

INTERNATIONAL HUMANITARIAN LAW IN THE FACE OF THE CRISES HITTING THE INTERNATIONAL COMMUNITY

Alfons Vanheusden¹

I. Introduction

The objective of this paper is to examine recent conflicts hitting the international community from an international law perspective, with particular emphasis on international humanitarian law. It will do so by identifying a selection of legal issues which arose in relation to the recent conflict in Lebanon and by explaining the legal framework applicable to these items. Going through these issues, it will become clear that many of them have also arisen in other recent conflicts and are thus of a higher relevance than only in the context of the conflict which broke out in Lebanon. This paper will not draw conclusions from specific situations of alleged violations of the law, when the facts needed to draw such conclusions still have to be objectively found.

II. The recent war in Lebanon

A. Facts²

What were the facts as to the recent clash between Israel and Hezbollah fighters in Lebanon? On 12 July 2006 Hezbollah, the Lebanese Shiite armed group based in southern Lebanon, launched rockets at Israeli villages and cities. Later that day they captured two Israeli soldiers and killed several others, in an attack across the Blue Line³. The Israeli Army Chief of Staff declared that if the soldiers were not returned, Israel would 'turn Lebanon's clock back 20 years'. According to Israeli Prime Minister Ehud Olmert the capture of the soldiers had to be considered as 'an act of war'. Israel imposed an air and sea blockade on Lebanon and Israeli planes started bombing Hezbollah positions in southern Lebanon. For the first time since the military withdrawal of 2000 Israeli troops crossed into Lebanon. Israeli forces were said to have used large numbers of cluster munitions in their operations in Lebanon. The headquarters of Hezbollah, Beirut's international airport, bridges, roads and fuel depots were bombed by Israeli planes, while Hezbollah rockets continued to target Israeli villages and cities. UN Secretary-General Kofi Annan underlined the need to let in aid into Lebanon and called for a ceasefire. UN emergency relief co-ordinator Jan Egeland visited the southern districts of Beirut and called 'the large scale of the destruction and its indiscriminate nature' a violation of humanitarian law. Despite the fact that the UN repeatedly asked Israel not to fire around its post, 4 UN observers, being at their post, have been killed by an Israeli strike on 26 July 2006 in the southern Lebanese town of Khiam. A few days later, 2 UN monitors were wounded by another Israeli strike. On 30 July 2006, an Israeli air strike

¹ Assistant Secretary-General of the International Society for Military Law and the Law of War; head of the Humanitarian Law and Criminal Law Section, DG Legal Support & Mediation, Belgian Ministry of Defence; lecturer of public international law at the Belgian Royal Military Academy for the Course for Advisors in the Law of Armed Conflict. The views expressed in this paper are solely those of the author and do not necessarily represent the views of the International Society for Military Law and the Law of War, the Belgian Government, the Belgian Ministry of Defence and the latter's DG Legal Support & Mediation. This paper was presented at a meeting of the Argentine Council for International Relations, in Buenos Aires on 14 September 2006.

² This part of the paper is largely based on C. Jacobsen and M. Schwierz, *The conflict between Hezbollah, Lebanon and Israel*, *Newsletter 2006/3 of the International Society for Military Law and the Law of War*; ed. A. Vanheusden; as well as on the sources mentioned in their respective contribution.

³ The UN embarked line after the Israeli withdrawal from Lebanon in 2000.

killed many civilians, including children, in the southern Lebanese village of Qana. According to Israel, Hezbollah had a base to fire rockets across the border in Qana. The Israeli Defence Forces (IDF) stated that they had warned the civilian population to stay away from the areas where Hezbollah launched rockets at Israel. At an emergency meeting of the UN Security Council Annan said ‘both sides in this conflict bear a heavy responsibility, and there is strong *prima facie* evidence that both have committed grave breaches of international humanitarian law’. After many discussions the UN Security Council unanimously adopted Resolution 1701 on 11 August 2006, calling for a full cessation of hostilities, a withdrawal of Israeli forces back into Israel, the insertion of a 15,000-strong Lebanese army contingent down to the border, the expansion of the 2,000-strong UN peacekeeping force in south Lebanon (UNIFIL) into a more powerful international force of up to 15,000 troops (UNIFIL 2) and the removal from south Lebanon of Hezbollah as an armed force. European nations will provide over half of the troops for UNIFIL 2⁴. The ceasefire came into force on 14 August 2006 at 8 o’clock local time.

B. *Ius ad bellum*

One could try to challenge Israel’s decision to attack targets in Lebanon, in response to the capture of the two Israeli soldiers. Article 51 of the UN Charter recognises each State’s inherent right of individual and collective self-defence if an armed attack occurs against a State, until the Security Council has taken measures necessary to maintain international peace and security⁵. UN Secretary-General Kofi Annan condemned Hezbollah’s attacks on Israel, and acknowledged Israel’s right to defend itself under article 51 of the UN Charter⁶.

Because Hezbollah is part of the Lebanese Government, some might argue that acts of Hezbollah can be seen as acts of the Lebanese Government. On the other hand, UN Secretary-General Kofi Annan declared that it is clear that the Lebanese Government had no advance knowledge of the provocative attack on 12 July 2006⁷. But article 51 of the UN Charter makes no mention of the entity which conducted the armed attack. One may deduce from it that article 51 was not meant to be related to armed attacks from States only⁸. This was confirmed in the aftermath of the 11 September 2001 attacks. Indeed UN Security Council resolutions 1368 (of 12 September 2001) and 1373 (of 28 September 2001) confirmed in their considerations the inherent right of individual or collective self-defence, while nobody presumed that a State had committed the terrorist attacks of 11 September 2001. Also state practice in the aftermath of the 11 September 2001 attacks indicates that the UN Charter has a broader field of application than only the interstate relations: NATO’s North-Atlantic Council called the terrorist attacks of 11 September 2001 an armed attack, when it invoked, for the first time in history, article V of the North-Atlantic Treaty, the article related to the obligation to render support in case of an ally being the subject of an armed attack coming from abroad⁹. At the beginning of the hostilities in Afghanistan in 2001, the US and the UK notified to the UN Security Council that they conducted operations against the Taliban and Al Qaeda by virtue of their right to individual and

⁴ Belgium for example will contribute almost 400 blue-helmets to UNIFIL 2.

⁵ On self-defence, see e.g. Y. Dinstein, *War, Agression and Self-defence*, Cambridge University Press, 2001, 159-282.

⁶ UN Secretary-General’s briefing to the Security Council on the situation in the Middle East, New York, 20 July 2006.

⁷ UN Secretary-General’s briefing to the Security Council on the situation in the Middle East, *supra* 6.

⁸ Cf. M. Schmitt, Counter-Terrorism and the Use of Force in International Law, in *International Law and the War on Terror – International Law Studies Volume 79*, 33-46, Naval War College, Newport, Rhode Island, 2003, ed. F. L. Borch and P. S. Wilson.

⁹ See <http://www.nato.int/docu/update/2001/1001/e1002a.htm>.

collective self-defence¹⁰. Such notification is prescribed by article 51 of the UN Charter. There was no objection against these notifications. The treaty notion ‘armed attack’ needs to be interpreted in accordance with the way States interpret it in practice¹¹. It is thus clear that also non-State actors, such as Hezbollah may launch an armed attack giving rise to lawful self-defence.

But was the use of force by Hezbollah fighters sufficiently serious to consider it an armed attack? In the Nicaragua Case, the International Court of Justice held that an armed attack requires an attack of important scale and with important effects. Border incidents and small-scale attacks are not to be considered armed attacks and do not open the right for a State to fight an international armed conflict in the exercise of the right to self-defence¹². However, it is accepted that a series of small scale attacks which individually do not reach the threshold of an armed attack, could collectively be considered an armed attack¹³. In the case of the recent conflict in Lebanon, the international community seemed to have reached a consensus that Israel had the right to defend itself against the attacks by Hezbollah fighters having a safe haven in Lebanon. The kidnapping and rockets fired on 12 July 2006 had indeed to be seen as only a part of a larger attack against Israel by Hezbollah fighters, as many attacks had been launched against Israel before this date and new attacks could be expected in the future if nothing was done against it¹⁴.

When acting out of self-defence, Israel was obliged to respond proportionally. The principle of proportionality under the *ius ad bellum*¹⁵ is different from the principle of proportionality in the *ius in bello* or international humanitarian law¹⁶. In international humanitarian law, the principle of proportionality refers to the obligation to weigh the importance of the military objective against the collateral damage (meaning the damage caused to civilians and civilian objects). In international humanitarian law there is a prohibition to attack the target if the advantage gained by that would be disproportionate in relation to the collateral damage caused¹⁷. Under the *ius ad bellum* the principle of proportionality refers to the obligation not to go further in its reactions than necessary to stop the armed attack and to take away the chance of foreseeable future attacks¹⁸. Sometimes it is erroneously suggested that the principle of proportionality requires that the consequences of the reactions should not exceed the gravity of the armed attack, but this is wrong. It is about stopping the enemy in what they are doing and what they will be doing in the foreseeable future, even if the consequences of the reactions are of more gravity than the armed attack against which one responds.

¹⁰ See e.g. letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (<http://www.usunnewyork.usmission.gov/s-2001-946.htm>).

¹¹ Article 31 paragraph 3 of the Vienna Convention on the Law of Treaties, done in Vienna on 23 May 1969, entered into force on 27 January 1980.

¹² Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US), Merits, I.C.J. Reports 1986, paragraph 195.

¹³ See M. Schmitt, *supra* 8, 67.

¹⁴ According to a statement of the Israel Ministry of Foreign Affairs of 25 July 2006, Responding to Hizbullah attacks from Lebanon : Issues of proportionality, the ‘response has to be measured not only in respect of the initial Hizbullah cross-border attack, or even the missiles which have already been fired at Israel’s northern towns and villages (some 2.500 at time of writing), but also against the threat of the estimated 13.000 missiles which Hizbullah still has and threatens to use against Israel’.

¹⁵ That part of international law which regulates the question when a State has the right to use force in its relation to other States.

¹⁶ That part of international law which regulates the use of force, once an armed conflict has been started.

¹⁷ See article 57 of Protocol I of 1977 to the Geneva Conventions of 1949.

¹⁸ Advisory Opinion on Nuclear Weapons, I.C.J. Reports, 1996, 245.

A similar legal reasoning underlies the global war on terror, which is waged under the lead of the United States¹⁹. The attacks of 11 September 2001 were preceded and followed by many terrorist attacks against the United States and its allies²⁰. This global *jihad* against the United States and its allies is now considered one ongoing armed attack, to which States continuously respond with military means in the exercise of their right to individual or collective self-defence²¹. The aim is to eradicate Al Qaeda and related organisations. It is clear that the magnitude of the consequences of the 11 September 2001 attacks triggered off this new trend, in which the judicial approach is now supplemented with a *ius ad bellum* approach.

C. *Ius in bello*

What were the applicable law and thus the status of Hezbollah fighters, the Lebanese armed forces and the Israeli armed forces in relation to the conflict?

Accepting that Israel had the right to stop the ongoing armed attack by Hezbollah fighters from Lebanon, the question should be posed what part of international humanitarian law governed the military operations conducted by Israel and Hezbollah.

Common article 3 of the Geneva Conventions of 1949, to which Israel is a Party, sets forth minimum standards for all parties to a conflict between a State, such as Israel, and a non-State actor, such as Hezbollah²². The wording of the article itself appears to limit its application to conflicts within the territory of a single State, but there is more and more consensus that such literal interpretation would lead to an unwanted loophole in international humanitarian law²³. Such loophole would indeed mean that the conduct of hostilities between a State and non-State actors in another State is not regulated by international humanitarian law. This was the position of the United States as to the global war on terror, until the recent decision of the United States Supreme Court in the Hamdan case intervened²⁴. The United States had never applied common article 3 in the context of the armed conflict with international terrorists. In directing that the United States forces would treat all detained terrorists humanely, the President of the United States specifically determined in February 2002 that common article 3 did not apply to the conflict with Al Qaeda on the ground that the war on terror is waged internationally but is not an inter-State conflict. This position is now under review, because of the decision in Hamdan vs. Rumsfeld²⁵. Mr. Hamdan is a Yemeni citizen who has spent several years working with Osama Ben Laden, allegedly as his driver and bodyguard. In late 2001 he was taken prisoner by Afghan warlords, who handed him over to United States forces. After six months in a US prison in Afghanistan, he was transferred to the US military base in Guantanamo Bay on the isle of

¹⁹ Within the United States the term ‘global war on terror’ is intended as a statement of fact with political and legal consequences.

²⁰ E.g. in 1998 against the US Embassies in Kenia and Tanzania, in 2000 against the USS Cole, in 2002 against western nightclubs in Bali, Indonesia, and against the oil tanker Limburg in Yemen.

²¹ Cf. Operation Enduring Freedom.

²² See also e.g. Human Rights Watch, Questions and Answers on Hostilities Between Israel and Hezbollah, update of 2 August 2006.

²³ Cf. C. Garraway, The ‘War on Terror’: Do the Rules Need Changing?, *Briefing Paper IL BP 06/02*, September 2006, ed. Chatham House (The Royal Institute of International Affairs), 10.

²⁴ Hamdan v. Rumsfeld, US, 126 S.Ct. 2749, 2006.

²⁵ Cf. the testimony of S. Bradbury (Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice) before the United States Senate, Committee on the Judiciary, 11 July 2006.

Cuba²⁶. Hamdan challenged his detention before court and on 29 June 2006 the Supreme Court invalidated the Military Commissions that President Bush had established to bring Guantanamo detainees to trial. The Court held that the minimum standards contained in common article 3 of the Geneva Conventions are applicable to the conflict with Al Qaeda and that these standards were not reached by the prescribed procedures of the Military Commissions.

The conflict between Israel and Hezbollah fighters is also certainly governed by customary international humanitarian law applicable to non-international (or better non-interstate) armed conflicts.

Israel has asserted on several occasions that it considered itself to be responding to the actions of the State of Lebanon, not just to those of Hezbollah. Israel targeted Lebanese infrastructure (including Lebanese army facilities and bases) and not just Hezbollah. On the other hand Lebanese armed forces have in general not responded to these attacks or have not engaged in own military operations. Therefore, there is dispute among international lawyers as to whether there was also an interstate armed conflict between Israel and Lebanon²⁷. If the answer is yes, such attacks were governed by the whole of the Geneva Conventions. If the answer is no, another question raises: Where Lebanese Armed Forces then to be considered as civilians, who are of course not to be the subject of attacks according to international humanitarian law?

The fact that a State does not respond to attacks against its armed forces, does not exclude the possibility of having an applicability of the law of international armed conflict. If one accepts that there was an interstate conflict, another question is whether this changed the conflict between Hezbollah and Israel also into an interstate conflict, namely one and the same conflict, or whether this did not influence the applicable law in the conflict between Hezbollah and Israel.

In its declaration of 25 July 2006 regarding the then-ongoing conflict, the Ministry of Foreign Affairs of Israel gives the impression for the whole of the situation to feel bound by all principles valid in interstate conflicts, nevertheless calling Hezbollah fighters terrorists, rather than combatants²⁸.

Within the Lebanese governmental structure and practice, Hezbollah is accepted as a legitimate resistance movement working for the liberation of Shebaa farms²⁹ and to free Lebanese and other prisoners in Israeli jails. Some argue therefore that Hezbollah fighters qualify as combatants under the law of international armed conflict. In particular, two positions are defended in this respect.

The first position is based on article 4.A.(2) of the Third Geneva Convention of 1949, which among others qualifies organised resistance movements belonging to a party to the conflict as combatants if they fulfil four conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognisable at a distance;
- (c) that of carrying arms openly; and
- (d) that of conducting their operations in accordance with the laws and customs of war.

²⁶ For more information see e.g. Program on Humanitarian Policy and Conflict Research Harvard University, Transnationality, War and the Law, April 2006, 11.

²⁷ Human Rights Watch, supra 22.

²⁸ Statement of the Israel Ministry of Foreign Affairs of 25 July 2006, supra 14.

²⁹ A small disputed piece of land.

As there seems to be no fixed distinctive sign recognisable at a distance and reports seem to confirm that Hezbollah fighters target civilians and Israeli forces at random, one should have serious doubts about the correctness of this position.

The second position is based on article 44 paragraph 3 of the First Geneva Protocol of 1977, which gives combatant status to persons who cannot distinguish themselves from the civilian population due to the nature of the armed conflict provided that they carry their arms openly:

- (a) during each military engagement; and
- (b) during such time as they are visible to the adversary while they are engaged in a military deployment preceding the launching of an attack in which they participate³⁰.

However, Israel is not a State Party to Protocol I. Moreover, this particular paragraph does not represent customary international humanitarian law, and is therefore not binding on Israel. There are consequently strong arguments to reject the second position as well.

One could conclude that in this conflict, common article 3 of the Geneva Conventions was certainly applicable, the rest of the Geneva Conventions was applicable, at least according to Israel, and Hezbollah fighters probably fail to meet the requirements to qualify as combatants and would therefore have to be considered as civilians who by (continuously) taking a direct part in hostilities lost the protection of a civilian. The classification of the conflict also influences the question whether an individual can be prosecuted for war crimes. The difference is clear in the Statute of the International Criminal Court, which lists 26 war crimes for international armed conflicts, while only 12 for non-international armed conflicts. As to the conflict between Hezbollah and Israel, it is for example interesting to note that intentionally launching a disproportionate attack only involves individual criminal responsibility in an international armed conflict³¹. We are consequently dealing with the difficult situation of a somewhat open question with important consequences for the final answer. For the purpose of this paper, it will be presumed that the whole of the Geneva Conventions applied to the conflict but Hezbollah fighters did not meet the requirements to be recognised as combatants.

Without prejudice to national law, under international humanitarian law, Hezbollah was allowed to fight against and capture members of the Israeli armed forces. Captured Hezbollah fighters and captured Israeli soldiers were and remain to be treated humanely. After capture, the prosecution by Israeli authorities of Hezbollah war criminals as well as Hezbollah fighters who committed ordinary crimes³² would be possible. The use of detainees to negotiate the release of other prisoners, after the end of the conflict is not authorised and would constitute hostage taking under international humanitarian law. Hostage taking is a war crime³³.

Could Israel target civilian objects?

³⁰ This position is defended in 'Nouveaux Droits de l'Homme – International' and 'Association Libanaise pour l'Education et la Formation', International Humanitarian Law violations in the current conflict opposing Hezbollah (Lebanon) to the State of Israel, Preliminary Report, 1 August 2006.

³¹ See also J. Somer, Acts of Non-State Armed Groups and the Law Governing Armed Conflict, *ASIL Insight*, 24 August 2006, *Volume 10, Issue 21*.

³² Under national legislation, including Israeli legislation.

³³ Common article 3 of the Geneva Conventions of 1949, as well as article 34 and 147 of the Fourth Geneva Convention of 1949.

International humanitarian law and more specifically the principle of distinction forbid direct attacks against civilian objects³⁴, unless they are being used for military purposes. If objects make an effective contribution to military action and their total or partial destruction, capture or neutralisation in the circumstances ruling at the time offers a definite military advantage, they become indeed military objectives³⁵.

Therefore, houses used as weapon caches or rocket launching platform are legitimate targets. Also Hezbollah fighters present in their homes are military objectives³⁶. Hezbollah offices are also a legitimate target if they in practice have a military function, apart from the political or social function they have. Al Manar TV station was also attacked. Civilian television and radio stations may not be attacked to stop them shaping civilian opinion³⁷. However, according to the ICTY Committee that was set up to review NATO bombings in Yugoslavia, they become legitimate targets if they are used to incite to crimes or for military communication³⁸. Beirut airport (only the runway Israel emphasised) was also attacked. Israel declared to have done so to stop transport of reinforcements and supplies of weaponry and military material for Hezbollah and to prevent the airport from being used to fly the captured Israeli soldiers out of Lebanon³⁹. If confirmed by credible evidence, it could in those circumstances be argued that this attack was lawful, especially as the attack was limited to the runway and thus limited the effects on the population⁴⁰. Israel also bombed roads and bridges, to cut off the lines of communication of Hezbollah. Bombing such dual use infrastructure has happened also in many other armed conflicts and is less controversial if they indeed meet the requirements of a military objective, as mentioned earlier⁴¹.

Under the principle of proportionality, the attacking force must in all such cases refrain from mounting an attack if this action would disproportionately harm the civilian population or be launched in a way that fails to discriminate between the enemy and civilians⁴².

Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas⁴³. Each party to the conflict must, to the maximum extent feasible endeavour to remove civilians and civilian objects under its control from the vicinity of military objectives⁴⁴. Whenever Hezbollah stored weapons in civilian objects (homes), it made them military objectives. But even in situations of illegal location of military targets or in other words the use of human shields, the attacking force must adhere to the principle of proportionality⁴⁵.

³⁴ Articles 48 and 52, paragraph 1 of Protocol I of 1977 to the Geneva Conventions of 1949.

³⁵ Article 52, paragraph 2 of Protocol I of 1977 to the Geneva Conventions of 1949.

³⁶ It could be argued that the word 'object' does not include enemy personnel. In 'Attack restraints, target limitations, etc.' (*Military Law and the Law of War Review*, 1979, Vol. 1-2) E. Rauch hints at a difference between enemy personnel and military objectives. If so, attacks on enemy personnel would not be limited in any way by the definition of a military objective.

³⁷ Propaganda should be countered with propaganda.

³⁸ Final Report to the Prosecutor by the Committee established to review NATO bombings in Yugoslavia, paragraphs 75-76.

³⁹ Statement of the Israel Ministry of Foreign Affairs of 25 July 2006, *supra* 14.

⁴⁰ The restoration of the runway will take less time than the restoration of an entire airport.

⁴¹ In 'The Conduct of Hostilities under the Law of International Armed Conflict' (Cambridge University Press, 2004, 92-93) Y. Dinstein defends the position that a bridge, as a rule, would qualify as a military objective and that it would fail to be a military objective only when it is neither actually nor potentially of any military benefit to the enemy.

⁴² Article 51, paragraph 4 and 5 and article 57 paragraph 2(a)(iii) of Protocol I of 1977 to the Geneva Conventions of 1949.

⁴³ Article 58 (b) of Protocol I of 1977 to the Geneva Conventions of 1949.

⁴⁴ Article 58 (a) of Protocol I of 1977 to the Geneva Conventions of 1949.

⁴⁵ Article 51 paragraph 8 of Protocol I of 1977 to the Geneva Conventions of 1949.

In this respect for example the Qana massacre of 30 July 2006 calls for a neutral investigation in order to determine the role of each of the warring parties. The same could be called for as to the attacks on Hezbollah offices, apartments and homes in the Beirut southern suburb, a densely populated area, leading to the destruction of many buildings rendering over 100 000 civilians homeless, according to reports⁴⁶.

The bombing of a civilian power plant because electricity is also used by the enemy, is highly controversial. In urban society, the lack of electricity greatly affects the civilian population. It is recommended to search alternatives which affect the local population less but give similar results, such as temporary disturbing of the plant or attacks against separate sub-installations serving only the enemy⁴⁷.

Is the firing of rockets by Hezbollah into Israel lawful under international humanitarian law?

Targeting civilians and civilian objects is forbidden and a war crime⁴⁸. Targeting military objectives is permitted under international humanitarian law, if the attacks are not indiscriminate or causing disproportionate collateral damage⁴⁹. If it is confirmed that Hezbollah targeted villages and cities as such, or used rockets that are so inaccurate as to be incapable of being properly targeted, they have violated international humanitarian law⁵⁰.

Should relief workers receive access to the war zone?

Parties to the conflict must allow rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in nature and without any adverse distinction, subject to their right of control. The freedom of movement of relief workers may only be restricted temporarily for reasons of imperative military necessity⁵¹. Despite talks about to establish safe corridors for humanitarian workers, according to reports, the South of Lebanon remained not accessible to humanitarian relief workers for quite some time⁵². Fact-finding work should be done in this respect.

Does international humanitarian law require warnings to civilians in advance of attacks?

International humanitarian law prescribes that effective advance warning must be given of attacks affecting the civilian population, unless circumstances do not permit⁵³. Warnings are to be designed to

⁴⁶ See 'Nouveaux Droits de l'Homme – International' and 'Association Libanaise pour l'Education et la Formation', supra 30, 7.

⁴⁷ See also Human Rights Watch, supra 22 and A.P.V. Rogers, *Law on the Battlefield*, Manchester University Press, 1996, 44-46.

⁴⁸ Article 8(2)(b)(i)-(ii) of the 1998 Rome Statute of the International Criminal Court.

⁴⁹ Article 51, paragraph 4 and 5 and article 57 paragraph 2(a)(iii) of Protocol I of 1977 to the Geneva Conventions of 1949.

⁵⁰ See also Human Rights Watch, supra 22.

⁵¹ Articles 70 and 71 of Protocol I of 1977 to the Geneva Conventions of 1949.

⁵² See UN Secretary-General's briefing to the Security Council on the situation in the Middle East, supra 6.

⁵³ Article 57 paragraph 2 (c) of Protocol I of 1977 to the Geneva Conventions of 1949.

allow, as far as possible, civilians to leave a locality before it is attacked⁵⁴. Israeli airplanes frequently dropped leaflets and issued warnings through among others radio broadcasts⁵⁵.

Civilians who do not evacuate after such an advance notice are still fully protected by international humanitarian law.

Was the blockade of Lebanon legitimate?

International humanitarian law accepts the imposition of blockades, subject to the principle of military necessity and proportionality⁵⁶. The legitimate purpose of restricting the re-supply of Hezbollah fighters must be weighed against the costs to the civilian population. Permitting free passage of certain 'innocent' supplies could in some circumstances help to avoid disproportionate blockades.

Is the use of cluster munitions lawful?

There is a general prohibition to use means of combat incapable of making a distinction between civilian and military targets⁵⁷. There is no consensus that cluster munitions fall under the scope of this general prohibition⁵⁸. There is no specific international ban on the use of cluster munitions. As there is only one national ban on the use of cluster munitions in the world (namely in Belgium)⁵⁹ and State practice often shows their use in current conflicts, there is no ground to state that customary international humanitarian law prohibits their use. On the other hand, the use of cluster munitions in densely populated areas could imply a violation of the prohibition to launch indiscriminate attacks. As to the conflict in Lebanon, one should analyse the facts to find out if indiscriminate attacks took place.

III. Conclusion

Many of the issues that arise in relation to the global War on Terror against Al Qaeda are applicable to Hezbollah. The United States Supreme Court's acknowledgment that at least the basic standards of common article 3 of the Geneva Conventions of 1949 apply to all armed conflicts, including international non-interstate conflicts, avoids a legal loophole that some had suggested to exist. This important clarifying decision should now univocally guide all involved in the implementation of international humanitarian law.

⁵⁴ A. Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3, *UCLAPBLJ* 55, 84, 1984.

⁵⁵ Confirmed in the statement of the Israel Ministry of Foreign Affairs of 25 July 2006, *supra* 14.

⁵⁶ On blockades see e.g. H. von Heinegg, *The Law of Armed Conflict at Sea*, in *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, 1995, ed. D. Fleck, 1051-1053.

⁵⁷ Article 51 paragraph 4 (b) of Protocol I of 1977 to the Geneva Conventions of 1949.

⁵⁸ See for example the debates in the framework of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, also known as the Convention on Certain Conventional Weapons (CCW). This Convention was done on 10 October 1980 and entered into force on 2 December 1983.

⁵⁹ Article 3 of the Law of 8 June 2006, 'réglant des activités économiques et individuelles avec des armes (loi sur les armes)', *Belgian Official Gazette*, 26 June 2006.
