



POSSIBILITY OF PROSECUTION OF ISRAELI POLITICAL AND MILITARY LEADERS FOR RECENT EVENTS IN GAZA

March 9, 2009

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QUESTION:

May Israeli political and/or military officials be prosecuted by the International Criminal Court (ICC) for their decisions/actions in the recent conflict with Hamas in the Gaza Strip?

SHORT ANSWER:

Generally, no; but the Israeli Government should closely monitor Israelis in positions of political and/or military authority who possess dual citizenship in a State which is a party to the ICC and who travel abroad as well as those who travel in areas subject to the reach of national statutes granting universal jurisdiction over violations of the law of armed conflict.

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Introduction

It has recently been reported that a number of international organizations¹ and some States² are seeking to bring charges against Israeli political and military leaders for supposed violations of the laws of armed conflict in the recent fighting between Israeli and Hamas forces in the Gaza Strip. This memorandum will first discuss the International Criminal Court (ICC) and its jurisdictional reach to determine if Israeli political and military leaders are amenable to

¹ See, e.g., Windsor Genova, *War Crimes Charges Against Israel Face Hurdles in International Criminal Court*, ALL HEADLINE NEWS, Feb. 10, 2009, <http://www.allheadlinenews.com/articles/7014035181> (noting that over 200 requests to investigate have been filed with ICC Prosecutor against Israel and Hamas for alleged atrocities during recent Gaza conflict)

² See, e.g., Abdul Jalil Mustafa, *Jordan MPs draw plans to sue Israel over Gaza*, ARAB NEWS, Jan. 27, 2009, <http://arabnews.com/?page=4§ion=0&article=118568&d=27&m=1&y=2009&pix=world.jpg&category=World> (outlining a plan endorsed by a Jordanian parliamentary panel to sue Israeli leaders for actions in Gaza).

ICC jurisdiction. This discussion will include an analysis of the implications of possessing dual nationality, especially in a State that is a State Party to the Rome Statute. The memorandum will then discuss the danger posed to Israeli officials by national statutes, especially in the European Union, which grant domestic courts universal jurisdiction over war crimes, crimes against humanity, and the like.

General Information on the International Criminal Court (ICC)

The Rome Statute of the International Criminal Court³ established the ICC on July 1, 2002. The ICC usually convenes at The Hague, Netherlands,⁴ although it may meet in the territory of any member State or in any other State by special agreement.⁵ By its own terms, the ICC has “the power to exercise its jurisdiction over persons for the most serious crimes of international concern.”⁶ The Rome Statute limits such crimes to genocide, crimes against humanity, war crimes, and the crime of aggression.⁷

The ICC comprises four major offices: the Presidency, the Judicial Divisions, the Office of the Prosecutor, and the Registry.⁸ The Judicial Branches of the ICC—the Presidency and the Judicial Divisions—are composed of eighteen judges,⁹ no two of whom may be nationals of the same State.¹⁰

³ Rome Statute of the Int’l Criminal Court, Conference of Plenipotentiaries on the Establishment of an Int’l Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), *reprinted in* 37 I.L.M. 998 (1998) [hereinafter Rome Statute], available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf.

⁴ *Id.* art. 3.

⁵ *Id.* art. 3, 4(2). There are currently 108 State parties to the Rome Statute; Israel is not one of the signatories. Int’l Criminal Court, Assembly of State Parties, The States Parties to the Rome Statute, <http://www2.icc-cpi.int/Menus/ASP/states+parties/> (last visited Feb. 19, 2009) [hereinafter State Parties to Rome Statute].

⁶ Rome Statute, *supra* note 3, art. 1, 5(1).

⁷ *Id.* art. 5(1)(a)–(d). See Appendix A for a list containing the elements of key crimes recognized by the ICC.

⁸ *Id.* art. 34.

⁹ *Id.* art. 36(1).

¹⁰ *Id.* art. 36(7).

The Presidency “is responsible for the overall administration of the Court, with the exception of the Office of the Prosecutor.”¹¹ Three judges are elected to the Presidency by their fellow judges to serve terms of three years.¹² The Judicial Divisions are composed of the remainder of the judges and are subdivided into three parts: the Pre-Trial Division, the Trial Division, and the Appeals Division.¹³ Each division is responsible for conducting proceedings at its respective stage of the process.¹⁴ Judges are assigned to a particular Division based on their personal expertise and background.¹⁵ The Office of the Prosecutor “is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court.”¹⁶ Finally, the Office of the Registry “is responsible for the non-judicial aspects of the administration and servicing of the Court.”¹⁷

Jurisdiction of the ICC

The International Criminal Court (ICC) has jurisdiction over certain enumerated offenses,¹⁸ provided that (1) they were committed by nationals of a State Party to the Rome Statute¹⁹ or (2) they occurred in the territory of a State Party to the Statute.²⁰ A non-Party State may, by special agreement, accede to ICC jurisdiction over its nationals and/or over an applicable offense committed on its soil.²¹

¹¹ Int’l Criminal Court, Structure of the Court, <http://www2.icc-cpi.int/Menus/ICC/Structure+of+the+Court/> (last visited Feb. 19, 2008).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*; Rome Statute, *supra* note 3, art. 42(1).

¹⁷ Structure of the Court, *supra* note 11; Rome Statute, *supra* note 3, art. 43(1).

¹⁸ *Supra* note 7 and accompanying text.

¹⁹ Rome Statute, *supra* note 3, art. 12(2)(b).

²⁰ *Id.* art. 12(2)(a).

²¹ *Id.* art. 12(3).

Under the Rome Statute, charges may be brought (1) by referral of a crime to the ICC Prosecutor by a State party,²² (2) by referral of a crime to the ICC Prosecutor by the UN Security Council,²³ or (3) by the Prosecutor's initiation of an investigation.²⁴

ICC jurisdiction will generally *not* attach in the following circumstances:

- (1) Where the case “is being investigated or prosecuted by a State which has jurisdiction over it”;²⁵
- (2) Where the case “has been investigated by a State . . . [which] has decided not to prosecute the person concerned, unless the decision resulted from unwillingness or inability . . . to prosecute”;²⁶
- (3) Where the accused would be exposed to double jeopardy;²⁷ or
- (4) Where the case is not of “sufficient gravity to satisfy further action by the [ICC].”²⁸

ICC Jurisdiction Should Not Attach to Israel and Its Officials

ICC jurisdiction should not (directly) reach Israel or its nationals. Israel is not a State Party to the Rome Statute,²⁹ and Israel has not specially acceded to ICC jurisdiction (nor is it likely to do so). Further, the recent events that occurred in and around the Gaza Strip did not occur on the territory of a State Party to the Rome Statute nor did the events rise to the level of offenses meant to be dealt with by the ICC. Assuming, *arguendo*, that events had arisen to such a level, Israel has an excellent track record of investigating and, when justified, trying its own

²² *Id.* art. 13(a). For referral procedure see *id.* art. 14.

²³ *Id.* art. 13(b).

²⁴ *Id.* art. 13(c); see also *id.* art. 15.

²⁵ *Id.* art. 17(1)(a).

²⁶ *Id.* art. 17(1)(b).

²⁷ *Id.* art. 17(1)(c); see also *id.* art. 20(3).

²⁸ *Id.* art. 17(1)(d).

²⁹ See State Parties to Rome Statute, *supra* note 5.

nationals for violations of the law of armed combat.³⁰ As such, Israeli political and military officials are not directly amenable to ICC arrest and prosecution.³¹

Potential Issues of Concern For Israeli Officials Re ICC Jurisdiction

Despite being a non-Party to the Rome Statute, Israeli nationals could conceivably be ensnared by the ICC in certain situations. ICC jurisdiction could *theoretically* attach to Israelis in the following circumstances:

- (1) Israelis who possess dual nationality may be vulnerable to arrest and potential ICC prosecution if their non-Israeli nationality is in a country that is a State Party to the Rome Statute. Being a national of a State Party to the Rome Statute automatically means that that individual is subject to ICC jurisdiction.³² For example, if an Israeli national also possesses French nationality, any of the following could occur: (1) the French government could refer a matter to the ICC Prosecutor; (2) another State Party could refer the matter to the ICC Prosecutor; (3) the UN Security Council could refer the matter to the ICC Prosecutor; or (4) the ICC Prosecutor could take up the matter on his own initiative.
- (2) It is also reported that Palestinian Authority (PA) officials have sent a letter to the ICC specially granting the ICC jurisdiction over its “territory” and “nationals.”³³

³⁰ See, e.g., *Israeli troops face abuse trial*, BBC NEWS, Nov. 14, 2008, http://news.bbc.co.uk/2/hi/middle_east/7729378.stm (“The Israeli military has said it will try by court martial a number of soldiers in connection with the abuse of a blindfolded Palestinian man.”)

³¹ See *supra* notes 25–26 and accompanying text (discussing the ICC’s deference to the good faith investigation and prosecution of a matter by a State).

³² *Supra* note 19 and accompanying text.

³³ *Palestinians make ICC overtures*, BBC NEWS, Feb. 3, 2009, http://news.bbc.co.uk/2/hi/middle_east/7867681.stm (“The court has made public a letter from Palestinian Justice Minister Ali Khashan recogni[z]ing the authority of the ICC—the world’s first permanent war crimes tribunal.”). It has also been suggested that the PA sent the letter less to attack Israel’s execution of its military mission than to attack Hamas leaders and fighters and place them at risk in the future, see Mike Corder, *Palestinians urge war crimes against Israel*, The Associated Press, Feb. 13, 2009, <http://www.google.com/hostednews/ap/article/ALeqM5jf6LGZASApBFKbpsECjD66ZQfGwwD96ART880> (last visited Feb. 24, 2009), given the fact that Hamas forces continue to fire missiles indiscriminately into Israel, *id.*; that Hamas leaders and combatants habitually use civilians as human shields, *Human shield deters Israel strike*,

It is unclear whether the ICC would—or even could—accept such an agreement in light of the fact that the Rome Statute requires that Parties to the Statute be States,³⁴ which the PA is not. *If the PA accession letter were to be accepted*, then any violations of the law of armed conflict which occurred in Gaza could theoretically ensnare Israelis. Yet, any potential impact on Israel and its leaders and military forces would depend on *when* the agreement was concluded, since the ICC only has jurisdiction over offenses that occur *after* a State has become a State Party to the Statute or has acceded to ICC jurisdiction.³⁵ *Nevertheless, if the PA letter is accepted, then Israeli forces will be at potential risk in the future.*

Other, Non-ICC Danger: National Statutes With Universal Jurisdiction

A significantly greater (though non-ICC-related) danger for Israeli political and military decision-makers arises from States like Spain which have enacted statutes that claim universal jurisdiction over serious violations of international law, no matter where or by whom they are committed.³⁶ A few years ago, a Spanish court issued an arrest warrant and an extradition request for Chilean Senator (formerly General) Augusto Pinochet, who, at the time, had traveled to the United Kingdom for medical treatment.³⁷ The Spanish court wanted to try Pinochet for a host of alleged crimes that took place in Chile—primarily against Chilean nationals—during the period Pinochet had served as President of Chile following the coup d'état against President

BBC NEWS, Nov. 19, 2006, http://news.bbc.co.uk/2/hi/middle_east/6162494.stm; that Hamas continues to endanger mosques, hospitals, schools, and the like, by using them for military purposes in violation of law of armed combat, *id.*; etc.

³⁴ See *supra* note 20 and accompanying text; see also *Palestinians make ICC overtures*, *supra* note 33 (detailing the complex discussion over whether the PA may be recognized as a State for the purposes of ICC jurisdiction).

³⁵ See *id.* art. 11 (codifying the principle of “Jurisdiction *ratione temporis*.”)

³⁶ CODIGO PENAL book II, tit. XXIV (1995) (Spain). For an example of a specific provision, see *id.* art. 607, available at <http://www.preventgenocide.org/es/derecho/codigos/espana.htm> (defining the crime of genocide and appropriate sentencing).

³⁷ Clifford Krauss, *Britain Arrests Pinochet to Face Charges by Spain*, N.Y. TIMES, Oct. 18, 1998, <http://query.nytimes.com/gst/fullpage.html?res=9D07E2DF163DF93BA25753C1A96E958260&sec=&spon=&pagewanted=all>.

Allende.³⁸ Pinochet was placed under house arrest by British authorities as they attempted to deal with the Spanish request.³⁹ Pinochet was ultimately released to return to Chile, but only after a panel of doctors concluded that he was too ill to stand trial.⁴⁰

Similar arrest and prosecution were threatened against Secretary of Defense Rumsfeld by a Belgian court pursuant to Belgium's universal jurisdiction statute (since repealed).⁴¹ The Belgian court threatened to issue arrest warrants charging Secretary Rumsfeld (and other Bush Administration officials) with a series of war crimes over events in Iraq.⁴² The United States convinced Belgium to repeal the statute by threatening to require the move of NATO Headquarters to another country if US officials had to fear being arrested when they visited Belgium.⁴³

Because of such statutes, all key Israeli political and military leaders must be very cautious when traveling abroad, but especially so when traveling to and through countries of the European Union.

Conclusions

Under the terms of the Rome Statute, there is currently no direct danger to Israeli political or military leaders *who are solely nationals of the State of Israel* concerning their decisions and actions in the recent Gaza conflict. There is potential danger to Israelis who possess dual nationality in States that are State Parties to the Rome Statute. There may also be danger in the

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Pinochet Is Ruled Unfit for Trial*, L.A. TIMES, July 10, 2001, at A7, available at <http://articles.latimes.com/2001/jul/10/news/mn-20452>.

⁴¹ STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBURG LEGACY 179 n.83 (2001), available at http://books.google.com/books?id=15dI2eirsNAC&pg=PA179&lpg=PA179&dq=spain+war+crimes+statute&source=bl&ots=q5sCl6omUr&sig=KKdzonoeC9_wOEAmSliluP_Kyw&hl=en&ei=JV2kSaeUHIjBnQe4sdGaBQ&sa=X&oi=book_result&resnum=2&ct=result#PPR14,M1 (citing Law of 16 June 1993, 2 Codes Belges (Bruylant), at 240/5 (62nd Supp. 1996)).

⁴² Human Rights Watch, Belgium: Universal Jurisdiction Law Repealed, July 31, 2003, <http://www.hrw.org/fr/news/2003/07/31/belgium-universal-jurisdiction-law-repealed>.

⁴³ *Id.*

future, assuming that the ICC accepts PA accession to the Rome Statute, though such danger would cut both ways—making both Israelis and Palestinians vulnerable to ICC arrest and prosecution for potential violations of the law of armed conflict. In a just world, this should preclude Israeli vulnerability, but this is not a just world. Finally, the greatest current and future danger to Israelis seems to spring from national statutes (like that of Spain) that provide a State's courts with universal jurisdiction to try all potential violators of the law of armed conflict. Such laws almost always inequitably target western nations like Israel and the United States and neglect gross violators like the Taliban, Somalia, Iraq under Saddam Hussein, or Iran. As such, Israelis must remain vigilant, and the Israeli Government should take all possible steps to shield the identities of key decision-makers, especially the identities of its military unit commanders who actually execute Israeli battle plans.

APPENDIX A

Relevant War Crimes Recognized by the International Criminal Court

A war crime is generally defined as a “[g]rave breach[] of the Geneva Conventions of 12 August 1949.”⁴⁴ The ICC recognizes over 70 different types of war crimes detailed in a supplement to the Rome Statute; and the two types are divided into (1) crimes committed during the conduct of international armed conflict within the established framework of international law and (2) crimes committed during armed conflict not of an international character.⁴⁵ Each separate war crime is a subdivision of Article 8 of the Rome Statute.⁴⁶ The following list includes offenses from both categories of recognized conflict and their particular elements. The offenses are labeled either (I) for international armed conflict or (N) for those conflicts not of an international character.

a) Willful Killing (I)⁴⁷

1. The perpetrator killed one or more persons.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

b) Torture (I)⁴⁸

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

⁴⁴ *Id.* art. 8(2)(a).

⁴⁵ Int’l Criminal Court, Elements of Crimes, http://www.icc-cpi.int/library/about/officialjournal/Element_of_Crimes_English.pdf (last visited Jan. 29, 2009) [hereinafter War Crimes Supplement].

⁴⁶ See Rome Statute, *supra* note 3, art. 8 (providing for the different types of war crimes).

⁴⁷ War Crimes Supplement, *supra* note 45, art. 8(2)(a)(i).

⁴⁸ *Id.* art. 8(2)(a)(ii)-1.

2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.
3. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
4. The perpetrator was aware of the factual circumstances that established that protected status.
5. The conduct took place in the context of and was associated with an international armed conflict.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

c) Inhuman Treatment (I)⁴⁹

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

d) Willfully Causing Great Suffering (I)⁵⁰

1. The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

⁴⁹ *Id.* art. 8(2)(a)(ii)-2.

⁵⁰ *Id.* art. 8(2)(a)(iii).

e) Destruction and Appropriation of Property (I)⁵¹

1. The perpetrator destroyed or appropriated certain property.
2. The destruction or appropriation was not justified by military necessity.
3. The destruction or appropriation was extensive and carried out wantonly.
4. Such property was protected under one or more of the Geneva Conventions of 1949.
5. The perpetrator was aware of the factual circumstances that established that protected status.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

f) Attacking Civilians (I)⁵²

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

g) Attacking Civilian Objects (I)⁵³

1. The perpetrator directed an attack.
2. The object of the attack was civilian objects, that is, objects which are not military objectives.
3. The perpetrator intended such civilian objects to be the object of the attack.

⁵¹ *Id.* art. 8(2)(a)(iv).

⁵² *Id.* art. 8(2)(b)(i).

⁵³ *Id.* art. 8(2)(b)(ii).

4. The conduct took place in the context of and was associated with an international armed conflict.

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

h) Attacking Personnel or Objects Involved in a Humanitarian Assistance or Peacekeeping Mission (I)⁵⁴

1. The perpetrator directed an attack.

2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.

3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.

4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.

5. The perpetrator was aware of the factual circumstances that established that protection.

6. The conduct took place in the context of and was associated with an international armed conflict.

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

i) Excessive Incidental Death, Injury, or Damage (I)⁵⁵

1. The perpetrator launched an attack.

2. The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

3. The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

⁵⁴ *Id.* art. 8(2)(b)(iii).

⁵⁵ *Id.* art. 8(2)(b)(iv).

4. The conduct took place in the context of and was associated with an international armed conflict.

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

j) Attacking Undefended Places (I)⁵⁶

1. The perpetrator attacked one or more towns, villages, dwellings or buildings.

2. Such towns, villages, dwellings or buildings were open for unresisted occupation.

3. Such towns, villages, dwellings or buildings did not constitute military objectives.

4. The conduct took place in the context of and was associated with an international armed conflict.

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

k) Attacking Protected Objects (I)⁵⁷

1. The perpetrator directed an attack.

2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.

3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.

4. The conduct took place in the context of and was associated with an international armed conflict.

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

l) Murder (N)⁵⁸

1. The perpetrator killed one or more persons.

⁵⁶ *Id.* art. 8(2)(b)(v).

⁵⁷ *Id.* art. 8(2)(b)(ix).

⁵⁸ *Id.* art. 8(2)(c)(i)-1.

2. Such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel⁵⁶ taking no active part in the hostilities.
3. The perpetrator was aware of the factual circumstances that established this status.
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.

m) Cruel Treatment (N)⁵⁹

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.
3. The perpetrator was aware of the factual circumstances that established this status.
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.

n) Attacking Civilians (N)⁶⁰

1. The perpetrator directed an attack.
2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.
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.

⁵⁹ *Id.* art. 8(2)(c)(i)-3.

⁶⁰ *Id.* art. 8(2)(e)(i).

o) Attacking Personnel or Objects Involved in a Humanitarian Assistance or Peacekeeping Mission (N)⁶¹

1. The perpetrator directed an attack.
2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.
4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.
5. The perpetrator was aware of the factual circumstances that established that protection.
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.

p) Attacking Protected Objects (N)⁶²

1. The perpetrator directed an attack.
2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.
3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.
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

⁶¹ *Id.* art. 8(2)(e)(iii).

⁶² *Id.* art. 8(2)(e)(iv).

Rocket Fire

Number of rockets since 2001: over 10,000

Number of rockets since Israel's withdrawal from Gaza in Aug. 2005: over 6,500

Number of rockets in 2008: over 3,000

Number of rockets during 6-month "cease fire" (June 19 – Dec 19) – about 300

Number of rockets after cease-fire and before IDF operation (Dec 19- Dec 27) – 200

Example of Hamas Crimes in Gaza

As for carrying arms openly, one Italian journalist observed: "Gaza civilians . . . complain[ed] that Hamas gunmen prevented them from leaving while firing from their homes. The gunmen told the civilians '*we are all destined for paradise, are you not happy to die together?*'"⁶³ Thus, while Hamas militants undoubtedly took up arms against the IDF, it is a stretch to say they did so "openly." THIS IS EVIDENCE OF A WARCRIME

⁶³ *Id.* (emphasis in original).