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Flare-up of tension in the Middle East

Committee Opinion[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Christos POURGOURIDES, Cyprus, Group of the European People's Party

A. Conclusions of the committee

1. The Committee on Legal Affairs and Human Rights congratulates the rapporteur of the Political Affairs Committee, Mr Piero Fassino, on his excellent report and expresses its overall approval of the proposed draft resolution.

2. Nonetheless, the committee would like to suggest a number of changes to strengthen the draft resolution still further.

B. Proposed amendments to the draft resolution

Amendment A (to the draft resolution)

In the draft resolution, replace the first sentence in paragraph 4 with the following:

> *"It considers the Israeli raid, which took place in international waters, an illegal act constituting a breach of international law, in particular customary law of the sea and international human rights and humanitarian law. The Assembly regards the response of the Israeli forces to the plan by the flotilla of six ships to force the blockade in place as manifestly disproportionate."*

Amendment B (to the draft resolution)

In the draft resolution, in the second sentence of paragraph 7, after the word "blockade", add the following:

> *", which is illegal under international humanitarian law,".*

C. Explanatory memorandum by Mr Pourgourides, rapporteur for opinion

1. I congratulate Mr Piero Fassino for his excellent report on the flare-up of tension in the Middle East.

2. Nonetheless, I would like to propose some amendments to the draft resolution to strengthen it still further.

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1. Reference to committee: request for an urgent debate, Reference 3691 of 21 June 2010. Reporting committee: Political Affairs Committee. See Doc. 12308. Opinion approved by the committee on 22 June 2010.

1. Amendment A

The rapporteur believes that there can be no legal justification under public international law, and in particular the customary law of the sea and international human rights and humanitarian law, for the military action undertaken by Israel.

a. From the standpoint of *jus ad bellum*, it would not appear that Israel is in a position to invoke its right to resort to force in the event of an attack, as a means of legitimate self-defence by virtue of Article 51 of the United Nations Charter, against a humanitarian flotilla which displayed prima facie no sign of threat to national security or the territorial integrity of the country. Furthermore, Israel had no explicit authorisation from the United Nations Security Council to resort to armed force (see Article 42 of the above-mentioned charter). The rapporteur is of the opinion that, to a certain extent, the attack on the convoy could even be seen as a violation of the United Nations Charter, equivalent to an act of war on the part of Israel towards the country whose flag was flying on the attacked ship.

b. With regard to international customary law of the sea, neither Israel nor Turkey is a party to the United Nations 1982 Convention on the Law of the Sea. However, Israel is bound by international customary law of the sea, which guarantees the freedom of navigation on the high seas (that is to say, in international waters, *inter alia*) for all, and the principle of the exclusive jurisdiction of the flag state. Consequently, a vessel flying a foreign flag may be inspected and boarded on the high seas only under very specific circumstances (referred to in Article 110 of the aforementioned United Nations convention of 1982), none of which applied in this case.[2] Moreover, the raid carried out by the military may also be considered as a violation of the United Nations Convention for the Suppression of Unlawful Acts Against c. the Safety of Maritime Navigation of 1998, to which both Turkey and Israel are parties.[3]

c. With regard to international human rights and humanitarian law (assuming that Israel can indeed invoke the right of war), a universally accepted principle is that of respecting the principle of proportionality and the distinction between civilians and combatants. Given the use, once on board the *Mavi Marmara* vessel, of strictly lethal means, and in the apparent absence of any build-up in carrying out the military operation, there is every reason to believe that the principle of proportionality was not adhered to. Furthermore, it would appear that the operation was poorly prepared, which placed the lives of the Israeli soldiers in danger and cost the lives of nine passengers: the rapporteur considers that Israel may also be held liable for this from the point of view of its positive obligations to take appropriate measures to protect the life of passengers against any use of lethal force by its armed forces.

2. Amendment B

The rapporteur wishes to emphasise that this amendment is closely linked to the first insofar as Israel claims that the military operation was launched to prevent any breach of the blockade set up since 2007 in its war against Hamas (even though the latter is not a state entity), the authority in place in the Gaza Strip.

He points out that a blockade, which is a codified and well-established military tactic,[4] may be perfectly legal provided that it has been officially declared in advance, is temporary, necessary and not excessive. It is, accordingly, a measure where humanitarian law applies. Paragraph 102 of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea prohibits any blockade if the damage caused to civilians is excessive and therefore disproportionate in relation to the direct military advantage derived from it, which would appear to be the case for the population of Gaza according to the reports and findings of international bodies.[5] Further, given the widely criticised humanitarian consequences,[6] the blockade of Gaza may be interpreted as a collective punishment of the whole civilian population of Gaza, in breach of the fourth

2. These are: if there is reasonable ground for suspecting that the ship is engaged in piracy, engaged in the slave trade, engaged in unauthorised broadcasting or is without nationality.
3. Article 3 of the Convention provides: “Any person commits an offence if that person unlawfully and intentionally:
a. seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or …
b. injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f)”.
4. See Article 42 of the United Nations Charter: see, more particularly, in the context of the region, the Gaza-Jericho Agreement of 4 May 1994 (Annex I, Article 11) granting Israel responsibility and the right for controlling the coast off Gaza.
5. See, amongst others, the United Nations “Goldstone” report, paragraph 1733; see United Nations Security Council Resolution 1860.
6. Notably by the International Red Cross itself, that considers the blockade of Gaza to be a collective punishment.

Geneva Convention of 1949.[7] Consequently, if the blockade is illegal, the San Remo Manual (which is not even a legally binding instrument), which authorises the boarding and the seizure of merchant vessels on the high seas if the latter attempt to force a blockade (paragraph 98), cannot apply.

7. See Articles 33 and 55 of the fourth Geneva Convention.