Annex L

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

Position Paper on behalf of the Military Advocate General's Corps

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Position Paper on the Legal Aspects of the Imposition of a Naval Blockade on the Gaza Strip and its Enforcement

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

Attached is the **position paper prepared by the Military Advocate General's Corps**, and submitted to the Public Commission to Examine the Maritime Incident of 31 May 2010, which presents the legal aspects related to the imposition of the naval blockade ("blockade") on the maritime zone off the coast of the Gaza Strip and its enforcement.

The document is divided into three parts. The **first part** contains a short review of legal and factual aspects concerning IDF activity in the Gaza Strip between the years 1967-2010, namely since its coming under Israeli control during the Six-Day War until the present day. Firstly, the key milestones in the history of the Gaza Strip during that period will be presented. These will lay the factual foundation for an analysis of the normative framework applying to IDF activity in the Gaza Strip nowadays, composed primarily of the Law of Armed Conflict.

T**he second part** of the document focuses on the legal and factual aspects of IDF activity in the maritime space of the Gaza Strip. The paper outlines the threats posed by the “maritime theater” to Israel's security, and the various legal options that were considered to meet these threats. The paper then proceeds to explain why these options could not provide a full response to the problem, resulting in the decision to impose a blockade.

The third part will focus on the conditions for imposing a blockade pursuant to the Law of Armed Conflict at Sea and their fulfillment in the present case. This part will also present, in brief, the key legal issues which arose during the preparations for enforcing the blockade at the end of May 2010.

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Part A: IDF activity in the Gaza Strip between the years 1967-2010 – factual and legal aspects

This part of the document will present, in a nutshell, **the normative framework of current IDF activity against Palestinian terrorism in the Gaza Strip**. This will serve as a basis for the document's later parts, which will focus on IDF activity in the Gaza Strip's maritime space.

To this end, firstly, the factual developments pertaining to the Gaza Strip since it came under IDF control in June 1967 until "Operation Cast Lead" (December 2008 – January 2009), will be overviewed. Subsequently, against the background of these developments, the various layers of the normative framework applying to IDF activity in the Gaza Strip over the years and their applicability to date will be examined. Finally, the document will briefly refer to the imposition of restrictions on the flow of goods to and from the Gaza Strip since September 2007 until recently, and will discuss how this fits into the said normative framework.

1. Factual background

a. The years of military government and the period of the diplomatic agreements

In June 1967, the Gaza Strip came under IDF control and immediately thereafter a military government was established in the region,[1] which operated in accordance with the International Law of Belligerent Occupation.[2] Under this framework Israel implemented the humanitarian provisions of the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereinafter *the Fourth Geneva Convention*)[3] and the relevant provisions of the regulations annexed to the 1907 Fourth Hague Convention respecting the Laws and Customs of

[1] Until the beginning of 1972, the Gaza region was administered as a single governmental unit along with the Northern Sinai region, which, as the Commission is aware, also came under Israeli control in June 1967. See Section 1 of the Order concerning Interpretation (Gaza Strip) (Amendment No. 4) (No. 418), 5732-1972.

[2] *See, e.g.*, HCJ 1661/05 The Gaza Coast Regional Council et al v. the Knesset et al, *P.D.* 59(2) 481, 512 (2005) (hereinafter *The Gaza Coast Case*).

[3] I *Kitvei Amana* (No. 30), 559. As is commonly known, Israel has denied the formal applicability of the Fourth Geneva Convention in relation to the Gaza Strip and the West Bank. This position has relied on various arguments, mainly the contention that the Strip did not constitute part of Egypt's sovereign territory prior to its coming under Israeli control: Egypt controlled the Strip since the War of Independence (except for a short period after the Sinai Campaign, when it was controlled by Israel); however, this took place under a military government without annexation (*See* Farhi Carol, *On the Legal Status of the Gaza Strip*, *in* MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS 61, 74 (M. Shamgar (ed.), 1982)). For a comprehensive review of Israel's arguments regarding the status of the Gaza Strip and West Bank territories and the resulting applicable law, *see* Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government – the Initial Stage*, *id*., at 13, 15-16; YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 20-25 (2009).

War on Land (hereinafter *the Hague Regulations*).[4] As required by these provisions,[5] the military government assumed the role of the sovereign in the territory along with the full powers and responsibilities[6] entailed therewith, while maintaining in place the "local law", namely the law in force in the Gaza Strip prior to its falling under IDF control.[7] Throughout the years of military government in the Strip, many and varied pieces of legislation ("Security Legislation") were added to this legal corpus, relating to all spheres of life entrusted to the management of the military government.[8]

During the 1990s, diplomatic negotiations took place between the Palestine Liberation Organization (PLO), representing the Palestinian people, and the State of Israel,[9] resulting in the Agreement concerning the Gaza Strip and Jericho Area (hereinafter *the Cairo Agreement*), signed on 4 May, 1994. Consequently, the IDF withdrew from most of the Gaza Strip, except for the Israeli settlements and main access routes ("lateral roads"), and the military installations area along the southern border of the Strip (the "Philadelphi Route"). Additionally, most of the powers and

[4] As is commonly known, Israel is not party to the 1907 Fourth Hague Convention; however, already upon taking control of the Gaza Strip this convention was regarded as reflecting customary international law (*see* Yoram Dinstein, the Ruling on the Rafah Crossing Case, 3 TAU L. Rev. 934, 938-39 (1973-74) [in Hebrew]; HCJ 606/78 Ayoob et al v. Minister of Defense et al, *P.D.* 33(2) 113, 120 (1979)).

[5] Article 43 of the Hague Regulations states: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

[6] "The IDF has today entered the area and assumed control of and the maintenance of security and public order in the area" (Section 1 of the Proclamation concerning Assumption of Control by the IDF (Gaza Strip and Northern Sinai) (No. 1), 5727-1967).

[7] "The law that was in force in the area on 27 Iyar 5727 (6 June 1967) will remain in effect insofar as it does not contradict this proclamation or any proclamation or order, to be issued by me, or the modifications stemming from the establishment of the IDF's administration in the area" (Section 2 of the Proclamation concerning Arrangements of Government and Law (Gaza Strip and Northern Sinai) (No. 2), 5727-1967).

[8] In this document, the term "military government" will serve as a generic term for all governing mechanisms used by the State of Israel in the Gaza Strip over the years. Briefly: at first, all authority, both in security and civil matters, was exercised by elements of the IDF, who were assisted by representatives of the relevant Government Ministries (serving as "staff officers" of the regional commander). This structure was established under Government Resolution No. 737, of 8 September 1968, and under a decision of the Prime Minister, Minister of Defense and Minister of Justice, entitled "Working Procedures in the Administered Territories", dated 11 October 1968. Shortly afterwards, the office of Coordinator of Government Activities in the Territories (COGAT), was established within the Ministry of Defense. As its name suggests, the COGAT unit was formed to coordinate, on behalf of the Minister of Defense, the government ministries' activity under the military government in Judea and Samaria and the Gaza Strip – namely, coordinating activity on civil matters. In this respect, the COGAT served as convenor of a senior inter-ministerial committee ("Committee of Directors-General"), which determined policy in civil matters for all the territories. This was the situation until the beginning of the 1980s, when the Government decided to "reorganize" the system of military government in Judea and Samaria and the Gaza Strip, chiefly by separating the civil components from the military government (Government Resolution No. 106 of 4 October 1981). Following this resolution, a Civil Administration (CA) was established for each region, and to these were delegated all the civil affairs powers of the regional commanders – and although formally, the latter remained the highest authorities, professionally, the CAs were directly subordinated to the COGAT. Finally, during 1994, after IDF forces withdrew from most of the Gaza Strip, the CA of this region was dismantled and replaced by the Administration, Coordination and Liaison Directorate (ACLD).

[9] "The Declaration of Principles on Interim Self-Government Arrangements" was signed by the parties on 13 September 1993 in Washington DC. A few days earlier the then PLO chairman, Yasser Arafat, and the then Israeli Prime Minister, Yitzhak Rabin, exchanged letters in which the PLO acknowledged, inter alia, Israel's right to a secure and peaceful existence; and the Israeli government acknowledged the PLO as the Palestinian people's representative and a party to diplomatic negotiations.

responsibilities were transferred from the military government to the autonomous governing entity established by virtue of the Cairo Agreement – the Palestinian Authority (PA).[10]

It will be noted that shortly prior to the signing of the Cairo Agreement, on 29 April 1994, the parties signed the Protocol on Economic Relations (hereinafter *the Paris Protocol*). As its name suggests, it regulated the variety of economic issues arising in relations between the State of Israel and the PA, such as taxation, monetary matters and the movement of workers and goods. The Paris Protocol was later subsumed in the Cairo Agreement.

Shortly after the signing of the Cairo Agreement, on 28 September 1995, the parties signed the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip (hereinafter *the Interim Agreement*),[11] which incorporated the previous agreements signed in the framework of the peace process, including the Cairo Agreement and the Paris Protocol.[12] It should be noted that unlike the case in the Judea and Samaria Area, following the Interim Agreement, a further withdrawal by the IDF was neither required nor executed in the Gaza Strip. However, powers and responsibilities in additional fields were transferred to the PA.[13]

b. <u>The armed conflict with Palestinian terror organizations</u>

Almost since the very establishment of the military government in the Gaza Strip, the IDF has been forced to deal with hostile elements operating among and from within the local population. Over the years, Palestinian terrorism has taken on a variety of manifestations: at times targeting Israeli settlements in the territories; at times targeting IDF troops and security forces' personnel; and at other times infiltrating Israel's sovereign territory and striking at the heart of its cities and towns. Between the late 1980s and early 1990s, a large-scale Palestinian uprising (the "Intifada") raged in the territories; and during the mid 1990s, alongside some progress made on the diplomatic level, a wave of deadly suicide attacks terrorized Israel.[14] It should be noted that from the legal point of

[10] The Cairo Agreement provisions and division of authorities were incorporated into the domestic law of the area through the Proclamation concerning the Implementation of the Gaza Strip and Jericho Area Agreement (Gaza Strip Area) (No. 4), 5754-1994.
[11] I *Kitvei Amana* (No. 33), 1071.
[12] Article 31(2) to the Interim Agreement states that "the Gaza-Jericho Agreement, except for Article XX thereof (confidence building measures), the Preparatory Transfer Agreement and the Further Transfer Protocol will be superseded by this Agreement." The Paris Protocol was incorporated as the fifth annex of the Interim Agreement, in addition to the completion and replacement of two of its Articles.
[13] The Interim Agreement provisions and the updated division of authorities set out therein were incorporated into the domestic law of the area through the Proclamation concerning the Implementation of the Interim Agreement (Gaza Strip Area) (No. 5), 5756-1995.
[14] The main suicide attacks during the said period were as follows: 6 April 1994 **eight people** were killed in a car-bomb attack in Afula; 13 April, 1994 **five people** were killed in a suicide bombing attack in the Hadera Central Bus Station; 19 October, 1994 **twenty two people** were killed in a suicide bombing attack on the No. 5 bus in Tel-Aviv; 22 January,

view, these manifestations of terrorism were seen as a problem residing in the "law enforcement" realm, the solution to which was police work accompanied by criminal prosecutions and the use of various administrative measures.[15]

However, towards the end of 2000, a material change took place in the nature of Palestinian terrorism. Palestinian terrorist organizations launched a wide-scale onslaught against the State of Israel, its civilians (within Israel's sovereign territory, Judea and Samaria and the Gaza Strip) and IDF forces.[16] This was a "campaign of terror" for all intents and purposes, which posed a much graver threat and which differed in terms of its nature, scope and duration from anything else Israel had faced until then. In addition to re-launching the deadly suicide attacks in the hearts of Israeli cities,[17] the terror organizations were equipped with various types of weaponary, ranging from

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1995 **twenty two people** were killed in a double suicide bombing attack at the Beit-Lid junction; 24 July, 1995 **six people** were killed in a suicide bombing attack on the No. 20 bus in Ramat-Gan; 21 August, 1995 **four people** were killed in a suicide bombing attack on the No. 26 bus in Jerusalem; 25 February, 1996 **twenty six people** were killed in a suicide bombing attack on the No. 18 bus in Jerusalem; 3 March, 1996 **nineteen people** were killed in a suicide bombing attack on the No. 18 bus in Jerusalem; 4 March, 1996 **thirteen people** were killed in a suicide bombing attack at a crosswalk near a large commercial center in Tel-Aviv; 21 March, 1997 **three people** were killed in a suicide bombing attack in a Tel-Aviv café; 30 July, 1997 **sixteen people** were killed in a suicide bombing attack in a Jerusalem market; 4 September, 1997 **five people** were killed in a suicide bombing attack in a Jerusalem pedestrian mall. Needless to say, each of these attacks involved many wounded. The figures are taken from the Prime Minister's Office website (http://www.pmo.gov.il/PMO/Communication/israelunderattack/terrorattacks.htm).

[15] This refers mainly to administrative detentions, namely the incarceration of individuals without trial, based on intelligence information as to the planned future actions of the detainee, which is not fully revealed to the detainee or his attorney, but is scrutinized by the Court within the framework of periodic review of the administrative detention order at least once every six months (see Order concerning Administrative Detentions (Temporary Provision) (Gaza Strip Area) (No. 941), 5748-1988). Furthermore, the power by virtue of Section 119 to the Defense (Emergency) Regulations, 1945 (hereinafter *the Defense Regulations*), was used to demolish houses resided in by perpetrators of attacks and terror operatives – for deterrence purposes. Until the early 1990s, the power by virtue of Section 112 to the Defense Regulations was also used to keep terror operatives out of the areas.

[16] The IDF and the defense establishment referred to this series of events as the "Ebb and Flow"; Palestinians referred to them as the *Al-Aqsa Intifada*, and the local and foreign press dubbed them "the Second Intifada".

[17] The main suicide attacks between 2001-2003 were as follows: 18 May 2001 **five people** were killed in a suicide attack in a mall in Netanya; 1 June, 2001 **twenty one people** were killed in a suicide bombing attack at the entrance to a dance club in Tel-Aviv; 9 August, 2001 **fifteen people** were killed in a suicide bombing attack at a Jerusalem restaurant; 1 December, 2001 **eleven people** were killed in a suicide bombing attack in a Jerusalem street; 2 December, 2001 **fifteen people** were killed in a suicide attack on the No. 16 bus in Haifa; 2 March, 2002 **eleven people** were killed in a suicide bombing attack at the entrance to a Yeshiva [Jewish learning center] in Jerusalem; 9 March, 2002 **eleven people** were killed in a suicide bombing attack in a Jerusalem café; 27 March, 2002 (Passover eve) **thirty people** were killed in a suicide bombing attack in a hotel in Netanya; 20 March, 2002 **seven people** were killed in a suicide attack on the No. 823 bus; 31 March, 2002 **sixteen people** were killed in a suicide bombing attack in a Haifa restaurant; 10 April, 2002 **ten people** were killed in a suicide attack on the No. 960 bus; 12 April, 2002 **six people** were killed in a suicide bombing attack in the entrance to a Jerusalem market; 7 May, 2002 **sixteen people** were killed in a suicide bombing attack in a Rishon LeZion dance club; 5 June, 2002 **seventeen people** were killed in a car-bomb attack near Bus No. 830; 18 June, 2002 **nine people** were killed in a suicide bombing attack on the No. 32A bus in Jerusalem; 19 June, 2002 **seven people** were killed in a suicide bombing attack in a bus station in Jerusalem; 19 July, 2002 **nine people** were killed in a suicide bombing attack on the No. 189 bus; 4 August, 2002 **nine people** were killed in a suicide bombing attack on the No. 361 bus; 19 September, 2002 **six people** were killed in a suicide bombing attack on the No. 4 bus in Tel-Aviv; 21 October, 2002 **fourteen people** were killed in a suicide bombing attack on the No. 841 bus; 21 November, 2002 **eleven people** were killed in a suicide bombing attack on the No. 20 bus in Jerusalem; 5 January, 2003 **twenty two people** were killed in a double suicide bombing attack in the Tel-Aviv old central bus station; 5 March, 2003 **seventeen people** were killed in a suicide bombing attack on the No. 37 bus in Haifa; 18 May, 2003 **seven people** were killed in a suicide bombing attack on the No. 6 bus in Jerusalem; 11 June, 2003 **seventeen people** were killed in a suicide bombing attack on the No. 14A bus in Jerusalem; 19 August, 2003 **twenty three people** were killed in a suicide

assault rifles to improvised explosive devices, with which they engaged in actual military combat against IDF forces. In this context, it will be noted that as early as the beginning of 2001, Gaza-based terrorist organizations began using steep-trajectory weapons – mortar shells and rockets – fired with increasing intensity, at Israeli settlements in the Strip, at Southern communities in proximity to Gaza and at various IDF bases, as well as at the crossing points between Israel and the Strip.[18]

Following this serious deterioration in the state of security, and in light of the transfer of control over significant parts of Judea and Samaria and the Gaza Strip to the PA following the diplomatic process, dealing with the Palestinian terrorism threat now required measures substantially different from those previously employed. Arrests, trials and administrative measures were no longer sufficient; it was now necessary to employ military means (even tanks and fighter aircrafts). During that period, the IDF conducted prolonged and wide-ranging military operations, both in Judea and Samaria and in the Gaza Strip, with the participation of infantry, armor, artillery, engineering, aerial and naval forces. Needless to say, such a change in the scope, duration and nature of the hostilities resulted in a dramatic increase in the number of casualties on both sides.

It should be noted that in light of this change in circumstances, Israel declared that the set of laws applicable to IDF activity in Judea and Samaria and the Gaza Strip had changed. In the context of numerous petitions filed with the Supreme Court since September 2000, as well as in other formal documents issued on its behalf,[19] Israel argued that it and the Palestinian terrorist organizations were engaged in an armed conflict,[20] as a result of which the relevant principles and rules of the Law of Armed Conflict found in International Law should apply to IDF activity. This position was

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bombing attack on the No. 2 bus in Jerusalem; 9 September, 2003 **eight people** were killed in a suicide bombing attack at a bus stop near the Tzrifin army base; 4 October, 2003 **twenty one people** were killed in a suicide bombing attack in a Haifa restaurant. Needless to say, each of these attacks involved many wounded. The figures are taken from the Prime Minister's Office website (*supra*, note 14).

[18] In 2001, four Qassam rockets were fired from the Gaza Strip area (the first of these was fired at the end of October); in 2002 the number increased to 35 rockets; in 2003 – 135 rockets; in 2004 – 281 rockets. In each of these years, a total of 245, 257, 265 and 876 mortar shells were fired, respectively. Since mortars have a shorter range (up to 3 km) they were mainly directed at Israeli settlements then located in the Gaza Strip, and at IDF forces; while the rockets were fired at the communities of Southern Israel located in proximity to the Strip. These figures are taken from a study conducted by the Intelligence and Terrorism Information Center headed by Dr. Reuven Erlich, entitled "The Rocket Threat from the Gaza Strip 2000-2007" (Hebrew), *available at*: http://terrorism-info.org.il/malam_multimedia/Hebrew/heb_n/pdf/rocket_threat.pdf).

[19] *See, e.g.*, First Statement of the Government of Israel to the Sharem El-Sheikh Fact-Finding Committee, paras. 112-131 (28 December 2000). This Committee, also known as the Mitchell Committee (named after Senator George Mitchell, who was appointed by former US President Clinton to head the Committee), was founded by virtue of the agreement ensuing from the Sharem El-Sheikh Summit on 16-17 October 2000. Its purpose was to probe the violent events that had been occurring for several weeks, and to make recommendations for preventing their recurrence.

[20] It is worth mentioning that upon the outbreak of hostilities between Israel and the Palestinian terrorist organizations, a legal approach was adopted according to which these amounted to an "armed conflict short of war". However, the statement that this was not a "war" but rather an "armed conflict" was of mainly diplomatic importance, having no actual legal ramifications. Therefore, the current paper will use the term which took hold in the rulings of the Supreme Court, namely – "armed conflict".

later adopted in a series of Supreme Court rulings in cases reviewing the measures taken by Israel to deal with Palestinian terrorism.[21]

c. The Implementation of the Disengagement Plan and termination of the military government

In 2004, against the background of the ongoing fight against Palestinian terror on the one hand and the lack of progress in the diplomatic process on the other, Israel began preparations to evacuate its troops and citizens from the Gaza Strip – a move which was named "The Disengagement Plan".[22] At the security level, the plan foresaw a reality whereby the IDF would defend Israel's land border with the Gaza Strip, maintain exclusive control over the airspace and continue to perform security activities in the maritime space, while reserving the fundamental right to self defense, including through the exercise of both preventive and reactive measures involving the use of force.[23] At the civil level, the plan aimed to maintain in force the existing arrangements, including as regards the movement of people and goods between the Gaza Strip, Judea and Samaria, Israel and third countries.[24] The actual implementation of the Disengagement Plan began on 17 August 2005 and lasted about three weeks. It should be noted that, at first, Israel planned to maintain control of the military installations area located along the southern border of the Gaza Strip ("The Philadelphi Route"),[25] but on 11 September 2005, a resolution was adopted to remove IDF forces from the entirety of the Gaza Strip and transfer responsibility over Gaza to the PA.[26] On the following day, 12 September 2005, the last of the IDF troops withdrew from the territory of the Gaza Strip and the

[21] *See, e.g.*: HCJ 9252/00 El Saka v. State of Israel, *Takdin Elyon* 2001(2) 1678; HCJ 9293/01 Barakeh v. Minister of Defense, *P.D.* 56(2) 509 (2001); HCJ 3114/02 Barakeh v. Minister of Defense, *P.D.* 56(3) 11 (2002); HCJ 3451/02 Almadani v. Minister of Defense, *P.D.* 56(3) 30 (2002); HCJ 4219/02 Gusin v. Commander of IDF Forces in the Gaza Strip, *P.D.* 56(4) 608 (2002); HCJ 7015/02 Ajuri v. Commander of IDF Forces in the West Bank, *Takdin Elyon* 2002(3) 1021; HCJ 8990/02 Physicians for Human Rights v. IDF Commander of the Southern Region, *P.D.* 57(4) 193 (2003); HCJ 4764/04 Physicians for Human Rights v. IDF Commander in Gaza, *P.D.* 58(5) 385 (2004); HCJ 769/02 The Public Committee against Torture in Israel et al v. the Government of Israel et al, *Takdin Elyon* 2006(4) 3958 (hereinafter: *the Public Committee against Torture Case*).

[22] "Israel will evacuate the Gaza Strip including all existing Israeli towns and villages, and will redeploy outside the Strip. This will not include military deployment in the area of the border between the Gaza Strip and Egypt (the "Philadelphi Route")… Upon completion of this process, there shall be no permanent presence of Israeli security forces on the ground in the areas to be evacuated." (Section 2(a)(3.1) of Government Resolution No. 1996, dated 6 June 2004). It should be noted that this resolution also dealt with the evacuation of four settlements in Northern Samaria, however these are not pertinent to this discussion.

[23] *Id.*, Section 3(a).

[24] *Id.*, Section 10.

[25] *Id.*; see also Government Resolution No. 3281, dated 20 February 2005; and The Disengagement Plan Implementation (Gaza Strip) Order – 2005, Govt. Regulations 2005 No. 6371, p. 449.

[26] Government Resolution No. 4235, dated 11 September 2005.

GOC (General Officer Commanding) IDF Southern Command signed a proclamation terminating the military government which had operated in the area for the preceding 38 years.[27]

The evacuation of Israeli citizens and IDF forces from the Gaza Strip was aimed at bringing about a substantive change in the situation of the Gaza Strip, and allowing the PA to establish a fully functioning and autonomous regime in the area, independent from Israeli intervention. To this end, in November 2005, the Government of Israel and the PA signed the Agreement on Movement and Access (AMA), under which Israel made certain undertakings regarding the export of goods from the Gaza Strip through Israeli territory, and the movement of people between the Gaza Strip and Judea and Samaria. The AMA also established arrangements for the operation of the Rafah and Kerem Shalom crossing points, through which the movement of people and goods between the Gaza Strip and Egypt, under the supervision of a third-party, was supposed to have been enabled.[28]

Despite the aforesaid, in effect, the security situation in the Gaza Strip continued to deteriorate. Shortly after the implementation of the Disengagement Plan, the Gaza Strip-based Palestinian terrorist organizations, principally Hamas, renewed their steep-trajectory weapons firing at Israel's Southern communities. Many attempted terror attacks were also launched (some accomplished their goals) against the crossing points between Israel and the Gaza Strip, and against IDF forces deployed along the land borders and off the Gaza coast. These organizations also expanded their subterranean activity: dozens of tunnels were dug under the "Philadelphi Route" with the purpose of smuggling weapons into the Strip, serving as a terrorists' passageway to and from the Gaza Strip, on their way to training camps overseas (Lebanon, Syria, Iran), and for committing suicide bombing attacks inside Israeli territory. Additional tunnels were also dug under the border with Israel.

The political situation also deteriorated after the Hamas organization won the elections for the Palestinian Legislative Council in January 2006, and was invited by the Fatah to join a coalition government headed by the latter. This meant the integration of a recognized terror organization engaged in an armed conflict with Israel, whose declared mission was to destroy Israel, within the Palestinian governmental institutions, which would allow Hamas to exploit the PA's various mechanisms for its own nefarious purposes under the cloak of formality and legitimacy. Thus, Israel demanded that Hamas accept the three requirements which it and the Middle East Quartet laid down and approved: recognizing Israel and renouncing the Hamas Charter; disavowing the use of terrorism and dismantling terrorist infrastructure; and respecting the previous agreements and

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[27] "As of the end of this day, the military government in the Gaza Strip area is terminated" (Section 1 of the Proclamation concerning the Termination of the Military Government (No. 6) (Gaza Strip Area), 5765-2005)

[28] The agreement is available at: http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Agreed+documents+on+movement+and+access+from+and+to+Gaza+15-Nov-2005.htm

understandings reached between Israel and the Palestinians.[29] Following Hamas' refusal to abide by these conditions and after a government headed by Hamas was sworn in at the end of March 2006, the Israeli government declared the PA to be a "terrorist authority hostile to Israel."[30]

Further escalation occurred when on 25 June, 2006, a band of terrorists infiltrated Israeli territory through a tunnel dug under the Israel-Gaza border and carried out a surprise attack on an IDF tank: two of the tank crew's members were killed and a third – Corporal (CPL) Gilad Shalit – was wounded and abducted by the terrorists to the Gaza Strip. As is well known, four years later, CPL Shalit is still being held by terrorist organizations in an unknown location in the Gaza Strip, in blatant violation of the minimal standards set forth by the Law of Armed Conflict concerning individuals in his situation – first and foremost the right to meet with representatives of the International Committee of the Red Cross and to maintain contact with family members.

This grave incident constituted another link in the continuous armed conflict between Israel and the Palestinian terrorist organizations operating in the Gaza Strip, which intensified further while a relative improvement was recorded in the security situation in Judea and Samaria. The steep-trajectory fire necessitated the use of artillery as well as aerial strikes by the IDF against the rocket launching crews. Also, from time to time, the situation required that the IDF send infantry and armored forces into the Gaza Strip for wider operations to root out the terrorist infrastructure established by the Palestinian organizations in the heart of civilian populated areas in towns and villages, particularly those in close proximity to the Israeli border.

d. <u>The Hamas's takeover of the Gaza Strip</u>

The deterioration described above eventually led to the most critical turning point thus far in Israel's relationship to the Gaza Strip – Hamas's violent takeover in June 2007. Approximately a year and a half after joining the PA's coalition government, Hamas initiated a campaign of widespread violence throughout the Gaza Strip, involving the murder of dozens of officials as well as personnel of the security apparatuses (established by the PA under the Interim Agreement) belonging to the Fatah. Hundreds of others fled for their lives to the crossing points between Israel and the Gaza Strip, and their safe passage to Judea and Samaria was enabled. The rest went underground or joined the ranks of Hamas, which finalized its coup by establishing an independent ruling entity which refuses to recognize Israel's right to exist or the agreements signed between the PLO and Israel and refuses to desist from acts of terrorism against Israel (hereinafter: **the Hamas regime).**

[29] Government Resolution No. 4705, dated 19 February 2006.
[30] Government Resolution No. 4780, dated 11 April 2006

Once Hamas had seized control of the Gaza Strip, it harnessed all of the government apparatuses to its ever continuing military buildup for its armed conflict with Israel. This process included the expansion of its available military forces; their reorganization into military and paramilitary bodies; the improvement of command and control mechanisms; large scale training exercises within and outside of the Gaza Strip (especially in Iran and Syria); equipping their forces with advanced means of warefare (mainly improved rockets and powerful improvised explosive devices); preparing the territory of the Gaza Strip for defense, including the construction of subterranean infrastructure throughout the Gaza Strip for combat, concealment and the planting of underground IED's in locations where confrontations with the IDF were anticipated.[31] The military buildup process relies on assistance from Iran, Syria and Hezbollah, which takes the form of doctrinal and technological knowledge transfer as well as the supply of weapons, equipment and training.[32] Weapons, money and terrorist operatives are smuggled into the Gaza Strip, primarily by means of the extensive tunnel network that has been dug beneath the border with Egypt.[33]

Prior to Hamas's takeover of the Gaza Strip, the main military force at its disposal was its military wing – the Izzadin-al-Qassam Brigades. In the years of Hamas rule in Gaza, the military wing has evolved into a large body, with an orderly military framework and a consolidated chain of command at its core which controls, directs and oversees all forces and enforces strict internal discipline. The military wing is charged with both defending the Gaza Strip and the Hamas regime and with prosecuting the conflict with Israel, and to this end it relies on structured combat doctrines formulated under the inspiration of Hezbollah and instilled during the training that operatives undergo in the Gaza Strip and abroad. Also, the military wing employs a variety of weapons,[34] including some of standard military grade.

In addition, while strengthening its military wing, the Hamas regime has created several security apparatuses, that were apparently meant to supplant those operated by the PA in the Gaza Strip for the enforcement of law and public order. However, as has been described extensively in documents published prior to Operation Cast Lead as well as in its aftermath, these apparatuses constitute part

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[31] *See, e.g.*, the Intelligence and Terrorism Information Center, "The Hamas' militarization in the Gaza Strip (Situation Assessment for March 2008)" (9 April 2008), *available at* http://terrorism-info.org.il/malam_multimidia/Hebrew/heb_n/pdf/hamas_080408h.pdf).,*See also*, *infra* note 35, 42-51.

[32] *See, e.g.*, the Intelligence and Terrorism Information Center, "The Iranian Assistance to Hamas" (12 January 2009), *available at* http://terrorism-info.org.il/malam_multimedia/Hebrew/heb_n/pdf/Iran_004.pdf). *See also*: *supra* note 31,46-58; *infra* note 35,97-101.

[33] *See, e.g.*, the Intelligence and Terrorism Information Center, "The thriving tunnel-based sector in the Gaza Strip has recently been undergoing a consolidation process by Hamas; this is done by means of press releases that the smuggling of goods into the Gaza Strip helps lift the "Israeli siege", while ignoring the smuggling of weapon systems and the flow of terrorist operatives that continues to take place through the tunnels" (27 October 2008), *available at* http://terrorism-info.org.il/malam_multimedia/Hebrew/heb_n/pdf/ct_009.pdf). *See also*, *supra* note 31, 43-45.

[34] *See supra* note 31, 10-11.

of the armed forces of the Hamas regime. They routinely maintain close connections with the military wing and in cases of large scale IDF operations in Gaza are designated to take an active and full-fledged combat role. All this while the Hamas regime tries to blur the ties between its military wing and the security apparatuses in an effort to preserve the "official" image of the latter.[35]

Of particular note is the fact that one of these security apparatuses is the "Coast Guard", which serves – according to its official mission statement – in the role of naval police for the Gaza Strip. According to intelligence gathered, in addition to this official role, it has also performed functions of an explicitly military nature. It is headed by a veteran operative of the Hamas military wing, which many of the "Coast Guard" 200 operatives and commanders belong to and have extensive ties with. Its operatives are armed with a variety of weapons intended primarily for use against IDF forces, and to this end, many of them have been trained in RPG use, anti-tank weapons, commando operations and ambushes. The "Coast Guard" has been involved in fighting IDF forces both during periods of relative calm and during periods of high-intensity conflict. As part of this it has been engaged in tracking and monitoring IDF naval activity and has even fired on IDF vessels. In addition it has assisted the military wing in combat-support functions.[36]

The continued deterioration in the security situation and the rise of the Hamas regime in the Gaza Strip led the Ministerial Committee for National Security to declare the Gaza Strip a "hostile territory".[37] This decision had no bearings on security-related issues – determining only that military activities would continue according to developments in the situation – but it led to a substantial change in the policy pertaining to the flow of goods to and from the Gaza Strip via Israeli territory. This issue will be further discussed in Section B(3) of this paper, *infra*.

In December 2008 the IDF commenced Operation Cast Lead, after the Hamas regime in the Gaza Strip had launched a widespread rocket offensive directed against Israeli southern communities, following its declaration of an end to the "lull" period. The operation was aimed at diminishing the capability of the terrorist organizations and chiefly that of the Hamas regime to engage in steep-trajectory fire towards Israel, as well as their military buildup capacity, while reducing the damage to the Israeli home front. Despite the severe blow sustained by the Hamas regime to its military infrastructure in the Gaza Strip, and the resulting drastic reduction in rocket and mortar fire towards Israel, the armed conflict between Israel and the Hamas regime in the Gaza Strip has continued

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[35] *See supra* note 31, 12-15. *See also* the Intelligence and Terrorism Information Center's "Hamas activity and the characteristics of terrorism from the Gaza Strip – examining the content of the Goldstone Report in comparison with the factual findings" 252-94 (March 2010), *available at* http://terrorism-info.org.il/malam_multimedia/Hebrew/heb_n/pdf/g_report_h1.pdf.

[36] *See supra* note 31, 14. *See also supra* note 35, 271-72.

[37] Ministerial Committee for National Security Resolution No. 34/b, dated 19 September 2007.

since the conclusion of the military campaign in the form of steep-trajectory fire, attacks on IDF forces patrolling the border fence and infiltration attempts for the purpose of carrying out terrorist attacks. Also, the weapons smuggling activity aimed at restoring and bolstering the military capabilities of the Hamas regime has continued with renewed momentum.

2. The legal framework

So far we have seen that since 1967 important changes have taken place in the prevailing reality of the Gaza Strip in general and in aspects related to IDF activity in particular. Naturally, these factual changes have ramifications on the content of the normative framework to which IDF forces are subject when in action against Palestinian terrorism. The following is a discussion of the three layers making up this legal framework and an attempt to identify the shifts that have occurred with respect to each as a consequence of the above-mentioned factual developments.

a. The legal status of the Gaza Strip and the applicability of the Law of Belligerent Occupation

As noted above, for 38 years (until 5 years ago), the Gaza Strip was under a military government established in the immediate aftermath of the Strip coming under IDF control in June 1967. The implications of this factual reality vis-à-vis the legal status of the area and the primary set of laws applicable to IDF activity in the Gaza Strip in general, and those directed against Palestinian terrorism in particular, were explained by the Supreme Court as follows:

> "According to the legal approach adopted by successive Israeli governments as presented to the Supreme Court – an approach that has been accepted by successive benches of the Supreme Court – these areas are held by the State of Israel through a "belligerent occupation". The meaning of this legal approach is two-fold: firstly, the law, jurisdiction and administration of the State of Israel do not apply in these areas; the Israeli Government has not issued any executive order for the application of Israeli law, jurisdiction and administration on the West Bank and Gaza Strip and the Minister of Defense has not issued a proclamation on this matter under the **Area of Jurisdiction and Powers Ordinance, 5708 - 1948**… These areas have not been 'annexed' to Israel, and do not constitute a part thereof. In the absence of a legislative provision (explicit or implicit) the laws of Israel's Parliament (the Knesset) have no force there… Secondly, the legal regime that applies

> in these areas is determined by the rules of public international law - primarily the rules pertaining to belligerent occupation."[38]

However, as described above, between then and now, material changes have taken place in this factual reality. Below is an attempt to detail the significance of these changes vis-à-vis the legal status of the Gaza Strip and the normative framework derived therefrom.

This question initially arose following the Israeli withdrawal from most of the Gaza Strip and the transfer of powers and responsibilities of the military government to the PA. This is a complex legal issue which due to the factual changes taking place subsequently need not be addressed here at length. Therefore, in a nutshell, it should be noted that in this matter there are two possible approaches: the first views the territories from which the IDF redeployed and for which it handed over authority to the PA as no longer under effective IDF control and as such, no longer under belligerent occupation by Israel; the other approach views the IDF as continuing its control over these territories, since the diplomatic agreements left the residual authority in these territories in its hands, as well as the overall responsibility for security. According to the latter approach, the PA received limited jurisdiction for self-rule in these territories without compromising the existence of the military government there. For the sake of clarity, it should be stressed that Israel refrained from making a clear determination on the legal status of the areas from which the IDF had withdrawn during implementation of the diplomatic agreements with the PLO; yet in practice, the IDF continued to make use of powers derived from the Law of Belligerent Occupation with regard to those areas.

In any event, this issue is no longer relevant with respect to the Gaza Strip, since upon completion of the withdrawal under the Disengagement Plan in 2005 and the signing of the proclamation terminating the military government, the physical presence of IDF forces in the Gaza Strip and the exercise of government-related authority by them had ceased.[39] Thus, effective IDF control over the Gaza Strip was brought to an end, and with it Israel's belligerent occupation of the territory. This position was submitted to the Supreme Court in response to several petitions pertaining to the Gaza Strip in the aftermath of the Disengagement Plan, and was explicitly adopted by the Court:

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[38] The Gaza Coast Case, *supra* note 2.

[39] Thus, for example, as part of the military government there were military courts operating by virtue of the military government's legislation on security matters and by virtue of Articles 64-66 of the Fourth Geneva Convention. With the termination of the military government the legislation it issued ceased to be valid and thus the courts could no longer be operated or serve as venues for prosecutions under the military security legislation. In addition, the legal basis for detaining those residents of Gaza who had been convicted in these courts and had been sentenced to remain in prison had presumably been rendered invalid by this development, since this authority was also anchored, first and foremost, in the military security legislation (and in "corresponding legislation" of the Israeli Parliament: Section 6 of the addendum to the Law Extending the Validity of Emergency Regulations (Judea and Samaria and Gaza Strip – Jurisdiction over Crimes and Legal Assistance), 5728-1967). Thus, a need arose for new legislation that would regulate the continued imprisonment and sentence-serving of these individuals – the Law on Prison Sentences Imposed by Military Courts in the Gaza Area (Transitional Provisions), 5767-2007.

> "In this context we note that since September 2005, Israel no longer has effective control over events in the Gaza Strip. The military government imposed in the territory in the past has been terminated by virtue of a government resolution, and Israeli soldiers are no longer permanently present in the area and do not manage affairs there. In these circumstances, Israel is under no general obligation to provide for the welfare of the residents of the Gaza Strip and to preserve the public order there according to the body of laws pertaining to belligerent occupation in international law. Israel also has no effective capability in its current situation to impose order and to manage civilian life in the Gaza Strip."[40]

Nevertheless, there are those who hold that Israel should still be considered the Occupying Power vis-à-vis the Gaza Strip.[41]

This claim is intended, *inter alia*, to call into question the legality of actions taken by Israel in relation to the Gaza Strip following the Disengagement Plan (*e.g.*, various economic measures, to be discussed below), the argument being that such actions constitute a breach of the obligations binding Israel vis-à-vis the residents of the Gaza Strip under the Law of Belligerent Occupation. As such, and despite the explicit Supreme Court decision on the matter, it seems appropriate to briefly revisit the legal status of the Gaza Strip and the applicability of the Law of Belligerent Occupation with regard to IDF activity..

Article 42 of the Hague Regulations sets forth when a territory is considered to be subject to belligerent occupation.[42] At its core is the test of "effective control" by the foreign army over the enemy territory, which exists when the area is under the authority of the military, which needs to be established and exercisable. The pre-requisite of "effective control" is also derived from Article 43 of the Hague Regulations which imposes the general onus on the military holding the territory to restore public order and safety as well as the responsibility to maintain them.[43] Naturally, meeting those conditions requires actual control over the area and the ability to exercise the authority necessary for that.[44] Recently, the International Court of Justice determined in this context, that in

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[40] HCJ 9132/07 Al-Bassiouni v. The Prime Minister, *Takdin Elyon* 2008(1) 1213, 1217 (hereinafter: *The Al-Bassiounni Case*)

[41] *See, e.g.*: UN Human Rights Council, Report of the UN Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48 (25 September 2009), paras. 276-79; GISHA: LEGAL CENTER FOR FREEDOM OF MOVEMENT, DISENGAGED OCCUPIERS: THE LEGAL STATUS OF GAZA (January 2007), *available at* http://www.gisha/org/UserFiles/File/Reportforthewebsite.pdf; Mustafa Mari, *The Israeli Disengagement from the Gaza Strip: an End of the Occupation?*, 8 YEARBOOK INT'L HUM. L. 356 (2005)

[42] "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised".

[43] *See supra* note5.

[44] For this matter, consider the words of Eyal Benvenisti:

> "The law of occupation is applicable to regions in which foreign forces are present, and in which they can maintain control over the life of the local population and exercise the authority of the legitimate power, The test for effective control is not the military strength of the foreign army which is situated outside the borders that surround the foreign area. What matters is the extent of that power's effective control over

order for a belligerent occupation to exist, the occupying army must actually exercise its authority in the territory, and thereby supplant the authority of the sovereign government of that area:

> "In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an "occupying Power" in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government."[45]

This means that even the physical presence of a foreign army in the territory in question does not in itself constitute a sufficient condition for determining the existence of effective control. Thus, clearly one must proceed with caution where no such presence exists – such as in the Gaza Strip following the withdrawal of IDF forces in implementation of the Disengagement Plan.

That said, it should be noted that some military manuals set a lower threshold for finding the existence of a belligerent occupation, and focus on the potential ability of the occupying army to maintain its authority over the area and the inability of the sovereing government to exercise its authority.[46] However, it should be stressed that also according to this approach, there still is a requirement that the control of the foreign army be effective in the sense that it can impose its will on the local population whenever it so chooses, while the sovereign government is unable to exercise its authority in the territory due to the effective control of the foreign army. This approach, which is centered on the potential ability to maintain effective control, is based on the judgment of the International Military Tribunal in Nuremberg[47] and was accepted, to some extent, in the ruling of the Supreme Court.[48]

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civilian life within the occupied area; their ability, in the words of Article 43 of the Hague Regulations, to 'restore and ensure public order and civil life."

Eyal Benvenisti, *Responsibility for the Protection of Human Rights under the Interim Israeli-Palestinian Agreements*, 28 Isr. L. Rev. 297, 308-09 (1994).

[45] *Armed Activities on the Territory of the Congo* (DRC v. Uganda), 2005 ICJ Rep. 168, 173.

[46] This approach was adopted by the US Army Field Manual (Department of the Army, Field Manual No. 27-10: The Law of the Land Warfare, 18 July 1956 (revised 15 July 1976) pp. 355-356) and in the Canadian Army Field Manual (Office of the Judge Advocate General (Canada), Joint Doctrine Manual: Law of Armed Conflict at the Operational and Tactical Levels, 13 August 2001, pp. 1203). See also the separate legal opinion of Judge *Kooijmans* which criticizes the minimalist approach that has been adopted by the International Court of Justice in the case of *DRC v. Uganda* (comment 45 above, paragraphs 44-50).

[47] See *The Hostages Trial (Trial of Wilhelm List and others)*, United States Military Tribunal, Nuremberg (Case no. 47), reprinted in VIII *Law Reports of Trials of War Criminals* (Selected and prepared by the United Nations War Crimes Commission, 1949) 34, 55-56

[48] See HCJ 102/82 Tzemel vs. Minister of Defense, *P.D.* 37(3) 365, 373-376 ("a military force can raid or invade an area in order to pass through it on its way to a destination that it set for itself, while leaving the area behind it without effective control. **But if the force took control over some area in a practical and effective manner, the temporary**

Although the Law of Belligerent Occupation does not explicitly stipulate the way in which the state of belligerent occupation will come to an end, the accepted approach is that of a "mirror image" of the conditions for its inception, namely, when the occupying army no longer maintains effective control in the territory (whether potential or actual) and in its place there is a new regime having effective control as noted. Thus, Greenspan states that:

> "Once an occupation has started, it must be maintained effectively if it is to be regarded as valid. If the occupant evacuated the territory, is driven out, or ceases to maintain effective control for any reason, and the legitimate government is able to resume its authority and functions, occupation ceases".[49]

Neither does the law address the question of whether the regime that supplants the occupying military must be the continuation of the sovereign government that was in control of the territory on the eve of the belligerent occupation, or whether a previously-unknown entity can qualify for ending the state of belligerent occupation. In any event, it seems that a disjointed assortment of local authorities (such as municipalities and city councils) do not meet this standard, which requires that the regime taking the place of the occupying military bear the hallmarks of a central government that can exercise its authority on the relinquished territory.[50] In the present case, as noted above, with the IDF withdrawal and the termination of the military government, the PA, which had control over most of the Gaza Strip at the time of the Disengagement Plan and was viewed by the international community as the legitimate government there, acted to impose its authority on the areas evacuated by the IDF.[51] With that, the Israeli belligerent occupation in the

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nature of the stay in the area or the intention to impose a non-permanent military control do not derogate from the fact that the factual conditions have been met for applying the laws of war that deal with the collateral implications of belligerent occupation. Moreover, the application of the third chapter of the Hague Convention and the application of the corresponding articles in the Fourth Geneva Convention are not contingent on the fact that a special organizational system be established in the form of a military rule. **The duties and authorities of the military force, which are derived from its effective occupation of some area, are established and created by the very fact that there is military control over the area, namely, even if the military force exercises control only by means of its regular combat units, without creating and dedicating a special military framework for military rule purposes** (emphasis added)). *See also*, HCJ 201/09 Physicians for Human Rights v. The Prime Minister, *Takdin Elyon* 2009(1) 565, 571 (hereinafter: the *Physicians for Human rights Case*) **(**"The applicability of the laws of occupation of international humanitarian law is conditioned on the potential for exercising government authorities in the area following the invasion of military forces, and not necessarily on the actual exercise of those authorities *de-facto*.")

[49] MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 223 (1959). *See also*, LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 258 (2nd ed., 2000) ("But if the [Occupying Power] evacuates or retreats from the territory and the legitimate government is able to reassert its authority, the occupation ceases.")

[50] *See* Marco Sassoli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Power*, 16 EUR. J. INT'L L. 661, 682 (2005) ("This raises the question of when the devolution of governmental authority to a national government is effective enough to end the applicability of IHL on belligerent occupation altogether… The decisive factor is, therefore, who effectively exercises governmental authority.")

[51] On 20 August 2005, the Chairman of the PA, Mahmud Abbas (Abu Mazen) issued an edict transferring all territories vacated by Israel to the Palestinian Authority. The edict stipulates that the PA "will assert its immediate control over the areas from which Israeli forces will withdraw" and "will lay its hands on a temporary basis on all assets, movable or immovable, until their status will be determined by the law". A committee of ministers was formed by the PA

Gaza Strip came to an end, since as of the completion of the Disengagement Plan, the IDF had neither actual nor potential effective control over the territory of the Gaza Strip (according to the manner this requirement is interpreted by international law) and was replaced by another governmental entity with the ability to exert its control as aforesaid.[52]

Those who take issue with this analysis claim that Israel still bears the responsibility of an Occupying Power towards the Gaza Strip under the Law of Belligerent Occupation, on account of various Israeli actions vis-à-vis the Gaza Strip, that are proof, in their view, of effective control over the Gaza Strip. Among other things, they mention: the control of the crossing points between Israel and the Gaza Strip, which allows Israel to set policy on matters pertaining to the flow of people and goods to and from the terrirory; the control over the airspace and maritime space of the Gaza Strip; and finally, the dependency that the Gaza Strip has developed on Israel due to the close ties that existed during the years of the military government, such as that with regard to fuel and electricity supply.

In addressing these claims, it should be noted that Israeli control of the crossing points between Israel and the Gaza Strip is derived from Israel's sovereign prerogative to set policy for movement of people and goods from and to its territory, and not from control over the Gaza Strip. This is similar to Israel's control over the flow of people and goods through the crossing points between it and its neighboring states like Egypt, Jordan, Lebanon and Syria without this being considered effective control over those countries.[53] Moreover, Israel does not control the southern border of the Gaza Strip, where the Rafah crossing point is located and is operated at the discretion of the Egyptian authorities. In addition, there is a large-scale two-way flow of goods and people through the tunnel system that has been created under this border with Egypt – and this channel also serves the flow of arms, funds and terrorist operatives.

As for IDF activity in the Gaza Strip airspace, this does not meet the standard for effective control over the Gaza Strip, as noted by Schmitt, in relation to the no-fly zone imposed on the northern and southern parts of Iraq by the US, the UK and France following the First Gulf War:

> "… the concept of aerial occupation is not a legal one. In traditional humanitarian law, occupation is a term of art for physical control by one belligerent over land territory of another (or of a State occupied against its

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government in order to coordinate and oversee the preparations for assuming responsibility for these areas (see: http://www.terrorism-info.org.il/malam_multimedia/html/final/sp/ heb_n/d2laung_05.htm.)

[52] *See, e.g.*, Nicholas Rostov, *Gaza, Iraq, Lebanon: Three Occupations under International Law*, 37 ISR. YEARBOOK HUM. RTS. 205, 214-21 (2008); Yuval Shany, *Faraway, So Close: The Legal Status of the Gaza Strip after Israel's Disengagement*, 8 YEARBOOK INT'L HUM. L. 369 (2005).

[53] *See* Avi Bell and Dov Shefi, *The Mythical Post-2005 Israeli Occupation of the Gaza Strip*, 16 ISR. AFF. 268, 281 (2010).

> will, but without resistance). When an occupation occurs, rights and duties arise as between the occupying power and individuals located in the occupied area. An aerial occupation, by contrast, is simply a de facto, vice de jure, status in which limits are placed on a States' use of its own airspace".[54]

Indeed, IDF activity in Gaza's airspace does not involve the exercise of any governmental authority vis-à-vis Gaza's population and is not carried out by virtue of the security legislation which governed such matters during the era of the military government.[55] Likewise, the activity of IDF naval forces in the maritime space of the Gaza Strip, whose characteristics and legal underpinnings will be discussed in detail below – does not establish effective control over the Gaza Strip. In this context, it should be stressed that there are no international precedents or examples of situations where military control over the airspace or maritime space were considered to constitute a belligerent occupation of an area without any presence of forces on the ground; this is because, as we have seen, the creation of a belligerent occupation requires the replacement of the sovereign government by the effective control of a foreign military. Operations in the air and in the sea, effective as it may be in those theaters, does not deny the existing government its ability to exercise its sovereignty vis-à-vis its population.[56]

That said, despite the conclusion that the Gaza Strip is no longer occupied territory and that Israel no longer bears duties or responsibilities toward the Gaza population under the Law of Belligerent Occupation, one should not understand Israel's position on this matter to be that there are no obligations applicable to the current situation. Such obligations can stem from alternative normative sources, as was noted by the Supreme Court:

> "In the circumstances created, the principle obligations placed on the State of Israel vis-à-vis the residents of the Gaza strip **stem from the state of conflict prevailing between it and the Hamas organization that controls the Gaza Strip**; these obligations **also stem from the degree of control by the State of Israel over the border crossings between it and the Gaza Strip**; as well as **from the situation that has been created between Israel and the Gaza Strip during the period of the Israeli military government in the area**, following which, to date, Gaza has become almost completely dependent on electricity supply from Israel". [57]

It should be noted that this decision of the Supreme Court was handed down after the Hamas takeover of the Gaza Strip. In this context, and for the avoidance of doubt, it should be noted that as far as the legal status of the Gaza Strip is concerned, the "regime change" from the PA to Hamas

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[54] *See* Michael N. Schmitt, *Clipped Wings: Effective and Legal No-fly Zone Rules of Engagement*, 20 LOY. L.A. INT'L & COMP. L.J. 727, (1998) at footnote 6.
[55] *See* Shany, *supra* note 52, 380.
[56] *See* Bell and Shefi, *supra* note 53, 282-83.
[57] The *Al-Bassiouni Case*, *supra* note 40.

does not detract from the conclusion stated above. In fact, just the opposite is true. In the aftermath of the Disengagement Plan, Israel's control over the Gaza Strip was negated, to such an extent , that the terrorist group, Hamas, whose stated objective is the annihilation of Israel – was able to take over the Gaza Strip. No one would dispute that this reality runs overwhelmingly counter to Israeli interests , as would later become evident when Hamas converted the entire Gaza Strip into a platform for launching terrorist attacks against Israel.

b. The status of the diplomatic agreements

Questions regarding the force of the Interim Agreement first arose shortly after the outbreak of the armed conflict in Judea and Samaria and the Gaza Strip, for a number of reasons: first, the deadline (extended by several subsequent agreements) set out in the Interim Agreement for completion of the negotiations on the final status had elapsed; second, the numerous violations that Israel ascribed to the PA, particularly due to its direct and indirect responsibility for the terrorist campaign that was being waged at the time, in which PA security forces also took part; and third, IDF activity in the areas under PA security control in Judea and Samaria and the Gaza Strip, in response to this terror campaign.

However, despite the uncertainty surrounding this issue since that period, so far neither side has officially declared that it considers the Interim Agreement, or parts thereof, to be null and void. In fact, both sides have continued to a large extent to adhere to provisions of the Interim Agreement and to implement them in practice.

As for the Interim Agreement's provisions relating to the Gaza Strip in particular, the implementation of the Disengagement Plan in 2005 has rendered many of these irrelevant – such as the arrangements for the division of security and civilian control between the military government and the PA in the various areas of the Gaza Strip, and those regarding security coordination and Israeli settlements. The substantive changes on the ground (namely, the withdrawal of IDF forces, dismantling of Israeli settlements and the termination of the military government) and the change in the legal landscape of the Gaza Strip (the end of the belligerent occupation), lend their weight to the notion that these provisions are no longer in force.

On the other hand, as noted, the Israeli government resolution approving the Disengagement Plan states, *inter alia*, that its implementation shall not invalidate the existing relevant agreements, which are to remain in force. As noted, this understanding has even served as the foundation for the Agreement on Movement and Access.

A third aspect is that the Interim Agreement was signed between Israel and the PLO. The PA, which was established through the Cairo Agreement, is the counterpart with which Israel is supposed to implement the various arrangements provided for in the agreement, through the relevant elements in the IDF and the security establishment. However, as noted previously, the PA no longer controls events in the Gaza Strip – and this also applies to the PLO, as Hamas is not included in any of its member organizations. *Prima facie*, this means that since the Hamas takeover of the Gaza Strip, the agreement framework has no bearing on the situation there.

Nevertheless, Israel has continued to adhere to the Interim Agreement in relation to the Gaza Strip, insofar as this is relevant and possible. Likewise, the international community continues to view the agreements between Israel and the Palestinians as binding, and has stated – for example – that their acceptance by the Hamas government would be a precondition for recognition of the latter.[58]

Thus, generally speaking, apart from those arrangements that have become irrelevant or impossible to implement due to changes on the ground and in the legal domain, the Interim Agreement should continue to be regarded as a legal source in the relations between the parties. In light of what has been stated above, the second part of this document relates to the status of the Interim Agreement's provisions pertaining to the maritime space of the Gaza Strip.

c. The Law of Armed Conflict: applicability and application

As noted earlier, since the end of 2000, the *modus operandi* of Palestinian terrorist organizations in Judea and Samaria and the Gaza Strip has undergone a substantial change, manifested in the frequency of their attacks against IDF forces and Israeli civilians (both within the territories and within Israel proper), as well as by their scope and intensity. The IDF responded to these attacks with methods that it had not previously employed in the Palestinian theater – including large-scale operations involving infantry, armored, artillery, engineering, naval and aerial forces. In response to petitions filed to the Supreme Court at the time, the State argued that the situation is one of armed conflict between it and the Palestinian terrorist organizations, implying that alongside the Law of Belligerent Occupation (which applied due to the legal status of Judea and Samaria and the Gaza

[58] *See, e.g.*, the statement which sets out the conditions for support of the Palestinian National Unity Government, composed of Fatah and Hamas members: commitment to non-violence; recognition of Israel; accepting previous agreements (Middle East Quartet Statement on Agreement to Form Palestinian National Unity Government, 9 February 2007, *available at*: http://www.unsco.org/Documents/Statements/Quartet/2008/09.02.07.pdf). It should be noted that the Interim Agreement, as well as the other political agreements between Israel and the Palestinians, form part of the Road Map. The UN Security Council has adopted the Road Map in Resolution 1515 (19 November 2003), and has reiterated its endorsement in Resolution 1850 (16 December 2008).

Strip at the time), IDF activity was governed by the Law of Armed Conflict. The Supreme Court accepted this view in various rulings issued subsequently, stating:

> "September 2000 saw the outbreak of the Second Intifada. A ferocious campaign of terror has been directed against the State of Israel and against Israelis arbitrarily. The campaign does not differentiate between combatants and civilians, or between women, men and children. The attacks have been taking place in the West Bank and Gaza Strip as well as in Israel itself. They are directed against civilian population centers, shopping malls, coffee shops and restaurants. Over the past five years thousands of terrorist attacks have been launched against Israel, as a result of which over a thousand Israeli citizens have been killed. Thousands of Israeli citizens have been injured. During this period, thousands of Palestinians have also been killed and injured…
>
> The general premise is that, since the First Intifada Israel and various terrorist organizations acting out of the West Bank and the Gaza Strip (the "Area") have been engaged in a continual state of armed confrontation or armed conflict…this premise is consistent with the definition of an armed conflict in international legal scholarship…and reflects accurately what is happening in the "area" to this day"[59].

Parenthetically, it should be noted that when this position was first formulated by the State, it was still insufficiently clear whether confronting a terrorist campaign amounting, in scope and nature, to an actual armed conflict, is conducted within the framework of the Law of Armed Conflict – since the campaign was being waged by a non-State actor.[60] Today, there is no longer any real legal disagreement on this issue, due to the fact that shortly after the change in the *modus operandi* of Palestinian terrorism took place, a similar trend appeared in international terrorism: the 9/11 attacks in New York City and Washington DC, the attacks on the London underground and on the railway station in Madrid, as well as the attacks which took place in Moscow and Mumbai – all attest to the improved capabilities and sophistication of modern terrorism. Consequently, the nature of dealing with terrorism around the world has undergone change similar to that which was described above – namely, it shifted from the paradigm of "law enforcement" to the paradigm of "armed conflict".

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[59] The *Public Committee against Torture Case*, *supra* note 21, 3965.

[60] Public International Law traditionally distinguishes between two states: "peace" and "war". The international laws of war, which are also called the Law of Armed Conflict, differentiate between *jus ad bellum*, the law of the use of force; and *jus in bello*, the law of conduct of hostilites. While the set of laws deals with the legality of launching a war and its conclusion, and by extension all issues relating to the existence of war, the second set of laws consolidates all the issues that might arise during its course, and among them the way to wage it, the legality of the weapons employed, treatment of POWs and so forth. The Law of Belligerent Occupation, which as mentioned in the previous section, is also included in this set of laws, and the same goes for the rules governing armed conflict at sea, which will be discussed in the next part. It should be noted that in the terminological sense, the shift to the Law of Armed Conflict was meant to represent the concept – that was already taking shape in the Four Geneva Conventions of 1949 – that the test for the application of these laws is substantive rather than formal, namely, the existence of armed hostilities between armed forces and not a "declaration of war". Another development is the shift towards the term "International Humanitarian Law", which was supposed to put an emphasis on the humanitarian considerations in the Law of Armed Conflict, at the expense of the weight given to considerations of military necessity. Many nations, among them the US and Israel, which do not accept the attempt to devalue the weight of the military considerations, continue to adhere to the term Law of Armed Conflict.

This is clearly exemplified by the intensive campaign being prosecuted by the US and its allies in Afghanistan against al-Qaeda.

The Law of Armed Conflict sets out the duties and rights of parties to an armed conflict. It applies both to State and non-State actors who are party to the conflict, as well as to neutral parties, in all areas concerning the armed conflict. Most of the rules comprising the Law of Armed Conflict are derived from the practice of States and have become customary international law, thereby binding on all states. Over the past 150 years, many of these rules have been consolidated under international conventions, some of which were written as codifications of preexisting customary law (and are thus called "declarative conventions"). As such, these conventions apply also to non-signatories. The Fourth Hague Convention of 1907 is a particularly good example of this. Conversely, "constitutive conventions" of the Law of Armed Conflict have created "new" law, the rules of which bind only their signatories. In practice, some of these rules have in turn become customary international law, having being adhered to by many nations and regarded as legally binding, as indicated, *inter alia*, by their incorporation into the military field manuals and by the practice of states. However, certain customary norms of the Law of Armed Conflict have not been adopted within the framework of any convention. Many of the rules applying to armed conflict at sea, to be discussed below, belong to this group.

As will be explained below, even in the absence of disagreement regarding the applicability of the Law of Armed Conflict to IDF counter-terrorism efforts, there remains the question of how to apply it in the case under discussion. This question stems from the existing distinction between two kinds of armed conflict: International Armed Conflict (IAC) and Non-International Armed Conflict (NIAC).[61] We will see below that although many rules of the Law of Armed Conflict apply equally to both kinds of conflict, some of the rules are category-specific while others are applied differently to each category.

International Armed Conflict is the “classic” type of conflic. The rules applying to it are anchored in a series of international conventions (among them the Fourth Hague Convention of 1907, the Four Geneva Conventions of 1949 and the First Additional Protocol to the Four Geneva Conventions of 1977 **(**hereinafter: *the First Protocol*),[62] as well as in customary international law. It should be noted that in comparison with non-international armed conflicts, the legal framework for

[61] For a legal analysis of this issue, see: *the Public Committee against Torture Case*, *supra* note 21, supplementary brief by the State Attorney's Office, dated 21 January 2004, pp. 30-50 (available at:…). See also, Cr.A. 6659/06 Anonymous v. The State of Israel, response to appeals by the State Attorney's Office, dated 1 March 2007, paragraph 282-294 (available at…).

[62] It should be noted that Israel is not a party to the First Additional Protocol. However, Israel is bound by some of its provisions that have become customary law over the years.

international armed conflicts is more extensive and elaborate: just as public international law is designed first and foremost to govern relations between states, the Law of Armed Conflict was created and developed in order to govern conflicts between them.

By contrast, a relatively recent development in the Law of Armed Conflict is the recognition of the need to regulate **Non-International** Armed Conflicts – namely, those that do not take place between States – and the conduct of the parties to such conflicts. Accordingly, the relevant rules for such situations are to be found in only a handful of legal sources, whose crux is Article 3 common to all Four Geneva Conventions of 1949 (hereinafter: *Common Article 3*), the Second Additional Protocol to the Four Geneva Conventions of 1977 (hereinafter: *the Second Protocol*) and customary international law. It should be clarified that both Common Article 3 and the Second Protocol are designed – according to their language – to apply to armed conflicts that are not between states, and that take place within the boundaries of a particular state.[63] Since at the time these sources were consolidated, an intervention by international law in matters internal to a sovereign state (at least those which other states were not involved in) was considered exceptional, the framework created by Common Article 3 and the Second Protocol is, relatively speaking, general, basic and undeveloped – and as stated, less detailed and less clear than that which applies to IACs. However, in recent years, there has been a noticeable trend of "importing" rules from the latter legal framework and applying them to NIACs. This trend, which began with rulings of the International Criminal Tribunal for Yugoslavia (ICTY) has won significant backing from the International Committee of the Red Cross, as part of a study it conducted on the customary rules of the Law of Armed Conflict.[64]

Against this backdrop, the question arises of how to classify an armed conflict between a State and a Non-State Actor (NSA), such as a terrorist organization – and particularly one that takes place outside the territory of the State. On the one hand there are those who would view this as an IAC, since it has features similar to that of an inter-state conflict, in that it transcends state boundaries and territory and since the terrorist organizations – in many cases – act under the direction or sponsorship of states and even take part in their political life. As such, according to this approach,

[63] The Second Protocol is designed to apply only to a very limited number of cases compared with Common Article 3 – namely, only to armed conflicts taking place within the boundaries of a State, between its armed forces and armed militias that control part of its territories. The State of Israel is not a party to the Second Protocol.

[64] See JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005). It should be noted that this study, conducted under the auspices of the International Committee of the Red Cross, was heavily criticized, both by nations and by academics. The brunt of the criticism focused on the way the study purported to identify customary rules, based on a limited number of sources and without any reference to state practice (*see, e.g.*: David Turns, *Weapons in the ICRC Study on Customary International Humanitarian Law*, 11 JOURNAL OF CONFLICT AND SECURITY LAW 201 (2006); John B. Bellinger III and William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study on Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443 (2007).

the current legal framework regarding international armed conflicts should be applied to an armed conflict between a state and a terrorist organization that operates outside its borders, *mutatis mutandis*. However, the main difficulty in this approach lies in the language of Article 2 common to all Four Geneva Conventions (hereinafter: *Common Article 2*), which stipulates that an IAC only exists when the parties involved are two or more states.[65]

On the other hand, there are those who call for expanding the category of NIACs, so as to encompass all armed conflicts between a State and a NSA, even if these do not formally fulfill the conditions of Common Article 3. Thus, even armed conflicts between a State and a terrorist organization operating outside its borders will be subject to the customary rules that apply to NIACs, *mutatis mutandis*.[66] Proponents of this approach claim that while one cannot categorize these conflicts as IACs (due to the clear language of Common Article 2), these conflicts must not take place within a legal vacuum; and thus, at the very least, the rules contained in Common Article 3 should be applied to them. These rules lay down fundamental guarantees, which are supposed to be upheld in all types of armed conflict, however classified.

To complete the picture it should be noted that in addition to both these approaches, in recent years a third trend has been emerging, according to which an armed conflict between a State and a NSA, and in particular terrorist organizations operating across State borders, should be viewed as a "new kind" of conflict. The subscribers to such an approach believe that the existing legal frameworks should not be applied to the fight against terrorism (whether directly or by analogy) – neither those which apply to inter-state conflicts nor those which apply to internal conflicts – since both legal frameworks, in their view, are both formally and substantively inappropriate. Instead, due to the fact that an armed conflict between a State and a terroris organization shares several features with both types of conflicts, a different legal framework should be applied to it – which will be identified in part by making analogies to the existing frameworks and in part by the practice of states fighting terrorism. [67]

Specifically, the armed conflict between Israel and the Palestinian terrorist organizations operating in the Gaza Strip clearly illustrates the difficulty in classifying armed conflicts waged between States and terrorist organizations that operate outside their borders. On the one hand, this is not an

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[65] Common Article 2 reads as follows: "In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." According to the normal interpretation, the term High Contracting Parties refers to states, since only a state can be party to an international convention.

[66] *See, e.g.*: *Hamdan v. Rumsfeld*, 126 S. Ct. 2749-96 (2006)

[67] *See, e.g.*: Roy S. Schondorf, *Extra-State Armed Conflict: Is There a Need for a New Legal Regime?* 37 N.Y.U. J. INT'L L. & POL'Y 1 (2004).

IAC in the classic sense, since it is not being waged between two States. On the other hand, neither is this a "classic" NIAC since it is not being waged (for the most part) within Israel's borders.

Despite the complexity described above, for such time as the territories in which the conflict with the terrorist organizations was being waged were under belligerent occupation (whether in whole or in part), the classification of the conflict did not become an issue from a practical standpoint. As such, in those years Israel refrained from adopting an official stance on this question – and when the issue arose, such as in the context of petitions to the Supreme Court, the State would argue that there was no need to decide on the matter.[68] In practice, since during those years the IDF subjected its activity against the terrorist organizations to the Law of Belligerent Occupation[69] – which belongs to the normative framework that applies to IACs only – Israel has applied the latter framework (which is, of course, the clearest and most stringent of the possible normative frameworks). It is suggested that the ruling by the Supreme Court, which did not shy away from deciding the matter, should be understood in this light:

> "The normative framework applying to the armed conflict between Israel and the terrorist organizations in the area is complex. At its center lies the international law dealing with international armed confrontations (or conflicts)… these laws apply in all cases of armed conflict of an international nature – namely, one that transcends borders – whether or not the site of the conflict is considered to be under belligerent occupation."[70]

Note: This statement was included in the Targeted Killings judgement – which were carried out in both Judea and Samaria and the Gaza Strip – and therefore, applies to the armed conflict with the Palestinian terrorist organizations in both these areas. When this ruling was handed down – after the implementation of the Disengagement Plan and the termination of the military government – the

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[68] See, e.g., the Public Committee against Torture Case, supra note 21, supplementary brief by the State Attorney's Office, dated 21 January 2004, pp. 51-70.

[69] It should be noted that one issue that has not been discussed in this document - because it has no practical relevance - is the issue of the relationship between the general framework of the Law of Armed Conflict and the specific framework of the Law of Belligerent Occupation with respect to certain actions regulated under both frameworks (sometimes in diverging ways). This question has arisen, for example, in the matter of land requisition for the purpose of building the security barrier in Judea and Samaria; in addressing this issue, the Supreme Court stated (in the majority opinion written by Chief Justice Barak) that: "In the case of Beit Surik and the ruling preceding it the Supreme Court has ruled that the right to expropriate land for military use is anchored not only in articles 43 and 52 of the Hague Convention and Article 53 of the Fourth Geneva Convention, but also in Article 23 (g) of the Hague Convention. In the advisory opinion of the International Court of Justice it has been stated that the second part of the Hague Convention, of which Article 23(g) forms part, applies only when there are hostilities, and thus does not apply to the issue of erecting a fence (paragraph 124). The court also added that the third part of the Hague Convention – containing Articles 43 and 52 – is applicable, since it talks about military rule (paragraph 125). This approach by the court does not change the approach of this court on the matter of the right of the military commander to seize land for the sake of erecting a fence…the situation on the ground is often fluid. Lulls are followed by periods of combat. When combat takes place it is conducted according to international law…in this situation, where the area subjected to belligerent occupation sees combat, the laws that apply to belligerent occupation will apply to these activities, as well as the laws of combat…Article 23(g) of the Hague Convention will apply in these cases in the area subjected to belligerent occupation, due to the combat activities taking place there." (HCJ 7957/04 *Mar'aba vs. Prime Minister of Israel*, *Takdin Elyon* 2005(3) 3333, 3342)

[70] See the case of The Public Committee against Torture, Comment 21 above, page 3966.

Gaza Strip was no longer under belligerent occupation (as far as Israel was concerned). Thus, this ruling seemingly applies to the current incarnation of the armed conflict between Israel and the Hamas regime in Gaza.

However, it appears that the above ruling of the Supreme Court was heavily influenced by the fact that Judea and Samaria and the Gaza Strip were, for many years, territories under belligerent occupation. This is apparent from the legal sources on which the Supreme Court based its ruling,[71] and from the fact that the Disengagement Plan's implementation and the termination of the military government in the Gaza Strip are nowhere mentioned in the factual part of the ruling. In this regard it should be recalled that, at the time, the issue of the legal status of the Gaza Strip had yet to be decided by the Supreme Court itself.[72] It should also be noted that the Supreme Court's position on the classification of the conflict has been widely criticized in academic writing.[73]

In light of the above, it seems that, at the very least, there is uncertainty as to the applicability of this determination with regard to the armed conflict currently being waged in the Gaza Strip, particularly in light of the various changes that have taken place there since the termination of the military government. Although the armed conflict between Israel and the Hamas regime in the Gaza Strip constitutes a direct continuation of the armed conflict between Israel and the Palestinian terrorist organizations being waged since September 2000, it nevertheless has unique characteristics (described at length in the factual background chapter): firstly, as stated, it is being waged in a territory that is not subject to IDF effective control; secondly, since June 2007, Israel's adversary – Hamas – has evolved from an "extra-governmental" organization into an "establishment" organization that has effective control over the Gaza Strip;[74] thirdly, the fighting on behalf of the

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[71] The only legal source on which the Supreme Court has mentioned in connection to its classification of the conflict is a book by Antonio Cassese, which deals with a conflict between an Occupying Power and insurgents and rebels in occupied territory.

[72] This issue has been resolved, as stated, in the *Al-Bassiouni Case*, for which the ruling was issued on 30 January 2008; the ruling in the *Public Committee against Torture Case* had been issued a year earlier, on 16 December 2006.

[73] *See*, Roy S. Schondorf, *The Targeted Killings Judgement: A preliminary Assessment*, 5 J. OF INT'L CRIM. JUS. 301, 303-305 (2007); Marko Milanovic, *Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case*, 89 INT'L REV. RED CROSS 373, 383-386 (2007).

[74] In this matter one should note that, on a fundamental level, Hamas is an organization (or rather a "movement"). Over the years of the armed conflict in the Gaza Strip and Judea and Samaria, Hamas has been operating according to a "movement" *Modus Operandi*. In each one of the areas there were local headquarters, which operated a "military wing" (Iz Ad-Din al-Qassam Brigades) alongside a Civilian Wing (the Da'wa disposition). In addition, over the last several years, Hamas representatives have been participating in various levels of the Palestinian governmental system operated by the PA in the territories – as members of parliament, mayors and even as cabinet members. All the while, Hamas has continued to serve as a "non-governmental" organization which has occasionally undermined the PA and even clashed with its security apparatuses (as has been shown during the violent takeover over of the Gaza Strip in June 2007). On the other hand, currently in the Gaza Strip, Hamas is no longer a non-governmental organization, but rather an integral part of the regime with effective control. Although there is no doubt that the Hamas rule in the Gaza Strip lacks any legal basis and is in violation of the diplomatic agreements signed between Israel and the Palestinians since the early 1990s, no one can deny that it has effective control that extends throughout the Strip and that it exercises all of the authority granted by its rule. As such, Hamas has been employing various apparatuses that deal both with imposing its

Hamas regime in the Gaza Strip within the framework of the conflict has become organized and institutionalized, and is conducted by armed forces, operating under a unified command, using military-grade weapons and following an orderly combat doctrine.

It should be clarified that these developments in the characteristics of the armed conflict being waged in the Gaza Strip have not resolved the existing difficulty in classifying it, since it still does not qualify as either one of the "classic" situations of IAC (in which the parties involved are States) or NIACs (taking place within the borders of the State). Accordingly, even today, Israel refrains from taking a clear stand on this issue, and in an official document released following Operation Cast Lead, it was stated that in the framework of the armed conflict being waged with Hamas in the Gaza Strip, Israel considers itself bound to the basic rules of the Law of Armed Conflict that apply to both IACs and NIACs:

> "In this case, the Gaza Strip is neither a State nor a territory occupied or controlled by Israel. In these *sui generis* circumstances, Israel as a matter of policy applies to its military operations in Gaza the rules of armed conflict governing both international and non-international armed conflicts. At the end of the day, classification of the armed conflict between Hamas and Israel as international or non-international in the current context is largely of theoretical concern, as many similar norms and principles govern both types of conflict."[75]

It should be stressed that the lack of a clear resolution of this issue is not a consequence of "tactical" considerations. The issue of counter-terrorism operations that become full-fledged armed conflicts governed by the Law of Armed Conflict is a dynamic and fledgling legal domain, and in relation to many of its aspects, a clear and unequivocal position is yet to be taken by the international legal community. The Supreme Court, when addressing this issue in a case brought before it during Operation Cast Lead concerning the humanitarian situation in the Gaza Strip as a result of the fighting, while reiterating the above statement from the *Targeted Killings Case*, also noted that "the classification of the armed conflict between the State of Israel and Hamas as an international armed conflict raises several difficulties".[76]

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rule domestically and in the fight against Israel. As a consequence, from a legal standpoint, since June 2007 the Hamas regime and all of its elements constitute the adverse party to the conflict with Israel. In this regard, the fact that its leadership is part of a wider framework that has "affiliates" in the West Bank does not contradict regarding it as a party to an armed conflict vis-à-vis Israel. The legal ramifications stemming from the fact that the Hamas regime in the Gaza Strip is a party to an armed conflict with Israel will be discussed below. However, it is important to clarify that this fact does not imply that all Hamas elements are legitimate targets in the context of the armed conflict, just as the fact that Israel is a party to the conflict does not imply as such with regard to Israeli targets. An attack, as stated, is legal, only if carried out in accordance with the Law of Armed Conflict.

[75] THE STATE OF ISRAEL, THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS (July 2009), 30.

[76] *The Physicians for Human Rights Case*, *supra* note 48, page 570.

d. Interim Summary

Thus far, the three principle layers of the normative framework applying to IDF activity in the Gaza Strip have been discussed. Initially, it was shown that due to the change in legal status of the Gaza Strip following the implementation of the Disengagement Plan and the termination of the military government, the Law of Belligerent Occupation no longer applies to IDF activity in the Gaza Strip (as long as the IDF does not reinstate effective control over the territory in the course of ongoing hostilities). Therefore, the IDF's responsibilities within the framework of combating Palestinian terror, do not resemble the responsibilities of an Occupying Power, but are limited to the responsibilities resting with a party to an armed conflict.[77] This is true since since as of September 2000, the IDF activities in the Gaza Strip have been governed by the Law of Armed Conflict.

In this context, we have clarified the difficulty inherent in classifying the armed conflict between Israel and the Palestinian terrorist organizations – an armed conflict between a State and a Non-State Actor, outside the territory of the former. As long as this conflict took place in a territory under belligerent occupation, Israel considered it an International Armed Conflict (and the Supreme Court also determined it to be such). However, this issue became more complicated following the change in the Strip's legal status. Although, despite the above-mentioned changes in the characteristics of the conflict between Israel and the Hamas regime, no formal changes were made to its classification, Israel's current position is that the IDF activity in the Gaza Strip is governed by the basic rules of the Law of Armed Conflict, which apply to both international and non-international armed conflicts.

In addition, it has been shown that despite existing doubts regarding the status of the Interim Agreement, especially in relation to the Gaza Strip, this agreement cannot be considered null and void – and its provisions must be taken into consideration, insofar as they are relevant and possible to implement.

3. Restrictions on the movement of goods to and from the Gaza Strip

Having clarified the normative framework currently governing Israel's conduct towards the Gaza Strip and its residents, some attention will be devoted to a concrete issue which arose following the

[77] On the concurrent implementation of the Law of Armed Conflict and the Law of Belligerent Occupation regarding IDF activity in the Gaza Strip prior to the implementation of the Disengagement Plan, see HCJ 4764/04, above-mentioned footnote 21, paragraphs 10-12.

changes in policy on movement of goods to and from the Gaza Strip via Israeli territory, since September 2007. In the public debate, this issue has, unjustifiably, become intertwined with the issue of the blockade on the maritime zone off the coast of the Gaza Strip, which will be discussed in the next part of this document. The factual background to this policy change, and a brief analysis thereof in light of the existing normative framework, will be presented below as well as an explanation as to why the connection drawn between this issue and that of the blockade is erroneous.

a. Factual Background

During the years of military government, the flow of goods between the Gaza Strip and Israel was, generally speaking, unrestricted. Security legislation regulated various aspects of this issue, from standardization, through implementation of economic policies, to taxation. In addition, specific restrictions were imposed relating to certain goods – first and foremost military or combat equipment – as well as goods which could be utilized for such purposes (dual-purpose materials). Similarly, limitations on the entry of money into the Gaza Strip were imposed, aimed at thwarting the funding of Palestinian terror organizations. This reality was later adopted by the diplomatic agreements between Israel and the PLO,[78] and it was maintained, even after the eruption of the armed conflict with Palestinian terrorist organizations. As stated above, Israel had intended to continue in this manner, even after the implementation of the Disengagement Plan, as expressed in the government resolution on this matter[79] as well as in the "Agreement on Movement and Access".[80]

However, intensified steep-trajectory weapons fire at the crossing points between Israel and the Gaza Strip since the implementation of the Disengagement Plan, and attacks perpetrated by terrorist organizations, endangered, to an unreasonable extent, the lives of the soldiers and civilians responsible for operating the crossing points. In this light, it became necessary to reduce the scope of their operations, resulting in a significant decrease in the volume of movement of goods to and from the Gaza Strip. In the same period, concerns mounted that the entry of goods would be exploited by the terrorist organizations (especially Hamas, which, following its joining the coalition government, gained a foothold on the Palestinian side of the crossing points) for smuggling armaments into the Strip. Thus, more rigorous and time-consuming inspections of goods entering

[78] Article IX(1)(d) to annex I to the Interim Agreement (redeployment and security arrangements protocol).
[79] Supra note 24, and adjacent text.
[80] Supra note 28, and adjacent text.

the Gaza Strip were required,[81] which also contributed to reducing the volume of movement at the crossing points. Finally, the movement of goods between Israel and the Gaza Strip was also adversely affected by fighting taking place in the area at the time, during the months following the abduction of CPL Gilad Shalit.

Given the narrowed scope of activity at the crossing points (including, at times, total closure for specific periods), the security establishment was required to prioritize the goods entering and exiting the Strip. Generally speaking, during that period, this prioritization was done in consultation with the relevant authorities in the PA. In this setting, exports from the Strip were greatly reduced; and among the imports, the emphasis was placed on staples and other essential goods (including the regular supply of fuels), although building, industrial and agricultural raw materials were also permitted. When this policy was challenged in the Supreme Court, the Court confirmed its legality and rejected the petition before it.[82]

Hamas' takeover of Gaza presented new hurdles to the flow of goods in and out of the Strip. Firstly, the PA representatives at the various crossing points were replaced by Hamas personnel, with whom Israel was not willing – both security-wise and politically – to perform the necessary coordination for the movement of goods. Secondly, concerns arose that basic raw materials for building and industry, which up to that point had not been considered "dual purpose" materials – such as concrete, iron, wood and glass – would be seized by Hamas and used for military purposes, such as the manufacture of rockets and the construction of fortifications. Thirdly, the fact that the Gaza Strip had fallen under the direct, independent and full control of a terrorist organization engaged in armed conflict with Israel, brought into sharp relief the paradox of continued orderly commercial and economic ties with the Strip. At the same time, Israel, its communities, citizens and soldiers in its sovereign territory were being subjected to daily attacks by rockets, mortars and other means, all under the direction of the terrorist organization controlling the Strip.

Against this background, the Ministerial Committee on National Security, as mentioned above, declared the Gaza Strip a "hostile entity" and directed the security establishment to impose, at its discretion, "severe limitations" in civil matters, including in relation to the transfer of goods and fuel supply.[83] The resolution noted that the said directive would be implemented only after legal scrutiny and with the aim of avoiding the creation of a humanitarian crisis in the Strip. Following

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[81] This decision was anchored in government resolution no. 4705, which was approved after the Hamas victory in the elections for the Palestinian Legislative Council (*supra* note 29): "In light of the heightened security risk, the security checks at the crossing, especially at Karni and Erez, will be intensified, with respect to individuals, workers and goods. In addition, renovation of the Gaza Strip crossings will continue, in order to allow more efficient security inspection".

[82] HCJ 5841/06 The Association for Civil Rights in Israel et al v. the Minister of Defense et al, *Takdin Elyon* 2007(1), 3077.

[83] Supra note 37.

this resolution, the policy regarding movement of goods between Israel and Gaza changed dramatically: from a state of affairs in which "all is permitted, unless specifically forbidden" – to one in which "all is forbidden, unless specifically permitted". The supply of various fuels to the Gaza Strip was also restricted – and the possibility of cut-backs in the electricity supply to the Strip was also considered (but ultimately, due to various reasons, was decided against).

As required by the Ministerial Committee on National Security resolution, this policy was formulated and implemented while taking into account the humanitarian aspects of the existing reality in the Gaza Strip. Accordingly, for as long as the policy was in force, it allowed for the transfer of goods essential to the survival of the civilian population, with emphasis on staples, medicines and medical equipment. In this framework, the security establishment, with the assistance of various sources, constantly monitored the existing stocks of 'essential goods' in the Strip, and allowed the replenishment of any lacking goods. It should be noted that transferring these goods required opening and operating the crossing points, at times taking substantial risks, in light of severe warnings of impending terrorist attacks. In addition, the restrictions on fuel supply were imposed on the basis of detailed estimates on the minimal amount of fuel required for maintaining essential services in the Gaza Strip, from hospitals and ambulances to water pumping facilities.

This general policy regarding transfer of goods continued until after Operation Cast Lead,[84] and remained in force until recently, when the Ministerial Committee on National Security decided to substantially ease the restrictions on the movement of goods.[85]

It should finally be noted that in the framework of a petition heard by the Supreme Court objecting to the restriction of fuel and electricity supplies to the Strip, the Court accepted the legal basis for the State's policy in its entirety, (to be presented below), and in so doing made a ruling on the legal status of the Gaza Strip, stating that it no longer constitutes a territory under belligerent occupation, as detailed above[86].

b. Legal analysis

The Ministerial Committee on National Security resolution of September 2007 reflected a material change in the State of Israel's attitude regarding the movement of goods in and out of the Gaza

[84] According to the Ministerial Committee on National Security resolution, dated February 18, 2009: "Israel will continue the broad humanitarian effort, in coordination with the Palestinian Authority and the relevant international entities, in order to meet the immediate and basic requirements of the Palestinian population. To this end, Israel will allow partial crossing activity from its territory to the Gaza Strip".

[85] Ministerial Committee on National Security resolution, dated June 20, 2010.

[86] The Al-Bassiouni, matter, above-mentioned footnote 40.

Strip, via Israeli territory: from a state of affairs in which specific restrictions were enforced, based on concrete security considerations, to a general ban on commerce with the Gaza Strip, subject to exceptions necessary to avoid a humanitarian crisis - based on broad security considerations (incorporating also political considerations).

In this respect, it should be noted that when an armed conflict erupts between states, pre-existing commercial and economic ties are severed (or at least suspended), including with regard to the movement of various categories of goods and persons between them - directly (when they share a common border) or indirectly (via third states)[87]. This severance of ties takes place, first and foremost, on the political - public level - i.e. in relation to commercial ties the state itself conducted with the now rival state; and usually, it extends to the personal level - i.e. the commercial ties between civilians of both nations[88].

From a legal standpoint, the right of a state to halt the movement of goods and persons between itself and another state (or other entity) with which it is engaged in armed conflict, is directly derived from the sovereignty principle - the cornerstone of public international law for hundreds of years. The sovereignty principle holds that each state has total control over its sovereign territory, including the entry thereto and exit therefrom[89], whether or not they share a common border and whether or not the said goods or individuals are from said state or from a third state. In this respect, it should be noted that according to the accepted approach in public international law, in a situation of armed conflict, certain contractual obligations undertaken by the conflicting states towards each other, are suspended.[90] Therefore, even if the free movement of goods and individuals is founded on a binding international agreement, this does not undermine the suspension's legitimacy, as long as the armed conflict continues.

It follows, that the partial severence of commercial ties between Israel and the Gaza Strip in September 2007 – and the resulting decline in the passage of goods and individuals – could be

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87 See, for example, Stone on the status of treaties governing trade relations while the parties were engaged in an armed conflict between them: "Second, and conversely, there are certain treaties which in their very nature cannot subsist between belligerents at war with each other. One group of these consist of what may be termed "political treaties"...another consists of treaties of friendship and commerce or arbitration and conciliation, and of friendly intercourse generally. It is almost unnecessary to observe that such treaties are abrogated as between the belligerents from the outbreak of war" (Julius Stone, Legal Controls of International Conflict 448 (1959)

88 This concept is expressed in Israeli Law, in the Trading with the Enemy Ordinance, 1939.

89 See, for example, Ian Brownlie, Principles of International Law 105-106 (2003). HCJ 482/71 Clark v Minister of Interior, *p.d.* 27(1) 113 "As far as matters of entry and residence of foreigners in the country are concerned, Israel is neither unique nor exceptional. Generally, every country reserves to itself the right to prevent foreigners from entering its territory or to deport them from its territory when their presence is no longer desired, for whatever reason or even for no reason."

90 In recent years, this issue has been on the agenda of the U.N. International Law Commission., and in the framework of its discussion, a draft of rules by which to regulate the issue was prepared (for a description of the actions taken on this subject and the documents prepared on the subject, see : http://untreaty.un.org/ilc/guide/1-10.htm).

presented as Israel's assertion of the sovereignty principle. Nonetheless, when the State of Israel was required to present the legal basis for this policy to the Supreme Court, the State argued that this was a case of "economic warfare". In fact, there is no binding definition of this term in the Law of Armed Conflict, which do not expressly cover this phenomenon. For present purposes, it could be said that this refers to the entire gamut of measures, which do not fall under the definition of an "attack"[91], employed by a party to an armed conflict in order to damage the economy of a rival. The goals is to cause the latter to cease hostilities, - by reducing the rival's manufacturing capabilities, depleting the resources at its disposal for its war effort and exerting direct pressure on its leadership, thus prevailing in the conflict.

"Economic warfare" is a well known tactic in the annals of armed conflict, well rooted in State practice. The two primary means utilized in "economic warfare" are a siege on land and a blockade at sea. In this framework, various rules regulating the means by which parties to a conflict are allowed to wage "economic warfare" have developed in the Law of Armed Conflict: from absolute prohibitions, such as the prohibition on starving a population[92], through to the provisions requiring parties to allow the passage of goods vital to the survival of the civilian population[93]. During the relevant period, the security establishment formulated the policy on the passage of goods into the Gaza Strip, while paying heed to these provisions and applying them in accordance with the resolution of the Ministerial Committee on National Security.

Indeed it could be questioned whether Israel's policy on the movement of goods and persons to and from the Gaza Strip constitutes "economic warfare" at all, as opposed to the realization of the sovereignty principle by the State of Israel, as described above. This is because the legal analysis of "economic warfare" assumes "active" prevention of the flow of goods to the other side as opposed to "passive" avoidance of mutual commerce. In other words, the question is whether and under what conditions is it legal to the impose restrictions on the movement of goods and persons originating in third countries (i.e. neutral nations, uninvolved in the conflict) and which do not involve passage through the restricting nation's territory (including territorial waters).

On the other hand, it might be argued, that due to Israel's control over most of the Gaza Strip's land border, limitations or bars on the movement of goods and persons via Israeli territory entirely negate the capability of third parties (states or organizations) to transport goods and individuals to

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91 The accepted definition of "attack' in the Law of Armed Conflict" is found in paragraph 49(1) in the First Protocol, which determines that: "Attacks" mean acts of violence against the adversary, whether in offence or in defence".

92 This prohibition is set out in paragraph 54(1) to the First Protocol and is considered a customary rule of the Law of Armed Conflict.

93 See, for example, paragraph 23 to the Fourth Geneva Convention.

the Strip over land - and therefore such action can be considered “economic warfare” and its legality should be examined in this context. However, as mentioned above, the State of Israel does not have full control over the Gaza Strip’s southern border- and specifically does not have control over the Rafah crossing or the volume of activity at the crossing. Therefore, *prima facie*, as long as the State of Israel has not taken steps to curtail the movement of goods and persons to the Gaza Strip other than in its own sovereign territory (or its territorial waters), there could be no justification for classifying the steps taken as “economic warfare", even if they were taken due to the armed conflict between Israel and the Hamas regime.

Consequently, *prima facie*, only from the moment that the blockade was imposed on the Gaza Strip, and the movement of goods to and from the Strip was prevented from territories and waters not under Israel’s sovereignty, could this constitute “economic warfare” under the Law of Armed Conflict. However - and this is the crux of this section- the use of military methods, such as a land siege or blockade, constitutes “economic warfare” only when its purpose - namely, the military objective at its root - is economic damage to the enemy. On the other hand, when these military methods are intended to achieve other military objectives, their legality should be examined under different criteria.

Therefore, as concerns the present case, it would have been possible to declare a blockade as a means of “economic warfare”, but the military objective which lay at the root of the blockade - preventing the entry of armaments and military equipment to the Gaza Strip, including raw materials needed for their manufacture, and “dual purpose” materials and equipment - was not damage to the Gazan economy, but rather the direct thwarting of military build-up capacity. This was similar to the situation, prior to the restrictions imposed by the Ministerial Committee on National Security resolution. At that time, the movement of goods and persons was halted due to steep-trajectory fire aimed at the border crossings, or concrete warnings regarding impending attacks on the crossings. The military objective was defending the lives of soldiers and civilians who operated the crossings – as opposed to damaging the Hamas regime’s economy in the Gaza Strip. Hence, this could not be considered a form of “economic warfare”.

As will be explained in the next section, similar security considerations were also behind the blockade, such as the inherent danger that the movement of vessels to and from the Gaza Strip would be used as a ruse to attack Israeli Naval vessels engaged in security activity in the maritime zone off the Gaza Strip coast; or the concrete concern that allowing certain vessels to enter the Gaza Strip would enable, either immediately or at a later stage, the smuggling of terrorists and weapons

into the Strip[94]. Here too, the military objective is not indirect damage to the Hamas regime's capacity to continue fighting, but rather a direct assault by negating the physical and human resources sustaining it. Hence, the blockade imposed on the Gaza Strip should not be viewed as "economic warfare" waged by Israel against the Hamas regime in that period, and should not be analyzed under this legal framework.

94 See Part C of this document.

Part B – Security activity in the maritime zone of the Gaza Strip prior to the blockade

The previous section dealt with the layers of norms that have governed IDF activity in its armed conflict with Hamas in the Gaza Strip. It has been shown that since the Disengagement, these activities were primarily subject to the Law of Armed Conflict in international law.

In the context of the armed conflict with Hamas, the IDF has had to apply security measures in order to contend with the threat of terrorism and to curtail Hamas' military buildup. Such measures have also been applied in the maritime theater adjacent to the Gaza Strip. The principle normative regime governing these activities is the set of laws governing armed conflict at sea. This section deals with the powers available to the IDF by virtue of the Law of Armed Conflict at Sea prior to the introduction of the blockade on the Gaza Strip. As will be shown, these powers were not sufficient to address all the security threats facing the IDF, hence the imposition of a blockade was deemed as warranted. The blockade itself will be discussed in the third section of this document.

1. Factual background

As noted above, since September 2000, an armed conflict has been in progress between Israel and Palestinian terrorist organizations in the West Bank and the Gaza Strip. Since June 2007, the Gaza Strip has been under Hamas control. The armed conflict with Hamas in the Gaza Strip has involved **a complex campaign,** against a belligerent that exploits the civilian population and civilian objects in order to carry out terrorist attacks against Israelis - civilians and soldiers alike. **This complexity also characterizes the conflict in the maritime theater.**

In recent years there has been a substantial increase in activity by the Hamas regime and other terrorist groups in the maritime theater. There have been attempts to carry out attacks against Israeli Navy vessels and against Israeli civilians[95], as well as attempts by terrorists to infiltrate into Israel by sea and to smuggle terrorist operatives into and out of the Gaza Strip. Also, terrorist activity in this arena poses a security threat to certain Israeli strategic installations. As noted earlier, the Hamas regime has also established a "coast guard" that performs military functions in the conflict with Israel.

An additional security threat in the maritime theater has involved efforts by Hamas and other terrorist organizations active in the Gaza Strip in arms smuggling and the smuggling of terrorist

[95] As in 13 April 2009, where there was an attempt to attack an Israeli Naval vessel by means of an exploding vessel. In the beginning of 2010, explosive barrels were discovered on Israeli beaches. They were believed to have been sent from the Gaza Strip in order to target Israelis.

operatives into and out of the Strip[96]. In this context one should recall the "Santorini" and "Abu Hassan" vessels that were interdicted on their way from Lebanon to the Gaza Strip, in May 2001 and May 2003, respectively; as well as the Karine A vessel whose port of origin was in Iran and was interdicted on its way to the Gaza Strip on 3 January 2002 (this vessel carried 50 tons of armaments, including rockets, mortars, anti-tank missiles, mines, assault rifles and so forth). These events and others illustrated full well that a single maritime vessel can carry a very large cargo of arms[97]. It should be noted that the efforts to smuggle arms to the Gaza Strip have played a key role in the military build-up of Hamas in the Gaza Strip, and the need to interdict them has been recognized as a key pillar of maintaining a viable calm in the Gaza Strip as part of UNSCR 1860 (the resolution adopted by the UN Security Council on 8 January 2010, in the midst of Operation "Cast Lead").

Alongside these threats, in July 2008 several pro-Palestinian organizations, among them *Free Gaza*, began organizing flotillas of vessels to sail to the Gaza Strip. These were to serve in the short run as intentional provocations under the guise of humanitarian assistance, and in the long run to open a route of transportation to the Gaza Strip, by means of the sea, which would circumvent the restrictions imposed by Israel on the entry of people and flow of goods into the Gaza Strip. As such, concerns arose that this route would also serve for the smuggling of arms and terrorist operatives into the Gaza Strip.

In order to contend with these threats, the IDF had to invoke its security prerogatives in the maritime theater near the Gaza Strip, with the aim of **preventing the arrival of foreign vessels to the Gaza Strip coast.**

2. Security powers in the maritime zone of the Gaza Strip not derived from the Law of Armed Conflict at Sea

Until the implementation of the Disengagement Plan, and so long as Israel controlled the Gaza Strip by way of belligerent occupation and functioned as the "sovereign power" in the area, the IDF had at its disposal, vis-à-vis the maritime theater adjacent to the Gaza Strip, the full extent of authority afforded to an occupier of a territory pertaining to its adjacent maritime area, including the right to interdict foreign vessels attempting to enter the area without authorization[98]. This prerogative was

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[96] For example, in May 2006 alone, during the interdiction of two smuggling attempts of arms into the Gaza Strip, 1 ton of explosives were captured.

[97] Another example in this case demonstrates the scope of the threat: the naval vessel *Francop* which was interdicted in November 2009 by the Israeli Navy, carried arms amounting to several hundred tons originating in Iran and earmarked, apparently, for Hezbollah use vis-à-vis Israel.

[98] As such, the commander of the IDF forces in the Gaza Strip area used this prerogative and proclaimed the Gaza Strip to be a closed military area, the entry to and exit from which by any means required authorization. See: the

also afforded to the IDF by virtue of the diplomatic agreements with the Palestinians: The Interim Agreement explicitly provides that Israel will continue to have full control and exclusive security authority in the sea adjacent to the Gaza Strip.[99] In connection with this responsibility, the Agreement states that vessels of the Israeli Navy are authorized to sail in this theater as needed and without limitations, and will be able to take all the necessary steps against vessels suspected of terrorist activities or the smuggling of arms, ammunition, drugs, goods or any other illegal activity.[100]

Moreover, according to the Interim Agreement, the maritime area adjacent to the Gaza Strip was not to be used as an international maritime transportation route. Transportation of this nature did not exist prior to the Interim Agreement since there was no suitable port in the Gaza Strip for this purpose. The introduction of international maritime transportation to and from the Gaza Strip, including through the construction of a sea port in the Gaza Strip, was to be agreed upon in negotiations between the parties, but due to the security situation this did not materialize. [101]The Agreement further stipulated that until the establishment of a sea port in the Gaza Strip, the entry of foreign maritime vessels within a range of 12 miles from Gaza's coast would be prohibited and that entry and exit of vessels, passengers and goods via the sea, would take place through Israeli ports only, according to the applicable rules and regulations in force in Israel [102].

As noted above, with the implementation of the Disengagement Plan and termination of the military government in the Gaza Strip, the jurisdiction that was granted to the IDF vis-à-vis the maritime theater of the Gaza Strip by virtue of the laws of belligerent occupation and the security legislation of the military government became void. As for the Interim Agreement, without addressing the relevance and feasibility of applying the arrangements contained therein with respect to the maritime theater of the Gaza Strip since Disengagement[103], relying on these exclusively for the interdiction of foreign ships into the Gaza Strip poses considerable difficulties due to the problems

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Oder concerning the Closure of the Area (Gaza Strip and Northern Sinai (number 144) 1968 – as amended in Order 191 and Order 847.

99 The security arrangements vis-à-vis the maritime theater of the Gaza Strip were first formulated in the Cairo Agreement, and later on were incorporated into Article XIV of Annex I of the Interim Agreement ("The protocol pertaining to redeployment and security arrangements"; **The Security Annex)**.

100 According to Article (4)(b) 1 of the security annex:

"As part of Israel's responsibilities for safety and security within the three Maritime Activity Zones, the Israeli Naval vessels may sail throughout these zones, as necessary and without limitation, and may take any measures necessary against vessels suspected of being used for terrorist activities or for smuggling arms, ammunition, drugs, goods, or for any other illegal activity".

101 After the adoption of the Interim Agreement, there were negotiations between Israel and the Palestinian Authority that were aimed at establishing a naval port, and several initial steps were even undertaken for its establishment. However, due to the outbreak of the armed conflict in 2000 between Israel and the Palestinian terror groups, the project did not reach completion.

102 Article XIV of the Security Annex to the Interim Agreement.

103 **See above**, section A, Chapter 2(b).

involved with invoking the Agreement to limit the rights of third parties not party to it. Thus, the primary remaining source of authority for the IDF on which to base its activity in the maritime theater adjacent to the Gaza Strip since Disengagement is the Law of Armed Conflict. This is due to the existence of an armed conflict between Israel and the Hamas regime in the Gaza Strip. These laws will be discussed below.

3. IDF powers in the maritime zone of the Gaza Strip under the Law of Armed Conflict at Sea

a. The Law of the Sea and its relationship to the Law of Armed Conflict at Sea

In contrast with the Law of Armed Conflict, which were discussed above, the Law of the Sea in international law is considered part of the "laws of peace", namely, the laws that govern relations between nations not in a state of armed conflict with one another. This is one of the oldest fields in international law, the origins of which can be traced back as early as the 17th century, with the development of the concept of "freedom of the high seas". Today, the laws are primarily to be found in the 1982 United Nations Convention on the Law of the Sea (**"UNCLOS"**). Although the State of Israel is not a signatory to this convention, it is bound by many of its provisions, which are considered to have customary law status.

Generally speaking, the Law of the Sea is founded on several fundamental principles, designed to regulate the activity of states at sea during times of peace. For the purposes of this discussion, three of these principles are particularly salient:

1) The sovereignty of the flag-state:According to the Law of the Sea, vessels are considered to be subject to the sovereignty of their state of nationality (flag-state), which, as a rule, is afforded exclusive jurisdiction over vessels carrying its flag in international waters.

2) Freedom of navigation: The law of the sea recognizes the right of free navigation granted to all nations in international waters. This means that all vessels enjoy freedom of navigation in international waters and that this is subject only to certain exceptions recognized by international law, some of which are contained in the Law of Armed Conflict at Sea. Since, as stated above, civilian vessels are considered to be under the sovereignty of the flag-state, the restriction of free navigation of a vessel in international waters, such as stopping a vessel or conducting a “visit and search”, might be considered a violation of the flag-state’s sovereignty, unless it is done with the consent of the vessel or is sanctioned by other provisions of international law.

3) Territorial waters: in contrast with the arrangements applying in international waters, in a state's territorial waters, vessels are not accorded freedom of navigation. [104] These waters are subject to the sovereignty of the coastal state, which has the authority to refuse entry to any maritime vessel, except in cases of "innocent passage". "Innocent passage" is the passage of a vessel through the territorial waters of a state that is required for timely and effective arrival at its destination (including to a port of that state) or due to *force majeure* or distress of the vessel, in a manner not prejudicial to the peace, good order and security of the coastal state.[105]

These three principles are intended, in general, to regulate maritime activity as between nations during times of peace. In situations of armed conflict, however, the Law of Armed Conflict at Sea allows the parties to the conflict to limit, in certain circumstances and subject to defined rules, the rights afforded to nations by virtue of these principles, both vis-à-vis nations that are party to the conflict as well as nations that are neutral. In other words, during times of armed conflict, some of the rights afforded to states under the laws of sea may be set aside in favor of rights afforded to the parties to an armed conflict under the Law of Armed Conflict. [106]

b. The Law of Armed Conflict at Sea – general

Unlike with the Law of the Sea, as well as much of the Law of Armed Conflict – which alongside their evolvement within customary law, have been written into black-letter law in international conventions - the Law of Armed Conflict at Sea, which have evolved over the course of hundreds of years in international customary law have never been consolidated in binding international conventions. However, there are several instruments that have been formulated over the years that are considered to be reflective of the customary law that has evolved in this domain. Among these instruments is the **"London Declaration Concerning the Laws of Naval War"**[107], adopted in a conference held in London in 1909 with the participation of the ten leading naval powers at the time ("The London Declaration"). Due to the refusal of the British House of Lords to ratify it, the declaration never came into force. Although state practice indicates that states did not adhere to the provisions of this declaration during the two world wars, and have even explicitly dissociated

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104 The territorial waters of a nation extend to 12 miles off the coast, although there are some cases where this is somewhat smaller.

105 See: article 19 of the convention of the Law of the Sea.

106 See: L. Oppenheim, INTERNATIONAL LAW: A TREATISE, VOL, II: DISPUTES, WAR AND NEUTRALITY (7th ed., edited by H. Lauterpacht, 1952) 774-75, §374

107 See: DECLARATION CONCERNING THE LAWS OF NAVAL WAR, London, 26 February, 1909.

themselves from it[108], it is generally accepted that some of the provisions of the declaration reflect customary international law[109]. Another important document is the **San Remo Manual on International Law Applicable to Armed Conflicts At Sea**[110] ("The San Remo Manual"). This manual was compiled between 1988 and 1994 by a group of experts in the Law of Armed Conflict at Sea and aimed to integrate all the customary law rules that apply to armed conflicts at sea alongside new and prevailing trends in this field.[111] A significant portion of the rules contained in this manual are indeed considered to reflect customary international law. In order to identify which rules have customary law status, it is generally accepted practice to consult the field manuals of foreign states that reflect the practice subscribed to by those states. For example: the US Navy Manual [112], the UK Field Manual[113] and the German Field Manual[114].

Naturally, as with other fields of international law, generally, and with the Law of Armed Conflict in particular, the Law of Armed Conflict at Sea have been formulated mainly against the backdrop of international armed conflicts. This stems not only from the fact that during the periods when the Law of Armed Conflict at Sea was evolving the prevalence of international armed conflicts was higher than those of a non-international nature, but also from the fact that in only a few domestic armed conflicts did a group fighting the government manage to attain effective control over territory that had access to the high seas in such a way as to render the Law of Armed Conflict at Sea relevant. Notwithstanding, as will be seen later in this chapter, the 19th and 20th centuries have seen state practice whereby powers granted by the Law of Armed Conflicts at Sea were invoked within the context of non-international armed conflicts, and in particular, the power to impose a blockade. It should also be noted, that to remove doubt on this point, the San Remo Manual states that although the provisions of the manual are designed to apply primarily to international conflicts at sea, the authors have deliberately refrained from limiting its application to such conflicts while the official commentary refers to the opening article of the manual thus:

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108 See Oppenheim, comment 106 above, page 769, and paragraph 368.

109 See: M. Bothe, *The Law of Neutrality*, in D. Fleck (ed.),in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS (OUP, 1995) 485, 506; W.H. von Heinegg, *The Law of Armed Conflicts at Sea*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS (id.) 405, 472

110 The San Remo Manual and commentary were published in: L. Doswald-Beck, San Remo MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, PREPARED BY INTERNATIONAL LAWYERS AND NAVAL EXPERTS CONVENED BY THE INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW (CUP, 1995) (**"San Remo Commentary"**)

111 San Remo Commentary, see above 110.

112 See: THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, U.S. Navy NWP 1-14M, U.S. Marine Corps MCWP 5-12.1. U.S. COMDTPUB P5800.7A (Edition July 2007) 7-9 ("The US Navy Manual)

113 SEE: THE MANUAL OF ARMED CONFLICT, UK Ministry of Defence (OUT, 2004) 362-363 ("The UK Field Manual)

114 See: THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS Above comment 109. As was noted in the introduction to this book, the main articles that appear in this book have been adopted as the field manual for the German army (page 10).

> "It should be noted that although the provisions of this Manual are primarily meant to apply to international armed conflicts 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."[115]

Thus it appears that the customary rules of the Law of Armed Conflict at Sea, to be discussed later in this chapter, apply to all types of armed conflicts, whatever their classification may be. As such, these laws apply to the armed conflict between Israel and the Hamas regime in the Gaza Strip; both according to the approach of the Israel Supreme Court, which stated that this is an armed conflict subject to the laws governing international armed conflicts, as well as the approach of the State of Israel which applies to the conflict the basic rules applicable to both international and non-international armed conflicts.[116]

c. The prerogatives of the parties to an armed conflict under the Law of Armed Conflict at Ssea

The Law of Armed Conflict at Sea affords the parties to an armed conflict various prerogatives for limiting the freedom of navigation of vessels in international waters and for conducting "visit and search" on such vessels, as well as prerogatives to limit the ability of the enemy to engage in commerce via the sea. In this context a distinction is made between an **"enemy vessel"** affiliated to an adversary in an armed conflict, and a **"neutral vessel"**, affiliated to a state not party to the conflict. Although the affiliation of merchant vessels and other privately-owned vessels is presumed according to the flag they are carrying[117], the Law of Armed Conflict at Sea recognizes the existence of certain circumstances in which, despite the fact that a vessel is flying a neutral flag, the vessel can be classified in effect as a vessel with "enemy affiliation". Indications of such an affiliation could be, for example, ownership of the vessel by citizens of an enemy state, leasing of the vessel by the enemy and so forth.[118]

Following is a brief outline of the main prerogatives afforded to parties in an armed conflict for limiting the freedom of navigation of vessels and conducting "visit and search" in international waters. A key prerogative that will not be presented in this section but rather in the next one is the right to impose a blockade, and the powers derived from it.

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115 San Remo Commentary, above note 110, p. 73.

116 Ibid. Part A, ch. 2(c)

117 See for example, article 112-113 of the San Remo Manual; as well as the Commentary on it in comment 110 above, page 88, paragraph 13.13.

118 See Article 117 of the San Remo Manual. Also see the commentary for it on comment 110, page 188 (paragraph 112.2) and page 192 (paragraph 116.1).

1) *The right to capture a vessel*

The Law of Armed Conflict at Sea affords the parties to an armed conflict extensive rights to act vis-à-vis enemy vessels. A party to an armed conflict is in effect entitled to capture an enemy vessel, including privately-owned vessels, except in cases where that vessel enjoys "special protection" from capture.[119]

In certain circumstances the Law of Armed Conflict also entitles a belligerent to capture neutral vessels. Such a power is available vis-à-vis a vessel carrying “contraband”, namely, cargo whose final destination is territory under enemy control and which is susceptible to enemy use in the armed conflict. It should be noted that along with unmistakably military-related cargo, such as arms and uniforms, even cargo supporting the military effort may be considered– in certain circumstances– to be contraband, such as construction material that could serve for fortifications, fuel, and so forth. There are some who argue that in order for cargo to be considered contraband it must appear as such on an open list to be published by the state in advance. However, the accepted view is that cargo clearly designated for military use need not be included in the contraband list in order to be considered as such[120]. Other grounds for capturing neutral vessels include the transportation of enemy combatants on board, a breach or attempted breach of a blockade (this will be expanded upon below), operation of a vessel under direct enemy control, presentation of false documentation, violation of orders given by a belligerent in an area where naval military operations are underway (on this subject, see below) and so forth.[121]

The capture of a maritime vessel is usually executed by boarding it and bringing it to a port under the control of the capturing party. In this context it should be noted that according to the Law of Armed Conflict at Sea, a maritime vessel legitimately subject to capture has no right to resist this action, and in the event that it does so, the capturing party has the right to use force in order to effect the capture. Thus, for example, the US Navy field manual stipulates the following in regard to neutral vessels: [122]

> “Neutral vessels or aircraft attempting to resist proper capture lay themselves open to forcible measures by belligerent warships and military aircraft and assume all risk of resulting damage.”

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119 See in this regard Articles 135-136 of the San Remo Manual: Articles 8.6.2-8.6.3 of the US Navy field manual and Articles 13.99-13.100 of the UK field manual. Generally speaking, small vessels are afforded "special protection" if used for coastal fishing, as well as small vessels that are engaged in local coastal commerce and rescue/ medical assistance vessels, as well as vessels that are engaged in scientific/non-military research and so forth.

120 See: Y. Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT (CUP. 2004) 217.

121 San Remo Manual, Article 146; The US Navy Field Manual, article 7.10

122 US Navy Field Manual, Article 7.10

As for the people on board the captured vessel, once it is brought to a safe port, one is generally required to effect their return to their countries of nationality as soon as possible. This, of course, provided they have not been involved in military activity, terrorism or criminal offenses over which the capturing party has jurisdiction. [123]

2) *Visit and search of vessels*

Beyond the authority to capture a vessel, the Law of Armed Conflict at Sea affords a belligerent the power to board an enemy vessel and to conduct a search on board ("visit and search"). This power also exists, in certain circumstances, with respect to neutral vessels, in order to allow a belligerent to determine the identity of a vessel (for example, in order to verify that a purportedly neutral vessel is not in fact an enemy vessel), to examine its cargo, to check the identity of the people on board and so forth. The power to conduct a search on board a neutral vessel exists, for example, when the vessel is suspected of transporting contraband or enemy combatants, of presenting false documentation or of assisting enemy military activity. If after visit and search of a neutral vessel the conditions for capture are met – the vessel may be captured . In all cases, as with the power to capture, the power to visit and search is granted to belligerents only outside the territorial waters of neutral nations.

As is the case regarding capture, the Law of Armed Conflict stipulates that a vessel meeting the requirements for visit and search has no right to resist the exercise of this power. Accordingly, when a vessel resists a demand by a belligerent to conduct visit and search or clearly resists an attempt to verify its neutrality, the belligerent is entitled to capture the vessel and to employ force to the extent required to affect the capture[124].

Moreover, in cases where a belligerent is entitled to visit and search a vessel yet the exercise of this power on the high seas in the circumstances is dangerous or unfeasible, the belligerent may instruct the vessel to sail to a port or other suitable location, in order to enable the visit and search. A vessel receiving such instructions is obliged to comply; should it refuse, the party giving the instruction has the right to capture the vessel, including by employing force. [125] Also, it should be noted that

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123 The US Navy Field Manual, Article 7.10.2

124 San Remo Manual, article 67(a); the US Navy field manual, articles 7.5.2, 7.10. Also see article 63 of the London Declaration. Also, see J. Astley & M.N. Schmitt, *The Law of the Sea and Naval Operations*, 42 AIR FORCE L. REV. 119, 154 (1997) Oppenheim, above comment 106, pp. 856-857.

125 See for example, the San Remo Field Manual, article 121. Also, the commentary to the San Remo Manual, above, comment 110, page 199.

even if circumstances allow for the visit and search to take place at sea, the vessel can still be brought to a port or other suitable location for this purpose, if the vessel consents to this[126].

3) *The power to limit maritime activity in or near an area of naval military activity*

The Law of Armed Conflict at Sea allow belligerents to impose restrictions on the activities of vessels in an area where military operations are taking place or in its vicinity and even to prohibit altogether the entry of such vessels to that area.[127] This prerogative is grounded on the premise that in an area of military activity, the security concerns of a belligerent trump the freedom of navigation of neutral vessels. Thus, for example, the Commentary on the San Remo Manual states that:[128]

> "Within the immediate area or vicinity of naval operations, a belligerent may establish special restrictions upon the activities of neutral vessels and aircraft and may prohibit altogether such vessels and aircraft from entering the area."

Should a neutral vessel fail to comply with these orders, it may be presumed to have hostile intent and as such can be treated as an enemy vessel[129]. In such circumstances, the party issuing the order has the right to capture the vessel and even employ force against it, as explained in the San Remo Commentary: [130]

> "Vessels or aircraft which ignore directions concerning communications risk being fired upon or captured."

4) *The powers derived from the declaration of an area as a "combat zone" or "exclusion zone".*

In armed conflicts of the 20th century involving naval warfare, one can witness a practice by belligerents whereby they declared certain areas at sea to be "combat zones", "war zones", "areas of hostilities" or "exclusion zones". Such declarations may be made by states for a variety of purposes. Thus, for example, some states have used this measure to warn vessels against approaching areas where hostilities are taking place, in order to spare them the dangers involved in sailing there. In addition, states have made use of this measure to reinforce the legitimacy of control and monitoring activities for security purposes in the area. On the other hand, some states have also

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126 Article 119 of the San Remo Manual stipulates that, "As an alternative to visit and search, a neutral vessel may, with its consent, be diverted from its declared destination".

127 See The San Remo Field Manual, article 146.

128 See the Commentary for the San Remo Manual, above comment 110, page 183.

129 Commentary to the San Remo Field Manual, Comment 110 above, page 214.

130 Commentary to the San Remo Field Manual, Comment 110 above, page 183. A similar instruction appears in the UK field manual, in article 13.106, and the US Navy field manual, in article 7.10.

made use of such declarations to severely curtail the freedom of navigation in areas of security activity, sometimes in areas encompassing hundreds of miles. [131]

In any event, it should be noted that among states and scholars, a range of interpretations can be found regarding the extent of powers deriving from the declaration of an area as a combat zone or exclusion zone, hence the lack of clarity on this point[132].

4. IDF activity to prevent the arrival of flotillas to the Gaza Strip prior to the blockade

In July 2008, as mentioned above, the first moves were made towards assembling flotillas to be sent to the Gaza Strip, at the initiative of pro-Palestinian groups, among them *Free Gaza.* As the vessels taking part in the flotillas were supposedly neutral, the Israeli Navy's authority to prevent their arrival to the shores of Gaza was limited to cases in which it transpired that the ships were carrying contraband, assisting the enemy's military activity in other ways, or violating orders of the navy within an area of naval operations (or in its vicinity). Alongside that option, the Israeli Navy had the authority to visit and search the vessels in the event of a suspicion arising as to their involvement in such activities, from which is derived the right to instruct them to sail to a port in Israel in order to conduct a visit and search if this would have been dangerous or unfeasible at sea.

In order to clarify the fact that the maritime zone adjacent to the Gaza Strip was the site of military activity, and thereby to warn vessels of the dangers of entering this area, as well as to reinforce the legitimacy of the Israeli Navy's actions vis-à-vis vessels attempting to enter the area, the Israeli Ministry of Transportation's shipping authority, at the request of the Israeli Navy, issued a "Notice to Mariners"[133] on 11 August 2008, stating:

> "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, bound by the following coordinates…"

One can view this notice, calling on shipping to avoid entering the maritime zone adjacent to the Gaza Strip, as a declaration of the area as a "combat zone" or "exclusion zone". In addition, the above notice stated **that transport of humanitarian aid to the Gaza Strip will be possible**

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131 Seer Von Heinegg, The Law of Armed Conflicts at Sea, above Comment 109, pp.464-468 (and as noted in comment 114, these are rules that were adopted by the German field manual). Also, see the US Navy field manual, article 7.9. Within this context one should note the restrictions imposed on maritime vessel activity in the Atlantic Ocean during the Falkland War between the UK and Argentina; the restrictions on navigation in the Persian Gulf during the Iran-Iraq War between 1980-1988; and the warnings issued by the US in 2003, during the war with Iraq.

132 See in this regard the San Remo Manual, Article 106, and the San Remo Commentary, see above at 110, page 182.

133 Advisory Notice (Maritime Zone off the Coast of the Gaza Strip), 11 August 2008

through the overland border crossings with Israel, **subject to inspection by Israeli authorities.** The notice was published, as stated, as a "Notice to Mariners" using the appropriate channels for notices of this type.

Despite the publication of this notice, on 20 August 2008 two yachts set sail from Larnaka, Cyprus for the Gaza Strip with about 40 people on board. **The two vessels were allowed to enter the Gaza Strip by the political leadership of Israel, as were four other yachts, which left Larnaka for the Gaza Strip on 28 August 2008, 5 November 2008, 8 December 2008 and 19 December 2008 respectively.** Another vessel, flying a Libyan flag, attempted to reach the Strip on 29 November 2008, but returned after being informed it was heading towards an area of Israeli naval military activity and that its approach would interfere with this activity.

The six vessels that succeeded in reaching the coast of Gaza during August - December 2008 raised serious security concerns regarding the creation of a permanent “sea traffic route” to the Gaza Strip, which could be exploited for the smuggling of arms and terror operatives. In addition, some of the activists who entered the Gaza Strip on these boats were involved, after their arrival, in provocative activity designed to interfere with naval activity in the waters adjacent to the Strip and in violating the security restrictions applying to vessels in this area using Palestinian boats. Furthermore, these events demonstrated the limited efficacy of the visit and search powers whose exercise is dependant on the existence of a suspicion that the vessel is involved in hostile activity such as shipping of contraband, which is not always easy to establish. Also, the declaration of the area as a "combat zone" did not fully address the difficulties noted, due to the lack of clarity as to the powers deriving from such a declaration vis-à-vis neutral vessels. Thus came about the understanding, that imposing a blockade on the Gaza Strip would allow Israel to better contend with a wide variety of security threats and would better address the security need to prevent additional vessels from reaching the Gaza Strip. This is due to the fact, as will be shown below, that a blockade allows a party to a conflict to prevent the entry of **any** vessel to a blockaded area, without the need for a concrete suspicion that the vessel is involved in hostile activity.

Part C: The blockade on the Gaza Strip and preparations for the flotilla of 31 May 2010

The security needs requiring the reinforcement of the IDF's authority to bar foreign ships from reaching the Gaza coast, such as emerged in July - December 2008, became more pressing at the onset of Operation "Cast Lead" at the end of December 2008, and with the arrival of reports regarding further imminent attempts by vessels to reach the Gaza Strip. These reports were confirmed when on 29 December 2008, another yacht set sail from the port of Larnaka for the Gaza Strip with 25 passengers on board. The Israel Navy instructed the vessel to turn back and to avoid entering the maritime area adjacent to the Gaza coast, due to the fighting taking place in the area at the time. During the incident, the yacht hit the bow of a Navy vessel, was damaged as a result and was eventually towed to the port of Beirut in Lebanon. This incident demonstrated the need to provide the Navy with the ability to intercept a vessel well away from the coast rather than waiting for the said vessel to get close to the shores of the Gaza Strip.

For these reasons, on 3 January 2009, the Ministry of Defense ordered the imposition of a blockade on the Gaza Strip extending to a distance of 20 miles from the shoreline. Notification of the blockade was provided via the appropriate channels, as detailed below.

1. The legality of the blockade on the Gaza Strip

a. The authority to impose a l blockade on the Gaza Strip

A blockade is a measure available to parties to an armed conflict under the Law of Armed Conflict at Sea, to prevent the entry of vessels to ports or shores under enemy control, as well as to prevent the exit of ships from these areas to the open sea. The objective of this measure is to prevent the passage by sea of cargo and persons to and from territories under enemy control [134].

As will be shown below, the primary advantage to imposing a blockade over relying on the general powers available to belligerents under the Law of Armed Conflict at Sea, lies in the power to prevent all vessels from entering or leaving the blockaded area. This applies even in the absence of concrete grounds to believe that a vessel is carrying arms, enemy combatants or that it is operating under the enemy's instructions. This advantage has significant security implications in circumstances such as those the IDF faces in the maritime area off the Gaza Strip coast where

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[134] See: Dinstein Y. The Conduct of Hostilities; C.J. Columbus, The International Law of the Sea (6th ed., Longman's Green & Co. Ltd., 1967) 714, **ibid** note 120, p. 120. Also see the San Remo Manual commentary note 110 **ibid.**
p. 176; The US Navy Handbook, section 7.7.1.

although there were concerns that the enemy would use the maritime theater for its military build-up, there was insufficient information to support concrete suspicions as regard specific vessels.

In accordance with the Law of Armed Conflict at Sea, the imposition of a blockade on the maritime area adjacent to the coast of an enemy state, is permissible for certain purposes. These include achieving specific security objectives, such as the prevention of the enemy's military build-up, as well as for the purpose of supporting broader interests pertaining to the outcome of an armed conflict, such as the prevention of the enemy's ability to conduct maritime trade. Thus, for instance, the legal expert Oppenheim asserts:

> "A blockade is termed strategic if it forms part of other military operations directed against the coast which is blockaded, or if it be declared in order to cut off supplies from enemy forces on shore. In contradiction to strategic blockade, one speaks of a commercial blockade when it is declared simply in order to cut off the coast from intercourse with the outside world, and no military operations take place on shore. That commercial blockades are, according to the present rules of International Law, as legitimate as strategic blockades is not generally denied"[135].

Furthermore, according to Oppenheim, no special justification is necessary for the imposition of a blockade as part of an armed conflict:

> "However, no special justification of blockade is necessary. The fact is that the detrimental consequences of blockade to neutrals stand in the same category as the many other detrimental consequences of war to neutrals. Neither the one nor the other need be specially justified. A blockade interferes indeed with the recognized principle of freedom of the sea, and. further, with the recognized freedom of neutral commerce. But all three have developed together, and when the freedom of the sea in time of peace and war, and, further, the freedom of neutral commerce, became generally recognized, the exceptional restrictions of blockade became at the same time recognized as legitimate[136] ."

The blockade has been recognized by international law for hundreds of years, and state practice in this regard can be seen in the twentieth century as well. Thus, for example, blockades were widely used during the two World Wars; UN and US forces imposed blockades off the coast of Korea

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135 See Oppenheim, note 106 **ibid**. pp. 769-770.

136 See Oppenheim, note 106 **ibid**. pp. 774-775 (para. 374).

during the Korean War (1950); the United States imposed a blockade off the Haiphong coast during the Vietnam War (1972); India imposed a blockade off the coast of Bangladesh during the conflict between the two states (1971); and Iran imposed a blockade on Iraq during the war between the two states (1980-1988). It should be mentioned that in most of these cases, neutral states never questioned the legality of these blockades[137].

To complete the picture, it should be noted that the blockade is also mentioned in Article 42 of the UN Charter as one of the measures available to the UN Security Council when acting, under Chapter Seven of the Charter, for the purpose of maintaining or restoring international peace and security. The Security Council has used this authority to impose blockades on several occasions, including in the context of sanctions approved by the Council against Iraq, Haiti and Yugoslavia[138].

Naturally, as with other fields of international law generally and with the Law of Armed Conflict in particular, the rules pertaining to blockades have been developed primarily against the backdrop of international armed conflicts. Nonetheless, as with other rules regulating armed conflict at sea, which – as mentioned above – apply also to non-international armed conflicts, a blockade also constitutes a legal and legitimate measure in conflicts of the latter type. In this context, one can point to the practice of States which have employed blockades in non-international armed conflicts, in the nineteenth and twentieth centuries, such as the blockade imposed by the Union government ("the North") on the Confederate States ("the South") during the American Civil War[139]; the blockade imposed by France on the coast of Algeria, as part of its efforts to quell the local uprising while Algeria was still under French rule (1954)[140]; and the blockade imposed by Sri Lanka on an area of the country controlled by the Tamil Tigers insurgents during the armed conflict that took place between the government and the group in 1987[141].

It will be recalled that during the Second Lebanon War, in 2006, Israel imposed a blockade off the Lebanese coast. As the parties to this conflict were the State of Israel and the Hezbollah terrorist organization – not the State of Lebanon, this conflict, as with Israel's conflict with Hamas, did not fall within the traditional categories of “international armed conflict” or “non-international armed conflict”[142]. However, the legality of the blockade was not disputed[143], indicating that the formal

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137 See M.N. Schmitt, *Aerial Blockades in Historical, Legal and Practical Perspective*, 2 US Air Force Academy J. Leg. Stud. 21, 30 (1991)

138 See: J.A. Frowein and N. Kirsch, *Article 42*, in B. Simma (ed.), The Charter of the United Nations: A Commentary, (2nd ed., OUP, 2002), Vol. I, 749, 755.

139 See: Schmidtt, *Aerial Blockades*, **ibid.,** note 137, p. 27

140 See: B. Estival, *The French Navy and The Algerian War,* 25(2), Journal of Strategic Studies 79, 80 (2002)

141 See: R. Cooper and M. Berdal, *Outside Intervention in Ethnic Conflicts*, 35(1) Survival 118, 123 (1993)

142 For further discussion on these definitions, see **ibid.** section A, Chapter 2(C).

143 See: N. Ronzitti, *Naval Warfare*, in Max Planck Encyclopedia of Public International Law, available at: www.,pepi.com § 19

classification of an armed conflict does not constitute a prerequisite for the legality of imposing a blockade.

As mentioned above, the blockade on the Gaza Strip was intended to meet the security imperative of preventing threats to Israeli Naval vessels and to the State of Israel in the maritime theater and of preventing the flow of weapons and terror operatives to the Hamas regime by preventing the establishment of a maritime route to the Gaza Strip. As a party to an armed conflict with the Hamas regime in the Gaza Strip, Israel had the right to impose a blockade on the Gaza Strip, regardless of the conflict's formal classification. In this regard, it should be mentioned that until the Flotilla incident on 31 May 2010, which occurred approximately one year and five months after the blockade was imposed and during which period the IDF captured two vessels which breached the blockade, Israel's authority to impose the blockade was not disputed.

b. The customary conditions for imposing a blockade

The Law of Armed Conflict at Sea lays down several conditions for the imposition of a blockade to be considered legal and valid. As with other rules that regulate armed conflict at sea, these conditions have developed by way of customary law[144].Within this framework, four conditions may be identified for the establishment of a blockade. These conditions are not considered controversial and are considered to have customary status[145]:

1) *Declaration*

A belligerent wishing to impose a blockade must declare the imposition of the blockade and notify the powers which stand to be affected by it, including neutral states[146].The declaration must specify the time of commencement, the geographical boundaries of the blockade and the period of time within which neutral ships will be permitted to leave the blockaded port, insofar as there are neutral ships in the area[147]. It should be further mentioned that according to the San Remo Manual, the declaration of a blockade must specify the blockade's duration[148]. The difficulty with this stipulation is that normally, when an armed conflict commences, it is difficult to assess when it will end and for how long the blockade will be required. It seems that the rationale behind this provision stems from the necessity to coordinate expectations with neutral States which maintain routine trade relations with the blockaded party. This rationale does not apply to areas in which no international trade by

144 See: Schmitt, *Aerial Blockades*, note 137 **ibid.** pp**.** 24-33.

145 See: Von Heinegg, *The Law of Armed Conflicts at Sea,* note 109 **ibid.** p. 472 ; Bothe, *The Law of Neutrality*, note 109 **ibid.**, p. 506;

146 The London Declaration, Article 11, The San Remo Manual, Article 93, The US Navy Handbook, section 7.7.2.2

147 See, e.g.: The London Declaration, Article 9; The US Navy Handbook, section 7.7.2.1.

148 Article 94 of the San Remo Manual.

sea takes place. In any event, it should be noted that the stipulation to specify the duration of a blockade appears in no other source, except for the San Remo Manual[149] and it is unlikely that it reflects the customary law on this matter.

It is important to point out the absence of binding rules regarding the manner in which the declaration of a blockade should be notified to neutral parties. In this light and given the development in recent years of advanced methods of notification to shipping authorities throughout the world, it appears that the principle requirement is to transmit notifications via effective means that will enable neutral parties to receive them[150] .

In the present case, following the Defense Minister's decision to impose a blockade on the Gaza Strip, the Israel Shipping and Ports Authority published a notice to mariners (NOTAM) regarding the blockade. The notice specified the time of commencement of the blockade and its geographical boundaries (providing the coordinates of the blockaded area's limits), and stated that the area would be off-limits to all maritime traffic from the time of the blockade's imposition until further notice. Parenthetically it should be mentioned that the notification did not specify a grace period for neutral vessels to leave the blockaded area, since at the time the blockade was imposed no such vessels were in the area. Furthermore, the notice did not specify the duration of the blockade since when the blockade was imposed (and in fact, to this day) it was impossible to predict the duration of the armed conflict between Israel and Hamas and the other terror organizations operating in the Gaza Strip. Moreover, there was no real necessity for such a stipulation given that the rationale behind this requirement, i.e. the coordination of expectations with neutral States which routinely trade with the blockaded area, is irrelevant to the Gaza Strip which has no seaport for international trade. Furthermore, as mentioned above, the status of this provision as legally binding is doubtful.

Notification of the imposition of the blockade was transmitted via a number of accepted international channels, and is also transmitted twice a day to vessels sailing at a distance of up to 300 km (about 186 miles) off Israel's coast. In addition, an announcement was published on the websites of the Israel Defense Forces and the Israel Ministry of Transport's Shipping and Ports Authority.

Beyond the general declaration and announcement on the imposition of the blockade, specific notifications regarding the existence of the blockade were relayed to the organizers of the Gaza Strip Flotillas, subsequently to the blockade being imposed. The said notifications were relayed via

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149 The US Navy Handbook, pp. 7-9 and 7-10; Columbus **ibid.** note 134, p. 722; Oppenheim, **ibid.** note 106, pp. 775-782; Von Heinegg, *The Law of Armed Conflicts at Sea*, **ibid.** note 109, pp. 471-472.

150 Thus, for example, the US Navy Handbook notes in section 7.7.7.2 : "[…] The form of the notification is not material as long as it is effective."

diplomatic channels to a number of states in which the 31 May 2010 Flotilla was being organized, as well as to bodies which were involved in organizing the Flotilla. Announcements on the matter were also published in the media.

2) *Effectiveness*

In order for a blockade to have effect, the blockading state must effectively enforce it in effect and prevent the access of vessels to the blockaded enemy coast as well as the exit of vessels from the blockaded area to the open sea[151]. The IDF did effectively enforce the blockade on the Gaza Strip from the time of its imposition and prevented the entrance of vessels into the blockaded area (as opposed to vessels which arrived in the area before the commencement of the blockade). Within this framework, even before the events of the 31 May 2010 Flotilla, the Navy commandeered two vessels that breached the blockade, despite being warned not to enter the blockaded area, and prevented the entry of two additional vessels, which turned back after being warned[152].

3) *Impartiality*

According to the Law of Armed Conflict at Sea, a blockade must be applied impartially to all vessels of all nations, including those sailing under the flag of the blockading state[153]. As mentioned above, since the imposition of the blockade on the maritime area adjacent to the Gaza Strip, the Israeli Navy prevented the entrance of all vessels to the blockaded area. The blockade has been enforced impartially on vessels of various nations.

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151 The San Remo Manual, Article 95; The US Navy Handbook, section 7.7.2.3; The London Declaration, Article 2.

152 See **ibid.** section C, Chapter 2.

153 The San Remo Manual, Article 100; The US Navy Handbook, section 7.7.2.4; The London Declaration, Article 5.

4) *Access to neutral States*

An additional condition for a blockade is that it must not bar access to ports and coasts of neutral States[154]. In this regard, it should be noted that the blockade on the Gaza Strip did not in any way affect the access of vessels to ports and coasts of neutral States.

c. c. Additional requirements

In addition to the four abovementioned conditions, considered - as stated above – to be of customary law status, the San Remo Manual terms a blockade as legal if it complies with two additional demands, which were not mentioned in prior sources relating to the subject[155]:

1) *Purpose*

According to the San Remo Manual, imposing a blockade is forbidden if "it has the sole purpose of starving the civilian population or denying it other objects essential for its survival". This demand is based, to the thinking of the Manual's authors, on the prohibition of using starvation as a means of warfare stipulated in article 54(1) to the First Protocol, which is considered a customary rule of international law. Accordingly, it could be argued that the requirement contained in the San Remo Manual in this respect reflects a customary rule.

As aforesaid, the blockade of the Gaza Strip was intended to meet the security imperatives of preventing threats to Israeli Naval ships and to the State of Israel in the maritime theater and to prevent the smuggling of weapons and terror operatives by preventing the establishment of a maritime route to the Gaza Strip. The blockade was never intended to starve the population or deny it essential objects for its survival. In this respect it should be noted that the necessary humanitarian supplies for the Gaza Strip were, and are, transferred via land crossings, and in actuality, since 1967, no goods have been transferred to the Gaza Strip via sea, a fact which is reflected in the provisions of the Interim Agreement[156].

Since the Disengagement and the end of its effective control in the Gaza Strip, the State of Israel has acted constantly to enable the transfer of necessary equipment and products to the Gaza Strip, this in accordance with its obligations towards this territory, and as determined by the Supreme Court[157]. In this framework, the State of Israel has announced explicitly, on a number of occasions, that there is no bar to the transfer of humanitarian equipment and basic supplies for the civilian

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154 The San Remo Manual, Article 99; The US Navy Handbook, section 7.7.2.5; The London Declaration, Article 18.

155 San Remo Manual, Article 102. These conditions are not mentioned, for instance, in the London Declaration or in academic writings prior to San Remo, such as: Columbus, aforesaid in footnote 134, pages 714-752, and Oppenheim, aforesaid in footnote 106, pages 775-782.

156 Mentioned above in Section B, Chapter 2.

157 Mentioned above in Section A, Chapter 3.

population in the Gaza Strip, even via the sea, through nearby seaports. A clear message to this effect was transmitted by the Israeli Navy to the participants of the flotilla of 31 May 2010, upon first contact with the flotilla ships. Most of the humanitarian equipment found on board the seized vessels of the flotilla was transferred to the Gaza Strip, as was the case with equipment found on vessels which had been seized previously in enforcement of the blockade.

2) *Proportionality*

According to the San Remo Manual, the imposition of a blockade is prohibited if the expected collateral damage to the population as a result would be excessive in relation to the anticipated military advantage of the imposed blockade. It should be noted that this demand does not appear in other legal sources dealing with the Law of Armed Conflict at Sea, including those written after publication of the Manual[158]. It appears, therefore, that this is an example of an update to the existing customary rules suggested by the Manual.

In any event, the blockade imposed by the State of Israel on the Gaza Strip complies with this demand. On the one hand, and as mentioned above, the blockade was intended to meet pressing security needs, and its imposition gives the State of Israel a significant military advantage. On the other hand, as was also mentioned, the imposition of the blockade did not prevent the supply of merchandise and goods to the Gaza Strip, since in any case, for the last forty years at least, this has not taken place directly via the sea, but rather via land crossings.

d. Rules for enforcing a blockade

The Law of Armed Conflict allows a state which has imposed a blockade and meets the above requirements, to capture merchant ships and other private vessels, whether these are enemy vessels or neutral vessels, which breach, or attempt to breach the blockade. This, on condition, that when this power is exercised, the vessel is situated outside the territorial waters of neutral states[159]. This power is in addition to the general powers - mentioned above - available to a party in an armed conflict under certain conditions, to visit and search vessels, and even to capture them, even if they have not breached a blockade.

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158 An example of a post-San Remo Manual source which does not refer to the proportionality demand is the U.S. Navy Handbook (see pages 7-9 and 7-10 of the Handbook).

159 See San Remo Manual, Articles 135-137.

1) *Breach or attempt to breach a blockade*

Passage of a vessel in an area subject to a blockade, entry to it or exit from it to the open sea, without special authorization from the blockading belligerent, are considered a breach of the blockade.[160]. When there are reasonable grounds to suspect that a neutral vessel is breaching or attempting to breach a blockade, the blockading belligerent has the authority to capture the vessel[161]. The San Remo Manual, Article 146(f) states:

> "Neutral merchant vessels are subject to capture outside neutral waters… if it is determined as a result of visit and search or by other means, that they… are breaching or attempting to breach a blockade."

This power is available only when the vessel is located outside the territorial waters of neutral states[162]. If a vessel which is subject to lawful capture, clearly resists capture and refuses to stop, force may be used in order to affect the capture and the vessel **may be attacked**, provided a warning was given prior to the attack (as expressed by the scholar Dinstein: "When duly established, the salient point is that merchant vessels - whether enemy or even neutral - can be attacked and sunk if they attempt to breach a blockade and resist capture or an order to stop.")[163].

The blockading party's authority to capture can materialize **even prior to the vessel actually breaching the blockade**, in other words, before it has penetrated the blockaded area. The Law of Armed Conflict allows the capture of a vessel **attempting** to breach a blockade, i.e. while the vessel is in international waters and there are reasonable grounds to suspect that the vessel's intention is to penetrate the blockaded area[164]. In this context, there are those who opine that in the presence of reasonable grounds to suspect that the vessel's **ultimate destination** is the blockaded area, the authority to capture it materializes the moment it leaves the territorial waters of a neutral state, **even**

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160 As stipulated in the U.S. Navy Handbook, Article 7.7.4: "Breach of blockade is the passage of a vessel or aircraft through a blockade without special entry or exit authorization from the blockading belligerent."

161 San Remo Manual, Article 146(f); U.S. Navy Handbook, Article 7.10

162 San Remo Manual, Article 146.

163 See: Dinstein, The Conduct of Hostilities, above-mentioned in footnote 120, page 106. Also, see: San Remo Manual, Articles 67(a) and 98; U.S. Navy Handbook, pgs. 7-13. In this context, it should be noted that Article 49(3) to the First Protocol states that the directives in Articles 48-67 of the Protocol, which deal with, *inter alia*, permissible and non-permissible targets, do not affect the rules of international law which apply to, *inter alia*, armed conflict at sea. According to the official commentary to the protocol, this directive was added to the protocol following the significant changes to armed combat at sea during and after World War II, and the difficulty to accurately determine which of the Armed Conflict at Sea Law rules pertaining to attack, continue to apply even after the adoption of the First Protocol (see: Commentary of the Additional Protocols (ICRC, Marinus Nijhoff Publishers,l 1987) Zimmermann B., Swinarski C., Sandoz Y.).

164 See: San Remo Manual, Article 146(f); U.S. Navy Handbook, Articles 7.7.4 and 7.10; Dinstein, The Conduct of Hostilities, above-mentioned in footnote 106; Columbus, IBID. in footnote 134, pg. 729.

if the vessel is captured en route to a neutral port (as an interim destination prior to sailing to the blockaded area). This approach was adopted by the U.S. Navy Handbook which determines that[165]:

> "Attempted breach of blockade occurs from the time a vessel or aircraft leaves a port or airfield with the intention of evading the blockade… It is immaterial that the vessel or aircraft is at the time of interception bound for neutral territory, if its ultimate destination is the blockaded area."

As mentioned above, the capture of a vessel is usually affected by boarding the vessel and bringing it to a port controlled by the capturing party. Regarding persons on board the vessel, once it has been brought to a safe port, one is generally required to take steps for their return to their states of nationality as soon as possible[166]. This of course, provided they are not involved in hostilities, terrorism or criminal activity over which the capturing nation has jurisdiction.

2) *Passage of humanitarian aid*

According to the San Remo Manual, if the civilian population within the blockaded area is not being supplied with food or other means essential for its survival, via alternative routes to the blocked sea route, the blockading party must allow the passage of said means, including medical supplies, via the sea[167]. In fulfilment of this obligation, the blockading party may **determine the applicable technical arrangements for the passage of said supplies to the civilian population,** which may include the prerequisite that the goods be subject to inspection[168]**.** As aforementioned, when a party to an armed conflict has the authority to visit and search aboard a ship, it also has the authority to demand that the vessel dock for inspection, if the inspection at sea is not feasible or unsafe[169]**.** In addition, the blockading party is entitled to condition the passage of said supplies upon their **distribution being carried out under the supervision of an impartial humanitarian organization,** such as the International Committee of the Red Cross[170]**.** This is meant to prevent a situation whereby under the ruse of importing essential humanitarian supplies, equipment intended for the use of fighting forces, including military equipment, could be imported, as well as to allow the blockading party to verify that the humanitarian supplies are indeed transferred to the civilian

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165 The U.S. Navy Handbook, Article 7.7.4, notes that the authors of the London Declaration tried to prevent the adoption of this approach in the framework of enforcement of maritime blockades (Articles 17 and 18 to the London Declaration); In actuality, extensive use of this approach was made during both World Wars, and several nations have declared that it is still valid regarding maritime blockades (see: Columbus, IBID in note 134, pgs 731-732; Oppenheim, IBID note 106, pgs. 784-786). It should be noted that the San Remo Manual did not reiterate the restrictions appearing in the London Declaration Articles 17-18.

166 The U.S. Navy Handbook, Article 7.10.2

167 San Remo Manual, Article 103. This stipulation, which is not mentioned in previous sources, such as the London Declaration, is based on Article 70 to the First Protocol. See San Remo Commentary, IBID note 110, pg.180.

168 San Remo Manual, Article 103(a).

169 San Remo Manual, Article 121.

170 San Remo Manual, Article 103(b).

population, and not utilized by the enemy for other purposes. In any event, it is accepted that the consent of the blockading state is required in order to transfer humanitarian aid to the blockaded region[171].

2. Enforcing the blockade on the Gaza Strip

Since the imposition of the blockade on the Gaza Strip on 3 January 2009, several attempts have been made to breach it. Two vessels attempting to reach the Gaza Strip in January 2009, during Operation “Cast Lead”, reversed their intention to breach the blockade after the Navy sent them warnings to stay clear of the area: the freight vessel "Iran Shahed", which the Iranian Red Crescent was involved in organizing, and the vessel "Spirit of Humanity" owned by the "Free Gaza" organization. On the other hand, two additional vessels, the freight vessel "Tali" which attempted to reach the Gaza Strip during February 2009, and the cruise vessel "Arion", which made an attempt during July 2009, were seized by the Navy after they refused to heed warnings directed at them and breached the blockaded area. In the course of the seizure, no violence was directed at the soldiers and it was accomplished without casualties.

Upon the vessels' arrival at an Israeli port, procedures for the passengers' deportation from Israel were initiated. As for the vessels themselves, it was decided, *ex gratia*, not to impound them, and contacts were made to facilitate their return to their owners, subject to an undertaking that they would not allow use of the vessels for future attempts at breaching the blockade. These contacts have yet to yield an agreement.

Essential humanitarian supplies are transferred to the Gaza Strip in an orderly fashion, via land crossings into the Strip. The manner in which the State of Israel acts regarding vessels carrying humanitarian aid to the Strip which breach the blockade is in line with the rules contained in the San Remo Manual which govern harsher instances of blockades when imposed on an area in which the populations' needs are not met via land. Namely, by bringing them to an Israeli port, executing a security check of the cargo and transferring it to the Gaza Strip via U.N. sources-

To complete the picture, it should be noted that after the conclusion of Operation "Cast Lead", it was decided to maintain the blockade on the Gaza Strip until further notice. This was necessary in light of the ongoing armed conflict between Israel and the Hamas regime and the additional terror organizations operating in the Strip. The security threats which necessitated the blockade have not diminished, but rather increased, in light of the Hamas regime’s efforts to replenish its military power, which was severely damaged during the operation.

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[171] See: Ronzitti, Naval Warfare, Ibid note 143, paragraph 19, notes: "Humanitarian action requires the consent of the blockading State".

3. Preparation for the 31 May 2010 flotilla

a. Background

Although the 31 May 2010 flotilla to the Gaza Strip was not the first flotilla attempting to breach the blockade on the Strip and undermine the blockade's legitimacy using the pretext of humanitarian aid, it had several special characteristics, which demanded special prior preparations.

Firstly, central to organizing the flotilla was the IHH organization, a Turkish organization with an extreme Islamist orientation, which in 2008 was declared by Israel a "prohibited association" under regulation 84 of the Defense Regulations, due to its membership in the Hamas organizations' "Charity Coalition"[172]. The "Free Gaza" organization, which was involved in several previous flotillas to the Gaza Strip, also took part in organizing this flotilla. **Secondly,** this flotilla consisted of a number of vessels sailing simultaneously with hundreds of people on board. Some of the vessels, first and foremost the "Mavi Marmara", carrying five hundred and fifty passengers, were especially large and capable of carrying large quantities of equipment. These factors were intended to make it difficult for the Navy to prevent the flotilla from reaching Gaza. At the same time, the Hamas regime prepared to receive the vessels at sea with about one hundred boats.

Accordingly, the preparations for engaging the Flotilla began several months prior to its departure, upon receipt of information regarding the preparations for the voyage. Diplomatic efforts were made to prevent the Flotilla's departure from the port of origin. These efforts were unsuccessful, and the flotilla set sail.

As mentioned in the preface to this section, it is not the intent of this document to deal with the actual events of the Flotilla incident, which were investigated by a professional investigative team headed by Major General (Reserve) Eiland and the Navy. These events will be studied by the Military Advocate General's Corps in accordance with existing debriefing and investigation policies regarding operational events and once the Chief of General Staff concludes his position on the investigation. However, several legal issues pertaining to the preparations for the flotillas arrival will be discussed.

b. The legal authority to intercept the Flotilla

In light of the flotilla's special characteristics, including the fact that several vessels would be sailing simultaneously in the direction of the Gaza Strip, carrying hundreds of participants, while preparations were being made in Gaza for some one hundred boats to receive them, it was

[172] Publication Portfolio 5822, 23.6.2008

imperative from an operational standpoint to intercept the vessels prior to their arrival at the blockaded area (an area spanning a distance of twenty miles from the shores of the Gaza Strip).

In accordance with the Law of Armed Conflict at Sea, since the IDF was in possession of clear and substantiated information that the intent of the Flotilla was to breach the blockade, the IDF had the authority to capture the participating vessels while in international waters (i.e. outside a neutral state's territorial waters) and prior to the vessels' penetration of the blockaded area[173](in effect, from a legal standpoint, the existence of a reasonable suspicion of said intent would have sufficed, but – under the actual circumstances - the evidence of intent was unequivocal.)[174].

Accordingly, the decision to intercept the flotilla outside the blockaded area was in line with the State of Israel's authority under the Law of Armed Conflict at Sea.

c. Preparations for the interception of the Flotilla

The preparations for the interception of the Flotilla included several elements designed to avoid, as far as possible, the need for IDF troops to board the vessels, or – if the need to board the vessels did arise – to avoid using force against the Flotilla's participants to the extent possible.

To this end, messages were composed and transmitted to the vessels in the Flotilla, in which they were advised that the Gaza Strip area was under blockade, and therefore, closed to all maritime traffic. Accordingly, the vessels were requested to change their course and refrain from entering the area. At the same time, it was clearly stated in the messages that the Government of Israel supports the transfer of humanitarian aid to the Gaza Strip. The organizers and participants of the Flotilla were further invited to unload the aid supplies on board the vessels at Ashdod's port, in order to transfer the goods to the Gaza Strip through the land crossings, in coordination with the Israeli authorities. The messages also made it clear that if the vessels in the Flotilla disregarded the order to change course, and persisted in their attempt to enter the blockaded area, the Navy would be obliged to take the necessary measures to enforce the blockade, including boarding the vessels.

In order to minimize, as far as possible, the degree of force to be used in the event of resistance against the blockade's enforcement, the instructions given to the Israeli forces stressed that the use of force against the Flotilla participants should be avoided as far as possible. The said instructions specified that lethal weapons should not be used, except as a last resort - in self defense against an immediate threat to life and only if the threat could not be removed by less harmful means. To this end, the forces taking part in the action were equipped with less-lethal-weapons, i.e. paintball guns

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173 Mentioned above in Chapter 2(d)(1) of present Section.

174 It should be noted that even in the absence of a blockade of the Gaza Strip, the State of Israel might have had the authority to inspect the flotilla vessels, in light of the special characteristics and circumstances of the flotilla.

and electric shockers, which would make it possible to subdue violent individuals without causing them irreparable harm. Furthermore, officers of the *YASAM* (Police Special Patrol Unit) and the Prison Service's "*Masada*" unit who are trained in riot-control, were assigned to assist the IDF and were designated to board the vessels once Naval forces had completed the initial takeover.

An additional measure aimed at reducing the degree of force required to stop the ships was the use of electronic jamming to disrupt the ships' communications. This was designed to diminish the vessels' ability to resist measures taken by the Navy to enforce the blockade, and so keep the number of potential casualties to a minimum as well as to safeguard IDF personnel. In preparation for the use of these measures, it was stressed that they should be applied for only a limited period of time just before the takeover and should not expose the ships and their passengers to any safety threat.

In sum, throughout all the phases of preparation ahead of the engagement with the Flotilla, the IDF placed an emphasis on the necessity to avoid, as far as possible, the use of force to stop the Flotilla. This was reflected in the attempts made to prevent the arrival of the Flotilla by delivering messages through diplomatic channels; by the preparations for the encounter with the Flotilla at sea, including the emphasis placed on the need to operate in a gradual manner (by transmitting messages and warnings at sea, etc. and to take control of the vessels only as a last resort); by instructions to forces to confine the use of force to the minimum necessary to complete the mission; by integrating units specializing in riot control and by equipping forces with less-lethal weapons.

As mentioned above, the question of whether the rules laid down in advance were implemented during the action to stop the Flotilla will not be addressed in this document.

Conclusion

This document presents the legal framework for the IDF's activities in the maritime theater of operations adjacent to the Gaza Strip, while focusing on the imposition of a blockade on the Strip and the manner of its enforcement.

The first section of this document reviews legal and factual aspects pertaining to the IDF's activities in the Gaza Strip since 1967, namely, since the Strip came under Israeli control during the Six Day War and up to the present day. Within this review the principle factual "milestones" were presented as a foundation for an analysis of the normative framework which applies to the IDF's current activities in the Gaza Strip. In this regard, it was shown that since the Disengagement and termination of the military government, the Gaza Strip can no longer be viewed as a territory under belligerent occupation. Therefore, and in light of the ongoing armed conflict between Israel and the Palestinian terror organizations in the Gaza Strip, most notably Hamas, which for the past three years has effectively ruled the territory, the normative framework applying to IDF activities in the Gaza Strip is comprised principally of the Law of Armed Conflict in international law.

Resting on this normative foundation, the **second section** of this document focuses on the legal aspects of the IDF's handling of security threats in the Gaza Strip maritime theater. This section describes the range of threats the IDF is forced to deal with, and the legal measures available to the IDF for this purpose, under the Law of Armed Conflict.

Finally, **the third section** of this document discusses the factual and legal bases for the imposition of a blockade on the Gaza Strip. In this context, the conditions for the legality of a blockade under the Law of Armed Conflict at Sea are discussed as well as the rules applying to its enforcement and the manner in which these rules were implemented by the IDF ahead of the Flotilla interception on 31 May 2010. The last part of this section briefly addresses legal aspects of the IDF's preparations to halt the said Flotilla.

It is believed that this document faithfully illustrates the legal challenges associated with the IDF's battle with the terror threat emanating from the Gaza Strip, in order to protect the State of Israel and its people, under the complex circumstances that characterize the fight against terrorism, as well as the meticulous manner in which the rules of international law are assimilated into the framework of this fight.