



# **The Public Commission to Examine the Maritime Incident of 31 May 2010**

**The Turkel Commission**

**Report | Part one**

**The Public Commission  
to Examine the Maritime  
Incident of 31 May 2010**

**The Turkel Commission**

**January 2010**

**Report | Part one**





The Public Commission to Examine the Maritime  
Incident of 31 May 2010

Mr. Benjamin Netanyahu

The Prime Minister

The honorable Prime Minister,

**Re: Report of the Commission for Examining the Maritime  
Incident of May 31, 2010 - Part One**

Pursuant to paragraph 10 of Government resolution no. 1796 of June 14, 2010, we respectfully submit to the Government a report on the following matters:

- a. The security circumstances in which the naval blockade on the Gaza Strip was imposed and whether the blockade complies with the rules of international law (paragraph 4a of the Government resolution).
- b. Whether the actions carried out by Israel to enforce the naval blockade on May 31, 2010, complied with the rules of international law (paragraph 4b of the Government resolution).
- c. The actions carried out by the organizers and participants of the flotilla and their identities (paragraph 4c of the Government resolution).

In the next stage, the commission will submit part two of the report, which will address the question whether the mechanism for examining and investigating complaints and claims of violations of the laws of war, as carried out by Israel in general, and as implemented with regard to the events of May 31, 2010, in particular, complies with the obligations of the State of Israel pursuant to the rules of international law. Part two of the report will also address other questions that arose from the material before the commission.

Justice Emeritus Jacob Türkel  
Chairman of the commission

Ambassador Reuven Merhav  
Member of the commission

Major-General (res.) Amos Horev  
Member of the commission

Prof. Miguel Deutch  
Member of the commission

Lord David Trimble  
Observer

Brigadier-General (ret.) Kenneth Watkin  
Observer



### **Commission Members**

Justice (Ret.) Jacob Turkel, Chairman  
Ambassador Professor Shabtai Rosenne, (Deceased 21.9.10)  
General (Ret.) Amos Horev  
Ambassador Reuven Merhav  
Professor Miguel Deutch

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Brigadier General (Ret.) Kenneth Watkin, Q.C. (Canada)

### **Commission Coordinator**

Advocate Hoshea Gottlieb

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## **The Rt. Hon. (William) David Trimble, Lord Trimble Brigadier-General (Ret.) Kenneth Watkin, Q.C.**

It is an honour for us to serve as Observers to the Public Commission appointed to inquire into the maritime incident of 31 May 2010. We understood and accepted the sensitivities that led to our appointment as observers to the Commission and not, strictly speaking, members of it. Nonetheless we are satisfied that we had access to all the material before the Commission and we were fully involved by the Commission in all its work.

All testimonies, both in open and private session and all formal meetings of the Commission were, of course, conducted in Hebrew. However they were simultaneously translated for us into English. In the early days there were some difficulties with the translation of documents into English; these were quickly overcome as our work proceeded.

We are glad that the Commission made repeated efforts to hear both sides, extending to making arrangement for evidence to be given by video conferencing and offering to take evidence in a neutral location. We regret that these offers were not taken up. But we would like to express our appreciation of the Israeli Arabs, who were on the Mavi Marmara and who gave evidence to us. We would also like to thank the representatives of the Israeli Human Rights Non-Governmental Organizations who testified and provided significant material to the Commission.

The Commission made enormous efforts, to get as much information as possible. This involved going back to the IDF for additional information, obtaining further staff to examine all the video material (hundreds of hours) including the CCTV downloaded from the Mavi Marmara and to collate the material so that it has been able to examine each use of force by the IDF. We have also been impressed with the efforts of the small but very dedicated team of lawyers supporting the work of the Commission.

We have no doubt that the Commission is independent. This part of the report is evidence of its rigour.

On a personal note we want to thank all the members of the Commission who each have gone out of their way to welcome and assist us. It is a pleasure to work with them. Special mention must be made of the chairman, Judge Turkel, for his consideration of us personally and the clarity with which he directed the work of the commission.

We would also like to extend our sincere appreciation to the tireless efforts of Commission Coordinator, Hoshea Gottlieb, who has been instrumental in ensuring our successful participation in this Commission.

We would also like to place on record our enormous regard for those who have assisted us as Observers from outside of Israel including the staff who provided the simultaneous translations of all the oral proceedings, punctuated only by reminders to us to speak into the microphones; the translators who ensured voluminous texts were available to us in English; and the ever helpful and diligent administrative staff who have looked after our every logistical need.

Finally we regret that our acquaintance with Shabtai Rosenne was cut short by his death. He impressed us with his knowledge, experience, insight and, above all, with his character and courtesy. He was a true gentleman.



**Lord David Trimble**



**Kenneth Watkin  
Brigadier-General (Ret.)**

# Preface to the Report

When the commission was established, we took upon ourselves, jointly and as individuals, the difficult and agonizing task of ascertaining the truth regarding the issues that we were asked to address. The commission was given complete independence, and each of its members has a record of many years of independent and objective service in various capacities: a Supreme Court justice, one of the most senior judges in Israel, as chairman of the commission; a professor, scholar, diplomat and researcher of international reputation in the field of international law, who sadly passed away during the Commission's work on September 21, 2010; a former president of the Technion - Israel Institute of Technology, a major-general in the IDF and the chairman of the board of directors of Rafael, with rich experience, including on public commissions of inquiry; an expert in Middle-East studies, a senior member of the intelligence and security establishment, a diplomat experienced in international relations, an ambassador and former director-general of the Ministry of Foreign Affairs; a professor, teacher, scholar, researcher and author of repute in the field of civil law. Two observers sat with us, as members of the commission in every respect: Lord David Trimble from Ireland, a Nobel peace prize winner and formerly the First Minister of the Northern Ireland Assembly, and Brigadier-General (res.) Kenneth Watkin from Canada, formerly the Judge Advocate-General of the Canadian Forces.

Initially we thought that the investigation of the circumstances in which the naval blockade was imposed on the Gaza Strip and enforced and the legality of these actions would not require the consideration of difficult factual and legal questions. But it soon became clear to us that the investigation would be lengthy and complex, and require a detailed study both of fact and law. We therefore asked the Government to extend the powers of the commission and to increase the number of its members (from three, at the time of the original appointment, to five), in order to enable it to carry out its duties in an optimal manner. The Government agreed to this request.

As an example of the need that arose for wider and more comprehensive investigations, it should be said here that at quite an early stage we realized that we could not examine the naval blockade without also examining the land crossings policy for the transfer of humanitarian supplies to the Gaza Strip and even the humanitarian situation in the Gaza Strip in general. Admittedly, the question of the land crossings policy and the humanitarian situation in the Gaza Strip would appear, *prima facie*, to go beyond the scope of the naval blockade - whose purpose was to prevent the passage of weapons to the Gaza Strip by sea, a route that

has never been used to convey humanitarian supplies - but the mistaken impression formed in certain circles with regard to the purposes of the blockade compelled us to consider this issue as well, and to widen our investigation far more than we had originally thought.

Another example of a question that required far more extensive and thorough consideration was the question of the circumstances and legality of the takeover of the *Mavi Marmara* and the other flotilla vessels by IDF forces. In this regard we felt ourselves duty-bound to examine the precise details of all the acts and operations carried out by each individual member of the armed forces and the security personnel that boarded the *Mavi Marmara* and the other flotilla vessels, minute by minute, and we examined the legality of the acts with great care from every proper perspective.

In investigating these and other issues in all their aspects, we have been as precise as possible and done everything that flesh and blood can do when called upon to pass judgment in such a matter. We have devoted ourselves to our work and aspired to arrive at the exact truth, even if it is hard and painful. Along this route, we have hoped that we should not stumble or err either in a matter of fact or of law. We hope that we have succeeded in achieving this.

Here we would like to express our gratitude and deep appreciation to the observers who sat with us, Lord Trimble and Brigadier-General Watkin, for their substantial and important contribution to the commission's work and for the considerable trouble that they took; to the external consultants of international reputation, Prof. Dr. Wolff Heintschel von Heinegg and Prof. Michael Schmitt, who agreed with the legal conclusions of the report; reviewed and commented on the Commission's legal analysis; and agreed with the legal conclusions, for their very valuable help; to Prof. Ruth Lapidoth, recipient of the Israel Prize for international law, for her advice and very important guidance. Special thanks are given to the excellent team of jurists and the administrative staff who assisted us tirelessly, and especially to Advocate Hoshea Gottlieb, the Commission Coordinator. Without his considerable and important legal and administrative assistance, this report could not have been published.

# Introduction

## The background to the establishment of the Commission and the Government decisions

1. Since the beginning of 2001, thousands of mortars and rockets of various kinds have been fired in ever growing numbers from the Gaza Strip at towns in the South of Israel near the Gaza Strip, various IDF military bases, the border crossings between Israel and the Gaza Strip (and before the disengagement from the Gaza Strip, also at Israeli towns in the Gaza Strip).<sup>1</sup> After the Hamas terrorist organization seized control of the Gaza Strip in June 2007, the Government adopted various measures. Later, on January 3, 2009, a naval blockade was also imposed on the Gaza Strip.<sup>2</sup>

2. Following information regarding the organization of flotillas whose stated destination was the Gaza Strip (and which therefore sought to breach the naval blockade), the State of Israel took various diplomatic and other measures, both openly and covertly, to prevent the departure of these flotillas by peaceful means. Several ships that tried to reach the Gaza Strip did indeed turn back; others were intercepted by the Israeli navy without the use of force and brought to a port in Israel, and the humanitarian supplies on board were transported to the Gaza Strip via the land crossings.

3 In the days preceding May 31, 2010, a flotilla of six vessels<sup>3</sup> advanced towards the coastline of Israel, with approximately 700 persons on board.<sup>4</sup> The largest of the ships in the flotilla, the *Mavi Marmara*, with

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1 See "The Public Commission to Examine the Maritime Incident of May 31, 2010" (position paper by the IDF Military Advocate General, July 2010), marked by the Commission as exhibit 10 [hereinafter *MAG position paper*]; "threat of rockets from Gaza Strip 2000-2007" (report by The Intelligence and Terrorism Information Center, The Intelligence Legacy Center (IICC) chaired by Reuven Ehrlich, December 2007), [terrorism-info.org.il/malam\\_multimedia/Hebrew/heb\\_n/pdf/rocket\\_threat.pdf](http://terrorism-info.org.il/malam_multimedia/Hebrew/heb_n/pdf/rocket_threat.pdf).

2 See declaration by Minister of Defense "Resolution of Naval Blockade" (Jan. 3, 2009).

3 This report uses the definitions of the Ministry of Transportation (Shipping and Ports Authority), which defines a 'boat' as a vessel which is not a ship and its full length is above 7 meters; and a 'ship' as a vessel whose capacity (gross) is above 100 tons, its length is above 24 meters and is licensed to transport more than 12 passengers out of the Israeli coasts. In this flotilla, there were two boats (Boat SFENDONH 8000, CHALLENGER) and four ships (Mavi Marmara, GAZZE, SOFIA, DEFNE Y). See the definitions chapter of the Seamanship (Sailors) regulations, 5762-2002.

4 See Ministry of the Interior data as submitted to the Commission on Jan. 9, 2011, found in folder marked by the Commission as exhibit 147. According to the Immigration Authority 690 foreign citizens participated in the cruise, along with five Israeli citizens and two



approximately 29 crew members and 561 passengers,<sup>5</sup> constituted the scene of the incident that is described below. The State of Israel also adopted various measures with regard to this flotilla before it departed, but these efforts were unsuccessful. Offers to allow the supplies for the Gaza Strip to enter via Ashdod port or El-Arish port and thereafter via the land crossings were not accepted.

On May 31, 2010, in the early hours of the morning, IDF forces boarded the *Mavi Marmara* and took control of the vessel. During the boarding and taking control of the ship, the IDF forces encountered violent resistance. When the conflict ended, it was found that nine of the ship's passengers had been shot dead, and fifty-five passengers and nine IDF soldiers were wounded.

4 On June 14, 2010, the Government of Israel decided to establish an independent public Commission to examine various aspects of the actions taken by the State of Israel to prevent the ships from reaching the Gaza Strip coast on May 31, 2010 (hereafter: **the Government resolution of June 14, 2010**).<sup>6</sup> Supreme Court Justice Emeritus Jacob Türkel was appointed to chair the Commission, and the late Professor Shabtai Rosenne and General (res.) Amos Horev were appointed as members. Two foreign experts were also appointed to act as observers (hereafter: **the observers**): Lord David Trimble and Brigadier-General (ret.) Kenneth Watkin.

The Commission was asked to examine the following issues:

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Palestinians.

- 5 It should be noted that the data transferred to the Commission on this matter is not unambiguous. This data which will serve us later on, is based on the radio recording of the Marmara captain's answer to the navy's question regarding the number of passengers on the ship; audio file "gc\_12\_156.550\_30\_05\_2010\_22\_23\_28\_19\_1.WAV" (minute 02:00 and onwards) from folder 633, in the Navy folder on a data hard disc, marked by the Commission as exhibit 133, transferred to the Commission on 16.09.2010 [hereafter: *Navy data disc*]. This data corresponds with a list by AMAN. At the same time, various sources at IDF and Israeli Police have transferred different data to the Commission on this matter. Thus for example, various IDF sources estimated that there were a larger number of passengers on the Marmara's deck. The ship's log, transferred to the Commission by Israeli Police, stipulates a different number - 601 - including 44 crew members and 557 passengers. The list is detailed and also includes the nationalities of the passengers. At the same time, it cannot be known whether this list was actually updated or whether it is a list containing the names of the passengers who signed up for the cruise. The Ministry of the Interior stated that at the end of the day 535 passengers disembarked from the Marmara at Ashdod's port (since some of the passengers wounded in the course of events were evacuated by air and the nine killed were evacuated by sea).
- 6 Resolution 1796 of the 32nd Government "appointment of a independent public Commission, chaired by the supreme court judge (ret.), Jacob Turkel, to examine the maritime incident of May 31, 2010" (Jun. 14, 2010) [hereinafter *Government Resolution of 14.6.2010*].

- a. An examination of the security circumstances for imposing a naval blockade on the Gaza Strip and whether the naval blockade complies with the rules of international law.
- b. Whether the acts carried out by Israel to enforce the naval blockade on May 31, 2010, complied with the rules of international law.
- c. An examination of the acts carried out by the organizers and participants of the flotilla, and their identities.<sup>7</sup>

The Commission was also asked to examine 'the question whether the examination and investigation process for complaints and allegations raised with regard to violations of the law of combat, as generally practiced in Israel and as implemented with regard to the incident under consideration, is consistent with the obligations of the State of Israel pursuant to the rules of international law.'<sup>8</sup>

The resolution also provided that the observers would participate in the deliberations and consultations of the Commission, but 'would not have a right to vote with regard to the Commission's proceedings and conclusions.'<sup>9</sup> At the outset, it should be noted that the two foreign observers were full participants in the Commission's work, as if they were actual members, including the hearing of the testimonies, the internal consultations and the preparation of this report. The observers gave of their time and efforts in order to ensure the work was of the highest standard, while critically examining the procedures that were followed and seeking to arrive at the truth, and they thereby made a very significant contribution to the Commission's work.

Advocate Hoshea Gottlieb was appointed as the Commission's Coordinator.

5 On July 4, 2010, the government decided to extend the Commission's powers and to give it certain powers pursuant to the Commissions of Inquiry Law, 5729-1968:

'The Minister of Justice shall determine that the Commission will be given powers pursuant to sections 9 to 11 and 27(b) of the Commissions of Inquiry Law, 5729-1968, subject to the restrictions stated in paragraph 6(c) of the aforesaid Government resolution no. 1796 [the Government resolution of June 14, 2010].'<sup>10</sup>

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7 *Government Resolution of 14.6.2010, supra* note 6, at art. 4.

8 *Government Resolution of 14.6.2010, supra* note 6, at art. 5.

9 *Government Resolution of 14.6.2010, supra* note 6, at art. 3.

10 Resolution 1895 of the 32nd Government "granting authority to the public Commission for the examination of the maritime incident of May 31, 2010" (Jul. 4, 2010) [hereinafter *Government Resolution of 4.7.2010*].

On July 5, 2010, the Minister of Justice decided accordingly.<sup>11</sup>

On July 25, 2010, the Government decided to expand the Commission's panel by adding two more members, Ambassador Reuven Merhav and Professor Miguel Deutch.<sup>12</sup>

On September 21, 2010, the late Professor Shabtai Rosenne passed away. The government subsequently resolved on October 11, 2010, not to appoint a replacement. The chairman of the Commission was given a 'casting vote in any case of a tied vote by the members of the Commission.'<sup>13</sup>

6 At the time of writing this report, two consultants that are prominent experts in the field of international law advised the Commission; Professor Dr. Wolff Heintschel von Heinegg<sup>14</sup> and Professor Michael Schmitt,<sup>15</sup> who agreed with the legal conclusions of the report. Professor Ruth Lapidot, who received the Israel Prize for international law, also contributed significantly to the preparation of the report, and the Commission extends its thanks to her.

7 The team that assisted in the Commission's work included Christine Bjork, Adv. Haim Wismontsky, Adv. and Moran Yahav, Adv.

For the sake of completeness, it should be mentioned that after the Commission was established, a petition was filed in the Supreme Court

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11 See Justice Minister's Resolution "determination regarding the granting of authority to the public Commission for the examination of the maritime incident of May 31, 2010" (Jul. 5, 2010) [hereinafter *Justice Minister Resolution of 5.7.2010*].

12 Resolution 2134 by the 32nd Government "appointing additional members to participate in the public Commission chaired by the supreme court judge (ret.), Jacob Turkel, to examine the maritime incident of May 31, 2010" (Jul. 25, 2010) [hereinafter *Government Resolution of 25.7.2010*].

13 Resolution 2297 by the 32nd Government "the public Commission to examine the maritime incident of May 31, 2010 chaired by judge (ret.), Jacob Turkel - following the death of Prof. Shabtai Rosenne" (Oct. 4, 2010) [hereinafter *Government Resolution of 4.10.2010*].

14 Prof. Dr. Wolff Heintschel von Heinegg is the Vice-President of the Europa-Universität Viadrina in Frankfurt (Oder), Germany, where he is Professor of Public International Law, European Law and Comparative Constitutional Law. He previously served as dean of the law faculty of the Europa-Universität and was the Charles H. Stockton Professor of International Law at the U.S. Naval War College in Newport, R.I., USA. He is a member of the Council of the International Institute of Humanitarian Law in San Remo, Italy and was a member of the group of international lawyers and naval experts who produced the San Remo Manual.

15 Prof. Michael Schmitt, BA, MA, MA, LL.M, JD is Chair of Public International Law at Durham Law School, United Kingdom. He was previously Dean of the George C. Marshall European Center for Security Studies in Garmisch-Partenkirchen, Germany, and Charles H. Stockton Professor of International Law at the U.S. Naval War College in Newport, R.I., USA. He served for 20 years in the United States Air Force, specializing in operational and international law. Professor Schmitt is the General Editor of the Yearbook of International Humanitarian Law.

against the establishment of a public Commission of examination by the government instead of a public Commission of inquiry.<sup>16</sup> Another petition was filed on account of the absence of women members on the Commission.<sup>17</sup> The former petition was amended after the Government resolution of July 4, 2010, regarding the extension of the Commission's powers, and it is pending before the Supreme Court, with the consent of the parties and pursuant to the court's recommendation, until the Commission's conclusions are submitted, in view of the possibility that the issue raised in the petition may become moot. The latter petition was granted by the court, which ordered that a woman should be appointed as a member of the Commission, but it went on to hold that insofar as the appointment would be offered by a specified date to five women who had not been offered the position in the past and all of them refused it, the Government would have discharged its duty pursuant to the Women's Equal Rights Law, 5711-1951. Pursuant to the court's decision, efforts were made to find women who would agree to serve as members of the Commission. On August 18, 2010, the Minister of Justice notified the Prime Minister that an offer was made to five women who had not been offered the position in the past, and all of them refused it.<sup>18</sup> A notice to this effect was submitted to the Supreme Court.<sup>19</sup>

## Deliberations of the Commission

8 It is not superfluous to emphasize from the outset that the scope of the Commission's work involves questions of both fact and law, and it follows that the examination of the facts was an essential and main element of its work. The Commission took steps to collect the information in various ways, and also heard oral and written evidence. At each stage of its work, the Commission sought to arrive independently and impartially at the truth, by means of a careful and objective consideration of the evidence that was brought before it, and with maximum transparency of its proceedings.

9 *Hearing testimonies.* In view of the importance that the Commission attached to making as much information as possible available to the public, the sessions at which testimonies were heard were open to the

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16 See HCJ 4641/10 *Uri Avneri v. Prime Minister* (submitted on Jun. 15, 2010).

17 HCJ 5660/10 *Itach - Women Lawyers for Social Justice v. Prime Minister* (still unpublished, Aug. 22, 2010) [hereinafter *HCJ 5660/10*].

18 On this matter see letter from Minister of Justice Yaakov Neeman to the Prime Minister of Israel titled "Supreme Court order in its function as high court of justice on *HCJ 5660/10*" (dated Aug. 22, 2010).

19 See state's notice regarding *HCJ 5660/10* (submitted Aug. 22, 2010).

public, even though parts of the testimonies were heard *in camera* for reasons of State security and Israel's foreign relations, pursuant to what was stated in the Government's resolution of June 14, 2010.<sup>20</sup> The Commission informed the witnesses that after hearing the testimonies *in camera*, it might decide to disclose parts of them. It should also be noted that the transcripts of all of the testimonies that were heard publicly were uploaded to the Commission's Internet site shortly after the testimonies were heard.<sup>21</sup> All of the testimonies were translated into English by means of simultaneous translation and the transcripts in English were also uploaded to the Commission's Internet site.

In total the Commission heard twenty-six testimonies during fifteen days of hearings, and eleven testimonies *in camera*. The list of the witnesses that appeared before the Commission and the dates and classified status of their testimonies are set out in annex "A".

It should be noted that the Government resolution of June 14, 2010, determined (which was also confirmed in the Government decision of July 4, 2010) that with regard to the examination of the military operations that were carried out by Israel to enforce the naval blockade on May 31, 2010, the Commission 'would be able to inspect the documents that it requires and would also be able to ask the head of the investigation team appointed by the Chief of Staff to show it the conclusions of the operational investigations that were carried out following the incident' (i.e., the final report of the military investigations that were carried out by a committee chaired by Major-General (res.) Giora Eiland; hereafter: the **Eiland Committee report**). However, it was determined that insofar as after reviewing these conclusions of the investigation the Commission would be of the opinion that 'there is a need for more thorough and extensive investigations, it could ask the head of the expert investigation team appointed by the Chief of Staff to order this to be done and to present to the Commission the conclusions of the investigations that would be carried out within this context.'

In order to ascertain the whole truth and in order to obtain closer access to the actual sources of the information, the Commission exercised the power given to it in the aforesaid Government resolution to request more thorough and extensive investigations (hereafter: **Further Debriefings of September 20, 2010**). Pursuant to the Commission's request, it was therefore resolved that a representation of the Commission

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20 See *Government Resolution of 14.6.2010*, *supra* note 6, at art. 7.

21 See *The Public Commission to Examine the Maritime Incident of May 31, 2010*, available at [www.turkel-committee.gov.il](http://www.turkel-committee.gov.il).

would work with IDF personnel that were appointed for this purpose and were not involved in the incident, who would carry out further inquiries for the Commission, in accordance with detailed instructions of the Commission's representation and with its assistance. Within the scope of these inquiries, documented testimonies were taken from 38 combat personnel and other IDF personnel who were directly involved in the events, and extensive additional material documenting the various aspects of the incident was received (the written statements that were provided to the Commission within this context will be referred to in this report as "testimonies"). Following this, additional supplementary inquiries were carried out, in which twenty additional combat personnel and 23 combat and other IDF personnel provided additional written testimony (hereafter: **IDF Supplementary Response to the Commission's Questions of November 7, 2010; IDF Supplementary Response to the Commission's Questions of November 15, 2010; IDF Supplementary Response to the Commission's Questions of November 29, 2010; IDF Supplementary Response to the Commission's Questions of December 7, 2010; IDF Supplementary Response to the Commission's Questions of December 8, 2010; IDF Supplementary Response to the Commission's Questions of December 30, 2010**). This material enabled the Commission to make a precise examination of the whole process of taking control of the ship and the military preparations that preceded it. In order to complete the picture of the investigation, even the Chief of Staff was summoned to testify once again on October 24, 2010 (in addition to his initial testimony on August 11, 2010).

In this regard it should be noted that the Commission has decided to prohibit the publication of the names of IDF personnel that testified in the further debriefings and in the supplementary responses that were conducted by the Commission (as mentioned above), including the publication of any identifying details with regards to them, in accordance with article 11 in the government's decision of June, 14, 2010.<sup>22</sup>

The Commission also sought to hear testimonies from non-officials and from non-Israelis in order to receive as complete a picture as possible. On September 12, 2010, the Commission sent an invitation to testify, through the Turkish Embassy in Israel, to the captain of the *Mavi Marmara*, Tural Mahmut.<sup>23</sup> Furthermore, on September 28, 2010, an invitation to testify was sent to the leader of the IHH, Bülent Yildirim, which stated

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22 See *Government Resolution of 14.6.2010*, *supra* note 6, at art. 11.

23 Letter from Hoshea Gottlieb, Commission Coordinator, to the Turkish Embassy in Israel, titled "The Public Commission to Examine the Maritime Incident of May 31, 2010", no. 2010-96 (dated Sep. 12, 2010).

that the Commission would be prepared to consider various procedural solutions in order to facilitate the testimonies.<sup>24</sup> No response was received to these invitations.<sup>25</sup> On October 14, 2010, the Commission contacted the Turkish Embassy in Israel and requested its help in compiling a list of witnesses who had information and/or relevant documents and who were prepared to testify before the Commission. Once again, the Commission stated that it would be prepared to assist in finding appropriate solutions regarding the manner of hearing the testimonies and in order to facilitate them. To the Commission's dismay, this request also did not receive a response.

On October 21, 2010, an invitation was issued to the public, in which any person who had in his possession relevant information or documents on the matters within the Commission's jurisdiction was requested to submit it to the Commission. Moreover, on October 22, 2010, following a request of the British Embassy in Israel to the Israeli Ministry of Foreign Affairs, British nationals who took part in the flotilla and expressed their desire to submit evidence to the Commission were invited (through their counsel) to submit to the Commission a synopsis of the matters that they wished to bring before it so that a decision could be made with regard to the need for their testimony. The Commission also proposed, after making arrangements with the British authorities, to hear these testimonies via Video-conference. The Commission's proposal remained unanswered. On October 22, 2010, the representatives of three Israeli human rights organizations<sup>26</sup> and two Israeli nationals who participated in the flotilla were invited to testify, and did so, before the Commission.<sup>27</sup>

In these circumstances, the Commission was therefore compelled to rely mainly on testimonies and reports of Israeli parties (although it also had before it statements that were made by some of the flotilla participants during the time they were in Israel, and Commission additional written and video/photographic material that it was able to obtain). The Commission examined all of the testimonies, sources, and references critically and analytically, while cross-checking them against

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24 Letter from Hoshea Gottlieb, Commission Coordinator, to the Turkish Embassy in Israel, titled "The Public Commission to Examine the Maritime Incident of May 31, 2010", no. 2010-111 (dated Sep. 28, 2010).

25 It should be noted that in spite of the fact that the two addresses were not sent directly to the addressees but transferred through the Turkish Embassy in Israel, it may be cautiously assumed that they reached the addressees, or at the very least the addressees were made aware of their existence, in light of the broad publicity granted to them by the Turkish media.

26 See Protocol of Meeting 12 of the Commission (Oct. 13, 2010).

27 See Protocol of Meeting 14 of the Commission (Oct. 25, 2010).



each other and against additional sources of information, insofar as they were direct and authentic sources as stated in paragraph 10 below.

10 *Assembling information.* In addition to the testimonies that it heard, the Commission received as aforesaid many documents for its inspection, which were included in more than 150 files of exhibits. A list of all documents that were submitted to the Commission can be found on the Commission's website.<sup>28</sup>

The Commission also received various synopses on issues relating to its work (some of which were prepared at the Commission's request); transcripts of Government meetings, Cabinet meetings and inner Cabinet meetings; summaries of work meetings of various parties in the Israeli Government, the IDF and other relevant authorities; internal investigations that were carried out in the IDF (including the investigations carried out by the Navy, the head of Israel Military Intelligence and the head of the Operations Division, and a summary of the investigation of the head of the Operations Branch) and additional bodies. Apart from all of these, the Commission received, *inter alia*, documentary material that directly documented the events that occurred on the flotilla vessels, and the manner in which the flotilla participants were treated after IDF servicemen took control of the vessels, which have a very high level of credibility. Thus, for example, the Commission received thousands of video and audio clips containing hundreds of hours of audio and video recordings, which were assembled from various sources. IDF authorities submitted to the Commission material from a variety of sources, including video recordings from the security cameras on the *Mavi Marmara*, the results of recordings made by various video devices, video recordings that were made by cameras installed in the helmets of the IDF combat personnel who operated on the *Mavi Marmara*, recordings of radio reports during the incident and photographs and video recordings that were made by participants in the flotilla when they were on board the *Mavi Marmara*, by personnel from the IDF spokesperson's unit, etc. The Israeli Police submitted 46 CDs of interrogations that it conducted following the incident, and the Commission also received documentation from media sources in Israel and abroad. Moreover, the Commission received objects and documents that were seized on the *Mavi Marmara*; material that was seized from computers on the *Mavi Marmara*; medical documents and medical certificates (including documents that were received from Magen David Adom, documents that were received from the Abu Kabir Forensic Institute, documents that were received from hospitals where the injured were hospitalized and treated), etc. All of these were reviewed and examined thoroughly by the Commission and were before it when preparing this report.

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28 *The Public Commission to Examine the Maritime Incident of May 31, 2010, available at [www.turkel-committee.gov.il](http://www.turkel-committee.gov.il).*



## The structure of the report

11 The Commission decided to divide its report into two parts. The first part, which is being submitted now, addresses three issues:

a. The first issue concerns the legality of the naval blockade that was imposed on the Gaza Strip, pursuant to the rules of international law (paragraph 4(a) of the Government resolution of June 14, 2010). Within the framework of this examination, the Commission examined the factual basis for imposing the blockade, including the conditions for maintaining it, the restrictions on the land crossings into the Gaza Strip and the relationship between them and the naval blockade, the humanitarian situation in the Gaza Strip and the question whether the blockade is affecting this situation. Alongside all of these issues, it examined the rules of international law that apply in such situations and the manner in which they are implemented, in general and in the incident under discussion.

b. The second issue concerns the actions carried out by the IDF in order to enforce the naval blockade (paragraph 4(b) of the Government resolution of June 14, 2010). Here, the main focus is a specific and precise examination of all the actions that were taken in order to stop the flotilla and identifying the rules of international law that apply to activity of this kind, and the application thereof in the case before us.

c. The third issue, which is related to the second issue, concerns the actions of the organizers and participants of the flotilla and their identities (paragraph 4(c) of the Government resolution of June 14, 2010).<sup>29</sup>

12 In the second part of the report, which will be submitted at a later point in time, we shall address the question that was presented in paragraph 5 of the Government resolution of June 14, 2010, namely whether the mechanism for examining and investigation complaints and claims raised in relation to violations of the laws of armed conflict that is practiced in Israel in general, and as applied with regard to the current incident, is consistent with the duties of the State of Israel pursuant to the rules of international law. Moreover, in the second part of the report we shall consider additional questions that arose in the course of the Commission's work, including questions that have importance from a domestic Israeli perspective.

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29 By nature, these three issues are intertwined and it is certainly possible that throughout this report, specific issues will come up in more than one place. The Commission has preferred, for the sake of convenience, and in spite of the repetitiveness of this, to return and discuss these issues where they are relevant.

## Chapter A:

# The naval blockade of the Gaza Strip

13 In this chapter we shall survey the security situation that led to the imposition of the naval blockade on the Gaza Strip, and we shall also examine whether the naval blockade that was imposed on the Gaza Strip is consistent with the rules of international law. The legal analysis in this chapter shall be divided into several parts. In the first part of this chapter we shall present, in brief, the complex factual background concerning the legal status of the Gaza Strip, the status of Gaza's territorial waters throughout the period since the capture of the Gaza Strip in 1967, and the circumstances in which the naval blockade of the Gaza Strip was imposed on January 3, 2009.

The second part of this chapter addresses the question of what a 'naval blockade' is from a conceptual and legal viewpoint, and the source of the legal rules regulating this method of warfare, including the rules of customary international humanitarian law and the international consensus regarding the rules that govern a naval blockade.

The third part addresses the classification of the conflict in the Gaza Strip: is the armed conflict between Israel and the Gaza Strip an international or non-international one, and is the Gaza Strip a territory that is occupied by Israel? The fourth and fifth parts examine how and why the naval blockade was imposed on the Gaza Strip, the alternatives to imposing the naval blockade that were considered by Israel, the relationship between the naval blockade and the restrictions imposed by Israel on September 19, 2007, with regard to the transfer of goods by land, and whether the measures adopted by Israel are consistent with the rules of international humanitarian law that govern the imposition of a naval blockade.

The next three parts address the humanitarian aspects of the naval blockade on the Gaza Strip. Here we shall examine several controversial issues with regard to the question of imposing the naval blockade and Israel's land crossings policy. We will also assess the applicability of human rights law to the case at hand and the claim that the naval blockade imposed on the Gaza Strip by Israel is a form of collective punishment directed by Israel at the population of the Gaza.

In the final part of this chapter, we shall consider the measures that individuals or groups are permitted to utilize when they object to the legality of a naval blockade.

# General background to the imposition of the naval blockade on the Gaza Strip

## The status of the Gaza Strip in the years 1967-2010

14 In June 1967, during the hostilities in the Six Day War, the Gaza Strip was captured by IDF forces (in addition to other areas, including East Jerusalem, the West Bank, the Golan Heights, the Sinai Peninsula). Shortly thereafter, a military administration was established in the 'territory' (i.e., the West Bank and the Gaza Strip), which operated pursuant to the laws of belligerent occupation in international law.<sup>30</sup> This legal perspective regarding the laws applicable in the territory was adopted by the Supreme Court since that time.<sup>31</sup> It should also be mentioned that, following the Six Day War, Israeli settlement also began in the Gaza Strip.<sup>32</sup>

15 During the 1990s, political negotiations were held between the Palestinian Liberation Organization (hereafter: **the PLO**), as the representative of the Palestinian people, and the State of Israel, in which context a declaration of principles was signed between the parties in September 1993 with regard to interim arrangements for Palestinian self-government.<sup>33</sup> On May 4, 1994, the Agreement on the Gaza Strip and Jericho Area (the Cairo Agreement) was signed.<sup>34</sup> Following this, the IDF

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30 In fact, two separate military governments were established: one in the West Bank and the second in the Gaza Strip. See HCJ 1661/05 *Hof Azza Regional Municipality v. Israel Knesset*, 49(2) 481, at para. 3 (2005) [hereinafter matter of *Hof Azza*]. It should be mentioned that as part of these rules, Israel also applied the fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War from 1949 and the relevant guidelines from the regulations appended to the fourth Hague Convention, Respecting the Rules and Customs of War on Land, of 1907 (to which Israel is not a party, but which already at the time of the Gaza Strip's occupation was considered to reflect customary international law, see HCJ 606/78 *Aiouv v. Defense Minister*, 33(2), 113, 120 (1979); *MAG position paper, supra* note 1, at 3). In this context it should be mentioned that Israel has rejected the formal application of the fourth Geneva Convention regarding the West Bank and the Gaza Strip. As to the Gaza Strip, this position was based on various claims, chief among them that the strip was not part of Egypt's sovereign territory prior to its occupation by Israel (see *MAG position paper, supra* note 1, at 3; Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government - The Initial Stage*, in *MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS* 13, 15-16 (M. Shamgar ed., 1982); matter of *Hof Azza, Id.*, at para. 4).

31 *Hof Azza case, Id.*

32 In 2003, the number of settlers in the Gaza Strip was estimated at 8,000 people; See *Hof Azza case, Id.*, at para. 12 and references there.

33 Declaration of principles regarding interim agreements of self governance with PLO (signed in 1994) [hereinafter *Oslo A Accords*], available at [www.knesset.gov.il/process/docs/oslo.htm](http://www.knesset.gov.il/process/docs/oslo.htm)

34 Agreement regarding Gaza Strip and Jericho region (signed in 1994) [hereinafter *Cairo*

forces withdrew from most of the territory of the Gaza Strip, except for the Israeli settlements, the main access routes to these settlements and the area of the military installations along the southern border of the Gaza Strip. Moreover, most of the administrative responsibility was transferred to the autonomous Palestinian entity that was established, the Palestinian Authority (hereafter: **the Palestinian Authority**). The Cairo Agreement also incorporated the Paris Protocol that was signed a short time earlier (on April 29, 1994), which regulated economic relations between Israel and the autonomous Palestinian entity.<sup>35</sup> On September 28, 1995, the parties signed an interim agreement, which incorporated the previous agreements signed between the parties (hereafter: **the Interim Agreement**).<sup>36</sup>

16 In October 2000, violent incidents broke out in the West Bank and the Gaza Strip, which were given the name 'the Second Intifada' by the Israeli public (the Palestinians call these incidents 'the Al-Aqsa Intifada'; the official title given to these incidents by the Israeli security establishment was the 'Ebb and Tide Events'). In these, suicide attacks were restarted in cities in Israeli territory, and from the beginning of 2001 and thereafter on an ever increasing scale, mortar and rocket attacks of various kinds were used to attack Israel, the Israeli settlements in the Gaza Strip, IDF bases in the Gaza Strip and the border crossings. Israel was no longer able to employ the measures that it had used in the past (such as administrative detentions) because of the transfer of control of significant parts of the West Bank and the Gaza Strip, and it responded in various ways, including prolonged large-scale military operations. Against this background, Israel declared that an armed conflict was taking place between it and the Palestinian terrorist organizations, and that the normative framework to be applied to the activity of the IDF was

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*Agreement*], available at [www.knesset.gov.il/process/docs/cairo\\_agreement.htm](http://www.knesset.gov.il/process/docs/cairo_agreement.htm)

35 Paris Protocol signed in April 1994 and included as appendix to *Cairo Agreement*, *supra* note 34, at 31.

36 Israeli-Palestinian Interim Agreement regarding the West Bank and the Gaza Strip (signed in 1995) [hereinafter *The Interim Agreement*], available at [www.knesset.gov.il/process/docs/heskemb1.htm](http://www.knesset.gov.il/process/docs/heskemb1.htm); the legal status of the interim agreements, particularly in all that relates to the Gaza Strip, constitutes a complex judicial issue. As a rule, even in the current time and in spite of Israel's withdrawal from Gaza (which made many clauses of the interim agreement redundant) and the Hamas's rise to power (that is, the rise to power of a party which does not recognize the interim agreements), Israel continues to apply the instructions of the agreements to the extent possible. For a review of the existing agreements and the questions that arises regarding their status see: Ruth Lapidot, *Israel and the Palestinians: Some Legal Issues* (The Jerusalem Institute for Israel Studies, 2003).

the principles and rules of the laws of war. This position was adopted by the Supreme Court in several judgments.<sup>37</sup>

17 In December 2003, the Prime Minister at that time, Mr. Ariel Sharon, announced a plan for the disengagement of the State of Israel from the Gaza Strip and from the area of North Samaria.<sup>38</sup> On September 12, 2005, the last of the IDF forces left the territory of the Gaza Strip, and the IDF Commander in the Gaza Strip signed a declaration terminating the military administration that had operated in the territory.<sup>39</sup> On September 20, 2005, the Minister of Interior designated five crossings and land terminals between Israel and the Gaza Strip as 'border stations,' in accordance with the power given to him pursuant to section 7 of the Entry into Israel Law, 5712-1952.<sup>40</sup> In November 2005, Israel and the Palestinian Authority signed a Movement and Access Agreement, in which Israel took upon itself various commitments with regard to the export of goods from the Gaza Strip and the movement of persons, and which arranged for the operation of the Rafah and Kerem Shalom border crossings, through which the movement of persons and goods was supposed to be facilitated at the Egyptian border under the supervision of a third party.<sup>41</sup> In December 2005, the Ministerial National Security Committee authorized the Minister of Defense to decide upon the opening or closing of the border terminals.<sup>42</sup>

A map of the Gaza Strip and the land crossings between it and Israel is attached to this report as annex "B".

18 In the general elections for the Palestinian Legislative Council that took place in January 2006, the Hamas<sup>43</sup> organization won a majority. The Hamas organization calls for the establishment of an Islamic law state in

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37 See, for example H CJ 9252/00 *El Ska v. State of Israel* (unpublished, May 23, 2001); H CJ 9293/01 *Bracha v. Defense Minister*, 56(2) 509 (2002); H CJ 3114/02 *Bracha v. Defense Minister*, 56(3) 11 (2002); H CJ 3451/02 *Almadni v. Defense Minister*, 56(3) 30 (2002); H CJ 4219/02 *Gossin v. Commander of IDF Forces in Gaza Strip*, 56(4) 608 (2002); H CJ 7015/02 *Ajuri v. Commander of IDF Forces in West Bank*, 56(6) 352 (2002); H CJ 8990/02 *Physicians for Human Rights v. Southern Command General*, 57(4) 193 (2003); H CJ 4764/04 *Physicians for Human Rights v. Commander of IDF Forces in Gaza Strip*, 58(5) 385 (2004); H CJ 769/02 *Public Committee Against Torture v. Government of Israel*, (unpublished, Dec. 14, 2006) [hereinafter *Targeted Killing case*].

38 Following the declaration the plan was brought to the Knesset's approval; See law implementing Disengagement Plan, 5765-2005, LB 1982.

39 *Manifest Regarding Termination of Military Rule* (manifest no. 6) (Gaza Region) 5765-2005.

40 See Order Regarding Entrance to Israel (border crossings) (amendment), 5765-2005.

41 Agreement regarding movement and access (signed in 2005) [hereinafter *Movement and Access Agreement*].

42 Resolution B/43 of the ministers' Commission on matters of national security (2005).

43 Initials of Harakat al-Muqāwamat al-Islāmiyyah, that is, Islamic Resistance Movement.

the whole of the territory of Mandatory Palestine, does not recognize the existence of the State of Israel and rejects reaching final agreements with it. Therefore, Israel called upon Hamas to accept the three basic conditions determined by Israel in the Government resolution of February 19, 2006,<sup>44</sup> which were approved in the resolution of the Quartet on the Middle East (an international body comprised of the United States, Russia, the United Nations and the European Union, which was established in 2002 at Madrid in order to oversee the resolution of the Israeli-Palestinian dispute; hereafter: '**the Quartet**'): (1) recognition of the State of Israel and repeal of Hamas's charter; (2) abandoning terrorism and dismantling terrorist infrastructure; (3) recognition of the agreements and understandings that Israel reached with the Palestinians.<sup>45</sup> Hamas refused to do so. In March 2006, a Palestinian government (whose territorial authority includes both the West Bank and the Gaza Strip) headed by Hamas was sworn in.<sup>46</sup> The Israeli Government's resolution of April 11, 2006, determined the general policy of Israel towards the Palestinian Authority following the establishment of the Hamas Government. In this context, regarding the Gaza Strip, it was resolved that 'subject to security considerations, the crossings from Israel into the Gaza Strip will remain open in order to allow the entry of humanitarian aid into the Gaza Strip.'<sup>47</sup>

On June 25, 2006, two IDF soldiers were killed, four were injured and Corporal Gilad Shalit was taken captive after a cell that had penetrated into Israel by means of a tunnel that was dug under the border with the Gaza Strip carried out an attack against an IDF tank. Corporal Shalit is currently still being held in captivity by the Hamas.<sup>48</sup>

During this period, the firing of rockets and mortars from the Gaza Strip at the towns of Southern Israel continued, as did attacks on the

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44 See Resolution 4705 of 30th Government "The Palestinian System Following Elections in Palestinian Authority - Israel's Policy in view of the Swearing in of the Palestinian Legislative Council" (Feb. 19, 2006) [hereinafter *Government Resolution of 19.2.2006*].

45 *Joint Statement by Quartet Engaged in Facilitation of Mideast Peace Process* (Jul. 16, 2002).

46 See Resolution 4780 of 30th Government ""Israel's Policy towards the Palestinian Authority upon Establishment of Hamas Government" (Apr. 11, 2006) [hereinafter *Government Resolution of 11.4.2006*]; The resolution stipulated, among other things, that the Palestinian Authority is a terrorist entity hostile to Israel and that the State of Israel will not have ties with it. See also government resolution of Feb. 19, 2006. This resolution determined, among other things, that "in light of the increasing security threat, the security examinations at border crossings will increase, particularly at Karni and Erez, in regards to people and workers as well as merchandise. Likewise there will be a continuation of the operation to upgrade the crossing in the Gaza Strip, in order to make more efficient security supervision possible."

47 *Id.*

48 For a detailed analysis, see MAG Position paper, *supra* note 1, at 8.

land crossings into the Gaza Strip. The IDF responded to these attacks by using artillery and aerial attacks, and also with operations, some of which were extensive, in the territory of the Gaza Strip. Consequently, the activity at the crossings was restricted (sometimes to the point of closing them entirely) and the Israeli security authorities were therefore required to determine priorities for goods entering the Gaza Strip, while giving preference to food products and basic products. In general, the entry of raw materials for building, industry and agriculture was also permitted, but the amount of goods exported from the Gaza Strip was restricted. This policy was approved by the Supreme Court.<sup>49</sup>

After a long period of tension between the Hamas and the Fatah, which led, *inter alia*, to violent incidents between the operatives of the two movements and the establishment of a unity government headed by Ismail Haniyeh in March 2007, the Hamas violently seized control of the Gaza Strip in June 2007.<sup>50</sup> After the Hamas seized control of Gaza, the rocket and mortar attacks on Israeli towns increased dramatically. On September 19, 2007, the Ministerial National Security Committee declared Gaza a 'hostile territory' and instructed the security establishment to impose 'additional restrictions' in the civilian sphere, including with regard to the passage of goods, the supply of oil and electricity and the movement of persons to and from the Gaza Strip.<sup>51</sup> Following this resolution, which expressly states that it will be implemented only after a legal examination and with the intention of preventing the creation of a humanitarian crisis in the Gaza Strip, trade with the Gaza Strip was prohibited, restrictions were imposed on the passage of goods between Israel and the Gaza Strip and the supply of fuels to Gaza was reduced.<sup>52</sup> It should be noted that throughout the whole period, efforts were made to continue coordination

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49 HCJ 5841/06 *The Association for Civil Rights v. Defense Minister* (unpublished, Mar. 13, 2007).

50 In response to this takeover, the Chairman of the Palestinian Authority, Mahmoud Abbas (Abu Mazen), announced the disassembly of the Palestinian Unity Government on Jun. 15, 2007, the firing of the Hamas appointed Prime Minister Ismail Haniyeh, and a general state of emergency. In addition, Abbas appointed Salam Fayyad, the Finance minister in the Unity Government, as the Prime Minister of the Palestinian Government, and outlawed Hamas' military wing.

51 Resolution B/34 of the ministers' commission on matters of national security "Israel's policy regarding Gaza (Military and Civilian)" (Sep. 19, 2007) [hereinafter *Ministers' Commission on National Security Resolution of 19.9.2007*].

52 See "Civilian Policy regarding Gaza Strip - Part A" (summation by Government Activity Coordinator in the Territories (COGAT), Aug. 31, 2010) marked by the Commission as exhibit 51 [hereinafter *Civilian Policy Regarding Gaza Strip - Part A*]; For a detailed review of Israel's border crossing policy following the resolution of the ministers' commission on matters of national security of Sep. 19, 2007, see paras. 67, 68, 73.



between the State of Israel and the Palestinian Authority (as distinct from the Hamas Government), even with regard to the Gaza Strip.<sup>53</sup>

19 With the assistance of Egyptian mediation, a ceasefire was reached in June 2008 for a period of six months. This was called a 'lull' (Arabic: *tahdia*). This lull collapsed in December 2008, when the rocket and mortar attacks against Israel recommenced. On December 27, 2008, Israel began a large-scale military operation in the Gaza Strip, the 'Cast Lead' operation, which lasted twenty-two days and at the end of which Israel withdrew its forces from the Gaza Strip and unilaterally declared a ceasefire.<sup>54</sup>

After the operation Cast Lead, on February 18, 2009, the Ministerial National Security Committee decided that, *inter alia*, Israel should continue the humanitarian effort, in coordination with the Palestinian Authority and the relevant international organizations, in order to provide the immediate and basic needs of the Palestinian population, and to this end it should allow the activity of the crossings, on a partial basis, from its territory into the Gaza Strip.<sup>55</sup> Nonetheless, in an affidavit signed by the Cabinet secretary that was submitted on March 31, 2009, in the State's reply to H CJ 2650/09 *Mitrael Ltd. v. Minister of Agriculture* (unpublished, April 1, 2009), it said that this decision was not intended to change Israel's fundamental policy towards the Gaza Strip and to remove the civilian restrictions imposed on it in the resolution of September 19, 2007, but merely to 'increase the list of food products whose entry into the Gaza Strip would be permitted and to give an appropriate response to the needs of the Palestinian population not involved in terrorism.'<sup>56</sup> Following this decision, the variety of products permitted to enter the Gaza Strip was indeed increased.<sup>57</sup>

On June 29, 2010, the Government announced a change of this policy and significantly reduced the restrictions on the passage of goods.<sup>58</sup>

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53 See expansion in paras. 66, 73.

54 Resolution B/84 of ministers' Commission on matters of national security "Declaration on cease fire concerning Operation 'Cast Lead'" (Jan. 17, 2009).

55 Resolution B/90 of ministers' Commission on matters of national security "Contact with Egypt following Operation 'Cast Lead'; Policy Regarding Response to Continued Terrorist Activity from Gaza; Abducted Soldier Gilad Shalit" (Feb. 18, 2009).

56 See the State response to H CJ 2650/09 *Mitrael LTD. v. Minister of Agriculture* (still unpublished, Aug. 22, 2010).

57 See "Civilian Policy Regarding Gaza Strip - Part B" (summation by Government Activity Coordinator in the Territories (COGAT), Aug. 31, 2010), at 56, marked by the Commission as exhibit 51 [hereinafter *Civilian Policy Regarding Gaza Strip - Part B*].

58 See Resolution B/44 of ministers' Commission on matters of national security "application of border crossing policy in relation to Gaza Strip" (Jun. 20, 2010; in the resolution the Prime Minister, Defense Minister, and Foreign Minister were authorized to make resolutions - in accordance with the opinion of the ministers' Commission on matters of national security



It was also decided that several alleviating measures would be carried out without delay, including publishing a list of items that would not be allowed into the Gaza Strip, which would 'include only weapons, military equipment and problematic dual-purpose items.'<sup>59</sup> Any item that did not appear on the aforesaid list would be allowed into Gaza. On December 8, 2010, the Ministerial National Security Committee further announced that subject to certain restrictions, a gradual plan for allowing goods to leave the Gaza Strip for places outside of Israel and the West Bank would be approved.<sup>60</sup>

## The territorial waters of the Gaza Strip in the years 1967-2010

20 Prior to the implementation of the disengagement plan and as long as the State of Israel exercised effective control over the Gaza Strip, the IDF operated with regard to the territorial waters off the Gaza Strip with all of the powers given to the party in control of a certain territory with respect to the territorial waters adjoining that territory, including control of the passage of naval transportation for security reasons. In 1968, the IDF Commander in the Gaza Strip determined that the Gaza Strip was a closed area, and permission was required to enter it and depart from it in any way, including by sea.<sup>61</sup> It should be noted that during the whole of the aforesaid period, Gaza did not have a port that could service international maritime transport, but only an anchorage for fishing boats.

21 The political agreements with the Palestinians, as discussed, retained this authority with the IDF. These agreements provided, *inter alia*, that the State of Israel would have full control and sole security authority in the territorial waters adjoining the Gaza Strip<sup>62</sup> and that ships of the Israel Navy would be permitted to sail in this area, as needed and

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- regarding steps and specific actions to enforce a border crossing policy in relation to the Gaza Strip; On Jun. 20, 2010 the Prime Minister's office announced undertaking a series of steps in order to "prevent the entrance of weaponry and combat-supportive materials into Gaza, and at the same time expand the manner of civilian merchandise's entrance into the Strip." See statement by Prime Minister's office regarding Israel's policy towards the Gaza Strip following the security cabinet meeting (Jun. 20, 2010).

59 *Id.*, at para. 1.

60 Resolution B/64 of the ministers' Commission on matters of national security (Dec. 8, 2010).

61 An order regarding the closing of the region (Gaza Strip and North Sinai) (no. 144), 5728-1968, as amended in order no. 191 and order no. 847.

62 The security arrangements regarding the Gaza Strip's naval space were initially determined in the *Cairo Agreement*, *supra* note 34; Afterwards they were absorbed into the *Interim Agreement*, *supra* note 36, in article XIV of appendix I.

without restriction, and take all of the necessary steps against shipping vessels suspected of terrorist activity or illegal activity, including against ships suspected of smuggling weapons, drugs, etc.<sup>63</sup> The agreements also provided that the issue of international maritime transport to and from the Gaza Strip will be settled in final arrangement negotiations between the parties (negotiations that have not ended). The agreement also provided that until a suitable port is established in the Gaza Strip, foreign ships will not be allowed into an area extending to a distance of 12 nautical miles from the coast, and that the entry of passengers and goods via the sea would be possible only through Israeli ports, pursuant to the rules and regulations applying to this matter in Israel.<sup>64</sup> It should be noted that after the Interim Agreement was signed, negotiations were begun between Israel and the Palestinian Authority with regard to the construction of a port in Gaza and several steps were even taken towards this goal, but the project was stopped when the Second Intifada broke out in the year 2000.<sup>65</sup> As stated above, the question of the status and application of the Interim Agreement today is complex and controversial. Moreover, the Military Advocate-General's Office pointed out to the Commission the a difficulty in relying on the Interim Agreement to prevent the entry of ships sailing under a foreign flag into the territorial waters of the Gaza Strip, since they are not a party to or bound by the agreement.<sup>66</sup>

22 Over the years, several shipping vessels have tried to reach the Gaza Strip by sea. In the last decade, these attempts have become more frequent, and weapons have been found on board some of the ships that were seized on their way to the Gaza Strip. Thus, for example, in May 2001 the *Santorini* left Lebanon for the Gaza Strip. This ship was seized by the Israeli navy and brought to Israel. Many weapons were found on the ship, including anti-tank RPGs (Rocket Propelled Grenades), Kalashnikov rifles, etc. In May 2003, the *Abu Hassan* was seized on its way from Lebanon to the Gaza Strip. A Katyusha fuse and weapons were found on the ship, as well as a Hezbollah operative. On January 3, 2002, the *Karine A*, which set sail from Iran, was seized with approximately fifty tons of weapons on board, including rockets, mortars, anti-tank missiles, mines, assault rifles, etc., which were intended for the Gaza Strip.

23 When the disengagement plan was implemented and the military administration in the Gaza Strip ended, the IDF was of the opinion that, in consequence, it no longer had the powers that it received pursuant

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63 *Id.*

64 *Id.*

65 See *MAG position paper, supra* note 1.

66 *Id.*

to the laws of occupation under international law and Israeli security legislation. In view of the armed conflict with the Hamas Government in the Gaza Strip, the Military Advocate-General examined the actions of the IDF in the territorial waters of the Gaza Strip pursuant to the laws of naval warfare.<sup>67</sup>

24 In July 2008, various flotillas whose stated destination was the Gaza Strip were organized. In view of the fact that the ships concerned were neutral, the IDF had relatively limited options, which mainly included the power of visit and search, a power that can be used, *inter alia*, on condition that there are reasonable grounds for suspecting that a ship is subject to capture.<sup>68</sup> The IDF expressed the concern that because of the need for this condition to be satisfied, the measures available to the IDF were insufficient to prevent attempts to smuggle weapons into the Gaza Strip.<sup>69</sup>

25 On August 13, 2008, the Shipping Authority at the Ministry of Transport published a Notice to Mariners (hereafter: **NOTMAR**),<sup>70</sup> calling upon shipping to refrain from entering the territorial waters off the Gaza Coast and stating that it would be possible to transport humanitarian supplies to Gaza by means of the land crossing, by arrangement with the Israeli authorities:

‘The Israel Navy is operating in the maritime zone off the coast of the Gaza Strip. In light of the security situation, all foreign vessels are advised to remain clear of area A in the attached map [...]

Delivery of humanitarian supplies to the civilian population in the Gaza Strip is permitted through the land crossings between Israel and the Gaza Strip, subject to prior coordination with the Israeli Authorities.<sup>71</sup>

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67 *Id.*, at 35.

68 For expansion on this matter see para. 54 below.

69 See *MAG position paper*, *supra* note 1, at 39.

70 Advisory Notice (Maritime Zone off The Coast of Gaza Strip), no. 6/2008 (Aug. 11, 2008), available at [en.mot.gov.il/index.php?option=com\\_content&view=article&id=74:no62008&catid=17:notice tomariners&Itemid=12](http://en.mot.gov.il/index.php?option=com_content&view=article&id=74:no62008&catid=17:notice tomariners&Itemid=12); See also protocol of meeting 3 of the Commission "Defense Minister's open door testimony" 17 (Aug. 10, 2010) [hereinafter *Defense Minister's Open Door Testimony*]; protocol of meeting 4 of the Commission "Chief of Staff's open door testimony" 13 (Aug. 11, 2010) [hereinafter *Chief of Staff's Open Door Testimony of 11.8.2010*]. These testimonies are accessible to the public at the Commission's website, available at <http://www.turkel-committee.gov.il>.

71 The map attached to the notice to mariners, as well as a list of exact coordinates, are attached as appendix C of this report. In para. 3 of the notice to mariners it is mentioned that the entry of foreign vessels into the maritime zone adjacent to the Gaza Strip is also prohibited according to the agreements between Israel and the Palestinian Authority.

The Military Advocate-General expressed his opinion before the Commission that this constituted a declaration that the maritime zone near the coast of the Gaza Strip was a 'combat zone' or an 'exclusion zone,' but he said that there was a dispute on the question of what are the powers given to a State that declares such a maritime zone.<sup>72</sup>

Despite the aforesaid NOTMAR, on August 20, 2008, two yachts set sail from Larnaca in Cyprus in the direction of the Gaza Strip, with forty passengers on board (the yachts *Liberty* and *Free Gaza*). Prior to this flotilla, which the IDF gave the name of 'Winds of Heaven 1,' the Navy determined an operational plan and defined operational possibilities, which including transmitting diplomatic messages, and also considered the possibility of stopping ships before they set sail or stopping them without the use of force during the voyage. Moreover, it considered the possibility of taking control of ships or, alternatively, of allowing ships to reach the Gaza Strip. Pursuant to a decision of the political echelon (the Prime Minister and the Minister of Defense),<sup>73</sup> the yachts were permitted to enter the Gaza Strip. Four additional yachts that left Larnaca port on separate occasions during the months of August-December 2008 were also permitted to enter Gaza. In their testimonies before the Commission, various parties said that the reasons for allowing the yachts to pass included, *inter alia*, the difficulty in carrying out searches on these boats, the thought that allowing them to pass would prevent repeated occurrences of the phenomenon and taking into account that these were relatively small yachts that according to intelligence did not present a real danger of carrying weapons.<sup>74</sup> Another ship (the *Al Marwa*), carrying a Libyan flag, which tried to reach the Gaza Strip on November 29, 2008, turned back after messages were transmitted to it that it was on course for an area where security activity of the Israeli Navy was taking place.<sup>75</sup> On December 29, 2008, another yacht (the *Dignity*) left Larnaca port with 25 passengers on board ('Winds of Heaven 2'). The Navy ordered the ship to turn back and not to enter the area adjoining the Gaza Strip because of the military operations in the area. During the incident, the yacht hit the bow of a Navy vessel and was damaged, but it made its way without assistance to the port of Beirut in Lebanon.<sup>76</sup> The IDF once again expressed the concern that in view of the dispute on the question of the legal ramifications of declaring an area a 'combat zone' or

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72 See MAG position paper, *supra* note 1, at 38-39.

73 See Defense Minister's Open Door Testimony, *supra* note 70, at 20-21.

74 *Id.*, at 19-21; Chief of Staff's Open Door Testimony of 11.8.2010, *supra* note 70, at 11.

75 Chief of Staff's Open Door Testimony of 11.8.2010, *supra* note 70, at 11.

76 *Id.*, at 12; Defense Minister's Open Door Testimony, *supra* note 70, at 12-21.

an 'exclusion zone,' the NOTMAR did not provide a complete solution to the difficulties that arose when the IDF dealt with the various flotillas.<sup>77</sup>

26 In these circumstances, on January 3, 2009, during the operation Cast Lead, the Minister of Defense ordered a naval blockade off the coastline of the Gaza Strip up to a distance of 20 nautical miles from the coast. The significance of imposing a naval blockade according to the rules of international law is that it allows a party to an armed conflict to prevent entry into the prohibited area of any vessel that attempts to breach the blockade (even without it being established that the vessel is assisting terrorist activity). Consequently, a NOTMAR was published in the following terms:

'All mariners are advised that as of 03 January 2009, 1700 UTC, Gaza maritime area is closed to all maritime traffic and is under blockade imposed by Israeli Navy until further notice.

Maritime Gaza area is enclosed by the following coordinates [...].'<sup>78</sup>

The notice was published on the IDF web site, on the web site of the Shipping Authority and the Ministry of Transport, and on several standard international channels, such as NAVTEX; an international satellite network that collects and distributes notices to vessels worldwide.<sup>79</sup> Moreover, this notice was broadcast twice a day on the emergency channel for maritime communications to ships that sailed at a distance of up to 300 km from the Israeli coast.<sup>80</sup> The Minister of Defense testified before the Commission that in any case of an attempt to transport humanitarian supplies by sea, the vessels would be directed to Ashdod port and the humanitarian supplies on board would, after inspection, be sent to the Gaza Strip via the land crossings.<sup>81</sup>

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77 See *MAG position paper*, *supra* note 1, at 39; See also letter from Brigadier General Avichai Mandelblit, the Military Advocate General, to Major General Eli Marom, Commander of the Navy (Dec. 29, 2008); letter from Brigadier General Avichai Mandelblit, the Military Advocate General, to Lieutenant General Gabi Ashkenazi, IDF Chief of Staff (Dec. 30, 2009); "The Public Commission to Examine the Maritime Incident of May 31, 2010" (position paper by the IDF Military Advocate General - Appendix, July 2010), marked by the Commission as exhibit no. 13 [hereinafter *MAG position paper - Appendix*]. In these letters, the Military Advocate General underlined the need to declare a naval blockade that would provide the navy with the proper tools and authorities to deal with the phenomenon of civilian vessels wishing to reach the Gaza Strip.

78 Advisory Notice (Blockade of Gaza Strip), no. 1/2009 (Jan. 3, 2009), available at [199.203.58.11/EN/index.php?option=com\\_content&view=article&id=124:no12009&catid=17:noticetomariners&Itemid=12](http://199.203.58.11/EN/index.php?option=com_content&view=article&id=124:no12009&catid=17:noticetomariners&Itemid=12).

79 See *IDF Answer to Commission's Completion Request of 15.11.2010*, marked as exhibit 145 of the Commission's exhibits.

80 See *Defense Minister's Open Door Testimony*, *supra* note 70, at 23.

81 *Id.*, at 24.

A map of the territorial waters of the Gaza Strip, including the blockaded area is attached to this report as annex "D".

In January 2009, during operation Cast Lead, two ships; the general cargo ship *Iran Shahed* and the *Spirit of Humanity*, decided not to breach the naval blockade as they had intended after naval forces sent them warnings not to enter the area ('Winds of Heaven 3' and 'Winds of Heaven 4,' respectively).

27 After operation Cast Lead ended, the resolution regarding the imposition of a naval blockade remained in force. In his testimony before the Commission, the Prime Minister Mr. Benjamin Netanyahu confirmed that the resolution to impose the naval blockade was not reexamined after the operation ended.<sup>82</sup>

In February 2009, the general cargo ship *Tali*, which left the port of Tripoli in Lebanon, tried to reach the Gaza Strip ('Winds of Heaven 5') with weapons on board. In June 2009, the vessel *Arion* tried to reach the Gaza Strip with 30 passengers on board ('Winds of Heaven 6'). It also carried humanitarian equipment (medications, infant formula, a few toys, some olive tree saplings, etc.) and bags of cement. The two ships were seized by the Navy, without the use of force, after they failed to heed warnings sent to them. The ships were brought to Ashdod port, proceedings were begun to expel the passengers from Israel and the humanitarian supplies on board were sent to the Gaza Strip through the United Nations after a security inspection.<sup>83</sup>

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82 See protocol of meeting 2 of the Commission "Prime Minister's open door testimony" 17-18 (Aug. 9, 2010) [hereinafter *Prime Minister's Open Door Testimony*].

83 It should also be noted that in the period from February 2009 to January 2010 a number of land convoys attempted to enter Gaza through its border with Egypt. A land convoy headed by a British Member of Parliament which included 3,000 participants was permitted to enter the Strip through the Rafah crossing. An additional convoy including 225 participants was allowed to enter the strip in July 2009 in a reduced capacity including 55 activists and 50 vehicles. In December 2009 another convoy departed from a number of countries in Europe. The Turkish organization named the IHH, whose participation in the flotilla we will discuss later, assisted in the transportation of participants from Turkey to El Arish. After the Egyptians placed various limitations on the convoy only about half the provisions were permitted to enter the Gaza Strip through the Rafah border crossing. In addition, there were rioting by the participants in the El Arish region and confrontations with the Egyptian security forces. During the confrontations, about 50 participants of the convoy were injured, including five in a critical manner. The leader of the IHH Bülent Yıldırım later admitted that during the confrontation seven Egyptian soldiers were taken hostage; See also: *IICC report* (Jun. 20, 2010) (all of the reports received from the IICC were marked by the Commission and are found in an exhibit marked by the Commission as folder no. 150; hereafter, all of the exhibits in this binder will be called "*IICC report*" and will be distinguished by their date of issuance); *IICC report* (Jul. 19, 2010).

## The Questions before the Commission

28. In this part of the report, the Commission will address the following questions:

- a. What is a naval blockade, and what are the legal rules that govern the imposition and the actual enforcement of such a blockade?
- b. Did Israel act in accordance with these rules?
- c. What legal obligations does Israel have vis-à-vis the Gaza Strip? Does the naval blockade have an impact on the humanitarian situation in the Gaza Strip that renders it contrary to international law?
- d. Do individuals or groups have a right under international law to disregard an established blockade?

## The Conformity of the Naval Blockade with International Law

### The legal framework

#### *The concept of a 'naval blockade' in general*

29. The term "blockade" is frequently used to cover diverse and often complex military operations.<sup>84</sup> While the term blockade is sometimes used to refer to land operations, the most common context in which the term appears is in naval operations. Historically, the concept differed only slightly from the concept of a 'siege'<sup>85</sup> but it should be emphasized that a naval blockade is not identical to a siege. Whereas a siege means the encircling of the enemy's military forces; a strategic fortress; or any other location defended by the enemy, and cutting it off from support and supply lines, a naval blockade describes a wider variety of operations.<sup>86</sup> Thus, for

84 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY; Vol I 755 (Bruno Simma et al. eds., 2nd ed., 2002):

85 "The concept of blockade does not assume a technical law-of-war sense, but rather points to military action with a view to sealing off particular coasts or land areas".

The term "Blockade" is defined in the online Oxford Dictionary (2010) as:

"an act or means of sealing off a place to prevent goods or people from entering or leaving: *they voted to lift the blockade of major railway junctions*. Origin: late 17th century: from block + -ade, probably influenced by *ambuscad*".

Wolff Heintschel von Heinegg, *Naval Blockade*, 75 INT'L L. STUD. SER. U.S. NAVAL WAR COL. 203, 205 (2000).

86 YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 133 (2004):



example, in a current collection of articles published as *Naval Blockades and Seapower: Strategies and Counter-Strategies, 1805-2005* (hereafter: *Naval Blockades and Seapower*), it has been noted that:

‘... while legal definitions of naval blockades attempt to be precise, the range of activities that have historically fit under this rubric are vast indeed.’<sup>87</sup>

*Naval Blockades and Seapower* provides eighteen examples of maritime blockade operations including those that were conducted during the two World Wars, in the conflict between the People’s Republic of China and the Republic of China (Taiwan) (in 1949-1958), in the Korean War (1950-1953), during the Cuban Missile Crisis (1962), in the Vietnam War, during the sanctions against Iraq (1990-2003), etcetera.<sup>88</sup> Naval blockades were also imposed, *inter alia*, in the Bangladesh Liberation War in 1971; by Egypt against the city of Eilat and the Gulf of Aqaba in 1967, and on the Bab el-Mandeb Strait in 1973;<sup>89</sup> during the Iran-Iraq War of 1980-1988,<sup>90</sup> and by Israel on the coasts of Lebanon during the Second Lebanon War (March 2006).<sup>91</sup> The variety of examples and contexts in which naval blockades were imposed shows the range of military actions that have historically been included in the term ‘naval blockade.’ While a strict legal assessment might challenge whether some of these operations meet the technical legal requirements of a ‘blockade’, it is clear that preventing the enemy from having access to the maritime area on which the blockade has been imposed, and preventing it from being able to receive supplies and assistance via that area, was and remains an integral part of this

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87 "Siege warfare is conducted by encircling an enemy military concentration, a strategic fortress or any other location defended by the enemy, cutting it off from channels of support and supply".

L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE; VOL II: DISPUTES, WAR AND NEUTRALITY* 768 (7th ed., H. Lauterpacht ed., 1952):

"Blockade must not be confused with siege, although it may take place concurrently with siege".

*NAVAL BLOCKADES AND SEAPOWER: STRATEGIES AND COUNTER-STRATEGIES 1805-2005* 4 (Bruce A. Elleman & S.C.M. Paine eds., 2006).

88 *Id.*; see also ix-xi (details of different subjects in table of contents).

89 *Heintschel von Heinegg, Int'l L. Stud, supra* note 85, at 211-212.

90 *Id.*

91 ANTHONY H. CORDESMAN, GEORGE SULLIVAN & WILLIAM D. SULLIVAN, *LESSONS OF THE 2006 ISRAELI-HEZBOLLAH WAR* 131-135 (Significant Issues Series 29(4), 2007); Wolff Heintschel von Heinegg, *Blockade*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum, ed., 2010), available at [www.mpepil.com/subscriber\\_article?script=yes&id=/epil/entries/law-9780199231690-e252&recno=3&author=Heintschel\\_von\\_Heinegg\\_Wolff](http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e252&recno=3&author=Heintschel_von_Heinegg_Wolff) [hereinafter *Heintschel von Heinegg, EPIL*]. and a naval blockade was imposed by Israel on the coasts of Lebanon during the Second Lebanon War (March 2006).he dispute sized



method of warfare.<sup>92</sup> Indeed, imposing naval blockades is ‘a basic and fundamental activity of navies.’<sup>93</sup>

30. The imposition of a naval blockade may have various purposes. One purpose is the strategic military one of frustrating giving possible aid to the enemy’s military operations or preventing the transport of weapons or supplies to a military force operating in the country whose coast is subject to the blockade.<sup>94</sup> However, a unique aspect of blockade as a method of warfare is that “in view of its impact on the commercial relations between the blockaded belligerent and neutrals, a blockade is regularly considered a method of economic warfare.”<sup>95</sup> As the eminent Israeli international scholar and former member of this Commission, the late Ambassador Shabtai Rosenne noted, one of the greatest advantages of a naval blockade is the ability to effectively cripple an enemy’s external trade, which is a legitimate object in armed conflict.<sup>96</sup>

### The legal sources

31. The law of the sea, which is the legal framework that normally applies in times of peace, constitutes one of the oldest fields in international law. Much of the law of the sea is codified by the United Nations Convention on the Law of the Sea of December 10, 1982 (hereafter: **UNCLOS**).<sup>97</sup> The State of Israel is not a party to this convention, but it is bound by those provisions that are regarded as having customary status.<sup>98</sup> For our purposes, two basic principles in the law of the sea are of particular importance: (1) sovereignty of the flag State, which means that ships on the high seas (i.e. in international waters) are subject to the

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92 See, for example, U. S. Navy, *THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS* 4-9 (2007); See also *Heintschel von Heinegg*, *Int’l L. Stud.*, *supra* note 85, at 211.

93 *NAVAL BLOCKADES AND SEAPOWER*, *supra* note 87, at xviii.

94 See CONSTANTINE JOHN COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 716-717 (1967); OPPENHEIM, *supra* note 86, at 769-770.

(who both use the term “strategic” when referring to a blockade that forms part of other military operations and “commercial” when the object of the blockade is to cut off all trade from the blockaded area).

95 *Heintschel von Heinegg*, *EPIL*, *supra* note 91, at para. 1; see also HERSCH LAUTERPACHT, *INTERNATIONAL LAW: COLLECTED PAPERS; VOLUME 5: DISPUTES, WAR AND NEUTRALITY, PARTS IX-XIV* 661 (Elihu Lauterpacht ed., 2004); COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA*, *Id.*

96 Shabtai Rosenne, *Modern Blockade: Some Legal Aspects*, 23 *BRITISH YEAR BOOK OF INT’L LAW* 346, 347-353 (1946).

97 United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter **UNCLOS**].

98 Transcript of session no. 4 “Testimony of the Military Advocate-General” (August 26, 2010), at 32 [hereinafter *Military Advocate-General’s testimony*].

jurisdiction of the State whose flag they bear;<sup>99</sup> (2) freedom of the high seas, which is a fundamental principle in modern law of the sea, meaning, *inter alia*, that all ships are entitled to complete freedom of movement in the high seas. Impeding the freedom of navigation of a ship on the high seas is likely to be regarded as a violation of the sovereignty of the flag State, unless consent of the flag State has been obtained or if permitted on another ground in international law. This principle applies not only in times of peace, but also to neutral shipping in times of armed conflict.

Admittedly, there have been proposals to prohibit use of the sea for military purposes altogether, but these efforts have encountered opposition. The laws of the sea do not operate in isolation from other rules and principles of international law,<sup>100</sup> in particular, the admissibility and legality of military uses of the sea derive from the laws of naval warfare, rules of neutrality, and principles of customary international law.<sup>101</sup> Accordingly, in times of armed conflict, the law of naval warfare, as *lex specialis*, prevails over the law of the sea.<sup>102</sup> In other words, the rules of international law permit a belligerent Party to restrict the operation of neutral vessels, with the result that some of the rights of neutral nations are set aside in favor of a State engaged in the armed conflict.<sup>103</sup>

32. The rules that regulate the imposition of a naval blockade are part of the laws of naval warfare and most of them have the status of customary international law. Customary international law is an integral part of Israeli law.<sup>104</sup> Indeed, attempts were made in the Paris Declaration of 1856 and the London Declaration of 1909 to codify the rules, but the Paris Declaration was signed by only seven States and the London Declaration was never given binding force; however, it is accepted that the customary

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99 A third principle of importance is the principle of territorial waters, according to which, unlike the arrangement which applies to international waters, in a country's territorial waters vessels are not allowed freedom of movement. These waters are under the jurisdiction of the coastal country and it is authorized to prevent vessels from entering it, excluding places where this is required within the frameworks of "innocent passage," that is, a passage necessary for quick and efficient arrival at the vessel's destination (including the port of said country) or dictated by force majeure or the vessel's distress, and which does not disrupt the peace, order, or security of the coastal country. See *Military Advocate-General's testimony*, *supra* note 98, at 33. *MAG position paper*, *supra* note 1, at 33.

100 See the introduction to UNCLOS, *supra* note 97: "matters not regulated by this Convention continue to be governed by the rules and principles of general international law".

101 For additional analysis of the law see GEORGE P. POLITAKIS, *MODERN ASPECTS OF THE LAWS OF NAVAL WARFARE AND MARITIME NEUTRALITY* (1998); WOLFF HEINTSCHEL VON HEINEGG, *SEEKRIEGSRECHT UND NEUTRALITÄT IM SEEKRIEG* (Berlin, 1995).

102 International Law Association, Committee on Maritime Neutrality, *Final Report to the Sixty-Eighth Conference* 496-521, at 498 (London 1998).

103 OPPENHEIM, *supra* note 86, at 769-770.

104 *Targeted Killing case*, *supra* note 37, at para. 19.

international humanitarian law governing blockades is largely based on the London Declaration of 1909.<sup>105</sup>

The development of these customary rules over the twentieth Century saw a number of disagreements, such as what constituted “effectiveness” (a requirement for naval blockades, discussed below) with regard to the imposition of a naval blockade, and whether it is permitted to operate vessels at a distance from the coast of a party to the conflict, ultimately being resolved.<sup>106</sup> In the two World Wars, states did not act in accordance with the rules appearing in the London Declaration of 1909,<sup>107</sup> which gave rise to the question whether this method of warfare had fundamentally changed.<sup>108</sup> However, despite the challenges presented by such large-scale conflicts, since 1945, States have, in general, taken care to operate within the limitations of the traditional rules governing blockades.<sup>109</sup>

33. At the end of the twentieth century, it became clear that it was necessary to update the understanding of the rules governing blockades because of the dated nature of the law; the introduction of new technology and modern methods and means of warfare; the development of the law governing armed conflict after the Second World War, including the First Additional Protocol to the Geneva Conventions; and developments in other fields of international law, such as the law of the sea, the United Nations Charter, environmental protection law, and laws of aerial

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105 See *Heintschel von Heinegg, Int'l L. Stud, supra* note 85, at 205-213 for a brief history of the development of naval blockade laws, particularly his statements on page 214:

106 "In general States are willing to accept the customary character of the principles laid down in the 1909 London Declaration".

See also, *Collections of Documents on the Law of Armed Conflict, Hague Conventions, Geneva Conventions & Additional Protocols, Charter of the United Nations, UNCLOS, Other Treaties and Related Canadian Statutes (Concerning general land, sea, air, neutrality, humanitarian law, disarmament and anti-personnel land mines* (Directorate of Law Training, ed., 2005), available at [www.forces.gc.ca/jag/publications/Training-formation/coll\\_docs\\_LOAC-DDCA\\_2005\\_eng.pdf](http://www.forces.gc.ca/jag/publications/Training-formation/coll_docs_LOAC-DDCA_2005_eng.pdf).

*Heintschel von Heinegg, Int'l L. Stud, supra* note 85, at 205-213.

107 See *Heintschel von Heinegg, EPIL, supra* note 91, at 205-209, which explains that the blockade system made use of terms like "continuous voyage" when the ships sailing to a neutral port could be captured, if their final destination was a port under blockade and long distance blockades were made possible by technological advancement such as long range artillery, submarines, and military aircrafts, who have made a blockade close to the enemy's shore impossible to supervise. See also, Geoffrey Till, *Naval Blockade and Economic Warfare in the European War, 1939-45*, in *NAVAL BLOCKADES AND SEAPOWERS, supra* note 87, at 123 (regarding the Navicert certification system which was employed by British clerks abroad during the second World War, which approved cargoes and even whole ships); Rosenne, *Modern Blockade, supra* note 96, at 347-349.

108 *Heintschel von Heinegg, Int'l L. Stud, supra* note 85, at 211-212.

109 *Id.*, at 211; see also *U.S. Navy, The Commander's Handbook, supra* note 92, at para. 7.7.5.

warfare.<sup>110</sup> In the years 1988-1994, a group of experts engaged in an attempt to combine the rules governing the law of naval warfare with innovations and new trends in this field. The result was the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea (hereafter: **San Remo Manual**), which offers a detailed current statement of the customary international law of naval warfare, including naval blockades. This manual will serve as the primary basis for the legal analysis of the issues before the Commission. However, since some of the provisions in the San Remo Manual are regarded as reflecting a progressive development of the law rather than merely a restatement thereof, the analysis below is also based on other accepted texts and manuals in order to identify areas where there may not be complete international consensus on the San Remo rules.<sup>111</sup> However, it should also be noted that the areas of divergence are limited.

34. Due to the influential role that the United States Navy plays in naval matters, reference will also be made to the 2007 *Commander's Handbook On The Law Of Naval Operations NWP 1-14M* (hereafter: **the U.S. Navy Commander's Handbook**).<sup>112</sup> Manuals of other states regarding the law of armed conflict<sup>113</sup> and academic texts<sup>114</sup> will serve as additional sources. The 2009 *Harvard Manual on International Law Applicable to Air and Missile Warfare* (hereafter: **the Harvard Air and Missile Warfare Manual**);<sup>115</sup> although it concerns aerial rather than naval blockades

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110 See San Remo Manual on International Law Applicable to Armed Conflicts at Sea (Louise Doswald-Beck ed., 1995) [hereinafter *San Remo Manual* when referring to the provisions, and *San Remo Explanation* when referring to the accompanying explanatory text].

111 *San Remo Explanation* (preface).

112 See also U.S. Navy, *The Commander's Handbook*, *supra* note 92.

113 For example, *The Manual of The Law of Armed Conflict: UK Ministry of Defence* (2004), available at [www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/LegalPublications/LawOfArmedConflict/](http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/LegalPublications/LawOfArmedConflict/) [hereinafter *The UK Manual*]; the *Canadian Law of Armed Conflict at the Operational and Tactical Level* (2001), available at [www.forces.gc.ca/jag/publications/Training-formation/LOAC-DDCA\\_2004-eng.pdf](http://www.forces.gc.ca/jag/publications/Training-formation/LOAC-DDCA_2004-eng.pdf) [hereinafter *The Canadian Manual*]; THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW (Dieter Fleck, ed., 1st ed., 1995 and 2nd ed., 2008) (the key statements in the Handbook of International Humanitarian Law were promulgated for the German Bundeswehr as Joint Services Regulations (ZDv) 15/2 to guide the conduct of military operations) [hereinafter *The German Manual*, when referring to its key statements, or *International Humanitarian Law Handbook*, when referring to its commentaries].

114 DINSTEN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT, *supra* note 86; LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT (2nd ed., 2000); *International Humanitarian Law Handbook*, *supra* note 113, *Id.*

115 Humanitarian Policy and Conflict Research at Harvard University (HPCR), 'The Commentary on the Humanitarian Policy and Conflict Research (HPCR) Manual on International Law Applicable to Air and Missile Warfare', (Mar. 2010), available at <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf>. [hereinafter *The Air and Missile Warfare Manual*].

(even when enforced by military planes, as in the operations to enforce the naval blockade on May 31, 2010), also provides a useful benchmark against which to assess the degree to which a consensus in the applicable law has developed over time.<sup>116</sup>

**The legal definition of the term ‘naval blockade’ and the rules governing its imposition and enforcement**

35. A widely accepted definition of the term ‘blockade’ can be found in the U.S. Navy Commander’s Handbook:

‘Blockade is a belligerent operation to prevent vessels and/or aircraft of all nations, enemy as well as neutral, from entering or exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of an enemy nation.’<sup>117</sup>

36. Provisions 93-104 of the San Remo Manual cover the imposition and enforcement of a naval blockade. These rules provide that a blockade should be declared and notified;<sup>118</sup> such a declaration should specify the commencement, duration, location and extent of the blockade;<sup>119</sup> the blockade must be ‘effective’;<sup>120</sup> the force maintaining the blockade may be stationed at a distance from the coast determined by military requirements;<sup>121</sup> the blockade may be enforced by a combination of legitimate methods and means of warfare;<sup>122</sup> access to the ports and coasts of neutral States may not be blocked;<sup>123</sup> the blockade should be applied impartially to the vessels of all States;<sup>124</sup> and any cessation, temporary lifting, re-establishment, extension or other alteration of a blockade must be declared and notified.<sup>125</sup>

The San Remo Manual also specifically addresses the humanitarian aspects of imposing and enforcing of a naval blockade, and prohibits the imposition of a naval blockade if its sole purpose is to starve the civilian

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116 *Id.*; The Air and Missile Warfare Manual represents the “most up to date re-statement of existing international law applicable to air and missile warfare, as elaborated by an international Group of Experts” of blockade law at least where the use of aircraft is concerned.

117 See also *U.S. Navy, The Commander’s Handbook*, *supra* note 92, at para. 7.7.1; *Heintschel von Heinegg, EPIL*, *supra* note 91, at para. 1 (which adopts the same definition).

118 See *San Remo Manual*, *supra* note 110, at 26, rule 93.

119 See *Id.*, at rule 94.

120 See *Id.*, at rule 95.

121 See *Id.*, at rule 96.

122 See *Id.*, 27, at rule 98.

123 See *Id.*, at rule 99.

124 See *Id.*, at rule 100.

125 See *Id.*, at rule 101.

population, or prevent objects essential for its survival.<sup>126</sup> Further, the imposition of a naval blockade is also prohibited if 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>127</sup> This is the principle of 'proportionality.' Moreover, subject to certain conditions, the blockading party must provide free passage of foodstuffs and other essential objects if the civilian population is inadequately provided with these supplies.<sup>128</sup> Similarly, subject to the right of the blockading party to prescribe the technical arrangements, the passage of medical supplies to the civilian population or the wounded and sick members of enemy forces must be permitted.<sup>129</sup>

As noted, the rules that concern the imposition and enforcement of a naval blockade apply during armed conflict. Therefore, the analysis will now turn to examine the question of the nature of the conflict in the Gaza Strip, because this determination impacts the assessment of the naval blockade imposed by Israel.

## **The conflict in the Gaza Strip**

### **The classification of the conflict between Israel and the Hamas and the implications of this classification for the naval blockade**

37. International law distinguishes between two types of armed conflict: international armed conflict and non-international armed conflict. In the traditional-formal sense, international humanitarian law classified 'international armed conflict' as war between States.<sup>130</sup> According to this approach, a conflict between a State and a non-state actor would be regarded as a non-international armed conflict. However, in reality, the complexities of modern warfare pose a significant challenge when classifying an armed conflict, since not all armed conflicts can be easily classified within the framework of the traditional definition.

38. The importance of classifying the armed conflict between Israel and the Hamas is a consequence of the fact that the international community is more willing to accept the imposition of a naval blockade within the

126 See *Id.*, at rule 102(a).

127 See *Id.*, at rule 102(b).

128 See *Id.*, at rule 103.

129 See *Id.*, at rule 104.

130 See GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT, *supra* note 114, at 54, where he mentions that the classic approach is that international law deals only with relations between countries. As a result of this, the conflict between countries is what this law regulates.

framework of an international armed conflict. This is likely the result of two interrelated factors. First, the rules governing naval blockades were developed within the framework of international conflicts, whereas, traditionally, States have demonstrated a reluctance to apply international humanitarian law to internal disputes. Second, the imposition of a naval blockade usually causes a disruption of trade with parties that are neutral to the conflict; an activity usually carried out by States or with their approval. Therefore, States have a particular interest in the issue of when and how naval blockades are instituted and enforced.

39. Naval blockades have, nevertheless, been imposed in non-international armed conflicts (which is not surprising in view of the large number of internal armed conflicts relative to the number of international armed conflicts throughout history). In certain situations, States have imposed a military or economic blockade against an enemy that is not a *de jure* government.<sup>131</sup> Historically, in order for the rules of international humanitarian law that govern international armed conflicts to apply to non-international ones, recognition of a 'belligerency' was required of other States. Such recognition was limited to circumstances in which the level of the conflict has reached 'a certain threshold of intensity manifesting a situation similar to that of a war between states.'<sup>132</sup> However, it should be noted that this has become less important and today is almost irrelevant.<sup>133</sup>

40. The Military Advocate-General, Major-General Avichai Mandelblit, testified before the Commission on the difficulty of classifying the conflict between Israel and the Hamas terrorist organization.<sup>134</sup> In his testimony,

131 See also *Prosecutor v. Tadic*, Appeals Judgment, No. IT-94-1-A, para. 84 (July 15, 1999): "[i]t is indisputable that an armed conflict is international if it takes place between two or more States".

See also *Legal Consequences Of The Construction Of A Wall In The Occupied Palestinian Territory*, I.C.J., (Jul., 2004) at 56, para. 139, available at [www.icj-cij.org/icjwww/idocket/imwp/imwppframe.htm](http://www.icj-cij.org/icjwww/idocket/imwp/imwppframe.htm) [hereinafter *the Wall case*] (where the ICJ indicated that the exercise of inherent right to self-defense under s. 51 of the United Nations Charter is only available where there has been an attack by one State against another State).

The most famous example of such a blockade was the blockade placed by Union states on the Confederate states during the American Civil War between 1861-1865. In the period following the Second World War, we may name the conflict of the "nationalists" with the People's Republic of China (1949-1958). See e.g., COLOMBOS, *INTERNATIONAL LAW OF THE SEA*, *supra* note 94, at 714-730 (for references to historical examples of blockades by and against insurgents) and David G. Surdam, *The Union Navy's Blockade Re-considered*, in *NAVAL BLOCKADES AND SEAPOWERS*, *supra* note 87, at 61.

132 ANTHONY CULLEN, *THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW* 17 (2010).

133 *The UK Manual*, *supra* note 113, at 382; See also CULLEN, *supra* note 132, at 22-23.

134 *Military Advocate-General's testimony*, *supra* note 98, at 11-19; Israel and several other States have recognized the Hamas as a terrorist organization: these include the United States ([www.state.gov/s/ct/rls/other/des/123085.htm](http://www.state.gov/s/ct/rls/other/des/123085.htm)), Canada ([www.publicsafety.gc.ca/](http://www.publicsafety.gc.ca/)



he said that after Operation Cast Lead, Israel adopted the position that it is bound by the laws of war that apply to both international armed conflict and non-international armed conflict.<sup>135</sup> The Military Advocate stated that, in practice, the IDF therefore focuses on compliance with the rules of international humanitarian law.<sup>136</sup>

41. While armed conflicts with non-State parties have been recognized as a non-international in character,<sup>137</sup> this approach has not been universally adopted. For example, there is a consensus that the conflict between the State of Israel and the Hamas is an international armed conflict, although the reasons that have led various parties to this conclusion vary, as we shall see below.

Indeed, in HCJ 769/02 *Public Committee Against Torture v. Government* [2006] (4) TakSC 3958; [2006] (2) IsrLR 459 (hereafter: **the Targeted Killings case**), the Supreme Court of Israel adopted the position that international humanitarian law applies to an armed conflict between Israel and terrorist organizations not merely in an area that is subject to occupation, but 'in any case of an armed conflict of an international character - in other words, one that crosses the borders of the state - whether or not the place in which the armed conflict occurs is subject to a belligerent occupation.'<sup>138</sup> The Israel Supreme Court has implemented this approach consistently in several judgments that addressed the issue of entering Israel via the crossings between it and the Gaza Strip.<sup>139</sup> In additional judgments, the Israel Supreme Court has gone on to hold that although the Gaza Strip is no longer occupied,<sup>140</sup> it is subject to those provisions in the Fourth Geneva Convention and the First Additional Protocol that reflect customary international law and apply only where there is an international armed conflict.<sup>141</sup>

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prg/ns/le/cle-eng.aspx#Hamas) and the European Union (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:178:0028:0030:EN:PDF>).

135 *Military Advocate-General's testimony*, *supra* note 98, at 91.

136 *Id.*, at 75-76.

137 See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

138 See *Targeted Killing case*, *supra* note 37, at paras. 18.

139 See for example HCJ 201/09, 248/09 *Physicians for Human Rights v. Prime Minister* (still unpublished, Jan. 19, 2009) 10, para. 14:

"The normative arrangements that govern the armed conflict between the State of Israel and the Hamas organization are complex. They revolve around the international laws relating to an international armed conflict. Admittedly, the classification of the armed conflict between the state of Israel and the Hamas organization as an international conflict raises several difficulties. But in a host of judgments we have regarded this conflict as an international conflict."

140 See for example HCJ 9132/07 *Al-Bassiouni v. Prime Minister* (unpublished, Jan. 30, 2008) [hereinafter *Al-Bassiouni case*], at para. 12.

141 *Id.*, at paras. 12-15.



The Supreme Court of Israel is not alone in classifying the conflict between Israel and the Hamas as an international armed conflict. Various United Nations organizations, humanitarian organizations, and human rights organizations also classify the conflict between Israel and the Hamas as an international armed conflict, although the reasons that led them to this conclusion differ. This classification is largely a result of the position of these organizations that the Gaza Strip is, even today and despite Israel's disengagement from the Gaza Strip in 2005, a territory occupied by Israel.<sup>142</sup> No doubt consistent with their humanitarian focus, the approach that Israel is an occupying power vis-à-vis the Gaza Strip optimizes the argument that the provisions of the Fourth Geneva Convention regarding the protection of civilians in a territory that is subject to a belligerent occupation apply to the population of Gaza. Since an occupation can only exist within the context of an international armed conflict, the position that the Gaza Strip is subject to an occupation necessarily leads to the conclusion that the conflict in the Gaza Strip is international in character.<sup>143</sup>

42. However, even if the conflict in the Gaza Strip were to be classified as a non-international armed conflict, it would appear that the rules of international humanitarian law regarding naval blockades would still be applicable given the decline of the doctrine of 'recognition of belligerency';<sup>144</sup> the increasing acceptance by courts and tribunals to apply international

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142 See *Human Rights Watch: I Lost Everything*, available at [www.hrw.org/en/reports/2010/05/13/i-lost-everything](http://www.hrw.org/en/reports/2010/05/13/i-lost-everything) (2010), at 117.

143 YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 276-280 (2009);

*Amnesty International: Occupied Palestinian Territories: The Conflict in Gaza: A Briefing on Applicable Law, Investigations, and Accountability*, available at [www.amnesty.org/en/library/asset/MDE15/007/2009/en/4c407b40-e64c-11dd-9917-ed717fa5078d/mde150072009en.html#1](http://www.amnesty.org/en/library/asset/MDE15/007/2009/en/4c407b40-e64c-11dd-9917-ed717fa5078d/mde150072009en.html#1) (2009).

*Human Rights Watch: Israel: 'Disengagement' Will Not End Gaza Occupation*, available at [www.hrw.org/english/docs/2004/10/29/isrlpa9577.htm](http://www.hrw.org/english/docs/2004/10/29/isrlpa9577.htm) (2004).

*ICRC: Dignity Denied in the Palestinian Territories*, available at [www.icrc.org/web/eng/siteeng0.nsf/htmlall/palestine-report-131207](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/palestine-report-131207) (2007).

*United Nations: Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/498/94/PDF/N1049894.pdf?OpenElement> (2010).

*Gisha: Disengaged Occupiers: The Legal Status of Gaza*, available at [www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf](http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf) (2010).

B'Tselem: Israel's Obligations According to International Law, available at [www.btselem.org/hebrew/gaza\\_strip/israels\\_obligations.asp](http://www.btselem.org/hebrew/gaza_strip/israels_obligations.asp).

See *International Humanitarian Law Handbook*, *supra* note 113, at 272:

144 "The law of belligerent occupation applies in international armed conflict only".

See also DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION*, *supra* note 142, at 33.

See *The UK Manual*, *supra* note 113, at 382; See also CULLEN, *supra* note 132, at 22-23.

humanitarian law to internal conflicts;<sup>145</sup> the consensus that is developing among legal experts regarding customary law rules applicable in non-international conflict;<sup>146</sup> and the difficulty previously discussed in classifying contemporary armed conflicts. In light of the aforesaid, it is likely there will be a willingness on the part of courts and other bodies to recognize that the rules governing the imposition and enforcement of a naval blockade are applicable to non-international armed conflicts.<sup>147</sup> A step in this direction was taken in the San Remo Manual, where it is stated that although its provisions were intended to apply mainly in situations of international armed conflicts at sea, this fact was not stated expressly in order not to deter the application of the manual's provisions to non-international armed conflicts, insofar as they involve naval warfare:

"However, it should be noted that although the provisions of this Manual are primarily meant to apply to international armed conflict at sea, this has intentionally not been expressly indicated in paragraph 1 in order not to dissuade the implementation of these rules in non-international armed conflicts involving naval operations."<sup>148</sup>

43. In light of this complex reality and in the absence of a general consensus under international law regarding the classification of such conflicts, the approach presented by the Military Advocate-General before the Commission; that Israel is bound by international humanitarian law regardless of the classification of the conflict, is an understandable and practically focused one. It should also be noted that the imposition of the naval blockade on the Gaza Strip is not the first case in which Israel has confronted these difficulties. For example, while the international community had difficulty in classifying the armed conflict between Israel and the Hezbollah organization in Lebanon in 2006,<sup>149</sup> that did not stop recognition of the naval blockade that Israel imposed during that conflict.

44. In view of the aforesaid, the Commission has examined the conditions for imposing and enforcing the naval blockade on the Gaza Strip on the basis of the assumption that the conflict between Israel and

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145 See, for example, *Prosecutor v. Tadic*, *supra* note 130, at paras. 65-142.

146 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

147 This should not be interpreted in any way to suggest that the historic doctrine of "belligerency" is applicable or appropriate in this case. As has been noted, it is a doctrine widely recognized to have fallen into disuse. Further, the application of such a doctrine implies a level of legitimacy that should not be applied to a recognized terrorist entity.

148 See *San Remo Explanation*, *supra* note 110, at 73.

149 NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 250-254 (2010).

Hamas is international in character. However, it should be noted that given the degree of *de facto* control that the Hamas exercises over the Gaza Strip; the significant security threat that it presents; and its attempts to import weapons, ammunition and other military supplies, *inter alia*, by sea; the Commission would have considered applying the rules governing the imposition and enforcement of a naval blockade even if the conflict between Israel and the Gaza Strip had been classified as a non-international armed conflict.

## Is the Gaza Strip an occupied territory?

45. In *Al-Bassiouni v. Prime Minister*, the Supreme Court of Israel held that since the disengagement in 2005, Israel does not have 'effective control' over the Gaza Strip. Because of the importance of this conclusion, the actual wording of the Supreme Court is cited below:

'... since September 2005 Israel no longer has effective control over what happens in the Gaza Strip. Military rule that applied in the past in this territory came to an end by a decision of the government, and Israeli soldiers are no longer stationed in the territory on a permanent basis, nor are they in charge of what happens there. In these circumstances, the State of Israel does not have a general duty to ensure the welfare of the residents of the Gaza Strip or to maintain public order in the Gaza Strip according to the laws of belligerent occupation in international law. Neither does Israel have any effective capability, in its present position, of enforcing order and managing civilian life in the Gaza Strip.'<sup>150</sup>

In its judgment, the Supreme Court further held that the main obligations imposed on the State of Israel vis-à-vis the inhabitants of the Gaza Strip derive from the existence of an armed conflict between Israel and the Hamas organization; the degree of control exercised by the State of Israel over the border crossings between it and the Gaza Strip; and the relationship of dependency that was created - at least in certain spheres, such as the electricity supply to the Gaza Strip - during the long period of military rule in the Gaza Strip.<sup>151</sup> The court also held, in accordance with the position presented by the State, that Israel is subject to the rules of customary international law that apply in armed conflict, including the requirement to permit the passage of 'food and basic humanitarian supplies necessary for the survival of the civilian population.'<sup>152</sup>

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150 *Al-Bassiouni* case, *supra* note 140, at para. 12.

151 *Id.*

152 *Id.*, at para. 14.

As previously noted, notwithstanding the Supreme Court's holding, several organizations have adopted the position that despite the disengagement, the Gaza Strip continues to be under Israeli occupation. This position is mainly based on the claim that although Israel no longer has a permanent military presence in the Gaza strip, Israel's control of several areas that effect the fabric of life in the Gaza Strip amount to 'effective control' of the Gaza Strip. For example, the organization Gisha - Legal Center for Freedom of Movement presented before the Commission its position that Israel effectively continues to control the Gaza Strip for six reasons: (i) Israel controls movement to and from the Gaza Strip via land crossings; (ii) Israel exercises complete control over Gaza's airspace and territorial waters; (iii) Israel controls movement within Gaza through periodic incursions and a "no-go zone"; (iv) Israel controls the Palestinian population registry; (v) Israel exercises control over Gaza's tax system and fiscal policy; (vi) Israel exercises control over the Palestinian Authority and its ability to provide services to Gaza residents.<sup>153</sup> A similar position was also presented by the representatives of the B'Tselem organization in their testimony before the Commission.<sup>154</sup>

46. Indeed, academics have diverging opinions as to whether Israel has 'effective control' over the Gaza Strip.<sup>155</sup> Certainly, the adoption of the position that Israel continues to be an occupying power in the Gaza strip requires an unjustifiably flexible and novel interpretation of the term 'effective control.' In other words, this interpretation would have to be based on the understanding that two different opposing powers can exercise 'effective control' in a territory at the same time: the Hamas and Israel. Moreover, the interpretation of the term 'effective control' needs to be assessed against the currently accepted approach in international law that 'occupation' does not merely require military forces to be stationed

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153 *Disengaged Occupiers*, *supra* note 142.

154 Transcript of session no. 12 "Testimony of member of the B'Tselem organization" (Jessica Montel & Eyal Hareoveny) (Oct. 13, 2010), at 2:

"There is a dispute regarding the question of whether Gaza is still subject to Israeli occupation. There is no doubt that Israel does not currently have effective control in all aspects of life in the Gaza Strip, but it has such control in a few very central areas; in the air space, the maritime space, the population registry, the entry and exit of people and of cargo".

155 For examples of the viewpoints of some leading Israeli scholars, see DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 142, at 12-30 (reaching the conclusion that Israel continues to be an occupying force); Yuval Shany, *Faraway, So Close: The Legal Status of Gaza After Israel's Disengagement* 8 Y. B. INT'L. HUM. LAW 369 (2005) (reaching the conclusion that the disengagement Plan led to the transfer of effective control of the entire Gaza Strip to the Palestinian Authority).

in a certain territory, but also that the occupying power performs the functions of an existing government.<sup>156</sup>

Indeed, during the long period that Israel had the Gaza Strip under effective control, the Gaza Strip did become dependent on Israel in certain spheres. However, as the Supreme Court of Israel held in *Al-Bassiouni v. Prime Minister*, this dependency is insufficient to establish 'effective control.' It should also be stated, *inter alia*, that insofar as the conclusion that Israel is an occupying power in the Gaza Strip derives from Israel's control of the airspace of the Gaza Strip, there is no support in international law for the proposition that the control of airspace amounts to 'effective control.'<sup>157</sup> With regard to land access to the Gaza Strip, it should be noted that the Gaza Strip also has a border crossing with Egypt (the Rafah crossing), even though Egypt, for its own reasons, also exercises control of the crossing from its territory into the Gaza Strip.<sup>158</sup> Similarly, the imposition of a naval blockade does not create a situation in which the laws of occupation come into effect. It should be emphasized that the very lack of 'control' over the land territory in the Gaza Strip in the traditional sense of this term is what makes an external naval blockade necessary to control access to and egress from that territory. As a comparison, a land siege does not automatically result in the besieged city being held under occupation. States, and particularly those that might employ navies or air forces, either unilaterally or within the framework of a coalition, will likely be wary of accepting the argument that the mere imposition of a naval blockade or influence over events on the shore of a State by the use of military power automatically creates a situation of occupation.

If Israel did indeed have effective control over the Gaza Strip, then it would have the power to act as the authority responsible for maintaining order in the Gaza Strip. The Israeli forces would then be able to wait on the coast of the Gaza Strip and intercept the vessels there. In practice, however, Israel does not control the coast of the Gaza Strip. This area is under the 'effective control' of the Hamas. The lack of effective control

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156 See *Case Concerning Armed Activities On The Territory Of The Congo*, I.C.J., 231(2005) available at [www.icj-cji.org/docket/files/116/10455.pdf](http://www.icj-cji.org/docket/files/116/10455.pdf) (where it was held the physical stationing of troops at an airport and the existence of "administrative control" was not sufficient to establish occupation in the sense of article 42 of the Hague Regulations).

157 *Bankovic v. Belgium and Others* 123 I.L.R. 94 (2001) (where NATO's control over the airspace of Federal Republic of Yugoslavia during the 1999 bombing campaign was rejected as a basis for arguing "effective control").

158 It should be noted that at a later stage, we will maintain that the fact that there is an additional border crossing between Egypt and the Gaza Strip does not diminish Israel's humanitarian responsibility for the situation in the Gaza Strip. Here, we are dealing with a question of a different nature, namely the question of "effective control" of the Gaza Strip.

over the Gaza Strip, including the ability to impose order there, and the security threat that the Hamas presents to the naval forces operating near the coast of the Gaza Strip, clearly indicate the underlying logic of international law that permits the enforcement of a naval blockade at some distance from the coast. Similarly, it is difficult to see how the Gaza situation differs in a practical sense from Lebanon in 2006, when the blockading Israeli warship INS *Hanit* was hit by a missile launched by Hezbollah from the Lebanese coast.<sup>159</sup> In light of the fact that the territorial waters of the Gaza Strip contain mainly small vessels that are capable of moving at high speeds, Israel's naval forces are confronted with a significant risk.<sup>160</sup> Examples such as the attack on the *USS Cole* in 2000 in Yemen and the attack on the French supertanker *Limburg* in 2002 highlight both the threat presented by small vessels and the difficulty in stopping them.<sup>161</sup>

47. An examination of the arguments, both individually and cumulatively, therefore leads to the conclusion that Israel does not have 'effective control' in the Gaza Strip. Therefore, in alignment with the Supreme Court of Israel, the Commission takes the position that Israel's effective control of the Gaza Strip ended when the disengagement was completed in 2005.

## **Israel's imposition of the naval blockade**

### **The purpose of the naval blockade**

48. According to the testimonies before the Commission, the Government of Israel imposed the naval blockade on the Gaza Strip on January 3, 2009, for military-security reasons, which focused on preventing weapons, ammunition, military supplies, terrorists and money from entering the Gaza Strip, and the need to prevent the departure of terrorists, vessels filled with explosives and other maritime borne threats from Gaza.<sup>162</sup> The various witnesses emphasized the large amount of weapons that can be smuggled by sea in one single operation

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159 See CORDESMAN ET AL., *supra* note 91, at 131-135.

160 Chief of Staff's Open Door Testimony of 11.8.2010, *supra* note 70, at 34-35.

161 See Thad Allen, *Friend or Foe? Tough to Tell*, 134 PROCEEDINGS MAGAZINE (2008), available at [www.usni.org/magazines/proceedings/2008-10/friend-or-foe-tough-tell](http://www.usni.org/magazines/proceedings/2008-10/friend-or-foe-tough-tell).

162 Chief of Staff's Open Door Testimony of 11.8.2010, *supra* note 70, at 28; Military Advocate-General's testimony, *supra* note 98, at 25; Transcript of session no. 7 "Testimony of Major-General Eitan Dangot, Coordinator of Government Activities in the Territories" (Aug. 31, 2010), at 134 [hereinafter *Testimony of Government Activity Coordinator in the Territories*]; *Defense Minister's Open Door Testimony*, *supra* note 70, at 22.

and therefore the danger that this route presents.<sup>163</sup> The purpose of the naval blockade was, therefore, to restrict the military resources available to the Hamas for carrying out hostilities against Israel.

49. A few officials, including the Military Advocate-General, took care in their testimony to distinguish between the 'purpose of the naval blockade' and 'Israel's border crossings policy,' i.e., the policy relating to the land border crossings with the Gaza Strip that Israel adopted after September 19, 2007, when the Ministerial National Security Committee decided to impose restrictions on the goods entering the Gaza Strip; on the movement of persons; and on the supply of electricity and fuel to the Gaza Strip, as a result of Hamas's rise to power.<sup>164</sup> They emphasized in their testimonies that the naval blockade was not imposed to disrupt the commercial relations of the Gaza Strip, for the reason that there is no commercial port on the coast of the Gaza Strip, and therefore there has been no maritime commerce via the coast of the Gaza Strip in the past.<sup>165</sup> As a result, the maritime activity in the Gaza Strip was limited to fishing, whereas any such commerce went via the Israeli port of Ashdod or the Egyptian port of El Arish.<sup>166</sup> The Military Advocate-General testified before the Commission that the IDF was compelled to find a suitable operational solution for the maritime zone in view of the increase in the phenomenon of flotillas bound for the Gaza Strip.<sup>167</sup> The Military Advocate-General further clarified that the possibility of imposing a naval blockade, specifically, arose in discussions held by the IDF with regard to the appropriate methods of contending with the phenomenon of the flotillas. A naval blockade was regarded as the best operational method of dealing with the phenomenon<sup>168</sup> because other solutions, such as the use of the right of visit and search, were proved to be problematic and other sources of authority were regarded as weaker.

This can also be seen from written material that was submitted to the Commission, which includes legal opinions, summaries of meetings, and letters that were written during the period that preceded the imposition

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163 *Israel's Actions to Prevent the Arrival of Vessels to Gaza's Shore* 8 (Opinion of Political-Security Branch, Aug. 3, 2010) [hereinafter *Opinion of Political-Security Branch*]; see also *Prime Minister's Open Door Testimony*, *supra* note 82, at 7; *Defense Minister's Open Door Testimony*, *supra* note 70, at 8; *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 6-7.

164 *Military Advocate-General's testimony*, *supra* note 98, at 25; *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 134.

165 *Military Advocate-General's testimony*, *supra* note 98, at 77.

166 *Id.*

167 *Military Advocate-General's testimony*, *supra* note 98, at 14-17.

168 *Id.*



of the naval blockade. Thus, for example, already on August 3, 2008, the legal advisor of the Israeli Navy wrote an opinion dealing with the powers of the Navy to stop foreign vessels off the coast of the Gaza Strip. The opinion, which was written in the context of operational deployment of the Navy prior to the arrival of a flotilla with two yachts flying Greek flags, surveyed in great detail the applicable law and the various possible actions open to the Navy, while mentioning the limitations faced by the Navy. In her 'Recommendations for further treatment,' she wrote: 'As stated, in the current security... in order that the IDF should have the powers required to deal with ships reaching the Gaza Strip, I recommend considering a "naval blockade" on the Gaza Strip (with an official announcement), which will restrict the entry of foreign shipping vessels into the Gaza Strip...'<sup>169</sup> An opinion with a similar conclusion was given by the International Law Department at the headquarters of the Military Advocate-General's Office on August 6, 2008.<sup>170</sup> On August 11, 2008, the Military Advocate-General approached the Attorney-General and brought to his attention the recommendation of the Military Advocate-General's Office as well as various legal disagreements that arose in this regard with the legal adviser of the security establishment, the legal adviser of the Ministry of Foreign Affairs and the legal adviser of the Israel Police. The Military Advocate-General also requested holding a meeting on the subject, with the participation of all of the relevant parties, in order to formulate a settled legal position.<sup>171</sup> On the same day the Military Advocate-General apprised the Chief of Staff in writing that he had spoken with the Attorney-General, who also expressed the position that the declaration of a naval blockade on the Gaza Strip gave the 'optimal legal-operational solution to preventing the entry of foreign shipping vessels into the Gaza Strip, and gave the Navy all of the tools and powers required to prevent the passage of shipping vessels. The sources of authority that allow action to be taken against shipping vessels, in the absence of a declaration of a "naval blockade," are weaker, and their practicability is doubtful.'<sup>172</sup> From the materials submitted to

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169 See "the Navy's authorities regarding foreign ships off the shore of the Gaza Strip" (opinion by the navy's legal advisor, 3.8.2008) *MAG position paper - Appendix, supra* note 77.

170 See "the Navy's authorities regarding foreign ships off the shore of the Gaza Strip" (opinion by the Chief Military Advocate General - Department of International Law, 6.8.2008) *MAG position paper - Appendix, supra* note 77.

171 See letter from Brigadier General Avichai Mandelblit, the Military Advocate General, to Yehuda Weinstein, Attorney General (11.8.2008) *MAG position paper - Appendix, supra* note 77.

172 See first letter from Brigadier General Avichai Mandelblit, the Military Advocate General, to Lieutenant General Gabi Ashkenazi, IDF Chief of Staff (11.8.2008) *MAG position paper - Appendix, supra* note 77.



the Commission, it appears that the Attorney-General agreed on the whole but thought that the issue required a practical solution within the authority of the political echelon and recommended holding a discussion at that level.<sup>173</sup>

On December 29, 2008, the Military Advocate-General once again approached the Navy Commander when, in the situation assessments that took place during Operation 'Cast Lead,' the question of how to deal with civilian shipping vessels that might try to reach the coast of the Gaza Strip arose once again. In his letter, the Military Advocate-General said that 'in view of the intensive combat operations taking place at this time in the Gaza Strip' (i.e., Operation 'Cast Lead'), he thought it right to recommend once again the imposition of a naval blockade on the Gaza Strip, even though no decision had yet been made on this issue.<sup>174</sup> On December 30, 2008, the Military Advocate-General once again contacted the Chief of Staff and said that in the early hours of the morning the Navy forces were required to contend with the yacht *Dignity* that left Cyprus for the Gaza Strip and that the incident highlighted the legal difficulty of dealing with foreign civilian shipping vessels trying to reach the coast of the Gaza Strip. He once again asked the Chief of Staff to bring his recommendation of a naval blockade before the political echelon.<sup>175</sup>

From a memorandum of the Minister of Defense it would appear that on December 30, 2008, a request was received from the Prime Minister's military secretary to act to impose a naval blockade, and that on December 31, 2008, a request was received by his military attaché from the Chief of Staff's office in this regard. On January 3, 2009, after the security establishment's legal advisor gave his opinion on the subject, the Minister of Defense signed an order to impose the blockade.<sup>176</sup>

50. It should be noted that, the leader of the opposition - who was Minister of Foreign Affairs at the time of imposing the naval blockade on the Gaza Strip, MK Tzipi Livni, said in her testimony that the imposition of the naval blockade, even though it was not done in order to disrupt the

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173 See second letter from Brigadier General Avichai Mandelblit, the Military Advocate General, to Lieutenant General Gabi Ashkenazi, IDF Chief of Staff (11.8.2008) *MAG position paper - Appendix, supra* note 77.

174 See letter from Brigadier General Avichai Mandelblit, the Military Advocate General, to Major General Eli Marom, Commander of the Navy (29.12.2008) *MAG position paper - Appendix, supra* note 77.

175 See letter from Brigadier General Avichai Mandelblit, the Military Advocate General, to Lieutenant General Gabi Ashkenazi, IDF Chief of Staff (30.12.2009) *MAG position paper - Appendix, supra* note 77.

176 See Defense Minister's Memorandum, 21 (30.8.2010), marked by the Commission as exhibit 53 [hereinafter *Defense Minister's Memorandum*].

commercial relations of the Gaza Strip, was done in a wider context, as part of Israel's comprehensive strategy (which she referred to as a 'dual strategy') of delegitimizing Hamas on the one hand and strengthening the status of the Palestinian Authority vis-à-vis the Gaza Strip on the other. Pursuant to this strategy, Israel does not recognize Hamas, yet it continues to act and uphold, insofar as possible, the interim agreements with the Palestinian Authority. According to her approach, the broad context is not merely the war on terror, but also the political ability to reach agreements between Israel and the Palestinian Authority since the attempts to transfer goods to the Gaza Strip by sea (despite Israel's offer to transfer humanitarian supplies to the Gaza Strip via the land crossings) is contrary to the arrangements determined in the interim agreements (according to which Israel will retain control of the territorial waters of the Gaza Strip until the final arrangement is reached) and it also gives legitimacy to the Hamas regime in the Gaza Strip, and harms the ability to reach future agreements between Israel and the Palestinian Authority.<sup>177</sup> MK Livni also stated that it would be a mistake to examine the circumstances of imposing the naval blockade from a narrow security perspective only.<sup>178</sup>

Similarly, in a document dated August 3, 2010, Major-General (res.) Amos Gilad, the head of the Political, Military and Policy Affairs Bureau at the Ministry of Defense gave details of the security and political reasons that led to imposing the naval blockade on the Gaza Strip. The document contains two considerations: one, which is mentioned as the main consideration, is to prevent any military strengthening of the Hamas; the other, which is mentioned alongside the security consideration, is to 'isolate and weaken Hamas.' In this context, Major-General (res.) Gilad stated that the significance of opening a maritime route to the Gaza Strip was that the Hamas' status would be strengthened significantly from economic and political viewpoints. He further stated that opening a maritime route to the Gaza Strip, particularly while it is under Hamas control, rather than within the framework of a political agreement between Israel and the Palestinians, would be tantamount of 'a very significant achievement for Hamas and the "path of resistance" in the internal arena, at the expense of Abu Mazen's government and the "path of agreements".'<sup>179</sup> Major-General (res.) Gilad concluded:

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177 Transcript of session no. 14 "Leader of the Opposition Tzipi Livni's open door testimony" 2-3 (Oct. 25, 2010) [hereinafter *Leader of the Opposition Tzipi Livni's open door testimony*].

178 See *Id.*, at 3: "The narrow security view, which is correct for such a body, in my view does somewhat of a disservice in the broader matter based upon which Israel could basically be granted legitimacy for actions which are security actions".

179 *Opinion of Political-Security Branch, supra* note 163, at 9, paras. 49-52.

'In summary, the need to impose a naval blockade on the Gaza Strip arises from security and military considerations of great weight, which are mainly the need to prevent a military strengthening of terrorists in the Gaza Strip, the entry of terrorists and the smuggling of weapons into the Gaza Strip by sea, and also to prevent any legitimization and economic and political strengthening of Hamas and strengthening it in the internal Palestinian arena.'<sup>180</sup>

It would therefore appear that even though the purpose of the naval blockade was fundamentally a security one in response to military needs, its imposition was also regarded by the decision makers as legitimate within the concept of Israel's comprehensive 'dual strategy' against the Hamas in the Gaza Strip.

### *Alternatives to the naval blockade*

51. From the material that was submitted to the Commission, it is evident that Israel - even though it was not obliged to do so under the rules of international law - imposed the naval blockade only after other options were considered. These included stopping and searching shipping vessels with consent, declaring a 'maritime zone,' and exercising the authority of 'visit and search.' During an armed conflict, it is lawful to impose a naval blockade, without considering alternatives, as long as the naval blockade itself satisfies the requirements of international humanitarian law. Rather, the analysis of the options demonstrates the degree to which Israel carefully considered the decision to impose a blockade.

52. *The power to stop and search ships with consent.* According to the principle of the freedom of the high seas in the law of the sea, as discussed above, there is a very limited authority to interrupt the voyage of a vessel in international waters and carry out a consensual search. While there are States that claim the consent of the ship's master is sufficient, the general view appears to be that the consent of the flag State is required.<sup>181</sup> In any event, virtual certainty that consent for a search would not be granted by the Masters of the ships bent on reaching Gaza limited the utility of following that option. The consent of the flag State provides a stronger legal basis for carrying out a search of a vessel. However, it was not certain that the consent of the flag State would actually be obtained, and,

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180 *Id.*, at 9, para. 53.

181 See UNCLOS, *supra* note 97, at art. 110 (UNCLOS generally limits the right of a warship to visit a foreign ship to situations where there is grounds for suspecting that a vessel is involved in piracy, slave trade, unauthorized broadcasting, is without nationality or in fact of the same nationality as the warship).

in any case, it is not possible to ensure that the consent would be given in a timely manner.

53. *Declaration of a 'maritime zone.'* International humanitarian law permits a party to a conflict to limit the activity of a neutral vessel (including taking control of the communications of a neutral vessel)<sup>182</sup> in or close to an area where naval military activity is taking place, as well as the establishment of maritime zones (or 'exclusion zones').<sup>183</sup> The possibility of creating a 'maritime zone' limiting access to the Gaza strip by the area where combat activity is taking place was not merely considered by Israel in theory, but was also implemented in practice.<sup>184</sup> As stated above (para. 25) on August 13, 2008, a NOTMAR was published, calling for all foreign vessels in the area not to enter the maritime zone adjacent to the Gaza Strip. The NOTMAR also stated that humanitarian aid would be transferred to the Gaza Strip via the existing land crossings. However, there is a lack of clarity in the law as to whether such a zone provides an authority to only search for contraband. Notwithstanding this NOTMAR, flotillas whose declared destination was the Gaza Strip continued to arrive. In the period between the months of August-December 2008, the Government of Israel even permitted six vessels to enter the Gaza Strip. The increasing interest in opening a maritime route to the Gaza Strip aroused grave concern in the security establishment that a permanent 'maritime traffic route' to the Gaza Strip would be created, since it could be abused for smuggling military supplies and terrorists.<sup>185</sup>

54. *Right of visit and search.* Another option considered by Israeli authorities was the exercise of the right of visit and search. As indicated in the U.S. Navy Commander's Handbook, the law of neutrality - a part of the law of armed conflicts that defines the rights of parties that are not involved in the armed conflict - does not prohibit commerce between a neutral State and a party to an armed conflict. However, a neutral government cannot itself supply war materials without it being regarded as a breach of neutrality. Moreover, a neutral government 'may forbid its citizens from carrying on non-neutral commerce with belligerent nations,'<sup>186</sup> but it is not required to do so.

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182 See U.S. Navy, *The Commander's Handbook*, *supra* note 92, at 7-11, para. 7.8; See also *San Remo Manual*, *supra* note 110, at rule 108.

183 See U.S. Navy, *The Commander's Handbook*, *supra* note 92, at 7-12, para 7.9; See also *San Remo Manual*, *supra* note 110, at rule 105.

184 *San Remo Manual*, *supra* note 110, at rule 119.

185 *MAG position paper*, *supra* note 1, at 39.

186 See U.S. Navy, *The Commander's Handbook*, *supra* note 92, at para. 7.4.

In order to ensure that cargo that is supplied to a party to a conflict does not breach the rules of neutrality, the laws of naval warfare grant 'a right to visit and search merchant vessels outside neutral waters where there are reasonable grounds for suspecting that they are subject to capture.'<sup>187</sup> An accepted definition of the concept is found in the U.S. Navy Commander's Handbook:

'Visit and search is the means by which a belligerent warship or belligerent military aircraft may determine the true character (enemy or neutral) of merchant ships encountered outside neutral territory, the nature (contraband<sup>188</sup> or exempt "free goods") of their cargo, the manner (innocent or hostile) of their employment, and other facts bearing on their relation to the armed conflict.'<sup>189</sup>

However, a key requirement is that such a right cannot be arbitrarily exercised. The challenge that confronted the Israeli authorities was to obtain sufficient information regarding the cargo and/or personnel on board the vessels in order to find a ground for suspicion that the vessel is engaged in transporting contraband, enemy combatants, is presenting fraudulent documentation, is contributing to the enemy's military activity, and similar actions.<sup>190</sup> In addition, exercising the right of visit and search at sea can be a complex process in view of the size of merchant vessels, practical difficulties that have arisen with regard to searching the cargo on vessels, the weather, limited naval resources and the need to carry out other operations.

55. None of the alternatives discussed above provided the means to comprehensively prevent the import of arms, ammunition, and war materials. Moreover, these alternatives did not provide authority to stop terrorists and vessels from leaving Gaza. Here it should be recalled that the Hamas has proven time and again its intention to camouflage its activity behind a civilian cloak. Therefore, it is legitimate for Israel to carefully scrutinize every action of the Hamas in order to determine whether it constitutes a threat to Israel's armed forces or its citizens. Imposing a naval blockade is therefore the only measure that gives authority under international humanitarian law to prevent the departure of vessels from the area where the naval blockade has been declared. It should also be pointed out that imposing a naval blockade is the method of warfare that

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187 See *San Remo Manual*, *supra* note 110, at rule 118.

188 See *San Remo Manual*, *supra* note 110, at rule 148 (defining contraband as "goods which are ultimately destined for territory under the control of the enemy and which may be susceptible for use in armed conflict").

189 See *U.S. Navy, The Commander's Handbook*, *supra* note 92, at para. 7.6.

190 See *San Remo Manual*, *supra* note 110, at rule 146.

interferes the least with neutral shipping, at least in principle, mainly for the reason that this method of warfare is restricted geographically to the specific area that is subject to the naval blockade, unlike the right of visit and search which can be exercised anywhere, except in the territorial waters of a neutral State.<sup>191</sup>

Given the aforesaid, Israel ultimately decided that imposing a naval blockade provided the most efficient and comprehensive legal tool to confront the prevailing security threat, which, as stated above, constitutes a legitimate method of warfare.

## **Israel's Compliance with the Legal Rules Governing a Naval Blockade**

### **Commitment to the rules of international law**

56. The analysis will now turn to the question of whether Israel complied with the conditions required for the imposition and enforcement of a naval blockade. The material before the Commission clearly shows that all of the organs of the State of Israel (the Government, the IDF, the Military Advocate-General, the Ministry of Foreign Affairs and the Attorney-General) made great efforts in order to comply with the technical legal rules governing the imposition of a naval blockade. The Government of Israel consulted military and civilian legal experts regarding all aspects of the comprehensive planning. From the first discussion of whether a naval blockade was to be introduced, it appears that there was a commitment to two principles: first, the blockade would be imposed pursuant to the rules of international law, i.e., Israel committed itself to follow the widely accepted legal limitations of a traditional blockade as reflected in the *San Remo Manual*. Second, the blockade would be imposed subject to Israel's legal obligations regarding provision of humanitarian assistance.

57. As stated above, the technical legal requirements for imposing a naval blockade can be found, *inter alia*, in articles 93-101 of the *San Remo Manual*.<sup>192</sup> The evidence before the Commission shows that Israel complied with the conditions regarding the effectiveness of the blockade,<sup>193</sup>

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191 *Id.*

192 *San Remo Manual*, *supra* note 110, at rule 93-101; See also *Heintschel von Heinegg, EPIL*, *supra* note 91, at paras. 28-40.

193 *San Remo Manual*, *supra* note 110, at rule 95; *Heintschel von Heinegg, EPIL*, *supra* note 91, at paras. 33-37 (as far as is known, the blockade has prevented all ships from accessing the coast of the Gaza Strip since the time of its establishment).

impartiality in imposing it<sup>194</sup> and non-interference with ports and coasts of neutral States.<sup>195</sup> One aspect of the technical compliance with the law governing blockades that warrant comment is the duty to give notice of the imposition of a blockade, and especially the duty to give notice of the ‘duration’ of the naval blockade.

### **‘Notice’ of the imposition and duration of a naval blockade**

58. The requirement of giving notice of a naval blockade appears, *inter alia*, in articles 93-94 of the San Remo Manual. Although the London Declaration of 1909 provides that notice of the imposition of a naval blockade should be given to neutral States by sending messages to their governments, today the accepted opinion is that publishing a ‘Notice to Airmen’ and a ‘Notice to Mariners’ satisfies the requirement of the article.<sup>196</sup> The Commentary to the San Remo Manual is of no assistance in this regard, since it merely states that article 94 of the San Remo Manual is ‘self-explanatory.’<sup>197</sup>

In the case at hand, the State of Israel took the following steps in order to give notice of the naval blockade: from the testimony of the Military Advocate-General, Major-General Avichai Mendelblit, it can be seen that the Military Advocate-General’s Office asked the Ministry of Transport to transmit information regarding the imposition of the naval blockade by all methods at its disposal, in order to ensure that the notice would reach all vessels in the Mediterranean Sea. This was also done. The notice was also published on the Internet sites of the IDF, the Shipping Authority, the Military Advocate-General, and the Ministry of Transport, and, as noted above, via several international channels. The announcement was also transmitted twice a day via the emergency channel for maritime communication to all ships within a distance of up to 300 kilometers from the Israeli coast.<sup>198</sup> In addition, notices were also sent to the flag States

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194 *San Remo Manual*, *supra* note 110, at rule 100; See also *Heintschel von Heinegg*, *EPIL*, *supra* note 91, at para. 40 (it appears that Israel has not authorized any vessel to access the coast of the Gaza Strip since the establishment of the blockade; as a result, Israel has not discriminated between vessels of different nationalities when enforcing the blockade).

195 *San Remo Manual*, *supra* note 110, at rule 99; See also *Heintschel von Heinegg*, *EPIL*, *supra* note 91, at para. 38 (there is no evidence that the blockade interferes with any ports or coasts outside the Gaza Strip).

196 See *Heintschel von Heinegg*, *EPIL*, *supra* note 91, at para. 31.

197 *San Remo Explanation*, *supra* note 110, at 177, para. 94.1.

198 *Defense Minister’s Open Door Testimony*, *supra* note 70, at 29-30; *Military Advocate-General’s testimony*, *supra* note 98, at 74.



and the States that Israel knew intended to send ships to the area.<sup>199</sup> These steps clearly satisfy the requirement of ‘notice.’

59. An issue that requires consideration in this context is whether Israel complied with the condition that notice should be given of the ‘duration’ of the naval blockade. The NOTMAR of January 3, 2009, states that ‘Gaza maritime area is closed to all maritime traffic and is under blockade imposed by the Israeli Navy until further notice’.<sup>200</sup>

The requirement that the duration of the naval blockade (hereafter: **the duration**) should be stipulated from the outset is stated in the San Remo Manual (article 94),<sup>201</sup> in the Harvard Air and Missile Warfare Manual (rule 148(b)),<sup>202</sup> and in the UK<sup>203</sup> and Canadian<sup>204</sup> Manuals (which adopted the provisions of the San Remo Manual). It is not, however, required by the 1909 London Declaration, nor does it appear in the U.S. Naval Commander’s Handbook.<sup>205</sup> The Military Advocate-General pointed to the fact that there is a lack of clarity with regard to the accepted norm in customary international law in this context. As stated above, the Commentary on the San Remo Manual cannot assist in the interpretive process.<sup>206</sup> The Commentary on rule 148(b) of the Harvard Air and Missile Warfare Manual states that this requirement refers to a grace period during which neutral aircraft are allowed to leave the blockaded area.<sup>207</sup>

Restricting the blockade to a specific duration was regarded as impossible, in view of the open ended nature of the conflict with Hamas.<sup>208</sup> Even if we regard the ‘duration’ as an emerging rule of customary international law, great weight is not attached to establishing a specific term during which the blockade is required to run. Therefore, it appears that the notice that the naval blockade would continue ‘until further notice’ satisfies the legal requirements. This notification was also included in the periodic notices that were sent with regard to the existence of a naval blockade. At the crux of the notification provisions is the goal of ensuring that neutral ships are aware of the existence of a naval blockade

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199 *Defense Minister’s Memorandum*, *supra* note 176, at 22.

200 Notice to mariners 1/2009 (Jan. 6, 2009).

201 *San Remo Manual*, *supra* note 110, at rule 94.

202 *The Air and Missile Warfare Manual*, *supra* note 115, at art. 148(b).

203 See *The UK Manual*, *supra* note 113, at 363, para. 13.66.

204 *The Canadian Manual*, *supra* note 113, at 8-11/8-12, para. 845.

205 See *U.S. Navy, The Commander’s Handbook*, *supra* note 92, at 7-10, para. 7.7.2.2.

206 *San Remo Explanation*, *supra* note 110, at 177, para. 94.1.

207 *The Air and Missile Warfare Manual*, *supra* note 115, at 289, art. 148(b).

208 *Defense Minister’s Open Door Testimony*, *supra* note 70, 3-5.



so that they can avoid entering the area. In the case at hand, the flotilla organizers' stated intention was to breach it and enter the Gaza Strip.<sup>209</sup>

60. Despite the aforesaid, one advantage of stipulating a specific duration is that it would ensure a systematic and periodic review of the blockade at the highest echelons of the Government, in order to examine whether there has been a change in circumstances and whether the naval blockade continues to achieve the anticipated effect. As noted, the lack of a specific duration of the blockade does not affect its legality, but stipulating a fixed duration would ensure that its effectiveness in achieving the Government's anticipated security purposes and its effect on the civilian population would come under review.

## Humanitarian obligations

61. As stated above, one of the unique features of a naval blockade is that irrespective of the purpose for which the blockade is imposed, all neutral vessels breaching the blockade or attempting to breach the blockade must be stopped, whether they are carrying weapons or other supplies (commercial cargo, humanitarian equipment, etc.).<sup>210</sup> In order for the blockade to be regarded as binding, it must be effective, i.e., the entry of all vessels into the Gaza Strip must be prevented *de facto*.<sup>211</sup> Israel satisfied these conditions. Once a blockade is established, it is likely to have a humanitarian impact on the civilian population in the blockaded area. The blockading party must therefore consider the humanitarian impact that the blockade will have on the civilian population of the territory.

The duty to consider the humanitarian impact of a naval blockade is stated in articles 102-104 of the San Remo Manual. Pursuant to these articles, the imposition of a naval blockade is prohibited if its sole purpose

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209 See Insani Yardim Vakfi, The Foundation for Human Rights and Freedoms and Humanitarian Relief (IHH), *Palestine Our Route Humanitarian Aid Our Load, Flotilla Campaign Summary Report 20* [hereinafter *IHH Flotilla Campaign Summary*], available at [www.ihh.org.tr/insani-yardim-filosu-ozet-raporu/en/](http://www.ihh.org.tr/insani-yardim-filosu-ozet-raporu/en/). See also Protocol "Freedom Flotilla Coalition Meeting" (May 16, 2010), found on the computer of a journalist who participated in the flotilla on board the *Mavi Marmara*. The intention to breach the blockade was dispatched by the flotilla participants over the radio when the IDF Navy's forces halted the ships at the start of the enforcement operation. See also *IICC report* (Jan. 19, 2010), *supra* note 83, at 5; *IICC report* (Jan. 31, 2010), *Id.*, at 1; *IICC report* (Mar. 7, 2010), *Id.*, at 3; and appendix 39 to "Defense Minister's Memorandum - Appendices" (A Collection added to the Defense Minister's Memorandum, Aug. 30, 2010), marked by the Commission as exhibit 54 [hereinafter *Defense Minister's Memorandum - Appendices*].

210 OPPENHEIM, *supra* note 86, at 774-775.

211 *Heintschel von Heinegg, EPIL, supra* note 91, at para. 33.

is to starve the civilian population or deprive them of other objects essential for their survival (article 102(a)) or if the damage to the civilian population is excessive, or is expected to be excessive, in relation to the military advantage anticipated from the blockade (article 102(b)). Article 103 concerns the duty of the blockading party to provide the civilian population with food and other objects essential for its survival, subject to certain conditions. Article 104 provides that, subject to certain conditions, the blockading party should ensure the passage of medical supplies for the civilian population or for the wounded and sick members of the enemy forces. In the original language:

‘102. The declaration or establishment of a blockade is prohibited 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.

103. 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:

(a) the right to prescribe the technical arrangements, including search, under which such passage is permitted; and

(b) the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross.

104. The blockading belligerent shall allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including search, under which such passage is permitted.’

The analysis shall now turn to the question whether the naval blockade that Israel imposed on the Gaza Strip had a humanitarian impact on the civilian population in the Gaza Strip that rendered it contrary to international law.

62. One of the difficulties that presented itself before the Commission was that the witnesses testifying on this matter found it hard to identify the ‘humanitarian’ impact of the naval blockade on the population of the

Gaza Strip, as distinct from the impact of Israel's land crossings policy. The difficulty created by the attempt to assess the humanitarian impact of the naval blockade itself arises in part because of the fact that even before the naval blockade, there was no maritime trade via the coasts of the Gaza Strip since there was no suitable port, and in part because of the fact that before Israel imposed the land crossings policy (September 19, 2007), the international community only made limited attempts to bring goods into the Gaza Strip by sea. Admittedly, the absence of a commercial port is not a decisive factor, since it is clear that it is possible to find other ways of transporting goods arriving by sea, such as by means of unloading the goods with the help of fishing boats. Moreover, the assumption that goods cannot be transported into the Gaza Strip in the absence of a commercial port inherently contradicts the main purpose of the blockade, i.e., preventing the passage of weapons to the Gaza Strip, since, according to the same logic; it would not be at all possible to transport weapons to the Gaza Strip by sea.

Although the transport of goods via the sea appears to be a limited possibility in the Gaza Strip, in the absence of information and records in this regard, it is difficult to determine the effect of the naval blockade alone on the humanitarian situation in the Gaza Strip. It would appear that the flotilla organizers themselves sought to focus attention on the 'humanitarian' impact of the land crossings policy, and not especially on the issue of the naval blockade.<sup>212</sup> The reason why the issue arose from a maritime perspective was that the activists on the Flotilla were seeking to focus attention on the "humanitarian" impact of the land border policy by loading the vessels with medical and other supplies and seeking to breach the blockade, instead of using the land route. Access from the sea offered a unique opportunity to internationalize and publicize the broader Israeli policy of limiting access to Gaza. Access from the sea offered a unique opportunity to internationalize and publicize the broader Israeli policy of limiting access to Gaza. The goal of the Flotilla was obviously not just to breach the blockade, but also to bring international pressure to bear in a bid to end the land based restrictions.<sup>213</sup>

63. As noted above, it should be recalled that the naval blockade was not imposed in a vacuum. Both the naval blockade and the land crossings policy were imposed and implemented because of the prolonged

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212 *Defense Minister's Open Door Testimony*, *supra* note 70, at 23-25.

213 The large number of members of the media on board the Marmara strengthens this assumption; it seems that the primary goal was political and concentrated on creating a media event; See also: *Prime Minister's Open Door Testimony*, *supra* note 82, at 8; *Military Advocate-General's testimony*, *supra* note 98, at 65.

international armed conflict between Israel and the Hamas. As noted, on the strategic level - even though this may not have been the primary purpose underlying the imposition of the naval blockade - the naval blockade is regarded by the Government as a part of Israel's wider effort not to give legitimacy to the Hamas's rule over the Gaza Strip, to isolate it in the international arena, and to strengthen the Palestinian Authority.<sup>214</sup> In this context, the leader of the opposition, Tzipi Livni testified before the Commission:

'On a practical level, even if not conceptually, on a practical level, when problems of this kind arise, I remember those times that we offered to transport the goods for them by land. And therefore the story is not whether it is possible to transport goods and whether for this purpose we are breaking the blockade, but a field that is a different field altogether, which is really a security field, and it is also diplomatic and political and another framework altogether.'<sup>215</sup>

The naval blockade is also connected to the land crossings policy on a tactical level. Because of the considerable difficulty of examining cargo on the high seas, the land border crossings provide a more controlled environment for the passage of humanitarian supplies.<sup>216</sup> Nonetheless, when vessels are directed for military-tactical reasons to Ashdod port, in practice, the transport of the goods on board is subject to the land crossings policy. Therefore, despite the circumstances described above, it is possible that the enforcement of the naval blockade in addition to the implementation of the land crossings policy has a humanitarian impact on the population, at least in principle. In other words, as long as the land crossings are subject to Israeli control, there is *prima facie* a possibility that the opening of an additional route to the Gaza Strip, such as a maritime route that is not controlled by the State of Israel, will affect the humanitarian situation in the Gaza Strip.

Thus, in the present case, some of the flotilla vessels carried iron and cement; materials that have been defined by Israel as materials that can be used for military purposes because of the extensive use made by the Hamas of these materials in order to fortify buildings and tunnels

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214 *Leader of the Opposition Tzipi Livni's open door testimony, supra* note 177, at 13-15

215 *Id.*, at 18.

216 Already in the Notice to Mariners from 2008 (which was issued prior to the establishment of the blockade), it was specifically mentioned that humanitarian equipment would be transferred through the land crossings. Likewise, in relation to this flotilla, the Israeli authorities offered the flotilla participants to change the direction towards the port of Ashdod and transfer the humanitarian supplies on board to the Gaza Strip through the land crossings).

in the Gaza Strip.<sup>217</sup> Therefore, the Israeli Government has allowed the supply of building materials, including cement and iron, through the land border crossings only for projects approved by Israel and on the condition that their entry is coordinated in advance with international agencies operating in the Gaza Strip.<sup>218</sup> By contrast, the representatives of human rights organizations that testified before the Commission emphasized the need to bring building materials into the Gaza Strip, in order to allow for housing and reconstruction in the wake of Operation Cast Lead.<sup>219</sup> According to the flotilla organizers, their decision to try and transport such materials by sea arose from their view that these materials, which they claim are required by the civilian population in the Gaza Strip, will not be permitted to pass by the land border crossings.<sup>220</sup> The approach of the Israeli Government therefore created, in this sense, a connection regarding the humanitarian effect on the Gaza Strip between the naval blockade and the land crossings policy.

64. Before assessing the humanitarian situation in the Gaza Strip, the analysis will briefly consider a preliminary question: does the fact that Israel is not in control of the southern border between the Gaza Strip and Egypt (i.e., the Rafah crossing) affect Israel's responsibility for the humanitarian situation in the Gaza Strip? The Commission has reached the conclusion that the answer to this question is no, for two reasons. First, even if the land crossing into Egypt was open (which was indeed the case at times), Israel would still be obliged, as the party that imposed the naval blockade, to examine the humanitarian situation in Gaza. Second, Egypt did indeed impose restrictions on movement at the Rafah crossing

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217 For a list of materials found on board the flotilla's ships See: "Civilian Policy regarding Gaza Strip - *Regarding the Claims of Human Rights Organizations*" (Oct. 31, 2010), at 27, marked by the Commission as exhibit 127 [hereinafter *Civilian Policy Regarding Gaza Strip - Regarding the Claims of Human Rights Organizations, Dated 31.10.2010*]; *ICC report* (Jun. 14, 2010), *supra* note 83.

218 *Id.*, at 27-28. For the current list of items which could serve both military purposes and non-military purposes and whose entrance into the Gaza Strip is not permitted; see: Israel Ministry of Foreign Cases: Gaza - Lists of Controlled Entry Item, available at [www.mfa.gov.il/MFA/HumanitarianAid/Palestinians/Lists\\_Controlled\\_Entry\\_Items\\_4-Jul-2010.htm](http://www.mfa.gov.il/MFA/HumanitarianAid/Palestinians/Lists_Controlled_Entry_Items_4-Jul-2010.htm) (2010).

219 *Fact Sheet: United Nations Humanitarian Country Team Advocacy Event on the Gaza Strip's Agricultural Sector*, available at [www.ochaopt.org/documents/gaza\\_agriculture\\_25\\_05\\_2010\\_fact\\_sheet\\_english.pdf](http://www.ochaopt.org/documents/gaza_agriculture_25_05_2010_fact_sheet_english.pdf) (2010) [hereinafter *Fact Sheet*];

220 *United Nations: 2010 Consolidated Appeal: Occupied Palestinian Territory*, available at <http://ochaonline.un.org/humanitarianappeal/webpage.asp?Page=1823> (2009), at 53 [hereinafter *Consolidated Appeal*];

*United Nations Relief and Works Agency (UNRWA): Emergency Operations in Gaza, Interim Progress Report January-March 2009*, available at [www.unrwa.org/userfiles/20100119593.pdf](http://www.unrwa.org/userfiles/20100119593.pdf) (2009), at 10 [hereinafter *Emergency Operations*].  
*IHH Flotilla Campaign Summary*, *supra* note 209, at 10.

during the relevant time period. Given the legal requirement to consider the impact of the naval blockade on the humanitarian situation in Gaza, the analysis will now turn to that issue.

### *The humanitarian situation in the Gaza Strip*

#### Background

65. The examination of the humanitarian situation in the Gaza Strip must be carried out in the context of the general framework of this discussion. As noted above, from the time that Israel took control over the Gaza Strip until 1981, Israel supplied all the civilian needs of the Gaza Strip through the military administration. In 1981, the civilian administration was established, which supplied the needs of the Gaza Strip until the Gaza-Jericho Agreement was signed in 1994. From this stage onward until the implementation of the disengagement plan in 2005, Israel's role was diminished and mainly included aid, coordination, and carrying out liaison operations with the Palestinian Authority. In 2005, when the military administration in the Gaza Strip was cancelled and the IDF left the territory, the need to continue to coordinate Government operations regarding the Gaza Strip remained, especially with regard to the activity of the land crossings between Israel and the Gaza Strip, which Israel continues to control.<sup>221</sup>

66. The Israeli entity responsible for coordinating with the Gaza Strip and the West Bank is called the 'Coordination of Government Activities in the Territories' (COGAT), which is headed by the Coordinator of Government Activities in the Territories, an officer with the rank of Major-General, who is directly subordinate to the Minister of Defense and at the same time is a member of the General Staff of the IDF. The branch of COGAT that deals with the Gaza Strip is the District Coordination and Liaison Office for the Gaza Strip (Gaza Strip DCO), which is headed by an officer with the rank of Colonel. The Gaza Strip DCO coordinates the activity with the Palestinian Authority, and it also advises IDF commanders in the field (headed by the Southern District Commander and the Gaza Division Commander) with regard to civilian and humanitarian issues in the Gaza Strip.

According to testimony of the Coordinator of Government Activities in the Territories, Major-General Eitan Dangot, it appears that COGAT's mission regarding the Gaza Strip is: (1) 'leading and implementing the civilian policy... in the changing reality, in coordination and cooperation

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221 *Civilian Policy Regarding Gaza Strip - Part A, supra note 52, at 6-7.*

with the IDF, the security establishment and Government ministries; (2) formulating and implementing contacts with the Palestinian Authority, civilian organizations and the international community...'.<sup>222</sup> The Coordinator of Government Activities in the Territories also stated that at the beginning of 2010, COGAT defined two particular goals for the coming two years: formulating an assessment of the civilian situation in the Palestinian sphere while identifying and analyzing trends and processes, and, with regards to the Gaza Strip, of 'planning and realizing the humanitarian effort and assistance to the population, while integrating them into the campaign to weaken Hamas.'<sup>223</sup>

Today, three land crossings between Israel and the Gaza Strip are active: the Kerem Shalom crossing, which is used, *inter alia*, as the official crossing for fuel into the Gaza Strip; the Erez crossing, which is used for the movement of people; and the Karni crossing, which is used for transporting seeded food and aggregates, and whose operation is assessed each day according to security considerations.<sup>224</sup> All of the crossings are operated by the Land Crossings Authority at the Ministry of Defense and in coordination between the Gaza Strip DCO and the Palestinian Crossings Administration, which is subordinate to the Palestinian Prime Minister, Salam Fayyad.<sup>225</sup>

#### Israel's border crossings policy September 19, 2007- June 10, 2009

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222 *Testimony of Government Activity Coordinator in the Territories, supra* note 162, at 2-3; the third designation - to constitute a civilian authority for the Israeli settlement in the West Bank in the fields of planning and infrastructure - is irrelevant to the Gaza Strip following the Disengagement.

223 *Id.*, at 4.

224 Over the years, border crossings Sufa and Nahal Oz also operated between Israel and the Gaza Strip. The Sufa crossing served as a temporary alternative passage following the closure of the Karni crossing in 2007 (in light of the difficult security situation in the area; the risk of operating the crossing; and the lack of a coordination entity on the Palestinian side). In August 2008, this crossing was closed and the activity was transferred to the Kerem Shalom crossing. The Gas terminal at Nahal Oz was targeted in a number of terrorist attacks, including the killing of two Israeli civilians who worked at the terminal on Apr. 9, 2008, as well as the firing of rockets and mortar shells and an attempt to dig a tunnel and plant explosives under the passage; it was therefore decided to shut it down. It should also be mentioned that the other crossings were also targeted by terrorist attacks, including a combined attack at Karni crossing on Jan. 13, 2005 where an explosive charge detonated at the crossing and three terrorists burst into the crossing and killed six Israeli civilians. On Apr. 19, 2008, Passover eve, an attack took place on the Kerem Shalom crossing, backed by mortar shells, an armored vehicle and two cars packed with explosives disguised to look like IDF jeeps. In this attack, 13 soldiers were injured and the crossing had to be shut down for repairs (estimated at ten million shekels); See *Civilian Policy Regarding Gaza Strip - Part A, supra* note 52, at 35-40.

225 *Id.*



67. As stated above, in 2007 there was a change in Israel's policy towards the Gaza Strip. As a result of the Hamas takeover of the Gaza Strip, the Ministerial National Security Committee decided to impose civilian restrictions on the Gaza Strip, including a restriction on the transfer of goods; a reduction in the supply of fuel and electricity; and a restriction on the movement of persons in and out of the Gaza Strip, after a legal examination of the issue and with the intention of preventing a humanitarian crisis in the Gaza Strip.<sup>226</sup> On June 10, 2009, the Ministerial Committee further decided that the activity of the crossings would be determined, *inter alia*, by the basic needs of the Palestinian population, and control was introduced with regard to the transfer of money to the Gaza Strip (hereafter, jointly: **the land crossings policy**). As evidenced by the testimonies that the Commission heard, the land crossings policy sought to achieve two goals: a security goal of preventing the entry of weapons, ammunition and military supplies into the Gaza Strip in order to reduce the Hamas' attacks on Israel and its citizens, and a broader strategic goal of 'indirect economic warfare,' whose purpose is to restrict the Hamas' economic ability as the body in control of the Gaza Strip to take military action against Israel.<sup>227</sup> This is not a unique circumstance; as has been noted historically, 'the two forms tend [military and economic] to run into each other.'<sup>228</sup>

It should be noted that pursuant to the aforesaid resolutions, there is no contact between Israel and the Hamas government in the Gaza Strip, and any communication with the Gaza Strip is carried out through representatives of the Palestinian Authority (the government of Salam Fayyad) or through international organizations.<sup>229</sup> The actual implementation of the policy is carried out by COGAT.<sup>230</sup> We shall discuss the principles that COGAT follows in implementing the policy and its actual implementation below.

68. In order to complete the picture it should be noted that the land crossings policy was altered in June 2010. In the relevant resolution, it was stated that several steps would be taken without delay, including

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226 *Id.*, at 10-11; See also *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 37.

227 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 51; on this matter see also JEREMY MATAM FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 107 (2007).

228 See COLOMBOS, THE INTERNATIONAL LAW OF THE SEA, *supra* note 94, at 716-717.

229 The Government Activity Coordinator in the Territories has contact with approximately 160 international organizations on matters regarding the Gaza Strip; See *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 14.

230 *Id.*, at 17.



the publication of a list of items prohibited from entering the Gaza Strip that would include 'only weapons, military equipment and problematic dual-purpose items.' Any item that does not appear on the aforesaid list, according to the resolution, will be permitted to enter. An additional change in this policy was made on December 8, 2010, when it was resolved that, subject to certain restrictions, approval would be given to a gradual policy for sending goods from the Gaza Strip outside the borders of Israel and to the West Bank.<sup>231</sup> Notwithstanding these recent alterations, below we shall consider the land crossings policy that was in force in May 2010.

### *Claims regarding the humanitarian situation in the Gaza Strip*

69. The evidence that the Commission took into consideration when assessing the impact of the land crossings policy on the civilian population in the Gaza Strip were the testimony of the Coordinator of Government Activities in the Territories, the testimonies of human rights organizations, and reports of human rights and humanitarian organizations that operate in the Gaza Strip. In this context, it should be noted that assessing the effectiveness and humanitarian consequences of economic sanctions can be challenging because of the difficulty in separating the effects of sanctions from other causes of political and social disruption. While this does not mean that tracing the influence of sanctions is impossible "it does suggest the need for humility and caution in drawing conclusions about sanctions effects."<sup>232</sup> At the same time, great care should be taken when analyzing the humanitarian situation in territories where the humanitarian situation was poor from the outset because '... countries already on the verge of humanitarian crisis clearly are more likely to be pushed over the edge by effectively imposed economic sanctions.'<sup>233</sup>

70. It is therefore important to bear in mind the position that prevailed in the Gaza Strip before this policy was adopted. From a publication of the World Bank of June 23, 2004, it would appear that the poverty level in the Gaza Strip has steadily increased. In 1998, the level was 21,6%,

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231 See decision no. B/64 of the Ministerial National Security Committee (the Political-Security Cabinet) of December 8, 2010.

232 DAVID CORTRIGHT AND GEORGE A. LOPEZ, *THE SANCTIONS DECADE: ASSESSING UN STRATEGIES IN THE 1990S* 213 (2000).

233 *Id.*

rising to nearly 35% in 2006.<sup>234</sup> In 2003, the unemployment level was 29%.<sup>235</sup> Sanitary conditions in Gaza were assessed as ‘very poor.’<sup>236</sup>

71. As for the humanitarian situation prevailing in the Gaza Strip since the establishment of the land crossings policy in September 2007, the evidence brought before the Commission and additional material examined by the Commission of its own initiative seemed at times to present two very different perceptions of reality. Human rights and humanitarian organizations presented (before the Commission and in other forums) a position that there is a real humanitarian crisis in the Gaza Strip.<sup>237</sup> By contrast, Israeli government officials were unanimously clear in their assessment that there was no “humanitarian crisis” in Gaza.<sup>238</sup> *Prima facie*, it is difficult to reconcile the view of the humanitarian situation presented by human rights organizations with that of the Israeli government. However, the Committee will provide a brief overview of some of the main areas that require further examination - which appears to be food, health care, medical supplies, electricity, fuel, water, sanitation, and livelihood - in order to clarify and illuminate the two positions.

72. According to reports of human rights and humanitarian organizations report that 60.5% of households suffer from ‘food insecurity.’<sup>239</sup> Food insecurity is defined as a situation in which ‘people

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234 *The World Bank: West Bank and Gaza: Economic Developments and Prospects - March 2008*, available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/WESTBANKGAZAEXTN/0,,contentMDK:21694302~menuPK:294370~pagePK:2865066~piPK:2865079~theSitePK:294365,00.html> (2008).

235 *Id.*

236 ICRC: *Gaza Closure: Not Another Year*, available at [www.icrc.org/web/eng/siteeng0.nsf/htmlall/palestine-update-140610](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/palestine-update-140610) (2010) [hereinafter *Gaza Closure*].

237 *Consolidated Appeal*, *supra* note 219, at 9 (which relates to the situation in Gaza as a crisis of “Human Dignity”);

UNRWA: *Emergency Appeal 2010*, 9, available at [www.reliefweb.int/rw/RWFiles2010.nsf/FilesByRWDocUnidFilename/VVOS-7ZUU59-full\\_report.pdf/\\$File/full\\_report.pdf](http://www.reliefweb.int/rw/RWFiles2010.nsf/FilesByRWDocUnidFilename/VVOS-7ZUU59-full_report.pdf/$File/full_report.pdf) (2010), 6 [hereinafter *Protracted Socioeconomic Crisis*];

United Nations, Office for the Coordination of Humanitarian Cases (OCHA): *Occupied Palestinian Territory, The Humanitarian Monitor*, available at [www.ochaopt.org/documents/ocha\\_opt\\_the\\_humanitarian\\_monitor\\_2010\\_06\\_21\\_english.pdf](http://www.ochaopt.org/documents/ocha_opt_the_humanitarian_monitor_2010_06_21_english.pdf) (2010) [hereinafter *Serious Crisis of Human Dignity*];

See also *Gaza Closure*, *supra* note 236, and *Fact Sheet*, *supra* note 219.

238 *Prime Minister’s Open Door Testimony*, *supra* note 82, at 8; *Military Advocate-General’s testimony*, *supra* note 98, at 57; *Open Door Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 60; *Defense Minister’s Open Door Testimony*, *supra* note 70, at 24; *Leader of the Opposition Tzipi Livni’s open door testimony*, *supra* note 177, at 31.

239 See *Consolidated Appeal*, *supra* note 219, at 2, 23.

The matter may actually reflect a certain improvement as compared to previous years, with the report showing that 75% of Gaza’s population suffered from food insecurity following Israel’s attack as part of Operation “Cast Lead”, however; it still presents a high level of food insecurity. See OCHA: *Locked In: The Humanitarian Impact of Two Years of*

lack sustainable physical or economic access to adequate safe, nutritious and socially acceptable food to maintain a healthy and productive life.<sup>240</sup> This situation is described as a result of 'food price inflation, poverty, livelihoods' deterioration and erosion of coping mechanisms, leading to increased difficulties of households to afford sufficient quantities of quality food.'<sup>241</sup>

These organizations also claim that the health care system in the Gaza Strip is deteriorating. Stocks of essential medical supplies have reached an all-time low.<sup>242</sup> The restrictions imposed on persons passing through the land border crossings affects patients that require medical treatment outside the Gaza Strip, the major impediment being lack of response by Israeli authorities to applications for permit by the time of the scheduled appointment.<sup>243</sup> According to the testimony of Physicians for Human Rights (a non-governmental organization, which advocates for human rights in general and for the right to health in particular, in Israel and in the territories), approximately 30 per cent of applications for permits are rejected or delayed.<sup>244</sup> With regard to the supply of electricity to the Gaza Strip, these organizations said that the demand at 240-280 Megawatts, is not being met. As a result, the population in the Gaza Strip experiences prolonged electricity outages of an average of seven hours a day. These outages have devastating effects on the health system, which now relies on generators for which fuel reserves are not easily accessible.<sup>245</sup>

As stated by various organizations, during the Operation Cast Lead, approximately 3,500 houses in the Gaza Strip were completely destroyed, and approximately 2,800 houses were significantly damaged.<sup>246</sup> The prohibition imposed by Israel on the entry of building materials prevents the building and reconstruction of residential houses, schools, medical facilities and public infrastructures. Moreover, only approximately 60% of

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*Blockade on the Gaza Strip, available at [www.ochaopt.org/documents/Ocha\\_opt\\_Gaza\\_impact\\_of\\_two\\_years\\_of\\_blockade\\_August\\_2009\\_english.pdf](http://www.ochaopt.org/documents/Ocha_opt_Gaza_impact_of_two_years_of_blockade_August_2009_english.pdf) (2009) [hereinafter *Special Focus*].*

240 *Special Focus, supra* note 239, at 9.

241 See *Consolidated Appeal, supra* note 219, at 23.

242 See *Gaza Closure, supra* note 236.

243 UNRWA: *Updated Quick Response Plan for Gaza: An Assessment of Needs Six Months after the War, available at [www.unrwa.org/userfiles/20100119144213.pdf](http://www.unrwa.org/userfiles/20100119144213.pdf) (2010), at 26 [hereinafter *Quick Response Plan for Gaza*].*

244 Transcript of session no. 4 "Testimony of Physicians for Human Rights Representatives" (Professor Tzvi Bentowitz, Ran Yeron & Dr. Moustafa Yasin) (Oct. 13, 2010), at 8 [hereinafter *Testimony of Physicians for Human Rights*].

245 *Special Focus, supra* note 239, at 3.

246 See *Consolidated Appeal, supra* note 219, at 15; *Special Focus, supra* note 239, at 3.

the population of the Gaza Strip is connected to the sewage system,<sup>247</sup> and 90% of the water supplied to the inhabitants of the Gaza Strip is unsafe for drinking according to the standards of the World Health Organization.<sup>248</sup>

According to various reports, more than a million people live on humanitarian aid provided by various humanitarian organizations in the Gaza Strip.<sup>249</sup> Various human rights and humanitarian organizations estimate that the prohibition on exports imposed by Israel, in addition to the severe restrictions on imports, has *de facto* paralyzed the private sector.<sup>250</sup> These organizations therefore conclude that the collapse of the economy of the Gaza Strip derives from the naval blockade imposed by Israel and its land crossings policy.<sup>251</sup> However, it should be noted that even though the various humanitarian organizations criticize the imposition of the naval blockade in January 2009, in reality, the imposition and the enforcement of the blockade drew only little attention prior to the event of May 31, 2010.

73. By contrast, the Coordinator of Government Activities in the Territories, in a testimony that was supported by a significant number of documents, explained how Israel *de facto* implements its land crossings policy in the four areas identified in the Government resolution: entry and exit of goods from the Gaza Strip, movement of persons, electricity and fuel, and monetary activity. The Coordinator of Government Activities in the Territories also addressed specific claims that were raised before the Commission by the testifying human rights organizations.

*The entry and exit of goods from the Gaza Strip.* The Coordinator of Government Activities in the Territories testified before the Commission that the implementation of the Government's policy in this field is guided by dual considerations: to implement the restrictions determined in the Government's resolutions and to transfer the goods necessary to meet the needs of the civilian population.<sup>252</sup> The Coordinator of Government Activities in the Territories clarified that all the goods entering the Gaza Strip are financed by the Palestinian Authority, merchants on market terms, or by international organizations; not by Israel.<sup>253</sup> Israel

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247 See *Gaza Closure*, *supra* note 236.

248 *Gisha: Red Lines Crossed: Destruction of Gaza's Infrastructure*, available at [www.gisha.org/UserFiles/File/publications\\_/Infrastructure\\_Report\\_Aug09\\_Eng.pdf](http://www.gisha.org/UserFiles/File/publications_/Infrastructure_Report_Aug09_Eng.pdf) (2009) [hereinafter *Red Lines Crossed*].

249 *Special Focus*, *supra* note 239, at 10.

250 *Quick Response Plan for Gaza*, *supra* note 243, at 7.

251 *Id.*, at 22.

252 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 77.

253 *Id.*, at 10-11.

is merely the party that coordinates and oversees the passage of goods in and out of the Gaza Strip. The Coordinator of Government Activities in the Territories went on to describe in detail the mechanism whereby this process operates as follows: the requests to bring goods into the Gaza Strip are received by the DCO from four parties. The Gaza Strip Economic Committee (a representation of the Palestinian Authority) is the main Palestinian party from which requests are received for entry of goods. This committee receives requests from private market forces and importers in the Gaza Strip. The requests need to include all of the relevant details, including the parties supplying the foods and details of the carriers. Ordering the goods and determining priorities between the various parties requesting the entry of goods is done by representatives of the Palestinian Authority in the Gaza Strip. This list is delivered each day from the Gaza Strip DCO to the head of the Economy Division (an officer with the rank of Lieutenant-Colonel), which examines the requests in accordance with the civilian policy as stated above. Persons in the Gaza Strip DCO only intervene in this internal order of priorities when according to their judgment there is a shortage of certain products in the Gaza Strip. In addition, the DCO receives requests from official bodies in the Gaza Strip, including the Palestinian Ministry of Agriculture in the Gaza Strip and the Palestinian Authority's water and electricity authorities. Other entities that submit requests to the DCO to bring goods into the Gaza Strip are international organizations.

The entry of goods is subject to the crossings' capacity. Between the various requests, the order of priorities for the entry of goods is determined as follows: (1) medical supplies and medicine; (2) requests by international organizations - humanitarian aid and supplies for approved projects; (3) agricultural materials; (4) the balance of supply capacity for the private market, according to the order of priorities determined by the Palestinians. After agreeing upon the list, the parties in the Gaza Strip DCO coordinate the actual entry of the goods with international bodies, the Palestinians, and the Land Crossings Authority of the Ministry of Defense. Implementation reports are distributed with a summary for each day, week, and month to all of the security authorities and the international community.<sup>254</sup>

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254 *Civilian Policy Regarding Gaza Strip - Part A, supra* note 52, at 17-18. Examples of said reports were transferred to the Commission, marked as exhibit 111-112 of the Commission's exhibits. As a rule, the daily reports include reference to the transfer of goods and fuel to the Gaza Strip; the crossings through which these goods passed; and the type of goods and fuel brought into the Gaza Strip according to the number of trucks (or tankers, as the case may be) and in metric tons.

In practice, there is a restriction on the *variety* of products that can be brought into the Gaza Strip, in the form of the 'list of humanitarian products approved for entry into the Gaza Strip.'<sup>255</sup> With regard to the restriction on the *quantity* of goods entering the Gaza Strip via the land crossings, the material submitted by COGAT states that apart from a restriction deriving from the capacity of the crossings and a quota for the entry of fuel (which was approved by the Supreme Court)<sup>256</sup> and a quota for the entry of agricultural products,<sup>257</sup> there is no quota limiting the amounts of foods that are allowed to enter the Gaza Strip. Notwithstanding, it should be stated that from the material submitted to the Commission by COGAT, it is evident that at least during certain periods there was a restriction on the number of trucks permitted to enter at the crossings each day / week for products that do not fall within the scope of agricultural products or fuel.<sup>258</sup> In addition, the Coordinator of Government Activities in the Territories added that, in general, the flow of goods at the land crossings is stable and permanent, but sometimes Israel is compelled to close the land crossings because of direct shooting attacks of rockets that are fired at them by Hamas. In such situations, the activity at the crossings usually decreases for several days, but usually returns thereafter to its previous level.

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255 See *Civilian Policy Regarding Gaza Strip - Regarding the Claims of Human Rights Organizations*, Dated 31.10.2010, *supra* note 217, at appendix A (marked as a draft but according to his statement served as an obligating order); from the document it is evident that the guidelines for the inclusion of a specific product in the list of products authorized to enter the Gaza Strip are: necessity of the product for meeting humanitarian needs, including implications on public health (in the Gaza Strip and in Israel); "the imagistic perception [thus in original] of the product" (that is, whether the product is considered to be a luxury item); legal/judicial obligation to permit the entrance of the product; "implications of the product's uses (will it be used for conservation, rebuilding, or development) while stressing the influence of its entrance on the status of the Hamas regime"; security implications (can the product be used for military purposes); sensitivity to the needs of the international community; the existence of alternatives.

256 *Al-Bassiouni* case, *supra* note 140, at paras. 17-21.

257 *Civilian Policy Regarding Gaza Strip - Part A*, *supra* note 52, at 14; 22 trucks a day which was expanded to 26 trucks a day, though it was mentioned that this is not a strict limit. Likewise it was mentioned that this cap does not apply to agricultural produce transferred from the West Bank to the Gaza Strip in coordination with the Economic committee in the strip. From the material submitted by the Government Activity Coordinator in the Territories, it can be seen that following the government's decision of 18.3.2009 the average daily number of trucks entering the strip rose to 71 double food trucks, as compared to 67 trucks (not all of them double) previously; at the same time it should be stressed that this data refers to the total food and agricultural products entering the Gaza Strip and not just the agricultural produce and input.

258 *Civilian Policy Regarding Gaza Strip - Regarding the Claims of Human Rights Organizations*, Dated 31.10.2010, *supra* note 217, at Appendix A. thus for example it arises from the material that on 30.5.2010 there was a quantitative cap on the number of trucks carrying clothing and shoes allowed to pass through the land crossings.

The Coordinator of Government Activities in the Territories made clear in his testimony that after the disengagement, the State of Israel is unable to monitor the destinations of the goods inside the Gaza Strip, since Israel has no physical presence in the territory itself.<sup>259</sup> However, he explained that COGAT monitors the situation with all of the means at its disposal in order to ensure that the policy does not lead to a humanitarian crisis in the Gaza Strip. For instance, COGAT makes use of situation assessments and periodic forums with Palestinian Authority authorities in the Gaza Strip, with Israeli Government ministries and the international community (such as UN agencies, the Secretary-General's Special Coordinator for the Middle East Peace Process, diplomatic representations, representatives of the Quartet, representatives of the European Union, the Red Cross, non-governmental organizations and human rights organizations), information that is received from the Palestinian media, etc. During the second half of 2008, COGAT formulated a support model for building up a situation picture, which is known as a 'Supply Assessment;' an economic model expressed in a formula that is supposed to help calculate the 'supply level' of various products (i.e., for how many days the amount of supplies currently present in the Gaza Strip will last). The premise is that at any given moment there should be a certain 'supply level' for each of the products whose entry is permitted. When the supply level for a certain product falls below a set minimum, procedures are put into operation in order to verify the figures; produce a daily supply assessment report until the supply is stabilized; and a plan is developed for 'increasing the entry of the relevant product, unless there is a deliberate restriction policy.' It was determined that in such a case, the implications of the shortage of the relevant product should be presented to the decision-makers.<sup>260</sup> The model itself is based on figures of the goods transported via the land crossings and information about local crops, and it is calculated each week for food products, animal feeds, and fuel. The economic model is as follows:

- Daily consumption for the product per capita × size of the population = estimated daily consumption for the Gaza Strip
- Estimated supply in the Gaza Strip on day X + amount that entered via crossings + [additional figures] - estimated daily consumption = supply assessment
- Supply / estimated daily consumption = supply level

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259 *Testimony of Government Activity Coordinator in the Territories, supra* note 162, at 31.

260 *Civilian Policy Regarding Gaza Strip - Regarding the Claims of Human Rights Organizations, Dated 31.10.2010, supra* note 217.



The Coordinator of Government Activities in the Territories emphasized that this is merely a support model for carrying out the monitoring process, and not a model for determining what enters the Gaza Strip on a day to day basis.<sup>261</sup>

Regarding the aforementioned claims of food insecurity in the Gaza Strip, the Coordinator of Government Activities in the Territories said that in most cases the requests sent by the Palestinian Authority correspond with COGAT's assessments regarding the population's needs.<sup>262</sup> Despite this, there is a large disparity between the information provided by the humanitarian organizations at work meetings regarding the coordination of aid to the Gaza Strip and their subsequent declarations to the media.<sup>263</sup> The Coordinator of Government Activities in the Territories particularly pointed out that a significant amount of consumption in the Gaza Strip is based on the supply of crops grown in the Gaza Strip itself, and Israel's land crossings policy has no effect on the consumption of these crops.<sup>264</sup> The Coordinator of Government Activities in the Territories repeatedly and clearly stated that there is no starvation in the Gaza Strip. With regard to medicine and medical supplies, he reemphasized that there is no disparity between the requests received from the Palestinian Authority and the products approved for entry into the Gaza Strip, except for medical supplies that also have military uses (such as radiation devices). The entry of these supplies is subject to a special system of approval before they are brought into the Gaza Strip.<sup>265</sup>

*Movement of persons.* The established principles permit movement between Israel and the Gaza Strip only in exceptional humanitarian cases, with an emphasis on urgent medical cases. Each request in this regard is examined on its merits.<sup>266</sup> According to the Coordinator of Government Activities in the Territories, four out of every five requests to receive permits for medical treatment outside the Gaza Strip are granted.<sup>267</sup> When such an application is refused, the reason is usually that the applicant has a security background that does not allow them to enter Israel or that the Palestinian Authority, for its own reasons, prefers that person to receive treatment in Gaza or Egypt.<sup>268</sup>

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261 *Testimony of Government Activity Coordinator in the Territories, supra* note 162, at 30.

262 *Id.*, at 42-43.

263 *Id.*, at 23.

264 *Id.*, at 103.

265 *Id.*, at 105-106.

266 *Civilian Policy Regarding Gaza Strip - Part A, supra* note 52, at 20.

267 *Testimony of Government Activity Coordinator in the Territories, supra* note 162, at 83.

268 *Id.*, at 82



*Electricity and fuel.* The principles determined for the entry of fuel and electricity, which were reviewed by the Supreme Court in *Al-Bassiouni v. Prime Minister*,<sup>269</sup> include the imposition of restrictions on the supply of fuel and electricity, without harming the humanitarian needs of the population. The Coordinator of Government Activities in the Territories explained that the supply of electricity in the Gaza Strip comes from three sources: Israel, Egypt and the power station in Gaza. In the context of implementing the land crossings policy, it was resolved to maintain the electricity supply capacity to the Gaza Strip as it was prior to the resolution of the Ministerial Security Committee of September 19, 2007,<sup>270</sup> and not to restrict the actual supply of electricity via the power lines. Likewise, it was decided to maintain the supply capacity of the power station in the Gaza Strip by allowing in a sufficient quantity of fuel to exhaust the station's full capacity of electricity production and to determine quotas of fuel that would meet the humanitarian needs of the population (as stated in *Al-Bassiouni v. Prime Minister*).<sup>271</sup> Moreover, as the Coordinator of Government Activities in the Territories said, in practice, Israeli authorities are not involved at all in fuel orders since these are made directly between the Palestinian Authority and the Israeli fuel companies. The restrictions on bringing fuel into the Gaza Strip that were mentioned in the testimonies of the human rights organizations were restrictions imposed by the Palestinian Authority in order to receive reimbursement from the Hamas.<sup>272</sup> Thus, for example, COGAT noticed at the end of 2009 that the supply of diesel to the power station in the Gaza Strip had decreased to an extent that could cause a reduction in the supply of electricity to the Gaza Strip. When COGAT contacted the Palestinian Authority in this regard, it was told that Hamas had not sent the tax payments that it collected for the use of electricity and, therefore, the Palestinian Authority decided to reduce the electricity supply.<sup>273</sup>

*Monetary activity.* The Coordinator of Government Activities in the Territories testified that because of the concern that considerable amounts of money brought into the Gaza Strip are used for terrorism, the banks in Israel have suspended their working relationship with the banks in the Gaza Strip. Therefore, it was resolved that until a suitable alternative that complies with international standards can be found, the Bank of Israel will be the party that assists in realizing monetary activity. Israel allows

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269 *Al-Bassiouni case, supra* note 140, at paras. 17-21.

270 *Testimony of Government Activity Coordinator in the Territories, supra* note 162, at 112.

271 *Civilian Policy Regarding Gaza Strip - Part A, supra* note 52, at 22.

272 *Testimony of Government Activity Coordinator in the Territories, supra* note 162, at 113.

273 *Id.*, at 55.

a fixed amount of money into the Gaza Strip each month to pay salaries to the employees of the Palestinian Authority; to pay the salaries and ongoing expenses of international organizations (UNRWA and the Red Cross<sup>274</sup>) at their request; and to take money out of the Gaza Strip at the request of the Palestinian Authority (surplus cash that accumulates in the bank deposit boxes and/or replacements for worn out bills). In addition, any other individual request received from the Palestinian Authority is reviewed by COGAT.<sup>275</sup>

The Coordinator of Government Activities in the Territories also addressed additional issues that the crossings policy is claimed to affect. As he confirmed, the water situation in Gaza has been bad for years, but according to him, the poor water quality is the result of thousands of wells that have been illegally drilled.<sup>276</sup> He emphasized that Israel has not refused to transfer equipment for projects relating to the maintenance of the water system. Israel supplies hypochlorite to purify drinking water and several projects to improve the sewage infrastructure are also underway.<sup>277</sup> Moreover, before Hamas took control of the Gaza Strip, Israel coordinated with the United Nations and the Palestinian Authority the advancement of several housing projects in the Gaza Strip, but these projects were stopped because of the increase in the number of missile attacks and hostilities.<sup>278</sup> The Coordinator of Government Activities in the Territories explained that Hamas is the entity that is responsible for the economic situation in the Gaza Strip, because it chose the path of terrorism that prevents the development of economic relations, such as those that Israel has with the Palestinian Authority.<sup>279</sup>

74. In sum, the main disagreement between Israel and the human rights and humanitarian organizations is not whether the land crossings policy (and, as explained above, indirectly the naval blockade) impacts on the population of the Gaza Strip since Israel recognizes the fact that its policy has an effect on the civilian population in Gaza. The disagreement concerns the question whether the rules of international humanitarian law have been violated. Various human rights and humanitarian organizations argue that Israel has violated the rules of international humanitarian law,

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274 It should be mentioned that according to the material submitted by the Government Activity Coordinator in the Territories since May 2009 the Red Cross did not request the entrance of funds into the Gaza Strip for its activity. See *Civilian Policy Regarding Gaza Strip - Part A*, *supra* note 52, at 25.

275 *Id.*, at 23-25.

276 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 108.

277 *Id.*, at 104.

278 *Id.*

279 *Id.*, at 59, 71.

whereas Israel holds the position that it is acting in accordance with the rules of international law and that it, in fact, has taken exceptional steps in order to comply with these obligations. Therefore, the analysis will now turn to consider the question whether international humanitarian law has been violated.

### *The prohibition of starving the civilian population*

75. As stated above, article 102(a) of the San Remo Manual prohibits the imposition of a naval blockade if its sole purpose is to starve the civilian population or prevent the supply of other objects essential for its survival. This rule of customary international law is also reflected in the military manuals of several countries,<sup>280</sup> and in legal<sup>281</sup> and academic<sup>282</sup> literature. Another customary rule that imposes a prohibition on starvation is found in article 54(1) of the First Additional Protocol to the Geneva Convention, which provides that ‘Starvation of civilians as a method of warfare is prohibited.’ This rule applies to operations on land as well as those at sea. However, in respect of starvation, the wording in Rule 102(a) is more limited in scope than the general prohibition reflected in article 54(1). *Prima facie*, one might conclude that as long as starvation is the consequence of a naval blockade but not its sole purpose, then it is not prohibited pursuant to international humanitarian law. However, insofar as a civilian population is actually starved as a result of a naval blockade, the party imposing the blockade is required to consider this result in the proportionality analysis required by article 102(b) of the San Remo Manual.<sup>283</sup> It should also be noted that the Harvard Air and Missile Warfare Manual recently proposed slightly amending the wording of article 102(a), so that the imposition of a naval blockade will be prohibited if the starvation of the civilian population is its sole or ‘main’ purpose.<sup>284</sup>

76. There is no formal definition of the concept of ‘starvation’ in international humanitarian law. However, the term ‘causing starvation’ should not be understood to simply cause hunger. The Commentary on article 54(1) of the First Additional Protocol states that the use of starvation as a means of warfare implies ‘... to provoke it deliberately, causing the

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280 See *U.S. Navy, The Commander’s Handbook*, *supra* note 92, at paras. 7.7.2.5; *The UK Manual*, *supra* note 113, at 64, para. 13.74; *The Canadian Manual*, *supra* note 113, at 8-12, para. (a) (1)850; *The German Manual*, *supra* note 113, at 470, para. 1051.

281 Heintschel von Heinegg, *INT’L L. STUD.*, *supra* note 85, at 217.

282 DINSTEN, *THE CONDUCT OF HOSTILITIES*, *supra* note 86, at 137-138, *International Humanitarian Law Handbook*, *supra* note 113, at 470-471 and GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT*, *supra* note 114.

283 See paras. 87-97 below.

284 *The Air and Missile Warfare Manual*, *supra* note 115, at 296, art. 157(a).

population to suffer hunger, particularly by depriving it of its sources of food or of supplies' and that '... starvation is referred to here as a method of warfare, i.e., as a weapon to annihilate or weaken the population.'<sup>285</sup> The Commission found no evidence in the considerable amount of material that was submitted to it, including the material submitted by human rights organizations, to the effect that Israel is trying to deprive the population of the Gaza Strip of food or to annihilate or weaken the population by means of starvation.

It is important to emphasize that humanitarian and human rights organizations themselves describe the situation in the Gaza Strip as a situation of 'food insecurity' (i.e., the lack of physical and economic access to sustainable food sources), and not as 'starvation' (a deliberate deprivation of food, which is intended to weaken or annihilate the population). Thus, the Coordinator of Government Activities in the Territories - the most senior official Israeli authority responsible for Israel's compliance with its humanitarian obligations vis-à-vis the Gaza Strip, who is in constant contact with the Palestinian Authority and the local and international humanitarian and human rights organizations operating in the Gaza Strip - also testified unequivocally before the Commission that no one has ever stated to him that the population of the Gaza Strip is 'starving.'<sup>286</sup> In a letter sent to the Commission on August 26, 2010, the organization Gisha stated that '[i]ndeed, it does appear that even during the flotilla events there was enough food in the Gaza Strip, but the continuing closure seriously impaired the economic ability of many people to purchase food products.'<sup>287</sup> The representatives of Gisha and Physicians for Human Rights confirmed in their testimonies before the Commission that during the relevant period, there was a sufficient quantity of food in the Gaza Strip, and that the problem was mainly economic, i.e., an inability of the population to purchase this food.<sup>288</sup>

77. There is no doubt that, economic warfare impacts on a blockaded population, and at least in theory has the potential to cause starvation. As article 103 of the San Remo Manual states, when the population does not receive an adequate supply of food and other objects essential

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285 See ICRC Commentary on Protocols Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims in Armed Conflicts (Protocol I), Jun. 8, 1977 [hereinafter *ICRC Commentary on Protocol I of the Geneva Conventions*], at paras. 2089, 2090.

286 *Testimony of Government Activity Coordinator in the Territories*, supra note 162, at 59.

287 See letter from Gisha - Legal Center for Freedom of Movement to The Public Commission to Examine the Maritime Incident of May 31, 2010 (Aug. 26, 2010).

288 Transcript of session no. 12 "Testimony of Gisha Representatives" (Tamar Feldman & Sari Beshi) (Oct. 13, 2010), at 32 [hereinafter *Testimony of Gisha Representatives*]; *Testimony of Physicians for Human Rights*, supra note 244, at 3.

for its survival, a duty arises to provide the civilian population with aid consignments<sup>289</sup> (with regard to an occupied territory, an identical obligation is found in article 59 of the Fourth Geneva Convention).<sup>290</sup> As noted, Israel's position is that there is no intention to cause 'starvation' of the population of the Gaza Strip and it is making significant efforts in order to prevent it. The material before the Commission shows that the IDF is working in close collaboration with the Palestinian Authority, human rights organizations, and the international community in order to prevent this outcome.<sup>291</sup> The restrictions imposed by Israel considered this humanitarian obligation and were planned precisely in order to prevent a situation of 'starvation.' 'Food insecurity' does not equate to 'starvation.'

In sum, the steps taken in this regard by Israel are consistent with customary international law as provided in articles 102(a) and 103 of the San Remo Manual.

### *The provision of objects essential for the survival of the civilian population*

78. The second obligation expressed in article 102 of the San Remo Manual is not to deprive the civilian population of 'objects essential for its survival.' Indeed, there is no exhaustive list of what constitutes objects essential for the population's survival, but various conventions state that this expression may include 'foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works,'<sup>292</sup> and 'clothing, bedding, means of

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289 *ICRC Commentary on Protocol I of the Geneva Conventions*, *supra* note 285, at para. 2095:

"It should be emphasized that the object of a blockade is to deprive the adversary of supplies needed to conduct hostilities, and not to starve civilians. Unfortunately it is a well-known fact that all too often civilians, and above all children, suffer most as a result. If the effects of the blockade lead to such results, reference should be made to Article 70 of the Protocol ' (Relief actions), ' which provides that relief actions should be undertaken when the civilian population is not adequately provided with food and medical supplies, clothing, bedding, means of shelter and other supplies essential to its survival. Such actions may be very extensive."

290 See art. 59 of the Fourth Geneva Convention which provides that:

"If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal. Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing. All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection."

291 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 60.

292 Article 54(2), Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims in Armed Conflicts (Protocol I), 8 June 1977

shelter... and objects necessary for religious worship.<sup>293</sup> Moreover, in HCJ 201/09 *Physicians for Human Rights v. Prime Minister* and in HCJ 248/09 *Gisha - Legal Center for Freedom of Movement v. Minister of Defense*<sup>294</sup> (joined), in which the Supreme Court of Israel considered the humanitarian obligations of the IDF during Operation Cast Lead, the Court recognized that international law required the civilian population to receive access to industrial diesel for operating the local power station in Gaza, as well as additional humanitarian requirements, such as cooking gas, diesel oil for transport, water, food and medications.<sup>295</sup>

79. Humanitarian organizations and human rights organizations have raised concerns regarding the sufficiency of such essential objects in the Gaza Strip, including the lack and means of shelter. With regard to the provision of shelter, Israel has indeed imposed restrictions on the import of construction materials into the Gaza Strip and it closely supervises the transfer of these materials. These restrictions are put in place because of the risk that the identified materials may be used for military purposes, since the intelligence information indicates that the Hamas uses these materials extensively in order to fortify buildings and tunnels.<sup>296</sup> It is clear that the restrictions were not imposed in order to prevent the use of these materials by the civilian population of the Gaza Strip. Moreover, Israel is even working in full cooperation with the international community in order to allow the passage of building materials for various projects that are supervised and approved by it, in a manner that is consistent with its duty to supply aid to the civilian population.<sup>297</sup>

Indeed, as described above, Israel imposes various restrictions on the supply of diesel and fuel but according to the testimony of the Coordinator of Government Activities in the Territories, not on the supply of electricity. However, diesel oil is needed in order to operate the power plant in Gaza for the supply of electricity. However, the Supreme Court has determined, according to the evidence brought before it in *Al-Bassiouni v. Prime Minister*, that despite these restrictions, and even if the restrictions were imposed on the supply of electricity, Israel is in compliance with its humanitarian obligations. In *Al-Bassiouni v. Prime Minister* the Court said that the relevant Palestinian authorities have made clear 'they have the capability to carry out load reductions if limits are placed on the

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[hereinafter *Additional Protocol I*].

293 *Id.*, at art. 69.

294 *Testimony of Physicians for Human Rights*, *supra* note 244, at 22, para. 27.

295 *Id.*, at para. 26.

296 *IICC report* (Jun. 14, 2010), *supra* note 83.

297 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 104.

power lines, and they have made actual use of this capability in the past.<sup>298</sup> Moreover, like many issues that arise with regard to the humanitarian situation in the Gaza Strip, it should be remembered that the scope of the electricity supply is also affected by the relations between the Palestinian Authority and the Hamas, since a significant part of the Gaza Strip's electricity needs is not supplied by Israel.

80. There is therefore no evidence before the Commission that Israel is denying objects essential for the survival of the civilian population, and, therefore, there is no basis for the conclusion that Israel is in violation of international humanitarian law in this regard. On the contrary, considerable evidence was presented to the Commission to show that Israel allows the passage of objects essential for the survival of the civilian population and that it provides humanitarian aid as required by the rules of international humanitarian law in those areas that human rights organizations identify as a source of concern.

Israel has therefore acted pursuant to the principles of customary international humanitarian law with regard to the imposition of the naval blockade, as stated in article 102(a) and article 103 of the San Remo Manual.

### *Passage of medical supplies*

81. Another well recognized requirement of customary international humanitarian law is to allow the passage of medical equipment, subject, however, to the right of the blockading party to prescribe technical arrangements, including a search, under which such passage is permitted<sup>299</sup> (it should be noted that on board some of the vessels in the flotilla there were some medical supplies as evidence of the humanitarian nature of the flotilla).<sup>300</sup>

82. Humanitarian and human rights organizations raised a concern regarding the adequacy of the medical supplies and the medical services in the Gaza Strip. However, in the complex situation that prevails in the Gaza Strip, it is not necessarily Israel that is responsible for any shortages. In this context, it should be noted that according to the report of the International Committee of the Red Cross: 'Stocks of essential medical supplies have reached an all-time low because of a standstill in cooperation between Palestinian authorities in Ramallah and Gaza.'<sup>301</sup> Moreover, certain types

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298 *Al-Bassiouni case*, *supra* note 140, at para. 18.

299 See *San Remo Manual*, *supra* note 110, rule 104.

300 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 47.

301 See *Gaza Closure*, *supra* note 236.



of supplies are legitimately restricted by Israel for security reasons, such as optical equipment, which, in addition to its ordinary use, can be used for military purposes.<sup>302</sup> No evidence was presented before the committee to the effect that Israel prevents the passage of medical supplies apart from those included in the list of materials whose entry into the Gaza Strip is prohibited for security reasons.<sup>303</sup> According to the Coordinator of Government Activities in the Territories, sometimes a request to transfer complex medical equipment requires careful examination, which can be time-consuming, and of course it is preferable that the length of time required be as short as possible. However, from the testimony of the Coordinator of Government Activities in the Territories, it can also be seen that when the relevant Israeli authorities are notified of a shortage of any medical supplies, there is an organized system for replenishing those supplies.<sup>304</sup>

83. In a press release on June 14, 2010, the International Committee of the Red Cross indicated how a shortage of certain materials might result in a deterioration in the maintenance of medical supplies, and as a result, to requests from many inhabitants of the Gaza Strip to seek medical treatment in Israel.<sup>305</sup> Israel has indeed allowed a substantial

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302 *Testimony of Government Activity Coordinator in the Territories, supra* note 162, at 105; *Testimony of Physicians for Human Rights, supra* note 244, at 7.

303 *Civilian Policy Regarding Gaza Strip - Regarding the Claims of Human Rights Organizations, Dated 31.10.2010, supra* note 217, Appendix A; More accurately, the restrictions stem from three sources - the instructions of the Israeli Ministry of Health, the instructions of the Israeli Ministry of Industry and Commerce, and the supervisory orders on defense export. In this context see *Reference to Claims Made by Physicians for Human Rights to the Commission to Examine the Maritime Incident* (opinion by Government Activity Coordinator in the Territories, Jan. 6, 2011), marked by the Commission as exhibit 166 [hereinafter *Response by Government Activity Coordinator in the Territories to Claims Made by Physicians for Human Rights*].

304 *Testimony of Government Activity Coordinator in the Territories, supra* note 162, at 28, It should be mentioned that the document transferred by the Physicians for Human Rights Organization to the Commission on Nov. 7, 2010 was appended with a list of medical equipment whose entrance was not approved or was delayed (see letter from the Physicians for Human Rights Organization to the Turkel Commission titled *Follow Up Report to Testimony of Physicians for Human Rights to the Turkel Commission* (Nov. 7, 2010), found in the folder marked by the Commission as exhibit 165. From the reference submitted by the Government Activity Coordinator to this matter it seems that the majority of the requests are unknown to the Gaza District Coordination Office. As to the requests which the District Coordination Office was able to track down it was mentioned that of the initial request, which included 21 items of complex medical equipment which required a meticulous examination by the security forces, 18 items were approved and there was a delay in transferring three items due to a shortage of these items (*Response by Government Activity Coordinator in the Territories to Claims Made by Physicians for Human Rights*).

305 See *Gaza Closure, supra* note 236.



number of inhabitants of the Gaza Strip access to the health system in Israel for various reasons, including the historical connection between the Gaza Strip and Israel (for years before the land crossings policy and the naval blockade were introduced, the inhabitants of the Gaza Strip were permitted to consult experts and receive advanced treatments in the Israeli health system). The evidence also shows that the number of persons requesting to leave the Gaza Strip in order to receive medical treatment has increased during the period since the land border crossings were introduced. This is apparently the result of Egypt introducing a restrictive border policy at the Rafah crossing, which traditionally was also used to exit the Gaza Strip (in this context, it should also be noted that the COGAT stated that activity at the Rafah crossing was significantly expanded after Operation 'Cast Lead').<sup>306</sup> In this regard it should be noted that even after this crossing was opened on June 1, 2010, the number of persons requesting treatment in the Israeli health system has remained high, apparently because many patients prefer it.<sup>307</sup>

84. Sorting through the evidence of whether Israel is adequately meeting its humanitarian law obligations in this area is in many respects an exercise in trying to sort out statistics. The Israeli authorities presented detailed statistics regarding the number of inhabitants of the Gaza Strip that are permitted to exit in order to receive medical treatment. Thus, for example, according to the material that was presented to the Commission, in 2009, Israel allowed 11,036 patients and their family members to exit the Gaza Strip to receive medical treatment.<sup>308</sup> It is important to point out that 86% of the exit applications that were submitted during this period were approved, whereas of the remaining 14%; about 10% were cancelled by the Palestinian Authority for its own reasons.<sup>309</sup> In their testimony before the Commission, representatives of Physicians for Human Rights also focused on delays in processing applications to receive medical treatment in Israel, and particularly the suffering caused to those involved. According to their testimony, approximately 70%-80% of the applications take between eight weeks to three months to be processed, and in many cases medical treatment is prevented as a result, even if a permit is approved at the end of the process.<sup>310</sup> It should be noted that, obviously, delays in the approval process that affect the health of the patient should be avoided wherever

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306 *Testimony of Government Activity Coordinator in the Territories, supra note 162, at 60-61; Civilian Policy Regarding Gaza Strip - Regarding the Claims of Human Rights Organizations, Dated 31.10.2010, supra note 217, at 20-26.*

307 *Testimony of Physicians for Human Rights, supra note 244, at 14.*

308 *Civilian Policy Regarding Gaza Strip - Part A, supra note 52, at 65.*

309 *Id.*, at 11.

310 *Testimony of Physicians for Human Rights, supra note 244, at 7.*

possible. However, it must also be remembered that most of the reasons for the delays involve security issues. It should also be understood that a Palestinian patient seeking to exit for medical treatment undergoes a complex process before the request reaches the Gaza Strip DCO. In general, the patient obtains a referral from a Palestinian hospital, which he submits to the representative of the Palestinian Ministry of Health in the Gaza Strip, who transfers it to the Ministry of Health in Ramallah for review. The Palestinian Ministry of Health transfers the referral to the Palestinian office which coordinates the treatment with a hospital in Israel or the West Bank. Only at this stage is the request transferred to the Gaza Strip DCO, who examines the request for security issues. Thus, a significant part of the process is not conducted by Israel at all.<sup>311</sup> What is crucial in terms of meeting international humanitarian law obligations in this regard is that there is a specifically established system put in place by the Israeli authority that serves to meet humanitarian needs while seeking to address the security concerns.

85. An analysis of the state of the health system in the Gaza Strip shows that a distinction should be made between the *existence* of a health care system and the *standard* of medical care. Thus, for example, a report of one of the UN agencies (the UN Officer for the Coordination of Humanitarian Affairs) stated:

‘The blockade, the internal Palestinian divisions and the “Cast Lead” offensive have undermined the ability of the health system in Gaza to function properly. As a result, *while most services are available to the population and there were no outbreaks of communicable diseases, there has been an overall decline in the quality of health services provided to the population.*’<sup>312</sup> [emphasis added]

86. Indeed, as evident from the testimony of Physicians for Human Rights, significant challenges face the health system in the Gaza Strip. However, these challenges are not the sole responsibility of Israel. It should also be noted that, even in this regard, Israel is acting in cooperation with the Palestinian Authority and the international community in order to minimize the problems. However, Israel should continue in the future to examine whether it is possible to improve the current position, so that the humanitarian needs of the inhabitants of the Gaza Strip will be fully addressed.

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311 *Civilian Policy Regarding Gaza Strip - Regarding the Claims of Human Rights Organizations*, Dated 31.10.2010, *supra* note 217, at 22.

312 See *Consolidated Appeal*, *supra* note 219, at 26

The Commission has reached the conclusion that Israel is complying with its obligations pursuant to international humanitarian law under article 104 of the San Remo Manual for the passage of medical supplies during a naval blockade. It should be emphasized that any passage of medical supplies to the Gaza Strip by sea would be possible by the method of transporting them via Ashdod port and the land border crossings.

### *The military advantage of the naval blockade versus harm caused to the civilian population*

87. According to article 102(b) of the San Remo Manual, the damage caused or expected to be caused to the civilian population should be considered in relation to the direct and concrete military advantage anticipated from the imposition of a naval blockade.<sup>313</sup> This principle is usually called the 'principle of proportionality.'<sup>314</sup> In this context, great care must be taken in its application. The obligation is not to cause "excessive" damage in relation to the concrete and direct military advantage anticipated from the blockade.<sup>315</sup> In that context the term "excessive" has been suggested to mean "the disproportion is clearly discernable".<sup>316</sup> The fact that considerable damage has been caused does not necessarily mean that the damage is 'excessive.' The word 'excessive' does not refer to an absolute concept and it is always measured 'in light of the military advantage that the attacker anticipates to attain through the attack.'<sup>317</sup> A significant military advantage can justify significant damage, whereas a marginal advantage will not.<sup>318</sup>

88. In his testimony before the Commission, the Military Advocate-General expressed doubt about the customary status of this rule although he also indicated that Israel implements it.<sup>319</sup> However, Like many of the

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313 See also DINSTEIN, *THE CONDUCT OF HOSTILITIES*, *supra* note 86, at 138, in applying that test he states:

"in accordance with the general (customary law) principle of proportionality, the expected injury to civilians in the wake of a blockade must not be excessive in relation to the military advantage anticipated (and, consequently, that a blockade must not have the starvation of civilians as its sole purpose".

314 *San Remo Manual*, *supra* note 110, rule 102(b) and *San Remo Explanation*, *supra* note 110, at 179 paras. 102.3-4.

315 *The Air and Missile Warfare Manual*, *supra* note 115, at 297.

316 DINSTEIN, *THE CONDUCT OF HOSTILITIES*, *supra* note 86, at 120.

317 *The Air and Missile Warfare Manual*, *supra* note 115, at 92.

318 *Id.*

319 *Military Advocate-General's testimony*, *supra* note 98, at 54. In the position paper submitted by the MAG, it was stated more expressly that the principle of proportionality in the San Remo Manual is not customary international law but that this rule is an example of the progressive developments in the San Remo Manual, see *MAG position paper*, *supra* note 1.

provisions of the San Remo Manual, this rule has been adopted in various military manuals,<sup>320</sup> international humanitarian law texts<sup>321</sup> and other legal literature.<sup>322</sup> The principle has also been adopted by the Harvard Air and Missile Warfare Manual of 2009.<sup>323</sup> Humanitarian and human rights organizations have also addressed the effect of the naval blockade on the civilian population of the Gaza Strip in terms of its proportionality.<sup>324</sup> The Commission therefore adopts the position that article 102(b) does indeed reflect an obligation under the rules of customary international law.

89. As for the military advantage, in his testimony before the Commission, the Chief of Staff, Lieutenant-General Gabi Ashkenazi, gave details of the nature of the current threat posed by the Hamas, which the naval blockade is intended to counter. The Chief of Staff explained that the Hamas has taken advantage of the relative calm after Operation Cast Lead in order to expand its military abilities in two main areas: arming itself with rockets and developing ground-based capabilities.<sup>325</sup> The Chief of Staff went on to explain that in the past, the Hamas only had mortars; then they bought short-range Qassam missiles; and today, it has longer-range missiles. The Chief of Staff stated that rockets, anti-tank missiles, anti-aircraft missiles, night vision equipment and additional military equipment is smuggled into the Gaza Strip via tunnels, by land, and by the sea. The main efforts of the Israeli navy currently focus on disrupting smuggling, especially because of the fact that it is possible to transport much larger amounts of weapons by sea than via the tunnels.<sup>326</sup> The Chief of Staff's assessment is that Hamas is also trying to improve its abilities to act in deep water against Israeli navy vessels. Therefore, the Chief of Staff anticipated that the threat in the territorial waters of the Gaza Strip derives not only from the possibility that vessels of terrorists laden with weapons or military supplies will reach the coast of the Gaza Strip but also from the possibility that ships laden with explosives will leave this area in

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320 *The Air and Missile Warfare Manual*, *supra* note 115, at 297. At the same time, see *U.S. Navy, The Commander's Handbook*, *supra* note 92, at paras. 7.7.2.5-7.7.3 (The US manual is silent on this issue. making reference to the specific requirement not to starve the civilian population or deny it objects essential to its survival, as wells as permitting neutral vessels engaged in transporting relief supplies to pass through the blockade cordon subject to prescribed technical arrangement.

321 DINSTEN, *THE CONDUCT OF HOSTILITIES*, *supra* note 86, at 137-138; and *Humanitarian Law Handbook* (2d ed.), *supra* note 113, at at 555, fn395 [for reference to the *San Remo Manual*, Rule 102(b)].

322 *Heintschel von Heinegg*, *INT'L L. STUD*, *supra* note 85, at 217.

323 *The Air and Missile Warfare Manual*, *supra* note 115, at 91-94.

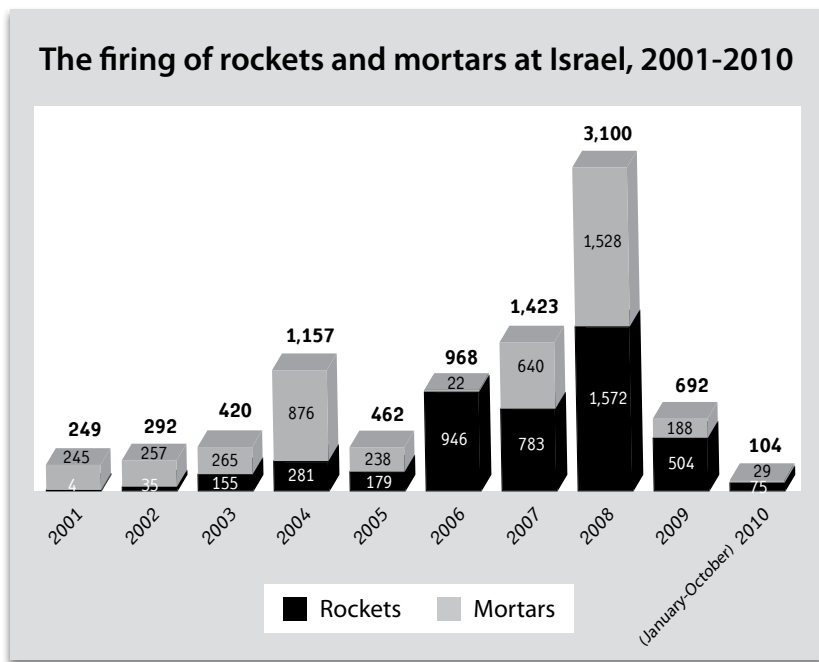
324 See *Gaza Closure*, *supra* note 236.

325 *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 8.

326 *Id.*, at 9-10.

the direction of the coast of Israel or in the direction of strategic facilities in the sea.<sup>327</sup> An additional purpose addressed by the Chief of Staff is to prevent the unsupervised flow of money to the Gaza Strip, something that happens from time to time via the tunnels, but can be done much more easily by sea. The Chief of Staff stated in his testimony that money is ‘oil upon the wheels of terror’ since large amounts of money are required to finance the smuggling operations.<sup>328</sup> According to this testimony and other evidence, the Commission is persuaded that were it not for the naval blockade, the Hamas could further increase its rearmament or attack the State of Israel by sea.

Moreover, as stated, the combined purpose of the naval blockade and the land crossings policy is to strategically limit the ability of the Hamas to carry out operations against Israel and its citizens. An important fact that should be taken into account in this regard is that the number of missile attacks from the Gaza Strip at Israel that has fallen from a record of 3,278 in 2008 to 165 in 2010 (as of October 7, 2010).<sup>329</sup>



Taken from Information Provided by COGAT to the commission

327 *Id.*, at 8.

328 *Id.*, at 11.

329 *Israeli Defense Forces: Rocket Attacks towards Israel*, available at <http://idfspokesperson.com/facts-figures/rocket-attacks-toward-israel> (2010).

It could be assumed that Operation Cast Lead had a significant effect on Hamas's ability to attack Israel, but, as stated above, one of the purposes of the naval blockade is also to close Hamas's rearmament channel. Indeed, it is not always possible to determine the precise effect of a naval blockade, and it should be remembered that naval operations are often combined with land operations.<sup>330</sup> Therefore, in the present case we should consider the overall combined effect of Operation Cast Lead, additional targeted operations, the naval blockade and the land crossings policy, by examining the decrease in the Hamas's ability to attack Israel.

In terms of anticipated military advantage, the Commission's opinion is that Israel's anticipated military gains can be assessed in part by reference to the fact that the attacks on Israel and its citizens have decreased significantly. Admittedly, recently the firing of rockets at Israel has recommenced. However, it would appear that the combined measures that were adopted have led to the Hamas being relatively limited in its abilities and the speed of rearmament is reduced relative to what it would have been if these steps had not been undertaken. This 'anticipated military advantage,' which concerns restricting Hamas's ability to continue to attack the citizens of Israel, is significant, especially in view of Israel's responsibility to protect its citizens against attacks and security threats, the scope and duration of the attacks in the past, and the fact that Israel is confronted against an enemy that is committed to Israel's destruction.

90. It is obvious that determining the anticipated military advantage of imposing the naval blockade is only the first stage in weighing its proportionality, and there remains the question of what criteria should be used in order to determine whether the damage to the civilian population in this regard is 'excessive.' Article 102(b) of the San Remo Manual recognizes that the civilian population in a territory at war will suffer to some extent. Indeed, this suffering is a tragic reality of both the population in Israel and the population of the Gaza Strip. International humanitarian law therefore adopts a practical approach to the realities of the conflicts, in that its rules do not necessarily preclude a negative effect on the population but seek to limit it.

The question to be resolved, therefore, is what constitutes 'damage' within the meaning of article 102(b) of the San Remo Manual. In the Commentary to the Sam Remo Manual, the concept of 'damage' is linked to starvation.<sup>331</sup> Article 103 of the Manual further provides that if the

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330 Till, *Naval Blockade*, *supra* note 107, at 130.

331 *San Remo Explanation*, *supra* note 110, at 179, para. 102.4.

civilian population in the area subject to a naval blockade is inadequately provided with food and other objects essential for its survival, the blockading party is obliged to allow free passage of foodstuffs and other basic objects, subject to the supervision of the blockading party. Further guidance regarding the proper interpretation may be found in the Harvard Air and Missile Warfare Manual, in which rule 157(b) replaces the word 'damage' with the word 'suffering.' The commentary on the Harvard Air and Missile Warfare Manual says that 'The main thrust of Rule 157(b) is to preclude a "hunger blockade" which causes severe suffering of the civilian population.'<sup>332</sup> Nonetheless, the Commentary states that 'suffering' is not confined to extreme instances such as a 'hunger blockade.' Where such suffering exists, the Commentary provides that the '...blockade has to be lifted, or free passage of foodstuffs and essential supplies is to be allowed...'<sup>333</sup> From these remarks, and from the context of the rule of proportionality in both the San Remo Manual and the Harvard Air and Missile Warfare Manual, it clearly follows that the 'damage' or 'suffering' discussed in international humanitarian law are mainly those that are identified in the prohibitions of starvation and deprivation of objects essential for the survival of the civilian population. In this context, we reiterate our conclusion above that the naval blockade has not caused starvation in the Gaza Strip, and that Israel has not prevented the passage of objects essential for the survival of the civilian population or the passage of medical supplies.

91. In the course of examining the principle of proportionality, the overall humanitarian cost of Israel's economic warfare should also be considered. The purpose of the economic warfare in the Gaza Strip is to weaken the economy in order to undermine the Hamas' ability to attack Israel and its citizens.<sup>334</sup> The non-security related restrictions on the passage of goods - such as the restrictions upon certain food products - are a part of this strategy. The restrictions on items such as food are of particular concern, *inter alia*, because of the unequivocal prohibition against starvation, but also because such restrictions can have a significant effect on the civilian population. Israel's policy of economic warfare gives rise, in general, to two significant issues. First, to what extent is it permissible for the land crossings policy and the naval blockade to restrict the access to foodstuffs and other basic products that are used solely for civilian needs when these restrictions do not cause starvation. The second problem

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332 *The Air and Missile Warfare Manual*, *supra* note 115, at 297, para. 1.

333 *Id.*, at 297, para. 3.

334 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 19; *Leader of the Opposition Tzipi Livni's open door testimony*, *supra* note 177, at 10-11.



concerns the duration of the land crossings policy and naval blockade, because there is a real danger that the longer they last, systemic damage to the economy will result. Therefore, it may be assumed that the ability of the civilian population to recover from the blockade after it is removed will be adversely affected the longer it lasts. These two issues should be taken into account when reviewing the principle of proportionality on an ongoing basis.

92. When we examine the principle of proportionality, a relevant comparison is the international responses to the economic sanctions imposed by the United Nations Security Council pursuant to chapter 7 of the United Nations Charter (i.e. when it determines that there is a threat to world peace, a breach of the peace or acts of aggression).<sup>335</sup> Admittedly, because of the deadlock in the Security Council during the Cold War, economic sanctions were imposed by the United Nations only twice during that period.<sup>336</sup> By contrast, in the decades since the fall of the Iron Curtain, the Security Council has imposed economic sanctions in more than a dozen cases.<sup>337</sup> Pursuant to article 42 of the United Nations Charter,

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335 See U.N. Charter, chapter 7, art. 41:

"The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations".

It should be mentioned that the establishment of a naval blockade or a land crossing policy are actually a type of "economic sanctions" or "economic measures" intended to disrupt or prevent the passage of goods or services to a country or from it. Sanctions such as these may be imposed according to a decision by a country or a regional organization (for the purpose of this report, these sanctions will be referred to as "unilateral") or as binding United Nation's Security Council [hereinafter The UN Security Council] resolution (for the purpose of this report, these sanctions will be referred to as "multilateral sanctions"). See FARRALL, *SANCTIONS*, *supra* note 227, at 107.

Using such unilateral sanctions have been common throughout history (see GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED: SUPPLEMENTAL CASE HISTORIES* 142-270 (3rd ed., 2007), which presents dozens of case studies of economic sanctions). Such sanctions were placed, among other cases, within armed conflicts; as a tactic to weaken opponents; to counter expropriation; and lately, to counter the proliferation of weapons of mass destruction and to combat international terrorism (*id.*, sanctions database on accompanying CD, 14, 65-75). At the same time, the establishment of a unilateral naval blockade for purposes of economic warfare during an armed conflict [hereinafter "Economic Warfare"; historically, it was not unusual to call such a blockade a "commercial blockade"] have been the exception in the post World War II period.

336 Prior to 1990, the UN's obligatory sanctions were only placed on South Rhodesia (1966) and South Africa (1997). See FARRALL, *SANCTIONS*, *supra* note 227, at 107; See also Kimberly Ann Elliot, *Trends in Economic Sanctions Policy*, in *INTERNATIONAL SANCTIONS, BETWEEN WORDS AND WARS IN THE GLOBAL SYSTEM* 3, 10-11 (Peter Wallensteen & Carina Staibano eds., 2005).

337 For an updated list of sanctions placed by the Security Council see UN Security Council



if the imposition of economic sanctions is ineffective, the Security Council may also take military action, and *inter alia* order the imposition of a naval blockade.<sup>338</sup> The power of the Security Council to impose economic sanctions ‘that do not involve the use of military force’ and the recognition of this form of warfare within the scope of the laws of armed conflict reflect the legality of using economic sanctions and the effectiveness of exercising economic pressure in order to influence States and other parties. Here, it should be stated that operations that are carried out with the approval of the United Nations Security Council are not necessarily subject to the same rules of international law that are mainly intended to regulate the conduct of states within the context of an armed conflict.<sup>339</sup> However, the deliberations that took place with regard to the imposition of these economic sanctions can help us find a standard for assessing the way in which they may be used.

Before the analysis, it is important to clarify that when assessing the use of economic sanctions as a means of economic warfare, care should be taken not to focus merely on the tactical level of conducting warfare<sup>340</sup> in the sense of ‘seizing ground and weakening or neutralizing the enemy’s armed forces.’<sup>341</sup> An armed conflict is ultimately conducted in order to achieve strategic aims, and not merely tactical goals.

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Sanctions Committee: Security Council Resolutions on General Issues Concerning Sanctions, *available at* [www.un.org/sc/committees/sanc\\_res.shtml](http://www.un.org/sc/committees/sanc_res.shtml) (2006). See also Craig H. Allen, *Limits on the Use of Force in Maritime Operations in Support of WMD Counter-Proliferation Initiatives*, 81 INT’L. STUD. SER. U.S. NAVAL WAR COL. 77, 122, fn. 16 (2006). The term Maritime Interdiction Operations have been used to cover a variety of different measures; while it was originally contemplated as naval operations to enforce UN Security Council Resolutions imposing embargoes the term is now used in a broader sense, *inter alia*, to cover naval operations for purposes of peacekeeping or to enforce economic sanctions.

See also HUFBAUER ET AL., *supra* note 335, at 33.

338 See U.N. Charter, chapter 7, art. 42:

"Should the Security Council consider that measures provided for in art. 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations".

339 *Heintschel von Heinegg, EPIL, supra* note 91, para. 55.

340 See the United States Department of Defense (DOD) Dictionary of Military and Associated Terms, Joint Publication 1-02 (Jul. 2010), *available at* [http://www.dtic.mil/doctrine/dod\\_dictionary/data/t/7465.html](http://www.dtic.mil/doctrine/dod_dictionary/data/t/7465.html) (which defines the "tactical level of war" as "The level of war at which battles and engagements are planned and executed to achieve military objectives assigned to tactical units or task forces. Activities at this level focus on the ordered arrangement and maneuver of combat elements in relation to each other and to the enemy to achieve combat objectives.").

341 See *ICRC Commentary on Protocol I of the Geneva Conventions, supra* note 285, at 57, para. 2218; see also letter from Gisha - Legal Center for Freedom of Movement to The Public

93. 'Comprehensive' sanctions (i.e., sanctions that affect all or almost all goods, products and economic resources), as opposed to 'targeted' or 'smart' sanctions (i.e., sanctions that only affect specific goods or products or that restrict a specific service of a specific economic instrument) have been imposed by the United Nations Security Council five times, all of which, with one exception, at the beginning of the 1990s.<sup>342</sup> These measures gave rise to criticism because of the drastic negative effects that they had on vulnerable groups in the civilian population, especially on children.<sup>343</sup> The conflict following the Iraqi invasion of Kuwait is an example of sanctions that led to a wave of critique during the 1990s. In this instance, the United Nations Security Council also imposed economic sanctions that are commonly referred to as a 'naval blockade,' even though no use was made of this term in the actual resolution that approved them.<sup>344</sup> Thus, for example, it is expressly written in resolution 661 of the United Nations Security Council, which imposed a complete export and import embargo on Iraq, that only '... supplies intended *strictly* for medical purposes, and, *in humanitarian circumstances*, foodstuffs...' <sup>345</sup> [emphases added] would be allowed into Iraq. The significance and effect of the economic sanctions and the naval blockade imposed on the Iraqi population are widely documented,<sup>346</sup> and it is superfluous to discuss them once more here. The UN sanctioned blockade prompted allegations of breaches of international

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Commission to Examine the Maritime Incident of May 31, 2010 (Oct. 10, 2010).

342 See SC Res 253 (May 29, 1968) concerning Southern Rhodesia; SC Res 661 (Aug. 6, 1990) concerning Iraq; SC Res 757 (May 30, 1992) and SC Res 820 (Apr. 17, 1993) concerning the former Yugoslavia; and SC Res 917 (May 6, 1994) concerning Haiti.

See also FARRALL, *SANCTIONS*, *supra* note 228, 107-108; as well as Nicco Schrijver, *The Use of Economic Sanctions by the UN: An International Legal Perspective*, in *INTERNATIONAL ECONOMIC LAW AND ARMED CONFLICT* 129-130; 132-135 (H.H.G. Post ed., 1994).

343 See for example UNICEF: *Iraq Watching Brief*, available at [www.unicef.org/evaldatabase/files/iraq\\_2003\\_watching\\_briefs.pdf](http://www.unicef.org/evaldatabase/files/iraq_2003_watching_briefs.pdf) (2003) [hereinafter *Iraq, Watching Brief*]. Various studies concluded that during the period of the Iraq sanctions, infant and child mortality rates increased significantly: See Christopher C. Joyner, *United Nations Sanctions after Iraq: Looking Back to See Ahead*, 4 *CHI J. INT'L L.* 329, 338-339 (2003).

See also CESCR: *Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 8*, E/C.12/1997/8, ¶ 5, 15, available at [www.unhchr.ch/tbs/doc.nsf/0/974080d2db3ec66d802565c5003b2f57?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/0/974080d2db3ec66d802565c5003b2f57?Opendocument) (2007) [hereinafter *CESCR, Comment 8*].

344 See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 295 (2005); see also Heintschel von Heinegg, *EPIL*, *supra* note 91, at para. 54 (where he notes technically the blockade can be discussed in terms of "non-military enforcement" under article 41 of the Charter).

345 S.C. Res. 661, ¶3, UN Doc. S/RES/661 (Aug. 6, 1990).

346 See for example FARRALL, *SANCTIONS*, *supra* note 227, at 224-227; *Iraq, Watching Brief*, *supra* note 343; Joyner, *United Nations Sanctions*, *supra* note 343, at 338-339; *CESCR, Comment 8*, *supra* note 343, at para. 2.

humanitarian law,<sup>347</sup> although there appears to be no suggestion by the United Nations or the participating member states that the blockade was ultimately considered to have been illegal.<sup>348</sup> Responding to the critiques, various governments sponsored processes in which methods to make smart sanctions more effective were examined as alternatives to comprehensive sanctions.<sup>349</sup> This trend could also be noted in the United Nations General Assembly,<sup>350</sup> and the United Nations Security Council has not been indifferent to this process either; in recent years it has not imposed comprehensive sanctions and it has also established a working group whose function is to recommend how to improve the effectiveness of smart sanctions.<sup>351</sup> However, the implementation of this new approach also gives rise to difficulties. It has been noted that ‘Even though sanctions of the scope imposed on Iraq *may* not be employed again, it is likely that relatively comprehensive sanctions will be used in the future, given that mere arms embargoes or travel bans will not prove sufficiently coercive in all situations.’<sup>352</sup>

94. In sum, when evaluating proportionality in this context, the negative effect on the civilian population inherent in economic sanctions, whether in or outside an armed conflict, should be taken into account. While it is not possible to anticipate or identify the effects of such sanctions with scientific precision, the goal is to limit the suffering of civilian populations. Israel has indeed done this by setting up the comprehensive

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347 See Marc Bossuyt, *The Adverse Consequences of Economic Sanctions*, Working Paper, Economic and Social Council, E/CN.4/Sub.2/2000/33 para. 71 (2000), available at [www.globalpolicy.org/component/content/article/202/42501.html](http://www.globalpolicy.org/component/content/article/202/42501.html);

Denis J. Halliday, *The Deadly and Illegal Consequences of Economic Sanctions on the People of Iraq*, 7 *THE BROWN J. OF WORLD AFF.* 229 (2000).

348 See for example Halliday, *Deadly and Illegal Consequences*, *supra* note 347, *Id.*; CORTRIGHT & LOPEZ, *THE SANCTIONS DECADE*, *supra* note 232, at 43, 45-48, 57.

349 These processes are: Interlaken processes (1998-2001); Bonn-Berlin (1999-2001); Stockholm (2001-2002). See Thomas J. Biersteker et al., *Consensus from the Bottom Up? Assessing the Influence of the Sanctions Reform Processes in INTERNATIONAL SANCTIONS*, *supra* note 336, at 15-31.

350 2005 World Summit Document (Sep. 2005) A/60.1/L.1 para. 106, available at [www.un.org/summit2005/documents.html](http://www.un.org/summit2005/documents.html). In the 2005 World Summit Outcome Document, the issue of sanctions was addressed, as member states pledged to “ensure that sanctions are implemented in ways that balance effectiveness to achieve the desired results against the possible adverse consequences, including socio-economic and humanitarian consequences, for populations and third States.”)

351 Report of the Informal Working Group of the Security Council on General Issues of Sanctions (Dec. 22, 2006) S/2006/997, available at: [www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/WG%20Sanctions%20S2006997.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/WG%20Sanctions%20S2006997.pdf)

352 Robin Geiss, *Humanitarian Safeguards in Economic Sanctions Regimes: A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-up Assessments of Long-Term Effects*, 18 *HARV. HUM. RTS. J.* 167, 198 (2005) [emphasis added].

mechanism for supervising and monitoring the transfer of humanitarian supplies to the Gaza Strip via the land border crossings. From the material that was brought before the Commission, it is clear that Israeli authorities regularly supervise the land crossings policy and make adjustments to this policy, in order to provide a response to problems brought to their attention. The Coordinator of Government Activities in the Territories meets with members of the Palestinian Authority, human rights groups, and representatives of the international community on a regular basis. At the end of 2009, such a meeting led to an increase in the variety of goods that could be brought into the Gaza Strip in order to reconstruct and repair residential buildings (such as glass, aluminum, and wood).<sup>353</sup> Nonetheless, it seems worthwhile to consider the progress that was made around the world with regards to targeted or "smart" sanctions. It seems that the Israeli government's current policy is more in line with those recommendations; in other words, there should be continued efforts to making the sanctions more focused on the Hamas itself.

95. With regard to the duration of the economic warfare, the Commission is of the view that there is a danger that comprehensive restrictions on goods may not be regarded as proportionate indefinitely. As stated in the Harvard Air and Missile Warfare Manual, 'The suffering of the civilian population may not originally be expected to be excessive in relation to the concrete and direct military advantage anticipated. However, later on, there may be empirical evidence to the effect that such excessive suffering is actually taking place.'<sup>354</sup> These remarks emphasize the need to maintain a regime of effective supervision and to carry out periodic reviews at the highest levels of government with regard to the restrictions imposed on the civilian population. Nonetheless, the Commission concludes that with regard to the period that it examined - from the introduction of the land crossings policy on September 19, 2007, until the incident on May 31, 2010, which is the subject of this report - the naval blockade and the land crossings policy did not become disproportionate pursuant to the rules of international law because of their duration.

96. In reaching its conclusions, the Committee notes that "proportionality" - a standard that directs decisions within international humanitarian law - often involves interpretation of difficult decisions and complex assessments. It has been said that 'Although tribunals and other commentators frequently endorse the principle of proportionality,

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353 *Testimony of Government Activity Coordinator in the Territories, supra* note 162, at 120.

354 *The Air and Missile Warfare Manual, supra* note 115, at art. 157(b), para. 3.

they have been less fastidious in explaining the exchange rate they have used to equate disparate integers...'.<sup>355</sup> An assessment of proportionality requires striking a balance on difficult and delicate questions, colloquially known as a 'comparison of apples and oranges',<sup>356</sup> which in our case is between the military advantage anticipated from the imposition of a naval blockade on the one hand, and humanitarian considerations on the other.<sup>357</sup> The Supreme Court addressed the principle of 'proportionality' in *Public Committee Against Torture v. Government* within the context of considering the scope of judicial review, stating: 'Proportionality is not a precise criterion. Sometimes there are several ways of satisfying its requirements. A margin of proportionality is created. The court is the guardian of its limits.'<sup>358</sup> In this regard it is important to emphasize two issues:

Within the "zone of proportionality", there can be disagreement regarding the impact of a decision and the answers can be politically and morally controversial. There is no exact formula against which a determination of excessiveness can be made. As a result, a determination that an act is "disproportionate" is invariably left to the clearest of examples.

In addition the monitoring and reviewing of Israeli authorities concerning the legality of the blockade remain subject to scrutiny by the Israeli judicial system. Israeli authorities have often be called upon to defend their position before the Supreme Court of Israel, and in the framework of the litigation, all parties are given an opportunity to present their claims.<sup>359</sup> As a result of this, Israeli authorities operate with the knowledge that the policy they introduce and implement has been examined and will be examined by an independent court in a democratic state where many human rights organizations are active in bringing these issues before the court. Indeed, it is regrettable that much of the criticism leveled at Israeli policy with regard to the Gaza Strip does not take into account the essential and direct role that the Israeli legal system plays in ensuring that operations carried out by the Israeli Government satisfy the requirements of the rule of law. Such an approach greatly undermines the basis of the scrutiny and testifies to an approach which regards the international community as the only arbiter of the operations of the Israeli

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355 Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L. L. 715, 729 (2008).

356 *Id.*

357 *Id.*, at 716.

358 *Targeted Killing* case, *supra* note 37, at para. 58.

359 See for example *Al-Bassiouni* case, *supra* note 140.

Government. This approach is flawed from a legal, policy, and practical perspective.

97. As stated above and to complete the picture, it should be noted that in June 2010, the Israeli Government changed the land border crossings policy from a policy in which only the transfer of limited humanitarian supplies was allowed to a policy where only the entry of goods that have military purposes is prohibited.<sup>360</sup> The Prime Minister, Mr. Benjamin Netanyahu, stated that this change was made for policy reasons, and not because the land border crossings policy was contrary to international humanitarian law.<sup>361</sup> On December 8, 2010, the Government further determined that subject to certain restrictions, a gradual plan would be approved for allowing goods to leave the Gaza Strip for destinations outside of Israel and the West Bank. Nonetheless, a report published by various human rights organizations on November 30, 2010, states that in practice only a slight change in Israel's policy toward the entry of goods to the Gaza Strip was apparent after Israel announced this relaxing of its land border policy.<sup>362</sup> The Commission did not examine new evidence relating to the new land crossings policy and therefore it is unable to assess its

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360 The current list of items whose entrance is controlled includes, among others; weapons and ammunition, "dual-use" objects, and building materials, see *Israel Ministry of Foreign Cases: Gaza: Lists of Controlled Entry Items*, available at [www.mfa.gov.il/MFA/HumanitarianAid/Palestinians/Lists\\_Controlled\\_Entry\\_Items\\_4-Jul-2010.htm](http://www.mfa.gov.il/MFA/HumanitarianAid/Palestinians/Lists_Controlled_Entry_Items_4-Jul-2010.htm) (2010).

361 *Prime Minister's Open Door Testimony*, *supra* note 82, at 17.

362 FIDH (International Federation for Human Rights, Dashed Hopes: Continuation of the Gaza Blockade (Nov. 30, 2010), available at <http://www.fidh.org/DASHED-HOPES-CONTINUATION-OF-THE-GAZA-BLOCKADE>; at the same time, in Gisha's report of December 2010 it was stated: "The past five months since the July 6<sup>th</sup> implementation of the government's decision have seen a steady increase in the amount of consumer goods entering the Gaza Strip, corresponding with the relaxing of the ban on household items and food products, and infrastructure changes made to the Kerem Shalom Crossing. Despite a seemingly promising International Monetary Fund report issued in September reflecting growth in the Strip, however, socioeconomic indicators point to a much less positive picture. Rates of unemployment, food insecurity, and poverty remain high." The report by Gisha points to the changes made in the field in terms of Israel's policy. Thus, for example, the report mentions that the volume of goods entering has increased to about 40% of need, rather than 22% of need during the past three years, "Some limited export has begun in the past weeks, with a promise to allow further export of items from the agriculture, furniture and light industry sectors, according to a December 8<sup>th</sup> cabinet decision." Likewise the report mentions that there is "a slight increase in the number of permits given to businesspersons" to exit the Gaza Strip. The report asserts that these easements are insufficient and that to obtain "true and sustainable economic recovery [...] requires removing remaining restrictions on the movement of goods and people." See "Reconstructing the Closure: Will recent changes to the closure policy be enough to build in Gaza?" (position paper by the Gisha organization - Legal Center for Freedom of Movement, December 2010).

effect. However, insofar as it might have improved the position of the civilian population in the Gaza Strip, it is of course to be commended.

The Commission has therefore reached the conclusion that Israel is in compliance with the requirement of proportionality provided in international humanitarian law, especially in view of the extensive steps that it took recently in order to restrict the effects of the naval blockade and the land crossings policy on the population of the Gaza Strip.<sup>363</sup>

## International human rights law and its application in our case

98. As mentioned above, as with many other contemporary questions concerning the implementation of international humanitarian law, an examination of the interface between these rules and international human rights law is required. In the *Wall* case, the International Court of Justice recognized that international human rights law, which includes political and civil rights and economic, social and cultural rights, continues to apply during an armed conflict.<sup>364</sup> Nonetheless, it is not always clear to what extent these rights apply, especially where rules of international humanitarian law apply as a *lex specialis*.<sup>365</sup>

Before we begin the analysis, it should be noted that in the *Wall* case, the International Court of Justice also considered the application of two normative systems to a territory that it classified as an 'occupied territory.' In a situation of occupied territory, it is often considered that human rights law may be more readily applied than in other armed conflict situations. Indeed, while this report concludes that Israel no longer has effective control over the Gaza Strip, the analysis also discusses how various organizations and bodies continue to hold the position that Israel is an occupying power in the Gaza Strip. However, even in the context of occupation, questions have been raised as to whether the whole panoply of human rights law can or should be applied by an occupying state that clearly cannot act as the sovereign authority.<sup>366</sup> This issue is especially

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363 See *The Air and Missile Warfare Manual*, *supra* note 115, at art. 157(b), para. 3 (where it is stated that if an aerial blockade causes excessive suffering "blockade has to be lifted, or free passage of foodstuffs and essential supplies is to be allowed" [emphasis added]).

364 See the *Wall* case, *supra* note 130, at paras. 102-107.

365 See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. (Jul. 1996) para. 239-240, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=09&case=95> [hereafter: *Nuclear Weapons Case*].

366 See Naz K. Modirzadeh, *The Dark Sides of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict*, 86 INT'L L. STUD. 349, 375-376 (2010).



complex in the Gaza situation since the argument suggesting Israel is the occupying power has to address the existence of an entity, the Hamas, that carries out actual physical control over the territory, while Israel controls only the borders. Human rights groups have rightly noted that it is the Hamas, as the ruling power in the Gaza Strip, who is responsible for protecting the human rights of the Gaza residents, which includes "protecting the right to life, health, education, adequate living conditions and clean water."<sup>367</sup>

99. Since there are comprehensive and detailed rules in international humanitarian law regulating the imposition of a naval blockade, the question arises as to what extent the criteria of international human rights law should be taken into account. For example, the rules of the international humanitarian law dealing with a naval blockade, such as the prohibition of starvation or the prohibition of depriving the civilian population of objects essential for its survival and the question of the 'damage' or 'suffering' addressed in article 102(b) of the San Remo Manual, address the right to life, a right that also lies, of course, at the heart of international human rights law. From this viewpoint, the two normative regimes 'share a common "core" of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted.'<sup>368</sup> Since the right of the inhabitants of the Gaza Strip to life is addressed in the *lex specialis* that applies here, namely the rules of international humanitarian law, it is these rules that should primarily be applied.

100. Allegations have also been raised that Israel is in violation of international human rights law <sup>369</sup> because it restricts the movement of people to and from the Gaza Strip and thereby violates the right to

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367 *Gisha: Electricity Shortage in Gaza: Who Turned Out the Lights?*, available at [www.gisha.org/UserFiles/File/publications/ElectricitypaperEnglish.pdf](http://www.gisha.org/UserFiles/File/publications/ElectricitypaperEnglish.pdf) (2010).

See also *Testimony of Physicians for Human Rights*, *supra* note 244, at 19.

368 *Prosecutor v. Delalic*, Appeals Judgment, No. IT-96-21-A, para. 149 (Feb. 20, 2001) (Celebici case); see also Theodor Meron, *The Humanization of Humanitarian Law*, 94 AJIL 239, 266-267 (2000).

369 See for example United Nations OHCHR: Human Rights Situation in Palestine and Other Occupied Arab Territories, ¶ 30, U.N. Doc. A/HRC/12/37 (Aug. 19, 2009), available at <http://unispal.un.org/UNISPAL.NSF/0/71266F7CD47BBDEA85257615004D8635>:

"The military operation and the continued blockade have had severe cumulative effects on the realization of a wide range of economic, social and cultural rights, as well as civil and political rights of the Gaza population".

See also *Consolidated Appeal*, *supra* note 219, at 8:

"Palestinians in the OPT continued to face widespread denial of their basic human rights, including the right to life, liberty, freedom of movement, self-determination and access to employment, health and education".



freedom of movement as stated in article 12 of the International Covenant on Civil and Political Rights (ICCPR).<sup>370</sup> In this respect, it should be noted that one of the legal conditions stipulated by the *lex specialis* regarding the imposition of a naval blockade is the condition of 'effectiveness'<sup>371</sup> and its impartial implementation with regard to the shipping vessels of all States.<sup>372</sup> Therefore, the concept of a 'naval blockade' inherently includes the restriction of all movement by sea. Moreover, the right of the citizens of one state to cross the borders of the state into another state with which they are at war is not unlimited. A state may, without doubt, restrict the freedom of movement of persons beyond its borders in order to protect national security and public order.<sup>373</sup>

Therefore, the Commission has reached the conclusion that most of the issues that were raised within this framework have already been addressed above pursuant to the *lex specialis* that applies here, namely the rules of international humanitarian law.

Further, there is nothing in the evidence that suggests that concerns raised regarding the realization of human rights norms would rise to a level that renders the naval blockade and the accompanying land closure contrary to international law because it is disproportionate.

## Claims regarding 'collective punishment'

101. An issue that has to be addressed is whether the blockade and Israel's land crossings policy are a form of 'collective punishment' that is contrary to the rules of international humanitarian law. This is a very serious claim.<sup>374</sup> Under the circumstances, it is important to analyze the concept of 'collective punishment' to understand its basis in law and potential relevance to the case at hand.

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370 *Gisha: Gaza Closure Defined: Collective Punishment, Position Paper on the International Law Definition of Israeli Restrictions on Movement in and out of the Gaza Strip*, available at [www.gisha.org/UserFiles/File/publications/GazaClosureDefinedEng.pdf](http://www.gisha.org/UserFiles/File/publications/GazaClosureDefinedEng.pdf) (2008), at 10.

371 *San Remo Manual*, *supra* note 110, at rule 93.

372 *Id.*, at rule 100.

373 International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

374 Collective punishment is not enumerated as a war crime in Article 147 of Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 [hereinafter *Geneva Convention IV*]. However, while grave breaches of the Geneva Conventions are the most serious war crimes, other violations of international humanitarian law are also categorized as such. It is unclear whether the accusation leveled at Israel by certain parties - according to which the naval blockade amounts to a breach of international law - also implies that this constitutes a war crime.

102. The suggested basis in treaty law for this concept is found in article 33 of the Fourth Geneva Convention<sup>375</sup> and article 50 of the Hague Regulations of 1907, which prohibit the punishment of a protected person because of acts that he did not commit independently or for which he is not otherwise responsible.<sup>376</sup> This prohibition was also recognized in the First Additional Protocol and the Second Additional Protocol as a basic guarantee for all civilians and injured members of the armed forces that can no longer act as combatants (*hors de combat*).<sup>377</sup> Although collective punishment has been recognized as a war crime in the constitution of the International Criminal Tribunal for Rwanda and in the Special Tribunal for Sierra Leone,<sup>378</sup> it is not included in the list of crimes enumerated in the Rome Statute of 1998 of the International Criminal Court, unlike, for example, the crime of ‘intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions’, which is stipulated in article 8(2)(b) (XXV) of the Rome Convention.

103. The various commentaries of the International Committee of the Red Cross provide a particularly broad interpretation to the term ‘collective punishment.’ The Commentary to article 33 of Geneva Convention IV indicates that collective penalties refers not to sentences pronounced by a court but rather penalties of any kind inflicted on persons or entire groups for acts those persons have not committed. Similarly, the commentary on article 75 of the First Additional Protocol proposes that ‘the concept of collective punishment must be understood in the broadest sense: it covers not only legal sentences but sanctions and harassment of any sort, administrative, by police action or otherwise.’<sup>379</sup> Finally, the

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375 *Geneva Convention IV*, *supra* note 374, at para. 33, states the following:

"No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

Pillage is prohibited.

Reprisals against protected persons and their property are prohibited".

376 The Hague Convention (1907), at para. 50, states the following:

"No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible".

377 See *Commentary on Protocol I of the Geneva Conventions*, *supra* note 285, at 225, art. 33, para. 1.

378 See art. 4(b) of the International Criminal Tribunal of Rwanda (ICTR), "Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II" and art. 3(b) of the Statute of the Special Court for Sierra Leone.

379 See *ICRC Commentary on Protocol I of the Geneva Conventions*, *supra* note 285, at 225, art. 75, para. 3055.

proposed interpretation of article 4(2)(b) in the Commentary on the Second Additional Protocol is that collective punishment “is virtually equivalent to prohibiting “reprisals” against protected persons” although such a prohibition is clearly found elsewhere in the law.<sup>380</sup> In this respect it should be noted that the case that is most often identified with the issue of collective punishment - the *Priebke* case - dealt with a conviction for acts of reprisal that were committed by German forces against Italian civilians during the Second World War.<sup>381</sup> The Commentary on the First Additional Protocol proposes that ‘the prohibition [of collective punishment] is actually concerned with intimidation,’<sup>382</sup> even though attempts to extend the provisions to the use of physical and moral coercion have not been successful, since similar articles already exist with regard to prisoners of war and civilians.<sup>383</sup>

This is where the difficulty lies from the viewpoint of those who claim that imposing a naval blockade and adopting a method of economic warfare is ‘collective punishment’; too broad an interpretation of the concept of ‘collective punishment’ can result in a conflict with additional and more specific provisions of international humanitarian law, such as the laws that govern the imposition of a naval blockade. A broad interpretation of what constitutes collective punishment has to be reconciled with both the nature of naval blockade as a lawful form of warfare and the specific customary law provisions regulating the conduct of such a blockade. If the customary rules regarding the imposition of a naval blockade are followed, it is difficult to see how this could constitute collective punishment.

104. Since one of the purposes of imposing a naval blockade is to use coercion against a hostile state or entity that is a party to an armed conflict, the affected population will generally feel the effects of this

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380 See ICRC Commentary on Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims in Armed Conflicts (Protocol II), Jun. 8, 1977 [hereinafter *ICRC Commentary on Protocol II of the Geneva Conventions*], at para. 4536.

381 Sergio Marchisio, *The Priebke Case before the Italian Military Tribunals: A Reaffirmation of the Principle of Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, 1 Y.B. INT’L HUM. LAW 344, 350 (1998) (it should be noted that the Military Tribunal rejected the claim that the killings constituted “collective punishment” arguing that “according to the doctrine, collective punishment can affect only a community and not individuals: in that sense a classical example of collective punishment is the requisition of properties of the state such as libraries, museums, etc”, see Francesca Martines *The Defences of Reprisals, Superior Orders and Duress in the Priebke Case Before the Italian Military Tribunal*, 1 YB OF INT’L HUM. LAW 354, 356 (1998)).

382 See *ICRC Commentary on Protocol I of the Geneva Conventions*, supra note 285, at 225, art. 75, para. 3056.

383 *Id.*, at para. 3057.

pressure. The issue is not that there is coercive action which impacts the population collaterally, but rather what that impact is and what mitigating humanitarian measures are put in place. This reality is reflected in the assessment of economic sanctions even in situations that do not amount to an armed conflict. As the Economic and Social Council of the United Nations said in 1997:

‘In considering sanctions, it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of the country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country. For that reason, the sanctions regimes established by the Security Council now include humanitarian exemptions designed to permit the flow of essential goods and services destined for humanitarian purposes. It is commonly assumed that these exemptions ensure basic respect for economic, social and cultural rights within the targeted country.’<sup>384</sup>

The issue is not that there is coercive action impacting the population collaterally, but rather what that impact is and what mitigating humanitarian measures are put in place. Therefore, the fact that the fabric of economic life of the civilian population is adversely affected as a result of economic warfare does not, in itself, amount to ‘collective punishment.’

105. When referring to ‘collective punishment’, a sharp distinction should be made in regards to two types of policy: (i) an authority punishes a group known to comprise innocent individuals, and (ii) an authority punishes a guilty individual, but in doing so, unintentionally or unavoidably causes a harmful effect upon innocent third parties. The second policy is accepted in the humanitarian legal system as long as the effect is not disproportionate compared to the military advantage. The key issue is therefore whether harm is intentionally directed at the civilian population or an unintended outcome.<sup>385</sup> For example, the Special Court for Sierra Leone has provided that the elements of the crime of collective punishments include “the intent on the part of the perpetrator to indiscriminately and collectively punish the persons for acts which

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384 See *CESCR, Comment 8, supra* note 343, at 2, para. 4 (the report then went on to indicate that the exemptions do not have the desired effect prompting recommendations for reform).

385 In terms of analyzing the alleged “collective punishment” as a war crime, it should be noted that criminal responsibility generally requires a mental element. The principle that criminal responsibility cannot be incurred without the requisite intent can be derived from Article 30 in the ICC Statute, which provides that a person should be liable for a crime only if the material elements are combined with intent and knowledge.

form the subject of the punishment."<sup>386</sup> Another example is article 51(2) of Additional Protocol I, which prohibits "acts or threats of violence the *primary purpose* of which is to spread terror among the civilian population [emphasis added]."

106. As to the effects of the blockade and the land crossings policy on the civilian population in the Gaza Strip, there is no doubt that the economic warfare Israel carries out with an intention of weakening the Hamas has an adverse impact on the daily life of the civilian population in Gaza. However, a number of the restrictions identified as evidence of the alleged collective punishment are imposed for a security reasons (i.e. restrictions on materials such as concrete and certain medical supplies that can have a military use).<sup>387</sup> Further, consistent with its obligations under international humanitarian law, Israel has set up a system for monitoring and coordinating humanitarian aid in Gaza in order to alleviate those effects.<sup>388</sup> There is nothing in the evidence, including that found in the numerous humanitarian and human rights reports, that suggest that Israel is *intentionally* placing restrictions on goods for the sole or primary purpose of denying them to the population of Gaza.

107. As for the naval blockade itself, within the framework of the rules that govern the imposition and enforcement of such a blockade, there is no basis for an allegation of 'collective punishment.' There is nothing in the Red Cross' Customary International Law Study that in any way connects the idea of 'collective punishment' with a naval blockade or siege warfare. On the contrary, the Study states that 'the prohibition of starvation as a method of warfare does not prohibit the imposition of a naval blockade as long as the purpose is to achieve a military objective and not to starve a civilian population.'<sup>389</sup> Similarly, with regard to a siege, which is another coercive method of warfare, the Red Cross' Customary International Law Study reiterates the fact that the prohibition of starvation as a means of warfare does not automatically prohibit a siege as long as the purpose is to achieve a military goal rather than the starvation of the civilian population.<sup>390</sup> It is hard to reconcile these statements with the notion that the naval blockade on the Gaza Strip, even when considered in conjunction with the border policy, falls within the meaning of collective punishment.

386 *Prosecutor v. Brima, Kamara, and Kanu*, Case No. SCSL-2004-16-T, Trial Chamber Judgment, para. 676 (Jun. 20, 2007).

387 *Prime Minister's Open Door Testimony*, *supra* note 82, at 25; *Leader of the Opposition Tzipi Livni's open door testimony*, *supra* note 177, at 12; *The Military Advocate-General's testimony*, *supra* note 98, at 60.

388 *Testimony of Government Activity Coordinator in the Territories*, *supra* note 162, at 38.

389 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 146, at 189.

390 *Id.*, at 188.

There is nothing on the facts that would suggest either operation was put into effect as a reprisal or directed at the civilian population.<sup>391</sup>

In conclusion, the Commission is of the view that the imposition and enforcement of the naval blockade and the land crossings policy on the Gaza Strip do not constitute 'collective punishment' of the civilian population.

## Means of resolving disputes regarding the legality of a naval blockade

108. Even if the naval blockade against the Gaza Strip had been considered not to meet the requirements of international law, individuals or groups do not have the right to take the law into their own hands and breach the blockade. Individuals or groups do not have the right to exercise unlimited "self-help" measures in the face of state authorities. This could result in the eventual justification of uses of force *external* to the realm of the U.N. Charter.

109. Moreover, the claim that neutral shipping is free to ignore the existence of a naval blockade for the reason that it *prima facie* breaches the provisions of article 102 of the San Remo Manual amounts to a claim that the blockade - an act of a sovereign state - is null and void. The Commission is of the opinion that the cases in international law where acts of a state are regarded as void - as opposed to illegal or unjust - are rare. In general, it is possible that the actions of a state that amount to a violation of 'the binding norms of international law' (*jus cogens*) will be defined as void *ab initio* and therefore they may be ignored. This is clearly the content of international treaties,<sup>392</sup> and it may be deduced from the International Law Commission's Draft Articles on State Responsibility, in cases where there is a gross violation of *jus cogens* norms.<sup>393</sup> Admittedly, there is some degree of consensus on the question of the content of *jus cogens* norms, but these norms are not authoritatively enumerated. The notes to the International Law Commission's Draft Articles, which is a non-exhaustive list, mention the prohibitions of aggression, slavery, genocide, racial discrimination and Apartheid, torture and the right to

391 See ICRC *Commentary on Protocol I of the Geneva Conventions*, *supra* note 285, 225:

"Reprisals are measures contrary to law, but which, when taken by one State with regard to another State to ensure the cessation of certain acts or to obtain compensation for them, are considered as lawful in the particular conditions under which they are carried out".

392 Vienna Convention on the Law of Treaties. May 23, 1969, 1155 U.N.T.S. 331, article 53.

393 *Id.*; Int'l L. Comm'n [ILC], *Draft Articles on Responsibility for Internationally Wrongful Acts, with Commentaries*, 2 Y.B. INT'L L. COMM'N (2001) articles 40-41 [hereinafter *ILC Draft*].

self-determination.<sup>394</sup> In the case at hand case, there is no basis for saying that these norms have been violated.

110. The rules that govern the imposition of a naval blockade, as reflected in leading naval manuals, as well as in the San Remo Manual, contains norms designated to protect the interests of three groups: the blockading party; neutrals; and the population of the blockaded state or entity. Among the norms protecting neutrals' interest are the requirements that a blockade be declared;<sup>395</sup> specified;<sup>396</sup> effective;<sup>397</sup> impartial;<sup>398</sup> and that it must not bar access to ports of neutral states.<sup>399</sup> These requirements protect mostly the reliance interest of neutral powers and vessels. The interests of the population within the blockaded territory, conversely, are protected in the aforementioned article 102.

Furthermore, in the situation at hand, it is indisputable that the vessels were offered to deliver the aid into Gaza through the Ashdod port, pending security inspection and under the supervision of relevant and impartial international agencies. Thus, and *in the relation* between the blockading power and the neutral vessels, Israel has acted according to the provisions of article 103 of the San Remo Manual. Therefore, even were we to accept, *arguendo*, that a neutral shipping vessel has a right to breach a naval blockade because it is disproportionate, in the specific circumstances of the case before us, it can be said that the illegality was repaired by Israel's offer to transfer the humanitarian supplies to the Gaza Strip, which was transmitted to the shipping vessels that participated in the flotilla. In truth, the attempt to breach the blockade could not have had any other purpose than a political one. The Commission is convinced that a political purpose in itself cannot give a shipping vessel the right to breach the blockade.

111. Therefore, the Commission finds that there is no basis to the claim that international law grants individuals or groups the liberty to disregard a declared, specified, effective, and impartial blockade - meaning, one that fulfills its obligations *vis-à-vis neutrals* - solely on counts of its view of the alleged violation of obligations *vis-à-vis the entity subject to the blockade*. Such an approach can lead to chaos in the relations between states and between states and individuals.

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394 *Id.*, at paras. 3-4.

395 *San Remo Manual*, *supra* note 110, at rule 93.

396 *Id.*, at rule 94.

397 *Id.*, at rule 95.

398 *Id.*, at rule 100.

399 *Id.*, at rule 99.

## Chapter A: Conclusions

112. Here we shall summarize the conclusions that the Commission has reached in this part of the report:

- The conflict between Israel and the Gaza Strip is an international armed conflict.
- Israel's 'effective control' of the Gaza Strip ended when the disengagement was completed.
- The purpose of the naval blockade imposed by Israel on the Gaza Strip was primarily a military-security one.
- The naval blockade was imposed on the Gaza Strip lawfully, with Israel complying with the conditions for imposing it.
- Israel is complying with the humanitarian obligations imposed on the blockading party, including the prohibition of starving the civilian population or preventing the supply of objects essential for the survival of the civilian population and medical supplies, and the requirement that the damage to the civilian population is not excessive in relation to the concrete and direct military advantage anticipated from the blockade.
- The imposition and enforcement of the naval blockade on the Gaza Strip does not constitute 'collective punishment' of the population of the Gaza Strip.
- International law does not give individuals or groups the freedom to ignore the imposition of a naval blockade that satisfies the conditions for imposing it and that is enforced accordingly, especially where a blockade satisfies obligations to *neutral parties*, merely because in the opinion of those individuals or groups it violates the duties of the party imposing the blockade vis-à-vis *the entity subject to the blockade*.





# Chapter B: The actions undertaken by Israel to enforce the naval blockade on May 31, 2010

## General

113. On May 31, 2010, a flotilla of six ships whose stated destination was the Gaza Strip approached the coast of the State of Israel. During May, the six ships of the flotilla left the ports of Ireland, Turkey and Greece, and they joined together at a meeting point approximately 30 miles south of Cyprus.<sup>400</sup> The largest of the ships in the flotilla was the *Mavi Marmara*, which started out from the port of Istanbul and picked up most of its passengers at the port of Antalya; it had approximately 590 passengers and crew on board, who were primarily of Turkish nationality.

Reports about the organization of the flotilla began at the end of January and the beginning of February 2010. The IDF's assessment was that this flotilla was different from those that preceded it, since from the initial information that it received, it transpired that the flotilla would be particularly large; both in terms of size (there was talk of approximately ten ships), and the quantity of passengers and equipment that the various ships could carry. Israel therefore made preparations, both from a diplomatic viewpoint in order to prevent the departure of the flotilla from the ports of origin, and from a military viewpoint, in order to enforce the naval blockade and prevent the flotilla from reaching the Gaza Strip. The

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400 In fact, eight vessels departed with the purpose of joining up and reaching Gaza together. Two vessels were detained along the way for various reasons and it was decided not to wait for them: one of the vessels, the CHALLENGER 2, did not take part in the flotilla due to a technical malfunction and some of its passengers transferred to the *Mavi Marmara*'s deck, see para. A of *IDF completion response* (Nov. 15, 2010), the folder containing the exhibit has been marked by the Commission as folder 145 [hereinafter *IDF completion response of 15.11.2010*]; the second vessel, the Rachel Corrie, tried to reach the Gaza Strip at a later stage, following the events of the flotilla in question. The ship reached Israel's shores on Jun. 5, 2010 and after it was requested to stop by the IDF it was offered to unload its cargo at the port of Ashdod and that the merchandise on board would be transferred to Gaza following inspection, through the land border crossings and this was the case, see decision 1759 of 32nd Government Treatment of Rachel Corrie Flotilla to Gaza (Jun. 6, 2010) as well as the *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 15.

diplomatic efforts were unsuccessful, and, consequently, the flotilla set sail with six ships as noted.

Shortly before the flotilla reached the coast of Israel, several warnings were sent to the ships, which stated that the ships were approaching the area of a naval blockade and they were requested to turn back. The warnings also stated that insofar as the ships did not comply with this instruction, the Israeli navy would adopt all of the measures at its disposal in order to enforce the naval blockade, and each of the warnings also stated that after security inspection, it would be possible to send the humanitarian cargo on board the ships to the Gaza Strip via the land crossings. When the ships reached a distance of approximately 70 miles from the coast of Atlit and still did not respond to the warnings, a military operation was started at 4:26 a.m. to take control of the ships with forces of the Shayetet 13 unit fast-roping from helicopters and boarding the ships from Morena speedboats of the Israeli navy (a Morena speedboat is a vessel for carrying servicemen that is made in the United States, where it is called RHIB for rigid-hulled inflatable boat, is used by the American special forces, and is characterized by advanced maneuvering capabilities and reaching high speeds; hereafter: **Morena speedboats**). On the deck of the *Mavi Marmara*, the IDF soldiers were met with extreme violence. The events that followed led to the deaths of nine of the participants of the flotilla, injuries to fifty-five others and injuries to nine IDF soldiers. On the decks of the other ships, the IDF soldiers encountered less or no resistance, and there were no loss of lives.

After the takeover of the ships was completed, the injured were taken to the various hospitals, and the bodies of the dead were taken to the Abu Kabir Forensic Institute, where only an external examination was carried out, and they were transferred to Turkey, at Turkey's request, without autopsies being performed. The ships and the other participants of the flotilla were taken to Ashdod port, where they began to arrive on May 31, 2010, at 1:00 p.m. The disembarking of the participants of the flotilla from the ships continued until around 9:45 a.m. on June 1, 2010. At Ashdod, the participants of the flotilla underwent a process that included a security check, issuing a detention order (in the language of each of the participants of the flotilla), and a medical examination, and some of them underwent the taking of biometric measurements (the taking of fingerprints and a photograph). Subsequently, the participants of the flotilla were transferred to several prisons where they were detained. On June 2, 2010, after the Attorney-General decided to terminate the criminal investigation that he had ordered on June 1, 2010, and after the approval of the Supreme Court was given in this regard, the participants were

taken to Ben-Gurion Airport and flown to the countries from which the flotilla set sail.

114. This chapter will address in depth the events of May 31, 2010 (i.e., the preparations that preceded these events, the events themselves and the grave consequences of these events). In the first part of this chapter, we will review in greater detail the factual sequence of events of the operations carried out by Israel to enforce the naval blockade of May 31, 2010, as revealed by the materials assembled by the Commission and the testimonies heard before it. First, we shall address the stage of the Israeli preparation before the arrival of the flotilla, both from the diplomatic and security viewpoint. Next, we shall consider the details of the military operation itself. Naturally, we will devote most of the analysis to examining the process of taking over the *Mavi Marmara*. The Commission will also examine, albeit in brief and to the extent required for deciding the issues before it, the identity of the participants of the flotilla and their actions during the stage of preparing for the flotilla and during the flotilla itself. We shall also present the questions that we posed during the course of the Commission's work, which shall be answered in this report.

Subsequently, we shall also address the laws that apply to the issues before the Commission, pursuant to international law. The legal discussion will be divided into a number of parts. As noted above, (see paras. 31-36), the laws applicable to enforcement of a naval blockade are the laws of naval warfare found, primarily, in the San Remo Manual. Also relevant are the laws and principles of customary international law. In this chapter, we will address the right to employ force in order to enforce a naval blockade. In this context, as we discuss at length below, it is important to distinguish between the use of force intended *to stop a vessel* and the use of force directed at *specific persons* aboard the vessel.

In the first three parts of the analysis in this chapter, we discuss the laws applicable to the "capture" of a vessel when enforcing a blockade. In the fourth part of this chapter, we discuss the issue of whether the force employed against the people on the *Mavi Marmara* was consistent with international law. This discussion requires a detailed analysis of the laws concerning the status of the flotilla participants under international humanitarian law. In the fifth part of this chapter, additional considerations related to the rules of engagement issued for the IDF operation will be presented. In the sixth part, we outline a number of factual and legal factors that are relevant when assessing the use of force and provide a general assessment of the use of force by the IDF soldiers

during the takeover operation, including their use of both lethal and less-lethal weapons.

In the seventh part (paras. 227-234), we present the conclusions of the detailed analysis conducted by the Commission with respect to each instance of the use of force in this event. As stated above, the Commission approached the IDF and requested the testimonies of all of the soldiers and commanders who used force during the takeover of the vessels. These statements were analyzed by the Commission pursuant to the principles of international law.

Finally, in the eighth part of this chapter, we examine the planning and organization of the military operation in general, as well as the training and preparations for it that were undertaken by the IDF soldiers, with the goal of determining the extent to which these preparations influenced the use of force during the events under consideration.

## The facts

### The preparation stage

#### *The situation before the operation from an intelligence perspective*

115. At the beginning of this part, we shall present an overview of the intelligence that the political echelon and the IDF had in their possession before the 'Winds of Heaven 7' operation began. Within this framework, we shall provide some of the details that were known before the operation began and on the basis of which the preparations for it were made.<sup>401</sup>

116. In March 2010, naval intelligence in the IDF began to produce intelligence information with regard to the flotilla.<sup>402</sup> In view of initial public information about the organization of the flotilla that began to appear at the end of January 2010, intelligence items were published on March 4, 2010, with regard to the involvement in the flotilla of an organization

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401 It should be mentioned that information gathering sources in addition to the ones mentioned below dealt with gathering an intelligence picture of the event. See for example Gilad Cohen "The Flotilla to Breach the Siege on Gaza" (May 17, 2010), the folder containing the exhibit has been marked by the Commission as folder 28.

402 See "Winds of Heaven 7" (General Staff experts inquiry by Giora Eiland, Jul. 11, 2010), at 29, marked by the Commission as exhibit 5 [hereinafter *The Eiland Report*]; for intelligence compilations see "Winds of Heaven 7 - presentation of combat plan principles" (summary by IDF operations branch, October 2010) marked by the Commission as exhibit 106 [hereinafter *Operations Branch Summary*]; *Defense Minister's Memorandum Appendixes*, *supra* note 209, at appendixes 35-37, 43-45, 49.

called Insani Yardim Vakfi, or Humanitarian Relief Foundation in English (hereafter: **IHH**), a Turkish organization that is prohibited in Israel by law. Additional naval intelligence information concerned the number of participants in the flotilla, the agreement of human rights activists and public figures to participate in the flotilla, the dates planned for the departure of the flotilla, and statements of its organizers that they attached great importance to the involvement of the Turkish government, they intended to create a media event in real time and they were aware of Israel's intention of stopping the flotilla from reaching Gaza and their ambiguity regarding their response to such an operation by Israel.<sup>403</sup> On May 26, 2010, the intelligence included a statement attributed to the prime minister of Turkey that any step that would be taken in order to prevent the flotilla from reaching Gaza would lead to a response whose nature was unclear. On May 29, 2010, intelligence was published that the chairman of IHH, Bülent Yildirim, who was on the *Mavi Marmara* itself, said that the participants of the flotilla did not have any weapons in their possession, but they intended to resist any takeover of the ship by force. It was also reported that there were divers on board the ship for the purpose of locating any damage to the ship. On May 30, 2010, intelligence was distributed to the effect that the ships in the flotilla had begun to move in the direction of the Gaza Strip and that, *inter alia*, the activists on *Boat 8000* intended to tie themselves with chains and start a hunger strike.<sup>404</sup> On May 30, 2010, at 10:45 p.m., a special intelligence report was written and distributed by Israeli naval intelligence, which stated that in the last few hours, the statements regarding an intention to use physical force to resist the takeover had increased, and that while the participants of the flotilla emphasized that there was no intention of using guns or knives, they had warned of spontaneous responses to the use of force against them and declared that 'it would be difficult' for the naval forces to board the ship.<sup>405</sup>

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403 *Id.*; on Apr. 6, 2010 it was stated that there is a possibility that the flotilla would be accompanied by Turkish vessels. On Apr. 26, 2010 the intention to create a media event in real time was mentioned, along with the extreme importance attributed by the flotilla organizers to the involvement of the Turkish Government. On May 23, 2010 it was mentioned that a day earlier, a demonstration with multiple participants was orchestrated by the IHH at Istanbul's port and that the flotilla organizers mentioned that they are aware of the Navy's intention to prevent the ships' arrival in Gaza, though they remained vague regarding their conduct when facing the IDF soldiers. On Feb 25, 2010 it was mentioned in the intelligence gathering that the organizations taking part in the flotilla have begun operating direct broadcasts via satellite and that the Marmara has entered the port of Antalya to collect passengers. On May 27, 2010 a compilation was published which mentioned that at the time it is unknown whether the passengers are preparing a backup plan to prevent our forces' takeover of the participating vessels.

404 *Id.*, in compilation of May 29, 2010.

405 See "telegram form for operation "Winds of Heaven 7" by the Naval Intelligence Division",

The research division of naval intelligence also distributed several documents, but this information was relatively sparse and did not change the intelligence picture.<sup>406</sup> Additional open intelligence material was published by the Intelligence and Terrorism Information Center of the Israel Intelligence Heritage & Commemoration Center (hereafter: **IICC**) back in January, 2010. A document published by IICC on January 19, 2010, mentioned Khatam Sawalha, a Hamas operative in Britain who led the campaign to break the blockade on Gaza and who is connected with the Turkish IHH organization, who said on January 17, 2010, on a site identified with Hezbollah, that ‘a new convoy of aid would leave for Gaza by sea’ and that this time (apparently unlike the incident that occurred in January 2010, in an attempt of one of the land convoys to enter Gaza via the Rafah crossing, during which a confrontation with the Egyptians developed), ‘the confrontation would be directly against the Zionist enemy.’<sup>407</sup> A document dated April 7, 2010, mentioned the possibility that the organizers of the flotilla took into account a possible scenario of confrontations with the Israeli Navy, and that they intended to ‘provoke Israel.’<sup>408</sup> On May 26, 2010, the IICC distributed a document outlining the character of IHH and indicating the organization’s links with Islamic extremists, including the Hamas and international Jihadists. The report discussed how the IHH was an organization with a radical Islamic orientation that had relations with the Hamas, *inter alia* through its membership of the ‘Union of Good Coalition’ (an umbrella organization of more than fifty Islamic funds around the world that transfer money, *inter alia*, to the Hamas) and that helped Hamas’s propagandist machine in Turkey.<sup>409</sup> A document was distributed on May 30, 2010, in which Bülent Yildirim was quoted as saying, while on the *Mavi Marmara*, that the youngest person on the *Mavi Marmara* was one year old, and the

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the folder containing the exhibit was marked by the Commission as folder 90.

406 See *Defense Minister’s Memorandum Appendixes*, *supra* note 209, at appendixes 36, 43. On Apr. 14, 2010 a general notice regarding the organization of a humanitarian flotilla was made public. The flotilla organizers’ preparation for a confrontation with IDF forces which would be covered by the media was mentioned on May 16, 2010. Two more documents were distributed in internal distribution only (that is, the documents only circulated within the research department itself): a document dealing with the activities of the IHH organization was published on May 24, 2010. The document discusses the organization’s activities as a non-governmental organization intended to aid Muslim communities throughout the world. On May 26, 2010 a document was distributed which mentioned the statement attributed to Turkish Prime Minister Recep Tayyip Erdoğan that steps undertaken to halt the flotilla would meet with a reaction.

407 See *IICC report* (Jan. 19, 2010), *supra* note 83, at 5; *IICC report* (Jan. 31, 2010), *Id.*, at 1; *IICC report* (Apr. 7, 2010), *Id.*, at 3.

408 *IICC report* (Apr. 7, 2010), *Id.*, at 3.

409 *IICC report* (May 26, 2010), *Id.*; see also identical report distributed on May 27, 2010.

oldest were eighty years old, and that although their resistance would not be violent, they would not allow Israeli forces to board the ship.<sup>410</sup> The document also said that the organizers of the flotilla expressed their desire that the conflict with the Navy would take place in daylight so that the media could document it and in order to create waves in the international media.<sup>411</sup> Additional reports which were distributed relate mostly to humanitarian aid issues, the equipment that the organizers of the flotilla intended to bring to the Gaza Strip, and the public figures and activists that would take part in the flotilla.<sup>412</sup>

The Mossad was asked by Israeli Naval Intelligence to send it information, which it did.

On May 11, 2010, a report was received from the National Security Council that according to a report in the Palestinian media, the prime minister of Turkey, Recep Erdogan, met with the organizers of the flotilla and said 'removing the blockade was top of Turkey's priorities.'<sup>413</sup>

### *Decision of the political echelon*

117. As a rule, 'Winds of Heaven' operations - a procedure that was formulated by the IDF in order to deal with the phenomenon of flotillas to Gaza<sup>414</sup> - were approved by the political echelon, namely the Prime Minister and the Minister of Defense. In the course of formulating the plan for the 'Winds of Heaven' operation, the IDF had considered various alternatives for seizing the vessels, and the possibilities for performing a "cold stop" of the vessels had proven to be impractical. However, the navy had been successful in stopping ships by taking control of them, whether by climbing aboard their decks from small boats that came alongside the ships, and by rappelling from a helicopter directly onto the deck or the bridge (a drill called "fast-rope").

Therefore, on April 22, 2010, a discussion was held on the question of the flotilla which is the subject of this report, against a background of

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410 *IICC report* (May 30, 2010), *Id.*, at 2, which references the IHH organization's official website. See also *The Eiland Report*, *supra* note 402, at 32.

411 See *IICC report* (May 30, 2010), *supra* note 83, at 2, which references a news story on Al Jazeera from May 29, 2010 as well as an interview on the IHH organization's open channel from May 30, 2010.

412 See, for example *IICC report* (May 11, 2010) *Id.*; See also *The Eiland Report*, *supra* note 402, at 32.

413 See *Defense Minister's Memorandum Appendixes*, *supra* note 209, at appendix 39.

414 See paras. 24-27 above in this report; see also "'Winds of Heaven" - General Staff Plan", in response to the completion request of Dec. 29, 2010, the folder containing the exhibit was marked by the Commission as folder 167 [hereinafter *The General Staff Plan*].



intelligence surveys that were prepared, at the weekly meeting that took place at the office of the Minister of Defense with the participation of IDF officers.<sup>415</sup> The IDF's position at the meeting was that if the diplomatic effort to prevent the flotilla setting sail was unsuccessful, there would be no alternative but to prevent the flotilla from reaching the Gaza Strip in a military operation, which would require taking control of the ships. At an additional meeting that took place on May 6, 2010, the Minister of Defense approved the overall format of the operation, even though he gave instructions that the preparations for the flotilla should be submitted for the approval of the Prime Minister, together with the Minister of Public Security, the Minister of Foreign Affairs, and the Minister of the Interior.<sup>416</sup> At the meeting that took place on May 13, 2010, the operation order was presented to the Minister of Defense.<sup>417</sup>

On May 26, 2010, the Prime Minister, Mr. Benjamin Netanyahu, raised the issue of the flotilla for discussion in the forum of the 'Septet' (an inner cabinet that includes the senior political-security echelon and persons with experience in these fields).<sup>418</sup> This discussion was not planned in advance. The ministers that participated in the discussion supported preventing the flotilla from reaching the Gaza Strip. At the end of the discussion, the Prime Minister asked the Minister of Defense to concentrate upon the inter-ministerial preparations and the preparations of all of the parties in the operation, as a result of his expected trip abroad a short time after that meeting.<sup>419</sup>

On the same day, a meeting took place at the office of the Minister of Defense with representatives of various entities and Government ministries that were involved in the preparations for the operation, including the Ministry of Foreign Affairs, the Ministry of the Interior, the Ministry of Public Security, the Ministry of Justice, IDF officers and public relations personnel.<sup>420</sup> At this meeting, the Commander of the Israel Navy reviewed the preparations of the forces for the operation. An additional meeting that took place at the office of the Minister of Defense on the same day addressed the issue of public relations in the context of the

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415 *Defense Minister's Memorandum*, *supra* note 176, at 32-34.

416 *Id.*, at 34-35.

417 *Id.*, at 35.

418 "Discussion regarding preparation for the flotilla to Gaza" (Protocol of septet forum meeting, May 26, 2010).

419 *Id.*, at 45.

420 See summary of meeting at Defense Minister's office "Preparation and Readiness of Forces for "Winds of Heaven" - Defense Minister's Summary" (May 26, 2010); protocol of meeting ""Winds of Heaven" - Part A", the folder where the exhibits are found was marked by the Commission as folder 28. See also *Defense Minister's Memorandum*, *supra* note 176, at 53.

preparations and deployment for the operation.<sup>421</sup> Following this, on May 27, 2010, the Ministry of Foreign Affairs sent a document to all of Israel's representations abroad.<sup>422</sup> On May 27, 2010, at a weekly update meeting that took place at the office of the Minister of Defense, the Minister of Defense said that he was impressed by the high level of preparation of the forces and entities for dealing with the flotilla, discussed the expected confrontation with the flotilla activists and the public relations difficulty presented by the incident.<sup>423</sup>

### *The diplomatic attempts to prevent the flotilla from departing*

118. From the materials before the Commission, it can clearly be seen that during the period before the flotilla set sail, many diplomatic moves were made, at various levels and to various countries, in order to prevent the flotilla's departure for Gaza.

Thus, for example, the Prime Minister, Mr. Benjamin Netanyahu, said in his testimony before the Commission that in view of the expected scale of the flotilla, a 'special diplomatic effort' was made to try to prevent it from reaching the Gaza coast and to divert it to Ashdod or the El-Arish port where it would unload the humanitarian equipment and transport it via the land crossings.<sup>424</sup> The Prime Minister went on to say that in May diplomatic moves were made continuously to many countries, including countries whose citizens were on board the vessels in the flotilla, or whose ports were used at any stage by the vessels in the flotilla. The Prime Minister further said that diplomatic efforts were also made to the United Nations and Turkey, since many of the flotilla's participants were Turkish citizens. In this context, the Prime Minister said that his office made direct contacts with 'the highest levels of the Turkish Government,' including Turkish Prime Minister, Recep Erdogan, himself; moreover, the Prime Minister said that on May 27, 2010, he personally contacted a senior figure in the Egyptian Government, with a request that Egypt would speak with the Turkish Government.<sup>425</sup> In his classified testimony before

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421 See summary of meeting at Defense Minister's office "'Winds of Heaven" - Publicity - Defense Minister's Summary" (May 27, 2010); protocol of meeting "'Sky Winds" - Part A", the folder where the exhibits are found was marked by the Commission as folder 28; See also *Defense Minister's Memorandum*, *supra* note 176, at 53.

422 Announcement by the Foreign Office spokesperson to Israeli representatives (May 27, 2010), *Defense Minister's Memorandum Appendixes*, *supra* note 209, at appendix 60/2.

423 See protocol of weekly situation estimate at Defense Minister's office "Operations and Excursions + weekly Situation Estimate" (May 27, 2010), the folder where the exhibits are found was marked by the Commission as folder 28; see also *Defense Minister's Memorandum*, *supra* note 176, at 54.

424 *Prime Minister's Open Door Testimony*, *supra* note 82, at 8.

425 *Id.*, at 9.

the Commission, the Prime Minister gave precise details of the nature and timing of the diplomatic moves.<sup>426</sup> Despite these actions, the Prime Minister ended by saying that 'All the efforts led to nothing.'<sup>427</sup>

The Minister of Defense, Lieutenant-General (res.) Ehud Barak, also testified regarding the diplomatic moves that were intended to prevent the flotilla from setting sail:

'Throughout the aforesaid period, there was extensive diplomatic activity on the part of the Prime Minister, the Ministry of Foreign Affairs, senior officials in the Ministry of Defense and the IDF and also by me, in an effort to bring about the cancellation of the flotilla, to stop it or limit it. In the two weeks prior to the arrival of the Turkish flotilla, I discussed the matter with the representative of the Quartet, Tony Blair, the envoy of the UN Secretary-General, Robert Serry, the head of Egypt's General Intelligence, the Greek Foreign Minister, the Turkish Foreign Minister, the Irish Foreign Minister, the Turkish Ambassador in Israel and several others who, because of the nature of their diplomatic contacts requested that their names should not be mentioned. Regrettably, these major diplomatic efforts did not lead to the result that we wanted.'<sup>428</sup>

In his classified testimony, the Minister of Defense went on to give details of the diplomatic contacts with Turkey immediately before the flotilla set sail in an attempt to prevent its departure. Here, he discussed the diplomatic contacts with the Turkish representatives in the United States, with senior officials in Egypt, Cyprus and the United States, and with senior officials in the Turkish Government itself.<sup>429</sup>

Additional details of the purposes, nature, and dates of the diplomatic contacts were given to the Commission in the testimony of the former director-general of the Ministry of Foreign Affairs, Ambassador Yossi Gal. In his testimony, the director-general of the Ministry of Foreign Affairs discussed how during the whole period of the diplomatic efforts Israel emphasized time and again the existence of the naval blockade and the fact that, as a rule, Israel does not prevent the entry of humanitarian equipment into Gaza, subject to a security inspection at the land crossings.<sup>430</sup>

426 Transcript of session no. 2 "Testimony of the Prime Minister, Close doors" (Aug. 26, 2010) [hereinafter *Prime Minister's Closed Door Testimony*].

427 *Prime Minister's Open Door Testimony*, *supra* note 82, at 9.

428 *Defense Minister's Open Door Testimony*, *supra* note 70, at 43-44.

429 Transcript of session no. 3 "Defense Minister's Closed Door Testimony" (Aug. 10, 2010), at 7-8, marked by the Commission as exhibit 85 [hereinafter *Defense Minister's Closed Door Testimony*].

430 Transcript of session no. 10 "Testimony of the Director General of the Ministry of Foreign Affairs" (Sep. 15, 2010), at 5, 7, [hereinafter *Open Door Testimony of the Director General of the*

The director-general of the Ministry of Foreign Affairs described in his testimony the scope of the contacts that were made with representatives in various capitals (including Washington, Nicosia, Athens, Dublin, London, Stockholm and other capitals), contacts which, according to his testimony, began many weeks before the maritime incident and continued until a short time before the flotilla arrived.<sup>431</sup> He went on to say that at a meeting with ambassadors of the twenty-seven member states of the European Union on May 23, 2010, he raised the issue of the flotilla with them, and that even after this another round of approaches was made, in which diplomatic letters were sent to representatives of countries that were *prima facie* able to help.<sup>432</sup> The director-general of the Ministry of Foreign Affairs also said that shortly before the flotilla set sail, the ambassadors of the countries from which the flotilla ships departed were summoned by him and another message was sent to these countries. These efforts were not fruitful, except with respect to Cyprus, which announced in May that it would not permit the flotilla's vessels to anchor in its ports.<sup>433</sup>

The director-general of the Ministry of Foreign Affairs discussed in his testimony the intensive diplomatic activity that was directed at Turkey itself, at all levels and in all spheres.<sup>434</sup> The director-general of the Ministry of Foreign Affairs went on to describe in his testimony several proposals that were sent that were made between Israel and Turkey, including Israel's consent to the proposal of the Turkish ambassador to the United States (which was made to the Israeli Embassy in the United States) that it would be the Red Crescent that would receive the humanitarian equipment from it at the land crossings, but these proposals were also rejected.<sup>435</sup> The director-general of the Ministry of Foreign Affairs also said that the scale of the contacts with Turkey was exceptional. In his words:

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*Ministry of Foreign Affairs*].

431 *Id.*, at 7.

432 See also letter from Gilad Cohen, Coordination manager, Foreign Ministry, to The Public Commission to Examine the Maritime Incident of May 31, 2010 (Nov. 22, 2010).

433 See "Concentration of Official Addresses to Cyprus and additional materials" submitted to the Commission by the Foreign Ministry, marked by the Commission as exhibit 60; see *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 14.

434 Transcript of session no. 10 "Close door Testimony of the Director General of the Ministry of Foreign Affairs (Sep. 15, 2010) [hereinafter *Closed Door Testimony of the Director General of the Ministry of Foreign Affairs*].

435 *Id.*; A document which testifies to this offer was sent by the Israeli ambassador to Washington D.C.'s office director, on Mar. 19, 2010, named subject: the Flotilla to Gaza, see letter from Lior Weintraub, Washington D.C. Ambassador's office director to the Director General of the Ministry of Foreign Affairs (Mar. 19, 2010), *Defense Minister's Memorandum Appendixes*, *supra* note 209.

'We tried every possible channel to prevent the flotilla from departing... In each of the very many conversations, the Minister of Defense and the Turkish Foreign Minister, from me to my Turkish counterpart, the embassies in Washington and Ankara, and all of the other contacts, there was a clear attempt to propose a solution for the ships, to propose a solution for the equipment on the ships, and at no stage was a positive response received.'<sup>436</sup>

It should also be noted that diplomatic efforts were also made by the military. The Commander of the Israeli Navy held a personal meeting with the military attachés of Turkey and Greece and wrote personal letters to the Commanders of their navies; senior officers held meetings with military attachés; a briefing was held with all IDF attachés, and so forth.<sup>437</sup> In the two weeks before the flotilla arrived, the Planning Division of the IDF also increased its involvement. The Liaison Department in the Planning Division began a series of discussions with various international organizations, including the Red Cross, UNIFIL (the United Nations Interim Force in Lebanon) and UNDOF (the United Nations Disengagement Observer Force that is stationed on the Israeli-Syrian border), as well as discussions with several countries, mainly Egypt and Jordan. The purpose of these was to prepare the way for the possibility that these countries would need to assist in receiving participants of the flotilla after they would be deported from Israel, and alternatively in dealing with any of the participants who is a citizen of a country with whom Israel has not diplomatic relations. The Planning Division also sent communications to all of the foreign military attachés in Israel and the IDF attachés abroad.<sup>438</sup>

### **The IDF's preparations for the 'Winds of Heaven 7' operation**

119. The military preparations carried out by the IDF to enforce the naval blockade will be reviewed from two main perspectives: (1) the legal preparations, which were an integral part of the preparatory work prior to the operation; (2) the military preparations themselves, i.e., the operation order, the soldiers' briefings and the rules of engagement that were determined for the operation, with special attention to the importance attached to the value of human life in the preparations for the operation. It should be clarified that this chapter will not review all of the

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436 See *Closed Door Testimony of the Director General of the Ministry of Foreign Affairs*, *supra* note 434, at 15.

437 *The Eiland Report*, *supra* note 402, at 49; For details of military-diplomatic contacts see *Operations Branch Summary*, *supra* note 402.

438 *The Eiland Report*, *supra* note 402.

preparations for the operation, but only the aspects that are relevant to the questions before the Commission.

As can be seen from the material before the Commission, the IDF carried out preparatory work before the flotilla arrived, and it emphasized the need to avoid, insofar as possible, the use of force for the purpose of stopping the ships participating in it. It is clear that the Military Advocate-General's Office was very much involved in the preparation process and that its recommendations were noted and incorporated in the operation orders and the various procedures that were determined prior to the operation. We see from the documents and the testimonies a high level of awareness of all of the persons involved, at all levels, of the need to carry out the operation without any injuries to the participants of the flotilla. However, it should be noted that we see from the material before the Commission that the level of violent resistance on the part of the flotilla participants that was anticipated by the IDF prior to the operation was clearly underestimated.

120. *The legal preparations.* As noted in chapter A, the use of a naval blockade in order to give the IDF all of the tools and powers required to prevent the passage of ships to the Gaza Strip was recommended by the Military Advocate-General back in 2008, when the preparations for the 'Winds of Heaven 1' operation began. In that context, the Military Advocate-General requested the opinion of the Attorney-General.<sup>439</sup>

Within the context of the preparations for the 'Winds of Heaven 7' operation, we clearly see the involvement of the Military Advocate-General's Office in the planning process carried out by the Chief of Staff level and the Navy, in preparing legal opinions on various military issues, in formulating a legal annex for the operation orders and in coordinating the legal position with parties outside the IDF.<sup>440</sup> The opinions surveyed, *inter alia*, the authority the Navy could use vis-à-vis foreign ships off the coast of Gaza, the confiscation of ships pursuant to the laws of war in general, and because of a breach of the naval blockade in particular, procedures for dealing with humanitarian equipment that was seized on a ship that

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439 Letter from the Chief Military Advocate General, Brigadier General Avichai Mendelblit to the Government's Attorney General (Aug. 11, 2008); *The Eiland Report*, *supra* note 402, at 151.

440 See *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 51: "I think, but it must be clear that we, all the activity, from the stage of combat protocol, from the stage of planning, and throughout all the stages of the operation and its various stages, including questions that stemmed from execution and including preparation afterward, as a set method. By the way, and not in a special way, the Military Advocate General is integrated in into the operational planning components of the IDF, a day to day matter. They are part of our operational presentations. In the branches and in the General Staff".

breached a naval blockade, and so forth. Moreover, the Military Advocate-General's Office addressed the question of the use of less-lethal weapons during the operation, and it gave specific approval for the weapons that were used in the operation.<sup>441</sup> The Military Advocate-General's Office also addressed the question of imposing communications blackouts during the operation<sup>442</sup> and the issue of the IDF receiving assistance from

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441 See also *The Eiland Report*, *supra* note 402, at 152-163.

The Military Advocate General was the one that drew the attention of the relevant IDF authorities to the need to complete approval processes for the use of less-lethal weapons intended for use in the operation. As part of a discussion that took place on May 17, 2010 and which dealt with the use of less-lethal weapons within the "Winds of Heaven 7" operation, the representatives of MAG presented the legal framework for the use of the less-lethal weapons within the operation in light of the rules of combat and the three terms which must be met as a condition for employing such means, that is, the approval that such means are not lethal; determining of appropriate safety and operational rules for the situation where it is intended to be used; and the qualification of soldiers expected to make use of the means; see *MAG position paper - Appendix*, *supra* note 77; see also *The Eiland Report*, *supra* note 402, at 155-156.

442 On the specific level, MAG sources expressed their opinion that it is possible, within the operation, to make use of a number of means regularly employed by the IDF and the use of "paintballs" and "talc-balls" was ruled out. Sometime after the said discussion, the operational elements asked that the use of these two means be allowed, in order to enable a graded operation of less-lethal weapons (among the means approved in said discussion none of the means could have been employed against specific people unless employed at zero range, excluding the "soft bag". But this was a relatively aggressive means and so the operational elements preferred not to use it as a first means). On May 27, 2010 the MAG distributed a detailed opinion where the legality of employing these means was examined. In light of the Chief Medical Officer's position that the likelihood that the employment of these weapons, in accordance with the operational instructions determined, would cause an irrevocable or fatal injury is low, the use of these means was approved, while defining the rules of operation determined for them, the approval for their use by soldiers from specific units only, and an instruction to train the soldiers equipped with this weapon. At the same time it was mentioned that due to time constraints a formal professional order regarding the use of these weapons was not consolidated, nor was a formal professional order consolidated regarding the training of the soldiers, and that this is not the manner in which the process of receiving a less-lethal weapon into the IDF should be conducted. Therefore, approval was granted for the employment of these weapons within operation "Winds of Heaven 7" only and it was recommended that an organized process of receiving these means be set into motion. See summary of meeting headed by the Navy's Information Security Branch Head "Legal Aspects in the Issue of Using Less-Lethal Weapons in Operation 'Winds of Heaven 7'" (27.5.2010), Appendix 14 of the *MAG position paper - Appendix*, *supra* note 77.

On May 18, 2010 the Military Advocate General's Department of International Law released a first legal reference to the possibility of executing such blocks where it was mentioned that there is no fundamental legal hindrance in terms of international law from performing blocks / disrupting the specific communications detailed, excluding the blocking of Global Positioning Systems (GPS) broadcasts, regarding which it was mentioned that in the absence of a sufficient factual basis their legality cannot be questioned. The relevant legal appendix was also attached to the opinion regarding the various aspects of blocking communication. This appendix was attached to the legal appendix to the order, but not to the communication blocking appendix of



the Israel Prison Service and the Israel Police during the operation.<sup>443</sup> The Military Advocate-General's Office was also involved in formulating the final wording of the communications that were transmitted to the ships before they were taken over. The Military Advocate-General's Office also prepared a legal annex to the operation order that included rules of conduct for the forces, rules of engagement for the operation, and also rules for carrying out electronic screening measures, including an approved list of blackouts that could be implemented.<sup>444</sup>

the order; see "Communication Blocks within Operation 'Winds of Heaven 7'" (MAG opinion, May 18, 2010), appendix 12 of the *MAG position paper - Appendix, supra* note 77. It should also be mentioned that on May 30, 2010 the Adalah organization approached the Government's Attorney General and the Chief Military Advocate General regarding the "electronic screening against the flotilla to Gaza." In the organization's letter a claim was raised that this screening was intended to prevent the broadcast of harsh images from the takeover of the flotilla vessels which could harm Israel's image and that, as far as this screening harms the ability to broadcast distress signals or hinders the ability to navigate, it constitutes a threat to the lives of the passengers on the ships. Following this, and at the request of the MAG, an urgent discussion was held with the participation of various elements in the Navy and headed by the Navy's Chief of Staff. In the discussion the operational capabilities of the Navy were presented regarding the blocking of the vessel's communication channels and the manner in which these capabilities are exercised during the operation. It was emphasized that throughout the operation the vessel's ability to move safely would not be hindered and that in case of distress a response would be given by a nearby Navy vessel. In light of these the MAG's Department of International Law released a response letter to the Adalah organization that same day where it was mentioned that there is no possibility to reveal the operational means and methods which will be employed by the IDF in its actions, but within the framework of employing the various means at the IDF's disposal, the "chief consideration is preventing the risk to human life at sea, and the possibility to call for help at times of distress." *The Eiland Report, supra* note 402, at 158.

443 In its opinion of May 17, 2010 MAG's Department of Consultation and Legislation stated that in its opinion there is no prevention from the Police and Prison Service forces assist the IDF in executing actions to enforce the blockade since the laws of war do not limit a state in the choice of armed forces participating on its behalf in the enforcement of the laws of war; see "Israeli Police and Prison Service Assistance to IDF During Operation 'Winds of Heaven 7'" (Opinion by the MAG, May 17, 2010), at appendix 11 of the *MAG position paper - Appendix, supra* note 77. In light of differences of opinion that had broken out between the MAG and elements in the Ministry of Justice and the Ministry of Defense regarding the incorporation of the Masada unit, a special unit of the Prison Service, the Chief Military Advocate General approached the Attorney General on May 24, 2010 in order to receive his legal approval to incorporate the Masada unit into the operation; see letter from the Chief Military Advocate General, Brigadier General Avichai Mendelblit to Attorney Yehuda Weinstein, Attorney General (May 24, 2010), at appendix 13 of the *MAG position paper - Appendix, supra* note 77. Said approval, based on the rules of combat, was given on May 26, 2010, but only in relation to actions executed outside Israel's territorial waters (while inside the territorial waters it was determined that Masada forces could only assist in escorting and guarding the ships' passengers); see letter from Attorney Raz Nizri, senior assistant to the Government's Attorney General, to attorney Benny Folchek, Prison Service Commissionship (May 26, 2010), at appendix 13 of the *MAG position paper - Appendix, supra* note 77.

444 See *MAG position paper - Appendix, supra* note 77, at appendix 14.



121. *The military preparations.* As previously noted, the IDF began its preparations back in February 2010, when it received the information regarding the steps taken to organize the departure of the flotilla. The Commission was provided with the operation orders of the Chief of Staff (command no. 1 and command no. 3), the naval command (no. 3), and the land command (no. 2), which were prepared by the IDF before the flotilla arrived.<sup>445</sup> The Commission also received the briefing that the Commander of the Navy gave to the commanders and soldiers on May 20, 2010, and a summary of the 'situation analysis' headed by the Commander of the Navy, which took place on May 26, 2010.<sup>446</sup>

The last Chief of Staff's operation order that was issued before the incident (hereafter: **the Chief of Staff's order**) defines the goal as follows: 'The IDF shall prevent unauthorized vessels reaching the Gaza Strip.'<sup>447</sup> The mission is defined as follows: 'The Navy shall enforce the naval blockade imposed on the Gaza Strip and shall prevent vessels from entering the Gaza Strip, while maintaining as low a media profile as possible.'<sup>448</sup> The Chief of Staff's order reviews the deployment of forces and the division of tasks and is accompanied by seven annexes dealing with various issues, including the division of responsibility for dealing with the deportation from Israel of foreign nationals that participated in the flotilla, the seizure of equipment belonging to foreign nationals that are deported against a background of committing security offences, legal emphases and annexes that concern subjects such as operating electronic screening, IDF spokesperson's statements, teleprocessing and logistics. The annex that concerns the seizure of personal equipment belonging to the flotilla participants placed an emphasis on carrying out checks from the viewpoint of data security and states the competent authority to approve various actions with regard to the seizure of the equipment and its treatment.

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445 For the most updated command, see General Staff Operational Order 3 "Winds of Heaven 7 - Situation Room Order", in response to the completion request of Nov. 7, 2010, the folder containing the exhibit was marked as folder 136 by the Commission [hereinafter *General Staff Operational Order 3*]; Naval Operational Order 3 "Winds of Heaven 7", the folder containing the exhibit was marked as folder 90 by the Commission [hereinafter *Naval Operational Order 3*]; Land Operational Order 2 "Winds of Heaven 7", in response to the completion request of Nov. 7, 2010, the folder containing the exhibit was marked as folder 136 by the Commission [hereinafter *Land Operational Order 2*].

446 Summary of situation analysis headed by Navy commander 'Winds of Heaven' Situation Analysis May 26, 2010 - Navy Commander's summary" (May 26, 2010), the folder containing the exhibit was marked as folder 90 by the Commission.

447 *General Staff Operational Order 3*, *supra* note 445, at para. 5. See also para. 4 of General Staff Operational Order 1 "Winds of Heaven - Situation Room Order", *Defense Minister's Memorandum Appendixes*, *supra* note 209 [hereinafter *General Staff Operational Order 1*].

448 *General Staff Operational Order 3*, *supra* note 445, at para. 6.

The naval operation order defines the mission as follows: 'A combined force of Shayetet 13 with the assistance of "second wave" forces ... will prevent the entry of shipping vessels into the Gaza Strip "Winds of Heaven 7" while maintaining legitimacy.'<sup>449</sup> The naval order is very detailed. We shall discuss here in brief certain aspects thereof that are relevant to our concerns, mainly from the viewpoint of the use of force and the treatment of the participants of the flotilla.

From the viewpoint of deploying the forces for the naval stage of the operation, it was decided that the command level would be very senior, including the Commander of the Navy himself.<sup>450</sup> In the naval stage, the force was divided into two types: (1) the takeover force, whose function was to take control of the ships if they would not respond to the radio communications. The takeover force was made up of three independent "centers", under the command of a senior commander holding the rank of lieutenant-colonel: "center A" was designated to take control of the *Mavi Marmara*, "center B" was designated to take control of *Boat 8000* and the *Gazze*, and "center C" was designated to take control of the *Challenger 1* and the *Sofia*. An additional force was designated to take control of the *Defne Y*. Each of these "centers" was intended to be completely independent at the operation stage; in other words, it was given its own independent medical personnel, navigators and reserves.<sup>451</sup> (2) The second wave force, which would be comprised of four teams commanded by lieutenant-colonels and whose tasks were: (a) to bring the flotilla vessels to Israeli ports; (b) to make a list of the persons on board and to deal with the magnetic media that would be found on board the vessels.

In the paragraph entitled 'details of the general method,' the order states that operations should be carried out to enforce the naval blockade according to an 'order of escalation - warning / prevention / bringing

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449 *Naval Operational Order 3*, *supra* note 445, at para. 4.

450 As part of the presentation of the operation's principles to the Chief of Staff prior to the operation, the Chief of Staff determined that the commander of the Navy is the commander of the operation. This instruction was given as part of the Chief of Staff's Operations and Excursions of May 6, 2010; see *IDF completion response of 15.11.2010*, *supra* note 400, at para. G. This instruction was incorporated into the orders, see *General Staff Operational Order 1*, *supra* note 447, at para. 8; *Naval Operational Order 3*, *supra* note 445, at para. 13. In addition, in Operations and Excursions summary of May 13, 2010, para. E, sub-para. 4 it is mentioned that: "The Chief of Staff stressed the importance of senior command's presence at the anticipated points of friction while conducting a sensitive and measured action - responsibility of the commander of the Navy." *IDF completion response of 15.11.2010*, *supra* note 400, at Para. G.

451 See the testimony of the commander of Shayetet 13, "Deepening and Broadening the General Staff's experts inquiry (Sep. 20, 2010)", at 3, marked by the Commission as exhibit 104 [hereinafter *Inquiry Expansion of 20.9.2010*].

the vessels to a halt / taking control of them.' In the 'details of method' paragraph, under the operation stage dealing with 'identification, monitoring and sending messages to the vessels,' in the special instructions paragraph, it was stated that before the stage of taking control of the vessels and after receiving approval from the Navy Commander, the force commander was permitted to employ various measures to stop the vessels, including firing 'skunk bombs' or water from water cannons, forcing the vessels to change their course or stop by means of missile ships, crossing bows, firing warning shots into the air and 'white lighting' (blinding using a large projector).<sup>452</sup> The legal annex to the order contained legal emphases for the use of these measures and the manner of operating them. In this regard, it should be stated from the outset that in practice, no use was made of these measures.<sup>453</sup>

The following instructions, *inter alia*, are also outlined in the naval order:

a. Instructions regarding communications and warnings that would be transmitted by a loudspeaker system: according to the Navy's operation order, five communications were planned with ascending levels of warning as the flotilla vessels approached the area of the naval blockade. The language of the five communications, and the points at which it was determined they would be sent to the flotilla vessels, as stated in the Navy's operation order, were the following:

Communication no. 1 - first communication from the Government, intended for transmission at the time of interception (attached to the list of communications the day before the operation at the request of the Prime Minister).<sup>454</sup>

'This is the Israeli Navy. You are approaching an area of hostilities which is under a naval blockade. The Gaza area, coastal region and Gaza Harbor are closed to all maritime traffic. The Israeli government supports delivery of humanitarian supplies to the civilian population in the Gaza strip and invites you to enter the Ashdod port. Delivery of the supplies in accordance with the authorities' regulations will be through the formal land crossings

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452 *General Staff Operational Order 3, supra* note 445.

453 See Transcript of session no. 13 "close door testimony of the Chief of Staff" (Dec. 24, 2010), at 14-15. The Chief of Staff mentioned in his testimony that "the order does not oblige the use of all the means. The order mentions all the means that may be used and the considerations regarding the employment of the means are in accordance with the situation, the missions [...] there is no obligation to go through all the means, but the means suitable for the matter must be used". In this context, see explanation presented in para. 227 for the negation of the possibility of using some of the means discussed.

454 See *IDF completion response of 15.11.2010, supra* note 400, at para. D.

and under your observation, after which you can return to your home ports aboard the vessels on which you arrived.<sup>455</sup>

Communication no. 2 - intended for transmission at the time of interception:

'This is the Israeli Navy. You are approaching an area of hostilities which is under a naval blockade. The Gaza area, coastal region and Gaza Harbor are closed to all maritime traffic.

You are hereby requested to change your course and refrain from entering the area.

Delivery of humanitarian supplies to the civilian population in the Gaza strip is possible through the formal land crossing between Israel and the Gaza strip, subject to prior coordination with the Israeli authorities.<sup>456</sup>

Communication no. 3 - intermediate communication:

'This is the Israeli Navy. You are approaching an area of hostilities which is under a naval blockade. The Gaza area, coastal region and Gaza Harbor are closed to all maritime traffic.

You are hereby ordered to change your course and refrain from entering the area. If you ignore this order and attempt to enter the blockaded area, the Israeli Navy will be forced to take all the necessary measures in order to enforce this blockade.

By ignoring this order, you are putting your crew members and your motor vessel at risk. You alone are responsible for the consequences of your action.

Delivery of humanitarian supplies to the civilian population in the Gaza strip is possible through the formal land crossings between Israel and the Gaza strip subject to prior coordination with the Israeli authorities.<sup>457</sup>

Fourth communication - intended as a loudspeaker announcement before the vessels entered a range of 20 miles from the area of the naval blockade:

'This is the Israeli Navy. You are approaching an area of hostilities which is under a naval blockade. The Gaza area is a combat zone, by entering this zone you are putting your vessel at risk.

You are hereby ordered to change your course and refrain from entering the area. If you ignore this order and attempt to enter the blockaded area, the Israeli Navy will be forced to take all

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455 *Naval Operational Order 3*, *supra* note 445, at 54, appendix F.

456 *Id.*

457 *Id.*, at 55.

the necessary measures including boarding your vessel in order to enforce his blockade. Be aware that you are violating a legal naval blockade and that the organizers and captains of this sail will be held responsible.

Delivery of humanitarian supplies to the civilian population in the Gaza strip is possible through the formal land crossings between Israel and the Gaza strip subject to prior coordination with the Israeli authorities.<sup>458</sup>

Optional fifth communication - after entering the area of the blockade:

'This is the Israeli Navy. You are sailing in a blockaded area according to international law. You were ordered several times to avoid entering this area. Due to your refusal to obey this order and your intent to violate a legal naval blockade, the Israeli Navy is obliged to take all necessary measures in order to enforce this blockade. By ignoring this order, you are putting your crew members and your motor vessel at risk. If you do not change your course immediately, you alone will be responsible for the consequences of your actions.'<sup>459</sup>

b. The weapons that were permitted for use - the safety annex states that the combat personnel would be armed only in accordance with the instructions of the Military Advocate-General's Office and the instructions of the Chief Medical Officer's Office.<sup>460</sup> It was also decided that the commanders would ensure, after issuing the weapons, that the combat personnel would only have in their possession weapons that were permitted for use pursuant to these instructions.<sup>461</sup>

According to the operation order, the less-lethal weapons that were approved for use in the operation included the following:

- (1) A Taser gun in the form of a shocker, without firing - a device that works like a shocker, by forming an electric circuit on the target from short range. Works on batteries. Type of ammunition: electric current.
- (2) Remington 870 shotgun - a firearm that can be used, *inter alia*, as a less-lethal weapon. It is loaded manually, with a three shell internal tube magazine (in addition to one shell in the barrel). It is possible to attach sights and a device for breaking windows.

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458 *Id.*, at 56.

459 *Id.*, at 57.

460 *Naval Operational Order 3*, *supra* note 445, at 33, appendix C, para. 4(c)(1).

461 *Id.*, at 33, appendix C, para. 4(c)(4).

The ammunition that was approved for using this weapon was 12 gauge bean bag shells.<sup>462</sup>

- (3) Tippman 98 paintball gun - a weapon that is designed to fill paintballs, with a semi-automatic firing capacity. It operates on the basis of a pneumatic mechanism that is operated by an air pressure canister of up to 2000 PSI. The ammunition that was approved for use in this weapon: 0.68 inch caliber paint balls.
- (4) Stun grenade 4 - a stun grenade is a grenade that when detonated creates a flare up to a distance of 30 cm from its base (i.e. a "flash bang" grenade). Delay of 1.5 seconds. It was emphasized that grenades of this kind should be used without gas and without smoke.

The order's safety annex clearly emphasized that the use of less-lethal weapons or ammunition other than those that appear in the instructions was prohibited,<sup>463</sup> and they stated that all of the combat personnel would undergo training and drills with regard to instructions for the use of the weapons,<sup>464</sup> that live ammunition would be clearly separated from less-lethal ammunition and clear operating procedures would be defined in order to prevent mistakes occurring between live ammunition and less-lethal ammunition.<sup>465</sup> Moreover, the instructions for the use of paintball guns provided that insofar as there would be any need to use them, they should be fired first at the feet, and then aimed higher if necessary (but not at the groin).<sup>466</sup> They also stated that the paintball guns should not be used if as a result 'a child under the age of 14 or women who appeared to be pregnant might be hit.'<sup>467</sup>

c. Rules of Engagement - the rules of engagement can be found in the legal annex to the land and sea operation order. The 'rules of conduct for the forces' (for the purposes of this report, these rules will be referred to as 'the rules of engagement') state that, as a matter of principle, in 'the scenario under discussion', i.e., 'dealing with foreign citizens who, according to the existing information, are not combatants' - the authority and measure that involve the use of force shall not be used

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462 There are two types of shells used by the IDF which differ in the amount of gunpowder they contain: a soft bag and a hard bag, the latter of which was not used in the operation. See *IDF completion response of 15.11.2010*, *supra* note 400, at para. E.

463 *Id.*, at 33, para. 4(f).

464 *Naval Operational Order 3*, *supra* note 445, at 35, appendix D, para. 6(6), 6(8).

465 *Id.*, at appendix D, para. 6(10).

466 *Id.*, at appendix C, para. 4(h).

467 *General Staff Operational Order 3*, *supra* note 445, at 19, appendix C, para. 2(g)(b)(9); *Naval Operational Order 3*, *supra* note 445, at 62, appendix G, para. 2(g)(b)(9).

against citizens, beyond the minimum required to fulfill the mission, i.e. stopping the vessels. The general rules for the use of force provided that, in general, force would not be used, and that it would be used only as a last resort, for the purpose of 'preventing danger of injury to human beings or to deal with an attempt to thwart bringing the vessels to an Israeli port.'<sup>468</sup> It was clarified that the use of force must be minimal and proportionate, and weapons should be used on an increasing scale.<sup>469</sup> The operation order permits use of less-lethal weapons only when this use is required in order to 'neutralize a real danger to the safety or lives of human beings that comes from a specific person, and states that insofar as it is possible to neutralize the cause of the danger without using less-lethal weapons, this should be done.'<sup>470</sup> It also states that it is permissible to use less-lethal weapons if there is a real anticipation that the event could deteriorate into a situation in which a real and immediate threat to life is foreseeable, and the use of less-lethal weapons is likely to prevent this deterioration; it further states that less-lethal weapons could only be used by those who have been trained to do so, and in accordance with the operating instructions and safety designations that had been formulated.

Regarding the use of lethal weapons, the operation order also states that, as a rule, live ammunition should not be used.<sup>471</sup> The use of lethal weapons was permitted in one situation only, namely in self-defense, for the purpose of averting a real and immediate danger to life, when it is not possible to avert the danger by less harmful means. It should be noted that the definition of 'danger to life' in the operation order is: 'a real and immediate danger of the loss of human life or serious physical injury.'<sup>472</sup> It should also be noted that the order states that lethal weapons should be used only as a last resort, after warnings have been given to the person against whom a lethal weapon is going to be used. It also states, with respect to the use of lethal weapons, that if there is a real concern that the gradual action "would endanger life, then it is permissible to shoot at the one creating the danger in order to eliminate the danger immediately, even without engaging in all of the stages set forth above."<sup>473</sup> The order

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468 *General Staff Operational Order 3*, *supra* note 445, at 17, appendix C, para. 2(g)(1)(a); *Naval Operational Order 3*, *supra* note 445, at 60, appendix G, para. 2(g)(1)(a).

469 *General Staff Operational Order 3*, *supra* note 445, at 18, appendix C, para. 2(g)(1)(b); *Naval Operational Order 3*, *supra* note 445, at 60, appendix G, para. 2(g)(1)(b).

470 *General Staff Operational Order 3*, *supra* note 445, at 18, appendix C, para. 2(g)(2)(b)(3); *Naval Operational Order 3*, *supra* note 445, at 61, appendix G, para. 2(g)(2)(b)(3).

471 *General Staff Operational Order 3*, *supra* note 445, at 18, appendix C, para. 2(g)(2)(a)(2); *Naval Operational Order 3*, *supra* note 445, at 61, appendix G, para. 2(g)(2)(a)(2).

472 *General Staff Operational Order 3*, *supra* note 445, at 16, appendix C, para. 2(g)(2)(a)(2); *Naval Operational Order 3*, *supra* note 445, at 59, appendix G, para. 4(g)(2)(a)(2).

473 For an expanded version of the rules of engagement see para. 206 below.



also provides that after the danger has been averted, an attempt should be made to capture the party endangering life in another manner without the use of weapons, that harm to those not involved should be avoided, that there should be no use of force at a person who has surrendered or has ceased to constitute a threat, and that medical treatment should be given to the wounded immediately upon the cessation of use of force.

From the statements of the commanders and soldiers at all levels it can be seen that these rules were made clear to the forces that took part in the operation.<sup>474</sup> At an operational briefing on May 20, 2010, the Navy Commander said that there was no intention to injure or punish the persons on board, and he went on to say that the Israel Navy's goal was to carry out the mission 'as professionals and in accordance with IDF ethical code.'<sup>475</sup> Moreover, it was also stated at that briefing that 'opening fire should only take place in a life threatening situation, to neutralize the person presenting the danger, but nonetheless, 'where possible, the benefit of doubt should be given.'<sup>476</sup>

Thus, the first soldier who fast-roped down from the first helicopter (hereafter: **the first soldier** or **soldier no. 1**) stated in the additional investigations of the Eiland Committee that were carried out at the request of the Commission: 'In the briefings, including my personal talk with the commander of my team, it was emphasized that the use of live weapons was the last option and a response to an immediate danger to life.'<sup>477</sup> The second soldier who fast-roped down from the first helicopter (hereafter: **the second soldier** or **soldier no. 2**) also stated: 'The rules of

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474 See the testimony of the commander of Shayetet 13, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2, and see also the testimony of the commander of the Takeover Force, 1; and the testimony of Questioner 2, *Id.* It should be mentioned that from the material before the Commission it arises that the forces received extensive mental preparation which included gathering information and writing insights towards preparation, and the preparation of the commanders to perform the preparation (by the Navy's behavioral science branch); the conversation of the Shayetet commander with all the commanders in the operation; two Company Command talks with all the commanders; 2 lectures by a Masada unit combatant about ways to deal with riots (one lecture to the commanders and one to the soldiers); a talk by each center commander with the forces in the center; analysis and investigation of the model in light of mental conduct (in this context see *IDF completion response of 15.11.2010*, *supra* note 400, at para. F). On the importance of this preparation in relation to the Open Fire instructions, see also the *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 38.

475 The summary of meeting headed by Navy Commander "Final Briefing for Operation 'Winds of Heaven 7' - Navy commander's Summary" (summary of meeting headed by Navy Commander, Jul. 4, 2010), at para. 2(a)(5), the folder containing the exhibit has been marked as folder 90 by the Commission.

476 *Id.*, at para. 2(c)(8)(b); See also *IDF completion response of 15.11.2010*, *supra* note 400, at para. F.

477 Testimony of soldier no. 1, *Id.*, at 1.



engagement were very strict, and the emphasis was that changing over to live ammunition would be a very exceptional event and only if we faced a real and immediate danger to life and it would not be possible to avoid harming him should we use live ammunition in order to neutralize the threat.<sup>478</sup>

d. Communications blackout - the instructions that were given in the operation order were to allow distress broadcasts, insofar as these did not endanger the military operation. Emphasis was also placed on the duty of care in this regard, the need to limit the blackouts insofar as possible and to terminate the blackouts when the military need ended. It was also determined that in a case of distress, insofar as a broadcast was not possible, assistance would be provided to the flotilla vessels by Navy ships.<sup>479</sup> Thus it was also determined that any electronic blackout or disruption of communications that was not one of the types of blackouts approved in the operation order required specific, separate, and detailed legal consideration, and that any such additional blackouts would be carried out only with the approval of the Chief of Staff's office.

e. Procedure for treating the injured - the medical annex to the order addresses, in its objective clause, both the treatment of combat personnel and providing medical treatment for civilians on the various flotilla vessels.<sup>480</sup> The procedure itself gives details of the medical personnel and medical equipment for the operation, the methods of evacuating and treating the injured and other professional details. The procedure relates, *inter alia*, to the subject of examining persons who are detained, a process whose purpose is to ensure that there is no medical condition that requires treatment in the emergency room.<sup>481</sup> The procedure also states that detained persons should not be examined without their consent and that if a detainee refuses an examination, a physician should explain to him the importance thereof and his refusal should be documented. In the legal annex to the order, it is stated that the injured and sick should be given medical treatment and be allowed to be evacuated from the incident site, and insofar as combat is taking place in the area where the injured are located, the evacuation should be allowed as soon as possible.<sup>482</sup>

f. Treatment of civilians - the legal annex to the operation order outlines rules of conduct for the forces and it states, *inter alia*, that

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478 Testimony of soldier no. 2, *Id.*, at 1.

479 *General Staff Operational Order 3*, *supra* note 445, at 21-22, appendix C, para. 3(a)(4); *Naval Operational Order 3*, *supra* note 445, at 63-64, appendix G, para. 3(a)(4).

480 *Naval Operational Order 3*, *supra* note 445, at 29, appendix B, para. 1.

481 *Id.*, at appendix B, para. 6.

482 *General Staff Operational Order 3*, *supra* note 445, at 17, appendix G, para. 2(c).

civilians should be treated 'at all times in a dignified and polite manner, while protecting their dignity and property.' It also states that sensitivity should be displayed to the basic needs of the civilians: where necessary, they should be given water and food, no threats should be made to them and they should not be called upon to assist in carrying out military activity. It emphasizes the prohibition of making use of civilians as a 'human shield' or as 'hostages,' and that civilian property may not be damaged or used, and that taking it constitutes a serious criminal offence.<sup>483</sup>

g. Dealing with persons suspected of military / terrorist activity or assisting such activity - the legal annex instructs the forces that when the flotilla vessels enter the territorial waters of the State of Israel, the treatment of suspects, including the question of arresting them, should be referred to the Israel Police or the Israel Prison Service. The instructions also state that persons suspected of such activity may be arrested, but for this purpose reasonable force may be used only to the extent required to carry out the arrest. The procedure goes on to emphasize that arrestees should not be harmed after they are arrested and their dignity and security should be safeguarded. The procedure also states that the circumstances of the arrest and the identity of the arrested persons should be documented.<sup>484</sup>

The instructions for the land operation define the mission as follows: "Navy - the theatre of Ashdod, in cooperation with the other forces, will prepare for receipt of the 'Winds of Heaven' vessels (cargo and passengers) and their transfer for the rest of their handling by the authorized entities." The order defines four stages in the handling of the flotilla participants: the entry of the vessels into the port; debarking of the flotilla participants into a facility for absorption and classification; the flotilla participants leaving the port area (boarding buses and arriving at a detention facility); the stage from their detention until they leave the borders of the country. The order is detailed and it specifies the tasks and the division of responsibility between the various entities including, *inter alia*, the Navy, the intelligence division, the planning division, the telecommunications division, the land command branch, the IDF spokesperson, COGAT, the chief military prosecutor command, the Military Police, the Israeli police, the Ministry of the Interior, the Foreign Ministry, the Prison Service, the Ministry of Transportation, etc.). The order contains, *inter alia*, annexes regarding security, medical care, information security, as well as an annex

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483 *Naval Operational Order 3*, *supra* note 445, at 59, appendix G, para. 2(b); *General Staff Operational Order 3*, *supra* note 445, at 16-17, appendix C, para. 2(b).

484 *Naval Operational Order 3*, *supra* note 445, at 73, appendix G, para. 2(d); *General Staff Operational Order 3*, *supra* note 445, at 17, appendix C, para. 2(d).

concerning the seizure of equipment belonging to the flotilla participants and a legal annex identical to the legal annex attached to the naval order, which defines rules of conduct for the forces.

## **The military operation for enforcing the naval blockade on May 31, 2010 - the implementation stage**

122. The military operation carried out in order to stop the aforesaid flotilla will be reviewed below according to the following stages: (1) The communications and warning stage; (2) giving the order to carry out the takeover; (3) the takeover stage and bringing the flotilla vessels to Ashdod port - first we shall review the takeover of the *Mavi Marmara*, and then we shall address, in brief, the takeover of the other vessels; (4) from arrival at Ashdod port until the deportation of the flotilla participants from Israel on June 2, 2010.

### **The inquiry and warning stage**

123. The inquiry stage for the flotilla vessels began on May 30, 2010, at around 9:00 p.m.<sup>485</sup> The stage of transmitting communications began on May 30, 2010, at 10:40 p.m., when the flotilla vessels, which were moving close to one another, were in the area of the latitude of Sidon (Lebanon), at a distance of eighty nautical miles from the shore. This stage concluded on May 31, 2010, at 12:41 a.m., when the vessels were in the area of the latitude of Nakura (Lebanon), at a distance of eighty nautical miles from the shore.<sup>486</sup> The communications were sent by operators designated for this purpose (naval officers located on the command ship during the operation who transmitted communications to the vessels in the flotilla in accordance with the operation command). The communications were transmitted by means of a Sailor radio device (an international civilian radio device for communication between vessels at sea and between vessels and coastal stations. The Sailor device has fixed channels not subject to alteration, including the international distress channel [channel 16]).

The recordings from the radio network that were submitted to the Commission show that four communications were indeed transmitted in full and according to the prepared text. The optional fifth communication was not transmitted. As stated, the warnings emphasized the fact that

485 The *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 24.

486 "IDF Answer to Completion Request" (Nov. 7, 2010), at 5, the folder containing the exhibit was marked as folder 136 by the Commission [hereinafter *IDF Completion Response of 7.11.2010*].

the vessels were about to enter an area in which a naval blockade had been imposed and a clarification that there was nothing that prevented the humanitarian supplies on the vessels entering the Gaza Strip via the land crossings, and the vessels were invited to go to Ashdod port for this purpose. The third warning included a notice that all legal measures would be taken in order to prevent the vessels entering the area of the naval blockade, and the fourth warning included a notice that, if necessary, IDF soldiers would board the vessels.<sup>487</sup>

Two of the radio operators, whose function was to transmit the communications, stated in the supplementary investigations.<sup>488</sup>

The first radio operator stated:

'We began with the standard inquiry to every vessel at sea. After that we went on to the request of the Israeli Government to enter Ashdod port and transfer the supplies to Gaza.

Next we went on to the communication that says that the area is closed and according to international law it is prohibited to enter the area, and we said that the vessel was in danger. The captain himself and the flotilla organizers were warned that they were responsible for any harm to the vessel and the persons and cargo on board. At no stage was there a break in communications and the message was transmitted clearly.

...

The transmission of the messages began a long way from the coast of Gaza and there was enough time to respond... *Mavi Marmara* repeatedly transmitted a fixed message that the Navy did not have power to stop them and that they were sailing to Gaza... In my opinion, all of the communications were transmitted clearly and in clear and unambiguous language.<sup>489</sup>

124. All of the flotilla vessels, apart from the *Sofia*, responded to the radio communications.<sup>490</sup> The recordings from the radio network show the character of the responses that were received from the flotilla vessels. The captain of the *Mavi Marmara* said that he refused to stop since the purpose of the flotilla was humanitarian only, and because Israel did not have authority to act against the ship outside its territorial waters. When the captain of the *Mavi Marmara* was warned that if the ship did not stop,

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487 Questioner 2's testimony, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 1-2.

488 For the exact wording of the warnings, see para. 121 of this report. Questioner 2 testified that the messages were transmitted "word for word as they appear in the order, see Questioner 2's testimony, *Id.*, at 2.

489 *Id.*, testimony of interrogator 1.

490 See the *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 25; See also *IDF Completion Response of 7.11.2010*, *supra* note 486, at 6.

it would be responsible for the consequences, a response was heard on the radio network that if the Israeli Navy attacked the ship, it would be the Israeli Navy that would suffer the consequences. Subsequently two other responses were heard on the radio: 'Shut up, Israeli Navy, shut up!'<sup>491</sup> and "Shut up, go back to Auschwitz," followed by: "We're helping Arabs to go and get the US, don't forget 9/11, guys." Due to the fact that the radio was operated on channel 16, the international frequency, it is not possible to determine which of the vessels made these statements.

The second radio operator also stated in this regard:

'The responses [that were received from the flotilla vessels] were that we were prohibited from doing what we were doing. They always finished by emphasizing the fact that they were on the way to Gaza. As time passed, the responses became more extreme, as our communications became more resolute. They said all the time that they would reach Gaza but they did not say at any stage that there would be resistance to the takeover although they were told we were about to take them over. In one of the responses they said in English: "Go back to Auschwitz".'<sup>492</sup>

The first radio operator said in his statement: 'From the responses of the vessels it was possible to understand that there was a determination to hold a confrontation and to try to reach Gaza at any cost.'<sup>493</sup>

125. It should be noted that apart from the responses that were received by radio communications, there was no noticeable attempt to change course. The aerial lookout watching the video monitor during the incident (hereafter: **the aerial lookout**) stated: 'I began my shift at approximately 3:00 a.m. ... During the whole voyage and my monitoring of the ships I did not identify any change in the course of the *Mavi Marmara* or any of the other vessels.'<sup>494</sup>

491 See video file "Shut Up.wav", in folder 663 on *Navy Data Disc*, *supra* note 5. See also the recordings in the "Achi Hanit" folder within the "Winds of Heaven 7" folder, *Id.*; in his investigation by an IDF investigative unit following the event, the captain of the *Mavi Marmara* testified that during the questioning he answered the Israeli Navy's questions, changed course to about 180 degrees and sailed south about 75 miles from the Israeli shore. According to his claim this was the last time where contact was established with him until the time of the raid and at this time he did not receive any additional warning; see article: 03/06/10/825/5092 *Military Intelligence Reports* (Jun. 3, 2010), the folder containing the exhibit was marked by the Commission as folder 89 [hereinafter *Military Intelligence Reports*].

492 *Id.*; for the recording of the words spoken over the radio see CD *From Peace Flotilla to Terror Flotilla* submitted by the army (minute 3:00), found in a folder marked by the Commission as exhibit 89 of the Commission's exhibits.

493 Questioner 1's testimony, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2; see also the flotilla diagrams found in folder 89.

494 *Id.*, testimony of the aerial look-out, as well as testimony of questioner 1, at 2.

After the aforesaid four warnings were sent, no additional warning was given before the vessels were taken over. The first radio operator stated that he made sure that the communications were transmitted to all of the vessels, and that the reason why no additional warning was given was operational needs for a covert takeover of the vessels.<sup>495</sup>

### *Giving the instruction to take over the ships*

126. At the end of the warnings stage and when the flotilla vessels were at a distance of approximately 70 miles west of the coast of Atlit, the order was given to take over the flotilla vessels.<sup>496</sup> The order given by the Navy Commander was sent to the naval command post at Navy Headquarters, where the head of the Operations Division, Maj. Gen. Tal Russo, was also stationed, and also to the supreme command post. From there, the order was transmitted to the maritime forces' control center, which informed the takeover forces command, which, in turn, transmitted it to the commanders of the takeover force.<sup>497</sup>

Before the takeover operation began, and pursuant to the operation instructions and the order of Navy Command, at 4:06 a.m. communication blackouts were employed vis-à-vis the *Mavi Marmara*. According to the IDF, the screening activity did not affect the ability of the vessels to move safely. Despite the use of the screening, several short video clips and several messages were sent from the *Mavi Marmara* during the takeover operation.<sup>498</sup>

The takeover operation itself began at 4:26 a.m. with the takeover of the *Mavi Marmara*.<sup>499</sup> We shall now address this in detail. Thereafter, we

495 *Id.*, testimony of questioner 1, at 2.

496 See the Chief of Staff's Presentation, which was shown as part of the *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 25. See also the Chief of Staff's presentation on the Commission's website.

497 This order of actions is described in *IDF Completion Response of 7.11.2010*, *supra* note 486, at 6. It should be mentioned that according to the Eiland Commission's Report (though this is not mentioned in the IDF completion response submitted to the Commission) it arises that in accordance with the Chief of Staff's instructions to approve the takeover operation in real time, at 04:00 AM (half an hour prior to the start of the takeover operation) the Chief of Staff held a "telephone situation analysis" with the head of the Operations Directorate and approved the takeover in light of the status report submitted to him. According to what has been stated in the Eiland Commission Report the Defense Minister also called the command post about 15 minutes prior to the takeover, and was given a status update and the Chief of Staff's approval for the takeover by the head of the Operations Directorate (see *The Eiland Report*, *supra* note 402, at 54).

498 See *IDF Completion Response of 7.11.2010*, *supra* note 486, at 6.

499 The Chief of Staff testified that the action started at 04:28; See the *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 25; however from other materials before the Commission it seems that the operation started at 04:26; see *Eiland Report*, *supra* note 402,

shall briefly discuss the takeover operations of the other flotilla vessels, in which there were no loss of lives.

### *The takeover of the Mavi Marmara*

127. As we have said, the *Mavi Marmara* was the largest passenger ship among the flotilla vessels. At the outset we should state, which will be further elaborated below (see paras. 164-167, 190-201 below), that in retrospect it transpired that, *de facto*, the persons on board the *Mavi Marmara* fell into two main groups: the *first group* of peace activists, which was the largest group, whose members boarded the *Mavi Marmara* at the port of Antalya; the *second group*, which included both approximately 40 activists in the Turkish organization called IHH, who boarded the *Mavi Marmara* at the port of Istanbul and who marked themselves as a separate group by means of items of equipment and carried out preparations before the takeover operation began; as well as flotilla participants who were either individual activists or belonged to other organizations and who decided to take part in the violent incidents for various reasons. This second group, which for ease of reference will be referred to below as '**IHH activists**', was the one which partook in the violence on board the *Mavi Marmara*.

The statements and the materials, including the magnetic media, indicate that the takeover of the *Mavi Marmara* began with an attempt to board from Israeli Navy Morena speedboats. This attempt failed because of violent resistance on behalf of some of the flotilla participants, which included throwing objects at the soldiers, shooting water at them with hoses, cutting the ladders on which they were climbing with an electric saw, using lights to blind them, etc. At this stage, it was decided to take over the ship by means of fifteen soldiers who would fast-rope down onto the roof from a helicopter. The soldiers encountered extreme violence - three of them were taken to the hold of the ship after they had been wounded, two were shot, and others suffered serious physical injuries. In response, the soldiers resorted to shooting with less-lethal and lethal weapons. Ten minutes later, an additional force fast-rope down onto the roof of the *Mavi Marmara* from a second helicopter, which also encountered extreme violence, and assisted in the attempts to secure the upper decks. Ten minutes later, a third force fast-rope down from another helicopter, and assisted in securing the position and move to the command bridge. At the same time as the third force of combat personnel fast-rope down on

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at 96; the Commander of Center A's testimony, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 1.



to the *Mavi Marmara*, other forces climbed up from Morena speedboats, after the commander of the force on the Morena speedboats realized that apparently a soldier from the force on roof was missing (in fact, three soldiers were missing). The stage of taking over the *Mavi Marmara* ended after the combat personnel from the third helicopter took control of the command bridge and the Captain of the *Mavi Marmara* announced on the *Mavi Marmara's* loudspeaker system that the ship was under IDF control.

Below we shall review the stages of the operation and the takeover of the *Mavi Marmara* in particular, as it arises from the statements of the combat personnel who took part in the takeover. It should be noted, the purpose of this section of the report is to provide a broad description of the takeover of the *Mavi Marmara* and the violence that the IDF faced.

The first attempt to board the *Mavi Marmara* from the Morena speedboats

128. According to the takeover plan, in the first stage of the operation an attempt was made by the Shayetet 13 servicemen to board the *Mavi Marmara* from the sea, by means of two Morena speedboats (hereafter: **the first Morena speedboat** and **the second Morena speedboat**). The first Morena speedboat was commanded by the commander of "center A", the most senior commander in the entire force that was designated to take control of the *Mavi Marmara* (hereafter: **the Commander of Center A**).

The first Morena speedboat reached the *Mavi Marmara*, came alongside it and an attempt was made to raise the poles with climbing pegs on them in order to enable the combat personnel to climb onto the deck. The Morena encountered resistance that included the shooting of water from hoses towards it, blinding lights being directed at it and the throwing of various objects, such as pieces of metal, bottles and the shooting of glass marbles from slingshots. The Commander of Center A decided to allow the firing of paintball guns and the use of flash bang grenades, but after approximately a minute during which the resistance did not diminish, he decided to retreat with the Morena and allow the helicopter force to open up a path for boarding from the sea.<sup>500</sup>

129. The second Morena speedboat encountered resistance from IHH activists who threw various objects on the combat personnel, including iron bars, screws,

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500 The Commander of Center A's testimony, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 1; Team Commander R's testimony, *Id.*, at 1.; See also the testimony of soldier no. 19, who was also on the command vessel: "at this point there was lighting from 2 large floodlights (Xenons) from the direction of the ship towards the NSW boats, and the whole event was accompanied by a lot of noise and chaos. Likewise, I saw the activists on the boat using water hoses to spray the NSW boats", *Id.*



etc. The commander of the second Morena speedboat (hereafter: **Commander of the Takeover Force**) gave an instruction to fire less-lethal weapons (beanbags, paintball rounds and flash bang grenades) at these participants, and as a result some of the IHH activists left the side. At this stage, the combat personnel threw a ladder in order to make it possible to climb up. When they began to climb up, the Commander of the Takeover Force discovered that the metal part that held the ladder to the side of the ship had been cut. In view of the fact that IHH activists returned to the place where they were climbing up and began to throw objects at the force from there, the Commander of the Takeover Force decided to withdraw with the Morena speedboats.

The Commander of the Takeover Force stated:

'We obtained eye contact with the *Mavi Marmara*. I saw a very large number of activists who were waiting for us on the sides around the whole boat and on all the levels, including at the stern, on all the decks at the bow and on the sides...

As I said, the people on the sides, most of them were masked, some with gas masks, all of them with orange protective vests. The men held iron bars, slingshots, chains.

As we approached, I gave an order not to carry out any shooting at this stage, including with less-lethal weapons. When we came close to the stern, we began to receive a barrage of objects, anything that came to hand, including metal bars, metal chairs, large cans of tinned food, large screws, which hit the combat personnel and the boat. One of the combat personnel was hit by a blunt object in the face and was cut under the eye. Another of the combat personnel was hit by a metal object on the head, and I gave an order to fire less-lethal weapons at the persons using violence against us.

The persons on the lower deck of the stern ran back, while on the higher decks they continued to throw things on us...

As a result of the firing of the less-lethal weapons, the side was vacated and my combat personnel raised the ladders and attached them to the side. I should point out that during the whole stage of raising the ladders; we continued to receive a salvo of objects from the higher decks, which hit the combat personnel. The combat personnel requested permission to fire live ammunition, but I did not give them approval. It should be said that as a result of firing the less-lethal weapons, as I said, the persons on the deck had moved back and from my point of view as a commander, the less-lethal weapons had achieved their purpose and there was no need to fire live ammunition. I began to climb first up the ladder and at that stage the top part of the ladder collapsed, hit me in the face (the ladder is made up of a flexible rope ladder

with flexible metal rungs, at the end of which is a metal rung that attaches to the side of the ship). I looked at the rung and saw that it was cut with an electric saw. At the same time, we prepared another ladder for climbing up while we still alongside the ship, when at the same time the persons on board, the activists, who retreated as a result of the firing of less-lethal weapons, came back to the climbing point. At this stage they were on top of us. The distance that they were above us was approximately two meters and they *de facto* had a commanding position above me. In other words, they had the advantage of height over me. The activists returned to throw objects at us. At that stage, I heard them shouting "Allahu Akbar." I understood that whoever was making such shouts in such a "mad" and "extreme" way was exuberant, extreme and dangerous. We continued to receive a barrage of objects and because we were very close to the activists, I and the combat personnel were in danger. I hesitated as to whether to open fire and decided to withdraw with the boat. I made a report on the radio that there was major violence on the ship. I received an update that the same thing also happened on the other side to the second team that tried to climb up from the sea.<sup>501</sup>

At this stage, the commander of the second Morena speedboat made another attempt to board the ship from the sea, from the middle of the ship. This attempt also encountered major opposition from the IHH activists and the Commander of the Takeover Force decided to withdraw with the Morena speedboat and to wait until the helicopter soldiers open the side up for climbing.<sup>502</sup>

130. The aerial lookout stated about these events:

'During the preparations, I saw the activists on the ship preparing all kinds of objects. I saw persons with cameras and large numbers of persons gathering all along the decks.

When the Morena speedboats approached the ship, I saw a massive throwing of objects by the activists at our boats. I also saw several explosions that might have been shooting at the Morenas.

The Morenas moved away because they did not succeed in climbing up.<sup>503</sup>

It should also be noted in the recording of the aerial lookout's radio network, at 4:29 a.m. it is possible to hear reports from the Morenas of

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501 The Commander of the Takeover Force's testimony, *Id.*, at 2-3.

502 Commander of Center A's testimony, *Id.*, at 2-3.

503 Testimony of the aerial look-out, *Id.*

a heavy barrage of stones and bottles, and as a result, that the combat personnel were prevented from boarding the *Mavi Marmara*.<sup>504</sup>

The video recordings that were submitted to the Commission by the IDF document some of the resistance of the IHH activists at the stern of the *Mavi Marmara*;<sup>505</sup> thus, for example, the security camera that was placed on the lower level of the *Mavi Marmara* show at 4:26 eight men wearing orange life jackets, some of them wearing gas masks and one of them holding a wooden club, looking in the direction from which the first *Morena* arrived.<sup>506</sup> In a video film recorded by one of the flotilla participants on a digital camera that was in his possession (the camera's clock indicates that the recording began at 4:27 a.m.),<sup>507</sup> the first *Morena* can be seen coming alongside the stern of the *Mavi Marmara* while several IHH activists along the stern are shooting water at the *Morena* from hoses and are directing a searchlight at it. It should also be pointed out that during the film, which lasts 2:05 minutes, cries of 'Allahu akbar' from the IHH activists at the stern can be heard.<sup>508</sup> In two additional video clips, IHH activists can be seen carrying long poles, some of them wearing masks on their faces, one of them directing a searchlight at the *Morenas* and one of them is seen throwing something at the *Morenas*.<sup>509</sup>

It should also be pointed out that various video films show that after the attempts to climb up from the *Morenas* to the stern of the *Mavi Marmara* were stopped and the *Morenas* moved away, a group of IHH activists remained at the site, armed with long poles, some wearing gas masks and one holding a slingshot.<sup>510</sup>

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504 See file "Neshek Ham.mov" in folder *Air, Navy Data Disc, supra* note 5; this is a taping from a visual device along with calls over the radio as received in the *Zofit*. The video permanently displays a clock indicating the precise time of taping.

505 See *Navy Data Disc, supra* note 5.

506 See video files from the security camera in folder *Security Cam* in folder *Arab* in folder *Ruhot HaShamaim7*, on data hard disc received from the army, marked by the Commission as exhibit 133 [hereinafter *Arab Data Disc*].

507 NB: According to the properties of the digital camera file later seized by the IDF forces.

508 See: video file "00983.MTS" in folder *STREAM* in folder *BMDV*, in folder *AVCHD* in folder *Sony* in folder *Video, Arab Data Disc, supra* note 506.

509 See video file "SatilCam\_GoingOnBoard14" in folder *Sea, Navy Data Disc, supra* note 5 (carrying metal bars and aiming floodlights at NSW boats); See also video file "SatilCam\_GoingOnBoard13" *Id.* (carrying metal bars, throwing objects at NSW boats).

510 This matter is verified by two sources: the security camera positioned on the bottom deck shows that this group of activists remained in place between 04:30 and 05:04 (see: security camera video files in folder *Security Cam, Arab Data Disc, supra* note 506). The security camera files one of the activists is even seen hurling a marble with a slingshot at 04:44 (according to the security camera's clock) towards the water near the stern, and one of the activists was also seen throwing some object towards the water near the stern at 05:04 (according to the security camera's clock). This was also documented in the videotaped by one of the participants of the flotilla with a digital camera he was carrying. According

## Fast-roping down from the helicopters

131. *The first helicopter.* At 4:29 a.m. the soldiers began to fast-rope down from the first helicopter. In view of the violence that the navy force encountered<sup>511</sup> and the fact that on the roof of the ship there were approximately 10-15 IHH activists, the Shayetet 13 commander ordered the force commander in the first helicopter from which the soldiers fast-roped down (hereafter: **the third soldier** and **the first helicopter**, respectively) to prepare two flash bang grenades and to throw them before they fast-roped down from the helicopter.<sup>512</sup> The first helicopter arrived above the *Mavi Marmara* with fifteen Shayetet 13 combat personnel. Some of the soldiers on the helicopter identified dozens of people on the roof of the *Mavi Marmara*, some of whom were wearing what appeared to be orange life jackets and with gas masks on their faces.<sup>513</sup> The rope was lowered

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to the camera's clock the events were videotaped at 04:47, that is, at the height of the takeover action executed through descent by fast rope from the helicopters, as will be detailed later on.

- 511 From the testimonies by the soldiers it arises that they did not hear any report over the radio regarding what was happening on the NSW boats at the time, see for example soldier no. 1's testimony, at 1, ("we reached the ship with the helicopter, prior to my descent I didn't hear any report over the radio about what was happening on the ship"); at the same time it seems that the commanders received a report regarding the events, see the Shayetet 13 Commander's testimony, at 3 ("I am aware of the great number of people on the sides of the ship and the resistance"), as well as soldier no. 3's testimony, at 1 ("I hear over the radio that the naval force is meeting with violence and harsh aggression and that the decision is that the naval force will not climb up. I remember hearing over the radio that their ladders were sawn and objects, chains, chairs and forks were thrown at them"), *Inquiry Expansion of 20.9.2010, supra* note 451.
- 512 See soldier no. 3's testimony, at 1 ("the Shayetet Commander orders me to prepare two stun grenades"); see also the testimony of Shayetet 13 commander, at 4 ("at this stage I'm speaking with the commander of the first helicopter [soldier no. 3] and stress that before descending he should throw down a number of stun grenades in order to drive people away and allow the soldiers to descend and organize as a unified force"), *Id.* Soldier no. 5, who served as a team commander on the first helicopter testified: "I identify people down there and in the preliminary planning between the commander of the force and myself it was decided that in such a case of people concentrated at the place we were planning to descend to - we will throw stun grenades from the helicopter (pyrotechnic weapons) in order to drive the people away and allow the safe descent of the force." See soldier no. 5's testimony, 1, *Id.*
- 513 See testimony of soldier no. 1, at 1 (from the helicopter I identified about 15 people, some with smoke/gas masks on their faces/heads and most with life vests (in retrospect we found out that these were protective vests for all intents and purposes), testimony of soldier no. 3, at 2, ("I identify dozens of people there. 30-40 [thus in source] people on the roof, with life vests, gas masks, holding chairs"), *Id.*; By comparison soldier no. 4 testified in response to the question "what did you notice from above before descending?" that "there was light but I did not notice anything and the light was from the helicopter", testimony of soldier no. 4, at 1, and soldier no. 12 testified: "a little before arriving we open the door, the team commander and I are sitting with our legs outside the door and the soldier behind me is holding me according to procedure. We reach the area above

and two stun grenades were thrown.<sup>514</sup> Immediately after that, before the soldiers began to fast-rope down, the rope itself was tied to the radar antenna on the roof of the ship by IHH activists.<sup>515</sup> In view of this, another rope was thrown down from the other side of the helicopter, another flash bang grenade was thrown and the soldiers began to fast-rope down the second rope, not in the order of descent that was planned in advance.<sup>516</sup>

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the ship, I see a lot of people on the roof (15-20 people) in a group. I see they are wearing orange belts”, testimony of soldier no. 12, at 1, *Id.*

514 It is unclear whether one grenade was tossed or two. A number of soldiers believed that two stun grenades were thrown, while others believed that one was thrown. See *IDF completion response of 15.11.2010*, *supra* note 400, at para. K.

515 See testimony of soldier no. 3, at 2 (“after the rope was tossed out the right side two stun grenades (flash bang), as stated were thrown, in a short period of time the rope was taken and tied to the antenna on the roof, which endangers the helicopter and the the [thus in original] people descending. I’m in a spot where I am looking at the roof of the ship from the opening in the helicopter, the helicopter is hovering at a height of 25 meters over the ship. After the rope is tied to the antenna I understand that it is impossible to descend and give the order to throw the second rope from the other side. After the rope is thrown the soldiers begin gliding down on it”); See also the commander of the takeover force’s testimony, at 3 (“at this stage I see that the helicopter’s rope was tied and I told myself the helicopter is going to crash if the rope stays tied”). This was also testified by soldier no. 4 (who in reality was the third soldier to glide down from the first helicopter and was soldier 3’s radio operator): “Soldier no. 5 sat at the helicopter’s opening, noticed a number of people on the roof and threw a number of stun grenades in order to make them scatter, then threw the fast rope down and I noticed they were grabbing the rope and tying it”; testimony of soldier no. 4, at 1; See also testimony of soldier no. 5, at 1 (“at this stage the airborne mechanic throws the rope we’re preparing to glide down to the roof, immediately after I throw a stun grenade at the people coming to grab the rope. On the roof there is a group of about 5 people trying to grab the rope. The people on the roof grab the rope from the helicopter and pull it towards the radar antenna on the roof. Immediately afterwards I throw a stun grenade at the group of activists fiddling with the rope. The first grenade thrown causes shock for a second or two and the second grenade does not influence their behavior (it should be mentioned that grenades of this type only create noise and a flash of light). Afterwards I tell the soldier sitting next to me to throw the stun grenade he has”). See also testimony of soldier no. 12, at 1 (“the airborne mechanic threw down the fast rope, after he threw it down the people down there tied it to the radar antenna, we saw them fiddling with the rope and the team commander threw a flash bang grenade, the people down there were a little alarmed but since the grenades only make noise they understood that and went about their business”), *Inquiry Expansion of 20.9.2010*, *supra* note 451.

516 See testimony of soldier no. 1, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 1 (“Soldier no. 5 ordered me to throw the stun grenade, I threw it at the roof, the grenade detonated [...] the pilot gave an order to lower the first rope on the side opposite to me on the helicopter, the rope was lowered, I did not see this but in retrospect the rope was seized by the activists and tied to the body of the ship. The next stage was that they threw the second rope on my side, someone patted me on the back and signaled me to descend. I began gliding down to the ship[...]”); Testimony of soldier no. 5, at 1-2 (“by this stage the rope is tied to the radar antenna and is at a diagonal angle that does not allow gliding down it. At this stage we get an order on the radio to rappel. I update the force commander [soldier no. 3] that no option exists to descend on my side since the rope is at an angle that does not permit gliding down and the force commander decides to descend from the second side and updates me. At this stage we begin descending, due to the transition

It should be noted that the events mentioned above after the arrival of the first helicopter were recorded by video camera directed at the *Mavi Marmara* from the IDF's aerial observation post.<sup>517</sup>

132. The soldiers' statements and the video files transferred to the Commission that were filmed by various parties (including participants on the flotilla, video recording devices, etc.) indicate that the fifteen soldiers who fast-roped one after the other from the first helicopter encountered severe violence upon landing on the roof of the *Mavi Marmara*. This violence included the use of physical force and attacks on the soldiers using various means, such as wooden clubs, iron rods, slingshots, knives, etc., as well as the use of firearms. Three soldiers were taken below deck. The soldiers' statements indicate that they were astounded by the fierceness of the resistance. They had expected, at most, verbal resistance, pushing or punching, but not the scene of conflict that they encountered on the roof of the *Mavi Marmara*.<sup>518</sup>

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to the second side of the chopper (the rope on the planned side was tied), the order of descent is disrupted and we descend contrary to the original planning."); Testimony of soldier no. 4, at 1 ("Upon throwing [thus in original] we were told to open the second door and prepare to descend from the second door. This created a situation where the order of descent was slightly altered from planning and soldiers 1 and 2 were the first to descend and soldier no. 3 and I descended after them."); As well as testimony of soldier no. 12, at 1, ("soldier no. 1 goes down first and the whole order of descent is disorganized. First we descended in opposite order but later the order of descent was according to the arrival of the soldiers to the rope"), *Id.*

517 See file "Neshek Ham" in folder *Air, Navy Data Disc*, *supra* note 5.

518 See for example testimony of soldier no. 2 ("During the preparation the message was passed that we were expected to encounter activists who would try to hurt us emotionally by creating provocations on the level of curses, spitting, removing face covering etc. but we did not expect a difficult physical confrontation"), *Inquiry Expansion of 20.9.2010*, *supra* note 451; Testimony of soldier no. 5, at 4-5 ("From the outset we planned for a condition of resistance but we expected resistance that in the main would attempt to prevent us from boarding the ship. We expected screams, curses, shoving, even a violent clash but only blows [...] When I observe the incident from the helicopter as well as during the course of the descent I still feel that I am descending to moderate physical resistance rather than to a combat situation. In practice I find myself in a genuine battle [...] my life is in danger and I must defend myself and the rest of the soldiers in the team that I command"); Testimony of soldier no. 6, at 1-2 ("In the preparations and briefings they always briefed us that we were expected to encounter peace activists and therefore the prospects that we would have to use weapons or other means was very low and from my standpoint there was nearly zero probability [...] Even after I received blows and people jumped me to hurt me the call that they were yelling "hot weaponry and a team member has fallen" led me to feel that matters had gone awry"); Testimony of soldier no.12, at 5 ("there was a huge gap between what I prepared for which was boarding a ship while meeting resistance from 'peace activists', and a situation where I am fighting to defend my life"); testimony of soldier no.15, at 1 ("I understood that I was in a combat situation against people who were trying to kill me and not against peace activists as we had been briefed during combat preparation"), *Id.*

At the outset, it should be noted that in response to this resistance, the soldiers used force of various types: hand-to-hand combat, shooting with less-lethal weapons; including the use of flash bang grenades, Tasers, the shooting of paintballs and beanbags, as well as the shooting of live ammunition. The conclusions of the analysis of the legality of the use of force by the IDF soldiers, under the circumstances, will be presented below in paras. 232-239. At this stage, the topic of discussion is only a general description of the circumstances that prevailed at the time of the soldiers' fast-roping onto the roof of the *Mavi Marmara* as evidenced primarily by the statements of the soldiers who participated in the take-over of the *Mavi Marmara* and the magnetic media collected by the IDF and furnished to the Commission.

The soldiers stated that as soon as the fast-roping commenced, the number of IHH activists on the roof at least doubled. Soldier no. 1 (the first soldier to fast-rope from the helicopter) stated about this matter as follows:

"While I was still in the air, I saw that dozens of people were quickly joining the 15 people who were already there, and they were wearing gas masks, life jacket, and they were armed with iron clubs, rods, wrenches, axes."<sup>519</sup>

Soldier no. 3 stated: "As I was descending the rope, I saw that the number of people on the roof multiplied by four."<sup>520</sup>

The statements of the soldiers who fast-roped from the first helicopter indicate that they encountered a real resistance force, armed with clubs, iron rods, chairs, etc. In a 23-second video recorded by one of the flotilla participants who was on the roof of the *Mavi Marmara* when the soldiers descended from the first helicopter, one can see a number of soldiers rappelling on the rope from the helicopter, while the IHH activists, all of whom are wearing life jackets, beat them with clubs, hit them with fists, and kick them.<sup>521</sup> In the video, several soldiers are also seen lying on the deck, surrounded by IHH activists.<sup>522</sup>

The video of the *Mavi Marmara's* deck from the IDF's video devices on the aerial observation post also documents some of the violence employed against the IDF soldiers who descended from the helicopters.

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519 Testimony of soldier no. 1, *Id.*, at 1.

520 Testimony of soldier no. 3, *Id.*, at 2.

521 See video file "M2U0004" in folder *sony\_handycam(silver)#2* in Video folder, *Arab Data Disc*, *supra* note 506.

522 It should be mentioned that at the end of the video, an IDF soldier is seen firing a pistol at one of the IHH activists who is about a meter away from him and the latter falls to the floor.



According to what is seen on film, at approximately 4:32 a.m., the first soldier rappelled down the rope. As he reached the roof, four men attacked him, hit him, and dragged him. Other soldiers can also be seen as they are fast-roping down and are immediately attacked upon landing, with rods, objects thrown at them, pushing, and punching. The aerial lookout who operated the video device stated: "As they reached the roof, I saw severe violence directed at the soldiers, including beating them with crow-bars, railings, chairs, etc."<sup>523</sup>

133. Three soldiers, soldier no. 1, no. 3 and no. 4, were attacked, beaten, and thrown onto the lower deck, from where they were taken below deck.

Soldier no. 1 stated:

"When I reached a height of 2 - 2.5 meters from the ship, people grabbed the end of the rope and pushed me to the side. Before I managed to touch my feet to the deck, about ten people jumped onto me and began brutally beating me from every direction, using clubs, metal rods and fists, and whatever they could grab. The blows were over my whole body and were concentrated mainly in the area of my face and head. It is important to note that at this stage I was not armed - my weapon was fastened behind my back and in my vest pocket I had a taser (electric shocker) which was completely irrelevant in light of the brutal attack on me. At this stage I sensed a real and immediate threat to my life, and I tried to reach the weapon (a mini-Uzi) on my back. I only managed to open the clips that were securing the weapon but I didn't manage to reach the weapon. At this stage I was occupied with attempts to reach my weapon while trying to protect myself as best I could from a fatal attack from the mob, and I waited for the rest of the soldiers to arrive.

The attackers pushed me toward the side of the ship. Because of the large number of attackers, I did not manage to resist. A number of attackers grabbed me by my legs and my torso and threw me over the side to the deck below, about 3.5 meters.

Up until this stage, I did not see any other soldier aboard the ship, and, to my knowledge, I was the only soldier who had fast-roped onto the ship. Upon landing on the middle deck, I fractured my arm, and a mob of dozens of people attacked me and basically lynched me - including pulling off my helmet, strangling me, sticking fingers into my eyes to gouge them out of their sockets, pulling my limbs in every direction, striking me in an extremely harsh manner with clubs and metal rods, mostly on my head. I truly felt that I was about to die, way beyond what

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523 Testimony of the aerial look-out, *Inquiry Expansion of 20.9.2010*, *supra* note 451.



we define as life-threatening. The behavior of the people at this stage was definitely like fighters of an enemy which has come to kill the other side, that is, me. I felt that at any moment I would take a blow to the head which would kill me. At this stage the mob succeeded in tearing my vest off of me (which included the weapon) and the weapon fell out of the vest.

I realized that I would not be able to overcome all of the attackers and in order to save my life I tried to jump into the water but: (a) I was worried that I would not fall into the water but rather onto the deck below me; (b) the mob blocked my access to the side. At a certain stage I managed to reach the weapon, I cocked it, and I shot one of the attackers in his leg.

The considerations in shooting were as follows:

- 1) To distance the attacking mob from me and to minimize the injury to me.
- 2) To signal my location to the rest of the team on the ship and the fact that I was in distress and my life was in danger.

Immediately after I fired the shot, I took an extremely harsh blow directly to my head from a metal rod. This stunned me briefly, and in this second they grabbed the weapon from me. At this stage, I thought that the mob wanted to take me as a captive and use me as a bargaining chip for entry to Gaza or in general. A lot of blood began streaming down my face from the wounds to my head. The mob continued to hit me and push me forward inside the ship.<sup>524</sup>

Soldier no. 3 (the commander of the force on helicopter 1 and the third who fast-roped from this helicopter) stated about the events that preceded his being taken below the ship's deck:

"While descending down the rope I see that they are trying to throw different objects at us. I was struck with metal poles and rocks. As I reached the roof, I feel a very strong blow to the neck from behind, and I see around me about 15-20 people who are surrounding me - some of them have clubs, some have knives, axes.

They are all wearing orange life vests, some of them have *kafiyot* over their faces, some have gas masks, and some have their faces uncovered. I realize immediately that my life is in danger, I realize that the lives of the other soldiers who fast-roped and are fast-roping are in danger. I understand as the commander that I am not in control of the situation. I manage to withdraw my

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524 Testimony of soldier no. 1, *Id.*, at 1-2.

mini-Uzi which is secured on my back (the weapon is fastened to the protective vest, in a way that enables it to be "drawn" rapidly). While I'm drawing the weapon, I feel myself flying - as the result of being pushed.

Someone pushes me forcefully and I fall onto the side. I find myself sitting on the deck with my back to the side and facing all the people surrounding me. The people surrounding me have axes, knives, metal poles and clubs, and they're running towards me - it's a matter of a second or two before they reach me. I manage to cock the weapon and release two bullets.

I don't know if I have hit anyone or who. People immediately reach me, grab the weapon from me, and hit me with full force with poles and clubs. I sit against the side with my knees bent - my side is turned toward the side of the wall, hands protecting my face. A mob of people around me are hitting me with many blows, mainly towards my head. The people surrounding me are going berserk, and they're constantly shouting "Allahu Akbar". I feel the blows on all parts of my body and, as I said, many blows to my head. After about two minutes while the people are beating me and I'm trying to protect myself, I feel a number of people grabbing my hands and feet, lifting me up. In this second I realize that they intend to throw me over the side into the water. I resist, thrust wildly, struggle, but without success. It is important to state that also during this time I continue to take very strong blows to the abdomen. I am fighting with all my strength until a certain stage when they manage to get me over the side of the boat. I am holding onto the side, with my hands, and hanging from the side. At this stage, the people from above me are hitting my hands and a second group of people is pulling me from below by grabbing my legs.

Very quickly, I fall to the level below the roof. As I land, another group of people are running towards me. Here as well there are shouts of Allahu Akbar. I am lying on the deck, there are many people above me, one of the people jumps on me and I feel a sharp pain in the lower abdomen. I put my hand there and I feel a knife, and I realize that I've been stabbed, I instinctively pull the knife out of my abdomen. It is important to state that, during this stage as well, I'm taking many blows, including from clubs."<sup>525</sup>

Soldier no. 4, the signal operator for soldier no. 3 and the fourth who fast-roped from the first helicopter, stated:

"As I reached the deck, I noticed a terrorist with an iron crowbar waiting to strike me in the head, but when he tried to hit me,

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525 Testimony of soldier no. 3, *Id.*, at 2-3.

I pushed him, and immediately another four terrorists jumped onto me while one of them wrapped the chain around my neck and strangled me, while I am struggling with them I thought of drawing my pistol but I felt that if I drew it, because they were up against me and kicking me, I wouldn't be able to shoot and they would grab the pistol from me. At this stage, I lost consciousness (apparently from the strangling - I saw stars), and when I awoke, I felt that I was in the air, and three / four terrorists are throwing me from the roof to the bridge deck. I was very heavy, and I felt a very quick and forceful fall. About 20 men were waiting there with poles, axes and more, and as I fell (this seemed to me as if it were planned), they grabbed me and dragged me inside the ship."<sup>526</sup>

It should be noted that soldier no. 4 was critically wounded during this event. He suffered from a fractured skull, a hematoma in his right eye, and convulsions. After the event, he was anesthetized, placed on respirators, and operated on for a fractured skull.<sup>527</sup>

134. Two soldiers from the takeover force in the first helicopter were wounded by live fire, which, according to their statements, was shot at them by IHH activists: soldier no. 2 (the second soldier who fast-ropeed from the first helicopter) was shot in his abdomen by a bullet with 9 mm circumference; soldier no. 5 was shot in his right knee.

Solder no. 2 stated:

"Upon exiting, I didn't see what was happening below and I fast-ropeed, during which I feel pulling on the rope and that they're trying to knock me off. Even before I landed on the deck, I get punched with a club to the head and I realize I'm entering an extremely violent situation and not as I had planned. About five terrorists jump onto me and I'm fighting wildly with them. I was attacked with clubs, poles, metal chairs, fists, they strangled me and tried to throw me over the right side of the *Mavi Marmara*. I got down into a half-kneeling position and I held onto the railing (the rail of the ship). I realized my life was in danger and they're trying to kill me and throw me over in order to wipe me out. I felt that I was fighting for my life and that this was not a game of stopping a ship, but a battle for my life, and so I fought back hard.

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526 Testimony of soldier no. 4, *Id.*, at 1-2.

527 See *IDF completion response of 15.11.2010*, *supra* note 400, at para. P.

At this stage I felt a strong blow to my abdomen on the left side and I realized that it was likely that I had been wounded by a bullet in my abdomen....<sup>528</sup>

It should be noted that soldier no. 2 was indeed injured by a bullet wound in the abdomen, he underwent two surgeries, and he required physiotherapeutic rehabilitation.<sup>529</sup>

Soldier no. 5 was injured by severe violence used against him, including live fire into his right knee and stabbing with a knife. The soldier stated:

"I landed with my feet onto the deck, while I'm throwing off the rappelling gloves. I start to take blows from metal poles, and I also clearly discern a terrorist with an axe in his hand. I withdraw about four to five meters towards the stern in order to distance myself from the encounter by the rope, and a group of about six (and it felt like more) pursues me toward the stern. I clearly remember what the people had in their hands: there were three people with metal poles which were light-blue (the color of the ship). At first, I didn't realize what they were. I thought maybe they were a type of toy, but as soon as I got hit with one of the poles, I realized that they were metal poles. There were two people with knives drawn, running after me with the intention of stabbing me, and another person with a crow-bar - a tool made of metal, about a half-meter long, which was sharp on one end and flat on the other [...]

I'm surrounded by six people and another person who arrives a few seconds later. This person has a large camera tripod in his hand and he joins the terrorists and beats me with the tripod. My situation at this point is that, as I said, I'm surrounded by terrorists. They're beating me with poles. I'm getting hit all over my body. I take several blows to the face with the metal poles. I take many blows to the head, my head is protected by the helmet (after the battle was over, my helmet was completely smashed). I am getting blows to my body, which is protected by my ceramic vest. I'm trying to protect my face with my arms and my arms are getting beaten. One of my arms breaks [...] I am trying with this hand to take out my pistol, which is fastened to my leg in a holster, but I don't succeed, because they see my attempt to draw the pistol and they stop me by hitting my hand with metal rods. The fighting continues a little longer, and at this stage I realize I'm not managing to withdraw the pistol. I try to find a solution, and then a terrorist runs towards me with a knife drawn and

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528 Testimony of soldier no.2, *Id.*, at 2.

529 See *IDF completion response of 15.11.2010*, *supra* note 400, at para. P.

stabs me with full force in the chest. What stops the knife is the ceramic vest I'm wearing. The terrorist who tried to stab me seems surprised that the knife was stopped by the ceramic shield and I push him off of me with a blow towards his head. I realize that I need a weapon to defend myself. I run toward one of the terrorists who is attacking me, I grab the iron pole from his hand, and I use it to start striking back at the terrorists who are surrounding me - blows with the iron pole in my hand. I felt that from the moment I took the iron rod the blows increased. I started to feel their impact and it was hard for me to breathe. I also started to feel dizzy. At this stage, I feel a cut in the area of my ear or head, it isn't clear to me exactly where. I turn and see someone with a knife - I hit him with the iron rod and the person falls. When I turned towards the terrorist with the knife, my back was left exposed and the terrorists who were behind me struck a number of blows in the area of the back of my neck. I retreat a few steps and at this stage I stumbled; my right leg buckled under. I fall to the deck. I fall where underneath me there is an open entrance - the hatch on the right side of the roof. It's about a meter wide. The people above are trying to push me down through the opening to the level below, and, at the same time, they are trying to pull me down from below. I manage to see that underneath me on the deck a mob of people have gathered. I realize that, in a situation like this, I cannot let the terrorists push me downwards. I roll about a meter to the side in order to distance myself from the opening. At every stage, the blows with the poles continue, non-stop. I get hit in the head, the abdomen, and the legs. After I manage to get away from the hatch, I take a number of blows to the head and the back of my neck, and I lose consciousness. The next stage that I remember -- when I awoke from a very strong pain in my knee, I see soldiers from the unit under my command putting a tourniquet on me. During a number of minutes, I alternate in and out of consciousness. I hear a report by the soldier who is the commander of the medical team, transmitting a report about my condition. At this stage, I realize for the first time that I have been shot in the knee. I also realize that I have a slash in the ear and a slash in the head, and fractures in my arm, because my arm is distorted and I have severe pains in the elbow."<sup>530</sup>

Soldier no. 5 was indeed injured, *inter alia*, by a bullet shot in the knee (and he also suffered from blunt trauma to his head and abdomen, a

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530 Testimony of soldier no.5, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2-4; See also testimony of soldier no.6, *Id.*, at 2; Testimony of soldier no. 6, *Id.*, at 3; Testimony of soldier no. 7, *Id.*, at 1; Testimony of soldier no. 8, *Id.*, at 2; Testimony of soldier no. 9, *Id.*, at 1;

fracture in his right hand, a wound to his right ear and hemorrhaging in his ear drum), and he underwent surgery after the event.<sup>531</sup>

The extreme violence which was inflicted upon the soldiers when they fast-roped from the first helicopter onto the roof of the *Mavi Marmara* is also described in the statements of soldier no. 6,<sup>532</sup> soldier no. 7,<sup>533</sup> soldier no. 8,<sup>534</sup> soldier no. 9,<sup>535</sup> soldier no. 10,<sup>536</sup> soldier no. 11,<sup>537</sup> soldier no. 12,<sup>538</sup> soldier no. 13,<sup>539</sup> soldier no. 14,<sup>540</sup> and soldier no. 15.<sup>541</sup>

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531 See *IDF completion response of 15.11.2010*, *supra* note 400, at para. P.

532 See testimony of soldier no. 6, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2-3; In his testimony he described that upon his arrival to the Marmara a chair was thrown at him by one of the men on deck and this struck his face, another man attempted to choke him and he was severely beaten on the head until he fell to the deck bleeding. Likewise, an attempt was made to push him to the side of the ship and throw him to the lower deck.

533 Testimony of soldier no. 7, *Id.*, at 1; The soldier describes in his testimony that immediately after a chair was thrown at him by one of the “activists” (as he called them), another struck him in the head with a club, and so he fell to the ground and was beaten while lying on the floor.

534 Testimony of soldier no. 8, *Id.*, at 2; According to the soldier’s testimony immediately upon his arrival on the *Mavi Marmara*, three “terrorists” (as he called them) jumped him and beat him with clubs and attempted to choke him and break his neck.

535 Testimony of soldier no. 9, *Id.*, at ; In his testimony he describes how he was beaten with a crowbar in the head until his helmet came off and he fell to the ground. While lying on the floor he was beaten by about five people with bars, a chair, and their bare hands.

536 See testimony of soldier no. 10, *Id.*, at 1-2; In his testimony he describes that upon reaching the roof of the *Mavi Marmara* he was attacked by 4-5 “terrorists” (his term) who did not stop hitting him with bats/ metal sticks/ axes and attempted to push him to the side of the ship and throw him to the deck below. He goes on to describe how he was unable to reach the weapon which was secured on his back, and so withdrew into himself in order to lessen the severity of the injuries.

537 Testimony of soldier no.11, *IDF Completion Response of 7.11.2010*, *supra* note 486, at 1; In his testimony he describes running towards a number of participants who were beating one of the soldiers and they attacked him, beating him in the head and breaking his hand. Likewise he describes how a chair thrown at him broke the paintball gun he held (the gun was out of Commission and could not be used).

538 See testimony of soldier no. 12, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 1-2. In his testimony the soldier describes a chair being thrown at him and an attempt to stab him in the hand with a knife.

539 See testimony of soldier no. 13, *Id.*, at 2-3, where he describes a sensation of mortal danger and of a minority of soldiers facing a large number of violent activists. The soldier also described how he was caught by three resistors, one beat him with a metal bar, the second pulled him powerfully and made him dislocate his shoulder, and the three attempted to throw him over the side to a lower deck of the ship.

540 See testimony of soldier no. 14, *Id.*, at 1, where he describes how he noticed upon his descent to the roof of the Marmara that the soldiers in his force were surrounded, each separately, by a number of resistors armed with cold weaponry. He also described that he noticed one resistor aiming a revolver at several soldiers.

541 See testimony of soldier no. 15, *Id.*, at 1-2, where he describes how he noticed each one of the soldiers was surrounded by 3-5 activists, some of the soldiers were lying on the floor. The soldiers were beaten with clubs and metal bars. The soldier also saw one axe being used by the resistors. He goes on to describe two resistors running towards him with

135. In addition to the violence that the IDF soldiers encountered on the deck of the *Mavi Marmara*, the three soldiers who were abducted and taken below the deck of the ship by the IHH activists (soldier no. 1, soldier no. 3 and soldier no. 4) also stated that while they were held below deck, approximately forty minutes in duration, their equipment and weapons were taken from them, they were beaten, and the necessary medical treatment required in their condition was withheld from them.

Soldier no. 1, who was attacked and thrown onto the lower deck (a height of about 3.5 meters), stated that while he was held below deck, he was beaten on the head with clubs and IHH activists strangled him. Soldier no. 1 also stated that although he had a very deep cut on his scalp, the doctor who treated him only wiped the blood from his forehead. He described the events as follows:

"When they brought me inside [below the ship's deck], I realized that here my physical resistance would be futile and that I would not be able to fight them all, so I just looked for an opportunity to escape and jump into the water. At this stage, I was certain that I was going to die, and all kinds of scenarios started running through my mind: being executed by the mob, being executed and it being photographed to distribute around the world and show their achievement; abducting me and bringing me into Gaza (Gilad Shalit), etc.

At this point, I tried to think of ways to escape, like jumping into the water, jumping out of a porthole, etc. Afterwards, they dropped me further down below deck, while photographing me many times (video, stills, a real "press conference") and they continued to hit me, mostly in the head and mainly using clubs. With every blow I took to my head, I was worried that I would faint, or worse, that I would die. During all of this movement below deck, one enemy strangled me from behind and twisted my arms from the back, while we were moving, so that everyone who passed by me made sure to strike at me and take part in beating me.

After descending half of the staircase, I began to call, "Doctor, Doctor," and a doctor was brought to me. At this stage, I had a very deep slash in my head. The doctor "treated me" in front of the cameras, when actually the only thing he did was to wipe the blood from my forehead. He didn't touch the injury to my skull at all. [Subsequently, at a hospital in Israel, he was diagnosed with a very deep scalp wound and a fractured skull; the slash required 14 stitches.]. Afterwards, they took me below to the

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metal bars in an attempt to hit him, since he managed to get away, but in the end was struck on the hand (apparently by a different resistor).

passengers hall and lay me down on the couches, and one of the enemies guarded me while waving a club over my head. I asked for water because I thought I was going to faint from the loss of blood. At first they didn't bring me water, and only after about 10-15 minutes they brought me water."<sup>542</sup>

Soldier no. 3, who, as noted, was wounded by being stabbed in the abdomen with a knife, described being dragged below deck, while being beaten and his hands being pulled every time they grabbed onto something. The soldier also described his injuries at this stage - massive hemorrhaging from the abdomen with his intestines protruding, a deep slash on his left arm and blood streaming from his nose. According to his statement, a doctor who saw him at his request gave him only a gauze pad in order to treat his injuries, and he held the pad against his abdomen with his underwear. Soldier no. 3 also described that, below deck, his hands and feet were bound and he described the fact that a guard with a wooden pole was stationed by him. As he described it:

"At a certain stage, a number of people drag me into the ship. What's running through my head is that they're dragging me into the ship in order to kill me. I try to resist and to grab at anything along the way. Every time I resist, I get severely beaten. At the first stage, they are dragging me inside from the side into the staircase. Before they start to bring me down the stairs, they take my equipment off of me. I resist with all my strength, without success. I recall a lot of shouting there, madness in the people's eyes, hate. I realize that this is the end of me, and that they're going to kill me. They start dragging me into the stairwell, two people, one from above and one from below. I try to grab onto the banisters and the railings, the whole way - because I realize that, as soon as I get below and reach the lower level, they're going to kill me. I hear the second helicopter arriving, I hear voices, shooting, and explosions on the deck, and I hope that within a short time they'll come to rescue me, and I realize that this is my chance to stay alive. Every time I grab onto something, my hands get burns (the marks on my hands are still visible today).

While they're taking me down the stairs, my pants fall down and my shirt rises up - I see that I am bleeding massively, that is, I'm losing a lot of blood, and I can tell that part of my intestines are protruding (today I know that they came out as a result of pulling the knife out of my abdomen). I also notice a deep cut in my left arm, from which I'm also losing a great quantity of blood.

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542 See testimony of soldier no. 1, *Id.*, at 2-4.



I also feel blood flowing from my nose into my mouth. At this stage, I have no head covering because they removed it from me after they took off my equipment.

During the descent in the staircase, I identify soldier no. 4 lying on the lower level, surrounded by a large number of crazed people, while he's continuously being beaten. They're continuing to drag me down the stairwell - while doing so, my pants fall down and my shirt rises up. At this stage, they move a bit away from me, and I find myself surrounded by people with cameras, video and stills, and they photograph me a number of times, with photos and flashes. At this stage, I ask for a doctor and point to the cut in my abdomen. I receive a gauze pad, which I press against the wound in my abdomen and hold in place using the elastic of my underpants.

My picture of the situation at this point is like this. I was dragged two flights down the stairwell, I'm lying in the staircase - opposite the entrance to this level of the ship. Soldier no. 4 is lying at the entrance to this level, surrounded by people who, on the one hand, are photographing him and me, and at the same time they're continuing to beat him.

Two people I remember from this stage were wearing (green) Hamas flags wrapped around their heads, who were very eager to kill us. They tried to strangle me and soldier no. 4. The hate in their eyes was just burning. They told us in English that they were going to kill us. Apparently, what stopped them from succeeding was the people who prevented them from doing it. They pushed them away from the area.

Afterwards, they continue to drag me down another level through the stairwell, and they bring me into a large hall. Upon entering the hall, I identify soldier no. 1, whose entire face is covered in blood. They lay me down on a couch opposite soldier no. 1. The hall is large, with many couches and dozens of people in the hall. There are women in it, with covered faces, who are taking care of the wounded people, but not us. Just after they bring me down, they bring soldier no. 4, and lay him down on the couch next to me.

The current situation is that the three of us are in the hall on three couches. Soldier no. 1 is sitting, soldier no. 4 is lying down, and I'm lying down on the couch opposite them, at a distance of about three meters.

They tied my hands and feet with rope. They station a person above me who is holding a wooden pole in one hand, and with his other hand he's holding onto my arm. He beats me with the wooden pole, and he indicates to me with his hand to be quiet, and that any movement by me will result in harsh blows with

the wooden pole. Apparently as a result of the loss of blood, I started to become groggy. I notice a group congregating around soldier no. 4, I look in his direction and I see that they are sitting on him and beating him with harsh blows. Soldier no. 4 starts to convulse. Both soldier no. 1 and I started shouting in English for the doctor.

At this point, the activists brought water and poured it over his face and he stopped and lay down quietly. I was sure that at this point he was dead."<sup>543</sup>

Solder no. 4, the signal operator for soldier no. 3, suffered convulsions and lost consciousness while he was below deck due to the blows to his head. As he stated:

"About 20 people were waiting there with poles, axes, and other [weapons], and as I fell (this seemed to me to have been planned), they grabbed me and dragged me into the ship. I notice knives and they cut all of my equipment off of me, and they're also beating me the whole time, during which time I saw soldier no. 3 after they had stabbed him in the abdomen. I tried to get to him and to help him, and he indicated to me to be calm and not do anything crazy, so that they wouldn't injure me further. They took us down - I was pretty foggy - through the stairwell into the ship below deck. They brought us into a room, during which time I heard all kinds of shouting, which wasn't clear, but it sounded to me like Haneen Zoabi. I got to the room and on the way there I was beaten the whole time. In the room, there were many blue couches. They lay me down on one of the couches. There were two people, one of whom beat me the whole time while I was tied to the couch, and they also held me, and, during this, the guy continues to beat me, and there was another guy who tried to calm him down, but it didn't help. At this stage, I felt foggy and not good, I felt my head. I saw soldier no. 1 with his hand on his head, covered with blood, and one of the terrorists, while one of them was sitting on me the whole time (or this was the same one with a pistol in his hand) and whispering things to me the whole time in Arabic, and I realized that it seemed like I was going to die. At this point, I lost consciousness (from my friends' description, I also started to have convulsions).<sup>544</sup>

In a 34-second video taken by one of the flotilla participants, soldier no. 1 is seen inside the ship below deck, bleeding from his head and groaning in pain, while he is being guarded by an IHH activist wearing

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543 See testimony of soldier no. 3, *Id.*, at 3-5.

544 See testimony of soldier no. 4, *Id.*, at 2.

a life jacket and a gas mask and holding a large wooden club.<sup>545</sup> In a 20-second video, soldier no. 4 is seen lying on the floor, inside the ship below deck, while an IHH activist with a protective vest and an iron rod is holding him. Other people are seen who are photographing the soldier.<sup>546</sup> In another video, soldier no. 3 is seen while he is being forcibly dragged down the stairwell into the ships' interior by an IHH activist wearing a protective vest and a gas mask. The soldier is seen trying to hold onto the banister, he is forcefully pulled off, an IHH activist strikes him, and the soldier is bleeding from his nose.<sup>547</sup>

136. It should be noted that the statements of the three soldiers who were abducted indicate that the flotilla participants on the *Mavi Marmara* were divided into two groups: (i) the IHH activists and their supporters, those same participants who seized the soldiers on the roof of the *Mavi Marmara* and took them below the ship's deck, while withholding appropriate medical treatment from them; and (ii) the other participants whom they encountered below deck, who tried to protect them and improve their situation.

Soldier no. 1 stated about this:

"At this stage, I noticed that there were two types of people in the room:

1. Terrorists - very large and strong men, approximately ages 20-40, armed with cold weapons,<sup>548</sup> [footnote added] running back and forth and appearing as if they're in the middle of a military operation. Some of them spoke into Motorolas, transmitted reports within the ship and, other than not having uniforms, looked and acted like a military force in every respect.

2. The relatively moderate people - slightly older men and women who showed restraint, relatively, and did not attack me.

I noticed that there was a disagreement between the two groups; the terrorist group wanted to attack me and kill me, while the moderate group tried to protect me. At this point, I was worried that someone from the terrorist group would succeed in getting to me and shooting or stabbing me to death."<sup>549</sup>

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545 See file "M2U00007" on CD marked as exhibit 159 of the Commission's exhibits, received on Dec. 30, 2010. This event from a different point of view is also documented in another video, see "M2U00008", *Id.*

546 File "M2U00011", *Id.*

547 File "Hayalim" (01:06), *Id.*; See also "M2U00012" (17 seconds), *Id.*

548 The term "cold-weapon" is defined in the Even-Shushan Dictionary (Concentrated) (Hebrew) as a weapon that can injure or cause death by means of stabbing, or hitting, thus a weapon that does not have materials that produce fire or heat as the result of the use of gun fire (as opposed to a "hot weapon").

549 See testimony of soldier no. 1, *Id.*, at 3.

Soldier no. 3 also stated:

"There were two groups there, the one which tried to kill us and was just waiting for the moment when they would succeed. There was another group there which tried to calm things down, and they were actually the ones who prevented the extreme group from killing us."<sup>550</sup>

Soldier no. 4 stated:

"It is important to note that when I was below the ship's deck they tied me up, and there was one who pulled my hair the whole time, whispered all sorts of things in my ear, and beat me with clubs, and, simultaneously, there was one who restrained him the whole time."<sup>551</sup>

At this point, it should be noted that the chain of command was not fully aware of the abduction of the three IDF soldiers immediately upon their capture, but only after some time had passed. The material obtained by the Commission indicates that the aerial lookout discerned the dragging of soldier no. 1 and his fall from the roof to the lower deck as the events took place, and he reported over the radio his concern that soldier no. 1 had been abducted by the IHH activists on the *Mavi Marmara*. Thus, by means of a radio report at 4:39 a.m., the aerial lookout reported his concern to the Commander of Center A, and even asked him twice whether a soldier was missing on the ship. The Commander of Center A responded that he did not have contact with the force from helicopter no. 1 and therefore he could not respond.<sup>552</sup> Likely, the Commander of Center A understood that soldiers were missing from the force after the third helicopter arrived, as described below (between 4:46 a.m., when fast-ropeing from the third helicopter began, until 5:07 a.m., when the command was given to board the *Mavi Marmara* from the Morena speedboats.) The commander of the force on the second helicopter (hereafter: **soldier no. 21**), stated that when he realized for the first time that soldiers no. 1, no. 3 and no. 4 were near the bow of the ship (at approximately 5:13 a.m., as

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550 See testimony of soldier no. 3, *Id.*, at 6.

551 See testimony of soldier no. 4, *Id.*, at 3.

552 The sounds over the radio regarding the absence of soldier no. 1 can be heard on file "Neshek Ham.mov" in folder *Air, Navy Data Disc*, *supra* note 5. The time of communication between the aerial look-out (Tzofit) and the Shayetet 13 Commander can be seen from the clock appearing on the visual device; See also the testimony of Shayetet 13 commander, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 4, according to which "at this time I cannot establish radio contact with the commanders on board the deck in order to receive a report from them regarding the status of the force, in retrospect it was because all six soldiers or commanders who descended first from the helicopter were injured in one way or another and were in a situation where they could not talk to me."

described below), he was surprised because he had not known anything about soldiers from the force being missing.<sup>553</sup>

On this issue, the Chief of Staff, General Gabi Ashkenazi, testified before the Commission that the soldiers on the vessel and the commanding forces nearby only realized that the three soldiers were missing after about fifteen minutes.<sup>554</sup> The Chief of Staff added: "From our perspective, it is entirely clear that there is a lesson here, that we should have known about this earlier."<sup>555</sup>

137. *The second helicopter.* The soldiers who fast-roped from the first helicopter did not respond to the radio transmissions directed to them. Therefore, at this stage, the Shayetet 13 commander ordered another helicopter to the *Mavi Marmara* (hereafter: **the second helicopter**), which had been designated in the operation's plan as back-up for the first helicopter. There were 12 soldiers on the second helicopter. At 4:36 a.m., fast-roping began from the second helicopter, using two rappelling ropes.<sup>556</sup> The commander of the force on the second helicopter received a report from the commander of the medical team for the force on the first helicopter (hereafter: **soldier no. 15**) about the condition of the wounded and began moving towards the forward part of the roof, where, according to the soldiers' description, the IHH activists who had attacked the first helicopter's soldiers were gathered. The team advanced to the edge of the roof while searching the IHH activists, and a number of soldiers remained in order to secure the area. Upon reaching the edge of the roof's porch, the commander of the force stationed a few soldiers in positions controlling the roof, and ordered them to guard over the lower decks. One of the soldiers tried to descend through the roof's opening (the hatch) in order to get to the ship's bridge, but he encountered resistance. The commander decided to handcuff the participants on the roof in order to free additional soldiers for the mission of descending to the bridge. He stated: "I realize it's necessary to free up soldiers to expand the team descending below deck, and so we decided to handcuff the terrorists on the roof. I gave

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553 See testimony of soldier no. 21, *Id.*, at 4.

554 Transcript of session no. 13 "The Open Door Testimony of the Chief of Staff" (Oct. 24, 2010), at 32-33 [hereinafter *Chief of Staff's Open Door Testimony of 24.10.2010*]. It should be noted that in the Eiland report, it is stated that the forces were not aware of the abduction of the soldiers until after 43 minutes had passed, see *The Eiland Report*, *supra* note 402, at 106. It appears as if this statement is correct with respect to most of the force, however, as mentioned - and this is probably what the Chief of Staff referred to in his testimony - some understood that at least one soldier had been abducted prior to that.

555 *Id.*, at 33; See also *The Eiland Report*, *supra* note 402, at 112.

556 The time of the descent's start was estimated according to the clock on the visual device (Tzofit); See video file "Neshek Ham.mov", in folder *Air, Navy Data Disc*, *supra* note 5.

the order to handcuff the terrorists who were lying on the deck, and I handcuffed them while they were lying on their stomachs. I handcuffed their hands behind their backs so that they would be neutralized and no longer present a threat to the unit, and it would be possible to reduce the number of guards securing them."<sup>557</sup>

It should be noted that at this stage, the Commander of Center A approached the *Mavi Marmara* in the Morena speedboat and tried to transmit a message to the soldiers on the roof using a megaphone. According to his testimony, the order given to the soldiers on the roof was 'to move to the bridge, while using live fire if needed. I ordered the soldiers that in case there is a danger to their lives, they should shoot to hit the activists that are endangering the force, but for those who do not constitute a threat to their lives, shoot at the legs.'<sup>558</sup>

138. *The third helicopter.* At this point, the Shayetet 13 commander ordered the third helicopter, which had been designated to take control of another ship (the *Defene Y*), to alter its destination and fast-rope onto the *Mavi Marmara* to assist the forces there (hereafter: **the third helicopter**). At 4:46 a.m., fast-roping using two ropes commenced from this helicopter, on which there were 14 soldiers. The team secured the perimeter of the roof and toward the lower decks,<sup>559</sup> and made contact with the commander of the second helicopter, who gave them an assessment of the situation. The commander of the force (hereafter: **soldier no. 18**) decided to advance towards the bridge.<sup>560</sup> It should be noted that this force was not calibrated on the same radio frequency as the other teams, due to the change in their mission. Therefore, soldier no. 18's contact remained on the roof with instructions to make contact with the Commander of Center A or the commander of the operation, and report about the condition of the wounded. A small team remained to secure the roof near the opening to down below. The order given to this team was to shoot toward the ship's body (into the clear area) to deter the activists and, in the event of any danger to the forces, to shoot at the threat.

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557 See the testimony of soldier no. 21, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 3; It should be emphasized here that we are dealing with the takeover stage exclusively.

558 See testimony of the Commander of Center A, *Id.*, at 2; At the same time, in the completion response on this matter the Commander of Center A mentioned that in his estimation these calls were not heard by the soldiers on board the ship, since they did not approve or in any way acknowledge that they had received the order (see *IDF Completion Response to the Commission's Questions of 29.11.2010*, at para. 6, marked by the Commission as exhibit 147).

559 See testimony of soldier no.18, *Id.*, at 1; The reference is to a sector free of people and for purposes of determent and prevention of the advancement of people towards the sector.

560 See testimony of soldier no. 18, *Id.*, at 2.

## The Takeover of the Bridge

139. Soldier no. 18, commander of the takeover force on the third helicopter, mobilized his force and began preparing for the descent. During the descent, a door on the body of the ship opened at a distance of approximately two meters from the force, and two activists came out. According to the force commander's statement, they were armed with clubs and axes. The force shot live fire at one of them, he was wounded, and the second IHH activist dragged him back inside and closed the door. Soldier no. 18 shot several rounds through the window of this door, toward the ship's inner wall. On their way to the bridge, the force identified two more IHH activists with clubs. One of the soldiers in the force shot the two IHH activists in the legs. Upon reaching the area of the bridge, soldier no. 18 gave the order to enter while firing, and also shot a number of live bullets into the area clear of people. The force charged onto the bridge, where there were five people in addition to the captain of the *Mavi Marmara*. Those who were present on the bridge did not provide resistance to the takeover of the bridge, although, from an inner corridor of the vessel, marbles and screws were shot at the IDF soldiers from a slingshot. Soldier no. 18, the force commander, gave the order to shoot into the inner corridor, and if the shooting continued, at the legs of participants holding slingshots. This event is also described in further detail below.

Soldier no. 18 ordered the captain of the *Mavi Marmara* to stop the vessel. Everyone on the bridge, other than the captain, was handcuffed.<sup>561</sup> The captain issued an announcement over the vessels' public announcement system that the ship was no longer under his control, but was instead under the control of IDF soldiers, and he ordered all of the passengers to go inside the ship.

## Boarding by the Soldiers from the Morena Speedboats

140. While these events were taking place on the *Mavi Marmara* itself, the naval force continued trying to board the ship. From its location at sea,

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<sup>561</sup> Soldier no. 9 testified that during the takeover of the bridge they instructed the captain of the *Marmara* to stop the ship and the latter started talking in Turkish on his internal radio; Soldier no. 9 went on to state in his testimony that he found out that the captain gave an order to sabotage the ship. In fact, there was indeed a technical malfunction on the ship which was identified by a Navy Engineer Officer as a deliberate malfunction. See testimony of soldier no. 9, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2; See also *IDF completion response of 15.11.2010*, *supra* note 400; Testimony of Chief [Engineer Officer] of the *Bat Yam* [Navy ship], *Id*; Soldier no. 9 also mentioned that the captain, who was wearing a Kevlar vest, remained at the ship's wheel and began cursing the soldiers and demanding they get off the ship.



the force could see some of the events taking place on the *Mavi Marmara*, but with only a partial view due to its location. At a certain stage, the naval force on the Morena speedboats even saw a person thrown from the roof onto the lower decks.<sup>562</sup> Attempts to establish contact with the soldiers on the roof of the *Mavi Marmara* failed. Before the arrival of the third helicopter, and after receiving the radio report that there were two injured on the roof, the Commander of Center A instructed the first Morena speedboat to approach the bow. The force encountered resistance from water hoses, poles, glass marbles, etc., and another attempt to raise the ladders in order to climb aboard failed.<sup>563</sup> The Commander of Center A decided not to approve live fire at this stage, and to wait for the third helicopter to stabilize the situation and clear the side. The Commander of the Takeover Force on the second Morena stated that he heard shooting on the roof and requested permission from the Shayetet 13 commander to open live fire. The Shayetet 13 commander refused to give approval for shooting "in order to prevent deaths among the participants of the flotilla."<sup>564</sup>

Additional attempts to establish contact with the force on the roof failed (as stated above, the Commander of Center A, who was aboard the first Morena, tried calling to the soldiers with a megaphone). The Commander of the Takeover Force saw shooting at the navy's boats, but he could not identify the source of the shooting and he did not return fire.<sup>565</sup> The team commander R., who was on the first Morena along with the Commander of Center A, also saw shooting at the Morena, which struck the water near the Morena.<sup>566</sup> At this stage, the names of the wounded were transmitted by radio, and the first unit commander realized that a soldier from the first helicopter was missing.

At 5:07 a.m., the Commander of Center A gave the order for the soldiers on both Morena speedboats to board the *Mavi Marmara*.<sup>567</sup> The Commander of Center A issued an order to use deterring fire against the side of the ship in order to deter the group of IHH activists standing there. According to his statement, the deterring fire did not have the anticipated effect. Therefore, the forces used live fire towards two of the IHH activists

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562 See testimony of soldier no. 20, at 2, as well as the testimony of the commander of center A, at 1, *Id.*

563 *Id.*

564 See testimony of the Commander of the Takeover Force, *Id.*, at 4.

565 *Id.*

566 See testimony of the Team Commander R, *Id.*, at 1.

567 See testimony of the Commander of Center A, *Id.*, at 1-2; see video file "Neshek Ham. mov", in folder *AirNavy Data Disc*, *supra* note 5.



who were throwing various objects towards them.<sup>568</sup> The soldiers on the second Morena boarded on the right side, without engaging in any live fire.<sup>569</sup> The shooting led to the dispersal of the people at the vessel's stern.

The forces from both Morena speedboats boarded the *Mavi Marmara*. The Commander of Center A directed the Commander of the Takeover Force to secure the openings, realized that the takeover of the bridge had been completed, and went up to the roof to assess the situation of the forces which were there. The assessment he obtained was that the unit had two wounded and two soldiers missing.<sup>570</sup> The force prepared to descend to the halls to locate the missing soldiers. At this stage, and after the report by the ship's captain over the loudspeaker system that the vessel was under the control of IDF soldiers, a report was received about the events taking place at the bow -- the three soldiers who had been abducted were brought out and taken to the bow. Soldier no. 3 described in his statement that shooting was heard at this time.<sup>571</sup> Soldier no. 21, the force commander of the second helicopter, described in his statement that there was shooting from less-lethal weapons at the violent activists who were holding soldiers no. 1, no. 3, and no. 4.<sup>572</sup> Two of the soldiers, soldier no. 1 and soldier no. 3, took advantage of the opportunity, jumped into the water, and were picked up by the navy's first Morena speedboat from there they were transported to the INS Hanit missile ship.<sup>573</sup> Soldier no. 4, who had a serious head injury, remained on the bow. The Commander of Center A and soldier no. 21 reached soldier no. 4, conducted a preliminary medical examination, and the Commander of Center A gave the order to evacuate him to the roof.

Regarding the events which took place at that time, soldier no. 1 stated:

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568 See the testimony of Commander of Center A, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2; See also the testimony of Commander of Center A, *IDF Completion Response of 7.11.2010*, *supra* note 486, at 2.

569 See the testimony of Commander of Center A, at 2, as well as the testimony of the commander of the takeover force, at 4, *Id.*  
Video file "VIDEO\_100530\_003.asf", in folder *cd11* in folder *sea*, *Navy Data Disc*, *supra* note 5. There is another video taken by the IDF forces, where the gathering of resistors at the stern was documented, their scattering at one moment (the shooting from the direction of NSW boat 1 was not seen), and the ascent of the soldiers from the NSW boat to the *Marmara*; See: CD 5 *Takeover of the Mavi Marmara*, in a folder marked as exhibit 90 by the Commission.

570 See the testimony of Commander of Center A, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2.

571 See testimony of soldier no. 3, *Id.*, at 5.

572 See testimony of soldier no. 21, *Id.*, at 4.

573 See testimony of soldier no. 1, *Id.*, at 5.

"After some time, the ship's captain was heard saying over the loudspeaker system that the ship was now under the control of the soldiers, and that they are using live weapons, and that all passengers should go below deck. This announcement caused a lot of agitation below deck, and the mob began shouting "Allahu Akbar" and began to incite each other. Afterwards, they brought us and sat us down against the bow of the ship. At this point, I saw that soldier no. 4 was not walking on his own, but instead was being dragged. Two people were also dragging me. At this stage, I thought they were going to execute us at the bow of the ship, as an act whose purpose from their perspective was to execute one soldier (me) and to threaten that they would do this to the other two if they weren't permitted to enter Gaza.

After about ten seconds, they opened the door and brought me out towards the bow. The guard bringing me out held me a little less tightly, and he was waving with his hand to the right and to the left in the direction of our boats, which I understood was to show our forces that they were holding soldiers in their custody. I took advantage of the opportunity that he was holding me with only one hand, and relatively loosely. I jabbed my elbow into his ribs and jumped into the water. While I was trying to jump, the guard tried to grab me, but I managed to free myself and I fell into the water. I did this because I realized that this was the only way to save my life. As soon as I reached the water, I dove underneath, so that they would not be able to hit me from the ship. I took off my shirt while diving and swimming, and I intended to swim and dive rapidly in a "zig zag" to escape from the enemy on the ship. After my first dive, I rose to the water's surface and I saw a Morena speedboat approaching me and soldier no. 3 next to me, since he had also jumped from the ship, after me. The Morena arrived. We weren't able to climb aboard it on our own, and we were pulled up by the members of our force. The medic on the Morena began treating soldier no. 3. I looked back at the vessel and I saw soldier no. 4 leaning on the side of the ship, completely dazed / semi-conscious. I picked up an M-16 rifle that was in the Morena and I began shooting in the air into the clear area, and this was because I was concerned that the mob on the ship wanted to abduct soldier no. 4 back into the ship, and I wanted to deter them.

I shouted to soldier no. 4 that he should jump into the water, but at this point I saw several soldiers from our forces were joining up with soldier no. 4. Afterwards, I learned that soldier no. 4 suffered from a fractured skull and compression, and that the operation which the unit paramedic performed on the deck of the *Mavi Marmara* saved his life. Afterwards, the Morena

transported soldier no. 3 and me to the INS Hanit missile ship. As the Morena speedboat moved toward the missile ship, we passed by the commander on the Zaharon boat and I shouted to him that the terrorists had possession of the equipment and weapons of the three of us (soldier no. 3, soldier no. 4, and me).<sup>574</sup>

Soldier no. 3 stated:

"We lay there for what seemed to me something like an hour and a half (in hindsight I know that from the moment we fast-roped until I got outside, 43 minutes passed)....

The shouting continues the whole time, there is a lot of noise, many people are involved with us and shouting at us. At a certain stage, the announcement of the ship's captain is heard. The captain shouts to everyone to go inside all of the rooms. After the captain's announcement, a lot of stress and panic is created. There are people around us who are shouting and cursing the whole time, as I stated. The people are looking out the windows the whole time.

At the next stage, my guard is replaced by another guard. The new guard lifts me up. I ask him to undo the ties at my hands and legs. He releases the ties (the rope) for me, and he begins taking me to the bow, with the distance between us and the exit to the bow about 50-70 meters.

The move toward the bow is done through the hall. While we're moving, the guard is trying to strangle me. Every time I feel that I don't have any air, I try to shout and people release me from him, and they don't allow him to succeed in strangling me.

This attempt to strangle me was made several times. It is important to state that they brought soldier no. 4 before me, two people grabbed him on each side. He couldn't walk. They just dragged him along and lay him down on a couch by the door which exited onto the bow. They sat me down next to him and, while they're sitting him up, I see that someone is taking soldier no 1 outside. I rise up forcefully to try and go outside along with them, and I find myself outside with soldier no. 1.

I find myself outside together with soldier no. 1 and the "Turkish guard". I hear shooting, I turn around and I see the "Turkish guard" fleeing back inside.

Soldier no. 1 and I run to the side of the ship, jump into the water from a height of 12 meters, and start swimming toward our boats, toward the Morena speedboats. We climb aboard the Morena,

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574 See testimony of soldier no. 1, *Id.*, at 4-5.

where they start treating me, and from there they transfer me to the missile boat, and from there by helicopter to the hospital."<sup>575</sup>

Soldier no. 20, who was on one of the *Morena* speedboats which picked up soldiers no. 1 and no. 3, who had jumped into the water, stated:

"At this stage, we approached the right side of the *Mavi Marmara* (the back third) and, while we're approaching, I see two people jumping into the water (two figures) from the right side of the bow. It was already daylight. To the best of my recollection, the *Mavi Marmara* was no longer moving.

We didn't know who the two figures were who had jumped, and we approached with our weapons ready and identified soldier no. 1 and soldier no. 3.

Soldier no. 1 swam towards us rapidly. He reached us, and we saw him, and that his whole face was swollen and beaten and his head was open and his hand was also injured.

We saw that soldier no. 3 was swimming with difficulty. We looked at him. He said that his abdomen was cut and that he can't climb.

We lifted him into our boat. We saw that his arms were full of cuts, his face was swollen from blows and smashing, and he had an open slash in his abdomen from which his internal organs were protruding. He looked like he was in critical condition.

At the same time, we looked at the place where they had jumped from, and we saw soldier no. 4 leaning on the side of the *Mavi Marmara*, with his eyes open. We called to him and he didn't react. We realized that he was critically wounded.

At this stage, the boat of the naval command approached us and he told us that he would continue dealing with (taking care of) rescuing soldier no. 4 and that we should evacuate the wounded."

Soldier no 21 the commander of the force on the second helicopter, stated as follows about the shooting with less-lethal weapons, which enabled the escape of soldiers no. 1 and no. 3, and also about the situation of soldier no. 4:

"I was stationed at the left side of the roof, and suddenly I heard shouts from the right part of the roof: "They're taking soldiers no. 1 and no. 3 with them". At this point, daylight broke.

We employed the shooting of less-lethal weapons at those who had abducted them, by the soldiers who saw the event, and immediately afterwards I heard a shout: "They jumped into the water." I reach the right side of the roof and I see soldier no. 4

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575 See testimony of soldier no. 3, *Id.*, at 4-5.

leaning on the railing of the ship on the right side of the open deck (the lower deck). I can't tell that he is wounded, but I see that he is only in uniform without any equipment. I was in shock, I kept my eye on him, I didn't know that soldiers from our unit were missing.

I realize that apparently not all of the decks had been searched yet, and now I'm on the bridge deck, one level below, and he is three levels below us, and I shout to him to jump into the water. I see that he doesn't react, he looks dazed, but he doesn't react at all. At this stage my second-in-command and I jump down in order to get to him. After we have gone down one level, I reached the second level, and there I see that the corridor is full of people. I leave my second-in-command, and I go down the stairs to the open deck and approach soldier no. 4.

I immediately realize that he is not conscious. I see signs of trauma to his face. I move him away from the side, lay him down on the deck, and, at this point, the commander of the force arrives, together with his signal operator. He asks him if they shot him and if everything is okay. Afterwards, I pick him up and take him up to the treatment site for the wounded, where I met the paramedic, who instructed me to lay him down."<sup>576</sup>

## Taking Care of the Wounded

141. The soldiers' statements indicate that the soldiers treated the wounded throughout the whole operation.<sup>577</sup> After the takeover of the vessel was completed, at around 5:17 a.m.,<sup>578</sup> the stage of treating and evacuating the wounded in a more organized manner commenced. The statements of the medical team indicate that the prioritization for treating the wounded was based on objective medical criteria, such that some IDF wounded only received treatment after the treatment of wounded flotilla participants.<sup>579</sup> There were about 15 wounded IHH activists on

576 See testimony of soldier no. 21, *Id.*, at 4.

577 See for example the testimony of soldier no. 7, at 3 ("I started treating about 15 wounded among the people who attacked us earlier"); testimony of soldier no. 15, at 4 ("the doctors performed operations on them [the reference is to the activists on board the ship who attacked us]. This lasted for 4 hours when they treated all the wounded on the ship"); Testimony of Commander of Center A, at 3; In the testimony the commander describes receiving ongoing reports from the unit doctor treating the wounded, and that every wounded person - including the flotilla activists - received full medical treatment; 669 Unit Commander's testimony, at 2, which describes that when he reached the Marmara he noticed that the wounded had already received first aid and assumed it was administered by the Shayetet soldiers; See also the testimony of the Commander of the Takeover Force, at 7; Testimony of soldier no. 6, at 4-5; Testimony of soldier no. 10, at 2, As well as the testimony of soldier no. 13, at 5, *Id.*

578 *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 27.

579 See the testimony of the 669 Commander, *IDF completion response of 15.11.2010*, *supra* note

the roof<sup>580</sup> and eight wounded IDF soldiers, of whom three had critical injuries.<sup>581</sup> The doctor who boarded with the force from the second Morena speedboat stated that he handled the evacuation of a number of IDF soldiers who were critically wounded, and he testified to the critical condition of these wounded.<sup>582</sup> At this stage, the forces realized that some of the flotilla participants in the halls of the vessel were wounded, and thus an order was given to first bring all of the wounded out through the entranceways of the halls. A doctor, a medic, and a medical team were stationed at each of the entranceways and conducted the first examination of the wounded. From there, the wounded were taken up to the roof. At any given time, there were about six or seven doctors on the roof (including the director of an emergency room at Rambam Hospital). Providing medical treatment on the roof were also six paramedics, four medical teams and the soldiers from the rescue and airlift evacuation unit 669 (hereafter: **unit 669**), all of whom are trained medics. During the course of this event, treatment was provided by in total 18 doctors, six paramedics, about 70 soldier-medics and a senior doctor from unit 669, who assisted with the prioritization for evacuating the wounded. The commander of unit 669 stated that, upon his command, the doctors began stabilizing the condition of the wounded. Those wounded who were in stable condition were harnessed into evacuation stretchers, prepared for helicopter evacuation, and transferred to the helicopters. Fourteen field operations were performed on the deck of the *Mavi Marmara*. By 11:40 a.m., 31 wounded flotilla participants had been evacuated, 20 of whom were in critical condition and the rest moderately or lightly injured. The doctor stated that, around 12:00, he personally conducted a search inside the ship, during which he identified himself as a doctor and asked whether there were any more wounded. The doctor also stated that his assistant had conducted a similar search several minutes before him. At this stage, the medical team believed that there were no more wounded aboard the vessel.<sup>583</sup> Retrospectively, it was understood that there were

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400, at para. P; See also the testimony of soldier no. 9, at 4 (“my treatment was performed after the Turkish injured were treated”).

580 See doctor’s testimony, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2.

581 See also *The Eiland Report*, *supra* note 402, at 107.

582 See doctor’s testimony, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2. It should be mentioned that the doctor testified that “after evacuating all the wounded of our forces we begin treating the wounded among the activists on the roof” (his testimony, at 2). However, from other testimonies it seems that the medical treatment was performed according to objective medical criteria.

583 See doctor’s testimony, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 3; See also the testimony of the 669 Commander, *IDF completion response of 15.11.2010*, *supra* note 400, at para. P.

an additional 14 passengers in the hall who had bullet wounds. These wounds were discovered during the physician's examination which was conducted at the port of Ashdod.

142. The statements of the medical caregivers indicate that some of those injured resisted receiving medical treatment. The doctor stated:

"During this event, there were incidents of resistance to medical treatment in the middle of treatment, which I had never encountered during any other event. While performing a chest drain (thoracostomy), the wounded pulled the drain out himself, and tells me: "I want to die like a *shaheed*." (NB: The term "*shaheed*" is a word in Arabic whose literal meaning is "witness" but is also used to refer to a "martyr.") [explanation added] Nonetheless, we insisted on treating him and hoisting him up to the helicopter for treatment.

There were many other incidents like that, including pulling out intravenous infusions, etc."<sup>584</sup>

The doctor further noted that not one of the wounded died of his injuries from the moment that the medical treatment began, despite the resistance they encountered during the treatment and the complicated conditions under which the treatment took place, including a lack of certain medical equipment (and equipment that flew into the air due to the motion of the helicopters), the difficulty in transporting the wounded through the narrow corridors of the vessel and from the lower decks to the roof, and the lack of a complete picture regarding the number of wounded.<sup>585</sup> It is also noted that the Shayetet 13 soldiers on the takeover teams took part in treating and evacuating the wounded flotilla participants. Thus, for example, soldier no. 14 stated: "At the site for treatment of the wounded, I performed artificial respiration on one of the enemy who was wounded, and I put a tourniquet onto the leg of another who had a bullet wound in his leg."<sup>586</sup> Soldier no. 15 stated: "I performed artificial respiration on another two members of the ship's crew (the "activists") who were wounded, until the paramedic was available to treat them, and afterwards they were evacuated by helicopter. The doctor, the medics and the paramedics worked for hours and went from one to the next, treating them, inserting intravenous infusions, performing artificial respiration, and performing operations on all of the wounded who were on the roof, and then some of them were evacuated by helicopter to the hospitals. I even saw an incident in which one of the medics treated a

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584 See the doctor's testimony, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2.

585 *Id.*, at 2-3.

586 See testimony of soldier no. 14, *Id.*, at 3.

wounded and performed artificial respiration on him, and then when he became conscious again, he tried to get up and attack him."<sup>587</sup>

Apparently, already at this stage the handcuffs were removed from some of the flotilla participants who had been handcuffed during the takeover.<sup>588</sup>

It should be noted that those wounded who remained below deck also received medical treatment, some against their will. The Commander of the Takeover Force stated:

"All of the people slowly exited the halls, other than the Knesset minister and a number of activists who were not willing to leave, and in addition to those not willing to leave were those wounded who didn't agree to be evacuated. At a certain point, I ask the activists inside the vessel whether there is any medical personnel inside, and I ask them to connect us. [...]

After I asked the activists, their doctor approaches me, and I ask him about the condition of the wounded. He tells me that there are a considerable number of wounded who are not willing to be evacuated, some of whom are critically wounded and other activists are not letting them be evacuated. I take the decision that, despite the danger to my people aboard the vessel, I'm entering the halls to search for the weapons which had been taken from us and to evacuate the wounded from the vessel, despite their lack of desire to be evacuated, in order to save their lives. We enter the halls and begin searching, informing the activists that we're entering in order to evacuate the wounded. At this stage, we encounter resistance: the Knesset member and other activists block us with their bodies and try to prevent us from getting to the wounded. We move them aside using our hands, without hitting, just moving them aside, and we reach the wounded who are lying on the couches - we bring our doctor and start treating and evacuating the wounded. During the evacuation of the wounded, we conduct a search and look for weapons [...].<sup>589</sup>

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587 See testimony of soldier no. 15, *Id.*, at 5; see also the testimony of soldier no. 13, *Id.*, at 5.

588 On this matter see for example testimony of soldier 21, at 3-4, and testimony of soldier no. 12, at 4-5, *Id.*

589 See testimony of the Commander of the Takeover force, *Id.*, at 6-7.



## Evacuation of the Bodies

143. According to the soldiers' statements, the bodies were collected at a certain location on the roof,<sup>590</sup> covered,<sup>591</sup> transferred to the Morena speedboats, and then put aboard the navy's missile boat and transported separately to the port of Haifa.

The Shayetet 13 commander stated about this:

"We covered the dead in a respectful manner, on the side [...]

We covered the dead and transferred them to the Morena speedboats in a concealed manner, in order to avoid causing unnecessary flak, and also out of respect for them. They were transferred from the Morena speedboats to the missile boat, which brought them to the base in Haifa."<sup>592</sup>

## Taking Control of the Halls

144. While the wounded were being treated and the dead were being evacuated, the *Mavi Marmara* was boarded by the "Masada" unit of the Israel Prison Service (the "Masada" unit is the operational control unit of the Prison Service, deployed in prison facilities under the Prison Service's authority, and it is an operationally-ready force in its areas of specialization, which include handling serious violations of public order through the use of less-lethal weapons); also, a force from the special patrol unit of the Border Patrol, which included 51 male police officers and two female police officers, boarded the *Mavi Marmara*.<sup>593</sup> After the wounded had left the halls, the IDF soldiers ordered all of the flotilla participants to leave the halls. At this stage, the participants were checked in order to ensure that they did not possess any weapons. According to the soldiers' statements, the checks of the participants were done according to guidelines (i.e., searches of women's bodies were conducted only by female police officers),<sup>594</sup> and that "the searches were conducted

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590 See for example the doctor's testimony, *Id.*, at 2: "on the roof I found about 20 activists lying down, of them five killed and 15 injured, we gathered the wounded and the dead separately"; as well as testimony of soldier no. 13, *Id.*: "soldier no. 18 asked me to organize and separate the bodies of the terrorists from the wounded [...] soldier no. 14 and I collected the bodies (about 5 bodies)".

591 See the Commander of the Takeover Force's testimony, *Id.*, at 7, according to which the bodies were covered in sleeping bags found on the ship.

592 See testimony of Shayetet 13 commander, *Id.*, at 6.

593 A reduced force from the Masada unit boarded the *Marmara* at about 05:10, after the fighting on board the *Marmara* was finished. The main force boarded the *Marmara* at about 05:38.

594 See for example the testimony of soldier no. 14, *Id.*, at 3.

with respect, without undressing the people and while protecting their dignity."<sup>595</sup>

The material in the Commission's possession indicates that some of the flotilla participants were handcuffed, mainly young men who the forces were concerned would try to attack them or to cause a disturbance. The Shayetet 13 commander stated that he had instructed the soldiers as follows: "The soldiers were instructed to handcuff people who were acting wild or constituting a danger or threat to the soldiers, and they were instructed that they should not handcuff women, children, or the elderly, and this is what was done."<sup>596</sup> Soldier no. 15 also stated: "None of the women or the older people on the ship's crew (both men and women) were handcuffed. Only the young men who could act wild or attack us."<sup>597</sup> Soldier no. 10 stated: "It is important to note that I did not see even one woman or any older / elderly man who was handcuffed. The only ones who were handcuffed were suspected terrorists who constituted a threat to the security of our forces."<sup>598</sup> Knives, slingshots and marbles were taken from some of the IHH activists who were handcuffed.<sup>599</sup> The commander of the takeover force stated that even after the wounded were removed, the physical resistance of some of the participants continued:

"After all of the wounded were removed (about 10-15), I don't remember exactly, the resistance continued - physical, by some of the activists - including one of them struggling wildly, which required us to use force in order to stop him."<sup>600</sup>

It should be noted that in his testimony before the Commission on October 25, 2010, Muhammad Zidan, chairman of the Israeli Arab Monitoring Committee, stated that all of the flotilla participants were handcuffed.<sup>601</sup> However, Mahmoud Abu-Dabas, the head of the southern branch of the Islamic Movement, stated in his testimony on October 25,

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595 *Id.*

596 See testimony of Shayetet commander, *Id.*, at 2.

597 See testimony of soldier no. 15, *Id.*, at 5.

598 See testimony of soldier no. 10, *Id.*, at 3; though the commander of the takeover force testified thus: "we concentrate them at points on the open deck, frisk their bodies - perform a search to make sure they are not carrying any weapons, with the women coming out being searched by female YASAM police officers, and we handcuff everyone", but later he states: "we did not handcuff all the women and elderly people". See the Commander of the Takeover Force's testimony, *Id.*, at 6-7. For an additional description of the handcuffing of resistors on the roof for fear they would continue attacking IDF soldiers, see the testimony of soldier 24, *IDF Completion Response of 7.11.2010*, *supra* note 486, at 2.

599 On this matter see the testimony of soldier no. 11, at 2; Testimony of soldier no. 24, at 2, as well as Testimony of soldier no. 25, *Id.*, at 3.

600 See testimony of the Commander of the Takeover Force, *Id.*, at 6-7.

601 Transcript of session no. 15 "Testimony of Mr. Muhammed Zidan" (Oct. 25, 2010), at 11.

2010, that not all of the passengers were handcuffed, but rather "the decisive majority".<sup>602</sup> Additional evidence obtained by the Commission supports the conclusion that not all of the flotilla participants were handcuffed. For example, various video footage from aboard the *Mavi Marmara* after the takeover and before anchorage in the port of Ashdod clearly supports this conclusion.<sup>603</sup> Also, in the internal investigation conducted by the "Masada" unit following the takeover operation on the *Mavi Marmara*, it was noted that 195 passengers were under the supervision of members of this unit and were not handcuffed, and that only the "people with fighting potential" were handcuffed.<sup>604</sup>

145. During the aforesaid searches, knives and large sums of cash were found on some of the IHH activists. During these searches, magnetic media which was found was confiscated (the magnetic media included, *inter alia*, laptop computers, mobile phones, memory cards, hard discs, videos, diskettes, compact discs, movies, players, etc.; cameras were not taken, although their memory chips were).<sup>605</sup> During the searches, some of the equipment which had been taken from soldiers no. 1, no. 3 and no. 4 (the soldiers who were taken below deck) was found. Similarly, soldier no. 3's pistol was found hidden inside the halls, which as far as is known he had not managed to shoot before it was taken from him by the IHH activists; it was found with its magazine empty and the guard back (i.e. a weapon from which someone had shot all of its ammunition, without performing the operation after finishing the ammunition, which is standard IDF procedure).<sup>606</sup> Beyond this, no firearms were found on the *Mavi Marmara*, not even the weapons that had been taken from the two soldiers by the IHH activists. However, one soldier testified that he saw

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602 Transcript of session no. 15 "Testimony of Sheikh Hamad Abu-Dabas" (Oct. 25, 2010), at 33.

603 See for example video file "Salah\_is\_a\_live.mov", on folder 13, *Navy Data Disc*, *supra* note 5, taped after the takeover by the army forces, presenting several dozen men, some handcuffed and some not (the exact time of the video is unclear from the properties of the file submitted to the Commission, but it is clear that it was taped after the takeover and before the ship reached Ashdod's Port). See also video file "MOV023.mov", in folder *Memory Card*, in folder *Sea, Id.* (the video was shot on 31.5.2010 at 10:54, according to the file's properties).

604 See *Masada Unit inquiry* 11 (Oct. 5, 2010), the folder containing the inquiry was marked as exhibit 98 by the Commission. From the inquiry it arises that 314 passengers were handcuffed by Masada personnel, while the rest were handcuffed by IDF soldiers.

605 See *IDF completion response of 15.11.2010*, *supra* note 400, at para. N, according to which some of the magnetic media gathered at this stage was transferred to Israel by helicopter to be used by the IDF spokesperson and advocacy department. The rest of the material was transferred to the Document and Technological Capture Collection unit upon the vessels' arrival at Ashdod Port.

606 See *Id.*, at para. K.

a firearm being thrown into the sea.<sup>607</sup> Various other combat equipment was found on the *Mavi Marmara*, which apparently had been brought on board by the flotilla participants, including flares, rods, axes, knives, tear gas, gas masks, marbles, screws, vests with the crescent symbol, night vision devices (including two types of devices that amplify starlight through both or only one eye), etc.<sup>608</sup> The commander of "center B" (the commander of the force that took control of the *Sfendonh Boat 8000* and the *Gazze*, and who afterwards boarded the *Mavi Marmara* in order to assist) stated that he saw Molotov cocktails which had been placed in orderly stacks.<sup>609</sup> In addition, scarves, and flags of the Hamas movement and its military wing were found.

After the searches and the handcuffing had been completed, the flotilla participants were brought back into the halls, where they sat until arrival in the port of Ashdod. According to the statements of the combat personnel, the participants were given water and food during this stage, and they were escorted to the bathrooms upon their requests.<sup>610</sup> Similarly, according to the statements of the soldiers, at this stage the handcuffs were removed from some of the participants who had been handcuffed earlier, and from the ship's crew as well, and regarding others, the plastic restraints were replaced and put on more loosely.<sup>611</sup> It should be noted that one of the passengers on the vessel held an infant. According to the soldiers' statements, they permitted her to go to her bag in order to take supplies for the baby and allowed her to walk freely around the ship.<sup>612</sup>

It should be noted that during the searches conducted on the *Mavi Marmara*, no humanitarian supplies were found.

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607 See testimony of soldier no. 33, *IDF Completion Response of 7.11.2010*, *supra* note 486, at 2-3.

608 See testimony of Team Commander R, *Id.*, at 2, as well as testimony of soldier no. 15, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 5-6.

609 See the testimony of Commander of Center B, *Id.*, at 2.

610 See for example the testimony of commander of the Takeover Force, *Id.*, at 6-7, as well as the testimony of Commander of Center A, *Id.*, at 2.

611 See testimony of soldier no. 10, *Id.*, at 3; as well as testimony of soldier no. 27, *IDF Completion Response of 7.11.2010*, *supra* note 486, at 2-3. See also Transcript of session no. 11 "Testimony of Foreigners & Enforcement Administration Head" (Oct. 12, 2010), at 10 [hereinafter *Testimony of Foreigners & Enforcement Administration Head*], according to which: "some were taken off the ship handcuffed, most were not handcuffed. Some, those who were the provocateurs in the full sense of the word, they were handcuffed." This testimony receives support from a videotaped at Ashdod Port and submitted to the Commission by the Prison Service, see Video CD *Flotilla arrestees Ashdod Port* (Oct. 5, 2010), the folder containing the investigation was marked by the Commission as exhibit 98 [hereinafter *Prison Service Video CD*].

612 In this context see the testimony of soldier no. 26, *Id.*, at 2-3; testimony of soldier no. 25, *Id.*, at 4, as well as the testimony of soldier no. 27, *Id.*

## *The Takeover of the Other Vessels*

146. As stated above, five other vessels approached the coast of Israel on May 31, 2010, in addition to the *Mavi Marmara*: the boats *Boat Sfendoneh 8000* (hereafter: ***Boat 8000***)<sup>613</sup> and *Challenger 1*, and the ships *Defene Y*, *Gazze*, and *Sofia*. The IDF took control of these vessels after they refused to heed warnings that were transmitted to them. No loss of lives occurred on these vessels; although the soldiers encountered violence during the takeover of some of them, it was at a much lower level than they encountered on the *Mavi Marmara*. With respect to some of the vessels, force was used in order to complete the takeover. The actions to take control of these vessels are described briefly below, in the chronological order of their being taken over.

### ***Boat 8000***

147. The takeover of this boat commenced at 4:27 a.m, which carried approximately 48 participants and crew members (most of them were Europeans, and there were four Americans, a Jordanian, a Moroccan, a Lebanese and two Iranians). Nineteen soldiers boarded the deck from two Morena speedboats, which simultaneously approached the sides of the boat, after paintballs were shot at those flotilla participants who were standing on the deck and throwing various objects at the soldiers, to cause them to flee from the deck. During the takeover, the force encountered violence, including an attempt to seize a weapon from a soldier, pushing and shoving soldiers from the stairs to the lower level, physical clashes at close ranges, and barricading themselves onto the ship's bridge. During the takeover, physical force was used against the violent activists. Paintball rifles were used (157 paintballs were shot during the takeover; some of the paintball rifles were broken during the takeover operation); 4 flash bang grenades were thrown (a type of stun grenade that creates noise and temporary blindness, which is used for dispersing demonstrations and controlling disorderly conduct) and Tasers were used.<sup>614</sup> No live ammunition weapons were used during the takeover. During the takeover, four passengers were injured from hand-to-hand combat blows. These passengers refused to accept Israeli medical treatment, and they were treated by the ship's doctor while they were not

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613 In the ship's documents only the name SFENDONH appears. In IDF documents it is named "Boat 8000". In order to prevent confusion this ship will be called by the name given to it in IDF documents. See *Boat 8000-Sfendoneh Information Documents* located on the ship by the IDF and transferred to the Commission; marked by the Commission as exhibit 91.

614 See Navy Inquiry, marked by the Commission as folder 90.

handcuffed. Out of the flotilla participants who were on the deck of this boat, about five of the passengers were handcuffed at the time the bridge was taken over, and about three additional passengers were handcuffed at a later stage because they "tried to incite everyone [...] and they began calling out to rise up and resist, including passages in Arabic from the Koran."<sup>615</sup> According to the statement of the commander of center B, the senior commander of the force designated to take control of this boat, the handcuffing was done while the participants were sitting on plastic chairs, some of them were released during the journey to the port of Ashdod, and, with respect to others, the pressure of the plastic restraints was loosened after they complained about them.<sup>616</sup>

It should be noted that soldier no. 19 stated that, during the stage of the fast-roping from the helicopters onto the *Mavi Marmara*, this boat maneuvered in such a way that almost brought it onto a collision course with, and it also chased after, the command vessel (the *Zaharon*) for Center A (the force designated to take control of the *Mavi Marmara*). According to him, the boat reached a distance of less than twenty meters from the command vessel and, finally, after a sharp evasive maneuver, the command vessel managed to escape.<sup>617</sup>

No humanitarian supplies were found on this boat.<sup>618</sup>

### *Challenger 1*

148. The takeover of the *Challenger 1* commenced at 4:56 a.m. There were 17 crew members and passengers aboard (including six who held American passports, two who held British passports and one who held an Israeli passport). Prior to the takeover, the boat performed an evasive maneuver and the force had to conduct a pursuit in order to reach it. The Takeover Force Commander (the commander of the force which had been designated to take over the *Mavi Marmara*) further stated that the boat tried to run into the Morena speedboat carrying his force, and the Morena had to perform a maneuver to escape.<sup>619</sup> After the force reached the boat,

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615 See testimony of the Commander of Center B, *IDF Completion Response of 7.11.2010*, *supra* note 486.

616 *Id.*

617 See testimony of soldier no. 19, *Id.*, at 1-2.

618 See the testimony of commander of Center B, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2. See also *Civilian Policy Regarding Gaza Strip - Part B*, *supra* note 57, at appendix L.

619 See testimony of the commander of the takeover force, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 1: "Near the challenger ship it attempts to run our vessel over, and through aggressive maneuvering we evade it". See also in the testimony of soldier no. 20, *Id.*, at 1: "at this stage as I am moving fast towards the target I notice the Challenger sailing towards us quickly and trying to ram us. We performed an evasion from it and at the same time soldier no. 19 came up on the radio and told me to be careful since the challenger is

15 soldiers climbed aboard it from two Morena speedboats. On the deck of the boat, the soldiers encountered verbal violence and an attempt to push them. The dining hall was locked from the inside by the boat's passengers. During the takeover, approximately 15 paintballs were fired and Tasers were used against several flotilla participants.<sup>620</sup> The participants resisted receiving medical treatment and some were handcuffed by IDF soldiers.

No humanitarian supplies were found on the boat.<sup>621</sup>

### *Defene Y*

149. At 5:15 a.m., the takeover of this ship commenced. There were 21 passengers and crew members on board, all of whom were Turkish. Fourteen soldiers fast-roped onto the deck of the ship from a helicopter and took control, without any violent incidents being reported, other than verbal violence. It should be noted that the ship's cranes were placed in such a way that they interfered with the fast-roping from the helicopter, which required fast-roping from a greater height and a change in the fast-roping landing point (the fast-roping was conducted onto a location adjacent to the ship's bridge). It should also be noted that in the communications room that had been set up on the ship, the takeover force found movies which documented the crew members practicing the use of water hoses against a takeover. Also, cables had been strung out, and stones and metal rods had been placed along the sides of the ship. The ship's passengers were not handcuffed after the takeover.

The force commander stated:

"My general sense from the inquiry of the people and from the preparations aboard the ship was that the ship was prepared for a physical confrontation and provocation, and chose during our takeover not to do so, because they heard in real time (from the sailor) that there were wounded aboard the *Mavi Marmara* and so they were afraid."<sup>622</sup>

Humanitarian supplies were found on this ship (wheelchairs, medical equipment, sanitary items, cartons of clothing, toys, beds, carpets, blankets, etc.), as well as construction supplies (raw materials for

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headed for me. I approve the report and increase speed and manage to evade the target and approach the Marmara [...]"

620 See Navy Inquiry, *Execution Description Center C*, marked by the Commission as folder 90.

621 See *Civilian Policy Regarding Gaza Strip - Part B*, *supra* note 57, at appendix L.

622 See the testimony of commander of the Takeover Force, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2.



buildings, construction materials for structures, sheet metal, etc.).<sup>623</sup> For a complete list of the supplies which were on this ship, see annex "E".

### *Gazze*

150. At 5:45 a.m., the takeover of this ship commenced. There were 18 passengers aboard, all of whom were Turkish citizens. Nineteen soldiers boarded the ship from two Morena speedboats which approached the sides of the ship. The takeover of the ship did not involve violence.

The commander of center B stated:

"The field commander instructed me to advance to taking control of the *Gazze*. I updated the force and we headed to the *Gazze*. The field commander came up opposite me, while we were moving, and he told me that they had all surrendered and were on the bridge with their hands up. I boarded the ship, which was not moving at the time. All the people were gathered on the bridge and we went up, there was no resistance. The captain gave me the passenger list. There was full cooperation. We did not see any weapons or combat items of any kind. On the boat, there were about 18 people, who were very frightened."<sup>624</sup>

The ship's cargo included 1,358 units of cement and 304 units of metal girders.<sup>625</sup>

### *Sofia*

151. At 5:45 a.m., the takeover of this ship began. Aboard this ship were 31 passengers, of whom 28 held Greek passports and three were Swedes. Eighteen soldiers boarded the ship from two Morena speedboats which approached the sides of the ship. The soldiers did not encounter violence, although several participants did not cooperate and did not heed the soldiers' instructions. The soldiers ordered the passengers to accompany them, to descend from the ship's bridge, and to come to an assembly point designated on the roof in front of the bridge, underneath a shade netting. Several participants refused to cooperate, cursed and swore at the soldiers, and agitated and incited the rest of the passengers. These participants also grabbed onto the ship's railing and the metal fencing along the edges of the ship's bridge. Force was applied and a Taser was used in order to handcuff these participants. The material before the Commission also indicates that, during the attempt to move

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623 *The Civilian Policy Towards the Gaza Strip - Regarding the Claims of Human Rights Organizations of 31.10.2010*, *supra* note 217, at 30-31.

624 See the testimony of commander of Center B, *Inquiry Expansion of 20.9.2010*, *supra* note 451.

625 See *Civilian Policy Regarding Gaza Strip - Part B*, *supra* note 57, at appendix L.



these participants to the assembly point, five paintballs were fired at the lower parts of their bodies.<sup>626</sup> This matter is discussed below.

Humanitarian supplies were found aboard this ship (electric wheelchairs, medical supplies, cartons of clothing, toys, water tanks, etc.). For a complete list of the supplies found aboard this ship, see annex "E".

### *Treatment of the Flotilla Participants from their Arrival in the Ashdod Port until their Deportation from Israel*

152. The vessels in the flotilla began entering the port of Ashdod at 11:00 a.m. on May 31, 2010. The *Mavi Marmara* was tied up in pier no. 1 in the port of Ashdod on May 31, 2010, at 5:19 p.m.<sup>627</sup> Upon its arrival at the Ashdod port, "the baton was handed over" (authority was transferred) from the IDF forces to the Special Central Unit force (hereafter: **Yamam**), (the counter-terrorism unit of the Israeli Border Police), which took authority for control over handling the ships. Afterwards, the process of debarking the flotilla participants from the ships commenced. On the ships' gangways, another "baton handover" took place between the members of Yamam and the escort force composed of both a police officer and an IDF officer or a non-Commissioned officer. It should be noted that the flotilla participants were instructed to leave their personal belongings on the vessels. The IDF forces guarded the personal belongings, and after they were examined by the bomb-squad unit, they were collected by the IDF, with each bag being fastened with a security closure ("sealed with an individual number") and documented. The personal effects were searched by the military police and collected in separate containers, in accordance with the vessel on which the participants had journeyed.<sup>628</sup> It is noted that after the event, several investigations were conducted (some of which led to indictments) concerning thefts perpetrated by some IDF soldiers during the stage when they were in charge of guarding the personal belongings of the participants. This matter will be addressed below (see below, para. 160).

According to the investigation of the Prison Service, processing the arrival of the flotilla participants on land commenced at 1:00 p.m.<sup>629</sup> Four

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626 See the testimony of soldier no. 18, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 4; See also summary, *Id.*, at 10.

627 The *CHALLENGER 1* ship entered Ashdod Port at 11:00; *Boat 8000* entered Ashdod Port at 12:00; the *DEFENE Y* ship entered Ashdod Port at 15:19; the *GAZZE* ship entered Ashdod Port at 15:30; The *SOFIA* ship entered Ashdod Port at 16:25.

628 *IDF completion response of 15.11.2010*, *supra* note 400, at para. N.

629 *Operation "Winds of Heaven 7"*, 14 (investigative report by the Prison Service Commander, Oct. 5, 2010) marked by the Commission as exhibit 98 [hereinafter *Prison Service Investigative*

tents were set up in the Ashdod port: (i) the first was used for a security check of the flotilla participants who were taken off the vessels; (ii) the second was used for conducting hearings by the border patrol supervisor on behalf of the Population and Immigration Authority of the Ministry of the Interior, pursuant to the Entry into Israel Law, 5712-1952 (hereafter: **Entry into Israel Law**),<sup>630</sup> (iii) the third was used for conducting medical examinations; and (iv) the fourth was used to prepare the participants to be taken from the port of Ashdod to prison facilities or to Ben-Gurion airport.<sup>631</sup> It should be noted that the entire facility was a closed facility under the control of the IDF, that restrooms had been set up in advance, and that while in this facility, the participants were given drinking water and a something to eat.<sup>632</sup>

As the participants debarked from the vessels in the port of Ashdod, each one was searched with a metal detector (similar to the manner in which these searches are conducted in airports throughout the world). At first, the search was conducted by means of a magnetometric gate. At a certain stage, the magnetometric gate broke down and, therefore, searches were conducted with a hand-held metal detector by members of the "Nachshon" unit of the Prison Service.<sup>633</sup> In general, physical searches were not performed on the participants, other than instances in which the metal detector emitted an alert about the presence of suspicious metals. In the event that a physical search was required (which was required in about 20% of the searches, according to the Nachshon unit), the participant being searched was brought to a private examination stall.<sup>634</sup> The material before the Commission indicates that a search of a male was conducted only by a male and the search of a female was conducted only by a female.<sup>635</sup> It should be noted that during the search of one of the flotilla

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*Report*].

630 See fourth chapter of the law, which deals with expulsion and custody. It is particularly stated in para. 13(a) of Israel's Entry Law 5712-1952 that "anyone who is not an Israeli citizen or an immigrant according to the Law of Return, 5710-1950 and found in Israel without a Permit of Residence (under this law - an unlawful resident), would be expelled from Israel as soon as possible unless he has previously departed of his own accord".

631 See *Testimony of Foreigners & Enforcement Administration Head*, *supra* note 611, at 2.

632 *Chief of Staff's Open Door Testimony of 24.10.2010*, *supra* note 554, at 35.

633 On this matter see *Gaza Flotilla - Reference* (summation of events by Brigadier Yossi Mikdash, commander of the Nachshon Prison Service unit, Oct. 17, 2010), marked by the Commission as exhibit 130 [hereinafter *Nachshon Prison Service Unit Commander's Reference*].

634 Letter from Brigadier Yossi Mikdash, commander of the Nachshon Prison Service unit to the Assistant Commissioner titled *Gaza Flotilla - Reference*, reference no. 58740610, (Oct. 17, 2010), at para. 1, marked by the Commission as exhibit 130.

635 See *Testimony of Foreigners & Enforcement Administration Head*, *supra* note 611, at 10-11; See also *Nachshon Prison Service Unit Commander's Reference*, *supra* note 633.

participants, an alert was emitted by the hand-held metal detector when the instrument passed near her groin area.<sup>636</sup> The material which was transferred to the Commission from the Ashdod port security indicates that the participant wore overalls and that, in the aforesaid area, no metal was visible (zipper, buttons, etc.). The person conducting the search consulted with her supervisors about this matter, and it was decided to perform an additional search without the overalls. The participant was requested to enter the private examination stall, to which the entry of men was prohibited, and to roll the overalls down to her knees. The security of the port of Ashdod reported that the participant remained dressed in her shirt and her underwear. The person conducting the search performed the additional search with the assistance of a hand-held metal detector. When she received another alert, she asked the flotilla participant what she was concealing, and the participant withdrew her mobile phone. The mobile phone was transferred to the IDF representative on site; the participant was released for the rest of the handling by the other authorities in the absorption process.

Escorting and guarding of the detainees was conducted by the Nachshon unit (which is experienced in escorting and transporting detainees and prisoners), and members of the "Oz" unit of the Population and Immigration Authority of the Ministry of the Interior.<sup>637</sup>

After the security check, the flotilla participants were directed towards one of the 14 stations set up by the Border Control supervisor of the Population and Immigration Authority. When they were brought to the hearing before representatives of the Enforcement and Foreigners Department, those flotilla participants who were handcuffed were released from their handcuffs. At these stations, the participants were identified, their faces were photographed, and a hearing was conducted, with the assistance of interpreters.<sup>638</sup> According to the testimony of the director of the Enforcement and Foreigners Department, Mr. Yossi Edelstein, at this stage some of the flotilla participants engaged in passive resistance, but force was not used.<sup>639</sup>

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636 See letter from the Ashdod Port Director General's office to the Public Commission to Examine the Maritime Incident of May 31, 2010 (Dec. 21, 2010).

637 Transcript of session no. 15 "Testimony of Prison Service Commander" (Oct. 12, 2010), at 9-12 [hereinafter *Testimony of Prison Service Commander*].

638 See *Testimony of Foreigners & Enforcement Administration Head*, *supra* note 611, at 2, according to which there were about 40 translators in the area, including 26 speakers of Turkish, 8 speakers of Arabic, 4 speakers of French, one speaker of German, 3 speakers of Spanish, as well as many English and Russian language translators, and so on.

639 *Id.*, at 3; in this context it should be mentioned that Israel's Entry Law 5712-1952 does not require the unlawful resident's agreement for his expulsion from the State of Israel.

At the conclusion of the process, detention orders were issued (including a copy in the language of each detainee), authorizing the incarceration of each detainee until their deportation from the territory of the State of Israel. The arrest warrants give the detainee the right to remain imprisoned within the territory of the State of Israel for 72 hours, so that s/he can exercise the right to appeal the Ministry of the Interior's decision to deport him or her from the State of Israel before a detention court.<sup>640</sup> After the completion of this process, the flotilla participants were brought to the medical tent, which also had 14 stations (in enclosed stalls). At these stations, the participants were asked about their medical condition (with the assistance of interpreters), and they were examined by a physician or a medic. Afterwards, the flotilla participants were taken to the last tent, where biometric measures were taken (fingerprinting and photographing).<sup>641</sup> It should be noted that the investigation of the Prison Service indicates that this station was cancelled by the deputy commander of the Nachshon unit in the early stages of the absorption process due to the great overload which developed at this station. It was decided that the biometric measures would be taken in the prisons instead. However, the process was not completed at the prisons either, due to "overload and the absorption process in the wings."<sup>642</sup>

It should be noted that a movie delivered to the Commission by the Prison Services indicates that some of the flotilla participants refused to move through the various tents, and that members of the "Nachshon" unit had to drag them physically from place to place. It should also be noted that in the briefing which the commander of the "Nachshon" unit, Brigadier Yossi Mikdash, held on May 31, 2010, for members of the unit before the debarking of the flotilla participants from the vessels, it was explained that the flotilla participants should not be handcuffed, other than in exceptional circumstances and with prior approval.<sup>643</sup> It was decided that the official who could give approval in this context would be the deputy Commissioner of the Prison Services, except in the event that a spontaneous extraordinary event developed which required handcuffing even without the aforesaid approval.<sup>644</sup> During the absorption phases at the port of Ashdod, three flotilla participants attempted to attack personnel, and at the directive of the commander of the "Nachshon" unit, they were bound, with the use of force.<sup>645</sup>

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640 See para. 13(d) of Israel's Entry Law 5712-1952.

641 See *Prison Service Investigative Report*, *supra* note 629, at 22.

642 *Id.*

643 See *Prison Service Video CD*, *supra* note 611, where the briefing is videotaped.

644 *Testimony of Prison Service Commander*, *supra* note 637, at 16.

645 See *Prison Service Investigative Report*, *supra* note 629, at 15.

153. The process of receiving the participants at the port in Ashdod concluded on June 1, 2010, at 9:45 a.m.<sup>646</sup> Forty-five flotilla participants requested immediate deportation from the territory of the State of Israel, and thus they were escorted directly from the Ashdod port to Ben-Gurion airport by the Nachshon unit of the Prison Service.<sup>647</sup> The remainder of the flotilla participants were transported<sup>648</sup> to facilities of the Prison Service, distributed as follows: 604 of the detainees were transported to the "Ella" prison; eight of the detainees were transported to the "Givon" prison; 19 of the detainees were transported to the Prison Service's medical center for medical treatment; seven of the detainees, citizens of the State of Israel, were transferred to the authority of the Israeli police for interrogation and detention; and, after the interrogation, three of these seven were brought to the "Shikma" prison.<sup>649</sup> According to the Prison Service's investigation, the flotilla participants were not bound during escort to the prisons (other than three of the participants who were unruly at the port of Ashdod and were transported to the "Ella" prison)<sup>650</sup> and the men and women were transported separately.<sup>651</sup>

The material before the Commission indicates that the flotilla participants were imprisoned in open wings (other than during four daily counts),<sup>652</sup> they were permitted to meet with attorneys and with the consuls of the countries of their citizenship (19 attorneys and 45 consuls entered the prisons),<sup>653</sup> and they were given food, personal effects, track suits,

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646 *Id.*, at 6.

647 See *Id.*, at 45-46; It should be mentioned that these forty five participants were asked to sign a form according to which they waive their right to appeal the decision to remove them from the State of Israel.

648 All prisoners were transported in air-conditioned busses; according to the existing procedures in Israel, a bus that is not air-conditioned is unsuitable for use when transferring prisoners; see *Testimony of Prison Service Commander*, *supra* note 637, at 12-13.

649 *Id.*, at 3-5.

650 See *Prison Service Investigative Report*, *supra* note 629, at 23.

651 *Id.*

652 *Id.*, at 27.

653 *Id.*, at 26; It should be mentioned that after the event claims were made that the participants of the flotilla were deliberately kept from meeting with their lawyers. The material before the Commission (which includes, among other things, materials relating to the preparations made towards the reception of the flotilla participants, the Prison Service inquiry which was conducted afterwards), indicates that there was no deliberate intention to prevent the flotilla participants from meeting with lawyers. At the same time, there were certainly more than a few difficulties in this context derived from the short period of the flotilla participants' stay in Israel, the large number of participants, and the fact that they were held in open cells and the "Ella" prison staff had difficulty locating them when they were asked to attend various meetings. In this context see the Supreme Court's verdict in H CJ 4169/10, 4193/10, 4220/10, 4221/10, 4240/10, 4243/10 *Cohen v. Defense Minister* (still unpublished, Jun. 2, 2010), at para. 6 [hereinafter *Cohen* matter]; See also *Testimony of Prison Service Commander*, *supra* note 637, at 22-23.

and undergarments.<sup>654</sup> Also, most of the participants met with a social worker upon their arrival at the prison (special instructions were given regarding one flotilla participant who was identified as being in a state of emotional distress).<sup>655</sup> Apparently, during the detention phase, force was used during only one incident: while one of the flotilla participants was in the "Ella" prison, she blocked the path of the team commander from the "Nachshon" unit, and she refused to move from the location. With the approval of the deputy commander of the "Nachshon" unit, the flotilla participant was physically moved. In response, the detainee pushed the team commander, scratched her on the face, and tore her shirt. During the incident, force was used in order to control the participant.<sup>656</sup>

154. Pursuant to the directive of the Attorney General on May 31, 2010, the Israeli police opened an investigation against the flotilla participants, on suspicion of attacking IDF soldiers who took control of the *Mavi Marmara*, and other offenses. On June 1, 2010, the United Nations Security Council approved a presidential statement denouncing Israel's actions and called for the release of the vessels and the detainees, as well as the transfer of the corpses to Turkey.<sup>657</sup> On the same day, the Ministerial Committee for National Security Matters met and recommended, for diplomatic reasons, to release all of the flotilla participants and not to pursue the legal proceedings against them.<sup>658</sup> After he undertook consultations on this matter, the Attorney General adopted this position, and on June 2, 2010, he issued a written order permitting the immediate deportation from Israel of "the foreigners who arrived on the flotilla who are suspected of committing criminal offenses", on the grounds which he set forth.<sup>659</sup> Three petitions which were submitted to the Supreme Court against the decision of the Attorney General were rejected.<sup>660</sup> Therefore, the flotilla participants were transferred from the prison facilities to Ben-

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654 See *Prison Service Investigative Report*, *supra* note 629, at 27.

655 *Id.*, at 26.

656 *Id.*, at 23-24.

657 See *The Gaza Flotilla - response update 4* (compilation by Foreign Ministry, Center for Political Research, 1.6.2010), at 1, 4-5; marked by the Commission as exhibit 59.

658 Decision B/39 by the Ministers' Committee on Matters of National Security *Israel's Policy Regarding the Gaza Strip (Military and Civilian)* (Sep. 19, 2007) [hereinafter *Ministers' Committee on Matters of National Security Decision of 1.6.2010*], the folder containing the exhibit was marked by the Commission as folder 4.

659 See decision of Government Attorney General (Jun. 2, 2010).

660 See the *Cohen* matter, *supra* note 653; in the verdict the three petitions (HCJ 4221/10 submitted by Yekutiel Ben Yaakov, HCJ case 4240/10 submitted by the *Shurat Hadin* Organization, and HCJ case 4243/10 submitted by the *Almagor* organization for Victims of Terrorism) who asked to prevent the release of the foreign participants of the flotilla were rejected after the Supreme Court determined that the decision to release them was well within the bounds of the Attorney General's discretion.

Gurion airport, from where they were flown to the countries from which they had departed on the flotilla. Therefore, the duration of the flotilla participants' stay in the prison facilities of the Prison Service did not exceed forty-eight hours.<sup>661</sup>

It should be noted that after the flotilla participants were transferred to Ben-Gurion airport, about 40 flotilla participants who had met with Turkish diplomatic representatives at Ben-Gurion airport began to clash with police forces in the passenger hall of the airport. The confrontation was documented by several journalists who came to Ben-Gurion airport to document the deportation of the participants.<sup>662</sup> The material provided to the Commission indicates that, in order to control the outbreak, the Israeli police engaged approximately twenty police officers who used their hands and handcuffs.<sup>663</sup> The material further indicates that in one instance, a club was used against a disturbance defined by the Israeli police as an "exceptional disturbance". As a result of the event, six of those who were disorderly required medical treatment.<sup>664</sup>

### *The Deceased and the Wounded*

155. *The deceased.* As stated, upon completion of the takeover operation of the *Mavi Marmara*, there were, regrettably, nine deceased flotilla participants. Their bodies were transferred to the Abu Kabir Forensic Institute for a pathological examination. However, on June 2, 2010, Turkey contacted the State of Israel and requested that Israel transfer the bodies to Turkey that day.<sup>665</sup> The next day, Turkey furnished a written request that the bodies held by Israel be transferred to Turkey without autopsies being performed on them.<sup>666</sup> Although several alternatives were considered, such as including Turkish pathologists during performance

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661 According to the Chief of Staff's testimony the last passenger left Israel on Jul. 6, 2010, see the *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 29.

662 See *Prison Service Investigative Report*, *supra* note 629, at 24, 30; according to the investigation, the Prison Service was not involved in the event, but the riot delayed the pace of accompanying flotilla participants from the holding facilities to Ben Gurion Airport.

663 *Israel Police - Data Completion* (Dec. 14, 2010), at 1-2, found in folder marked by the Commission as exhibit 149.

664 *Israel Police - Data Completion* (Dec. 22, 2010), at 1, *Id.*

665 See letter from Rafael Barak, Foreign Ministry Deputy Director General, to Yossi Gal, Foreign Ministry Director General (Jun. 1, 2010), the folder containing the exhibit was marked by the Commission as folder 60; the letter details a phone request made by the Turkish Ambassador to Israel that the bodies be returned that same day.

666 Letter from Jülide Kayihan, deputy to the Turkish Ambassador to Israel, to Rafahel Barak, Foreign Ministry Deputy Director General (Jun. 2, 2010), the folder containing the exhibit was marked by the Commission as folder 60.



of the autopsy, it was ultimately decided to transfer the bodies to Turkey after performing only an external examination.<sup>667</sup> This is the place to note that the Commission is unable to identify the deceased by their names.

The findings of the external examinations are as follows:<sup>668</sup>

- Body no. 1: Bullet wounds: two in the abdomen-chest on the left side, one tangential wound on the left side of the abdomen, on the back from the right, on the right elbow, in the right arm, on the left hand, two on the left thigh. Superficial lacerations on the face, abrasions and scratches.
- Body no. 2: Bullet wounds: on the right side of the head, on the right side of the back of the neck, on the right cheek, underneath the chin, on the right side of the back, on the left thigh. A bullet was palpated on the left side of the chest. Abrasion on the right arm.
- Body no. 3: Bullet wound on the right side of the back of the neck, two bullet wounds on the right side of the back of the neck, a bullet wound on the right side of the abdomen, a bullet wound on the right side of the lower back, a bullet wound on the left back-buttock.
- Body no. 4: Bullet wounds: on the left breast, the left buttock, the right shoulder, the right thigh, the right calf, two in the left thigh. Subcutaneous bleeding on the right side of the forehead. Lacerations on the forehead. Various additional abrasions.
- Body no. 5: Two bullet wounds in the left shoulder, bullet wound in the right side of the chest, bullet wound in the right shoulder, bullet wound in the right thigh.

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<sup>667</sup> See folder 74 of the Commission's exhibits. The State of Israel has asked to clarify whether the authorities in Turkey wished that a pathologist on their behalf would accompany the process in Israel, on this matter see letter from Rafael Barak, Foreign Ministry Deputy Director General, to Ahmet Oguz Celikkol, the Turkish Ambassador to Israel (Jun.2, 2010); in response to Israel's request, turkey stated that due to time constraints it would not be able to send a pathologist as stated, see letter from Jülide Kayihan, deputy to the Turkish Ambassador to Israel, to Rafael Barak, Foreign Ministry Deputy Director General (Jun. 2, 2010), the folder containing the exhibit was marked by the Commission as folder 60.

<sup>668</sup> See *Pathological Report* (opinion by the National Center for Forensic Pathology, Jun. 1, 2010), the folder containing the exhibit was marked by the Commission as folder 74.



- Body no. 6: Bullet wounds in the forehead and the back of the neck. Abrasion wounds on the right side of the forehead, the nose, the right knee.
- Body no. 7: Bullet wounds on the left side of the chest, subcutaneous bleeding on the back, the left calf, and right elbow joint.
- Body no. 8: Bullet wounds on the front of the right ear, bullet palpated under the skin of the torso on the left side, two bullet wounds on the right side of the back, bullet wound on the right buttock, various abrasions.
- Body no. 9: Bullet wounds in the area of the right temple/back of neck, bullet wound in the left nipple, bullet wound in the area of the scalp-forehead on the left side, bullet wound on the face (nose), bullet wound on the left torso, bullet wound on the right side of the back, two bullet wounds in the left thigh, two bullet wounds as a result of the bullet passing through toes four and five on the left foot.

156. *The Wounded Flotilla Participants.* As stated above, approximately 55 wounded flotilla participants were brought to hospitals in Israel. Ten of the wounded were treated at the Chaim Sheba Medical Center at Tel Hashomer, six of the wounded were treated at Rambam Hospital, 14 of the wounded were treated at Beilinson Hospital, four of the wounded were treated at Hadassah Ein Kerem Hospital, and 21 of the wounded were treated at Barzilai Hospital.<sup>669</sup>

157. *The Wounded IDF Soldiers.* As stated above, nine IDF soldiers were wounded during the takeover of the *Mavi Marmara*. At the Chaim Sheba Medical Center at Tel Hashomer, four soldiers were treated (soldier no. 2, soldier no. 4, soldier no. 5, and soldier no. 7), two of whom had bullet wounds. Soldier no. 2, who had a bullet wound in his abdomen, required two operations. Soldier no. 4 underwent an operation on his head. Soldier no. 5, who had a bullet wound in his left knee, and had been severely beaten on his head and abdomen, was hospitalized for treatment. At Rambam Hospital, three soldiers were treated (soldier no. 1, soldier no. 6,

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<sup>669</sup> 31 wounded were evacuated by plane with Unit 669, 24 wounded were evacuated via the port of Ashdod, see *The Eiland Report*, *supra* note 402, at 146. The materials received from the various hospitals involved are found in the binder marked as Binder 147 by the Commission.

and soldier no. 3). Soldier no. 3, who had been stabbed in the abdomen, underwent surgery. Soldier no. 1 and soldier no. 6 were hospitalized for treatment in the hospital. Two IDF soldiers (soldier no. 9, soldier no. 11) were treated at Ichilov Hospital.

### Post-incident events

158. All of the vessels other than the *Challenger 1* (which left the pier where it was anchored in the port of Ashdod on July 13, 2010, and is currently anchored in the naval base marina in Ashdod) left the Ashdod port and are anchored in the port in Haifa.<sup>670</sup>

With respect to the cargo that was on board the vessels, it was agreed between the Coordinator of Government Activities in the Territories (hereafter: **COGAT**) and the UN Secretary General's envoy to the Middle East, Mr. Robert Serry, in accordance with COGAT's guidelines on these matters, that the humanitarian supplies and construction materials found on board the vessels would be transferred to the UN for use by its agencies in the Gaza Strip. The material furnished to the Commission indicates that, within the UN, it was agreed to divide the supplies between the various agencies in the following manner: (a) the construction materials - 70% would be transferred to the United Nations Relief and Works Agency (UNRWA) and 30% would be transferred to the United Nations Development Programme (UNDP); (b) the other supplies would be divided among UNRWA (which has received the supplies and materials for the benefit of the population under its care), the WHO (the World Health Organization of the UN, which has received the medical and medical-related supplies, including medicines, wheelchairs, etc.), and UNICEF (the United Nation's Children's Fund, which has received supplies and materials to distribute to children, including clothing, toys and backpacks). As of December 26, 2010, 114 trucks carrying humanitarian supplies from the flotilla's vessels that are the subject of this report had entered the Gaza Strip, in coordination with the UN agencies, from among a total of approximately 200 trucks.<sup>671</sup>

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670 The *Mavi Marmara* left Ashdod Port on 6.6.2010; the *Defney* and Boat 8000 left Ashdod Port on 11.6.2010; the *Sofia* left Ashdod Port on 6.11.2010; the *Gazze* left Ashdod Port on 17.6.2010; see *Flotilla to Gaza of 31/5/2010* (detail completion from The Ashdod Port Company LTD, 25.11.2010), found in folder marked by the Commission as exhibit 149.

671 See *Civilian Policy Regarding Gaza Strip - Part A*, *supra* note 52, at 30; see also Appendix C of *Civilian Policy Regarding Gaza Strip - Part B*, *supra* note 58; in general 35 trucks of concrete and eight trucks of building iron were brought in for seven UNRWA projects, as well as 71 trucks carrying an assortment of equipment (motorized carts, batteries, medical equipment and medicine, two water desalinization containers, generators, beds, and more). Goods not yet transferred and awaiting coordination with the UN include: (1)

159. The personal belongings of the flotilla participants were flown back to Turkey with the flotilla participants (after having been brought by naval officers to the "Ella" prison in Beer Sheva, where the prison staff refused to receive it because the flotilla participants were in the process of being transferred to Ben-Gurion airport).<sup>672</sup> Pursuant to instructions of the Ministry of Defense, 105 suitcases, which were returned by Turkey after they were not claimed, are being stored at the navy's supply base.<sup>673</sup> The magnetic media and the combat items found on the vessels were retained in Israel for further investigation.<sup>674</sup> It should be noted that, during the searches of the vessels after the event, additional personal belongings were discovered (wallets and documents), which were collected in six bags. These items were transferred to the representative of the Turkish embassy in Israel.<sup>675</sup>

It should be noted that in the prison cells in which the flotilla participants were held in the "Ella" prison, sums of cash were found in the amount of €3,500 and \$4,000. These sums are currently being held in the safe of the legal department of the Prison Service (the Commission has been informed that the Prison Service contacted the Foreign Ministry about this matter, but has not received any instructions regarding the handling of these sums).<sup>676</sup>

On September 15, 2010, the photography equipment which was collected in this event was transferred to a representative of the journalists, Mr. Danny Zaken, the chairman of the Journalists Association in Israel.<sup>677</sup>

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raw materials for UNDP projects and for two UNRWA projects; (2) three X-ray machines which the UN refuses to bring into the strip claiming there is no need for used equipment without warranty; (3) transportable structures (caravans) and the materials to construct them - as of Dec. 26, 2010 the UN has not been able to receive instructions on how to construct the transportable structures. This issue should be resolved by the UN in the next few weeks.

672 See *IDF completion response of 15.11.2010*, *supra* note 400, at para. N.

673 *Id.*; for a list of the equipment stored at the naval base see also appendix E, *Id.*

674 See *Complementary Information Regarding the Magnetic Media Captured During Operation "Winds of Heaven 7"* (Dec. 23, 2010), marked by the Commission as exhibit 158.

675 See *IDF completion response of 15.11.2010*, *supra* note 400, at para. N; see also the document signed by the Turkish representative approving the reception of the equipment, appendix D, *Id.*

676 See "The Turkish Flotilla - Cash Currency Found in the Prison Service's Possession (Prison Service Data Completion, Nov. 16, 2010), found in folder marked by the Commission as exhibit 149.

677 During the handing over of the equipment there was an exhibition of the equipment and there was also a repeated examination and physical count and comparison to the catalogues prepared; see letter from Logistical Operations and Assets Branch to the Public Commission to Examine the Maritime Incident of May 31, 2010 (Sep. 19, 2010), found in folder marked by the Commission as exhibit 165.

160. As stated, after the event, the Military Police Investigations initiated seven criminal investigations against 16 suspects for various incidents of theft of property belonging to the flotilla participants by IDF soldiers who had contact with the aforesaid property.<sup>678</sup> At the time of writing this report, three of the investigations have led to indictments against four defendants and the conducting of criminal trials (the proceedings in one have even concluded). The details of these investigations are as follows:

- a. Military Police Criminal Investigation Division, central region, file no. 67/10 - This case concerns the theft of a new laptop computer, two camera lenses and a compass which were seized on the *Mavi Marmara*, and entering into a conspiracy to commit the offenses of theft of the equipment which was seized on the *Mavi Marmara*. The investigation led to an indictment which was submitted in the military court against a recruits squad commander with the rank of corporal, who boarded the *Mavi Marmara* after it was anchored in the port of Ashdod and conducted searches aboard it. The defendant was charged with theft by a public servant, pursuant to Section 390 of the Penal Law, 5737-1977, and conspiracy to commit a crime, pursuant to Section 499(a)(1) of the foregoing law (file no. 430/10). After the indictment was submitted and as part of the plea bargain, the conspiracy charge was dismissed. On October 18, 2010, 2010, the military court sentenced the accused to the following: five months in prison (less the 39 days during which the defendant had already been imprisoned); a five months suspended sentence for three years; the maximum fine possible pursuant to Section 29 of the Military Justice Law, 5715-1955 (a sum of NIS 700 or three days imprisonment in exchange); demotion to the rank of private.<sup>679</sup>
- b. Military Police Criminal Investigation Division, central region, file no. 64/10 and Special Investigations, northern region, file no. 10/03 - This case concerns the theft of four laptop computers with a total estimated market value of approximately NIS 10,000, and their sale to another IDF soldier in consideration of a total sum of NIS 4,800. The investigation led to an indictment which

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678 See *IDF Response for Completion Request* (Dec. 7, 2010), the folder containing the exhibit was marked by the Commission as folder 148 [hereinafter *IDF Completion Response of 7.12.2010*]; *IDF Response for Completion Request* (Dec. 15, 2010), the folder containing the exhibit was marked by the Commission as folder 154 [hereinafter *IDF Completion Response of 15.12.2010*].

679 Indictment and military court protocol in case GOC (district) 430/10, *IDF completion response of 15.11.2010*, *supra* note 400.

was submitted to the military court against the recruits platoon commander with the rank of second lieutenant, and a sergeant in the recruits platoon, who boarded the *Mavi Marmara* after it was anchored in the port of Ashdod and conducted searches on it. The two defendants were charged with the offense of theft by a public servant, pursuant to Section 390 of the Penal Law, 5737-1977, and unbecoming behavior pursuant to Section 130 of the Military Justice Law, 5715-1955.

- c. Military Police Criminal Investigation Division, central region, file no. 66/10 - This case concerns the theft of a laptop computer and computer game console and conspiring to steal laptop computers which were seized from the passengers of the *Mavi Marmara*. The investigation led to an indictment which was submitted in the military court against a recruits squad commander with the rank of corporal, who boarded the *Mavi Marmara* after it was anchored in the port of Ashdod and conducted searches on it. The defendant was charged with the offense of theft by a public servant, pursuant to Section 390 of the Penal Law, 5737-1977, and conspiracy to commit a crime, pursuant to Section 499(a)(1) of the foregoing law.
- d. Military Police Investigation, central region, file nos. 63/10, 65/10, 68/10 and Special Investigations, northern region, file no. 3/10 - These cases concern the suspected offenses of theft by a public servant and the possession of stolen property by seven soldiers, the offenses of buying stolen property, and the possession of stolen property by five additional soldiers (a total of 12 soldiers). These cases concern the suspected thefts of portable computers, which were on the *Mavi Marmara*, by several soldiers who boarded the vessel and searched it after the takeover was completed, and their sale to other soldiers. The criminal investigation of these cases has concluded and the files were transferred for review and decision by the military prosecutor. The decision of the military prosecutor about these cases is pending.

In addition to the foregoing, on December 15, 2010, the IDF informed the Commission that the military prosecutor has instructed the Military Police Investigations to initiate another investigation, concerning the suspected illegal use of the credit card of an Italian citizen who was on board the *Mavi Marmara*. A complaint was transmitted to the IDF by the Italian ambassador to Israel on behalf of the Italian citizen, whose wallet was confiscated from him after the takeover of the vessel was

completed. Upon the complainant's return to his country, he claims to have discovered that unauthorized use had been made of his credit card, which had been in his wallet when it was confiscated.<sup>680</sup>

## **The Flotilla Participants and Their Activities: Additional Details**

161. The Commission was also requested to examine "the activities which were undertaken by the flotilla organizers and its participants, and their identity," pursuant to section 4.c of the Government's decision on June 14, 2010. These subjects are indeed integrally related to the matters which have been described above and which will be analyzed below. Nevertheless, the Commission find it appropriate to include additional details at this point in the report. As will be apparent, this information concerning the identity of the flotilla's participants and its organizers and the actions they undertook became known only after the events had taken place and after completion of the military operation. First, we will provide details about the identity of the flotilla's organizers. We will then discuss certain details concerning the identity of the flotilla's participants. Finally, we will describe the advance preparations undertaken by some of the flotilla participants in anticipation of the confrontation with IDF soldiers, as revealed by the documents and testimony obtained by the Commission.

## **The Organizers of the Flotilla**

162. The flotilla itself was organized by a coalition comprised of a number of organizations, of which the leading organization was the IHH.<sup>681</sup> The IHH organization is, as stated, a humanitarian organization with a radical-Islamic orientation, which was established in 1992 and which was formally registered in Istanbul in 1995.<sup>682</sup> The organization is headed by Bülent Yildirim. The organization conducts a broad range

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680 See *IDF Completion Response of 15.12.2010*, *supra* note 678. In the margins, it should be mentioned that the Commission has, by coincidence, learned of a television news story regarding the suspected theft of equipment on the vessels participating in the flotilla by some of the Ashdod Port workers, but the Commission could not locate additional information in this context.

681 See *IHH Flotilla Campaign Summery*, *supra* note 209.

682 *IICC report* (May 27, 2010), *supra* note 83, at 1; some of these details, particularly the general details relating to the IHH organization and its activities, were known in advance of the flotilla incident, at the same time, concrete details regarding the scope of the IHH organization's involvement with the planning of the flotilla, as well as concrete details regarding the participants themselves, were only found out later.

of humanitarian activities, and, within this framework, it operates in distressed regions in the areas of food deliveries, assistance projects for orphans, establishing educational facilities, hospitals and medical clinics, programs for vocational education, supplying medicines, building mosques, and preventing human rights violations throughout the world.<sup>683</sup> The organization also operates in various European countries through its branches.<sup>684</sup> However, alongside its humanitarian activities, the IHH organization provides support to radical-Islamic and anti-Western terrorist organizations.<sup>685</sup> The organization also supports the Hamas and does not conceal the ties between the organizations.<sup>686</sup> The ICC report dated May 27, 2010, states, *inter alia*, that the IHH organization is a member of the "Union of Good" coalition, and provides assistance to the Hamas by organizing public support conferences in Turkey in which senior Hamas officials took part, by providing significant amounts of funding to Hamas institutions in the West Bank (including associations which have been banned in Israel) and operating widespread activities in the Gaza Strip.<sup>687</sup> The organization has even established a branch in the Gaza Strip, which is headed by Muhammad Kaya. In January 2008, during a meeting of the organization's delegation with Ahmed Bahar a senior Hamas activist who serves as the deputy speaker of the parliament of the Hamas government in the Gaza Strip, the organization presented the extent of the assistance it provides to the Gaza Strip, and also announced that it would double this support in the future. In January 2009, the head of the IHH organization, Bülent Yıldırım, met with Khaled Mashaal, the head of the Hamas political bureau in Damascus. At this meeting, Mashaal thanked Yıldırım for the support that the IHH organization gives to the Hamas.<sup>688</sup> In January 2010, the leader of the IHH organization visited the Gaza Strip and even met with Ismail Haniyeh, the Hamas prime minister in the Gaza Strip.<sup>689</sup>

683 *ICC report* (May 26, 2010), *Id.*, at 1-2.

684 *Id.*

685 In this context see *ICC report* (Sep. 20, 2010), *Id.*, at 2, which describes an interview with an Iranian investigator named Yazdan Karimi to the Iranian news agency Fars regarding the IHH organization. In the interview, Karimi states that the IHH organization was founded in 1992 by Turkey's Mujahidin (Jihad warriors), where its immediate goal was to assist Muslims fighting in Bosnia-Herzegovina and other regions. At that time the Turkish Mujahidin asked for the assistance of the Red Crescent in order to provide aid to those injured by the war in Bosnia but their request was denied. Therefore, according to Karimi, the IHH decided to establish itself as an organization offering aid to Muslim nations in combat zones which would also aid other poor and vulnerable groups throughout various regions of the world.

686 *ICC report* (May 27, 2010), *Id.*, at 2-3.

687 *Id.*

688 *Id.*; see also *The Spittoon: Viva Palestina, Mahathir and IHH*, [www.spittoon.org/archives/4168](http://www.spittoon.org/archives/4168) (2009).

689 See *ICC report* (May 27, 2010), *supra* note 83, at 3; see also Velfecr: Gazze'de Göz Yaşartan



In 2008, Minister of Defense Ehud Barak declared that 36 organizations, including the IHH organization, which are members of the "Union of Good" coalition, an umbrella organization of over 50 Islamic foundations throughout the world and which transfers funds, *inter alia*, to the Hamas organization, were "prohibited associations".<sup>690</sup> In November 2009, the IHH organization sent an activist on its behalf, Mr. Izzat Shahin, to the West Bank in order to establish another branch of the organization there. In the context of his activities, Shahin raised tens of thousands of dollars for two leading Hamas associations operating in the West Bank.<sup>691</sup> Shahin was detained for investigation by the Israeli security forces in April 2010 on suspicion of financing terror and supporting the Hamas organization, and he was deported from Israel, upon the conclusion of the investigation, at the request of Turkish officials. It is further noted that on July 12, 2010, the German government also declared the IHH organization to be an "prohibited organization" because of its economic assistance and support to the Hamas, and in effect outlawed it throughout Germany.<sup>692</sup> In recent months, an American examination is being conducted to potentially declare the IHH organization as an organization that finances terror, i.e., an organization included on the "black lists" of the U.S. Treasury Department towards which economic sanctions can be imposed.<sup>693</sup>

It should also be noted that the IICC report dated May 27, 2010, states that in the past, the IHH organization maintained contacts with global Jihad elements, through which it assisted terrorist cells in Bosnia, Syria, Iraq, Afghanistan and Chechnya, mainly by giving logistical support for transferring weapons and funding.<sup>694</sup> However, the IICC report noted

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Büyük Buluşma (Video-Foto), [www.velfecr.com/gazza-de-goz-yasartan-bulusma-video-foto-1408-haberi.html](http://www.velfecr.com/gazza-de-goz-yasartan-bulusma-video-foto-1408-haberi.html) (2010).

690 Declaration 5822 by Defense Minister *Declaration of Unlawful Organization - Union of Good 3521* (May 26, 2008) [www.mod.gov.il/pages/general/pdfs/teror.pdf](http://www.mod.gov.il/pages/general/pdfs/teror.pdf); it should also be mentioned that in May 2008 the United States officially declared the Union of Good to be an organization sponsoring terrorism and as such it was included in the "black list" by the Treasury Ministry in Washington D.C., found in the folder marked by the Commission as exhibit 149.

691 Hebron Islamic Charity Society and Al-Tadhamun organization in Nablus; see *IICC report* (May 27, 2010), *supra* note 83, at 4.

692 See the statement made by the German Minister of the Interior de Maizière, *Completion of Required Facts from the Foreign Office 1* (data completion by the Foreign Ministry, Nov. 22, 2010), in folder marked by the Commission as exhibit 149: "The IHH offers knowing and focused support to organizations directly linked to Hamas [...] and thus enables Hamas to allocate more financial resources to fund its terrorist activities. The IHH thus lends support to the increase of violence and terrorism in the Palestinian Authority's territories". Though we are dealing with two separate branches of the organization there seems to be a connection between the German branch and the Turkish branch.

693 *Id.*, at 2.

694 *IICC report* (May 27, 2010), *supra* note 83, at 5-8; Danish Institute for International Studies,



that it did not possess updated information regarding the aforesaid links of the organization.<sup>695</sup> In his closed testimony, the head of the Mossad testified that the Mossad's assessment was that some of the funds raised by the IHH organization were provided to the Islamic Jihad.<sup>696</sup>

The IICC report dated June 20, 2010 implies that there is a connection between the IHH organization and the government of Turkey. The leader of the organization, Yildirim, enjoys close relationships with the most senior members of the Turkish government, including the Turkish Prime Minister, Recep Tayyip Erdoğan.<sup>697</sup> It should be noted in this context that the protocol of a meeting held on May 16, 2010, among representatives of the leading organizations that participated in the flotilla and several captains of vessels planning to join the flotilla (hereafter: **protocol of the flotilla leadership meeting**), which was taken from the computer of one of the flotilla participants, indicates that the IHH deputy president, Yavuz

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an independent research institute which deals with interdisciplinary research into international issues, in 2006 study presented the organization's connections with the Al Qaeda organization, see, Evan F. Kohlmann, *The Role of Islamic Charities in International Terrorist Recruitment and Financing*, DANISH INSTITUTE FOR INTERNATIONAL STUDIES, (2006), available at [www.diis.dk/graphics/Publications/WP2006/DIIS%20WP%202006-7.web.pdf](http://www.diis.dk/graphics/Publications/WP2006/DIIS%20WP%202006-7.web.pdf).

695 This study, which was conducted by senior American terrorism researcher, Dr. Evan Kohlman and dealt with the involvement of charity organizations in assisting terrorism, mentioned among other facts that in December 1997 the Turkish authorities launched an investigation regarding the IHH organization following a claim that senior members of the organization purchased automatic weapons from extremist Islamic organizations. Following this there was a raid on the organization's office in Istanbul, activists were arrested and weapons and explosives were found along with instruction on how to make bombs, a flag with a jihadist message, and various documents which reveal that the members of the organization planned to take part in jihadist activities in Afghanistan, Bosnia, and Chechnya, *Id.*, at 10-11. The research also quotes a report composed by French intelligence which states that the leader of the organization, Bülent Yıldırım, has directly acted in the past to recruit former members of the military to jihadist activity. The report also mentions that a number of activists were sent by the IHH to combat zones in Islamic countries with the goal of obtaining combat experience and that the IHH organization provided Muslim combatants in these countries with financial aid, weapons, and explosives. The research also mentions that an examination of the phone calls conducted by the IHH activists in Istanbul in 1996 reveals repeated interactions with an Al Qaeda hostel in Milan Italy as well as with Algerian terrorists acting in Europe, including a senior member of Al Qaeda named Abu Ma'ali (Abdelkader Mokhtari) who was active in Bosnia. It was also mentioned that following the American invasion of Iraq in 2003 Yildirim and the IHH organization served a role in anti-western incitement among Turkish Muslims, including protests, marches, and demonstrations.

*IICC report* (May 27, 2010), *supra* note 83, at 5. Regarding the IHH organization's links to organizations linked to Al Qaeda see also JEAN-LOUIS BRUGUIERE, *CE QUE JE N'AI PAS PU DIRE* (Robert Laffont ed., 2009).

696 Transcript of session no. 8 "Testimony of Mossad Head" (Sep. 14, 2010), at 20.

697 *IICC report* (Jun. 20, 2010), *supra* note 83, at 2.

Dede, stated that the Prime Minister of Turkey and several other ministers had recently begun expressing support for the flotilla:

"Government did not announce openly support for mission at first; but last few days. Getting direct support from PM and other ministers. During F2F discussions, openly said that if we have any difficulties, gov will extend what support they can. During Dec. land convoy, although gov didn't announce support, they provided, not only to Turkish, but to all who were on the mission."<sup>698</sup>

As stated, from what is known, the IHH organization was one of the leading organizations which took part in organizing the flotilla that is the subject of this report. The IHH organization owns the *Mavi Marmara* and the *Gazze* ship.<sup>699</sup> According to the IICC report from May 27, 2010, during the months preceding the departure of the flotilla, the organization assisted the Ministry of Transportation and the Ministry of Public Works of the Hamas administration to undertake projects in the Gaza Strip in order to prepare the port to receive the vessels taking part in the flotilla.<sup>700</sup> During the police investigations conducted after the event, some of the flotilla participants stated that the IHH organization was behind the organizing of the flotilla<sup>701</sup> and that they themselves are activists in the organization (some of them even receive salaries from

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698 See *IHH Flotilla Campaign Summery*, *supra* note 209; it should also be mentioned that Amir Akan, a crew member on board the *Gazze* which participated in the flotilla along with the *Marmara*, claimed in his investigation by Military Intelligence that the Turkish government approved the ship's departure towards Gaza. Due to this fact he felt relatively safe during the flotilla, see article 03/06/10/821/5062, *Military Intelligence Reports*, *supra* note 491.

699 In the *Marmara's* registration certificate, which was issued on May 19, 2010, the IHH organization (Insan Hak ve Hurriyetleri ve Insani Yardim Vakfi - Turkey) appears as the owner, see Provisional Registration Certificate D/RG/0333/UAE (May 19, 2010), the folder containing the exhibit was marked as folder 92 by the Commission; likewise, the *Gazze's* registration certificate, which was issued on Apr. 1, 2010, see Certificate of Registry DM10GS0143Q254937 (Apr. 1, 2010), the folder containing the exhibit was marked as folder 93 by the Commission; the investigation of some of the flotilla's participants, members of the IHH, by the IDF's investigative unit, also reveals that all the vessels were purchased by the organization, see report of the investigation of Ismail Yalmez, article 03/06/10/895/5026, *Military Intelligence Reports*, *supra* note 491.

700 *IICC report* (May 27, 2010), *supra* note 83, at 9.

701 In total 41 participants of the flotilla on board the *Marmara* were investigated, of which 13 mentioned the connection between the flotilla and the IHH organization; this connection also came up in the investigations of about 105 flotilla participants conducted by the IDF investigative unit between the dates May 31, 2010 and Jun. 3, 2010.

it),<sup>702</sup> or that they had joined the flotilla at the request of the organization.<sup>703</sup>

702 See for example Mr. Takir Eurdnach's statements to the police, according to which he is an employee of the organization, suspect 18 statement, *Soldiers, Doctors, and Suspects Statements* (Jun. 1, 2010), the folder containing the exhibit was marked as folder 71 by the Commission [hereinafter *Soldiers, Doctors, and Suspects Police Statements*]; suspect 18's statement, *Soldiers, Doctors, and Suspects Statements* (Jun. 2, 2010) *Id.*; see also the report of Muhassan Ingin's investigation, wherein he admitted that he is an IHH activist, article 03/06/10/825/5090 *Military Intelligence Reports*, *supra* note 491; report of Yishar Kotli's investigation, wherein he admitted that he works as the IHH's secretary-general, article 03/06/10/825/5056, *Id.*; report of Mehmet Bulga's investigation, who was on the Gazze ship, wherein he admitted that he works at the IHH's archives, article 03/06/10/821/5057, *Id.*; report of Enfi Sinan's investigation, wherein he admitted that he is a member of the IHH, article 03/06/10/821/5077, *Id.*; report of Abdullah Izikiah's investigation, wherein he admitted that he started working as a volunteer for the IHH, but has been an employee of the organization for seven years, article 03/06/10/821/5069, *Id.*; report of Ismail Ymez's investigation, according to which he has been working for the IHH organization as head of product purchasing, article 03/06/10/895/5026, *Id.*; reports of the captain of the *Mavi Marmara*, Mehmet Torel's investigation, wherein he stated that the IHH hired his services for the flotilla, articles 03/06/10/825/5080 and 03/06/10/825/5092, *Id.*; report of the captain of the Defney ship's captain Haluk Kulkwan's investigation, according to which IHH workers and cargo were on the ship, article 03/06/10/825/5081, *Id.*; reports of Hussein Uruz's investigation, according to which he has been working for the IHH organization for seven years and deals with the organization's ties to foreign organizations and the media, article 03/06/10/825/5060 and article 03/06/10/825/5050, *Id.*; report of the head of the IHH, Bülent Yıldırım's investigation, according to which three of those killed in the flotilla were IHH volunteers, article 03/06/10/825/5059, *Id.*; report of Muhammad Achmed Salam's investigation, according to which he is a reporter for the organization, article 03/06/10/825/5060, *Id.*; report of Mehmet Ozmesha's investigation, according to which he is a donor to the organization, as well as a volunteer, article 03/06/10/825/5036, *Id.*; report of Radouan Kayah's investigation, according to which he organized donations for the organization and is also a volunteer in it, article 03/06/10/825/5062, *Id.*

703 See Muchram Gonash's announcement to the police, according to which he is a volunteer at the IHH, testimony of suspect 3 of *Soldiers, Doctors, and Suspects Police Statements*, *supra* note 702; Mustafa Butran's announcement that he was employed on the ship by his uncle, who works for the IHH, testimony of suspect 7, *Id.*; Gili Muchitin's announcement that he offers humanitarian aid in different counties on behalf of the IHH, testimony of suspect 22, *Id.*; Zachariah Kaya's announcement that he took part in the flotilla which was organized by the IHH, as an employee of a humanitarian aid organization from Istanbul, testimony of suspect 24, *Id.*; Pati Kiukodan's announcement that he was requested by the aid organization he works for to join the flotilla organized by Bülent Yıldırım (head of the IHH), testimony of suspect 41, *Id.*; see also the report of Manuel Vespiner's investigation according to which he was invited to the flotilla by the IHH, article 03/06/10/821/5097, *Military Intelligence Reports*, *supra* note 491; report of kukirian Guyan's investigation, whose friend wished to hire him as a crew member on board the *Marmara*, and according to whom the IHH group "controlled" the vessel and gave instructions to the passengers, the crew members, and the journalists, article 03/06/10/825/5085, *Id.*; report of Abdel Hakim Alkteibi's investigation, according to which he was invited to the flotilla by the IHH, article 03/06/10/825/5044, *Id.*; report of the head of the IHH, Bülent Yıldırım's investigation by the IDF investigative unit, according to which three of those killed in the flotilla were IHH volunteers, article 03/06/10/825/5030, *Id.*; report of Oskan Tonboylu's investigation, according to which aside from the flotilla he took part in other IHH activities, article 03/06/10/825/5063, *Id.*; see also an interview with one of the participants of the flotilla given to an Haaretz reporter in Belfast, Noam Sheizaf *Testimony from the Deck*:

Other participants in the flotilla, who stated that they had joined the flotilla due to humanitarian motivations alone, also stated that they had responded to appeals from the IHH organization or had signed up for the flotilla through it.<sup>704</sup> Also, the transcript of the flotilla leadership meeting indicates that the IHH organization set up a command headquarters for the flotilla on land, where the deputy director of the organization, Yavuz Dade, stayed.<sup>705</sup>

163. The transcript of the flotilla leadership meeting indicates that the other organizations which took part in organizing the flotilla are as follows: the Free Gaza Movement (hereafter: **FGM**), the European

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*Kenneth O'Keefe, Former Marine, was on board the Marmara Wishing to reach Gaza Haaretz Online 24.9.2010, as well as IICC report (Sep. 27, 2010), supra note 83.*

704 See for example the announcement of Halim Yizigi according to which he reached the flotilla following the publication and convention the IHH organization held regarding the flotilla meant to provide aid for Gaza, testimony of suspect 19 of *Soldiers, Doctors, and Suspects Police Statements*, supra note 702; the testimony of Pkar Shukri, within which he stated that Bülent Yıldırım (head of the IHH) is the flotilla organizer and that he himself joined the flotilla in order to help Gaza, following IHH publication, testimony of suspect 20, *Id.*; Police testimony by Mehmet Ali Akdniz, according to which the IHH members gave the Marmara passengers orders and “ran the show”, according to his statement he joined the flotilla through the organization’s website in order to provide humanitarian aid to Gaza, testimony of suspect 21, *Id.*; Police testimony by Ribha Kumrok, according to which the IHH advertized an invitation to volunteer for the flotilla, see testimony of suspect 8, *Id.*; Police testimony by Pikari Krawil, according to which he joined the flotilla with the purpose of providing aid, following publication in the media and a conference held by the IHH, testimony of suspect 23, *Id.*; Police testimony by Ikhsan Shamrock, according to which he signed up for the flotilla through the organization’s website in order to provide humanitarian aid to Gaza, stayed at a hotel in Istanbul through the organization and departed to Antalya on a bus provided by the IHH, where he took part in a conference held by the members of the organization who wore special uniforms and got on a bus to the port provided by the IHH, testimony of suspect 25, *Id.*; Police testimony by Abdulhalim Al Mali, according to which he joined the flotilla through an IHH campaign with the purpose of providing aid to Gaza, testimony of suspect 26, *Id.*; see also the report of Adil Yuksel’s investigation, who volunteered for the flotilla through the IHH, according to his statement, the *Mavi Marmara* was actually being run by the IHH, and some of the organization’s members wore vests emblazoned with the organization’s print, the people on the ship were briefed to act according to the IHH’s instructions and at a certain stage of the flotilla the instruction was given that the boarding of the ship by IDF soldiers must be prevented at all costs, article 03/06/10/825/5094, *Military Intelligence Reports*, supra note 491; report of Achmed el Dsham’s investigation, according to which he signed up for the flotilla through the IHH offices in Istanbul, and according to his statements, the head of the organization distributed instructions to the passengers, briefed the journalists, and was responsible for the whole flotilla, , article 03/06/10/821/5083, *Id.*; report of Hakan al Biraq’s investigation, article 03/06/10/825/5071, *Id.*; report of Said Ibjiuhalo’s investigation, article 03/06/10/825/5082, *Id.*; report of Yujel Kusa’s investigation, article 03/06/10/825/5043, *Id.*; report of Adal Huna’s investigation, article 03/06/10/825/5090, *Id.*; report of Adal Tuna’s investigation, article 03/06/10/825/5057, *Id.*; report of Hasin Shbar’s investigation, article 03/06/10/825/5047, *Id.*

705 *IHH Flotilla Campaign Summary*, supra note 209.

Campaign to End the Siege on Gaza (hereafter: **ECESG**), the Greek Ship to Gaza Campaign, and the Swedish Ship to Gaza.

FGM is an organization registered in Cyprus as a human rights organization, with its headquarters located in Nicosia. The organization was founded in 2006, and its website states that it has 28 branches throughout the world. The organization's charter provides that its purpose is to break the siege on the Gaza Strip by means of, *inter alia*, "civil resistance and non-violent direct action", which will establish a permanent sea lane between the Gaza Strip and the rest of the world.<sup>706</sup> The organization began dispatching flotillas to the Gaza Strip in 2008, and was behind the dispatching of eight flotillas, five of which succeeded in reaching the Gaza Strip (in August 2008, in October 2008, in November 2008, and two in December 2008), whereas three were stopped by the navy (the *Dignity* yacht, which attempted to reach the Gaza Strip at the end of December 2008, and the *Spirit of Humanity* vessel, which attempted to reach the Gaza Strip in January 2009 and again in June 2009).<sup>707</sup> Another organization operates within the framework of the FGM, under the name of the "International Solidarity Movement" (hereafter: **ISM**), which has adopted the goal of supporting Palestinian popular resistance activities and opposing Israeli policy in the West Bank and Gaza Strip.<sup>708</sup>

The IICC report of June 10, 2010, notes that the FGM organization had its activists sign a declaration in which they pledge not to use physical or verbal violence against IDF soldiers.<sup>709</sup> However, in its report from September 27, 2010, IICC notes that it possesses an internal document of the organization from March 7, 2010, which was seized on the *Mavi Marmara*, which states in a section on mission strategy that the organization's working assumption is that "the only way for Israel to stop us is to use force." This document analyzes various options for how to act in such a situation, including placing obstacles (encircling the deck with metal rods; scattering sharp obstacles in order to prevent landing from the air), and barricading themselves inside the control room and the engine room.<sup>710</sup> However, it should be noted that the document's heading states that it is a draft that is not intended for distribution. Another document that was seized on the *Challenger 1* contains legal information that, apparently, was intended to be conveyed to the boat's passengers. This

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706 See the organization's website [www.freegaza.org](http://www.freegaza.org).

707 See *Defense Minister's Memorandum Appendixes*, *supra* note 209, at appendixes Y, Z.

708 See the organization's website [palsolidarity.org](http://palsolidarity.org).

709 *IICC report* (Jun. 10, 2010), *supra* note 83, at 2.

710 *Draft - Not for Distribution* (Free Gaza Movement report, Jul. 3, 2010); see also *IICC report* (Jun. 14, 2010), *supra* note 83, at 6-17.

information explicitly states that the organization is aware of the fact that the transfer of supplies to the Hamas constitutes a crime under the laws of the United States, and also that the United Nations added the Hamas to its black list of terrorist organizations. Therefore, the Americans and citizens of other nationalities were warned "to avoid even the appearance of material support" for the Hamas or its leadership.<sup>711</sup>

The ECESG is an umbrella organization uniting about 30 non-governmental organizations (NGOs), whose purpose is "to bring to an end Israel's illegal siege of Gaza". The organization operates in cooperation with politicians, academics, and human rights organizations throughout Europe. It should be noted that one of the founders of the organization (and one of the organizers of and participants in the flotilla which is the subject of this report) is Amin Abu Rashed, a Palestinian holding a Dutch passport, who is identified with the "Muslim Brotherhood" and with organizations connected to it in Holland and Europe.<sup>712</sup>

It is further noted that the official protocol of the flotilla leadership meeting does not mention any plans for violent action against the IDF, and that in this forum it was decided that the question of how to protect the passengers' security would be left to the discretion of the vessels' captains.<sup>713</sup>

## The Participants on the Flotilla

164. The total number of participants on the flotilla was approximately 700 passengers, from 40 countries.<sup>714</sup> On the *Mavi Marmara*, there were approximately 590 passengers from 34 different countries, including

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711 *Legal Information* (Opinion by Free Gaza Movement); see also *IICC report* (Jun. 14, 2010), *supra* note 83, at 4-5.

712 *IICC report* (Oct. 5, 2010), *Id.*, at 5.

713 *IHH Flotilla Campaign Summary*, *supra* note 209. From the [protocol it arises that the flotilla organizers discussed several options for the way events at sea might develop, and among other options took into consideration the possibility of fire being directed at them or an arrest of the people on board the ship; as to the possibility of shooting it was written:

714 "Opening fire

- a) Just to intimidate, we keep moving forward
- b) Need to do political and media work at the same time
- c) Continue slowly, communicating with Israel
- d) If shooting is more serious will need to stop and assess. Captains will have to make decisions concerning safety of mission.
- e) We all stay together..."

For a detailed analysis of the national and organizational affiliations of the passengers on board the *Marmara* as well as the outlines of various organizations and activists on board the *Marmara*, see the list of passengers found on the *Mavi Marmara*, *IMO Passenger List* (May 27, 2010); *IICC report* (Sep. 26, 2010), *supra* note 83, at 8-104.



Turkey (most of the participants, approximately 353 passengers), Britain, Kuwait, Bahrain, Australia, Spain, Belgium, Macedonia, Malaysia, Ireland, Lebanon, Algeria, France, New Zealand, Pakistan, South Africa, Indonesia, United States, Germany, Canada, Greece, Norway, Morocco, Yemen, Syria, Serbia, Kosovo, Bosnia, Sweden and Israel. According to an analysis conducted by the IICC, the passengers can be divided into the following three categories, based on their organizational affiliation:

- (1) Ninety-one activists and volunteers of the IHH organization, including the organization's leader, Bulent Yildirim. Approximately 40 activists from this group boarded in the port of Istanbul without a security check, and the rest, including Bulent Yildirim, boarded in the port of Antalya.
- (2) Over 200 activists from non-governmental organizations and bodies (NGOs), most of whom were from Turkey and a few of whom were from other countries.
- (3) Hundreds of volunteers who responded to the appeals of various organizations to participate in the flotilla. Also prominent among the passengers were journalists, many of whom were from the Arab world (including representatives of two Hamas television stations), and dozens of members of parliaments from, *inter alia*, Germany, Kuwait, Ireland, Yemen, Egypt, Algeria, and Israel.

165. The investigative material that was furnished to the Commission by various authorities indicates that there was a "hardcore group" of about 40 IHH activists who boarded the *Mavi Marmara* separately and without any security checks in the port of Istanbul, while the rest of the passengers had been asked to gather independently in Antalya on May 26-27, where they boarded the vessel after undergoing security checks.<sup>715</sup> A large amount of equipment was found on the *Mavi Marmara* which, apparently, had been taken aboard in Istanbul: 150 protective ceramic vests, which had the flag of Turkey printed on them,<sup>716</sup> 300 gas masks

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715 See *IDF Completion Response of 7.11.2010*, *supra* note 486, at appendix G; *The Eiland Report*, *supra* note 402, at 38; *IICC report* (Jun. 10, 2010), *supra* note 83, at 2; *IICC report* (Jun. 7, 2010), *Id.*, at 3; In his testimony before the Military Intelligence investigating the event the captain of the *Marmara* mentioned that in fact only Antalya had metal detectors in spite of the fact that the ship collected 40 passengers from Istanbul, see article 03/06/10/825/5093, *Military Intelligence Reports*, *supra* note 491.

716 There is uncertainty regarding the number of protective Kevlar vests found and their number in the various IDF reports fluctuates between 100 to 150 units, see main findings from inquiry 1/06 of Collection Branch Head, Deepening and Broadening the General Staff's Experts Inquiry (Aug. 25, 2010), marked by the Commission as exhibit 90 [hereinafter *Inquiry Expansion of 25.8.2010*], where it is mentioned that 100 vests with the Turkish flag drawn on them were distributed to some of the *Mavi Marmara's* passengers

and about 200 additional filters, communication devices, optical devices (several night vision goggles and a few binoculars), 50 slingshots of various kinds, 200 knives, 20 axes, thousands of ball bearings and stones, disk saws, pepper sprays, and smoke flares. A few flags and scarves of the Hamas and its military wing were found,<sup>717</sup> as well as a telescopic rifle sight and ammunition (rifle bullets),<sup>718</sup> scuba-diving gear and spear guns,<sup>719</sup> and a field hospital.

166. The material before the Commission also indicates that the group of activists that boarded the vessel in Istanbul designated itself using various identification stickers. Some of them wore stickers identifying them as "crew". Others wore red stickers with the words "*khares amni*", i.e., identifying them as a "security guard".<sup>720</sup> According to the soldiers' testimonies, the violent activists also wore ceramic vests under their life jackets (which, apparently, were also distributed to the doctors and the journalists).<sup>721</sup> The testimony of the chief officer of the

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in advance; in the summary of the combat equipment found on board the ship conducted by the Naval Intelligence company, on the other hand, it was mentioned that 150 military protective vests made in Turkey were found on board the ship; see also *IICC report* (Jun. 7, 2010), *supra* note 83, at 6, according to which about 100 Kevlar vests were found on board the Marmara as well as *IICC report* (Jun. 10, 2010), *Id.*, at 3, according to which about 150 vests were brought on board the ship.

717 Some of the slingshots, for example, were inscribed with "Hezbollah", see *IICC report* (Jun. 7, 2010), *Id.*, at 6; *IICC report* (Jun. 10, 2010), *Id.*, at 3; As for the scarves, see also the summary of combat equipment conducted by the Naval Intelligence company, *Inquiry Expansion of 25.8.2010*, *supra* note 716.

718 It should be mentioned that four bullet casings not used by the IDF were found on board the *Mavi Marmara*, likewise, a bullet recovered from the knee of one of the injured soldier was also not a standard IDF bullet. At the same time, Mr. Giora Eiland, the head of the IDF's expert team appointed to investigate the event, mentioned that it cannot be said with complete certainty that these were bullets fired from a non-IDF weapon since it cannot be ruled out that these bullets somehow made their way into the IDF ammunition, see protocol of meeting 7 by the Commission, *Testimony of the Head of the Expert Inquiry Team* (Aug. 24, 2010), at 6 [hereinafter *Closed Door Testimony of the Head of the Expert Inquiry Team*]; *Chief of Staff's Open Door Testimony of 24.10.2010*, *supra* note 554, at 30 ("in retrospect it turns out we had such bullets. Since 2007 the Shayetet does not know this. But I can't say definitively [...]").

719 See summary of combat equipment found on board the ship conducted by the Naval Intelligence company, *Inquiry Expansion of 25.8.2010*, *supra* note 716.

720 See *IDF Completion Response of 7.11.2010*, *supra* note 486, at appendix G.

721 See for example the testimony of soldier no. 8, 4 ("another fact that showed that they were preparing for a violent struggle were the orange vests which in retrospect turned out to be Kevlar vests"); the testimony of soldier no. 7 ("they had protective vests, some had gas masks"); the testimony of the Commander of the Takeover Force ("as far as I am concerned terrorists are an armed group dressed for battle - protective vests masks and facial covers"). *Inquiry Expansion of 20.9.2010*, *supra* note 451; the testimony of soldier no. 24, at 2 ("while handcuffing I noticed that he's dressed in a protective vest. I also checked the other people and saw they were wearing protective vests"); the testimony of soldier no. 26, at 1 ("some of the terrorists were dressed in large protective vests"), the testimony



vessel, Mr. Gokkiran Gokhan, indicates that the IHH people distributed communication devices to the activists, which they used to communicate amongst themselves.<sup>722</sup> Communication devices were also distributed to the vessel's crew members, but they were calibrated on a different frequency.<sup>723</sup> According to various testimonies, these activists stayed on the roof and maintained a separation from the rest of the passengers on the *Mavi Marmara* during the voyage.<sup>724</sup> Inside an area designated as a press room, where the journalists were concentrated, with a guard from the IHH organization stationed at its entrance, another secured area was set up, which was protected continuously by two IHH guards. Yildirim and other activists stayed there. This area also contained an editing room and the computers connected to the ship's closed circuit security cameras.<sup>725</sup>

The statement of the chief officer of the *Mavi Marmara*, Gokkiran Gokhan, indicates that the people from the IHH took control of the vessel during the journey and prevented people whom they did not know from moving about freely:

Interviewer: You seem to be saying that the people from IHH were in control of the ship. Did the crew need their permission to move around the ship?

Chief Officer: Definitely, they didn't let the people they didn't know move around.

Interviewer: Did they prevent anyone they didn't know from moving freely around the ship?

Chief Officer: Yes, definitely.

Interviewer: Was that from the first moment they went up on deck?

Chief Officer: Yes, definitely.

....

Interviewer: I don't understand, they didn't let the passengers and crew go from one deck to another?

Chief Officer: They could go anywhere, except to the control center they set up on the bridge.

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of soldier 16, 1 ("we identified a group of terrorists with protective vests"); testimony of soldier no. 27, at 1 ("while scanning we found some of the people had protective vests"), *IDF Completion Response of 7.11.2010*, *supra* note 486; see also *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 29; *IICC report* (Jun. 7, 2010), *supra* note 83, at 6.

722 The transcript of the testimony was published in *IICC report* (Jun. 9, 2010), *Id.*, at 8; See also *Defense Minister's Memorandum Appendixes*, *supra* note 209, at appendix N.

723 *Id.*

724 See for example the testimony of the commander of Shayetet 13, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 6-7; see also *IICC report* (Jun. 1, 2010), *supra* note 83, at 7.

725 *IICC report* (Jun. 10, 2010), *Id.*, at 7.

Yildirim was interviewed frequently by the media during the voyage on the *Mavi Marmara* towards the Gaza Strip, and he said, *inter alia*, that although the resistance by the flotilla participants would not be violent, they would not let IDF soldiers board the vessels.<sup>726</sup> During a press conference held before the *Mavi Marmara* left Antalya, Yildirim stated, "We are determined to enter Gaza, regardless of what happens."<sup>727</sup> In a video found on the *Mavi Marmara*, which apparently had been filmed by one of the photographers who documented the events on the roof, Yildirim is seen speaking heatedly before a large crowd of listeners. Yildirim said, *inter alia*: "If you send in the commandos, we'll throw you down below from here, and you'll be humiliated in front of the whole world."<sup>728</sup>

An article in Turkish written by the journalist Adham Ozkaze for "The World Bulletin" newspaper, which was headlined "*Mavi Marmara* is Ready to Resist", found on one of the computers seized on the *Mavi Marmara*, states that the activists on the ship were preparing for "civil resistance" and they had taken it upon themselves "to defend the ship". This article also reports that the activists were unwilling to divulge their strategy for defending the vessel, but they said, "We will teach the Israelis a lesson they won't forget and the Israeli army will be humiliated before the eyes of the entire world."<sup>729</sup> On various videos that were seized on the *Mavi Marmara* and in a report which was broadcast on the Al-Jazeera station live from the *Mavi Marmara* two days before the events, some of the passengers on the ship are seen singing songs of praise for the intifada and calling out impassionedly.<sup>730</sup> In the same report, one of the passengers on the ship who was interviewed, Shaza Barakat, said: "Two good things will happen: either we will die as *shaheeds* or we'll reach Gaza."<sup>731</sup> In films taken on the *Mavi Marmara*, other activists are seen expressing the desire to die as *shaheeds*, and saying goodbye to their family members.<sup>732</sup>

726 See transcript of the first officer's testimony, *supra* note 722.

727 IHH: Yildirim: *We are Going to Leave in Due Course*, available at [www.ihh.org.tr/yildirim-zamani-gelince-yola-cikacagiz/en](http://www.ihh.org.tr/yildirim-zamani-gelince-yola-cikacagiz/en) (2010).

728 IICC report (Jun. 20, 2010), *supra* note 83, at 8, appendix - *Specific Remarks by Bülent Yıldırım*.

729 IICC report (Jun. 17, 2010), *Id.*, at 1-2; The video file *Instigating the Crowd on Board the Mavi Marmara by the Head of the IHH and Other Activists* may be seen on the IICC's website (video clips file 4).

730 IICC report (Jun. 10, 2010), *Id.*, at 12.

731 IICC report (Jun. 13, 2010), *Id.*, at 1; The video file *Instigating the Crowd on Board the Mavi Marmara Prior to the Encounter with IDF Forces* may be seen on the IICC's website (video clips file 2).

732 IICC report (Jun. 13, 2010), *Id.*, at 1; A television report from the Al Jazeera channel from May 29, 2010, which was broadcast from the ship two days prior to the encounter with the IDF forces may be seen on the IICC's website; in the interview given to Al Jazeera by Hasin Urush, a senior IHH member and among the flotilla's organizers, a number of

167. The passengers' testimonies and the interrogation of the captain and chief officer of the *Mavi Marmara* indicate that on May 30, 2010, at approximately 10:00 p.m., after the announcement of the navy was heard, which requested the ships to reverse their course or to redirect the vessel's course to the port of Ashdod, an order was given to all the non-Turkish passengers to enter the hall on the lower deck, while the Turkish IHH people were told to go up to the upper decks. The *Mavi Marmara's* sirens were activated, and an order was given to don flotation vests. At the same time, the activists began to saw chains and other items from metal (approximately 100 iron rods and 50 improvised clubs were found on the *Mavi Marmara*)<sup>733</sup> and to collect axes (which were taken from the ship's fire extinguishing equipment stations; a total of about 20 axes), knives (which were taken from the kitchen and the cafeterias on the ship; a total of about 200 knives of various sizes were found); hammers, tools, bolts and bottles found on the ship. The activists were divided into groups which were stationed in several different areas: one group gathered on the roof of the ship; another group apparently concentrated near the roof and served as reinforcements for the resisters on the roof; and another group gathered at the ship's stern. Some of the groups were given an advance briefing.<sup>734</sup> The activists were equipped with ceramic vests, most

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days prior to the takeover he went on to say that all the passengers were willing to die as "Shaheeds" since the goal of the flotilla was to reach Gaza or be killed (Al Jazeera story from Jun. 5, 2010). For similar materials see audio file "Shahid.mov", in folder *Video, Arab Data Disc, supra* note 506.

733 See video files "motot1.mov" and "motot2.mov" in folder *Video, Arab Data Disc, supra* note 506. The videos, 20 and 34 seconds long accordingly, show three activists on board the *Marmara* at night, using an electric disc saw to remove iron bars from the deck's railing' see also of Yishar Kotli's investigation, article 03/06/10/825/5056, *Military Intelligence Reports, supra* note 491. During the investigation of the IHH volunteer he stated that at a certain stage when they started receiving messages from the Israeli Navy "the blood rose to the head" of a lot of youngsters on board the ship, some of them sawed metal bars off the ship's railing with electric saws and at a certain stage the ship's captain (who is not a member of the IHH) asked over the public address system that people desist from sawing said bars.

734 According to the *Marmara's* security cameras it arises that on May 30, 2010 at 21:36 (according to the clock in the security camera) a number of activists concentrated at the ship's stern and one person arrived with a bunch of wooden poles and distributed them among those present. Also according to the security camera on May 30, 2010 at 22:03 (according to the clock in the security camera) a group of men, all dressed in life jackets, are seen gathered together for a briefing, when some of those present are holding wooden poles. Later on, near the start of the *Marmara's* takeover on May 31, 2010 at 04:22 a group of men is seen, all dressed in life vests, some holding gas masks in their hands, and they appear to be pointing at the sea (apparently towards the Navy ships drawing closer to the *Marmara*), and they call their friends to join them, and indeed several additional men join the group. See video files from the security camera in folder *Security Cam, Arab Data Disc, supra* note 506. See also the report of Hussein Uruz's investigation, article 03/06/10/825/5050, *Military Intelligence Reports, supra* note 491. This person stated

of them were equipped with gas masks, and some of them were equipped with clubs, iron rods, chains, slingshots and ball bearings.<sup>735</sup> The material obtained by the Commission also indicates that during the briefing given by Yildirim, he instructed the activists to "make a human chain and throw the commandos back into the sea with chairs and rods."<sup>736</sup>

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that, on the eve of the takeover he saw protective vests and gas masks being handed out to some of the passengers and noticed two passengers with slingshots. Likewise, as he stated, there were fanatics among the passengers, though the majority expressed opinions supporting passive resistance only.

735 Facts regarding the equipment used by the resisters, as stated, may be learned from several sources: *First*, a video shot by the IDF forces after the Marmara has docked at Ashdod Port which documents a concentration of some of the combat equipment used by the resisters and brought down from the ship: hundreds of Gas masks, many dozens of knives (kitchen knives as well as commando knives, one of which seems to be covered in blood), hundreds of marbles, crowbars, wooden and iron rods in large quantities (several dozen), various sprays. See CD *From Peace Cruise to Terror Cruise* submitted by the army (minute 4:27), found in a folder marked by the commission as exhibit 89.

736 *Second*, mobile Forensics lab report by the police from Jun. 2, 2010 (document 66 in the police file, folder 72 of the commission's exhibits), which documents the collection of many bars, clubs, pipe wrenches, some of which were covered with blood. According to the mobile forensics lab's report there is indication that the bars found were sawn off the ship's railing; see also, photo CD and video clip documenting the mobile forensic lab's visit to the ship, during which clubs, knives of various types, gas masks, screwdrivers, glass bottles and axes are seen, all of them found on the Marmara, and corresponding with the descriptions regarding physical violence employed by the resisters on board the Marmara, marked by the commission as exhibit 75.45. Some of the photos were printed onto photograph boards (documents 67-69 in the police file, folder 72 of the commission's exhibits).

*Third*, the video shot by one of the cruise participants on 30.5.2010 at 03:55 (according to the file properties on the digital camera), participants are seen opening crates and taking out life jackets and gas masks. The gas masks are packed and new. One of the people is seen holding a gas mask and stating "Allahu Akbar" at the camera. See video file "00234.mov" in folder *STREAM* in folder *BDMV*, in folder *AVCHD* in folder *Sony3* in folder *Video*, *Arab Data Disc*, *supra* note 506.

*Fourth*, one of the IHH volunteers on board the Marmara testified to the Military Intelligence investigators that at a certain stage, thugs (as he called them) from the IHH distributed clubs and iron bars (and he himself was also armed with one), see report of Adil Yuksel's investigation, article 03/06/10/825/5094, *Military Intelligence Reports*, *supra* note 491.

*Fifth*, IDF soldiers taking over the Marmara testified about the concentration of weaponry and combat gear in the possession of the resisters on board the ship. See, for examples, the testimony of the Commander of the Takeover Force regarding the existence of a large concentration of axes, bars, knives, chains, slingshots, and glass marbles. See also the testimony of Team Commander R, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2, regarding the discovery of flares, sticks, axes, knives, tear gas, gas masks, marbles, bolts, crowbars, metal bars, Kevlar vests with a crescent symbol, various night vision equipment, and more; See also the testimony by the commander of the takeover force, *Id.*, at 4-6.

See Military Intelligence inquiry, submitted to the commission, *Deepening and Broadening the Inquiry - Response to Completion Request by the Public Commission to Examine the Naval Event of 31.5.2010*, at appendix G, transferred by the IDF on Nov. 17, 2010, in response to the commission's request of Nov. 7, 2010, at 2, marked as exhibit 90 in the commission's

One of the passengers described the event as follows:

"At 11:30 pm there was a meeting to give orders to the security teams for urgent intervention. Orders were given about how to put on life belts, how to put on gas masks and most important, how to act if there was Israeli intervention or an attack. After the meeting the heads of the teams along with their operatives went to secure the sectors. We were responsible for the upper aft sector of the second deck on the starboard side. We were supposed to deploy for defense. How? Only with sticks and bottles, apparently this is how glass bottles should be used. And life belts, [but] there weren't enough for everyone..."<sup>737</sup>

Another passenger wrote in his journal:

"The Israeli gunboats are approaching...All passengers have been given rescue suits in case the ship is attacked. Everyone has gone to the locations determined beforehand. A press conference was held and broadcast live. IHH leader Bülent Yildirim said that 'it will be a war of nerves until tomorrow morning. There are people here from more than 50 countries. If people are detained, it will sully the honor of more than 50 countries. We want the entry to the Israeli embassies in Istanbul and Ankara to be locked. We will defend ourselves from here. We know there

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exhibits. The inquiry mentions that Yildirim admitted this in his testimony; *IICC report* (Jun. 10, 2010), *supra* note 83, at 8-11. It should also be mentioned that a number of books detailing the events on board the Marmara have been recently published in Turkey. One of them, *The Bleeding Mavi Marmara*, was written by journalist Şefik Dinç, a reporter for the popular newspaper *Habertürk*, who was on board the Marmara, documented the violent confrontation between the IHH activists and the IDF soldiers with his camera, and smuggled the photographs back to Turkey.

737 *IICC report* (Sep. 19, 2010), *Id.*, reviews this book and compares what's stated in it to additional information available to *IICC*. Among other details Dinç describes in his book that there were lively conversations between the volunteers on board the Marmara where the possibility was raised that Israel would attack the ship and the activists were prepared for every scenario and even expressed a willingness to die, as long as the siege is brought to an end. It is also mentioned in the book that during the wait for the confrontation with the IDF several activists practiced drills in preparation for a possible Israeli attack, practiced aiming water hoses to thwart attempts by IDF soldiers to board the ship from the sea, they received guidance regarding the use of gas masks and were instructed on how to resist the IDF soldiers. It was also stated that each one of the people in charge of the passengers' security received a sector and a spot where he had to position himself once the alarm is sounded. Dinç goes on to state that after the Navy ships addressed the Marmara the IHH activists woke up the passengers and distributed life jackets and gas masks among them and organized them for resistance. The position holders took their places in the predetermined spots and the clubs were brought out. Dinç adds that "iron bars were added to the wooden clubs I had seen earlier" and that "according to the image I perceived, the resistance for the possible ascent of Israeli soldiers is not going to be so passive." Likewise Dinç describes a press conference held by Yildirim in the hours prior to the takeover where he declares that "soon we will meet with Israel's true face". *IICC report* (Jun. 10, 2010), *Id.*, at 9.

will be a price and we are willing to pay it. We will not retreat one step. Israel is behaving like a pirate in international waters. [Will] the world watch from the side?"<sup>738</sup>

Filmed interrogations of the captain of the *Mavi Marmara* and its chief officer indicate that in the evening hours the atmosphere aboard the vessel was tense, and that about two hours before the takeover began, a crowd had gathered on the main deck. The crew members checked and discovered that the activists were using disk saws to cut the railings of the ship and create metal clubs. The crew members of the *Mavi Marmara* stated during their questioning that their attempts to prevent this activity were unsuccessful.<sup>739</sup> The testimonies also indicate that this group was made up of those IHH activists who had boarded the *Mavi Marmara* in Istanbul.

The captain of the *Mavi Marmara*, Mr. Tural Mahmut, stated:

Captain: There were passengers gathering on the main deck, I asked the chief officer, What is happening there? He said they're cutting the steel rods and the chains on the deck. He said that they are putting the cut railings in the radio room on the bridge. Even when your soldiers took over the ship they went into the radio room and took the cut railings. I had to send the chief officer to collect the railings from their hands, he asked an IHH man, and they gave them to him.

Interviewer: What did they give to him?

Captain: The disks.

Interviewer: But what did they do with the railings and the chains?

Captain: I took this and I threw this in the sea. We knew what would happen if these things get taken to the bridge. After this, we didn't see anything in their hands.

Interviewer: But we saw on the ship that they cut many of the railings.

Captain: What I saw, I threw into the sea [...] I said to them to stop and I took them up. I told the sponsors about this many times.

Interviewer: You were not worried about the violence that would occur?

Captain: I was worried. [...] But I thought that as soon as their commander was with them nothing would happen, nobody

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738 *IICC report* (Jun. 10, 2010), *Id.*, at 13.

739 The transcript of the testimony was published in *IICC report* (Jun. 9, 2010), *Id.*, at 2-3; See also *Defense Minister's Memorandum Appendixes*, *supra* note 209, at appendix N.

would fighting or kicking back. I asked many times, because I knew what would happen, but I thought that because there were citizens on the ship nothing would happen, they would stay on the boat just as civilians, without physical resistance.

Interviewer: You weren't worried about the fact that they were preparing a lot of weapons?

Captain: Whatever I saw I threw into the sea and some I stored in the radio room. I didn't know there was so many.

....

Interviewer: But they were preparing themselves for violence against the soldiers?

Captain: Yes, I was informed that. That's why I warned them, I said to them that the people on the boat came to demonstrate. They saw some helicopters. There was a tense air on the boat, and then I saw people who kept on cutting.<sup>740</sup>

The chief officer of the *Mavi Marmara* stated about the identity of the activists in this group:

"Interviewer: How many IHH operatives were there on the roof?

Chief Officer: Forty.

Interviewer: The same forty all the time or did they change?

Chief Officer: More or less, the same forty.

Interviewer: You're referring to the group that joined the ship in Istanbul?

Chief Officer: Yes."<sup>741</sup>

These testimonies are supported by a number of other statements which were given by participants of the flotilla during questioning by the police and the IDF investigation unit.<sup>742</sup> All of the aforesaid interrogations

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740 *Id.*; The matter of cutting the ship's railing by IHH activists for the purpose of making iron bars also came up in the investigation of the ship's captain by Military Intelligence, see report of Mehmet Torel's investigation, article 03/06/10/825/5092, *Military Intelligence Reports*, *supra* note 491.

741 The transcript of Gukiran Gukehan's testimony was published in *IICC report* (Jun. 9, 2010), *supra* note 83, at 5; *Defense Minister's Memorandum Appendixes*, *supra* note 209, at appendix N; See also report of kukirian Guyan's investigation, article 03/06/10/825/5085, *Military Intelligence Reports*, *supra* note 491.

742 See for example report of Yusuf Mehmed's investigation, article 03/06/10/825/5029, *Military Intelligence Reports*, *supra* note 491. Mehmed, a citizen of Bahrain, refused to cooperate with the investigation but mentioned that the Turkish passengers (as opposed to the passengers who were citizens of other countries) were the one who acted with violence including, as far as he knew, the use of clubs and slingshots; see also Mehmet Yıldırım's testimony to the police, where he mentioned that one of the passengers wished to hit a soldier, the soldier fell to the floor and the testifier protected him from additional injuries inflicted with an iron bar, testimony of suspect 4 of *Soldiers, Doctors, and Suspects*



strengthen the testimonies of the soldiers that the passengers of the vessel were divided into two types, violent activists (the IHH activists) and non-violent peace activists, and that the IHH activists were armed and behaved like an organized force.

Soldier no. 4, who was taken below deck, stated:

Q: How did the activists look?

A: They all seemed to be dressed alike, gas masks and an orange vest. They looked well-prepared, they were waiting, and it seemed like it was all planned. They were all very big and heavy, and it looked like their goal was clear, to harm us.

Q: Were there different characteristics among the activists?

A: Yes, it seemed to me that there was a group that was equipped with the gear, and that came to attack us, and the whole way that they were dragging me inside, there were photographers who were photographing me, and I also heard women's voices, including in English, like 'Stop hit him', etc."<sup>743</sup>

The Commander of Center A stated:

"I have no doubt that the terrorists on the vessel planned, organized, foresaw the events, and planned to kill a soldier. They were organized like a military force: equipped with gas masks, protective vests, hot and cold weapons. They were organized in a military structure, divided into groups, they spoke to each other on radios [...]."<sup>744</sup>

The Shayetet 13 commander stated:<sup>745</sup>

"No ordinary civilians knows how to fight at night with a vest and gas mask for a long time, to take a weapon and cock it to shoot, and to not be deterred when they're fighting back with you, unless he has trained for this and has been prepared in advance..."

In the margins, it should be noted that, on his own initiative, Yildirim was interviewed for Israeli television (a report by Oshrat Kotler-Bengal for Channel 10, which was broadcast in Israel on June 26, 2010). The Commission received the interview conducted with Yildirim, in a rough cut format that includes exchanges of words beyond what was said during the official interview. In his statements, Yildirim confirmed that there had indeed been violent organizing by some of the flotilla participants, and he added: "What did you want, flowers?" Yildirim also

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*Police Statements, supra* note 702.

743 Testimony of soldier 4, *Inquiry Expansion of 20.9.2010, supra* note 451.

744 Testimony of the Commander of Center A, *Id.*

745 Testimony of Shayetet 13 Commander, *Id.*, at 7.

confirmed that the flotilla participants armed themselves with rods for the confrontation with the soldiers. However, Yildirim hinted that Israel had "planted" anti-Semitic statements by flotilla participants within the videos it distributed and other weapons (such as knives). This claim by Yildirim is not consistent with the original radio recordings, the pictures, and the original and unedited films (which were photographed, *inter alia*, by some of the flotilla participants in real time), which the Commission examined.

## The Identity and Organizational Affiliation of the Dead and the Wounded

168. An examination of the identity and organizational affiliation of those who died leads to the following conclusions. Four out of the nine who died have been identified as IHH activists or volunteers. Another four of those who died were activists in Turkish Islamic organizations. Two of them were activists in the Saadet Partisi (hereafter: **Felicity Party**), an Islamic party which was outlawed in Turkey for violating secular articles of the Turkish constitution. The Felicity Party is affiliated with IHH, and it supports the Hamas and maintains connections with it. The head of the party, Professor Numan Kurtulmus, expressed explicit support for the flotilla to the Gaza Strip and called it a "brave historic step." It should be noted that there were in total only four activists from the Felicity Party aboard the *Mavi Marmara*. Another person who died was a 19-year-old who held dual citizenship (Turkish and American) and who, as far as is known, was not affiliated with any organization.

According to the IICC report dated September 27, 2010, with respect to four of the nine who died, their family members stated that they had expressed their desire to die as *shaheeds* (including the young man with the dual citizenship mentioned above). Regarding two of those who died, it was reported that they had left a letter or will prior to boarding the *Mavi Marmara*. In a video which was recorded before the violent confrontation on the *Mavi Marmara*, another one of those who died is heard saying: "I pray that Allah grant us the same good end as those *shaheeds*."<sup>746</sup>

The following are details regarding the identity and organizational affiliation of the deceased:

1. **Ibrahim Bilgen** - 61 years old, citizen of Turkey. He joined the flotilla as an IHH volunteer. In 2007, he was a candidate in the general elections in Turkey on behalf of the Felicity Party, and, in

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746 IICC report (Sep. 26, 2010), *supra* note 83, at 25.

2009, he was a candidate on its behalf in the elections for mayor of the city of Siirt. He boarded the ship in Antalya. According to the IICC report dated September 27, 2010, one of his family members stated that he wanted to die as a *shaheed*.

2. **Ali Haydar Bengi** - 39 years old, citizen of Turkey. He served as the chairman of an Islamic charitable organization named Ayder. According to the IICC report dated September 27, 2010, Ayder is a charitable organization, and the Ayder branch headed by Bengi cooperated with the IHH. Bengi was a member of the Felicity Party. He boarded the ship in Antalya. His wife and friends said that he had a strong desire to die the death of a *shaheed*.
3. **Cevdet Kiliçlar** - 38 years old, citizen of Turkey. He was an IHH activist who worked as a writer and the manager of the IHH's internet site. He boarded the ship in Antalya. On the flotilla to Gaza, he was employed by the IHH as photographer. In a video taken aboard the *Mavi Marmara*, he is heard saying, "I pray that Allah grant us the same good end as those *shaheeds*."
4. **Cetin Topcuoglu** - 54 years old, citizen of Turkey. He was a member of the charitable non-profit organization, Adyer, a humanitarian assistance organization that cooperates with the IHH organization. He is a former Turkish champion in the martial art of *taekwondo*. He participated in a prior aid convoy to the Gaza Strip, which had reached El Arish, where it engaged in a confrontation with the Egyptian security forces. He boarded the ship in Antalya. According to the IICC report dated September 27, 2010, he left a letter before he departed on the flotilla in which he hinted that he expected to die as a *shaheed* and he called upon others to aspire to a similar death.
5. **Necdet Yildirim** - 32 years old, citizen of Turkey. He was an IHH activist in Istanbul (his name appears on the list of IHH activists which was found on the *Mavi Marmara*).
6. **Fahri Yaldiz** - 43 years old, citizen of Turkey. He was an IHH activist in his city, Adiyaman. Since 2007, he was a security guard at the IHH conferences and he was active in his city. During municipal elections, he served as the bodyguard to the mayor on behalf of the Refah party, which is the Islamic party of Erbakan. His name appears on the list of IHH activists which was found on the *Mavi Marmara*. He boarded the ship in Antalya. According to the IICC report dated September 27, 2010, prior to departing on

the flotilla, he announced that he was going to be a *shaheed* and he said goodbye to his wife and his children.

7. **Cengiz Songur** - 47 years old, citizen of Turkey. He was an activist in the Islamic organization Ozgurder in Izmir. He boarded the ship in Antalya.
8. **Cengiz Akyuz** - 41 years old, citizen of Turkey. He was an IHH activist. He boarded the ship in Antalya. According to the IICC report dated September 27, 2010, he joined the flotilla together with the director of a branch of the IHH organization, Zakariya Kanat, and he left a will before he boarded the flotilla.
9. **Furkan Dogan** - 19 years old, dual citizenship: Turkish and American. According to an article in a Turkish newspaper, "Radical", on June 16, 2010, he wrote in his diary on the morning before the events, ""These are the last hours before I take part in the sweet experience of becoming a *shaheed*. Is there anything more beautiful than that?"<sup>747</sup> Also, according to the IICC report of September 27, 2010, his brother Mustafa said that his family was not sorry that his brother had been killed as a *shaheed*.

169. An examination of the list of wounded which was carried out by the IICC indicated that most of the wounded belonged to the IHH organization and to Turkish and Islamic parties and entities. On the list of the wounded, there is one Indonesian, and there are no wounded from Western countries or from the rest of the Arab world.<sup>748</sup>

Summary of this part: The IHH organization is one of the leading organizations which took part in organizing the flotilla to the Gaza Strip. Activists in this organization, as well as other volunteers who wanted to take part in humanitarian activity on behalf of the Gaza Strip, were recruited to the flotilla. A core of about 40 activists from the organization were equipped and prepared during the journey, particularly during the hours just preceding the takeover, to resist with force the IDF soldiers' taking control of the vessel. This is indicated by the extensive equipment which was brought on board, by their organizing as a group with distinct identity signs who were equipped with communications devices and cold weapons, by the preparations which were undertaken prior to the takeover operation, and by their actions during the event itself. The severity of this resistance was not foreseen by the IDF, within the context of the intelligence assessment prior to the event.

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<sup>747</sup> *Id.*, at 26.

<sup>748</sup> *IICC report* (Sep. 26, 2010), *Id.*, at 4; *IICC report* (Jun. 20, 2010), *Id.*, at 1.

## The Questions before the Commission

170. In this part of the report, the Commission will examine the following legal questions:

1. Were the actions undertaken by Israel on May 31, 2010 to intercept and board the flotilla vessels, outside the blockaded area of the Gaza Strip, in conformity with international law?
2. Was Israel's use of force against the flotilla participants during the interception of the flotilla vessels carried out in accordance with international law?
3. Was the planning and organization of the Israeli military operation carried out in conformity with international law?

## Conformity between the Actions Israel Took to Enforce the Blockade on May 31, 2010, and International Law

### The Law Governing the Enforcement of the Blockade

171. As discussed in Chapter A of this report, Israel established the naval blockade as part of its international armed conflict with the Hamas. The legal regime governing the establishment and enforcement of such a blockade is the laws of naval warfare. The relevant legal rules can be found in customary international humanitarian law, which have largely been outlined in the *San Remo Manual*. Article 97 of the manual states: "A blockade may be enforced and maintained by a combination of *legitimate methods and means of warfare* provided this combination does not result in acts inconsistent with the rules set out in this document."<sup>749</sup> [emphasis added]

An attempt to breach a properly established blockade is a non-neutral act, resulting in a loss of the protection and relative freedom of navigation available to neutral shipping under the law of the sea. As a result, a ship that attempts to breach a blockade becomes subject to the rules of international humanitarian law governing the conduct of hostilities.

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749 *San Remo Manual*, *supra* note 110, at article 97.

## Enforcement in International Waters

172. The Israeli armed forces boarded the *Mavi Marmara* and the other flotilla vessels 70-100 nautical miles from the Gaza coast outside the blockaded area,<sup>750</sup> i.e., in international waters (for a map of the blockaded area, see annex "F").

There has been an ongoing international debate regarding the location at which ships seeking to breach a blockade may be boarded. The key issue in this debate is not whether such boarding may take place in international waters, but rather at what distance outside the blockaded area a party may board a vessel attempting to breach the blockade.

173. According to customary international humanitarian law, an attempt to breach a blockade occurs when a ship is on a course destined for a blockaded port or is anchored or hovering outside a blockaded area so that it can evade the blockading forces.<sup>751</sup> As the *US Commander's Naval Handbook* notes, "[k]nowledge of the existence of the blockade is essential to the offenses of breach of blockade and attempted breach of blockade." Therefore, if it can be established that a ship is purposefully attempting to breach a blockade, that ship is subject to capture wherever it is located.<sup>752</sup> The stated goal of the flotilla was to breach the blockade.<sup>753</sup> Hence, the flotilla organizers and participants must have been aware of the existence of the Gaza blockade and that they were on course towards the blockaded area.

174. The material before the Commission demonstrates that the Israeli forces chose to enforce the blockade outside the blockaded area on the basis of two reasons. First, the intelligence assessment indicated that the Hamas were organizing small boats to meet the flotilla, and there was concern that those boats would pose a security risk if the flotilla vessels were intercepted close to the Gaza coastline.<sup>754</sup> Second, as was outlined in the testimony of the Chief of Staff, Lieutenant-General Ashkenazi, the intention of the Israeli forces was to capture the vessels with the minimum use of force, and, during such an operation, there is a great advantage to operating under the cover of darkness.<sup>755</sup> As a result, the operation was carried out just before dawn, at which point the flotilla vessels were still

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750 *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 36.

751 See *Heintschel von Heinegg, EPIL*, *supra* note 91, at para. 43.

752 See *San Remo Manual*, *supra* note 110, at article 98. See also *the 1909 London Declaration*, art. 20; *U. S. Navy, The Commander's Handbook*, *supra* note 92, at 7-8, para. 7.7.4.

753 See *IHH Flotilla Campaign Summary*, *supra* note 209, at 26.

754 *Military Advocate-General's testimony*, *supra* note 98, at 77.

755 *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 82.

located outside the blockaded area. These grounds constitute valid and reasonable operational considerations falling within the customary rules regarding the distance from the coast that a blockade can be enforced.

175. The Commission concludes that the Israeli armed forces were justified in boarding the flotilla vessels in international waters under the rules of international humanitarian law, given (i) their location and announced destination;<sup>756</sup> (ii) the public pronouncements by the flotilla organizers and participants regarding their intention to breach the blockade;<sup>757</sup> and (iii) the refusal of the ships' captains to accept the invitation to alter their course to Ashdod after they were warned by the IDF.<sup>758</sup> Therefore, the interception of the flotilla vessels seaward of the announced blockade was lawful.

## The Capture of the Flotilla Vessels

176. Customary international law provides that a blockading party is entitled to prevent all vessels from entering or leaving the blockaded area. Merchant vessels believed on reasonable grounds to be breaching the blockade may be captured.<sup>759</sup> Before capturing a neutral vessel, there may be a need to verify its neutral status and its intentions.<sup>760</sup> At the outset, it should be noted that there is an important distinction between a "capture" and an "attack" of such vessels. According to Article 67(a) of the *San Remo Manual*, merchant vessels which are believed on reasonable grounds to be breaching the blockade may not be attacked unless, after prior warning, "they intentionally and clearly refuse to stop, or *intentionally and clearly resist* visit, search or *capture*..."<sup>761</sup> [emphasis added] Neutral merchant vessels do not have a right to resist capture.<sup>762</sup> As the Encyclopedia of

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756 *Id.*

757 *Id.*

758 *Id.*

759 *San Remo Manual*, *supra* note 110, art. 98, 146 (f); See also DINSTEIN, *THE CONDUCT OF HOSTILITIES*, *supra* note 86, at 106 (concluding that the sinking of neutral merchant vessels without warning is unlawful).

760 See OPPENHEIM, *supra* note 86, at 856 ("the purpose of ascertaining whether these vessels really belong to the merchant marine of neutrals, and, if this is found to be the case, whether they are attempting to break blockade, or are carrying contraband, or rendering unneutral service to the enemy. [...] its *raison d'être* is so obvious that it has long been universally recognized in practice. It is indeed the only means by which belligerents are able to ascertain whether neutral merchantmen intend to bring assistance to the enemy and to render him unneutral service.").

761 *San Remo Manual*, *supra* note 110, at art. 67.

762 R.W. TUCKER, *THE LAW OF WAR AND NEUTRALITY AT SEA* 336 (1955); See also COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA*, *supra* note 94, at 768, para. 884.



Public International Law notes in respect of resisting capture during the enforcement of a blockade:

‘Clear resistance’ presupposes that they act in a manner that has, or may have, an impeding or similar effect on the intercepting forces. Therefore, a mere change of course in order to escape is not sufficient. An act of clear resistance against interception or capture is considered to be an effective contribution to enemy military action by purpose or use.<sup>763</sup>

Once the threshold of "clear resistance" has been reached, the ship may be attacked lawfully. An attack under international humanitarian law "means acts of violence against the adversary, whether in offence or in defence."<sup>764</sup>

177. Under international humanitarian law, only military objectives, combatants and civilians directly participating in hostilities may be attacked. The definition of "military objective" is set forth in Additional Protocol I, article 52.2:

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>765</sup>

This definition is generally deemed reflective of customary international humanitarian law. In the context of a blockade, vessels breaching the blockade and resisting capture qualify as military objectives by virtue of the fact that their "use" makes an effective contribution to military action, since using these vessels to breach the blockade renders it ineffective.<sup>766</sup> That a vessel breaching a blockade is a military objective can also be derived from the *San Remo Manual*, which states that merchant vessels that are believed on reasonable grounds to be breaching a blockade and that, after prior warning, clearly resist capture may be attacked,<sup>767</sup> because only when an object satisfies the military objective criteria, may it be "attacked."

The resistance offered by persons on board the *Mavi Marmara* (even before the attempt to fast-rope a boarding team onto the roof) was sufficient to have allowed the Israeli Commander to conclude that the

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763 *Heintschel von Heinegg, EPIL, supra* note 91, at para. 47.

764 *Additional Protocol I, supra* note 292, at art. 49(1).

765 *Id.*, at art. 52(2).

766 *Heintschel von Heinegg, EPIL, supra* note 91, at para. 47.

767 *San Remo Manual, supra* note 110, at art. 98.

ship was clearly resisting capture, thereby making it a military objective. As a result, pursuant to international humanitarian law, that vessel could have been attacked. Nevertheless, the Commission is of the view that the Israeli forces did *not* attack the flotilla vessels. In other words; they did not use force or “violence” against the *ships*. Their efforts were focused exclusively on capturing the ships and diverting them from their destination.

178. The next issue to be determined is whether the means that Israel used to perform the capture of the flotilla vessels were in accordance with the law. The options available to State authorities seeking to stop a vessel at sea are in fact quite limited. The practical challenges are not unique to armed conflict. Operations to stop merchant vessels at sea are carried out on a regular basis, often by State naval forces engaged in law enforcement (i.e., counter-drug operations, fisheries patrols, customs, immigration) or those acting to prevent the proliferation of weapons of mass destruction (e.g., in accordance with the Proliferation Security Initiative (PSI)).<sup>768</sup>

179. In a law enforcement context, the distinction between a “capture” and an “attack” is not made, since an “attack” is not contemplated within that framework. Nonetheless, the tactics applied in the law enforcement context to stop a vessel serve as a relevant comparison to the attempt to capture a vessel while enforcing a blockade during an armed conflict with respect to the issue of the appropriate escalation of force. The obligation under international humanitarian law to attempt to capture a neutral vessel before attacking it when enforcing a blockade is based on the principle of using force only when necessary. This principle is also applicable in a law enforcement context, where the necessity for using force must be demonstrated by establishing that less forceful means were attempted and failed, or that such means would have been impossible or futile under the circumstances.<sup>769</sup>

Typically, the escalation of the use of force during a law enforcement operation commences with identifying a ship and its intentions, progresses to the firing of warning shots, and then, as a last resort, possibly using disabling fire.<sup>770</sup> The required sequence of measures before resorting to the use of force begins with identifying the enforcing vessel and making its intentions clear by giving a visual or auditory signal to stop.<sup>771</sup> The

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768 Allen, *Limits on the Use of Force*, *supra* note 337, at 105-106.

769 *Id.*, at 99-100; See also D.P. O’CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 65 (1975).

770 Allen, *Limits on the Use of Force*, *supra* note 337, at 100.

771 *Id.*, at 99-100. In respect of the Gaza flotilla, the Israeli authorities identified their vessels as enforcing the blockade to the flotilla vessels, and they provided the flotilla vessels with

US Navy MIO Doctrine provides for the use of "non-violent" signals and maneuvers as a first step before resorting to force.<sup>772</sup>

The next step in the appropriate level of force against a non-compliant vessel includes "deterrence" or warning measures, such as firing warning shots.<sup>773</sup> The objective of warning shots is to provide a clear signal to the decision-makers on board the offending ship that there is an intention to exert force if the ship does not stop. A relevant example in this context is the American case, *Lewin v. U.S.*,<sup>774</sup> in which the US Coast Guard had used firearms and unintentionally killed a crew member on the suspect ship. A different crew member forcefully resisted the takeover of the ship and, in the subsequent proceedings against him, he claimed that his use of force was justified since no warning shots had been fired. The court ruled that even though no warning shots had been fired, the defendant was well aware of the fact that there was a pursuit of the ship with the intention of stopping it by force, which was sufficient to render the defendant's use of force unjustified.<sup>775</sup>

After the use of "deterrence" measures, the next level includes a "show of force", such as disabling fire, which means employing firearms to stop the ship without using force against the passengers themselves.<sup>776</sup> The appropriateness of using disabling fire depends upon the nature of the enforcement action being undertaken. For instance, it has been suggested that disabling fire is lawful in a PSI context because of the importance to counter the proliferation of weapons of mass destruction,<sup>777</sup> and it is certainly contemplated in the context of Maritime Interdiction Operations (MIO) to, *inter alia*, enforce UN Security Council resolutions.<sup>778</sup>

180. The use of disabling fire is indeed an option when enforcing a blockade during an armed conflict, particularly in light of the fact

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the required information about the Israeli intentions to prevent the flotilla vessels from breaching the blockade.

772 *Id.*, at 99-100.

773 *Id.*, at 100.

774 *Lewin v. U.S.*, 62 F. 2d 619 (1933).

775 As stated previously, Israeli authorities had made their intentions to halt the flotilla vessels clear to the captains of the vessels. Since the Israeli armed forces did not intend to use force against the vessels themselves, which will be further elaborated upon below, there was no requirement to issue warning signals before the boarding.

776 Allen, *Limits on the Use of Force*, *supra* note 337, at 100.

777 *Id.*, at 110-111.

778 For a definition of MIO see *op. cit.* See Wolff Heintschel von Heinegg, *Maritime Interception/ Interdiction Operations in The Handbook of International Law of Military Operations*, 393, para. 20.12 (2010) (where the sequence is outlined a shot being fired, but not in the direction of the ship; a second warning shot across the bow; and finally a shot into the rudder).

that resistance to capture renders a vessel a military objective. The use of disabling fire in this context would constitute an "attack" under international humanitarian law.<sup>779</sup> At the same time, however, its use would have been both lawful and a reasonable escalation in force, prior to considering an attack that could sink the vessel.<sup>780</sup>

The evidence brought before the Commission demonstrates that, throughout the planning process, it was clear to those planning the operation that violence would not be used against the flotilla vessels, i.e., the actual ships themselves. From the evidence, it appears that among the factors that weighed heavily on those who planned the operation against the use of force was the presence of over 500 civilians on board the *Mavi Marmara* and a significant number of civilians on the remaining ships.<sup>781</sup> Potential collateral casualties and damage had to be factored into the consideration. Furthermore, the use of disabling fire would not necessarily have been effective under the circumstances, because "the typical merchant ship is often able to survive even prolonged disabling fire by the weapons and ammunition allowed by the use of force doctrines."<sup>782</sup>

181. While the Israeli authorities used less force than would have been permissible under international law, another issue, which has been the subject of considerable debate in the media and elsewhere, is whether they should have used intermediate levels of force. One question is whether they should have chosen to use water cannons or similar devices to either cause the vessel to "heave to" or to create a "sterile" environment on the top decks of the *Mavi Marmara*, which would have permitted the Israeli navy commandoes to board or land on the ship without being threatened by any of its passengers. While these suggestions are attractive in theory, the reality is that the technical ability to compel a fleeing vessel to stop is exceedingly limited. As noted in one study of the use of force in a maritime environment:

A variety of low-level force tactics ... have been tried over the years, including low level passes by aircraft; physically blocking or even "shouldering" the fleeing vessel; directing fire hose streams into the fleeing vessel's exhaust stack to flood the engine;

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779 *Additional Protocol I*, *supra* note 292, at art. 49(1).

780 Allen, *Limits on the Use of Force*, *supra* note 337, at 104 ("Disabling fire" refers to use of weapons to disable the ship without risk to the crew).

781 The protection of a passenger vessel is reflected in *San Remo Manual*, *supra* note 110, at Rule 152, which prohibits the destruction of captured neutral passenger vessels carrying civilian passengers at sea.

782 Allen, *Limits on the Use of Force*, *supra* note 337, at 105.

deploying nets, lines and other devices designed to entangle the vessel's propellers; and severing the vessel's fuel line.<sup>783</sup>

These tactics have enjoyed only limited success and often pose considerable danger to the ship, the crew, and any passengers on board.<sup>784</sup> The Israeli navy had already experienced an incident in December 2009 where significant damage was caused when a warship collided with a relatively small yacht that was seeking to breach the Gaza blockade.<sup>785</sup> The large size of the *Mavi Marmara* and a number of the other flotilla vessels made "shouldering" (i.e., brushing up against the side of the ship) of those vessels impractical and also very dangerous for Israeli forces.

182. The tactics employed to intercept and board the vessel by the Israeli authorities was to fast-rope soldiers from helicopters down to the roof of the *Mavi Marmara* combined with an attempt to board from Morena speedboats. The decision to try to capture the vessels by fast-rope from helicopters was influenced by the degree of resistance anticipated from the subject vessel. Special Forces trained teams are often used when a boarding is anticipated to be "opposed" or "non-compliant."<sup>786</sup> The Shayeyet 13, an Israeli naval commando force, is trained in vertical envelopment from helicopters and was thus able to perform the difficult operation.

These tactics can be compared to those employed by Coalition naval forces conducting MIO during the Gulf War against Iraq in 1990-1991. It became evident during the course of those operations that large merchant vessels were very difficult to disable without recourse to large caliber weapons with the accompanying risk of casualties; a potential need for a search and rescue operation; and the risk of environmental damage due to the release of oil into the waters. In that situation, other tactics, such as "shouldering" a large merchant vessel, were not practically feasible for

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783 *Id.*, at 101.

784 Transcript of session no. 13 "Testimony of the Chief of Staff, open door" (Oct. 24, 2010), at 14 [hereinafter *Chief of Staff's Open Door Testimony of 24.10.2010*].

785 *MAG Position Paper*, *supra* note 1, at 40.

786 See RULES OF ENGAGEMENT HANDBOOK, International Institute of Humanitarian Law, Annex D, 81, 84 (Nov. 2009) [hereinafter *The ROE Handbook*] available at [www.usnwc.edu/getattachment/7b0d0f70-bb07-48f2-af0a-7474e92d0bb0/San-Remo-ROE-Handbook](http://www.usnwc.edu/getattachment/7b0d0f70-bb07-48f2-af0a-7474e92d0bb0/San-Remo-ROE-Handbook) (there are three types of boardings in established maritime doctrine: "opposed boarding" a boarding where the master or crew has made it clear that steps will be taken to prevent the boarding; "non-compliant boarding" a boarding where agreement to board has not been obtained; and "compliant boarding" a boarding where the master and crew of the vessel cooperate).

thin-skinned warships and they raised the possibility of rendering the target vessel a risk to navigation.<sup>787</sup> As a result:

The tactic adopted ... was to surround a recalcitrant ship with a number of coalition warships. If these could not compel obedience by radio, voice calls, or warning fire, a coordinated assault was conducted by specially trained forces lowered from one or more helicopters, with other helicopters providing surveillance and potential covering fire. Once control was established, naval boarding parties conducted physical searches of ships, cargoes, and documentation.<sup>788</sup>

This technique was also deployed in what is perhaps one of the best known Weapons of Mass Destruction (WMD) boardings; the 2002 interdiction of the M/V So San by Spanish naval forces. During that operation, a helicopter-borne Special Operations force boarding team was ultimately deployed to stop the vessel. This is an area where the tactics are well established and understood by naval forces.<sup>789</sup>

Consequently, the decision to have the Shayeyet 13 board the *Mavi Marmara* and the other flotilla vessels by helicopter and from Morena speedboats was fully consistent with established naval practice, whether enforcing a blockade or carrying out maritime law enforcement.

183. In conclusion, the Commission has found that the flotilla vessels were attempting to breach the blockade and Israeli armed forces were therefore justified in capturing them in order to enforce the blockade. By clearly resisting capture, the *Mavi Marmara* had become a military objective. After prior warning, the Israeli forces could have considered using disabling fire against that ship. However, if that option or any other option that involved the use of armed force against the ship had been employed, it would have caused a significant risk of harm to the passengers aboard the ship (under international humanitarian law; "collateral damage"). Therefore, the option of fast-roping naval commandoes onto the *Mavi Marmara* represented an internationally recognized means by which to minimize the potential for civilian casualties or damage to civilian objects that could have occurred if armed force had been used against the ship itself. It remains unclear whether the majority of the passengers on the vessels understood the limited options available to the Israeli military forces when enforcing the blockade, and the risk that the

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787 See James Goldrick, *Maritime Sanctions Enforcement Against Iraq*, in *NAVAL BLOCKADES AND SEAPOWER*, *supra* note 87, at 203-204.

788 *Id.*, at 204.

789 Allen, *Limits on the Use of Force*, *supra* note 337, at 105-106.

Flotilla organizers were exposing them all to by attempting to breach the blockade.

In light of this conclusion, the analysis will now turn to the use of force against persons on board the flotilla vessels.

## **Law Applicable to the Use of Force against Persons on Board the Flotilla Vessels**

### *Application of International Humanitarian Law or Human Rights Law*

184. In the context of an armed conflict, a key issue is what principles govern the use of force against civilians: international humanitarian law or human rights law? As has been noted by the International Court of Justice in the *Wall* case, the interface between these two normative regimes is intricate: “[T]here are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”<sup>790</sup>

185. As discussed in chapter A of this report, there is considerable ongoing debate about the interface between international humanitarian law and human rights law.<sup>791</sup> However, often lost in the dialogue regarding the applicable framework is the fact that humanitarian law reflects many of the norms that are also recognized as being part of human rights law.<sup>792</sup> This is evident when considering, for instance, the individual right of self-defense. Military and civilian personnel have the right to protect their own lives, whether they are operating in an armed conflict or in peacetime.<sup>793</sup> In addition, military forces have always had to

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790 *The Wall Case*, *supra* note 130, at 178, para. 106.

791 See, e.g., David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense?* 16 EUR. J. INT’L. L. 171 (2005); Françoise J. Hampson, *The Relationship Between International Humanitarian Law And Human Rights Law From The Perspective Of A Human Rights Treaty Body*, 90 INT’L REV. RED CROSS 549 (2008); Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Al Bassiouni v. The Prime Minister of Israel*, 37 ISR. L. REV. 101 (2009); Yuval Shany & Orna Ben-Naftali, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV. 17 (2003-04) (supporting the application of human rights to all acts of States, even outside their own territories, and towards individuals that are not their citizens).

792 See, e.g., *Additional Protocol I*, *supra* note 292, at art. 75 (outlining fundamental rights available to persons who are in the power of a Party to the conflict. These rights found under international humanitarian law reflect human rights “norms”; See also *Hamdan v. Rumsfeld*, *supra* note 137, at 71 (where a plurality of the United States Supreme Court held this provision was customary international law)).

793 See *Prosecutor v. Dario Kordic*, Mario Cerkez, Case No. IT-95-14/2-T, Judgment, para. 451



deal with civilians, including during the policing of occupied territories when carrying out their international humanitarian law responsibilities to maintain public order and safety.<sup>794</sup>

186. Although there are schools of thought that largely favor extensive applicability of human rights law, this approach is not universally accepted.<sup>795</sup> For example, neither Israel nor the United States agrees with a broad extra-territorial application of human rights law.<sup>796</sup> The issue of whether, or the degree to which, there is extra-territorial application of human rights law is particularly relevant to the enforcement of the Gaza

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(Feb. 26, 2001) (noting that the principle of self-defence enshrined in the ICC Statute, at art. 31(1)(c) “reflects provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law”); Further, the right to self-defense is reflected in Geneva Convention I, at art. 22 (1) regarding the arming of medical personnel and art. 22(2) for armed pickets, sentries or escorts at medical units or establishments; See also AP I, at art. 65(1) (regarding the arming for self-defense of civilian civil defence personnel); art. 67. (regarding members of the armed forces and military units assigned to civil defence organizations); and *The UK Manual*, *supra* note 113, at 40, para. 4.3.7 (indicating that civilians accompanying a military forces “should be issued with small arms for self-defence purposes only”).

794 See, e.g., 1907 Hague Regulations, Art. 43 (providing that the occupying power “shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety [civil life], while respecting, unless absolutely prevented, the laws in force in the country.” The reference to “civil life” comes from the official French version, which has been suggested was incorrectly phrased as “safety” in the first English translation); See also EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 10-11 (2004).

795 See, e.g., LUBELL, *EXTRATERRITORIAL USE OF FORCE*, *supra* note 149, at 193-235 (2010) (for an analysis favoring the universal application of human rights law). To the extent the notion of universal application of the International Covenant on Civil and Political Rights is based on interpretations of the Human Rights Commission, including its *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev. 1/Add.13 (2004), care must be taken in viewing such interpretations as “law”. See also *Amnesty International v. Chief of the Defense Staff for the Canadian Forces* T-324-07 Fed. Ct. TD. para. 239 (2008) (“Insofar as the commentaries of the United Nations Committees are concerned, as the respondents observed, these are recommendations made by groups with advocacy responsibilities. While they clearly reflect the views of knowledgeable individuals, they do not reflect the current state of international law, but more the direction that those groups believe the law should take in the future”).

796 LUBELL, *EXTRATERRITORIAL USE OF FORCE*, *supra* note 149, at 197-198 (discussing the United States position). For the official Israeli position, see, e.g., Israel Ministry of Foreign Affairs, *Legal Advisor of the Israel Ministry of Foreign Affairs on the Applicability of the ICCPR to the Current Situation in the West Bank and Gaza Strip*, Response of Mr. Alan Baker, *Legal Advisor of the Israel Ministry of Foreign Affairs, On the Applicability of the ICCPR to the Current Situation in the West Bank and Gaza Strip* (May 15, 1998) available at [www.mfa.gov.il/MFA/MFAArchive/1990\\_1999/1998/7/Legal+Advisor+of+the+Israel+Ministry+of+Foreign+Af.htm](http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1998/7/Legal+Advisor+of+the+Israel+Ministry+of+Foreign+Af.htm); See also Françoise J. Hampson, *The Relationship*, *supra* note 791, at 550; Michael Dennis, *ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L. L. 119 (2005).

naval blockade on May 31, 2010, since it took place on the high seas, outside the territory of the Israeli State.

Recently, the European Court of Human Rights ruled in the *Case of Medvedyev and Others v. France*<sup>797</sup> that the interception of a vessel on the high seas by a French warship in a counter-drug law enforcement operation did engage human rights jurisdiction after "full and exclusive control" over the ship had been established. However, the judgment does not clarify exactly when the French armed forces were considered to have obtained "full and exclusive control" of the ship, especially since the litigation did not center on the boarding and overtaking of the ship, but rather on the arrest and confinement of the crew to their cabins for a period of 13 days during the transit to France.

In the case at hand, it is difficult to see how Israel could be considered to have had "full and exclusive control" prior to taking control of the bridge of the flotilla vessels and the subsequent cessation of resistance. Further, even if Israeli forces were considered to have had such control over the *Mavi Marmara* prior to taking control of the bridge, the actions of the Israeli forces would still be governed by the *lex specialis* of international humanitarian law since the enforcement of a blockade is not a law enforcement mission. Therefore, the ruling of the European Court of Human Rights in the *Medvedyev* case is of limited assistance in resolving the issue of extra-territorial application of human rights law during the enforcement of the Gaza blockade.

187. With respect to the enforcement of the blockade, the use of force is to be interpreted under the international humanitarian law framework,<sup>798</sup> which permits attacks against combatants and civilians taking a direct part in hostilities. International humanitarian law is guided by the principle of distinction, which is an obligation to distinguish at all times between civilians and combatants. A civilian is any person who is not defined as a "combatant."<sup>799</sup> Civilians enjoy a general protection against the dangers arising from military operations.<sup>800</sup> Hence, when attacking a military objective, the attacking party must take all feasible precautions to avoid incidental (collateral) injury and death to civilians.<sup>801</sup> Further, the expected incidental harm caused to civilians by an attack must not

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797 *Medvedyev and Others v. France*, Application No. 394-03, Eur. Ct. H.R., Gr. Ch., Judgment, para. 63-67 (Mar. 29, 2010).

798 See *Nuclear Weapons Case*, *supra* note 365, at para. 25.

799 *Geneva Convention III*, *supra* note 48, at art. 4(A)(1), (2), (3) and (6); *Additional Protocol I*, *supra* note 292, at art. 43; See also the *Targeted Killing* case, *supra* note 37, at para. 24.

800 *Additional Protocol I*, *supra* note 292, at art. 51(1).

801 *Id.*, *supra* note 292, at art. 57(2)(a)(ii).

be excessive in relation to the concrete and direct military advantage anticipated (the "principle of proportionality").<sup>802</sup> Civilians shall not be the object of an attack unless, and for such time as they take a direct part in hostilities.<sup>803</sup> Regarding the use of force, international humanitarian law treats combatants and civilians who take a direct part in hostilities differently than uninvolved civilians.

Under international humanitarian law, the right to life is protected by prohibitions against indiscriminate attacks,<sup>804</sup> targeting individual civilians and the civilian population unless they take a direct part in hostilities,<sup>805</sup> causing superfluous or unnecessary suffering to combatants,<sup>806</sup> and targeting those who are *hors de combat*.<sup>807</sup>

188. As a result, the applicable rules regarding the use of force against persons on board the flotilla vessels are thus primarily governed by their "status" under international humanitarian law. The salient issue is whether the passengers were civilians taking a direct part in hostilities or uninvolved civilians. The distinction is significant for three main reasons. First, as stated above, civilians who are not taking a direct part in hostilities cannot be the object of an attack, whereas direct participants can be attacked for such time they are taking part in hostilities.

Second, under international humanitarian law, the flotilla vessels became valid military objectives once they resisted capture. However, the presence of civilians on board the vessels is relevant to the assessment of the principle of "proportionality" discussed above. For instance, had the *Mavi Marmara* been "attacked," Israeli forces would have had to assess whether the expected incidental loss of civilian life or injury to civilians would be excessive in relation to the concrete and direct military advantage anticipated by the attack.<sup>808</sup> Direct participants in hostilities, however, would not be considered civilians for the purpose of assessing the proportionality of the action.

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802 *Id.*, *supra* note 292, at art. 57(2) (iii).

803 *Id.*, *supra* note 292, at art 51(3).

804 *Id.*, *supra* note 292, at art. 51(4).

805 *Id.*, *supra* note 292, at art. 51(3).

806 *Id.*, *supra* note 292, at art. 35.

807 *Id.*, *supra* note 292, at art. 41; *Additional protocol I* provides that a person is *hors de combat* if:

"(a) he is in the power of an adverse Party;

(b) he clearly expresses an intention to surrender; or

(c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;

provided that in any of these cases he abstains from any hostile act and does not attempt to escape".

808 *Id.*, *supra* note 292, at art. 57(2).

Third, there are particular norms that apply when force is directed at civilians who are not taking a direct part in hostilities. Generally, such force is governed by the principles of "necessity" and "proportionality." The principle of "necessity" requires that force must be necessary in order to enforce the law or perform some other lawful act. The principle of "proportionality" has a different meaning regarding the use of force against civilians than it has, as explained above, when applied to the targeting of military objectives under international humanitarian law. In the *Targeted Killing* case, the Israeli Supreme Court relied on the following excerpt from a European human rights case to explain the test for assessing when the use of lethal force by Israeli forces is disproportionate:

[T]he use of lethal force would be rendered disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk.<sup>809</sup>

189. In a law enforcement context (which applies human rights norms), the use of lethal force by state agents is generally permitted in three circumstances: self-defense, defense of others, and enforcement of the law. There are basic principles that guide the use of force to ensure that it is necessary and proportionate: (i) application of non-violent means before resorting to the use of force and firearms; (ii) use of force and firearms only if other means are ineffective or without promise of achieving the intended result; (iii) use of warnings before using firearms unless it places personnel at risk or is inappropriate or pointless in the circumstances; (iv) intentional lethal use of firearms only when strictly unavoidable to protect life; (v) providing law enforcement personnel with self-defense equipment; and (vi) use of less-lethal incapacitating weapons to restrain

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809 *Targeted Killing case*, *supra* note 37, at para. 40 (quoting *McCann v. United Kingdom*, Application No. 18984/91, Eur. Com. H.R., Report of the Commission (Sep. 27, 1995), at para. 235 [hereinafter *The McCann case*] (it should be noted that the quote can be found in the European Commission of Human Rights' Report, even though the Israeli Supreme Court indicates it was from the European Court of Human Rights)). The Israeli Supreme Court referred to this statement while assessing the use of force against direct participants in hostilities in the *Targeted Killing case*, *supra* note 37, at para. 40; However, it should be noted that this reasoning, which incorporates human rights law into international humanitarian law, does not reflect the more widely accepted interpretation of international humanitarian law. In any event, in the case at hand, the Israeli Supreme Court's reasoning would not be applicable when assessing the use of force against direct participants in hostilities given that is not clear to what extent the court believed the obligation to capture rather than kill a civilian taking a direct part in hostilities applied to the use of lethal force outside the narrow field of targeted killing, or whether it was restricted to the uniquely high levels of control inherent in being an occupying power. These are cogent reasons for restricting its application to the specific security scenario presented in that case.

the use of deadly force.<sup>810</sup> Further, the use of firearms is permitted in self-defense or the defense of others against the imminent threat of death or serious injury; to prevent a particularly serious crime involving grave threat to life; to arrest a person presenting such a danger and resisting their authority; or to prevent his or her escape.<sup>811</sup>

Any use of force against civilians who are *not* taking a direct part in hostilities, is guided by the principles of "necessity" and use of "proportionate force" associated with human rights-based law enforcement norms.

To determine the applicable norms governing the use of force in the matter before the Commission, therefore, it is first necessary to assess the status of the persons aboard the flotilla vessels pursuant to the principles of international humanitarian law. The status of the following three groups will be considered separately: (i) the civilian passengers, (ii) the IHH-controlled activists who partook in the violence on board the *Mavi Marmara*,<sup>812</sup> and (iii) the captain and crew of the *Mavi Marmara*.

### *The Status of the Civilian Passengers*

190. As discussed above, the participants in the Gaza flotilla were predominantly an international group of activists whose primary goal appeared to be to bring publicity to the humanitarian situation in Gaza by breaching the blockade imposed by Israel. On board the *Mavi Marmara*, a majority of the passengers appear not to have been controlled by, or acting on behalf of, the IHH, which, as will be discussed below, had a significantly different goal in mind. The disparity between these two groups (the flotilla participants and the IHH activists) was evident both due to a physical separation between the two groups and by their actions. Perhaps the clearest example is the behavior of the two respective groups as soon as the Israeli Navy commenced its capture of the vessel. At that point, an order was given over the loud speaker that the passengers should return to their seats below deck.<sup>813</sup> One group, by far the largest, knew to

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810 See The United Nations, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, available at [www2.ohchr.org/english/law/firearms.htm](http://www2.ohchr.org/english/law/firearms.htm) [hereafter: *U.N. Basic Principles*].

811 *Id.*, at prov. 9.

812 As necessary, these categorizations will be applied to the other vessels in the flotilla in the analysis of the use of force.

813 Mr. Muhamad Zidan and Sheikh Hamed Abu-Debs testified before the Commission that the person who gave the order was the Captain of the *Mavi Marmara*; Transcript of session no. 15 "Testimony of Mr. Muhamad Zidan" (Oct. 25, 2010), at 7; Transcript of session no. 15 "Testimony of Sheikh Hamed Abu-Debs" (Oct. 25, 2010), at 5.

go below decks and did not participate in the violent opposing of the boarding. The other group, organized and controlled by the IHH, stayed on the upper decks and prepared to confront the Israeli forces. Further, from the testimonies of the three soldiers who were taken below deck by the IHH activists, it is evident that there was a clear distinction between the two groups. As opposed to the violent IHH activists who brought the soldiers below deck, where they beat them and prevented them from receiving adequate medical care, some of the flotilla participants they encountered below deck protected them from abuse by the IHH-directed captors. All of the soldiers who were taken below deck stated that without the intervention of some of the flotilla participants, their situation would have been much worse.<sup>814</sup>

191. Therefore, the Commission concludes that the use of force against civilians who did not take a direct part in the violence on board the *Mavi Marmara* is governed by the principles of necessity and the use of "proportionate force" associated with human rights-based law enforcement norms. We will discuss the implications of this conclusion below.

### **Status of the IHH Activists**

192. On board the *Mavi Marmara*, a distinct group of activists seemed to have a different agenda than the other participants in the Gaza flotilla. The dominant members of this group consisted of a "hard core" of 40 activists in the Turkish organization IHH. It also included other participants, largely of Turkish nationality, that decided, for one reason or another, to participate in the violence on board the *Mavi Marmara*. In this respect, they operated in concert with the hard core of IHH activists. It is the group of activists that resisted the IDF's attempts to capture the *Mavi Marmara* (as mentioned above, the IHH affiliated persons that partook in the violence are referred to in the report as "IHH activists").<sup>815</sup> The actions of these activists after the IDF began to attempt taking over the *Mavi Marmara* (and for some; even before this) show that their status under international humanitarian law was distinct from the other passengers on the ship.

193. Civilians retain the protection that their status grants them under international humanitarian law, as long as they do not take a direct part in hostilities. When they do take such part in hostilities, they can be targeted

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814 Testimony of the commander of Shayetet 13, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 4.

815 For more details, see *supra* paras. 126-140 in this report.

in the same manner as if they were combatants. This principle is reflected in article 51(3) to the First Additional Protocol, which states:

"Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities".<sup>816</sup>

The term "take a direct part in hostilities" has been the subject of considerable analysis and discussion. The ICRC Commentaries to Additional Protocol I define direct participation as follows:

"acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces. It is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection under this Section, i.e., against the effects of hostilities, and he may no longer be attacked".<sup>817</sup>

194. More recently, in a document entitled *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, the ICRC has suggested three constitutive elements that are cumulatively required for an act to qualify as direct participation: (i) a threshold of harm; (ii) a causal link between that act and the harm likely to result; and (iii) that the act be in support of one party to the conflict and to the detriment of another.<sup>818</sup> However, it should be noted that this document has generated considerable controversy, and the participants were not able to reach a broad consensus regarding the definition of direct participation in hostilities. Therefore, the *Interpretive Guidance on the Notion of Direct Participation in Hostilities* will be used cautiously in this report.<sup>819</sup>

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816 *Additional Protocol I*, *supra* note 292 at art. 51(3).

817 See ICRC *Commentary Additional Protocol I*, *supra* note 285, at art. 51(3), para. 1944.

818 See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 46 (Nils Melzer ed., 2009), available at [www.icrc.org/eng/assets/files/other/icrc\\_002\\_0990.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0990.pdf) [hereinafter ICRC *Interpretive Guidance*]:

"In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)".

819 In 2003, the ICRC and the Asser Institute commenced a project to provide interpretive guidance on the concept of direct participation in hostilities (i.e. ICRC *Interpretive Guidance*, *supra* note 818) Various critiques of the *Interpretive Guidance* can be found at the NYU J. INT'L L & P forum, available at [www.nyuilp.com/2010/06/05/new-issue-forum-on-direct-participation-in-hostilities](http://www.nyuilp.com/2010/06/05/new-issue-forum-on-direct-participation-in-hostilities); Further, *The Air and Missile Warfare Manual*,



195. The Supreme Court has ruled on the issue of direct participation in hostilities in 2005 in the *Targeted Killings* case. In this report, the Commission has chosen to rely primarily on this ruling when assessing direct participation in hostilities. The court provided that, although Israel had not enacted Additional Protocol I, its provisions relating to direct participation nonetheless are applicable to Israel as part of customary international law.<sup>820</sup> The judgment concludes that article 51(3) of Additional Protocol I encompasses three main parts: *first*, the concept of "hostilities"; *second*, the requirement that civilians take a "direct" part in hostilities; and *third*, the provision by which civilians are not protected from attack "for such time" as they take direct part in hostilities.<sup>821</sup> In relying on the ICRC Commentaries to the Additional Protocols, the court stated:

According to the accepted definition, a civilian is taking part in hostilities when using weapons in an armed conflict, while gathering intelligence, or while preparing himself for the hostilities. Regarding taking part in hostilities, there is no condition that the civilian use his weapon, nor is there a condition that he bear arms (openly or concealed). It is possible to take part in hostilities without using weapons at all.<sup>822</sup>

The court further noted that since there is no consensus on what "direct" participation entails, that standard must be assessed on a "case by case" basis. However, it concluded that a civilian who generally supports the hostilities is not taking a direct part, while "a civilian bearing arms (openly or concealed) who is on his way to the place where he will use them against the army, at such place, or on his way back from it, is a civilian taking "an active part" in the hostilities...."<sup>823</sup> Regarding the interval between these two examples of indirect and direct participation, the court emphasized that the decisive factor is whether the individual is performing the functions of a combatant.<sup>824</sup> Finally, with regards to "for such time", the court was of the view that there was a lack of clarity as to

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*supra* note 115, at 121, para. 5, notes that the criteria established in the DPH Study were not unanimously accepted by the participants in that Study. The lack of international consensus on this document is reflected in the May 2010 Human Rights Council *Report Of The Special Rapporteur On Extrajudicial, Summary Or Arbitrary Executions, Study On Targeted Killings*, A/HRC/14/24/Add.6, at 20, para. 62, which states: "In 2009, the ICRC issued its Interpretive Guidance on DPH, which provides a useful starting point for discussion [emphasis added]."

820 See *Targeted Killing* case, *supra* note 37, at para. 30.

821 *Id.*, at para. 32.

822 *Id.*, at para. 33.

823 *Id.*, at para. 34.

824 *Id.* at para. 35; See also Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L. 17 (2004).

the scope of the provision "for such time" in international law,<sup>825</sup> although it provided that if "such time" has passed, the protection granted to a civilian returns.<sup>826</sup>

In determining whether any of the persons on board the *Mavi Marmara* should be considered direct participants in hostilities, the Commission is thus mindful that the existing criteria lack a degree of precision and are controversial. As the Israeli Supreme Court has stated, in the case of doubt, the status of an individual should be that of a civilian.<sup>827</sup>

196. As previously stated, from the materials before the Commission, including oral testimonies, documentary and magnetic media, it appears that the violence that the Israeli forces encountered when seeking to capture the *Mavi Marmara* was organized and planned. This is evident by the actions of the IHH activists as detailed above, including the following facts: a core group of some 40 IHH activists boarded the *Mavi Marmara* in Istanbul without going through a security check; some of the members of this group identified themselves during the journey with specific signs on their clothing, such as "Security Guard"; a large number of bullet proof ceramic vests, gas masks, telescopic sights, and night-vision aids were found on board the *Mavi Marmara*;<sup>828</sup> the IHH activists established a communications structure through the use of handheld radios (which were also given to the crew but with a different frequency);<sup>829</sup> a few hours before the boarding and after the captain on the *Mavi Marmara* had been warned by the IDF, an order went out to all passengers to return to their seats below deck - some passengers, however, remained on the upper decks; and some of those passengers used disk saws to cut the ship's metal railings and prepare iron bars; IHH activists were divided into groups and stationed for duty at specific posts around the ship.<sup>830</sup> Other passengers, who were primarily of Turkish nationality, joined this core group in resisting the Israeli attempts to board the ship. It is evident that the IHH organized and planned for a violent confrontation with the Israeli military forces.

From the IDF's *infra red* (a visual recording device) it seems that when the takeover started, some approximately 100 IHH activists were

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825 *Targeted Killing* affair, *supra* note 37, at para. 40.

826 *Id.*, at para. 38.

827 *Id.*, at para. 40.

828 Testimony of commander of the Takeover Force, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 4.

829 *Chief of Staff's Open Door Testimony of 11.8.2010*, *supra* note 70, at 29.

830 See the video file "VIDEO\_100530\_003.asf", in folder *Sea, Navy Data Disc*, *supra* note 5; See also the video file "VTS\_01\_2.mov", in folder *Air*, *Id.*

located on the upper decks of the ship. The coordinated manner in which the IHH activists met the Israeli soldiers individually fast-roping to the deck (for some of them, even before they reached the deck), indicates a clear intent to violently oppose a capture of the ship. IDF soldiers on the Morena speedboats were attacked with iron bars, chairs, bolts, and other objects as they approached the *Mavi Marmara*. Further, three soldiers were thrown off the roof to a lower deck where they were stripped of their equipment, sustained severe injuries and were dragged to a location below deck. Several other soldiers testified that attempts were made to throw them over to the lower decks as well.<sup>831</sup> This concerted effort on the roof to throw soldiers to other IHH activists that were waiting on the deck below, taken together with the fact that all three captured soldiers were taken to the same location below decks, points to the existence of a plan to capture Israeli soldiers and possibly hold them as hostages (as happened in a different event that the IHH was involved in about six months prior to this event, when seven Egyptian soldiers were kidnapped by the organization's activists).

197. The level of violence on board the *Mavi Marmara* cannot be categorized as civil disobedience. There was nothing passive regarding the resistance carried out by the IHH activists.<sup>832</sup> Neither were they part of a “criminal gang” or a group of rioters.<sup>833</sup> The violence was specifically directed at the IDF soldiers and was clearly intended to harm them. The manner in which a number of the IHH activists pressed home their attacks even after the Israeli forces started to use lethal force in self-defense reflects a strong commitment to engage in conflict. Some of those activists also expressed their wish to be “*Shaheeds*.”<sup>834</sup> Setting aside the question of whether some of their proclamations may have been demonstrative in nature, it was evident from the testimony of a number of soldiers that the IHH activists they encountered were using violence with the specific intent to prevent the Israeli forces from boarding the *Mavi Marmara*. The Israeli forces were expecting a low level of resistance from the passengers on board the flotilla vessels, but what they experienced on the *Mavi*

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831 Testimony of soldier no. 11, *IDF Completion Response of 7.11.2010*, *supra* note 486; Testimony of soldier no. 22, *Id.* and Testimony of soldier no. 24, *Id.*

832 Passive resistance is defined in the Oxford Online Dictionary as “non-violent opposition to authority, especially a refusal to cooperate with legal requirements”, available at [oxforddictionaries.com/view/entry/m\\_en\\_gb0608850#m\\_en\\_gb0608850](http://oxforddictionaries.com/view/entry/m_en_gb0608850#m_en_gb0608850).

833 See ICRC *Interpretive Guidance*, *supra* note 818, at 24 (which suggests “[l]astly, it should be pointed out that organized armed violence failing to qualify as an international or non-international armed conflict remains an issue of law enforcement, whether the perpetrators are viewed as rioters, terrorists, pirates, gangsters, hostage-takers or other organized criminals”).

834 See the doctor's testimony, Inquiry Expansion of 20.9.2010, *supra* note 451, at 2.

*Marmara*, were levels of violence that they associated with "combat." The weapons used by the IHH activists offered lethal force and resulted in significant injuries to Israeli soldiers. It seems that if it were not for the protective equipment worn by Israeli military personnel and their use of both non-lethal and lethal force in self-defense, the injuries sustained by both soldiers and IHH activists would have been even worse and more widespread.

198. It should also be noted that breaching the blockade could have adversely affected the IDF's military operations in that establishing that the blockade was not effective, thus jeopardizing the security and political goals for which the blockade was established. Consequently, breaching the blockade, in and of itself, constitutes a potential harm to Israel's military effort. Further, the IHH activists attempted to carry out their plan by using force against the soldiers of one of the parties to the conflict. The IHH activists acted directly to cause, or attempt to cause, this harm to one side to the armed conflict, i.e. Israel. However, it should be noted that the other flotilla participants, who did not actively participate in the violence on board the *Mavi Marmara*, are not considered to have taken a direct part in hostilities based on their participation in the attempted breach of the blockade alone.

In addition, the materials before the Commission show that there was also a nexus between the actions of the IHH activists and the conflict. While the flotilla was self-described as a "humanitarian mission," that title masked an, in part, different objective. This is evident from the fact that the flotilla organizers did not attempt to reach an agreement with Israel regarding the delivery of humanitarian supplies. Those controlling the flotilla specifically refused the Israeli offer to divert the vessels to Ashdod and have their supplies forwarded over land to Gaza. On the other hand, however, the arrival of the flotilla was planned and coordinated in advance with the Hamas. As stated above, from the evidence before the Commission, it appears that the IHH aided the Ministry of Transportation and the Ministry of Public Works of the Hamas government in preparing the fishing port in the Gaza Strip to receive the flotilla vessels.<sup>835</sup> Further, while referred to as a humanitarian mission, the flotilla was carrying cement, a commodity that Israel has identified as being used by the Hamas for military purposes and that the transfer of which to the Gaza Strip was restricted by Israel.

199. In sum, the IHH activists' resistance to the boarding of the *Mavi Marmara* was planned and extremely violent. Further, it was directly

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835 IICC report (Apr. 7, 2010), *supra* note 83.

connected to the ongoing international armed conflict between Israel and the Hamas. The obstruction of the Israeli attempts to enforce the blockade and the levels of violence offered by the IHH activists were not representative of acts associated with civil disobedience or isolated or sporadic acts of violence. Under the circumstances, these acts can reasonably be viewed as attempts to privilege the Hamas (acting to the detriment of Israel in its armed conflict with the Hamas) by establishing that the blockade was not effective.

200. It should be noted that suggestions that the IHH activists were acting in legitimate self-defense are not supported by the evidence. First, the blockade was established in accordance with the rules governing blockades and there was no right of self-defense to be exercised by the IHH activists simply because the Israeli military was attempting to enforce the blockade. Second, in seeking to capture and board the ship, the Israeli forces had to respond to the violence offered first by the IHH. This is evident from the magnetic media that shows the extreme levels of violence used against the IDF's soldiers. Such attacks also occurred before the soldiers could reach the roof of the *Mavi Marmara*; as they fast-ropeed down to the ship, when they were most vulnerable because they had not yet had an opportunity to defend themselves or draw their weapons.

201. Based on the criteria established in the *Targeted Killings* case, the Commission concludes that the IHH activists who participated in violence on the *Mavi Marmara* were direct participants in hostilities. In addition, it should be noted that the Commission would have reached the same conclusion by applying the standards set out in the ICRC *DPH Interpretive Guidance on the Notion of Direct Participation in Hostilities*.

For the purposes of this report, the Commission has assessed that participation in hostilities occurred at least from the time that the passengers were directed to take their positions as the Israeli naval vessels arrived, until the ship was taken under Israeli control. While it is also evident that a number of IHH activists took part in hostilities from a planning and logistical perspective well before the arrival of the Israeli armed forces, for the purposes of this analysis, it is only necessary to find that they were directly participating from the time the IDF's takeover of the ship began.

The finding that the IHH activists were taking a direct part in hostilities is important, because it places their actions in the proper legal context. However, due to the Israeli government's lack of information with regards to the IHH organization and the intentions of the flotilla organizers, the IDF was not aware of that group's plan until the first

Solider fast-roped down towards the roof. During the planning of the Israeli military operation, the possibility that the passengers aboard the vessels might be direct participants in hostilities was not expected and was not taken into account. The Rules of Engagement (ROE), which outlined the authorized levels of force to be used by the Israeli soldiers, reflected that approach. This will be discussed in detail below.

### Status of the Captain and Crew

202. Finally, the status of the captain and crew will be examined. Merchant crews have enjoyed a somewhat unique status under international humanitarian law. However, depending upon their actions, the captain and crew of a neutral merchant vessel can be considered to have taken a direct part in hostilities.

203. The captain of the *Mavi Marmara* had a special responsibility to avoid an attempted breach of the blockade. This responsibility is reflected in the constant reference to the "Master" of summoned merchant vessels in foundational texts on the law of naval warfare.<sup>836</sup> The Master of a neutral vessel has a responsibility for the ship and all persons aboard, which includes complying with all belligerent orders; ordering that the ship's crew comply with those orders; and doing everything feasible to ensure that neither the crew nor the passengers interfere with or hamper the exercise of belligerent rights.

In this instance, the captain's actions demonstrated a clear intent to breach the blockade, either under his own volition or under the direction of the IHH.<sup>837</sup> Further, the captain's control of and position on the bridge during the boarding, and the clear refusal to stop the vessel despite repeated warnings, demonstrate that he was not a passive participant in the events on May 31, 2010. In his interrogation in Israel, the captain of the *Mavi Marmara* stated that he changed the course of the ship when directed by Israeli forces.<sup>838</sup> However, from the evidence before the Commission, including footage from the IDF's *infra red* and the analysis of the course based on that footage, it is evident that the captain did not change the

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836 See COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA*, *supra* note 94, at 765 et seq. paras. 879-883; See also OPPENHEIM, *Supra* note 86, at 851 et seq.

837 It has been suggested that the captain acted to stop IHH personnel from preparing weapons by cutting the railings of the *Mavi Marmara*; Such steps, assuming they did take place, were obviously ineffective since they did not stop the IHH personnel from amassing those weapons and making preparations for the assault on the Israeli personnel. The captain thus remained responsible for what occurred on the vessel.

838 see article: 03/06/10/825/5092 *Military Intelligence Reports*, *supra* note 491.

course of the ship during the entire event.<sup>839</sup> The soldiers who took over the bridge stated that the captain was the one holding the steering wheel.<sup>840</sup> Furthermore, it also appears that after the IDF soldiers had taken over the *Mavi Marmara*, the captain gave an order to his crew to wreck the engine of the ship.<sup>841</sup> The Israeli armed forces had to bring technical personnel from shore to fix the engine to get the *Mavi Marmara* underway.<sup>842</sup>

The captain's acts point to an integrated role in the IHH efforts to oppose the Israeli boarding of the vessel. As a result, the Commission finds that the captain of the *Mavi Marmara* was an active participant in the attempts to obstruct the Israeli boarding operations and, therefore, he was a direct participant in hostilities. Regarding the crew, the Commission does not have sufficient evidence to establish whether they were active participants, and they will thus be considered to have had a status as civilians who did not take part in the hostilities.

## The Rules of Engagement and the Use of Force

204. Having reviewed the status of the flotilla participants, the analysis will now turn to the direction given to the IDF combat personnel regarding the use of force. These directions are called Rules of Engagement (hereafter: the **ROE**).<sup>843</sup> The ROE is a document that in practical terms communicates to the soldiers the applicable legal framework for the use of force during an operation. As reflected in the European Court of Human Rights case *McCann v. The United Kingdom*, a determination of the legality of the use of force during an operation requires an assessment of whether the Rules of Engagement (ROE) were consistent with the law.<sup>844</sup> A key issue, therefore, is whether the ROE issued to the soldiers before the Winds of Heaven 7' operation properly reflected the law that governs the use of force.<sup>845</sup>

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839 Testimony of the aerial look-out, *Inquiry Expansion of 20.9.2010*, *supra* note 451.

840 It should be noted that according to the soldiers' testimonies, the Captain did not resist when the Israeli force took over the bridge, see the testimony of soldier no. 18, commander of the force taking over the bridge, *Id.*, at 2.

841 Testimony of soldier no. 9, *Id.*, at 2, testified that when taking over the bridge, the soldiers told the Captain to halt the ship, he started to speak in Turkish to his crew. Soldier no. 9 stated that he later found out that what the Captain said to his crew was an order to wreck the engine of the ship.

842 *Id.*

843 It should be noted that the phrase "rules of conduct for the forces" might be more appropriate under the circumstances. However, due to the fact that in our case it is mainly the provisions concerning the use of force that are relevant, especially the use weapons, this report uses the narrower but more familiar expression "rules of engagement."

844 *McCann and others v. United Kingdom*, App. No. 18984/91, Eur. Ct. H.R., Judgment (1995), at 156 [hereafter: the *McCann* case].

845 See *The ROE Handbook*, *supra* note 786, Part One: Introduction, 1 at para. 3 ("ROE are



205. During a law enforcement operation, the ROE would normally reflect the authority to use force in self-defense, defense of others, and for mission accomplishment. If the mission is conducted during an armed conflict, where the legal authority to use force is broader, the ROE could reflect rules directly based on international humanitarian law. However, even during armed conflict, the authority to use force may still be more narrowly prescribed in the ROE than what the law permits, either because of operational considerations or due to a need to meet particular policy goals. Therefore, the substance of any ROE is dependent upon both the nature of the mission and the anticipated levels of force required to complete that mission.

206. The ROE issued for the 'Winds of Heaven 7' operation on May 31, 2010, were entitled "the Rules of Conduct." They were set out in Annex G (the legal annex) to the naval command issued by the Israeli Navy operation department (this was also annexed to the land operation command). Under the provision named "General" in the Rules of Conduct, it was provided that when dealing with civilian foreigners who are not, "according to existing information", combatants, force should not be exercised towards those civilians beyond the minimum amount necessary for completion of the mission, i.e., to halt the vessels.<sup>846</sup> The use of force was permitted only as a last resort and only if persuasion was unsuccessful. Further, the authority to use force was limited to two distinct circumstances: to prevent the risk of harm to a person, and to deal with an attempt to thwart the bringing of a vessel to an Israeli port.<sup>847</sup> If force had to be used, it had to be exercised gradually and in proportion to the resistance met, and only after examining alternatives to prevent deterioration of the situation.

*Use of less-lethal weapons.* The use of less-lethal weapons was permitted only when necessary to neutralize an immediate threat to the safety or life of persons from a specific person. Further, if the person posing the threat could be neutralized without using a less-lethal weapon,

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issued by competent authorities and assist in the delineation of the circumstances and limitations within which military forces may be employed to achieve their objectives. ROE appear in a variety of forms in national military doctrines, including execute orders, deployment orders, operational plans, or standing directives. Whatever their form, they provide authorisation for and/or limits on, among other things, the use of force, the positioning and posturing of forces, and the employment of certain specific capabilities. In some nations, ROE have the status of guidance to military forces; in other nations, ROE are lawful commands").

846 *Naval Operational Order 3*, *supra* note 445, annex G, at 59-61.

847 *Id.*

the soldiers were instructed to do so.<sup>848</sup> The ROE also specified that in case force was required, only less-lethal weapons specifically approved for the mission would be used. In this context, it should be noted that the ROE refer to the operation and safety instruction found in Annex D to the naval command, which further restricted the use of less-lethal weapons to certain ranges and limited which parts of the body could be targeted. For example, shooting at the head or back was prohibited due to the risk of lethal harm.

*Use of lethal weapons.* The ROE provided that generally, the use of live fire is not permitted. The only case in which lethal weapons was permitted was in self defense - to remove a real and imminent danger to life, when the danger cannot be removed by less harmful means.<sup>849</sup> Prior to using lethal weapons, the soldiers had to issue verbal warnings or attempt to subdue the person posing the danger by less harmful means. If that was not possible, the next steps were to threaten the use of weapons; shoot warning shots in the air; and fire towards the legs (at the knees or lower). However, the soldiers could use lethal force without following these steps if necessary to remove an immediate threat. The ROE also stated that medical assistance has to be provided to any person wounded by the use of force during the operation. Once the danger was removed, there must be an attempt to apprehend the person posing a risk without the use of firearms. Further, the infliction of harm to uninvolved persons must be avoided and someone who has surrendered or stopped constituting a threat must not be fired upon.

207. While the operation was being conducted in the context of an armed conflict, the ROE provided an authority to use force that reflected the nature of a law enforcement operation, in which the authority to use force is more limited. In fact, the ROE that were issued for the operation appear to be even more limited than what can sometimes be found in an operational or law enforcement context, because they did not overtly contemplate the use of either lethal or less-lethal force to complete the mission or, as in a law enforcement context, to enforce the law. While the ROE did authorize the use of force to prevent the thwarting of bringing the vessels into an Israeli port, they also limited the use of lethal and less-lethal weapons to self-defense and defense of others. Consequently, it appears that the use of such weapons was not authorized directly for the purposes of mission accomplishment, but only within the scope of self-defense. Therefore, notwithstanding the *ex post facto* categorization of the

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848 *Id.*

849 *Id.*; Annex D to the *Naval Operational Order 3*, *supra* note 445.

IHH activists as civilians taking a direct part in hostilities, the authority to use force provided to the soldiers by the naval command was more restrictive than the law required. Since it is the ROE that set out the authority to use force, the analysis of how those directions were applied provides one framework under which the actions of the soldiers can be assessed.

208. The question to be addressed next is whether the self-defense-based ROE issued to the Israeli forces were consistent with the doctrine followed by other military forces. The International Institute of Humanitarian Law Rule of Engagement Handbook provides a helpful overview of how the law regarding the use of force in self-defense, defense of others, and mission accomplishment is generally interpreted and communicated to military personnel. As the Handbook acknowledges, both international and domestic law recognize the right of self-defense. That right can also include the authority to defend other persons. Self-defense is available in all situations, including during armed conflict.<sup>850</sup> From a doctrinal perspective, that right is often divided into individual<sup>851</sup>, unit<sup>852</sup> and national self-defense.<sup>853</sup> Generally, Rules of Engagement drafted for military forces authorize the use of force to defend oneself against an attack or imminent attack. The use of force in self-defense requires the use of necessary and proportional means and actions. Further, a sequential escalation of force with an “aim to use the least harmful option available in those circumstances” is generally required in order for the use of force to be lawful.<sup>854</sup> However, whether such an escalation of force is possible is dependent upon the prevailing circumstances at the point that force is used.

209. Another issue is the authority to use force outside the scope of self-defense or defense of others, that is; for mission accomplishment. Such authority clearly exists under international humanitarian law.

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850 See *The ROE Handbook*, *supra* note 786, at 3, para. 8.

851 *Id.*, at 83, Annex D (where individual self-defense is defined as “the right of an individual to defend himself or herself (and in some cases other individuals) from *hostile act* or *hostile intent*.” This is not to be confused with the right of individual states to act in self-defence as is reflected in art. 51 of the UN Charter).

852 *Id.*, at 85, Annex D (*unit self-defence* the right of unit commanders to defend their unit, other units of their nation, and other specified units against *hostile act* or *hostile intent*). However, see also DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE, *supra* note 344 (where he notes that the United States Rule of Engagement approach of distinguishing between defending elements or personnel of a defined unit (‘unit self-defense’) from ‘national self defense’ can be misleading in law of armed conflict terms since all self-defense international law in that context is national self-defense).

853 See *The ROE Handbook*, *supra* note 786, at 3, para. 8.a.

854 *Id.*, at 24; Appendix 5 to Annex A, para. 5.1.

However, the use of force beyond self-defense is not unique to armed conflict situations. As has been noted:

Broadly speaking, during peacetime, the use of force is permitted in self-defense, in the exercise of law enforcement authority, and to accomplish operations or missions specifically authorised by a higher national authority or other governing body, such as the U.N. Security Council.<sup>855</sup>

Hence, there is a possibility to authorize the use of force beyond self-defense in the enforcement of the law, although such use is normally narrowly prescribed.<sup>856</sup>

210. The ROE Handbook recognizes that national approaches to self-defense often differ on the definition and content of the right of self-defense, and individuals “exercise this right in accordance with their respective national law.”<sup>857</sup> This connection between national and international law is reflected in a decision from the International Tribunal for the Former Yugoslavia, *Prosecutor v. Dario Kordic*, which held that the principle of self-defense enshrined in the Rome Statute of the International Criminal Court reflects provisions found in most national criminal codes and could be regarded as a rule of customary international law.<sup>858</sup> The same principles are prevalent in Israeli domestic law governing the use of force in self-defense.<sup>859</sup>

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855 *Id.*, at 4, para. 13-13b. (which states in respect of law enforcement and UN sanctioned operations “[w]here the use of force is not justified by *self-defence*, but is nonetheless necessary for accomplishment of an assigned military mission, reasonable force may be exercised within the constraints of the relevant national and international law”); For a discussion of the authority to use force during MIO, see also Heintschel von Heinegg, *Maritime Interception*, *supra* note 778, at 392-393, para 20.12.

856 Note that even during law enforcement operations, the use of force is not strictly limited to self-defense or the defense of others. As the *U.N. Basic Principles*, *supra* note 810, at 2, para. 9 states, firearms can be used “to arrest a person presenting such a danger [threat to life] and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.” See also the European Convention on Human Rights, at art. 2(2):

Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defense of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection [emphasis added].

However, the deprivation of life in such circumstances is narrowly prescribed. For example, see *The McCann case*, *supra* note 809; *Nachova and Others v. Bulgaria*, App. No. 43577/98, Eur. Ct. H.R., Judgment (2005); *Makaratzis v. Greece*, App. No. 50385/99, Eur. Ct. H.R., Judgment (2004); and *Kakoulli v. Turkey*, App. No. 38595/97, Judgment (2005/2006).

857 See *The ROE Handbook*, *supra* note 786, at 3, para. 8.

858 See *Prosecutor v. Dario Kordic*, *supra* note 793, at para. 451.

859 See e.g., C.A. 4191/05 *Eltgauz v. the State of Israel* (unpublished, Oct. 25, 2006), at para. 13; C.A. 4546/03 *Tadessa v. the State of Israel* (unpublished, Jun. 23, 2004), at para. 4; C.A.

211. The Commission is satisfied that the ROE provided for the operation were consistent with the practice followed by other nations regarding the provision of ROE for international operations. Further, it can be concluded that the ROE for the military operation contain principles similar to the human rights-based norms applicable in a law enforcement context.<sup>860</sup> Those principles are also reflected in many regional and domestic court cases dealing with the question of self-defense and the use of force by State authorities.<sup>861</sup>

## **General Assessment Regarding the Use of Force during the Enforcement of the Blockade**

212. When assessing the use of force by Israeli soldiers during the enforcement of the blockade against the Gaza Strip, there are a number of factual and legal factors which are particularly relevant.<sup>862</sup> These factors include the resistance that the soldiers faced and the nature of their response to that resistance, as well as the type of weapons used. This analysis will now turn to the nature of the overall situation on board the *Mavi Marmara*. However, it should be noted, that the general principles guiding the analysis are applicable to the use of force on the other flotilla vessels.

### **The nature of the threat posed to the IDF**

The overall situation

213. The soldiers' testimonies demonstrate the fact that the situation they anticipated (one of relatively minor civil disobedience)<sup>863</sup> was not

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6147/07 *Abisidris v. the State of Israel* (still unpublished, Jul. 2, 2009), at para. 33; C.A. 410/71 *Horovitz v. the State of Israel*, SCJ 26(1) 624, 628-629 (1972); C.A. 8554/00 *Zrabilov v. the State of Israel*, SCJ 57(4) 913, 917-918, at para. 5 (2001); C.A. 20/04 *Kliener v. the State of Israel*, SCJ 58(6) 80, 90-91 (2004).

860 These include the use of only necessary and proportionate force; escalation of the use of force; use of force including less-lethal and lethal weapons as a last resort; and the use of lethal force in self-defense or the defense of others against imminent threat of death or serious injury.

861 See, e.g., *The McCann case*, supra note 809; *Makaratzis v. Greece*, supra note 856; *Huohavanen v. Finland*, App. No. 57389/00, Eur. Ct. H.R., Judgment (2007); *Giuliani and Gaggio v. Italy*, App. No. 23458/02, Eur. Ct. H.R., Judgment (2009); and *Bubbins v. The United Kingdom*, App. No. 50196/99, Eur. Ct. H.R., Judgment (2005).

862 As is noted in *The McCann case*, supra note 809, at 160, para. 148 (where it is noted limiting the use of force to situations of absolute necessity indicates that "a stricter and more compelling test of necessity must be employed [than] that normally applicable when determining whether State action is 'necessary in a democratic society.'").

863 See, for example, para. 132 above. It should be noted that in the strategic discussions prior to the operation, the possibility that firearms might be present was mentioned,

the one they encountered - more than one soldier described the scene of violent assaults as being one of "combat." Above we described the chronicle of the takeover of the *Mavi Marmara* and the other ships. For the purposes of the analysis here, a few details described above should be reinforced.

The IDF soldiers - particularly those who fast-roped down to the roof of the *Mavi Marmara* from the first helicopter - encountered severe violence. While initially it was estimated that there were 10 to 15 IHH activists on the roof, their numbers doubled as the first soldiers landed there. A determined and organized opposition, which acted in concert, confronted the soldiers. Groups of three to five IHH participants met each soldier as they fast roped to the roof.<sup>864</sup> There was an organized effort to throw the soldiers of the first helicopter (carrying 15 soldiers) over the side of the roof or down through hatch openings to the IHH activists waiting below. The IHH activists captured three of the first four soldiers who landed on the roof (soldiers no. 1, no. 3 and no. 4) and there were still attempts by IHH activists to seize soldiers as late as when soldier no. 13 landed on the roof.<sup>865</sup> Even when the IDF soldiers established a secure area in one part of the roof, the IHH activists remained grouped together towards the bow and stern ends of that deck. Groups of IHH activists repeatedly threatened the soldiers through the deck hatches from the next lower deck (for this report, called the "bridge deck"). Such attacks continued from internal stairways and passageways inside the ship once the bridge deck was entered by the soldiers for the purposes of gaining access to the bridge and ultimately control of the ship.

214. All the IDF soldiers who descended to the *Mavi Marmara* from the first helicopter describe the following facts, which must be taken into account in the examination of the incidents of the use of force in which they took part. *First*, IDF soldiers were at a numerical disadvantage in relation to the IHH activists who were equipped with a variety of assault weapons. *Second*, the IDF soldiers expected a low level of violence and thus prepared, as a main scenario, for an unarmed confrontation with the ship's passengers. The soldiers were equipped with less-lethal weapons (e.g. paintball guns, beanbags) as their primary weapons and their live firearms (pistols or rifles) were used as secondary weapons. *Third*, the

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nonetheless, from the soldiers testimonies it is evident that this did not transpire down the chain of command to the individual soldiers. For a detailed analysis, see para. 243-245 below.

864 Testimony of the commander of Shayetet 13, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 4; The report's summary, *Id.*, at 5.

865 Testimonies of soldier no. 1, soldier no. 2, soldier no. 3, soldier no. 4, soldier no. 6, soldier no. 9, soldier no. 10 and soldier no. 13, *Id.*

harsh attack which all the soldiers descending from the first helicopter experienced in addition to the two factors mentioned above, caused the soldiers to sense that a real, clear, and immediate threat was being posed to the safety and physical well being of their fellow soldiers and themselves.

215. In addition, the testimonies of the IDF soldiers indicate that there were common features to the way the IHH activists dressed, looked, and acted. They were equipped with orange life vests, body armor, and gas masks.<sup>866</sup> However, perhaps the most distinctive characteristic of each IHH activists was that they were armed with weapons such as an iron bars, clubs, axes, slingshots, knives and, in some cases, firearms. In their testimonies, the IDF soldiers expressed surprise at these persons' willingness to continue to attack even when confronted with the use of flash bang grenades and firearms.<sup>867</sup>

216. However, the fact that most of the passengers on the upper decks of the *Mavi Marmara* appeared to be part of the IHH-directed group resisting the capture of the ship does not mean every person on those decks (or those who may have resisted more passively on the other ships) were automatically direct participants in hostilities. For example, during the fighting it was noted by one soldier that on one of the lower decks towards the center and stern of the ship there were many photographers with cameras.<sup>868</sup> In this regard, there is a continuing requirement under international humanitarian law to apply the principle of distinction in order to ensure that attacks are only directed at civilians taking a direct part in hostilities. This means that every soldier had to differentiate between those persons who were direct participants in hostilities and those who were not.

#### Use of weapons by the IHH

217. The use of weapons is an important criterion in determining whether a person is taking a direct part in hostilities. It is also relevant to the issue of self-defense, since a fundamental principle of self-defense is that any use of force must be proportionate to the threat that is presented. Where law enforcement norms are applied, factors such as the level of violence caused by the individual, the injuries that the individual has inflicted on state agents, and the amount of force needed to subdue him have been considered in the assessment of whether the use of force

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866 See para. 166 above.

867 Testimony of soldier no. 28, *IDF complementary response of 7.11.2010*, *supra* note 486, at 2.

868 Testimony of soldier no. 31, *Id.*, at 2.



was proportionate.<sup>869</sup> The use of "proportionate force" does not require that a proportionate response be of the same nature as the threat that is presented. For example, a person threatening the application of lethal force with an iron bar does not have to be countered with a club. Rather, the use of defensive force will be measured by the degree of force needed to effectively defend oneself or others and the means available to do so.

218. The right to use deadly force in self-defense is not limited to situations where a life is threatened; rather, the right is also applicable when serious injury can result. It is evident from the materials before the Commission that the IHH activists armed themselves with a wide array of "cold" weapons that were used in a manner which could cause death or serious bodily injury.<sup>870</sup>

The fact that the IHH activists were predominately armed with these weapons rather than firearms does not alter the fact that these weapons were "lethal". One soldier suffered a serious wound when stabbed in the stomach.<sup>871</sup> Another soldier avoided receiving a knife wound in his chest because the weapon struck the ceramic plate of his body armour.<sup>872</sup> The iron bars and other blunt force weapons caused significant head injuries to two other soldiers.<sup>873</sup> The injuries inflicted on the soldiers while they were on the ropes or as they let go of the ropes included broken or injured arms and hands,<sup>874</sup> as the soldiers used their arms to protect themselves.

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869 *Bekirski v. Bulgaria*, App. No. 71420/01, Eur. Ct. H.R. (2010), at para. 135; See also C.A. 6157/04 03 *Hoch v. the State of Israel* (unpublished, Sep. 9, 2005), at para. 14g.

870 See paras. 165, 167 above.

871 Testimony of soldier no. 3, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 3. For the details of the injuries caused to soldier no. 3, see the medical reports received from Rambam Hospital and detailed in *IDF complementary response of 15.11.2010*. Among the injuries detailed: stab wound in the abdomen, facial bruise and gash in left hand, a fractured nose and torn tendon in the finger.

872 Testimony of soldier no. 5, *Id.*, at 3.

873 Testimony of soldier no. 4, *Id.*, at 2-3. For the details of the injuries caused to soldier no. 4, see the medical reports received from Tel Hashomer Hospital and detailed in *IDF complementary response of 15.11.2010*. Among the injuries and treatment detailed: compressed fracture to the skull, hematoma in right eye, seizures; the soldier was sedated and attached to respirator and received surgery to treat skull fracture. Testimony of soldier no. 1, *Id.*, at 2. For the details of the injuries caused to no. soldier 1, see the medical reports received from Rambam Hospital and detailed in the IDF's response to the Commission's request on this matter, *IDF complementary response to the Commission's Questions of 15.11.2010*, marked as exhibit 145 in the Commission's exhibits [hereinafter *IDF complementary response of 15.11.2010*]. Among the injuries detailed: a deep cut to the scalp, light internal bleeding in skull, fractured skull, injuries to the palm of his left hand (an X-ray showed that the injury was sustained in the same place as a previous fracture and therefore, his hand was put in a cast), and more.

874 Testimony of soldier no. 7, *Id.*; Testimony of soldier no. 8, *Id.*; Testimony of soldier no. 11, *IDF Completion Response of 7.11.2010*, *supra* note 486.

The soldiers were indeed protected by helmets and ceramic vests and some of them report to have been protected from grave injuries because of this equipment.<sup>875</sup> One soldier stated that his helmet had been shattered by the strikes he received during the incident (it should be noted that while all of the soldiers were equipped with helmets, which were not only strapped but fixed to their heads, some of these helmets shifted position on their heads during the fast-roping).<sup>876</sup> Further, the wide spread use of slingshots to fire iron balls, bolts, and glass marbles represented another form of force capable of causing serious bodily injury.<sup>877</sup> The attempts by the IHH activists to prevent the Israeli soldiers from boarding the *Mavi Marmara* from the Morena speedboats by cutting loose the climbing ladders represented another risk that might have caused death or serious injury.<sup>878</sup> These soldiers, who were attempting to board the *Mavi Marmara* from a smaller boat while both vessels were under way, were placed at grave risk by these actions of the IHH activists. Moreover, on two occasions when the Israeli vessels were positioning to board, two other Gaza flotilla vessels, the *Challenger 1* and *Boat 8000* maneuvered in such a way as to potentially collide with Israeli naval vessels. It required quick action by the personnel on the Israeli vessels to avoid collision.<sup>879</sup>

From the above, it is clear that the Israeli soldiers - on board the *Mavi Marmara* and on the Morena speedboats - were confronted with a large group of IHH activists who were armed with weapons capable of causing death and who were intent on causing death or serious bodily injury.

#### Use of Firearms by the IHH

219. Another issue to be addressed is whether IHH activists used firearms during the incident. Focusing on the issue of whether the IHH used firearms is misleading, since as mentioned, there is ample evidence that IHH activists used other lethal weapons in their assaults on the Israeli soldiers, which justifies the use of lethal force by those soldiers in self-defense or the defense of others. Therefore, the use of firearms is

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875 Testimonies of soldiers no. 3, *Inquiry Expansion of 20.9.2010*, *supra* note 451; and testimony of soldier no. 5, *Id.*

876 Testimony of soldier no. 5, *Id.*

877 Testimonies of soldier no. 11, soldier no. 20, soldier no. 24, soldier no. 25, soldier no. 26, soldier no. 27 and soldier no. 38, *IDF Completion Response of 7.11.2010*, *supra* note 486, indicate they were targeted with slingshots.

878 Testimony of Task Force Commander, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2-3.

879 The Israeli vessels were RHIB No' 2, threatened by the CHALLENGER 1 (See Testimony of Task Force Commander, at 1, *Id.*); and A Commanding Vessel, 'Zaharon', threatened by the Boat 8000 (See Testimony of soldier no. 19, at 1, *Id.*; See testimony of Commander of Missile Boat A, *Id.*, at 2.)

not determinative of whether Israeli forces were justified in using lethal force in self-defense. However, the use of firearms by IHH activists is an important factor for two reasons. First, the use of firearms is important because it relates to the tactical situation which the Israeli forces confronted. The possible use of firearms significantly heightened the risk posed to the soldiers and their perception of that risk. Second, establishing the level of threat that the Israeli soldiers believed they were facing, is a factor in the assessment as to whether their response was proportionate.

220. The statements of the soldiers include a number of reports about the use of firearms. One of the salient issues is whether the IHH activists themselves brought firearms on board the *Mavi Marmara*. Apparently, there was security screening for passengers boarding the ships prior to departure. Such screening presumably was meant to ensure, *inter alia*, that weapons could not have been brought on board. However, 40 activists; the persons who have been deemed as the 'hard-core IHH group,' boarded in Istanbul without such a screening. Given this fact, and the fact that the evidence points towards the fact that the IHH had a preexisting plan to violently oppose the Israeli boarding, the Commission is not convinced that the pre-boarding security measures ensured that there were no weapons brought on board the *Mavi Marmara* by the IHH activists.

221. However, the Commission did not find that the evidence point conclusively to the fact that the IHH activists were using firearms which they brought on board the *Mavi Marmara* themselves. The IDF's position that the IHH activists brought the firearm on board is primarily based on three incidents: the timing of the shooting of soldier no. 2; the discovery of a non-IDF issued bullet in the knee of soldier no. 5; and the sighting of a non-IDF issued pistol on the roof of the *Mavi Marmara*. As will become evident, this is not sufficient.

Soldier no. 2 was shot in the stomach. The round that hit soldier no. 2 went through his body and was never recovered. As a result, no ballistics test could be performed to determine whether or not it came from an IDF weapon. However, it has been suggested in testimony and in a written submission to the Commission that soldier no. 2 was shot before there was an opportunity for Israeli military personnel to unholster their weapons.<sup>880</sup> Apparently this conclusion was reached based on an assessment by the Israeli military that soldier no. 2 was shot within the first 20 seconds of landing on the deck of the *Mavi Marmara*.<sup>881</sup> However,

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880 *Chief of Staff's Open Door Testimony of 11.8.2010, supra* note 70, at 26; See also Testimony of Commander Shayetet 13, *Inquiry Expansion of 20.9.2010, supra* note 451, at 9.

881 *Id.*

Soldier no. 2 did not indicate in his testimony that the shooting occurred within the first 20 seconds of landing on the deck of the *Mavi Marmara*. He states that immediately after he noticed that he was shot in the stomach, he drew his handgun, which deterred a number of IHH activists who were threatening him, and he then fired from a range of 5-6 meters at a person with a handgun at the back of the left wall. It is not clear from the testimony whether this pistol was used to shoot soldier no. 2. The statement of soldier no. 2 indicates that he fired simultaneously with soldiers no. 13 and no. 14 at the person holding the pistol.<sup>882</sup> Soldier no. 17 on helicopter no. 2 states that, from the vantage point of the helicopter, he saw an IHH participant holding what he believed to be a 9mm pistol.<sup>883</sup> Soldier no. 14 immediately went to the body of the IHH participant and retrieved a Glock pistol. In response to the Commission's inquiry, Soldier no. 14 stated that he believed this pistol to be an Israeli-issued weapon. From this fact, it seems that the IDF's estimate that the shooting happened some 20 seconds after the fast-roping from the first helicopter began, could be mistaken. In order for soldier no. 13 and no. 14 to be involved in this shooting, it would likely have had to occur approximately 1-2 minutes after soldier no. 2 landed on the deck. Soldier no. 12 stated that when he first encountered soldier no. 2, that soldier initially thought a less-lethal weapon from the Israeli forces might have hit him. Shortly after, soldier no. 2 informed soldier no. 12 that he had realized he had in fact been hit by a bullet.<sup>884</sup> It should be noted, that at this stage, three other IDF soldiers who were abducted by the IHH activist, had already fast-roped to the roof of the *Mavi Marmara*. It seems that two of them, were already overpowered and stripped of their equipment and weapons, including Glock pistols, at this point.<sup>885</sup> It is probable that it is one of these weapons which the IHH participant had in his possession. Thus, the Commission finds it hard to establish based solely on this event that the said weapon was necessarily a weapon brought on board the *Mavi Marmara* by an IHH activist.

Soldier no. 5 received a gun shot wound in the knee. He believes that he was shot when there were only five soldiers on the deck. In this case, the bullet remained in his knee. After the bullet was recovered from his knee, it was determined that it was not of a type presently in use by the Israeli military. However, in the Chief of Staff's general testimony, the

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882 Testimony of soldier no. 2, *Id.*; Testimony of soldier no. 13, *Id.*; and Testimony of soldier no. 14, *Id.*

883 Testimony of soldier no. 17, *Id.*, at 1; Supplementary Testimony of soldier No. 17, *IDF Completion Response of 7.11.2010*, *supra* note 486.

884 Testimony of soldier no. 12, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 3.

885 Testimony of soldier no. 13, *Id.*, at 3; Testimony of soldier no. 14, *Id.*, at 1.

Commission was informed that the bullet was 9 mm in caliber and had previously been in use by the IDF until 2007.<sup>886</sup> Again, without ballistics tests it is not possible to confirm which weapon fired the bullet.

There were other incidents in which IDF soldiers reported seeing IHH participants use weapons or where they observed the effects of gunfire. For example, soldier no. 33 fired at the legs of an IHH participant who was firing a revolver at the soldiers.<sup>887</sup> What was described in military terminology as “long guns” or rifles, were also seen on the bridge deck level. Soldier no. 9 stated that he fired at an IHH participant when he saw a gun barrel, whose length and caliber corresponded with a rifle, protruding from an opening of the floor.<sup>888</sup> Another soldier stated that he saw a “long firearm” being thrown over the side of the ship.<sup>889</sup> Another soldier stated that he saw both a “long gun” and a pistol being fired by IHH participants, albeit the latter sighting was made from a distance of 40 to 50 meters.<sup>890</sup> Those weapons were never located. There are also statements from Israeli military personnel on board the Morena speedboats and accompanying naval vessels stating that gunfire was directed at the Morena speedboats.<sup>891</sup> At one point, a Morena speedboat reduced its speed and quickly altered its course in order to avoid such fire.<sup>892</sup>

One soldier believed he saw a handgun lying on the deck with a “hammer” that bore no resemblance to the 9mm Glock handgun used by the Israeli soldiers. However, this weapon was not found after the incident.<sup>893</sup> Furthermore, most of the testimonies do not specify whether the weapons they reported seeing were weapons used by the IDF. It is important to note that during the initial stages of the fighting, two mini-Uzi weapons were taken from captured Israeli soldiers.<sup>894</sup> An IDF pistol with an empty magazine was also found hidden under a sofa located on one of the lower decks. Under these circumstances, the Commission cannot establish whether IHH activists brought firearms on board the *Mavi Marmara*.

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886 *Chief of Staff's Open Door Testimony of 11.8.2010, supra* note 70.

887 Testimony of soldier no. 33, *IDF Completion Response of 7.11.2010, supra* note 486, at 2.

888 Supplementary Testimony of soldier no. 9, *Id.*

889 Testimony of soldier no. 33, *Id.*, at 3.

890 Testimony of soldier no. 32, *Id.*, at 2.

891 Testimony of soldier no. 19, *Inquiry Expansion of 20.9.2010, supra* note 451; Testimony of Team Commander R, *Id.*; See also Supplementary testimony of Commander of Center A, *IDF Completion Response of 7.11.2010, supra* note 486, at 2.

892 Testimony of soldier no. 19, *Inquiry Expansion of 20.9.2010, supra* note 451, at 2.

893 Testimony of soldier no. 6, *Id.*, at 7.

894 Testimony of soldier no. 1, *Id.*, at 2; Testimony of soldier no. 3, *Id.*, at 2.

222. However, and having reviewed the available evidence, the Commission finds that members of the IHH activists used firearms against Israeli forces on May 31, 2010, in their efforts to repel the boarding of the *Mavi Marmara* by Israeli military personnel. In reaching this conclusion, the Commission has taken into consideration that the melee on board the *Mavi Marmara*, especially during the initial stages on the roof, was a situation of considerable confusion. The use of slingshots with metal and glass balls added to that confusion because some soldiers believed they represented pistols and gunfire,<sup>895</sup> although other soldiers stated that they differentiated between the sound of gunfire and marbles fired by slingshots.<sup>896</sup> In addition, iron bars were sometimes mistaken for the barrels of rifles.<sup>897</sup> For a considerable period of time, the soldiers thought soldier no. 5 had been shot in the head, when his head injuries actually resulted from physical assaults.<sup>898</sup> Such confusion is a normal part of conflict; often termed the “fog of war.” However, the physical evidence of gunshot wounds; the statements of numerous soldiers operationally experienced in the use of firearms who gave accounts of seeing weapons in the hands of IHH activists; and the fact that IHH activists had access to captured IDF handguns and mini-Uzis, supports the conclusion that the IHH used firearms against Israeli military personnel.

223. Following the conclusion that the IHH activists did indeed use firearms, there are two factors that should be taken into account when assessing the use of force by the IDF soldiers. The use of firearms by the IHH impacted the soldiers in two ways. First, while the operation had planned for less-lethal weapons to be carried as the primary weapon, with lethal weapons remaining holstered, the initial fighting on the roof resulted in an order to switch to “live” weapons. This order appears to be reasonable given the nature of the violence experienced by the soldiers; the continuing threat that the soldiers faced; and the fact that a number of soldiers were seriously wounded. Although this meant that often the most readily available weapon to them was a lethal weapon, it did not mean that the use of less-lethal weapons was abandoned. Some of the IDF soldiers continued to use less-lethal weapons, either by switching between lethal and less-lethal weapons or as their primary weapon.<sup>899</sup>

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895 For example, see Testimony of soldier no. 13, *Id.*, at 4.

896 See Supplementary Testimony of soldier no. 9, *IDF Completion Response of 7.11.2010*, *supra* note 486; See also Testimony of soldier no. 33, *Id.*

897 Testimony of soldier no. 34, *Id.*, at 2.

898 Testimony of soldier no. 14, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2; The medic treating soldier no. 5 who due to the severity of his head injury thought he had been shot in the head in addition to having fractures in the limbs and a bullet in the knee.

899 Testimony of Commander Shayetet 13, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at

Secondly, the use of firearms also impacted on the soldiers' view of the nature and imminence of the threat. Assaults with iron bars and knives require a close proximity between the assailant and the person being assaulted (although there is also considerable evidence that in some cases IHH activists threw iron bars and other objects at the soldiers as well). Generally, however, the use of such weapons means that the assailant has to expose himself physically to the person being threatened. In such circumstances, when identifying such a weapon from a distance, there is often a greater opportunity to use less-lethal weapons in response. However, the use of firearms does not require that same degree of physical exposure or close proximity by the assailant. When it became clear to the soldiers that the IHH activists were using firearms, the soldiers were particularly cognizant of the heightened risk and the different nature of the threat. As a general rule, whenever an individual is carrying a firearm, there is a heightened risk to the lives of state agents and others. Thus, even if the firearm is not directly aimed at anyone, the use of lethal force in response can under certain circumstances be considered to be necessary and proportionate.<sup>900</sup>

### *The Nature of the Response by the IDF*

#### Legal Test for Assessing Decision Making

224. A number of factors should be taken into consideration when assessing the lawfulness of the use of force by individual soldiers.<sup>901</sup> The test for assessing a decision by a soldier to target a military objective is whether it is reasonable to believe that the potential target is a lawful one.<sup>902</sup>

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900 *Huohavanen v. Finland*, *supra* note 861, at para. 97.

901 See *Giuliani and Gaggio v. Italy*, *supra* note 861, at paras. 217-225 (where the European Court of Human Rights took into account the findings of an investigating judge which was based on "the testimonies and images showing the violence of the demonstrators' attack, the constant barrage of stones to which the vehicle was subjected and which caused physical harm to its occupants, and the aggression shown towards the passengers by the demonstrators, who had continued to surround the vehicle at very close quarters while thrusting hard objects inside. This situation of persistent danger undeniably amounted, in the judge's view, to a real and unjust threat to the personal integrity of [the policeman] and his colleagues and called for a defensive reaction that had been bound to culminate in [policeman] using the only means at his disposal: his weapon." However, the Court has also emphasized that public disturbances does not give law-enforcement officials *carte blanche* to use firearms. On the contrary, there is a heightened responsibility to organize the actions of the police carefully with a view to minimizing a risk of deprivation of life or bodily harm"); See also Haled Ganaim, Doron Menashe & Mordechai Kremizer, *The Boundaries of Exercising Fatal Force when Arresting*, 25 *LEGAL STUDIES* 703, 730-731 (2009).

902 *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgment, paras. 50, 51, 55 (Dec. 5, 2003); See also Michael N. Schmitt, *Fault Lines in the Law of Attack*, in *TESTING THE BOUNDARIES OF*



In a law enforcement context, the reasonableness of the use of force when depriving someone of his or her life is generally decided on the basis of the facts "which the user of the force honestly believed to exist: this involves the subjective test as to what the user believed and an objective test as to whether he had reasonable grounds for that belief."<sup>903</sup> Thus, both international humanitarian law and human rights law recognize the test of "reasonable belief" with respect to decisions to use force.<sup>904</sup> A test of reasonable belief does not require perfection. A person using force can have an honest but mistaken belief regarding the basis upon which the force is used.<sup>905</sup> In a law enforcement context, once reasonable belief is established, "it must then be determined whether it was reasonable to use the force in question in the prevention of crime or to effect an arrest."<sup>906</sup>

225. Generally, the law also recognizes that decisions often have to be made under duress and in a compressed time period. As the United States Supreme Court famously stated, "Detached reflection cannot be demanded in the presence of an upturned knife."<sup>907</sup> Further, it has been noted, "Police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation."<sup>908</sup> Finally, as the European Court of Human Rights has indicated, a court making an *ex post facto* examination cannot, "detached from the events at issue, substitute its own assessment of the situation for that of an officer who was required to react in the heat of the moment to avert an honestly perceived danger to his life."<sup>909</sup> This principle is also recognized under the Israeli law of self-defense.<sup>910</sup>

The difficulties of assessing in hindsight the appropriate response to lethal force should be kept in mind when reviewing the actions taken by Israeli soldiers on the *Mavi Marmara*. The confined and crowded spaces on the ship and the repeated attempts by IHH activists to press home lethal attacks with iron bars, knives, chairs, etc, often left the Israeli soldiers with little time to contemplate the use of less-lethal means. That

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INTERNATIONAL HUMANITARIAN LAW 277, 304 (Susan Breau & Agnieszka Jachec-Neale, eds. 2006).

903 *The McCann case*, *supra* note 809, at para. 134.

904 *Prosecutor v. Galic*, *supra* note 902; *The McCann case*, *supra* note 809, at para. 200.

905 *The McCann case*, *supra* note 809, at para. 200; *Huohavanen v. Finland*, *supra* note 861, at para. 96; See also *Giuliani and Gaggio v. Italy*, *supra* note 861, at para. 224.

906 *The McCann case*, *supra* note 809, at para. 134.

907 See U.S. Supreme Court, *Brown v. United States* 256 U.S. 335, 343 (1921).

908 See U.S. Supreme Court, *Graham v. Connor* 490 U.S. 386, 397 (1989).

909 See also *Giuliani and Gaggio v. Italy*, *supra* note 861, at para. 224; and *Bubbins v. The United Kingdom*, at para. 139, *ld.*

910 *Eltgauz v. the State of Israel*, *supra* note 859.

being said, as a review of the evidence establishes, the soldiers made use of less-lethal means even in the context of the crowded conditions on the deck.

### The Use of Lethal and Less-Lethal Weapons

226. A proportionate response envisages a graduated use of force with an emphasis on considering the use of less-lethal weapons prior to the use of lethal ones. Such a graduated response, however, is not required under international humanitarian law. While the term “non-lethal” is often used doctrinally, the IDF prefers the term “less-lethal” weapons. This choice reflects the reality that any weapon has the potential for lethal consequences.

The NATO definition for non-lethal weapons highlights that what separates “lethal” from “less-lethal” weapons is the intended effect of incapacitation combined with a low probability of death or injury:

Non-Lethal Weapons are weapons which are explicitly designed and developed to incapacitate or repel personnel, with a low probability of fatality or permanent injury, or to disable equipment, with minimal undesired damage or impact on the environment.<sup>911</sup>

This definition is similar to the Israeli definition of less-lethal weapons found in the ROE for the operation, which stated: “An instrument which, by its purpose, can cause a temporary function-disability, and which its probability to cause death or lethal injury, when used in its proper way, is low.”<sup>912</sup>

It should be noted that a weapon designed to be less-lethal may nevertheless cause death or injury, such as a beanbag round used at close range. Obviously, the fact that a weapon is labeled as “less-lethal” does not mean it cannot be used *in extremis* in self-defense. Therefore, even if the ROE put safety restrictions on its use, that does not mean it could not be used outside these restrictions under threat of serious injury or death, as long as it would meet the requirement of legally permissible use of proportionate force.

227. The less-lethal weapons used during the operation included both impact weapons (paintball guns and beanbag rounds) and conducted-energy weapons (in this case, Tasers). The use of paintball guns was a choice that reflected the fact that a very low level of resistance was anticipated. In

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911 See North Atlantic Treaty Organization (NATO), *NATO Policy on Non-Lethal Weapons*, Press Release, para. 3 (Oct. 13, 1999) available at [www.nato.int/docu/pr/1999/p991013e.htm](http://www.nato.int/docu/pr/1999/p991013e.htm).

912 *Naval Operational Order 3*, *supra* note 445, annex G, at 61.

this context, it should be noted that the color of the paintballs chosen for the operation was red. Retrospectively, it turned out that this choice was used by various advocates to claim that the red marker in the paintball rounds was blood on the decks and outer hull of the *Mavi Marmara*. These advocates used this as evidence that the IDF soldiers used excessive force, when, in fact, just the opposite was the case.<sup>913</sup> “Flash bang” grenades were used as a warning device. These grenades, which create both a loud noise and bright light, have limited potential for injury even if ignited next to a person. Indeed, at one point one of the Israeli soldiers ignited such a grenade against his body while he was lying on the deck in a successful effort to cause the group of IHH activists who were assaulting him to step back.<sup>914</sup>

In this context it should be mentioned that the use of other less-lethal weapons was considered. Due to the close quarters of the vessel, it was decided not to use certain ammunitions, such as “baton” rounds<sup>915</sup> and the use of CS gas (i.e. teargas or maloderant) was found inappropriate to the nature of the operation (due to the conditions at sea and the presence of a strong downdraft from the helicopters, which did not allow for their effective use).<sup>916</sup>

All less-lethal weapons used by the Israeli forces underwent legal and medical review prior to being authorized for use, and the soldiers received extensive training on them prior to deployment (see para. 120, footnote 441). A number of the less-lethal weapons were specifically approved and issued for this operation, and the naval forces - which in the ordinary course of events would not use such weapons - received specialized training on their use.<sup>917</sup> Overall, the Commander of the Shayetet 13 assessed that the paintball guns and other less-lethal weapons prevented harsher results and were effective when limited force was required.<sup>918</sup> The commander of center B, commanding the force taking

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913 See *YouTube: Israeli Paintball Attack on the Mavi Marmara*, [www.youtube.com/watch?v=cO4Hirkx7iw](http://www.youtube.com/watch?v=cO4Hirkx7iw) (2010).

914 Testimony of Soldier no. 6, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 3.

915 *Chief of Staff's Open Door Testimony of 24.10.2010*, *supra* note 554, at 14-15.

916 *The Eiland Report*, *supra* note 402, at 92-93, 155-157; See also *Additional Protocol I*, *supra* note 292, art. 36, which provides for the legal review of weapons, means or methods of warfare “to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party”. Such a review often relies on medical evidence regarding the potential or actual effect of such weapons.

917 *The Eiland Report*, *supra* note 402, at 92-93.

918 Testimony of Commander Shayetet 13, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 8-10.

over *Boat 8000* and *Gazze*, expressed a similar opinion.<sup>919</sup> However, the statements of the Israeli soldiers on board the *Mavi Marmara* indicate that these weapons were not always effective in stopping IHH activists who were intent on harming them.<sup>920</sup>

228. The term “lethal” weapon, which is defined in the Oxford Dictionary as “sufficient to cause death”, is associated with the more traditional weapons carried by the Israeli soldiers: the Glock 9mm handgun, the 9 mm mini-Uzi and M-16 assault rifles. The weapons carried by the helicopter borne force were holstered, either attached to the equipment vests or to the legs of the soldiers (in the case of the 9mm handgun) or strapped to their backs (for the mini-Uzi and M-16s).<sup>921</sup> The mini-Uzi, which is capable of automatic fire, was only used in the single shot mode throughout the operation.<sup>922</sup> These weapons appeared to cause the majority of the deaths and serious injuries to the IHH activists.<sup>923</sup>

Estimating the number of shots fired that actually hit their target is very difficult. From the military debriefings, it appears that, during the course of the operation on the *Mavi Marmara*, the Israeli forces discharged 308 rounds (from the soldiers' testimonies, it appears that 110 rounds were shot aimed at persons; an estimated 39 hits were identified by the soldiers; out of which an estimated 16 participants were injured by shots to the center of mass), 87 bean bags, and 264 paint ball rounds.<sup>924</sup> The number of rounds fired does not in and of itself imply that the use of force was excessive. From the soldiers' testimonies, it appears that a significant number of rounds were not fired directly at IHH activists. The IDF applied a graduated use of force, including the use of warning shots and deterring fire.<sup>925</sup> When appropriate to limit the chance of causing death or serious injury, the Israeli military's graduated use of force also provides

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919 Testimony of Commander of Center B, *Id.*, at 3-4.

920 Testimony of soldier no. 11, *IDF Completion Response of 7.11.2010*, *supra* note 486; Testimony of soldier no. 22, *Id.*; and Testimony of soldier no. 24, *Id.*

921 Testimony of soldier no. 5, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2-4; See also *The Eiland Report*, *supra* note 402, at 108-109.

922 *The Eiland Report*, *supra* note 402, at 104, 107.

923 *Id.*, at 107-108.

924 *Id.*, at 109; See also testimony of Commander Shayetet 13, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 8, according to him it has been estimated that 70 of the rounds were directed to the bodies of IHH personnel, and about 50 to their legs and the rest of them for warning only.

925 *The Eiland Report*, *supra* note 402, at 117; Although the definitions are not precise, it seems that the distinction between warning shots and deterring fire is primarily determined on the basis of where the round is aimed. Warning shots are directed away from the targeted person, while deterring fire is aimed at a safe location but close to an individual in order to provide a more direct warning. For example, during the operation, deterring fire was directed at the sides and deck of the ship.

for firing at the legs and feet of a person. This use of force appears to have resulted in the wounding of a number of the IHH activists. In determining whether such disabling fire is excessive, it must be weighed against the alternative of shooting at the center of visible mass of the target, with increased likelihood of death or serious injury.

229. The evidence shows that the IDF soldiers made considerable use of graduated force during the operation, with soldiers switching repeatedly between less-lethal and lethal weapons, depending upon the threat being posed.

#### Firing from Helicopters

230. The Commission has reached the conclusion that the Israeli army did not fire any rounds from the helicopter. The only force that was used on the helicopters were 3-4 “flash bang” grenades that were deployed from the first helicopter in the initial stages of the fast roping to attempt to stop IHH activists from interfering with the ropes. The accurate use of firearms from a helicopter requires both specific equipment and specially trained personnel, with which the helicopters were not equipped.<sup>926</sup>

A high angle of the trajectory of wounds in some deceased IHH activists could have been the result of a number of factors. First, some firing took place under circumstances where IHH activists were on top of or bent over one Israeli soldier who was lying on the deck while they were assaulting him.<sup>927</sup> Secondly, firing also took place from the roof down towards the IHH activists who were threatening the IDF soldiers on a lower deck.<sup>928</sup> Finally, in some instances, numerous rounds were fired either by one soldier or by more than one soldier to stop an IHH activist who was a threat to the lives of themselves or other soldiers.<sup>929</sup> It

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926 See testimony of Commander of Sheyetet 13, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 9-10; Testimony of the pilot of Helicopter 1, *Id.*, at 2; Testimony the pilot of Helicopter 2, *Id.*, at 1-2; Testimony the pilot of Helicopter 3, *Id.*, at 1-2.

927 For example, see the testimony of soldier no. 1, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 2; Testimony of soldier no. 2, *Id.*, at 2; Testimony of soldier no. 3, *Id.*, at 2.

928 For example, as set out in the testimony of soldier no. 12, *Id.*, at 4.

929 For example, see the testimony of soldier no. 2, *Id.*, at 2, indicates he fired 2-3 rounds to the center of mass and below and one round to the head (the soldier testified that after firing the last round the IHH person fell and he ceased fire); See also the testimony of soldier no. 7, *Id.*, at 2, who states he fired 5-6 rounds at a person running at him with a club. For example, in firing at an IHH participant with a pistol in his hand, soldier no. 13, *Id.*, at 2, estimates that he, soldier no. 2 and soldier no. 14 fired 15 rounds at that person; Similarly, soldiers no. 8, *Id.*, at 2, states that he and no. 12 fired at the same group of IHH participants threatening them with the weapons they had in their hands at the time (with Glock pistols).

cannot be discounted that some rounds impacted when the person had already started to fall.

#### Use of Tasers and other Less-Lethal Weapons to Effect Detention

231. Inherent in the authority to use force under international humanitarian law is the power to detain someone who poses a threat to the safety of military personnel or who is interfering with the conduct of a mission. Similarly, law enforcement norms provide for the use of force to “arrest” a person presenting a danger of death or serious injury or resisting their authority.<sup>930</sup> This question is particularly relevant to the use of force with less-lethal weapons against those persons who are assessed *not* to have taken a direct part in hostilities and to whom the principles of “necessity” and use of “proportionate force” apply as a matter of law.

In a domestic law enforcement context, the question of when less-lethal weapons such as conducted energy weapons can be used to carry out a detention, has been considered in a domestic law enforcement context, as such weapons are used by law enforcement officials as part of a use of force continuum against various levels of resistance (these levels can be generally categorized as cooperative, passive resistance, active or defensive resistance, assaultive, and grievous bodily harm or death).<sup>931</sup> A particular focus has been on the use of Tasers as a method of “pain compliance” against persons who are passively or defensively resisting arrest.<sup>932</sup> It has been variously suggested that such weapons should be restricted to situations where a person poses an immediate threat of death or serious injury and no lesser options are available<sup>933</sup>; the person is causing bodily harm or poses a threat of imminent bodily harm<sup>934</sup>; or at levels above passive resistance and consider banning their use against defensive resistance.<sup>935</sup> However, it cannot be stated that there is a broad

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930 See *U.N. Basic Principles*, *supra* note 810, at para. 9 (e.g. firearms can be used against someone who is presenting a danger of an imminent threat of death or serious injury and resisting the authority of law enforcement officials).

931 See *Braidwood Commission on Conducted Energy Weapon Use, Phase I Report* 97 (Jun. 18, 2009) (referring to the Canadian National Use of Force Framework); See also David A. Harris, *Taser Use: Report of the Use of Force Working Group of Alleghany Country*, Legal Studies Research Paper Series, Working Paper No. 2008-32 7 (2009) (for a similar use of force continuum applied in the American context).

932 See Harris, *Taser Use*, *supra* note 931, at 7 (Passive resistance is generally involves not cooperating with commands and taking action such as lying down so that they can be carried away; The author would extend to tensing and bracing. Defensive resistance is described as “twisting, pulling, holding onto fixed objects or fleeing”).

933 *Less Than Lethal?: The Use of Stun Weapons in US Law Enforcement*, AMNESTY INTERNATIONAL 58 (2008).

934 See *Braidwood Commission*, *supra* note 931, Executive Summary, Part B, at para.2.

935 See Harris, *Taser Use*, *supra* note 931, at 6.

consensus that the use of Tasers even in the situation of passive resistance is unlawful.<sup>936</sup>

As a result, the Commission concludes that the Israeli forces' use of Tasers to carry out the detention of civilians is not unlawful under international law, although it is the subject of considerable controversy, particularly when such force is used against persons passively and defensively resisting state officials. A similar conclusion can also be reached with respect to other less-lethal weapons, such as paintball guns.

## **Analysis of the Use of Force by IDF Soldiers during the Takeover Operations on May 31, 2010**

232. As stated above in the general assessment of the use of force, the material before the Commission indicates that lethal force including firearms was used by IHH activists against the IDF soldiers attempting to stop the *Mavi Marmara* from breaching the blockade. In response, the IDF soldiers used force, ranging from the use of flash bang grenades to live fire. There was less resistance encountered on the other vessels and, correspondingly, less force was employed by the IDF soldiers.

233. The Commission has examined each instance of the use of force reported by the IDF soldiers in their testimonies, pursuant to the limitations discussed below. Not only was the use of force undertaken by each soldier assessed, but the specific circumstances under which the use of force occurred and additional available relevant information concerning the use of force was also considered.

234. Each use of force was assessed according to the applicable law - international humanitarian law. According to that legal regime, the use of force against civilians who are not taking a direct part in hostilities is governed by law enforcement norms, whereas direct participants can be targeted for such time they are taking part in hostilities. Thus, the Commission examined first whether force was used against a civilian

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936 Buckley v. Haddock, 292 Fed. Appx. 791, 2008 U.S. App. LEXIS 19482 (Sep. 9, 2008 11th Cir.); See also Warren Richey, *Police Tasers: Excessive Force or Necessary Tool?* (May 28, 2009) (for reference to the case of Jesse Buckley where the US Supreme Court declined to hear an appeal of a lawsuit of a motorist against a police officer who "tased" the individual for refusing to stand up and walk to a patrol car) available at [www.csmonitor.com/USA/Justice/2009/0528/p02s05-usju.html?cmpid=addthis\\_email&sms\\_ss=email&at\\_xt=4d1f8b1713c34d53,0](http://www.csmonitor.com/USA/Justice/2009/0528/p02s05-usju.html?cmpid=addthis_email&sms_ss=email&at_xt=4d1f8b1713c34d53,0). See also See *Braidwood Commission*, *supra* note 931, at 67-69 (where the Commissioner was not satisfied that the normal use of conducted energy weapons violated the United Nations Conventions against torture and other cruel, inhuman and degrading treatment or punishment in customary international law).



taking a direct part in hostilities. Where it was determined that the person was a direct participant, an assessment of the use of force was first made using the applicable rules of international humanitarian law. If the person against whom force was used was determined not to have taken a direct part in hostilities, that use of force was assessed solely under law enforcement norms.

235. As has been noted, the Rules of Engagement (ROE) issued for the operation were developed in anticipation that the persons on board the Flotilla were civilians not taking a direct part in hostilities. The planned use of force was based on the same principles as those applicable in a law enforcement context, with the ROE primarily permitting the use of force in self-defense.<sup>937</sup> In a similar vein, the Israeli Government has on a number of occasions stated that the force by used Israeli forces was in self-defense.<sup>938</sup> Therefore, all the uses of force were analyzed pursuant to law enforcement norms to confirm the degree to which they fell within the scope of those norms, including self-defense or defense of others. The assessment also served to highlight the degree to which the Israeli personnel endeavored to restrict their actions to the limits of the ROE while being confronted with significant and unanticipated levels of violence on board the *Mavi Marmara*. This analysis indicates the challenges that can arise when a self-defense based ROE is applied to accomplish a mission in the context of an armed conflict.

The conclusions of this analysis are presented below. The detailed testimonies of the soldiers as well as their analysis can be found in an annex to the report. The Commission decided, while giving due consideration to article 539 A of the Military Justice Law 5715-1955, to privilege this annex pursuant to its authority under Article 11 to the Government's decision of June 14, 2010, unless the government decides to lift this privilege. The Commission recommends that the Government will examine the possibility of making this annex public pursuant to its authority under law.

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937 However, it should be noted that the use of graduated force, such as use of less-lethal weapons, are not required under the general framework of international humanitarian law when using force against combatants or persons taking a direct part in hostilities.

938 See *Prime Minister's Open Door Testimony*, *supra* note 82; See also *Israel Ministry of Foreign Affairs: Gaza Flotilla: Excerpts from Press Conference with DM Barak, CoS Ashkenazi and Naval Commander Marom*, [www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2010/Gaza\\_flotilla\\_press\\_conference\\_DM\\_Barak\\_CoS\\_Ashkenazi\\_Naval\\_Commander\\_31-May-2010.htm](http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2010/Gaza_flotilla_press_conference_DM_Barak_CoS_Ashkenazi_Naval_Commander_31-May-2010.htm) (2010) (quoting Naval Commander Major Eliezer Marom: "Once an imminent danger to life was seen, in order to defend themselves the soldiers had to operate their weapons... the soldier's lives were in danger, they had to use live ammunition to defend themselves").

236. At the outset, a general comment is called for regarding the evidence before the Commission at the time it formed its conclusions, and the ability of the Commission to draw conclusions using the tools at its disposal. The analysis by the Commission is based primarily on the documented testimonies of over 40 soldiers and commanders who played an active role in the takeover of the *Mavi Marmara*, as well of the commanders of the takeover of the other vessels in the flotilla, and of other commanders and soldiers who took part in the operation on May 31, 2010. The Commission furnished written requests to IDF authorities seven times in order to deepen and expand the inquiries that were conducted.<sup>939</sup> Pursuant to these requests for information, additional soldiers provided statements and soldiers who had already done so added to their submissions. As a general rule, the Commission found that the soldiers' accounts were credible and trustworthy. The soldiers gave detailed information, used natural language, and did not appear to have coordinated their versions. The soldiers' accounts were examined meticulously, cross-referenced against each other, and verified, as far as possible, against additional materials submitted to the Commission. This included medical documents regarding the injuries to the soldiers, IDF inquiries regarding the amount and types of ammunition (paintballs, beanbag rounds, flash bang grenades, and live ammunition) fired during the various events and a review of the magnetic media furnished to the Commission.

237. The Commission's ability to construct a complete picture of the incidents in which force was employed by IDF soldiers is limited for a number of reasons. *First*, the incidents on May 31, 2010, involved many participants, took place at night in several different locations and on a number of decks, and, according to the soldiers' testimonies, the violence surprised them with respect to its intensity. By its very nature, the Commission's ability to "dissect" the operation into its various components and, several months later, retroactively reconstruct each and every incident that took place during the operation is and cannot be perfect. It should also be noted that the soldiers' statements were only documented in writing and submitted to the Commission. The soldiers were not put on notice that their rights were implicated when giving their statements (which is the ordinary proceedings in a custodial interrogation or judicial proceeding) and they did not undergo cross-examination.

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939 For details of the Commission's requests for information to the IDF, see *supra* para. 9, in this report.

*Second*, some of the flotilla participants were interrogated by the Israeli Police<sup>940</sup> and by Military Intelligence,<sup>941</sup> and while their versions do indeed shed some light on what transpired on board the *Mavi Marmara*, nevertheless, it was not possible to conduct an organized examination of the IDF soldiers' use of force during the takeover events in reliance on these accounts. It should also be noted that even the Military Intelligence investigators stated that the interrogations themselves were conducted under conditions that were not suited to such an inquiry.<sup>942</sup> In addition, and as stated above, the Commission's requests to the captain of the *Mavi Marmara* and the chairman of the IHH, and its general invitation to the other flotilla participants, to testify before the Commission received no responses - except from two Israeli citizens who did testify.<sup>943</sup> Under these circumstances, the analysis was based primarily on testimonies and materials that were submitted by Israeli sources.

*Third*, from the time the events occurred to the initiation of the various investigations, the scenes in which the events took place were not kept "sterile". Some of the bodies of those who were killed were moved from the places where they had been shot, the bullets and shells found on the *Mavi Marmara* were not collected in an organized manner, the various assault weapons used by the IHH activists (knives, clubs, slingshots, etc.) were gathered in one location and not documented as they were apprehended, etc. The Commission will address this issue as part of the discussion of article 5 of the Government's decision of June 14, 2010, which will be presented at a later time, and which relates to the method of examining and investigating the complaints that have been raised regarding violations of the laws of war, both in general and with respect to the events of May 31, 2010, in particular.

*Fourth*, the Israeli authorities do not have access to autopsy reports; but rather only to the reports from an external examination of the bodies of those who were killed. As stated above, the reason for this stems from

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940 Overall, 42 of the flotilla participants were questioned by the Israeli police. They were all given notice of their right to an attorney and the questions were translated to them (excluding those who were citizens of Israel). The majority of the participants refused to sign the statements, a large portion refused to answer questions, and out of those who gave a statement, their versions were sparse and did not allow for a complete picture to be reconstructed.

941 Overall, 86 of the flotilla participants were questioned by the Military Intelligence. From reviewing the report of that questioning, it appears that a relatively small portion of the flotilla participants referred in their questioning to the use of force by the IDF soldiers. Most of those flotilla participants did not specifically refer to such events which would enable a legal analysis of the use of force.

942 See article 03/0610A2415004 *Military Intelligence Reports*, *supra* note 491, at 6.

943 See *supra* para. 9 in this report.

the Turkish government's request, immediately after the event, that the Israeli government would not perform autopsies on the bodies of the deceased.<sup>944</sup> As a result, the gunshot wounds on the bodies cannot be linked to the weapons used by the IDF soldiers and autopsies were not available to assist in trying to determine who shot the deceased.

*Fifth*, the Commission received magnetic media of various types that had been collected from the *Mavi Marmara* upon conclusion of the vessel's takeover. As stated, the magnetic media includes videos and photographs from digital cameras and video recorders used by the flotilla participants, videos from the security cameras aboard the *Mavi Marmara*, videos, and recordings from the IDF's recording devices. This material constitutes objective and reliable evidence. On several occasions, the Commission asked the IDF whether all of the media that was seized had been furnished to the Commission. On December 23, 2010, the Commission received the response that all of the magnetic media that had been collected on the *Mavi Marmara* and which was technically sound had been examined by the IDF, and that the relevant files had been copied and given to the Commission,<sup>945</sup> with the exception of one video in which IHH activists are seen beating and videotaping the soldiers who had been abducted inside the ship. That video was provided with the IDF response. That response stated that "the examination of the relevant sources indicates that, other than this video, all of the material that was found on the devices which were confiscated from the flotilla participants has been furnished to the Commission."<sup>946</sup> On December 30, 2010, however, the Commission received another file of videos from the IDF authorities, containing another copy of said video, as well as five additional videos in which IHH activists are seen beating and videotaping the IDF soldiers who were abducted inside the ship, and which were not previously in the Commission's possession.

That said, several hundreds of hours of video evidence was reviewed. Unfortunately, the vast majority of it was not helpful in resolving the incidents involving the use force and not all of the events recorded by the magnetic media can be matched with the soldiers' testimonies. A number of the events documented in the magnetic media could match more than one of the events described by the soldiers, whereas, regarding other

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944 See the letter from the Turkish ambassador to the Minister of Foreign Affairs (2 June, 2010) in a binder from Rafi Barack, marked as exhibit 169 in the Commission's exhibits.

945 See IDF response for additional information of the Commission from Dec. 8, 2010, exhibit 158 in the Commission's exhibits. According to the IDF's response, the test of "relevancy" was defined as any connection directly or indirectly to the event, in contrast to pictures or private messages that were not connected to the event.

946 *Id.*, at 2, art. 6.

events, it is not clear whether they are in fact described in the soldiers' testimonies. Thus, for example, after analyzing one of the videos in which a soldier is seen firing at an IHH activist armed with an iron bar who was attacking him, the Commission was unable to relate this incident to a specific event described in the soldiers' testimonies (this incident could possibly correspond to a number of different events that were described).

238. The Commission took upon itself a complicated project, which had obvious limitations. It should be stated here that this analysis is particularly complex when it is conducted retroactively, under the fluorescent lights of the office and after the fog of war has dissipated. It is clear to the Commission that, especially with respect to the takeover of the *Mavi Marmara*, the IDF soldiers were required to make difficult, split-second decisions regarding the use of force, under conditions of uncertainty, surprise, pressure, and in darkness, with the perception of a real danger to their lives and with only partial information available to them. Further, in this situation, they were also aware of the fact that some of the IHH activists on board the *Mavi Marmara* were using firearms. These factors were taken into account when analyzing the force used during the takeover event. Further, in a limited number of cases, there was insufficient information to be able to reach a conclusion regarding the circumstances surrounding the use of force.

At the same time, to the extent possible, a proper assessment of the use of force requires meticulous analysis. To a certain extent, the Commission believes that it was able to analyze the soldiers' testimonies and draw conclusions regarding the majority of the events described by the soldiers. When the Commission could not reach a conclusion regarding the use of force with the tools at its disposal, this is stated.

239. After an in-depth analysis of all the material in its possession, the Commission drew the following conclusions regarding the use of force:

- (a) The Commission examined 133 incidents in which force was used (including events when live fire was employed; firing less-lethal weapons; shooting as a deterrent; threatening with a weapon; using a Taser, and using physical force under certain circumstances), which were described by over 40 soldiers who fast-roped onto the *Mavi Marmara* from the helicopters or who testified about the takeover actions from the Morena speedboats. This number also includes a few incidents that were depicted on the available relevant magnetic media and that did not correspond to the soldiers' testimonies.

- (b) The large number of uses of force is reflective of the decision to look at all uses of force by IDF soldiers; the large number of IHH activists who armed themselves to resist the capture of the ships attempting to breach the blockade; and the scope and scale of the violence offered by those activists. It should also be noted that the majority of the uses of force involved warning or deterring fire and less-lethal weapons. Of the total number of uses of force reported by the soldiers, 16 incidents of hitting the center of body ("center of mass") with rounds of live fire were reported.
- (c) Overall, the IDF personnel acted professionally in the face of extensive and unanticipated violence. This included continuing to switch back and forth between less-lethal and lethal weapons in order to address the nature of the violence directed at them.
- (d) The Commission found that 127 uses of force investigated appeared to be in conformity with international law. In an additional six cases, the Commission has concluded that it has insufficient information to be able to make a determination regarding the use of force. Three out of those six cases involved the use of live fire and three cases involved physical force; two incidents of kicking and one strike with the butt of a paintball gun.
- (e) In five of the 127 cases, force appeared to be used against persons taking a direct part in hostilities; however, there was insufficient evidence to conclude that the force used was in accordance with law enforcement norms. In another five cases, the Commission concluded that force appeared to be used in accordance with law enforcement norms, but in two cases it was unable to determine whether the person against whom force was used was a direct participant in hostilities and in three cases, it was determined that force was used against civilians who were not considered direct participants.

## Impact of the Planning and Organization of the Operation on the Use of Force

240. In both situations of armed conflict and law enforcement, an assessment of whether there was appropriate use of force by State armed forces should include looking broadly at all of the surrounding circumstances, including the planning and control of the operation.<sup>947</sup> Focusing on planning and organization is relevant not only to the question of overall liability, but it also reflects the reality that the actions of individual soldiers are in many cases directly impacted by the information they are provided, the training they receive, and the operational limitations resulting from planning decisions made higher up the chain of command. The analysis will now turn to some of these issues. In reviewing the planning and preparation for the operation, the Commission is particularly mindful of the danger of looking at a situation with the benefit of hindsight. Effective operational planning requires considerable experience and the need to make professional judgment calls based on the available information. In addition, a particular course of action may not be feasible for a wide range of reasons.

241. An operation designed to intercept a flotilla of six uncooperative ships on the high seas is complex. Air and naval forces had to be effectively coordinated. Further, the entire military operation, both during the operation and in the aftermath of the incident, had to be coordinated with the timely and professional provision of medical assistance and evacuation of both IDF and IHH injured persons.

242. The placement of senior commanders on scene, including the Commander of the Navy, demonstrated the seriousness with which this incident was viewed by the Israeli military. It also enhanced the situational awareness of the chain of command in order to help ensure timely and effective decision making as the incident unfolded. The use of the special unit "Masada" and other law enforcement units, and the coordination across Government in order to handle the large number of passengers, reflected the realization that post-interception treatment of these potentially uncooperative civilians was best left to forces specially trained for those types of operations.

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947 See *The McCann* case, supra note 809, at para. 150 ("In keeping with the importance of this provision [the right to life] in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination").



The decision to use the naval Special Forces unit, Shayetet 13, was in accordance with the normal international practice for naval operations even outside the context of armed conflict, particularly in light of the need for specialized training to board a moving vessel and for fast-roping onto the deck of a ship at night. Further, the training and exercises they underwent to familiarize themselves with less-lethal weapons and the graduated use of force as well as the "mental preparations" that they underwent ensured that they were well prepared for the mission of intercepting vessels with a large number of civilians on board.<sup>948</sup>

243. From the materials before the Commission, it appears that the Israeli authorities did not have a forewarning of the violent reception planned by the IHH. The inability to identify IHH intentions had a direct impact on the planning and implementation of the operation. However, the lack of appreciation of the threat was not exclusively the result of incomplete intelligence gathering. Throughout the planning process, whether looked at from a policy, operational, or legal perspective, the scenario of an organized force armed with lethal weapons actively resisting the boarding attempt appears not to have been considered. In part, this assumption appears to have resulted from anticipation that the participants in the flotilla were all peaceful civilians as was the case with previous flotillas on the same route.

While a certain level of violence was anticipated during the strategic discussions held prior to the operation, and the possibility that there might be firearms present was mentioned in these discussions,<sup>949</sup> government witnesses appearing before the Commission had difficulty identifying exactly what that meant in a practical sense at the time.<sup>950</sup> The planners of the operation seem not to have believed that the use of force would be necessary, except perhaps in isolated cases of soldiers acting in self-defense. Whether driven by a lack of information; confidence in the ability of the Special Forces and other Israeli units involved to handle any unanticipated situation; or a sense of "routine" that may have developed regarding these types of operations (although it was clearly understood that this flotilla was different and presented new challenges), the planning appeared to end with the assumption that any violence would occur at

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948 *Id.*, at para. 183 (where the court rejected allegation that the choice of personnel specially trained to combat terrorism mean that it was intended to kill the terrorists).

949 *Defense Minister's Open Door Testimony*, *supra* note 70, at 33-34; *Chief of Staff's Open Door Testimony of 24.10.2010*, *supra* note 554, at 33, 38.

950 *Open Door Testimony of the Director General of the Ministry of Foreign Affairs*, *supra* note 430, at 8; *Chief of Staff's Open Door Testimony of 24.10.2010*, *supra* note 554, at 10; *Defense Minister's Open Door Testimony*, *supra* note 70, at 30-33.

the extreme lower end of the conflict spectrum. This had a direct impact on operational tactics, the Rules of Engagement, and training before the operation.

244. In any event, from the soldiers' testimonies it is evident that the possibility of a violent confrontation, on one level or another, did not filter down during the planning process to the tactical level.<sup>951</sup> The soldiers almost universally indicated that they expected low levels of violence, perhaps involving some pushing and limited physical contact.<sup>952</sup> As a result, the soldiers were surprised to find themselves in a situation that they ultimately viewed as combat.<sup>953</sup>

245. However, in this context two additional factors must be emphasized: one, the presence of large numbers of civilians on the vessels limited the operational options. There was an understandable and strongly held view across Government that a use of force against the ships could not be justified on moral grounds. Second, the training and preparation of the soldiers leading up to the operation was very thorough, with a particular emphasis on the use of less-lethal weapons. For the soldiers, the default position was to use less-lethal weapons until an opposing threat forced the use of the lethal options. This preparation proved effective during the takeover of the other 5 flotilla vessels where the levels of violence generally met the planners' expectation.

246. In fact, the situation presented in this case is exactly the opposite of what occurred in the *McCann* case from the European Court of Human Rights, where British authorities were faulted for making assumptions that led to a sense of increased risk (i.e., not considering that their intelligence assessments that a car bombing was imminent might be wrong) and for employing soldiers who were trained to automatically use lethal force.<sup>954</sup>

In the present case, the risk was underappreciated and the limitations in the ROE with respect to the use of less-lethal weapons (range, areas of the body to be targeted, etc), while put in place to limit injury to civilians, proved very restrictive considering the situation faced by the soldiers that fast-roped to the *Mavi Marmara*. In this respect, the planning process has to account for possibilities that seem less likely, and include those

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951 *The Eiland Report*, *supra* note 402, at 62-63.

952 See the testimony of soldier no. 1, *Inquiry Expansion of 20.9.2010*, *supra* note 451, at 1; Testimony of soldier no. 2, *Id.*, at 1; Testimony of soldier no. 4, *Id.*, at 1; Testimony of soldier no. 6, *Id.*, at 1; Testimony of soldier no. 8, *Id.*, at 1; Testimony of soldier no. 9, *Id.*, at 1; Testimony of soldier no. 10, *Id.*, at 1; Testimony of soldier no. 15, *Id.*, at 1.

953 See the testimony of soldier no.2, *Id.*, at 2; Testimony of soldier no. 9, *Id.*, at 1; Testimony of soldier no. 10, *Id.*, at 1; Testimony of soldier no. 15, *Id.*, at 1.

954 *The McCann case*, *supra* note 809, at para. 210-213.

scenarios in the preparation of the soldiers before the operation. While commanders rightly should be able to rely on the known capabilities of personnel under their command, it is evident that the soldiers were placed in a situation they were not completely prepared for and had not anticipated. The anticipation of and planning for “worst case” scenarios could have better prepared the soldiers for the situation to which they were exposed. In preparing exclusively for less violent scenarios, the danger from a legal perspective is that the soldiers might overreact when confronted with such unanticipated threats. However, and this should be emphasized, looking at the operation as a whole, that appears not to have happened, as the soldiers acted continually to distinguish the types of threat posed in different situations, and they even switched back and forth between lethal and less-lethal weapons to address those threats. This occurred also after it had become clear that the IHH activists were using firearms.

247. Questions regarding the adequacy of the planning also arise in reviewing the naval command, which identified a few options for the graduated use of force to stop the ships: the use of water hoses and malodorants. As outlined above, most of these methods were ultimately rejected by the military itself as impracticable. In that respect, it is not clear why the naval command was not drafted or amended to reflect the actual limited options that were available to board the ships. A clearer acknowledgement of these operational limitations during the preparation of the naval command might have forced consideration of other alternatives or different courses of action.

. Under the circumstances, at the time it became evident that boarding from the sea was going to be opposed, it was decided to order the soldiers to fast-rope onto the roof and seize the bridge. As it turned out, this placed the soldiers at an increased level of risk. When the resistance to the initial boarding from the *Morena* speedboats occurred, or when the rope was tied off when lowered from the first helicopter, another possible approach might have been to temporarily withdraw in order consider other options, including warning the captain of the *Mavi Marmara* and the IHH participants that deadly force would be used if violent opposition persisted. As has been noted, the technical means and operational doctrine for stopping vessels on the high seas, and particularly one the size of the *Mavi Marmara*, are quite limited. The large number of civilian passengers on board and the potential for collateral damage further increased the challenge. However, clear warnings and the controlled and isolated use of force may have helped avoid a wider and more violent confrontation such as the one that occurred. In this regard, the warnings

issued to the Gaza flotilla should be reviewed to determine whether they should more directly have indicated what action would be taken by Israeli authorities if resistance were to continue. Having an alternate plan when clear resistance was first shown (i.e. when it became evident that the IHH activists were in possession of weapons and violently opposed the boarding from the Morena speedboats) might have avoided the position of having to continue to land soldiers one by one into the midst of the waiting IHH activists.

However, the issuance of warnings would not necessarily have been feasible or effective. For example, warning shots intended to stop a ship may have limited effect, depending on a number of factors, including the weather, the state of the sea, and the available weapons. Further, warning shots can only be used when other ships or personnel will not be endangered. The presence of a large number of vessels taking part in this incident is therefore a significant complicating factor.<sup>955</sup>

248. While the Commission has commented on the planning and organization of the mission, this critique should not be interpreted to mean that the actual plan as developed by the Israeli military or the organization of the mission led to a systemic misapplication of force by the soldiers involved or a breach of international law.

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955 See Allen, *Limits on the Use of Force*, *supra* note 337, at 87 (indicating when describing the United States Coast Guard approach to using warning shots and disabling fire in a law enforcement scenario: “[w]arning shots are only used after other signaling methods have been tried without success. Warning shots are not used against aircraft or under circumstances where their use might endanger any person or property. Generally, warning shots are not used unless the enforcement units have the capability to deliver disabling fire if the warning shots are ignored. Disabling fire is the firing of ordnance at a vessel with the intent to disable it, with minimum injury to personnel or damage to the vessel. Under the CGUFP [Coast Guard Use of Force Policy], disabling fire is to be discontinued when the vessel stops, is disabled, enters the territorial sea of another State, or the situation changes in a manner that introduces substantial risk to those aboard the noncompliant vessel”).

## **An Alternative Perspective: Analysis of the Opening Actions Under Law Enforcement Norms**

249. It would be worthwhile to examine the influence of the tactics that were applied by the IDF at the opening stages of the capture of the Marmara, on the compatibility of the operation with the requirements of necessity and proportionality, according to the Law Enforcement norms. The issue to be discussed is whether it would be possible to argue that the initial choice of the IDF to apply unaggressive steps in order to capture the ship (due to lack of information concerning the anticipated intensity of the resistance to the capture) actually led to a more severe damage than this which would have occurred, if more aggressive measures, to some extent, had been taken in the first place.

250. As described above, the initial step of the operation included an attempt to climb on to the ship from one of the Morena, without using increased force. In the course of this initial stage, the IDF used only "soft" measures in order to capture the ship, in response to the violence demonstrated by the IHH activists. The forces on the boat preferred to temporarily retreat, instead of using lethal weapon or severe non-lethal ones. In addition, the soldiers rappelled from the helicopter although ensure facilitated by violent means the access of the soldiers to the ship. At this stage only "flash bang" grenades, which did not pose any threat to the participants' lives, were used.

Only subsequently to the fact that the IHH group severely and cruelly attacked the first soldier who had climbed down to the ship, and by this escalated the confrontation, the soldiers found themselves compelled to use a higher degree of force.

251. The initial tactics which have been implemented by the IDF posed only a minimal threat upon the participants, while they imposed an increased risk upon the Israeli soldiers, in particular regarding to these who participated in the fast-rope maneuver. As aforementioned, it should be emphasized that the IDF soldiers have initially used only non-lethal weapons in a very moderate mode, notwithstanding the substantial violence applied by the flotilla participants. These acts optimally fulfilled by themselves the requirements of necessity and proportionality according to the international human rights law. As much as the necessity test is concerned, the participants did not suffer any damage during the opening stage at stake and therefore there is no need to examine whether any other tactics which could have caused a lesser damage had been available at this time. As much as the necessity test (in its narrow sense) is concerned,

given the fact that no damage has been caused within the opening stage of the operation, the balancing between the operational advantage and the damage been inflicted leads necessarily to the conclusion that the proportionality requirement has been fulfilled at this stage.

Indeed, the escalation started only after the aforementioned initial step of the operation. One may contend that the escalation could have been prevented if a more vigorous tactic would have been implemented against the participants in the flotilla (for example, by creating a "sterile zone", using means like skunk bombs. It should therefore be examined whether the IDF was under any obligation according to the international law to use any more aggressive initial steps than these been applied, in order to prevent the escalation which subsequently occurred, leading to the necessity of using lethal weapons.

252. It seems that a negative answer should be given to the aforementioned question. At first, it is entire doubtful whether the implementation of more aggressive tactics at the beginning of the operation could indeed have lessen the damage caused to the participants of the flotilla, given the fact that the IHH participants were certainly determined to generate a violent confrontation. At the same time, there is a reasonable basis to assume that more aggressive steps could have lessen the risk and the injuries among the IDF soldiers (an aspect which does not have any implications in relation to the international law obligations but rather only concerning the Israeli internal context).

253. Secondly, the requirements of necessity and proportionality should be considered according to the information which was available, or should have been available, to the operational forces at the time of the operation. While implementing these requirements, special weight should be given to the subjective aspect (the good faith issue) and to the ex ante point of view, as opposed to the ex facto perspective. At the opening stage of the operation, the information available to the IDF was that no substantial violent opposition was likely to evolve. The subsequent escalation occurred within a tense and violent situation, which involved decisions been immediately taken. We have already mentioned that in the context of violent confrontations, soldiers have frequently only partial information, which later on, in an ex post perspective, may be proved as being unreliable under the circumstances.

We aforementioned that both the political and the military decision makers have acted in good faith, while taking into consideration the obligations of Israel under the international law during the preparation stages, as well as within the operation itself. Giving appropriate weight

to Israel's obligations also fitted the general interest of Israel to avoid international delegitimization and damage to Israel's image.

254. In conclusion, the initial stage of the operation, until the first soldier climbed down to the Marmara, as well as the other abovementioned stages, had been conducted according to the international law. Indeed, looking at this issue through an ex post perspective, the non-aggressive tactics applied by the IDF at this stage, provided the IHH participants with the opportunity to create a violent and high profile confrontation, generating an escalation which involved the use of firearms and non-lethal weapons. Notwithstanding the aforesaid, the decision of Israel to implement a non-violent approach at the initial stage of the operation did not violate in any sense its obligations under the international law. A country does not violate the international law where it acts in a "soft" mode, hoping that the lawbreakers do not escalate the situation. The willingness to provide a prospect of conducting and concluding an operation without any violence at all should not be credited against the enforcing country. The violence which had been used by the IHH group served as the decisive factor leading to the escalation of violence within the operation.



## Chapter B: Conclusions

255. The Commission has reached the following conclusions:

- A vessel that attempts to breach a blockade is subject to international law governing the conduct of hostilities: international humanitarian law, including the rules governing use of force.
- The Israeli armed forces' interception and capture of the Gaza Flotilla vessels in international waters - seaward of the blockaded area - was in conformity with customary international humanitarian law.
- The tactics chosen to intercept and capture the Flotilla vessels -including having Shayetet 13 naval commandoes board from Morena speedboats and fast-rope from helicopter onto the roof of the vessels - was consistent with established international naval practice.
- The participants in the Flotilla were predominantly an international group of civilians whose main goal was to bring publicity to the humanitarian situation in Gaza by attempting to breach the blockade imposed by Israel.
- On board the *Mavi Marmara* and the other flotilla vessels was a group of IHH and affiliated activists (the "IHH activists") that violently opposed the Israeli boarding. The IHH activists who participated in that violence were civilians taking a direct part in hostilities.
- The force used against civilians on board the flotilla was governed by the principles of "necessity" and use of "proportionate force" associated with human rights based law enforcement norms. However, the IHH activists lost the protection of their civilian status for such time as they directly participated in the hostilities. The use of force against these direct participants in hostilities is governed by the applicable rules of international humanitarian law.
- The Rules of Engagement for the operation provided an authority to use force that reflected the nature of a law enforcement operation.
- The IHH activists carried out the violence on board the *Mavi Marmara* by arming themselves with a wide array of weapons, including iron bars, axes, clubs, slingshots, knives, and metal objects. These were weapons capable of causing death or serious injury. Further, the hostilities were conducted in an organized manner with IHH activists, *inter alia*, operating in groups when violently assaulting the IDF soldiers.

- The IHH activists used firearms against the IDF soldiers during the hostilities.
- The Commission has examined 133 incidents in which force was used. The majority of the uses of force involved warning or deterring fire and less-lethal weapons.
- Overall, the IDF personnel acted professionally in the face of extensive and unanticipated violence. This included continuing to switch back and forth between less-lethal and lethal weapons in order to address the nature of the violence directed at them.
- The Commission has concluded that in 127 cases, the use of force appeared to be in conformity with international law.
- In six cases, the Commission has concluded that it has insufficient information to be able to make a determination.
- Three out of those six cases involved the use of live fire and three cases involved physical force; two incidents of kicking and one strike with the butt of a gun.
- In five out of the 127 incidents that appeared to be in conformity with international law, there was insufficient evidence to conclude that the use of force was also in accordance with law enforcement norms. However, in these cases, force appeared to be used against persons taking a direct part in hostilities and, as a consequence, was in conformity with international law.
- The planning and organization of the IDF mission to enforce the blockade did not include anticipation that there would be a violent opposition to the boarding, which had a direct impact on the operational tactics, Rules of Engagement, and training before the operation. However, the focus of the planning and organization of the operation on a lower level of resistance did not lead to a breach of international law.

# Concluding Remarks

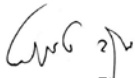
Today, approximately five months after hearing the first testimonies, the Commission is completing this part of its work by submitting this report to the Government of Israel. For whom was the report written? It was written, of course, for the Government of Israel, but also for military personnel and jurists studying international humanitarian law, who may, perhaps, use it in the future for guidance and instruction; for the public, who in all the confusion of information wishes to know what happened; and for ourselves, who sought with all our abilities to arrive at the truth.

After a journey full of obstacles and pitfalls, and after exhaustive investigations, inquiries, studies and discussions, we unanimously and wholeheartedly summarize our conclusions:

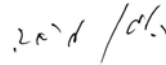
The naval blockade imposed on the Gaza Strip - in view of the security circumstances and Israel's efforts to comply with its humanitarian obligations - was legal pursuant to the rules of international law.

The actions carried out by Israel on May 31, 2010, to enforce the naval blockade had the regrettable consequences of the loss of human life and physical injuries. Nonetheless, and despite the limited number of uses of force for which we could not reach a conclusion, the actions taken were found to be legal pursuant to the rules of international law.

'Now all has been heard, here is the conclusion of the matter.'



Justice Emeritus Jacob Türkel  
Chairman of the commission



Ambassador Reuven Merhav  
Member of the commission



Major-General (res.) Amos Horev  
Member of the commission



Prof. Miguel Deutch  
Member of the commission



Lord David Trimble  
Observer



Brigadier-General (ret.) Kenneth Watkin  
Observer

# Annexes

**Annex A: List of Witnesses Appearing Before the Commission, the Dates and Classifications of their Testimonies**

**Annex B: Map of Gaza and the land border crossings**

**Annex C: Notice to Marines Aug. 2008**

**Annex D: Map of the blockaded area**

**Annex E: List of Goods on Flotilla Vessels**

**Annex F: Map of the area where the takeovers of the flotilla took place**

**Annex G: Drawing of the Main Marmara**



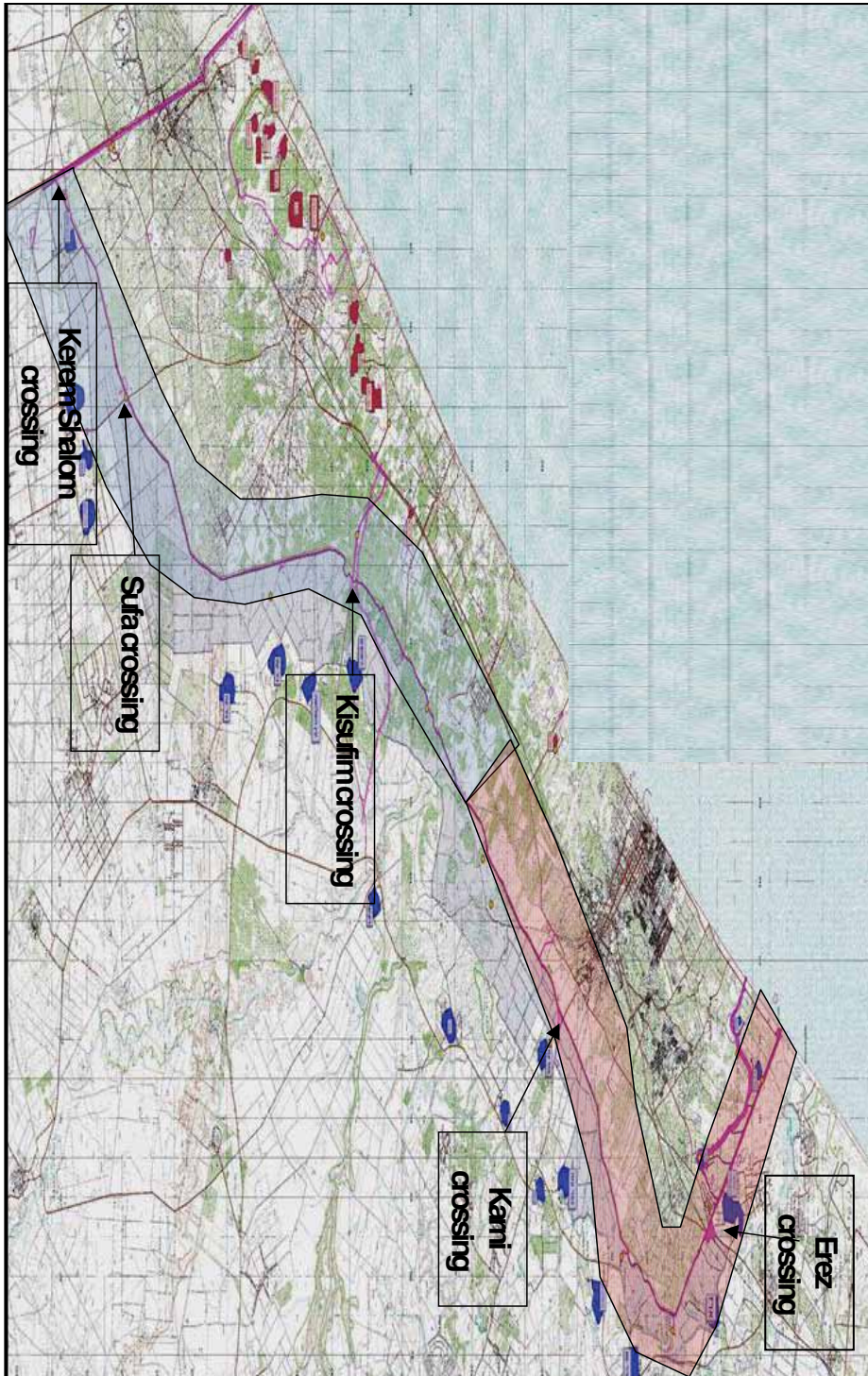
**Annex A: the List of Witnesses Appearing Before the Commission,  
the Dates and Classifications of their Testimonies**

<b>Date</b>	<b>Public testimony</b>	<b>Closed door testimony</b>
28.6.10	Opening meeting	
9.8.10	Prime Minister, Mr. Benjamin Netanyahu	Prime Minister, Mr. Benjamin Netanyahu
10.8.10	Defense Minister, Ehud Barak	Defense Minister, Ehud Barak
11.8.10	IDF Chief of Staff Lt. Gen. Gaby Ashkenazi	IDF Chief of Staff Lt. Gen. Gaby Ashkenazi
24.8.10		Maj. Gen. (ret.) Giora Eiland, Chair the IDF General Staff Expert Inquiry Team [meeting]
26.8.10	Maj. Gen Avichai Mendelblit, IDF Chief Military Advocate General	Maj. Gen Avichai Mendelblit, IDF Chief Military Advocate General
31.8.10	Maj.-Gen. Eitan Dangot, Coordinator of Government Activities in the Territories	Maj.-Gen. Eitan Dangot, Coordinator of Government Activities in the Territories
13.9.10		Dr. Uzi Arad, Chairman of the Israeli National Security Council and the Prime Minister's National Security Advisor
14.9.10		Mr. Meir Dagan, Director of the Mossad
15.9.10	Mr. Yossi Gal, Director General of the Ministry of Foreign Affairs	Mr. Yossi Gal, Director General of the Ministry of Foreign Affairs
12.10.10	Mr. Yossi Edelstein, Head of the Enforcement and Foreigners Division of the Population and Immigration Authority	

12.10.10	Lt. Gen Benny Kaniak, Commander of the Prison Service	
13.10.10	B'Tselem: The Israeli Information Center for Human Rights in the Occupied Territories, Ms. Jessica Montel, and Mr. Eyal Hareuveni.	
13.10.10	Doctors for Human Rights, Prof. Tzvi Bentowitz, Mr. Ran Yaron, and Dr. Mustafa Yassin.	
13.10.10	Gisha: The Legal Center for Freedom of Movement, Ms. Tamar Feldman	
24.10.10	IDF Chief of Staff Lt. Gen. Gaby Ashkenazi	IDF Chief of Staff Lt. Gen. Gaby Ashkenazi
25.10.10	MK Tzipi Livni, Leader of the Opposition	MK Tzipi Livni, Leader of the Opposition
25.10	Sheikh Mr. Hamad Abu Dabus	
25.10	Mr. Muhammad Zidan	



## Annex B: Map of Gaza and the land border crossings



## Annex C: Notice to Marines Aug. 2008

### **NO. 6/2008 All mariners be advised**

Wednesday, 13 August 2008 00:00

No. 6 / 2008 13 August, 2008

All mariners be advised:

*Please not the following notice from the Israeli Navy:*

1. The Israeli Navy is operating in the maritime zone off the coast of the Gaza Strip. In light of the security situation, all foreign vessels are advised to remain clear of area A in the attached map. Bound by the following coordinates:

	<b>E</b>	<b>N</b>
1.	34.10.02	31.46.08
2.	33.56.41	31.33.48
3.	34.29.28	31.35.42
4.	34.13.06	31.19.23

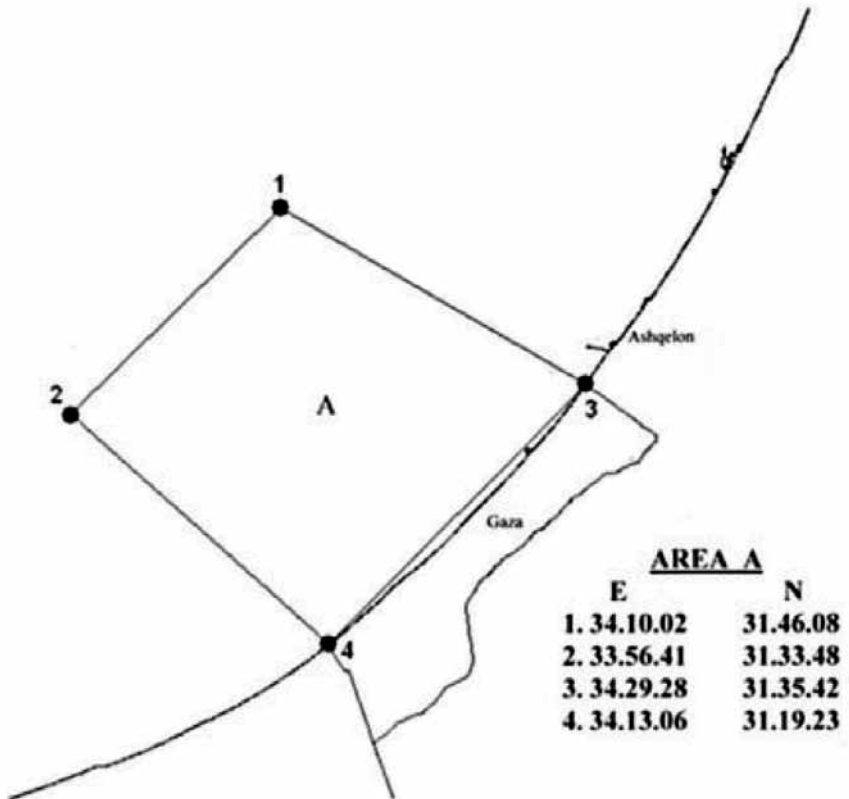
Delivery of humanitarian supplies to the civilian population in the Gaza Strip is permitted through the land crossings between Israel and the Gaza Strip, subject to prior coordination with the Israeli Authorities.

2. Vessels approaching the maritime zone off the coast of the Gaza Strip are requested to maintain radio contact with Israel Naval Forces on channel 16 and will be subject to supervision and inspection.

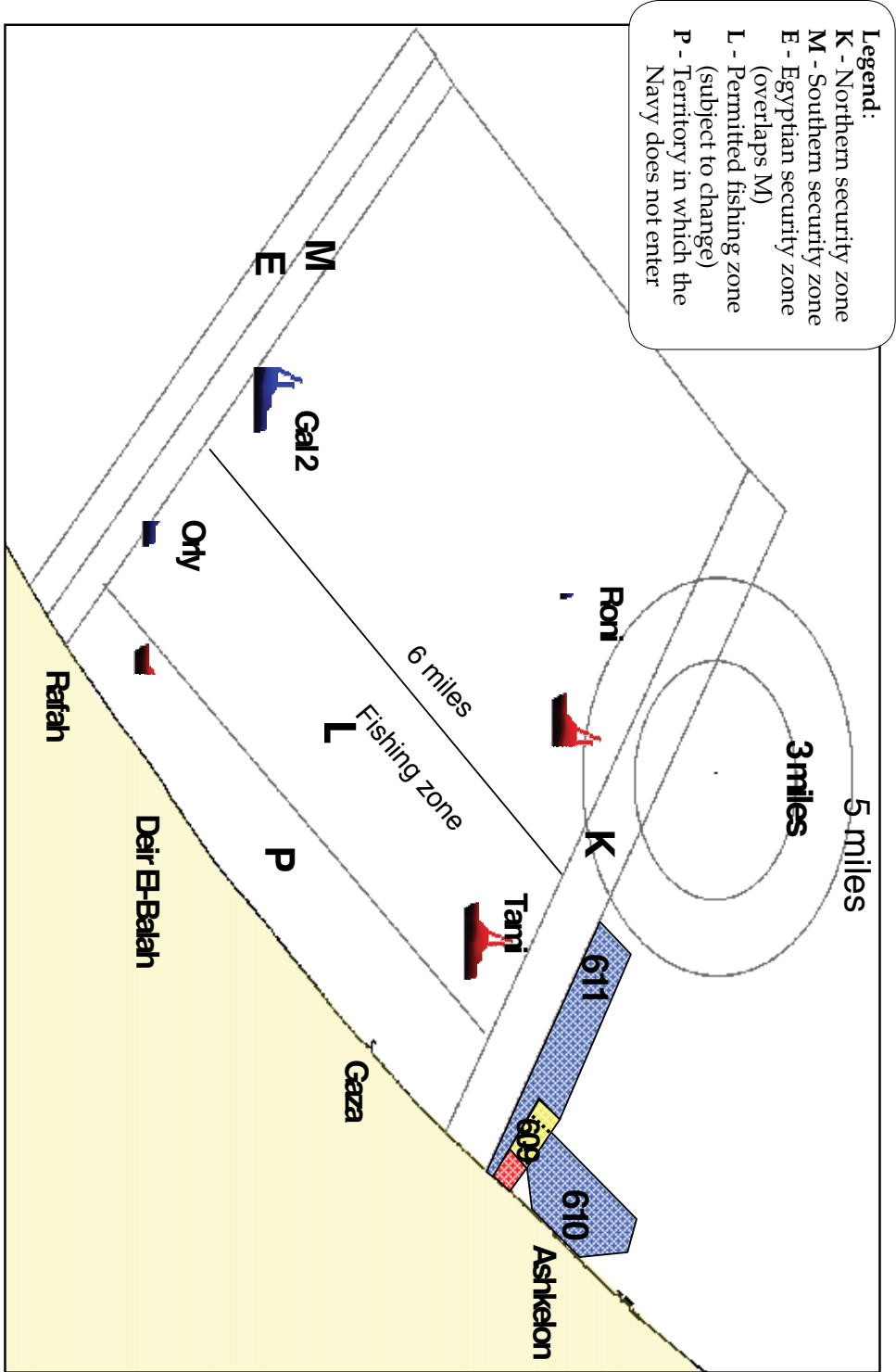
3. In accordance with the agreements between Israel and the Palestinian Authority, entry of foreign vessels to the maritime zone adjacent to the Gaza Strip is prohibited due to the security situation and in light of these agreements, foreign vessels are barred from such entry.
4. This notice is published in order to ensure safe navigation and to prevent vessels from approaching areas in which their safety may be endangered due to the security situation in those areas.

ADVISORY NOTICE (MARITIME ZONE OFF THE COAST OF GAZA STRIP)

AUG. 11, 2008



**Annex D: Map of the blockaded area**



**Annex E: List of Goods on Flotilla Vessels**

Below is a list of all the goods unloaded from the flotilla’s vessels.

**The “SOFIA”:**

No.	Type of Goods	Amount of Cargo
1	Electric scooters	143 units
2	Electric wheel chairs	128 units
3	Batteries	198 unit
4	Walls for movable structures	197 pallets
5	Fiberglass	10 pallets
6	Medical equipment	234 boxes
7	Rubber boats (rescue)	1 unit
8	Roof constructions	34 batches of 12 units – 400 units total
9	Gallons of paint	89 gallons
10	Scattered cardboard boxes	117 boxes
11	Work tools and ladders	164 items
12	Ceramic flooring	35 pallets
13	Lumber	17 pallets
14	Wooden profiles	167 units
15	Toys	17 boxes
16	Boxes of clothing	131 boxes
17	School bags	7 boxes
18	Pipes	10 pallets
19	Desalination device	2 containers
20	Metal sheets	9 pallets
21	Generator	1 unit
22	Tents	19 units
23	Tent gear	35 packages
24	Water containers	3 pallets

**The “DEFNEY”:**

No.	Type of Goods	Amount of Cargo
1	Wheel chairs	138 units
2	Boxes of clothing	463 boxes
3	Scattered equipment	38 boxes
4	Electric tools	287 boxes
5	Medical equipment	2084 boxes / items
6	Toys	770 boxes
7	Generators	65 units
8	Cardboard boxes	9 units
9	Gallons of paint	121 gallons
10	Scattered cardboard boxes	117 cartons
11	Work tools and ladders	149 items
12	Ceramic flooring	61 pallets
13	Raw materials for building	858 boxes
14	Lumber	11 pallets
15	Constructions for structures	978 pallets
16	Drywall	6 pallets
17	Pipes	21 pallets
18	Windows	2 pallets
19	Electronic gear	23 pallets
20	Food	49 pallets
21	Bathroom fixtures	181 pallets
22	Beds	85 pallets
23	School gear	77 pallets
24	Boxes with building equipment / structures	164 cartons
25	Carpets	97 pallets
26	Industrial fabric	165 units
27	Work tools	105 units
28	Plastic for industry (profiles)	34 units

29	Blankets	176 pallets
30	Sewing machines	12 units
31	Electric cables	645 pallets
32	Floor tiles	18 pallets
33	Metal	15 pallets
34	Metal plates	63 pallets
35	Metal profiles	104 units

**The “GAZZE”:**

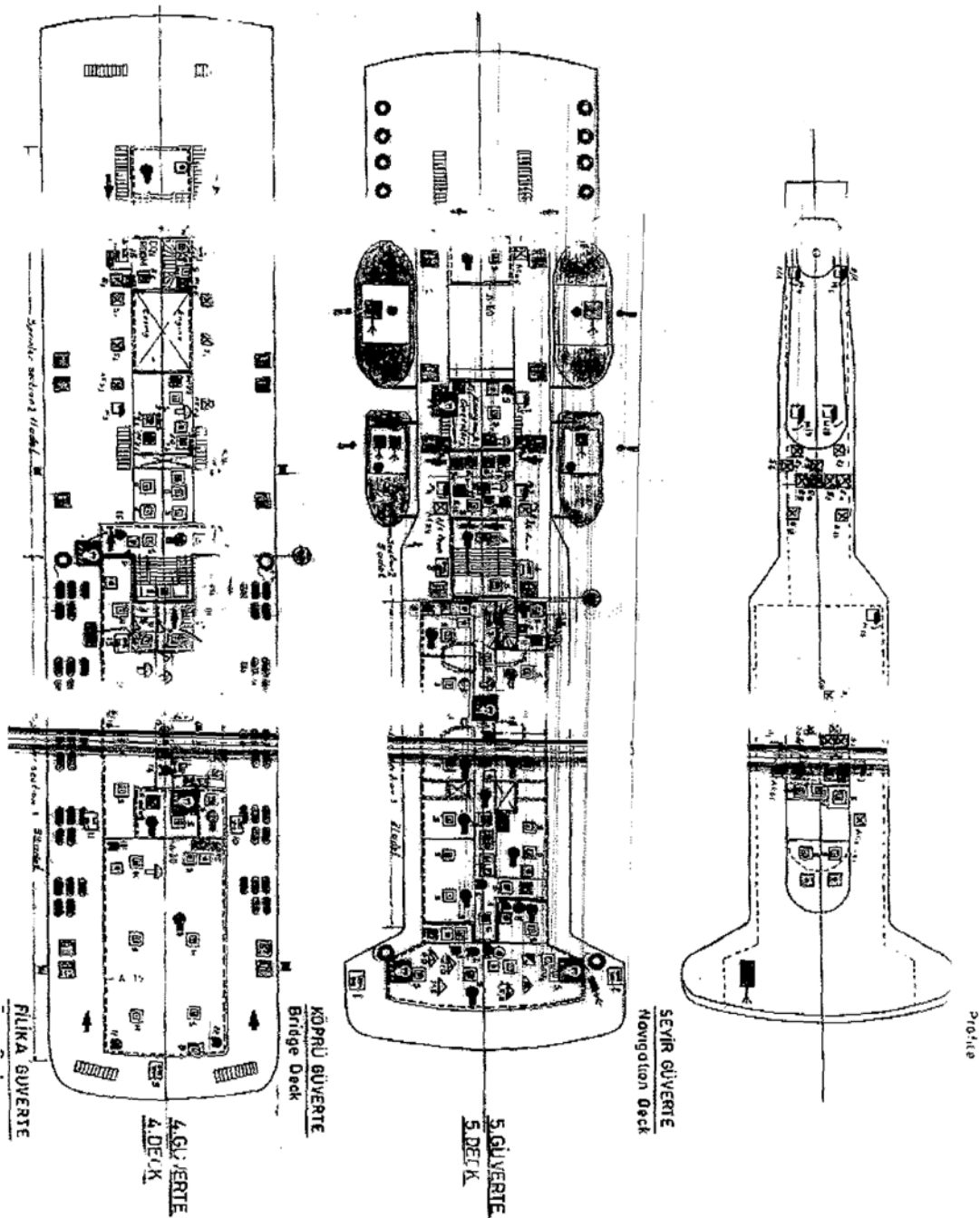
No.	Type of Goods	Amount of Cargo
1	Concrete “Bales”	1358 units
2	Metal bars	304 units

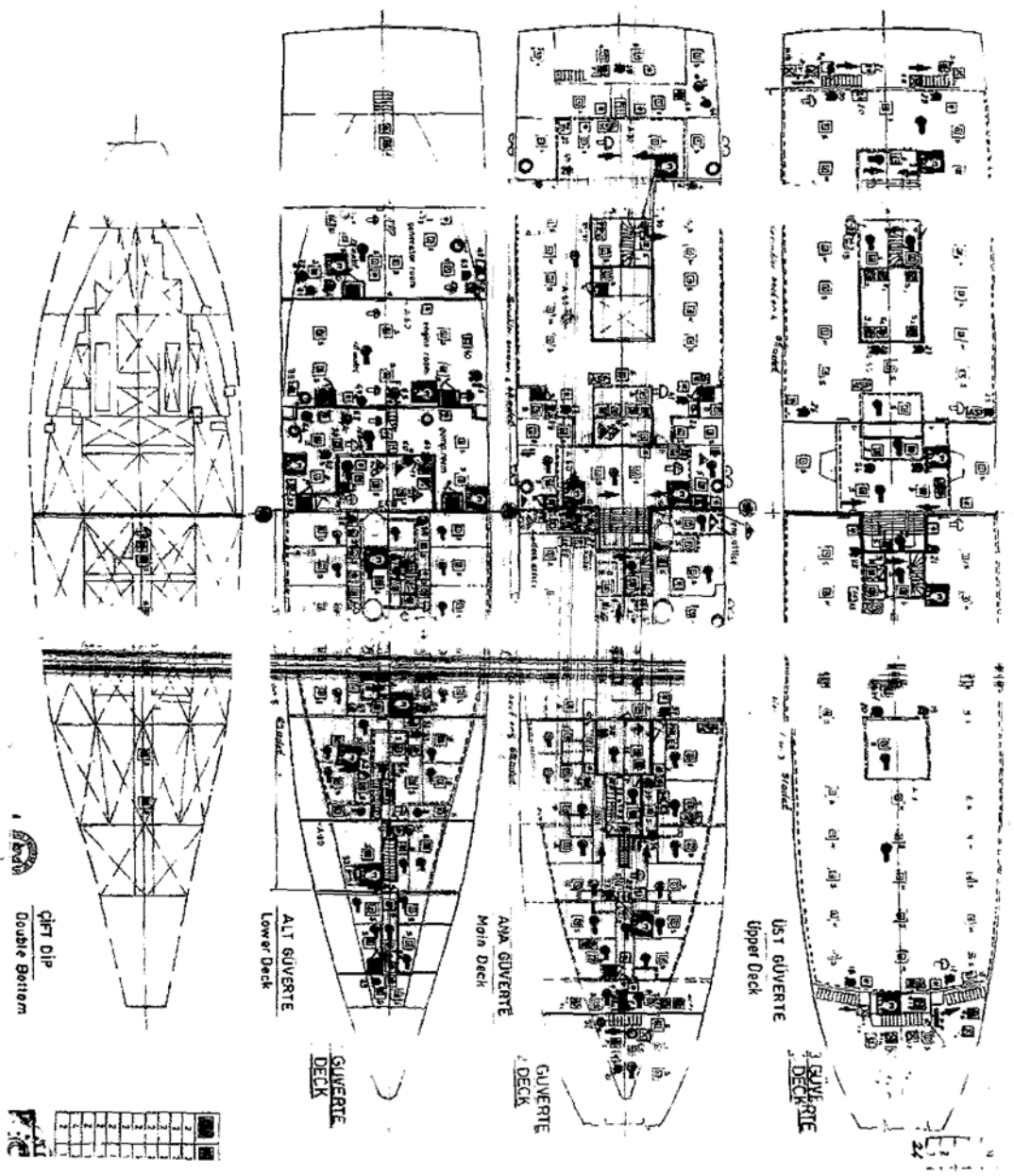






# Annex G: Drawing of the Main Marmara







Supreme Court Justice (Ret.)  
Jacob Turkel, Chairman



Ambassador Professor  
Shabtai Rosenne  
(Deceased 21.9.10), Member



General (Ret.) Amos Horev,  
Member



Ambassador Reuven Merhav,  
Member



Professor Miguel Deutch,  
Member



Lord David Trimble,  
Observer



Brigadier General (Ret.)  
Kenneth Watkin, Q.C., Observer



Advocate Hoshea Gottlieb,  
Commission's Coordinator



Prof. Dr. Wolff Heintschel von Heinegg,  
Special Consultant



Prof Michael Schmitt,  
Special Consultant