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Legal Challenges of War in Areas of Problematic Sovereignty

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International Institute for Counter-Terrorism (ICT)

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In his last office, Mr. Libman served as Head of the International Law Department during 2009-2011. Within that capacity he was the senior officer responsible for legal advice in Law of War issues involving the IDF. One of the major challenges during that period was engaging with different responses to the Gaza operation and the Gaza flotilla incident by Israeli and international bodies, notably, the Goldstone Report, published in September 2009, the Turkel public commission and the UN Palmer panel.

Mr. Libman's previous military roles include Chief Military Prosecutor in 2005-2008. In that position he was responsible, among other things, for criminal prosecution in cases of misconduct during operation or against Palestinian civilians involving IDF soldiers. Mr. Libman earned his LL.B. degree from Bar-Ilan University in 1989. He completed his graduate studies and received an LL.M. degree from the Hebrew University in Jerusalem (magna cum laude) in 1997. He also participated in various military courses, including the IDF course for Command and Staff (1999). Mr. Libman is a member of the Israeli Bar since 1991 and a qualified mediator.

Abstract:

This paper examines how non-state organized armed groups operating in areas of problematic sovereignty challenges existing Law of War. First, the initial phase of war is discussed. When a state is attacked by an organized armed group, based on another state, complex questions as to the territorial state's responsibility for the attack and the scope of the attacked state's right to self-defense arise. Secondly, a glance into the law regulating the conduct of hostilities reveals problems arising from a failure to take defensive measures to protect the population in these areas against the effects of attacks. Finally, the paper elaborates on attributes of non-state organized armed groups that affect the possibility of determining an end to the armed conflict. The legal analysis is illustrated by case studies from the Israeli experience.

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Introduction

The legal challenges of war in areas of problematic sovereignty are closely connected to the prevalence of non-state armed groups involved in armed conflicts.

Radical non-state groups may use violence to achieve their aims, whether by initiating terror attacks, committing sabotage or instigating riots. However, in areas where the

sovereign has control, this violence cannot reach the minimum level to be considered an "armed conflict".

This connection is evident in the second additional Protocol to the Geneva Conventions, dealing with non-international armed conflicts.² AP II applies to the clash between a state's armed forces and dissident armed forces or other organized armed groups only if the latter "*exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations...*".³ Without this level of control over territory by non-state armed groups, their actions remain "*internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature*"⁴, which are not considered an "armed conflict" on which the Laws of armed conflict (LoAC)⁵ apply. Government forces will have to handle these acts of violence using only law-enforcement measures.

Israel has experienced fighting in such areas for decades, each incident showing unique characteristics, and thus may serve, unfortunately, as a "lab" for examining the different problems that arose and the various responses to them.

South Lebanon was such an area from the seventies, when PLO and other Palestinian armed groups took control during the civil war in the south of that country and used it as a base for attacks on Israel, until Israel finally invaded Lebanon in 1982. Later, the Shiite armed group Hezbollah took over the area and used it in the same way, as evidenced most dramatically during the war in the summer of 2006.

Moving from the north to the east, the PLO launched attacks on Israel from Jordan in the late sixties, until, in September 1970 (called by the Palestinians "black September") after

a failed attempt to assassinate king Hussein of Jordan, Jordanian government military forces cracked down on the Palestinian armed strongholds in Jordan.

While in Lebanon and in Jordan it was clear who the sovereign was formally and who was challenging their authority, in the West Bank and the Gaza strip there is ambiguity as to sovereignty itself. In these areas, too, an armed conflict between Palestinian armed groups and Israel started in September 2000 and is still ongoing with changing degrees of intensity.

Last, but not least, we are witnessing in recent years the strengthening of Jihadist armed groups in the Sinai Peninsula in Egypt. Some of these groups are local, some connected to Hamas in Gaza and some to Al-Qaida. Last August, after 16 Egyptian border guards were killed in an attack of such a group, stealing an Egyptian armed vehicle and crossing the border to Israel in an attempt to carry on the attack, Egyptian military forces started an operation in an effort to crack down on these groups. While there is no question as to Egyptian sovereignty in Sinai, there are limitations on the scale and quality of Egyptian armed forces in Sinai, agreed upon in the Peace treaty with Israel. The Jihadists are able to take advantage of these limitations.⁶

In the future, because of the regional turmoil, additional areas of problematic sovereignty may be created, for instance, as a result of the strife in Syria and the weakening of central government there.

In this paper I will examine some of these problems in the "chronological" order of their appearance, from the Jus Ad Bellum questions in the beginning of warfare, through the

Jus in Bello issues of conducting hostilities, and finally to questions of the end of the armed conflict.

Jus Ad Bellum Problems

State responsibility for armed attacks from its territory

Is a state responsible for an armed attack against another state that originates from its territory?

Clear cases

If the attack is carried out by the state's armed forces, obviously the answer is affirmative. The basic rule in international law is that a state is responsible for all the acts of its organs, meaning any person or entity, which has that status in accordance with the internal law of the state.⁷ A state's official military or armed forces, established by law, are considered state organs. When they act under their capacity, their actions will be attributed to the state even if they exceed their authority or contravene instructions.⁸

What is the situation when an armed group, not officially a state organ, initiates the attack? If the armed group was sent to attack by a state, the state will be responsible for the attack.⁹

On the other end of the continuum from ordering the attack, is a case where the state is against the armed group and tries to suppress its operation on its soil altogether, but due to the weakness of state authority in the territory in question, the state is not able to uproot the armed group. In this situation, the attack will not be attributed to the state. Furthermore, the state will probably not be responsible for violating other obligations under international law in the circumstances leading to the attack.

Complex cases

More complex than these two extremes are situations, where, on the one hand, the territorial state from which the attacks originated did not instruct the attacks,¹⁰ but on the other hand, the state did not take all feasible measures to suppress the operation of the armed group in its territory.

Under this category, an array of different relations between the state and the armed group can exist. The state may be against the armed group, but fail to act against it vigilantly. On the other hand, the state may support the armed group in different ways and degrees of support: Harboring its bases in its territory; Rendering moral support; Allowing the armed group to finance itself by illicit trade (in drugs, diamonds etc.); Turning a blind eye to arms smuggling through its borders; Giving direct logistic support; Financing the armed group; Providing military training; Providing arms to the group; Sharing intelligence; Coordinating strategy and operations.

This long list is not an exhaustive list of ways to support an armed group. As shown, these ways can be passive or active; the support given can be of civilian character or of military character; the state may help the armed group in its effort to build military capability or support its military operations directly.

What, out of all possible ways of support by the territorial state to the armed group, makes the state responsible for an armed attack by the group?

Legal vagueness

The factual complexity is intensified by legal uncertainty in international law as to the terms needed to create such a responsibility.

A state may be responsible either by attributing the actions of the non-state armed group to the state or by finding that the state has violated an obligation under international law in the circumstances surrounding the attack, without attributing the attack itself to the state.

The Nicaragua case

A good example for these different tracks of responsibility, although in a different context¹¹, is the 1986 International Court of Justice (ICJ) judgment in the *Nicaragua* case.¹² Nicaragua complained against US support of the *Contras*, the rebels against the Sandinista government. Nicaragua alleged that the *Contras* were committing war crimes, for which the US was responsible.

Evidence presented before the court showed the deep involvement of the US, mainly through the CIA, in the *Contras'* operations. Although the Court found that different groups of resistance to the regime existed before US involvement, it concluded that the US had a crucial role in uniting these groups into one and then financing, training, equipping, arming and organizing this group. US advisers were involved in the forming of the *Contras'* strategy and tactics. The US had a part in choosing the *Contras'* leaders and paid their salaries. Especially embarrassing for the US was the exposure of a manual entitled "Psychological operations in Guerilla warfare", claimed to have been written and distributed among the *Contras* by the CIA. This manual recommended different dubious actions, not in line with the laws of armed conflict.

Despite the US's deep involvement and the Court's finding that in some periods the *Contras'* dependency on the US was substantial, the Court did not find sufficient

evidence to prove US effective control over the actions of the *contras* alleged to be violations of international law. The combination of the general support the US handed to the *Contras*, the US awareness of allegations of war crimes perpetrated by the *Contras* and certain illegal instructions in the manual was not enough. In reaching this conclusion, the Court noticed that the *contras* continued to operate even after a substantial cut in US support due to an internal struggle between government and Congress. Therefore, the *Contras'* actions were not attributed to the US.

However, the ICJ determined that the US had violated international law because its support of the *Contras* violated the rule forbidding interference in the internal affairs of a sovereign state and because by the distribution of the manual the US encouraged violations of the laws of armed conflict by the *Contras*, another violation of a rule of international law.

In other words, the US was not found responsible for the *Contras* alleged violations, but was found responsible for its own actions in support of the *Contras* that violated international law.

The criterion for attribution of non-state groups' actions to a state supporting them in the *Nicaragua* judgment is considered a stringent test of **complete dependence** of the group on the state or of effective control of the state over the specific operations of the non-state group and specifically instructing the performance of violations of international law. General control over the group and its general dependency on the state is not enough.

The Tadic case

However, this is not a universally accepted rule. The International Criminal Tribunal for the former Yugoslavia (ICTY) implemented a looser test in the *Tadic* case.¹³ The Court agreed that mere support by providing equipment or financial support is not enough to attribute non-state entities' actions to the supporting state. Nonetheless, the Court's opinion was that, at least when responsibility for the actions of an organized armed group is considered, it is enough to show **overall control** of the state over the group, manifesting itself by coordinating or helping in the general planning of its military activity. However, it is not necessary to prove in addition that the state issued instructions for the commission of specific acts contrary to international law. Under this legal framework, the court found that the operations of the Bosnian-Serb Army (VRS) in Bosnia-Herzegovina were attributable to the Federal Republic of Yugoslavia (FRY, Serbia and Montenegro), even in the absence of evidence of specific instructions.¹⁴

In forming these criteria, the ICTY had two important comments on the significance of territory when considering the attribution of an organized armed group's actions to a state. On the one hand, the Court thought that less extensive and compelling evidence of control is needed when the state is the territorial state where the armed clashes occur.¹⁵

On the other hand, substantial evidence is needed when "*although the State in question is the territorial State where armed clashes occur, the general situation is one of turmoil, civil strife and weakened State authority*".¹⁶

Another important warning of the ICTY in this judgment is to be aware of possible intention to mask the control of the state over the armed group and therefore, not to take

at face value ostensible structures and overt declarations, but rather to engage in a nuanced analysis of the reality.¹⁷

The Genocide case

To make things more complicated, the ICJ addressed the subject again, in its 2007 judgment in the *Genocide* case.¹⁸ The context was very close to that discussed by the ICTY: that of the responsibility of the FRY to the actions of the Bosnian-Serb army (VRS). Here, the Court concentrated on the responsibility for the massacre committed by the VRS at Srebrenica in July 1995. The court refused to attribute responsibility for the massacre itself to the FRY. It specifically discussed and rejected the overall control text endorsed by the ICTY in the *Tadic* case, and reaffirmed ICJ's previous holding in the *Nicaragua* case.

The Court clarified that in this context, attribution can be made on one out of three tracks: first, a state is responsible for all the acts of official state organs, as defined in internal law. Second, a state is responsible for all the acts of *de facto* state organs. These are persons or groups which, although lacking official legal status as state agents, nevertheless are under strict control and **completely dependent** on the state concerned. In other words, for a state to be responsible for **all** its actions, such a group must be a mere instrument through which the state acts, lacking any real autonomy. Thirdly, a state is responsible for actions of people or groups not considered its organs, *de jure* or *de facto*, if it directed or instructed them to perpetrate the crimes in question or if the state had effective control over the operations, in course of which the violations occurred. The court found no evidence to hold Serbia responsible for the massacre in Srebrenica under

any of these tracks. However, Serbia was found responsible for violating other duties under the Genocide Convention, apart from the prohibition on the genocide itself, such as the duty to prevent such crimes and to punish the offenders.

9/11 effects

In the *Genocide* case, the ICJ did not address the possible effects of the global response to the 9/11 attacks on the law of state responsibility. After the attacks, the US exercised the right to self-defense, not just against Al-Qaida, but also against the Taliban regime in Afghanistan. The US claim was not that Al Qaida terrorists were *de facto* organs of Afghanistan, whether under the complete dependence test or the overall control test. Furthermore, the US did not claim that Afghanistan specifically instructed the terrorists to perpetrate the attacks. Rather, the justification was that the Taliban regime in Afghanistan harbored Al Qaida bases in its territory and generally aided them.

The Security Council expressly acknowledged US right to self-defense and tacitly accepted US exercising this right against Afghanistan. Thus, some commentators understood the events as a shift in the law of state responsibility towards a criterion even more relaxed than that of the *Tadic* case, signaling that harboring and aiding a terrorist organization is enough to attribute its actions to the supporting state.¹⁹

Other scholars expressed the opinion that the post 9/11 practice should be interpreted in a more limited manner, as allowing the use of force in self-defense against a state, which is either unwilling or unable to prevent armed attacks by non-state actors operating from its territory, without changing the general rule of attribution under international law.²⁰

Either way, in the context discussed here, even a more restricted shift allowing the use of force in self-defense against a state harboring an armed group responsible for an armed attack from its territory is important.

The Israeli experience

Hezbollah and Lebanon

In the summer of 2006 Hezbollah attacked a military patrol in Israel near the border, killing eight soldiers and kidnaping two wounded soldiers, while simultaneously firing rockets at Israeli border towns. Israel responded by the use of military force in Lebanon in what ended up being a 34 day armed conflict.

The official Israeli position emphasized the responsibility of the government of Lebanon for these events:

"Lebanon by supporting Hizbullah and allowing it to operate against Israel from within Lebanese territory, is in direct contradiction to international law. The Hizbullah terrorist organization is even a party to the government of Lebanon .The government of Lebanon bears additional responsibility for the Hizbullah threat. It provided Hizbullah with official legitimacy and allowed its armed operations to proceed unhindered. Hizbullah would never have obtained the missiles and military equipment at its disposal had the Lebanese government not allowed this weaponry to reach Lebanon. Hizbullah's threat along Israel's border would not have been possible were it not for the failure of the Lebanese government to deploy its forces in southern Lebanon. Therefore, Israel also

viewed Lebanon as responsible for the situation, and consequently, Lebanon could not expect to escape the consequences."²¹

However, in spite of the responsibility attributed to Lebanon, Israel did not view the war as a war **against Lebanon**, but rather as a war **against Hezbollah in Lebanon**.²² It seems that this view reflects a policy decision, rather than an understanding of the limits of international law. Israel could have targeted the Lebanese army, but chose not to do so - probably, in an attempt not to weaken central Lebanese government vis-à-vis the Hezbollah and to leave room for post-war changes inside Lebanon.

Anyway, Israel's right to use force in self-defense against Hezbollah's attacks was acknowledged in the scholarly writing after the war.²³

A unique feature in the context of Lebanon is the participation of the Hezbollah in the government of Lebanon. While in 2006 Hezbollah was ostensibly a junior member in the government, in 2011 the group actually chose the PM.²⁴ This reality might require looking at the control test for state responsibility for the actions of armed groups in the **opposite direction**: If an armed group effectively controls the government, is the state responsible for the armed group's actions, even if that group chooses to launch an attack without involving the state's official military?

Israeli-Palestinian armed conflict and sovereignty

Problematic sovereignty can be the outcome of a state unwilling or unable to enforce its authority over an armed group operating in a part of its territory. It may reflect a deliberate policy of a state to avoid the responsibilities of sovereignty without conceding the rights attached to it.

Otherwise, problematic sovereignty can be a reflection of ambiguity or dispute over the sovereignty in the relevant territory. An organized armed group can operate in such a territory and launch an attack from it to a neighboring state, without a territorial state in the picture.

This is the case in the West Bank and the Gaza Strip. Under the Oslo Accords, a Palestinian elected Authority (PA) was established, received powers and has since then self-governed the Palestinians. A strong Palestinian police force was established while the Israeli forces withdrew from the Palestinian population centers to specified locations around Israeli settlements and security zones. The final status of the territory was to be negotiated during a transitional period, meaning that both sides could hold to their territorial claims until reaching a final agreement.

In September 2000, after the failure of the Camp David talks, there began what the Palestinians call the "Al-Aqsa intifada" and the Israelis call the Palestinian terror offensive. Suicide bombing of Israeli buses, malls and restaurants, cost the lives of more than a thousand Israelis. As a response, the building of a security barrier got under way, with the aim of preventing Palestinian human bombs from entering Israel from the West bank.

The legal consequences of the building of the so-called "wall" were brought before the ICJ for its advisory opinion.²⁵ In its opinion, the ICJ denied the applicability of the right to self-defense, as a possible justification for the construction of the barrier by Israel.

Two reasons were given: first, that the right of self-defense is recognized only in a case of an armed attack by another state. This reason alone could not explain why the Security

Council recognized the right of self-defense against "international terrorism" after the 9/11 attacks, so a second reason was given: since Israel exercises control in the West Bank and the threat against which the barrier is constructed originates within that territory, the right to self-defense has no relevance.²⁶

This view was rejected in a separate statement by Judge Buergenthal, pointing to the fact that the UN Charter²⁷, in affirming the inherent right of self-defense does not make its exercise dependent upon an armed attack by another state. As to the Second reason given by the Majority opinion, judge Buergenthal declared:

"For to the extent that the Green Line is accepted by the Court as delimiting the dividing line between Israel and the Occupied Palestinian Territory, to that extent the territory from which the attacks originate is not part of Israel proper. Attacks on Israel coming from across that line must therefore permit Israel to exercise its right of self-defense against such attacks, provided the measures it takes are otherwise consistent with the legitimate exercise of that right".²⁸

In my opinion, the second reason given by the majority of the ICJ in the *Wall* case, cannot rationally differentiate between the 9/11 attacks on the US and the Palestinian terror organizations' attacks on Israel. 9/11 terrorists launched the attacks from within the US, using US planes taking off from US airports. If control over the territory from which the attack is launched places the attack outside the definition of an "armed attack" and the right of self-defense, this right should not have been recognized after 9/11 attacks either. Of course, 9/11 terrorists had some training outside the US. The command of Al Qaida was, at the time, in Afghanistan. However, the same can be said of some of the

Palestinian terror organizations: Although they launched the attacks from the West Bank, some had a command chain traceable to Syria or finance and training traceable to Iran.

Jus in Bello issues

The protection of civilians

International Humanitarian Law (IHL) strives to mitigate civilian suffering in warfare by combining complementary obligations: On the attacking belligerent and on the defending belligerent, on whose soil the fighting takes place.²⁹

The attacking belligerent should take precautions in an effort to spare civilian population and civilian objects from superfluous damage. Those who plan or decide upon an attack are required to do everything feasible to verify the military character of the object of attack. Means and methods of attack should be chosen carefully so as to avoid or minimize incidental loss of civilian life, injury to civilians and damage to civilian property. If the expected incidental loss is excessive in relation to the military advantage anticipated from the attack, one should refrain from attack. This is known as the principle of proportionality. If an attack may affect the civilian population, effective advance warning must be given, unless military needs, such as the need for surprise, do not permit such a warning.³⁰

However, the defending or territorial belligerent also has obligations designed to spare its civilian population from the outcomes of war. It should, to the maximum extent feasible, endeavor to remove the civilian population and civilian objects under its control from the vicinity of military objectives. The territorial belligerent must avoid locating military objectives within or near densely populated areas. The belligerent in control of the

territory should take other necessary precautions to protect civilians against the dangers resulting from military operations.³¹ Such additional precautions may include building shelters, having a warning system to indicate to civilians that an attack is approaching (for instance, by using sirens) and having civil defense forces ready, such as rescue teams, fire fighters and medical teams.

One of the common problems in areas of problematic sovereignty is a deficiency in implementing protective defensive measures. The reason may be the split between the sovereign state, not in control of the territory and the armed group involved in the fighting, which takes no responsibility for the defense of the civilian population and may, in some cases, even see a propaganda benefit in intensifying civilian casualties and civilian damage.

The obligations of the attacking belligerent and the defending belligerent are not reciprocal. The fact that civil defense measures are not taken does not relieve the attacking side from its obligations to take precautions. However, the practical result may be a heavier burden on an attacking belligerent that wishes to obey the law. If the "price tag" attached to a certain target is higher due to the deliberate placing of that military target in the vicinity of civilians without any shelters or other means to defend the civilians, attack on that target may be considered not proportional in relation to the military advantage and thus should be avoided. Moreover, even if a professional military and legal evaluation finds the attack proportional, it may still be advisable to avoid it due to possible media damage expected.

This factual and legal situation creates an unstable system. This system was designed for states, under the premise that a state does not require an incentive to protect its civilian population from the horrors of war. However, when a belligerent is a non-state armed group, based in an area where the sovereign government has lost its grip, this group may feel no responsibility for protecting the civilian population in its area of operation. Moreover, the armed group may have practical incentives not to defend the population.

Operation "cast lead" in Gaza

In December 28, 2008, Israel launched the "Cast Lead" operation, in order to stop the firing of rockets from the Hamas-controlled Gaza Strip against Israeli population centers in southern Israel. When the operation ended 22 days later, on 18 January 2009, the death toll among Palestinians reached between 1,166³² and 1,440.³³ Initially, an even wider difference existed as to the distribution of the casualties between fighters and civilians. Later, Hamas Interior Minister, Fathi Hammad, stated that around 700 of the Gaza fatalities were Hamas fighters or militants from allied groups such as Islamic Jihad³⁴, very close to IDF figures. Still, Hundreds of civilians were killed, among them women and children. On the other side of the border, at least 401 rockets and 135 mortar shells³⁵ launched toward Israel caused the death of three civilians. What is the reason that such a volume of inaccurate rockets aimed deliberately to hit population centers³⁶ caused much less casualties than IDF operations in Gaza, aimed at military targets and often using precision munitions?

In my opinion, the answer lies largely with the fact that Hamas, despite having the *de facto* control in Gaza, does not act as a sovereign state acts and does not feel responsible to implement the defensive measures demanded by international law from a belligerent

towards the population in its territory. It is not just the omission to prepare shelters for the civilian population and a warning system to mitigate their exposure to dangers, but also deliberate actions endangering the civilians, such as using civilian sites as a cover for military operations and launching attacks from within densely populated areas.³⁷

The fierce criticism on Israel after the Operation³⁸ illustrates the dilemmas caused to a belligerent state by the split between the enemy belligerent and the burden and responsibilities of a sovereign over the territory it controls.

Issues concerning the end of the conflict - "Jus post Bellum"

Strategic goals and military targets

One of the oldest instruments of modern IHL, the Saint Petersburg Declaration, says in its preamble: "*Considering: That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men*".³⁹

This is not a description of the reality of war aims, not today and certainly not in the 19th century, but rather an ethical statement as to the legitimate means to be used.

Wars always aim to change the decisions taken by the leadership of the other side, for instance, a decision to occupy a certain territory or to shoot rockets at a neighboring country.

When the other side is a state, such a change usually does not require the total destruction of military forces and infrastructure. A democratic state, leaning on consent and legitimacy by its population will be aware of its suffering and look for a way out of war

when realizing that victory cannot be achieved and the continuance of fighting will just increase the public's suffering. Even totalitarian regimes will wish to stop the war and preserve some of their military forces, in fear of losing their grip on the population, kept by government forces loyal to the regime.

Non-state armed groups may feel relieved from this burden. If they do not need their fighters to enforce law and order on the population and do not feel responsible for the population's welfare, they might fight not just to the last fighting man but also to the last civilian around, regardless of destruction and suffering caused.

Even hardened ideological movements, when rising to power and governing a state, will usually be moderated by the reality of the everyday management of a state and responsibility towards the population. Non-state armed groups, once again, are free from these restraints on their extreme ideology.

Furthermore, a state usually has an identifiable "center of gravity": A concentration of assets critical for military functioning. Targeting this center of gravity may force the other side to surrender or achieve the aim of the war while sparing lives and property outside this center. When fighting a non-state armed group, such a center of gravity may not exist or may be harder to identify.

The combination of all these factors may make a war longer and more destructive. Even if the non-state group is considered objectively defeated, it may not be willing to negotiate an agreement to end the war.

Unlike the beginning of a war, which is no longer a question of declaration, but rather a factual conclusion when the scale of a clash reaches the bar of an "armed conflict"⁴⁰, the

end of a war is not just a decline in the intensity of fighting. From an international law point of view, a state of war will exist until a signing of a peace treaty or until what is called *Debellatio*, the total destruction of the adversary.

In the absence of these two routes, how can the armed conflict end?

The Israel-Hezbollah conflict summer 2006

As previously described, the conflict started on 12 July 2006, with Hezbollah attacking Israel from Lebanon. The conflict commenced for 34 days, causing death, devastation and the fleeing of civilians from the warzone on both sides of the border, but on a significantly larger scale in Lebanon.⁴¹ Diplomatic efforts to stop the fighting began almost immediately, but it seemed that Hezbollah was in no hurry to spare Lebanon from the continuing war. For a long time the organization insisted on an unconditional ceasefire, clearly unacceptable to Israel.⁴² Being a political power in Lebanon and having members in the Lebanese government, Hezbollah's hardline attitude delayed the Lebanese government's agreement to realistic terms to end the hostilities.⁴³ Only after Lebanese PM, Fuad Siniora, presented a seven point plan⁴⁴, including deployment of the Lebanese army in Southern Lebanon, strengthening the UN peacekeeping force in Lebanon (UNIFIL) and prohibiting any other organization from bearing arms there, things could move forward towards the adoption of resolution 1701 in the UN Security Council, ending this round of fighting.⁴⁵

This case is an example of the difficulties of ending an armed conflict with a non-state armed group, not responsible for the territory from which it operates.

Conclusion

In this paper, I tried to describe some of the legal challenges caused by non-state armed forces fighting from territories of problematic sovereignty. I tried to illustrate these difficulties by using factual examples from the Israeli experience. In the field of *Jus ad bellum*, there may be a positive shift of the rules, still debated, that might curb legal incentives to avoid responsibility, both by the sovereign state and by the armed group based on its soil. However, when it comes to the conduct of hostilities or the way out of an armed conflict, the challenges presented still lack a proper response. Bearing in mind the possibility that these areas of problematic sovereignty may expand in the future, due to the recent turmoil in the Middle East, this is a challenge worth further efforts.

¹This paper was prepared for a workshop titled "The state of Arab states: between democracy, new authoritarianism, and state failure?", held on October 11, 2012, at the IDC, Herzliya, Israel.

²Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II) of 8 June 1977, hereinafter: AP II.

³ AP II, article 1(1), emphasis added.

⁴AP II, article 1(2).

⁵Otherwise known as International Humanitarian Law (IHL).

⁶For an analysis of the legal aspects of this problems and a possible way forward see Liron A. Libman, "Egypt and the treaty", the Jerusalem Post, 27.8.2012, <http://www.jpost.com/Opinion/Op-EdContributors/Article.aspx?id=282678> (last visited 22.9.2012).

⁷*Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Report of the ILC on the Work of its Fifty-third Session, UN GAOR, 56th Sess, Supp No 10, p 43, UN Doc A/56/10 (2001) (hereafter: *draft articles*), article 4. available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (last visited on 4.10.2012).

⁸*Draft articles*, article 7.

⁹*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, [1986] ICJ Rep. 1, at 14 (hereinafter *Nicaragua*). Available at: <http://www.icj-cij.org/docket/files/70/6503.pdf> (last visited in 4.10.2012). See paragraph 195: "The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State". See also *draft articles*, article 8: "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."

¹⁰At least, there is no evidence of such directions given.

¹¹The supporting state (the US) was not the territorial state from which the armed group (the *Contras*) operated.

¹²*Nicaragua*, paragraphs 93-122.

¹³*Prosecutor v. Duško Tadić*, Judgment (Appeals Chamber), Case No.IT-94-1-A, 15 July 1999, paragraph 131. Hereafter: *Tadic*. Available at: <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> (last visited: 8.10.2012).

¹⁴*Tadic*, paragraphs 146-162. The ICTY mandate is to determine individual criminal responsibility, as opposed to state responsibility. However, in the context of this case, the court used the international law on state responsibility to decide whether the Bosnian-Serb army belonged to the FRY. This finding determined the classification of conflict in Bosnia as an international armed conflict, having bearing on the Court's jurisdiction.

¹⁵*Tadic*, paragraph 138.

¹⁶*Tadic*, paragraph 139, emphasis added.

¹⁷*Tadic*, paragraph 154.

¹⁸*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, paragraphs 379-415, available at: <http://www.icj-cij.org/docket/files/91/13685.pdf> (last visited: 1.10.2012), hereafter: the *Genocide* case.

¹⁹Jinks, Derek, "State Responsibility for the Acts of Private Armed Groups" (March 2003). *Chicago Journal of International Law*, Vol. 4, 2003. Available at: <http://dx.doi.org/10.2139/ssrn.391641>. The author also elaborate as to the detailed statements and resolutions after the 9/11 attacks. However, the author does not support the shift he describes.

²⁰Milanovic, Marko, "State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Pluecken" (November, 25 2008). *Leiden Journal of International Law*, Vol. 22, 2009, pp. 16-17. Available at SSRN: <http://ssrn.com/abstract=1307093>.

²¹FAQ: The Second Lebanon War - One year later, an article on Israel Ministry of Foreign Affairs site, available at:

<http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Return+of+Israel+abducted+soldiers+16-Jul-2008.htm> (last visited: 6.10.2012).

²²See FAQ, *ibid* footnote 22: "*Israel's military operations were directed against Hizbullah targets located in Lebanon and not against Lebanese targets... Israel avoided striking at Lebanese military installations, unless these were used to assist the Hizbullah, as were a number of radar facilities which Israel destroyed after they helped the terrorists fire a shore-to-ship missile at an Israeli naval vessel.*"

²³For examples see: Zimmermann A., "The Second Lebanon War: Jus ad bellum, Jus in Bello and the issue of Proportionality", *Max Planck Yearbook of United Nations Law*, Volume 11, 2007, p. 99-141. Available at: http://www.mpil.de/shared/data/pdf/pdfmpunyb/03_zimmermann_11.pdf (last visited: 8.10.2012).

²⁴"Hezbollah Chooses Lebanon's Next Prime Minister", *New York Times* 24.1.2011, available at: <http://www.nytimes.com/2011/01/25/world/middleeast/25lebanon.html?pagewanted=all&r=0> (last visited: 6.10.2012).

²⁵*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p. 136, hereafter: the *wall* case. Available at: <http://www.icj-cij.org/docket/files/131/1671.pdf> (last visited: 6.10.2012).

²⁶See the *Wall* case, paragraphs 138-139.

²⁷Article 51 of the charter, available at: <http://www.un.org/en/documents/charter/chapter7.shtml> (last visited: 6.10.2012).

²⁸See the *Wall* case, Declaration of Judge Buergenthal, paragraphs 5-6, available at: <http://www.icj-cij.org/docket/files/131/1687.pdf> (last visited: 6.10.2012).

²⁹In the Jus in Bello context, attacking and defending are mere tactical terms. They do not imply a responsibility for the breaking out of war and should not be confused with Jus Ad Bellum terms such as crimes against peace, aggression or self-defense.

³⁰Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International armed Conflicts (Protocol I) of 8 June 1977, hereafter: AP I, article 57. Israel has not ratified the Protocol, however, some parts of it are considered as reflecting customary international law.

In the context of this paper, I will not go into the complex question of classification of an armed conflict between a state and a non-state armed group, which is based outside that state: Whether it is classified as an international armed conflict or as a non-international armed conflict. Even if the latter is the situation, there is a substantial authority to the point that precaution in attack, as well as precautions against the effects of attacks, to be discussed next, are part of customary international law in a non-international armed conflict, too. See Henckaerts J.M. & Doswald-Beck L., *Customary International Humanitarian Law* (New York, Cambridge University Press, 2005), volume I: Rules, chapters 5-6.

³¹AP I, article 58.

³²"Majority of Palestinians Killed in Operation Cast Lead: Terror Operatives", IDF website, 26.3.2009, available at: <http://www.idf.il/1283-11179-en/Dover.aspx> (last visited: 8.10.2012).

³³United Nations Office for the Coordination of Humanitarian Affairs, Field Update on Gaza from the Humanitarian Coordinator, 3 - 5 February 2009, available at: <http://unispal.un.org/unispal.nsf/85255db800470aa485255d8b004e349a/50a7789ce959e0c285257554006d3e56?OpenDocument> (last visited: 8.10.2012).

³⁴" Hamas confirms losses in Cast Lead for first time", the Jerusalem Post, 1.11.2010, available at: <http://www.jpost.com/MiddleEast/Article.aspx?id=193521> (last visited: 8.10.2012).

³⁵Israeli Security Agency figures, available at: http://www.shabak.gov.il/SiteCollectionImages/arabic/TerrorInfo/docs/oferet100110_en.pdf (last visited: 8.10.2012).

³⁶For evidence of this policy, See Israeli official report: "The Operation in Gaza: Factual and Legal Aspects", paragraphs 145-150, hereafter: the *Gaza Report*, available at: <http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperationwLinks.pdf> (last visited: 8.10.2012).

³⁷See the *Gaza report*, paragraphs 150-170.

³⁸The most important example was the Goldstone report: United Nations Fact Finding Mission on the Gaza Conflict. The report is available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf> (last visited: 8.10.2012). For a critical assessment of the report, see Blank, Laurie R., "The Application of IHL in the Goldstone Report: A Critical Commentary" (October 28, 2010). Yearbook of International Humanitarian Law, Vol. 12, 2009; Emory Public Law Research Paper No. 10-96. Available at SSRN: <http://ssrn.com/abstract=1596214> (last visited: 8.10.2012).

³⁹*Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight*. Saint Petersburg, 29 November / 11 December 1868, available at: <http://www.icrc.org/ihl.nsf/FULL/130> (last visited: 7.10.2012).

⁴⁰See common article 2 of the Geneva Conventions of 12 August 1949 (hereafter: GC): "*the present 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*". Available at: <http://www.icrc.org/ihl.nsf/WebART/365-570005?OpenDocument> (last visited: 7.10.2012).

⁴¹"Lebanon Sees More Than 1,000 War Deaths", AP, 28.12.2006, available at: http://news.ustinet.net/home/news/cn/?/world.mideast.misc/1/wed/bq/Alebanon-war-deaths.RYBR_GDS.html (last visited: 8.10.2012). As to the Israeli toll of war, see: "Israel-Hizbullah conflict: Victims of rocket attacks and IDF casualties", available at: <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hizbullah/Israel-Hizbullah+conflict-+Victims+of+rocket+attacks+and+IDF+casualties+July-Aug+2006.htm> (last visited: 8.10.2012).

⁴²"Hezbollah Sharply Rejects Cease-Fire, Say It Will Continue Rocket Strikes", Fox News, available at: <http://www.foxnews.com/story/0,2933,203908,00.html#ixzz28hutrxjK> (last visited: 8.10.2012).

⁴³"ANALYSIS: The UN cease-fire proposal needs Hezbollah seal", Haaretz, 6.8.2006, available at: <http://www.haaretz.com/news/analysis-the-un-cease-fire-proposal-needs-hezbollah-seal-1.194505> (last visited: 8.10.2012).

⁴⁴Available at: <http://www.rebuildlebanon.gov.lb/english/f/NewsArticle.asp?CNewsID=61> (last visited: 8.10.2012).

⁴⁵Resolution 1701 (2006) Adopted by the Security Council at its 5511th meeting, on 11 August 2006, available at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1701\(2006\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1701(2006)) (last visited: 8.10.2012).