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# **The Mavi Marmara Incident and the International Criminal Court**

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## Abstract

On 15 May 2015 the OTP announced that it would be conducting a preliminary investigation into the events that occurred on 31 May 2010, when Israel enforced its naval blockade against a flotilla of vessels that was seeking to deliver humanitarian aid to Gaza. 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) the situation 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 ultimately these criteria are satisfied and therefore conclude by encouraging the OTP to open a formal investigation into the situation.

Key Words: blockade; Israel; Gaza; Mavi Marmara; armed conflict

## 1. Introduction

From June 1967 until May 1994 Israel implemented a complete military occupation over Palestine (comprising the Gaza Strip and the West Bank). In 1994 Israel and Palestine concluded a peace agreement known as the Oslo Accords, which was intended to result in Israel pulling out of both the Gaza Strip and the West Bank, ultimately leading to the negotiation of a permanent status agreement which would establish a sovereign 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'.<sup>1</sup>

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.<sup>2</sup> Concerned that a humanitarian crisis was occurring in Gaza, in late May 2010 the Free Gaza Movement dispatched a flotilla of ships – known as the Peace Flotilla (comprising 8 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 Israeli forces to either turn

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<sup>1</sup> Statement of Israel's Foreign Minister Regarding Israel's Policy towards Hamas and its Terrorism (1 October 2007), available at <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>.

<sup>2</sup> 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:noticetomariners&Itemid=12](http://en.mot.gov.il/index.php?option=com_content&view=article&id=124:no12009&catid=17:noticetomariners&Itemid=12).

back or to dock at a nearby Israeli port so as to allow their cargo to be inspected. With the flotilla rejecting the offer, Israel sought to enforce its naval blockade against the vessels. In general, this occurred relatively peacefully. However, one boat, the *Mavi Marmara*, resisted capture and violence erupted between the crew members and Israeli forces. 9 crew members were killed and at least 24 seriously wounded. Several Israeli military personnel were also injured. Israel eventually assumed control of the situation and confiscated all the vessels in the flotilla and detained the crew members.<sup>3</sup> As we shall see, concerns have also been raised about the manner in which the crew members (particularly those from the *Mavi Marmara*) were treated after being detained by Israeli forces, with suggestions of considerable violence being used against them whilst they were onboard Israeli boats being ferried back to Israel.

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? In the months and years following the interception, four quasi judicial bodies have produced reports examining many of these legal questions; the Turkish Report was published on 1 September 2010 at the request of the Turkish

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<sup>3</sup> 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).

government (herein referred to as the Turkish Report);<sup>4</sup> the Turkel Report was released on 23 January 2011 under the authority of the Israeli government (herein referred to as the Turkel Report);<sup>5</sup> a UN Fact-Finding Report was published on 22 September 2010 under the authority of the UN Human Rights Council (herein referred to as the Human Rights Council Report);<sup>6</sup> and the Palmer Report was published in September 2011 at the behest of the UN Secretary-General (herein referred to as the Palmer Report).<sup>7</sup> These legal questions have also been addressed in academic literature,<sup>8</sup> to which I have contributed.<sup>9</sup>

Notably, a question that has remained unexplored to date 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 has referred the incident that occurred on 31 May 2010 to the International Criminal Court (ICC), asserting that international crimes were committed.<sup>10</sup> In particular, the Comoros asserts that international crimes were committed when the Israeli forces used violence against the crew members during the capture of the *Mavi* and when Israeli forces used violence against crew members during their period of detention as they were being transported back to Israel. 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 open a preliminary investigation, the findings of which will determine whether a formal investigation is initiated. On 15 May 2013 the OTP released the following statement

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<sup>4</sup> Report of Turkish National Commission of Inquiry (11 February 2011), available at <http://www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf>.

<sup>5</sup> The Public Commission to Examine the Maritime Incident of 31 May 2010 (23 January 2011), available at [http://www.jewishvirtuallibrary.org/jsource/Society\\_&\\_Culture/TurkelCommission.pdf](http://www.jewishvirtuallibrary.org/jsource/Society_&_Culture/TurkelCommission.pdf).

<sup>6</sup> Human Rights Council Report, *supra* note 3.

<sup>7</sup> Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, July 2011, available at <http://graphics8.nytimes.com/packages/pdf/world/Palmer-Committee-Finalreport.pdf>.

<sup>8</sup> Douglas Guilfoyle, 'The *Mavi Marmara* Incident and Blockade in Armed Conflict' (2011) 81 *BYIL* 1.

<sup>9</sup> Russell Buchan, 'The International Law of Naval Blockade and Israel's Interception of the *Mavi Marmara*' (2011) *Netherlands International Law Review* 209; Russell Buchan, 'The Palmer Report and the Legality of Israel's Naval Blockade of Gaza' (2012) 61 *ICLQ* 264.

<sup>10</sup> Letter of Referral of the Situation that occurred on 31 May 2010 (14 May 2013), available at <http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf> (herein referred to as the letter of referral).

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 are met. After careful analysis of all available information, I shall make a determination that will be made public in due course.<sup>11</sup>

When conducting a preliminary investigation Article 53(1)(a)-(c) of the Rome Statute explains that the OTP shall open a formal investigation where, after considering the available information, there is a ‘reasonable basis’<sup>12</sup> to believe that (a) a crime has been or is being committed,(b) the case is admissible under Article 17 and (c) an investigation would not be contrary to the interests of justice.

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<sup>11</sup> 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), available at [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-14-05-2013.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-14-05-2013.aspx).

<sup>12</sup> This has been interpreted by the ICC to require ‘a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court has been or is being committed’; *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 35.

In light of this, the objective of this article is to assess 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 requirement that the situation is of sufficient gravity to warrant the ICC engaging its jurisdiction. 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 could be argued that a formal investigation would not serve the interests of justice.

## 2. 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 Statute provides that the ICC does have jurisdiction where an international crime is committed on the territory of a party to the Rome Statute.<sup>13</sup> Article 12(2)(a)

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<sup>13</sup> Letter of Referral, *supra* note 10, at para 18.

further states that territory in this context includes vessels that fly under the flag of a state that is party to the Rome Statute.<sup>14</sup> 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.<sup>15</sup>

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, the ICC can engage its jurisdiction where the Security Council refers a situation to the ICC by declaring a threat to international peace and security under Chapter VII of the UN Charter. Secondly, an investigation can be initiated *proprio motu* by the OTP; this is where the OTP initiates an investigation on its own impulse. Thirdly, a state party may refer a situation to the ICC.

As I have noted above, the Comoros (as a state party) has made the referral to the ICC. 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) to the ICC. Article 14 defines a situation as where 'one or more crimes within the jurisdiction of the Court appear to have been committed'. This is satisfied in the context of the current discussion because the Comoros has referred the incident that occurred on 31 May 2010, rather than allegations of certain individuals committing specific crimes.<sup>16</sup>

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<sup>14</sup> This is entirely consistent with the law of the sea, which provides that a vessel sailing on the high seas is considered to be under the exclusive sovereignty of the flag state; Article 92 of the Law of the Sea Convention 1982.

<sup>15</sup> See generally Jordan Paust, 'The Reach of ICC Jurisdiction over Non-Signatory Nationals' (2000) 33 *Vanderbilt Journal of Transnational Law* 1.

<sup>16</sup> Dapo Akande, 'Court between a Rock and a Hard Place: Comoros Refers Israel's Raid on Gaza Flotilla to the ICC' (15 May 2013) EJIL: *Talk!*, available at <http://www.ejiltalk.org/court-between-a-rock-and-a-hard-place->



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 cases to be tried by 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.<sup>17</sup> 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'.<sup>18</sup> Critics therefore argue that the Rome Statute does not allow for self-referrals. In particular, they contend that the possibility of self-referral is not expressly provided for in the Rome Statute (namely Article 14) and thus the ICC's reading of Article 14 as permitting self-referrals represents an 'interpretative deviation'.<sup>19</sup> 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'.<sup>20</sup>

Robinson has provided a 'compelling'<sup>21</sup> critique of these normative and legal arguments.

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. In brief, in terms of realising the goals of the Rome Statute it is better for international crimes to be punished

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[comoros-refers-israels-raid-on-gaza-flotilla-to-the-icc/](#); and K J Heller, 'Could the ICC Investigate Israel's Attack on the *Mavi Marmara*' (14 May 2013) *Opinio Juris*, available at <http://opiniojuris.org/2013/05/14/could-the-icc-investigate-the-mavi-marmara-incident/>.

<sup>17</sup> See William Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2009) 6 *JICJ* 731; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: OUP, 2010); Mahnoush Arsanjani and Michael W Reisman, 'Law-in-Action of the International Criminal Court' (2005) 99 *American Journal of International Law* 385.

<sup>18</sup> Arsanjani and Reisman, *ibid*, at 390.

<sup>19</sup> Schabas 'Prosecutorial Discretion', *supra* note 17, at 760.

<sup>20</sup> Schabas *The International Criminal Court*, *supra* note 17, at 7.

<sup>21</sup> Dapo Akande, 'Darryl Robinson on Self-Referrals: Is the International Criminal Court Really a Court of Last Resort?' (10 August 2011) *EJIL: Talk!*, available at <http://www.ejiltalk.org/darryl-robinson-on-self-referrals-is-the-international-criminal-court-really-a-court-of-last-resort/>.

yet ICC jurisdiction abused than for international crimes to go unpunished in order to ensure that ICC jurisdiction is not abused.<sup>22</sup> 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 (VCLT) 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.<sup>23</sup> Given that the ordinary meaning is clear, Robinson correctly notes that there is no need to take recourse to the TP, as Article 32 of the VCLT explains that this is only necessary where the ordinary meaning of a treaty term is ambiguous or would lead to a result that is manifestly absurd.<sup>24</sup> 'Setting this aside',<sup>25</sup> 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, Robinson quotes directly from the *travaux préparatoires* to reveal that 'the records show extensive discussion of the prospects of territorial state referral'.<sup>26</sup>

Regardless of the academic debate over the desirability or permissibility of the ICC's acceptance of self-referrals, the ICC has 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

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<sup>22</sup> Daryl Robinson, 'The Controversy over Territorial State Referrals and Reflections on ICL Discourse' (2011) 9 *JICJ* 355, 367-370.

<sup>23</sup> *Ibid* at 359-361.

<sup>24</sup> *Ibid* at 361-362.

<sup>25</sup> *Ibid* at 362.

<sup>26</sup> *Ibid* at 365.

enshrined in the jurisprudence of the Court'.<sup>27</sup> In conclusion, the ICC would possess jurisdiction under Article 13.

## *2.2 Subject Matter Jurisdiction*

Article 5 of the Rome Statute provides the ICC with jurisdiction over four different international crimes: genocide (Article 6); crimes against humanity (Article 7); war crimes (Article 8); and the crime aggression (Article 9).

The letter of referral identifies two different sets of circumstances that occurred on 31 May 2010 where international crimes were committed. First, the use of violence (which resulted in 9 deaths and at least 24 counts of serious injury) by Israeli forces in order to capture the *Mavi Marmara*; specifically, the letter of referral suggests 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 back to Israel. Citing the Human Rights Council Report, the letter of referral explains that this included 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 verbal abuse and derogatory sexual comments.<sup>28</sup> The letter of referral claims that this treatment amounts to war crimes and crimes against humanity. Whether there is a reasonable basis to conclude that the necessary ingredients of either of these offences in either of these scenarios can be established requires examination.

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<sup>27</sup> Payam Akhavan, 'Self-Referrals Before the International Criminal Court: Are States the Villains or the Victims of Atrocities?' (2010) 21 *Criminal Law Forum* 103, 110.

<sup>28</sup> Human Rights Council Report, *supra* note 3, at para 133-135.

### 2.2.1 War Crimes

Article 8 of the Rome Statute imposes criminal responsibility upon those that commit 'grave violations' of the four Geneva Conventions of 1949. The Geneva Conventions maintain a sharp distinction between international and non-international armed conflicts. In short, they impose a far more comprehensive international legal framework in relation to armed conflicts of an international character. Article 8 of the Rome Statute maintains this distinction, and carefully enumerates different types of grave violations of the Four Geneva Conventions (war crimes) in times of international and non-international armed conflict.

At the outset it is therefore imperative to determine whether Israel was engaged in an international armed conflict or a non-international armed conflict on 31 May 2010. 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 Court for the Former Yugoslavia (ICTY) defined an international armed conflict as 'recourse to armed force between two or more States';<sup>29</sup> in the same case the ICTY defined a non-international armed conflict as 'protracted armed violence between a state and an organized group or between two or more groups'.<sup>30</sup>

It is thus apparent that common to the definition of an international armed conflict and a non-international armed conflict is that, factually speaking, the parties to the dispute are engaged in an armed conflict. As the International Law Association (ILA) has explained, 'the international

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<sup>29</sup> *Prosecutor v. Tadić*, Case No. IT-94-I-I, Judgment, 15 July 1999, para 70.

<sup>30</sup> *Ibid.*

community embraces a common understanding of armed conflict. All armed conflict has certain minimal, defining characteristics that distinguish it from situations of non-armed conflict or peace'.<sup>31</sup> After reviewing state practice the ILA determined that in order for there to be an armed conflict 1) the parties to the dispute must exhibit a sufficient degree of organisation and 2) the violence must be 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 1.5 million population. The more pertinent question is whether on 31 May 2010 Israel and Hamas were engaged in an armed conflict of sufficient intensity to warrant the application of international humanitarian law. According to the ILA

[f]actors relevant to assessing intensity include for example the number of fighters involved; the type and quantity of weapons used; the duration and territorial extent of fighting; the number of casualties; the extent of destruction of property; the displacement of the population; and the involvement of the Security Council or other actors to broker cease-fire efforts. Isolated acts of violence do not constitute armed conflict. The intensity criterion requires more than, for example, a minor exchange of fire or an insignificant border clash. None of the factors identified above is necessarily determinative in itself. A lower level with respect to any one may satisfy the criterion of intensity if the level of another factor is high.<sup>32</sup>

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<sup>31</sup> ILA, *The Hague Conference: Use of Force – Final Report on the Meaning of Armed Conflict in International Law* (2010) 1-2.

<sup>32</sup> *Ibid* at 30.

In order to determine whether Israel and Hamas were engaged in an armed conflict an assessment of the material facts is therefore required. It is of course 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. Israel alleged that these fighters were responsible for violating the cease-fire agreement by indiscriminately firing rockets from Gaza into southern Israel. This being said, this operation lasted only a month, being concluded on 18 January 2009. Although this operation was generally regarded as successful by the Israeli government, since January 2009 Hamas fighters have 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.<sup>33</sup> According to the Israeli Foreign Ministry website, between 1 January 2009 and 31 May 2010 four Israeli military officers were killed by Hamas and also a foreign civilian. Three police officers were also wounded.<sup>34</sup> In response, Israel has made frequent military incursions into Gaza (using both land and air offensives) in order to target those responsible for firing the rockets and prevent the firing of future rockets.<sup>35</sup> Again, according to the Israeli Foreign Ministry website, Israel claims to have killed 13 Hamas fighters and wounded many more.<sup>36</sup> I argue, therefore, that the dispute occurring between Israel and Hamas on 31 May 2010 constituted more than 'isolated acts of violence' or an 'insignificant border clash'. In fact, I argue that the dispute involved 'substantial clashes' of organised forces and thus constituted 'protracted, large scale violence';<sup>37</sup> an armed conflict. As Milanovic notes, although the exchange of violence between Israel and Hamas is not continual it is nevertheless 'not by itself controversial' to

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<sup>33</sup> Turkel Report, *supra* note 5, at para 89.

<sup>34</sup> See the news features available at [www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/](http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/).

<sup>35</sup> For an overview of the nature of the armed conflict between Israel and Hamas both during and after Operation Cast Lead see generally UN Human Rights Council, *Report of the UN Finding Mission on the Gaza Conflict*, A/HRC/12/48 (23 September 2009) (hereafter referred to as the 'Goldstone Report').

<sup>36</sup> See n 34.

<sup>37</sup> *Tadić*, *supra* note 29, at para 70.

assert that the hostilities are of sufficient intensity to amount to an armed conflict.<sup>38</sup> Indeed, the very fact that Israel considered it necessary to deploy a naval blockade is evidence that an armed conflict was being experienced.

In light of this, it is now necessary to determine the classification of this armed conflict; namely, is it international or non-international in character? As I have noted, an international armed conflict is defined as recourse to force between *states*. Hamas, however, is not the government of a state,<sup>39</sup> but is instead an organised group. In this sense, the dispute between Israel and Hamas would seem to fall within the category of a non-international armed conflict.<sup>40</sup> This would certainly seem to be the case given the *Hamdan* ruling, where the US Supreme Court held that the US (a state) was engaged in a non-international armed conflict with Al Qaeda (an organised armed group) located outside of the US.<sup>41</sup> This being said, international humanitarian law does recognise several grounds for internationalising an otherwise non-international armed conflict.<sup>42</sup>

The letter of referral 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 under the effective control of Gaza; Gaza is therefore occupied territory. The letter explains 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

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<sup>38</sup> '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'; Marko 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.

<sup>39</sup> Although the question of Palestinian statehood is back on the political (and legal) agenda since Palestine formally submitted a request to join the UN as a full member state on 23 September 2011.

<sup>40</sup> This position is supported by the decision of the US Supreme Court in *Hamdan*, where the court held that the US (a state) was engaged in a non-international armed conflict with Al Qaeda (an organised armed group);

<sup>41</sup> *Hamdan v. Rumsfeld*, 584 US 557 (2006).

<sup>42</sup> See generally James 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.

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'.<sup>43</sup> This position is controversial and requires analysis.

In the *Wall Advisory Opinion* the ICJ did indeed determine that for the purposes of the Fourth Geneva Convention Israel's armed conflict in Palestine could be regarded as international in character.<sup>44</sup> This is because Israel occupied territory that was acquired during its international armed conflict with Egypt and Jordan in the 1967 Six Days War. 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. Thus, 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. In 1979 Egypt and Israel signed a peace treaty. Similarly, in 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.<sup>45</sup> Instead, Palestine possesses the right to self-determination. 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'.<sup>46</sup> 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

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<sup>43</sup> Letter of Referral, *supra* note 10, at para. 52.

<sup>44</sup> *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (2004) ICJ Report 136.

<sup>45</sup> UN Human Rights Council, A/HRC/RES/10/20, 26 March 2009.

<sup>46</sup> Milanovic, *supra* note 38, at 383. For a similar approach see Geoffrey Watson, 'The "Wall" Decisions in Legal and Political Context' (2005) 99 *AJIL* 6.



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.

Importantly, Cassese argues that customary international law has developed even further, submitting that '[a]n armed conflict which 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'.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> To this end, can this approach be relied upon in order to claim that customary international law recognises the armed conflict occurring between Israel and Hamas on 31 May 2010 to be international in character? Two points require consideration.

First, 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

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<sup>47</sup> Antonio Cassese, *International Law* (Oxford, Oxford University Press 2005) 420.

<sup>48</sup> HCJ 769/02 *Public Committee Against Torture v Government* [2006] (2) IsrLR 459, para 18.

<sup>49</sup> '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'; Milanovic, *supra* note 38, 384-385.

under customary international law'.<sup>50</sup> 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'.<sup>51</sup>

Secondly, even if we assume that Cassese and the Supreme Court's interpretation of customary international law is accurate, in order to classify the Israel-Hamas armed conflict as international in character it must be established that Israel was in fact an occupying power in Gaza on 31 May 2010. In the *Wall Opinion* the ICJ determined that Gaza was occupied by Israel. However, this opinion was delivered in 2004 when Israel still had forces physically stationed in Gaza. 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 it is no longer an occupying power in Gaza.<sup>52</sup> The legal test for determining whether a state is an occupying power is based upon factual criteria. Article 42 of the Hague Regulations provides that a 'territory is considered occupied when it is actually placed under the authority of the hostile army'. Benvenisti interprets Article 42 of the Hague Regulations to mean that a state will become an occupying power over territory that it exercises 'effective control'.<sup>53</sup>

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<sup>50</sup> David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence' (2005) 16 *EJIL* 171, 209.

<sup>51</sup> Milanovic, *supra* note 38, at 385. This is also the opinion of Greenwood; Christopher Greenwood, 'Customary Law Status of 1977 Geneva Protocols', in Astrid Delissen and Gerard Tanja (eds), *Humanitarian Law in Armed Conflict – Challenges Ahead: Essays in Honour of Frits Kalshoven* (Dordrecht, Nijhoff Publishers 1991) 93.

<sup>52</sup> Israel Military of Foreign Affairs, 'The Disengagement Plan – General Outline', 18 April 2004, available at [www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Disengagement+ Plan+-+General+Outline.htm](http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Disengagement+Plan+-+General+Outline.htm)

<sup>53</sup> Eyal Benvenisti, *The International Law of Occupation* (Princeton, NJ, Princeton University Press 1993) 4.

Conventionally, the effective control test has been interpreted to require, at a very minimum, 'the deployment of a presence in the territory in question'.<sup>54</sup> If this interpretation is correct then Israel cannot be an occupying power in Gaza. Case law, however, does seem to support a broader interpretation of the effective control test. Case law suggests that a state will be regarded as an occupying power over territory that it is capable of exercising effective control over. A state can therefore be in effective control of territory without maintaining a continuous troop presence there. In the *List* case the military tribunal in Nuremberg held that 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]'.<sup>55</sup> 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'.<sup>56</sup> 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 maintained a significant amount of control over the territory

[g]iven the specific geopolitical configuration of the Gaza Strip, the powers that Israel exercises from the borders enables it to determine the conditions of life within the Gaza Strip. Israel controls the border crossing (including to a significant degree the Rafah crossing to Egypt, under the terms of the Agreement on Movement and Access) and decides what and who gets in or out of the Gaza Strip. It also controls the territorial sea adjacent to the Gaza Strip and has declared a virtual blockade and limits to the fishing zone, thereby regulating economic activity in that zone. It also keeps complete control of the airspace of the Gaza

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<sup>54</sup> Sylvain Vite, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concept and Actual Situations' (2009) 91 *International Review of the Red Cross* 69, 85.

<sup>55</sup> *United States v. List (Hostages case)*, 8 *Law Reports of Trials of Major War Criminals* (1949) p. 38 at pp. 55-56.

<sup>56</sup> *Prosecutor v. Naletilić*, Case No. IT-98-34-T, Judgment (31 March 2003) para 217. This broader interpretation of the effective control test has also been endorsed by Israel's Supreme Court; H CJ 102/82, *Tsemel v. Minister of Defence*, 37(3) Piskei Din 365.

Strip, inter alia, through continuous surveillance by aircraft and unmanned aviation vehicles (UAVs) or drones. It makes military incursions and from time to time hit[s] targets within the Gaza Strip. No-go areas are declared within the Gaza Strip near the border where Israeli settlements used to be and enforced by the Israeli armed forces. Furthermore, Israel regulates the local monetary market based on the Israeli currency, (the new sheqel) and controls taxes and duties.<sup>57</sup>

This paragraph would indicate that Israel does in fact possess the capacity to exercise effective control over Gaza. Indeed, it seems to be for this reason 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'.<sup>58</sup> Moreover, in 2009 the UN General Assembly twice confirmed that the Fourth Geneva Convention applies to Gaza as part of occupied Palestinian territory.<sup>59</sup>

In *Al-Bassiouni* the Israeli Supreme Court also adopted this broader interpretation of the effective control test. Crucially, however, the 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'.<sup>60</sup> Shany agrees with this decision for two main reasons. First, Shany argues that Gaza possesses an organised government ( Hamas ) that openly

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<sup>57</sup> Goldstone Report, *supra* note 35, at para 58.

<sup>58</sup> UK Foreign and Commonwealth Office, *Annual Reports on Human Rights 2008 – Israel and the Occupied Palestinian Territories*, 26 March 2009.

<sup>59</sup> GA Res. 62/94 (2009); GA Res. 64/94 (2009).

<sup>60</sup> *Al-Bassiouni v. Prime Minister* HCJ 9132/07, 30 January 2008, para. 12.

exercises power and authority over the population.<sup>61</sup> This means that 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’.<sup>62</sup> 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.<sup>63</sup> Milanovic agrees, arguing that ‘[u]nlike Germany in Yugoslavia ... Israel really *can’t* re-establish its control over Gaza with ease’.<sup>64</sup> 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 convincing argument that Gaza is not under occupation but ‘is under a situation analogous to that of a siege’.<sup>65</sup>

In its analysis of Israel’s interception of the Peace Flotilla the Turkel Report also considers Israel and Hamas to be involved in an 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 the armed conflict between Israel and Hamas could be regarded as international in character where violence ‘crosses the border of a state’ ie Israel’s border.<sup>66</sup> However, this interpretation has been heavily criticised 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. As Milanovic explains, the Israeli Supreme Court’s interpretation of customary international humanitarian law is

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<sup>61</sup> Yuval 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.

<sup>62</sup> *Naletilić*, *supra* note 56, at para. 173.

<sup>63</sup> Shany, *supra* note 61, at 7.

<sup>64</sup> Marko Milanovic, ‘Is Gaza Still Occupied by Israel?’, *EJIL: TALK!*, 1 May 2009, available at <http://www.ejiltalk.org/is-gaza-still-occupied-by-israel/>.

<sup>65</sup> Shany (n 61) 8. That Israel has placed Gaza under a siege is also the opinion of Milanovic, *ibid*.

<sup>66</sup> *Targeted Killings*, *supra* note 48, at para 18.

inconsistent with state practice because historically ‘the single defining feature of international armed conflicts has not been their cross-border, but their interstate, nature’.<sup>67</sup>

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.<sup>68</sup> As Milanovic contends, what the Palmer Report is essentially saying is that Hamas amounts to a belligerent power under international humanitarian law: ‘the Palmer Report now seems to have taken the belligerency route’.<sup>69</sup> If Hamas can be regarded as a belligerent then it is indeed correct that Israel and Hamas were engaged in an international armed conflict on 31 May 2010; it is well established that where a state is in an armed conflict with a belligerent power, that conflict is to be regarded as international in character and the legal framework relating to international armed conflict will apply.<sup>70</sup>

However, this approach is problematic because Hamas does not exhibit the necessary features in order to be regarded as a belligerent. Lauterpacht identifies four characteristics that an organised armed group must possess in order to be classified as a belligerent power under international humanitarian law

[F]irst, there must exist within the State an armed conflict of a general (as distinguished from purely local) character; secondly, the insurgents must occupy

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<sup>67</sup> Milanovic, *supra* note 38, at 384.

<sup>68</sup> Palmer Report, *supra* note 7, at para 73.

<sup>69</sup> Marko Milanovic, ‘Palmer Committee Report on the Mavi Marmara Incident, EJIL: *Talk!*’ (2 September 2011) available at <http://www.ejiltalk.org/palmer-committee-report-on-the-mavi-marmara-incident/>.

<sup>70</sup> Although interestingly note that the Turkel Report concludes that the doctrine of belligerency is ‘almost irrelevant’ under contemporary international humanitarian law; Turkel Report, *supra* note 5, at para 39.

and administer a substantial portion of national territory; thirdly, they must conduct hostilities in accordance with the rules of war and through organized armed forces acting under a reasonable authority; fourthly, there must exist circumstances which make it necessary, for outside states to define their attitude by means of recognition of belligerency.<sup>71</sup>

According to this definition, Hamas cannot be regarded as an occupying power. First, belligerency status is intended to apply to organised armed groups that are participating in a particularly fierce and entrenched civil war against the government (note the requirement that ‘there must exist *within* a state’ (emphasis added)). Demonstrably, Hamas is not ‘within’ Israel. Secondly, Hamas does not comply with the third requirement that it conducts hostilities in accordance with the rules of war. As is well known, Hamas frequently engages in the indiscriminate firing of mortar shells into Israel, with wanton disregard for civilian damage. Such conduct is manifestly inconsistent with the basic tenets of international humanitarian law; in particular, the requirement to distinguish between civilians and combatants and between civilian objects and military objects.<sup>72</sup>

I would therefore argue that Israel and Hamas were in fact engaged in a non-international armed conflict with Hamas 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 relating to international armed conflict were committed. Instead, we need to examine whether grave violations of the rules of *non-international* armed conflict were committed. Article

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<sup>71</sup> Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press, 1947) 176.

<sup>72</sup> The use of weapons in an indiscriminate manner constitutes a clear violation of international humanitarian law; see J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005) Rule 11.

8(2)(c) and Article 8(2)(e) identifies grave violations of the law of non-international armed conflict, and thus which violations can be regarded as war crimes for the purposes of the Rome Statute.

First, however, it is necessary to determine whether those crew members onboard the *Mavi* that were violently targeted by Israeli forces (both during the capture of the vessel and during their detention whilst being transported to Israel) were civilians or, instead, civilians that were directly participating in hostilities. The reason for this is because Article 8(2) clearly stipulates that in a non-international armed conflict war crimes can only be committed against individuals that are not directly participating in hostilities.

According to the International Committee of the Red Cross (ICRC), an individual will be regarded as directly participating in hostilities where three criteria 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'.<sup>73</sup>

The Turkel Report concludes that there are two points at which the crew members can be regarded as having directly participated in hostilities, thereby precluding them from being classified as civilians. First, by being physically present on a vessel that had deliberately violated a lawfully established naval blockade and subsequently refused to stop when instructed.<sup>74</sup> Such an act would appear to satisfy the first two criteria outlined above. By deliberately violating the blockade and refusing to

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<sup>73</sup> N Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva, ICRC 2009) 46.

<sup>74</sup> Turkel Report, *supra* note 5, at para. 198.



stop 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; Hamas? In this context the ICRC 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 required threshold of harm to another party’.<sup>75</sup> In light of this, it would seem 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 Choen and Shany explain

While the flotilla and the IHH [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).<sup>76</sup>

The Turkel Report also argues that those crew members targeted by the Israeli military were directly participating in hostilities when they used ‘severe violence’<sup>77</sup> against Israeli forces as they sought to capture the *Mavi*. Although there can be no doubt that the crew of the *Mavi* did use considerable violence against the Israeli military (thereby satisfying the first two limbs of the ICRC’s definition of directly participating in hostilities), whether this violence was perpetrated in support of a party to

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<sup>75</sup> Melzer, *supra* note 73, at 63-64.

<sup>76</sup> Amichai Cohen and Yuyal Shany, ‘The Turkel Commission’s Flotilla Report (Part One): Some Critical Remarks’, EJIL: *TALK!*, 28 January 2011, available at <http://www.ejiltalk.org/know-your-rights-the-flotilla-report-and-international-law-governing-naval-blockades/>.

<sup>77</sup> Turkel Report, *supra* note 5, at para 132.

the conflict ( Hamas ) is again questionable. Two points need to be highlighted. First, the use of violence by the crew may have been in self-defence. If this was the case then their use of force cannot be regarded as being in support of a party to the armed conflict, but instead in defence of themselves. However, even if we concede that it was the crew that used violence first it still seems difficult to sustain the claim 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 (humanitarian aid) and deliver it to the population of 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.

The next question is whether any of the grave violations enumerated in Article 8(2)(a) and Article 8(2)(c) were committed by Israeli forces when using violence to capture the *Mavi* and when detaining crew members post-capture. From those listed the most relevant appear to be: '[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture' (Article 8(2)(c)(i)); '[c]ommitting outrages upon personal dignity, in particular humiliating and degrading treatment' (Article 8(2)(c)(ii)); and '[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities' (Article 8(2)(e)(i)).

In relation to the use of violence by Israeli forces against crew member when seeking to capture the *Mavi*, the fact that 9 crew members were killed and at least 24 seriously injured would strongly suggest that the *actus reus* of the three crimes identified above were committed. Moreover, there seems little doubt that these attacks were committed intentionally, thereby satisfying the *mens rea* of these crimes. Article 30 of the Rome Statute outlines the required *mens rea* of the crimes enumerated in Article 5, explaining that these crimes can only be committed intentionally; and a

person can be regarded as having intent where, 'in relation to conduct, the person means to engage in that conduct or, in relation to a consequence, the person means to cause that consequence or is aware that it will occur in the ordinary course of events'.

Importantly, Israel has asserted that even if those individuals onboard the *Mavi* that were subjected to violence cannot be regarded as directly participating in hostilities then they were at a minimum civilians that used personal violence against Israeli forces. For this reason, Israel has argued that the use of violence by Israeli forces was a lawful act of self defence.<sup>78</sup> This is significant because Article 31(1)(c) of the Rome Statute provides a complete defence to charges of war crimes where the accused can demonstrate that the violent acts in question were necessary for the purposes of self-defence. As Article 31(1)(c) explains, crucial to establishing this defence is that 'the person acts reasonably to defend himself or herself' and in a 'manner proportionate to the degree of danger'.<sup>79</sup> Whether or not this defence is available to those Israeli forces that used violence to capture the *Mavi* of course depends on the facts of the case. Although this will be a decision for the OTP, international institutions and courts have demonstrated a tendency to accept facts as true where they are determined by fact-finding missions that act under the authority of the UN.<sup>80</sup> As I noted in the introduction to this article, a UN fact-finding commission has produced a report into the *Mavi* interception. The facts outlined in this report are therefore likely to heavily influence decisions of the OTP.

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<sup>78</sup> <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/31/AR2010053101209.html>.

<sup>79</sup> See generally Eric David, 'Self-Defence and State Necessity in the Statute of the ICC' in José Doria, Hans-Peter Gasser and Cherif Bassiouni, *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (Martinus Nijhoff, 2009).

<sup>80</sup> Simone Halink, 'All Things Considered: How the International Court of Justice Delegated its Fact-Assessment to the United Nations in the *Armed Activities Case*' (2008) 40 *NYU Journal of International Law and Politics* 13, 16 ['the Court accepts as proven facts that are drawn from secondary evidence, in particular from United Nations (UN) reports'].

Importantly, this report concludes that the Israeli military were first to use violence against crew members and that many of the deaths and injuries inflicted upon the crew members cannot be justified on the basis of self defence

The Mission is satisfied that much of the force used by the Israeli soldiers on board the *Mavi Marmara* and from the helicopters was unnecessary, disproportionate, excessive and inappropriate and resulted in the wholly avoidable killing and maiming of a large number of civilian passengers. On the basis of the forensic and firearm evidence, at least six of the killings can be characterized as extra-legal, arbitrary and summary executions.<sup>81</sup>.

If this is correct Israeli forces cannot rely upon self defence under Article 31(1)(c) and liability for murder, committing outrages upon personal dignity and intentionally directing attacks against civilians would arise.

It also seems likely that those Israeli forces that used violence against crew members whilst they were detained committed war crimes. The Human Rights Council Report explains

[S]ome 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

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<sup>81</sup> Human Rights Council Report, *supra* note 3, at para. 172.

left unattended for some time before being dragged to the front of the deck by their arms or legs

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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.<sup>82</sup>

To this end, the report determines 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.'<sup>83</sup> Such conduct undoubtedly constitutes 'cruel treatment and torture' within the meaning of Article 8(2)(c)(i) and the commission of 'outrages upon personal dignity, in particular humiliating and degrading treatment' within the meaning of Article 8(2)(c)(ii). Given that this conduct appears to have been perpetrated intentionally, those Israeli forces committing these acts would be liable for war crimes under Article 8 of the Rome Statute.

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<sup>82</sup> Human Rights Council Report, *supra* note 3, at para 178.

<sup>83</sup> *Ibid* at 181.

### 2.2.2 Crimes against Humanity

Article 7 of the Rome Statute identifies conduct that, when committed as part of a widespread or systematic attack directed against a civilian population, and where the accused has knowledge of the attack, amounts to a crime against humanity.

It is important to note that Article 7 applies regardless of whether an armed conflict is in existence. Thus, although I argue that on 30 May 2010 a non-international armed conflict was occurring between Israel and Hamas, Guilfoyle has argued differently, concluding that no armed conflict was underway.<sup>84</sup> If this interpretation is correct, Article 7 (as opposed to Article 8) would come into vogue.

At first instance it is necessary to determine whether the Israeli forces committed any acts listed in paragraph 1 of Article 7, which identifies conduct that can amount to a crime against humanity when committed as part of a widespread or systematic attack against a civilian population. First, let us consider the use of violence in capturing the *Mavi*. From the acts listed in paragraph 1, and in light of the fact-finding report compiled by the Human Rights Council, it would appear that the following have been committed; 'murder' (Article 7(1)(a)) and conduct causing 'serious injury to body or to mental or physical health' (Article 7(1)(k)). Secondly, in regard to the violence used against the crew members during their period of detention, from paragraph 1 it would appear that the following 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)).

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<sup>84</sup> Guilfoyle, *supra* note 8, at 18.

It is important to reiterate 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 civilians were killed and at least 24 seriously injured. The abuse of detained crew members that was reported by the Human Rights Council Report would also satisfy this criterion, given that the reported abuse was committed 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 population.

In relation to the discussion of war crimes under Article 8 I have already concluded that the crew members were civilians at the time of the interception; the individuals onboard the vessels comprising the Peace Flotilla can therefore be regarded as a 'civilian population'. Perhaps a trickier issue is whether this attack was the product of a 'policy'. The ICC has held in the *Katanga* case 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.<sup>85</sup>

As this paragraph reveals, 'a low threshold for policy is applied';<sup>86</sup> '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'.<sup>87</sup> Can the violence committed by the Israeli forces when capturing the *Mavi* and detaining the crew members be described as being the product of policy? First, let us consider the violence used in capturing the *Mavi*. Sure, the interception of the Flotilla was part of a policy - Operation Sea Breeze - which had been planned months in advance, with extensive training having been undertaken by the forces to prepare them for the interception. But the question is whether the violence committed onboard the *Mavi* was 'planned, directed or organised'. There is of course no evidence to suggest that the level of violence that was used against the crew members 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 commit the attack 'can be deduced from the way in which the acts occur'.<sup>88</sup> This is important in the current context. As the Human Rights Council Report notes, live ammunition was used by Israeli forces before boarding the *Mavi* (whilst the Israeli forces were still on the helicopter). Moreover, 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,

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<sup>85</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges* (30 September 2008) para 396.

<sup>86</sup> Thomas Hansen, 'The Policy Requirement in Crimes Against Humanity: Lessons From and For the case of Kenya' (2011) 43 *George Washington International Law Review* 1, 12.

<sup>87</sup> *Ibid.*

<sup>88</sup> Kai Ambos, *Treatise on International Criminal Law: Volume 1: Foundations and General Part* (2013) at 283



it seems that the violence was of an organised and directed nature rather than spontaneous and isolated.

It also appears that the treatment of detained crew members by Israeli forces can be regarded as the product of a policy to commit an attack against a civilian population. This is because Israeli forces committed sustained physical and verbal attacks against a number of crew members and also repeated attacks against specific individuals. Furthermore, this violence occurred over a period of at least 12 hours (as the Israeli forces transferred the crew members back to shore). Again, although there may not have been any formal, written policy to treat the detainees in this manner, from this 'regular pattern'<sup>89</sup> of conduct it is difficult to argue that the violence was random or isolated; instead, it appears organised and directed.

Article 7 further requires that the attack against the civilian population be widespread or systematic.<sup>90</sup> The criterion of widespread is defined in quantitative terms, requiring the attack on the civilian population to be 'large-scale in nature'.<sup>91</sup> 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'.<sup>92</sup> In this sense, the attack 'must be massive, frequent, carried out collectively

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<sup>89</sup> In the Bemba trial the PTC concluded that a policy can be deduced where the violence followed a 'regular pattern'; *Prosecutor v Bemba, Pre-Trial Chamber Decision on the Confirmation of Charges*, ICC-01/05-01/08 (15 June 2009) para 81.

<sup>90</sup> 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'; Tim McCormack, *Crimes Against Humanity*, in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing, 2004) 187

<sup>91</sup> *Prosecutor v Bashir* (ICC-02/05-01/09), Decision of the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (4 March 2009) para 81.

<sup>92</sup> *Ibid* at para 84.

with considerable seriousness and directed against a large number of civilians'.<sup>93</sup> With respect to the violence used to capture the *Mavi*, as I have noted 9 crew members were killed and at least 24 seriously injured. Although the Human Rights Council Report notes that individuals were targeted with excessive violence, many of the crew members onboard the *Mavi* took recourse to lower cabins and waited for Israeli forces to arrive. Indeed, crew members onboard other vessels comprising the flotilla did not resist capture and permitted Israeli forces to board their vessels. Thus, the attack against a civilian population that occurred on 31 May 2010 was restricted to only those individuals that resisted capture of the *Mavi*. To this end, it seems difficult to conclude that the attack was 'massive'; instead, it was limited to recalcitrant individuals.

It also seems unlikely that the violence used against crew members whilst they were detained can be considered widespread. Although there was the multiple commission of serious violent acts against crew members, generally this violence was limited to those crew members from the *Mavi* that resisted detention. Crew members from the various vessels that capitulated to Israeli forces were, by and large, not subjected to acts that fall within paragraph 1 of Article 7. When cast in this light, it is difficult to argue that the maltreatment of detained crew members was widespread.

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 systematic. Systematic refers to 'the organised nature of the acts of violence and to the improbability of their random occurrence'<sup>94</sup> and can 'often be expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis'.<sup>95</sup> The requirement that the attack be systematic

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<sup>93</sup> *Bemam* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the prosecution Against Jean-Pierre Bemba Gombo (15 June 2009) para 83.

<sup>94</sup> Bashir, *supra* note 91, at para 81.

<sup>95</sup> Kenya, *supra* note 12, at para 96.

corresponds closely with the requirement in Article 7(2)(a) that the acts were the product of a policy. In fact, it has been held that where an attack against a civilian population has been determined a product of policy, the systematic criterion will be automatically satisfied.<sup>96</sup> On the basis that I have already determined that both the violence used to capture the *Mavi* and when detaining the crew members was the product of a policy, this conduct can also be regarded as systematic for the purposes of Article 7.

The *mens rea* for Article 7 is contained in Article 30 of the Rome Statute, which as we have seen requires an intention to engage in the said conduct (murder, torture etc) or where the accused is aware that his conduct will produce such consequences in the ordinary course of events. There seems little doubt that the violence used to capture the *Mavi* and when detaining the crew members was done so intentionally. Importantly, in order to establish the requisite *mens rea* for crimes against humanity Article 7 requires that in addition to intentionally committing the act in question the accused must have *knowledge* that his acts were part of a widespread or systematic attack against a civilian population. However, this 'should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State'.<sup>97</sup> Instead, what is required is that the 'perpetrator must either know that he did not act in isolation but as part of a widespread or systematic attack, or intended to further the attack'.<sup>98</sup> Again, given that the violence used to capture the *Mavi* and when detaining the crew members was employed openly and as part of a team operation to capture the *Mavi* and to detain and restrain the crew passengers whilst onboard Israeli vessels, there seems little doubt that those Israeli forces using violence did so with knowledge that their conduct was part of a broader attack against the crew members.

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<sup>96</sup> Ibid at para 93.

<sup>97</sup> Article 7(2) Elements of Crime.

<sup>98</sup> Ambos, *supra* note 82, at 282.

### 3. Admissibility

#### 3.1 *The Principle of Complementarity*

Unlike the ICTY and ICTR 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; it will only intervene where a state fails to adequately investigate or prosecute for the alleged commission of international crimes. Thus, at the preliminary investigation stage Article 53 provides that the OTP can only open a formal investigation into a situation where the state in question is considered unable or unwilling to investigate or prosecute.

There has been much debate as to whether the complementarity test is applicable to situations (and, subsequently, which individual cases are to be prosecuted from that situation) where the state upon which the alleged crimes have been committed is inactive, in the sense that it has completely failed to initiate an investigation or prosecution. The question is whether in such circumstances the OTP must still apply the complementarity test, only being able to declare a situation (or case) admissible before the ICC where the referring state is considered unwilling and unable to carry out an investigation and prosecution.

This important question has been addressed by the ICC in the seminal case of *Katanga*. In this case the defence argued that the Congo was willing and able to prosecute Katanga and, for this reason, the ICC should refuse to entertain the prosecution. In essence, the argument was that the national

jurisdiction was the competent authority to hear the case. The defence saw 'no reason why in respect of Mr. Katanga the DRC [Democratic Republic of Congo] was unable or unwilling to prosecute him. All signals indicated otherwise'.<sup>99</sup> The defence further argued that the ICC's previous determination that a case was admissible where a state was inactive without performing the admissibility test meant that the ICC possessed primacy over national courts, when in fact ICC jurisdiction is complementary to national jurisdiction, and thus constituted a perversion of the intended role of the ICC: 'the current regime – as developed by the Court's early practice [...] – is *de iure* one of complementarity, but *de facto* is nothing less than primacy of the ICC over national courts'.<sup>100</sup>

However, such an approach is inconsistent with the wording of Article 17. The phraseology of Article 17 makes it quite clear that the complementarity test is only applicable where a case is being or has been investigated or prosecuted; a case is presumed admissible unless the state has made some attempt to investigate or prosecute the alleged commission of an international crime ('the Court shall determine a case inadmissible where...'). Thus, it is only when some attempt to investigate or prosecute has been made that the ICC needs to address whether a state can be regarded as unable or unwilling to investigate or prosecute.

In addition, to adopt an approach whereby the ICC can only engage its jurisdiction in relation to an inactive state where that state can be regarded as unwilling or unable to investigate or prosecute would inhibit the realisation of the primary objective of the Rome Statute: to end impunity for those suspected of committing international crimes. This is because such an approach would mean that the ICC is unable to exercise its jurisdiction where a state is able and willing to investigate and

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<sup>99</sup> ICC, 'Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga' (11 March 2009) para 61.

<sup>100</sup> *Ibid* at para 19

prosecute, even though the state has no intention of doing so. This could potentially lead to a large number of individuals avoiding prosecution at the national and international level. Indeed, this was recognised by the ICC when responding to the arguments of the defence counsel in the *Katanga* case that were outlined above

[The] interpretation [of the defence] is not only irreconcilable with the wording of the provision, but is also in conflict with a purposive interpretation of the Statute. The aim of the Rome Statute is “to put an end to impunity” and to ensure that “the most serious crimes of concern to the international community as a whole must not go unpunished”. This object and purpose of the Statute would come to naught were the said interpretation of article 17(1) of the Statute as proposed by the Appellant to prevail. It would result in a situation where, despite the inaction of a State, a case would be inadmissible before the Court, unless that State is unwilling or unable to open investigations. The Court would be unable to exercise its jurisdiction over a case as long as the State is theoretically willing and able to investigate and to prosecute the case, even though that State has no intention of doing so. Thus, a potentially large number of cases would not be prosecuted by domestic jurisdictions or by the International Criminal Court. Impunity would persist unchecked and thousands of victims would be denied justice. ... [T]he general prohibition of a relinquishment of jurisdiction in favour of the Court is not a suitable tool for fostering compliance by States with the duty to exercise criminal jurisdiction.<sup>101</sup>

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<sup>101</sup> ICC, Appeals Chamber, ‘Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case’, ICC-01/04-01/07 OA8 (25 September 2009), at para. 79

All in all, when assessing admissibility the first question to ask is whether there has been, or is currently, a national investigation or prosecution into any of the alleged crimes that form part of the situation that has been referred. If the answer to that question is no, the case is automatically admissible; in the words of the OTP, '[t]he absence of national proceedings, i.e. domestic inactivity, is sufficient to make the case admissible'.<sup>102</sup>

This interpretation of Article 17 is obviously important in the context of the current discussion because the Comoros has not taken any steps to investigate or prosecute for the alleged international crimes that were committed on 31 May 2010. In this sense, the Comoros can be regarded as an inactive state for the purposes of Article 17. Thus, the situation would be admissible before the ICC regardless of whether the Comoros can be regarded as able or willing to investigate or prosecute those Israeli forces accused committing international crimes.<sup>103</sup>

### 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

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<sup>102</sup> OTP, *Draft Policy Paper on Preliminary Investigations* (4 October 2010) para 55, available at [http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP\\_Draftpolicypaperonpreliminaryexaminations04101.pdf](http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf). It is important to note here that this does not mean that the OTP has to prosecute. The case may still be rejected on the basis that it fails to meet the gravity threshold or that an investigation or prosecution is not in the interests of justice. All that the ICC is saying here is that the complementarity test is inapplicable to situations where the concerned state is active.

<sup>103</sup> Although do note that the letter of referral fails to recognise that the complementarity test is inapplicable to inactive states. The letter of referral makes the case 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 this is probably correct, the point is that where the state in question is inactive (like it is here) questions concerning inability or unwillingness are not relevant.

‘the most serious crimes of international concern’.<sup>104</sup> 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’.<sup>105</sup> If this were to happen, the effectiveness of the ICC would be severely diminished, with perhaps the entire system coming to a standstill. To this end, Article 17(1)(d) requires that the Court assess as an admissibility threshold whether 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.

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 ICC have provided guidance here. Given that there has been considerable changes in the way in which the gravity criterion has been interpreted by the OTP and the ICC, and that this has occurred fairly recently and in a fairly short period of time, it is necessary to track these changes chronologically.

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, 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

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<sup>104</sup> 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’.

<sup>105</sup> Susana SáCouto and Katherine Cleary, ‘The Gravity Threshold of the International Criminal Court’ (2007) 23 *American University Law Review* 807, 818.



have to be set aside in the interest of focusing on a competing situation involving thousands of killings and rapes.<sup>106</sup> In essence what Ocampo was saying was that the gravity criterion would in essence equate to a 'magic number' approach;<sup>107</sup> a situation would be grave where the number of victims is sufficiently great.

Indeed, Ocampo seemed to adopt this quantitative approach to the gravity threshold in February 2006 when the OTP released a statement explaining that it would not open a formal investigation into allegations that British soldiers committed international crimes in Iraq because the 'the information available at this time supports a reasonable basis for an estimated number of 4-12 victims subjected to willful killing and a limited number of victims of inhumane treatment, totaling less than 20 persons';<sup>108</sup> this was therefore a situation of insufficient gravity to justify initiating a formal investigation.

The ICC was required to adjudicate the gravity requirement for the first time in relation to the situation that was occurring in the DRC. In particular, the OTP issued a request to Pre Trial Chamber I for the issue of arrest warrants for Thomas Lubanga and Bosco Ntaganda for their role in recruiting and conscripting child soldiers into an armed group. PTC I released its judgement a day after the OTP's published its statement regarding British forces in Iraq.<sup>109</sup> Although PTC I confirmed the arrest warrant for Lubanga, it refused to do so for Ntaganda on the basis that the case against him did not meet the gravity threshold. This determination was made because Ntaganda, unlike Lubanga, could

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<sup>106</sup> Statement by Luis Moreno-Ocampo, Informal meeting of Legal Advisors to Ministries of Foreign Affairs, New York (24 October 2005) 6.

<sup>107</sup> Melanie 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.

<sup>108</sup> Prosecutor's communication response to communications concerning the situation in Iraq (9 February 2006), available at [http://www.iccnw.org/documents/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.iccnw.org/documents/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf).

<sup>109</sup> Prosecutor v Lubanga, ICC-01/04-01/06 (10 February 2006).

not be regarded as being the most responsible for the commission of the alleged crimes. In short, he lacked any authority over the armed group and did not play any significant role in formulating or implementing its policies.<sup>110</sup>

The OTP appealed the Chamber's refusal to issue an arrest warrant on the ground that it had erred in law by defining the gravity test too narrowly. The Appeals Chamber agreed and overruled the decision of PTC I, determining that its conclusion that the gravity criterion required those most responsible to be targeted had no basis in the Rome Statute<sup>111</sup> The Appeals Chamber subsequently issued an arrest warrant for Ntaganda. Although this litigation deals with whether a case (as opposed to a situation) is of sufficient gravity, the significance of it from the perspective of this article is that the ICC has recently refocused the gravity test away from a quantitative approach towards one that is defined holistically, taking into account both the qualitative and quantitative aspects of the case or situation under consideration. According to the OTP

[t]he Appeals Chamber has dismissed the setting of an overly restrictive legal bar to the interpretation of gravity that would hamper the deterrent role of the Court. It has also observed that the role of persons or groups may vary considerably depending on the circumstances of the case and therefore should not be exclusively assessed or predetermined on excessively formalistic grounds.<sup>112</sup>

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<sup>110</sup> Ibid at para 89.

<sup>111</sup> *Prosecutor v Lubanga*, Case No. ICC-01/04-169-PUB-Exp, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58' (13 July 2006).

<sup>112</sup> Policy Paper, *supra* note 102, at para 69.

Indeed, this approach corresponds to Regulation 29(2) of the Regulations of the Office, adopted in 2009, which enumerates a non-exhaustive list of factors that can be used to guide the OTP's application of the gravity threshold. This Regulation explains that factors to be considered include the scale, nature, manner of commission of the crimes, and their impact. In 2010 a draft 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, inter alia, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the moodily 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, 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, 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.<sup>113</sup>

Applying these guidelines, the OTP considered 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.<sup>114</sup>

Taking this into consideration, the question that needs to be posed is whether there is a reasonable basis to believe that the interception that occurred on 31 May 2010 constitutes 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

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<sup>113</sup> Ibid at para 70.

<sup>114</sup> Ibid at para 71.

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.<sup>115</sup>

Keller thus concludes that it is 'exceedingly unlikely' that the OTP will open a formal investigation.<sup>116</sup> 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 victims), is not determinative of whether a situation can be regarded as sufficiently grave. This is well illustrated in relation to the situation in Darfur. Here the OTP opened a formal investigation where 12 UN peacekeepers were killed and 8 severely wounded. Regardless of the fact that the number of victims was relatively low, the matter was still of sufficient gravity because the violence was committed against a specific group of people that was legally present on the territory with the objective of bringing peace and stability to the area.<sup>117</sup> Thus, in short, what is necessary is the presence of some form of 'aggravating factors' that attach to the alleged crime.<sup>118</sup>

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

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<sup>115</sup> Heller, *supra* note 16.

<sup>116</sup> Ibid.

<sup>117</sup> *Situation in Darfur, Sudan (Bahar Idriss Abu Garda)* Decision on the Prosecutor's Application under Article 58 ICC PT. Ch. 8.2.2010, paras 30-4.

<sup>118</sup> '...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'; ICC, Situation in Republic of Kenya, Pre-Trial Chamber m. No. ICC-01/09-19-Corr, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", (31 March 2010), para 62.

- 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 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.<sup>119</sup>

I would agree with this reasoning. In particular, there seem to be three factors that particularly aggravate the situation. First, the considerable levels of violence employed by Israeli forces against the detained passengers. As the UN Human Rights Council Report concludes, Israeli forces subjected detained passengers to inhuman and degrading treatment, and in several instances this treatment amounted to torture. Secondly, it is significant that the interception of the Peace Flotilla, which was attempting to deliver supplies to Gaza in order to alleviate the humanitarian crisis that is occurring there,<sup>120</sup> has raised considerable social alarm. Indeed, the magnitude of this social alarm is illustrated by the fact that in the days after the interception there was 'widespread condemnation'

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<sup>119</sup> Letter of Referral, *supra* note 10, at para 25.

<sup>120</sup> ICRC News Release No. 10/103 (14 June 2010).

of Israel's actions by the international community and also by civil society.<sup>121</sup> This condemnation relates to not just the violence employed by Israel to intercept the vessels, but the imposition of the naval blockade more generally and its adverse impact upon the lives of the Gazan population. This notwithstanding, neither the legality of the blockade nor the manner of its enforcement have ever received judicial attention. True, there have been four quasi judicial inquiries into the incident,<sup>122</sup> but they have produced conflicting factual accounts of the interception and its compatibility with international law.<sup>123</sup> These reports have therefore not provided any resolution or closure to the events that occurred on 31 May 2010, and so the social alarm raised by the interception remains. Thirdly, other humanitarian vessels have sought to deliver aid to Gaza since the *Mavi* interception. These flotillas have also been interdicted on the basis that they are in violation of the naval blockade (with allegations again being made that Israel used violence to enforce this blockade).<sup>124</sup>

Consideration of the legality of the *Mavi* interception and in particular the violence used by the Israeli forces seems important in order to help to bring closure to this matter and, moreover, to clarify and set the legal limits for Israeli action for future interceptions. In light of these factors I conclude that although the number of victims is relatively low, when approached holistically and situated in its broader context this situation qualifies as sufficiently grave to justify the attention of the ICC.

#### 4. Interests of Justice

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<sup>121</sup> BBC News, *Israeli Deadly Raid on Flotilla* (22 March 2013) available at <http://www.bbc.co.uk/news/10203726>.

<sup>122</sup> As quasi judicial bodies the reports that they produced are not legally binding.

<sup>123</sup> I have documented the considerable discrepancies between the reports of these quasi judicial bodies in Russell Buchan, 'The Mavi Marmara Incident and the Application of International Humanitarian Law by Quasi-Judicial Bodies', in Jackson Maogoto, Derek Jinks, Solomon Solomon (eds.), *The Application of International Humanitarian Law by Judicial Bodies* (Asser Press, 2013).

<sup>124</sup> The Guardian, 'Gaza-Bound Ship Estelle Intercepted by Israeli Forces' (20 October 2012) available at <http://www.guardian.co.uk/world/2012/oct/20/gaza-ship-estelle-israeli-forces>.

The interests of justice provision contained in Article 53 provides that the OTP can refuse to initiate an investigation or prosecution, or can terminate an existing investigation or prosecution, if such action is not considered to be in the interests of justice, even if there is a reasonable basis to believe that an international crime has been committed and that it is of sufficient gravity to warrant the attention of the ICC.

Although subject to review by the PTC, this is obviously an extremely important power for the OTP to possess. 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 or prosecution, or to terminate an investigation or prosecution, where such action would undermine justice in the broad sense of the term, such as threatening regional or even international peace and security.<sup>125</sup> 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 or prosecution should not go ahead.<sup>126</sup> 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

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<sup>125</sup> Max Pensky, 'Amnesty on trial: Impunity, Accountability, and the Norms of International Law' (2008) 1 *Ethics and Global Politics* 1-40; Thomas 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.

<sup>126</sup> Daryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 *European Journal of International Law* 481.



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).<sup>127</sup> Recently however there has been a dramatic improvement in their relations in light of Israel's formal apology to Turkey and its agreement to pay compensation to the victims' families.<sup>128</sup> 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), the international community is currently seeking to restart negotiations between these actors.<sup>129</sup> It is certainly open to suggestion that intervention by the ICC and 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 even derail current political endeavours to bring Israel and the Palestine to the negotiating table and hammer out a peace agreement. In short, although intervention by the ICC may help bring closure to the families of the victims, 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 or prosecution 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 VCLT requires that terms within treaties must be accorded their 'ordinary meaning'. Conferring the phrase 'taking into account all the circumstances' its ordinary meaning

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<sup>127</sup> The Guardian, 'Turkey Expels Israel's Ambassador over refusal to Apologies for Gaza Flotilla Raid' (2 September 2011) available at <http://www.guardian.co.uk/world/2011/sep/02/turkey-israel-ambassador-mavi-marmara>.

<sup>128</sup> The Times of Israel, 'Israeli-Turkish Reconciliation Talks off to Positive Start' (22 April 2013), available at <http://www.timesofisrael.com/israeli-turkish-reconciliation-talks-off-to-a-good-start/>,

<sup>129</sup> The Washington Times, 'John Kerry: Progress made in Israeli-Palestinian Peace Talks' (30 June 2013), available at <http://www.washingtontimes.com/news/2013/jun/30/kerry-progress-made-israeli-palestinian-peace-talk/>.

would seemingly confer to the OTP broad discretion to consider any factor that it deems relevant, including promoting regional or international peace. For this reason, this expansive reading has received substantial academic support.<sup>130</sup> According to Ohlin, 'it is difficult to think of a factor that would not be relevant'.<sup>131</sup> For Olasolo, under Article 53 the OTP enjoys 'unlimited political discretion' to decide not to proceed with an investigation or prosecution.<sup>132</sup>

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 '*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 '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 ('*Einzelfallgerechtigkeit*') rather than general policy considerations. It is therefore

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<sup>130</sup> Eric 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; Philip Kastner, 'The ICC in Darfur – Savior or Spoiler?' (2007-2008) 14 *ILSA Journal of International and Comparative Law* 145.

<sup>131</sup> Jens Ohlin, 'Peace, Security and Prosecutorial Discretion', in Carsten Stahn and Göran Sluitter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff, 2009) 188; Richard Goldstone and Nicole Fritz, 'The ICC Prosecutor's Unprecedented Powers' (2000) 12 *Leiden Journal of International Law* 655, 662.

<sup>132</sup> Héctor Olásolo, 'The Prosecutor of the ICC Before the Initiation of Investigations: A Quasi-Judicial or a Political Body?' (2003) 3 *International Criminal Law Review* 87, 141.

doubtful whether Article 53 offers a vast space to weigh general interests of national reconciliation or objectives of peacemaking versus interests of individual accountability.<sup>133</sup>

In this sense, when the provision is read holistically it becomes apparent that the framers of Article 53 never intended to confer to the OTP the power to deliberate upon matters that do not specifically relate to the commission of the crime in question. Similarly, for Dukic 'the structure of the sentence does not seem to elevate 'the interests of justice' criterion above the other considerations but rather subsumes more traditional issues that could be raised in this matter', such as for example the interests of the victims or the gravity of the crime committed.<sup>134</sup> Article 53 in fact reads that when deciding whether to discontinue an investigation or prosecution the OTP can take into account all the circumstances that relate to the commission of the specific offence under consideration but not wider political factors such as the maintenance of regional or international peace and security.

Secondly, Article 16 of the Rome Statute permits the UN Security Council to defer an ICC investigation or prosecution for a period of twelve 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.

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<sup>133</sup> Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court' (2005) 3 *JICJ* 695-720, 718.

<sup>134</sup> Drazan Dukic, 'Transitional Justice and the International Criminal Court – in 'the Interests of Justice'?' (2009) 89 *International Review of the Red Cross* 691, 697.

Article 16 reminds us that the Security Council and the OTP possess very different competences and that these must not be confused.<sup>135</sup> 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’.<sup>136</sup> 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’.<sup>137</sup> Thus, all in all, justice should not be interpreted ‘so broadly as to embrace all issues related to peace and security.’<sup>138</sup> 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 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 by the OTP would be contrary to the interests of justice.

## 5. Conclusion

Given the OTP’s recent determination that it will engage in a preliminary examination into 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 requires that the OTP shall open a formal investigation where there is a reasonable basis to believe that the crimes within

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<sup>135</sup> Clark, *supra* note 125, at 396, fn 40.

<sup>136</sup> Office of the Prosecutor, ‘Policy Paper on the Interests of Justice’ (September 2007) 1, available at <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIterestsOfJustice.pdf>.

<sup>137</sup> *Ibid* at 8 (emphasis added).

<sup>138</sup> *Ibid*.

the jurisdiction of the ICC have been committed, that the situation is of sufficient gravity to warrant attention of the ICC (that 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 is 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 investigation stage, this is an issue that is beyond the scope of this article and has therefore not been addressed.