

## **Legal Brief: Obligations of States and Private Entities under the Law of the Sea in Relation to Arms and Energy Transfers to Israel**

This brief, based on the [expert opinion](#) commissioned by the BDS National Committee and prepared by a team of law of the sea experts coordinated by ASCOMARE, addresses the international legal obligations of states and private entities with respect to arms and energy transfers to Israel by maritime shipping. It focuses on the legal regime of the Law of the Sea, as codified by the [United Nations Convention on the Law of the Sea](#) (UNCLOS), and its complementary application with other rules of international law.

In its [Advisory Opinion of July 2024](#), the ICJ determined that Israel's occupation of the Occupied Palestinian Territory (OPT) is unlawful and identified a range of violations under international law, including violations of peremptory norms, which give rise to obligations *erga omnes*. States must comply with the legal duties set forth by the ICJ and cease transfer of arms or energy to Israel which sustains its unlawful occupation or facilitates violations of international law.

This obligation also arises from States' obligations to employ all means reasonably available to them to prevent genocide,<sup>1</sup> to ensure respect for International Humanitarian Law (IHL),<sup>2</sup> and not to aid or assist another state in the commission of an internationally wrongful act.<sup>3</sup>

### **1. Innocent Passage and the Obligations of Coastal States**

Under customary international law, as codified in Article 17 of UNCLOS, foreign-flagged vessels enjoy the right of innocent passage through territorial seas. However, under certain conditions, coastal States have the right—and in some cases the obligation—to interrupt or suspend such passage. Four legal bases exist under UNCLOS:

1. **Non-innocent passage** (UNCLOS Art. 19): Passage is deemed not innocent where it is prejudicial to the peace, good order or security of the Coastal state, and when it is found to contravene UNCLOS or other rules of international law (UNCLOS Art. 19(1)). This

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<sup>1</sup> Article 1 of the [Genocide Convention](#). The ICJ in [Bosnia v Serbia](#) confirmed states must use 'all means reasonably available' (para 32) and that the obligation arises when a state learns of, or should have learned of the existence of a **serious risk** of genocide (para 431). In [its interim order in the South Africa v Israel](#) case the ICJ determined that the current situation in Gaza entailed a real and imminent risk of irreparable harm to the plausible rights being claimed, namely the right to be protected from genocide.

<sup>2</sup> Under Common Article 1 of the [Geneva Conventions of 1949](#) as well as customary international law.

<sup>3</sup> [Draft articles on Responsibility of States for Internationally Wrongful Acts](#).

includes where a vessel aids or facilitates violations of human rights obligations or peremptory norms.<sup>4</sup>

2. **Violation of port entry conditions** (UNCLOS Art. 25(2)).
3. **Security justifications** (Art. 25(3)), though limited to pre-declared suspensions.
4. **Criminal enforcement jurisdiction over serious international crimes** (Art. 27).

Where a vessel violates peremptory norms or aids other States in committing such violations, States may have an obligation to suspend or redirect a vessel's passage. This would include the prohibition of apartheid and the prevention and punishment of genocide.

## 2. Due Diligence Obligations of Flag States

Flag States have obligations under customary international law and Articles 91 and 94 of UNCLOS to exercise effective control and jurisdiction over all vessels flying their flag, even in foreign waters. This includes:

- putting in place the necessary rules and procedures to ensure compliance by such vessels;
- monitoring and preventing vessels from involvement in serious international crimes;
- enforcing compliance with obligations under the Arms Trade Treaty, the Genocide Convention and the Apartheid Convention;
- exercising due diligence, defined as a duty of conduct—not result—requiring States to take reasonable steps to prevent harm.

## 3. Obligations under the Arms Trade Treaty

Article 6(3) of the [Arms Trade Treaty](#) (ATT) prohibits States from authorising “transfer” of arms if they have **knowledge at the time of transfer** that the arms will be used to commit genocide, crimes against humanity, or serious violations of international humanitarian law.<sup>5</sup> This includes trans-shipment and transit through all areas under State control, including internal waters and territorial seas (ATT Art. 9).

The provisions of the ATT should be understood as complementary to the legal framework under UNCLOS. Passage which is contrary to ATT Article 6(3) will be ‘non-innocent’ within the meaning of Article 19 of UNCLOS.

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<sup>4</sup> For full analysis of Article 19 of UNCLOS, see the [legal opinion](#) by ASCOMARE.

<sup>5</sup> Under Article 2(2) of the ATT, ‘transfer’ includes “export, import, transit, trans-shipment and brokering”.

#### 4. Private Entities

The [UN Guiding Principles on Business and Human Rights](#) affirms States' duty to take appropriate steps to prevent, investigate and punish human rights abuses by third parties, including shipping companies.

Private shipping and energy companies facilitating transfers of weapons or fuel to Israel may face risk of civil or criminal liability under domestic and international law, especially in jurisdictions recognizing universal jurisdiction or incorporating the ATT and human rights treaties. Directors and managers of private entities can also incur criminal responsibility for aiding and abetting of acts of genocide, war crimes and crimes against humanity.<sup>6</sup>

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<sup>6</sup> See ICRC, '[Private Business and Armed Conflict](#)' and Irene Pietropaoli, '[Obligations of Third States and Corporations to Prevent and Punish Genocide in Gaza](#)' (5 June 2024) for further discussion regarding genocide.