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THE MAVI MARMARA INCIDENT AND THE INTERNATIONAL CRIMINAL COURT

ABSTRACT. On 15 May 2013 the OTP announced that it was conducting a preliminary examination of the events surrounding Israel’s enforcement of its naval blockade against the Mavi Marmara on 31 May 2010 in order to determine whether a formal investigation into the incident should be opened. According to Article 53 of the Rome Statute, the OTP shall open a formal investigation where there is a reasonable basis to believe that (a) the ICC possesses temporal, territorial and subject-matter jurisdiction in relation to the situation, (b) it is admissible before the ICC and (c) that a formal investigation would not be contrary to the interests of justice. The application of this framework to the events that occurred on 31 May 2010 is difficult and complex, especially in regard as to whether the situation can be considered of sufficient gravity to warrant the ICC’s attention and whether any of the crimes enumerated in Article 5 of the Rome Statute have been committed. This notwithstanding, I argue that there is a reasonable basis to believe that these criteria are satisfied and therefore conclude by encouraging the OTP to open a formal investigation into the situation.

I INTRODUCTION

From June 1967 until May 1994, Israel occupied the Gaza Strip and the West Bank without any self-administering rights to be awarded to the Palestinian population.1 In 1994 Israel and the Palestinian Liberation Organization (PLO) concluded a peace agreement known as the Oslo Accords, which divided the Gaza Strip and the West Bank into areas A, B and C, largely granting autonomy over the major Palestinian population centres and thereby paving the way for the negotiation of a permanent status agreement that would establish a

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1 See generally B. Kimmerling and J. Migdal, Palestinians: The Making of a People (Cambridge, MA: Harvard University Press, 1994).
southern Palestinian state existing alongside the state of Israel. However, this two-state solution (as it is known) suffered a serious setback in 2006 when Hamas secured enough seats in the Palestinian Legislative Council (PLC) to become the elected government in Palestine. This resulted in a period of prolonged fighting between Hamas and Fatah, the previous government in Palestine. In June 2007 Hamas took control of Gaza and Fatah retained control of the West Bank. Given that Hamas has adopted an extremely belligerent stance towards Israel, on 19 September 2007 Israel declared Hamas a ‘terrorist organisation’ and Gaza ‘hostile territory’.

On 14 November 2001 Israel imposed a land blockade against the Gaza Strip in order to prevent war material from being delivered to Hamas fighters. Believing that the land blockade was being circumvented by sea, on 3 January 2009 Israel imposed a naval blockade against the Gazan coast. Concerned that a humanitarian crisis was occurring in Gaza, in May 2010 the Free Gaza Movement dispatched a flotilla of ships—known as the Peace Flotilla (comprising eight vessels)—with the express intention of violating the naval blockade and delivering humanitarian aid to Gaza. On 31 May 2010 the flotilla approached the naval blockade and was advised by Israel to either turn back or to dock at a nearby Israeli port so as to allow their cargo to be inspected. The vessels comprising the flotilla rejected this

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2 For a critical overview of the Oslo Accords see E. B. Miller, ‘Implementing the Oslo Accords’ (1998) 6 Cardozo Journal of International and Comparative Law 363.

3 Statement of Israel’s Foreign Minister Regarding Israel’s Policy towards Hamas and its Terrorism (1 October 2007), http://www.mfa.gov.il/MFA/About+the+Ministry/Foreign+Minister+Livni/Speeches+interviews/Statements+by+Israeli+FM+Livni+regarding+Israeli+policy+toward+the+Hamas+and+its+terrorism+11-Sep-20.htm.

4 The land crossings were implemented in response to the Second Intifada, which began in September 2000. See J. Pressman, ‘The Second Intifada: Background and Causes of the Israeli–Palestinian Conflict’ (2003) 23 Journal of Conflict Studies 114.

5 Number 1/2009 Blockade of the Gaza Strip 3 January 2009, publicised by the Israeli Government at: http://en.mot.gov.il/index.php?option=com_content&view=article&id=124:no12009&catid=17:noticeomariners&Itemid=12.

6 For an overview of the activities of the Free Gaza Movement see their webpage at http://www.freegaza.org/.

7 These facts have been determined and outlined by a fact-finding mission established by the UN Human Rights Council; see United Nations (UN) Human Rights Council, 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, A/HRC/15/21 (27 September 2010) [hereafter UN Report].
offer, explaining that their intention was to sail to Gaza to deliver humanitarian aid.\(^8\) Whilst still on the high seas and in anticipation of the flotilla violating the blockade, Israel sought to enforce its naval blockade. In general, this occurred without incident. However, one boat, the *Mavi Marmara*, refused to cooperate. Israeli forces first attempted to board the *Mavi* by using boats, although when these were easily repelled by the crew of the *Mavi* Israeli forces sought to board the vessel by helicopter.\(^9\) Crew members of the *Mavi* armed themselves with sticks, metal rods and knives and gathered on the top deck of the vessel in order to prevent Israeli forces boarding via rope.\(^10\) In response, from the helicopters Israeli forces fired smoke and stun grenades onto the vessel, as well as live ammunition.\(^11\) This enabled Israeli forces to secure access to the vessel. As the UN Report concedes, ‘it is difficult to delineate the exact course of events on the top deck between the time of the first soldier descending and the Israeli forces securing control of the top deck’.\(^12\) What the report does conclude however is that a ‘fight ensued’\(^13\) between crew members and Israeli forces, resulting in the ‘deaths of 9 passengers and the wounding of at least 50 other passengers’.\(^14\) Importantly, the report determines that at least four passengers who were killed did not pose ‘any threat to the Israeli forces’.\(^15\) It was also reported that 10 Israeli military personnel were injured during the takeover of the *Mavi*, one seriously.\(^16\) Israel eventually assumed control of the situation and confiscated all the vessels in the flotilla and detained the crew members. The UN Report also determines that Israeli forces employed considerable violence against detained crew members (and particularly those from the *Mavi Marmara*) for a period of 12 h whilst they

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\(^8\) *Ibid.*, para 109.
\(^9\) *Ibid.*, paras 112–113.
\(^10\) *Ibid.*, para 116.
\(^11\) *Ibid.*, paras 114–115.
\(^12\) *Ibid.*, para 115.
\(^13\) *Ibid*.
\(^14\) *Ibid.*, para 117.
\(^15\) *Ibid.*, para 120.
\(^16\) ‘Deaths as Israeli Force Storm Gaza Aid Ship’, *BBC News*, 31 May 2010, [http://www.bbc.co.uk/news/10195838](http://www.bbc.co.uk/news/10195838) (last visited 29 August 2014).
were on board Israeli boats being ferried to Israel, including depriving passengers of basic human needs such as food, toilet facilities and medical treatment and subjecting them to physical and verbal abuse.\(^\text{17}\)

The events that occurred on 31 May 2010 raise many questions relating to the interpretation and application of public international law. Did Israel’s interdiction of the flotilla constitute a violation of the law of the high sea? If so, could the interception be justified on the basis that Israel was engaged in an armed conflict with Hamas and so permissible under international humanitarian law? Even if the imposition of the blockade was permissible under the law of war, was the level of force used to enforce the blockade disproportionate and therefore unlawful? Was the confiscation of the vessels and their cargo and the detention and treatment of the crew members in conformity with Israel’s obligations under international human rights law?

No national or international court has yet had the opportunity to consider these questions. However, in the months and years following the interception four quasi judicial bodies have produced reports examining many of these legal issues;\(^\text{18}\) the Turkish Report was published on 1 September 2010 at the request of the Turkish government (herein referred to as the Turkish Report);\(^\text{19}\) a UN Fact-Finding Report was published on 22 September 2010 under the authority of the UN Human Rights Council (referred to as the UN Report);\(^\text{20}\) the Turkel Report was released on 23 January 2011 under the authority of the Israeli government (herein referred to as the Turkel Report);\(^\text{21}\) and the Palmer Report was published in

\(^{17}\)UN Report (n 7 above) para 178.

\(^{18}\)For a detailed discussion of the mandates and findings of these reports, and for a comparison of how they interpret and apply international humanitarian law, see R. Buchan, ‘The Mavi Marmara Incident and the Application of International Humanitarian Law by Quasi-Judicial Bodies’ in D. Jinks, J. Maqgoto and S. Solommon (eds), Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies (The Hague: TMC Asser Press, 2014).

\(^{19}\)Turkish National Commission of Inquiry, Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010 (Ankara, 11 February 2011), http://www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf (last visited 29 August 2014).

\(^{20}\)UN Report (n 7 above).

\(^{21}\)The Public Commission to Examine the Maritime Incident of 31 May 2010, The Turkel Commission Report (23 January 2011), http://www.jewishvirtuallibrary.org/jsource/Society_&_Culture/TurkelCommission.pdf (last visited 29 August 2014).
September 2011 at the behest of the UN Secretary-General (herein referred to as the Palmer Report).\(^{22}\) These legal questions have also been addressed in academic literature,\(^{23}\) to which I have contributed.\(^{24}\)

Notably, a question that has remained largely unexplored is whether Israeli forces committed any international crimes whilst enforcing the naval blockade. However, this issue has become particularly important recently given that the Comoros, which is a signatory of the Rome Statute, has referred the incident that occurred on 31 May 2010 to the International Criminal Court (ICC), asserting that international crimes were committed.\(^{25}\) The Comoros has therefore urged the Office of the Prosecutor (OTP) to open a formal investigation into the incident. When such a referral occurs the OTP is obliged to engage in a preliminary examination of the situation, the findings of which will determine whether a formal investigation is initiated. On 15 May 2013 the OTP released the following statement

Today my Office met with a delegation from the Istanbul-based Elmadag Law Firm, acting on behalf of the Government of the Union of the Comoros, a State Party to the International Criminal Court since 18 August 2006.

The delegation transmitted a referral “of the Union of the Comoros with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip, requesting the Prosecutor of the International Criminal Court pursuant to Articles 12, 13 and 14 of the Rome Statute to initiate an investigation into the crimes committed within the Court’s jurisdiction, arising from this raid”. In accordance with the requirements of the Rome Statute my office will be conducting a preliminary examination in order to establish whether the criteria for opening an investigation

\(^{22}\) Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident (July 2011), [http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf](http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf).

\(^{23}\) For an excellent discussion see D. Guilfoyle, ‘The Mavi Marmara Incident and Blockade in Armed Conflict’ (2011) 81 British Yearbook of International Law 1.

\(^{24}\) R. Buchan, ‘The International Law of Naval Blockade and Israel’s Interception of the Mavi Marmara’ (2011) 58 Netherlands International Law Review 209; R. Buchan, ‘The Palmer Report and the Legality of Israel’s Naval Blockade of Gaza’ (2012) 61 International and Comparative Law Quarterly 264.

\(^{25}\) Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation (14 May 2013), [http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf](http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf) [hereinafter Letter of Referral].
are met. After careful analysis of all available information, I shall make a determination that will be made public in due course.26

When conducting a preliminary examination Article 53(1) of the Rome Statute explains that the OTP shall open a formal investigation unless it believes that there is ‘no reasonable basis’ to proceed under the Rome Statute. In deciding whether to initiate an investigation, the OTP shall consider whether (a) there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed, (b) that any cases to emerge from the situation would be admissible under Article 17 and (c) an investigation would serve the interests of justice.

In light of this, the objective of this article is to engage in a prima facie assessment of whether there is a reasonable basis to conclude whether these criteria are met and thus whether the OTP should open a formal investigation into the incident that occurred on 31 May 2010. This article therefore proceeds as follows. Section two deals with issues relating to jurisdiction; namely, whether the ICC possesses temporal, territorial and subject-matter jurisdiction. Section three addresses issues concerning admissibility under Article 17 of the Rome Statute; notably, the principle of complementarity and the gravity threshold. Concluding that the ICC is likely to possess jurisdiction in relation to the situation and that it is admissible under Article 17, in section four I examine whether there are any grounds upon which it can be argued that a formal investigation would not serve the interests of justice.

II ESTABLISHING JURISDICTION

2.1 Temporal and Territorial Jurisdiction

In temporal terms the ICC does not possess jurisdiction in relation to international crimes that were committed before 1 July 2002. As Israel’s interception of the Peace Flotilla occurred on 31 May 2010, the ICC clearly possesses temporal jurisdiction.

Israel has not signed the Rome Statute and is therefore not a party to the ICC. Significantly, however, Article 12(2)(a) of the Rome

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26 ICC Press Release, ICC Prosecutor Receives Referral by the authorities of the Union of the Comoros in relation to the events of May 2010 on the vessel ‘Mavi Marmara’ (14 May 2013), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-14-05-2013.aspx.
Statute provides that the ICC possesses jurisdiction where an international crime is committed on the territory of a party to the Rome Statute. Article 12(2)(a) further states that territory in this context includes vessels that fly under the flag of a state that is party to the Rome Statute. This is crucial in relation to the incident that occurred on 31 May 2010 because the Comoros is a state party to the Rome Statute and the alleged crimes were committed on a vessel flying under the flag of the Comoros. Thus, the fact that Israel is not a party does not pose any jurisdictional hurdle and the preconditions to jurisdiction stipulated in Article 12 are satisfied.

Although the ICC possesses jurisdiction under Article 12 it is still necessary to determine whether the ICC’s jurisdiction can be triggered under Article 13. Article 13 provides three trigger mechanisms. First, a state party may refer a situation to the OTP. Secondly, the ICC can engage its jurisdiction where the Security Council refers a situation to the OTP by declaring a threat to international peace and security under Chapter VII UN Charter. Thirdly, an investigation can be initiated proprio motu by the OTP.

As I have noted above the Comoros, a state party, has made the referral to the OTP. At first it is important to note that under Article 14 a state party may only refer a situation (rather than the alleged commission of specific crimes by certain individuals) to the OTP. Article 14 defines a situation as where ‘one or more crimes within the jurisdiction of the Court appear to have been committed’. Potentially, then, even the commission of one crime can constitute a situation for the purpose of Article 14. In the context of the current discussion it seems likely that the Comoros has referred a situation to the OTP because it has referred the entire incident that occurred on 31 May 2010, rather than allegations that certain individuals committed specific crimes. Indeed, the referral is not just limited to the conduct of Israeli forces in relation to crew members of the Mavi Marmara, but extends more broadly to the possibility of international crimes being committed by Israeli forces on another vessel in the flotilla, the MV Sofia, which flies under the flag of Greece, a party to the Rome Statute. Moreover, the letter of referral suggests that Israel’s attack on the MV Rachel Corrie on 6 June 2010, which was

27 Letter of Referral (n 25 above) para 18.
28 See generally J. Paust, ‘The Reach of ICC Jurisdiction over Non-Signatory Nationals’ (2000) 33 Vanderbilt Journal of Transnational Law 1.
29 On the difference between a situation and a case see R. Rastan, ‘What is a “Case” for the Purpose of the Rome Statute’ (2008) 19 Criminal Law Forum 435.
registered to Cambodia (also a party to the Rome statute), should be included in the overall situation.\footnote{That the Comoros has referred a ‘situation’ to the ICC is also the opinion of K. J. Heller, ‘Could the ICC Investigate Israel’s Attack on the Mavi Marmara’, Opinio Juris, 14 May 2013, http://opiniojuris.org/2013/05/14/could-the-icc-investigate-the-mavi-marmara-incident/ (last visited 29 August 2014) and D. Akande, ‘Court between a Rock and a Hard Place: Comoros Refers Israel’s Raid on Gaza Flotilla to the ICC’, EJIL: Talk!, 15 May 2013, http://www.ejiltalk.org/court-between-a-rock-and-a-hard-place-comoros-refers-israels-raid-on-gaza-flotilla-to-the-icc/ (last visited 29 August 2014).}

In recent years the process of self-referring has become an important way in which the ICC’s jurisdiction has been triggered. Indeed, the first three situations to be referred to the ICC were all the product of self-referrals (the Congo, Uganda and the Central African Republic). In certain academic circles however the ICC’s acceptance of self-referrals as a trigger mechanism has been criticised.\footnote{W. Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (2009) 6 Journal of International Criminal Justice 731; W. Schabas, The International Criminal Court: A Commentary to the Rome Statute (Oxford, New York: Oxford University Press, 2010); M. Arsanjani and M. W. Reisman, ‘Law-in-Action of the International Criminal Court’ (2005) 99 American Journal of International Law 385.} On a normative level the concern is that this process can result in abuse of the ICC; in essence, allowing states to engage in ‘the selective externalization of difficult cases’.\footnote{Arsanjani and Reisman, ibid., 390.} Critics therefore argue that the relevant legal provision of the Rome Statute (namely Article 14) does not allow for self-referrals. In particular, they contend that the possibility of self-referral is not expressly provided by Article 14 and thus the ICC’s reading of Article 14 as permitting self-referrals represents an ‘interpretative deviation’.\footnote{Schabas, ‘Prosecutorial Discretion’ (n 31 above) 760.} Moreover, they argue that there is not ‘a trace in the travaux préparatoires or in the various commentaries by participants in the drafting process to suggest that a State referring a case against itself was ever contemplated’.\footnote{Schabas, The International Criminal Court (n 31 above) 7.}

Robinson has persuasively repudiated these arguments.\footnote{Daryl Robinson, ‘The Controversy over Territorial State Referrals and Reflections on ICL Discourse’ (2011) 9 Journal of International Criminal Justice 355.} Normatively, Robinson defends the ICC’s acceptance of self-referrals on the basis that the overriding objective of the ICC is to end impunity for individuals that commit international crimes. Robinson therefore
argues that it is better for international crimes to be punished even if this means the ICC ‘s jurisdiction is abused than for international crimes to go unpunished yet preserve the integrity of the ICC system.\textsuperscript{36} At the level of treaty interpretation, Robinson also defends the ICC’s acceptance of self-referrals. He argues that by giving the terms within Article 14 their ordinary meaning (as required by Article 31 of the Vienna Convention on the Law of Treaties 1969), it is clear that the process of self-referral is permitted by the Rome Statute. Articles 13 and 14 provide that ICC jurisdiction can be triggered where a ‘State Party’ refers a situation. Robinson argues that the requirements are quite straightforward: the referral must be made by (1) a state and (2) a state party to the ICC. These requirements are plainly satisfied in the event of self-referral by a state party.\textsuperscript{37} Given that the ordinary meaning is clear, Robinson correctly notes that there is no need to take recourse to the travaux préparatoires, as Article 32 of the Vienna Convention on the Law of Treaties explains that this is only permissible where the ordinary meaning of a treaty term is ambiguous or would lead to a result that is manifestly absurd.\textsuperscript{38} ‘Setting this aside’,\textsuperscript{39} Robinson argues that there is in fact no evidence in the travaux préparatoires to suggest that the process of self-referral was not envisaged at the drafting stage. On the contrary, Robison quotes directly from the travaux préparatoires to reveal that ‘the records show extensive discussion of the prospects of territorial state referral’.\textsuperscript{40}

Regardless of the academic debate concerning the desirability or permissibility of the ICC’s acceptance of self-referrals, it seems that the ICC has now unambiguously accepted this process as a trigger mechanism. As Akhavan explains, ‘[t]hrough this ruling [the Appeals Chamber acceptance of the Congo’s self referral in the Katanga case], the self referral revolution in international criminal justice has now become enshrined in the jurisprudence of the Court’.\textsuperscript{41}

\textsuperscript{36} Ibid., pp. 367–370.
\textsuperscript{37} Ibid., pp. 359–361.
\textsuperscript{38} Ibid., pp. 361–362.
\textsuperscript{39} Ibid., p. 362.
\textsuperscript{40} Ibid., p. 365. The records to which Robinson refers are United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, Official Records, Vol. III, A/CONF.183/13 (Vol Ill), 15 June–17 July 1998, 180–199.
\textsuperscript{41} P. Akhavan, ‘Self-Referrals Before the International Criminal Court: Are States the Villains or the Victims of Atrocities?’ (2010) 21 Criminal Law Forum 103, 110.
On the basis of the above discussion, I conclude that the ICC possesses jurisdiction under Article 13 of the Rome Statute. The next question to consider is whether there is a reasonable basis to believe that any of the crimes that fall within the jurisdiction of the ICC have been committed.

2.2 Subject-Matter Jurisdiction

Article 5 of the Rome Statute provides the ICC with jurisdiction over four different international crimes: genocide; crimes against humanity; war crimes; and the crime aggression.

The letter of referral identifies two different sets of circumstances that occurred on 31 May 2010 where international crimes were allegedly committed.\(^{42}\) First, the use of violence by Israeli forces to capture the *Mavi Marmara*. Specifically, the letter of referral alleges that this conduct amounts to war crimes and crimes against humanity. Secondly, the use of violence by Israeli forces against detained crew members of the Peace Flotilla (and particularly those crew members of the *Mavi*) when they were being ferried to Israel. Citing the UN Report, the letter of referral explains that this includes kicking and punching detained crew members, hitting them with the butts of rifles, forcing them to kneel for long periods of time, placing them in direct sunlight to the extent that they received first degree burns and subjecting them to physical abuse and derogatory sexual comments.\(^{43}\) The letter of referral claims that this treatment amounts to war crimes and crimes against humanity. In light of this, my attention will now turn to consider whether there is a reasonable basis to believe that either war crimes or crimes against humanity have been committed in either of these scenarios.\(^{44}\)

\(^{42}\) Letter of Referral (n 25 above) para 1.

\(^{43}\) Ibid., para 49.

\(^{44}\) At the preliminary examination stage the role of the OTP is to determine whether there is a reasonable basis to believe that within the situation referred to it the *actus reus* of any of the international crimes subject to the jurisdiction of the Court have been committed. At the preliminary examination stage an assessment of questions relating to the presence of *mens rea* and to the availability of individual defences is not appropriate. These issues pertain to individual criminal responsibility rather than the situation generally and fall within the competence of the trial Court. To this end, issues relating to *mens rea* and individual defences will not be addressed in this article.
2.2.1 War Crimes

Article 8 of the Rome Statute imposes international criminal responsibility upon those that commit serious violations of the international humanitarian law, which are known as war crimes. In particular, Article 8(2)(a) provides that during times of international armed conflict ‘grave breaches of the Geneva Conventions of 12 August 1949’ will be regarded as war crimes. Article 8 further provides that during times of a non-international armed conflict serious violations of common Article 3 of the Geneva Conventions\(^{45}\) and any other serious violations of the laws and customs applicable in non-international armed conflicts will constitute a war crime.\(^{46}\)

Although much of the conduct that Article 8 identifies as war crimes during international armed conflict is also identified as war crimes during non-international armed conflict,\(^{47}\) Article 8 nevertheless formally distinguishes between war crimes committed during international and non-international armed conflict. It is therefore necessary at the outset to determine whether the storming of the Mavi Marmara on 31 May 2010 occurred in the context of an international armed conflict or a non-international armed conflict. If Israel was not engaged in either at that time, liability for war crimes under Article 8 of the Rome Statute cannot be established.

In the Tadić decision the International Criminal Tribunal for the Former Yugoslavia (ICTY) defined an international armed conflict as ‘recourse to armed force between two or more States’\(^{48}\) and a non-international armed conflict as ‘protracted armed violence between a state and an organized group or between two or more groups’.\(^{49}\) According to this definition, an international armed conflict occurs where they is recourse to violence between states. If this is correct then the violence occurring between Israel and Hamas on 31 May 2010 cannot be regarded as an international armed conflict because at

\(^{45}\) Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, Article 8(c) [hereinafter Rome Statute].

\(^{46}\) Ibid., Article 8(e).

\(^{47}\) Article 8 therefore follows in the footsteps of the Tadić decision in the sense that it seeks to assimilate the rules applicable during international and non-international armed conflicts; Prosecutor v. Tadić, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-I–I-AR72 (2 October 1995), paras 97–127.

\(^{48}\) Ibid., para 70.

\(^{49}\) Ibid. See S. Vite, ‘Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations’ (2009) 91 International Review of the Red Cross 69.
that time it was widely accepted that Hamas was not the government of a state, but was instead an organised group. It would therefore appear that the Israel-Hamas dispute in May 2010 is properly classified as a non-international armed conflict, being a conflict between a state and an organised group. This being said, it is important to recall that in Tadić the ICTY explained that a non-international armed conflict only occurs between a state and an organised group where there is ‘protracted armed violence’.

In Tadić the ICTY explained that in order for there to be protracted armed violence (1) the parties to the dispute must exhibit a sufficient degree of organisation and (2) the violence must be sufficiently intensive. In the context of the Israel-Hamas conflict the question of organisation does not seem problematic. Israel is a state and Hamas is an elected authority that exercises effective control over Gaza’s 1.8 million population.

The more pertinent question is whether on 31 May 2010 Israel and Hamas were engaged in an armed conflict of sufficient intensity. In this context it is important to note that on 19 June 2008 Israel and Hamas formally declared a cease-fire and made an express public commitment to peace. However, on 27 December 2008 Israel launched Operation Cast Lead, a military offensive against Hamas fighters in Gaza that were considered responsible for violating the cease-fire agreement by indiscriminately firing rockets from Gaza into southern Israel. Notwithstanding Operation Cast Lead, since

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50 Although note that on 29 November 2013 the UN General Assembly upgraded the Palestinian Authority to the status of a ‘non-member observer state’; E. Mac-Askill and C. McGreal, ‘UN General Assembly makes resounding vote in favour of Palestinian Statehood’, The Guardian, 29 November 2012, http://www.theguardian.com/world/2012/nov/29/united-nations-vote-palestine-state (last visited 29 August 2014).

51 This interpretation of ‘protracted armed violence’ has been subsequently reaffirmed by numerous decisions of international tribunals. For a review of these decisions see International Law Association, The Hague Conference: Use of Force—Final Report on the Meaning of Armed Conflict in International Law (2010) 14 ff, available at http://www.ila-hq.org/en/committees/index.cfm/cid/1022 (last visited 29 August 2014).

52 P. Walker and agencies, ‘Gaza Militants and Israel begin Fragile Truce’, The Guardian, 19 June 2008, http://www.theguardian.com/world/2008/jun/19/israelandthepalestinians (last visited 29 August 2014).

53 T. El-Khodary and E. Bronner, ‘Israelis say Strikes Against Hamas will Continue’, The New York Times, 27 December 2008, http://www.nytimes.com/2008/12/28/world/middleeast/28mideast.html?pagewanted=all&_r=0 (last visited 29 August 2014).
January 2009 Hamas has continued to fire rockets into southern Israel. The Turkel Report explains that during 2009 and 2010 approximately 794 rockets and mortars were fired from Gaza into Israel. According to the Israeli Foreign Ministry website, between 1 January 2009 and 31 May 2010 four Israeli military officers have been killed and also a foreign civilian. Three police officers were also wounded. In response, Israel has made frequent military incursions into Gaza. As Milanovic notes, although the exchange of violence between Israel and Hamas is not continual it is nevertheless ‘not by itself controversial’ to conclude that the hostilities are of sufficient intensity to amount to protracted armed violence within the meaning of Tadić.

It therefore appears that on 31 May 2010 Israel and Hamas were engaged in a non-international armed conflict. Importantly, however, international humanitarian law does recognise several grounds for internationalising an otherwise non-international armed conflict. Indeed, the letter of referral by the Comoros explains that Israel is engaged in an international armed conflict with Hamas, internationalising this otherwise non-international armed conflict on the basis that Gaza is occupied territory. The letter notes that the International Court of Justice (ICJ) has held that where territory is occupied it is subject to the rules of international armed conflict, and in particular the Fourth Geneva Convention: ‘[t]he fact that Gaza is an occupied territory which falls within the ambit of the GC IV means that it is covered by the rules governing international armed conflicts’.

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54 Turkel Report (n 21 above) para 89.
55 See the news features at www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/.
56 For an overview of the nature of the armed conflict between Israel and Hamas both during and after Operation Cast Lead see UN Human Rights Council, Report of the UN Finding Mission on the Gaza Conflict, A/HRC/12/48 (23 September 2009) [hereinafter Goldstone Report].
57 The conclusion that an armed conflict is occurring is not by itself controversial, bearing in mind the intensity of the violence and its protracted character; M. Milanovic, ‘Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case’ (2009) 89 International Review of the Red Cross 373, 382.
58 See generally J. Stewart, ‘Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict’ (2003) 85 International Review of the Red Cross 313.
59 Letter of Referral (n 25 above) para 52.
In the *Wall Advisory Opinion* the ICJ did indeed determine that for the purpose of the Fourth Geneva Convention Israel’s armed conflict in Palestine could be regarded as international in character.\(^{60}\) This conclusion was based upon the determination that Israel was occupying territory that was acquired during its international armed conflict with Egypt and Jordan in the 1967 Six Days War.\(^{61}\) According to the ICJ, because of Israel’s occupation of Egyptian (the Gaza Strip) and Jordanian (the West Bank) territory the original international armed conflict between Israel and Egypt and Israel and Jordan continued to exist and thus the rules of international armed conflict applied to these territories.\(^{62}\) Given this reasoning, could it be argued that Israel continues to occupy Egyptian and Jordanian territory and that this continues the international armed conflict that Israel and Egypt and Israel and Jordan were originally engaged in, thereby characterising Israel’s current hostilities with Hamas in the Gaza Strip as an international armed conflict?

There is a fundamental problem with this approach. On 26 March 1979 Egypt and Israel signed a peace treaty. Similarly, on 26 October 1994 Jordan and Israel signed a peace treaty. Moreover, the UN has unambiguously determined that neither Egypt nor Jordan possesses any sovereign claim over Palestinian territory; instead, Palestine possesses the right to self-determination.\(^{63}\) Correctly in my view, Milanovic argues that these events have ‘thereby end[ed] beyond any doubt the international armed conflict’ during which these territories were occupied’.\(^{64}\) In light of this it is therefore difficult to agree with the ICJ’s opinion that the original international armed conflict between Israel and Egypt and Israel and Jordan can continue to define the nature of Israel’s involvement in Palestine. I therefore submit that Israel is in fact involved in a new and distinct armed conflict with Hamas.\(^{65}\)

Importantly, Cassese argues that customary international law has developed even further, submitting that ‘[a]n armed conflict which

\(^{60}\) *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (2004) ICJ Report 136.

\(^{61}\) See generally E. Hammel, *Six Days in June: How Israel won the 1967 Arab-Israel War* (Pacifica, California: Pacifica Military History, 2001).

\(^{62}\) *Wall Advisory Opinion* (n 60 above) para 86 ff.

\(^{63}\) UN Human Rights Council, A/HRC/RES/10/20, 26 March 2009.

\(^{64}\) Milanovic (n 57 above) 383.

\(^{65}\) G. Watson, ‘The “Wall” Decision in Legal and Political Context’ (2005) 99 *American Journal of International Law* 6.
takes place between an Occupying Power and rebel or insurgent groups—whether or not they are terrorist in character—in an occupied territory, amounts to an international armed conflict. The significance of this claim is that any occupied territory, irrespective of whether it was occupied during the course of an international armed conflict, will be subject to the law applicable during an international armed conflict. Crucially, this interpretation of customary international law was also adopted by the Israeli Supreme Court in the Targeted Killings case, which cited with approval this paragraph by Cassese. Determining that Gaza was, at the time of the targeted killings, occupied by Israel the Israeli Supreme Court held that Israel and Hamas were engaged in an international armed conflict. Importantly, in 2005 Israel invoked its unilateral disengagement plan, which resulted in Israel withdrawing all of its forces previously stationed in Gaza. Israel therefore maintains that because it no longer has a continuous physical presence in Gaza it is no longer an occupying power.

It is generally accepted that under Article 42 of the Hague Regulations territory becomes occupied when it is placed under the ‘effective control’ of a state. Significantly, case law indicates that a state will be regarded as being in effective control of territory that it is capable of exercising effective control over. Thus, a state can be in effective control of territory without maintaining a continuous physical presence. For example, in the Control Council Case in the American Zone the military tribunal in Nuremberg held that

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66 Antonio Cassese, International Law (Oxford, New York: Oxford University Press, 2nd edn, 2005) 420.
67 HCJ 769/02 Public Committee Against Torture v Government [2006] (2) IsrLR 459, para 18.
68 The Court’s position therefore appears to be that whenever an armed conflict occurs within an occupied territory that conflict must be classified as international'; Ibid., pp. 384-385.
69 Prime Minister’s Office, ‘The Disengagement Plan—General Outline’, Israel Military of Foreign Affairs’, 18 April 2004, http://www.mfa.gov.il/mfa/foreignpolicy/peace/mfdocuments/pages/disengagement%20plan%20-%20general%20outline.aspx.
70 Article 42 of the Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention (II) with Respect to the Laws and Customs of War on Land of 1899 and (IV) respecting the Laws and Customs of War on Land of 1907, Martens Nouveau Recueil (ser 3) 461.
71 E. Benvenisti, The International Law of Occupation (Princeton, NJ: Princeton University Press 1993) 4.
Germany occupied certain areas of Greece and Yugoslavia even though it did not maintain a troop presence in the territories because ‘the Germans could at any time they desired assume physical control of any part of [Greece and Yugoslavia]’. More recently, in Naletilić the ICTY held that the law of occupation would apply to areas where a state possesses ‘the capacity to send troops within a reasonable time to make the authority of the occupying power felt’. With this in mind, it is therefore significant that in 2009 the Goldstone Report explained that even though Israel has removed its forces from Gaza it still maintains a significant amount of control over the territory, such as controlling border crossings, regulating economic activity and reserving the right to make military incursions. Indeed, it is on the basis that Israel retains the capacity to exercise effective control over Gaza that many states and international organisations continue to recognise Gaza as occupied territory, despite Israel’s unilateral disengagement. For example, the UK Foreign and Commonwealth Office explains that [a]lthough there is no permanent physical Israeli presence in Gaza, given the significant control Israel has over Gaza’s borders, airspace and territorial waters, Israel retains obligations as an occupying power. Moreover, in 2009 the UN General Assembly twice confirmed that Israel remains an occupying power in Gaza.

In contrast, in 2008 the Israeli Supreme Court determined that Israel did not possess the capacity to exercise effective control over Gaza; ‘[n]or does Israel have effective capability, in its present status, to enforce order and manage civilian life in the Gaza Strip’. Shany agrees with this decision for two main reasons. First, Shany argues that Gaza possesses an organised government (Hamas) that openly exercises power and authority over the population. This means that...

72 United States v. List (Hostages case), 8 Law Reports of Trials of Major War Criminals (1949) 38, 55–56.
73 Prosecutor v Naletilić, (Judgment) IT-98-34-T (31 March 2003), para 217.
74 Goldstone Report (n 56 above) para 58.
75 UK Foreign and Commonwealth Office, ‘Israel and the Occupied Palestinian Territories’ in Annual Reports on Human Rights 2008 (London: UK Foreign and Commonwealth Office, 2009) 148.
76 UN Doc. A/Res/62/94 (2007); UN Doc. A/Res/64/94 (2010).
77 Al-Bassiouni v. Prime Minister, (Judgement) HCJ 9132/07 (30 January 2008), para 12.
78 Y. Shany, ‘The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. Prime Minister of Israel’, Hebrew University International Law Research Paper No. 13-09 (27 February 2009) 7.
Israel, although reserving the right to make military incursions into Gaza, is not in a position to substitute its own authority for that of Hamas. This is significant given that in Naletilić the ICTY explained that ‘the occupying power must be in a position to substitute its own authority for that of the occupied’. Secondly, Shany points out that in Gaza there exist organised military forces that can mount considerable resistance to Israel’s military incursions. Thus, applying the rubric of the ICTY, Shany argues that Israel would find it difficult to ‘make its authority felt’ in Gaza. Milanovic agrees, arguing that ‘[u]nlike Germany in Yugoslavia … Israel really can’t re-establish its control over Gaza with ease’. To this end, notwithstanding the fact that many states and international organisations continue to regard Israel as an occupying power in Gaza (and of course the Comoros is its letter of referral), Shany makes a persuasive and convincing argument that Gaza is not under occupation but ‘is under a situation analogous to that of a siege’.

However, even if we concede for the sake of argument that Gaza is occupied territory, there seems to be very little state practice (let alone opinio juris) to substantiate Cassese’s claim that customary international law regards any occupied territory to be subject to the law of international armed conflict. For example, in response to Cassese, Kretzmer argues that ‘a conflict between a state and a people under occupation is not regarded as an international armed conflict under customary international law’. Milanovic concurs, asserting that ‘[a]lthough this is certainly a well-argued, common-sense position, with which the present author agrees as a matter of desirability, it is hard to say that it is in any way established in state practice, as there is indeed very little state practice to go on’.

In its analysis of Israel’s interception of the Peace Flotilla the Turkel Report considers Israel and Hamas to be involved in an

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79 Naletilić (n 73 above) para 173.
80 Shany (n 78 above) 7.
81 M. Milanovic, ‘Is Gaza Still Occupied by Israel?’, EJIL: TALK!, 1 May 2009, http://www.ejiltalk.org/is-gaza-still-occupied-by-israel/ (last visited 29 August 2014).
82 Shany (n 78 above) 8. That Israel has placed Gaza under a siege is also the opinion of Milanovic, ibid.
83 D. Kretzmer, ‘Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence’ (2005) 16 European Journal of International Law 171, 209.
84 Milanovic (n 57 above) 385.
international armed conflict. The report reaches this conclusion on the basis of the *Targeted Killings* case. In this case Israel’s Supreme Court accepted the position that an armed conflict can be regarded as international in character where violence ‘crosses the border of a state’ i.e. Israel’s border. However, this interpretation has been heavily critised because there is insufficient state practice to support the claim that an armed conflict is international in character merely because it crosses the border of the state. For example, Milanovic criticises the Israeli Supreme Court’s interpretation of customary international humanitarian law is inconsistent with state practice because historically ‘the single defining feature of international armed conflicts has not been their cross-border, but their interstate, nature’.

The Palmer Report also concludes that the conflict between Israel and Hamas has ‘all the trappings of an international armed conflict’, justifying this determination on the grounds that Hamas is in control of territory and possesses state like features. What the Palmer Report is essentially saying here is that Hamas amounts to a belligerent power under international humanitarian law. The doctrine of belligerency is well established in international law and thus if Hamas can be regarded as a belligerent its armed conflict with Israel can be rightly regarded as international in character.

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85 Turkel Report (n 21 above) para 44.
86 Note that the report never expressly states that Israel and Hamas were involved in an international armed conflict on the basis of the *Targeted Killings* case. After determining that an international armed conflict was in existence in paragraph 44 of the report the Turkel Commission then discusses both the *Target Killings* case and the law of occupation as possible justifications for this conclusion. At paragraph 47 the Commission clearly dismisses the proposition that Gaza was occupied territory. Thus, the only remaining justification is on the basis of the *Targeted Killings* judgment.
87 Targeted Killings (n 67 above) para 18.
88 Milanovic (n 57 above) 384.
89 Palmer Report (n 22 above) para 73.
90 As Milanovic contends, ‘the Palmer Report now seems to have taken the belligerency route’; Marko Milanovic, ‘ Palmer Committee Report on the Mavi Marmara Incident’, *EJIL: Talk*, 2 September 2011, http://www.ejiltalk.org/palmer-committee-report-on-the-mavi-marmara-incident/ (last visited 29 August 2014).
91 Although it is interesting to note that the Turkel Report concludes that the doctrine of belligerency is ‘almost irrelevant’ under contemporary international humanitarian law; Turkel Report (n 21 above) para 39.
However, this approach is problematic because Hamas does not exhibit the necessary features to qualify as a belligerent. Lauterpacht identifies four characteristics that an organised armed group must possess in order to be classified as a belligerent power:

1. There must exist within the State an armed conflict of a general (as distinguished from purely local) character.
2. The insurgents must occupy and administer a substantial portion of national territory.
3. They must conduct hostilities in accordance with the rules of war and through organized armed forces acting under a reasonable authority.
4. There must exist circumstances which make it necessary, for outside states to define their attitude by means of recognition of belligerency.

According to this definition, Hamas cannot be regarded as a belligerent power. First, belligerency is conferred to organised armed groups that are participating in a particularly entrenched civil war against their government (note the requirement that ‘there must exist within a state’). Demonstrably, Hamas is not within Israel. Secondly, Hamas does not conduct its hostilities compatibly with the rules of war. For example, Hamas frequently engages in the indiscriminate firing of rockets into Israel, failing to distinguish between civilians and combatants and between civilian objects and military objects, which is manifestly inconsistent with the basic tenets of international humanitarian law.

All in all, I would therefore argue that the armed conflict between Israel and Hamas cannot be internationalised and were thus engaged in a non-international armed conflict on 31 May 2010, not an international armed conflict as the letter of referral maintains. In light of this, the letter of referral falls into error when suggesting that grave violations of the rules of international armed conflict were committed. Instead, we need to examine whether serious violations of the rules of non-international armed conflict were committed. Article 8(2)(c) and Article 8(2)(e) identifies serious violations of the law of non-international armed conflict, and thus which violations can be regarded as war crimes for the purpose of the Rome Statute.

Let us first consider whether there is a reasonable basis to believe that Israel’s use of violence to capture the Mavi Marmara, which resulted in the death of 9 crew members and the wounding of at least

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92 H. Lauterpacht, Recognition in International Law (Cambridge University Press, 1947) 176.
93 J. M. Henckaerts and L. Doswald-Beck, Customary International Humanitarian Law, vol I (New York: ICRC and Cambridge University, 2005) Rule 11.
50 others, amounted to a war crime. Article 8(2)(c)(i) appears particularly relevant, which prohibits ‘[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture’. However, this provision only applies to conduct ‘committed against persons taking no active part in the hostilities’. Article 8(2)(e)(i) is also relevant, which provides that ‘[i]ntentionally directing attacks against the civilian population of against individual civilians not taking direct part in hostilities’ amounts to a war crime.

There seems little difficulty in concluding that the use of force by Israeli forces against the crew members of the *Mavi* constitutes ‘violence’ within the meaning of Article 8(2)(c)(i) and an ‘attack’ within Article 8(2)(e)(i). The trickier question, and a question that is relevant to the application of both Article 8(2)(c)(i) and Article 8(2)(e)(i), is whether those crew members that were targeted were directly participating in hostilities.

According to the International Committee of the Red Cross’s (ICRC) influential interpretive guidance, a civilian will be regarded as directly participating in hostilities where three criterion are satisfied: (1) ‘the act must be likely to adversely affect the military operations or military capacity of a party to the armed conflict or, alternatively, to inflict death, injury, or destruction on person or objects protected against direct attack’; (2) the civilian can be regarded as having directly caused the harm to the enemy; and 3) that this harmful act was ‘in support of a party to the conflict’. 94

The Turkel Report concludes that there are two points at which the crew members can be regarded as having directly participated in hostilities. First, by being physically present on a vessel which expressed an intention to violate a lawfully established naval blockade. 95 Such an act would satisfy the first two criteria outlined above. By expressly refusing to respect the naval blockade the crew of the *Mavi* directly caused the Israeli military to divert its resources away from its armed conflict with Hamas. Military harm was therefore caused to Israel. However, was this act in support of a party to the armed conflict, namely Hamas? In this context the ICRC guidance explains that ‘the decisive question should be whether the conduct of a civilian, in conjunction with the circumstances prevailing at the relevant time and place, can reasonably be perceived as an act designed to support one party to the conflict by directly causing the

94 N. Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva, ICRC, 2009) 46.

95 Turkel Report (n 21 above) para 198.
required threshold of harm to another party’.\(^{96}\) It seems difficult to sustain the claim that the crew of the *Mavi* violated the blockade with the intention of supporting Hamas in its armed conflict with Israel. As Cohen and Shany explain

While the flotilla and the IH\textsubscript{H} [those that resisted capture of the *Mavi*] clearly intended to provide *political* support to the Hamas by running the blockade, it is hard to see this essentially demonstrative act as an integral part of the ongoing hostilities between Israel and the Hamas (especially, since there was no indication that the flotilla ships carried military equipment).\(^{97}\)

The Turkel Report also argues that those crew members targeted by the Israeli military were directly participating in hostilities when they used ‘severe violence’\(^{98}\) against Israeli forces as they sought to capture the *Mavi*. Although there can be no doubt that the crew of the *Mavi* did use violence against the Israeli military (thereby satisfying the first two limbs of the IC\textsubscript{RC}’s definition of directly participating in hostilities), whether this violence was perpetrated in support of a party to the conflict (Hamas) is questionable. Two points need to be highlighted. First, in light of the UN Report’s determination that whilst in their helicopters Israeli forces fired smoke bombs, stun grenades and live ammunition onto the *Mavi*,\(^ {99}\) it seems likely the use of violence by the crew was in self-defence.\(^ {100}\) Where force is used in self-defence it cannot be regarded as being in support of a party to the armed conflict. However, even if we concede that the crew were first to use violence against Israeli forces it still seems difficult to accept that their use of force was designed to support Hamas in its armed conflict with Israel. On the contrary, the intention of the *Mavi* was to protect the cargo and deliver it to Gaza. For these reasons, I conclude that the crew members should be regarded as civilians engaging in civil unrest rather than as civilians directly participating in hostilities. In light of this, I argue that there is a reasonable basis to believe that during the

\(^{96}\) Melzer (n 94 above) 63–64.

\(^{97}\) A. Cohen and Y. Shany, ‘The Turkel Commission’s Flotilla Report (Part One): Some Critical Remarks’, *EJIL: Talk!* 28 January 2011, http://www.ejiltalk.org/the-turkel-commissions-flotilla-report-part-one-some-critical-remarks/ (last visited 29 August 2014).

\(^{98}\) Turkel Report (n 21 above) para 132.

\(^{99}\) UN Report (n 7 above) paras 114–115.

\(^{100}\) The Palmer Report concludes that ‘[p]assengers on board the Mavi Marmara panicked and acted in self-defence to prevent the IDF personnel from boarding the vessel’; Palmer Report (n 22 above) para 32.
capture of the *Mavi Marmara* war crimes were committed against civilians within the meaning of Article 8(2)(c)(i) and Article 8(2)(e)(i).

The next question concerns whether the conduct of Israeli forces in relation to crew members as they were being ferried to Israel constituted a serious violation of the laws and customs of war. In its investigation into this incident the UN Report determined that some of the wounded were subjected to further violence, including being hit with the butt of a weapon, being kicked in the head, chest and back and being verbally abused. A number of the wounded passengers were handcuffed and then left unattended for some time before being dragged to the front of the deck by their arms or legs...

During the period of detention on board the *Mavi Marmara* the passengers were subjected to treatment that was cruel and inhuman in nature and which did not respect the inherent dignity of persons who have been deprived of their liberty. This included a large number of persons being forced to kneel on the outer decks in harsh conditions for many hours, the physical mistreatment and verbal abuse inflicted on many of those detained, the widespread unnecessarily tight handcuffing and the denial of access to basic human needs such as the use of toilet facilities and provision of food. In addition there was a prevailing climate of fear of violence that had a dehumanizing effect on all those detained on board. ¹⁰¹

As a result, the report concluded that ‘[t]he treatment of passengers… by the Israeli forces amounted to cruel, inhuman and degrading treatment and, insofar as the treatment was additionally applied as a form of punishment, torture.’ ¹⁰² Given such determinations, I submit that there is a reasonable basis to believe that the conduct of Israeli forces constituted ‘violence to life and person, in particular … cruel treatment and torture’ (Article 8(2)(c)(i)) and the commission of ‘outrages upon personal dignity, in particular humiliating and degrading treatment’ (Article 8(2)(e)(ii)). Recall that both of these provisions only apply to civilians that were not at the relevant time directly participating in hostilities. As the civilians were detained at the relevant time they were clearly under the authority and control of Israel and thus demonstrably not directly participating in hostilities. I therefore argue that there is a reasonable basis to believe that the treatment of detained passengers amounted to war crimes within the meaning of Article 8 of the Rome Statute.

¹⁰¹ UN Report (n 7 above) para 178.
¹⁰² *Ibid.*, para 181.
2.2.2 Crimes against Humanity

Article 7 of the Rome Statute identifies conduct that amounts to a crime against humanity. Article 7 provides that in order for this conduct to constitute a crime against humanity it must be committed as part of a widespread or systematic attack directed against a civilian population and that this attack is committed pursuant to an organizational policy.

Let us first consider whether there is a reasonable basis to believe that the use of violence by Israeli forces when capturing the *Mavi Marmara* constitutes a crime against humanity. From the acts listed in Article 7(1), and in light of the report compiled by the UN Human Rights Council, it would appear that the following conduct has been committed; ‘murder’ (Article 7(1)(a)) and conduct causing ‘serious injury to body or to mental or physical health’ (Article 7(1)(k)). In relation to the treatment of the detained crew members whilst they were being ferried to Israel, and appreciating that the UN Report described this treatment as amounting to ‘torture’, it would appear that the following acts within the meaning of Article 7(1) have been committed; ‘torture’ (Article 7(1)(f)) and conduct causing ‘serious injury to body or to mental or physical health’ (Article 7(1)(k)).

It is important to underscore that the commission of such acts do not in themselves constitute crimes against humanity. In order to amount to a crime against humanity for the purpose of Article 7 such acts must be committed as part of a widespread or systematic attack against a civilian population. An attack against a civilian population is defined in Article 7(2)(a) as ‘a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.’

The violence used to capture the *Mavi* would almost certainly constitute ‘the multiple commission’ of acts listed in paragraph 1. As I have already noted, 9 passengers on the *Mavi* were killed and at least 50 wounded. The abuse of detained crew members that was documented by the UN Report would also satisfy this criterion, given that the reported abuse was committed repeatedly and against numerous crew members.

More troublesome is whether the violence used to capture the *Mavi* and when detaining the crew members can be regarded as the product of a policy by Israel to commit an attack against a civilian

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103 *Ibid.*
population. In this context the civilian population refers to the 748 individuals that were passengers on the vessels comprising the flotilla. Whether or not they can be regarded as a civilian population is defined by reference to the rules of international humanitarian law; individuals will be civilians providing they are not combatants or civilians directly participating in hostilities. In my discussion of war crimes under Article 8 I have already concluded that the passengers of the flotilla are rightly regarded as civilians.

Can the use of violence to capture the Mavi and when detaining the crew members be considered a product of a ‘policy’? The ICC has held in the Katanga judgment that

the requirement of an organisational policy pursuant to article 7(2)(a) of the Statute ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources… The policy need not be explicitly defined by the organisational group. Indeed, an attack which is planned, directed or organised—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion.

As this paragraph reveals, ‘a low threshold for policy is applied’; ‘the threshold for policy adopted by the majority seems simply to be that the attack must be something more than spontaneous or isolated acts of violence’. Can the violence committed by Israeli forces when capturing the Mavi and whilst detaining the crew members be described ‘planned, directed or organised’? There is of course no evidence to date to suggest that this violence was planned from the outset. In this sense there was no formal written policy by Israel to use lethal violence. However, it is accepted that a policy to

\[104\] Ibid., Annex III.

\[105\] Prosecutor v Blaskic, (Judgment) IT-95-14-A (29 July 2004), paras 113–115. Cf G. Werle, Principles of International Criminal Law (The Hague, TMC Asser Press, 2nd edn, 2009) 294.

\[106\] Prosecutor v Katanga and Ngudjolo Chui, (Decision on the Confirmation of Charges) ICC-01/04-01/07 (30 September 2008) para 396. On the policy requirement see generally T. Hansen, ‘The Policy Requirement in Crimes Against Humanity: Lessons From and For the case of Kenya’ (2011) 43 George Washington International Law Review 1.

\[107\] Hansen, ibid., 12.

\[108\] Ibid.
commit the attack ‘can be deduced from the way in which the acts occur’. This is important in the current context. As the UN Report notes, live ammunition was used by Israeli forces before boarding the Mavi (whilst the Israeli forces were still on the helicopter). Moreover, live ammunition and additional violence was employed as Israeli forces moved in a strategic and concerted manner from the top deck down through the boat, with military personnel targeting crew members that were considered to be resisting the capture of the vessel. In light of these facts, it seems that the violence was organised and directed as opposed to random and isolated.

It also appears that the treatment of detained crew members by Israeli forces can be regarded as the product of policy. This is because Israeli forces committed a host of physical and verbal attacks against crew members, and in particular those of the Mavi that were regarded as having resisted capture and detention. Furthermore, this violence recurred over a period of at least 12 h (as the Israeli forces transferred the crew members to shore). Again, although there does not appear to have been a formal, written policy to treat the detainees in this manner, given that in the Bemba judgment the PTC II concluded that a policy can be deduced where the violence follows a ‘regular pattern’ it seems that the violence was organised and directed as opposed to random and isolated.

Article 7 further requires that the attack against the civilian population be widespread or systematic. The criterion of widespread is defined in quantitative terms, requiring the attack on the

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109 K. Ambos, Treatise on International Criminal Law: Volume 1: Foundations and General Part (Oxford: Oxford University Press, 2013) 283.

110 UN Report (n 7 above) paras 114–115.

111 Ibid., para 177.

112 Prosecutor v. Bemba, (Pre-Trial Chamber Decision on the Confirmation of Charges) ICC-01/05-01/08 (15 June 2009) para 81.

113 Note the disjunctive nature (‘or’) of this aspect of Article 7; theoretically the attack need only be widespread or systematic. However, in reality both are required given Article 7(2)(a), which requires multiple commission of crimes and also that the attack be a product of policy. As McCormack explains, ‘the wording in Article 7(2)(a) has the practical effect of rendering the qualifying terms ‘widespread’ and ‘systematic’ as joint requirements rather than in the alternative’: T. McCormack, Crimes Against Humanity’, in D. McGoldrick, P. Rowe and E. Donnelly (eds), The Permanent International Criminal Court: Legal and Policy Issues (Oxford: Hart Publishing, 2004) 187.
civilian population to be ‘large-scale in nature’. In *Bashir* an attack was deemed widespread where it ‘affected hundreds of thousands of individuals and took place across large swathes of the territory of the Darfur region’. In this sense, the attack ‘must be massive, frequent, carried out collectively with considerable seriousness and directed against a large number of civilians’. With respect to the violence used to capture the *Mavi*, as I have noted 9 crew members were killed and 50 wounded. On the basis that there were 589 passengers on board the *Mavi Marmara* and 748 passengers on all vessels that formed the flotilla, on a purely numerical basis it seems difficult to conclude that the attack was ‘massive’ or ‘large-scale’ in the sense understood by the Court in *Bashir*. Similarly, the abuse of passengers whilst detained by Israeli forces is unlikely to be characterised as widespread because this abuse was directed mainly at those passengers from the *Mavi Marmara* and in particular those that were resisting detention.

It is more likely that the conduct by Israeli forces—both in regard to the violence used to capture the *Mavi* and when detaining the crew members—can be characterised as systematic. Systematic refers to ‘the organised nature of the acts of violence and to the improbability of their random occurrence’ and can ‘often be expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis’. In this sense, the requirement that the attack be systematic corresponds closely with the requirement in Article 7(2)(a) that the acts were the product of a policy. In fact, the ICC has indicated that where an attack against a civilian population has been determined a product of policy, the systematic criterion will be automatically satisfied. On the basis that I have already determined that the violence used to capture the *Mavi* and

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114 *Prosecutor v. Bashir*, (Decision of the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 (4 March 2009) para 81.
115 Ibid., para 84.
116 *Bemba* (n 112 above) para 83.
117 UN Report (n 7 above) Annex III.
118 Ibid., para 179.
119 *Katanga and Ngudjolo Chui*, supra note 106, para 394.
120 Ibid., para 397.
121 *Situation in the Republic of Kenya*, (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19-Corr (31 March 2010), para 93.
against detained crew members was the product of a policy, this conduct can also be regarded as systematic for the purpose of Article 7.

In conclusion, I argue that that there is a reasonable basis to believe that the use of violence by Israeli forces to capture the *Mavi Marmara* and in their treatment of detained passengers amounts to crimes against humanity within the meaning of Article 7 of the Rome Statute.

### III ADMISSIBILITY

Article 53(1)(b) provides that the OTP can only open a formal investigation where ‘the case is or would be admissible under article 17’. Admissibility requires an assessment of complementarity and gravity.\(^{122}\)

#### 3.1 Complementarity

Unlike the ICTY and International Criminal Tribunal for Rwanda the ICC does not possess primacy over international crimes. Instead, the ICC is built upon the premise that its jurisdiction is complementary to national jurisdictions; the ICC will only intervene in the absence of genuine national proceedings. Thus, at the preliminary examination stage Article 53(1) provides that the OTP can only open a formal investigation into a situation where the state in question is considered unable or unwilling to genuinely carry out an investigation or prosecution.

Where a state is inactive however and has made no attempt to investigate or prosecute the alleged commission of international crimes the phraseology of Article 17 makes it clear that the complementarity test is inapplicable. Article 17(1) explains that a case is

\(^{122}\) Not that Article 53(1)(b) refers to the admissibility of a ‘case’. At the preliminary examination stage there is not yet a case against a specific individual, but instead a situation that comprises incidents, suspects and conduct. Consequently, and in the words of the OTP, ‘the consideration of admissibility (complementarity and gravity) will take into account potential cases that could be identified in the course of the preliminary examination based on the information available and that would likely arise from an investigation into the situation’; OTP, *Policy Paper on Preliminary Examinations* (November 2013), para 43, [http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%202013.pdf](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%202013.pdf).
presumed admissible unless the state has made some attempt to carry out proceedings (Article 17(1) reads that ‘the Court shall determine a case inadmissible where...’). In the words of the OTP, ‘[t]he absence of national proceedings, i.e. domestic inactivity, is sufficient to make the case admissible’. 123

This interpretation of Article 17 is important in the context of the current discussion because the Comoros has not taken any steps to investigate or prosecute the alleged international crimes that were committed on 31 May 2010.124 The Comoros can be therefore regarded as inactive for the purpose of Article 17(1) and thus the situation is automatically admissible.125

3.2 Gravity

Although it goes without saying that the commission of any international crime is grave and serious, the Preamble to the Rome Statute places a statutory limitation upon the ICC to focus its attention on ‘the most serious crimes of international concern’.126 This is clearly in response to concerns over resources; namely, that given the unfortunate frequency of international crimes and the failure of national authorities to investigate and prosecute them, the ICC could quickly become overburdened by ‘less serious cases’.127 If this were to happen, the effectiveness of the ICC would be severely diminished, with

123 Ibid., para 47.
124 This is not surprising given that those alleged to have committed international crimes on the Comoros’s territory—Israeli military personnel—are now physically present in Israel. In light of the Turkel Report which exonerates Israeli forces from any wrongdoing on 31 May 2010 it is thus extremely unlikely that Israel would extradite its force to the Comoros to face prosecution. Israel is also equally unlikely to initiate its own investigation into the alleged commission of international crimes on 31 May 2010.
125 Although note that the letter of referral fails to recognise that the complementarity test is inapplicable to inactive states. The letter of referral explains that the situation is admissible on the basis that the Comoros is unable to investigate the crime because those suspected of committing the crimes are Israeli and the Comoros is unable to extradite them. Although probably correct, the point is that where the state in question is inactive (like it is here) questions concerning inability or unwillingness are circumvented.
126 Article 5 of the Rome Statute also explains that the ‘jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole’.
127 S. SáCouto and K. Cleary, ‘The Gravity Threshold of the International Criminal Court’ (2007) 23 American University Law Review 807, 818.
perhaps the entire system coming to a standstill. To this end, Article 17(1)(d) requires the Court to determine that a case is of sufficient gravity to justify further action by the Court. Article 53 also requires that at the preliminary investigation stage the OTP apply the same gravity test when deciding whether to open a formal investigation into a situation.

Although the gravity criterion imposes a considerable limitation upon the jurisdiction of the ICC, the Rome Statute does not provide any guidance as to when a situation is of sufficient gravity. However, both the OTP and the Court have provided guidance.

In 2005 the then Prosecutor of the ICC Luis Moreno-Ocampo, in a meeting with Foreign Ministers of state parties to the ICC, explained that the gravity criterion represents a recognition of the temporal and financial restrictions under which the ICC operates and that it is therefore necessary to adopt a ‘resource driven approach’ when deciding which situations and cases are brought before the ICC. However, Moreno-Ocampo recognised that such an approach was far from ideal: ‘A resource driven approach…would mean that situations involving hundreds of crimes, such as killings and rapes, may have to be set aside in the interest of focusing on a competing situation involving thousands of killings and rapes.’128 In essence, what Moreno-Ocampo was saying was that the gravity criterion equates to a ‘magic number’ approach129; a situation would exceed the gravity threshold where the number of victims is sufficiently high.

This quantitative approach appeared to form the basis for Moreno-Ocampo’s refusal to open a formal investigation into the allegations that British soldiers committed international crimes in Iraq. Moreno-Ocampo explained that because ‘the information available at this time supports a reasonable basis for an estimated number of 4–12 victims subjected to wilful killing and a limited number of victims of inhumane treatment, totalling less than 20 persons’,130 this was a situation of insufficient gravity to justify initiating a formal investigation.

128 Statement by Luis Moreno-Ocampo, Informal Meeting of Legal Advisors to Ministries of Foreign Affairs, New York (24 October 2005) 6, http://www.icc-cpi.int/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-CEA8B6799E37/143836/LMO_20051024_English.pdf.
129 M. O’Brien, ‘The Impact of the Iraq Communication of the Prosecutor of the International Criminal Court on War Crimes Admissibility and the Interests of Victims’ (2007) University College Dublin Law Review 109, 115.
130 OTP, Letter Concerning the Situation in Iraq (9 February 2006), http://www.icc-cpi.int/NR/rdonlyres/7FD042F2E-678E-4EC6-8121-690BE61D0B5A/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.
However, more recently both the OTP and the Court has moved away from this magic number approach, instead focusing upon both quantitative and qualitative criteria. For example, Regulation 29(2) of the Regulations of the Office identifies a non-exhaustive list of factors that can be used to guide the OTP’s application of the gravity threshold.\textsuperscript{131} This Regulation explains that factors to be considered include the scale, nature, manner of commission of the crimes, and their impact. In 2013 a policy paper was published by the OTP explaining how Regulation 29(2) should be interpreted.

(a) The scale of the crimes may be assessed in light of, \textit{inter alia}, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, and their geographical or temporal spread (intensity of the crimes over a brief period or low intensity over an extended period);

(b) The nature of the crimes refers to the specific elements of each offence such as killings, rapes and other crimes involving sexual or gender violence and crimes committed against children, or the imposition of conditions of life on a community calculated to bring about its destruction;

(c) The manner of commission of the crimes may be assessed in light of, \textit{inter alia}, the means employed to execute the crime, the degree of participation and intent in its commission, the extent to which the crimes were systematic or result from a plan or organized policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying communities;

(d) The impact of crimes may be assessed in light of, \textit{inter alia}, their consequence on the local or international community, including the long term social, economic and environmental damage; crimes committed with the aim or consequence of increasing the vulnerability of civilians; or other acts the primary purpose of which is to spread terror among the civilian population.\textsuperscript{132}

\textsuperscript{131} Regulations of the Office of the Prosecutor (2009), ICC-BD/056-01-09, Regulation 29(2).

\textsuperscript{132} Policy Paper on Preliminary Examinations (n 122 above) paras 62–65.
Applying these guidelines the OTP determined that the situation in Kenya was of sufficient gravity to warrant a formal investigation on the basis that the conflict had resulted in the forced displacement of tens of thousands of civilians, over a thousand killings, numerous abductions and the commission of large-scale sexual violence (the quantitative dimension to the situation). However, the OTP also focused upon its qualitative aspects; namely, that the violence used was of a sexual nature and that this had escalated the spread of HIV and other sexually transmitted diseases, and that the prolonged nature of the conflict had severe repercussions for the entire country, especially the Kenyan economy. Similarly, in the Abu Garda case the PTC I explained that ‘the gravity of a given case should not be assessed only from a quantitative perspective, i.e. by considering the number of victims; rather, the qualitative dimension of the crime should also be taken into consideration when assessing the gravity of a given case’.

The question that must now be addressed is whether the events that occurred on 31 May 2010 constitute a situation of sufficient gravity to warrant the attention of the ICC? In a blog written for Opinio Juris Keller explains that

I don’t want to minimize the tragedy of nine civilians deaths, and I am no fan of determining gravity by simply counting victims, but I think the OTP would have a difficult time justifying a decision to prioritize the flotilla attack over many of the other situations it is considering, such as Colombia, Georgia, or Afghanistan.

Keller thus concludes that it is ‘exceedingly unlikely’ that the OTP will open a formal investigation. Sure, when compared to other situations before the OTP (and that have come before the ICC), where the number of victims is in the tens if not hundreds of thousands, it must be conceded that quantitatively the number of victims is actually rather low. However, as I have noted, both the ICC and the OTP have recently explained that the quantity of victims (essentially a mathematical exercise of counting the number of

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133 Ibid., para 71.

134 Prosecutor v Bahar Idriss Abu Garda, (Decision on the Confirmation of Charges) ICC-02/05-02/09 (8 February 2010) para 31. Although this litigation was in the context of a case rather than a situation, the same reasoning in relation to the application of the gravity threshold is nevertheless applicable.

135 Heller (n 30 above).

136 Ibid.
victims), is not determinative of whether a situation can be regarded as sufficiently grave. Even if the number of victims is relatively low, if the international crimes allegedly committed against those victims are accompanied by some ‘aggravating factors’ then that situation is likely to exceed the gravity threshold. This is well illustrated by the *Abu Garda* case. In this case the PTC I determined that the allegations that Abu Garda had committed war crimes for his role in an attack that resulted in 12 UN peacekeepers being killed and 8 severely wounded exceeded the gravity threshold even though the number of victims was low. The Court held that the case was still of sufficient gravity because; the violence was committed against a group of people (the UN African Mission in Sudan (AMIS)) that was legally present on the territory and which was operating under a UN mandate to help bring peace and stability to the area; the attacks on AMIS resulted in this mission initially suspending and then reducing its activities in Sudan (namely, providing security and humanitarian assistance), ‘and that this left a large number of civilians without AMIS protection, on which they had allegedly relied before the attack’. In its letter of referral the Comoros identifies several aggravating factors in support of its determination that the situation can be considered of sufficient gravity:

1. **Act of war:** Israel’s interception of the *Mavi* whilst on the high seas was an unlawful use of force against the sovereignty of the Comoros, the flag state of the vessel, as thus tantamount to an act of war.

2. **International reaction:** the use of violence to enforce the naval blockade was condemned by the UN Security Council and

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137 ‘...gravity may be examined following a quantitative as well as qualitative approach. Regarding the qualitative dimension, it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave’; *Situation in Republic of Kenya*, (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19-Corr (31 March 2010) para 62.

138 As I mentioned in footnote 134, this litigation relates to a case rather than a situation. However, it is worth reiterating that similar factors are to be considered when determining whether a situation is of sufficient gravity as to when determining whether a case is of sufficient gravity.

139 *Abu Garda* (n 134 above) para 33.
various human rights groups, and by a large section of the international community.

(3) Israel–Gaza conflict: the vessels were part of a humanitarian endeavour to alleviate the crisis that is occurring in Gaza, and their interception by Israel perpetuates this situation.

(4) Deliberate plan and policy to use violence: the actions of the Israeli forces were manifestations of a plan or policy to use violence to dissuade humanitarian flotillas from attempting to reach Gaza.140

In light of the policy guidance by the OTP and the jurisprudence of the Court detailed above, it appears that it is only the second, third and fourth points that qualify as ‘aggravating’ for the purpose of determining gravity. In relation to point 2 I agree with the letter of referral that it is significant that the violence employed by Israeli forces during the interception of the Peace Flotilla has raised considerable social alarm within the international community. Indeed, the magnitude of this social alarm is illustrated by the fact that in the days after the interception there was ‘widespread condemnation’ of Israel’s actions by the international community and also by civil society.141 This notwithstanding, neither the legality of the blockade nor the manner of its enforcement has ever received judicial attention. True, there have been four quasi-judicial inquiries into the incident, but these have produced conflicting factual accounts of the interception and its compatibility with international law.142 These reports have therefore exacerbated the social alarm surrounding the interception of the *Mavi Marmara*, rather than alleviating it.

With regard to point 3 of the letter of referral, it is correct that a humanitarian crisis was occurring in Gaza in May 2010 and that the local population were in urgent need of assistance and supplies.143 Israel’s violent interception of the Peace Flotilla therefore not only prevented the delivery of the humanitarian aid by that particular Peace Flotilla but, moreover, has almost certainly had the consequence of deterring other humanitarian agencies from attempting to deliver aid to this population. As both the guidance of the OTP and

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140 Letter of Referral (n 25 above) para 25.
141 ‘Israeli Deadly Raid on Flotilla’, *BBC News*, 22 March 2013, http://www.bbc.co.uk/news/10203726 (last visited 29 August 2014).
142 For detailed consideration of these discrepancies see Buchan (n 18 above).
143 ‘Gaza closure: not another year!’, *ICRC News Release No. 10/103* (Geneva/Jerusalem, 14 June 2010).
decisions of the Court have made clear, the impact of international crimes on the local population is relevant to the gravity assessment and this includes 'crimes committed with the aim or consequence of increasing the vulnerability of civilians'.

In relation to point 4, I agree with the letter of referral that the considerable levels of violence employed by Israeli forces, and it in particular the systematic use of this violence, aggravates the situation. As the UN Report concludes, four civilians were shot dead by Israeli forces even though they posed no threat to Israeli forces. Moreover, whilst the passengers were detained and being ferried to Israel Israeli forces subjected them to the systematic use of inhuman and degrading treatment, and in several instances this treatment amounted to torture. It is worth labouring over the exact language used by the report.

The conduct of the Israeli military and other personnel towards the flotilla passengers was not only disproportionate to the occasion but demonstrated levels of totally unnecessary and incredible violence. It betrayed an unacceptable level of brutality.

It is also relevant that this conduct was not momentary or ephemeral, but instead perpetrated over a 12 h period.

In light of these points I conclude that although the number of victims is relatively low there are aggravating factors attached to this situation and that these qualify it as sufficiently grave to justify the attention of the Court.

### IV INTEREST OF JUSTICE

Article 53(1)(c) provides that the OTP can refuse to initiate an investigation if such action is not considered to be in the interests of justice, even if there is a reasonable basis to believe that international crimes have been committed and that the situation is of sufficient gravity.

Although subject to review by the Pre-Trial Chamber, this is obviously an extremely important power for the OTP to possess.

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144 Policy Paper on Preliminary Examinations (n 122 above) [emphasis added].
145 UN Report (n 7 above) para 120.
146 Ibid., para 181.
147 Ibid., para 264.
However, Article 53 does not provide an exhaustive definition of what the concept of ‘interests of justice’ means and thus when the OTP can exercise this power. As a result, two schools of thought have emerged. On the one hand, there are those that argue that this concept should be interpreted expansively, enabling the OTP to refuse to initiate an investigation where such action would undermine justice in the broad sense of the term, such as threatening regional or even international peace and security. Others have interpreted the concept of justice more narrowly, submitting that the OTP can only engage Article 53 where the specific circumstances of the case demand that an investigation should not go ahead. Examples of such circumstances would be where the interests of the victims do not require an investigation or prosecution, or because of the particular characteristics or circumstances of the accused.

Which is the correct approach could have important implications for whether the OTP can open a formal investigation into the interception of the Peace Flotilla. This is because in the years following the interception of the Peace Flotilla relations between Israel and Turkey were extremely strained (on the basis that many of those killed onboard the Mavi were Turkish citizens). Recently however there has been an improvement in their relations in light of Israel’s formal apology to Turkey and its agreement to pay compensation to the victims’ families. Moreover, in order to end the long running armed conflict between Israel and Palestine (and the destabilising effect that this has on the whole region), which escalated considerably in July 2014 when Israeli forces commenced air strikes and launched

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148 M. Pensky, ‘Amnesty on trial: Impunity, Accountability, and the Norms of International Law’ (2008) 1 Ethics and Global Politics 1; T. H. Clark, ‘The Prosecutor of the International Criminal Court, Amnesties and the ‘Interests of Justice’: Striking a Delicate Balance’ (2005) 4 Washington University Global Studies and Law Review 389.

149 D. Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14 European Journal of International Law 481.

150 J. Borger and C. Letsch, ‘Turkey Expels Israel’s Ambassador over Refusal to Apologise for Gaza Flotilla Raid’, The Guardian, 2 September 2011, http://www.guardian.co.uk/world/2011/sep/02/turkey-israel-ambassador-mavi-marmara (last visited 29 August 2014).

151 M. Shmulovich, ‘Israeli-Turkish Reconciliation Talks off to Positive Start’, The Times of Israel, 22 April 2013, http://www.timesofisrael.com/israeli-turkish-reconciliation-talks-off-to-a-good-start/ (last visited 29 August 2014).
a ground offensive against Hamas militants in Gaza,\(^{152}\) the international community is focusing its efforts on restarting peace negotiations between these actors.\(^{153}\) It is certainly open to suggestion that intervention by the ICC and its insistence on prosecution of those Israeli military personnel suspected of committing international crimes could adversely impact upon the recent improvement in relations between Israel and Turkey, and perhaps more importantly frustrate or hinder recent political endeavours to bring Israel and the Palestine to the negotiating table and forge a peace agreement. In short, although intervention by the ICC may help vindicate the rights of the victims and their families, such intervention is unlikely to foster an environment where the relevant actors are prepared to engage in cooperative dialogue and make difficult concessions. However, the question is whether factors relating to regional and international peace and security can be considered by the OTP when deciding whether an investigation is contrary to the interests of justice.

In answering this question the first point to note is that the term justice is ascribed a broad meaning by Article 53, requiring the OTP to ‘take into account all the circumstances…’ As I have already noted above, Article 31 of the Vienna Convention on the Law of Treaties requires that terms within treaties must be accorded their ordinary meaning in light of the object and purpose of the treaty. To give the phrase ‘taking into account all the circumstances’ its ordinary meaning would seemingly confer to the OTP broad discretion to consider any factor that it deems relevant, including promoting regional or international peace. An expansive reading of Article 53 and in particular the term justice has therefore received substantial academic support.\(^{154}\) According to Ohlin, ‘it is difficult to think of a

\(^{152}\) M. Weaver and A. Yuhas, ‘Palestinian Casualties mount as Israel Intensifies Gaza Offensive’, The Guardian, 9 July 2014, http://www.theguardian.com/world/2014/jul/09/israel-intercepts-gaza-rockets-heading-for-tel-aviv-live-updates (last visited 29 August 2014).

\(^{153}\) AP and Times of Israel Staff, ‘Egypt Suggests Restarting Peace Talks as part of Ceasefire Bid’, The Times of Israel, 22 July 2014, http://www.timesofisrael.com/egypt-calls-for-israeli-palestinian-peace-talks/ (last visited 29 August 2014).

\(^{154}\) E. Blumenson, ‘The Challenge of a Global Standard of Justice: Peace, Pluralism and Punishment at the International Criminal Court’ (2006) 44 Columbia Journal of Transnational Law 801; P. Kastner, ‘The ICC in Darfur—Savior or Spoiler?’ (2007–2008) 14 ILSA Journal of International and Comparative Law 145; R. Goldstone and N. Fritz, ‘The ICC Prosecutor’s Unprecedented Powers’ (2000) 12 Leiden Journal of International Law 655, 662.
factor that would not be relevant.\textsuperscript{155} For Olasolo, under Article 53 the OTP enjoys ‘unlimited political discretion’ to decide not to proceed with an investigation.\textsuperscript{156}

I argue, however, for a narrow interpretation of Article 53. I suggest that the factors that can be taken into account when interpreting this provision should exclude wider political factors such as whether an investigation or prosecution will adversely affect regional or international peace and security. Two points support this restrictive approach.

First, although the phraseology of Article 53 requires ‘\textit{all the circumstances} to be taken into account’ (emphasis added) and provides a list of factors preceded by the word including, the nature of the factors specified in Article 53 limit or qualify the term ‘\textit{all the circumstances}’. As Stahn has argued

These criteria make it clear that the notion of ‘the interests of justice’ is linked to justice in a specific case (‘\textit{Einzelfallgerechtigkeit}’) rather than general policy considerations. It is therefore doubtful whether Article 53 offers a vast space to weigh general interests of national reconciliation or objectives of peacemaking versus interests of individual accountability.\textsuperscript{157}

From a holistic reading of Article 53 it thus becomes apparent that the framers of this provision never intended to confer to the OTP the power to deliberate upon matters that extend beyond the particularities of the situation before it. Article 53 provides that when deciding whether to initiate an investigation the OTP can take into account all the circumstances that relate to the alleged commission of international crimes within the situation but not wider political factors such as the maintenance of regional or international peace and security. This conclusion is also supported by the \textit{travaux préparatoires} of Article 53, which can be consulted

\textsuperscript{155} J. Ohlin, ‘Peace, Security and Prosecutorial Discretion’, in C. Stahn and G. Sluiter (eds), \textit{The Emerging Practice of the International Criminal Court} (Leiden: Brill, 2009) 188.

\textsuperscript{156} H. Olásolo, ‘The Prosecutor of the ICC Before the Initiation of Investigations: A Quasi-Judicial or a Political Body?’ (2003) 3 \textit{International Criminal Law Review} 87, 141.

\textsuperscript{157} C. Stahn, ‘Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court’ (2005) 3 \textit{Journal of International Criminal Justice} 695–720, 718. For a similar approach see D. Dukic, ‘Transitional Justice and the International Criminal Court—in ‘the Interests of Justice’?’ (2009) 89 \textit{International Review of the Red Cross} 691, 697.
in order to provide clarity to an ambiguous treaty provision.\textsuperscript{158} During the diplomatic conference leading up to the signing of the Rome Statute the Kenyan delegation explained that when engaging the interests of justice standard the OTP must be ‘free from political manipulation, pursuing only the interests of justice, with due regard to the rights of the accused and the interests of the victims’.\textsuperscript{159}

Secondly, Article 16 of the Rome Statute permits the UN Security Council to defer an ICC investigation (or prosecution) for a period of 12 months, with the possibility of annual renewal. The one limitation is that this deferral must be issued under Chapter VII of the UN Charter; that is, the Security Council must determine that the situation constitutes a breach of the peace, a breach of international peace and security or a threat to international peace and security.

Article 16 reminds us that the Security Council and the OTP possess very different competences and that these must not be confused.\textsuperscript{160} Indeed, this is recognised by the OTP in its Policy Paper, explaining quite clearly that ‘there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the OTP’.\textsuperscript{161} Importantly, the OTP acknowledges that the ICC must ‘work constructively with and respect the mandates of those engaged in other areas... [and] pursue its own judicial mandate independently’.\textsuperscript{162} Thus, all in all, justice should not be interpreted ‘so broadly as to embrace all issues related to peace and security.’\textsuperscript{163} To this end, if there are concerns that an investigation or prosecution by the ICC will adversely affect relations between Israel and Turkey, and more importantly peace negotiations between Israel and Palestine, then this

\textsuperscript{158} Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (23 May 1969), Article 32.

\textsuperscript{159} United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: summary records of the plenary meetings and of the meetings of the Committee of the Whole (U.N. Diplomatic Conference), 379, A/CONF.183/13 (Vol. II) (1998) 97, http://www.un.org/law/icc/rome/proceedings/E/Rome%20Proceedings\_v2\_e.pdf.

\textsuperscript{160} Clark (n 148 above) 396, footnote 40.

\textsuperscript{161} ICC–OTP, \textit{Policy Paper on the Interests of Justice} (September 2007) 1, http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf (last visited 29 August 2014).

\textsuperscript{162} \textit{Ibid.}, 8 (emphasis added).

\textsuperscript{163} \textit{Ibid.}
is a matter that manifestly falls within the competence of the UN Security Council under Article 16, not the OTP under Article 53.

For the reasons outlined above, I conclude that there is no reasonable basis to believe that a formal investigation into the interception of the *Mavi Marmara* on 31 May 2010 would be contrary to the interests of justice.

V CONCLUSION

Given the OTP’s recent determination that it will engage in a preliminary examination of the events that occurred on 31 May 2010, the purpose of this article has been to assess whether the criteria for opening a formal investigation under Article 53 are met. Article 53 imposes a legal duty upon the OTP to open a formal investigation where there is a reasonable basis to believe that the crimes within the jurisdiction of the ICC have been committed, the situation is admissible, and that an investigation would not be contrary to the interests of justice. After assessing the application of these criteria to the events that occurred on 31 May 2010 I have concluded that the OTP should open a formal investigation into this situation.

It is important to reiterate that the objective of this article has been to assess whether the OTP should open a formal investigation into the *situation* that has been referred to it by the Comoros. If the OTP decides to open a formal investigation—which I have argued it should—and that after this formal investigation the OTP considers that international crimes within the jurisdiction of the ICC have been committed, the OTP will then be required to select individual cases to be prosecuted. The selection of which individuals to prosecute would be determined by reference to the gravity threshold contained in Article 17. However, considering that the OTP is currently at the preliminary examination stage, this is an issue that is beyond the scope of this article and has therefore not been addressed.