

ANNEX A

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**Cour
Pénale
Internationale**

**International
Criminal
Court**

Le Bureau du Procureur
The Office of the Prosecutor



Situation on Registered Vessels of Comoros, Greece and Cambodia

Article 53(1) Report

6 November 2014

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EXECUTIVE SUMMARY

1. The Office of the Prosecutor (“Office” or “OTP”) of the International Criminal Court (“Court” or “ICC”) is responsible for determining whether a situation meets the legal criteria established by the Rome Statute (“Statute”) to warrant investigation by the Court. For this purpose, the Office conducts a preliminary examination of all situations that come to its attention based on statutory criteria and the information available. Once a situation is thus identified, article 53(1)(a)-(c) of the Statute establishes the legal framework for a preliminary examination. It provides that, in order to determine whether there is a reasonable basis to proceed with an investigation into the situation, the Prosecutor shall consider: jurisdiction (temporal, territorial or personal, and material); admissibility (complementarity and gravity); and the interests of justice.
2. On 14 May 2013, the OTP received a referral on behalf of the authorities of the Union of the Comoros with respect to the 31 May 2010 Israeli interception of a humanitarian aid flotilla bound for the Gaza Strip. On the same day, the Prosecutor announced that her Office had opened a preliminary examination on the basis of the referral. This report presents the findings of the Office on jurisdictional and admissibility issues resulting from its preliminary examination.
3. The Prosecutor has concluded that the information available provides a reasonable basis to believe that war crimes were committed on board the Comorian-registered vessel (the *Mavi Marmara*) during the interception of the flotilla on 31 May 2010. However, the information available does not provide a reasonable basis to proceed with an investigation of the situation on the registered vessels of Comoros, Greece, and Cambodia that arose in relation to the 31 May 2010 incident. This conclusion is based on a thorough legal and factual analysis of the information available and pursuant to the requirement in article 17(1)(d) of the Statute that cases shall be of sufficient gravity to justify further action by the Court.
4. The available information which forms the basis of this report is based on open and other reliable sources, which the Office has subjected to a fully independent, impartial and thorough analysis. It should be recalled that the Office does not enjoy investigative powers at the preliminary examination stage. Not having collected evidence itself, the Office’s analysis in this report must not be considered to be the result of an investigation. The Office’s conclusions may be reconsidered in the light of new facts or evidence.

Procedural History

5. On 14 May 2013, the Office received a referral from Elmadağ Law Firm, acting on behalf of the authorities of the Union of the Comoros, with respect to the 31 May 2010 Israeli interception of a humanitarian aid flotilla bound for the Gaza Strip.
6. In response to a request by the Office, the attorneys representing the Comoros have clarified that the territorial scope of the referral is not limited to the Comorian-registered vessel (the *Mavi Marmara*), but also extends to other flotilla vessels registered in State Parties. The attorneys also clarified that temporally the referral relates to events that began on 31 May 2010 and encompasses all alleged crimes flowing from the initial incident, including the interception of the seventh ship on 5 June 2010.
7. On 14 May 2013, the Prosecutor announced the opening of a preliminary examination on the basis of the referral. On 5 July 2013, the Presidency of the ICC assigned the situation to Pre-Trial Chamber I.
8. On 19 May 2014, the legal representatives for the Comoros provided additional information to the Office.
9. The Office also offered Turkey and Israel the opportunity to provide additional information but did not receive any in return.

Contextual Background

10. On 3 January 2009, Israel imposed a naval blockade off the coastline of the Gaza Strip up to a distance of 20 nautical miles from the coast. The naval blockade was part of a broader effort to impose restrictions on travel and the flow of goods in and out of the Gaza strip, following the electoral victory of Hamas in 2006 and their extension of control in 2007.
11. The Free Gaza Movement was formed to challenge the blockade. It organised the "Gaza Freedom Flotilla," an eight-boat flotilla with over 700 passengers from approximately 40 countries, with the stated intentions to deliver aid to Gaza, break the Israeli blockade, and draw international attention to the situation in Gaza and the effects of the blockade.
12. The Israeli Defence Forces ("IDF") intercepted the flotilla on 31 May 2010 at a distance of 64 nautical miles from the blockade zone. By that point, one of the vessels in the flotilla had withdrawn due to mechanical difficulties, and another (the *Rachel Corrie*) had been delayed in its departure and thus was

not able to join the rest of the flotilla and only continued towards Gaza separately at a later date. The six remaining vessels were boarded and taken over by the IDF. The interception operation resulted in the deaths of ten passengers of the *Mavi Marmara*, nine of whom were Turkish nationals, and one with Turkish and American dual nationality.

13. The situation has been the subject of a United Nations Human Rights Council Fact-Finding Mission, which delivered its report in September 2010, and a separate Panel of Inquiry appointed by the United Nations Secretary-General, which published its report in September 2011. The Governments of Turkey and Israel have also conducted national inquiries.

Jurisdiction

14. *Jurisdiction ratione loci/jurisdiction ratione personae*: The flotilla was comprised of a total of eight vessels; however, only three of these vessels were registered in States Parties. The Court has jurisdiction *ratione loci* under article 12(2)(a) (“State of registration of that vessel”) over conduct committed on board the vessels registered respectively in Comoros (the *Mavi Marmara*), Cambodia (the *Rachel Corrie*) and Greece (the *Eleftheri Mesogios/Sofia*). Although Israel is not a State Party, according to article 12(2)(a) of the Statute, the ICC can exercise its jurisdiction in relation to the conduct of non-Party State nationals alleged to have committed Rome Statute crimes on the territory of, or on vessels and aircraft registered in, an ICC State Party.
15. *Jurisdiction ratione temporis*: The Court has jurisdiction over Rome Statute crimes committed on the territory of, or on vessels and aircraft registered in, the Comoros or by its nationals as of 1 November 2006. The Court also has jurisdiction over Rome Statute crimes committed on the territory of, or on vessels and aircraft registered in, Cambodia or by its nationals as of 1 July 2002, and those committed on the territory of, or on vessels and aircraft registered in, Greece or by its nationals as of 1 August 2002. The situation forming the subject of the referral began on 31 May 2010 and encompasses all alleged crimes flowing from the interception of the flotilla by the Israeli forces, including the other related interception on 5 June 2010. These events forming the subject of the referral are collectively referred to as the “flotilla incident” for the purposes of this report.
16. *Jurisdiction ratione materiae*: The hostilities between Israel and Hamas at the relevant time do not meet the basic definition of an international armed conflict as a conflict between two or more states. However, as acknowledged

by the case law of the Court, the ICC Elements of Crimes clarifies that the applicability of the law of international armed conflict also extends to situations of military occupation. While Israel maintains that it is no longer occupying Gaza, the prevalent view within the international community is that Israel remains an occupying power under international law, based on the scope and degree of control that it has retained over the territory of Gaza following the 2005 disengagement. In accordance with the reasoning underlying this perspective, the Office has proceeded on the basis that the situation in Gaza can be considered within the framework of an international armed conflict in view of the continuing military occupation by Israel.

17. The analysis conducted and the conclusions reached would generally not be affected and still be applicable, if the Office was of the view, alternatively, that the law applicable in the present context and in light of the Israel-Hamas conflict is the law of non-international armed conflict. Given the crimes of possible relevance to the present situation, which are substantially similar in the context of both international and non-international armed conflicts, it is not necessary at this stage to reach a conclusive view on the classification of the conflict. Additionally, as the protection accorded by the rules on international armed conflicts is broader than those relating to internal conflicts, it seems appropriate, for the limited purpose of a preliminary examination, in cases of doubt, to apply those governing international armed conflicts.
18. The flotilla incident occurred in the context of, and was directly related to, Israel's imposition of a naval blockade against the Gaza Strip. The legality of the blockade has been the subject of controversy. For the purposes of this report, however, it is unnecessary to reach a conclusion on this issue, which only has an impact on the assessment of the alleged war crime of intentionally directing an attack against civilian objects under article 8(2)(b)(ii) of the Statute. While not taking a position on the legality of the blockade, the Office has conducted its analysis to take into account both possibilities of a lawful and unlawful blockade.
19. Ultimately, in the Office's assessment, the information available indicates that there is a reasonable basis to believe that war crimes were committed on board the *Mavi Marmara* during the interception of the flotilla on 31 May 2010 in the context of an international armed conflict, namely: (1) wilful killing pursuant to article 8(2)(a)(i); (2) wilfully causing serious injury to body and health pursuant to article 8(2)(a)(iii); and (3) committing outrages upon personal dignity pursuant to article 8(2)(b)(xxi) of the Statute. In

addition, if Israel's naval blockade against Gaza was unlawful, there is consequently also a reasonable basis to believe that the IDF committed the crime of intentionally directing an attack against two civilian objects pursuant to article 8(2)(b)(ii) in relation of the forcible boarding of the *Mavi Marmara* and the *Eleftheri Mesogios/Sofia*.

20. As a general observation, it is noted that protected civilian status does not preclude, in certain circumstances, the possibility for the lawful use of force in individual self-defence against civilians who have resorted to violence. Under the Rome Statute, however, self-defence is recognised as a ground for excluding criminal responsibility. Accordingly, the hypothetical issue of whether a perpetrator committed a crime in self-defence, and therefore may be absolved from criminal responsibility, is to be properly addressed at the investigation and trial stages, and not the preliminary examination stage.
21. Lastly, on the basis of the information available, it does not appear that the conduct of the IDF during the flotilla incident was committed as part of widespread or systematic attack, or constituted in itself a widespread or systematic attack, directed against a civilian population. Accordingly, there is no reasonable basis to believe that crimes against humanity under article 7 were committed within the referred situation.

Admissibility

22. *Gravity*: The Office's assessment of gravity includes both quantitative and qualitative considerations. As stipulated in regulation 29(2) of the Regulations of the Office of the Prosecutor, the factors that guide the Office's assessment include the scale, nature, manner of commission of the crimes, and their impact. This assessment is conducted bearing in mind the potential cases that would be likely to arise from an investigation of the situation.
23. It is further noted that article 8(1) of the Statute provides that "the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes". Although this threshold is not a prerequisite for jurisdiction, it does, however, provide statutory guidance indicating that the Court should focus on cases meeting these requirements.
24. Having carefully assessed the relevant considerations, the Office has concluded that the potential case(s) that would likely arise from an investigation of the flotilla incident would not be of sufficient gravity to justify further action by the Court, in light of the criteria for admissibility

provided in article 17(1)(d) and the guidance outlined in article 8(1) of the Statute.

25. The parameters of the Office's assessment are determined by the limited scope of the situation referred, namely a confined series of events primarily on 31 May 2010. By virtue of article 12(2)(a) of the Statute, the Court's territorial jurisdiction is further limited to events occurring on three vessels in the flotilla and does not extend to any events that occurred after passengers were taken off those vessels. As such, the potential case(s) that could be pursued is inherently limited to an event encompassing a small number of victims of the alleged ICC crimes, with limited countervailing qualitative considerations.
26. Although the interception of the flotilla took place in the context of the Israel-Hamas conflict, the Court does not have jurisdiction over other alleged crimes committed in this context, nor in the broader context of any conflict between Israel and Palestine. While the situation with regard to the civilian population in Gaza is a matter of international concern, this issue must be distinguished from the present assessment, which is limited to evaluating the gravity of the crimes allegedly committed by Israeli forces on board the vessels over which the Court has jurisdiction during the interception of the flotilla.
27. In light of the conclusion reached in respect of the gravity assessment, it is unnecessary to consider or reach a conclusion on the issue of complementarity.

Conclusion

28. The Prosecutor has concluded that the information available does not provide a reasonable basis to proceed with an investigation of the referred situation. The referring State, the Comoros, may however request the Pre-Trial Chamber to review the Prosecutor's decision not to proceed, pursuant to article 53(3)(a) of the Statute.

I. INTRODUCTION

1. The Office of the Prosecutor (“Office” or “OTP”) of the International Criminal Court (“Court” or “ICC”) is responsible for determining whether a situation meets the legal criteria established by the Rome Statute (“Statute”) to warrant investigation by the Court. For this purpose, the Office conducts a preliminary examination of all situations that come to its attention based on statutory criteria and the information available. Once a situation is thus identified, article 53(1)(a)-(c) of the Statute establishes the legal framework for a preliminary examination. It provides that, in order to determine whether there is a reasonable basis to proceed with an investigation into the situation, the Prosecutor shall consider: jurisdiction (temporal, territorial or personal, and material); admissibility (complementarity and gravity); and the interests of justice. This report presents the Office’s assessment pursuant to article 53(1) of the Statute.
2. The Union of the Comoros (“Comoros”) is a State Party to the ICC. On 14 May 2013, the OTP received a referral on behalf of the authorities of the Comoros with respect to the 31 May 2010 Israeli interception of a humanitarian aid flotilla bound for the Gaza Strip.
3. The available information which forms the basis of this report is based on open and other reliable sources, which the Office has subjected to independent, impartial and thorough analysis. The Office has analysed the supporting materials and documentation accompanying the referral along with, *inter alia*, the reports published by the four commissions¹ that have previously examined the 31 May 2010 incident.²
4. It should be recalled that the Office does not enjoy investigative powers at the preliminary examination stage. Its findings are therefore preliminary in

¹ These four commissions include: the fact-finding mission established by the UN Human Rights Council; the four-member panel of inquiry appointed by the UN Secretary-General, chaired by Geoffrey Palmer and vice-chaired by Alvaro Uribe; the national commission of inquiry established by the Turkish Government; and the investigative commission established by the Israeli Government, headed by Israeli Supreme Court Justice Jacob Turkel.

² See 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, U.N. Doc. A/HRC/15/21, 27 September 2010 (“HRC Report”); Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011 (“Palmer-Uribe Report”); Turkish National Commission of Inquiry, Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010, February 2011 (“Turkish Report”); Turkel Commission, The Public Commission to Examine the Maritime Incident of 31 May 2010 - Part I, 2011 (“Turkel Report”); Turkel Commission, The Public Commission to Examine the Maritime Incident of 31 May 2010 - Part 2, 2013 (“Second Turkel Report”).

nature and may be reconsidered in the light of new facts or evidence. The preliminary examination process is conducted on the basis of the facts and information available. The goal of this process is to reach a fully informed determination of whether there is a reasonable basis to proceed with an investigation. The ‘reasonable basis’ standard has been interpreted by Pre-Trial Chamber II (“PTC II”) to require that “there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court ‘has been or is being committed’”.³ In this context, PTC II has indicated that all of the information need not necessarily “point towards only one conclusion”.⁴ This reflects the fact that the reasonable basis standard under article 53(1)(a) “has a different object, a more limited scope, and serves a different purpose” than other, higher evidentiary standards provided for in the Statute.⁵ In particular, at the preliminary examination stage, “the Prosecutor has limited powers which are not comparable to those provided for in article 54 of the Statute at the investigative stage” and the information available at such an early stage is “neither expected to be ‘comprehensive’ nor ‘conclusive’”.⁶

II. PROCEDURAL HISTORY

5. On 14 May 2013, the Turkish law firm, Elmadağ, submitted a referral on behalf of the Government of the Comoros.⁷ The Comoros Mission to the United Nations in New York and the Justice Ministry of the Comoros confirmed the mandate granted by the Comoros Government to Elmadağ law firm for the purpose of submitting the referral. The Legal Director of the Justice Ministry specified in this respect that the Comoros Government had decided to mandate the law firm for this purpose, in collaboration with the Government of Turkey.

³ 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 (“Kenya Article 15 Decision”).

⁴ Kenya Article 15 Decision, para. 34. In this respect, it is further noted that even the higher “reasonable grounds” standard for arrest warrant applications under article 58 does not require that the conclusion reached on the facts be the only possible or reasonable one. Nor does it require that the Prosecutor disprove any other reasonable conclusions. Rather, it is sufficient to prove that there is a reasonable conclusion alongside others (not necessarily supporting the same finding), which can be supported on the basis of the evidence and information available. Situation in Darfur, Sudan, Judgment on the appeal of the Prosecutor against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’, ICC-02/05-01/09-OA, 3 February 2010, para. 33.

⁵ Kenya Article 15 Decision, para. 32.

⁶ Kenya Article 15 Decision, para. 27.

⁷ [Referral under Articles 14 and 12\(2\)\(a\) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation 14 May 2013 from Comoros](#) (“Referral”).

6. On 14 May 2013, the Prosecutor announced the opening of a preliminary examination on the basis of the referral, and the Presidency was notified accordingly.⁸ On 5 July 2013, the Presidency assigned the situation to Pre-Trial Chamber I (“PTC I”).⁹
7. The Office sought and received clarification on the territorial and temporal scope of the referral from the Comoros. In particular, on 21 June 2013, the legal representatives of the Comoros clarified that the territorial scope of the referral is not limited to the Comorian-flagged vessel, the *Mavi Marmara*, but also extends to other vessels in the flotilla, registered in a State Party. Temporally, the situation forming the subject of the referral began on 31 May 2010 and encompasses all other alleged crimes flowing from the interception of the flotilla by Israeli forces, including the other related interception on 5 June 2010.¹⁰
8. On 19 May 2014, the legal representatives for the Comoros provided additional information to the Office. On 19 August 2014, the Office received information from the Turkish Foundation for Human Rights and Freedoms and Humanitarian Relief, which was one of the primary organisers of the 2010 flotilla campaign and owned the *Mavi Marmara*.
9. The Office also offered Turkey and Israel the opportunity to provide additional information but did not receive any in return.
10. On 8 October 2014, the Office was informed that KC Law, a London law firm, had been mandated by the Government of the Comoros to act on its behalf in relation to its referral of the situation to the Court.

III. CONTEXTUAL BACKGROUND

11. On 3 January 2009, Israel imposed a naval blockade of the coastline of the Gaza Strip up to a distance of 20 nautical miles from the coast.¹¹ Israel stated

⁸ See [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.

⁹ See Situation on Registered Vessels of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, *Decision Assigning the Situation on Registered Vessels of the Union of the Comoros to Pre-Trial Chamber I*, ICC-01/13-1, 5 July 2013.

¹⁰ The referral and subsequent clarification indicate the date of this later interception as 6 June 2010. However, in fact, this interception (of the *MV Rachel Corrie*) occurred instead on 5 June 2010. See Turkel Report, fn. 400; HRC Report, para. 157; Ethan Bronner (New York Times), “Israeli Military Boards Gaza Aid Ship”, 5 June 2010; Ron Ben-Yishai (Ynet News), “Takeover ended in five minutes”, 5 June 2010.

¹¹ Turkel Report, para. 26. The waters are generally subject to the provisions of the Oslo Accords, under which responsibility for external security of the Gaza Strip was retained by Israel until the final status agreement. HRC Report, para. 27.

that the primary purpose of the blockade was military-security. This followed earlier attempts to prevent foreign ships from traveling through the zone, which was still under Israeli control. The naval blockade was part of a broader effort to impose restrictions on travel and the flow of goods in and out of the Gaza Strip following the electoral victory of Hamas in 2006 and their extension of control in 2007.¹²

12. The Free Gaza Movement was formed to challenge the blockade. It organised the "Gaza Freedom Flotilla", an eight-vessel flotilla with over 700 passengers from approximately 40 countries, with the stated intentions to: (i) deliver aid to Gaza; (ii) break the Israeli blockade; and (iii) "raise international awareness about the prison-like closure of the Gaza Strip and pressure the international community to review its sanctions policy and to end its support for continued Israeli occupation".¹³
13. The IDF intercepted the flotilla on 31 May 2010 in international waters, at a distance of 64 nautical miles from the blockade zone.¹⁴ By that point, one of the eight vessels in the flotilla had withdrawn due to mechanical difficulties, and another (the *Rachel Corrie*) had been delayed in its departure and thus was not able to join the rest of the flotilla and only continued towards Gaza separately at a later date.¹⁵ The six remaining vessels were boarded and taken over by the IDF. The interception operation resulted in the deaths of ten passengers of the *Mavi Marmara* and serious injuries to at least twenty others. Nine of the deceased were Turkish nationals, and one with Turkish and American dual nationality.
14. The incident triggered concern and outrage from the international community.¹⁶ For example, the United Nations Security Council issued a presidential statement condemning the acts which resulted in the loss of civilian life and calling for a prompt, impartial, credible and transparent investigation into the incident.¹⁷ The incident was the subject of a United Nations Human Rights Council fact-finding mission ("UN HRC Fact-Finding Mission"), which delivered its report in September 2010, and a separate panel of inquiry appointed by the United Nations Secretary-General

¹² HRC Report, para. 30.

¹³ HRC Report, para. 79.

¹⁴ Palmer-Uribe Report, para. 110.

¹⁵ Palmer-Uribe Report, para. 83; HRC Report, paras. 82, 154-157.

¹⁶ See for example Carol Migdalovitz, "Israel's Blockade of Gaza, the *Mavi Marmara* Incident and its Aftermath", 23 June 2010, Congressional Research Service, pp. 6-7.

¹⁷ UNSC Presidential Statement 9, UN Doc S/PRST/2010/9, 1 June 2010.

(“Palmer-Uribe Panel”), which published its report in September 2011.¹⁸ The Governments of Turkey and Israel also established national commissions of inquiry (“Turkish Commission” and “Turkel Commission”, respectively) which published reports on the incident.¹⁹

IV. PRECONDITIONS TO JURISDICTION

15. Temporally, the situation forming the subject of the referral began on 31 May 2010, when the IDF intercepted the *Mavi Marmara* vessel and five other vessels in the Gaza Freedom Flotilla, and encompasses all other alleged crimes flowing from these events, including crimes allegedly committed on 5 June 2010, when the IDF intercepted a seventh vessel (the *Rachel Corrie*). These events forming the subject of the referral are collectively referred to as the “flotilla incident” for the purposes of this report.
16. Israel is not a party to the Rome Statute. However, according to article 12(2)(a) of the Statute, the ICC can exercise its jurisdiction in relation to the conduct of non-Party State nationals alleged to have committed Rome Statute crimes on the territory of, or on vessels and aircraft registered in, an ICC State Party.
17. The events under examination primarily occurred on board the *Mavi Marmara*, a vessel registered in the Comoros at the time of the incident.²⁰ Comoros is a State Party to the Rome Statute since 18 August 2006. The Court may therefore exercise jurisdiction over Rome Statute crimes committed on the territory of, or on vessels and aircraft registered in, the Comoros on or after 1 November 2006. The Court thus has jurisdiction *ratione loci* under article 12(2)(a) (“State of registration of that vessel”) over conduct or crimes committed on board the *Mavi Marmara*.²¹
18. The flotilla comprised a total of eight ships, of which one had to turn back due to mechanical difficulties prior to the incident in question and another was delayed and only continued towards Gaza at a later date. In addition to the *Mavi Marmara*, registered in the Comoros, the remaining ships were

¹⁸ See HRC Report and Palmer-Uribe Report.

¹⁹ See Turkel Report and Turkish Report.

²⁰ Referral – Appendix VII (Registration Certificate of *Mavi Marmara*).

²¹ This restriction on the scope of jurisdiction is adopted in light of a plain reading of the relevant provision of article 12(2)(a) of the Statute. Nothing in the Statute, commentary, or relevant jurisprudence supports the proposition that the Court’s jurisdiction would also extend to any events that, while related to the events on board the vessels in the flotilla, occurred after individuals were taken off the vessels.

registered in the following countries: Greece, Turkey, Kiribati, Cambodia, and the United States.²² Of these States of registration, only Cambodia and Greece are States Parties since 11 April 2002 and 15 May 2002, respectively. The Court thus has jurisdiction over Rome Statute crimes committed on the territory of, or on vessels and aircraft registered in, Cambodia or by its nationals as of 1 July 2002, and those committed on the territory of, or on vessels and aircraft registered in, Greece or by its nationals as of 1 August 2002. The Court thus also has jurisdiction *ratione loci* under article 12(2)(a) (“State of registration of that vessel”) over conduct or crimes committed on board the *Rachel Corrie* (Cambodia) and the *Eleftheri Mesogios/Sofia* (Greece).

V. LEGAL ANALYSIS – JURISDICTION *RATIONE MATERIAE*

A. War Crimes

1. Contextual elements of war crimes

(a) *Existence and characterisation of the armed conflict*

19. The application of article 8 of the Statute requires the existence of an armed conflict.²³ Trial Chamber I (“TC I”) in the *Lubanga* case recalled with approval the following definition of armed conflict provided by the Appeals Chamber of the UN International Criminal Tribunal for the Former Yugoslavia (“ICTY”): “[a]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”²⁴

20. PTC II has further stated that “an international armed conflict exists in case of armed hostilities between States through their respective armed forces or other actors acting on behalf of the State.”²⁵ As TC I has confirmed, “if the

²² See HRC Report, para. 81, Annex III.

²³ See Elements of Crimes, second to last element of each crime under article 8.

²⁴ Situation in the Democratic Republic of Congo, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 533 (“Lubanga Judgment pursuant to Article 74”) (quoting ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, “Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction”, 2 October 1995, para. 70).

²⁵ Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-424, 15 June 2009, para. 223 (“Bemba Confirmation of Charges Decision”), recalled by Trial Chamber I in *Lubanga* Judgment pursuant to Article 74, at para. 541.

armed group is not acting on behalf of a government, in the absence of two States opposing each other, there is no international armed conflict”.²⁶

21. The hostilities between Israel and Hamas at the relevant time do not appear to meet the threshold of an international armed conflict in terms of a conflict taking place “between two or more States”, either directly or by proxy.²⁷
22. However, as recalled by Trial Chamber II (“TC II”) in the *Katanga* case, footnote 34 of the ICC Elements of Crimes clarifies that the applicability of the law of international armed conflict also extends to situations of military occupation.²⁸
23. In the light of footnote 34 of the Elements of Crimes, with respect to military occupation, TCI relied upon Article 42 of the Hague Regulations, holding that territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.²⁹
24. Under international law, the general test for occupation³⁰ is that of “effective control”, whereby a state will be regarded as an occupying power of territory over which it is capable of exercising effective control.³¹

²⁶ Lubanga Judgment pursuant to Article 74, para. 541. In this context, Trial Chamber I endorsed the “overall control” test for determining the necessary degree of control of another State over an armed group acting on its behalf. *Ibid.*

²⁷ See Bemba Confirmation of Charges Decision, para. 223. See also Situation in the Democratic Republic of Congo, *The Prosecutor v. Thomas Lubanga Dyilo*, Prosecution’s Closing Brief – Public Redacted Version, ICC-01/04-01/06-2748-Red, 21 July 2011, para. 32 (“Prosecution’s Closing Brief in Lubanga”).

²⁸ Situation in the Democratic Republic of Congo, *The Prosecutor v. Gemaïn Katanga*, Jugement rendu en application de l’article 74 du Statut, ICC-01/04-01/07-3436, 7 March 2014, para. 1179 (“Katanga Jugement rendu en application de l’article 74”) (“En outre, en ce qui concerne l’applicabilité du droit relatif aux conflits armés internationaux dans le cadre de l’exercice de la compétence de la Cour, les Éléments des crimes précisent que celle-ci s’étend également aux situations d’occupation militaire”). See also Lubanga Judgment pursuant to Article 74, para. 542; Elements of Crimes, article 8(2)(a), fn. 34 (“The term ‘international armed conflict’ includes military occupation” and “applies to the corresponding element in each crime under article 8(2)(a)”). See also generally article 6 of Geneva Convention IV; ICTY, *Prosecutor v. Naletilić and Martinović*, Judgement, Case No. IT-98-34-T, 31 March 2003, paras. 214-217. If Israel is found to be an occupying power in Gaza, the activities of its armed forces in the incident at issue would be regulated by the law of international armed conflict.

²⁹ Katanga Jugement rendu en application de l’article 74, para. 1179, citing article 42 of the Regulations concerning the Laws and Customs of War on Land (Hague Convention II), The Hague, 29 July 1899, and recalling the same position adopted by the Pre-Trial Chamber; Situation in the Democratic Republic of Congo, *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the confirmation of charges,” ICC-01/04-01/06-803tEN, 14 May 2007 (English translation), para. 212 (“Lubanga Confirmation of Charges Decision”).

³⁰ The term “occupation” referred to in this context is military or belligerent occupation within the meaning of international humanitarian law – that is one which is coercive and in the absence of

25. In its advisory opinion in 2004, the International Court of Justice (“ICJ”) concluded that Israel continued to have the status of an occupying power in Gaza.³² Thereafter in September 2005, Israel completed its unilateral withdrawal from Gaza, including dismantling its settlements and withdrawing its forces. However, Israel reserved its right to re-enter the Gaza Strip on the basis of military necessity and maintained control over the air and maritime space as well as borders of the Gaza Strip.³³
26. Israel maintains that following the 2005 disengagement, it is no longer an occupying power in Gaza as it does not exercise effective control over the area.³⁴
27. However, the prevalent view within the international community is that Israel remains an occupying power in Gaza despite the 2005 disengagement.³⁵ In general, this view is based on the scope and degree of control that Israel has retained over the territory of Gaza following the 2005 disengagement – including, *inter alia*, Israel’s exercise of control over border

consent (from the occupied state) – as opposed to ‘*pacific occupation*’ to which the sovereign government of the occupied state consents. See for example Tristan Ferraro, “Determining the beginning and end of an occupation under international humanitarian law”, *International Review of the Red Cross*, vol. 94, no. 885, Spring 2012, pp. 152-155 (“Ferraro”).

³¹ See ICJ, *Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, I.C.J. Reports 2005, 19 December 2005, paras. 172, 175-176; European Court of Human Rights, *Cyprus v. Turkey*, Application no. 25781/94, 10 May 2001, paras. 76-77; ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, 7 May 1997, para. 580; Ferraro, pp. 139-140; Yoram Dinstein, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* (2009), pp. 40-45 (“Dinstein”).

³² ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, 9 July 2004, paras. 78 *et seq.*, 101. Prior to this decision, Israel’s status as occupying power was recognized by, *inter alia*, the Oslo Accords, the Israeli Supreme Court, the UNSC, the UNGA, and the U.S. State Department.

³³ Israel Ministry of Foreign Affairs, “The Cabinet Resolution Regarding the Revised Disengagement Plan”, 6 June 2004 (stating, *inter alia*, “Israel will guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza airspace, and will continue to exercise security activity in the sea off the coast of the Gaza Strip.”).

³⁴ See, *e.g.*, Israeli Supreme Court, HCJ 9132/07, *Jaber Al-Bassiouni v. Prime Minister*, Judgment of 30 January 2008, para. 12 (“*Bassiouni* Judgement”); Israel Ministry of Foreign Affairs, “The Operation in Gaza: Factual and Legal Aspects”, July 2009, para. 30.

³⁵ Notably on 10 December 2009, UNGA Resolution 64/92 (adopted by 168 votes to 6, with 4 abstentions) affirmed the applicability of the Fourth Geneva Convention to the “Occupied Palestinian Territory”, while also on the same day explicitly referred to Gaza as part of the “Occupied Palestinian Territory” in a separate resolution, UNGA Resolution 64/94 (adopted by 162 votes to 9, with 5 abstentions). UNGA Res. 64/92 (10 December 2009) UN Doc A/Res/64/92; UNGA Res. 64/94 (10 December 2009) UN Doc A/Res/64/94; UN Doc A/64.PV/62 (for voting record). The ICRC also considers that Israel remains an occupying power in the Gaza Strip, taking the view that “[w]hile the shape and degree of this military occupation have varied, Israel has continuously maintained effective control” over the territory. Peter Maurer (as President of the ICRC), “Challenges to international humanitarian law: Israel’s occupation policy”, *International Review of the Red Cross*, vol. 94, Winter 2012, pp. 1504-1505, 1506.

crossings, the territorial sea adjacent to the Gaza Strip, and the airspace of Gaza; its periodic military incursions within Gaza; its enforcement of no-go areas within Gaza near the border where Israeli settlements used to be; and its regulation of the local monetary market based on the Israeli currency and control of taxes and customs duties.³⁶ The retention of such competences by Israel over the territory of Gaza even after the 2005 disengagement overall supports the conclusion that the authority retained by Israel amounts to effective control.³⁷

28. Although it no longer maintains a military presence in Gaza, Israel has not only shown the ability to conduct incursions into Gaza at will, but also expressly reserved the right to do so as required by military necessity.³⁸ This consideration is potentially significant considering that there is support in international case law for the conclusion that it is not a prerequisite that a State maintain continuous presence in a territory in order to qualify as an occupying power. In particular, the ICTY has held that the law of occupation would also 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.”³⁹ In this respect, it is also noted that the geographic proximity of the Gaza Strip to Israel potentially facilitates the ability of Israel to exercise effective control over the territory, despite the lack of a continuous military presence.⁴⁰
29. Overall, there is a reasonable basis upon which to conclude that Israel continues to be an occupying power in Gaza despite the 2005 disengagement. The Office has therefore proceeded on the basis that the situation in Gaza can

³⁶ See, e.g., UN HRC, “Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict”, 15 September 2009, A/HRC/12/48, para. 278. Notably, in the *Bassiouni* case, the Israeli Supreme Court held that although there is no longer an occupation in Gaza, Israel has certain ongoing responsibilities toward Gaza (including in relation to the supply of fuel and electricity) due to “the degree of control exercised by the State of Israel over the border crossings between it and the Gaza Strip” as well as the historical relationship of dependency by Gaza on Israel for electricity. *Bassiouni* Judgement, para. 12.

³⁷ Regarding the potential significance of retention of certain competences following unilateral withdrawal of foreign troops from occupied territory with respect to the assessment of effective control, see generally Ferraro, pp. 152-155.

³⁸ See Douglas Guilfoyle, “The *Mavi Marmara* Incident and Blockade in Armed Conflict, 81 BRITISH YEARBOOK OF INTERNATIONAL LAW 171, 182 (2011) (“Guilfoyle”); Dinstein, p. 40-45.

³⁹ ICTY, *Prosecutor v. Naletilić and Martinović*, Judgement, Case No. IT-98-34-T, 31 March 2003, para. 217 (footnotes omitted). See also *U.S. v. Wilhelm List et al.*, Nuremberg Military Tribunal, 8 LAW REPORTS OF MAJOR WAR CRIMINAL 38 (1949), pp. 55-56.

⁴⁰ See, e.g., Ferraro, p. 157.

be considered within the framework of an international armed conflict⁴¹ in view of the continuing military occupation by Israel.

(b) *Blockade and related legal issues*

30. The flotilla incident occurred in the context of, and was directly related to, Israel's imposition of a naval blockade against the Gaza Strip. The legality of the blockade has been the subject of controversy.⁴² The issue is relevant, to a certain extent, to the Office's assessment of the interception of the flotilla and the alleged commission of crimes within the Court's jurisdiction. Accordingly, the issue is briefly addressed below.

31. The 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea ("SRM") provides the most useful guidance on the applicable law of naval blockades. The SRM represents an attempt to codify customary international law, carried out by a panel of naval law experts of diverse nationalities with both military and academic backgrounds.⁴³ The SRM thus provides a useful expression of the crystallisation of maritime law of armed conflict in the context of an international armed conflict.⁴⁴ The SRM is referred to and relied upon by the Turkel Commission, the Turkish Commission, the UN HRC Fact-Finding Mission, and the Palmer-Uribe Panel in their respective discussion and analysis of Israel's blockade against Gaza. The introduction to article 8 in the Elements of Crimes provides that "[t]he

⁴¹ It is noted that although Israel does not consider itself to be an occupying power, it nevertheless considers that it is engaged in an armed conflict with Hamas and associated organised armed groups in Gaza, and the Israeli Supreme Court has specifically held that that such a conflict is international in character. See, for example, Israeli Supreme Court, HCJ 769/02, *Pub. Comm. Against Torture in Israel v. Israel*, Judgment of 13 December 2006), para. 21 ("*Targeted Killings Judgment*"); Israel Ministry of Foreign Affairs, "Hamas's illegal attacks on civilians and other unlawful methods of war", 2009. The Palmer-Uribe Panel also took the position that conflict between Israel and Hamas "should be treated as an international one for the purposes of the law of blockade." Palmer-Uribe Report, para. 73.

⁴² For example, the Turkel Commission and Palmer-Uribe Panel concluded that the naval blockade was lawful, while the Turkish Commission and UN HRC Fact-Finding Mission both reached the opposite conclusion. See Turkel Report, paras. 58-60; Palmer-Uribe Report, paras. 75-78; Turkish Report, pp. 62-63, 74-78; HRC Report, para. 58.

⁴³ Louise Doswald-Beck (ed.), *SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Explanation)* (1995), p. 67.

⁴⁴ For example, many academic commentators and governments (as reflected in military manuals) have indicated that the SRM can generally be considered a reliable restatement of the law of naval warfare, including the provisions related to blockades. See, e.g., Martin David Fink, "Contemporary Views on the Lawfulness of Naval Blockades", 1 *AEGEAN REVIEW OF THE LAW OF THE SEA AND MARITIME LAW* 191, 203 (2011) (but indicating that the customary status of paras. 102-104 is more contested); Andrew Sanger, "The Contemporary Law of Blockade and the Gaza Freedom Flotilla", pp. 409-410, in *YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW VOLUME 13* (M.N. Schmitt et al., 2010); Russell Buchan, "The Palmer Report and the Legality of Israel's Naval Blockade of Gaza", 61 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 264, 266 (2012).

elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict including, as appropriate, the international law of armed conflict applicable to armed conflict at sea". Accordingly, the Office has derived guidance from the SRM as part of its analysis and considered the SRM provisions in the context of the relevant provisions of the Statute.⁴⁵

32. If the blockade is lawful, then Israel would have been entitled (and in a sense obligated)⁴⁶ to take certain actions against vessels, such as the flotilla, in order to enforce it. Namely, the blockading power may intercept and capture neutral vessels believed on reasonable grounds to be breaching the blockade.⁴⁷ Additionally, such vessels may be lawfully subject to attack if "after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture".⁴⁸ This follows from the consideration that such clear resistance to interception or capture renders the vessels legitimate military objectives.⁴⁹ Any such attack nevertheless would have to comply with the principles of distinction, precaution, and proportionality.⁵⁰ In the alternative, if the blockade was unlawful, then Israel would not have been legally entitled to take measures to enforce the blockade, including those of capture and attack as outlined above.
33. The issue of the legality of the blockade therefore only has an impact on the assessment of the alleged war crime of intentionally directing an attack against civilian objects (under article 8(2)(b)(ii)). The considerations noted above are addressed in detail below later (see paras. 90-96).
34. Finally, whether or not the blockade is lawful has no impact on the assessment of the following other war crimes alleged to be relevant to the

⁴⁵ See also Rome Statute, article 21(1)(b).

⁴⁶ For Israel to maintain the blockade it had to be effective, and thus enforced. In this respect, it is recalled that effectiveness is an essential element of a lawful blockade.

⁴⁷ See SRM, paras. 98, 146(f). See also, for example, Wolff Heintschel von Heinegg, "Blockade", para. 42, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ("von Heinegg, MPEPIL"). It is reiterated that the applicable provisions of the SRM are referred to in this context not as the law but rather as a useful expression of the crystallization of maritime law of armed conflict in the context of an international armed conflict.

⁴⁸ SRM, paras. 67(a), 98. Under international humanitarian law, "attack" means an act of violence, whether in offence or in defence. Additional Protocol I, article 49(1); SRM, para. 13(b).

⁴⁹ See San Remo, paras. 40-41, 47-48, 52, 67(a). See also Additional Protocol I, article 52(2); von Heinegg, MPEPIL, para. 47 (explaining that such "[a]n act of clear resistance [...] is to be considered an effective contribution to enemy military action by purpose or use. Hence, such vessels [...] lose their civilian status and become legitimate military objectives whose destruction [or capture or neutralisation] offers a definite military advantage because, thus, the effectiveness of the blockade is preserved.").

⁵⁰ See SRM, paras. 39, 46.

flotilla incident because such conduct would in any case be prohibited: wilful killing (under article 8(2)(a)(i)); inhuman treatment (under article 8(2)(a)); wilfully causing serious injury to body and health (under article 8(2)(a)(iii)); extensive destruction and appropriation of property (under article 8(2)(a)(iv)); intentionally directing an attack against civilians (under article 8(2)(b)(i)); intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians (under article 8(2)(b)(iv)); intentionally directing an attack against personnel or objects involved in a humanitarian assistance mission (under article 8(2)(b)(iii)); and committing outrages upon personal dignity pursuant to (under article 8(2)(b)(xxi)).

(c) *Conclusion*

35. The Office's assessment below of alleged acts constituting war crimes focuses on the relevant provisions under articles 8(2)(a) and 8(2)(b) of the Statute as a result of the conclusion reached above concerning the existence of a military occupation.⁵¹ The analysis conducted would also be generally relevant and applicable if it was concluded, alternatively, that the law applicable in the present context and in light of the Israel-Hamas conflict, is the law of non-international armed conflict. Given the crimes of possible relevance to the present situation, which are substantially similar in the context both of international and non-international armed conflicts,⁵² it is not necessary at this stage to reach a conclusive view on the classification of the conflict. Additionally, as the protection accorded by the rules on international armed conflicts is broader than those relating to internal conflicts, it seems appropriate for the limited purpose of a preliminary examination, in cases of doubt, to apply those governing international armed conflicts.⁵³

⁵¹ See Elements of Crimes, article 8(2)(a), fn. 34 (noting that the term "international armed conflict" includes military occupation and that this applies to the corresponding element in each crime under article 8(2)(a)). The Office notes its position that the application of footnote 34 (in the Elements of Crimes) should not be expanded beyond that explicitly provided for. See Prosecution's Closing Brief in Lubanga, fn. 78. However, in *Lubanga*, Trial Chamber I appears to have taken the view that this footnote is also applicable to the corresponding element in under article 8(b). See Lubanga Judgment pursuant to Article 74, para. 542. Accordingly, in the analysis below, the Office has addressed the relevant crimes provided under both article 8(2)(a) and article 8(2)(b) for the sake of completeness.

⁵² See articles 8(2)(c)(i)-(ii), 8(2)(e)(i), 8(2)(e)(iii) and articles 8(2)(a)(i)-(iii), 8(2)(b)(i), 8(2)(b)(iii), 8(2)(b)(xxi) of the Statute.

⁵³ See Andreas Zimmermann, "Classification of armed conflicts as 'international armed conflicts' or 'armed conflicts not of an international character'", p. 485, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL (Triffterer, 2008); Antonio Cassese, INTERNATIONAL LAW (2nd ed. 2005) p. 420.

2. Acts allegedly constituting war crimes

36. The Office focused on the most relevant provisions under articles 8(2)(a) and 8(2)(b) of the Statute in light of the alleged facts and information in its possession.

(a) *Wilful killing pursuant to Article 8(2)(a)(i)*

37. The war crime of “wilful killing” under article 8(2)(a)(i) of the Statute requires the following three elements: (i) the perpetrator killed one or more persons; (ii) such person or persons were protected under one or more of the 1949 Geneva Conventions; and (iii) the perpetrator was aware of the factual circumstances that established the protected status. Pursuant to article 8(2)(a)(i), the war crime of wilful killing occurs when it is committed by a person who, by act or omission, causes the death of one or more persons referred to in articles 13, 24, 25 and 26 of Geneva Convention I, articles 13, 36 and 37 of Geneva Convention II, article 4 of Geneva Convention III (“GC III”) and articles 4, 13 and 20 Geneva Convention IV (“GC IV”).⁵⁴

38. During the boarding and takeover by the IDF, nine passengers⁵⁵ on board the *Mavi Marmara* were killed by IDF forces, as a result of gunshot wounds.⁵⁶ A tenth passenger later died in May 2013 as a result of the injuries he sustained during the incident, which included at least one gunshot wound to the head.⁵⁷

39. It is uncontested that the ten passengers were killed by IDF soldiers as a result of the interception operation.⁵⁸ However, the precise circumstances in which these killings were committed remains subject to some uncertainty as a result of the conflicting accounts of the events that took place during the

⁵⁴ Situation in the Democratic Republic of the Congo, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Decision on the confirmation of charges”, ICC-01/04-01/07-717, 30 September 2008, paras. 286-287 (“Katanga and Ngudjolo Decision on Confirmation of Charges”).

⁵⁵ All ten deceased were male, nine of whom were of Turkish nationality and one who was of Turkish and US dual nationality, and were aged from 19 to 61 years old. Turkish Report, pp. 18, 27-28; HRC Report, pp. 29-30; Al Jazeera, “Mavi Marmara death toll rises to 10”, 25 May 2014.

⁵⁶ Palmer-Uribe Report, para. 56; Turkel Report, pp. 191-192; Turkish Report, pp. 18, 26-28.

⁵⁷ Al Jazeera, “Mavi Marmara death toll rises to 10”, 25 May 2014. This individual, Uğur Suleyman Söylemez, died after being in a coma for nearly four years after the incident. See *ibid.*; See also HRC Report, p. 30; Palmer-Uribe Report, para. 130; Turkish Report, p. 29.

⁵⁸ See Palmer-Uribe Report, para. 127.

boarding and takeover of the vessel and overall lack of sufficient information regarding each individual killing.⁵⁹

40. A little before 4:30 a.m., Israeli forces made an attempt to board the *Mavi Marmara* from Morena speedboats. The information available indicates that the IDF forces' initial efforts were met with resistance from some passengers on board the vessel, who shot water at the soldiers from a hose, shone bright lights down towards the Morena speedboats, repelled the IDF's attempts to board, and threw objects from the *Mavi Marmara* at the soldiers.⁶⁰ After this failed attempt to board the vessel, 15 IDF soldiers fast-roped down onto the vessel from a helicopter.⁶¹ It appears based on the information available that these IDF soldiers immediately encountered violent resistance from a large group of passengers who had assembled on the roof of the vessel and attacked the IDF soldiers with, *inter alia*, their fists, wooden clubs, iron rods, chains, slingshots (used with metal and glass balls), and knives.⁶² During these initial events, it appears that three soldiers were attacked and overpowered by a group of passengers and taken to the hold of the ship.⁶³ The available information indicates that overall nine IDF soldiers were seriously wounded by passengers.⁶⁴
41. A little more than five minutes later at 4:36 a.m., 12 more IDF soldiers descended on to the roof from a second helicopter, and at 4:46 a.m., 14 IDF soldiers landed from a third helicopter.⁶⁵ The information available indicates that these IDF soldiers, as well as other soldiers attempting to board the vessel from Morena speedboats during this period, continued to encounter some violent resistance from some of the passengers.⁶⁶ Shortly thereafter, the IDF forces secured the roof and lower decks as well as the bridge of the vessel, restrained and handcuffed passengers, and completed the takeover at

⁵⁹ For example, compare Turkel Report, pp. 141-168, 210-215, 247-256, 261-262, with Turkish Report, pp. 21-26. See also Palmer-Urbe Report, paras. 118 (noting that there is conflicting material on many of the key points regarding the confrontation that occurred when the IDF soldiers boarded the *Mavi Marmara* and expressing that it "may never be possible to fully establish precisely what occurred"), 127-128 (noting that no satisfactory explanation has been provided for how the individual deaths occurred); HRC Report, para. 115.

⁶⁰ See HRC Report, paras. 112-113; Turkel Report, para. 127.

⁶¹ Turkel Report, pp. 142-148; Turkish Report, pp. 20-23. See also HRC Report, paras. 112-113; Palmer-Urbe Report, para. 119.

⁶² Palmer-Urbe Report, paras. 119, 123-124; HRC Report, paras. 114-116; Turkel Report, pp. 149-163, 247-250, 255; Turkish Report, p.114.

⁶³ Palmer-Urbe Report, para. 125; Turkel Report, pp. 151-154, 158-164, 167-172; HRC Report, para. 125. See also Turkish Report, p. 115.

⁶⁴ See Turkel Report, pp. 192-193.

⁶⁵ Palmer-Urbe Report, para. 119; Turkel Report, pp. 164-165.

⁶⁶ Turkel Report, pp. 164-168, 251.

approximately 5:17 a.m.⁶⁷ It is generally uncontested that, in response to the resistance from some of the passengers during this entire period, the IDF soldiers used various types of force against the passengers of the *Mavi Marmara* including: hand-to-hand combat and use of less-lethal (such as flash bang grenades, tasers, shooting of paintballs and beanbags) and lethal means (live ammunition).⁶⁸ It is noted that by some accounts of passengers, live ammunition was fired from both the Morena speedboats and helicopters, including possibly prior to the boarding, resulting in the killing and injuring of some individuals.⁶⁹ By contrast, the Turkel Commission concluded that no firing from helicopters took place and that the only force used by soldiers from the helicopters was flash bang grenades that were deployed from the first helicopter in the initial stages of the fast-roping in an attempt to stop the passengers on the deck below from interfering with the ropes.⁷⁰ The Turkel Commission also concluded that during the operation, the IDF soldiers alternated between non-lethal and lethal force as needed to protect themselves and other soldiers, depending on the threat posed.⁷¹ Overall, the information available makes it difficult to establish the exact chain of events in light of the significantly conflicting accounts of when live ammunition was first used and from where it emanated.⁷²

42. Ultimately, during the course of the operation to secure control of the top and lower decks of the vessel, the IDF soldiers' use of such lethal and non-lethal weapons against passengers of the *Mavi Marmara*, resulted in serious injuries to many passengers and the deaths of ultimately ten passengers.⁷³ As noted above, these ten passengers died as a result of gunshot wounds sustained during the incident.⁷⁴ Based on the available information, there is a reasonable basis to believe that the conduct of IDF soldiers was the cause of death of the ten victims.⁷⁵ It is noted that in this regard, the reports of the UN HRC Fact-Finding Mission, Palmer-Uribe Panel, and Turkish Commission

⁶⁷ Palmer-Uribe Report, 119; Turkel Report, pp. 164-168, 172.

⁶⁸ Turkel Report, p. 150; Turkish Report, pp. 20-23; Palmer-Uribe Report, para. 113; HRC Report, para. 128.

⁶⁹ Turkish Report, pp. 20, 22-23.

⁷⁰ Turkel Report, para. 230.

⁷¹ See Turkel Report, paras. 229-230.

⁷² Compare for example Turkish Report, pp. 20, 22-23 with Turkel Report, paras. 229-230. See also Palmer-Uribe Report, para. 120; HRC Report, paras. 112, 115.

⁷³ Palmer-Uribe Report, para. 56; HRC Report, paras. 117-130, pp. 29-30; Turkel Report, pp. 191-192; Turkish Report, pp. 18, 26-28; Times of Israel, "Comatose Turkish man injured on Mavi Marmara dies", 24 May 2014.

⁷⁴ Palmer-Uribe Report, para. 56; HRC Report, pp. 29-30; Turkel Report, pp. 191-192; Turkish Report, pp. 18, 26-28; Al Jazeera, "Mavi Marmara death toll rises to 10", 25 May 2014.

⁷⁵ See Katanga and Ngudjolo Decision on Confirmation of Charges, para. 296.

are consistent in attributing the killings of the passengers to the conduct of the IDF soldiers.⁷⁶ The Turkel Commission acknowledged that “upon the completion of the takeover operation of the *Mavi Marmara*, there were, regrettably, nine deceased flotilla participants”.⁷⁷ Although the Turkel Commission does not discuss the circumstances of these deaths, it never explicitly denies that these men were killed by IDF soldiers. The Israeli Point of Contact to the Palmer-Uribe Panel later explained that the chaotic circumstances of the situation made it “difficult to identify the specific incidents described by soldiers as related to specific casualty from among the nine activists who died during the takeover.”⁷⁸

43. In order for the killings to constitute wilful killing pursuant to article 8(2)(a)(i), the ten men must have qualified as protected persons under one or more of the 1949 Geneva Conventions at the relevant time. Under article 4 of the GC IV, protected persons are defined as civilians who “at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the Conflict or Occupying Power of which they are not nationals.” Regarding the term “in the hands of”, it is not limited to the physical capture or control, but also means that “the person is in the territory which is under the control of the Power in question.”⁷⁹
44. According to the ICRC commentary to article 4 of the GC IV, nationals of neutral States *in occupied territory* are protected persons and the Convention is applicable to them, regardless of the existence or non-existence of normal diplomatic representation.⁸⁰ The passengers of the *Mavi Marmara*, including the ten victims, were nationals of neutral States although they were not “in occupied territory” since they were aboard a vessel intercepted on the high seas. In this respect, it is noted that article 4 of GC IV does not specifically address or cover civilians on the high seas. However, as observed by the Palmer-Uribe Panel, the SRM does not exempt civilians of neutral States on the high seas from status as protected persons.⁸¹ The Commission considered

⁷⁶ HRC Report, paras. 117, 128, pp. 29-30; Palmer-Uribe Report, paras. 127, 134; Turkish Report, pp. 26-28.

⁷⁷ Turkel Report, pp. 190-192.

⁷⁸ Palmer-Uribe Report, para. 127.

⁷⁹ Katanga and Ngudjolo Decision on Confirmation of Charges, fn. 399.

⁸⁰ ICRC Commentary, p. 48.

⁸¹ The Explanation on the SRM suggests that individuals who have fallen into the power of a belligerent “may not be ill-treated in any way and [...] the authority is under the obligation to assure that officials treat the persons correctly and that they are kept in healthy conditions. Further, if any of these persons are in need of medical treatment, this should be given in accordance with the needs of the individuals concerned and without any adverse discrimination.” SRM Explanation, at 224, quoted in Palmer-Uribe Report, Appendix I, para. 58.

that this view might be justified on the basis, for example, that persons falling into the hands of a belligerent while on the high seas are not in a practical position to appeal to the protection of their diplomatic representatives.⁸² This logic is also consistent with the view expressed in the Commentary to GC IV, which suggests that civilians should enjoy full protection under GC IV when the protection afforded by the diplomatic relations between their state of nationality and the attacking state may not be effective, such as in occupied territory.⁸³ For this reason, although the Office notes the language of article 4 of GC IV, it will proceed on the basis that the victims are protected persons for the limited purpose of this preliminary examination. It is noted that in any event, the passengers generally could fall within the protection afforded to civilians under Common Article 3 of the Geneva Conventions. *A fortiori*, they should enjoy such protected status in situations governed by the law of international armed conflict such as the present one.⁸⁴

45. The Turkel Commission acknowledged that the participants in the flotilla, including those on the *Mavi Marmara*, were predominantly civilians, consisting of activists whose primary goal appeared to be to bring publicity to the humanitarian situation in Gaza by breaching the blockade.⁸⁵ However, the Commission concluded that among such passengers of the *Mavi Marmara*, there was a distinguishable group of passengers, organised and controlled by, or acting on behalf of, IHH,⁸⁶ who appeared to have a different agenda and were the ones who assembled on the upper decks in preparation to

⁸² Palmer-Urbe Report, Appendix I: The Applicable International Legal Principles, para. 58.

⁸³ GC IV, article 4; ICRC Commentary, pp. 48-50.

⁸⁴ See ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, I.C.J. Reports 27 June 1986, para. 218 (in which the ICJ stated: "Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts").

⁸⁵ Turkel Report, p. 233.

⁸⁶ IHH is a Turkish NGO based in Istanbul which was one of the primary organisers of the flotilla campaign and owned two vessels in the flotilla, the *Mavi Marmara* and the *Gazze I*. See Palmer-Urbe Report, para. 86. IHH is a humanitarian organisation established in 1992 which provides humanitarian relief on a global scale and seeks to raise public awareness about human rights violations. It has special consultative status with the UN Economic and Social Council. See IHH website. However, IHH has been accused of providing support to Islamist fighters in Bosnia, Chechnya, and Afghanistan, and more recently Syria. See for example Iason Athanasiadis (Christian Science Monitor), "Targeted by Israeli raid: Who is the IHH?", 1 June 2010; Jeffrey Fleishman (LA Times), "Turkish charity defends actions", 6 June 2010; CNN, "Police raid Islamic charity in Turkey", 14 January 2014. In 2008, Israel banned the organization on the basis of its alleged ties with Hamas and the Union of Good, an organization that is affiliated with the Muslim Brotherhood and provides financial support to Hamas. Turkel Report, para. 162.

confront the Israeli forces during the interception.⁸⁷ The Turkel Commission concluded that the Captain of the *Mavi Marmara* and this group of IHH activists who participated in the violence against the IDF soldiers boarding the vessel were civilians directly participating in hostilities and therefore subject to targeting.⁸⁸ The Commission considered that the IHH activists' resistance to the boarding of the *Mavi Marmara* was "planned and extremely violent" and their acts were directly connected to the international armed conflict between Israel and the Hamas as the attempt to breach the blockade can be viewed as an attempt to privilege Hamas by establishing that the blockade was not effective.⁸⁹

46. Under international humanitarian law, a civilian taking an active or direct part in hostilities loses his civilian status and may be subject to lawful attack, until such time that he ceases said participation.⁹⁰ PTC I in the *Abu Garda* case, following the case law of the ICTY, considered that "any determination as to whether a person is directly participating in hostilities must be carried out on a case-by-case basis".⁹¹
47. In the *Katanga* case, TC II noted that the ICRC Commentary on article 13(3) of Additional Protocol II ("AP II") defines "hostilities" as "acts of war that by their nature or purpose struck at the personnel and 'matériel' of enemy armed forces".⁹² Similarly, in the *Galić* case, the ICTY held that "[t]o take a 'direct' part in the hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel or matériel of the enemy armed forces."⁹³ However, the precise type or nature of activities that may constitute direct participation in hostilities is subject to some uncertainty.
48. The ICRC has expressed that three constitutive elements are required for an act to qualify as direct participation in hostilities: (i) the act must be likely to adversely affect the military operations or military capacity of a party to an

⁸⁷ Turkel Report, pp. 233-234. See also *ibid.*, p. 216.

⁸⁸ Turkel Report, pp. 233-242, 278. See also *ibid.*, p. 216 .

⁸⁹ Turkel Report, para. 199.

⁹⁰ See, e.g., AP I, article 51(3); AP II, article 13(3); Common Article 3(1) of the Geneva Conventions; J-M. Henckaerts and L. Doswald-Beck, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Volume 1: Rules (2005), pp. 19-24; *Targeted Killings* Judgment, paras. 23, 29-30.

⁹¹ Situation in Darfur, Sudan, *The Prosecutor v. Bahar Idriss Abu Garda*, "Decision on the Confirmation of charges", ICC-02/05-02/09-243-Red, 8 February 2010, para. 83.

⁹² See *Katanga* Jugement rendu en application de l'article 74, para. 790, referring to Comité international de la Croix-Rouge (Yves Sandoz et autres [Dir. pub.]), *Commentaire des Protocoles additionnels du 8 juin 1977 aux Conventions de Genève du 12 août 1949* (1986), p. 1475.

⁹³ ICTY, *Prosecutor v. Galić*, Judgment, IT-98-29-T, 5 December 2003, para. 48.

armed conflict (threshold of harm); (ii) there must be a direct causal link between the act and the harm likely to result (direct causation); and (iii) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).⁹⁴ Although the ICRC's proposed criteria in this respect are not a statement of customary international law on the subject, it nevertheless provides a useful analytical tool for assessing the type of activities that may amount to direct participation in hostilities.

49. Based on the information available, it does not appear that the passengers' resistance to the IDF interception and boarding of the vessel amounts to taking a direct part in hostilities so as to deprive those particular passengers of their protected civilian status.
50. On one hand, the passengers' efforts to breach the blockade (and thereby render it ineffective), including through violence used against IDF soldiers, may potentially have amounted to acts directly causing the required threshold of harm to Israel's military operations and/or capacity. However, as explained by the ICRC, "in order to amount to direct participation in hostilities, an act must not only be *objectively likely* to inflict harm [...] but it must also be *specifically designed to do so in support of a party to an armed conflict and to the detriment of another*".⁹⁵ The information available does not indicate that the crew and passengers' actions were specifically designed to support Hamas by harming Israel. Rather, as participants in the Gaza Freedom Flotilla, their actions appeared to be designed to address and generate publicity about the serious humanitarian situation in Gaza and to protest the blockade, which they considered inhumane and argued violated the human rights of Palestinian civilians.⁹⁶ Although the participants in the flotilla sought to contribute to bringing an end to the blockade, their conduct in this respect appears not to have been designed to support Hamas (such as by making shipments of weapons more accessible to them), but instead appears to have been designed to assist the plight of the civilian population of Gaza and raise attention to their cause.
51. Although some passengers used violence against the IDF soldiers, injuring a number of soldiers, and thereby caused harm, the available information does

⁹⁴ Nils Melzer, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), p. 46 ("Melzer, ICRC Guidance"). See also *ibid.*, pp. 63-64.

⁹⁵ Melzer, ICRC Guidance, p. 58 (emphasis in original).

⁹⁶ See Referral - Appendix II, p. 44; Palmer-Urbe Report, paras. 86-87. See generally Melzer, ICRC Guidance pp. 60-62.

not indicate that such conduct was specifically designed to support Hamas. Rather, the information available suggests that the passengers who engaged in such conduct did so in the context of resisting the IDF soldiers' efforts to board and take control of the vessel. In this respect, it appears that their acts were intended to oppose Israel's enforcement of the blockade in furtherance of the flotilla's humanitarian and politically focused objectives, as noted above, rather than specifically designed to support a party to the conflict. This conclusion is not altered by the fact that the passengers may have made advance preparations for violent resistance, that they may have resorted to violence first, or that some of them may have harbored pre-existing animosity towards Israel.⁹⁷

52. Generally addressing an arguably similar factual pattern, the ICRC has explained:

During armed conflict, political demonstrations, riots, and other forms of civil unrest are often marked by high levels of violence and are sometimes responded to with military force. In fact, civil unrest may well result in death, injury, and destruction and, ultimately, may even benefit the war effort of a party to the conflict by undermining the [...] authority and control of another party through political pressure, [...] destruction, and disorder. It is therefore important to distinguish direct participation in hostilities – which is specifically designed to support a party to an armed conflict against another – from violent forms of civil unrest, the primary purpose of which is to express dissatisfaction with the [...] authorities.⁹⁸

53. Overall, the information available provides a reasonable basis to believe that all of the passengers of the *Mavi Marmara*, including those who resorted to violence against the IDF soldiers, qualify as protected persons under international law.⁹⁹ Consequently, whether or not any of the ten deceased engaged in some degree of violence against the IDF soldiers, the information available provides a reasonable basis to believe that they still qualified as protected persons at the time they were killed by the IDF during the takeover of the vessel. In this regard, the Office also recalls the presumption of civilian

⁹⁷ See generally Turkel Report, pp. 200-216. It is noted that the Turkel Commission alleged that IHH supports Hamas through the Union of the Good coalition. See Turkel Report, pp. 197-200. However, at this stage, there is insufficient information to substantiate this allegation. See also Palmer-Urbe Report, para. 86. In any case, this alleged connection alone is insufficient to demonstrate that the flotilla campaign, which was organised by a number of organizations in addition to IHH, and actions undertaken by participants in this campaign were designed to support Hamas in particular in its conflict against Israel.

⁹⁸ Melzer, ICRC Guidance, p. 63.

⁹⁹ This conclusion applies equally to the passengers of the other relevant vessels in the flotilla.

status, as embodied under article 50 of Additional Protocol I (“AP I”), providing that in case of doubt, persons are to be presumed to be protected against direct attack.

54. The information available also indicates that the civilian status of the passengers of the flotilla was conveyed to the IDF commanders and soldiers in advance of the interception operation. In the operation’s rules of engagement, which were communicated to the soldiers, the passengers were referred to as “foreign citizens who, according to the existing information, are *not* combatants”.¹⁰⁰ Similarly, several IDF soldiers testified that during the preparations for the operation, they were briefed to expect to encounter “peace activists”.¹⁰¹ Recognition of the status of the passengers is also reflected in the rules of engagement’s stipulation that lethal force was to be used only as a last resort in response to an immediate danger to life.¹⁰² During an operational briefing on 20 May 2010, it was also reiterated that lethal force should be used only in a life threatening situation in relation the person presenting the danger, but nonetheless that where possible “the benefit of doubt should be given”.¹⁰³ In the circumstances of this incident, it thus appears that the IDF soldiers who boarded and took over the vessel would have been aware of the factual circumstances that established such protected status of the passengers.¹⁰⁴ Even upon encountering violent resistance from some passengers during the boarding of the vessel, in case of doubt, the presumption of civilian status should have prevailed, especially taking into account the information provided to the IDF soldiers prior to the operation.
55. Finally, it is noted that the passengers’ protected civilian status did not preclude, in certain circumstances, the possibility for the lawful use of force by IDF soldiers, in individual self-defence, against passengers who resorted to violence. As explained by the ICRC, “[t]he presumption of civilian protection does not exclude the use of armed force against civilians whose conduct poses a grave threat to public security, law and order without clearly amounting to direct participation in hostilities. In such cases, however, the use of force must be governed by the standards of law enforcement and of individual

¹⁰⁰ See Turkel Report, pp. 133-134.

¹⁰¹ See Turkel Report, fn. 518.

¹⁰² See Turkel Report, pp. 134-135. The information available indicates that this was well understood by the soldiers taking part in the operation. See Turkel Report, pp. 135-136. See also *ibid.*, p. 125.

¹⁰³ See Turkel Report, p. 135.

¹⁰⁴ See Turkel Report, para. 206, p. 243.

self-defence, taking into account the threat to be addressed and the nature of the surrounding circumstances.”¹⁰⁵

56. Under the Rome Statute, self-defence is recognised as a ground for excluding criminal responsibility.¹⁰⁶ Pursuant to article 31(1)(c), a person shall not be held criminally responsible if, at the time of that person’s conduct, “the person acts reasonably to defend himself or another person [...] against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or other person”. This provision thus requires an assessment of: (i) the existence of danger to a person from an imminent and unlawful use of force; and (ii) whether the person acted reasonably and proportionately to avert the danger.
57. In this context, the Office notes, however, that the evaluation of grounds for excluding criminal responsibility is distinct from the determination made at the preliminary examination stage regarding whether there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been or are being committed (*i.e.*, establishing subject-matter jurisdiction). Accordingly, the issue of whether a perpetrator committed a crime in self-defence and therefore may be absolved from criminal responsibility, is to be properly addressed at the investigation and trial stages, and not the preliminary examination stage.¹⁰⁷
58. In any case, with respect to the flotilla incident, the information available suggests that the level of force used, in at least some instances during the incident, appears to have been excessive. In particular, there is no information that any deceased were armed with lethal weapons when they were shot by IDF soldiers.¹⁰⁸ The findings of the post-mortem medical examinations carried out by both Israeli and Turkish pathologists indicate that most of the deceased were shot

¹⁰⁵ Melzer, ICRC Guidance, p. 76.

¹⁰⁶ See Rome Statute, article 31(1)(c).

¹⁰⁷ For example, see generally Kenya Article 15 Decision, paras. 29, 32 (expressing that the criminal responsibility of an individual is “something which is not at stake for the authorization of an investigation”, and that the reasonable basis standard used at the preliminary examination stage was “not designed to determine whether a particular person was involved in the commission of a crime within the jurisdiction of the Court, which may justify his arrest” but instead “has a different object, a more limited scope and serves a different purpose”).

¹⁰⁸ See Palmer-Uribe, para. 128. However, it is noted that video footage appears to show one of the passengers holding an open fire hose when he is shot and killed by a single shot to the head or throat fired from a nearby speedboat. See for example Palmer-Uribe Report, para. 128. In this regard, it is acknowledged that a fire hose can have significant water pressure, including that which potentially is sufficient to knock a person off his feet and cause him or her to fall overboard, and thereby, in certain circumstances, potentially pose a threat to life.

multiple times (including to the head, neck, trunk, and limbs).¹⁰⁹ The Turkish autopsy reports also indicate that five of the deceased men were shot in the head at close range.¹¹⁰

59. Additionally, there is information indicating that one of the deceased was shot in the forehead while taking photos,¹¹¹ and that another was filming with a small video camera when he was first hit with live fire.¹¹² The autopsy report and some witness accounts further suggest that this latter individual was already lying on the ground wounded when the fatal shot was delivered.¹¹³ There is also information available suggesting that another man killed was engaged in helping to bring injured passengers inside the ship to be treated around the time when he was shot.¹¹⁴ Additionally, one witness claims that even after he and others waved white flags to indicate their surrender, IDF soldiers continued shooting and subsequently at least two men were shot and killed.¹¹⁵ Similarly, according to other witness statements, IDF soldiers kept shooting even after attempts had been made to surrender and/or individuals were already wounded.¹¹⁶
60. In summary, the information available indicates that all of the passengers of the *Mavi Marmara* qualified as protected persons under international law, that the IDF soldiers were aware of the factual circumstances that established such protected status, that the passengers' resistance to the IDF forces' interception of the vessel did not amount to direct participation in hostilities and that during the flotilla incident, IDF soldiers killed ten passengers of the *Mavi Marmara*. As indicated above (para. 9), the Office offered Israel the opportunity to provide additional information but did not receive any in return.

¹⁰⁹ Turkel Report, pp. 191-192; Turkish Report, pp. 27-28; Referral – Appendix IX (Autopsy Reports). External examinations of the deceased were carried out by Israeli pathologists prior to repatriation of the bodies to Turkey. However, no autopsies were performed by the Israeli authorities in light of a request by the Turkish government. Turkel Report, pp. 114, 190-191. Autopsies of the nine men killed on board the *Mavi Marmara* were later carried out in Turkey.

¹¹⁰ Turkish Report, p. 26. See also Palmer-Uribe Report, para. 128.

¹¹¹ Referral - Appendix I, p. 49; HRC Report, para. 120.

¹¹² HRC Report, para. 117 (also indicating that he was not engaged in the fighting with the soldiers), p. 29.

¹¹³ See Palmer-Uribe Report, para. 128; Turkish Report, p. 27. HRC Report, para. 118 (making a similar conclusion regarding the circumstances of this particular killing).

¹¹⁴ HRC Report, p. 30.

¹¹⁵ Turkish Report, p. 128.

¹¹⁶ Palmer-Uribe Report, para. 126; HRC Report, para. 123; Turkish Report, p. 26; Referral - Appendix I, p. 22.

61. Accordingly, while bearing in mind that self-defence is a possible ground for excluding criminal responsibility, the information available at this stage provides a reasonable basis to believe that the killing of passengers of the *Mavi Marmara* amounted to the war crime of wilful killing pursuant to article 8(2)(a)(i) of the Statute.
- (b) *Inhuman treatment pursuant to Article 8(2)(a)(ii)-2 and Committing outrages upon personal dignity, in particular humiliating and degrading treatment pursuant to Article 8(2)(b)(xxi)*
62. The war crime of “inhuman treatment” under article 8(2)(a)(ii) requires the following three elements: (i) the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; (ii) such person or persons were protected under one or more of the Geneva Conventions of 1949; and (iii) the perpetrator was aware of the factual circumstances that established the protected status.¹¹⁷
63. The findings of the Turkish and Turkel Commissions regarding the treatment the passengers on board the *Mavi Marmara* after the takeover differ significantly.¹¹⁸ For example, the Turkel Commission concluded that reasonable treatment was provided to the passengers throughout the journey to Ashdod.¹¹⁹ By contrast, on the basis of statements from passengers, the Turkish Commission found that during this period, passengers “were subjected to severe physical, verbal and psychological abuses” by the IDF soldiers.¹²⁰
64. Despite the conflicting accounts, on balance, the information available provides a reasonable basis to believe that some passengers were subjected to mistreatment by IDF soldiers after the initial takeover, while being detained aboard the *Mavi Marmara* on route to the port at Ashdod.¹²¹ The statements and accounts of passengers indicate that such mistreatment included: overly tight handcuffing for extended periods (in some instances causing swelling, discoloration, and numbing in their hands and causing

¹¹⁷ Elements of Crimes, article 8(2)(ii)-2, para. 1. See also Katanga and Ngudjolo Decision on Confirmation of Charges, para. 356.

¹¹⁸ See also Palmer-Uribe Report, para. 136.

¹¹⁹ Turkel Report, pp. 176-190.

¹²⁰ Turkish Report, p. 115. See also *ibid.*, pp. 35-39.

¹²¹ See, for example, Palmer-Uribe Report, para. 137 (noting that “[a]lthough not all the passengers allege mistreatment, in none of the other events to which the statements of the 93 witnesses relate are the witnesses generally more consistent than upon this matter” and finding the more general explanations offered by the Turkel Report in response “do not answer all the specific allegations made in the witness statements”).

lingering problems after the incident); being beaten; being denied access to toilet facilities and medication (such as for diabetes, asthma, and heart conditions); being given only limited access to food and drink; being forced to remain kneeling on the decks, exposed to the sun (reportedly resulting in 13 passengers receiving first-degree burns) as well as continuous seawater spray and wind gusts from helicopters hovering nearby, for a period of several hours; being subjected to various physical and verbal harassment such as pushing, shoving, kicking, and threats and intimidation (including from dogs which reportedly also bit a few passengers); being blindfolded or having hoods put over their heads.¹²²

65. As a result of the denial of access to bathrooms, some passengers reportedly soiled themselves, and in one described case, “a kneeling passenger who tried to move away from urine coming down from his neighbour had his face pressed down into the puddle.”¹²³ There is some information that those who were permitted to use toilet facilities were kept handcuffed and were watched.¹²⁴
66. According to the Turkel Report, only those passengers who posed a continuing security threat or danger to the soldiers (“mainly young men who the forces were concerned would try to attack them or to cause a disturbance”¹²⁵) were handcuffed, and later some of those who had been handcuffed had their restraints loosened or removed.¹²⁶ The HRC Fact-Finding Mission however found that the vast majority of passengers were handcuffed, though some women and elderly were not handcuffed or were initially handcuffed and then un-cuffed after a relatively short time.¹²⁷ Both the HRC Fact-Finding Mission and Turkish Commission also found that many passengers who complained of pain caused by handcuffs were ignored or in some cases had their handcuffs further tightened.¹²⁸
67. The Turkish Commission also concluded that IDF personnel also deliberately prevented passengers from providing first aid to the injured despite repeated requests and deliberately denied medical treatment or deliberately

¹²² Palmer-Uribe Report, para. 139; Turkish Report, pp. 36-38; HRC Report, paras. 133-135; Referral - Appendix I, pp. 36-37.

¹²³ Turkish Report, p. 37.

¹²⁴ Turkish Report, p. 37.

¹²⁵ Turkel Report, p. 177.

¹²⁶ Turkel Report, pp. 177-179.

¹²⁷ HRC Report, para. 133.

¹²⁸ Turkish Report, p. 36.

mistreated wounded passengers.¹²⁹ The UN HRC Fact-Finding Mission found that many wounded passengers encountered difficulties receiving medical treatment and had to wait hours in some cases.¹³⁰ Based on statements of the medical teams, the Turkel Commission however found that following the take-over, evacuation of the wounded began and that medical attention was prioritised on the basis of objective medical criteria.¹³¹ Faced with the conflicting accounts contained in the Turkish and Turkel Reports, the Palmer-Uribe Panel concluded that the Turkel Report “provides a detailed and plausible description of the steps that were taken by the Israeli forces to ensure that all wounded were treated in a timely and properly [*sic*] manner” and that “[w]hile there might have been initial delays due to the chaotic situation on board of the *Mavi Marmara*, [...] appropriate medical treatment was provided as soon as circumstances allowed.”¹³²

68. Overall, based on the information available at this stage, it is unclear whether the difficulties that some wounded passengers encountered in receiving medical treatment was due to the deliberate acts of the IDF or alternatively was an unintended consequence of the logistical and practical difficulties faced by medical personnel in locating and treating the injured on board the vessel. Taking into account these considerations and the available information, it appears that at this stage there is not a reasonable basis to believe that the mistreatment of passengers also included deliberate denial of medical treatment.
69. As described above, the information available indicates that some passengers of the *Mavi Marmara* were subjected to mistreatment in other forms by the IDF forces. However, it does not appear that the mistreatment by the IDF amounts to infliction of “severe” pain or suffering so as to fall within the intended scope of inhuman treatment under article 8(2)(a)(ii).¹³³ According to the available information, it therefore does not appear that the criteria of article 8(2)(a)(ii) is met in relation to the mistreatment of passengers by the IDF. Instead, considering the level of suffering and discomfort as well as humiliation caused to passengers, the mistreatment of the passengers on the *Mavi Marmara* by IDF soldiers, could rather amount to the war crime of

¹²⁹ Turkish Report, pp. 28, 30-31.

¹³⁰ HRC Report, paras. 130-132.

¹³¹ Turkel Report, pp. 172-175.

¹³² Palmer-Uribe Report, para. 144. See also Turkel Report, pp. 172-175.

¹³³ For example, inhumane treatment has been held to include use of persons as human shields and imprisoning civilians with their hands tied for many hours in a classroom filled with dead bodies. See ICTY, *Prosecutor v. Kordić and Čerkez*, Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 256; Katanga and Ngudjolo Decision on Confirmation of Charges, para. 363.

outrages upon personal dignity, in particular humiliating and degrading treatment pursuant to article 8(2)(b)(xxi).

70. The war crime of “outrages upon personal dignity” requires the two following elements: (i) the perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons; and (ii) the severity of the humiliation, degradation or other violation was of such a degree as to be generally recognized as an outrage upon personal dignity.¹³⁴
71. Considering the form and duration of the acts described above¹³⁵ as well as the physical and mental suffering likely resulting from it,¹³⁶ there is a reasonable basis to believe that the IDF soldiers’ alleged mistreatment of passengers detained aboard the *Mavi Marmara* constituted humiliating and degrading treatment. In addition, taking into account the circumstances and nature of this mistreatment, there is a reasonable basis to believe that the alleged conduct was sufficiently serious to constitute an outrage upon the personal dignity of the passengers concerned.
72. The information available therefore provides a reasonable basis to believe that the war crime of outrages upon personal dignity pursuant to article 8(2)(b)(xxi) was committed by IDF soldiers in relation to the treatment of the affected passengers on board the *Mavi Marmara* during the journey to the port at Ashdod.
- (c) *Wilfully causing great suffering, or serious injury to body or health pursuant to Article 8(2)(a)(iii)*
73. The war crime of “wilfully causing great suffering, or serious injury to body or health” under article 8(2)(a)(iii) requires the following elements: (i) the perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons; (ii) such person or persons were protected under one or more of the Geneva Conventions of 1949; and (iii) the perpetrator was aware of the factual circumstances that established that protected status.¹³⁷
74. The grave breach of “wilfully causing great suffering, or serious injury” is a single offence whose elements are set out as alternative options. The

¹³⁴ See Elements of Crimes, article 8(2)(b)(xxi); Katanga and Ngudjolo Decision on Confirmation of Charges, para. 367.

¹³⁵ See Palmer-Uribe Report, para. 139; Turkish Report, pp. 36-38; HRC Report, paras. 133-135.

¹³⁶ See generally ICTY, *Prosecutor v. Aleksovski*, Judgment, Case No. IT-95-14/1-T, 25 June 1999, paras. 56-57.

¹³⁷ Elements of Crimes, article 8(2)(a)(iii).

Elements of the Crimes defines “great suffering” as “great physical or mental pain or suffering”. With respect to the second alternative, although there must be a showing of serious mental or physical injury, such injury need not be permanent. However, acts related to a person’s dignity, such as that which may only cause temporary unhappiness, embarrassment, or humiliation, are not sufficient.¹³⁸

75. All four commissions found that some passengers sustained injuries during the boarding and takeover of the *Mavi Marmara* by the IDF forces, as described previously. Specifically, the information available indicates that between 50-55 passengers of the *Mavi Marmara* suffered injuries as a result of the force used, including shooting with live ammunition, by IDF soldiers during these events.¹³⁹ Such serious injuries included bullet wounds to critical areas of the body (including the head, chest, and abdomen), broken bones, and internal injuries requiring surgery.¹⁴⁰ The Turkish Commission found that some passengers were shot by IDF soldiers from behind and one passenger was shot four times.¹⁴¹ The HRC Fact-Finding Mission also found that Israeli soldiers continued shooting at passengers who had already been wounded with live ammunition, soft baton charges (beanbags), and plastic bullets, and that some passengers were subjected to continued violence after being wounded such as being hit with the butt of a weapon and being kicked in the head, chest, and back.¹⁴² The Palmer-Urbe Panel similarly noted that “[m]any witness statements describe indiscriminate shooting, including of injured, with some referring to shooting even after attempts had been made to surrender.”¹⁴³

¹³⁸ See ICTY, *Prosecutor v. Kordić and Čerkez*, Judgment, Case No. IT-95-14/2-T, 26 February 2001, para. 245.

¹³⁹ See HRC Report, p. 26 (indicating that at least a total of 50 passengers were wounded), para. 17 (concluding that during the IDF’s initial operation to secure control of the top deck, 19 passengers were injured, 14 of who suffered gunshot wounds), para. 128 (finding that during the entire 45-50 minute IDF operation, more than 24 passengers received serious injuries caused by live ammunition and “a large number of other passengers” received injuries caused by plastic rounds, soft baton charges, and other means); Turkel Report, p. 192; Turkish Report, p. 29. The information collected by IHH as provided in the material appended to the Referral lists 23 individuals as having been “seriously wounded” and 31 individuals as being “wounded” as a result of the IDF conduct on board the *Mavi Marmara*. Referral, Appendix I, pp. 32-33. The Palmer-Urbe Report provides no numerical estimate of the number of passengers who were injured but stated that “the medical reports show extensive serious injuries were sustained by other passengers”. Palmer-Urbe Report, para. 130.

¹⁴⁰ Palmer-Urbe Report, para. 130; HRC Report, para. 117; Turkel Report, 192; Turkish Report, pp. 29-31.

¹⁴¹ Turkish Report, pp. 29-30.

¹⁴² HRC Report, para. 118.

¹⁴³ Palmer-Urbe Report, para. 126. See also Turkish Report, pp. 4, 25, 29, 115.

76. As discussed previously, the passengers of the *Mavi Marmara* were protected persons under international law and the IDF soldiers would have been aware of the factual circumstances that established their protected status.
77. Taking into account the serious nature of the physical injuries caused by the IDF's use of force against some affected passengers, and even bearing in mind that self-defence is a possible ground for excluding criminal responsibility, the information available provides a reasonable basis to believe that IDF soldiers committed the war crime of wilfully causing serious injury to body or health pursuant to article 8(2)(a)(iii) during the takeover of the *Mavi Marmara*.
78. In addition to the *Mavi Marmara*, the IDF forces also took control of other vessels in the flotilla.¹⁴⁴ The boarding and takeover of these other vessels was also conducted by the use of force.¹⁴⁵ However, the information available indicates that the level of force used by IDF soldiers in the course of these takeovers was significantly lower than that used on the *Mavi Marmara*.¹⁴⁶ Passengers on these other vessels offered limited or no violent resistance in response to the takeovers by the IDF forces.¹⁴⁷ The information available indicates that although some of these passengers also sustained injuries, no significant serious injury or loss of life occurred on these other vessels in the flotilla.¹⁴⁸
79. As noted above, in addition to crimes committed on board the *Mavi Marmara*, the jurisdiction of the Court also extends to any crimes committed on board the vessels registered in Cambodia (the *Rachel Corrie*) and Greece (the *Eleftheri Mesogios/Sofia*).
80. The HRC, Turkish, Turkel Reports provide some, albeit limited, information on the use of force by the IDF against passengers on the *Eleftheri Mesogios/Sofia*. This information indicates that rubber bullets, paintballs, and tasers were used against a number of passengers and at least one passenger was thrown to the floor and kicked in the ribs.¹⁴⁹ However, there is no information at this stage that any passengers as a result sustained any serious injuries.

¹⁴⁴ Turkel Report, pp. 180-184.

¹⁴⁵ Palmer-Uribe Report, para. 132.

¹⁴⁶ See Palmer-Uribe Report, para. 132; HRC Report, paras. 137-139, 143-144, 149; Turkel Report, pp. 180-184; Turkish Report, pp. 31-35.

¹⁴⁷ Palmer-Uribe Report, para. 132; HRC Report, paras. 136-159; Turkel Report, pp. 180-183.

¹⁴⁸ Turkel Report, p. 180.

¹⁴⁹ Turkish Report, pp. 34-35; HRC Report, para. 149-151; Turkel Report, pp. 183-184.

81. There is also no information that IDF forces used any force in relation to the interception of the *Rachel Corrie*, when it tried to reach the Gaza Strip later on 5 June 2010; rather, the available information indicates that the interception occurred without incident. As previously noted, the *Rachel Corrie* was delayed in its departure and thus was unable to join as planned with the rest of the flotilla and only tried to reach the Gaza Strip several days later on 5 June 2010. After the vessel ignored repeated Israeli requests to change course (or face naval takeover), IDF forces boarded the ship from speedboats about 20-30 km from Gaza. There were no attempts at resistance by passengers and no reports of violence.¹⁵⁰
82. Overall, the available information does not provide a reasonable basis to believe that IDF soldiers committed the war crime of wilfully causing great suffering, or serious injury to body or health pursuant to article 8(2)(a)(iii) during the takeover of the *Eleftheri Mesogios/Sofia* or the *Rachel Corrie*.
- (d) *Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly pursuant to Article 8(2)(a)(iv)*
83. The war crime of “extensive destruction and appropriation of property” under article 8(2)(a)(iv) requires the following elements: (i) the perpetrator destroyed or appropriated certain property; (ii) the destruction or appropriation was not justified by military necessity; (ii) the destruction or appropriation was extensive and carried out wantonly; (iii) such property was protected under one or more of the Geneva Conventions of 1949; and (iv) the perpetrator was aware of the factual circumstances that established that protected status.¹⁵¹
84. Following the takeover of the *Mavi Marmara*, passengers’ belongings were searched and personal property was seized by the IDF personnel.¹⁵² Such property and items seized included cameras, cell phones, laptops, MP3 players, various recording devices, cash, credit cards, IDs, watches, jewellery and clothing.¹⁵³ According to the Turkel Report, magnetic media (*i.e.* laptops, cell phones, memory sticks, DVDs, and MP3 players) were confiscated and retained for further investigation but were later returned after they had been

¹⁵⁰ See HRC Report, paras. 157-160. The vessel and its passengers were then diverted towards Israel, and after inspection there, Israel separately transferred to Gaza the vessel’s cargo of humanitarian supplies. Ethan Bronner (New York Times), “Israeli Military Boards Gaza Aid Ship”, June 5, 2010; Ron Ben-Yishai (Ynet News), “Takeover ended in five minutes”, 5 June 2010; Turkel Report, fn. 400.

¹⁵¹ Elements of Crimes, article 8(2)(a)(iv).

¹⁵² Turkel Report, pp. 184, 194; Turkish Report, p. 49. See also Palmer-Uribe Report, para. 143.

¹⁵³ Palmer-Uribe Report, para. 143; HRC Report, paras 235-239, 242; Turkish Report, p. 49.

examined, sealed, and documented.¹⁵⁴ However, the information available indicates that only some of the belongings taken from passengers were returned, and some of that which was returned was damaged or incomplete.¹⁵⁵

85. The available information indicates that in some instances, IDF soldiers may have unlawfully and wantonly appropriated the personal property and belongings of passengers of the vessel.¹⁵⁶ The seizure of personal belongings such as cash, personal electronics, jewellery, and clothing clearly is not justified by any military necessity. Although the Israeli authorities may have had a legitimate interest in initially confiscating and examining magnetic media, even by their own account¹⁵⁷ these items were intended to be returned after completion of investigations – though it appears that this did not happen in all cases.
86. However, the passengers' property that was appropriated in some instances by IDF soldiers does not appear to fall within the scope of protected property envisioned under article 8(2)(a)(iv). In particular, this provision only applies to property protected under one or more of the Geneva Conventions of 1949, namely (i) property, regardless of whether or not it is in occupied territory, but that is generally protected by the Geneva Conventions; and (ii) property protected under Article 53 of GC IV.¹⁵⁸
87. The personal property appropriated by IDF soldiers (such as cash, jewellery, and personal electronics) does not fall within these categories. While Article 53 of GC IV refers to real or personal property belonging individually to private persons, this specific provision only refers to such type of property in the context of destruction, but not appropriation.¹⁵⁹ Accordingly, it is not

¹⁵⁴ Turkel Report, pp. 184, 194.

¹⁵⁵ Palmer-Uribe Report, para. 143; Turkish Report, pp. 49-50.

¹⁵⁶ It is also noted in this regard that after the flotilla incident, the IDF Military Police initiated seven criminal investigations against 16 IDF soldiers for various incidents of theft of property belonging to flotilla participants. Turkel Report 195-197.

¹⁵⁷ Turkel Report, pp. 184, 194.

¹⁵⁸ See GC IV, articles 18, 21, 22; AP I, article 53, 54, 56; AP II, article 16. Under the Geneva Conventions, such property includes: (i) civilian hospitals; (ii) convoys of vehicles or hospital trains on land or specifically provided vessels on sea, conveying wounded and sick civilians; (iii) aircraft exclusively employed for the removal of wounded and sick civilians, or for the transport of medical personnel and equipment; (iv) cultural objects and places of worship; (v) objects indispensable for the survival of the civilian population (such as water and energy supply systems); and (vi) works and installations containing dangerous forces (dams, dykes, nuclear power plants).

¹⁵⁹ See also ICTY, *Prosecutor v. Naletilić and Martinović*, Judgement, Case No. IT-98-34-T, 31 March 2003, paras. 574-580.

evident that this grave breach was intended to encompass appropriation of personal property belonging to private individuals.

88. In any case, in order to amount to a war crime pursuant to article 8(2)(a)(iv), the appropriation must also be “extensive”. The assessment of extensiveness must be made on a case-by-case basis, but an isolated act or incident generally would not be sufficient to constitute this crime.¹⁶⁰ Overall, there is insufficient information available at this stage to ascertain the extent of the appropriation of personal belongings as to indicate whether such appropriation occurred in limited, isolated instances or on a more extensive scale.¹⁶¹
89. In light of the foregoing, the information available does not provide a reasonable basis to believe that the alleged theft of passengers’ property by IDF soldiers amounted to the war crime of extensive appropriation of property pursuant to article 8(2)(a)(iv).
- (e) *Intentionally directing attacks against civilian objects pursuant to Article 8(2)(b)(ii)*
90. Articles 8(2)(b)(ii) prohibits intentionally directing attacks against civilian objects, that is, objects which are not military objectives. Three specific criteria must be met to commit an offence under article 8(2)(b)(ii): (i) the perpetrator directed an “attack”; (ii) civilian objects must be “the object of the attack”; and (iii) the perpetrator must have “intended the civilian objects to be the object of the attack.”¹⁶²
91. A vessel breaching or attempting to breach a blockade is subject to attack if, having received prior warning, it intentionally and clearly refuses to stop or

¹⁶⁰ Knut Dörmann, “Extensive destruction and appropriation of property”, p. 312, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL (Triffterer, 2008). See also ICTY, *Prosecutor v. Kordić and Čerkez*, Judgement, Case No. IT-95-14/2-T, 26 February 2001,, paras. 335-341; ICTY, *Prosecutor v. Blaškić*, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 157.

¹⁶¹ Furthermore, although it is apparent that some of the confiscation and ultimate appropriation took place on board the *Mavi Marmara*, it also appears that other belongings may have been taken away from passengers only at a later stage when they were being processed at the Ashdod detention center. See for example HRC Report, para. 235; Palmer-Uribe Report, paras. 135, 143. While the former would fall within the Court’s territorial jurisdiction, the latter (*i.e.* any appropriation of property stemming from items taken or confiscated at Ashdod) would not, due to a lack of territorial jurisdiction over such events. This circumstance further compounds the problem of assessing the extensiveness of the appropriation.

¹⁶² Elements of Crimes, article 8(2)(b)(ii), elements 1–3. Elements 4 (existence of an armed conflict) and 5 (perpetrator was aware of the circumstances that established the armed conflict) are discussed earlier in this report.

resists visit, search, or capture.¹⁶³ Humanitarian vessels are also subject to this regime if, *inter alia*, they are not innocently employed in their normal role or fail to immediately submit to identification and inspection when required.¹⁶⁴

92. Applying this law, if it is assumed that Israel's blockade of Gaza was legal, Israel was entitled to enforce the blockade by these means. Subject to the issue of prior warning, and clear and intentional failure by the vessels to stop or other forms of resistance, Israel could lawfully direct an attack against relevant vessels of the flotilla. For the relevant period, those vessels would lose the protection to which they were otherwise entitled as merchant or similar vessels. Equally, if it is assumed that Israel's blockade was unlawful, then Israel could not lawfully direct an attack against relevant vessels of the flotilla.
93. It is considered that an attack for the purposes of this discussion must include a forcible boarding operation, by analogy with other areas of international humanitarian law in which an attack includes all acts of violence against an adversary. In the course of such an attack, which is directed against the vessel, civilian passengers do not lose the protections to which they are entitled. Anticipated harm to civilian passengers must therefore be taken into account in determining if the attack was proportionate, in the sense that the anticipated harm to civilian passengers must not have been clearly excessive in relation to the concrete and direct military advantage gained by capture of the vessel.

¹⁶³ See SRM, paras. 67(a), 98, 146. It is noted that although Israel intercepted the flotilla 64 nautical miles from the coast of Gaza, *opinio juris* and relevant provisions of the SRM generally appear to permit capture of blockade-runners on "the high seas even at a distance from the area of naval operation and prior to breach of any cordon." Guilfoyle, p. 197. See SRM, paras. 14, 146(f). See also Palmer-Urbe Report, paras. 109-110. The SRM indicates that an assessment of distance should be carried out in light of "military requirements". SRM, para. 96.

¹⁶⁴ See SRM, paras. 47(c)(ii), 136-137. In this regard, it is also noted that the fact that the flotilla was transporting humanitarian supplies intended for the civilian population did affect Israel's right to intercept the vessels under the applicable law. In particular, although a blockading power is obliged to allow the transit of relief shipments destined for the civilian population, it has the right to search such inbound supplies and prescribe the mode of their delivery. SRM, paras. 103-104. See also Article 59 of GC IV (where the occupied territory is inadequately supplied, an occupying power is also obliged to accept relief consignments destined for the civilian population, though it still maintains the right to search and regulate the passage of such relief supplies); article 70 of the AP I. See also Dinstein, p. 456. This is what Israel appears to have done in proposing that the flotilla offload their supplies at another port (such as Ashdod) and that it would then arrange to have such supplies delivered by land. See Palmer-Urbe Report, paras. 80, 90, 100.

94. On the basis of the information available, the vessels of the flotilla were headed to Gaza and intended to breach the blockade.¹⁶⁵ Vessels of the flotilla ignored repeated warnings from Israel to desist or to otherwise face measures to enforce the blockade. Some vessels, including the *Mavi Marmara*, resisted initial attempts by Israel to board them by sea.¹⁶⁶ Both the *Mavi Marmara* and the *Eleftheri Mesogios/Sofia* clearly and intentionally refused to stop. Both vessels were forcibly boarded by Israel. These two forcible boarding incidents may be characterised as an attack.
95. As noted previously, the *Rachel Corrie* approached the blockade at a later date than other vessels of the flotilla.¹⁶⁷ On 5 June 2010, Israel warned the *Rachel Corrie* that it was approaching a blockade and notified them of the intention to board. Although the captain of the *Rachel Corrie* informed Israel that he disputed Israel's right to board, it was stated that no resistance would be offered. The *Rachel Corrie* subsequently cut her engines, and IDF soldiers boarded and detained the vessel peacefully.¹⁶⁸ This boarding is therefore not characterised as an attack, and need not be considered further.
96. From these facts, if the blockade was lawful, then the conduct of the IDF with respect to the *Mavi Marmara* and the *Eleftheri Mesogios/Sofia* does not constitute the war crime of intentionally directing an attack against civilian objects, that is, objects which are not military objectives, pursuant to article 8(2)(b)(ii) of the Statute. If the blockade was unlawful, however, then there is consequently a reasonable basis to believe that the war crime of intentionally directing an attack against two civilian objects pursuant to article 8(2)(b)(ii) was committed by IDF soldiers in relation to the non-consensual boarding and takeover of the *Mavi Marmara* and the *Eleftheri Mesogios/Sofia*.¹⁶⁹

¹⁶⁵ Palmer-Uribe Report, paras. 87-88, 95, 105-109; HRC Report, para. 109; Turkel Report, pp. 139-140. See also HRC Report, paras. 99-101.

¹⁶⁶ Palmer-Uribe Report, paras. 104-109; HRC Report, paras. 108-109, 113, 148; Turkel Report, pp. 139-140, 142-146, 180-181, 222-223.

¹⁶⁷ HRC Report, paras. 82, 154-157.

¹⁶⁸ HRC Report, paras. 157-160.

¹⁶⁹ It is noted that this preliminary conclusion does not take into account the possibility of excluding criminal responsibility on the ground of mistake of fact or law. As noted previously, the evaluation of grounds for excluding criminal responsibility is distinct from the determination made at the preliminary examination stage and instead is an issue that is to be properly addressed at the investigation and trial stage.

- (f) *Intentionally directing attacks against civilians not taking direct part in hostilities pursuant to Article 8(2)(b)(i)*
97. Articles 8(2)(b)(i) prohibits intentionally directing attacks against individual civilians not taking direct part in hostilities. Three specific criteria must be met to commit an offence under article 8(2)(b)(i): (i) the perpetrator directed an “attack”; (ii) civilians not taking direct part in hostilities must be “the object of the attack”; and (iii) the perpetrator must have intended such civilians to be the object of the attack.¹⁷⁰
98. As addressed previously, it does not appear that the passengers of the *Mavi Marmara* (or those of the other vessels in the flotilla) can be considered to have been taking direct part in hostilities but rather, they qualify as protected civilians. Additionally, as noted above, the forcible boarding of the vessels by the IDF soldiers appears to amount to an “attack”.
99. However, none of the information available suggests that the intended object of the attack was the civilian passengers on board these vessels. Rather, viewed in the context of the interception operation, such an attack (*i.e.*, the forcible boarding) appears to have been solely directed at the vessels.¹⁷¹ Since the attack was directed at the vessels of the flotilla, as opposed to the civilian passengers, the Office does not consider relevant in this respect the war crime of intentionally directing an attack against civilians under article 8(2)(b)(i).¹⁷²
- (g) *Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians pursuant to Article 8(2)(b)(iv)*
100. Article 8(2)(b)(iv) criminalises “[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe

¹⁷⁰ Elements of Crimes, article 8(2)(b)(i), elements 1–3. Elements 4 (existence of an armed conflict) and 5 (perpetrator was aware of the circumstances that established the armed conflict) are discussed earlier in this report.

¹⁷¹ In this context, it is also noted that the fact that civilian casualties are caused during an attack does not as such render it unlawful as incidental civilian casualties or damage, which are not expected to be excessive in relation to the concrete and direct military advantage anticipated, are legally acceptable. See for example generally Jean-François Quéguiner, “Precautions under the law governing the conduct of hostilities”, *International Review of the Red Cross* Vol. 88, No. 864 (December 2006), p. 794.

¹⁷² It is noted in this regard that alleged crimes associated with particular acts or conduct by IDF soldiers against passengers during the course of securing control of the vessels have been separately addressed in the context of other applicable war crimes as discussed above previously.

damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”

101. Article 8(2)(b)(iv) draws on the principles in article 51(5)(b) of the 1977 AP I to the 1949 Geneva Conventions, but restricts the criminal prohibition to cases that are “clearly” excessive. The application of article 8(2)(b)(iv) requires, *inter alia*, an assessment of: (i) the anticipated civilian damage or injury; (ii) the anticipated military advantage; and (iii) whether the anticipated civilian damage or injury was “clearly excessive” in relation to the anticipated military advantage.
102. The ICC Elements of Crimes specify that “the expression ‘concrete and direct overall military advantage’ refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack.”¹⁷³ Thus, the relevant inquiry is as to the anticipated military advantage from the perpetrator’s perspective, not the victim’s.
103. In the *Galić* case, the ICTY Trial Chamber indicated that “in determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.”¹⁷⁴ The Rome Statute, however, adopts a higher standard, restricting the criminal prohibition to only those cases that are “clearly” excessive.¹⁷⁵ As confirmed in the relevant commentaries, this reflects the drafters’ intent to emphasise that a value judgement within a reasonable margin of appreciation should not be criminalised, nor second guessed by the Court from hindsight.
104. The interception of the flotilla occurred in the context of the Israeli forces’ enforcement of the naval blockade, which it imposed for the military objective of preventing the flow of arms to Hamas and entry of “terrorists” to Gaza by sea. Irrespective of its lawfulness, Israel would have viewed its enforcement as essential to ensure that the blockade remained effective and

¹⁷³ Elements of Crimes, fn. 36.

¹⁷⁴ ICTY, *Prosecutor v. Galić*, Judgement, Case No. IT-98-29-T, 5 December 2003, para. 58.

¹⁷⁵ This approach represents a deliberate deviation from AP I, and reflects the consideration that the difficulties of calculating anticipated civilian losses and anticipated military advantage and the lack of a common unit of measurement with which to compare the two make this assessment difficult to apply, both in military decision making and in any *ex post facto* assessment of the legality of that action.

thus perceived a military advantage in intercepting the flotilla. Nevertheless, the manner of such enforcement by the IDF forces would have had to comply with the principle of proportionality.¹⁷⁶

105. Prior to the interception, four warnings were issued to the vessels, the last one two hours prior to the boarding. In the third warning, the vessels were notified that all legal measures would be taken in order to prevent the vessels from entering the area of the blockade, and the fourth warning included a notice that, if necessary, IDF soldiers would board the vessels.¹⁷⁷ Prior to the commencement of the boarding operation, the Israeli Navy did not issue any final warning or communication to the flotilla about the IDF's immediate intentions to board the vessels by force.¹⁷⁸ However, the Israeli radio operator explained that no additional warning was given due to the operational needs for a covert takeover of the vessels.¹⁷⁹ Such an attempt to use the element of surprise is reasonably consistent with an effort to reduce the potential for confrontation.
106. With respect to their conduct during the boarding and takeover of the *Mavi Marmara*, as discussed previously, the IDF forces were met with violent resistance from a group of passengers and responded with varying levels of force, both lethal and non-lethal.¹⁸⁰ Based on IDF soldiers' own accounts, they were unprepared for, did not anticipate, and were surprised by the level of resistance and violence engaged in, by the passengers of the vessel.¹⁸¹ Their statements indicate that during the preparations, they were briefed to anticipate resistance to the boarding of the vessels from "peace activists" and thus expected at most verbal harassment (such as shouting and cursing), spitting, shoving, and punching, but not the level of physical confrontation that they ultimately encountered on board the *Mavi Marmara*.¹⁸² The Turkel Commission noted that faced by unanticipated situation, the IDF soldiers made "difficult, split-second decisions regarding the use of force, under conditions of uncertainty, surprise, pressure, and in darkness, with the

¹⁷⁶ See SRM, para. 46(c)-(d).

¹⁷⁷ Turkel Report, pp. 138-139.

¹⁷⁸ Palmer-Uribe Report, para. 110. See also Turkel Report, p. 141. *Ibid.*

¹⁷⁹ Turkel Report, p. 141.

¹⁸⁰ Turkel Report, p. 260; Palmer-Uribe Report, paras. 123-124, 126, 133.

¹⁸¹ See Turkel Report, paras. 132, 197, 213, 215, 237, 244.

¹⁸² See for example Turkel Report, para. 132, fn. 518. Notably, in contrast to violent resistance engaged in by some passengers of the *Mavi Marmara*, it appears that on other vessels (including the *Eleftheri Mesogios/Sofia*), passengers used only measures of passive resistance, which was more consistent with what the IDF soldiers had been briefed to expect. See HRC Report, paras. 137, 144, 149,

perception of a real danger to their lives and with only partial information available to them.”¹⁸³

107. Consistent with the accounts of the IDF soldiers, it appears that the planners of the IDF operation to intercept the flotilla did not believe that the use of substantial force would be necessary and that they considered that any violence encountered would be at a low level at most – an assumption which then informed the operational tactics and rules of engagement developed before the operation as well as the preparation and training of the soldiers which emphasised use of non-lethal weapons.¹⁸⁴ In this respect, the available information suggests that during the planning and development of the operation, the Israeli authorities did not have information indicating that passengers intended to respond to any boarding attempt with organised, violent resistance.¹⁸⁵ The available information also indicates that the Israeli navy had previously been successful in stopping ships by taking control of them through similar means as those planned for the flotilla interception operation.¹⁸⁶
108. It is noted that the UN HRC Fact-Finding Mission concluded that the level of force in the end employed by IDF personnel was “not only disproportionate to the occasion but demonstrated levels of totally unnecessary and incredible violence”.¹⁸⁷ The Palmer-Uribe Panel similarly concluded that the manner in which Israel conducted its enforcement of the blockade with respect to the *Mavi Marmara* was “excessive and unreasonable” and that “the operation should have been better planned and differently executed.”¹⁸⁸
109. While the force ultimately used during the course of the boarding operation may have been disproportionate, as concluded by the UN commissions in their *ex post facto* evaluations, the relevant test under article 8(2)(b)(iv) is whether the Israeli authorities and IDF forces could have reasonably foreseen that it would be disproportionate at the relevant time – namely, at the time the operation was launched. The available information suggests that in the lead-up to the incident, the Israeli authorities and IDF forces may have anticipated that passengers of the flotilla would react with hostility and opposition to their intervention, and therefore would have expected some degree of civilian casualties or damage to result from the non-consensual

¹⁸³ Turkel Report, para. 238.

¹⁸⁴ See Turkel Report, pp. 118-119, 125, 128-136, 264, 271-272.

¹⁸⁵ See Turkel Report, pp. 118-119, 271-272.

¹⁸⁶ See Turkel Report, para. 117.

¹⁸⁷ HRC Report, para. 264.

¹⁸⁸ Palmer-Uribe Report, paras. 116-117. See also *ibid.*, para. 126.

interception and boarding of the vessel by force. However, the information is insufficient to conclude that they anticipated that the operation would result notably in ten civilian deaths on the *Mavi Marmara*, and therefore that the anticipated civilian impact would have been *clearly excessive* in relation to the anticipated military advantage of enforcement of the blockade (as to maintain its effectiveness).

110. The information available at this stage therefore does not provide a reasonable basis to believe IDF forces committed the war crime of intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians pursuant to article 8(2)(b)(iv) in relation to the interception and forcible boarding of the *Mavi Marmara* and the *Eleftheri Mesogios/Sofia*.

(h) *Intentionally directing attacks against personnel or objects involved in a humanitarian assistance mission in accordance with the Charter of the United Nations pursuant to Article 8(2)(b)(iii)*

111. Even assuming that the attack against the vessels of the flotilla was unlawful, the elements of the crime are still not met. Neither article 8(2)(b)(iii) nor article 8(2)(e)(iii), which contains the identical crime for international and non-international conflicts respectively, define “humanitarian assistance mission”.¹⁸⁹ Although there is no generally accepted definition of what constitutes a humanitarian assistance mission,¹⁹⁰ it must be in “accordance with the Charter of the United Nations”, which prohibits “in particular any use of force or intervention in internal affairs.”¹⁹¹ The ICJ has indicated that in order to avoid amounting to an intervention in internal affairs, humanitarian assistance must be limited to the purposes embodied in the practice of the Red Cross, namely to “prevent and alleviate human

¹⁸⁹ The text reads: “Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict”. Rome Statute, article 8(2)(b)(iii).

¹⁹⁰ Humanitarian assistance refers to consignments of food, medical supplies, clothing, bedding, means of shelter and other supplies essential to the survival of the civilian population. See GC IV, article 55; AP I, article 69. See also Helen Durham and Phoebe Wynn-Pope, “Chapter 10: Protecting the ‘Helpers’: Humanitarians and Health Care Workers During Times of Armed Conflict”, 14 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 327, 330 (2011) (“Durham and Wynn-Pope”).

¹⁹¹ Michael Cottier, “Attacks on humanitarian assistance or peacekeeping missions”, p. 331, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL (Triffterer, 2008).

suffering”, “to protect life and health and to ensure respect for the human being”, and “above all, be given without discrimination to all in need”.¹⁹²

112. Commentary on the Rome Statute further indicates that humanitarian assistance missions should be impartial, non-discriminatory, and should receive the consent of the parties to the conflict and that “no party to the conflict or other group should be given undue advantage”.¹⁹³ Additionally, the Commentary indicates that “the full approval of the actual parties to the conflict must be given so that no risk of a conflict with the parties arises” and that “[u]sing force to gain access to a certain area or to certain persons would disqualify the personnel and objects from this protection.”¹⁹⁴
113. The ICRC has indicated that the fundamental underlying principles of its humanitarian operations are “humanity, impartiality and neutrality”.¹⁹⁵ Neutrality means “not taking sides in hostilities” or “engaging at any time in controversies of a political, religious or ideological nature.”¹⁹⁶ For non-ICRC related humanitarian efforts, independence is generally taken as the third criteria for humanitarian relief organisations instead of neutrality.¹⁹⁷ Impartiality has been defined as the “absence of any discrimination based on race, nationality, religion, political opinions or any other similar criterion, with priority given to those in most urgent need.”¹⁹⁸ This forms the lynchpin for obtaining the requisite consent of the parties to the conflict and is an individual obligation on relief workers themselves so as not to jeopardise their operation and compromise relief for the civilian population.¹⁹⁹
114. International humanitarian law provisions that govern humanitarian assistance underline that while there are obligations on parties to allow relief, they are also entitled to prescribe technical arrangements governing its

¹⁹² *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, ICJ Reports 1986, para 243.

¹⁹³ Michael Cottier, “Attacks on humanitarian assistance or peacekeeping missions”, pp. 332-333, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL (Triffterer, 2008).

¹⁹⁴ Michael Cottier, “Attacks on humanitarian assistance or peacekeeping missions”, p. 335, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL (Triffterer, 2008).

¹⁹⁵ Keynote address by Dr. Cornelio Sommaruga, President of the International Committee of the Red Cross, UNITAR/IPS/NIRA Conference, Singapore (24 February 1997), quoted in M. Sassoli and A. A. Bouvier, HOW DOES LAW PROTECT IN WAR? (1999), p. 494.

¹⁹⁶ *Ibid.*, p. 495.

¹⁹⁷ Durham and Wynn-Pope, p. 330.

¹⁹⁸ Durham and Wynn-Pope, p. 331.

¹⁹⁹ Durham and Wynn-Pope, p. 331.

distribution and that the relief must be provided with parties' consent.²⁰⁰ Similarly, the SRM also provides that while foodstuffs, objects essential for survival, and medicines must be allowed free passage, they are subject to the technical arrangements of the blockading power.²⁰¹

115. The Gaza Freedom Flotilla was organised by a number of NGOs, with the IHH being one of the lead organisers.²⁰² The Gaza Freedom Flotilla carried "35 MPs, numerous press members, artists, intellectuals, writers, representatives from NGOs, activists, women and children and 15,000 tons of humanitarian aid cargo."²⁰³ The Gaza Flotilla Individual Participation Form²⁰⁴ for those participating in the flotilla required a variety of information, including participants' professional background, but it does not appear that experience in humanitarian relief work was a pre-requisite for participation. The public statements noted above about the composition of the passengers also tend to confirm this conclusion.
116. Although the flotilla carried several tons of humanitarian and construction supplies, these materials were primarily carried by only three of the six vessels in the flotilla intercepted on 31 May 2010 – the *Gazze I*, the *Eleftheri Mesogios/Sofia*, and the *Defne-Y*.²⁰⁵ The supplies contained on these three vessels included items such as wheelchairs, medical equipment, sanitary items, cartons of clothing, toys, beds, carpets, blankets, water tanks, playground equipment, and construction supplies (such as cement, wood, sheet metal, building materials, work tools).²⁰⁶ Based on the information available, it appears that the *Mavi Marmara*, which was a passenger ship, was not carrying humanitarian supplies to be delivered to Gaza, other than any limited foodstuffs and toys carried in passengers' personal baggage.²⁰⁷

²⁰⁰ See for instance in international armed conflicts, GC III, articles 72-75 (governing relief for POWs); GC IV, article 23 and articles 55-63 (governing occupation), especially article 59; AP I, article 70; and in non-international armed conflicts, AP II, article 18 para. 2.

²⁰¹ See SRM, paras. 103-104.

²⁰² See, e.g., HRC Report, para. 78.

²⁰³ Press Release, "Palestine Our Route, Humanitarian Aid Our Load" Flotilla, 27 May 2010, in Referral - Appendix II, p. 32. See also Palmer-Urbe Report, paras. 84, 86; HRC Report, para. 85; Turkish Report, p. 15.

²⁰⁴ Referral - Appendix II, pp. 36-42.

²⁰⁵ Palmer-Urbe Report, para. 89; Turkel Report, pp. 179-184. See also Turkish Report, p. 15, Annex 3; Referral - Appendix I, p. 12 (listing the three vessels named above as cargo ships and the remaining three as passenger ships). The *Rachel Corrie*, which was intercepted later on 5 June 2010, also carried some humanitarian supplies. See HRC, para. 156; Turkel Report, fn. 400.

²⁰⁶ Turkel Report, pp. 182-184, Annex E, pp. 289-291; Referral - Appendix I, p. 14.

²⁰⁷ Turkel Report, p. 179; Palmer-Urbe Report, para. 89, referring to the Turkish Point of Contact Response of 11 April 2011. Medical supplies were also on board the *Mavi Marmara*, but these appear to have been intended only for use during the voyage itself. See *ibid*.

117. The “Contract” that each participant had to sign declared that the journey’s purpose was “to create an awareness amongst world public and international organizations on the inhumane and unjust embargo on Palestine and to contribute to end this embargo which clearly violates human rights and delivering humanitarian relief to the Palestinians.”²⁰⁸ It also contained a statement that:

Given that the embargo on Palestine is inhumane and illegal ... I will not obey by the decisions, warnings or demands of the governments of countries in the region regarding this ship, in the direction of continuation of the embargo, I will, if necessary, join in civil protests and I accept all the legal and punitive consequences of this.²⁰⁹

118. Appendix II of the Referral contains a letter, dated 1 January 2009, from the flotilla organisers addressed to the Israel Embassy of Istanbul requesting permission to “deliver 100 trucks and 700 tons of food and medicine via ship”.²¹⁰ In its Press Release upon departure, members of the flotilla claimed that it had never received a response to this request.²¹¹
119. The information available, however, indicates that by March 2010, Israel began engaging in diplomatic efforts with various countries from which the vessels of the flotilla were to depart, including Turkey, Greece, the UK, Ireland, Egypt, and the US, in order to reach a solution to the problem posed by the flotilla.²¹² These efforts included offers by Israel, as conveyed to the flotilla organisers through Turkish officials, to facilitate the delivery of the humanitarian supplies from the flotilla to Gaza as to make unnecessary the need to challenge the blockade.²¹³ Such offers for alternative arrangements for the delivery of the supplies were reportedly not accepted by the flotilla organisers.²¹⁴ Additionally, in the warnings radioed to each of the flotilla vessels in the hours prior to the interception, Israeli authorities reiterated that the humanitarian supplies could be delivered to Gaza via the land crossing and invited the vessels to divert their course and go to Ashdod port

²⁰⁸ Referral - Appendix II, p. 43. See also HRC Report, para. 79; Palmer-Uribe Report, para. 87.

²⁰⁹ Referral - Appendix II, p. 45.

²¹⁰ Referral - Appendix II, p. 11.

²¹¹ Press Release, “Palestine Our Route, Humanitarian Aid Our Load” Flotilla (27 May 2010), in Referral - Appendix II, p. 32.

²¹² Palmer-Uribe Report, paras. 98-102; HRC Report, para. 94; Turkish Report, pp. 16-17; Turkel Report, pp. 121-124.

²¹³ Palmer-Uribe Report, paras. 100, 102-103; Turkel Report, pp. 123-124. See also Turkish Report, pp. 16-17.

²¹⁴ Palmer-Uribe Report, paras. 101-103; Turkel Report, pp. 123-124.

in Israel for this purpose.²¹⁵ However, the vessels in the flotilla responded by reasserting their intention to break the blockade and reach Gaza.²¹⁶

120. The Turkish Commission cited the SRM to support its finding that “vessels carrying humanitarian aid are exempt from seizure” and that the passengers on board the *Mavi Marmara* were entitled to “resist the Israeli attempts to stop, seize and search the ship.”²¹⁷ However, the Commission did not mention, in this regard, the refusal of the vessels to cooperate with Israeli authorities’ proposed alternative arrangements for the delivery of the humanitarian assistance, despite this requirement in the SRM²¹⁸ or the implications of the flotilla organisers’ stated intention to breach the blockade.
121. The UN HRC Fact-Finding Mission made the following statement about the flotilla’s primary objective:

The Mission notes a certain tension between the political objectives of the flotilla and its humanitarian objectives. This comes to light the moment that the Government of Israel made offers to allow the humanitarian aid to be delivered via Israeli ports but under the supervision of a neutral organization. The Mission also notes that the Gaza Strip does not possess a deep sea port designed to receive the kind of cargo vessels included in the flotilla, raising practical logistical questions about the plan to deliver large quantities of aid by the route chosen. Whilst the Mission is satisfied that the flotilla constituted a serious attempt to bring essential humanitarian supplies into Gaza, it seems clear that the primary objective was political, as indeed demonstrated by the decision of those on board the *Rachel Corrie* to reject a Government of Ireland-sponsored proposal that the cargo in that ship to be allowed through Ashdod intact.²¹⁹

122. It is clear from its report that the Turkel Commission did not consider the flotilla vessels to be subject to the provisions on relief assistance in the SRM. The Turkel Commission treated the vessels as merchant vessels.²²⁰ It considered the IHH organisation to be “a humanitarian organization with a radical-Islamic orientation”.²²¹ In this respect, the Turkel Commission stated that “alongside its humanitarian activities, the IHH organization provides support to radical-Islamic and anti-Western terrorist organizations”,

²¹⁵ Turkel Report, pp. 130-131, 138-140; HRC, para. 108; Palmer-Urbe Report, para. 106.

²¹⁶ Turkel Report, pp. 139-140; HRC, para. 109.

²¹⁷ Turkish report, p. 83.

²¹⁸ SRM, paras. 48, 103.

²¹⁹ HRC Report, para. 80.

²²⁰ Turkel Report, paras. 176-177.

²²¹ Turkel Report, para. 162.

supports Hamas through the “Union of the Good” coalition, and in the past “maintained contacts with global Jihad elements, through which it assisted terrorist cells in Bosnia, Syria, Iraq, Afghanistan, and Chechnya, mainly by giving logistical support for transferring weapons and funding.”²²² The IHH is a “prohibited association” in Israel owing to its activities in the Union of the Good coalition.²²³

123. The Palmer-Uribe Panel stated that it seriously questioned the “true nature and objectives of the flotilla organizers”, though it indicated it did not have sufficient information to assess allegations that IHH had provided support to Hamas.²²⁴ The Panel noted that the flotilla’s own statements indicated that “one of the primary objectives [...] was to generate publicity about the situation in Gaza by attempting to breach Israel’s naval blockade.”²²⁵ The Panel also questioned the number of passengers on board, the quality and value of the humanitarian goods on board, the necessity of using so many ships if the supplies themselves were largely carried on only three of them, and the organisers’ refusal to offload the supplies at other ports or have them delivered by land. Based on these considerations, the Panel thus concluded that “the primary objective of the flotilla organizers was to generate publicity by attempting to breach the blockade”.²²⁶
124. It is also noted that in a press release issued after the events on 31 May 2010, the ICRC referred to those on board the flotilla as “civilians” and “activists” but did not mention humanitarian assistance or relief work.²²⁷
125. Based on the available information and taking into account the foregoing, the flotilla does not appear to reasonably fall within the humanitarian assistance paradigm envisioned under article 8(2)(b)(iii), due to its apparent lack of neutrality and impartiality as evidenced in the flotilla’s explicit and primary political objectives (as opposed to a purpose limited to delivery of humanitarian aid), failure to obtain Israeli consent, and refusal to cooperate

²²² Turkel Report, para. 162.

²²³ Turkel Report, para. 162.

²²⁴ Palmer-Uribe Report, para. 86.

²²⁵ Palmer-Uribe Report, para. 87, fn. 301 (referring in this respect to the flotilla organisers’ internal documentation as well as their public statements, such as “If Israel prevented the delivery of this aid, we would then attract attention to this illegal blockade and make live broadcasting for a while through media correspondents aboard and then we would return back.”).

²²⁶ Palmer-Uribe Report, paras. 89-90. The Panel also noted in this context that “[t]he number of journalists embarked on the ships gives further power to the conclusion that the flotilla’s primary purpose was to generate publicity.” *Ibid.*, para. 89.

²²⁷ ICRC, “Israel: ICRC visits detained activists”, 1 June 2010.

with the Israeli authorities in their proposals for alternative methods of distributing the relief supplies.

3. Nexus between the alleged acts and the armed conflict

126. There needs to be a nexus between the conduct (the interception of the flotilla and the crimes alleged to have occurred aboard the relevant vessels), and the specific armed conflict. The acts must be closely related to the hostilities, meaning that the armed conflict must play a substantial role in the perpetrator's decision and his ability to commit the crime, and the manner in which the crime was committed.²²⁸ Nonetheless, "the armed conflict need not be considered the ultimate reason for the conduct and the conduct need not have taken place in the midst of the battle."²²⁹
127. Factors which PTC I considered relevant to the determination of sufficiency of the relationship between the act(s) and armed conflict, in line with jurisprudence from the ICTY, include: "the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties."²³⁰
128. The information available indicates that the alleged conduct of the IDF soldiers on board the *Mavi Marmara* took place in the context of Israel's occupation of the Gaza Strip and the naval blockade pertaining to it. Accordingly, the requisite nexus can be established between this context and the alleged conduct.

B. Crimes Against Humanity

129. The contextual elements of crimes against humanity include the following: (i) an attack against any civilian population; (ii) a State or organisational policy; (iii) an attack of a widespread or systematic nature; (iv) a nexus

²²⁸ Katanga Jugement rendu en application de l'article 74, para. 1176; Situation in the Republic of Côte d'Ivoire, "Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire'", ICC-02/11-14-Corr, 15 November 2011, para. 150 ("Côte D'Ivoire Article 15 Decision").

²²⁹ Côte D'Ivoire Article 15 Decision, para. 150. See also Lubanga Confirmation of Charges Decision, paras. 287-288; Katanga and Ngudjolo Decision on Confirmation of Charges, para. 380.

²³⁰ Katanga and Ngudjolo Decision on Confirmation of Charges, para. 382, citing *Prosecutor v. Kunarac*, Appeal Judgement, Case No. IT-96-23&23/1, 12 June 2002, para. 59.

between the individual act and the attack; and (v) the accused's knowledge of the attack.²³¹

130. On the basis of the information available, it does not appear that the conduct of the IDF during the flotilla incident was committed as part of widespread or systematic attack, or constituted in itself a widespread or systematic attack, directed against a civilian population.
131. In the absence of the required contextual elements, there is no reasonable basis to believe that crimes against humanity under article 7 of the Statute were committed during the flotilla incident.

C. Conclusion

132. The information available indicates that there is a reasonable basis to believe that war crimes have been committed in the context of the interception of the *Mavi Marmara* by IDF soldiers on 31 May 2010, including namely: (1) wilful killing pursuant to article 8(2)(a)(i); (2) wilfully causing serious injury to body and health pursuant to article 8(2)(a)(iii); and (3) committing outrages upon personal dignity pursuant to article 8(2)(b)(xxi). If the blockade was unlawful, an issue on which the Office has not taken a position, there is consequently also a reasonable basis to believe that the IDF committed the crime of intentionally directing an attack against two civilian objects pursuant to article 8(2)(b)(ii).

VI. ADMISSIBILITY

133. As set out in article 17(1) of the Statute, admissibility requires an assessment of complementarity (subparagraphs (a)-(c)) and gravity (subparagraph (d)). Pursuant to its prosecutorial strategy, the Office assesses complementarity and gravity in relation to the most serious crimes alleged and as a rule, to those who appear to bear the greatest responsibility for those crimes within the context of potential cases that are likely to arise from an investigation of the situation.²³²
134. Although any crime falling within the jurisdiction of the Court is serious,²³³ article 17(1)(d) requires the Court to assess as an admissibility threshold whether a case is of sufficient gravity to justify further action by the Court. In this respect, PTC I has stated that "the fact that a case addresses one of the

²³¹ Côte D'Ivoire Article 15 Decision, para. 29.

²³² Kenya Article 15 Decision, para. 50.

²³³ See ICC Statute, Preamble para. 4, articles 1 and 5.

most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court”.²³⁴ At the preliminary examination stage, gravity is examined against the backdrop of the likely set of potential cases that would arise from investigating the situation.²³⁵

135. An evaluation of gravity includes: (i) whether the individuals or groups of persons that are likely to be the object of an investigation, include those who may bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of the crimes committed within the incidents which are likely to be the focus of an investigation.²³⁶
136. The assessment of gravity of crimes includes both quantitative and qualitative considerations based on the prevailing facts and circumstances. As stipulated in regulation 29(2) of the Regulations of the Office, the non-exhaustive factors that guide the Office’s assessment include the scale, nature, manner of commission of the crimes, and their impact.²³⁷
137. Additionally, it is worth recalling that for war crimes, a specific gravity threshold is set down in article 8(1) of the Statute, which stipulates that “the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes”. Although this threshold is not an element of the crime, it does, however, provide statutory guidance indicating that the Court should focus on war crimes cases meeting these requirements. With respect to the flotilla incident, according to the available information, it does not appear that the criteria of article 8(1) are satisfied, especially considering that the Court’s jurisdiction does not extend to other alleged crimes committed in the context of the conflict between Israel and Hamas nor in the broader context of any conflict between Israel and Palestine. Therefore, the Office is not entitled to assess the gravity of the alleged crimes committed by the IDF on the *Mavi Marmara* in reference to other alleged crimes falling outside the scope of the referral and the jurisdiction of the ICC.

²³⁴ Situation in Darfur, Sudan, *The Prosecutor v. Abu Garda*, “Decision on the Confirmation of Charges”, ICC-02/05-02/09-243-Red, 8 February 2010, para. 30 (“Abu Garda Confirmation of Charges Decision”); Situation in the Democratic Republic of the Congo, *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision on Prosecutor’s Application for a warrant of arrest, Article 58”, ICC-01/04-01/06-8-US-Corr, 17 March 2006, para. 41.

²³⁵ See Côte D’Ivoire Article 15 Decision, paras. 202-204; Kenya Article 15 Decision, paras. 48, 50;

²³⁶ Côte D’Ivoire Article 15 Decision, para. 204; Kenya Article 15 Decision, paras. 188-189.

²³⁷ See, in concurrence with the Prosecution’s submissions, Abu Garda Confirmation of Charges Decision, paras. 31; Kenya Article 15 Decision, para. 188.

138. Scale: The *Mavi Marmara* which was intercepted by IDF forces was carrying over 500 civilian passengers in total.²³⁸ Nine passengers of the *Mavi Marmara* were killed by IDF forces during the interception operation, and another passenger later died of the serious injuries he sustained during the 31 May 2010 incident. The available information also indicates that around 50-55 other passengers were injured, some seriously, during these events on the *Mavi Marmara*. Based on the available information, at this stage, the precise or even approximate number of passengers who were victims of outrages upon personal dignity is unclear.²³⁹ In addition to the *Mavi Marmara*, seven other vessels in the flotilla were intercepted by the IDF forces, however no serious injuries occurred during the course of these interceptions. Overall, while the Office regrets and deplores the loss of life and injury, it has to be acknowledged that the total number of victims of the flotilla incident reached relatively limited proportions as compared, generally, to other cases investigated by the Office.
139. Nature: There is a reasonable basis to believe that the following war crimes have been committed: wilful killing and wilfully causing serious injury to body and health under article 8(2)(a)(i) and article 8(2)(a)(iii) – both of which are grave breaches of the Geneva Conventions – as well as the war crime of committing outrages upon personal dignity under article 8(2)(b)(xxi). With respect to this latter crime, the available information suggests that following the takeover of the *Mavi Marmara*, there was mistreatment and harassment of passengers by the IDF forces and that such humiliating or degrading treatment lacked justification or explanation. It is noted, however, that the information available does not indicate that the treatment inflicted on the affected passengers amounted to torture or inhuman treatment.
140. Manner of commission: The deaths and injuries to passengers occurred during the course of the IDF's efforts to board and take control of the *Mavi Marmara* in enforcement of the naval blockade. Overall, the means and extent of force used by the IDF forces against the passengers on board the vessel appears to have been excessive in a number of instances. As noted by the Palmer-Uribe Panel, "no adequate explanation has been provided for the nine deaths or why force was used to the extent that it produced such high

²³⁸ The Palmer-Uribe Report and Turkish Report referred to the *Mavi Marmara* as carrying 546 passengers; while, IHH indicated there were 577 passengers on board and the Turkel Report noted that there were approximately 591 passengers on the vessel. See Palmer-Uribe Report, para. 84; Turkish Report, p. 15; Referral – Appendix I (IHH Summary Report), p. 12; Turkel Report, p. 113.

²³⁹ In characterising these events, the Palmer-Uribe Panel characterised the mistreatment of passengers as "significant" and referred to "many" passengers as having been subjected to various forms of mistreatment. Palmer-Uribe Report, paras. 137, 139.

levels of injury.”²⁴⁰ However, the information available does not suggest that the alleged crimes were systematic or resulted from a deliberate plan or policy to attack, kill or injure civilians or with particular cruelty. Even in the context of the overall interception of the flotilla, the information available indicates that the commission of serious crimes was confined to one vessel, out of seven, of the flotilla.

141. Impact: The alleged crimes clearly had a significant impact on victims and their families and other passengers involved, who suffered physical and/or psychological or emotional harm as a result of the alleged crimes. However, while the flotilla campaign involved aspects of humanitarian assistance for the civilian population, it does not appear that the conduct of the IDF during the incident can be considered to have had a significant impact on the civilian population in Gaza. While the Israeli forces intercepted the flotilla and prevented it from reaching Gaza, the information indicates that Israel made offers and proposals to the flotilla participants to permit the humanitarian supplies to be delivered through an alternative route. Additionally, the supplies carried by the vessels in the flotilla were ultimately later distributed in Gaza.²⁴¹ In these circumstances, the interception of the flotilla cannot be considered to have resulted in blocking the access of Gazan civilians to any essential humanitarian supplies on board the vessels in the flotilla.
142. Ultimately, considering the scale, impact and manner of the alleged crimes committed, the Office is of the view that the flotilla incident does not fall within the intended and envisioned scope of the Court’s mandate. It should be noted that even when considering that the IDF might have also committed the war crime of intentionally directing an attack against the *Mavi Marmara* and the *Eleftheri Mesogios/Sofia*, in the case of an unlawful blockade, such a finding would not significantly affect the gravity assessment of the potential case.

²⁴⁰ Palmer-Uribe Report, para. 131.

²⁴¹ In particular, after the vessels were taken to Ashdod and their cargo was unloaded and inspected, Israel announced that it would deliver the humanitarian supplies confiscated from the vessels, except for certain banned items such as cement. Hamas initially refused to allow the aid to be transferred to Gaza until certain conditions were met. However, after diplomatic negotiations, it was announced in mid-June 2010 that the cargo would be delivered to Gaza under UN supervision and coordination. See Carol Migdalovitz, “Israel’s Blockade of Gaza, the *Mavi Marmara* Incident and its Aftermath”, 23 June 2010, Congressional Research Service, p. 3; IRIN, “Flotilla aid to enter Gaza under UN supervision”, 17 June 2010. The cargo of the *Rachel Corrie*, intercepted separately on 5 June 2010, was also transferred by Israel to Gaza. Turkel Report, fn. 400.

143. The limited nature of the referred situation affects the gravity of the potential case(s) that could arise from it. The referral concerns a confined series of events and alleged crimes concerning primarily the interception of the flotilla by IDF forces on 31 May 2010. The scope of the situation is further narrowed by the following considerations: (i) the Court's territorial jurisdiction is limited to events occurring on only three of the seven vessels in the flotilla; (ii) the information available provides a reasonable basis to believe that a limited number of crimes within the material jurisdiction of the Court were committed on only one of these three vessels; and (iii) the Court's territorial jurisdiction does not extend to any events that, while related to the events on board these vessels, occurred after individuals were taken off those vessels.
144. In certain circumstances, a single event of sufficient gravity could warrant investigation by the Office. However, in the context of the current referral, it is clear that the potential case(s) that could be pursued as a result of an investigation into this situation is limited to an event encompassing a limited number of victims of the alleged ICC crimes, with limited countervailing qualitative considerations.
145. In this regard, it is noted that the case brought against *Abu Garda et al* similarly concerned a single attack involving a relatively low number of victims. With respect to gravity, the *Abu Garda* case, however, is distinguishable in relation to both the nature and impact of the alleged crimes. Specifically, the nature of the alleged crimes included intentionally directing attacks against peacekeeping personnel, the killing of twelve (and attempt to kill a further eight) African Union Mission in Sudan ("AMIS") peacekeeping personnel, and destruction and the pillaging of AMIS property.²⁴² Moreover, in addressing the impact of attacking peacekeepers, the Office recalled the commentary of the International Law Commission on the Draft Code of Crimes against the Peace and Security of Mankind, which stated that attacks against peacekeepers are "directed against the international community and strike at the very heart of the international legal system established for the purpose of maintaining international peace and security by means of collective security measures taken to prevent and remove threats to the peace" and accordingly constitute "violent crimes of exceptionally serious gravity which have serious consequences not only for the victims, but also for the international community. These crimes are of concern to the international community as a whole because they are committed against persons who represent the international community and

²⁴² Abu Garda Confirmation of Charges Decision, para. 21.

risk their lives to protect its fundamental interest in maintaining the international peace and security of mankind".²⁴³ In direct consequence of the attack against African Union peacekeepers stationed at Haskanita, the Office further observed that "AMIS operations were severely disrupted, thus affecting its mandated protective roles with respect to millions of Darfurian civilians in need of humanitarian aid and security" and that ultimately the AMIS "reduced its activities in the area, and this left a large number of civilians without AMIS protection".²⁴⁴ The PTC concluded that the case was of sufficient gravity because not only were the consequences of the attack grave for the direct victims of the attack (the AMIS personnel) and their families, but additionally the initial suspension and ultimate reduction of AMIS activities in the area as a result of the attack had "a grave impact on the local population."²⁴⁵

146. By contrast, the alleged crimes committed during the flotilla incident are of a different nature and do not have a corresponding qualitative impact. In particular, the alleged crimes committed do not involve similar aggravating factors.²⁴⁶ In this respect, it is noted that similar to peacekeeping missions, attacking personnel involved in a humanitarian mission is also as a war crime under the Statute and that such a crime would similarly involve a substantial impact since it could directly affect a civilian population. However, as concluded above, the flotilla does not appear to constitute a humanitarian mission within the scope of article 8(2)(b)(iii) of the Statute due to its apparent lack of neutrality and impartiality as evidenced in the flotilla's explicit political objectives and apparent primary purpose of challenging the blockade and raising publicity for this cause, failure to obtain Israeli consent, and refusal to cooperate with the Israeli authorities in their proposals for alternative methods of distributing relief supplies. Accordingly, although the flotilla campaign involved aspects of humanitarian assistance, this consideration does not significantly impact the

²⁴³ ICC-02/05-02/09-24-Conf-Exp-AnxA, para. 128, citing International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind (1996), Commentary to Article 19, Yearbook of The International Law Commission, 1996, Volume II, Part Two, A/CN.4/SER.A/1996/Add.1 (Part 2), p. 51.

²⁴⁴ Abu Garda Confirmation of Charges Decision, para. 33.

²⁴⁵ *Ibid.*, paras. 33-34. See also Situation in Darfur, Sudan, *The Prosecutor v. Abdallah Banda Abakaer Nourrain and Saleh Mohammed Jerbo Jamus*, "Corrigendum of the 'Decision on the Confirmation of Charges'", ICC-02/05-03/09-121-Corr-Red, 7 March 2011, paras. 27-28 ("Banda and Jerbo Confirmation of Charges Decision").

²⁴⁶ See Abu Garda Confirmation of Charges Decision, para. 31; Kenya Article 15 Decision, para. 62. See Banda and Jerbo Confirmation of Charges Decision, paras. 27-28.

overall assessment of gravity pursuant to article 17(1)(d) in light of the particular circumstances of this situation.

147. The Office notes that the flotilla campaign in a broader sense was related to the humanitarian crisis faced by the civilian population of Gaza resulting from the overall restrictions and blockade imposed by Israel, insofar as the campaign sought to bring attention to this situation. While the situation with regard to the civilian population in Gaza is a matter of international concern, this issue must be distinguished from the Office's assessment which was limited to evaluating the gravity of the alleged crimes committed by Israeli forces on board the vessels during the interception of the flotilla.
148. Accordingly, based on the foregoing considerations, the Office has determined that the potential cases that would likely arise from an investigation of the situation concerning the flotilla incident would not meet the required gravity threshold, pursuant to article 17(1)(d) of the Statute. In light of the conclusion reached on gravity, it is unnecessary to reach a conclusion on complementarity.

VII. CONCLUSION

149. The information available provides a reasonable basis to believe that war crimes under the Court's jurisdiction have been committed in the context of interception and takeover of the *Mavi Marmara* by IDF soldiers on 31 May 2010, including namely: (1) wilful killing pursuant to article 8(2)(a)(i); (2) wilfully causing serious injury to body and health pursuant to article 8(2)(a)(iii); and (3) committing outrages upon personal dignity pursuant to article 8(2)(b)(xxi). If the blockade was unlawful, an issue on which the Office has not taken a position, there is consequently also a reasonable basis to believe that the IDF committed the crime of intentionally directing an attack against two civilian objects pursuant to article 8(2)(b)(ii) in relation of the forcible boarding of the *Mavi Marmara* and the *Eleftheri Mesogios/Sofia*. The Office emphasises that these conclusions are solely based on the assessment of the information available at this stage and in accordance with the 'reasonable basis' standard. Not having collected evidence itself, the Office's analysis in this report must therefore not be considered to be the result of an investigation.
150. However, on the basis of information available, the Office considers that the potential case(s) that would likely arise from an investigation into the situation would not be of sufficient gravity to justify further action by the

Court and would therefore be inadmissible pursuant to articles 17(1)(d) and 53(1)(b) of the Statute.

151. Accordingly, the Office has determined that there is no reasonable basis to proceed with an investigation and has decided to close this preliminary examination. The referral and additional information submitted by the Comoros will be maintained in the Office's archives and the decision not to proceed may be reconsidered at any time based on new facts or information.
152. The Office notes that as the referring State, the Comoros, may request the Pre-Trial Chamber to review the Prosecutor's decision not to proceed with an investigation, pursuant to article 53(3)(a).²⁴⁷

²⁴⁷ See also rules 105, 107, 108 of the ICC Rules of Procedure and Evidence.