

# The Second Lebanon War: *Jus ad bellum, jus in bello* and the Issue of Proportionality\*

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## I. Introduction

The 34 days of intense fighting which took place between Hezbollah on the one hand and Israel on the other during the summer of 2006, now commonly referred to as the “Second Lebanon War”,<sup>1</sup> raised not only political, but also significant, and to a large extent yet unresolved, fundamental legal issues of both, *jus ad bellum* and *jus in bello*.<sup>2</sup> More specifically, given the circumstances and realities of the armed conflict as it unfolded, one has to address in particular<sup>3</sup> issues of proportionality

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- <sup>1</sup> The Israeli cabinet had, by decision of 25 March 2007, formally decided to call said conflict with Hezbollah the “Second Lebanon War”, cf. Cabinet Communiqué of 25 March 2007, available at: <<http://www.mfa.gov.il/MFA/Government/Communiques/2007/Cabinet%20Communique%2025-Mar-2007>>. In Lebanon, the conflict is also referred to as the “July war”.
- <sup>2</sup> Cf. C. Tomuschat, “Der Sommerkrieg des Jahres 2006. Eine Skizze”, *Friedenswarte* 81 (2006), 179 et seq.; as well as S. Weber, “Die israelischen Militärfaktionen im Libanon und in den besetzten palästinensischen Gebieten 2006 und ihre Vereinbarkeit mit dem Völkerrecht”, *AVR* 44 (2006), 460 et seq. and E. Cannizzaro, “Contextualizing Proportionality: *jus ad bellum* and *jus in bello* in the Lebanese War”, *International Review of the Red Cross* 88 (2006), 779 et seq.; but cf. also for a critical view from an international relations standpoint H. Münkler, “Asymmetrie und Kriegsvölkerrecht. Die Lehren des Sommerkrieges 2006”, *Friedenswarte* 81 (2006), 59 et seq.; as well as D. Kramer, “Rechtliche Regelung asymmetrischer Konflikte? Völkerrecht und empirische Realität”, *ibid.*, 96 et seq., but cf. for a critical analysis of their views C. Tomuschat, “Der Sommerkrieg des Jahres 2006. Ein Schlusswort”, *Friedenswarte* 82 (2007), 107 et seq. Besides, the conflict also raised thorny issues *post bellum* since S/RES/1701 (2006) of 11 August 2006 adopted by the Security Council to bring about an end of the fighting, raises serious problems as to its nature and binding effect, which, however, will not be considered here.
- <sup>3</sup> The conflict also raises other issues of international humanitarian law, including the use of certain weapons as such, and more specifically the use of cluster munitions, cf. generally in that regard V. Wiebe, “Footprints of Death: Cluster Bombs as Indiscriminate Weapons under International Humanitarian Law”, *Mich. J. Int. L.* 22 (2000), 85 et seq., as well as specifically as to the use of cluster ammunition in Kosovo T.M. MacDonnell, “Cluster Bombs over Kosovo – a Violation of International Law?”, *Arizona Law Review* 44 (2002), 31 et seq. As to current attempts to outlaw cluster ammunition, the use of which is currently not regulated by specific rules of international humanitarian law, but solely by general rules, and, in particular the prohibition to use weapons of an indiscriminate nature cf. the homepage on the recent Oslo Conference on Cluster Munitions, February

with regard to both *jus ad bellum*, i.e. questions of the prohibition of the use of force under international law and possible exceptions thereto, and questions of the scope and possible limits of the right to self-defense under Article 51 of the Charter of the United Nations,<sup>4</sup> as well as questions of proportionality within the context of *jus in bello*, namely in relation to the causation of civilian damages when attacking military objects.<sup>5</sup>

Before doing so, it has to be noted, however, that many factual questions concerning the “Second Lebanon War” remain open and will most probably do so for a significant period of time, if not forever. This is the case notwithstanding the report of the *Commission of Inquiry on Lebanon* established by the Human Rights Council of the United Nations<sup>6</sup> on the occasion of its second special session on 11 August 2006.

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22 - 23 2007, available at: <<http://www.regjeringen.no/en/dep/ud/selected-topics/Humanitarian-efforts/The-Norwegian-Governments-initiative-for-conference.html?id=449312>>. As to the follow-up conference held in Lima from May 23-25, 2007 cf. <<http://hrw.org/english/docs/2007/05/25/global16006.htm>>. As of today, the legality of the use of cluster munitions would depend on the way they are used, i.e. whether they are exclusively used against larger concentration of members of the enemy armed forces (in which case their use is not prohibited by international humanitarian law) or rather in circumstances where their use can (or even necessarily would) lead to prohibited excessive incidental damage to civilians or civilian objects.

<sup>4</sup> Cf. A. Cassese, “Article 51”, in: J.P. Cot/ A. Pellet/ M. Forteau (eds), *La Charte des Nations Unies. Commentaire article par article*, 3rd edition 2005, 1329 et seq.; N. Ocho-Ruiz/ E. Salamanca-Aguado, “Exploring the Limits of International Law relating to the Use of Force in Self-defence”, *EJIL* 16 (2005), 499 et seq.

<sup>5</sup> Cf. J. Gardam, *Necessity, Proportionality and the Use of Force by States*, 2004, 85 et seq.; Y. Dinstein, “Collateral Damage and the Principle of Proportionality”, in: D. Wippman/ M. Evangelista (eds), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, 2005, 211 et seq.

<sup>6</sup> Cf. generally as to the overall mandate and structure of the new Human Rights Council P. Alston, “Reconceiving the UN Human Rights Regime – Challenges confronting the new UN Human Rights Council”, *Melbourne Journal of International Law* 7 (2006), 185 et seq.; M. Bossuyt, “The new Human Rights Council – a first Appraisal”, *NQHR* 24 (2006), 551 et seq.; W.S. Heinz, “Von der Menschenrechtskommission zum Menschenrechtsrat”, *Friedenswarte* 81 (2006), 129 et seq.; G. Theissen, “Mehr als nur ein Namenswechsel – der neue Menschenrechtsrat der Vereinten Nationen”, *Vereinte Nationen* 54 (2006), 138 et seq.

Still the report, delivered on 23 November 2006,<sup>7</sup> had in any case to deal only with alleged violations of Israel against international law.<sup>8</sup>

It follows therefore that any evaluation of legal issues arising under applicable norms of international humanitarian law is somewhat hampered. This is particularly true, *inter alia*, with regard to the attack on military objects within or in the vicinity of civilian settlements. It is against this background that the following considerations will almost exclusively focus on legal issues *stricto sensu*.

Before considering issues of international humanitarian law, one has to first consider whether the use of force by Israel as such was justified under international law and, in particular under the Charter of the United Nations.

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<sup>7</sup> Cf. Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, Doc. A/HRC/3/2 of 23 November 2006, available at: <<http://www.ohchr.org/english/bodies/hrcouncil/docs/CoILebanon.pdf>>.

<sup>8</sup> Human Rights Council resolution S-2/1 had already determined in its operative para. 1, notwithstanding the outcome of the report of the Commission of Inquiry that was about to be set up by this very resolution, that Israel had committed breaches of international humanitarian law in Lebanon. It is also worth noting that the very same resolution in its operative para. 7 had deliberately decided to limit the focus of the Commission both *ratione personae* and *ratione loci* to,

“(a) (...) investigate the systematic targeting and killings of civilians *by Israel in Lebanon*, (...)

(b) [t]o examine the types of weapons used *by Israel* and their conformity with international law; [and finally]

(c) [t]o assess the extent and deadly impact of *Israeli* attacks on human life, property, critical infrastructure and the environment”, (emphasis added), thus per se excluding any investigation of possible violations of international humanitarian law by Hezbollah. The Human Rights Council was criticized for this approach by the Commission of Inquiry which stated that said mandate, “does not allow for a full examination of *all* of the aspects of the conflict, nor does it permit consideration of the conduct of *all* parties” (emphasis in the original), cf. Report of the Commission of Inquiry, *ibid.*, para. 10. Cf. also paras 14-15 of the Report of the Commission of Inquiry.

## II. The Second Lebanon War, the Prohibition of the Use of Force and the Exercise of the Right to Self-Defense

### 1. Factual Background

The conflict began after Hezbollah had fired a series of Katyusha rockets and mortars at Israeli border villages.<sup>9</sup> At the same time, another armed Hezbollah unit crossed the Lebanese-Israeli border, kidnapping two Israeli soldiers and killing three other members of the Israeli armed forces.<sup>10</sup> Israeli troops attempted to rescue the abducted soldiers, but were unsuccessful, whereby five more members of the Israeli army were killed.<sup>11</sup> This raises the question which possible justifications might be relevant when considering the legality of the acts of Israel for the purposes of *jus ad bellum*.

### 2. Possible Justifications for the Use of Military Force by Israel

There is no doubt that the use of military force by Israel against Lebanon was not authorized by the Security Council. Besides, armed reprisals, or to use the more recent terminology used by the ILC in its Arti-

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<sup>9</sup> Israel-Hezbollah Conflict, Summary of Events, 12 July 2006, available at: <<http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hezbollah/Israel-Hezbollah+Conflict-+Summary+of+Events+July-Aug+2006.htm>>. Cf. also Israeli Ministry of Foreign Affairs, Israel's War with Hezbollah – Preserving Humanitarian Principles While Combating Terrorism, April 2007, available at: <<http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hezbollah/Preserving+Humanitarian+Principles+While+Combating+Terrorism+-+April+2007.htm>>.

<sup>10</sup> Special Cabinet Communiqué: Hezbollah Attack, 12 July 2006, available at: <<http://www.mfa.gov.il/MFA/Government/Communiques/2006/Special+Cabinet+Communique+-+Hezbollah+attack+12-Jul-2006.htm>>. See also Report of the Commission page 20/21 and S/RES/1701 (2006) of 11 August 2006.

<sup>11</sup> Ibid.

cles on State Responsibility,<sup>12</sup> countermeasures involving the use of force, have for a long time, but at the very latest since the inclusion of such a prohibition in the Friendly Relations Declaration of the General Assembly of 1970,<sup>13</sup> been prohibited under customary international law. This view is now confirmed in article 50 para. 1. (a) of the ILC Articles on State Responsibility.<sup>14</sup>

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<sup>12</sup> Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the ILC at its fifty-third session (2001) and by the General Assembly, cf. A/RES/56/83 of 12 December 2001.

<sup>13</sup> Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, A/RES/2625 (XXV) of 24 October 1970, which *inter alia* provides that, "States shall refrain in their international relations from the threat or use of force". Besides, it was previously in 1968 that the Security Council had condemned Israeli military attacks of 28 December against the airport of Beirut which Israel had attempted to justify as armed reprisal, see S/RES/262 (1968) of 31 December 1968,

"(...) *Observing* that the military action by the armed forces of Israel against the civil International Airport of Beirut was premeditated and of a large scale and carefully planned nature,

*Gravely concerned* about the deteriorating situation resulting from this violation of the Security Council resolutions,

*Deeply concerned* about the deteriorating situation resulting from this violation of the Security Council resolutions,

*Deeply concerned* about the need to assure free uninterrupted international civil air traffic,

1. *Condemns* Israel for its premeditated military action in violation of its obligations under the Charter and the cease-fire resolutions;

2. *Considers* that such premeditated acts of violence endanger the maintenance of the peace;

3. *Issues* a solemn warning to Israel that if such acts were to be repeated, the Council would have to consider further steps to give effect to its decisions;

4. *Considers* that Lebanon is entitled to appropriate redress for the destruction it has suffered, responsibility for which has been acknowledged by Israel."

<sup>14</sup> Said norm provides, "1. Countermeasures shall not affect: (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nation (...)". The ICJ has frequently confirmed in its jurisprudence the customary law nature of various principles of State Responsibility, as codified in the ILC Articles on State Responsibility (cf. lately Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, available at: <<http://www.icj->

It is against this background that any justification under international law of the Israeli use of force against Lebanon during the summer of 2006 may rely only, if at all, on Article 51 of the Charter of the United Nations.<sup>15</sup> This, in turn, raises three issues, namely, first, whether the use of military force by the Lebanese side had reached the necessary intensity in order to constitute an armed attack within the meaning of Article 51 of the Charter;<sup>16</sup> second, whether the shelling of Israeli dwellings and cities by Hezbollah<sup>17</sup> and the killing respectively the hijacking of Israeli soldiers since late June 2006 can be attributed to the state of Lebanon;<sup>18</sup> third, whether, and if so under what conditions, attacks by non-state entities such as Hezbollah, the acts of which may eventually not be attributed to any state, do in themselves trigger the right to self-defense under Article 51 of the Charter of the United Nations.<sup>19</sup>

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ij.org/>, with regard to arts 4 (cf. paras 385 et seq. of the judgment), 8 (cf. paras 398 et seq. of the judgment), 31 and 36 of the ILC articles (cf. para. 460 of the judgment)), but has so far never dealt with the issue of counter-measures involving the use of armed force, not least because no state has ever invoked such a right which, in itself, is quite telling. It is worth noting, however, that it was back in 1949 that the Court in the Corfu Channel case rejected what it referred to as “power politics”, cf. Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), ICJ Reports 1949, 4 et seq. (35 et seq.).

<sup>15</sup> Cf. generally as to the development of the law of self-defense until 2002, A. Randelzhofer, “Article 51”, in: B. Simma et al. (eds), *The Charter of the United Nations – A Commentary*, 2nd edition, 2002; for more recent developments cf. the comprehensive study by Y. Dinstein, *War, Aggression and Self-Defence*, 4th edition 2005, in particular 175 et seq.

<sup>16</sup> Cf. under II. 3.

<sup>17</sup> For an account of these actions prior to the Israeli counter-attack from an Israeli point of view cf. *inter alia* Hezbollah attacks along Israel’s northern border May 2000 - June 2006, 1 June 2006, available at: <<http://www.mfa.gov.il/NR/exeres/9EE216D7-82EF-4274-B80D6BBD1803E8A7,frameless.htm?NRMODE=Published>>.

<sup>18</sup> Cf. under II. 4.

<sup>19</sup> Cf. under II. 5.



### 3. The Intensity of the Military Actions by Hezbollah and the Notion of “Armed Attack” under Article 51 of the Charter of the United Nations

It is common knowledge that Article 51 of the United Nations Charter grants a state, which is exposed to an *armed attack*, the right to have recourse to acts of self-defense. It is the ICJ, however, which, ever since its judgment in the Nicaragua case,<sup>20</sup> takes the position that not each and every violation of the prohibition of the use of force under Article 2 para. 4 of the Charter of the United Nations in itself necessarily constitutes an armed attack within the meaning of Article 51 of the Charter. Instead, such violation of the prohibition of the use of force must, according to the Court’s jurisprudence, reach a certain level of intensity in order to simultaneously constitute an armed attack.<sup>21</sup> Accordingly, the ICJ had, by way of example, considered smaller border incidents, even when constituting a violation of Article 2 para. 4, as not (yet) amounting to an armed attack within the meaning of Article 51 of the Charter.<sup>22</sup> Following up on this jurisprudence, the ICJ had in 2003 in the Oil Platforms Case between Iran and the United States,<sup>23</sup> while generally acknowledging that a single attack on a foreign ship might

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<sup>20</sup> Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1986, 14 et seq.

<sup>21</sup> Ibid., para. 191:

“As regards certain particular aspects of the principle in question, it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.” But cf. for a critical view on this threshold approach *inter alia* J.L. Hargrove, “The *Nicaragua* Judgement and the Future of the Law of Force and Self-Defence”, *AJIL* 81 (1987), 135 et seq., (139 et seq.).

<sup>22</sup> Ibid., para. 195, the Court stated:

“In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also ‘the 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 such gravity as to amount to’ (*inter alia*) an actual armed attack conducted by regular forces, ‘or its substantial involvement therein’.”

<sup>23</sup> Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America), ICJ Reports 2003, 161 et seq.

constitute an armed attack,<sup>24</sup> *in concreto* not considered the damage to a U.S.-American ship as an armed attack which could be attributed to Iran.<sup>25</sup>

This approach raises the issue of the existence of a “grey zone” of such military acts, which on the one hand are prohibited by virtue of Article 2 para. 4 of the Charter, but which at the same time do not yet trigger the right to self-defense under Article 51 of the Charter.<sup>26</sup> Regarding the “Second Lebanon War”, there is no need to tackle that issue in detail, however, since the acts under consideration had, even when using the standard set out by the ICJ,<sup>27</sup> reached the level of intensity amounting to an armed attack.

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<sup>24</sup> The Court stated, “The Court 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’”(para. 72). Cf. also as to the question whether attacks on foreign vessels may, under Article 51 of the Charter respectively under parallel norms of customary international law, trigger the exercise of the right of self-defense, C. Lerche, *Militärische Abwehrbefugnisse bei Angriffen auf Handelsschiffe*, 1993, in particular 77 et seq.

<sup>25</sup> Oil Platforms case, see note 23, para. 78.

<sup>26</sup> Cf. most recently for a comprehensive study of this possible “lacuna”, K. Oellers-Frahm, “Der IGH und die ‘Lücke’ zwischen Gewaltverbot und Selbstverteidigungsrecht – Neues im Fall ‘Kongo gegen Uganda’?”, *Zeitschrift für Europarechtliche Studien* 10 (2007), 71 et seq. with ample further references.

<sup>27</sup> As a matter of principle, there are two possible ways to avoid the problems raised by the creation of such a “grey zone” of violations of the prohibition of the use of force not amounting to an armed attack: on the one hand, one might either consider that only large-scale instances of the use of force do amount to a violation of Article 2 para. 4 of the Charter and that by the same token similarly low-instance reactions by the “attacked” state, even when involving small-scale use of force are not prohibited, cf. for such proposition *inter alia* C. Kreß, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater*, 1995, 172 et seq.; A. Verdross/ B. Simma, *Universelles Völkerrecht*, 1984, 289 – 290, and lately the Separate Opinion of Judge Simma in the Oil Platforms case, see note 23, Separate Opinion Simma, para. 12. In the alternative, one could also, in order to bring the two notions of “use of force” under Article 2 para. 4 and “armed attack” under Article 51 of the Charter in line consider that the content of both coincide, cf. e.g. Q. Wright, *The Role of International Law in the Elimination of War*, 1961, 60; J. Becker, “The Continuing Relevance of Art. 2 (4)”, *Den. J. Int’l L. & Pol’y* 32 (2004), 583 et seq. (589-590).

*Inter alia*, it is not disputed there had been rocket attacks on Israeli territory from late 2005 until mid 2006 during which several people were killed.<sup>28</sup> On 12 July 2006, several Israeli soldiers were killed on Israeli territory by Hezbollah fighters, while two others were hijacked and taken into Lebanese territory.<sup>29</sup> At least when taken together, there seems to be no doubt that these acts involving both relatively large-scale and protracted cross-border shelling and incursions into the territory of another state, did amount to an armed attack within the meaning of Article 51 of the Charter of the United Nations, as defined by the above-mentioned jurisprudence of the ICJ.<sup>30</sup>

It is doubtful, however, whether such an attack must be attributable to another “state” in order to trigger the right of self-defense under Article 51 of the Charter, or whether instead this right of self-defense also comes into play in a case of armed attacks attributable to non-state entities such as Hezbollah.<sup>31</sup> This question would, however, be irrelevant provided the attacks undertaken by Hezbollah could under general international law be attributed to the state of Lebanon, anyway. It is therefore this question of attributability that must be tackled first.

#### 4. Attributability of the Acts of Hezbollah

As a matter of principle, acts by private persons or entities, *in concreto* Hezbollah, can be attributed to a state, *in concreto* Lebanon, if those persons or entities, first, are *de jure* or *de facto* governmental organs of a state,<sup>32</sup> or if they, second, perform governmental functions on behalf of such state,<sup>33</sup> or finally, third, if they are *de facto* directed or controlled by official authorities.<sup>34</sup>

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<sup>28</sup> Cf. note 9 et seq. above.

<sup>29</sup> Ibid.

<sup>30</sup> It is against this background that Israel did, by letter addressed to the president of the Security Council, notify the Security Council of its actions against Lebanese territory, as required by Article 51, 2nd phrase of the Charter, claiming to act in self-defense, cf. Doc. A/60/937-S/2006/515 of 12 July 2006.

<sup>31</sup> Cf. under II. 5.

<sup>32</sup> Cf. under II. 4. a. and c.

<sup>33</sup> Cf. under II. 4. b.

<sup>34</sup> Cf. under II. d.

**a. Attribution of the Acts of Hezbollah as *de jure* Organs of Lebanon (Article 4 ILC Articles on State Responsibility)**

Notwithstanding the fact that Hezbollah, under the circumstances prevailing at the relevant time, was (and indeed continues to be) represented in the Lebanese government,<sup>35</sup> the Hezbollah fighters which started the armed attack against Israel may not be considered formal organs of the Lebanese state within the meaning of article 4 of the ILC Articles on State Responsibility, which in turn has codified customary international law.<sup>36</sup>

This is due to the fact that any such attribution would, under article 4 para. 2 of the ILC Articles on State Responsibility, require that the persons acting on the ground must possess the “status [of an organ] in accordance with the internal law of the State”,<sup>37</sup> i.e. must “make up the organization of the State [in question] *and* act on its behalf.”<sup>38</sup> Thus, in order to qualify as a *de jure* organ, a person or group of persons must be formally incorporated into the state structure of the state concerned, which, as mentioned, was not the case with those military forces involved in the armed attack against Israel.

**b. Attribution of the Acts of Hezbollah as Persons or Entities Exercising Elements of Governmental Authority of Lebanon (Article 5 ILC Articles on State Responsibility)**

Neither may the acts of Hezbollah fighters be considered the conduct of persons or entities exercising elements of governmental authority within the meaning of article 5 of the ILC Articles on State Responsi-

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<sup>35</sup> This is true, *inter alia* for Muhammad Fneish and Trad Hamadeh, as well as independent Hezbollah-endorsed member Fawzi Sallouhk, cf. Heads of State and Cabinet Members, available at: <<http://www.infoplease.com/world/leaders/lebanon.html>>.

<sup>36</sup> Bosnian Genocide case, see note 14, para. 385.

<sup>37</sup> Cf. *ibid.*, para. 386, where the Court reiterates the very formulation contained in article 4 para. 2 of the ILC Articles on State Responsibility. The Court also confirmed that, unless there is a clear *lex specialis* to the contrary, the general rules of attribution apply to all different forms of violations of international law, *ibid.*, para. 401.

<sup>38</sup> ILC Commentary to article 4 para. 1 of its Articles on State Responsibility, para. 1, referred to by the ICJ in its recent judgment in the Bosnian Genocide case, see note 14, para. 388 (emphasis added).

bility, since this would not only somewhat similarly require an empowerment by virtue of the law of the state concerned, i.e. Lebanon, but furthermore also require that the specific acts were undertaken in such capacity.<sup>39</sup> Since the Lebanese government had neither empowered Hezbollah to exercise governmental authority, nor still less to undertake military action on its behalf, the acts of Hezbollah may not be attributed by virtue of article 5 of the ILC Articles on State Responsibility.

**c. Attribution of the Acts of Hezbollah as *de facto* Organs of Lebanon (Article 4 ILC Articles on State Responsibility)**

Notwithstanding the fact that Hezbollah does not qualify as a *de jure* organ of Lebanon,<sup>40</sup> the military attacks undertaken by Hezbollah fighters against Israel might nevertheless be attributed to Lebanon, provided they could be considered to have acted as *de facto* organs of Lebanon. As the ICJ had already stated, however, in the Nicaragua case<sup>41</sup> and most recently reconfirmed in the Genocide case,<sup>42</sup> such attribution would presuppose not only a complete dependence by the respective group,<sup>43</sup> lacking any real autonomy of its own,<sup>44</sup> so that it could be considered a mere instrument or agent of the state concerned,<sup>45</sup> but also a particularly great degree of control by the state involved.<sup>46</sup> Accordingly, any such qualification solely serves to cover an exceptional situation,<sup>47</sup> where the state could escape its otherwise existing international responsibility despite the alleged independence of the group being nothing but a pure fiction.<sup>48</sup>

Yet, the very fact that the Security Council had frequently requested that Lebanon should exercise full control over its entire territory, and

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<sup>39</sup> ILC Commentary to article 5 para. 7 of its Articles on State Responsibility, see note 38.

<sup>40</sup> Cf. under II. 4. a.

<sup>41</sup> Nicaragua case, see note 20, para. 109/110.

<sup>42</sup> Bosnian Genocide case, see note 14, para. 385.

<sup>43</sup> Ibid., para. 110.

<sup>44</sup> Ibid., para. 394.

<sup>45</sup> Ibid., para. 392.

<sup>46</sup> Ibid., para. 393.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid., para. 392.

particularly those parts of its territory bordering Israel,<sup>49</sup> already demonstrates that Hezbollah could not be considered to have been subject to complete control by Lebanon. Besides, since even Israel itself had continuously claimed that third states such as Syria and Iran had supported Hezbollah, e.g. by the delivery of weapons,<sup>50</sup> shows that Hezbollah was not sufficiently dependent on Lebanon. Its acts could therefore not be attributed to Lebanon as constituting *de facto* organs.

**d. Attribution of the Acts of Hezbollah as Acting Under the Direction and Control of Lebanon (Article 8 ILC Articles on State Responsibility)**

Accordingly, the only remaining possibility of attribution is to consider that the acts of Hezbollah were directed or controlled by Lebanon within the meaning of article 8 of the ILC Articles on State Responsibility. According to article 8 the conduct of a person or group of persons shall be considered an act of a state if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that state. This raises the question, however, to what extent Lebanon has controlled or directed the acts of Hezbollah.

Previously, in the Nicaragua case the ICJ, relying on article 3 lit. g.) of the Definition of Aggression in A/RES/3314 (XXIX),<sup>51</sup> considered that private acts of military violence might be attributed to a state, provided such state uses these armed groups under its control against another state. This general possibility of attributing acts of irregular troops, acting on behalf of a state, relying on article 3 lit. g.) of the

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<sup>49</sup> Cf. note 89 below.

<sup>50</sup> Cf. e.g. the allegations contained in “Iranian complicity in the present Lebanese crisis – July-August 2006”, 15 August 2006, available at: <<http://www.mfa.gov.il/MFA/The+Iranian+Threat/Support+of+terror/Iranian%20complicity%20in%20the%20present%20Lebanese%20crisis%20-%20July-Aug%202006>>.

<sup>51</sup> Under article 3 lit. g.) of the Definition of Aggression, as contained in A/RES/3314 (XXIX) of 14 December 1974, “The 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 such gravity as to amount to the acts listed above, or its substantial involvement therein”, shall qualify as an act of aggression; for a detailed analysis of the definition of aggression, see B. Ferencz, “Defining Aggression: Where It Stands and Where It’s Going”, *AJIL* 66 (1972), 491 et seq.

Resolution, has lately been reconfirmed once again by the ICJ in December 2005 in the case between the Democratic Republic of the Congo and Uganda.<sup>52</sup>

It was in 1986 in the Nicaragua case, that the ICJ had taken the position, however, that any such attribution by virtue of the principle now contained in article 8 of the ILC Articles on State Responsibility, which the Court considers to have also codified customary international law,<sup>53</sup> requires a so-called “effective control” over the groups or non-state entities concerned and their military or paramilitary operations.<sup>54</sup> Yet, unlike in the case of attribution under article 5 ILC Articles on State Responsibility,<sup>55</sup> there is no need to prove “complete” dependence of the group.<sup>56</sup> On the other hand, it was again in its Nicaragua judgment, that the ICJ had also stressed that, in order to attribute such acts emanating from irregular groups, the control by the state concerned must extend to specific individual acts.<sup>57</sup> In other words, a simple “overall control” would not be sufficient in order to bring about attribution of acts of non-state entities.

In sharp contrast thereto, the International Criminal Tribunal for the Former Yugoslavia (ICTY) had in its own jurisprudence, both in relation to the somewhat different question of the qualification of an armed conflict as possessing an international or a non-international character, and with regard to the question of attribution for purposes of state responsibility, considered it to be sufficient that the state con-

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<sup>52</sup> Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, para. 146, available at: <<http://www.icj-cij.org/docket/index.php?p1=3&k=51&case=116&code=co&p3=4>>. The Court stated *inter alia* that it: “has found (...) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974”, thus implying, had it found otherwise, that those acts would then have to be attributed to the Democratic Republic of Congo.

<sup>53</sup> Bosnian Genocide case, see note 14, para. 398.

<sup>54</sup> Nicaragua case, see note 20, para. 116/117.

<sup>55</sup> See note 38.

<sup>56</sup> Bosnian Genocide case, see note 14, para. 143.

<sup>57</sup> Nicaragua case, see note 20, para. 115.

cerned was exercising “overall control” over the acts of the respective non-state group.<sup>58</sup>

Notwithstanding, the ILC had in turn, in its own codification work on the law of state responsibility, however, followed the approach originally taken by the ICJ in the Nicaragua case, as is demonstrated by the official commentary accompanying article 8 of the then Draft Articles on State Responsibility.<sup>59</sup> Most recently, the ICJ has once again reiterated its own strict view in its judgment of 26 February 2007 in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). In particular, it underlined that this form of strict attributability does apply, as a matter of principle, to all various forms of illegal acts under international law.<sup>60</sup> It thus also applies to possible violations of the prohibition of the use of force and the undertaking of an armed attack within the meaning of Article 2 para. 4 respectively Article 51 of the UN Charter, unless there is proof of a divergent *lex specialis*.<sup>61</sup> More specifically, the ICJ has underlined that the rule contained in article 8 of the ILC Articles on State Responsibility is to be considered as an extension of the general rule, under which states are, at least as a matter of principle, only responsible for acts of their

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<sup>58</sup> International Criminal Tribunal for the Former Yugoslavia, IT-94-1-A, Judgment of 15 July 1999, Prosecutor v. Dusko Tadić, paras 124 et seq., discussing the Nicaragua standard, and more specifically para. 131 where the Appeals Chamber stated, “In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, *it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.*” (emphasis added). Cf. also A. de Hoogh, “Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadić case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia”, *BYIL* 72 (2001), 255 et seq.

<sup>59</sup> ILC Commentary to article 8 para. 5 of its Articles on State Responsibility, see note 38 where the ILC explicitly rejected the standard of attribution developed by the ICTY in the Tadić case.

<sup>60</sup> Bosnian Genocide case, see note 14, para. 401.

<sup>61</sup> Ibid.



own organs.<sup>62</sup> Accordingly, it is necessary, that the organs of the state concerned are indeed in a position to direct the behavior of the non-state actor, since otherwise the necessary nexus would no longer exist.<sup>63</sup>

Following this line of argument so far consistently followed by the ICJ, it is probably true to say that the attacks by Hezbollah in June 2006 may not be attributed to the state of Lebanon, given both the degree of independence of Hezbollah and the lack of effective control Lebanon was exercising in the southern part of its own territory, including over Hezbollah fighters operating in the area.<sup>64</sup> Yet, even if one were to follow, be it only *arguendo*, the approach chosen by the ICTY in its Tadić line of jurisprudence, any attribution would still require, as the Appeals Chamber of the ICTY had stated, “*overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.”<sup>65</sup> Accordingly, there still would be serious doubts, as to whether one could consider that the authorities of Lebanon, considering the role of Hezbollah as a “state within the Lebanese state”, had been in a position to exercise such overall control over the acts of Hezbollah. Thus, and in any event, at the time the Israeli military measures were taken against Lebanese territory, there was no armed attack which could be attributed to the state of Lebanon under traditional rules of state responsibility.

Still it follows the question, whether an armed attack emanating from a non-state actor, such as Hezbollah, nevertheless empowers the attacked state to exercise its right to self-defense under Article 51 of the Charter of the United Nations.

## 5. Exercise of the Right to Self-Defense Against Attacks Emanating from Non-State Actors

In its Advisory Opinion on the legality of the Israeli security wall in the occupied Palestinian territories,<sup>66</sup> the ICJ has, without further justi-

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<sup>62</sup> Ibid., para. 406.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid., para. 401.

<sup>65</sup> Tadić case, see note 58, para. 145.

<sup>66</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136 et seq.

fication and explanation, however, taken the position that the scope of application of Article 51 of the Charter of the United Nations is limited to the defense against attacks emanating from another *state*. The Court specifically stated in that regard, when dealing with the Israeli argument that the security wall allegedly served Israel's defense against attacks from non-state terrorist organizations and accordingly did not amount to a violation of international law, that,

“Article 51 of the Charter (...) recognizes the existence of an inherent right of self-defence in the case of *armed attack by one State against another State*. However, Israel does not claim that the attacks against it are imputable to a foreign State. (...)”<sup>67</sup>

Consequently, the Court concluded that Article 51 of the Charter had no relevance in that case.

Hereby the Court continued a line of jurisprudence which it had started, be it only implicitly, in 2003 in its judgment in the Oil Platforms case.<sup>68</sup> In said judgment, the Court had considered that the United States, in order to be able to rely on Article 51 of the Charter of the United Nations *vis-à-vis* attacks on ships occurring in the Persian Gulf, must at least claim to be the victim of attacks which are attributable to Iran, when stating that “[t]he United States has to show that attacks had been made upon it for which Iran was responsible.”<sup>69</sup>

In the meantime, the ICJ no longer seems to take a firm position on the matter anymore. *Inter alia*, it was in 2005 in the Case concerning Armed Activities on the Territory of the Congo<sup>70</sup> that the Court expressly left it open whether, and if so under what conditions, contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces, i.e. non-state armed attacks.<sup>71</sup>

In that regard, one must first take note of the fact that the very wording of Article 51 of the Charter does not contain any specific ref-

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<sup>67</sup> Ibid., para. 139 (emphasis added).

<sup>68</sup> Oil Platforms case, see note 23.

<sup>69</sup> Ibid., para. 51.

<sup>70</sup> Congo/Uganda case, see note 52.

<sup>71</sup> Cf. *ibid.*, para. 147, where the Court stated that, given the circumstances of the case, there is, “no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.”

erence to the state character of a given armed attack.<sup>72</sup> This is even more important since Article 2 para. 4 of the UN Charter, in turn, indeed does refer to such an inter-state relation insofar as the latter norm only 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 ...*” (emphasis added). This difference between Article 2 para. 4 on the one hand, and Article 51 of the UN Charter on the other, seems to imply, by way of an *argumentum e contrario*, that Article 51 of the Charter in turn does not require any inter-state situation.<sup>73</sup> A teleological interpretation in line with the very purpose of Article 51 of the Charter, i.e. the goal of protecting the victim of an armed attack pending action by the Security Council, also seems to militate for the proposition that Article 51 of the Charter does not require an armed attack emanating from another state, but instead only refers to the perspective of said victim state, for whom it is irrelevant and indeed in most instances not even recognizable from whom the attack is emanating or whether the acts of a non-state entity might be attributed to a state or not.<sup>74</sup>

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<sup>72</sup> Cf. for such proposition e.g. Separate Opinion Kojimans, *ibid.*, paras 26 et seq. (27), where Judge Kojimans takes the position that, “[i]f the activities of armed bands present on a State’s territory cannot be attributed to that State, the victim State is not the object of an armed attack by it. But if the attacks by the irregulars would, because of their scale and effects, have had to be classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its *inherent* right of self-defence.” (emphasis in the original). Cf. also already his Separate Opinion in the Advisory Opinion on Legal Consequences of the Construction of a Wall, see note 66, para. 35 where he had already stated that Article 51 merely, “conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State (...)”.

<sup>73</sup> T. Bruha/ C. Tams, “Self-Defence Against Terrorist Attacks. Considerations in the Light of the ICJ’s ‘Israeli Wall’ Opinion”, in: K. Dicke et al. (eds), *Weltinnenrecht – liber amicorum Jost Delbrück*, 2005, 85 et seq. (94 et seq.).

<sup>74</sup> S. Talmon, “Grenzen der ‘Grenzenlosen Gerechtigkeit’”, in: W. März (ed.), *An den Grenzen des Rechts*, 2003, 101 et seq. (142); cf. J. Delbrück, “The Fight Against Global Terrorism: Self-defence or Collective Security as International Police Action? Some Comments on the International Legal Implications of the ‘War Against Terrorism’”, *GYIL* 44 (2001), 9 et seq. (15); Dinstein, see note 15, 204 – 208. Cf. also Rule 6 of the Chatham House

On the other hand, one could also argue that Article 51 of the UN Charter, providing for an exception from the general prohibition of the use of force as contained in Article 2 para. 4 of the Charter, has, in line with general principles of interpretation, to be interpreted restrictively.<sup>75</sup>

Besides, subsequent state practice within the meaning of article 31 of the Vienna Convention on the Law of Treaties relating to Article 51 of the UN Charter was, at least until the end of the last century, largely, if not almost exclusively, formed by the conviction that the right to self-defense would and could only apply in cases of armed attacks emanating from or initiated by a state.<sup>76</sup> This state practice has, however, significantly changed since the attacks of 11 September 2001. *Inter alia*, both, S/RES/1368 (2001), as well as S/RES/1373 (2001), have confirmed the right to self-defense against those actors responsible for the attacks, without mentioning and indeed still less discussing, the question whether the attacks did indeed emanate from a state or not. The Security Council has thereby recognized the inherent right of individual or collective self-defense without making any reference to an armed attack which may be attributed to a state.<sup>77</sup> It is certainly not the least the Security Council and its practice which is, given its primary responsibility for the maintenance of international peace and security under the UN Charter, and further given the fact that Article 51 is to be found in

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“Principles of International Law on the Use of Force by States in Self-Defence” adopted by a group of British scholars in 2005 (for further details and the accompanying report cf. <<http://www.chathamhouse.org.uk/index.php?id=79>>): “Article 51 is not confined to self-defence in response to attacks by states. The right of self-defence applies also to attacks by non-state actors. In such a case the attack must be large scale. If the right of self-defence in such a case is to be exercised in the territory of another state, it must be evident that that state is unable or unwilling to deal with the non-state actors itself, and that it is necessary to use force from outside to deal with the threat in circumstances where the consent of the territorial state cannot be obtained. (footnote omitted) (...)”.

<sup>75</sup> Cf. for such a proposition e.g. M. Bothe in: W. Vitzthum (ed.), *Völkerrecht*, 2004, 589 et seq. (597), as well as Randelzhofer, in: Simma, see note 15, 788 et seq. (802).

<sup>76</sup> Judge Koijmans, in his Separate Opinion in the Congo/Uganda case, see note 72, para. 28, refers to what he calls a “generally accepted interpretation for more than 50 years”.

<sup>77</sup> See preamble para. 3 of S/RES/1368 (2001) of 12 September 2001, as well as preamble para. 4 of S/RES/1373 (2001) of 28 September 2001.

Chapter VII of the UN Charter as an exception to Article 2 para. 4 of the Charter, relevant when considering and interpreting the content of the provisions of the Charter of the United Nations dealing with the prohibition of the use of force.<sup>78</sup>

The same more liberal approach as to the possibility to act in self-defense *vis-à-vis* a non-state armed attack is also mirrored in the reactions by a significant number of states, after 11 September 2001, within the framework of both NATO<sup>79</sup> and the OAS,<sup>80</sup> which serve as further examples of recent state practice and *opinio juris* allowing for self-defense against armed attacks by non-state actors.

Yet, even if one were to take the position that measures of self-defense could not be taken against the aggressor in each and every case of armed attacks emanating from non-state actors (even provided they reach a sufficient level of intensity in order to constitute an armed attack<sup>81</sup>), one would have to still recognize that at least under certain circumstances, as proven by the example of Afghanistan after 11 September 2001, different considerations must prevail.

In the case of Afghanistan, the Security Council had requested the Taliban regime not to use by themselves and not to allow territory under their control to be used for aggressive acts against other states.<sup>82</sup> It was after the Taliban regime had failed to do so that the Security Council adopted S/RES/1368 and 1373 (2001) recognizing the right to take

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<sup>78</sup> J. Alvarez, *International Organizations as Law-makers*, 2005, 184 et seq. and 196 et seq.

<sup>79</sup> Press Release 124 (2001) of 12 September 2001, "Invocation of Article V of the Washington Treaty", available at: <<http://www.nato.int/docu/pr/2001/p01-124e.htm>>.

<sup>80</sup> Press Release E-194 (2001) of 21 September 2001, "Invocation of the Treaty of Reciprocal Assistance", available at: <<http://www.oas.org/OASpage/press2002/en/press2001/sept01/194.htm>>.

<sup>81</sup> Cf. under II. 3.

<sup>82</sup> Cf. *inter alia* S/RES/1267 (1999) of 15 October 1999, operative para. 1, which provides that, "the Taliban [shall ....] cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with efforts to bring indicted terrorists to justice (...)". This obligation was reconfirmed by S/RES/1333 (2000) of 19 December 2000.

measures of self-defense against the attacks of 11 September 2001.<sup>83</sup> This practice of the Security Council might be interpreted in the way, that the Security Council, by determining that a given situation did constitute a threat to the international peace and security<sup>84</sup> and by further requiring either a territorial state or an entity exercising *de facto* control over certain territory, to take certain actions, thereby provided for a specific norm of attribution, constituting a *lex specialis*, in case no such action is taken and further provided such territory is then used for acts by non-state actors constituting an armed attack against another state.

Such a situation where the Security Council had specifically requested a certain state to take action against a non-state group and not to have its territory used for hostile acts against another state is significantly different from a mere absence of action by the territorial state. In that regard, it is quite telling that the ICJ, when confronted in the case concerning Armed Activities on the Territory of the Congo<sup>85</sup> with the claim that,

“armed attacks by armed bands whose existence is tolerated by the territorial sovereign generate legal responsibility and therefore constitute armed attacks for the purpose of Article 51”,  
leading to,

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<sup>83</sup> As was rightly pointed out by R. Wolfrum/ C.E. Philipp, “The Status of the Taliban: Their Obligations and Rights under International Law”, in: J.A. Frowein/ R. Wolfrum (eds), *Max Planck UNYB* 6 (2002), 559 et seq. (589, there footnote 114), there can be no doubt, that the attacks of 11 September 2001 were clearly of a magnitude that, if undertaken by a state or by state organs, would have constituted an armed attack and would accordingly have clearly triggered the right of self-defense under Article 51 of the Charter.

<sup>84</sup> With regard to Afghanistan generally and the behavior of the Taliban more specifically, the Security Council had on various occasions determined that a threat to international peace and security within the meaning of Article 39 of the Charter did exist, cf. *inter alia* S/RES/1267 (1999) of 15 October 1999, S/RES/1333 (2000) of 19 December 2000 and S/RES/1363 (2001) of 30 July 2001.

<sup>85</sup> Congo/Uganda case, see note 52.

“a separate, a super-added standard of responsibility, according to which a failure to control the activities of armed bands, creates a susceptibility to action in self-defence by neighbouring States”<sup>86</sup>

stated that it,

“cannot conclude that the absence of action by Zaire’s Government against the rebel groups in the border area is tantamount to ‘tolerating’ or ‘acquiescing’ in their activities.”<sup>87</sup>

It therefore, and rightfully so, rejected that part of Uganda’s first counter-claim alleging Congolese responsibility for tolerating the rebel groups.<sup>88</sup>

It follows that, as in the case of Afghanistan, the inaction by a territorial state which has been expressly requested by the Security Council to take action against armed groups operating from its territory against other states, does constitute a specific form of *qualified* inaction which in turn must enable states concerned, pending Security Council action under Chapter VII, to themselves exercise their right of self-defense under Article 51 of the Charter.

This approach can, *mutatis mutandis*, be transposed to the situation between Israel and Lebanon as it existed after the shelling of Israeli dwellings by Hezbollah forces and the Hezbollah incursions into Israeli territory. As a matter of fact, the Security Council had, on several occasions, previously called upon Lebanon to fully extend and exercise its sole and effective authority throughout its own territory. More specifically, Lebanon had been called upon by the Security Council to prevent attacks from Lebanon across the so-called “Blue Line” into Israel.<sup>89</sup> The fact that the Security Council had with regard to Lebanon, and unlike in the case of Afghanistan, not acted under Chapter VII

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<sup>86</sup> Congo/Uganda case, see note 52, Statement of I. Brownlie of 18 April 2005, *Compte Rendue* 2005/7, 30, para. 80.

<sup>87</sup> Congo/Uganda case, see note 52, para. 301.

<sup>88</sup> *Ibid.*

<sup>89</sup> See e.g. S/RES/1614 (2005) of 29 July 2005, operative para. 6, whereby the Security Council called upon the government of Lebanon to, “fully extend and exercise its sole and effective authority throughout the south, (...) and to exert control and monopoly over the use of force on its entire territory and to prevent attacks from Lebanon across the Blue Line”. Similar requests were reiterated *inter alia* in S/RES/1583 (2005) of 28 January 2005, operative para. 4, as well as in operative para. 8 of S/RES/1655 (2006) of 31 January 2006.

seems to be irrelevant. This is due to the fact that the non-action by Lebanon *vis-à-vis* relevant Security Council resolutions is solely taken as a factor in considering its behavior in deciding upon the question of attribution, but does not purport to endow Security Council resolutions adopted under Chapter VI with binding force.

On the whole, there therefore seems to be no doubt that Israel, at least as a matter of principle, was in a position to exercise its right of self-defense against the armed attacks emanating from Hezbollah, either because such attacks emanating from non-state actors do *per se* trigger the right to self-defense, or because of the specific situation Lebanon found itself in, with regard to relevant Security Council practice prior to the Israeli acts of self-defense.

One might wonder, however, whether Israel, when exercising its rights to self-defense under Article 51 of the UN Charter, was still acting within the limits prescribed by Article 51, and namely the principle of proportionality.

## 6. Self-Defense under Article 51 of the UN Charter and the Principle of Proportionality

There seems to be no dispute that the actions by a state exercising its right of self-defense under Article 51 of the Charter must abide by the principle of proportionality.<sup>90</sup> This requirement has also been referred to by the ICJ in its Nicaragua judgment.<sup>91</sup> It was later reconfirmed in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.

The issue of proportionality is defined by the nature and the scope of the armed attack and the question, how the attack could, under the prevailing circumstances, be refuted. The ICJ stated in that regard that “[s]elf-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it.”<sup>92</sup>

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<sup>90</sup> Cassese, see note 4, 1333; P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th edition 1997, 315 et seq.; Randelzhofer, see note 15, marginal note 42.

<sup>91</sup> Nicaragua case, see note 20, para. 194.

<sup>92</sup> *Ibid.*, para. 176, and with regard to Article 51 of the Charter, Legality of the Threat or Use of Nuclear Weapons case, ICJ Reports 1996, 226 et seq. (para. 41).



This statement by the ICJ has to be interpreted in the sense that only those measures of self-defense are legitimate and legal under international law, which serve the overall goal to counter the armed attack.<sup>93</sup> In that regard much depends on the specific circumstances of the concrete situation and not least depends on the command and control structure of the aggressor. If there are military control centers located in the *hinterland* of the attacking state, they might be attacked in accordance with the principle of proportionality, even if the armed attack as such, which triggered the exercise of the right to self-defense in the first place, only originated from a limited territory adjacent to the territory of the attacked state.

On the other hand, the exercise of the right to self-defense must not be a mere motive for military sanctions, since otherwise the exercise of the right to self-defense would amount to nothing but hidden armed counter-measures, which, as was mentioned,<sup>94</sup> are illegal under international law. In particular, the actions allegedly taken in the exercise of the right to self-defense must, by their very nature, be able to diminish the military abilities of the aggressor and to induce the enemy not to continue its attack.<sup>95</sup>

It is against this background that one has to take account of the determination of the ICJ of December 2005, which in the case between the Democratic Republic of the Congo and Uganda, considered the taking of airports and towns many hundreds of kilometers away from Uganda's border as not being proportionate within the meaning of Article 51 of the Charter of the United Nations.<sup>96</sup> Yet, the longer the armed attack continues, the more measures of self-defense may then aim at the infrastructure of the aggressor, such as roads or oil refineries, provided it is only by such attacks that the aggressor can be prevented from continuing the attack or is forced to stop its attack.<sup>97</sup>

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<sup>93</sup> R. Higgins, *Problems and Process*, 1994, 232 et seq.

<sup>94</sup> Cf. under II. 2.

<sup>95</sup> G. Dahm, *Völkerrecht II*, 1961, 417; also Randelzhofer, see note 15, 788 et seq. (805).

<sup>96</sup> Congo/Uganda case, see note 52, para. 147. The Court stated, "The Court cannot fail to observe, however, that 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, nor to be necessary to that end."

<sup>97</sup> K. Doehring, *Völkerrecht*, 2nd edition 2004, para. 584; Gardam, see note 5, 155 et seq.

Finally, a further prerequisite relates to the fact that measures taken under Article 51 of the Charter must be also legal for purposes of *jus ad bellum*, i.e. must abide by applicable rules of international humanitarian law.<sup>98</sup> This inter-linkage between *jus ad bellum* and *jus in bello* was unequivocally confirmed by the ICJ in its Advisory Opinion concerning the Legality of the Threat or Use of Nuclear Weapons, since in the view of the Court, any,

“use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflicts which comprise in particular the principles and rules of humanitarian law.”<sup>99</sup>

Reviewing the conflict as it unfolded between Israel and Hezbollah during the summer of 2006, it seems to be unproblematic for purposes of *jus ad bellum*, that Israel was exercising its right of self-defense, and that it particularly abided by the principle of proportionality, when it attacked military targets in southern Lebanon.

It might be more problematic, however, to reach the same conclusion when considering Israeli military measures taken far beyond southern Lebanon, given that the original armed attack by Hezbollah triggering the Israeli reply originated only in southern Lebanon. The legality of such measures of self-defense involving targets beyond southern Lebanon would, in view of the above considerations, depend on the answer to the question whether, and if so to what extent, command and control structures of Hezbollah were located in other parts of Lebanon, and especially in Beirut, from where the attacks of Hezbollah were coordinated or controlled.

Israel also argued at the time of the conflict and continues to do so, that weaponry had entered Lebanon via both, the airport of Beirut, and via roads from Syria. Assuming these allegations to be correct, they would lead to the legality of attacks on such objects at least for purposes of *jus ad bellum*. Yet, one might wonder, who carries the burden of proof in that regard. In order to increase the efficiency of the prohibition of the use of force, the ICJ had, in its judgment in the Oil Platforms case between the United States and Iran concerning U.S. attacks on Iranian oil platforms in the Persian Gulf during the first Gulf

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<sup>98</sup> For further details as to the principle of proportionality as forming part of international humanitarian law cf. Gardam, see note 5, 59 et seq.

<sup>99</sup> Legality of the Threat or Use of Nuclear Weapons case, see note 92, para. 42.

War,<sup>100</sup> taken the position that the United States not only carried the burden of proof as to the existence of an armed attack as such, but also as to the question whether this alleged armed attack was attributable to either Iran or Iraq. The Court stated that it did not,

“have to attribute responsibility for firing the missile (...) on the basis of a balance of evidence, either to Iran or to Iraq.”

It rather considered that,

“if at the end of the day the evidence available [was] insufficient to establish that the missile was fired by Iran, then the necessary burden of proof ha[d] not been discharged by the United States.”<sup>101</sup>

One might wonder whether this consideration should not also be applied, *mutatis mutandis*, with regard to the question of the proportionality of measures of self-defense. Otherwise, and similar to the burden of proof concerning the legality of the use of force as such, the danger of an escalation of military violence might significantly increase. Yet, one of the fundamental goals of Article 51 of the UN Charter, as demonstrated by Article 51, second phrase and the duty contained therein to inform the Security Council about measures taken in the exercise of the right to self-defense, is an attempt to, as far as possible, limit the unilateral use of military force.

On the other hand, an argument could also be raised as to whether the state which is exercising its right of self-defense under Article 51 of the Charter, as being exposed to the threat of an ongoing or imminent armed attack, should not be granted a somewhat lowered *standard of proof*. In line with a parallel rule applicable for purposes of *jus in bello* concerning the legality of attacking objects, the civilian status of which is doubtful,<sup>102</sup> it seems plausible to argue that the relevant standard is that of the person, who was responsible for the specific planning, decision-making and taking of actions in self-defense, taking into consideration the information that was available *ex ante*.

It would accordingly be sufficient, in order for the reply to the armed attack to be considered legal under international law, that a *bona fide* claim could be made, that it could have *ex ante* been expected that the measures of self-defense, given the available information, would be proportionate in light of the anticipated armed attack.

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<sup>100</sup> Case concerning Oil Platforms, see note 23.

<sup>101</sup> Ibid., para. 57.

<sup>102</sup> Cf. under III. 2. b.

As was mentioned before,<sup>103</sup> military actions in self-defense must, in order to be legal under international law, also abide by applicable norms of humanitarian law. It is against this background, that one must now address the issue of possible violations, by Israel, of relevant rules of international humanitarian law. This, however, first of all, requires a qualification of the conflict in order to be able to determine which rules were applicable, i.e. requires a determination whether the “Second Lebanon War” should indeed be qualified as an international armed conflict.

### III. The Second Lebanon War and International Humanitarian Law

#### 1. Character of the Armed Conflict and Applicable Norms of International Humanitarian Law

At least for purposes of *jus ad bellum*, the “Second Lebanon War” constituted an armed conflict.<sup>104</sup> This could raise the question what kind of armed conflict we are facing for purposes of *jus in bello*. In *Hamdan v. Rumsfeld*,<sup>105</sup> the United States Supreme Court had deliberately left it open how to qualify the conflict between the United States and Al-Qaida respectively the Taliban, provided one was to agree that said conflict did constitute an armed conflict,<sup>106</sup> and took the position that at least common article 3 of the Four Geneva Conventions, which is applicable to all different forms of armed conflict, would apply.<sup>107</sup>

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<sup>103</sup> Cf. under II. 6.

<sup>104</sup> Cf. under II. 3.

<sup>105</sup> Decision of 29 June 2006, 126 S. Ct. 2749 (2006); text to be also found at: <<http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf>>.

<sup>106</sup> *Ibid.*, 2766.

<sup>107</sup> *Ibid.*, 2766 et seq. But cf. also the judgment by the Israeli Supreme Court in the so-called targeted killings case, HCJ 769/02, Judgment of 12 December 2006, Public Committee against Torture in Israel et al. v. The Government of Israel et al., para. 21, (text to be found at: <[http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf)>), where the Court qualified the conflict between Israel and armed groups in the Gaza strip as amounting to an international armed conflict.

Yet, at least when, as was undoubtedly the case during the “Second Lebanon War” of 2006, one state uses military means on the territory of another state, the rules of international armed conflicts do apply even if the “real” enemy in the conflict is not the territorial state as such, but rather a non-state group operating on and from the territory of said territorial state.<sup>108</sup> This conclusion can *inter alia* be based on an *argumentum a fortiori* to common article 2 para. 2 of the Four Geneva Conventions. Under this provision the four Geneva Conventions do apply even where in case of an occupation, the occupying power is not encountering armed resistance. If, therefore, norms of international humanitarian law, applicable to international armed conflicts, do apply in all types of occupation, even if no resistance takes place, this must be even more true where, as was clearly the case in Lebanon, military operations meet significant resistance, be it only by non-state armed groups.<sup>109</sup>

Besides, the issue how to qualify the “Second Lebanon War” for purposes of *jus in bello* is of a somewhat limited relevance. This is due, first, to the fact that, while Israel is a contracting party to the Four Geneva Conventions<sup>110</sup> it is not a contracting party to the First Additional Protocol of 1977.<sup>111</sup> Yet, it is only this latter Protocol that contains express regulations dealing with the issue of proportionality.<sup>112</sup> It follows that in order to determine whether a given military operation was proportionate or not, one has to rely on applicable norms of customary international law, to the extent that they are binding upon Israel.

Moreover, it must also be noted that the norms of customary international law applicable in international and non-international armed

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<sup>108</sup> D. Schindler, “Different Types of Armed Conflicts”, *RdC* 163 (1979), 125 et seq. (132); M. Frostad, *Jus in bello after September 11, 2001, 2004*, 30 et seq.

<sup>109</sup> Frostad, see above, 32.

<sup>110</sup> List of State parties, available at: <<http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=IL#S>>.

<sup>111</sup> Unlike the United States, Israel has not even signed the First Additional Protocol to the four Geneva Conventions. For the reasons underlying Israel’s decision not to become a contracting party to the protocol cf. A. Zimmermann, “Israel and the International Criminal Court – An Outsider’s Perspective”, *Isr. Y. B. Hum. Rts* 36 (2006), 231 et seq. (241 et seq.) with further references.

<sup>112</sup> Arts. 51 para. 5. lit. b.); 57 para. 2, lit. a.) iii), and 85 para. 3, lit. b.) and c.) First Additional Protocol.

conflicts concerning means and measures of warfare that can be legitimately used during an armed conflict, seem increasingly to merge.<sup>113</sup> It is true that, as far as the Rome Statute of the ICC is concerned, the crime of causing excessive collateral damage only applies in an international armed conflict setting.<sup>114</sup> Yet, the Rome Statute is, at least in that regard, not fully in line with modern customary international law.<sup>115</sup> Moreover said norm, as contained in the Rome Statute, solely covers the issue of individual criminal responsibility for the causation of excessive damage to civilians or civilian objects.<sup>116</sup> This, therefore, does not preclude that a more far-reaching prohibition does indeed exist under customary international law for purposes of state responsibility.<sup>117</sup>

The general nature and applicability of the principle of proportionality in every kind of armed conflicts, be they of an international or a non-international nature, has, besides, been confirmed by the jurispru-

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<sup>113</sup> Cf. for such a proposition *inter alia* K. Ambos, *Internationales Strafrecht*, 2006, 241 et seq.

<sup>114</sup> Cf. on the one hand article 8 para. 2 lit. b.) iv) of the Rome Statute, and the lack of any parallel provision in article 8 para. 2 lit. e) of the Rome Statute on the other; for the underlying reasons of this unfortunate *lacuna* cf. A. Zimmermann, "Preliminary Remarks on para. 2 (c) - (f) and para. 3: War Crimes Committed in an Armed Conflict not of an International Character", in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 1999, 263 et seq.

<sup>115</sup> Cf. C. Kreß, "War Crimes committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice", *Isr. Y. B. Hum. Rts* 30 (2000), 103 et seq. (134).

<sup>116</sup> Cf. article 25 para. 4 of the Rome Statute. As to the interrelationship between the Rome Statute and general international law, as well as international humanitarian law cf. A. Pellet, "Applicable Law", in: A. Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (2002), 1051 et seq. (1082-1084).

<sup>117</sup> Cf. for a similar proposition distinguishing attribution for purposes of state responsibility from involvement of a third state in a military conflict in order to internationalize the conflict the judgment of the ICJ in the Bosnian Genocide case, see note 14, para. 405, where the Court stated, "It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict."

dence of the ICTY,<sup>118</sup> as well as by relevant state practice.<sup>119</sup> This led the International Committee of the Red Cross in its customary law study to the conclusion that the principle of proportionality indeed equally applies to both, international and non-international armed conflicts.

It is against this background that the issue of proportionality shall now be considered with regard to the “Second Lebanon War” regardless of a definite characterization of the armed conflict.

## 2. The Second Lebanon War and Possible Violations of the Principle of Proportionality

### a. Customary Law Nature and Content of the Principle of Proportionality as Part of International Humanitarian Law

The principle of proportionality, as a limit for military attacks, is enshrined in particular in article 51 para. 5 lit. b) of the First Additional Protocol to the Four Geneva Conventions of 1977 according to which,

“an attack which 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”,

is prohibited. It seems to be generally recognized, that the content of this norm is generally accepted to form part of customary international law.<sup>120</sup>

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<sup>118</sup> International Criminal Tribunal for the Former Yugoslavia, IT-95-16-T, Judgment of 14 January 2000, Prosecutor v. Zoran Kupreskic et al., paras 521 et seq.

<sup>119</sup> Cf. for a survey of relevant state practice in that regard J.M. Henckaerts/ L. Doswald-Beck, *Customary International Humanitarian Law, Volume I*, 2005, 47; Gardam, see note 5, 110 et seq.

<sup>120</sup> Cf. Henckaerts/ Doswald-Beck, see note 119, 49 et seq.; D. Casey, “Breaking the Chain of Violence in Israel and Palestine: Suicide Bombings and Targeted Killings Under International Humanitarian Law”, *Syracuse Journal of International Law* 32 (2005), 311 et seq. (319). Cf. also most recently as to the position of the Israeli Supreme Court its judgment in the targeted killings case, Supreme Court of Israel sitting as the High Court of Justice, see note 107, para. 43, affirmatively referring to article 51 of the First Additional Protocol as being declaratory of customary international law.

While it is true that Israel itself is not a contracting party to the First Additional Protocol and therefore not bound by the said provision as a matter of treaty law, it must be noted that this rejection of the protocol is not due to the principle contained in article 51 para. 5 lit. b.) of the Protocol.<sup>121</sup> Even if one were to generally consider Israel as a persistent objector<sup>122</sup> *vis-à-vis* the development of customary international law as enshrined in the First Additional Protocol of 1977,<sup>123</sup> this would not hold true for the principle of proportionality.

On the one hand, Israel has lost its status as a persistent objector at least with regard to those parts of the First Additional Protocol which, like the principle of proportionality, have found their way into the Rome Statute of the ICC,<sup>124</sup> which Israel at least at a certain point had signed,<sup>125</sup> before it later indicated its intention not to ratify the Rome Statute.<sup>126</sup> On the other hand, it is Israel itself that maintains that the principle of proportionality does apply in armed conflicts. *Inter alia*, the official manual on the law of war of the Israeli Defense Forces provides that the commander shall not go ahead with an attack if it is to be anticipated that the damage to the civilian population would be excessive as compared to the anticipated military advantage.<sup>127</sup>

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<sup>121</sup> As to the reasons why Israel is not becoming a contracting party of the First Additional Protocol cf. Zimmermann, see note 111.

<sup>122</sup> Cf. generally as to the notion of persistent objection and its effects M. Akehurst, "Custom as a Source of International Law", *BYIL* 47 (1974-75), 1 et seq. (23 et seq.); M. Bos, "The Identification of Custom in International Law", *GYIL* 25 (1982), 10 et seq. (43 et seq.).

<sup>123</sup> Cf. for such a proposition A. Zimmermann, "Responsibility for Violations of International Humanitarian Law, International Criminal Law and Human Rights Law – Synergy and Conflicts", in: V. Epping/ W. Heintschel v. Heinegg (ed.), *International Humanitarian Law – Facing new Challenges*, 2006, 203 et seq. (218).

<sup>124</sup> Cf. for example article 8 para. 2 lit. b.) i) Rome Statute; for a detailed analysis of this provision cf. W.J. Fenrick, "Other serious Violations of the Laws and Customs applicable in International Armed Conflicts", in: Triffterer, see note 114, 186 et seq.; cf. also Zimmermann, note 111, 240.

<sup>125</sup> Israel signed the Rome Statute on 31 December 2000, see : <<http://www.un.org/law/icc/statute/status.htm>>.

<sup>126</sup> Communication from Israel to the Secretary General of 28 August 2002, available at: <[http://www.amicc.org/icc\\_ratifications.html](http://www.amicc.org/icc_ratifications.html)>.

<sup>127</sup> Henckaerts/ Doswald-Beck, see note 119, 302.



When considering the issue of proportionality, one might wonder, however, what is the relevant military advantage to be balanced against the ensuing damage to civilians or civilian objects. The study undertaken by the International Committee of the Red Cross on the current status of customary international law in the field of international humanitarian law<sup>128</sup> in that regard simply repeats the formula contained in article 51 para. 5 of the First Additional Protocol. On the other hand, it is well known that almost all NATO Member States ratifying the First Additional Protocol including the Federal Republic of Germany, but also other states such as the United States of America, Australia, New Zealand, or Nigeria, have, when signing or ratifying the First Additional Protocol, made almost identical declarations under which *mutatis mutandis*,

“[i]n applying the rule of proportionality in Article 51 and Article 57 [of the First Additional Protocol], ‘military advantage’ is understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.”<sup>129</sup>

If one was to now, following the International Committee of the Red Cross and its customary law study, consider that customary international law does not take account of the advantage of the attack taken as a whole, but that one had to rather consider the specific attack as such and the specific advantage resulting there from, one would wonder, whether those states which had made the above mentioned declarations were now, and if so since when, bound by this new, stricter rule of customary international law. Furthermore, it must also be noted, that article 8 para. 2 lit. b) iv) of the Statute of the ICC, in turn, does criminalize such attacks only, when committed in the knowledge,

“(...) that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct *overall military advantage* anticipated (...)”.<sup>130</sup>

In this context, it is particularly interesting to take note of the elements of crimes adopted by the contracting parties of the Rome Stat-

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<sup>128</sup> Ibid.

<sup>129</sup> Text of this, as well as that of the other, parallel declarations to be found at: <<http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&cps=P>>.

<sup>130</sup> Emphasis added.

ute,<sup>131</sup> which hint at the fact that the military advantage anticipated “may or may not be temporally or geographically related to the object of the attack”.<sup>132</sup> It is against that background that at least under customary international law, when considering the proportionality of a given attack, the anticipated military advantage of the attack as a whole has to be kept in mind and taken into account.

Yet in any case, and first and foremost, the attack must be directed against a legitimate military target. Otherwise, i.e. when the attack is not directed against such a legitimate military target, the attack would *per se* be illegal under applicable norms of international humanitarian law. This, therefore, raises the question what constitutes a legitimate military target.

## b. Notion of Military Targets

A generally accepted<sup>133</sup> definition of what constitutes a military target is to be found in article 52 para. 2 of the First Additional Protocol. Under said provision, in order to qualify as a military target, it is decisive whether these are objects,

“which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

In that regard one must take account of the fact, however, that an object does not lose its status as a military object, simply due to the fact that in such an object or in the vicinity of such an object, protected persons, and in particular, civilians are to be found.<sup>134</sup> This is particularly

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<sup>131</sup> Text to be found, *inter alia*, at: <[<http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/elements\(e\).html?page=library/officialjournal/basicdocuments/elements\(e\)>](http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/elements(e).html?page=library/officialjournal/basicdocuments/elements(e))>.

<sup>132</sup> Elements of Crimes, see above, there note 36 relating to article 8 para. 2 lit. b.) iv) of the Rome Statute.

<sup>133</sup> For a general overview as to the notion of “military target” cf. A.P.V. Rogers, “What is a Legitimate Military Target?”, in: R. Burchill et al. (eds), *International Conflict and Security Law*, 2005, 160 et seq.

<sup>134</sup> Cf. H. Fischer, “The Jurisdiction of the International Criminal Court for War Crimes: Some Observations concerning Differences between the Statute of the Court and War Crimes Provisions in Other Treaties”, in: V. Epping/ H. Fischer/ W. Heintschel v. Heinegg (eds), *Brücken bauen und begeben, Festschrift für Knut Ipsen zum 65. Geburtstag*, 2000, 77 et seq. (98);

true in situations where the enemy deliberately stations military objects or installations in the vicinity of, or even within civilian installations, or close to a civilian population.<sup>135</sup> At the end of the day, the qualification of a specific object as a military or non-military one depends on the specific circumstances prevailing at the time of the attack, its use, as well as the general structure of the conflict. It is against this background that some specific issues will now be dealt with.

With regard to considering roads and bridges in southern Lebanon destroyed by Israeli attacks,<sup>136</sup> one may argue that they are to be considered legitimate objects, provided that those roads and bridges were actually used or could have been used for the transport of Hezbollah fighters or ammunition or other kinds of logistical support of Hezbollah.<sup>137</sup> This result just reached is also in line with the list of military objects set up by the International Committee of the Red Cross in 1956, according to which roads, bridges, and tunnels of military relevance may, as a matter of principle, be targeted in times of conflict as constituting legitimate military targets.<sup>138</sup>

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see also W.J. Fenrick, "Utilizing the Presence of a Protected Person to render certain Objects immune from Military Operations", in: Triffterer, see note 114, 253.

<sup>135</sup> Cf. 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/ M. Evangelista (eds), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, 2005, 181 et seq. (207).

<sup>136</sup> Cf. as to the position of the Israeli government in that regard the statement by the Israel Ministry of Foreign Affairs of 25 July 2006, *Responding to Hezbollah attacks from Lebanon: Issues of Proportionality*, available at: <<http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Responding+to+Hezbollah+attacks+from+Lebanon+-+Issues+of+proportionality+July+2006.htm>>.

<sup>137</sup> See for such a proposition also the above mentioned statement of the Israeli Ministry of Foreign Affairs, see above.

<sup>138</sup> Cf. Y. Sandoz/ C. Swiniarski/ B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987, 632-633, "In 1956, the International Committee of the Red Cross (ICRC) drew up the following proposed list of categories of military objectives (...):

(6) Those of the lines and means of communications (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance.

(7) The installations of broadcasting and television stations; telephone and telegraph exchanges of fundamental military importance. (...)".

The same is true for private homes in southern Lebanon, but also in Beirut and other cities, as far as and as long as they were used for military purposes by Hezbollah as such or by Hezbollah fighters, be it as launching pads for missiles or for the setting-up of command and control installations, which allegedly happened not infrequently.

It seems to be more problematic, however, to also qualify roads in the Lebanese *hinterland* as legitimate military targets. This could only be done if, on the basis of reliable information, Israel could have taken the position that those roads had then been used in order to transport logistics and ammunition, e.g. from Syria, via those roads towards Hezbollah positions in southern Lebanon. The same is true, *mutatis mutandis*, for the airport of Beirut, the runways of which had been bombed by the Israeli defense forces provided they were used for such military purposes.<sup>139</sup>

Somewhat similarly, the attack on the TV installation *Al Manar* run by Hezbollah in Beirut,<sup>140</sup> may only be considered a legitimate attack on a military object provided it was not only used for propaganda purposes but, at the same time, was used as a so-called “dual-use” installation for both, civilian and military purposes, and especially if the telecommunication installations contained therein were used in order to coordinate military attacks by Hezbollah. On the other hand, and in line with the final report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia,<sup>141</sup> one must take the position that the sole fact that a mass medium was or is used for war propaganda does not *per se* make it a legitimate military target.<sup>142</sup> Even more problematic, keeping this result in mind, are obviously attacks on other, state-run Lebanese TV stations which, as far as can be discerned, were not connected to Hezbollah activities, whether of a military or a non-military nature.

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<sup>139</sup> For such allegation, see note 136.

<sup>140</sup> Ibid.

<sup>141</sup> Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, available at: <<http://www.un.org/icty/pressreal/nato061300.htm>>.

<sup>142</sup> ICTY, NATO Final Report, *ibid.*, para. 47. The report stated, “Whether the media constitutes a legitimate target group is a debatable issue. If the media is used to incite crimes, as in Rwanda, then it is a legitimate target. If it is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target.”

Particularly problematic in light of applicable rules of international humanitarian law, given the very nature of the specific conflict here under consideration and further given the command and control structure of Hezbollah, seem to be attacks on other infrastructure installations of Lebanon, namely water and electricity installations. This applies particularly to those facilities which were not located in the immediate combat-zone of southern Lebanon since any such attacks, even if successful, would not bring about a definite military advantage, as required by article 52 para. 2 of the First Additional Protocol to the Four Geneva Conventions and parallel norms of customary international law.<sup>143</sup>

Similar considerations do apply with regard to attacks on oil refineries or oil deposits, where once again the question arises, whether their destruction could have brought about a definite military advantage in light of the decentralized structure of Hezbollah, which therefore does not seem, or if so only to a very small degree, to have been dependent on transportation. This could eventually lead to the result that such attacks on oil refineries did not constitute attacks on legitimate military targets. Otherwise, those installations would indeed constitute legitimate military targets, provided they were subject to control of Hezbollah and were located in southern Lebanon, in which case it seems that their destruction could have brought about, at least from the *ex ante* viewpoint of a reasonable military commander,<sup>144</sup> a definite military advantage.

It is against this classification of various groups of objects as military or non-military objects, that one must now consider the issue of proportionality in a strict sense, i.e. the relationship between the military advantage anticipated and the ensuing civilian damages.

### c. Weighing Military Advantages and Civilian Damages

An attack upon a military target is to be considered illegal under applicable norms of international humanitarian law, if, upon weighing the anticipated civilian damages, the attack is to be regarded as excessive in relation to the anticipated military advantage. This leads, however, as is indeed acknowledged in the authoritative ICRC Commentary on article 51 of the First Additional Protocol, to significant value judg-

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<sup>143</sup> Cf. for a similar proposition already Tomuschat, see note 2, 187.

<sup>144</sup> See note 142, para. 37, 50; cf. Henckaerts/ Doswald-Beck, see note 119, 36 et seq.

ments.<sup>145</sup> More specifically this raises the problem to evaluate a given anticipated military advantage as compared to ensuing collateral damage to either civilians or civilian objects or both.

One has to bear in mind, be it only with a heavy heart, that even causing the death of civilians as collateral damage as the result of an attack against a legitimate military object does not render the attack *per se* illegal under current rules of international humanitarian law.<sup>146</sup> It was the office of the prosecutor of the ICTY that took the position in that regard, that there exists a grey zone in which one may not yet determine that a violation of the principle of proportionality has indeed occurred.<sup>147</sup> In the Kupreskic case, a trial chamber of the ICTY took the position that a multitude of such “grey zone” cases could lead to the assumption, that the overall attacks under consideration could then, when taken as a whole, violate the principle of proportionality, as applicable under customary international law.<sup>148</sup> It specifically stated that,

“(...) in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardize excessively the lives and assets of civilians, contrary to the demands of humanity.”<sup>149</sup>

Understood this way, the application of the principle of proportionality could have the somewhat surprising effect that single attacks, each of which when taken individually, would be in line with international law, would then, when considered as a whole, suddenly, constitute an

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<sup>145</sup> Sandoz/ Swiniarski/ Zimmermann, see note 138, para 1979.

<sup>146</sup> *Ibid.*, para. 1948.

<sup>147</sup> ICTY, NATO Final Report, see note 141. The report stated, “It is suggested that the determination of relative values must be that of the ‘reasonable military commander’. Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to non-combatants or the damage to civilian objects was clearly disproportionate to the military advantage gained (...)”. Cf. also the judgment of the ICTY in the Kupreskic case, see note 118, para. 254.

<sup>148</sup> See M. Bothe/ K.J. Partsch/ W.A. Solf (eds), *New Rules for Victims of Armed Conflicts*, 1982, 677-678.

<sup>149</sup> Kupreskic case, see note 118, para. 526.

overall violation of international law.<sup>150</sup> One should therefore rather understand the judgment in the sense, that one has to take into account, when deciding upon the issue of proportionality, the general context of multiple attacks and the military advantages gained there from and weigh them with the civilian collateral damage caused by the whole set of military attacks.<sup>151</sup>

In order to now decide upon the proportionality of the Israeli attacks during the “Second Lebanon War” in light of these considerations, however, one would have to undertake an intensive verification of the relevant facts on the ground as they existed at the time of the individual attacks. At first, one would have to verify to what extent, how often and under what circumstances Hezbollah fighters were seeking shelter in civilian buildings, whether they undertook attacks from such buildings or coordinated such attacks from there, and if so, to what extent civilian infrastructure was, as had been argued and continues to be argued by Israel,<sup>152</sup> used for military purposes. On the other hand, one would also have to verify to what extent the Israeli armed forces were solely taking such military actions by Hezbollah as a possible pretext to destroy whole villages or quarters or infrastructural facilities.

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<sup>150</sup> For a critical view on this judgment cf. also the Final Report to the Office of the prosecutor of the ICTY, see note 141, para. 52, “This formulation in *Kupreskic* can be regarded as a progressive statement of the applicable law with regard to the obligation to protect civilians. Its practical import, however, is somewhat ambiguous and its application far from clear. It is the committee’s view that where individual (and legitimate) attacks on military objectives are concerned, the mere *cumulation* of such instances, all of which are deemed to have been lawful, cannot *ipso facto* be said to amount to a crime.”

<sup>151</sup> *Ibid.*, para. 52, “The committee understands the above formulation, instead, to refer to an *overall* assessment of the totality of civilian victims as against the goals of the military campaign.” (emphasis in the original).

<sup>152</sup> Israel Ministry of Foreign Affairs, Responding to Hezbollah attacks from Lebanon: Issues of proportionality of 25 July 2006, available at: <<http://mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Responding+to+Hezbollah+attacks+from+Lebanon+-+Issues+of+proportionality+July+2006.htm>> (cf. Report of the Commission of Inquiry, see note 7; Israel Ministry of Foreign Affairs, Israel’s War with Hezbollah – Preserving Humanitarian Principles While Combating Terrorism, Diplomatic Notes No. 1 of April 2007, section II, available at: <<http://mfa.gov.il/NR/rdonlyres/74D04C9D-FA73-4A54-8CBA-DBCB1152C82E/0/Diplomatic+Notes01.pdf>>.

The Commission of Inquiry set up by the Human Rights Council, consisting of a Brazilian diplomat, a Greek professor of international law and member of the Fact Finding Commission under article 90 of the First Additional Protocol,<sup>153</sup> as well as a Tanzanian judge,<sup>154</sup> in its report reached the conclusion that Israeli troops had committed significant violations of the principle of proportionality.<sup>155</sup> In particular, the Commission of Inquiry took note of attacks which had taken place not in southern Lebanon, but rather in Lebanon's northern part and, in particular, in the Beirut area. In this regard one must, however, consider that Israel did not cooperate with the Commission of Inquiry, which quite obviously led to the consequence that at least to a certain extent, relevant information was not available. The background of this non-cooperation by Israel was, *inter alia*, the already mentioned fact<sup>156</sup> that the Human Rights Council in its Resolution of 11 August 2006<sup>157</sup> had deliberately limited the mission of the Commission of Inquiry to solely consider alleged violations of international humanitarian law by Israel in Lebanon, and had thereby specifically precluded the Commission of Inquiry from looking into and investigating possible violations of international humanitarian law by Hezbollah.

Moreover, the Human Rights Council had already *ex ante* itself determined that Israel had committed serious violations of international humanitarian law. This in turn had led to the fact that, with the sole exception of Switzerland which abstained, all states members of the Western European and Other Countries group<sup>158</sup> represented in the Human Rights Council, as well as all Eastern European states, with the sole ex-

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<sup>153</sup> As to the mandate and function of the Fact-Finding Commission under article 90 of the First Additional protocol cf. A. Mokhtar, "To be or not to be: The International Humanitarian Factfinding Commission", *Italian Yearbook of International Law* 12 (2002), 69 et seq.

<sup>154</sup> The members were João Clemente Baena Soares (Brazil), Stelios Perrakis (Greece), as well as Mohamed Chande Othman (Tanzania).

<sup>155</sup> Cf. in particular paras 319–322 of the report, see note 7.

<sup>156</sup> See note 8.

<sup>157</sup> 2nd Special Session of the Human Rights Council, Geneva, 11 August 2006, see note 7.

<sup>158</sup> As to the composition of the various geographic groups within the UN system cf. S. v. Schorlemer, "Blocs and Groups of States", in: R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, Vol. I, 1995, 69 et seq., (71).



ception of Azerbaijan and the Russian Federation,<sup>159</sup> had voted against the setting-up of the Commission of Inquiry as such.

The obvious problem to determine possible violations of the principle of proportionality becomes clear when considering the following specific example.

In paras 111 and 112 of its report,<sup>160</sup> the Commission of Inquiry describes repeated attacks by Israeli forces against a small southern Lebanese town located only a few hundred meters north of the Israeli border. This town had been the scene of intensive combats ever since the beginning of the conflict. Frequently, missiles had been fired into Northern Israeli cities from this location.<sup>161</sup> Despite repeated attempts by Israeli forces to conquer the town, Hezbollah fighters stationed in the village were successful in preventing Israeli troops from gaining control over the village. Apart from approximately one hundred inhabitants, all of the 12,000 inhabitants of the town had left their homes due to Israeli warnings.<sup>162</sup> The Israeli armed forces had initially attempted to destroy the houses with bulldozers, and only after they had been unsuccessful in trying to do so, started shelling the town with artillery and the Israeli air force started flying air raids before each new attack.<sup>163</sup> Due to these shelling and bombardments more than 800 houses were completely and 400 houses were partially demolished.

Without even considering the number of Hezbollah fighters or the duration of the fighting within the town, the report of the Commission of Inquiry reached the somewhat blunt result that the attack was to be considered not to be proportionate and did thus constitute a violation of international humanitarian law. It is the view of this author that, in order to determine the proportionality or non-proportionality of the attack, one would have needed to gain access to much more specific information, including, but not limited to, the following issues, namely to

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<sup>159</sup> At the relevant time the following Eastern European states, apart from Azerbaijan and the Russian Federation, were represented in the Human Rights Council: Czech Republic, Poland, Romania and Ukraine, cf. <<http://www.ohchr.org/english/bodies/hrcouncil/groups.htm>>.

<sup>160</sup> See note 7.

<sup>161</sup> As to the (alleged) number of missiles fired into Israel by Hezbollah on a daily basis cf. Israeli Ministry of Foreign Affairs, *Israel's War with Hezbollah – Preserving Humanitarian Principles While Combating Terrorism*, see note 9, Appendix A.

<sup>162</sup> Cf. in particular para. 111 of the report, see note 7.

<sup>163</sup> Cf. in particular para. 112 of the report, see note 7.

what extent civilian houses and buildings had really been used for military purposes, to what extent the launching of missiles had taken place from such civilian installations, and whether they had, as was claimed by Israel, been equipped with military bunkers.

Moreover, the Commission of Inquiry should have made an effort to determine to what extent it would have been possible from the *ex ante* view point of a reasonable military commander,<sup>164</sup> to conquer the town without significantly increased risks for his own troops without air support or far-reaching and extensive artillery shelling.

#### IV. Concluding Remarks

Concluding, one might say that it is quite probable that violations of the principle of proportionality by Israeli armed forces have occurred. On the other hand Hezbollah from the very beginning of the conflict, considering its deliberate missile attacks on Northern Israeli cities which did constitute civilian objects,<sup>165</sup> made no attempt to abide by applicable norms of *jus in bello*.<sup>166</sup> At the end of the day, one might be

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<sup>164</sup> See note 142, para. 37, 50; cf. Henckaerts/ Doswald-Beck, see note 119, 49 et seq.

<sup>165</sup> See as to the parallel situation with regard to the attacks on Dubrovnik during the war in Yugoslavia the judgment of the ICTY in Prosecutor v. Pavle Strugar, IT-01-42-T, Judgment of 31 January 2005, para. 277 et seq., text to be found at: <<http://www.un.org/icty/strugar/trialc1/judgement/index2.htm>>.

<sup>166</sup> It has to be noted, however, that any such Hezbollah attacks against civilians or civilian objects may not legitimize, under current rules of international humanitarian law, violations of international humanitarian law by Israel as constituting prohibited reprisals, cf. in that regard the overview in United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict*, as well as the recent statement by the ICJ in the Bosnian Genocide case, see note 14, para. 328:

“The Court (...) takes account of the assertion that the Bosnian army may have provoked attacks on civilian areas by Bosnian Serb forces, but does not consider that this, even if true, can provide any justification for attacks on civilian areas.” Cf. also S. Darcy, “What future for the doctrine of belligerent reprisals”, *Yearbook of International Humanitarian Law* 5 (2002), 107 et seq. As to the jurisprudence of the ICTY see F. Kalshoven, “Reprisals and the protection of civilians – two recent decisions of the Yugoslavia Tribunal”, in: L. Vohrah et al. (eds), *Man’s Inhumanity to Man – Essays on International Law in Honour of Antonio Cassese*, 2003, 481 et seq.

therefore tempted to agree with the statement made by Knut Ipsen at the very beginning of the conflict, who had then stated:

“While Israel violates international law, Hezbollah completely disregards it from the very beginning.”<sup>167</sup>

Keeping this in mind one cannot but continue attempts to bring about increased respect for international humanitarian law in case future conflicts should arise.

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<sup>167</sup> Frankfurter Rundschau of 1 July 2006, 15.

