

Aid flotilla and legal remedies: Can the world court rescue the rule of law?

By David Beatty

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There are only two ways to settle conflicts: physical force or mental force. You can either fight it out or you can use the force of reason to break an impasse. Whether we're talking about individuals, groups or independent states, there is no other choice.

Sadly, we live in a world in which too many conflicts are being resolved by brute force. Too often political leaders look to the generals rather than their diplomats or jurists to settle their

disputes.

Ongoing wars and insurgencies wreak death and destruction across Africa, Asia and the Middle East. In Somalia, Sudan, Congo, Afghanistan, Kashmir, Kyrgyzstan, Palestine, and Iraq it is the firepower of the gun, rather than the cool reason of the law, that determines who can do what to whom.

In the midst of all this killing and carnage sometimes there occur instances of sudden, dramatic attacks, like the sinking of the South Korean naval ship, and Israel's attack on the aid flotilla that was headed to Gaza, that grab the headlines. Why this is so, why the world fixes on some acts of violence and not others, is worth a moment's reflection.

At first, our preoccupation with these one off, isolated events seems rather odd. As horrible as any violent death always is, in terms of loss of life the Israeli and Korean cases were not major battles.

If it's not the body count that is newsworthy, what is it about these cases that attract so much attention? Why do the deaths of nine people on an aid flotilla matter so much when hundreds of other victims of armed aggression die every day?

My guess is, for many people, the infamy of these two cases lies in the fact that their calculations of might over right were so crude. On the facts that have been reported, both these incidents were flagrant violations of international law. They defy reason and common sense.

If the report of the international team of experts is right, the South Koreans were the victims of an unprovoked act of aggression. So far as we know they did nothing to warrant being attacked in this way.

In international law the only time it's legal to use armed force is when it is necessary as an act of self-defense. In all other circumstances it's unlawful. The Israelis claim they were acting in self-defense but in terms of international law their case is weak.

Another core principle of international law is that when acting in self-defense it is only permissible to use an amount of force that is proportional to the attack one is responding to and that is necessary to repel it.

Just as you or I can slap, but not shoot, someone who is trying to force us to kiss them, so states can't engage in overkill when their sovereignty or security are threatened.

When the Israeli commandoes boarded the Mavi Marmara, they had the same legal duty to ensure their response was not way out of line with the resistance they encountered. On the facts that have been reported so far, it seems almost certain they didn't live up to their legal obligation.

Compared to the wounds suffered by the Israeli soldiers, fatally shooting nine passengers was egregious overkill. As a matter of proportionality, when no Israeli lost his life, or even suffered a life-threatening injury, killing anyone seems excessive.

So although in numbers it did not result in a large loss of life, it is because the violation of international law was so blatant that so many people found Israeli's use of armed force so disturbing.

Indeed the Israelis compounded their betrayal of the law by refusing to participate in an independent, impartial investigation of the incident. They insisted on investigating what happened on their own.

Setting up their own inquiry violates another fundamental precept of the rule of law that says a person who is involved in a legal conflict can't be the judge of his own case. Edward Coke, an English judge, laid down the rule 400 years ago and it is still true today.

Israel is a state that knows better. It has a strong tradition of solving conflicts with the force of reason and the law. Its Supreme Court has handed down landmark rulings on the unlawfulness of torture and the illegality of parts of the Palestinian Wall.

When a state that historically has shown great respect for the rule of law chooses to resolve its disputes with its neighbors by resorting to illegal violence, the world should pay attention.

Any violation of one of the most important principles of international law is a bad thing. When it is done by a state that professes allegiance to the rule of law it is worse. Unless Israel is held to account, the force of reason and the law will be marginalized even further.

If the international community wants to maintain the rule of law as a viable way to solve disputes it must act. The UN Charter provides that the General Assembly can ask the International Court of Justice in The Hague to pass judgment on the case. Indeed they should be asked to render judgment in the Korean case as well.

Judging the legality of armed conflict is one of the Court's jobs. In fact, it has already rendered half a dozen judgments on the use of armed force so it knows the issue and the law very well.

If, as I would expect, the Court ruled that Israel and North Korea both broke the law, it has the power to order them to pay compensation to the victims' families. If either refused, that would provide a legitimate basis for the international community to impose sanctions as it does against any rogue state that acts outside the law.

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