The ICC and the Saga of the Mavi Marmara

Victor Kattan*

I Introduction 53
II The Commissions of Inquiry 57
III The OTP’s Preliminary Examination 60
IV The Application for Review 67
V The Prosecutor’s Response to the Application for Review 71
VI Application for Leave to Reply to the Prosecution Response 78
VII Prosecution’s Response and Victims’ Participation 80
VIII Pre-Trial Chamber’s Review of the Prosecutor’s Decision not to Investigate 81
IX Conclusions 89

They were shooting as if in a battlefield.

I Introduction

In the early hours of a balmy spring morning on 31 May 2010, Israeli special forces from Shayetet 13 (the elite combat unit of the Israeli navy), stormed a flotilla of ships full of political activists sailing on the high seas towards the Gaza Strip. During the interdiction, the soldiers shot and killed nine Turkish nationals on board the M.V. Mavi Marmara, the largest ship in the flotilla. The dead included 18-year-old Furkan Doğan, a United States (US) citizen,

* Senior Research Fellow, Middle East Institute; Associate Fellow, Faculty of Law, National University of Singapore (NUS). The author was a postdoctoral fellow at NUS Law from 2013–2015 and a legal adviser to the Palestinian Negotiations Support Project in Ramallah on secondment from the United Nations Development Program from 2012–2013. He holds an LL.B (Hons.) from Brunel University (2001); an LL.M from Leiden University (2002); and a PhD from the University of London’s School of Oriental and African Studies (SOAS) (2012). He can be reached at meivmk@nus.edu.sg.
who received five gunshot wounds in the back of his head, nose, left leg, left ankle, and back from close range while lying unconscious on the deck of the ship. At the time of attack, the flotilla was 64 nautical miles (approx. 10 hours sailing time) from the blockaded zone around Gaza’s territorial waters (and 72 nautical miles from the nearest coast). A tenth Turkish victim died of his injuries in June 2014.1

The “Gaza Freedom Flotilla”, as it came to be called, was not ashamed of advertising its humanitarian motives in seeking to breach Israel’s maritime blockade and provide food, medical supplies, and toys to the Palestinian residents of the besieged, impoverished, and overcrowded strip of land occupied by Israel since 1967. The flotilla was organized following Israel’s 22-day conflict with Hamas – “Operation Cast Lead” – that began in December 2008 and left between 1,391 and 1,440 Palestinians, as well as thirteen Israelis, dead.2 The organizers of the flotilla were quite open about wanting to draw international attention to the plight of Gaza’s residents who were struggling to rebuild their shattered homes, schools, and hospitals. As political activists, the passengers on the flotilla were by definition noncombatants who were not taking a direct part in hostilities.

The use of lethal force by Israeli commandos against a civilian convoy protesting Israel’s blockade of Gaza, and that was sailing peacefully on the high seas, outraged many. In a Presidential Statement, the United Nations (UN) Security Council expressed deep regret for “the loss of life and injuries resulting from the use of force during the Israeli military operation in international waters against the convoy sailing to Gaza”.3 The Council also condemned the acts that resulted “in the loss of at least ten civilians and many wounded, and [expressed] its condolences to their families”.4 The Council then referred to a statement made by the UN Secretary General “on the need to have a full investigation into the matter” and called for “a prompt, impartial, credible and transparent investigation conforming to international standards”.5

---

1 51-year-old Turkish citizen Uğur Süleyman Söylemez died of injuries he sustained from the attack on May 33, 2014.
2 Differing casualty figures depend on how organizations classify combatants hence the discrepancy in figures. The Government of Israel classifies policemen as combatants unlike most states in the world. The figures quoted are those used by B’tselem, an Israeli NGO, and the Palestinian Ministry of Health. The thirteen Israelis killed included 10 soldiers who are, by definition, combatants.
3 See Statement by the President of the Security Council, UN Doc. S/PRST/2010/9 (June 1, 2010).
4 Id.
5 Id.