The Blockade of Gaza and International Law

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Ladies and gentlemen,

The main focus of the talk today is the "Legality of the blockade of Gaza", which is indeed a very controversial issue and has attracted much debate in the media as well as in intellectual discourse. There have been arguments for and against it and many seem to be tainted with political connotations. For me, I will concentrate my discussions of the issue from purely international law perspective. Before taking on the issue of the legality of the blockade, it is more proper to touch on the question of the status of Gaza and the applicable law.

1. The status of Gaza and the applicable law

1.1 The status of Gaza: Is it an occupied territory?

What is Gaza? Is it a sovereign State? Or is it an occupied territory?
What is very clear is that Gaza is not a sovereign State. It is just a tiny piece of territory, forming and integral part of the Palestinian territories occupied by Israel in the 1967 War.

International law of occupation

What is occupation? The Hague Regulations 1907 (Laws and Customs of War on Land)
Art. 42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

It has been argued by some that a necessary element of an occupation is a permanent military ground presence in the territory concerned. Occupation law, however, does not prescribe the precise form of the military force through which a state is to assert its control. What matters for the definition of occupation is the effectiveness of the foreign power's control. At the core of the concept of occupation is the idea of effective control.

In the *Hostages* case, the Nuremberg Tribunal took the view that Germany was indeed an occupant of Yugoslavia, Greece and Norway, including of areas controlled by resistance groups at various times, because Germany could "at any time [it] desired assume physical control of any part of the country."

Similarly, the ICTY recognized that the authority of an occupant may be established when "the occupying power has a sufficient force present, or the capacity to send troops within a reasonable

time to make the authority of the occupying power felt." *Prosecutor v. Naletilic & Martinovic* (2003), Case No. IT-98-34-T.

In the *Case Concerning Armed Activities in the Territory of the Congo (Congo v. Uganda),* [2005], the ICJ ruled that Uganda would be deemed an occupier of Congolese territory if Ugandan forces "had substituted their own authority for that of the Congolese Government", stating that "whether or not Uganda had established a structured military administration of the territory occupied" was irrelevant.

Legal scholars take a similar view, some asserting that a power may exert sufficient military control through its air force to assert its authority (Professor von Glahn).

The Gaza Strip was formerly part of the British Mandate for Palestine. After the first Arab-Israeli war in 1948, the Gaza Strip fell under Egyptian administration.

Israel seized control of the Gaza Strip in 1967 war. Israel maintained that, because it had not displaced a recognized sovereign state in taking control of the Gaza Strip and the West Bank, these territories were "administered" by Israel, but not "occupied" within the meaning of international law.

Israel's position was rejected by most authorities, and in time, its status as an occupying power was confirmed by:

(1) the International Court of Justice (*Palestinian Wall* case, 2004),
(2) the Oslo Accords,
(3) the Israeli Supreme Court, (*Adjuri v. IDF Commander* (2004)
(4) the UN Security Council, S.C. Res. 1544, (May 19, 2004)
(5) the UN General Assembly, G.A. Res. 58/292 (May 17, 2004), and
(6) the U.S. State Department. Country Report on Human Rights Practices: Israel and the Occupied Territories 2003 (Feb. 25, 2004).

Disengagement of 2005

Israel withdrew its forces from its permanent military bases in Gaza in 2005. Israel maintains that its "withdrawal" from Gaza ended its occupation of the Strip and that, accordingly, it no longer has any obligations to the population of Gaza. However, it is still widely accepted by the international community that Israel continues to occupy the Gaza Strip as a matter of international law. This is because despite ending their colonization of the Gaza Strip in 2005, Israel still maintains "effective control" over the Gaza Strip through control of its borders, air space and of course, sea lanes. The Disengagement Plan makes clear that "Israel will guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza air space, and will continue to exercise security activity in the sea off the coast of the Gaza Strip.

Given the specific geopolitical configuration of the Gaza Strip, the powers that Israel exercises from the borders enable it to determine the conditions of life within the Gaza Strip.

(1) Israel controls the border crossings and decides what and who gets in or out of the Gaza Strip.
(2) It also controls the territorial sea adjacent to the Gaza Strip and has declared a virtual blockade and limits to the fishing zone, thereby regulating economic activity in that zone.
(3) It also keeps complete control of the airspace of the Gaza Strip, inter alia, through continuous surveillance by aircraft and unmanned aviation vehicles (UAVs) or drones.
(4) It makes military incursions and from time to time hits targets within the Gaza Strip.
(5) No-go areas are declared within the Gaza Strip near the border where Israeli settlements used to be and enforced by the Israeli armed forces.
(6) Furthermore, Israel regulates the local monetary market based on the Israeli currency (the new sheqel) and controls taxes and custom duties.

Israel appears to have a love-hate relationship with Gaza. It does not want to bear the heavy responsibility of an occupying power and at the same time it wants to make sure that Gaza is under its effective control. To achieve this double purpose, a strategy was cleverly crafted: the unilateral withdrawal and disengagement plan.

It is a fact that Gaza is not only under an effective naval blockade but also virtually under siege. It is therefore not surprising that even the Prime Minister of the UK, David Cameroon, very recently made a sharp remarks that Israeli blockade has turned Gaza into a prison camp. I quote "Gaza cannot and must not be allowed to remain a prison camp." Unquote. (27-July 2010)

The applicable law

It has been suggested that the UNCLOS, by reserving the use of the high seas for peaceful purposes, has effectively outlawed acts of naval warfare on the high seas. However, there was no consensus on this position during the negotiation of the Convention and it was certainly not accepted by the major naval powers at the time. Indeed, the military manuals of many States continue to include provisions on the law of naval warfare and blockade. Further, these UNCLOS provisions did not affect action that was lawful either under the law of self-defence under Article 51 of the Charter of the United Nations (the *jus ad bellum*) or acts justified by the law of armed conflict (LOAC) once an armed conflict has commenced (the *jus in bello*).

The majority of scholarly opinion would also support the view that the law of naval warfare continues to be potentially applicable on the high seas. One attempt at codifying this law was the independent expert study, the San Remo Manual on International Law Applicable to Armed Conflicts at Sea (SRM). While not authoritative, its codification effort has had a significant impact on the formulation of military manuals and it has been expressly relied upon by Israel.

In the *Palestinian Wall Advisory Opinion* (2004), the ICJ has concluded that the Fourth Geneva Convention is applicable in the occupied Palestinian territories. 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 (GA resolutions 64/92 and 64/94)(reaffirming the applicability of the Fourth Geneva Convention to the occupied

territories) and the Security Council (SC resolution 1860 (2009)(*Stressing* that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state).

There are two ways to assess the legality of the Israeli blockade in accordance with international laq. The first is by assessing the legality of the nature of the blockade. The second is by assessing the legality of the existence of the blockade.

1.1 Does international law allow Israel to establish blockade of Gaza?

The *Jerusalem Post* says the Israeli government is arguing that "Israel was in a state of armed conflict with Gaza and therefore entitled by international law to blockade Gaza." But that defense ignores a critical question: *what kind of armed conflict*?

If the conflict between Israel and Hamas is an international armed conflict (IAC), there is no question that Israel has the right to blockade Gaza, (Which is not to say that the *manner in which* Israel is blockading Gaza is legal. That's a different question.)

The 1909 Declaration Concerning the Laws of Naval War (the London Declaration), the first international instrument to acknowledge the legality of blockades, specifically recognized the right of belligerents to blockade their enemy during time of war. Article 97 of the San Remo Manual does likewise. And there is certainly no shortage of state practice supporting the legitimacy of blockades during IAC.

But what justifies a blockade in *non-international* armed conflict (NIAC)? The London Declaration does not justify such a blockade, because it only applies to "war"– war being understood at the time as armed conflict between two states. Does the San Remo Manual justify it? The Manual is not so clear about when its rules apply, but it does not seem to contemplate non-international sea conflicts. Article 1 speaks of "the parties to an armed conflict at sea," (Naval warfare) which does not seem to include NIAC, unless perhaps a rebel group has a navy. (Do rebels any?) Article 2 parallels the *Martens Clause* in the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, which only applies to IAC. Article 3 acknowledges the right of self-defense under Article 51 of the UN Charter, but that right is an exception to the prohibition on the use of force in Article 2(4), which only operates between

states. And numerous articles in the Manual refer specifically to "belligerent States" and "Nutral states. It appears that san Remo Manual is applicable in the case of an IAC.

There also appears to be little state practice to support the idea that a blockade is legally permissible in NIAC. The Israeli government is defending the blockade by citing Yoram Dinstein's statement that "there are several instances of contemporary (post-UN Charter) the Law of the Seas practices of blockades, e.g. in the Vietnam and in the Gulf War." But those were all blockades in *IAC*.

The seeming absence of support for blockades in NIAC is obviously important, because it is difficult to argue that Israel is involved in an IAC with Hamas. First, it is obviously not in a traditional IAC, because Gaza is not a state. Second, not even Israel claims that the conflict has been internationalized by the involvement of another state. And third, although the Israeli Supreme court held – controversially - in the *Targeted Killings* case that armed conflict between an occupying power and a rebel group is international, Israel's official government position is that it not currently occupying Gaza.

Israel's defense of the blockade thus appears to create a serious dilemma for it. Insofar as Israel insists that it is not currently occupying Gaza, it cannot plausibly claim that it is involved in an IAC with Hamas. And if it is not currently involved in an IAC with Hamas, it is difficult to see how it can legally justify the blockade of Gaza. Its blockade of Gaza, therefore, seems to depend on its willingness to concede that it is still the occupying power of Gaza and is thus in an IAC with Hamas. But Israel does not want to do that, because it would then be bound by the very restrictive rules of belligerent occupation in the Fourth Geneva Convention.

It seems to me, in short, that it is difficult to argue Israel has the legal right to blockade Gaza because of its own official Government position, which is contradicting itself with the right to blockade.

1.2 Even if Israel has the right to pronounce blockade, does the existence of blockade in accord with international law?

Israel maintains that the blockade is legal in accordance with the "San Remo Manual on International Law Applicable to Armed Conflicts at Sea".

We have seen that Let us assume that the Manual is applicable to the Gaza situation. A number of points in the San Remo Manual make it clear that the Israeli blockade of Gaza is not sanctioned by international law.

International law tells us that states may create and enforce blockades during an armed conflict, but it also tells us that those blockades must meet humanitarian standards to be lawful.

Restrictions on blockades
Art. 93: A blockade shall be declared and notified to all belligerents and neutral States.
Art. 95: A blockade must be effective.
Art. 100: A blockade must be applied impartially to the vessels of all States.

Prohibited blockades (Art. 102)
A blockade is prohibited if:
(a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or
(b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade

Dov Wiesglass, the Israeli official and aid to Former Israeli Prime Minister Ehud Olmert stated the intention of the blockade was "to put the Palestinians on a diet, but not to make them die of hunger."
Numerous statements of the UN, Human Rights Council, and NGOs' have made it clear that the deleterious effects on the civilian population are severe.
The international community has questioned the blockade's strategic value to Israel. Many States have concluded it is instead counterproductive in nature.

The Gaza Strip now has one of the highest population densities in the world: Almost 1.5 million people live within its 146 square miles. Eighty percent of Gazans live below the poverty line.

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The underlying legal question is whether or not Israel's blockade of Gaza is lawfully established. To be lawful, a blockade must not be implemented where the damage to the civilian population is excessive in relation to the concrete and direct military advantage anticipated from the blockade, and this is where Israel's legal position is open to question.

According to the UN agencies, insufficient aid is reaching Gaza, possibly less than one quarter of daily needs. This raises serious questions about the underlying legality of the blockade.

The relevant rules of armed conflict prohibit intentionally starving the civilian population and require that humanitarian supplies essential to survival must be allowed to pass, albeit subject to certain controls by the blockading power.

To maintain a population at a level just above the bare minimum needed for survival might arguably be within the strictest letter of the law, but could never seriously be thought consistent with its spirit.

The blockade as Collective Punishment

Israel's blockade violated international law in another respect. Under **Article 33** of the Fourth Geneva Convention: "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 ... against protected persons and their property are prohibited."

This article prohibits the use of collective punishment of protected persons, the breach of which constitutes war crimes. "Protected persons" are civilian individuals who find themselves, in case of an armed conflict or occupation, in the hands of a power of which they are not nationals.

A blockade against a civilian population inherently raises concerns of collective punishment because of the effect that prohibiting food and other essentials may have, particularly over the long run, on the survival of that population. According to Amnesty International's Middle East and North Africa program director, Malcolm Smart, Israel's action "appears calculated to make an already dire humanitarian situation worse, one in which the most vulnerable - the sick, the elderly, women and children - will bear the brunt, not those responsible for the attacks against Israel."

To reiterate: Israel instituted the blockade against the Gaza Strip not in response to a violent attack, but rather in response to Hamas's ascension to exclusive authority in the Gaza Strip, and earlier in response to the Hamas victory in the 2006 Palestinian elections. Israel, in short, engaged in an act of war against an occupied people, and violated its legal obligations to them.

The more important question is whether the blockade itself is causing excessive damage to the civilian population of Gaza. If so, it is illegal and must end.

Calls for the immediate cessation of the blockade may well have a good case in law as well as in humanitarian policy.

The Hague Regulations 1907 (Laws and Customs of War on Land)

Art. 42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

Art. 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as

possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Geneva Convention IV (Civilian Convention)

Art. 55. To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.

Art. 56. To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining the medical and hospital establishments and services, public health and hygiene in the occupied territory