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Foreword – International Law Competition

This edition of the Heidelberg Student Law Review includes articles by the two winners of an international law essay competition run by the Cambridge Student Law Review and the Heidelberg Student Law Review, in collaboration with the British Council. Both writers are to be congratulated on their success.

The two articles discuss the legality of Israel's use of force against Lebanon in 2006. The Cambridge paper by *Georgina Redsell* and the Heidelberg paper by *Astrid Wiik* both argue that Israel's use of force was unlawful.

This is an extremely controversial issue on which many have strong opinions. The two articles re-examine the debate on the scope of self-defence under Article 51 of the UN Charter in the light of recent case-law of the International Court of Justice and of the Eritrea/Ethiopia Claims Commission. They examine the question as to how far the traditional doctrine has been, or should be, modified in the light of the terrorist attacks of 9/11 and of their aftermath. The two articles discuss the fundamental notions of armed attack, necessity and proportionality. Can there be an armed attack by non-state actors such as Hezbollah, even in the absence of state complicity? This question has been avoided by the International Court of Justice in recent cases such as *Armed Activities on the Territory of the Congo*, DRC v Uganda (2005), but is addressed in some detail in these two articles. Were the events of 12 July 2006 of sufficient gravity to amount to such an attack? And, if so, did they allow the use of force in self-defence against Lebanon, even in the absence of complicity by that state in the initial use of force by Hezbollah? These are difficult and divisive questions.

There is common ground between the two articles on the notion of armed attack; they also agree on the crucial question of the application of the customary international law requirements of necessity and of proportionality. For many states in the Security Council debates on the Lebanon conflict these were the critical issues in assessing the legality of the Israeli use of force. A majority of states argued that the thirty-four day massive Israeli attack on Lebanon, claimed by Israel to be aimed at Hezbollah rather than Lebanon, was grossly disproportionate. Others such as the USA argued that the proportionality of the Israeli use of force should be assessed in the light of the threat to the existence of Israel posed by Hezbollah. Thus there is

now a fundamental divide as to the proper meaning of “proportionality” in the law of self-defence.

Astrid Wiik also discusses the application of international humanitarian law arising out of the use of cluster bombs, the bombing of roads and airports, the deaths of civilians. She defends the legality of the Israeli actions, and controversially asserts that the current law needs revision to regulate conflicts between a state and a non-state actor. These questions and others discussed by the two articles are of great importance for the development of the law in this area.

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Illegitimate, unnecessary and disproportionate: Israel's use of force in Lebanon

I. Introduction

On the morning of 12 July 2006, an event took place that triggered a lengthy armed conflict between Israel and Hezbollah. At around nine o'clock local time, Hezbollah launched several rockets from Lebanese territory across the Blue Line¹ towards Israeli Defence Force (IDF) positions. Then Hezbollah fighters crossed the Blue Line into Israel and attacked an IDF patrol, captured two IDF soldiers, killed three others and took the captured soldiers across the border into Lebanon. After this attack on the patrol, a heavy exchange of fire ensued across the Blue Line between both sides. Hezbollah targeted IDF positions and Israeli towns south of the Blue Line. Israel retaliated with ground, air and sea attacks, and the conflict quickly escalated into a war that lasted 34 days. On 11 August, the Security Council passed Security Council Resolution 1701 which called for a 'full cessation of hostilities', and a ceasefire took effect on 14 August.

This essay assesses whether the armed conflict was justified under international law as a legitimate use of force by Israel in self-defence.² The starting point for such a discussion is the UN Charter, which sets out the rules regulating the use of force between states. The general prohibition on the use of force contained in Article 2(4)³ is subject to two exceptions: the 'inherent' right of self-defence contained in Article 51 and authorisation of the Security Council for states to use force under Chapter VII

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1 The border demarcation between Israel and Lebanon drawn by the United Nations on 7 June 2000, necessary for confirming the withdrawal of Israeli forces from Lebanon in compliance with Security Council resolution 425 (1978).

2 Hezbollah's use of force also raises issues relevant to international law, though they cannot be discussed in full detail here: for example, whether the use of force may be justified in the struggle for self-determination.

3 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.'

of the Charter.⁴ States have relied upon other potential exceptions to the prohibition on interstate violence, but these exceptions are not contained in the Charter and their legality is fiercely debated. For the purposes of this essay, however, there is no need to look beyond the justification of self-defence as it is clear that Israel's response to the actions of Hezbollah was based on the right contained in Article 51. The fact that the discussion focuses on this provision does not, however, mean that the legal issues involved are any less complex than the non-Charter justifications for the use of force. On the contrary, as will be shown, the law on self-defence is subject to fundamental disagreement, and the scope of the right is far from clear.

By way of a brief introduction, the requirements for a right to individual self-defence to be triggered under Article 51 will be set out. The various conditions and surrounding controversies will then be discussed in some detail. The meaning of the prerequisite of an 'armed attack' will be examined. It will be argued that on a strict interpretation of the law the events of 12 July were not sufficiently grave to amount to an armed attack, despite the support that Israel received from many in the international community. The issue of whether there is a right to self-defence against Hezbollah as a non-state actor will then be considered. It will be argued that the current state of the law regarding this issue is open to debate due to developments in state practice since the *Nicaragua* judgment was handed down by the International Court of Justice (ICJ).⁵ It will be demonstrated that Hezbollah's actions are not attributable to the state of Lebanon under the *Nicaragua* test or any broader test that may form part of customary international law at present. After having examined whether Israel did have a right to self-defence, the requirements of necessity and proportionality will be discussed. It will be shown that despite the relative uncertainty that surrounds what the prerequisites of necessity and proportionality entail, it is quite plain that Israel's use of force in self-defence was neither necessary nor proportionate.

II. The Right To Self-Defence Under Article 51

The legality of the armed conflict in Lebanon and Israel turns on the interpretation of Article 51, which provides:

Nothing in the present Charter shall impair the inherent right of individual and collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of the right to self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary to maintain or restore international peace and security.

4 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression.'

5 ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, (hereafter 'Nicaragua') [1986] ICJ Reports 14.

The primary debate regarding this provision arises from the word 'inherent'. Those who support a wide right to self-defence argue that the use of the word 'inherent' preserves the earlier customary international law right to self-defence. This line of reasoning claims that at the time the Charter was concluded, customary international law established a wide right to self-defence that allows for the protection of nationals and anticipatory (or pre-emptive) self-defence.⁶ On the opposing side are those who argue that the right to self-defence arises only if an armed attack takes place, and that since this right is an exception to the prohibition of use of force contained in Article 2(4), it ought to be narrowly construed.⁷ It is necessary to outline this debate because, although not directly relevant to the present discussion, whether one takes a wide or narrow view of self-defence, it will affect how one interprets the conditions that constrain the exercise of that right.

There are two main issues regarding the prerequisites of the right to self-defence that are relevant to this discussion. First of all, there is the requirement that an 'armed attack'⁸ must have taken place and what this condition entails. There is some controversy about how 'grave' the use of force must be in order to amount to an 'armed attack'. It will be argued that since the International Court of Justice appears to require a high threshold for a form of force to be classified as an armed attack, the events of 12 July cannot be characterised as such. Secondly, there is the question of what level of state involvement (if any) is required for the right to self-defence against non-state actors to be exercised legitimately. This requirement has been subject to a great deal of criticism especially in the context of the 'war on terror'. It will be argued that it is open to debate whether the requirement of 'sending by or on behalf' of a state as set out in *Nicaragua* continues to represent the law at present. Finally, it will be shown that the actions of Hezbollah are not attributable to the state of Lebanon, and therefore Israel did not have a right to self-defence.

III. Was There A Right To Self-Defence Under Article 51? (I.e. Was There An 'Armed Attack'?)

1. Were The Actions Of Hezbollah Of Sufficient Gravity To Amount To An 'Armed Attack'?

The starting point for the definition of 'armed attack' is the definition applied by the ICJ in *Nicaragua*, which is based upon the 'Definition of Aggression' set out by the UN General Assembly.⁹ According to this definition, there has been an armed attack where there has been a 'sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of

6 D. Bowett, *Self-Defence in International Law* (1958).

7 I. Brownlie, *International Law and the Use of Force by States* (1973).

8 The question of whether an 'armed attack' is a requirement at all (i.e. if there is a right to anticipatory self-defence) will not be pursued here.

9 'Declaration on the Definition of Aggression' (1974) UNGA Resolution 3314 (1974) Article 3 (g).

such gravity as to amount to acts of aggression'.¹⁰ In *Nicaragua* the Court stated that in order to amount to an armed attack the use of force must be 'of such gravity to amount to an act of aggression'. A distinction was made between 'most grave' uses of force amounting to an armed attack and other forms.¹¹ Furthermore, a cross-border incident might be classified as an armed attack rather than as a 'mere frontier incident', the Court stated, 'because of its scale and effects'.¹² This distinction between armed attacks in the sense of Article 51 and lesser forms of force not triggering the right to self-defence was reaffirmed recently in the *Iranian Oil Platforms* case.¹³ It will be argued that on a strict reading of *Nicaragua* and the *Oil Platforms* decision the Hezbollah attack on the IDF positions was not of sufficient gravity of amount to an armed attack.

On a narrow reading of ICJ judgments, the threshold for an act of force to amount to an 'armed attack' appears to be very high. As outlined above, this high threshold seems to have been reaffirmed in the *Oil Platforms* case.¹⁴ Moreover, in a recent decision made by the Eritrea/Ethiopia Claims Commission it was stated that, 'Localised border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for the purposes of the Charter'.¹⁵ On such a narrow view, clearly the events that happened in Israel on 12 July would not qualify as an 'armed attack'. However, the state of the law is not as clear-cut as the Claims Commission's decision suggests. The decision must be viewed with caution in light of the fact that the Commission dealt with complex issues regarding the right to self-defence in a very brief and superficial manner—the court used no more than eight pages to explain its judgment. The sweeping statements made in that decision regarding the right to self-defence have attracted criticism.¹⁶ Therefore, although the threshold of an 'armed attack' is very high, it is argued that that condition is not as narrow as this decision suggests. Nonetheless, Richard Falk has argued that the events of 12 July ought to be characterised as mere border incidents, and that Israel would only have had a right to self-defence if a full-scale attack across Israeli borders had occurred. He also argues that 'If every violent border incident or terrorist provocation were to be regarded as an act of war, the world would be aflame'.¹⁷ Therefore,

10 *Nicaragua*, para. [195].

11 *Ibid.*, para. [191].

12 *Ibid.*, para. [195]. It has been argued that the distinction between armed attacks and 'mere frontier incidents' is only relevant in relation to collective self-defence, with the intervention of a third state requiring a higher threshold. However, a distinction was drawn in the context of individual self-defence with regard to the most grave forms of force amounting to an 'armed attack' and less grave forms.

13 ICJ, *Islamic Republic of Iran v. United States of America* (hereafter, *Oil Platforms*), [2003] ICJ Reports 161, paras. [51]–[64].

14 *Ibid.*, paras. [51] and [71].

15 Eritrea/Ethiopia, Partial Award, *Ius Ad Bellum* Ethiopia's Claims 1 8, 19 December 2005, 2006 ILM 430.

16 For more detailed criticism of the decision see C. Gray, 'The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?' (2006) 17 EJIL 699.

17 See R. Falk, 'Lurching Toward Regional War in the Middle East' (2006) *Today's Zaman*,

from a policy perspective as well as from a legal perspective the events of 12 July should not be characterised as an armed attack.

However, the ICJ's decisions are open to interpretation on this point. It is arguable that the ICJ has not completely excluded small-scale attacks from the spectrum of 'armed attack'. For example, in the *Oil Platforms* case, the Court stated that it 'does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defence''.¹⁸ Moreover, Yoram Dinstein has argued that there is no need to exclude smaller-scale attacks from the definition: 'An armed attack presupposes a use of force producing (or liable to produce) serious consequences, epitomized by territorial intrusions, human casualties, or considerable destruction of property. When no such results are engendered by (or reasonably expected from) a recourse to force, Article 51 does not come into play.'¹⁹ The ICJ has declined to give precise guidance as to how 'grave' a form of force must be to reach the threshold of 'armed attack', however, it seems clear that under Dinstein's definition, the events of 12 July would qualify. The actions of Hezbollah did produce serious consequences and also involved territorial intrusions and human casualties. It is contended that there is scope to argue that the actions of Hezbollah should be considered an 'armed attack' justifying a response under Article 51.

Such a contention is supported by the response of many in the international community to the events of 12 July. The actions of Hezbollah were widely denounced and Israel's right to defend itself widely affirmed. Furthermore, the fact that Israel was subject to an armed attack seemed to be relatively uncontroversial in the opinion of many states.²⁰ In their opinion, the killing of three Israeli soldiers, the taking hostage

21 July 2006 <<http://www.zaman.com/?bl=commentary&alt=&trh=20060721&hn=34951>> accessed 7 March 2007.

18 *Oil Platforms*, para. [72].

19 Y. Dinstein, *War, Aggression and Self-Defence* (1988), p. 193.

20 See Security Council debates. In particular, S/PV 5489, 14 July, 2006, 10 a.m.: 'Argentina does not deny the fact that Israel has a right to defend itself against foreign attack.' 'While we recognise the right of all States ... to defend themselves, the waging of a wide-spread military campaign directly targeting civilians and hitting their infrastructure, such as in the current campaign by Israeli forces, can in no way be consonant with that objective ...' (Qatar). 'Japan acknowledges the legitimate security concerns of Israel.' 'Israel has every right to act in self-defence.' (the United Kingdom). 'Peru recognises Israel's right to self-defence and security.' 'Denmark is unwavering in its recognition of the right of States to self-defence – in this case Israel's.' 'We recognize and acknowledge the right of each and every State to self-defence.' (Slovakia). 'We deplore the recent attack by Hizbollah ... We equally deplore and express our deep alarm at Israeli counterattacks ... We continue to believe that, while preserving the right to self-defence, Israel must respect its obligations under international law ...' (Greece). 'Israel has a right to defend its territory and its citizens when they are attacked – and they have been attacked. But we condemn the disproportionate nature of the response ...' (The Security Council President, on behalf of France). See also, S/PV 5493, 21 July, 2006, 3 p.m.: 'Argentina recognises that Israel has a legitimate right to self-defence, in accordance with Article 51 of the Charter.' 'The European Union recognises Israel's legitimate right to self-defence, but it urges Israel to exercise utmost restraint and not to resort to disproportionate action.' (Finland, on behalf of the European Union). 'There is no doubt that

of two others, and the launching of Katyusha rockets across the border as a diversionary tactic *were* sufficiently grave to constitute an armed attack.

Despite the broad international support for Israel's right to self-defence it is suggested that the threshold for an 'armed attack' remains the high threshold propounded by the ICJ, as set out above. The opinions expressed by the states mentioned were political, rather than legal statements. Moreover, the acceptance of Israel's right to self-defence was not unanimous. Some states denounced Israel's invocation of the right to self-defence as an excuse to carry out an act of aggression.²¹ There is also a lack of state practice to support any cogent argument that the threshold is lower than that expounded by the ICJ in *Nicaragua*. It is contended that the law as it presently stands must lead to the finding that there was no 'armed attack' of the scale and gravity to justify an Article 51 response on 12 July. However, as has been seen this proposition may be argued either way as the ICJ has not completely excluded small scale attacks from the scope of the definition. Nonetheless, from a policy perspective it is contended that the actions of Hezbollah cannot be considered an 'armed attack' as allowing a right to self-defence against such small scale attacks would lead to a very broad right to use force. If it was conceded that an armed attack took place in Israel then it must also be conceded that hundreds of armed attacks took place last year justifying an Article 51 response. It is clear from this analysis that this area of the law is in need of elucidation, however, and it is submitted that a more detailed definition of 'armed attack' is required.²² The other requirements for a legitimate exercise of self-defence will be considered, should the conclusion on this point be considered incorrect.

2. Is there a right of self-defence against Hezbollah as a non-state actor?²³

Are the actions of Hezbollah attributable to the state of Lebanon?

The second prerequisite for the legitimate exercise of the right to self-defence under Article 51, as interpreted by the ICJ in *Nicaragua*, is that non-state actors must have been sent 'by or on behalf of the state'. In other words, the traditional approach to

Israel has the right to protect its territory and its population against such acts committed by Hezbollah.' (Switzerland). 'While we recognise Israel's inherent right to self-defence, we believe that all use of armed force must satisfy requirements of necessity as well as proportionality ...' (Norway). 'We cannot in any way condone hostage-taking, and we cannot deny the right to self-defence ...' (Turkey). 'Hizbollah violated Israel's sovereignty, unprovoked. Israel's response to the abduction and killing of its soldiers was an exercise of its right to self-defence.' (Canada).

21 For example, S/PV 5493, 21 July 2006, 3 p.m., 'No-one would doubt Israel's ability and skills at slapping together a pretext to justify pursuing its aggression and to cover its tracks ...' (Saudi Arabia). 'The incidents that appear to be at the origin of the new aggression cannot justify or explain the collective punishment that Israel ... is inflicting today on a sovereign State ...' (Algeria). 'The Government of the Hashemite Kingdom of Jordan strongly condemns the Israeli aggression against Lebanon, its use of force and actions outside the scope of international law..' (Jordan).

22 T. Ruys, 'Attacks by Private Actors and the Right to Self-Defence' (2005) 10 *Journal of Conflict and Security Law* 289.

Article 51 is that there is no right of self-defence against non-state actors in the absence of state complicity. 'Effective control' and 'acknowledgment' are recognised as bases for state responsibility by the International Law Commission (ILC) in their Articles on State Responsibility.²⁴ However, the 'effective control' requirement has been the subject of a great deal of criticism and controversy. The ICJ appears to favour this narrow view of the concept of 'armed attack',²⁵ but this approach is contested by some writers²⁶ and certain states such as Israel, Portugal, South Africa and the United States.²⁷ It will be argued that the current state of the law regarding the level of state complicity required to trigger a corresponding right of self-defence is open to debate, but Hezbollah's actions are not attributable to the state of Lebanon under the traditional *Nicaragua* test or any broader test that may form customary international law after 9/11.

According to the ICJ, the level of support required for acts of non-state actors to be attributable to a state is that of 'effective control' of the operations.²⁸ The mere provision of weapons, logistical or other support is not sufficient to amount to an armed attack.²⁹ While this judgment was controversial,³⁰ it has been argued that the decision was in keeping with state practice at the time.³¹ Moreover, it would appear that recent decisions of the ICJ have reaffirmed the *Nicaragua* test.³² In the *Wall* advisory opinion,³³ the Court stated that Article 51 recognises an inherent right to self-defence in the case of an armed attack 'by one State against another State'.³⁴ This would appear to reaffirm the narrow interpretation of the right to self-defence. However, the situation of Israel that is contemplated in the *Wall* advisory opinion is distinguishable on the basis that the alleged non-state actors were not originating from a foreign state

23 This essay proceeds on the basis that some level of state complicity is required. The question of whether there is a right of self-defence against non-state actors *per se* is not pursued.

24 Articles 8 and 11, General Assembly Resolution 56/83 of 12 December 2001, and see J. Crawford, *The International Law Commission's Articles on State Responsibility Introduction, Text and Commentaries* (2002).

25 See, for example, ICJ, *Oil Platforms and Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Reports 194.

26 A. Cassese, *International Law*, (2001); T. M. Franck, 'Terrorism and the Right of Self-Defence', (2001) 98 AJIL 840; J. Paust, 'Use of Armed Force Against Terrorists in Afghanistan, Iraq and beyond', (2002) 35 Cornell JIL 534; R. Wedgwood, 'Responding to Terrorism: The Strikes Against Bin Laden', (1999) 24 Yale JIL 564.

27 C. Gray, *International Law and the Use of Force*, (2004), p. 111–115 and p. 165–167.

28 *Nicaragua* at para. [115].

29 *Ibid.*

30 See Judge Schwebel's dissent, *ibid.* at paras [174]–[181].

31 C. Gray, *International Law and the Use of Force*, (2004), p. 109.

32 ICJ, *Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of Congo v. Uganda)* 1 July 2000. But see the dissenting opinion of Judge Kooijmans, para [27] onwards; *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Reports 194.

33 ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Reports 194.

34 *Ibid.*, para. [139].

but from within territory of which Israel had control. For that reason Article 51 had no application whatsoever.³⁵ Consequently, on a closer reading of the judgment, the *Wall* advisory opinion does not necessarily reaffirm this narrow conception of armed attack because the situation was not relevantly analogous, and was therefore not discussed.

In addition to the lack of positive reaffirmation of the test by the ICJ, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia declined to apply the test in its famous *Tadic* judgment.³⁶ It was held that the *Nicaragua* test was at variance with judicial and state practice, and not consonant with the logic of the law on state responsibility.³⁷ Moreover, the *Nicaragua* test has been subject to a great deal of academic discussion and criticism since that case was decided.³⁸ In addition to the critical literature, there is evidence that the customary practices of states have changed. It has been argued that since the late 1990s many states have accepted a broader reading of Article 51 and a right of self-defence against non-state actors.³⁹ Whether this is really the case is contested, however, after the attacks on the World Trade Center, the international community expressly confirmed that the right to self-defence could be exercised against armed attacks that are not attributable, under the *Nicaragua* test, to another state.⁴⁰ Moreover, it has been explicitly stated in Security Council resolutions that the international community's response to the bombings of 9/11 brought about a new approach to Article 51, which could not be brought within the narrow test expounded in the *Nicaragua* judgment.⁴¹ Such a new approach may also be evidenced in the reaction to Israel's response to the actions of Hezbollah on 12 July.⁴²

Therefore, it appears that the current law regarding the level of state involvement in the actions of non-state actors is uncertain and open to debate. Christian Tams has stated that this demonstrates that the traditional understanding of self-defence, as set out in *Nicaragua*, is 'now no longer 'generally accepted''.⁴³ State practice points towards a wider interpretation of the concept of 'armed attack' than that propounded

35 *Ibid.*

36 *The Prosecutor v. Tadic*, IT-94-1-A, ICTY Appeals Chamber, 38 ILM 1518 (1999), at paras [116]–[145].

37 A test of 'overall control' was adopted, at para. [145].

38 For example, G. Travalio and J. Altenberg, 'Terrorism, State Responsibility, and the Use of Military Force' (2003) 4 Chicago Journal of International Law 97; A. Cassese, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 EJIL 993; J. Brunnee and S. J. Toope, 'The Use of Force in International Law after Iraq' (2004) 54 ICLQ 785.

39 C. J. Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the *Wall* Case', (2005) 16 EJIL 963 c.f.; C. Gray, *International Law and the Use of Force*, (2004), p. 111–117.

40 SC Resolutions 1368 (2001) and 1373 (2001).

41 Judge Kooijmans separate opinion in the *Wall*, at para. [35].

42 See Security Council debates, e.g. S/PV.5493.

43 C. J. Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the *Wall* Case', (2005) 16 EJIL 963.

by the ICJ. Iran, Russia and the United States have all asserted a right to self-defence against armed attacks against non-state actors even where those actions could not be attributed to any state under the *Nicaragua* test.⁴⁴ The requirement for the right to self-defence to be triggered, in light of state practice, seems to no longer be that of 'effective control', but rather something less. The level of state involvement in a belligerent attack that is required to confer a valid right to the use of force in self-defence must be reconsidered, especially in light of 'Operation Enduring Freedom' in Afghanistan. The language popularly used is that states have the right to self-defence against states that are 'harbouring' terrorists. It is unclear what this phrase actually means, although implicit is some sort of tacit support or approval by the state. In addition, the justifications for the war against Afghanistan are open to varying interpretations. Some commentators have argued that there has been a change in the law to allow self-defence against states 'harbouring' terrorists,⁴⁵ whereas some argue that there has been no change in the law whatsoever, and that on the facts the relationship between Al Qaida and the Taliban regime was sufficiently close to come within the traditional requirements contained in the 'Definition of Aggression'.⁴⁶

It is therefore unclear what the state of international law currently is. The test according to the ICJ in *Nicaragua* is 'effective control', whereas academic literature and state practice tend to challenge this. First of all it must be asked whether the 'effective control' test, as the stricter test, is satisfied. This is a question of particular complexity requiring specialist knowledge regarding the workings of Hezbollah. Therefore only a tentative conclusion may be reached. It is contended that the *Nicaragua* 'effective control' test, now codified in Article 8 of the ILC's Articles on State Responsibility, is not satisfied because Hezbollah does not act under the directions or control of Lebanon.⁴⁷

However, the following facts may support an argument for attribution. Since its emergence after the Lebanese civil war, Hezbollah has developed into a political, social and military organisation which is active in the Lebanese political system and society. Hezbollah participates in the Government of Lebanon. In the general election of 2005 it won 14 seats nationwide and an Amal-Hezbollah alliance won all 23 seats in Southern Lebanon. In addition, Hezbollah held two important ministerial seats at the time of the conflict. Hezbollah also exercises governmental authority in Southern Lebanon in the absence or default of official Lebanese authority. Therefore, it might be thought that Hezbollah would qualify as a 'State organ' under Article 4 of the ILC Articles. However, this argument fails on the basis that Article 4(2) seems to imply

44 *Ibid.*

45 S. R. Ratner, 'Jus ad Bellum and Ius in Bello after September 11' (2002) 96 AJIL 906.

46 For example, J. J. Paust, 'Use of armed force against terrorists in Afghanistan, Iraq and beyond' (2002) 35 Cornell ILJ 532.

47 Such an argument might be more persuasive in relation to Iran or Syria. Hezbollah developed under and still enjoys Iranian guidance and support and Syrian patronage. For more detail see, M. Ranstorp and C. B. E. Waite, *Hezbollah in Lebanon: The Politics of the Western Hostage*, (2003).

that only the acts of the two cabinet ministers or the members of parliament would be attributable to the state of Lebanon. The actions which were carried out on 12 July were carried out by other individuals who cannot be considered an organ of the state. Alternatively, the actions of Hezbollah might be attributable to Lebanon under Article 5 since Hezbollah are empowered by the law of the state to exercise elements of governmental authority.⁴⁸ However, in the commentaries it is stated that if an act is to be regarded as an act of state for the purposes of international responsibility, the conduct must concern 'governmental activity' and not private or commercial activity. The question then is whether the actions of 12 July can be considered 'governmental activity', a term not defined in the Articles or the commentaries. The commentaries state that of importance are the content of the powers conferred on the entity, the purposes for which they are exercised and the extent to which the government is accountable to the government for their exercise.⁴⁹ In other words, the internal law in question must specifically authorise the conduct as involving the exercise of public authority. The action of Hezbollah on 12 July was clearly not authorised as an exercise of public authority. The Lebanese government declared on that date that it was not aware of the incident, that it did not take responsibility for that act and did not endorse it, must also be rejected.⁵⁰ The only other possibility for attribution of the action would be Article 9,⁵¹ however, the commentaries state that the government must have had 'knowledge' of the action and did not 'specifically object' to it.⁵² As has been outlined above, this was not the case. Under the ILC Articles on State Responsibility therefore Lebanon cannot be held responsible for the acts of Hezbollah.

As Hezbollah forms part of the government of Lebanon this conclusion seems somewhat odd. Yet, it is contended that it cannot be convincingly argued that Lebanon has 'effective control' over Hezbollah. It is also questionable whether the actions of Hezbollah would be attributable to Lebanon under any lesser test that arguably forms part of customary law at present. Even under a lesser test it is submitted that some sort of direct support or at least tacit approval should be required.⁵³ The fact that Hezbollah's actions are not attributable to Lebanon is reflected in the previous justifications used by Israel for its use of force in Southern Lebanon. During the 1970s and 1980s Israel justified its use of force on the basis that Lebanon was incapa-

48 Article 5: 'Conduct of persons or entities exercising elements of governmental authority'.

49 *J. Crawford*, *The International Law Commission's Articles on State Responsibility Introduction, Text and Commentaries* (2002), p. 100–102.

50 'Address to the Lebanese People' of 15 July 2006 Prime Minister Fouad Siniora stated that '[T]he Lebanese government announced from the first instance when the events broke, that it had no prior knowledge of what happened. Nor did it endorse the operation carried out by Hezbollah, which led to the abduction of the two Israeli soldiers'. The full statement can be found at <http://www.lebanonundersiege.gov.lb/english/F/eNews/NewsArticle.asp?CNewsID=17> accessed 7 March 2007.

51 'Conduct carried out in the absence or default of the official authorities'.

52 *J. Crawford*, *The International Law Commission's Articles on State Responsibility Introduction, Text and Commentaries* (2002), p. 114.

53 *J. Brunnee and S. J. Troope*, 'The Use of Force in International Law after Iraq' (2004) 54 *ICLQ* 785, p. 795.

ble of preventing attacks from its territory from Hezbollah.⁵⁴ However, it is submitted that, even if mere acquiescence were sufficient, the defensive use of force would have to be limited to targeting Hezbollah only and not Lebanon and its infrastructure. Israel did not limit its military action during the conflict in this manner. It is contended that even under a less stringent test than that propounded by the ICJ in *Nicaragua* Hezbollah's actions are not attributable to Lebanon.

It is thus concluded that whatever the result of the current test under international law is, even if the use of force by Hezbollah had been grave enough to constitute an 'armed attack', Israel would still not have had a right to act in self-defence against Hezbollah because the latter's actions are not attributable to the state of Lebanon. In the alternative, should this conclusion be wrong, the additional requirements of necessity and proportionality will be discussed.

IV. Was The Use Of Force In Self-Defence Necessary And Proportionate?

If Israel did have a right to self-defence on 12 July, the exercise of that right must have been necessary and proportionate in order to be legitimate under international law. These requirements can be traced back to the 1837 *Caroline* incident and they have been reaffirmed in *Nicaragua*, the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,⁵⁵ and the *Oil Platforms* case. The necessity and proportionality requirements are not set out in the UN Charter but form part of customary international law.⁵⁶ It is not entirely clear what these requirements entail as there is very little that can be gleaned from ICJ judgments. The Court usually finds that the exercise of self-defence has been illegal on some other basis, such as a finding that there has been no armed attack and therefore the conditions of necessity and proportionality tend to be treated as marginal considerations.⁵⁷ Moreover, there has been relatively little discussion of these issues in the academic literature. Due to the lack of guidance provided by the ICJ, the discussion regarding these requirements will be mainly based on an academic discussion of the relevant issues.⁵⁸

The prerequisites of necessity and proportionality will be discussed separately, although there will be an overlap between the two heads. Before setting out on a dis-

54 (1978) UNYB 297; (1980) UNYB 349; and (1984) UNYB 288.

55 Advisory Opinion on the ICJ, *Legality of the Threat or Use of Nuclear Weapons*, [1996] ICJ Reports 226.

56 *Nicaragua*, para. [176], *Oil Platforms*, para. [76] and the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* para. [41].

57 In both *Nicaragua* and the *Oil Platforms* case the Court held that the criteria of necessity and proportionality were 'additional grounds of wrongfulness' because the use of force had already been found to be illegal on some other ground.

58 The structure of this section will be largely based on the detailed exposition of proportionality and necessity in the *ius ad bellum* in Chapter 5 of J. Gardam, *Necessity, Proportionality and the Use of Force by States* (2004).

cussion of these two requirements, it must be made clear which yardstick one is using to measure the necessity and proportionality of the use of force. Clearly one would reach diametrically opposed conclusions if one were measuring the necessity and proportionality of the response, on the one hand, in response to the abduction of the soldiers on 12 July, and if, on the other hand, one took into account the subsequent escalation of hostilities from both sides. It is contended that the latter approach is preferable. The initial, localised response to the attack involving the abduction of the soldiers may, if it could be treated as an isolated event, be considered both necessary and proportionate. However, it is not possible to isolate that initial response from the subsequent escalation of hostilities. As the ICJ observed in the *Oil Platforms* decision it is not possible for one to close one's eyes to 'the scale of the whole operation'.⁵⁹

It will be demonstrated that in the context of the whole campaign, the use of force by Israel was neither necessary nor proportionate to 'halt and repel' the attacks from Hezbollah.

1 Necessity

Various matters are of relevance in assessing whether Israel's actions were necessary. The earliest formulation of necessity was in the 1837 *Caroline* incident, which was as follows: 'necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation'.⁶⁰ However, this formulation of the requirement of necessity must be viewed against the background of the then unsettled situations in which states were regarded as having the right to use force.⁶¹ Today the situations in which states may resort to the use of force are limited (by the requirements of 'armed attack' for instance), and so this early formulation should be regarded with a degree of caution.

Nevertheless, it is submitted that the requirement of 'instancy' or immediacy in the *Caroline* formula needs to be satisfied if it is to be determined that an armed attack has occurred.⁶² Secondly, the aim and purpose of the self-defence will be examined as a requirement of necessity. Although the Court in the *Oil Platforms* decision did not formally pronounce on this as a requirement of necessity, it is contended that the aim and purpose of the self-defence is an important consideration under this head.⁶³ The aim must be to halt and repel an attack and nothing more. It will be demonstrated

59 *Oil Platforms*, at para. [77].

60 Stated in correspondence from the American Secretary of State to the British authorities quoted in *J. Gardam*, *Necessity, Proportionality and the Use of Force by States* (2004), p. 149. For discussion of the formula see *I. Brownlie*, 'Use of Force in Self-Defence' (1961) 37 BYIL 183, at p. 186.

61 *I. Brownlie*, 'Use of Force in Self-Defence' (1961) 37 BYIL 183, p. 429.

62 As discussed in *Nicaragua*, para. [237].

63 Gardam discusses the 'aims of self-defence' under the requirement of proportionality, however, it shall be discussed here on the basis that necessity forms part of the requirement of proportionality.

that it is highly questionable whether Israel's intent remained within this narrow purpose. Thirdly, the nature of the targets targeted by Israel will be discussed.⁶⁴ It was recognised in the *Oil Platforms* case that in order to be considered necessary the state acting in self-defence can only attack 'legitimate military targets'.⁶⁵ It will be demonstrated that the nature of the targets further supports the contention that the Israeli response to Hezbollah's initial actions went beyond the objective of halting and repelling the attack. These issues shall be discussed in turn.

a) Immediacy

The requirement of immediacy is inherent in the text of Article 51. The right of self-defence arises in response to an armed attack but only for as long as it takes to notify the Security Council and for the necessary action to be taken by that body to restore international peace and security. This was of significance in the *Nicaragua* judgment, where the ICJ stated that the fact that measures were taken several months after the major offensive meant that it could not be held that the activities carried out by the United States were necessary.⁶⁶ There is support, therefore, for the claim that the necessity requirement implies a temporal connection between an armed attack and the response taken in self-defence.

It is not entirely clear, however, what this requirement consists of. A strict view of the requirement is that once the armed attack is over, the right of self-defence comes to an end and states must rely on the Security Council. State practice does not, however, support this view of immediacy. States have allowed themselves some flexibility regarding the limits of the timeframe in which they must initiate their defensive action. During the period directly after the armed attack it is expected that states will attempt to resolve the dispute by peaceful means. The 1982 conflict between Argentina and the United Kingdom and the 1990–1 Persian Gulf conflict are cited as evidence of state practice in this area.⁶⁷

With regard to this requirement, it might be questioned whether Israel's right to self-defence was necessary because after the initial attack, the kidnapping of the soldiers and the subsequent attempt by the IDF to retrieve them, Israel did not pursue alternative means of settling the dispute. Israel did pursue a prisoner-captive exchange but this was alongside 'Operation Just Deserts'. Therefore it is open to debate whether the Israeli action after the response to the 'initial attack' meets the requirement of immediacy.

b) Aim and Purpose

It is uncontroversial that necessity and proportionality mean that self-defence must not be retaliatory or punitive; the aim should be to halt and repel an attack.⁶⁸ State-

64 Again, Gardam discusses this issue under the head of proportionality but it is discussed here because the ICJ's treatment of the requirement in the *Oil Platforms* case.

65 *Oil Platforms*, para. [51].

66 *Nicaragua*, para [237].

67 J. Gardam, *Necessity, Proportionality and the Use of Force by States* (2004), p. 151.

68 C. Gray, *International Law and the Use of Force*, (2004), p. 121.

ments made by Israeli political and military leadership indicate that the operations that began on 12 July had a purpose beyond that of halting and repelling of the attack by Hezbollah. The statements suggest that the purpose was retaliatory and punitive in nature rather than defensive.

Statements by Israeli military officials seem to confirm that the destruction of civilian infrastructure was a goal of the military campaign. On 13 July, the IDF Chief of Staff Lieutenant General Dan Halutz noted that all of Beirut could be included among the targets if Hezbollah rockets continued to hit Northern Israel. He said, 'Nothing is safe [in Lebanon], as simple as that'.⁶⁹ Also according to *The New York Times*, he said that air strikes were aimed at keeping pressure on Lebanese officials, and delivering a message to the Lebanese government that they must take responsibility for Hezbollah's actions. He called Hezbollah 'a cancer' that Lebanon must get rid of, 'because if they don't their country will pay a very high price'.⁷⁰ This aim of pressurising the Lebanese Government was mirrored by comments made by the Foreign Minister of Israel, reported in the *Jerusalem Post*, that 'the operation was not intended to avenge Wednesday's attacks, in which two soldiers were captured and eight were killed, but had larger strategic goals.' He added that, 'There will be a point of time where the Lebanese government will need to decide that Hezbollah does not promote Lebanon, it is a burden on the Lebanese people and the Lebanese government ...'.⁷¹ Moreover, Israeli Prime Minister Ehud Olmert declared the Hezbollah actions an 'act of war' and promised Lebanon a 'very painful and far-reaching response'.⁷² These statements suggest more than just a response intended to halt and repel an attack. They are indicative of broader aims of teaching the Lebanese government and people a lesson, which clearly amounts to a punitive purpose.

In addition to the alleged punitive objectives of the conflict in Lebanon, it was suggested in news reports at the time that the Israeli operation was pre-planned. *The San Francisco Chronicle* reported that the Israeli campaign had been prepared one to two years in advance and it had also been rehearsed by Israel.⁷³ There were also reports that the Pentagon had been consulted and helped to plan the operation well before 12 July.⁷⁴ Ehud Olmert's, recently leaked, submission to the Winograd Commission supports this allegation. He stated that he first discussed the possibility of war in Jan-

69 S. Farrell, 'Our aim is to win – nothing is safe, Israeli chiefs declare' *The Times*, 14 July 2006.

70 Amnesty International, *Israel/Lebanon: Deliberate destruction or collateral damage? Israeli attacks on civilian infrastructure*, August 2006, citing the *New York Times*, S. Erlanger, 'Israel Vowing to Rout Hezbollah', 15 July 2006.

71 H. Keinon, 'Ramon suggests Nasrallah is a target' *Jerusalem Post*, 14 July 2006 <<http://www.jpost.com/servlet/Satellite?apage=1&cid=1150885995191&pagename=JPost%2FJPArticle%2FShowFull>> fiOfi accessed 7 March 2007.

72 C. McGreal, 'Capture of Soldiers was an Act of War says Israel' *The Guardian*, 13 July 2006 <<http://www.guardian.co.uk/israel/Story/0,,1819123,00.html>> fiOfi accessed 8 March 2007.

73 M. Kalman, 'Israel set war plan more than a year ago' *San Francisco Chronicle*, 21 July 2006 <<http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/07/21/MIDEAST.TMP>> accessed 7 March 2007.

74 S. Hersh, 'Washington's interests in Israel's war' *The New Yorker*, 21 August 2006 <http://www.newyorker.com/fact/content/articles/060821fa_fact> accessed 7 March 2007.

uary 2006 and asked to see military plans in March of that year.⁷⁵ These reports that the action was pre-planned also indicate that the response had wider strategic aims than self-defence.

It is suggested that these statements of Israeli political and military officials made during the conflict indicate a punitive and retaliatory purpose. Moreover, as will be shown in the next section, these statements coupled with the nature of the targets besieged during the campaign do strongly hint towards a punitive rather than defensive aim and purpose.

c) The Nature of the Targets

The requirement that only legitimate military targets can be targeted for the use of force to be considered necessary is a clear prerequisite of the legitimate use of force, as recognised by the ICJ in the *Oil Platforms* case.⁷⁶ In that case, the Court stated that it was not convinced that the evidence supported the USA's contentions as to military presence and activity on certain oil platforms and therefore found that those acts were not justified as acts of self-defence.⁷⁷ In the recent conflict in Lebanon, many targets besieged during the campaign were not legitimate military targets and therefore the targeting of them cannot be considered to be necessary under international law.

There are various examples of areas targeted by the IDF that were not Hezbollah positions and therefore not legitimate military targets. For example, the Lebanese government estimates that 32 'vital points' (such as airports, ports, water and sewage treatment plants, and electrical facilities) have been completely or partially destroyed, as have around 109 bridges and 137 roads.⁷⁸ More than 25 fuel stations and around 900 commercial enterprises were hit. The number of residential properties, offices and shops completely destroyed exceeds 30,000. All of Lebanon's airports were attacked, some repeatedly. Beirut international airport and fuel tanks were targeted. An IDF statement issued on 14 July claimed that the airport had been targeted because it is a 'central hub for the transfer of weapons and supplies to Hezbollah'. However, in light of statements already outlined above it is arguable that the targeting of the airport was not necessary, but rather all part of a general policy of making the Lebanese government 'pay a high price'. In addition, hospitals were targeted, which are, by their nature, civilian targets. Moreover, there are various incidents of direct attacks on medical and relief personnel. The IDF also attacked UNIFIL and Observer Group Lebanon positions.

In addition to the targeting of civilian infrastructure, the IDF targeted Lebanon's largest power station in Jiyeh. This action caused 15,000 tons of heavy fuel oil to leak into the sea, affecting two thirds of Lebanon's coastline. The report of the Com-

75 C. Urquhart, 'Israel planned for Lebanon war months in advance, PM says' *The Guardian*, 9 March 2007 <<http://www.guardian.co.uk/syria/story/0,,2029732,00.html>> accessed 9 March 2007.

76 *Oil Platforms*, para. [74].

77 *Ibid.*, at para. [76].

78 A/HRC/3/2, 23 November 2006, *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1*.

mission of Inquiry on Lebanon states that it is convinced that this attack was pre-meditated. The targeting of the power station was undoubtedly unnecessary to the aim of curbing the threat from Hezbollah.

The fact that the types of targets targeted must be legitimate military targets is in keeping with the *ius in bello*, the laws of warfare. Moreover, in order to be considered a 'necessary' use of force in self-defence the state acting in self-defence must take precautions to minimise incidental damage to civilians.⁷⁹ It is contended that Israel did not take any necessary precautions to minimise such damage. In terms of the extent of the harm caused to civilians this seems clear: 1,191 deaths, one third of which were children; 4,409 people injured; and more than 900,000 displaced.⁸⁰ Most strikingly, as the Secretary General of the UN pointed out, more children than fighters have been killed in this conflict.⁸¹

It may be argued in defence of Israel that relevant precautions were taken by dropping cautionary flyers on the civilian population. However, the Commission of Inquiry on Lebanon has concluded that although warnings were given, they often did not allow sufficient time for the population to leave, and in any event, civilians were at risk of being attacked if they did leave. Israel has also argued that the IDF was targeting Hezbollah positions and support facilities, and that damage to civilians was incidental and resulted from Hezbollah using the civilian population as a 'human shield'. However, both Human Rights Watch⁸² and Amnesty International⁸³ have concluded that the evidence strongly suggests that the extensive destruction of public works, power systems, civilian homes and industry was deliberate and an integral part of the military strategy rather than just 'collateral damage'.

Therefore it is submitted that, in light of all three requirements outlined, the use of force by Israel in self-defence did not comply with the requirement of necessity under international law.

2 Proportionality

The requirement of proportionality is linked to the requirement of necessity. In light of the fact that it has been concluded that the use of force by Israel was unnecessary, it is inevitable that one will also reach the conclusion that the use of force was disproportionate. The requirement still demands separate consideration, however, largely because this issue has been the main point of discussion surrounding this conflict.

79 A. Cassese, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 EJIL 993, p. 355.

80 See note 78 above.

81 UNSC 'IT Is Absolutely Vital That The Fighting Now Stopps' (2006) UN Doc SG/SM/10595 <www.un.org/News/Press/docs/2006/sgsm10595.doc.htm> accessed 7 March 2007.

82 'Fatal Strikes: Israel's Indiscriminate Attacks Against Civilians in Lebanon' (2006) 18, Human Rights Watch 3(E). Amnesty International, Israel/Lebanon: Deliberate destruction or collateral damage? Israeli attacks on civilian infrastructure, August 2006.

83 Amnesty International, Israel/Lebanon: Deliberate destruction or collateral damage? Israeli attacks on civilian infrastructure, August 2006.

Furthermore, the ICJ gave separate discussion to this requirement in the *Oil Platforms* judgment despite the prior finding that the use of force by the USA was illegal. In addition to this it should briefly be pointed out that there have been debates about whether the requirement of proportionality has been subject to modification in light of 9/11. In particular, doubts have been raised whether the use of force should be proportionate to the attack itself or to the threat posed by the attackers. Whilst the majority of the international community denounced Israel's use of force as disproportionate,⁸⁴ the Foreign Minister of Israel has argued that the whole discussion is misguided because: 'Proportionality is not compared to the event, but to the threat, and the threat is bigger and wider than the captured soldiers.'⁸⁵ It is contended that this proposition should be dismissed at the outset. This definition of proportionality does not, and should not, form the law at present because to accept such an argument makes the requirements of both necessity and proportionality completely redundant. The traditional requirements of proportionality therefore apply and it will be demonstrated that Israel's use of force was disproportionate in light of those requirements.

First of all it is necessary to outline what is meant by the requirement of proportionality in this context. This requirement is particularly controversial because there are considerable differences of opinion as to how to measure proportionality. As with the requirement of necessity, the ICJ has rarely carefully analysed this condition.⁸⁶ In *Nicaragua* the Court's approach was not to focus on the nature of the attack itself and to ask what a proportionate response is, but rather to determine what is proportionate to achieving the legitimate goal under the Charter (for example, here the halting and repulsion of the attack).⁸⁷ State practice is also generally consistent on this issue.⁸⁸ Therefore, it is important to bear in mind that the requirement of proportionality does not require a weighing up of pain suffered and pain inflicted,⁸⁹ but what is proportionate to achieve the aim of halting and repelling the attack.

Despite the sparse guidance provided by the ICJ, it is possible to extract some guiding principles as to how proportionality functions from state practice and *opinio juris*, ICJ jurisprudence, and views of commentators. Gardam identifies various factors applicable to assessing the proportionality of the response in self-defence.⁹⁰ Those relevant to the present discussion are: the geographical and destructive scope of the response, the duration of the response, the selection of means and methods of

84 See the Security Council debates: S/PV.5489 and S/PV.5493. For a summary of the response: <<http://www.csmonitor.com/2006/0714/dailyUpdate.html>> accessed 8 March 2007.

85 S. Erlanger, 'With Israeli Use of Force, Debate Over Proportion' *The New York Times*, 19 July 2006. <<http://www.nytimes.com/2006/07/19/world/middleeast/19israel.html?ex=1310961600&en=7e6791fb127de87a&ei=5088&partner=rssnyt&emc=rss>> accessed 8 March 2007>

86 Briefly discussed in *Nicaragua* and *Oil Platforms*.

87 J. Gardam, *Necessity, Proportionality and the Use of Force by States* (2004), p. 158.

88 For example, Gardam cites the Falklands Islands and the 1990–1 Gulf conflicts.

89 G. Verdirame, 'Assessing Israel's right to self-defence' *Transatlantic Institute* 2 <http://www.ajc.org/atf/cf/%7B42D75369-D582-4380-8395-D25925B85EAF%7D/TI_2.PDF> accessed 8 March 2007.

90 J. Gardam, *Necessity, Proportionality and the Use of Force by States* (2004), pp. 155–179.

warfare, and targets.⁹¹ Each of these requirements shall be discussed in turn. It will be demonstrated that the use of force by Israel was disproportionate. This conclusion is supported by the response of the international community to Israel's use of force.

a) Geographical and destructive scope of the response

It is generally accepted that proportionality usually requires that forceful actions in self-defence be confined to the area of the attack that they are designed to repel. In addition, the 'extent to which interference with territorial rights of an aggressor state is consistent with limitations inherent in proportionate self-defence will differ from case to case'. It has also been recognised that in order to repel an attack, especially where a state needs to expel an invader, invading the territory of the aggressor state will sometimes be necessary.⁹² The United States' invasion of Panama is put forward by Gardam as a 'relatively clear-cut' example of a disproportionate response, and it is submitted that there is a parallel to be drawn in this instance. Israel conducted a full-scale assault from land, sea and air, killing thousands of civilians. It argued that in any conflict there would inevitably be 'collateral damage' and that this was the case here. Israel also argued that the reason why Israeli civilian casualties were so low, while they were so high in Lebanon, was that Israel has an infrastructure designed to protect its civilian population from attacks, whereas Lebanon has not.⁹³ This may be the case and yet, as has already been outlined above, two NGOs have found that the scale and ferocity of the attacks indicate that the extent of the devastation was not merely 'collateral damage'.⁹⁴ As in Panama, it was the scale of the invasion accompanied by the number of civilian casualties that attracted the most criticism. The Israeli use of force in Lebanon was widely denounced as 'excessive and disproportionate'.⁹⁵ Also the Secretary General himself denounced Israel's use of force stating that it had caused 'death and suffering on a wholly unacceptable scale'.⁹⁶ It would therefore appear that from previous state practice and the international community's reaction at the time that the use of force by Israel was disproportionate in terms of the geographical and destructive scope of the response.

b) The Duration of the Response

A response that may satisfy the requirements of proportionality at the outset may lose that character if it continues past the point in time that is necessary to deal effectively with the armed attack.⁹⁷ In relation to the Israeli response it is arguable that although the initial localised response was proportionate, because of the excessive du-

91 For discussion of the nature of targets see the earlier discussion of necessity.

92 J. Gardam, *Necessity, Proportionality and the Use of Force by States* (2004), p. 164.

93 G. Verdirame, *Assessing Israel's right to self-defence* Transatlantic Institute 2 <http://www.ajc.org/atf/cf/%7B42D75369-D582-4380-8395-D25925B85EAF%7D/TI_2.PDF> accessed 8 March 2007, p. 5.

94 See notes 82 and 83 above.

95 See note 84 above.

96 S/PV 5498, 30 July 2006, 11.40 a.m.

97 *Nicaragua*, para. [237].

ration of the later escalation, the proportionality requirement was violated. However, as has been outlined above, it is important to take into account the rapid escalation from both sides. All that can be said with certainty is that the longer the conflict continued the harder it was for Israel to justify its use of force in self-defence before the international community.

c) Means and Methods of Warfare

In addition to the destructive scope of the response, the means and methods of warfare are also relevant to the proportionality of Israel's use of force.⁹⁸ The ICJ itself has stated that a use of force that is proportionate under the law of self-defence or the *ius ad bellum* must also meet the requirements of the law applicable in armed conflict, the *ius in bello*.⁹⁹

In this context there is a distinction between whether the use of a particular weapon is disproportionate *per se*, and whether the manner in which it is used is considered disproportionate. Although allegations were made that Israel had used depleted uranium, white phosphorous and fuel air explosives during the hostilities, according to the Commission of Inquiry on Lebanon none of the weapons used by Israel were *per se* illegal under international humanitarian law.¹⁰⁰ Therefore the relevant assessment of proportionality must consider how, when, in what quantity, and against which targets the weapons were used, rather than what weapons were actually used. In this respect there are various reasons why the use of force by Israel was disproportionate. One such example is the use of cluster munitions by the IDF, ninety per cent of which were fired 72 hours before the end of the conflict. Cluster munitions disperse dozens and often hundreds of sub-munitions over a large area. These munitions have a high failure rate which result in numerous unexploded but volatile duds, which pose similar risks to civilians as anti-personnel landmines. The Commission of Inquiry found these weapons were deliberately used to turn large areas of fertile land into no-go areas for the civilian population.¹⁰¹ These cluster munitions are still causing deaths and casualties three months after the hostilities have ended. The use of such weapons in such a manner cannot be considered proportionate to curb the threat posed by Hezbollah.

In light of the issues outlined it must be concluded that Israel's use of force in Lebanon was both unnecessary and disproportionate, and this is supported by the majority view expressed throughout the international community.

98 J. Gardam, *Necessity, Proportionality and the Use of Force by States* (2004), p. 169.

99 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, at para. [42].

100 A/HRC/3/2, 23 November 2006, *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1*.

101 *Ibid.*, p. 58–60.

V. Conclusion

It may be concluded from this brief exposition of the legal issues surrounding the armed conflict in Israel and Lebanon that the use of force by Israel was not legitimate under international law. It has been demonstrated that Israel did not have a right to act in self-defence in response to the events that took place on 12 July, although such a right was widely supported within the international community. Moreover, the way in which Israel exercised that alleged right contravened international law. The response was neither necessary nor proportionate. In particular, statements made by political and military leadership at the time, and the indiscriminate nature of the targets besieged during the campaign, strongly suggest a punitive rather than a defensive purpose. The subsequent debate and the international response to the conflict demonstrate not only the continuing relevance and importance of the law on the use of force, but also the need for its clarification on certain points. The level of state complicity required in order for there to be a right against non-state actors needs elucidation, as does the definition of 'armed attack', especially in the current security climate. The fact that states must respect these rules is self-evident, even if sadly, as in this instance, the rules are honoured more in their breach than their observance.

Astrid Wiik*

Nothing but allegations and accusations? The legality of Israel's and Hezbollah's use of force in the July war of 2006

I. Introduction

After Hezbollah trespassed onto Israeli territory killing eight and kidnapping two soldiers in July 2006, Israel responded with massive military operations in Lebanon. The following month an intense armed conflict led to the death of approximately 1234 people, the displacement of 975 000 Lebanese and 300 000 Israelis, a cease in daily life in both countries and damage to large parts of the Lebanese infrastructure.¹ Apart from the human tragedy, discourse continues as to the legality of the conflict. Much remains unclear, because the existing law envisages conflicts arising between or within sovereign states. A framework regulating conflicts between a state and a foreign non-state actor has not evolved yet. Nevertheless, Cicero's dictum '*intra bellum leges silent*' is not accurate either. This paper discusses which norms limited the parties' military actions. Two aspects have to be separated: whether Israel had a right to use force against Lebanon, touching upon the *jus ad bellum*; and the conformity of the parties' military activities to international humanitarian law (IHL), the *jus in bello*.

II. Background

Israel and Lebanon share a violent history that persisted after Israel withdrew from Lebanon in 2000. Lebanon has long failed to control militant groups within its borders and Israel has a history of using force in Lebanon as a response to militant attacks.² Israel's invasion in 1982 to expel the PLO, which led to the emergence of Hezbollah as a Shiite militant group aiming at the deletion of Israel, has especially strained Lebanese-Israeli relations.³

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1 UN General Assembly Report A/HRC/2/7, 5.

2 See Security Council Resolutions 1655 (2006), 425, 426 (1978); S/PRST/2006/3.

3 'Timeline: Decades of conflict in Lebanon' at: <http://edition.cnn.com/2006/WORLD/meast/07/14/israel.lebanon.timeline/> (11. 02. 2007).

The recent conflict commenced on 12 July 2006 when Hezbollah launched diversionary rockets towards Israeli military positions and simultaneously entered Israeli territory, killing three and kidnapping two Israeli soldiers. An additional five soldiers died in the ensuing rescue attempt. The conflict terminated with an UN-brokered ceasefire on 14 August.⁴ Even though the government of Lebanon regarded Israel's actions as a violation of its territorial sovereignty, it distanced itself from Hezbollah and the Lebanese army remained passive throughout the conflict.

Hezbollah is divided into a socio-political and a militant arm. The socio-political arm is deep-seated in Lebanese society, providing a network of social institutions.⁵ Until November 2006, two Hezbollah members served as ministers in the Siniora-Cabinet. It is disputed, whether Hezbollah is a terrorist organization.⁶ As it is not decisive in this context, the term 'terrorist organization' will be avoided.

In the following section, the legality of Israel's response to Hezbollah will be examined.

III. Legality in *jus ad bellum*

The UN Charter prohibits the unilateral use of force by states. Article 2(4) provides that 'all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.' In the *Nicaragua Case*, the International Court of Justice (ICJ) held this rule to be of customary nature and *jus cogens*.⁷ Abidance to the norm is ensured through the Security Council which is vested with the primary responsibility for the maintenance of international peace and security and has the power to impose on states all measures it sees fit in accordance with the UN Charter to coerce compliance with Article 2(4).⁸

The military operations carried out by the Israel Defence Forces (IDF) without consent of the Lebanese Government on Lebanese territory fall undoubtedly under the prohibition of Article 2(4).

The UN Charter denominates two situations in which the deployment of force is legitimate: with authorization of the Security Council pursuant to Article 42 or subject to Article 51 if it is an exercise of the right to self-defence.⁹ Moreover, some states

4 Security Council Resolution 1701 (2006).

5 *Supra* note 1, 10.

6 While the USA and Israel regard Hezbollah as a terrorist organization, the UN and EU do not; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:144:0025:0029:EN:PDF>; <http://usinfo.state.gov/is/Archive/2004/Apr/29-636067.html> (05. 03. 2007).

7 ICJ, *Military and Paramilitary Activities in and Against Nicaragua*, Merits, 1986, para. 190; http://www.icj-cij.org/icjwww/icasess/inus/inus_ijudgment/inus_ijudgment_19860627.pdf (11. 02. 2007).

8 Article 24 UN Charter; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para. 26; <http://www.icj-cij.org/icjwww/idoocket/imwp/imwpframe.htm> (11. 02. 2007).

9 K. Ipsen, *Völkerrecht*, 5th ed. (2004), ch. 15, para. 10.

proclaim the existence of a customary norm granting a right to anticipatory or pre-emptive self-defence.¹⁰

The Security Council's reaction to Hezbollah's trespassing was delayed due to political differences. The attack was not defined as a threat to peace, breach of peace or an act of aggression as required for an action under Article 42. Thus, Israel's resort to force was not sanctioned by the Security Council. Resolution 1701 of 11 August 2006 did not retroactively legitimize the use of force.¹¹

Therewith, Israel's resort to force was only legal if Israel acted in self-defence.

1 Right to self-defence

Article 51 UN Charter states:

*'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations [...].'*¹²

There are three problematic issues. Firstly, it is questionable whether an armed attack carried out by a non-state actor – Hezbollah – can be imputed to the state where that actor resides, allowing the victim state to act in self-defence against the attacker on the territory of the other state. Otherwise, any action carried out by the victim state on the territory of the host state would itself violate Article 2(4) allowing the host state to react in self-defence.¹³ Secondly, the trespassing of Hezbollah must have constituted an armed attack. Thirdly, Israel's response must have respected the limitations of Article 51.

10 There is an inconsistency in the use of terminology. For the purposes of this paper, the terms anticipatory and pre-emptive self-defence are used interchangeably. Proponents refer to a definition that was developed in the Caroline incident in 1837. Thereafter, self-defence is legitimate when 'the necessity of that self-defence is instant, overwhelming and leaving no choice of means and no moment for deliberation'. In contrast, preventive self-defence merely anticipates an attack that is foreseeable. Interceptive self-defence as the narrowest concept describes a situation in which the aggressor has committed himself to an armed attack in an ostensibly irrevocable way and the attack is foreseeable, imminent and unavoidable. M. Brailey, 'The Use of Pre-emptive and Preventive Force in an Age of Terrorism', AA Journal (2004) Vol. II, 149, 150; M. Krajewski, 'Preventive Use of Force and Military Action Against Non-State Actors Revisiting the Right of Self-Defence in Insecure Times', <http://www.uni-potsdam.de/jpkrajewski/Publications/PreventiveUse.pdf>. The National Security Strategy of the USA of 2002 refers to pre-emptive self-defence but redefines it, approximating it to the concept of preventive self-defence. In this paper, the traditional understanding is meant when speaking of pre-emptive self-defence.

11 The entire conflict was defined as a threat to peace and security allowing the extension of the UNIFIL mission.

12 The Charter speaks of a right to act in self-defence. Thus, a state may decline to resort to counterforce. Y. Dinstein, *War, Aggression and Self-defence*, 4th ed. (2005), 179.

13 J. Somer, *Acts of Non-State Armed Groups and the Law Governing Armed Conflict*, 24.08.2006, 10 ASIL Issue 21.

With regard to the first issue, it has been argued that the term 'armed attack' demands an attack by another state. This understanding is forwarded by the ICJ in *Legal Consequences of the Wall*.¹⁴ However, as the dissenting Judges *Higgins*¹⁵ and *Koijmaans*¹⁶ point out, nothing in the wording of Article 51 supports such a narrow reading. There is a difference between assaults committed by non-state actors in an occupied territory and those that cross borders. That the latter qualify as armed attacks is reflected in Security Council Resolutions 1368 and 1373. These Resolutions, defining the 9/11 terrorist attacks as a threat to the peace, reaffirm the United States' right to inherent self-defence.¹⁷ Thus, armed attacks can be committed by non-state actors.

As any act of military self-defence encompassed by Article 51 necessarily is directed against the territory of another state, the armed attack by the non-state actor must be attributable to that state. In the *Corfu Channel Case*, the ICJ held that every state is obliged not to allow its territory to be used for acts contrary to the rights of other states.¹⁸ The same was enshrined in the Friendly Relations Declaration.¹⁹ If a state tolerates a situation in which armed bands control parts of its territory and use its territory as a base to launch attacks against another state, these attacks are attributed to that state²⁰ and it must tolerate actions being carried out on its territory against the armed group.²¹ To that extent, the host state forfeits its protection under Article 2(4).²²

Lebanon declared itself unable to disarm Hezbollah, although several Security Council Resolutions urge Lebanon to fulfil this international duty.²³ Lebanon's declaration is irrelevant in international law,²⁴ as Lebanon as a sovereign state must control its territory and comply with its obligations under Article 2(4).²⁵ The trespassing is imputed to Lebanon.

14 *Supra* note 8, para. 139.

15 *Supra* note 8, para. 33; http://www.icj-cij.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_separate_higgins.htm (04.03.2007).

16 *Supra* note 8, para. 35; http://www.icj-cij.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_separate_kooijmans.htm (04.03.2007).

17 A. Cassese, *International Law*, 2nd ed. (2005), 472 et seq.

18 ICJ, *Corfu Channel Case*, Merits, ICJ Reports (1949) 4, 22.

19 Principle 1; UN General Assembly Resolution 2625 (XXV), 1970.

20 J. Delbrück, 'The Fight against Global Terrorism', 44 GYIL (2001) 9, 15. The law on attribution must be separated from the law on state responsibility. Instead of bearing responsibility for the act itself, in the latter case the state will only be responsible for the omission of due diligence obligations; *supra* note 12.

21 *Supra* note 11, 206.

22 C. Tomuschat, 'Der 11. September 2001 und seine rechtlichen Konsequenzen', EuGRZ 2001, 535, 541. He also points out the difference to terrorists that are involved in a specific attack on a state. These individuals generally fall under the victim state's domestic criminal law without enjoying the privileges of IHL.

23 Security Council Resolutions 1559 (2004), 1680 (2006).

24 C. Tomuschat, 'Der Sommerkrieg des Jahres 2006 im Nahen Osten', 81 Friedenswarte (2006) 179, 181.

25 This is the significant difference from the *Nicaragua Case* where the ICJ stated that the USA could only be held responsible if it had effective control of the paramilitary operations in the course of which the violations were committed, *supra* note 7, para. 195.

As to the second issue, the Definition of Aggression Resolution lists incidents that are defined as aggression, including acts of non-state actors that are attributable to a host or sponsoring state.²⁶ In accordance with the Resolution, the ICJ held that 'the prohibition of armed attacks may apply to sending by a state of armed bands to the territory of another state, if such operation would have been classified as an armed attack rather than a mere frontier incident had it been carried out by regular armed force'.²⁷ This seems to be in accordance with most writers who require the fulfilment of two conditions: first, the attack must be grave, jeopardizing essential interests of the state in protecting its citizens and political order; and second, the violence must amount to a 'consistent pattern of violent terrorist action'.²⁸ The entering of Israeli territory to kidnap soldiers to negotiate an exchange of prisoners threatens Israel's security and violates its territorial integrity. Also, a history of violence between Hezbollah and IDF exists. Late violent eruptions include gunfire exchanges in 2003 in Shebaa Farms and the firing of rockets by Hezbollah in May 2006.²⁹ The trespassing and the prior incidents amount to an armed attack.

The third issue concerns the permissible degree of counterforce. Self-defence substitutes legal enforcement until the Security Council takes action.³⁰ Therefore, it must not surpass what is 'necessary and proportional in pursuit of legitimate military objectives'.³¹ Proportionality requires that the defence shall not be excessive in relation to the armed attack. It largely depends on the actual circumstances, the attacker's military force, his method and area of attack.³² If an attack is mainly orchestrated from areas remote from the place of attack, the victim state may react beyond the area of attack.³³

Hezbollah's armed attack constituted a serious border incident. A military operation directed against those Hezbollah positions from which Israel was attacked, would have been clearly proportional. It is doubtful whether a response beyond the border zone was proportional. No evidence has been presented that allows the conclusion that the attack was coordinated from Beirut. Evidence is lacking to justify the early bombing of Hariri International Airport, the seaport, roads and bridges on 13 July 2006.³⁴ If shown that Hezbollah used these facilities for the armed attack or to hide

26 *Supra* note 9, ch. 15, para. 10; Article 3(g) GA Resolution 3314 (XXIX).

27 *Supra* note 7, para. 195.

28 C. Schachter, 'The Lawful Use of Force by a State Against Terrorists in Another Country', in: H. Han (ed.), *Terrorism and Political Violence*, 1993, 243.

29 Israel MFA list of all incidents: <http://www.mfa.gov.il/NR/exeres/9EE216D7-82EF-4274-B80D-6BBD1803E8A7.frameless.htm?NRMODE=Published> (06. 03. 2007).

30 *Supra* note 17, 355.

31 *Supra* note 7, para. 194.

32 *Supra* note 9, ch. 15, para. 39.

33 *Ibid.*

34 The ICJ reached a similar conclusion in relation to Uganda's use of force in the Congo: 'the taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence.' ICJ, *Armed Activities on the Territory of the Congo*, 2005 ILM (2006) 45, 271.

the kidnapped soldiers, the attack might be proportional. However, on the basis of the information available, such a grave initial counterattack seems disproportionate.

2 Pre-emptive or anticipatory self-defence

Israel's measures might be legal if carried out in anticipatory self-defence to prevent graver attacks. Article 51 calls the right to self-defence an 'inherent right'. In the *Nicaragua Case*, the ICJ understood this term as referring to customary law predating the UN Charter.³⁵ This is flanked by the argument that in light of Weapons of Mass Destruction (WMD), states cannot be expected to wait until they are lethally attacked, but must be able to defend themselves pre-emptively.³⁶

Opponents argue that an ordinary reading of Article 51 forbids pre-emptive action, especially with regard to the purpose of the UN Charter to prohibit all use of force except in those instances explicitly listed in the Charter.³⁷ Moreover, every customary rule needs to be based on widespread state practice and *opinio juris*. Both are scarce:³⁸ Israel invoked anticipatory self-defence in some instances; the USA extended and used the concept to justify the 2003 invasion of Iraq.³⁹ However, all attempts to rely on the concept were forcefully rejected by the majority of states.⁴⁰ Israel cannot invoke anticipatory self-defence for its measures.

3 Conclusion

Respecting the current *jus ad bellum*, Israel had a right to self-defence, but its defence was disproportionate.

IV. Legality in *jus in bello*

Any use of force must also be compatible with IHIL. Its purpose is to spare those that are not involved in the conflict and to limit military actions to those of military necessity.⁴¹ Before turning to an examination of exemplary attacks, it is necessary to determine both the nature of the conflict and the applicable law.

35 *Supra* note 7, para. 193.

36 *Supra* note 10; A. Sofaer, 'On the Necessity of Pre-emption', 14 EJIL (2003) 209.

37 I. Brownlie, *Principles of Public International Law*, 6th ed. (2003), 700.

38 *Supra* note 9, ch. 15, para. 30.

39 *Supra* note 10; K. Peters, 'International Law and the Use of Force', QUT 4 L&Just. J (2004) 1, 6, 11.

40 *Supra* note 17, 360 et seq. The concept of interceptive self-defence is, by contrast, widely accepted.

41 P. O'Brien/C. Smith, 'The Use of Force in Self-Defence', 4; www.isil.ie (10. 02. 2007).

1 The nature of the conflict

IHL is tailored to the traditional armed conflicts between sovereign states (international armed conflicts).⁴² With peoples' struggle for self-determination, the concept of non-international armed conflicts evolved, describing internal domestic conflicts between a state and a non-state actor. The differentiation is significant as there is a comprehensive framework for international conflicts but only minimum standards to regulate non-international conflicts. Rationale for the difference is that most states prefer to handle internal violence within their domestic law.⁴³ Attacks of foreign armed groups like Hezbollah challenge this dual system, because the non-state actor neither emanates from within nor acts on behalf of a state.

It has been argued that conflicts between a state and a foreign armed group must be regarded as non-international armed conflicts.⁴⁴ The law on non-international conflicts views members of non-state armed groups as legitimate targets if they actively engage in the conflict, without granting them combatant status. While this would give states broad powers in dealing with such groups, it is difficult to argue that the conflict between Israel and Hezbollah was non-international in light of its actual dimension and the involvement of two foreign parties.⁴⁵

Additionally, according to Common Article 2 of the Geneva Conventions, a conflict is international in the case of a partial occupation of the territory of a party by another party (even if not met with armed resistance). Consequently, even though Lebanon was not involved in the conflict militarily, the Geneva Conventions applied, formally erecting a conflict between Lebanon and Israel. Furthermore, as two Hezbollah politicians served in the Lebanese government at that time, it could be argued that all military acts of Hezbollah have to be attributed to the state of Lebanon, making the conflict international.⁴⁶ Thus, relating to IHL, two international armed conflicts arose: one between Lebanon and Israel and another one between Hezbollah and Israel.

2. Applicable law

Israel and Lebanon are parties to the four Geneva Conventions.⁴⁷ Lebanon is party to the Additional Protocol I (AP I) to the Geneva Conventions. Like the USA, Israel has not ratified AP I.⁴⁸ However, many rules in AP I are customary law.⁴⁹ Only those

42 *D. Jinks*, 'September 11 and the Laws of War', 28 *Yale J Int'l L.* (2003) 1, 20.

43 *D. Kretzmer*, 'Targeted Killing of Suspected Terrorists', 16 *EJIL* (2005) 171, 195.

44 *Supra* note 42, 38.

45 *K. Ipsen*, 'Israel verstößt gegen das Völkerrecht, und die Hisbollah achtet es erst gar nicht', FR, 01.08.2006, 15 at: <http://www.friedenskooperative.de/themen/nahost25.htm> (06.03.2007); *M. Bothe*, 'Als Rechtsbegriff hat der „Krieg“ ausgedient', Interview *Sueddeutsche Zeitung*, 03.08.2006 at: <http://www.sueddeutsche.de/kultur/artikel/992/81911/3/> (06.03.2007).

46 *Supra* note 13.

47 Lebanon: 10.04.1951, Israel: 06.07.1951; <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (06.03.2007).

48 <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P> (06.03.2007). Both are parties to the Fourth Hague Convention of 1907 to which the Regulations Concerning the Laws and

norms that an ICRC study group in 2005 found to be of such nature will be cited as customary.⁵⁰

IHL is based on the prohibition of indiscriminate attacks which encompasses two major principles to be applied in every target selection: the principle of distinction and the principle of proportionality. In addition, belligerents must fulfil precautionary measures. Any attack – offensive or defensive – must satisfy these exigencies.

a) Principle of distinction

The principle of distinction determines that the belligerents must always distinguish between combatants and civilians, civilian and military objectives. Only military objectives and combatants comprise legitimate targets.⁵¹ The rationale of the principle is that war is only permissible as a means to weaken the enemy's military capacities.⁵² Thus, the definition of who is a combatant and what constitutes a military objective is of utmost importance if this concept of limited warfare shall be effective.

aa) Combatants

In international armed conflicts, combatant status expresses the right to participate directly in hostilities and to enjoy the rights of the Third Geneva Convention;⁵³ above all, the right to attack military objectives and combatants. Article 4 third Geneva Convention grants combatant status to members of two entities: armed forces and volunteer corps that fulfil several conditions, one being the conduct of operations in accordance with IHL. Hezbollah is not an army. It also fails to fulfil the conditions of Article 4(2)(d) by refusing to adhere to IHL. Thus, Hezbollah fighters do not acquire combatant status.⁵⁴

A question arises as to whether Hezbollah fighters classify as civilians, the other category of IHL. Civilians are those who are not combatants.⁵⁵ They are protected against attack, unless and for such time as they take direct part in hostilities.⁵⁶ The latter must be determined individually; the mere belonging to a group is insufficient. Such civilians become legitimate targets without enjoying combatants' rights.⁵⁷ Hos-

Customs on War on Land are annexed. The IMT of Nuremberg held them to be of customary nature (30 September 1946, 65). As IHL has developed largely since then, no reference will be made to the Regulations.

49 Customary international law is part of Israeli domestic law. Israel Supreme Court, *Public Committee against Torture et al. v. Government of Israel* (13. 12. 2006), HCJ 769/02, para. 19.

50 J.-M. Henckaerts (ed.), *Customary International Humanitarian Law Vol. 1: Rules*, 2005.

51 *Ibid.*, Rules 1, 7.

52 St Petersburg Declaration of 1868.

53 K. Dörrmann, 'The legal situation of unlawful/unprivileged combatants', 85 ICRC (2003) 45.

54 Israel Supreme Court, *Arad v The Knesset*, HCJ 2967/00, 54 PD(2), 188, 191.

55 *Supra* note 49, para. 26.

56 *Supra* note 50, Rule 6. Embraced by the Israel Supreme Court, *supra* note 49, para. 30.

57 *Supra* note 47, para. 31.

ilities are generally regarded as 'acts which by their nature and purpose are intended to cause actual harm to the armed forces', a condition Hezbollah fighters fulfil.⁵⁸ Concerns arise with regard to the terms 'takes direct part' and 'for such time'.⁵⁹ While it is clear that a person carrying arms or gathering intelligence information takes direct part, it is disputed whether a Hezbollah member driving ammunition to his peers does. Is physical involvement necessary? Can civilians only be targeted whilst carrying out hostilities or already when planning the attack?

If interpreted too narrowly, the right to self-defence against foreign non-state actors becomes nugatory. Fighters could bounce back and forth between their protected and unprotected status (revolving door phenomenon). A too broad interpretation, however, would undermine the principle of distinction. Various writers propose solutions. For example, it is argued, that in the special case of an armed conflict between a state and a foreign armed group, civilians should be denied the ability to revert to their protected status.⁶⁰ The USA and Israel seek to establish the category of unlawful combatants which shall encompass members of armed groups that refuse to abide by Article 4 and actively engage in conflict. They shall be legitimate targets for the entire conflict.⁶¹ However, under current IHL, members of Hezbollah are civilians, losing their status only for the time they engage in hostilities. The practical difficulties that arise have been outlined.

bb) Military objective

The customary definition of military objects is identical to Article 52 (2) AP I:⁶² an objective element requires that the object '*by its nature, location, purpose or use makes an effective contribution to military action*' whereas a subjective element stipulates that the '*total or partial destruction, capture or neutralization offers a definite military advantage in the circumstances ruling at the time.*'

Every object can become a military objective if it effectively contributes to military action. The classification depends on the actual circumstances. The purpose of the objective element is twofold: the destruction of the enemy is only admitted as a means to overcome his will; and the element ensures that civilian objects which support the conflict financially or psychologically do not qualify as military objectives.⁶³ It does not oppose the definition of such objects as military which also serve civilian needs like the general infrastructure. Due to their double function, these dual-use ob-

58 Y. Sandoz (ed.), *Commentary on the Additional Protocols*, 1987, 618. Proposals suggest including acts directed against civilians to encompass terrorists. See Israel Supreme Court, *supra* note 49, para. 33.

59 *Supra* note 50, 23; *supra* note 49, para. 39.

60 H. Parks, 'Air War and the Law of War', 32 *AFL Rev* (1990) 1, 118.

61 *Supra* note 47, para. 11. Israel's Supreme Court rejected the category, para. 28.

62 A. Cassese, 'The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law', 3 *UCLA Pacific Basin L.J.* (1984) 55, 86 et seq.

63 M. Sassòli, 'Targeting: The Scope and Utility of the Concept of 'military objectives' for the Protection of Civilians in Contemporary Armed Conflicts', in: D. Wippman (ed.), *New Wars, New Laws?*, 2005, 181, 199.

jects challenge the principle of discrimination. Practical implementation is difficult as it is almost impossible to assess the extent to which these objects effectively contribute to military action.⁶⁴

The objective element is criticised by US Army officials for failing to encompass the enemy's war-sustaining capabilities.⁶⁵ According to them, all objects that prolong a conflict constitute military objectives.⁶⁶

The subjective element reflects the principle of military necessity and obliges combatants to gather precise intelligence information of the enemy's objectives.⁶⁷ Moreover, the element requires the expectation of a definite, not only potential military advantage. While it must not be expected of each single military action, it must correspond to a concrete operation. To equate it with the entire war effort, like Israel does, would render it superfluous.⁶⁸

It has been argued that civilian morale forms a permissible advantage as it expedites an ending of hostilities.⁶⁹ This so-called effects-based targeting has served to justify attacks on the media.⁷⁰ Under current IHL, however, the direct military advantage must remain the decisive factor in target selection. Otherwise, the principle of distinction might be undermined.⁷¹

b) Principle of proportionality

Every targeting decision must be proportional. An attack against a combatant or a military objective cannot be carried out if it *'may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof which would be excessive in relation to the concrete and direct military advantage anticipated'*.⁷² If several military objectives can be attacked, only an attack on the military objective expected to cause the least damage to civilians and civilian objects is proportionate.

The principle serves as the vital link between military necessity and considerations of humanity in forming a corrective in favour of humanity in cases of contradictory interests.⁷³

64 B. Dougherty/N. Quéniwet, 'Has the Armed Conflict in Iraq Shown once more the Growing Dissension Regarding the Definition of a Legitimate Target', 16 Humanitäres Völkerrecht (2003) 4, 188, 190.

65 J. Meyer, 'Tearing down the Façade: A critical look at the Current Law on Targeting and the Will of the Enemy', 51 AFL Rev. (2001) 143, 180 et seq.

66 J. Burger, 'International Humanitarian Law and the Kosovo Crisis', 837 IRRC (2002) 365, 367.

67 S. Oeter, 'Methods and Means of Combat', in: Fleck (ed.), Handbook of Humanitarian Law, 1995, 105, 158.

68 Israel MFA *Responding to Hizbullah Attacks from Lebanon* <http://www.mfa.gov.il/MFA/Government/Law> (16.08.2006).

69 *Supra* note 65, 180 et seq.

70 *Supra* note 64, 190.

71 *Ibid.*

72 *Supra* note 50, Rule 14; compare Article 51(5)(b) AP I.

73 M. Bothe (ed.), *New Rules for Victims of Armed Conflicts: Commentary on the two Protocols Additional to the Geneva Conventions of 1949* (1982) 309.

The assessment takes place in the concrete situation on the basis of the information available, not on the actual results.⁷⁴ With regard to the difficult application in practice – especially when values of differing quality are involved – ‘excessive’ means that the disproportion must be obvious.⁷⁵

The breadth of the clause is unclear: must the attacker only look at the immediate effects or must he consider long term implications and the symbiotic effect of all attacks even if there is only a weak casual link between his actions and the overall effect?⁷⁶ There seems to evolve agreement in relation to environmental damages with a banning of attacks that cause severe, widespread and long-term damage.⁷⁷ However, too much cannot be expected, as a soldier acting in the heat of the battle will rarely have the means to foresee and assess all potential effects of a targeting choice, in particular if operations are conducted concurrently.

c) Defender's obligations

The defender has two main obligations: he is not allowed to intentionally utilize the civilian population or individual civilians *hors de combat* to render certain points or areas immune, in particular in attempts to shield military objectives from attacks or to impede the enemy's military operations.⁷⁸ The second obligation requires the defending party to employ precautionary measures to protect civilians against the consequences of attacks against military objectives, such as avoiding the location of military objectives within or near densely-populated areas.

3 Incidents

This subsection reviews exemplary military operations in light of the norms just outlined.

a) Infrastructure: roads and bridges.

The Lebanese government stated that 600 kilometers of roads and 62 bridges have been damaged.⁷⁹ The bombings cut large areas off from medical and food supplies.⁸⁰ IDF stated that ‘the roads in Lebanon are used to transport terrorists and weapons to

⁷⁴ *Supra* note 43, 201.

⁷⁵ *Supra* note 73, 365.

⁷⁶ The bombing of Jiyeh Power Station by the IDF, causing the leakage of 15,000 tons of oil into the Mediterranean Sea raised concern. EC officials have called the contamination an environmental disaster that will have grave consequences for the livelihood and health of the people in Lebanon. 17. 08. 2006 IP/06/1106; <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1106&format=HTML&taged=0&language=DE&guiLanguage=en> (06. 03. 2007)

⁷⁷ *M. Bothe*, ‘The Protection of the Civilian Population and NATO Bombing on Yugoslavia’, 12 EJIL (2001) 531, 532.

⁷⁸ Compare Article 51(7) API.

⁷⁹ MSA Lebanon Damage Report of 26. 07. 2006; <http://un.cti.depaul.edu/public/Lebanon/12/English/> (07. 03. 2007).

⁸⁰ Amnesty International, Israel/Lebanon: Deliberate destruction or ‘collateral damage’?, <http://web.amnesty.org/library/print/ENGMDE180072006> (08. 02. 2007).

the terror organisations operating from Lebanese territory against civilians in Israel.⁸¹ This generalized comment is insufficient. In order to qualify as a legitimate target, each road and bridge must entail an effective contribution to Hezbollah's military efforts and IDF must show that the destruction offers a definite military advantage.

Furthermore, the advantage expected from their destruction must outweigh the anticipated negative effects on civilians. While the destruction of most transport routes in Southern Lebanon served to destroy Hezbollah's mobility and arms supply, it isolated several towns and villages and interrupted the supply of food and medical aid. Bridges in their entirety, not just access to them, were destroyed. It seems that these targeting decisions were disproportionate.

b) Bombing of Beirut

150 apartment buildings in the Shiite suburbs of Beirut were destroyed.⁸² Israel's targeting policy aimed at Hezbollah's entire infrastructure including the headquarters and offices of the organization's social branch. The IDF position is that each building was a military objective. No detailed information was released.⁸³ The headquarters were military objectives, if used to coordinate military operations and if their destruction served the destruction of Hezbollah's military capacity. There is no evidence that the social offices are linked to the military. *Prima facie* their destruction appears illegal. The US Army wants to include all war-sustaining capabilities in the definition of military objectives.⁸⁴ This would legitimize the attacks on the objects listed. Israel seems to follow this strategy in arguing that certain armed conflicts – whose primary goal is to hinder the enemy from committing unlawful acts – require broader military discretion.⁸⁵

What are the likely consequences of such a broadening? It will be difficult to draw a line between war sustaining capabilities and civilian objects as the entire infrastructure somehow contributes to the war effort. The grocer selling food to Hezbollah members, the driver that takes him to a Hezbollah meeting, the ammunition factory that sells him a gun – they all enable him to continue the fighting. To preserve the principle of distinction, a line must be drawn and the only feasible criterion so far is that of a military nexus.⁸⁶ The proposal to condition the scope of IHL on the type of

81 Israel MFA, Summary of IDF operations against Hizbullah, 14.07.2006: <http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace+from+Lebanon+Hizbullah/IDF+Operations+against+Hizbullah+in+Lebanon+14-Jul-2006.htm> (11. 02. 2007).

82 *Supra* note 80.

83 IDF, The IDF-Hezbollah Confrontation, <http://www1.idf.il/DOVER/site/homepage.asp?clr=1&sl=EN&id=-8888&force=1> (11. 02. 2007); *supra* note 1, 10.

84 Articles 3B, 5D Military Commission Instruction No. 2 (30 April 2003) quoted by N. Qué-
nivet, 'A US version of what constitutes a 'military objective'?', BOFAXE, <http://209.85.135.104/search?q=cached:d6NafJIPouMJ:www.ruhr-uni-bochum.de/afh/publications/bofaxe/x256E.pdf+Military+Commission+Order+No.2+war+sustaining&hl=de&ct=clnk&cd=1&gl=de> (14. 03. 2007).

85 *Supra* note 68.

86 *Supra* note 24, 187 et seq.

war fought intermingles the *jus in bello* and the *jus ad bellum* and conflicts with IHL's objective to protect those uninvolved irrespective of the purpose or legality of the war.

c) Cluster Bombs⁸⁷

The IDF extensively used cluster bombs during the conflict, highlighting their efficacy in targeting moving rocket launch sites.⁸⁸ In September 2006, the UN had recorded 590 individual strike locations in populated and agricultural areas. Approximately 850 000–1 million bomblets were expended, of which an estimated 170 000–340 000 failed to explode. Most of the bombs were dropped in the final 72 hours of the conflict, when ceasefire was imminent.⁸⁹

Cluster bombs raise controversy as to their compatibility with the prohibition on indiscriminate attacks when used near or in populated areas. They cannot be precision guided. Moreover, as they cover wide areas it is nearly impossible to avoid civilian casualties. Thus, any cluster bomb strike in an area where military and civilian facilities commingle tends to be indiscriminate. As the majority of the bombs were released in the final stage of the war, military necessity is doubtful, as well. In light of the foregoing and a lack of information indicating military necessity in particular situations, the overall use of cluster bombs by Israel was indiscriminate.

d) Hezbollah's bombing and defence strategy

Hezbollah fired approximately 4000 rockets on Northern Israel. An estimated 23 percent of these hit inhabited areas including Haifa, Hadera and Nazareth. Hezbollah did not follow any specific targeting policy. To the contrary, it indiscriminately directed its weapons at cities without indicating the intention to target military objectives.⁹⁰ Therefore, Hezbollah's bombing strategy forms a blatant violation of IHL.

UN reports have documented incidents in which Hezbollah installed weapons and rocket launchers in or near civilian homes and operated from bunkers constructed underneath hospitals.⁹¹ Such acts constitute clear violations of the defender's obligations. Nevertheless, they neither liberate the attacker from his obligations nor does the object cease to be a military objective.⁹² The attacker remains bound to the prin-

87 After the conflict, a process was initiated to draft a prohibition treaty. Furthermore, in November 2006, Protocol V to the CWC entered into force, obligating belligerents to undertake clearance of explosive remnants of war and to provide information on their location. The Protocol does not explicitly refer to cluster bombs. <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/cluster-munition-interview-061106?opendocument> (07. 03. 2007).

88 *Supra* note 1, 13.

89 *Ibid.*, 13 et seq.

90 U. Rubin, 'Hizbullah's Rocket Campaign Against Northern Israel', 6 Jerusalem Brief 10, <http://www.jcpa.org/brief/brief006-10.htm> (14. 02. 2007).

91 *Supra* note 1, 14; 'Deadly Hezbollah Chess Match' at <http://www.washingtonpost.com/commentary/20061025-092622-2090r.htm> (11. 02. 2007).

92 Compare Article 51(8) AP I.

ciple of proportionality. Critics claim that this result incites violations while unduly burdening the attacker.⁹³ Proposals have been made to classify all voluntary human shields as combatants.⁹⁴ Such proposals are infeasible; it is unclear how an attacker shall distinguish between voluntary and involuntary shields. Moreover, such proposals would jeopardize the purpose of IHL: protecting civilians to the greatest extent possible.

V. Conclusion

The paper showed that Hezbollah's trespassing constituted an armed attack imputable to Lebanon granting Israel the right to resort to self-defence. Yet, the measures applied were disproportionate. Thereafter, the paper outlined that the current *jus in bello* is not designed to regulate conflicts between a state and a foreign non-state actor. New regulations are required, especially with regard to the legal status of Hezbollah fighters. An examination of the parties' military operations revealed a flagrant violation of IHL on Hezbollah's side. Israel generally adhered to IHL. In some instances, military expedience induced a perfunctory implementation of the law. Often, scarce information hampered a thorough examination of the conflict.

In 1952, *Lauterpacht* wrote: 'If international law is, in some ways, at the vanishing point of law, the law of war is, even more conspicuously, at the vanishing point of international law.'⁹⁵ Today, his statement remains accurate in that the success of IHL depends on a meticulous good faith application by the respective attacker. However, extensive media coverage of conflicts and the erection of the International Criminal Court with jurisdiction over war crimes make it difficult to escape IHL obligations.

93 *Supra* note 60, 163.

94 *M. Schmitt*, 'Targeting and Humanitarian Law', 34 *IYHR* (2004) 59, 95.

95 *H. Lauterpacht*, 'The Problem of the revision of the law of war', 29 *BYIL* (1952) 382.