

In the International Criminal Court

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*By and For Yair Mana, Ofer Liberman, Raphael Babayan and Eduardo Polonsky; all similarly situated farmers in Southern Israel; and 50,000 civilians worldwide, **the complainants***

v.

Khaled Mashal, Saleh al-Arouri, and Zaher Jabarin,

Accused of War Crimes

Communication

To the Prosecutor of the International Criminal Court
regarding war crimes committed by Khaled Mashal,
Saleh al-Arouri, and Zaher Jabarin,

September 3, 2018

COMMUNICATION

Of SHURAT HADIN – ISRAEL LAW CENTER of Tel-Aviv, Israel on behalf of

1. Yair Mana, Ofer Liberman, Raphael Babayan and Eduardo Polonsky, Israeli farmers whose personal and real property is located on Kibbutz cooperative farms in Southern Israel, who have suffered destroyed agricultural fields and other severe property damage as a result of the unlawful and deliberate conduct and activities described herein;
2. All similarly situated farmers in Southern Israel within the range of aerial incendiary devices described herein;
3. 50,000 civilians worldwide who have joined this communication along with the Israeli farmers and who complain of the unlawful and deliberate activity described herein (A list of the 50,000 citizens is attached hereto as Appendix “A”):

regarding criminal activities of Khaled Mashal, Saleh al-Arouri, and Zaher Jabarin, requesting that the Prosecutor of the International Criminal Court, pursuant to Article 15 of the Rome Statute,¹ initiate an investigation into the war crimes committed within the Court’s jurisdiction by Khaled Mashal, Saleh al-Arouri, and Zaher Jabarin, citizens of the Hashemite Kingdom of Jordan (hereinafter Jordan).

1. Introduction: THE COMPLAINANTS submit to the Prosecutor this communication concerning the criminal activities of Khaled Mashal, Saleh al-Arouri, and Zaher Jabarin, citizens of Jordan and overall *de jure* and *de facto* chairman, deputy chairman, and finance officer, respectively, of Ḥarakat al-Muqāwamah al-’Islāmiyyah (hereinafter Hamas). Additionally, Mashal has been the commander of the Izz ad-Din al-Qassam Brigades (hereinafter IDQB) since 1996, a component of Hamas. These individuals are

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.].

jointly and severally responsible for the war crimes of those groups, in violation of Articles 8 (2) (c) (vii) and 28 (2) of the Rome Statute.²

2. Jurisdiction *ratione personæ*: The Court has jurisdiction *ratione personæ* because Khaled Mashal is a citizen of Jordan who actively exercises the prerogatives of his citizenship.^{3,4} The 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.

The Court has jurisdiction *ratione personæ* over Saleh al-Arouri because he is a citizen of Jordan. Al-Arouri is a citizen of Jordan because he was born in Arura, in the Ramallah District, in the West Bank, on August 19, 1966.⁷ Jordan controlled the West Bank at that time.⁸ Al-Arouri is a Jordanian citizen under Jordanian law because he was born in an area under Jordanian control and is not Jewish.⁹ In 1954, the Jordanian Parliament extended citizenship to all non-Jews born or resident in all areas then under Jordanian control, including the West Bank.^{10,11} The Jordanian Parliament has never repealed these statutes.¹²

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

³ *Hamas 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.

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 *Palestine Facts*, Palestinian Academic Society for the Study of International Affairs (2006).

⁸ Eyal Benvenisti, *The International Law of Occupation* 108 (Princeton University Press 2004).

⁹ Palestinian Authority Official Biography of Ministers, *available at* <http://www.palestinecabinet.gov.ps/ar/Govs/ViewMinister.aspx?mid=3>

¹⁰ Law No. 6 of 1954 on Nationality, Official Gazette, no. 1171, February 16, 1954, p. 105, arts. 3 and 9.

¹¹ Law No. 56 of 1949 Additional to the Law of Nationality, Official Gazette, no. 1004, December 20, 1949, p. 422.

¹² Human Rights Watch, *Stateless Again, Palestinian-Origin Jordanians Deprived of their Nationality* [hereinafter "Stateless Again"] 17, Jan., 2010.

King Hussein of Jordan purported, by decree, to withdraw Jordanian citizenship from those Jordanian citizens resident in the West Bank in 1988. This decree was invalid under Jordanian law.¹³ The Jordanian constitution does not permit the withdrawal of citizenship on the basis of place of residency and does not permit the Monarch to unilaterally amend the constitution.¹⁴ Further, international law prevents Jordan from withdrawing citizenship from its Palestinian citizens on the basis of their place of residency.¹⁵ Customary international law further prohibits arbitrary deprivation of citizenship, especially where that deprivation would result in statelessness.¹⁶ This declaration was illegal under both Jordanian and international law because it was not ratified by the Jordanian Parliament and was not reflected in amendments to the Jordanian constitution. Further, it is arbitrary in its nature, and, if effective, would result in the statelessness for those so deprived.¹⁷ Therefore, this Court must continue to consider Al-Aroui to be a Jordanian citizen, for to do otherwise would allow the Jordanian government to shirk its legal and moral responsibility for its citizens on the basis of place of residency. The Court thus has jurisdiction *ratione personæ* over Al-Aroui.

The COMPLAINANTS aver, based upon information and belief, that Zaher Jabarin is a citizen of Jordan based upon his birth in the West Bank at a date unknown. The COMPLAINANTS further aver, based upon information and belief, that Zaher

¹³ *supra*. at note 9.

¹⁴ Constitution of Jordan, art. 6(i) and 9(ii).

¹⁵ Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948), art. 13, 15.

¹⁶ See e.g. Kay Hailbronner, *Nationality in Public International Law and European Law*, in 1 *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries* 70 (Rainer Bauböck, Eva Ersboll, Kees Groenendijk, & Harald Waldrauch eds., 2005).

¹⁷ Stateless again, *supra* note 8, 17.

Jabarin actively exercises the prerogatives of his Jordanian nationality and utilizes a Jordanian passport when engaged in international travel. Therefore, the Court has jurisdiction *ratione personæ* over Jabarin.

3. Jurisdiction *ratione temporis*: Jordan ratified the Rome Statute on April 11, 2002.¹⁸

Therefore, the Court has jurisdiction over all criminal acts committed by Jordanian nationals after July 1, 2002 when the Rome Statute entered into force.¹⁹

4. Jurisdiction *ratione materiae*: This Court has jurisdiction over the war crime of attacking civilians in a conflict not of an international nature.²⁰ A perpetrator is guilty of the war crime of attacking civilians in a conflict not of an international nature when:

1. He directs an attack.
2. The object of the attack is a civilian population as such or individual civilians not taking direct part in hostilities.
3. He intends the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.
4. The conduct takes place in the context of and is associated with an armed conflict not of an international character.
5. He was aware of factual circumstances that established the existence of an armed conflict.²¹

This Court has jurisdiction over the war crime of destroying or seizing the enemy's property in a conflict not of an international nature.²² A perpetrator is guilty of the war crime of destroying or seizing the enemy's property in a conflict not of an international nature when:

1. The perpetrator destroyed or seized certain property.
2. Such property was property of an adversary.

¹⁸ *Id.*

¹⁹ Rome Stat., *supra* note 1 at art. 126(1).

²⁰ *Id.* at art. 8(2)(e)(i)

²¹ Elements of Crimes, International Criminal Court publication, RC/11 (2011).

²² *Id.* at art. 8 (2) (e) (xii)

3. Such property was protected from that destruction or seizure under the international law of armed conflict.
4. The perpetrator was aware of the factual circumstances that established the status of the property.
5. The destruction or seizure was not required by military necessity.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.²³

This court has jurisdiction over the war crime of using children in a conflict not of an international character.²⁴ A perpetrator is guilty of the war crime of using children in a conflict not of an international character in a conflict not of an international nature when:

1. The perpetrator used one or more persons to participate actively in hostilities.
 2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.²⁵

The facts clearly demonstrate that Hamas has directed its combatants participating in the “Great March of Return” to launch incendiary devices which targeted and destroyed Israeli civilian agricultural and residential property and that no military necessity required Hamas militants to target said property. The facts indisputably establish that Hamas militants utilized persons under the age of 15 for the purpose of conducting the operations previously described herein. Finally, the facts indisputably demonstrate the Hamas directed teams of combatants to attempt to enter Israel with the

²³ Elements of Crimes, International Criminal Court publication, RC/11 (2011).

²⁴ *Id.* at art. 8 (2) (e) (vii)

²⁵ Elements of Crimes, International Criminal Court publication, RC/11 (2011).

purpose of murdering Israeli civilians in their homes and launched rocket attacks against Israeli civilian targets for the same purpose.

Khaled Mashal, Saleh al-Aroui and Zaher Jabarin are liable for the acts of Hamas because they, together with other unnamed persons not within the jurisdiction of this court, are responsible superiors exercising effective command and control of them.

4A. Alternative theory of Jurisdiction *ratione materiae*: This court has jurisdiction over the war crime of using protected persons as shields. A perpetrator is guilty of the war crime of using protected persons as shields in international armed conflict when:

1. The perpetrator moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict.
2. The perpetrator intended to shield a military objective from attack or shield, favour or impede military operations.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.²⁶

If this court finds that the armed conflict between Hamas and Israel constitutes international armed conflict, the facts will clearly demonstrate that Hamas used civilians as shields for its combatants who operated from within masses of civilian rioters with the tactical aim of preventing the IDF from targeting of its combatants, and with the strategic aim of generating civilian casualties for geopolitical gain. The facts will further demonstrate that Hamas targeted civilians and destroyed Israeli civilian property in an unlawful manner and for unlawful purposes in the context of an international armed conflict, should the court rule that this conflict is international.

5. Facts Supporting Jurisdiction:

²⁶ *Id.* at art. 8 (2) (e) (xxiii)

5(a)(1). Khaled Mashal, Saleh al-Arouri and Zaher Jabarin directed attacks.

Khaled Mashal, Saleh al-Arouri and Zaher Jabarin face command liability for the criminal actions of Hamas and IQMB because they, along with other persons not within the jurisdiction of the court, exercise effective control and responsibility over them. Hamas and IQMB attacks of all varieties and at all places occur only on Mashal's direct orders.²⁷

Mashal has absolute control over the tactics and strategy of Hamas and IQMB's attacks. He dictates the location, equipment, weapons, and aims of these attacks.²⁸ Mashal states without reservation that Hamas forces are under his personal control, and that they has had complete control of Hamas forces for at least the past four years.²⁹ In past conflicts, at Mashal's order, rocket fire has ceased when "not firing the rockets... serves the Palestinians' interest."³⁰ Mashal controls when Hamas violence begins and when it ends. He is therefore in legal and actual authority over Hamas and IQMB. Based upon information and belief, the complainants aver that Mashal directed the attacks at issue.

Saleh al-Arouri in Deputy Leader of Hamas.³¹ In this capacity he exercises command authority and is liable for the actions of subordinates in Hamas and IQMB. Based upon information and belief, the complainants aver that al-Arouri participated in the planning and execution of the attacks at issue.

²⁷ Isabel Kershner, *Hamas claims shooting of an Israeli on border Group's first attack since November truce*, International Herald Tribune, Mar. 20, 2007.

²⁸ Scott Wilson, *Israeli airstrike destroys offices*, Washington Post, Jul. 2, 2006.

²⁹ *Palestine Leadership Divide Could Hamper Cease-Fire Agreement; Hamas Rejects Israeli Cease-Fire Proposal*, AP, Aug. 5, 2014.

³⁰ Taghreed El-Kohdary and Ethan Bronner, *Hamas leader reaches out to West*, International Herald Tribune, May 6, 2009.

³¹ *Hamas appoints West Bank terror chief as its deputy leader*, Times of Israel, Oct. 5, 2017.

Zaher Jabarin exercises command authority within Hamas and IQMB. Jabarin is responsible for financing weapons, materiel and logistics for both groups.³² He therefore controls Hamas and IQMB operations, because no operation can go forward without financing. He therefore also shares command liability for his role in directing financing for the attacks at issue.

5(a)(2). Hamas combatants attempted to invade for the purpose of attacking Israeli civilians and launched rockets for the same purpose. The object of their attacks were therefore a civilian population not taking direct part in hostilities.

Hamas combatants attempted to invade Israeli territory. On May 15, 2018, a team of 8 Hamas combatants attempted to breach the Gaza-Israel border.³³ On May 28, 2018, a team of 3 Hamas combatants similarly attempted such to breach the Gaza-Israel border.³⁴ On July 1, 2018, Hamas combatants crossed the Gaza-Israel border and set fire to agricultural fields.³⁵ These combatants engaged soldiers of the Israeli Defense Forces with small arms fire and grenades. The Hamas combatants also had wire cutters and other devices in their possession for the purpose of breaching the border with Israel. Therefore, Hamas combatants attempted to breach the border and in one case, actually did breach it.

Hamas fired rockets at Israel from the Gaza Strip. In May, 2018, Hamas militants fired more than 70 rockets and mortars at Israel.³⁶ In June, 2018, Hamas militants fired 58

³² Judah Ari Gross, *Shin Bet accuses Turkey of allowing Hamas to raise, launder money*, Times of Israel, Feb. 12, 2018

³³ Judah Ari Gross, *IDF says it thwarted 8 Hamas gunmen attempting to breach fence Monday*, Times of Israel, May 15, 2018.

³⁴ *Israeli army kills Gaza fighter while thwarting border breach*, Reuters, May 28, 2018

³⁵ Judah Ari Gross, *Palestinians infiltrate Israel from Gaza, burn abandoned army post*, Times of Israel, July 1, 2018.

³⁶ Ruth Eglash and Hazem Balousha, *Tensions rise as Gaza militants fire more than 70 mortars, rockets into Israel*, Washington Post, May 29, 2018.

rockets into Israeli territory.^{37,38} In July, 2018, Hamas militants fired over 114 mortars into Israel.³⁹ In August, 2018, as of the date of filing, Hamas militants fired at least 8 rockets.⁴⁰

Hamas combatants attempted to invade Israeli territory for the purpose of killing Israeli civilians. Hamas officials disseminated, by electronic and other means, maps of nearby Israeli civilian communities so that any Hamas combatant who successfully crossed into Israeli territory would know where he might find the nearest civilians.⁴¹

Simultaneously, Hamas officials gloried in the prospect of Israeli civilian casualties which Hamas militants would inflict, were they successful in penetrating Israeli territory.⁴² Hamas combatants therefore attempted to invade for the purpose of killing Israeli civilians.

Hamas combatants launched rockets at Israeli civilian targets. The May, 2018 attacks targets civilian locations such as a kindergarten in Sderot, Israel. They injured four civilians.⁴³ Hamas leadership issued a statement taking credit for the attacks, stating “We conduct this battle with the Zionist enemy in accordance with the interest of the Palestinian people.”⁴⁴ The June, 2018 attacks targeted civilian communities in Israel’s Eshkol region.⁴⁵ A Hamas spokesman confirmed that the attacks were “courageous

³⁷ 45 rockets, mortars fired toward Israel; IDF retaliates with 25 airstrikes, The Jerusalem Post, June 20, 2018

³⁸ Judah Ari Gross, *At least 13 rockets launched from Gaza after army strikes Hamas cell's car*, Times of Israel, June 27, 2018

³⁹ Judah Ari Gross, *IDF: Over 174 mortar shells, rockets fired at Israel on Saturday*, July 14, 2018

⁴⁰ Judah Ari Gross, *Three hurt as rockets fired from Gaza slam into Sderot*, Times of Israel, Aug. 8, 2018

⁴¹ *The 'Great Return March' Campaign: An Initiative Sponsored By Hamas, Whose Goal Was To Breach The Border Fence, Penetrate Israeli Territory*, Middle East Media Research Institute, May 15, 2018

⁴² *Id.*

⁴³ *Supra.* at n. 33.

⁴⁴ *Id.*

⁴⁵ Anna Anrohnheim, *IDF vows to return Security to Southern Israel after Night of Rocket Salvo*, Jerusalem Post, Jun. 20, 2018

resistance” and that a message to Israeli civilians was to be found in “the message of the bombardment.”⁴⁶

The July, 2018 attacks targeted civilian communities in Southern Israel. Numerous mortar rounds landed inside Israeli villages of no military importance, wounded 3 civilians, and damaged civilian infrastructure, to include a synagogue.⁴⁷

The August, 2018 rocket launches targets Sderot, a civilian community in Southern Israel. They injured three civilians.⁴⁸ No military installation exists in Sderot proper.⁴⁹

The targeting choices of Hamas rocket attacks, none of which damaged Israeli military installations, proves that the Hamas leaders, including Khaled Mashal, Saleh al-Arouri and Zaher Jabarin, intentionally targeted civilian persons for killing.

5(a)(3). Hamas leadership intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.

Hamas leaders were aware that they directed their combatants to invade communities consisting solely of civilian residents. Hamas leaders provided instructions for its combatants to reach the Israeli communities of Kisuffim, Be'eri, Nativ Ha-Asara, Erez, Sderot, Nir Am [and] Mefalsim.⁵⁰ These communities are agricultural villages containing no military personnel. This fact is open and obvious and known to the Hamas leadership.

Hamas leadership made clear that its attempt to breach the Gaza-Israel border is for the purpose of killing Israeli civilians. According to the leader of Hamas in Gaza,

⁴⁶ *Id.*

⁴⁷ *Supra.* at n. 36.

⁴⁸ *Supra.* at n. 36.

⁴⁹ *Supplying support*, Jerusalem Post, Jul. 17. 2014.

⁵⁰ *Supra.* at n. 30.

Yehya al-Sinwar, combatants who succeed in penetrating Israeli territory will “uproot the borders, (and) pluck out their hearts.”⁵¹ Another Hamas leader urges any combatant who successfully reached Israeli territory to “murder, slaughter, burn and never show them any mercy.”⁵² It is therefore indisputable that Hamas leaders, including Khaled Mashal, Saleh al-Arouri and Zaher Jabarin, were aware of the civilian status of the persons in the communities to which they directed their combatants.

The past statements of Hamas leaders with regard to rocket attacks proves that Hamas officials, to include Khaled Mashal, Saleh al-Arouri and Zaher Jabarin, know of the civilian status of the persons whom they target with rockets, and, in fact, rely upon that status for strategic purposes. In 2014, Mashal openly bragged that Hamas launched rockets from Gaza against Ben Gurion International Airport, a purely civilian facility, on his orders. “Today, Israel is worried about what happened at Ben Gurion Airport. Do you want a blockade in return for the blockade? Today the resistance in Gaza can blockade you, in the future it will from the West Bank.”⁵³ This comports with the present-day statements of Hamas officials about the purpose for the rocket launches. According to Hamas spokesman Fawzi Barhoum, Hamas rocket launches were an “immediate response” that was meant to “deliver the message” by terrorizing Israeli civilian communities.⁵⁴ Hamas leaders therefore know and intend that its rocket attacks will target Israeli civilians and civilian locations and intend the same as a part of strategy.

5(a)(4) Hamas’s conduct takes place in the context of and is associated with an armed conflict not of an international character

⁵¹ Tovah Lazaroff, *Nine Killed During Friday “March of Return,”* Jerusalem Post, Apr. 8, 2018

⁵² *Supra.* at n. 30.

⁵³ Roi Kais, *Hamas leader rejects ceasefire efforts,* YNet News, Jul. 23, 2014.

⁵⁴ Aron Heller, *Israel exchanges intense fire with Hamas militants in Gaza; Israel exchanges intense fire with Hamas militants in Gaza,* Associated Press, Jul. 15, 2018

Hamas and IDQB’s “Great March of Return” takes place in a conflict which 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.⁵⁵ Hamas and IDQB are not high contracting parties to the Geneva Conventions. Although Hamas is the *de facto* ruler of Gaza, the Palestinian Authority has *de jure* responsibility for governance there.⁵⁶ Hamas members participate in both the Palestinian Liberation Organization (PLO) and the Palestinian National Authority.^{57,58} Hamas remains a separate organization, however. The PLO is legally distinct from the Palestinian National Authority (PNA), has no sovereign authority in Gaza or in any other place, and is not a state.⁵⁹ The PLO may not accede to the Geneva Conventions as a matter of law.⁶⁰ Therefore, Hamas and IDQB attacks against Israeli civilians do not constitute armed conflict of an international nature because Hamas, IDQB, the PLO and the PNA are all not high contracting parties to the Geneva Conventions. Although the “State of Palestine” submitted documents to the Swiss Federal Council purporting to accede to the Geneva Conventions,⁶¹ Hamas and IDQB are not components of, and do not claim to be, the armed forces of the “State of Palestine.” Neither the “State of Palestine,” the Palestinian National Authority or the PLO have, at the time of the purported accession or subsequently, exercised *de facto* control over the Gaza Strip. Neither Hamas or IDQB

⁵⁵ Geneva Conventions I-IV, common art. 2, Aug. 12, 1949, 6 U.S.T. 3316 *et seq.*

⁵⁶ Oslo I, Art. IVb

⁵⁷ Associated Press and Zvi Ba’arel, *Hamas moves to join Palestine Liberation Organization*, Ha’aretz, Dec. 22, 2011.

⁵⁸ Peter Beaumont, *Fatah and Hamas agree landmark pact after seven-year rift*, The Guardian, Apr. 24, 2014

⁵⁹ *Ungar v. Palestine Liberation Organization*, 402 F.3d 274, 290-92 (1st Cir. 2005).

⁶⁰ 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].

⁶¹ *Accession of the “State of Palestine” to the Geneva Conventions*, April 2, 2014

has ever claimed to constitute the *de facto* or *de jure* government of the “State of Palestine” or of any portion thereof. Therefore, even were the purported accession of the “State of Palestine” to the Geneva Conventions effective, it would not cause armed conflict between Hamas or IDBQ and the Israeli Defense Force to be an international armed conflict because Hamas and IDBQ are not the armed forces of the “State of Palestine.”

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.⁶² Israel is a high contracting party to the Geneva Conventions.⁶³ Hamas and IDQB conduct operations against Israel’s governmental forces. Therefore, Hamas and IDQB attacks on Israeli forces constitute armed conflict not of an international character because one party to the conflict is a high contracting party, while the other is not.

5(a)(5). Khaled Mashal, Saleh al-Arouri and Zaher Jabarin are aware of factual circumstances that established the existence of an armed conflict

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

⁶² Int’l Comm. of the Red Cross, *How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?* 5 (2008)

⁶³ 1080 U.N.T.S. 370

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).”⁶⁴ In 2005, Mashal declared that Hamas and IDGQ 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...”⁶⁵ In 2007, he declared that Hamas had readied “an increase of the resistance” against Israel.⁶⁶ In 2009, he stated that “Hamas and the Resistance will continue combat” until Israel is destroyed.⁶⁷ In 2012, Mashal declared that Hamas would continue firing rockets at Israel territory for the purpose of destroying Israel.⁶⁸ In 2014, Mashal said that Hamas had “caravans of martyrs” to contribute to “the eternal struggle” against Israel.⁶⁹ These statements are a mere sampling of Mashal’s numerous public declarations acknowledging the existence of armed conflict with Israel.

Saleh al-Arouri and Zaher Jabarin are also aware of the existence of armed conflict between Israel, Hamas, and IDBQ. Both personally participated in armed attacks against Israeli civilian targets and served terms of imprisonment in consequence of said attacks, obtaining release in 2007.⁷⁰ More recently, Al-Arouri publicly discussed his role

⁶⁴ Sam F, Ghattas, *Hamas official says selection of dove as Labor Party leader will not lead to truce*, AP Worldstream, Nov. 20, 2002.

⁶⁵ Nassib Azar, Agence France Presse English Wire, Dec. 10, 2005.

⁶⁶ *Hamas warns of more attacks after US peace meet*, Agence France Presse English Wire, Nov 24, 2007.

⁶⁷ *Iran/Palestine: Ahmadinejad Underlines Iran's Support for Palestinian People*, Thai News Service, Dec. 15, 2009.

⁶⁸ David Lev, *Gaza Rocket Terror Returns to Southern Israel*, Dec. 23, 2012

⁶⁹ *When suicide is permissible*, Al-Ahram Weekly, Aug. 8, 2014.

⁷⁰ Jack Khoury, *Hamas Appoints Ex-prisoner Who Orchestrated West Bank Attacks to Top Political Role*, Haaretz, Oct. 5, 2017

in Israeli-Hamas prisoner exchange efforts and in Hamas's efforts to re-arm.⁷¹ These comments clearly demonstrate Al-Aroui's knowledge and awareness of the state of armed conflict between Israel, Hamas, and IDBQ. Khaled Mashal, Saleh al-Aroui and Zaher Jabarin are therefore aware of the existence of armed conflict.

5(b)(1). Participants in the "Great March of Return" launched incendiary devices which destroyed agricultural and residential property.

One or more persons participating in the "Great March of Return" launched incendiary devices which destroyed agricultural and residential property. These attacks occurred from 30 March 2018 until the present. The misnamed "Great March of Return" includes individuals who have launched airborne incendiary devices targeting agricultural and residential property.⁷² These devices have caused the destruction of 400 acres of fully-grown wheat valued at over \$500,000.⁷³ Participants who launched these devices intended for them to destroy agricultural and residential property. According to Ismail al-Qrinawi, a combatant who launched said devices, "we are waiting for (the wind) to pick up so we can fly tens of kites and burn their crops."⁷⁴

5(b)(2). Hamas militants destroyed the property of an adversary.

Hamas militants destroyed Israeli civilian property. Hamas considers Israel to be its arch-enemy. 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.⁷⁵ Hamas has called for continuous

⁷¹ Adam Ragson, *Hamas Deputy Chief: Israel not making moves for prisoner swap with Hamas*, Jerusalem Post, Dec. 31, 2017

⁷² Isabel Kershner, Iyad Abuheweila, *Flaming Kites From Gaza Thwarted by Winds*, NY Times, May 4, 2018.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Timeline of Israel and Hamas conflict in Gaza since 2002*, News.com.au, Nov. 15, 2012.

“resistance and jihad (holy war)” against Israel.⁷⁶ Hamas’s leader have publicly declared that they 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...”⁷⁷ “Hamas and the Resistance will continue combat” until Israel is destroyed.⁷⁸ Israeli property is therefore the property of Hamas’s adversary because Hamas’s self-defined purpose for existence is the destruction of Israel.

5(b)(3). Israeli agricultural property was protected from destruction under the international law of armed conflict.

Israeli agricultural property was protected from destruction under the international law of armed conflict. Customary international law, as applied to non-international armed conflicts, protects civilian objects. Civilian objects are “objects that are not used for military purposes.”⁷⁹ Agricultural wheat is not used for military purposes. Therefore, it is protected from attack by customary international law applicable to non-international armed conflict.

5(b)(4). Hamas militants were aware of the factual circumstances that established the status of the property.

Hamas militants publicly and repeatedly stated that their launch of aerial incendiary devices was for the purpose of destroying Israeli agriculture. According to Hamas militants, “Allah willing, (the incendiary devices) will light up and burn fields and

⁷⁶ Sam F, Ghattas, *Hamas official says selection of dove as Labor Party leader will not lead to truce*, AP Worldstream, Nov. 20, 2002.

⁷⁷ Nassib Azar, *Agence France Presse English Wire*, Dec. 10, 2005.

⁷⁸ *Iran/Palestine: Ahmadinejad Underlines Iran's Support for Palestinian People*, Thai News Service, Dec. 15, 2009.

⁷⁹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol 1, Int’l Comm. of the Red Cross (2009), Rule 10.

houses... (they) will get to a place where it will burn a large area.”⁸⁰ Hamas militants therefore knew that their aerial incendiary devices targeted Israeli agriculture.

5(b)(5). No military necessity required Hamas to burn Israeli agriculture

No military necessity required Hamas to burn Israeli agriculture. No Hamas militant has ever claimed that Hamas’s attack on Israeli agriculture targets Israeli Defense Force installations or personnel. It does not. No military objective is present within Israeli wheatfields. Therefore, no military necessity required the destruction of the Israeli agricultural property.

5(b)(6). Hamas’s conduct takes place in the context of and is associated with an armed conflict not of an international character

The complainants rely on the facts previously produced for the proposition that the conflict between Israel and Hamas occurs in the context of a non-international armed conflict.

5(b)(7). Khaled Mashal, Saleh al-Arouri and Zaher Jabarin are aware of factual circumstances that established the existence of an armed conflict.

The complainants rely on the facts previously produced for the proposition the Khaled Mashal, Saleh al-Arouri and Zaher Jabarin are aware of the existence of armed conflict with Israel.

5(b)(8). Hamas and IQMB militants are within the responsibility and control of Khaled Mashal, Saleh al-Arouri and Zaher Jabarin and other co-conspirators not within the jurisdiction of the court.

The Complainants rely on the facts adduced in paragraph 5(a) for the command responsibility of Khaled Mashal, Saleh al-Arouri and Zaher Jabarin.

5(b)(9). Khaled Mashal, Saleh al-Arouri and Zaher Jabarin failed to take all necessary and reasonable measures within their power to prevent or repress Hamas

⁸⁰ *Blazing kites from Gaza set fire to Israeli wheat field*, Times of Israel, 23 Apr. 2018

and IQMB from indiscriminate attacks or to submit the matter to the competent authorities for investigation and prosecution.

Khaled Mashal, Saleh al-Arouri and Zaher Jabarin failed to take any steps whatever to prevent or repress Hamas and IQMB from launching aerial incendiary devices. On the contrary, they have ordered, directed and encouraged these attacks. There is no evidence that any named individual has ever directed Hamas's internal discipline mechanisms to control Hamas and IQMB members who launch aerial incendiary attacks at Israeli civilian areas.

There is no evidence that any named individual has ever directed any person to stand trial in a Gaza court for indiscriminately directing aerial incendiary devices at Israeli civilians. Therefore, Khaled Mashal, Saleh al-Arouri and Zaher Jabarin have failed to take all necessary and reasonable measures within his power to prevent or repress Hamas and IQMB from indiscriminately attacking Israeli agriculture or to submit the matter to the competent authorities for investigation and prosecution, to include denying payments to Hamas and IQMB members who engage in indiscriminate attacks, or ordering such individuals held for trial.

5(c)(1). The perpetrator used one or more persons to participate actively in hostilities.

The complainants rely on the facts adduced above to prove that Hamas officials directed the launch aerial incendiary devices at Israeli civilian communities.

5(c)(2). Such person or persons were under the age of 15 years.

The public record contains numerous incidents in which children participated in hostilities against Israel. In March, 2018, Hamas sent a 7 year old girl to the Gaza security fence during deadly protests who was engaged in the conflagration then

underway. This conflagration included setting tires and scraps of wood on fire and throwing Molotov cocktails and rocks at the Israeli soldiers on the other side of the fence.

⁸¹ This was not an isolated incident. In May, 2018, large numbers of children participated in the manufacture and launching of flaming kites.⁸²

The complainants aver that this small sampling of the use of children to participate in hostile acts provides sufficient evidence on which to further investigate Hamas's use of children in combat operations.

5(c)(3). The perpetrator knew or should have known that such person or persons were under the age of 15 years.

The news coverage of the “Great March of Return” makes plain the participation of children in it. It is therefore public knowledge of which Hamas leaders were aware or should have been aware.

5(c)(4). The conduct took place in the context of and was associated with an armed conflict not of an international character and he perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The complaints rely on facts previously adduced for the proposition that the conflict is not of an international character and for the proposition that Hamas officials, including Khaled Mashal, Saleh al-Aroui and Zaher Jabarin are aware of the existence of armed conflict.

5A. Facts supporting alternative theory of jurisdiction:

5A(a). The perpetrator moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict.

⁸¹ Judah Ari Gross, *IDF: Hamas cynically sent 7-year-old girl to breach Gaza border*, Times of Israel, Mar. 30, 2018.

⁸² Iyad Abuheweila and Isabel Kershner, *Flaming Kites from Gaza Thwarted by Winds*, N.Y. Times, May 4, 2018

Khaled Mashal, Saleh al-Arouri and Zaher Jabarin directed the placement of Gaza civilians along the frontier between Gaza and Israel. Unarmed civilians are protected persons under the international law of armed conflict.⁸³ Hamas militants within the command and control of Khaled Mashal, Saleh al-Arouri and Zaher Jabarin placed themselves in and amongst civilian rioters.⁸⁴ These rioters were present to shield Hamas armed militants who attempted to breach the border.⁸⁵ Hamas organized and transported them to the border.⁸⁶ Hamas specifically directed funds to civilians, raised by Zaher Jabarin, in order to incentivize civilian presence at the border, masking the presence of militants at places of conflagration. Specifically, Hamas offered \$500 to every protestor seriously injured and \$3000 to the families of those killed.⁸⁷ Hamas therefore specifically drew civilians to the border with Israel, taking advantage of their presence to obscure the operations of Hamas militants.

5A(b). The perpetrator intended to shield a military objective from attack or shield favour or impede military operations.

Hamas intended the presence of civilians to shield its military operations. Hamas openly directed civilians to the border for the purpose of lighting tires and throwing gasoline bombs.⁸⁸ Hamas specifically directed civilians to burn 10,000 tires.⁸⁹ Hamas issued propaganda videos in which it advised civilians that the purpose of burning tires

⁸³ Third Geneva Convention, Article 4(A)(6).

⁸⁴ Jack Houry, *50 of Dead in Gaza Protests Were Hamas Activists, Says Senior Hamas Official*, Haaretz, May 16, 2018.

⁸⁵ Judah Ari Gross, *New Gaza protest looms, amid warnings violence may no longer stop at border*, Times of Israel, Apr. 5, 2018

⁸⁶ Mehul Srivastava, *Hamas steers Gaza protests away from activists' peaceful vision*, Financial Times, Apr. 6, 2018

⁸⁷ Adam Rasgon, *Ahead of Fresh Standoff, Hamas reveals payouts to injured protesters*, Jerusalem Post, Apr. 5, 2018.

⁸⁸ Elior Levy and Yoav Zitun, *Israel warns of ecological damage following tire burning in Gaza border protests*, YNet News, Apr. 4, 2018.

⁸⁹ *Ibid.*

was to mask the movements of its armed militants.⁹⁰ Hamas therefore organized the presence of civilians for the purpose of shielding the operations of its militants.

5A(c). The conduct took place in the context of and was associated with an international armed conflict.

If this court finds that the conflict between Hamas and Israel was not a non-international armed conflict, this court should find that the conflict is an international armed conflict because it occurs between the armed forces of a High Contracting party and irregular forces operating from *terra nullius*. As discussed above, the purported accession of the “State of Palestine” to the Geneva Conventions is not relevant to the consideration of whether the conflict is international because Hamas and IDBQ are not components of, and do not claim to be, the armed forces of the “State of Palestine.”⁹¹ Neither the “State of Palestine,” the Palestinian National Authority or the PLO have, at the time of the purported accession or subsequently, exercised *de facto* control over the Gaza Strip. In order for part of a territory to be the territory of a state, that state must, at some point, exercise effective control over that territory.⁹² Neither Hamas or IDBQ has ever claimed to constitute the *de facto* or *de jure* government of the “State of Palestine” or of any portion thereof. Therefore, even were the purported accession of the “State of Palestine” to the Geneva Conventions effective, it would not place the Gaza Strip within the territory of the “State of Palestine.”

This court should instead find that the Gaza Strip is *terra nullius*. *Terra nullius* is territory which is not governed by any sovereign.⁹³ As discussed above, the PLO, the

⁹⁰ *Ibid.*

⁹¹ *Accession of the “State of Palestine” to the Geneva Conventions*, April 2, 2014

⁹² See e.g. *Legal Status of Eastern Greenland (Denmark v. Norway)*, 1933 P.C.I.J. (ser. A/B) No. 53 (April 5); *Western Sahara*, 1975 I.C.J. 12 (Oct. 16).

⁹³ *Western Sahara*, 1975 I.C.J. 12, 101 (Oct. 16).

Palestinian National Authority, and the “State of Palestine” do not govern the Gaza Strip because they do not exercise control over the Gaza Strip. While Hamas is the *de facto*, ruler of the Gaza Strip, it is not a sovereign and does not claim to be. Therefore, no sovereign governs the Gaza Strip and it is *terra nullius*.

If this court does not restrict international armed conflict to conflicts involving High Contracting Parties, it should instead find that the conflict between Hamas and Israel is an international armed conflict because it involves a conflict occurring between the sovereign territory of Israel and the Gaza Strip, constituting *terra nullius*. In the alternative, armed conflict which occurs outside the sovereign territory of a single nation is international armed conflict.⁹⁴ Since the conflict surrounding the “Great March of Return” occurs between *terra nullius* and the sovereign territory of Israel, it is, in the alternative, therefore an international armed conflict.

5A(d). The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The complainants reference the facts contained in paragraph 5(g) for the purpose of establishing the knowledge of the perpetrators as to the existence of armed conflict.

5A(e). Khaled Mashal, Saleh al-Arouri and Zaher Jabarin face command liability for the actions of Hamas during the current conflict.

The complaints reference the facts contained above to demonstrate the command liability of Khaled Mashal, Saleh al-Arouri and Zaher Jabarin.

5A(f). Khaled Mashal, Saleh al-Arouri and Zaher Jabarin destroyed the enemy’s civilian property in an international armed conflict.

⁹⁴ ICRC, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, March, 2008.

The complaints rely on the facts contained above to support the allegation concerning the destruction of Israeli civilian property, and on the rationale contained in paragraph above to establish, in the alternative, the existence of international armed conflict.

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

6(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.⁹⁵ A State is unwilling to begin proceedings in its national courts when it shields a persons from criminal responsibility, when it delays proceedings unjustifiably, or when the proceedings in the case are neither independent nor impartial.⁹⁶ A State is unable to begin proceedings in its national courts when it is unable to obtain custody of the accused.⁹⁷

THE COMPLAINTANTS have no knowledge of Jordan bringing a prosecution against any Hamas or IQMB official or member for war crimes. Although Jordan has wide-ranging anti-terror laws, these laws are applied in a patently unfair and

⁹⁵ Article 17, Rome Stat.

⁹⁶ Stuart Risch, *Hostile Outsider or Influential Insider? The United States and the International Criminal Court*, 2009 Army Law 61, 71 at n. 57.

⁹⁷ Article 17, Rome Stat.

politically-motivated fashion.⁹⁸ THE COMPLAINANTS aver, to the best of their knowledge and belief, that no prosecution of any Hamas or IQMB official, including Hamas, IDQB, Khaled Mashal, Saleh al-Arouri and Zaher Jabarin is contemplated. Further, even if one were, Jordan cannot instantly obtain custody over Mashal or Al-Arouri as Mashal is presently resident in Qatar and Al-Arouri is apparently resident in Beirut, Lebanon and Jabarin's present location is unknown.^{99,100}

Jordan has never prosecuted a Hamas or IQMB member for war crimes and could not obtain custody of Khaled Mashal, Saleh al-Arouri and Zaher Jabarin even if it were willing. Therefore, Jordan is both unwilling and unable to prosecute Khaled Mashal, Saleh al-Arouri and Zaher Jabar.

6(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.¹⁰¹ 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 and IQMB officials such as Khaled Mashal, Saleh al-Arouri and Zaher Jabar who flout the law of armed conflict. The ICC exists to provide justice in cases in which national courts

⁹⁸ Areej Abuqudairi, *Jordan anti-terrorism law sparks concern*, Al-Jazeera, Apr. 25, 2014

⁹⁹ Roi Kais, *Private jets, restaurants, luxury hotels: the good life of senior Hamas officials*. YNet News (Israel), Jul. 22, 2014.

¹⁰⁰ *Senior Hamas leader spotted in Beirut for first time since Qatar expulsion*, Times of Israel, Aug. 2, 2017.

¹⁰¹ International Criminal Court: Situation in the Republic of Cote D'Ivoire, 51 I.L.M. 228, 255 (Pre-Trial Chamber III, 2012).

are unwilling or are unable, as is the case here.¹⁰² Therefore, the Prosecutor should open an investigation.

6(c) A preliminary investigation is in the interests of justice: A preliminary inquiry in the interests of justice. The Rome Statute directs the prosecutor to consider the interests of victims, the age or infirmity of the perpetrator, and his role in the crime in determining whether an investigation is in the interests of justice.¹⁰³ Here, there is no indication that any of these individuals should avoid prosecution on any of the above grounds. Therefore, a preliminary inquiry in in the interests of justice.

7. Conclusion: The information presented above is only a preliminary collection of evidence, but it gives rise to significant concerns that Khaled Mashal, Saleh al-Arouri and Zaher Jabar are engaging in a continuing course of conduct in which they have 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 the acts detailed herein.

¹⁰² Jann N. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* 3-4 (Ruth Mackenzie et. al eds. 2008).

¹⁰³ Art. 53(2)(b), Rome Stat.