

The Maritime Court in Haifa

Claim *in rem* 19424-10-16

Before His Honour Judge R.
Sokol

On the matter of:

The State of Israel

Through Prosecutor, Civil District of Haifa

15A Pal Yam Boulevard, Haifa

Tel: 04-8634006, Fax: 04-8634011

The Claimant

- v -

The ship Zaytouna-Olivia

Through representative Attorney Gaby Lasky and/or Hayya Abu Warda and/or Karin Torn Hibler

From 18 Ben Avigdor St., POB 57092, Tel Aviv-Yafo 61570

Tel: 03-6243215, Fax 03-6244987

The Respondent

Summaries of the arguments of the Respondent

In accordance with decision of the Honourable Court from 24/03/18 the representative of the Respondent have the honour of presenting summaries of her arguments, as follows:

Factual background

1. Since the State of Israel imposed a general closure on the Gaza Strip several years ago as part of its war on the Hamas administration, the civilian population of Gaza have been suffering in all the aspects of their lives from the destructive effects of the closure, and they are subject to abysmal hardship to the point of a real humanitarian crisis, the present dimensions and likely future consequences of which are difficult to fathom and describe.
2. In order to raise a clear voice against the outrageous injustice that the policy of the blockade visits on the residents of the Strip who have committed no crime, several women human-rights activists set sail on board a small vessel in a non-violent symbolic protest flotilla, in the hope that their protest would stimulate public discussion within the international community and bring about a change in the desperate situation in which the residents of the Strip have been living for so long. For that protest action the State now wants to order the confiscation of the Respondent.

3. On 16/09/2016 the Respondent sailed from the port of Barcelona in Spain towards the eastern Mediterranean in a protest flotilla against the blockade on the Gaza Strip. On its way the ship moored at a number of ports where the activists conducted meetings, cultural events and press conferences. As declared by the owners of the ship and the organizers of the events, the activities of the flotilla were intended to raise awareness of the ongoing blockade on the Gaza Strip and to protest against it, as well as to stimulate public discussion of the matter and to encourage political activism to bring it to an end.
4. On 05/10/2016 as the ship approached the blockade area and its being at a distance of about 20 nautical miles from the blockade area, the navy contacted the Respondent and announced that the maritime area of the Gaza Strip was under a sea blockade. The crew of the ship were requested to change the course of the ship, but they replied that they would continue on their course. After that, the Respondent was stopped by the navy and taken to the port of Ashdod.

Previous proceedings

5. Prior to this proceeding previous complaints that were brought by the State of Israel which the State appealed for the confiscation of ships on the grounds that they had violated the maritime blockade on Gaza have been discussed in this Honourable Court. The first complaint that was submitted was discussed in this Honourable Court in the case of the ship *Estelle*, in which the Honourable Court dismissed the State's request to confiscate the ship, due to a delay in the submission and ordered her returned to her owner, after a review of the instructions that regulate the authority of the Maritime Court to deliberate on proceedings for the confiscation of ships under Israeli law as well as international law.
6. To the Honourable Court's decision in the claim *in rem* (Haifa) 26861-08-13 **State of Israel v the ship Estelle**, the State submitted an appeal to the Supreme Court. That appeal too was rejected on the grounds of delay in submitting the request for confiscation. In that same decision Her Honour the president, Judge (ret.) M. Naor considered the question of the preliminary conditions for submitting a request for confiscation and emphasized the importance of the requirement that the State to exercise discretion for the purposes of a decision on the necessity of seizing the ship. In particular the honourable president emphasized the question of the period of time within which the ship must be brought before the court, in the course of which the State must carry out the investigation necessary to gather evidence and hear the arguments of the owner before making the decision. Those actions, for which the allotment of the above-mentioned period of time was intended, were defined as part of the duty to exercise discretion (see Civil Appeal 7307/14 **State of Israel v the Ship Estelle** (published in Nevo, 7/8/2016)).
7. On 05/07/15 an additional request was submitted to this Honourable Court in the framework of the State's appeal to confiscate the ship *Marianne*, which had also sailed towards the zone of the maritime blockade on the Gaza Strip in protest against the policy of siege. This Honourable Court accepted the State's request and ordered the confiscation of the ship, having determined that preliminary conditions existed for the submission of the request for confiscation and that

the condition of the population in the Gaza Strip did not justify a declaration that the maritime blockade was invalid (see claim *in rem* 7961-07-15 **State of Israel v the ship Marianne**).

8. On that decision the Respondent submitted an appeal to the Supreme Court. In discussion of that appeal the Respondent accepted the Court's recommendation to withdraw the appeal in Civil Appeal 3614/17 **The Ship Marianne v State of Israel**.

The maritime blockade on the Gaza Strip is illegal

9. In order for a maritime blockade be legal under the binding rules of the law of sea warfare as set out in the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea (hereafter: "the San Remo Manual"), it must meet several requirements: a maritime blockade must be declared and the warring parties and neutral states must be informed. The declaration must specify the date of the beginning of the blockade, its duration, location and extent; the blockade must be effective, as a question of fact, and be enforced equally and without favour against all maritime vessels, using legitimate methods and arms.
10. The rules of the San Remo Manual, also stipulate, in Art. 102, that in certain cases "[t]he declaration or establishment of a blockade is prohibited" even if the other conditions apply, first, if "it has the sole purpose of starving the civilian population or denying it other objects essential for its survival", and secondly, if "*the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.*" This is the requirement of "proportionality".

The maritime blockade on the Gaza Strip does not fulfil the formal requirements

11. The Applicant has not proven that a maritime blockade has been legally declared, inasmuch as it has not appended the document of declaration, but only secondary documents that derive from the declaration itself. Thus for example the Applicant has submitted, in Appendix 1 of the application, a letter from the Minister of Defence, which instructs the Chief of General Staff to publish the declaration, but no constitutive document that confers judicial and legal validity on the declaration of a maritime blockade on the Gaza Strip has been submitted.
12. And moreover, the announcement of the imposition of the blockade that was appended, also as part of Appendix 1 of the Applicant's application does not fulfil the requirement to prove the existence of the document of declaration, as a declaration of a blockade constitutes a policy change that requires regularization in the framework of legislation, and not an announcement of the imposition of a blockade, which is merely a formal announcement.
13. This state of affairs resembles a situation in which a minister decrees regulations that instruct functionaries in his office to operate within a certain domain when in fact the legislation that authorizes the minister to take action within that domain has not yet been passed. It is clear that in such a situation, it would be forbidden for a minister to decree the regulations in the absence

of authorizing legislation. Accordingly in the matter before us – in the absence of an explicit and effective declaration of the imposition of a maritime blockade on the Gaza Strip, the Minister of Defence cannot order the enforcement of the blockade as was done in Appendix 1.

The absence of an expiry date – Art. 94 of the San Remo Manual:

14. Even if the matter of the declaration has been proven as required, the declaration is still not legal, due to the fact that the announcement to mariners of 06/01/09 stated that the blockade would be imposed “until further notice”, even though international law requires that the declaration specify in detail the period of time in which the blockade will be in effect. From this it also follows that even if it is determined that the declaration was effective and legal at the beginning of the year 2009, that does not prove the legality of the blockade after the passage of nearly nine years from the date of the declaration. Thus it is specified, *inter alia*, in Art. 94 of the San Remo Manual:

“The declaration shall specify the commencement, **duration**, location, and extent of the blockade and the period within which vessels of neutral States may leave the blockaded coastline.” (Emphasis added – G. L.)
15. The Applicant bases its claims of the legality of the blockade, despite the lack of specification of its duration, on both the Honourable Court’s ruling on the matter of the Marianne and on the findings of the Turkel Commission and the Palmer Commission which rejected the claims of the illegality of the blockade. However, the representative of the Respondent will argue in this context that the findings of the Honourable Court in the matter of the Marianne are contrary to the declared purpose of the requirement that the duration be specified. For both the Palmer Commission and the Turkel Commission, although they seemingly allowed the declaration *ex post facto*, pointed out that the lack of a specified duration of time raises a difficulty in that it does not permit the implementation of periodic and systematic review of the effectiveness of the blockade and its effect on the humanitarian situation in the Gaza Strip (see section 60 of the Turkel Commission report¹ and the Palmer Report, sections 150 and 156²). These questions have a direct bearing on the question of the legality of the blockade and are not limited to mere technical requirements, for the absence of a systematic and periodic review of the effectiveness of the blockade and its effect on the humanitarian situation of the population negates the possibility of assessing the legality of the blockade and its consistency with proportionality.
16. The Applicant’s representative has not submitted even one piece of evidence that points to an attempt to carry out a renewed review of the circumstances of the blockade, being content instead with treating that requirement as a mere formal requirement from which no conclusions about the legality of the blockade can be drawn. This despite the fact that nearly 8 years have passed since the publication of the conclusions of the Turkel Commission and 9 years since the maritime blockade on the Gaza Strip was declared, and since then no renewed review or examination of the blockade and its effects on the population in the Gaza Strip has been carried out, the declaration was not updated and no assessment was made of the effectiveness of the

¹ The Public Commission to Examine the Maritime Incident of 31 May 2010: The Turkel Commission. January 2010. https://www.gov.il/BlobFolder/generalpage/alternatefiles/he/turkel_eng_a_0.pdf

² United Nations. Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident. September 2011. http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf

blockade, the harm it causes and its proportionality. In this context it must be pointed out that even in the testimony of the witness (Prosecution Witness 1) before the court, the witness failed to provide answers about any attempt to re-examine the blockade (see protocol from 11/09/17, p. 11, lines 16-17).

17. In addition, the Respondent will argue in this regard that the Applicant is taking an inconsistent position regarding its commitments under the San Remo Manual, in that on the one hand the Applicant is relying on its instructions in order to justify the legality of the blockade and to substantiate the claim that the Applicant is fulfilling the instructions of international law, and on the other hand the Applicant claims that it does not reflect customary law where the Applicant does not fulfill its requirements (Para. 36 of the Applicant's summaries). Also, the Applicant seeks to rely partly on the conclusions of the Turkel Commission and ignores the findings that relate to the purpose of the instruction that establishes the requirement that the duration of the blockade be defined.
18. In effect, by partially adopting the findings of the Turkel Commission, the Palmer Report and the instructions of the San Remo Manual, the Applicant is emptying of content the provisions of the law that are intended to ensure the legality of the blockade, and treats as superfluous the need to conduct a regular and systematic review of the effectiveness of the blockade and its impact on the humanitarian situation in Gaza, questions that touch directly on the proportionality of the blockade and its legality.
19. As stated, the Applicant relies in its claims on the findings of the Turkel Commission regarding the legality of the blockade, despite its findings about the need for a systematic examination of the effects of the blockade and its necessity. This when the Turkel Commission submitted its conclusions in 2011, that is, two years after the declaration of the blockade, and now we are 7 years away from the publication of its conclusions. The Respondent will argue in this regard that the difficulty the Commission pointed to back in 2011 continues to increase as the years pass and in fact the fear that was raised in the findings of the Commission regarding the possible consequences of the lack of review and regular and systematic examination of the blockade, its effectiveness and the harm it causes, has been realized, as attested to by the worsening humanitarian crisis in the Gaza Strip, on which we will elaborate below.

The proportionality of the blockade – Art. 102 of the San Remo Manual:

20. According to the rules set out in the San Remo Manual, along with the formal requirements there are also essential rules according to which a blockade will be prohibited by law in two cases: first, if the sole objective is to starve the civilian population in the enemy's territory or to deny it vital means of survival. Secondly, if the harm that is caused or is expected to be caused to the civilian population is excessive in relation to the direct concrete military benefit the blockade is expected to produce – this is the requirement of "proportionality". Thus Art. 102 of the San Remo Manual stipulates under what conditions the declaration of a blockade will be prohibited:
"The declaration or establishment of a blockade is prohibited if: (a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or (b) the

damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.”

21. In this context the Respondent will argue that the blockade imposed on Gaza does not meet the requirement of proportionality in enforcing the blockade, as the gravity of the harm to the civilian population in the Gaza Strip inestimably exceeds the concrete and direct military advantage.
22. The Respondent will further add that an examination of the proportionality of the maritime blockade as well as an assessment of the efficacy of the blockade need to be done not only regarding the maritime blockade that was imposed in 2009 but also regarding the land closure that was imposed back in 2007, which has the potential to have direct ramifications on the condition of the civilian population in the Gaza Strip. As we have said, in the framework of the policy of the land closure severe restrictions were imposed on the passage of civilian products, the supply of fuel and the movement of people to and from the Gaza Strip (See Decision 34/b of the Ministerial Committee on National Security Affairs, “Israel’s policy towards Gaza (military and civilian)” (19/09/07)) **It will be clear that even after the granting of relief and certain “humanitarian gestures”, no essential change occurred in the state of affairs, as will be indicated in detail below, as Israel continues to prevent economic rehabilitation in the Gaza Strip, and the dependence on Israel remains nearly the same as it was at the height of the closure.**
23. Therefore, the Respondent will argue that it is necessary to examine the legality of the closure in the context of the ongoing control, which creates essential obligations to the civilian population in the Strip. Thus, both on the date of seizure and also today, Israel continues to control the land crossings, the airspace and the territorial waters of the Strip in a way that can prevent the reconstruction and development of the civilian infrastructure in the Gaza Strip, and which aggravates the humanitarian crisis that prevails in the Strip.
24. In light of the above, the Respondent will argue that Israel’s control over the crossings in Gaza as well as the Gaza Strip’s dependence on Israel which is the result of years of Israeli military rule in the area confers on the State of Israel legal responsibility towards the residents of the Gaza Strip. Fitting in this regard are the words of Her Honour the president (ret.) Beinisch in High Court of Justice 9132/07 **Al-Bassiouni v Prime Minister** (30/01/08), who stated the following:

“In the prevailing circumstances, the main obligations of the State of Israel relating to the residents of the Gaza Strip derive from the state of armed conflict that exists between it and the Hamas organization that controls the Gaza Strip; these obligations also derive from the degree of control exercised by the State of Israel over the border crossings between it and the Gaza Strip, as well as from the relationship that was created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the territory, as a result of which the Gaza

Strip is currently almost completely dependent upon the supply of electricity from Israel.”* (See para. 12 of **Al-Bassiouni**).

25. Regarding the question of the existence of a concrete and direct military advantage according to art. 102 of the Manual, the Respondent will argue that the Applicant has not addressed in its summaries the matter of the closure in a way that is helpful in assessing the military advantage conferred by the closure of Gaza in relation to the harm that has been caused to the population. Similarly, the Respondent will argue that the affidavit that was submitted by the Applicant, signed by M., which indicates the security objectives of the closure, stands in contradiction to the fact that the policy of the closure was also in fact implemented as a means of applying economic pressure on the civilian population in the Gaza Strip (see the State’s reply in **Al-Bassiouni**, para. 44).
26. Regarding the other side of that requirement, the Respondent will argue that **the gravity of the harm to the civilian population inestimably surpasses the concrete military advantage of the closure**. In this regard it should be stressed that the conclusions of the Turkel Commission have nothing in them on which to base any finding on the legality of the closure, for those conclusions were formed on the basis of information from nearly 7 years ago, whereas the humanitarian situation in Gaza attests to a trend of conspicuous deterioration that has even become a matter of judicial notice these days.
27. In the affidavit that was submitted by the Respondent, it is argued that the existing restrictions have caused and are still causing the humanitarian crisis in which the Gaza Strip finds itself. The harm that has been caused due to the maritime blockade and the restrictions on land have been detailed extensively in the affidavit on behalf of the Respondent, which is based in part on facts that are known to the declarant personally, and in part based on the facts that are known to the declarant by virtue of his occupation and in part based on the processing of the data and their consolidation as part of the general report.
28. These facts attested that in the last past 9 years the civilian population in the Gaza Strip has suffered from a crisis in the supply of electricity that was caused by Israeli bombardment of the only power station in Gaza, and as well as the decision of the Israeli cabinet to accede to the request of the Palestinian Authority to reduce the supply of electricity in Gaza. As a result of the shortage of electricity in Gaza (about which the submitter of a Public Servant’s Statement, Mr. Maman (prosecution witness 2) also testified), households, businesses, hospitals and schools are suffering from the electricity cuts that last up to 20 hours a day. In fact, **the residents of Gaza are forced to subsist on 3-6 hours of electricity a day**, and those ongoing electricity cuts are causing grave damage to the civilian infrastructure and vital services like medical services and desalination and sewage treatment plants (see para. 8 of the affidavit on behalf of the Respondent).

* English version: http://elyon1.court.gov.il/Files_ENG/07/320/091/n25/07091320.n25.pdf

29. It also emerges from the affidavit that the closure of Gaza and especially the electricity crisis have had grave ramifications on the healthcare sector in Gaza. Thus for example, in consequence of the electricity cuts the hospitals operate at minimal capacity, services are delayed following electricity cuts and sterilization services are reduced, which leads to high levels of contamination, and lack of capacity to respond to vital medical needs of the residents of the Strip.
30. Moreover, due to the lack of electricity the hospitals are forced to use generators in order to operate equipment, lighting, and in effect for the continuous operation of the hospitals. However, due to the shortage of fuel and the lack of means to buy fuel, many hospitals are forced to completely close or partially suspend their services (see World Health Organization report from 27/4/17 at the link: <http://www.who.int/news-room/detail/27-04-2017-thousands-of-lives-at-risk-as-gaza-public-hospitals-face-fuel-and-electricity-crisis>). It will be emphasized that even in the testimony of Prosecution Witness 2 before the court, the witness confirmed this fact (see protocol from 12/11/17 on page 18, line 20). This state of affairs endangers the lives of about 4,000 patients every day, including babies, patients in intensive care, and patients who require weekly dialysis (see World Health Organization report from 27/4/17).
31. Needless to say, this state of affairs, along with the fact that there is a serious shortage of medical equipment, medications and personnel due to the restrictions on the entry of supplies as part of the policy of closure among other reasons, as well as the increase in food insecurity, poverty, pollution and lack of access to clean water, puts the infrastructure of the healthcare system in the Gaza Strip in danger of collapse and increases the barriers that stand in the way of the rebuilding and development of the healthcare system in Gaza. (See paras. 150-153 of the full report of the Al Mezan organization, which appears in the defence witness' statement of opinion, at this link: http://mezan.org/uploads/files/22_Nov_GAZA_CLOSURE_FOR_UPLOAD_Full_submission.pdf)
32. Regarding the policy on the departure of Gaza residents to Israel and the West Bank, contrary to what was reported by Prosecution Witness 2, in May 2017 the processing time for "non-urgent" applications for exit permits from Gaza was lengthened from 23 days to 70 working days. In addition, also in the cases of Palestinian patients applying for exit permits through the Erez crossing, the trend has been for approvals for entry to decline. In 2017 up to the end of November, 54% of the applications of Palestinian patients for permits to travel through the Erez crossing were approved, whereas in 2016, 62% were approved. Most of the applications that were not approved in 2017 were not met with refusals based on security reasons, but were delayed – that is, they were not processed on time, such that no reply was received by the time of the hospital appointment (See the report of the Office for the Coordination of Humanitarian Affairs at this link: <https://www.ochaopt.org/content/palestinian-access-gaza-strip-declined-sharply-2017>).
33. These numbers should be read against the background of the deterioration in the condition of the healthcare system in the Strip as detailed above. They all produce the consequence that vital and life-saving services and treatments are not available to the residents of the Strip, and

so the dependence of patients who are residents of the Strip on the services of Israeli hospitals and Palestinian hospitals in the West Bank only continues to grow. But despite the dependence of Gaza Strip patients on Israeli and West Bank Palestinian medical services, the change that is manifest in the trend of issuing crossing permits to Israel and the West Bank to Palestinian patients points to a sharp decline in the number of patients who are referred for medical treatment outside the Strip (See the humanitarian monthly of the United Nations Office for the Coordination of Humanitarian Affairs: <https://www.ochaopt.org/content/palestinian-access-gaza-strip-declined-sharply-2017>).

34. It also emerges in the affidavit on behalf of the Respondent that the closure has destructive effects on the water and sewage infrastructure. Because the restrictions imposed on the entry of resources to the Gaza Strip for purposes of repair and reconstruction of the water and sewer infrastructures, along with the damage to the water infrastructure that was caused by Israeli bombing, have led to a situation of shortage of clean water for household use, while 100 thousand residents remain cut off from the public water supply, and sanitation conditions have deteriorated (see para. 9 of the affidavit).
35. According to the affidavit of the defence witness Mr. Yahya Muharib, which was supported by data from the World Health Organization, the main source of water in the Strip is the Gaza coastal aquifer. Indeed, in view of the lack of electricity supply and the shortage of fuel needed to operate the desalination and purification facilities, a situation has been created in which the level of pollution in the water is high, and untreated sewage is poured into the sea and contaminates the main source of water in the Strip, rendering 96% of the water in the Strip unfit for human use by the World Health Organization's standard. In addition, according to a UN report from 2012, the issue of water in the Gaza Strip is one of great concern, and there is a fear that by the year 2020 the Gaza Strip will be uninhabitable. (See paras. 144-146 of Al-Mezan's full report (link above), and the World Health Organization report from 22/09/16 at the link: <http://www.emro.who.int/pdf/emhj-volume-22-2016/volume-22-issue-12/water-usage-in-the-gaza-strip-recommendations-from-a-literature-review-and-consultations-with-experts.pdf>).
36. In fact, due to the lack of available sources of water in the Strip that do not draw on the coastal aquifer, the residents of Gaza are forced to reduce the amount of water they consume, the overall consumption for household use in 2016 being only 58.7 million cubic metres and the average consumption for household use that year was 91.2 litres per person per day, while the minimum recommended by the World Health Organization is 100 litres per person per day.
37. In this context it should be pointed out that the problem of water in Gaza has also preoccupied Prime Minister Binyamin Netanyahu, who, in his statement in June 2016 said the following: "When there is not enough water in Gaza, and Gaza is in the process of gradually drying up, the aquifers become polluted and when the aquifers become polluted, this is not limited to the Gaza side of the aquifer but also passes over to the aquifer on our side. Therefore, it is in Israel's clear interest to deal with the water problem in the Gaza Strip. Electricity: When there is not enough electricity, various problems arise, including those having to do with sanitation, and when there are outbreaks, the outbreaks do not stop at the fences. This is both a humanitarian interest and

an outstanding Israeli interest.” (See Israeli Ministry of Foreign Affairs, “PM Netanyahu’s statement at his press conference in Rome”, 27 June 2016.

www.mfa.gov.il/MFA/PressRoom/2016/Pages/PM-Netanyahus-statement-in-Rome-27-June-2016.aspx)

38. Regarding Israel’s part in the creation of the water crisis in Gaza, as is pointed out above, a large part of the shortage of water is due to the collapse of the water and sanitation infrastructure that followed rounds of fighting in Gaza, and persisted following the restrictions that Israel has imposed on the entry of equipment for the purpose of implementing plans to rebuild the water infrastructure and to set up desalination and sewage-treatment facilities. In addition to this, the shortage of electricity supply is also a major obstacle to dealing with the problems related to sanitation and the advancement of solutions for building desalination facilities.
39. It also emerges from the affidavit submitted by the Respondent that the vital civilian infrastructure in Gaza has sustained great damage, which is manifest both in the shortage of housing units after the destruction that was caused during military operations over the past decade, and the impossibility of repairing and rebuilding the infrastructures after the ban on the entry of certain materials needed for reconstruction and infrastructure repair (see para 11 of the affidavit).
40. Over the course of Operation “Protective Edge”, extensive damage was caused to residential buildings in the Gaza Strip due to the Israeli security forces’ bombardments in the area. After that round of fighting a total of 8,377 housing units were entirely destroyed and 23,597 were partly destroyed, in consequence of which about 7,700 Palestinian families were displaced as of February 2017 (see <https://www.ochaopt.org/content/funding-gaps-increase-uncertainty-and-hardship-internally-displaced-persons-idps-gaza>). These numbers are added to the 5,000 housing units that were destroyed in previous rounds of fighting and which have not yet been rebuilt (See para 158 of the Al-Mezan report: www.mezan.org/uploads/files/22_Nov_GAZA_CLOSURE_FOR_UPLOAD_Full_submission.pdf).
41. Regarding this matter, one of the manifestations of the effect of the Israeli blockade and land control on the crisis in Gaza is the present housing crisis. Inasmuch as due to the restrictions that are imposed on the importation of cement and building materials to the private sector in Gaza, a situation has been created in which there is a demand for large quantities of building materials to build and repair housing units, but the quantities of materials that have been approved for entry to the Strip do not suffice to implement the plans for rebuilding in the time allotted (See the Al Mezan report, para. 160, pp 75-76).
42. In fact, although the importation of cement to Gaza was resumed in 2016, the number of trucks that crossed was limited to 90 trucks per day through the UN Gaza Reconstruction Mechanism, compared to 120 trucks a day before 2016. Due to that restriction, a situation was created in which 33 thousand families received permission to acquire cement through the Gaza Reconstruction Mechanism, but only 4% of the required cement was imported. (Link: <https://www.ochaopt.org/content/intensified-restrictions-entry-building-materials-delay->

[completion-housing-projects-gaza](#)). And in fact only 11.8% of the housing units that were destroyed during Operation “Protective Edge” were successfully rebuilt. (See the Al-Mezan report, para. 161).

43. On the economic level, the current state of affairs is having a prolonged and widespread effect on the economic situation in the Gaza Strip and is causing the nearly complete paralysis of the economy of Gaza. The combination of the various effects of the closure on the economic level have caused a sharp rise in unemployment, which has reached up to 41%, among the highest levels of unemployment in the world. This is in addition to the decline in the annual GDP which in the past decade went from 1,096 dollars per person to 970 dollars in 2014. Thus, despite the Applicant’s claims that the State is permitting the entry of sufficient quantities of goods and merchandise, due to the economic collapse that has befallen the area, residents of the Strip do not have access to those resources in order to satisfy their basic needs including food, medication, fuel, electricity, water etc. (See para. 19 of the full Al-Mezan report). In consequence, 47% of the households in the Strip are suffering from food insecurity and about 80% of the residents of the Strip rely on humanitarian aid (Para. 17 of the affidavit).
44. In this context the effect of the closure on the agricultural and fishing sectors in Gaza, two sources of employment, livelihood and food that remain among the few means of fulfilling economic needs and sources of food security left within the borders of Gaza, must be examined.
45. Agriculture has always been a basic product in the Gaza Strip and constituted a central branch of the economy according to the affidavit submitted on behalf of the Respondent. But the policy of closure that Israel is imposing on the Strip has had very harmful effects on agricultural production.
46. First, the procedures employed by the army to enforce the buffer area, which can include opening fire towards farmers who enter the buffer area near the border fence, as well as spreading herbicides in agricultural lands in the buffer area, which have reduced the areas available for cultivation, and also created a highly deterrent effect on farmers, who are forced to undergo a significant risk to their lives to access their lands in order to work the fields, which gravely harms their ability to support themselves and their families (See p. 81 in Al-Mezan’s full report).
47. Thus for example, according to the UN Office for the Coordination of Humanitarian Affairs for the defence of civilians, in October, November and December 2017 soldiers opened fire on farmers and fishermen from the Gaza Strip on 68 different occasions in order to enforce the restrictions on access to land along the border fence and fishing grounds.
48. Moreover, in consequence of the procedure for enforcing the buffer zone by spreading herbicides on agricultural areas, many cultivated areas have been damaged, including areas that are more than 100 metres from the border fence in the buffer area, and serious damage has been inflicted on crops. This state of affairs, along with the restrictions imposed on the importation of materials necessary for cultivation, as well as restrictions on movement that have

been imposed as part of the policy of closure on farmers and their representatives who work outside the Strip, have gravely harmed the capacity of the agricultural sector in the Strip to develop (See p. 82 of Al-Mezan's full report). In addition to the heavy restrictions farmers in the Strip have to contend with, the condition of the market within the Strip is only getting worse, which adds to the hardship of the farmers, because due to the restrictions on the export of goods the local market in the Strip has been flooded, with the result that the prices at which agricultural products are sold in the market barely cover the costs of production (See p. 84 of the report).

49. Regarding the effects of the blockade on the fishing sector in Gaza, which, in the face of shortages of food and employment remains as a significant source of employment, the Respondent will argue that the ramifications of the maritime blockade are most grave. According to the fishery branch of the agriculture ministry in Gaza, as of today there are 3,700 fishermen for whom the sector is their source of livelihood. From the affidavit that was submitted on behalf of the Respondent, signed by Mr. Yahya Muharib, it emerges that the Israeli navy makes a practice of opening fire with live ammunition, wounding and sometimes killing Palestinian fishermen, as well as systematically confiscating their fishing equipment, including among other things, fishing boats, nets etc. All this for the purpose of enforcing the maritime boundaries. (See para. 181 of the full Al-Mezan report)
50. Over the course of most of the period of the maritime blockade on Gaza, the fishing area has been restricted to 3 miles from the Gaza coast, which has caused limitations on the catches and incomes of Gaza fishermen. It will be emphasised that throughout the period of the blockade changes have been made to the fishing boundary, which reached its peak with the expansion of the fishing area to up to 9 miles. However, those changes as well as the constriction of the fishing boundaries have been made in an arbitrary way, such that the fishermen cannot know or anticipate when they will be violating the fishing boundaries and when they will not (See paras. 184-186 of the full report of Al-Mezan). Consequently, a chilling effect has been created, which deters fishermen from practicing their trade due to the high level of danger involved. Moreover, due to the reduction of the range permitted for fishing, most of the fishing activity is centred and concentrated in a restricted area, which harms the availability of fish and the breeding grounds of the fish. Accordingly, the restriction of the fishing sector is a direct consequence of the policy of blockade on Gaza, the policy of enforcing the blockade by arrests and gunfire, the reduction of the area permitted for fishing, the confiscation of boats and fishing equipment, restrictions on the export and marketing of fish, all this has caused the fishing sector in Gaza to contract and left most of its residents who worked and made their livings from fishing without livelihood and employment.
51. **In light of the above, the Respondent will argue that the restrictions imposed by the maritime blockade as well as the land closure of Gaza are leading to a bleak situation that amounts to a serious humanitarian crisis for the civilian population in Gaza. These restrictions violate international humanitarian law and their effects are manifest in acute economic collapse, inability to rebuild and develop, and inevitable humanitarian crisis.**

The evidence of the parties

The evidence of the Applicant

52. The Applicant submitted two affidavits of primary evidence from the witnesses **A.** (marked as Prosecution 1) and **M.** as well as a Public Servant Statement from Major Tzidki Maman, the head of the Economic Coordination Department at the Coordination and Liaison Administration for Gaza (Prosecution 2).
53. Regarding the Public Servant Statement (Prosecution 2), the Respondent will argue that the Public Servant Statement that was submitted by the Applicant presented information that is based mostly on procedures for the passage of people and merchandise to and from Gaza, which in no way contradict any of the data that were submitted in the affidavit on behalf of the Respondent, and are in no way instructive about the humanitarian situation that prevails in Gaza. Those data do not attest to anything without being presented as part of the broad picture regarding the humanitarian situation in the Gaza Strip, as can be learned from the affidavit on behalf of the Respondent.
54. In fact, the Respondent has not claimed at all that the Applicant does not permit the entry of goods into the Gaza Strip or that it does not permit exports, but rather that the existing restrictions are getting worse and continue to undermine development and contribute to the high rate of unemployment in Gaza as well as the rise in the percentage of households that suffer from food insecurity. As stated, harm that was caused to the civilian population due to the closure has been expansively detailed in the affidavit on behalf of the Respondent, which relies in part on the declarant's personal knowledge as well as on data from human-rights organizations.
55. As will be detailed below, it emerges from the testimony of Mr. Maman (Prosecution 2) that the factual claims in the Public Servant Statement in no way demonstrate that the State of Israel is meeting its humanitarian obligations towards the residents of the Gaza Strip. In fact, Mr. Maman's testimony in the court indicates that his familiarity with the humanitarian situation in the Strip is incomplete and superficial, and also shows the gap between the procedures and data detailed in the Public Servant Statement and the actual situation and their implementation in practice.
56. Thus for example, regarding the policy of permits for commerce or entry into Israel, Mr. Maman testified that there has been no change in the policy of issuing entry permits to Israel or to the West Bank, but he affirmed that the number of commerce permits was reduced (See the protocol of proceedings from 12/11/17, p. 22, lines 1-4). Moreover, Mr. Maman indicated in his testimony that no change has been made to the policy of commerce permits or permits to enter Israel and the West Bank, but the facts that emerge from the OCHA report indicate that the number of departures of Palestinians from Gaza through the Erez crossing, which is under Israeli control, declined by nearly 50% on average: from 13,200 per month in 2016 to about 7,000 per month in 2017 (Link to the report: <https://www.ochaopt.org/content/palestinian-access-gaza-strip-declined-sharply-2017>).

57. Moreover, notable in Mr. Maman's testimony to the court is a lack of knowledge about relevant and central subjects related to the closure of Gaza and Israel's policy in the Strip, which raises doubt about the reliability of his declaration as an indication of the existence or absence of violations of humanitarian obligations in the Gaza Strip, or anything related to the existence of the humanitarian crisis in the Strip. Thus for example, in the course of his testimony before the court Mr. Maman submitted that the list of banned materials was last updated in December 2015. But when he was asked by the representative of the Respondent about the frequency with which the list is updated, the witness submitted that it was done according to need, without detailing what the need is, and what are the considerations that cause security officials to update the list (See protocol from 12/11/17, p. 17, lines 10-13). Subsequently when the witness was asked about the changes that have been apparent in the political situation in Gaza and the opening of the crossings facing the Egyptians, the witness replied that he "do[es] not follow developments on the Egyptian scene across from the Strip". When the witness was asked about the agreement that is being formulated between the Palestinian Authority and Hamas in the Gaza Strip, he replied again that he could not confirm, because he "know[s] publications on the subject" and no more (See protocol from 12/11/17, pp. 17-18).
58. The Respondent will argue in this context that the witness' lack of expertise on what is actually happening on the ground attests to two possible things: the first is that it is doubtful if Mr. Maman's testimony can be relied on as an indication of the humanitarian situation in Gaza, and the second is that the policy of closure of Gaza, despite the instructions of international law, is not influenced by, updated for or adapted to political and factual changes that are taking place in the Strip (which is inconsistent with the requirement of proportionality and effectiveness).
59. As an additional indication that the Public Servant Statement presents an incomplete picture and is not instructive about the humanitarian situation in the Strip, the Respondent will argue that even the easing of the policy of restrictions on the passage of merchandise and people, which the submitter of the Public Servant Statement testified about, did not change the bleak situation in reality. In fact, the remaining restrictions continue to reduce the possibility of development, reconstruction and solutions to the housing crisis caused by the destruction of houses during the rounds of fighting, the crisis in health and sanitation and food insecurity, and also contribute to the high level of unemployment in Gaza.
60. Thus for example, in Mr. Maman's testimony as well as the Public Servant Statement that he testified about, the number of trucks allowed to enter and leave Gaza was pointed to as an indication of the "free passage" of goods and merchandise to and from Gaza. Similarly in the course of his testimony he testified that the number of trucks that are actually entering does not reach the permitted ceiling, and that in fact commercial opportunities that are open to the residents of Gaza are not being taken advantage of, according to him. However, this fact must be read against the background of a broader picture that includes the population's lack of purchasing power, which derives from the high rate of unemployment and the economic hardship from which the Strip is suffering due to years of closure and rounds of fighting. This fact must also be read against the background of the grave damage done to the Strip's

production capacity – both in light industry and agricultural produce, industries that have been harmed by the lack of electricity, clean water and raw materials.

61. In addition, when the witness was asked about the state of the water infrastructure in the Strip he replied that he does not know the facts related to the decline in the amount of water available per person on average, and that to the best of his knowledge there is no shortage in the Gaza Strip. This is in contradiction to testimony and facts that have even become a matter of judicial notice, according to which the state of the water and sanitation infrastructures in Gaza has reached the stage of a humanitarian crisis and is causing a deterioration in the conditions of the residents of the Strip.
62. Additionally, facts about the housing shortage which derives from the restrictions imposed due to the policy of closure of Gaza, the water hardship that has now become a matter of judicial notice, as well as the dilapidated state of the sanitation system were all unknown to the witness, as reflected in his replies under cross-examination. (Pp. 19-21 of the protocol from 12/11/17)
63. If the testimony of Mr. Maman was supposed to be instructive about the humanitarian situation that prevails in the Gaza Strip due to the closure policy, his testimony before the court actually shows expertise on the instructions of the Coordinator of Government Activities in the Territories, but not necessarily on the implementation of those instructions or even any familiarity with basic facts about the humanitarian situation in the Gaza Strip. Thus for example, when Mr. Maman (Prosecution Witness 2) was asked about the humanitarian activities of international organizations, he replied in a most laconic way that amounted to indicating that there is some activity by international organizations in the areas of medicine and provision of food. Therefore it is not clear how a witness who does not know basic facts such as the percentage of the residents who rely on humanitarian aid can testify about the humanitarian situation in the Strip (See protocol of deliberations from 17/12/17, p. 22, lines 15-21).
64. In addition, the Respondent will argue that not only is Mr. Maman's testimony not instructive about the actual humanitarian situation in the Gaza Strip, inasmuch as, as indicated above, the representation of the legal status of the instructions and procedures of the Coordinator of Government Activities in the Territories does not contradict the facts that have been presented by the Respondent, but moreover his testimony actually confirms those facts in certain cases. Thus for example, the witness confirmed the matter of the shortage of electricity in Gaza, and the fact that this situation has caused increased use of generators (See protocol of deliberations from 12/11/17, p. 18, lines 20-21), and Mr. Maman also confirmed that due to the shortage of fuel a number of hospitals have been forced to close (*ibid*, lines 29-30), the high level of unemployment among the residents of Gaza (*ibid*, p. 20, line 8), as well as the decline in the fishery in the area permitted for fishing on the coast of the Gaza Strip (*ibid*, p. 20, line 23).
65. In light of the above, it appears that there is nothing in the Public Servant Statement and/or the testimony of Mr. Maman that is instructive about the humanitarian situation that prevails in the Gaza Strip, and even more, there is nothing in the facts that were presented, in isolation from the broader picture related to the humanitarian situation in the Gaza Strip, to contradict even

one of the facts presented by the Respondent and that are supported by reports from the World Health Organization and the United Nations Office for the Coordination of Humanitarian Affairs, and so they are lacking in value regarding the question of the humanitarian crisis of the civilian population in the Strip. Accordingly, the information presented by the Respondent should be considered to be facts that are not under contention.

66. Regarding the affidavit submitted by Lieutenant-Colonel A. (Prosecution 1), according to what is stated in the affidavit, all the facts that are claimed within it are “by virtue of his office”, and are not known to the declarant from personal knowledge. There is therefore no debate over the fact that the information in the affidavit was not registered through the unmediated senses of the witness, as required for him to attest to the truthfulness of the words. Therefore the Respondent insisted on examining the witness, and his testimony was heard in the deliberations of 11/09/17.
67. As will be detailed below, it emerges from the testimony that the factual claims in his affidavit are not actually known to him from personal knowledge, such that he could not at all affirm them by declaration. It also emerges that the Applicant is in possession of relevant documents that relate to matters on which the witness wanted to testify, but without explanation that evidence was not submitted.
68. In paras. 7 and 8 of his affidavit the witness Lieutenant-Colonel A. declared that upon the flotilla’s approach to the blockade area the navy began to transmit messages to the ship in an attempt to convince the crew not to violate the blockade, and he also declared that in the context of the transmission of those messages it was suggested to the crew that the ship dock at the port of Ashdod and be transferred to the Gaza Strip through the land crossings. That suggestion was rejected by the flotilla’s crew. The witness also declared that representatives of the navy tried several times to convince the crew to change the ship’s course, and those messages too were answered with refusal. When the witness was asked about his part in transmitting the messages, the witness replied that he was not the one who had transmitted the messages, but he was listening to the radio and heard the messages and the captain’s replies (p. 12, line 22). When he was asked if the radio communication was recorded or transcribed, he replied that the radio communication was transcribed, but that he did not know if it was recorded (p. 12, line 25). When he was asked about the transcription he replied that the transcription was not with him, and in the same context the representative of the Applicant indicated that there is a transcription of the radio networks and that it was no problem for him to pass them along, but he never did. (P. 12, line 1)
69. In paragraph 5 of his affidavit Lieutenant-Colonel A. declared that the objective of the flotilla was to break the maritime blockade on Gaza and that the crew declared that it was not their intention to provide humanitarian aid in the framework of the flotilla. Indeed when the witness was asked if what was written in para. 5 was from his personal knowledge he replied that part of the information he saw on social networks, part from intelligence officials in the navy, and part he had heard with his own ears on the radio networks. Accordingly, in para. 3 the witness declared that since the imposition of the blockade, the navy has enforced the blockade effectively and that it does not discriminate. When the witness was asked about the blockade

itself, its duration, or the implementation of the conclusions of the Turkel Commission in that regard, he replied that he had not come to defend the legality of the blockade, and that there are other parties who are responsible for that (p. 11, lines 16-17). When the witness was asked about the purpose of the blockade, the witness replied that “as far as he knows” the imposition of the blockade was done for security reasons, and that once in a while the reasons for continuing the blockade are examined (p. 13, lines 23-24). And when he was asked to give details about that examination alleged by him, he could not answer regarding when discussions of that kind take place and who participates in them (p. 13, lines 23-30).

70. In light of the known rule according to which the failure to provide relevant evidence that is in a party’s possession acts to the detriment of the party and leads to the inference that if the evidence were presented it would not support the party’s claims, the appropriate weight must be given to the non-provision of the evidence that the Applicant failed to provide on the matter at hand, as emerged *inter alia* from the cross-examination of its only witness.
71. Regarding the affidavit that was submitted by M., in which the witness made a declaration about the security advantage of the maritime blockade imposed on Gaza, M. testified in his affidavit that the opening of the crossing-points for free passage of dual-use products and the free passage of “activists” who leave the Strip and return would constitute a significant security risk to the State of Israel.
72. However, that objective, as was represented in the Applicant’s affidavit, is not consistent with the position of the State in its response to the appeal at the High Court of Justice **Al-Bassiouni**, according to which part of the policy of closure is for the purpose of applying pressure on the civilian population and thereby to influence the Hamas regime in Gaza. Thus for example, in para. 23 of the preliminary response from the State, it was claimed that the political security cabinet’s decision to cut electricity and fuel derived from “the right of the State to decide that it does not intend to be economically connected to or economically to aid the other side in the conflict, or to act by means of ‘economic warfare’.” (See para. 23 of the Respondent’s preliminary response in High Court of Justice **Al-Bassiouni**). And moreover, those objectives, which diverge from clear security/military objectives, were also imputed to the closure by the Turkel Commission (Para. 50 of the Turkel Commission).

The Respondent’s evidence

73. The Respondent will argue that whereas the Applicant agreed to the submission of the affidavit of Attorney Yahya Muharib for the Respondent, and declined to question it by cross-examination, it cannot now argue against the submissibility of that document. The Applicant cannot have it both ways, both to decline to conduct a cross-examination in the course of which it could have clarified which parts of the affidavit are from personal knowledge and which ones are not, and also to argue against the submissibility of the entire document. Thus, to the extent that the Applicant had arguments regarding parts of the affidavit that are not from the personal knowledge of the declarant, the Applicant could have requested clarification at the very least, for included in that affidavit were considerable parts [composed of] of facts that are from personal knowledge, and its other part is based on data that the declarant processed and he had direct familiarity by virtue of his function as lawyer in the organization that formulated that report.

74. Therefore, that affidavit should be given full weight in the absence of any evidence to refute its contents, all the more so in light of the fact that the Respondent met the burden of submitting the evidence about the question of the humanitarian crisis that prevails in the Strip and it was upon the Applicant to submit evidence to refute it.

Obligations that derive from Israel's ongoing control over the borders of the Gaza Strip

75. An examination of the legality of the maritime blockade requires considering additional norms that are established in international law, especially in the laws of belligerent occupation and human-rights laws, for the reasons that will be detailed below.
76. The Respondent will argue that the illegality of the closure does not derive only from the failure to meet the requirement of proportionality and the other conditions that are set out in the San Remo Manual, but derive from the violation of human rights that are protected in the rules of international humanitarian law.
77. As was described above, Israel still controls the Gaza Strip despite the withdrawal of the military presence on the ground. In fact, Israel effectively controls many and significant aspects of the lives of the residents of the Gaza Strip by creating a situation in which vital components in the lives of residents of the Strip are subject to the authority of a foreign government. Thus, Israel's nearly exclusive control over the borders of Gaza, expressed in the restrictions on the passage of merchandise and people through its land crossings, as well as the control over vital necessities such as electricity and fuel, on which the existence of normal life depends, along with the maritime blockade that prevents trade with third countries, render Israel the exclusive controller of the connection between Gaza and the world.
78. In consequence of this, Israel's obligations towards the Gaza Strip do not derive only from the laws of armed conflict but also by virtue of Israel's ongoing control over the land and sea borders of Gaza, which, as described above, rises to the level of effective control under the meaning of Article 42 of the Hague Regulations (Annex to the Convention: Regulations respecting the Laws and Customs of War on Land). Those obligations were also recognized by the High Court of Justice **Al-Bassiouni** in which it was stipulated that the obligations of the State of Israel towards the Gaza Strip were derived not only from the laws of armed conflict, but also by virtue of Israel's ongoing control over Gaza's crossing-points as well as Gaza's dependence on Israel that has been created in certain contexts (See paragraph 12 of the **Al-Bassiouni** case).
79. It will be emphasized that the imposition of enhanced obligations on the State of Israel by virtue of the laws of occupation is required also by the purpose of humanitarian law, that is, the protection of civilians who are subject to the decisions of a foreign power. From that it follows that the application of the laws of belligerent occupation on the activities of Israel towards the Gaza Strip are not binary but dependent on context. Thus, in areas where it is clear that the State continues to control decisively, the State has duties by virtue of the laws of occupation to permit the supply of vital products including electricity, fuel and spare parts, and the obligation to ensure the possibility of normal life in Gaza to the extent that its existence is dependent on the supply of fuel, electricity and other products.
80. In addition to the duties that derive from international humanitarian law, there is an explicit ban on harming human rights including freedom of movement, the right to livelihood, the right to

health, the right to family life and more. In the context of the guarantee of conditions for sustenance, the restrictions on the passage of goods acquires double significance, for as described above, those restrictions harm the right to conditions for a decent life, including the right to food, a right that is anchored in the Universal Declaration of Human Rights and in central conventions on human rights. Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights (1966), which Israel ratified in 1991, states the following:

“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”

81. It must be pointed out that the standard set by the International Convention on Economic, Social and Cultural Rights (1966) for the right to food is higher than freedom from hunger and refers to the broader meaning of the right to adequate food, and the right to health and welfare. The policy of land and sea closure on Gaza entail grave harm to the right to food, not only due to the restrictions on the passage of food products to Gaza but especially due to the harm caused to the economy of Gaza due to the policy of economic warfare the State of Israel is applying against the Gaza Strip.
82. Regarding the extent of Israel’s duty towards Gaza as derived from the right to food, in consideration of the extent and duration of its control over Gaza’s channels of commerce and its decisive influence on the economy of the Strip, Israel is obliged at the very least to respect that right, that is, not to take measures that actively violate the right of Gaza residents to food. The policy of economic warfare in general, and the maritime blockade as part of it, contravenes that responsibility.
83. In light of the above, the Respondent will argue that Israel’s policy of imposing restrictions on the crossings in Gaza as well as the maritime blockade is contravening Israel’s responsibility according to the relevant laws of war, as well as duties derived from the duration and extent of Israel’s control over Gaza’s land borders and its territorial waters. As detailed above, that control engenders control over the economy of Gaza as well, and in consequence also over the conditions of sustenance of its residents.
84. **An examination of the relevant provisions of international humanitarian law shows that the policy of closure stands in contradiction to Israel’s duty to permit the entry of supplies at an adequate rate (Articles 55 and 59 of the Geneva Convention) and also violates the right of Gaza residents to reasonable conditions of sustenance, especially the right to adequate food.**

The Respondent’s activity falls under the right to freedom of protest

85. The Respondent will argue that the activity of the flotilla falls under freedom of expression and protest, for they are intended to raise awareness of the ongoing blockade on the Gaza Strip and to protest against it, as well as to stimulate public discussion of the subject and encourage international political activity to bring it to an end. That objective is found in the Respondent’s declarations and it can be learned from the fact that no humanitarian supplies or any other supplies that were supposedly intended to be taken to Gaza were on board the flotilla.

86. Therefore, in order to examine the legality of the confiscation, it is necessary to answer the question of whether political protest against the closure of Gaza constitutes a threat that justifies the seizure of the boat and justifies its confiscation.
87. The right to freedom of expression and protest is anchored in Art. 19 of the Universal Declaration of Human Rights that sets out the conditions for defence of freedom of expression and freedom of protest, accordingly:
- “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”
88. Additionally, the defence of freedom of expression and freedom of protest found its place in the International Covenant on Civil and Political Rights (1966), which Israel signed and ratified in 1991, thereby conferring binding force on its provisions. Under the International Covenant on Civil and Political Rights, the right to freedom of expression and protest anchored in Art. 19 of the Covenant includes within it the right of every person to seek, receive and impart information and ideas of every kind regardless of borders, whether orally, in writing, in print or in any other medium they choose. The rights to freedom of expression and protest as anchored in the above-mentioned Covenant constitutes a necessary condition for the preservation of the principle of transparency and accountability, two vital principles for the protection and promotion of human rights (See para. 3 of General Comment No. 34 on Article 19 of the ICCPR).
89. The defence of freedom of expression by virtue of Art. 19 of the Covenant also applies *inter alia* to political expression and criticism of public policy as well as discussions about human rights (See para. 11 of General Comment No. 34 of Art. 19 of the Covenant on Civil and Political Rights), and it obliges states that are party to the Covenant, including all their authorities, to respect and to guarantee the right to freedom of expression. The obligation imposed on states by virtue of Art. 19 is not absolute and there is discussion in subsection (3) of that provision, which allows restriction of the rights to freedom of expression where the restriction is required for the protection of the reputations of others and for the protection of national security, public order and public health, any such restriction needing to be stipulated in legislation.
90. In this context the Respondent will argue that in the matter at hand the seizure of the ship and preventing it from reaching its destination constitutes a violation of the right to freedom of expression under Art. 19 of the Covenant. This is because the activities of the ship constitute an act of legitimate and non-violent symbolic protest, the purpose of which is to express opposition to the policy of isolation and the maritime blockade imposed on Gaza which has brought about a grave humanitarian crisis in the Strip. The operators of the flotilla never wanted or intended to actively interfere in the military and political operations they are protesting against, and the purpose of sailing to the coast of the Gaza Strip was only to demonstrate a presence in the area.
91. In one of its rulings the European Court for Human Rights has interpreted Arts. 10 and 11 of the European Covenant on Human Rights that anchor the right to freedom of expression and association, such that the only justified restriction on the realization of that right is that its realization be “peaceful”, thus:

“the freedom to take part in a peaceful assembly – in this instance a demonstration that had not been prohibited – is of such importance that it cannot be restricted in any way, even for an avocat, so long as the person concerned does not himself commit any reprehensible act on such an occasion.” (See **Ezelin v. France, ECHR, 26 April 1991, at para. 62**)

92. Accordingly, whereas the crew chose to realize their right to demonstrate and to protest by sailing in a flotilla as a symbolic act that was intended to draw widespread attention to the meaning of the blockade and to stimulate international public discussion of the subject, and whereas that objective is explicitly included in the protection that the Covenant confers under the right to freedom of expression, the seizure of the flotilla constitutes an attack on the right to freedom of expression under the International Covenant on Civil and Political Rights.
93. It would be superfluous to point out that the pretext for seizing the ship does not fall under any of the conditions specified in subsection 19 (3) of the Covenant on Civil and Political Rights, and on that there is no disagreement even from the Applicant, for it is not argued that the boat constituted a security danger to the State of Israel, nor was there any equipment on board the flotilla that could have represented a danger to Israel’s security or the peace of the public.
94. Therefore, whereas the activities of the flotilla as it sailed towards the Gaza Strip fall under the right to freedom of expression and protest, and the purpose of which was explicitly indicated in declarations of the operators of the flotilla that they were intended to express protest against a hostile policy that violates the basic human rights of the residents of the Gaza Strip and contradicts the rules of humanitarian international law, the seizure of the ship is comparable to silencing protest, in violation of obligations imposed on the State of Israel by virtue of its commitment to the Covenant.
95. Additionally, the Respondent will argue that the seizure of the ship also violates the right of the crew to demonstrate under Israeli law by virtue of the right to freedom of expression. As is known, freedom of expression is one of the fundamental values of a democratic state, and it is recognized in Israeli jurisprudence as one of the basic human rights in Israel, that it is the “heart and soul” of democracy, which is the first of the freedoms on which a democratic regime is based (See High Court of Justice 6126/94, 6143/94, Giora Senesh *et al* v Broadcasting Authority *et al*, Piskey Din [Judgments] 53(3), 817, section 9, His Honour A. Barak).
96. The Respondent will also argue that whereas the ship was intercepted and seized before it had entered the area of the maritime blockade on Gaza, and before it was possible to consider the consequences of the ship’s entering the Gaza coast, an arbitrary and sweeping violation of the crew’s right to freedom of expression and demonstration took place. For according to Israeli jurisprudence, the defence of freedom of expression and demonstration shall cede to public considerations and interests when the limitation placed on the right to demonstrate has been made while balancing freedom of protest and the public interest. However, in this case, preventing the protest in advance and thwarting any possibility of its taking place constitutes a grave attack on freedom of expression, as in this way no examination of the harm caused by the flotilla’s protest, if any, to public or security interests was possible. In other words, the decision that struck at freedom of expression, manifest in the seizure of the ship at a distance of 20 miles from the boundary of the maritime blockade on Gaza was made without any basis in adequate

factual grounds that rendered possible an examination of the balance necessary to limit freedom of expression, and therefore was illegal.

Proportionality regarding confiscation as a last and extreme resort

97. According to the principles of Israeli administrative law, in the application of administrative discretion it is necessary to consider whether there is a possibility of taking measures less likely to harm rights and that will achieve the same objective, for the most extreme and harmful measure possible should not be taken. In other words, in the case under discussion it was possible to divert the Respondent to the port of Ashdod and to free her to return to her country of origin – a course of action that could still be taken today.

98. The Supreme Court, sitting as the High Court of Justice, held to that requirement in High Court of Justice 2056/04 **Beit Sourik Village Council v Government of Israel**, when it ruled that:

“One of the basic principles that balance between a reasonable objective and the means to achieve it is the principle of proportionality. According to it, the liberty of the individual (in the matter before us, the liberty of the local residents under belligerent occupation) can be restricted in order to achieve reasonable objectives (in the matter before us, the security of the State and its citizens and the security of the area), and as long as the restriction be proportional” (See para. 36 of the judgment of His Honour, the then-president A. Barak).

99. Also, in High Court of Justice 3477/95, **Ben-Atiya et al v Minister of Education, Culture and Sport**, Piskey Din [Judgments] 49(5) (below: **Ben-Atiya Case**), the court ruled that the question at the centre of the consideration of the proportionality of an administrative act is:

...“if the means the government took in order to achieve a reasonable purpose stand in reasonable relation to the objective they want to achieve. The rationale of proportionality requires that the governmental means need to accord with the realization of the objective, and not beyond what is required for the realization of the objective. The principle of proportionality is intended to defend the individual from the government. It is intended to prevent excessive harm to the liberty of the individual. It stipulates that the governmental means must be determined stringently in order to befit the realization of the purpose. The principle of the rule of law and the legality of rule thereby finds expression.” (See pp. 11-12 **Ben-Atiya Case**)

100. However, without any explanation, the Applicant chose to apply the most extreme means against the Respondent – the confiscation of the Respondent, without considering less harmful means, thereby violating the principle of proportionality. Therefore the Applicant’s demand for the confiscation of the Respondent is inconsistent with the principle of proportionality in administrative law.

Conclusion

101. Throughout, the Applicant has dealt with the Respondent in complete contravention of international administrative law and Israeli constitutional and administrative law, and now the Applicant is asking the Honourable Court to give its seal of approval to its violations in an

arbitrary and unreasonable process, which serves no reasonable purpose and disproportionately and unreasonably patently harms fundamental rights and protected legitimate interests.

102. In view of all of the above, the Honourable Court is asked to reject the Applicant's request and to order the liberation of the ship before she is destroyed, and/or to order reasonable compensation for the heavy damages that the illegal actions of the State have caused.

103. Likewise, the Honourable Court is asked to assign to the Applicant the Respondent's expenses and the lawyer's fees along with the Value Added Tax as required by law.

[signature]

Attorney Gaby Lasky

Representative of the Respondent