Operation Change of Direction: A short survey of the legal basis and the applicable legal regimes

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Introduction

The Second Lebanon War of 2006 (henceforth: the conflict) contains a number of elements which are not only relevant for a good insight into present-day (combat) operations, but also controversial with regard to certain aspects of legal bases and legal regimes. Thus, the Israeli decision to launch a large-scale military operation in response to what seemed a minor attack of Hezbollah fighters on an Israeli border patrol is criticised because Israel lacked the legal basis for this operation, called *Change of Direction*. In other words, the *ius ad bellum* supposedly did not offer a foundation for the operation. Israel, on the other hand, appeals to its inherent right of self-defence, as laid down in the UN Charter. In doing so, it takes the position that self-defence against a non-state actor (Hezbollah) is possible. Also, the manner in which the Israel Defense Forces (IDF) carried out the operation raises questions. For instance, which legal regimes are applicable to their actions? The law of armed conflict, *ius in bello*, is central in this. For instance, is this an 'armed conflict' between Israel and a non-state actor (Hezbollah) according to the law of armed conflict? If so, which type of conflict (non-international or international armed conflict) is it, and, as a consequence of this, which part of the law of armed conflict is applicable to the actions of the belligerents/Israel?

It cannot be ruled out that the Netherlands, too, can fall victim to an attack by non-state actors, making use of the territory of a third state in carrying out the attack. In such a situation both these issues – legal bases and legal regimes – are also relevant to both the Netherlands and its armed forces. The first issue offers the reader an insight into the option a state has for launching a cross-border military operation[2] against a non-state entity. The second issue gives an understanding of the legal rules that are applicable during (the execution of) such an operation.

The objective of this research, therefore, is to consider the relevant aspects of the conflict with a view to possible Dutch military extra-territorial operations. The pertinent central questions are: What was the legal basis for the Israeli operation *Change of Direction*, and which legal regimes were applicable to the Israeli actions?

It is important to emphasise that Israel's actions as a state and its armed forces, the IDF, have been taken as the starting point, and not that of Hezbollah or Lebanon. This is related to the instrumental character of the armed forces of a state. It is decisive in this that Israel (and the Netherlands) is considered a democratic constitutional state, which implies that the government exercises its monopoly on force within the constraints of the democratic constitutional state. In other words, the armed forces, as an instrument *in extremis* of this monopoly on force, are exclusively employed by the government. This also means that these states will not only (have to) operate within the constitutional boundaries, but also within those of the international legal order. After all, western democratic constitutional states strive for legitimacy in their national and international (military) actions.[3] Therefore, on the one hand, in particular in the case of extra-territorial actions, there will have to be a legitimate foundation - a legal basis – to legitimise their military operations. On the other hand, the states will (have to) comply with the legal rules that are applicable during the execution of military operations.

The set-up of this contribution follows the above-mentioned division. The issue of the legal bases will be dealt with first, after which the potential foundations in the *ius ad bellum* will be considered. In particular the state's right of self-defence will be discussed, where a distinction will be made between the addressee of the operation:[4] Hezbollah and Lebanon. Secondly, the legal regimes applicable to the operation will be analysed. Finally, a conclusion will be presented in which the central question will be answered.

Legal bases for extra-territorial military operations

Irrespective of their objectives, military operations such as *Change of Direction* are only allowed in the international legal order within the boundaries of international law and the *ius ad bellum*. Within these, the inter-state prohibition of force and the principle of non-intervention in the UN Charter determine the room that states have to carry out military (counter-terror) operations. Cross-border military (counter-terror) operations can only be founded on three principles:

- intervention with consent of or invitation by a (host) nation;
- authorisation of the UN Security Council under Chapter VII of the UN Charter;
- self-defence.

Although a liberal view on the extent and purport of the prohibition on force is sometimes heard, here – in line with the accepted view – the extensive interpretation of the inter-state prohibition on force is used: threatening with or using any military force is

forbidden in international relations.[5] This absolute prohibition, incidentally, has a customary law as well as a *ius cogens* character.

The potential foundations for operation *Change of Direction* will be analysed below. First, the meaning of the inter-state prohibition on force will be considered briefly,[6] after which the exceptions on the general rule introduced above will be dealt with. In doing so, the main focus will be on the last legal basis advanced for *Change of Direction*: self-defence.

General rule 'ius ad bellum': the prohibition of force

The meaning and purport of the inter-state prohibition on force forms the basis for all discussions in the *ius ad bellum* on the legitimacy of extra-territorial military operations. The prohibition is laid down in article 2(4) of the UN Charter, which is also sometimes called the 'heart of the Charter';[7] it functions as the corner stone of the present-day *ius ad bellum*:[8]

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

The accepted interpretation of the prohibition on force applied here is that *any* use of (or threat with) cross-border armed (i.e. military) violence by UN member states, for whatever reason, is forbidden, except when the UN Charter or international law provides in an exception to this rule.[9] The threat with force, too, is forbidden when this use of force itself cannot be legitimised.[10] Armed or military use of force can encompass many shapes and means. The essence relates to the application of physical force, and the scale of this force does not play any role in this.

Although the prohibition on force primarily refers to inter-state relations, it also covers cross-border use of force against non-state actors, like Hezbollah, as such an operation also concerns the territorial integrity of the state where the non-state actor (NSA) is located.[11]

> *An invasion, however brief in duration, violates the essence of territorial integrity (the right of a state to control access to its territory).*[12]

Operation *Change of Direction* was the Israeli invasion of the Lebanese territory.

The prohibition on force does not only protect the territorial integrity of a state, but also its political independence. This pair of concepts points at the totality of rights that a sovereign state possesses.[13] Therefore, temporary or limited breaches of the territorial integrity or political independence, for instance, in the form of a brief liberation action against a non-state actor, as was the case in the Israeli *Thunderbolt* operation in Entebbe (1971) – irrespective of their objectives - also fall under the prohibition.[14]

> *Israel's action in rescuing the hostages clearly involved a temporary breach of the territorial integrity of Uganda. Normally such action would be impermissible under the Charter of the United Nations.*[15]

Apart from that, any use of force that goes against the purposes of the United Nations is forbidden.[16] The main objective of the United Nations is maintaining international peace and security and - in view of that - preventing and ending any threats against that peace, and repressing acts of aggression or other breaches against peace.[17]

Change of Direction can unmistakably be qualified as cross-border military use of force, and in the accepted view this operation falls under the prohibition of force. If Israel cannot appeal to one of the exceptions to the general rule, a sound legal basis is absent. Below, it will be considered whether an exception to the prohibition on force is applicable.

Exceptions

Intervention with consent

Within the boundaries of international law, a sovereign state is allowed to give another state permission to carry out military operations on its territory. This is, for instance, the case in Afghanistan, where (Dutch) ISAF armed forces operate with the consent of the Afghan government and fight the Taliban, amongst others (see Figure 1). Although intervention with consent is not considered an exception to the prohibition of force, it is a circumstance that precludes the wrongfulness of an extra-territorial military action.[18] Consent also implies that the foreign troops are not there in contravention with the territorial integrity and political independence of the sovereign state.

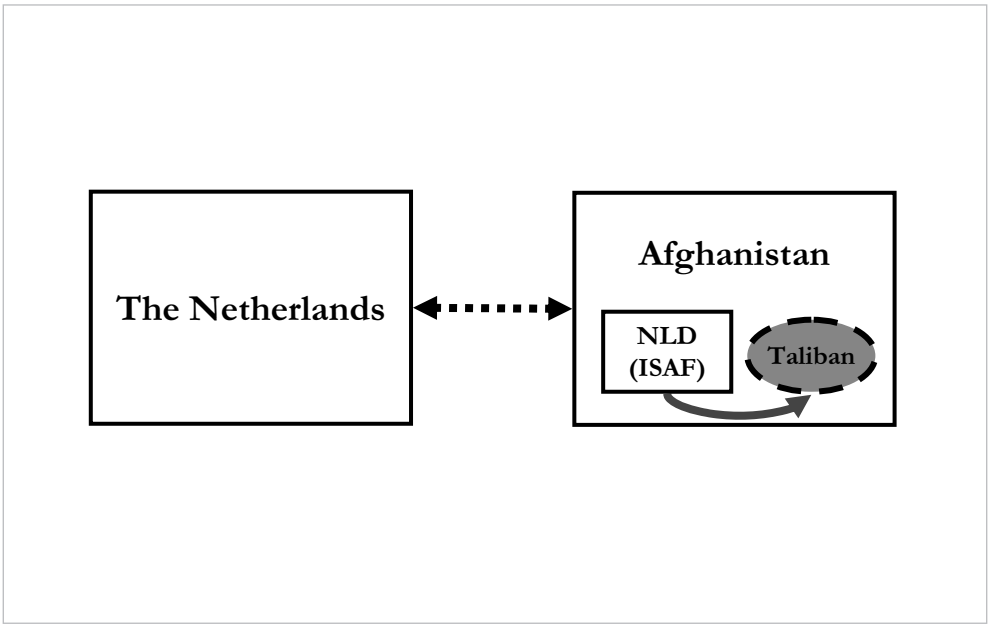

Figure 1: intervention with consent

The Lebanese protests clearly show that there was no consent with the Israeli operation.[19] This implies that the operations must be founded on a different legal basis, i.e. one of the two remaining exceptions to the prohibition of force. This will be considered in the following section.

Authorisation by the United Nations Security Council under Chapter VII

Although in case of international use of force states usually - rightfully or not - appeal to the state's right of self-defence, the primary exception to the prohibition on force as it has been in effect since 1945, concerns the use of force on the authority of a decision of the UN Security Council. In the collective security system of the UN this body holds the primacy for maintaining (and restoring) international peace and security.[20] As the occasion arises, the UN Security Council will define a situation as "a threat to the peace, a breach of the peace or an act of aggression".[21] Such a definition opens the road to, and is a *conditio sine qua non* for, the authorisation of the use of force against state or non-state actors. This authorisation is based on the authorities that have been adjudicated to the Security Council under (article 42) of Chapter VII of the UN Charter. The authorisation of the use of force is the legal basis for one or more states, or a regional organisation, to use force against the specified state or non-state actor(s) in order to impose the will of the international community on those actors.[22] This authorisation usually contains the

phrase "to use all necessary means" or "to take all necessary measures", which - as the occasion requires – also includes the use of force.

However, the UN Security Council does not come to an authorisation of the use of force in all cases which it qualifies as a threat to the peace (etc). In fact, such an assessment is often absent. There are several reasons for this. First of all, the UN Security Council is a political body, which means that, apart from the collective security system, there are other (geo) political interests that play a role. Beside the interests of the permanent members of the Council, who can veto an assessment ex art. 39 or an authorisation under Chapter VII, also other members of the UN Security Council have their own geopolitical considerations and interests.

In the case of the conflict between Hezbollah and Israel both conditions for an armed action were lacking. Although Israel had immediately reported the Hezbollah actions of 12 July 2006 to the UN Security Council,[23] and the Council had held a meeting on the matter on 14 July,[24] it did not come to an assessment that this was a case of "threat against the peace, etc.". In Resolution 1697 of 31 July 2006 the Council did no go beyond expressing its grave concerns.[25] Though Resolution 1701 of 11 August 2006 contains an authorisation for the use of force, this relates to UNIFIL, which had to monitor a proposed cease-fire.[26]

The conclusion, therefore, is that the UN Security Council did not give an authorisation for the use of force against Hezbollah and/or Lebanon, which means that the Israeli operation could not be founded on the primary exception to the prohibition of force. The only remaining exception/legal basis to be considered, therefore, is self-defence.

Self-defence

Self-defence concerns the (reactive) use of inter-state force, in order for a state to defend itself against the use of force by others, and in doing so, protect its sovereignty and independence. The dual purpose of self-defence is defensive: (1) fending off an attack in progress or impending and negate the consequences thereof;[27] (2) preventing a sequel to the initial attack.[28]

Because of the fact that the collective security system of the UN shows various defects in practice, states appeal to this inherent right in the majority of cases of inter-state use of force. The right to self-defence has been laid down in article 51 of the UN Charter:

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

Self-defence is allowed conditionally. It can, *first of all*, be invoked only after an armed attack or an imminent threat (of an armed attack), which does not allow a moment of deliberation or choice of other means.[29] Also a series of multiple smaller attacks can qualify as an armed attack on the basis of the accumulation of events in their mutual relation.[30] *Secondly*, self-defence is a temporary right until the UN Security Council – which, after all, has the primacy on maintaining and restoring international peace and security – has taken effective measures in the matter. Self-defence operations, *thirdly*, have to be reported immediately to the UN Security Council.

Fourthly, self-defence has to meet the intrinsic requirements of necessity (including immediacy) and proportionality. These principles first of all pertain to the question whether an operation may be carried out, i.e. whether the operation is legitimate. If either of both principles is flawed, the operation lacks a correct legal basis and will be considered illegitimate. Apart from that, the principles determine the content of the operation, in that they determine size, the intended intensity and effects, as well as the form of the operation. These principles are closely related and carefully balanced. Both principles can be applied via partial aspects.

Necessity is related to (1) the armed attack (assaults) and the purpose of self-defence, (2) the purpose of the author of the attack (assaults), (3) the availability of alternatives.[31]

Proportionality refers to both the quantitative and qualitative aspects of self-defence, and is related to (1) the parity between the attack and the defence measured in terms of the total scale and effects of both, and (2) the purpose of the attack(er) and the defence. The parity between form and scale of the attack and the defence can be assessed through a combination of quantitative and qualitative aspects. The total scale of the armed attacks that give rise to the reaction may be taken into account in this. Also, the purpose of the armed attack plays a role. All these elements must be taken into account in the reaction.

Necessity, first of all, implies that peaceful alternatives prevail over military reactions. If force has to be applied out of necessity against a group like Hezbollah, this is primarily a responsibility of the state in which the group is located: Lebanon. Lebanon could have given Israel permission on request for an operation on its territory. If Lebanon does not want to or is unable to give this permission, it must be considered whether such an operation is possible via the collective security system of the UN. If these alternatives are not available (in time), or not opportune in the sense that they may be expected to be effective, the necessity to self-defence is present. As soon as realistic alternatives present themselves during a reaction of self-defence, or the threat or the source of the attacks has been taken away, the necessity for self-defence terminates. This is also the case when the Security Council takes effective measures, after all.

It falls primarily to the inflicted state to determine whether it is a case of armed attack or self-defence. This classification prevails until the international community - for instance, the UN Security Council – decides otherwise.[32]

In the case of the conflict between Israel, on the one hand, and Hezbollah, on the other, Israel reported the attacks on its territory, which it conceived as acts of war, to the UN Security Council on 12 July 2006.[33] Israel simultaneously announced measures, explicitly appealing to its right of self-defence.[34]

In the meeting of the Security Council it appeared that several members endorsed Israel's right of self-defence *within* the conditions from the Charter and customary law.[35] This did not mean that there were no concerns, in which, in particular, the principle of proportionality played an prominent role. Furthermore, it is of importance that both the UN Security Council and Lebanon proved unable to defuse the conflict in an effective manner until well into August.[36]

It is possible to make a realistic plea for the Israeli appeal to self-defence in response to Hezbollah's action. Below, this will be further explained in two different situations, the first of which relates to the reaction against Hezbollah, and the second to the reaction against Lebanon itself. In the analysis of the two situations three aspects play an important role in the acceptation of self-defence as a legal basis for *Change of Direction*. In the first place, there is the fact that the direct author of the armed attack appeared to be not a state but a non-state actor: Hezbollah. Secondly, there is the fact that this non-state actor is 'dealt with' inside another country, and in connection with this, thirdly, that Israel directed its reaction not only against the non-state actor Hezbollah, but also against the state of Lebanon, which was involved indirectly. So, this was a situation of a dual addressee. These aspects have been presented schematically in Figure 2.

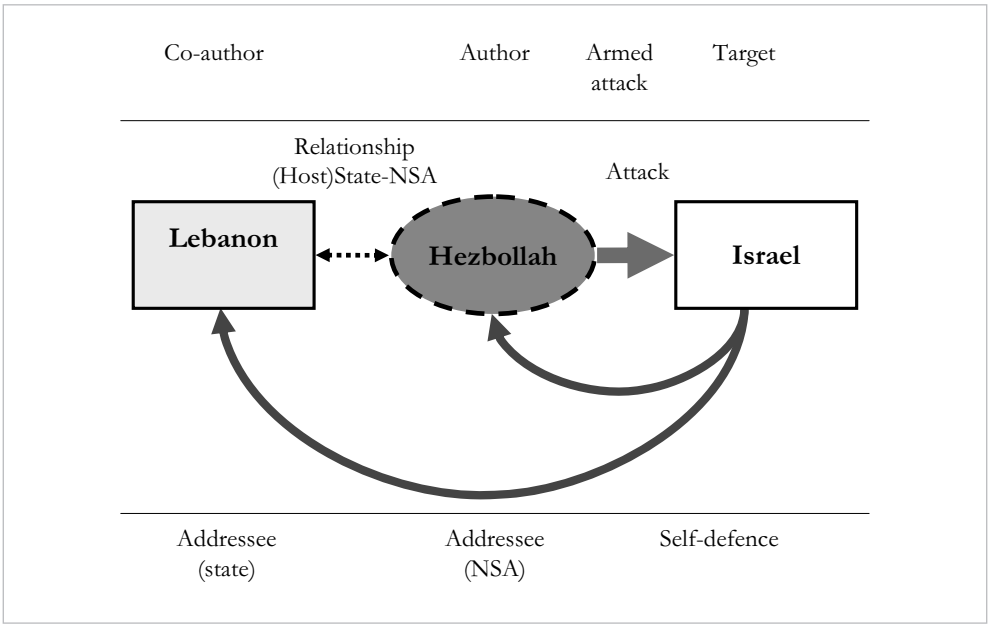

Figure 2: Self-defence[37]

These facets – non-state actor, non-state addressee and an indirectly involved state as co-addressee – are *apparently* new within self-defence and the *ius ad bellum*.[38] Therefore, they will be discussed at some length here. In doing so, a distinction will be made with regard to the addressee of the Israeli operation. First, self-defence against Hezbollah will be dealt with, and, subsequently, against Lebanon.[39]

Self-defence against Hezbollah

Self-defence against Hezbollah raises several questions which will have to be answered below. They relate to the above-mentioned conditions for self-defence, and in this the Israeli operation does not stand on its own. Also other countries sometimes react via self-defence against non-state actors. Thus, Colombia appealed to self-defence in an operation against the FARC in Ecuador (2008).[40] This was also the case with Turkish operations against the PKK on Iraqi territory (1995, 2007-2008),[41], the American operation *Infinite Reach* against Al Qa'ida in Sudan and Afghanistan (1998),[42] the American actions against Al Qa'ida fighters in Somalia (2007-2008)[43] and Ethiopia (2002),[44], and the recent attacks on Taliban fighters and locations in Pakistan.[45]

Three issues will be considered specifically. First, the issue of authorship will be addressed: can Hezbollah be the author of an armed attack? Secondly, the proportionality and necessity of Israel's reaction against Hezbollah, and, finally, the addressee of the self-defence will be considered: the non-state actor Hezbollah.

Hezbollah as the author of an armed attack

Before answering the question whether a non-state actor can be seen as the author of an armed attack, the preliminary question to be asked is when the use of force can be qualified as an armed attack, according to article 51 of the UN Charter at all. For this, the threshold value in separate situations, or, alternatively, in a series of uses of force is of importance.

– Threshold value armed attack

Armed attacks are characterised by a combination of elements. They have, first of all, a cross-border character. Besides, a combination of quantitative and qualitative aspects is a determiner, as this is about the nature (qualitative) and the scale and the effects of the attack (quantitative).[46] A first indicator is the nature of the attack. This encompasses qualitative elements, such as the method applied, the means used and the status of the attacker. The next two indicators are of a quantitative nature. Scale of the attack is related to the measure of the method used and the means. The third indicator, effects, concerns the scale and the type of consequences (material, physical and symbolic damage) of the attack. These three indicators will be discussed in their relation.

The qualitative element is decisive for the sub-division in direct attacks by the armed forces of a state and indirect ones. In the latter case, a state participates in the armed activities of third parties, either by sending irregular troops that carry out armed actions, or by its substantial involvement in armed actions carried out by third parties.

Crucial - although contested in doctrine - is the quantitative element, which requires sufficient gravity of the attack.[47] In this, scale and effect of the attack are relevant. With regard to the effects the doctrine points at "severity of injury, human casualties and/or serious destruction of property".[48]

The state of technology allows the use of force not only to include purely military classic kinetic force. Also unconventional or alternative techniques, new methods and means can be used for an armed attack. A completely effect-oriented approach, incidentally, must be rejected. Therefore, an armed attack will also have to contain 'classic' military elements. When these unorthodox techniques are applied with the same purpose as classic use of force, i.e. the generation of physical (kinetic) effects, a classification as an

armed attack will not be problematical. In connection with this, three conditions apply: (1) the unconventional techniques (means and methods) must be used as weapons, causing (2) physical damage of casualties, while (3) this is intentional.[49]

In this conflict the armed actions of Hezbollah play the role of 'trigger' of the conflict. In any case, it is clear that this is cross-border use of force. Although Hezbollah is considered a terrorist organisation, it employs in this conflict, amongst others, classic military means and methods, such as the missile barrages from pre-positioned mobile as well as fixed launching installations.[50] So, there were clear qualitative characteristics of an armed attack. What remains is the question whether the quantitative criteria were met: were these cross-border firings and the attack on the patrol on 12 July 2006 of sufficient gravity, in view of their scale and effects? In this it is irrelevant whether they were classic military attacks or acts of terrorism. The size is the same.[51] This was, for instance, clear in the 9/11 attacks. When acts of terrorism are sufficiently grave they qualify as an armed attack.

On 12 July Hezbollah launched several missiles against Israeli military positions and border villages. This barrage was a diversionary manoeuvre to support another Hezbollah-unit that in a different location – near Zarit and Shtula - crossed the border and ambushed an Israeli patrol (two armoured vehicles).[52] In this attack three of the seven patrol members were killed and two were abducted. It can be argued that the action of 12 July 2006 on itself was of sufficient gravity, in view of scale and effects, to qualify as an armed attack. The actions were of a different order than a "mere frontier incident", which was *not* deemed an armed attack by the International Court of Justice in the Nicaragua case.[53] The organisation and coordination of the Hezbollah action, the quantity of employed weapon systems and the eventual effects in the sense of material damage, abduction and loss of human lives, were considerable.[54] Also the fact that anti-tank weapons and pre-positioned explosives were used in the ambush, endorses this view.[55] In the terminology of the International Court of Justice, these actions were "of such gravity" that they would qualify as armed attacks if they had been carried out by regular armed forces.

– Accumulation of multiple armed action: 'Nadelstichtaktik'

Even if the action of 12 July should not reach the quantitative threshold value, it is possible to qualify them as an armed attack by Hezbollah on the basis of the accumulation of events doctrine. As it is, the attacks do not stand on themselves, but form part of a more comprehensive armed campaign against Israel. After its full withdrawal from Lebanon in 2000 Israel had had to suffer from the firings.[56] In case the individual armed (terrorist) actions should lack sufficient gravity, it is possible under certain conditions

to consider a series of connected actions as a totality - cumulative - as an armed attack.[57] For this, four criteria must be met.[58] There must be (1) a consistent pattern of - non-sporadic – violent actions not separated by long intervals. The actions (2) come from one and the same author – state or non-state -, and they are (3) directed at one and the same addressee. Finally (4), the gravity (as for scale and effect) of the attacks seen in their mutual relation must be of such a nature that they would qualify as armed attacks if they had been carried out by regular armed forces.

The accumulation of events doctrine, or *Nadelstichtaktik*, is applied in practice by a number of states. Since the Qibya incident in 1953 (operation *Shoshana*)[59] Israel has used the argument that (the proportionality of) counter-measures must be seen in the context of "the overall pattern of past and projected acts".[60]

The United States has used the doctrine since 1986.[61] On 14 April 1986 the United States launched operation *El Dorado Canyon* against Libya. It was a reaction against an "ongoing pattern of attacks" against American targets in 1985 and the early months of 1986.[62] The terror attacks were ascribed to Libya as an indirect attack. After the bomb attack on the Berlin discotheque La Belle, a popular venue for American servicemen, the USA had enough.[63] Libya's involvement was assumed on the basis of intelligence. The USA reacted and appealed to self-defence. In accordance with article 51 of the UN Charter it reported the operations to the Security Council:

> *In accordance with Art. 51 of the Charter (...) US Forces have exercised the US right of self-defence by responding to an ongoing pattern of attacks by the government of Libya. (...) Over a considerable period of time Libya has openly targeted American citizens and US installations.)*[64]

On 7 August 1998 bombs exploded near the American Embassies in Nairobi (Kenia) and Dar es Salaam ((Tanzania). The attacks were ascribed to Osama bin Laden's Al Qa'ida. On 20 August 1998 the United States again appealed to self-defence via the *accumulation of events theory*. It launched operation *Infinite Reach* because of "a series of armed attacks against the United States embassies and United States nationals".[65] The American reaction was criticised on a number of other grounds by several states.[66] The British report on 7 October 2001 to the Security Council, by which the United Kingdom announced operation *Veritas*[67], referred to Al Qa'ida's "concerted campaign against the United States and its allies".[68] In doing so, the United Kingdom seemed to be referring (implicitly) to the accumulation theory.[69]

Hezbollah's actions of July 2006, too, were not the first in a series. In November and December 2005, for instance, there were reports in the UN Security Council of missile

barrages carried out against Israel from southern Lebanon.[70] Seen in relation with these actions, those of 12 July 2006 in any case exceeded the threshold value.[71]

– *Non-state author: Hezbollah*

Now that it has been ascertained that Hezbollah's actions of 12 July 2006 - in any case in relation to prior firings – reached the threshold value of an armed attack, it is important that the actions were carried out by a non-state actor. This circumstance *seemingly* deviates from the accepted views on self-defence. At present, however, it can be argued that - certainly in view of the practice and views since 2001 – also non-state actors can qualify as authors of an armed attack.[72]

Five arguments for this can be brought forward. In the first place, there is the normal purport of the UN Charter.[73] Article 51 does *not* require that there be an armed attack by a *state*.[74] The article merely describes self-defence after an armed attack, without specifying who or what carries out that attack. Secondly, the *travaux préparatoires* show that article 51 was not intended to only facilitate inter-state self-defence reactions.[75] Although the phrase "in the event of an attack *by any state* against any member state"[76] originally made up part of one of the proposals, "by any state" was deleted in later proposals, because of the issue of collective self-defence. A third argument is enclosed in the customary law meaning of self-defence. The famous *Caroline case* – from which the classic definition of self-defence is still derived – concerned a British-Canadian self-defence reaction after attacks of non-state actors (in this case Canadian insurgents) who received support from American sympathising citizens. The reaction followed a threat of an attack by a non-state actor.[77] Fourthly, state practice endorses the alternative view. The broad support (amongst other from NATO, EU, and OAS) for the American-British reaction against Afghanistan (operation *Enduring Freedom*) is indicative of this.[78] It also holds, fifthly, for the decisions of international organisations. As early as 1967 the UN Security Council already condemned explicitly "armed attacks committed (against the DRC) by foreign forces of mercenaries". With this, the Council implies that the armed attack had been carried out by non-state actors.[79] The Security Council expressed a similar notion on the occasion of the 9/11 attacks by Al Qa'ida.[80] Although it is also possible to point at the ambiguous character of those resolutions,[81] it is difficult to explain that there can be an inherent right of self-defence, without the required presence for this of an armed attack.[82]

In conclusion, it can be said that in 2008 there were good arguments to assume that also non-state actors such as Hezbollah and Al Qa'ida may qualify as authors of an armed attack.

Intrinsic conditions: proportionality and necessity

Above, three aspects of the armed attack as *conditio sine qua non* for self-defence have been analysed. Now, the second issue, the intrinsic conditions for self-defence, will be discussed. Proportionality and necessity (including immediacy) are aspects of the same principle. In a juridical sense, a flaw leads to a loss of legitimacy. Apart from that, the principles actually shape the self-defence reaction: they influence form, size, method or means of the military reaction.

The customary law principles apply in full to self-defence against attacks from non-state actors.[83] Within the international community there were grave concerns whether Israel's reaction to the armed attack by Hezbollah (12 July 2006) did indeed meet the principles, in particular, that of proportionality. Both principles will be discussed below.

– *Necessity*

As was said above, necessity is related to (1) the armed attack (assaults) and the purpose of self-defence, (2) the purpose of the author of the attack, (3) the availability of alternatives. With regard to alternative methods for solution, it was already observed that consent of Lebanon with the Israeli action against Hezbollah, as well as an authorisation from the UN Security Council, was absent. Apparently, Israel deemed it equally inopportune to resort to peaceful means, such as negotiations. After all, Hezbollah had had a long history of use of force on the Israeli northern border. In spite of appeals by Israel and the UN Security Council, Lebanon also proved to be unable to stop the firings up to that moment.[84] Consequently, Israel had few, if no, other reasonable alternatives which could be expected to be effective than a military operation with an appeal to self-defence.[85]

Self-defence is intended, necessarily, to fend off and beat back an attack, or to prevent its (renewed) success.[86] It is also allowed to prevent an attack from having a sequel. In order to liberate the abducted servicemen and to counter any further attacks on military and civilian targets from southern Lebanon, Israel decided - six years after its withdrawal from southern Lebanon – to a renewed armed reaction.[87] Hezbollah's anti-Israeli objectives - among which allegedly the annihilation of the state of Israel – certainly plays a role in this.[88] The fact that Hezbollah was capable of continually launching attacks with sizeable armed forces, which it had been able to build up with the support of states such as Iran and Syria, is a relevant factor in this.[89] As soon as Hezbollah is prevented from carrying out further attacks, the necessity of further self-defence ceases.

The aspect of immediacy was also met, as Israel reacted within the day.

Because of the principle of necessity, in case of a non-state author self-defence measures against the direct author of the attack (Hezbollah) prevail over measures against an involved state (Lebanon).[90]

In this light it is defensible that Israel had to resort to an armed self-defence reaction against Hezbollah; after all, a state does not have to accept such breaches. This does not mean that Israel's reaction was a sensible one. What matters, here, however, is that the right of self-defence comes about by an armed attack, and that also the other conditions, attached to the right, are met.

– *Proportionality*

Proportionality cannot be considered separately from necessity. As was said above, it relates to the parity between the total scale and effects of an attack versus defence, and it also concerns the relation between the purpose of the defence and the attack preceding it. Parity between attack and defence must be viewed at the macro level. In general, the intensity of the reaction correlates with the intensity of the attack, without identical means, methods in reaction to the attack, having to be used.[91] Sometimes a large-scale reaction to a relatively limited attack is unavoidable. This may be related to the purpose of the attacker. This is, for instance, relevant in case of a danger of continuation or repetition of those attacks. In such a case the ability of the attacker must sometimes be countered in order to undo the consequences of the attack and avoid a repetition.[92]

When the single 'trigger' for self-defence is not considered separately, but a series of acts of armed violence is seen in relation as an armed attack, it is defensible that the reaction has a larger scale than each of the separate occasions.[93]

Proportionality also influences the choice of the addressee of self-defence, with the primary author (Hezbollah) prevailing.[94]

Addressee (Hezbollah)

The third and last issue of self-defence against Hezbollah concerns the addressee. Normally speaking, i.e. in a classic inter-state conflict, there are relatively few problems to determine the addressee of a self-defence reaction. This is usually the author of the armed attack, the attacker. In other words, in classic inter-state conflicts authorship (of an armed attack) and the addressee (of the self-defence reaction) are one and the same.

In attacks by non-state actors, in general, and in terrorist attacks, in particular, this is more problematical:[95] there is a non-state author/attacker. In spite of this, it is defensible that in this kind of cases, too, self-defence is directed against the author of the armed

attack, irrespective of his status.[96] In the first place, this is not in violation of the UN Charter. In fact, just as article 51 'is silent' about the authorship, it says nothing about the addressee. The logic and purpose of self-defence require, secondly, that the attacked state defends itself against the attacker, the author.[97] Thirdly, the *Caroline case* in international customary law shows that defence can be directed against non-state actors. The essence of self-defence, fourthly, is self-help. This takes the form of fending off attacks, undoing consequences of attacks and preventing subsequent breaches in the form of attacks. Self-defence would be illusory if the addressee and the author were not one and the same. A counter-argument might be derived from the rulings of the International Court of Justice: for the time being, the Court does not share this view. The Court, however, does not reject it either, which can be seen as a fifth argument, in particular, as the Court is internally divided over this issue, and as several prominent judges have voiced criticism with regard to this aspect.[98] Sixthly, the international reactions following the 9/11 attacks and the ensuing *Enduring Freedom* operation confirm the validity of this thesis. Finally, there is support in legal doctrine for this view,[99] as is shown in the report of the *Expert Meeting on Counter-Terrorism Strategies*:

> *It appears that a new understanding is emerging that the right of self-defence also exists in relation to an armed attack which cannot directly be ascribed to another state.*[100]

One of the basic principles of international law is that states must respect the sovereignty of other states, and, that, therefore, they are not allowed - without a legitimate basis - to exert their authority on the territory of another state.[101] This was confirmed in the *Lotus case*.[102] The right of self-defence – provided the limiting conditions of necessity and proportionality are met – is such a legal basis, a 'permissive rule'.[103]

Thus, that the right of self-defence arises, also in the case of a non-state author, implies that Israel can also project this right and therefore has a legal basis for the breach of Lebanese sovereignty. This is quite apart from the question whether Lebanon can also be considered as author and addressee. Lebanon must allow that Israel manifests the right of self-defence and carries out a necessary and proportional action against the author of the preceding attack.

In the conflict there was a dual addressee of Israel's self-defence: Hezbollah and Lebanon. As was explained above, that decision is reasonable, in any case insofar as it concerns addressee Hezbollah. From the perspective of necessity and proportionality the direct author of an attack prevails as addressee of self-defence.

Self-defence against Lebanon

Israel held Lebanon responsible for Hezbollah's attacks and considered that state as (co-) addressee.[104] On the face of it, this situation is somewhat similar to operation *Enduring Freedom*, which was not only directed against Al Qa'ida, but also against Afghanistan. Gill argues that there was no other option than to decide on "eradication of the Al Qaeda network in Afghanistan and consequently the overthrow of the Taliban regime".[105] The 'symbiotic' relation between Al Qa'ida and the Taliban regime which held power in Afghanistan probably had a strong influence on that option.[106] That relation, incidentally, is clearly different in Lebanon.[107]

Above, it was concluded that the self-defence reaction against Hezbollah is legitimate in any case. Self-defence against Lebanon is controversial for two reasons. First, it is not clear in advance whether Lebanon can be considered the author of an armed attack. Second, as a result, it is unclear whether the self-defence reaction can also be directed against Lebanon; in other words, whether Lebanon (along with Hezbollah) can and may be considered an addressee.

Lebanon as co-author by attribution?

Insofar as an armed attack is carried out by a non-state actor, that attack is considered as a *direct* attack by that actor. In this conflict Hezbollah is the direct author of the armed attack. Above, it was explained that this view is valid in present-day insights. Classic armed attacks are carried out by armed forces, and these attacks are ascribed to the attacking states without any problems.[108] In such a case the state is the *direct* author of such an attack.

Insofar as a state cannot be considered as the direct author, it is still possible in a number of cases to ascribe *indirect* use of force (by third parties) to an involved state. In that case there is an *indirect* armed attack (by that state). Such states can be considered as co-authors, of the armed attack, and as such they can also become the addressees of a self-defence reaction. In such a situation the right of self-defence legitimises the (temporary) violation of territorial integrity.[109] The various positions have been presented in the scheme in Figure 3.

Attribution, first of all, follows the primary rules of the *ius ad bellum*. In the famous *Nicaragua case* the International Court of Justice ascertained that, apart from direct attacks, states can also (have) carry out indirect attacks:

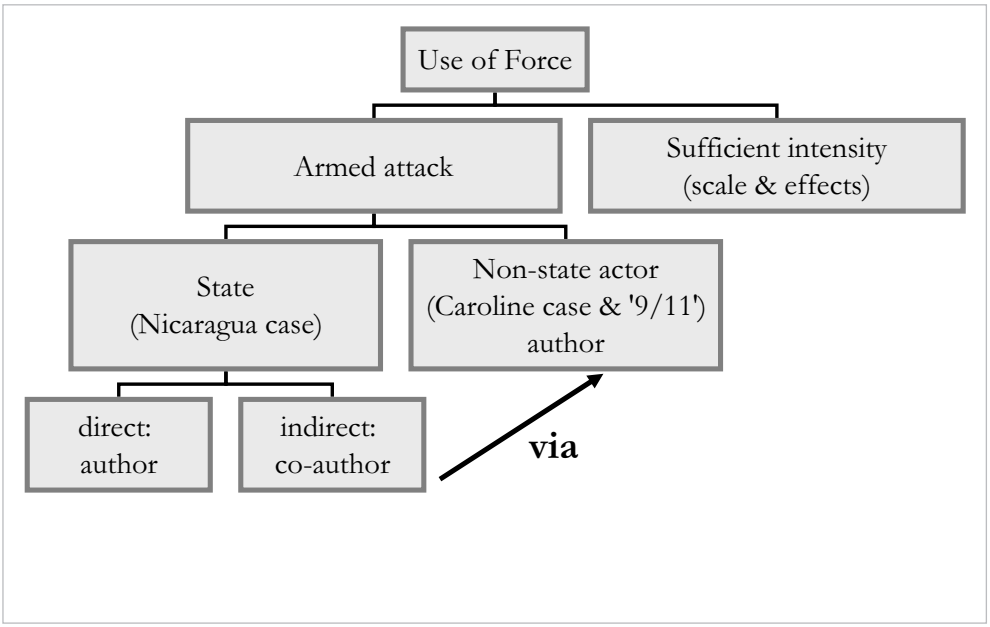

Figure 3: Authorship armed attack

> *In particular, it may be considered to be agreed that an armed attack must be understood as not merely (1) action by regular armed forces across an international border, but also (2) 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to' (inter alia) an actual armed attack conducted by regular forces, 'or (3) the substantial involvement therein'.*[110]

Up to the present moment the most attention in the doctrine has gone to the interpretation of the "sending of" via the *secondary* rules of state responsibility for international wrongful acts. These, however, have only rarely led directly to attribution to a state. There is attribution when the non-state actor *de facto* acts according to the instructions, or, alternatively, under the effective control of the state involved.[111] This was once more confirmed in the recent *Genocide case*.[112]

The Lebanon-Hezbollah relation is not such that there will be attribution of the Hezbollah attack(s) to the state of Lebanon via the *secondary* rules for state responsibility.[113] Under the *primary* rules of the *ius ad bellum* the question remains valid whether the Lebanon-Hezbollah relation is such that Lebanon is substantially involved in the Hezbollah actions, so that those actions must be attributed to Lebanon. To this end, the concept of *substantial involvement* from the *Nicaragua case* is used.[114] The components of *substantial involvement* are constituted as follows:[115]

- Cognizance requirement. Lebanon has knowledge (or should have as a sovereign state) of the fact that Hezbollah is committing international wrongful acts against Israel.[116]
- Conduct Lebanon. In spite of this knowledge, Lebanon refrains from taking suitable measures to prevent this abuse of its territory, while it does have the possibilities to do so. On the basis of due diligence requirements[117] with regard to resolutions of the UN Security Council and anti-terror stipulations, it should take those preventive measures.[118] In the extreme case Lebanon supports Hezbollah's activities.[119]
- Substantiality. Through this omission or active support, Lebanon contributes substantially to Hezbollah's wrongful acts,[120] making them easier to carry out.
- Causality. The substantial contribution in the form of omitting or supporting Lebanon has a causal relation[121] with Hezbollah's international wrongful acts ([terror] assaults that reach the level of an armed attack) and is foreseeable for every objective observer.[122]

It is almost unimaginable that Lebanon did have no knowledge of the fact that Hezbollah had made preparations from Lebanese territory for the attacks and had also carried them out on earlier occasions.[123] In any case, Lebanon should have known this as a sovereign state.[124] In spite of this knowledge and the obligation to do so, Lebanon took no or insufficient action to prevent Hezbollah's attacks (in the future). In other words, Lebanon is *unable*, or *unwilling* to establish its authority in parts of its territory.[125] Therefore, Israel claimed that this was complicity of Lebanon (and Syria) in the attacks by Hezbollah.[126] With regard to this aspect caution is of the essence. The distinction between *unable* and *unwilling* is very subtle. Is, for instance, a state, which in theory might be able to interfere, but by doing so would probably 'blow itself up', and therefore does not do so, *unable* or *unwilling*? The outcome might be that *unable* carries an absolute and objective element, while *unwilling* harbours a subjective element.

Apart from that, harbouring can be qualified as substantial if the attack had been impossible without this harbouring.[127] What is crucial is not the fact that Lebanon harbours, but that other countries give shelter anyway, in defiance of the obligations that ensue from Security Council resolutions, international anti-terrorism treaties and customary law. States have to refrain unconditionally from supporting or harbouring terrorists.[128] When harbouring coincides with other forms of support, this may be qualified as a substantial contribution.[129]

On the basis of the above analysis there may be a "substantial involvement" of Lebanon in the assaults/attacks committed by Hezbollah. As they exceeded the threshold of an armed attack, Lebanon could be considered as co-author of the attacks on the basis of its *substantial involvement*.

Intrinsic conditions: necessity and proportionality

Although there may be *substantial involvement* which makes it possible to regard Lebanon as co-author, this does not necessarily mean that Lebanon can be the addressee of the Israeli self-defence. After all, for that to be the case the intrinsic conditions of necessity and proportionality must be met.

For operations which are not (only) directed against the non-state author, but (also) against a 'host nation' as co-author, logic demands a double necessity test: (1) peaceful counter-measures are not sufficient to deter future attacks; and (2) measures (use of force) against the non-state actor himself are not adequate to fend off the danger of any future assaults.[130]

The second necessity test implies that self-defence measures against the non-states prevail over measures against the harbouring state.[131] This can be explained from various perspectives. In the first place, from the combination of the necessity and the proportionality principles it follows that a self-defence operation be as limited as possible. The purpose of the operation is to tackle the primary source of the assaults. Secondly, it falls within the *ius ad bellum* that the exception to the general rule of the prohibition of force is used as limited as possible. The general rule needs to be respected to a maximum. Thirdly, the - legitimate - breach of the sovereignty of Lebanon that the operation constitutes (in this case) must be as limited as possible; not more than necessary for the purpose of the defence.

In the conflict between Israel and Hezbollah it is imaginable that an operation purely directed against Hezbollah might have met the purpose of self-defence. By limiting *Change of Direction* to Hezbollah, it is not unthinkable that the threat of further assaults could also have been allayed. If this limitation had not led to a satisfactory result against Hezbollah, Israel – in the second instance - could have regarded Lebanon as an addressee after all. This was not the case now, as Israel chose not only to attack Hezbollah but also Lebanese (military and civilian) targets.[132] Apart from the fact that an action against Hezbollah – the non-state direct author – should have prevailed, the necessity of the actions against Lebanon is hard to imagine. It is not quite clear how Lebanese targets enhanced Hezbollah's attack capabilities,[133] what the necessity was of those attacks in relation to the purpose of the primary attacker (Hezbollah) and the purpose of self-defence. Moreover, it is doubtful whether from the perspective of proportionality, too, Israel, with the scale of the actions against Lebanese targets, stayed within the limits of the *ius ad bellum* After all, in this way the impact on the Lebanese sovereignty is greater than when the operation had been limited to Hezbollah, most certainly so when the

impact of the blockade off the Lebanese coast and the disrupting effect of the ample use of cluster ammunition as a method of waging the war are taken into account.[134]

Although this ex post assessment is relatively simple in hindsight, it seems that international reactions also supported this conclusion at the time.[135] This is clear from the concerns that were expressed in the discussion in the UN Security Council of 14 and 21 July 2006, during which the term 'disproportional' was used several times.[136] All in all, it seems that the intrinsic conditions for a self-defence action, which was also directed against the Lebanese state and infrastructure, were not met. In other words, from the perspective of necessity and proportionality Israel's reaction against Lebanon is hard to justify.

Addressee (Lebanon)

If Lebanon is to be considered a legitimate addressee of Israel's self-defence, it must be regarded as (co) author of the armed attack, and the intrinsic conditions of necessity and proportionality must be met.

Above, it was found that Hezbollah is to be regarded as the direct author of the attacks. Besides, it is probable that Lebanon can be considered co-author. However, on the basis of the principle of necessity, the self-defence measures – in case of a non-state author - against the direct author of the attack (Hezbollah) prevail over measures against an involved state (Lebanon).[137] Only if self-defence against the direct author does not yield the desired effect, is self-defence against the co-author acceptable.[138] Israel did not use this phasing.

Also from the perspective of proportionality it seems that Israel's reaction against Lebanon did not stay within the conditions for self-defence. The breach of sovereignty as it was committed now was unnecessarily disproportionate. The choice to regard Lebanon as an addressee is at odds with the intrinsic conditions of necessity and proportionality.

Conclusion legal bases

What is the legal basis for the Israeli operation *Change of Direction* directed against Lebanon as well as the non-state actor Hezbollah? Israel explicitly appealed to its inherent right of self-defence.

From the above analysis it is clear that Israel was *right* in appealing to this basis insofar as it concerns the operations directed against Hezbollah (addressee). This interpretation is possible as Hezbollah's use of force can be regarded as an armed attack. In addition

to this, the accumulation of events doctrine or *Nadelstichtaktik* may be used if necessary, which makes it possible to regard a series of connected smaller attacks as one armed attack. The operations against Hezbollah were reported to the UN Security Council in conformity with the procedural conditions and stayed within the intrinsic pre-requisites of necessity and proportionality. The fact that it concerns a non-state author and ditto addressee, falls within the present-day insights into the concept of self-defence.

However, the operations directed against (military and civilian) Lebanese targets, cannot be founded on this legal basis. As there was no Lebanese consent for the intervention, either, and a UN Security Council mandate to that effect was absent, this part of the operation appears to be without a basis in the *ius ad bellum*. Therefore, the operation against Lebanon seems to lack a proper legal basis. This conclusion is based on the analysis that self-defence against Lebanon (addressee) was disproportionate and not necessary – although in itself it would be possible to argue that Lebanon could be regarded as co-author of Hezbollah's attack, as it was probably substantially involved in Hezbollah's actions.

Legal regimes during extra-territorial military operations

This contribution will limit itself to the law of armed conflict perspective. Normally speaking, also the applicability of the human rights treaties should be considered. The fact that this aspect cannot be investigated here does not detract from the relevance of the legal regime as a normative framework prior to and during the execution of military operations. As said, the discussion is limited to the question whether the law of armed conflict is applicable, and if so, which partial regime is relevant.

Introduction: law of armed conflict

Usually, states try to move within the constraints of international law. This implies that they will not only appeal to a legal basis for the use of force under the *ius ad bellum*, but that they will also want to respect the legal regimes that apply during the execution of operations. In this case, this concerns primarily the law of armed conflict, whereby it will first be considered whether the law of armed conflict is indeed applicable to the conflict between the IDF and Hezbollah (and Lebanon), and if so, which part is relevant.

The issue of the legal regimes is separate from the legal basis of the operation. In other words, even if the legal basis under the *ius ad bellum* is lacking for the Israeli operations, as seems to be partially the case, one or more legal regimes apply. Extra-territorial military use of force, after all, is never unlimited. This is one of the principles of the democratic constitutional states and international law.

Once an armed conflict exists, the law of war automatically applies to the parties in the conflict - irrespective of their status. Given the phenomenon of war – *war being what it is*[139] – the *ius in bello* – has of old tried to find a balance between the requirements and the reality of the phenomenon of war, on the one hand, and the principle of humanity, on the other.[140] In other words, the law of armed conflict has an internal balance between war (military necessity) and humanity.[141] This is expressed in its dual purpose:[142]

- the protection of those who do not (any longer) take part in the hostilities (especially civilians, but also combatants who have been put *hors de combat*);
- regulating the allowed means and methods of warfare.[143]

The law of armed conflict applies to armed conflicts, as is clearly shown in the comments on the law of armed conflict:

> *Humanitarian law should apply in all circumstance (of armed conflict:* PD&EP*) to all persons (and objects) protected by it, without taking into account the nature or origin of the conflict, or the causes actually espoused by or attributed to the Parties of the conflict.*[144]

The primary question here is: what is an armed conflict?[145] This concept is not defined in the law of war treaties. The following definition can be derived from ICTY case law:

> *An armed conflict exists whenever there is a resort to armed force (1) between States or (2) protracted armed violence between (a) governmental authorities and organised armed groups or (b) between such groups within a State.*[146]

The Commentaries to the treaties support this definition. An armed conflict is a factual situation[147] that exists when there are open hostilities - acts of combat – between more or less organised 'armed forces',[148] regular or irregular armed forces.[149]

> *The concept of armed conflict, in principle, requires the existence of organised armed groups that are capable of and actually do engage in combat and other military operations against each other.*[150]

The opinion of the parties involved about the existence of an armed conflict is not decisive here, as is shown in position of the Dutch government.[151]

Therefore, the question that must first be raised is when use of force can be regarded an armed conflict. When it is ascertained that an armed conflict exists, it must then be

determined what part of the law of armed conflict is relevant as legal regime. Eventually, those findings must be applied to *Change of Direction*.

Threshold: armed conflict

Not every use of force will be regarded as an armed conflict. Only qualified forms come up for consideration. This is the lower limit to the *genus* armed conflict.[152] Below this lower limit there is no armed conflict and consequently the law of armed conflict does not apply.[153]

For an armed conflict two cumulative conditions must be met.[154] There must be (1) actual hostilities of certain intensity, consisting of a number of related armed "incidents", which (2) are carried out by opposing organised armed groups capable of undertaking military operations over longer periods of time. Below, these conditions will be considered briefly.[155]

Intensity of violence

ICTY case law shows that – in contrast to crime or internal unrest – the emphasis in an armed conflict lies on "the protracted extent of the armed violence and the extent of the organisation of the parties involved".[156] The 'protracted' criterion must be seen as a re-formulation of the general rule that excludes "isolated and sporadic acts of violence (disorganized and short-lived)" from the scope of application of the law of armed conflict.[157] In a recent ruling ICTY indicated that the "protracted armed violence" criterion is determined more by the intensity of the violence than by its duration.[158] Intensity must be assessed by several indicative criteria:

> *These indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.*[159]

It seems evident that the violence in question is of more than enough intensity to meet this condition. On top of that, the conflict lasted for 33 days, during which Hezbollah fired some 4,000 missiles on Israeli targets.[160] There were 55 dead, 100 heavily and 1,338 lightly wounded.[161] Israel carried out large-scale combat operations with air, land and naval forces, during which more than 1,000 Lebanese civilian and an estimated 500 Hezbollah fighters were killed, several hundred thousands of people on both sides

fled their homes and heavy damage was inflicted on the infrastructure on both side of the borders.[162]

Organisation

The second requirement concerns opposing armed groups that are capable of undertaking military operations over a longer period of time.[163] This is the organisation requirement: "an armed conflict can exist only between parties that are sufficiently organised to confront each other with military means".[164] Regular armed forces, such as the IDF and the Lebanese armed forces, are deemed to meet this requirement.[165] For irregular forces, armed groups, an assessment must be made with the help of a number of indicative criteria:

> *the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.*[166]

That Hezbollah is not only a political organisation but also an armed group, is clear, amongst others, from the missile attacks carried out during the conflict. It has weapons stores and launching installations on Lebanese territory, and it uses them.[167] It is also clearly capable of planning, coordinating and conducting military operations, a fact which was evident from the attack on 12 July alone. But also during the conflict Hezbollah showed evidence of using (classic) military tactics:

> *Hizballah, on the other hand, operated in a manner compatible with the battlefield conditions. Its fighters used their defensive capabilities – advanced but easy-to-operate weapons, effective evasion and hit-and-run tactics, bunkers network, and familiarity with the terrain and population – to engage small Israeli combat teams in battle under advantageous conditions.*[168]

In short, Hezbollah is an organised armed group within the meaning of the law of armed conflict.

Regime

Above, it was ascertained that the conflict is an armed conflict and for that reason the law of armed conflict is applicable to the hostilities. It now remains to be seen which regime is relevant. In other words, which rules from the law of armed conflict apply to

the conflict. In order to give the answer to that question, the conflict must by classified. Is it an international, a non-international armed conflict, or possibly another form of armed conflict?

Israel-Lebanon

As was concluded above, *Change of Direction* is considered an international armed conflict between Israel and Lebanon.[169] The fact that the Lebanese armed forces put up no or hardly any resistance, does not detract from this.[170] On this situation *in any case* the international customary law for international armed conflicts applies. *Besides*, the Geneva Conventions of 1949 apply, as appears from the Common Article 2 (CA 2):

> *the (...) Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.*[171]

As Israel is not a contracting party of the First Additional Protocol to the Geneva Conventions of 1949 (AP I),[172] this Protocol, which monitors international armed conflicts, does not apply to the IDF operations. As substantial parts from AP I, however, have the status of international customary law, Israel is bound by these customary law stipulations in AP I.[173] Lebanon is a party to AP I,[174] and insofar the Lebanese armed forces have partaken in the hostilities AP I applies.

Israel-Hezbollah

In themselves the hostilities between Israel and Hezbollah must be qualified as an armed conflict. It is, however, a type that does not fall within the definition of *international* armed conflicts used in the CA 2 and article 1(4) of AP I. After all, there is no inter-state conflict, but a conflict between a state and a non-state actor, while there are no situations applying ex art. 1(4).[175]

Nor is it, however, a conflict that takes place on the territory of a single state, a situation which Common Article 3 of the Geneva Conventions (CA 3) and the Second Additional Protocol (AP II) for non-international armed conflicts (mainly) focus at. As it is, in that respect, too, there is no intra-state armed conflict.

> *Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with 'armed forces' on either side engaged in 'hostilities' - conflicts, in short, which are*

in many respects similar to an international war, but take place within the confines of a single country.[176]

It is, however, unacceptable that no law of armed conflict regime is applicable at all, while a war is being waged. This goes against the history, purpose and ratio of the law of armed conflict.[177] After all, this would constitute a black hole in the law of armed conflict.

Although there is no intra-state, but a trans-national armed conflict against Hezbollah, the regime of CA 3 is applicable, according to its letter and purpose.

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties (...)[178]

This position is confirmed in the much debated decision of the US Supreme Court in *Hamdan v. Rumsfeld*.[179] The Court rejected the position of the US government that the CA 3 did not apply to the fight against Al Qa'ida (either).

The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being 'international in scope', does not qualify as a 'conflict not of an international character'. (...) That reasoning is erroneous. The term 'conflict not of an international character' is used here in contradistinction to a conflict between nations (...)
Common Article 3 (...) affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither signatory nor even a nonsignatory 'Power' who are involved in a conflict 'in the territory of' a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase 'not of an international character' bears its literal meaning.[180]

The position of the Supreme Court implies that if a conflict is not an international conflict, it must be deemed a non-international armed conflict on the basis of (the literal meaning of) CA 3.[181] This would lead to the conclusion that – seen on itself – the regime for non-international armed conflicts, consisting of the relevant customary law and CA 3, applies to the armed conflict between Hezbollah and Israel.[182] This conclusion, however, ignores the fact that apart from the *non-international* conflict between Israel and Hezbollah, there is also the *international* conflict between Israel and Lebanon. It is therefore relevant to see both conflicts in their relation.

Overall picture regime

In the opinion of the UN Human Rights Council the conflict concerned a *sui generis* situation which was qualified as an armed conflict, in which Hezbollah and Lebanon were parties.

> *It is the view of the Commission that hostilities were in fact and in the main only between IDF and Hezbollah. The fact that the Lebanese Armed Forces did not take an active part in them neither denies the character of the conflict as a legally cognizable international armed conflict, nor does it negate that Israel, Lebanon and Hezbollah were parties to it.*[183]

In finding so, the Council made use of an analogy with an occupation that does not meet with any resistance: even then it is an international armed conflict.[184]

Moreover, the Council explicitly states that Hezbollah was one of the parties in the international armed conflict and, as such, bound by the legal regime applicable to it.[185] The fact that Hezbollah is not a state, and consequently cannot be a contracting party in the Geneva Conventions and the Additional Protocols, does not detract from this. Also non-state actors in an armed conflict are bound by the law of armed conflict.[186]

This situation is in a sense comparable to the armed conflict in the period of October 2001- June 2002 between the US (and its allies, amongst which the Netherlands), on the one hand, and Afghanistan and Al Qa'ida, on the other, which must be seen as an international armed conflict in that period.[187] As Israel, too, attacked Lebanese as well as Hezbollah targets, this seems a defensible position.[188]

Another solution would be to use two separate regimes, but this would lead to practical problems with the planning and execution of the IDF operations. In such a case attacks on Hezbollah targets would fall under a different regime than attacks on Lebanese targets, while both might be attacked in one and the same mission. Incidentally, because of the fading distinction between international customary law for international and non-international armed conflicts, the practical significance of the various legal regimes is decreasing further. The practical problems might also be obviated by a policy decision to the effect that for both addressees the more comprehensive regime for international armed conflicts applies.

Conclusion legal regime

Which legal regimes were applicable to the Israeli operations? As was said above, this is limited to the question whether the law of armed conflict applies, and if so, which partial regime is relevant.

The law of armed conflict applies during armed conflicts. An armed conflict requires (1) actual hostilities of a certain intensity, consisting of related armed 'incidents', which (2) are carried out by opposing organised armed groups capable of undertaking military operations over a longer period of time. There was an actual armed conflict between Israel, on the one hand, and Hezbollah and Lebanon, on the other, as the threshold value for an armed conflict on both cumulative criteria - intensity and organisation - was far exceeded.

The law of armed conflict regime applicable to this conflict depends on the type of conflict. Israel attacked Hezbollah as well as Lebanese targets, with the Lebanese armed forces barely putting up any resistance. This situation has been deemed a unique (*sui generis*) situation, whereby the comparison with the hostile occupation without resistance forces itself upon us. That approach leads to the full regime for international armed conflicts being applicable. This regime primarily consists of the Geneva Conventions, the First Additional Protocol applying to Israel insofar as the stipulations are of a customary law character.

Conclusion for extra-territorial military operations

Military operations take place within the constraints of a democratic constitutional state and international law. This also holds for extra-territorial operations and, likewise, for operations against non-state actors, such as Hezbollah. They are founded – or should be – on a legal basis under the *ius ad bellum*. Besides, such operations – also against non-state entities or actors – must be carried out within the legal regimes that apply. In particular in modern conflicts, determining the right regime is not always simple. These two issues – legal basis and legal regime – are also of importance for the Netherlands and its armed forces. After all, in the present-day security situation confrontations between Dutch units and non-state actors are foreseeable.

In the case of operation *Change of Direction* the basis – the legal basis – must be found in the state's right of self-defence, as laid down in article 51 UN Charter. This is also the legal basis brought forward by Israel. This right arises after an armed attack, whereby, according to modern insights, the status of the author (state or non-state) of that attack is irrelevant. However, the threshold value for an armed attack must be reached. This can also happen via the accumulation of events doctrine, in which a number of smaller attacks are seen in relation. The logic of self-defence demands that it must be directed against the author of the attack. Preferably, this addressee is the direct author, in this case Hezbollah. In a number of cases an involved state can have substantial involvement

in the attack to such an extent that it can be deemed co-author. This might be argued with regard to Lebanon. All the same, self-defence against the direct author prevails over actions against the co-author because of the principles of proportionality and necessity. For that reason, an appeal to self-defence against Lebanon must be rejected, where self-defence against Hezbollah is a legal basis.

Apart from the legal bases, the legal regime during operations is of significant relevance. In the case of *Change of Direction* it has been established that the conflict exceeded the threshold value of an armed conflict, which results in the law of armed conflict being applicable. There must be (1) actual hostilities of a certain intensity, consisting of a number of related armed "incidents", which (2) are carried out by opposing organised armed groups capable of undertaking military operations over a longer period of time. Both requirements are met. The next question is which part of the law of armed conflict relates to the conflict. In the view of the Human Rights Council this is the regime for international armed conflicts. In an alternative view this would depend on the addressee: with respect to Lebanon, the regime for international armed conflicts; with respect to Hezbollah, the regime for non-international armed conflicts. The practical difference is 'subdued' due to the decreasing difference between both regimes, caused by congruence in customary law.

Notes

1. Colonel dr. P. (Paul) A.L. Ducheine and major mr. E. (Eric) H. Pouw are legal advisors (Army Legal Service). Colonel Ducheine is an associate professor and major Pouw is a researcher within the Military Law section of the Netherlands Defence Academy.
2. We do not differentiate for the goal or objectives of a military operation: this could be a regular conventional operation, as well as a counter-terrorism operation. What is decisive, is the fact that armed force may be used.
3. As it is also valid for the armed forces themselves. This can be deduced from the principle of 'legitimacy of military operations' (Royal Netherlands Army (1996), *Military Doctrine* (ADP-I), The Hague, p. 89). It must be noted that this principle is not used in *The Netherlands Defence Doctrine* (2005), The Hague: Ministry of Defence, pp. 55-59. For criticism in this respect: Ducheine, P.A.L. (2008), *Krijgsmacht, Geweldgebruik & Terreurbestrijding; een onderzoek naar juridische aspecten van de rol van strijdkrachten bij de bestrijding van terrorisme*, Nijmegen: Wolf Legal Publishers, (dissertation University of Amsterdam, pp. 27 and 561.

4. Object of self-defence: the actor against whom the operation is directed (Ducheine (2008), p. 133).
5. The different opinions are summarised in: Ducheine (2008), p. 127, note 37.
6. An 'intervention with consent' is *stricto sensu* no exception to the prohibition of force. Although it serves as a separate legal basis in Public International Law for extra-territorial military operations, it is used here as one of the 'exceptions'.
7. Henkin, L. (1971) 'The Reports of the Death of Article 2(4) Are Greatly Exaggerated', in: 65 *American Journal of International Law* (3), pp. 544-548.
8. Dinstein, Y. (2003), 'Ius ad Bellum aspects of the 'War on Terrorism'', in: Heere, W.P. and International Society for Military Law and the Law of War (Netherlands National Group) (eds.), *Terrorism and the military: international legal implications*, The Hague: T.M.C. Asser Press, pp. 13-23 at 13.
9. Dinstein, Y. (2005), *War, Aggression and Self-Defence*, Cambridge: University Press, p. 88; Simma, B. (1999), 'NATO, the UN and the Use of Force: Legal Aspects', in: 10 *European Journal of International Law*, pp. 1-22, at 2.
10. For the classic example: ICJ (1949), Corfu Channel case, p. 31. On the issue of 'Threat': Sadurska, R. (1989), 'Threats of Force', in: 82 *American Journal of International Law* (2), pp. 239-268, at 242; Stürchler, N. (2007), *The Threat of Force in International Law,* Cambridge: Cambridge University Press, p. 252; Roscini, M. (2007), 'Threats of armed force and contemporary international law', in: 54 *Netherlands International Law Review* (2), pp. 229-277, at 229.
11. For an overview of the contra opinions: Ducheine (2008), pp. 135-138.
12. Schachter, O. (1984), 'The Legality of Pro-democratic Invasion', in: 78 *American Journal of International Law* (3), pp. 645-650, at 649.
13. See the typology in: Brownlie, I. (1963), *International Law and the Use of Force by States,* Oxford: Oxford University Press, p. 268.
14. Simma, B. (2002), *The Charter of the United Nations. A Commentary,* Oxford: Oxford University Press, p. 123. In conformity with: Lauterpacht, H. (ed.) (1952b), *Oppenheim's International Law. A treatise (Vol II) Disputes, War and Neutrality,* London: Longmans, Green and Co, p. 54; and ICJ (1949), Corfu Channel case, p. 35.
15. Monroe Leigh (Legal Advisor US Department of State), reprint in: Nash, M.L. (1979), 'Contemporary Practice of the US Relating to International Law: International Terrorism (Entebbe)', in: 73 *American Journal of International Law* (1), pp. 122-124, at 123.
16. As used in the Preamble as well as in Article 1 UN Charter.
17. Art. 1(1) UN Charter. See also: Lauterpacht, H. (ed.) (1952a), *Oppenheim's International Law. A treatise (Vol I) Peace*, London: Longmans, Green and Co, p. 367; Goodrich, L.M. and A.P. Simons (1957), *The United Nations and the Maintenance of*

International Peace and Security, Washinton D.C.: The Brookings Institution, p. 12; Goodrich, L.M. (1959) *The United Nations*, New York: Thomas Y. Crowell Company, p. 29. As stated in the very first paragraph of the Preamble of the UN Charter.

18. So-called 'circumstances precluding wrongfulness'.
19. Un Doc A/60/948; S/2006/550 (letters dated 19 July 2006 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the UN addressed to the Secretary-General and the President of the Security Council). UN Doc. S/2006/550; A/60/948 (2006) (Letters from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the (UN) addressed to the Secretary-General and the President of the (SC)).
20. Art. 24(1) UN Charter.
21. Art. 39 UN Charter. Hereafter: 'threat to the peace (etc.)'.
22. Blokker, N. (2000), 'Is the authorization authorized? Powers and practice of the UN Security Council to authorize the use of force by 'coalitions of the able and willing'', in: 11 *European Journal of International Law* (3), pp. 541-568, at 544.
23. UN Doc. S/2006/515; A/60/937 (2006) (Letters from the Permanent Representative of Israel to the (UN) addressed to the SG and the President of the SC); and UN Doc. S/RES/1655 (2006).
24. UN Doc. S/PV.5489 (2006) (Provisional Records of the 5489th meeting of de SC (61th year)).
25. UN Doc. S/RES/1697 (2006) (SC Resolution 1697).
26. UN Doc. S/RES/1701 (2006) (SC Resolution 1701).
27. For a description of a restrictive and realistic opinion: Manusama, K.M. (2006), *The United Nations Security Council in the Post-Cold War Era. Applying the Principle of Legality*, Leiden: Martinus Nijhoff Publishers, p. 249.
28. Ochoa-Ruiz, N. and E. Salamanca-Aguado, 'Exploring the Limits of International Law relating to the Use of Force in Self-defence', in: 16 *European Journal of International Law* (3), pp. 499-524, at 515.
29. We accept the concept of preemtive of anticipatory self-defence. Preventive self-defence, however, is not accepted, and cannot be used as an adequate legal basis for the use of force. See: Ducheine (2008), pp. 222-230.
30. The so-called 'Nadelstichtaktik'. See: Ducheine (2008), pp. 212-222.
31. In conformity with: Gill, T.D. (2002), *The 11th of September and the International Law of Military Operations*, Amsterdam: Vossiuspers, oration University of Amsterdam, p. 17.
32. Greig, D.W. (1991), 'Self-Defence and the Security Council: what does Article 51 require', in: 40 *International & Comparative Law Quarterly*, pp. 366-402, at 392; Ducheine (2008), pp. 236-237. But see: Gill, T.D. (2007), 'The Temporal Dimension of Self-Defense: Anticipation, Pre-emption, Prevention and Immediacy', in:

Schmitt, M.N. and J. Pejic (eds.), *International law and armed conflict: exploring the fault lines. Essays in honour of Yoram Dinstein,* Leiden: Martinus Nijhoff, pp. 113-155, at 119-120; and Dinstein (2005), p. 215.

33. For a description of the events initiating the Israeli reaction, see the briefing of Jean-Marie Guéhenno, Under-Secretary-General for Peacekeeping Operations in UN Doc. S/PV.5489 (2006) (Provisional Records of the 5489th meeting of de SC (61th year)), pp. 2-3; and UN Doc. S/2006/515; A/60/937 (2006) (Letters from the Permanent Representative of Israel to the (UN) addressed to the SG and the President of the SC).
34. UN Doc. S/2006/515; A/60/937 (2006) (Letters from the Permanent Representative of Israel to the (UN) addressed to the SG and the President of the SC).
35. In favour: UK, Greece, Japan, Peru, Denmark. Against (i.a. as a result of the lack of proportionality): Russia, Ghana, Argentina, Qatar, China ('armed aggression') and the DRC. See UN Doc. S/PV.5489 (2006) (Provisional Records of the 5489th meeting of de SC (61th year)).
36. UN Doc. S/RES/1701 (2006) (SC Resolution 1701) only 'calls' for cessation of attack and operations (§ 1).
37. In conformity with: Ducheine (2008), p. 256.
38. In a classic inter-state armed conflict, the author (of an armed attack) and the subject of self-defence are one and the same. This is also valid in a terrorist situation: Ducheine (2008), pp. 256-259.
39. Israel qualified the actions as a Lebanese attack: UN Doc. S/2006/515; A/60/937 (2006) (Letters from the Permanent Representative of Israel to the (UN) addressed to the SG and the President of the SC).
40. Declaration of the Ministry of Foreign Relations of Colombia No. 081 (Mar 2, 2008). Comunicado del Ministerio de Relaciones Exteriores de Colombia No. 081. For an analysis: Waisberg, T. (2008), *ASIL Insight: Colombia's Use of Force in Ecuador Against a Terrorist Organization: International Law and the Use of Force Against Non-State Actors*, <www.asil.org/insights/2008/08/insights080822.html#author>, (viewed: 27-8-2008).
41. UN Doc. S/1995/605 (1995) (Letter from the Chargé D'Affaires a.i. of Turkey to the (UN) addressed to the President of the SC); Bothe, M. and T. Lohmann (1995), ´Der türkische Einmarsch im Nordirak: neue Probleme des völkerrechtlichen Gewaltsverbots´, in: 5 *Schweizerische Zeitschrift für internationales und europäisches Recht* (4), pp. 441-454: *De Volkskrant* (24-10-2007), 'Turkse leger viel rebellen in Noord-Irak aan'.
42. See the Notification to the SC, UN Doc. S/1998/780 (1998) (Letter from the Permanent Representative of the (USA) to the (UN) addressed to the President of the (SC)), p. 1; Manusama (2006), pp. 288-289.

43. *NRC Handelsblad* (9-1-2007), 'Luchtaanvallen VS op strijders Somalië'; *NRC Handelsblad* (25-1-2007), 'Weer luchtaanval VS op Somalië'; *NRC Handelsblad* (4-3-2008), 'Leger VS voert opnieuw aanval uit in Somalië'; *NRC Handelsblad* (2-5-2008), 'VS doden Somalische militant'.
44. *The New Yorker* (23-12-2002), 'Manhunt; The Bush Administration's New Strategy in the War Against Terrorism'; *USA Today* (2002), 'U.S. kills al-Qaeda suspects in Yemen', <www.usatoday.com/news/world/2002-11-04-yemen-explosion_x.htm>, (viewed: 21-11-2005); Coomans, F. and M.T. Kamminga (eds.) (2004), *Extraterritorial Application of Human Rights*, Oxford: Intersentia, p. 1; *BBC News* (2002), 'CIA 'killed al-Qaeda suspects' in Yemen', <news.bbc.co.uk/1/hi/world/middle_east/2402479.stm>, (viewed: 21-11-2005); New York Times (4-11-2002), 'Threats and Responses: Hunt for Suspects; CIA is Reported to Kill a Leader of Qaeda in Yemen'; The Washington Post (5-11-2002), 'US strike kills six in Al Qaeda'; Hersch, S. (2004), *Chain of Command. The Road from 9/11 to Abu Ghraib*, London: Penguin Books, pp. 262-263.
45. *NRC Handelsblad* (3-9-2008), 'Twintig doden in Pakistan bij luchtaanval'; *NRC Handelsblad* (11-9-2008), 'Bush keurde acties in Pakistan goed'.
46. In conformity with: Ducheine (2008), pp. 160-162.
47. See the overview in: Ducheine (2008), p. 154. Some authors are of the opinion that every use of armed force is sufficient (Higgins). The International Court of Justice, as well as other authors, apply the threshold of 'sufficient gravity': ICJ (1986), Nicaragua case, p. 103, § 195.
48. Dinstein, Y (2001), *War, Aggression and Self-Defence*, Cambridge: University Press, p. 174.
49. Stahn, C. (2004), ''Nicaragua is dead, long live Nicaragua'- the Right to Self-defense under Art. 51 UN Charter and International Terrorism', in: Walter, C., S. Vöneky and F. Schorkopf (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Berlin/Heidelberg: Springer, pp. 827-877, at 858.
50. See the description of means and methods in: Rubin, U. (2007), *The Rocket Campaign against Israel during the 2006 Lebanon War*, Begin-Sadat (BESA) Center for Strategic Studies Mideast Security and Policy Studies, pp. 4-14.
51. Ducheine (2008), p. 161. In conformity with: Rowles, J.P. (1987) 'Military Responses to Terrorism: Substantive and Procedural Constraints in International Law', in: *Proceedings of the 81st Annual Meeting of the ASIL*, pp. 307-318, at 314; Arend, A.C. and R.J. Beck (1994), ''Don't tread on us': International law and forcible state responses to terrorism', in: 12 *Winconsin International Law Review* (Spring), pp. 153-219, at 217.

52. Ruys, T. (2007), 'Crossing the Thin Blue Line: An Inquiry into Israel's recourse to Self-Defense against Hezbollah', in: 43 *Stanford Journal of International Law* (Summer), pp. 265-294, at 268.
53. ICJ (1986), Nicaragua case, p. 103, § 195.
54. In conformity with: Wrachford, J.S. (2007), 'The 2006 Israeli Invasion of Lebanon: Aggression, Self-Defense, or a Reprisal Gone Bad?', in: 60 *The Air Force Law Review* (1), pp. 29-89, at 79-80; Ruys (2007), p. 273.
55. Ruys (2007), pp. 268, 273; UN Doc. S/2006/560 (Report of the Secretary-General on the United Nations Interim Force in Lebanon), p. 1.
56. See: UN Doc. S/2006/560 (Report of the Secretary-General on the United Nations Interim Force in Lebanon), p. 4; UN Doc. S/PV.5489 (2006) (Provisional Records of the 5489th meeting of de SC (61th year)), p. 6.
57. Advocated in: Ducheine (2008), pp. 212-221. The ICJ made use of the doctrine twice implicitely: ICJ (1986), Nicaragua case, p. 120, § 231; and ICJ (1996), Oil Platforms case (preliminary objections), § 64. Zie ook: Ruys (2007), p. 272; and Harris, D.J. (1998), *Cases and Materials on International Law*, London: Sweet and Maxwell (1998), p. 898.
58. In conformity with: Ducheine (2008), p. 221.
59. See UN Doc. S/RES/101 (1953) (SC Resolution 101). Manusama (2006), p. 296: before that date, Israel referred to its right of belligerent reprisals.
60. O'Brien, W.V. (1990), 'Reprisals, Deterence and Self-Defense in Counterterror Operations', in: 30 *Virginia Journal of International Law*, pp. 421-478, at 472, citing Eban from UN Doc. S/PV.637 (1953) (Provisional record of the 637th meeting of the SC), pp. 15-38. Also: Bowett, D.W. (1972), 'Reprisals Involving Recourse to Armed Force', in: 66 *American Journal of International Law* (1), pp. 1-36, at 5-7, summarizing the Israeli position (1953-1966). In conformity with: Dinstein (2005), pp. 230-231; Levenfeld, B. (1982), 'Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal under Modern International Law', in: 21 *Columbia Journal of Transnational Law* (1), pp. 1-48, at 40; and O'Brien (1990), pp. 433-434.
61. O'Brien (1990), p. 472.
62. Nash Leich, M. (1986), 'Contemporary Practice of the US Relating to International Law: Use of Force (Self-Defence against Terrorism, Libya: El Dorado Canyon)', in: 80 *American Journal of International Law* (3), pp. 632-644, at 632; Greenwood, C. (1986), 'International Law and the United States' Air Operation against Libya', in: 89 *West Virginia Law Review*, pp. 933-960, at 933; Roberts, G.B. (1987), 'Self-Help In Combating State-Sponsored Terrorism: Self Defense and Peacetime Reprisals', in: 19 *Case Western Reserve Journal of International Law*, pp. 243-293, at 286.
63. Greenwood (1986), p. 934.

64. Letter dated 14 April 1986 form the (acting) Permanent Representative of the US to the UN, Addressed to the President of the SC, UN Doc. S/17990 (1986) (in: Nash (1986), p. 633). (Accent: PD).
65. See the notification to the SC, UN Doc. S/1998/780 (1998) (Letter from the Permanent Representative of the (USA) to the (UN) addressed to the President of the (SC)), p. 1; Manusama (2006), pp. 288-289, memorising the 'chain' of Al Qa'ida attacks.
66. I.e. the reaction against the Al Shifa chemical plant (Sudan).
67. The US and allies like the Netherlands use the most common term: Operation Enduring Freedom. See <www.mod.uk/>, 'Operations in Afghanistan' (viewed: 28-10-2007).
68. UN Doc. S/2001/947 (Letter dated 7 October 2001 from the Chargé d' affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council), p. 1.
69. In conformity with: Manusama (2006), p. 289; O'Connell, M.E. (2002), 'Lawful self-defense to terrorism', in: 63 *University of Pittsburgh Law Review* (Summer), pp. 889-908, at 899.
70. On 21-11-2005 and 27-12-2005, zie: UN Doc. S/RES/1655 (2006).
71. In conformity with: Wrachford (2007), p. 80.
72. For an overview: Ducheine (2008), pp. 162-170. In contravention: ICJ (2004a), Palestinian Wall case, § 139. This 'old' position received severe criticism from several judges, i.a. ICJ (2004b), Palestinian Wall case: Seperate Opinion Higgins, § 33-34.
73. Art. 31-32 Vienna Convention on the Law of Treaties.
74. Schrijver, N. (2004), 'September 11 and Challenges to Terrorism', in: Boulden, J. and T. Weiss (eds.), *Terrorism and the UN: Before and After September 11*, Bloomington: Indiana University Press, pp. 55-73, at 62; Schachter, O. (1988), 'The Extraterritorial Use of Force against Terrorist Bases', in: 11 *Houston Journal of International Law*, pp. 309-316, at 311. Murphy, S.D. (2002), 'Terrorism and the concept of 'Armed Attack' in article 51 of the UN Charter', in: 43 *Harvard International Law Journal* (Winter), pp. 41-51, at 50; Stahn (2004), p. 848.
75. For an overview: Kearley, T. (2003), 'Regulation of preventive and pre-emptive force in the United Nations Charter: a search for original intent', in: 3 *Wyoming Law Review*, pp. 663-732, at 680-713.
76. US Department of State, Foreign Relations of the United States: Diplomatic Papers, 1945 (1967), p. 674. (in: Kearley (2003), p. 694).
77. Jennings, R.Y. (1938), 'The Caroline and McLeod Cases', in: 32 *American Journal of International Law* (1), pp. 82-99, at 82; Greenwood, C. (2002), 'International Law

and the 'War against Terrorism'', in: 78 *International Affairs* (2), pp. 301-317, at 308; Murphy (2002), p. 50; Gill, T.D. (2003), 'The Eleventh of September and the Right if Self-Defense', in: Heere, W.P. and N.N.G. International Society for Military Law and the Law of War (eds.), *Terrorism and the military: international legal implications*, The Hague: T.M.C. Asser Press, pp. 23-37, at 26.

78. I.a. SN 4296/2/01, REV 2 (OR. fr) (Declaration by the Heads of State or Government of the European Union and the President of the Commission. Follow-up to the September 11 Attacks and the fight against terrorism), NATO (2001, Sep 12) Statement by NATO Secretary General, Lord Robertson; NATO (2001, Oct 2) Press Release (2001) 124: Statement by the North Atlantic Council; and OAS Res. RC.23/RES.1/01; OEA/Ser. F/II.23 (Twenty-Third Meeting of Consultation OEA of Ministers of Foreign Affairs. Resolution on Strengthening Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism).
79. Ruys, T. and S. Verhoeven (2005), 'Attacks by private actors and the right of self-denfence', in: 10 *Journal of Conflict and Security Law* (3), pp. 289-320, at 311, referring to: UN Doc. S/RES/241 (1967) (Security Council Resolution 241). In newer Resolutions, the SC also referred to 'armed aggression' with a view to attacks by mercenaries against Benin (1977) and the Seychelles (1981), see UN Doc. S/RES/405 (1977) (SC Resolution 405); UN Doc. S/RES/496 (1981) (SC Resolution 496) and UN Doc. S/RES/507 (1982) (SC Resolution 507).
80. UN Doc. S/RES/1368 (2001) (SC Resolution 1368 Threats to international peace and security caused by terrorist acts); and UN Doc. S/RES/1373 (2001) (Security Council Resolution 1373) respectively.
81. Myjer, E.P.J. and N.D. White (2002), 'The Twin Towers attack: An unlimited right to self-defence', in: 7 *Journal of Conflict and Security Law* (1), pp. 5-17, at 7; Stahn, C. (2001), 'Security Council Resolutions 1368 (2001) and 1373 (2001): What they say and what they do not say', <www.ejil.org/forum_WTC>, (viewed: 14-3-2005).
82. The authors mentioned refer rightfully to the fact that the SC remained silent with regard to the qualification of armed attack and the related authorship of that attack.
83. Ducheine (2008), pp. 254-255.
84. See Wrachford (2007), p. 45, fn. 115, for an overview of the resolutions.
85. The Israeli Ambassador to the UN, D. Gillerman, in the SC: "Israel had no choice but to react", UN Doc. S/PV.5489 (2006) (Provisional Records of the 5489th meeting of de SC (61th year)), p.6.
86. Ago, R. (1980), *Addendum to the Eighth Report on State Responsibility*, UN Doc. A/CN.4/318 and Add.5-7, in: 1980 Yearbook of the International Law Commission (Volume II, part one), pp. 14-70, at 69, § 119.

87. UN Doc. S/2006/515; A/60/937 (2006) (Letters from the Permanent Representative of Israel to the (UN) addressed to the SG and the President of the SC), p. 2.
88. Hezbollah's goals and policy are described in: Lara Deeb, *Hizballah: A Primer*, July 31, 2006, <merip.org/mero/mero073106.html>.
89. Wrachford (2007), p. 85.
90. Ducheine (2008), p. 245. See also below on self-defence against Lebanon.
91. Gill (2003), p. 33 (referring to Brownlie (1963), pp. 261-264; Dinstein (2001), pp. 183-184; and Schachter, O. (1991), *International law in theory and practice*, Dordrecht: Martinus Nijhoff Publishers, pp. 152-155.
92. As is the case after an occupation that met no resistance. See also the destruction of Germany's military capabilities in 1945.
93. For cumulative proportionality: Ducheine (2008), p. 253.
94. Ducheine (2008), p. 252. In conformity with: Nollkaemper, P.A. (2005b), *Kern van het internationaal publiekrecht*, Den Haag: Boom Juridische Uitgevers, p. 292.
95. Apart from the fact that the author (of the terrorist attack) may not be known, or that there is otherwise doubt or uncertainty on the origin of the attacks.
96. Ducheine (2008), pp. 256-259.
97. Ducheine (2008), p. 258.
98. See the Opinions of the judges Higgins (§ 33-34), Buergenthal (§ 6), Kooijmans (§ 35) in ICJ (2004a), Palestinian Wall case, and Simma (§ 6-11), Kooijmans (§ 26-30) in ICJ (2005), DRC-Uganda case.
99. I.a. Manusama (2006), pp. 292-293, noting that in UN Doc S/PV.4370 (2001) (Provisional Records of the 4370th meeting of the SC (56th year)) self-defence was not mentioned, as it was obvious; also UN Doc. S/PV.4413 (2001) (Provisional Records of the 4413th Meeting of the SC), pp. 6-7, 10, where France and Norway supported self-defence prior to acceptance of UN SC Resolution 1377.
100. Schrijver, N. and L.v.d. Herik (2007), *Counter-terrorism strategies, human rights and international law: meeting the challenges. Expert meeting counter-terrorism strategies* (10-13 April 2007), in: LIV *Netherlands International Law Review* pp. 571-587.
101. Ducheine (2008), p. 260.
102. PCIJ (1927), S.S. Lotus (France v. Turkey), 7-9-1927, Series A No. 10 PCIJ (Lotus case), p. 18.
103. Kirgis, F.L. (2002), *Pre-emptive Action to Forestall Terrorism*, <www.asil.org/insights/insigh88.htm#author>, (viewed: 1-11-2006).
104. UN Doc. S/2006/515; A/60/937 (2006) (Letters from the Permanent Representative of Israel to the (UN) addressed to the SG and the President of the SC).
105. Gill (2003), p. 33.
106. Stahn, C. (2002), 'International Law at a Crossroad? The impact of September 11', in: 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, pp. 183-256,

at 225. In conformity with: UK Government Number 10 (2001), *Responsibility for the Terrorist Atrocities in the United States, 11 September 2001 - An Updated Account*, <www.number-10.gov.uk/output/Page3682.asp>, (viewed: 16-11-2005), § 19; Slaughter, A.-M. and W. Burke-White (2002), 'An international constitutional moment', in: 43 *Harvard International Law Journal* (Winter 2002), pp. 1-21, at 20; 'it is the Al Qaeda members who have 'hijacked' Afghanistan'.

107. See Ruys (2007), p. 284.
108. This follows from the fact that acts committed by state organs (i.a. armed forces) are acts of the state. See Art. 4 Draft articles on Responsibility of States for internationally wrongful acts (ASR 2001).
109. Ducheine (2008), p. 569.
110. ICJ (1986), Nicaragua case, p. 103, § 195. (Accent: PD). In ICJ (2005), DRC-Uganda case, § 146, the existence of a direct and indirect was rejected.
111. Art. 8 ASR Conduct directed or controlled by a State: 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.' (Accent: PD). Also: ICJ (1986), Nicaragua case, p. 48, § 80, and ICJ (1986), Nicaragua case, pp. 64-65, § 115. The ICTY applied a lower threshold: 'overall control': ICTY (1999), Tadic (Appeal: judgement), § 120, 122. The ICJ maintained its own norm: ICJ (2007), Genocide case (judgement).
112. ICJ (2007), Genocide case (judgement), § 401.
113. Compare : Ducheine (2008), pp. 180-190.
114. Ducheine (2008), pp. 175-207. But see: Ruys (2007), p. 281.
115. Likewise: Nollkaemper (2005b), p. 348; and Nollkaemper, P.A. (2005a), 'Attribution of Forcible Acts to States: Connections Between the Law on the Use of Force and the Law of State Responsibility', in: Blokker, N. and N. Schrijver (eds.), *The Security Council and the Use of Force. Theory and Reality - A Need for Change?*, Leiden: Martinus Nijhoff Publishers, pp. 133-171, at 162; Brown, D. (2003), 'Use of Force against terrorism after September 11th: state responsibility, self-defense and other responses', in: 11 *Cardozo Journal of International and Comparative Law*, pp. 1-53, at 16-17. Philipp, C.E. and R. Wolfrum (2002), 'The Status of the Taliban: Their Obligations and Rights under International Law', in: 6 *Max Planck Yearbook of United Nations Law*, pp. 560-597, at 592.
116. By analogy: ICJ (1949), Corfu Channel case, p. 22; also art. 16 ASR. Also Nollkaemper (2005a), p. 161; Brown (2003), p. 16.
117. See i.a. ICJ (1949), Corfu Channel case, p. 23. Due diligence obligations require a certain effort, rather than guaranteeing result.
118. Also Becker, T. (2006), *Terrorism and the State. Rethinking the Rules of State*

Responsibility, Oxford: Hart Publishing, p. 130, based on UN SC Resolutieons1373 and 1368, States are obliged 'to exercise due diligence in preventing all acts or terrorism [...], the duty to actively and fully cooperate with other states [...] in preventing terrorist offences [...]; the duty to abstain any form of toleration, acquiescence, encouragement, or support for acts of terrorism'.

119. For an overview of the different forms of support: Cassese, A.(1989), 'The International Community's 'Legal' Response to Terrorism', in: 38 *International & Comparitive Law Quarterly*, pp. 589-608, at 589; Arend & Beck (1994), pp. 164-165; Erickson, R.J. (1989), Air University Press, p. 32; Murphy, John F. (1989), State Support of International Terrorism: Legal, Political and Economic Dimensions, pp. 3-43, at 32-33.
120. After Nicaragua and by analogy of art. 16 ASR. See i.a.: Gill (2003), p. 29.
121. Nollkaemper (2005a), pp. 160-164, seems to be using 'foreseeablility' instead.
122. After Nicaragua, and Simma (2002), p. 801; Nollkaemper (2005a), p. 161; Brown (2003), p. 17.
123. Rubin (2007), pp. 8-9; for previous attacks, supra note 70. Lebanon claimed to be 'unaware', see UN Doc. S/2006/518; A/60/938 (2006) (Letters from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the (UN) addressed to the SG and the President of the SC).
124. After being reminded in that respect by the SC: UN Doc. S/RES/1310 and 1337, and UN Doc. S/RES/1559 (2004) (SC Resolution 1559).
125. See i.a. the Dutch position: Aanhangsel Handelingen II 2005-06, 2016, 4281-4282; Gray, C. (2004), *International Law and the Use of Force,* Oxford: University Press, p. 172. On the issue: Somer, J. (2006), ASIL Insight: Acts of Non-State Armed Groups and the Law Governing Armed Conflict, <www.asil.org/insights/2006/08/insights060824.html>, (viewed: 24-8-2006).
126. Gray (2004), p. 172: Lebanon never vested governmental powers after the Israeli withdrawl in 2000 (SC Resolutions 1559, 1680 and 1701); Aanhangsel Handelingen II 2005-06, 2016, 4281-4282.
127. Glennon, M.J. (2002), 'The fog of war: self-defense, inherence, and incoherence in article 51 of the United Nations Charter', in: 25 *Harvard Journal of Law & Public Policy*, pp. 539-558, at 550.
128. Wedgwood, R. (1999), 'Responding to terrorism: The strikes against Bin Laden', in: 24 *Yale Journal of International Law* (Summer), pp. 559-575, at 565. In conformity with: Tomuschat, C. (2001), 'Der 11. September 2001 und seine rechtlichen Konsequenzen', in: 28 *Europäische Grundrechte Zeitschrift* (21-23), pp. 525-545, at 542.
129. Schachter, O. (1989), 'The lawful use of force by a state against terrorists in another state', in: 19 *Israel Yearbook of Human Rights*, pp. 209-231, at 218.

130. Stahn (2002), p. 230.
131. Ducheine (2008), p. 245. As in Operation Infinite Reach (1998) against Al Qa'ida targets in Afghanistan. Also: Manusama (2006), p. 289.
132. For an overview of Lebanese objects that were targeted by Israel: UN Doc. A/HRC/3/2 (2006) Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1; and Human Rights Watch (2006) *Fatal Strikes - Israel's Indiscriminate Attacks Against Civilians in Lebanon*, (August), p. 1 ff.
133. This assessment is not related to the issue whether Lebanese objects are legitimate targets under the law of armed conflict.
134. Without mixing *ius in bello* aspects with the current *ius ad bellum* issue. The effect of a blockade, attacking other Lebanese lines of communications, and the effects of air-and ground operations (including the use of cluster munitions) is our concern.
135. Ruys (2007), p. 292. The fact that Lebanese armed forces were not involved, is of no relevance, since Lebanon was a party to the conflict otherwise, see International Crisis Group (2006), *Israel/Palestine/Lebanon: Climbing Out of the Abyss*, ICG, Middle East Report No. 57 (2006, July 25), pp. 11-14.
136. UN Doc. S/PV.5493 (2006) (Provisional Records of the 5493th meeting of de SC (61th year)); UN Doc. S/PV.5493 (2006) (Provisional Records of the 5493th meeting of de SC (61th year)) and UN Doc. S/PV.5493 (Resumpton 1) (2006) (Provisional Records of the 5493th meeting of de SC (61th year) Resumption 1).
137. Ducheine (2008), p. 245.
138. Ducheine (2008), pp. 254-255.
139. Amersfoort, H. (2005), *Ik had mijn Roode-Kruis band afgedaan'. Oorlogsrecht en gedragingen van Nederlandse en Duitse militairen in gevecht, mei 1940,* Den Haag: Sdu Uitgevers, p. 11. Likewise Dinstein, Y. (2004), *The Conduct of Hostilities under the Law of International Armed Conflicts*, Cambridge: Cambridge University Press, p. 1: 'War is not a chess game. Almost by definition, it entails human losses, suffering and pain'.
140. In conformity with: Koninklijke Landmacht (2005), *Handleiding Humanitair Oorlogsrecht*, p. 18, § 0117. Rona, G. (2003), 'Interesting Times for International Humanitarian Law: Challenges from the 'War on Terror'', in: 27 *Fletcher Forum of World Affairs* (2), pp. 55-74, at 57; Gasser, H.-P. (2002), 'Acts of terror, 'terrorism' and international humanitarian law', in: 84 *International Review of the Red Cross* (847), pp. 547-570, at 560: the regime applicable to non-international armed conflicts is a compromise between the concepts of sovereignty and humanity.
141. Dinstein (2004), p. 16.
142. See i.a.: Koninklijke Landmacht (2005), p. 18, § 0118; UK Ministery of Defence (2004), *The manual of the Law of Armed Conflict*, Oxford: Oxford University Press,

p. 3, § 1.8; or Kalshoven, F. and L. Zegveld (2001), *Constraints on the waging of war. An introduction to International Humanitarian Law*, Geneva: ICRC, p. 12: 'to humanize war'.

143. Gillard, E.-C. (2004), 'International Humanitarian Law and Extraterritorial State Conduct', in: Coomans, F. and M.T. Kamminga (eds.), *Extraterritorial Application of Human Rights*, Oxford: Intersentia, pp. 25-39, at 25-26.
144. Sandoz, Y., C. Swinarski and B. Zimmerman (eds.) (1987), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva: Martinus Nijhof, p. 29, § 32. Compare this with the Preamble of AP I: 5.
145. See ICRC (2008) ICRC Opinion paper (March), *How is the Term 'Armed Conflict' Defined in International Humanitarian Law?*
146. ICTY (1995), Tadic (Appeal: jurisdiction), § 70.
147. In the classic meaning 'war' (de jure) existed after a declaration of war. This practice is outdated. Unlike others, Dinstein (2005), p. 15, still uses 'war' (in a specific meaning).
148. Sandoz, Swinarski and Zimmerman (1987), p. 1319, § 4341.
149. Armed forces has a broad meaning. They could be armed rebels, insurgents, or paramilitary groups. See: Sandoz, Swinarski and Zimmerman (1987), p. 1352, § 4462.
150. IACommHR (1997, November 18), Juan Carlos Abella v. Argentina (Abella case), Report No. 55/97, OEA/Ser.L/V/II.98, § 152.
151. Kamerstukken I 2005-06, 30 300 X, nr. A, p. 4.
152. Ducheine (2008), p. 472.
153. See i.a. art. 1(2) AP II; Pictet, J.S. (ed.) (1958), *Commentary (Volume IV) on the Geneva Convention of 12 August 1949, relative to Protection of Civilian Persons in Time of War*, Geneva: ICRC, p. 36; Sandoz, Swinarski and Zimmerman (1987), p. 1354, § 4474.
154. For example ICRC (2003), *International humanitarian law and the challenges of contemporary armed conflicts*, Report prepared by the ICRC, 28th International Conference of the Red Cross and Red Crescent, Geneva, 2 to 6 December 2003), 03/IC/09 (December), p. 18-19: 'Armed conflict of any type requires a certain intensity of violence and, among other things, the existence of opposing parties'.
155. ICRC (2003), pp. 18-19: 'Armed conflict of any type requires a certain intensity of violence and, among other things, the existence of opposing parties'. Also: IACommHR (1997, Nov 18), Abella case; ICTY (1999), Tadic (Appeal: judgement); ICTY (2008), Haradinaj.
156. ICTY (1998), Celibici (Trial), § 185.
157. Jinks, D. (2003b), *The temporal scope of application of international humanitarian law in contemporary conflicts*, Harvard University, January 2003, p. 6; Quénivet, N.

(2005), 'The Applicability of International Humanitarian Law to Situations of a (Counter-)Terrorist Nature', in: Arnold, R. and P.-A. Hildbrand (eds.), *International Humanitarian Law and the 21st Century's Conflicts. Changes and Challenges*, Lausanne: Editions interuniversitaire suisse (Edis), pp. 25-61, at 34.

158. ICTY (2008), Haradinaj, § 49. Also: IACommHR (1997, Nov 18), Abella case, where a rebellion of 30 hours qualified as armed conflict.
159. ICTY (2008), Haradinaj, § 49.
160. Rubin (2007), p. 10.
161. Human Rights Watch (2007), *Civilians under Assault - Hezbollah's Rocket Attacks on Israel in the 2006 War*, (August), p. 4: 43 civilian and 12 military.
162. Middle East Facts and Figures (BBC): <news.bbc.co.uk/2/hi/middle_east/5257128.stm>, (viewed: 3-9-2009). Also: Human Rights Watch (2006); Rubin (2007), p. 10; and UN Doc. A/HRC/3/2 (2006) (Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1), p. 4, § 20.
163. See also M. Sassoli, XXXIst Round Table on 'International Humanitarian Law and Human Rights in Peace Operations (4-6 Sep 2008, San Remo), www.iihl.org.
164. ICTY (2008), Haradinaj, § 60.
165. Ibidem.
166. Ibidem.
167. Rubin (2007), pp. 5-14; Human Rights Watch (2007), pp. 29-48.
168. Kober, A. (2008), 'The Israel defense forces in the Second Lebanon War: Why the poor performance?', in: 31 *Journal of Strategic Studies* (1), pp. 3-40, at 6-7. Cfm: Brongers, D.M. (2007), 'De toekomst van de tank', in: 175 *Militaire Spectator* (7-8), pp. 302-310, at p. 308.
169. In conformity with: Human Rights Watch (2007), p. 21.
170. Common Article 2 to the Geneva Conventions of 1949 (CA 2). UN Doc. A/HRC/3/2 (2006) (Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1), p. 3, § 9; and p. 22, § 55. Israel also attacked Lebanese objects (p. 23, § 58), inter alia a military airfield (Qliat), radar installations alongside the coastline, and a barracks (Djamhour). Lebanese armed forces did not resist the attacks (p. 22, § 53.)
171. Art. 2 G I-IV. (Accent: PD&EP).
172. See <www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P> (viewed: 3-9-2008).
173. Zie Dinstein (2004), pp. 10-11; Human Rights Watch (2007), p. 22; Henckaerts, J.-M. and L. Doswald-Beck (2005), *Customary International Humanitarian Law (Volume I: Rules)*, Cambridge: Cambridge University Press, p. 1 ff. See also ICTY (1995), Tadic (Appeal: jurisdiction). Criticism on ICRC's Study was voiced by: Dinstein, Y. (2006), 'The ICRC Customary International Humanitarian Law

Study', in: 36 *Israel Yearbook on Human Rights*, pp. 1-15.

174. Roberts, A. and R. Guelff (eds.) (2000), *Documents on the Laws of War*, Oxford: Oxford University Press, p. 495.
175. For a similar issue: Ducheine (2008), pp. 531-548 (Transnational armed conflict).
176. Pictet, J. (1960), *Commentary (Volume III) on the Geneva Conventions of 12 August 1949, relative to the treatment of prisoners of war*, Geneva: ICRC, p. 37.
177. Compare with Ducheine (2008), pp. 539-540.
178. Art. 3 GC I-IV.
179. The US argued that that 'war' against Al Qa'ida was neither covered by CA 3, nor by the Geneva Conventions. See Sassòli, M. (2003), *Occupation and Peacebuilding*, Harvard University, (November 2003), p. 5, referring to White House, Memorandum of February 7, 2002, Appendix C to Independent Panel to Review DoD Detention Operations, Chairman the Honorable James R. Schlesinger to US Secretary of Defense Donald Rumsfeld, August 24, 2004 <www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> (viewed: 07-08-2007)).
180. US Supreme Court (2006), Hamdan v. Rumsfeld, p. 67.
181. Ducheine (2008), p. 544.
182. In that respect: Zegveld, L. (2002), *Accountability of armed opposition groups in international law*, Cambridge: Cambridge University Press, p. 136; Jinks, D. (2003a), 'September 11 and the laws of war', in: 28 *Yale Journal of International Law* (Winter), pp. 1-49, at 39; IACommHR (2002) Report on terrorism and human rights, OEA/Ser.L/V/II.116, § 76; Bassiouni, M.C. (2002), 'Legal control of international terrorism: a policy-oriented assessment', in: 43 *Harvard International Law Journal* (Winter), pp. 83-103, at 99; McDonald, A. (2003), 'Terrorism, Counter-Terrorism and the Ius in Belllo', in: Schmitt, M.N. and G.L. Beruto (eds.), *Terrorism and International Law: Challenges and Responses*, George C. Marshall European Center for Security Studies & International Institute for Humanitarian Law, pp. 57-74, at 61; Sassòli, M. (2006), *Transnational Armed Groups and International Humanitarian Law*, Harvard University, (Winter), p. 5; Ducheine (2008), pp. 543-545.
183. UN Doc. A/HRC/3/2 (2006) (Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1), p. 3, § 9; and p. 22, § 55.
184. See CA 2.
185. UN Doc. A/HRC/3/2 (2006) (Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1), p. 24, § 67. In conformity with: IACommHR (2002) Report on terrorism and human rights, § 72. Also IACHR, Third report on the situation of Human Rights in Colombia, OEA/Ser. L/V/II.102 doc.9 rev. 1, 26 February 1999). In contravention: the US rejected the regime for international armed conflict (the Geneva Conventions) as being applicable to Al Qa'ida since this Group was no party to the Conventions: US Supreme

Court (2006), Hamdan v. Rumsfeld, p. 6, § (ii); and also Vöneky, S. (2004), 'The Fight against Terrorism and the Rules of the Law of Warfare', in: Walter, C., S. Vöneky and F. Schorkopf (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Berlin: Springer, pp. 925-949 (2004), p. 932.

186. Whether this non-state actor acts in conformity with the laws of war, is another question.
187. Ducheine (2008), p. 509.
188. An alternative approach resulting in the same applicable regime is the so-called 'global approach': two separate conflicts, an interstate international armed conflict between Israel and Lebanon, as well as a non-international armed conflict between Israel and Hezbollah exist at the same time. Those who favour this approach are of the opinion that the overall result is a conflict that is governed by the regime of international armed conflict. See: Ducheine (2008), p. 503.