

# THE MARITIME BLOCKADE OF THE GAZA STRIP

LEGAL BRIEF  
July 2011

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*The Gaza Strip is currently under a continued naval and land blockade.<sup>1</sup> As a result, humanitarian flotillas from abroad have been trying to reach Gaza to provide assistance. In light of the deadly outcome of the flotilla of 31 May 2010, the Diakonia IHL Resource would like to reiterate the relevance and importance of international humanitarian law (IHL) to the access to Gaza by sea.*

### The Gaza Strip is an occupied territory

The Gaza Strip remains an occupied territory as it is effectively controlled by the Israeli army (land, sea, airspace), which administers the supply of basic services (customs, currency, population registry, electricity, water, fuel etc.).<sup>2</sup> The opening of Rafah border crossing has only allowed for the movement of people only, and, at large, restricts the passage of goods.<sup>3</sup> Furthermore, even if the presence of Israeli troops inside Gaza has decreased or, at times, diminished, Israel retains the capacity to regain its military control over the Strip at will.<sup>4</sup>

### The naval and land blockade is illegal

#### 1. The naval and land blockade does not serve a concrete and direct military advantage

According to the January 2011 report of the Israeli Turkel Committee that investigated the incidents around the May 2010 flotilla “[a]s evidenced by the testimonies (...), the land crossings policy sought to achieve two goals: a security goal of preventing the entry of weapons, ammunition and military supplies into the Gaza Strip in order to reduce Hamas’ attacks on Israel and its citizens; and a broader strategic goal of ‘indirect economic warfare’ whose purpose is to restrict the Hamas’ economic ability - as the body in control of the Gaza Strip - to take military action against Israel”.<sup>5</sup>

A well established principle of the law of military occupation requires the Occupying Power to respect a balance between its own military interests and the

necessities of the occupied population.<sup>6</sup> This also holds true also in the economic sphere, where the Occupying Power must take into consideration the evolving needs of the Gazan population, including when imposing economic devastating measures, such as the naval and land blockade.

Finally, economic warfare cannot be applied in order to secure a “concrete and direct military advantage”, as set out in Art 102(b) of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, of 12 June 1994 (hereinafter – San Remo Manual), which reflects customary international law.<sup>7</sup>

#### 2. Continued disproportional harm to civilians

The naval blockade is a key component of Israel’s overall closure of the Gaza Strip. Therefore, it cannot be analysed independently of other components, such as the blockade by land. Israel has maintained its closure regime with regard to land crossings, despite the declared easing of restrictions in 2010. According to a recent report from the World Food Program (WFP) of June 2011, the population of Gaza remains food insecure and improvements the expected improvements under the new regime are not significant. The WFP report states that the opening of crossings remains unreliable - exposing the population to various risks - and did not translate into a tangible relaxation of exports.<sup>8</sup> The UN Office for the Coordination of Humanitarian Affairs (OCHA) recently stated that measures taken to ease the blockade in June 2010 have had little real effect.<sup>9</sup> Therefore, there seems to be no evidence that the principle of proportionality, which is customary international law,<sup>10</sup> has been adhered to in the use of the closure policy as a method of warfare.

#### 3. Continued collective punishment

ICRC position in its news release of 14 June 2010 was that “[t]he whole of Gaza’s civilian population is being punished for acts for which they bear no responsibility. The closure therefore constitutes a collective

<sup>6</sup>On the general question of the economic law of belligerent occupation, see E. Feilchenfeld, 1943(2000) *The International Economic Law of Belligerent Occupation*.

<sup>7</sup> Art 102 declares that the establishment of a blockade is prohibited if: (a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or (b) 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. See criticism by Prof. Yuval Shany and Dr. Amichai Cohen at: <http://www.ejiltalk.org/the-turkel-commissions-flotilla-report-part-one-some-critical-remarks>.

<sup>8</sup> WFP, 2011. “With the blockade ongoing and despite the new access regime, the current economic situation in the Gaza Strip is unsustainable and the high level of food insecurity persists: ...more than half of the Gaza population is unable to secure sufficient income to meet their essential food and non-food requirements (...) The new access regime was supposed to bring about significant improvements in the crossings and even potentially open new trading points. However, with the closing of Karni, Kerem Shalom is the only official crossing in operation”. Available at: [http://unispal.un.org/pdfs/WFP\\_GazaFoodRep0611.pdf](http://unispal.un.org/pdfs/WFP_GazaFoodRep0611.pdf)

<sup>9</sup> OCHA, 2011. Available at: [http://www.ochaopt.org/documents/ocha\\_opt\\_Gaza\\_Fact\\_Sheet\\_July\\_2011.pdf](http://www.ochaopt.org/documents/ocha_opt_Gaza_Fact_Sheet_July_2011.pdf)

<sup>10</sup> See also Art 102(b) of the San Remo Manual.

<sup>1</sup> IDF press release, 26 June 2011. Available at: <http://idfspokesperson.com/2011/06/26/the-idfs-lawfully-enforced-naval-blockade-on-the-gaza-strip/>.

<sup>2</sup> To find out more about the legal status of Gaza, as well as other information on IHL in Israel and the oPt, visit us online at: [www.diakonia.se/ihl](http://www.diakonia.se/ihl).

<sup>3</sup> New travel arrangement mechanism will be introduced, with priority given to certain categories of travelers including patients, foreign passports holders and students. OCHA, 2011. protection of civilians weekly report. Available at: [http://www.ochaopt.org/documents/ocha\\_opt\\_protection\\_of\\_civilians\\_weekly\\_report\\_2011\\_06\\_24\\_english.pdf](http://www.ochaopt.org/documents/ocha_opt_protection_of_civilians_weekly_report_2011_06_24_english.pdf)

<sup>4</sup> For more, visit our IHL Resource Centre at: <http://www.diakonia.se/sa/node.asp?node=3500>.

<sup>5</sup>Turkel Commission Report available at: [http://www.jewishvirtuallibrary.org/jsourc/Society\\_&\\_Culture/TurkelCommission.pdf](http://www.jewishvirtuallibrary.org/jsourc/Society_&_Culture/TurkelCommission.pdf).

punishment imposed in clear violation of Israel's obligations under international humanitarian law."<sup>11</sup>

On 5 January 2011, Wikileaks released a cable from 3 November 2008 which reported that "[a]s part of their overall embargo plan against Gaza, Israeli officials have confirmed to *EconOffs*<sup>12</sup> on multiple occasions that they intend to keep the Gazan economy on the brink of collapse without quite pushing it over the edge... Some observers have told *EmbOffs* that political pressure arising from the issue of captured Israeli soldier, Gilad Shalit, may have influenced high-level Israeli officials to tighten their stance on monetary policy".<sup>13</sup>

As long as the punitive as well as the collective nature of the land and naval closure remain in force, this measure remains unlawful. According to OCHA the Gaza blockade is a denial of basic human rights in contravention of international law and amounts to collective punishment.<sup>14</sup>

### Violation of the obligation to ensure basic needs or facilitate rapid and unimpeded aid

The continued closure policy violates the Occupying Power's humanitarian obligations to ensure for the provision of basic needs and objects essential for the survival of the population.<sup>15</sup> Violation of these obligations does not depend on intent to deny the population of its basic needs. It is a matter of fact, whether the obligation has been violated or not.

As an Occupying Power, Israel is under an obligation to "restore and ensure, as far as possible, public order and safety",<sup>16</sup> which includes the welfare of the population. This is an obligation whereby the Occupying Power must pursue, with all available, lawful and proportionate means, the public order and civil life in the occupied territory. As shown in the WFP report, much remains to be done to improve the dire humanitarian conditions of the civilian population in Gaza.

The continued humanitarian crisis points at another failure of the Occupying Power - the obligation to do all it can to facilitate the rapid and unimpeded access of aid agencies to the population in need.<sup>17</sup> According to ICRC commentaries on Art 70 IAP, the rationale is to avoid any obstacle and reduce formalities as much as possible.

<sup>11</sup> ICRC, 2010. Available at: <http://www.icrc.org/eng/resources/documents/update/palestine-update-140610.htm>. The legal basis for ICRC's position seems to be Art 50 of the 1907 Hague Regulations concerning the Laws and Customs of War on Land and Art 33 of IVGC.

<sup>12</sup> *EconOff* and *EmbOff* refer to Economic and Embassy officials.

<sup>13</sup> Wikileaks, 2010. Available at: [http://www.huffingtonpost.com/2011/01/05/israel-gaza-collapse-wikileaks\\_n\\_804583.html](http://www.huffingtonpost.com/2011/01/05/israel-gaza-collapse-wikileaks_n_804583.html)

<sup>14</sup> OCHA, 2011. See footnote 9 for link.

<sup>15</sup> Art 55 IVGC, Art 69 IAP. Israel is clearly disregarding Security Council Resolution 1860 of 2009, which "calls for the unimpeded provision and distribution throughout Gaza of humanitarian assistance, including of food, fuel and medical treatment." UN Doc. S/RES/1860 (2009).

<sup>16</sup> Art 43 Hague Regulations, 1907

<sup>17</sup> Art 59 IVGC, 70(2) IAP

### The Occupying Power is under an obligation to consider in good faith access of aid through the sea

Whenever the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide free passage of such foodstuffs and other essential supplies. This is subject to the right of the Occupying Power to prescribe for the technical arrangements, including the right to search and condition that the distribution of such supplies shall be made under the local supervision of a protecting power or a humanitarian organisation which offers guarantees of impartiality, such as the ICRC.<sup>18</sup>

The party to the conflict can stop free passage if there are serious reasons to fear that: the relief may be diverted from its destination; the control may not be effective; or that it may provide definite advantage to the military efforts or economy of the enemy.

However, Art 70 IAP states that, "offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts".<sup>19</sup>

The Occupying Power must observe its international obligations, including the right to prescribe the conditions in which aid is delivered, in good faith.<sup>20</sup>

In light of the persistent operational inadequacy and malfunctioning of land crossings to Gaza - and even if land crossings were to operate reasonably - Israel must consider allowing access for humanitarian goods and personnel through the shores of Gaza.

This is 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. Additionally, if circumstances show that access through the sea may be more feasible and rapid than through land crossings, the former route should be allowed by the Occupying Power, unless military necessity arguments prevail.

*For more on IHL and Israel's policies in the Gaza Strip, visit Diakonia's IHL Resource Centre at [www.diakonia.se/ihl](http://www.diakonia.se/ihl) where you can find an extensive collection of resources and legal analysis of the Israeli-Palestinian Conflict.*

<sup>18</sup> San Remo Manual, Art 103

<sup>19</sup> Notice should be given to ICRC's statement that "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 re Art 18(2) APII).

<sup>20</sup> Art 26 Vienna Convention on the Law of Treaties, 1969

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## Stoppage of the flotilla on 31 May 2010 should have been carried out in accordance with international law

### 1. The flotilla is not a legitimate military objective for attack

The flotilla is composed of neutral vessels, and thus should not be regarded as a legitimate military objective for attack, under Art 52 IAP. Its attack does not seem to offer, under the current circumstances, a definite military advantage. In case of doubt, it shall be presumed not to be a lawful military objective.

Furthermore, even if the flotillas could be considered to be formally breaking the blockade, according to Art 17 of the 1909 London Declaration on the Laws of Naval War reflecting customary international law, neutral vessels may not be captured for breach of blockade except within the area of operations of the Israeli warships that has been established to render the blockade effective.<sup>21</sup>

### 2. Measures should be proportional and respect the civilian status of those on board

Due to the civilian nature of the flotilla and the people on board, the Occupying Power should avoid any use of measures that go beyond law enforcement as long as the level of violence does not rise to a situation of hostilities. Furthermore, measures should always be proportional to the threat.

Even if Israel views the advancement of the flotilla to the coast of Gaza as an act of warfare, it is bound by the core principles that govern the conduct of hostilities:

- the distinction between civilians and combatants;
- proportionality in the use of force between the potential harm to civilians and the military goal sought; and
- precautions in and during attacks.

Furthermore, the Israeli Supreme Court, for instance, has stated that the Occupying Power should use the least harmful measure, including in situations where civilians take direct part in hostilities.<sup>22</sup>

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<sup>21</sup> The text of the Declaration is available at: <http://www.icrc.org/ihl.nsf/FULL/255?OpenDocument>.

<sup>22</sup> See HCJ 769/02 in the *assassination case* of 2006. Available at: [elyon1.court.gov.il/files\\_eng/02/690/007/.../02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/.../02007690.a34.pdf)