



In the
International Criminal Court

The Jerusalem Institute of Justice

The Complainant

v.

Ismail Abdel Salam Ahmed Haniyeh

(هنية أحمد السلام عبد إسماعيل)

*Accused of war crimes committed against the
children of Gaza*

*Communication to the Prosecutor of the International Criminal
Court regarding the militarization of children as amounting
to war crimes 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 war crimes through the recruitment, enlistment and use of children below the age of 15 to participate directly in hostilities in an armed conflict.

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 "Palestine" 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's extremist ideology and consistent human rights violations against, amongst others, the Gazan civilian population. Not only did Haniyeh fail to prevent war crimes against children committed by Hamas operatives, he has actively encouraged the recruitment of child soldiers to bolster the Hamas military and paramilitary forces.

In this communication we provide evidence that Haniyeh is guilty of the war crime of conscripting, enlisting or using children below the age of 15 to participate actively in hostilities. Though this known colloquially as using "child soldiers", the crime also includes the use of children to support hostilities, including as "human shields".

First as the *de facto* and subsequently the *de jure* leader of Hamas, Haniyeh wielded effective control over the relevant activities in the Gaza Strip. Hamas' interconnected command structure is such that the political, social and military wings of the organisation are intertwined, and in reality under a common, highly-centralised leadership. Accordingly Haniyeh knew of and was in a position to prevent the enlistment/conscription/use of children as active participants in hostilities, but failed to do so. *Secondly* and even more egregiously, Haniyeh was an active proponent of the enlistment/conscription/use through his attendance of graduation ceremonies for military training camps aimed at recruiting children, and giving numerous speeches in which he advocated children joining the military struggle against Israel.

The case is grave enough to merit further investigation. Haniyeh's crimes have had and will continue to have devastating consequences on the children of Gaza, their families as well as their society and region. Apart from mental and physical injuries or even deaths, these actions destroy the childhood of their victims, and perpetuate an endless cycle of conflict which benefits no one but the Hamas leadership. There is no prospect of local justice; the Hamas-dominated Gazan Courts have done nothing to punish those who play a direct role in committing these crimes against children.

Haniyeh's crimes are not merely historical; they are ongoing and contribute to the radicalisation of each new generation of Palestinians – rendering peaceful coexistence with their neighbours increasingly difficult. The ICC therefore has the rare opportunity to take an important step not just in punishing perpetrators and deterring war crimes, but also in improving Gaza's civil society and promoting peace. For all these reasons, we 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
War Crimes committed against Palestinian
children in the Gaza Strip from June 13,
2014 through August, 2018

Submitted on September 13, 2018

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 investigation into war crimes within “Palestine”, then such investigation should concern crimes committed by Ismail Abdel Salam Ahmed Haniyeh (“Haniyeh”), as the leader of Ḥarakat al-Muqāwamah al-’Islāmiyyah (حركة المقاومة الاسلامية) (“ Hamas”).

The communication details Haniyeh’s criminality in exercising effective authority and control over, as well as actively promoting the widespread use of children as active participants in hostilities.

The communication describes how Haniyeh’s acts constitute war crimes under Article 8(2)(b)(xxvi) and/ or 8(2)(e)(vii) 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 war crimes is clearly met. Taking into account the vulnerability of the children who are being exploited, as well as the systematic and cynical manner in which these crimes are being carried out, 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 in 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 war crimes 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 personae*: the requirement that reasonable basis be shown that war crimes 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 which 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 Oslo Interim Agreement in 1995.¹ 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.² 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 Interim Agreement led to the establishment of the Palestinian National Authority (“PA”).³ The new interim PA assumed administrative control over Gaza, except for the Jewish settlements, soon after it was established. Elections were held 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.⁴

B. Hamas

1. Establishment

Hamas is an Islamist organization established in 1987 as an offshoot of the Egyptian Muslim Brotherhood Association in Gaza.⁵ Initially, the Muslim Brotherhood was mainstream and relatively moderate, but many radical small groups have sprouted from it over the decades.⁶

¹ 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_DeclarationPrinciplesnterimSelf-Government%28Oslo%20Accords%29.pdf

² 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>

³ The Editors of Encyclopaedia Britannica, *Palestinian Authority (PA)*, Encyclopaedia Britannica (date accessed: July 3, 2018); available at: <https://www.britannica.com/topic/Palestinian-Authority>

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

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

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

As noted above, the full name of Hamas is al-Harakat al-Muqawwama al-Islamiyya, which translates as the “Islamic Resistance Movement.”⁷ 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.⁸ In other words the founding documents of Hamas provide that its mission will not be complete without the destruction of Israel.

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.*”⁹ Other elements of the Hamas Charter exhort the killing of Jews and call for the destruction of the Israel.¹⁰

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, Palestine held elections and Hamas won a majority. Hamas appointed Haniyeh as the PA Prime Minister with the cooperation of Fatah, who had been the majority party previously.¹¹

⁷ Robert Staloff, *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>

⁸ Hroub Khaleed, *Hamas: A Beginner’s Guide*, (The Other Press 2009) at pg. 17

⁹ Hamas Covenant 1988: The Covenant of the Islamic Resistance Movement (August 18, 1988); available at: http://avalon.law.yale.edu/20th_century/hamas.asp

¹⁰ *Id.* at Articles 7, 28

¹¹ 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/>

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.¹²

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 signed both agreements as well as a representative of the PLO appointed by Abbas, in which Hamas agreed to cede control of Gaza to a newly formed Unity Government.¹³ However, neither agreement succeeded and Abbas decided in 2015 to dissolve the Fatah-Hamas Unity Government on the ground that Hamas was unwilling to release control of operations in Gaza.¹⁴

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.¹⁵ 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.¹⁶ The fact that such negotiations between Fatah and Hamas were deemed necessary at all is demonstrative of the fact that Gaza (until at least December 2017) remained under Hamas control, notwithstanding Fatah otherwise controlling

¹² 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>

¹³ 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>

¹⁴ 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>

¹⁵ 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>

¹⁶ 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/>

the PA. Nothing has changed between the last round of failed negotiations and the date of submission of this complaint.

In reality, 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*.¹⁷

4. Nature of Hamas Governance Structure

Hamas operates through three interrelated wings: social welfare, political, and military.¹⁸ 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.¹⁹

The social welfare and political wings have traditionally been the public face of Hamas and operate under license pursuant to the Oslo Agreement. The social and political wings include the school 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.²⁰

C. 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.²¹ As noted above, following Hamas' victory in the 2006 elections, Haniyeh was appointed Prime Minister of the

¹⁷ 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

¹⁸ Matthew Levitt and Dennis Ross, *Hamas: Politics, Charity, and Terrorism in the Service of Jihad*, (2007) at p.2

¹⁹ Hroub Khaleed, *Hamas: A Beginner's Guide*, The Other Press, (2009) at pg. 19

²⁰ *Id.*

²¹ BBC News, *Profile: Hamas PM Ismail Haniya* (December 14, 2006); available at: http://news.bbc.co.uk/2/hi/middle_east/4655146.stm

PA.²² 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.²³ Since then, Haniyeh has been a leading public representative of Hamas from within Gaza.

On May 6, 2017, Haniyeh was elected as the head of Hamas's political wing.²⁴ 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.’*”²⁵ In January 2018 the US State Department designated Haniyeh a Specially Designated Global Terrorist,²⁶ noting: Haniyeh has close links with Hamas' military wing and has been a proponent of armed struggle, including against civilians.²⁷

D. Gaza Conflict 2014

The Gaza conflict in 2014 (the “2014 Conflict”) was triggered by the kidnapping and murder of three Israeli teenagers who were hitchhiking to their homes at the Israeli settlement of Alon Shvut on June 12, 2014. The bodies of the three missing teenagers were found on June 30, 2014, in the Northwest area of Hebron. It was discovered that they had been shot dead shortly after the June 12 abduction.²⁸

²² *Id.*

²³ 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>

²⁴ 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>

²⁵ *Haniyeh: There's No Distinction Between Hamas' Military, Civilian Wings*, The Tower (August 2, 2016); available at: <http://www.thetower.org/3727-haniyeh-theres-no-distinction-between-hamas-military-civilian-wings/>

²⁶ Under Section 1(b) of Executive Order (E.O.) 13224.

²⁷ US State Department, *State Department Terrorist Designations of Ismail Haniyeh, Harakat al-Sabireen, Liwa al-Thawra, and Harakat Sawa'd Misr (HASM)* (Jan 31, 2018); <https://www.state.gov/r/pa/prs/ps/2018/01/277792.htm>

²⁸ 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>

Following the kidnapping, the Israeli Defence Forces (“IDF”) launched Operation “Brother’s Keeper”,²⁹ pursuant to which Israel arrested approximately 350 Hamas members. In August 2014, Hamas official Salah al-Arouri claimed the organization’s military wing was responsible for the kidnapping and murders.³⁰

The 2014 Conflict can be divided into three phases. First, Hamas rocket attacks and Israeli airstrikes intensified in the first week of July 2014.³¹ In response to a dramatic increase in Hamas rockets and infiltration attacks, the IDF declared the start of a new, expanded military operation: Protective Edge.³² A ceasefire 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, Hamas continued to fire rockets at Israel from Gaza despite Abbas’s express wishes.³³

The second phase of the 2014 Conflict involved ground-based incursion by Israel into Gaza, in the hopes of destroying the network of attack tunnels that extended from sites within Gaza into Israel and which were being used by Hamas militants to launch deadly raids within Israel.³⁴ This increased the death toll on both sides and amplified the intensity of the fighting.

²⁹ 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>

³⁰ 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>

³¹ 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>

³² 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> and Hirsh Goodman and Dore Gold, *The Gaza War 2014: The War Israel Did Not Want and the Disaster It Averted*, Jerusalem Center for Public Affairs (2015); available at: <http://jcpa.org/pdf/The-Gaza-War-2014-Site.pdf>

³³ 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>

³⁴ *Id.*

Multiple ceasefires were negotiated without success in the following weeks.³⁵ By the beginning of August 2014, Hamas accepted a ceasefire, bringing the 2014 Conflict to a close.³⁶

Over 2,100 Palestinians, and 70 Israelis were killed during the 2014 Conflict.³⁷ It is submitted in this communication that the actions of Haniyeh served to exacerbate casualties. To the extent that Palestinian combatants killed or injured were under the age of 15, this was a direct result of the Hamas recruitment policies complained of in this communication.

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.*”,³⁸ thereby deliberately excluding the kidnapping and murder of the three innocent Israeli teenagers by one day.

³⁵ Chelsea J. Carter, Ashley Fantz and Karl Penhaul, *No End in Sight: Israel, Hamas Blame Each Other for Fighting Casualties*, CNN (July 30, 2014); available at: <https://edition.cnn.com/2014/07/29/world/mideast/mideast-crisis/>

³⁶ 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>

³⁷ Lizzie Dearden, *Israel-Gaza Conflict: 50 Day War by Numbers*, The Independent, (August 27, 2014); available at: <https://www.independent.co.uk/news/world/middle-east/israel-gaza-conflict-50-day-war-by-numbers-9693310.html>

³⁸ ICC, *Preliminary Examination – Palestine* (access date: July 3, 2018); 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*”, (emphasis added) 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. 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,³⁹ or ultimately to make a substantive finding of guilt.⁴⁰ 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*

³⁹ 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>

⁴⁰ *Id.* at Article 66(3)

*Statute.*⁴¹ The Pre-Trial Chamber said further: “*the information available to the Prosecutor is neither expected to be ‘comprehensive’ nor ‘conclusive’ if compared to evidence gathered during the investigation.*”⁴² As the Pre-Trial Chamber further explained, for the “*reasonable basis*” test under Article 53 to be satisfied, “*it is sufficient at this stage to prove that there is a reasonable conclusion alongside others (not necessarily supporting the same finding), which can be supported on the basis of the evidence and the information available.*”⁴³

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*” (emphasis added).⁴⁴ We note that the OTP has taken preliminary steps to investigate potential crimes within the Situation in Palestine.⁴⁵ 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*”.⁴⁶

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 the submission was made by the PA with a view to implicating only Israeli actions. It is particularly appropriate that the OTP should give due consideration to the crimes committed by Hamas when these involve acts as brazen as the systematic recruitment of child soldiers.

⁴¹ Pre-Trial Chamber II, *Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* (March 31, 2010), para. 27; available at: https://www.icc-cpi.int/CourtRecords/CR2010_02399.PDF.

⁴² *Id.*

⁴³ *Id.* para. 33

⁴⁴ 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

⁴⁵ ICC, *Preliminary Examination – Palestine* (access date: July 3, 2018); available at: <https://www.icc-cpi.int/palestine>

⁴⁶ 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

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 **Error! Reference source not found.**

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 Statute provides that the ICC may exercise territorial jurisdiction (*ratione loci*) over “[t]he State on 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. After gaining the status of observer state at the UN in November 2012,⁴⁷ on January 1, 2015, President Abbas, purportedly on behalf of the “State of Palestine” lodged a 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.*”⁴⁸ Accordingly, if the OTP considers that Gaza is within “*the occupied Palestinian territory*” and that President Abbas had

⁴⁷ 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>

⁴⁸ ICC, *Preliminary Examination – Palestine*; available at: <https://www.icc-cpi.int/palestine>

competence 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 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 neighbour Israel is not subject to the jurisdiction of the ICC). 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, and 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", and despite the decision of the Pre-Trial Chamber to issue an extraordinary call for evidence from victims 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.⁴⁹

The borders of "Palestine" are a matter reserved to "final status" negotiations under the Oslo Accords. 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 such negotiations as to borders by

⁴⁹ 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

pre-emptively taking jurisdiction over this territory prior to an agreement being reached between “Palestine” and Israel.

We respectfully submit that 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 otherwise take submission 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. 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. Doing so otherwise risks the OTP, and indeed the ICC, acting *ultra vires* and thereby risk 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).⁵⁰

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 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

⁵⁰ 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

ICC has declared that the Rome Statute entered into force with regards to Palestine on 1 April 2015.⁵¹ The crimes referred to in this communication occurred or continued after June 13, 2014. Accordingly the ICC would have temporal jurisdiction.

⁵¹ ICC Website, *Entry on Palestine*, <https://www.icc-cpi.int/palestine>.

VI. JURISDICTION RATIONE MATERIAE

A. Definition of War Crimes Under the Rome Statute

The basis for the ICC having jurisdiction *ratione materiae* is that Ismail Haniyeh has committed war crimes under Article 8 of the Rome Statute, specifically: 8(2)(b)(xxiii) and/ or 8(2)(e)(vii).

As to the definition of “war crimes” Article 8(1) of the Rome Statute provides:

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

To establish that a war crime under Article 8 of the Rome Statute has been committed, the following must be demonstrated: (1) the existence of an armed conflict, either of an international or non-international character and that the impugned conduct took place in the context of, and was associated with, the armed conflict; and (2) the conduct fell within the prohibitions set out in Articles 8(2)(a),(b),(c), or (e), which include requisite knowledge and intent.⁵²

The Rome Statute suggests that the ICC should concentrate in particular on war crimes that formed as a “*part of a plan or policy on a large scale.*”⁵³ It should be noted that the threshold suggested in Article 8(1) is a practical guideline, and not a strict requirement. Nevertheless, the evidence presented below demonstrates that war crimes were committed by Hamas officials in Gaza, under the effective control of Ismail Haniyeh, as part of a “*large-scale commission*”. The war crimes committed by Haniyeh, fulfil all of the requirements for the OTP to open an investigation.

⁵² Knut Dormann, *War Crimes Under the Rome Statute of the International Criminal Court with a Special Focus on the Negotiations on the Elements of Crimes* (2003); available at: <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>

⁵³ Knut Dormann, *War Crimes Under the Rome Statute of the International Criminal Court with a Special Focus on the Negotiations on the Elements of Crimes* (2003), at pg. 345; available at: <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>

B. Armed Conflict and Nexus to the Crimes

The International Criminal Tribunal for the former Yugoslavia (“ICTY”) in *Prosecutor v. Dusko Tadic*, defined an armed conflict as existing “*whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.*”⁵⁴ This definition has been affirmed in the jurisprudence of the ICC.⁵⁵

In the OTP’s Report under Article 53(1) of the Rome Statute on the “Situation on Registered Vessels of Comoros, Greece and Cambodia” of 6 November 2014, the OTP said as

follows:

“The hostilities between Israel and Hamas at the relevant time do not meet the basic definition of an international armed conflict as a conflict between two or more states. However, as acknowledged by the case law of the Court, the ICC Elements of Crimes clarifies that the applicability of the law of international armed conflict also extends to situations of military occupation. While Israel maintains that it is no longer occupying Gaza, the prevalent view within the international community is that Israel remains an occupying power under international law, based on the scope and degree of control that it has retained over the territory of Gaza following the 2005 disengagement. In accordance with the reasoning underlying this perspective, the Office has proceeded on the basis that the situation in Gaza can be considered within the framework of an international armed conflict in view of the continuing military occupation by Israel.”⁵⁶

Similarly, Professor Dapo Akande states in *International Law and the Classification of Conflicts* that the law of international armed conflict applies to any situation in which there is an occupying power within an occupied territory.⁵⁷ Applying the above reasoning to the present case, and assuming that the OTP considers that no material changes have taken place since that Report was published in November 2014, the relationship between Israel and Gaza remains one

⁵⁴ *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, ICTY, (October 2, 1995), at para.70.

⁵⁵ See e.g. *Lubanga*, (ICC-01/04-01/06) Judgment, Trial Chamber I (“*Lubanga Trial*”), at para. 533

⁵⁶ OTP’s Report under Article 53(1) of the Rome Statute on “Situation on Registered Vessels of Comoros, Greece and Cambodia” (November 6, 2014), [https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53\(1\)-Report-06Nov2014Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf).

⁵⁷ Dapo Akande, *Legal Concepts in International Law and the Classification of Conflicts* (Elizabeth Wilmshurst ed) (OUP, August 2, 2012)

of international armed conflict. Accordingly, the OTP should find that this threshold is met as regards Haniyeh's war crimes.

In the alternative, if, for any reason, the above reasoning did not apply (for instance if the OTP were to consider that Israel is not in occupation of Gaza), it is submitted that at the very least the 2014 Conflict would have constituted an "international armed conflict" for the purposes of the Rome Statute. As noted in Section III.D above: the 2014 Conflict consisted of constant rocket fire from within Gaza, coupled with infiltrations through military tunnels, which were met with air strikes and a ground incursion by Israel. Hamas and its affiliates launched over 4,500 rockets towards Israel. Israel hit over 5,000 targets within Gaza. As noted above, nearly 2,200 people are estimated to have died during the 50 days of intense hostilities. In short, the 2014 Conflict undoubtedly constituted "*protracted armed violence*", which is the standard contained in the *Tadic* case and adopted by ICC jurisprudence, and far surpasses the "*internal disturbances and tensions*" standard in the Rome Statute.

In the further alternative, even if the armed conflict in question is deemed to be not *international* in nature, the war crime under Article 8(2)(e)(vii) of the Rome Statute would still have been committed by Haniyeh, because this offence is one of those listed as "*applicable in armed conflicts not of an international character*" (emphasis added).

As will be set out in further detail below, the relevant war crimes committed by Haniyeh were closely related to the international armed conflict between Hamas and Israel. Specifically, the very purpose of the militarisation of children (through their indoctrination, use as combatants and as human shields) was undertaken by Hamas with a view to furthering its conflict with Israel.

C. War Crimes under Article 8(2)(b)(xxvi) and/ or 8(2)(e)(vii)

Article 8(2)(b)(xxvi) provides that in the context of an international armed conflict the following is a war crime:

“Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.”

As noted above, Article 8(2)(e)(vii) is in materially identical terms, save that it applies in an armed conflict not of an international character, with the key difference being that the enlistment/conscription need only to be into “armed forces or groups” and not into “national armed forces”:

“Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;”

For the purposes of this section, the two crimes will be addressed at the same time given that their substantive requirements are otherwise the same. The question of whether children are being recruited into “national armed forces” or merely “armed forced or groups” is determined by whether the ICC considers the dispute in question to be national or international in character (as to which, see Section VI.B above).

As explained above, if the OTP considers that there was an international armed conflict, Article 8(2)(b)(xxvi) would apply, but if and to the extent that the OTP considers there to have been a non-international armed conflict then Article 8(2)(e)(vii) would apply. References in this section to the term “children” refer to individuals below the age of 15.

1. Legal Standard

The ICC’s Elements of Crimes document (which, pursuant to Article 9(1) of the Rome Statute stand as an aid to the interpretation of Article 8) stipulates the following requirements for Article 8(2)(b)(xxvi), which are repeated as regards Article 8(2)(e)(vii), with appropriate modifications in relation to the armed conflict being non-international:

- “1. The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an international armed conflict.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.”

Elements 1, 2 and 4 form part of the *actus reus* or criminal act associated with these war crimes. They will be addressed in the present Section, VI.C. Elements 3 and 5 constitute the *mens rea*, or knowledge requirements. They will be dealt with below in Section VI.D.

The crimes under Articles 8(2)(b)(xxvi) and Article 8(2)(e)(vii) of the Rome Statute were considered at length by the Appeals Chamber in *Prosecutor v Thomas Lubanga Dyilo*⁵⁸ (the “*Lubanga Appeal*”). The *Lubanga Appeal* is, to date, the most authoritative assessment of these crimes by the ICC or indeed any international court and heavy reliance will be placed on its findings here.

The Trial Chamber in *Lubanga* considered that the enlistment, conscription or use of children under the age of 15 to participate actively in hostilities constituted three separate and distinct ways of committing the same crime.⁵⁹ This finding was not challenged on the appeal and accordingly in our submission represents an accurate statement of the law.⁶⁰ It is also supported by the wording of the Rome Statute and the Elements of Crimes, both of which separate each term with a disjunctive “*or*”, signifying that they are alternative, rather than the conjunctive “*and*”, which would have indicated that the terms are cumulative. As such, the crimes under Articles 8(2)(b)(xxvi) and Article 8(2)(e)(vii) can be committed by a perpetrator doing any single *one* of these three acts.

Criteria for each element of the war crimes are listed below. In light of the emphatic pronouncement by Chief Prosecutor Ms Bensouda that “[*c*]hildren have no place in war; their recruitment as weapons of war must stop”,⁶¹ we submit that the OTP should take a broad and purposive approach to the Statute’s requirements.

⁵⁸ Case No. ICC-01/04-01/06 A 5, Judgment (December 1, 2014)

⁵⁹ *Lubanga Trial* paras. 609, 1358

⁶⁰ *Lubanga Appeal*, para. 37

⁶¹ Coalition for the International Criminal Court, *The ICC Agrees: Children, Not Soldiers*, (February 15, 2017); available at: <http://www.coalitionfortheicc.org/news/20170215/icc-agrees-children-not-soldiers>

We respectfully submit that the criteria listed below in case law and commentaries are best seen as illustrative, but not comprehensive. Given the broad nature of societal pressures which can be placed on children to become actively engaged in hostilities, the OTP should retain an open mind as to new ways in which the war crime can be committed. As the Trial Chamber in *Lubanga* stated:

“These provisions recognise the fact that “children are particularly vulnerable [and] require privileged treatment in comparison with the rest of the civilian population”.¹⁷⁷¹ The principal objective underlying these prohibitions historically is to protect children under the age of 15 from the risks that are associated with armed conflict, and first and foremost they are directed at securing their physical and psychological well-being. This includes not only protection from violence and fatal or non-fatal injuries during fighting, but also the potentially serious trauma that can accompany recruitment (including separating children from their families, interrupting or disrupting their schooling and exposing them to an environment of violence and fear).”⁶²

a. Enlistment

The Trial Chamber in *Lubanga* defined “enlistment” as “to enrol on the list of a military body” and “conscription” as “to enlist compulsorily”.⁶³ Based on these definitions, the Trial Chamber found that the distinguishing “element” between the two crimes is that conscription has an “added element of compulsion”.⁶⁴

William Schabas in *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed.) (“Schabas”), says that enlistment has been held to entail “accepting and enrolling individuals when they volunteer to join an armed force or group”. Schabas says further that purported consent of the children is immaterial:

“In any event, ‘it will frequently be the case that girls and boys under the age of 15 will be unable to give genuine and informed consent when enlisting in an armed group or force’”⁶⁵

⁶² *Lubanga Trial* para. 605.

⁶³ *Lubanga Trial* para. 608, referring to Oxford Dictionary, page 491, M. Cottier et al., “Article 8” in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Beck et al., 2nd ed., 2008), page 472 at marginal note 231 and K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary* (ICRC and Cambridge University Press, 2003), page 377

⁶⁴ *Lubanga Trial*, para. 608

⁶⁵ See *The Prosecutor v. Moinina Fofana and Allieu Kondewa*, Case number SCSL-04-14-A Special Court for Sierra Leone (Appeals Chamber), Sierra Leone, (May 28, 2008), para. 140.

b. Recruitment

As to recruitment, the Appeals Chamber in the *Lubanga Appeal* held at paras. 277-278:

“277. According to article 31 of the Vienna Convention on the Law of Treaties, treaty provisions are to be interpreted according to their ordinary meaning in their context and in the light of the object and purpose of the treaty. The ordinary meaning of conscription is the “compulsory enlistment of persons into military service”. The purpose of articles 8 (2) (b) (xxvi) and 8 (2) (e) (vii) of the Statute, as well as the provisions of international law upon which they are based, specifically article 77(2) of Additional Protocol I, article 4 (3) (c) of Additional Protocol II, and article 38 (3) of the Convention on the Rights of the Child, is to protect children who are under the age of fifteen years from being recruited into armed forces or groups.”

278. The Appeals Chamber considers that the element of compulsion necessary for the crime of conscription can be established by demonstrating that an individual under the age of fifteen years joined the armed force or group due to, inter alia, a legal obligation, brute force, threat of force, or psychological pressure amounting to coercion. As explained below, the Appeals Chamber is of the view that this interpretation is consistent with other comparable provisions of the Statute involving an element of compulsion, as well as the jurisprudence of the [Special Court for Sierra Leone].”

As to psychological pressure, the Appeals Chamber said later at para. 282: “*the determination as to whether the element of compulsion has been established should be carried out on a case-by-case basis, taking into account whether the force, threat of force or psychological pressure applied was of such a degree and so pervasive, that individuals can be said to have been forced to join the armed force or group.*” Notably, the Appeals Chamber rejected Mr Lubanga’s argument that psychological pressure could *never* amount to enlistment. To the contrary the Appeals Chamber held at para. 284: “*it cannot be said in the abstract that ‘recruitment and mobilisation campaigns’ always (or never) constitute the crime of conscription.*”

The Appeals Chamber noted further at para. 285 that “*public appeals and encouragement to enlist in an armed force are regular features of recruitment campaigns in countries that have voluntary military forces, even more so during on-going armed conflicts, and that recruitment campaigns of this nature do not, without more, amount to coercion*”.

However, in situations where the recruiters were themselves armed, this was considered to constitute a threat of force.⁶⁶ Pressure on the families of child conscripts was further evidence for a threat of force.⁶⁷

Mr Lubanga argued before the Appeals Chamber that if a child had apparently consented to conscription then it was not possible for such conscription to be forcible.⁶⁸ The Appeals Chamber rejected this argument, determining that “*lack of consent, or the requirement that the act is against the conscripted individual’s will generally does not form an element of the crime of conscription*”.⁶⁹

c. Use of Children to Participate Actively in Hostilities

Schabas says of the “use” element:

“...this crime does not depend on the child having been conscripted or enlisted.... According to one decision:

The use of children to participate actively in hostilities is not limited to participation in combat. An armed force requires logistical support to maintain its operations. Any labour or support that gives effect to, or helps maintain, operations in combat constitutes active participation. Hence carrying loads for the fighting faction, finding and or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields are some examples of active participation as much as actual fighting and combat.”

In *Lubanga*, the Trial Chamber contrasted the formulation in the Rome Statute, “*to participate actively in hostilities*”, with the expression “*direct participation*” used in Additional Protocol I to the Geneva Conventions, as evidence that the drafters of the Rome Statute “*intended to import a wide interpretation to the activities and roles that are covered by the offence of using children under the age of 15 to actively participate in the hostilities*”.⁷⁰ This

⁶⁶ *Lubanga Appeal*, para. 290

⁶⁷ *Ibid*, para. 291

⁶⁸ *Ibid*, para. 298

⁶⁹ *Ibid*, paras. 301-302

⁷⁰ *Lubanga Trial*, para. 627

was also the position of and the Preparatory Committee's draft Rome Statute,⁷¹ cited by *Lubanga* Trial Chamber, and which set out at para. 622 several examples of "active" but not "direct" participation including "scouting, spying, sabotage and the use of children as decoys, couriers or at military check-points." The *Lubanga Appeals* Chamber reached the same conclusion at paras. 334-335.

The *Lubanga* Trial Chamber continued at para. 628:

"Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target."

The *Lubanga Appeals* Chamber arguably expanded on the Trial Chamber's definition of active participation, explaining at para. 333 that (contrary to the Trial Chamber's view) there was no requirement that the child be exposed to danger in order for them to participate actively in hostilities. The key issue was the link between the *activity* and the hostilities. By way of examples of activities likely to qualify, the Appeals Chamber noted that the International Committee of the Red Cross commentary on the Additional Protocols indicates that article 4(3) of Additional Protocol II prohibits participation in "*military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage*".⁷²

Importantly for present purposes, the Appeals Chamber at para. 334 cited with approval an explanatory footnote in the *Travaux Préparatoires* to the Rome Statute which listed the following as examples of active participation in this context:

"...use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology" (emphasis added)

⁷¹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1 at pg. 12, FN 12 (July 17, 1998); available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/101/05/PDF/N9810105.pdf?OpenElement>

⁷² Y. Sandoz et al., Commentary on the Additional Protocols of June 1977 to the Geneva Conventions of 12 August 1949 (ICRC, 1987), page 1380, para. 4557

2. Application to the Facts

a. Enlistment and Conscription

Although enlistment and recruitment are separate elements, the following subsections set out evidence that is pertinent to both, given that the criminal activities of Hamas were not strictly divided into separate stages of recruiting on the one hand and enlisting on the other. Rather, Hamas operated a continuous campaign of indoctrination coupled with pressure and the threat or even use of force in order to cause as many children as possible to become part of Hamas' military machinery.

We respectfully submit that Hamas did in fact use threats of force at various times during this process, such that the higher threshold of conscription is met. However, even if the OTP is not satisfied that there was enough force to merit a finding of conscription, at the very least there is an abundance of evidence that the lesser threshold required for enlistment is met. Either way, the thresholds of conduct proscribed in Articles 8(2)(b)(xxvi) and/or Article 8(2)(e)(vii) are met.

The enlistment/conscription of children is a feature of the Hamas education system at every level. There are essentially three chronological steps to the process: *First*, kindergartens, songs and television programmes are used to introduce very young children to the ideas of perpetual warfare, hatred of Jews, and a desire for martyrdom; *secondly*, school textbooks and lessons more generally promote these ideas for older children; *thirdly* military training camps for children below the age of 15 are used to give more official instruction and to augment the enlistment/conscription process. The use of children as active participants in hostilities can and does happen at any one of these stages, but is particularly likely for those who have gone through the training camps, since such children will have acquired more military skills.

We respectfully submit that the steps detailed below go well beyond mere “*public appeals and encouragement*” and meet the level of compulsion set out in the *Lubanga Appeal* judgment. For the avoidance of doubt, although evidence is provided below for enlistment, recruitment and use of children, the legal standard required for commission of the relevant crime is satisfied when any single one of these three elements is present. The fact that all three have been committed is, however, relevant to increase the gravity of the crime by Haniyeh, a point discussed in Section VII.A below.

i. Role of the education system

Hamas maintains significant control over education in Gaza, and utilises this as a tool in its conflict against Israel – both for propagandizing and conscripting. A study published in October 2016 by the UN stated that Hamas controlled 395 schools in Gaza with 234,892 students, compared to 257 schools run by the United Nations Relief and Works Agency (“UNRWA”), with 249,672 students.⁷³

The indoctrination of Gazan children begins in kindergarten.⁷⁴ In 2001, a kindergarten graduation ceremony was held which showed children “*wearing military uniforms and carrying mock rifles; a five-year-old girl dips her hands in red paint to mimic the bloodied Palestinians proudly displayed after the lynching of two Israelis in Ramallah [. . .] other children [are] costumed as suicide bombers.*”⁷⁵

The New York Times reported in 2013:

⁷³ The remainder of schools are private, accounting for a further 18,139 students as at the date of the UN Survey. UN OCHA, *Start of new school year in Gaza: Good progress made in repairs but other challenges impact pupil well-being and performance*, (October 7, 2016); available at <https://www.ochaopt.org/content/start-new-school-year-gaza>

⁷⁴ Israeli Intelligence Heritage and Commemoration Center, *Educating for Hatred and Violence Against Israel in a Performance Held in a Kindergarten Sponsored by the Palestinian Islamic Jihad*, (December 31, 2017); available at <http://www.terrorism-info.org.il/en/educating-for-hatred-and-violence-against-israel-in-a-performance-held-in-a-kindergarten-sponsored-by-the-palestinian-islamic-jihad-pij/>

⁷⁵ Matthew Levitt, *Teaching Terror: How Hamas Radicalizes Palestinian Society*, The Washington Institute (February 12, 2007); available at: <http://www.washingtoninstitute.org/policy-analysis/view/teaching-terror-how-hamas-radicalizes-palestinian-society>

“For the first time since taking control of the Gaza Strip in 2007, the Hamas movement is deviating from the approved Palestinian Authority curriculum, using the new texts as part of a broader push to infuse the next generation with its militant ideology.

Among other points, the books, used by 55,000 children in the eighth, ninth and 10th grades as part of a required “national education” course of study in government schools, do not recognize modern Israel, or even mention the Oslo Peace Accords the country signed with the Palestine Liberation Organization in the 1990s.”⁷⁶

Hamas schools and television channels teach songs which encourage young children to seek death in war and the role of the *shahada* (religious martyrdom – often in battle).⁷⁷ Hamas television broadcasts often show children as young as 10⁷⁸ singing about the virtues of suicide attacks, and expressing their will to become *shahids*.⁷⁹

Hamas organises theatrical productions – some of which are televised – in which children depict violent scenes. One showed Palestinian children aged eight or younger simulating the capture of Israeli soldiers, whilst dressed in military fatigues and holding toy machines guns.⁸⁰ Another show was filmed at an elementary school, in which children simulated placing bombs under a tank.⁸¹ As part of the plot of these plays, the children of Gaza are rewarded for violence and military prowess.⁸² These endeavours, we submit, cross the line between “cultural” occasions or historical re-enactment, which is generally permitted, and the active enlistment/conscription of child combatants, which is a war crime. The activities to

⁷⁶ Id Fares Akram and Jodi Rudoren, *To Shape Young Palestinians, Hamas Creates its own Textbooks*, The New York Times (November 3, 2013); available at: <https://www.nytimes.com/2013/11/04/world/middleeast/to-shape-young-palestinians-hamas-creates-its-own-textbooks.html>.

⁷⁷ Wildolive, *The Indoctrination of Palestinian Children and Incitement to Violence*, (June 6, 2016); available at: <http://www.wildolive.co.uk/indoctrination.htm>

⁷⁸ Al-Aqsa (Hamas) TV, *Hamas TV Hosts Applaud Girl's Wish for Martyrdom Death*, (January 22, 2010) added by Palestinian Watch on Jan. 25, 2010; video available at: <https://www.youtube.com/watch?v=YWie0iM5DtU>

⁷⁹ Al-Aqsa TV (Hamas-Gaza), *Hamas TV Show has Gaza Children Sing Praises of Suicide Bombing*, (March 29, 2013); video available at: <https://www.youtube.com/watch?v=N3OYjKZ2Cu8>; see also Al-Aqsa TV (The Palestinian Authority), *Children Show on Hamas TV, Teaching About Islamic Rule*, (April 13, 2007); video available at: https://www.youtube.com/watch?v=kkNE_TiMZo.

⁸⁰ The Tower, *Gaza Children Abduct, Kill Israelis in School Plays*, (October 5, 2016); available at: <http://www.thetower.org/watch-gaza-children-abduct-kill-israelis-in-school-plays/>

⁸¹ Elior Levy, *Gazan Kids Put on Play of Death*, Ynet news, (May 31, 2016); available at: <https://www.ynetnews.com/articles/0,7340,L-4809937,00.html>

⁸² Clarion Project, *Hamas Children Display their Military Might*, (Add June 7, 2017); video available at: https://www.youtube.com/watch?v=U61l6Doa_co; more information on the Clarion Project available at: <https://clarionproject.org/jgen/>

which children in Gaza are exposed have a level of realism and immediacy which demonstrates that their aim is not just to educate or entertain children, but rather to inspire and even compel them to become combatants.

ii. **Military Training Camps for Children**

After the initial indoctrination in kindergarten and schools, the next stage in the enlistment/conscription of child soldiers by Hamas is full military training. Hamas regularly runs training camps⁸³ in which children receive, as part of their school studies, military-like preparation for their future membership in Hamas forces.⁸⁴ The Washington Institute for Near East Policy says of this process:

“The radicalization campaign continues through the course of a Palestinian student's academic career, employing materials produced and distributed by the dawa [religious preaching organizations]. The Hamas Islamic Student Movement in the Bethlehem area distributed to young students so-called "Instruction Cards," bearing the pictures of Hamas suicide bombers and others killed carrying out terrorist attacks, and encouraging Palestinian youth to follow in their footsteps.

In addition to schools, Hamas dawa organizations run summer camps at which Palestinian children are saturated with the group's propaganda and even given semi-military training. Combining childhood recreation with radical indoctrination, the camp environment exposes children to both active programming in the form of classes on radical Islam and passive indoctrination through the pervasive images of suicide bombers plastered on walls throughout the camp. According to Hamas's Sheikh Bahar, summer camps are especially successful for indoctrinating religious and secular youth alike. Bahar explained that teaching children the history of Islam while they are surrounded by pictures of martyrs instills [sic] ‘seeds of hate against Israel’.”⁸⁵

⁸³ ITV News, *Inside the Hamas Summer Training Camp for Gaza Teens*, (added on July 27, 2016); video available at: <https://www.youtube.com/watch?v=cD2FezhJgqA>

⁸⁴ Meir Amit Intelligence and Terrorism Information Center, *Incitement to Terrorism and Hatred*, (June 8, 2017); <http://www.terrorism-info.org.il/en/21218/>

⁸⁵ Matthew Levitt, *Teaching Terror: How Hamas Radicalizes Palestinian Society*, (February 12, 2007); available at: <http://www.washingtoninstitute.org/policy-analysis/view/teaching-terror-how-hamas-radicalizes-palestinian-society>

The UK's ITV News has reported that children were being trained by Hamas in military activities: including as snipers, handling firearms, and are receiving physical training.⁸⁶ Other activities recorded taking place on these military camps include:

- Children performing military parades and learning to hold weapons.⁸⁷
- A 12-year-old learning to crawl beneath barbed wire and wield assault rifles in simulated attacks on Israeli military outposts.⁸⁸
- A 14-year-old child is trained in how to carry weapons, and teenagers practice very seriously for hostile situations where they are taught how to kill.⁸⁹
- Training about how to use various types of weapons, including pistols, rifles and mortars.⁹⁰
- Specific training for military operations,⁹¹ including cross-border raids and the kidnap of Israelis.⁹²

A 2015 documentary film included an interview with a Palestinian boy under the age of ten, who affirmed that he was being “*trained to be a warrior*” and that the training camp was teaching him and the others that they are the generation of suicide bombers.⁹³ Another child interviewed in the documentary says “[w]e are being trained to be warriors to fight the evil Israeli presence.”⁹⁴

⁸⁶ ITV NEWS, *Inside the Hamas Summer Training Camp for Gaza Teens*, (added on July 27, 2016); video available at: <https://www.youtube.com/watch?v=cD2FezhJgqA>

⁸⁷ AFP News Agency, *Gaza Children Play War in Hamas Summer Camp*, (added June 18, 2013); video available at: <https://www.youtube.com/watch?v=9Pw8SO0GOJU>

⁸⁸ Riley Clifton, *At Summer Camp, Hamas Raises the Next Generation of Killers*, The Tower (August 2016); available at: <http://www.thetower.org/article/at-summer-camp-hamas-raises-the-next-generation-of-killers/>

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Info Live TV English, *Teaching Palestinian Children to Hate*, (added January 1, 2010); video available at: <https://www.youtube.com/watch?v=GIfdfKBD244>

⁹² ITV NEWS, *Inside the Hamas Summer Training Camp for Gaza Teens*, (added on July 27, 2016); video available at: <https://www.youtube.com/watch?v=cD2FezhJgqA>

⁹³ *Children's Army of Hamas*, Israeli documentary, (April 2, 2015); available at: <http://www.jpost.com/Arab-Israeli-Conflict/New-Israeli-documentary-shows-Hamas-training-child-soldiers-395928>

⁹⁴ *Id.*

Teenagers are taught “*the values of courage, sacrifice and love of jihad [holy war]*.”⁹⁵ The children’s’ naivety and their ability to be manipulated is highlighted by a 15-year old Palestinian teenager, Radwan Wasfi who was interviewed by the Associated Press after having recently graduated from a military training camp: “*My officer taught me the values of courage, sacrifice and love of jihad, as well as some battle tactics... I can do for real what I do in video games.*”⁹⁶

Hamas leaders who run the camps are overt and unrepentant as to their aims. In a press release, a senior Hamas official explained that, “*These camps are designed to prepare a generation that carries the Quran and rifle.*”⁹⁷

b. Use of Children to Participate Actively in Hostilities

As explained above, the conduct which can constitute active participation in hostilities by children is very broad. We respectfully submit that even if the OTP was not sufficiently satisfied that the crimes of enlistment/ conscription detailed above have been committed by Hamas, its operatives would have independently been guilty of “using” children to participate actively in hostilities. Such use falls broadly into three categories: children as combatants, children in military support roles, and children as human shields. Disgracefully, Hamas and Haniyeh are guilty of all three.

⁹⁵ Petra Marquardt-Bigman, *The Child-Soldiers of Palestine*, The Jerusalem Post, (January 26, 2013); available at: <http://www.jpost.com/Blogs/The-Warped-Mirror/The-child-soldiers-of-Palestine-364920>

⁹⁶ Petra Marquardt-Bigman, *The Child-Soldiers of Palestine*, The Jerusalem Post, reporting by Associated Press, (January 26, 2013); available at: <http://www.jpost.com/Blogs/The-Warped-Mirror/The-child-soldiers-of-Palestine-364920>

⁹⁷ Riley Clifton, *At Summer Camp, Hamas Raises the Next Generation of Killers*, The Tower (August 2016); available at: <http://www.thetower.org/article/at-summer-camp-hamas-raises-the-next-generation-of-killers/>

i. Children as combatants

Video evidence from 2017 shows Hamas arming children with firearms and rocks and sending them to try to provoke or injure Israeli soldiers.⁹⁸ Hamas officials also praise child terrorists, such as when spokesman Husam Badran praised the two 14-year-old terrorists Omar Rimawi and Ihad Sabah responsible for murdering Israeli Tuvia Weissman, and lauded the courage of the "*intifada youth*."⁹⁹

ii. Children in military support roles

Hamas has also used children to build their terror tunnels. Palestinian media has reported that over 300 young men have died in the tunnels, and at least 160 of them were children. These children are exploited and forced to work in very dangerous conditions to earn some much-needed money.¹⁰⁰

Children are often used as spotters in the front line of combat, and in missions where the Hamas soldiers do not want to risk their own lives: they are used to retrieve weapons from fallen combatants and are unknowingly sent with explosives in their school bags.¹⁰¹

⁹⁸ Israel Today, *Shocking Video Shows Young Gaza Child Opening Fire on IDF Soldiers*, (October 26, 2017); available at: <http://www.israeltoday.co.il/NewsItem/tabid/178/nid/32619/Default.aspx>

⁹⁹ IDF Website, *The Status of Children in Gaza*; <https://www.idf.il/en/minisites/facts-and-figures/hamas/the-status-of-children-in-gaza/>

¹⁰⁰ Lea Spyer, *How Child Labor in the Terror Tunnels is Killing Palestinian Children*, (July 27, 2014); available at: <https://www.breakingisraelnews.com/18992/child-labor-terror-tunnels-killing-palestinian-children/>; Myer Freimann, *Hamas Killed 160 Palestinian Children to Build Tunnels*, (July 25, 2014); available at: <http://www.tabletmag.com/scroll/180400/hamas-killed-160-palestinian-children-to-build-terror-tunnels>

iii. Children as human shields

Although the use of any civilians as human shields is separately a war crime prohibited by Article 8(2)(b)(xxiii) of the Rome Statute, we submit that the act of using *children* as human shields is also a mode of committing the crimes under Articles 8(2)(b)(xxvi) and 8(2)(e)(vii).

The use of human shields is a reprehensible yet effective tactic against any army which respects international humanitarian law.¹⁰² Parties like Hamas which use human shields do so on the basis of a perceived double-victory: either the other side (Israel) refrains from firing because of a wish to avoid killing civilians, in which case Hamas attains a *military victory* because its militants are able attack Israelis with impunity; alternatively, if Israel responds with proportionate force and sadly but unavoidably kills civilians, then Hamas attains a *propaganda victory* which it can then promote in the Western and Arab media as a means of discrediting Israel.¹⁰³

The propaganda and training described above encourages children to submit themselves to being used as human shields, and not to heed the many warnings by Israel to vacate areas in which fighting is likely to take place.¹⁰⁴ As such, the use by Hamas of children in this manner clearly constitutes their *active* participation in the hostilities.

In a separate communication to the OTP, filed in 2017, the Jerusalem Institute of Justice submitted that Haniyeh was guilty of the war crime under Article 8(2)(b)(xxiii) of the Rome Statute, and we repeat those allegations here, with particular regard to those under the age of 15 who were abused in this manner. In addition to the evidence we have previously submitted, we would add the following.

¹⁰² Michael N. Schmitt, *Human Shields in International Humanitarian Law*, Columbia Journal of Transnational Law Vol. 47, 2009, 297; available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1600258

¹⁰³ *Id.*

¹⁰⁴ ICRC, *Customary IHL Database: Israel – Rule 20. Advance Warning*, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_il_rule20

Both the UN High Commissioner for Human Rights and the European Union have publicly condemned Hamas for storing rockets within schools and hospitals, launching rockets from densely populated areas, and calling on civilians to sacrifice themselves as human shields.¹⁰⁵ Israel's Prime Minister Benjamin Netanyahu explained in a speech on July 11, 2014: *“The difference between us [Israel and Hamas] is simple. We develop defensive systems against missiles in order to protect our civilians and they use civilians to protect their missiles. This is the entire difference.”*¹⁰⁶

On the official Hamas Television Channel Al Aqsa, Hamas spokesman Sami Abu Zuhri advocated for the use of civilians as human shields by saying:

“Our citizens took a bold step by standing on the roof of the house to prevent the occupation forces [IDF] from attacking . . . the fact that people are willing to sacrifice themselves against Israeli warplanes in order to protect their homes. I believe this strategy is proving itself. And we, Hamas, call on our people to adopt this practice.”¹⁰⁷ In another interview, Hamas spokesman Sami Abu Zuhri also claimed that, “The resistance [Hamas] is truly glorifying our people. We are leading them to death - I mean, to confrontation.”¹⁰⁸

On June 1, 2017, UNRWA announced that it had uncovered a Hamas attack tunnel under two of its schools.¹⁰⁹ On October 15, 2017, another tunnel was discovered under a school.¹¹⁰ Hamas built an attack tunnel just steps away from a playground in Beit Lahia, which

¹⁰⁵ Yossi Lempkowicz, *EU Strongly Condemns Indiscriminate Hamas Rockets on Israel and Use of Palestinian Population as Human Shields, ‘Terrorist Groups in Gaza Must Disarm,’ Calls for ‘Immediate Ceasefire,’* European Jewish Press, (July 22 2014); available at: https://web.archive.org/web/20141231235450/http://ejpress.org/index.php?option=com_content&view=article&id=49892

¹⁰⁶ Israeli Ministry of Foreign Affairs, *Prime Minister Netanyahu on the Fourth Day of Operation Protective Edge*, (July 11, 2014); available at: <http://mfa.gov.il/MFA/PressRoom/2014/Pages/PM-Netanyahu-on-the-fourth-day-of-Operation-Protective-Edge-11-Jul-2014.aspx>

¹⁰⁷ Israel Defence Force, *Hamas Spokesperson Encourages Use of Human Shield*, (July 9, 2014); video available at: <https://www.youtube.com/watch?v=UXZEzbTOH1s>

¹⁰⁸ Israel Defence Force, *Hamas Spokesperson Encourages Use of Human Shield*, (July 9, 2014); video available at: <https://www.youtube.com/watch?v=UXZEzbTOH1s>

¹⁰⁹ IDF, “*The Status of Children in Gaza*”; available at: <https://www.idf.il/en/minisites/facts-and-figures/hamas/the-status-of-children-in-gaza/>

¹¹⁰ i24NEWS, *Tunnel Found Under UN School in Gaza for Second Time in Months*, (October 29, 2017); available at: <https://www.i24news.tv/en/news/israel/158903-171029-tunnel-found-under-un-school-in-gaza-for-second-time-in-months>

is a city in Gaza.¹¹¹ Hamas uses tunnels to hide its arsenal of rocketry underground, to facilitate communication, to permit ammunition stocks to be hidden, and to conceal militants making detection from the air difficult.¹¹²

In February 2018, the United States House of Representatives passed a bill sanctioning Hamas for “*violating universally applicable international laws of armed conflict by intentionally using civilians and civilian property to shield military objectives from lawful attack.*”¹¹³ A significant proportion of these civilians were children.

We noted above that the Trial and Appeals Chambers in *Lubanga* had endorsed a definition of active participation in hostilities which included sending children to the front lines and/or using them as decoys. During 2018, this has become a major part of Hamas’ *modus operandi*, as it sends civilians (especially children) to “protest” at the *de facto* border with Israel, in other words on the front lines. In reality such protests are often a deliberate decoy for Hamas to undertake military activities, such as breaching the fence, planting explosives or shooting at Israeli soldiers. During border protests in March 2018, Hamas sent a 7-year-old girl to breach the Gaza border, undoubtedly endangering the girl’s life.¹¹⁴

Even up to the time of preparation of this communication, in July 2018, the cynical use of child shields continues. On 25 July 2018, Israel’s Channel 7 reported “*Under the cover of a children’s protest: Sniper injures officer*”.¹¹⁵ The report continued: “*The Palestinian Arab sniper had fired at IDF troops under the cover of 20 children that were sent towards the border fence as decoy.*”

¹¹¹ Israeli Ministry of Foreign Affairs, *Hamas Terrorist Confess to Using Human Shields*, (August 27, 2014), available at: <http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Pages/Hamas-terrorists-confess-to-using-human-shields.aspx>

¹¹² See i24NEWS, *Tunnel Found Under UN School in Gaza for Second Time in Months* (October 29, 2017); available at: <https://www.i24news.tv/en/news/israel/158903-171029-tunnel-found-under-un-school-in-gaza-for-second-time-in-months>

¹¹³ United States House of Representatives, *Hamas Human Shield Prevention Act*; available at: <https://www.congress.gov/bill/115th-congress/house-bill/3542/text>

¹¹⁵ Under the cover of a children’s protest: Sniper injures officer, Arutz Sheva, July 25, 2018, available at: <https://www.israelnationalnews.com/News/News.aspx/249546>

D. Mental Requirements for the Commission of War Crimes

1. Legal Standard

In addition to the criminal acts described in the preceding Section, it is necessary that the perpetrators of war crimes had the necessary mental elements at the time. We submit that Haniyeh is liable both as a direct perpetrator *and* as a superior. The present Section addresses the mental requirements of those directly carrying out the crimes. Section VI.E addresses Haniyeh's liability as a superior commander.

With respect to the mental elements of war crimes under the Rome Statute, Article 30 provides that: "*unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.*"¹¹⁶ *Intent* is found where the perpetrator "*means to engage in the conduct*" and "*means to cause that consequence or is aware that it will occur in the ordinary course of events.*"¹¹⁷ *Knowledge* in this context "*means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.*"¹¹⁸ Furthermore, for every war crime under Article 8 of the Rome Statute, the Elements of Crimes require that the perpetrator was aware of the factual circumstances that established the existence of the armed conflict.¹¹⁹

As noted above, the mental requirements specified in the Elements of Crimes document in relation to the war crimes under 8(2)(b)(xxvi) and 8(2)(e)(vii), are as follows (*mutatis mutandis*):

"The perpetrator knew or should have known that such person or persons were under the age of 15 years.

¹¹⁶ Article 30 of the Rome Statute

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Elements of Crimes, Article 8 – War Crimes, p. 13 – 42.

The perpetrator was aware of factual circumstances that established the existence of an armed conflict.”¹²⁰

2. Application to the Facts

In the present circumstances, the mental requirements in the statute detailed above are undoubtedly satisfied. The immediate perpetrators of the war crimes in question are the kindergarten personnel, teachers, military instructors, and television propagandists and other participants in the Hamas recruitment project, all of whom contribute to the social, educational and other forms of pressure on children to become part of the Hamas military forces.

Teachers and kindergarten instructors will have direct knowledge of the age of the children within their pastoral care and to whom the lessons promoting military and terrorist activities are being taught. Film makers and propagandists who create quasi-educational materials aimed at young children clearly also have knowledge of the intended audience, as indicated by factors including the jaunty songs which accompany videos promoting hatred and glorifying death in combatant. It should be noted that the knowledge requirement is objective rather than subjective: it is not necessary to prove that the perpetrators actually knew the children in question were below 15: rather it is enough that they ought to have been aware. Accordingly, the first *mens rea* requirement is satisfied, namely that “[t]he perpetrator knew or should have known that such person or persons were under the age of 15 years.”

As to the second *mens rea* requirement, the repeated presentation by Hamas in its propaganda aimed at children (and indeed its citizens more widely) of the Palestinian people being in a constant and existential conflict with Israel is sufficient evidence that “[t]he perpetrator was aware of factual circumstances that established the existence of an armed conflict”.

¹²⁰ See Section VI.C.1 above.

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

E. Criminal Responsibility of Ismail Haniyeh as a Superior

The Rome Statute advances two separate standards for superior liability, depending on whether the superior is a military commander or civilian superior. Though some commentators consider the leader of Hamas to be a military command position, in this communication the arguably more stringent civilian standard will be addressed 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 submit that it should find that in the alternative that Haniyeh fulfilled the lower threshold for military superior liability pursuant to Article 28(a) of the Rome Statute.

1. Legal Standard

Article 28(b) of the Rome Statute defines the potential criminal liability of a non-military superior for the commission of a crime. A non-military superior is held responsible for failing to control war crimes committed within his effective authority and control when:

- “(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and,
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”¹²¹

¹²¹ UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), Article 28(b) (July 17, 1998); available at: <http://www.refworld.org/docid/3ae6b3a84.html>.

There are four principal requirements to meet this statutory test for civilian superior liability. *First*, the relationship must be one of a superior and subordinate. This requires there be a hierarchical relationship between those who commit the crime and the individual being charged as a superior.¹²² This relationship can be *de jure* recognized by the regime itself, or it can *de facto*, by reflecting the actual state of the relationship.¹²³ The existence of intermediaries is irrelevant to finding this relationship, as only the ability of the superior to control the actions of the subordinate is considered.¹²⁴

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.*”¹²⁵ It is similar to recklessness under common law,¹²⁶ which requires less than absolute knowledge that the crime would be committed, but more than mere negligence with regard to that possibility. In other words, the superior does not prevent or punish the crime, despite knowing that there is a high likelihood the crime will be, or has been, committed.¹²⁷

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.¹²⁸ This is a case-specific inquiry, and depends heavily on the relevant evidence.¹²⁹ Though it concerned a military superior, the Court in *Bemba* named a number of factors it looks at when deciding if there is

¹²² See *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08), Trial Chamber III (2016), at para. 184

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Chantal Meloni, *Command Responsibility in International Criminal Law*, The Hague, The Netherlands (2010), at pg. 187

¹²⁶ Willam A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), at pg. 463

¹²⁷ Jamie A. Williamson, *Some Considerations on Command Responsibility and Criminal Liability* (2008)

¹²⁸ See *Bemba*, at para. 184

¹²⁹ *Id.*

effective control. These include the official position of the superior, the power to issue orders, the capacity to ensure compliance with orders, the power to promote members of the armed forces, and a number of other evidentiary factors.¹³⁰ 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.¹³¹

The final clause of Article 28 requires the superior fail to take all “*necessary and reasonable measures...to prevent or repress*” the commission of the crime. Additional Protocol I explains an analogous clause as obligating a superior to take “*all feasible measures within their power.*”¹³² This definition reiterates the condition that it is within the superior’s power, and further limits it to only feasible measures, but obligates that all measures meeting these conditions be taken.¹³³

2.Application to the Facts

a. Military, Social and Civilian Wings of Hamas Under Common Control

Section III.B details the circumstances in which Hamas seized control over the Gaza Strip in 2007, and how it has maintained this position.¹³⁴ 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...

¹³⁰ *Id.*

¹³¹ The Prosecutor v Jean-Pierre Bemba Gombo, Judgment of the ICC Appeals Chamber, No. ICC-01/05-01/08 A, June 8, 2018.

¹³² Jamie A. Williamson, *Some Considerations on Command Responsibility and Criminal Liability* (2008), citing Article 86(2)

¹³³ *Id.*

¹³⁴ See Section III.B above. See also

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.”¹³⁵

As the leader of Hamas, Haniyeh had “effective control” over the militants who acted as supervisors in the training camps, over the military supervisors who participated to militarize the children, and those who strategically tried to use the children as human shields. Indeed, in practical terms, Haniyeh is currently the current highest-ranking official located in Gaza as the Head of the Political Bureau.¹³⁶ Even during the periods when he did not hold such an official position, Haniyeh was in equivalent control.

There are two aspects to Haniyeh’s control over the machinery for child enlistment/conscription. *First*, such enlistment/conscription takes place through Hamas schools and school summer camps, which are under the *de jure* control of the civilian leadership in any case. *Secondly*, the nature of Hamas’ institutional structure is such that there is no practical difference between its civilian and military leadership in the upper echelons: all come under a common control – that of a political bureau which has at its head Haniyeh.

The first point has been explained above. As to the second, the intermingling between Hamas’s political governance and military fighting has been present from the start of Hamas’s rise to power in the Gaza strip. For example, when Hamas created its “internal security force” in September of 2007 after taking control of Gaza from Fatah, it staffed it almost entirely with fighters from al-Qassam.¹³⁷ This control of Haniyeh’s political bureau over al-Qassam was further illuminated during the negotiations with Fatah in 2014 right immediately the 2014

¹³⁵ UN Country Team in the occupied Palestinian territory, *Gaza Ten Years Later* (July 2017), at pg. 5; available at https://unsco.unmissions.org/sites/default/files/gaza_10_years_later_-_11_july_2017.pdf

¹³⁶ Nidel 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>

¹³⁷ Human Rights Watch, *Internal Fight: Palestinian Abuses in West Bank and Gaza* (2008), at pg. 55

Conflict when Hamas expressly bargained with the apparent control of al-Qassam and its weapons.¹³⁸

Haniyeh has also consistently referred to Hamas as a single organization which includes its social, political, and military wings. After Qatar provided US\$31 million in foreign aid to Hamas in 2016, Haniyeh expressly reiterated that he makes no distinction between the political and military wings, and vowed the money would be used to pay all government employees; including the fighters of al-Qassam.¹³⁹ This is consistent with his attendance of a military parade in Gaza in 2013, where he marched through the procession and saluted the fighters in support.¹⁴⁰

The allocation of money to the military wing, the portrayal of Hamas as being one organization in Haniyeh's own rhetoric, and the personnel overlap between the political and military wings, all point to the reality that Hamas is one organization.

The Hamas "civilian" leadership under Haniyeh's direct control has acknowledged its role in the enlistment/conscription of children. In a documentary entitled "Children's Army of Hamas", Hamas Education Minister Osama al-Mizini states: "*They [the children] are strong soldiers; proving their potential with Allah's help.*"¹⁴¹ Al-Mizini continues: "*each year, we [Hamas] are progressing. We will develop our programs [War Games], to a stage where youngsters will be skilled in weaponry.*"¹⁴²

Hamas Interior Minister Fathi Hamad made references to the indoctrination of children, appearing to acknowledge they are being trained to fight: "*We are strengthening their [the children's] religious awareness and inducing solidarity with their country. This solidifies their*

¹³⁸ Al-Monitor, *Hamas Won't Give Up Military Wing Despite Agreement* (May 2, 2014)

¹³⁹ The Tower, *Haniyeh: There's No Distinction Between Hamas' Military, Civilian Wings* (August 2, 2016)

¹⁴⁰ Occupied Palestine, *Al-Qassam Brigade Military Parade in Gaza* (September 21, 2013)

¹⁴¹ David Bedein, *Children's Army of Hamas*, (added March 22, 2015); video available at:

<https://www.youtube.com/watch?v=iO4UKXnr8zk&t=58s>

¹⁴² *Id.*

jihad, and their commitment to being a warrior, a curse to Israel".¹⁴³ At one camp's graduation ceremony in the summer of 2014, Hammad urged the young participants to "*study, conduct training, become experts and be inventive, with the help of Allah. The battle will be your battle. The Jihad will be your Jihad.*" Later in the ceremony, the graduates chanted "*Our utmost desire is death for the sake of Allah, further demonstrating the extent to which they had been infused with Hamas' ideology.*"¹⁴⁴

b. Actual knowledge and endorsement of Haniyeh

In order to satisfy the knowledge requirements under the Rome Statute it is not necessary that Haniyeh had actual knowledge or indeed that he was a direct participant in the enlistment/conscription of child soldiers. Accordingly, his criminal liability would be complete even without the following evidence. However, as suggested below, such liability is compounded by the fact that Haniyeh knew of and indeed actively encouraged the enlistment/conscription of children.

There is no doubt as that Haniyeh personally had and continues to have actual knowledge of the widespread training of child-soldiers. Indeed there is video footage of Haniyeh attending rallies to celebrate children graduating from military training camps, and giving passionate speeches about the need for children to enter into Hamas' fight.¹⁴⁵

Haniyeh's role in the crimes committed therefore satisfies the ICC statutory requirements for civilian superior liability. He knew of, and "consciously disregarded", the use of human shielding in Gaza. He also had "effective control" over the subordinates committing

¹⁴³ Jerusalem Post, *Children's Army of Hamas*, Israeli documentary, (April 2, 2015); available at: <http://www.jpost.com/Arab-Israeli-Conflict/New-Israeli-documentary-shows-Hamas-training-child-soldiers-395928>

¹⁴⁴ IDF Website, *The Status of Children in Gaza*; available at <https://www.idf.il/en/minisites/facts-and-figures/hamas/the-status-of-children-in-gaza/>

¹⁴⁵ Jerusalem Post, *Children's Army of Hamas*, Israeli documentary, (April 2, 2015); available at: <http://www.jpost.com/Arab-Israeli-Conflict/New-Israeli-documentary-shows-Hamas-training-child-soldiers-395928>

these crimes as the highest ranking official of the organization responsible for their violations. Finally, not only did his government not prevent or punish these practices, it actively encouraged their use.

Furthermore, the summer training camps are concluded by military-style graduation ceremonies.¹⁴⁶ Those ceremonies congratulate the children who have participated in the camps and are attended by important Hamas officials including Ismail Haniyeh.¹⁴⁷ At a graduation ceremony of a training camp, Haniyeh exhorted the children as follows:

“This generation is prepared to liberate the land, it will be victorious; will fulfill the right of return, our independence; beware! This generation is not afraid to confront you in your centers; this is the generation of the stones! This is the generation of the missiles! This is the generation of the tunnels! This is the generation of the suicide bombers!”¹⁴⁸

In conclusion as to Haniyeh’s liability as a superior, we have demonstrated in this section that Hamas easily surpasses the threshold of “effective control” over Gaza. Indeed, 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 organisation. The situation is quite unlike that in *Lubanga*, where there was significant confusion, unrest and an arguable lack of control on the part of the accused.

Coupled with this high degree of control, Hamas organises itself as a single cohesive unit – with a high degree of cross-over between its social, political and military wings. The recruitment of child soldiers sits across all three of these. Haniyeh had ample opportunity and resources to discourage the heinous practice of recruiting children as combatants yet he failed to do so. To the contrary, he actively encouraged the practice and continues to do so.

¹⁴⁶ Jerusalem Post, *Thousands of Gazan Children Graduate Hamas Military Summer Camp*, (August 6, 2015); available at: <http://www.jpost.com/Middle-East/WATCH-Thousands-of-Gazan-children-graduate-Hamas-military-summer-camp-411309>

¹⁴⁷ Khaled Abu Toameh, *Hamas’s New Army of Children*, Gatestone Institute (February 18, 2015); available at: <https://www.gatestoneinstitute.org/5230/hamas-army-children>

¹⁴⁸ David Bedein, *Children’s Army of Hamas*, (added on March 22, 2015); video available at: <https://www.youtube.com/watch?v=iO4UKXmr8zk>

F. Conclusion on Jurisdiction *Ratione Materiae*

In conclusion, pursuant to Article 53(1)(a) of the Rome Statute, provided that the ICC considers that it has jurisdiction over crimes committed within the territory of “Palestine” or by Palestinian nationals (we submit that only the latter is present), then there is a reasonable basis to believe that crimes within the jurisdiction of the court have been committed.

The conduct of Haniyeh and other Hamas operatives described in this communication took place in the context of, and was associated with the international armed conflict in Gaza from June 13, 2014 onwards. Alternatively the relevant conduct took place in the context of a non-international armed conflict in the same period. The evidence of war crimes presented in this communication satisfies the suggested threshold in Article 8(1) of the Rome Statute.

Finally, Hamas, under the control of Haniyeh, committed war crimes described in Article 8, in particular with regard to the enlistment/conscription of child combatants. As the person in overall and effective control of Hamas personnel and forces in Gaza, Haniyeh is criminally liable and should be held to account.

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. In this Section, address 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.”¹⁴⁹ The concept of gravity is crucial to the OTP’s selection of investigations to initiate.

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 determines that a case is inadmissible if “*a case is not of sufficient gravity to justify further action by the Court.*”¹⁵⁰

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).”¹⁵¹ This entails “a generic assessment of whether such groups that are likely to form the object of investigation capture those who may bear the greatest responsibility for the alleged crimes committed. Such assessment should be general in nature, and compatible with the pre-investigative stage into a situation”;¹⁵² 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

¹⁴⁹ UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), Article 5 (July 17, 1998); available at: <http://www.refworld.org/docid/3ae6b3a84.html>

¹⁵⁰ The Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (November 2013), at para. 59; available at: https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf

¹⁵¹ *Id.* at para 59

¹⁵² *Id.* at para 60

case(s).”¹⁵³

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).”¹⁵⁴

At the preliminary examination stage, the OTP will assess the gravity of each potential case that would likely arise from an investigation of the situation.¹⁵⁵ 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.*”¹⁵⁶ This assessment includes both qualitative and quantitative considerations, based on the relevant facts and circumstances.¹⁵⁷ 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”¹⁵⁸
2. *The nature of the crimes* – which “refers to the specific elements of each offence”¹⁵⁹
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, 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”¹⁶⁰
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”¹⁶¹

¹⁵³ *Id.* at para 59

¹⁵⁴ *Id.* at para 61

¹⁵⁵ OTP, Policy Paper on Preliminary Examinations (November 2013), at para. 67.

¹⁵⁶ ICC, Regulations of the Office of the Prosecutor (ICC-BD/05-01-09, Regulation 29) (2009), para. 2.

¹⁵⁷ OTP, Paper on Preliminary Examination (November 2013), at para. 61

¹⁵⁸ The Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (November 2013), at para. 62; available at: https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf

¹⁵⁹ *Id.* at para. 63

¹⁶⁰ *Id.* at para. 64

¹⁶¹ *Id.* at para. 65

With regard to the scale of the crimes, the OTP has stated that this:

“... 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”¹⁶²

2. Application to the Facts

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

At all relevant times, Haniyeh was at the very highest level of the Hamas structure in Gaza,¹⁶³ 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)*.”

a. Scale of the Crimes

Some indication of the numbers of children involved may be gleaned from the number of participants in just one stage of the enlistment/conscription process: a 2015 documentary film concluded that at that time Hamas recruiting approximately 17,000 children through training camps.¹⁶⁴ As noted above, in 2016 Hamas controlled schools in which over 230,000 children were enrolled.

¹⁶² *Id.* Para. 62

¹⁶³ See Sections III.B, III.C, and VI.E.2 above.

¹⁶⁴ *Children’s Army of Hamas*, Israeli documentary, (April 2, 2015); available at: <http://www.jpost.com/Arab-Israeli-Conflict/New-Israeli-documentary-shows-Hamas-training-child-soldiers-395928>

As at the date of this communication, the CIA World Fact Book estimates the population of Gaza at approximately 1.8m.¹⁶⁵ The CIA states that, of this population, 44.78% are 0-14 years of age, and therefore subject to the prohibition on enlistment/conscription into armed forces. This means that at any given time, approximately 0.81m children will be subject to Hamas' military enlistment/conscription process. Indeed the number of children who will likely have passed through such process since June 13, 2014 is likely to be even greater, as each year more children become old enough to become subject to it.

b. Nature of the Crimes

The OTP in its guidance on the “nature of crimes” rightly draws attention to crimes committed against children as a particular exacerbating factor in their severity.¹⁶⁶

Children suffer significantly when used as combatants. This includes through suffering physical harm either in training or in combat, as well as the deep psychological harm which they are likely to suffer as a result of being exposed to scenarios which they lack the maturity to process. Such psychological scarring can continue throughout a person's lifetime, even if they are fortunate enough to survive any combat unscathed physically.

As to actual physical harm done to children through their enlistment/conscription by Hamas, children are particularly prized for their nimble bodies in constructing military attack tunnels which cross the border into Israel. A 2012 paper in the *Journal of Palestine Studies* reported that “*at least 160 children have been killed in the tunnels, according to Hamas officials.*”¹⁶⁷

¹⁶⁵ CIA World Factbook, *Gaza*, available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/gz.html>

¹⁶⁶ The Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (November 2013), at para. 62; available at: https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf

¹⁶⁷ Nicholas Pelham, “Gaza's Tunnel Phenomenon: The Unintended Dynamics of Israel's Siege” *Journal of Palestine Studies*, 2012

Finally, numerous conflicts have demonstrated that child soldiers are capable of being exploited to an even greater extent than adult combatants, owing to their naivety and their lack of understanding of the dangerous consequences of their actions. Child soldiers are thus more likely to be used as the instruments of yet further war crimes.

c. Manner of commission of the crimes

The enlistment/conscription of children as combatants is not haphazard or accidental. Rather, it has been a systematic and organized policy of the Hamas *de facto* government of Gaza to conscript and use child soldiers. Cynically, this serves their dual aims of enlarging their fighting forces, as well as of increasing the likelihood of child casualties, which can then be trumpeted as part of an ongoing anti-Israel propaganda campaign waged in the media and at institutions such as the United Nations.

d. Impact of the Crimes

The impact of these crimes cannot be understated. The children of Gaza are a vulnerable group deserving of protection from their own Government. As noted above, radicalising and then forcing children to become combatants leaves them with emotional and physical injuries, and has drastic effects on the community in Gaza as a whole.¹⁶⁸ The impact is both direct (on the children), and indirect – on their families as well as Gazan society as a whole, which is forced to see children fighting and, sadly being injured or killed in conflict as a direct result of the Hamas policies.

In addition to the harm done directly to children – both physically and psychologically – there is also a high opportunity cost to the constant pressure on children to become fighters. Gazan psychologist Fadl Abu Hein has commented: “*Martyrdom has become an ambition for*

¹⁶⁸ Al-Aqsa TV (Hamas), *Hamas Summer Camp Brainwashes Gaza Children to Hate*, (June 19, 2013), added by Israel Defence Forces on July 11, 2013; video available at: <https://www.youtube.com/watch?v=IJPxDAIYZc>

our children. If they had a proper education in a normal environment, they won't have looked for a value in death."¹⁶⁹

One of the most egregious parts of the war crimes committed by Haniyeh in conscripting children is that these acts facilitate and perpetuate the cycle of conflict between Palestinians in Gaza with Israel. By bringing up children as soldiers, and force-feeding them with a constant diet of propaganda encouraging them to give up their lives to kill Israelis, Hamas ensures that each generation has no option but to continue fighting. Hamas in turn justifies its corruption and mismanagement of Gaza through a supposed need to be in a perpetual conflict with Israel, until the latter is defeated and – in the words of the Hamas Charter – “obliterated”.¹⁷⁰ The militarisation of children thus becomes self-fulfilling: when the conflict is ongoing Hamas considers that more children are needed to participate, and the conflict itself is fuelled by Hamas conscripting children to fight.

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 17.¹⁷¹ The Court considers the action or inaction of the relevant State, and then scrutinizes the motive behind this action or inaction, asking *first*: are there on-going investigations or prosecutions, or have investigations been carried out and a decision made not

¹⁶⁹ Reported in Matthew Levitt, *Teaching Terror: How Hamas Radicalizes Palestinian Society*, (February 12, 2007); <http://www.washingtoninstitute.org/policy-analysis/view/teaching-terror-how-hamas-radicalizes-palestinian-society>

¹⁷⁰ Hamas Covenant 1988: The Covenant of the Islamic Resistance Movement (August 18, 1988), Preamble; available at: http://avalon.law.yale.edu/20th_century/hamas.asp

¹⁷¹ The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, (ICC-01/04-01/07-1497), *Judgement on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case* (September 25, 2009), at para. 78; available at: https://www.icc-cpi.int/CourtRecords/CR2009_06998.PDF

to prosecute?; and *secondly*: is the state unwilling or unable to carry out investigations or prosecutions to the required standard?

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.”¹⁷²

2. Application to the Facts

The crimes of recruiting/conscripting/ using children in hostilities might conceivably be tried as either a civilian or military matter. We submit that neither the military nor the civil justice systems within Gaza is willing to prosecute individuals and accordingly the threshold is met for the OTP to make a finding that there is no complementarity within the relevant justice system.

a. Military Justice System Within Gaza

The military judiciary in Gaza is structured according to Military Justice Law Number 4, which was passed on February 21, 2008 in the (then) Hamas-controlled Palestinian Parliament.¹⁷³ It has not been ratified by President Abbas of the PA or applied by the PA military judiciary to the West Bank, and the military justice system in Gaza is viewed largely as a Hamas-run institution.¹⁷⁴ 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.*”¹⁷⁵ In other words, the Minister of Military Justice, a member of Hamas as the ruling party, is required to refer a case in order

¹⁷² OTP, *Policy Paper on Preliminary Examinations* (November 2013), at para.47

¹⁷³ Human Rights Watch, *Abusive System: Failures of Criminal Justice System in Gaza* (October 3, 2012)

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

for it to fall within the scope of Article 63. The likelihood of a Hamas Minister referring Haniyeh for a war crimes prosecution is fanciful.

Given that it is Hamas' official policy, as dictated and ratified by Haniyeh, to recruit children into the military forces, it hardly needs to be said that no military disciplinary proceedings have taken place in this regard.

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.¹⁷⁶ In practice, the High Justice Council in Gaza appoints judges without PA Presidential approval and generally manages the judiciary in Gaza independently.¹⁷⁷ Even though the reconciliation agreement between Fatah and Hamas was supposed to unify the legal and legislative systems of Gaza and the West Bank, Fatah still does not have any legal authority on the ground in Gaza.¹⁷⁸

The UN Country Team in the occupied Palestinian territory has said as follows 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

¹⁷⁶ Hazem Balousha, *Hamas-Fatah divide cripples Palestine's judiciary*, Al Monitor (May 14, 2015)

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

by military courts, which lack procedural and substantive safeguards to ensure a fair trial”¹⁷⁹

Unsurprisingly, this system has not prosecuted or held accountable any of the participants in the crimes subject to this communication. As Amnesty International – a body which is often far from critical of the Palestinian leadership – 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 abuses continue to enjoy impunity, 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.”¹⁸⁰

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 interest of justice in accordance with Article 53(1)(c).

This is a limited mandate, which sets the default position firmly in favour of an investigation provided the other criteria are satisfied. Indeed Article 17(c) of the Rome Statute provided only restrains the OTP from proceeding with an investigation if there are substantial reasons to believe that it is *not* in the interest of justice to proceed; it does not require that the OTP affirmatively find the situation is in the interests of justice.¹⁸¹

2. Application to the Facts

¹⁷⁹ UN Country Team in the occupied Palestinian territory, *Gaza Ten Years Later* (July 2017), at pg. 5; available at https://unsco.unmissions.org/sites/default/files/gaza_10_years_later_-_11_july_2017.pdf

¹⁸⁰ Amnesty International, *Strangling Necks Abductions, Torture and Summary Killings of Palestinians by Hamas Forces During the 2014 Gaza/Israel Conflict* (May 2015)

¹⁸¹ The Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (November 2013), at para. 67; available at: https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf

In the present circumstances, we respectfully submit that it is surely within the interests of justice to investigate Haniyeh's war crimes concerning the enlistment/conscription of children. 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 willing actions: Gaza is not in a state of chaos or confusion, where numerous groups are able to influence young people. To the contrary, Gaza is subject to a totalitarian regime, where Hamas rules with an iron fist, and Haniyeh controls those rulers.

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 war crimes.

D. Conclusion on Admissibility

The war crimes committed by Haniyeh satisfy the admissibility requirements enumerated in Article 17 of the Rome Statute. The nature and scale of the war crimes as well as the manner and impact of the commission of the crimes meet the requirement of gravity for the OTP to initiate an investigation.

Hamas cannot meet the complementarity requirements set out in Article 17(2) and (3), so as to oust the jurisdiction of the ICC by guaranteeing proper criminal processes in Gaza. The legal authorities in Gaza and Palestine have failed to conduct any criminal investigations into the Hamas officials who bear responsibility for the war crimes committed during the time period of June 14, 2014 through May 31, 2018 and have demonstrated no intention or willingness to contemplate doing so in the future.

Finally, it is clearly in the interests of justice to proceed with an investigation of Haniyeh for these crimes.

VIII. OVERALL CONCLUSION

We respectfully submit that - subject to the general proviso on the ICC taking jurisdiction over “Palestine” at all - the evidence presented in this communication provides the OTP with ample basis to initiate a full investigation in accordance with Article 53(1) of the Rome Statute.¹⁸² The investigation should focus on a case against Ismail Haniyeh for war crimes committed both historically and on an ongoing basis by Hamas against the children of Gaza.

The charge of war crimes is appropriate because the acts in question took place in the context of an armed conflict. Article 8(2)(b)(xxvi) will apply if the conflict is deemed to be international and Article 8(2)(d)(vii) if it is deemed to be non-international.

Hamas operatives, military forces and civil servants committed these war crimes by conducting training and military operations and by enrolling children into the hostilities. 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 and had the power and ability to prevent and prosecute them. Instead, he and members of Hamas chose to facilitate and encourage the recruitment of child soldiers.

Through the radicalisation of children from a young age, they are raised in an atmosphere of hatred and extremism. This makes them even more vulnerable to the military recruiting that they are then exposed to, in the media, in school lessons and in martial training camps. Via these egregious acts of abuse, Hamas poisons the minds of generation after

¹⁸² Subject always to the proviso above, that the OTP should first satisfy itself that it is possible and appropriate to take jurisdiction over crimes emanating from “Palestine” prior to a political settlement of its borders and other fundamental matters.

generation of Palestinian children, condemning them to a life filled with animosity and violence. There is another way for these children to live, but Hamas will not provide it.

Notwithstanding the overt and brazen nature of these crimes, the Hamas-controlled Gazan judicial system has done nothing to prosecute or punish the offenses. The ICC therefore stands as the Court of last resort for the children of Gaza. We therefore request that the OTP launch a full investigation into the actions of Hamas and Haniyeh.

There are no countervailing reasons in the interests of justice militating against prosecution. To the contrary: “*ensuring human rights for children is not a courtesy, not a bonus, not a choice, but a binding obligation.*”¹⁸³

¹⁸³ United Nations Human Rights, Office of the High Commissioner, Facebook Post, (May 15, 2018); available at: <https://www.facebook.com/unitednationshumanrights/posts/2205601026123359>

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