



In the
International Criminal Court

**The Jerusalem Institute of
Justice**

The Complainant,

v.

Mahmoud Abbas

(عَبَّاس مَحْمُود)

Accused of Crimes Against Humanity

Communication to the Office of the Prosecutor of
the International Criminal Court regarding Crimes
Against Humanity committed against Palestinian
citizens in the West Bank by Mahmoud Abbas
(عَبَّاس مَحْمُود)

EXECUTIVE SUMMARY

We, the Jerusalem Institute of Justice, submit this communication to the Office of the Prosecutor of the International Criminal Court concerning Mahmoud Abbas, in relation to crimes against humanity committed through a **systematic and widespread campaign of murder, torture, and unlawful imprisonment** against parts of the Palestinian population in the territory of Judaea and Samaria, known as the “West Bank”.

Abbas is a national of the Hashemite Kingdom of Jordan (“Jordan”), which has been a State Party to the ICC since 2002. Accordingly, the ICC has jurisdiction over crimes he has committed under the Rome Statute, regardless of where they took place.

Abbas became President of the Palestinian Authority (“PA”) in January 2005. Despite his term of office having elapsed without further elections being held, Abbas remains internationally recognised President and *de facto* leader of the PA, the body which maintains effective control over certain areas in the West Bank.

During his time in power, Abbas has directed or allowed various crimes against humanity against various Palestinian groups – including those deemed to have been critical of the current PA government or which have supported rival Palestinian factions. Abbas knew of and was in a position to prevent the crimes against humanity that have been committed against the civilian population of the West Bank, yet he has manifestly failed to do so.

The case is grave enough to merit further investigation. Abbas’s crimes have had and will continue to have deleterious consequences on the Palestinian population of the West Bank, their families as well as the society and region. These crimes benefit no one but the PA leadership.

There is no prospect of local justice; pursuant to a series of international agreements, the PA has sole jurisdiction over crimes committed by Palestinians against Palestinians within the West Bank. The PA courts are not independent of the PA government, and have done nothing to punish those who play a direct role in committing these crimes against humanity. In any event, as PA President, there is no realistic chance of Abbas being prosecuted by courts over which his administration exerts significant control.

The crimes of Abbas are not merely historical; they are ongoing and contribute to the continued conflict between the rival Palestinian political factions Hamas and Fatah, and to the instability in the region. This internal conflict within the Palestinian leadership is damaging to the Palestinian population it is supposed to represent, and renders peaceful coexistence with its neighbours increasingly difficult. The ICC has the rare opportunity to take an important step not just in punishing perpetrators and deterring crimes against humanity, but also in sending a powerful statement that torture and similar acts are unacceptable. For all these reasons, we urge the Office of the Prosecutor to launch a full investigation.

The Jerusalem Institute of Justice
**Communication to the Office of
the Prosecutor of the
International Criminal Court**

The Responsibility of Mahmoud Abbas
for Crimes against Humanity committed
against the Palestinian people in the West
Bank from February 2011 through
February 2019

Submitted on 20 February 2019

by the Jerusalem Institute of Justice

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I. INTRODUCTION

The Jerusalem Institute of Justice hereby files this communication regarding criminal activities pursuant to Article 15 of the Rome Statute. We respectfully request that the Office of the Prosecutor (“OTP”) of the International Criminal Court (“ICC” or “Court”) should open an investigation into crimes committed by Mahmoud Abbas (also known as “Abu Mazen”). Since 2011, Abbas has held Jordanian citizenship/nationality, and Jordan is a State Party to the Rome Statute. Accordingly, the ICC may exercise jurisdiction over crimes he has committed since becoming a Jordanian citizen/national.

This communication details Mahmoud Abbas’ criminality in exercising effective authority and control over the widespread or systemic murder, imprisonment and torture of the Palestinian civilians, in furtherance of a state policy designed to deter resistance towards his government.

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

We respectfully submit that the low evidentiary threshold required under Article 53 for the OTP to open an investigation into Abbas’ crimes against humanity is clearly met. Taking into account the widespread and systemic nature as well as the severity of these attacks, there is every reason why it is in the interest of justice to pursue this matter. These crimes are on-going, and therefore justify urgent consideration by the OTP.

II. CONTENTS OF SUBMISSION

Section III of this communication sets out the historical background and circumstances through which the PA, and more specifically Abbas, came to exercise effective control over the West Bank.

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

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

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

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 justice system in the West Bank, and in VII.C why there are no reasons that it would be in the interests of justice not to proceed with a prosecution.

Section VIII summarises and concludes our submissions. Annexed to the communication is a bibliography of the sources used.

III. HISTORICAL BACKGROUND

The crimes addressed in this communication took place in the West Bank, against (real or perceived) Palestinian opponents of Mahmoud Abbas. Section III sets out the political and historical background to Abbas' somewhat precarious control over relevant parts of the West Bank, and the violent means through which he has maintained such power. The following is not intended to be a comprehensive history of the region and parties involved, but rather an introduction to the context in which Abbas' crimes took place.

A. Control of the West Bank and the Gaza Strip: 1948 - 1994

According to the UN Partition Plan of 1947,¹ most of the West Bank was scheduled for inclusion in a future Arab state. This plan was rejected by Palestinian representatives as well as the wider regional Arab leadership.² Immediately following Israel's declaration of independence the surrounding countries invaded. During the subsequent 1948 War, Jordan conquered the West Bank and annexed it two years later.³ Jordan's annexation of the West Bank was recognised only by Britain, Iraq and Pakistan.⁴

In the 1967 War, Jordan initiated hostilities between itself and Israel by bombarding Israeli cities and advancing its armed forces beyond the previous armistice lines around Jerusalem. Responding to these attacks, Israel acquired control over the West Bank and East Jerusalem from Jordan, annexing East Jerusalem and exercising administrative authority over

¹ United Nations General Assembly, *Resolution 181 (II). Future government of Palestine*, A/RES/181(II), (November 29, 1947), available at:

<https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253>

² United Nations, "The Plan of Partition and End of the British Mandate", *The Origins and Evolution of the Palestine Problem 1917-1988*, (New York: United Nations, 1990), available at:

<http://www.un.org/Depts/dpi/palestine/ch2.pdf>

³ Encyclopaedia Britannica, s.v. "West Bank", available at: <https://www.britannica.com/place/West-Bank>

⁴ Economic Cooperation Foundation, "The Israeli-Palestinian Conflict: An Interactive Database - Jordanian Annexation of the West Bank (1950)", available at: <https://ecf.org.il/issues/issue/134>

the West Bank.⁵ In 1988 Jordan renounced its claims over the West Bank.⁶ As set out further below in Section III C, Israeli administrative control of Gaza and the West Bank continued until around 1994, at which point the PA assumed certain powers – in particular with regards to the enforcement of criminal law (as set out further in Section III C, F and G below).

B. Formation of Fatah, Hamas and the PLO

Following 1948, Palestinians organized various political groupings, including the Palestinian National Liberation Movement, known as “Fatah” (ففتح) in 1959.⁷ The Fatah co-founders included Abbas and Yasser Arafat. In 1964, the Palestinian Liberation Organization (“PLO”) was established as an umbrella organization for the various national Palestinian movements.⁸ Shortly afterwards, Fatah joined the PLO and its members became leading figures within the latter organisation.⁹ In 1987, the Muslim Brotherhood established the Islamic Resistance Movement, known as “Hamas” (حماس).¹⁰

C. Oslo Accords, Formation of the PA and Palestinian Legislative Council

In September 1993 the Palestinian representatives and Israel entered into the Declaration of Principles on Interim Self-Government Arrangements (“Oslo I”).¹¹

Following Oslo I, Israel recognized the PLO as the representative of the Palestinian people and these parties entered into the Agreement on the Gaza Strip and the Jericho Area of

⁵ Encyclopaedia Britannica, s.v. “West Bank”.

⁶ Ibid. In the 1967 War, Israel also acquired control over Gaza, though the latter is not subject to the present communication, given that at the relevant times Abbas did not exercise effective control over that territory.

⁷ Encyclopaedia Britannica, s.v. “Palestine Liberation Organization”, available at: <https://www.britannica.com/topic/Palestine-Liberation-Organization>

⁸ Ibid.

⁹ Ibid.

¹⁰ Encyclopaedia Britannica, s.v. “Hamas”, available at: <https://www.britannica.com/topic/Hamas>

¹¹ United Nations General Assembly Security Council, *Declaration of Principles on Interim Self-Government Arrangements (Oslo I)*, in *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*, A/48/486, S/26560, (October 11, 1993), available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/71DC8C9D96D2F0FF85256117007CB6CA>

May 1994 (“the Gaza-Jericho Agreement”) which established and transferred some powers to an elected “Palestinian Authority”.¹² The Gaza-Jericho Agreement and other intervening agreements were superseded by or incorporated into the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of September 1995 (“Oslo II”).¹³ This Agreement established a new “Palestinian Interim Self-Government Authority”, now known as the Palestinian Authority (“the PA”), which replaced the Palestinian Authority established by the Gaza-Jericho Agreement. Under Oslo II the PA comprised an elected Ra’ees (President) and an elected Council, now commonly called the “Palestine Legislative Council” (“PLC”).

Pursuant to Oslo II, government functions over particular areas within the West Bank and Gaza (referred to as Areas A and B) were transferred to the PA pending final status negotiations.¹⁴ Under Oslo II executive functions of the PA were to be carried out by an Executive Authority comprising the President, members of the PLC nominated by the President and approved by the PLC, and other persons appointed by the President not constituting more than 20% of the Executive Authority.¹⁵

The first PLC elections were held on 20th of January 1996 and Fatah won the majority of the 88 seats.¹⁶ Fatah became the leading party within the initial PA government, and many of its members were given positions within the PA security or civil services.¹⁷ In 2002 the PLC purported to enact the Palestinian Basic Law, which has a quasi-constitutional status for the PA administration.¹⁸

¹² *Agreement on the Gaza Strip and the Jericho Area*, (May 4, 1994), available at: <http://ucdp.uu.se/downloads/fullpeace/ISR%2019940504.pdf>

¹³ United Nations Special Coordinator for the Middle East Peace Process, *Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip*, A/51/889, S/1997/357, (September 28, 1995), available at: <https://unsco.unmissions.org/israeli-palestinian-interim-agreement-west-bank-and-gaza-strip>

¹⁴ *Ibid.*

¹⁵ *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II) Article V4*, (28 September 1995), available at: <https://www.refworld.org/docid/3de5ebbc0.html>

¹⁶ Encyclopaedia Britannica, s.v. “Fatah”, available at: <https://www.britannica.com/topic/Fatah>

¹⁷ *Ibid.*

¹⁸ The Palestinian Basic Law was purportedly amended in 2003 and all references herein are to the amended version. See: *The Palestinian Basic Law, 2003 Amended Basic Law*, Article 13, (March 18, 2003), available at: <https://www.palestinianbasiclaw.org/basic-law/2003-amended-basic-law>

As explained below, owing to ongoing disputes between Fatah and Hamas, the PLC has not operated since 2007 and no further PLC elections have been held.

On December 22, 2018, Abbas announced that the Constitutional Court (which had purportedly been created by his decree in April 2016) had issued a decree dissolving the PLC and calling for legislative elections within 6 months (by mid-May 2019). Shortly after, PA Prime Minister Saeb Erekat called for the PLC to be replaced by a new “constituent assembly of the State of Palestine”. Hamas condemned the move as illegal and unconstitutional whilst maintaining its support for “*consensual general elections*” provided that Fatah pledges to accept their results whatever they may be.¹⁹

D. Conflict between Hamas and Fatah

Israel completed its withdrawal of civilians and military forces from Gaza on September 22, 2005, at which point that territory came under the control of the PA. On January 25, 2006, the second general elections for the PLC took place.²⁰ Hamas won 76 seats out of 132 in the PLC (which had been expanded since 1996), while Fatah won only 43 seats.²¹ Representatives of Hamas formed a new government, with the Hamas leader Ismail Haniyeh installed as the PA Prime Minister.²²

Members of the PLC subsequently agreed in September 2006 to form a national unity government between Fatah and Hamas.²³ However, before the unity government could be established as planned, violent clashes broke out between the two groups.²⁴

¹⁹ European Council on Foreign Relations, “Mapping Palestinian Politics - Palestine Legislative Council”, available at: https://www.ecfr.eu/mapping_palestinian_politics/detail/palestine_legislative_council

²⁰ BBC News, “Hamas sweeps to election victory”, (January 26, 2006), available at: http://news.bbc.co.uk/2/hi/middle_east/4650788.stm

²¹ Ibid.

²² Ibid.

²³ Ben Fishman and Mohammad Yaghi, “The Future of a Palestinian Unity Government”, *The Washington Institute*, (September 13, 2006), available at: <http://www.washingtoninstitute.org/policy-analysis/view/the-future-of-a-palestinian-unity-government>; Encyclopaedia Britannica, s.v. “Hamas”.

²⁴ Ibid.

In June 2007, following a short but intense period of fighting, Hamas took over full control of Gaza, ousting Fatah from governmental positions.²⁵ On 14 June 2007, in both response to and retaliation for the Hamas seizure of Gaza, Abbas announced the dissolution of the unity government, and formed an “emergency” administration in the West Bank.²⁶ Hamas claimed these acts could not be legally valid because they had not been approved by the PLC. Nonetheless, the international community appears to have treated the government headed by Abbas as if it were legitimate. As noted above, owing to these events the PLC has not been in session since 2007.

Several rounds of negotiation intended to achieve reconciliation between Hamas and Fatah have taken place since then. Despite several agreements to form a unity government, in particular in 2014 and 2017, none have been implemented. The government of Abbas continues to restrict supply of various goods and services, as well as tax funds to the Hamas administration in Gaza.²⁷

From June 2007 onward, the *status quo* position has been that Fatah, under Abbas, has exercised effective control over Areas A of the West Bank.²⁸ Hamas has exercised effective control over Gaza. Despite occasional periods of discussions between the two factions, both remain strongly opposed to each other’s continued rule, and protective of their own power in their respective territorial areas of influence.

It is these internecine disputes which form the primary background to the crimes committed by Abbas in the West Bank.

²⁵ Ibid.

²⁶ Scott Wilson, “Abbas Dissolves Government As Hamas Takes Control of Gaza”, *The Washington Post*, (June 15, 2007), available at:

<http://www.washingtonpost.com/wpdyn/content/article/2007/06/14/AR2007061400145.html?noredirect=on>

²⁷ Avi Issacharoff, “השתלטות או ייבוש: האולטימטום של אבו מאזן שעלול להסתיים בהסלמה”, *Walla! NEWS*, (September 21, 2018), available at: <https://news.walla.co.il/item/3188717>

²⁸ Haaretz, “PLO Unanimously Elects Abbas President of Future Palestinian State”, (November 23, 2008), available at: <https://www.haaretz.com/1.5063856>

E. Mahmoud Abbas

Mahmoud Abbas was born in Safed (now Israel) in November 1935. He studied in Damascus, Syria, and later in Moscow. His doctorate degree was published in 1984 under the title: “The Other Side: the Secret Relationship between Nazism and Zionism”. It has been described as anti-Semitic and a work of Holocaust denial.²⁹

Since co-founding Fatah in the 1950s, Abbas has been heavily involved in Palestinian politics.³⁰ Following Arafat’s death in 2004, Abbas has assumed many of his leadership roles. Abbas was appointed Chairman of the PLO in 2004 and remains in this post.³¹ In January 2005 he was elected President of the PA.³² Under Palestinian law Abbas’ term was supposed to have ended on January 25, 2009, following which elections were to be held.³³ However, since Abbas gained presidency he has refused to call any such elections; consequently he is now in his 13th year of office – and his 9th year without an electoral mandate.

As the PLC has not been in session since 2007, Mahmoud Abbas has ruled in the West Bank by presidential decrees,³⁴ taking advantage of a loophole in the Palestinian Basic Law.³⁵ As noted above, in June 2007 Abbas formed an “emergency” government for the West Bank, mainly composed of members of the Fatah movement.³⁶ In 2008 Abbas was purportedly

²⁹ BBC News, "Profile: Mahmoud Abbas", (November 5, 2009), available at: http://news.bbc.co.uk/1/hi/world/middle_east/1933453.stm

³⁰ Website of the President of the State of Palestine, “Biography of the President”, available at: <http://www.president.ps/eng/officialresume.aspx>

³¹ Ibid.

³² Ibid.

³³ Mohammed Assadi, “PLO set to extend Abbas term as Palestinian leader”, *Reuters*, (December 13, 2009), available at: <https://www.reuters.com/article/us-palestinians-israel-abbas/plo-set-to-extend-abbas-term-as-palestinian-leader-idUSTRE5BC0TC20091213>

³⁴ Linda Gradstein, “Palestinian Authority President Making Laws by Decree”, *The Jerusalem Post*, (July 30, 2016), available at: <http://www.jpost.com/Arab-Israeli-Conflict/Palestinian-Authority-President-making-laws-By-decree-highlighting-problems-462757>

³⁵ The Palestinian Basic Law, *2003 Amended Basic Law*, Article 43, (March 18, 2003).

³⁶ Isabel Kershner and Steve Erlanger, “Palestinian Splits Deepens; Government in Chaos”, *The New York Times*, (June 15, 2007), available at: <https://www.nytimes.com/2007/06/15/world/middleeast/15mideast.html>

elected by the PLO as President of the “Future State of Palestine”³⁷ and, in 2009, the PLO purported to extend indefinitely his term in office as President of the PA.³⁸

In the early months of 2011, Abbas and his two sons obtained Jordanian citizenship/nationality.³⁹ It was reported in April 2018 that Jordan was planning to revoke such citizenship. However, we are not aware that such revocation has taken place. Accordingly we respectfully invite the OTP to proceed on the basis that Abbas remains, and was at all material times, a citizen/ national of Jordan.

The European Council on Foreign Relations (“ECFR”), a think tank with offices across Europe, has written of Abbas:

“Over the years, Abbas has steadily purged or constrained his political rivals, monopolised the various Palestinian decision-making processes, and pursued increasingly authoritarian measures to stifle dissent and shrink the space for Palestinian democracy and popular participation. This political fragmentation and fragility has been compounded by continued infighting between Fatah and Hamas and the ensuing political and geographic separation between the West Bank and Gaza.”⁴⁰

It is the process by which Abbas has maintained power in the West Bank – in particular the “*increasingly authoritarian measures to stifle dissent*” which forms part of the subject matter of this communication.

F. Jurisdictional Responsibilities of the PA in the West Bank and in Gaza

The Oslo Accords divided the West Bank and Gaza into three categories as the first step in a phased process intended to transfer control of parts of the West Bank from Israel to the PA. Area A (initially 2.7% and now 18% of the area) came under complete PA control in

³⁷ Haaretz, “PLO Unanimously Elects Abbas President of Future Palestinian State”, (November 23, 2008), available at: <https://www.haaretz.com/1.5063856>

³⁸ Isabel Kershner, “P.L.O. Extends President Mahmoud Abbas’s Term”, *The New York Times*, (December 17, 2009), available at: <https://www.nytimes.com/2009/12/17/world/middleeast/17mideast.html>

³⁹ Khaled Abu Toameh, “Abbas, Dahlan take out Jordanian Citizenship”, *The Jerusalem Post*, (February 9, 2011), available at: <https://www.jpost.com/Middle-East/Abbas-Dahlan-take-out-Jordanian-citizenship>

⁴⁰ European Council on Foreign Relations, “Mapping Palestinian Politics: Introduction”, https://www.ecfr.eu/mapping_palestinian_politics/introduction

civil and internal security matters; Area B (initially 25.1% and now 20% of the area) came under Palestinian civil control while security related matters fell under Israel's jurisdiction; and Area C (initially 72.2% and now 60% of the area) remained under Israeli territorial control.⁴¹

For the avoidance of doubt, the crimes described in this communication refer to those committed in Areas A and B. As such they occurred in a territory over which, from around September 1995 onward, the PA has exercised a high degree of control (the nature and extent of such control is addressed further below at Section VI. G 2).

G. Criminal Justice System in the West Bank

The criminal justice system in the West Bank is relevant to the present communication for two reasons: *first*, in terms of the commission of crimes under the Rome Statute, the local criminal justice system is a tool actively used by the PA under the veneer of lawfulness, in order to support its campaign of violence against perceived enemies; *second*, with regards to the question of complementarity, it is necessary to describe the nature of the PA's *de facto* and *de jure* control over the local judiciary in order to explain why it offers no prospect for effective (or indeed any) prosecution of the perpetrators of such crimes.

Pursuant to Oslo II, Annex IV, Article I (1b):

“[The PA] has criminal jurisdiction over Palestinians and their visitors who have committed offenses against Palestinians or their visitors in the West Bank and the Gaza Strip in areas outside the Territory, provided that the offense is not related to Israel's security interests”.

Accordingly, although criminal offenses related to Israel's security committed in the West Bank fall under the jurisdiction of Israeli Courts, all other criminal acts committed by Palestinians against Palestinians fall under the jurisdiction of the PA's courts.⁴²

⁴¹ Mustafa. H. Abdelbaqi, *Introduction to the Palestinian Criminal Justice System*, 1st Edition, (Fribourg: Max Planck Institute for Foreign and International Criminal Law, 2006), available at:

https://www.mpicc.de/shared/data/pdf/fa_35_abdelbaqi07_06.pdf

⁴² Ibid.

1. PA Courts and Judiciary

The Palestinian High Judicial Council was established pursuant to Article 100 of the Palestinian Basic Law.⁴³ PA courts hold judicial authority over all legal persons and are responsible for “*all disputes and crimes except those that are exempted by a special legislative text*”.⁴⁴ Under the Palestinian Basic Law the PA President must authorise all judicial appointments; accordingly each serving judge owes their position (and its continuation) to Abbas.

The PA Public Prosecutor is responsible for the investigation of crimes and the decision of whether subjects should be charged. He maintains exclusive authority to “*file and initiate criminal cases unless the law provides otherwise*”.⁴⁵ However, as legal commentator M. H. Abdelbaqi explains in a leading work on the Palestinian Justice System, the Public Prosecutor “rarely intervenes or practices his authority over the security forces, especially in relation to ‘political’ and ‘security’ prisoners; the security forces do not often inform the attorney general about detentions, nor apply to him for extensions of detention although they are required to do so by law”.⁴⁶

2. PA Penal Institutions

The PA controls all Palestinian penal institutions within the West Bank. These include: formal prisons, pre-trial detention centres at police stations and unsupervised (illegal) detention centres at different security stations.⁴⁷ In theory, these institutions are subject to inspections in order to maintain compliance with local and international law. The reality is that such inspections rarely occur, and when they do they are cursory in nature.⁴⁸

⁴³The Palestinian Basic Law, *2003 Amended Basic Law*, Article 100, (March 18, 2003).

⁴⁴ Mustafa H. Abdelbaqi, *Introduction to the Palestinian Criminal Justice System*, 1st Edition.

⁴⁵ Ibid.

⁴⁶ Ibid., p.25.

⁴⁷ Ibid., p.39.

⁴⁸ Ibid.

3. PA Security Forces

The security services comprise of the national security force, the internal security force, and the intelligence force.⁴⁹ The civil police, a part of the internal security force, are the main law enforcement apparatus and consist of two branches, although the legal system does not distinguish between them.⁵⁰ The branch responsible for the investigation of crimes is the “judicial police”.⁵¹ The “civil police” “are controlled by the Head of the Police force under the auspices of the Ministry of Interior”.⁵²

The result of this structure is that the Ministry of Interior retains overall control over disciplinary measures for police.⁵³ As set out in further detail in Section VI.G.2.a below, the Minister of Interior is ultimately accountable to the PA President, namely Abbas.

⁴⁹ Ibid., p. 17.

⁵⁰ Ibid.

⁵¹ Ibid., p. 18 .

⁵² Ibid.

⁵³ Ibid., pp. 16-19.

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 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.”⁵⁴

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

It should be noted that the standard of proof required to trigger an investigation pursuant to Article 53 falls well below the standard required for later stages of a criminal investigation and trial, such as the decision to issue an arrest warrant at Pre-Trial stage,⁵⁵ or ultimately to make a substantive finding of guilt.⁵⁶ A Pre-Trial Chamber of the ICC described the standard to be met under Article 53 as “*the lowest evidentiary standard provided for in the Statute.*”⁵⁷

⁵⁴ United Nations General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, (17 July 1998), available at: <https://www.refworld.org/docid/3ae6b3a84.html>

⁵⁵ *Ibid.* Articles 58(2)(d) and 61(7), 1998.

⁵⁶ *Ibid.* Article 66(3), 1998.

⁵⁷ International Criminal Court Pre-Trial Chamber II, *Situation in the Republic of Kenya: Decision Pursuant to*

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.*”⁵⁸ As the Pre-Trial Chamber explained, for the “*reasonable basis*” test under Article 53 to be satisfied, “*it is sufficient at this stage to prove that there is a reasonable conclusion alongside others (not necessarily supporting the same finding), which can be supported on the basis of the evidence and the information available.*”⁵⁹ The threshold at this point is merely that “*a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court has been or is being committed*”.⁶⁰

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*”.⁶¹ We note that the OTP has taken preliminary steps to investigate potential crimes within the situation in Palestine.⁶² 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.*”⁶³

The OTP’s consideration of the situation in Palestine comes as a result of purported acceptance of the ICC’s jurisdiction, through a declaration lodged by Abbas on January 1st and 2nd, 2015.⁶⁴ A submission to the jurisdiction of the ICC made by one party to a conflict should

Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya [2010], ICC-01/09, (March 31, 2010), para. 27, available at: <https://www.legal-tools.org/doc/338a6f/pdf/>

⁵⁸ Ibid.

⁵⁹ Ibid., para. 33.

⁶⁰ Ibid., para. 35.

⁶¹ International Criminal Court 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

⁶² International Criminal Court, *Preliminary Examination – Palestine*, available at: <https://www.icc-cpi.int/palestine>

⁶³ International Criminal Court Pre-Trial Chamber I, *Situation in the State of Palestine: Decision on Information and Outreach for the Victims of the Situation [2018]*, ICC-01/18, (July 13, 2018), p.8, available at: https://www.icc-cpi.int/CourtRecords/CR2018_03690.PDF

⁶⁴ Ibid., p.3.

not exclude investigation into the acts of the other party. Accordingly, it is appropriate that the OTP should give due consideration to the crimes against humanity committed by Abbas himself, especially in circumstances where these crimes are a cynical, calculated and sustained attack against the Palestinian civilian population of the West Bank.

V. JURISDICTION RATIONE PERSONAE, LOCI 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, pursuant to Article 7 of the Rome Statute. Requirements (1) and (2) are addressed in this section. Jurisdiction *ratione materiae* is addressed in Section VI.

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

Article 12(2)(b) of the Rome Statute provides that the ICC may also exercise jurisdiction, if the ICC’s jurisdiction has been accepted by “[t]he State of which the person accused of the crime is a national.” This is known as the nationality, or “active personality” principle.⁶⁵

⁶⁵ Zsuzsanna Deen-Racsmany, “The Nationality of the Offender and the Jurisdiction of the International Criminal Court”, *The American Journal of International Law*, Vol. 95, No. 3, (July, 2001), pp. 606-623.

B. Application to Facts

1. Ratione Personae

As noted above, since February 2011 Abbas has been a citizen/national of Jordan,⁶⁶ there being no difference between the two concepts pursuant to the relevant Jordanian law.⁶⁷ Jordan signed the Rome Statute on 7 October 1998 and ratified it on 11 April 2002, thereby becoming a State Party and accepting the jurisdiction of the Court pursuant to Article 12(2)(b) of the Rome Statute.⁶⁸ Consequently, the ICC has jurisdiction over crimes committed by Abbas (at least during the period of his nationality), regardless of where they occurred.⁶⁹

2. Ratione Loci

Alternatively, and only if for any reason the OTP does not consider it sufficient that Abbas is or was at the relevant times a citizen/national of Jordan, then we would respectfully submit that the ICC should nonetheless exercise jurisdiction over his crimes in the event that it is prepared to take *any* jurisdiction over crimes alleged to have been committed in the “State of Palestine”.

The OTP will recall that it was Abbas himself, in his purported capacity as President of the “State of Palestine”, who deposited a retrospective *ad hoc* submission to the ICC’s jurisdiction under Article 12(3) on January 1st, 2015.⁷⁰ On January 2nd, 2015 Abbas again purporting to act on behalf of the “State of Palestine”, purported to accede to the Rome Statute by depositing its instrument of accession with the UN Secretary-General. The ICC website

⁶⁶ Khaled Abu Toameh, “Abbas, Dahlan take out Jordanian Citizenship”

⁶⁷ See Law No. 6 of 1954 on Nationality (last amended 1987), available at: <https://www.refworld.org/docid/3ae6b4ea13.html>

⁶⁸ Website of the International Criminal Court, entry on Jordan, available at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/jordan.aspx

⁶⁹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, (Oxford, 2016), p. 351 *et seq.*

⁷⁰ International Criminal Court, *Preliminary Examination – Palestine*, available at: <https://www.icc-cpi.int/palestine>

provides that the Rome Statute entered into force (in relation to Palestine) on 1 April 2015.⁷¹ However, such announcement remains subject to any determination by the ICC itself.

The position of the Jerusalem Institute of Justice as regards the “State of Palestine” and its purported submission to the jurisdiction of the ICC is set out at length in our communication dated September 13th 2018, concerning crimes committed by Ismail Haniyeh, and we respectfully refer the OTP to that document.⁷²

In summary, if the OTP considers that the West Bank is within “*the occupied Palestinian territory*” and that Abbas had competence to submit such territory to the jurisdiction of the ICC, then the OTP has an alternative route to take jurisdiction over the crimes described herein on the basis of *ratione loci*.⁷³

3. Ratione Temporis

Pursuant to Articles 11 and 126 of the Rome Statute, the temporal jurisdiction of the Court applies from the date of the Rome Statute’s entry into force (which occurred on 1 July 2002).⁷⁴ If a State becomes a Party to the Rome Statute after its entry into force, the Court may

⁷¹ Ibid.

⁷² We set out in the communication dated September 13th 2018 concerning Haniyeh, why the “State of Palestine” – even if such an entity exists – cannot confer jurisdiction over crimes committed by Israelis because to do so would breach Oslo II (which, as noted above, restricts the jurisdiction of the PA to crimes committed by Palestinians against Palestinians).

⁷³ For the avoidance of doubt, the Jerusalem Institute of Justice reserves its position as to whether, notwithstanding the Palestinian submission to the ICC’s jurisdiction, and the latter’s purported acceptance of such submission, it is legally permissible or otherwise appropriate in the interests of justice for the ICC to take jurisdiction over matters within the territory of “the State 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). A resolution adopted by the UN General Assembly on 4 December 2012 (A/RES/67/19), which accorded to Palestine non-member observer State status in the United Nations, did not thereby create a State or determine the borders of any such entity. In any case, it is generally accepted that UN General Assembly resolutions are not, of themselves, binding in international law. *See e.g. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, of July 8, 1996 at paras. 68 – 70. Nor is the position altered by Security Council Resolution 2334 of December 23, 2016, which is fully consistent with the continuation of the Oslo Accords; See: A. Zimmermann Andreas, “Security Council Resolution 2334 (2016) and its Legal Repercussions Revisited”, *EJILtalk*, (January 20, 2017), available at: <https://www.ejiltalk.org/security-council-resolution-2334-2016-and-its-legal-repercussions-revisited/>

⁷⁴ United Nations General Assembly, Rome Statute of the International Criminal Court (last amended 2010), (17 July 1998), ISBN No. 92-9227-227-6, available at: <https://www.refworld.org/docid/3ae6b3a84.html>

exercise its jurisdiction only with respect to crimes committed after the entry into force of the Rome Statute, unless the State has made a declaration under Article 12(3).⁷⁵

As noted above, Jordan deposited its instrument of ratification of the Rome Statute on April 11, 2002, and thereby accepted the ICC's jurisdiction over crimes committed by its nationals or on its territory from that date onward pursuant to Article 12.⁷⁶ Jordan has not made any declarations under Article 12(3).

The wording of the Rome Statute, as well as related instruments such as the ICC's Rules of Evidence and Procedure are silent as to how the nationality principle in Article 12(2)(b) of the former is to be applied in circumstances where an alleged perpetrator of crimes has acquired or lost the nationality of a Member State following the accession of that Member State to the Rome Statute (as has occurred here).⁷⁷

We respectfully submit that, consistent with the nationality principle set out in Article 12(2)(b) read in the context of the Rome Statute as a whole, the OTP should open an investigation into Abbas concerning crimes committed between February 2011 (the approximate date of his acquiring Jordanian nationality) and the date of this communication. Alternatively, and in the event that Abbas is able to prove he lost Jordanian nationality prior to the date of this communication, then the OTP's investigation should consider the period between February 2011 and the date on which such nationality was lost.

In relation to jurisdiction via the nationality principle, it might be suggested that Abbas should avoid the jurisdiction of the Court by reason of the fact that – even if his Jordanian nationality has not yet been revoked or renounced at the time of the submission of this

⁷⁵ ICC 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

⁷⁶ In the event that the OTP decides for any reason it cannot rely on Abbas' citizenship, then it is respectfully submitted that the applicable dates for the purported submission of the State of Palestine should apply, assuming of course that such submission is accepted. 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.

⁷⁷ Zsuzsanna Deen-Racsmay, "The Nationality of the Offender and the Jurisdiction of the International Criminal Court".

communication – pursuant to press reports from around April 2018, he may have lost his Jordanian nationality *by the time any investigation* or indeed prosecution being opened against him. It should be noted in this regard that, under Articles 17-19 of the Rome Statute, the Court has the competence to rule on questions of admissibility and jurisdiction, and that as of yet there are no rulings on this point.

We respectfully submit that, having been a national of a State Party to the ICC and having committed crimes under the Rome Statute during such period in which he held Jordanian nationality, Abbas should not escape the jurisdiction of the ICC, even if he were to have lost such nationality before the opening of an investigation/ prosecution.

This approach submitted, would accord with the fundamental principle of non-impunity for the most serious international crimes, which underlies the approach of the Rome Statute. The recitals to the Rome Statute recognize “*that such grave crimes threaten the peace, security and well-being of the world*”, affirm: “*that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation*” and finally determine: “*to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes*”.

To allow a perpetrator of grave crimes to escape the jurisdiction of the ICC by revoking his nationality of a State Party would therefore severely undermine the purpose of the Rome Charter. It would also run contrary to the writings of learned jurists, as set out below.⁷⁸

Article 5 of the 1935 Harvard Draft Convention on Jurisdiction with Respect to Crime, an influential legal text, based jurisdiction on nationality *either* at the time of the commission of the crime *or* at the time of prosecution.⁷⁹ Similarly, as to jurisdiction continuing after an

⁷⁸ Khaled Abu Toameh, “Abbas, Dahlan take out Jordanian Citizenship”.

⁷⁹ *Harvard Draft Convention on Jurisdiction with Respect to Crime with Comment Article 5*, *American Journal of International Law*, vol. 29, p.439, (1935), available at: www.jstor.org/stable/2213634

alleged perpetrator has lost his nationality of a State Party to the Rome Statute, Zsuzsanna Deen-Racsmany has written in a widely-cited paper:

“Since any other rule might lead to undesirable results, including impunity and abuse, it is suggested here that the principles expressed in Article 5 of the 1935 Harvard Draft Convention, which are supported by many municipal penal laws and some municipal decisions, should continue to be applied. Nationality either at the time of prosecution or at the time of the commission of the crime should be sufficient for jurisdiction, even before the ICC. This rule is in harmony with the provisions of the statute, and if the court should find that it reflects international law, it could be applied without amending the statute”.⁸⁰

In conclusion, it is respectfully submitted that the above represents the correct approach, which ought to be adopted by the OTP. Abbas was a Jordanian national at the time of the commission of his crimes, from at least February 2011 to April 2018, and accordingly ought to be subject to the jurisdiction of the ICC in that period.

⁸⁰ Zsuzsanna Deen-Racsmany, “The Nationality of the Offender and the Jurisdiction of the International Criminal Court”.

VI. JURISDICTION RATIONE MATERIAE

In this Section we set out why there is a reasonable basis for the OTP to believe the relevant crimes have been committed by Abbas pursuant to Article 53(1) of the Rome Statute.

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

Article 7(1) of the Rome Statute provides:

“Crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁸¹

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

Within a relatively opaque society such as that maintained by the PA in the West Bank, where freedom of speech and press freedoms are restricted, definitive evidence of crimes against humanity by the ruling party can be difficult to come by. This is especially so in circumstances where those who speak out may well face the same fate as the original victims. Nonetheless, the following sections show that despite the significant restrictions on individuals within the West Bank, as well as upon journalistic freedom to report the administration’s crimes,⁸² there is compelling evidence that crimes against humanity have been committed.

⁸¹ ICC, *Elements of Crimes*, Article 7, available at: <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>

⁸² For example, *Freedom House*, dedicated to freedom of speech, reported numerous arrests of journalists and other media workers who expressed criticism towards the Palestinian Authority between 2011 and 2018. Victims were held in prison for a prolonged amount of time without being charged and “*arrests and interrogations by Palestinian forces were reportedly accompanied by physical mistreatment and verbal abuse*”.

The following sub-sections refer to *the “chapeau”*, or general, requirements for the commission of crimes against humanity: that they be widespread or systematic, directed against any civilian population, and that the accused had knowledge of the attack.⁸³ The OTP will note that the Elements of Crimes repeat the chapeau requirements for each individual crime against humanity. Accordingly, and necessitated by the structure of the Rome Statute, there will be some repetition in the substance of this communication between Sections VI. A-C (chapeau requirements), and Sections VI. D-F (individual crimes against humanity). Even so, all such evidence serves to further confirm the guilt of Abbas.

A. “Widespread or Systematic”

1. Legal Standard

Article 7(1) of the Rome Statute requires that for an attack to be considered a crime against humanity, it must be either “*widespread or systematic*”. These conditions apply disjunctively, meaning that only one of the described elements needs to be satisfied.⁸⁴ “Widespread” refers to the “*large-scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims*”.⁸⁵ “Systematic” refers to “*the organized nature of the acts of violence and the improbability of their random occurrence*”.⁸⁶

To determine whether an attack satisfies the requirements, “*the consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible*

Cf. Freedom House, “Freedom of the Press 2016: West Bank and Gaza Strip”, Freedom of the Press Surveys, 2011-2018, available at: <https://freedomhouse.org/report/freedom-press/2017/west-bank-and-gaza-strip>

⁸³ Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals*, (Oxford Scholarship Online, 2010), pp.29-51, available at:

<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199207541.001.0001/acprof-9780199207541-chapter-11>

⁸⁴ ICC Pre-Trial Chamber II, *Decision Pursuant to Article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya [2010]*, ICC-01/09-19-Corr, (March 31, 2010), para. 94.

⁸⁵ *Ibid.*, para. 95.

⁸⁶ *Ibid.*, para. 96.

participation of officials or authorities or any identifiable patterns of crimes, could be taken into account".⁸⁷

A “*widespread attack*” needs to be carried out in the context of an organizational policy, meaning the attack needs to be “*thoroughly organized and follow a regular pattern*”.⁸⁸ Furthermore, “such a policy may be made either by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population”.⁸⁹

2. Application to Facts

With regards to each of the crimes detailed in Sections VI. D, E and F, the relevant acts were widespread and/ or systematic in nature. Further explanation is provided below on how these attributes apply to the specific crimes of murder, imprisonment and torture, but the following general observations can be made as to the PA’s use of these crimes as a central part of its governmental policies to maintain power.

In 2016, the Henry Jackson Society published a report entitled “Confronting Human Rights Abuses in the Palestinian Authority: An Essential Step for Progress in the Region”, which stated the following:

“The Palestinian Authority has been responsible for numerous extrajudicial killings of individuals held in its detention facilities, as well as having a long and troubling record with regards to the issuing of the death penalty. There is an equally serious and

⁸⁷ International Criminal Tribunal for the former Yugoslavia Appeals Chamber, Prosecutor v. Kunarac, Kovac and Vukovic Judgement [2001], IT-96-23-T and IT-96-23/1-A, (12 June, 2002), para. 95, available at: <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf> ; ICTY Trial Chamber II, Prosecutor v. Stakić, Judgement [2003], IT-97-24-T, (31 July 2003), para. 625, available at: <http://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf>

⁸⁸ Larry May and Elizabeth Edenberg, *Jus Post Bellum and Transitional Justice* (New York: Cambridge University Press, 2013), p. 113.

⁸⁹ International Criminal Court Pre Trial Chamber I, *Decision on the confirmation of charges against Germain Katanga and Mathieu Ngudjolo [2008]*, ICC-01/04-01/07, (September 30, 2008), para. 396, available at: https://www.icc-cpi.int/CourtRecords/CR2008_05172.PDF

widespread phenomenon of torture and extreme physical abuse that has taken place in Palestinian Authority prisons.⁹⁰

Human Rights Watch similarly concluded in an October 2018 report entitled “Two Authorities, One way, Zero Dissident: Arbitrary Arrest & Torture under the Palestinian Authority & Hamas”, that:

“The mistreatment and torture of those in Palestinian custody is routine” and that “torture is governmental policy for [...] the PA”.⁹¹

Consistent with the above, the NGO Amnesty International recorded in its 2017/2018 report that:

“Torture and other ill-treatment of detainees remained common and was committed with impunity by Palestinian police and security forces in the West Bank, and by Hamas police and security forces in Gaza. The Independent Commission for Human Rights (ICHR), Palestine’s national human rights institution, received hundreds of allegations of torture and other ill-treatment of detainees held in the West Bank and Gaza”.⁹²

A high number of torture cases and occurrences, committed by the PA authorities, are reported by victims, however the majority of incidents go undocumented due to intimidation and/or fear of further persecution.

The Independent Commission for Human Rights (“ICHR”) is a Palestinian organization established by decree of (then) PLO Chairman Yasser Arafat, which describes its mission as being “to protect and promote human rights in accordance with Palestinian Basic Law and the international principles of human rights”.⁹³ In May 2018 alone, the ICHR reported 23 cases of

⁹⁰ Bassem Eid, *Confronting Human Rights Abuses in the Palestinian Authority: An Essential Step for Progress in the Region*, (London: The Henry Jackson Society, 2016), p.3, available at: http://henryjacksonsociety.org/wp-content/uploads/2016/05/Palestinian-Human-Rights_online.pdf

⁹¹ Human Rights Watch, “Two Authorities, One way, Zero Dissident: Arbitrary Arrest & Torture Under the Palestinian Authority & Hamas”, (October 2018), available at: https://www.hrw.org/report/2018/10/23/two-authorities-one-way-zero-dissent/arbitrary-arrest-and-torture-under_p_6

⁹² Amnesty International, *The State of World Human Rights - Report 2017/18* –, (February 2018), available at: <https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF>.

⁹³ Independent Commission for Human Rights, “About Us”, available at: <http://ichr.ps/en/1/1/84/About-Us.htm>

torture and ill-treatment in the West Bank.⁹⁴ The mistreatments included beatings, deprivation of sleep, punching, threats, mental torture and forcing detainees to stand or sit in stress positions (known as “shabeh”) for long periods.⁹⁵ Moreover, the ICHR observed an increase in the number of violations of the right to physical liberty committed by the Jericho branch of the PA’s Joint Security Committee (part of the PA security services) in 2017.⁹⁶

The systematic nature of the relevant criminal acts is further illustrated by the enactment of a law designed to suppress political dissent in the West Bank: the Electronic Crimes Law, which was originally issued by a decree of President Mahmoud Abbas in June 2017. In its initial form, the law penalized any criticism concerning the PA online. Anyone deemed to have disturbed “*public order*”, “*national unity*” or “*social peace*” was liable to be sentenced to imprisonment and up to 15 years hard labour.⁹⁷ In April 2018, the PA approved a new version of the Electronic Crimes Law with some modifications, “despite severe criticism from local and international rights groups”.⁹⁸

Even if the law as ultimately enacted has removed some of the most egregious elements, it is nonetheless clear that the intent of the PA (and in particular of Abbas) is to suppress free speech in the West Bank among particular groups through intimidation. The Association for

⁹⁴ The Independent Commission for Human Rights, *Monthly Report Human Rights and Freedom’s Violations in Palestine*, (May 2018), available at: <http://ichr.ps/en/1/5/2409/Monthly-Report-Human-Rights-and-Freedom’s-Violations-in-Palestine-May-2018.htm>

⁹⁵ The Independent Commission for Human Rights, *Monthly Reports*, (January 2015 – January 2018), available at: <http://ichr.ps/en/1/5>

⁹⁶ The Independent Commission for Human Rights, *23rd Annual Report: Executive Summary 2017*, (January-December 31, 2017), available at: <http://ichr.ps/en/1/6/2408/ICHR-23rd-Annual-Report.htm>

⁹⁷ Amnesty International, “Palestine: Dangerous escalation in attacks on freedom of expression”, (August 23, 2017); available at: <https://www.amnesty.org/en/latest/news/2017/08/palestine-dangerous-escalation-in-attacks-on-freedom-of-expression/>; Amnesty International, *Report 2017/18 – The State of World Human Rights*, (February 2018), available at: <https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF> ; Human Rights Watch, *World Report 2018*; available at: https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf

⁹⁸ Middle East Monitor, “PA approves ‘Electronic Crimes Law’ despite severe criticism”, (April 18, 2018); available at: <https://www.middleeastmonitor.com/20180418-pa-approves-electronic-crimes-law-despite-severe-criticism/>

Progressive Communications has reported that the updated 2018 version of the Electronic Crimes Law:

“[...] threatens to penalize individuals by imprisonment and/or fines for anyone who deliberately enters these websites and/or continues to use them despite knowing that the websites were blocked. This is considered a direct violation of media freedoms, in addition to the fact that the Palestinian economy could face severe repercussions in the face of blocked web pages.”⁹⁹

To be clear, it is not submitted in this communication that the restriction of free speech is a crime under the Rome Statute *per se* but rather that the commission of crimes such as torture, unlawful imprisonment and murder against political opponents in the furtherance of a wider campaign to subdue and discourage dissent (as demonstrated by the Electronic Crimes Law) is compelling evidence that those crimes were systematic in nature.

We respectfully submit that there are powerful reasons for the OTP to conclude that the relevant incidents of unlawful violence are not limited and random. Instead they have been, and continue to be part of the PA’s governmental policy – as directed or approved by Abbas – to stay in power at whatever cost, even if this involves the commission of crimes against humanity in relation to its own population.

B. “Attack Directed Against Any Civilian Population”

1. Legal Standard

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

⁹⁹ Association for Progressive Communications, “Has the Palestinian Cybercrime Law really been amended?”, (June 5, 2018), available at: <https://www.apc.org/en/news/has-palestinian-cybercrime-law-really-been-amended>

However, in practice, element (a) is satisfied by the actions which otherwise give rise to the crimes – in other words it is not treated as a freestanding requirement. An ICC Pre-Trial Chamber has confirmed that the attack need not be a military act, but can be a “*campaign or operation carried out against the civilian population.*”¹⁰⁰ Indeed, the Pre-Trial Chamber held further that “[t]he commission of the acts referred to in article 7(1) of the Statute constitute the ‘attack’ itself and, besides the commission of the acts, no additional requirement for the existence of an ‘attack’ should be proven.”¹⁰¹ Similarly, the ICTY has held that “[t]he attack in the context of a crime against humanity is not limited to the use of armed force; it encompasses any mistreatment of the civilian population”¹⁰² and could simply consist in “*exerting pressure on the population to act in a particular manner*”¹⁰³.

As to element (b), for the attack to qualify as a crime against humanity, the perpetrator must commit multiple instances of the relevant crimes enumerated in Article 7(1); a single isolated incident will not qualify. The standard “*requires that the State or organization actively promote or encourage such an attack against a civilian population.*”¹⁰⁴

Civilian population is defined in Article 50(1) of the Additional Protocol I of the Geneva Convention as, *inter alia*, anyone who is not a part of an armed forces, member of militia or volunteer corps, and who is not engaging in the customs of war (for example, carrying arms openly). The term is to be interpreted broadly,¹⁰⁵ and the “*presence within the civilian*

¹⁰⁰ ICC Pre-Trial Chamber II, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo* [2009], ICC-01/05-01/08, (June 15, 2009), para.75, available at: <https://www.icc-cpi.int/pages/record.aspx?uri=699541>

¹⁰¹ Ibid. See also on this point: ICTR, *The Prosecutor v. Akayesu* [1998], Case No. ICTR-96-4-T, "Judgment", (September 2, 1998), para. 581, available at:

<http://www.un.org/en/preventgenocide/rwanda/pdf/AKAYESU%20-%20JUDGEMENT.pdf>

¹⁰² ICTY Appeals Chamber, *Prosecutor v. Kunarac et al. Judgement* [2002], IT-96-23 & 23/1, (June 12, 2002), para. 86, available at: <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>

¹⁰³ Simon Chesterman, An Altogether Different Order: Defining the Elements of Crimes Against Humanity, in *Duke Journal of Comparative & International Law*, vol. 10, (2000), pp. 307-322, available at:

<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1219&context=djcil>

¹⁰⁴ UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), Article 7(3), available at: <http://www.refworld.org/docid/3ae6b3a84.html>

¹⁰⁵ E.g., ICTY Trial Chamber, *Prosecutor v. Tadic* Judgement [1997], IT-94-1-T, (May 7, 1997), para. 643, available at: <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>

*population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.”*¹⁰⁶ The Court has further stated that a “civilian population” could be of any nationality, ethnicity or other distinguishing features¹⁰⁷ and, particularly relevant for present purposes: “*the population targeted can include a group defined by its (perceived) political affiliations.*”¹⁰⁸

2. Application to Facts

In broad terms, the civilian population against which the attacks are directed – attacks instigated by the PA - is the Palestinian population of the West Bank.¹⁰⁹ These attacks have occurred at all levels of society, but have specifically been aimed at individuals who do not cooperate with and/or do not support the acting PA government led by Abbas. The most vicious of these attacks are carried out against groups defined by their (perceived) political affiliations, including supporters of Hamas, and persons who are thought to be supporting or assisting Israel. Thus, the immediate victims of such crimes are known or suspected political opponents of Abbas, but the wider class of victims (and intended targets) of such crimes is the entire Palestinian population of the West Bank, who are thereby intimidated into submitting to Abbas’ continued reign.

In an October 2018 report, Human Rights Watch documented more than two dozen cases of Palestinians detained by the PA “for no clear reason beyond writing a critical article

¹⁰⁶ ICRC, *Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, of 8 June 1977, Article 50(3), available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=E1F8F99C4C3F8FE4C12563CD0051DC8A>

¹⁰⁷ ICC Pre-Trial Chamber I, *Decision on the Confirmation of Charges Against Germain Katanga and Mathieu Ngudjolo*[2008], (ICC-01/04-01/07), (September 30, 2008), para. 399, available at: <https://www.icc-cpi.int/pages/record.aspx?uri=571253>

¹⁰⁸ ICC Pre-Trial Chamber II, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute* [2012], (ICC-01/09-01/11), (February 4, 2012), para. 164, available at: <https://www.icc-cpi.int/pages/record.aspx?uri=1314535>

¹⁰⁹ As the OTP will be aware, Jewish communities also live in the West Bank, though crimes against them are not subject to the present communication.

or Facebook posting or belonging to the wrong student group or political movement”.¹¹⁰ For instance, PA forces detained 38-year-old O.N. at least 15 times since he finished serving a 12-year prison sentence in Israel in October 2014, including just two days after his release, apparently because of his involvement with the Hamas political bloc while in Israeli prison. On April 18th 2016, PA security forces arrested him and held him under administrative detention - a form of imprisonment increasingly used in recent years and not subject to the legal procedures set out under the Palestinian Criminal Procedures law - pursuant to orders by local officials, including the governor of Qalqilya.¹¹¹ Following interrogation and torture, O.N. was eventually released without being presented before a prosecutor or court. His repeated arrests have had a significant toll on his family life, particularly his wife who was pregnant during the majority of his arrests.¹¹²

Other frequent targets for the PA include university professors, students, journalists and other individuals, whose only common characteristic is that they have been publicly critical of the PA government or have allegedly collaborated with Hamas or Israel.¹¹³

Accordingly, photojournalist M.H. was interrogated at Ramallah intelligence headquarters in September 2017 for Facebook posts encouraging cooperation of security forces with Israel, despite Abbas’s public statement suspending coordination. After being threatened, he handed over his phone and provided his social media and email passwords. When M.H. was eventually released, he realized monitoring applications had been installed on his telephone. After deleting the applications, and fearing arrest, M.H. fled to Jordan where he remains up to

¹¹⁰ Sawafta Ali, “Rights group accuses Palestinian Authority, Hamas, of using systematic torture”, *Reuters* (October 23, 2018), available at: <https://www.reuters.com/article/us-palestinians-politics-rights/rights-group-accuses-palestinian-authority-hamas-of-using-systematic-torture-idUSKCN1MX1DZ>

¹¹¹ Human Rights Watch, “Two Authorities, One way, Zero Dissident: Arbitrary Arrest & Torture Under the Palestinian Authority & Hamas”, (October 2018), pp.2-3.

¹¹² Testimony collected by Jerusalem Institute of Justice.

¹¹³ Human Rights Watch, “Two Authorities, One way, Zero Dissident: Arbitrary Arrest & Torture Under the Palestinian Authority & Hamas”, (October 2018), pp.2-3. See also: Addameer, “*Bone of their Bone: Torture and Ill-Treatment by Palestinian Security Forces*”, (June 26, 2016), available at: <http://www.addameer.org/news/bone-their-bone-torture-and-ill-treatment-palestinian-security-forces>

this day. In his own words he expresses: “I do not want to live in a place where I am constantly harassed... The PA exists to look after me, not to intimidate me”.¹¹⁴

Human Rights Watch have reported: “the Fatah-dominated Palestinian Authority (PA) in the West bank [...] [has] in recent years carried out scores of arbitrary arrests for peaceful criticism of the authorities, particularly on social media, among independent journalists, on university campuses, and at demonstrations”.¹¹⁵ This is illustrated by the case of a student in Ramallah who was arrested in 2015 after sharing a Facebook post which was critical of the PA. The student reported that a Palestinian police officer asked him to read the post aloud. After he did so, the police beat the student. The victim shares:

“They hit me in different ways: kicking, beatings, punching all over the body, but especially on my back. This lasted for about 45 minutes [...] I was beaten by more than six police officers and they were constantly insulting me verbally. After they finished, they asked me to put my face against the wall and to raise one of my legs (shabeh). They asked me not to move and not to touch the wall. When I was standing some police officers would come into the room and start hitting and insulting me”¹¹⁶

Likewise, the NGO Freedom House reported numerous arrests of journalists and other media workers who expressed criticism towards the PA between 2011 and 2018. Victims were held in prison for prolonged periods without being charged and “*arrests and interrogations by Palestinian forces were reportedly accompanied by physical mistreatment and verbal abuse*”.¹¹⁷ One such victim was Amir Khalil Abu Arram, a cameraman for *Al Aqsa TV*, who was arrested and taken to the intelligence headquarters in Ramallah. Freedom House reports

¹¹⁴ Testimony collected by Jerusalem Institute of Justice.

¹¹⁵ Human Rights Watch, “Two Authorities, One way, Zero Dissident: Arbitrary Arrest & Torture Under the Palestinian Authority & Hamas”, (October 2018), p.1

¹¹⁶ Ibid.

¹¹⁷ Freedom House, *Freedom of the Press 2014 - Gaza and the West Bank*, (April 2014), available at: <https://freedomhouse.org/report/freedom-press/2014/west-bank-and-gaza-strip>; Freedom House, *Freedom of the Press 2015 - Gaza and the West Bank*, (April 2015), available at: <https://freedomhouse.org/report/freedom-press/2015/west-bank-and-gaza-strip>; Freedom House, *Freedom of the Press 2016 - Gaza and the West Bank*, (March 2016), available at: <https://freedomhouse.org/report/freedom-press/2016/west-bank-and-gaza-strip>; Freedom House, *Freedom of the Press 2016 - Gaza and the West Bank*, (April 2017); available at: <https://freedomhouse.org/report/freedom-press/2017/west-bank-and-gaza-strip>; Freedom House, *Freedom of the Press 2017 - Gaza and the West Bank*, available at: <https://freedomhouse.org/report/freedom-press/2017/west-bank-and-gaza-strip>.

that the victim was forced to stand on his feet for several hours while handcuffed strongly and blindfolded.¹¹⁸ The “severe pain” and “bad circumstances of his arrest” as Abu Arram shares resulted in his transfer to Ramallah hospital.¹¹⁹

In summary, we respectfully submit that there is ample evidence for the OTP to consider that the attacks carried out by the PA are *directed against* specific groups within the Palestinian population, defined by their (real or perceived) political affiliations.

C. **“With Knowledge of the Attack”**

1. **Legal Standard**

Article 7(1) of the Rome Statute requires that for crimes against humanity to be committed, there must be “*knowledge of the attack.*” With regards to the mental element of the crime and the clause of intent, under article 7(2) the perpetrator need not know all characteristics or precise details of the plan, policy or attack to have the requisite participation in and knowledge of a widespread or systematic attack against a civilian population.¹²⁰ The ICC’s *Element of Crimes* document specifies that, “[i]n the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.”¹²¹ This passage from the *Elements of Crimes* is consistent with Article 30(1) of the Rome Statute which states that: “[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with *intent and knowledge*”. Article 30(2) of the Rome Statute provides

¹¹⁸ Palestinian Centre for Development and Media Freedoms, *Media Freedom Violations in Palestine 2016*, p. 48, available at: http://www.madacenter.org/images/text_editor/AnnualrepE2016.pdf

¹¹⁹ Ibid.

¹²⁰ ICC, *Elements of Crimes*, Article 7(2), available at: <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>

¹²¹ Ibid.

that a person has intent where:

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

Knowledge, on the other hand, is defined in Article 30(3) as “*the awareness that a circumstance exists or a consequence will occur in the ordinary course of events*”. To determine whether a perpetrator has the requisite knowledge to be held liable for crimes against humanity, the Court may rely on circumstantial evidence “*such as: the accused's position in the military hierarchy; his assuming an important role in the broader criminal campaign; his presence at the scene of the crimes; his references to the superiority of his group over the enemy group; and the general historical and political environment in which the acts occurred.*”¹²²

2. Application to Facts

It suffices for the purposes of the OTP at this preliminary stage that there is overwhelming circumstantial evidence (admissible pursuant to Article 30(3) of the Rome Statute) that the perpetrators of the relevant crimes had the requisite knowledge and intent to fulfil Article 7(1) of the Rome Statute. This element only needs to be satisfied by the perpetrator of the underlying criminal act, and does not apply to a person with command responsibility who did not directly participate in the atrocities, such as Abbas.

As explained below, Abbas’ individual criminal responsibility arises under Article 28 (b) of the Rome Statute in his capacity as a civilian superior accountable for actions taken by his subordinates. The mental requirements associated with Abbas personally will be discussed in Section VI. G below (Personal Criminal Liability of Mahmoud Abbas).

¹²² ICC Pre Trial Chamber I, *Decision on the Confirmation of Charges Against Germain Katanga and Mathieu Ngudjolo [2008]*, (ICC-01/04-01/07), (September 30, 2008), para. 402, available at: <https://www.icc-cpi.int/pages/record.aspx?uri=571253>

The fact that the acts of violence and intimidation described herein were carried out predominantly against individuals politically opposed to the PA is strong *prima facie* evidence that those carrying out the individual actions knew precisely why such individuals were singled out for abuse; it was not a random selection.

In the case of 38-year-old I.A., who in a September 2017 Facebook post criticised the PA authority-initiated arrest of a Hebron journalist who called for the resignation of President Abbas and Prime Minister Hamdallah, he was told by the Preventive Security that President Abbas himself issued an order for his arrest. Prosecutors charged him under the Palestinian Penal code with creating “sectarian strife”, “insulting higher authorities” and under Article 20(1) of the Electronic Crimes Law with “creating a website [...] that aims to publish news that would endanger the public order of the state”. I.A.’s detention was extended for four days, during which he underwent further interrogation and was accused by officers of wanting to lead a “coup” against the PA, “ruining the Palestinian national project” and working with the US Central Intelligence Agency (CIA). He was released on bail on September 10th, 2017 but his phones were confiscated and kept by officers who claimed his case is still open.¹²³

Oftentimes and as is custom to do, political arrests as those detailed above, are undertaken without evidence supporting allegations and in the absence of arrest warrants.¹²⁴ The targeted persons are denied procedural rights such as the right to legal consultation and are more frequently subjected to inhumane treatment and torture. In addition, these measures are employed for the purposes of intimidation and/or the obtainment of a confession. It is to be expected of any public official that he is capable of recognising that those measures are part of a policy and constitute an attack on the targeted group of the population.

¹²³ Testimony collected by Jerusalem Institute of Justice.

¹²⁴ Palestinian Centre for Development and Media Freedoms, *The violations of Media Freedom in Palestine Annual Report, (2016)*, p. 127.

D. Murder

1. Legal Standard

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

- “1. The perpetrator killed one or more persons.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.”¹²⁵

Murder is the “*unlawful, intentional killing of a human being*”.¹²⁶ The death of a victim must have occurred as a result of an act or of an omission of the perpetrator.¹²⁷ The perpetrator must have intended to engage in killing one or more persons, meant to cause death, or was aware that death would occur in the ordinary course of events.¹²⁸ The prosecution need only prove “*beyond reasonable doubt that the accused’s conduct contributed substantially to the death of the victim.*”¹²⁹ It is therefore not required for the perpetrator to directly participate in the act of murder as long “*as the result of omissions known to be likely to lead to death.*”¹³⁰ Consequently, victims need not die instantly due to injuries inflicted upon them. For an example applicable to the crimes described herein, murder could still be committed in

¹²⁵ ICC, *Elements of Crimes*, Article 7, available at: <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>

¹²⁶ ICTR Trial Chamber, *Prosecutor v. Akayesu Judgement [1998]*, (ICTR-96-4-T), (September 2, 1998), para. 589, available at: <http://www.un.org/en/preventgenocide/rwanda/pdf/AKAYESU%20-%20JUDGEMENT.pdf>

¹²⁷ ICTY Appeals Chamber, *Prosecutor v. Kvočka et. al.* (IT-98-30/1-A) Judgement [2005], (February 28, 2005), para. 251, available at: <http://www.icty.org/x/cases/kvočka/acjug/en/kvo-aj050228e.pdf>

¹²⁸ ICTY Appeals Chamber, *Prosecutor v. Vlastimir Dordevic Judgement [2014]*, (IT-05-87/1-A), (January 27, 2014), para. 548, available at: <http://www.icty.org/x/cases/djordjevic/acjug/en/140127.pdf>

¹²⁹ ICTY Trial Chamber II, *Prosecutor v. Brđanin Judgement [2004]*, IT-99-36, (September 1, 2004), para. 380-381, available at: <http://www.icty.org/x/cases/brđanin/tjug/en/brd-tj040901e.pdf>; ICTY Appeals Chamber, *Prosecutor v. Čelebići Judgement [2001]*, IT-96-21-A, (February 20, 2001), para. 424, available at: <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>

¹³⁰ ECCC Trial Chamber, *Prosecutor v. Kaing Guek Eav Judgement [2010]*, 001/18-07-2007/ECCC/TC, (July 26, 2010), para. 437, available at: <https://www.refworld.org/cases,ECCC,4c56ccfb2.html>

circumstances where a victim succumbs to injuries sustained from torture during interrogation or imprisonment.

2. Application to Facts

The first element of this crime, that the perpetrator killed one or more persons, is evidenced through reports and testimonies of individuals from the West Bank, describing how individuals' friends, family and other acquaintances have been killed by the PA Security Forces.

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

"When people are deprived of their liberty, responsibility for their fate rests mainly with the detaining authorities, who must guarantee the life and physical integrity of each detainee. Therefore, when someone dies in custody, it is only fitting that an independent investigation be conducted – regardless of the presumed cause of death, which may be natural or accidental, but which may also have been an instance of unlawful killing or the result of ill treatment or inadequate conditions of detention. A prompt, impartial and effective investigation is essential".¹³¹

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

A family case of victims succumbing to torture while in custody, that of Khaled al-Aghbar and Fares Halawa, attests to the suspicion surrounding the death of prisoners. While PA authorities insist that the individuals died in the August 2016 clash in the Old City of Nablus, the Independent Commission for Human Rights (ICHR) found "strong evidence" that

¹³¹ International Committee of the Red Cross, *Guidelines for Investigating Deaths in Custody*, (December 21, 2013), p.5, available at: <https://www.icrc.org/eng/assets/files/publications/icrc-002-4126.pdf>

contradicted the official statements of security agencies, including forensic medical reports and accounts from three eyewitnesses who saw officers detain the men while still alive.¹³² Ahmed Halawa also died while in detention, with Nablus' mayor acknowledging that he died following a severe beating and describing the incident as an "unacceptable mistake".¹³³

With regards to Ahmed Halawa's death, the United Nations Office of the High Commissioner for Human Rights recorded in its 2017 Report that:

"On 23 August 2017, Palestinian security forces arrested a [...] suspect, a 50-year-old police officer, Ahmed Halawa. One of his family members told OHCHR that Mr. Halawa had been severely beaten during his arrest at his house. Mr. Halawa was taken to Jeneid prison in Nablus, where officers of the Palestinian security forces allegedly beat him to death. Senior officials, including the Governor of Nablus, have made admissions to that effect. Images of the victim's body circulated on social media reveal the extent of the beating. The Palestinian Authority immediately established a committee of inquiry into the apparent extrajudicial execution but, at the time of reporting, OHCHR had not been able to obtain information on the outcome."¹³⁴

Cases such as the above are common. For instance, the Palestinian daily newspaper Felesteen reported in August 2018 how 28-year-old Palestinian Ahmed Abu Hamada died in a PA prison: "*The PA had claimed that Abu Hamada had a heart attack however rights groups have said that many prisoners die as a result of torture in detention*".¹³⁵

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

¹³² ICHR, "Fact-Finding Report About the Events that Took Place in Nablus", (August, 2017), pp. 19, 37-38.

¹³³ Nablus Al-Hadath's Facebook page, available at: <https://www.facebook.com/nablus.alhadath/photos/pb.804218409634320.-2207520000.1472060897.1163723917017099/?type=3&theater>

¹³⁴ Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the Implementation of Human Rights Council resolutions S-9/1 and S-12/1* (A/HRC/34/36), (January 25, 2017), p.12, available at: <https://undocs.org/A/HRC/34/36>; Human Rights Watch, "Two authorities, One Way, Zero dissident. Arbitrary Arrest & Torture under the Palestinian Authority and Hamas", (October 2018), pp. 44-45, available at: <https://www.hrw.org/report/2018/10/23/two-authorities-one-way-zero-dissent/arbitrary-arrest-and-torture-under>; Cf. Jacob Burns, "Palestinians speak out about torture in PA prisons", (September 27, 2017), available at: <https://www.aljazeera.com/indepth/features/2017/09/palestinians-speak-torture-pa-prison-170906092016102.html>

¹³⁵ Middle East Monitor, "Claims of torture in PA prisons resurface as prisoner dies in custody", (August 16, 2018), available at: <https://www.middleeastmonitor.com/20180816-claims-of-torture-in-pa-prisons-resurface-as-prisoner-dies-in-custody/>

large number of documented cases in published human rights reports.¹³⁶ These killings appear also systematic in nature, in their targeting specific groups of the West Bank population defined by their political beliefs (see discussion above in Section VI. A 2, which applies equally here).

As to the third element (knowledge), it is required that “*at the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensues or not*”¹³⁷. Accordingly, “both a *dolus directus* and a *dolus eventualis* are sufficient to establish the crime of murder”.¹³⁸ Where a victim dies as a result of injuries sustained during torture, it is readily apparent that the necessary *mens rea* to inflict grievous bodily harm was present, whether or not the torture intended that death would result.

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

E. Imprisonment

1. Legal Standard

Pursuant to the commentary on Article 7(1)(e) of the Rome Statute in the Elements of Crimes, for imprisonment and severe deprivation of personal liberty to amount to crimes against humanity, the following factors must be present:

- “1. The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty;
2. The gravity of the conduct was such that it was in violation of fundamental rules of international law;
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.

¹³⁶ See Amnesty International, “Israel and Occupied Palestinian Territories 2017/2018”, (February 22, 2018), available at: <https://www.amnesty.org/en/countries/middle-east-and-north-africa/israel-and-occupied-palestinian-territories/report-israel-and-occupied-palestinian-territories/>; Human Rights Watch, “Internal Fight Palestinian Abuses in Gaza and the West Bank”, (July 29, 2008), available at: <https://www.hrw.org/report/2008/07/29/internal-fight/palestinian-abuses-gaza-and-west-bank>; UN Human Rights Council, “Human Rights Situation in the Occupied Palestinian Territory”, A/HRC/34/38, para. 51, (March 16, 2017), available at: <http://www.refworld.org/docid/59d4dd704.html>.

¹³⁷ ICTR Trial Chamber; *Prosecutor v. Akayesu Judgement [1998]*, ICTR-96-4-T, (September 2, 1998), para. 589.

¹³⁸ ICTY Trial Chamber, *Prosecutor v. Stakić Judgement [2003]*, IT-97-24-T, (July 31, 2003), para. 587.

4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”¹³⁹

Clearly, not every act of imprisonment is in violation of international law. However, where such acts of imprisonment are conducted without legal basis, even in local laws, this is a strong indication that they are also illegal as a matter of international criminal law. An initially lawful act may become unlawful when certain procedural rights and guarantees fail to be complied with¹⁴⁰, i.e. “*the deprivation of liberty of the individual without due process of law*”.¹⁴¹

2. Application to Facts

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

In its 2015 Annual Report on Human Rights in Palestine, the ICHR noted that: “*The continuation of arbitrary detention is an important indicator of the deterioration of human rights in Palestine.*”¹⁴²

As in the case of 32-year-old “Rami”, who was arrested in June 2017 and sent to Jericho

¹³⁹ ICC, *Elements of Crimes*, Article 7; available at: <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

¹⁴⁰ ICTY Trial Chamber III, *Prosecutor v. Jadranko Prlić et al.* Judgement [2013], IT-04-74-T, (May 29, 2013), para. 63-68, available at: <http://www.icty.org/x/cases/prlic/tjug/en/130529-1.pdf>

¹⁴¹ ICTY Trial Chamber, *Prosecutor v. Kordić and Čerkez* Judgement [2001], IT-95-14/2-T, (February 26, 2001), para. 302, available at: http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf

¹⁴² ICHR, *The Status of Human Rights in Palestine: 20th Annual Report*, (May 2015), p.17, available at: <http://ichr.ps/en/1/6/275/ICHR-20th-Annual-Report.htm>

national security agency headquarters, where interrogators questioned him about his relations to the Halawa family and whether or not he had harboured escapee Imad Halawa, his imprisonment and detention are arbitrary. Following threats, “Rami” admitted to harbouring the detainee and shares that he was placed in “the Closet”, a 60x60 cm cell, for 22 hours a day for eight days, and that he spent 14 days in solitary confinement.¹⁴³

Similarly, on June 2nd 2017, 22-year-old S.S. was arrested following a street fight in Ramallah and upon arriving at Ein Musbah police station had his head knocked against the wall, was slapped, hit on his legs and had his gold cross ripped from around his neck. On another occasion, while walking up a staircase, an officer kicked S.S. on his chest causing him to fall back down the staircase. During interrogation officers uttered “God’s anger will fall upon you”, “[y]ou drank alcohol and we will crush you. You have been drinking during Ramadan”, “Daesh [ISIS] needs to come for you” and “they are Christian pigs, they should be left in prison to rot”. Prosecutors charged S.S. and eight other young men with “assaulting an officer” and “drinking in public”, a crime under Palestinian law, despite not having performed alcohol tests on the individuals. Released on bail, S.S. filed a complaint with the military prosecutor against the officer who allegedly assaulted him, however the police called his father and advised him to drop the case.¹⁴⁴

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

“The United Nations has also documented a growing use of administrative detention by Palestinian security forces in the West Bank and arbitrary detention by Hamas against perceived political opponents, including members of Fatah and former personnel of the Palestinian Authority in the Gaza Strip. The Office of the United Nations High Commissioner for Human Rights has also consistently received and documented reliable allegations of torture and ill-treatment of Palestinian detainees in the West Bank and in Gaza, including cases that led to death.”¹⁴⁵

¹⁴³ Testimony collected by Jerusalem Institute of Justice.

¹⁴⁴ Ibid.

¹⁴⁵ UN General Assembly, *Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People*, A/72/35, para. 44, (September 5, 2017), available at: <http://www.refworld.org/docid/59d228984.html>

With regards to administrative detention, H.Z., a 33-year-old project coordinator was placed under arrest in May 2016 and interrogated at the Jericho Preventive Security forces offices for social media posts. When asked about his Facebook post ‘[w]e will struggle against the PA like we struggle against occupation’, officers threatened to imprison him asking “[w]hy [he is] attacking [the PA] and swearing at the President”. He was called a liar and slapped for characterising his arrest as a “political arrest”. The following day H.Z. was told he would be taken to appear before prosecutors, but was instead informed that his detention was extended in the absence of a court order. He was eventually released that night, on May 10th, by security forces without a formal release order.¹⁴⁶

As to the third element (knowledge), the public officials must have been aware of the lack of legal justification to conduct those arrests, as imprisonment can only be imposed according to clear legal prerequisites generally laid out in procedural codes, which are part of their police training.

Such is the case of then 17-year-old “H.” from Jenin, who accused of theft, was arrested on April 19th 2017 by Palestinian police and interrogated at Jenin prison. At the facilities, officers tied his hands to a plastic chair and ordered him to hold up the chair for four hours or else they would beat him. They also tied his hands to a rope and slowly pulled it causing his arms to raise until the tip of his feet barely touched the ground, and on another occasion laid him on the ground, placed his feet on a chair and hit the bottom of his feet and legs with a baton. During his one week detention, the adolescent boy was interrogated without a lawyer, relative or juvenile protection counsellor present and was not allowed family visits.¹⁴⁷

Another clear indication of knowledge is the upholding of imprisonment contradictory to a judicial order of release.¹⁴⁸ One example of the PA ignoring a judicial order for the release

¹⁴⁶ Testimony collected by Jerusalem Institute of Justice.

¹⁴⁷ Ibid.

¹⁴⁸ Human Rights Watch, “Internal Fight. Palestinian Abuses in Gaza and the West Bank”, p.6, (July 29, 2008), available at: https://www.hrw.org/sites/default/files/reports/iopt0708_1.pdf

of a prisoner is the case of Shadi al-Nammoura, a Hamas member from Dura, who continues (at the date of this communication) to be held in Jericho central prison “*despite a court having ordered his release four times*”.¹⁴⁹ According to Ashraf Abu Hayyeh, a legal adviser for Al-Haq, “Palestinian intelligence services had been adding new charges after each release order, but since August 3 [2017] – aside from a brief period when he was held under the order of the governor of Nablus – he has been held without the addition of any new charges.”¹⁵⁰

In conclusion, it is respectfully submitted that all elements of the crime against humanity of unlawful imprisonment are satisfied.

F. Torture

1. Legal Standard

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

- “1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons;
2. Such person or persons were in the custody or under the control of the perpetrator;
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions;
4. The conduct was committed as part of a widespread or systemic attack directed against a civilian population; and,
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”¹⁵¹

The Court has established that the term “intentional” does not engender a requirement that the perpetrator have knowledge that the harm inflicted was severe.¹⁵² Moreover, Article 7(1)(f) of the Rome Statute does not require any special purposes of inflicting pain and suffering upon the victim and is not limited to persons acting as, or with the consent or acquiescence of, a public official or in an official capacity.¹⁵³

¹⁴⁹ Jacob Burns, “Palestinians speak out about torture in PA prisons”.

¹⁵⁰ Ibid.

¹⁵¹ Article 7(1)(f) of the ICC Statute.

¹⁵² International Criminal Court, *Elements of Crimes*, Article 7(1)(f).

¹⁵³ Johan D. Van Der Vyver, *Torture as a Crime under International Law*, vol. 67 Alb. L. Rev., (2003), p. 437.

2. Application to Facts

There is very strong evidence that the first condition for this crime, that the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons, is fulfilled by the actions of the PA's employees and agents.¹⁵⁴ For instance, ICHR recorded that in the West Bank in 2017 there were at least 98 cases of physical or moral assaults outside of detention centres, 203 cases of physical torture or threats during custody within the detention centres, and 50 cases of inhumane and degrading treatment.¹⁵⁵

The use of torture in the West Bank by PA officials, including police officers and Special Forces is widespread. Human Rights reported that: "*the PA [...] [uses] detention to punish critics and deter them and others from further activism. In detention, security forces routinely taunt, threaten, beat and force detainees into painful stress positions for hours at a time*".¹⁵⁶ Human Rights Watch stated further that the "*Palestinian authorities routinely arrest people whose peaceful speech displeases them and torture those in their custody*".¹⁵⁷

In its 2016 report, the ICHR recorded 180 instances of individuals being arrested or detained who were subject to torture, 18 individuals subject to cruel, inhuman or degrading treatment or punishment, and 117 reports of people enduring violence, physical or mental abuse in the West Bank alone.¹⁵⁸ The complaints reported to the ICHR included:

"A wide range as severe beating causing bone fractures in hands, feet and heads; threat of torture during detention; beating with electric wires; kicking on legs and genitals; psychological pressure; verbal abuse; standing for an extended time; shabeh;¹⁵⁹

¹⁵⁴ International Criminal Court, *Elements of Crimes*, Article 7(1)(f).

¹⁵⁵ ICHR, *Status of Human Rights in Palestine, January 1, 2017 – December 31, 2017*, (November 20, 2018), available at: <http://ichr.ps/en/1/6/2408/ICHR-23rd-Annual-Report.htm>

¹⁵⁶ Human Rights Watch, "Two Authorities, One Way, Zero Dissent. Arbitrary Arrest & Torture Under the Palestinian Authority & Hamas" (October 2018), p.1.

¹⁵⁷ Ibid.

¹⁵⁸ ICHR, *Status of Human Rights in Palestine: 21st Annual Report*, (November 2016), p.177, available at: <http://ichr.ps/en/1/6/1941/ICHR-21st-Annual-Report.htm>

¹⁵⁹ This term refers to torture whereby victims are handcuffed and bound in stress positions for long stretches of time, for example suspending the victim from the ceiling by their wrists for hours or days. See discussion in Human Rights Watch, "If the Dead Could Speak: Mass Deaths and Torture in Syria's Detention Facilities",

flagellation; hanging from the ceiling; incarceration in dark cells for an extended period; and solitary confinement. In some cases, the same detained persons could be subjected to several techniques of physical torture.”¹⁶⁰

The 2014 ICHR Annual Report stated that there were 287 complaints of torture and ill-treatment in the West Bank. The report noted that, “*the torture and ill-treatment included beatings, deprivation of sleep, punching, threats, and mental torture.*”¹⁶¹

“Z.”, who resides in the Balata Refugee camp, known as a central point of resistance to President Abbas, was arrested by Palestinian security forces on allegations of criminal activity and subjected to prolonged torture in December 2016. Interrogated in the Jericho facility about a murder he said he had witnessed, the officer clarified that “If [he did] not speak, [he] will be destroyed”, before handcuffing him, covering his face and putting him in “the Closet” – a 60 x 60 cm cell - where he had difficulty breathing. “Z.” was kept there for 22 hours a day for 22 consecutive days. He admits to being subjected to shabeh numerous times during detention as well as being handcuffed and tied to a rope which was gradually raised to stretch his arms thus applying pressure for a duration of 20 consecutive hours. “Z.” was also deprived of sleep, electroshocked on his shoulders, had a cord tied around his penis for eight hours causing his genitals to swell and turn blue and was also kicked while on the ground which resulted in the fracturing of his knee. ¹⁶²

Similarly, 29-year-old “H.” from Balata, was summoned by the Preventive Security in January 2017 for his alleged involvement in clashes in the Balata camp. Upon visiting the detainee at the centre, “H.’s” father noticed that his son’s shoulder was dislocated and nose and thumb broken. “Z.”, another detainee, believed the injuries were a result of “H.” being hit on the shoulder with a chair while his arms were being pulled by a rope. “H.” was sent to Nablus

(December 16, 2015), available at: <https://www.hrw.org/report/2015/12/16/if-dead-could-speak/mass-deaths-and-torture-syrias-detention-facilities>

¹⁶⁰ ICHR, *Status of Human Rights in Palestine: 21st Annual Report*, (November 2016), p. 179.

¹⁶¹ ICHR, *The Status of Human Rights in Palestine: 20th Annual Report*, (May 2015), p.17, available at: <http://ichr.ps/en/1/6/275/ICHR-20th-Annual-Report.htm>

¹⁶² Testimony collected by Jerusalem Institute of Justice.

for medical treatment but returned to Jericho where he was once more subjected to *shabeh* from 5 a.m to 4 p.m daily, put in “the Closet” and kicked and beaten. “H.” appeared in court several times to answer to charges of “firing guns”, “armed robbery”, “resisting security forces” and forming a “criminal gang”. He remains detained in the maximum-security section at the Jericho Rehabilitation and Reform prison.¹⁶³

The second condition for this crime requires that the victim be in custody *or* under control of the perpetrator. These are disjunctive requirements.¹⁶⁴

The high number of documented incidents and cases of torture and abuse that have occurred during the arrest process and/or during detention shows that this criterion is clearly fulfilled. Various NGO reports supply testimonies from individuals who have been tortured by the PA. One such narrative, recorded in a 2018 Human Rights Watch report, provides:

“On February 2, 2017, Sami As-Sai, 39-year-old independent journalist and researcher [...] reported to the Intelligence Services agency in Tulkarm in the northwest West Bank, after receiving a phone call the previous day requesting his presence. There, officers questioned him about his relationship to a Hamas member with whom he had shared a publicly accessible list of names of Palestinians in Israeli prisons in late 2015. [...] On his second night at the facility, he told Human Rights Watch that four officers tied his hands together using a rope and dragged him across a corridor to another room. There, they tied the rope to the room’s door and slowly pulled it to apply pressure on his arms. As-Sai said he did not know how long the *shabeh* lasted, since he passed out at some point. After he awoke, he said officers hit him about 20 times on the bottom of his feet. [...]”¹⁶⁵

Alaa Zaqeq, 28, a graduate student at Hebron University active in the “Islamic Bloc” (a student group affiliated with Hamas) was arrested on April 24, 2017 by PA security forces while visiting the al-Aroub refugee camp. Human Rights Watch describes the brutal physical attacks Zaqeq suffered at the hands of the PA officers:

“Eight cars from Intelligence Services conducted the raid without a warrant and pushed him by the neck out of the house and to the cars, threatening to hit him with batons if he resisted. [...] Upon arrival, officers moved Zaqeq, blindfolded and handcuffed,

¹⁶³ Ibid.

¹⁶⁴ ICC, *Elements of Crimes*, Article 7(1)(f).

¹⁶⁵ Human Rights Watch, “Two Authorities, One Way, Zero Dissent. Arbitrary Arrest & Torture Under the Palestinian Authority & Hamas”, (October 2018), pp. 33-34.

through the detention facility, shaking and slamming his body against the walls until he reached the warden's office. [...] The warden slapped Zaqeq several times, hit him on his neck, and instructed other officers to "hang" Zaqeq. [...] Officers then cuffed his hands behind his back and tied them by cloth to the door and kept him in that position, blindfolded, for about 45 minutes. [...] The Juicer subjected him to shabeh [...] [and] told him he would 'leave this place in a wheelchair' and 'wearing a skirt and a headscarf'".¹⁶⁶

A significant proportion of those whose accounts of torture and abuse have been reported by the Palestinian Centre for Human Rights ("PCHR"), were civilians accused of collaborating with Hamas, the Islamic Jihad and other Islamist movements which Fatah seeks to suppress.¹⁶⁷

The case of 23-year-old F.J., who was questioned about his involvement in the Islamic bloc student society and a Facebook page created to identify security officers that carried out arrests during a book exhibition on January 8th 2017, testifies to this suppression. During interrogation, officers threatened F.J. that he would be transferred to the facility in Jericho where "people confess of things they know and don't know" and from which he would emerge a "different person". At the detention center, F.J. was "made to stand with [his] hands raised for two hours while officers hit [him] on [his] sides with a plastic hose [...] underwent shabeh where [he] was handcuffed and hung by the hands while officers tightened the pressure [...] blindfolded and subjected to [his] knees while weights were added to [his] back, putting pressure on [his] legs and blocking blood flow for about an hour [...] whipped with a hose on [his] feet [and] placed on [his] back for two hours while officers kicked and hit [him] with a baton. F.J. says he lost consciousness about 7 times and suffers from psychological trauma and nightmares where "the cell is strangling [him] and [he] cannot breathe."¹⁶⁸

The 2015 PCHR Annual Report includes accounts from individuals in the West Bank who were subject to torture while being interrogated and detained. For instance, an individual

¹⁶⁶ Ibid., p. 39.

¹⁶⁷ Palestinian Centre for Human Rights, *Annual Report 2015*, (2016), p. 66, available at <http://pchrgaza.org/en/wp-content/uploads/2016/08/annual-english2015.pdf>

¹⁶⁸ Testimony collected by Jerusalem Institute of Justice.

who was arrested on February 3, 2015 reported that “*he was interrogated for 11 days, during which he had his clothes taken off and was placed in a room with cold air-conditioner*”.¹⁶⁹ Another detainee said that on February 28, 2015 that “*he was shackled 4 times during interrogations by PSS officers. In his statement, he said that he was subjected to shackling by the PSS in Ramallah while he was questioned on his participation in a protest in support of Lina Khattab, the Palestinian former prisoner in Israeli jails*”.¹⁷⁰

Similar reports were made by Awni Mazen Al-Shaksheer, a 25-year-old Palestinian student from Nablus, who was arrested on June 18, 2015 for his student activism but never charged with any offence. He spent the night at Juneid Prison in Nablus and was transferred the following morning to the intelligence services headquarters in Bethlehem where he was tortured every day. The Arab Organization for Human Rights in the UK reports:

“According to Awni, one of the investigators – originally from Gaza – told him that Hamas had killed his brother and two cousins and that Awni was being tortured because he belonged to Hamas, not for any crime he had committed. Awni was arrested, questioned and tortured over his student activism at Al-Najah University where he represented the Islamic bloc on the Student Union”.¹⁷¹

The third criterion for the war crime of torture, that the pain and suffering did not arise from and was not inherent in or incidental to lawful sanctions, is also met. Torture is not sanctioned in either the Penal Code of 1936 (which continues to be applicable in the West Bank) nor in the PLO “Revolutionary Law of 1979”.¹⁷²

Though it is not expressly required under the ICC’s Elements of Crimes that torture be *illegal* in the jurisdiction in which it occurs, Article 108 of the Penal Code and Article 280 of the PLO Revolutionary Law of 1979 actively *criminalize* torture, as defined in Article 1 of the

¹⁶⁹ Ibid., pp. 65-66.

¹⁷⁰ Ibid., p. 66.

¹⁷¹ The Arab Organization for Human Rights in the UK, “Palestinians routinely tortured by Bethlehem and Nablus intelligence services”, (July 8, 2015), available at: <http://aohr.org.uk/index.php/en/all-releases-2/4390-palestinians-routinely-tortured-by-bethlehem-and-nablus-intelligence-services.html>

¹⁷² PCHR, *Crimes of Torture in Palestinian Prisons and Detention Centres*, (January 2016), available at: <http://pchr.org/en/wp-content/uploads/2016/03/Crimes-of-Torture-in-Palestinian-Prisons.pdf>

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.¹⁷³ Article 13 of the Palestinian Basic Law renders confessions made under torture invalid.¹⁷⁴

The relevant provisions in the Palestinian Basic Law were made in conjunction with Article 15 of the United Nations Convention Against Torture, purportedly ratified in 2014 by the “State of Palestine”, which stated that, “*Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.*”¹⁷⁵

It is hence clear that the use of torture is an unlawful practice under local Palestinian law. The third criterion for the war crime of torture is thereby fulfilled.

The fourth element, that the conduct was a part of a “*widespread or systemic attack directed against a civilian population,*” is also met. An October 2018 Human Rights Watch report states that: “*in the 25 years since Palestinians gained a degree of self-rule over the West Bank and the Gaza Strip, their authorities have established machineries of repression to crush dissent, including through the use of torture*”.¹⁷⁶ This report further states that these criminal acts by the PA occur in the context of “*peaceful criticism of the authorities, particularly on*

¹⁷³ The Palestine Gazette, *An Ordinance to Provide a General Penal Code for Palestine*, Article 108, (September 1936), p. 973, available at: https://www.nevo.co.il/law_html/law21/PG-e-0633.pdf. Article 108 reads: “Any person employed in the public service who subjects or orders the subjection of any person to force or violence for the purpose of extorting from him or from any member of his family confession of an offence or any information relating to an offence, is guilty of a misdemeanour”.

¹⁷⁴ The Palestinian Basic Law, *2003 Amended Basic Law*, Article 13, (March 18, 2003). Article 13 reads: “1. No person shall be subject to any duress or torture. Indictees and all persons deprived of their freedom shall receive proper treatment. 2. All statements or confessions obtained through violation of the provisions contained in paragraph 1 of this article shall be considered null and void.”

¹⁷⁵ Office of the United Nations High Commissioner for Human Rights, *Convention Against Torture and Other Cruel, Inhuman, or Degrading Punishment*, (June 26, 1987), available at: <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>

¹⁷⁶ Human Rights Watch, “Two Authorities, One Way, Zero Dissent. Arbitrary Arrest & Torture Under the Palestinian Authority & Hamas”, (October 2018), p. 1.

social media, among independent journalists, on university campuses, and at demonstrations”.¹⁷⁷

The widespread nature of the attack is apparent from how voluminous the number of *reported* cases has been. As noted above, in 2017 alone, the ICHR reported that there were 203 reported cases of individuals in West Bank prisons who were subject to abuse in detention.¹⁷⁸ Accordingly, there is strong evidence that attacks through torture have been “*directed against a multiplicity of victims.*”

With regards to the crimes above, the widespread nature of the acts of torture denotes that it is unnecessary for the OTP to be satisfied that the crimes were systematic as well. However, there is compelling evidence that the torture was *also* systematic in nature. As with the crimes detailed above, the PA employs torture on those who are politically and otherwise opposed to it and/or criticize it (including those persons’ families and associates). For instance, Addameer, a Prisoner Support and Human Rights Organization focused on the Palestinian population, has strongly criticised the use of torture by the PA noting that it is often targeted against “*university professors, students, journalists, teachers and civil society activists*”¹⁷⁹

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

Once again, it would be highly improbable if individual security personnel were committing acts of torture absent of any knowledge that their colleagues were also committing similar acts at the same time. To the contrary, torture by PA Security Forces is public knowledge in the West Bank and forms part of the PA system of governance through fear and threat. Human Rights Watch has noted that in the West Bank, there is “*little to no actual*

¹⁷⁷ Ibid.

¹⁷⁸ ICHR, *Status of Human Rights in Palestine: 23rd Annual Report*, (2017), p. 19, available at: <http://ichr.ps/en/1/6/2408/ICHR-23rd-Annual-Report.htm>,

¹⁷⁹ Addameer, “Bone of their Bone: Torture and Ill-Treatment by Palestinian Security Forces”, (June 26, 2016).

accountability for serious violations, fuelling a culture of impunity that encourages abuse".¹⁸⁰

For there to be a climate of impunity, it follows that there must be an official policy to turn a blind eye to (or even encourage) abuse. If such a policy exists, then those carrying out acts of abuse are highly likely to be aware of it. It is also foreseeable that an officer or guard who commits one act of torture and is not punished, will not stop there. Rather it is likely that the officer will continue carrying out such acts, a pattern which in and of itself reinforces and confirms to perpetrators the knowledge that torture is systematic and/or widespread in the West Bank.

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

G. Personal Criminal Responsibility of Mahmoud Abbas

The Rome Statute provides two separate standards for superior liability, depending on whether the superior is a military commander or civilian superior.¹⁸¹ The evidence presented in this communication strongly indicates the superior individual criminal liability of high-level officials in the PA, particularly President Mahmoud Abbas. Although this does not exclude the criminal responsibility of low-level officials, we recall the policy of the OTP to identify "*those most responsible*" for war crimes and crimes against humanity.¹⁸²

Abbas sits at the apex of the centralised power structure within the PA, holding positions of power, including Chairman of the PLO, President of the (future) "State of Palestine" and President of the PA. These linked and overlapping mandates allow him an

¹⁸⁰ Human Rights Watch, "Two Authorities, One Way, Zero Dissent. Arbitrary Arrest & Torture Under the Palestinian Authority & Hamas", (October 2018).

¹⁸¹ The lower threshold for military superior liability pursuant to Article 28(a) of the Rome statute are: a) that the military commander knew or ought to have known that the forces were committing or about to commit the crimes; and, b) that the military commander failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit them to the proper authorities. UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), Article 28(a), (July 17, 1998), available at: https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

¹⁸² ICC, "Office of the Prosecutor", available at: <https://www.icc-cpi.int/about/otp>

unrivalled degree of power over Palestinian society in the West Bank and enable him to prevent these abuses from occurring. He has clearly failed to do so. Indeed to the contrary, there is reasonable evidence that Abbas encourages the commission of such crimes in order to maintain power and authority.

1. Legal Standard

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

- “(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and,
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”¹⁸³

There are four requirements to meet this test. *First*, the relationship must be one of a superior and subordinate. This requires there be a hierarchical relationship between those who commit the crime and the individual being charged as a superior.¹⁸⁴ This relationship can be *de jure* recognized by the regime itself, or it can *de facto*, by reflecting the actual state of the relationship.¹⁸⁵ The presence of intermediaries between a superior and an individual perpetrator is irrelevant to finding this relationship, as only the ability of the superior to control the actions of the subordinate is considered.¹⁸⁶

¹⁸³ Ibid.

¹⁸⁴ See ICC Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo* [2016], ICC-01/05-01/08, (March 21, 2016), para.184, available at: https://www.icc-cpi.int/courtrecords/cr2016_02238.pdf

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

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.*”¹⁸⁷ It is similar to recklessness under common law,¹⁸⁸ which requires less than absolute knowledge that the crime would be committed, but more than mere negligence in regards to that possibility. In other words, despite knowing of a high likelihood that the crime will be, or has been committed, the superior does not prevent or punish it.¹⁸⁹

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.¹⁹⁰ This is a case-specific inquiry, and depends heavily on the relevant evidence.¹⁹¹ Though it concerned a military superior, the Court in *Bemba* identified several elements to be examined when deciding if there is effective control. These include the official position of the superior, the power to issue orders, the capacity to ensure compliance with orders, the power to promote members of the armed forces.¹⁹² 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.¹⁹³

The final clause of Article 28 (and *fourth* requirement) provides that a civilian superior will be liable where they fail to take all “*necessary and reasonable measures...to prevent or repress*” the commission of the crime. Additional Protocol I explains an analogous clause as

¹⁸⁷ Chantal Meloni, *Command Responsibility in International Criminal Law*, (T.M.C Asser Press, 2010), p. 187.

¹⁸⁸ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, (Oxford, 2010), p. 463.

¹⁸⁹ Jamie. A. Williamson, “Some Considerations on Command Responsibility and Criminal Liability”, *The International Review of the Red Cross*, vol. 90, no. 870 (2008).

¹⁹⁰ See ICC Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo [2016]*, ICC-01/05-01/08, (March 21, 2016), para.184.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ ICC Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo Judgment [2018]*, ICC-01/05-01/08 A, (June 8, 2018), available at: https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF

obligating a superior to take “*all feasible measures within their power.*”¹⁹⁴ This definition reiterates the condition that it is within the superior’s power, and further limits it to only feasible measures, but requires that all measures meeting these conditions be taken.¹⁹⁵

The ICTY has held as follows with regards to civilian superiors having effective control over their subordinates:

“For a finding that civilian superiors have effective control over their subordinates, it suffices that civilian superiors, through their position in the hierarchy, have the duty to report whenever crimes are committed, and that, in light of their position, the likelihood that those reports will trigger an investigation or initiate disciplinary or criminal measures is extant”.¹⁹⁶

The Court has explained further that, “*The superior does not need to know the exact identity of those subordinates who committed the crimes, to be held responsible under Article 7(3) of the Statute*”. It suffices that the superior knows that a crime has been or is being committed and does not do anything to prevent it.¹⁹⁷

2. Application to Facts

a. Control of the West Bank by the PA, and control of the PA by Mahmoud

Abbas

According to victim testimonies set out above, the direct perpetrators of the crimes against humanity – in terms of physically undertaking the acts of torture, murder and imprisonment – largely appear to be police, prison guards, paramilitary and other members of the PA security forces, of varying degrees of seniority.

¹⁹⁴ Jamie. A. Williamson, “Some Considerations on Command Responsibility and Criminal Liability”, *The International Review of the Red Cross*, vol. 90, no. 870 (2008), citing Article 86(2).

¹⁹⁵ Ibid.

¹⁹⁶ ICTY Trial Chamber, *Prosecutor v. Brđanin* Judgment [2004], IT-99-36-T, (September 1, 2004), para. 281, available at: <http://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf>

¹⁹⁷ Ibid.

According to Article 39 of the Palestinian Basic Law, “*the President of the National Authority*” – i.e., President Mahmoud Abbas – “*is the Commander-in-Chief of the Palestinian Forces*”. Abbas is also the President of the National Security Council.

We recall that “*superior responsibility applies to every superior at every level*” and “*the subordination does not need to be direct or formal*”.¹⁹⁸ Consequently, as the Commander-in-Chief, President Abbas *de jure* holds a superior position to every member of the PA forces within the chain of command. Therefore, in his capacity as President of the PA, Abbas maintains effective control over the PA Security Forces.

The PA President has, according to Article 45 of the Palestinian Basic Law, the power to appoint or remove government figures¹⁹⁹ who in turn hold direct authority over security forces.²⁰⁰ For instance, the President has the authority to appoint or dismiss the Prime Minister. In turn, the Prime Minister is authorized *to constitute his government*, which includes the Minister of Interior, who in turn holds the power to control and direct the civil and judicial police. As noted above in Section III. G, one of the Ministry of Interior’s responsibilities is the inspection of prisons and rehabilitation centres, an obligation that more honoured in the breach rather than the observance.

The Council of Ministers is required by the Palestinian Basic Law to assist the PA President in the fulfilment of his obligations.²⁰¹ Consequently, the chain of command shows a clear connection between the Palestinian Security Forces and the President, demonstrating his *de facto* effective control over the direct perpetrators of the relevant crimes.

¹⁹⁸ ICTY Trial Chamber I, *Prosecutor v. Perišić Judgement* [2011], IT-04-81-T, (September 6, 2011) para.138 and 149, available at: http://www.icty.org/x/cases/perisic/tjug/en/110906_judgement.pdf

¹⁹⁹ President Abbas has the authority to appoint *the Prime Minister*, who reports directly to him. In turn, the Prime Minister is authorized *to constitute his government*, i.e. the Minister of Interior, who holds the power to control and direct the civil and judicial police and is responsible for an efficient and lawful work performance.

²⁰⁰ ICTY Trial Chamber, *Prosecutor v. Boškoski and Tarčulovski Judgement* [2008], IT-04-82-T, (July 10, 2008) para. 510-514, available at: http://www.icty.org/x/cases/boskoski_tarculovski/tjug/en/080710.pdf

²⁰¹ The Palestinian Basic Law, *2003 Amended Basic Law*, Article 43, (March 18, 2003).

Overall, it is clear that Abbas has a clear responsibility to assess and act upon the actions of the Palestinian Security Forces, which he has failed to discharge. He is both *de facto* and *de jure* in effective control over the relevant direct perpetrators of the aforementioned crimes against humanity.

b. Actual knowledge of Abbas

Although conscious disregard would suffice to link Abbas to the crimes, his attitude towards the crimes committed by those under his command and control go beyond this standard. We respectfully submit that there is compelling evidence that he was and continues to be well aware of such crimes.

Since 2011, and during the period in which Abbas has been President of the PA, local organisations as well as international NGOs including Amnesty International and Human Rights Watch, and intergovernmental agencies such as UNHCR and OHCHR have reported and denounced the commission of the crimes referred to in this communication.

These reports have been submitted to the competent authorities and yet none of the NGOs reported that adequate measures had been taken to address such crimes or to punish the perpetrators.²⁰² Such reports have provided specific information as to the nature, scope, logistical details and locations of the criminal acts²⁰³ and concluded that “*torture and degrading treatment were mainly practiced on political and security grounds*”.²⁰⁴

As such, it is inconceivable that Abbas was unaware of such reports by third parties. Indeed so widespread and systematic are the acts of violence that the strong inference is that Abbas would have had first-hand knowledge of these abuses from his own security forces.

²⁰² Ma’an News Agency, “ICHR: Palestinian interrogators using torture for forced confession”, (December 16, 2015), available at: <https://www.maannews.com/Content.aspx?id=769362>

²⁰³ ICTR Trial Chamber; *Prosecutor v. Augustin Ndindiliyimana et al. Judgement [2011]*, ICTR-00-56, (May 17, 2011), para.1920-1921, available at:

http://www.worldcourts.com/ictt/eng/decisions/2011.05.17_Prosecutor_v_Ndindiliyimana_1.pdf

²⁰⁴ PCHR, *Crime of Torture in Palestinian Prisons and Detention Centres*, (January 2016).

The denial of responsibility by the PA for such crimes is not credible. An official spokesperson of the PA stated in 2015 that personnel accused of torture have been fired in the past.²⁰⁵ In 2013 Abbas issued an order “*confirming the commitment of the competent authorities to the prohibition of all forms of torture*”.²⁰⁶ The order emphasized the necessity for such authorities “*to abide by the Palestinian Basic Law and relevant laws that prohibit all forms of torture and degrading treatment*”.²⁰⁷ However, such statements ring hollow. Numerous incidents of abuse have been recorded since 2013 demonstrating that abuses are not going on “behind the back” of Abbas and senior PA figures, but rather that they are prepared to communicate one thing in public (especially to the international community and to the English-speaking press) yet issue different directions to internal security forces.

As in the case of 38-year-old I.A. who criticised the PA authority-initiated arrest of a Hebron journalist who called for the resignation of President Abbas and Prime Minister Hamdallah via a Facebook post, President Abbas was the figure behind the arrest order, as per Preventive Security officers.²⁰⁸

In the event that the OTP is not sufficiently persuaded that Abbas has actual knowledge of such atrocities, the information available regarding the commission of such crimes by his subordinates must at least qualify as sufficiently alarming in order for Abbas to have taken the necessary steps to confirm or deny any allegations.

Having been in a position of significant power within Fatah, the PLO, the PA and the incumbent President since 2004, Abbas is clearly aware of his superior position and the effective control he maintains over the perpetrators.²⁰⁹ Indeed since 2007 he has ruled the West

²⁰⁵ Ma’an News Agency, “ICHR: Palestinian interrogators using torture for forced confession”, (December 16, 2015).

²⁰⁶ PCHR, “PCHR welcomes Presidential Order confirming prohibition of all forms of torture”, (May 15, 2013); available at: <http://pchrgaza.org/en/?p=1790>

²⁰⁷ Ibid.

²⁰⁸ Testimony collected by Jerusalem Institute of Justice.

²⁰⁹ ICTY Trial Chamber, *Prosecutor v. Jadranko Prlić* Judgement [2013], IT-04-74-T, (May 29, 2013), para.245, available at: <http://www.icty.org/x/cases/prlic/tjug/en/130529-1.pdf>

Bank with even fewer constitutional safeguards than anticipated under the Oslo Accords and Palestinian Basic Law, using Presidential decrees to issue laws given the dysfunctionality of the PLC.

In conclusion as to Abbas' liability as a superior, we have demonstrated in this Section, read in conjunction with Section III above, that the PA easily surpasses the threshold of "effective control" over Areas A and B of the West Bank as regards criminal acts committed by Palestinians against Palestinians. Abbas sits at the apex of this organization and was well-aware of the crimes being committed, or at the very least knew about consciously disregarded them. Either way he has done nothing to stop these acts. Abbas's role in the crimes committed therefore satisfies the ICC statutory requirements for civilian superior liability.

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

VII. ADMISSIBILITY

Pursuant to Article 53(1)(b) of the Rome Statute, for the OTP to initiate an investigation, the case must be admissible under Article 17. In this Section, we 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.*”²¹⁰

Importantly, the OTP in its Policy Paper on Preliminary Examinations has noted that:

“The Appeals Chamber has dismissed the setting of an overly restrictive legal bar to the interpretation of gravity that would hamper the deterrent role of the Court. It has also observed that the role of persons or groups may vary considerably depending on the circumstances of the case and therefore should not be exclusively assessed or predetermined on excessively formulistic grounds.”²¹¹

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.*”²¹² This additional threshold is a means to prevent the Court from adjudicating peripheral cases and to ensure the prosecution of the most serious international crimes.²¹³

The Pre-Trial Chamber II has previously defined the parameters of a “*case*” in Article 17(1)(d) for purposes of its gravity by way of reference to:

²¹⁰ UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), Article 5 (July 17, 1998); available at: https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

²¹¹ ICC OTP, *Policy Paper on Preliminary Examinations* (November 2013), para. 60, available at: https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf

²¹² *Ibid.*, para. 59.

²¹³ ICC Pre-Trial Chamber II, *Decision Pursuant to Article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya [2010]*, ICC-01/09-19-Corr, (March 31, 2010), para. 56.

“The groups of persons involved that are likely to be the object of an investigation for the purpose of shaping the future case(s).”²¹⁴ 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”²¹⁵; 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).”²¹⁶

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).”²¹⁷

The OTP will be aware that since the ICC’s establishment there have been discrepancies between the trial divisions and the OTP about what constitutes the gravity threshold. 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.*”²¹⁸ This assessment includes both qualitative and quantitative considerations, based on the relevant facts and circumstances.²¹⁹ The non-exhaustive factors that guide the OTP’s assessment include:

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, and their geographical or temporal spread”.²²⁰

The nature of the crimes – which “refers to the specific elements of each offence such as killings, rapes and other crimes involving sexual or gender violence and crimes committed against children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction”.²²¹

²¹⁴ Ibid., para. 59.

²¹⁵ Ibid., para. 60.

²¹⁶ Ibid., para. 59.

²¹⁷ Ibid., para. 61.

²¹⁸ ICC, Regulations of the Office of the Prosecutor (ICC-BD/05-01-09, Regulation 29) (2009), para. 2, available at: <https://www.icc-cpi.int/nr/rdonlyres/fff97111-ecd6-40b5-9cda-792bcbe1e695/280253/iccbd050109eng.pdf>

²¹⁹ ICC OTP, *Policy Paper on Preliminary Examinations*, (November 2013), para. 61.

²²⁰ Ibid., para. 61-66.

²²¹ Ibid., para. 63.

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 (if discernible at this stage), 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 the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying groups.”²²²

The impact of 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.”²²³

2. Application to Facts

a. The Parameters of the case

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

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).*”

As President of the PA, Abbas is the individual who should be held accountable for the commission of crimes against humanity, even if these were committed by military forces or under the auspices of military courts. In any case, PA security forces directly under Abbas’

²²² Ibid., para. 64.

²²³ Ibid., para. 65.

control have committed many of the abuses, especially in the capacity of detention (see above at Sections VI. D, E, and F).²²⁴ Accordingly, Abbas qualifies as an individual who “*bear[s] the greatest responsibility*” and is more so “*likely to be the object of an investigation for the purpose of shaping the future case(s)*”.

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

b. The scale of the crimes

We have set out above the frequency and intensity with which the relevant crimes have taken place in the various discussions of their widespread and/ or systematic nature and it is unnecessary to repeat this here. In particular, we refer the OTP once more to the numerous reports of NGOs and international organizations documenting the various reported occurrences of such crimes.²²⁵

We also refer the OTP to the severe physical and psychological injuries caused by these crimes²²⁶; not just to the individual victims (some of whom suffer life-changing injuries) but more broadly to the Palestinian population, which is brutalized and – in effect – shackled by the cruelty with which the PA meets any dissent. Though it may be premature to reach any conclusions on the point without further evidence, we would respectfully submit that the reported instances of such crimes are likely to be the tip of the iceberg, and that far more abuses go undocumented, owing to the repressive nature of the PA regime in the West Bank.

²²⁴ See ICHR, *The Status of Human Rights in Palestine: 21st Annual Report*, (November 2016), p. 177; ICHR, *Status of Human Rights in Palestine*, (June 13, 2018).

²²⁵ See Sections VI D-F above.

²²⁶ Amanda C. de C. Williams and Jannie Van der Merwe, “The Psychological Impact of Torture”, *British Journal of Pain*, vol. 7, issue 2, (London, 2013), pp.101–106.

Moreover, it is to be noted that the relevant torture policies have been practiced long before 2011. Though it may be premature to reach any conclusions on the point without further evidence, we would respectfully submit that the reported instances of such crimes underrepresents their actual occurrence.

c. Nature of the crimes

One of the ICC's Pre-Trial Chambers has held: "*Regarding the qualitative dimension, it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave.*"²²⁷ In this case, the aggravating quality of the crimes consists in their cynical use by the PA to subjugate a population which it claims to represent.

d. Manner of commission of the crimes, and their impact

These crimes are not the result of internal chaos and a lack of governmental control. To the contrary, the PA cynically utilises these three crimes as a tool of repression, to suppress and intimidate political rivals and democratic debate within the West Bank. On an individual level – to the victims and their families – the crimes in and of themselves are evidently injurious. But on a wider societal level, these unlawful acts likewise have an impact (exactly as intended by the PA). Unwilling to risk any dissent within the West Bank, the PA regularly uses murder, torture and unlawful incarceration as tools of "governance".

These practices are rife not just among a group of low-level security personnel, but rather are ratified and approved by all relevant levels of the PA security apparatus, reaching up to the President, Abbas. Notwithstanding occasional public announcements purportedly

²²⁷ ICC Pre-Trial Chamber II, *Decision Pursuant to Article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya [2010]*, ICC-01/09-19-Corr, (March 31, 2010), para. 62.

disapproving of these crimes, they continue year after year, which is clear evidence that they are *de facto* approved and that perpetrators are treated with impunity. In short, the legislative, executive and judiciary branches of government within the PA are collaborating in order to provide an atmosphere that makes such inhumane practices possible.

In conclusion, we respectfully submit that this case surpasses the relevant gravity threshold for the OTP to commence an investigation into crimes against humanity in the West Bank.

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 17.²²⁸ The Court considers the action or inaction of the relevant State, and then scrutinizes the motive behind this by asking the following:

“1. Are there on-going investigations or prosecutions, or have investigations been carried out and a decision made not to prosecute? and,

2. Is the State unwilling or unable to carry out investigations or prosecutions to the required standard? This requires the OTP to consider the nature and quality of the proceedings. The OTP is guided by the considerations set out in Article 17(2) and (3) of the Rome Statute”.²²⁹

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”.²³⁰

²²⁸ ICC Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chu Judgement* [2009], ICC-01/04-01/07-1497, (September 25, 2009), para. 78, available at: https://www.icc-cpi.int/CourtRecords/CR2009_06998.PDF

²²⁹ Ibid.

²³⁰ ICC OTP, *Policy Paper on Preliminary Examinations*, (November 2013), para. 47.

2. Application to Facts

There is a lack of complementarity in the West Bank, regarding crimes committed by Palestinians against Palestinians to not affect the security of Israel (and therefore fall outside the remit of Israeli Courts pursuant to the Oslo Accords). This atmosphere of impunity is amply demonstrated by numerous human rights reports.

Amnesty International has stated that “*impunity for human rights abuses including unlawful killings and torture in the West Bank and Gaza persisted*”²³¹ and that “*no criminal investigations were launched*”²³² in apparent cases. Similarly, Freedom House has reported that the PA’s military court “*lacks almost all due process rights*”²³³ and that “*allegations of torture and other abuse by PA security forces are common, and officers are rarely punished for such violations*”.²³⁴

The PCHR likewise concluded in its 2015 report that “*during the preparation of this report, it has been observed that law enforcement officials have failed to open investigations or prosecute perpetrators of torture in the Gaza Strip and the West Bank. PCHR notes that none of the cases investigated have resulted in bringing the perpetrators of torture acts to trial.*”²³⁵ The High Commissioner of the OHCHR has noted that “*the State of Palestine’s non-compliance with the calls for accountability and urges the State of Palestine to conduct prompt, impartial and independent investigations of all alleged violations of international human rights law and all allegations of international crimes*”.²³⁶ The High Commissioner went on to call

²³¹ Amnesty International, *Report 2017/18 – The State of World Human Rights*, (February 2018), available at: <https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF>

²³² Ibid.

²³³ Freedom House, “*Freedom in the World 2018: West Bank Profile*”, available at: <https://freedomhouse.org/report/freedom-world/2018/west-bank>

²³⁴ Ibid.

²³⁵ PCHR, *Crime of Torture in Palestinian Prisons and Detention Centres*, (January 2016), p.33.

²³⁶ Human Rights Council, *Ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory, including East Jerusalem: comprehensive review on the status of recommendations addressed to all parties since 2009*, (A/HRC/35/19), (June 12, 2017), available at: http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session35/_layouts/15/WopiFrame.aspx?sourcedoc=/EN/HRBodies/HRC/RegularSessions/Session35/Documents/A_HRC_35_19_AEV.docx&action=default&DefaultItemOpen=1

*“[...] upon the State of Palestine to ensure that all victims have access to remedies and reparation.”*²³⁷

Despite the “State of Palestine” purporting to accede to various international agreements which prohibit torture and the other criminal acts described in this communication, there is scant evidence that any of the cases referred to above, or indeed any of those referred to by way of the statistics cited in the reports, have even been *investigated* let alone perpetrators brought to justice. Consequently, victims do not have any access to justice and reparations.

Moreover, considering that (as noted above) the numbers of victims of these crimes have remained consistent or even increased throughout the past decade, regardless of the recent purported accessions to various international human rights treaties²³⁸ and President Abbas’ presidential decree emphasizing compliance with domestic law and confirming the prohibition of torture²³⁹, future investigations and prosecutions or a change of policy remain highly unlikely.

As set out in Section III. C 1 above, as a structural matter, although the PA may in theory have a judicial framework, in practice this is under the control of the political leadership and there is accordingly no prospect of the perpetrators being punished, or proper oversight being exercised over the prisons and detention centres in which many of the systematic, politically-motivated crimes occur. In summary, there is an inability of *“the competent authorities to exercise their judicial powers in the territory concerned”*.²⁴⁰

Although Abbas is a Jordanian national, he lives and works in the West Bank. He does occasionally travel to Jordan, but that State has evinced no intention to investigate or charge Abbas with any crimes – and even if it did, Abbas would likely avoid the consequences of any

²³⁷ Ibid.

²³⁸ UNHCHR, “Press briefing notes on Palestine”, (May 2, 2014), available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/262AC5B8C25B364585257CCF006C010D>

²³⁹ PCHR, “PCHR welcomes Presidential Order confirming prohibition of all forms of torture”, (May 15, 2013).

²⁴⁰ ICC OTP, Policy Paper on Preliminary Examinations, (November 2013), para. 56-57.

prosecution by remaining in the West Bank. Investigation by the OTP therefore remains the only option for him to face justice in this regard.

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 no 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 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.²⁴¹

2. Application to Facts

In the present circumstances, we respectfully submit that it is surely within the interests of justice to investigate Abbas' crimes against humanity. There are no countervailing reasons as to why Abbas should be above justice or escape the consequences of his actions. There can be no justifications for these conscious and deliberate actions: the West Bank is not in a state of chaos or confusion, where numerous groups are able to commit acts of wanton cruelty to Palestinians.

This communication goes to the very heart of how the PA controls the West Bank: through a climate of fear inflicted on the population in the West Bank, achieved by widespread and/ or systematic murder, detention and torture. It is by no means necessary for the OTP to

²⁴¹ Ibid., para. 67.

commence an investigation, which in doing so should bring any incidental benefits beyond doing justice. Nonetheless, if the ICC were to end the impunity enjoyed by Abbas in committing such acts against his own people, it is possible that the ripple effects in terms of promoting democracy and human rights might echo not just among the Palestinian society, but also bring improvements across the Middle Eastern region.

One major intention, and indeed a consequence, of these crimes against humanity is that such internecine political violence renders far more difficult any reconciliation between various Palestinian factions – as demonstrated by the numerous failed initiatives since Hamas seized power. The lack of a coherent leadership hinders the Palestinian people rights and international standing, including any efforts to reach a lasting peace agreement with Israel.²⁴²

Finally, any future “State of Palestine” that wishes to become part of the rule-abiding international community, is required to comply substantively with at least a minimum level of international standards.

Far from there being substantial reasons in the interests of justice for the OTP not to proceed, there are substantial reasons in the interests of justice for the OTP *to proceed* with the investigation of Mahmoud Abbas for crimes against humanity.

²⁴² Erlanger Steven, “Abbas wins Palestinian vote by strong margin”, The New York Times, (January 10, 2005), available at: <http://www.nytimes.com/2005/01/10/world/middleeast/abbas-wins-palestinian-vote-by-strong-margin.html>

VIII. OVERALL CONCLUSION

In conclusion, we respectfully submit that the evidence presented in this communication provides the OTP with a reasonable basis to initiate a full investigation in accordance with Article 53(1) of the Rome Statute.

The investigation should focus on a case against Mahmoud Abbas for crimes against humanity committed both historically and on an ongoing basis by public officials of the Palestinian Security Forces against the population of the West Bank, and subsets thereof.

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

Notwithstanding the overt and brazen nature of these crimes, the PA judicial system has done nothing to prosecute or punish their perpetrators and nor is there any prospect of it doing so. The ICC therefore stands as the Court of last resort for the people of the West Bank. The present situation is admissible according to Article 17 of the Rome Statute as the scale, nature, impact and manner of the committed criminal acts are sufficiently severe and grave.

There are no countervailing reasons in the interests of justice militating against prosecution. In fact, an investigation could contribute to the building of a functioning Palestinian civil society and support a responsible Palestinian government which serves rather than oppresses its citizens. The OTP has the chance to act. We respectfully submit that it should now be seized.

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