



# centerforconstitutionalrights

*on the front lines for social justice*

To: BAKA: Students United for Middle Eastern Justice, Rutgers University

From: Shane Kadidal, Senior Managing Attorney and Katherine Gallagher, Senior Staff Attorney  
Center for Constitutional Rights

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You have asked us for a legal opinion on whether delivering humanitarian assistance to the people of Gaza violates federal or international law. By way of background, the Rutgers University student group "BAKA: Students United for Middle Eastern Justice" held a fundraiser on November 4, 2010, that sought to raise money for a non-profit organization that is a recognized 501(c)(3) organization, which is supporting a US boat to participate in an upcoming flotilla to Gaza.

This opinion is predicated on the following facts regarding the flotilla and the delivery of the aid to Gaza. There is a future flotilla planned that will include a boat with Americans bound for Gaza, as a platform to protest Israel's blockade of Gaza. The boat may simply participate as part of the larger flotilla, with passengers engaging in advocacy supportive of the human rights and human needs of Palestinians in Gaza, and critical of Israel's policies that infringe on those rights and needs. Alternatively, the boat may deliver humanitarian aid to be distributed to the people of Gaza. The organizers of the U.S. boat do not intend to provide any aid to Hamas. To the extent that aid is provided, it will be provided only through organizations that are not on either the State Department's list of "foreign terrorist organizations" or the Treasury Department's list of "specially designated terrorists" or "specially designated global terrorists." Moreover, the organizers of the U.S. boat would not provide aid to anyone they have reason to believe is acting on behalf of, or controlled by, a designated entity.

**Delivering humanitarian assistance under the factual scenario described above does not violate any federal law.**

Based on the facts set forth above regarding the future flotilla, the actions of the organization sending U.S. boat in the flotilla to Gaza would not violate laws banning "material support" to designated terrorist organizations. There are three such sets of restrictions, but all prohibit only knowing provision of material support to specifically designated groups or individuals. Accordingly, as long as the U.S. boat is not knowingly providing aid to a designated entity, there is no liability under these laws.

The first law is 18 U.S.C. 2339B, which the Supreme Court recently upheld in *Holder v Humanitarian Law Projects*. That law authorizes the Secretary of State to designate “foreign terrorist organizations,” and then makes it a crime to provide “material support” to such organizations. “Material support” is defined broadly to include not only money and tangible assets but also “expert advice or assistance,” “training,” and “service.” The statute only prohibits the knowing provision of aid “to” designated organizations, such as Hamas.<sup>1</sup> Thus, as long as the aid is not being provided to Hamas (or to someone you have reason to believe is owned or controlled by or acting on behalf of Hamas or another designated entity), you are not violating 18 U.S.C. 2339B. The law does not bar aid to individuals who are not designated, and does not prohibit the provision of aid to persons in Gaza, so long as they do not fit the above description.

Similar analysis applies to the ban on engaging in transactions with or providing material support to entities designated by the Treasury Department as “specially designated terrorists” or “specially designated global terrorists,” under the International Emergency Economic Powers Act. Here, too, the law broadly prohibits aid to and transactions with designated groups, but only with those designated groups or individuals. Hamas has been designated under this law as well. However, as long as aid is provided to entities and individuals who are *not* on the Treasury Department’s list (or someone you have reason to believe is owned or controlled by or acting on behalf of a designated entity), you are not violating the International Emergency Economic Powers Act.

The same analysis applies to the third set of restrictions, the Terrorism Sanctions Regulations (under which Hamas is designated a “Specially Designated Terrorist”).<sup>2</sup>

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<sup>1</sup> The Office of Foreign Assets Control (OFAC) within the Treasury Department publishes one master list of organizations and individuals designated under similar but overlapping federal laws that restrict transactions (both those involving money and those involving free transfer of aid) in goods and services with (directly and indirectly) a long list of entities (including their agents) and individuals (available in several searchable formats here: <http://www.treas.gov/offices/enforcement/ofac/sdn/>).

<sup>2</sup> See 31 CFR § 595.204 (prohibiting transactions in “funds, goods, or services”); *id.* § 595.408 (a) (“For purposes of this part, a contribution or donation is made to or for the benefit of a specially designated terrorist if made to or in the name of a specially designated terrorist; if made to or in the name of an entity or individual acting for or on behalf of, or owned or controlled by, a specially designated terrorist; or if made in an attempt to violate, to evade or to avoid the bar on the provision of contributions or donations to specially designated terrorists.”); *id.* § 595.408(b) (“Individuals and organizations who donate or contribute funds, goods, services or technology without knowledge or reason to know that the donation or contribution is destined to or for the benefit of a specially designated terrorist shall not be subject to penalties for such donation or contribution.”); *id.* § 505.202 (prohibited transactions are legally void unless transferor “did not have reasonable cause to know or suspect, in view of all the facts and circumstances known or available to such person, that such transfer required a license or authorization by or pursuant to this part”).

**Participating in a flotilla to Gaza as a form of protest and/or delivering humanitarian assistance to the people of Gaza violates no federal or international law.**

*The Legality of the Blockade*

As an initial matter, the Israeli blockade of the Gaza Strip is illegal under international law.<sup>3</sup>

The San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1994),<sup>4</sup> which recognizes that blockades in the context of armed conflicts,<sup>5</sup> prohibits a blockade if: (a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.<sup>6</sup> The San Remo Manual also provides: “If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies,” subject to certain technical arrangements and conditions of distribution.<sup>7</sup>

The international community has repeatedly and emphatically called for an end to the blockade of the Gaza Strip.<sup>8</sup> Reports on the situation in Gaza under the Israeli blockade by the

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<sup>3</sup> For a discussion on the scope and effect of the “blockade,” see Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact Finding Mission on the Gaza Conflict, A/HRC/12/48, ¶ 27, Sept. 15, 2009 (“Goldstone Commission Report”).

<sup>4</sup> *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, June 12, 1994 (“San Remo Manual”), available at: <http://www.icrc.org/IHL.nsf/52d68d14de6160e0c12563da005fdb1b/7694fe2016f347e1c125641f002d49ce!OpenDocument>.

<sup>5</sup> The analysis of the blockade takes into account the laws of occupation; Israel is the occupying power because of the complete control of access to and egress from the territory. See Hague Regulations, Art. 42. See, e.g., Goldstone Commission Report, ¶ 187: “In addition to controlling the borders, coastline and airspace, after the implementation of the disengagement plan, Israel continued to control Gaza’s telecommunications, water, electricity and sewage networks, as well as the population registry, and the flow of people and goods into and out of the territory while the inhabitants of Gaza continued to rely on the Israeli currency; *Id.*, ¶ 28: “The Mission holds the view that Israel continues to be duty-bound under the Fourth Geneva Convention and to the full extent of the means available to it to ensure the supply of foodstuff, medical and hospital items and others to meet the humanitarian needs of the population of the Gaza Strip without qualification.” Article 55 of the Fourth Geneva Convention requires the occupier to provide food and health care to the occupied population. Accordingly, the blockade can be found to be illegal on the basis that an occupier cannot blockade the territory it is occupying; pursuant to the San Remo Manual, blockades are only legal in the armed conflicts – not occupation, as is the case for Gaza.

<sup>6</sup> San Remo Manual, *supra* n.4, par. 102.

<sup>7</sup> *Id.*, par. 103.

<sup>8</sup> See, e.g., “UN human rights chief calls for end to the Israeli blockade of Gaza,” Nov. 18, 2008, available at [www.un.org/apps/news/story.asp?NewsID=28983&Cr=Palestin&Cr1](http://www.un.org/apps/news/story.asp?NewsID=28983&Cr=Palestin&Cr1) (UN High Commissioner for Human Rights Navi Pillay stated: “By function of this blockade, 1.5 million Palestinian men, women and children have been forcibly deprived of their most basic human rights for months. This is in direct contravention of international human rights and humanitarian law. It must end now.”); “UN chief Blames Israeli Blockade for Suffering in Gaza,” Mar. 21,

World Health Organization and United Nations Relief Works Agency (UNRWA) demonstrate the impact of the blockade on the Palestinian population of Gaza: inadequate food supplies leading to malnutrition and starvation, a crumbling and over-burdened health care system, environmental harms caused by pollution due to heavy damage to the water and sanitation facilities, lack of schools and supplies to maintain a functioning education system and a lack of supplies needed to rebuild destroyed homes.<sup>9</sup> The impact of the blockade has been felt acutely on Gaza's most vulnerable: children.<sup>10</sup> The Commissioner-General of UNRWA recently summarized the situation in Gaza in stark terms: "The closure and associated policies have resulted in a crisis that transcends the humanitarian sphere. Every Gazan is affected by poverty, unemployment and crippled public services, causing human misery on a massive scale."<sup>11</sup>

It can therefore be concluded that the impact of the Israeli blockade on the civilian population of Gaza amounts to "collective punishment," as defined in Article 33 of the Fourth Geneva Convention of 1949, and cannot be reconciled with the principles of international law, including international humanitarian law.<sup>12</sup>

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2010, available at: [www.voa.com/english/news/UN-Chief-In-Gaza-Strip-To-Express-Solidarity-With-Palestinians-88759057.html](http://www.voa.com/english/news/UN-Chief-In-Gaza-Strip-To-Express-Solidarity-With-Palestinians-88759057.html) (Secretary General Ban Ki-moon stated: "I have repeatedly made it quite clear to Israel's leaders that the Israeli policy of closure is not sustainable and that it's wrong. It causes unacceptable suffering of human beings."); Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, A/HRC/10/20, ¶ 41(c), Feb. 11, 2009 ("sustainable peace in Gaza requires the permanent lifting of the blockade in the short term").

<sup>9</sup> See, e.g., [www.unrwa.org](http://www.unrwa.org); <http://www.who.int/hac/crises/international/wbgs/en/> (WHO reports and statements on the occupied Palestinian territory). See also Goldstone Commission Report, *supra* n.3, ¶¶ 1217-1335; *Gaza closure: not another year!* International Committee of the Red Cross, June 14, 2010, News Release 10/103 available at: <http://www.icrc.org/web/eng/siteeng0.nsf/html/palestine-update-140610> ("ICRC June Statement") (reporting on "all-time low" of medical supplies, including essential medicines, and the effects of electricity cuts on health care, including power outages during surgery); Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, A/HRC/13/53/Rev.1, June 7, 2010, ¶¶ 30-34. See, e.g., Goldstone Commission Report, ¶ 65 ("Insufficient supply of fuel for electricity generation had a negative impact on industrial activity, on the operation of hospitals, on water supply to households and on sewage treatment. Import restrictions and the ban on all exports from Gaza affected the industrial sector and agricultural production. Unemployment levels and the percentage of the population living in poverty and deep poverty were rising.").

<sup>10</sup> Goldstone Commission Report, *supra* n.3, ¶ 70: "Children's learning difficulties of psychological origin are compounded by the impact of the blockade and the military operations on the education infrastructure. 280 schools and kindergartens were destroyed in a situation in which already restrictions on the importation of construction materials meant that many school buildings were in serious need of repair." See also "40,000 students turned away from UNRWA schools due to Gaza closure," Press Release, Sept. 15, 2010, available at: <http://www.unrwa.org/etemplate.php?id=797>.

<sup>11</sup> Commissioner-General's Statement to the Advisory Commission, 21-22 June 2010, available at: <http://www.unrwa.org/etemplate.php?id=712>.

<sup>12</sup> See, e.g., Report of 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, A/HRC/15/21, Sept. 27, 2010, paras. 53-54, 59-61, and 261, available at: [http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.21\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.21_en.pdf) ("UN Flotilla Report"), and sources cited therein.

### *Participation in the Flotilla*

The stated purpose of the planned flotilla is two-fold: to protest the blockade of Gaza and to deliver humanitarian assistance to Gaza. Neither purpose violates federal or international law.

The Human Rights Council conducted a fact-finding mission to investigate any possible violations of international law related to the Israeli attack on the Gaza-bound flotilla on May 31, 2010. The report of that mission was released on September 27, 2010.<sup>13</sup> The stated aims of the May 2010 flotilla were threefold: (a) to draw international public attention to the situation in the Gaza Strip and the effect the blockade; (b) to break the blockade; and (c) to deliver humanitarian assistance and supplies to Gaza.<sup>14</sup> Particularly relevant to the instant matter, in discussing the May 2010 flotilla, the fact find mission observed “[p]articipants raised money within their communities for the trip and also solicited cash donations which would be given directly to the population of Gaza.”<sup>15</sup>

The report discusses the “aims of the Free Gaza Movement and the Gaza flotilla of May 2010,”<sup>16</sup> examined the preparation of the flotilla,<sup>17</sup> and contains numerous findings relevant to this opinion:

- The flotilla passengers are considered civilians and are considered “protected persons” under the Fourth Geneva Convention;<sup>18</sup>
- Among the rights for all flotilla participants violated by the interception of the boats and detention of passengers is the freedom of expression;<sup>19</sup> and
- Punishing Israeli citizens for participating in the flotilla could give rise to violations of international law obligations, including freedom of expression and political participation rights.<sup>20</sup>

The fact finding mission conclusions were made with the understanding that while the flotilla constituted a “serious attempt to bring essential humanitarian supplies into Gaza,” “the primary objective” of the flotilla was political.<sup>21</sup> Such an objective does not render participation

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<sup>13</sup> UN Flotilla Report, *supra* n.12.

<sup>14</sup> *Id.* at ¶ 79.

<sup>15</sup> *Id.* at ¶ 87.

<sup>16</sup> *Id.* at ¶¶ 76-80

<sup>17</sup> *Id.* at ¶¶ 84-90.

<sup>18</sup> *Id.* at ¶ 66.

<sup>19</sup> *Id.* at ¶ 265. *See also id.* at ¶ 276 (“humanitarian organizations who wish to intervene in situations of long-standing humanitarian crises where the international community is unwilling for whatever reason to take positive action [are] [t]oo often...accused of being meddling and at worst as terrorists or enemy agents.”)

<sup>20</sup> *Id.* at ¶ 257.

<sup>21</sup> *Id.* at ¶ 80

in the flotilla illegal. Notably, when the Human Rights Committee conducted its review of Israel's human rights record, it reserved its criticism for Israel's attack on the May 2010 flotilla – not for the organizers or the participants of the flotilla.<sup>22</sup>

Furthermore, the fact finding mission made relevant findings related to the legality of intercepting the blockade:

- The decision to stop the flotilla was not taken because the vessels in themselves posed any immediate security threat, no right of belligerent interdiction or wider claim of self-defense against the flotilla has been asserted by Israel, and the flotilla presented no imminent threat;<sup>23</sup>
- The interception of the flotilla was motivated by concerns about the possible “propaganda victory” of the organizers of the flotilla;<sup>24</sup> and
- the interception of the flotilla was illegal.<sup>25</sup>

The conclusions of the Human Rights Council's fact finding mission, drawing on international human rights law and international humanitarian law, reflect that participating in the flotilla as a form of protest and/or to deliver humanitarian assistance to the people of Gaza who are living under an illegal blockade falls within *inter alia* the right of the participants to freedom of expression, freedom of association and political participation – rights that are recognized under federal law and by the United States.<sup>26</sup>

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<sup>22</sup> Consideration of reports submitted by States parties under article 40 of the Covenant Concluding observations of the Human Rights Committee, Israel, CCPR/C/ISR/CO/3, Sept. 3, 2010, para. 8: “The Committee also notes with concern the use of force when boarding vessels carrying humanitarian aid for the Gaza Strip, which resulted in the death of nine individuals and the wounding of several others.”

<sup>23</sup> UN Flotilla Report, *supra* n.12, at ¶ 56.

<sup>24</sup> *Id.* at ¶ 57.

<sup>25</sup> *See, e.g., id.* at ¶ 174.

<sup>26</sup> *See, e.g.,* Report of the United States of America submitted to the U.N. High Commissioner for Human Rights in Conjunction with the Universal Periodic Review, A/HRC/WG.6/9/USA/1, Aug. 23, 2010, ¶¶ 17-18 (“dissent is a valuable and valued part of our politics: democracy provides a marketplace for ideas, and in order to function as such, new ideas must be permitted, even if they are unpopular or potentially offensive”); ¶¶ 22-23 (“In the United States our vibrant civil society exists because people freely come together to meet and share interests and to advocate for political and other causes.”); ¶¶ 24-27, available at: [http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/A\\_HRC\\_WG.6\\_9\\_USA\\_1\\_United%20States-eng.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/A_HRC_WG.6_9_USA_1_United%20States-eng.pdf)