

MEMORANDUM OF FACT AND LAW

TO THE ATTORNEY GENERAL OF THE UNITED STATES AND TO THE UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA:

Issue Presented

WHETHER THE UNITED STATES HAS JURISDICTION TO TRY HAMAS TERRORISTS FOR ATTACKS ENDANGERING UNITED STATES CITIZENS AND AFFECTING THE NORMAL OPERATION OF UNITED STATES COMMERCIAL AIRCRAFT AT BEN GURION INTERNATIONAL AIRPORT.

Introduction

The United States should indict and prosecute those Hamas officials and agents, including, but not limited to Hamas leader Khaled Mashaal, Hamdan Awad Sami Abu Zuhri, Hudheifa Samir Abdullah Allachlot, Ahmad Ghandour, Raed Sa'ad, Marwan Abd al-Karim Issa and Salah Amar Dalul (collectively "Hamas"), responsible for brazen violations of 18 U.S.C. § 37(a) by deliberately firing missiles at Israel's Ben Gurion International Airport ("BGA") last summer. As discussed below, Hamas violated Section 37(a) by deliberately directing its missile fire towards BGA in an attempt to kill or grievously injure as many civilians as possible. Hamas also violated Section 37(a), when it both attempted to, and in at least two instances succeeded in, disrupting air traffic and service at BGA. Jurisdiction to prosecute these crimes lies in United States federal court pursuant to 18 U.S.C. § 37(b) because the victims of Hamas's acts included United States nationals.

Statement of Facts

On July 8, 2014, Israel launched Operation Protective Edge to terminate persistent rocket fire directed towards Israel by Hamas and other Gaza-based terror organizations. Hamas is a

designated foreign terrorist organization¹ that is the *de facto* governing authority of the Gaza Strip

Over the following several weeks, Hamas targeted missiles at BGA for the express purpose of killing or injuring civilians and disrupting international flight service in and out of Israel.

On July 11, 2014, Hamas first directed rocket fire at Ben Gurion International Airport.² Again, on July 22, 2014, Hamas operatives fired a missile towards BGA. The July 22 missile narrowly missed its target, landing instead in the nearby community of Yehud, where it destroyed a civilian home.³ In response to this missile strike, the United States Federal Aviation Administration issued a ban prohibiting U.S. carriers from flying to BGA. The ban severely disrupted service at BGA, coming at the height of the summer tourism season.

All United States carriers that fly to Israel cancelled flights for approximately 36 hours. In addition to the U.S. cancellations, Delta Air Lines flight 468 with 273 passengers on board was diverted over Greece and forced to land in Paris.⁴ American Airlines was forced to remove passengers from a flight waiting to depart from BGA because the FAA would not allow the plane to take off with passengers on board. The crew was left to ferry out the empty plane.

Following the FAA ban, the European Aviation Safety Agency “strongly recommend[ing]” that airlines avoid BGA, by far Israel’s busiest airport. The Israel Airports Authority kept the airport open, but numerous airlines cancelled their flights in and out of BGA.

¹ 62 F.R. 52650.

² Isabel Kershner, *Israel weighs ground invasion*, Canberra Times (Australia) July 13, 2014.

³ Ben Hartman, *Rocket damages Yehud house in first direct hit in Tel Aviv area*, Jerusalem Post, Jul. 22, 2014.

⁴ Christopher Seeward, *Delta suspends service to Israel; FAA orders US flights to Tel Aviv halted*, Atlanta Journal-Constitution, Jul. 22, 2014.

These included Air Canada, Air France, Alitalia, American Airlines, Austrian Airlines, Delta Air Lines, Easy Jet, Iberia, KLM, Lufthansa, United Airlines and U.S. Airways to name a few.⁵

Hamas took credit for the missile fire and declared the disruption of Israeli air service a “great victory.” Hamas spokesman Sami Abu Zuhri released a statement proclaiming that “the success of Hamas in closing Israeli airspace is a great victory for the resistance, and is the crown of Israel’s failure.”⁶

The July 22 rocket attack was not an isolated incident. Hamas deliberately targeted BGA throughout the summer. On August 19, 2014, Hudheifa Samir Abdullah Allachhlot (also known as Abu Obedia),⁷ spokesman for the Izz ad-Din al-Qassam Brigades, a constituent Hamas element, publically acknowledged that Hamas fired a J-80 rocket at Ben Gurion International Airport because Hamas had decided to respond to “Israeli aggression” by making the airport the “target of attack” for the day.^{8,9}

On August 20, 2014, Hamas explicitly threatened to launch an additional missile attack on BGA the following morning at 6:00 am. Hamas warned international airlines to cancel all flights to BGA. Royal Jordanian Airlines cancelled its scheduled BGA flight in response to this threat.¹⁰

⁵ *All U.S. flights to Israel cancelled: FAA bans travel to Tel Aviv as Delta plane turns back at last minute after rocket attack near airport*, Daily Mail (UK), Jul. 22, 2014.

⁶ “World suspension of Israel flights a ‘great victory’: Hamas,” Agency France Press, Jul. 23, 2014.

⁷ Hadas HaRouche, *اللمرة الأولى يُكشف وجه أبو عبيدة*, Al-Masdar, Jul. 25, 2014, available at <http://www.al-masdar.net/اللمرة-الأولى-يُكشف-وجه-أبو-عبيدة/>

⁸ Yoav Zitun, Elior Levy, *Heavy barrage of rockets fired at Tel Aviv area, southern Israel, Jerusalem*, YNet News, Aug. 20, 2014.

⁹ Hamas announcement concerning Aug. 19, 2014 rocket attack on Ben Gurion International Airport, available at <https://www.youtube.com/watch?v=3vkVOFXc31M>

¹⁰ Danny Sadeh, *Royal Jordanian cancels flight from Jordan to Tel Aviv*, YNet News, Aug. 21, 2014

American-citizen passengers and aircrew were, at all relevant times present in Ben Gurion International Airport and in the airspace immediately adjacent thereto.

Law and Analysis

The Anti-Terrorism and Effective Death Penalty Act of 1996 [hereinafter “ATEDPA”]¹¹ criminalizes the actions of Hamas officials responsible for the firing of rockets at Ben Gurion International Airport. 18 U.S.C. § 37(a) provides in pertinent part:

A person who unlawfully and intentionally, using any device, substance, or weapon--
(1) performs an act of violence against a person at an airport serving international civil aviation that causes or is likely to cause serious bodily injury ... or death; or
(2) ... disrupts the services of [an] airport [serving international civil aviation],

if such an act endangers or is likely to endanger safety at that airport, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 20 years, or both...

By its terms, Section 37(a) hold liable not only those who carry out the acts of violence but also those who attempt or conspire to do so. Jurisdiction exists for an act committed outside of the United States when a victim is a United States national, 18 U.S.C. § 37(b). Venue is proper in the United States District Court for the District of Columbia or on whichever district court the apprehending agency first brings the defendant, 18 U.S.C. 3238.

The persons within Hamas responsible for rocket attacks on Ben Gurion international airport are amenable to prosecution both for performing an act of violence against a person at an

¹¹ Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, §721, 110 Stat. 1299 (1996).

airport and for disrupting the services of an international airport with an act that endangers the safety of that airport.

A. Hamas co-conspirators are criminally liable for performing an act of violence against a person at an airport.

Hamis rocket attacks constituted acts of violence against the individuals who were at the airport at the time of the various attacks. A person commits an act of violence against a person within the meaning of ATEDPA when he targets, with force likely to cause death or serious bodily injury, an air transportation facility in which a person is present. *Basulto v. Republic of Cuba*, 2005 U.S. Dist. LEXIS 48556, at *2(S.D. Fla. 2005). The law does not require actual injury to victim the act to constitute an act of violence. *Id.* Even if the attacks against BGA had injured no one, they were acts of violence against people at the airport and were likely to cause serious bodily injury to those present at BGA at the time of their commission.

B. Ben Gurion International Airport is an airport serving international civil aviation within the meaning of ATEDPA.

Ben Gurion International Airport is an airport serving international civil aviation. An airport serving international civil aviation is an airport with regularly-scheduled international flights. *See United States v. Brems*, 2007 U.S. Dist. LEXIS 30387 at*4 (M.D. Fla. 2007).

Almost all of the nearly 300 scheduled arrivals and departures from Ben Gurion International Airport are to or from airports outside of Israel.¹² Therefore, Ben Gurion International Airport is an airport serving international aviation within the meaning of ATEDPA.

C. Hamas rocket attacks were likely to cause serious bodily injury (as defined in 18 USCS § 1365) or death.

Hamis rocket attacks were likely to cause serious bodily injury. "Serious bodily injury" means bodily injury which involves, a substantial risk of death, extreme physical pain, protracted

¹² Israel Airports Authority Timetable, 2015, available at <http://www.iaa.gov.il/en-US/airports/bengurion/Pages/OnlineFlights.aspx>

and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. 18 U.S.C. § 1365(h)(3). Hamas rocket attacks, when successful, cause severe shrapnel wounds, protracted and extreme physical pain, and debilitating post-traumatic stress disorder.¹³ They are therefore attacks likely to cause serious bodily injury or death.

D. Hamas leaders are criminally liable for disrupting the services of an international airport.

Hamas rocket attacks disrupted the services of Ben Gurion International airport. On July 22, 2014, in response to a Hamas rocket, Delta Air Lines flight 468 diverted from its scheduled New York-to-Tel Aviv itinerary to make an unscheduled landing.¹⁴ Immediately thereafter, on July 22, 2014, the Federal Aviation Administration (FAA) ordered all US air carriers to suspend operations to and from Ben Gurion International Airport.¹⁵ Air Canada, Air France, Alitalia, Austrian, Brussels, Germanwings, KLM, Korean, LOT, Norwegian, Royal Jordanian, SAS, Swiss, US Airways, United Airlines and other US and foreign airlines cancelled flights because of these rocket attacks.¹⁶ The FAA did not lift its ban on operations to BGA until July 24, 2014.¹⁷ Normal operations did not resume at BGA until after July 25, 2014.¹⁸

Hamas leaders and agents attempted to, conspired to and did in fact disrupt normal operations at BGA again on August 20, 2014. At that time, Hamas spokesman Hudheifa Samir Abdullah Allahhlot warned civil aircraft to avoid Ben Gurion Airport because of its renewed

¹³ Bill Van Esveld, *Rockets from Gaza: Harm to Civilians from Palestinian Armed Groups' Rocket Attacks*, 10-16 (Human Rights Watch, Jan. 1, 2009).

¹⁴ *FAA Closes air route from US to Israel for 24 Hours*, CNBC, Jul. 22, 2014.

¹⁵ Notice to Airmen (NOTAM) !FDC-4/3630,

¹⁶ Paul Koring, *List of cancelled flights to Israel grows as violence continues*, The Globe and Mail, Jul. 23, 2014.

¹⁷ Niv Elis, *Hours after extending a 24-hour ban that went into effect Tuesday, the FAA cancels flight restrictions in response to increased Israeli security measures*, Jerusalem Post, Jul. 24, 2014.

¹⁸ *Id.*

rocket attacks against the airport.¹⁹ In response to the Hamas threat, Royal Jordanian Airlines cancelled its scheduled BGA flight.

E. US nationals were present at BGA during rocket attacks and were forced to evacuate or otherwise take cover

United States nationals present at BGA or in the airspace above BGA during rocket attacks were victims of the Hamas attacks. Although ATEDPA does not specifically define the term “victim” for the purposes of 18 U.S.C. 37, “victim” is generally defined as “a person directly and proximately harmed as a result of the commission of an offense.” 110 Stat. 1228. Passengers who faced flight cancellations, disruptions in travel, sprints to, and extended stays in bomb shelters were “directly and proximately harmed.” Therefore, the persons present at BGA during rocket attacks were victims of those attacks.

The following United States nationals were present at or in the airspace above BGA during rocket attacks at BGA. This list is not an exhaustive list of American victims and is amenable to further enhancement through investigation:

Table 1, US Citizen Victims of Rocket Attacks at BGA (Minor Victims Highlighted in Yellow)

Name	Date	Place of Residence
Balint, Judy	26-Aug-14	Jerusalem, Israel
Breitstein, Abby	21-Jul-14	Bet El, Israel
Breitstein, Tehila	21-Jul-14	Bet El, Israel
Brenner, Dave	22-Jul-14	Alon Shvut, Israel
Brenner, Helaine	22-Jul-14	Alon Shvut, Israel
Broder, Marilyn	21-Jul-14	Efrat, Israel
Broder, Masha	21-Jul-14	Efrat, Israel
Bryk, Joel	22-Jul-14	Woodmere, New York
Dirnfeld, Fredl	22-Jul-14	Brooklyn, New York
Greenbaum, Avi	8-Jul-14	Southfield, Michigan

¹⁹ *Hamas Threatens Ben-Gurion Airport, Warns Airlines to Stay Away, Arutz Sheva, Aug. 20, 2014.*

Harow, Robert	11-Jul-14	Bet Shemesh, Israel
Irwin, Tali	8-Jul-14	Chery Hill, NJ
Kagan-Harow, Elke	11-Jul-14	Bet Shemesh, Israel
	20-Aug-	
Koslowe, Tzvi	14	Matzkert Butia, Israel
Lakritz, Estelle	21-Jul-14	Enfield, Connecticut
Mandel, Joel	22-Jul-14	Hewlett, New York
Plutchok, Jonathan	22-Jul-14	New York, New York
Porter, Lazar	13-Jul-14	Cleveland Heights, Ohio
Raab, Moshe	22-Jul-14	Deerfield Beach, Florida
Raab, Rebecca	22-Jul-14	Deerfield Beach, Florida
Robbins, Arnold	21-Jul-14	Nof Ayalon, Israel
Rotter, Shana	22-Jul-14	Hashmoniaim, Israel
Rubin, Cheryl	22-Jul-14	Rehavot, Israel
Rubin, Raimy	22-Jul-14	Rehavot, Israel
		Cambridge,
Smith, Jill	9-Jul-14	Massachusetts
	20-Aug-	
Weiss, Abraham	14	Jerusalem, Israel

E. The Hamas Conspiracy to attack Ben Gurion Airport includes all rocket launches directed at the airport from July 11, 2014 forward.

Hamas operatives entered into a conspiracy to attack BGA beginning not later than July 11, 2014, the date on which Hamas first attempted to attack the airport with a rocket.²⁰ A conspiracy commences when one of the co-conspirators first engages in relevant conduct in furtherance of the conspiracy. *United States v. Cornog*, 945 F.2d 1504, 1509-10 (11th Cir. 1991). A conspiracy continues until the co-conspirators abandon or disavow their purpose, or when the actions of the co-conspirators make the completion of the ends of the conspiracy impossible. *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2013). Once Hamas operatives entered into a conspiracy to disrupt BGA’s operations, the criminal liability of the co-conspirators extends to all acts of wrongdoing occurring during the course of and in furtherance

²⁰ Isabel Kershner, *Israel weighs ground invasion*, Canberra Times (Australia) July 13, 2014

of the conspiracy. *United States v. Gallerani*, 68 F.3d 611, 620 (2d Cir. 1995). On July 11, 2014, Hamas first tried to hit BGA with rocket fire.²¹ The conspiracy did not end until after August 20, 2014, the date of the most recent known attempted rocket attack on BGAA.²²

F. Criminal liability of Khaled Mashal, as a Principal, for Rocket Fire on Ben Gurion Airport.

Khaled Mashal [hereinafter Mashal] is criminally liable for Hamas's violations of Section 37(a). Hamas military activity occurs only on Mashal's direct orders.²³ Mashal has absolute control over the tactics and strategy of Hamas attacks. He dictates the location, equipment, weapons, and aims of these attacks.²⁴ 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.²⁵

Mashal is also the conduit through which Hamas's finances flow. Hamas receives, through Mashal, financial support from the Qatari government.²⁶ Qatar has donated over \$500 million to Hamas, all of which Mashal controls.²⁷ Specifically, Qatar has donated to Mashal \$60 million to pay salaries to Hamas fighters and civil servants.²⁸ Mashal therefore controls Hamas operations.

Mashal conspired with other Hamas operatives to launch rockets at Ben Gurion airport. He publically acknowledged his ability to control the launching of rockets and direct them at

²¹ *Id.*

²² *Woman And Two-Year-Old Killed In Gaza Airstrike*, Sky News, Aug. 20, 2014.

²³ Isabel Kershner, *Hamas claims shooting of an Israeli on border Group's first attack since November truce*, International Herald Tribune, Mar. 20, 2007.

²⁴ Scott Wilson, *Israeli airstrike destroys offices*, Washington Post, Jul. 2, 2006.

²⁵ *Palestine Leadership Divide Could Hamper Cease-Fire Agreement; Hamas Rejects Israeli Cease-Fire Proposal*, AP, Aug. 5, 2014.

²⁶ *Qatar, home to Hamas boss and funder of Gaza Strip, criticized amid cease-fire talks' collapse*, Associated Press, Aug. 21, 2014.

²⁷ *Middle East Updates*, Yerepouni Daily News (Lebanon), Aug. 21, 2014.

²⁸ *Palestinian unity gov't not able to pay salaries to Hamas staff in Gaza: PM*, Xinhua News Agency, Jun. 23, 2014.

BGA. Mashal has asserted that the firing of rockets against BGA is a tactic in Hamas's war against Israel. Speaking after Hamas fired its first rockets at BGA, Mashal stated "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."²⁹ Mashal's public statements indicate that he controls when rockets are fired and at which targets – in this case, at the airport. He is thus criminally liable under Section 37(a) both as a principal and as co-conspirator with other Hamas officials and agents. See also, under 18 U.S.C. §§ 2 and 371.

G. Criminal liability of Hamdan Awad Sami Abu Zuhri and Hudheifa Samir Abdullah Allachlot for rocket attacks on BGA.

Hamdan Awad Sami Abu Zuhri(AKA Sami Abu Zuhri) and Hudheifa Samir Abdullah Allachlot (AKA Abu Odeida) are similarly liable both as principals and co-conspirators for the violations of 18 U.S.C. 37(a). These Hamas officials issued threats demonstrating a foreknowledge of the rocket launches and caused or attempted to cause the closure of BGA. A threat to commit an act of violence is sufficient evidence of common purpose to expose the person communicating the threat to liability as a co-conspirator for a completed and previously threatened violent act. *United States v. Foster*, 507 F.3d 233, 247 (4th Cir. 2007). Here, Abu Zuhri, during the period of the conspiracy, issued threats of violence directed at BGA in order to disrupt service at BGA.³⁰ Disruption of service was one of the aims of the conspiracy. Thus, the conspiracy was furthered by Abu Zuhri's threats.

²⁹ Roi Kais, *Hamis leader rejects ceasefire efforts*, YNet News, Jul. 23, 2014.

³⁰ *Hamis hails 'closure of Israel's airspace'*, Al-Arab English Service, Jul. 23, 2014.

Hudheifa Samir Abdullah Allachlot (AKA Abu Odeida) is similarly liable. Abu Odeida directed threats at BGA designed to disrupt the operations of the airport.³¹ On August 20, 2014, he warned foreign airlines to avoid BGA and acknowledged that Hamas would employ rocket fire at the airport on that date in its attempt to shut the airport.³² Abu Odeida's statement and the concurrent rocket launch towards the airport were part of a continuing effort to attempt the same on the part of the co-conspirators. A defendant's participation in a conspiracy is presumed to continue "until all objects of the conspiracy have been accomplished or until the last overt act has been committed by any of the conspirators." *United States v. Arias*, 431 F.3d 1327, 1340 (11th Cir. 2005). The co-conspirators, including Abu Odeida, launched rockets and issued threats in an attempt to injure or kill civilians and to disrupt service at BGA. Abu Odeida's threats, in concert with the actual rocket fire, caused the disruption of service at BGA. He is therefore liable as a co-conspirator.

H. Criminal liability of Ahmad Ghandour as a principle and co-conspirator.

Ahmad Ghandour is liable as a principle and co-conspirator. Ahmad Ghandour is Brigade Commander in Hamas responsible for the northern Gaza Strip.³³ He ordered hundreds of rocket launchings from the northern Gaza Strip towards Israel, both during the war of this past Summer, and on other occasions.³⁴ Investigation will reveal that the launch sites from which Hamas unlawful combatants fired the rockets directed at BGA were within the geographical area of Ghandour's command and control. Investigation will further reveal that Ghandour executed Mashal's order to fire rockets at BGA in furtherance of the Hamas conspiracy to disrupt normal commercial aviation in Israel. Mid-level leaders of a criminal organization are liable as co-

³¹ *Hamas Threatens Ben-Gurion Airport*, *supra*, note 20.

³² *Id.*

³³ Ahmed HaBiet, אלה חפיקדי החמאס שלא ישנו בשקט בסוף השבוע הקרוב, Globes Israel News, Aug. 21, 2014.

³⁴ אלה חפיקדי החמאס שלא ישנו בשקט בסוף השבוע הקרוב, Israel National News, Jul. 9, 2014.

conspirators, and qualify at sentencing for leader enhancement of their sentence, despite the fact that they both receive and transmit orders. *United States v. Casas*, 356 F.3d 104, 129 (1st Cir. 2004). Therefore, Ghandour should be indicted as a co-conspirator and face enhanced liability for the attacks on BGA.

I. Criminal Liability of Raed Sa'ad, Marwan Abd al-Karim Issa and Salah Amar Dalul as co-conspirators.

Raed Sa'ad, Marwan Abd al-Karim Issa and Salah Amar Dalul are liable as co-conspirators. Raed Sa'ad is a Brigade Commander in Hamas and is responsible for rocket production, development, and supply.³⁵ Marwan Abd al-Karim Issa and Salah Amar Dalul are Hamas munitions experts responsible for the development of the M75 rocket, which Hamas used to target BGA.^{36, 37} Investigation will reveal that Issa and Dalul specifically developed a rocket with the necessary range to attack BGA for the purpose of such an attack. Investigation will further reveal that Sa'ad was the supplier of the M75 rockets which Ghandour and Mashal ordered Hamas unlawful combatants to fire at BGA. Finally, investigation will reveal that Issa and Dalul knew of that one of the critical purposes of the rocket which they developed was to attack BGA. Sa'ad, by virtue of his position within the Hamas hierarchy, knew of the intended use of the rockets which he supplied.

A person who knowingly provides material support to a conspiracy to commit an unlawful act of violence is liable as a co-conspirator for that unlawful act of violence, *United States v. Hassoun*, 476 F.3d 1181, 1188 (11th Cir. 2011). Here, investigation will reveal that Issa and Dalul developed the means used to attack BGA with specific knowledge of the intended

³⁵ Shimon Efragan, כ"ל והשב"רשימת המבוקשים של צה?מי יהיה הבא בתור, Mako (Israel), Jul. 10, 2014.

³⁶ Asaf Gabor, שכלול מבצעי וקושי כלכלי: מאחורי איומי חמאס, NRG (Israel), Jul. 4, 2014.

³⁷ Ahmed HaBiet, ל הפגיז את בתיהם היום בעזה"בכירי חמאס שצה 5אלה, Jul. 9, 2014.

purpose, and that Sa'ad provided the form of support most material to the attacks on BGA, the munitions which Hamas unlawful combatants used to consummate the attack. Investigation will further reveal that this support was fully knowing, based upon Sa'ad's position within the Hamas hierarchy and based upon Issa and Dalul's need for specific knowledge in designing the munitions used. Therefore, Sa'ad, Issa and Dalul are liable as a co-conspirators because of the material support to the attacks on BGA which they provided.

Conclusion

All members of the Hamas hierarchy who participated in rocket launches against BGA in any capacity are criminally liable as co-conspirators. Many, even without priming a fuse, are liable under 18 U.S.C. 37. The United States should obtain indictments, institute efforts to procure the custody of, and commence prosecutions against all responsible parties including but not limited to those named above.