

In the
International Criminal Court

SHURAT HA-DIN ISRAEL LAW
CENTER

The complainant,

v.

KHALED MASHAL

(خالد م شعل),

Accused of War Crimes,

Communication

to the Prosecutor of the International Criminal Court
regarding war crimes committed by KHALED MASHAL

(خالد م شعل),

COMMUNICATION

of SHURAT HADIN – ISRAEL LAW CENTER regarding criminal activities of Khaled Mashal (“Mashal”), requesting that the Prosecutor of the International Criminal Court (the “Court”), pursuant to Article 15 of the Rome Statute,¹ initiate an investigation into the war crimes committed within the Court’s jurisdiction by Mashal, a citizen of the Hashemite Kingdom of Jordan (“Jordan”).

1. Introduction:

THE COMPLAINANT submits to the Prosecutor this communication concerning the criminal activities of Mashal, a citizen of Jordan and overall *de jure* and *de facto* chairman of Ḥarakat al-Muqāwamah al-ʿIslāmiyyah (تحركة المقاومة الإسلامية) (hereinafter “*Ham*as”) since 1996, responsible for the war crimes of *Ham*as, in violation of Articles 8 (2) (c) (iv) and 28 (2) of the Rome Statute.² Mashal is criminally liable for *Ham*as’s war crime of execution without due process because: 1) he is a citizen of Jordan, which is a state party to the Rome Statute, 2) executions without due process violate the Rome Statute, and 3) *Ham*as’s execution of civilians in Gaza without due process is imputed to Mashal under the Rome Statute because he formulated, directs and approves the executions and oversees *Ham*as’ governance of Gaza.

2. Jurisdiction *Ratione Personæ*:

The Court has jurisdiction *ratione personæ* because Mashal is a citizen of Jordan.^{3,4} The

¹ The Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force on 1 July 2002)[hereinafter Rome Stat.].

² *Ham*as re-elects Khaled Mashaal, Associated Press, Apr. 1, 2013.

³ *Ham*as leader Khaled Meshaal returns for Jordan visit, BBC News, Jan. 29, 2012.

⁴ Fares Akram, *Abbas Considered to Lead Interim Palestinian Body*, N.Y. Times, Feb. 6, 2012.

Court may exercise its jurisdiction over all acts committed by the citizen of a state party to the court, wherever those acts are committed.⁵ Jordan is a member state of the Court.⁶ Therefore, the Court has jurisdiction *ratione personæ* over Khaled Mashal.

3. Jurisdiction *Ratione Temporis*:

Jordan ratified the Rome Statute on April 11, 2002.⁷ Therefore, the Court has jurisdiction over all criminal acts committed by Jordanian nationals after July 1, 2002, when the Rome Statute entered into force.⁸

4. Jurisdiction *ratione materiæ*:

The Court has jurisdiction over the war crime of sentencing or execution without due process.⁹ A perpetrator is guilty of the war crime of sentencing or execution without due process when:

1. The perpetrator executed one or more persons.
2. Such person or persons were civilians taking no active part in the hostilities.
3. The perpetrator was aware of the factual circumstances that established this status.
4. There was no previous judgment pronounced by a court.
5. The perpetrator was aware of the absence of a previous judgment.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.

⁵ Rome Stat., *supra* note 1 at art. 12(2)(b).

⁶ Ratification of Jordan of the Rome Statute, Apr. 11, 2002, C.N.368.2002.TREATIES-19 (Depositary Notification)

⁷ *Id.*

⁸ Rome Stat., *supra* note 1 at art. 126(1).

⁹ *Id.* at art. 8(2)(e)(i)

7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.¹⁰

This Court has jurisdiction to impute to a civilian superior the war crimes committed by his subordinates.¹¹ A civilian superior is liable for the criminal acts of his subordinates when he:

1. Knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.
2. The crimes concerned activities that were within the effective responsibility and control of the superior, and;
3. The superior failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

The facts clearly demonstrate that Hamas has executed civilians subject to its control without regular trial and that Mashal is liable for the acts of the individuals conducting the investigation because he is their responsible superior exercising effective command and control of them.

5. Facts Supporting Jurisdiction:

A. Hamas executed one or more persons.

On August 22, 2014, Hamas executed 18 so-called “collaborators” who had been convicted of no crime. Hamas publically executed seven of these “collaborators.”¹² Journalists

¹⁰ Elements of Crimes, International Criminal Court publication, RC/11 (2011).

¹¹ *Id.* at art. 28(b)

¹² Martin Bagot, *Hamas executes 18 ‘spies’ - 7 of them in busy public square*, Mirror (UK), Aug. 22, 2014.

observed Hamas executing 11 more in an abandoned Gaza City police station.¹³ Additionally, on July 28, 2014, Hamas summarily executed 20 Gazan civilians for engaging in anti-war protests against the Hamas *de facto* government of Gaza.¹⁴ Therefore, Hamas has executed more than one person.

B. Such person or persons were civilians taking no active part in the hostilities.

The persons whom Hamas executed were civilians who were taking no active part in the hostilities then ongoing. The persons whom Hamas executed on August 22, 2014 were unlawfully detained in prison for two years prior to their execution.¹⁵ It is therefore impossible that they, immediately prior to their execution, could have taken an active part in the hostilities. The anti-war protestors who Hamas executed on July 28, 2014 were unarmed protestors, not combatants.¹⁶ Therefore, all persons whom Hamas executed on July 28 and August 22, 2014 were civilians not actively engaged in hostilities.

C. Hamas was aware of the factual circumstances that established this status.

Hamas is the *de facto* governing authority for the Gaza strip and has been since 2007.¹⁷ Although it has entered into a *de jure* agreement with the Palestinian Authority to share power

¹³ Hamas executes 18 suspected collaborators with Israel in Gaza, Reuters, Aug. 22, 2014.

¹⁴ Ariel Ben Solomon, *Report: Hamas executes alleged spies, shoots protesters in Gaza*, Jerusalem Post, Jul. 29, 2014.

¹⁵ *Id.*

¹⁶ *What Happens When Palestinians Protest Hamas*, Israel Today, Jul. 30, 2014.

¹⁷ Report of the United Nations Fact-Finding Mission on the Gaza Conflict, ¶383 UN Doc. A/HRC/12/48, Sep. 25, 2009.

within Gaza, this agreement has yet to have practical effect with regard to control in Gaza.¹⁸ Hamas specifically controls the Gaza prisons.¹⁹ It also controls the Gaza police forces.²⁰

Hamas was aware that the persons whom it executed on August 22, 2014 were civilians not actively participating in the conflict, because they had been imprisoned in Hamas-run confinement facilities up to the moment of their execution. Hamas was aware that the persons whom it summarily executed on July 28, 2014 were unarmed protestors because its police force observed the protests prior to their execution.²¹

D. There was no previous judgment pronounced by a court

No lawful constituted tribunal, either convened by the *de facto* Hamas authorities or by the Palestinian Authority, pronounced a death sentence over any person whom Hamas executed on August 22, 2014 or July 28, 2014. According to Tayeb Abdel Rahim, the secretary-general of the Palestinian Authority presidency, these killings were instead “random executions” that were “absolutely not... in accordance with the law.”²² Therefore, no court pronounced a previous judgment.

E. The perpetrator was aware of the absence of a previous judgment.

Hamas was aware that no previous judgment was pronounced by a competent court. According to Moussa Abu Marzouk, a Mashal advisor, close confidant, and deputy leader of

¹⁸ Karin Laub and Ian Deitch, *Israel Extends Gaza Truce For 24 Hours As Death Toll Tops 1,000*, AP News, Jul. 26, 2014.

¹⁹ Elad Benari, *Hamas Releases Fatah Prisoners from Gaza Prisons*, Israel National News, May 6, 2014.

²⁰ Yaakov Katz, *Gaza police was incorporated into Hamas military wing*, Jerusalem Post, Mar. 15, 2010.

²¹ וְהוּצְאוּ לְהוֹרֵג - פְּלִסְטִינִים יֵצְאוּ לְהַפְגִּין נֶגַד חֲמָאָס. Channel 10 (Israel), Jul. 29, 2014/

²² *Palestinian Authority slams Hamas executions*, Jerusalem Post, Aug. 24, 2014.

Hamas,²³ the executions were “taken to satisfy the public in this matter, without considering other legal measures that should have been taken.”²⁴ The second-most senior official in Hamas admitted, that Hamas disregarded the regular legal process to satisfy a perceived public bloodlust. These executions were therefore in the absence of a previous judgment.

F. Hamas’s conduct takes place in the context of and is associated with an armed conflict not of an international character.

Hamas executions of “collaborators” takes place in the context of its conflict with Israel that is not of an international character. A conflict which is of an international nature is one which occurs between two high contracting parties to the Geneva Conventions.²⁵ Hamas is not a high contracting party to the Geneva Conventions. Although Hamas is the *de facto* ruler of Gaza, the Palestinian Authority has *de jure* responsibility for governance there.²⁶ Hamas members participate in both the Palestinian Liberation Organization (“PLO”) and the Palestinian National Authority (“PNA”).^{27,28} Hamas remains a separate organization, however. The PLO is legally distinct from the PNA, has no sovereign authority in Gaza or in any other place, and is not a state.²⁹ The PLO may not accede to the Geneva Conventions as a matter of law.³⁰ Therefore,

²³ Michael Jansen, *How Hamas continues to resist after commanders are slain-A resilient structure helps the group rebound after any attack on leadership*, Irish Times, Aug. 25, 2014.

²⁴ Roi Kais, *Hamas official: Executions were meant to satisfy the people*, YNet News (Israel), Aug. 24, 2014.

²⁵ Geneva Conventions I-IV, common art. 2, Aug. 12, 1949, 6 U.S.T. 3316 *et seq.*

²⁶ Oslo I, Art. IVb

²⁷ Associated Press and Zvi Ba’arel, *Hamas moves to join Palestine Liberation Organization*, Ha’aretz, Dec. 22, 2011.

²⁸ Peter Beaumont, *Fatah and Hamas agree landmark pact after seven-year rift*, The Guardian, Apr. 24, 2014

²⁹ *Ungar v. Palestine Liberation Organization*, 402 F.3d 274, 290-92 (1st Cir. 2005).

Hamas's conflict with Israel does not constitute armed conflict of an international nature because Hamas, the PLO and the PNA are not high contracting parties to the Geneva Conventions.

Non-international armed conflicts are "protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory" of a high contracting party to the Geneva , Conventions.³¹ Israel is a high contracting party to the Geneva Conventions.³² Hamas conducts operations and attacks inside of the undisputed territory of Israel.³³ Therefore, Hamas conducts operations inside of the territory of a high contracting party even though Hamas is not a high contracting party and the Hamas-Israel conflict is an armed conflict not of an international character.

G. Mashal is aware of factual circumstances that established the existence of an armed conflict.

Mashal is aware of the factual circumstances that established armed conflict between Hamas and Israel. Since the attachment of the jurisdiction of the court to Jordanian citizens in July, 2002, armed conflict between Hamas and Israel has existed continuously, punctuated only by periods of truces or ceasefires.³⁴

Mashal has spoken publicly and continuously about armed conflict with Israel. In November, 2002, in speaking of a potential truce, Mashal stated that "We do not see any benefit

³⁰ Interim Agreement on the West Bank and the Gaza Strip, Isr.-P.L.O., art. IX(5)(b), Sep. 28, 1995, 36 I.L.M. 557 [hereinafter Oslo II].

³¹ Int'l Comm. of the Red Cross, *How is the Term 'Armed Conflict' Defined in International Humanitarian Law?* 5 (2008)

³² 1080 U.N.T.S. 370

³³ Zachary Laub, *Hamas*, Council on Foreign Relations, Aug. 1, 2014.

³⁴ *Timeline of Israel and Hamas conflict in Gaza since 2002*, News.com.au, Nov. 15, 2012.

of the so-called truce, halting the resistance or ending the martyrdom (suicide) operations as some are calling for . . . If the occupation ends, resistance will end . . . Giving periods of truce or calm have proved that it only serves the occupation.” He vowed to continue “resistance and jihad (holy war).”³⁵ In 2005, Mashal declared that Hamas would not “enter a new truce... and are preparing for a new round of conflict” because “the Palestinian gun will always be pointed only at the Zionist enemy”³⁶ In 2007, he declared that Hamas had readied “an increase of the resistance” against Israel.³⁷ In 2009, he stated that “Hamas and the Resistance will continue combat” until Israel is destroyed.³⁸ In 2012, Mashal declared that Hamas would continue firing rockets at Israel territory for the purpose of destroying Israel.³⁹ In 2014, Mashal said that Hamas had “caravans of martyrs” to contribute to “the eternal struggle” against Israel.⁴⁰ These statements are a mere sampling of Mashal’s numerous public declarations acknowledging the existence of armed conflict with Israel. Accordingly, Mashal is aware that Hamas is engaged in non-international armed conflict with Israel.

H. Mashal knew or should have knows that Hamas executes civilians not taking an active part in the hostilities.

Mashal knew or should have known that Hamas executes civilians. Prior to the

³⁵ Sam F, Ghattas, *Hamas official says selection of dove as Labor Party leader will not lead to truce*, AP Worldstream, Nov. 20, 2002.

³⁶ Nassib Azar, Agence France Presse English Wire, Dec. 10, 2005.

³⁷ *Hamas warns of more attacks after US peace meet*, Agence France Presse English Wire, Nov 24, 2007.

³⁸ *Iran/Palestine: Ahmadinejad Underlines Iran’s Support for Palestinian People*, Thai News Service, Dec. 15, 2009.

³⁹ David Lev, *Gaza Rocket Terror Returns to Southern Israel*, Dec. 23, 2012

⁴⁰ *When suicide is permissible*, Al-Ahram Weekly, Aug. 8, 2014.

executions of July 28, 2014, Hamas had executed 15 civilian residents of Gaza since 2010.⁴¹ These executions were not in accordance with the laws of the Palestinian Authority. Hamas accomplished a majority of these executions by summarily spraying suspected individuals with machine-gun fire on the streets of Gaza City without any process at all.⁴² In one particularly heinous execution, the victim was tied with a chain to a motorcycle and was dragged through the streets accompanied by a gang of cheering Hamas members on motorcycles.⁴³ Mashal knew or should have known that Hamas conducts summary executions because of Hamas's history of performing these executions and because, as discussed below, Mashal controls Hamas.

I. Hamas is an organization within the effective responsibility and control of Mashal.

Hamas is an organization and government within the effective control and responsibility of Mashal. Hamas military activity occurs only on Mashal's direct orders.⁴⁴ Mashal has absolute control over the tactics and strategy of Hamas attacks. He dictates the location, equipment, weapons, and aims of these attacks.⁴⁵ Mashal states without reservation that Hamas forces are under his personal control, and that he has had complete control of Hamas forces for at least the past four years.⁴⁶

⁴¹ *Hamas court gives Gazan death sentence for aiding Israel*, Xinhua News Agency, Dec. 5 2013.

⁴² *Id.*

⁴³ Video of this execution can be seen at <http://youtu.be/7JvTi5wYcjE> and was widely reported in international news media.

⁴⁴ Isabel Kershner, *Hamas claims shooting of an Israeli on border Group's first attack since November truce*, International Herald Tribune, Mar. 20, 2007.

⁴⁵ Scott Wilson, *Israeli airstrike destroys offices*, Washington Post, Jul. 2, 2006.

⁴⁶ *Palestine Leadership Divide Could Hamper Cease-Fire Agreement; Hamas Rejects Israeli Cease-Fire Proposal*, AP, Aug. 5, 2014.

Mashal is also the conduit through which Hamas's finances flow. Hamas receives, through Mashal, financial support from the Qatari government.⁴⁷ Qatar has donated over \$500 million to Hamas, all of which Mashal controls.⁴⁸ Specifically, Qatar has donated to Mashal \$60 million to pay salaries to Hamas fighters and civil servants.⁴⁹ Mashal therefore has the ability to cut payments to anyone who disobeys his desires. There is no evidence that he has ever done so in the case of executions, principally because he approves of the execution of "collaborators."

J. Mashal failed to take all necessary and reasonable measures within his power to prevent or repress Hamas from executing civilians not taking an active part in the hostilities.

Mashal has failed to take any steps whatever to prevent or repress Hamas from executing civilians not taking an active role in the hostilities. Mashal controls the Gaza *de facto* governing authority and its institutions of justice.⁵⁰ There is no evidence that Mashal has ever reprimanded, punished or caused to be tried any person for executing civilians not actively involved in the conflict. There is no evidence that he has ever even stopped paying salaries to Hamas members who engaged in these executions. Therefore, Mashal has failed to take any necessary and reasonable measures within his power to prevent or repress Hamas from executing civilians not taking an active part in the hostilities.

⁴⁷ *Qatar, home to Hamas boss and funder of Gaza Strip, criticized amid cease-fire talks' collapse*, Associated Press, Aug. 21, 2014.

⁴⁸ *Middle East Updates*, Yerepouni Daily News (Lebanon), Aug. 21, 2014.

⁴⁹ *Palestinian unity gov't not able to pay salaries to Hamas staff in Gaza: PM*, Xinhua News Agency, Jun. 23, 2014.

⁵⁰ *Gaza: Halt Executions*, Human Rights Watch, Aug. 25, 2014.

6. Obligation of the Prosecutor to Initiate an Investigation:

The Prosecutor is obligated, under Article 53(1) of the Rome Statute, to initiate an investigation when the information made available to him indicates that a case is:

- a. Admissible to ICC Jurisdiction
- b. Grave, and
- c. In the interests of justice

A. Admissibility of this case to ICC jurisdiction:

This case is admissible for trial before the ICC under the criteria of Article 17 of the Rome Statute. War crimes are admissible for trial before the ICC where national courts are unwilling or unable to prosecute offenders.⁵¹ A State is unwilling to begin proceedings in its national courts when it shields a person from criminal responsibility, when it delays proceedings unjustifiably, or when the proceedings in the case are neither independent nor impartial.⁵² A State is unable to begin proceedings in its national courts when it is unable to obtain custody of the accused.⁵³

THE COMPLAINANTS have no knowledge of Jordan bringing a prosecution against any Hamas official or member for war crimes. Although Jordan has wide-ranging anti-terror laws, these laws are applied in a patently unfair and politically-motivated fashion.⁵⁴ THE COMPLAINANTS aver, to the best of their knowledge and belief, that no prosecution of any Hamas official, including Mashal, is contemplated. Further, even if one were, Jordan cannot

⁵¹ Article 17, Rome Stat.

⁵² Stuart Risch, *Hostile Outsider or Influential Insider? The United States and the International Criminal Court*, 2009 Army Law 61, 71 at n. 57.

⁵³ Article 17, Rome Stat.

⁵⁴ Areej Abuqudairi, *Jordan anti-terrorism law sparks concern*, Al-Jazeera, Apr. 25, 2014

instantly obtain custody over Mashal as Mashal is presently resident in Qatar.⁵⁵

Jordan has never prosecuted a Hamas member for war crimes and could not obtain custody of Mashal even if it were willing. Therefore, Jordan is both unwilling and unable to prosecute Mashal.

B. Gravity of the Conduct.

Pursuant to Articles 17 and 52 of the Rome Statute, the Prosecutor should open an investigation unless he believes that “there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice,” despite the clear evidence of a war crime.⁵⁶

Here, there is every reason to believe that an investigation would serve the substantial interests of justice and no reason to believe that it would not. Failure to open an investigation would be a substantial miscarriage of justice. At present, there is no method of accountability for Hamas, for Mashal, and for Hamas military personnel and officials who execute civilians for “collaboration” without due process. The ICC exists to provide justice in cases in which national courts are unwilling or are unable, as is the case here.⁵⁷ Therefore, the Prosecutor should open an investigation.

C. A preliminary investigation is in the interests of justice

The Rome Statute directs the Prosecutor to consider the interests of victims, the age or

⁵⁵ Roi Kais, *Private jets, restaurants, luxury hotels: the good life of senior Hamas officials*. YNet News (Israel), Jul. 22, 2014.

⁵⁶ International Criminal Court: Situation in the Republic of Cote D’Ivoire, 51 I.L.M. 228, 255 (Pre-Trial Chamber III, 2012).

⁵⁷ Jann N. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* 3-4 (Ruth Mackenzie et. al eds. 2008).

infirmity of the perpetrator, and his role in the crime in determining whether an investigation is in the interests of justice.⁵⁸ Here, millions of Gaza civilians remain at potentially vulnerable to the whims of Hamas and could find themselves the subject of an unlawful execution. Hamas and Mashal have a history of total disregard for the lives and well-being of the civilian population in Gaza. For example, Hamas has institutionalized the use of human shields by creating a tactical field manual that gives its military irregulars a “how-to” list on the use of civilian for this purpose.⁵⁹ The same disregard which Hamas shows for civilian life in its use of human shields, coupled with Hamas’s history of engaging in executions, makes the continuation of this practice a foregone conclusion. Therefore, the interests of the victims are served by a prosecution.

Khaled Mashal is 58 years of age.⁶⁰ He enjoys soccer and use of exercise bikes.⁶¹ There is no evidence of advanced age or ill health which would mitigate against a prosecution.

Finally, the Prosecutor should open an inquiry to ensure that officials the world over are on notice that the Prosecutor takes all war crimes seriously without bias, regard to political pressures or convenience, and that the era of willful blindness of leaders and impunity for that willful blindness is over. Mashal’s rôle in these offenses is central. As discussed above, he exercises absolute control over Hamas, and therefore should face justice for its criminal activities.

⁵⁸ Art. 53(2)(b), Rome Stat.

⁵⁹ Yonah Jeremy Bob, *Will captured Hamas manual on using human shields help Israel block war crimes trials?*, Jerusalem Post, Aug. 5, 2014.

⁶⁰ Holly Yan, Steve Almasy, and Ali Younes, *CNN exclusive: Inside the mind of Hamas’ political leader*. CNN, Aug. 4, 2014

⁶¹ Roi Kais, *Private jets, restaurants, luxury hotels: the good life of senior Hamas officials*. YNet News (Israel), Jul. 22, 2014.

7. Conclusion

The information presented above is only a preliminary collection of evidence, but it gives rise to a reasonable belief that KHALED MASHAL has engaged in a continuing course of conduct in which he has committed grave crimes falling within the jurisdiction of the Court. The available evidence provides a compelling case for an investigation in accordance with the Prosecutor's obligation under Article 53 of the Statute. Based upon the information contained herein, THE COMPLAINANTS respectfully submit that proper cause exists for the Prosecutor to initiate an investigation into the crimes committed within the Court's jurisdiction, arising from KHALED MASHAL'S control over Hamas combatants loyal to him and using such combatants to commit war crimes against civilians in Gaza.

Dated: Brooklyn, New York
September 2, 2014

Respectfully submitted,

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