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04 November 2015

**Does the Citizen have the Right  
 to protest on the high seas**

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**Overview**

The MV Mavi Marmara was one of several vessels loaded with humanitarian aid that attempted to break the Israeli blockade of Gaza in 2010. A case has been started at the International Criminal Court, in which a fundamental issue (separate from the killing of ten people on board, by Israeli persons) is whether people should be allowed to protest on the high seas, as the passengers on the ships of the flotilla were doing, in part.

Last month I spoke about how to approach the issue of establishing whether war crimes were committed in the Israel-Gaza conflict, not with whether they had been or not.

This month I am going to speak about an incident involving the MV [Motor Vessel] Mavi Marmara, an event to be seen as within the overall conflict, where in 2010, a flotilla of ships with humanitarian aid sought to break the blockade of Gaza.

The vessel was boarded by members of the Israeli Defence Force (IDF) some 73 nautical miles from the Gaza shore and nine passengers on the Mavi Marmara were shot dead by the IDF; one other was in a coma from gunshot wounds until he died last year. Hundreds of passengers were handcuffed and - so they and reports about them say - gravely abused. All were taken to the port of Ashdod under arrest but later released without charge of any kind. I represent the States of Comoros (flag state of the Mavi Marmara), the ship’s owners, bereaved and passengers at the International Criminal Court and elsewhere.

Just as last month I offered no conclusion about whether war crimes had been committed by either side – on the grounds of having insufficient access to material and witnesses – I will not do so on this occasion for similar and additional reasons arising from my representation of involved parties.[[1]](#footnote-1)

This is the last lecture I will give at Gresham focused on the role of law in international armed or internal armed conflicts. And looking back it is an appropriate one with which to end.

In all lectures I may have revealed a concern, sometimes scepticism, about the application of law to war.

In three years, some of us have journeyed together from the beginnings of law about war in the 19th Century to the hopes – dashed – before WWI that arbitration could take the place of war[[2]](#footnote-2); through the one sided trials prosecuted by international victors against leaders of a losing side that merited the description ‘victor’s justice’; via the creation of the term genocide in WWII codified in part because of US desires not to be caught for lynchings of Afro-Americans or the massacre of Native Americans by the offence of Crime Against Humanity if that were drawn too widely; to the ad hoc tribunals for Yugoslavia and Rwanda, each of which was an international UN body investigating all sides of conflicts but that seemed, sometimes, to show partiality and vulnerability to political pressure in various ways; to the other ‘mixed’ tribunals - Cambodia, Sierra Leone for example – where national tribunals with external international involvement sought to try leaders of former regimes or neighbouring regimes but were susceptible to political interference; to the only world court – the ICJ – where states can pursue states for breaches of the Genocide Convention and where alleged crimes of genocide in Srebrenica and elsewhere in the former Yugoslavia were dealt with unsatisfactorily for newly independent states of Serbia, Bosnia and Croatia. In all these courts individuals were charged, often as members of paramilitary groups as well as of state forces.

Finally I considered informal tribunals that dealt on the basis of evidence with WWII crimes overlooked for political reasons (‘Comfort Women’ Tribunal) inter-state war (‘Russell Tribunal’ for Vietnam) or internal humanitarian atrocities (Iran massacres of 1980s – the ‘Iran Tribunal’) because the international community would never dare to institute proper judicial proceedings concerning such powerful state actors.

Many categories of the world citizen’s concerns about the tragedies of which they hear daily, and about the courts and tribunals that deal with them, have been explored but always, I hope, with a conclusion that there was a role for law and that there were reasons to press on with what could be seen as experimental judicial and quasi-judicial processes.

In sum, states, state forces, paramilitaries and individuals have been, and are being, examined for criminality – done well and sometimes less well – by these courts and tribunals. What is there left to consider?

We live in a world where ‘uninvolved’ citizens of the world are ever better informed of events by television, radio and social media. They form opinions and often enough recognise that their concerns and interests are not being reflected in what nations and international bodies do in their name. But experience shows – and this is one underlying reality of this lecture – that expressing opinions is of limited effect. Public demonstrations, ‘letters to the editor’ and even ‘op ed’s’ rarely achieve much. Yet the world citizen has a right to his/her opinion and, in a dangerous world, may have the right to express it and to seek to have it affect the way the world turns. But merely to say – even out loud – what your opinion is may achieve little or nothing.

For example, in the Israel Gaza conflict generally there have been opinions by several international or otherwise apparently objective bodies adverse to the legality of some / many aspects of all sides of the conflict – Richard Goldstone’s Report, Mary Davis’s Report, the informal Russell Tribunal’s opinion on the conflict, and so on. But these opinions count for little and often achieve nothing at all. Even the highly critical words of the UN Secretary General or the UN High Commissioner of Human Rights about aspects of Operation Protective Edge had no apparent effect.

Yet the formal international institutions – including the UN itself - constructed to deal with such issues are inactive and silent. What can and what should the bystander do? Nothing? Something? They sometimes want to and try, as the hundreds of passengers on the Mavi Marmara did. But what is their standing when they do?

One of the four reasonably contemporaneous reports into the Flotilla / Mavi Marmara incident - the UN HRC Report chaired by retired ICC Judge Hudson Phillips QC, that was not recognised by Israel[[3]](#footnote-3), dealt with this issue at its conclusion:

*Para 276. The Mission has given thought to the position of humanitarian organizations who wish to intervene in situations of long-standing humanitarian crisis where the international community is unwilling for whatever reason to take positive action. Too often they are accused as being meddlesome and at worst as terrorists or enemy agents.*

*Para 277. A distinction must be made between activities taken to alleviate crises and action to address the causes creating the crisis. The latter action is characterized as political action and therefore inappropriate for groups that wish to be classified as humanitarian. This point is made because of the evidence that, while some of the passengers were solely interested in delivering supplies to the people in Gaza, for others the main purpose was raising awareness of the blockade with a view to its removal, as the only way to solve the crisis. An examination should be made to clearly define humanitarianism, as distinct from humanitarian action, so that there can be an agreed form of intervention and jurisdiction when humanitarian crises occur.*

This insightful and constructive proposition may not quite get to the issue of those who were ‘demonstrating’ on the high seas on board the Mavi Mamara when it was boarded by the Israeli Defence Force (IDF) in the middle of the night five and a half years ago.

First, let it be noted that efforts by citizens to affect the course of world affairs by peaceful means other than the ballot box of their own nation will attract many categories of individuals: Those whose anguish[[4]](#footnote-4) for the suffering they seek to remedy is high; those whose desire to engage in politics other than through being elected or appointed to office is high; those who simply enjoy meddling in the affairs of others; fellow travellers in some way with the suffering group, who may be hiding political affiliation and be subversive or worse.

The Israel-imposed blockade on Gaza was announced in 2007 and placed restrictions on the *“passage of goods, the supply of oil and electricity and the movement of persons”* to and from Gaza, in response to a number of military-security concerns regarding Hamas, the newly elected leadership in the region[[5]](#footnote-5). The effect of the sanctions through the tightened import of goods to only primary food, fodder and hygiene items, prevented entry of items beyond basic humanitarian products such as clothing and construction materials. Coupled with the stifling of its exports industry, the restrictions caused Gaza’s economy to become dramatically depressed and led to the continued impoverishment of its population. Despite Israel’s pledge to loosen these sanctions, this effort has been regarded as mostly ineffective[[6]](#footnote-6). In 2015, more than half of the population still suffer from food insecurity[[7]](#footnote-7), 70% continue to rely on humanitarian aid and exports of marketable goods remains at 6% of what it was prior to the closure in 2007[[8]](#footnote-8).

The Israeli government remains firm in its justification of the blockade. The Turkel Commission, an independent commission initiated by the Israeli government to examine the Flotilla incident, reaffirmed Israel’s compliance with obligations under international law[[9]](#footnote-9) and supported the proportionality of the blockade’s military objective, even when considered in light of the suffering imposed on the civilian population[[10]](#footnote-10).

The legality of the blockade remains hotly debated, attracting the passions and attention of the wider human rights and legal community. To cite from a few of its opponents, the International Committee of the Red Cross described the blockade as a *“collective punishment imposed in clear violation of Israel's obligations under international humanitarian law”[[11]](#footnote-11)* (and contrary to binding Geneva Conventions) and a report prepared as a joint enterprise by a number of NGOs and interested parties including Christian Aid, Oxfam and Amnesty International concluded that the imposition of the blockade was illegal under international law and a *“disproportionate response”* to the threat posed by Hamas[[12]](#footnote-12).

Attempts by human rights organisations to breach this allegedly unlawful blockade soon began, by land and by sea, to deliver humanitarian aid to the Gazans whilst exposing their condition to the world. Amongst those, Free Gaza Movement (“FGM”)[[13]](#footnote-13) organised a series of Motor Vessel trips to Gaza and was successful on five separate occasions. On each of these occasions, between August and December 2008, boats carrying humanitarian supplies and a varied gathering of passenger / delegates were able to reach the Gazan coast, albeit being tracked by the Israeli military[[14]](#footnote-14).

In early 2009, a MV called Dignity carrying 3 tonnes of medical supplies to Gaza during *Operation Cast Lead*, was stopped in international waters approximately 90 nautical miles from the coast of Gaza and damaged by three Israeli military vessels[[15]](#footnote-15). A further attempt was made soon after which resulted in the boat changing course under the threat of fire from the Israeli navy[[16]](#footnote-16).

In early 2010, a collaborative effort from FGM and a number of other NGOs, referred to as the Freedom Flotilla, announced its intention to form another humanitarian convoy made up of eight vessels and to break the siege on Gaza.

An organisation extremely supportive of the IDF is the Intelligence and Terrorism Information Center[[17]](#footnote-17). Accordingly its analysis of the expected composition of the passengers on the Mavi Marmara is likely to be undisputed as over-favourable to the Flotilla. About 900 passengers were expected with cargo of 5,000 tons of aid including medicine, construction materials, and ready-made houses. Passengers were to include human rights activists, parliament members, and journalists.

The MV Mavi Marmara left Istanbul for Antalya on May 29 where 500 passengers were to board but where 40 IHH activists also boarded; they were to run the ship and were said by the ITIF Center to be radical and to have in their number those intent on becoming, or willing to become, martyrs (a suggestion that surface in no subsequent report by any agency or organisation).

Nearly everything that can be disputed by one interest or another has been disputed: whether the blockade was lawful; what were the real motives of the passengers or activists; were the activists active or reactive in violence shown to the IDF boarding party; was any firearm on board before the IDF boarded (there is no suggestion anywhere that one was used by passengers); whether the IDF fired onto the vessel before boarding or when descending the ropes from helicopters; the level of abuse of passengers; how long they were kept in handcuffs; how they were treated on way to Ashdod etc. The inquiries established by UN, UNHRC, Israel and Turkey have all been subject to allegations of bias of one kind or another. Nevertheless some common features may be regarded as very broadly non-controversial.

The Freedom Flotilla was found indeed to have carried an eclectic delegation in excess of 700 passengers[[18]](#footnote-18) from more than 40 different nationalities and hundreds of tonnes of humanitarian aid including medical supplies and construction equipment[[19]](#footnote-19).

At approximately 0400 on 31 May 2010, in international waters 73 nautical miles from the coast of Gaza, the Israeli military launched *Operation Winds of Heaven 7* by surrounding the six Freedom Flotilla vessels[[20]](#footnote-20) and attempting to board by force. Non-lethal weaponry including stun and smoke grenades, tear gas and paintballs were used on all of the vessels; the main passenger ship the MV Mavi Marmara was targeted with live ammunition fire and plastic bullets[[21]](#footnote-21).

Pausing in the narrative, to whom, if any, should those aboard be most likened? Fighters in the Spanish Civil War, whose actions are often compared and contrasted in modern argument with those of jihadists who travel to join radical Islamic groups and become terrorists, it is said? To those – including from England – who join the IDF under the Mahal scheme[[22]](#footnote-22)? Probably not – at their strongest the allegations against the passengers is that the 40 who were activists were violent in their response to what happened to them when the IDF boarded, using ‘cold’ weapons including medal rods cut from the bars of the ship and kitchen knives, not allegations that have been conceded or proved; none of the passengers was in a military or militarized force. To peaceful civil disobedience protesters in India led by Gandhi for some 40 years whose record was punctured by some violence most seriously by the massacre at Amritsar for which David Cameron said ‘we must never forget what happened here and we must ensure that the UK stands up for the right of peaceful protests’? Possibly some similarity although the scale of death very different and the protesters in this case were international ‘outsiders’ not those internally involved, for the most part at least. To demonstrators around the world who attempted to move public opinion over the Vietnam War and where inevitably, as time passed, the large groups of protesters did include some inclined to martyrdom (the people who burnt themselves alive) or who used some violence at demonstrations, and where – as in Kent State University – some reaction by the authorities did bring death to the innocent? Possibly.

Or is the destruction of the Berlin Wall by people on both sides closer? A boundary was being torn down and set aside but in Berlin many people on all sides, after a time, were unopposed by the authorities on both sides. Actions by the East Germans before the wall fell to imprison and prosecute those trying to remove or simply to overcome the Wall were rapidly set at naught once the barrier was removed although not before:

*‘… police and Stasi were involved in the operation against the demonstrators. Eye witnesses later described their behaviour: more than 1,000 people were beaten and arrested, then taken to various police stations and prisons, where during the night and the next day they were humiliated, mistreated, denied food or use of toilets, and in some cases forced to stand for hours without moving or to run a gauntlet of police armed with clubs ("Ich zeige an," 1989). In the following weeks, a major demand by the opposition would be prosecution of those responsible for this behaviour’.[[23]](#footnote-23)*

All of these may have something to say about how protesters *were* treated on land and how protesters *should* be treated. The Police at the US Embassy in Grosvenor Square (or the South African Embassy in Trafalgar Square at anti-apartheid demonstrations) attempted to maintain a peaceable nature for the demonstrations and used force only when necessary to maintain the peace. They got criticised and were sometimes no doubt improperly attacked - their horses famously were. But whenever authorities used lethal force against protesters (Amritsar; Kent State University e.g.) they exposed themselves not just to criticism but often to forces of opinion sufficiently strong as to become part of the reason for long term change of policy. Of course that did not always happen, but sometimes.

What legal instruments, if any, give us guidance as to what the passengers on the flotilla could expect from a law abiding state?

The UN Universal Declaration on Human Rights, of universal application but without itself legal force, says (inte alia) that no one shall be subjected to arbitrary arrest or detention and that everyone has the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association.

At first sight irrelevant: of no legal effect in itself and concerns Human Rights law whereas armed conflicts are covered by International Humanitarian Law. Is the Convention of any relevance? Two points:

First, in the ICJ case about the Wall built in Israel dividing communities, the Court found that the construction of such a wall constituted breaches by Israel of several of its obligations under applicable international humanitarian law and human rights instruments including the International Covenant of Civil and Political Rights. (paragraph 103 of the ruling) It continued:

*Paragraph 104. In order to determine whether these texts are applicable in the Occupied Palestinian Territory, the Court will first address the issue of the relationship between international humanitarian law and human rights law and then that of the applicability of human rights instruments outside national territory.*

*Paragraph 105. In its Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of' Nuclear Weapons, the Court had occasion to address the first of these issues in relation to the International Covenant on Civil and Political Rights. In those proceedings certain States had argued that "the Covenant was directed to the protection of human rights in peace-time, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict" (1.C.J. Reports 1996 (I), p. 239, para. 24).*

The Court rejected this argument, stating that:

*"the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. (Ibid, p. 240, para. 25.)*

*106. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.*

*107. It remains to be determined whether the two international Covenants and the Convention on the Rights of the Child are applicable only on the territories of the States parties thereto or whether they are also applicable outside those territories and, if so, in what circumstances.*

*108. The scope of application of the International Covenant on Civil and Political Rights is defined by Article 2*

*"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

*109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.*

Powers to derogate from certain provisions of the Covenant under Article 4 arise ‘in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed’. Israel has neither claimed nor ‘proclaimed’ derogation from any part of the Covenant in respect of the operation on the Mavi Marmara and it is, thus, arguable that Israel was exercising its jurisdiction on the high seas and that the Covenant applied with full force to all that was happening.

Second, The terms of the International Covenant on Civil and Political Rights that has been ratified by Israel include:

**Article 9**

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention…

**Article 10**

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

**Article 19**

Everyone shall have the right to hold opinions without interference.

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

**Article 20**

Any propaganda for war shall be prohibited by law.

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

**Article 21**

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order….

The European Convention on Human Rights, that may have no binding application to this event but that may now be regarded as part of Customary International Law, includes more or less identical provisions freedom of expression. Freedom of peaceful assembly.

Returning to broadly non-controversial facts, *Winds of Heaven 7* resulted in the death of 10 civilian passengers[[24]](#footnote-24), the serious wounding of more than 50 passengers and many other passengers who sustained injuries from the firing of plastic rounds, soft baton charges (bean bags)[[25]](#footnote-25). Scores more were subjected to mistreatment including overly tight handcuffing for extended periods, beating, denial of access to toilet facilities, denial of medication (such as for diabetes, asthma, and heart conditions), provision of only limited access to food and drink. Passengers were forced to remain kneeling on decks exposed to the sun (resulting in 13 passengers receiving first-degree burns), seawater spray and wind gusts from helicopters, various physical and verbal harassment such as pushing, shoving, kicking, and threats and intimidation (including through the use of dogs) and to being blindfolded or having hoods put over their heads[[26]](#footnote-26).

All vessels were rerouted to Ashdod where the fingerprints of passengers were taken and intimate body searches were conducted. The passengers experienced intimidating and coercive behaviour from Israeli officers and were denied access to legal representatives or consular representatives until their release some days later[[27]](#footnote-27).

There were several initiatives in response to legality of the Flotilla incident, most notably those commissioned by the Israeli government and the United Nations. An Israeli military probe of the incident led by retired Israeli General, Giora Eiland acknowledged *“mistakes in various decisions made, including at relatively senior ranks, that ended up in a result we [the Israeli military] didn’t anticipate,[[28]](#footnote-28)”* This motivated the formation of the fact-finding Turkel Commission which concluded upon the information available to it, including witness testimonies from the Israeli officials, that Israel’s use of force against the Flotilla incident was proportionate in all of the circumstances[[29]](#footnote-29).

The fact-finding mission initiated by the United Nations Human Rights Commission and led by former ICC judge Hudson Phillips QC and that included a UK Privy Counsellor who had previously been Chief Prosecutor of the Sierra Leone Tribunal (the “UNHRC Report”) found the blockade to be unlawful and that *“several violations and offences have been committed”* with *“clear evidence to support prosecutions of crimes”* under the Geneva Convention and concluded that the *“right to an effective remedy should be guaranteed to all victims.[[30]](#footnote-30)”*

A panel of inquiry established by the UN Secretary-General to investigate the Flotilla incident (the “Palmer report”), on the other hand, found the blockade to be lawful but also found that Israel’s decision to board the vessel *“with such substantial force”* was *“excessive and unreasonable.”,* noting *“[n]on-violent options should have been used in the first instance”* and the *“operation should have reassessed its options when the resistance to the initial boarding attempt became apparent.[[31]](#footnote-31)”*

In May 2013, lawyers for the government of the Union of the Comoros (“GoCo”), the flag state for the Mavi Marmara and a signatory state to the Rome Statute, filed a State Referral with the International Criminal Court, requesting the Prosecutor to initiate an investigation into the Flotilla incident. Whilst the referral focused on the interception of the Mavi Marmara, the Rachel Corrie and Eleftheri Mesogios were later incorporated into a Situation as within the temporal scope of the Court[[32]](#footnote-32). The Prosecutor announced the opening of a preliminary examination and later the same year, the Situation was assigned to Pre-Trial Chamber I (the “PTC”)[[33]](#footnote-33).

GoCo submitted Israel had committed a number of war crimes on board the vessels including wilful killing, wilfully causing great suffering and severe physical injury, torture and inhuman treatment and outrages upon personal dignity which was part of a wider policy or plan amounting to crimes against humanity (all contrary to the ICC’s Rome Statute)[[34]](#footnote-34). The referral submitted witness evidence, autopsy reports and video evidence as part of the complaint.

The timing of events now needs thought. Hundreds of sincere civilians with mixed motives were subject of events on the high seas that give rise to allegations of illegality / criminality of a very high order. They looked, through the reference of the Comoros to the ICC and by their own subsequent applications as victims, to more or less the only court able to deal with the issue of criminality comprehensively for a decision about their suffering and whether it was the result of crime. They had to turn to that court knowing that it was thought to be vulnerable to US / Israeli pressure or interest. But they had hopes. The very first decision that the court had to make – simply whether to investigate at all – could have been made in days or weeks in reality, if there had been will.

The only other route to criminal accountability – apart from in Israel that has shown no appetite for investigating and prosecuting the IDF for these alleged offences – might have been via the Law of the Sea Convention; but neither Israel nor the Comoros has ratified the Convention. Alternatively a national jurisdiction such as our own in the UK where torture is a universal crime could be a suitable forum if individuals responsible for any of the alleged crimes comes into the jurisdiction; and the UK police are investigating with that possibility on mind.

Despite all efforts to have that simple issue of whether to investigate issue decided swiftly, 18 months passed before it was made.

In the meantime Operation Protective Edge happened where 2,200 people were killed, mostly civilians including 500 children.

*Suppose* now that the court – probably seen by both sides until then as unlikely to dare to investigate the Israel–Palestinian–Gaza problem had heard the Prosecutor say she would investigate and do so independently and quickly. Might participants on all sides, along with the observing, concerned citizens, have felt some reason to lower the temperature of the conflict? Might they not have done what they were to do in that conflict? Might those 2,200 people be alive today? We will not know but we could have hoped. The Prosecutor has said her function includes deterrence. How regrettable that with such an obvious chance to deter within her power nothing was done.

In November 2014 the Prosecutor published her negative response to GoCo’s request[[35]](#footnote-35) for an investigation on the basis of the evidence made available[[36]](#footnote-36) did not give rise to potential claims capable of surmounting the ICC’s gravity threshold.

In her decision, the Prosecutor recognised that there was reasonable basis to believe war crimes had been committed by the Israeli military including wilful killing[[37]](#footnote-37), wilfully causing serious bodily injury and the mistreatment of passengers, all within the scope of the ICC’s temporal jurisdiction; however she decided their nature, scale, manner of commission and overall impact, were not serious enough to compel the Court to investigate[[38]](#footnote-38).

She further refused to make a finding on the legality of the blockade on Gaza, suggesting that this had no wider benefit beyond lending itself to the finding of a reasonable basis that crimes pursuant to one of the many alleged had been committed[[39]](#footnote-39). The Prosecutor stated she could not consider evidence beyond the Court’s jurisdiction, and with this in mind, found there was insufficient evidence of the incident contributing to a wider plan or policy.

GoCo responded with an application for review to the PTC I[[40]](#footnote-40), submitting that the Prosecutor had erred in her duty to assess its referral with the correct standard and in line with the spirit of the Rome Statute to prosecute perpetrators where there was otherwise impunity for their crimes. It challenged her refusal to consider evidence on the wider context of the attack as relevant information to the crimes that were within the ICC’s jurisdiction, dismissed the finding against the presence of a wider policy as *“surprisingly premature”* where she had reserved her position on other important issues such as the lawfulness of the blockade[[41]](#footnote-41). The Review Application highlighted evidence available to the Prosecutor that would reach the gravity requirement and demonstrate serious and aggravating factors in the commission of the crimes whilst criticising the Prosecutor’s attitude to unclear evidence which suggested was a greater not less reason to invite a formal investigation[[42]](#footnote-42).

On the 16 July 2015 the PTC I decided by a majority[[43]](#footnote-43) that the Prosecutor had deviated from her duty by her reasoning not to investigate which was flawed, preferring GoCo’s positions on unclear/conflicting evidence as a reason to initiate an investigation and not a basis to shy away from doing so[[44]](#footnote-44), also affirming the position concerning the use of extra-jurisdictional information in reviewing the crimes within the court’s jurisdiction[[45]](#footnote-45) and concluding that she had ultimately erred in assessment of the gravity considerations[[46]](#footnote-46). PTC I requested that there be a prompt reconsideration of the Prosecutor’s decision, a request which is presently challenged by the Prosecutor at the Appeal Chamber of the ICC but remains undecided[[47]](#footnote-47).

If the Prosecutor succeeds in her appeal, the hundreds of innocent civilians will be left with little or no prospect of remedy so far as bringing criminal proceedings are concerned and with no international recognition that their rights were disregarded.

The Prosecutor’s original decision was flawed in many respects, it was argued, and the Pre-Trial Chamber judgment that she should reconsider her decision was one she could have accepted and thereafter got on with the task? What was asked of her was, after all, simply to decide to investigate - all without prejudice as to which way her decision on charging in due course would be? But no.

By appealing the decision time passes as the victims and Comoros wait for the Appeal Chamber’s decision. If she wins then the process will continue – more applications, more referrals to the court, more work by lawyers hoping to persuade the only person with appropriate authority to examine what happened but no actual detailed analysis by that person of what did happen. The effect of such a history on any belief that Israel through America wields unwarranted influence on the court appears highly possible, even if unjustified.

Israel has been widely reported as having negotiated with the government of Turkey over compensating the Turkish passengers and the bereaved, with $20,000,000 being said to have been offered. It is hard to see how the Turkish Government could negotiate for those acting independently of government.

In May 2015 there was the first Free Gaza Movement attempt to bring boats to Gaza since the Flotilla incident and to break the Israeli blockade. In similar fashion to what happened in 2010, at 0206 hours three Israeli naval ships boarded the flotilla boats by force[[48]](#footnote-48) subjecting passengers and their belongings to harsh inspections and confiscating mobile technology. Passengers on board the Estelle, were tasered and beaten with clubs and the seized boats were taken to Ashdod where passengers were imprisoned and later sent back to their home countries without charge[[49]](#footnote-49). One thing this episode reveals is that the use of lethal weapons was not necessary to take a boat by force, however unpleasant and potentially unlawful the acts of the IDF, as yet unproven, may have been.

Two weeks ago another case was instituted in another court. The family relations of the young man killed on the Mavi Marmara who had US citizenship (and against whom no allegation of ‘activism’ has been made) have brought an action in California. Ehud Barak, former Prime Minister and Minister of Defence at the time of the events, has been served with papers and a court process will start. It will be interesting to see whether there is submission to the jurisdiction or whether there will be maximum resistance by him and by governments to the process going ahead. As efforts are appropriately expended on that case, we might consider whether it would have been preferable for the energy to have been expended on a proper exploration at the ICC by international independent judges of whether the attack on the people on board was lawful at all.

Those engaged in seemingly unending conflicts around the world might consider the stance of the bystanders – like most of us – who may be appalled by what we see, may want to help and may feel increasingly alarmed and threatened by a world coming daily more dangerous. Bystanders’ interest in the historic rights and wrongs of any conflict wears thin measured against the growing anguish they may feel for the victimhood/suffering of others moderated only by concerns they will have for themselves (as approaches to recent refugee crises shows). They may want, justifiably, to see authoritative answers to questions of the legality of actions in conflicts as a better way to a safer future if they can reduce or stop the killing of the innocent. And that sadly, is not what they necessarily get.

What rights do people have to demonstrate on the High Seas? Probably as many or more than people who protest on dry land. Probably at least as many as those protesting in a secure capital city on some political issue, perhaps more given the danger to the protesters of the sea as opposed to dry land. It might seem a strange, or even illogical, thing to do but hundreds of well-intentioned, unarmed people from around the world are said to have had, as one reason for being on the vessels involved and exposed to IDF intervention, the purpose of drawing attention to the plight of Gaza and the Gazan people. Given that the Mavi Marmara was 73 Nautical miles off the Gaza coast when attacked it might be appropriate to consider, as a very rough analogy, whether hundreds of demonstrators gathering on, say, Hampstead Heath for a protest they intended to make in central London could all be arrested, handcuffed and treated/abused in the way that happened on the high seas. Given that it must have been possible for the IDF to immobilize the vessels without boarding them perhaps demonstrators gathering on the Isle of Sheppey, from which there is one easily controllable bridge to mainland Kent, is a more appropriate analogy. Should they all be handcuffed and then detained in Sheppey’s prisons so conveniently to hand?

Those in this audience who have journeyed with me over the last 3 years through consideration of many conflicts have shown a continuing concern for the victims of atrocities and, by their very presence here in Gresham College’s Barnard’s Inn Hall, their willingness to consider with open minds how difficult it is to find ways to alleviate the suffering caused by states that go to war. For them – and for many - the specific Gaza question effectively asked by Hudson-Phillips may be of particular practical importance: should an independent agency, presumably the UN, arrange for aid voluntarily given in such large amounts to be transported to and distributed within Gaza in order to tap the manifest goodwill of the uninvolved but concerned citizens of the World? That would separate out one function – political protesting – from humanitarian relief. I am not aware of it being attempted.

The political function of the demonstrators would remain and there is no reason to believe that people independent, but anguished, over suffering they believe to be unjustified might not take again to the seas in numbers to mark their desire for change. Maybe not just off Gaza.

But for those who protest in such a way much stands in the way of their humanitarian aid getting through or of their having much political effect or of changing the thinking of those whose thinking may need to open up or change. What part can the law play?

The fact that everything here is challenged, with the four major inquiries already conducted not being respected, shows a need for an independent court to investigate with full cooperation of all parties and to bring some definitive conclusions. And the very fact of a proper legal investigation happening may – as I suggested when considering the way Operation Protective Edge came when there was no answer from the Prosecutor about whether she would investigate – itself have a beneficial effect. Legal process, and even the beginning of activity towards a proper legal process, may have effects on parties in conflict, as is and has been revealed in other conflicts. The overall legal process may not cure any conflict but may provide a blanket that dampens violence and allows other beneficial changes to come.

Legal process may be part of a bridge between parties that will ultimately have to be made politically but that can be started or furthered once it is known that the supporting pillar of an accurate legal determination is being created. With such a process in place, and if physical aid can get through to those in need, then the non-involved but concerned bystander may not need feel the need to put her or his legal rights to the test or to put innocent life at any risk on the high seas.

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1. Barristers are now allowed to express personal opinions on cases in which they appear whereas they used not to be. The change in the barrister’s Code of Conduct was introduced against the inclination of many barristers by the Bar Standards Board (BSB) under Baroness Deech at a time when I was Vice Chairman of the Board. We were effectively required to do so because EU law required it in order not to limit the rights of the lawyer to have and express an opinion (ECHR Article 9).

   However the disinclination to express personal opinions remains and for the following reasons:

   * Until a trial is over even the lawyers on one side or another will not have access to all information and evidence on which to form a conclusion;
   * It is for the court to decide final issues and there is little or no benefit for the advocates to add opinions that cannot, or certainly should not, affect the decision maker – especially important in a case with a jury that might learn of a lawyers personal opinions;
   * If the lawyer is in the habit of standing on the court steps and announcing his personal favourable opinion of a client – say for Mr A in one case, Mr B in another case and Mr C in a third - what is he to do if instructed in a case by Mr D about whose case he does not hold a favourable personal opinion? He may not – and under the English Bar’s cab rank rule may not be allowed to – refuse to do the case. His failure to express a favourable opinion would be noticed and could be the subject of press questioning, all adverse to his as yet un-tried client Mr D.

   [↑](#footnote-ref-1)
2. Consider the Permanent Court of Arbitration in The Hague and Baron D’Estournelles, as starting points on this topic. [↑](#footnote-ref-2)
3. ‘The Mission expresses its profound regret that, notwithstanding a most cordial meeting on 18 August 2010, the Permanent Representative of Israel advised in writing at the end of the meeting that the position of his Government was one of non-recognition of, and non-cooperation with, the Mission. In the hope that this position would change before the conclusion of its work, the Mission left the Permanent Representative a list of requests for information.’ [↑](#footnote-ref-3)
4. There may not be time enough in the lecture to go into the emotions of activists; if there is, then for this lecture I may need a term to describe neutrally the range of emotions / sentiments / opinions etc that one human – bystander or involved - feels for another human who has been gravely wronged.  The term needs, for the purposes of this lecture only, to cover emotion, considered opinion, intellectual scholarly or learned opinion and whatever other emotion or thought process that *can* be positive emerges from considerations of another’s suffering.  I will use ‘anguish’, but in this particular way specified. There is no monopoly on anguish in those who are nearer to rather than further from any particular suffering.  It is obvious, of course, that Jewish survivors of the holocaust who had forebears and friends killed are more likely to feel anguish at a far higher level than others will feel.  It is inevitable that, as a proportion of all Jews, a greater proportion are going to feel anguish than the proportion of those who experience anguish among the totality of non-Jews.  But that does not mean that the level of anguish felt by a Jewish person is always and inevitable greater in quality than that felt by a non-Jew.  There may be many others whose response of anguish to the holocaust will be quite as intense even though they have no direct connection to it.  This is a reflection of how human beings can be, and it is not to be discounted or discredited.  It may even be risky to assume otherwise. [↑](#footnote-ref-4)
5. “*The Public Commission to Examine the Maritime Incident of 31 May 2010*”, Turkel Commission at page 11 available at http://turkel-committee.gov.il/files/wordocs/8808report-eng.pdf [↑](#footnote-ref-5)
6. Easing the Blockade [↑](#footnote-ref-6)
7. The Coordinator of Government Activities in the Territories testified before the Turkel Commission of “no starvation in the Gaza Strip” c.f. Turkel Commission Report at page 80 [↑](#footnote-ref-7)
8. “The Gaza Cheat Sheet – Real data on the Gaza Closure” Gisha – 9 July 2015 Legal Center for Freedom of Movement [↑](#footnote-ref-8)
9. “*The Public Commission to Examine the Maritime Incident of 31 May 2010*”, Turkel Commission at page 103 [↑](#footnote-ref-9)
10. Ibid. at page 99 [↑](#footnote-ref-10)
11. International Committee of the Red Cross, “*Gaza closure: not another year!*” 14 July 2010 News Release 10/103 https://www.icrc.org/eng/resources/documents/update/palestine-update-140610.htm [↑](#footnote-ref-11)
12. “*Gaza: Humanitarian Implosion*”, 01 Mar 2008, Joint Agency [↑](#footnote-ref-12)
13. Founded in 2006 and with a stated purpose on its website (http://www.freegaza.org/) to“*break the Israel’s illegal siege on Gaza’s 1.8 million civilians, since it inflicts collective punishment on the Palestinians who live there and has destroyed its economy*.” [↑](#footnote-ref-13)
14. Details of each of its voyages are available on Free Gaza Movement’s website:

    http://www.freegaza.org/trips.html [↑](#footnote-ref-14)
15. There is a disparity between the account of the Free Gaza Movement which alleges that the boat was rammed three times without prior warning and that of the Israeli military forces which allege that the damage to the Dignity in Operation “Winds of Heaven II” occurred from the boat hitting the bow of the Navy vessel after ignoring orders to turn back**.** C.f. <http://www.freegaza.org/sixth-trip/>**;** [↑](#footnote-ref-15)
16. http://www.freegaza.org/seventh-trip/ [↑](#footnote-ref-16)
17. The organization has close ties with Israel's military leadership and maintains an office at the Israeli Defense Ministry. It has been described as the *"public face of Israeli intelligence"*and as *a "pipeline" for the release of information that Israeli military intelligence does not want to be directly associated with*.

    Several former members of the Israeli intelligence community ([Mossad](https://en.wikipedia.org/wiki/Mossad), Military Intelligence, the [Shin Bet](https://en.wikipedia.org/wiki/Shin_Bet) and [Nativ](https://en.wikipedia.org/wiki/Nativ)) have criticized the "symbiotic" relationship between the center and Israeli military intelligence and the centre's establishment, arguing that the connection of military intelligence with a propaganda body would be detrimental to "objective" and "ideologically unbiased" analysis. – see Wikipedia [↑](#footnote-ref-17)
18. The precise number of passengers is unclear, the UN Human Rights Commission reports 748 passengers at page 19, whereas other sources have indicated more than this number [↑](#footnote-ref-18)
19. “*Summary of equipment and aid aboard the Gaza flotilla*”, Israeli Ministry of Foreign Affairs, 7 June 2010 http://www.mfa.gov.il/MFA/Government/Communiques/2010/Equipment\_aid\_Gaza\_flotilla\_7-Jun-2010.htm [↑](#footnote-ref-19)
20. Two of the vessels set to sail, the Challenger II and Rachel Corrie, were not present due to engine failure and late departure respectively [↑](#footnote-ref-20)
21. 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, UN Human Rights Council, A/HRC/15/21, 27 September 2010, para. 128 (hereinafter “UNHRC Report”) at page 26 [↑](#footnote-ref-21)
22. According to the rules, British men under 24 or women under-21 who have one parent or grandparent who is or was Jewish are eligible. Overseas recruits get the same pay and conditions as Israelis and “serve always shoulder to shoulder with regular Israeli soldiers”. The IDF told Channel 4 News there are “around one hundred Brits currently serving” in its ranks. Unlike some other countries, Britain does not have an effective law prohibiting its citizens from fighting for foreign armies. There is an obscure piece of legislation still on the statute books – the [Foreign Enlistment Act 1870](http://www.legislation.gov.uk/ukpga/Vict/33-34/90) – which ostensibly makes it illegal for British citizens to join the armed forces of a country fighting a state at peace with Britain. But this proved to be ineffective when prosecutors attempted to stop British volunteers from fighting in the Spanish Civil War in the 1930s. [↑](#footnote-ref-22)
23. POLICING IN CENTRAL AND EASTERN EUROPE: Comparing Firsthand Knowledge with Experience from the West, © 1996 College of Police and Security Studies, Slovenia [↑](#footnote-ref-23)
24. Nine were killed on board the ship and on 23 May 2014, a tenth victim, who had been in a coma since the Flotilla incident passed away as a result of gunshot wounds sustained during the takeover of the Mavi Marmara. [↑](#footnote-ref-24)
25. UNHRC Report at page 28 [↑](#footnote-ref-25)
26. “*Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia: Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation*”, Pre-Trial Chamber I, 16 July 2015 (the “PTC Decision”) at page 14 [↑](#footnote-ref-26)
27. UNHRC Report at page 41-42 [↑](#footnote-ref-27)
28. “*Israeli Army Inquiry Says Mistakes Made in Gaza Raid”*, Jonathan Ferziger, 12 July 2010; *<http://www.bloomberg.com/news/articles/2010-07-12/israeli-inquiry-says-intelligence-other-mistakes-made-in-raid-on-flotilla> “* [↑](#footnote-ref-28)
29. Turkel Report at page 279 [↑](#footnote-ref-29)
30. UNHRC Report at page 53 [↑](#footnote-ref-30)
31. “*Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident*” September 2011, at page 117 [↑](#footnote-ref-31)
32. Flag states of the Eleftheri was Greece in Hellenic Republic and Rachel Corrie was Kingdom of Cambodia, both signatory states to the Rome Statute [↑](#footnote-ref-32)
33. PTC Decision at page 3 [↑](#footnote-ref-33)
34. The exhaustive list of all of the alleged crimes committed is available in the referral document at pages 15-16: [↑](#footnote-ref-34)
35. *“Situation on Registered Vessels of Comoros, Greece and Cambodia Article 53(1) Report”* available at <http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf>(“OTP Report”) [↑](#footnote-ref-35)
36. Relying upon “*open and other reliable sources*” (OTP Report) although the extent these “sources” has not been identified by the OTP [↑](#footnote-ref-36)
37. The Prosecutor did suggest that if upon a formal investigation it was found that the civilian passengers had resorted to violent resistance as was found by the Turkel Commission, the Israeli officers might be able to assert self-defence as justification for the killings. [↑](#footnote-ref-37)
38. Report at pages 56-60 [↑](#footnote-ref-38)
39. In the presence of an unlawful blockade, the was reasonable basis to believe that the war crime of intentionally directing an attack against civilian objects pursuant to Article 8(2)(b)(ii) of the Rome Statute was committed by IDF soldiers in relation to the non-consensual boarding and takeover of the *Mavi Marmara* and the *Eleftheri Mesogios*. [↑](#footnote-ref-39)
40. “Application for Review pursuant to Article 53(3)(a) of the Prosecutor’s Decision of 6 November 2014 not to initiate an investigation in the Situation” 29 January 2015 (the “Review Application’) [↑](#footnote-ref-40)
41. Ibid. at pages 23-26 [↑](#footnote-ref-41)
42. Ibid. at pages 33-59 [↑](#footnote-ref-42)
43. Jude Péter Kovács dissented on various issues and found the Prosecutor had not erred in her application of the law. The decision also provided analysis of the alleged crimes, arriving at the conclusion that the IDF had not acted disproportionately in response to the attempted break of a blockade that was assumed as legal. [↑](#footnote-ref-43)
44. PTC Decision Page 8 [↑](#footnote-ref-44)
45. *Ibid.* at page 9 [↑](#footnote-ref-45)
46. *Ibid.* at page 22 [↑](#footnote-ref-46)
47. *Ibid.* at page 25 [↑](#footnote-ref-47)
48. https://www.freedomflotilla.org/news/25-israel-once-again-commits-an-act-of-state-piracy-in-the-mediterranean [↑](#footnote-ref-48)
49. https://www.freedomflotilla.org/news [↑](#footnote-ref-49)