

Israel, Blockade of Gaza and the Flotilla Incident

[N.B. The Flotilla Incident has also been the object of a decision on 6 November 2014 by the Prosecutor of the ICC not to proceed with an investigation (see [http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53\(1\)-Report-06Nov2014Eng.pdf](http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf)), a decision by an ICC Pre-Trial Chamber requesting her to review her decision (<https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/13-34>) and a final decision of the Prosecutor of 29 November 2017 not to do so (see <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/13-57>).]

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

A. Gaza flotilla raid

[Source : Courrier International, "L'attaque de la flottille de Gaza", 9 June 2010, available at <http://www.courrierinternational.com>]

On 31 May 2010 Israeli soldiers boarded a flotilla of six ships manned by 700 pro-Palestinian militants [...] from over 50 countries. The so-called Gaza Freedom Flotilla was carrying 10,000 tonnes of humanitarian aid and had set out from Istanbul in an attempt to break Israel's blockade of Gaza. The raid by the Israeli Defense Forces, which left nine people dead, received widespread condemnation internationally. [...]

B. Report of the international fact-finding mission to investigate Israeli attacks on the flotilla of ships carrying humanitarian assistance

[Source : Human Rights Council, Fifteenth session, *Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance*, A/HRC/15/21, 27 September 2010; available at <https://www.ohchr.org/FR/Pages/Home.aspx> ; footnotes omitted]

Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance

(...)

II. Background

A. Context

1. The blockade of the Gaza Strip

(...)

30. Economic and political measures started to be imposed against the Gaza Strip in February 2006 following the Hamas election victory in the legislative elections, accompanied by the withholding of financial resources on the part of donor countries. The closure on the Gaza Strip was imposed by Israel after Hamas took control of the Gaza Strip in June 2007. In September 2007, Israel declared the Gaza Strip “hostile territory” and that the movement of goods into and out of Gaza would be restricted for security concerns as well as in order to apply pressure on the Hamas government “as part of the State of Israel’s operations against continuous terrorism.”¹² Harsher fuel restrictions came into effect since October 2007.

31. In a petition to the Israeli Supreme Court,¹³ the legality of the decision by the Government of Israel to reduce the supply of electricity and fuel was challenged based on the argument that such cuts were inconsistent with the obligations of Israel under the Fourth Geneva Convention relating to the protection of civilians. [See case study Israel, Power Cuts in Gaza [Part A.]]

(...)

32. From mid-2008, in response to the Free Gaza Movement’s attempts to enter Gaza by sea, the Israeli Government took a series of steps aimed initially at deterring shipping from travelling to the area. A Notice to Mariners was issued stating that all ships entering the central zone of the Gaza Maritime Area would be “subject to supervision and inspection.” Then, in August 2008, a second Notice to Mariners was issued stating that a maritime zone extends 20 miles to seaward from the Gaza Strip. In accordance with the agreements between Israel and the PA, entry by foreign vessels to this zone is prohibited.

Imposition of the naval blockade

(...)

34. (...) [A]t the end of 2008, a recommendation for the initiation of a closure was made by the Military Advocate General to the Defence Minister, who directed the imposition of a maritime closure on the Gaza Strip until further notice.¹⁹ The naval blockade of the Gaza Strip was established by Israel on 3 January 2009 and announced by the Israeli Navy on 6 January. The advisory states that “the Gaza maritime area is closed to all maritime traffic and is under blockade imposed by [the] Israeli Navy until further notice.” (...)

B. Applicable law

(...)

1. The law of naval warfare and the question of the blockade

(...)

Blockade

51. Under the laws of armed conflict, a blockade is the prohibition of all commerce with a defined enemy coastline. A belligerent who has established a lawful blockade is entitled to enforce that blockade on the high seas. A blockade must satisfy a number of legal requirements, including: notification, effective and impartial enforcement and proportionality. In particular a blockade is illegal 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.

52. A blockade may not continue to be enforced where it inflicts disproportionate damage on the civilian population. The usual meaning of “damage to the civilian population” in the law of armed conflict refers to deaths, injuries and property damage.

Here the damage may be thought of as the destruction of the civilian economy and prevention of reconstruction further to damage. One might also note, insofar as many in

Gaza face a shortage of food or the means to buy it, that the ordinary meaning of “starvation” under the law of armed conflict is simply to cause hunger.

53. In evaluating the evidence submitted to the Mission, including by OCHA oPt, confirming the severe humanitarian situation in Gaza, the destruction of the economy and the prevention of reconstruction (as

detailed above), the Mission is satisfied that the blockade was inflicting disproportionate damage upon the civilian population in the Gaza strip and that as such the interception could not be justified and therefore has to be considered illegal.

54. Moreover, the Mission emphasizes that according to article 33 of the Fourth Geneva Convention, collective punishment of civilians under occupation is prohibited. "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited." The Mission considers that one of the principal motives behind the imposition of the blockade was a desire to punish the people of the Gaza Strip for having elected Hamas. The combination of this motive and the effect of the restrictions on the Gaza Strip leave no doubt that Israel's actions and policies amount to collective punishment as defined by international law. (...)

55. It might be suggested that a belligerent in an armed conflict has a right to visit, inspect and control the destinations of neutral vessels on the high seas, irrespective of any declared blockade. Whilst there is some controversy on this issue, the San Remo Manual and a number of military manuals take the view that the right may only be exercised upon reasonable suspicion that a vessel is engaged in activities which support the enemy [See document San Remo Manual on International Law Applicable to Armed Conflicts at Sea [para. 67-69]] . The Mission takes the view that a right of interference with third States' freedom of navigation should not lightly be presumed.

56. Thus, if there is no lawful blockade, the only lawful basis for intercepting the vessel would be a reasonable suspicion that it:

- was making an effective contribution to the opposing forces' war effort, such as by carrying weaponry or was otherwise closely integrated into the enemy war effort (belligerent right of capture); or
- posed an imminent and overwhelming threat to Israel and there was no alternative but to use force to prevent it (self-defence under Article 51 of the United Nations Charter).

(...) The evidence of Prime Minister Netanyahu (...) indicates that the decision to stop the flotilla was not taken because the vessels in themselves posed any immediate security threat. In any event, no such right of belligerent interdiction or wider claim of self-defence against the Flotilla has been asserted by Israel.

57. Therefore the Mission is satisfied not only that the flotilla presented no imminent threat but that the interception was motivated by concerns about the possible propaganda victory that might be claimed by the organizers of the flotilla.

58. (...) [I]t is clear that there was no reasonable suspicion that the Flotilla posed any military risk of itself. As a result, no case could be made for intercepting the vessels in the exercise of belligerent rights or Article 51

self-defence. Thus, no case can be made for the legality of the interception and the Mission therefore finds that the interception was illegal.

59. The Mission finds that the policy of blockade or closure regime, including the naval blockade imposed by Israel on Gaza was inflicting disproportionate civilian damage. The Mission considers that the naval blockade was implemented in support of the overall closure regime. As such it was part of a single disproportionate measure of armed conflict and as such cannot itself be found proportionate.

60. Furthermore, the closure regime is considered by the Mission to constitute collective punishment of the people living in the Gaza Strip and thus to be illegal and contrary to article 33 of the Fourth Geneva Convention.

61. The Mission considers that the enforcement of an illegal blockade does not only constitute a violation of the laws of war, but also a violation of the laws of neutrality giving rise to State responsibility.

2. International humanitarian law

(...)

63. As the occupying power, Israel has certain obligations imposed on it by international law. The International Court of Justice has concluded that the Fourth Geneva Convention is applicable in the occupied Palestinian territories which before the 1967 conflict lay to the east of the Green Line and which during the conflict were occupied by Israel. This is also the case for the Gaza strip, despite the unilateral withdrawal by Israel of the forces from the Gaza Strip in 2005, as the occupation has been confirmed repeatedly since then by the General Assembly and the Security Council. In this context, the Mission notes that occupation continues to the extent to which the occupying power retains effective control.

64. The Mission agrees with the assessment presented in the Goldstone Report as follows: [See case study Israel/Gaza, Operation Cast Lead [Part. II, para. 278]] The Mission is satisfied that these circumstances continued to prevail at the time of the incident under investigation.

(...)

66. Flotilla passengers were civilians and in the context of the interception of the vessels must be considered protected persons. Under article 4 of the Fourth Geneva Convention, protected persons “are those who, at a given moment and in any manner whatsoever, find themselves ... in the hands of a Party to the conflict or Occupying Power of which they are not nationals”. In a situation of armed conflict, military force can only be used against a combatant or against civilians participating actively and directly in combat activities, which cannot be said of the civilians on the *Mavi Marmara*.

(...)

III. L'interception de la flottille par la marine israélienne et ses conséquences

A. Organisation de la flottille pour Gaza et réaction du Gouvernement israélien

(...)

79. The stated aims of the Flotilla, as testified by the leaders of the Free Gaza Movement and IHH [Turkish humanitarian organization "Foundation for Human Rights and Freedoms and Humanitarian Relief"], were threefold: (a) to draw international public attention to the situation in the Gaza Strip and the effect the blockade; (b) to break the blockade; and (c) to deliver humanitarian assistance and supplies to Gaza. All participants interviewed by the Mission shared their aims, although most placed emphasis on the delivery of humanitarian aid.

80. The Mission notes a certain tension between the political objectives of the flotilla and its humanitarian objectives. This comes to light the moment that the Government of Israel made offers to allow the humanitarian aid to be delivered via Israeli ports but under the supervision of a neutral organization. The Mission also notes that the Gaza Strip does not possess a deep sea port designed to receive the kind of cargo vessels included in the flotilla, raising practical logistical questions about the plan to deliver large quantities of aid by the route chosen. Whilst the Mission is satisfied that the flotilla constituted a serious attempt to bring essential humanitarian supplies into Gaza, it seems clear that the primary objective was political, as indeed demonstrated by the decision of those on board the Rachel Corrie to reject a Government of Ireland-sponsored proposal that the cargo in that ship to be allowed through Ashdod intact.

B. The interception of the Gaza flotilla by the Israeli Navy on 31 May 2010

(...)

108. (...) The Israeli Navy requested each vessel to identify itself and state its destination. It then warned each vessel, with some variations, it was approaching an area of hostilities which is under a naval blockade, that the Gaza maritime area is closed to all vessels and that they must change course to deliver their supplies to the Port of Ashdod in Israel. In some of the messages, the captain of each vessel was warned that he would be held personally responsible for any consequences of a failure to comply with the Israeli request. The Israeli Navy's contacts were similar to those in relation to previous Free Gaza Movement efforts to enter Gaza by sea.

109. In response, the captains of the various vessels stated that their destination was Gaza and the purpose was to deliver humanitarian aid. They also asserted that the Israeli forces did not have the right to order the

vessels to change course and that the blockade referred to was illegal. A representative of the Free Gaza Movement spoke to the Israelis on behalf of the whole flotilla, reiterating that the passengers were unarmed civilians delivering humanitarian aid and that none of the ships should be considered as any form of threat to Israel. At no stage was a request made by the Israeli Navy for the cargo to be inspected. (...)

(b) Events on board the M.V. Mavi Marmara

(i) Initial attempt to board the Mavi Marmara from the sea

(...)

113. The Israeli forces attempted to board the ship through attaching ladders to the hull. Passengers engaged in efforts to repel the attempted boarding using the ship's water hoses⁶⁸ and the throwing of various items at the boats including chairs, sticks, a box of plates and other objects that were readily to hand. This initial attempt to board the ship proved unsuccessful. It is the view of the Mission that the Israeli forces should have re-evaluated their plans when it became obvious that putting their soldiers on board the ship may lead to civilian casualties.

(ii) Landing of soldiers from helicopters onto the Mavi Marmara

(...)

114. The Mission (...) has concluded that live ammunition was used from the helicopter onto the top deck prior to the descent of the soldiers. (...)

116. (...) The Mission has found no evidence to suggest that any of the passengers used firearms or that any firearms were taken on board the ship. (...)

(iii) Deaths of 9 passengers and wounding of at least 50 other passengers

117. (...) The Israeli forces used paintballs, plastic bullets and live ammunition, fired by soldiers from the helicopter above and soldiers who had landed on the top deck. (...)

118. Israeli soldiers continued shooting at passengers who had already been wounded, with live ammunition, soft baton charges (beanbags) and plastic bullets. Forensic analysis demonstrates that two of the passengers killed on the top deck received wounds compatible with being shot at close range while lying on the ground (...).

123. During the shootings on the bridge deck and as it became apparent that a large number of passengers had become injured, Bulent Yildirim, the President of IHH and one of principal organizers of the flotilla,

removed his white shirt which was then used as a white flag to indicate a surrender. This does not appear to have had any effect and live firing continued on the ship. (...)

(iv) Shootings at the bow deck, the release of the Israeli soldiers and end of the operation

125. During the initial fighting on the top deck three Israeli soldiers were taken under control and brought inside the ship. While some passengers wished to harm the soldiers, other passengers ensured that they were protected and able to receive rudimentary medical treatment from doctors on board. (...)

126. As the seriousness of incidents on the outer decks became apparent, there was growing concern among some of the flotilla organisers that holding the captured Israeli soldiers may have serious implications for the security of all passengers on board. It was decided that the soldiers should be released and they were taken to the bow of the lower deck. Once on the bow deck two of the soldiers jumped into the sea and were picked up by Israeli boats. The third soldier did not jump and was rapidly joined by Israeli soldiers who came down from the top deck. (...)

128. The Israeli forces stated that the active phase of the Israeli forces operation concluded at 0517 hours, once the ship was under their control and the three soldiers were released. During the 45-50 minute operation, nine passengers were killed, more than 24 passengers had received serious injuries caused by live ammunition and a large number of other passengers had received injuries caused by plastic rounds, soft baton charges (beanbags) and other means. (...)

V. Conclusions

(...)

261. The Mission has come to the firm conclusion that a humanitarian crisis existed on the 31 May 2010 in Gaza. The preponderance of evidence from impeccable sources is too overwhelming to come to a contrary opinion. Any denial of this cannot be supported on any rational grounds. One of the consequences flowing from this is that for this reason alone the blockade is unlawful and cannot be sustained in law. This is so regardless of the grounds on which one seeks to justify the legality of the blockade.

262. Certain results flow from this conclusion. Principally, the action of the Israel Defense Force in intercepting the Mavi Marmara on the high seas in the circumstances and for the reasons given was clearly unlawful. Specifically, the action cannot be justified in the circumstances even under Article 51 of the Charter of the United Nations.

263. Israel seeks to justify the blockade on security grounds. The State of Israel is entitled to peace and security like any other. The firing of rockets and other munitions of war into Israeli territory from Gaza constitutes serious violations of international law and of international humanitarian law. But any action in

response which constitutes collective punishment of the civilian population in Gaza is not lawful in any circumstances.

264. The conduct of the Israeli military and other personnel towards the flotilla passengers was not only disproportionate to the occasion but demonstrated levels of totally unnecessary and incredible violence. It betrayed an unacceptable level of brutality. Such conduct cannot be justified or condoned on security or any other grounds. It constituted a grave violation of human rights law and international humanitarian law.

(...)

C. Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident

[**Source** : Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, July 2011 ; available at <https://www.un.org/press/en/2010/sgsm13032.doc.htm> ; references omitted]

Report of the Secretary-General's Panel of Inquiry

on the 31 May 2010 Flotilla Incident,

July 2011,

Sir Geoffrey Palmer, Chair

President Alvaro Uribe, Vice-Chair

Mr. Joseph Ciechanover Itzhar

Mr. Süleyman Özdem Sanberk

(...)

5. Facts, Circumstances and Context of the Incident

(...)

The Naval Blockade

(...)

70. (...) The naval blockade is often discussed in tandem with the Israeli restrictions on the land crossings to Gaza. However, in the Panel's view, these are in fact two distinct concepts which require different treatment and analysis. First, we note that the land crossings policy has been in place since long before the naval blockade was instituted. In particular, the tightening of border controls between Gaza and Israel came about after the take-over of Hamas in Gaza in June 2007. On the other hand, the naval blockade was imposed more than a year later, in January 2009. Second, Israel has always kept its policies on the land crossings separate from the naval blockade. The land restrictions have fluctuated in intensity over time but the naval blockade has not been altered since its imposition. Third, the naval blockade as a distinct legal measure was imposed primarily to enable a legally sound basis for Israel to exert control over ships attempting to reach Gaza with weapons and related goods. This was in reaction to certain incidents when vessels had reached Gaza via sea. We therefore treat the naval blockade as separate and distinct from the controls at the land crossings. This is not to overlook that there may be potential overlaps in the effects of the naval blockade and the land crossings policy. (...)

71. The United Nations Charter, Article 2 (4) prohibits the use of force generally, subject to an exception under Article 51 of the Charter for the right of a nation to engage in self-defence. Israel has faced and continues to face a real threat to its security from militant groups in Gaza. Rockets, missiles and mortar bombs have been launched from Gaza towards Israel since 2001. More than 5,000 were fired between 2005 and January 2009, when the naval blockade was imposed. Hundreds of thousands of Israeli civilians live in the range of these attacks. (...) It seems obvious enough that stopping these violent acts was a necessary step for Israel to take in order to protect its people and to defend itself. (...)

72. The Panel notes in this regard that the uncertain legal status of Gaza under international law cannot mean that Israel has no right to self-defence against armed attacks directed toward its territory. The Israeli report to the Panel makes it clear that the naval blockade as a measure of the use of force was adopted for the purpose of defending its territory and population, and the Panel accepts that was the case. It was designed as one way to prevent weapons reaching Gaza by sea and to prevent such attacks to be launched from the sea. (...) [A] blockade in those circumstances is a legitimate exercise of the right of self-defence. Although a blockade by definition imposes a restriction on all maritime traffic, given the relatively small size of the blockade zone and the practical difficulties associated with other methods of monitoring vessels (such as by search and visit), the Panel is not persuaded that the naval blockade was a disproportionate measure for Israel to have taken in response to the threat it faced.

73. The Panel now turns to consider whether the other components of a lawful blockade under international law are met. Traditionally, naval blockades have most commonly been imposed in situations where there is

an international armed conflict. While it is uncontested that there has been protracted violence taking the form of armed conflict between Israel and armed groups in Hamas-controlled Gaza, the characterization of this conflict as international is disputed. The conclusion of the Panel in this regard rests upon the facts as they exist on the ground. The specific circumstances of Gaza are unique and are not replicated anywhere in the world. Nor are they likely to be. Gaza and Israel are both distinct territorial and political areas. Hamas is the de facto political and administrative authority in Gaza and to a large extent has control over events on the ground there. It is Hamas that is firing the projectiles into Israel or is permitting others to do so. The Panel considers the conflict should be treated as an international one for the purposes of the law of blockade. This takes foremost into account Israel's right to self-defence against armed attacks from outside its territory. In this context, the debate on Gaza's status, in particular its relationship to Israel, should not obscure the realities. The law does not operate in a political vacuum, and it is implausible to deny that the nature of the armed violence between Israel and Hamas goes beyond purely domestic matters. In fact, it has all the trappings of an international armed conflict. (...)

75. As required, the naval blockade was declared and notified. The Israeli authorities issued a "Notice to Mariners" through the appropriate channels, setting out the imposition of the blockade and the coordinates of the blockaded area. In addition, the notice was broadcast twice a day on an emergency radio channel for maritime communications. There is no contest about this. The suggestion that because the blockade was stated to be imposed "until further notice" means that the notification's content is insufficient and the blockade thus invalid does not seem to us to be persuasive. The notice does specify a duration. Given the uncertainties of a continuing conflict, nothing more was required. Likewise, a limitation to certain groups of prohibited items in the blockade's notification was not necessary. It lies in the nature of a blockade that it affects all maritime traffic, given that its aim is to prevent any access to and from a blockaded area. (...)

77. Important humanitarian considerations constrain the imposition of a naval blockade. For one, it would be illegal if its imposition was intended to starve or to collectively punish the civilian population. However, there is no material before the Panel that would permit a finding confirming the allegations that Israel had either of those intentions or that the naval blockade was imposed in retaliation for the take-over of Hamas in Gaza or otherwise. On the contrary, it is evident that Israel had a military objective. The stated primary objective of the naval blockade was for security. It was to prevent weapons, ammunition, military supplies and people from entering Gaza and to stop Hamas operatives sailing away from Gaza with vessels filled with explosives. This is regardless of what considerations might have motivated Israel in restricting the entry of goods to Gaza via the land crossings, an issue which (...) is not directly related to the naval blockade. It is also noteworthy that the earliest maritime interception operations to prevent weapons smuggling to Gaza predated the 2007 take-over of Hamas in Gaza. The actual naval blockade was imposed more than one year after that event. These factors alone indicate it was not imposed to punish its citizens for the election of Hamas.

78. Perhaps a more difficult question is whether the naval blockade was proportional. This means to inquire whether any damage to the civilian population in Gaza caused by the naval blockade was excessive when

weighed against the concrete and direct military advantage brought by its imposition. As this report has already indicated, we are satisfied that the naval blockade was based on the need to preserve Israel's security. Stopping the importation of rockets and other weapons to Gaza by sea helps alleviate Israel's situation as it finds itself the target of countless attacks, which at the time of writing have once again become more extensive and intensive. On the other hand, the specific impact of the naval blockade on the civilian population in Gaza is difficult to gauge because it is the land crossings policy that primarily determines the amount of goods permitted to reach Gaza. One important consideration is the absence of significant port facilities in Gaza. The only vessels that can be handled in Gaza appear to be small fishing vessels. This means that the prospect of delivering significant supplies to Gaza by sea is very low. Indeed, such supplies were not entering by sea prior to the blockade. So it seems unrealistic to hold the naval blockade disproportionate as its own consequences – either alone or by compounding the restrictions imposed by Israel on the entry of goods to Gaza via its border crossings – are slight in the overall humanitarian situation. Smuggling weapons by sea is one thing ; delivering bulky food and other goods to supply a population of approximately 1.5 million people is another. Such facts militate against a finding that the naval blockade itself has a significant humanitarian impact. On the contrary, it is wrong to impugn the blockade's legality based on another, separate policy.

79. This is not to deny or ignore the consequences of the land crossings policy and the state of the humanitarian situation in Gaza. We have reached the view that the naval blockade was proportionate in the circumstances. While we are unable to conclude that the combined effects of the naval blockade and the crossings policy rendered the naval blockade disproportionate, we can make the policy judgment that the procedures applied by Israel in relation to land access to Gaza are unsustainable and need to be changed.

80. As a final point, the Panel emphasizes that if necessary, the civilian population in Gaza must be allowed to receive food and other objects essential to its survival. However, it does not follow from this obligation that the naval blockade is per se unlawful or that Israel as the blockading power is required to simply let vessels carrying aid through the blockade. On the contrary, humanitarian missions must respect the security arrangements put in place by Israel. They must seek prior approval from Israel and make the necessary arrangements with it. This includes meeting certain conditions such as permitting Israel to search the humanitarian vessels in question. The Panel notes provision was made for any essential humanitarian supplies on board the vessels to enter Gaza via the adjacent Israeli port of Ashdod, and such an offer was expressly made in relation to the goods carried on the flotilla.

81. The Panel therefore concludes that Israel's naval blockade was legal. (...)

D. ICRC, Gaza closure: not another year!

[Source : ICRC, News Release 10/103, 14 June 2010 ; available at <https://www.icrc.org/eng/resources/documents/update/palestine-update-140610.htm>]

Gaza closure: not another year!

Geneva/Jerusalem (ICRC) - The hardship faced by Gaza's 1.5 million people cannot be addressed by providing humanitarian aid. The only sustainable solution is to lift the closure.

The serious incidents that took place on 31 May between Israeli forces and activists on a flotilla heading for Gaza once again put the spotlight on the acute hardship faced by the population in the Gaza Strip.

As the ICRC has stressed repeatedly, the dire situation in Gaza cannot be resolved by providing humanitarian aid. The closure imposed on the Gaza Strip is about to enter its fourth year, choking off any real possibility of economic development. Gazans continue to suffer from unemployment, poverty and warfare, while the quality of Gaza's health care system has reached an all-time low.

The whole of Gaza's civilian population is being punished for acts for which they bear no responsibility. The closure therefore constitutes a collective punishment imposed in clear violation of Israel's obligations under international humanitarian law.

"The closure is having a devastating impact on the 1.5 million people living in Gaza", said Béatrice Mégevand-Roggo, the ICRC's head of operations for the Middle East. " That is why we are urging Israel to put an end to this closure and call upon all those who have an influence on the situation, including Hamas, to do their utmost to help Gaza's civilian population. Israel's right to deal with its legitimate security concerns must be balanced against the Palestinians'right to live normal, dignified lives. "

(...)

Under international humanitarian law, Israel must ensure that the basic needs of Gazans, including adequate health care, are met. The Palestinian authorities, for their part, must do everything within their power to provide proper health care, supply electricity and maintain infrastructure for Gaza's people.

Furthermore, all States have an obligation to allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel. (...)

Ruined livelihoods

Although about 80 types of goods are now allowed into Gaza – twice as many as a year ago – over 4,000 items could be brought in prior to the closure. Generally, the price of goods has increased while their quality has dropped – this is one consequence of the largely unregulated trade conducted through the tunnels that have been dug under the Gaza-Egypt border to circumvent the closure.

Fertile farmland located close to the border fence has been turned into a wasteland by ongoing hostilities,

affecting people's livelihoods in many rural communities. The buffer zone imposed by Israel extends in practice over one kilometre into the Gaza Strip, covering a total area of about 50 square kilometres that is host to nearly a third of Gaza's farmland and a large share of its livestock. Agricultural activities in the area are hampered by security conditions. Israel's enforcement of the buffer zone and frequent hostilities have resulted not only in civilian casualties and the destruction of civilian property but also in the impoverishment and displacement of numerous families.

Gaza's fishermen have been greatly affected by successive reductions imposed by Israel on the size of the fishing grounds they are allowed to exploit. The latest restriction to three nautical miles has cut down both the quantity and quality of the catch. As a result, nearly 90% of Gaza's 4000 fishermen are now considered either poor (with a monthly income of between 100 and 190 US dollars) or very poor (earning less than 100 dollars a month), up from 50% in 2008. In their struggle to survive, the fishermen have little choice but to sail into no-go zones, at the risk of being shot by the Israeli navy. (...)

No cure in sight for ailing health-care system

Gaza is suffering from an acute electricity crisis. The power supply in Gaza is interrupted for seven hours a day on average. The consequences for public services, especially the primary health-care system, are devastating. Hospitals rely on generators to cope with the daily blackouts.

The power cuts pose a serious risk to the treatment of patients – and to their very lives. It takes two to three minutes for a generator to begin operating, and during that time electronic devices do not function. As a result, artificial respirators must be reactivated manually, dialysis treatment is disrupted and surgery is suspended as operating theatres are plunged into darkness.

To make matters worse, fuel reserves for hospital generators keep drying up. Three times this year, fuel shortages have forced hospitals to cancel all elective surgery and accept emergency cases only. Gaza's paediatric hospital had to transfer all its patients to another facility because it could no longer function. Laundry services have repeatedly shut down. With the prospect of increased electricity consumption during the hot summer months when air conditioning is required, the situation is likely to deteriorate further if hospitals do not receive ample fuel.

Fluctuations in the power supply can also damage essential medical equipment. Repairs are difficult owing to the closure, under which the transfer into Gaza of spare parts for medical equipment is subject to excessive delays of up to several months.

The transfer of disposable electrodes, which are used to monitor the heart rhythm of cardiac patients, has been delayed since August 2009. Without this equipment, patient lives are at risk, as heart problems may not be detected in time. Because of the restrictions in place, most heart monitors in Gaza will be unusable by the

end of this month. The run-down state of equipment is one of the reasons for the high numbers of patients seeking treatment outside the Strip. (...)

More than 110 of the 700 disposable items that should be available are also out of stock. The only way to cope is to re-use such items as ventilator tubes or colostomy bags, even though doing so can lead to infections that endanger patients' lives.

"The state of the health-care system in Gaza has never been worse," said Eileen Daly, the ICRC's health coordinator in the territory. "Health is being politicized: that is the main reason the system is failing. Unless something changes, things are only going to get even worse. Thousands of patients could go without treatment and the long-term outlook will be increasingly worrisome."

The health-care system is further weakened by severe restrictions imposed on the movement of people into and out of Gaza. The restrictions prevent medical staff from leaving the Strip to get the training they need to update their skills, and technicians from entering to repair medical equipment.

Lack of sanitation hazardous for health and the environment

(...) Assembling enough suitable materials to carry out sanitation projects is a slow and haphazard process. Materials obtained through the tunnel trade can be of questionable quality, while some items, such as certain electro-mechanical pumps, cannot be found at all, which hobbles construction efforts.

"The current situation is critical and may lead to an irreversible trend in the degradation of underground fresh water," said Javier Cordoba, who oversees the ICRC's water and sanitation activities in Gaza. "Large-scale projects, such as the construction of a desalination plant, must be undertaken to meet water-supply needs without further exposing the aquifer. The closure must be lifted so that the 4.5 billion US dollars pledged by donor countries over a year ago can be put to use."

Discussion

I. Definition of the situation and the applicable law

1. (*Document B.*) How does the Mission of the Human Rights Council describe the situation in Gaza in May 2010? (*Document C.*) How does the Commission of Inquiry of the United Nations Secretary-General describe it? How would you describe it? According to each of the two reports, which law is applicable?

2. a. (*Document C., para. 73*) Do you think, as stated in the report of the Commission of Inquiry, that the conflict between Israel and the armed groups in the Gaza Strip under Hamas administration is an international armed conflict? Can a conflict be defined as international if one of the parties is not recognized as a State? Is that because it is a war of national liberation, within the meaning of Art. 1(4) of Additional

Protocol I? Even if Israel is not party to that Protocol? Is it because the territories are occupied by Israel? Does the definition of the conflict by the Commission of Inquiry and the arguments that it uses to justify it confer a special status on the Gaza Strip?

b. (*Document B., paras 63-64*) Do you think, as stated in the report of the Mission of the Human Rights Council, that the situation in Gaza is still one of occupation? Can one refer to a situation of occupation when the occupation forces are no longer present in the occupied territory? Does the fact that Israel has control of the people and property that are allowed to enter or leave the Gaza Strip affect the answer? (See **case studies**, Israel/Gaza, Operation Cast Lead, and Israel, Power Cuts in Gaza)

II. Legality of blockades

3. a. Does international humanitarian law (IHL) contain a definition of a blockade? Is a blockade applicable solely at sea? (*Document B., paras 30-31*) Can the measures restricting the movement of goods on land – or the closure policy – taken by Israel in 2006-2007 be considered a blockade? Is the legal regime of those two measures similar under IHL?

b. (*Document B., paras 32, 34 and 59; Document C., para. 70; Document D.*) Do you, like Mission of the Human Rights Council and the ICRC, think that the maritime blockade measures imposed in 2008 were taken in support of the land closure regime and that they are thus part of just one measure or, as stated by the Commission of Inquiry of the United Nations Secretary-General, that those two types of measures are distinct? What arguments would you put forward in favour of one or the other position? Does the Mission of the Human Rights Council explain the thinking underlying its position? What do you think of the arguments used by the Commission of Inquiry to justify its position?

4. a. In IHL is a blockade considered a lawful method of warfare? Does IHL govern blockade situations? (GC IV, Art. 23; AP I, Art. 70)

b. Can the legality of a blockade be assessed on the basis of its objectives? (*Document C., para. 72*) Does the fact that the blockade was decided in order to prevent weapons from reaching Gaza by sea affect the assessment of its legality? (*Document B., para. 54*) Does the fact that the blockade was imposed in response to election of Hamas in the Gaza Strip affect its legality? Can a blockade be used as a lawful reprisal measure? (*Document C., paras 71-72*) Can Israel justify the legality of resorting to a blockade by citing security reasons? Are there grounds for justifying it as a measure taken in self-defence?

c. (*Document B., para. 54; Document C., para. 77; Document D.*) Do you agree with the Mission of the Human Rights Council and the ICRC when they state that “one of the main aims of the blockade [having been] to punish the population of the Gaza Strip for having elected Hamas,” the blockade was tantamount to collective punishment? Are collective penalties prohibited in IHL? Can a measure be deemed equivalent to collective punishment on the basis of the disproportionate consequences that it may have for the civilian

population? Or does the existence of an intention to punish the civilian population as such have to be determined? (GC IV, Art. 33)

5. (*Document B.*, para. 34; *Document C.*, para. 75) Is a blockade that is imposed “until further notice” or “until a new order is given” legal? Does the argument to the effect that no deadline may be set “given the uncertainty of an ongoing conflict” seem appropriate to you? (See San Remo Manual on International Law Applicable to Armed Conflicts at Sea [para. 94], CD)

6. a. Given its nature and its aim, can a blockade be imposed in such a way as to distinguish between the military or civilian nature of the people and goods that it affects? (AP I, Arts 48 and 51(4); CIHL, Rule 7)

b. (*Document B.*, paras 52-53; *Document C.*, para. 78) Doesn't a blockade inevitably harm the civilian population? Does that imply that a certain degree of harm to the population is accepted in IHL? How can one assess whether the humanitarian consequences of the blockade are disproportionate to the security advantages for Israel? What criteria are used by the Mission of the Human Rights Council and the Commission of Inquiry of the United Nations Secretary-General to assess it? Do they seem appropriate to you? Does economic damage have to be taken into account in that assessment? What if it leads to death or damage to property? Even if it was not the result of attacks? (AP I, Art. 51(5)(b); CIHL, Rule 14; See San Remo Manual on International Law Applicable to Armed Conflicts at Sea [para. 102(b)], CD)

c. (*Document C.*, paras 78-79) If one accepts the argument that a land closure policy and a maritime blockade are two legally distinct methods, does that mean that their effects cannot be assessed cumulatively? What are the dangers for the civilian population of treating those two measures and their effects separately?

7. a. (*Document B.*, para. 52; *Document C.*, para. 77) Is a blockade illegal if it leads to starving the civilian population? Or does the existence of an intention to cause starvation have to be determined before its legality can be questioned? (AP I, Art. 54(1); CIHL, Rule 53; See San Remo Manual on International Law Applicable to Armed Conflicts at Sea [para. 102(a)], CD)

b. (*Document B.*, para. 261) Are all blockades of a territory subject to a humanitarian crisis prohibited, or only when the territory is already subject to famine?

c. Is Israel under an obligation to let humanitarian aid into the Gaza Strip? Only if the population no longer has sufficient supplies? Does the establishment of a blockade violate that obligation? (GC IV, Arts 23 and 59; AP I, Art. 70; CIHL, Rule 55; See San Remo Manual on International Law Applicable to Armed Conflicts at Sea [para. 103], CD)

d. (*Document B.*, para. 56; *Document C.*, para. 75) Is the power imposing the blockade required to draw

up a list of prohibited merchandise, or can it restrict sea traffic as a whole? Can a blockade apply only to goods contributing to the military action? What does IHL have to say on that matter? Wouldn't it be preferable to draw up a list of prohibited goods rather than a list of goods whose passage is authorized? (GC IV, Arts 23 and 59; AP I, Art. 70; CIHL, Rule 55; See San Remo Manual on International Law Applicable to Armed Conflicts at Sea [para. 103], CD)

d. (*Document B.*, para. 80; *Document C.*, para. 80) Under IHL, are humanitarian missions required to ask for Israel's prior approval in order to transport supplies? Is Israel under an obligation to give its consent if the civilian population is in need? Did Israel have the right to impose conditions on the passage of humanitarian aid, such as transporting it from Israeli ports and under the supervision of a neutral organization? Did the fact that the flotilla did not reply favourably to those conditions give Israel the right to intercept it? (*Document B.*, para. 109) Does the fact that Israel at no time asked to inspect the cargo affect the answer? (GC IV, Arts 23 and 59; AP I, Art. 70; See San Remo Manual on International Law Applicable to Armed Conflicts at Sea [para. 103], CD)

e. (*Document B.*, para. 80) Does the fact that the flotilla had a political objective in addition to that of transporting humanitarian aid affect its right to free passage to Gaza? (GC IV, Art. 23; AP I, Art. 70)

8. (*Document D.*) If Israel is considered to be the occupying power in the Gaza Strip, is it under an obligation to supply the people of Gaza with food? Medical supplies? Electricity and fuel? Electro-mechanical pumps to treat the water? Is it under an obligation to let humanitarian aid through if it is unable to deliver supplies? Is it entitled to require that assistance to pass through its ports? Does the imposition of a blockade run counter to Israel's obligations to the Gaza Strip as the occupying power? (HR, Art. 43; GC IV, Arts 23 and 55; AP I, Art. 69-70)

III. Legality of intercepting the flotilla

9. (*Document B.*, para. 55-58) If the blockade was lawful, did Israel have the right to attack the flotilla? What if the blockade was unlawful? Does the fact that the attack took place on the high seas affect the answer? (See San Remo Manual on International Law Applicable to Armed Conflicts at Sea [paras 67-69 and 98], CD)

10. a. From the perspective of IHL, were the passengers on board the *Mavi Marmara* combatants? (*Document B.*, para. 66) Were they protected persons within the meaning of Article 4 of Geneva Convention IV? Does the fact that the attack took place on the high seas affect the answer? Can an occupied territory exist on the high seas? If the place of the incident had not been an occupied territory, were the Turkish passengers persons protected by GC IV? If they were not protected civilians, was it lawful to attack them? (GC III, Art. 4; GC IV, Art. 4; AP I, Arts 50(1) and 51 (2))

b. Can the fact that the flotilla decided to continue travelling towards Gaza be considered as direct participation in the hostilities? (*Document B.*, para. 116) Even if its passengers were not armed? (*Document*

B., para. 113) Can the fact that they attempted to resist the attempt to board ship and used water jets, chairs, sticks and other objects be likened to direct participation in hostilities? (*Document B.*, paras 125-126) What about the fact that they had taken Israeli soldiers captive? If not, what was their status? (AP I, Arts 50(1) and 51(3); CIHL, Rule 6; See ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities, CD)

11. (*Document B.*, para. 123) Is there a provision in IHL relating to the use of a white flag? Does a white flag need to be waved to signal surrender? Is a party to a conflict obliged to accept the surrender of enemies? (CIHL, Rule 58)

12. (*Document B.*, paras 113-128) Did Israel take all necessary precautions to avoid loss of human life and to minimize damage during the attack on the flotilla? Does the use of colour-filled balls, plastic balls or beanbags affect the answer? (*Document B.*, paras 108-109) Were the radio warnings sent by the Israeli navy before the attack a sufficient precautionary measure? (AP I, Art. 57; CIHL, Rules 15-21; See San Remo Manual on International Law Applicable to Armed Conflicts at Sea [para. 46], CD)