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Operation 'Sea Breeze' – Legal Aspects

Introduction

For several years, the State of Israel has been engaged in an ongoing armed conflict with terrorist organizations operating in the Gaza Strip. This armed conflict has intensified after Hamas violently took over Gaza, in June 2007, and turned the territory under its *de-facto* control into a launching pad of mortar and rocket attacks against Israeli towns and villages in southern Israel.

The State of Israel took different measures to defend its citizens from the terrorist attacks originating from the Gaza Strip. Initially, all feasible steps were taken in order to avoid using extensive military force, including diplomatic and economic military measures, as well as relatively limited military operations. When these measures proved ineffective, and the barrage of rockets against the Israeli civilian population continued, and even intensified, the State of Israel had no choice but to take an extensive military action – Operation "Cast Lead".

The entire activities of Israel in this armed conflict are governed by the Law of Armed Conflict (also known as: International Humanitarian Law).

The Naval Blockade on Gaza

According to the Laws of Armed Conflict, a State party to an armed conflict has the right to establish a naval blockade on its enemy's coast for security reasons. A naval blockade means preventing the passage (entry or exit) of all vessels to or from the ports and coastal areas of the enemy, irrespective of the kind of cargo carried by these vessels.

The power to impose a naval blockade is well established under customary international law. It is a common practice, and even the Charter of the United Nations, when enumerating the different actions which can be taken by the Security Council in order to maintain or restore international peace and security, explicitly mention the naval blockade among these measures (Article 42 of the Charter).

Similarly, Article 7.7.1 of the "Commander's Handbook on the Law of Naval Operations", published by the U.S. Navy on July 2007 (hereinafter: **The US Navy Handbook**), explains that:

"Blockade is a belligerent operation to prevent vessels and/or aircraft of all nations, enemy as well as neutral, from entering or exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of an enemy nation. While the belligerent right of visit and search is designed to interdict the flow of contraband goods, the belligerent right of blockade is intended to prevent vessels and aircraft, regardless of their cargo, from crossing an established and publicized cordon separating the enemy from international waters and/or airspace".

International law sets several conditions for a legal naval blockade (these conditions are reflected, for example, in the "San Remo Manual on International Law Applicable to Armed Conflict at Sea" from 1993; hereinafter: **The San Remo Manual**):

- A. **Public declaration** – a blockade shall be publicly declared and notified to all States that might be affected by its establishment, in particular those State whose vessels are sailing or suppose to be sailing near the relevant area. The declaration shall specify, among other things, the commencement, duration (as far as it is known when the blockade is established) and geographical boundaries of the blockade.
- B. **Effectiveness** – no fictitious blockade shall be established. A State that declares a naval blockade must enforce it in practice. An ineffective blockade would expire.
- C. **Impartiality** – a blockade must be applied impartially to vessels of all States (including of those carrying the flag of the State which imposed it).
- D. **Access to neutral States** – a naval blockade must not bar access to the ports and coasts of neutral States.
- E. **Passage of humanitarian assistance** – a naval blockade is imposed for security reasons. Thus, the blockading party must provide for passage of humanitarian assistance for the civilian population of the blockaded area. This obligation is subject to the right of the blockading party to prescribe the technical arrangements, including search, under which the passage is permitted, in order to make sure that no means are transferred to the benefit of the enemy, rather than to the civilian population, and that the humanitarian assistance is distributed under the supervision of a neutral party which prevents the abuse of humanitarian assistance by the enemy.

The naval blockade imposed by the State of Israel on the Gaza Strip, which was violated by the vessels participating in the current flotilla, is in conformity with the aforementioned rules of international law:

- A. **Public declaration** – on 03/01/09, during operation "Cast Lead", the State of Israel declared a naval blockade on the Gaza Strip, in the distance of 20 miles from the coast. The naval blocked was established for a clear military necessity – to prevent the military strengthening of Hamas by stopping the entry of terrorist elements and the smuggling of weapons into the Gaza Strip, an aim supported also by SCR 1860 .The establishment of the naval blockade was published by the ordinary international channels. These publications detailed the geographical boundaries of the blockaded area (by coordinated) and emphasized that the naval blockade shall be in force until a further notice. Before the current flotilla had begun, the State of Israel approached the States involved, by diplomatic channels, and the organizers of the flotilla were well aware of the blockade.

- B. **Effectiveness** – the naval blockade on Gaza has been effectively enforced by the State of Israel since its commencement. Indeed, before it was established, Israel allowed the entry of a vessel carrying humanitarian assistance into Gaza, but since the naval blockade was declared, no vessel was allowed in.
- C. **Impartiality** – the naval blockade has been enforced on the vessels of all States, with not discrimination.
- D. **Access to neutral States** – the naval blockade on Gaza has not affected, in any manner, the access of vessels to the ports or coasts of neutral States.
- E. **Passage of humanitarian assistance** – the State of Israel allowed the passage of humanitarian assistance into the Gaza Strip long before the naval blockade had been imposed. This assistance has entered Gaza through the crossing points between Israel and Gaza, subject to security check and in coordination with international organizations working in Gaza. The State of Israel openly declared that it will allow the entry of the humanitarian goods carried by the current flotilla into Gaza, after it is unloaded in Israel, in the port of Ashdod.

In conclusion, the naval blockade imposed by the State of Israel on the Gaza Strip is in accordance with international law.

Breach or Attempt of Breach of a Naval Blockade

Passage of a vessel through a blockaded area or entrance into it without special entry or exit authorization from the State imposing the blockade is considered a breach of the blockade. According to the Law of Armed Conflict at Sea, if there are reasonable grounds to believe it has breached a Naval Blockade, the State imposing the blockade is authorized to capture the vessel, and if it resists capture and refuses to stop, after prior warning, it may be attacked.

For instance, the Red Cross Model Manual 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".

Moreover, the State imposing the blockade may capture a vessel even prior to entering the blockaded area, if it is attempting to breach the Naval Blockade, i.e. is on its way to the blockaded area and there are reasonable grounds to believe it intends to breach the Naval Blockade. **Capture of a vessel attempting to breach a Naval Blockade can be done in international waters, before entrance to the blockaded area, but not in the territorial waters of neutral States.**

In other words, the legal authority to capture a vessel is independent of whether at the time of capture the vessel had already entered the blockaded area or was in international waters on its way to breach the Blockade.

For instance, article 7.7.4 of the U.S. Navy "Commander's Handbook on the Law of Naval Operations" notes that:

"Breach of blockade is the passage of a vessel or aircraft through a blockade without special entry or exit authorization from the blockading belligerent. 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 ".

Regarding the recent incidents, all vessels taking part in the flotilla were explicitly warned by the IDF that they were approaching an area under a Naval Blockade closed to all maritime traffic, and were ordered to change their course of navigation and refrain from further attempting to breach the Naval Blockade. These vessels were also offered to dock in Ashdod port and deliver humanitarian supplies to the Gaza Strip through the formal land crossings. Nevertheless, the vessels explicitly declared their intent to breach the Naval Blockade on the maritime zoned adjacent to the Gaza Strip and their course of navigation unequivocally indicated its intent to breach the Naval Blockade.

Therefore, according to International Law, Israel had the authority to capture the vessels, from the moment they left the territorial waters of neutral States. Under the circumstances, i.e. the vessels' refusal to stop or obey warnings to refrain from breaching the blockade, use of force was permissible in order to enable capture.

The IDF did not attack the vessels with cannons, machine guns or rockets and did not attempt to harm them. It took the necessary steps in order to capture the vessels in an operation that clearly indicates vigilance and proportionality. Capture of most vessels was completed with no casualties. IDF soldiers taking part in the capture made significant efforts to refrain from using force and did so only when facing clear and immediate threat to life.

The Treatment of Personnel on Board a Vessel Captured in Breach of a Blockade

Generally speaking, according to International Law, people on board a vessel captured in breach of a Naval Blockade should be repatriated as soon as possible.

On this matter, Article 7.10.2 of the U.S. Navy "Commander's Handbook on the Law of Naval Operations" notes that:

"The officers and the crews of captured neutral merchants vessels and civil aircrafts who are nationals of a neutral nation do not become prisoners of war and must be repatriated as soon as circumstances reasonably permit ".

In practice, since the vessel itself is caught on the high seas, people on board should be brought to a safe place (i.e., a harbor of the capturing State) and repatriated as soon as possible. In this context, due regard needs to be given to their safety and basic needs (including food and water, medical treatment if needed and reasonable sanitary conditions).

The State of Israel has fully implemented the above obligations regarding the people on board the ships which have been captured. Foreign nationals are being treated by the Ministry of Internal Affairs in order to provide for their repatriation, and the wounded were evacuated to hospitals in Israel, some of them by helicopter. Nevertheless, activists suspected of attacking IDF soldiers will be investigated and the necessary legal measures will be taken against them.