



Situation in the Republic of Korea

Article 5 Report

June 2014

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I. 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 6 December 2010, the Office of the Prosecutor (OTP) announced that it had opened a preliminary examination to evaluate whether two incidents that occurred in 2010 in the Yellow Sea, namely the sinking of a South Korean warship, the *Cheonan*, on 26 March 2010 and the shelling of South Korea’s Yeonpyeong Island on 23 November 2010, could amount to war crimes under the jurisdiction of the Court. This report presents the findings of the Office on jurisdictional issues.
3. The Prosecutor has concluded that, at this stage, the Statute requirements to seek authorization to initiate an investigation of the situation in the Republic of Korea have not been satisfied, based on a thorough legal and factual analysis of the information available. Nonetheless, nothing in this report should be construed as condoning in any way the resort to armed force by the Democratic People’s Republic of Korea described below. Furthermore, having noted the recurrent threats issued by North Korea against its neighbour, the Prosecutor stresses that should any future acts be committed that appear to fall under the Court’s jurisdiction, she remains prepared to initiate a preliminary examination into such acts and, if appropriate, investigate and prosecute the perpetrators of crimes under the Rome Statute.¹
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 independent, impartial and thorough analysis. It should be recalled that the Office does not enjoy investigative powers at the preliminary examination stage. Its findings are therefore preliminary in nature and may be reconsidered in the light of new facts or evidence.
5. In accordance with article 15, the Office has sought and obtained additional information on the two incidents from multiple sources. The Government of the Republic of Korea (“ROK” or “South Korea”) provided information to the Office on

¹ See, e.g., Reuters, North Korea threatens South with “final destruction,” 19 February 2013, at <http://www.reuters.com/article/2013/02/19/us-nkorea-threat-idUSBRE9110J520130219>; Korean Central News Agency, KPA Supreme Command Warns Lee Myung Bak Group of Quick Action, 23 April 2012, at <http://www.kcna.co.jp/item/2012/201204/news23/20120423-26ee.html>.

multiple occasions in response to the OTP's requests for information of 7 January 2011 and 13 July 2011. The Government of the Democratic People's Republic of Korea ("DPRK" or "North Korea") has not responded to or acknowledged the request for information of 25 April 2012 sent by OTP. The Prosecutor expresses her appreciation for the full cooperation her office received from the Government of the ROK.

6. ***Acts Underlying the Alleged Crimes:*** The shelling of Yeonpyeong Island occurred after military exercises with prior notification by the ROK Marine Corps stationed on the island, including an artillery firing exercise. Such exercises have been conducted annually since 1974. The shelling by the DPRK on 23 November 2010 came in two waves, the first between 14h33 and 14h46, and the second between 15h11 and 15h29. It resulted in the killing of four people (two civilians and two military), the injuring of sixty-six people (fifty civilians and sixteen military) and the destruction of military and civilian facilities on a large scale, estimated to cost \$4.3 million. In addition to the military base in the southwestern part of the island and other marine positions, several civilian installations were hit, including the History Museum, locations close to Yeonpyeong Police Station and the Maritime Police Guard Post, the township office, a hotel, a health center and other civilian structures in the town of Saemaoul. As to the total number of artillery shells and rockets fired by the DPRK, the report of the U.N. Command² states that a total of 170 rounds were fired, of which 90 landed in the water surrounding Yeonpyeong Island. The ROK Government indicated that 230 rounds were fired, of which 50 landed in the surrounding waters. The DPRK publicly acknowledged responsibility for the shelling.
7. In contrast, the DPRK denied responsibility for the sinking of the *Cheonan*, a Patrol Combat Corvette of the ROK Navy's Second Fleet. At 21h22 on 26 March 2010, the *Cheonan* was hit by an explosion, broke in half and sank, resulting in the deaths of 46 ROK Navy sailors. A Joint Investigation Group led by the ROK with participation from the US, UK, Australia, Canada and Sweden concluded that an underwater explosion from a torpedo manufactured by North Korea caused the sinking. Furthermore, the Multinational Combined Intelligence Task Force (MCITF), composed of South Korea, the US, Australia, Canada and the UK found that the torpedo was launched from a North Korean submarine. The U.N. Command Military Armistice Commission also established a Special Investigation Team that reached the same conclusion and found that the evidence was "so overwhelming as to meet the ... standard of beyond reasonable doubt."³
8. ***Preconditions to the exercise of jurisdiction:*** The Republic of Korea is a State Party to the Rome Statute since 13 November 2002. The Court may therefore exercise jurisdiction over conduct occurring on the territory of ROK or on vessels and

² Special investigation into the Korean People's Army attack on Yeonpyeong-Do and the Republic of Korea Marine Corps response on 23 November 2010, U.N. Doc. S/2010/648, 19 December 2010.

³ Letter dated 23 July 2010 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2010/398, p.7.

aircraft registered in the ROK on or after 1 February 2003. The attack on Yeonpyeong Island was launched from the Democratic People's Republic of Korea and it is therefore likely that the perpetrators were DPRK nationals. The DPRK is not a state party. However, because the territorial requirement has been met, the Court may exercise its jurisdiction over the perpetrators. The same applies to the nationals of any non-State Party involved in the alleged attack against the *Cheonan*.

Legal Analysis: Subject-matter Jurisdiction

9. ***Contextual Elements:*** The fundamental contextual element needed to establish the commission of a war crime is the existence of an armed conflict. There are two possible bases for the existence of an international armed conflict between the ROK and the DPRK. The first is that the two countries are technically still at war; the Armistice Agreement of 1953 is merely a ceasefire agreement and the parties are yet to negotiate the peace agreement expected to formally conclude the 1950-53 conflict. The second is that the 'resort to armed force between States' in the form of the alleged launching of a torpedo into the *Cheonan* or the launching of shells into Yeonpyeong, created an international armed conflict under customary international law.
10. The classic position adopted by many authorities, including the ICRC, is that no element of scale is necessary to the application of the definition of international armed conflict so long as there is a resort to armed force between states. According to this position, the contextual requirement of the existence of an international armed conflict is met in the present situation, as the alleged launching of a torpedo into the *Cheonan* and the launching of artillery shells into Yeonpyeong created an international armed conflict.
11. Whether the technical state of war between the DPRK and ROK is sufficient to establish an international armed conflict would impact upon an assessment of whether the alleged acts by the DPRK constitute acts of aggression and breaches of Article 2(4) of the UN Charter. However, as resort to armed force creates an international armed conflict, for the present purposes, it is unnecessary to determine this issue. Because the fundamental contextual element to establish the commission of a war crime appears to be met, the OTP has further examined the two incidents in question.
12. The incidents in question have been analyzed only from the perspective of the *jus in bello* (law in war; international humanitarian law), and not for their conformity with the *jus ad bellum* (law on the use of force), as the ICC does not have jurisdiction over the crime of aggression until 2017 at the earliest.
13. ***Underlying acts – sinking of the Cheonan:*** The *Cheonan* was a naval vessel and all those on board who drowned in the sinking were military personnel. In general, it is not a war crime to attack military objectives including naval ships or to kill enemy military personnel including sailors on a naval ship. If this incident was a

result of a military attack, it was not a violation of any of the provisions in Article 8 of the Rome Statute.

14. However, if it could be found that the sinking of the *Cheonan* itself precipitated a state of international armed conflict between the parties, which were until that point governed by the Armistice Agreement, then, and to the extent that the sinking may be attributed to the DPRK, the war crime of killing or wounding treacherously (Article 8(2)(b)(xi)) may require further examination. Specifically, if ROK forces were invited to believe that they were entitled to the protections of the Armistice Agreement, and the DPRK intentionally betrayed the ROK's confidence that the Armistice was still in effect, then the question arises as to whether the attack might be considered as "killing or wounding treacherously."
15. The conclusion of an agreement to suspend combat with the intention of attacking by surprise the adversary relying on it is, in itself, considered a violation of customary international humanitarian law and has been set forth in numerous military manuals. However, this prohibition is not listed as such as a war crime in the Rome Statute and customary law is unclear on whether this violation can be considered as a form of perfidy, generally understood to include several categories of conduct in which a combatant feigns protected status, such as "simulating surrender or an intent to negotiate under the white flag".⁴ More importantly, in the case at hand, it would need to be shown that the DPRK entered into an armistice agreement in 1953 with the specific intent to conduct surprise attacks, such as the alleged attack on the *Cheonan* of 2010.
16. Therefore, based on the current internationally accepted definition of the war crime of killing or wounding treacherously under article 8(2)(b)(xi) and the specific circumstances of the incident in question, the OTP is unable to conclude that the alleged attack on the *Cheonan* would meet the definition of this war crime.
17. ***Underlying acts – shelling of Yeonpyeong Island:*** The shells fired onto Yeonpyeong hit both military and civilian objects. The targeting of the military base, the killing of two ROK Marines and the wounding of a number of ROK Marines do not constitute war crimes, as such objects and persons are legitimate military targets. However, with respect to the civilian impact, it is necessary to inquire whether there was intentional targeting (Articles 8(2)(b)(i) or (ii)) or excessive incidental death, injury or damage (Article 8(2)(b)(iv)).
18. Although the attack resulted in injury to civilians and damage to civilian objects, it is not clear that they were the objects of the attack. There are other possible explanations for the striking of civilian objects other than intentional targeting. The fact that military objectives, including the military base on the southwestern part of

⁴ International Committee of the Red Cross, Customary IHL Database, Rule 65 "Perfidy," at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule65.

Yeonpyeong island, were attacked eliminates any reasonable basis to believe that civilians or civilian objects were the *sole* object of the attack.

19. Furthermore, the DPRK had apparent targeting difficulties. According to most sources, including the U.N. Command's report on the incident, of the 170 rounds fired only 80 rounds landed on the island and approximately 90 rounds landed in waters surrounding the island.⁵ Approximately 40-50 shells, the majority of those that landed on the island, directly hit military targets. A significant number landed in the area immediately surrounding those targets. According to information provided by the ROK Government, 230 rounds were fired, of which approximately 180 rounds landed on the island and 50 in the surrounding waters. Out of 180 rounds, approximately 150 landed in and around 8 different military areas in various locations on the island and 30 on the civilian area immediately surrounding.
20. On balance, the available information does not provide a reasonable basis to believe that the DPRK intentionally targeted the civilian population or civilian objects. The fact that civilian objects were damaged may in some cases, without more, provide a reasonable basis to believe that there was an intention to damage civilian objects. However, in this case, the majority of the attack was directed towards military objectives, the majority of the impact was upon military objectives and there are alternative explanations for the civilian impact (targeting accuracy of artillery weapons). An argument that the DPRK had knowledge that the targets were civilian and they deliberately targeted them nonetheless would, without more information, be based on speculation or suspicion rather than reasonable grounds.
21. The war crime of excessive incidental death, injury or damage requires an assessment of: (a) the anticipated civilian damage or injury; (b) the anticipated military advantage; and, (c) whether (a) was "clearly excessive" in relation to (b). 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.
22. In assessing the *anticipated* civilian damage or injury, a number of factors are relevant. The DPRK had access to maps of Yeonpyeong island and thus would have been aware of the proximity of the civilian areas to the military objects. The DPRK allegedly conducted a firing drill near the Northern Limit Line in January 2010 using the same 'time on target' method used in the Yeonpyeong attack.⁶ If the DPRK equipment did have low targeting accuracy, leading to the incidental civilian

⁵ Special investigation into the Korean People's Army attack on Yeonpyeong-Do and the Republic of Korea Marine Corps response on 23 November 2010 (U.N. Doc. S/2010/648; 19 December 2010), pp.6-7.

⁶ Korea Joongang Daily, N. Korea fired thermobaric bombs, 26 November 2010, at <http://joongangdaily.joins.com/article/view.asp?aid=2928905>.

impact, one can presume that the DPRK was aware of this and of the likelihood of the subsequent civilian impact after the January drill.

23. However, the island is a total 7.3km² and at the time of the attack had a civilian population of 1,361. Thus, while the DPRK could have anticipated a likely civilian impact from its attack, it does not appear that a reasonably well-informed person in the circumstances of the actual perpetrator would have expected such civilian impact to be very high. The civilian population on the island (1,361) was concentrated in one area near the island's main port; this population does not appear to have been the intended object of the attack, for the reasons described above. The size of the island and its civilian areas meant that many of the shells that missed their targets would fall in uninhabited areas of the island or in the surrounding waters (rather than on civilian areas) – in fact, of the 230 shells fired, 50 landed in the surrounding waters and approximately 30 fell on civilian objects.
24. While it has been suggested that the attack was motivated by internal North Korean politics,⁷ this does not mean that there was no perceived military advantage to the attack. Given the context of the attack, principally the DPRK fashioning it as a response to South Korean military activity,⁸ one may surmise that the perceived *military* advantage of the attack was a reassertion of DPRK territorial control of particular waters and a demonstration of its military power in the area.⁹
25. Ultimately, the attack resulted in two military personnel killed and 16 injured, as compared to two civilians killed and 52 injured. In terms of damage to property and military and civilian objects, the U.N. Command's report of the incident indicated that "considerable damage was suffered by military facilities and destruction of civilian homes."¹⁰
26. While a reasonably well-informed person in the circumstances of the actual perpetrator, would have expected some degree of civilian casualties and damage to result from the attack given the relative proximity of military and civilian objects, the information available is insufficient to provide a reasonable basis to believe that the anticipated civilian impact would have been *clearly excessive* in relation to the anticipated military advantage of the attack, considering the size and population of the island, and the fact that military targets appeared to be the primary object of the attack. Nonetheless, the loss of human life that resulted from the attack is to be greatly regretted.

⁷ International Crisis Group, North Korea: The Risks of War in the Yellow Sea, Asia Report No. 198 (23 December 2010), p.1.

⁸ Special investigation into the Korean People's Army attack on Yeonpyeong-Do and the Republic of Korea Marine Corps response on 23 November 2010 (U.N. Doc. S/2010/648; 19 December 2010), p.6.

⁹ See International Crisis Group, 'North Korea: The Risks of War in the Yellow Sea', Asia Report No. 198 (23 December 2010), pp.27, 29-31.

¹⁰ Special investigation into the Korean People's Army attack on Yeonpyeong-Do and the Republic of Korea Marine Corps response on 23 November 2010 (U.N. Doc. S/2010/648; 19 December 2010), p.7

27. Therefore, following a thorough factual and legal assessment of the alleged crimes, the Office has reached the conclusion that, based on the information available, it currently lacks a reasonable basis to believe that either incident constitutes a crime within the jurisdiction of the Court. Accordingly, the Office lacks a reasonable basis to proceed with an investigation.
28. Should further information become available in the future which would lead the Office to reconsider these conclusions in the light of new facts or evidence, the preliminary examination of these two incidents could be re-opened.

II. INTRODUCTION

29. 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. The present report is a public version of the Office’s jurisdictional assessment, the first phase of its preliminary examination.
30. The Republic of Korea is a State Party to the ICC. On 6 December 2010, the Office of the Prosecutor issued a statement announcing that the situation in Korea was under preliminary examination.¹¹ The preliminary examination was initiated by the Prosecutor taking into consideration information on alleged crimes, including information sent by individuals or groups, States and non-governmental organizations as well as additional information sought by the Office to analyse the seriousness of the allegations. The statement specified that the preliminary examination would evaluate whether two incidents constitute war crimes under the jurisdiction of the Court. The incidents are:
 - a) the shelling of Yeonpyeong Island on the 23 November 2010 which resulted in the killing of South Korean marines and civilians and the injury of many others; and
 - b) the sinking of a South Korean warship, the *Cheonan*, hit by a torpedo allegedly fired from a North Korean submarine on 26 March 2010, which resulted in the death of 46 persons.

¹¹ “ICC Prosecutor: alleged war crimes in the territory of the Republic of Korea under preliminary examination,” 6 December 2010, at <http://www.icc-cpi.int/NR/rdonlyres/40BB19F9-3193-4A76-9E70-EB8BE39363B3/282744/KoreaEng1.pdf>.

31. This report summarizes the analysis conducted and presents the findings of the Office with respect to issues of jurisdiction.

III. CONTEXTUAL BACKGROUND

32. Since the armistice agreement was signed at the end of the Korean War (1953), both South and North Korea have acknowledged and respected the Northern Limit Line as a practical maritime demarcation in the Yellow Sea (West Sea) and reconfirmed its validity as the maritime demarcation in the Basic Agreement between South and North Korea in 1991 and its Protocol on Non-Aggression in 1992. However, in 1999 North Korea proclaimed the so-called "Chosun Sea Military Declaration Line," unilaterally modifying the previously agreed Northern Limit Line.
33. The shelling of Yeonpyeong Island occurred after military exercises with prior notification by the ROK Marine Corps stationed on the island, including an artillery firing exercise. The exercises have been conducted annually since 1974. The shelling by the DPRK on 23 November 2010 came in two waves, the first between 14h33 and 14h46, and the second between 15h11 and 15h29. It resulted in the killing of four people (two civilians and two military), the injuring of sixty-six people (fifty civilians and sixteen military) and the destruction of military and civilian facilities on a large scale, estimated to cost \$4.3 million. In addition to the military base in the southwestern part of the island and other marine positions, several civilian installations were hit, including the History Museum, locations close to Yeonpyeong Police Station and the Maritime Police Guard Post, the township office, a hotel, a health center and other civilian structures in the town of Saemaoul.
34. As to the total number of artillery shells and rockets fired by the DPRK, the report of the U.N. Command¹² states that a total of 170 rounds were fired, of which 90 landed in the water surrounding Yeonpyeong Island. The ROK Government indicated that 230 rounds were fired, of which 50 landed in the surrounding waters. The discrepancy appears to be explained by the fact that the United Nations Command report was produced rapidly in the immediate aftermath of the incident: according to the ROK Government, further analysis of the drop zones, recovered rocket components and camera footage confirmed that the total number of rounds fired was 230. The DPRK publicly acknowledged responsibility for the shelling.
35. In contrast, the DPRK denied responsibility for the sinking of the *Cheonan*, a Patrol Combat Corvette of the ROK Navy's Second Fleet. At 21h22 on 26 March 2010, the *Cheonan* was hit by an explosion, broke in half and sank, resulting in the deaths of 46 ROK Navy sailors. A Joint Investigation Group led by the ROK with participation from the US, UK, Australia, Canada and Sweden concluded that an

¹² Special investigation into the Korean People's Army attack on Yeonpyeong-Do and the Republic of Korea Marine Corps response on 23 November 2010, U.N. Doc. S/2010/648, 19 December 2010.

underwater explosion from a torpedo manufactured by North Korea caused the sinking. Furthermore, the Multinational Combined Intelligence Task Force (MCITF), composed of South Korea, the US, Australia, Canada and the UK found that the torpedo was launched from a North Korean submarine. The U.N. Command Military Armistice Commission also established a Special Investigation Team that reached the same conclusion and found that the evidence was “so overwhelming as to meet the ... standard of beyond reasonable doubt.”¹³

IV. PROCEDURAL HISTORY

36. On 6 December 2010, the Office of the Prosecutor issued a statement announcing that the situation in Korea was under preliminary examination.¹⁴
37. In accordance with Article 15, the Office has sought and obtained additional information on the two incidents from multiple sources. The Government of the Republic of Korea (“ROK” or “South Korea”) provided information to the Office on multiple occasions in response to the OTP’s requests for information of 7 January 2011 and 13 July 2011.. The latest submission by South Korea was received on 19 March 2014. The Government of the Democratic People’s Republic of Korea (“DPRK” or “North Korea”) has yet to respond to or acknowledge the OTP’s request for information of 25 April 2012.

V. PRELIMINARY JURISDICTIONAL ISSUES

A. *Territorial and Temporal Jurisdiction*

38. The Republic of Korea (“ROK” or “South Korea”) is a State Party to the Rome Statute since 13 November 2002. The Court may therefore exercise jurisdiction over conduct occurring on the territory of the ROK or on vessels and aircraft registered in the ROK on or after 1 February 2003.¹⁵
39. The *Cheonan* is a ROK naval vessel and therefore registered in the Republic of Korea.¹⁶ It is uncontested that the island of Yeonpyeong is South Korean territory. Therefore, the alleged firing of a torpedo into the *Cheonan* is conduct on board a vessel registered to a State Party and the conduct of firing shells onto Yeonpyeong Island is conduct occurring on the territory of a State Party. It is not possible to separate the conduct of firing from the conduct of hitting the targeted area; this

¹³ Letter dated 23 July 2010 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2010/398, p.7.

¹⁴ “ICC Prosecutor: alleged war crimes in the territory of the Republic of Korea under preliminary examination,” 6 December 2010, at <http://www.icc-cpi.int/NR/rdonlyres/40BB19F9-3193-4A76-9E70-EB8BE39363B3/282744/KoreaEng1.pdf>.

¹⁵ Articles 11(2), 12(2)(a), and 126(2).

¹⁶ Joint Investigation Report, *On the Attack Against ROK Ship Cheonan*, p.36.

would create an artificial distinction when the acts are one and the same.¹⁷ Therefore, the territorial requirement of Article 12(2)(a) is satisfied.

B. Personal Jurisdiction

40. The attack on Yeonpyeong Island was launched from DPRK¹⁸ and it is therefore likely that the perpetrators were DPRK nationals. The DPRK is not a State Party. However, because the territorial requirement has been met, the Court may exercise its jurisdiction over the perpetrators.¹⁹
41. The same argument applies to the nationals of any non-State Party involved in the alleged attack against the *Cheonan*.

VI. LEGAL ANALYSIS – JURISDICTION *RATIONE MATERIAE*

42. International humanitarian law and the Rome Statute permit belligerents to carry out military operations against military targets, even when it is known that some civilian death or injury will occur. A crime occurs if there is a deliberate targeting of civilians or civilian objects (Articles 8(2)(b)(i) or (ii)), or targeting of a military objective in the knowledge that the incidental civilian injury would be clearly excessive in relation to the anticipated military advantage (Article 8(2)(b)(iv)).

A. The Existence of an Armed Conflict

43. The fundamental contextual element needed to establish the commission of a war crime is the existence of an armed conflict. There are two possible bases for the existence of an international armed conflict between the ROK and the DPRK. The first is that the two countries are technically still at war; the Armistice Agreement of 1953 is merely a ceasefire agreement and the parties are yet to negotiate the peace agreement expected to formally conclude the 1950-53 conflict. The second possible basis is that the ‘resort to armed force between States’ in the form of the alleged launching of a torpedo into the *Cheonan* or the launching of shells into Yeonpyeong, created an international armed conflict at customary international law.²⁰

¹⁷ See also Harvard Research in International Law, ‘Draft Convention on Jurisdiction with Respect to Crime,’ American Journal of International Law, vol. 29 (Supp. 1935) 435, at 445: “A crime is committed “in whole within the territory when every essential constituent element is consummated within the territory”; it is committed “in part within the territory” when any essential constituent element is consummated there. If it is committed either “in whole or in part” within the territory, there is territorial jurisdiction”; and *Code de procedure pénale* (France) Article 693 which grants jurisdiction over the entire offence if one of the elements occurs in France.

¹⁸ Special investigation into the Korean People’s Army attack on Yeonpyeong-Do and the Republic of Korea Marine Corps response on 23 November 2010 (UN Doc S/2010/648; 19 December 2010), pp.6-8.

¹⁹ Article 12(2).

²⁰ *Geneva Conventions*, Common Article 2; *Prosecutor v. Tadić*, IT-94-1, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (hereinafter “*Tadić*”), 2 October 1995, para. 70.

44. Both the ICC Statute and the Elements of Crimes are silent as to the definition of “armed conflict,”²¹ leaving this to judicial interpretation. Thus far, the ICC has adopted the definition of armed conflict elaborated by the ICTY Appeals Chamber in *Prosecutor v. Tadić*,²² which held:

[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. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.²³

45. The classic position adopted by many authorities, including the ICRC, is that no element of scale is necessary to the application of this definition of international armed conflict so long as there is a resort to armed force between states.²⁴ As Jean Pictet writes, “[a]ny difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of [the Geneva conventions] It makes no difference how long the conflict lasts, or how much slaughter takes place.”²⁵ Likewise, the ICTY Appeals Chamber in *Tadić* reasoned that, “[i]t is indisputable that an armed conflict is international if it takes place between two or more States,”²⁶ and other commentators writing just after the Rome Statute was adopted have stated that the Geneva Conventions “apply to interstate conflicts, regardless of their level of intensity.”²⁷

²¹ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, *Judgment pursuant to Article 74 of the Statute*, (hereinafter “Lubanga Trial Judgment”), para. 531 (14 March 2012).

²² *Id.*, para. 533 (citing *Tadić*, para. 70).

²³ *Tadić*, para. 70. This definition has been generally recognized by scholars, as well as the ICRC commentary, as authoritative. See, e.g., Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* 23 (2003) (ICRC publication); Malcolm N. Shaw, *International Law*, 6th Ed. 435-36 (2008).

²⁴ Robert Cryer, Håkan Friman, Darryl Robinson, Elizabeth Wilmschurst, *International Criminal Law and Procedure* 233 (2007).

²⁵ Jean S. Pictet, *I The Geneva Conventions of 12 August 1949: Commentary* 32 (1952).

²⁶ *Prosecutor v. Tadić*, Case No. IT-94-1, *Judgment on Appeal*, para. 84 (15 July 1999). See also *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, *Trial Chamber Judgment*, para. 208 (16 Nov. 1998). The possibility that ROK prisoners of war continue to be held in the DPRK may underscore the utility of the classic definition of international armed conflict in this case. Prolonged detention was among the ICTY Appeals Chamber’s concerns when it reasoned that international armed conflicts could extend temporally beyond the cessation of major armed activities.

²⁷ William J. Fenrick, *War Crimes*, in *Triffterer Commentary*, at 182.

46. The legal analysis of the two incidents that follows below is based on this classic position, according to which the required contextual element for the commission of war crimes under articles 8(2)(a) and 8(2)(b) is met in this situation, as the alleged launching of a torpedo into the *Cheonan* and the launching of artillery shells into Yeonpyeong created an international armed conflict. Whether the technical state of war between the DPRK and ROK is sufficient to establish an international armed conflict would impact upon an assessment of whether the alleged acts by the DPRK constitute acts of aggression and breaches of Article 2(4) of the UN Charter. However, as resort to armed force creates an international armed conflict, for the present purposes, it is unnecessary to determine this issue.

B. *The Sinking of the South Korean Warship Cheonan on 26 March 2010*

47. The *Cheonan* was a naval vessel and all those on board who drowned in the sinking were military personnel. In general, it is not a war crime to attack military objectives including naval ships or to kill enemy military personnel including sailors on a naval ship. If this incident was a result of a military attack, it was not a violation of any of the war crimes in Article 8 of the Rome Statute.

48. However, if it could be found that the sinking of the *Cheonan* itself precipitated a state of international armed conflict between the parties, which were until that point governed by the Armistice Agreement, then, and to the extent that the sinking may be attributed to the DPRK, the question arises as to whether Article 8(2)(b)(xi) may apply, as discussed below.

49. Article 8(2)(b)(xi) of the ICC Statute defines “Killing or wounding treacherously individuals belonging to the hostile nation or army” as a war crime.²⁸ The definition of killing treacherously (commonly referred to as perfidy) is derived from the Convention (IV) respecting the Laws and Customs of War on Land, *Regulations concerning the Laws and Customs of War on Land* (Hague Regulations), Article 23(b).²⁹ Perfidy’s scope is not clearly defined in either the ICC Statute or the Hague Regulations,³⁰ but customary international law provides some guidelines to its application.

50. The International Committee of the Red Cross, in its survey of customary international law, references several categories of perfidious acts: simulating disability due to injury, simulating surrender or an intent to negotiate under the white flag, simulating protected status by using internationally recognized symbols (UN or ICRC symbols, etc.), simulating civilian status, and using flags or military

²⁸ ICC Statute, art. 8.

²⁹ See Knut Dörmann, *Elements of War Crimes under the Rome Statute* (hereinafter “Dörmann,”) 240 (2003); Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land [hereinafter “The Hague Regulations”], art. 23(b) (18 Oct. 1907) (“To kill or wound treacherously individuals belonging to the hostile nation or army”).

³⁰ See Dörmann, at 240.

uniforms.³¹ Perfidy is not always limited to incidents causing death; the Goldstone Report found instance of perfidy when a combatant enticed enemy troops to surrender by saying that the ICRC was present when they were not permitted to enter.³² It is also worth noting that perfidy does not include “ruses of war.”³³ In a refugee status proceeding, the German *Bundesverwaltungsgericht* (Federal Administration Court) made the same distinction: “not every misleading of an adversary is prohibited, but rather only the exploitation of a confidence obtained under false pretences through specific acts contrary to international law.”³⁴

51. The ICC Elements of Crimes follow customary international law in defining perfidy, setting forth two core elements of the crime.³⁵ First, the act must “objectively be of a nature to cause or at least to induce the confidence of an adversary.”³⁶ Second, the perpetrator must intend to mislead the other party when acting to invite confidence.³⁷ The *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* gives a nearly identical definition of perfidy,³⁸ its commentary clarifies that “while protected status is simulated by a warship or military aircraft, an act of hostility is prepared and executed.”³⁹
52. It is worth noting that the conclusion of an agreement to suspend combat with the intention of attacking by surprise the adversary relying on it is, in itself, considered a violation of customary international humanitarian law.⁴⁰ The ICRC’s survey of customary law specifies that a “breach of an agreement to suspend combat constitutes a breach of trust and is a violation of the principle of good faith.” It further notes that this rule is set forth in numerous military manuals, and that some of these manuals consider the feigning of a cease-fire to be “perfidious.”⁴¹

³¹ International Committee of the Red Cross, Customary IHL Database (hereinafter “ICRC Customary IHL Database,”) Rule 65 “Perfidy,” http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule65#Fn23.

³² United Nations Fact Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories*, U.N. Doc. A/HRC/12/48, para. 1106 (25 Sept. 2009).

³³ See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 37(2) (8 June 1977)[hereinafter Protocol I] (“Ruses of war are not prohibited...[t]he following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.”).

³⁴ *Federal Administrative Court in the Name of the People: Decision*, International Journal of Refugee Law, Vol. 22, pp. 452–53 (2010).

³⁵ Dörmann, at 241. See, e.g., Instructions for the Government of Armies of the United States in the Field (Lieber Code), § V (24 April 1863); The Laws of War on Land, art. 8, Oxford (9 Sept. 1880); The Hague Regulations, art. 23(b) (18 Oct. 1907); Protocol I, note 33, art. 37(1)–(2). See also *Federal Administrative Court*, at 451–53 (2010).

³⁶ Dörmann, at 241.

³⁷ ICC Elements of Crimes, art. 8(2)(b)(xi) (2002 and 2010).

³⁸ San Remo Manual on International Law Applicable to Armed Conflicts at Sea § 3, para. 111 (12 June 1994).

³⁹ Louise Doswald-Beck, Ed., *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, no. 111.2, p. 186 (1995).

⁴⁰ See ICRC Customary IHL Database, Rule 64, at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule64.

⁴¹ *Ibid.*

53. The U.S. Army Field Manual 27-10, in addressing the law pertaining to armistices, states that “it would be an outrageous act of perfidy for either party, without warning, to resume hostilities during the period of an armistice, with or without a formal denunciation thereof, except in case of urgency and upon convincing proof of intentional and serious violation of its terms by the other party.”⁴² Belgium’s Law of War Manual states that the “denunciation of an armistice for doubtful motives in order to surprise the adversary without giving him the time to prepare could be considered as an act of perfidy.”⁴³ The military manuals of Australia, Russia and the United Kingdom contain similar provisions. Other military manuals cited as national practice in the ICRC’s survey confirm the legal prohibition on firing at, killing or injuring an enemy when an armistice is in force, without characterizing the violation of such a prohibition as perfidy.⁴⁴
54. Applying these elements to the sinking of the *Cheonan*, one scenario presents itself as an instance of “killing or wounding treacherously.” If the Armistice Agreement was still in force, then ROK forces could be arguably invited to believe that they were entitled to its protection, satisfying the first element of perfidy. If the DPRK intentionally betrayed the ROK’s confidence that the Armistice was still in effect—the second element—then the attack may have been “killing or wounding treacherously.”
55. Limited precedent exists for treating the legal prohibition on firing at, killing or injuring an enemy when an armistice is in force as a war crime.⁴⁵ Article 8 of the Rome Statute does not impose criminal liability for all violations of the laws of armed conflict. Rather, a limited number of serious violations of IHL were codified in the Rome Statute as giving rise to individual criminal liability. Under articles 8(2)(a) and (b), grave breaches of the Geneva Conventions, and “other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts” are defined as war crimes. Concluding an agreement to suspend combat with the intention of attacking by surprise the enemy relying on that agreement is not listed as a war crime in the Rome Statute. As made clear in the ICRC’s survey of customary law, this prohibition and the prohibition on perfidy are distinct violations under Rule 64 and Rule 65 respectively.⁴⁶ While some military manuals consider the former prohibition to be an example of the broader prohibition on perfidy, the evidence of national practice and *opinio juris*, as reviewed by the ICRC, was insufficient to subsume the two. Only the prohibition on perfidy is criminalized under article 8(2)(b)(xi). To broaden the definition of perfidy to an attack breaking a decades-old armistice, rather than literally

⁴² U.S. Army Field Manual 27-10, para. 493 (1956).

⁴³ ICRC Customary IHL Database, Practice Relating to Rule 64, at http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule64.

⁴⁴ *Ibid.*

⁴⁵ *Scuttled U-boats case* (1945), U.N.W.C.C., Trials of War Criminals, vol. 1., p.55; see also Leslie C. Green, “The contemporary law of armed conflict,” 3rd ed., Manchester University Press: 2008, p. 105.

⁴⁶ ICRC Customary IHL Database

“simulating surrender or an intent to negotiate under the white flag,”⁴⁷ would be particularly difficult in light of article 22 of the Statute.

56. Even if it were the case that the violation of an armistice agreement is criminalized under the Rome Statute as a form of perfidy, it would still need to be established that the armistice agreement had been concluded *with the intention* of attacking by surprise the enemy relying on it. The allegation that DPRK entered into an armistice agreement in 1953 – and recommitted itself to this agreement in 1991 – with the specific intent to conduct surprise attacks, such as the alleged attack on the *Cheonan* committed in 2010, does not meet the reasonable basis standard.
57. Therefore, based on the current internationally accepted definition of the war crime of killing or wounding treacherously under article 8(2)(b)(xi) and the specific circumstances of the incident in question, the OTP is unable to conclude that the alleged attack on the *Cheonan* would meet the definition of this war crime.

C. *The Shelling of the South Korean Island Yeonpyeong on 23 November 2010*

58. The shells fired onto Yeonpyeong hit both military and civilian objects. The targeting of the military base, the killing of two ROK Marines and the wounding of a number of ROK Marines cannot constitute war crimes, as such objects and persons are legitimate military targets. However, with respect to the civilian impact, it is necessary to inquire whether there was intentional targeting (Articles 8(2)(b)(i) or (ii)) or excessive incidental death, injury or damage (Article 8(2)(b)(iv)).

1. War crimes of attacking civilians or civilian objects (Articles 8(2)(b)(i) or (ii))

a. Elements of Crimes and relevant jurisprudence

59. The attack on Yeonpyeong Island involved civilian deaths and non-military targets. This raises the possibility that it constituted a war crime under Articles 8(2)(b)(i) or (ii), which prohibit:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives.

60. Two specific criteria must be met to commit an offence under Article 8(2)(b)(i) or (ii): the civilian population or civilian objects must be “the object of the attack” and the perpetrator must have “intended the [civilian population or civilian objects] to be the object of the attack.”⁴⁸

⁴⁷ ICRC Customary IHL Database, Rule 65.

⁴⁸ Elements of Crimes, art. 8(2)(b)(i), elements 2–3; art. 8(2)(b)(ii), elements 2–3.

61. The ICTY Appeals Chamber applied the following criteria in order to determine whether a civilian population is a “primary object” of the attack:

[T]he means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.⁴⁹

62. It may be difficult to establish that civilians and civilian objects were targeted intentionally within the meaning of Article 8. With only two cases having proceeded to judgment, there is as yet no ICC jurisprudence involving shelling attacks. The ICTY, however, has decided several such cases⁵⁰ and has set a high evidentiary standard for proving that attacks intentionally target civilians: “[The] attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity.”⁵¹ Accordingly, the likelihood that civilians might be victims of an attack probably would not satisfy the intent requirement at the ICTY,⁵² nor, as explained below, at the ICC.

63. Article 30(2) of the ICC Statute, which applies “unless otherwise provided,”⁵³ defines intent as follows:

- (a) In relation to conduct, that person means to engage in the conduct;
- (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.⁵⁴

⁴⁹ Prosecutor v. Kunarac et al., Case No. IT-96-23, *Appeals Chamber Judgment*, para. 91 (12 June 2002) (cited and applied in Prosecutor v. Galić, Case No. IT-98-29-A, *Appeals Chamber Judgment* (hereinafter “Galić Appeals Judgment”), para. 132 (30 Nov. 2006); Prosecutor v. Blaškić, Case No. IT-95-14-A, *Appeals Chamber Judgment*, para. 106 (29 July 2004)).

⁵⁰ See, e.g., Prosecutor v. Momčilo Perišić, Case No. IT-04-81-T, *Trial Chamber Judgment*, para. 320 (6 Sept. 2011) (“the civilian population was deliberately targeted and subjected to immense hardships that served no military purpose.”).

⁵¹ *Blaškić*, para. 180. See also *Perišić*, para. 320; Prosecutor v. Milan Martić, Case No. IT-95-11-T, *Trial Chamber Judgment*, para. 60 (12 June 2007).

⁵² Trial and Appeal Chambers at the ICTY have, however, held that the *mens rea* for direct attacks against civilians would include attacks conducted “recklessly,” relying on the Commentary to Article 85 of Additional Protocol I (the provision which defines intent for the purposes of Article 51(2) Additional Protocol 1): see *Prosecutor v. Galić*, Case No. IT-98-29-T, *Trial Chamber Judgment* (hereinafter “Galić Trial Judgment”), para. 54 (5 December 2003); *Galić Appeals Judgment*, para. 140. Both the Trial Chamber and the Appeal Chamber opined that a reckless state of mind is distinct from a merely negligent one.

⁵³ ICC Statute, art. 30(1).

⁵⁴ *Id.*, art. 30(2).

64. The jurisprudence regarding Article 30(2) is still in its infancy. To date, case law has confirmed that the threshold in article 30(2)(b) requires more than “mere eventuality or possibility.”⁵⁵ In *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II stated that the standard was higher than the common standard for *dolus eventualis* (or what common lawyers might refer to as recklessness), and in fact suggested that the standard is “near inevitability or virtual certainty.”⁵⁶ The Trial Chamber in *Prosecutor v. Katanga* recently also endorsed this standard.⁵⁷ On the other hand, while the *Lubanga* Trial Chamber expressly excluded *dolus eventualis* and a low risk of a crime’s occurrence as sufficient under Article 30(2)(b), its reasoning would appear to allow an interpretation of Article 30(2)(b) that would include awareness of a high risk of a crime’s occurrence.⁵⁸ The latter interpretation is in line with the OTP’s position that the words “will occur in the ordinary course of events” should be given their ordinary meaning.⁵⁹

65. An argument could be made that a pattern of indifference and recklessness with respect to civilian life and property *should* eventually satisfy the intent requirements of Articles 30 and 8(2)(b)(i) and (ii).⁶⁰ If the civilian deaths, injury, and property damage were the result of carelessness, poor equipment, or mistaken targeting information and DPRK military continue to launch attacks using this equipment and information—with knowledge of the prior civilian deaths and injury—persisting in that conduct in the face of such knowledge may well rise to the level required to meet the intent standard under Article 30(2)(b) and Articles 8(2)(b)(i) and (ii).

b. Application of the law to the facts

66. Although the attack resulted in injury to civilians and damage to civilian objects, it is not clear that they were the objects of the attack. There are a number of possible

⁵⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/01-01/08, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 15 June 2009 (hereinafter “Bemba Confirmation Decision”), para. 363; *Lubanga Trial Judgment*, paras. 1010-1011.

⁵⁶ *Id.* The Pre-Trial Chamber reviewed the *travaux préparatoires* of the ICC Statute, concluding that the deletion of a draft provision that included liability based on recklessness “makes it even more obvious that both concepts were not meant to be captured by Article 30 of the Statute.” *Bemba Confirmation Decision*, para. 367.

⁵⁷ *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, *Jugement rendu en application de l’article 74 du Statut*, paras. 776-777 (8 March 2014).

⁵⁸ *Lubanga Trial Judgment*, para. 1012. Some commentators suggest that recklessness remains a possibility under Article 30(2) and Article 8(2)(b)(i) and (ii): see Triffterer, at 186; *see also* Schabas, at 477 (noting some doubt whether recklessness is included, but excluding any possibility that negligence is included).

⁵⁹ There is no reason why Article 30(2)(b) should not also apply when interpreting the term “intent” in Article 8(2)(b)(i) and (ii).

⁶⁰ *See Galić Appeals Judgment*, para. 132 (Trial Chamber can rely on a pattern of indiscriminate attacks from which to infer a direct attack against civilians). *Cf. also* *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, *Decision on the confirmation of charges*, 16 Dec. 2011, paras. 142, 218 (disproportionate attacks would not satisfy the requirement of ‘intentionally’ under the elements of the crime for article 8(2)(e)(i)); *Prosecutor v. Sylvestre Mudacumura*, Case No. ICC-01/04-01/12, *Decision on the Prosecutor’s Application under Article 58*, 13 July 2012, para. 38 (indiscriminate targeting against mixed civilian-military positions would be a crime under article 8(2)(e)(i)).

explanations for the striking of civilian objects other than intentional targeting. The fact that military objectives, including the military base on the southwestern part of Yeonpyeong island, were attacked at least eliminates any reasonable basis to believe that civilians or civilian objects were the *sole* object of the attack.

67. The available information indicates that two types of artillery guns were used by the DPRK. The primary weapon used was a battery of 122mm Multiple Rocket Launchers (MRL); a small number of shells used in the attack originated from 76.2mm shore guns. However, sources differ as to the total number of artillery shells and rockets fired by the DPRK. According to the UNC report and other open sources, a total of 170 rounds were fired, of which 90 landed in the surrounding waters and 80 hit both military and civilian areas on Yeonpyeong island.⁶¹ According to subsequent information provided by the ROK Government, 230 rounds were fired, of which 180 struck the island and 50 landed in the surrounding waters. Out of 180 rounds, approximately 150 landed in and around 8 different military areas in various locations on the island and 30 on the civilian area immediately surrounding.
68. Both sources concur in reporting that a large number of shells (even the majority according to the UNC) actually hit the surrounding waters, thereby suggesting that the DPRK had targeting difficulties. Furthermore, only a small proportion of the shells (approximately 30 out of 230 according to ROK estimates) fell on civilian dwellings, which happened to be located close to military targets. In these circumstances, unless the DPRK also deliberately targeted the waters, an argument that the DPRK had knowledge that the targets were civilian and they deliberately targeted them nonetheless would, without more information, be based on speculation or suspicion rather than reasonable grounds.
69. Some may argue however, that the use of inaccurate targeting technology is an indicator that the attack was indiscriminate. States have an obligation to choose a means and method of attack which will minimize incidental civilian impact;⁶² failure to do so may indicate that the attack was in fact directed against civilians.⁶³ In this situation, it has been alleged that other, more accurate types of artillery possessed by the DPRK could have been utilized. However, the added degree of targeting accuracy they would have provided is unclear. More importantly, the choice to use one type of artillery weaponry over another is of limited probative value in ascertaining an intention to direct attacks against civilians. Based on the

⁶¹ Letter dated 19 December 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, pp. 6-7; JoongAng Daily, South thwarts even bigger attack, 25 November 2010, at <http://joongangdaily.joins.com/article/view.asp?aid=2928852>; 38 North Special Report 11-1, The Yönp'Yöng-Do Incident, November 23, 2010, 11 January 2011, pp.6-7.

⁶² API, Article 57(2)(a)(ii); *Galić Trial Judgment*, para. 132.

⁶³ *Galić Trial Judgment*, para. 57; Prosecutor v. Blaskic, IT-95-14-T, *Trial Chamber Judgment* (3 March 2000), paras. 501, 512; Prosecutor v. Martić, IT-95-11-R61, *Review of the Indictment*, reprinted in: 108 ILR 39, p.47, paras. 18, 31.

available information, the use of 122mm MRLs instead of other types of artillery would not be sufficient to establish a reasonable basis to believe that the attack was intentionally directed against civilians.

70. On balance, the information available does not provide a reasonable basis to believe that the DPRK intentionally targeted the civilian population or civilian objects. The fact that civilian objects were damaged may in some cases, without more, provide a reasonable basis to believe that there was an intention to damage civilian objects. However, here the majority of the attack was apparently directed towards military objectives; the majority of the impact was upon military objectives and there are alternative explanations for the civilian impact (targeting accuracy of artillery weapons).

2. War crime of excessive incidental death, injury or damage (Article 8(2)(b)(iv))

71. Article 8(2)(b)(iv) criminalizes “[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 damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”

72. The application of Article 8(2)(b)(iv) therefore requires an assessment of:

- (a) the anticipated civilian damage or injury;
- (b) the anticipated military advantage; and
- (c) whether (a) was “clearly excessive” in relation to (b).

73. 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, the Rome Statute restricts the criminal prohibition to cases that are “clearly” excessive. This is clear from the plain meaning, the meaning in context, as well as the intent of drafters, as confirmed in the relevant commentaries. (The term ‘clearly’ is designed to emphasize that a value judgment within a reasonable margin of appreciation should not be criminalized nor second guessed by the Court from hindsight.) The ICTY Final Report on NATO Bombing observed that:

Operational reality is recognized in the Statute of the International Criminal Court, an authoritative indicator of evolving customary international law on this point, where [in] Article 8(2)(b)(iv)...the use

of the word 'clearly' ensures that criminal responsibility would be entailed only in cases where the excessiveness was obvious.⁶⁴

74. 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."⁶⁵
75. In *Prosecutor v. Galic*, 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."⁶⁶
76. In assessing the *anticipated* civilian damage or injury, a number of factors are relevant. The DPRK had access to maps of Yeonpyeong island and thus would have been aware of the proximity of the civilian areas to the military objects. The DPRK allegedly conducted a firing drill near the Northern Limit Line in January 2010 using the same 'time on target' method used in the Yeonpyeong attack.⁶⁷ If the DPRK equipment did have low targeting accuracy, leading to the incidental civilian impact, one can presume that the DPRK was aware of this and of the likelihood of the subsequent civilian impact after the January drill.
77. However, the island is a total 7.3km² and at the time of the attack had a civilian population of 1,361. Thus, while the DPRK could have anticipated a likely civilian impact from its attack, it does not appear that a reasonably well-informed person in the circumstances of the actual perpetrator would have expected such civilian impact to be very high. The civilian population on the island (1,361) was concentrated in one area near the island's main port; this population does not appear to have been the intended object of the attack, for the reasons described in the previous section. The size of the island and its civilian areas meant that many of the shells that missed their targets would fall in uninhabited areas of the island or in the surrounding waters (rather than on civilian areas) – in fact, of the 230 shells fired, 50 landed in the surrounding waters and approximately 30 fell on civilian objects.

⁶⁴ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, at http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf, para. 21.

⁶⁵ ICC Elements of Crimes, fn. 36.

⁶⁶ *Galić Trial Judgment*, para. 58.

⁶⁷ Korea Joongang Daily, N. Korea fired thermobaric bombs, 26 November 2010. <http://joongangdaily.joins.com/article/view.asp?aid=2928905>.

78. While it has been suggested that the attack was motivated by internal North Korean politics,⁶⁸ this does not mean that there was no perceived military advantage to the attack. Given the context of the attack, principally the DPRK fashioning it as a response to South Korean military activity,⁶⁹ one may surmise that the perceived *military* advantage of the attack was a reassertion of DPRK territorial control of particular waters and a demonstration of its military power in the area.⁷⁰
79. In fact, the attack resulted in damage to military objectives and appears to have been directed towards those objectives, including the military base on the southwestern part of the island, three marine helipads, and K-9 howitzers that had been deployed outside of their hardened positions for a firing drill earlier on the same day.⁷¹ Those military objects were damaged or destroyed during the attack, and the attack may have been timed, in part, to catch the K-9s outside of their hardened positions.⁷² It would thus appear that the neutralization of South Korean military assets was also part of the concrete and direct overall military advantage anticipated by DPRK, in addition to the military advantage related to the demonstration of DPRK's military power in the area.
80. In evaluating whether the anticipated military advantage was "clearly excessive" in relation to the anticipated civilian damage or injury, as noted above, the lack of a common unit of measurement with which to compare the two makes this assessment difficult to apply. Ultimately, the attack resulted in two military personnel killed and 16 injured, as compared to two civilians killed and 52 injured. In terms of damage to property and military and civilian objects, the U.N. Command's report of the incident indicated that "considerable damage was suffered by military facilities and destruction of civilian homes."⁷³ The attack resulted in destruction or damage of the military base on the southwestern part of the island, three marine helipads, and K-9 howitzers that had been deployed outside of their hardened positions for a firing drill earlier on the same day.⁷⁴ According to the ROK, it also resulted in the destruction or damage of an estimated 159 civilian houses, 15 warehouses, 10 public facilities and 6 shops and services.⁷⁵ The total destruction and damage resulting from the attack was estimated to cost

⁶⁸ International Crisis Group, North Korea: The Risks of War in the Yellow Sea, Asia Report No. 198 (23 December 2010), p.1.

⁶⁹ Special investigation into the Korean People's Army attack on Yeonpyeong-Do and the Republic of Korea Marine Corps response on 23 November 2010 (U.N. Doc. S/2010/648; 19 December 2010), p.6.

⁷⁰ See International Crisis Group, North Korea: The Risks of War in the Yellow Sea, Asia Report No. 198 (23 December 2010), pp.27, 29-31.

⁷¹ 38 North Special Report 11-1, The Yönp'Yöng-Do Incident, November 23, 2010, (11 January 2011), pp. 6, 10.

⁷² *Ibid.*

⁷³ Special investigation into the Korean People's Army attack on Yeonpyeong-Do and the Republic of Korea Marine Corps response on 23 November 2010 (U.N. Doc. S/2010/648; 19 December 2010), p.7

⁷⁴ 38 North Special Report 11-1, The Yönp'Yöng-Do Incident, November 23, 2010, January 11, 2011, pp. 6, 10.

⁷⁵ Communication from the ROK Government, 28 October 2011.

US\$4.3 million, but this figure does not distinguish between damage to civilian or military objects.⁷⁶

81. To conclude, while a reasonably well-informed person in the circumstances of the actual perpetrator, would have expected some degree of civilian casualties and damage to result from the attack given the relative proximity of military and civilian objects, the information available is insufficient to provide a reasonable basis to believe that the anticipated civilian impact would have been *clearly excessive* in relation to the anticipated military advantage of the attack, considering the size and population of the island, and the fact that military targets appeared to be the primary object of the attack. Nonetheless, the loss of human life that resulted from the attack is to be greatly regretted.

VII. CONCLUSION

82. The Office has therefore reached the conclusion that, based on the information available, it currently lacks a reasonable basis to believe that either incident constitutes a crime within the jurisdiction of the Court. Accordingly, the Office lacks a reasonable basis to proceed with an investigation. This should not be construed as condoning in any way the resort to armed force by the Democratic People's Republic of Korea, as the law applied by the Office is that of *jus in bello*, not of *jus ad bellum*.
83. Should further information become available in the future which would lead the Office to reconsider these conclusions in the light of new facts or evidence, the preliminary examination of these two incidents could be re-opened. Furthermore, having noted the recurrent threats issued by North Korea against its neighbour, the Prosecutor stresses that should any future acts be committed on the Korean peninsula that appear to fall under the Court's jurisdiction, she remains prepared to initiate a preliminary examination into such acts.⁷⁷

⁷⁶ International Crisis Group, North Korea: The Risks of War in the Yellow Sea, Asia Report No 198, 23 December 2010, p. 28.

⁷⁷ See, e.g., Reuters, North Korea threatens South with "final destruction," 19 February 2013, at <http://www.reuters.com/article/2013/02/19/us-nkorea-threat-idUSBRE91I0J520130219>; Korean Central News Agency, KPA Supreme Command Warns Lee Myung Bak Group of Quick Action, 23 April 2012, at <http://www.kcna.co.jp/item/2012/201204/news23/20120423-26ee.html>.