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THE CLASSIFICATION OF HEZBOLLAH IN BOTH INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS.

CATHERINE BLOOM**

I. INTRODUCTION

The 2006 conflict between Hezbollah and Israel questions an important, yet unclear part of international humanitarian law. Specifically, what would Hezbollah's legal classification be if another armed conflict were to arise between Israel and Lebanon? Would Hezbollah be considered a State or non-State actor? If Hezbollah is a non-State actor, would the group be considered "guerrillas"? Would the term "mercenary" be a better fit?

In attempting to answer some of these questions, we must first look at what exactly occurred between Israel and Lebanon in the summer of 2006. Second, we must understand who Hezbollah is and how the group fits in with Lebanon. Third, we need to examine what kinds of rules of international humanitarian law govern both international and intra-national armed conflicts. Specifically, the Hague Conventions, the Geneva Conventions, international agreements between Lebanon and

* This article focuses only on the conflict between Israel and Hezbollah in the summer of 2006 and attempts to discuss the implications of international law with respect to that specific armed conflict only. Recent events taking place in Lebanon would lend themselves to a different analysis and, likely, a different outcome

** J.D., 2008, Golden Gate University; B.S., DePaul University, 2001.

Israel, and international customary law. Only then will we be ready to investigate the various implications Hezbollah's classification has on the laws of armed conflict. This will primarily be accomplished by initially looking at which of the Geneva Conventions apply based on whether Hezbollah is a State or non-State actor. A more complex argument is whether Hezbollah is indeed a Lebanese State actor. However, since the law in this sphere is still being defined, we will continue by examining Hezbollah's classification assuming they are non-State actor. Therefore, an analysis of Hezbollah as a guerrilla group and one comprised of mercenaries will follow. Finally, we will look to see how domestic law fits in with international humanitarian law, and whether the former can help adjudicate either party in a future conflict.

The answer to these questions is of great significance because Hezbollah's classification determines how international humanitarian law applies. For example, if Hezbollah is a State actor, then any future conflicts would be between Lebanon and Israel. As such, this would be an international armed conflict. On the other hand, if Hezbollah is a non-State actor, then this would be an intra-national armed conflict governed by a substantially limited body of law. Furthermore, if Hezbollah is given prisoner of war status, then members of the group would have to be released at the end of the hostilities. If Hezbollah members are not considered prisoners of war, then the individuals may be held and prosecuted under domestic criminal law for their conduct.

II. BACKGROUND

A. RECENT ISRAEL – LEBANON CONFLICT

On July 12, 2006, members of Hezbollah attacked an Israeli army convoy, killing eight Israeli soldiers and capturing two more.¹ Hezbollah claimed that the soldiers were captured for the purpose of being used as "bargaining chips" in negotiations for the release of three Lebanese Hezbollah members detained by Israel (even though the country's own Supreme Court ordered for their release).² As a result of the soldiers' kidnapping, Israel attacked Lebanon with a force unseen since 1982.³ In response to Israel's "bombing campaign," Hezbollah launched hundreds

1. Lara Deeb, *Hizballah: A Primer*, Middle East Reporter Online, July 31, 2006, <http://www.merip.org/mero/mero073106.html>; see also Anthony Dworkin, *The Middle East Crisis and International Law*, Crimes of War Project, July 18, 2006, <http://www.crimesofwar.org/onnews/news-middleeast.html>.

2. Lara Deeb, *Hizballah: A Primer*, Middle East Reporter Online, July 31, 2006, <http://www.merip.org/mero/mero073106.html>

3. *Id.*

of rockets into Israel.⁴ Israel and Hezbollah engaged in a heavy armed conflict until August 14, 2006.⁵ In addition to executing 5,000 air strikes over Lebanon, Israel's "Operation Change of Direction" involved attacking various parts of Lebanon from land and sea.⁶ Hezbollah fired over 2,500 rockets into Israel over the course of the conflict.⁷ According to the Reuters Foundation, as of August 25, 2006, close to 1,200 Lebanese and 157 Israelis were killed in the conflict.⁸ Hundreds of thousands of Israeli civilians and roughly one million Lebanese civilians were displaced as a result of the conflict and the destruction of a large part of southern Lebanon.⁹

The armed attack on the convoy on Israeli soil and Israel's retaliatory bombing campaign on Lebanon is considered an armed conflict. There is much debate with respect to this conflict, including the question of whether it should be classified as an international or non-international armed conflict.¹⁰ In either scenario, this conflict is governed by international humanitarian law.

4. *Id.*

5. Amnesty Int'l, *Israel/Lebanon: Under fire: Hizbullah's attacks on northern Israel*, September 14, 2006, <http://web.amnesty.org/library/Index/ENGMDE020252006>.

6. *Id.*; see also Statement submitted by Human Rights Watch to the Second Special session of the Human Rights Council, *The terrible toll of the Israel-Lebanon conflict on civilians: ongoing human rights abuses and violations of international humanitarian law*, August 10, 2006, http://hrw.org/english/docs/2006/08/10/lebano13955_txt.htm.

7. Statement submitted by Human Rights Watch to the Second Special session of the Human Rights Council, *The terrible toll of the Israel-Lebanon conflict on civilians: ongoing human rights abuses and violations of international humanitarian law*, August 10, 2006, http://hrw.org/english/docs/2006/08/10/lebano13955_txt.htm.

8. Reuters Foundation, *Who Works Where: Lebanon latest*, August 24, 2006, <http://www.alertnet.org/thefacts/reliefresources/115348060912.htm>; see also Sara Leah Whitson, *Hezbollah Needs to Answer*, Al-Sharq al-Awsat, October 5, 2006, <http://hrw.org/english/docs/2006/10/05/lebano14336.htm> (Additionally, according to Lebanon's reconstruction chief, the conflict caused \$3.6 billion worth of physical damage in Lebanon. Most Lebanese displaced by the war have returned, but a third remains homeless because their houses are destroyed or littered with unexploded bombs. A survey by UNICEF showed that 10 out of 12 villages visited in southern Lebanon had no water supply. The World Health Organization reported severe damage to 800 health centers).

9. Sara Leah Whitson, *Hezbollah Needs to Answer*, Al-Sharq al-Awsat, October 5, 2006, <http://hrw.org/english/docs/2006/10/05/lebano14336.htm>; see Amnesty Int'l, *Israel/Lebanon: Under fire: Hizbullah's attacks on northern Israel*, September 14, 2006, <http://web.amnesty.org/library/Index/ENGMDE020252006>.

10. Much of the other debate focus and discussion was about the fact that Hezbollah launched thousands of "Katyusha" rockets into densely-populated regions in Northern Israel. These types of rockets are particularly dangerous to civilians because they are neither technologically advanced nor can they aim for military targets with sufficient precision. Hezbollah justified the attacks on Israeli civilians by either claiming that the rockets were indeed aimed at military targets or that such acts were legitimate under Islamic law. On the other hand, Israel was accused of an egregiously disproportional reaction to the kidnapping of their soldiers in violation of international humanitarian law. Both sides also resorted to the use of cluster bombs, which are particularly condemned in the community due to their highly destructive nature.

B. HISTORICAL OVERVIEW OF HEZBOLLAH

The Lebanese Shia, driven by a desire to gather forces to fight the Israeli occupation of southern Lebanon, founded Hezbollah (the Party of God) in 1982.¹¹ This movement gained momentum quickly due to logistical, financial, and military support from both Syria and Iran.¹² Currently, Hezbollah is an inspiration to other Islamic groups (including Hamas in Palestine and Muqtada al-Sad's Madhi Army in Iraq) because of its success in driving Israel out of Lebanon.¹³ The group consists of several thousand core members who function independently with some military aid provided by Iran.¹⁴ Hezbollah's spiritual leader is Sheikh Mohammed Hussein Fadlallah.¹⁵ Another important member of the organization is Imad Fayeze Mugniyah, who, prior to his death on February 13, 2008, was considered the main event planner of the organization's military operations.¹⁶ The senior political leader, Hassan Nasrallah, is arguably the most charismatic man in the modern Islamic world.¹⁷ Nasrallah was originally a military commander, but he quickly took advantage of the intra-organizational rivalries (and his favorable status with the head of Iran's government, Ayatollah Ruhollah Musavi Khomeini) to become Hezbollah's Secretary General in 1992, and remains there to this day.¹⁸

According to a number of United States' intelligence reports indicate that, in addition to Hezbollah's presence in Lebanon, Hezbollah operates cells in Europe, Africa and both South and North America.¹⁹ Over the last twenty years, Hezbollah has developed a sophisticated structure.²⁰ The organization consists of a seven-member council called the majlis al-shura.²¹ Each member is in charge of a different function, including

11. James Brandon, *Factfile: Hezbollah*, Aljazeera, July 14, 2006, <http://english.aljazeera.net/English/archive/archive?ArchiveId=24454>; see also *Who are Hezbollah?*, BBC News, July 13, 2006, http://news.bbc.co.uk/2/hi/middle_east/4314423.stm.

12. *Id.*

13. *Id.*

14. *Id.*

15. Council on Foreign Relations, *Hezbollah*, July 17, 2006, <http://www.cfr.org/publication/9155>.

16. *Id.*; Imad Mugniyah was killed in a car bombing in Damascus. Hezbollah official accused Israel of his murder, however, the Israeli government denied any involvement, more information available at http://www.cfr.org/publication/11317/imad_mugniyah_hezbollahs_elusive_mastermind.html

17. *Id.*

18. *Id.*

19. *Id.*

20. Lara Deeb, *Hizballah: A Primer*, Middle East Reporter Online, July 31, 2006, <http://www.merip.org/mero/mero073106.html>.

21. *Id.*

financial, judicial, social, political and military matters.²² When Hezbollah first entered Lebanese politics, the organization created an executive council and a politburo.²³

Hezbollah's decision to participate in the 1992 Lebanese elections signaled a shift in the organization's focus from a "pan-Islamic resistance to Israel" to the internal affairs of Lebanon.²⁴ This shift demonstrated Hezbollah's growing desire to infiltrate Lebanon's political system.²⁵ Hezbollah has continued this transformation from a regional militia group to a formidable political party.²⁶

Hezbollah's entry into mainstream Lebanese politics was aided by the assassination of ex-Prime Minister Rafik Hariri.²⁷ Although a determination as to which group caused Hariri's death has never been made, Syria "came to figure prominently in virtually all theories about Hariri's assassination."²⁸ Hariri's assassination led to a growing anti-Syrian sentiment among the Lebanese. As a result, Syria withdrew all of its troops from Lebanon.²⁹ The withdrawal of Syrian troops drastically changed the balance of power in Lebanon.³⁰ Specifically, this shift in power allowed Hezbollah to become the most powerful military force in Lebanon, and allowed it to develop a presence in the Lebanese cabinet.³¹ Consequently, Hezbollah defined itself as a "force of resistance" not only for Lebanon, but for the entire region as a whole.³² After the elections in 2005, Hezbollah won fourteen seats in the 128-seat

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Who are Hezbollah?*, BBC News, July 13, 2006, http://news.bbc.co.uk/2/hi/middle_east/4314423.stm.

28. Rayyan Al-Shawaf, *The Assassination of Rafik Hariri: Lebanon's Shakespearean Tragedy*, *The Christian Science Monitor*, Nov. 7, 2006, <http://www.csmonitor.com/2006/1107/p16s01-bogn.html>

29. *Id.*

30. *Id.* (Hezbollah and Syria, at one point, were so intrinsically linked that many viewed Hezbollah as Syria's "Lebanese card" in their effort to regain the Golan Heights from Israel. However, after ex-Prime Minister Hariri's assassination and the resulting withdrawal of Syrian troops, Hezbollah has taken on a position that they were opposed to Syria's withdrawal, however, they described Syria's decision as one of "gratitude" to Lebanon and that in return Lebanon should not sever its ties with Syria. Although Syria may still provide some support to Hezbollah, the relationship has become a political one. Hezbollah's initial dependency on Syria has ceased to exist today).

31. *Id.*

32. *Id.*

Lebanese Parliament.³³ Hezbollah also currently has two ministers in the government.³⁴

In addition to Hezbollah's vital presence in the Lebanese government, it has gathered ample popular support by providing social services and healthcare to many Lebanese in the southern region. Furthermore, Hezbollah represents the largest Lebanese community, which is the Shiia. Under the leadership of Nasrallah, Hezbollah has helped the Shiia community go from one of obscure and marginalized people to an organized social and political party.³⁵ Hezbollah also owns the prominent television station, al-Manar.³⁶

Furthermore, Hezbollah has developed a reputation, even with those who oppose its ideals, as being an extremely capable political party on both the national and local level.³⁷ Hezbollah's effectiveness has been evident throughout Lebanon's history. For example, on May 24, 2000 the last Israeli soldier withdrew from Lebanon.³⁸ Many people predicted that after Israeli forces depart, those regions most heavily influenced by the departure would erupt in violence.³⁹ However, these predictions were never realized because Hezbollah maintained strict order in the border regions.⁴⁰

Hezbollah's dedication to Lebanon is evident in the organization's actions for the benefit of the country and its people. The first item on the organization's 2005 electoral platform stated that the organization is dedicated to:

33. Council on Foreign Relations, *Hezbollah*, July 17, 2006, <http://www.cfr.org/publication/9155>.

34. *Id.*

35. Interview by Kenneth Pollack with Nahum Barnea, Saban Center Kreiz Visiting Fellow and Senior Political Analyst of *Yediot Aharonot*, Hisham Milhem, Washington Correspondent for *An-Nahar*, Shibley Telhami, Saban Center Nonresident Senior Fellow and Anwar Sadat Professor at the University of Maryland, Martin Indyk, Director of the Saban Center, at the Saban Center for Middle East Policy at the Brookings Institution (July 17, 2006), www.brookings.edu/comm/events/20060717.pdf (In this expert discussion of the Israel-Lebanon conflict, Mr. Barnea gave the Israeli perspective, Mr. Milhem, provided the Lebanese perspective, Ms. Telhami, commented on the view from the Arab world, and Mr. Indyk, presented policy options for the United States) [hereinafter Saban Center Interview].

36. *Who are Hezbollah?*, BBC News, July 13, 2006, http://news.bbc.co.uk/2/hi/middle_east/4314423.stm.

37. Lara Deeb, *Hizballah: A Primer*, Middle East Reporter Online, July 31, 2006, <http://www.merip.org/mero/mero073106.html>.

38. *Id.*

39. *Id.*

40. *Id.*

“safeguard Lebanon’s independence and protect it from the Israeli menace by safeguarding the Resistance, Hezbollah’s military wing and its weapons, in order to achieve total liberation of Lebanese occupied land.”⁴¹

It is important to note that this position directly contradicts the 2004 United Nations Council Resolution 1559, which clearly called for the disarmament of all Lebanese militia and withdrawal of foreign (mainly Syrian) forces from Lebanon.⁴² With “strong Lebanese political support,” Hezbollah has used the Shebaa Farms on the Israel-Lebanon border as a reason for refusing to demilitarize.⁴³ Hezbollah contends that the Shebaa farms are occupied Lebanese territory; however, Israel asserts that the farms are on the Syrian side of the border and therefore are part of the occupied Golan Heights.⁴⁴

Israel’s military campaign in the summer of 2006 has led to unprecedented support for Hezbollah among the Lebanese because the people are putting their “ideological disagreements” with Hezbollah aside and are instead supporting the party’s anti-Israeli platform.⁴⁵ In October of 2006, 800,000 pro-Hezbollah demonstrators marched in Beirut, a city of roughly one million people.⁴⁶ Such support shows that Hezbollah is not only an alarming military power, but also has become a political force to be reckoned with.⁴⁷ In fact, Lebanon has called for

41. *Id.*

42. *Id.*; see also *Who are Hezbollah?*, BBC News, July 13, 2006, http://news.bbc.co.uk/2/hi/middle_east/4314423.stm.

43. *Who are Hezbollah?*, BBC News, July 13, 2006, http://news.bbc.co.uk/2/hi/middle_east/4314423.stm (After Israel’s withdrawal of forces from Lebanon, Hezbollah faces one of their greatest challenges. If Israel is gone, how would Hezbollah justify maintaining their military in Southern Lebanon? Many believe that this is why the Sheeba Farms have become Hezbollah’s “excuse” for not demilitarizing).

44. *Who are Hezbollah?*, BBC News, July 13, 2006, http://news.bbc.co.uk/2/hi/middle_east/4314423.stm; The United Nations has repeatedly requested that both Syria and Lebanon take steps to determine the exact boundary between them in the Shebaa Farms region, for more information, see <http://www.spot-on.com/allbritton/UN-Report-on-Implementation-of-1701-Oct-31.pdf>.

45. Lara Deeb, *Hizballah: A Primer*, Middle East Reporter Online, July 31, 2006, <http://www.merip.org/mero/mero073106.html>.

46. Sara Leah Whitson, *Hezbollah Needs to Answer*, Al-Sharq al-Awsat, October 5, 2006, <http://hrw.org/english/docs/2006/10/05/leban014336.htm> (The exact population of Beirut is difficult to obtain, but various estimates range from roughly 900,000 to 1.1 million people. According to the United States Department of State, the current total population of Lebanon is approximately 3.9 million people).

47. *Id.*

Israel to be accountable for its violations throughout this conflict, but has failed to hold Hezbollah up to the same standard.⁴⁸

III. RULES OF LAW

Fundamentally, international humanitarian law (also known as “the law of armed conflict” or “the law of war”) is a set of rules that govern how parties and individuals should conduct themselves in times of armed conflict.⁴⁹ The purpose of these rules is to limit the effects of armed conflicts, to govern the methods and kind of warfare utilized, and to protect individuals that are no longer participating in the armed conflict.⁵⁰ International humanitarian law falls under the larger umbrella of international law, and is contained in treaties or conventions between States and various customary laws.⁵¹ However, international humanitarian law must be distinguished from international human rights law. Although the two bodies of law compliment one another, the former applies in situations of armed conflict, whereas the latter is tailored to protect individuals in times of peace.⁵²

A. GENERAL RULES OF INTERNATIONAL ARMED CONFLICT: HAGUE CONVENTIONS, GENEVA CONVENTIONS, ADDITIONAL PROTOCOLS

One of the first treaties creating rules of conduct in armed conflict was the first Geneva Convention of 1864, which pertained only to the care of wounded soldiers.⁵³ The next significant treaties were the Hague Conventions. In 1899, the first peace conference at the Hague produced four conventions dealing with the settlement of international disputes, the laws and customs of war on land, and the regulation of some means of warfare.⁵⁴ In 1907, the second Hague peace conference revised the

48. *Id.* (The United Nations Human Rights Council, mainly at the request of Arab member nation, quickly established a “commission of inquiry” to look into Israel’s violations of the laws of international armed conflict. However, the Human Rights Council refused to look at whether Hezbollah was guilty of any violations. Therefore, as of October 2006, no international body has investigated Hezbollah’s actions in the recent conflict.)

49. Int’l Comm. of the Red Cross, *What is International Humanitarian Law?*, July 31, 2004, <http://www.icrc.org/web/eng/siteeng0.nsf/html/humanitarian-law-factsheet>.

50. *Id.*

51. *Id.*

52. Int’l Comm. of the Red Cross, *International Humanitarian Law: Answers to your Questions*, February, 2004, [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0703/\\$File/ICRC_002_0703.PDF!Open](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0703/$File/ICRC_002_0703.PDF!Open).

53. Int’l Comm. of the Red Cross, *The Geneva Conventions: the core of international humanitarian law*, January 9, 2006, <http://www.icrc.org/web/eng/siteeng0.nsf/html/genevaconventions>.

54. Hague Convention IV, Declaration I- Concerning the Prohibition, for the Term of Five Years, of the Launching of Projectiles and Explosives from Balloons or Other New Methods of a Similar Nature, July 29, 1899, 32 Stat. 1839; *see also* The Avalon Project at Yale Law School, *The*

original conventions, and created numerous other provisions with respect to the rights and duties of States and military personnel in times of war, the types of weapons that could be utilized, and various additions to the rules governing the naval forces in times of war.⁵⁵ In 1949, the Geneva Conventions were expanded into a cohesive body of law comprised of the following four Geneva Conventions:

- Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
- Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
- Convention (III) relative to the Treatment of Prisoners of War
- Convention (IV) relative to the Protection of Civilian Persons in Time of War.⁵⁶

While the Hague Conventions established the rules governing belligerents in armed conflicts and limited the effects of war on the

Laws of War, <http://www.yale.edu/lawweb/avalon/lawofwar/lawwar.htm> (last visited Apr. 22, 2007) (The specific conventions consisted of: Hague I -- Pacific Settlement of International Disputes, Hague II -- Laws and Customs of War on Land, Hague III -- Adaptation to Maritime Warfare of Principles of Geneva Convention of 1864. Hague IV -- Prohibiting Launching of Projectiles and Explosives from Balloons).

55. Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 3 Stat. 2277; see also The Avalon Project at Yale Law School, *The Laws of War*, <http://www.yale.edu/lawweb/avalon/lawofwar/lawwar.htm> (last visited Apr. 22, 2007) (The specific conventions consisted of: Hague I - Pacific Settlement of International Disputes, Hague II - Limitation of Employment of Force for Recovery of Contract Debts, Hague III - Opening of Hostilities, Hague IV - Laws and Customs of War on Land, Hague V - Rights and Duties of Neutral Powers and Persons in Case of War on Land, Hague VI - Status of Enemy Merchant Ships at the Outbreak of Hostilities, Hague VII - Conversion of Merchant Ships into War Ships, Hague VIII - Laying of Automatic Submarine Contact Mines, Hague IX - Bombardment by Naval Forces in Time of War, Hague X - Adaptation to Maritime War of the Principles of the Geneva Convention, Hague XI - Restrictions With Regard to the Exercise of the Right of Capture in Naval War, Hague XIII - Rights and Duties of Neutral Powers in Naval War).

56. Int'l Comm. of the Red Cross, *The Geneva Conventions: the core of international humanitarian law*, January 9, 2006, <http://www.icrc.org/web/eng/siteeng0.nsf/html/genevaconventions> (A number of armed conflicts have had an, essentially, immediate impact on the development of international humanitarian law. For example, World War I gave rise to a number of treaties in response to the use of certain weapons, such as poison gas, aerial bombardments and the capture of prisoners of war, in an unprecedented manner. World War II saw a tremendous rise in the death of civilians which gave rise to the Fourth Geneva Convention).

enemy, the Geneva Conventions went even further.⁵⁷ The Geneva Conventions focused not only on the safety of military personnel, but on the safety of civilians as well.⁵⁸ In 1977, the ratification of Additional Protocols I and II to the Geneva Conventions of 1949 essentially combined the fundamental laws and principles of the Hague and Geneva Conventions.⁵⁹

Additional Protocol I established the rules on the conduct of hostilities.⁶⁰ One of the most fundamental rules created by Additional Protocol I was the importance of distinguishing between civilians and combatants, and between civilian objects and military objectives.⁶¹ Additional Protocol II was the first international treaty devoted exclusively to protecting civilians involved in non-international armed conflicts.⁶²

In June of 2002, the President of the International Committee of the Red Cross (hereafter, "ICRC"), Jakob Kellenberger, spoke about the Additional Protocols. He stated that as controversial as the Protocols were, they reflected the "new reality" of guerilla warfare (the central method used by national liberation movements in their struggle for independence). Additionally, Kellenberger stated that the Protocols gave rise to the idea that non-international armed conflicts are a "matter of international concern."⁶³

In 2006, the four Geneva Conventions of 1949 became the first international treaties to achieve universal acceptance by the 194 States in the world.⁶⁴ Thus far, 164 States, including Lebanon (but not Israel), have signed Additional Protocol I and 160 States, again including Lebanon (but not Israel), have signed Additional Protocol II.⁶⁵ There are numerous other international treaties that are significant in international

57. Int'l Comm. of the Red Cross, *International Humanitarian Law: Answers to your Questions 4*, February 2004, [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0703/\\$File/ICRC_002_0703.PDF!Open](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0703/$File/ICRC_002_0703.PDF!Open)

58. *Id.*

59. *Id.*

60. Int'l Comm. of the Red Cross, *The 25 years of the Additional Protocols to the Geneva Conventions of 1949*, July 6, 2002, <http://www.icrc.org/web/eng/siteeng0.nsf/html/5D6KU6>.

61. *Id.*

62. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), December 12, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Protocol II].

63. *Id.*

64. Int'l Comm. of the Red Cross, *A milestone for international humanitarian law*, September 22, 2006, <http://www.icrc.org/web/eng/siteeng0.nsf/html/geneva-conventions-Statement-220906>.

65. Int'l Comm. of the Red Cross, *The relevance of IHL in the context of terrorism*, May 21, 2005, <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/terrorism-ihl-210705>.

law, however, in relations to this conflict, the Geneva Conventions and Additional Protocols I and II are the most relevant.⁶⁶

B. INTERNATIONAL AGREEMENTS

Both Israel and Lebanon are bound by those international agreements to which they are signatories. For example, both States are parties to the 1989 Convention on the Rights of the Child, and as such, would not be allowed to have children under the age of 15 serve in any armed conflict.⁶⁷ The complication in any armed conflict between Hezbollah and Israel is that Hezbollah is not a State and cannot be a signatory to an international treaty. However, if Hezbollah is acting on behalf of Lebanon, it would be bound by any treaty in which Lebanon is a signatory. For example, Additional Protocols I and II bind Lebanon because the State has signed both treaties. On the contrary, Israel has not signed Additional Protocols I and II. Therefore, Israel is bound only to those parts of the Protocols that have attained customary law status. States and individuals are bound to customary international law regardless of whether the specific State is a party to a particular treaty.⁶⁸ Therefore, Israel, Lebanon, and Hezbollah are bound to abide by certain rules of international humanitarian law because they are so universally accepted that they rise to the level of customary law.

66. Some other important international treaties include: the 1868 Declaration of St. Petersburg (prohibiting the use of certain projectiles in wartime), the 1925 Geneva Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases and of bacteriological methods of warfare, the 1954 Hague Convention for the protection of cultural property in the event of armed conflict, 1972 Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxic weapons and on their destruction, the 1980 Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects (CCW), which includes: the Protocol (I) on non-detectable fragments, the Protocol (II) on prohibitions or restrictions on the use of mines, booby traps and other devices, the Protocol (III) on prohibitions or restrictions on the use of incendiary weapons, the 1993 Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, 1995 Protocol relating to blinding laser weapons, the 1998 Rome Statute of the International Criminal Court, 1999 Protocol to the 1954 Convention on cultural property, 2000 Optional Protocol to the Convention on the rights of the child on the involvement of children in armed conflict.

67. Convention on the Rights of the Child, art. 38, G.A. Res. 44/25, U.N. Doc. A/44/49 (Nov. 20, 1989), available at <http://www.unhcr.ch/html/menu3/b/k2crc.htm>

68. Int'l Comm. of the Red Cross, *The relevance of IHL in the context of terrorism*, May 21, 2005, <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/terrorism-ihl-210705>.

C. INTERNATIONAL CUSTOMARY LAW: GENERAL OVERVIEW AND SPECIFIC ILLUSTRATION OF HOW PROTOCOL I AND II APPLY TO A NON-SIGNATORY PARTY SUCH AS ISRAEL

Customary law comes about when a certain practice is so generally accepted in the international community, that it essentially becomes law.⁶⁹ The fact that parties in armed conflicts must distinguish between combatants and civilians; the fact that civilians cannot be the object of attacks; and the notion that parties must do everything in their power to avoid disproportionately harming civilians are all examples of customary law (even if they have been codified in the Geneva Conventions).⁷⁰ A particular State's acceptance of a practice can be seen by looking at official accounts of military operations, military manuals, national legislation and case law.⁷¹ The obligation for this practice to be "accepted as law" is called *opinio juris*.

Customary law plays a particularly important role in non-international armed conflicts. Even though the majority of modern conflicts are non-international in nature, there is still a plethora of specific rules that govern international armed conflicts, as compared to the sparse nature of rules governing non-international armed conflicts (as those are generally laid out in Common Article Three and Additional Protocol II).⁷² According to a study published by the ICRC in 2005, a number of crucial customary laws define appropriate conduct in non-international armed conflicts to a much greater extent than what can be derived from treaty law.⁷³

D. APPLICATION OF THE RULES OF LAW TO INTERNATIONAL VS. NON-INTERNATIONAL CONFLICTS

In international armed conflicts, essentially all of the Geneva Conventions, Additional Protocol I, and any other international treaties

69. Int'l Comm. of the Red Cross, *Customary international humanitarian law: questions and answers*, August 15, 2005, <http://www.icrc.org/web/eng/siteeng0.nsf/html/6BPK3X>.

70. Human Rights Watch, *Questions and Answers on Hostilities Between Israel and Hezbollah*, July 31, 2006, <http://hrw.org/english/docs/2006/07/17/lebanol13748.htm>.

71. Int'l Comm. of the Red Cross, *Customary international humanitarian law: questions and answers*, August 15, 2005, <http://www.icrc.org/web/eng/siteeng0.nsf/html/6BPK3X>.

72. *Id.*

73. *Id.* (For example, no treaty expressly forbids attacks on civilian objects in non-international armed conflicts. According to the ICRC study, this is purely a child of customary international law. However, as with any law, customary international law is bound to be violated. The fact that such violations are not tolerated by States only strengthens the rule in question. For example, when a party attacks a civilian object, such attacks are not only criticized by various States, but frequently are justified by the offending party. Both the "condemnation and justification implicitly" enforce the idea that under customary law attacks on civilians are prohibited).

apply to those parties that are signatories. As explained above, some portions of treaties apply to parties who are not signatories through customary law. In non-international armed conflicts, Common Article 3 of the Geneva Conventions applies to all parties, as it is in essence a “catch all” article that applies regardless of the type of conflict. Additionally, Protocol II applies to those parties that are signatories. Otherwise, non-international armed conflicts are governed by customary law.

The *Prosecutor v. Dusko Tadic* decision by the Appeals Chamber at the International Criminal Tribunal for Yugoslavia discussed the application of customary law to non-international armed conflicts.⁷⁴ In February of 1994, Dusko Tadic was arrested after Bosnian exiles recognized him as one of the main Bosnian Serbs involved in the atrocities committed against Bosnian Muslims.⁷⁵ One of the most difficult aspects of the *Tadic* case from a legal perspective, was that the conflict in the former Yugoslavia had both internal and international characteristics.⁷⁶ The *Tadic* decision proved to be ground-breaking because the Appeals Chamber concluded that the rules and principles governing international armed conflicts would now also apply to internal armed conflicts as a matter of customary law.⁷⁷ Prior to this decision, internal armed conflicts were governed solely by Common Article 3 and Additional Protocol II.⁷⁸ The *Tadic* decision essentially blurred the line between international and internal armed conflict so that the rules of customary law would now govern internal conflicts.⁷⁹ The Appeals Chamber wrote that these customary laws specifically include:

“...protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in the hostilities, as well as prohibition of means of warfare

74. *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal, ¶ 126 (Oct.2, 1995) (Appeal on Jurisdiction).

75. Major Ian G. Corey, Note, *The Fine Line between Policy and Custom: Prosecutor v. Tadic and the Customary International Law of Internal Armed Conflict*, 166 Mil. L. Rev. 145, 146 (2000).

76. *Id.* at 150.

77. *Id.* at 152.

78. *Id.*

79. *Id.*

proscribed in international armed conflicts and ban of certain method of conducting hostilities."⁸⁰

However, the Appeals Chamber clearly stated that not all of the rules of international conflict apply to internal conflicts and that this gradual extension is just that; therefore, the general meaning of the rules of international conflict, rather than the specific regulation, apply in internal conflicts.⁸¹

In today's world, non-international armed conflicts are rising in both number and complexity. The application of international humanitarian law to non-international armed conflict is difficult, because as critical as customary law is to this practice, it has not been codified in any treaty. Although Additional Protocol II provides abundant guidance above Common Article 3, it has not been universally accepted and much debate still exists as to which parts of Additional Protocol II are indeed customary law. For this reason, the determination of a conflict as international versus non-international impacts the rules of humanitarian law to the greatest extent.

E. APPLICATION OF DOMESTIC LAW

Humanitarian law, by its very nature, overrides some domestic criminal and human rights law.⁸² However, from a legal perspective, when armed violence falls outside of an armed conflict, domestic and international criminal law applies rather than humanitarian law.⁸³ As already determined, international armed conflict involves armed violence between States, and if the actions of Hezbollah are not attributed to that of a State, then any future Israeli-Hezbollah conflict will be a non-international armed conflict.⁸⁴ In non-international armed conflict, neither combatant nor prisoner of war status are guaranteed, because States are often unwilling to grant members of armed opposition groups immunity from prosecution under domestic law.⁸⁵ Furthermore, in such

80. *Id.* (citing Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal, ¶ 127 (Oct.2, 1995) (Appeal on Jurisdiction)).

81. *Id.* (citing Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal, ¶ 126 (Oct.2, 1995) (Appeal on Jurisdiction)).

82. Rona Gabor, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 Chi. J. Int'l L. 499, 502 (2005).

83. Int'l Comm. of the Red Cross, *The relevance of IHL in the context of terrorism*, May 21, 2005, <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/terrorism-ihl-210705>.

84. *Id.*

85. *Id.*

conflicts, members of organized armed groups (such as combatants and guerrillas) are not entitled to special status or protection above and beyond customary international law, and as such, can be prosecuted under domestic criminal laws.⁸⁶

In the conflict, Israeli prosecutors charged three Hezbollah fighters captured during the Israel-Lebanon conflict with the intention of trying them for murder and for being members of a terrorist organization.⁸⁷ The decision to try the captured Hezbollah fighters under domestic Israeli law demonstrated that Israel refuses to view Hezbollah as a “legitimate fighting force.”⁸⁸ Israel believes that members of Hezbollah are not entitled to prisoner of war status on capture because they do not meet the conditions of Article 4 or Articles 43 and 44 of Additional Protocol I, and therefore, domestic rather than international humanitarian law should govern the actions of Hezbollah.⁸⁹ As will be demonstrated, this view seems to blatantly contradict the status Hezbollah has achieved both within Lebanon and in the eyes of the entire international community.

IV. ANALYSIS UNDER GENEVA CONVENTIONS: IMPLICATIONS OF HEZBOLLAH’S CLASSIFICATION

A. HEZBOLLAH: A STATE ACTOR?

Determining whether the acts of Hezbollah are attributable to Lebanon has tremendous effects on exactly how international humanitarian law would govern any future conflicts between Hezbollah and Israel. If Hezbollah’s acts are attributable to Lebanon, then the conflict becomes an international one and the Geneva Conventions and Additional Protocols will apply.⁹⁰ Therefore, if Hezbollah is a State actor, then both Israel and Lebanon would have to grant prisoner of war status to enemy combatants under Article 4 of the Third Geneva Convention.⁹¹ On the

86. *Id.*

87. *Israel charges Hezbollah fighters*, BBC News, September 18, 2006, http://news.bbc.co.uk/go/pr/ft/-/2/hi/middle_east/5355682.stm

88. *Id.*

89. Dr. Robbie Sabel, *Hezbollah, Israel, Lebanon and the Law of Armed Conflict*, Univ. of Pittsburgh School of Law: Jurist Legal News and Research, July 25, 2006, <http://jurist.law.pitt.edu/forumy/2006/07/hezbollah-israel-lebanon-and-law-of.php>

90. Jonatha Somer, *Acts of Non-State Armed Groups and the Law Governing Armed Conflict*, ASIL Insight, August 24, 2006, <http://www.asil.org/insights/2006/08/insights060824.html> (Another argument that a future Hezbollah – Israel conflict would be international is that Common Article 2 would apply when Israel attacks Lebanese territory. Specifically, because Common Article 2 applies when there has been some kind of occupation of a High Contracting Party, even when there has been no resistance from the State that is being occupied).

91. Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

other hand, if Hezbollah's acts are not attributed to a State, this becomes a non-international armed conflict, and only Common Article 3 of the Geneva Conventions and customary law apply. This would mean that Hezbollah would have to meet the definition of "other militia" pursuant to Article 4, Section 2 to acquire prisoner of war status.⁹²

Another relevant part of the Geneva Conventions is Common Article Two, which applies when there has been a partial or total occupation of a High Contracting Party (or "State"). Since Hezbollah occupies essentially all of Southern Lebanon, this would mean that even if Hezbollah is a non-State actor, the Geneva Conventions may apply to that region of Lebanon. However, prior to discussing the application of the Geneva Conventions to a non-State versus State actor, it is necessary to determine whether Hezbollah is acting on behalf of Lebanon, or whether they are merely a militia group on Lebanese territory.

1. Hezbollah is Implicitly Acting on Behalf of Lebanon

Currently, the law of "State responsibility" and attribution is still in development.⁹³ However, a number of international cases and the United Nations treaty, *Responsibility of States for Internationally Wrongful Acts*, provide guidance.⁹⁴ In *Nicaragua v. United States*, the International

92. *Id.* (The determination of whether this would be an international or non-international conflict also determines of when humanitarian law applies. In international armed conflict, humanitarian law applies immediately after the first act of war or occupation occurs. However, in non-international armed conflicts, the level of conflict must be beyond "internal disturbances and tension" in order for humanitarian law to apply. Additionally, the classification of a future conflict would affect when a specific individual would be prosecuted from any resulting war crimes. Since grave breaches of the Conventions can only be committed in international armed conflicts, in such a conflict, all States would have an obligation to prosecute suspects, regardless of where the crime occurred).

93. As stated in *The Prosecutor v. Dusko Tadic* decision, "International humanitarian law does not contain any criteria unique to this body of law for establishing when a group of individuals may be regarded as being under the control of a State, that is, as acting as *de facto* State officials. Consequently, it is necessary to examine the notion of control by a State over individuals, laid down in general international law, for the purpose of establishing whether those individuals may be regarded as acting as *de facto* State officials. This notion can be found in those general international rules on State responsibility which set out the legal criteria for attributing to a State acts performed by individuals not having the formal status of State officials".

94. The International Law Commission has had a long history in trying to codify the law of State responsibility which started at its very first session in 1949. The Commission actually began to study the topic in 1955. By 1963, the Commission agreed that a report on State responsibility agreed on the following: "(1) that priority should be given to the definitions of the general rules governing the international responsibility of the State; and (2) that, in defining these general rules, the experience and material gathered in certain special sectors, especially that of responsibility for injuries to the persons or property of aliens, should not be overlooked and that careful attention should be paid to the possible repercussions which developments in international law may have had on State responsibility." In 1969, the Commission was ready to start working on a first set of draft articles on the topic. The Commission stated that all future work on the topic of State responsibility would abide by the following guidelines: "(a) The Commission intended to confine its study of

Court of Justice held that a State may be held accountable for the actions of State agents acting within the scope of their official capacity.⁹⁵ There are different legal outcomes when an act of a non-State group is attributed to a State, and when a State fails to diligently meet its obligation in preventing the acts of the non-State militia group acting on the territory of a particular case.⁹⁶ Under the *Nicaragua* standard, in order for an act of an armed non-State group to be attributable to a particular State, the State must have “effective control”, including “financing, organizing, training, supplying and equipping.”⁹⁷ The “selection of its military or paramilitary targets, and the planning of the whole of its operation” is not enough to meet the *Nicaragua* standard.⁹⁸ The *Tadic* decision, discussed *supra*, loosened the *Nicaragua* standard substantially. The court in *Tadic* held,

“...control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of

international responsibility, for the time being, to the responsibility of States; (b) The Commission would first examine the question of the responsibility of States for internationally wrongful acts. The question of responsibility arising from certain lawful acts, such as space and nuclear activities, would be examined as soon as the Commission’s programme of work permitted; (c) The Commission agreed to concentrate its study on the determination of the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and that of defining the rules that place obligations on States, the violation of which may generate responsibility; (d) The study of the international responsibility of States would comprise two broad separate phases, the first covering the origin of international responsibility and the second the content of that responsibility” After numerous debates and drafts spanning an additional forty years, in December of 2001, The General Assembly “took note of the articles on responsibility of States for internationally wrongful acts.” However, the adoption of these articles was moved to 2004. In 2004, the General Assembly moved the item entitled “Responsibility of States for internationally wrongful acts” to its sixty-second session in 2007. A full summary of the history behind the articles is available at the International Commission of Law website at http://untreaty.un.org/ilc/summaries/9_6.htm.

95. Maria Cristina Cardenas, Note, *Columbia’s Peace Process: The Continuous Search for Peace*, 15 Fla. J. Int’l L. 273, 293 (2002) (citing *Nicar. v. U.S.*, 1986 I.C.J. 14 (June 27)); see also *United States v. Iran*, 1980 ICJ 3, 19 Int’l Legal Materials 553 (1980); *The Prosecutor v. Dusko Tadic*, IT-94-1-A, ICTY Appeals Chamber, 38 Int’l Legal Materials 1518 (1999).

96. Jonatha Somer, *Acts of Non-State Armed Groups and the Law Governing Armed Conflict*, ASIL Insight, August 24, 2006, <http://www.asil.org/insights/2006/08/insights060824.html>.

97. *Id.* (citing *Nicar. v. U.S.*, 1986 ICJ 14, 25 Int’l Legal Materials 1023 (1986)).

98. *Id.*

military operations and any alleged violations of international humanitarian law."⁹⁹

Chapter II of the *Responsibility of States for Internationally Wrongful Acts* discusses attribution of conduct to a particular State.¹⁰⁰ Article 4 States:

"Article 4: Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State."¹⁰¹

Although, as of today, the *Responsibility of States for Internationally Wrongful Acts* is not per se binding law, even though it is cited in many judicial decisions, including the *Tadic* decision *supra*. Based on the aforementioned standards, whether Hezbollah's acts can be attributable to Lebanon depends on whether Lebanon had the requisite control over Hezbollah's military operations, and whether Hezbollah acted in their capacity as an authority empowered by the Lebanese government.

Upon initial inspection, it would seem that under the *Tadic* standard, there is no legally feasible way for Lebanon to have controlled Hezbollah because it did not provide the majority of Hezbollah's military equipment or training (particularly in light of the fact that the general sentiment is that both financial and military support for Hezbollah comes from Iran). However, upon further investigation, it becomes clear that

99. *Id.* (citing *The Prosecutor v. Dusko Tadic*, IT-94-1-A, ICTY Appeals Chamber, 38 Int'l Legal Materials 1518 (1999)) (Paragraphs 98-145 of *The Prosecutor v. Dusko Tadic* fully discuss the *Nicaragua* standard, <http://www.un.org/icty/tadic/appeal/judgement/index.htm>. It may also be helpful to look at the International Law Commission's Articles on State Responsibility. The articles, arguably, encompass customary law and State that both "control and "acknowledgment" are basis for State responsibility).

100. *Responsibility of States for Internationally Wrongful Acts*, G.A. Res. 56.83, U.N. Doc. A/56/10 (Dec. 12, 2001), http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf

101. *Id.*

Hezbollah has achieved such significant status in Lebanese politics and culture that they are no longer a “subordinate” group under Lebanon’s control. In fact, Hezbollah has cemented their position in Lebanon to such a degree (with the government’s consent and encouragement), that Lebanon and Hezbollah have indeed become one.

Further, it is important to remember that in this conflict, Israel invaded Lebanon and attacked various parts of the country, thereby expanding their targets beyond the Hezbollah-occupied region of southern Lebanon. Israeli officials have stated numerous times that Israel was not merely responding to the actions of Hezbollah, but to the State of Lebanon as well.¹⁰² However, the official Lebanese army did not respond to any military action by Israel nor did the army instigate any offensive military action.¹⁰³

Lebanon did not investigate Hezbollah’s activities, nor did Lebanon go after Nasrallah and try to stop his attacks on Israel. Israel was attacking Lebanon from every direction and the only party that responded was Hezbollah. Fundamentally, if a State were attacked by a neighboring State, the former would respond. If the attacked State has an army, it would send its troops to defend itself. However, Lebanon did not deploy its “official” army. Instead, Lebanon fully supported its real army, Hezbollah, to defend the country against Israel.

Those in support of the argument that Hezbollah is a non-State actor would argue that mere passive permission on the part of Lebanon is insufficient for attribution. However, from a historical perspective, Lebanon has not been a “passive” government. On the contrary, the Lebanese government has been vocal, and based on the experience of the Lebanese Civil War, has not allowed one group to dominate. For example, when ex-Prime Minister Hariri was assassinated, the Lebanese government publicly criticized Hezbollah for refusing to demilitarize.¹⁰⁴ During this time, the multi-fractioned Lebanese government was very much against allowing one group, even the largest one in the country, to maintain its military force. However, in this conflict, Lebanon did not stop Hezbollah from using this military force, nor did it stop Hezbollah from upgrading to modern weapons and technologies. Decisions about war are generally made by the sovereign Lebanese government. However, not only did Lebanon allow Hezbollah to engage in an armed

102. Human Rights Watch, *Questions and Answers on Hostilities Between Israel and Hezbollah*, July 31, 2006, <http://hrw.org/english/docs/2006/07/17/leban013748.htm>.

103. *Id.*

104. Saban Center Interview, *supra* note 33.

conflict with Israel, but even in the year after the conflict, the Lebanese government had not questioned Hezbollah's actions. Lebanon's implicit support of Hezbollah, and refusal to intervene in any manner, implies that Hezbollah was indeed acting on behalf of Lebanon, and was therefore, a State actor.

Furthermore, in the 1990's Lebanon and Israel entered into an agreement not to target civilians in any future armed conflicts. The rules arising out of that agreement have governed the Israeli-Lebanese border dispute.¹⁰⁵ Although the State of Lebanon and Israel entered into this agreement, in reality, any border dispute has always been between Israel and Hezbollah. As such, Lebanon knowingly has and continues to allow Hezbollah to control the border between Israel and Lebanon. It seems, at the very least unusual for a State to allow any guerrilla, terrorist, or militia group to control its borders when its own army is capable of doing so. If Lebanon is comfortable allowing an organized military group to both control and defend its borders, this only further supports the notion that Hezbollah is a Lebanese-sponsored State actor.

Finally, Hezbollah themselves purport to act on behalf of Lebanon. On August 3, 2006, Hezbollah's chief Nasrallah made a televised offer to Israel to stop firing Hezbollah rockets in exchange for an end to Israeli air strikes on Lebanon.¹⁰⁶ However, Nasrallah warned that Hezbollah would fire rockets at Tel Aviv if Israel attacked Beirut.¹⁰⁷ Nasrallah stated:

"If you attack our cities, villages and capital, we will react. And any time you decide to stop your attacks on our cities, villages and infrastructure, we will not fire rockets on any Israeli settlement or city. Naturally, we

105. Lara Deeb, *Hizballah: A Primer*, Middle East Reporter Online, July 31, 2006, <http://www.merip.org/mero/mero073106.html>; see also Human Rights Watch Arms Project, *Civilian Pawns: Laws of War Violations and the Use of Weapons on the Israel-Lebanon Border*, May 1996, <http://hrw.org/reports/1996/Israel.htm> (These "rules of the game" came out of Israel's bombing Beirut a number of times in the nineties, causing relatively large civilian deaths. For example, in 1996, Israel bombed a United Nations bunker in Qana, Lebanon. Many civilians had taken refuge in the bunker and as a result of the attack, 106 civilians died).

106. Andrew McGregor, *Hezbollah's Rocket Strategy*, 4 Terrorism Monitor 16 (2006).

107. *Id.*; see also Amnesty Int'l, *Israel/Lebanon: Under fire: Hizbullah's attacks on northern Israel*, September 14, 2006, <http://web.amnesty.org/library/Index/ENGMDE020252006> (On July 14, 2006 Nasrallah stated, "You wanted open warfare, and we are going into open warfare. We are ready for it, a war on every level." Two days Hezbollah bombed the city of Haifa even though a large Arabic population resides in Haifa. After another attack on Haifa in August, Nasrallah stated that Hezbollah bombed Haifa in "response to Zionist attacks against the southern suburbs [of Beirut] and the rest of the Lebanese territory...").

would rather, in case of fighting, fight soldier to soldier on the group and battlefield.”¹⁰⁸

Hezbollah’s repetitive use of the word “our” implies that Hezbollah believes it was acting on behalf of Lebanon. Moreover, most of Nasrallah’s speeches aired on the very popular Hezbollah television station *al-Manar*. The fact that the Lebanese government has constantly failed to act in response to Hezbollah, only confirms that Lebanon was indeed sponsoring Hezbollah’s activity with full knowledge of Hezbollah’s strategic plan and military objectives.

Hezbollah’s accomplishments with respect to the conflict only support the notion that Hezbollah has essentially morphed into the true Lebanese army. After all, it was Hezbollah and not the “official” Lebanese army that responded to each Israeli attack. Hezbollah was able to abduct two Israeli soldiers, bomb a tank which crossed the border in order to follow the kidnappers, and conduct an overall military campaign into regions of Israel that were never reached by weapons from Lebanon. Additionally, Hezbollah has fixed training bases, rocket-launching facilities, and trained artillerymen.¹⁰⁹ A senior United States military official stated, in reference to Hezbollah, that “[the] analysis around here is they have more expertise than the Lebanese military.”¹¹⁰ The Lebanese army is “lightly armed, poorly organized for maneuver warfare and lacked both a meaningful air force and modern-based air defence assets.”¹¹¹ The Lebanese army has 70,000 men, and while still recovering from twenty years of civil war, it is the only Lebanese military force capable of any serious military action because Lebanon has no real air force or navy.¹¹²

Moreover, Hezbollah has demonstrated some serious technological advancement in the conflict. Not only did Hezbollah utilize cluster munitions for the first time, but they used the Chinese-made Type-81 122mm rocket (an inaugural use of this type of rocket in the world).¹¹³

108. Amnesty Int’l, *Israel/Lebanon: Under fire: Hizbullah’s attacks on northern Israel*, September 14, 2006, <http://web.amnesty.org/library/Index/ENGMDE020252006> (citing a speech broadcast by Al-Manar TV station, Arabic text: Ad-Diyar website, 15 July 2006 pdf edition, English text: www.islamicdigest.net/v61/content/view/1870/0/ and www.aimislam.com/forums/index.php?showtopic=457).

109. Peter Spiegel & Sebastian Rotella, *Hezbollah’s Skill More Military Than Militia*, Los Angeles Times, July 20, 2006, <http://www.iiss.org/index.asp?pgid=14309>.

110. *Id.*

111. Estanislao Oziewicz, *What rules govern the conflict?*, The Int’l Institute for Strategic Studies, July 19, 2006, <http://www.iiss.org/whats-new/iiss-in-the-press/press-coverage-2006/july-2006/what-rules-govern-the-conflict>.

112. *Id.*

113. Human Rights Watch, *Lebanon/Israel: Hezbollah Hit Israel with Cluster Munitions During Conflict*, October 19, 2006, <http://hrw.org/english/docs/2006/10/18/lebanol4412.htm>

This shows that Hezbollah is not only capable of being a national army, but has potentially become one.¹¹⁴

The strongest argument that Hezbollah is not acting on behalf of Lebanon is that Iran and Syria are the ones assisting Hezbollah with both financing as a whole, and military operations specifically. As such, an argument could be made that under the *Nicaragua* and *Tadic* standard, Hezbollah is not a State-sponsored actor, but rather an organized political government that is merely occupying Lebanese territory and supporting itself with the funds of other States. This argument has validity because Hezbollah is a recognized political party in both Syria and Iran. Additionally, during the conflict, an Iranian military source revealed to the London Arabic daily newspaper, *Al-Sharq Al-Awsat*, that Iran provided overall military support and weapons to Hezbollah “in defense of Lebanon.”¹¹⁵ Specifically, the Iranian official stated:

“The Revolutionary Guards....equipped Hezbollah with mobile bases, [i.e.] medium-sized trucks that can carry and launch missiles. Between 1992 and 2005, Hizbullah received approximately 11,500 missiles and rockets, 400 short- and medium- range pieces of artillery, [and] Aresh, Nuri and Hadid rockets. Last year, Hizbullah first received a shipment of large ‘Uqab missiles with 333-millimeter warheads, and an enormous supply of SAM7 shoulder-[fired] anti-aircraft missiles as well as C802 missiles, copied from Chinese missiles, two of

(Cluster munitions are particularly dangerous to civilians because they spread “submunitions” over a very large area thereby guaranteeing casualties. Moreover, cluster munitions leave behind a large quantity of “duds” that essentially turn into landmines and either kill or injure civilians after the conflict has seized. These types of weapons have also been used in the Iraq, Afghanistan, and Kosovo conflict, many nations have joined to prohibit the use of cluster munitions due to the danger posed to civilians during and after a particular conflict. In November of 2006, The Review Conference of the Convention on Conventional Weapons began looking into this problem).

114. Saban Center Interview, *supra* note 33.

115. Dr. Robbie Sabel, *Hezbollah, Israel, Lebanon and the Law of Armed Conflict*, University of Pittsburgh School of Law: Jurist Legal News and Research, July 25, 2006, <http://jurist.law.pitt.edu/forumy/2006/07/hezbollah-israel-lebanon-and-law-of.php>; *see also* Andrew McGregor, *Hezbollah’s Rocket Strategy*, 4 *Terrorism Monitor* 16, (2006) (The introduction of long-range Iranian Fajr-3 and Fajr-5 rockets has allowed Hezbollah to expand their targets beyond the thinly-populated area in Northern Israel. The Fajr-3 has a range of 45 kilometers and carries a 45 kilogram warhead. Another grave concern to Israel, is Hezbollah’s possession of the Iranian Zelzal 2 missile which has a range of 60-240 miles and would, in effect, put all Israeli cities within range of southern Lebanon).

which were used in the attack on the Israeli ship the day before yesterday."¹¹⁶

A senior United States military official commented that the missiles used in the attack on the Israeli ship off the coast of Beirut were "fired by Hezbollah themselves, [and] they would have had to have training in these missile technologies."¹¹⁷ The official also noted that such training would probably come from Iranian military schools or from people trained in Iran.¹¹⁸ According to a London-based International Institute for Strategic Studies, Hezbollah possesses 13,000 missiles and rockets, 11,000 of which were shipped from Iran.¹¹⁹

While it is clear that Iran has and continues to provide military support to Hezbollah, Iran does not dictate Hezbollah's behavior, nor does it direct the group's actions.¹²⁰ Although Hezbollah faithfully follows the traditional "rule of the clerics" promoted by Iran's Ayatollah Khomeini, while Iran still provides some military and financial support, Hezbollah's relationship with Iran is now based upon consultations with Iranian leaders, rather than on Hezbollah members acting as Iranian puppets.¹²¹ Iran may have had more control over the group at the beginning, however, Iran has lost much of that control because its desire to influence Lebanese politics have strengthened Lebanese nationalism and support of Hezbollah.¹²² Although Iran has lost a great deal of control over Hezbollah's members, it still provides them with military support and training. Does this fact lead to the conclusion that Hezbollah is acting on behalf of Iran? The *Tadic* standard requires "overall control" beyond merely financing or military support in order for Iran to have control over Hezbollah. The bottom line is that under the *Tadic* standard, the mere fact that Iran has provided military support to Hezbollah does not negate the idea that Hezbollah is acting on behalf of Lebanon.

116. Dr. Robbie Sabel, *Hezbollah, Israel, Lebanon and the Law of Armed Conflict*, University of Pittsburgh School of Law: Jurist Legal News and Research, July 25, 2006, <http://jurist.law.pitt.edu/forumy/2006/07/hezbollah-israel-lebanon-and-law-of.php>

117. Peter Spiegel & Sebastian Rotella, *Hezbollah's Skill More Military Than Militia*, Los Angeles Times, July 20, 2006, <http://www.iiss.org/index.asp?pgid=14309>.

118. *Id.*

119. Estanislao Oziewicz, *What rules govern the conflict?*, The International Institute for Strategic Studies, July 19, 2006, <http://www.iiss.org/whats-new/iiss-in-the-press/press-coverage-2006/july-2006/what-rules-govern-the-conflict> (There are also reports that the largest weapons in Hezbollah's missile arsenal are likely to be at least partially manned by members of Iran's Revolutionary Guards).

120. Lara Deeb, *Hizballah: A Primer*, Middle East Reporter Online, July 31, 2006, <http://www.merip.org/mero/mero073106.html>.

121. *Id.*

122. *Id.*

Lebanon has permitted Iran to pass weapons and potentially train Hezbollah on their territory. In order for Iran to ship weapons to Hezbollah, they would have to use Lebanese ports; therefore, Lebanon must have been aware that Hezbollah was obtaining weapons. Similarly, the Taliban government permitted Al Qaeda to conduct “planning, training, and financing operations” within Taliban-controlled territory.¹²³ The United States, relying on the draft of the *Responsibility of States for Internationally Wrongful Acts* attributed responsibility for Al Qaeda’s actions on September 11, 2001 to the Taliban regime because of the latter’s tolerance of Al Qaeda’s activity on their sovereign territory.¹²⁴ The sovereignty of a State implies an obligation to prevent that State’s territory from becoming a “staging area for armed attacks.”¹²⁵ With this in mind, Lebanon had the responsibility to assure that Hezbollah was not using Lebanese territory to prepare for attacks against Israel. Lebanon was unlikely merely a “passive” player that did not provide any financial aid to Hezbollah.

Hezbollah occupies a large part of Lebanon and provides services to many of the country’s Shiiia majority. Why would Lebanon allow a group to have so much control without providing it with some kind of funding? Moreover, it seems equally unlikely that the Lebanese government was unaware of Hezbollah’s military plans in the conflict. After all, when Israel attacked Lebanon, the responding military power was Hezbollah. From a purely logical perspective, the Lebanese government would want to know how Hezbollah is defending the nation’s civilians.

Undoubtedly, the argument that Hezbollah is acting on behalf of Lebanon is not purely black and white, particularly in light of the fact that State responsibility is an area of law that is still highly debated in the international community. However, Hezbollah has become an intrinsic part of the Lebanese government, social structure, and culture. The Lebanese government did nothing to curb Hezbollah’s acts of aggression against Israel, nor have they looked into Hezbollah’s activity since. Lebanon has given the rest of the world the perception that when Israel

123. Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 *Hastings Int'l & Comp. L. Rev.* 303, 306 (2002).

124. *Id.* (Many uncertainties still exist concerning the rules of attribution for acts conducted by guerrilla forces. The draft articles on Responsibility of States for internationally wrongful acts are not completely clear on the issue either).

125. *Id.* (“The United Nations General Assembly defined “aggression” as “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 [acts of aggression committed directly by the State], or of its substantial involvement therein. G.A. Res. 3314, Dec. 14, 1974, U.N. Doc. A/9631 (1975)).

attacks Lebanon, Hezbollah defends. As stated in Article 7 of *Responsibility of States for Internationally Wrongful Acts*:

“Article 7: Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”¹²⁶

Lebanon has empowered Hezbollah to do what the Lebanese government is supposed to control. Specifically, it has allowed Hezbollah to make decisions in times of armed conflict and provide a military defense for the country. Therefore, Hezbollah is a State actor by implication.

2. Application of the Geneva Conventions

If Hezbollah is a State actor, then all of the Geneva Conventions would apply to a future conflict between Israel and Lebanon, as both States are signatory parties to the Conventions. Additional Protocol I would also apply to Lebanon, as it is a signing party to that treaty. The application of Additional Protocol I to Israel is a more complex issue, as Israel is not a signatory to Protocol I. Under these circumstances, customary law plays a crucial role within international humanitarian law.

States cannot avoid responsibility by merely arguing that they are not a party to a certain international treaty.¹²⁷ This is because numerous principles laid out in the Protocols are considered customary law, as they are supported by both non-signatory and signatory States to a particular international treaty.¹²⁸ With respect to Protocol I, Israel could try arguing

126. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56.83, U.N. Doc. A/56/10 (Dec. 12, 2001), http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

127. Int'l Comm. of the Red Cross, *The relevance of IHL in the context of terrorism*, <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/terrorism-ihl-210705>.

128. Int'l Comm. of the Red Cross, *Study on Customary International Humanitarian Law*, July 21, 2005, <http://www.icrc.org/web/eng/siteeng0.nsf/html/customary-law-statement-210705> (The study on customary law is the outcome of eight years of research covering State practices from all over the world. The idea behind the study was to capture the “clearest possible ‘photograph’” of modern customary law. The study would include those principles as “customary” that were supported by all States and identify those rules and principles still debated. The parts of treaties that caused disagreement were not included as the rules of customary law (for example, the presumption

that unlike the Geneva Conventions, Additional Protocol I is not as strongly rooted in customary law. However, unlike the Geneva Conventions which have been signed by all parties, the Protocols have not gained such universal recognition.¹²⁹ However, not only do many States uphold the fundamental principles in both Protocols, but a substantial number of States are signatories to the Protocols.

If Hezbollah is determined to be a non-State Actor, then Common Article 3 would be the only applicable part of the Geneva Conventions. This Article lays out the fundamental rules of a non-international conflict and protects those individuals that are no longer taking an active part in the armed conflict.¹³⁰ The Article prohibits murder, mutilation, torture, cruel treatment, the taking of hostages, and outrages upon personal dignity (in particular, humiliating and degrading treatment).¹³¹ The Article also requires that sentences be passed with the observance of "all the judicial guarantees which are recognized as indispensable by civilized peoples."¹³² The protections of Common Article 3 have become so fundamental in the laws of armed conflict, that they are now referred to as "elementary considerations of humanity" that must be observed in any type of armed conflict.¹³³ Common Article 3 is the foundation of international humanitarian law and applies regardless of the type of conflict or the classification of the individual.

In addition to Common Article 3, it is possible that Common Article 2 would apply in a non-international conflict. Article 2 states that:

"In addition to the provisions which shall be implemented in peace time, 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

of civilian status in situations where doubt about such a status exists). The 5,000-page study produced 161 rules of customary law).

129. Int'l Comm. of the Red Cross, *A milestone for international humanitarian law*, September 22, 2006,

<http://www.icrc.org/web/eng/siteeng0.nsf/html/geneva-conventions-Statement-220906>.

130. Geneva Convention III, *supra* note 89, art. 3.

131. *Id.*

132. *Id.*

133. Int'l Comm. of the Red Cross, *Developments of US policy and legislation towards detainees: the ICRC position*, October 19, 2006,

<http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/kellenberger-interview-191006?opendocument> (Preserving the integrity of Common Article 3 is extremely important because it applies to the treatment of all individuals who fall in enemy hands without any regard to how the conflict or the individual is classified. Common Article 3, along with the rest of the Geneva Conventions, was written after one of the darkest period in time. The "totality" of Article 3 reflects that).

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.”¹³⁴

The language of Article 2 would make it applicable to Hezbollah in a non-international armed conflict because Hezbollah occupies essentially all of southern Lebanon (a territory of a High Contracting Party), and the occupation was met without resistance. However, according to Jean Pictet, one of the main authors of the Geneva Conventions, the second paragraph of Article 2 “was intended to fill the gap left by paragraph 1.”¹³⁵ Pictet continues to explain that “paragraph 2 was designed to protect the interests of protected persons in occupations achieved without hostilities when the government of the occupied country considered that armed resistance was useless.”¹³⁶ This explanation of the seemingly all-encompassing meaning of paragraph 2 also accounts for why Common Article 2 rarely applies in modern armed conflicts and why it also would not apply to Hezbollah. Although Hezbollah has occupied Lebanese territory for decades, it has neither achieved such occupation without hostilities, nor has Lebanon ever considered an armed resistance to Hezbollah as futile. As a matter of fact, as illustrated in the 2006 conflict, Lebanon has allowed Hezbollah to act on Lebanon’s behalf, to control the Lebanese border, and to impact every aspect of Lebanese social and political culture.

Similar to Common Article 2, it would seem (at least on its face) that Article 4 of Geneva Conventions *Relative to the Treatment of Prisoners of War* may also apply to Hezbollah in a non-international armed conflict:

“(2) Members of other militias and members of other volunteer corps, including those organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied provided that such militias or

134. Geneva Convention III, *supra* note 89, art. 2.

135. Michael W. Reisman & James Silk, *Which Law Applies to the Afghan Conflict?*, 82 A.J.I.L. 459, 461 (July, 1988) (citing 3 The Geneva Conventions of 12 August 1949. Commentary 22-23 (J. Pictet ed. 1952-60) (4 vols., one on each Convention)).

136. *Id.*

volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.”¹³⁷

Nevertheless, Article 4 would not provide significant protection to Hezbollah in a non-international armed conflict. Even if Hezbollah “belongs” to Lebanon for the purposes of this law, Hezbollah does not fulfill all of the conditions required for protection under Article 4. Hezbollah meets the first element because the group is commanded by a person who is responsible for his subordinates. It could also meet the second requirement of having an identifying sign or uniform that is easily recognizable. Although the group does not actually have such a sign, due to the modern nature of armed conflict, armed forces are not required to distinguish themselves by wearing a uniform and could, for example, carry arms openly to sufficiently distinguish themselves.¹³⁸ However, Hezbollah (like many other similar organizations) does not carry arms openly, but rather blends in with civilians. This is one of the main reasons why Hezbollah fighters are difficult to capture and distinguish.¹³⁹ Therefore, Hezbollah does not meet the third requirement of Article 4, because Hezbollah members, as a matter of strategy, do not carry weapons openly. Hezbollah would also have difficulty meeting the fourth requirement of Article 4 because it has repeatedly violated the laws and customs of war (as reported by the ICRC, Human Rights Watch, Amnesty International, major newspapers, and in numerous legal

137. Geneva Convention III, *supra* note 89, art. 4 (Additionally, Article 5 dictates that: “Should any doubt arise as to whether, persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” Even with Article 4 and 5 of the Geneva Conventions, according to Amnesty International, neither Israel nor Hezbollah have treated captured combatants as prisoners of war).

138. Int’l Comm. of the Red Cross, *The relevance of IHL in the context of terrorism*, May 21, 2005, <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/terrorism-ihl-210705>.

139. Israel has used this as a defense on numerous occasions, claiming that they did not violate the laws of armed conflict because they were not targeting civilians but rather Hezbollah. Nonetheless, the majority opinion, based on both the Geneva Conventions and the fundamental principle of customary law, holds Israel responsible for indiscriminate attacks on Lebanese civilians.

opinions). For example, in the 2006 conflict, Hezbollah indiscriminately attacked civilians utilizing weapons such as “Katyusha” rockets, which are so technologically lacking that they frequently miss their supposed military targets and kill or injure civilians instead.

Unlike an international armed conflict where the Geneva Conventions and parts of Additional Protocol I would apply to Hezbollah, in a non-international conflict, only Common Article 3 would apply. As always, customary law would also govern Hezbollah’s conduct. However, neither Common Article 2 nor Article 4 of Geneva Convention III would apply. Based on the analysis thus far, it would seem that in a non-international armed conflict, Hezbollah would not be able to obtain prisoner of war protection because they do not meet the requirements of “organized militia” under Article 4.

B. “COMBATANT” CLASSIFICATION

Guerrilla warfare has been a part of armed conflict for many centuries, and is currently the most common form of warfare.¹⁴⁰ Prior to Additional Protocol I, the treatment of guerrillas was governed by Article 4 of the Third Geneva Convention. One of the main problems with the guerrilla classification is that guerrillas will infrequently meet the requirements of Article 4. Usually, guerrilla fighters are part-time soldiers who have to live as “normal civilians” in order to survive in their respective communities.¹⁴¹

Another point of concern under the guerrilla classification is that an occupying power can deny prisoner of war treatment to captured guerrillas based on a number of exceptions that exist in the Third Geneva Convention of 1949.¹⁴² First, the occupying party would refuse to recognize the party to the conflict that the guerrillas are a part of.¹⁴³ Second, normally, members of armies do not lose their prisoner of war status no matter what kind of violations of humanitarian law they commit.¹⁴⁴ However, guerrillas are held to a higher standard, and under Article 4, may be denied prisoner of war status because the captors

140. John Dwight Ingram, *The Geneva Convention is Woefully Outdated*, 23 Penn St. Int’l L. Rev. 79 (2004) (citing as examples the conflicts in Somalia and Afghanistan).

141. George Aldrich, *New Life for the Laws of War*, 75 A.J.I.L. 764, 769 (1981).

142. *Id.*

143. *Id.*

144. *Id.*

believe that the guerrilla group (in whole or in part) has not sufficiently complied with the laws of armed conflict.¹⁴⁵

As a response to some of these issues, Articles 43 through 47 of Additional Protocol I created a uniform set of rules applicable to all combatants (both regular and irregular). The Articles prescribe some, albeit limited, exceptions for those guerrillas that take advantage of their civilian status and conceal weapons while moving into position for an attack.¹⁴⁶ Article 43 defines the term “combatant,” stating (in relevant part):

“1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party.”¹⁴⁷

Article 44 discusses that combatants are guaranteed prisoner of war status, stating (in relevant part):

“1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and

145. *Id.*

146. *Id.* at 770.

147. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art 43, December 12, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I].

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention... ”¹⁴⁸

These articles also give guerrillas and other irregular armed forces presumptive prisoner of war status that would no longer depend on whether the occupying power deemed them worthy of such status.¹⁴⁹ Additionally, Article 44 clarified that combatants (including guerrillas) must distinguish themselves from the civilian population only while they are engaged in an attack or in preparation for an attack.¹⁵⁰

Of significant importance is that Protocol I grants prisoner of war status to those individuals who lawfully participate in armed conflicts.¹⁵¹ Under Protocol I, to be a “lawful” member of an armed force (whether a guerrilla group or lawful combatant), armed forces must be organized, be under a command responsible to that party, and be subject to an internal disciplinary system that enforces compliance with humanitarian law.¹⁵² Further, members must distinguish themselves from the civilian population in order to be entitled to prisoner of war status.¹⁵³

As explained *supra*, Israel does not and would not want to recognize Hezbollah as anything other than a terrorist group in any future armed conflicts. Israel would classify Hezbollah members as terrorists that do not warrant any protections under Additional Protocol I because they cannot be given combatant status. Since Additional Protocol I only provides protection to those groups that act on behalf of a State or entity that is subject to international law, terrorist groups acting on their own behalf do not receive prisoner of war protection.¹⁵⁴ According to the

148. Geneva Protocol I, *supra* note 145, art. 44

149. 75 A.J.I.L. at 771.

150. *Id.* at 774.

151. Int’l Comm. of the Red Cross, *The relevance of IHL in the context of terrorism*, May 21, 2005, <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/terrorism-ihl-210705>.

152. *Id.*

153. *Id.*

154. Int’l Comm. of the Red Cross, *The relevance of IHL in the context of terrorism*, May 21, 2005, <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/terrorism-ihl-210705>.

ICRC, Additional Protocol I does not grant prisoner of war status to those who unlawfully participate in hostilities because Protocol I recognizes and protects only those organizations (and their respective members) who act either on behalf of a State or an "entity" that meets the criteria established by the Protocol and, therefore, are governed by international law.¹⁵⁵

Israel would argue that Hezbollah members are not combatants because Hezbollah is not the official Lebanese army. Specifically, Lebanon did not explicitly recognize Hezbollah as its armed forces in the conflict, nor did Hezbollah wear the uniform of the Lebanese army. Israel would also rely on the fact that Hezbollah's fighters (and their weapons) are hidden among civilians.¹⁵⁶ Therefore, Israel would argue that this clearly supports the notion that Hezbollah is a terrorist organization, rather than a State party or combatant.

However, Israel's potential arguments lack merit with respect to Hezbollah's combatant status. Hezbollah's ability in the conflict to utilize complex weapons provides strong basis for the argument that it has transitioned from guerilla group to a viable military power. For Hezbollah to qualify as a "combatant" under Article 43, it would have to be an organized unit which would be under a command responsibility to Lebanon for the conduct of its members. Hezbollah is clearly an organized unit. As illustrated above, throughout the conflict, Hezbollah was the only group fighting on behalf of Lebanon in defense of Israeli attacks. This implies that Hezbollah was under command responsibility to Lebanon for all of its military strategies and activities.

However, even as combatants, Hezbollah would very likely be unable to receive prisoner of war protections because of the manner in which they conduct themselves in armed conflicts. Hezbollah's policy and the secret to its effectiveness is the manner in which the group blends in with the civilian population. Even if Hezbollah is comprised of combatants, its members do not carry arms openly during military engagements. Therefore, even if Hezbollah were to receive combatant status pursuant to Article 44, Paragraph 3(a), it fails to meet one of the requirements necessary to attain prisoner of war status as a combatant. Even if

155. Int'l Comm. of the Red Cross, *The relevance of IHL in the context of terrorism*, May 21, 2005, <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/terrorism-ihl-210705> (The ICRC goes further stating that the Protocol purposefully excludes "private wars" in the same manner that the 1949 Geneva Conventions and the 1907 Hague Regulations have done in regards to the laws of war on land).

156. Anthony Dworkin, *The Middle East Crisis and International Law*, Crimes of War Project, July 18, 2006, <http://www.crimesofwar.org/onnews/news-middleeast.html>.

Hezbollah's members are considered to be terrorists rather than combatants, they would still receive the fundamental protections laid out in Common Article 3 and would be subject to customary law in any future armed conflict.

The analysis of whether Hezbollah deserves "combatant" status changes dramatically in a non-international conflict because Additional Protocol I would not apply. Although Common Article 3 would still apply in a non-international armed conflict, Hezbollah would mainly have to abide by customary law. Additional Protocol II also provides guidance in this type of armed conflict. Since Lebanon is a party to Additional Protocol II, and Hezbollah would be acting on the State's behalf as combatants, Hezbollah would have to abide by all the rules laid out in Protocol II. These include: prohibitions against certain inhumane acts against individuals who do not take a direct part in the armed conflict; respect and protection for the wounded; and special protection of children.¹⁵⁷

C. "MERCENARY" CLASSIFICATION

Mercenarism has long been one of the elements of traditional armed conflict.¹⁵⁸ Generally, mercenarism is strongly discouraged under international law.¹⁵⁹ By their very definition, mercenaries pose a threat because they intensify existing conflicts. For example, the United Nations has stated that mercenarism is a destabilizing force and impedes the sovereign rights of both the people and the State.¹⁶⁰ Additionally, under the International Criminal Court, traditional mercenaries may be tried for war crimes, genocide, or crimes against humanity.¹⁶¹ However, an individual who technically meets the definition of "mercenary" can still obtain prisoner of war status by enlisting in the armed forces of the hiring party until the conflict ends.¹⁶² For this reason, the definition of "mercenary" in Additional Protocol I has been criticized.¹⁶³ In 1989, the International Convention against the Recruitment, Use, Financing, and Training of Mercenaries tried to expand the definition by shifting to the purpose for why a particular

157. Geneva Protocol II, *supra* note 60, art. 4, 7, 13.

158. James R. Coleman, *Constraining Modern Mercenarism*, 55 *Hastings L.J.* 1493, 1496 (2004).

159. *Id.* at 1493.

160. *Id.*

161. *Id.*

162. David Kassebaum, Note, *A Question of Facts – The Legal Use of Private Security Firms in Bosnia*, 38 *Colum. J. Transnat'l L.* 581, 589 (2000).

163. *Id.* at 590.

individual was hired.¹⁶⁴ However, although this was adopted by the General Assembly, the “Mercenary Convention” has not received sufficient ratification as only seventeen (rather than twenty-two) nations have ratified it.¹⁶⁵ Neither Israel nor Lebanon have ratified the Convention.¹⁶⁶

One could argue that Hezbollah classifies as a group of mercenaries if one believes that Hezbollah is merely being paid to act out the wishes of a State, whether Lebanon or Iran.¹⁶⁷ Additional Protocol I, Article 47 lays out six elements defining a “mercenary” as any person who:

“(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) does, in fact take a direct part in the hostilities;

(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;

(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) is not a member of the armed forces of a Party to the conflict; and

(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.”¹⁶⁸

Article 47 also removes the protection of combatant or prisoner of war status from mercenaries provided that an individual cumulatively meets all of the definitional elements above.¹⁶⁹

164. *Id.* (citing International Convention against the Recruitment, Use, Financing and Training of Mercenaries, U.N. GAOR, 72nd pl. Mtg., U.N. Doc. A/RES/44/34 (1989)).

165. *Id.* at 591.

166. As of 1999, the 17 parties that have ratified the treaty are Azerbaijan, Barbados, Belarus, Cameroon, Cyprus, Georgia, Italy, Maldives, Mauritania, Qatar, Saudi Arabia, Seychelles, Suriname, Togo, Turkmenistan, Ukraine, and Uzbekistan.

167. Due to their limited financial involvement with Hezbollah, as of today, Syria does not seem a likely State to hire Hezbollah as their mercenaries.

168. Geneva Protocol I, *supra* note 145, art. 47.

An argument could be made that Additional Protocol I would not apply to a future armed conflict because Lebanon signed the treaty, and Hezbollah has no international standing or ability to be a party to international treaties. While this would be true (as explained above), the international community and the majority of States (including all the ones that have ratified Protocol I) condemn mercenarism. Therefore, this particular part of Additional Protocol I would apply to Hezbollah under customary law. Article 47 summarizes and codifies the definitional elements that have come to be associated with mercenarism. Therefore, whether Hezbollah can be defined as a mercenary group can be analyzed using the framework laid out in Article 47.

The first element of Article 47 requires a member of Hezbollah to be recruited locally or abroad in order to engage in an armed conflict with Israel. Although this may have been true initially when Hezbollah's dependence on Iran and Syria was at its peak, this is no longer true today. Neither Iran, Lebanon nor Syria recruit Hezbollah in order to fight Israel. Quite the contrary, Hezbollah organized the conflict in question and continued to take full credit for every attack thereafter. Even if Iran helped Hezbollah by providing weapons, Hezbollah has infiltrated Lebanon to the point that it does not need to be "recruited" in order to carry out aggressions against Israel.

The second element would require Hezbollah to take part in the hostilities, which Hezbollah has clearly done. However, the third element requires that Hezbollah be "materially compensated" for maintaining an armed conflict with Israel above and beyond members of the hiring State's regular armed forces. In the conflict, Hezbollah carried out the entire war without the involvement of either Lebanon's or Iran's armed forces.

Potentially, an argument could be made that Iran's armed forces were indeed involved in the fighting. Quite possibly some members of Iran's army aided Hezbollah by physically engaging in the conflict. However, even Iran's own military official admitted that Iran's major part in the 2006 conflict was to provide Hezbollah with weapons, not military manpower. Furthermore, there is no evidence that Iran, Lebanon, or Syria paid Hezbollah compensation at all (either above or below what they would pay their own armed forces).

169. 38 Colum. J. Transnat'l L. at 589 (citing Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 47).

Since Hezbollah is, at the very least, a resident of Lebanon (and Lebanon controlled and was a Party to the conflict), the organization does not meet the next requirement either. Technically, Hezbollah meets the requirements of the fifth and sixth elements because Hezbollah was not a member of the Lebanese armed forces, and was not sent by a State which was not a Party to the conflict on any sort of official duty.

If Hezbollah were to attain the classification of “mercenaries,” only Common Article Three would apply in any future armed conflict. However, since Hezbollah does not meet all of the elements set forth by the definition, the type of international humanitarian law that would apply depends on whether this is an international or non-international armed conflict. As always, regardless of what classification Hezbollah falls under, international customary law applies.

V. CONCLUSION

By examining the 2006 Israel-Lebanon conflict, the history of the region, and both the social and political developments of Hezbollah, a clearer legal picture can be formed with respect to the type of international humanitarian law that will apply in a future conflict between the two States. Due to Hezbollah’s robust status in Lebanese economic, social, cultural, and political life, it is quite likely that a future armed conflict will be international in nature. If Hezbollah will again act either implicitly or explicitly on Lebanon’s behalf, all of the Geneva Conventions will govern the conflict. Furthermore, Additional Protocols I and II will bind Lebanon because they are a signing party to this international treaty. Israel, as a non-signatory, will be bound by those principles in both Additional Protocol I and II that rise to the level of customary law.

As international humanitarian law develops with each new armed conflict, it is also important to remember that Hezbollah militia may still be defined as “combatants” in a future armed conflict. In such a scenario, Additional Protocol I may provide prisoner of war protection to members of Hezbollah, provided that certain codified requirements are met by the group. Specifically, Hezbollah would have to distinguish themselves from the civilian population and carry arms in plain view during those times they are preparing for or engaging in military combat. In this type of conflict, Common Article 3 and customary law will also bind Hezbollah. Additionally, if Hezbollah limits its activity within mainstream Lebanese society and politics, it would be classified as terrorists, and be held accountable under Israeli domestic law.

From a humanitarian perspective, the hope is that Hezbollah, Lebanon, and Israel will not find themselves in a future armed conflict. However, not only does history usually repeat itself, but the Middle East is also a steaming pot of conflict that will likely keep boiling over. With this in mind, how Hezbollah is classified in future conflicts will have a tremendous impact on what laws will govern Hezbollah's conduct. If it is held to answer and is accountable under all of the Geneva Conventions, Additional Protocol I, and international customary law, the chances that the group will act more responsibly will only increase. Perhaps, Hezbollah will continue to grow and focus its attention on the complete annihilation of Israel. Possibly, Israel will also continue to violate various international humanitarian laws. However, the continued hope is that the core laws applicable to armed conflicts will help restore some peace in this part of the world.