another*"[120]. Not one of the four accused Israeli officers was on board the Mavi Marmara (or any other vessel in the flotilla) when any of the alleged criminal acts took place. Hence, not one of them discharged a weapon at anyone or otherwise injured anyone on the ship, but they are nonetheless being tried in a Turkish court for alleged crimes committed by others. It is *uncontested* that Israeli political authorities had determined that the LOAC governed what transpired concerning the boarding of the Mavi Marmara[121]. Under the LOAC, once a blockade has been established, it *must be enforced* impartially against all neutral ships[122]. Further, the armed forces of the enforcing State have authority to use military force to enforce the blockade against a renegade ship, when necessary[123]. The Mavi Marmara was just such a renegade ship on 31 May 2010, whose Master refused to change course as directed and openly stated that he planned to breach the blockade[124]. Trying Israeli officers who were not even present for alleged crimes committed aboard the Mavi Marmara violates the Penal Code and is a perversion not only of justice, in general, but of the Turkish justice system, in particular, and clearly reveals the political nature of the trial. Further, once the ship had been brought into port, responsibility for the passengers and crew devolved upon police officials[125] over whom the accused military officers had no lawful authority. Yet, some of the

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[120]*Id.* art. 20(1) (emphasis added).
[121]*See, e.g.*, PALMER REPORT, *supra* note 5, ¶ 73; TÜRKEL REPORT, *supra* note 7, ¶ 16. *See also* San Remo Manual, *supra* note 4, arts. 98, 100.
[122]San Remo Manual, *supra* note 4, arts. 95, 100.
[123]*Id.* art. 98.
[124]*Gaza Flotilla Raid: No Israel Charges Over Mavi Marmara*, BBC (6 Nov. 2014), http://www.bbc.com/news/world-middle-east-29934002.
[125]TÜRKEL REPORT, *supra* note 7, ¶ 152.

alleged "crimes" of which the officers are accused took place after the passengers and crew had been placed under civilian police control, once again in clear and obvious violation of Article 20(1) of the Penal Code.

Coupled with the requirement that "[c]riminal responsibility [be] personal" is the requirement that "[t]he existence of a criminal offence depends upon the presence of intent"[126]. In other words, without the requisite intent, there is no criminal offence. In that regard, it is also *uncontested* that Israeli military leaders had neither anticipated nor planned for a situation where Israeli forces would encounter serious violent resistance when boarding Flotilla vessels to enforce the blockade[127], as even the UN Human Rights Council's Report explicitly found and confirmed[128]. Accordingly, Israeli forces had expected and trained for a relatively peaceful boarding[129] and, hence, the boarding party had been armed primarily with non-life-threatening weapons, like paintball guns[130]. The decisions by senior Israeli military officers to use non-lethal weapons as the primary weapons of the commandos indicate that the Israelis lacked the requisite evil intent necessary to be culpable of the crimes alleged. They had expected (albeit wrongly) to board the vessels peacefully[131]. Hence, killing and serious injuries were not expected, much less explicitly sought, thereby wholly rebutting any presence in the accused Israeli officers of the evil intent required for the offences charged. Moreover, the fact that the Israelis had offered flotilla participants a

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[126]*Id.* ¶ 21.

[127]*See, e.g.*, TÜRKEL REPORT, *supra* note 7, ¶ 119 (noting that the level of violent resistance was "clearly underestimated").

[128]UNHRC Report, *supra* note 5, ¶ 165, n.78. It is significant that Israeli forces encountered a level of resistance that was wholly unexpected. That, added to the confusion during the boarding, could have led to errors in judgement and outright mistakes when soldiers had to make instantaneous decisions in a highly chaotic situation. Yet, errors in judgement and mistakes lack the requisite evil intent and are not crimes. Further, the Report details the Rules of Engagement (ROE), which clearly indicated that the Israeli boarders were to use the minimum force they deemed necessary at the time, once again a strong indicator that the accused soldiers lacked the requisite evil intent to have committed any of the alleged crimes.

[129]*See, e.g.*, TÜRKEL REPORT, *supra* note 7, ¶ 121. Note especially sub-para. b (regarding non-lethal weapons) and sub-para. c (regarding Rules of Engagement).

[130]*See id.*

[131]The Israeli military admitted after the event that its presumption of peacefulness had been incorrect. *Deaths as Israeli Forces Storm Gaza Aid Ship*, BBC (31 May 2010), http://www.bbc.com/news/10195838.

good faith, peaceful alternative for delivering the humanitarian goods to Gaza over land further subverts any allegation of evil intent on the Israelis' part[132]; instead, the Israelis had sought a peaceful resolution of the matter from the outset. Additionally, once the Israeli commandos had been met with lethal force, to wit, "clubs, knives and steel pipes"[133], they had the right to use lethal force in self-defence[134]. The indictment's reported claim that the resisting Mavi Marmara passengers had been armed solely with "flagpoles, spoons and forks"[135] is absurd on its face and so easily refuted[136] that inclusion of such an allegation in the indictment, if the press reports are correct, would be a public embarrassment to the entire Turkish judicial system, but especially to the prosecutor who drafted such absurd language and to the judges who approved it. Further, it is *uncontested* that the ship's Master was aware that some of the passengers aboard his ship had been fashioning weapons in anticipation of an Israeli boarding[137].

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[132]Varner, *supra* note 31.

[133]Daniel Dombey & Tobias Buck, *Turkey Draws up Indictment of Israeli Soldiers*, FINANCIAL TIMES (23 May 2012), http://www.ft.com/cms/s/0/9cad8bdc-a4f2-11e1-b421-00144feabdc0.html#axzz3SyXg7llB; *see also IDF Forces Met with Pre-planned Violence when Attempting to Board Flotilla*, ISR. MINISTRY OF FOREIGN AFF., (31 May 2010), http://www.mfa.gov.il/MFA/PressRoom/2010/Pages/Israel_Navy_warns_flotilla_31-May-2010.aspx.

[134]*Turkey Indictment Targets Israel*, GULF NEWS (25 May 2012), http://gulfnews.com/turkey-indictment-targets-israel-1.1027466.

[135]Dombey, *supra* note 133; *see also Indictment Seeks Life For Israeli Commanders for Mavi Marmara Raid*, *supra* note 45. The Weekly Zaman article explicitly claims that passengers possessed "sticks, spoons and forks" and that they had no weapons:

> Self-defense [for the Israeli boarders] is out of question in spraying and killing people possessing sticks, spoons and forks with [ammunition from] heavy weapons and automatic rifles on the grounds that they attacked them. For self-defense [to be legitimate] there should be a concrete [threatening] act and this act should be illegal. No attacks by victims or complainant occurred during the incident that would require Israeli soldiers to use heavy weapons. The *fact that complainants and victims possessed no weapons was confirmed by international reports and inspections of the ship*.

Id. (emphasis added).

[136]*See, e.g.*, UNHRC Report, *supra* note 5, ¶¶ 101 (noting that passengers were fashioning weapons) & 116 (noting use of "sticks, metal rods, and knives" to resist the Israeli commandos); PALMER REPORT, *supra* note 5, ¶¶ 50 (noting flares, rods, axes, knives, tear gas, gas masks, protective masks, and night vision goggles were found on board the Mavi Marmara), 55 (soldiers were attacked with clubs, iron rods, slingshots, and knives) & 124 (soldiers were met with iron bars, staves, chains, slingshots, and knives).

[137]*See, e.g.*, UNHRC Report, *supra* note 5, ¶ 101.

Accordingly, any claim that the Israelis had been met by unarmed passengers is utter nonsense and simply provides additional evidence that the trial is grounded and motivated by politics, rather than a search for the truth.

Moreover, because the general rule concerning an accused's presence at trial is that "[t]he main hearing *shall not be conducted* about the *accused who fails to appear*"[138], *in absentia* trials are generally forbidden. The Criminal Procedure Code gives two exceptions: (1) where "the crime requires as punishment a judicial fine or confiscation,"[139] i.e., it is a relatively minor crime not requiring imprisonment, which is clearly not the case in the Mavi Marmara trial, and (2) where "the collected evidence is sufficient to give a judgment other than conviction,"[140] i.e., when the evidence indicates that no conviction is warranted, a conclusion with which the prosecutor and the court would disagree in this matter. The phrase, "even if he has not been interrogated as to the merits of the case" in Criminal Procedure Code Article 193(2), demonstrates the general requirement under the Criminal Procedure Code that *the accused must be interrogated about the case before he can be tried*[141]. Despite the clear limits on conducting *in absentia* trials, the Mavi Marmara trial is proceeding apace in spite of the absence of the accuseds. This indicates that the prosecutor and the court are willing to disregard explicit, written limits on their authority to act when such limits are politically inconvenient to the ends they seek to achieve. That is part and parcel of a political show trial. The following example reveals this more fully.

Another obvious violation concerns the court's designation of the accused Israeli officers as "fugitives". The obvious designation under the Criminal Procedure Code for the accused Israeli officers should have been "defaulters", since they are accuseds "who [are] outside the country and *cannot be brought in*"[142]. As Israeli nationals not present in Turkey and as persons owing no allegiance or legal duty to Turkey, Turkey had (and has) no lawful authority to compel the accused Israeli officers to appear at a Turkish judicial hearing for an interrogation or any other purpose. "Fugitive" is not the appropriate

[138]Criminal Procedure Code art. 193(1) (emphasis added).
[139]*Id.* art. 195(1).
[140]*Id.* art. 193(2) (emphasis added).
[141]*Id.*
[142]Criminal Procedure Code art. 244(1) (emphasis added).

category for the Israeli accuseds for a number of reasons. *First*, the Criminal Procedure Code defines a "fugitive", in part, as an "individual who hides himself *within the country* in order to invalidate a pending prosecution against him"[143]. Hence, a fugitive is an individual who is otherwise within the jurisdiction of Turkish courts but who is actively evading his attendance at court. *Second*, the part of the definition, "or is in a foreign country and for this reason the court cannot reach him"[144], might seem, at first glance, to apply to persons like the Israeli military officers, but the means Turkish law possesses to encourage a fugitive's presence in court belies that interpretation. Article 247 of the Criminal Procedure Code (which deals solely with fugitives) notes that, should an accused not appear as required, "[t]he court shall render a decision on advertising the invitation in a newspaper, *which shall be posted at the door of the accused's domicile*"[145]. The court could only do so if the accused had a domicile in Turkey, which foreign accuseds like the Israeli military officers would not. *Third*, if the accused does not respond in fifteen days to the invitation *in the newspaper*, the court would then designate him as a fugitive and could inflict on him the measures set forth in Article 248 of the Criminal Procedure Code, to wit, seizing the accused's belongings in Turkey as well as seizing his "rights and credits"[146]. Hence, *fugitives* are presumed to have assets in Turkey, which suggests that they are either Turkish nationals or foreigners resident in Turkey. There is no analogous provision to try to compel defaulters to appear before a Turkish court. As such, defaulters have no such ties to Turkey. Hence, the Israeli officers meet the definition of defaulters under the Criminal Procedure Code. Accordingly, no main hearing should *lawfully* have been opened against the Israeli military officers[147]. Nonetheless, in the Mavi Marmara "trial", the Turkish court acquiesced in the legal stretch and designated the Israeli accuseds as "fugitives", doubtless to allow the main hearing to proceed (which would not be permitted under the Criminal Procedure Code for defaulters[148]). Yet, making such a legal stretch violates the rule of law and indicates, once again, the political nature and motivation of the Mavi Marmara "trial". It also indicates

[143]Criminal Procedure Code art. 247(1) (emphasis added).
[144]*Id.*
[145]*Id.* art. 247(1)(a) (emphasis added).
[146]*Id.* arts. 247 (1)(b) & 248.
[147]*Id.* art. 244(2).
[148]*Compare* Criminal Procedure Code art. 244(2) *with* art. 247(3).

that judicial officials are fully complicit in the politicisation of the Turkish justice system in this matter.

Despite the prohibition on *in absentia* trials, the main hearing of the trial nevertheless commenced on 6 November 2012 in Istanbul. It began without the presence of any of the accuseds and despite the fact that no interrogations of any of the accuseds had been conducted. According to the indictment, approximately 500 witnesses were expected to be heard[149]. Yet, there was another obvious legal impediment to starting the trial on 6 November. It has been reported that "[t]he 'accused' ha[d] not been served, summoned, notified or informed in any way that they [we]re going to be charged, or what the charges against them [were]"[150], all in clear violation of Turkish criminal law and procedure[151]. Conveying such information to an accused is a basic requirement in any legitimate justice system. Having failed to do so is incredible—and inexcusable. Such open, notorious, and obvious violations of Turkish criminal law and procedure establish the notorious, political nature of the ongoing "trial" and can only mean that judicial officials involved in this matter are more concerned with getting the show trial underway than they are in following the rule of

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[149]Ece Toksabay, *Turkey Begins Trial of Israeli Military Over Gaza Ship Killings*, REUTERS (6 Nov. 2012), http://www.reuters.com/article/2012/11/06/us-turkey-israel-trial-idUSBRE8A50KO20121106.

[150]Gul Tuysuz, *Trial Opens in Turkey Against Israeli Military Officers in 2010 Ship Raid*, CNN (6 Nov. 2012), http://www.cnn.com/2012/11/06/world/meast/turkey-israeli-officers-trial/ (quoting an email to CNN from Israeli Foreign Ministry spokesman Yigal Palmor); *see also Turkey Tries Israeli Officers, Seeks 18,000-Year Sentences for Mavi Marmara Deaths*, TIMES OF ISRAEL (6 Nov. 2012), http://www.timesofisrael.com/turkey-tries-israeli-commanders-in-absentia-seeks-18000-year-sentence/ ("The so-called accused were not even informed or served or notified that they were going to be charged, which makes th[e trial] one big puppet show".); Toksabay, *supra* note 149 ("This is not a trial, this is a show trial with a kangaroo court. This is a trial taken right out of a Kafka novel, a grotesque political show that has nothing to do with law and justice".). *See also An Istanbul Court Holds a Show Trial of Israelis Accused of Responsibility for the Deaths of Nine Turkish Operatives Aboard the Mavi Marmara*, MEIR AMIT INTELLIGENCE & TERRORISM CTR. (13 Nov. 2012), http://www.terrorism-info.org.il/en/article/20422, ¶¶ 2 (claiming deliberations were postponed after three days to 21 February 2013 "because of legal flaws") & 6 (citing report by Turkish journalist Efkan Bulaç on the Ulkedehaber website, November 7, 2012, that the accused Israelis had not received formal summonses prior to the commencement of the trial).

[151]Criminal Procedure Code arts. 175(2) (requiring the issuing of summonses to those to appear at main hearing) & 176(1) (requiring that the "indictment and summons shall be notified to the accused all together".).

law in the pursuit of truth and justice, thereby tainting the entire Turkish system of justice.

As a final point, Article 24(2) of the Penal Code reads as follows: "A person who carries out an order given by an authorized body as part of his duty, and the execution of this duty is compulsory[,] shall not be held culpable for such act"[152]. Pursuant to this article, persons are not to be held culpable for mandatory acts they have been ordered to carry out. In fact, the article states that they "*shall not* be held culpable" for such acts.[153] This would surely apply to members of the armed forces of a country executing an operation in defence of that country as determined by the appropriate national political authorities. Defence policy in Israel is made at the Parliamentary level, *inter alia*, by the Prime Minister and the Minister of Defence of Israel. When Israeli political authorities determine that an armed conflict exists, Israeli armed forces must then conduct themselves in accordance with the LOAC. Moreover, when Israeli government officials determine that the armed forces of Israel are needed to defend the country by enforcing a naval blockade established pursuant to the LOAC, then such soldiers (from the highest echelons to the lowest) are duty-bound to obey such an order, i.e., it is "compulsory". As such, based on the principle of comity among sovereigns, Turkey is obligated to grant to Israeli public servants the same respect and legal leeway that it grants to its own public servants. Accordingly, the accused Israeli officers should never have been charged since they were carrying out the compulsory orders of their government. Once again, deciding to try Israeli officers for acts for which Turkish military officers would not be tried or held legally culpable clearly reveals the political nature of the ongoing "trial" in Istanbul.

[152]Penal Code art. 24(2).

[153]*Id.* (emphasis added). Although Article 24(3) reads, in effect, that an unlawful order should not be carried out at any time, enforcing a properly announced and established naval blockade is not an unlawful order under the LOAC. In fact, enforcing such a blockade is itself *required* by the LOAC. *See, e.g.*, San Remo Manual, *supra* note 4, art.100.

IV. THE TURKISH PROSECUTOR'S FAILURE TO INDICT THE MAVI MARMARA'S MASTER FOR CRIMINALLY RECKLESS CONDUCT IN PRECIPITATING THE EVENTS THAT RESULTED IN THE DEATHS OF NINE PASSENGERS ABOARD HIS SHIP REVEALS THE POLITICAL MOTIVATION OF THE ONGOING TRIAL

On 31 May 2010, the date of the clash between the Israeli armed forces and the so-called Free Gaza Flotilla, the Mavi Marmara was a Comoros-flagged ship[154]. As such, the Union of Comoros could have—*and should have*—intervened to prevent the unlawful actions of the ship's Master and crew, since the Mavi Marmara was a Comoros national under international law. It is the responsibility of Comoros to ensure that its flagged vessels abide by international law[155]. Yet, in addition to failing to prevent the Master's unlawful conduct on that date, Comoros has taken no subsequent legal action against the Master of the ship, despite his having violated his obligations under international law by knowingly placing his ship, crew, passengers, and cargo at grave risk when he attempted to breach a properly announced and defended naval blockade in a recognised zone of armed conflict.

It is well-established as customary international law that the captain of a ship is the Master of the vessel[156]. Accordingly, the Master bears ultimate responsibility for the safety of the vessel and all persons aboard it: "*The master is charged with the safety of the ship and cargo*; *in his hands are the lives of passengers and crew*"[157]. The Master of

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[154]*See supra* note 44.

[155]Jeremy Firestone & James Corbett, *Combating Terrorism in the Environmental Trenches: Responding to Terrorism: Maritime Transportation: A Third Way for Port and Environmental Security*, 9 WID. L. SYMP. J. 419, 437 (2003).

[156]EDGAR GOLD, COMMAND: PRIVILEGE OR PERIL? THE SHIPMASTER'S LEGAL RIGHTS AND RESPONSIBILITIES 7 (Background paper prepared for the 12th International Command Seminar, London 2003), *available at* http://www.ifsma.org/fairtreatment/documents/commandGold.pdf (discussing that the master's legal authority and responsibility have "been confirmed by numerous legal decisions in many states over a long period of time, despite the fact that it has never been set out in any international instrument. In other words, the master's authority and responsibility is something that is *accepted in terms of customary law on a global basis*". (emphasis added)).

[157]HERBERT HOLMAN, A HANDY BOOK FOR SHIPOWNERS & MASTERS 1 (William H. Maisey 6th ed. 1906) (1896) (emphasis added). *See also* CHRISTOPHER HILL, MARITIME LAW 495 (5th ed. 1995) ("[The master] is also the commander of men, his crew, and he occupies a position of special trust, a fiduciary relationship with his

the Mavi Marmara on the day of the clash on the high seas was a Turkish national over whom Turkish courts have jurisdiction by virtue of his nationality[158] and over whom Comoran courts have jurisdiction by virtue of his serving as Master of a Comoros-flagged vessel.

Regarding the 31 May attempt to breach the Israeli naval blockade of the Gaza Strip, the Master of the Mavi Marmara was aware of the following facts at the time he made the fateful decision to breach the Israeli naval blockade:

(1) That the Israeli navy had established a naval blockade of the Gaza Strip[159];

(2) That the blockade had been properly announced to mariners[160];

(3) That the Israeli navy considered the blockade to be a lawful blockade[161];

(4) That the Israeli navy intended to enforce the blockade against the Flotilla of vessels of which the Mavi Marmara was a part[162];

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owners. He is absolutely responsible for the safety of the ship and remains in command regardless of whether or not his ship is in charge of a pilot at any given time".)

[158]TURKISH REPORT, *supra* note 5, at 122.

[159]*Id.* at 64; UNHRC Report, *supra* note 5, ¶ 108; TÜRKEL REPORT, *supra* note 7, ¶ 123. There is also a very telling comment in the UNHRC Report that mentioned the reluctance of commercial shipping companies to allow their vessels to be chartered by the planned flotilla. UNHRC Report, *supra* note 5, ¶ 81 (noting that Flotilla supporters had to purchase their own vessels in light of the reluctance of commercial firms to lease their ships to the Flotilla). Although the reason for such reluctance is not explicitly stated in the UNHRC Report, it is well-known that commercial shipping companies are reluctant to put their ships in harm's way, and challenging an announced naval blockade in a zone of armed conflict would clearly constitute such a danger. The Master of the Mavi Marmara would have known that, but he sought to breach the blockade anyway, once again establishing how reckless his actions truly were.

[160]TURKISH REPORT, *supra* note 5, at 64; PALMER REPORT, *supra* note 5, ¶ 75; TÜRKEL REPORT, *supra* note 7, ¶¶ 26 & 58.

[161]TURKISH REPORT, *supra* note 5, at 64; TÜRKEL REPORT, *supra* note 7, ¶ 123.

[162]UNHRC Report, *supra* note 5, ¶ 108; TÜRKEL REPORT, *supra* note 7, ¶ 123; PALMER REPORT, *supra* note 5, ¶ 105 & n.337 (citing TURKISH REPORT, Annex 5/1/i, at 1 ("I told them [the Israelis] again that we were in international waters and our

(5) That the Israeli navy had given multiple warnings to Flotilla vessels about the blockade and its intent to enforce it[163];

(6) That the Israeli navy had directed the vessels to change course away from the Gaza Strip multiple times prior to attempting to board the Mavi Marmara[164];

(7) That, during the voyage towards the Gaza Strip, persons on board the Mavi Marmara had been fashioning weapons to resist any Israeli attempt to board the ship[165];

(8) That there were passengers aboard the ship who had expressed their hope to achieve martyrdom[166]; and

(9) That Israel had offered a peaceful alternative for delivering the humanitarian goods to the Gaza Strip over land under UN auspices and control[167].

Despite all that he knew, the Master knowingly and deliberately decided to reject the Israeli demand either to alter course away from the Gaza Strip or to change course to the Israeli port of Ashdod pursuant to the Israeli offer to deliver the humanitarian cargo to Gaza over land. *The captain's knowing and deliberate decision to reject the Israeli Navy's demands set in motion the series of events that directly led to the boarding of his ship by Israeli commandos and ultimately to*

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route was directed towards Israel [Gaza] and that they could not ask us to change our route".), Annex 5/5/x, at 2 ("I proceeded to communicate to the Israeli Navy over VHF radio on behalf of the Freedom Flotilla, stating . . . that we were unarmed civilians aboard six vessels carrying only humanitarian aid headed for the Gaza Strip".).

[163]PALMER REPORT, *supra* note 5, ¶¶ 106, 111; TÜRKEL REPORT, *supra* note 7, ¶ 123.

[164]PALMER REPORT, *supra* note 5, ¶ 106; TÜRKEL REPORT, *supra* note 7, ¶ 123.

[165]UNHRC Report, *supra* note 5, ¶¶ 99–101; PALMER REPORT, *supra* note 5, ¶ 123 & n.384 (noting passengers' preparing for violent resistance "well in advance"); TÜRKEL REPORT, *supra* note 7, ¶ 167 (noting that the Captain of the Mavi Marmara was aware that some passengers were fashioning metal clubs to resist any attempt to board the ship).

[166]TÜRKEL REPORT, *supra* note 7, ¶ 168 (noting that six of the nine passengers killed had expressed a desire to become martyrs); Hartmann, *supra* note 26. This news story includes a video of a passenger stating, "When I went on the first convoy, I wanted to be a shaheed [martyr]. I wasn't that lucky. Second time, I wanted to be a shaheed. Didn't work. Third time, lucky, [with the help of God] I will be a shaheed". *Id.*; *see also* Spencer, *supra* note 26.

[167]PALMER REPORT, *supra* note 5, ¶ 100; TÜRKEL REPORT, *supra* note 7, ¶ 123.

the deaths of nine of the ship's passengers who resisted the Israeli boarding with deadly force, an outcome that was clearly foreseeable given the Master's knowledge that some passengers aboard his ship had been fashioning weapons to resist any attempt to board the vessel. Given what he knew at the time, the Master's decision constitutes criminal recklessness. *But for* the Master's decision to reject both Israel's demand that he alter course away from the Gaza Strip as well as Israel's good faith offer of a peaceful alternative to deliver the humanitarian goods to Gaza over land, Israeli commandos would not have had to board the vessel to enforce the blockade, passengers on the vessel would not have attacked the Israelis with lethal force, the Israelis would not have had to resort to lethal force in self-defence, and no one aboard the Mavi Marmara would have been killed or injured. Remarkably, *despite the foregoing*, neither Turkish nor Comoran prosecutors have sought to indict and try the Master of the Mavi Marmara for his criminal recklessness in knowingly putting his ship, its passengers and crew, and its cargo in a situation where there was not only a serious *possibility* of death, injury, and/or damage, but where *actual* death and serious bodily injury did, in fact, occur.

In light of the foregoing, the ship's Master was criminally culpable for the deaths and serious injuries that occurred as a result of his criminally reckless decision to reject the peaceful alternative offered by the Israeli government and to continue to sail his vessel towards the Gaza Strip, knowing that the Israeli navy had repeatedly stated its intent to enforce the blockade against all ships seeking to breach it, including his ship. Moreover, *given that the Master was aware that passengers on his ship had been fashioning weapons to resist attempts to board the ship, he was fully on notice of the danger of death or serious bodily injury to which he was subjecting his passengers by continuing to sail toward the Gaza Strip*.

The Turkish Penal Code contains articles to deal with such criminal recklessness. It appears that the Turkish Master violated a number of criminal provisions in the Penal Code. He appears, for example, to have violated Article 179(2) of the Penal Code, which reads, in pertinent part: "Any person who directs and controls a . . . sea . . . transportation vehicle such as to risk the life, health or property of others shall be sentenced to a penalty of imprisonment for a term up to two years"[168]. The Master of the Mavi Marmara did exactly that by

[168]Penal Code art. 179(2).

knowingly and deliberately sailing his ship into a recognised zone of armed conflict despite international maritime notices of the existence of the naval blockade and despite multiple warnings by Israeli naval forces that they would enforce the blockade[169]. It also appears that the Master violated Article 180(1): "Any person who endangers the life, health or property of another by recklessness during sea . . . transportation shall be sentenced to a penalty of imprisonment for a term of three months to three years"[170]. Once again, the Master was on clear notice of the danger, and he sailed on despite the multiple warnings he had received. Further, because the Master knowingly and willingly accepted the risk of death and severe bodily injury to his passengers and crew by disregarding the international maritime warning as well as Israel's warnings to alter course away from Gaza and Israel's good faith offer to deliver the ship's humanitarian cargo to Gaza by land, he appears to have violated Article 85 of the Penal Code: "Any person who causes the death of another by reckless conduct shall be sentenced to a penalty of imprisonment for a term of two to six years"[171]. Article 85 continues: "If the act results in the death of more than one person, or the injury of more than one person together with death of one or more persons, the offender shall be sentenced to a penalty of imprisonment for a term of two to fifteen years"[172]. The Master's knowing and willful reckless acts resulted in the deaths of nine persons and the injury of many others. Yet, no known indictment has been offered to a court for consideration.

The Master (and the IHH members who sought the armed confrontation with the Israeli armed forces) may also be criminally liable for violating Article 306(1), which reads in pertinent part as follows: "Any person who, without authorisation . . . engages in . . . hostile activities against a foreign state in a manner which exposes the Turkish state to the risk of war, shall be sentenced to a penalty of imprisonment for a term of five to twelve years"[173]. Then Turkish Prime Minister Erdoğan described the 31 May clash on the high seas as

[169] *See supra* notes 159 & 160.
[170] Penal Code art. 180(1).
[171] *Id.* art. 85(1).
[172] *Id.* art. 85(2).
[173] *Id.* art. 306(1).

"a cause for war"[174]. Yet, once again, *but for* the Master's refusal to comply with Israeli instructions to choose one of the two alternatives that would have avoided a confrontation, there would have been no confrontation. It is the Turkish Master of the Mavi Marmara whose criminally reckless acts created the "risk of war". Article 306(3) continues: "If the act is such as to merely impair political relations with the foreign state or to expose the Turkish state or Turkish citizen to the risk of retaliation, the offender shall be sentenced to a penalty of imprisonment for a term of two to eight years"[175]. There is no doubt that diplomatic relations between Israel and Turkey have been significantly impaired since the Mavi Marmara and other Flotilla vessels attempted to breach the Israeli blockade[176].

A ship's Master has the duty to protect his ship, passengers, crew, and cargo[177]. Part and parcel of the Master's duty is to identify and evaluate known and potential dangers and to avoid them, if at all possible. The Master of the Mavi Marmara disregarded his clear legal duty and, instead of protecting his passengers and crew by avoiding danger, exposed them to clear and foreseeable *but wholly avoidable* danger. He did so knowingly and willingly. Such actions constitute criminal recklessness on the part of a ship's Master. Hence, *but for* the Master's criminally reckless conduct, no Israeli boarding of the Mavi Marmara would have been necessary, and no clash would have occurred. Nevertheless, it appears that no Turkish prosecutor has sought an indictment against the Master, despite his clear role in the deaths of eight Turkish passengers and one Turkish-American passenger, not to mention injuries to numerous other passengers and to the Israeli commandos carrying out their legal duty to enforce the blockade. *The Master of the Mavi Marmara had it solely within his power and authority to have altogether avoided the confrontation with the Israeli forces*. Instead of doing so, he knowingly and deliberately chose to risk the confrontation, thereby endangering the ship, its passengers and crew, and its cargo. That is the definition of criminal recklessness for the Master of a ship[178]. Moreover, the Master's

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[174]*See, e.g.*, *Erdoğan: Mavi Marmara Raid Was 'Cause for War'*, TODAY'S ZAMAN (12 Sept. 2011), http://www.todayszaman.com/diplomacy_erdogan-mavi-marmara-raid-was-cause-for-war_256509.html.
[175]Penal Code art. 306(3).
[176]*See supra* note 174.
[177]*See supra* notes 156 & 157.
[178]*See id.*

knowing and deliberate acceptance of the risk inexorably led to the events that resulted in the deaths of nine passengers and in bodily injury to many more. Accordingly, the Master of the Mavi Marmara, *who by virtue of his position as such bore sole responsibility for the safety and welfare of his passengers*, failed dramatically in carrying out his duties to protect them. He was, therefore, personally responsible for what occurred due to his criminal recklessness in failing to properly execute his duties as ship's Master to protect his ship, passengers, crew, and cargo.

The Turkish prosecutor's failure to charge the Master of the Mavi Marmara, a Turkish national, for his role in the deaths of nine Turkish passengers and the serious bodily injury to many others that occurred on his ship due to his refusal to comply with the directions of the Israeli navy concerning a properly declared naval blockade once again reveals that Turkish authorities are more interested in politics than in justice and the rule of law. The Master of the Mavi Marmara, *like the Master of every ship of every nationality*, must comply with applicable international maritime law, whether in peace or in war. When a military blockade has been established and announced, the LOAC becomes *lex specialis* with respect to the blockade, and its requirements take precedence over peacetime maritime rules for all ships in the area of the blockade—irrespective of whether the ship's Master personally believed the blockade to be lawful or not. The Master knew that he was sailing his ship into harm's way and, hence, should have affirmatively acted to avoid the danger, especially since there were two obvious ways to do so, *known to him at the time*. He did neither. Instead, he knowingly and willfully continued on the course to breach the blockade, thereby placing his ship, passengers, crew, and cargo at risk in direct violation of his responsibilities as ship's Master. Accordingly, he is criminally culpable and should be tried for his criminal recklessness that resulted in the deaths of nine of the passengers under his care as well as the bodily injury to countless others for whose safety he bore sole responsibility as ship's Master.

CONCLUSION

The ongoing trial in Istanbul of four Israeli military officers is nothing more than a political show trial. The trial disregards the fact that Israeli political authorities had determined, based on the attacks emanating from the Gaza Strip, that a state of armed conflict exists between Israel and Hamas and its Islamist allies in Gaza; that Israel has

an absolute right to defend itself and its people from such attacks; that the applicable law in periods of armed conflict is the LOAC; and that establishing a naval blockade to stanch the flow of militarily useful materiel to one's enemies is lawful. The Turkish trial also disregards Israel's obligation under the LOAC to enforce a blockade it establishes against all neutral ships, including those claiming to be on humanitarian missions. The 31 May 2010 clash between Israeli armed forces and the so-called Free Gaza Flotilla occurred—*not because Israel desired it*—but because Flotilla vessels knowingly and willfully refused to avail themselves of either of the two peaceful alternatives known to them—i.e., either to change course away from the Gaza Strip or to divert course into the port of Ashdod to unload their humanitarian cargo for subsequent delivery to Gaza over land under UN auspices—and because Israel was duty-bound under the LOAC to impartially enforce its blockade.

Further, despite Israel's attempt to avoid the confrontation altogether by making its good faith offer to deliver the humanitarian goods to Gaza over land, Turkish authorities are trying, via the ongoing trial, to force on Israel *their view* of what the applicable law was on 31 May 2010—to wit, peacetime maritime law. Turkey has no authority to force its view on another sovereign state. Moreover, the vessel Mavi Marmara was not a Turkish-flagged vessel on 31 May 2010. As such, Turkey lacks general jurisdiction over what occurred on that vessel on that date—that jurisdiction belongs to the flag state, the Union of the Comoros. Nonetheless, Turkey has asserted jurisdiction anyway. Yet, even assuming *arguendo* that Turkish courts have authority to assert jurisdiction, how the prosecutor and the judges are conducting the trial indicates without question that the trial is political theatre rather than a search for the truth and the achievement of justice. Turkish judicial authorities were so anxious to get the trial underway that the trial began *before* any of the accused Israeli officers had been served with summonses or copies of the indictment. Turkish judicial authorities were so anxious to get the trial underway that they improperly designated the Israeli officers as "fugitives" because designating them properly under Turkish law (i.e., as "defaulters") would have meant that no main hearing could be commenced without their presence. Turkish judicial authorities were so anxious to get the trial underway that the judges approved an indictment holding the Israeli officers personally responsible for alleged crimes they could not have committed. Finally, Turkish officials were so anxious to try Israelis

that they declined to investigate and indict the one person who had both the authority and the opportunity to have avoided the confrontation altogether, the Turkish Master of the Mavi Marmara (a person over whom Turkish courts clearly have jurisdiction by virtue of his nationality as well as his presence in Turkey). It was the Master's knowing and willful dereliction of his duty as ship's Master to ensure the safety of his ship, passengers, crew, and cargo that inexorably led to the deaths and injuries of the passengers aboard his vessel. Instead of trying the one person whose actions directly precipitated the events that led to the deaths and injuries aboard the Mavi Marmara, Turkish authorities have instead decided to prosecute Israeli officers who were duty-bound by the LOAC to enforce the blockade against vessels seeking to breach it. In the final analysis, the ongoing political show trial in Istanbul constitutes a huge stain on the Turkish judicial system, makes a mockery of the rule of law, and has turned the Turkish judicial system into an object of ridicule before the world.