

A WAR-CRIMES COMMISSION FOR THE HIZBOLLAH-ISRAEL WAR?

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On August 11, 2006, the UN Security Council unanimously adopted Res. 1701 calling for an immediate cessation of hostilities between Hizbollah and Israel and setting out the principles and elements for a permanent ceasefire and long-term solution to the dispute between Israel and Lebanon.¹ Noticeable by its absence from the resolution was any mention of a war-crimes commission to address violations of international humanitarian law (IHL) — also known as the *jus in bello* or the laws of war — alleged to have been committed by both Hizbollah and Israel during their 34-day war.

The following article will examine this element missing from the package of measures intended to bring about a long-term resolution of the conflict between Israel and Hizbollah (and Lebanon, more broadly). It will provide a preliminary assessment of the charges of war crimes leveled at both parties to the armed conflict, and conclude with an examination of the need, and the prospects, for the establishment of an impartial international commission to investigate and adjudicate these allegations.

It must be emphasized at the outset that the assessment of war crimes pre-

sented here is preliminary and tentative only. The reasons for this are twofold. First, there is ambiguity as to the law applicable to this conflict. What is the proper corpus of law governing the battlefield conduct of the parties? It is my opinion, for reasons set out below, that customary IHL relating to armed conflict “not of an international character” is the appropriate body of law to which we should refer. This, however, is not — and certainly should not be considered — a determinative statement on the law relevant to the conflict.

Assuming that customary IHL is the apposite branch of law, what are the rules and principles that constitute that legal regime? Customary IHL, by its very nature, is imprecise and difficult to define. Many of its norms have been codified in international treaties, such as the Geneva Conventions (1949) and their Additional Protocols (1977). Much, however, remains unwritten and hence subject to conflicting interpretation and debate (even those norms recorded in written conventions are the focus of competing interpretations). The following analysis relies on a recently completed International Committee of the Red Cross (ICRC) study of customary IHL for guidance as to the rules and

principles of customary IHL related to non-international armed conflict. Though the most comprehensive assessment of customary IHL to date, the ICRC study is not the last word on the matter.

All this is to say that the law applicable to the Hizbollah-Israel war is not black and white, but grey. The structure of the analysis in the pages that follow, in which the legal principles thought to apply to this conflict are set out in the form of “rules” as defined in the ICRC study, may give the impression of greater precision in terms of the content of the law than is warranted. This is an unfortunate necessity if some analytical order is to be imposed on the welter of confusing and often contradictory information relating to possible breaches of IHL during the war. Nevertheless, the reader should bear in mind that what is presented here is only one individual’s best understanding of the applicable law and its substantive content.

Second, there is the problem of the ‘facts’ used in the analysis. This study is based exclusively on open-source information. Consequently, it can be considered *prima facie* evidence suggesting the *possible* commission of war crimes. It is not conclusive evidence that war crimes have, in fact, been committed. Indeed, the word “evidence” will not appear in this analysis, for that term suggests a standard of reliability and accuracy, normally required for ‘facts’ to be admissible in a court of law, that cannot be attributed to the available information.

To sum up, there are uncertainties as to the law applicable to the conflict as well as the substantive content of that law. The data upon which this analysis is based is not necessarily of a quality that would be found acceptable before a judicial tribunal.

Indeed, these acknowledged shortcomings are the two strongest arguments that can be made for the need for an authoritative international war-crimes commission.

BACKGROUND

The Civilian Toll

During the 34-days of conflict in Lebanon and northern Israel (from the initial Hizbollah snatch operation on July 12 to the ceasefire on August 14), Hizbollah barraged Israel with 3,970 rockets, 901 falling in urban areas. Forty-three civilians were killed in these attacks, with another 4,262 treated in hospital for injuries — 101 for moderate to serious wounds, 1,388 for light wounds, and 2,773 for shock and anxiety. Hizbollah rockets struck 6,000 homes and forced 300,000 residents to flee and more than a million to retreat to shelters.² The Israeli treasury estimates that direct and indirect damage — destruction of property, lost wages, etc. — incurred during the fighting totaled NIS 6 billion (\$1.4 billion).³

In Operation Change of Direction, the Israel Air Force (IAF) carried out over 10,000 air combat missions striking more than 7,000 targets, while the Israeli navy conducted 2,500 naval bombardments.⁴ During the course of these and IDF ground operations, at least 1,140 Lebanese civilians were killed and another 4,054 injured as of August 19. Thirty percent of those civilians killed were children under the age of twelve.⁵ A quarter of Lebanon’s population — some one million people — were forced to leave their homes; as many as 200,000 of these displaced persons may have no homes to return to.⁶ Israeli operations damaged “airports, ports, water and sewage facilities, electrical plants, 80 bridges and 94 roads, more than 25 gas

stations, 900 other businesses and 30,000 homes or shops.”⁷ Lebanon’s Council for Development and Reconstruction estimates the total cost of infrastructure damage at \$3.6 billion, not including the destruction in Beirut’s suburbs, estimated at almost \$1 billion.⁸

Allegations of War Crimes

The extensive damage and suffering inflicted upon the civilian population and infrastructure in both Israel and Lebanon during the conflict led many observers to warn of the possible commission of war crimes. In the first week of the fighting, UN High Commissioner for Human Rights Louise Arbour warned,

I do believe that on the basis of evidence that is available in the public domain there are very serious concerns that the level of civilian casualties, the indiscriminate shelling of cities and so on, on their face raise sufficient questions that I think one must issue a sobering signal to those who are behind these initiatives to examine very closely their personal exposure [i.e., they could bear personal responsibility for the commission of war crimes].⁹

UN Undersecretary-General for Humanitarian Affairs and Emergency Relief Coordinator Jan Egeland was characteristically blunt in criticizing both parties for their conduct of the fighting. Speaking to reporters at Larnaca airport, Cyprus, on July 24, he labeled Israel’s offensive as “disproportionate” and “a violation of international humanitarian law.”¹⁰ He was equally damning of Hizbollah’s actions:

Consistently, from the Hizbollah heartland, my message was that

Hizbollah must stop this cowardly blending...among women and children. I heard they were proud because they lost very few fighters and that it was the civilians bearing the brunt of this. I don’t think anyone should be proud of having many more children and women dead than armed men.¹¹

Relying on more diplomatic language, UN Secretary General Kofi Annan expressed his concern over the impact of the war on the civilian populations. In a letter reporting to the UN Security Council on the circumstances of an Israeli aerial attack on the Lebanese village of Qana in which 28 persons were killed, including 14 children, Kofi Annan wrote,

The attack on Qana should be seen in the broader context of what could, on the basis of preliminary information available to the United Nations, including eyewitness accounts, be a pattern of violations of international law, including international humanitarian law and international human rights law, committed during the course of the current hostilities.¹²

These and other expressions of concern voiced during and after the conflict suggest the need for an assessment, however preliminary in nature, of the informational basis of these allegations of war crimes.

ASSESSMENT

The Applicable Law — Customary IHL

First, what law is applicable in this conflict? International humanitarian law is the body of treaty and customary law providing for the protection of noncombatants in armed conflict and for the regulation of the means and methods of warfare.

Issues of the law governing the resort to force (*jus ad bellum*) are irrelevant from the standpoint of the responsibility of the parties to an armed conflict for possible violations of IHL. It makes no difference whether a party is deemed the aggressor or the victim in the conflict (a determination that, under the UN Charter *jus ad bellum* regime, falls within the purview of the Security Council). A party engaged in a legitimate exercise of self-defense against an armed attack may deliberately massacre enemy civilians during the course of its defensive operations, a grave breach of the principles of IHL. Conversely, a party that launches an unprovoked act of aggression against another nevertheless may adhere scrupulously to the rules of war. In other words, from the standpoint of the possible commission of war crimes, *why* the conflict is being fought is irrelevant. In the context of IHL, the focus is on *how* it is fought.

Binding on Both Israel and Hizbollah

Those treaties of IHL that it has ratified — for example, the four Geneva Conventions of 1949 — are binding on Israel. However, it is not a state party to the whole panoply of treaties, conventions and protocols that, in part, make up the corpus of IHL. Moreover, Hizbollah, as a non-state actor, is not a signatory to any of these international treaties. What rules and principles, then, if any, govern the conduct of both Israel and Hizbollah in their armed conflict?

These rules and principles may be found in customary IHL. Customary international law — unwritten law based on established state practice and *opinio juris* (i.e., states' conviction that they are legally obliged to engage in or to refrain

from a particular practice) — is difficult to define, precisely because it is not written down, though, over time, more of its norms have been codified in formal treaties and conventions. Nevertheless, in March 2005, the International Committee of the Red Cross published a two-volume, 5,125-page study of customary IHL.¹³ The study's purpose was twofold: (1) "to determine which rules of international humanitarian law are part of customary international law and therefore applicable to all parties to a conflict, regardless of whether or not they have ratified the treaties containing the same or similar rules"; and (2) "to determine whether customary international law regulates non-international armed conflict in more detail than does treaty law and if so, to what extent."¹⁴ The eight-year project identified 161 "rules" as operative in practice among states with regard to international and non-international armed conflict.¹⁵

But are these customary rules applicable in an armed conflict in which one of the belligerents is a non-state actor? A recent ruling of the U.S. Supreme Court in the case of *Hamdan v. Rumsfeld* suggests there may be a legal basis for assuming that these rules do, in fact, apply in such a situation. As a preliminary comment, it should be noted, first, that the U.S. Supreme Court does not "make" international law. Rather, its interpretation of the law in this case becomes an element of state practice contributing to the evolving understanding of international humanitarian law, though it is practice to which special weight should be attached in this instance (as opposed to, say, a ruling of the superior court of Vanuatu), given the U.S. position as the sole superpower and its leading role in the global war on terror. Second, the

question before the Court was whether the president, exercising his powers as commander-in-chief, could set up military commissions to try Guantanamo detainees under the structures and procedures outlined in the military order of November 13, 2001 (in the event, the Court ruled that the commissions were not authorized under U.S. federal law and contravened the Geneva Conventions). The Court's discourse on the law applicable to an armed conflict between a state and non-state actor formed a part of its overall legal reasoning on the question before it; it was not the primary focus of the Court's deliberations. Nevertheless, the Court's thinking on this matter does shed some light as to the law that could be applied to such conflicts.

The Court noted in its decision that the conflict between the United States and al-Qaeda — that is, between a state and a non-state actor — was a “conflict not of an international character,” in contradistinction to an international conflict or “a clash between nations.”¹⁶ Thus, it ruled that Common Article 3 of the four Geneva Conventions (1949) governing the conduct of parties¹⁷ to an armed conflict “not of an international character,” which is considered to be reflective of customary IHL, applies to the “war on terror” between the United States and al-Qaeda.¹⁸ Logically, we can conclude by extension that both the state and the non-state actors as parties to an armed conflict are bound to respect the norms and principles of IHL.

Reasoning analogously, Hizbollah, like al-Qaeda, is a non-state actor that can be a

party to an armed conflict not of an international character. Indeed, I would argue that the factual basis for making this argument is even stronger for Hizbollah than it is for al-Qaeda. Hizbollah is an organized political-military entity with a disciplined hierarchical structure and a responsible chain of command through which the conduct of its subordinate paramilitary units is controlled (the ability of Hizbollah's military wing to sustain its rocket attacks against Israel despite the intensity of the IDF air and ground assault mounted against it demonstrates the resilience of this command structure). It is not an amorphous band of armed brigands subject only to the domestic

criminal law of the Lebanese state. It has a much tighter organizational structure than does the looser al-Qaeda terrorist network.

Indeed, President

Bush has gone so far as to describe the group as a “state within a state.”¹⁹ Hence, consistent with the reasoning of the U.S. Supreme Court, Hizbollah, as an organized entity capable of enforcing respect for the rules of IHL among its armed members, is obliged under customary IHL to ensure that respect. In sum, the war between Israel and Hizbollah is one in which the customary rules of IHL relating to an armed conflict not of an international character apply to both parties. Neither Israel nor Hizbollah has a legal free pass with respect to strict observance of the laws of war.

The Record

Did Israel and Hizbollah fulfill their obligations to respect IHL during their armed conflict? A preliminary assessment

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of their conduct in the recent fighting suggests that both sides may have violated the rules of war. To explore this further, a two-step process will be used. First, the customary IHL rule(s), as listed in Henckaerts (2005), will be set out to define the putative legal standards against which the conduct of the parties should be held (though bearing in mind the caveats discussed above). Second, selected open-source information indicative of possible breaches of these customary rules will then be presented.

Distinction

Distinction between Civilians and Combatants

Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.

Distinction between Civilian Objects and Military Objectives

Rule 7. The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.

Rule 8. Insofar as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

One of the bedrock principles of IHL is the distinction between civilians and combatants. The death of innocent civilians is a tragic but inevitable consequence of

warfare. In order to minimize this tragedy, customary IHL obliges the parties to an armed conflict to strictly differentiate between civilians and civilian objects, on the one hand, and combatants and military objectives, on the other, directing their attacks only against the latter.

The death of civilians in the course of a military operation is not, in itself, proof that a war crime has been committed. As Luis Moreno Ocampo, chief prosecutor of the International Criminal Court (ICC), noted in response to accusations that the rules of war had been violated during the 2003 American invasion of Iraq:

Under international humanitarian law and the Rome Statute, the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime. International humanitarian law and the Rome Statute permit belligerents to carry out proportionate attacks against military objectives, even when it is known that some civilian deaths or injuries will occur.²⁰

In other words, IHL does not prohibit military operations simply because they may result in incidental civilian casualties. Nevertheless, it does require that every reasonable precaution be taken to minimize the possible loss of civilian life and damage to civilian objects, weighed against the demands of military necessity, during the course of these operations.

During its war with Hizbollah, the Israeli government insisted that it “takes pains to ensure that it directs its attacks against legitimate military targets, and that in conducting its operations incidental damage to civilians is kept to a minimum.”²¹ However, in its report *Fatal*

Strikes: Israel's Indiscriminate Attacks against Civilians in Lebanon, New York-based Human Rights Watch (HRW), after investigating a sample of IDF air and artillery attacks over the period July 12-27 in which at least 153 Lebanese civilians lost their lives, concluded that these incidents were not the result of accidents but “reveal[ed] a systematic failure by the IDF to distinguish between combatants and civilians.”²² It noted the statements of Israeli officials that suggested “at the very least, the IDF has blurred the distinction between civilian and combatant and is willing to strike at targets it considers even vaguely connected to the latter. At worst, it considers all people in the area of hostilities open to attack.”²³ For instance, at the end of July, Justice Minister Haim Ramon was reported as saying that, as Israel had given the residents of southern Lebanon ample time to leave the area — from the start of the conflict, Israel had broadcast warnings advising civilians to flee the combat zone — “all those now in south Lebanon are terrorists who are related in some way to Hizbollah.”²⁴

A possible instance of a failure to distinguish between civilians and combatants occurred on the night of August 11. Israeli aircraft fired missiles into a convoy of over 500 cars carrying some 350 Lebanese Army and security personnel and more than a thousand refugees from the southern town of Marjayoun. The warplanes hit the column well north of the Litani River, outside of Israel’s unilaterally proclaimed free-fire zone in southern Lebanon. Six people were killed and more than 30 wounded.²⁵

In a communiqué released after the attack, the IDF spokesman said, “The IDF identified suspicious movement along a

route forbidden for travel which had been used by Hizbollah to transport rockets and other weaponry. Acting on the suspicion that these were Hizbollah terrorists transporting weaponry an aerial attack was carried out.”²⁶ The press release also noted, “a request for the passage of the convoy was submitted to the IDF coordination apparatuses prior to its departure and was not authorized.”²⁷

UN officials claimed, however, that the IDF knew prior to the attack that the column consisted of noncombatants. Milos Strugar, spokesman for the UN Interim Force in Lebanon (UNIFIL), said “UNIFIL had informed the IDF about the convoy and about the road to Beirut through the Bekaa. And then, the Israeli soldiers who were controlling the joint Lebanese security headquarters [in Marjayoun] knew exactly who was in the convoy.”²⁸ Strugar also insisted that, contrary to the IDF spokesman’s statement, the Israeli military had approved UNIFIL’s request for passage of the convoy, a statement that UNIFIL commander Gen. Alain Pelligrini later confirmed: “We had a green light.”²⁹ This preliminary information suggests that the IDF may have, at a minimum, failed to distinguish this noncombatant column — of which it had, by its own admission, advance knowledge — from a Hizbollah military supply column. However, in light of the confusion surrounding the circumstances as reported, this incident warrants further investigation by a war-crimes commission before any conclusions can be drawn as to whether a war crime was committed.

Other reporting of Israeli operations during the war also suggests that there may have been a blurring of the distinction between civilian objects and military

objectives. Under customary IHL — reflected also in Art. 52 of Additional Protocol I³⁰ — a “military objective” is defined as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage” (Rule 8 above). As the ICRC Commentary³¹ to Protocol I explains, this definition comprises two elements:

- a) the nature, location, purpose or use which makes an effective contribution to military action;
- b) the total or partial destruction, capture or neutralization which in the circumstances ruling at the time offers a definite military advantage.³²

The second element of the definition specifies that the destruction, capture or neutralization of the objective must offer a “definite military advantage” in the prevailing circumstances. As the ICRC Commentary remarks, it is not legitimate to launch an attack that offers only “potential or indeterminate advantages.”³³ This notion of military advantage is also referred to in Art. 57 2(a)(iii) of Additional Protocol I, specifying that an attack must be cancelled or suspended if the expected collateral damage is excessive in relation to the “concrete and direct” military advantage anticipated.³⁴ The Commentary interprets the phrase “concrete and direct” to mean that “the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded.”³⁵

The Israeli Ministry of Foreign Affairs takes note of the generally accepted

definition of “military objective” as set out in Art. 52 of Additional Protocol I but adds, “This definition has been criticized by some for being too narrow and failing to pay sufficient attention to war-sustaining capability, including economic targets.”³⁶ In support of this contention, the ministry cites an article written by W. Hays Parks, the special assistant for Law of War Matters to the U.S. Army Judge Advocate General, in which he wrote that the Protocol I definition focused too much on “definite military advantage” and too little on war-sustaining capability, including economic targets such as export industries.³⁷ Apparently adopting a definition consistent with this broader understanding of military objectives, Israel attacked a wide range of dual-purpose infrastructure and property targets across Lebanon that it contended Hizbollah was using to sustain its military operations. These included (with the attending Israeli government justification):

Bridges and roads — The activity of terrorist groups in Lebanon is dependent on major transportation arteries through which weaponry and ammunition, as well as missile launchers and terrorist reinforcements are transported. Damage to key routes is intended to prevent or obstruct the terrorists in planning and perpetrating their attacks. In this case it is also intended to prevent the kidnapped soldiers being smuggled out of the country.

Runways at Beirut International Airport — In the view of the IDF, rendering the runways unusable constituted the most appropriate method of preventing reinforcements and supplies of weaponry and military matériel reaching the terrorist organi-

zations. It is also a response to reports that it is the intention of the terrorists to fly the kidnapped Israelis out of Lebanon.

Al Manar TV station — Operating as the Hizbollah television station, Al Manar was used to relay messages to terrorists as well as incite acts of terrorism.

Fuel reserves — Terrorist activity is dependent, inter alia, on a regular supply of fuel, without which the terrorists cannot operate. For this reason a number of fuel depots that primarily serve the terrorist operations were targeted.³⁸

Inferring from the range of IDF operations, it seems that Israel's conception of "military objectives" was so broad as to designate significant elements of Lebanon's civilian infrastructure and economy as, at least potentially, part of the Hizbollah support network, and, hence, as legitimate targets of attack. If so, this may have effectively erased the distinction between civilian objects and military objectives. In so doing, the IDF might have crossed the line from "definite" or "concrete and direct" military advantage — advantage that is "substantial and relatively close" — to that which is "potential or indeterminate," "hardly perceptible" or appearing only in the long run.

International human-rights organizations were at the forefront of criticizing Israel for its "overbroad interpretations"³⁹ of military objectives and military advantage, used to justify attacks against Lebanese civilian infrastructure and objects. For example, HRW took issue with Israel's rationale for attacks on the Beirut airport:

Israel has not claimed that the transport of arms was current or

underway. It is thus unclear why Israel could not have waited to see whether such supply operations actually began and only then targeted either particular flights or, if necessary, the airport at that time. Instead, Israel has attacked Beirut airport on a number of occasions, without any publicly available evidence that it has been used for any recent transport of arms or troops. As for the possible use of the airport to transport the captured Israeli soldiers out of Lebanon, the military advantage of destroying the airport is negligible in comparison with the civilian cost, given the many alternative routes out of Lebanon along its long border with Syria. On the other hand, the civilian cost of targeting the airport is high, since it impedes the ability of civilians in Lebanon to escape the fighting or those who remain to receive provisions.⁴⁰

HRW leveled a similar criticism against IDF attacks on Lebanese roads and bridges. While admitting that it had not yet carried out field research permitting an evaluation of the legitimacy of Israel's strikes on the transportation infrastructure, HRW indicated that among the factors to be considered would be whether the destruction of particular roads or bridges conferred a definite military advantage in light of the availability of alternative routes for military transport, or whether it was intended to inconvenience the civilian population or, possibly, interfere with their attempts to flee the combat zone.⁴¹

HRW roundly condemned airstrikes on electrical facilities as "almost never" legitimate.⁴² Though such facilities can support military forces, they are critical for the maintenance of essential services, such

as refrigeration, sanitation and medical care, upon which modern urban society depends. It would be much better, HRW maintained, to focus attacks on those elements of the electrical grid that directly serve military facilities. Again, as it had not completed field investigations of Israeli attacks on the Lebanese power grid, HRW could come to no definitive judgment as to the legitimacy of those operations. However, it insisted that Israel faced “a very high burden” of justification for these attacks.⁴³

As for Israeli strikes against Hizbollah’s television station, Al-Manar, Amnesty International (AI) criticized these attacks as another example of Israel’s “dangerous distortion of the meaning of military advantage.”⁴⁴ The station’s broadcast of anti-Israel propaganda did not make it a legitimate military target, AI maintained. Rather, it must transmit orders to Hizbollah’s military forces or in some other way contribute to their combat operations before it would constitute a legitimate military objective.⁴⁵

In sum, Israel’s seemingly broad definition of “military objectives” and “military advantage” — used to justify attacks against a wide range of targets that could be held to actually or potentially contribute in some fashion to Hizbollah’s military operations — may have blurred the distinction between civilian objects and military objectives, a distinction that all parties to an armed conflict are duty-bound to respect under customary IHL.

Discrimination

Indiscriminate Attacks

Rule 11. Indiscriminate attacks are prohibited.

Rule 12. Indiscriminate attacks are those

a. which are not directed at a specific military objective;

b. which employ a method or means of combat which cannot be directed at a specific military objective; or

c. which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

General Principles on the Use of Weapons

Rule 70. The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited.

Rule 71. The use of weapons which are by nature indiscriminate is prohibited.

Related to the principle of distinction is the prohibition on conducting indiscriminate attacks, that is, attacks that are not aimed at specific military targets or that employ weapons and/or tactics that, by their very nature, cannot be limited to military objectives.

Though Hizbollah claimed that some of its rocket attacks into northern Israel were aimed at military bases, which are legitimate targets in an armed conflict, it also admitted that it targeted civilian areas in reprisal for Israeli strikes against civilian targets in Lebanon (see “Reciprocity and Reprisals” below). Indeed, HRW observed that most of Hizbollah’s attacks “appear[ed] to have been directed at civilian areas and have hit pedestrians, hospitals, schools, homes and businesses.”⁴⁶ As Kenneth Roth, HRW executive director, said, “Lobbing rockets

blindly into civilian areas is without doubt a war crime... Nothing can justify this assault on the most fundamental standards for sparing civilians the hazards of war.”⁴⁷

Occasionally, Hizbollah’s rockets did strike military targets. On August 6, a barrage of more than a dozen rockets crashed into the hills surrounding the northern Israeli village of Kfar Giladi. One rocket slammed into a parking lot outside the village gate where a group of army reservists had gathered prior to deploying to the combat zone in Lebanon. Twelve soldiers were killed and another six wounded.⁴⁸ Such a troop marshalling area is a legitimate objective of attack. However, it is questionable whether this area was the intended target of Hizbollah’s barrage. The seemingly indiscriminate nature of the rocket attack suggests that the strike against this military target was incidental rather than the intended effect of a more general bombardment of a civilian area.

As for indiscriminate weapons, the ICRC Commentary to Additional Protocol I cites “long-range missiles which cannot be aimed exactly at the objective” — such as the German V2 rockets used at the end of World War II — as a prime example of such weapons.⁴⁹ AI notes that the indiscriminate effects of a weapon may stem from its design, the intent and professionalism of its operators, and the operational circumstances — weather, visibility, reliability of intelligence, etc. — at the time of its employment. Hence, AI defines an indiscriminate weapon as one “deemed to have indiscriminate effects either because of inherent characteristics or because of the way it tends to be used, or both.”⁵⁰ Note again that these are interpretive rather than definitive statements regarding indiscriminate weapons.

Hizbollah used three types of rockets in its missile offensive against Israel. Most of these were 122mm Katyusha rockets, but longer-range 220mm Fajr and 302mm Khaiber-1 rockets were also fired against urban centers far south of the border.⁵¹ It is important to emphasize that these weapons are not banned *per se* under international humanitarian law. Nevertheless, HRW points out that, because they lack a precise guidance system, they are inherently indiscriminate and, hence, *should never be used against civilian areas*⁵² (note this important qualification). AI takes a somewhat broader position, arguing that the use of such weapons, given their inherent inaccuracy over long distances, violates the prohibition on indiscriminate attack, even if ostensibly directed at legitimate military objectives.⁵³

However, there appears to be little doubt as to the illegality of the apparent Hizbollah practice of packing the warheads of some of its rockets with metal ball bearings so as to cause extensive injury and suffering to civilians. On July 16, for example, a rocket struck the main train depot in the Israeli port city of Haifa, killing eight rail workers. The warhead was reportedly filled with 14kg of metal ball bearings.⁵⁴ According to Israeli doctors who treated the wounded, the ball bearings increased the lethality of the rocket against civilians without any commensurate increase in military effectiveness (though it must be recognized that medical personnel are seldom in a position to judge matters of military effectiveness). “In my medical opinion, they [these rockets] are supposed to injure as many people as possible,” Dr. Eran Tal-Or, director of the Surgical Emergency Room at Haifa’s Ramban Hospital, told HRW investigators. “If you

wanted to bring down a building, you would make a weapon with a heavier blast. And you wouldn't bother with the balls inside that don't do much harm to buildings, just to people."⁵⁵

The IDF also came under fire for the use of weapons with alleged indiscriminate effects, specifically, its use of cluster bombs. These are aerial bombs or artillery shells that contain anywhere from a few dozen to several hundred explosive submunitions in a single canister, which burst at a planned altitude and scatter submunitions capable of destroying armored vehicles

over an area the size of a football field. Apart from its effects as an area weapon, one problem with cluster bombs has historically been the high failure or dud rate. Typically, 10 to 15 percent of cluster

submunitions do not explode (though in the recent fighting in south Lebanon, some estimates placed the dud rate for Israeli submunitions at two in five, possibly due to the age of the weapons⁵⁶ or because they landed on soft ground, became tangled in trees and other obstacles, or were fired too low to explode when they hit the ground).⁵⁷ Consequently, they can pose a lingering hazard to civilians even after the end of hostilities, becoming, in effect, unexploded landmines. These submunitions have caused an average of three casualties per day since the August 14 ceasefire,⁵⁸ killing at least 21 people and injuring over 100 others as of October 19.⁵⁹

Nevertheless, cluster bombs, like Hizbollah's rockets, are not illegal per se; no treaty prohibits their use. However, the potential violation of customary IHL may stem from the manner in which they are used. As HRW researcher Bonnie Docherty pointed out in an interview with BBC radio, the use of cluster bombs is frequently illegal especially when employed in civilian areas. Their effects can be disproportionate, in that the civilian harm — both the damage inflicted during the original strike and that suffered from duds that later explode in the targeted area —

outweighs the military advantage. Moreover, their use can violate the principle of discrimination in that, as area effects weapons, they fail to distinguish between civilian and military targets. For these reasons, Docherty

“What’s shocking and I would say, to me, completely immoral is that 90 percent of the cluster bomb strikes occurred in the last 72 hours of the conflict, when we knew there would be a resolution.”

noted, HRW advocates the negotiation of a Cluster Munition Convention that would prohibit the use of such weapons in populated areas and prohibit the use of munitions with a high dud rate.⁶⁰

Israel has acknowledged the use of such weapons during its conflict with Hizbollah, though government spokeswoman Miri Eisin maintained, “Israel does not break any international laws in the type of armaments it uses. Their use conforms with international standards.”⁶¹ Israeli officials insisted that, despite Hizbollah's practice of hiding in civilian areas, Israel's intent was to use these weapons only in open terrain.⁶²

Nevertheless, allegations have been leveled against the IDF for the indiscriminate way in which these weapons were apparently employed during the campaign. UN officials have identified 590 separate bomb-strike areas contaminated with as many as one million bomblets of both Israeli and American make.⁶³ Speaking at a news conference on August 30, Jan Egeland condemned what he considered Israel's indiscriminate use of these weapons, in particular, during the final stages of the conflict: "What's shocking and I would say, to me, completely immoral is that 90 percent of the cluster bomb strikes occurred in the last 72 hours of the conflict, when we knew there would be a resolution."⁶⁴

One month after the fighting ended, an IDF reserve rocket commander revealed that the Israeli military had fired some 1,800 cluster bombs, carrying over 1.2 million submunitions, during the fighting in Lebanon. The artillery units relied heavily on mobile Multiple Launch Rocket System (MLRS) platforms that, according to the media report, fire unguided cluster rockets with a range of 32 km and a margin of error of up to 1,200 meters. Given the rockets' inaccuracy, the commander reported that units would "flood" the battlefield with munitions. "What we did was insane and monstrous; we covered entire towns in cluster bombs," he maintained.⁶⁵ Responding to this revelation, the IDF Spokesman's Office released a statement reiterating that the "[t]he IDF makes use only of methods and weaponry which are permissible under international law. Artillery fire in general, including MLRS fire, were used in response solely to firing on the state of Israel."⁶⁶

Nor has Hizbollah escaped charges of

cluster bomb use. Two months after the ceasefire, HRW reported that the group had fired two Chinese-manufactured Type-81 122mm cluster bomb rockets at the village of Mghar in the Galilee.⁶⁷ This rocket typically carries 39 submunitions that discharge hundreds of 3.5mm steel spheres. All told, Israeli authorities maintain that at least 113 cluster bomb rockets hit northern Israel during the war, killing one and injuring twelve.⁶⁸ Hizbollah officials deny the allegations. Lebanese member of parliament Hassan Hoballah told the BBC "We did not use these bombs. We don't have them. We reject the use of these bombs anywhere in the world because they hurt civilians, especially when dropped on residential areas. Our stance is consistent. It can never change."⁶⁹

To sum up, the information publicly available to this point suggests that both parties to the conflict may have violated the principle of discrimination, either deliberately engaging in attacks that did not distinguish between civilian and military targets, and/or employing means or methods of combat that may be indiscriminate in their effects.

Proportionality

Proportionality in Attack

Rule 14. Launching 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.

Another foundational principle of customary (and conventional) IHL is the principle of proportionality. This is discussed, among other places, in the ICRC

Commentary to Art. 57 “Precautions in attack,” in Additional Protocol I. This principle — concerned with the incidental effects that attacks against military objectives may have on the civilian population and civilian objects — seeks to contribute to “an equitable balance between the necessities of war and humanitarian requirements.”⁷⁰ As the Commentary notes, military commanders must take into consideration a range of factors that bear on the risks faced by civilians — from location, terrain, weapons accuracy, weather conditions and the nature of the military objectives to the technical skill of the combatants⁷¹ — when contemplating an attack against a military objective. In some instances, the decision is straightforward: “For example, the presence of a soldier on leave obviously cannot justify the destruction of a village.”⁷² On the other hand, if destroying a bridge carries with it a “concrete and definite” military advantage, “it is understood that some houses may be hit, but not that a whole urban area be leveled.”⁷³ The argument has sometimes been made that, if the military stakes are high enough, extensive civilian losses may be justified. The Commentary rejects this argument: “The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.”⁷⁴ As the Commentary notes, the “golden rule” to be followed in deciding whether or not to proceed with an attack is “the duty to spare civilians and civilian objects in the conduct of military operations.”⁷⁵

In its approach to the question of proportionality in attack, the Israeli government maintains that this must be measured in terms of the military force required to remove the overall threat rather than that

needed to respond to the specific attack that prompted the defensive action:

[T]his means that its [Israel’s] response has to be measured not only in respect of the initial Hizbollah cross-border attack, or even the missiles which have already been fired at Israel’s northern towns and villages...but also against the threat of the estimated 13,000 missiles which Hizbollah still has and threatens to use against Israel.⁷⁶

The risk of incidental damage to civilians and civilian objects in a specific operation must take into consideration the requirement to eliminate the overall threat. Hizbollah’s practice of storing and firing rockets from civilian areas, according to the Israeli government, further heightens the risk of injury to civilians.

The Israeli government insists that the IDF assesses each operation individually and rejects those that it deems disproportionate — that is, that threaten to inflict civilian injury and damage in excess of the expected military advantage. If the decision is made to proceed with an operation, the means and methods employed are such as to reduce incidental damage without risking the success of the operation, including issuing warnings, where possible, advising civilians to leave the areas targeted for attack.⁷⁷

Though the preceding is consistent with the principle of proportionality in theory, available information concerning IDF operations in Lebanon seems to call into question how scrupulously the Israeli military adhered to this principle in practice. The aerial attack carried out against the mixed Christian-Muslim quarter of Al Shiyah in southern Beirut on August 7 may

be one such instance. On the day in question, an Israeli reconnaissance drone had been circling over the district for more than two hours when an unidentified man riding a motorcycle — whom residents described as a “lunatic” — stopped, dismounted, and fired his AK-47 assault rifle at the drone. Within minutes, an IAF warplane fired two missiles into the neighborhood, destroying 3 apartment buildings and killing 47 civilians and wounding at least 70 others, making it the deadliest airstrike in the war to that point.⁷⁸

It is unclear why the Israeli Air Force targeted the Al Shiyah district at the time it did. The IDF’s *Summary of Operations* for August 8 did not specifically mention this strike when it announced that over 200 air sorties in the previous 24-hour period had targeted “structures used by Hizbollah terrorists as offices and headquarters, launching grounds and five rocket launchers.”⁷⁹ Possibly, the IDF had determined that these apartment buildings were just such “structures.” However, the timing of the attack, coming as it did only minutes after an armed individual fired at the Israeli drone, suggests that the missile strike may have come in response to that particular incident. If this was, in fact, the case, a missile strike in which 47 civilians were killed and 3 apartment buildings destroyed was arguably a disproportionate response to a lone fighter “taking pot-shots” at an unmanned aerial drone.

AI questioned whether the damage inflicted on civilians and civilian objects during Israeli attacks on targets in Lebanon was, in fact, incidental:

The evidence strongly suggests that the extensive destruction of public works, power systems, civilian homes and industry was deliberate and an

integral part of the military strategy, rather than “collateral damage” — incidental damage to civilians or civilian property resulting from targeting military objectives.⁸⁰

If this was indeed a deliberate strategy of disproportionate response as AI charges, two possible motivations for this strategy may be inferred from comments of some senior Israeli officials. First, such a strategy may have been considered necessary to restore the credibility of the IDF’s deterrent posture — deemed to have been seriously eroded as a result of the two successful raids carried out on June 25 and July 12⁸¹ — so as to prevent future attacks. Israeli Vice Prime Minister and security cabinet member Eli Yishai maintained, “If Hizbollah fires Katyushas, we have to deliver a severe blow to Lebanon’s infrastructure, black out Beirut, cut off electricity, turn off the water, destroy bridges, halt industry and flatten entire villages. If there is horrible damage in Lebanon, they will say, ‘The Jews are crazy’”⁸² — the implication being that Israel is capable of virtually anything in response to challenges to its security.⁸³

Second, the intent may have been to inflict such disproportionate costs that the Lebanese people would turn on Hizbollah and compel them to end their anti-Israel operations (which, in the event, did not happen). Again, Yishai expressed the rationale for this approach:

It hurts me to see civilians hurt by our air force, but there is no choice. We cannot be bleeding hearts while our citizens are being hurt. If Lebanese citizens pay the price, they will rise up against Hizbollah. [The policy of bombing villages] would have assured

that Lebanese citizens would not permit Hizbollah to live next to them.⁸⁴

As HRW remarks, “Leaving aside the question of whether the Lebanese government is militarily capable of reining in Hizbollah, it is illegal under international humanitarian law...to use military force to squeeze the civilian population, to enhance its suffering or to undermine its morale, regardless of the ultimate purpose.”⁸⁵

Warnings

Precautions in Attack

Rule 20. Each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit.

As a part of the precautions taken to minimize civilian casualties, the warring parties are required, where possible, to provide advance warning of attacks to civilians in order to allow them to evacuate the combat zone before fighting begins. From the start of the war, Israel formally complied with this obligation.⁸⁶ For example, on July 25, it scattered leaflets over south Lebanon calling on residents “to evacuate your villages and move north of the Litani River.”⁸⁷ Having issued these warnings, however, the Israeli military apparently assumed that any individual remaining in the south thereafter was a Hizbollah “terrorist” or “terrorist supporter” and, hence, a legitimate target of attack; this, at least, was the conclusion of HRW.⁸⁸ If true, this assumption on the part of the IDF would seem to contravene the rules of war. As the ICRC reminded the parties in a statement issued on July 30, “Issuing advance warning to the civilian

population of impending attack in no way relieves a warring party of its obligations under the rules and principles of international humanitarian law. In particular, the principles of distinction and proportionality must be respected at all times.”⁸⁹

There was another problem with the IDF’s approach to warnings. At the same time as it was advising civilians to leave the combat zone, it stated that it would attack vehicles traveling south of the Litani River on suspicion of transporting Hizbollah weapons or fighters, in effect, indicating that southern Lebanon would henceforth be considered a free-fire zone. Leaflets dropped July 25 — the same day as the one calling on civilians to evacuate their villages — warned that “any pickup truck or truck traveling south of the Litani River will be suspected of transporting rockets and weapons and may be bombed.”⁹⁰ Two weeks later, the IDF scattered another batch of leaflets indicating that the travel ban had been expanded to include any vehicle found on the roads south of the Litani: “*Any vehicle of any kind* [emphasis added] traveling south of the Litani River will be bombarded, on suspicion of transporting rockets, military equipment and terrorists.”⁹¹

The civilian residents of south Lebanon were caught in a classic Catch-22 situation. On the one hand, the IDF ordered them to flee north of the Litani, ostensibly for their own safety. At the same time, heeding this warning exposed them to IAF attack on the roads. For many Lebanese, the consequences of these conflicting warnings were deadly. A possible instance of this occurred on the road from Marwaheen. On July 15, the IDF, using loudspeakers, called on residents to evacuate their village. Twenty-seven residents chose to leave the town and, after being

turned away from the local UN camp, headed north along the open road. An Israeli naval craft bombarded their convoy, and a helicopter gunship struck it minutes later. The Israeli strike killed 23 of the 27 civilians in the convoy.⁹²

AI was skeptical that the intent of the Israeli warning policy was to minimize civilian casualties. Rather, it labeled this policy a “distortion” of the concept of effective warning that “seems to result in spreading of panic among the civilian population, rather than enhancing their safety.”⁹³ Indeed, in past conflicts in Lebanon — for example, the 1996 Grapes of Wrath operation — Israel encouraged the massive flight of civilians as a means of pressuring the Lebanese government to rein in Hizbollah’s activities (though without success). Whether or not such was the intent in this recent round of fighting, the bottom line from the standpoint of IHL is that the issuing of warnings does not absolve the parties to an armed conflict from the duty to distinguish between civilians and combatants or to take feasible precautions to minimize civilian casualties when conducting attacks.

“Hiding” and Human Shields

Precautions against the Effects of Attacks

Rule 23. Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas.

Treatment of Civilians and Persons Hors de Combat - Fundamental Guarantees

Rule 97. The use of human shields is prohibited.

Under IHL, warring parties are required, to the extent feasible, to avoid

locating military objectives in built-up areas. Note this is not an absolute prohibition. Indeed, in today’s highly urbanized societies, it is difficult if not impossible to effect a total physical separation between the military and society at large. Nevertheless, the parties have an obligation to base military assets and to conduct military operations away from civilian population centers wherever possible.

This matter is, of course, inextricably linked to the issue of human shields, a practice prohibited under IHL. Article 28 of the Fourth Geneva Convention states that “the presence of a protected person may not be used to render certain points or areas immune from military operations.”⁹⁴ The commentary to this article expands on the rationale behind the prohibition:

During the last World War public opinion was shocked by certain instances (fortunately rare) of belligerents compelling civilians to remain in places of strategic importance (such as railway stations, viaducts, dams, power stations or factories), or to accompany military convoys, or again, to serve as a protective screen for the fighting troops. Such practices, the object of which is to divert enemy fire, have rightly been condemned as cruel and barbaric.⁹⁵

As the commentary suggests, there are two elements to the practice of using human shields: (1) compulsion — a warring party forces civilians against their will to remain in proximity of military objects, whether strategic locations or military forces; and (2) deliberate intent — a warring party consciously places civilians in harm’s way as a means to deflect enemy fire or to screen strategic locations

or military forces. A recent example of this practice occurred during the 1991 Gulf War. On August 19, 1990, then-President Saddam Hussein announced that up to 10,000 Westerners in Iraq would be sent to strategic sites throughout the country, including power plants, oil production facilities and strategic military installations, to deter a U.S. attack in response to Iraq's invasion and occupation of Kuwait (the hostages were subsequently released in December of that year, prior to the outbreak of fighting between the coalition and Iraqi forces in January 1991).⁹⁶ In another example, in May 1995, Bosnian Serb

forces detained 400 unarmed UN personnel deployed in Bosnia and, among other acts, chained some hostages to the door of a munitions facility and outside a radar site in order

to deter NATO air strikes against these and other military positions. The Hague Tribunal subsequently indicted Bosnian Serb leaders Radovan Karadzic and Ratko Mladic for using these prisoners as human shields.⁹⁷

During the Israel-Hizbollah war, the Israeli government routinely charged that Hizbollah based its military headquarters, stored weapons caches, and fired rockets from civilian centers in southern Lebanon and the southern suburbs of Beirut, contrary to IHL principles.⁹⁸ As the Israeli Foreign Ministry charged, "The deliberate placing of military targets in the heart of civilian areas is a serious violation of humanitarian law, and those who chose to

locate such targets in these areas must bear responsibility for the injury to civilians which this decision engenders."⁹⁹ However, the ministry also noted that "the callous disregard of those who hide behind civilians does not absolve the state seeking to respond to such attacks from the responsibility to avoid or at least to minimize injury to civilians and their property in the course of its operations."¹⁰⁰ To substantiate its claims, the ministry posted video and photographic evidence on its website allegedly proving that Hizbollah had "purposely hidden themselves and stockpiled their missiles in residential areas.

Indeed, many of the missiles recently fired at Israel were stored and launched from or near private homes, commandeered by Hizbollah terrorists wishing to shield their actions behind civilians in

order to thwart Israel's response."¹⁰¹ For example, one pair of photographs showed what the Israeli government claimed were the remains of a truck and a Zelzal long-range missile destroyed in an IAF airstrike, one of ten rockets that Hizbollah had allegedly stationed in the Christian neighborhood of Wadi Shahrour in Beirut on July 17. The website noted that, prior to the deployment of these weapons, Israel had not targeted the area.¹⁰²

Available open-source information strongly suggests that Hizbollah did, indeed, store weapons in and fire rockets from civilian areas or near UN observers, in violation of the duty of parties to take all feasible measures to separate military

HRW observed that Hizbollah's practice of operating from civilian areas did not justify what it considered the IDF's indiscriminate attacks against civilian areas in Lebanon.

assets and operations from civilian areas.¹⁰³ For example, residents of the Lebanese village of Marwaheen reported that, following the outbreak of the war, Hizbollah fighters set up rocket launchers in the village and fired them towards Israel, provoking devastating return fire from the IDF on the town. A teenage girl, who said she had seen a Hizbollah fighter run for cover between civilian houses in the village after setting up a timed volley of rockets on a nearby hilltop, told reporters, “We begged them to leave. We told them, ‘Get out! We have children here. We don’t want anybody to get hurt.’ But they ignored us.”¹⁰⁴ A few blocks from the village mosque was a stone house destroyed in an Israeli strike. Residents described it as a Hizbollah weapons depot, and reporters found the detritus of rocket-propelled grenades, mortar tubes and ammunition boxes. “Nobody knew they were using our houses to store weapons,” said one resident. “We were surprised to find them. How could they keep weapons in the middle of all these civilian houses?”¹⁰⁵

However, it is unclear whether this practice of locating forces in civilian areas, many of which were the home villages of Hizbollah fighters, amounted to a policy of deliberate shielding.¹⁰⁶ In *Fatal Strikes*, HRW reported that it had found no cases in which the Lebanese militia had deliberately used civilians as a means to fend off Israeli retaliatory strikes.¹⁰⁷ I have yet to see any public information suggesting that Hizbollah resorted to shielding practices comparable to the Iraqi and Bosnian Serb examples discussed above. Furthermore, HRW observed that Hizbollah’s practice of operating from civilian areas did not justify what it considered the IDF’s indiscriminate attacks against civilian areas in Lebanon.

In its sampling of some two dozen Israeli strikes over a two-week period in July, it found no indication that Hizbollah paramilitary forces had been operating in or around civilian centers during or just prior to IDF strikes on those areas.¹⁰⁸

For instance, on July 30, the IAF bombed a building in the village of Qana in which over 60 Lebanese civilians had taken refuge, killing 28 people including 14 children. In a statement issued later that day, the IDF maintained that Qana had “served as a shelter for escaping terrorists and a center of rocket attacks against Israel. Over 130 rockets have been launched from the vicinity of the village towards northern Israel. More than 50 rockets were launched from within the village itself.”¹⁰⁹ The statement said that rocket launchers were routinely situated close to residential buildings, and that a regional Hizbollah headquarters was based in the village as well as weapons depots and logistics sites. The statement also emphasized that the IDF had previously warned civilians in the village to leave the area.¹¹⁰ As a subsequent IDF inquiry maintained,

The building was targeted in accordance with the military’s guidelines regarding the use of fire against suspicious structures inside villages whose residents have been warned to evacuate, and which were adjacent to areas from where rockets are fired towards Israel. The IDF operated according to information that the building was not inhabited by civilians and was being used as a hiding place for terrorists. Had the information indicated that civilians were present in the building the attack would not have been carried out.¹¹¹

However, an article in the Israeli daily *Ha’aretz* subsequently called into question

the IDF's justification. As the newspaper reported:

It emerges that no Katyusha-rocket launchings had been previously detected from the yard of the house that was bombed and that there was no information about the presence of Hizbollah members at the site. The house was chosen as a target because Katyusha attacks had previously been launched from an area not far from it, and the air force decided to attack a few houses within a certain radius from the site of the previous launch, as was done at other launching sites. On the day of the attack, no rocket launches from the village of Qana had been detected.¹¹²

HRW's investigation into the incident seemed to lend support to this media report. Eyewitnesses interviewed by its field researchers insisted that no Hizbollah fighters were in the area of the attack at the time of the IAF strike. Moreover, its researchers saw no destroyed military equipment in or near the targeted building, nor did other outside observers find any indication that Hizbollah fighters had been present in the area.¹¹³

Hostages

Treatment of Civilians and Persons Hors de Combat - Fundamental Guarantees

Rule 96. The taking of hostages is prohibited.

Under the rules of war, the targeting and capture of enemy combatants is permissible, though those captured in combat must in all circumstances be treated humanely. However, the taking of

hostages in an armed conflict is forbidden. The Commentary to Additional Protocol I defines hostages as "persons who find themselves, willingly or unwillingly, in the power of the enemy and who answer with their freedom or their life for compliance with the orders of the latter (the enemy) and for upholding the security of its armed forces."¹¹⁴ The ICRC maintains that hostage taking occurs when the two following conditions are fulfilled:

- A person has been captured and detained illegally.
- A third party is being pressured, explicitly or implicitly, to do or refrain from doing something as a condition for releasing the hostage or for not taking his life or otherwise harming him physically.¹¹⁵

The July 12 attack in which Hizbollah fighters ambushed two IDF armored Humvees near the northern Israeli villages of Zarit and Shtula and captured two reservists, Ehud Goldwasser and Eldad Regev, was a deliberate "snatch" or hostage-taking operation. Previous to this incident, Hizbollah leaders had promised to secure the release of three Lebanese detained in Israel, including Samir Kuntar, currently serving four life sentences for the 1979 murder of two Israeli policemen and two civilians. After the attack, code named Operation Truthful Promise in apparent fulfillment of this earlier "promise", Hizbollah leader Sheikh Hassan Nasrallah announced that the two soldiers "were taken hostage. What we did today was our natural right and the only way to bring about the release of prisoners and detainees held by Israel. The soldiers will be returned on one condition — indirect negotiations for the exchange of prisoners."¹¹⁶

HRW notes that the use of captured prisoners of war in this fashion, i.e., as bargaining chips to compel an adversary to acquiesce to one's demands, constitutes hostage taking and is strictly forbidden under IHL.¹¹⁷

Reciprocity and Reprisals

Compliance with and Enforcement of International Humanitarian Law

Rule 140. The obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity.

Rule 148. Parties to non-international armed conflicts do not have the right to resort to belligerent reprisals. Other countermeasures against persons who do not or who have ceased to take a direct part in hostilities are prohibited.

Both parties to an armed conflict are obligated to respect the rules and principles of IHL regardless of the conduct of the other. That is, violations of IHL on the part of the adversary do not justify the commission of war crimes in retaliation. In particular, belligerent reprisals against civilians and other noncombatants are prohibited.

During the course of the war, Hizbollah maintained that its attacks against civilians in northern Israel were retaliation for IDF strikes against civilian targets in Lebanon. Ali Fayyad, a Hizbollah Politburo member, claimed that the group did not want to target civilians, "First, for humanitarian and moral reasons, and, second, because when civilians are killed we come out as the losers. Far more of our people get killed than Israel's."¹¹⁸ Nevertheless, according to Hizbollah's public rationale, these attacks were in the nature of (what it considered legitimate) reprisals: Israel hit

"civilian infrastructure," so Hizbollah launched rockets into "occupied Palestine" (i.e., Israel).¹¹⁹

Likewise, Hizbollah leader Sheikh Hassan Nasrallah insisted that IDF actions justified rocket attacks against towns and villages in Israel: "When the Zionists behave as if there are no rules and no red lines and no limits to the confrontation, it is our right to behave in the same way."¹²⁰ During the fighting, Nasrallah went further, threatening in a televised address on August 3, the same day that the IAF resumed air combat operations in Lebanon after a 48-hour partial suspension, that Hizbollah would respond to Israeli airstrikes against the Lebanese capital with missile attacks on Tel Aviv:

If you hit Beirut, the Islamic resistance will hit Tel Aviv and is able to do that with God's help. You attack our cities, our villages, our civilians, our capital, we will react. At any time you decide to stop your aggressions on our villages and towns and cities and our civilians, we will not hit any settlement or any Israeli city.¹²¹

Though recognizing that these remarks could be propaganda, they suggest that Hizbollah may have deliberately conditioned restraint in its rocket barrages against civilian areas in Israel to reciprocal restraint on the part of the IDF in its operations against civilian targets in Lebanon, contrary to Hizbollah's obligations under IHL.

CONCLUSION

It should not be assumed that the guilt of Hizbollah or Israel with respect to the allegations discussed in this paper has been incontrovertibly established. The publicly

available information suggests that both parties *may* have committed breaches of customary IHL. Only a duly constituted judicial commission with investigative and adjudicatory powers could make such a determination.

Indeed, there have been calls for the creation of an international commission to investigate allegations of war crimes. In his letter to the UN Security Council reporting on the Qana incident, Kofi Annan wrote,

The effects of the current conflict on civilians in Lebanon and Israel rise to a level of seriousness that requires further gathering of information, including information on violations of international humanitarian law and international human-rights law. Accordingly, I support the calls for a more comprehensive investigation.¹²²

HRW has proposed the establishment of an International Commission of Inquiry, “headed by a widely-respected and impartial expert with direct experience investigating wartime compliance with the laws of war...adequately funded and staffed with a team having expertise in forensics, ballistics and weaponry, and international humanitarian law,”¹²³ to investigate reported violations of IHL. Likewise, AI called for a panel of independent experts “with proven expertise in investigating compliance with international humanitarian and human-rights law, in military matters, as well as in forensics and ballistics”¹²⁴ to investigate the commission of war crimes and propose effective measures to hold those responsible to account.

Why is such an impartial commission necessary? Two general reasons argue for the establishment of such a body. First, a war-crimes commission could strengthen

respect for international humanitarian law. As Henckaerts notes,

The general opinion is that violations of international humanitarian law are not due to the inadequacy of its rules. Rather, they stem from an unwillingness to respect the rules, from insufficient means to enforce them, from uncertainty as to their application in some circumstances and from a lack of awareness of them on the part of political leaders, commanders, combatants and the general public.¹²⁵

The workings of such a commission would be a concrete demonstration of the international community’s commitment to enforce compliance with the norms and principles of IHL. It would be an expression of the commitment of the states to justice, tangible recognition that justice must be done — and, as importantly, that it must be seen to be done — and that those who breach these rules and norms must be held to account. The proceedings of such a commission could also serve an educational function, increasing awareness among combatants and noncombatants alike as to their rights and responsibilities in armed conflict. Finally, an impartial commission would counteract the tendency of parties to armed conflicts to use IHL as a propaganda tool to delegitimize the adversary and claim the moral high ground — a practice that only serves to undermine the credibility of the law.

Second, from a regional standpoint, a comprehensive war-crimes commission could contribute to an easing of tension and conflict in the Middle East. It would show Israeli and Lebanese civilians that the international community does not privilege the pain and suffering of the nationals of

one country over that of the other. As noted commentator Rami Khouri remarked, even symbolic actions such as establishing a war-crimes commission could show the parties “that impunity is not an option in the long run.”¹²⁶ More generally, he speculates that “engagement and changes in policies and behavior will happen only if a single standard of morality and law is applied” to all those in the region.¹²⁷

If the need for a war-crimes commission is there, what are the chances that such an impartial body will be created? In fact, an international commission has already been mandated. In a special session held on August 11, 2006, at the behest of the Arab states and the Organization of the Islamic Conference, the newly constituted UN Human Rights Council (HRC) met to consider the violation of human rights and IHL occasioned by the fighting in Lebanon. In a vote of 27 to 11, the Council approved Resolution S-2/1 that, in its operative paragraphs

1. Strongly condemns the grave Israeli violations of human rights and breaches of international humanitarian law in Lebanon;
2. Condemns the massive bombardment of Lebanese civilian populations...;
3. Also condemns the Israeli bombardment of vital civilian infrastructure...;
4. Calls upon Israel to abide, immediately and scrupulously, by its obligations under human rights law... and international humanitarian law;
6. Calls upon Israel to immediately stop military operations against the civilian population and civilian objects resulting in death and destruction and serious violations of human rights.¹²⁸

The resolution did not mention Hizbollah’s alleged violations of human rights or international humanitarian law, at most urging “*all concerned parties* [emphasis added] to respect the rules of international humanitarian law... [and] to refrain from violence against the civilian population.”¹²⁹

The resolution also called for the establishment of a “high-level commission of inquiry comprising eminent experts on human-rights law and international humanitarian law”

- a) To investigate the systematic targeting and killings of civilians by Israel in Lebanon;
- b) To examine the types of weapons used by Israel and their conformity with international law;
- c) To assess the extent and deadly impact of Israeli attacks on human life, property, critical infrastructure and the environment.¹³⁰

However, this is not the impartial investigative commission that many commentators have called for. The HRC resolution setting out the mandate of the commission has been criticized as one-sided, focusing as it does only on Israel’s alleged violations of human rights and international humanitarian law while remaining silent over Hizbollah’s breaches of the law. As both HRW and AI remarked,¹³¹ the Council’s adoption of such a highly politicized resolution undermined its credibility as well as that of the investigating commission. An impartial and objective inquiry requires the investigation of allegations of abuses committed by both sides to the conflict. As HRW noted, “If the scope of an investigation is artificially constricted [to accusations leveled against only one

party to an armed conflict], investigators will have a harder time gaining the cooperation of the parties and securing respect for their findings.”¹³²

At a meeting of its second session in Geneva from September 18 to October 6, the HRC considered a joint report from four Special Procedure mandate holders on their mission to Israel and Lebanon.¹³³ This mission was independent of the High Level Commission of Inquiry set up under Res.S-2/1. The report concluded that, in many instances, both Israel and Hizbollah had violated IHL, a conclusion that was not well received by many members of the Council. For its part, Israel faulted the report for its failure to mention Lebanon’s responsibility for hostile acts prepared and perpetrated from its territory. It also criticized the report for recommending that Hizbollah train its fighters with respect to its obligations under IHL. Such a recommendation implied that the group had a right to retain its weapons and maintain its paramilitary forces, and gave unwarranted legitimacy to the group, in the Israeli government’s opinion.¹³⁴

Speaking on behalf of the Organization of the Islamic Conference (the Arab group formally associated itself with this statement), Pakistan criticized the procedural basis of the report, maintaining that the four experts had “stretched their mandates to cover the remit of the Inquiry Commission in order to pre-empt and prejudge its conclusions,”¹³⁵ a charge that Philip Alston,

the special rapporteur on extrajudicial, summary or arbitrary executions, denied. Moreover, Pakistan remarked that the report was a “one-sided narrative” lacking “internal consistency and cohesiveness,” and that it displayed “artificial spatial balancing” and was “deferential to Israel, condescending to Lebanon and accusatory towards Hizbollah.”¹³⁶ For these reasons, the Pakistani representative said, the OIC distanced itself from the report’s conclusions.

As HRW’s Peggy Hicks noted in a statement to the HRC, this joint effort of the four Special Procedures experts “fell far short of the impartial, independent and comprehensive investigation”¹³⁷ that Kofi Annan had called for. Unfortunately, the creation of such an impartial war crimes commission seems unlikely. The focus of international attention at the moment is on implementation of the ceasefire provisions set out in UN Security Council Res. 1701, and, ultimately, on the prevention of another outbreak of fighting between Hizbollah and Israel, as well as on the economic reconstruction and political stabilization of Lebanon. Thus, a mechanism to investigate and adjudicate the allegations of war crimes made against both Hizbollah and Israel will in all likelihood remain missing from the package of measures needed to facilitate the long-run resolution of the dispute between Israel and Lebanon.

¹ United Nations Security Council, Resolution 1701 (2006), U.N. Doc. S/Res/1701 (2006), August 11, 2006, available online at <<http://daccessdds.un.org/doc/UNDOC/GEN/N06/465/03/PDF/N0646503.pdf?OpenElement>> accessed September 21, 2006.

² Israel Ministry of Foreign Affairs, *Hizbollah Attacks Northern Israel and Israel’s Response*, available online at <<http://www.israel-mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hizbollah/Hizbollah+attack+in+northern+Israel+and+Israels+response+12-Jul-2006.htm>> accessed September 21, 2006.

³ Moti Bassok and Irit Rosenblum, “Treasury Shocked by Cost of War,” *Ha’aretz*, August 22, 2006.

⁴ Israel Defense Forces, *News: 7,000 Targets in Lebanon*, August 15, 2006, available online at <<http://www1.idf.il/DOVER/site/mainpage.asp?sl=EN&id=7&docid=56765.EN>> accessed September 21, 2006.

⁵ *The Daily Star*, “Timeline of the July War 2006,” available online at <http://www.dailystar.com.lb/July_War06.asp> accessed September 21, 2006.

⁶ Kim Murphy, “Lebanon’s Renewal is Dashed in Weeks,” *The Los Angeles Times*, August 13, 2006.

⁷ Robert F. Worth and John Kifner, “Lebanese and Aid Groups Find Dangers in the Rubble,” *The New York Times*, August 25, 2006.

⁸ Osama Habib, “Hizbollah Begins Monumental Task of Rebuilding Southern Suburbs,” *The Daily Star*, August 18, 2006.

⁹ *BBC News*, “UN Warning on Mid-East War Crimes,” July 20, 2006.

¹⁰ Associated Press, “UN Humanitarian Chief Blasts Hizbullah,” *The Jerusalem Post*, July 25, 2006.

¹¹ *Ibid.*

¹² United Nations Security Council, Letter Dated 7 August 2006 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/2006/626, August 7, 2006, p.5, available online at <<http://daccessdds.un.org/doc/UNDOC/GEN/N06/457/84/IMG/N0645784.pdf?OpenElement>> accessed September 21, 2006.

¹³ In an article entitled “Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict,” project head Jean-Marie Henckaerts explains the rationale, methodology and organization of the ICRC study of customary IHL. The complete study is available in a two-volume set, published by Cambridge University Press:

Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law, Volume 1, Rules* (Cambridge University Press, 2005); and, Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law, Volume 2, Practice, Parts 1 and 2* (Cambridge University Press, 2005).

¹⁴ Jean-Marie Henckaerts, “Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict,” *International Review of the Red Cross*, Vol.87, No.857, March 2005, pp.177, 178.

¹⁵ These rules are listed in the Annex to Henckaerts article, cited above.

¹⁶ *Hamdan v. Rumsfeld*, 548 U.S. 1, 67 (2006), available online at <<http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf#search=%22hamdan%20v.%20rumfeld%22>> accessed September 21, 2006.

¹⁷ As the U.S. Supreme Court noted, the term “Party” to an armed conflict need not refer to a signatory of the Geneva Conventions nor “even represent a legal entity capable of undertaking international obligations.” See *Hamdan v. Rumsfeld*, 548 U.S. 1, 66, fn.2 (2006). In other words, a non-state actor such as al-Qaeda (or Hizbollah) may be a party to an armed conflict and, hence, obliged to respect the rules and principles of IHL.

¹⁸ *Ibid.*, p.69.

¹⁹ President George W. Bush, “President Discusses Foreign Policy during Visit to State Department,” August 14, 2006, available online at <<http://www.whitehouse.gov/news/releases/2006/08/20060814-3.html>> accessed October 5, 2006.

²⁰ International Criminal Court, The Office of the Prosecutor, Letter dated 9 February 2006, responding to allegations of, *inter alia*, the commission of war crimes in Iraq, available online at <http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf> accessed September 21, 2006.

²¹ Israel Ministry of Foreign Affairs, *Responding to Hizbollah Attacks from Lebanon: Issues of Proportionality*, July 25, 2006, available online at <<http://www.israel-mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Responding+to+Hizbollah+attacks+from+Lebanon+Issues+of+proportionality+July+2006.htm>> accessed September 21, 2006.

²² Human Rights Watch, *Lebanon: Fatal Strikes — Israel’s Indiscriminate Attacks against Civilians in Lebanon*, Vol.18 No.3 (August 2006), p.3, available online at <<http://hrw.org/reports/2006/lebanon0806/>> accessed September 21, 2006.

²³ *Ibid.*, p.6.

²⁴ *BBC News*, “Israel Says World Backs Offensive,” July 27, 2006. HRW challenged the claim that Israel had

given the residents of southern Lebanon ample time to leave the area. Though some Lebanese chose to stay in the south, the vast majority “were unable to flee due to destroyed roads, a lack of gasoline, high taxi fares, sick relatives, or ongoing Israeli attacks. Many of the civilians who remained were elderly, sick or poor.” See *Fatal Strikes*, p.6.

²⁵ Sabrina Tavernise, “Before Attack, Confusion over Clearance for Convoy,” *The New York Times*, August 13, 2006.

²⁶ IDF Spokesman, IDF Response on Convoy Hit in South Lebanon, August 12, 2006, available online at <<http://www.israelmfa.gov.il/MFA/Government/Communiques/2006/IDF+response+on+convoy+hit+in+south+Lebanon+12-Aug-2006.htm>> accessed September 21, 2006.

²⁷ Ibid.

²⁸ Edward Cody and Molly Moore, “Cease-fire is Accepted in Lebanon,” *The Washington Post*, August 13, 2006.

²⁹ Edward Cody, “Negotiations Preceded Attack on Convoy of Fleeing,” *The Washington Post*, August 24, 2006.

³⁰ Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977.

³¹ The ICRC Commentaries to the Geneva Conventions (1949) and the Additional Protocols (1977) are not definitive, universally-acclaimed statements of IHL. Indeed, many States express reservations concerning the interpretations of IHL found in the Commentaries; see, for example, the Israeli Government’s comments below. Nevertheless, they are deserving of special consideration when interpreting the law in light of the ICRC’s role, formally entrusted to it by the international community, as “guardian” of IHL. See, Yves Sandoz, *The International Committee of the Red Cross as Guardian of International Humanitarian Law*, December 31, 1998, available online at <<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList109/7E2A3790156D885FC1256C5400268136>> accessed October 5, 2006.

³² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 [hereinafter, Additional Protocol I], Commentary, para.2018, available online at <<http://www.icrc.org/ihl.nsf/COM/470-750067?OpenDocument>> accessed September 21, 2006.

³³ Additional Protocol I, Commentary, para.2024.

³⁴ Additional Protocol I, Art.57 2(a)(iii), available online at <<http://www.icrc.org/ihl.nsf/WebART/470-750073?OpenDocument>> accessed September 21, 2006.

³⁵ Additional Protocol I, Commentary, para.2209, available online at <<http://www.icrc.org/ihl.nsf/COM/470-750073?OpenDocument>> accessed September 21, 2006.

³⁶ Israel Ministry of Foreign Affairs, *Responding to Hizbollah Attacks from Lebanon: Issues of Proportionality*, July 25, 2006.

³⁷ W. Hays Parks, “Air War and the Law of War,” *Air Force Law Review* Vol.32, 1990, pp.135-145.

³⁸ Israel Ministry of Foreign Affairs, *Responding to Hizbollah Attacks from Lebanon: Issues of Proportionality*, July 25, 2006.

³⁹ Amnesty International, *Israel/Lebanon: Deliberate Destruction or “Collateral Damage”? Israeli Attacks on Civilian Infrastructure*, August 23, 2006, available online at <<http://web.amnesty.org/library/Index/ENGMDE180072006>> accessed September 21, 2006.

⁴⁰ Human Rights Watch, *Questions and Answers on Hostilities between Israel and Hizbollah*, July 31, 2006, available online at <http://hrw.org/english/docs/2006/07/17/leban013748_txt.htm#6> accessed September 21, 2006.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Amnesty International, *Israel/Lebanon: Israel and Hizbollah Must Spare Civilians; Obligations Under International Humanitarian Law of the Parties to the Conflict in Israel and Lebanon*, July 15, 2006, available online at <<http://web.amnesty.org/library/Index/ENGMDE150702006?open&of=ENG-2MD>> accessed September 21, 2006.

⁴⁵ Ibid. The committee reviewing allegations of war crimes committed during NATO’s 1999 bombing campaign against Yugoslavia arrived at a similar conclusion with respect to the Alliance’s attacks on Serbia’s

radio relay stations and TV transmitters. See *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, June 2000, available online at <<http://www.un.org/icty/pressreal/nato061300.htm#IVB3>> accessed September 21, 2006.

⁴⁶ Human Rights Watch, *The Terrible Toll of the Israel-Lebanon Conflict on Civilians: Ongoing Human Rights Abuses and Violations of International Humanitarian Law — Written Statement Submitted by Human Rights Watch (HRW) to the Second Special Session of the Human Rights Council*, August 10, 2006, available online at <<http://hrw.org/english/docs/2006/08/10/leban013955.htm>> accessed September 21, 2006.

⁴⁷ Human Rights Watch, *Israel/Lebanon: Hizbollah Must End Attacks on Civilians*, August 5, 2006, available online at <<http://www.hrw.org/english/docs/2006/08/05/leban013921.htm>> accessed September 21, 2006.

⁴⁸ Jonathan Finer, "Rocket Assault Kills 12 Israelis in Border Town," *The Washington Post*, August 7, 2006.

⁴⁹ Additional Protocol I, Commentary, para.1958, available online at <<http://www.icrc.org/ihl.nsf/COM/470-750065?OpenDocument>> accessed September 21, 2006.

⁵⁰ Amnesty International, *Israel/Lebanon: Israel and Hizbollah Must Spare Civilians*, July 15, 2006.

⁵¹ Human Rights Watch, *Israel/Lebanon: Hizbollah Must End Attacks on Civilians*, August 5, 2006.

⁵² Human Rights Watch, *The Terrible Toll of the Israel-Lebanon Conflict on Civilians*, August 10, 2006.

⁵³ Amnesty International, *Israel/Lebanon: Israel and Hizbollah Must Spare Civilians*, July 15, 2006.

⁵⁴ Human Rights Watch, *The Terrible Toll of the Israel-Lebanon Conflict on Civilians*, August 10, 2006.

⁵⁵ Human Rights Watch, *Lebanon: Hizbollah Rocket Attacks on Haifa Designed to Kill Civilians: Anti-personnel Ball Bearings Meant to Harm "Soft" Targets*, July 18, 2006, available online at <<http://hrw.org/english/docs/2006/07/18/leban013760.htm>> accessed September 21, 2006.

⁵⁶ Associated Press, "Israeli Cluster-bombing Deemed 'Immoral,'" *The New York Times*, August 30, 2006.

⁵⁷ Anthony Shadid, "In Lebanon, a War's Lethal Harvest," *The Washington Post*, September 26, 2006.

⁵⁸ *BBC News*, "Hezbollah Denies Cluster Bomb Use," October 19, 2006.

⁵⁹ Rob Winder, "Hezbollah Accused Over Cluster Bombs," *Aljazeera.net*, October 19, 2006.

⁶⁰ *BBC World Service — Newshour*, Interview with Bonnie Docherty, HRW, August 30, 2006.

⁶¹ Associated Press, "Israel Defends Use of Cluster Bombs in Lebanon," *Ha'aretz*, August 31, 2006.

⁶² David S. Cloud, "Inquiry Opened into Israeli Use of U.S. Bombs," *The New York Times*, August 25, 2006.

⁶³ Anthony Shadid, "In Lebanon, a War's Lethal Harvest," *The Washington Post*, September 26, 2006.

Following the war, the U.S. State Department Office of Defense Trade Controls opened an investigation to determine whether Israel's alleged use of American-made cluster bombs violated secret agreements negotiated in 1976 and later reaffirmed in 1978 and 1988 restricting the use of these weapons to regular Arab armies and specific military targets under conditions of conventional warfare. The State Department also put on hold a shipment of M-26 artillery rockets that Israel had requested during the fighting. See, David S. Cloud, "Inquiry Opened into Israeli Use of U.S. Bombs," *The New York Times*, August 25, 2006.

⁶⁴ Associated Press, "Israeli Cluster-bombing Deemed 'Immoral,'" *The New York Times*, August 30, 2006.

⁶⁵ Meron Rappaport, "IDF Commander: We Fired More than a Million Cluster Bombs in Lebanon," *Ha'aretz*, September 12, 2006.

⁶⁶ *Ibid.*

⁶⁷ Human Rights Watch, *Lebanon/Israel: Hezbollah Hit Israel with Cluster Munitions During Conflict*, October 19, 2006, available online at <http://hrw.org/english/docs/2006/10/18/leban014412_txt.htm> accessed November 5, 2006.

⁶⁸ *Ibid.*

⁶⁹ *BBC News*, "Hezbollah Denies Cluster Bomb Use," October 19, 2006.

⁷⁰ Additional Protocol I, Commentary, para.2206, available online at <<http://www.icrc.org/ihl.nsf/COM/470-750073?OpenDocument>> accessed September 21, 2006.

⁷¹ *Ibid.*, para.2212.

⁷² *Ibid.*, para.2213.

⁷³ *Ibid.*, para.2214.

⁷⁴ Additional Protocol I, Commentary, para.1980, available online at <<http://www.icrc.org/ihl.nsf/COM/470-750065?OpenDocument>> accessed September 21, 2006. Some would disagree with what they maintain is the Commentary's overly narrow interpretation, arguing that the appropriate standard is "excessive" rather than "extensive" civilian losses and damage.

⁷⁵ Additional Protocol I, Commentary, para.2215, available online at <<http://www.icrc.org/ihl.nsf/COM/470->

750073?OpenDocument> accessed September 21, 2006.

⁷⁶ Israel Ministry of Foreign Affairs, Responding to Hizbollah Attacks from Lebanon: Issues of Proportionality, July 25, 2006.

⁷⁷ Ibid.

⁷⁸ Edward Cody, "With Fatal Blasts, War Invades Quiet Enclave of Beirut," *The Washington Post*, August 9, 2006; and, Molly Moore and Jonathan Finer, "Israelis Authorize Expansion of Combat," *The Washington Post*, August 10, 2006.

⁷⁹ IDF Spokesman, *Summary of IDF Operations against Hizbollah in Lebanon*, August 8, 2006, available online at <<http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hizbollah/Summary+of+IDF+operations+against+Hizbollah+in+Lebanon+8-Aug-2006.htm>> accessed September 21, 2006.

⁸⁰ Amnesty International, *Israel/Lebanon: Deliberate Destruction or "Collateral Damage"?*, August 23, 2006.

⁸¹ On June 25, Palestinian militants, emerging from a tunnel constructed under the Gaza-Israel border, raided an IDF outpost near Kerem Shalom; two militants and two Israeli soldiers were killed and a third, Cpl. Gilad Shalit, was captured and spirited away to the Gaza Strip. On July 12, following diversionary rocket attacks on northern Israel, Hizbollah fighters ambushed an IDF patrol near the Israeli border village of Zar'it, killing three soldiers, wounding two, and capturing two others.

⁸² Gideon Alon, "'We Failed in the Psychological War,'" *Ha'aretz*, August 21, 2006.

⁸³ The comment that Israel is capable of virtually anything in response to challenges to its security echoes Israeli Prime Minister Ehud Olmert's remarks earlier in the crisis with the Palestinians, in which he reportedly said in an internal discussion that he "wants the Palestinians to understand that the landlord has gone crazy" (this before the crisis erupted on the northern front with Lebanon). See, Akiva Eldar, "The Landlord's Craziest," *Ha'aretz*, July 3, 2006.

⁸⁴ Ibid.

⁸⁵ Human Rights Watch, *Questions and Answers on Hostilities between Israel and Hizbollah*, July 31, 2006.

⁸⁶ Hizbollah also issued warnings, though these were highly selective in nature. In a television address on August 9, Sheikh Hassan Nasrallah warned Israeli Arabs in Haifa to leave that city: "I have a special message to the Arabs of Haifa, to our martyrs and to your wounded. I call on you to leave this city. I hope you do this... Please leave so we don't shed your blood, which is our blood." See, Ian MacKinnon, "Haifa's Arabs Urged to Flee Rocket Attacks," *The Times*, August 12, 2006.

⁸⁷ Israel Ministry of Foreign Affairs, *IDF Warns Lebanese Civilians to Leave Danger Zones*, available online at <<http://www.israel-mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hizbollah/IDF+warns+Lebanese+civilians+to+leave+danger+zones+3-Aug-2006.htm?DisplayMode=print>> accessed September 21, 2006.

⁸⁸ Human Rights Watch, "Indiscriminate Bombardment," *The Jerusalem Post*, August 20, 2006.

⁸⁹ International Committee of the Red Cross, "Lebanon/Israel: ICRC Alarmed by High Number of Civilian Casualties and Disrespect for International Humanitarian Law," *Press Release 06/83*, July 30, 2006, available online at <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/Lebanon-news-300706?OpenDocument&style=custo_print> access September 21, 2006.

⁹⁰ Israel Ministry of Foreign Affairs, *IDF Warns Lebanese Civilians to Leave Danger Zones*.

⁹¹ Ibid.

⁹² Associated Press, "In South Lebanon Village, Sunnis Express Disdain for Hizbollah," *Ha'aretz*, August 26, 2006.

⁹³ Amnesty International, *Israel/Lebanon: Israel and Hizbollah Must Spare Civilians*, July 15, 2006.

⁹⁴ Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 [hereinafter Geneva Convention (IV)], Art.28, available online at <<http://www.icrc.org/ihl.nsf/9861b8c2f0e83ed3c1256403003fb8c5/732d7ea50df1a5ecc12563cd0051bbf0!OpenDocument>> accessed September 21, 2006.

⁹⁵ Geneva Convention (IV), Commentary, para.1, available online at <<http://www.icrc.org/ihl.nsf/COM/380-600033?OpenDocument>> accessed September 21, 2006.

⁹⁶ U.S. Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* (April 1992),

pp.34-35.

⁹⁷ Roy Gutman and David Rieff, eds., *Crimes of War: What the Public Should Know — Hostages*, available online at <<http://www.crimesofwar.org/thebook/book.html>> accessed September 21, 2006.

⁹⁸ The charge that Hizbollah comingled its military forces and assets with the civilian population, contrary to IHL principles, could also be leveled at the IDF. For instance, its headquarters are located in metropolitan Tel Aviv. Uniformed IDF personnel routinely use the civilian bus system as transport to and from military bases. During the war, military personnel in transit to and from the frontlines were billeted in civilian hotels in northern Israel. As one commentator noted, Israeli military posts in the north of the country are blended in with the civilian population. On the latter point, see, *BBC World Service — Newshour*, Interview with John Quigley, Professor of International Law, Ohio State University, August 27, 2006.

⁹⁹ Israel Ministry of Foreign Affairs, *Responding to Hizbollah Attacks from Lebanon: Issues of Proportionality*, July 25, 2006.

¹⁰⁰ Ibid.

¹⁰¹ Israel Ministry of Foreign Affairs, *Hizbollah's Exploitation of Lebanese Population Centers and Civilians: Photographic Evidence*, available online at <http://www.israel-mfa.gov.il/MFA/MFAArchive/2000_2009/2006/Operation+Change+of+Direction+Video+Clips.htm> accessed September 21, 2006.

¹⁰² Ibid.

¹⁰³ Human Rights Watch, *The Terrible Toll of the Israel-Lebanon Conflict on Civilians*, August 10, 2006.

¹⁰⁴ Associated Press, “In South Lebanon Village, Sunnis Express Disdain for Hizbollah,” *Ha’aretz*, August 26, 2006.

¹⁰⁵ Ibid.

¹⁰⁶ The IDF itself is not free from allegations of human shielding. During the second Palestinian intifada, the IDF employed a practice known as the “neighbor procedure” or “operational directive — prior warning,” in which Palestinian civilians were asked “voluntarily” to approach suspected militants holed up in houses and convince them to surrender. For more details on this practice, see B’Tselem, *Human Shields — The “Neighbour Procedure,”* available online at <http://www.btselem.org/english/Human_Shields/Neighbor_Procedure.asp> accessed September 21, 2006; and, B’Tselem, *Human Shields — The State's Response*, available online at <http://www.btselem.org/english/Human_Shields/State_Response.asp> accessed September 21, 2006. On October 6th, 2005, the Israeli High Court of Justice ruled that the use of civilians as human shields by the IDF was illegal and that the practice of prior warning was forbidden. See, B’Tselem, *Human Shields: Timeline of Events*, available online at <http://www.btselem.org/english/Human_Shields/Timeline_of_Events.asp> accessed September 21, 2006.

¹⁰⁷ Human Rights Watch, *Lebanon: Fatal Strikes*, p.3.

¹⁰⁸ Human Rights Watch, “Indiscriminate Bombardment,” *The Jerusalem Post*, August 20, 2006.

¹⁰⁹ IDF Spokesman, *Incident in Kafr Qana*, July 30th, 2006, available online at <<http://www.israelmfa.gov.il/MFA/Government/Communiques/2006/Incident+in+Qana+-+IDF+Spokesman+30-Jul-2006.htm>> accessed September 21, 2006.

¹¹⁰ Ibid.

¹¹¹ IDF Spokesman, *Completion of Inquiry into July 30th Incident in Qana*, August 2, 2006, available online at <<http://www.israelmfa.gov.il/MFA/Government/Communiques/2006/Completion+of+inquiry+into+July+30+incident+in+Qana+2-Aug-2006.htm>> accessed September 21, 2006.

¹¹² B’Tselem, *Possible War Crime: Killing of Tens of Lebanese Civilians in the Village of Qana*, July 30, 2006, available online at <http://www.btselem.org/english/Special/20060803_Shelling_of_the_village_of_Qana_in_Lebanon.asp> accessed September 21, 2006.

¹¹³ Human Rights Watch, *Lebanon/Israel: IDF Fails to Explain Qana Bombing*, August 3, 2006, available online at <http://hrw.org/english/docs/2006/08/03/leban013910_txt.htm> accessed September 21, 2006.

¹¹⁴ Additional Protocol I, Commentary, para.3052, available online at <<http://www.icrc.org/ihl.nsf/COM/470-750096?OpenDocument>> accessed September 21, 2006.

¹¹⁵ International Committee of the Red Cross, “ICRC Position on Hostage-taking,” *International Review of the Red Cross* No.846 (June 30, 2006), pp.467-470, available online at <<http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5c6c1n?opendocument>> accessed September 21, 2006.

¹¹⁶ *ynetnews.com*, “Nasrallah: Hostages in Secure Location, Far Away,” July 12, 2006, available online at <<http://www.ynetnews.com/Ext/Comp/ArticleLayout/CdaArticlePrintPreview/1,2506,L-3274616,00.html>>

accessed September 21, 2006.

¹¹⁷ Human Rights Watch, *Questions and Answers on Hostilities Between Israel and Hizbollah*, July 31, 2006.

¹¹⁸ Jon Lee Anderson, "Letter from Beirut: The Battle for Lebanon," *The New Yorker*, August 7, 2006.

¹¹⁹ *Ibid.*

¹²⁰ Amnesty International, *Israel/Lebanon: Israel and Hizbollah Must Spare Civilians*, July 15, 2006.

¹²¹ *CNN.com*, "Bombs Pound Beirut for Second Night," August 3, 2006.

¹²² United Nations Security Council, Letter Dated 7 August 2006 from the Secretary-General Addressed to the President of the Security Council, August 7, 2006, p.5.

¹²³ Human Rights Watch, *U.N.: Open Independent Inquiry into Civilian Deaths*, August 8, 2006, available online at <http://hrw.org/english/docs/2006/08/08/leban013939_txt.htm> accessed September 21, 2006.

¹²⁴ Amnesty International, *Israel/Lebanon: Deliberate Destruction or "Collateral Damage"?*, August 23, 2006.

¹²⁵ Jean-Marie Henckaerts, "Study on Customary International Humanitarian Law," March 2005, p.176.

¹²⁶ Rami Khouri, "Europe Should Revise Its Middle East Policy," *The Daily Star*, September 11, 2006.

¹²⁷ *Ibid.*

¹²⁸ United Nations Human Rights Council, The Grave Situation of Human Rights in Lebanon Caused by Israeli Military Operations, Resolution A/HRC/S-2/L.1, August 11, 2006, available online at <http://www.ohchr.org/english/bodies/hrcouncil/docs/specialsession/res_S_2_1.doc> accessed September 21, 2006.

¹²⁹ *Ibid.*, para.5.

¹³⁰ *Ibid.*, para.7. A three-person team of investigators arrived in Lebanon on September 25 to conduct a three-week inquiry into alleged Israeli war crimes.

¹³¹ Amnesty International, *Lebanon/Israel: Human Rights Council Members Put Politics before Lives*, August 11, 2006, available online at <<http://news.amnesty.org/index/ENGMDE020142006>> accessed September 21, 2006; and, Human Rights Watch, *Lebanon/Israel: U.N. Body Squanders Chance to Help Civilians*, August 11, 2006, available online at <<http://hrw.org/english/docs/2006/08/11/leban013969.htm>> accessed September 21, 2006.

¹³² Human Rights Watch, *Lebanon/Israel: U.N. Body Squanders Chance to Help Civilians*, August 11, 2006.

¹³³ The four Special Procedure mandate holders included the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Representative of the Secretary-General on the human rights of internally displaced persons; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living. The Special Rapporteur on the right to food presented a separate report to the HRC on his mission to Lebanon.

¹³⁴ The United Nations Office at Geneva, *Human Rights Council Discusses Reports on Missions to Lebanon and Israel by Special Procedures*, October 4, 2006, available online at <[http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/602BFF8F971BDE8DC12571FD004424CD?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/602BFF8F971BDE8DC12571FD004424CD?OpenDocument)> accessed October 7, 2006.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ The United Nations Office at Geneva, *News & Media: Council Hears from Non-Governmental Organizations on Reports of Missions to Lebanon and Israel and Other Issues*, October 4, 2006, available online at <[http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/C9B868247BC034CFC12571FD0050D082?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/C9B868247BC034CFC12571FD0050D082?OpenDocument)> accessed October 7, 2006.