

Chapter 13

Rule Selection in the Case of Israel’s Naval Blockade of Gaza: Law of Naval Warfare or Law of the Sea?

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Contents

13.1	Introduction.....	368
13.2	On Board the Mavi Marmara.....	369
13.3	Navigating Dichotomy: Law of the Sea and the Law of Naval Warfare.....	373
13.3.1	Blockade in history.....	374
13.4	The Gaza Blockade.....	375
13.5	Law of Blockade.....	379
13.6	Enforcement: Belligerent Right of Visit and Search.....	383
13.7	Visit and Search in International Waters.....	385
13.8	Blockade in Non-international Armed Conflict.....	386
13.9	Conclusion.....	391
13.10	Annex.....	392
	References.....	394

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13.1 Introduction

On 27 September 2010 the UN Human Rights Council in Geneva released its analysis of the 31 May 2010 boarding of the large passenger liner, *Mavi Marmara*, by forces of the Israeli Navy.¹ The ship was interdicted in the eastern Mediterranean Sea by Israeli commandoes, who rappelled vertically onto the top deck of the ship from a helicopter. The boarding incident and ensuing melee that unfolded on the deck of the ship left several Israeli military members seriously injured and resulted in the death of nine Turkish nationals. The event ignited a firestorm of controversy in international humanitarian law. These sad and unfortunate results raise interdisciplinary questions concerning both fact selection—determining what actually happened, or whose version of the facts are accepted—and rule selection—what was the legal relationship between Israel and the vessel *Mavi Marmara*. Because of the tense stand-off between the Gaza Strip and Israel, however, and the volatile brew of religion, politics and geography that colors choices of fact selection and rule selection, analysis of the incident is especially challenging. The issues of fact selection are more important for resolving questions surrounding the deaths and injuries of persons on board the ship and Israeli naval personnel. Factual claims necessarily are colored by a veneer of subjectivity, and in this case go more toward determining whether the use of force on the part of Israeli commandoes was lawful. The nature of the tactical operation that unfolded on board the ship and the reaction of the vessel's passengers are bitterly disputed, inseparable from who used what force and when.

In contrast to these questions of tactical fact, there is a fairly standard understanding of the strategic landscape upon which the Israeli assault occurred. The facts concerning Israeli's maintenance of a blockade and the resulting interception of the ship are less controversial. Nearly everyone agrees there is some level of armed conflict between the state of Israel and Hamas, the armed group governing the Gaza Strip. What are less clear are the legal implications of the relationship between Israel and Hamas, not over a disagreement with the facts, but rather over a dispute about the law that should apply. Is Israel in an armed struggle with only Hamas, or at war with the Gaza Strip? Is the Gaza Strip part of Israel, or a foreign area (or country) physically or constructively occupied by Israeli forces? Are standards for the use of force derived from international human rights law or international humanitarian law?

In the case of the maritime interception of the *Mavi Marmara*, which is to be sure a single narrow element of the overall relationship between Israel and Hamas or Gaza, the overriding legal issues lay at the intersection of the international law of the sea and the law of naval warfare, which is a subset of international

¹ Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance, UN Doc A/HRC/15/21, 27 September 2010, p 53.

humanitarian law (IHL). Dissecting the legal elements of the raid is important for a better understanding of what happened—and how to prevent a reoccurrence. The report of the Human Rights Council, for example, concluded that the Israeli interception resulted in ‘... a series of violations of international law, including international humanitarian and human rights law...’²

Israel has initiated several investigations into the matter. The Israeli Defense Force (IDF) concluded an inquiry on 12 July 2010, which found that the only way the IDF could have stopped the *Mavi Marmara* was to board the ship, and that the commandoes acted properly.³ Israel also created a national commission to investigate the incident, which issued its final report exonerating any wrongdoing.⁴ In announcing the investigatory commission, Prime Minister Netanyahu stated ‘only the Israeli Defence Force (IDF) should question the soldiers, as is generally done in armies around the world’.⁵ Turkey has rejected the ability of an Israeli Commission to conduct a thorough investigation. A statement released by the Turkish Ministry of Foreign Affairs in early June 2010 stated: ‘Israel does not have the authority to assign a national commission to investigate a crime perpetrated in international waters ...,’ and that the inquiry by Tel Aviv ‘cannot be impartial, fair, transparent and credible’.⁶ Instead, Turkey supported UN Secretary General Ban Ki Moon’s call for creation of an independent UN investigation into the matter.

13.2 On Board the *Mavi Marmara*

Israel’s maritime interdiction of the ‘freedom flotilla’ was designated ‘Operation Sea Breeze’. The flotilla set sail from Turkey in May 2010 bound for the Gaza Strip. The stated intentions of the convoy were to deliver humanitarian supplies to the beleaguered people of Gaza, and also to tangibly break the naval blockade of Gaza that was imposed by Israel. A number of nongovernmental groups, led by the

² Ibid.

³ Maj. Gen. (Res.) Eiland Submits Conclusions of Military Examination Team Regarding *Mavi Marmara*, 12 July 2010, IDF Blog, 12 July 2010, <http://idfspokesperson.com/2010/07/12/maj-gen-res-eiland-submits-conclusions-of-military-examination-team-regarding-mavi-marmara-12-july-2010/>.

⁴ Justice Emeritus Jacob Türkel, et al., *The Public Commission to Examine the Maritime Incident of 31 May 2010*, pp 278–279 (The Türkel Commission) January 2010.

⁵ The investigation team includes Brig. Gen. (Res.) Aviv Kohavi, the former head of the Operations Division, Brig. Gen. (Res.) Yuval Halamish, former head of the IDF Intelligence and a senior member of the Israeli National Security Council Col. (Res.) Ben Tzion Daabul, the former head of the Israel Navy Operational Branch. Brigadier General Ken Watkins, former Judge Advocate General of the Canadian Armed Forces and Irish Nobel prize holder David Trimble serve as international observers. BG Watkins has been selected to serve as the Stockton Chair of International Law at the US Naval War College for academic year 2010–2011, but the author has not discussed this analysis with him.

⁶ Deen 2010.

controversial Turkish charity *İnsan Hak ve Hürriyetleri ve İnsani Yardım Vakfı* (IHH), or Foundation for Human Rights and Freedoms and Humanitarian Relief, announced on 28 April that it intended to sail a flotilla into the coast of the Gaza Strip despite the blockade. Prior to the arrival of the ships in the eastern Mediterranean near Gaza, Israel officially reiterated a standing offer to Turkey to escort the ships into the port of Ashdod, inspect the cargoes and transfer the foreign humanitarian shipments for distribution throughout the Gaza Strip. The offer was declined, however.

The civilian vessels that comprised the relief armada were registered in several nations. The group consisted of the cargo ship *Gazze* (Turkey), the cargo ship *Eleftheri Mesogeios* or *Free Mediterranean* (Greece), the cargo ship *Define Y* (Kiribati), the tourist boat *Sfendonh* (Togo), and the US-flagged yacht, *Alhaya*. The boats were scheduled to arrive in the region on 24 May 2010 together with the Cambodian-flagged *Rachel Corrie*, which departed from Ireland on 17 May with a giant Irish flag painted on the ship along with the words 'Free Gaza'. Due to technical difficulties, the ships began to arrive at the pre-defined gathering point south of Cyprus on Friday, 28 May. The largest vessel, the Comoros-flagged passenger ship *Mavi Marmara*, had 561 persons on board, including 67 members of the IHH. The ship also embarked 16 parliamentary members from a variety of nations and 34 media reporters, underscoring the propaganda or public diplomacy aspect of the voyage.

IHH has a checkered reputation. Reports suggest the group has links to Global Jihad in Syria, Iraq, Afghanistan and Chechnya. In 1996, the CIA reported that IHH had connections to violent extreme groups. The organization gained some prominence in the 2001 US prosecution case of an Algerian terrorist convicted of the attempted 31 December 1999 'millennium bombing' plot at Los Angeles International Airport. In the federal prosecution *United States v Ahmed Ressam*, French counter-terrorism magistrate Jean-Louis Brougiere testified that 'IHH is a [non-governmental organization], but it was kind of a type of cover-up ... [sic] in order to obtain forged documents and also to obtain different forms of infiltration for Mujahedeen in combat ... [and recruitment]. And finally, one of the last responsibilities that they had was also to be implicated or involved in weapons trafficking.' Despite this testimony, however, IHH has not been designated a terrorist group by the US Department of State.⁷ In 2006, the Danish Institute for International Studies issued a report that stated that during the 1990s the IHH maintained links with al-Qaida and a number of global jihad networks.⁸

The IHH participation in the relief flotilla included purchase of three ships, including the *Mavi Marmara*, as well as providing aid to the Hamas regime in

⁷ In a letter to Secretary of State Hillary Clinton, however, the Anti-Defamation League of the United States requested that IHH and another group of 'freedom flotilla' organizers and funders, Union of Good, be designated as Foreign Terrorist Organizations (FTO) under Sect. 219 of the Immigration and Nationality Act. See Robert G. Sugarman and Abraham H. Foxman letter to the Hon. Hillary R. Clinton, 8 June 2010, http://www.adl.org/terrorism/Letter_flotillaorganizers.asp.

⁸ Kohlmann 2006. See also Hartman 2010.

preparing to receive the convoy. On 30 May 2010, Bulent Yildirim, president of IHH, told the media that there were children and elderly persons on board the ship, and that the passengers would act as human shields. IHH members on *Mavi Marmara* were armed with an assortment of homemade urban weapons, including pipes, clubs and knives taken from the ship's kitchen and from six cafeterias on board the ship. Steel cables and metal rods sawn from the ship's railings by electric saws, were distributed among IHH members, along with wooden clubs, hammers and other industrial tools, such as large pipe wrenches, that could be used as weapons.⁹ Metal screw-nuts were strewn throughout the upper deck to impede the movement of any Israeli naval forces that might come on board.¹⁰ There were a large number of slingshots and ammunition secreted aboard the ship, and flares were also stockpiled in preparation for dazzling night vision devices on helicopters.¹¹ Later, when commandoes came on board, flares were used to burn soldiers. Israeli authorities uncovered one hundred ceramic protective vests—each imprinted with the Turkish flag—and two hundred gas masks.¹² Eight axes had been removed from the ship's fire-fighting stations and set out as weapons.¹³

After interviewing passengers from the *Mavi Marmara*, Israel's Intelligence and Terrorism Information Center discovered that IHH members riding the ship had prepared for a violent clash with IDF soldiers. The reaction of some of the passengers on the *Mavi Marmara* to the Israeli boarding team apparently was not spontaneous, but rather a pre-planned action orchestrated by a group of hardcore IHH operatives numbering about 40. These principal or dedicated members of IHH

⁹ Video—Weaponry Overview and Footage of *Mavi Marmara* Passengers Preparing Weaponry, Israeli Defense Force Spokesperson, 3 June 2010, <http://idfspokesperson.com/2010/06/03/video-weaponry-overview-and-footage-of-mavi-marmara-passengers-preparing-weaponry-3-june-2010/>; IDF forces met with pre-planned violence when attempting to board flotilla, Israel Ministry of Foreign Affairs, 31 May (Updated 21 June) 2010, http://www.mfa.gov.il/MFA/Government/Communiques/2010/Israel_Navy_warns_flotilla_31-May-2010.htm#weapons. See also Guns may have been thrown overboard, The Jerusalem Post, 4 June 2010, <http://www.jpost.com/Israel/Article.aspx?id=177479> (gun sights, coded plans found on *Mavi Marmara*) and Israel Continues In-Depth Investigation into Flotilla Incident, Targeted News Service, 26 September 2010, Israel Condemned for Deadly, CNN 1 June 2010 Tuesday, Cable News Network (CNN), 1 June 2010 (Transcript 060103CN.V11 in NEWS, ALL (English, Full Text), Lexis-Nexis database.

¹⁰ Report on the IHH's preparations for confronting the IDF, Israeli Defense Force, 9 June 2010, <http://dover.idf.il/IDF/English/News/today/10/06/0902.htm>.

¹¹ Photos of Bullet Proof Vests, Saw-Off Rods, Night Vision Goggles and Rifle Scope Found on *Mavi Marmara*, Israeli Defense Force, 2 June 2010, <http://idfspokesperson.com/2010/06/02/photos-of-bullet-proof-vests-saw-off-rods-night-vision-goggles-and-rifle-scope-found-on-mavi-marmara-2-june-2010/> and Katz 2010.

¹² Photos of *Mavi Marmara*'s Equipment and Weapons, Israeli Defense Force, 1 June 2010, <http://idfspokesperson.com/2010/06/01/photos-of-the-mavi-marmaras-equipment-and-weapons-1-jun-2010/>.

¹³ Anshel Pfeffer, Report: 40 IHH activists on *Mavi Marmara* planned violent resistance, Haaretz.com, 10 June 2010, <http://www.haaretz.com/print-edition/news/report-40-ihh-activists-on-mavi-marmara-planned-violent-resistance-1.295233>.

boarded the ship in the port of Istanbul, and it appears they did so without undergoing a security inspection. Other passengers who boarded in Antalya went on board the ship only after a full inspection. Some of the IHH operatives wore tags on their clothing that stated they were ships security detail. The activists distributed walkie-talkies, and they occupied the upper deck of the vessel as a communications room and command center. Two hours before the Israelis boarded the ship, Yildirim reportedly ordered the formation of a human chain to repel the commandoes. Chairs and clubs were employed to beat back the Israeli boarding team and throw them into the sea.

When small Israeli patrol boats attempted to come alongside the ship for boarding it at the waterline, the IHH operatives removed grappling hooks that were attached by Israelis to facilitate climbing up the side. Israel claims that IHH members seized the sidearm of at least one commando and used it to shoot at the boarding party. One individual Israeli apparently was thrown over a rail, hitting the deck below, and was seriously injured. Eventually, the IDF commandoes opened fire on the attackers. Israel claims the use of deadly force was a reaction to the violence used by IHH to repel the boarding party. In the melee nine IHH protesters were killed and 34 injured. Seven Israeli soldiers were injured, two of them critically. Nonviolent activists also were among the injured. In contrast to the breakdown of order on the decks of the *Mavi Marmara*, the successful boarding of the other vessels in the convoy was without incident. IDF commandoes on the other five ships were met only with passive, nonviolent resistance, and the vessels were either directed or steered into Ashdod for inspection.

In retrospect, the boarding team appears to have been woefully unprepared to establish order on the ship, let alone seize control of the vessel. Israeli commandoes were armed with paintballs, shotguns with beanbag ammunition for crowd dispersal, tasers and stun grenades, yet even these non-lethal armaments were not employed effectively. After the incident on the *Mavi Marmara*, all six flotilla vessels were taken to Ashdod and unloaded; their passengers were repatriated. Hamas delayed acceptance of the humanitarian aid from the five smaller ships for several weeks, declining to consent to delivery of the materials at the Kerem Shalom crossing. In mid-June, however, Israel reached agreement with the United Nations to facilitate the transfer of the humanitarian aid from the flotilla. Robert H. Serry, a representative of the UN Secretary General, informed Major General Eitan Dangot, Israel's Coordinator of Government Activities in the Territories (CO-GAT), that the UN would make arrangements for the transfer of humanitarian goods from the convoy for transfer into the Gaza Strip. Serry also pledged to ensure that the material was used only for humanitarian aid operations. Of the six original vessels that comprised the flotilla, only the *Mavi Marmara* did not have humanitarian supplies on board. Two weeks later, in mid-June 2010, as another flotilla was getting underway from Lebanon with the stated intention of breaking the blockade, Israeli Defense Minister Ehud Barak said in a speech: 'The government of Lebanon ... has to prevent war materials, weaponry, ammunitions, explosive charges and so on, which can later lead to violent and dangerous confrontation in case the ship refuses to dock in Ashdod, from finding their way into

the ships.’¹⁴ This pronouncement set forth the Israeli government’s rationale for intercepting a ship on the high seas.

13.3 Navigating Dichotomy: Law of the Sea and the Law of Naval Warfare

In accordance with Articles 58 and 87 of the 1982 UN Convention on the Law of the Sea (UNCLOS), all ships enjoy the peacetime right of freedom of navigation on the high seas and throughout the exclusive economic zone. Except for provisions of the law of naval warfare that trump the peacetime rules, nations—particularly neutral states—enjoy the same broad freedom of the seas during periods of armed conflict. In challenging the Israeli action, the government of Turkey and the IHH asserted that Israel violated the peacetime right of freedom of navigation of the ships in the convoy. This argument could best be made by the flag states of the vessels boarded—in the case of the *Mavi Marmara* only Comoros, as the state of registry, was in a position to assert this claim. Only the *Gazze* was a Turkish-flagged ship. Although Ankara is not a party to UNCLOS, the right to exercise freedom of navigation is a tenet of a liberal order of the oceans and reflective of customary international law, binding on all nations. In peacetime, freedom of navigation has very few limitations, especially beyond the territorial sea.

In time of armed conflict, although the rules reflected in UNCLOS continue to apply, they share the stage with IHL and more specifically with the law of naval warfare. In effect, during periods of armed conflict, the law of naval warfare is superimposed on the regimes of peacetime oceans law. So while the provisions of UNCLOS are applicable, in time of war the peacetime rules are calibrated by another set of rules governing the rights and duties of parties to conflict at sea. The law of naval warfare helps to regulate relations between neutral states and belligerent states, and the law of blockade is an important element of IHL.¹⁵ Consequently, in some circumstances the law of blockade and its provision for the belligerent right of visit and search provide fidelity to the peacetime framework of navigational freedom.¹⁶

The right of the parties to an armed conflict to select the methods and means of warfare are not unlimited; the enemy’s civilian population may not be targeted for attack. Maritime blockade may be analogized to land-based siege warfare. The law concerning siege on land, and by implication naval blockade, implicate the

¹⁴ Arnon Ben-Dror, The Lebanese Government is Responsible for Every Ship Leaving from its Territory, Israeli Defense Force press release, 17 June 2010, <http://dover.idf.il/IDF/English/News/today/10/06/1702.htm>.

¹⁵ § 1.3, Helsinki Principles on the Law of Maritime Neutrality, adopted by the International Law Association, Taipei, Taiwan, 30 May 1998, Schindler and Toman 2004, Doc 115, pp 1425–1430 (hereinafter, Helsinki Principles).

¹⁶ Oppenheim 1969, pp 768–769.

principles of distinction and proportionality. Consequently, siege and blockade often give rise to criticism that the measures are inconsistent with the duty of belligerents to protect civilian populations.

13.3.1 Blockade in history

Blockade, or the interdiction of maritime traffic coming from or going to a port or coastline of a belligerent, is a legitimate method of naval warfare and a maritime instrument of economic warfare.¹⁷ Blockade was an enduring feature of the First and Second World Wars. With the Orders-in-Council of 11 March 1915, London instituted a blockade during World War I ‘to prevent vessels carrying goods for or coming from Germany’. The British also blockaded the Russian port of Petrograd on 10 October 1919, as part of their intervention in the Russian revolution. In the case of the Petrograd blockade, the British government acted even though it was uncertain whether a ‘state of war’ existed between the two nations.¹⁸ The concept of blockade also was a feature of the interwar period. On 8 March 1936, for example, the United Kingdom, France, Italy and Germany established a four-power Non-Intervention Patrol to prevent outside involvement in the Spanish Civil War. The Patrol maintained a blockade of the Spanish coastline, with France and Great Britain participating in the Patrol after Italy and Germany dropped out.¹⁹

Blockade was employed as a method of war by Axis and Allied powers during World War II, and the naval blockades against Germany and Japan devastated the economies of Nazi Germany and Imperial Japan. Since World War II, nations once again resorted to maritime interdiction to enforce maritime blockade during time of armed conflict. The French Navy blockaded Algeria during its struggle with the colony. The United States conducted naval blockades during the Korean War and the Vietnam War (Haiphong Harbor), the latter of which Moscow protested as interference in freedom of navigation.²⁰ In the 1960s, the Beira Patrol sought to prevent the flow of oil from reaching Rhodesia. But for all of its good intentions, the Patrol found that it was particularly difficult to craft coercive rules of engagement for visit and search on the high seas.²¹ Politically, however, there never was a risk that Rhodesia’s two supporters—South Africa and Portugal—would forcibly challenge the blockade.²² The burden for enforcing the Beira Patrol fell on Britain, and by virtue of UN Security Council Resolution 217 of 20

¹⁷ § 5.2.10, Helsinki Principles, *supra* n 15.

¹⁸ Cable 1981, p 70.

¹⁹ Thomas 2001, p 715.

²⁰ McDougal and Feliciano 1961, pp 493–495 and Swayze 1977, p 143. Blockade during the Korean War is discussed in Weigley 1973, pp 388–389.

²¹ O’Connell 1975, p 174.

²² Cable 1981, p 126.

November 1965, the United Kingdom was legally entitled to enforce the oil embargo against Rhodesia. Iran and Iraq both blockaded each other's ports during the Iran–Iraq war of the 1980s, with Tehran's order of 1 October 1980 initiating a tit-for-tat tanker war that endangered oil shipping. Iran boarded 1,200 foreign-flagged merchant ships during the early-1980s, including US-flagged vessels, and did so mostly in a professional manner. On the other hand, Iran laid mines in the shipping channels of the Gulf and launched numerous cruise missiles, aviation and small boat attacks against civil neutral shipping, abrogating its responsibilities under the law of armed conflict.

After the Iraqi invasion of Kuwait in August 1990, the UN Security Council adopted resolution 660 (1990), which required withdrawal of Iraqi military forces from Kuwait.²³ Resolution 661 imposed a general embargo on all trade with Iraq and Kuwait, serving as the principal means of inducing Iraqi compliance with resolution 660. Resolution 665 imposed a blockade on Iraq on 25 August 1990, less than a month after the invasion—providing a means to enforce resolution 661.²⁴ Specifically, resolution 665 authorized states to 'halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations', using authority under Chap. VII of the charter.

These contemporary examples illustrate that blockade is part of state practice and that the law concerning blockade has not fallen into desuetude. As part of the conflict with Hamas, the Israeli government has asserted that the 'limitation on the transfer of goods is a central pillar in the means at the disposal of the State of Israel in the armed conflict between it and Hamas', which is known as the Islamic Resistance Movement.²⁵

13.4 The Gaza Blockade

The Oslo Accords recognize that the Palestinian Authority (PA) may exercise jurisdiction over the territorial waters off Gaza.²⁶ Israel, however, was granted the right to maintain external security of the Gaza Strip until such time as there was a final status agreement.²⁷ Under Article 5(1)(b) of the Gaza-Jericho Agreement, the PA was excluded from exercising functional authority for external security. Article 8 of the Gaza-Jericho Agreement states: 'Israel shall continue to carry the responsibility ... for defense against external threats from the sea and from the air

²³ UN Security Council Res. 660 (1990) and UN Security resolution 661 (1990).

²⁴ Interestingly, resolution 665 requested states 'cooperating with the Government of Kuwait' while executing the blockade of Iraq also coordinate their actions using the mechanism of the Military Staff Committee in Articles 46 and 47 of the UN charter. The US-led coalition refrained from doing so, however. See Dinstein 2005, p 306.

²⁵ Franks 2010.

²⁶ Article 5, para 1(a), Gaza–Jericho Agreement.

²⁷ Article 5, para 3, *ibid.*

... and will have all the powers to take the steps necessary to meet this responsibility.' In order to maintain coastal security, three maritime zones were established off Gaza. A central zone extends seaward from the beach to a distance of twenty nautical miles (nm) from the coastline. Along the north and south marine border of the central zone are strips of water adjacent to Egyptian and Israeli territorial seas and measuring one nm in width. The two strips constitute military security areas and are under Israeli authority. The central zone is jointly managed by the government of Israel and the Palestinian Authority, and is open for fishing throughout the zone and for recreational boating out to a distance of three nm from shore. Foreign shipping is not permitted to approach closer than twenty nm from the coastline.

Hamas, which won electoral victory in Gaza in 2006, has consistently opposed the Oslo peace process. The conflict between Israel and Hamas accelerated after the Hamas election success and the subsequent withholding of donor funds and closure of the Gaza strip in 2007. In June 2007, group violently seized control of Gaza from the PA and Israel promptly declared Gaza 'hostile territory'. Hamas was formed in 1987 as the Palestinian branch of the Muslim Brotherhood. The US Department of State has designated Hamas an international terrorist organization, but the group enjoys widespread support and sympathy throughout Gaza, strengthened by a network of social, religious and political patronage. Izz-al-Din al-Qassam Brigades, the military forces of Hamas, are responsible for thousands of missile strikes and hundreds of suicide bombings and terrorist attacks inside Israel and the West Bank. Negotiations between Israel and the PA collapsed in 2002, and Palestinian support for the PA began to erode. Israel imposed intermittent but increasingly restrictive impediments to land and sea entry into Gaza about the same time.²⁸ On 19 September 2007, Israel issued a communiqué that stated:

Hamas is a terrorist organization that has taken control of the Gaza Strip and turned it into hostile territory. This organization engages in hostile activity against the State of Israel and its citizens and bears responsibility for this activity. In light of the foregoing, it has been decided to adopt the recommendations that have been presented by the security establishment, including the continuation of military and counter-terrorist operations against the terrorist organization. Additional sanctions will be placed on the Hamas regime in order to restrict the passage of various goods to the Gaza Strip and reduce the supply of fuel and electricity. Restrictions will also be placed on the movement of people to and from the Gaza Strip. The sanctions will be enacted following a legal examination, while taking into account both the humanitarian aspects relevant to the Gaza Strip and the intention to avoid a humanitarian crisis.²⁹

²⁸ Prime Minister Ehud Olmert (Communicated by the Prime Minister's Media Adviser) Security Cabinet declares Gaza hostile territory, 19 September 2007, <http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm>.

²⁹ At <http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm>.

The Israeli Security Cabinet's designation of Gaza as 'hostile territory' is a factual (rather than a legal) determination, since Hamas is 'an organization dedicated to the destruction of the State of Israel'.³⁰ In response to a large increase in the number and frequency of missile attacks into Israel from Gaza throughout 2008, on 27 December the Israeli Air Force launched 'Operation Cast Lead'. Israeli ground troops entered Gaza just days later—on 3 January 2009—the same day the naval blockade was established. The Israeli Navy publicly announced the blockade three days later, and its boundaries were superimposed on the 20 nm Gaza maritime zone.³¹ The purpose of the naval blockade was to prevent Hamas from resupplying rockets and other weapons and to stop the infiltration of terrorists into Gaza. The IDF and Hamas were engaged in battle for nearly 3 weeks, and on 21 January 2009, Israeli forces withdrew from the territory. But the naval blockade has persisted.

Since Hamas' takeover of Gaza, Israel limited the import of various goods to Gaza to a 'humanitarian minimum'.³² All foreign vessels are barred from the Gaza offshore area. Vessels delivering humanitarian supplies to the civilian population are permitted to do so through the land crossings, subject to prior coordination with Israel and inspection of the cargoes. The list of permitted goods includes about 40 items; prior to 2007, about 4,000 items were permitted into Gaza.³³ The humanitarian group Gisha claimed that Israel allowed only 25% of the goods into Gaza than it had before the Hamas takeover.³⁴ One apparent problem, however, was that there appeared to be no official list of contraband that traders could observe, and Gisha alleges the list was seemingly arbitrary and subject to frequent change without notice. Israel was criticized because decisions on what cargoes were permitted into the Gaza Strip appeared to be made on a case-by-case basis, resulting in eclectic and inconsistent decisions. Gisha claims that items such as newspapers, tea, standard A4 office paper and chocolate were among those reportedly barred (Fig. 13.1 and Table 13.1).

Thus, the contraband list has been criticized as overbroad and illogical. Gisha argued in court that the blockade of Gaza was tantamount to unlawful collective

³⁰ Behind the Headlines: Israel Designates Gaza a 'Hostile Territory', Israel Ministry of Foreign Affairs, 24 September 2007, <http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Gaza+designated+a+Hostile+Territory+24-Sep-2007.htm>.

³¹ State of Israel Ministry of Transport and Road Safety, Notice to Mariners No. 1/2009 Blockade of the Gaza Strip, 6 January 2009, http://en.mot.gov.il/index.php?option=com_content&view=article&id=124:no12009&catid=17:noticetomariners&Itemid=12.

³² Knickmeyer 2007, p A1. For the current Israeli maritime security notice, see Advisory Notice (Maritime Zone off the Coast of the Gaza Strip), 11 August 2008, No. 6, 13 August 2008.

³³ A complete Israeli list of contraband and acceptable goods in the Gaza blockade emerged from a court case filed in Israel by the Israeli human rights group Gisha. Gisha claimed that prior to the closure, Israel allowed an average of 10,400 trucks to enter Gaza with goods each month, but by the summer of 2010 only 2,500 trucks per month were permitted (Frenkel 2010).

³⁴ At http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/05_05_10_gazaimports.pdf.

Agreement on the Gaza Strip and the Jericho Area

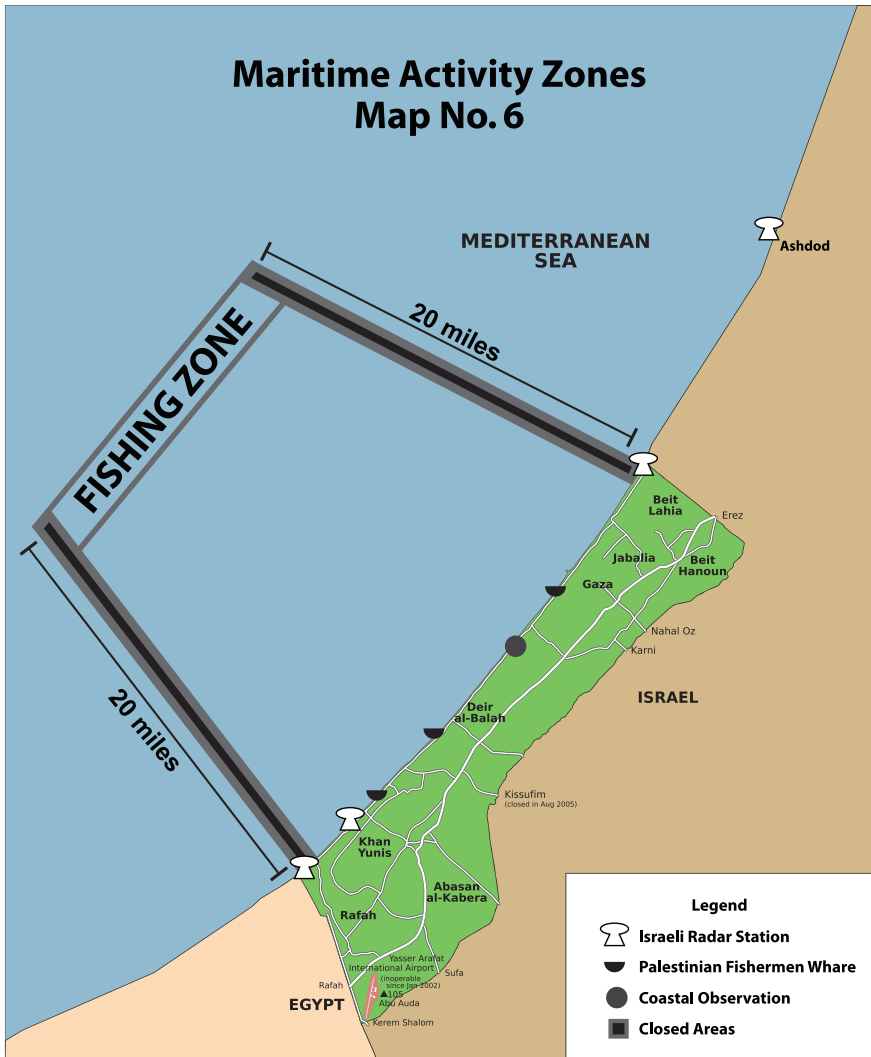


Fig. 13.1 Maritime Activity Zones (Source Map No. 6, Agreement on the Gaza Strip and the Jericho Area; see also the Annex appended to the end of this article)

punishment against the civilian population. ‘Gisha’s position is that the closure is illegal because it punishes civilians in the Gaza Strip for acts they did not commit and for political circumstances beyond their control. The closure inflicts harm to

Table 13.1 Contraband list for the Gaza land crossing as of May 6, 2010

Prohibited	Permitted
<i>Contraband list: Israeli blockade of Gaza</i>	
Steel, cement	Aniseed, cinnamon, black pepper
Coriander, nutmeg, ginger	Fresh fruit, frozen fruit
Canned fruit, dried fruit	Frozen meat and vegetables
Fresh meat	Rice, chickpeas, beans
Seeds and nuts	Frozen fish
Fabric for clothing	Clothes
Fishing rods and ropes for fishing	Animal feed and hay
Chickens and chicken hatcheries	Cartons for transporting chicks
Donkeys, horses, goats and cattle	Chemical fertilizers and pesticides
Musical instruments	Medicine and medical equipment
Newspapers	Wood for doors and window
Construction lumber	

Source Gisha

the civilian population and civilian institutions by blocking the passage of goods necessary for health, well-being, and economic life'.³⁵

The Israeli government stated in a document obtained by the media that the blockade is a tool of economic warfare is intended to achieve a political goal. Still, in the aftermath of the *Mavi Marmara* incident, Israel pledged to ease the blockade but would not lift the embargo so long as Hamas remains in control of Gaza.³⁶ To explain further, Gisha contends that Israel's ban on the entry of raw materials is designed to prevent economic development in the Gaza Strip. For example, Israel allows residents of the Gaza Strip to accept small packages of margarine—a consumer item—but prohibits companies in the region from receiving shipments of large blocks of margarine, because those are used in industrial food manufacture. It is not the product, but rather the purpose, that Gisha claims is banned.

13.5 Law of Blockade

A blockade is a legitimate method of warfare to prevent ingress and egress of all vessels, and it includes the interdiction of all or certain maritime traffic coming from or going to a port or coast of a belligerent party to a conflict.³⁷ The act of initiating a blockade is tantamount to an act of war, and is one of the enumerated

³⁵ Gaza Closure Defined: Collective Punishment Position Paper on the International Law Definition of Israeli Restrictions on Movement in and out of the Gaza Strip (Legal Center for the Freedom of Movement, Gisha, December 2008), available at <http://gisha.org/UserFiles/File/publications/GazaClosureDefinedEng.pdf>.

³⁶ Frenkel 2010.

³⁷ Article 5.2.10 [Blockade], Helsinki Principles, *supra* n 15.

specific acts of aggression that appears in the General Assembly's consensus Definition of Aggression adopted on 14 December 1974.³⁸ The object of a blockade is the disruption of seaborne transportation links to and from an enemy state. A blockade must meet several criteria, including that it be applied during a state of war or armed conflict.

Senior Israeli officials testified that the legal basis for the blockade was customary international law and the existence of a state of armed conflict between Hamas and Israel. The London Declaration, the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* and the US Navy's *Commander's Handbook on the Law of Naval Operations (Commander's Handbook)* all recognize the application of the law of blockade as an important component of the law of naval warfare.³⁹ A state imposing a blockade must provide notice to the international community, and a blockade must be effective in order to be lawful.

During the eighteenth century, blockade became a routine practice in European conflict. But the difficulty of blockading long coastlines soon gave rise to the 'paper blockade', in which a nation might declare a blockade, but lack the naval force to effectively maintain it. The early Dutch blockades of England (1662) and France (1672–1673) and the Dutch–English blockade (1689) were regarded as paper blockades. Consequently states agreed in the Declaration of Armed Neutrality (1780) that in order to be lawful, a blockade also must be effective. The French wars opposing Great Britain from 1793 to 1815 included a continental decree issued by Paris on 21 November 1806 with the goal of closing off Europe to British goods. The project proved too ambitious, however, and it was not well-enforced. British and French naval forces blockaded Russia during the Crimean War from 1854 to 1856 in order to coerce Moscow into abandoning its aspirations in Turkey. The 'effectiveness' criterion entered into the law as a requirement in paragraph 4 of the 1856 Paris Declaration Respecting Maritime Law.⁴⁰ In the opening salvo of the Spanish–American War, on 21 April 1898, Secretary of the Navy John Long directed US warships of the North Atlantic Squadron to blockade Cuba to wrest control of the island from Madrid. Spain was ill-prepared to defend its possession, and within days the island was locked in a vice grip.⁴¹

Although much of the law of naval warfare is rather antiquated, the law surrounding naval blockades still has currency. The contemporary international law of blockade emerged from a lack of consensus over the customary international law of prize, which was to be applied by an International Prize Court established

³⁸ Article 3(c), UNGA Res. 3314, 14 December 1974.

³⁹ IDF Chief Military Advocate General Staff, Avichai Mandelblit's testimony to the Türkel Committee: Public Commission to Examine the Maritime Incident of May 31, 2010, Session Number 4, 26 August 2010, pp 41–45.

⁴⁰ 1856 Paris Declaration Respecting Maritime Law, 16 April 1856, reprinted in AJIL 1 (1907) Supp. 89–90.

⁴¹ Hayes 2006, pp 81–85.

by Hague Convention XII of 1907.⁴² In an effort to clarify the customary law relative to prize, ten powers met in a conference in London beginning on 4 December 1908 to determine and codify the rules.⁴³ The 1909 London Declaration Concerning the Laws of Naval War (the London Declaration) emerged as a product of the meeting. The London Declaration contains 21 provisions concerning 'Blockade in Time of War'.⁴⁴ Although the Declaration was never ratified, it is accepted as a general expression of the customary international law of blockade.

Blockade is a lawful measure and is recognized by the UN. After World War II, the UN charter included the concept of naval blockade as a legitimate instrument for the use of force by the UN Security Council. Importantly, the concept of blockade in the charter appears in Article 42 (military sanctions) rather than in Article 41 (economic sanction).⁴⁵ Scholars and practitioners in naval warfare similarly have accepted blockade as a legal mechanism during armed conflict. Article 97 of the 1993 *San Remo Manual of International Law Applicable to Armed Conflicts at Sea* also accepts blockade as a lawful tool of naval warfare.⁴⁶ Following the 1980–1988 Iran–Iraq War, the International Law Association (ILA) formed a Committee on Maritime Neutrality to consider the rules affecting neutral ships, which suffered heavily during the conflict. Throughout the war, the UN Security Council had called on states to respect the right of neutral shipping to freedom of navigation, but often to little effect.⁴⁷ In order to strengthen these rights, the law of blockade was reflected in the Helsinki Principles on the Law of Maritime Neutrality, which were adopted by the ILA at its Taipei Conference on 20 May 1998. In the United States, analysis and practice on the law of blockade is reflected in a manual published by the US Navy, Coast Guard and Marine Corps, the *Commander's Handbook*.⁴⁸

An important element of an effective blockade is to employ 'force sufficient really to prevent access to the enemy coastline'.⁴⁹ The date of beginning, period of

⁴² International Prize Court, Hague Convention XII (1907) Doc 81, reprinted in Schindler and Toman 2004 Helsinki Principles.

⁴³ Austria-Hungary, France, Germany, Great Britain, Italy, Japan, Netherlands, Russia, Spain and the United States participated in the conference.

⁴⁴ Naval Conference of London, Declaration Concerning the Laws of Naval Warfare, signed at London 26 February 1909, reprinted in Schindler and Toman 2004 Helsinki Principles, Doc 83, pp 1111–1122.

⁴⁵ Dinstein 2005, p 295.

⁴⁶ § 97, Doswald-Beck 1995, p 178.

⁴⁷ UN Security Council Resolutions 540 (1983), 552 (1984), 582 91986) and 598 (1987).

⁴⁸ Declaration concerning the Laws of Naval War, 208 Consol. T.S. 338 (1909), available at <http://www1.umn.edu/humanrts/instree/1909b.htm>. The Commander's Handbook on the Law of Naval Operations (US Navy, Naval Warfare Publication 1–14 M, 2007) (hereinafter, Commander's Handbook), is a product of the International Law Department at the US Naval War College, where I lead a joint effort to revise the document. The revision is planned for release during 2011.

⁴⁹ Article 2, London Declaration.

blockade and specific geographic boundaries of a blockade must be published. Neutral vessels must be given some period of time in advance to avoid the blockade, typically between two and 30 days, and failure to provide safe passage from the blockaded coast before initiation of a blockade renders the declaration unlawful.⁵⁰ A blockade also may not bar access to neutral coastlines or ports.⁵¹ Furthermore, a blockade must be applied impartially to the ships of all nations, and the blockading belligerent may not discriminate among nations in the enforcement of the blockade.⁵²

Weapons, ammunition and other items of military utility constitute 'absolute contraband'.⁵³ Other goods and material, such as medicine and religious objects, constitute 'free goods' and may not be seized as contraband.⁵⁴ Clothing, bedding, and essential foodstuffs and means of shelter for the civilian population generally are considered free goods, provided 'there is not serious reason to believe that such goods will be diverted to other purpose', or accrue a 'definite military advantage' to the enemy.⁵⁵ Some scholars retain a third category of 'conditional goods', which are those goods that are considered contraband. Even though not patently military goods, conditional goods are susceptible to being used for a military purpose. In order to consider enumerated conditional goods as contraband, the blockading state must designate them on a published list.⁵⁶

'Starvation of civilians as a method of warfare', may not be the sole purpose of a blockade. Thus, the object of the blockade must be to prohibit war-sustaining goods and cannot be aimed 'solely' at starving the civilian population.⁵⁷ A blockade must permit non-belligerent material to flow, but this rule gives rise to inevitable disagreements about dual use items, which may be used by civilians, but also have qualities or uses that may make them 'war sustaining'. Legally, however, the 'war sustaining' element of blockade is actually quite minimal. Article 23 of 1949 Geneva Convention IV, for example, states that blockade must allow 'free passage of all consignments of foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers, and maternity cases', and then only on condition that there be 'no reason for fearing ... that a definite advantage may accrue to the military efforts or economy of the enemy'.

A blockade does not target any specific cargo, but rather constitutes a total exclusion of transit into and out of the area or location.⁵⁸ But since a naval

⁵⁰ Article 10, London Declaration.

⁵¹ Article 18, London Declaration.

⁵² Article 5, London Declaration.

⁵³ Article 22, London Declaration.

⁵⁴ Article 38, GC II and Article 23(1), 59 and 61, GC IV. See also, § 150, Doswald-Beck 1995, p 217.

⁵⁵ GC III and Article 59, GC IV. See also § 150, Doswald-Beck 1995, p 217.

⁵⁶ § 149, Doswald-Beck 1995, p 216.

⁵⁷ Article 54 (1), Geneva Additional Protocol I (1977) and Article 33, Geneva Convention IV.

⁵⁸ Schmitt 1991, p 3.

blockade is imposed for security purposes and not 'solely for the punishment of the civilian population', humanitarian material must be separated from contraband.⁵⁹ But the blockading force may prescribe technical arrangements, including visit and search, under which the passage is permitted, in order to ensure that no aid is transferred to the benefit of the enemy, rather than to the civilian population.

In the case of Gaza, the IDF claims that Israel has fulfilled the impartiality and non-discrimination elements of a lawful blockade. Israel has suggested that it has maintained an effective blockade of Gaza, preventing all known vessels from landing in the area, and diverting humanitarian aid shipments through the Israeli port of Ashdod in order to inspect cargo inbound to Gaza. Because the bar for what constitutes 'war sustaining' materiel is so low, it appears in the case of the Gaza blockade that Israel would be within its rights to only permit bare minimum humanitarian supplies for children, pregnant women, and new mothers. Indeed, Israel has adopted this rationale, stating:

At the heart of (the decision to declare Gaza 'hostile territory') the principle that although Israel remains committed to averting any humanitarian crises, it does not feel required to provide any supplies, which go beyond that. It would be hypocritical to expect Israel to provide anything beyond the basic human needs of a population when a large number of its members, including the authorities, are engaged in systematic hostile activities. While Israel does not wish to see the innocent residents of Gaza harmed, it must protect its own citizens.⁶⁰

There certainly is no legal right for a blockaded people to insist on luxury goods, spices like cinnamon, let alone construction supplies, such as cement, which could be used to construct homes as well as defensive works and bunkers, and steel pipes, which in the past have been used to develop makeshift al-Qassam rocket tubes.⁶¹

13.6 Enforcement: Belligerent Right of Visit and Search

The right of visit and search is the means by which a belligerent warship or military aircraft may enforce a blockade against an enemy for the purpose of inspecting commercial shipping in order to ascertain the enemy character of the

⁵⁹ Although blockade is prohibited if 'it has as its sole purpose the starvation of the civilian population,' all of the methods of warfare are subject to proportionality—if the effect on the civilian population is excessive in relation to the lawful military purpose and military benefit. § 102, Doswald-Beck 1995, p 179.

⁶⁰ Behind the Headlines: Israel Designates Gaza a 'Hostile Territory', Israel Ministry of Foreign Affairs, 24 September 2007, available at <http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Gaza+designated+a+Hostile+Territory+24-Sep-2007.htm>.

⁶¹ Qassam rockets are 90–115 mm with a range of 6–12 km. See Rocket threat from the Gaza Strip, 2000–2007, at p 11 (Intelligence and Terrorism Information Center at the Israel Intelligence Heritage & Commemoration Center (IICC), December 2007), available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/rocket_threat_e.pdf.

ship and its cargo. This is a war-time right and a lawful basis for compliant, noncompliant or opposed boarding of foreign-flagged merchant ships at sea. A party to an armed conflict may enforce a blockade against an enemy coastline or port through the belligerent right of visit and search. Visit and search is the process whereby a warship summons to neutral ship to lie to, using the international flag signal (SN or SQ)⁶² or firing a blank charge, in order that the warship may determine the enemy character and destination of the ship or its cargo.⁶³ The summoned neutral merchant ship is required to stop and display her colors, and submit to boarding and inspection of the vessel. As a wartime right, visit and search is entirely separate and distinct from other lawful bases for boarding foreign-flagged ships at sea, including self-defense, authorization by the UN Security Council, boarding as a condition of port entry or boarding under authority of flag-state consent via direct permission, procedures exercised under a bilateral or multilateral maritime security agreement or, in the view of the United States, the consent of the master of the vessel.⁶⁴

Vessels attempting to breach a blockade or resist the exercise of a belligerent's right of visit and search are liable to capture or even risk being sunk.⁶⁵ Rule 1710.4 of the *1999 Model Manual of the Law of Armed Conflict for Armed Forces*, published by the International Committee of the Red Cross, for example, indicates that: 'Merchant vessels believed on reasonable ground to be breaching a blockade may be captured and those which, after prior warning, clearly resist capture may be attacked'. Neutral merchant vessels that attempt to breach a blockade or resist attempts to conduct visit and search may be treated as enemy ships.⁶⁶ Thus, failure of a neutral ship to submit to visit and search is an assumption of risk for damage or loss of the ship. Naval forces that are conducting visit and search may use force to compel compliance, including deadly force and the destruction of the vessel. Ordinarily, merchant ships should be provided warning so that they may re-route or off-load belligerent cargo. If the warning is ignored by a neutral-flagged merchant ship, however, the Helsinki Principles set forth that:

Merchant ships flying the flag of a neutral State may be attacked if they are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search, capture or diversion.⁶⁷

The blockading state enjoys the belligerent right to capture and condemn neutral or enemy merchant vessels and cargo as prize if they constitute contraband, attempt to breach a blockade, if ships are fraudulently documented, they operate under the

⁶² International maritime signal flags for 'SN' are as follows: 'S' is a white flag with a blue square in the center; 'N' is a blue and white checkerboard pattern. 'Q' is a solid yellow flag.

⁶³ § 5.2.1, Schindler and Toman 2004.

⁶⁴ See, e.g., Kraska 2011.

⁶⁵ Article 20, London Declaration.

⁶⁶ § 7.5.2, Commander's Handbook, *supra* n 48.

⁶⁷ § 5.1.2(3), Helsinki Principles, *supra* n 15.

control of the enemy, they transport enemy troops or they violate regulations in the immediate area of naval operations.⁶⁸ Neutral ships also may be attacked if they engage in belligerent acts on behalf of the enemy or are assimilated into the enemy's intelligence system, such as merchant ships that report the movement of belligerent ships or aid the enemy in targeting of belligerent ships.⁶⁹ A merchant vessel also may be attacked if it 'otherwise makes an effective contribution to the enemy's military action'.⁷⁰

A warship may direct the neutral merchant to a port to conduct a shore-side inspection of the ship and cargo. If passengers and crew leave the ship, they are not to be regarded as prisoners of war, but instead should be repatriated as quickly as is feasible. Even the officers and crews of captured neutral merchant vessels who are nationals of a neutral nation do not become prisoners of war and must be repatriated 'as soon as circumstances reasonably permit'.⁷¹ The US Navy has issued additional guidance to its forces conducting visit, board, search and seizure, including a checklist of information that the boarding officer should obtain, such as not only the enemy character of the vessel, but the ports of departure and destination, nature of cargo, manner of employment, and other facts.⁷²

13.7 Visit and Search in International Waters

Although a blockade is declared within a defined area, it may be applied virtually worldwide outside of the territorial seas of neutral states. The prohibition against visit and search in neutral territorial waters also includes archipelagic sea lanes of neutral states and straits used for international navigation that are overlapped by the territorial seas of a neutral state. As an exercise of belligerent right and military activities at sea, visit and search may be conducted on the high seas and in any nation's EEZ. These rules makes logical sense, because if a blockading belligerent were forbidden from conducting visit and search in enforcement of a blockade in international waters, then the only place that such activity could occur would be within 12 nm of the shoreline of the belligerent or the enemy—inside the enemy's territorial sea. This interpretation would require an impossibly large force lay down to cover a coastline of any size, as well as compel the blockading belligerent to operate exposed in dangerous littoral waters, enforcing a blockade under the

⁶⁸ § 14–148, Doswald-Beck 1995, pp 212–216.

⁶⁹ § 5.1.2(4), Helsinki Principles, supra n 15.

⁷⁰ Ibid.

⁷¹ § 7.10.2, Commander's Handbook, supra n 48.

⁷² Normally, the following papers will be examined: the certificate of national registry, crew list, passenger list, logbook, bill of health clearances, charter party (if chartered), invoices or manifests of cargo, bills of lading, and on occasion, a consular declaration or other certificate of non-contraband carriage certifying the innocence of the cargo. See para 630.23, OPNAVINST 3120.32C CH-6, 26 May 2005.

nose of visual coastal surveillance and vulnerable to all manner of land-based attack. It is no surprise that these naval operational aspects of blockade have meant that blockade occurs in international waters rather than the enemy's territorial sea.

The *Commander's Handbook*, for example, indicates that: 'Attempted breach of blockade occurs from the time a vessel or aircraft leaves a port or airfield with the intention of evading the blockade ... It is immaterial that the vessel or aircraft is at the time of interception bound for neutral territory, if its ultimate destination is the blockaded area.'⁷³ Similarly, Yoram Dinstein and W. Heintschel von Heinegg are in agreement that neutral merchant ships outside neutral waters are subject to visit and search by belligerent warships in order to determine the enemy character of the cargo and vessel, unless such ships are travelling under convoy of neutral warships.⁷⁴

Visit and search has never been illegal in international waters, although a surprising number of international law scholars have stated as much in the aftermath of the Mari Marmara seizure.⁷⁵ To deny Israel the right of blockade would conflate the peacetime international law of the sea with the wartime law of armed conflict and naval warfare. Such a claim constitutes a form of legal minimalism in that it so narrowly prescribes the rule against the interests of the belligerent exercising the blockade as to completely undermine the purpose of the rule. The international law of the sea was never designed to replace or conflict with the law of naval warfare. During the negotiations at the Third UN Convention on the Law of the Sea from 1973 to 1982, for example, delegates roundly rejected the notion that the new Convention set terms either for naval arms control or naval warfare. The law of naval warfare, which developed concurrently with and complementary to the law of the sea in customary international law, was codified long before the first multilateral treaty restated the rules for peacetime law of the sea in 1958. Consequently, the suggestion that the Israeli interception of the 'Freedom Flotilla' in international waters is an unlawful act is incorrect as a matter of law so long as one accepts that the nation enjoyed the right of blockade as a component of the armed conflict with Gaza.

13.8 Blockade in Non-international Armed Conflict

The greatest legal wrinkle in the case of 'Operation Sea Breeze' is whether law of naval warfare applies in the struggle between Israel and Gaza. Blockade is a creature of the law of naval warfare, which applies a priori to international armed

⁷³ § 7.7.4, *Commander's Handbook*, supra n 48.

⁷⁴ Dinstein 2004, p 217. See also Heintschel von Heinegg 1991, pp 283, 299 and Heintschel von Heinegg 1992, pp 89, 115.

⁷⁵ See, e.g., at statements by John Quigley, Ohio State University School of Law, Deen 2010, and Michael Byers, They should not have been there: Israel's soldiers may have acted in self-defence, but boarding a flotilla of aid ships on the high seas violated international law, *Ottawa Citizen*, 3 June 2010.

conflicts (IACs). Common Article 2 of the Geneva Conventions of 1949 states that IAC occurs when one or more states engage in armed conflict with another state, regardless of the intensity of the combat or even in the absence of hostilities. The Geneva Conventions are applicable to IACs involving 'two or more High Contracting Parties, even if a state of war is not recognized by one of them'. No formal declaration of war is required. Common Article 2 also applies in cases of military occupation. Some consider Gaza as occupied by Israel; it is not. There are no Israeli troops in Gaza, which everyone regards as a self-governing enclave cut from the Middle East. The Gaza Strip could be considered part of Egypt, which inherited governance of the area from the British Ottoman protectorate. But Egypt does not want it. An argument could be made that the territory is 'constructively occupied' by virtue of the blockade, but this is rather circular, since the entire analysis is being conducted to determine whether Israel may conduct such a blockade.⁷⁶ Article 1(4) of Additional Protocol I of 1977 extends the definition of IAC to include wars of national liberation—armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination.

But the Gaza Strip is not a traditional *de jure* state, raising the question of whether the conflict between Israel and Gaza is not an IAC, but rather a 'non-international armed conflict' (NIAC). Traditionally, a struggle between two states constitutes IAC, whereas a conflict between a state and non-state entity, such as an insurgency of a terrorist network, constitutes NIAC. The distinction is important because different rule sets apply to IACs and NIACs, and there is some debate as to whether blockade is available as a lawful measure in NIACs. NIACs typically are fought between governmental forces and non-state armed groups, or among such groups only. To further complicate matters, international humanitarian law recognizes a distinction between NIACs within the ambit of common Article 3 of the Geneva Conventions of 1949 and NIACs within the definition set forth in article 1 of Additional Protocol II of 1977.

Common Article 3 applies to 'armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties'. The ICRC suggests that the requirement that the armed conflict occur in the territory of one of the High Contracting Parties has lost its importance in contemporary state practice since the Geneva law is universally accepted, and a conflict 'has to but take place on the territory of one of the Parties to the Convention'.⁷⁷ It is not entirely clear, however, that conflict occurring in the Gaza Strip takes place 'on the territory one of the Parties to the Convention'. The definition of NIAC is supplemented by Additional Protocol II of 1977, which contains an even more restrictive definition of the term and therefore is of little help in capturing the Gaza conflict as NIAC.

⁷⁶ I am indebted to Eugene Kontorovich, Associate Professor of Law, Northwestern University Law School, for this observation.

⁷⁷ How Is the Term 'Armed Conflict' Defined in International Humanitarian Law? International Committee of the Red Cross Opinion Paper at p 3 (International Committee of the Red Cross, March 2008).

Article 1(1) of Additional Protocol II indicates that the treaty applies to armed conflicts, ‘which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol’.

In sum, the Israeli–Gaza conflict does not fit squarely within the definition of IAC because Gaza is not a state, nor within NIAC because the conflict does not take place in the territory of a High Contracting Party—namely, Israel. Gaza is not a High Contracting Party. Some scholars have tried to solve this dilemma by suggesting that the reference in common article 3 to conflicts ‘occurring in the territory of one of the High Contracting Parties’, and in Article 1 of Protocol II, to conflicts, ‘which take place in the territory of a High Contracting Party’, are not geographic limitations, but simply recount that treaties apply only to their state parties. The argument is made that if the limitations excluded conflicts that spread over the territory of several states, there would be a gap in NIAC protection. It is incongruous that peoples affected by armed conflict that are spread throughout several states would receive less protection than those in a single state. But even this interpretation does not clearly cover the case of the Gaza Strip, since it is not merely another state, but rather an amorphous, ill-defined entity without any concrete *de jure* status. The *San Remo Manual on the Law of Non-International Armed Conflict*, for example, excludes from NIAC armed conflicts that extending to the territory of two or more states.⁷⁸ The *San Remo Manual* defines NIAC as, ‘armed confrontations occurring within the territory of a single State and in which the armed forces of no other State are engaged against the central government’.

In some cases, it appears the rules governing conduct during armed conflict at sea apply in both IAC and NIAC, so the two bodies of law overlap. The law of blockade arose originally as a feature of IAC. If the Gaza conflict constitutes IAC, then the law of blockade applies. If, however, the Gaza conflict constitutes NIAC, the application of the law of blockade is less clear. Reverting attention for the moment to the peacetime international law of the sea, one could question whether there exists a right of blockade beyond the territorial sea during NIAC. It is not clear why parties to a NIAC should be entitled to interfere with foreign-flagged vessels and aircraft beyond the territorial sea. At the same time, it is just as murky why foreign-flagged, purportedly neutral merchant ships, should be immune from visit and search in international waters while fomenting insurrection as part of a NIAC.

In consideration of these issues, there are three particularly prominent applications of the law of blockade to NIAC—the US Civil War, the Spanish Civil War and the French war against Algerian independence. Being sensitive to space limitations, this article addresses in detail only the American Civil War. The conflict has the deepest factual symmetry to the case at hand and richest legal

⁷⁸ § 1.1.1, Schmitt et al. 2006.

history of the three case studies. During the US Civil War the Union conducted a strangling blockade against the Confederacy. The Northern blockade was initiated only days after the war with the South began. At 0430 on 12 April 1861 43 Confederate guns situated in a ring around Fort Sumter in Charleston Harbor began a bombardment that thrust America into its bloodiest war ever. President Lincoln declared a blockade against Confederate ports 7 days later—on 19 April 1861.⁷⁹ The blockade was the most ambitious undertaken by any nation, stretching 3,549 miles along a complex coastal zone comprised of 180 bays, rivers and harbors.⁸⁰ The rather novel application of the law of blockade against one's own nation required all of the legal and political skills of the president and Secretary of State William H. Seward. Because of the dismal condition of the US Navy, the blockade served more to put foreign nations on notice not to conduct maritime trade with the South than to actually stop all traffic in and out of the Confederacy. The paucity of Union naval forces and the challenges posed by the extensive coastline call into question the effectiveness of the blockade. Of the 1,300 attempts to break the blockade, 1,000 of were successful.⁸¹

The Union argued that the Confederate States of America did not form a legitimate sovereign, but rather should be characterized as an insurrection.⁸² At the same time, however, the Union boarded and captured Southern merchant ships in international waters. The Confederate commercial ships protested their capture, arguing that that since war can only be conducted between two or more sovereign nations, the Union blockade of the South was unlawful. Initially, European states also questioned the legality of the blockade, echoing the concerns of the Confederacy that Union action was an unlawful impairment of the right of all nations to exercise freedom of the seas during peacetime. British Law Officers stated:

For the United States to demand the exercise of these belligerent rights, and at the same time to refuse a belligerent status to the enemy was plainly contradictory. In truth the position is as novel and unsound in international law and clearly propounded for the first time for the obvious purpose of giving the United States the advantage of being exclusively recognized by the Neutral State as Belligerent.⁸³

But slowly neutral European states began to comply out of practical reasons with the terms of the blockade, submitting their merchant ships to inspection by Union

⁷⁹ Rush et al. 1903 Proclamation of President Abraham Lincoln, 19 April 1861, V Official Records of the Union and Confederate Navies in the War of Rebellion, Ser. I, 27 Vols, at p 620.

⁸⁰ To make matters worse, nearly one-quarter of U.S. naval officers resigned their commissions and offered their services to the Confederacy (Wagner et al. 2002, p 547).

⁸¹ Wagner et al. 2002, p 548, Referencing statement by historian Stephen R. Wise.

⁸² Greater than a riot, which is a 'minor disturbance of the peace ... perpetrated by a mob', an insurrection was regarded as an 'organized armed uprising which seriously threatens the stability of government and endangers social order'. There is no recognition of belligerency, and combatants have no immunity for their actions on the field of battle. Insurrection was distinguished from rebellion, which was regarded as a less extensive form of conflict (Randall 1926, p 81).

⁸³ F.O. 83,2225, reproduced in Smith 1932, pp 309–310.

naval forces. At the same time, however, the Europeans argued that acceptance of the belligerent right of the Union to impose a blockade against the South also triggered for the Confederacy enjoyment of the entire menu of belligerent rights in time of war. The Confederacy was entitled to formal belligerent status, which would have the effect of converting a NIAC into an IAC. In addition to the dilemma posed in the law of armed conflict, there was a related constitutional problem. Blockade is an act of belligerency, yet it was Congress that held the power to declare war. Finessing this point, Lincoln's proclamation included a savings clause, making the blockade operative only 'until Congress shall have assembled and deliberated' on the issue, thereby giving the legislative branch the ultimate authority over whether to maintain the blockade. Eventually, Congress approved the blockade, but that still left the complaint of the English and other neutral nations and the status of the Confederacy as a lawful belligerency.

According to English reasoning, although Lincoln proclaimed the rebels to be insurrectionists and thus not recognizable under international law as a belligerent power engaged in war, his declared blockade was an act of war, which would have to be conducted against a sovereign state. Thus Lincoln had actually granted belligerency status to the Confederacy and thereby forced foreign powers to do the same. By proclaiming neutrality, England afforded the Confederacy the status of a belligerent power.⁸⁴

The English position—that the blockade converted a NIAC into an IAC—came to be validated by the US Supreme Court. In the 1863 Prize Cases, the Court held that a state of armed conflict existed between the North and the South, even though the Confederacy was not a sovereign state.⁸⁵ In the Prize Cases, the owners of seized Confederate merchant vessels sought to have the court recognize that only an insurrection existed between the North and the South, and therefore seizure of their private property was invalid. But the Court rejected this argument, and held that whether a state of war existed, as opposed to a state of insurrection, was determined by the magnitude of the violence attendant to the conflict and not by the language contained in formal declarations.⁸⁶ 'The proclamation of blockade itself', the court found, was 'official and conclusive evidence ... that a state of war existed ...'⁸⁷ The Northern blockade and the subsequent British proclamation of neutrality meant that there existed an armed conflict between two belligerents.⁸⁸ Therefore the law of blockade applied to the conflict.⁸⁹

But Washington's interest was to deny the Confederacy status as a belligerent, because doing so opened the door to a host of belligerent rights and privileges that

⁸⁴ Abraham Lincoln: American President; An Online Reference Source, Miller Center of Public Affairs, University of Virginia, available at <http://millercenter.org/academic/americanpresident/lincoln/essays/biography/5>.

⁸⁵ *The Prize Cases*, 67 U.S. 635 (1863).

⁸⁶ *Ibid.*

⁸⁷ *The Prize Cases*, (1862), 2 Black 635, 17 L 459, 477.

⁸⁸ *The Prize Cases*, 67 U.S. 635 (1863).

⁸⁹ Green 1993, p 303.

the South would enjoy. As a belligerent party, the naval forces of the Confederacy stood to benefit from safe harbor, secure credit and contract for warships and other weapons from neutral states. The English Parliament could take up the merits of more active or formal intervention in the war in support of the South.⁹⁰ These issues were only the tip of the iceberg, as belligerent status implicated almost every aspect of the conflict, including:

... [t]he treatment of captured 'insurgents' as criminals instead of prisoners of war; the possible punishment of such 'insurgents' as traitors, and the confiscation of their property; the use of the municipal power over the territory claimed by the insurgents when such territory should be captured; the legality of Confederate captures at sea, and the disposition to be made of the crews of Confederate warships and privateers.⁹¹

Inevitably, some hybridization of the conflict slowly evolved. Throughout the war, for example, the Union government often afforded Confederate forces belligerent status, particularly when they were captured while in uniform, even though the South was never formally recognized as a belligerent party. On the other hand, captured Southern privateers were hanged as pirates early in the war. The death penalty was imposed on the crews and officers of Confederate naval vessels and privateers operating under letters of marque issued by the Confederate government, in strict accord with Lincoln's blockade proclamation. Later, however, the Union changed this practice as it found it impolitic to punish Confederate sailors as pirates.⁹²

13.9 Conclusion

In a more contemporary era, the Spanish Nationalists proclaimed a blockade of Republican ports on 17 November 1936. The Nationalists announced that they would attack international shipping bound for these ports. The blockade was somewhat effective. On 3 December 1936, Britain (really the only major nation genuinely neutral in the conflict) prohibited the export of arms to Spain in British-flagged vessels. Meanwhile, Stalin was supplying war materiel to the Spanish Republic, and the Soviet merchant freighter *Komsomol* was the first Soviet ship to transport armored battle tanks, armored cars and artillery into the country. Eighty-four Soviet ships were stopped and searched by Spanish Nationalists from October 1936 to April 1937. The Canarias, the flagship of the Nationalist Navy, intercepted and sank the *Komsomol* on 14 December 1936.⁹³ For their part, the Republican forces seized the German vessel *Palos*, which was bound for Nationalist Spain. Even more recently, the 2006 Lebanon War involved an Israeli blockade of the

⁹⁰ Abraham Lincoln, *supra* n 84.

⁹¹ Randall 1926, pp 59–60.

⁹² *Ibid.*

⁹³ Thomas 2001, pp 432, 555.

coast of Lebanon, but arguably the contest was a transnational NIAC rather than an IAC since the IDF was fighting Hezbollah, a non-state irregular force, and not the national armed forces of Lebanon. The 2006 war was not a war between Israel and Lebanon, *per se*, but rather Israel and Hezbollah—a NIAC in which Israel's prosecution of a blockade was widely accepted by the international community.

The analogy of the American Civil War offers clues for addressing the Israeli blockade of Gaza. The US experience suggests that if Gaza were regarded as a sovereign state, then a state of war—IAC—would exist between Israel and Gaza. In such case, there is no doubt that the imposition of blockade is lawful. But this determination places Israel in the same dilemma experienced by the Union during the Civil War. If Israel avails itself of the right to blockade Hamas, is it also willing to grant Hamas lawful belligerent status? Are Hamas fighters privileged combatants, operating as the armed forces of the 'state' of Gaza? On the other hand, Hamas militants would be entitled to attack Israeli combatants and, if captured, warrant treatment as prisoners of war. Belligerent status however, does not obviate the need for the army of the 'state' of Gaza to comply with the laws of war—something that the group has blatantly failed to do.

If Gaza is not a state, then the conflict may be characterized as a NIAC, even though there are similar definitional shortcomings with this determination. While blockade originated as a legal concept in IAC, usage, state practice and *opinio juris* have caused it to migrate into NIAC. It is not longer the case that the application of the law of blockade and other rules of warfare are restricted only to conflicts in which both parties are states. Gaza is not a nation, but Gaza and Israel certainly are engaged in a war-like struggle. If the law of blockade does not apply in the case of the Israeli armed struggle with Gaza because Gaza is not a 'state', then this produces the absurd result that a nation may defend itself using a lawful instrument recognized by the law of armed conflict in fighting another state, but must voluntarily forgo the option if confronted with an equally powerful entity that does not meet the legal definition. Consequently, the law of blockade applies in the case of Gaza because there is no other rule set that appropriately balances the interests of the belligerents and neutrals. Furthermore, application of blockade law in NIAC in the case at hand dispenses with the rather metaphysical question of the legal status of Gaza.

Annex

Article XI, Annex I, Maritime Activity Zones (Map No. 6), Agreement on the Gaza Strip and the Jericho Area, Declaration of Principles on Interim Self-Government Arrangements [Declaration of Principles (DOP)], 13 September 1993

1. Maritime Activity Zones

a. Extent of Maritime Activity Zones

The sea off the coast of the Gaza Strip will be divided into three Maritime

Activity Zones, K, L, and M as shown on map No. 6 attached to this Agreement, and as detailed below:

1. Zones K and M

- a. Zone K extends to 20 nautical miles in the sea from the coast in the northern part of the sea of Gaza and 1.5 nautical miles wide southwards.
- b. Zone M extends to 20 nautical miles in the sea from the coast, and one (1) nautical mile wide from the Egyptian waters.
- c. Subject to the provisions of this paragraph, Zones K and M will be closed areas, in which navigation will be restricted to activity of the Israel Navy.

2. Zone L

- a. Zone L bounded to the south by Zone M and to the north by Zone K extends 20 nautical miles into the sea from the coast.
- b. Zone L will be open for fishing, recreation and economic activities, in accordance with the following provisions:
 - (i) Fishing boats will not exit Zone L into the open sea and may have engines of up to a limit of 25 HP for outboard motors and up to a maximum speed of 15 knots for inboard motors. The boats will neither carry weapons nor ammunition nor will they fish with the use of explosives.
 - (ii) Recreational boats will be permitted to sail up to a distance of three nautical miles from the coast unless, in special cases, otherwise agreed within the Maritime Coordination and Cooperation Center as referred to in paragraph 3 below. Recreational boats may have engines up to a limit of ten horsepower. Marine motor bikes and water jets will neither be introduced into Zone L nor be operated therein.
 - (iii) Foreign vessels entering Zone L will not approach closer than 12 nautical miles from the coast except as regards activities covered in paragraph 4 below.

b. General Rules of the Maritime Activity Zones

1. The aforementioned fishing boats and recreational boats and their skippers sailing in Zone L shall carry licenses issued by the Palestinian Authority, the format and standards of which will be coordinated through the JSC.
2. The boats shall have identification markings determined by the Palestinian Authority. The Israeli authorities will be notified through the JSC of these identification markings.
3. Residents of Israeli settlements in the Gaza Strip fishing in Zone L will carry Israeli licenses and vessel permits.

4. As part of Israel's responsibilities for safety and security within the three Maritime Activity Zones, Israel Navy vessels may sail throughout these zones, as necessary and without limitations, and may take any measures necessary against vessels suspected of being used for terrorist activities or for smuggling arms, ammunition, drugs, goods, or for any other illegal activity. The Palestinian Police will be notified of such actions, and the ensuing procedures will be coordinated through the Maritime Coordination and Cooperation Center.

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