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THE GAZA FLOTILLA INCIDENT AND THE MODERN LAW OF BLOCKADE

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The law and operational practice of blockade were considered all but dead by many in the 1990s.[1] However, in recent years, Israel has employed blockade twice: in 2006 against Hezbollah in south Lebanon and since then against Hamas in Gaza. The latter blockade, which will be the focus of this article, was instituted in January 2009 to prevent arms and other materials reaching Hamas and thereby to halt rocket attacks against Israeli territory.[2]

In May 2010, a flotilla of six ships gathered in the eastern Mediterranean with the declared purpose of publicly breaching the blockade. *Mavi Marmara* was the largest ship in the flotilla. It carried activists from the Free Gaza Movement and the Turkish charity Foundation for Human Rights and Freedoms and Humanitarian Relief (IHH), others sympathetic to the circumstances of the people of Gaza, and numerous journalists. IHH's reputation has been described as "checkered," with reported links to Islamic extremist organizations, including Al Qaeda.[3] In a series of communications culminating late on 30 May 2010, Israel told the flotilla that unless it diverted to Ashdod, an Israeli city to the north of Gaza, and allowed its cargo to be inspected and distributed under Israeli control, personnel of the Israel Defense Forces (IDF) would board the vessels and prevent them from reaching the Gaza coast. The flotilla refused to divert; the IDF intercepted and boarded the ships sixty-four nautical miles outside the declared blockade zone.

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Five of the vessels were captured without loss of life. The case of *Mavi Marmara* was different: on that ship nine civilian activists were killed during clashes between them and the IDF boarding party.

Mavi Marmara had sailed from Turkey, and all of those killed had Turkish nationality. Turkey was a loud critic of the IDF's alleged heavy-handedness and of the blockade generally. Turkish criticism after the incident centered on the following claims: that Israel did not have the legal right to establish a blockade; that even if a blockade could have been lawfully established, on the facts it was unlawful because of the disproportionate suffering inflicted on the inhabitants of Gaza; and that in any event, the IDF boarding team used excessive force in carrying out the boarding.[4]

Three significant panels of inquiry have investigated the incident; facts found and legal conclusions reached varied greatly. Israel's inquiry was led by a justice of the Israeli Supreme Court—Justice Emeritus Jacob Turkel.[5] The Turkel Commission's report is a comprehensive analysis of the law and facts, and it attempts to adopt an objective tone. It nonetheless concludes that the Israeli blockade was lawful as a matter of international law and that the Israeli enforcement operation was in the main similarly lawful. The Turkish National Commission of Inquiry included representatives from the prime minister's office and other offices of state.[6] The weight of the Turkish report's analysis and conclusions is, in the opinion of the author, diminished because of its transparent political motivation. It concludes the blockade was unlawful and that the Israeli boarding operation (which it describes as an "attack") used excessive force. Both these reports were provided to the United Nations secretary-general, who established his own commission, headed by Sir Geoffrey Palmer, to consider the incident.[7] The Palmer report takes into account the findings of the two national inquiries and concludes that while the establishment of the blockade was lawful, the Israeli boarding operation appeared to use excessive force in dealing with the passengers and crew of *Mavi Marmara*.

Three years on, the incident remains a valuable case study, because it raises legal issues on several levels. At the grand strategic, when will the international community tolerate the imposition of a blockade, and when will states accept consequent interference with the navigational rights of vessels flying their flags? At the operational, how far from the blockaded coast should the naval commander be prepared to enforce the blockade? At the tactical, what level of force is acceptable for the individual members of a blockade-enforcement boarding party to use? This article will consider the incident anew and use it to establish some principles that might guide maritime doctrine on the future establishment and enforcement of blockades.

DID ISRAEL HAVE THE RIGHT TO ESTABLISH A BLOCKADE?

The law of blockade is part of the law of naval warfare, a body of law that does not come into effect until there is an international armed conflict (IAC)—that is, a conflict between two or more states. In contrast, a non-international armed conflict (NIAC) is a conflict between a state and an organized armed group.[8] The law of naval warfare does not apply in a NIAC, except when both the state party in the NIAC and other states not involved in the conflict have recognized the organized armed group as a "belligerent."[9]

For an IAC to exist, two or more states must have resorted to force between themselves, and the level of that force must be of sufficient magnitude to be considered an "armed conflict."[10] The Gaza situation challenges the first of these "threshold" requirements. Despite aspirations to the contrary, Palestine is not a state; neither is Gaza. That ought to be the end of the matter, but many states, aid agencies, and scholars classify the conflict in Gaza as an IAC.[11] They justify this position using three main grounds.

The first is known as the "border crossing" argument. Because the armed conflict is occurring beyond Israel's borders, it must, so the argument goes, be "international." The Israeli Supreme Court has ruled to this effect;[12] further, the Turkel Commission has classified the situation as an IAC on this basis.[13]

However, the position appears inconsistent with prior practice. For instance, Israel itself argued that the armed conflict it fought with Hezbollah in Lebanese territory in 2006 was a NIAC.[14] The United States does not maintain that its war against Al Qaeda is an IAC simply because it occurs abroad. As these examples illustrate, the mere crossing of a border does not of itself render a conflict "international."

The second is the "occupation" argument. NIACs occur primarily on the territories of the states against which the organized armed groups are fighting. Since it would be illogical to suggest that a state can occupy its own territory, occupation must be limited to *international* armed conflict. If, at the material time, Israel occupied Gaza, the conflict must have been international in character. The Turkish report concluded that Gaza was under occupation by Israel and adopted this argument.[15]

However, the premise that Gaza is "occupied" is questionable. The legal test for occupation is twofold: an absence of government or authority and the presence of a putative occupying power in a position to substitute its own authority for that of a former government (leading to a situation of effective control by the occupying power).[16] Since implementation of the policy of disengagement in September 2005, the Supreme Court of Israel has determined that Israel is no longer an occupying power.[17] Indeed, the Turkel Commission found in its report (page 52) that "the very lack of control over the land territory in the Gaza Strip

. . . is what makes an external naval blockade necessary to control access to and egress from that territory."

Others have argued that while Israel may have no permanent military presence within Gaza or any control over the elected government, it exercises such control of the territory's borders that it must be considered to have "effective control" over the whole territory.[18] They point to Gaza's dependence on Israel for such essential services as water and electricity. But dependence in any respect is not determinative of "occupation." So it is submitted here that the "occupation" argument does not lead to the inevitable conclusion that Israel and Gaza were parties to an IAC.[19]

Third is the "special case" argument. The Palmer report concluded (page 41) that Gaza is a unique case, the facts of which are unlikely to be repeated elsewhere in the world. It suggests that because the conflict has "all the trappings of an international armed conflict," it *should be treated* as one.[20] The conclusion that the conflict "should" rather than "must" be treated as an IAC could be viewed as tantamount to acceptance that it is not, as a matter of current law, within that categorization.

Accordingly, these three arguments may not between them afford a satisfactory reason to forgo fulfillment of the "states parties" criterion, and this article doubts that the conflict in Gaza is an IAC.

The suggestion that the conflict is international in character can equally be rebutted by demonstrating that it is instead non-international. The International Criminal Tribunal for the former Yugoslavia set forth in the *Prosecutor v. Tadic* case the accepted criteria for qualification as a non-international armed conflict: "a [non-international] armed conflict exists whenever there is . . . protracted armed violence between government authorities and organized armed groups, or between such groups within a State."[21]

Accordingly, whether the conflict between Israel and Hamas in Gaza in 2009–10 (the operating period of the blockade prior to the Gaza flotilla incident) was non-international depends on the existence of, first, an organized armed group, and second, protracted armed violence.

Hamas is undeniably an "organized armed group." It was sufficiently organized at the material time to be able to coordinate extensive smuggling of arms and to conduct sustained rocket attacks against Israeli territory. It seems equally uncontroversial that the level of armed violence between Hamas and Israel had been "protracted." The word "protracted" can reflect either "intensity" or "duration" or both. According to Israeli figures, in 2009 there were 692 rocket/mortar attacks from Gaza on Israel's territory and 104 in January–October 2010.[22] Estimates of deaths on either side may seem relatively low;[23] nonetheless, the sustained rocket attacks and the continued Israeli policy of targeting and killing "terrorists" in

Gaza in 2009–10 all point to a conclusion that the violence is sufficiently significant and sustained to be labeled "protracted."[24] This article concludes that at the material time there was a NIAC between Israel and Hamas.

Was it a NIAC in which Israel had a right to declare a blockade? That is, was there a recognition of belligerency? Historically, belligerent recognition seems to have been required on the part both of the relevant state-party opponents in the NIAC and of affected neutral powers, although it did not need to be express and could be implied from other acts.[25] During the American Civil War, for instance, the Union implicitly recognized the existence of a belligerency by the declaring of a blockade against the Confederacy. Other states (most prominently Great Britain) implicitly recognized belligerency when they proclaimed "neutrality"—a proclamation that would have made no sense without an implied recognition of belligerency.

Some scholars suggest that the doctrine of "belligerent recognition" has fallen into desuetude and therefore no longer reflects the law.[26] They argue that the twentieth-century NIACs in which blockades have (or blockade-like activity has) taken place do not constitute reliable state practice supporting the proposition that blockades may be established during a NIAC. In the Spanish Civil War, interested European powers sought to regulate the delivery of arms and material to the belligerents, including by sea. However, "no European state conceded to any party to the conflict any right to interfere with neutral shipping."[27] In 1956, France (when still the colonial power) established a "customs zone" off the coast of Algeria to prevent arms reaching rebel Algerian groups. But the French measures met with "sharp protests" from the flag states of the vessels boarded or diverted, and no formal blockade was ever declared.[28] During the course of the NIAC between Sri Lanka and the Tamil Tigers, the Sri Lankan government took measures under domestic law to control the smuggling of weapons and supplies into Tamil territory. These measures were taken solely within territorial waters, and so they were not a blockade.[29] The blockade enforced by Israel during its NIAC with Hezbollah in Lebanon in 2006 has been held unreliable, as its context was not "a straight-forward NIAC."[30]

As the critics suggest, the first three examples are unreliable precedent in support of the contention that blockades may be established during a NIAC. However, it is not as easy to dismiss the 2006 Israel/Hezbollah NIAC as such a precedent, since it does appear to be a recent example of a NIAC in which blockade was employed without widespread international objection.

Other scholars maintain that recognition of belligerency is still a valid legal concept, pointing out that mere lack of use is insufficient grounds for a conclusion that a concept is no longer valid as a matter of law.[31] This is the more defensible position. Applied to the facts of the Israel/Hamas situation, it means that

Israel implicitly recognized Hamas's belligerency by declaring the blockade. The attitude of the international community is harder to determine, not least because many consider the conflict to be an IAC, not a NIAC. However, this might be a reflection of the international community's view of the intensity of the conflict and of the position of Hamas as a belligerent.[32] If this is a plausible interpretation, both the state party (Israel) and third parties have implicitly recognized Hamas's belligerency in the manner that occurred in respect of the Confederacy during the American Civil War. On this analysis, it was lawful for Israel to employ blockade as a method of warfare against Hamas in 2009–10.

THE CONDUCT OF THE ISRAELI BLOCKADE

When the flotilla was intercepted, it was sailing on the high seas—that area of the ocean not within the sovereign control of any state.[33] In the ordinary course of events, vessels of every nation are entitled to enjoy the freedom of navigation on the high seas.[34] However, states that are parties to an IAC (or a NIAC against an opponent whose belligerency has been recognized) may interfere with navigational rights enjoyed by merchant vessels from other states in certain circumstances and in certain ways, including by the establishment of a blockade.[35] The phrase "merchant vessel" refers to any vessel that is not a warship, naval auxiliary, or other ship on government service. "Blockade" is the blocking of the approach to the enemy coast or part of it for the purpose of preventing the ingress and egress of ships and aircraft of all states.[36] To be lawful, a blockade must comply with a number of specific rules.

Notification. All aspects (location, duration, etc.) of the blockade must be formally announced.[37] This is usually done through diplomatic channels and "notices to mariners." The notification requirement is important, because before a merchant vessel may be held to have "breached" a blockade, the blockading state must be able to prove the vessel knew or ought to have known of the blockade's existence.[38]

Effectiveness. A blockade must also be "effective."[39] This provision in the law of blockade might seem puzzling at first sight, but it has its origins in the protection of the rights of neutrals. Found in article 4 of the 1856 Declaration of Paris, it is grounded in the neutral concern that belligerent powers not be permitted wantonly to declare "paper blockades," thereby interfering with neutral shipping, without the means or motive to enforce them. The requirement does not necessitate interception of every blockade-runner, but sufficient military resources must be committed to render ingress or egress of the blockaded area "dangerous" to vessels attempting breach.[40] The Gaza blockade was well publicized and properly notified;[41] further, there is no indication that blockade-runners routinely breached it.[42]

Position and Nature of the Blockading Force. The force maintaining the blockade may be located at a distance from the coast dependent on military requirements.[43] There is a balance to be struck between positioning the blockading force so close to the coast that it may be at risk from enemy on-shore weaponry and so far away that the blockade may fail for want of effectiveness.[44] Blockades may be enforced by whatever means are expedient, although there is some dispute as to whether a blockade may be enforced by a minefield alone. The traditional view has been that it cannot, because an unmanned blockade may risk unintended harm to, for example, a vessel in distress or one that is ignorant of the blockade and unwittingly stumbles into the minefield.[45] A second objection is that the prescribed legal penalty for breach of blockade is capture, not destruction or attack.[46] Nonetheless, the rule must be construed on the basis of its object and purpose—the prevention of unintended harm to vessels with no intention of breaching the blockade. So long as the means used to enforce the blockade are capable of the necessary judgment and distinction, there should be no breach of the law.[47] Warships were used to enforce the Gaza blockade, so the mode of enforcement should not be considered contentious.

Place of Enforcement. In addition to the question of "when" (or in what circumstances) a blockade may be enforced, there is that of "where." Although some commentators suggest that a blockade may only be enforced in the vicinity of the blockade line, others take the position that a state that has properly established a blockade may enforce it anywhere it likes, so long as it can show that the object vessel *intends* to breach the blockade.[48] European powers traditionally espoused the more restrictive position, while traditionally expeditionary maritime powers such as the United States and Great Britain took the broader view.[49] The current state of the law remains unclear. U.S. Navy NWP 1-14M, *The Commander's Handbook on the Law of Naval Operations* (July 2007) (NWP 1-14M), still expressly embraces (art. 7.7.4) the "intention" doctrine; Joint Services Publication 383, *Joint Service Manual of the Law of Armed Conflict* (2004) (the UK Manual), is silent on the issue. The *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (the San Remo Manual) also offers no view on the "intention" doctrine.

The IDF employed the doctrine to enforce the blockade sixty-four miles from the blockade line. Even if criticism based on the intention doctrine is set aside, the IDF decision allowed for criticism that the blockade enforcement was too early and therefore demonstrated excessive force. The Turkish report criticized the early enforcement of the blockade, arguing it left no room for "peaceful and non-violent alternative measures to stop the vessels."[50] The Palmer report adopted a similar position.[51] It is difficult to see why military necessity compelled the IDF to intercept the vessels so early.

Breach and Consequences of Breach. As noted above, the penalty for breach of blockade is capture. Captured vessels are "prizes";[52] they must therefore be subject to later adjudication before national prize courts.[53] Blockade commanders must tread a careful line between ensuring the blockade's effectiveness, on the one hand, and not rendering their national governments liable for compensation by overzealous enforcement, on the other. The formula most commonly employed is that a vessel may be captured if there are *reasonable grounds for suspecting* that it is breaching or attempting to breach the blockade.[54]

Obviously, crossing or attempting to cross the blockade line will constitute reasonable grounds. Equally plainly, a vessel's public declaration of intent to breach the blockade would be sufficient grounds. Loitering near the boundary of the blockaded area, failing to answer radio communications from the blockading force, failure to display night navigation lights, or other attempts at concealment would probably all constitute reasonable grounds for suspicion on the part of the blockade commander. In making the determination, a commander may presume that a vessel has knowledge of the blockade once notification has taken place.[55] In the case of the Gaza flotilla, the vessels had publicly and repeatedly declared their intention to breach the blockade.[56] If the "early enforcement" issue is set aside, there can be no doubt that the blockade force commander was within the law in effecting a capture of the flotilla vessels.

Resistance to Capture. A merchant vessel that "clearly resists" capture must be warned that it may be attacked if it persists. The legal basis for this position is that clear resistance to capture renders a merchant vessel a "military objective"—that is, a prima facie lawful target for attack.[57] "Clear resistance" is a question of fact in each circumstance, but the threshold is a high one. Mere evasion or attempting to flee (without persisting in breaching the blockade) is likely not sufficient. Firing on the blockade force or attempting to ram a blockading warship would meet the threshold. Even where a resisting vessel is a lawful target, before a commander may attack it he is obliged to weigh the likely military advantage to be obtained from attacking it against the number of civilian casualties the attack might collaterally cause. Sometimes collateral damage is an inevitable consequence of a lawful attack on a legitimate military objective and is thus not inherently unlawful.[58] However, the commander bears a strict duty to take all feasible measures to keep collateral damage to a minimum.[59]

What sort of military advantage might attacking the vessel confer? First is the important consideration that allowing a vessel to bully its way through the blockade line seriously calls into question the blockade's effectiveness, especially if the attempt is part of a coordinated campaign to undermine the blockade. An ineffective blockade must be abandoned. Second, it might be known that the

resisting vessel is carrying cargo that will make a valuable contribution to the enemy's military effort ashore. These factors would increase the military advantage conferred in attacking a vessel in clear breach.

Against that military advantage must be balanced the likely civilian casualties. In the case of *Mavi Marmara,* the Turkel Commission concluded there were around 570 civilians on board who were not resisting the IDF's attempts to board.[60] If the vessel had been attacked and sunk, this would surely have been an unacceptable level of collateral damage, when the military advantage of preventing breach of the blockade could equally have been achieved by carrying out an opposed boarding, as the IDF in fact did.[61]

Impartiality. A blockade must be applied impartially—that is, it must be enforced against vessels from all states, whether neutral or belligerent.[62] Accordingly, Israel bore not just a right but a *duty* to prevent the Gaza flotilla from breaching the blockade. The Palmer report agreed with this position.[63] The Turkish report's allegations that the blockade was "arbitrary, erratic and partial" are unpersuasive, because they are based on incidents that occurred before the blockade had been declared.[64]

Failure of a Blockade. As with the "effectiveness" rule, breach of the impartiality rule renders the entire blockade void. Once it becomes void, the blockading power must lift the blockade. Before a failed blockade is lifted, however, there is no rule that a merchant vessel may disobey or ignore a notified blockade because it unilaterally considers the blockade unlawful; it could still be subject to capture. However, any such capture ought to be found unlawful during subsequent prize proceedings and due compensation paid by the putative blockading power.

THE EFFECT OF THE BLOCKADE ON THE INHABITANTS OF GAZA

The rules discussed so far have regulated the relationship between the blockading power and other ships at sea. There are three rules that seek to limit the effect a blockade may have on the civilian population in the blockaded territory.

The first is an outright ban on a blockade that has as its "sole" purpose starvation of civilians.[65] "Sole" appears to be a very high threshold—so much so that it might render the starvation rule one of very limited practical application. Even where a blockading belligerent is unscrupulous enough to impose a blockade in order to starve civilians, it will likely be possible to construe some other military advantage to the blockade that might help it evade liability under this rule. Nonetheless, that is the stated and considered position (art. 7.7.2.5) of NWP 1-14M; it is also that of the San Remo Manual.[66] The Palmer report concluded (page 42) that Israel had a legitimate military objective in enforcing the blockade. There was no evidence before any panel of inquiry that Israel's sole (or even main)

purpose was the starvation of the population of Gaza, and so the Gaza blockade may not be impugned on this ground.[67]

The second rule is a much broader reflection of a key principle of the law of armed conflict, that of proportionality—a blockade is prohibited if the damage caused to the civil population is excessive compared to the military advantage conferred.[68] It is clear that the sort of "damage" under contemplation in this rule is starvation or, perhaps more broadly, hunger.[69] This once again raises the difficult "proportionality" judgment. What level of human suffering justifies what level of military advantage? In the context of the Israeli blockade of Gaza, there is the added complexity of distinguishing the effects of the blockade from the controls in place under the land-crossings policy in force ashore.[70] It could be said that it makes little sense to try to separate the effects of the one from those of the other, that each should be assessed in the context of the other such that if the combined effects of the two policies are disproportionate to their military gain, they are both unlawful for want of proportionality.[71] Nonetheless, both the Turkel and the Palmer reports do distinguish the two policies' effects: "It is wrong to impugn the blockade's legality based on another, separate policy," concludes the latter report (page 43, paragraph 78).

On the facts, it is submitted here that the effects of the two policies can and should be sufficiently distinguished to make a proportionality judgment on each. The determining factor in reaching this conclusion is that Gaza has no port facilities. Even prior to the establishment of the blockade, the population of Gaza received virtually no goods or supplies by sea.[72] As regards the blockade's military advantage, Israel points to a sharp reduction in rocket attacks launched from Gaza after the blockade began, an accomplishment that had not been achieved by the land-crossings policy alone before the blockade was established.[73] It may be concluded that despite Gaza's lack of port facilities, Hamas's ability to resupply arms and other material was significantly reduced by the blockade. This article concludes that the blockade was not unlawful for disproportionality.

The third rule is that a blockade must not deny to the civilian population "items essential to its survival."[74] This would include items involved in the production of foodstuffs and would also likely include medical supplies and maybe heating fuel, depending on the circumstances of the blockaded population. The blockading power retains the right to determine the technical arrangements for providing such items to the population of the blockaded territory.[75] It is important to note that because a state may lawfully make technical arrangements for the delivery of humanitarian aid to the blockaded territory, merchant vessels carrying it are obliged to abide by those technical arrangements; vessels carrying humanitarian aid have no right simply to sail through the blockade.[76] The Israeli

blockade made clear provision for the supply of humanitarian aid to Gaza. Such supplies were to be routed through the Israeli port of Ashdod, just to the north of the Gaza Strip, for onward movement to Gaza via the designated land crossing checkpoint. The blockade itself should not be challenged on the basis that it failed to take account of "items essential to survival."

ENFORCEMENT OF THE BLOCKADE

As noted, a vessel that "clearly resists" capture may be attacked in certain circumstances. The issue here, though, is how to treat a crew or passengers who resist the boarding team once the capture is under way. Traditionally the law of naval warfare did not look beyond the platform; the law of naval warfare said nothing about the targeting of individuals. But the principle of distinction—that only combatants must be the object of attack, that civilians must as far as possible be protected from attack—is so fundamental to the law of armed conflict that it would be absurd to suggest that it did not apply at sea.[77]

A blockading force will be dealing almost exclusively with merchant vessels.[78] Therefore, the blockade commander's starting point must be that individuals on board the object vessel are civilians protected from attack unless, and for such time as, they take "direct part in hostilities."[79] The International Committee of the Red Cross propounds the following test for whether an act amounts to "direct participation":

- The act must be likely to affect adversely the military operations or military capacity of a party to an armed conflict.
- There must be a direct causal link between the act done and the harm inflicted.
- That act must be specifically designed to cause directly the required threshold of harm in support of a party to the conflict and to the detriment of another.[80]

If a commander is satisfied on the facts that this test is met by any personnel resisting the boarding, it is lawful to attack them.

Of course, members of the boarding party always retain their right to use proportionate and necessary force in self-defense or in defense of others. This may include lethal force where such force is proportionate and necessary—for example, when there is an imminent threat to human life and there is no other way to extinguish the threat. In many circumstances, service personnel confronted by direct participants will be justified in using force in self-defense and will not need to consider the more complex "direct participation" formulation. However, that will not always be the case, and, so as not to fetter improperly (and

perhaps dangerously) the discretion of blockading forces, the national command must consider whether to authorize rules of engagement (ROE) that also permit the targeting of direct participants, rather than relying solely on the self-defense paradigm.[81] The *Mavi Marmara* case illustrates this position.

The Mavi Marmara *Boarding*

Anticipating that they would be boarded, some persons on board *Mavi Marmara* armed themselves in order physically to repel the IDF boarding party.[82] The IDF party attempted to board by speedboat but was unable to do so due to physical resistance by personnel on board *Mavi Marmara,* resistance that included the use of water cannons and the throwing of objects at the speedboats.[83] After the speedboat boarding failed, three helicopters inserted the boarding party. There were later reports that live fire was used from the helicopter against personnel on the upper deck of *Mavi Marmara;*[84] these were denied by Israel. The first three soldiers to fast-rope onto the deck of *Mavi Marmara* were captured and taken below decks, where they later claimed to have been assaulted.[85] During the boarding, Israeli forces faced armed resistance from persons on board. Israel would claim that firearms were used against its forces, though none were found on board afterward and this was denied by the activists. Before the boarding party gained control of the ship, nine activists were killed by firearms. The autopsies showed that some of the bodies had multiple bullet wounds, some inflicted from behind and some at close range.

There were no military personnel on board *Mavi Marmara;* all of the passengers and crew members were civilians. The Israeli force commander was obliged to make the operating assumption that all of the personnel on board were protected from attack unless it could be determined that they were taking a direct part in hostilities. The Turkel Commission devoted much time to considering (with the benefit of hindsight) which personnel on board *Mavi Marmara* were directly participating in hostilities.[86] The blockade force commander would have had far less knowledge than the commission. However, once the speedboat boarding was attempted and repelled, it would have been abundantly clear that there were individuals on board prepared forcibly to resist the IDF boarding. If it could have been safely concluded that the resisting members of the crew and passengers were direct participants, and if these individuals could have been adequately identified and distinguished, there would have been no reason in law for them not to have been targeted with sniper fire from the helicopter prior to the boarding team's insertion, as was to be alleged by the activists but denied by Israel. The *Mavi Marmara* experience therefore demonstrates circumstances where a "direct participation" analysis would allow a commander lawfully to use force in circumstances outside of self-defense.

The Turkel Commission determined that it could not criticize the level of force used by the IDF in the fatal cases, because of the level of resistance demonstrated and the consequent challenging operating environment.[87] The Palmer report concluded (pages 58–60) that Israel had provided insufficient evidence as to the circumstances of each death to allow the panel to conclude that each of the nine could have lawfully been targeted under the law of armed conflict (i.e., that the test for direct participation had been met). The panel was unpersuaded (page 61) that the nine had been lawfully killed in self-defense, because of the nature and number of the bullet wounds inflicted.

The Impact of International Human Rights Law

This assessment of applicable law would be incomplete without consideration of the impact of international human rights law. Some human rights law is treaty based, such as the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights, or ECHR) or the 1966 International Covenant on Civil and Political Rights (ICCPR). Whether their norms apply depends on whether the state enforcing the blockade is a party to the relevant treaty. Elements of human rights law have also increasingly crystalized into customary law. This law remains applicable during an armed conflict. A state is obliged to protect the human rights of those "within its jurisdiction."[88] The U.S. position is that this provision in human rights law means that there can be no application of human rights obligations outside the territory of the state.[89] On that basis, for an American commander, human rights law has no part to play in any operation outside U.S. territorial waters. However, this is not a widely held position, and both the Human Rights Committee of the ICCPR and the European Court of Human Rights have concluded that norms can apply extraterritorially. The test for whether there is jurisdiction depends on whether the state has "effective control" of the relevant territory.[90] In multinational operations, American commanders must be aware that allies will be subject to additional operating constraints derived from human rights law.[91]

In the context of the *Mavi Marmara* boarding operation, "effective control" of the vessel (vice territory) was achieved once the vessel had been captured and the boarding party had full control.[92] Before that point, the conduct of the boarding was governed by the law of armed conflict alone. After that point, the IDF was obliged to comply with human rights norms, such as the right to freedom from inhuman and degrading treatment. The Turkish report criticized the IDF for interfering with this (and other) rights of the captured crew and passengers;[93] the Turkel Commission considered that the IDF had employed reasonable measures to ensure the safety of the boarding team during the passage to Ashdod and that rights were not infringed.[94]

LESSONS IDENTIFIED FOR THE FUTURE CONDUCT OF BLOCKADES

The foregoing analysis allows four conclusions to be drawn, which may inform the future conduct of blockade operations.

Reaffirmation of the Traditional Law and Practice of Blockade. Despite a lack of consensus on every aspect of the law of blockade, the three investigations into the incident all relied on the classic law of blockade. It seems, therefore, that the concept of blockade is alive and well today. It is equally clear that in certain circumstances blockade can be an effective method of warfare. It deserves to retain its place in national doctrine.

Right to Establish a Blockade in a NIAC. It is difficult to say whether the position that blockade can be a lawful method of conducting a NIAC (on the part of the state party, at any rate) is gaining in contemporary acceptance. Neither of the national reports nor the UN report concluded that the Gaza conflict was a NIAC in which blockade law applied; they all concluded it was an IAC. For the present author, however, Israeli practice in Lebanon in 2006 and in Gaza in 2009 constitute contemporary examples of NIACs in which the international community was (in the main) prepared to tolerate the imposition of blockades.

Employment of the Intention Doctrine. Israel's enforcement action sixty-four nautical miles from the blockade zone was the subject of criticism. Belligerents often wish to court international support for their cause; the perception of overzealous enforcement of rules that might already impact heavily on neutral states' trade may count against that. Early enforcement may also facilitate criticism on the grounds of excessive force. In the case of the Gaza flotilla, what would have been lost militarily had the IDF waited until the flotilla was in the immediate vicinity of the declared blockade zone before effecting capture? Doing so would have made it abundantly clear that the flotilla's actual intentions matched its rhetoric. Even if the intention doctrine is reflective of the contemporary law, one of the key lessons that the Gaza flotilla incident demonstrates is that a blockade is a balance between what is militarily effective and what neutral states will tolerate.

Use of Force in Blockade Enforcement Operations. During an armed conflict a belligerent state's armed forces may target combatants (usually the armed forces of a state) and civilians who are directly participating in hostilities. Whether in an armed conflict or not, a state's armed forces always retain the right to use proportionate and necessary force in self-defense or in defense of others, which may include lethal force where such force is proportionate and necessary. In most cases, vessels that breach or attempt to breach a blockade will be crewed by civilians. It must be assumed that unless the tests for clear resistance or direct participation can be met, the only force that may be employed against a vessel in breach or its

crew is that used in self-defense or defense of others. Because enforcement of the blockade is a legal right (and a duty), reasonable force to compel compliance with the lawful directions of the blockade force would also be permitted; it is unlikely that lethal force would be reasonable in those circumstances.

Therefore the force permitted in most blockade enforcement operations will mirror that for the conduct of peacetime maritime security operations: counterpiracy, counternarcotics, enforcement of UN arms embargoes, and the like. Typical ROE to achieve such a mission will be modeled on this "law enforcement" use of force. Force used is to be the minimum necessary in all circumstances. Lethal force may be employed, but only where proportionate and necessary in self-defense or defense of others. The ROE should contain a series of escalatory measures to compel a vessel to submit for boarding and inspection: a series of verbal warnings, warning shots, nondisabling fire, disabling fire. During the conduct of the boarding, crew members may be detained or restrained where necessary for the safety of the boarding team.

It is submitted here that this model of enforcement operation is appropriate for blockade enforcement. However, ROE should reflect that armed conflict rules continue to apply. Depending on the circumstances, a commander may need rapid authority to attack a vessel that clearly resists capture or to target individual crew members who are directly participating in hostilities. ROE issued need to be agile enough to reflect that need, while also retaining a politically acceptable level of control over the blockade force's activity.

NOTES

1. See Louise Doswald-Beck et al., *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge, U.K.: Cambridge Univ. Press, 1995) [hereafter San Remo Manual], Explanation, p. 176.
2. See the evidence of Lt. Gen. Gabi Ashkenazi, Israel Defense Forces Chief of Staff, to the Public Commission to Examine the Maritime Incident of 31 May 2010 (known as the Turkel Commission), summarized in State of Israel, *The Public Commission to Examine the Maritime Incident of 31 May 2010* (n.p. [Jerusalem]: January 2010) [hereafter Turkel Commission report], pp. 91–92, available at www.turkel-committee.gov.il/.
3. James Kraska, "Rule Selection in the Case of Israel's Naval Blockade of Gaza: Law of Naval Warfare or Law of the Sea?," in *Yearbook of International Humanitarian Law* 13 (2010), p. 370.
4. Turkish National Commission of Inquiry, *Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010* (Ankara: February 2011) [hereafter Turkish report], executive summary, pp. 4–5, available at www.mfa.gov.tr/.
5. Turkel Commission report.
6. Turkish report.
7. Sir Geoffrey Palmer et al., *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident* (n.p. [New York]: United Nations, September 2011) [hereafter Palmer report], available at www.un.org/.
8. Or between two organized armed groups within a state.
9. The doctrine of belligerency deals with occurrences of civil war and other situations of belligerency where the threshold of hostilities

is often insufficient for the application of the laws of armed conflict. There are four conditions of facts arising during such conflicts that classically give rise to the state of belligerency: existence of civil war beyond the scope of mere local unrest; occupation by insurgents of a substantial part of the territory of a state; a measure of orderly administration by the group in the area it controls; and observance of the laws of war by rebel forces acting under responsible authority. V. Azarov and I. Blum, "Belligerency," in *The Max Planck Encyclopedia of Public International Law,* ed. R. Wolfrum (Oxford, U.K.: Oxford Univ. Press, 2008 [updated]), available at www.mpepil.com.

10. 1949 Geneva Conventions, common art. 2. The "level of violence" threshold in an IAC is admittedly very low and is amply met by the conditions in Gaza. See, for example, Sylvain Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations," *International Review of the Red Cross* 91, no. 873 (March 2009), p. 71.
11. Douglas Guilfoyle, "The *Mavi Marmara* Incident and Blockade in Armed Conflict," *British Yearbook of International Law* (2011), note 54.
12. HCJ 769/02 *Public Committee against Torture v Government* [2006] (4) TakSC 3958 (known as the *Targeted Killings* case), paras. 16–18.
13. Turkel Commission report, p. 47.
14. Indeed, the Turkel Commission cites the conflict with Hezbollah in Lebanon as an example of a NIAC in which the international community tolerated the use of blockade. Ibid., p. 49.
15. Turkish report, pp. 81–83.
16. UK Ministry of Defence, *Joint Service Manual of the Law of Armed Conflict,* Joint Services Publication 383 (Shrivenham, U.K.: Joint Doctrine and Concepts Centre, 2004) [hereafter UK Manual], para. 11.3; 1907 Hague Convention IV Regulations, art. 42.
17. HCJ 9132/07 *Al Bassiouni v Prime Minister* (unpublished 30 January 2008), note 140, para. 12.
18. See, for example, Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge, U.K.: Cambridge Univ. Press, 2009), pp. 277–80.
19. Guilfoyle, "*Mavi Marmara* Incident," p. 183.
20. Ibid. It appears the Palmer panel too was persuaded by the "occupation" argument; Palmer report, p. 83, legal appendix, para. 20.
21. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72 (2 October 1995), para. 70.
22. Turkel Commission report, p. 91.
23. Guilfoyle, "*Mavi Marmara* Incident," pp. 188–89.
24. Wolff Heintschel von Heinegg, "Methods and Means of Naval Warfare in Non-international Armed Conflicts," in *Non-international Armed Conflict in the Twenty-First Century,* ed. Kenneth Watkin and Andrew J. Norris, International Law Studies, vol. 88 (Newport, R.I.: Naval War College, 2012), p. 228, reaches the same view. Guilfoyle, "*Mavi Marmara* Incident," p. 189, reaches the conclusion that the conflict is (or was at the material time) neither an IAC nor a NIAC, for want of sufficiently "protracted" violence.
25. *The Prize Cases,* 67 U.S. 635, 670 (1863); Guilfoyle, "*Mavi Marmara* Incident," note 112.
26. Guilfoyle, "*Mavi Marmara* Incident," pp. 191–94, 216.
27. Heintschel von Heinegg, "Methods and Means," p. 214, citing Guilfoyle, "*Mavi Marmara* Incident," p. 192.
28. Heintschel von Heinegg, "Methods and Means," p. 215; Guilfoyle, "*Mavi Marmara* Incident," p. 193.
29. Heintschel von Heinegg, "Methods and Means," p. 215; Guilfoyle, "*Mavi Marmara* Incident," p. 193.
30. Guilfoyle, "*Mavi Marmara* Incident," p. 193, and on the basis of analysis, pp. 187–78. The basis for this position is Israel's entry into Lebanese territory without Lebanese consent, lending the conflict an international character.
31. Heintschel von Heinegg, "Methods and Means," pp. 214, 228.
32. While as a matter of law, the threshold of intensity of violence for an IAC is lower than for a NIAC, it is submitted that the appearance of "all the trappings of an IAC" is a factor that states may have taken into account in reaching their views, as did the Palmer report, p. 41.

33. 1982 UN Convention on the Law of the Sea (UNCLOS), art. 86.
34. Ibid., art. 87(1)(a).
35. UNCLOS recognizes this by subordinating in article 87(1) the freedom of navigation to "other rules of international law."
36. U.S. Navy Dept., *The Commander's Handbook on the Law of Naval Operations,* NWP 1-14M (Washington, D.C.: July 2007) [hereafter NWP 1-14M], art. 7.7.1; San Remo Manual, Explanation, p. 176.
37. NWP 1-14M, art. 7.7.2.2; UK Manual, para. 13.65; San Remo Manual, para. 93.
38. NWP 1-14M, art. 7.7.2.2.
39. Ibid., art. 7.7.2.3.
40. Ibid.
41. Palmer report, p. 42.
42. Ibid. The Turkish report (pp. 74–75) relies on incidents prior to the establishment of the blockade to conclude, unconvincingly, the converse position. See also discussion of the "impartiality" rule below.
43. UK Manual, para. 13.65; San Remo Manual, para. 96.
44. See NWP 1-14M, art. 7.7.5; and San Remo Manual, Explanation, p. 177.
45. San Remo Manual, Explanation, p. 178; Wolff Heintschel von Heinegg, "The Law of Armed Conflicts at Sea," in *The Handbook of International Humanitarian Law,* ed. Dieter Fleck, 2nd ed. (Oxford, U.K.: Oxford Univ. Press, 2008), p. 557.
46. NWP 1-14M, art. 7.10; UK Manual, para. 13.70; San Remo Manual, para. 98.
47. NWP 1-14M, art. 7.7.5, adopts this position, as does the San Remo Manual, p. 178.
48. See R. W. Tucker, *The Law of War and Neutrality at Sea,* International Law Studies, vol. 50 (Washington, D.C.: U.S. Government Printing Office, 1955), pp. 293–94.
49. See, for example, the states' respective positions during negotiations at the Hague Peace Conference in 1907, discussed in Stephen C. Neff, *The Rights and Duties of Neutrals: A General History* (Manchester, U.K.: Manchester Univ. Press, 2000), p. 135.
50. Turkish report, p. 87.
51. Palmer report, pp. 4, 52–53.
52. "The term 'prize' relates to those vessels or cargoes which may be seized, with or without the consent of the captain or master . . . , and then brought before a national prize court to be condemned for the use of the captor." James Kraska, "Prize," in *Max Planck Encyclopedia of Public International Law,* ed. Wolfrum.
53. NWP 1-14M, art. 7.10; San Remo Manual, Explanation, p. 193. The UK Manual (p. 367n103) declares that the United Kingdom is unlikely to use prize courts in the future and that captured vessels might simply be deemed to be the property of Her Majesty's government. This position has been sharply criticized in Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge, U.K.: Cambridge Univ. Press, 2010), p. 248. In response to this criticism, one of the authors of the chapter "Maritime Warfare" of the UK Manual has corrected that position, saying that the High Court retains a prize jurisdiction that would still be exercised if required: Steven Haines, "The United Kingdom's Manual of the Law of Armed Conflict and the San Remo Manual: Maritime Rules Compared," *Israel Yearbook on Human Rights* 36 (2006), p. 107.
54. UK Manual, para. 13.70; San Remo Manual, para. 98. NWP 1-14M does not employ this formulation, but neither does it suggest another.
55. NWP 1-14M, art. 7.7.4.
56. Palmer report, p. 52.
57. NWP 1-14M, art. 7.10, reflects this position, as does the San Remo Manual, para. 98. The UK Manual is more guarded, adopting the position that determination of "clear resistance" may not be sufficient of itself in all circumstances to render a vessel a military objective and thus a lawful target (para. 13.70, referring to paras. 13.46–48).
58. NWP 1-14M, art. 8.3.1.
59. Ibid.; UK Manual, para. 13.32; San Remo Manual, para. 46.
60. Turkel Commission report, pp. 234–42.
61. An opposed boarding is defined by Alan Cole and others in Dennis Mandsager et al., *Sanremo Handbook on Rules of Engagement* (San Remo, Italy: International Institute of Humanitarian Law, November 2009), annex D, p. 84, as "a boarding where the master or

crew has made it clear that steps will be taken to prevent the boarding."

62. NWP 1-14M, art. 7.7.2.4; UK Manual, para. 13.72; San Remo Manual, para. 100.
63. Palmer report, p. 52.
64. Turkish report, pp. 74–75: "In 2008, prior to the 3 January 2009 formal declaration of the 'blockade,' at least six voyages from Cyprus to Gaza occurred without naval interception." The report even goes on to say, "After January 2009, enforcement seems to have increased."
65. UK Manual, para. 13.74.a; San Remo Manual, para. 102(a).
66. At para. 102(a) and Explanation, p. 179. The UK Manual interprets the prohibition more broadly, saying that a blockade will be unlawful if it is "intended to starve" the civilian population (art. 13.74.a).
67. The Turkish report seems to read the rule (p. 68) too broadly, looking at the blockade's effect rather than intent.
68. NWP 1-14M, art. 5.3.3; UK Manual, para. 13.74.b; San Remo Manual, para. 102(b).
69. See San Remo Manual, Explanation, p. 179.
70. The limitations on imports into Gaza imposed under the land crossings policy are described in detail by Kraska, "Rule Selection in the Case of Israel's Naval Blockade of Gaza," pp. 377–79.
71. Guilfoyle, "*Mavi Marmara* Incident," p. 204. The Turkish report adopts (p. 70) a similar position.
72. Palmer report, p. 43, para. 78.
73. Turkel Commission report, p. 92.
74. UK Manual, para. 13.74.a; San Remo Manual, para. 102(a).
75. UK Manual, paras. 13.74.a, 13.75; San Remo Manual, paras. 102(a) and 103–104.
76. The Turkish report's conclusion to the contrary (p. 83) must be doubted.
77. See San Remo Manual, Explanation, p. 114; and Heintschel von Heinegg, "Law of Armed Conflicts at Sea," pp. 491–93. For present purposes, "combatants" may be defined simply as members of the armed forces of a state.
78. Enemy warships, as military objectives, are subject to attack whether they attempt to breach a blockade or not.
79. As expressed in the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51(3), but reflecting customary international law.
80. Nils Melzer, "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law," *International Committee of the Red Cross,* 2009, www.icrc.org/.
81. The author is aware that it is not just the law that guides the content of ROE but important policy constraints may also prevent a national command from authorizing certain uses of force.
82. By sawing iron bars from the guardrails and assuming agreed positions; Palmer report, p. 56.
83. Turkel Commission report, p. 142.
84. Turkish report, p. 93.
85. Turkel Commission report, p. 151ff.
86. See analysis in ibid., pp. 184–201.
87. Ibid., pp. 263–69.
88. See, for example, ECHR, art. 1, www.echr.coe.int/.
89. See, e.g., Aldo Zilli, "Approaching the Extraterritoriality Debate: The Human Rights Committee, the U.S. and the ICCPR," *Santa Clara Journal of International Law* 9 (2009), p. 410ff.
90. See, for example, *Bankovic and others v Belgium and others* (2001) BHRC 435, para. 71.
91. In particular, these additional constraints will apply in the context of armed-conflict detention operations. An example of the effect of this is *Al Jedda v United Kingdom* (2011) Application 27021/08, a decision of the Grand Chamber of the European Court of Human Rights.
92. Turkel Commission report, p. 230, citing the European Court of Human Rights case *Medvedyev and Others v France* (2010) Application 394-03, pp. 63–67.
93. Turkish report, p. 105.
94. Turkel Commission report, pp. 176–79. The disagreement between the two reports is attributable in the main to different findings of fact in relation to the allegations of mistreatment.