

The Attack on the Gaza Freedom Flotilla and International Law

(1) Factual Outline

On 29 May 2010 the Gaza Freedom Flotilla, consisting of six civilian ships and 700 human rights activists and journalist from over 40 countries, set sail for the Gaza Strip carrying over 10,000 tonnes of aid and supplies¹ for Gazan civilians. The purpose of the Flotilla was twofold: (1) to bring much needed supplies for the reconstruction of Gaza, a territory and population that remains largely in ruins after Israel bombing during Operation Cast Lead in 2008-09 and (2) to protest – a non-violent and peaceful protest – against Israel’s illegal military blockade² against the Gaza Strip,³ which has, amongst other things, prevented any rebuilding since the Israeli bombing and engendered a humanitarian crisis.

At 04:00 on Monday 31 May 2010, Israeli naval commandoes rappelled from helicopters onto a Gaza Freedom Flotilla ship (the Mavi Marmara) while it was travelling through international waters (approximately 90 miles or 150k/m from the coast of Gaza). The ship was flying a Turkish flag. During an operation designed to gain control of the ship, the Israeli commandos opened fire on the civilians, killing at least ten (at the time of writing - this estimate is not yet confirmed: the figure could be higher) and injuring many more.

(2) Questions and Answers

(i) Why did Israel prevent the Flotilla from reaching the Gaza Strip?

Israel has imposed, as part of its general blockade against Gaza, a blockade of the coastline around Gaza (20 nautical miles), preventing ships from entering, leaving and in many cases,

¹ Aid supplies included, amongst other things, medical supplies, concrete and other building materials.

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³ The attack on the Flotillas is part of the illegal siege and closure of the Gaza Strip by the Israeli military that is now reaching unprecedented proportions and amounts to collective punishment of the civilian population, which is illegal under international human rights and humanitarian law. The Occupied Palestinian Territory (OPT) in general and the Gaza Strip in particular, is facing an unprecedented human rights crisis that demands the immediate and effective intervention from the international community.

operating within Gazan waters. Israel argues that it acted in order to prevent the Flotilla from breaching the blockade.

(ii) Does international law permit a coastal blockade?

Imposing a blockade over a coastline is not legal under international law save in specific circumstances involving armed conflict: war must be declared (imposing a unilateral blockade is, in and of itself, an act of war) or Israel must be acting as a belligerent occupier (something which it strongly denies). Israel has declared a unilateral blockade around Gaza, arguing that it is in a state of war with Hamas. However, it is generally agreed that certain items – such as food, water, and medical supplies for the sick and wounded – are to be permitted through the blockade and that banning these items is not permitted under international law.

Furthermore, with the exception of a binding decision by the United Nations Security Council,⁴ it is unlawful for a State to enforce a blockade against ships flying the flag of another State in the high seas.

(iii) Was the interdiction of the ship in international waters permitted under international law?

Since the ship was sailing in the high seas, the underlying basic international law principle that applies is *exclusive flag jurisdiction*, which was identified as part of customary international law by the Permanent Court of International Justice in 1927:

“It is certainly true that – apart from certain special cases which are defined by international law – vessels on the high seas are subject to no authority except that of the State whose flag they fly”.⁵

The Court went to explain that,

⁴ Article 41 United Nations Convention

⁵ *S.S. Lotus Case (Fr. v. Turk.)*, 1927 P.C.IJ. (ser. A) No. 9, at 25.

“[F]ailing the existence of a permissive rule to the contrary, [a State] may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention...

...[V]essels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law.

...A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State of the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so.”⁶

Since the ship was flying a Turkish flag it was only subject to Turkish jurisdiction.

International law does provide that warships may interfere with the passage on the high seas of ships flying the flag of another State in limited circumstances. Article 22(1) of the 1958 Geneva High Seas Convention (which sets out customary international law, and to which Israel is a party):

“Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is a reasonable ground for suspecting:

- a. that the ship is engaged in piracy; or
- b. that the ship is engaged in the slave trade; or
- c. that, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.”

⁶ *Ibid.*

This Article is repeated in Article 110(1) of the 1982 United Nations Convention on the Law of the Sea, to which Israel is not a party.

These exceptions were not relevant in this incident in that none of these grounds existed and there was no reasonable basis on which any of these grounds could be suspected.

In addition, the 1988 IMO Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (to which Israel is a party) likely makes the actions of the Israeli navy unlawful. Article 3 provides:

1. Any person commits an offence if that person unlawfully and intentionally:
 - a. seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
 - b. performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship;
 - ...
 - g. injures or kills any person, in connection with the commission or attempted commission of any of the offences set forth in subparagraphs (a) to (f).

Article 13 further provides:

1. States Parties shall co-operate in the prevention of the offences set forth in Article 3, particularly by:
 - a. Taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories;...

(iv) Was the enforcement action – Israeli commandos boarding and attempting to take control of the ship through the use of weapons including live ammunition fire – legal under international law?

Both the international law of human rights and international humanitarian law require operations undertaken by armed forces – whether in law enforcement or armed conflict

modes – to be proportionate. The 1990 Basic Principles of the Use of Force and Firearms by Law Enforcement Officials offer some guidance on this matter – Principles 4 and 5 explain that:

4. Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.

5. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

- (a) exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
- (b) minimize damage and injury, and respect and preserve human life;
- (c) ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;
- (d) ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.

(v) Did the human rights activists on board the ship have the right to repel the Israeli commanders on the basis of self-defence?

Since the initial boarding of the ship was likely illegal, the civilian passengers did have the right to act in self-defence against the invading soldiers. However, lawful self defence on the part of the civilians was limited to reasonable force in the circumstances. Since the ship's flag determines the legal jurisdiction of the ship that it flies and, in this case, it was a Turkish flag, the precise rules on self-defence and the amount of force permitted, is determined by Turkish criminal law. However, given that the Israeli commanders were displaying firearms and the response appears to have been through the use of 'sharp objects' including 'sticks' and in some cases, 'bladed weapons', it is arguable that the response by the civilians was indeed proportional to the threat they faced, especially if evidence emerges that Israeli commandos had used their weapons on any civilians prior to their actions against the commandos.

(vi) Could the humanitarian aid workers have simply docked in at the Port of Ashdod and transferred supplies into the Gaza Strip on land?

This blockade prevents the ships from being able to dock at the Port of Ashdod (a Port located in the Israeli city of Ashdod on the Mediterranean coast) and transfer the humanitarian aid on land into the Gaza Strip. Although Israel has stated that the ships will be towed to Ashdod, the supplies unloaded, inspected and transferred to the Gaza Strip, this option was not available to humanitarian workers as a result of the siege on Gaza. The siege prevents *any* supplies from entering Gaza except in specific situations as determined by Israel. Israel has often prevented the transfer of food or medical supplies into Gaza, in violation of international law.

The Israeli siege is considered⁷ to be a form of collective punishment prohibited by international humanitarian law, international human rights law and the Fourth Geneva Convention – Article 33 states: “no protected person may be punished for an offence he or she has not personally committed... Reprisals against protected persons and their property is prohibited”. When Israel prevents supplies from entering the Gaza Strip, it breaches this prohibition: this conduct represents a continuous and disproportionate punishment against the civilians of Gaza, who rely on the much needed food, medical supplies and construction materials.

Furthermore, as an occupying power, Israel is obliged by international humanitarian law – specifically the Hague Regulations of 1907 (“HR”), the Fourth Geneva Convention of 1949 (“GCIV”) and the First Additional Protocol to the GCIV (“AP1”) – to ensure the protection of civilians and individuals not taking part in hostilities. In respect of these individuals, Article 27 GCIV states that they “shall at all times be humanely treated”: a requirement mocked by Israel’s siege policy on Gaza. In addition, Israel’s siege policy routinely violates:

Article 55 GCIV which provides that it has the *“duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.”*

⁷ See: Address by Ms. Louise Arbour, UN High Commissioner for Human Rights on the occasion of the 6th Special Session of the Human Rights Council, 23 January 2008, available at www.domino.un.org.

Article 5B GCIV stipulates that all persons must be *“provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict.”*

Article 46 HR provides for individual liberty, stating that *“family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.”*

These violations and the many others that form part of Israel’s policy of siege against Gaza mean that Palestinians on the ground face an immeasurable humanitarian disaster as they live without food, clean drinking water, medicine, fuel, electricity, heating and in some cases, adequate shelter.

(vi) What should happen next?

As the ship was flying a Turkish flag and pursuant to the principle of exclusive flag jurisdiction, Turkey has complete jurisdiction over the vessel, and it is within its rights to conduct and demand a full investigation into the violation of its sovereign rights and Israel’s violation of international law, including international human rights and humanitarian law provisions protecting the right to life of civilians and breaches of Turkish homicide law etc.

Israel should be required to release all the evidence to the Turkish authorities and the civilians who have been kidnapped by Israel should be given immediate access to their consulates and legal assistance and be enabled to give their accounts to the Turkish authorities without delay. The full details of the dead and injured should be released to the consulates and published without delay to end the anxiety of waiting friends and relatives.