



**In the  
International Criminal Court**

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**Jerusalem Institute of Justice**

*The complainant,*

*v.*

**Ismail Abdel Salam Ahmed**

**Haniyeh**

(إسماعيل عبد السلام أحمد هنية)

*Accused of War Crimes,*

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Communication to the Prosecutor of the International Criminal Court  
regarding war crimes committed by Ismail Abdel Salam Ahmed Haniyeh

(إسماعيل عبد السلام أحمد هنية)

## EXECUTIVE SUMMARY

We, the Jerusalem Institute of Justice, have filed a communication with the Office of the Prosecutor to the International Criminal Court concerning Hamas's actions during the 2014 Gaza war. On January 16, 2015, the Prosecutor began a preliminary examination into the "situation in Palestine" in order to determine whether a full investigation should be opened for crimes committed within the Palestinian territories. In the communication filed, we argue that a full investigation should be pursued, and a case should eventually be lodged, against Ismail Haniyeh for his role in the commission of war crimes during the 2014 conflict with Israel.

Haniyeh is the longtime leader of Hamas within Gaza, and was Hamas's local leader during the 2014 conflict. He has played a pivotal role in Hamas's extremist ideology and its consistent violation of the human rights of the Gazan civilian population. Not only did he not prevent the human rights violations of Hamas militants during the 2014 war, he actively encouraged and funded their unlawful acts.

There were two primary war crimes committed by Hamas militants during the war within the Gaza strip. First, they consistently used civilians for military protection and purposes, placing the Gazan population in grave danger as "human shields." This was done by firing rockets and mortars from densely populated areas, by encouraging (and sometimes forcing) civilians to remain in potential military targets, and by storing rockets in schools, hospitals, mosques, and other civilian structures. Second, the rockets Hamas used during the war are inherently indiscriminate under international law, and were therefore unlawful to use. These rockets are unable to be controlled, and therefore could not accurately be fired at lawful military targets, particularly from within civilian areas.

Haniyeh played a significant role in these crimes as the head of Hamas's interconnected structure. He personally, and his government more generally, urged Gazan civilians to remain in the vicinity of their homes despite Israeli warnings. The government, along with its al-Qassam military wing, also established a curfew that would ensure civilians remained in their homes, with some militant groups forcibly confining Gazans when they tried to disobey the curfew. The funding for the military wing, which was responsible for the indiscriminate firing of over 4,000 rockets and mortars, also came directly from foreign aid given to Hamas's political and social wings. Despite knowing of these acts being commonly committed within its territory, Haniyeh's political wing did nothing to prevent them being carried out. Not surprisingly, the Hamas run-and-created Gazan courts have also done nothing to punish those who played a direct role in committing these crimes.

These crimes had devastating consequences. Over 2,100 Gazans were killed during the conflict, with these crimes playing a direct and significant role in causing the high number of fatalities. The strain these crimes put on civilians by placing them in the path of danger and cutting off all potential avenues to safety cannot be overstated. Moreover, the indifference with which Hamas sacrificed Gazans for military protection and an advantageous narrative is the precise manner of crime the International Criminal Court was established to combat.

For these reasons, we filed a communication urging the Prosecutor to launch a full investigation into Haniyeh and Hamas. The Court was created to bring to justice the individuals responsible for the worst sorts of crimes, and Haniyeh is an individual who was particularly responsible for a prime example of these crimes being broadly committed.

The Jerusalem Institute of Justice

# Communication to the Office of the Prosecutor of the International Criminal Court

The Responsibility of Ismail Haniyeh for War  
Crimes Against the Palestinian people in Gaza  
from June 13, 2014 through August 26, 2014

Submitted on March 6, 2017  
by the Jerusalem Institute of Justice

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## I) INTRODUCTION

We, the Jerusalem Institute of Justice, hereby file this communication regarding criminal activities pursuant to Article 15 of the Rome Statute of the International Criminal Court (the “Rome Statute”). We request that the Prosecutor of the International Criminal Court (the “Prosecutor” and “ICC” or “Court”), initiate an investigation into the war crimes committed within the Court’s jurisdiction by Ismail Abdel Salam Ahmed Haniyeh (“Haniyeh”), as the leader of “Ḥarakat al-Muqāwamah al-’Islāmiyyah” (حركة المقاومة الاسلامية) (“ Hamas”) within Gaza during its 2014 conflict with Israel (the “Conflict”).

We submit this communication concerning Haniyeh’s criminality in exercising effective authority and control over, and actively promoting the widespread use of civilians as human shields and indiscriminate rocket attacks during the Conflict. These pervasive practices and policies consistently and greatly endangered the Gazan [and Israeli<sup>1</sup>] civilian populations. On January 16, 2015 the Office of the Prosecutor (“OTP”) announced that it had opened a preliminary examination into the situation in Palestine. We ask that the Prosecutor now open a full investigation into the actions of Hamas and in particular those of Haniyeh during the Conflict. This communication describes in detail how Haniyeh’s acts during the Conflict constitute war crimes under Article 8 of the Rome Statute, which are within the jurisdiction of the court, and satisfy the admissibility requirements of Article 17. The low evidentiary threshold required under Article 53 for the Prosecutor to open an investigation into Haniyeh is clearly met and

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<sup>1</sup> Kashmira Gander, *Israel-Gaza conflict: Mortar attack kills 4-year-old boy in Israel* (2015); available at: <http://www.independent.co.uk/news/world/middle-east/israel-gaza-conflict-mortar-attack-kills-4-year-old-boy-in-israel-9686493.html>

there is no reason why it would not be in the interest of justice to pursue such an investigation.

## **II) CONTENTS OF SUBMISSION**

Section III of this communication will set out the historical background and circumstances through which Hamas, and more particularly Haniyeh came to exercise effective control over the military and paramilitary forces within Gaza. Section IV outlines the main events of the Conflict.

Section V explains the appropriate prosecutorial standard to launch a full investigation into the acts alleged. The Sections which follow elaborate on why the criteria set out in Section V are fulfilled.

The communication first establishes, in Section VI, the ICC's jurisdiction over the relevant crimes. Next, Section VII explains the particular war crimes committed by Haniyeh under Article 8 of the Rome Statute, elaborating on the existence of an international armed conflict, and the fact that such crimes formed a widespread and systematic campaign, as well as Haniyeh's effective control over the primary perpetrators.

In Section VIII the communication sets out why these crimes are admissible to the Court, both in terms of gravity and a lack of complementarity within the Gazan legal system. Our conclusions and recommendation to the Prosecutor are contained in Section IX.

Annexed to the communication is a bibliography of the sources used, including links to the videos discuss in the text and an exhibit which provides extracts from the relevant sources cited.

### III) HISTORICAL BACKGROUND

#### A. Formation of Palestinian Authority

In 1995, the State of Israel (“Israel”) and the Palestine Liberation Organization (herein “PLO”) entered into the Oslo Interim Agreement, pursuant to which the PLO, in its capacity as representative of the Palestinian People, was to form an independent entity that would negotiate for, and govern, the Palestinian population.<sup>2</sup> Together with the Agreement on Preparatory Transfer of Powers and Responsibilities signed at Erez on August 29, 1994 (known as the Gaza-Jericho Agreement), the Oslo Interim Agreement led to the establishment of the Palestinian National Authority (herein “PA”), which has been the official chief governing body of the Palestinian people ever since.<sup>3</sup> Soon after the new interim PA government was established, it assumed administrative control over the Gaza Strip (except for the Jewish settlements), and elections were held to determine the first Palestinian Legislative Council, which resulted in 75% of the electoral seats going to the “Ḥarakat al-Taḥrīr al-Waṭanī al-Filasṭīnī” (حركة التحرير الوطني الفلسطيني) (“Fatah”) party.<sup>4</sup>

#### B. Hamas

Hamas is an Islamist organisation established in 1987 as an offshoot of the Egyptian Muslim Brotherhood Association in Gaza.<sup>5</sup> It has placed the liberation of Palestine through Jihad (holy war) as well as the establishment an Islamic Palestine

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<sup>2</sup> United Nations Special Coordinator for the Middle East Peace Process, *Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip* (September 28, 1995); available at: <http://www.unsco.org/Documents/Key/Israeli-Palestinian%20Interim%20Agreement%20on%20the%20West%20Bank%20and%20the%20Gaza%20Strip.pdf>

<sup>3</sup> The Editors of Encyclopædia Britannica, *Palestinian Authority (PA)*, Encyclopædia Britannica (access date: February 13, 2017); available at: <https://www.britannica.com/topic/Palestinian-Authority>

<sup>4</sup> Central Elections Commission (CEC), *Results of first General election, 1996. The 1996 Presidential and Legislative Elections* (1996); available at: <https://www.elections.ps/Portals/0/pdf/Resultselection1996.pdf>. This dominance was in part attributable to Fatah’s chief rival, Hamas, boycotting the elections. Hamas viewed the election as capitulating and legitimizing Israel, and therefore refused to participate. See Frode Løvlie, *Explaining Hamas’s Changing Electoral Strategy, 1996–2006*, 48 *Government and Opposition* 570 (Cambridge University Press 2013); available at: [doi:10.1017/gov.2013.3](https://doi.org/10.1017/gov.2013.3)

<sup>5</sup> Anthony H. Cordesman, *Peace and War: The Arab–Israeli Military Balance Enters the 21st Century* (2003), at page 234

“from the Mediterranean Sea to the Jordan River” as its top priorities.<sup>6</sup> The Covenant of the Islamic Resistance Movement (also known as the Hamas Charter) was published on the 18<sup>th</sup> of August 1988 and remains in force. The Hamas Slogan is set out in Article 8: “Allah is its target, the Prophet is its model, the Koran its constitution: Jihad is its path and death for the sake of Allah is the loftiest of its wishes.” Other Articles of the Hamas Charter exhort the killing of Jews and call for the destruction of the State of Israel.<sup>7</sup>

Hamas divides its leadership between those located within the West Bank and Gaza Strip, and the “external leadership” located abroad.<sup>8</sup> It operates with three interrelated wings: its social welfare wing, political wing, and military wing.<sup>9</sup> The social and political wings have traditionally been the public face of Hamas, and operate under license pursuant to the Oslo agreement.<sup>10</sup> The military wing is a more covert network comprised of regular forces alongside military cells and regional networks, answerable ultimately to a central command.<sup>11</sup> Importantly, as explained further below in [Section VII D.(2)] all three wings fall under a common command structure, and are ultimately controlled by Hamas leadership including Haniyeh.

The second Palestinian Legislative elections were held a decade after the first, when the Israeli government completed its withdrawal from Gaza on September 22<sup>nd</sup>, 2005.<sup>12</sup> The unilateral withdrawal brought to the forefront the question of administrative jurisdiction over the Gaza strip, and was primarily contested by Fatah,

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<sup>6</sup> *Id.*

<sup>7</sup> *Hamas Covenant 1988: The Covenant of the Islamic Resistance Movement* (August 18, 1988); available at: [http://avalon.law.yale.edu/20th\\_century/hamas.asp](http://avalon.law.yale.edu/20th_century/hamas.asp)

<sup>8</sup> Mathew Levitt, Dennis Ross, *Hamas: Politics, Charity, and Terrorism in the Service of Jihad* (2007), at pg. 2

<sup>9</sup> *Id.* at pg. 3

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Israeli Ministry of Foreign Affairs, *Israel's Disengagement from Gaza and Northern Samaria* (2005); available at: <http://www.mfa.gov.il/mfa/aboutisrael/maps/pages/israels%20disengagement%20plan-%202005.aspx>

and the now participating Hamas. On January 25<sup>th</sup>, 2006, Hamas won a majority in this Palestinian Legislative Council election, and with the cooperation of Fatah, appointed Haniyeh as the PA Prime Minister.<sup>13</sup>

There have been changes over time in the relationship between the two major Palestinian factions, but Hamas has functioned as the *de facto* governing authority for the Gaza strip since 2007, when it firmly seized control in a violent battle with Fatah.<sup>14</sup> Despite the tensions and fighting at that time, several negotiations toward reconciliation between Hamas and Fatah have been carried out since, including the Hamas-Fatah Doha agreement mediated by Egypt and signed by President Mahmoud Abbas (“Abbas”), the leader of Fatah, and the official leader of Hamas, Khaled Mashal (“Mashal”).<sup>15</sup> The parties again reached two agreements, in April and September 2014. Both were signed by Haniyeh and a representative of the PLO appointed by Abbas, in which Hamas agreed to cede control of the Gaza strip to a newly formed unity government.<sup>16</sup> However, neither agreement has been implemented by Hamas officials located within the Gaza Strip. Abbas stated his intention in 2015 to end the unity government because Hamas “had not cooperated” in the unity efforts.<sup>17</sup>

In reality, the Gaza strip has been firmly in Hamas’s control since it wrested it away from Fatah in 2007, and as explained further below, this was manifestly the situation during the Conflict. Indeed, the OTP itself recognised the “extension of

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<sup>13</sup> Lloyd Vries, *Hamas’ Haniyeh to be Prime Minister*, CBS News (February 21, 2006); available at: <http://www.cbsnews.com/news/hamas-haniyeh-to-be-prime-minister/>

<sup>14</sup> Ian Black and Mark Tran, *Hamas Takes Control of Gaza*, The Guardian (June 15, 2007); available at: <https://www.theguardian.com/world/2007/jun/15/israel4>

<sup>15</sup> The Middle East Monitor, *The Doha Declaration signed between Hamas and Fatah* (February 7, 2012); available at: <https://www.middleeastmonitor.com/20140217-full-text-of-the-doha-declaration-signed-between-hamas-and-fatah/>

<sup>15</sup> Shadi Bushra, *Fatah-Hamas Agreement Gives Unity Government Control Over Gaza*, Reuters, (September 25, 2014); available at: <http://www.reuters.com/article/us-mideast-gaza-cairo-talks-idUSKCN0HK1JI20140925>

<sup>16</sup> The Times of Israel, *Palestinian Unity Government Mulls Resigning Over Gaza*, (June 16, 2015); available at: <http://www.timesofisrael.com/palestinian-unity-government-mulls-resigning-over-gaza/>

control in 2007” by Hamas over Gaza in its latest Report on Preliminary Examination Activities.<sup>18</sup>

In the nearly ten years since seizing control, Hamas has committed numerous human rights violations. From November 2008 through January 2009, Hamas was found to have endangered Gazan civilians by intentionally launching rockets from civilian populated areas.<sup>19</sup> Most of these rockets were “Qassam” rockets, and because of the inability to direct them, their use in densely populated areas is considered inherently indiscriminate under International Humanitarian Law (“IHL”).<sup>20</sup> On December 24, 2008, Hamas claimed responsibility when one of these rockets hit a residence of a Palestinian family living in Tel al-Hawa, Gaza.<sup>21</sup> One man was critically wounded in the incident, and described his wounds, stating: “shrapnel hit me in the head, the right arm, and leg (...) two small fragments are still in my skull.”<sup>22</sup> He also explained that “[t]here are dozens of these cases. You face a taboo on directly criticising these accidents.”<sup>23</sup> Another incident occurred on December 26 of that same year, when a rocket struck a residence in Beit Lahiya, Gaza, and killed two Palestinian children, later identified as Sabbah Abu Khusa and Henein Ali Abu Khusa.<sup>24</sup> On another occasion, a Gazan doctor suffered an abrasion to his face after his home was struck by a rocket he claims was launched by an Islamic Jihad group associated with Hamas.<sup>25</sup>

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<sup>18</sup> The Office of the Prosecutor, *Report on Preliminary Examination Activities 2016* (Nov 14, 2016), para 113; available at: [https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-pe\\_eng.pdf](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-pe_eng.pdf)

<sup>19</sup> Bill Van Esveld, *Rockets from Gaza: Harm to Civilians from Palestinian Armed Groups’ Rocket Attacks*, Human Rights Watch (August 6, 2009); available at: <https://www.hrw.org/report/2009/08/06/rockets-gaza/harm-civilians-palestinian-armed-groups-rocket-attacks>

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

Other examples of Hamas firing rockets from within heavily populated areas include the 2009 conflict with Israel. Residents of a town in Gaza tell of shouting at Hamas fighters to not fire rockets from their neighbourhood, stating that: “[t]he Hamas guys had already cut the wires of the gate to break in (...) all the people got together and shouted at them to leave told them the rockets were going to backfire on us (...) after that we came back every day to the garden for a few hours to prevent them from firing from it.”<sup>26</sup> Separately, two residents from the Tel al-Hawa neighbourhood in the southern part of Gaza City described that “they could hear repeated rocket firings from the neighbourhood (...) but could not identify the precise location of the launch sites.”<sup>27</sup> There were many other incidents and witness reports of this occurring, with a general finding that Hamas was “making the normally civilian structure a lawful military target and may have been placing the residents of nearby homes at unnecessary risk.”<sup>28</sup> In a particularly egregious incident, it was reported that Hamas had fired from the vicinity of a school, as “[w]itnesses....said that Hamas fired just outside the school compound, probably from the secluded courtyard of a house across the street, 25 yards from the school.”<sup>29</sup>

The “security branch” of Hamas has also violated citizens’ rights, via the criminal justice system which it operates.<sup>30</sup> One commentator described in 2012 that “[a]fter five years of Hamas rule in Gaza, its criminal justice system reeks of injustice, routinely violates detainees’ rights, and grants impunity to abusive security services.”<sup>31</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> The New York Times, *Weighing Crimes and Ethics in the Fog of Urban Warfare* (January 16, 2009); available at: <http://www.nytimes.com/2009/01/17/world/middleeast/17israel.html>

<sup>30</sup> See e.g. Bill Van Esveld, *Abusive System: Failure of Criminal Justice System in Gaza*, Human Rights Watch (October 3, 2012); available at: <https://www.hrw.org/report/2012/10/03/abusive-system/failures-criminal-justice-gaza>

<sup>31</sup> Bill Van Esveld, *Gaza: Arbitrary Arrests, Torture, Unfair Trials*, Human Rights Watch (October 3, 2012); available at: <https://www.hrw.org/news/2012/10/03/gaza-arbitrary-arrests-torture-unfair-trials>

He further stated: “[t]here is ample evidence that Hamas security services are torturing people in custody with impunity and denying prisoners their rights.”<sup>32</sup> In August 2008, Abdel Karim Shrair was arrested by members of Hamas’s armed wing, and was tortured for three weeks in an undisclosed location.<sup>33</sup> In January 2010, three people were arrested and held for seven days without a warrant merely for supporting Fatah.<sup>34</sup> In January 2011, a man was beaten severely by security forces for questioning why his neighbour was being arrested.<sup>35</sup> A non-partisan Palestinian rights group reported that in 2011 alone there were 147 complaints of torture perpetrated by the internal security services of Hamas.<sup>36</sup> While Hamas claims those responsible for violations have been punished, no evidence has been published of any disciplinary measures being taken.<sup>37</sup>

Hammas has not relented in its violations of human rights in the years since the Conflict. In its 2015 annual report on human rights in Palestine, the Independent Commission for Human Rights (herein “ICHR”) noted that: “the continuation of arbitrary detention is an important indicator of the deterioration of human rights in Palestine.”<sup>38</sup> As of July 31, 2015, there were 258 reported cases of torture and ill treatment within Gaza in just over half a year.<sup>39</sup> Of those tortured, dozens were Fatah activists who were accused of collaborating with the Fatah leadership in Ramallah.<sup>40</sup> Unfavourable journalists received similar treatment, when for example “on 09 March 2015, a journalist Khaled Isma’il Abu Maghasib said that he was arrested and beaten

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<sup>32</sup> *Id.*

<sup>33</sup> *Supra* at note 29

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> ICHR, *The Status of Human Rights in Palestine: 20<sup>th</sup> Annual Report* (May 2015), at pg. 17; available at: <http://ichr.ps/en/1/6/275/ICHR-20th-Annual-Report.htm>

<sup>39</sup> Human Rights Watch, *Israel/Palestine: Events of 2015* (2016), <https://www.hrw.org/world-report/2016/country-chapters/israel/palestine>

<sup>40</sup> Palestinian Center for Human Rights, *Annual Report 2015* (2016), at pg. 66; <http://pchr.org/en/wp-content/uploads/2016/08/annual-english2015.pdf>

by the security services in the Gaza Strip, when he was covering an activity calling for the right to work and reduce the high costs of living.”<sup>41</sup> In May 2016 alone, there were 21 complaints of torture and ill treatment filed by those detained within Gaza.<sup>42</sup> On June 2<sup>nd</sup>, 2016, Gazan security forces killed an activist and opponent of Hamas in a raid on his home in Gaza city.<sup>43</sup>

In sum, both in its internal governance, and in its actions during external conflicts, Hamas has violated the rights of Gazan citizens throughout its tenure in control.

### **C. Ismail Haniyeh**

Haniyeh rose to prominence within Hamas in the 1990s through his relationship with the co-founder of the organization Sheikh Yassin.<sup>44</sup> As mentioned above, after Hamas’s victory in the 2006 elections, Haniyeh was appointed Prime Minister of the PA.<sup>45</sup> In 2007, during the Fatah-Hamas clashes for control, Abbas removed him from that position, though Haniyeh dismissed the order and continued acting as the Prime Minister of the Hamas controlled Gaza.<sup>46</sup> From that time he has been the top spokesperson and public representative of Hamas from within the Gaza strip. In 2007, after the United States imposed economic sanctions against the PA due to Hamas’s election, Haniyeh positioned himself as the voice of Gazans and called on President George Bush to lift the sanctions, claiming “we are an elected government which came

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<sup>41</sup> *Id.* at pg. 73

<sup>42</sup> ICHR, *May 2016 Report on Human Rights Violations* (2016); available at: <http://ichr.ps/en/1/5/151/May-2016-Report-of-Human-Rights-Violations.htm>

<sup>43</sup> Amnesty International, *Palestine (State of) 2015/2016* (2016); available at: <https://www.amnesty.org/en/countries/middle-east-and-north-africa/palestine-state-of/report-palestine-state-of/>

<sup>44</sup> BBC News, *Profile: Hamas PM Ismail Haniya* (December 14, 2006); available at: [http://news.bbc.co.uk/2/hi/middle\\_east/4655146.stm](http://news.bbc.co.uk/2/hi/middle_east/4655146.stm)

<sup>45</sup> *Id.*

<sup>46</sup> Counter Extremism Project, *Ismail Haniyeh*; available at: <http://www.counterextremism.com/extremists/ismail-haniyeh>

through a democratic process.”<sup>47</sup> In another example of Hamas’s superiority within Gaza, even after signing a unity agreement with Fatah, Hamas continued to fire rockets that same year at Israel from Gaza against Abbas’s express wishes.<sup>48</sup> Though Haniyeh officially stepped down to Deputy Leader of Hamas after the unity agreement with Fatah in 2014, the inability of the agreement to gain traction within Gaza has meant he is still effectively in control; though now acting as an agent of the PA, and not exclusively Hamas.<sup>49</sup> This control includes directing the Gazan police forces discussed above. Article 39 of the Palestinian Basic Law provides “The President of the National Authority is the Commander-in-Chief of the Palestinian Forces”. Although a dispute exists as to who is officially President of Gaza, Haniyeh has effectively fulfilled this role since 2007, supplanting Abbas as regards that territory.

Haniyeh’s rhetoric has been incendiary. Following the killing of Osama Bin Laden in 2011, Haniyeh opposed the assassination, stating that “we condemn the assassination and the killing of an Arab holy warrior (...) we ask God to offer him mercy with the true believers and the martyrs.”<sup>50</sup> In 2014, Haniyeh gave a speech in Gaza which appeared to justify the use of human shields: “we are a people that yearn for death, just as our enemies yearn for life (...) we yearn for martyrdom for the same goal for which our leaders died, just as the others love their seats of power.”<sup>51</sup>

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<sup>47</sup> Barak Ravid and Haaretz Correspondent, *In 2006 Letter to Bush, Haniyeh Offered Compromise With Israel* Haaretz (November 14, 2008); available at: <http://www.haaretz.com/in-2006-letter-to-bush-haniyeh-offered-compromise-with-israel-1.257213>

<sup>48</sup> BBC News, *Profile: Hamas Palestinian Movement* (July 11, 2014); <http://www.bbc.com/news/world-middle-east-13331522>

<sup>49</sup> *Supra* at note 45

<sup>50</sup> Nidal al-Mughrabi, *Abbas Government Welcomes Bin Laden Death, Hamas Deplores*, Reuters (May 2, 2011); available at: <http://www.reuters.com/article/us-binladen-palestinians-idUSTRE7413UL20110502>

<sup>51</sup> The Middle East Media Research Institute, *Hamas PM Haniya Extols Martyrdom, Says: We Shall Rock Tel Aviv* (March 23, 2014); available at: <https://www.memri.org/tv/hamas-pm-haniya-extols-martyrdom-says-we-shall-rock-tel-aviv>

Before and during the Conflict, he was the unquestioned leader of Hamas within Gaza, serving as Prime Minister from 2007 to 2014, and still remains in effective control after changing positions following the latest unity agreement with Fatah. His role during Operation Protective Edge, as well as the details of the Conflict itself, will be discussed in greater detail below.

#### IV) 2014 GAZA CONFLICT

On June 12<sup>th</sup>, 2014 three Israeli teenagers were kidnapped and murdered by two Hamas members, with Hamas proudly claiming responsibility for the attack months later.<sup>52</sup> Notably, the Palestinian *ad hoc* declaration recognising the ICC’s jurisdiction over its territory, pursuant to Article 12(3) of the Rome Statute, lodged January 1<sup>st</sup>, 2015 (the “Declaration”) refers to events “since June 13, 2014” – thereby deliberately excluding the kidnap and murder of the three teenagers. In the days following the kidnap, Israel launched an extensive military operation to find the teenagers, and arrested hundreds of Hamas members in the process.<sup>53</sup> Hamas responded to this crackdown with constant rocket fire towards Israel, to which Israel responded to with air strikes of its own.<sup>54</sup> On June 30<sup>th</sup>, 2014 the bodies of the three teenagers were found in a pit outside of Hebron,<sup>55</sup> prompting Israel to strike 34 “terror targets” in Gaza.<sup>56</sup> Hamas warned Israel that it had “opened the gates of hell” and that Hamas would respond with force.<sup>57</sup> The fighting further intensified on July 2<sup>nd</sup>, after Jewish extremists

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<sup>52</sup> Jack Khoury, *Hamas Claims Responsibility for Three Israeli Teens’ Kidnapping and Murder*, Haaretz (August 21, 2014); available at: <http://www.haaretz.com/israel-news/1.611676>

<sup>53</sup> Alessandria Masi, *Timeline Of Events In Gaza and Israel Shows Sudden, Rapid Escalation*, International Business Times (July 23, 2014); available at: <http://www.ibtimes.com/timeline-events-gaza-israel-shows-sudden-rapid-escalation-1636264>

<sup>54</sup> *Id.*

<sup>55</sup> Yolande Knell, *Abducted Israeli Teens Found Dead Near Hebron*, BBC News (June 30, 2014); available at: <http://www.bbc.com/news/world-middle-east-28097164>

<sup>56</sup> Alessandria Masi, *Timeline Of Events In Gaza and Israel Shows Sudden, Rapid Escalation*, International Business Times (July 23, 2014); available at: <http://www.ibtimes.com/timeline-events-gaza-israel-shows-sudden-rapid-escalation-1636264>

<sup>57</sup> *Id.*

murdered a 16 year old Palestinian boy in a Jerusalem forest, purportedly in retaliation for the murder of the Israeli teenagers.<sup>58</sup>

In the first week of July, Hamas rocket fire intensified, prompting Israel to kill at least nine Hamas members in retaliatory air strikes.<sup>59</sup> On July 8<sup>th</sup>, Israel declared that it was launching “Operation Protective Edge”, to stop the rocket attacks from Gaza and to obtain quiet on its Southern borders.<sup>60</sup> On July 15<sup>th</sup>, a ceasefire was proposed by the Egyptian government which was accepted by Israel but rejected by Hamas.<sup>61</sup> On July 17<sup>th</sup>, the air campaign was expanded into a ground incursion by Israel, in the hopes of combatting the threat of tunnels which extended into Israel and were being used by Hamas militants.<sup>62</sup> This increased the death toll on both sides, and amplified the intensity of the fighting. On July 29<sup>th</sup>, the PA (of which Hamas was officially part), proposed a ceasefire that could be extended up to 72 hours, but it was rejected by Hamas as it did not guarantee an end to the Israeli blockade of Gaza.<sup>63</sup> On July 31<sup>st</sup> Hamas and Israel agreed to a ceasefire, which was quickly violated the following day when Hamas allegedly kidnapped an Israeli soldier, who was soon declared dead, to which Israel responded with force.<sup>64</sup> It is readily apparent from the dynamic of the ceasefire negotiations that operational military control throughout the Conflict was maintained by Hamas leadership, including Haniyeh.

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Daniel Rubenstein, *The Gaza War 2014. The War Israel Did Not Want and the Disaster it Averted. Key Moments in a 50 Day War: A Timeline*, Jerusalem Center for Public Affairs (February 26, 2015); available at: <http://jcpa.org/timeline-key-moments-gaza-war/>

<sup>61</sup> Alessandria Masi, *Timeline Of Events In Gaza and Israel Shows Sudden, Rapid Escalation*, International Business Times (July 23, 2014); available at: <http://www.ibtimes.com/timeline-events-gaza-israel-shows-sudden-rapid-escalation-1636264>

<sup>62</sup> BBC News, *Israel Starts Gaza Ground Offensive* (July 18, 2014); <http://www.bbc.com/news/world-middle-east-28359582>

<sup>63</sup> Chelsea J. Carter, Ashley Fantz and Karl Penhaul, *No End in Sight: Israel, Hamas Blame Each Other for Fighting Casualties*, CNN (July 30, 2014); available at: <http://edition.cnn.com/2014/07/29/world/meast/mideast-crisis/>

<sup>64</sup> BBC News, *Gaza Conflict: Missing Israeli Soldier Hadar Goldin 'Dead'* (August 3, 2014); available at: <http://www.bbc.com/news/world-middle-east-28627888>

The ground campaign ended on August 5<sup>th</sup>, though Israeli air strikes and Hamas rocket fire continued.<sup>65</sup> This continued until August 26<sup>th</sup> when Hamas finally accepted an open-ended ceasefire with Israel.<sup>66</sup>

During the Conflict, Israel struck 5,226 targets in Gaza,<sup>67</sup> including 1,814 linked to rocket firing, and destroyed all 32 tunnels it discovered during the Conflict.<sup>68</sup> Hamas fired at least 4,591 rockets towards Israel during the war.<sup>69</sup> Over 2,100 Palestinians and 70 Israelis were killed during the Conflict, with many more being displaced on both sides.<sup>70</sup> The reasons for the large numbers of casualties on the Palestinian side during the Conflict, compared to those of Israel, have been debated by the international community.<sup>71</sup> Although not integral to the allegations herein, it is submitted in this communication that the actions of Haniyeh served to exacerbate casualties on the Palestinian side, and were a significant factor in the high ratio of Palestinians killed.

## V) PROSECUTORIAL LEGAL STANDARD

Article 53(1) of the Rome Statute provides that in deciding whether to initiate an investigation, the Prosecutor shall consider 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;

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<sup>65</sup> Daniel Rubenstein, *The Gaza War 2014. The War Israel Did Not Want and the Disaster it Averted. Key Moments in a 50 Day War: A Timeline*, Jerusalem Center for Public Affairs (February 26, 2015); available at: <http://jcpa.org/timeline-key-moments-gaza-war/>

<sup>66</sup> *Id.*

<sup>67</sup> BBC News, *Gaza Crisis: Toll of Operations in Gaza* (September 1, 2014); available at: <http://www.bbc.com/news/world-middle-east-28439404>

<sup>68</sup> Ben Hartman, *50 Days of Israel's Gaza Operation Protective Edge- By the Numbers*, The Jerusalem Post (August 28, 2014); available at: <http://www.jpost.com/Operation-Protective-Edge/50-days-of-Israelis-Gaza-operation-Protective-Edge-by-the-numbers-372574>

<sup>69</sup> BBC News, *Gaza Crisis: Toll of Operations in Gaza* (September 1, 2014); available at: <http://www.bbc.com/news/world-middle-east-28439404>

<sup>70</sup> *Id.*

<sup>71</sup> See e.g. The Telegraph, *A Bloody Conflict in Gaza, but Israel is Not to Blame* (July 22, 2014); available at: <http://www.telegraph.co.uk/news/worldnews/middleeast/israel/10980627/A-bloody-conflict-in-Gaza-but-Israel-is-not-to-blame.html>; But See The Guardian, *View on the Human, Economic, and Political Costs of the Gaza War* (September 24, 2014); available at: <https://www.theguardian.com/commentisfree/2014/sep/24/guardian-view-human-economic-political-costs-gaza-war>

(b) the case is or would be admissible under article 17; 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.”

These requirements will be addressed in turn in the Sections that follow. In the next two Sections, we explain why in relation to article 53(1)(a) of the Rome Statute there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed.

It should be recalled that the standard of proof required to trigger an investigation pursuant to Article 53 falls well below the standard required for later stages of a criminal investigation, such as the decision to issue an arrest warrant<sup>72</sup> at pre-Trial stage,<sup>73</sup> or ultimately make a substantive finding of guilt.<sup>74</sup> Indeed a Pre-Trial Chamber of the ICC has described the standard to be met under Article 53 as “the lowest evidentiary standard provided for in the Statute”.<sup>75</sup> The Pre-Trial Chamber continued that “the information available to the Prosecutor is neither expected to be ‘comprehensive’ nor ‘conclusive’ if compared to evidence gathered during the investigation”.<sup>76</sup> As the Pre-Trial Chamber further explained, for the “reasonable basis” test under Article 53 to be satisfied, “it is sufficient at this stage to prove that there is a reasonable conclusion alongside others (not necessarily supporting the same finding), which can be supported on the basis of the evidence and the information available.”<sup>77</sup>

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<sup>72</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, Article 58(2)(d) (July 17, 1998); available at: <http://www.refworld.org/docid/3ae6b3a84.html>

<sup>73</sup> *Id.* Article 61(7)

<sup>74</sup> *Id.* Article 66(3)

<sup>75</sup> Pre-Trial Chamber II, Situation in the Republic of Kenya, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (March 31, 2010), para. 27; available at: [https://www.icc-cpi.int/CourtRecords/CR2010\\_02399.PDF](https://www.icc-cpi.int/CourtRecords/CR2010_02399.PDF)

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* Para. 33

Moreover, any full investigation into the situation in Palestine should be balanced in nature as between the parties to the Conflict rather than focussing solely on the alleged wrongdoing of one particular party. The OTP has recently affirmed that it “will examine allegations against *all* groups or parties within a particular situation” (emphasis added).<sup>78</sup>

We are aware that the OTP is currently undertaking preliminary steps on the ground within Israel and potentially also within Gaza to assess alleged crimes.<sup>79</sup> Although any decision by the OTP to investigate crimes allegedly committed by Israelis does not automatically mean that it should also investigate Palestinians, a decision to investigate one party to a conflict should not exclude investigation into the acts of the other party. This basic principle of justice applies notwithstanding that the submission was made by the PA with a view to implicating only Israeli actions.

## VI) JURISDICTION

Article 53(1)(a) contains two requirements: first that there is territorial or nationality-based jurisdiction pursuant to Article 12(2)(a) or (b), and second that there is subject-matter jurisdiction over the relevant crimes alleged, pursuant to Article 8. Section VI of this complaint addresses the first issue.

The criminal conduct impugned in this communication occurred in the territory of Gaza, which is considered part of the Palestinian territory by the ICC. On January 1<sup>st</sup> 2015, the Government of Palestine lodged the Declaration, which accepted the jurisdiction of the International Criminal Court (ICC) over alleged crimes committed

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<sup>78</sup> The Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation* (September 15, 2016), para. 20; available at: [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf)

<sup>79</sup> See, for example Yonah Jeremy Bob, *Analysis: Why is ICC allegedly in contact with Hamas terrorists' families?*, Jerusalem Post (November 22, 2016); available at: <http://www.jpost.com/Arab-Israeli-Conflict/Analysis-Why-is-ICC-allegedly-in-contact-with-Hamas-terrorists-families-473325>

“in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014”.<sup>80</sup> With respect to jurisdiction *ratione temporis*, although in Sections III and IV we provide circumstantial evidence of the numerous human rights breaches committed by Hamas and Haniyeh, the allegations in this communication set out in Sections VI, VII and VIII all relate to conduct which occurred from June 13<sup>th</sup>, 2014 onwards. With respect to jurisdiction *ratione materiae*, we refer to the allegations and legal analysis provided in Section VII below, which demonstrate the commission of war crimes within the Court’s jurisdiction.

We note that the status indicator on the website of the ICC provides that the OTP preliminary examination into the situation in Palestine is at “Phase 2: Subject-matter jurisdiction”.<sup>81</sup> We understand this to mean that the OTP has acknowledged that it has either territorial or nationality-based jurisdiction over the alleged crimes, by virtue of the Declaration.

An alternative route to the ICC having jurisdiction over the crimes set out in this communication is via the nationality principle, under Article 12(2)(b) of the Rome Statute. Haniyeh is a national of Palestine and therefore his actions – in whatever territory – fall within the ICC’s jurisdiction.

Given that the part of Article 53(1)(a) relating to territorial or nationality-based jurisdiction is clearly satisfied, the following Section of this communication will move on to discuss the second component of Article 53(1)(a): the nature of the crimes committed by Haniyeh.

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<sup>80</sup> ICC, *Palestine*; available at <https://www.icc-cpi.int/palestine>.

<sup>81</sup> *Id.*

## VII) WAR CRIMES UNDER ARTICLE 8 OF THE ROME STATUTE

In this Section, we present the legal requirements for war crimes under Article 8 of the Rome Statute. In Part VII A, we discuss the requirements relating to the existence of an armed conflict, the character of the Conflict, and the connection between the acts committed and the armed conflict. We explain why the Conflict constituted an international armed conflict, and that all impugned conduct was directly related to the Conflict. In Part VII B, we discuss the threshold required in Article 8(1) of the Rome Statute, and demonstrate how the acts committed by Hamas personnel in Gaza reach this threshold. In Part VII C, we explore the relevant war crimes committed by Hamas officials during the war, particularly the use of “human shielding” by Hamas personnel. Part VII D sets out the link between Haniyeh and the aforementioned crimes.

In order to establish that a war crime under Article 8 of the Rome Statute has been committed, the following must be demonstrated: i) the existence of an armed conflict, either of an international or non-international character and that the impugned conduct took place in the context of, and was associated with, the armed conflict; ii) the conduct fell within the prohibitions set out in Article 8(2)(a),(b),(c) or (e) of the Rome Statute, which include the requisite knowledge and intent.<sup>82</sup> In addition, and as a preliminary point, the Rome Statute suggests that the ICC should concentrate in particular on war crimes which formed part of a larger policy. The war crimes committed by Haniyeh fulfil all of the above requirements.

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<sup>82</sup> 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); available at: [http://www.mpil.de/files/pdf3/mpunyb\\_doermann\\_7.pdf](http://www.mpil.de/files/pdf3/mpunyb_doermann_7.pdf)

## **A. Suggested Threshold - Article 8(1) Rome Statute**

Article 8(1) of the Rome Statute provides that:

“The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”

The specific conduct constituting the war crimes is discussed in the following Section, and as will be seen, were committed as part of “*a large-scale commission of such crimes.*” The evidence presented in this communication demonstrates the breadth and extent to which Gazan and Israeli civilians were abused by Hamas’s actions during the Conflict. Both its frequent use of a variety of human shielding methods, and the firing of thousands of indiscriminate rockets from within populated areas, were part of a systemic plan to fight a substantial war without regard for, or in some cases with the twisted hope of, producing civilian deaths. Section IX below on Gravity also discusses these factors in greater detail.

The endangerment of Gazan civilians was the official strategy of Hamas. As one former Hamas minister described it: “Hamas wanted us butchered so it could win the media war against Israel showing our dead children on TV and then get money from Qatar.”<sup>83</sup> It was very common for Hamas to undertake attacks on Israel from civilian areas, with the express intention of either causing increased Palestinian casualties and/or of rendering effective retaliation by Israel more difficult. As one report on the Conflict explains:

“... the numerous specific incidents of attacks launched in close proximity to civilian buildings reported by the Israeli authorities, together with accounts of

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<sup>83</sup> Mudar Zahran, *Gazans Speak Out: Hamas War Crimes*, Gatestone Institute (September 19, 2014); available at: <https://www.gatestoneinstitute.org/4706/gazan-hamas-war-crime>

journalists in Gaza during the conflict and the findings of Amnesty International researchers documenting previous rounds of hostilities, indicate that attacks by armed groups in Gaza launched from within residential areas were *far from isolated occurrences*.<sup>84</sup>

It is worth noting, the threshold in Article 8(1) is a practical guideline, and not a strict requirement. Nevertheless, the evidence presented strongly demonstrates that war crimes were committed by Hamas officials in Gaza as part of a “*large-scale commission*” of such crimes.

## **B. Existence of an Armed Conflict, its Character and Nexus to the Acts**

Article 8 of the Rome Statute, and the various Geneva Conventions and Additional Protocols it aims to incorporate, apply only during an *armed conflict*.<sup>85</sup> The International Criminal Tribunal for the former Yugoslavia (herein “ICTY”) in *Prosecutor v. Dusko Tadic*, defined an armed conflict as existing “whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>86</sup> This definition has been used in previous ICC jurisprudence.<sup>87</sup>

It is implicit in the above definition of an armed conflict that it can be of an international or non-international character, depending on whether both actors are

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<sup>84</sup> Amnesty International, *Unlawful and Deadly Rocket and Mortar Attacks by Palestinian Armed Groups during the 2014 Gaza/Israel conflict* (March 26, 2015); available at:

<https://www.amnesty.org/en/documents/mde21/1178/2015/en/>

<sup>85</sup> See e.g. The Prosecutor v. Thomas Lubanga Dyllo, (ICC-01/04-01/06), Decision on the Confirmation of Charges, Pre-Trial Chamber I (January 29, 2007), at para. 504; available at: [https://www.icc-cpi.int/CourtRecords/CR2007\\_02360.PDF](https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF)

<sup>86</sup> The Prosecutor v. Dusko Tadic a/k/a “Dule,” Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY (October 2, 1995), at para. 70; available at: <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>

<sup>87</sup> See e.g. The Prosecutor v. Thomas Lubanga Dyllo, (ICC-01/04-01/06), Decision on the Confirmation of Charges, Pre-Trial Chamber I (January 29, 2007), at para. 533; available at: [https://www.icc-cpi.int/CourtRecords/CR2007\\_02360.PDF](https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF)

states. This notion is directly supported by the Rome Statute which applies different crimes to the two different types of conflicts.<sup>88</sup>

The actions of a non-state actor can be attributed to a state, thereby making a conflict an international conflict, if the state has “overall control” over the non-state actor.<sup>89</sup> This is the general standard of attribution used for classifying conflicts, and is more inclusive than the standard used to attribute responsibility.<sup>90</sup> Additionally, though different portions of the Geneva Conventions,<sup>91</sup> different Additional Protocols,<sup>92</sup> and different Sections of the Rome Statute apply to international or non-international armed conflicts, the practical legal distinctions between the two have eroded somewhat over time.<sup>93</sup>

In this case, the Conflict meets the threshold of an armed conflict. The Conflict consisted of air strikes and a ground invasion from Israel, and constant rocket fire from within Gaza.<sup>94</sup> Hamas and its affiliates launched over 4,500 rockets towards Israel, while by its own estimates, Israel hit over 5,000 targets within Gaza during the Conflict.<sup>95</sup> Nearly 2,200 people are estimated to have died during the 50 days of intense hostilities.<sup>96</sup> In short, the Conflict undoubtedly constituted “protracted armed violence”, which is the standard contained in the *Tadic* case and adopted by ICC jurisprudence,

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<sup>88</sup> See, Articles 8(2)(a)-(b) apply to international armed conflicts, 8(2)(c) and (e) apply to non-international armed conflicts

<sup>89</sup> See e.g. The Prosecutor v. Thomas Lubanga Dylio, (ICC-01/04-01/06), Decision on the Confirmation of Charges, Pre-Trial Chamber I (January 29, 2007), at para. 541; available at: [https://www.icc-cpi.int/CourtRecords/CR2007\\_02360.PDF](https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF)

<sup>90</sup> See ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits)*, judgment of 27 June 1986, at paras. 105–115; available at: <http://www.icj-cij.org/docket/?sum=367&p1=3&p2=3&case=70&p3=5>

<sup>91</sup> Common Article 2 to international armed conflicts, Common Article 3 to non-international armed conflicts

<sup>92</sup> Additional Protocol I to international armed conflicts, Additional Protocol II to non-international armed conflicts

<sup>93</sup> See e.g. Douglas Wedderburn-Maxwell, *Classic Distinctions and Modern Conflicts in IHL* (Spring 2014), at pg. 28; available at: <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=4587846&fileId=4587849>

<sup>94</sup> *Id.*

<sup>95</sup> BBC News, *Gaza-Israel Conflict: Is the Fighting Over?* (August 26, 2014); available at: <http://www.bbc.com/news/world-middle-east-28252155>

<sup>96</sup> *Id.*

and far surpasses the “internal disturbances and tensions” standard in the Rome Statute.<sup>97</sup>

In addition to being an “armed conflict”, the Conflict was also of an international character, and is therefore governed by Article 8(2)(a) and (b) of the Rome Statute. For purposes of the ICC, and more generally the United Nations,<sup>98</sup> Palestine has held non-member state status since 29 November 2012.<sup>99</sup> Palestinian Statehood was recognised for the purposes of the Rome Statute is demonstrated by accession of Palestine to the ICC,<sup>100</sup> which also serves as the basis for jurisdiction for this potential case.

Hamas’s actions during the Conflict are representative of the PA and hence the Palestinian State given the unity agreement entered into in April of 2014 and the unity government which lasted from June 2014<sup>101</sup> until June 2015;<sup>102</sup> a period which spans the entire duration of the relevant conflict. This establishes that Hamas was acting throughout this Conflict as a party that was a member to the Palestinian unity government which constituted the PA, and on a political basis represented the State of Palestine in the international arena. The official political role of Hamas as the *representative* of the PA in Gaza remains valid as regards the Conflict notwithstanding the fact that it was Hamas, rather than the PA which maintained operational and military

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<sup>97</sup> Articles 8(2)(d) and (f)

<sup>98</sup> United Nations, *General Assembly Votes Overwhelmingly to Accord Palestine ‘Non-Member Observer State’ Status in United Nations* (November 29, 2012); available at: <https://www.un.org/press/en/2012/ga11317.doc.htm>

<sup>99</sup> *Id.* See also UNGA Resolution 67/19 (November 29, 2012); available at: <http://www.jewishvirtuallibrary.org/un-general-assembly-resolution-67-19-november-2012>

<sup>100</sup> BBC News, *Palestinians Formally Join the International Criminal Court* (April 1, 2015); available at: <http://www.bbc.com/news/world-middle-east-32144186>

<sup>101</sup> William Booth and Anne Gearan, *Palestinians Form New Unity Government that Includes Hamas*, The Washington Post (June 2, 2014); available at: [https://www.washingtonpost.com/world/middle-east/palestinians-form-new-unity-government-including-hamas/2014/06/02/c681d5c6-ea46-11e3-9f5c-9075d5508f0a\\_story.html?utm\\_term=.bba29f63d538](https://www.washingtonpost.com/world/middle-east/palestinians-form-new-unity-government-including-hamas/2014/06/02/c681d5c6-ea46-11e3-9f5c-9075d5508f0a_story.html?utm_term=.bba29f63d538)

<sup>102</sup> Khaled Elgindy, *Palestinian political crisis deepens with collapse of unity government*, Al-Jazeera America (June 19, 2015); available at: <http://america.aljazeera.com/articles/2015/6/19/palestinian-political-crisis-deepens-with-collapse-of-unity-government.html>

control over the forces within Gaza during this time. Notably, the Fatah factions in the PA made no attempts to disavow or to distance themselves from the actions of Hamas in the Conflict.

It is our primary case that for the purposes of the crimes committed during the Conflict that the three wings of Hamas were functionally under the same command. Hamas and Haniyeh may seek to argue that even if the political wing served as the representative of the PA, the military wing was separate. Even if the OTP were to accept that the Hamas military wing is separate from its political wing, or the OTP assumes the various fighting cells within Gaza are not part of Hamas, the test for attribution to the PA is nonetheless met, and the Conflict is therefore an international conflict. The “overall control” test for purposes of classifying a conflict is satisfied when a State “has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.”<sup>103</sup> Hamas remained the political representative of the PA in Gaza during the Conflict. Acts performed by a group can cause the group to be “de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.”<sup>104</sup> As discussed in the Sections II and III above, Hamas’s wings are financially interrelated, and the political wing at the very least organizes, coordinates, and finances the military wing in its actions. Additionally, Hamas’s established control and superiority within Gaza also indicates that any other military cells operating within Gaza would be directly or indirectly controlled by Hamas. For the purposes of the Rome Statute, Hamas’ direct operational control over the military forces in Gaza, combined with its political status as representative of the

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<sup>103</sup> *Prosecutor v. Tadic*, IT-94-1-A, In the Appeals Chamber (1999), at para. 137;

<http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>

<sup>104</sup> *Id.*

PA, mean that the PA as the overall government of the Palestinian State, met the test for “overall control” of the hostilities in Gaza.

Alternatively, though the occupation of Gaza is a disputed issue under international law following Israel’s withdrawal in 2005,<sup>105</sup> if the OTP considers that during the Conflict there was an occupation, then that would also trigger a finding of international armed conflict, pursuant to the ICC’s jurisprudence.<sup>106</sup> This finding was expressly made by the OTP in 2014, when it concluded the laws of international armed conflict should be applied to the situation in Gaza as a result of the alleged occupation.<sup>107</sup> This would result in all of this Conflict being governed by the clauses relevant to international armed conflict, regardless of whether the resistance is attributable to the Palestinian state.

In sum, even if the Prosecutor considers that Hamas’s operational branches are not directly related, the actions and behaviour of Hamas during the Conflict satisfy the “overall control” test, and therefore occurred within the framework of an international armed conflict. It is important to note at this juncture that – whatever the relationship between the different branches of Hamas government was before and after the Conflict, it is their interplay during the Conflict which is actually relevant to the OTP’s assessment. To the extent, if any, that the limbs of Hamas coalesced and acted as one – even if only a temporary measure during the Conflict – then that is the relevant factual matrix of overall control for the purposes of the OTP’s assessment.

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<sup>105</sup> See e.g, Ruth Eglash, *Does Israel Actually Occupy the Gaza Strip*, The Washington Post (July 2, 2015); available at: [https://www.washingtonpost.com/news/worldviews/wp/2015/07/02/does-israel-actually-occupy-the-gaza-strip/?utm\\_term=.0984d8926172](https://www.washingtonpost.com/news/worldviews/wp/2015/07/02/does-israel-actually-occupy-the-gaza-strip/?utm_term=.0984d8926172)

<sup>106</sup> See The Prosecutor v. Thomas Lubanga Dyilo, (ICC-01/04-01/06), Decision on the Confirmation of Charges, Pre-Trial Chamber I (January 29, 2007), at para. 209; available at: [https://www.icc-cpi.int/CourtRecords/CR2007\\_02360.PDF](https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF)

<sup>107</sup> The Office of the Prosecutor, *Situation on Registered Vessels of Comoros, Greece, and Cambodia: Article 53(1) Report* (November 6, 2014), at para. 17; available at: <http://opiniojuris.org/wp-content/uploads/2014-11-03-Final-Report-on-Situation-ICC-01.13.pdf>

In the alternative, a finding that Israel still occupies Gaza (which is strenuously opposed) would also render the acts during the Conflict within the international armed conflict rubric.

### **C. Specific War Crimes - Article 8(2) of the Rome Statute**

Acts constituting war crimes under the Rome Statute are set out in Article 8(2).

The relevant parts of Article 8(2) state as follows:

“For the purpose of this Statute, ‘war crimes’ means:

(b) 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:

[...]

(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;

[...]

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;”

Each of these crimes will be addressed in turn below. It is worth noting, these exist in conjunction with the general requirement from Article 48 of the 1977 Additional Protocol I to the Geneva Conventions, which provides: “in order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between ....civilian objects and military objectives.”

In order to satisfy the requirements for both these crimes, a number of general factors must be met. First, the people being endangered must have protected person

status, meaning they are civilians. Furthermore, and most importantly, the acts alleged must meet the definitions included above from the Rome Statute. Finally, the mental requirements contained in the statute must be satisfied, depending on the form of liability being alleged. This will be discussed in conjunction with the Section on criminal responsibility below.

The people endangered from the conduct alleged here were indisputably civilians and therefore were within the rubric of the statute. The Geneva Conventions define a civilian to be “any person who does not belong to one of the categories of persons referred to in Article 4 A (1) [armed forces], (2), (3) and (6) [prisoners of war] of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”<sup>108</sup> As discussed below, those endangered by Hamas’s conduct were medical workers, children, journalists, women, elderly people and many others. The evidence available suggests that most of the exposed people were civilians who were taking no active part in hostilities, and did not belong to armed forces or groups.

Although the overall definition of combatants is in dispute as regards certain participants who are at the margins of civilian and combatant status, the allegations in this present communication do not rely on the OTP making a finding as to the status of every single person involved in the Conflict. Rather, the allegations herein relate to crimes committed against a core civilian population whose existence is beyond dispute.

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<sup>108</sup> ICRC, *Additional Protocol I to The Geneva Conventions of 12 August 1949, Article 50* (August 12, 1949); available at: [https://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0321.pdf](https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf)

### 1) Article 8(2)(b)(xxiii) – War Crime of Using Protected Persons as Shields

The Rome Statute defines the crime of using protected persons as shields as the: “*war crime of utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.*” This crime will be referred to herein as the use of “human shields”. There is no corresponding provision applicable in non-international armed conflicts in the Rome Statute, though there is no logical or practical reason to distinguish between them for this crime.<sup>109</sup> The Rome Statute defines the elements of the crime as follows: (i) the perpetrator moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict, (ii) the perpetrator intended to shield a military objective from attack or shield, favour or impede military operations, and (iii) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>110</sup> The tactic of using human shields can serve two purposes: first that the prospect of killing civilian shields may dissuade an attacker from striking.<sup>111</sup> Alternatively, and even more damningly, human shields may be utilised so as to increase “friendly” civilian deaths and gain the supposed narrative and public relations advantage associated with a higher number of fatalities.<sup>112</sup>

The elements of the crime demonstrate that it applies broadly in cases where civilians are utilized to protect or enhance a military operation.<sup>113</sup> This can be accomplished by moving or keeping the civilians in the proximity of a military

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<sup>109</sup> William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), at pg. 250

<sup>110</sup> Roman Statute of the ICC, Elements of Crimes. War Crimes, Article 8 (2)(b)(xxiii); available at: [http://legal.un.org/icc/asp/1stsession/report/english/part\\_ii\\_b\\_e.pdf](http://legal.un.org/icc/asp/1stsession/report/english/part_ii_b_e.pdf)

<sup>111</sup> Michael N. Schmitt, *Human Shields in International Humanitarian Law* (2003); available at: <http://www.marshallcenter.org/mcpublicweb/mcdocs/files/college/hshlds-schmitt.pdf>

<sup>112</sup> American Thinker, *Surreal in the Middle East: Hamas’s Human Shields* (July 14, 2014); available at: [http://www.americanthinker.com/articles/2014/07/surreal\\_in\\_the\\_middle\\_east\\_hamass\\_human\\_shields.html](http://www.americanthinker.com/articles/2014/07/surreal_in_the_middle_east_hamass_human_shields.html)

<sup>113</sup> William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), at pg. 250

operation, by conducting a military operation in populated civilian areas, or by storing and protecting military equipment in civilian structures. All of these are used “to take advantage of the location of one or more civilian”, and are examples of shielding or favouring military operations. Examples of all three of these types of violations of the Rome Statute by Hamas will be demonstrated and analysed below.

The motivations for Hamas’s use of human shields has been discussed by many in the Gazan community. Speculating on Hamas’s reasons for keeping civilians in their homes during hostilities, a former Hamas Official noted:

“Some people say Hamas wants civilians killed in order to gain global sympathy, but I believe this is not the main reason. I think the reason is that if all the people were allowed to evacuate their homes, they all would have ended up in a certain area in Gaza. If that happened, it would have made the rest of Gaza empty of civilians, and the Israelis would have been able to hit Hamas without worrying about civilians in all those empty areas. Hamas wanted civilians all over the place to confuse the Israelis and make their operations more difficult.”<sup>114</sup>

A Gazan businessman subscribed to a different theory stating: “Hamas has blackmailed the world with the killed Gazan civilians to make itself look like a freedom fighter against an evil Israel. Hamas showed Gazans that it could not care less for their blood and their children.”<sup>115</sup> A Gazan physician also supported this explanation, noting that “Hamas wanted the dead bodies to make Israel look ugly. The media has exerted a huge pressure on Israel for every dead Gazan....Of course Hamas doesn't care if we all die so long as it achieves its goals.”<sup>116</sup> The latter theory is tangentially supported by Haniyeh, who declared after the conflict that they had won the media war, stating “our

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<sup>114</sup> Mudar Zahran, *Gazans Speak Out: Hamas War Crimes*, Gatestone Institute (September 19, 2014); available at: <https://www.gatestoneinstitute.org/4706/gazan-hamas-war-crime>

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

narrative has gained the upper hand in the media and was the more credible. Our image in the media was the more effective.”<sup>117</sup>

The policy of using damage to its own civilians as an offensive tactic against Israel was expressly prescribed by Hamas’s al-Qassam Brigade. During the course of the Conflict, the Israeli Defense Forces (“IDF”) recovered a manual concerning “urban warfare” belonging to the Shuj’aya Brigade of al-Qassam.<sup>118</sup> The manual espoused the advantages of using Gazan civilians against the IDF. As far as protecting its forces from the IDF through the use of civilians it stated (as translated): “The soldiers and commanders (of the IDF) must limit their use of weapons and tactics that lead to the harm and unnecessary loss of people and [destruction of] civilian facilities. It is difficult for them to get the most use out of their firearms, especially of supporting fire [e.g. artillery].”<sup>119</sup> The manual further explained that it makes it difficult for the IDF to open fire, control the civilian population, or render assistance and first aid to civilians, when civilians are present.<sup>120</sup> Finally, the manual discussed the advantages to the forces when Gazan homes are destroyed, stating: “[t]he destruction of civilian homes: [t]his increases the hatred of the citizens towards the attackers [the IDF] and increases their gathering [support] around the city defenders (resistance forces [i.e. Hamas]).”<sup>121</sup> Attempts by Hamas to secure all three suggested “advantages” during the Conflict are described further below.

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<sup>117</sup> Memri TV, *Hamis Leader Ismail Haniya: Our Media Was the River from Which Global Media Drank Information* (August 29, 2014); available at: <https://www.memri.org/tv/hamas-leader-ismail-haniya-our-media-was-river-which-global-media-drank-information>

<sup>118</sup> See e.g. Simon Wiesenthal Center, *Breaking: IDF Captures Hamas Combat Manual Explaining Benefits of Human Shields* (July 29, 2014); available at: <http://www.wiesenthal.com/site/apps/nlnet/content.aspx?c=lsKWlbpJLnF&b=8776547&ct=14144177>

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

a) **Conducting military operations from within or near densely populated areas**

Firing from densely populated areas makes distinguishing between civilian objects and military objectives hard for any opponent, and in many cases, causes civilian areas to become lawful military objectives. It is an established principle of customary IHL that all parties to the conflict must, to the extent feasible, avoid locating military “objectives”, namely forces, equipment and other assets which might constitute legitimate targets, within or near densely populated areas.<sup>122</sup> Parties to a conflict must also, to a reasonable extent, remove civilians and civilian objects under their control from the vicinity of military objectives.<sup>123</sup>

Hamas constantly fired rockets from densely populated during the Conflict. It is important to first establish this is an issue in which Hamas had a choice to make. There are many reports, including from Hamas themselves, which point to the population density of Gaza to justify the firing from civilian areas. Though the Gaza strip is very densely populated, with approximately 1.3 million residents in only 147 square miles, this density is chiefly due to extreme density in even smaller pockets of spaces. The following map demonstrates this phenomenon, and shows how a majority of the space in the Gaza strip contains fewer than 10,000 residents:<sup>124</sup>

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<sup>122</sup> ICRC Customary IHL Study, Rule 23, available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter6\\_rule23](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter6_rule23); see also Additional Protocol I, Article 58(b); available at: <https://ihl-databases.icrc.org/ihl/WebART/470-750074?OpenDocument>

<sup>123</sup> ICRC Customary IHL Study, Rule 24; available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter6\\_rule24](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter6_rule24)

<sup>124</sup> BBC News, *Israel and the Palestinians, Key Maps, Gaza: Population and Security*; available at: [http://news.bbc.co.uk/2/shared/spl/hi/middle\\_east/03/v3\\_israel\\_palestinians/maps/html/population\\_settlements.stm](http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/v3_israel_palestinians/maps/html/population_settlements.stm)



Rather than it being a physical necessity to fire from populated areas, in fact the firing of rockets from within civilian areas was a deliberate choice made by Hamas, and should form the basis for a finding of criminality.

Hamas itself admitted after the Conflict that it had fired rockets from civilian areas.<sup>125</sup> A senior Hamas official, Ghazi Hamad, told the Associated Press in the months following the war: “The Israelis kept saying rockets were fired from schools or hospitals when in fact they were fired 200 or 300 meters (yards) away. Still, there were some mistakes made and they were quickly dealt with.”<sup>126</sup> Hamad’s suggestion that knowingly firing rockets as close as 200-300 meters to schools and hospitals was legitimate demonstrates a callous disregard for IHL. Distances as small as 200 or 300 meters are clearly insufficient to properly protect the schools and hospitals, particularly in areas of high urban population density, where houses and buildings are closely

<sup>125</sup> Adam Chandler, *Hamas Quietly Admits It Fired Rockets from Civilian Areas*, The Atlantic (September 12, 2014); available at: <https://www.theatlantic.com/international/archive/2014/09/hamas-quietly-admits-it-fired-rockets-from-civilian-areas/380149/>

<sup>126</sup> *Id.*

packed together. Hamad's attempted denial of the use of human shields in fact serves as confirmation that Hamas perpetrated such war crimes.

There is a significant amount of video and eyewitness evidence proving that Hamas deliberately fired rockets from civilian areas. The currently available evidence provides a reasonable basis for the belief that war crimes were committed by Hamas and Haniyeh, for the purposes of Article 53(1)(a) of the Rome Statute. A full investigation by the OTP pursuant to Article 15(3) would, it is submitted, allow for the verification of such evidence as well as for more to be discovered. One widely-distributed video filed by New Delhi TV captured the entire launch process.<sup>127</sup> The video shows three militants assembling a tent in a residential area on August 4<sup>th</sup>, 2014 setting up rockets, and covering the rockets with branches.<sup>128</sup> It also shows the militants hiding in the area immediately surrounding the launch site, presumably hoping to remain undiscovered.<sup>129</sup> The episode was filmed from the hotel window used by the reporters, and clearly shows the area to be densely populated.<sup>130</sup> The reporter further discusses how on a previous evening they had heard a rocket being fired from the same site.<sup>131</sup> It is also notable that the video was only published after the team left the Gaza strip in order to avoid potential retribution from Hamas.<sup>132</sup>

In another video, a French news reporter was conducting an interview when suddenly a rocket was launched right beside him in the heart of a residential area.<sup>133</sup> The video shows him subsequently visiting the launching pad, which clearly illustrates

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<sup>127</sup> Business Insider, *Hamas Caught on Video Firing Rockets from a Densely Packed Residential Area* (August 5, 2014); video available at:

<http://www.ndtv.com/video/news/news/watch-ndtv-exclusive-how-hamas-assembles-and-fires-rockets-332910>

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> France 24, *Exclusive: Hamas Rocket Launch Pad Lies Near Gaza Homes* (August 7, 2014), video available at: <https://www.youtube.com/watch?v=ABwLwSNwCeU>

the nearby buildings and a number of young children exploring the site.<sup>134</sup> The rocket launching site was also in close proximity to a UN facility.<sup>135</sup> A Polish correspondent who spent a month during the Conflict in Gaza also provides a separate and disturbing eyewitness account. He writes “it was obvious that they were breaking international rules of war and worst of all, were not afraid to use their own citizens as living shields.”<sup>136</sup> He further notes:

“I was in the bathroom when I heard a loud rocket noise and my Spanish colleague, a journalist who was renting a flat with me near the Gaza beach, started to scream. He wanted to light a cigarette and came to one of the open windows. The moment he was using his lighter, he saw a fireball in front of his eyes and lost his hearing. From what our neighbours told us later, a man drove up in a pickup to our tiny street. He placed a rocket launcher outside and fired. But the rocket failed to go upwards and flew along the street at ground level for a long time before destroying a building. It was a miracle that nobody was hurt or killed. When we calmed down, we started to analyze the situation. It became obvious that the man or his supervisor wanted the Israel Defense Forces to destroy civilian houses, which our tiny street was full of. Whoever it was, Hamas, Iz al-Din al-Qassam or others, they knew that the IDF can strike back at the same place from which the rocket was fired.”<sup>137</sup>

He also tells of a second story, where he and other journalists were sitting in a hotel and “suddenly I saw a man firing a rocket from between the hotels. It was obvious that we journalists became a target. If the IDF would strike back, we all would be dead.”<sup>138</sup>

This was hardly a lone account. A Finish reporter stated in a TV segment that “a rocket attack was conducted from the ‘backyard’ of the hospital at 2 o’clock in the morning. It (the rocket launch), in fact, happened somewhere close by because the noise

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Wojciech Cegielski, *I Saw Hamas’ Cruel and Selfish Game in Gaza*, Haaretz (August 25, 2015); available at: <http://www.haaretz.com/opinion/.premium-1.672684>

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

right here at the hospital area was really loud.”<sup>139</sup> In another instance, a resident of the al-Karama neighbourhood described events taking place on July 21, 2014 to Amnesty International: “That day, while I was resting, two Qassam rockets were fired from the right and left of the house.”<sup>140</sup> A local Gazan journalist, who wished to remain anonymous, described his experience:

“ Hamas fired rockets from next to homes. Hamas was running from one home to another. Hamas lied when it claimed it was shooting from non-populated areas. To make things even worse for us, Hamas would fire from the balconies of homes and try to drag the Israelis into door-to-door battles and street-to-street fights -- a death sentence for all the civilians here. They would fire rockets and then run away quickly, leaving us to face Israeli bombs for what they did. They are cowards. If Hamas militants are not afraid of dying, why do they run after they fire rockets from our homes? Why don't they stay and die with us? Are they afraid to die and go to heaven? Isn't that what they claim they wish?”<sup>141</sup>

There were many other reports of Gazan militants firing from civilian areas. The Archbishop of Gaza's Greek Orthodox Church described how Palestinian fighters used his church to fire rockets at Israel, despite there being over 2,000 civilians taking shelter in the church during the fighting.<sup>142</sup> The UN Office of the High Commissioner, “documented cases of the firing of rockets from in and around a cemetery in the al-Faluja neighbourhood in densely populated Jabalia, in the northern Gaza Strip, on 20 and 29 July.”<sup>143</sup>

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<sup>139</sup> Sharon Schwartz, ‘Don't Use Me’: Reporter Admits Seeing Rocket Fired from Gaza Hospital, then Blasts Pro-Israel Media for Quoting Her, *The Blaze* (August 3, 2014); available at:

<http://www.theblaze.com/stories/2014/08/03/dont-use-me-reporter-admits-seeing-rocket-fired-from-gaza-hospital-then-blasts-pro-israel-media-for-quoting-her%E2%80%A8/>

<sup>140</sup> Amnesty International, *Unlawful and Deadly Rocket and Mortar Attacks by Palestinian Armed Groups during the 2014 Gaza/Israel conflict* (March 26, 2015); available at:

<https://www.amnesty.org/en/documents/mde21/1178/2015/en/>

<sup>141</sup> Mudar Zahran, *Gazans Speak Out: Hamas War Crimes*, Gatestone Institute (September 19, 2014); available at:

<https://www.gatestoneinstitute.org/4706/gazan-hamas-war-crime>

<sup>142</sup> Amnesty International, *Unlawful and Deadly Rocket and Mortar Attacks by Palestinian Armed Groups during the 2014 Gaza/Israel conflict* (March 26, 2015), at pg. 38; available at:

<https://www.amnesty.org/en/documents/mde21/1178/2015/en/>

<sup>143</sup> *Id.*

The firing of rockets and conducting of operations by Hamas militants within Gaza was part of a large scale plan, and was consistently being used throughout the 2014 Conflict. As the accounts stated above show, this was not a case of a few isolated incidents, but was instead a common strategic practice used by Hamas.

**b) Encouraging and Forcing Civilians to Remain in the Vicinity of Military Targets**

Hamas did not just demonstrate an indifference to civilians being in the vicinity of potential military targets, it actively encouraged it. This was true of both the political wing headed by Haniyeh, and more directly by the representatives of its military wing on the ground. A spokesman for the Ministry of Interior stated after Hamas residents heeded Israeli warnings of a potential strike that “we call on all our people who have left their homes to return to them immediately.”<sup>144</sup> Similarly, a Hamas spokesman in a television interview flaunted the effectiveness of civilians sacrificing themselves, and finished by saying “we call on all our people to adopt this practice.”<sup>145</sup>

However, more disturbing than the rhetoric coming from the political wing concerning civilians remaining at home, were the policies developed to enforce this. When strongly urging its civilians to remain in their homes was ignored by many after receiving Israeli warnings of a pending strike, Hamas ordered a curfew in Gaza to keep residents in their homes. A graduate student at an Egyptian university who was in Gaza at the time described this phenomenon:

“When people stopped listening to Hamas orders not to evacuate and began leaving their homes anyway, Hamas imposed a curfew: anyone walking out in

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<sup>144</sup> Itamar Marcus and Nan Jacques Zilberdik, *Hamas encourages civilians to act as human shield: Hamas Tells Civilians to Return to their Homes to Act as Human Shields*, Palestinian Media Watch (July 14, 2014); available at: [http://palwatch.org/main.aspx?fi=157&doc\\_id=12019](http://palwatch.org/main.aspx?fi=157&doc_id=12019)

<sup>145</sup> Palestinian Media Watch, *Hamas Spokesman Calls on Palestinians to Use their Bodies as Human Shields* (July 9, 2014); video available at: <https://www.youtube.com/watch?v=UXZEzbTOH1s>

the street was shot without being asked any questions. That way Hamas made sure people had to stay in their homes even if they were about to get bombed. God will ask Hamas on judgment day for those killers' blood.”<sup>146</sup>

After being asked directly whether Hamas used human shields, this student replied: “Hamas held the entire Gazan population as a human shield. My answer to you is yes.”<sup>147</sup> A Gazan who wished to remain anonymous and lost his leg in an Israel air strike, expressly blamed Hamas for his injury, saying:

“My father received a text-message from the Israeli army warning him that our area was going to be bombed, and Hamas prevented us from leaving. They said there was a curfew. A curfew, can you believe that? I swear to God, we will take revenge on Hamas. I swear to God I will stand on my other foot and fight against Hamas. Even if Israel leaves them alone, we will not. What had my two-year-old nephew done to be killed under the rubble of our home so Khaled Mashaal [Hamas leader based in Qatar] could be happy? We want change at any cost. I am not claiming the Israelis are innocent, but I know Hamas has fired rockets from every residential spot in Gaza. If that was not hiding behind civilians, then it was stupidity and recklessness. Nobody who is normal, in his right mind, in Gaza supports Hamas. People have lost parents, children and friends, and have nothing more to lose. I believe if given the chance and the weapons, they will stand against Hamas.”<sup>148</sup>

Finally, when the curfew was ignored and some Gazans still chose to risk leaving their homes, they were forcefully confined to them by Hamas forces. As one medical worker noted:

“The Israeli army sends warnings to people [Gazans] to evacuate buildings before an attack.... Hamas's strict policy, though, was not to allow us to evacuate. Many people got killed, locked inside their homes by Hamas militants. Hamas's official Al-Quds TV regularly issued warnings to Gazans not to evacuate their homes. Hamas militants would block the exits to the places residents were asked to evacuate. In the Shijaiya area, people received warnings from the Israelis and tried to evacuate the area, but Hamas militants blocked the exits and ordered people to return to their homes. Some of the people had no choice but to run towards the Israelis and ask for protection for their families. Hamas shot some of

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<sup>146</sup> Mudar Zahran, *Gazans Speak Out: Hamas War Crimes*, Gatestone Institute (September 19, 2014); available at: <https://www.gatestoneinstitute.org/4706/gazan-hamas-war-crime>

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

those people as they were running; the rest were forced to return to their homes and get bombed. This is how the Shijaiya massacre happened. More than 100 people were killed.”<sup>149</sup>

It is important to note, all these statements and accounts were obtained despite the threat inherent in speaking out, which leads to the obvious question of how many more unreported cases of these activities there are. As one Gazan businessman said after he declined a television or radio interview: “speaking out against Hamas is not smart.”<sup>150</sup> Or as a prominent Gazan academic more expansively noted: “Hamas does not want the truth about Gaza to come out. Hamas terrorizes and kills us just like Daesh [ISIS] terrorizes kills Iraqis. Hamas is a dictatorship that kills us. The Gazans you see praising Hamas on TV are either Hamas members or too afraid to speak against Hamas.”<sup>151</sup>

The dangers faced by civilians who refused to cooperate with Hamas orders is demonstrated by Hamas’s totalitarian actions against its own population during the Conflict. Between August 21<sup>st</sup> and 23<sup>rd</sup>, 2014 Hamas publicly executed without trial 25 men in public accused of collaborating with Israel.<sup>152</sup>

### **c) Blurring the distinction between military and civilian objects and people**

For the same reason that conducting military operations within densely populated areas is unlawful, it is also a violation of IHL to store the military equipment in these areas. All parties to the conflict must, to the extent feasible, avoid locating

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<sup>149</sup> *Id.*

<sup>150</sup> CBC News, *Israel-Gaza Conflict: Palestinians Critical of Hamas but Hopeful of Open Borders* (August 14, 2014); available at: <http://www.cbc.ca/news/world/israel-gaza-conflict-palestinians-critical-of-hamas-but-hopeful-of-open-borders-1.2735071>

<sup>151</sup> Mudar Zahran, *Gazans Speak Out: Hamas War Crimes*, Gatestone Institute (September 19, 2014); available at: <https://www.gatestoneinstitute.org/4706/gazan-hamas-war-crime>

<sup>152</sup> Human Rights Watch, *World Report 2015: Israel/Palestine: Events of 2014* (2015); available at: <https://www.hrw.org/world-report/2015/country-chapters/israel/palestine>

military objectives within or near densely populated areas.<sup>153</sup> They must also, to the extent feasible, remove civilians and civilian objects under their control from the vicinity of military objectives.<sup>154</sup>

The storing of rockets by Hamas in civilian structures throughout the Conflict, including schools and hospitals, is well established. On July 22<sup>nd</sup>, 2014, the United Nations Relief and Work Agency (herein “UNRWA”), an organisation which was established to provide developmental aid to Palestinian refugees, and which generally refrains from criticising any aspects of the Palestinian leadership, admitted that:

“Today, in the course of the regular inspection of its premises, UNRWA discovered rockets hidden in a vacant school in the Gaza Strip. As soon as the rockets were discovered, UNRWA staff were withdrawn from the premises, and so we are unable to confirm the precise number of rockets. The school is situated between two other UNRWA schools that currently each accommodate 1,500 internally displaced persons. UNRWA strongly and unequivocally condemns the group or groups responsible for this flagrant violation of the inviolability of its premises under international law.”<sup>155</sup>

UN Secretary General, Ban Ki-Moon, further condemned this practice, when he declared: “I am dismayed that Palestinian militant groups would put United Nations schools at risk by using them to hide their arms.”<sup>156</sup> On July 29<sup>th</sup>, a cache of rockets was discovered in a school in Nuseirat.<sup>157</sup> The Maghazi Preparatory Girls School, the Deir El Balah School, the Beit Hanoun Elementary, the Zaitoun Girls School, El Azhar

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<sup>153</sup> ICRC Customary IHL Study, Rule 23; available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter6\\_rule23](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter6_rule23); see also Protocol I, Article 58(b); available at: <https://ihl-databases.icrc.org/ihl/WebART/470-750074?OpenDocument>

<sup>154</sup> ICRC Customary IHL Study, Rule 24; available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter6\\_rule24](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter6_rule24)

<sup>155</sup> UNRWA Press Release, *UNRWA Condemns Placement of Rockets, for a Second Time, in One of its Schools* (July 22, 2014); <https://www.unrwa.org/newsroom/press-releases/unrwa-condemns-placement-rockets-second-time-one-its-schools>

<sup>156</sup> Office of the High Commissioner, *Report of the Detailed Findings of the Commission of Inquiry on the 2014 Gaza Conflict*, A/HRC/29/CRP.4; available at: <http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx>

<sup>157</sup> Amnesty International, *Unlawful and Deadly Rocket and Mortar Attacks by Palestinian Armed Groups during the 2014 Gaza/Israel conflict* (March 26, 2015), at pg. 44; available at: <https://www.amnesty.org/en/documents/mde21/1178/2015/en/>

Islamic College, the Abu Nur School, the Jabalia Elementary Girls School, and the Rafah Boys School, all located within the Gaza strip, were all named by the UN as being involved in military operations.<sup>158</sup>

Schools were hardly the only civilian structures to be used as protection by Hamas for its weapons and fighters. Hamas turned the Al-Shifa hospital in the Gaza City Center as its de facto headquarters throughout the Conflict.<sup>159</sup> One journalist described a scene where he was taken to the emergency room of the hospital, before being met and interrogated by admitted fighters of al-Qassam in a hospital room “which served that day as the command office of three people.”<sup>160</sup> Another reporter from The Wall Street Journal posted a picture on social media of a prominent Hamas leader being interviewed at the hospital with the caption: “You have to wonder [with] the shelling how patients at Shifa hospital feel as Hamas uses it as a safe place to see media.”<sup>161</sup>

There were many other examples of Hamas using civilian cover to protect its militants and weapons. On July 17<sup>th</sup>, 2014 it was reported that during a five hour humanitarian ceasefire “a group of men at a mosque in northern Gaza said they had returned to clean up the green glass from windows shattered in the previous day’s bombardment. But they could be seen moving small rockets into the mosque.”<sup>162</sup>

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<sup>158</sup> Office of the High Commissioner for Human Rights, *Report of the Detailed Findings of the Commission of Inquiry on the 2014 Gaza Conflict*, A/HRC/29/CRP.4; available at: <http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx>

<sup>159</sup> See William Booth, *While Israel Held its Fire, the Militant Group Hamas Did Not*, The Washington Post (July 15, 2014); available at: [https://www.washingtonpost.com/world/middle-east/while-israel-held-its-fire-the-militant-group-hamas-did-not/2014/07/15/116fd3d7-3c0f-4413-94a9-2ab16af1445d\\_story.html?utm\\_term=.dc428619e59d](https://www.washingtonpost.com/world/middle-east/while-israel-held-its-fire-the-militant-group-hamas-did-not/2014/07/15/116fd3d7-3c0f-4413-94a9-2ab16af1445d_story.html?utm_term=.dc428619e59d)

<sup>160</sup> Joshua Levitt, *Journalist Describes Interrogation at Hamas Headquarters Next to Emergency Room at Gaza’s Al-Shifa Hospital*, The Algemeiner (July 24, 2014); available at: <https://www.algemeiner.com/2014/07/24/french-journalist-describes-interrogation-at-hamas-headquarters-next-to-emergency-room-at-gazas-al-shifa-hospital/>

<sup>161</sup> Joshua Levitt, *WSJ Reporter in Gaza Wonders How Patients in Shifa Hospital Feel About Hamas Using it as a Base*, The Algemeiner (July 24, 2014); available at: <https://www.algemeiner.com/2014/07/22/wsj-reporter-in-gaza-wonders-how-patients-in-shifa-hospital-feel-about-hamas-using-it-as-base/>

<sup>162</sup> William Booth, Sudarsan Raghavan and Ruth Eglash, *Israel Launches Ground Invasion of Gaza*, The Washington Post (July 17, 2014); available at: [https://www.washingtonpost.com/world/gaza-residents-scramble-to-make-most-of-five-hour-truce/2014/07/17/e5485fce-0d7e-11e4-8341-b8072b1e7348\\_story.html?utm\\_term=.1684d2f7ee9e](https://www.washingtonpost.com/world/gaza-residents-scramble-to-make-most-of-five-hour-truce/2014/07/17/e5485fce-0d7e-11e4-8341-b8072b1e7348_story.html?utm_term=.1684d2f7ee9e)

Similarly, a captured combatant admitted under interrogation that the organization uses mosques for its military activity, and purposefully built tunnels near kindergartens and clinics.<sup>163</sup> He also added that he himself was trained to fire antitank missiles in a room under a mosque, and that “local mosques were used to store weapons, including rocket-propelled grenade launchers and Kalashnikov rifles.”<sup>164</sup> A long time Middle East analyst also decried this practice by Hamas of planting weapons in civilian structures, stating: “It happens in schools... Hamas has buried caches of arms and explosives under its own kindergarten playgrounds.”<sup>165</sup> Mosques, and private homes, were also used to protect tunnel entrances used by militants, as demonstrated in a series of photos.<sup>166</sup>

A similar tactic used to blur the distinction between combatants and civilians was the disguising of combatants, thereby endangering actual civilians. One Canadian Television reporter tweeted that inside Shuj’aya “we also saw several #Hamas Gunmen. One passed dressed in a woman's headscarf... tip of a gun poked out from under cloak.”<sup>167</sup> Another reporter described seeing militants during a humanitarian truce, stating that: “[s]ome bore their weapons openly, slung over their shoulder, but at least two, disguised as women, were seen walking off with weapons partly concealed under their robes. Another had his weapon wrapped in a baby blanket and held on his chest as if it were an infant.”<sup>168</sup> Similar to the placement of weapons within civilian structures, which complicates the principle of distinction and turns civilian structures

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<sup>163</sup> Gili Cohen, *Mosques Used for Military Operations, Say Hamas POW's*, Haaretz (August 26, 2014); available at: <http://www.haaretz.com/israel-news/premium-1.612455>

<sup>164</sup> *Id.*

<sup>165</sup> Terrence McCoy, *Why Hamas Stores its Weapons Inside Hospitals, Mosques, and Schools*, The Washington Post, (July 31, 2014); available at: [https://www.washingtonpost.com/news/morning-mix/wp/2014/07/31/why-hamas-stores-its-weapons-inside-hospitals-mosques-and-schools/?utm\\_term=.99e16961e152](https://www.washingtonpost.com/news/morning-mix/wp/2014/07/31/why-hamas-stores-its-weapons-inside-hospitals-mosques-and-schools/?utm_term=.99e16961e152)

<sup>166</sup> *Id.*

<sup>167</sup> Sharona Schwartz, *Ambulances, Schools and Mosques: Hamas' Top 10 Hiding Places That Are Frustrating Israel's Fight Against Terror*, The Blaze (July 23, 2014); available at: <http://www.theblaze.com/news/2014/07/23/ambulances-schools-and-mosques-hamas-top-10-hiding-places-that-are-frustrating-israels-fight-against-terror/>

<sup>168</sup> Patrick Martin, *Death Tolls Mount as Israel Expands Offensive, Hamas Resistance Hardens*, The Globe and Mail (July 20, 2014); available at: <http://www.theglobeandmail.com/news/world/thousands-flee-gaza-homes-as-israel-expands-ground-assault/article19683732/>

into potentially lawful military targets, the dressing up of militants as civilians also complicates the ability of enemy combatants to discern lawful military targets; which results in the potential endangerment of all civilians.

## 2) **Article 8 (2)(b)(iv) – War Crime of Excessive Incidental Death, Injury, or Damage**

The Rome Statute defines this war crime as:

“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.”

This provision is drawn from article 57(2)(a)(iii) of Additional Protocol I, which states that during an armed conflict military operatives should: “refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>169</sup> These acts are a crime under the Rome Statute only in the case of international armed conflicts.<sup>170</sup>

The elements of the crime are as follows:

1. The perpetrator launched an attack.
2. The attack was such that it would cause incidental death or injury to civilians or damage to 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.

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<sup>169</sup> ICRC, *Additional Protocol I to The Geneva Conventions of 12 August 1949, Article 57* (August 12, 1949); available at: [https://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0321.pdf](https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf)

<sup>170</sup> William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2010, 229-230.

3. The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to 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.
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 use of the Qassam rockets during the Conflict violated this principle, and caused excessive incidental death and injury to the citizens of Gaza [as well as Israel]. In November 2012, for example, Hamas fired these same types of rockets towards the densely populated area of Tel Aviv. Three Israelis were killed, 38 were injured, property was damaged, and two Palestinians of Gaza were killed due to the unreliability of the rockets and their targeting.<sup>171</sup> The danger of firing rockets from within civilian areas was not only the attraction of return fire, but also the risk that these inherently indiscriminate rockets would kill local civilians directly. As a report on the Conflict noted:

“All the rockets used by Palestinian armed groups are unguided projectiles which cannot be accurately aimed at specific targets and are inherently indiscriminate; using such weapons is prohibited under international law and their use constitutes a war crime. Mortars are also imprecise munitions and should never be used to attack military targets located in or near civilian areas.”<sup>172</sup>

Independent reports on the Conflict substantiate the dangers caused by Hamas firing rockets from civilian areas. The UN report on the Conflict noted that “[b]y firing

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<sup>171</sup> Human Rights Watch, *Gaza: Palestinian Rockets Unlawfully Targeted Israeli Civilians* (December 24, 2012); available at: <https://www.hrw.org/news/2012/12/24/gaza-palestinian-rockets-unlawfully-targeted-israeli-civilians>

<sup>172</sup> Amnesty International, *Palestinian Armed Groups Killed Civilians on Both Sides in Attacks Amounting to War Crimes* (March 25, 2015); available at: <https://www.amnesty.org/en/latest/news/2015/03/palestinian-armed-groups-killed-civilians-on-both-sides-in-2014-gaza-conflict/>

rockets from densely populated areas, Palestinian armed groups also put Gazans in danger; for example, on 28 [of] July 2014, 13 civilians, including 11 children, were killed in Al-Shati camp when a rocket appears to have fallen short of its target and landed in a supermarket where the children were buying crisps and breads.”<sup>173</sup> A report following the war concluded that Hamas rockets killed more Gazan civilians than Israelis, their intended targets.<sup>174</sup> As one commentator notes about the example above: “evidence suggesting that a rocket launched by a Palestinian armed group may have caused 13 civilian deaths inside Gaza just underscores how indiscriminate these weapons can be and the dreadful consequences of using them.”<sup>175</sup>

These rockets were launched incessantly by Hamas militant groups, the attacks were such that they would cause incidental loss of life to the Gazan population, and the perpetrator must have known that given the nature of the rockets this would be the result. The elements of the crime are therefore satisfied by Hamas’s conduct, and their actions’ constitute the war crime of causing excessive incidental death and damage.

### **3) Mental Requirements of primary participants**

As discussed in Section VIII. D. on criminal responsibility, superior liability, of which Haniyeh should be charged, is a derivative form of criminal liability which arises where a primary crime is actually committed by a subordinate. So while the mental requirements associated with Haniyeh will be discussed in that Section, there are still mental requirements the militants carrying out the crimes must themselves satisfy, in order that the underlying crime be committed.

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

With respect to the mental elements of war crimes under the Rome Statute, Article 30 provides that: “unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”<sup>176</sup> *Intent* is found where the perpetrator “means to engage in the conduct” and “means to cause that consequence or is aware that it will occur in the ordinary course of events.”<sup>177</sup> *Knowledge* in this context “means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”<sup>178</sup> Furthermore, for every war crime under Article 8 of the Rome Statute, the Elements of Crimes require that the perpetrator was aware of the factual circumstances that established the existence of the armed conflict.<sup>179</sup>

Because this sub-Section addresses the mental requirement of the subordinate, it will focus on the intent and knowledge of the combatants themselves. The requirements in the statute detailed above are undoubtedly satisfied. The firing of rockets from within civilian areas was purposeful conduct committed with the knowledge that it would very likely invite return fire which would endanger civilians. The combatants who forced civilians to return to their homes also had the clear intent to return them home “knowing” that an attack would very likely occur given the warning by the IDF. These combatants were also aware that their intentional conduct of placing weapons within civilian structures would make these structures a potential military target, and knew that this was “a consequence” that “will occur in the ordinary course of events.” Finally, the firing of inherently indiscriminate rockets, which were

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<sup>176</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, Article 30 (July 17, 1998); available at: <http://www.refworld.org/docid/3ae6b3a84.html>

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Rome Statute, Elements of Crimes, Article 8 – War Crimes, pgs. 13-42; available at: <https://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf>

proven to be so throughout this and previous conflicts with Israel, was purposeful conduct with the knowledge that they could land anywhere “in the ordinary course of events.”

While the intent and knowledge of Haniyeh himself will be discussed in detail in the following sub-Section, the underlying crimes, along with their required mental state, were satisfied by the Hamas ruled combatants operating within Gaza.

#### **D. Personal Criminal Responsibility of Ismail Haniyeh**

Commander liability is a form of liability that is applied to a superior for a failure to act, not the actual commission of a crime.<sup>180</sup> The Rome Statute advances two separate standards for superior liability, depending on whether the superior is a military commander or civilian superior.<sup>181</sup> Though some commentators consider the leader of Hamas to be a military command position,<sup>182</sup> in this communication the arguably more stringent civilian standard will be addressed given Haniyeh’s official position was Deputy Leader of the Hamas political wing within Gaza at the time of the relevant conflict.<sup>183</sup> In the event that the OTP does not consider Haniyeh to fulfil the civilian standard of control, it is submitted that in the alternative it should find that in the alternative, Haniyeh fulfilled the lower threshold for military superior liability pursuant to Article 28(a) of the Rome Statute.<sup>184</sup>

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<sup>180</sup> Guenael Mettraux, *The Doctrine of Superior Command and Responsibility*, The Peace and Justice Initiative: Towards Universal Implementation of the Rome Statute; available at: <http://www.peaceandjusticeinitiative.org/implementation-resources/command-responsibility>

<sup>181</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010), Article 28(a)* (July 17, 1998); available at: <http://www.refworld.org/docid/3ae6b3a84.html>

<sup>182</sup> See e.g. Mathew Levitt, Dennis Ross, *Hamas: Politics, Charity, and Terrorism in the Service of Jihad* (2007), at pg. 3

<sup>183</sup> Counter Extremism Project, *Ismail Haniyeh*, available at: <http://www.counterextremism.com/extremists/ismail-haniyeh>

<sup>184</sup> These are: a) that the military commander knew or ought to have known that the forces were committing or about to commit the crimes and b) that the military commander failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit them to the proper authorities

### 1) **Knowledge and Control Requirements for Civilian Superior**

Article 28(b) of the Rome Statute defines the potential criminal liability of a civilian superior for the commission of a crime within the Statute's purview by a subordinate. A non-military superior will be responsible for failing to control crimes committed within his or her effective authority and control when:

“(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”<sup>185</sup>

There are four principal requirements to meet this statutory test for civilian superior liability. First, the relationship must be one of a superior and subordinate. This requires there be a hierarchical relationship between those who commit the crime and the individual being charged as a superior.<sup>186</sup> This relationship can be *de jure* recognized by the regime itself, or it can *de facto*, by reflecting the actual state of the relationship.<sup>187</sup> The existence of intermediaries is irrelevant to finding this relationship, as only the ability of the superior to control the actions of the subordinate is considered.<sup>188</sup>

The second requirement is that the superior must know of, or consciously disregard, the commission of the crime. Conscious disregard has been defined to mean

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<sup>185</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, Article 28(b) (July 17, 1998); available at: <http://www.refworld.org/docid/3ae6b3a84.html>

<sup>186</sup> See *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08), Trial Chamber III (2016), at para. 184; available at: [https://www.icc-cpi.int/CourtRecords/CR2016\\_02238.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF)

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

“something more than simply ignoring something; it means to deliberately take no notice of, not take into [account] despite the evidence [of] serious and substantial information.”<sup>189</sup> It is similar to recklessness under common law,<sup>190</sup> which requires less than absolute knowledge that the crime would be committed, but more than mere negligence in regards to that possibility. In other words, despite knowing of a high likelihood that the crime will be, or has been, committed, the superior does not prevent or punish it.<sup>191</sup>

The third requirement in the statute is that the activities were in the effective control and responsibility of the superior. This being satisfied essentially leads to a finding of a *de facto* superior and subordinate relationship discussed above. “Effective control” requires the superior have had the material ability to prevent or punish the crimes committed by the subordinate.<sup>192</sup> This is a case specific inquiry, and depends heavily on the relevant evidence of each case.<sup>193</sup> Though it concerned a military superior, the Court in *Bemba* named a number of factors it looks at when deciding if there is effective control. These include the official position of the superior, the power to issue orders, the capacity to ensure compliance with orders, the power to promote members of the armed forces, and a number of other evidentiary factors.<sup>194</sup>

This condition is closely related to the final clause, which requires the superior fail to take all “necessary and reasonable measures...to prevent or repress” the commission of the crime. Additional Protocol I explains an analogous clause as

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<sup>189</sup> Chantal Meloni, *Command Responsibility in International Criminal Law*, The Hague, The Netherlands (2010), at pg. 187

<sup>190</sup> Willam A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), at pg. 463

<sup>191</sup> Jamie A. Williamson, *Some Considerations on Command Responsibility and Criminal Liability* (2008); available at: [https://www.icrc.org/eng/assets/files/other/irrc-870\\_williamson.pdf](https://www.icrc.org/eng/assets/files/other/irrc-870_williamson.pdf)

<sup>192</sup> See *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08), Trial Chamber III (2016), at para. 184; available at: [https://www.icc-cpi.int/CourtRecords/CR2016\\_02238.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF)

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

obligating a superior to take “all feasible measures within their power.”<sup>195</sup> This definition reiterates the condition that it is within the superior’s power, and further limits it to only feasible measures, but obligates that all measures meeting these conditions be taken.<sup>196</sup> In the context of a military superior, this has been held by the ICC to require the prevention of the crime, as well as the submission of the commission of the crime to the competent authorities for prosecution.<sup>197</sup>

## 2) Application of Requirements to Haniyeh

Haniyeh’s role in relation to the crimes committed during the Conflict meets the requirements set out in the Rome Statute. Because the requirement of a superior-subordinate relationship depends on whether there was effective control, these will be addressed together.

Haniyeh did more than just “consciously disregard” the use of human shields and the firing from civilian populated areas by Gazan militants. Rather, he and his government had detailed knowledge of its use, and indeed praised the practice. First, the use of human shielding by Hamas militants during the war was being widely reported on by the international media throughout the Conflict,<sup>198</sup> and it stands to reason the leader of Gaza itself would be aware of those reports and occurrences. Moreover, Haniyeh has previously praised the practice of civilians sacrificing themselves to the

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<sup>195</sup> Jamie A. Williamson, *Some Considerations on Command Responsibility and Criminal Liability* (2008), citing Article 86(2); available at: [https://www.icrc.org/eng/assets/files/other/irrc-870\\_williamson.pdf](https://www.icrc.org/eng/assets/files/other/irrc-870_williamson.pdf)

<sup>196</sup> *Id.*

<sup>197</sup> *See* The Prosecutor v. Jean-Pierre Bemba Gombo (ICC-01/05-01/08), Trial Chamber III (2016), at para. 202-209; available at: [https://www.icc-cpi.int/CourtRecords/CR2016\\_02238.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF)

<sup>198</sup> *See e.g.* Thane Rosenbaum, *Hamas’s Civilian Death Strategy*, *The Wall Street Journal* (July 21, 2014), available at <https://www.wsj.com/articles/thane-rosenbaum-civilian-casualties-in-gaza-1405970362>; William Booth, *While Israel Held its Fire the Militant Group Hamas Did Not*, *The Washington Post* (July 15, 2014), available at: [https://www.washingtonpost.com/world/middle-east/while-israel-held-its-fire-the-militant-group-hamas-did-not/2014/07/15/116fd3d7-3c0f-4413-94a9-2ab16af1445d\\_story.html?utm\\_term=.39c33a4c4ad7](https://www.washingtonpost.com/world/middle-east/while-israel-held-its-fire-the-militant-group-hamas-did-not/2014/07/15/116fd3d7-3c0f-4413-94a9-2ab16af1445d_story.html?utm_term=.39c33a4c4ad7); Patrick Martin, *Death Tolls Mount as Israel Expands Offensive, Hamas Resistance Hardens*, *The Globe and Mail* (July 20, 2014), available at: <http://www.theglobeandmail.com/news/world/thousands-flee-gaza-homes-as-israel-expands-ground-assault/article19683732/>; New Delhi Television, *How Hamas Assembles and Fires Rockets* (August 5, 2014); video available at: <http://www.ndtv.com/video/news/news/watch-ndtv-exclusive-how-hamas-assembles-and-fires-rockets-332910>

military. In 2006, he said in a radio interview about the civilians who acted as human shields: “I feel that what happened last night will serve as a model...an example for our Palestinian people and [send] the message that aggression will not break our will.”<sup>199</sup>

A senior spokesman, for Haniyeh’s government, Sami Abu Zhuri, said in the midst of the Conflict: “the fact that people are willing to sacrifice themselves against Israeli warplanes in order to protect their homes, I believe this strategy is proving itself, and we Hamas, *call on our people to adopt this practice.*”<sup>200</sup> He also said during the conflict concerning civilian deaths in Gaza: “We are leading them to death”, though he quickly corrected himself and said: “I mean to confrontation.”<sup>201</sup> Similarly, the Hamas Ministry of Interior spokesman, Iyad al-Buzum, stated on his Facebook page after some Gaza residents ignored Hamas’s warning to not leave their home: “we call on all our people who have left their homes to return to them immediately.”<sup>202</sup> The use of mass media, such as radio broadcasts, to channel actions by civilians and militants has been recognised and affirmed by war crimes tribunals in the past. In 2003, the ICTR convicted those in control of Rwandan broadcaster Radio Television Libre des Mille Collines of crimes including incitement to genocide.<sup>203</sup> In sum, not only did Haniyeh’s Hamas government know of and ignore the use of human shields, he personally in the

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<sup>199</sup> The Meir Amit Intelligence and Terrorism Information Center, *Hamas again uses Gazan civilians as human shields to prevent the Israeli Air Force from attacking operatives' houses. Hamas will probably employ various tactics of using civilians as human shields as Operation Protective Edge continues and expands* (July 10, 2014); transcript available at: [http://www.terrorism-info.org.il/Data/articles/Art\\_20669/E\\_111\\_14\\_2032155167.pdf](http://www.terrorism-info.org.il/Data/articles/Art_20669/E_111_14_2032155167.pdf)

<sup>200</sup> Palestinian Media Watch, *Hamas Spokesman Calls on Palestinians to Use their Bodies as Human Shields* (July 8, 2014), taken from Al-Aqsa TV; video available at: <https://www.youtube.com/watch?v=UXZEzbT0H1s>

<sup>201</sup> Palestinian Media Watch, *Hamas Spokesman Defends Policy of Using Civilians as Human Shields* (July 16, 2014), taken from Al-Aqsa TV; video available at: <https://www.youtube.com/watch?v=k4FqIIOCfNM>

<sup>202</sup> Itamar Marcus and Nan Jacques Zilberdik, *Hamas encourages civilians to act as human shield: Hamas Tells Civilians to Return to their Homes to Act as Human Shields*, Palestinian Media Watch (July 14, 2014); available at: [http://palwatch.org/main.aspx?fi=157&doc\\_id=12019](http://palwatch.org/main.aspx?fi=157&doc_id=12019)

<sup>203</sup> *The Prosecutor v. Ferdinand Nahimana and others* (Judgment and Sentence) ICTR-99-52-T (2003); available at: <http://www.refworld.org/docid/404468bc2.html>

past, and more generally his government during the Conflict, encouraged its use through mass media outlets.

Haniyeh also had “effective control” over the militants who exercised the human shield tactics pursuant to the factors discussed in the *Bemba* case. Because of this, the relationship between Haniyeh and these militants was also a *de facto* superior and subordinate relationship. Practically speaking, Haniyeh was the highest ranking official located in Gaza at the time as the recent Prime Minister and current Deputy Leader of the PA,<sup>204</sup> and often by his own account (as will be seen below) has attributed the fighting carried out by the al-Qassam Brigade (the military wing of Hamas) to the Hamas political wing.

This intermingling between Hamas’s political governance and military fighting has been present from the start of Hamas’s rise. For example, when Hamas created its “internal security force” in September of 2007 after taking control of Gaza from Fatah, it staffed it almost entirely with fighters from al-Qassam.<sup>205</sup> This control of Haniyeh’s political bureau over al-Qassam was further illuminated during the negotiations with Fatah in 2014 right before the Conflict when Hamas expressly bargained with the apparent control of al-Qassam and its weapons.<sup>206</sup> This reality was also reinforced by one of the main issues of contention during the Conflict; the tunnels used by al-Qassam. These were tunnels built from Gaza into Israel for military purposes, and were funded entirely by foreign aid given to the Hamas political and social wings.<sup>207</sup> A major

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<sup>204</sup> Counter Extremism Project, *Ismail Haniyeh*; available at: <http://www.counterextremism.com/extremists/ismail-haniyeh>

<sup>205</sup> Human Rights Watch, *Internal Fight: Palestinian Abuses in West Bank and Gaza* (2008), at pg. 55; available at: <https://www.hrw.org/reports/2008/iop0708/iop0708web.pdf>

<sup>206</sup> Adnan Abu Amer, *Hamas Won’t Give Up Military Wing Despite Agreement*, Al-Monitor (May 2, 2014); <http://www.al-monitor.com/pulse/originals/2014/05/qassam-weapons-hamas-fatah-reconciliation.html>

<sup>207</sup> Alejandra Azuero-Quijano, *Gaza’s Tunnel Paradox*, Al-Jazeera (August 14, 2014); available at: <http://america.aljazeera.com/opinions/2014/8/gaza-tunnel-siegeisraelidfblockade.html>

military objective of the IDF during the Conflict was neutralizing the threat posed by these tunnels which were funded by aid given to the political and social wings.<sup>208</sup> This control over the tunnels was again demonstrated in 2016, when Haniyeh attended the funeral of military operatives who died building tunnels and stated: “East of Gaza City, heroes are digging through rock and building tunnels, and to the west they are experimenting with rockets every day.”<sup>209</sup>

Haniyeh has also consistently referred to Hamas as a single organization which includes its social, political, and military wings, though at times when asked directly he has denied he has control. After Qatar provided US\$31 million in foreign aid to Hamas in 2016, Haniyeh expressly reiterated that he makes no distinction between the political and military wings, and vowed the money would be used to pay all government employees; including the fighters of al-Qassam.<sup>210</sup> This is consistent with his attending a military parade in Gaza thrown by al-Qassam in 2013, where he marched through the procession and saluted the fighters in support.<sup>211</sup>

The allocation of money to the military wing, the portrayal of Hamas as being one organization in Haniyeh’s own rhetoric, and the personnel overlap between the political and military wings, all point to the reality that Hamas is one organization. As the leader of the entire operation, and the long-time Prime Minister of this organization, Haniyeh had “effective control” over the crimes being committed by the militants during the Conflict.

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<sup>208</sup> *Id.*

<sup>209</sup> Kate Shuttleworth, *The Next War Between Israel and Hamas Might be Fought Underground*, Time (February 22, 2016); available at: <http://time.com/4230752/gaza-israel-tunnels-hamas/>

<sup>210</sup> TheTower.org Staff, *Haniyeh: There’s No Distinction Between Hamas’ Military, Civilian Wings*, The Tower (August 2, 2016); <http://www.thetower.org/3727-haniyeh-theres-no-distinction-between-hamas-military-civilian-wings/>

<sup>211</sup> Occupied Palestine, *Photos: Al-Qassam Brigade Military Parade in Gaza* (September 21, 2013); available at: <https://occupiedpalestine.wordpress.com/2013/09/22/photos-alqassambrigade-military-parade-in-gaza-2/>

As stated above, the final requirement that the superior fail to prevent the commission of the crimes was also met in this case. Not only did Haniyeh and his government not take “all feasible measures within their power” to prevent the practice, they encouraged and praised the practice. The second requirement discussed in *Bemba*, the recommendation for punishment by a superior for the carrying out of a crime by the subordinate, has also been ignored in this case. As discussed in greater detail below, there has been a complete lack of any prosecution within Gaza by Hamas for the crimes committed by al-Qassam.<sup>212</sup>

The fact that Haniyeh was able to exercise effective control over the Hamas and indeed any other affiliated military and paramilitary forces operating from Gaza during the Conflict is demonstrated also by his ability to call and enforce a ceasefire.

Haniyeh’s role in the crimes committed therefore satisfies the ICC statutory requirements for civilian superior liability. He knew of, and “consciously disregarded”, the use of human shielding in Gaza. He also had “effective control” over the subordinates committing these crimes as the highest ranking official of the organization responsible for their violations. Finally, not only did his government not prevent or punish these practices, they actively encouraged its use throughout the Conflict.

### **E. Conclusion on Article 53(1)(a)**

In conclusion, pursuant to Article 53(1)(a) of the Rome Statute, there is a reasonable basis to believe that crimes within the jurisdiction of the court have been committed. The conduct of Hamas officials alleged in this communication took place in the context of, and was associated with the international armed conflict in Gaza from

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<sup>212</sup> Human Rights Watch, *World Report 2015: Israel/Palestine: Events of 2014* (2015); <https://www.hrw.org/world-report/2015/country-chapters/israel/palestine>

June 13 to August 26, 2014. The evidence presented in this communication also satisfies the suggested threshold in Article 8(1) of the Rome Statute.

Finally, the evidence shows how Hamas committed war crimes expressly described in Article 8. The firing of rockets from densely populated areas, the forcing of civilians to remain in the vicinity of potential military targets, and the storing of rockets in civilian structures all violate the war crime against the use of human shielding. The incessant firing of over 4,000 rockets from within Gaza that are inherently indiscriminate also constitutes a violation of the war crime of causing excessive incidental death and damage. These war crimes were also committed intentionally, and with the knowledge of the likely result. War crimes were therefore committed by Hamas, under the command of Haniyeh, pursuant to the Rome Statute.

## **VIII) ADMISSIBILITY**

Pursuant to Article 53(1)(b) of the Rome Statute the case must be admissible under Article 17. In this Section, we address the admissibility requirements in Article 17 of Gravity (see VIII A) and Complementarity (see VIII B).

We note at the outset that the OTP may decline to initiate an investigation, even though it is admissible in accordance with Article 17 of the Rome Statute if there are substantial reasons to believe that an investigation will not benefit the interests of justice in accordance with Article 53(1)(c) of the Rome Statute. This is a limited mandate and only means that if certain circumstances provide substantial reasons to believe that it is *not* in the interest of justice then the OTP should not proceed; it does not require the OTP affirmatively find it to be in the interests of justice.<sup>213</sup> In any case, it surely is

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<sup>213</sup>The Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (November 2013), at para. 67; available at: [https://www.icc-cpi.int/iccdocs/otp/OTP-Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf)

within the interests of justice to investigate Haniyeh’s crimes given that they have led to significant unnecessary deaths, injuries and destruction of civilian property and infrastructure. There are no counter-vailing reasons as to why he should be above justice or escape the consequences of his actions.

## **A. Gravity - Article 17(1)(d) of the Rome Statute**

### **1) Legal Requirements**

Article 17(1)(d) of the Rome Statute provides that the Court shall determine that a case is inadmissible, if “a case is not of sufficient gravity to justify further action by the Court.”<sup>214</sup> The Court has previously defined the parameters of a “*case*” in Article 17(1)(d) for purposes of its gravity determination by way of reference to:

1. “the groups of persons involved that are likely to be the object of an investigation for the purpose of shaping the future case(s).”<sup>215</sup> This entails “a generic assessment of whether such groups that are likely to form the object of investigation capture those who may bear the greatest responsibility for the alleged crimes committed. Such assessment should be general in nature, and compatible with the pre-investigative stage into a situation”;<sup>216</sup> and
2. “the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).”<sup>217</sup> Focused mainly on: “the gravity of the crimes committed within the incidents, which are likely to be the focus of the investigation, and there is interplay between the crimes and the context in which they were committed (the incidents).”<sup>218</sup>

Further papers issued by the OTP have described this process in greater detail.

At the preliminary examination stage, the OTP assesses the gravity of each potential

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<sup>214</sup> *Id.* at para. 59.

<sup>215</sup> ICC Pre-Trial Chamber II, Decision Pursuant to Article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (ICC-01/09-19-Corr), para. 59; available at: [https://www.icc-cpi.int/CourtRecords/CR2010\\_02399.PDF](https://www.icc-cpi.int/CourtRecords/CR2010_02399.PDF)

<sup>216</sup> *Id.* at para 60

<sup>217</sup> *Id.* at para 59

<sup>218</sup> *Id.* at para 61

case that would likely arise from an investigation of the situation.<sup>219</sup> A supplementary regulation provides that in order to assess the gravity of the crimes allegedly committed in each situation, the OTP “shall consider various factors including their scale, nature, manner of commission, and impact.”<sup>220</sup> This assessment includes both qualitative and quantitative considerations, based on the relevant facts and circumstances.<sup>221</sup> These non-exhaustive factors that guide the OTP’s assessment are:

1. *The scale of the crimes* - this may be assessed in light of the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, and their geographical or temporal spread.<sup>222</sup>
2. *The nature of the crimes*- this refers to the specific elements of each offence
3. *The manner of commission of the crimes* - This may be assessed in light of the means employed to execute the crimes, the degree of participation and intent in their commission, the extent to which the crimes are systematic or result from a plan or organized policy or otherwise result from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims or motives involving discrimination;<sup>223</sup> and
4. *The impact of the crimes* - this may be assessed in light of the sufferings endured by the victims and their increased vulnerability; the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities.<sup>224</sup>

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<sup>219</sup> The Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (November 2013), at para. 59; available at: [https://www.icc-cpi.int/iccdocs/otp/OTP-Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf)

<sup>220</sup> ICC, *Regulations of the Office of the Prosecutor*, 2009 ICC-BD/05-01-09, Regulation 29, para. 2; available at: <https://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109ENG.pdf>

<sup>221</sup> The Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (November 2013), at para. 61; available at: [https://www.icc-cpi.int/iccdocs/otp/OTP-Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf)

<sup>222</sup> *Id.* at para 62

<sup>223</sup> *Id.* para. 64

<sup>224</sup> *Id.* at para. 65

As a final note, when assessing the gravity of each case, “it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave.”<sup>225</sup>

## 2) **Analysis**

The facts and circumstances regarding the situation in Gaza, and more particularly any potential case that would be brought against Haniyeh, support a finding of sufficient gravity.

### a) **The Parameters of the Case**

In accordance with Article 17(1)(d), the crimes alleged in the communication would be within the parameters of a “*case*” satisfying the gravity determination. The requirement that the persons involved be the likely object of an investigation is amply supported by the Section on criminal responsibility above. As the OTP has recognised, those who bear the greatest responsibility for the alleged crimes in this communication should, and would be, the likely objects of an investigation.<sup>226</sup> Haniyeh was at the very highest level of the Hamas structure in Gaza, and if there is one person who should be held accountable for the commission of the crimes, it is the leader of the organization who committed these crimes.

The second factor determining the parameter of a case requires the incidents in which the crimes were committed be a likely part of a future investigation. The rampant use of human shielding, the storing of weaponry in civilian structures, and the firing of indiscriminate rockets, are at the very heart of any case that would be lodged against

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<sup>225</sup> ICC Pre-Trial Chamber II, Decision Pursuant to Article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (ICC-01/09-19-Corr), para 62; available at: [https://www.icc-cpi.int/CourtRecords/CR2010\\_02399.PDF](https://www.icc-cpi.int/CourtRecords/CR2010_02399.PDF)

<sup>226</sup> The Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation* (September 15, 2016) paras. 42-43; [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf)

Hamas in connection within the Conflict. Therefore, in determining whether the gravity requirement of the Rome Statute is satisfied, the incidents and people discussed above would be within the parameters of a case meeting the required threshold.

#### **b) The Requirement of Sufficient Gravity**

As noted above, the OTP looks at the scale, nature, manner, and impact of the crimes when determining Gravity. The Egyptian student in Gaza mentioned above (in Section C (b) Encouraging and Forcing Civilians to Remain in the Vicinity of Military Targets) best described the scale of the crimes committed when in response to a question about whether Hamas used human shields he responded: “Hamas held the entire Gazan population as a human shield.”<sup>227</sup> The crimes committed were massive in scale, and get to the soul of the entire Conflict, and the very high casualty numbers within Gaza. As discussed in detail above, these were not isolated incidents, and constituted the official policy of Hamas within Gaza during the Conflict.<sup>228</sup> The ceaseless repetition and combination of these war crimes tormented nearly all civilians and areas within Gaza.

The nature and manner of the crimes also indicate a finding of sufficient gravity. With respect to the nature of the alleged crimes, this communication details evidence of the widespread commission of war crimes directly mentioned in the Rome Statute. The manner of commission of these crimes, as described previously by the Court itself, also indicates a finding of sufficient gravity. Shootings, forced curfews, knowing endangerment to the civilian population, and false information were all used to commit these crimes. As mentioned, this was also the widespread policy of Hamas, and was

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<sup>227</sup> Mudar Zahran, *Gazans Speak Out: Hamas War Crimes*, Gatestone Institute (September 19, 2014); available at: <https://www.gatestoneinstitute.org/4706/gazan-hamas-war-crime>

<sup>228</sup> *Supra* notes 109-113

implemented with an insidious purpose. Finally, the victims of the crimes were often the weak and vulnerable: patients in hospitals, congregants of mosques, those displaced and staying in schools; the crimes committed endangered the very weakest of the Gazan population.

Finally, the impact of the crimes was vast. The effect on the local community in Gaza as a result of the widespread use of human shielding by Hamas officials is highly significant, both in its direct and indirect impact. There is no greater impact than the deprivation of life, which is something these crimes often directly caused. The use of mosques, hospitals, schools, and other civilian structures, puts a huge pressure on the local civilians, and removes all relatively safe zones they may have had. The launching of attacks from within densely populated areas, in which the civilians were often forced to stay, further exacerbates this stress and sense of helplessness. Moreover, the impact of these crimes was further aggravated by the lack of accountability for those bearing the biggest responsibility for the fatal crimes that were committed.

### **3) Conclusion with Respect to Gravity**

The facts and circumstances presented in this communication meet the gravity threshold for the opening of a full investigation. The person most responsible for incidents that are likely to be the object of any investigation is Haniyeh, and he is therefore squarely within the bounds of a case for purposes of determining gravity. The Gravity of the crimes themselves is sufficiently demonstrated by their scale in both qualitative and quantitative terms. Their serious nature, the calculating and vicious way they were executed, and the vast impact the alleged crimes had on the local community, all point to a mass systemic abuse of the Gazan civilian population.

## **B. Complementarity (Article 17(2) and (3) of the Rome Statute)**

### **1) Legal Requirements**

The ICC Appeals Chamber in *Katanga* established a two-step test for complementarity under Article 17.<sup>229</sup> The court first considers the action or inaction of the relevant State, and then scrutinizes the motive behind this action or inaction:

1. Are there on-going investigations or prosecutions, or have investigations been carried out and a decision made not to prosecute?; and
2. Is the state unwilling or unable to carry out investigations or prosecutions to the required standard? This requires the OTP to consider the nature and quality of the proceedings. The OTP is guided by the considerations set out in Article 17(2) and (3) of the Rome Statute.<sup>230</sup>

We note that the absence of national proceedings is enough to make the case admissible and the question of unwillingness or inability does not need to be answered.<sup>231</sup>

### **2) Investigation and Prosecution in Gaza for war crimes**

The military judiciary in Gaza is structured according to Military Justice Law Number 4, which was passed on February 21, 2008 in the Hamas controlled Palestinian Parliament at the time.<sup>232</sup> It has not been ratified by President Abbas of the PA or applied by the PA military judiciary to the West Bank, and the military justice system in Gaza is viewed largely as a Hamas-run institution.<sup>233</sup> Article 63 of the law states that it applies to people who commit “military offenses that are referred [to the military

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<sup>229</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, (ICC-01/04-01/07-1497), Judgement on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case (September 25, 2009), at para. 78; available at: <https://www.icc-cpi.int/pages/record.aspx?uri=746819>

<sup>230</sup> *Id.*

<sup>231</sup> The Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (November 2013), at para.47; available at: [https://www.icc-cpi.int/iccdocs/otp/OTP-Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf)

<sup>232</sup> Bill Van Esveld, *Abusive System: Failure of Criminal Justice System in Gaza*, Human Rights Watch (October 3, 2012); available at: <https://www.hrw.org/report/2012/10/03/abusive-system/failures-criminal-justice-gaza>

<sup>233</sup> *Id.*

judiciary] by the competent Minister of Military Justice,” including “crimes that have civilian parties.”<sup>234</sup> In other words, the Minister of Military Justice, a member of the Hamas ruling party, is required in order to refer a case as a military offense.

The more general judiciary in Gaza is also Hamas-controlled. Though under the Palestinian Basic Law the PA President must authorise all judicial appointments, since Hamas expelled Fatah from Gaza in 2007, it supplanted the West Bank PA administration’s role in judicial appointments with a parallel body in Gaza, the Supreme Justice Council.<sup>235</sup> In practice, the Supreme Justice Council appoints judges without PA Presidential approval and generally manages the judiciary in Gaza independently.<sup>236</sup> Even though the reconciliation agreement between Fatah and Hamas was supposed to unify the legal and legislative systems of Gaza and the West Bank, Fatah still does not have any legal authority on the ground in Gaza.<sup>237</sup>

Unsurprisingly, this system, which is completely created and dictated by Hamas, has not prosecuted or held accountable any Hamas officials in connection with the Conflict. As Amnesty International summarized in a report on Hamas crimes within Gaza:

“... the bodies and mechanisms set up by the Hamas de facto administration to carry out law enforcement and the administration of justice lack the necessary skills, independence, oversight, and accountability to ensure that the rule of law is respected for both victims and accused [...] it seems clear that perpetrators of human rights abuses continue to enjoy impunity, and that the Hamas de facto administration lacks the political will to hold perpetrators of such crimes to

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<sup>234</sup> *Id.*

<sup>235</sup> Hazem Balousha, *Hamas-Fatah divide cripples Palestine’s Judiciary*, Al Monitor (May 14, 2015); available at: <http://www.al-monitor.com/pulse/en/originals/2015/05/palestine-gaza-west-bank-hamas-fatah-judiciary-legislation.html>

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

account, particularly Hamas members, and to respect fundamental human rights.”<sup>238</sup>

Indeed, far from punishing perpetrators of such war crimes, Hamas military commanders receive official commendation and veneration. The street along the presidential compound of the Palestinian Authority, in fact, is named after one of Hamas’s most infamous bomb engineers, Yihyeh Ayyash, a man who was an architect of multiple attacks on Israeli citizens.<sup>239</sup> As Palestinian Media Watch puts it:

“Terror glorification is highly visible in Palestinian society. A Palestinian child can walk to school along a street named after the terrorist Abu Jihad, who planned a bus hijacking that killed 37, spend the day learning in a school named after Hamas founder Ahmad Yassin, in the afternoon play football in a tournament named after suicide terrorist Abd Al-Basset Odeh who killed 30, and end his day at a youth center named after terrorist Abu Iyad, responsible for killing the 11 Olympic athletes in Munich.”<sup>240</sup>

### 3) Conclusion on complementarity

With regard to the first step of the Court’s complementarity test set out above, the legal authorities in Gaza have failed to conduct any criminal investigations into the Hamas officials who bear responsibility for the war crimes committed during the Conflict and have demonstrated no intention or willingness to even contemplate doing so. Therefore, the legal authorities in Gaza have failed the standards of investigation and prosecution required to render this case inadmissible before the ICC.

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<sup>238</sup> Amnesty International, *Strangling Necks Abductions, Torture and Summary Killings of Palestinians by Hamas Forces During the 2014 Gaza/Israel Conflict* (May 2015); available at: <https://www.amnesty.org/en/documents/mde21/1643/2015/en/>

<sup>239</sup> Haaretz, *PA Names Ramallah Street After Hamas Terror Mastermind* (April 7, 2010); available at, <http://www.haaretz.com/news/pa-names-ramallah-street-after-hamas-terror-mastermind-1.891>

<sup>240</sup> Itamar Marcus, Nan Jacques Zilberdik, Barbara Crook and PMW staff, *From Terrorists to Role Models: The Palestinian Authority's Institutionalization of Incitement The PA's policy of naming schools, streets, sporting events, summer camps and ceremonies after terrorists fundamentally undermines the chance for peace* (May 2010); available at: <http://palwatch.org/STORAGE/special%20reports/PA%20honors%20terrorists%20Final%20Eng.pdf>

### **C. Conclusion on Admissibility**

The crimes committed by Hamas militants in Gaza, and Haniyeh's role in their commission, satisfy the admissibility requirements in Article 17 of the Rome Statute. Factors such as the nature of the crimes, the endangering of thousands of protected persons, and the impact on the general community, compel a finding that the gravity threshold in Article 17(1)(d) of the Rome Statute has been met. A review of the legal mechanisms in Gaza, and the fact that there have been no national proceedings of the people responsible for the alleged war crimes in this communication, demonstrates that an investigation is not precluded on complementarity grounds. Therefore, the situation during the Conflict generally, and the case against Haniyeh more specifically, should be admissible pursuant to Article 17.

## **IX) OVERALL CONCLUSION**

The evidence presented in this communication provides the OTP with a reasonable basis to proceed in accordance with Article 53(1) of the Rome Statute and justifies the initiation of a full investigation by the OTP. This investigation should focus on a case against Ismail Haniyeh for the crimes committed by Hamas militants and leaders during the Conflict.

During the Conflict, Hamas was officially part of a unity government comprising the PA, and therefore was a state actor. The Conflict was therefore an international armed conflict, either because Hamas was acting officially as representative of the Palestinian State, or because the crimes of Hamas can otherwise be attributed to the Palestinian State or, or because Gaza is still considered occupied territory under international law and therefore all such conflicts against the alleged occupier automatically constitute international armed conflict.

Under the Rome Statute, during an international armed conflict the use of human shielding is a war crime under Article 8(2)(b)(xxiii). Hamas committed this crime by conducting military operations from populated areas, by forcing civilians to remain in potential military objectives, and by storing weaponry in civilian structures. This was not merely a case of a few isolated examples of each form of human shielding; rather it constituted the express and widespread policy of Hamas, often with disturbing motivations. Hamas also committed the war crime under Article 8(2)(b)(iv) of causing incidental death or damage by incessantly firing indiscriminate rockets within populated areas within Gaza.

Haniyeh should be held criminally responsible as a civilian superior for these crimes. He knew of, and at the very least ignored, the commission of these crimes by Hamas militants. Furthermore, as the highest ranking official within the Hamas organizational structure in Gaza, he had the power and ability to prevent and prosecute the commission of these crimes. Instead, he and members of his government chose to encourage and praise the commission of these crimes.

Finally, the case against Haniyeh would not be inadmissible pursuant to Article 17 of the Rome Statute. The scale, nature, manner, and impact of the crimes all point to a disturbing policy that had far reaching implications for a high number of civilians. Despite this fact, the Hamas-controlled Gazan judicial system has done nothing to prosecute or punish the offenses committed by Hamas during the Conflict.

We therefore respectfully request that the Prosecutor launch a full investigation into the actions of Hamas and Haniyeh during the Conflict. War crimes were committed during an international armed conflict, Haniyeh was criminally responsible for their

commission, the crimes are squarely within the jurisdiction of the court, and no other reason exists to render the case inadmissible.

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