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WRITING SAMPLE

The attached writing sample is a final paper I wrote for an International Judicial System seminar. It analyses the prospects of the International Criminal Court Office of the Prosecutor initiating a formal investigation into North Korea's liability for the *Cheonan* and Yeonpyeong Do incidents on South Korean territory.

MEMO

TO: Professor Thomas Buergenthal
FROM: Daniel Aum
DATE: November 30, 2012
RE: Analysis of the International Criminal Court Office of the Prosecutor's preliminary examination of and prospects for initiating a formal investigation into North Korea's liability for the *Cheonan* and Yeonpyeong Do incidents on South Korean territory.

I. INTRODUCTION

On March 26, 2010, the *Cheonan* – a South Korean navy corvette – making its routine patrol within Republic of Korea (“ROK” or “South Korea”) maritime borders was hit by an explosion, split in half, and sank killing 46 crew members.¹ A joint military-civilian investigation team of international experts from around the world, including from South Korea, concluded that the *Cheonan* was sunk by a Democratic People's Republic of Korea (“DPRK” or “North Korea”) torpedo launched by a North Korean submarine.² North Korea subsequently conducted its own investigation denying all allegations.³

Later the same year on November 23, the South Korean army was performing its regular artillery exercises on Yeonpyeong Do (“YPD”)⁴, an island near the South and North Korean maritime border.⁵ Following the exercise, North Korea military forces fired around 170 artillery

¹ Permanent Rep. of the U.S. to the U.N., Letter dated July 23, 2010 from the Permanent Rep. of the U.S. to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2010/398 (Aug. 20, 2010) [hereinafter US to UN 8-20-2010].

² *See id.*

³ Permanent Rep. of the DPRK to the U.N., Letter dated Nov. 2, 2010 from the Permanent Rep. of the Democratic People's Republic of Korea to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2010/568 (Nov. 3, 2010) [hereinafter DPRK to UN 11-3-2010].

⁴ “Do” translated from Korean means “island.”

⁵ Permanent Rep. of the U.S. to the U.N., Letter dated Dec. 19, 2010 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2010/648 (Dec. 19, 2010) [hereinafter US to UNSC 10-19-2010].

shells and rockets at YPD, impacting military and civilian targets and other areas of the island.⁶

South Korea retaliated by firing 80 K-9 howitzer rounds back toward North Korean islands.⁷

The final casualty count on YPD was 4 South Korean deaths and 68 injuries and damage throughout the island.⁸ An unknown number of North Korean were killed or injured.⁹

On December 6, 2010, International Criminal Court (ICC) Office of the Prosecutor (OTP) announced that it would open a preliminary examination based on information received related to both the *Cheonan* and YPD incidents incidents.¹⁰

This memo analyzes the issues the ICC Prosecutor will have to address in determining whether these incidents fall within the jurisdiction and admissibility requirements under the Rome Statute to initiate a formal investigation. Part II lays out the facts regarding the *Cheonan* and YPD incidents. Part III addresses the statutory requirements to open a formal investigation, namely 1) jurisdiction 2) admissibility and 3) balance of the interests of justice. Part IV analyzes the *Cheonan* and YPD incidents under the legal criteria. Part V concludes that the Prosecutor will likely find that the sinking of *Cheonan* fails to satisfy the requirements to open a formal investigation, because a torpedo strike against a military target, even if committed by North Korea, is not a violation of the existing international armed conflict between North Korea and South Korea. The Prosecutor, however, may find that the shelling of Yeonpyeong Do gives a reasonable basis to open a formal investigation for war crime violations, primarily for damage to civilian persons and property.

⁶ *See id.*

⁷ *See id.*

⁸ *See id.*

⁹ *See (2nd LD) Military Suggests Counterfire Caused ‘Many Casualties’ in N. Korea*, YONHAP NEWS (Dec. 2 2010), <http://english.yonhapnews.co.kr/national/2010/12/02/83/0301000000AEN20101202009100315F.HTML>

¹⁰ The Office of the Prosecutor, Report on Preliminary Examination Activities, ICC 10 (Dec. 13 2011) [hereinafter OTP Report on Preliminary Activities].

II. FACTUAL BACKGROUND

On June 25, 1950, the Democratic People’s Republic of Korea (“DPRK” or “North Korea”) army marched across the 38th parallel into Republic of Korea (“ROK” or “South Korea”) igniting what is known as the Korean Civil War.¹¹ At the time when North Korea seemed to be on the verge of a swift victory, the United Nations Security Council issued Resolutions 82 to 84, condemning the North Korean invasion of South Korea and establishing the United Nations Command (“UNC”) forces to aid South Korean forces on the Korean peninsula.¹² UNC’s involvement turned the turn of the tide of battle prompting China to enter the fold in support of North Korea. With forces evenly matched and no substantial gains in territory, the war returned to where it had started – the 38th parallel.¹³ At a deadlock and human losses accumulating, in 1953 the UNC and North Korea-China forces signed the Korean War Armistice Agreement of 1953 (“armistice”) with the purpose of eventually terminating the war with a peace treaty.¹⁴ Fast forward, as of 2012, a peace treaty has not been signed.

Instead, for 69 years since 1953, the Korean Peninsula has been replete with political, legal, and military provocations and altercations.¹⁵ To highlight a few examples, North Korea made multiple assassination attempts against sitting South Korean presidents in 1968, 1974, and 1983 and bombed a South Korea Boeing 707 civilian plane in 1987.¹⁶ It is reported that North Korea has made 3,693 infiltration attempts into the South from 1954 to 1992.¹⁷ In the last couple

¹¹ JAMES L. STOKESBURY, A SHORT HISTORY OF THE KOREAN WAR 14 (1990).

¹² S.C. Res. 82, U.N. Doc. S/RES 82 (June 25, 1950), at 4-5; S.C. Res. 83, U.N. Doc. S/RES 83 (June 27, 1950), at 5.; S.C. Res. 84, U.N. Doc. S/RES 84 (July 7, 1950), at 5.

¹³ See Stokesbury, *supra* note 11, at 145, 175-77.

¹⁴ See *id.*

¹⁵ HANNAH FISCHER, CONG. RESEARCH SERV., RL 30004, NORTH KOREAN PROVOCATIVE ACTIONS, 1950–2007 (2007).

¹⁶ See *id.*

¹⁷ See *id.*

decades, naval skirmishes began to increase near the maritime border of South and North Korea. Moreover.¹⁸ Since 1953, North Korea has made multiple denunciations to its obligations to the armistice, most recently in 2009, claiming South Korea breached its obligations under the armistice by joining the US-led Proliferation Security Initiative movement.¹⁹ The two Koreas have shared this ongoing tumultuous relationship for just under 60 years, and the incidents involving *Cheonan* and YPD are only one of the more recent notable skirmishes.

On March 26, 2010, the *Cheonan* – a South Korean navy corvette – was conducting a routine patrol in its assigned sector within the South Korea maritime border.²⁰ Without warning, the *Cheonan* was hit by an explosion resulting in its almost immediate sinking and loss of 46 South Korean sailors.²¹ No trace of any hostile vessel was found near the vicinity around the time of the explosion.²² Subsequently on March 31, 2010, South Korea established the Joint Investigative Group (JIG) composed of 47 South Korean experts and 24 multinational experts from the United States, Australia, the United Kingdom, Sweden, Canada, and New Zealand.²³ The JIG was established to ascertain the cause of the *Cheonan* sinking through “scientific and objectively precise investigative means”.²⁴ Based on the available facts and expert analysis, JIG concluded that “*Cheonan* was sunk as a result of an external underwater explosion caused by a torpedo made in north Korea and that the evidence pointed overwhelmingly to the conclusion

¹⁸ *See id.*

¹⁹ *See id.*; see also Heejin Koo and Indira A.R. Lakshmanan, *Clinton Warns North Korea for ‘Belligerent’ Behavior in the Region*, Bloomberg (March 27, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aS17xp.yHokM>.

²⁰ Permanent Rep. of the U.S. to the U.N. Letter dated July 23, 2010 from the Permanent Rep. of the U.S. to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2010/398 (Aug. 20, 2010).

²¹ *See id.*

²² *See id.*

²³ *See id.*

²⁴ *See id.*

that the torpedo was fired by a north Korean submarine. There is no other plausible explanation.²⁵

North Korea immediately rejected the findings of the study claiming “the objective and scientific military analysis and the environment surrounding the incident reveal that the incident is a fabricated scenario, purely for the political and military purposes of the United States,” and requested that North Korea be able to independently inspect and evaluate the site of the incident.²⁶ North Korea later established the Inspection Group of the National Defence Commission (“IGNDC”) to conduct an independent investigation.²⁷ The IGNDC repudiated all the findings of the JIG study, concluding that a torpedo did not cause the *Cheonan* to explode and even if it did, North Korea did not launch the torpedo. On July 9, 2011, the UN Security Council, taking into consideration both reports, issued a Presidential Statement condemning the attack of the *Cheonan* but stopped short of identifying the aggressor.²⁸

Later that year, on November 16, in preparation of its future live fire exercise to be held on November 23, South Korea published a Korean Navigation Warning out to the international community.²⁹ The South Korean military has conducted regular, live fire training exercises at

²⁵The Joint Civilian-Military Investigation Group, Investigation Result on the Sinking of ROKS “*Cheonan*” 5 (May 20, 2010) [hereinafter JIG Report].

²⁶Permanent Rep. of the DPRK to the U.N., Letter dated June 8, 2010 from the Permanent Rep. of the Democratic People’s Republic of Korea to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2010/294 (June 8, 2010).

In the same letter, North Korea also attacked the integrity of the UN SC, stating, “It is imperative for the Security Council not to step into the same situation in which it was once misused as a tool of high-handedness and hegemony of the United States by giving legitimacy to its armed invasion into Iraq, based on a single word of lies of Powell, United States Secretary of State, in February 2003.”

²⁷Permanent Rep. of the DPRK to the U.N., Letter dated Nov. 2, 2010 from the Permanent Rep. of the Democratic People’s Republic of Korea to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2010/568 (Nov. 3, 2010).

²⁸Press Release, Security Council, Security Council Condemns Attack on Republic of Korea Naval Ship ‘*Cheonan*’, Stresses Need to Prevent Further Attacks, Other Hostilities in the Region, U.N. Press Release SC/9975 (July 9, 2010).

²⁹See US to UNSC 10-19-2010, *supra* note 5.

YPD since 1974.³⁰ From 2006 to 2010, the South Korean military previously announced and conducted 65 live fire exercises in the vicinity of YPD, including three previous such live fire exercises in 2010 alone.³¹

The morning of November 20, the North Korea military issued a “grave warning” to the South Korea army through military channels, stating that it would take “immediate tangible measures” against South Korea if South Korea conducted live fire exercises “in the vicinity of Yeonpyeong-Do in the West Sea of Chosun”.³²

On November 23, the South Korean military went forward in conducting a live fire exercise on pre-planned and previously utilized targets located in waters “customarily patrolled and administered by Republic of Korea and UNC forces . . . i.e., not towards the land area of the Democratic People’s Republic of Korea controlled by the [North Korea military] or waters contiguous to such area.”³³ Additionally, no [North Korea military] forces were in the vicinity of the pre-planned targets.”³⁴

Several hours later, approximately 170 North Korean artillery shells and rockets were fired at YPD. In response, South Korea retaliated with 80 K-9 howitzer 155mm rounds against a North Korean island.³⁵ Within approximately an hour, both sides agreed to cease fire.³⁶

In casualties, the bombardment killed two South Korean marines and two South Korean civilians, while injuring 16 marines and 52 civilians.³⁷ Additionally, the shells and rockets

³⁰ *See id.*

³¹ *See id.*

³² *See id.*

³³ *See id.*

³⁴ *See id.*

³⁵ *See id.*

³⁶ *See id.*

³⁷ *See id.*

caused considerable damage on military facilities and civilian homes.³⁸ It is also reported that the attack started widespread fires on the island.³⁹ According to the local county office, 70 percent of the island's forests and fields were burned and 21 houses and warehouses and eight public buildings were destroyed in the bombardment.⁴⁰ Moreover, most of the islanders were evacuated in the aftermath of the shelling.⁴¹ Around 1,500 of the 1,780 residents on the island were taken aboard fishing boats and government ships to nearby cities.⁴² The Incheon city authorities sent 22 fire engines and ambulances to the island, along with firefighters and paramedics, to help with the recovery and relief effort. Authorities additionally sent 2,000 boxes of emergency relief materials and more than 3,500 relief kits and boxes of food to help residents recover.⁴³

The UN Command subsequently conducted a special investigation from December 6 through 13 into the YPD incident.⁴⁴ On March 9, 2011, the UNC submitted its report to the UNSC with the following conclusions: South Korea's live fire drills were neither hostile nor directed towards North Korea; North Korea's artillery provocation on Yeonpyeong Island, however, was a deliberate and premeditated attack in violation of the Armistice Agreement.⁴⁵ North Korea submitted its own findings to the UNSC on March 14, 2011, claiming South Korea opened "a reckless military provocation" into North Korea territorial waters, despite North

³⁸ *Yeonpyeong residents continue evacuation of island*, THE DONG-A ILBO (Nov. 25, 2010), <http://english.donga.com/srv/service.php3?bicode=050000&biid=2010112539998>.

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² *Yeonpyeong residents continue evacuation of island*". The Dong-a Ilbo, 2010-11-25., available at <http://english.donga.com/srv/service.php3?bicode=050000&biid=2010112539998>.

⁴³ *Yeonpyeong residents continue evacuation of island*". The Dong-a Ilbo, 2010-11-25., available at <http://english.donga.com/srv/service.php3?bicode=050000&biid=2010112539998>.

⁴⁴ *See* US to UNSC 10-19-2010, *supra* note 5.

⁴⁵ *See* Press Release, UN Command's Special Report on North Korea's Artillery Provocation, on Yeonpyeong Island Circulated, MOFAT KOREA (Mar. 9, 201).

Korea's repeated strong warnings,⁴⁶ to provoke North Korea into an attack. This attack would create the justification to "shape a triangular military alliance involving the United States, Japan, and south Korea . . . and expand the United States-led military blocs to the east and the west and then throughout the world."⁴⁷

North and South Korea do not retain amicable relations. The demarcation zone ("DMZ") separating North and South Korea is the most heavily militarized border in the world. To date, neither South Korea nor North Korea recognizes the *de jure* existence of each other, nor do they maintain official diplomatic relations.⁴⁸ Each country constitutions declare that it retains sole sovereignty over the Korean peninsula. As North Korea often reiterates, any such infringement on North Korea's sovereignty would be an "act of war" and North Korea would retaliate by turning Seoul into a "sea of flames."⁴⁹

The same year, the International Criminal Court (ICC) Office of the Prosecutor (OTP) received Article 15 communications regarding the shelling of YPD and the sinking of *Cheonan* from "citizens around the world."⁵⁰ On December 6, 2010, OTP announced that it would open a preliminary examination into the incidents.⁵¹

In the course of the preliminary examination, the OTP has stated it considers in particular the findings of international investigations into the two incidents, including the two reports by

⁴⁶ Permanent Rep. of the DPRK to the U.N., Letter dated Mar. 11, 2011 from the Permanent Rep. of the Democratic People's Republic of Korea to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2011/129 (Mar. 14, 2011) [hereinafter DPRK to UNSC 3-14-2011]

⁴⁷ P. 11

⁴⁸ Background Note: North Korea, U.S. STATE DEPT., www.state.gov/r/pa/ei/bgn/2792.htm.

⁴⁹ See e.g., AP, *North Korea threatens Attack over Leaflets*, CBSNEWS, www.cbsnews.com/8301-202_162-57535810/north-korea-threatens-attack-overleaflets' (responding to South Korean activists sending anti-North Korea propaganda leaflets over the border) .

⁵⁰ Kim Young-jin, *South Korea Welcomes ICC Probe Into NK Attacks*, KOREA TIMES (DEC. 17, 2010) http://www.koreatimes.co.kr/www/news/nation/2011/04/116_77605.html.

⁵¹ OTP Report on Preliminary Activities, *supra* note 10, at 10.

the UN Command on the sinking of the *Cheonan* and the attack on Yeonpyeong Island.⁵² Thus, this memo relies heavily on those reports for its factual support.

III. THE CRITERIA FOR AUTHORIZATION OF A *PROPRIO MOTU* INVESTIGATION UNDER ARTICLE 15 OF THE ROME STATUTE

Article 15 of the Rome Statute (“Statute”) establishes the procedure for initiating an investigation by the Prosecutor’s own initiative, subject to authorization by a Pre-trial Chamber.⁵³ According to sections 2 and 3 of article 15 of the Statute, based on the seriousness of information received concerning crimes within the jurisdiction of the Court, the Prosecutor may conclude whether to initiate an investigation into a situation. To reach this conclusion, rule 48 of the Rules of Procedure and Evidence (the “Rules”) dictates that the Prosecutor shall consider the statutory factors set out in Article 53(1) (a) to (c).

Article 53(1)(a)–(c) of the Statute require that the Prosecutor considers whether (a) the information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) the case is or would be admissible under Article 17 of the Statute; and (c) taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.⁵⁴

⁵² *See id.*

⁵³ Rome Statute to the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3. This provision was a point of controversy throughout the drafting process of the Rome Conference, primarily because it empowers the Prosecutor to trigger the jurisdiction of the Court of his own motion absent a referral from a State Party or the Security Council. The current Article, however, is the result of extensive discussion and reflects final consensus. *See generally*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Mar. 31, 2010, ICC-01/09 paras. 17-20 [hereinafter *Authorization in Kenya*].

⁵⁴ Pre-Trial Chamber II, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d’Ivoire”, Nov. 15, 2011, ICC-02/11 paras 20. [hereinafter *Authorization in Cote d’Ivoire*].

On the basis of a finding by the Prosecutor that there is "a reasonable basis to proceed with an investigation" under Article 53(1)(a)-(c), the Prosecutor "shall submit" to a Pre-trial Chamber a request for authorization of the investigation..⁵⁵ Accordingly, the standards provided in Article 53(1)(a)-(c) are examined next.

A. Article 53(1)(a) - "Reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed"

i. Reasonable basis to believe

The first prong of Article 53(1) requires that, in evaluating the information provided to the Prosecutor, the Prosecutor must find a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed. The "reasonable basis to believe" test is the lowest evidentiary standard in the Statute.⁵⁶ Given the nature of this early stage of the proceedings, the information available to the Prosecutor is neither expected to be "comprehensive" nor "conclusive" compared to the evidence that will be gathered during the formal investigation.⁵⁷ This is logical given that, at this preliminary stage, the Prosecutor has limited investigatory powers compared to those under Article 54 during the formal investigative stage.⁵⁸ An ICC Appeals Chamber stated that meeting this standard does not require that the conclusion reached on the facts be the only possible or reasonable one.⁵⁹ In addition, it is not even necessary to identify individual criminal liability at this point.⁶⁰

ii) A crime within the jurisdiction of the Court

Upon defining the reasonable basis standard, the Prosecutor must then consider whether based the available information, when assessed through the lens of this standard, there is

⁵⁵ *See id.* para 16.

⁵⁶ Authorization in Kenya, *supra* note 53, para. 27.

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ Appeals Chamber, 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", Feb. 3, 2010, para. 33.

⁶⁰ Authorization in Kenya, *supra* note 53, para. 102.

sufficient evidence to prove that "a crime within the jurisdiction of the Court has been or is being committed".⁶¹ The jurisdictional elements are as follows:⁶²

i. Temporal Jurisdiction

Under Article 11(1) and (2), the Court only has jurisdiction with respect to crimes committed after the entry into force of this Statute for that State.

ii. Territorial or Personal Jurisdiction.

Under Article 12(2)(a) and (b), the Court may only exercise jurisdiction if the alleged crimes occurred on the territory of a State Party or the person accused of a crime is a national of State Party. So, if a territorial jurisdiction is found, personal jurisdiction does not have to be considered.⁶³

iii. Subject-matter Jurisdiction

For the Court to exercise jurisdiction, the alleged crime must fall within the category of crimes defined in Articles 5 of the Statute.

B. Article 53(1)(b) – Admissibility

Following an examination of jurisdiction, Article 53(1)(b) requires the Prosecutor to consider whether "the case is or would be admissible under article 17". In this regard, the admissibility test has two main prongs: (i) complementarity; and (ii) gravity.

i. Article 17(1)(a)-(c) - Complementarity

With respect to complementarity, Article 17(1)(a) of the Statute mandates that the Court "shall determine that a case is inadmissible where: (a) The case is being investigated or

⁶¹ Id. at para. 36.

⁶² Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2)(a) of the Statute, Oct. 3, 2006, paras 21-22.

⁶³ See Authorization in Kenya, *supra* note 53, para. 65.

prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution".

An ICC Appeals Chamber interpreted this provision as involving a two-fold test: In considering admissibility, the initial questions to ask are 1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction, has decided not to prosecute the person concerned.⁶⁴ It is only when the answers to these questions are in the affirmative that one has to examine the question of unwillingness and inability.⁶⁵ It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction renders a case admissible before the Court, subject to article 17 (1)(d) of the Statute.⁶⁶

ii. Article 17(1)(d) – Gravity

The second prong under article 17(1) of the Statute, provides that even where there is a reasonable basis to believe that a crime has been committed, the case is inadmissible where the case is “not of sufficient gravity to justify further action by the Court.”⁶⁷

The Appeals Court in *Authorization in Kenya*, in determining gravity looked to : (i) a preliminary assessment of the groups of persons involved that are likely to be the object of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the

⁶⁴ Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber 11 of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497, paragraph 78 [hereinafter *Appeals Katanga*]. See also Appeals Chamber, *Corrigendum to the Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber m of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges"*, 19 October 2010, ICC-01/05-01/08-962-Con-, paragraphs 107-109.

⁶⁵ See *Appeals Katanga*, *supra* note 64, para. 78.

⁶⁶ *Id.* See also *Authorization in Kenya*, *supra* note 53, para. 53.

⁶⁷ The former ICC Prosecutor, Luis Moreno-Ocampo, explained that while, in a general sense, any crime within the subject-matter jurisdiction of the Court is “grave”, the Statute requires an additional threshold of gravity in light of the principle of complementarity with national systems. The additional assessment on gravity is a necessary filter “as the Court is faced with multiple situations involving hundreds or thousands of crimes and must select situations in accordance with the Article 53 criteria. ICC Chief Prosecutor, Letter to Senders Regarding Iraq, ICC (Feb. 9, 2006) [hereinafter *Iraq Letter*].

jurisdiction of the Court allegedly committed and the context in which they were committed that are likely to be the focus of an investigation for the purpose of shaping the future situations.⁶⁸

In making its assessment, the Chamber considers that gravity may be examined following a quantitative as well as a qualitative approach.⁶⁹ Regarding the qualitative dimension, it is not only the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which make it grave.⁷⁰

C. Article 53(1)(c) – Interests of Justice

The third requirement that the Prosecutor must review under Article 53(1)(c) of the Statute is "[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice". The Prosecutor is not required to establish that an investigation or prosecution is in the interests of justice. Rather, he shall proceed with investigation *unless* there are specific circumstances which provide substantial reasons to believe it not in the interests of justice at that time.⁷¹

Aside from a Policy Paper on the Interests of Justice by the OTP,⁷² jurisprudence on this subject is thin, and the Prosecutor has yet to deny a case based on the argument that it was against the Interests of Justice. However, the Policy Paper conveys that the developments in the last ten or fifteen years point to a consistent trend imposing a duty on States to prosecute crimes

⁶⁸ See Authorization in Kenya, *supra* note 53, para. 182.

⁶⁹ Iraq Letter, *supra* note 67. The former Prosecutor commented, "The number of potential victims of crimes within the jurisdiction of the Court – 4 to 12 victims of wilful killing and less than 20 victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office. Three other situations that the OTP is investigating involve long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of wilful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes."

⁷⁰ See Authorization in Kenya, *supra* note 53, para. 63.

⁷¹ See *id.* para. 63.

⁷² Policy Paper on the Interests of Justice, ICC OFFICE OF THE PROSECUTOR (Sept. 2007).

of international concern committed within their jurisdiction. Thus, the presumption is in favor of investigation or prosecution.⁷³ Moreover, the role of the Office of the Prosecutor is to investigate and prosecute those responsible for crimes under the jurisdiction of the Court.⁷⁴ Therefore, the Prosecutor of the ICC will only conclude that an investigation or a prosecution may not serve the interests of justice in exceptional circumstances.⁷⁵

IV. APPLICATION OF THE *CHEONAN* AND *YEONPYEONG DO* INCIDENTS TO THE STATUTORY CRITERIA

A. Whether There Is a Reasonable Basis to Believe That War Crimes Within the Jurisdiction of the Court Have Been Committed

Taking into account publicly available information, the nature of present proceedings to determine if some reasonable claim exists for further evaluation, and the low “reasonable basis” bar, the Prosecutor will likely find that there is a reasonable basis to believe war crimes have been committed with regards to the Yeonpyeong Do shelling but not in regards to the *Cheonan* sinking.

i. Temporal Jurisdiction

South Korea deposited its instrument of ratification to the Rome Statute on November 13, 2002.⁷⁶ Accordingly, the International Criminal Court has jurisdiction over Rome Statute crimes committed on the territory of South Korea or by its nationals from February 1, 2003 onwards.⁷⁷

In regards to the present situations, the *Cheonan* exploded and sank on March 29, 2010, and Yeonpyeong Do was bombarded on November 23, 2010.⁷⁸ Then, all acts germane to alleged

⁷³ *See id.*

⁷⁴ *See id.*

⁷⁵ *See id.*

⁷⁶ OTP Report on Preliminary Activities, *supra* note 76.

⁷⁷ *See id.*

⁷⁸ *See* Part II.

war crimes occurred after 2003. North Korea does not dispute this. Thus, the Prosecutor will most certainly find that temporal jurisdiction is satisfied for the two events.

ii. *Territorial or Personal Jurisdiction*

The sinking of *Cheonan* occurred within South Korea maritime territory.⁷⁹ Yeonpyeong Do is an island part of South Korea territory.⁸⁰ North Korea neither disputes the location nor the legitimacy of the borders where the incidents occurred. Accordingly, all crimes in this situation are alleged to have been committed on the territory of South Korea in 2010, and thus, the Prosecutor will likely find that territorial jurisdiction exists over the alleged crimes

iii. *Subject-matter Jurisdiction*

The Prosecutor's preliminary investigation into the *Cheonan* and events at YPD revolve around allegations of war crimes.⁸¹ Then, the Prosecutor must assess whether there is a reasonable basis to believe that war crimes within the jurisdiction of the Court have been committed.

In reviewing the available information and taking the standard of review in consideration, the Prosecutor will likely find that there are reasonable grounds to believe that in the context of this armed conflict, acts constituting war crimes according to articles 8(2)(c)(i), 8(2)(e)(vi) and 8(2)(e)(v) of the Statute were committed by the shelling of Yeonpyeong Do.

However, the Prosecutor will likely not find a reasonable basis that in the context of this armed conflict, war crimes were committed during the sinking of *Cheonan*.

These findings are based on the following considerations:

a. Contextual elements

⁷⁹ *See id.*

⁸⁰ *See id.*

⁸¹ OTP Report on Preliminary Activities, *supra* note 76.

- i. Article 8(1) “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes”

In the context of war crimes, Article 8(1) of the Statute first lays out 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". Former Chamber decisions have found that this provision does not articulate a strict requirement for the Court to exercise jurisdiction over war crimes, but only gives "a particular guideline for the Court".⁸² Accordingly, a single act could also amount to a war crime within the jurisdiction of the Court if it was committed in the context of and was associated with an armed conflict.⁸³

In addition, whereas the Elements of Crimes requires a “State or organizational policy” be found to constitute a crime against humanity under Article 7, the Elements of Crimes does not include such “plan or policy or as a part of a large-scale commission of such crimes” requirement to decide that war crimes occurred under Article 8.⁸⁴

In sum, given the Chambers’ past holdings, Prosecutor’s consistent practice, and Elements of the Crimes’ omitting the element, Article 8(1) is not a requisite element that the Prosecutor must review and thus, does not warrant further analysis for the purposes of investigating the *Cheonan* and YPD incidents.

- ii. Article 8(2)(b) – “international” armed conflict

⁸² Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of Prosecutor Against Jean-Pierre Bemba Gombo into the Situation in the Central African Republic, June 15, 2009, 2010, ICC-01/05-01/08-424, para. 211 [hereinafter Confirmation in CAR]; *see also* comment on article 8(1), M. Cottier in: O. Triffterer (ed.). Commentary on the Rome Statute of the International Criminal Court - Observer's Notes, Article by Article (C.H. Beck, Hart, Nomos, Verlag 2nd ed., 2008) 299-300.

⁸³ Pre-Trial Chamber I, Decision on the Confirmation of Charges in the Situation in the Democratic Republic of the Congo, Dec. 16, 2011, ICC-01/04-01/10, para. 94 [hereinafter Confirmation in DRC]. *See also* Iraq Letter, *supra* note 67.

⁸⁴ *See Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B. [hereinafter Elements of Crimes].

Turning to the nature of an international armed conflict, it is first necessary to define what constitutes an *international* dispute before assessing an international armed conflict. There is no specified definition of "international armed conflict" in the Rome Statute.⁸⁵ However, other international texts offer guidance. Common article 2(1) of the 1949 Geneva Conventions, stipulates that:

. . . the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

In addition, the decision on the confirmation of charges Pre-Trial Chamber I, relying on common article 2 of the aforementioned Conventions and the relevant ICTY jurisprudence, stated, “The Chamber considers an armed conflict to be international in character if it takes place between two or more States.”⁸⁶ Therefore, an international armed conflict exists in case of armed hostilities between States through their respective armed forces.

Upon the information available, the Prosecutor will likely find that there is sufficient evidence to establish reasonable grounds to believe that an international armed conflict existed between the North Korea and South Korea in relation to the *Cheonan* and YPD incidents. Here, the conflicts involve disputes between the North Korea and South Korea giving rise to kinetic interaction between members of the armed forces. As both entities are universally recognized as independent States, the Prosecutor will likely find nature of this dispute is of an international character.

Regarding the *Cheonan*, the Joint Investigative Group (“JIG”), after on site investigation and analysis, reached the conclusion that a North Korean torpedo from a North Korean

⁸⁵ Confirmation in CAR, *supra* note 82, para. 221.

⁸⁶ See Pre-Trial Chamber I, Lubanga decision, ICC-01/04-01/06-803-tEN, para. 209.; *see also* Confirmation in CAR, *supra* note 82, para. 220.

submarine was the cause of the *Cheonan* sinking “beyond a reasonable doubt”.⁸⁷ The fact that the JIG report was the result of international joint effort of scientists from various reputable countries around the world to conduct a scientific investigation into the cause of *Cheonan* sinking and the high standard of review they found to have been satisfied all lends credibility to the findings in the report that North Korea was involved. North Korea, however, refutes any involvement to the *Cheonan* sinking, and thus in effect, argues that it did not engage with South Korean forces *via Cheonan*. The Prosecution will also take into consideration that aside from North Korea’s own study, other countries have pointed to inconsistencies and questionable findings in the JIG report.⁸⁸ On balance, the Prosecutor could likely find that the conclusion in the JIG report reflects *at least* one reasonable explanation for *Cheonan*’s sinking. Thus, this finding is sufficient to satisfy the low baseline for the reasonable basis standard that North Korea, could have been involved in sinking the *Cheonan*. Thus, the Prosecutor will likely find there is a rational basis to believe that a period of hostile engagement between two States regarding *Cheonan*, giving rise to an international armed conflict.

In assessing the YPD incident, the United Nations Command (UNC), comprised of U.S. and South Korean forces, produced a report claiming that beyond a reasonable doubt, North Korea initiated an unprovoked attack against South Korea on the island of Yeonpyeong.⁸⁹ North Korea claims that South Korea invaded North Korea’s maritime territory during South Korea’s live-fire drill, thus justifying North Korea’s retaliation against South Korean forces.⁹⁰ However, the issue here is not whether North Korea was justified in its attack, but whether there was some level of hostile engagement between two States. Given that North Korea does not dispute that

⁸⁷ See US to UN 8-20-2010, *supra* note 1.

⁸⁸ DPRK to UN 11-3-2010, *supra* note 3.

⁸⁹ See Part II.

⁹⁰ See DPRK to UN 3-14-2011, *supra* note 46.

some engagement between North and South existed during the artillery exchange on YPD, the Prosecutor will most likely find that there is a reasonable basis to believe the crossfire was international in character.

iii. Article 8(2)(b) “armed conflict”

Turning to the second prong of an international armed conflict, the Prosecutor must define what kind of engagement constitutes an armed conflict. Based on the findings below, for the purposes of an armed conflict of an international character, any difference arising between two States and leading to the intervention of armed forces constitutes an armed conflict.

Common Article 2 to the Geneva Conventions of 1949, which is in regards to states that: "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." The International Committee of the Red Cross (ICRC), tasked by the States parties to the 1949 Geneva Conventions develop the understanding of knowledge of international humanitarian law applicable in armed conflict⁹¹, added regarding common article 2 of the 1949 Geneva Conventions, “It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims.”⁹²

In a direct address to the question of what constitutes an international armed conflict, the ICRC further described in an Opinion Paper:

⁹¹ Statutes of the International Red Cross and Red Crescent Movement, art. 5, para.

2(g).. <http://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm>

⁹² J. Pictet, (ed.), ICRC Commentary on Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, (ICRC, 1958), p. 20. The convention mentioned is further referred to as the "Fourth Geneva Convention", *see* UNTS, 75 vol. 287.

an international armed conflict occurs when one or more States have recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation. Relevant rules of IHL may be applicable even in the absence of open hostilities. Moreover, no formal declaration of war or recognition of the situation is required.⁹³

The seminal case on this issue, *Tadic*, from the International Criminal Tribunal for the former Yugoslavia (ICTY) stated that “an armed conflict exists whenever there is a resort to armed force between States”⁹⁴ Since then, other international bodies have found an armed conflict exists when a State resort to armed forces against another State.⁹⁵ Therefore, 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.⁹⁶

I. termination of armed conflict

In the existence of an armed conflict, the question remains as to when the armed conflict comes to its end: Under the Geneva Conventions, the generally accepted rule is that international humanitarian law applies until the “general close of military operations”. There are however, exceptions to this rule. First, the obligation to repatriate persons protected under the Third (POWs) and Fourth (Civilians) Geneva Conventions is actually triggered by the “cessation of

⁹³ ICRC Opinion Paper, 1-2.

⁹⁴ *Prosecutor v Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber) Oct. 2, 1995, para. 70 [hereinafter *Tadic Appeal*].

It is also worth noting that *Tadic* case indicated that the armed hostilities must occur over a “protracted period of time”.⁹⁴ However, the protracted element only applies to the non-international armed conflict. The Rome Statute makes this distinction as well, requiring that a protracted conflict exist in the context of a non-international armed conflict but requiring no such analogous requirement exists international armed conflict. The protracted element was an important factor in distinguishing the existence of non-international armed conflict from other “internal disturbances and other and tensions (or) other isolated and sporadic acts of violence” as stated under Article 1(2) of the Additional Protocols to the Geneva Conventions. The Rome Statute also reflects that the Court did not want to deal with internal disturbances that did not reach the level of international intervention by including an extra level of scrutiny in adjudicating non-international conflicts differently from international ones is. This same reasoning does not apply to conflicts of an international character where States are engaging in hostilities.

⁹⁵ See e.g., Confirmation in CAR, *supra* note 82, para. 223; Confirmation in DRC, *supra* note 83, para. 100.

⁹⁶ *But see* Report, Meaning of Armed Conflict in International Law, ILA (2010) (Although a group of international lawyers under the ILA gathered to produce a report finding that at least two characteristics were required that define an armed conflict beyond mere engagement and that includes the existence of organized armed groups engaged in fighting of some intensity, no international tribunal case has been found that has followed this published standard) [hereinafter ILA].

active hostilities.” Second, the obligations imposed upon occupying powers by the Civilians Convention extend beyond the “general close of military operations.” Thus, the obligations under international humanitarian law can extend past the cessation of active hostilities.⁹⁷

In the same vein, the Appeals Chamber in Tadic found that international humanitarian law extends beyond the cessation of hostilities until a general conclusion of peace is reached. Until this conclusion, international humanitarian law continues to apply in the whole territory of the warring States.⁹⁸

The International Law Association (“ILA”), a committee of international jurists, commented that as it is increasingly rarer that countries end armed conflicts with formal agreements, it more often the case that the hostilities must cease “for a long enough period of time so that the parties and the international community recognize that the conflict is at an end.”⁹⁹ But ILA further states that international law provides no strict rule as to how long the cessation must last for an armed conflict to legally come to an end.¹⁰⁰

Because North and South Korea signed an armistice in 1953, it is further necessary to determine what legal effect, if any, an armistice has to the existence of an armed conflict.

II. general principles on legal effect of armistice agreements

In terms of the general legal effects of an armistice, the Hague Regulations of 1907 Article 36 defines that an armistice “suspends military operations by mutual agreement between

⁹⁷ Tadic Appeal, *supra* note 94, para. 70.

⁹⁸ Tadic Appeal, *supra* note 94, para. 70.. (finding that hold that the alleged crimes were committed in the context of an armed conflict notwithstanding various temporary cease-fire agreements, because no general conclusion of peace has brought military operations in the region to a close).

⁹⁹ ILA, *supra* note 96, at 31.

¹⁰⁰ *Id.*

the belligerent parties.”¹⁰¹ Furthermore, in the same provision, “belligerent parties may resume their operations provided that the enemy is warned.” The key words ‘suspend’ and ‘resume’ imply that an armistice is not a complete termination of military operations, but only a temporary cessation of actions.¹⁰² The temporary and limited nature of the armistice is also reflected under Article 40 of the Hague Regulations, which provides that a serious violation of the armistice is grounds for denunciation, and in cases of urgency, an immediate recommencement of hostilities. However some international scholars argue that as the armistice agreement has gained importance as an international agreement in a majority of cases, armistice agreements are no longer followed by a peace agreement as it was general practice by custom, but it remains as the only agreement.¹⁰³ It is also relevant to view the terms of the armistice itself to determine if it provides for denunciation or specific legal effects.

III. Application regarding *Cheonan* and Yeonpyeong Do

Here, the Prosecutor could analyze the existence of the armed conflict through two lens: viewing the *Cheonan* and YPD as isolated incidents or viewing them as two engagements occurring on a single continuum of confrontations, since 1950 when the Korean war began. Though the only actions that can come under investigation are those occurred after 2003 when the Rome Statute entered into force for South Korea, the incidents since 1950 should be reviewed for the purposes of gaining a broad scope of the ongoing tension between the Koreas. In light of the extended history and ongoing altercations between the countries, as discussed

¹⁰¹ Hague Regulations of 1907 Art. 36 (“Laws and Customs of War on Land, July 29, 1899).

¹⁰² Seunghyun Nam, Unpublished Paper, *War On the Korean Peninsula? Application of Jus in Bello and Existence of War Crimes*, ExpressO (2012).

¹⁰³ J. Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes-and War- Law* 644 (Stevens & Sons, 1954), Yoram. Dinstein, *War, Aggression, and Self-defense*, 42 (Cambridge University Press, 2004).

below, the Prosecutor can view these incidents from the long term construct rather than as isolated incidents.

When the North Korea army crossed into South Korea territory in 1950 engaging in large-scale hostilities, an armed conflict broke out as two organized and *de facto* militaries were engaging in hostilities.¹⁰⁴ At the time of invasion, though the United Nations General Assembly only recognized the Republic of Korea to be the only valid government of the Korean peninsula,¹⁰⁵ North Korea had obtained a large *de facto* military of their own. This armed conflict persisted until the 1953 with the signing of the Korean Armistice Agreement. Even though the two Koreas were not party to the Geneva Conventions¹⁰⁶, the Supreme Commander of the UN Forces and the Minister of Foreign Affairs of the DPRK during the Korean conflict had voluntarily declared that they would abide by the Geneva Conventions, implying that they considered themselves to be engaged in armed conflict at the time.¹⁰⁷

In 1953, the two countries temporarily ceased hostile engagement when the armistice was signed with the view of eventually agreeing to a peace treaty.¹⁰⁸ Article 62 of the Korean Armistice states that the Armistice remains in effect until a peace settlement is achieved, and it can be implied through the language of the treaty that the parties were anticipating a peace

¹⁰⁴ Sydney D. Bailey, *The Korean Armistice*, 10 (St. Martin's Press 1992).

¹⁰⁵ GA Res. 112 (II), 12 Dec. 1948; A Joint Commission had been established to set up a provisional Korean government. The General Assembly passed a resolution calling for elections held under the auspices of the United Nations Temporary Commission on Korea (General Assembly Res. 112 (II) 14 Nov. 1947). Therefore, an election was held in May 10, 1948 with Syngman Rhee being elected as President, but the Soviet Union refused to permit the members of the Commission to enter the portion of the peninsula, which it occupied. A People's Committee adopted a constitution for North Korea in July 1948 and Kim Il-sung became the Prime Minister of Democratic People's Republic of Korea.

¹⁰⁶ The ROK became a party to the 1949 Geneva Convention in 1966, whereas the DPRK became a party in 1957.

¹⁰⁷ Leslie Green, *The Contemporary Law of Armed Conflict* 55 (Manchester University Press, 1993).

¹⁰⁸ Yoram Dinstein, *War, Aggression and Self-Defence*, 43-44, (Cambridge, 4th ed. 2005); G. von Glahn, *Law among Nations* 727 (6th ed., 1992).

agreement in the near future to permanently end the war.¹⁰⁹ However, the parties have failed to conclude a peace agreement since the armistice was signed just under sixty years ago.

As discussed above, a mere armistice does not terminate the existence of an armed conflict, but there must be a general close of military operations within a period of time so that the parties and the international community recognize that the conflict is at an end. However, since the armistice was signed in 1950, the Korean peninsula has experienced tumultuous and ongoing hostile engagements that have fluctuated in intensity throughout the years but never completely ceased.¹¹⁰

As many of the events regarding the repeating altercations between North and South Korea are set out in the Part II, this section will review them in brief. There have been numerous firefights on land and sea on both sides of the border. Both North and South Korea have stayed at a level of military readiness always prepared by the threat of war. The demilitarized zone between North and South Korea continues to be the most heavily militarized border in the world. North and South Korea have continued to maintain that they view the other as a constant threat to the State's livelihood,¹¹¹ and the North has repeated multiple times that it denounces its obligations under the armistice, recalling the full state of war between the Koreans.¹¹² And while both countries sometimes publicly discuss pathways to peace and reunification, both countries continue to develop and expand their military capabilities.¹¹³ Thus, while an armistice may indicate that countries are heading towards the end of an armed conflict, the repeated string of

¹⁰⁹ It was recommended under Article IV of the Armistice that within three (3) months after the Armistice Agreement is signed and becomes effective, a political conference be held to settle through negotiations the question of withdrawal of all foreign forces and the peaceful settlement of the Korean question.

¹¹⁰ CRS Report, *supra* note **Error! Bookmark not defined.**

¹¹¹ Choe Sang-hun, *South Korean Official Warns of 'Existential Threat' From North*, N.Y. Times (Oct. 12, 2012).

¹¹² Heejin Koo and Indira A.R. Lakshmanan, *Clinton Warns North Korea for 'Belligerent' Behavior in the Region*, Bloomberg (March 27, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aS17xp.yHokM>.

¹¹³ See e.g., Choe Sang-hun, *U.S. Agrees to Let South Korea Extend Range of Ballistic Missiles*, N.Y. Times (Oct. 7, 2012); Choe Sang-un, *North Korea Says Its Missiles Can Reach U.S. Mainland*, N.Y. Times (Oct. 9, 2012).

military engagement between the Koreas for over a period of almost sixty years would strongly indicate that neither party accepts a general close of military operations.

Given the ongoing de facto armed conflict between the two Koreas, the Prosecutor will likely find the armistice did not cease hostilities, and even if it did, such cessation was only temporary preceding the return of continued hostile confrontations between two sovereign States, as the *Cheonan* and YPD incidents are prime examples.

b. Underlying Acts

If the Prosecutor finds an international armed conflict exists between North and South Korea, the Prosecutor will need determine whether there is a reasonable basis to believe North Korea committed certain underlying prohibited acts in the context of the international armed conflict.

i. Article 8(2)(a) Grave breaches of Geneva Convention 1949 against persons or property protected:

The Prosecutor could find that North Korea committed violations under Article 8(2)(a) regarding grave breaches of the Geneva Convention 1949 against protected persons or property. In accordance with the case law of the ICTY, grave breaches of the Geneva Convention are acts committed in the context of an international armed conflict against persons or property protected under the relevant provisions of the four Geneva Conventions.¹¹⁴ As the Prosecutor will likely find that the incidents regarding *Cheonan* and YPD occurred in the context of an international armed conflict, the remaining element to determine is whether the attacks were against persons or property protected under any of the Geneva Convention.

¹¹⁴ See ICTY Judgement, *The Prosecutor v. Zejnil Delalic and others*, IT-96-21-T, para. 201, 76.

Turning to the *Cheonan* sinking, all the direct victims involved were members of the South Korea military. There is no indication that the now deceased sailors were wounded, sick, shipwrecked, or prisoners of war at the time of *Cheonan*'s explosion and immediate sinking. And the *Cheonan*, being a navy vessel, does not fall under any of the special protected statuses. Thus, although the Prosecutor could reasonably believe that the *Cheonan* was attacked and sank due to a North Korean torpedo in the context of an armed conflict, the *Cheonan* and its sailors were legitimate military targets and thus not protected under the definition of protected persons under the Geneva Conventions. Accordingly, the Prosecutor will likely find there is no rational basis to believe the alleged attack and subsequent sinking of the *Cheonan* falls under the category of war crimes.

On the other hand, the attack regarding YPD involved civilian deaths and injury, as well as destruction to civilian property. As civilians – those not engaged in military operations – are protected persons within the Fourth Geneva Convention,¹¹⁵ those South Korean civilians and civilian objects that were adversely affected by the bombardment on YPD will qualify for protection under Article 8(2)(a) of the Statute.

Once it has been established that Article 2 of the Statute is applicable in general, it becomes necessary to prove the ingredients of the various crimes alleged.¹¹⁶

ii. Article 8(2)(a)(i) – wilful killing.

Under the Article 8(2)(a)(i), wilful killing of a protected person is a crime. To establish wilful killing occurred, the Rome Statute Elements of Crimes provides that the following must be shown: that 1) the perpetrator killed one or more persons, 2) such person or persons were protected under one or more of the Geneva Conventions of 1949, 3) the perpetrator was aware of

¹¹⁵ ICTY, Judgment, *The Prosecutor v. Tihomir Blaskic*, IT-95-14-T, para. 180[hereinafter Blaskic].

¹¹⁶ Id.

the factual circumstances that established that protected status, 4) the conduct took place in the context of and was associated with an international armed conflict, and 5) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.¹¹⁷

As discussed above, it is undisputed that South Korean civilians died on YPD as a result of the North Korea bombardment. While at this stage, it is not necessary to identify individual liability for the attacks, if North Korea military leaders that ordered the attack, they likely were aware of the presence of civilians on YPD. Not only is YPD in close proximity to North Korea territory and within the surveillance of North Korea, North Korea admitted as much regarding its knowledge of the presence of civilians on the island.¹¹⁸ In addition, the fact that North Korea denounced the armistice with South Korea and constantly threatened South Korea of “all out war”¹¹⁹ strongly indicates North Korea not only recognizes a state of war but promulgates it. Thus, the Prosecutor may find that there is a rational basis to believe all the elements are met for wilful killing.

iii. Article 8(2)(a)(iv) – extensive destruction and appropriation of property, not justified by military necessity or carried out unlawfully and wantonly.

Article 8(2)(a)(iv), which prohibits the “extensive destruction and appropriation of property, not justified by military necessity or carried out unlawfully and wantonly,” reflects the a long-standing rule of customary international law already recognized in the Lieber Code and the Brussels Declaration and codified in the Hague Regulations.¹²⁰ The violation of this rule

¹¹⁷ Elements of Crimes, Art. 8(2)(a)(i).

¹¹⁸ DPRK to UNSC, *supra* note 3-14-2011. (“As for ‘civilian casualties’, they were a few civilians enlisted in the armed forces. They were in the barracks of the puppet army. Had they not entered the barracks, they would not have met death.”)

¹¹⁹ Choe Sang-hun, *South Korean Official Warns of ‘Existential Threat’ From North*, N.Y. Times (Oct. 12, 2012).

¹²⁰ Knut Dormann, *War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes* (2003). Lieber Code, Articles 15–16 (cited in Vol. II, Ch. 16, §§ 57–58); Brussels Declaration, Article 13(g) (*ibid.*, § 60); Hague Regulations, Article 23(g) (*ibid.*, § 51).

through “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly,” is a grave breach under the Geneva Conventions.¹²¹ With respect to the requirement that the destruction be extensive, the ICTY stated in the Blaskic case that “the notion of ‘extensive’ is evaluated according to the facts of the case – a single act, such as the destruction of a hospital, may suffice to characterize an offence under this count”.¹²²

The bombardment on YPD caused significant damage on property throughout the island. According to the local country office, 21 houses and warehouses and eight public buildings were demolished.¹²³ The Incheon city authorities from the mainland had to send 22 fire engines and ambulances to the island, along with firefighters and paramedics, to help with the recovery and relief effort.¹²⁴

The United Nations Command (“UNC”) report alleges conducted its live fire exercise on pre-planned and previously utilized targets located in waters “customarily patrolled and administered by Republic of Korea and UNC forces . . . i.e., not towards the land area of the Democratic People’s Republic of Korea controlled by the [North Korea military] or waters contiguous to such area.”¹²⁵ Additionally, no [North Korea military] forces were in the vicinity of the pre-planned targets.”¹²⁶ Furthermore, according to the UNC report, South Korea did not make threatening gestures or advances towards North Korea territory. South Korea simulated its pre-planned exercise per routine and thus, there was no justification for North Korea’s attack on

¹²¹ First Geneva Convention, Article 50 (*ibid.*, § 53); Second Geneva Convention, Article 51 (*ibid.*, § 53); Fourth Geneva Convention, Article 147 (*ibid.*, § 53).

¹²² ICTY, *Blaškić case*, Judgement para 239.

¹²³ Yeonpyeong residents continue evacuation of island". The Dong-a Ilbo, 2010-11-25., available at <http://english.donga.com/srv/service.php3?bicode=050000&biid=2010112539998>.

¹²⁴ *Id.*

¹²⁵ *See id.*

¹²⁶ *See id.*

YPD. North Korea alleges that South Korean forces fired into the maritime territory of North Korea during the live exercise, and thus was compelled to retaliate as a means of self-defense.¹²⁷

The UNC investigation team consisted of South Korean and U.S. personnel, reflecting less diversity and the appearance of objectivity than the *Cheonan* JIG. Yet, the report is not without credibility. Compared to the JIG report on *Cheonan*, the UNC report was much more generally accepted by the international community.¹²⁸ In addition, many countries publicly condemned North Korea's actions against YPD, supporting the view that the UNC report deserves merit in its findings.¹²⁹ Thus, reminded of the rational basis threshold and the weighed assessment of the information presented, it is likely the Prosecutor will find the UNC report at least provides a rational basis that the events occurred as the UNC found.

Additionally, the shells and rockets caused considerable damage on public facilities and civilian homes. It is also reported that the attack started widespread fires on the island.¹³⁰ According to the local county office, 70 percent of the island's forests and fields were burned and 21 houses and warehouses and 8 public buildings were destroyed in the bombardment. Moreover, most of the islanders were evacuated in the aftermath of the shelling. Around 1,500 of the 1,780 residents on the island were taken aboard fishing boats and government ships to nearby cities.¹³¹ The Incheon city authorities sent 22 fire engines and ambulances to the island, along with firefighters and paramedics, to help with the recovery and relief effort. Authorities additionally

¹²⁷ DPRK to UN, *supra* note 46.

¹²⁸ Bombardment of Yeonpyeong, WIKIPEDIA, available at www.en.wikipedia.org/wiki/Bombardment_of_Yeonpyeong

¹²⁹ Id.

¹³⁰ Yeonpyeong residents continue evacuation of island". The Dong-a Ilbo, 2010-11-25., available at <http://english.donga.com/srv/service.php3?bicode=050000&biid=2010112539998>.

¹³¹ Id.

sent 2,000 boxes of emergency relief materials and more than 3,500 relief kits and boxes of food to help residents recover.¹³²

Therefore, as there is a reasonable basis that the South Korean military was conducting its live fire drills as claimed and North Korea attacked unjustifiably and without warning, the Prosecutor will likely find there is a reasonable basis to believe North Korea caused extensive destruction on YPD without military necessity,

iv. Article 8(2)(b)

The crimes defined in Article 8(2)(b) Rome Statute cover “other serious violations of the laws and customs applicable in international armed conflict”. They are derived from various sources, in particular the 1907 Hague Regulations, Additional Protocol I and various provisions prohibiting the use of specific weapons.¹³³

There is no requirement that a certain consequence result from the perpetrator’s actions. The UN Preparatory Committee explicitly added a result requirement elsewhere in the Statute, namely in article 8(2)(b)(vii: “Making use ... resulting in death or serious injury”. Thus, the exclusion of a result requirement in 8(2)(b) provisions indicates all those underlying acts require a lower threshold.¹³⁴ Thus, an act would still be a violation if the attack was directed against the civilian population or individual civilians, but due to weapons malfunction, the intended target was not hit. Other crimes follow the same structure except for the act being committed.

v. Article 8(2)(b)(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities

Regarding Article 8(2)(b)(i), the Elements of Crimes lists the following criteria to be satisfied:

¹³² Id.

¹³³ Dormann, *supra* note 120, at 38.

¹³⁴ Dormann, *supra* note 120, at 40.

1. The perpetrator directed an attack.
2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The ICTY further explains, the Trial Chamber held: “Such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians . . . were being targeted”¹³⁵

In the YPD situation, North Korea fired administered the artillery shells and rocket with the intent of impacting those inhabiting YPD. Whether North Korea was deliberately aiming for civilians is more difficult to prove at this point. Some reporters have suggested that North Korea fired at oil storage units, a post office, a supermarket, and municipal buildings thinking they were military targets because North Korea planned its attack on outdated maps.¹³⁶ However, given UNC’s report finding that beyond a reasonable doubt North Korea’s attack was deliberate and premeditated, the Prosecutor could find a rational basis to believe that North Korea planned to hit specific civilian targets in line with their preparation. At this point, it is difficult to determine North Korea’s intended targets without knowing more.

¹³⁵ ICTY, Judgment, *The Prosecutor v. Tihomir Blaskic*, IT-95-14-T, para. 180.

¹³⁶ Christine Kim, N. Korea fired thermobaric bombs, <http://koreajoongangdaily.joinsmsn.com/news/article/article.aspx?aid=2928905>

vi. Article 8(2)(b)(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives

Article 8(2)(b)(ii) requires the same analysis as 8(2)(b)(i) except that the attack be intentionally directed at civilian objects not people. For the same reasons mentioned above regarding 8(2)(b)(iv), further information is necessary.

vii. Article 8(2)(b)(iv) Intentionally 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 damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated

The elements under Article 8(2)(b)(iv) have been addressed except that the target of the attack must be “civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated, and knowledge of this type of attack”.

The UN Preparatory Committee defined the expression “concrete and direct overall military advantage” by explaining that “the attack must be directed against a military objective with means which are not disproportionate in relation to the objective, but are suited to destroying only that objective, and the effects of the attacks must be limited in the way required by the Protocol; moreover, even after those conditions are fulfilled, the incidental civilian losses and damages must not be excessive.”¹³⁷ This explanation ties closely with the elements in Rome 8(2)(a)(iv) except that the perpetrator must have intended to cause such harm in excess to the concrete and direct overall military advantage. For all the reasons stated above in 8(2)(a)(iv), the

¹³⁷ Dormann, *supra* note 120, at 46-7.

Prosecutor will likely find the force exercised was excessive and in relation to North Korea's alleged objective of preserving peace and stability on the Korean peninsula.¹³⁸

viii. Article 8(2)(b)(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war

The elements in Article 8(2)(a)(xiii), in regards to necessities of war and destroying enemy property, finds its analogue to 8(2)(a)(iv), and thus, under similar analysis, the Prosecutor will likely find there is a rational basis to believe North Korea destroyed civilian property when it was not imperatively demanded by the necessities of war.

B. Admissibility Requirements Under Article 17 Of The Statute

i. Complementarity

Once the Prosecutor makes a finding of jurisdiction, she must examine whether the requirements regarding admissibility are met, as discussed in Part III.B.i.

In the present scenario, the Republic of Korea has undertaken and completed investigations through the JIG and UNC regarding *Cheonan* and YPD, respectively. However, South Korea has not initiated any prosecutions nor has it declared any intent to prosecute within the domestic legal system. This is most likely due to the fact that South Korea has no jurisdiction to prosecute those potentially involved in causing the *Cheonan* and YPD incidents. All potential defendants are North Korean nationals living in North Korea – people and a place that South Korea has no jurisdiction over. To note, neither South Korea nor North Korea recognizes the *de jure* existence of each other and they do not have official diplomatic relations. Each country constitutions declare that it retains sole sovereignty over the Korean peninsula. In light of that fact that the results of the investigation into the *Cheonan* and YPD events sparked

¹³⁸ DPRK to UN 3-14-2011, *supra* note 46.

bellicose rhetoric from North Korea, it is highly unlikely that South Korea will request an internal investigation within North Korea and make a request to extradite those responsible. The likelihood that those involved in both incidents were high military commanders who planned and ordered the attacks makes this option even more remote. An almost definite degree of finality is attached to South Korea's inability to pursue prosecution, because the jurisdictional status quo is unlikely to change within the foreseeable future.

Thus, here, it is not necessary to proceed to examination of unwillingness or inability to prosecute, because the charged State is without jurisdiction necessary to prosecute potential defendants. Thus, the Prosecutor will likely find that the present situations are not barred by complementarity requirements.

ii. **Gravity**

Even if one were to assume that Article 8(1) had been satisfied, it would then be necessary to consider the general gravity requirement under Article 53(1)(b). In terms of the gravity of the crimes under Article 17(1) (d), as set out more fully in Part III.B.ii., there was massive damage to civilians and public property, eventually leading to a temporary mass exodus of the majority of residents.¹³⁹ If the Prosecutor is to view the YPD incident as a single and isolated attack, this may not rise to a sufficient level of gravity based on a quantitative analysis.

However, if the Prosecutor is to view the YPD shelling as a snapshot from a longstanding clip of altercations the Prosecutor may find that the YPD incident satisfies the gravity requirement in terms of an accumulated weight. This is not an instance where the Prosecutor is punishing or holding a country liable for events which occurred prior to the enactment of the Rome Statute, which would be beyond the scope of the Prosecutor and Court's mandate, but this would be viewing the incident from a holistic view to take into account the context in which one

¹³⁹ Part II.

incident occurred in order to more fully appreciate the weight of this event. Furthermore, if North Korea did commit these crimes in actuality and the ICC as an international system were to formally and publicly declare that incidents of these kind, do not carry the gravity to even begin an investigation in the ICC, this will likely further impunity in North Korea and may lead to further provocations from North Korea in a piece-meal manner. Thus, on balance, if the Prosecutor views the YPD shelling in light of the historical context since 1950, Prosecutor will likely find that the YPD incident satisfies the gravity requirement.

C. Interests Of Justice

As discussed above, while the other two tests (jurisdiction and admissibility) are positive requirements that must be satisfied, the “interests of justice” is not.¹⁴⁰ The interest of justice test is a potential countervailing consideration that might produce a reason not to proceed even where the first two are satisfied.¹⁴¹ This difference is important: the Prosecutor is not required to establish that an investigation or prosecution is in the interests of justice.¹⁴² Rather, he shall proceed with investigation unless there are specific circumstances which provide substantial reasons to believe it is not in the interests of justice to do so at that time.¹⁴³

It should be noted that since Fatou Bensouda replaced Luis Moreno-Ocampo as ICC Prosecutor on December 12, 2011, Bensouda has opened one preliminary investigation by State referral from Mali on July 18, 2012,¹⁴⁴ but has yet to submit an official report on the situation. While the changing of the guard may leave the issue of the Office of the Prosecutor’s investigatory and prosecutorial practice in question without a thorough examination of precedent,

¹⁴⁰ Policy Paper on the Interests of Justice, ICC OFFICE OF THE PROSECUTOR (Sept. 2007).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Press Release, *ICC Prosecutor Fatou Bensouda on the Malian State referral of the situation in Mali since January 201*, ICC (July 18, 2012).

at least initially, there is no indication that the new Prosecutor will take a contrary policy to her predecessor.

In sum, given the gravity of the alleged war crimes committed, the requirement of exceptionality, the presumption of prosecution, and no indication that the new Prosecutor will divert wildly from precedent, it is unlikely that the Prosecutor will find that the interests of justice are not served by opening a formal investigation.

V. CONCLUSION

For the foregoing reasons, the Prosecutor is likely to find that a reasonable basis exists to believe war crimes, specifically enumerated previously, occurred on the territory of South Korea in the Yeonpyeong Do incident, while the *Cheonan* incident is likely not to pass statutory muster.