THE STATE OF WAR CRIMES FOLLOWING THE ISRAELI - HEZBOLLAH WAR

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This article examines the state of “war crimes” today by thinking through why the prosecution of war crimes has been frustrated for the 2006 Israeli - Hezbollah War in Lebanon. Even though the international machinery for trying war crimes has been set up - above all, the ICC - and the means of documenting and publicizing such crimes have expanded and become widely accessible globally, it is now nearly impossible to prosecute major geopolitical perpetrators on the world stage. The article focuses on legal issues regarding the conduct of war (jus in bello): how the threat of prosecution due to the use of excessive violence might affect the different tactical and strategic “self - interests” of the belligerents. Finally, it makes an argument in favour of when principles of proportionality (that the violence deployed was excessive and disproportionate to the threat) may trump principles of equity (that both parties deserving of punishment must be prosecuted), and assesses the political efficacy of prosecutions in this case. This analysis brings to light several paradoxes in the field of international justice generally, or international humanitarian law more specifically, and suggests why there is a certain contemporary impasse in the prosecution of war crimes.

Cet article examine l'état actuel des «crimes de guerre» en examinant en détail pourquoi la poursuite pour crimes de guerre a été frustrée pour la guerre Israeli - Hezbollah de 2006 au Liban. Quoique le mécanisme international pour faire le procès de crimes de guerre soit en place – surtout, la Cour pénale internationale – et que les moyens de documenter et de rendre publics de tels crimes aient été augmentés et soient devenus largement accessibles globalement, il est maintenant presque impossible de poursuivre les auteurs de crimes géopolitiques sur la scène mondiale. L'article concentre sur des questions légales relatives à la conduite d'une guerre (jus in bello) : comment la menace de poursuite pour l'utilisation excessive de violence peut affecter les divers «intérêts propres» tactiques et stratégiques des belligérants. En dernier lieu, il présente un argument pour quand les principes de proportionnalité (que la violence perpétrée était excessive et disproportionnée par rapport à la menace) peuvent l'emporter sur les principes d'équité (que les deux parties qui méritent d'être punis doivent être poursuivies) et évalue l'efficacité politique de poursuites dans un tel cas. Cette analyse met en lumière plusieurs paradoxes dans le domaine de la justice internationale en général, ou plus précisément le droit humanitaire international, et suggère qu'il y a une certaine impasse contemporaine quant à la poursuite pour crimes de guerre.

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I. INTRODUCTION

This article examines the state of “war crimes” today by thinking through why the prosecution of war crimes has been frustrated in the 2006 Israeli - Hezbollah War in Lebanon. It focuses on legal issues regarding the conduct of war (*jus in bello*), and critically analyzes how the threat of prosecution due to the use of excessive violence might affect the different tactical and strategic “self-interests” of the belligerents. Finally, it makes an argument in favour of when principles of proportionality may trump principles of equity, and assesses the political efficacy of prosecutions in this case. This war brings to light several paradoxes in the field of international justice generally, or international humanitarian law more specifically, and suggests a certain contemporary impasse in the prosecution of war crimes.

The war lasted for thirty-four days, from July 12 to August 14, in the summer of 2006, and pitted Hezbollah (Party of God) paramilitary forces against the state of Israel. In Lebanon it was dubbed the “July War”, in Israel the “Second Lebanon War”. But as this war was not primarily about either a period of time or about Lebanon, I prefer to call it, after its major belligerents, the Israeli - Hezbollah War.¹ Claiming to be responding to a raid on July 12 by Hezbollah forces into Israel, in which they abducted two Israeli soldiers and killed three others, and to a failed rescue mission in which five more soldiers were killed, Israel launched massive airstrikes and artillery fire on the Lebanese civilian infrastructure, an air and naval blockade, and a ground invasion of southern Lebanon.² During the conflict, 159 Israelis were killed, most of whom were soldiers. However, about forty-one civilians were also hit by some 4000 Katyusha rockets and mortars indiscriminately fired by Hezbollah forces from Lebanon into northern Israel. Another 997 were injured (seventy-five “seriously” and 115 “moderately”), and approximately 300,000 Israeli civilians were displaced.

On the other side, 1191 Lebanese were killed, nearly all civilians. One third of those killed were children under twelve, including about forty-three Lebanese soldiers and police, seventy-four Hezbollah and seventeen Amal combatants. Further, some 4,490 Lebanese were wounded, and

1 In this nomination, I am following many Lebanese scholars, in particular the legal scholar Chibli Mallat, who first used the term in an August 4, NY Times editorial: Chibli Mallat, “Who Is Really at War? The Patterns So Far,” *The New York Times* (4 August 2006).

2 The following facts are based on these reports: UN Human Rights Council, *Report of the Commission of Inquiry on Lebanon*, UNHRC, 3d. Sess., UN Doc.A/HRC/3/2 (2006) [UN Human Rights Council, *Report*]; “Lebanon: UN de-miners hurt as agricultural damage from conflict hits \$280 million,” UN News Center (27 November 2006), online: UN News Center <<http://www.un.org/apps/news/story.asp?destruction>>, or ‘Collateral damage?’ Israel attacks on civilian infrastructure,” Amnesty International (23 August 2006), online: Amnesty International <http://web.amnesty.org/library/index/engmde180072006>. “Under fire: Hizbullah’s attacks on northern Israel,” Amnesty International (14 September 2006), online: Amnesty International <http://web.amnesty.org/library/Index/ENGMD02052006>; “Timeline of the July War 2006” *The Daily Star* (10 November 2006), online: *The Daily Star* <http://www.dailystar.com.lb/July_War06.asp>; Reuven Erlich, “Hezbollah’s use of Lebanese civilians as human shields,” Intelligence and Terrorism Information Center for Special Studies American Jewish Congress (4 December 2006), online: American Jewish Congress <<http://www.ajcongress.org/site/PageServer?pagename=secret2>>. In late December 2006, I also visited the major sites in southern Beirut and southern Lebanon covered in the UN Human Rights Council report.

approximately 900,000 were displaced. Israeli attacks obliterated a few villages and sections of Beirut and Tyre, set some forests in the north afire, caused an estimated \$280 million in agricultural damage, and in targeting power stations and oil refineries, unleashed an oil slick in the eastern Mediterranean whose environmental damage is estimated to be \$64 million. There was also the July 25th airstrike on a U.N. peacekeeping post in Khiyam, leaving four United Nations Interim Force in Lebanon [UNIFIL] observers dead.³

Perhaps the most controversial of these attacks was the artillery units' use of white phosphorous shells (which cause painful and often lethal burns), and the air force dropping, indiscriminately in civilian areas, of at least 1800 cluster bombs containing 1.2 million cluster bomblets around the south of Lebanon. Neither weapon is banned by international law, but ninety percent of the bomblets were scattered north of the Litani River in the final seventy-two hours of the assault, in rich agricultural land outside the "Katyusha" range for targets within Israel.⁴ At the time of the U.N. brokered cease-fire that ended the armed conflict, more than 100,000 of these unexploded bomblets were causing and will continue to cause accidental deaths into the indefinite future.

The facts of this international armed conflict are well documented, and on the surface they constitute convincing grounds for several kinds of violations of the rules of war. Indeed, a three-member commission of the United Nations Human Rights Council [UNHCR], sent to Lebanon to probe charges of "systematic targeting and killing" of Lebanese civilians by Israel, concluded in a November 21, 2006 report that Israel was guilty of «excessive, indiscriminate and disproportionate use of force against Lebanese civilians

3 I have not included the massive and professional attacks on the Lebanese civilian infrastructure, most of which are arguably not war crimes per se but nonetheless important for my later argument of disproportionality. When the costs to the Lebanese economy for the entire bombardment are totalled, estimates go up to around \$7 billion. The major issue here, as discussed later, is why Israel continued its devastating air campaign, especially the use of cluster munitions, for punitive reasons alone, after it had already deployed its army, and after which it was already clear that only its army could penetrate the labyrinth of tunnels and underground sites from which Hezbollah launched missiles. During the campaign, Israel's Air Force flew more than 12,000 combat missions. The Navy fired 2,500 shells, and the Army fired over 100,000 shells destroying 400 miles of roads, 73 bridges and 31 targets such as Beirut International Airport, ports, water and sewage treatment plants, electrical facilities, 25 fuel stations, 900 commercial structures, up to 350 schools and two hospitals, as well as some 15,000 homes. Some 130,000 more homes were damaged. For an analysis along similar lines, see Wesley Moore, "A War-Crimes Commission for the Hezbollah - Israel War?" (2006) 13(4) Middle East Policy 61. Moore argues that the "facts," although generally agreed upon by many independent sources, are nonetheless not yet "evidence." Evidence, he argues, could only be established by an investigation of both sides for war crimes by an independent, high-level commission of inquiry with international experts on human rights law.

4 Nir Hasson and Meron Rapoport, "IDF admits targeting civilian areas in Lebanon with cluster bombs," *Haaretz*, (21 November 2006), online: Haaretz <<http://www.Haaretz.com>>. The *Interim Report* of the Winograd Commission, released on April 30, 2007, charged with examining the "preparation and conduct of the political and the security levels" in the campaign, restricted its findings to the period leading up to the war and to the first six days: Israel, Ministry of Foreign Affairs, The Interim Report of the Winograd Commission (Ministry of Foreign Affairs, 2007), online: Ministry of Foreign Affairs <http://www.mfa.gov.il/MFA/Government/Communications/2007/Winograd+Inquiry+Commission+submits+Interim+Report+30-Apr-2007.htm> [Winograd, *Report Interim*]. This limited focus alleviated the commission of assessing responsibility for major violations - the excess violence on which this paper focuses - of conduct in the 33 day war, much of which occurred during the last two days of fighting.

and civilian objects» in the war. At the same time, the Commission found evidence of Hezbollah “using UNIFIL and Observer Group Lebanon posts as deliberate shields for the firing of their rockets.”⁵ Moreover, international machinery exists in the form of the International Criminal Court [ICC]. The ICC was established in The Hague in 2002, as a treaty-based “court of last resort,” to prosecute such violations (after July 2002) in cases where national judicial systems are incapable or unwilling to do so.

However, it appears at present highly unlikely there will be a prosecution for the violations of either side.⁶ This is not simply because Israel, and its major supporter, the United States, have refused to participate in the Court or recognize its jurisdiction, or that Lebanon also has not acceded to the *Rome Statute* of the ICC, or that Hezbollah and its allies would resist any prosecution of its own actions, perhaps directly targeting witnesses and judicial officials. Many Lebanese and Israelis have dual citizenship, that is, citizenship in a signatory nation, which means that members of the Hezbollah forces or the Israeli military, members of so-called “objector nations,” could still be prosecuted or appear as plaintiffs before the ICC. In addition, there could be a prosecution on behalf of the UN peacekeepers “apparently deliberately target[ed]” in Khayam.⁷ The reasons for the lack of prosecution of war crimes must, therefore, lie elsewhere.⁸

5 The Commission’s mandate was limited to investigation of actions in Lebanon, though it recognized the importance of understanding “conduct... with reference to all of the belligerents.” It was not authorized to investigate the actions by Hezbollah in Israel, though it does report damage done within Israel (UN Human Rights Council, *supra* note 2 at 16).

6 That said, Lebanese MP Ghassan Moukheiber, head of the Parliamentary Committee on Human Rights, is chairing a committee determined to sue Israel for war crimes. Several lawsuits have already been filed against Israel in Belgium, Germany, Canada and the U.S. On December 1, the UN Commission suggested that Israel be made to pay compensation for damages, especially losses incurred by civilians, by setting up an international compensation program similar to the one which has paid out billions of dollars to cover losses due to Iraq’s 1990-91 invasion and occupation of Kuwait. As yet, Israel has paid nothing, though other countries have contributed what is called “aid.”

7 Kofi Annan cited in “Annan ‘shocked’ by Israeli attack on UN Lebanon post that killed at least 2,” *UN News center*, (25 June 2006) online: UN News center <<http://www.un.org/apps/news/story.asp?NewsID=19306&Cr=leban&Cr1=>>. In the leaked testimony of Prime Minister Ehud Olmert before the Winograd Commission, Olmert admitted that the attack on Khiam was of major concern, and the Commission, in turn, concluded that the Prime Minister’s actions during the war “add up to a serious failure in exercising judgment, responsibility and prudence.”

8 My analysis seeks to broaden the debate within both the legal-political and anthropological discourses on human rights violations. Neither discourse takes up the issues presented in this paper. The legal-political discourse tends to focus on the politics of trying war crimes and not on their nature. See Geoffrey Robertson, *Crimes against Humanity: The Struggle for Justice* (New York: New Press, 2003), Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2001), and Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003). Within anthropology, the focus has been either on war itself as a form of conflict or on human rights, without addressing human rights violations in the conduct of war. Among recent work, see Richard Wilson, ed., *Human Rights, Culture and Context: Anthropological Perspectives* (London: Pluto Press, 1996), and Raymond Kelly, *Warless Societies and the Origins of War* (Ann Arbor: University of Michigan Press, 2000).

II. CONDUCT IN A WAR AND COMMENCING A WAR

Rules to limit the type and extent of violence permissible in war are the oldest of judiciable wrongs in the international sphere, though their evolution has not been continuous.⁹ The statute that established the ICC makes war crimes part of a trilogy of human rights violations.¹⁰ It contains three articles: Article 6 regulating genocide, Article 7 regulating crimes against humanity, and Article 8 regulating war crimes. Article 8 is by far the lengthiest and most detailed of these. All three offences have been conceptualized as involving excessive violence of primarily state militaries, or groups modeled after them (for example, irregulars, guerrillas, militias), and because of their exceptionally heinous nature, they have no statute of limitations.

War crimes are not only the oldest of international offences, they also distinguish themselves from the others in that all groups, at least during any period of intense armed conflict, have a peculiarly strong self-interest in upholding the rules against them. Unlike the regulation of crimes against humanity and genocide, rules of war intend to limit the cruelty and destructiveness (egregious violence) that the enemy can legitimately inflict on oneself. Rules of war are about protecting oneself from the aggression of the other and not the other from one's own aggression. A secondary aspect of self-interest rests in the assumption that if the violence in armed conflict is limited in type and extent, then such conflicts will not expand, and reconciliation between the belligerents after the war is more likely. These self-interest motives should, theoretically, give war crimes a particular advantage over the other two types of human rights violations and lead to an international consensus on their regulation, but that is clearly not the case; their nature and the conditions under which such violence is actionable, in the legal sense, remain as essentially contested as ever.

For several reasons, my focus will be on legal issues regarding the conduct of war (*jus in bello*) and not on the legality of initiating war (*jus ad bellum*), although the laws of war cover both categories of offence. The Nuremberg precedent, strictly speaking, like the *Kellogg - Briand Pact* of 1928 before it, reinforced a belief that was not so foregrounded in the declarations of The Hague Conferences of 1899 and 1907, or the *Geneva Conventions* of 1929 and 1949: that one could hinder a conflict by identifying and prosecuting the party who commences a war. According to this belief, the supreme international crime is that of commencing a war of aggression, also sometimes called "crimes against peace", because it is the crime from which all war crimes follow; and, equally important, it is assumed that the threat of prosecution for commencing a war would prevent future wars.

First, the evidence from the last century overwhelmingly disproves these assumptions. All war crimes do not follow from the commencement of a war

9 For example, steady advancements in the regulation of war crimes are often followed by conflicts characterized by excessive cruelty and barbarity (e.g., the Crusades, the Thirty Years' War (1618-1648), World War I, and World War II), and then again followed by periods of renewed attention to regulation.

10 Rome Statute of the International Criminal Court, 17 July 1998, A/Conf.183-9 (entered into force 1 July 2002)

(for example, it is possible to commit a war crime through strategic assaults, such as the massacre of 9/11, without actually commencing a war or even intending to do so). And if, following the Nuremberg precedent, the threat of prosecution for such action had deterred future wars, then we would not have witnessed the sheer number and brutality of armed conflicts, and of recurrent wars, in the Cold War and post-Cold War periods. Especially since Nuremberg and the *Geneva Protocols*, examples of states, both weak and small, and of non-state groups initiating war are simply too numerous to support the hypothesis that the threat of prosecution has acted as a deterrent. To be sure, I am still of the opinion that we should support international efforts to prevent the planning, preparing, or initiating of wars of aggression. But there is little reason to expect the threat of legal prosecution for commencing a war to be a deterrent to armed conflict generally. This deterrent must come from a source, if not outside, then at least one not primarily dependent on law. The establishment of the ICC and its unique ability to threaten an international prosecution is unlikely to change this logic.

Second, except perhaps in new wars with little history of conflict among the belligerents, it is nearly impossible to establish fairly that one side alone is primarily responsible for commencing a war. In the case at hand, Israel and Hezbollah both claim, plausibly enough, that the other initiated the war and both can indeed legitimate their claims if one grants their respective periodizations of when the conflict began. Pointing to the immediate abduction of soldiers, Israel has a very good *prima facie* case that Hezbollah's actions forced it into an equally aggressive response. Alternately, however, Hezbollah's Secretary-General Sheikh Hassan Nasrallah claims the abductions were a response to four prior Israeli actions: occupation of the Shebaa Farms, violations of Lebanese sovereignty, holding of prisoners, and attacks on Lebanese civilians.¹¹ These claims may be, and usually are, dismissed as specious, but not because they are factually incorrect. Rather, they are disputed as to their significance in a chain of events over time. As with most long-running conflicts, the date of and responsibility for the origin of excessive aggression is subject to an infinite regress. In any conflict that endures, there is usually a point in time, and usually fairly early during the hostilities, when the victim also becomes an aggressor. For this reason, as in all long-running conflicts, it is not possible to arrive at a fair or just conclusion about who is solely or primarily responsible for commencing the war of 2006. Each claim regarding "commencement of armed conflict" is correct from its own perspective about the temporal sequence of events.

Third, to assess one party as being solely responsible for commencing a war is often used as justification by the (then recognized) victim group for not conforming to the rules about how to conduct war fairly. In this way, the question of the origin of the war serves to deflect one's focus from a question that can be subject to realistic assessment and legal regulation: not how to stop aggression but how to deter excessive violence. How, after an ongoing conflict becomes defined as a "war," might the threat of prosecution for war

11 Nasrallah's justifications for the abductions and the war that followed, like those of Israeli leaders, shifted over time. For a reliable source on the shifting legitimations on both sides, see Israel's leading English-language daily, *Haaretz*, online: <http://www.haaretz.com/>.

crimes subject the belligerents to legally binding rules specifically limiting the type and amount of permissible violence?

III. WAR CRIMES IN THE ISRAELI - HEZBOLLAH WAR

What are the alleged war crimes? The U.N. Commission of Inquiry report, cited above, concludes that the conflict was an “international armed conflict” (fulfilling the first condition of Article 8 of the statute that established the ICC), and that the “basic corpus of international humanitarian law” and “international human rights law” are applicable, specifically to Israel, Lebanon, and Hezbollah.¹² As required by its mandate, this U.N. Commission largely restricts itself to the damage Israel inflicted in this war. Nonetheless, it also finds evidence of Hezbollah violations. For neither side does it specify which war crimes specifically may apply.¹³ My purpose here is not to construct a case against either Israel or Hezbollah, but merely to establish that there is abundant evidence, outlined above in the first section of this article, as well as in the necessary statutes so as to make a war crime prosecution of both sides possible. To present some initial order, we can identify under Article 8 of the ICC statute minimally three war crimes that might apply to both Israel and Hezbollah, three that might apply primarily to Hezbollah, and six that might apply primarily to Israel.¹⁴

Of those crimes that apply to both:

Article 8 (2) (a) (iv) War crime of destruction and appropriation of property.

Article 8 (2) (b) (i) War crime of attacking civilians.

Article 8 (2) (b) (v) War crime of attacking undefended places.

Of those that apply primarily to Hezbollah:

Article 8 (2) (a) (viii) War crime of taking hostages: “The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.”

Article 8 (2) (b) (xxiii) War crime of using protected persons as shields: “The perpetrator moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict.”

12 In specifying only the necessity of a cross-border conflict and not what kinds of actors are involved, Article 8 of the statute establishing the ICC does not restrict prosecution only to conflicts between states but includes any person or persons, military or civilian, involved in “armed conflict.” Violations in internal conflicts for war crimes are typically limited to local (national) jurisdictions.

13 UN Human Rights Council, *supra* note 2 at 24-26.

14 ICC Statute, *supra* note 10 at Article 8.

Of those that apply primarily to Israel:

Article 8 (2) (a) (iii) War crime of wilfully causing great suffering.

Article 8 (2) (e) (iii) War crime of attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission.

Article 8 (2) (b) (iv) War crime of excessive incidental death, injury, or damage

“The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”

Article 8 (2) (b) (ix) War crime of attacking protected objects.

Article 8 (2) (b) (xi) War crime of treacherously killing or wounding: “The perpetrator invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict.”

Article 8 (2) (b) (xix) War crime of employing prohibited bullets.

IV. RELATING TACTICAL AND STRATEGIC SELF-INTEREST TO THE PROSECUTION OF WAR CRIMES

We return, then, to our central paradox: at the very moment when the international machinery for trying war crimes has been set up-above all, the ICC-and when the means of documenting and publicizing such crimes have expanded and become widely accessible globally, it is nearly impossible to prosecute major geopolitical perpetrators on the world stage. It is, at the same time, proving entirely possible to prosecute perpetrators from geopolitically marginal conflicts, such as Yugoslavia, Rwanda, the Democratic Republic of Congo, Uganda, Liberia, and Sudan. But prosecutions are stymied of the active belligerents within the geopolitical center, a broadly defined Middle East-that is, the United States in Afghanistan and Iraq, Russia in Chechnya, and Israel and Hamas in the occupied Palestinian territories, or Israel and Hezbollah in Lebanon.

The obvious structural reason for this paradox is one of self-interest, and it has limited analytic utility: those in positions of power tend to escape justice, irrespective of the category of crime allegedly committed or the jural system in which they operate. The powerful states control, if not the rules, certainly the conditions of their enforcement, and they have sufficient incentives to offer or punitive possibilities to exact compliance, or silence, from their allies, and enable them to escape accountability for international crimes. According to this logic (which the current administrations in the U.S., Russia, and China all embrace), a self-interest motive is compelling because, first, one might be powerful enough to go it alone, second, the international machinery can and might be used unfairly against superpowers, and third, one might need the flexibility to violate international norms in order to gain an advantage over

enemies perceived to be more ruthless (and criminal) than oneself.

While the merits of unrestricted national sovereignty and self-realization in obtaining immediate tactical advantages in war are debatable, this go-it-alone logic is seriously flawed strategically over the long term, as it ignores how self-interest is always defined in an inter-subjective process over time. Since long-term balances in types of power are unpredictable and subject to reversals, it might be wise to support institutional stability at the international level in order to minimize the effects of contingent, unplanned events. Yet, the term “self-interest” in the conduct of war tends to be deployed only in a tactical sense—with the assumption of autonomous actors in a short time frame—in part because strategic interests appear, by comparison, speculative. Who can predict the long-term consequences of victory or defeat in a war? Both Hezbollah’s provocation and Israel’s response were predicated on assumptions of tactical advantage with no serious regard for long term relations between neighbours. As the possibilities for self-delusion are infinite, delusions about self-determination often assert themselves over reality checks, especially when a recognition of reality requires the integration of imagined long-term relations with others into one’s own immediate self-interest.

V. RATIONALIZED INDULGENCE IN THE CONDUCT OF WAR

This confusion about self-interest leads to a related paradox: that the apparent moral progress, historically in the definition and acceptance of the legal category “war crimes”, since the Nuremberg trials after World War II is not in any way matched by a lessening of the brutality of means, the cruelty and destructiveness of action, in war. This framing may appear to be a mere repeat of the “Dialectic of the Enlightenment” argument of the Frankfurt School,¹⁵ but let us ask more methodically what this dialectic might mean if indeed it is integral also to the historical logic of war crimes.¹⁶

The evidence seems to suggest that there exists an inverse relationship of violence to such legal progress in specifying war crimes, in that moral advances in the consciousness of regulation of violence foster perverse effects, like the devious deployment of cruelty, and the simultaneous self-deceptive repression and rhetorical rationalization of wishes to debase the other through excessive injury. These cruel wishes are, then, notwithstanding rational agreement on moral regulation, acted out when conditions permit. Contemporary examples

15 Max Horkheimer & Theodor W. Adorno, *Dialectic of Enlightenment*, trans. by John Cumming (New York: Continuum, 1972 [1944]). See William E. Conklin, “The Legal Theory of Horkheimer and Adorno” in (1985) 5 Windsor Y.B. Access Justice.

16 The primary hope of Nuremberg was the prevention of war and not the regulation of its conduct. Still, there have been subsequent advances in regulating the conduct of war and in making excessive violence illegal, such as the Universal Declaration of Human Rights in 1948, and the Geneva Convention on the Laws and Customs of War in 1949, with its supplementary protocols in 1977. For arguments about the increased brutality in modern war, see George Kassimeris, ed., *The Barbarization of Warfare* (London: Hurst & Company, 2006); Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (New York: Random House Inc., 1998); Richard Falk, Irene Gendzier, and Robert Jay Lifton, eds. *Crimes of War: Iraq* (New York: Nation Books); Roy Gutman and David Rieff, eds. *Crimes of War: What the Public Should Know* (New York: W.W. Norton & Company, 1999).

of this kind of indulgence in war are legion. For example, what do we make of the increasingly brutal behaviour of the militaries of the two Cold War superpowers and their non-state opponents: the U.S.'s indefinite detainment and torture of suspects in the War on Terror, its use of waterboarding and sexual humiliation in Abu Ghraib in Iraq, as well as Iraqi insurgent beheadings of Western mercenaries and bodily mutilation of civilians; not to mention the brutality of Russian bombing, killing, torture, and abductions in Chechnya, as well as the barbarity of the Chechen resistance in the Moscow theatre hostage crisis and the Beslan school siege. In both of these cases, rationalized cruelty parallels moral progress in defining the limits of the use of violence in the conduct of war.

What about Israel and Hezbollah? The U.N. Commission of Inquiry report of late November 2006, accuses Israel of lack of respect for the "cardinal principles of armed conflict: ... distinction, proportion, precaution", and of "collective punishment of Lebanese civilians" for Hezbollah attacks. It specifically takes Israel to task for the damage to "civilian infrastructure," arguing "that damage inflicted on some infrastructure was done for the sake of destruction"; and for the use of cluster munitions which, while not illegal per se, amount "to a de facto scattering of anti-personnel mines across wide tracts of Lebanese land ... to act as a major impediment to the return of IDPs [internally displaced persons] and refugees, as well as threatening the lives and livelihoods of those who have chosen to return."¹⁷ As well, the explicit goal stated by the Israeli Defense Force of the "removal" of Hezbollah, or of "Hezbollah strongholds," presupposes the possibility of separating Hezbollah forces from the civilian population, whereas the so-called "strongholds" were in fact civilian spaces. For example, the Beirut residential suburb of al-Dahiya was a dense residential space with both Hezbollah Party organizations and markets, apartment buildings, mosques, and the like.¹⁸

Israel's response to the charge of indiscriminate and disproportionate use of force has been equivocal. On the one hand, it quickly fired one general, set up an internal State Commission of Inquiry to assess its own behaviour, and prepared a legal staff to advise and defend the individuals who were responsible for the attacks in Lebanon. On the other hand, Israel's rhetorical defence has been to insist on total innocence, and that because Hezbollah deliberately operated within civilian areas, its own attacks against Hezbollah targets in populated areas were of "military necessity" and therefore not a violation of international law.

Additional support for this defence, documenting Hezbollah's tactics,

17 UN Human Rights Council *Report*, *supra* note 2 at 5. Because cluster bombs by nature explode indiscriminately, and are therefore likely to harm civilians when used in densely populated areas, their use by Israel in the past has been controversial. Israel had (mis)used them in its 1982 invasion of Lebanon, after which the Reagan administration banned their export to Israel for six years.

18 For anthropological accounts, on Hezbollah, see Augustus Richard Norton, *Hezbollah: A Short History* (Princeton: Princeton University Press, 2007); on Hezbollah and the war, see Laura Deeb, "Hizbullah Strongholds' and Civilian Life," *Anthropology News*, (October 2006), 10. The Winograd *Interim Report*, *supra* note 4, while not referring specifically to these facts, does support this critical perspective, affirming that from the start the plans were "not set out clearly and carefully, [and the goals] over-ambitious and not feasible".

especially those of hiding among civilians, came in early December 2006, in the form of a 300-page report with videos authored by Reuven Erlich, a retired lieutenant colonel who now heads the Intelligence and Terrorism Information Center, which has close ties with the Israel Defense Forces [IDF] and maintains an office at the Defense Ministry. Erlich specifically asserted that his report “could offer a response to allegations of human rights organizations on why the Israel Defense Forces operated in civilian areas.”¹⁹ Hezbollah’s counterargument, in the words of Nasrallah, is that because “Zionists behave like there are no rules and no red lines... it is our right to behave in the same way.” Both sides offer in effect the same weak argument: that they are justified in engaging in war crimes because the other side is engaging in them, too, and not to engage in these crimes would be to grant the other side a tactical advantage in war. Much as an automobile driver cannot legally exceed the speed limit because the cars in front of him do, the fact that Israel or Hezbollah disobey the law does not waive the other’s obligation to obey.²⁰

VI. EQUITY VERSUS PROPORTIONALITY

If both sides are correct in their accusations of war crimes (and the available evidence supports the claims of both belligerents), then the principle of equity requires that both sides be prosecuted for their conduct in this war. Although the current geopolitical configuration makes any prosecution unlikely, in an ideal world of justice the principle of equity in prosecution is a precondition for justice. But given that we must act and decide under non-ideal circumstances, the question that follows is: Does this impasse with regard to equity of prosecution (that both parties deserve punishment) always trump the principle of proportionality (that the violence deployed was excessive and disproportionate to the threat)?

To talk of the principle of proportionality requires, in this case, a comparison of excessive brutalities and relative threats. This is an unpleasant task, but it would be irresponsible, even cowardly, to merely conclude that this conflict was one of equally wrong belligerents engaged in equally excessive violence in response to an unchanging and equal threat; in which case, to

19 Yuval Yoaz, “IDF general leaving post over pre-war Hezbollah kidnappings” *Haaretz*, (12 December 2006), online: *Haaretz* <http://www.haaretz.com/hasen/pages/ShArtVty.jhtml?sw=IDF+lebanon+discipline&itemNo=797160http://haaretz05/12/2006>. Even before the end of the hostilities, on July 30, Kenneth Roth of Human Rights Watch had explicitly rejected this defence, “Just because the Israeli military warned the civilians of Qana to leave does not give it carte blanche to blindly attack. It still must make every possible effort to target only genuine combatants. Through its arguments, the Israeli military is suggesting that Palestinian militant groups might ‘warn’ all settlers to leave Israeli settlements and then be justified in targeting those who remained”. “Israel Responsible for Qana Attack: Indiscriminate Bombing in Lebanon a War Crime,” Human Rights Watch (30 July 2006), online: Human Rights Watch <<http://www.hrw.org/english/docs/2006/07/30/lebanon13881.htm>>.

20 Three weeks after the cease-fire ending the war, the Israeli Foreign Ministry set up a special legal team to provide protection for officers and officials involved in the conflict. Associated Press, Jerusalem, “Israel fears war crimes prosecution after Lebanon war,” *The Associated Press* (4 September 2006), online: International Herald Tribune <http://www.iht.com/articles/ap/2006/09/04/africa/ME_GEN_Israel_War_Crimes.php>.

be fair either both or neither should be prosecuted.²¹ A closer look at the argument of proportionality in light of strategic self-interest might recast the equity argument in more relative terms.

Given the asymmetrical nature of the power between Israel and Hezbollah - a powerful militarized state versus a small militarized social movement - might not the strategic self-interest motives of the more powerful party to uphold international norms for moral conduct and refrain from war crimes be stronger? If Israel, as the militarily stronger party, upholds the rules of war, is it more likely that Hezbollah will also have an interest in doing so? Yes. This follows because, not only is Israel capable of inflicting more damage on Hezbollah than Hezbollah on Israel, but also the international community can in reality put much more pressure on Hezbollah to refrain from aggression (e.g. withdrawal of funds or weapons) than it can on Israel (which has its own economy and weapons production system, much less to speak of its nuclear threat). Hezbollah is often seen as a mere puppet of Iran and/or Syria (without which it would presumably collapse), while Israel rarely defers to the authority of its major benefactor, the United States. In short, Hezbollah compliance with the rules of conduct in war is in the interests of Israel, and such compliance might follow merely from Hezbollah's weakness vis-à-vis Israel.

The argument about restraint does not work in both directions, however. Hezbollah restraint alone will not increase the likelihood that Israel restrains from excessive violence. Ultimately Israel counts on its military superiority, and it enjoys relative impunity from punishment for its behaviour in wars with its Arab (or Persian) neighbours. Nor is Israel likely to reward Hezbollah in some way for upholding the international norms that limit the violence it can inflict on Israel. Hezbollah, for its part, only came into existence in 1982 as a militia precisely to inflict violence on Israel in south Lebanon during what Israel dubbed the "First Lebanon War." It was a response to an Israeli invasion (the intent of which was to eliminate attacks on Israel by Palestinian refugees who had been displaced from Israel), and over time thought of itself as taking the place in the south of the Lebanese state, which could not pose a threat sufficient to force Israel to end the occupation. In 2000, Israel suddenly withdrew, and today Hezbollah, of course, takes primary credit for this end. My point is that Israel existed without an enemy on its northern border for over twenty years (Israelis, in this period, used to even vacation in Lebanon), and Israel would seem to have a compelling self-interest in eliminating the conditions that gave rise to and sustain Hezbollah.²²

21 Human Rights Watch, which had issued a report during the conflict that criticized Israel for its indiscriminate use of violence against civilians, has been the object of particularly vicious attacks. See "Fatal Strikes: Israel's Indiscriminate Attacks Against Civilians in Lebanon," *Human Rights Watch* (3 August 2006) online: Human Rights Watch <<http://www.hrw.org/reports/2006/lebanon0806/>>. Kenneth Roth, director of Human Rights Watch, was accused of everything from Jew-hating to "blood libel." See the defence of HRW by Aryeh Neier, former head of HRW, Aryeh Neier, "The Attack on Human Rights Watch," *New Review of Books* 53 (17), (2 November 2006).

22 Since forming in 1982, Hezbollah has attacked Israeli targets worldwide. The end of the Israeli occupation, in 2000, did not stop its attacks on Israel. It then competed in elections, gaining fourteen seats in parliament and two cabinet posts. Israel holds the Lebanese state responsible

In point of fact, the behaviour in this last war contradicts this logic of asymmetrical restraint: Israel behaved as if its self-interest is neither to calculate the proportionality of the threat, nor to refrain from excessive violence, nor to address the conditions that sustain Hezbollah forces. By contrast, Hezbollah, perhaps fearing complete destruction, neither used its longest range missiles nor became more aggressive as the war continued. Perhaps this was because Hezbollah merely lacked the means to do the same thing as Israel. Certainly both sides stated openly their wish to inflict maximum pain on the other.

Yet the behaviour of Israel is distinctive in that it suggests a fully conscious, unambiguous flaunting of the rules of conduct in war. Israel directly bombed not only infrastructure that could be used by Hezbollah, but also ambulances, medical facilities, Red Cross vehicles and relief personnel, fleeing groups of refugees, refugee centers, cultural and archaeological sites, churches and mosques. It bombed not only Hezbollah targets but engaged in thirty direct attacks on UN peacekeepers, UNIFIL, and Observer Group Lebanon positions. The IDF mass abducted people with the last name of "Nasrallah," and even rebombed the city of Qana, a site where the IDF had massacred refugees in a UN center during the First Lebanese War. And then there was the order to "flood," as one Israeli soldier reported, the south with cluster bombs after plans for the cease-fire had already been finalized and preparations for withdrawal were well underway.²³

The pattern of brutality here is not uncommon in war: As a conflict endures and the enemy does not go away, the violence of the warriors and the rhetoric of their leaders become more extreme. Frustrated by its inability to destroy Hezbollah's military capabilities, which, camouflaged underground, could not be seen from the air, Israel was forced into comprehensive use of ground troops in search-and-destroy missions. At the same time, it continued the useless and indiscriminate air assault, expanding the types of targets and weapons deployed. In this mess, on the verge of retreat or even defeat that they could not admit to themselves, the Israelis exacted a final price and did it quickly, in the last seventy-two hours, before withdrawing its troops and returning to civilization, which is certainly where they eventually want to be-to rules of restraint, and to the laws regulating aggression in war. This resort to excessive and disproportionate violence before the end was, in fact, rational and consistent with one major goal of Israeli policies since 1982: to make south Lebanon uninhabitable for now in order to create a larger buffer zone on Israel's northern border.²⁴

for Hezbollah's attacks (and the failure to disarm it, mandated by a United Nations Resolution). UN Security Council Resolution 1559, issued on September 2, 2004, coauthored by France and the United States, called on all "foreign forces to withdraw from Lebanon" and "for the disbanding and disarmament of all Lebanese and non-Lebanese militias," including the military wing of Hezbollah. On January 23, 2006, the UN Security Council called on Lebanon to make more progress in controlling its territory and disbanding its militias. Hezbollah's relation with the Lebanese state - both a part of and a force subverting the state's authority - complicates its relations with other Lebanese parties and political organs and explains, in part, the inability of the Lebanese state to disarm it.

23 "Shooting without a Target", *Haaretz* (18 September 2006) online: Haaretz <<http://www.haaretz.com/hasen/spages/762427.html>>.

24 The idea of the buffer zone as official Israeli policy dates back to the first occupation of south Lebanon. For a short history of this idea, see Joshua Mitnick, "A buffer zone in Lebanon? A

According to this logic, Israeli use of excessive violence did in fact have a strategic, long-term interest, of controlling and structuring the future of Lebanon so as to maximize its own security. And it resorted to this violence only after being frustrated in its immediate goals: of retrieving its abducted soldiers without giving up any prisoners itself, soon supplemented by the rationale of turning Lebanon's population against Hezbollah so that other Lebanese would eliminate that part of themselves the Israelis identify as an adversary. But the violence unleashed in pursuit of this interest had the perverse effect, from the Israeli perspective, of uniting large segments of Lebanese society with the fate of Hezbollah (and silencing others). The Interim Report of the Winograd Commission, while avoiding any talk of excessive violence or military conduct, said as much, focusing directly on the policy failure to make immediate goals serve long-term interests through a military campaign. The Report leaves unquestioned, however, the kind of future imagined by Israel's warriors and the public who supported them - Israel as an autochthonous island surrounded by adversaries.

The buffer zone argument proves crucial to the imagination of the future, but it is of limited explanatory power to explain conduct that includes the commission of war crimes. Each year brings improvements in weapon technologies, so that while Hezbollah missiles of today may not reach Tel Aviv and Jerusalem, who doubts that these limitations will hold in a few years? And didn't this massive destruction of things that are Lebanese both elevate the status of Hezbollah among the Lebanese, specifically, and among Arabs and Muslims, generally, guaranteeing the production of a future generation of anti-Israeli fighters? This future was, of course, not only about the buffer zone, Hezbollah, and the Lebanese, but also about the Israelis themselves, about preserving an image of themselves as invulnerable, and therefore to secure some kind of "victory" at all costs before leaving.

By comparison, Hezbollah's terror of Israel, specifically the hiding of its forces in civilian areas, the cross-border abduction of soldiers, and the indetermination of its targets - where will its rockets and mortars land? - also constitutes war crimes. But the issue of the proportionality of violence to the threat is relevant here, and it relativizes the issue of equity of prosecution. The responses of the two belligerents were not at all proportionate to each other's aggression, and as the conflict progressed the Israeli response became excessively violent and increasingly disproportionate to the relative threat.

To be sure, Hezbollah's abduction of Israeli soldiers was a grave miscalculation. Nasrallah himself admitted that he did not anticipate the way Israel would respond. In the past both sides had periodically engaged in abductions, eventually resulting in prisoner exchanges. But in this case the abduction became the trigger for war, with Israeli leaders assuming that Hezbollah could not survive its superior assault weapons. Hezbollah did survive, however, and in the public opinion of the Arab world if not of Europe and America, it won this round of conflict, this war. It did not "win", however, because it inflicted more damage on Israel and forced it to retreat. Hezbollah

flashback many Israelis don't like," *Christian Science Monitor*, (7 August 7, 2006), online: *Christian Science Monitor* <<http://www.csmonitor.com/2006/0807/p10s01-wome.html>>.

won because of how it survived in its conduct of the war: by holding back some of its arsenal. It did not use the longer-range missiles it supposedly possessed. It did not target Tel Aviv, Israeli refugees, Red Cross officials, or sacred sites. Nor did it use poisons or cluster bombs or the like against Israeli troops. In other words, Hezbollah's response, its lobbing of mostly cheap Soviet- and Iranian-made rockets onto the Israeli civilian population, while certainly criminal, was proportionate to the threat, and proportionately a lesser crime.

Despite its official rhetoric insisting on the elimination of the state of Israel, Hezbollah was reckoning with the continued existence of its neighbour, and kept open the possibility for peaceful coexistence. That is, Hezbollah's violence in this war was in the spirit of a sacrifice that risked the immolation of all of Lebanon and all Lebanese in order to inflict damage on Israel, but it did not aim to annihilate Israel. Israel's violence, by contrast, had no element of self-sacrifice; it was directed initially against all "Hezbollah strongholds" - meaning most of the Shi'a population of the south - but soon extended to all Lebanese in the assumption that the annihilation of Hezbollah and destruction of Lebanese infrastructure would save Israeli lives in the future. So, at this point, the conclusion to be drawn about the prosecution of war crimes is that the insistence on equity (to be fair one must prosecute all guilty parties) should not always trump the argument of proportionality (the violence inflicted must not be excessive but relative to the threat). That is, justice demands in principle that Israel be prosecuted regardless of the status of a potential prosecution of Hezbollah.²⁵

VII. THE POLITICAL EFFICACY OF PROSECUTION FOR WAR CRIMES

This leads us to a final paradox arising from this war, about the political efficacy of prosecution for war crimes in creating justice. Why engage in the contentious prosecution of the conduct of war if such action is likely to be ineffectual? Such prosecution would be efficacious if it led, minimally, to any one of three conditions: to better regulation of the justifications for and conduct of war; to more measured use of force in war; or to improved conditions for peace after the conflict has ended.²⁶ A legal prosecution, then,

25 A similar argument of equity is dismissed in the "Limaj Judgment." See Prosecutor *v.* Limaj, Bala, Musliu (2005), Case No. IT-03-66-T (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991). The tribunal argued that prosecution of members of the Kosovo Liberation Army was permissible for "crimes against humanity," despite the fact that both sides deployed similar tactics (specifically the targeting of civilians) in this inter-national armed conflict.

26 The best research on the efficacy of prosecution for international human rights violations concerns Nazi Germany. Although most of these trials have been for genocide or crimes against humanity, not for war crimes, questions of their merit apply for all three kinds of violations. While such trials can and are evaluated from many perspectives, their perhaps most important and enduring legacy is the historical record established. See the excellent review of recent historical literature on Nazi trials and their impacts by Norman J.W. Godu, "Law, Memory, and History in the Trials of Nazis" (2006) 28(4) *International History Review* 798. For a comparative theoretical perspective on the place of legal trials in establishing accountability, see John Borneman, *Settling Accounts: Violence, Justice, and Accountability in Postsocialist Europe* (Princeton Studies in Culture/

is a relative goal to achieve an end, not an end in and of itself. And, as few wars today are merely for and about a narrow set of belligerents, efficacy of prosecution for conduct is contingent on many actors within a regional political dynamic.

What would a prosecution of Israel and/or Hezbollah for war crimes do? Trials cannot, after all, bring back lives, or undo destruction. But they can, perhaps, contribute to trust in a legal system and bring about some version of justice. Long-term peace, according to the logic of the post-Westphalian state system, is contingent on trust in the rule of law, that is, in deferral of conflict resolution to the official instruments of justice, considered superior due to, e.g., the predictability of law's application, the nonarbitrary interpretation of legal statutes, and the regularized and impartial enforcement of law. Equity is a key element in building trust. But trust is difficult to create without equity. And it is precisely the lack of equity in prosecuting all those presumed guilty that often, at least in the short term, produces perverse effects. Prosecutions considered one-sided foster cynicism; they result in groups turning inward (including increased public support for whichever strong man or woman is in power); or they can even destabilize political systems, which increases the likelihood of uncontrolled violence.

Justice systems within the larger Middle East are not particularly trusted; they are neither well known for their impartiality, nor for their ability to retain much independence from the executive branches of government. Political systems in the Middle East generally maintain stability more by sheer force than the threat of law. For both belligerents, Israel and Hezbollah, the issues of jurisdictional level and trust in a legal verdict are central. A prosecution of Israelis for war crimes, without a concurrent prosecution of Hezbollah, may serve as an issue to unite the Israelis further against the entire system of international justice, especially so when Israelis are engaging in an internal debate, albeit largely restricted to political organs, about their conduct in the war. Since the ICC is charged with prosecution only in those cases where national judicial systems refuse or are unable to act, it may be best at present to merely support the internal forces for justice in Israeli society and refrain from any attempt to threaten Israelis with external punishment. On the other hand, the threat of prosecution alone may facilitate a process of internal judicial investigation into war crimes, if not prosecution for them. A judicial intervention can cut either way.²⁷

A prosecution of Hezbollah for war crimes now, even with a concurrent

Power/History, Princeton: Princeton University Press, 1997); on legal trials among other processes that might lead to reconciliation, see John Borneman "Reconciliation after Ethnic Cleansing: Listening, Retribution, and Affiliation," (2002) 14(2) Public Culture, 281-304, and John Borneman, "Why Reconciliation: A Response to Critics," (2003) 15 (1) Public Culture, 197-206; on monetary restitution, see John Borneman "On Money and the Memory of Loss," (2002) 6(2) Etnográfica, 281-302.

27 The attempted politicization of such trials appears inevitable, yet, as the trials for Nazi crimes during the Cold War-international, in Israel, the Federal Republic of Germany, and the German Democratic Republic-suggest, the effects of such politicization can be fought (and spin counter-balanced). See the study by Anette Weinke, *Die Verfolgung von NS-Tätern in geteilten Deutschland: Vergangenheitsbewältigung 1949-1969: oder: Eine deutsche Beziehungsgeschichte im Kalten Krieg* (Paderhorn: Schoeningh, 2002).

prosecution of Israel, would also be unlikely to produce trust among its followers in the international legal system or make conditions for peace more propitious. The Israeli assault, by strengthening Hezbollah's position and claim to leadership within internal Lebanese politics, has in fact tremendously destabilized Lebanon's already fragile political system.²⁸ It has created awareness and sympathy for the demands of Hezbollah's followers for more political inclusion within Lebanon, and it has increased the status and solidarity of Shi'a followers of Islam vis-à-vis their generally more conservative Sunni counterparts throughout the Arab world. Any prosecution of Hezbollah would likely exacerbate and harden the Lebanese sectarian fault lines, already frayed by the attempt, internationally organized, to prosecute those suspected of assassinating in 2005 the former Prime Minister Rafiq Hariri, a Sunni Arab. In response to a prosecution for war crimes, Hezbollah forces may target witnesses and prosecutors for assassination, much as it appears Syria has assassinated Lebanese public figures who dare to voice criticism of its role in Lebanon (including its alleged role in the murder of Hariri).²⁹ Should there be a prosecution, Lebanon's democratic reform movement from the "Cedar Revolution" of 2005 would likely further splinter, leading to a strengthening of Syria's control over Lebanon's diverse domestic constituencies-the inverse of the intent of the reform movement, and, in this case, of Israel. Without political stability, the stability of judicial organs is precarious, and without cooperation between the two - the executive must enforce judicial decisions - there can be no trust, or, one might say, satisfaction, in what prosecutions can or do achieve.³⁰ The state of war crimes, in this case, is at an impasse.

28 See Shibley Telhami, "Lebanese Identity and Israeli Security in the Shadows of the 2006 War" Current History 21. A Lebanese public opinion poll Telhami conducted with Zogby International in November 2006 suggests that all sects agree that if anyone won the war it was Hezbollah, although Hezbollah's popularity after the war increased only among the Shi'a population. Telhami concludes that this war has increased sectarian polarization, which portends instability and is not in the interest of Israeli security.

29 See Detlev Mehlis, *Report of the International Independent Investigation Commission established pursuant to Security Council Resolution 1595 (2005)* UNICC (2005). Detlev Mehlis of Germany, appointed in May of 2005 to head the UN Commission to investigate Hariri's murder, issued two Reports before stepping down on December 15, 2005. A number of assassinations of Lebanese public figures critical of Syria occurred during his term. He was replaced by Serge Brammertz of Belgium, who continues the investigation as of this writing.

30 For example, it is difficult to construct an argument that the trial of Saddam Hussein has contributed to trust in the rule of law. In fact, his trial seems to have contributed to the general destabilization of Iraq. The attempted prosecution of Ariel Sharon in Belgium for the Sabra and Shatila massacre also seems to have had the immediate effect of strengthening support for him among Israeli Jews, while having little effect on creating any legal trust that might lead to resolving the conflict with Palestinians generally (see John Borneman, "Introduction: The Case of Ariel Sharon and the Fate of Universal Jurisdiction," in Borneman, ed., *The Case of Ariel Sharon and the Fate of Universal Jurisdiction* (Princeton: Princeton Institute for International and Regional Studies Monograph Series, 2004). This is not an argument against the prosecution of war crimes *per se*, however, but for a consideration of the many structural reasons why such prosecutions are so fraught with difficulty. These reasons include 1) the rules of war are partly laid down in written treaties between states for which there is no effective enforcement, 2) these rules consist partly of unwritten "international" customs subject to widely varying cultural interpretations (the problem of cultural/legal pluralism), and 3) the lack of agreement about the definition of war is exacerbated today by the problem of asymmetry between belligerents and the difficulty of defining them in contemporary conflicts. Many such conflicts are caused or perpetuated by the aggression of non-state actors in unstable groups who are not signatories to any treaties.