

Disappointment at the United Nations: The Failure of the Palmer Report

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ABSTRACT

After the Israeli attack of May 31, 2010 on the Freedom Flotilla led by the Mavi Marmara, the UN Secretary General appointed a panel of inquiry to resolve the sharp legal dispute that had emerged between Turkey and Israel. The panel was chaired by Jeffrey Palmer, former Prime Minister of New Zealand, and it was hoped that the report issued would clear the diplomatic air between the two countries. In fact, the publication of the report in May had exactly the opposite effect, enraging Turkey, straining diplomatic relations still further. Turkey seemed fully justified in its response, given the departures from appropriate interpretations of international law. This commentary critically examines the process from the formation of the Palmer panel through the release of its conclusions, looking at the legal and political implications.

When the UN Secretary General announced on August 2, 2010 that a Panel of Inquiry had been established to investigate the Israeli attacks of May 31, 2010 on the *Mavi Marmara* and five other ships carrying humanitarian aid to the beleaguered people of Gaza, there was widespread hope that international law would be vindicated, the Israelis would finally be held accountable, and the diplomatic rift between Turkey and Israel would be sensibly restored to normalcy. With the release of the Palmer Report these hopes have all but vanished as the document fails to address the central international law issues in a credible and satisfactory manner. Turkey, not surprisingly, has harshly responded that it is not prepared to live with the central finding of this detailed report that reached the entirely unacceptable conclusions that the Israeli blockade of the Gaza Strip is lawful and, furthermore, that it could be legally enforced by Israel against a humanitarian mission in international waters.

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On further reflection, this outcome should have been anticipated. After all, the panel as appointed was woefully ill-equipped to render an authoritative result. Geoffrey Palmer, the chair of the panel, although a respected public figure being the former prime minister of New Zealand and an environmental law professor, was not particularly knowledgeable

about either the international law of the sea or the law of war. Beyond this he enjoyed a reputation, based on his political career, of being “a special friend” of Israel. Somewhat incredibly, the only other independent member of the panel was Alvaro Uribe, the former president of Colombia, who possessed no professional credentials relevant to this assignment, and was notorious both as a political leader with a particularly horrible human rights record while holding office and as someone who developed intimate ties with Israel through extensive arms purchases and consistent diplomatic cooperation. Such a partisan profile was duly acknowledged by Alvaro receiving the “Light Unto the Nations” award from the American Jewish Committee. Such closeness to Israel, given the nature of the controversy, should have been sufficient by itself to cast doubt on Alvaro’s suitability for this appointment. His presence on the panel deeply compromised the integrity of the process, raised questions about the UN’s capacity for neutral auspices, and made one step back and wonder how could such an appointment can be explained, let alone justified and accepted. Turkey’s agreement to participate in such a flawed process was itself, it now becomes clear, a serious diplomatic failure. The Turkish government had every right and responsibility to insist on a more qualified, and less aligned, membership for the panel, as well as a larger panel, as would seem to be required for this complex situation.

The other two members of the panel were designated by the governments of Israel and Turkey, and predictably appended partisan dissents to those portions of the report that criticized the position taken by their respective governments. Another unacceptable limitation of the report was that the panel was constrained by its artificial terms of reference that prohibited reliance on any legal or evidentiary materials other than those contained in the two national reports submitted by the contending governments. With these considerations in mind, we can only wonder why the Secretary General would have lent his authority to establish a formal process so unlikely to achieve its proclaimed goals, which were to produce findings and recommendations that would put the legal controversy to rest

and resolve diplomatic tensions dangerous for peace and security in the Middle East. Whatever else, the Palmer Report failed miserably to reach these goals, and must be put aside if the diplomatic air is ever to be cleared. As with Turkey, it would seem that the UN Secretariat is responsible for establishing such a panel of inquiry that seems to have been flawed at its inception. Only Israel appears to have done its homework, but even Israel gains only a hollow victory if it appears to win on the technical issues in dispute but loses the possibility of healing relations with the most important country in the Middle East.

To establish a favorable diplomatic atmosphere, the report had to interpret the legal issues in a reasonable and responsible manner

It is notable that even this ill-conceived panel did not altogether endorse Israeli behavior on May 31. The panel found that Israel used excessive force and seemed legally and morally responsible for the majority of the deaths of the nine passengers on the *Mavi Marmara*, advised Israel to pay compensation to families and survivors and to issue a statement of regret. In other words the Palmer Report seems to seriously fault the manner by which Israel enforced the blockade, despite mistakenly upholding the underlying legality of Israel's blockade and its right of enforcement, and that is the rub. Such a conclusion contradicts the earlier finding of a more expert and credible panel established by the Human Rights Council, and rejects the overwhelming consensus that had been reached by qualified international law specialists on these core issues.

A core inadequacy of the report was to consider the legal assessment of the blockade as if had been exclusively established and maintained for the sake of Israeli security. This ignores the essential role of the blockade in imposing an intolerable regime of collective punishment on the population of Gaza that has lasted for more than four years, and that is sustained in flagrant violation of Article 33 of the Fourth Geneva Convention. It is widely admitted that Israel has the right as the occupying power to monitor the entry of goods to Gaza to ensure that weapons are not being smuggled, and has been doing so ever since 1967 when the occupation commenced. What has been drawn into serious legal question is whether a blockade is needed or permissible to reach this goal, and more concretely, whether the humanitarian harm inflicted on the people far outweighs the security justifications for the blockade. It is worth observing, which was not done in the Palmer Report, that Israel in response to the public outcry after the attack on the *Mavi Marmara* announced with great fanfare that it was acceding to international pressure by easing the restrictions on the entry to Gaza of humanitarian



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assistance. In fact, this easing of the blockade has not been implemented to any great extent with the result that there is a deteriorating situation with respect to the physical and mental health of the 1.6 million civilians living in Gaza, further aggravated by the dependence of more than 80 percent of the population on UN assistance for food, health, and education and the existence of one of the highest unemployment levels in the world, above 45 percent according to the most recent UN report.

The panel delayed the release of the report several times to give diplomacy a chance to resolve the contested issues without what was understood to be the complications of making the report public. This unusual development signaled the inadequacy of the report as a contribution to the peaceful resolution of a dispute between sovereign states. Surely, it is strange that a panel that was expected to help with this process produced a report that was understood to have the opposite effect to such an extent that the release of the report was postponed in the hope that the parties on their own might find a solution, and the report could then be forgotten, possibly not released at all, or treated as a confidential document.

As we now know, Israel and Turkey could never take advantage of this alternate opportunity to reach closure. There were intriguing leaks during the period between the scheduled release and the actual release of the Palmer Report that

unpublicized discussions between representatives of the two governments had succeeded in reaching a compromise agreement that consisted of Israel's readiness to offer Turkey a formal apology and to compensate the families and survivors of those killed and wounded during the attacks. But when the time to formalize

the resolution of this conflict in public came, Israel backed away, asserting that it would never apologize for its allegedly defensive uses of force. In particular, Israeli Prime Minister Benjamin Netanyahu proved unwilling to take the last step, claiming that an apology to Turkey would demoralize the citizens of Israel and convey signs of weakness to Israel's enemies in the region. Cynical observers believed that Netanyahu's rigidity was mainly a reflection of domestic politics in Israel, especially in relation to his bitter rivalry with the even more extremist political figure, Foreign Minister Avigdor Lieberman. As a tactic, Lieberman was continually accusing Netanyahu of being a wimpy leader and has made no secret of his own ambition to be the next Israeli to run the country. The *Mavi Marmara* incident served Lieberman well but Israel badly by backing the government into its no-win refusal to make a diplomatic retreat.

The report as written is a step backward from the fundamental effort of international law to limit permissible uses of international force to situations of established *defensive necessity*

Whatever was the true mix of reasons, which may not become clear for decades if ever, the diplomatic track failed, despite intense cheerleading from Washington. The US government made no secret of its strong interest in seeing a diplomatic resolution at the earliest possible time of this conflict between its two most important strategic partners in the Middle East. Given the turmoil in the region, it had become a high priority for American foreign policy to have stable and amicable relations between Israel and Turkey.

It is against this background that the Palmer Report proved to be such a disappointment. It achieved just the opposite of the intended result. It must have been assumed that a reputable technical inquiry about issues of law and fact would provide Israel with an opportunity to demonstrate their flexibility. It was probably anticipated that the report would hold the blockade to be unlawful, and, as a result, that Israel should apologize and compensate. Israel could have complied even as it complained about UN bias. It may turn out that Israel, with American support, successfully twisted arms at the UN in the hope of gaining a public relations victory by constructing this biased structure of inquiry, overlooking the degree to which they had far more to gain by complying with adverse recommendations and being rewarded by a renewal of their normal relationship with

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Turkey. What happened instead was a sharp and further deterioration of relations with Turkey that overwhelmed the significance of the pro-Israeli outcome of the Palmer Panel.

From the public perspective it seemed that after the feverish diplomatic efforts failed, the Palmer Panel seemed to offer the last chance for the parties to reach a mutually satisfactory resolution based on the application of international law and

that the resulting recommendations would delimit what must be done to overcome any violations that had taken place during the attack on the flotilla. But this is misleading. The actual situation was reversed. It was because the parties and the UN understood that the Palmer Report had failed to provide a platform on which the conflict could be resolved that a diplomatic maneuver was attempted when the scheduled release of the report was delayed.

To establish a favorable diplomatic atmosphere, the report had to interpret the legal issues in a reasonable and responsible manner. This meant, above all else, a finding that the underlying blockade imposed more than four years ago on the 1.6 million Palestinians living in Gaza was unlawful and should be immediately lifted. On this basis, the enforcement by way of the May 31 attacks was unlawful, an offense aggravated by being a gross interference with freedom of navigation on the high seas, and further aggravated by deliberately causing nine deaths among the humanitarian workers and peace activists on the *Mavi Marmara* and by Israeli harassing and abusive behavior toward the rest of the passengers. Such moderate conclusions should have been reached without difficulty by the panel, so obvious were these determinations from the perspective of international law as to leave little room for reasonable doubt. But this was not to be, and the report as written is a step backward from the fundamental effort of international law to limit permissible uses of international force to situations of established *defensive necessity*, and even then, to ensure that the scale of force employed was *proportional*, respectful of civilian innocence, and weighed security claims against harmful humanitarian effects. It is a further step back to the extent that it purports to allow a state to enforce on the high seas a blockade, condemned around the world for its cruelty and damaging impact on civilian mental and physical health, a blockade that has deliberately deprived the people of Gaza of the necessities of life as well as locked them into a crowded and impoverished space that is defenseless

and has been mercilessly attacked with modern weaponry by Israel from time to time. It is true that militias operating often beyond the control of the Hamas administration in Gaza have fired many crude rockets toward civilian targets in Israel and that this is a violation of international humanitarian law, but it is also true that comparatively little damage has been done, and that Israel has either broken ceasefires when established or refused to agree to them.

The Turkish refusal to swallow the findings of the Palmer Report has meant that it has adopted a political posture that has a strong popular resonance throughout the Middle East and beyond

Given these stark realities it is little wonder that the Turkish government reacted with anger and were resolved to proceed in a manner that expresses not only a sense of right and justice widely shared in the international community, but also reflects Turkish efforts in recent years to base regional relations on principles of fairness and mutual respect. The Turkish Foreign Minister, realizing that the results reached by the Palmer Panel were unacceptable, formulated his own Plan B that responded to the unacceptable elements in the report, but also to the failure of Israel to act responsibly and constructively on its own by offering a formal apology and setting up adequate compensation arrangements. Israel had more than a year to meet these modest Turkish demands, and stubbornly showed its unwillingness to do so. Turkey could more provocatively, but not unreasonably, have demanded that those who perpetrated and ordered these homicidal acts be brought to justice, but refrained from doing so, which indicates its basic interest in ending the standoff.

As Turkish Foreign Minister Ahmet Davutoğlu made clear, this Turkish response was never intended to produce a confrontation with Israel, but on the contrary was to put relations between the countries back on “the right track.” I believe that this is the correct approach under the circumstances as it takes international law seriously, and rests policy on issues of principle and prudence rather than opting for geopolitical opportunism. As Davutoğlu said plainly, “The time has come for Israel to pay a price for its illegal action. The price, first of all, is being deprived of Turkey’s friendship.”

And this withdrawal of friendship is not just symbolic. Turkey has downgraded diplomatic representation, expelling the Israeli ambassador from Ankara and maintaining inter-governmental relations at the measly level of second secretary. Beyond this all forms of military cooperation have been suspended, Turkey has

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indicated that it intends to strengthen its naval presence in the eastern Mediterranean, and hinted somewhat ambiguously that it would provide naval protection to any future flotillas designed to challenge the Israeli blockade. As well, Turkey has indicated that it might encourage action

within the General Assembly to seek an Advisory Opinion from the International Court of Justice as to the legality of the blockade. What is sadly evident is that Israeli internal politics have become so belligerent and militarist that the political leaders in the country are hamstrung, unable to take a foreign policy initiative that is manifestly in their national interest. For Israel to lose Turkey's friendship is second only to losing America's support, and coupled with the more democratic-driven policies of the Arab awakening, this alienation of Ankara is a major strategic setback for Israel's future in the region, underscored by the angry anti-Israeli protests in Cairo in response to the killing of Egyptian policemen in Egypt after a cross-border attack.

What is more, the Turkish refusal to swallow the findings of the Palmer Report has meant that it has adopted a political posture that has a strong popular resonance throughout the Middle East and beyond. At a time when some of Turkey's earlier diplomatic initiatives have run into difficulties, most evidently in Syria, this Turkish stand on behalf of the victimized population of Gaza represents a rare display by a government of placing values above interests. The people of Gaza are weak, abused, and vulnerable. In contrast, Israel is a military powerhouse, economically prospering, a valuable trading partner for Turkey, and having in the background an ace in the hole: the United States, ever ready to pay a pretty penny if it could induce a rapprochement, thereby avoiding the awkwardness of dealing with this breakdown between its two most significant strategic partners in the Middle East. We should also keep in mind that the passengers on these flotilla ships were idealists and activists, seeking nonviolently to overcome a humanitarian ordeal that the UN and the interplay of national governments had been unable and unwilling to address effectively for several years. This initiative by civil society activists deserved the support and solidarity of the world, not discouragement from the UN and a slap on the wrist by being chastened by the Palmer Report's view that their actions were irresponsible and provocative instead of being praised as empathetic and courageous.

Israel has managed up to now to avoid paying the price for defying international law. For decades it has been building unlawful settlements in occupied West

Bank and East Jerusalem. It has used excessive violence and relied on state terror on numerous occasions in dealing with Palestinian resistance, and has subjected the people of Gaza to sustained and extreme forms of collective punishment. It attacked villages and the Dahiya neighborhood of Beirut mercilessly in 2006, launched its massive campaign (code named “Operation Cast Lead”) from land, sea, and air for three weeks at the end of 2008 against a defenseless Gaza, and then shocked world opinion with its violence against the *Mavi Marmara* in its nighttime attack in 2010. It should have been made to pay the price long ago for this pattern of defying international law, above all by the United Nations. If Turkey sustains its position it will finally send a message to Tel Aviv that the well-being and security of Israel in the future will depend on a change of course in its relation to both the Palestinians, its regional neighbors, and to the international community. The days of flaunting international law and fundamental human rights are no longer policy options for Israel that have no downside. Turkey is dramatically demonstrating that there can be a decided downside to Israel’s flagrant lawlessness.



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