

The Israel Project Conference Call Briefing

“The Gaza Flotilla: Is Israel's Action Justified Under International Law?”

**Moderator:
Alan Elsner,
Senior Director,
Strategic Communications and Research,
The Israel Project**

**Speaker:
Professor Dr. Wolff Heintschel von Heinegg,
Professor of Public Law,
Europa-Universität Viadrina,
Frankfurt (Oder), Germany**

**Time: 2:00 p.m. EDT
Date: Thursday, June 23, 2011**

*Transcript by
Federal News Service
Washington, D.C.*

ALAN ELSNER: Good afternoon everyone. This is Alan Elsner, I'm the communications director for The Israel Project and I'm speaking to you from Washington, D.C. We're about to have a conference call with Professor Heintschel von Heinegg and you'll excuse my German mispronunciation as I go through his bio. Before I introduce our guest, just a few words about The Israel Project – we are a privately funded, independent educational organization, and we devote ourselves to providing accurate and detailed information about the Middle East to journalists and leaders and to members of the general public.

You can follow us on Twitter @israelproject – and we will be tweeting live as this call progresses – and you can also follow us on Facebook, and we encourage you to do so. Our website is www.theisrealproject.org.

Now, to introduce Professor Doctor Wolff Heintschel von Heinegg. Professor von Heinegg is a professor of public law, and especially public international law, European law and foreign constitutional law at the Europa-Universität Viadrina in Frankfurt, Germany. From October 2004 until October 2008 he was the dean of the law faculty of the Europa-Universität. And since then, he's the Vice-President of the same university. He has a lengthy resume in here, which I'm not going to go through all of it, but just a few highlights.

He was the rapporteur of the International Law Association Committee on Maritime Neutrality and was the Vice-President of the German Society of Military Law and the Law of War. He also, since 2007, has served on the Council of the International Institute of Humanitarian Law in San Remo, Italy. He was one of a group of international lawyers and naval experts who produced the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, which is particularly relevant to the subject of today's talk. And he is a widely published author of articles and books on public international law and German constitutional law.

Welcome. Very – we're very, very happy to have you, Professor von Heinegg. The subject today is the legal aspects of the Gaza Flotilla, which is gathering in various ports of the Mediterranean and the Mediterranean littoral. Is Israel's action justified under international law? I'd like to invite now Professor von Heinegg to make an introduction. And we'll follow that with some questions.

WOLFF HEINTSCHEL VON HEINEGG: Well, good day everybody. And Alan, thank you for the kind introduction. Yes, let me start with two preliminary remarks. I will talk about the blockade; and this means I am going to talk about the naval blockade, and not about operations on land that may have similar effects as operations like a naval blockade. Secondly, please keep in mind that it is – there is no requirement for any kind of justification if a belligerent has established and enforces a blockade. However, there are security interests that have been mentioned by the IDF, and – but this is nothing which has been brought about by some kind of legal obligation.

The first point I would like to address is that the naval blockade is a recognized method of the Law of Armed Conflict. And as such, it overrules the Law of the Sea and especially the rights of all other states to use the high seas for navigation purposes. They of course – or this of

course, presupposes the existence of an armed conflict. And the interesting thing is that nobody, including very neutral international humanitarian organizations – like, for example the ICRC, the International Committee of the Red Cross – do accept and do recognize that an armed conflict exists. And the ICRC and many others do also say that this is an international armed conflict. As such, the international armed conflict brings about the right of the belligerent party to establish a naval blockade and to enforce it vis-à-vis the vessels of all other states.

But I have to admit of course that, especially amongst public international lawyers, the characterization of the conflict is far from, well, settled. There are many who say: No, this is not an international armed conflict. It's a non-international armed conflict. But even if we accepted that it were a non-international armed conflict, we have to keep in mind that with the establishment of the blockade by the Israel Defense Forces, that would go with a recognition – an implicit recognition of belligerency, thus triggering the applicability of the law of international armed conflicts.

So in short, since there is an armed conflict, Israel was entitled to establish the blockade of Gaza. And any vessels that breaches or attempts to breach the blockade is thus liable to capture and obliged to comply with all legitimate orders of the blockading power, meaning here the Israeli Defense Forces. What you have to keep in mind that the Israeli Defense Forces do not have a choice but to prevent the vessel from arriving at Gaza because if a blockade has been established, and if the blockading power wishes to maintain the blockade, the blockade must be effective. And if it loses its effectiveness, it would become legally void.

So if Israel decided to let some vessels through, and others not, then the blockade would become invalid. So any vessel that tries to breach the blockade or in fact breaches the blockade must be prevented and must be treated accordingly. Under the Law of Armed Conflict, all vessels – all vessels – irrespective of the flag they are flying must be prevented from entering the blockaded area. This certainly holds true if they cross the line that is here about 20 nautical miles off the coast of Gaza, or if they attempt to breach that blockade. If that is the case, they are liable to capture and to any other measures by the blockading power in order to prevent the continuation of their voyage.

In the case of the Gaza flotilla, this year like last year there is no problem in establishing that there is an attempted blockade because the organizers have expressly stated their intent to breach that blockade, and therefore any approach to the blockaded area already constitutes an attempted breach of the blockade. In other words, the IDF do not have to wait until the ships would reach the blockade line, 20 nautical miles off Gaza, but they can already take measures as soon as the attempt of breach of blockade has been established.

If that is the case, if they are breaching or attempting to breach the blockade, they must comply with all orders by the blockading power. So if they are summoned to stop, they may not continue their voyage or try to escape. They are obliged to let boarding teams on board, which take over the control over the ships. And any act of escape, active resistance, may be overcome by the use of force.

Of course, the organizers of the so-called Gaza Flotilla state that they are pursuing humanitarian purposes only. Let us assume for the argument's sake that this is true, even though one could of course doubt that. Well, first of all, a blockade is of course, must uphold humanitarian considerations, but this not mean that any humanitarian consideration would have an impact on the blockade or even its legality. First of all, the blockade would only become unlawful if the casualties amongst the civilian population would be excessive in relation to the military advantage anticipated from the blockade.

Excessive, please note the term, is not equivalent to extensive. Excessive is really much more than proportionate or in accordance with the principle of proper finality. But this is just an academic issue here, because there are no reports about any casualties amongst the civilian population of Gaza. There are of course inconveniences, no question about that, but these inconveniences can certainly not be characterized as excessive damage amongst the civilian population.

And finally, of course, there would be an obligation of the blockading power to provide for relief consignments for the civilian population of the blockaded area, but only if and in so far the civilian population is no longer adequately provided with goods that are essential for its survival. So we are talking here about fundamental goods like food, water, medical supplies. But even if that were the case, that would not mean that anybody who decides to bring such goods to the blockaded area, that they would be entitled to do so on their own will and without any interference by the blockading power.

The blockading power is of course entitled to first search the cargos, they made – they will certainly not be able to do that at sea, so they may divert the ships into a given harbor in order to conduct the search there. They may proscribe certain routes. They may even proscribe how the goods would be disseminated amongst the civilian population. They may proscribe to make use of the services of a neutral international organization, like the United Nations, or a humanitarian organization, like the International Committee of the Red Cross.

In view of all these aspects of the legal framework surrounding the blockade of Gaza, it is quite clear that there is no unilateral right of the organizers of the Gaza Flotilla to approach Gaza without complying with the orders given by the IDF. If they don't comply, if they offer resistance, well, then of course, the IDF would not only be entitled, but as I already said in view of the principle of effectiveness, be obliged to take all necessary measures in order to prevent the continuation of their voyage.

I think that would suffice for the beginning. And I am happy to answer any questions.

MR. ELSNER: I have an interesting question from David Cutner (ph). And he asks, once the blockade is legally justified, how much force is justified to prevent violation of the blockade?

MR. VON HEINEGG: Well, now you will get a typical lawyer's answer: It depends on the circumstances. (Chuckles.) I'm sorry to say that. As I said, the vessels must really be prevented from crossing the line. Or, the attempt at – the attempted breach must be terminated.

So usually, you summon the ship. You order it to stop. If they don't do that, then you will go on an escalation course by first warning them, then you fire a shot across the bow. And if they still don't comply, then you would even be entitled to fire into their rudder or into some other part of the vessel in order to make it stop.

Then you are entitled to board the ship. And any resistance against that or any attempt to prevent the boarding, by whatever means, may be overcome again by the use of proportionate force. So it's not – we are not talking about sinking the ships. But of course, any other measures to take over control over the ships is lawful and in accordance with the principle of proportionality.

MR. ELSNER: So you're saying that what happened last year was in fact – Israel was completely legally justified in doing what it did. And yet, and in political terms, it was generally seen as a fiasco for Israel. How can you balance the kind of narrow legalistic position that you're putting forward against the political realities of what might happen in these kind of confrontations?

MR. VON HEINEGG: Well, you see this is the funny thing with it all – with the law. The law may allow you to do something, but for reasons of political prudence or whatever considerations, you may not want to make full use of the law and of the tools the law provides. But as I said in the beginning, don't forget, the blockade is very important for security purposes; it is to prevent the flow of arms into Gaza or the transportation of terrorists from Gaza to Israel or to other areas.

So in view of that, if the blockade is to be maintained it must be enforced, even though politically it may have even disastrous effects. It must be enforced, and if it's not enforced it would become legally void within a second. So if the security interests persist, the blockading power has no choice but to take all necessary steps.

MR. ELSNER: Now, you were citing something called International Maritime Law, is that correct?

MR. VON HEINEGG: Excuse me?

MR. ELSNER: You're citing something called International Maritime Law –

MR. VON HEINEGG: No, I'm citing the Law of Naval Warfare.

MR. ELSNER: The Law of Naval Warfare.

MR. VON HEINEGG: It's a part of the –

MR. ELSNER: Are there situations in which that law, the Law of Naval Warfare, comes into conflict with other international laws pertaining to humanitarian actions or even U.N. charter or things of that nature?

MR. VON HEINEGG: Well, first of all, the law as such, I already refer to it in the last part of my short statement, the law as such – the Law of Naval Warfare, the Law of Armed Conflict, already recognizes certain humanitarian considerations, like relief consignments, like excessive damage to the civilian population. And you should never forget that the Law of Armed Conflict always balances humanitarian interests with considerations of military necessity. So the generally humanitarian aspects have already been taken care of by that law.

The United Nations' charter is not an obstacle as long as the Security Council does not take action under Chapter 7 of the charter. So the charter, as such, is no obstacle for the blockading power to continue on its course by not only maintaining but also enforcing the blockade.

MR. ELSNER: I'd like to ask a question we received from Barry Augenbraun of St. Petersburg, Florida. And he asks: Are there recent examples of other blockades against belligerents that have been enforced and recognized as valid under international law?

MR. VON HEINEGG: Well, just to name a few – I don't know how far back in time you want me to go, but let's just look at the time after World War II. Of course, there was the naval and aerial blockade of southern Lebanon by Israel. There was the blockade in the Black Sea in the conflict between Russia and Georgia. So there are plenty of examples in history, and even recent history, where blockades have been used by the belligerents in order to prevent access to or egress from a given coastal area.

MR. ELSNER: There are quite a few questions we received relating to the opening of the Gaza boarder with Egypt, the Rafah Crossing. Does that change the situation in any way with respect to Israel's ability to maintain a blockade?

MR. VON HEINEGG: No, because – remember my first preliminary remarks – a naval blockade must be looked at from the naval perspective or maritime perspective only. So the only purpose of a naval blockade is to prevent vessels from either entering or leaving the respective area. Whether or not the blockaded area can be accessed via land or from some other direction other than the sea is absolutely irrelevant. Of course, if you were asking, now, politically or strategically or tactically, that has an impact – no question. But this has no impact on the legality of the blockade whatsoever.

MR. ELSNER: Do you have a sense that events may unfold differently this time? Do you have the sense that Israel is better prepared for the political ramifications of stopping this blockade and taking control of the ships?

MR. VON HEINEGG: I'm quite convinced, even though this is rather a guess than positive knowledge, but in view of the fact that, as you already had mentioned, last year's interception was a political disaster even though I wouldn't share your view on the term disaster. Of course, the IDF forces will be much better prepared this time if they are to enforce the blockade vis-à-vis the Gaza Flotilla. I'm quite certain of that.

MR. ELSNER: What's your assessment of the motivations of those who are in the Flotilla?

MR. VON HEINEGG: Now, this is simple. They have officially declared, they did it last year and they have done so again, that their only aim is a political one. They do that for propaganda purposes. And if you look at the cargos of last year, you cannot seriously believe that this is triggered by purely humanitarian considerations because if that had been the case, last year they would have delivered the goods to the United Nations, as offered by Israel, and then the goods would have been distributed by the United Nations to the population of Gaza.

But that's not their concern. They have officially declared that their ultimate goal is to breach the blockade and to be provocative vis-à-vis Israel. And again, it's – this is even positive for the blockading power in this case because they do not need to establish by the facts whether there would be an attempted breach of the blockade, they have an express statement. So they are entitled to take all necessary measures under the law.

MR. ELSNER: If you were really motivated by humanitarian concerns, and you were motivated by sincere desire to help the people of Gaza, how would you think would be the best, most effective way to deliver that kind of aid?

MR. VON HEINEGG: I think the most appropriate way would be to ask the International Committee of the Red Cross to be of assistance. The International Committee of the Red Cross would be competent. It is a neutral organization. It is – it pledges allegiance to the principle of neutrality. So no state in the – no government in the world, no entity in the world, would ever doubt the neutrality of the ICRC. And this is the most trustworthy international humanitarian organization that exists. And I think the ICRC would be happy to respond positively to any question and therefore assistance in any – would render any assistance necessary if it were for humanitarian reasons only.

MR. ELSNER: Last year blockade, as we know, led to loss of life – I believe nine people were killed. And since there relations between Turkey and Israel have not recovered. The two sides seem unable to reconcile their contrary demands or needs in respect of an apology from Turkey and Israel's unwillingness to do so. What's your legal assessment of the Turkish demand for an apology and the Israeli position in response to that?

MR. VON HEINEGG: Well, legally there would be a claim for an apology, or more, only and so far if there had been a violation of international law. But since there was no violation of international law, or of international legal obligations of Israel, there is no legal rule that would oblige Israel to give that apology or some other form of compensation.

MR. ELSNER: So you're saying that the Turks have no legal basis for demanding this apology?

MR. VON HEINEGG: That's exactly right.

MR. ELSNER: What do you anticipate actually – you know, they say that the history if it repeats itself the first time is tragedy, the second time is farce. And there have been difficulties in assembling this – the particular Flotilla. As you look at the situation, and it's obviously – I'm going to put you in a difficult situation in terms of predicting the future – but how do you think events are likely to unfold this time?

MR. VON HEINEGG: Well, this is indeed a difficult question because I don't have a crystal ball in front of me. (Chuckles.) But I – as you may know, the IHH is not any longer directly involved it seems in this year's Gaza Flotilla. It is a rather diverse and ambivalent group that seemed to come together this time. You have peace activists and other activists, you even have members of German parliament again on the vessel, I'm afraid.

So I don't know whether the people who take part in that Gaza Flotilla are really aware of the legal issues involved. Nobody, I think, has really informed them properly. They believe that, some say, this is absolutely illegal and we have the right to render resistance to the IDF. This is rather naïve, and I was asked just two weeks ago in Germany whether – what advice I would give to those who plan to take part in that voyage. And I clearly said, stay at home because you don't know what you are inviting and you are not aware of the legality of the measures that may include the use of force by the IDF.

MR. ELSNER: I'm going to take you a little bit outside your sphere. Right now in the Middle East, I believe, it's only 175 miles that separates Gaza from Damascus, where human rights atrocities are indeed unfolding according to organizations like Amnesty International and Human Rights Watch. Do you find any kind of disproportionality between the relentless focus on the situation in Gaza on the one hand and the relatively neglect of the same left-wing, for the most part, groups with respect to what's happening in Syria?

MR. VON HEINEGG: Yeah, this is interesting isn't it? It – (chuckles) – it depends on one's perspective, I believe, whether you are claiming atrocities to have occurred or even violations of fundamental human rights. Again, if you are suppressing the legitimate demands of your own citizens by the use of force, if you are killing people deliberately, this is certainly not comparable to what is happening with a view to the Gaza Blockade. I absolutely agree with you on that.

MR. ELSNER: I have a couple more questions, and then we'll end the call. Again, we're taking you a little bit beyond your sphere as a naval expert, but on Saturday Gilad Shalit, the Israeli soldier who was kidnapped, will mark his fifth anniversary in captivity without having had access to the International Red Cross or his family. What would you say about the legal position regarding the holding and the captivity of Gilad Shalit?

MR. VON HEINEGG: Well, if the Palestinians wish to be taken seriously by the international community, and not only by the international community but by humanitarian activists as well, they should rather reconsider their position and do everything necessary in order to provide him with the fundamental and generally recognized rights of those who have been detained or who are being detained by one of the belligerent parties. So I would say that,

yes, they should rather have done it yesterday than today to give the ICRC access to him so that they could verify whether he's being treated in accordance with minimum standards.

MR. ELSNER: And lastly, another little noticed event this week, two more rockets were fired at Israel from Gaza, bringing the total this year, according to our count at The Israel Project, to 332. What's the position on the international law with respect to firing these kinds of rockets? Is there any kind of justification, under some form of the law of armed resistance or some such law, that would justify the firing of rockets at Israeli towns and villages?

MR. VON HEINEGG: Well, I don't think so, unless you go with those who say that there is a people exercising its right of self-determination. But I don't care too much about whether there is some form of legitimacy because for me it is important that there is an armed conflict. There are armed hostilities going on and they have been going on for quite a long time now. And the very existence of those armed hostilities justify – or justify me to establish that there is an armed conflict.

And I'm not the only one saying that. The ICRC is saying that too. And in the course of such an armed conflict, here an armed conflict of an international character, the belligerent, in this – on this part Israel, is entitled to make use of the entire spectrum of the Law of Armed Conflict. And that's important. So the legitimacy or legality or alleged legitimacy or legality of rocket attacks plays no role whatsoever in – with a view to the question of whether the IDF are entitled to maintain and enforce the blockade.

MR. ELSNER: And with your permission, I'm going to take this opportunity just to read the first couple of paragraphs of an item that does appear on our website. And it was posted June 22nd, "Israel Facilitates 1,200 New Homes and 18 New Schools in Gaza."

"Israel approved the delivery of \$100 million of materials needed to build 1,200 new homes and 18 new schools in Gaza – Hamas-ruled Gaza on Tuesday. The step was lauded by United Nations officials. 'I welcome this significant step,' said U.N. Middle East Envoy Robert Serry."

What has been the United Nation's position with respect to the Flotilla, Professor von Heinegg?

MR. VON HEINEGG: We know that there is no United Nations position. We know that last year the Human Rights Council has delivered an opinion which bluntly stated that the blockade was unlawful, without giving any – any – argument supporting that position. Moreover, the Human Rights Council made this very surprising analogy to collective punishment, and all of the international lawyers I know and I've spoken to are just shaking their heads and are saying this doesn't make sense at all.

This is not a form of punishment. This is a method of warfare that of course has an impact on a number of – on those who are living in the blockaded area. And with a view to the news item you just mentioned, it shows you that despite the fact that Israel would not be obliged to go beyond good essential for the survival, it does so. And it does not make use of the entire

spectrum provided by the law, but it renders assistance in a form and to an extent that is certainly not provided for by the law. So –

MR. ELSNER: So let me just add, because you may not be aware of this, I have a report in front of me from Mr. Lynn Pascoe, under-secretary-general of the United Nations for political affairs. A briefing to the Security Council on the situation in the Middle East including the question of Palestine dated June 23rd 2011, which I believe is today.

MR. VON HEINEGG: Yeah.

MR. ELSNER: And he says in paragraph 12: In relation to reports that a new flotilla is planned in the next few days, I want to reiterate today the strong view of the United Nations that that assistance for the population of Gaza should be delivered through official crossings. The secretary-general has called upon, and written letters to governments concerned to use their influence to discourage flotillas which carry the potential for dangerous escalation. All involved must act responsibly and with caution to avoid any violent incident. Any comment on that, Professor von Heinegg?

MR. VON HEINEGG: I only can say this reemphasizes what I have said. That's exactly what I have said. Make use of official routes, of official transit points. Make use of neutral actors if your goal is humanitarian in character. Yes.

MR. ELSNER: Well, I think on that note I'm – we're going to end this conference call. I really want to thank our guest, Professor Doctor Wolff Heintschel von Heinegg, very much indeed for your expertise and for taking the time to share that expertise with us. And perhaps if – indeed we hope that nothing untoward happens with this Flotilla next week, but if the need arises perhaps we'll be able to call on your expertise again.

MR. VON HEINEGG: Yes, you're very welcome.

MR. ELSNER: Thank you so much. And let me again urge our listeners to take a look at our website where all of these issues are going to be extensively reported. We have graphics. We're going to have a transcript of this particular call hopefully within 24 hours. And please do follow us on Facebook and Twitter. And with that, I'm going to bid everyone a very good weekend, Shabbat shalom from Washington. Thank you very much.

MR. VON HEINEGG: Have a good day. Good bye.

(END)