

CARNEGIE COUNCIL
*The Voice for Ethics
 in International Affairs*

Legal Scholars Weigh in on Gaza Blockade, Flotilla Deaths

Erik Schechter

June 28, 2010



[MV Mavi Marmara, May 22, 2010](#) by Free Gaza Movement (CC)

Nearly a month after its deadly naval raid on an aid flotilla, Israel refuses to lift its blockade of the Gaza Strip.

Still, the government of Benjamin Netanyahu has loosened restrictions on the types of goods that may enter the Hamas-ruled coastal enclave. Likewise, it has set up a commission to examine the events of May 30-31. None of this, however, has squelched criticism of the Gaza blockade and the flotilla incident.

To recap, in late May, the [Free Gaza Movement](#), a pro-Palestinian solidarity group, arranged for six ships loaded with humanitarian aid to breach the Israeli naval blockade. Anticipating arrival of this flotilla, the Israeli navy sailed out to the boats and warned them

away from Gaza coastline, offering instead to have the cargo delivered to the territory via Israeli land terminals. However, the flotilla activists rejected the offer.

When the Free Gaza crew made it clear that they intended to run the blockade, Israeli navy commandos boarded the boats at night, in international waters, and subdued the passengers. This occurred, for the most part, without incident. However, on one ship, the *MV Mavi Marmara*, a large contingent of baton-wielding Turkish Islamist activists clashed with commandos, resulting in the deaths of nine passengers.

This bloody episode provoked a wave of outrage—and not just in the Muslim world. In the United States, conservative pundit Pat Buchanan denounced the Israeli naval action as "piracy," while progressive columnist Glenn Greenwald decried it as a "massacre." Meanwhile, a number of human rights groups reiterated their position that the blockade was a form of "collective punishment" and illegal.

Putting aside overheated rhetoric and pseudo-legal analyses, I asked a group of international law experts about the blockade of the Gaza Strip and the methods employed by Israel to enforce it. These are their answers:

Q. Did Israel commit piracy?

The short answer is no, states U.S. Navy Commander [James Kraska](#), who teaches international humanitarian law (IHL, otherwise known as the Law of War) at the U.S. Naval War College. Article 101 of the [United Nations Convention on the Law of Sea](#) defines piracy as "a private act, typically with some sort of pecuniary interest. And by private, that means it's not going to be a governmental act," he explains.

Accordingly, Israel—or any other state—cannot commit piracy, though in the past governments did issue [Letters of Marque](#) to privateers, who would raid enemy vessels. However, the [Paris Declaration of 1856](#) banned this legal form of state piracy, and that prohibition has since taken root in international customary law. As such, privateering is a "historical artifact," says Kraska, and has no relevance to the Gaza flotilla incident.

Of course, even if not guilty of piracy, Israel may have still violated IHL. Therefore, to get at the root

of the controversy, one must determine two things: Is the naval blockade of the Gaza Strip legal—in other words, can Israel ban ships from entering or leaving Palestinian ports? And did Israeli naval commandos use the correct amount of force when attempting to stop ships bound for the Hamas-run territory?

Q. Are naval blockades a legal form of warfare?

Though it has a negative impact on enemy civilians and neutral third parties, blockading a state is a "legitimate method of naval warfare," says [Marko Milanovic](#), a legal scholar at Cambridge University. However, the [San Remo Manual on International Law Applicable to Armed Conflicts at Sea](#) (1994), considered to be the consensus view of customary law on the issue, does contain a few caveats.

First, the state setting up the blockade must have some military rationale for its action other than just wishing to starve the enemy population or deprive it of goods necessary for survival. Second, the manual states that the blockade would be illegal if "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."

According to the *San Remo Manual*, Israel could—provided it adhered to the aforementioned conditions—impose a blockade on Lebanon in order to prevent Katyusha rockets from reaching Hezbollah, a local Shiite militia. Then again, Lebanon is an independent state and falls neatly into the legal category of international armed conflict. What does the law say about the Israeli naval blockade of the Gaza Strip?

Q. Can Israel blockade a foreign, non-state entity like Gaza?

In August 2005, Israel withdrew its soldiers and settlers from the Gaza Strip. However, since then, no independent state of Palestine has emerged—leaving the small evacuated territory in a weird legal limbo. This, in turn, makes adjudicating the Israeli naval action tricky because, while blockades clearly apply in the case of two states at war, the law falls silent with regard to non-state combatants like Hamas, notes Milanovic.

Now, were Gaza still under military occupation (as the UN considers it to be), there would be no problem blockading it. Indeed, Common Article 2 of the [Fourth Geneva Convention](#) states that IHL extends to undeclared wars and occupied territory, says [Wolff Heintschel von Heinegg](#), a law professor at the Viadrina European University. This being the case, the IHL rules governing naval blockades also apply to Gaza.

However, if Gaza is not occupied, as Israel claims, things get messy again.

Customary law provides little guidance because so few states in history have blockaded non-state actors. One rare case is France in the late 1950s. Seeking to intercept arms ships bound for the Algerian independence movement, France "established a so-called security zone, which extended up to 60 nautical miles into the Mediterranean," says von Heinegg. Interestingly, the international community accepted this action with little protest.

Another example is the Union blockade of the Confederacy during the Civil War. However, in that case, "the imposition of a blockade on the Confederacy was recognized by the European powers as a belligerent act and converting the insurrection into an international armed conflict," Kraska says, though others believe that this latter concept only emerged in the 20th century.

Whatever the case, the Confederates did go from being mere "insurrectionists" to legitimate "belligerents."

For now, the U.S. and European Union classify Hamas as a terrorist group. But should the Islamist militia gain belligerency status, its fighters—so long as they did not commit war crimes—could not be prosecuted for murder by Israeli authorities for actions taken on the battlefield, states [Avi Bell](#), a law professor at Bar-Ilan University. Likewise, Hamas would have the right to block ships bound for Israel.

Of course, all this assumes that Gaza is comparable to the Confederacy or Algérie Française. It isn't,

says [Stefan Talmon](#), a legal scholar at Oxford University. Just as it is not a foreign state, Gaza is also not an Israeli province in rebellion. Still, he says one could argue that if a state can employ a naval blockade in such radically different cases, then "you must also be able to blockade territory that is somehow in the middle..."

Q. What goods must Israel allow through?

Following the diplomatic fallout over the *MV Mavi Marmara* killings, the Israeli cabinet drew up a new, expanded list of humanitarian items allowed into Gaza via border terminals. Previously, however, Israel kept transfers to a bare minimum. Innocuous items like toys, livestock, sewing machines parts, musical instruments, chocolate, and coriander had all been barred entry into the enclave, contends [Gisha](#), an Israeli NGO that supports the "freedom of movement of Palestinians, especially Gaza residents."

Were such restrictions legal? International law experts are divided on the topic. Milanovic argues that one may only seize contraband, i.e. military and dual-use supplies. By contrast, von Heinegg and others contend that a blockade is designed to keep out all vessels and their cargo, not just a list of particular goods. Only when the blockaded population is faced with starvation must "essential" items be allowed in.

"Water, medical supplies, [and basic] food—that's what we're talking about," von Heinegg says.

Q. Is the Israeli blockade a form of collective punishment?

Human Rights Watch, Amnesty International and the International Committee of the Red Cross have all decried the Gaza blockade as collective punishment. In doing so, they all look to Article 33 of the Fourth Geneva Convention, which states, "No protected person may be punished for an offense he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited..."

This prohibition has its roots in the experience of German reprisal killings during World War II, Bell notes. Keeping that in mind, to then argue that Article 33 applies to the Israeli naval blockade of Gaza is "bizarre," he says, adding that there "has never even been a claim in any legal forum ... that economic sanctions of any kind or blockades of any kind constitute collective punishment."

The collective punishment argument is likewise critiqued by other academics. Von Heinegg, for example, contends that it "has no basis in the law" because the only limits set for blockades are in *San Remo*. To be illegal, the Israeli blockade would have had to be instituted—not to stop the importation of rockets—but just to starve Gazans. Or, if, intentions aside, the blockade were to kill hundreds of innocent Palestinians.

Neither is the case, he explains.

[Geoffrey Corn](#), a South Texas College of Law professor and retired U.S. Army lawyer, concludes that some, when confronted with the issue of Gaza, simply default to human rights principles. "They focus on the individual 'victim' of the Israeli decision-making process, which is the Gaza civilian." However, this approach, Corn believes, has a "perverse impact on the debate" because it nullifies the role of Hamas.

Q. Can Israel intercept a blockade-runner in international waters?

Speaking in a private capacity, Major [John Dehn](#), a law professor at the West Point Military Academy, says that, if a state has instituted a legal blockade, then it can board neutral ships in international waters. However, there must also be a reasonable belief that "the vessel is trying to breach a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture."

In radio exchanges with Israeli navy personnel on May 30, the flotilla crew made it clear that they intended to run the Gaza blockade. Therefore, Israel was well within its rights to stop the boats. But what of proportionality? Did the Israeli naval commandos use the proper amount of force when boarding the *MV Mavi Marmara* and confronting resistance from a contingent of Turkish activists?

Though some video clips of the incident have been released by the IDF [Israeli Defense Forces] Spokesman, nearly all the footage shot by flotilla passengers has been confiscated. In addition, the first-hand accounts of the clashes are vague or fragmentary. "It's really difficult to say [if the commandos used the right amount of forces," Kraska says, "because you don't know all the facts. You have to do a moment-by-moment tactical review."

Nevertheless, he thinks Israeli lawyers could make "a colorable claim" that their troops acted in self-defense.

Q. Can the Gaza blockade lose its legality over time?

Yes. Blockades do not stay legal forever, says Talmon. Case in point: Egypt and Israel, following the War of Independence. In 1949, the two countries signed an armistice agreement, yet Egypt continued to ban Israeli ships from the Suez Canal. Finally, two and a half years later, the UN Security Council declared the blockade to be an "unjustified interference with the rights of nations to navigate the seas."

Granted, Egypt and Israel signed a formal armistice, while the 2008-2009 Gaza War with Hamas ended with unilateral ceasefire declarations. Still, the scope of the violence has decreased significantly since then. "The question you would have to ask yourself is can you maintain this blockade indefinitely," Talmon states, adding that the Israeli blockade has already inched its way into a murky "gray area."

Copyright © 2010 Carnegie Council for Ethics in International Affairs