



In the  
International Criminal Court

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**The Jerusalem Institute of Justice**

*The Complainant,*

*v.*

**Ismail Abdel Salam Ahmed  
Haniyeh**

(هنية أحمد السلام عبد إسماعيل)

*Accused of crimes against humanity*

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

(هنية أحمد السلام عبد)

## EXECUTIVE SUMMARY

We, the Jerusalem Institute of Justice, submit this communication to the Office of the Prosecutor of the International Criminal Court concerning Ismail Haniyeh's crimes against humanity committed through widespread and/or systematic acts of murder, imprisonment, and torture of civilians in the Gaza Strip.

On January 16, 2015, the Prosecutor began a preliminary examination into the "situation in Palestine" to determine whether a full investigation should be opened for crimes committed within the Palestinian territories. In this communication, we contend that if any full investigation is to be pursued into crimes committed in such territories or by Palestinian nationals, then a case should be lodged against Haniyeh.

Haniyeh is, and has been at all times material to this communication, a senior leader of Hamas. He has played a pivotal role in developing and enforcing Hamas' extremist ideology and consistent human rights violations against the Gazan civilian population as well as others.

As the *de facto* and subsequently *de jure* leader of Hamas, Haniyeh wielded effective control over the relevant activities in Gaza. Hamas' interconnected command structure is such that the political, social, and military wings of the organization are intertwined, and in reality, under a common, highly-centralized leadership. Accordingly, Haniyeh knew of and was in a position to prevent the crimes against humanity that have been committed against the civilian population of Gaza; yet he has manifestly failed to do so.

The case is grave enough to merit further investigation. Haniyeh's crimes have had and will continue to have devastating consequences on the entire population of Gaza, as well as their families and the rest of society in the surrounding region. These crimes benefit no one but the Hamas leadership. As the Hamas-dominated Gazan courts have done nothing to punish those who play a direct role in committing these crimes against humanity, there is no prospect of local justice.

Haniyeh's crimes are not merely historical; they are ongoing and contribute to the continued conflict between Hamas and Fatah and to the instability in the region. This internal conflict within the Palestinian leadership is damaging to the Palestinian population it is supposed to represent, and it constantly diminishes any chance of peaceful coexistence with its neighbours. The ICC has the rare opportunity to take an important step not just in punishing perpetrators and deterring crimes against humanity, but also in improving Gaza's civil society and promoting peace. For all these reasons, if any investigation is to be pursued into crimes committed in Palestine, then we respectfully urge the Office of the Prosecutor to launch a full investigation into the actions of Haniyeh.



The Jerusalem Institute of Justice

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

The Responsibility of Ismail Haniyeh for crimes  
against humanity committed against the  
Palestinian population in the Gaza Strip from  
June 2014 through July 2018

**Submitted on 24 July 2019**

**by the Jerusalem Institute of Justice**

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## **I. INTRODUCTION**

The Jerusalem Institute of Justice hereby files this communication regarding criminal activities pursuant to Article 15 of the Rome Statute of the International Criminal Court (the “Rome Statute”). We respectfully request that if the Office of the Prosecutor (“OTP”) of the International Criminal Court (“ICC” or “Court”) decides to initiate any investigations into crimes against humanity within “Palestine” or by Palestinian nationals, then such an investigation should concern crimes committed by Ismail Abdel Salam Ahmed Haniyeh (“Haniyeh”), in his capacity as the leader of “Ḥarakat al-Muqāwamah al-’Islāmiyyah” ( حركة المقاومة الاسلامية ) (“ Hamas”).

This communication details Haniyeh’s criminality in exercising effective authority and control over the widespread and/or systemic murder, imprisonment, and torture of civilians in the Gaza Strip (“Gaza”).

We describe how Haniyeh’s acts constitute crimes against humanity under Article 7(1)(a), (e), and (f) of the Rome Statute, which are within the jurisdiction of the Court under Article 53, and satisfy the admissibility requirements of Article 17 in terms of gravity, complementarity, and the interests of justice.

We respectfully submit that the low evidentiary threshold required under Article 53 for the OTP to open an investigation into Haniyeh’s crimes against humanity is clearly met. Taking into account the widespread and systematic nature, as well as the severity of these attacks, there is every reason why it is in the interests of justice to pursue this matter.

## II. CONTENTS OF SUBMISSION

Section III of this communication sets out the historical background and circumstances through which Hamas, and more specifically Haniyeh, came to exercise effective control over the civilian political apparatus in addition to military and paramilitary forces within the Gaza Strip (“Gaza”).

Section IV details the prosecutorial legal standard required to open an investigation: there is reasonable basis to believe that crimes against humanity within the Court’s jurisdiction have been committed, the case is admissible, and the gravity of these crimes provides sufficient reason to initiate an investigation that would serve the interests of justice.

Section V addresses the first two elements necessary for the ICC to have jurisdiction: *ratione personae* (in virtue of nationality or territory) and *ratione temporis* (the crimes happened at a time period over which the ICC has jurisdiction).

Section VI addresses the third element of jurisdiction, *ratione materiae*, the requirement that reasonable basis be shown that crimes against humanity have been committed. This includes the culpable acts, as well as the intent and knowledge requirements on the part of key participants necessary to establish the personal responsibility of Haniyeh.

Section VII explains why this case is admissible for an investigation, addressing in VII A the significant gravity of the crimes, in VII B why there is no complementarity within the Gazan justice system, and in VII C why there are no reasons that it would be in the interests of justice not to proceed with a prosecution (at least subject to a general caveat that the OTP must first deem it possible or appropriate to investigate *any* crimes on the basis of their commission within the territory of “Palestine”).

Section VIII summarises and concludes our submissions. Annexed to the communication is a bibliography of the sources used, including links to the videos referred to and an exhibit that provides extracts from the sources cited.

### **III. HISTORICAL BACKGROUND**

#### **A. Formation of the Palestinian Authority**

The Palestine Liberation Organization (“PLO”) and the State of Israel (“Israel”) entered into the Declaration of Principles on Interim Self-Government Arrangement in September 1993 (“Oslo I”), which, with The Interim Agreement on the West Bank and the Gaza Strip of September 1995 (“Oslo II”), formed part of a series of agreements known collectively as the Oslo Accords.<sup>1</sup> The PLO, in its capacity as the 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, (also known as the Gaza-Jericho Agreement), the Oslo Accords led to the establishment of the Palestinian National Authority (“PA”).<sup>3</sup> The new interim PA assumed administrative control over Gaza, except for the Jewish settlements, soon after it was established. Elections were held in 1996 to determine the first Palestinian Legislative Council with a result of 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**

##### **1. Establishment**

Hamas is an Islamist organization established in 1987 as an offshoot of the Egyptian Muslim Brotherhood Association in Gaza.<sup>5</sup> Initially, the Muslim Brotherhood was mainstream and relatively

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<sup>1</sup> United Nations General Assembly Security Council, *Letter Dated 8 October 1993 from the Permanent Representatives of the Russian Federation and the United States of America to the United Nations Addressed to the Secretary-General* (October 11, 1993); available at:

[https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20PS\\_930913\\_DeclarationPrinciplesInterimSelf-Government%28Oslo%20Accords%29.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20PS_930913_DeclarationPrinciplesInterimSelf-Government%28Oslo%20Accords%29.pdf).

<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: <https://unsco.unmissions.org/israeli-palestinian-interim-agreement-west-bank-and-gaza-strip>.

<sup>3</sup> The Editors of Encyclopedia Britannica, *Palestinian Authority (PA)*, Encyclopedia Britannica; available at: <https://www.britannica.com/topic/Palestinian-Authority>.

<sup>4</sup> Central Elections Commission (CEC), *The 1996 Presidential and Legislative Elections* (1996); available at: <http://www.elections.ps/Portals/0/pdf/Resultselection1996.pdf>.

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

moderate, but many radical small groups have sprouted from it over the decades.<sup>6</sup> The full name of Hamas is al-Harakat al-Muqawwama al-Islamiyya, which translates as the “Islamic Resistance Movement.”<sup>7</sup>

## **2.Hamas’ Aims as Set Out in its Charter**

The Covenant of the Islamic Resistance Movement (also known as the “Hamas Charter”) was published on August 18, 1988, and remains in force. The Hamas slogan is set out in Article 8: “*Allah is its target, the Prophet is its model, the Quran its constitution: Jihad is the path and death for the sake of Allah is the loftiest of its wishes.*”<sup>8</sup>

Hamas has placed the “liberation” of “Palestine” and the recognition of the rights of Palestinians through Jihad (holy war) as well as the establishment of an Islamic Palestine “*from the Mediterranean Sea to the Jordan River*” as its top priorities.<sup>9</sup> In other words, the founding documents of Hamas assert that its mission will not be complete without the destruction of Israel.<sup>10</sup> Numerous other clauses refer to the expulsion and/or killing of Jews, with Article 28 stating: “*Israel, by virtue of its being Jewish and of having a Jewish population, defies Islam and the Muslims*”.<sup>11</sup>

## **3.Hamas Seizes Control of Gaza**

The Israeli government completed its withdrawal from Gaza on September 22, 2005. The unilateral withdrawal brought to the forefront the question of administrative jurisdiction over Gaza. On January 25, 2006, the PA held elections and Hamas won a parliamentary majority. Hamas

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<sup>6</sup> Hroub Khaleed, *Hamas: A Beginner’s Guide*, (The Other Press 2009) pg. 7.

<sup>7</sup> Robert Satloff, *A Primer on Hamas: Origins, Tactics, Strategy, and Response*, The Washington Institute for Near East Policy; available at: <http://www.washingtoninstitute.org/html/pdf/PF53-Satloff.pdf>.

<sup>8</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>9</sup> Hroub Khaleed, *Hamas: A Beginner’s Guide*, (The Other Press 2009), pg. 17.

<sup>10</sup> See also 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), Articles 7, 28.

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

appointed Haniyeh as the PA Prime Minister with the cooperation of Fatah, who had been the majority party previously.<sup>12</sup>

Hamas has functioned as the *de facto* governing authority of Gaza since 2007 when it seized control following several days of violent battle with Fatah, subsequently expelling Fatah forces and political personnel from Gaza.<sup>13</sup>

Several rounds of negotiation aiming to achieve reconciliation between Hamas and Fatah have taken place since 2007. The parties purportedly reached agreements in April and September 2014. Haniyeh, as well as a representative of the PLO appointed by Mahmoud Abbas, the President of the Fatah-led PA since 2005 (“Abbas”), signed both agreements. In these agreements, Hamas agreed to cede control of Gaza to a newly formed Unity Government.<sup>14</sup> However, neither agreement succeeded, and Abbas decided in 2015 to dissolve the Fatah-Hamas Unity Government on the grounds that Hamas was unwilling to release control of operations in Gaza.<sup>15</sup>

In October 2017, a new Fatah-Hamas agreement was signed in Cairo, Egypt. Once again, the agreement aimed to determine the control of Gaza. According to the agreement, the PA was to resume full control of Gaza by December 1, 2017. In exchange, Abbas and the PA were expected to lift crippling restrictions imposed by the PA on the electricity supply to Gaza.<sup>16</sup> However, Fatah and Hamas failed to meet the December 10, 2017 deadline set for the Palestinian Unity Government (led by the PA and operating under the Fatah-Hamas Agreement) to assume full responsibility of Gaza.<sup>17</sup> The fact that such negotiations between Fatah and Hamas were deemed necessary at all is

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<sup>12</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>13</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>14</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>15</sup> Khaled Elgindy, *Palestinian Political Crisis Deepens with Collapse of Unity Government* (June 19, 2015); available at: <http://america.aljazeera.com/articles/2015/6/19/palestinian-political-crisis-deepens-with-collapse-of-unity-government.html>.

<sup>16</sup> Peter Beaumont, *Hamas and Fatah Sign Deal Over Control of Gaza Strip*, The Guardian (October 12, 2017); available at: <https://www.theguardian.com/world/2017/oct/12/hamas-claims-deal-agreed-fatah-control-gaza-strip>.

<sup>17</sup> Middle East Monitor, *Hamas: Reconciliation Agreement with Fatah 'Collapsing'* (December 22, 2017); available at: <https://www.middleeastmonitor.com/20171222-hamas-reconciliation-agreement-with-fatah-collapsing/>.

demonstrative of the fact that Gaza remains under Hamas control. Nothing has changed between the last round of failed negotiations and the date of submission of this communication.

Despite Fatah's formal control of the PA, Gaza has been firmly in Hamas' control since Gaza was wrested away from Fatah in 2007. Indeed, the OTP itself recognized the "*extension of control in 2007*" by Hamas over Gaza in its *2016 Report on Preliminary Examination Activities*.<sup>18</sup>

#### **4. Nature of Hamas' Governance Structure**

Hamas operates through three interrelated wings: social welfare, political, and military.<sup>19</sup> Notwithstanding this supposed separation of roles, it is important to note that Hamas combines them under a unitary leadership and uses each to support the others in furtherance of its general aims as set out in the Hamas Charter.<sup>20</sup>

The social welfare and political wings have traditionally been the public face of Hamas and exercise a jurisdiction which was originally granted to the PA in the Oslo Accords.<sup>21</sup> The social wing includes the prison system, a crucial element in the present communication. The military wing is a more covert network comprised of regular forces alongside military cells and regional networks, answerable ultimately to the central command.<sup>22</sup>

#### **C. Gaza's Criminal Justice System**

The Hamas Ministry of Interior, under the overall command of the Prime Minister, is responsible for the Police Commander, who in turn oversees a force numbering more than 12,000. This force includes the National Security Forces, Civil Police, Security and Protection Apparatus,

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<sup>18</sup> The Office of the Prosecutor, *Report on Preliminary Examination Activities 2016* (November 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> Matthew Levitt and Dennis Ross, *Hamas: Politics, Charity, and Terrorism in the Service of Jihad*, (2007), pg.2.

<sup>20</sup> Hroub Khaleed, *Hamas: A Beginner's Guide*, The Other Press, (2009), pg. 19.

<sup>21</sup> See in particular the Oslo II Accord (September 28, 1995).

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

and Internal Security Apparatus.<sup>23</sup> The Minister of Interior is also, covertly, in command of (or at the very least strongly linked to) the Izzad-Din al-Qassam Battalions, a division which serves as a major part of the military forces of Hamas, and which numbers approximately 2,500 soldiers.<sup>24</sup>

The Ministry of Interior likewise controls the Department of Reform and Rehabilitation, which administers the prisons in Gaza.<sup>25</sup> The justice system of Gaza includes Shari'a, administrative, civil, criminal, and military courts; it is described further, below, in Section VII B of this communication.<sup>26</sup>

#### **D. Ismail Haniyeh**

Ismail Haniyeh rose to prominence within Hamas in the 1990s through his close relationship with the co-founder of the organization, Sheikh Yassin.<sup>27</sup> As noted above, following Hamas' victory in the 2006 elections, Haniyeh was appointed Prime Minister of the PA.<sup>28</sup> In 2007, during the Fatah-Hamas clashes for control, Abbas attempted to remove Haniyeh from that position, although Haniyeh ignored that order and continued acting as the Prime Minister of the Hamas controlled Gaza.<sup>29</sup> Since then, Haniyeh has been a leading public representative of Hamas from within Gaza.

From 2014 to 2017 Haniyeh served as the deputy leader of Hamas.<sup>30</sup> On May 6, 2017, Haniyeh was elected as the head of Hamas's political wing.<sup>31</sup> In reality his influence and control extends

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<sup>23</sup> Sayigh Yezid, *Policing the People, Building the State: Authoritarian Transformation in the West Bank and Gaza*, The Carnegie Papers, (2011), pg. 6; available at: [http://carnegieendowment.org/files/gaza\\_west\\_bank\\_security.pdf](http://carnegieendowment.org/files/gaza_west_bank_security.pdf).

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

<sup>25</sup> Amnesty International, *Strangling Necks' Abductions, Torture and Summary Killings of Palestinians by Hamas Forces During the 2014 Gaza/Israel Conflict*, (2015); available at: <https://www.amnesty.org/download/Documents/MDE2116432015ENGLISH.PDF>.

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

<sup>27</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>28</sup> *Id.*

<sup>29</sup> Jewish Virtual Library, *Ismail Haniyeh (1955- )*; available at: <http://www.jewishvirtuallibrary.org/ismail-haniyeh>; Counter Extremism Project, *Ismail Haniyeh*; available at: <http://www.counterextremism.com/extremists/ismail-Haniyeh>.

<sup>30</sup> Counter Extremism Project, "Ismail Haniyeh"; available at: <https://www.counterextremism.com/extremists/ismail-haniyeh>

<sup>31</sup> Nidal al-Mughrabi, *Hamas Elects Former Deputy Haniyeh as New Political Chief*, Reuters (May 6, 2017); available at: <https://www.reuters.com/article/us-palestinians-hamas-election/hamas-elects-former-deputy-haniyeh-as-new-political-chief-idUSKBN1820DV>.

beyond “political” matters. Haniyeh himself has said that Hamas makes no distinction between its political and military wings, and has even gone so far as to vow to “*take payments intended for government employees and funnel them to ‘military personnel.’*”<sup>32</sup> In January 2018, the United States Department of State named Haniyeh as a Specially Designated Global Terrorist,<sup>33</sup> noting: “*Haniyeh has close links with Hamas’ military wing and has been a proponent of armed struggle, including against civilians.*”<sup>34</sup>

### **E. Gaza Conflict 2014**

The kidnapping and subsequent murder of three Israeli teenagers who were hitchhiking to their homes in the Israeli settlement of Alon Shvut on June 12, 2014 triggered the Gaza conflict in 2014 (the “2014 Conflict”). The bodies of the three missing teenagers were found on June 30, 2014, in the Northwest area of Hebron. It was determined that they had been shot and killed shortly after the June 12 abduction.<sup>35</sup>

Following the kidnapping, the Israeli Defense Forces (“IDF”) launched Operation “Brother’s Keeper.”<sup>36</sup> During this operation, Israel arrested approximately 350 members of Hamas. In August 2014, Hamas official Salah al-Arouri claimed the organization’s military wing was responsible for the kidnapping and murders.<sup>37</sup>

A ceasefire in the 2014 Conflict proposed by the Egyptian government in mid-July was backed by President Abbas. However, in a notable example of Hamas’s complete control within Gaza,

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<sup>32</sup> The Tower, “Haniyeh: There’s No Distinction Between Hamas’ Military, Civilian Wings”.

<sup>33</sup> Under Section 1(b) of Executive Order (E.O.) 13224.

<sup>34</sup> US State Department, *State Department Terrorist Designations of Ismail Haniyeh, Harakat al-Sabireen, Liwa al-Thawra, and Harakat Sawa'd Misr (HASM)* (January 31, 2018); available at: <https://www.state.gov/r/pa/prs/ps/2018/01/277792.html>.

<sup>35</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>36</sup> State of Israel, *The 2014 Gaza Conflict: 7 July-26 August; Factual and Legal Aspect* (May 2015); available at: <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf>.

<sup>37</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>.

Hamas continued to fire rockets at Israel from Gaza despite Abbas' express wishes.<sup>38</sup>

In a notable example of the “lawfare” waged by Palestinians against Israel in international courts and forums, the Palestinian ad hoc submission to the ICC’s jurisdiction over its territory pursuant to Article 12(3) of the Rome Statute, lodged January 1, 2015 (the “Declaration”) refers to events “*since June 13, 2014,*”<sup>39</sup> thereby deliberately excluding the kidnapping and murder of the three innocent Israeli teenagers by one day.

Though the crimes of Haniyeh referred to in the present communication were not restricted to ones committed within the 2014 Conflict, as will be shown below in Section VI, Hamas and Haniyeh used this period as both a distraction and as an excuse to intensify their crimes against humanity.

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<sup>38</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>39</sup> ICC, *Preliminary Examination – Palestine*; available at: <https://www.icc-cpi.int/palestine>.

#### IV. PROSECUTORIAL LEGAL STANDARD

Article 53 of the Rome Statute provides:

“(1) The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. 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;
- (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.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.”

Through its use of the words “*shall ... unless there is no reasonable basis to proceed,*” the Rome Statute indicates that having evaluated the information made available, the OTP is under a positive duty to open an investigation which can *only* be displaced if no reasonable basis is shown pursuant to factors (a) – (c) of Article 53(1). The three factors will be addressed in turn in the following Sections of this communication.

It should be noted 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 and trial, such as the decision to issue an arrest warrant at Pre-Trial stage,<sup>40</sup> or ultimately to make a substantive finding of guilt.<sup>41</sup> Indeed, a Pre-Trial Chamber of the ICC described the standard to be met under Article 53 as “*the lowest evidentiary standard provided for in the Statute.*”<sup>42</sup> The Pre-Trial Chamber

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<sup>40</sup> UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), Articles 58(2)(d), 61(7) (July 17, 1998); available at: <http://www.refworld.org/docid/3ae6b3a84.html>.

<sup>41</sup> *Id.*, Article 66(3).

<sup>42</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:

said further: “*the information available to the Prosecutor is neither expected to be ‘comprehensive’ nor ‘conclusive’ if compared to evidence gathered during the investigation.*”<sup>43</sup> As the Pre-Trial Chamber 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>44</sup>

Any investigation into the complex situation in “Palestine” should be balanced in nature. The OTP has recently affirmed that it “*will examine allegations against all groups or parties within a particular situation*”.<sup>45</sup> We note that the OTP has taken preliminary steps to investigate potential crimes within the “Situation in Palestine”.<sup>46</sup> Pre-Trial Chamber I, which has been assigned the “Situation in Palestine” by the ICC, has even taken the extraordinary step of ordering its registry “*to establish, as soon as practicable, a system of public information and outreach activities for the benefit of the victims and affected communities in the situation in Palestine.*”<sup>47</sup>

A submission to the jurisdiction of the ICC made by one party to a conflict should not exclude investigation into the acts of the other party. This basic principle of justice applies notwithstanding that a submission was made by the PA with a view to solely implicate Israeli actions. In this case it is appropriate that the OTP should give due consideration to the crimes against humanity committed by Hamas, especially in circumstances when these crimes are a cynical, calculated and sustained attack against the civilian population of Gaza.

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[https://www.icc-cpi.int/CourtRecords/CR2010\\_02399.PDF](https://www.icc-cpi.int/CourtRecords/CR2010_02399.PDF).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*, para. 33.

<sup>45</sup> The Office of the Prosecutor, *Policy Paper on Case Selection and Prioritization* (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>46</sup> ICC, *Preliminary Examination – Palestine* (date visited: July 3, 2018); available at: <https://www.icc-cpi.int/palestine>.

<sup>47</sup> Pre-Trial Chamber I, *Decision on Information and Outreach for the Victims of the Situation*, No: ICC-01/18 (July 13, 2018); available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-2>.

## V. JURISDICTION RATIONE LOCI, PERSONAE AND TEMPORIS

### A. Legal Standard

Pursuant to Article 53(1)(a) of the Rome Statute, there are three requirements for the ICC to accept jurisdiction over a crime: (1) *ratione loci or personae*: territorial or nationality-based jurisdiction; (2) *ratione temporis*: the crimes alleged were committed within a time period during which the ICC had jurisdiction; and (3) *ratione materiae*: subject-matter jurisdiction over the relevant crime alleged.

Requirements (1) and (2) are addressed in this Section. Jurisdiction *ratione materiae* is addressed in Section VI.

### B. Application to Facts

#### 1. Ratione Loci

Pursuant to Article 24 of the Statute, the ICC must have either territorial or personal jurisdiction over the crimes in order to proceed with a prosecution. Article 12(2)(a) of the Rome Statute provides that the ICC may exercise territorial jurisdiction (“*ratione loci*”) over “[t]he State or the territory of which the conduct in question occurred...”, provided such State has accepted the jurisdiction of the ICC.

The crimes referred to in this communication occurred in the territory of Gaza. As noted above, after gaining the status of observer state at the UN in November 2012,<sup>48</sup> on January 1, 2015, President Abbas, purportedly on behalf of the “State of Palestine” lodged the Declaration pursuant to 12(3) of the Rome Statute accepting the jurisdiction of the ICC over alleged crimes committed “*in the occupied Palestinian territory, since June 13, 2014.*”<sup>49</sup> Accordingly, if the OTP considers that

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<sup>48</sup> Middle East Eye, *Hamas Signs Palestinian Application for ICC Membership* (February 12, 2015); available at: <http://www.middleeasteye.net/news/hamas-signs-palestinian-application-icc-membership-1878224231>.

<sup>49</sup> ICC, *Preliminary Examination – Palestine*; (date visited: July 3, 2018); available at: <https://www.icc-cpi.int/palestine>.

Gaza is within “*the occupied Palestinian territory*” and that President Abbas had the authority to submit such territory to the jurisdiction of the ICC, then the OTP should make a finding that the ICC has jurisdiction over the crimes described herein on the basis of *ratione loci*.

For the avoidance of doubt, the Jerusalem Institute of Justice reserves its position as to whether notwithstanding the Palestinian submission to the ICC’s jurisdiction, and the latter’s purported acceptance of such submission, it is legally permissible or otherwise appropriate in the interests of justice for the ICC to take jurisdiction over matters within the territory of “Palestine,” given that the borders of any such entity remain undetermined (and its neighbor Israel is not subject to the jurisdiction of the ICC).<sup>50</sup> As explained in further detail below, any purported delegation by Abbas of prescriptive criminal jurisdiction over Israelis would also be in breach of the Oslo Accords. All submissions in this communication – and indeed any other made by the Jerusalem Institute of Justice concerning “Palestine” – are subject to this general caveat.

## **2. Ratione Personae**

An alternative route to the ICC having jurisdiction over the crimes set out in this communication is via the nationality principle stated in Article 12(2)(b) of the Rome Statute. Haniyeh is a Palestinian national, a State party to the Rome Statute; therefore, his actions in any territory fall within the ICC’s jurisdiction.

Owing to the uncertain status in Public International Law of the “State of Palestine,”<sup>51</sup> and despite the decision of the Pre-Trial Chamber to issue an extraordinary call for evidence from victims

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<sup>50</sup> A resolution adopted by the UN General Assembly on 4 December 2012 (A/RES/67/19), which accorded to Palestine non-member observer State status in the United Nations, did not thereby create a State or determine the borders of any such entity. In any case, it is generally accepted that UN General Assembly resolutions are not, of themselves, binding in international law. See e.g. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, of July 8, 1996 at paras. 68 – 70. Nor is the position altered by Security Council Resolution 2334 of December 23, 2016, which is fully consistent with the continuation of the Oslo Accords. See Andreas Zimmermann, “Security Council Resolution 2334 (2016) and its Legal Repercussions Revisited”, *EJILtalk* (January 20, 2017); available at: <https://www.ejiltalk.org/security-council-resolution-2334-2016-and-its-legal-repercussions-revisited/>.

<sup>51</sup> As confirmed for example by the ICJ in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall on Occupied Palestinian Territory*, 9 July 2004.

in the “State of Palestine,” we do not understand the OTP to have already determined that it has jurisdiction *ratione loci* or *personae* in this regard.<sup>52</sup>

As noted in Section V B.1., (and even if there is such a juridical entity, which is not admitted) the borders of “Palestine” remain undetermined. They are a matter reserved to “final status” negotiations under the Oslo Accords.<sup>53</sup> No agreement has yet been reached in this regard. The fact that in theory the PA, and in practice Hamas, exercise day-to-day control over Gaza is not determinative of the legitimacy of either regime doing so *as a State* in Public International Law. As such it would not be appropriate for the OTP to pre-judge the outcome of negotiations as to borders by preemptively taking jurisdiction over this territory prior to an agreement being reached between “Palestine” and Israel.

As described in Section III B.1., the PA was created and granted certain administrative/governmental powers pursuant to the Oslo Accords. Oslo II is the specific instrument which gives the PA (and by extension the Hamas administration) authority over certain aspects of the governance of the West Bank and Gaza Strip.<sup>54</sup> It remains binding as a matter of international law.<sup>55</sup> Oslo II provides at Article XVII(2)(c) that:

“The territorial and functional jurisdiction of the Council [i.e. the Palestinian leadership] will apply to all persons, except for Israelis, unless otherwise provided in this Agreement.”<sup>56</sup>

Accordingly, Hamas lacks any criminal jurisdiction over Israelis. Pursuant to the well-established principle<sup>57</sup> of *nemo dat quod non habet* (you cannot give to another what you do not have),

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<sup>52</sup> Pre-Trial Chamber I, *Decision on Information and Outreach for the Victims of the Situation*, No: ICC-01/18 (July 13, 2018); available at [https://www.icc-cpi.int/CourtRecords/CR2018\\_03690.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_03690.PDF).

<sup>53</sup> See Declaration of Principles on Interim Self-Government Arrangements (September 13, 1993), (Oslo I), Article V (3).

<sup>54</sup> Agreement of September 28, 1995.

<sup>55</sup> This is so notwithstanding occasional announcements of a political nature by President Abbas to the effect that “Oslo is dead”.

<sup>56</sup> The Oslo Accords make no provision for the Palestinian leadership to have jurisdiction in criminal matters over Israelis.

<sup>57</sup> Pursuant to Article 38 of the Statute of the International Court of Justice, this principle is an example of “the general principles of law recognized by civilized nations;” – and as such is a valid source of international law.

the above provision of the Oslo Accords provides an additional reason why Mahmoud Abbas was not legally entitled to grant the ICC jurisdiction over any criminal acts committed *by Israelis*.<sup>58</sup>

We respectfully submit that, if the ICC is to accept any jurisdiction arising from the purported submission to its jurisdiction by Abbas, a reasonable and just approach would be for the ICC to take jurisdiction over *Palestinian nationals* from the date of the purported Article 12(3) submission, but not to take submission otherwise over crimes committed on “Palestinian territory” by non-Palestinian nationals until such a point as such territory is properly determined as a matter of Public International Law and/or the relevant provisions of the Oslo Accords are formally amended or terminated.

In other words, it would be appropriate for the ICC to take jurisdiction *ratione personae* at present, but not *ratione loci* until territorial disputes are resolved and when doing so would contradict a pre-existing international treaty. Doing so otherwise risks the OTP, and indeed the ICC, acting *ultra vires* and thereby rendering invalid any convictions made on the basis *only* of territorial jurisdiction over “Palestine.” Following our recommended approach, Haniyeh’s crimes continue to be within the jurisdiction of the ICC because he is a Palestinian national, rather than because of where the conduct took place.

### **3. Ratione Temporis**

Pursuant to Article 11 of the Rome Statute, the temporal jurisdiction of the Court applies from the date of its entry into force. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under Article 12(3).<sup>59</sup>

“Palestine’s” purported Declaration under Article 12(3) was a retrospective submission to the jurisdiction of the ICC, for all events since June 13, 2014. On January 2, 2015, the Government of

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<sup>58</sup> Eugene Kontorovich, “Israel/Palestine — The ICC’s Uncharted Territory”, *Journal of International Criminal Justice*, Volume 11, Issue 5, 1 (December 2013), pgs. 979–999; available at: <https://doi.org/10.1093/jicj/mqt070>.

<sup>59</sup> OTP, *Policy Paper on Preliminary Examinations* (November 2013), para. 37; 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).

“Palestine” purportedly acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General pursuant Article 125(2) of the Rome Statute. The ICC has declared that the Rome Statute entered into force in regard to “Palestine” on April 1, 2015.<sup>60</sup> The crimes referred to in this communication occurred or continued after June 13, 2014. Accordingly, subject to the caveats above, the ICC would have temporal jurisdiction.

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<sup>60</sup> ICC Website, *Entry on Palestine*; available at: <https://www.icc-cpi.int/palestine>

## VI. JURISDICTION RATIONE MATERIAE

Provided the other bases for jurisdiction are satisfied, the basis for the ICC to take jurisdiction *ratione materiae* is that Ismail Haniyeh has committed crimes against humanity under Article 7 of the Rome Statute, specifically: 7(1)(a), (e), and (f).

Article 7(1) of the Rome Statute provides:

“Crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>61</sup>

In sections VI A – C below, we elaborate upon these general requirements of crimes against humanity. We then set out the specific crimes that have been committed in Gaza including Section VI D (murder), Section VI E (imprisonment), and Section VI F (torture). In Section VI G, we explain the personal criminal responsibility of Haniyeh for these crimes.

Within a totalitarian and opaque society such as that maintained by Hamas in the Gaza Strip, where freedom of speech and press freedom are highly restricted, definitive evidence of crimes against humanity by the ruling party can be difficult to come by. This is especially so in circumstances where those who speak out may well face the same fate as the original victims. Nonetheless, the following sections show that despite the severe restrictions on individuals within Gaza, as well as upon press freedom to report the administration’s crimes, there is compelling evidence that crimes against humanity have been committed.<sup>62</sup>

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<sup>61</sup> ICC, *Elements of Crimes*. Article 7; available at: <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

<sup>62</sup> For example, Freedom House reported in 2017: “Hamas in the Gaza Strip stepped up its use of summonses and interrogations to intimidate journalists who produced critical coverage”. See also Freedom House, “West Bank and Gaza Strip”, Freedom of the Press Surveys, 2014-2017, available at: <https://freedomhouse.org/report/freedom-press/2017/west-bank-and-gaza-strip>

## A. “Widespread or Systematic”

### 1. Legal Standard

Article 7(1) of the Rome Statute requires that for an attack to be considered a crime against humanity, it must be either “*widespread or systematic*”. These conditions apply disjunctively meaning that only one of the described elements must be satisfied.<sup>63</sup> “Widespread” refers to the “*large-scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims.*”<sup>64</sup> “Systematic” refers to “*the organized nature of the acts of violence and the improbability of their random occurrence.*”<sup>65</sup>

To determine whether an attack satisfies the requirements, “*The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account.*”<sup>66</sup> The individual act need not be widespread or systemic in and of itself; however, it must be a part of an attack that is considered widespread or systemic.<sup>67</sup> This is commonly described as the nexus between the attack and the individual act.<sup>68</sup>

Accordingly, a “*widespread attack*” still needs to be carried out in the context of an organizational policy, meaning the attack needs to be “*thoroughly organized and follow a regular pattern.*” Further, “*such a policy may be made either by groups of persons who govern a specific*

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<sup>63</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. 94; available at: [https://www.icc-cpi.int/CourtRecords/CR2010\\_02399.PDF](https://www.icc-cpi.int/CourtRecords/CR2010_02399.PDF).

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

<sup>65</sup> *Id.*

<sup>66</sup> Report of the International Law Commission on the Work of its Forty-Eighth Session, Yearbook of the International Law Commission, 1996, Vol. II (Part Two), at pg. 47 as cited by Sean D. Murphy, Special Rapporteur, *First Report on Crimes Against Humanity International Law Commission – 67th session*; para. 95.

<sup>67</sup> *Id.*, para.96.

<sup>68</sup> Pre Trial Chamber II, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, No: ICC-01/05-01/08 (June 15, 2009), para.84; available at: <https://www.icc-cpi.int/pages/record.aspx?uri=699541>.

*territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population.”*<sup>69</sup>

## **2.Application to Facts**

In regard to each of the crimes detailed in Sections VI D, E and F, the relevant acts were widespread and/or systematic in nature. Further explanation is provided below of how these attributes applied to the specific crimes of murder, imprisonment, and torture, but the following general observations can be made as to Hamas’ use of these reprehensible actions as a central part of its governmental policies.

The NGO Amnesty International has recorded in a report entitled ‘*Strangling Necks*’: *Abduction, torture and summary killings of Palestinians by Hamas forces during the 2014 Gaza/Israel conflict*, that:

“ Hamas forces carried out a brutal campaign of abductions, torture and unlawful killings against Palestinians accused of “collaborating” with Israel and others during Israel’s military offensive against Gaza in July and August 2014.”<sup>70</sup>

Philip Luther, Director of the Middle East and North Africa Programme at Amnesty International commented of the report’s findings:

“In the chaos of the conflict, the de facto Hamas administration granted its security forces free rein to carry out horrific abuse including against people in its custody. These spine-chilling actions, some of which amount to war crimes, were designed to exact revenge and spread fear across the Gaza Strip.”<sup>71</sup>

Though Hamas appears to have used the 2014 Conflict as cover to intensify its campaign of intimidation against perceived political dissidents, these acts have not stopped in the years since,

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<sup>69</sup> *Id.*, para.396.

<sup>70</sup> Amnesty International, “Gaza: Palestinians tortured, summarily killed by Hamas forces during 2014 conflict” (May 27, 2015); available at: <https://www.amnesty.org/en/latest/news/2015/05/gaza-palestinians-tortured-summarily-killed-by-hamas-forces-during-2014-conflict/>.

<sup>71</sup> *Id.*

and indeed continue to the present day. For instance, Hamas executed three men for political “crimes” in April 2017. Reuters reported:

“The Hamas-run Interior Ministry said the men, aged 32, 42 and 55, were convicted of treason and spying for hostile foreign parties and had provided information that helped Israel track and kill Palestinians, including leaders of militant factions.”<sup>72</sup>

Human Rights Watch indicated that these killings formed part of a general campaign of intimidation against the Gazan population by Hamas. Sarah Leah Whitson, Executive Director of the NGO’s Middle East division, criticized these tactics in a statement:

“Hamas authorities will never achieve true security or stability through firing squads or by the gallows, but rather through respect for international norms and the rule of law.”<sup>73</sup>

## **B. “Attack Directed Against Any Civilian Population”**

### **1. Legal Standard**

Article 7(2) of the Rome Statute defines an attack directed at a civilian population as “*a course of conduct involving the multiple commission of acts...against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.*” Nominally, there are two elements to the above standard: (a) an attack; and (b) which is directed against any civilian population.

However, in practice, element (a) is satisfied by the actions which otherwise give rise to the crimes – in other words it is not treated as a freestanding requirement. The ICC’s Pre-Trial Chamber has confirmed that the attack need not be a military act, but can be a “*campaign or operation carried out against the civilian population.*”<sup>74</sup> Indeed, the Pre-Trial Chamber held further that “[t]he

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<sup>72</sup> Nidal al-Mughrabi, “Hamas executes three Palestinians in Gaza, says they collaborated with Israel”, *Reuters* (April 6, 2017); available at: <https://www.reuters.com/article/us-palestinians-gaza-spies-iduskbn1781fe>

<sup>73</sup> *Id.*

<sup>74</sup> Pre Trial Chamber II; *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, No: ICC-01/05-01/08 (June 15, 2009), para.75; available at: <https://www.icc-cpi.int/pages/record.aspx?uri=699541>.

*commission of the acts referred to in article 7(1) of the Statute constitute the ‘attack’ itself and, beside the commission of the acts, no additional requirement for the existence of an ‘attack’ should be proven.”*<sup>75</sup> Similarly, the ICTY has held that “[t]he attack in the context of a crime against humanity is not limited to the use of armed force; it encompasses any mistreatment of the civilian population”.<sup>76</sup>

As to element (b), for the attack to qualify as a crime against humanity, the perpetrator must commit multiple instances of the relevant crimes enumerated in Article 7(1); a single isolated incident will not qualify. The standard “requires that the State or organization actively promote or encourage such an attack against a civilian population.”<sup>77</sup>

Civilian population is defined in Article 50(1) of the Additional Protocol I of the Geneva Convention as, *inter alia*, anyone who is not a part of an armed forces, member of militia or volunteer corps, and who is not engaging in the customs of war (by, for example, carrying arms openly). The term is to be interpreted broadly,<sup>78</sup> and the “presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.”<sup>79</sup> The Court has further stated that a “civilian population” could be of any nationality, ethnicity or other distinguishing features<sup>80</sup> and, particularly relevant for present purposes: “the population targeted can include a group defined by its (perceived) political affiliations.”<sup>81</sup>

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<sup>75</sup> *Id.* See also on this point: ICTR, *The Prosecutor v Akayesu*, Case No: ICTR-96-4-T “Judgment” (September 2, 1998), para. 581.

<sup>76</sup> ICTY Appeals Chamber, *Prosecutor v Kunarac et al.*, No: IT-96-23 & 23/1 “Judgement” (June 12, 2002), para. 86; available at: <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>.

<sup>77</sup> UN General Assembly, Rome Statute of the International Criminal Court (2010), Article 7(3); available at: <http://www.refworld.org/docid/3ae6b3a84.html>.

<sup>78</sup> ICTY Trial Chamber; *Prosecutor v. Tadic*, No: IT-94-1-T “Judgement” (May 7, 1997), para. 643; available at: <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>.

<sup>79</sup> ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, of 8 June 1977, Article 50(3); available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=E1F8F99C4C3F8FE4C12563CD0051DC8A>.

<sup>80</sup> Pre Trial Chamber I; *Decision on the Confirmation of Charges Against Germain Katanga and Mathieu Ngudjolo*, No: ICC-01/04-01/07 (September 30, 2008), para. 399; available at: <https://www.icc-cpi.int/pages/record.aspx?uri=571253>.

<sup>81</sup> Pre Trial Chamber II; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, No: ICC-01/09-01/11 (February 4, 2012), para. 164; available at: <https://www.icc-cpi.int/pages/record.aspx?uri=1314535>.

## **2. Application to Facts**

In broad terms, the civilian population against which the attacks are directed by Hamas is that of Gaza. Specifically, within the Gazan population, the attacks are directed against anyone who expresses (or indeed is perceived to express) political dissent against Hamas, or otherwise is seen to threaten its authoritarian grip on the territory. The most vicious of these attacks are directed against groups defined by their political affiliations, including supporters of Fatah, and anyone who is thought to be supporting or assisting Israel.

The US Department of State emphasized two important features of Hamas' *modus operandi* in its 2016 Report on the Occupied Territories, *first* that the abuses are committed habitually by Hamas' official security forces, and *secondly* that they are targeted against certain sectors of the population defined by political beliefs. The US Department of State said as follows: "*Human rights abuse under Hamas included security forces killing, torturing, arbitrarily detaining, and harassing opponents, including Fatah members and other Palestinians with impunity*".<sup>82</sup> Similarly, the UN has reported that UN Hamas officials and groups "[t]arget in particular dissenting voices, journalists and social media activists, members of Salafi groups and political opponents considered as 'collaborating' with Israel or the Palestinian Authority."<sup>83</sup>

### **C. "With Knowledge of the Attack"**

#### **1. Legal Standard**

Article 7(1) of the Rome Statute requires that for crimes against humanity to be committed, there must be "*knowledge of the attack*." The perpetrator need not know every characteristic or detail of the plan or attack to have the prerequisite knowledge.<sup>84</sup> The ICC's *Element of Crimes* document

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<sup>82</sup> US Department of State, 2016 Country Reports on Human Rights Practices – The Occupied Territories (March 3, 2017), pgs. 80, 92; available at: <http://www.refworld.org/docid/58ec89b9af.html>.

<sup>83</sup> United Nations, *Gaza Ten Years Later* (July 2017), pg. 27,; available at: [https://unsco.unmissions.org/sites/default/files/gaza\\_10\\_years\\_later\\_-\\_11\\_july\\_2017.pdf](https://unsco.unmissions.org/sites/default/files/gaza_10_years_later_-_11_july_2017.pdf).

<sup>84</sup> ICC, *Elements of Crimes*, Article 7(2); available at: <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

specifies that, “*In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.*”<sup>85</sup> This passage from the *Elements of Crimes* is consistent with Article 30(1) of the Rome Statute which states that “[u]nless 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.” Article 30(2) of the Rome Statute provides that a person has intent where:

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

Knowledge is defined in Article 30(3) as “*the awareness that a circumstance exists or a consequence will occur in the ordinary course of events.*” To determine whether a perpetrator has the requisite knowledge to be held liable for crimes against humanity, the Court may rely on circumstantial evidence “*such as: the accused's position in the military hierarchy; his assuming an important role in the broader criminal campaign; his presence at the scene of the crimes; his references to the superiority of his group over the enemy group; and the general historical and political environment in which the acts occurred.*”<sup>86</sup>

## **2.Application to Facts**

There is overwhelming circumstantial evidence (admissible pursuant to Article 30(3) of the Rome Statute) that the perpetrators of the relevant crimes had the requisite knowledge and intent to fulfill Article 7(1) of the Rome Statute. This element only needs to be satisfied by the perpetrator of the underlying criminal act, and does not apply to a person with command responsibility who did not

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<sup>85</sup> *Id.*

<sup>86</sup> Pre Trial Chamber I; *Decision on the Confirmation of Charges Against Germain Katanga and Mathieu Ngudjolo*, No: ICC-01/04-01/07 (September 30, 2008), para. 402; available at: <https://www.icc-cpi.int/pages/record.aspx?uri=571253>

directly participate, such as Haniyeh (albeit that Haniyeh would have had this knowledge also). As explained below, Haniyeh's individual criminal responsibility arises from Article 28(b) of the Rome Statute in his capacity as a civilian superior accountable for actions taken by his subordinates. The mental requirements associated with Haniyeh will be discussed below in Section VI F.

The fact that the acts of violence and intimidation described herein were carried out predominantly against individuals politically opposed to Hamas is strong *prima facie* evidence that those carrying out the individual actions knew precisely why such individuals were singled out for abuse; it was not a random selection. Moreover, in order for the criminal acts to have their full desired effect of intimidating the population of Gaza into submission, they have been publicized by Hamas so as to serve as a lesson to anyone who might otherwise consider opposing its aims. In April 2017, the Hamas Ministry of the Interior announced a one-week amnesty:

“For the sake of national and social responsibility, the interior and national security ministry will open the door of repentance to those who have fallen victim to the occupation and its intelligence services.”<sup>87</sup>

The statement by the Hamas Ministry of Interior ends threateningly: “*Those who do not turn themselves in will be in the hands of the security services and considered forewarned*”. The references to the “*hands of the security services*” and “*forewarned*” clearly alludes to the criminal acts of torture, imprisonment and murder to which political dissidents and supposed collaborators would be subject. The perpetrators of individual crimes could not have been blind to the publicity campaigns by Hamas concerning its own brutality, and we invite the OTP to find as much.

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<sup>87</sup> Dov Lieber, “Hamas tells ‘collaborators’ to turn selves in amid hunt for assassins”, *The Times of Israel*, September 4, 2017; available at: <https://www.timesofisrael.com/hamas-tells-collaborators-to-turns-selves-in-amid-hunt-for-assassins/>

## **D. Murder**

### **1. Legal Standard**

The ICC's *Element of Crimes* provides that for the crime of murder to constitute a crime against humanity, the following factors must be present:

- “1. The perpetrator killed one or more persons;
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and,
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systemic attack against a civilian population.”<sup>88</sup>

In a leading textbook, William Schabas writes that “*The term ‘killed’ is interchangeable with the term ‘caused death’*”.<sup>89</sup> The death of a victim must have occurred as a result of an act or of an omission of the perpetrator.<sup>90</sup> The perpetrator must have intended to engage in killing one or more persons, meant to cause death, or was aware that death would occur in the ordinary course of events.<sup>91</sup> It is therefore not required that perpetrator directly participate in the murder so long “*as the result of omissions known to be likely to lead to death.*”<sup>92</sup> Consequently, it would still be considered murder if a victim later succumbs to injuries sustained from torture during interrogation or imprisonment.

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<sup>88</sup> ICC, *Elements of Crimes*, Article 7; available at: <https://www.icc-cpi.int/NR/ronlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

<sup>89</sup> William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, (Oxford University Press, 2010), pg. 158.

<sup>90</sup> ICTY Appeals Chamber, *Prosecutor v. Kvočka et. al.*, No: IT-98-30/1-A “Judgement” (February 28, 2005), para. 251; available at: <http://www.icty.org/x/cases/kvočka/acjug/en/kvo-aj050228e.pdf>.

<sup>91</sup> ICTY Appeals Chamber, *Prosecutor v. Vlastimir Dordevic*, No: IT-05-87/1-A “Judgement” (January 27, 2014), para. 548; available at: <http://www.icty.org/x/cases/djordjevic/acjug/en/140127.pdf>.

<sup>92</sup> See e.g., Extraordinary Chambers in the Courts of Cambodia, *Prosecutor v. Kaing Guek Eay*, No: 001/18-07-2007/ECCC/TC “Judgement” (July 26, 2010); para. 437; available at: [https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726\\_Judgement\\_Case\\_001\\_ENG\\_PUBLIC.pdf](https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf).

## **2. Application to Facts**

The first element of this crime, that the perpetrator killed one or more persons, is evidenced in this case through reports and testimonies of individuals from Gaza describing how individuals' friends, family and other acquaintances have been killed by Hamas.

A large number of the deaths in question took place while the victim was in the custody of the Gaza police and/or security forces. The International Committee of the Red Cross stated in a 2013 publication entitled *Guidelines for Investigating Deaths in Custody*:

“When people are deprived of their liberty, responsibility for their fate rests mainly with the detaining authorities, who must guarantee the life and physical integrity of each detainee. Therefore, when someone dies in custody, it is only fitting that an independent investigation be conducted – regardless of the presumed cause of death, which may be natural or accidental, but which may also have been an instance of unlawful killing or the result of ill treatment or inadequate conditions of detention. A prompt, impartial and effective investigation is essential.”<sup>93</sup>

In light of these principles, we respectfully submit that the OTP should treat the deaths of political prisoners in Gaza's prisons, whether through alleged suicide or purported “natural causes”, as extremely suspicious. Coupled with evidence in many cases that the individuals were tortured prior to their deaths, we suggest that there is at the very least *prima facie* evidence that those deaths constituted unlawful killings by the Hamas security forces.

In their 2017 Report, the Palestinian Centre for Human Rights (“PCHR”), an NGO based in Gaza City, recorded at least three deaths that occurred in two weeks in September 2017 in Gaza police stations and detention facilities, which were likely due to acts of torture and degrading treatment or resulting from omissions in terms of providing detainees protection and security.<sup>94</sup> We observe that the fact that an NGO based in Gaza was able to report these occurrences is evidence either that the

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<sup>93</sup> ICRC, *Guidelines for Investigating Deaths in Custody* (December 21, 2013), pg. 5; available at: <https://www.icrc.org/eng/assets/files/publications/icrc-002-4126.pdf>

<sup>94</sup> Palestinian Centre for Human Rights, *Third Case During This Month in Gaza, PCHR Calls upon Attorney General to Investigate into Death of Prisoner in Al-Shuja'iyya Police Station* (September 26 2017); available at: <https://pchr-gaza.org/en/?p=9485>.

practices are so widespread in Gaza as to be undeniable even by a regime which otherwise abjures criticism, or (and perhaps additionally) that Hamas actively consented to the publication of these events so as to create a climate of fear. Either way the result is damning.

On September 19, 2017, Hamas announced the death of a detainee after he allegedly jumped out of an investigation room window on the fourth floor of the Gaza Prosecution Building.<sup>95</sup> According to the statement of the victim's father; after examining his son's body, he discovered wounds consistent with torture and potential indications that the death was not self-inflicted:

“I found a bruise on my son's left eye and beating signs on his feet and throughout his body. After that, I went to the office of the Attorney General and demanded not to bury my son until I know the circumstances of his death. I told them that my son would never commit suicide. The Attorney General advised me to bury my son. My son was buried, but the Attorney General assured me that he will open an investigation into the incident and will not tolerate any person involved.”<sup>96</sup>

Despite the official assurances, Hamas failed to open any investigation into this death.<sup>97</sup>

On September 22, 2017, medical sources in al-Quds Hospital, Gaza City announced the death of an individual known as M.S. (aged 16), who had been detained in Beit Lahia police station since July 2017. Police reported that M.S. committed suicide while imprisoned. However, the victim's family said that “[M.S.] complained about the maltreatment he received in the prison when they visited him on the day of his death and that there were signs of incised wounds on the abdomen and shoulders and a swelling in the neck.”<sup>98</sup>

On September 24, 2017, an individual known as A.S.F, a prisoner in the al-Shuja'iyia Police Station, was declared dead by Hamas. The Ministry of Interior and National Security in Gaza published a press statement on its website from Ayman al-Batniji, Spokesperson of the Palestinian Police in Gaza, saying that the detainee died after fainting while in al-Shuja'iyia Police Station.

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<sup>95</sup> *Id.*

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

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

However, the victim's brother explained later that during his brother's detention, A.S.F admitted to being exposed to torture several times and complained of pain in his chest as well as malnourishment by the police officers.<sup>99</sup>

In addition to the specific cases above, the Office of the UN High Commissioner for Human Rights ("OHCHR") "*has also consistently received and documented reliable allegations of torture and ill-treatment of Palestinian detainees in the West Bank and in Gaza, including cases that led to death*".<sup>100</sup>

The death penalty is, in itself, not illegal as a matter of international law. However, we submit that the deaths referred to in this communication were unlawful, and therefore amounted to murder. Contrary to the Palestinian Basic Law of 2003 and the 2001 Penal Procedure Law, executions in Gaza have, since 2009, taken place without ratification of death sentences by PA President, Abbas.<sup>101</sup> This means that all the executions referred to in this communication (not to mention the extra-judicial killings) were, as a matter of Palestinian law, illegal.<sup>102</sup>

Additionally, some of the executions were held in public (in violation of international legal principles),<sup>103</sup> most of the death sentences were issued by Gaza's military court against civilians

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<sup>99</sup> *Id.*

<sup>100</sup> United Nations General Assembly, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General Human rights situation in Palestine and other occupied Arab territories, *Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People*, No: A/72/35, para. 44 (September 5, 2017); available at: <http://www.refworld.org/docid/59d228984.html>;

<sup>101</sup> *Palestinian Basic Law - 2003 Amended Basic Law*, (March 18, 2003), Article 109; available at: <https://www.palestinianbasiclaw.org/basic-law/2003-amended-basic-law>.

<sup>102</sup> B'tselem, "Death Penalty in the Palestinian Authority and Under Hamas Control" (October 16, 2013); available at: [https://www.btselem.org/inter\\_palestinian\\_violations/death\\_penalty\\_in\\_the\\_pa](https://www.btselem.org/inter_palestinian_violations/death_penalty_in_the_pa). See also: Human Rights Watch, *Internal Fight Palestinian Abuses in Gaza and the West Bank* (July 29, 2008); available at: <https://www.hrw.org/report/2008/07/29/internal-fight/palestinian-abuses-gaza-and-west-bank>.

<sup>103</sup> The UN Human Rights Committee has declared that public executions are "incompatible with human dignity". See William A. Schabas, *The Abolition of the Death Penalty in International Law* (Third Edition: Cambridge UP, 2002), pg. 376.

(without any jurisdiction), and the executions did not respect the minimum legal standard for fair trials.<sup>104</sup>

On April 18, 2016, Gaza Permanent Military Court sentenced three civilians to death by hanging. The Military Court upheld two other death sentences: the execution of N.A. who was a security service officer, by firing squad, and the execution of a civilian from Gaza City by hanging.<sup>105</sup>

On July 19, 2016 Gaza's military court released a statement affirming that two unidentified Palestinians were sentenced to execution by hanging for collaborating with Israel. One was a 59-year-old resident of Gaza City and the other was a 49-year-old resident of Khan Yunis. Another 38-year-old resident of Gaza City was sentenced to execution by firing squad.<sup>106</sup>

In a public statement on May 23, 2017, the OHCHR condemned as illegal the death sentences pronounced against three civilians on May 21, 2017.<sup>107</sup> The OHCHR further denounced the Gaza military court trials, stating:

“The conviction and sentence of a ‘field military court’ are final, allowing no possibility of appeal or plea for clemency, in violation of international law. International law sets very stringent conditions for the application of the death penalty, including meticulous compliance with international fair trial standards. These trials do not appear to meet these minimum standards.”<sup>108</sup>

The second element of murder under Article 7(1) of the Rome Statute, that the conduct was committed as a part of a widespread or systematic attack directed against a civilian population, is also

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<sup>104</sup> See generally Amnesty International *Fair Trial Manual*, 2, 2014; available at:

<https://www.amnesty.org/en/documents/POL30/002/2014/en/>.

<sup>105</sup> Palestinian Centre for Human Rights, *3 Death Sentences Issued and 2 Others Upheld Before Military Courts in the Gaza Strip; PCHR Condemns Ongoing Application of Death Penalty and Demands its Abolishment* (April 19, 2016); available at: <http://pchrghaza.org/en/?p=8044>.

<sup>106</sup> Ma'an News Agency, *Gaza court issues death sentences to Palestinians accused of collaborating with Israel*, (July 19, 2016); available at, <http://www.maannews.com/Content.aspx?ID=772299>.

<sup>107</sup> United Nations Human Rights Office of the High Commissioner, *OHCHR: Gaza Death Sentences Illegal* (May 23, 2017); available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21653&LangID=E>.

<sup>108</sup> *Id.*

satisfied here. The widespread nature of the killings is evidenced by the large number of documented cases published human rights reports.<sup>109</sup>

The killings are also systematic in nature, as they targeted specific groups of the Gazan population defined by their political beliefs. As discussed above, the Hamas-controlled military courts have handed down numerous death sentences against persons suspected of having collaborated with the Israeli authorities. The UN Human Rights Council has confirmed: “*Death sentences continue to be pronounced by Gaza courts. According to the Palestinian Centre for Human Rights, 19 individuals were sentenced to death during the reporting period [2017] for offenses including murder and collaboration with hostile parties.*”<sup>110</sup> The deaths are not just inflicted through court processes. On June 2, 2016, Gazan security forces killed an activist and opponent of Hamas in a raid on his home in Gaza City.<sup>111</sup>

On February 20, 2017, the Gaza Military Courts issued seven death sentences against Palestinian civilians convicted of collaboration with Israel. The PCHR noted:

“Three of those sentences were new ones while two sentences were issued by the Military Appeal Court upholding previous sentences. The last two sentences were upheld and ready to be applied after the appeal was rejected by the Military Supreme Court. It should be noted that all sentences issued by the military courts were against civilians.”<sup>112</sup>

Although it would be enough under Article 7 of the Rome Statute if either element were satisfied, the evidence above demonstrates that these killings were both widespread *and* systematic.

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<sup>109</sup> See Amnesty International *Israel and Occupied Palestinian Territories 2017/2018* (February 22, 2018); available at: <https://www.amnesty.org/en/countries/middle-east-and-north-africa/israel-and-occupied-palestinian-territories/report-israel-and-occupied-palestinian-territories/>; Human Rights Watch, *Internal Fight Palestinian Abuses in Gaza and the West Bank* (July 29, 2008); available at: <https://www.hrw.org/report/2008/07/29/internal-fight/palestinian-abuses-gaza-and-west-bank>; UN Human Rights Council, *Human Rights Situation in the Occupied Palestinian Territory*, No: A/HRC/34/38 (March 16, 2017), para. 51; available at: <http://www.refworld.org/docid/59d4dd704.html>.

<sup>110</sup> United Nations Human Rights Council, *Implementation of Human Rights Council Resolutions S-9/1 and S-12/1*, (January 25, 2017), para. 67; available at: <http://www.refworld.org/docid/58ad8c054.html>.

<sup>111</sup> Amnesty International, *The Amnesty International Report 2015/16 Documenting the State of Human Rights in 160 Countries During 2015* (2016), pg. 286; available at: <https://www.amnesty.org/en/latest/research/2016/02/annual-report-201516/>.

<sup>112</sup> Palestinian Centre for Human Rights, *Military Courts Issues 7 Death Sentences in Gaza in One Day* (February 20, 2017); available at: <http://pchrgaza.org/en/?p=8831>.

As to the third element (knowledge), for the reasons given above, it is inconceivable that those Hamas officers or agents who directly carried out the attacks (whether they were police, internal security services or others) did not know that the attacks were intended to be widespread or systematic in nature. It is highly probable that the torture which preceded or precipitated some of the murders of individuals in custody included an element of interrogation. Anyone carrying out such an interrogation would clearly have had knowledge of why they were doing so (i.e. to systematically locate and destroy opposition to Hamas). In carrying out such acts of torture and murder, the perpetrators therefore created a direct link between the systematic policies of Hamas to destroy a certain political view within the population and the relevant criminal acts.

In conclusion, all elements of the crime against humanity of murder are satisfied.

## **E. Imprisonment**

### **1. Legal Standard**

Pursuant to the ICC Elements of Crimes document, for imprisonment and severe deprivation of personal liberty to amount to crimes against humanity, the following factors must be present:

- “1. The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty;
2. The gravity of the conduct was such that it was a violation of fundamental rules of international law;
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct;
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and,
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”<sup>113</sup>

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<sup>113</sup> ICC, *Elements of Crimes*, Article 7; available at: <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

## **2.Application to Facts**

Although they are separated in the scheme of the Rome Statute, imprisonment is frequently associated with the commission of the other two crimes referred to in this communication, namely murder (Section VI D) and torture (Section VI F). As such, some of the analysis relevant to the crime of imprisonment is contained in those Sections of this communication. The imprisonment of those who are deemed enemies of Hamas is frequently a precursor to their torture and, in some cases, death.

The Independent Commission for Human Rights (“ICHR”) is a Palestinian organization established by decree of (then) PLO Chairman Yasser Arafat, which describes its mission as being “to protect and promote human rights in accordance with Palestinian Basic Law and the international principles of human rights”.<sup>114</sup> In its 2015 Annual Report on Human Rights in “Palestine”, the ICHR noted that: “*The continuation of arbitrary detention is an important indicator of the deterioration of human rights in Palestine.*”<sup>115</sup>

A Report of the UN Committee on the Exercise of the Inalienable Rights of the Palestinian People said in September 2017:

“The United Nations has also documented a growing use of administrative detention by Palestinian security forces in the West Bank and arbitrary detention by Hamas against perceived political opponents, including members of Fatah and former personnel of the Palestinian Authority in the Gaza Strip. The Office of the United Nations High Commissioner for Human Rights has also consistently received and documented reliable allegations of torture and ill-treatment of Palestinian detainees in the West Bank and in Gaza, including cases that led to death.”<sup>116</sup>

The targeted nature of the imprisonment of civilians is likewise described by the US Department of State as follows:

“Hamas reportedly practiced widespread arbitrary detention in the Gaza Strip, particularly of Fatah members, civil society activists, journalists, and others accused of publicly criticizing Hamas ... Hamas detained an estimated several hundred persons, allegedly because of their political affiliation, public criticism of Hamas, or suspected collaboration with Israel, and

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<sup>114</sup> ICHR, *About Us*; available at: <https://ichr.ps/en/1/1/84/About-Us.html>

<sup>115</sup> ICHR, *The Status of Human Rights in Palestine: 20th Annual Report* (May 2015), pg. 17; available at: <http://ichr.ps/en/1/6/275/ICHR-20th-Annual-Report.htm>.

<sup>116</sup> UN General Assembly, *Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People*, No: A/72/35 (September 5, 2017), para. 44; available at: <https://www.refworld.org/docid/59d228984.html>.

held them for varying periods. Observers associated numerous allegations of denial of due process with these detentions.”<sup>117</sup>

In conclusion, all elements of the crime against humanity of unlawful imprisonment are satisfied.

## **F. Torture**

### **1. Legal Standard**

According to the ICC’s *Elements of Crimes*, torture occurs where:

- “1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons;
2. Such person or persons were in the custody or under the control of the perpetrator;
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions;
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and,
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”

The Court has established that the term “intentional” does not engender a requirement that the perpetrator have knowledge that the harm inflicted was severe.<sup>118</sup> Moreover, Article 7(1)(f) of the Rome Statute does not require any special purposes of inflicting pain and suffering upon the victim and is not limited to persons acting as, or with the consent or acquiescence of, a public official or in an official capacity.<sup>119</sup>

### **2. Application to Facts**

There is very strong evidence that the first condition for this crime, that the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons, is fulfilled by the

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<sup>117</sup> US Department of State, *2016 Country Reports on Human Rights Practices – The Occupied Territories* (March 3, 2017), pgs. 80, 92; available at: <http://www.refworld.org/docid/58ec89b9af.html>.

<sup>118</sup> ICC, *Elements of Crimes*, Article 7(1)(f); available at: <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

<sup>119</sup> J.D. Van Der Vyver, *Torture as a Crime under International Law*, 67 *Alb. L. Rev.* 427 (2003), pg. 437.

actions of Hamas officials and agents.<sup>120</sup> For instance, ICHR recorded that in Gaza in 2017 there were: 57 cases of physical or moral assaults outside of the detention center; 368 cases of physical torture or threats during custody within the detention centers, and 122 cases of inhumane and degrading treatment.<sup>121</sup>

The use of torture in Gaza by Hamas officials including police officers, Special Forces, and other paramilitaries under the control of the Hamas leadership is widespread. Human Rights Watch reported 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>122</sup> Human Rights Watch stated further: “[T]here is ample evidence that Hamas security services are torturing people in custody with impunity and denying prisoners their rights.”<sup>123</sup>

In its 2016 report, the ICHR indicated that there were 264 reports of individuals who were arrested or detained who were subject to torture, 246 individuals subject to cruel, inhuman, or degrading treatment or punishment, and 94 reports of people enduring violence and/or physical or mental abuse in Gaza alone.<sup>124</sup> The complaints reported to the ICHR included:

“A wide range as severe beating, causing bone fractures in hands, feet and heads; threat of torture during detention; beating with electric wires; kicking on legs and genitals; psychological pressure; verbal abuse; standing for an extended time; shabeh;<sup>125</sup> flagellation; hanging in the ceiling; incarceration in dark cells for an extend period; and solitary confinement. In some cases, the same detained persons could be subjected to several techniques of physical torture.”<sup>126</sup>

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<sup>120</sup> ICC, *Elements of Crimes*, Article 7(1)(f); available at: <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

<sup>121</sup> ICHR, *Status of Human Rights in Palestine, January 1, 2017 – December 31, 2017 (June 13, 2018)*; available at: <http://ichr.ps/en/1/6/2408/ICHR-23rd-Annual-Report.htm>.

<sup>122</sup> B. 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>.

<sup>123</sup> *Id.*

<sup>124</sup> ICHR, *Status of Human Rights in Palestine Twenty First Annual Report January 1, 2015 – December 31 2015*, (November 2016), pg. 177; available at: <http://ichr.ps/en/1/6/1941/ICHR-21st-Annual-Report.htm>.

<sup>125</sup> This term refers to a torture involving hanging a victim from the ceiling by their wrists. See discussion in: Human Rights Watch, “If the Dead Could Speak: Mass Deaths and Torture in Syria’s Detention Facilities”, (December 16, 2015); available at: <https://www.hrw.org/report/2015/12/16/if-dead-could-speak/mass-deaths-and-torture-syrias-detention-facilities>.

<sup>126</sup> *Id.*, pg. 179.

The 2014 ICHR Annual Report stated that there were 996 complaints of torture and ill treatment, most of which were against the civil police in Gaza. The report noted that, “*The torture and ill-treatment included beatings, deprivation of sleep, punching, threats, and mental torture.*”<sup>127</sup>

Simply taking into account those individuals who have *reported* torture and abuse over the course of a relatively short time-period of three years (2014 through 2017), it is clear that the first element, that one or more persons have been subjected to severe physical or mental pain, has been fulfilled. Reports for 2018 have not yet been published but we expect these to follow the same pattern as previous years, and we invite the OTP to infer the same.

The second condition for this crime requires that the victim be in custody *or* under control of the perpetrator. These are disjunctive requirements.<sup>128</sup>

The very high number of documented cases of torture abuse that have occurred while individuals are under detainment or are being arrested shows that this criterion is clearly fulfilled. The ICHR Annual Reports frequently provide narratives of individuals who have been tortured. One such narrative in the 2016 ICHR Annual Report provides as follows:

“Mohammed Abu Jayyab was summoned for interrogation at the Al Zahra’ Police station in the Central Gaza governorate. Abu Jayyab stated he was slapped, doused with a bucket of water mixed with soap, beaten with a hose stuffed with a stick inside, thrown on the ground, and kicked on various parts of his body. As a result, Jayyab suffered from a permanent disability and had his right testicle removed because of severe beating.”<sup>129</sup>

Mohammed Sufian al-Qassas, 30, a resident of Khan Yunis, was arrested on September 18, 2017 by three officers of the intelligence services at his internet cafe.<sup>130</sup> His uncle, Mohammed Yahya al-Qassas, described brutal physical attacks by the officers:

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<sup>127</sup> ICHR, *The Status of Human Rights in Palestine: 20th Annual Report (May 2015)*, pg. 17; available at: <http://ichr.ps/en/1/6/275/ICHR-20th-Annual-Report.html>.

<sup>128</sup> ICC, *Elements of Crimes*, Article 7(1)(f); available at: <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

<sup>129</sup> ICHR, *The Status of Human Rights in Palestine Twenty First Annual Report January 1, 2015 – December 31, 2015*, (November 2016), pg. 179; available at: <http://ichr.ps/en/1/6/1941/ICHR-21st-Annual-Report.htm>.

<sup>130</sup> Why Israel, *Gaza Activists Decry Rise in Torture Within Prisons*, (October 6, 2017); available at: <https://www.whyyisrael.org/2017/10/06/gaza-activists-decry-rise-in-torture-within-prisons/>. It was alleged against al-

“They started beating him up using their guns and sticks ever since they got ahold of him in the cafe until they arrived at the headquarters of the intelligence agency. When they took him in, they brutally assaulted him...His face got all swollen and he ended up with some broken ribs, a dislocated shoulder and a smashed foot. They then held his head over a toilet seat and poured burning hot water all over his face,’ he said. After the torture, which lasted for several hours, they left his nephew at the door of a hospital in the city of Khan Yunis. ‘Later we were informed of his presence at the hospital and we were shocked by the sight and the amount of torture he was obviously subjected to. He was in a coma for 2½ days,’ ”<sup>131</sup>

Of those whose accounts of torture and abuse were reported in the PCHR’s 2015 Annual Report, dozens were civilians accused of collaborating with the Fatah leadership in Ramallah or accused of expressing criticism of Hamas’ performance.<sup>132</sup>

The 2015 PCHR’s Annual Report also included accounts from individuals in Gaza who were subject to torture during interrogation or detention. For instance, an individual reported that during an investigation in March 2015, “*he was shackled, beaten by gun butts and kicked [in the] testicles.*”<sup>133</sup> Another detainee said that on March 19, 2015, he “*was tortured at al-Sheikh Redwan police station in Gaza on grounds of allegedly stealing a motorbike. He said that he needed 66 stitches in his head, in addition to suffering from a fracture in a finger.*”<sup>134</sup> On May 2, 2015, another individual said that “*he was subjected to severe torture, including beating and shackling, by the Criminal Police officers. As a result, he suffered a kidney failure due to repeated beating on his kidney by the officers, on charges of stealing.*”<sup>135</sup> These narratives, and many more documented by various international human rights reports in the timeframe of this communication repeatedly reiterate the same message: individuals are regularly subjected to torture during Hamas-ordered detainment and interrogations.

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Qassas that he had been “insulting God.” Whether or not this was a pretext for an arrest on other grounds is unclear. However, what this episode illustrates is the pattern of torture employed by Hamas in Gaza, regardless of its motivation.

<sup>131</sup> Why Israel?, *Gaza Activists Decry Rise in Torture Within Prisons*, (October 6, 2017); available at:

<https://www.whysisrael.org/2017/10/06/gaza-activists-decry-rise-in-torture-within-prisons/>.

<sup>132</sup> PCHR, *Annual Report 2015* (2016), pg. 66, available at <http://pchrgaza.org/en/wp-content/uploads/2016/08/annual-english2015.pdf>.

<sup>133</sup> *Id.* at pg. 65.

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

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

The third criterion for the war crime of torture, that the pain and suffering did not arise from and was not inherent in or incidental to lawful sanctions, is also satisfied. Torture is not sanctioned in either the Penal Code of 1936 (which is applicable in Gaza) or the PLO Revolutionary Law of 1979.<sup>136</sup> Though it is not expressly required under the ICC’s Elements of Crimes that torture be *illegal* in the jurisdiction in which it occurs, Article 108 of the Penal Code and Article 280 of the PLO Revolutionary Law of 1979 actively *criminalize* torture as defined in Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.<sup>137</sup> Article 13 of the Palestinian Basic Law renders invalid confessions made under torture.<sup>138</sup>

The relevant provisions in the Palestinian Basic Law were made in conjunction with Article 15 of the International Convention against Torture, ratified in 2014 by the Palestinian Authority, which stated that, “*Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.*”<sup>139</sup>

Consequently, it is clear that the use of torture is an unlawful sanction under local Palestinian law. The third criterion for the war crime of torture is thereby fulfilled.

The fourth element, that the conduct was a part of a “*widespread or systematic attack directed against a civilian population,*” is also met. The July 2017 UN Report, *Gaza – 10 Years Later*, stated that substantial human rights violations “*are... taking place in Gaza under Hamas’s control. These*

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<sup>136</sup> Palestinian Centre for Human Rights, *Crimes of Torture in Palestinian Prisons and Detention Centers*, (2015); available at: <http://pchr.org/en/wp-content/uploads/2016/03/Crimes-of-Torture-in-Palestinian-Prisons.pdf>.

<sup>137</sup> *An Ordinance to Provide a General Penal Code for Palestine*, Article 108, (1923); available at: [https://www.nevo.co.il/law\\_html/law21/PG-e-0633.pdf](https://www.nevo.co.il/law_html/law21/PG-e-0633.pdf). “Oppression by public officer “Any person employed in the public service who subjects or orders the subjection of any person to force or violence for the purpose of extorting from him or from any member of his family confession of an offence or any information relating to an offence, is guilty of a misdemeanour.”

<sup>138</sup> The Palestinian Basic Law, *2003 Amended Basic Law*, Article 13, (March 18, 2003); available at: <https://www.palestinianbasiclaw.org/basic-law/2003-amended-basic-law>. “1. No person shall be subject to any duress or torture. Indictees and all persons deprived of their freedom shall receive proper treatment. 2. All statements or confessions obtained through violation of the provisions contained in paragraph 1 of this article shall be considered null and void.”

<sup>139</sup> United Nations Human Rights Office of the High Commissioner, *Convention Against Torture and Other Cruel, Inhuman, or Degrading Punishment*, (June 26, 1987); available at: <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>.

*occur not only during times of heightened tensions or when hostilities escalate but have also become a feature of daily life.*”<sup>140</sup> The report further stated that these acts of torture (and other) abuse by Hamas “*target in particular dissenting voices, journalists and social media activists, members of Salafi groups and political opponents considered as ‘collaborating’ with Israel or the Palestinian Authority.*”<sup>141</sup>

The widespread nature of the attack is apparent from how voluminous the number of *reported* cases has been. As noted above, in 2017 alone, the ICHR reported that there were 368 reported cases of individuals in Gaza prisons being detained who were subject to abuse.<sup>142</sup> Accordingly, there is strong evidence that attacks of torture have been “*directed against a multiplicity of victims.*”

As with the crimes above, the widespread nature of the acts of torture signals that it is unnecessary for the OTP to conclude that they were also systematic. Nonetheless, the *systematic* nature of acts of torture can also be proven. Hamas targets for torture those who are politically opposed to it (as well as their families and associates). For instance, according to the ICHR, Hamas has regularly “*detained individuals for interrogation and harassment, particularly prodemocracy youth activists, based on purported actions of their family members.*”<sup>143</sup>

The fifth and final criterion for the crime against humanity of torture, that the perpetrator had knowledge that the intended conduct was to be a part of widespread or systematic attack directed against a civilian population, is clearly met.

Once again, it would be highly improbable if individual security personnel were committing acts of torture absent any knowledge that their colleagues were also committing similar acts at the same time. To the contrary, torture by Hamas officials and agents is public knowledge in Gaza and

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<sup>140</sup> United Nations, *Gaza Ten Years Later*, (July 2017), pg. 27; available at: [https://unsco.unmissions.org/sites/default/files/gaza\\_10\\_years\\_later\\_-\\_11\\_july\\_2017.pdf](https://unsco.unmissions.org/sites/default/files/gaza_10_years_later_-_11_july_2017.pdf).

<sup>141</sup> *Id.*

<sup>142</sup> ICHR, *Status of Human Rights in Palestine, January 1, 2017 – December 31, 2017, (June 13, 2018)*; available at: <http://ichr.ps/en/1/6/2408/ICHR-23rd-Annual-Report.htm>.

<sup>143</sup> US Department of State, *2016 Country Reports on Human Rights Practices – The Occupied Territories*, (March 3, 2017), pg. 92; available at: <https://www.state.gov/j/drl/rls/hrrpt/2016/nea/265502.htm>.

forms part of Hamas' system of governance by fear and threat. The UN High Commissioner for Refugees ("UNHCR") has noted that in Gaza, "*human rights violations and abuse take place mostly in a climate of impunity.*"<sup>144</sup> For there to be a climate of impunity, it follows that there must be an official policy to turn a blind eye to (or even encourage) abuse. If such an official policy exists, then those carrying out the abuse are highly likely to be aware. It is also unlikely that an officer or guard who commits one act of torture and is not punished will stop there; rather he is likely to continue such acts, a pattern which in and of itself reinforces the knowledge of perpetrators that torture is systematic and/or widespread in Gaza.

In conclusion, all elements of the crime against humanity of torture are satisfied.

### **G. Personal Criminal Responsibility of Haniyeh**

The Rome Statute provides two separate standards for superior liability, depending on whether the superior is a military commander or civilian superior.<sup>145</sup> Though some commentators consider the leader of Hamas to be a military command position, in this communication the more stringent civilian standard will be adopted, given Haniyeh's official position was officially a civilian one at the relevant times. In the event that the OTP does not consider Haniyeh to fulfil the civilian standard of control, we respectfully submit in the alternative that it should find that Haniyeh fulfilled the lower threshold for military superior liability pursuant to Article 28(a) of the Rome Statute.

### **1. Legal Standard**

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<sup>144</sup> United Nations Refugee Agency, *Country of Origin Information on the Situation in the Gaza Strip Including on Restrictions on Exit and Return*, (February 23, 2018); available at: [https://www.ecoi.net/en/file/local/1425917/1930\\_1520326763\\_5a9908ed4.pdf](https://www.ecoi.net/en/file/local/1425917/1930_1520326763_5a9908ed4.pdf).

<sup>145</sup> The lower threshold for military superior liability pursuant to Article 28(a) of the Rome statute 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. UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), Article 28(a), (July 17, 1998); available at: [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf).

Article 28(b) of the Rome Statute defines the criminal liability of a civilian superior for the commission of a crime by a subordinate. A civilian superior is held responsible for crimes committed by subordinates under his or her effective authority and control as a result of his or her failure to exercise control properly over such subordinates where:

“(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>146</sup>

There are four principal requirements to meet this test. *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>147</sup> This relationship can be *de jure* recognized by the regime itself, or it can be *de facto*, by reflecting the actual state of the relationship.<sup>148</sup> The presence of intermediaries between a superior and an individual perpetrator is irrelevant to finding this relationship, as only the ability of the superior to control the actions of the subordinate is considered.<sup>149</sup>

The *second* requirement is that the superior must know of or consciously disregard the commission of the crime. Conscious disregard has been defined as “*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>150</sup> It is similar to recklessness under common law,<sup>151</sup> which requires less than absolute knowledge that the crime would be committed, but more

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<sup>146</sup> *Id.*

<sup>147</sup> See Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, No: ICC-01/05-01/08, (2016), para. 184

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

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

<sup>150</sup> Chantal Meloni, *Command Responsibility in International Criminal Law*, The Hague, The Netherlands (2010), pg. 187

<sup>151</sup> William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, (2010), pg. 463.

than mere negligence in regard 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>152</sup>

The *third* requirement is that the activities were in the effective control and responsibility of the superior. “Effective control” requires the superior have had the material ability to prevent or punish the crimes committed by the subordinate.<sup>153</sup> This is a case-specific inquiry, and depends heavily on the relevant evidence.<sup>154</sup> Though it concerned a military superior, the Court in *Bemba* identified several elements to be examined when deciding if there were effective control. These include the official position of the superior, the power to issue orders, the capacity to ensure compliance with orders, and the power to promote members of the armed forces.<sup>155</sup> The *Bemba* decision was recently overturned on the facts, but the above list of factors was not challenged on appeal and therefore, we submit, remains good law.<sup>156</sup>

The final clause of Article 28 (and *fourth* requirement) provides that a civilian superior will be liable where they 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 obligating superiors to take “*all feasible measures within their power.*”<sup>157</sup> This definition reiterates the condition that it is within the superior’s power, and further limits it to only feasible measures, but requires that all measures meeting these conditions be taken.<sup>158</sup>

## **2. Application to Facts**

### **a. Control of Gaza by Hamas, and control of Hamas by Haniyeh**

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<sup>152</sup>Jamie A. Williamson, *Some Considerations on Command Responsibility and Criminal Liability*, (2008)

<sup>153</sup>See *Bemba*, para. 184

<sup>154</sup>*Id.*

<sup>155</sup>*Id.*

<sup>156</sup>*The Prosecutor v Jean-Pierre Bemba Gombo*, Judgment of the ICC Appeals Chamber, No. ICC-01/05-01/08 A, June 8, 2018.

<sup>157</sup>Jamie A. Williamson, *Some Considerations on Command Responsibility and Criminal Liability*, (2008), citing Article 86(2)

<sup>158</sup>*Id.*

Haniyeh's role in relation to the crime of torture committed by Hamas security forces and police officers meets the requirements set out in Article 28 of the Rome Statute.

Section I B.3 above details the circumstances in which Hamas seized control over the Gaza Strip in 2007 and how the organization has maintained this position.<sup>159</sup> The UN Country Team in the occupied Palestinian territory said in a report dated July 2017 entitled *Gaza Ten Years Later* (referring to the Hamas takeover):

“Upon seizing control of Gaza, Hamas has increasingly tightened its grip on power, including by executing, maiming and jailing opponents and suppressing dissent. For years, Hamas was able to sustain its de facto authority and build up its military strength...

The Hamas coup in Gaza in June 2007 and the administrative division that followed between the PA and Hamas has had a significant impact on administration and public services in Gaza. Despite several national unity agreements between Fatah and Hamas over the past ten years... the two sides remain increasingly divided, administered separately and on progressively divergent policy directions.”<sup>160</sup>

As noted above, Haniyeh served as deputy leader of Hamas between 2014 and 2017 and in May 2017 he was elected as the organization's leader (formally, at least, of the political wing).<sup>161</sup> Even after his purported dismissal as PA Prime Minister in 2007, Haniyeh remained the *de facto* leader of the Hamas movement in Gaza.<sup>162</sup> Haniyeh remains in effective control after changing positions, following the latest unity agreement with Fatah.<sup>163</sup> The failure of the latest supposed Hamas-Fatah agreement to gain any traction within Gaza confirms that Haniyeh is still in control.<sup>164</sup>

Despite Article 39 of the Palestinian Basic Law (which is “Palestine's” current governing document) which states that “*The President of the National Authority is the Commander-in-Chief of*

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<sup>159</sup> See Section 0 above.

<sup>160</sup> UN Country Team in the occupied Palestinian territory, *Gaza Ten Years Later* (July 2017), pg. 5; available at [https://unsco.unmissions.org/sites/default/files/gaza\\_10\\_years\\_later\\_-\\_11\\_july\\_2017.pdf](https://unsco.unmissions.org/sites/default/files/gaza_10_years_later_-_11_july_2017.pdf)

<sup>161</sup> Nidal al-Mughrabi, *Hamas Elects Former Deputy Haniyeh as New Political Chief*, Reuters (May 6, 2017); available at: <https://www.reuters.com/article/us-palestinians-hamas-election/hamas-elects-former-deputy-haniyeh-as-new-political-chief-idUSKBN1820DV>

<sup>162</sup> Aljazeera, *Profile: Ismail Haniya, Hamas' political chief* (May 9, 2017); available at <https://www.aljazeera.com/indepth/features/2017/05/profile-ismail-haniya-hamas-political-chief-170508132332351.html>.

<sup>163</sup> Nidal al-Mughrabi, *Hamas Elects Former Deputy Haniyeh as New Political Chief*, Reuters (May 6, 2017); available at: <https://www.reuters.com/article/us-palestinians-hamas-election/hamas-elects-former-deputy-haniyeh-as-new-political-chief-idUSKBN1820DV>

<sup>164</sup> Freedom House, *Freedom in the World, 2016 – Gaza Strip* (September 1, 2018); available at: <https://freedomhouse.org/report/freedom-world/2016/gaza-strip>.

*the Palestinian Forces,*” Hamas and by extension Haniyeh, have held *de facto* governing authority and control over Gaza since they took over in 2007.<sup>165</sup>

As explained above, Hamas’ leader commands the Minister of Interior, Chief of Police, National Security Forces, civil police, security and protection apparatus department, the internal security apparatus, as well as the Izzed-Din al-Qassam Battalions.<sup>166</sup> Accordingly, at all material times, Haniyeh was either one of, or the highest-ranking official in effective control of the relevant personnel who personally perpetrated the crimes.

Haniyeh, by exercising effective control of the area of Gaza and having authority over the security forces and police officers, is considered a civilian superior. This standard is confirmed in the Court’s case law:

“For a finding that civilian superiors have effective control over their subordinates, it suffices that civilian superiors, through their position in the hierarchy, have the duty to report whenever crimes are committed, and that, in light of their position, the likelihood that those reports will trigger an investigation or initiate disciplinary or criminal measures is extant.”<sup>167</sup>

The Court has explained further that, “*The superior does not need to know the exact identity of those subordinates who committed the crimes, to be held responsible under Article 7(3) of the Statute*”. It suffices that the superior knows that a crime has been or is being committed and does not do anything to prevent it.<sup>168</sup>

#### **b. Actual knowledge of Haniyeh**

Although conscious disregard would suffice to link Haniyeh to the crimes, Haniyeh’s attitude towards the crimes committed by those under his command and control goes far beyond this standard.

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<sup>165</sup> *Palestinian Basic Law – 2003 Amended Basic Law* (March 18, 2003), Article 39; available at: <https://www.palestinianbasiclaw.org/basic-law/2003-amended-basic-law>.

<sup>166</sup> Sayigh Yezid, *Policing the People, Building, the State: Authoritarian Transformation in the West Bank and Gaza*, Carnegie Papers, (2011); available at: [http://carnegieendowment.org/files/gaza\\_west\\_bank\\_security.pdf](http://carnegieendowment.org/files/gaza_west_bank_security.pdf).

<sup>167</sup> ICTY Trial Chamber, *Prosecutor v. Brđanin*, No: IT-99-36-T “Judgement” (September 1, 2004), para. 281; available at: <http://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf>.

<sup>168</sup> *Id.*

We respectfully submit that Haniyeh had actual and intimate knowledge of such crimes, and explicitly or implicitly endorsed them.

While Haniyeh has been in power, international NGOs including Amnesty International and Human Rights Watch, and intergovernmental agencies such as UNHCR and OHCHR, have reported and denounced the commission of the crimes referred to in this communication.

In 2016 Human Rights Watch reported that relatives of a detainee in Gaza had appealed directly to Haniyeh in person. During their encounter, the family members informed Haniyeh of the condition and abuse the detainee suffered: “*Relatives (of Mahmoud Eshtewi – tortured and killed on 2 February, 2016) visited Ismail Haniyeh. [...] They said they told Haniyeh that Eshtewi was being tortured.*”<sup>169</sup> In this case, despite the personal appeal to Haniyeh, he did nothing to prevent or repress the commission of torture that resulted in a detainee’s death.

The reasons given above, as to why individual perpetrators of the criminal acts would have known such acts were widespread, apply *a fortiori* to the Hamas leadership and in particular to Haniyeh. Accordingly, there can be little doubt that Haniyeh knew of the criminal acts undertaken by Hamas militia and police officers.<sup>170</sup>

As the leader of Hamas in Gaza, Haniyeh had and continues to have the power and authority to prevent and repress the commission of crimes against humanity by forces under his command and control, including murder, imprisonment, and torture.

Haniyeh and his government did not take all feasible measures within their power to prevent the widespread and systematic practice of murder, imprisonment, and torture of the citizens of Gaza. By affording the perpetrators impunity, Hamas authorities have contributed to the creation of a

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<sup>169</sup> Human Rights Watch, *Palestine: Torture, Death of Hamas Detainee - Relatives Say Senior Officials Knew of Abuse*, (February 15, 2016); available at: <https://www.hrw.org/news/2016/02/15/palestine-torture-death-hamas-detainee>.

<sup>170</sup> See e.g., Human Rights Watch, *Palestine: Torture, Death of Hamas Detainee - Relatives Say Senior Officials Knew of Abuse* (February 15, 2016); available at: <https://www.hrw.org/news/2016/02/15/palestine-torture-death-hamas-detainee>; Palestinian Centre for Human Rights, *Third Case During This Month in Gaza, PCHR Calls Upon Attorney General to Investigate into Death of Prisoner in Al-Shuja'iyia Police Station* (September 26, 2017); available at: <https://pchrghaza.org/en/?p=9485>.

climate of fear and intimidation that deters many victims and their families from reporting or even disclosing abuse committed against them.

In conclusion, as to Haniyeh's liability as a superior, we have demonstrated in this Section that Hamas surpasses the threshold of "*effective control*" over Gaza. As a matter of fact, Hamas has complete and totalitarian control-it effectively operates a one-party state in which political dissent is impossible. Haniyeh sits at the very apex of this organization and was well aware of the crimes being committed, or at the very least, consciously disregarded them. Either way he has done nothing to stop these acts. Haniyeh's role in the crimes committed therefore satisfies the ICC's statutory requirements for civilian superior liability.

Consequently, all elements of jurisdiction *ratione materiae* are satisfied with regards to crimes against humanity committed by Haniyeh. The final remaining question for the OTP is whether the case is admissible by the Court.

## VII. ADMISSIBILITY

Pursuant to Article 53(1) of the Rome Statute, for the OTP to initiate an investigation, the case must be admissible under Article 17. This Section, addresses the requirements of Gravity (VII A) Complementarity (VII B), and the Interests of Justice (VII C).

### A. Gravity – Article 17(1)

#### 1. Legal Standard

Article 5 of the Rome Statute states that the “*jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.*”<sup>171</sup> Importantly, the OTP in its Policy Paper on Preliminary Examinations has noted that:

“The Appeals Chamber has dismissed the setting of an overly restrictive legal bar to the interpretation of gravity that would hamper the deterrent role of the Court. It has also observed that the role of persons or groups may vary considerably depending on the circumstances of the case and therefore should not be exclusively assessed or predetermined on excessively formalistic grounds.”<sup>172</sup>

The OTP applies the concept of gravity at two stages in determining whether to initiate an investigation. Article 17(1)(d) of the Rome Statute provides that the Court determine that a case is inadmissible if “*a case is not of sufficient gravity to justify further action by the Court.*”<sup>173</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:

“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>174</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

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<sup>171</sup> UN General Assembly, *Rome Statute of the International Criminal Court* (2010), Article 5 (July 17, 1998); available at: [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf).

<sup>172</sup> OTP, *Policy Paper on Preliminary Examinations* (November 2013), para. 60; 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) (“OTP, *Paper on Preliminary Examinations*”).

<sup>173</sup> *Id.*, para. 59.

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

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>175</sup> and “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>176</sup>

This element is 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>177</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>178</sup> This assessment includes both qualitative and quantitative considerations, based on the relevant facts and circumstances.<sup>179</sup> The non-exhaustive factors that guide the OTP’s assessment include:

1. *The scale of the crimes* – which “may be assessed in light of, *inter alia*, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families or their geographical or temporal spread”.<sup>180</sup> The OTP has stated that scale:

“... may be assessed in light of, *inter alia*, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, or their geographical or temporal spread”<sup>181</sup>

2. *The nature of the crimes* – which “refers to the specific elements of each offence”<sup>182</sup>

3. *The manner of commission of the crimes* – which “may be assessed in light of, *inter alia*, the means employed to execute the crime, the degree of participation and intent of the perpetrator,

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<sup>175</sup> *Id.* para. 60.

<sup>176</sup> *Id.*, para 59.

<sup>177</sup> *Id.*, para 61.

<sup>178</sup> ICC, Regulations of the Office of the Prosecutor, No: ICC-BD/05-01-09, Regulation 29 (2009), para. 2; available at: <https://www.icc-cpi.int/nr/rdonlyres/fff97111-ecd6-40b5-9cda-792bcbe1e695/280253/iccbd050109eng.pdf>.

<sup>179</sup> OTP, *Paper on Preliminary Examinations*, para. 61.

<sup>180</sup> *Id.*, para. 62.

<sup>181</sup> *Id.*, para. 62.

<sup>182</sup> *Id.*, para. 63.

the extent to which the crimes were systematic or result from a plan or organized policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of victims, any motives involving discrimination.”<sup>183</sup>

4. *The impact of the crimes* – which “may be assessed in light of, *inter alia*, 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>184</sup>

## **2. Application to Facts**

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

In accordance with Article 17(1)(d) of the Rome Statute, we respectfully submit that the crimes alleged in this communication are within the Court’s parameters of a “*case*” which is capable of satisfying the gravity determination. The requirement that the persons involved will likely be the object of an investigation is amply supported by Section VI G above, on Haniyeh’s personal criminal responsibility.

At all relevant times, 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. Accordingly, this case meets the initial hurdles set out above, namely that “*the groups of persons involved that are likely to be the object of an investigation for the purpose of shaping the future case(s),*” and “*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).*”

Since Hamas does not effectively distinguish between the political and military wings of its organization,<sup>185</sup> as the political head, Haniyeh is the individual who should be held accountable for

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<sup>183</sup> *Id.*, para. 64.

<sup>184</sup> *Id.*, para. 65.

<sup>185</sup> The Tower, “*Haniyeh: There’s No Distinction Between Hamas’ Military*”, *Civilian Wings* (August 2, 2016); available at: <http://www.thetower.org/3727-haniyeh-theres-no-distinction-between-hamas-military-civilian-wings/>.

the commission of crimes against humanity, even if these were committed by military forces or under the auspices of military courts. In any case, Hamas civilian officials directly under Haniyeh's control have carried out and committed much of the abuse, especially in the capacity of detention (refer to Sections VI D, E, and F).<sup>186</sup>

The second factor in determining the parameter of a case requires that the incidents will likely be a part of a future investigation. We respectfully submit that the crimes against humanity detailed in this communication should form a key component in any case to be initiated against Haniyeh at the ICC.

**b. Scale of the Crimes**

We have set out above the frequency and intensity with which the relevant crimes have been committed in the various discussions of their widespread and/or systematic nature, rendering repetition in this section unnecessary. In particular, we once more refer the OTP to the numerous reports of NGOs and international organizations documenting the various reported occurrences of such crimes.<sup>187</sup>

We also refer the OTP to the severe physical and psychological injuries caused by these crimes; not just to the individual victims (some of whom suffer life-changing injuries) but more broadly to the Palestinian population, who are brutalized and, in effect, shackled by the cruelty with which Hamas treats any dissent. Though it may be premature to reach any conclusions on the point without further evidence, we would respectfully submit that the reported instances of such crimes are likely to be the tip of the iceberg, and that far more abuse goes undocumented, owing to the repressive nature of the Hamas regime in the Gaza strip.

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<sup>186</sup> See ICHR, *The Status of Human Rights in Palestine Twenty First Annual Report 1 January - 31 December 2015*, (November 2016), pg. 177, available at <http://ichr.ps/en/1/6/1941/ICHR-21st-Annual-Report.htm>; ICHR, *Status of Human Rights in Palestine, January 1, 2017 – December 31, 2017* (June 13, 2018); available at: <http://ichr.ps/en/1/6/2408/ICHR-23rd-Annual-Report.htm>.

<sup>187</sup> See Sections VI D-F above.

### **c. Nature of the Crimes**

One of the ICC's Pre-Trial Chambers has held: "*Regarding the qualitative dimension, it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave.*"<sup>188</sup> In this case, the aggravating nature of the crimes constitutes a method by which Hamas subjugates a population who it claims to represent.

### **d. Manner of Commission of the Crimes, and their impact**

These crimes are not the result of internal chaos and a lack of governmental control. To the contrary, they result from the *complete* control exercised by Hamas in Gaza. Indeed, the crimes do not just result from Hamas' control; they are key tactics in maintaining this position, especially when considering no elections have been held since Hamas seized power in 2007.

## **B. Complementarity – Article 17(2) and (3)**

### **1. Legal Standard**

The ICC Appeals Chamber in *Katanga* established a two-step test for complementarity under Article 17.<sup>189</sup> The Court considers the action or inaction of the relevant State, and then scrutinizes the motive behind this by asking the following:

- “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>190</sup>

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<sup>188</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*, No: 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>189</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, No: ICC-01/04-01/07-1497, *Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case* (September 25, 2009), para. 78; available at: [https://www.icc-cpi.int/CourtRecords/CR2009\\_06998.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_06998.PDF).

<sup>190</sup> *Id.*, para. 78.

As to Article 17, the OTP has explained:

“the first question in assessing complementarity is an empirical question: whether there are or have been any relevant national investigations or prosecutions. This is expressly stated in articles 17(1)(a) (“being investigated or prosecuted”), 17(1)(b) (“has been investigated”) and 17(1)(c) (“tried”). The absence of national proceedings, i.e. domestic inactivity, is sufficient to make the case admissible. The question of unwillingness or inability does not arise and the Office does not need to consider the other factors set out in article 17.”<sup>191</sup>

## **2. Application to Facts**

### **a. Military Justice System Within Gaza**

The structure of the military “justice” system in Gaza was established by Military Justice Law Number 4, passed on February 21, 2008, in the (then) Hamas controlled Palestinian Parliament.<sup>192</sup> It has not been ratified by President Abbas of the PA or applied to the PA military judiciary in the West Bank, and the military justice system in Gaza is viewed largely as a Hamas-run institution.<sup>193</sup> Article 63 of the law states that it applies to people who commit “*military offenses that are referred [to the military judiciary] by the competent Minister of Military Justice,*” including “*crimes that have civilian parties.*”<sup>194</sup> In other words, the permission of the Minister of Military Justice, a member of Hamas, is required in order to refer a case as a military offense. The likelihood of a Hamas Minister referring Haniyeh for prosecution regarding crimes against humanity is unlikely.

Given that it is Hamas’ policy to use systematic brutality including imprisonment, torture and murder, in order to maintain power, no military disciplinary proceedings against Haniyeh or other Hamas officials have taken place in this regard.

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<sup>191</sup> OTP, *Policy Paper on Preliminary Examinations* (November 2013), para.47

<sup>192</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>193</sup> *Id.*

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

## **b. Civilian Justice System Within Gaza**

The civil 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 High Justice Council.<sup>195</sup> In practice, the High Justice Council in Gaza appoints judges without PA Presidential approval and continues to administer the judiciary in Gaza independently.<sup>196</sup>

The UN Country Team in the Occupied Palestinian Territory has said of the Gaza justice system and its dominance by Hamas:

“The division also led to the establishment of a parallel justice system in the Gaza Strip. As early as September 2007, the new de facto Council of Ministers established a parallel High Judicial Council in Gaza responsible for the Strip's ten Regular Courts as well as a parallel Higher Sharia'a Court Council related to the family courts. The new judges and prosecutors lack experience. External support for capacity-building has been unavailable due to limits on foreign assistance for work associated with Hamas. Moreover there are no guarantees for judicial independence, which substantially jeopardizes the safeguarding of human rights and essential freedoms in Gaza. More than 100 death sentences have been issued in Gaza since 2007, many of which were issued by military courts, which lack procedural and substantive safeguards to ensure a fair trial”<sup>197</sup>

Unsurprisingly, this system has not prosecuted or held accountable any of the participants in the crimes subject to this communication. As Amnesty International said 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 abuse continue to enjoy impunity,

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<sup>195</sup> Hazem Balousha, “Hamas-Fatah divide cripples Palestine's judiciary”, *Al Monitor* (May 14, 2015).

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

<sup>197</sup> UN Country Team in the occupied Palestinian territory, *Gaza Ten Years Later* (July 2017), pg. 5; available at [https://unsco.unmissions.org/sites/default/files/gaza\\_10\\_years\\_later\\_-\\_11\\_july\\_2017.pdf](https://unsco.unmissions.org/sites/default/files/gaza_10_years_later_-_11_july_2017.pdf)

and that the Hamas de facto administration lacks the political will to hold perpetrators of such crimes to account, particularly Hamas members, and to respect fundamental human rights.”<sup>198</sup>

### **C. Interests of justice**

#### **1. Legal Standard**

The final requirement for a decision to open an investigation is for the OTP to be satisfied that there are not substantial reasons to believe that an investigation will not benefit the interests of justice in accordance with Article 53(1)(c).

This is a limited mandate, which sets the default position firmly in favor of an investigation provided that the other criteria are satisfied. Indeed, Article 17(c) of the Rome Statute only restrains the OTP from proceeding with an investigation if there are substantial reasons to believe that it is *not* in the interests of justice to proceed; it does not require that the OTP affirmatively find that the situation is in the interests of justice.<sup>199</sup>

#### **2. Application to Facts**

In the present circumstances, we respectfully submit that it is within the interests of justice to investigate Haniyeh’s crimes against humanity. There are no countervailing reasons as to why Haniyeh should be above justice or escape the consequences of his actions. There can be no justifications for these conscious and deliberate actions. Gaza is not in a state of chaos or confusion where numerous groups are able to commit acts of wanton cruelty to Palestinians. To the contrary, Gaza is subject to a totalitarian regime where Hamas rules with an iron fist, and Haniyeh controls those rulers.

This communication goes to the very heart of how Hamas controls Gaza – through a climate of fear inflicted on the Gazan population, achieved by widespread and/or systematic murder,

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<sup>198</sup> Amnesty International, *Strangling Necks Abductions, Torture and Summary Killings of Palestinians by Hamas Forces During the 2014 Gaza/Israel Conflict* (May 2015).

<sup>199</sup> OTP, *Policy Paper on Preliminary Examinations* (November 2013), 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)

detention, and torture. It is by no means necessary for the OTP to commence an investigation that would bring any incidental benefits beyond doing justice. Nonetheless, if the ICC were to end the ability of Hamas to commit such acts against its own people with impunity, it is possible that the ripple effects in terms of promoting democracy and human rights might echo not just through Palestinian society, but also bring improvements across the region.

One major intention, and indeed a consequence, of these crimes against humanity is that such internecine political violence renders far more difficult any reconciliation between various Palestinian factions (particularly Hamas and Fatah) as demonstrated by the numerous failed initiatives since Hamas seized power. The lack of a coherent leadership hinders the Palestinian people internationally, including any efforts to reach a peace agreement with Israel.

Far from there being substantial reasons in the interests of justice for the OTP not to proceed, there are substantial – indeed we would submit overwhelming – reasons in the interests of justice for the OTP *to proceed* with the investigation of Haniyeh for crimes against humanity.

## **VIII. OVERALL CONCLUSION**

In conclusion, we respectfully submit that, subject to the general provision of the ICC to exercise jurisdiction over “Palestine,” the evidence presented in this communication provides the OTP with an ample basis to initiate a full investigation in accordance with Article 53(1) of the Rome Statute. The investigation should focus on a case against Ismail Haniyeh for crimes against humanity committed both historically and on an ongoing basis by Hamas against the population of Gaza and subsets thereof.

Hamas operatives, particularly those involved in the justice and security apparatus, committed these crimes against humanity by carrying out acts of widespread and/or systematic murder, imprisonment, and torture. Haniyeh should be held criminally responsible as a civilian superior. As the highest-ranking official within the Hamas organizational structure in Gaza, he was well aware of the crimes, had the power and ability to prevent them. Instead, he and members of Hamas chose to facilitate and encourage these activities so as to maintain their control.

Notwithstanding the overt and brazen nature of these crimes, the Hamas-controlled Gazan judicial system has done nothing to prosecute or punish their perpetrators. The ICC therefore stands as the Court of last resort for the people of Gaza.

There are no countervailing reasons in the interests of justice militating against prosecution. Hamas leaders proudly promote their cruelty by way of example to anyone who might dare to oppose them. This has profoundly negative consequences as the crimes of Hamas perpetuate a cycle of violence, repression, and misery for the victims, their families, the wider society of Gaza, the entire Palestinian people, and potentially even their regional neighbors. The OTP has the chance to act. We respectfully submit that it should now be seized.

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