

1. What are the rights of the Palestinians to the Gaza sea under the international law of the sea?

Palestinians have a right of self-determination in the occupied Palestinian territory (oPt). The Gaza sea is part of the oPt. Therefore, Palestinians have a right to the territorial water (12 nautical miles which are approx. 22 km) and some rights in the continuous zone (additional 12 nautical miles) of the Gaza sea.

Since 1967 occupation the Gaza sea is being administered by Israel's navy, as the occupying power. Israel is under the obligation to administer the Gaza sea according to international law including international humanitarian law.

2. What are the rights and duties of Israel as the Occupying Power under IL/IHL?

International Law of the Sea

Article 14(1) of the Convention on the Territorial Sea and the Contiguous Zone of 1958, to which Israel is a party, states that "ships of all states, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea". "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. Such passage shall take place in conformity with these articles, and with other rules of international law" (article 14(4)). The convention is international customary law.

Right of Humanitarian Assistance

The Palestinians have the right to demand humanitarian assistance (article 30 IVGC, article 50 Hague Regulations). The international community has a corresponding right to provide humanitarian assistance (erga omnes) through all existing border crossings including the Gaza sea.

The occupying power is under the obligation to provide humanitarian aid to the occupied people (article 55 IVGC) and allow others to provide it in case it does not or cannot do so. It must facilitate the rapid and unimpeded passage of humanitarian aid even across a blockade line (article 59 IGVC, article 70 IAP which reflects international customary law, rule 55 ICRC Study of 2005). All states are under the obligation to allow free access to such aid and guarantee its safety.

The ICRC Commentary on the article 70 states that the intention of "rapid and unimpeded passage" of the relief consignments, equipment and personnel is to avoid any harassment, to reduce formalities as far as possible and dispense with any that are superfluous. ...Thus the obligation imposed here is relative: the passage of the relief consignments should be as rapid as allowed by the circumstances. ... such a Party must do all it can to facilitate the passage of relief consignments."

The occupying power has the right to search the relief coming in, to regulate their passage time and route-wise and to be satisfied that they are genuinely humanitarian in character. This is in order to avoid hampering military operations and to conform to the maximum extent with security requirements. However, this should not be misused in

order to hamper and unduly delay humanitarian aid to the occupied territory (ICRC commentary to article 59). The party to the conflict can also subject free passage if it is satisfied that there are serious reasons of fearing that the relief may be diverted from its destination, that the control may not be effective, or that it may provide definite advantage may accrue to the military efforts or economy of the enemy (article 23 IVGC).

The participation of relief personnel such as psychologists, doctors, social workers, electricians, maintenance personnel etc., shall be subject to the approval of the party in whose territory they will carry out their duties (article 71 IAP). Each Party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted based on compelling and valid grounds.

ICRC Commentary re article 18(2) IAP: the fact that consent is required does not mean that the decision is left to the discretion of the parties. If the survival of the population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non discrimination is able to remedy this situation, relief actions must take place. In fact they are the only way of combating starvation when local resources have been exhausted...” (ICRC Study Vol II, page 1205).

In light of the operational inadequacy and malfunctioning of land crossings to Gaza, and especially under the current blockade, Israel must consider in good faith allowing access for humanitarian goods and personnel through the Gaza sea subject to Israel’s right to visit and search the ships prior to entry and exit. Dismissal of the sea option is only justified if imperative security reasons override.

Blockades

Blockades can be imposed by an occupying power or by a state in a non-occupation situation, as an act of war as self-defence. Israel, as an occupying power cannot claim that it blockades Gaza as self-defence (or pre-emptive self-defence for that matter) as Gaza is controlled and occupied by Israel (see International Court of Justice advisory opinion on the Wall discussing that same argument vis-à-vis the wall). Israel may block access to Gaza not as self-defence but under its authority as an occupying power to protect itself from security threats, where those exist.

Illegal blockade - according to international humanitarian law blockades, including naval blockades that deprive the civilian population of objects essential for survival conditions should not be imposed by the occupying power (articles 17, 23 IVGC).

Starvation is illegal method of warfare and objects indispensable for the survival of the population need to be protected (article 54 IAP). According to the San Remo Manual on International Law Applicable to Armed Conflicts at Sea of 1994 the declaration or establishment of a blockade is prohibited if the damage to the civilian population is, or may be expected to be excessive in relation to the concrete and direct military advantage anticipated from the blockade (article 102(b)).

Therefore, in light of the dire humanitarian situation in the Gaza Strip as well as the punitive aspect (article 33 IVGC) of the Gaza siege the current policy is illegal.

If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to the right to prescribe the technical arrangements, including search and the condition that the distribution of such supplies shall be made under the local supervision of a Protecting power or a humanitarian organization which offers guarantees of impartiality, such as the ICRC (San Remo Manual, article 103).

US Naval Handbook (1995) article 7.7.3 states that “neutral vessels and aircraft engaged in the carriage of qualifying relief supplies for the civilian population...should be authorized to pass through the blockade cordon” (Vol II ICRC study, page 1145).

Australia’s Commanders’ Guide(1994) article 850 footnote 6: states in relation to blockades that “there is a duty to consider, in good faith, requests for relief operations.....Good faith is a well established principle in international law.

Breaking the Blockade

According to London Declaration Concerning the Laws of Naval War of 1909 “neutral vessels may not be captured for breach of blockade except within the area of operations of the warships detailed to render the blockade effective (article 17). As published in 31.5.2010 Haaretz article, the order signed by Israeli Minister of Defence Ehud Barak imposing a naval blockade stated 20 nautical miles. Therefore, it appears that beyond this line Israel is not allowed to interfere with the freedom of movement of civilian vessels.

Merchant vessels believed on reasonable grounds to be breaching a blockade may be captured. If clearly refuse an order to stop or actively resist capture they may be attacked (article 98, San Remo Manual). Any attack should follow the customary law principles of distinction and proportionality and the rule on precautions in and during attack.

When a merchant vessel makes an effective contribution to the enemy’s military action (e.g. by carrying military materials), and after prior warning or interception, they intentionally and clearly refuse to divert from their destination, the vessel may be attacked. Neutral vessels are to be granted a grace period to leave the blockaded port.

Attack is only lawful when it is anticipated to result in a concrete and direct military advantage. It is highly doubtful that exist such a military advantage to justify an armed attack against civilian ships. Deterrence from future flotillas alone does not stand the requirements of military advantage.

The fact that the ships are armed cannot by itself justify an attack (article 69, San Remo Manual). The existence of ammunition does not grant carte blanche to regard the civilians on the ships or the ships themselves as legitimate military targets.

With regard to the conduct of Israeli warship in the high seas (beyond the territorial waters) - according to the Convention on High Seas from 1958 a warship encountering a foreign merchant ship on the high seas can board it only if there is reasonable ground for suspecting that the ship is engaged in piracy, slave trade, contraband or the ship is of the same nationality as the warship (article 22).

In high seas Israel cannot arrest or detain a ship even as a measure of investigation unless the acts were ordered by the authorities of the flag state (article 11). The convention is international customary law. Israeli warships have the right to approach the ships to verify their nationality. Illegal attack by warships or state agents of civilian ships cannot be regarded as piracy as piracy is an act for private gain.

Israel is not a member state of the International Tribunal for the Law of the Sea and is not expected to concede to its authority voluntarily.

Civilians on board

Distinction - Persons participating in relief actions are civilians and the parties to the conflict must respect and protect them. Vessels carrying civilians should never be the object of attack.

Proportionality - An attack shall not be launched if it may be expected to cause collateral casualties or damage which would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole.

Precautions in and during an attack - Precautions should take place before and during the attack. An attack shall be cancelled or suspended as soon as it becomes apparent that the collateral casualties or damage would be excessive.

Civilians that take direct part in hostilities - may become a justified military objective only for that time as they do so. In addition, they may be attacked only if no other means - less harmful - exists, to dispose them of their arms or eliminate the danger they pose.

3. What are the rights and duties of Israel re Gaza population not under the law of occupation?

In such case naval blockade is an act of war. Articles 17 and 23 of the IVGC apply regarding blockades and relevant articles of the San Remo Manual.

According to the Israeli High Court of Justice (HCJ) following the Disengagement Plan Israel does not have a general duty for the general welfare of the Gaza Strip residents and maintain public order. Under the current circumstances, the Israel's main duties concerning Gaza's civilian population stem from the armed conflict and the level of control it holds in the border passages.

The Revised Disengagement Plan of 6 June 2004 clearly states that “Israel will guard the perimeter of the Gaza Strip, continue to.. patrol the sea off the Gaza Coast”.

The Israeli HCJ clearly stated that a party to the conflict cannot refuse transfer of foodstuff and basic humanitarian goods needed to the survival of the civilian population (HCJ 9132/07 Al Basyuni et. At. Vs. Prime Minister et. Al of 27.1.2008).

4. What are the rights and obligations of Israel and the PA according to the Oslo Agreements?

The Israelis and Palestinians shall cooperate on all sea matters (The Israeli-Palestinian Interim Agreement – Annex I – Protocol Concerning Redeployment and security Arrangements, article XIV, article 2(e)).

However, Israeli vessels may sail throughout the Gaza sea zones (specified in the Agreement) as necessary and without limitations, and may take any measures necessary against vessels suspected of being used for smuggling goods and other illegal activity (ibid, article 1(b)(4)). Pending construction of a port, arrangements for entry and exit of vessels and goods by sea, as well as international voyages to the Gaza Strip shall be through Israeli ports in accordance with the relevant rules and regulations applicable in Israel.. (ibid, article 4(c)).