

The Gaza Blockade and International Law

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Israel's raid on a fleet of activists bound for the Gaza Strip has led to wild accusations of illegality. But the international law applicable to the blockade eludes the grasp of those in search of easy answers.

The most serious charge is that by seizing control of the flotilla, Israel violated the freedom of ships to travel on the high seas. The basic law here is that states have jurisdiction over a 12-mile territorial sea and can take enforcement actions in an additional 12-mile contiguous zone, according to the 1982 Law of the Sea Convention (which Israel has not ratified, but which is generally regarded as reflecting customary international law). Outside that area, foreign ships can sail unmolested.

But there are exceptions. Longstanding customary international law permits states to enforce publicly announced blockades on the high seas. The Gaza blockade was known to all, and certainly to those who launched the ships for the very purpose of breaking it. The real question is whether the Israeli blockade is lawful. Blockades certainly are during times of war or armed conflict. The U.S.-led coalition imposed a blockade on Iraq during the first Gulf War.

The catch here is the meaning of "armed conflict." Traditionally, armed conflict can take place only between sovereign states. If Gaza were clearly a sovereign state, then Israel would be at war with Gaza and the blockade would be lawful. If, however, Gaza were just a part of Israel, Israel would have the right to control its borders -- but not by intercepting foreign ships outside its 12-mile territorial sea or contiguous zone.

Gaza is not a sovereign state (although it has its own government, controlled by Hamas) and is not a part of Israel or of any other state. Its status is ambiguous, and so too is the nature of the armed conflict between Israel and Hamas. Thus there is no clear answer to the question whether the blockade is lawful.

However, the traditional idea of armed conflict involving only sovereign states has long given way to a looser definition that includes some conflicts between states and nonstate actors. The international rules governing blockades attempt to balance belligerents' interest in security and other countries' economic interests in shipping. During war, security interests prevail.

War-like conditions certainly exist between Israel and Hamas. And because Israel intercepts only self-identified blockade runners, its actions have little impact on neutral shipping. This balance is reflected in the traditional privilege of states to capture foreign pirates on the high seas.

So Israel's legal position is reasonable, and it has precedent. During the U.S. Civil War, the Union claimed to blockade the Confederacy while at the same time maintaining that the Confederacy was not a sovereign state but an agent of insurrection.

When the Union navy seized ships trying to run the blockade, their owners argued that a country cannot interfere with shipping on the high seas except during war, and one cannot be at war except with another sovereign state. The U.S. Supreme Court approved the captures in an ambiguous opinion that held that an armed conflict existed, even though one side was not a sovereign state. The opinion suggests a certain latitude for countries to use blockades against internal as well as external enemies.

Human Rights Watch argues that a blockade to strike at a terrorist organization constitutes a collective penalty against a civilian population, in violation of Article 33 of the fourth Geneva Convention. This argument won't stand up. Blockades and other forms of economic sanction are permitted in international law, which necessarily means that civilians will suffer through no fault of their own.

Most attention has focused on the question whether Israeli commandos used excessive force while taking control of one of the flotilla ships, which resulted in nine deaths. Human Rights Watch says that Israel's actions violated the 1990 United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. However, that document is not international law; its principles are akin to a set of "best practices" for advising countries with poorly trained police forces. It is also vague and it would not apply to a military operation.

Military operations must respect the principle of proportionality, which is a fuzzy, "know-it-when-you-see-it" test. But one thing is clear. Ships that run blockades may be attacked and sunk under international law. If Israel had exercised that right, far more than nine people would have been killed.

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