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NEWS IN CONTEXT

Flotilla Battle Continues: In Law Schools

Written by Benjamin Joffe-Walt
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International law experts debate the legality of Israel's raid on the Gaza-bound Turkish flotilla.

On May 31, 2010, Israeli naval forces intercepted, boarded and seized a flotilla of six ships carrying 663 people from 37 countries attempting to break the Israeli blockade of the Gaza Strip by delivering humanitarian aid and building supplies to Gaza.

Israel, determined to prevent weapons from reaching Hamas, had demanded that the ships have their cargo inspected at the Israeli port of Ashdod, offering to have items permitted by Israel delivered to Gaza by

land. The ships refused and at 4am Israeli commandos seized the ships in the high seas about 80 miles off the Gaza shores.

In the ensuing raid, Israeli commandos killed nine activists, and dozens more were wounded as well as seven Israeli commandos. Israel arrested hundreds of activists.

The incident caused a major diplomatic crises for Israel, a global propaganda war over what various sides think of what happened, and the beginnings of international and internal Israeli investigations.

But an arguably more substantive battle has been growing on a less noticed battlefield: international law.

As various nations and international actors bicker about the raid, international lawyers and legal experts have been intensely debating the legality of the raid and Israel's naval blockade on the Gaza Strip.

The blockade is legal

A number of legal scholars have argued that blockades are legal during times of armed conflict. Given years of Hamas rocket attacks on Israeli cities, coupled with Israel's responses to those attacks, they argue that Israel is entitled under the law of armed conflict to do whatever it deems necessary to prevent the shipment of arms into the Gaza Strip. They base this on the 1909 London Declaration concerning the Laws of Naval War, later written into the San Remo Manual on International Law Applicable to Armed Conflicts at Sea. Neither document has been ratified.

"This matter has not been codified by any international treaty," Ruth Lapidoth, an expert in international law and professor emeritus at the Hebrew University of Jerusalem's faculty of law told The Media Line. "It is regulated by the 1909 London Declaration concerning the Laws of Naval War. This declaration has not been ratified by the states, nevertheless all states have behaved according to it and it has been described in the military manuals of various countries, including the US, UK, Germany."

"The rules are that if a ship on the high seas is on its way to a blockaded area you may stop it, even on the high seas," Lapidoth said. "If it nevertheless tries to continue you can take it over, and if there is opposition you may use force."

Lapidoth said a blockade must be made public to all parties involved, effectively implemented and applied without discrimination. Israel fulfilled these conditions, Lapidoth said.

"There is also the obligation to let through humanitarian assistance - mainly food and medication," Lapidoth said. "But the state that applies the blockade can decide how these goods enter and through which port they should enter to reach the blockaded area."

Prof Michael Schmitt, an expert on international law and the use of force and the chair of Public International Law at Durham Law School, agreed that international law provided for the enforcement of a blockade on the high seas.

"The critical issue is whether or not the conflict with Hamas is an international armed conflict or not," he told the Media Line. "If it is an international armed conflict, then it's clear that Israel can establish a blockade, exactly as they have done. If it's not, then the legal basis for getting on those ships is more questionable and Israel would have to show that it did so in self defence."

"I personally believe it is an international armed conflict, but many people who I have great respect for disagree," said Prof Schmitt. "Hamas is a non-state actor so the international legal community is split on this issue."

"Blockade law goes back over a century and the Israelis have been very careful to comply with it," he argued.

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"Once they set up a blockade they provided the international community with notification. They are then allowed to enforce the blockade, even in international waters, and given modern technology and the ability to offload any cargo that would breach the blockade, it would make sense to me that they would enforce it at that distance."

"With regard to the individual use of force, the law of blockade allows the use of force and while I wasn't there, it appears that it was a reasonable use of force given the attacks on the Israeli commandos," Prof Schmitt said. "Remember I'm talking to you about international law, not whether or not the blockade is a good policy."

The blockade is illegal

International legal experts opposed to the blockade argue that the blockade amounts to collective punishment and is legally considered an act of war, legal only during active military conflict. Many opponents of the blockade base their arguments on a prohibition in the San Remo Manual on International Law Applicable to Armed Conflicts at Sea which says that a blockade is illegal 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."

"Naval blockades can be seen as lawful and are a legitimate lawful instrument of war," Jason Alderwick, a maritime defense analyst, told The Media Line. "The problem is that the effects of blockade damage the economic well being of the citizens of Gaza and engender a humanitarian situation which one cannot deny is bordering on intolerable. That's where the Israelis are being challenged in international law."

"Israel does have the right to protect itself from arms smuggling that has taken place in the past and is undeniably still taking place," he said. "But this goes beyond any military benefit that Israel may gain, and is punitive against the civilians of Gaza."

Sari Bashi, the director of Gisha: The Legal Center for the Freedom of Movement in Israel, argued that Israel is using international law selectively.

"Israel is systematically picking the parts of international law that give it control and ignoring the parts of international law that give it responsibility," she told The Media Line. "According to international law, Israel is controlling the shores of Gaza and other borders of Gaza under the framework of occupation. Many of those elements of control were relinquished in 2005 with the disengagement, but Israel continues to control enough elements of life in the Gaza strip to impose obligations under the law of occupation."

"International law recognizes the fact of control but requires that the responsibility to exercise such control be commensurate with the rights and needs of civilians in Gaza," Bashi continued. "The problem from an international law perspective is not that Israel is preventing ships from entering Gaza, because Israel can determine the route into Gaza and can check shipments and persons. The problem is in the end you have to let people and goods go in and out."

"For the last the years Israel has blocked all but a trickle of humanitarian goods from entering Gaza in what they call economic warfare designed to dismantle the economy," she said. "We call that collective punishment because civilians are being punished for acts they didn't commit."

"As for the naval blockade, Israel has prevented ships from reaching Gaza since 1967," Bashi concluded. "They were careful not to declare a naval blockade because doing so would carry other consequences under international law. Either way, Israel sovereignty over Gaza is not by law. It's by fact. So the framework of a naval blockade doesn't make sense."

The blockade was legal, now it is not

Dr Stefan Talmon, an international legal expert at the University of Oxford's St. Anne's College, said that the lack of relevant treaties or applicable past precedents make determining the legality of Israel's blockade of Gaza a serious legal conundrum.

"There are many unknowns here where international law does not have a clear answer, so I would be very careful to say outright this is lawful or unlawful," he told The Media Line. "There is no treaty outlining the conditions under which a naval blockade is legal or which regulates naval blockades," Dr Talmon said. "So a lot is based on what is called customary international law."

"But to establish customary international law you have to go back to past precedent and try to derive rules from the past practice," he continued. "The problem is there is no past precedent that matches the situation in Gaza as it's not exactly an international conflict and it's not exactly an internal conflict or insurgency. That makes the whole thing difficult, as we end up trying to apply laws that were developed in the 19th century to a very unique context in the 21st century."

Nonetheless, Dr Talmon argued that the legality of the flotilla raid would rest on the overall legality of the blockade.

"International law provides for the interception of ships on the high seas if a blockade is in place," he said. "The main question is whether you can actually impose a blockade in the first place, and that basically depends on what type of armed conflict it is."

"As an international armed conflict there is no problem imposing a blockade as an act of war," Dr Talmon said. "Most international lawyers say that blockades are limited to international armed conflicts, and Gaza is not exactly a state. One could argue there is no international armed conflict and a blockade is therefore illegal. So the question is whether there is a right to blockade a territory that is under the control of a non-state actor."

Dr Stefan Talmon said that Israel has tried to walk a fine line by not defining the nature of its conflict with Hamas. But it has put itself into a tricky corner by imposing a blockade of Gaza and defending it under international law Israel.

"Israel is very ambiguous about the nature of its conflict with Hamas, never specifying whether it is an internal

armed conflict or an international armed conflict," he said. "If it's an international conflict, the full range of the laws of war, including the Geneva conventions and Hague regulations, would all be applicable. Israel doesn't want that for both legal and political reasons."

"By imposing a long term blockade, Israel brought the conflict between itself and Hamas into the realm of international armed conflict," Dr Talmon continued. "Israel can't have it both ways: it cannot impose a blockade, which is a tool of interstate warfare, but on the other hand deny that there is an interstate conflict with Hamas."

Dr Talmon argued for a distinction between Israel's original application of the blockade, during a three week war with Hamas, and its continued maintenance over the past year and a half.

"When the blockade was imposed it was a valid and legal act of war taken by Israel," he said. "If the flotilla had come in January 2009, there would have been no doubt that its interception would have been a lawful act."

"The problem is that the blockade is still in effect yet there is no longer any active, sustained fighting between the two sides," Dr Talmon said. "According to past precedent, including Egypt's blockade of Israel, a blockade cannot be imposed indefinitely. After the fighting has ended, with two unilateral ceasefires, it is very difficult to maintain that the blockade can still be a valid act of war."

"There is a legitimate aim here, but the question is how do you achieve that aim," Talmon continued. "A blockade is an act of war and subject to the conditions under which force can be used, including proportionality. It certainly was a proportionate measure when the fighting was going on, but now there are other less harmful ways to achieve the same aim."

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