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Doomed to Be Violated - The U.S.-Israeli Clandestine End-User Agreement and the Second Lebanon War: Lessons for the Convention on Cluster Munitions

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DOOMED TO BE VIOLATED ?

THE U.S.-ISRAELI CLANDESTINE END-USER AGREEMENT AND THE SECOND LEBANON WAR: LESSONS FOR THE CONVENTION ON CLUSTER MUNITIONS

EITAN BARAK*

Israel's extensive cluster munitions (CMs) use in the 2006 Second Lebanon War served as a major impetus for the 2008 Convention on CMs (CCM). It also led to an extensive U.S.-Israeli diplomatic entanglement over Israel's supposed violations of U.S. legislation, specifically the 1976 classified Bilateral End-User Agreement detailing Israel's use of U.S.-made CMs. The Article first tracks the Agreement's inception and the diplomatic crises caused by Israel's alleged breach since then. The second section provides a detail account of the 2006 crisis while the third analyzes if U.S. legislation was violated. The Article concludes, using a flexible interpretation, that in effect U.S. legislation was not violated and argues that given its out-dated stipulations the Agreement was doomed to be violated under a formal interpretation. More importantly, given the restrictions imposed on Israel by the Agreement, this case provides a unique opportunity to assess the rationale behind the refusal of CCM supporters to accept anything but a total ban on CMs.

Only after the war did we, Amir [Amir Peretz, Israel's 2006 Wartime Minister of Defense] and I, first learn about the use of cluster bombs . . . the responsible echelons in the IDF [Israel Defense Force] refused to provide me with the maps [of the strike locations]. They wanted to hide the fact that we had fired this problematic weapon . . . without any higher authorization and in an uncontrolled manner, although they were old munitions which the Americans had provided us following assurance that we would use it only in case our very survival was at stake.[1]

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1. *See* Akiva Eldar, *Captured in Conception*, HAARETZ, Friday Supplement, July 18, 2008, at 21, 24 (recollection of Hagai Alon, a former political adviser of Peretz).

I. INTRODUCTION

In summer 2006, amidst intense fighting, accusations appeared in the international media claiming Israel's use of cluster munitions (CMs)[2] in Lebanon was illegal.[3] Yet the world's outcry was raised in the war's aftermath, with Israel suddenly finding itself under heavy attack.[4]

However, while the government's initial formal response stressed that "strenuous efforts were made to ensure that these [IDF operations] were carried out in complete accordance with international law, both with regard to method and weaponry,"[5] on November 19, 2006 the then IDF Chief of Staff Lt. Gen. Dan Halutz *surprisingly chose a completely different response* stating that the use of cluster bombs often constituted a *clear violation of his explicit order not to fire into populated zones*.[6]

As expected, Halutz's announcement took the Israeli public by surprise and caused bitterness among Israeli war veterans who felt that they had followed all orders when firing.[7] An artillery officer (reservist) was quoted saying: "Did he [Halutz] really say that . . . . We fired not a single rocket on our own initiative. No one would have ever considered firing at any target without explicit orders to do so."[8]

The queries over Halutz's statement given its unequivocal connotation (i.e., the IDF was an unruly army which did not follow orders) as reflected in the Israeli press became more frequent and vocal. However, neither the Israeli public nor the international community was aware that Halutz's admission was made in an attempt to appease the U.S.; the U.S. State Department had already begun an

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2. *See generally* Nout van Woudenberg, *The Long and Winding Road Towards an Instrument on Cluster Munitions*, 12 J. OF CONFLICT AND SEC. L. 447, 450-54 (2007) (defining cluster bombs as "weapon[s] comprising multiple explosive submunitions [i.e., bomblets] which are dispensed from a container" and are "munition[s] designed to be dispensed in multiple quantities from a container and to detonate prior to, on, or after impact.").

3. *See, e.g.*, Press Release, Human Rights Watch (HRW), Israeli Cluster Munitions Hit Civilians in Lebanon (July 24, 2006) (*available at* http://hrw.org/english/docs/2006/07/24/isrlpa13798_txt.htm); Robert Pear, *Rally Near White House Protests Violence In Mideast*, N.Y. TIMES, Aug. 13, 2006, at A22.

4. *See* Marvin Kalb & Carol Saivetz, *The Israeli-Hezbollah War of 2006: The Media as a Weapon in Asymmetrical Conflict*, 12 THE INT'L J. OF PRESS/POLITICS. 43, 51 (2007) (noting that some leading U.S. newspapers portrayed Israel as the aggressor).

5. ISR. MINISTRY OF FOREIGN AFFAIRS, Behind the Headlines: Legal and Operational Aspects of the Use of Cluster Bombs (Sept. 5, 2006), *available at* http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Legal+and+operational+aspects+of+the+use+of+cluster+bombs+5-Sep-2006.htm.

6. *See, e.g.*, Nir Hason & Meron Rapoport, Chief of Staff is to Appoint a Major General to Inquire into Use of Cluster Rockets, HAARETZ, Nov. 20, 2006, at A1; Yossi Joshua, IDF Fired Cluster Bombs Contrary to the Chief of Staff's Order, YEDIOT AHARONOT, Nov. 20, 2006, at 2 (referring to Halutz's announcement, which was reported on November 19 via the major Israeli TV evening news programs and appeared the day after in daily national newspapers).

7. *See, e.g.*, Meron Rapoport, Peretz's Office Admits 'Irregularities' in Use of Cluster Bombs During War, HAARETZ, Nov. 21, 2006, at 2.

8. *See* Meron Rapoport, *A Barrage of Accusations*, HAARETZ, Dec. 8, 2006, at B2.

inquiry into Israel's use of U.S.-made cluster bombs prior to his admission.[9] Israel's concern was not due to the seemingly pertinent U.S. legislation: The 1952 U.S.-Israeli Mutual Defense Assistance Agreement (hereinafter the 1952 Agreement) under which Israel may employ U.S.-made weapons if they are "'used solely to maintain *its internal security*, its legitimate self-defense . . ."[10] and the 1976 U.S. Arms Export Control Act (AECA), which governs use of U.S.-made defense equipment and services by foreign nations and under which the U.S. may stop aid to countries that use U.S. military assistance for purposes other than "'legitimate self defense."[11]

On December 16, 1976 a bilateral end-use agreement specifying conditions for the use of U.S.-made cluster bombs by Israel was concluded between the two allies.[12] The agreement is so highly classified that even 30 years later the two states continue to keep its exact terms secret:"[O]ftentimes it [the end use agreement] gets into rules of engagement for specific countries and those themselves are usually classified or tightly held by the foreign national government."[13]

Today, with the crisis behind us and the participants (the Olmert Government and the Bush Administration) leaving center stage, it is a good time to explore this affair within its current context. In December 2008, 94 states signed *the Convention on Cluster Munitions* (CCM) in Oslo, Norway,[14] which prohibits the

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9. David S. Cloud, *Inquiry Opened Into Israeli Use of U.S. Bombs*, N.Y. TIMES, Aug. 25, 2006, at 1.

10. Exchange of Notes Constituting an Agreement Between the United States of America and Israel Relating to Mutual Defense Assistance, U.S.-Isr., art. 2, July 1-23, 1952, 1953 U.N.T.S. 2363, (providing participation in U.N. collective security agreements as a third allowed purpose but not defining terms such as "internal security," "legitimate self-defense," or "act of aggression") (emphasis added).

11. Arms Export Control Act, 22 U.S.C. § 2754 (1976). *See also* 22 U.S.C. § 2753 (1976) (outlining presidential and Congressional response options to violations under this act); *see* RICHARD F. GRIMMETT, U.S. CONG. RESEARCH. SERV., RL 30982, U.S. DEFENSE ARTICLES AND SERVICES SUPPLIED TO FOREIGN RECIPIENTS: RESTRICTIONS ON THEIR USE, (Mar. 14, 2005), CRS1-4 (providing a brief overview of the act); Foreign Assistance Act of 1961, As Amended, Pub. L. No. 87-195, § 502, 75 Stat. 424 (authorizing the provision of defense articles and services on a government-to-government grant basis in provisions virtually identical to those in the AECA).

12. *See* CONG. REC., 12030 (May 1, 1978), *cited in* WILLIAM ESPINOSA & LES JANKA, DEFENSE OR AGGRESSION? U.S. ARMS EXPORT CONTROL LAWS AND THE ISRAELI INVASION OF LEBANON 16 (American Educational Trust Rep., 1982) (citing a letter dated April 20, 1978 and written by Israel's Ambassador to the U.S., Simcha Dinitz (1973-79) during the 1978 crisis over the use of U.S.-made CMs in Lebanon that was later introduced into the Congressional Record by Paul N. McCloskey, Jr. of California).

13. Sean McCormack, U.S. Dep't. of State Daily Press Briefing (Jan. 29, 2007), *available at* http://2001-2009.state.gov/r/pa/prs/dpb/2007/jan/79467.htm (justification provided by Assistant Secretary for Public Affairs and the State Department spokesperson at the time).

14. ClusterConvention.org, Convention on Cluster Munitions Signing Conference (2008), http://www.clusterconvention.org/pages/pages_iv/iv_signingconferece.html (noting that four states also ratified the CCM at the same time: The Holy See, Ireland, Norway and Sierra Leone); *see generally* ClusterConvention.org, Ratifications and Signatures (2008), http://www.clusterconvention.org/pages/pages_i/i_statessigning.html (listing the signatories to the CCM). As of Nov. 1, 2009 103 states have signed the the Convention from which 24 states have already ratified it. An updated list of

use, development, production, stockpiling, and transfer of CMs.[15] The CCM represents the culmination of the Oslo Process which spearheaded five international conferences between February 2007 (Oslo, Norway) and May 2008 (Dublin, Ireland).[16]

In contrast, due to the total ban adopted by the CCM in 2007, several major countries that stock and/or use CMs, led by the U.S., initiated another multilateral process. The new process called for the regulation of, rather than a complete ban of, CMs thorough a series of legally binding restrictions initiated under the auspices of the 1980 UN Convention on Certain Conventional Weapons (CCW).[17] In the face of international outcries over the absence of any legal restrictions on CMs, various restrictions were proposed in the (sixth) draft Protocol on CMs; these were believed to adequately address the need to dramatically minimize the likely post-conflict harm associated with such weapons.[18]

At the time of its extensive use of CMs in the 2006 War, Israel was actually subject to legal restrictions far more stringent than those proposed by the current draft protocol ("Draft Protocol"). The source of these restrictions was, however, quite different: a bilateral end-user agreement (with subsequent assurances and clarifications)[19] and not a multilateral agreement.

Ratifications and Signatures is *available at* http://www.unog.ch/80256EE600585943/(httpPages) /67DC5063EB530E02C12574F8002E9E49?OpenDocument).

15. *See* Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, U.N. Doc. CCM/77 (May 30, 2008) (will be ratified six months after its ratification by 30 States ratification), *available at* http://www.clusterconvention.org/downloadablefiles/ccm77_english.pdf (comprising separate articles that refer to assistance to victims, clearance of contaminated areas, and destruction of stockpiles) [hereinafter, CCM]; *see generally* Priya Pillai, *Adoption of the Convention on Cluster Munitions*, 12 ASIL Insights (Oct. 1, 2008), http://www.asil.org/insights081001.cfm (providing a brief overview of the CCM's provisions).

16. ClusterConvention.org, Calendar of Events, http://www.clusterconvention.org/pages/ pages_iii /iii_calendar.html (last visited September 18, 2009) (indicating the other three conferences were held at Lima, Peru (May 2007), Vienna, Austria (December 2007), and Wellington, New Zealand (February 2008) in addition to a large number of regional meetings that were held to promote signing of the CCM between March 2007 (South East Asia) and November 2008 (Beirut, Lebanon)). For the most comprehensive and updated overview and analysis of this process see John Borrie, *Unacceptable Harm: A History of How the Treaty to Ban Cluster Munitions Was Won* (United Nations, 2009. forthcoming).

17. *See* United Nations Convention on Certain Conventional Weapons, 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, Oct. 10, 1980, 19 I.L.M. 1523; *see generally http://www.unog.ch/80256EE600585943/(httpPages)/4F0DEF093B4860B4C1257180004B1B30? OpenDocument* (referring to the CCW as the Inhumane Weapons Convention and noting that there are currently 110 parties to the CCW, some of which have not ratified all the protocols, and five signatories).

18. *See* Draft Protocol on Cluster Munitions, Oct. 21, 2009, CCW Doc. CCW/MSP/2009/WP.1. The draft was presented by Gustavo Ainchil, Chairperson of the CCW Group of Governmental Experts (GGE) for the consideration of the issue in the 2009 Meeting of the States Parties (Geneva, 12-13 Nov. 2009), item 10 of the provisional agenda, under his personal responsibility *available at* http://www.unog.ch/80256EE600585943/(httpPages)/BF4E78AA321C4B4EC12573CF005D0136?Ope nDocument [hereinafter, Draft Protocol].

19. THOMAS NASH, FORESEEABLE HARM 4 (Richard Moyes ed., Land Mine Action 2006).

This Article is divided into three parts. Part One briefly sketches the background of the 1976 Agreement and its history leading up to the 2006 War. Since Israel used CMs in all of its post 1976 large-scale conflicts (i.e., 1978, 1982, 2006), the Article explores U.S. attempts to strengthen the Agreement following Israel's first round of CM use in Israel's 1978 invasion of Lebanon, by adding an additional, more detailed classified legal instrument. An overview of the sanction (suspension) imposed on Israel, following its second round of CM use in the 1982 Lebanon War, concludes this part.

In Part Two, the Article focuses on the U.S.-Israel entanglement following Israel's extensive CM usage in 2006. It begins with an account of the IDF's unprecedented response to U.S. criticism analyzing the U.S. State Department's inquiry and the manner in which the Bush Administration managed the crisis by successfully concluding it despite escalating pressure from Human Rights NGOs and the international media.

The first two parts provide the background necessary for the Article's main thrust: an in-depth legal analysis of whether U.S. legislation in general and the bilateral agreement in particular were violated during the Second Lebanon War. Furthermore, given the similarity between International Humanitarian Law's (IHL) requirements and U.S. demands vis-à-vis Israel, an inquiry into the aggregated stipulations of all pertinent U.S. instruments addressed by Israel implies addressing, in part, whether Israel's extensive CM use complies with international law in general and IHL in particular. This analysis in Part Three suggests that in applying flexible interpretation, Israel did not likely violate the 1976 Agreement. In contrast, under formal and strict methods of interpretation, such an agreement, given its outdated stipulations and clarifications *was doomed to be violated.* In fact, had Israel escaped its ever-growing dependency on the U.S., it could have invoked the doctrine of *rebus sic stantibus.*[20]

Moreover, the restrictions imposed on Israel by the bilateral end-user agreement are similar to those introduced in the newly proposed CCW Protocol. Thus, regardless of the outcome of the U.S. initiative (creating a new CM protocol), the 2006 Israeli use in the context of the 1976 Agreement provides a unique opportunity to assess the rationale behind the refusal of CCM supporters to accept anything less than a complete ban on CMs. Salient conclusions as to the CCM's importance, beyond the legal issues, close the Article.

II. A HISTORY OF THE 1976 U.S.-MADE CLUSTER AGREEMENT (UP TO THE SECOND LEBANON WAR)

A. Origins of the 1976 U.S.-Made Cluster Agreement

In the 1950s, Israel began developing an aerial-dropped CM. In fact the first

20. *See generally* Detlev F. Vagts, *Rebus Revisited: Changed Circumstances in Treaty Law*, 43 COLUM. J. TRANSNAT'L L., 459, 470-71 (2004-2005) (discussing the doctrine of rebus sic stantibus as recognized in the Vienna Convention on the Law of Treaties).

casualty (March 1954) suffered in EMET[21] resulted from a live CM test and the improper care of a dud's fuse.[22] Yet no mass production line was established at the time.

In the face of mounting incidents on the Israeli-Egyptian front in the wake of the 1967 Six Day War, Israel repeatedly requested that the U.S. provide it with the modern U.S.-made CMs used during the Vietnam War. Its efforts were, however, to no avail.[23] When the intensity of armed incidents reached the level justifying their formal classification as a War of Attrition, Israel's need for CMs became more urgent.[24] Because the U.S. refused to provide Israel with this "sensitive weapon"—as the U.S. defined CMs—despite its necessity to attack the Egyptian anti-aircraft batteries that were limiting Israeli Air Force (IAF) freedom of operation, Israel was left with no choice but to begin master production of modern CMs.[25] Israel therefore initiated a crash program[26] in 1970, which resulted in the remarkable development of a highly advanced aerial-dropped CM known as Tal-1 (a 550lb bomb containing 279 bomblets).[27] However, because the War of Attrition ended on August 7, 1970, shortly after the first—"highly successful"—use of the weapon on June 8, 1970 (*Operation Baldness 75*), this indigenous CM was barely used in this war.[28]

While technical problems prevented Israel from mass-producing this weapon, the mere realization that Israel could establish an indigenous CM manufacturing industry was sufficient to convince the Nixon Administration to drop its objections and provide CMs to its ally. The first shipments of U.S.-made CMs (such as the CBU-7/A, which contains 1200 bomblets) to Israel arrived in the War's aftermath

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21. *See* Munya Mardor (A), RAFAEL 57-160 (1981) for a discussion by EMET's chief administrator and the founding director of RAFAEL regarding EMET's short history (1952-1958) and the transformation of EMET (a Hebrew acronym for Division of Research and Planning) into RAFAEL (a subdivision of the Ministry of Defense, in Hebrew, Armament Development Authority Advanced Defense Systems Ltd.).

22. *See* Munya Mardor (B), *RAFAEL,* in THE DEFENSE INDUSTRIES: RESEARCH, DEVELOPMENT AND DEFENSE PRODUCTION 1, 26-28 (Nathan Roee ed., 1982) for a detailed description of this incident; *see* Mardor (A), *RAFAEL, Id,* 143-5 (explaining that the bomb was known as Z-15, for the seventh letter in the Hebrew alphabet).

23. *See* Danny Shalom, Phantoms Over Cairo – Israeli Air Force In The War Of Attrition (1967-1970) 838 (Bavir Aviation & Space Publications 2007).

24. *See* Mardor (A), *RAFAEL, supra* note 21, at 215-16 (noting that the War of Attrition officially began in March 1969 and ended in August 1970, although intensive incidents occurred already in late 1967, and that the intensive use of armament, especially aerial arms, resulted in, for example, a ten-fold jump in some types of ammunition, such as 100kg gravity bombs: 4000 during 1969 to 40,000 in 1970).

25. *See* Shalom, *supra* note 23, at 837-38.

26. *See* Alan Hayman, Bombs and Unguided Rockets: Low-Cost-Ordnance for Aerial Warfare, 41 MILITARY TECHNOLOGY (1982), cited in Kevin Danaher, *Israel's Use of Cluster Bombs in Lebanon,* 12 J. OF PALESTINE STUDIES, 48, 51 (1982).

27. *See* Shalom, *supra* note 23, at 837 (providing a detailed specification of Tal-I); *see* Mardor (B), *RAFAEL, supra* note 22, at 76 (noting that at that time, this was a remarkable achievement which even won its development team the 1971 prestigious *Israel Defense Prize* for exceptional technological breakthroughs).

28. *See* Shalom, *supra* note 23, at 1141.

and during the 1973 War, additional urgent shipments of CMs were requested and approved.[29] By 1975, Israel had received approximately 22,000 U.S. CBU units.[30]

Although Israel used US-made CMs against Palestinian bases in Lebanon during March-April 1974, the only reported restriction imposed by the U.S. was that "the weapons not be used against civilian populations."[31] Even the January 1975 Ford Administration decision to sell 200 Lance cluster warheads missiles (MGM-52) to Israel had no effect on this slack restriction.[32] However, in October 1976, President Ford granted Israel's request for "a small number" of CBU-72[33] that, although listed as CMs, attracted considerable attention because they were in fact Fuel-Air Explosive [FAE] bombs, referred to as "enhanced blast munitions" by some experts[34] but more often as simply "concussion bombs."[35] Interestingly, under both the CCM and the Draft Protocol, CBU-72s are not considered CMs.[36] Concussion bombs disperse an aerosol cloud of fuel that, once ignited, produces a highly destructive shock wave. Those in the explosion area face being crushed by the blast or killed by having air sucked out of their lungs due to the vacuum created by the explosion.[37] Because of its potential severe collateral damage and its devastating impact on combatants, this weapon caused much concern in the international community, reflected in the 1976 proposal to ban "anti-personnel use of weapons which for their effects rely exclusively on shock waves in the air."[38]

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29. *See* Leslie H. Gelb, *Arms Aid to Israel May Cost $2-Billion*, N.Y. TIMES, Oct. 18, 1973, at 97 (noting the urgent supply obtained during the 1973 War).

30. *See* Don Oberdorfer, *Cluster Bomb Curbs Sought in Mideast*, WASH. POST, Apr. 13, 1978, at A1.

31. ADAM ARNON, LAND OF LEBANON 312 (2005) (discussing Israel's CM use in March-April 1974); *see* Lee Lescaze, *U.S. to Give Israel Devastating Bombs*, L.A. TIMES, Oct. 13, 1976, at B15 (discussing the loose restrictions prior to December 1976).

32. *See* CHRISTOPHER CHANT, A COMPENDIUM OF ARMAMENTS AND MILITARY HARDWARE 501-2 (Routledge & Kegan Paul Inc.) (1987) (explaining that lance missiles had only cluster warheads containing 836 bomblets each in their non-nuclear version); John W. Finney, *Israel to Receive 200 U.S. Missiles*, N.Y. TIMES, Jan. 24, 1975, at 6 for a discussion of Ford's decision after nearly four years of Israeli lobbying; YIGAL LEV, ARTILLERY CORPS 143 (1981) for Israeli accounts of their reception; William Beecher, *U.S. Said to Weigh Sending Israel Short-Range Missiles,* N.Y. TIMES, Nov. 25, 1971, at 3 for a discussion of Israel's request as early as 1971.

33. *See* David Binder, *President Cancels Israeli Bomb Sale*, N.Y. TIMES, Feb. 18, 1977, at 11; *see also* Diplomacy: Time to Meet the Players, TIME, Feb. 21, 1977.

34. *See, e.g.*, Erich Prokosch & Ernst Jan Hogendoorn, *Antipersonnel Weapons*, *in* 65 WAR OR HEALTH? A READER 75 (Ilkka Taipale et al., eds., 2002).

35. *See, e.g.*, Bernard Gwertzman, *Ford Move on New Arms to Israel Is Termed Political*, N.Y. TIMES, Oct. 14, 1976, at 3.

36. Draft Protocol, *supra* note 18, at art. 2, ¶ 2(d)(i) (requiring at least ten "explosive sub-munitions"); CCM, *supra* note 15, at art.2, ¶ 2(c)(i) (also requiring at least ten "explosive sub-munitions").

37. For more on the first generation of FAE weapons see, e.g., SIPRI, ANTI-PERSONNEL WEAPONS 171-175 (1978). For reasons to ban this weapon see, e.g., Ove Bring, *Regulating Conventional Weapons in the Future – Humanitarian Law or Arms Control?*, 24 J. OF PEACE RESEARCH, 275, 278-280 (1987).

38. *See* International committee of the Red Cross, Conference of Government Experts on the Use of Certain Conventional Weapons, Annex A.1, 167 (1976), *available at* http://www.loc.gov/rr/frd/

Despite Israel's declaration that the FAE bombs were needed for "destroying minefields, neutralizing ground-to-air missiles site, and smashing concrete fighter plane revetments"[39] the Ford Administration sought a concrete commitment that this weapon, then considered an advanced CM, would not be used against civilians and some military targets.[40] The IDF would thus have to pledge "to drop them only in certain cases."[41] On December 5, 1976, Shimon Peres, then Israel's Minister of Defense, flew to Washington to secure advance weapons, including CMs.[42] On December 16, 1976 the cited classified end-use agreement was secretly signed.[43]

Formally, other than the fact that it contains "stipulations and conditions on the use of CBU's,"[44] the agreement's exact terms remain classified.[45] However, various U.S. officials have suggested that in addition to the basic requirement (grounded in the AECA and the 1952 Agreement) of "legitimate self defense," Israel is required to meet three additional criteria before resorting to using U.S.-made CMs: (a) a war must be in progress; (b) the weapon is to be used against "military, fortified targets";[46] and (c) these targets are to be Arab armies.[47]

Although President Ford promised Peres that he would advise the newly elected President Carter to confirm the weapons supply to Israel,[48] two months later, on February 17, 1977, Carter canceled his predecessor's decision and declared that the CBU-72 bombs might even be withdrawn from U.S. arsenals.[49] Israel's statement that "it had committed itself late last year not to employ the bombs as anti-personnel weapons" did not dissuade Carter, whose position was final.[50]

B. Israeli Use of CMs in the 1978 Litani Operation and the U.S. Response: Clarifications

In March 1978, the first diplomatic crisis over the use of CMs materialized

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Military_Law/ pdf/RC-conf-experts-1976.pdf.

39. Binder, *supra* note 33.

40. Finney, *supra* note 32.

41. *See* Nissim Kiviti, *U.S. Will Limit the Use of Shock Bombs*, YEDIOT AHARONOT, Oct. 17, 1976, at 1, 8 (in Hebrew). It should be noted that Kiviti's sources are U.S. Congress members.

42. See Dan Margalit, *Rumsfeld to Peres: The Pentagon Has Ended its Examination of the Weapons Deal*, HAARETZ, Dec. 16, 1976, at 1 for Israeli press reports on the visit.

43. See ESPINOSA & JANKA, *supra* note 12, for the date of signing.

44. RICHARD MOYES & THOMAS NASH, CLUSTER MUNITIONS IN LEBANON 7 (Simon Conway ed., Landmine Action 2005) (quoting a letter sent by Ezer Weizman, Israel's Minister of Defense, to congressional leaders in May 1978); David Wood, *Israel Said to Violate Rules on Bombs' Use*, L.A. TIMES, July 14, 1982, at A1.

45. *See* McCormack, *supra* note 13.

46. *See* Oberdorfer, *supra* note 30.

47. Bernard Gwertzman, *Israelis Renew Pledge to Curb Cluster Bombs*, N.Y. TIMES, May 13, 1978, at 1. See Cloud, *supra* note 9, at A1, for the stipulations; MOYES & NASH *supra* note 44, at 9.

48. *See* Yeshayahu Ben-Porat, *Minister of Defense Upon His Return from Washington: The Motion in the Pentagon: Favorable to Israel*, YEDIOT AHARONOT, FRIDAY MAGAZINE, Dec. 17, 1976, at 1. It should be noted that Ford's decision was perceived as politically motivated. *See, e.g.*, Binder, *supra* note 33; Gwertzman, *supra* note 35.

49. Binder, *supra* note 33.

50. See *id.*, for Israel's Embassy Spokesman response.

within less than 15 months of the signing of the agreement when Israel invaded South Lebanon (*the Litani Operation)* following a deadly terrorist attack.[51] A March 20, 1976 media report about Israel's aerial attack using CMs lead Congressman Paul N. McCloskey Jr. (R-CA) to call President Carter inquiring if the 1952 Agreement had been violated.[52]

Faced with the press reports and CIA confirmation of Israel's CM use, which was delivered to the members of Congress on April 5, the Carter Administration had no choice but to report that Israeli violations of the 1952 Agreement "may have occurred."[53] A U.S. State Department spokesperson later explained that discussions were being held with Israel "to assur[e] that those restrictions . . . be observed in the future."[54] According to Israeli press reports, the then-U.S. Secretary of State, Cyrus Vance, sent a clear message to Moshe Dayan, Israel's Minister of Foreign Affairs, demanding "a renewed and clear commitment not to use cluster bombs save in a war in which Israel was attacked."[55] A week later, Israel was forced to consent to "'new and tighter restrictions" through an exchange of notes dated April 10 and 11, 1978 (hereinafter the 1978 Notes).[56]

Nevertheless, the 1978 terms were, in essence, similar to the 1976 Agreement: Israel was permitted to employ the weapon against "regular forces of a sovereign nation" and in "special wartime conditions."[57] Yet, in a clear response to that current crisis, the 1978 Notes defined the terms of use. "Special wartime conditions" were defined "as equal to or exceeding the level of conflict during the 1967 and 1973 Middle East Wars, when Israel was fighting two or more nations."[58] Furthermore and most importantly given the 2006 entanglement, the 1978 Notes stipulated that "cluster bombs cannot be used in or adjacent to areas of civilian populations." [59] Finally, Israel provided assurance "that Israel[i] field commanders will not employ these weapons without a decision by politically responsible

51. *Background Note: Lebanon*, Jan. 2009, Dep't St. Publ'n, *available at* http://www.state.gove/r /pa/ei/bgn/35833.htm (last visited October 11, 2009).

52. Bernard Gwertzman, *U.S. Says Israelis in Lebanon Used Cluster Bombs, Breaking Pledge*, N.Y. TIMES, Apr. 8, 1978, at 1, 4. The Assistant Secretary of State for Congressional Relations, Douglas J. Bennet, was forced to admit that it was "... a use contrary to previous assurances given to us." *See* Gwertzman, *supra* note 47, at 4.

53. MICHAEL F. BROWN, ARMS EXPORT CONTROL ACT: ISRAELI BREACHES & U.S. INDULGENCE RESULT IN PALESTINIAN & LEBANESE CIVILIAN CASUALTIES 6 (The Palestine Center 2008), *available at* http://thejerusalemfund.org/ht/a/GetDocumentAction/i/3061; Grimmett, *supra* note 11, at 6; ESPINOSA & JANKA, *supra* note 12, at 16.

54. Oberdorfer, *supra* note 30, at A17.

55. *U.S. Demands Israel Provide Assurances to Restrict Dropping Cluster Bombs*, DAVAR, Apr. 14, 1978, at A1.

56. MOYES & NASH, *supra* note 44; Oberdorfer, *supra* note 30.

57. MOYES & NASH, *supra* note 44, at 9 (quoting George Skelton, *Cluster Bombs for Israel Held Back*, L.A. TIMES, Jul. 20, 1982, at 1).

58. *Id.*

59. *See* Wood, *supra* note 44, at 10; Charles Mohr, *'78 Pact Said to Limit Israeli Use of Cluster Bombs*, N.Y. TIMES, June 30, 1982, at A12.

superiors [Israel's Minister of Defense]."[60] With such clarifications and specific stipulations the 1978 Notes were far from a mere Israeli reaffirmation of its 1976 commitment.

With that said, the strain in the bilateral relations dissipated within weeks and, in fact, in his report to Congress, Vance stated that "no action was contemplated to deprive Israel of further military equipment."[61] The reasons for this Israeli diplomatic success would become relevant to the 2006 crisis.

Israel, in addition to admitting to a breach of the 1976 Agreement, issued a formal apology and promised no further violations would occur.[62] It was later revealed that Ezer Weizman, Israel's then-Minister of Defense, pleaded ignorance of the use of CM weapons as well as the existence of the 1976 Agreement; he blamed the entire incident on the failure of the IDF Chief of Staff Mordechai Gur to update him appropriately.[63] To the Israeli press, Weizman claimed: "They have a case and I told them so. Had I known about the existence of the letter of commitment, I would have considered the matter differently . . . . In such a case, truth is the best thing."[64] Consequently, as the Administration informed Paul N. McCloskey, Jr. regarding its request for renewed Israeli assurances, the State Department had expressed "strong concern . . . that effective procedures be instituted to ensure that the assurances given . . . are known and effective in the context of Israeli decision-making."[65] Nonetheless, *realpolitik* played an important role in the U.S. consent, as Vance clearly stated in his report: Israel's promise to withdraw from Lebanon (in compliance with U.N. Security Council Resolution 425)[66] and its efforts "to restore movement in the peace negotiation" were behind the decision not "to deprive Israel of further military equipment."[67]

Within a year, on August 7, 1979, the Carter Administration again reported to Congress that Israel may have violated U.S. law by using U.S.-supplied arms during its raids into Lebanon.[68] This time, the weapons in question were U.S.-made aircraft and artillery, which were deployed inside South Lebanon.[69] Israel

60. Oberdorfer, *supra* note 30. The source of this sensitive information – leaked as background of the 1982 crisis over the same issue – seems to have been Paul N. McCloskey, a frequent critic of Israel. Nevertheless, the Israeli press reported that the U.S had requested that "Israel undertake to avoid using cluster bombs in a non real war cases." Avner Tavori, *Israel to Promise the U.S. to Limit the Use of Cluster Bombs to A Real War*, YEDIOT AHARONOT, Apr. 17, 1978, at 2.

61. Gwertzman, *supra* note 52, at 4.

62. *Id.* at 1; Danaher, *supra* note 26, at 52.

63. Weizman's explanation was made known from a letter which had been sent approximately one month following the U.S. letter, i.e., mid May. MOYES & NASH, *supra* note 44, at 8; Danaher, *supra* note 26, at 52.

64. Eitan Haber, *Weisman: Hoping to Return to Cairo in the Next Days* [interview], YEDIOT AHARONOT, Apr. 21, 1978, at 1, 4.

65. The Letter was sent by Bennett to McCloskey, who made it available to the N.Y. Times. *See* Gwertzman, *supra* note 47, at 4.

66. S.C. Res. 425, ¶ 2, U.N. Doc. S/RES/425 (Mar. 19, 1978).

67. Gwertzman, *supra* note 52, at 4.

68. Bernard Gwertzman, Vance Asserts Israel May Violate Pact by Using U.S. Jets in Air Raids, N.Y. TIMES, Aug. 8, 1979, at A1.

69. *Id.*

announced that its use was in self-defense; future use and use of American weapons would be more carefully supervised.[70] Although CMs were not involved on this occasion, it was clear that this incident, coupled with the April 1978 reassurances, meant that should the CM issue arise once more, mediating the likely ensuing strain in relations would be much harder.

C. Israel's Use of CMs in the 1982 Lebanon War and the U.S. Response: Suspension

The 1982 crisis over the use of U.S.-made Cluster bombs seemed almost inevitable given the scope and intensity of fighting that broke out between Israel and the Palestinian militias and between the IDF and the Syrian army during the 1982 First Lebanon War.[71] Subsequent to a July 2 news report from Beirut on Israeli use of U.S.-made CMs (confirmed by the technical data and serial numbers on the duds found),[72] it was almost impossible for the U.S. Administration to restrain from applying sanctions to Israel.[73]

On July 15, as a CIA report on Israeli CM was being circulated in Congress, the Reagan Administration delivered a confidential letter to Congressional leaders reporting that a "'substantial violation"' by Israel of the AECA "'may have occurred."[74] The letter, while mentioning specific U.S. weapons, did not explicitly note the CMs because no Israeli clarifications had been received despite repeated State Department "requests."[75] Israel's response, delivered later that day, acknowledged CM use but stated that its use was "within the conditions laid down

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70. *See, e.g., id.*; Oberdorfer, *supra* note 30; Ron Ben-Yeshi, *Vance, We May Take Measures If Israel Keeps Operating Weapons from U.S. in Lebanon*, YEDIOT AHARONOT, Aug. 8, 1979, at 3, for more on this incident.

71. Indeed, Israeli CMs mainly targeted Syrian infantry and armored forces in the area of the Beirut-Damascus highway and Palestinian camps in the southern outskirts of Beirut. *See* David B. Ottaway, *Israel Said to Deny Misuse of Bombs*, WASH. POST, July 19, 1982, at A1, A19.

72. The reporter was the famous *London Times* Middle East correspondent, Robert Fisk. For Fisk's reflections on his intensive efforts to collect as much evidence as possible on Israel's use of U.S.-made CMs, see ROBERT FISK, PITY THE NATION 277-78 (Thunder's Mouth Press/Nation Books 2002) (1990). Already in June 30, 1982, however, President Reagan voiced concern over reports on Israeli use of CMs, saying that the U.S. "is reviewing the question" whether its law were violated. *See* Jack Nelson, *Reagan Denies Giving Israelis a 'Green Light'*, L.A. TIMES, July 1, 1982, at B1.

73. During a Congressional hearing on June 21, 1982, Senator Paul Tsongas (D-MA) warned Israel of a harsh response. *See* Bernard Weinraub, *Senate Panel Increases Lebanese Aid Proposal*, N.Y. TIMES, June 22, 1982, at A8. The then Israeli P.M. Menachem Begin received a testy lecture by the Chairman of the House Foreign Relations Committee, Clement Zablocki, on this subject. William Chapman, *Zablocki Says Arms Pledge Broken in Israeli Attack*, WASH. POST, June 22, 1982, at A14. For news reports affecting congressmen at that time, see William Branigin, *'Dirty War' in Lebanon Is Causing a Backlash Against U.S*, WASH. POST, June 21, 1982, at A19.

74. Ottaway, *supra* note 71, at A1; Hedrick Smith, *U.S. is Holding up Shipment of Arms Ordered by Israel*, N Y. TIMES, July 17, 1982, at A4. It is important to note that besides CMs, the entire question of U.S.-supplied arms used by Israel was raised due to the 1952 Agreement and the AEAC's conditions. *Id.* at 4. As Zablocki was quoted in Smith, *Id.*: "I can't by any stretch of the imagination see how using planes, tanks and artillery deep in the territory of another country is defensive."

75. Eleanor Randolph, *Israel Answers U.S. on Use of Cluster Bombs*, L.A. TIMES, July 18, 1982, at A1, A7.

in the sale of U.S. arms": i.e., only for defensive purposes and against military targets solely.[76] Moreover, Syria's intervention had turned the confrontation into a "full-scale war."[77]

Nevertheless, on July 19, after succumbing to pressure from Congress and the Pentagon at a time when Senator Charles H. Percy, then Chair of the Senate Foreign Relations Committee, described bilateral relations as "at an all-time low,"[78] Reagan suspended the shipment of artillery-delivered CMs to Israel, scheduled for that same day.[79] The suspension—for which Israel blamed U.S. Secretary of Defense Caspar Weinberger—troubled Israel, which publicly announced its concern over ". . . this trend of punishing Israel whenever disagreements between the two states arise."[80]

On July 28, Reagan extended this suspension "indefinitely";[81] the move was criticized by some congressmen as a "minimal" or "inadequate" response to the violation.[82] Israel found some comfort in the fact that Reagan's decision was political rather than legal,[83] but given the importance it ascribed to securing a continuous supply of CMs, high priority was given to indigenous production of artillery-delivered CMs: firing tests were conducted already in 1982 and by 1984 a sufficient arsenal had been built.[84]

Yet, in the summer of 1986, eight senior Israeli officials were subpoenaed by a Federal Grand Jury investigating an illegal attempt to export American technology for manufacturing artillery-delivered CM.[85] After the affair subsided,

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76. Ottaway, *supra* note 71, at A1.

77. Report of Israel's government-run radio, *as cited in id. See also* Bernard Gwertzman, *Israelis Concede and Defend Use of Cluster Bomb*, N.Y. TIMES, July 19, 1982, at A1, A7. For the text of this governmental announcement, delivered on July 18, 1982, in the Israeli press, see Arie Zimoki & Joshua Halmis, *Jerusalem is Waiting for Reagan's Moves,* YEDIOT AHARONOT, July 18, 1982, at 1, 7.

78. Gwertzman, *supra* note 77, at A7.

79. *See* Michael Getler, *President Halts Shipment Of 'Cluster' Shells to Israel*, WASH. POST, July 20, 1982, at A1; George Skelton, *Cluster Bombs for Israel Held Back*, L.A. TIMES, July 20, 1982, at B1.

80. Zeev Barak, Jerusalem: Suspension of Cluster Bombs—The Victory of Weinberger's Approach, YEDIOT AHARONOT, July 20, 1982, at 1, 6.

81. Formally, the July 28th State Department statement mentioned only artillery-delivered CMs and indeed the shipment contained 4,000, 155mm CM shells for Israel's 155mm howitzers. However, as Israel by that time had manufactured its own air-delivered CM, it was tantamount to a total ban on CMs supplied to Israel. *See* Judith Miller, *U.S. Bars Cluster Shells for Israel Indefinitely*, N.Y. TIMES, July 28, 1982, at A16; GRIMMETT, *supra* note 11, at 5.

82. *See* Eleanor Randolph, *U.S. Halts All Cluster Bomb Aid to Israelis*, L.A. TIMES, July 28, 1982, at B1.

83. As Israel stressed, this implied that "Reagan is refraining from blaming Israel in breaching its commitment – which would have required a total suspension of weapons shipment." *See* Zeev Barak, *"Until Further Notice", Reagan Suspends Supply of Cluster Bombs to Israel*, YEDIOT AHARONOT, July 28, 1982, at 3.

84. Dan Fisher, *Israel Denies Smuggling Cluster Bomb Technology From U.S*, L.A. TIMES, July 10, 1986, at 9. Fisher relied on the statement made at the time to Israeli television by Yitzhak Rabin, the Minister of Defense.

85. The eight officials were part of Israel's military procurement office stationed in New York. Stephen Engelberg, *U.S. Investigates Possible Plot to Send Bomb Technology to Israel*, N.Y. TIMES, July 9, 1986, at A14. Senior Israeli officials denied the suspicions, arguing that Israel was producing

Israel bought the needed equipment in Europe. Yitzhak Rabin, Israel's then-Minister of Defense, clarified in an interview that "[y]ou can buy . . . (such technologies) freely, without any government complications."[86] Only in December 1988, following a prolonged Israeli campaign, was an understanding reached and the ban revoked.[87]

III. THE 2006 LEBANON WAR AND THE USE OF U.S.-MADE CLUSTER BOMBS

A. Israel's Unprecedented Response to Criticism over Its Extensive Use of CMs

Considering the 2006 Second Lebanon War's limited geographic boundaries and short duration (34 days), an unprecedented quantity of CMs were fired by Israel.[88] In addition to the small-scale use of indigenous M85 bomblets,[89] there was extensive use of U.S.-made CMs delivered by U.S.-made 155mm artillery shells, Multiple Launch Rocket System's (MLRS) M26 rockets, and—albeit on a limited scale—Vietnam-era aerially delivered bombs (CBU-58B).[90] As more than 1,800 rockets were fired at Lebanon—each rocket containing 644 bomblets—more

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the weapon in its own facilities and according to its own designs. As Rabin clarified: "Whoever looks at the Israeli bomblet next to the American bomblet will immediately see that there is no similarity" *See* Dan Fisher, *supra* note 84. For the affair, see also Phil Shenon, *Israelis Contest U.S. Subpoenas in Inquiry on Bomb Technology*, N.Y. TIMES, Aug. 5, 1986, at A1.

86. *See* Dan Fisher, *Stung by Criticism, Israel Reviews Its Arms Industry*, L.A. TIMES, Sept. 18, 1986, at A17.

87. *See, e.g.*, Nancy Dunne, *US Lifts Ban on Cluster Bombs for Israel*, FINANCIAL TIMES, Dec. 8, 1988, at 4; Yoav Karni, *The U.S. Lifts the 1982 Embargo on Selling Israel Cluster Bombs*, HAARETZ, Dec. 6, 1988, at 1. It should be noted that in the domestic arena, Israeli officials attempted to underrate this by pointing to Israel's own CM production. *See* Aral Ginai, *U.S. Removes Cluster Bombs Supply Ban to Israel*, YEDIOT AHARONOT, Dec. 7, 1988, at 5.

88. Kalb & Saivetz, *supra* note 4, at 43; Meron Rapoport, *When Rockets and Phosphorous Cluster*, HAARETZ, Sept. 13, 2006, at 3 (an interview with MLRS's battalion commander). For a brief overview of the complex historical predicates to the 2006 War (Operation Change Direction) from 1978 onwards, see Michael N. Schmitt, *"Change Direction" 2006: Israeli Operations in Lebanon and the International Law of Self-Defense*, 29 MICH. J. INT'L L. 127, 130-34 (2008), *available at* http://students.law.umich.edu/mjil/article-pdfs/v29n2-schmitt.pdf.

89. Each M395 and M396 155mm artillery shells contain 63 bomblets each. Some 130 Israeli-made Trajectory Correction System (TCS) rockets, first operational in this war (*see* Press Release, Ramat Hasharon, Israel Military Industries, IMI's Trajectory Corrected Rocket Operated and Combat Proven in the 2nd Lebanon War (May 15, 2007), *available at* http://www.imi-israel.com/news.aspx?FolderID=13&docID=662) have nothing to do with the rocket's content (644 M77 bomblets). Data presented to the author at the IMI exhibit marking Israel's 60th anniversary, Rishon LeZion, 16-23 Sept. 2008; *see also* Amnon Barzilai, *A Precise Rocket for 40 km– for IDF Use*, HAARETZ, Aug. 17, 2004, at 6.

90. *See* HUMAN RIGHTS WATCH, FLOODING SOUTH LEBANON: ISRAEL'S USE OF CLUSTER MUNITIONS IN LEBANON IN JULY AND AUGUST 2006 32 (Human Rights Watch 2008), *available at* http://www.hrw.org/en/reports/2008/02/16/flooding-south-lebanon?print. No exact data are available for the number of air-dropped CMs (CBU-58B with 650 bomblets each) used, but as of mid-January 2008, 28,136 duds BLU-63 bomblets from the 2006 War were found; these constitute 20% of the total number of duds destroyed by the deminers. It was argued that CBU-71 cluster bombs were used as well, but so far no related duds (BLU-68/B bomblets) have been found. *See* WILLIAM M. ARKIN, DIVINING VICTORY: AIRPOWER IN THE 2006 ISRAEL-HEZBOLLAH WAR 64 (Air University Press 2007).

than 1.1 million cluster bombs were dispersed from this weapon system alone.[91]

Nevertheless, while even amidst intense fighting, few accusations in the international media claimed Israel's use of CMs illegal.[92] The world outcry against Israel was raised only in the war's aftermath.[93] Even then-U.N. Secretary General (UNSG) Kofi Annan condemned Israel,[94] while Annan's aide, the Humanitarian Affairs and Emergency Relief Coordinator and Under-Secretary-General Jan Egeland, focused his criticism on the "shocking and completely immoral" fact that "90 percent of the cluster-bomb strikes occurred in the last 72 hours of the conflict, when everybody knew there would be an end to hostilities."[95]

The international outcry against Israel's extensive use of CMs during the War was quickly reflected in Israel's open media but with surprisingly intense aftershocks. "The cluster bomb," argued the influential Israeli newspaper *Haaretz*, "is not a banned weapon, but it is described as an 'indiscriminate' weapon, which should not be used against targets in civilian areas because, [among other things], it continues to kill once the war is over."[96] *Haaretz* went on to publish numerous articles on this issue; all were harshly critical of the weapon's use.[97] On September 4, 2006, a legal response was initiated by The Association for Civil Rights in Israel (ACRI) which appealed to Israel's Attorney General Meni Mazuz to commence the investigation into circumstances behind the decision to use CMs.[98] A similar appeal was made that same month to Israel's *Inquiry Commission into the Second Lebanon War* (Winograd Commission), which has since reviewed Israel's use of CMs and its legality.[99]

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91. *See* Rapoport, *supra* note 88. *See also* Amir Rapaport, FRIENDLY FIRE 344 (2007).

92. *See, e.g.*, Press Release, *supra* note 3.

93. *See* Kalb & Saivetz, *supra* note 4, at 46-47.

94. Yoav Stern & News Agency (AP), *Annan Condemns IDF Use of Cluster Bombs*, HAARETZ, Sept. 1, 2006, at 3.

95. This information was provided by UNIFIL observers. *See* Emergency Relief Coordinator, Press Conference (Aug. 30, 2006), *available at* http://www.un.org/News/briefings/docs/2006/060830_Egeland.doc.htm. It led many Lebanese to believe that Israel's intention was " . . . to litter the south with unexploded cluster bombs as a strategy to keep people from returning right away." *See* Michael Slackman, *Israeli Bomblets Plague Lebanon*, N.Y. TIMES, Oct. 6, 2006, at A10. For a criticism of IDF policy, see, e.g., Yoav Stern & News Agency (AP), *supra* note 94; Todd Pitman, *Unexploded Israeli Bombs Menace Lebanese*, ASSOCIATED PRESS ONLINE, Aug. 31, 2006.

96. Editorial, *Shooting Without a Target*, HAARETZ, Sept. 14, 2006, at 5.

97. *See, e.g.*, Rapoport, *supra* note 88; Meron Rapoport, *Lebanese Child is Killed by an Israeli Cluster Bomb*, HAARETZ, Sept. 28, 2006, at A2; Rapoport, *supra* note 8.

98. Mazuz was also requested to "examine the level of personal responsibility for all those involved in the firing of these weapons, including the political echelons, in the event that they authorized their use." Letter from Sonia Boulos, Adv., ACRI to Meni Mazuz, AG, Ministry of Justice, ¶ 10(a) (Sept. 4, 2006), *available at* http://www.acri.org.il/eng/story.aspx?id=327.

99. The report— released in Jan. 2008— is known as the Winograd Commission after its chair, Justice (Ret.) Dr. Eliyahu Winograd. Other members include Law Professor Ruth Gavison, Political Science Professor Yehezkel Dror, and IDF Reserve Generals Menachem Einan and Chaim Nadel. *See The Commission to Investigate the Lebanon Campaign in 2006, The Second Lebanon War, Final Rep.* [unclassified version], [hereinafter, Winograd Final Rep.]; *see also* ACRI's appeal to the Winograd Commission Letter from Sonia Boulos, Adv., ACRI to Dr. Eliyahu, Judge (Ret.), Winograd, (Sept. 26, 2006), *available at* http://www.acri.org.il/eng/story.aspx?id=340.

Israel was no doubt surprised by the barrage. These attacks were, however, of little comparison to past incidents in which Israel was criticized for using "dubious weapons" such as flechette armor rounds in the Gaza Strip since 2001.[100] Moreover, the traditional IDF response to the NGO's complaints, "[w]e use all munitions within the confines of international humanitarian law . . ."[101] was no longer accepted by the international community.

However, while the government's initial formal response stressed that "strenuous efforts were made to ensure that these [IDF operations] were carried out in complete accordance with international law, both with regard to method and weaponry,"[102] on November 19, 2006, Lt.-Gen. Dan Halutz, took a surprisingly different line of defense stating that the use of CMs often constituted a *clear violation of his explicit order not to fire into populated zones.*[103]

Halutz's response was apparently due to a preliminary IDF "operational inquiry into the use of cluster munitions throughout the Israeli-Lebanese conflict," conducted by Brig. Gen. Michel Ben-Baruch, of the IDF's Ground Forces Command, at Halutz's request.[104] Ben-Baruch's probe—which, unlike previous IDF internal inquiries, was classified prior to the moment Halutz issued his statement—found that while the IDF had complied with Halutz's order, the same order was ignored by the Artillery Corps, which fired thousands of cluster bombs "mainly in the War's last days."[105] More importantly, as part of his statement, Halutz assigned the Commander of the IDF Military College, Maj. Gen. Gershon HaCohen, "to look into the implementation of all orders and instructions regarding the use of cluster type munitions, in the course of the conflict."[106] The statement's text, however, raised doubts whether a further inquiry was needed.[107]

As expected, Halutz's announcement astonished the Israeli public and caused resentment among Israeli war veterans who felt that they had followed IDF orders when firing. This bitterness became open on the following day, in press reports

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100. *See* SIPRI, THE LAW OF WAR AND DUBIOUS WEAPONS 70-72 (1976) (discussing the dubious nature of the flechette weapon). For an overview into Israel's use of flechette weapons as well as a history of the weapon, see EITAN BARAK, DEADLY METAL RAIN: THE LEGALITY OF FLECHETTE WEAPONS IN INTERNATIONAL LAW: A Reappraisal Following Israel's Use Of Flechette Rounds In The Gaza Strip (2001-Present), (forthcoming 2009), (on file with the author).

101. For such a response see, e.g., News Release, Human Rights Watch, Lebanon: Israeli Cluster Munitions Threaten Civilians (Aug. 17, 2006), *available at* http://www.hrw.org/en/news/2006/08/17/lebanon-israeli-cluster-munitions-threaten-civilians.

102. Isr. Ministry of Foreign Affairs, *supra* note 5.

103. *See* Hason & Rapoport, *supra* note 6; Joshua, *supra* note 6.

104. IDF Spokesperson, Maj. Gen. Ha'cohen Appointed to Inquire the Circumstances of the Use of Cluster Munitions During the Israeli-Lebanese Conflict (Nov. 20, 2006), *available at* http://thehague.mfa.gov.il/mfm/Data/104928.pdf.

105. Hason & Rapoport, *supra* note 6.

106. *See* IDF Spokesperson, *supra* note 104; Greg Myre, *Israel Orders Investigation of Bomb Use in Lebanon*, N.Y. TIMES, Nov. 21, 2006, at A8 (discussing international repercussions).

107. After emphasizing the weapon's legality *per se*, it stated "safety warnings were given by the IDF to the civilian population, ... the firing *of cluster munitions was directed only at legitimate military targets* ..." (emphasis added). *Id.*

effectively contradicting Halutz's claim.[108]

Queries over Halutz's statement in light of its meaning—i.e., the ground forces were disobedient and did not follow orders—were reflected daily in the Israeli press for two full weeks and has only gained in strength. Surprisingly, while news reports were citing war veterans' testimonies that the CMs' deployment throughout the war was maximally regulated, the IDF preferred being presented as an unruly army. Instead of supporting these frontline testimonies, military sources were cited as saying that "this story only demonstrates the scope of the army's mess,'" apparently to expose Halutz's lack of control over the army.[109] Given the fact that the IDF is highly sensitive to allegations of internal disorder, especially due to the repeated NGO allegations about unlawful actions of soldiers and officers in the Occupied Territories,[110] this is quite surprising. Furthermore, a week following Halutz's November 19th announcement, reporters had already been informed of the identity of the army officer suspected of using CMs in populated areas during the war's last days "[i]n direct opposition to an order": Officer Commanding (O.C.) Northern Command, Maj. Gen. Udi Adam. [111] This easily available scapegoat had resigned his post two months earlier: September 13, 2006.[112] The unexpected refusal of "[h]igh-ranking sources" in the Northern Command to deny this charge only intensified the public's image of an army out of control.[113]

However, although given the secrecy over the 1976 Agreement no official documentation will be available for some time, the key to understanding the IDF's seemingly counterproductive admission—severe internal disorder—is found in Israel's relationship with the U.S at the time.

B. Israel's 2006 CM Use and the Bush Administration

In late August 2006, the U.S. State Department Office of Defense Trade Controls Compliance (DTCC) launched an inquiry into Israel's use of U.S.-made CMs[114] and—to the satisfaction of numerous NGOs[115]—a shipment of additional

108. *See, e.g.,* Rapoport, *supra* note 7, at 2. One MLRS battery commander even testified that all targets north of the Litani River—those targets massively bombarded in the last 72 hours - were described at the time as "General Staff targets." *See* Meron Rapoport, *A Testimony: The General Staff Had Authorized All Cluster Bomb Firings North of the Litani*, HAARETZ, Nov. 21, 2006, at A4; Yossi Joshua, *All Knew That We are Firing Cluster Bombs*, YEDIOT AHARONOT, Nov. 21, 2006, at 2.

109. *See* Joshua, *supra* note 6.

110. *See, e.g.*, Yael Stein, B'tselem, Case Study No. 17, Soldiers' Abuse Of Palestinians In Hebron 3 (2002).

111. *See* Yaakov Katz, *N. Command Ordered Cluster Bombing*, JERUSALEM POST, Nov. 28, 2006, *available at* http://www.jpost.com/servlet/Satellite?cid=1162378506069&pagename=JPost%2FJPArticle%2FShowFul.

112. Jonathan Lis, *MK Ayalon Calls on Peretz to Resign as Defense Minister*, HAARETZ, Sept. 13, 2006, *available at* http://www.haaretz.com/hasen/spages/762240.html.

113. As Haaretz journalist and columnist Uzi Benziman wrote the following day: "In the General Staff, the core of security policy, failures have been exposed that appear to be a symptom of the defective work of a culture of fudging. The Chief of Staff [sic] reveals that his explicit orders to avoid firing cluster bombs were not followed." Uzi Benziman, *It's All Shoddy*, HAARETZ, Nov. 29, 2006, at 5.

114. *See* Cloud, *supra* note 9 (erroneously, Cloud refers to DTCC by its previous name); Pitman,

CMs (M-26 rockets for the MLRS), which Israel had asked the U.S. to send during the war to offset the depletion of its own stocks, was immediately held up.[116] More importantly, as part of its inquiry the U.S. demanded clarifications from Israel, which created a weighty predicament for Israel.[117]

Apparently, as U.S. officials interpreted the events, "in view of [former] President Bush's publicly announced support for Israel's action,"[118] Israeli clarifications regarding its campaign against Hezbollah as legitimate self-defense (i.e., the CM's use complied with both the AECA and the 1952 Agreement) should not encounter many obstacles in terms of the Administration.[119] However, not only were none of these legal instruments the DTCC's focus (rather, the 1976 End-Use Agreement, as discussed in this Article, was the focus), it was the third time that CM use in Lebanon was responsible for straining Israeli-U.S. relations within the last three decades.

Therefore, given the 1978 and 1982 crises and the possible U.S. sanctions (ranging from a repeat of the 1982 CM supply moratorium to a total U.S. arms sales ban, as suggested in April 1978 by Rep. McCloskey),[120] Halutz's unprecedented admission seems more than plausible. In fact, in light of the April 1978 crisis and the subsequent Israeli pledge to assimilate the restrictions placed on CMs by Israel's senior military and government officials, low-ranking non-obedience was one of the few explanations at Israel's disposal. Indeed, this account caused Israel great discomfort, as noted previously, but it did provide Israel with a valuable asset once the U.S. inquiry began: *time*.

Halutz's announcement of HaCohen's appointment provided an additional

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supra note 95. For an excellent, albeit highly one-sided, overview of various cases in which such an inquiry was initiated in regard to Israel, see BROWN, *supra* note 53.

115. *See* Open Letter from Kenneth Roth, Executive Director, Human Rights Watch, to Stephen J. Hadley, U S. National Security Advisor (Aug. 11, 2006), *available at* http://www.hrw.org/en/news/2006/08/11/letter-national-security-advisor-hadley-requested-us-cluster-munition-transfer-israe.

116. *See* Cloud, *supra* note 9. For Israel's request in early August, see David S. Cloud, *Weapons: Israel Asks U.S. to Ship Rockets with Wide Blast*, N.Y. TIMES, Aug. 11, 2006, at A1. A license for the sale of 1,300 M26 was approved in Fiscal Year 2005. *See* Press Release, Human Rights Watch, U.S.: Deny Israeli Request for Cluster Munitions, (Aug. 11, 2006), *available at* http://www.hrw.org/en/news/2006/08/11/us-deny-israeli-request-cluster-munitions.

117. Journalists were informed that the State Department was "seeking more information on Israel's alleged improper use" which it takes "very seriously." E-mail from Patricia Peterson, Department of State spokesperson, to Arms Control Today (Sept. 14, 2006), *cited in* Wade Boese, *Cluster Munitions Under New Scrutiny*, ARMS CONTROL TODAY, Oct. 2006, at 38; *see also* Cloud, *supra* note 9.

118. Cloud, *supra* note 9.

119. *See*, e.g., JEREMY M. SHARP ET AL., U.S. CONG. RESEARCH SERV., RL 33566, LEBANON: THE ISRAEL-HAMAS-HEZBOLLAH CONFLICT (Aug. 14, 2006) (discussing For Bush Administration's repeatedly "unequivocal support for Israel" during the 2006 War). Nonetheless, explaining the massive use of the CM in the last 72 hours of the war could have been more problematic.

120. McCloskey had sent a letter to all House members as well as to President Carter and Israeli Ambassador Simcha Dinitz, proposing an amendment to the Foreign Assistance Bill calling for termination of all arms deliveries to Israel in the event of any future CM use against civilian targets. *See* Oberdorfer, *supra* note 30, at A17.

pause, necessary for the entire process to come to an end: the IDF's Military Advocate General (MAG) Brig. Gen. Avihai Mendelblit, who Halutz had assigned to review the HaCohen inquiry's findings, now had time to decide further actions.[121] Hence, when the DDTC inquiry was completed on January 29, 2007 and a classified preliminary report[122] concluding that first, U.S.-made CMs were "'misused in civilian areas"' and second, Israel had breached a clandestine bilateral "Use Agreement," was forwarded to Congress, the IDF spokesman was able to "decline comment until after that [the internal inquiry] was complete[d]."[123] Concurrently NGO attempts to take advantage of this report and prevent more U.S.-made CM weapons from reaching Israel only reinforced the view that Israel's time-gaining maneuver had proven itself.[124]

Shortly before the DTCC submitted its preliminary findings to Congress, Israel submitted a short 12-page report to the State Department.[125] In an accompanying note, a senior U.S official commended its authors for their "great cooperation" in the investigation.[126] While acknowledging the firing of "thousands of American cluster munitions,"[127] Israel denied violating the 1976 Agreement and stressed its leafleting warning practices prior to employing CMs in populated areas and the fact that "many of the villages were deserted because civilians had fled the fighting."[128] As a U.S. official stated, "From their perspective, use of the munitions was clearly done within the agreements."[129] The atmosphere was such that Israel felt it had almost settled the issue with the Bush Administration—undoubtedly one of the friendlier administrations from Israel's perspective,[130] and the January 17, 2007 resignation of wartime Chief of Staff Halutz only contributed to this rapprochement as U.S. officials joined their Israeli counterparts in an effort to mitigate the entanglement. [131] Israel's CM use, stressed the U.S. Embassy

121. *See* IDF Spokesperson, *supra* note 104.

122. The AECA requires Congressional notification of even preliminary findings regarding possible violations. *See* Arms Export Control Act, 22 U.S.C. § 2753(c)(2) (1976).

123. News Agencies, *U.S.: Israel May Have Breached Cluster Bomb Agreement During War*, HAARETZ, Jan. 30, 2007, *available at* http://www.haaretz.com/hasen/spages/819096.html; *see* Andrew Buncombe, *U.S. Attacks Israel's Cluster Bomb Use*, THE INDEPENDENT (London) Jan. 29, 2007, at 28; David S. Cloud & Greg Myre, *Israel May Have Violated Arms Pact, U.S. Says*, N.Y. TIMES, Jan. 28, 2007, at A1.

124. *See, e.g.*, Press Release, Human Rights Watch, United States: Cut off Cluster Munition Sales to Israel (Jan. 29, 2007), http://hrw.org/english/docs/2007/01/29/usint15212.htm. For an explanation of the aftershocks caused see News Release, *supra* note 101.

125. Cloud & Myre, *supra* note 123.

126. *Id.* The official was the Assistant Secretary of State in charge of the bureau until that month, John Hillen.

127. *Id.*

128. *Id.*

129. *Id. See also*, Yitzhak Benhorin, *Report: Bush may Fault Israel on Cluster Bomb Claim*, YNETNEWS, Jan. 28, 2007, *available at* http://www.ynetnews.com/articles/0,7340,L-3357638,00.html.

130. As Brown had complained about U.S. non-action regarding "misuse of American weaponry": "President Bush failed to express impatience and dissatisfaction with Israeli military action at the height of the summer carnage in Lebanon and in fact was a cheerleader for the Israeli action—as was almost the entire U.S. Congress." BROWN, *supra* note 53, at 7.7.

131. AP, *Israeli Army Chief of Staff Resigns Over Lebanon Failures*, INDEPENDENT (London), Jan.

spokesman in Tel Aviv, "isn't going to undermine our ironclad commitment to Israel's security or hamper our excellent bilateral cooperation in many areas."[132] "A chiding from Washington, but nothing more," was the outcome predicted by the late Zeev Schiff, one of Israel's leading military analysts.[133]

Only in September 2007 was Israel's ongoing investigation officially concluded by the MAG;[134] although the Winograd Commission's Final Report suggests that already on January 17, 2007—when HaCohen testified before the Winograd Commission—he could already provide conclusive findings.[135] By that time, however, the necessity of this puzzling investigation was understood as well as its usefulness to the U.S. State Department in repelling questions over its own inquiry.[136]

Furthermore, the completion of Mendelblit's review in September 2007 was *kept a secret* until December 24, when the threat of sanctions was completely dispelled. On that day, the IDF spokesman issued a statement, intentionally targeted for worldwide publication, that the MAG had "recently concluded his evaluation."[137] The statement stressed the MAG's declaration that the IDF's use of CMs accorded with IHL; that "the IDF had complied with the Chief of Staff's

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17, 2007, *available at* http://www.independent.co.uk/news/world/middle-east/israeli-army-chief-of-staff-resigns-over-lebanon-failures-432475.html.

132. Stewart Tuttle, U.S. Embassy spokesman. Israeli security officials anonymously stated "that they didn't expect sanctions." *See* Amy Teibel (AP), *U.S. Faults Israeli Use of Cluster Bombs But Report Unlikely to Harm Relations, Americans Say*, SEATTLE POST-INTELLIGENCER, Jan. 31, 2007, *available at* http://www.seattlepi.com/national/301777_israel31.html.

133. Amy Teibel (AP), *US-Israeli Relations Unlikely to be Hurt by Israeli Cluster Bomb Use, Analysts Say*, Jan. 30, 2007 (no longer available, on file with author). On February 1, 2007, in another unprecedented move, Israel's deputy prime minister at the time, Shimon Peres, told an *Al Jazeera* reporter referring to the use of CMs: "To be short and clear, we committed a mistake, regrettably." He made sure to add, however, that it was done "apparently . . . without the knowledge even of the Chief-of-Staff." *See Peres: Cluster Bombs A Mistake*, ALJAZEERA, Feb. 1, 2007, *available at* http://english.aljazeera.net/news/middleeast/2007/01/2008525 12206640997.html.

134. *See* MAG, Brig. Gen. Avihai Mendelblit Main Points of MAG's Legal Opinion for Inquiring Officer Over the Circumstance of Employing Cluster Munitions during the Second Lebanon War, June 18, 2008 (in Hebrew), *cited in* Eitan Barak, Association for Israel Studies Annual Conference, Israel in 2009: Center and Periphery, June 1-3, 2009, *None to be Trusted: Israel's Use of Cluster Munitions in the Second Lebanon War and the Case for the Convention on Cluster Munitions*, *available at* http://www.aisisraelstudies.org/Conferences/2009_Sapir/2009Papers/Barak2009.pdf.

135. *See* Winograd Final Rep., *supra* note 99. It is still unknown as to when these findings were submitted to the MAG.

136. *See, e.g.*, Sean McCormack, Assistant Sec'y of State for Pub. Affairs, U.S. State Dep't., State Department Regular News Briefing (Feb. 23, 2007). In response to a question, Sean McCormack said "[w]e are still gathering some information from the Israeli side. They still have an investigation that is ongoing." *Id.* Indeed, in September 2007, the Israeli press reported a request by a State Department senior official, during a visit to Israel, for data on CM used in the 2006 War. *See* Barak Ravid, *The US to Israel: Stop Flights in Lebanon*, HAARETZ, Sept. 20, 2007, at A4.

137. The secrecy over the date of the MAG's review reached such a level that even the *Winograd Commission,* which was about to conclude its final report, promptly requested a copy for review after hearing the spokesman's statement. *See* Winograd Final Rep., *supra* note 99, at 496, ¶ 4.

orders forbidding the firing of cluster munitions at built-up areas";[138] and that precautions had been taken in all cases excluding one in which CMs were indeed "fired at residential areas/neighborhoods."[139]

As expected, the statement attracted considerable attention as well as criticism in Israel[140] and abroad.[141] In Israel, however, it was welcomed by the IDF artillery veterans who had fought in the 2006 War because it vindicated their claims that they had strictly obeyed orders from day one and that they were neither uncontrolled nor irresponsible.[142] The Bush Administration's spokesperson then abruptly announced that the State Department's 2007 report "does not draw conclusions on Israel's use of cluster munitions"[143] while adding that the U.S. government will "continue discussions" with Israel over "the findings of its internal investigation."[144]

In May 2008, it had become clear that the crisis was effectively and officially over. During a briefing on the *U.S. CM Policy,* Stephen D. Mull, the U.S. Acting Assistant Secretary for Political-Military Affairs, was forced to address this subject. After pointing out Israel's "strict internal review," Assistant Secretary Mull stated that "very intensive" bilateral consultations were under way and revealed that "[w]e just had a team in Israel."[145] When asked about future CM supplies to Israel, he first pointed to the new U.S. domestic legislation forbidding the export of CMs having less than a 99% reliability rate.[146] He also remarked that given the unavailability of such U.S.-made CMs for export, "we are not providing cluster munitions to foreign partners anymore."[147] Nevertheless, when asked about

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138. IDF Spokesperson, Opinion of the Military Advocate General Regarding Use of Cluster Munitions in Second Lebanon War (Dec. 24, 2007) (Eng. Version), *available at* http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings.

139. The announcement also explained the need to use CMs and referred to cases where "commanders deviated from orders." In the latter case, it was stated that given the circumstances and the fact that even then, their use "was [still] in accordance with international law..." the MAG decided not to take legal measures in response to the deviations. *Id.*

140. *See, e.g.*, Amos Harel & Yuval Azoulay, *IDF Won't Take Legal Action against Officers for Firing Cluster Bombs in Lebanon*, HAARETZ, Dec. 25, 2007, at 2; Yaakov Katz, *Cluster Bomb Use Was Legal in Lebanon IDF Judge Rules, Firing Them Was A Concrete Military Necessity*, THE JERUSALEM POST, Dec. 25, 2007, at 3; Meron Rapoport, *The Post-War Bombings*, HAARETZ, Jan. 1, 2008, at 5 (harshly criticizing IDF CM use against Lebanese civilian populations).

141. *See, e.g.*, Josef Federman, *Israeli Cluster Bombing Ruled within the Law: Military Ends Probe of Strikes on Lebanon*, WASH. POST, Dec. 25, 2007, at A18; Isabel Kershner, *Israel Won't Prosecute for Use of Cluster Bombs in Lebanon*, N.Y. TIMES Dec. 25, 2007, at A4. For a harsh criticism, see, e.g., Editorial, *Cluster Bombs: It's Still Not OK*, SEATTLE POST-INTELLIGENCER, Dec. 26, 2007, at B6.

142. *See* Hanan Greenberg, *Soldiers who Fired Cluster Bombs: We Knew We were Following the Law*, YNET, Dec. 25, 2007, *available at* http://www.ynet.co.il/articles/0,7340,L-3486339,00.html.

143. Email from Department of State spokesperson, to Arms Control Today [ACT] (Jan. 4, 2008), *cited in* Wade Boese, *Israel Defends Past Cluster Arms Use*, 38 ACT 14 (Jan.-Feb. 2008).

144. *Id.*

145. *See* Stephen D. Mull, Acting Asst. Sec'y for Political-Military Affairs Ambassador, On-the-Record Briefing: On U.S. Cluster Munitions Policy (May 21, 2008), *available at* http://www.america.gov/st/texttrans-%20english/2008/ May/20080522163101eaifas0.8921015.html.

146. *Id.*; *see* Consolidated Appropriations Act, Pub. L. No. 110-161, § 646 (b), 1844 Stat. (2008).

147. Mull, *supra* note 145.

potential available U.S.-made CMs with negligible Hazardous Dud Rate (HDR), he answered: "If there were a future request from Israel to purchase it . . . we'd look at it at the time . . . We'd want to know—I know they're still looking at this internally . . . what restrictions that they would have in place on its use, what sort of controls . . ."[148]

Indeed, as of February 2009, no final determination has been made. Irrespective of the new U.S. administration under President Obama, one may assume that when it comes to the U.S.-Israel relationship, whether Israel's extensive use of CMs in the 2006 Lebanon War violated U.S. legislation is a non-issue. However, as we soon detail, in the wake of an absence of sanctions imposed on Israel, its critics claimed that "the AECA application gap between the Reagan and Bush II administrations suggests a United States increasingly prepared to look the other way on Israeli human rights violations and the breaking of American law" may occur too easily.[149]

IV. DOOMED TO BE VIOLATED? LESSONS FOR THE CCM

A. Legal Analysis: Israel and U.S. Legislation: Formal vs. Flexible Interpretation

In contrast to the above-mentioned claim by Israel's critics, looking closely at the 2006 case, it seems that Israel breached neither the AECA nor the 1952 Agreement requiring that Israel use U.S.-made CMs only in the event of "legitimate self defense." Furthermore, Israel's violations of the 1976 End-Use Clandestine Agreement and the 1978 Notes—which rightly explains the focus of the DTCC's inquiry—are not gross violations.

1. Legitimate self-defense?

According to Israel—as stated in identical letters sent to the UNSG and the Security Council following the Hezbollah's deadly attacks on July 12, 2006—the law of self-defense under Article 51 of the U.N. Charter provides a legal basis for Israel's military operation,[150] and that in relaying these letters on the very day that Israel's military operation began, Israel complied with the stipulation that a State acting in self-defense immediately notify the Security Council.

Naturally, as the operation was perceived as "post-modern conflict involving a 'state-like apparatus inside a State,'"[151] the question of whether Israel's actions complied with *jus ad bellum* has already attracted jurists' interests.[152] Therefore,

148. *Id.*

149. *See* BROWN, *supra* note 53, at 18.

150. As Israel notified, while exercising its right of self-defense "The State of Israel will take appropriate actions to secure the release of the kidnapped soldiers and bring an end to the shelling that terrorizes our citizens." *See* U.N. GASC, 60th Sess., U.N. Doc. S/2006/515,A/60/937 (July 12, 2006) [hereinafter July 12, 2006 Letters]. For an overview on Israel's detailed legal justification, see Schmitt, *supra* note 88, at 136-41.

151. Jonathan Somer, *Acts of Non-State Armed Groups and the Law Governing Armed Conflict*, 10 Asil Insight (2006), *available at* http://www.asil.org/insights060824.cfm.

152. *See, e.g., id.*; Schmitt, *supra* note 88, at 163-64; Yaël Ronen, *Israel, Hizbollah, and the Second Lebanon War*, 9 Y.B. OF INT'L HUMAN. L. 362, 391-93 (2006).

given the purpose of the Article, it is sufficient to point out that a recent in-depth legal analysis, dedicated entirely to this question, concluded that "there is relative agreement that Israel had the right to respond to the Hezbollah attacks pursuant to the law of self-defense."[153] Hence, we can focus on *the U.S. perspective* on this issue by means of the AECA and 1952 Agreements.

As one may expect given the above-mentioned conclusion, a 2008 Congressional Research Service (CRS) Report found that the Bush Administration and the Congress "supported Israel's 2006 military campaigns against Hezbollah and Hamas *as acts of self-defense.*"[154] On July 18, 2006, the Senate unanimously passed a bipartisan resolution, which, *inter alia*, "urges the President to continue fully supporting Israel as Israel exercises its right of self-defense in Lebanon and Gaza."[155] Two days later, the House of Representatives, in a vote of 410 to 8, expressed unconditional support for "Israel's right to . . . defend itself."[156] As *The Washington Post* reported: "Democratic and Republican congressional leaders are rushing to offer unalloyed support for Israel's offensive against Hezbollah fighters . . ."[157] Israel enjoyed such overwhelming and bipartisan support in the Congress that even the Republican descendent of Lebanese family, Darrell Issa, a California Representative who co-sponsored an alternative resolution, justified his intention to eventually support the majority bill as follows: "I want to show support for *Israel's right to defend itself.*"[158] Even at the end of the War, on August 14, 2006 when the Lebanese civilian suffering was known, former President Bush clearly stated that "we recognize that responsibility for this suffering [civilians on both sides] lies with Hezbollah. It was an unprovoked attack by Hezbollah on Israel that started this conflict. Hezbollah terrorists targeted Israeli civilians with daily rocket attacks."[159]

Indeed, some jurists have raised reservations of this blanket support on the grounds that necessity and, mainly, proportionality (two out of the three accepted

153. Schmitt, *supra* note 88, at 163. Prof. Schmitt even claimed that Israel's 2006 operation "serves as further evidence of an operational code extending the reach of self-defense to armed attacks conducted by non-State actors." *Id.* at 164.

154. Carol Migdalovitz, U.S. Cong. Research Serv., RL 33222, Israel: Background and Relations With the United States (2008) (emphasis added).

155. S. Res. 534, 109th Cong. (2006) (enacted), *available at* http://thomas.loc.gov/cgi-bin/query/z?c109:S.RES.534:. Cong. S. Res. 534 was passed by a roll call vote. "Condemning Hezbollah and Hamas and their state sponsors and supporting Israel's exercise of its right to self-defense." *Id.*

156. H. Res. 921, 109th Cong. (2006) (enacted). *See* Final Vote Results for Roll Call 391, Clerk of the United States House of Representatives (July 20, 2006), *available at* http://clerk.house.gov/evs/2006/roll391.xml. The text is *available at* http://thomas.loc.gov/cgi-bin/query/D?c109:18:./temp/~c109Zv19Nn.

157. Jim VandeHei, *Congress is Giving Israel Vote of Confidence*, WASH. POST, July 19, 2006, at A5.

158. Melissa McNamara, *House Passes Pro-Israel Resolution*, July 20, 2006 (emphasis added), *available at* http://www.cbsnews.com/stories/2006/07/20/politics/main1820193.shtml.

159. Press Release, White House, President Discusses Foreign Policy During Visit to State Department (Aug. 14, 2006), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/08/20060814-3.html.

criteria of self-defense)[160] were breached.[161] Nevertheless, it seems fair to conclude that in the context of Israel-U.S. bilateral relations, Israel's CM use, *in and of itself*, is likely to comply with the legitimate self-defense requirement appearing in the AECA and the 1952 Agreement.[162]

Once the basic demand of legitimate "self-defense" was addressed, we are left with the 1976 Agreement (including the 1978 Notes), which contains three main criteria to be met: use (a) "in a war"; (b) against "military, fortified targets" and (c) "against Arab armies."[163]

2. Did the Second Lebanon War fall under the first criteria "in a war" or—using the 1978 wording—"special wartime conditions"?[164]

First and foremost, it should be noted that even within the legal realm, as Professor Yoram Dinstein has pointed out, "the term 'war' gives rise to more than a handful of definitional problems."[165] In the absence of an agreed definition, serviceable for all purposes, the term currently has little meaning as a legal matter. We are therefore confined to focusing on the assumed meaning as it evolved within the context of the end-user agreement.

As the 1978 Notes clarify, the main intention of the American authors of the document was an *International Armed Conflict (IAC)* exhibiting high levels of violence.[166] In fact, great levels of violence or—in the words of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic* decision on jurisdiction—"protracted armed violence" is required in order to initiate the application of IHL in Non-IAC (NIAC).[167]

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160. The third requirement is immediacy. *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, at 103, ¶ 194 (June 27) (Merits); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, at 245, ¶ 44 (July 8).

161. *See* Ronen, *supra* note 152, at 393; STUART MASLEN & VIRGIL WIEBE, CLUSTER MUNITIONS: A SURVEY OF LEGAL RESPONSES 22-23 (Landmine Action 2008). In contrast, according to Schmitt's analysis, for instance, "it is self-evident therefore, that, at least vis-à-vis operations designed to stop rocket attacks, Israeli actions were proportionate (indeed, arguably *in*sufficient)." Schmitt, *supra* note 88, at 154.

162. *See* Cloud & Myre, *supra* note 123.

163. Gwertzman, *supra* note 47, at 1. It should be noted that NGO reports on Israel's use of CMs claim that Israel violated the 1976 End-Use Agreement through its widespread and indiscriminate use of the weapon. *See* NASH, *supra* note 19, at 42; MASLEN & WIEBE, *supra* note 161, at 23. In fact, Maslen & Wiebe even questioned Israel's compliance with the AECA given the criteria of necessity and proportionality with respect to "legitimate self-defense." *Id.* at 22-23.

164. MOYES & NASH, *supra* note 44, at 9.

165. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 15 (Cambridge University Press 2005) (1988).

166. Relying on various Israeli statements during the 1978 crisis, there is a possibility that following the crisis the 1978 Notes recognized Non-State Arm Groups (NSAG) as regular armies under certain circumstances but none of the known open sources refers to that. For such a statement by the then IDF Chief of Staff Mordechai Gur Stated during an interview with the Israeli Press Corps upon his retirement see Elyeho Agres et al., *The Retired Chief of Staff, Lt. Gen. "Mota" Gur – Exclusive Interview to Davar*, DAVAR, Apr. 21, 1978, at 19.

167. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory

While the U.N. Security Council Resolution 1701[168] contains no reference to the armed conflict qualification, the special U.N. Commission of Inquiry (COI) established by the U.N. Human Rights Council (UNHRC) following the four Rapporteurs reports on their September 2006 fact-finding mission to Lebanon and Israel[169] was forced to discuss this issue.[170] However, due to the issue's sensitivity, it evaded giving a definitive decision of the conflict's legal classification. Instead, it stated following:

> It is the view of the Commission that hostilities were in actual fact and in the main only between the IDF and Hezbollah. The fact that the Lebanese Armed Forces did not take an active part in them neither denies the character of the conflict as a legally cognizable *international armed conflict*, nor does it negate that Israel, Lebanon and Hezbollah were parties to it.[171]

When the war began, however, Israel viewed the Lebanese government responsible for the unprovoked aggression against it. Within two days, however, and apparently following U.S. pressure, Israel decided that Hezbollah alone was responsible for making redundant any discussion of the requirements for attributing acts of a Non-State Armed Group (NSAG) to states.[172] However, leaving aside the fact that both military and legal experts used the term "war" with respect to the 2006 "hostilities,"[173] the important point is the perspectives of the parties, described in the following.

Israel clearly stated in its identical letters to the UNSG and the Security Council on July 12, 2006: "Today's act is a clear declaration of war."[174] The IDF even viewed its operations in Lebanon as an International Armed Conflict

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Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

168. S.C. Res. 1701, ¶ 2, U.N. Doc. S/RES/1701 (Aug. 11, 2006). The term to be used was "hostilities."

169. *See* U.N. Human Rights Council [UNHRC], Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt; the Representative of the Secretary-General on Human Rights of Internally Displaced Persons, Walter Kälin; and the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari: Mission to Lebanon and Israel, ¶ 11, U.N. Doc. A/HRC/2/7 (Oct. 2, 2006), [hereinafter The Rapporteurs' Rep.]; *see also* UNHRC, Human rights in Lebanon: Report of the Special Rapporteur on the Right to Food, Jean Ziegler, on his mission to Lebanon, ¶ 7, U.N. Doc. A/HRC/2/8 (Sept. 29, 2006).

170. *See* UNHRC, Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1, ¶ 5, U.N. Doc. A/HRC/3/2 (Nov. 23, 2006) [hereinafter The COI's Rep.]. The qualification was needed as an essential pre-condition for the application of IHL and the establishment of applicable and governing rules.

171. The COI's Rep., *supra* note 170, at 22, ¶ 55 (emphasis added).

172. See Ronen, *supra* note 152, at 377-79, for an account of Israel's approach regarding Lebanese responsibility for the July 12 attack before and after the policy's change. See *id.* at 379-84, for an analysis of whether Lebanon can be held responsible for the attack. See Somer, *supra* note 151, for a succinct discussion on requirements regarding the 2006 War.

173. *See, e.g.*, Arkin, *supra* note 90, at xviii (discussing the military view); Schmitt, *supra* note 88, at 157 (discussing the legal view).

174. *See* July 12, 2006 Letters, *supra* note 150.

(IAC).[175] A similar view, at least regarding the hostilities' magnitude, seems to have been shared by the U.S., as former President Bush stated on August 14: "In Lebanon, Hezbollah declared war on Lebanon's neighbor, Israel, without the knowledge of the elected government in Beirut."[176] In fact, in response to a provocative question on the very day the DTCC's preliminary report was sent to Congress (January 29, 2007), over whether the U.S. "would allow an agreement [e.g., the 1976 Agreement] with anybody to [allow use of] cluster bombs against civilians,"[177] State Department spokesperson Sean McCormack replied: ". . . [O]bviously the conflict between Hezbollah and Israel was one between Hezbollah and Hezbollah fighters which engaged in an act of aggression against Israel. *They crossed an international border. They started a war.* So clearly the conflict was between those two parties."[178]

Indeed, to the extent that the 1976 Agreement permitted CM use only in an IAC, Israel's employment of these weapons can be regarded as permissible only if Lebanon is regarded as a party to the conflict. However, if one applies a strict interpretation of Article 51 of the U.N. Charter, even Israel's use of force was wrongful if Hezbollah's acts cannot be attributed to any state.[179] Nevertheless, as held by the ICTY Appeals Chamber in *Tadić*: "[A]n armed conflict exists whenever there is a resort to armed force between States *or protracted armed violence between governmental authorities and organized armed groups . . .*"[180] This test was recently interpreted by the ICTY Trial Chamber in *Haradinaj et al.*, where it focused on two criteria: "protracted armed violence" and "organization."[181]

As to the latter criterion—the existence of an organizational structure—Hezbollah meets this criterion, observed, for instance, in the existence of headquarters, a command structure, and the ability to obtain access to weapons.[182] Protracted armed violence has been interpreted "as referring more to the intensity of the armed violence than to its duration."[183] Reviewing the indicators for "intensity" as outlined in *Haradinaj*—such as the number and caliber of munitions fired or the extent of material destruction—it is clear that the 2006 War fits this

175. *See, e.g.*, The COI's Rep., *supra* note 170, at ¶ 62.

176. Press Release, *supra* note 159.

177. McCormack, *supra* note 13.

178. *Id.* (emphasis added).

179. U.N. Charter art. 51.

180. *Tadić*, Case No. IT-94-1 at ¶ 70 (emphasis added).

181. Prosecutor v. Haradinaj et al., Case No. IT-04-84-T, Judgment, ¶¶ 37-40, 50-51 (Apr. 3, 2008), *available at* http://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf.

182. *Haradinaj*, Case No. IT-04-84-T at ¶ 53. *See, e.g.*, HALA JABER, HEZBOLLAH: BORN WITH A VENGEANCE 38 (1997), for an overview on the Hezbollah's command structure. For an inside account on its emergence, training, installations and other aspects raised by the Trial Chamber in the case of *Haradinaj et al.*, see NAIM QASSEM, HIZBULLAH: THE STORY FROM WITHIN 70-71 (Dalia Khalil trans., 2005).

183. *Haradinaj*, Case No. IT-04-84-T at ¶ 49.

criterion as well.[184]

However, it is exactly this preference for the existence of substance (assessing the conflict's intensity in practice) over a strictly formal approach (the belligerent's legal status) that characterized Israel's traditional interpretation of the 1976 End-User Agreement. Within this context, the preference for substance brings us to the Agreement's implicit requirement for *high levels of violence* (especially if the 1967 and 1973 Wars serve as precedents).

First and foremost, 3,917 rockets, averaging 100 rockets daily within a 34-day period, hit Israel's civilian population; on the other side, 173,293 Israeli artillery projectiles and rockets were fired into South Lebanon, mainly to prevent the Hezbollah from firing first.[185] In addition, the IAF conducted a higher number of sorties than in the 1973 War—an average of 350 sorties per day.[186] Moreover, it is perhaps sufficient to recall that in contrast to the heavy attacks on Israel's civilian population in 2006 (resulting in 43 civilian casualties and thousands of wounded),[187] the conduct of the 1956 Sinai War—undoubtedly a classic IAC—kept Israel's civilian population out of the war.[188] Even the IDF's casualty rate, approximately 50 soldiers, differentiates the two wars; in the 1956 War there were fewer soldiers injured.[189] Both Israel's civilian and IDF casualties are, of course, moderate in comparison to the extensive civilian harm caused to the Lebanese and Hezbollah (1,191 deaths—with as many as 600 deaths of military personnel).[190] Moreover, almost one million Lebanese people were displaced.[191]

In sum, while applying the ICTY's criterion for determining the existence of an armed conflict to the 2006 War demonstrates that this was a classic armed conflict, the large-scale firepower together with the high level of civilian harm and casualties on both sides support the claim that the 2006 War was an IAC using a

184. It should be noted that none of the indicative factors is, in itself, essential to establish that the criterion are satisfied. *Id. at* ¶ 60.

185. Brig. Gen. (Res.) Ya'acov Zigdon, *Much Fire, Little Thinking*, 420-421 MA'ARACHOT 44, 45-46 [IDF'S OFFICIAL JOURNAL], (Sept. 2008).

186. AMOS HAREL & AVI ISSACHAROFF, 34 DAYS: ISRAEL, HEZBOLLAH, AND THE WAR IN LEBANON 292 (2008).

187. The COI's Rep., *supra* note 170, at ¶ 78.

188. The then Chief of Staff, Moshe Dayan, recalled in his memoirs that Egypt's air force limited its activity to the Sinai Peninsula and only in two cases carried out bombing sorties into Israel; these resulted in no damage whatsoever. *See* MOSHE DAYAN, AVNEI DEREKH (MILESTONES - AN AUTOBIOGRAPHY) 280 (1976). This episode is missing from the book's English version, MOSHE DAYAN, MOSHE DAYAN: STORY OF MY LIFE (1976).

189. During the 1956 War, the IDF suffered 172 causalities; in the 2006 War, the IDF suffered 119 casualties. For data on the 1956 War see, e.g., AVNER YANIV, POLITICS AND STRATEGY IN ISRAEL 142 (1994). For data on the 2006 War see Winograd Final Rep., *supra* note 99, at 33.

190. The COI's Rep., *supra* note 170, at ¶ 11.

191. For the numbers of Lebanese killed or displaced as provided by the Lebanese authorities, see *id.*; *see also* United Nations Institute for Disarmament Research [UNIDIR], *The Humanitarian Impact of Cluster Munitions*, 29, U.N. Doc. UNIDIR/2008/1 (2008). For the high estimate regarding Hezbollah's casualties, see Kalb & Saivetz, *supra* note 4, at 48-49 (relying on Israeli sources). The Winograd Committee mentioned "hundreds" when referring to *Hezbollah's* casualties. *See* Winograd Final Rep., *supra* note 99, at 33.

flexible interpretation. As noted by Professor Antonio Cassese: "An armed conflict which takes place between an Occupying Power and rebel or insurgent groups — whether or not they are terrorist in character—in occupied territory, amounts to an international armed conflict."[192] Even Israel's Supreme Court, acting as the High Court of Justice (HCJ), in the *Targeted Killing* case preferred such a flexible interpretation when classifying the conflict with Palestinian organizations inside the Occupied Territories as an IAC.[193]

With respect to the second criterion (military, fortified targets), it is clear that whenever the targets were bases, infrastructure or "'areas of dense vegetation, in which the Hizbullah set up fortified infrastructures (known as 'Nature Reserves'),"[194] this criterion was met.

In contrast, whenever CMs were used against populated areas (e.g., villages) or within their vicinity —even if deserted—the 1976 Agreement was breached. As Halutz's statement vis-à-vis unruly ground troops indicates, this was Israel's utmost concern. After all, the 1978 stipulation is quite clear: "cluster bombs cannot be used in or adjacent to areas of civilian population."[195] However, given South Lebanon's population density and Hezbollah's tactic of taking advantage on the presence of civilian population,[196] it is hard to conceive how Israel could employ CMs in future actions against Hezbollah while strictly following this stipulation. In the 2006 War, the IDF organized a plan for evacuating 170 Lebanese villages and employing massive artillery barrages. As recently exposed in one of the IDF's official journals, "[t]he firing was first directed to the villages' periphery and after a short pause, to their center."[197] The fact is that CMs are neither designated to nor capable of harming civilians hiding in bomb shelters.[198]

Indeed, much can be said on the legality of this act irrespective of its minimal collateral damage to human life. However, for this Article's purposes, other than providing an explanation for the gap between Israel's large-scale CM use and the marginal collateral damage *during* its firing, it indicates Israel's efforts to bridge

192. ANTONIO CASSESE, INTERNATIONAL LAW 420 (2d. ed., 2005).

193. *See* HCJ 769/02 The Public Committee against Torture in Israel et al. v. The Government of Israel et al. [2006] IsrSC 53(4) 817, ¶ 16-21, *translated at* http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf [hereinafter *Targeted Killing* case]. For a different approach calling for "a mixed legal regime" (international human rights law and IHL) which incorporates features of international human rights law, see David Kretzmer, *Targeted Killings of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171, 174 (2005). For a comprehensive analysis of targeted killing in general, see NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 3-5 (2008).

194. *See* Opinion of the Military Advocate General Regarding Use of Cluster Munitions in Second Lebanon War, *supra* note 134.

195. *See* Wood, *supra* note 44, at 10.

196. For recent demographic data on South Lebanon, see *Lebanese Republic - Presidency Of The Council of Ministers*, 2007 Stat. Y.B. (Cent. Admin. for Stats.) 9.

197. *See* Zigdon, *supra* note 185, at 48.

198. This is a result of the bomblet's low penetration capability given a standard shelter's thick cement wells.

the immense gap between the 1978 stipulation and the 2006 reality.[199] Israel's explanation for its breach is already detailed in the MAG's legal opinion.[200] In a nutshell, Israel's extensive use of CMs—which, as the MAG stressed, is "'a legal weapon which does not inflict superfluous injury on the enemy [i.e., within the principle of humanity]"— was legal as (1) a concrete *military necessity* to prevent rockets being fired at Israel existed and (2) the principles of *distinction* and *proportionality* were maintained because the CMs were fired exclusively at military targets and then only when it was determined that the potential collateral damage was not disproportionate to the military advantage gained.[201] In practice, the MAG held the view that excluding one clear deviation and an additional case in which CMs were used to assist in evacuating forces,[202] CMs were used in populated areas solely as an immediate defensive response to rocket attacks after non-combatants were evacuated from these same targets.[203] That is, all the uses, save one, were lawful.

Within the Article's context (i.e., the bilateral end-use agreement), however, it is important to note that the U.S, which itself has engaged in similar asymmetric conflicts,[204] did realize that following this condition strictly (e.g., not even targeting "nature reserve" which were build next to populated areas) is tantamount to depriving Israel from using CM in South Lebanon regardless of the CMs chosen's HDR. As McCormack stated upon relating to the 1976 Agreement (January 29, 2007): "It's a fact that they [Hezbollah fighters–EB] used human shields, that they hid themselves among the civilian populations . . . no military commander wants to be . . . in the position of acting in self-defense and going after those people who have committed aggressions against your country but are then hiding among civilian populations."[205] Furthermore, there is a difference between breaching a basic condition of the Agreement (i.e., employing under a situation far from being amount to meaningful military conflicts) and breaching a secondary

199. As the Winograd Committee clearly stated: "We should note that we did not hear (*sic*) any claims regarding civilian injuries from cluster bombs **during** the war." *See* Winograd Final Rep., *supra* note 99, at 497. Indeed, even the HRW in its February 2008 comprehensive report counted very few instances of "time of attack casualties" and therefore focused on "'civilian harm" in the chapter on post-conflict effects. *See* HUMAN RIGHTS WATCH, *supra* note 92, at 52. This is not to argue that there were no civilian casualties from other weapons. For a list of these casualties and details on the incidents leading to their deaths see HUMAN RIGHTS WATCH, WHY THEY DIED: CIVILIAN CASUALTIES IN LEBANON DURING THE 2006 WAR 62-178, Appendix II (2007).

200. *See* Opinion of the Military Advocate General Regarding Use of Cluster Munitions in Second Lebanon War, *supra* note 134. For a concise English summary, see IDF Spokesperson, *supra* note 138.

201. *See id.* at ¶¶ 32-39. For a summary of this argument, see also Winograd Final Rep., *supra* note 99, at ¶ 10.

202. In this case, the IDF fired at the Lebanese village of Maroon-A-Ras on July 20th. Halutz himself justified the use *post facto*. *See* Israel News Agency, *Israel: Cluster Bombs Used Legally Against Terrorist Targets* (Dec. 26, 2007), http://www.israelnewsagency.com/lebanonwarhizbullah hezbollahterrorattacksisraelidfclusterbombsdefensekatusha48122607.html.

203. *See* MAG's Legal Opinion, *supra* note 134, at ¶¶ 18-20.

204. *See, e.g.*, Human Rights Watch, Fatally Flawed: Cluster Bombs And Their Use By The United States In Afghanistan 21-24 (2002) (summarizing reports of cluster strikes in or near populated areas in Afghanistan).

205. McCormack, *supra* note 13.

stipulation within the Agreement's parameters once the use *per se* is already permissible.

In sum, we hold the view that given the altered reality and the possibility of dual use, a careful case-by-case examination is needed. Relying on NGOs' reports it does seem that there were a few breaches—as Halutz himself admitted.[206] It is clear, however, that under a non-flexible interpretation of this clause—as the Bush Administration demonstrated—the 1976 Agreement is doomed to be violated in the next would-be large-scale military conflict in Lebanon.

As such, the third criteria, a "regular army" or "regular forces of a sovereign nation" in its 1978 wording, becomes highly important. Hezbollah is not a regular army, and as such, CM use against it apparently constitutes a breach of the 1976 Agreement regardless of its specific targets. However, according to flexible and purpose-oriented interpretation, the agreements need to be understood "in the light of present-day conditions."[207] Professor Schmitt's comments regarding whether Israel's 2006 military actions were consistent with criteria for lawful defensive actions should be adopted, *mutatis mutandis*, to this case: "[I]nternational law is dynamic, that if it is to survive, it has to reflect the context in which it is applied as well as community expectations as to its prescriptive content."[208]

Many jurists currently hold the view that the traditional distinction between "a regular army" and a NSAG with respect to various applications of *jus ad bellum* and *jus in bello should be reconsidered.* Interestingly, this view finds much support in the approach adopted by Israel's high command, when it was engaged in warfare against NSAGs (armed Palestinian organizations) already during the first diplomatic crisis (1978), as reflected in the following explanation to Israel's CMs use by then-IDF Chief of Staff, Gur as follows:[209]

> Personally, I have no slight doubt that we have not violated the spirit of the agreement with the Americans. We employed the bombs against artillery guns, which are weapons of regular armies and not terrorists. Therefore I haven't seen in the use of these bombs violation in our agreement with the Americans. In my judgment if we had spoken with them about artillery firing and Katyushas [Russian weapon which fires rockets and was widespread among armed Palestinian organizations], they would have agreed to include the responses to that [the firing] in

206. For such reports, see HUMAN RIGHTS WATCH, *supra* note 90, at 107; NASH, *supra* note 19, at 36.

207. *See* Tyrer v. UK, 58 I.L.R. 339, 553 (Eur. Ct. H.R.1978) (wording of the European court of Human Rights regarding the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222), *cited in* MALCOLM N. SHAW, INTERNATIONAL LAW 938 (6th ed., 2009).

208. Schmitt, *supra* note 88, at 149.

209. For the implications of the NSAG in the current international system see Nicolas Florquin & Elisabeth Decrey Warner, *Engaging Non-State Armed Groups or Listing Terrorists? Implications for the Arms Control Community*, 1 DISARMAMENT FORUM 17, 20 (2008).

> the parameters within we were allowed to employ cluster bombs.[210]

Such a flexible interpretation was rendered during the 1982 crisis—even though Syria's military involvement in the 1982 War was sufficient for Israel to meet that demand—by presenting the Palestinian forces' large quantity and sophisticated arms as evidence that supported the CM use criterion regarding regular armies. As Maj. Gen. Aharon Yariv clearly stated in a news conference: "Cluster bombs and cluster shells were used only against *organized resistance*, mainly the Syrians' armor and infantry."[211] Yet, in the 1982 case, it appears that Israel felt that the military imperatives for employing CMs should override any externally imposed restrictions. As Ariel Sharon, Israel's then-Minister of Defense proclaimed: "In wartime it is necessary to interpret formal agreements differently than in peacetime."[212]

It has since become much clearer that the distinction between "a regular army" and an NSAG—perceived as a weaker military force—is superficial.

The implications are that banning some means of warfare by resting on the formal definition of a national opponent's formal status (independent state or NSAG) *is completely obsolete*. Indeed, some jurists do support the U.S. perspective as recently formulated by a senior State Department official:

> The United States hasn't used them [CMs] in the conflicts we're involved in since 2003 . . . Since then, when you're fighting a counterinsurgency, which is what's happening in both Afghanistan and Iraq, I think our military planners would agree with you completely that *they're not appropriate* and wouldn't be very useful.[213]

Nevertheless, Hezbollah's conduct and capabilities—such as firing 3,917 rockets within 34 days of war[214]—led many military experts to perceive its campaign "as a major departure from the asymmetric methods of traditional terrorists or guerrillas and as a shift toward the conventional military methods normally associated with state actors."[215] As stated in the *Targeted Killing* ruling:

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210. Stated during an interview with the Israeli Press Corps upon his retirement, *see* Agres et al., *supra* note 166. Gur explained to the foreign press on that occasion that CMs were used "only in a very few cases, and then against artillery [positions], in accordance with the spirit of our agreement with the US." *See* Milan J. Kubic, *The Cluster Bomb Furor*, NEWSWEEK, Apr. 24, 1978, at 50. The issue's sensibility is reflected in the total absence of Gur's (censored) memoirs regarding this period. *See* MORDECHAI GUR, CHIEF OF THE GENERAL STAFF (1974-1978) ch. 7 (1998).

211. *Use of Cluster Bombs Is Confirmed by Israel*, N.Y. TIMES, June 28, 1982, at A8 (emphasis added).

212. After being questioned on this issue during a meeting with a delegation of six Congressmen headed by Nick Rahall (D-VA) during their ten-day visit to the region in late July 1982. *See* Nick J. Rahall II, *Lebanon and U.S. Foreign Policy Toward The Middle East*, 2 AM.-ARAB AFF. 40, 45 (Fall 1982).

213. Mull, *supra* note 145.

214. *See* Zigdon, *supra* note 185, at 46.

215. Stephen Biddle, & Jeffrey A. Friedman, The 2006 Lebanon Campaign And The Future Of Warfare: Implications For Army And Defense Policy 5 (2008). As this study by the U.S. Army War College concludes "[i]n all, then, Hezbollah's behavior in 2006 conformed to neither an ideal model of 'guerrilla' warfare nor one of 'conventional' war fighting, but its approach and proficiency nonetheless

"Indeed, in today's reality, a terrorist organization is likely to have considerable military capabilities. At times they have military capabilities that exceed those of states."[216] As a case in point, Sri Lanka's Liberation Tigers of Tamil Eelam (LTTE), proscribed as a terrorist organizationby 32 states, has its own air and naval forces.[217] Therefore, given the altered reality, this Article strongly suggests that the distinction between "a regular army" and an NSAG vis-á-vis their attributed military strength and the appropriate means to be used in combat—should be re-considered.

It should be noted, however, that while the 1976 Agreement's conditions focusing on the adversaries' firepower justified addressing the 2006 War as an IAC and Hezbollah as an organization akin to a regular army, the issue currently at hand is whether Hezbollah's guerrilla tactics justify the employment of CMs against them. Nevertheless, the 1978 clarifications give the impression that their U.S. authors were preoccupied with the adversaries' firepower as a threat to Israel's security. Hence, the open question regarding the adversaries' tactics should have but a limited effect on the conclusion as to whether this End-User Agreement was breached.

Because not all U.S. Administrations can be expected to be as favorably inclined toward Israel as was the Bush Administration was it is likely that they may confine themselves to a formal and strict approach to the Agreement's interpretation. Therefore, it is interesting to assess whether Israel can invoke the doctrine of *rebus sic stantibus* in light of a strict legal interpretation. It should be emphasized, however, that the following discussion has no practical implication given the rather intense patron-client relationship, such an Israeli move is unlikely, *a prior*.[218]

As the International Court of Justice (ICJ) stated in the 1973 *Fisheries Jurisdiction* case:

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place it well within a band that has characterized many past state militaries in interstate conflicts." *Id.* at XV.

216. *Targeted Killing* case, *supra* note 193, at ¶ 21 (Decision written by Aharon Barak, then President of the Israeli Supreme Court).

217. *See, e.g.*, Sumantra Bose, CONTESTED LANDS: ISRAEL-PALESTINE, KASHMIR, BOSNIA, CYPRUS, AND SRI LANKA 6, 27-28, 35, 41 (2007) (discussing the LTTE's military capabilities). However, in January 2009 the Government initiated a major military offensive which forced the LTTE to give up much of their territory. By January 25, the Sri Lankan army "had captured" the town of Mullaitivu, the last major LTTE stronghold—a move which brings an increasing belief that the final military defeat of the LTTE is near or, at least, "signal[s] the end of conventional battles." *See, e.g.*, Somini Sengupta, *Troops Take A Town Held By Rebels In Sri Lanka*, N.Y. Times, Jan. 26, 2009, at A9; Emily Wax, *Sri Lankan Leader Says Tamil Rebels Nearly Defeated*, Wash. Post, Feb. 5, 2009, at A10. On February 21, despite the LTTE desperate military situation, its air force, the "Air Tigers" launched a surprise air attack (its 10th since the first one in March 2007) on Sri Lanka's capital, Colombo, in what observers described as "a defiant show of power." Emily Wax, *Rebel Air Attack Kills 3 in Sri Lankan Capital-One Plane Crashes, 2nd is Shot Down*, Wash. Post, Feb. 21, 2009, at A10.

218. For the diplomatic and intellectual history of this doctrine, see David J. Bederman, *The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View on the Law of Nations*, 82 AM. J. INT'L L. 1, 2-4 (1988).

> International law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty.[219]

While the observation that "this Convention has since its conclusion been the source of much and angry discussion between the two Governments" referred to the 1865 U.S.-Britain Clayton Bulwer Treaty in which the U.S. attempted to revoke the doctrine, the same description could easily apply to the 1976 End-User Agreement as well.[220] In addition, one may notice that Israel was forced to consent to the treaty's stipulations. Historically, it should be remembered, the element of coercion has been responsible for states resorting to this doctrine, especially between the two world wars.[221]

Nevertheless, Article 62 of the 1969 *Vienna Convention on the Law of Treaties,*[222] which represents the customary law on this issue, [223] includes strict conditions which have to be met in order for such a radical claim be accepted.[224] In fact, in the two cases this claim was raised before the ICJ, it was rejected.[225] Clearly, the burden of proof is heavy, and rightly so given that the "doctrine is an important but limited exception to the foundational principle of *pacta sunt servanda.*"[226] Professor Vagts, in summarizing the doctrine's status as of 2005 notes: "*rebus sic stantibus* will not avail unless the change of circumstances is clearly a drastic change from the circumstances anticipated by the parties."[227]

Given such a heavy burden, it is indeed difficult to determine how Israel could invoke this doctrine, particularly because prior to the agreement's conclusion in December 1976, but mainly in the subsequent period (i.e., up to the 1978 Litani Operation), rockets were fired into Israel from South Lebanon by Palestinian organizations.[228] The 2006 Hezbollah rocket attacks were indeed much more extensive and penetrating (rockets reached as far south as Haifa, Israel's third

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219. Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 3, 19 (Feb. 2). The Court repeated this stance following 25 years in the *Gabcikovo-Nagymaros Project* case. *See* Gabcikovo-Nagymaros Project (Hung. v. Slovk.) 1997 I.C.J. 7, 63-4 (Sept. 25).

220. For the citation as well as a brief overview of this historic case, see Vagts, *supra* note 20, at 467 (quoting Arnold McNair, The Law of Treaties 521 (1961)). It should be noted, however, that following a strong Britain resistance the U.S. dropped its claim. *Id.*

221. *See id.* at 468.

222. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 62, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

223. *See, e.g.,* Fisheries Jurisdiction, *supra* note 219, at 18; *see also* SHAW, *supra* note 207, at 496.

224. For the five accumulated conditions, see *Reports of the Commission to the General Assembly*, [1966] 2 Y.B. Int'l Comm'n 259, U.N. Doc. A/6309/Rev.1.

225. Fisheries Jurisdiction, 1973 I.C.J. at 19; Gabcikovo-Nagymaros Project, 1997 I.C.J. at 38-39.

226. Mark Bennett & Nicole Roughan, *Rebus Sic Stantibus and the Treaty of Waitangi*, 37 VICTORIA U. WELLINGTON L. REV. 505, 513 (2006).

227. Vagts, *supra* note 20, at 475.

228. For such attacks, see, e.g., Raymond H. Anderson, *Cairo Reports an Israeli Jet Hit*, N.Y. TIMES, July 8, 1970, at 9; *Chronologies*, N.Y. TIMES, Dec. 3, 1973, at 3; *Israeli Planes Strike 2 Palestinian Areas at Beirut After Theater Attack*, N.Y. TIMES, Dec. 13, 1974, at 12.

largest city). Yet, even these did not amount to meeting the requirement of "a fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty."[229] Furthermore, the "fundamental change of circumstances" must not be "foreseen by the parties."[230] Gur, however, stated in the wake of the 1978 crisis: "In my judgment, if we had spoken with them [the U.S.] about artillery and Katyushas, they would have agreed to include responses to them."[231] However, the 1978 clarifications indeed contained no revisions regarding the rocket threat imposed by NSAGs in Lebanon, and as such it is hard to claim, given the opportunity to amend the agreement in April 1978, that rocket attacks had not been foreseen by Israel.

In concluding this issue, a flexible and object-oriented method of interpretation, according to which the formally classified End-User Agreement is interpreted "in the light of present-day conditions,"[232] enables us to claim that the use of CMs in the *2006 War per se* (as distinct from a few specific cases of improper use) does not constitute the treaty's violation. As to the Bush Administration, the January 2007 internal debate over whether Israel should be penalized for using CMs "against towns and villages where Hezbollah had placed its rocket launchers" perhaps indicates that many U.S. Administration officials have adopted just such an interpretation.[233] In the absence of a formal acceptance of this stance, given Israel's inability—politically and legally—to invoke the doctrine of *rebus sic stantibus*, the 1976 Agreement is doomed to be violated again in the next large-scale military encounter with Hezbollah. For many Israelis, a situation in which the entire northern part of the country is paralyzed due to the threat of rockets is tantamount to or even worse than a Syrian limited offensive operation designated to retake the Golan Heights.[234] Although such a subjective perception will not be upheld by any international court, it does explain why—as a senior U.S. official stated regarding the 2006 employment of CMs—"[f]rom their perspective, use of the munitions was clearly done within the agreements."[235]

B. Possible Lesssons for the CCM

In November 2006, when the CCW Third Review Conference convened, the issue of CMs was not on the agenda, with most observers doubtful that it would attract much attention.[236] In the aftermath of the Second Lebanon War (July-

229. Vienna Convention on the Law of Treaties, *supra* note 222, at art. 62(1).

230. *Id.*

231. *See* Agres et al., *supra* note 166.

232. SHAW, *supra* note 207, at 348-49 (discussing Loizidou v. Turkey, 103 ILR 622).

233. While some U.S. officials contended that Israel violated U.S. prohibitions when using CMs against populated areas, others argued that Israel used these arms in self-defense to stop Hezbollah's rocket attacks, which would amount to a "technical violation" at most. *See* Buncombe, *supra* note 123; Cloud & Myre, *supra* note 123; News Agencies, *supra* note 123.

234. For the heavy economic costs, see, e.g., Winograd Final Rep., *supra* note 99, at ¶ 5.

235. The official is John Hillen, the Assistant Secretary of State for Political-Military Affairs in the Bush administration (2005-2007), *cited in* Benhorin, *supra* note 129; Cloud & Myre, *supra* note 123.

236. John Borrie, The Road from Oslo: Emerging International Efforts on Cluster Munitions, 85 Disarmament Dipl., Summer 2007, at 85.

August 2006), however, banning or heavily restricting the use of CMs—with strong encouragement by the ICRC [237] and the Cluster Munition Coalition (CMC)[238]—secured a high place on the agenda.[239] Nonetheless, a call by 25 states, led by Norway, to ban CMs "that pose serious humanitarian hazards because they are, for example, unreliable and/or inaccurate,"[240] did not achieve a consensus. It was ultimately decided to convene a meeting of experts in June 2007 to further consider the application and implementation of existing IHL "to specific munitions that may cause explosive remnants of war, with particular focus on cluster munitions."[241]

And so in June 2007, four months after 46 states agreed to launch the "Oslo Process" and endorse the Oslo Declaration, which committed them to conclude an instrument to ban CMs by late 2008, [242] Germany submitted a draft Protocol VI on CMs.[243] The draft included prohibitions and restrictions on the storage, destruction, and transfer of CMs between countries but fell far short of the prohibitions contained in the CCM.[244] In brief, the Draft Protocol sought to prevent significant post-conflict civilian harm in future conflicts involving employment of CMs due to the availability of new cluster bombs with a negligible

237. ICRC personnel were shocked by Israel's extensive use of CMs. As the ICRC's Director for International Law and Cooperation, Philip Spoerri, later (2007) stated, "[T]he density of cluster submunition contamination may be unprecedented," *cited in* United Nations Institute for Disarmament Research, *supra* note 191, at 30, 61.

238. The CMC—a group of about 300 NGOs from more than 80 countries—was formed after the 2003 Dublin Conference on ERW. For more on the CMC, see Cluster Munition Coalition, http://www.stopclustermunitions.org/.

239. For more details on the 2006 War's contribution to the CCM's emergence, see John Borrie, *The 'Long Year': Emerging International Efforts to Address the Humanitarian Impacts of Cluster Munitions, 2006–2007,* 10 Y.B. OF INT'L. HUMANITARIAN L. 251, 258-60 (2007).

240. Third Review Conference of the High Contracting Parties to the 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, Geneva, Switz., Nov. 7-17, 2006, *Final Document*, 41, U.N. Doc. CCW/CONF.III/11, Part III.

241. Third Review Conference of the High Contracting Parties to the 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, Geneva, Switz., Nov. 7-17, 2006, *Final Declaration*, 6, U.N. Doc. CCW/CONF.III/11, Part II.

242. Olso Conference on Cluster Munitions, Oslo, Nor., Feb. 22-23, 2007, *Declaration*, ¶ 1, *available* at http://www.clusterconvention.org/downloadablefiles/Oslo%20DeclarationFeb07.pdf.

243. *See* Group of Gov'tl Experts of the States Parties to the Convent'n on Prohibit'ns or Restrict'ns on the Use of Certain Convent'l Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscrim. Effects, Geneva, Switz., June 19-22, 2007, *Draft CCW Protocol on Cluster Munitions,* 1, U.N. Doc. CCW/GGE/2007/WP.1 (May 2007). The proposed Protocol joins three initial protocols and two Protocols which were adopted later: Protocol on Non-Detectable Fragments (Protocol I), Dec. 2, 1983, 1342 U.N.T.S. 168; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Devices (Protocol II), Dec. 2, 1983, 1342 U.N.T.S. 168, *amended by* 35 I.L.M. 1206 (entered into force Dec. 13, 1998); Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Dec. 2, 1983, 1342 U.N.T.S. 171; Protocol on Blinding Laser Weapons (Protocol IV), Oct. 13, 1995, U.N. Doc. CCW/CONF .I/7 (Oct. 12, 1995); and Protocol on Explosive Remnants of War, May 16, 2006, U.N. Doc. CCW/MSP/2003/2.

244. *See* Draft Protocol, *supra* note 18, at art. 5-6.

HDR (less than one percent).[245] This state of affairs should, however, become effective only after a long transition period (8 years, with the Protocol's optional extension for an additional four years) after its entry into effect.[246] In the interim period, use of "old-generation"' CMs was allowed due to a few loosely structured conditions, such as approval by "[the] highest-ranking operational commander in the area of operations or by the appropriate politically mandated operational authority, in accordance with its national procedures."[247]

In November 2007, at the CCW State Parties annual meeting, a consensus was achieved to "negotiate a proposal to address urgently the humanitarian impact of cluster munitions, while striking a balance between military and humanitarian considerations."[248] However, no agreed text on CMs was completed during the five sessions held by the CCW's Group of Governmental Experts (GGE, the expert subsidiary body of the CCW) on CMs in 2008.[249] Yet, the CCW State Parties, in their November 2008 annual meeting, decided to continue work into 2009, while setting aside two 2009 GGE sessions to address the CM weapons issue.[250] Nonetheless, no agreed text was completed even in 2009 and in their November 2009 annual meeting, CCW State Parties decided to continue negotiation in 2010.[251]

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245. *See id.* at art. 4, ¶ 2(b). Alternatively, employing CM weapons under the proposed Draft Protocol is permissible once they possess at least one effective safeguard "that must effectively ensure] with a high degree of reliability that unexploded submunitions will no longer function as explosive submunitions" such as self-destruction mechanisms, self-deactivating features or self-neutralization mechanisms. *Id.* at ¶ 2(a).

246. *Id.* at art. 4 ¶ 3. As expected, this point which in the Protocol's earlier drafts ranged up to 15 years has drawn heavy criticism by CCM supporters who hold the view that "the 13-20 year deferral is designed to permit continued *use* of the weapon during that time." Steve Goose, Co-Chair, CMC, CMC Statement on Article 4, Gen. Prohibitions and Restrictions on Conventional Weapons (CCW) Group of Governmental Experts (GGE) on Cluster Munitions (Nov. 3, 2008), *available at* www.stopclustermunitions.org/wp/wp-content/uploads/2008/ 11/ccw-art-4-11308.pdf.

247. Draft Protocol, *supra* note 18, at art. 4, ¶ 4(a).

248. Meeting of the High Contract'g Parties to the Convent'n on Prohibit'ns or Restrict'ns on the Use of Certain Convent'l Weapons which may be Deemed to be Excessively Injurious or to have Indiscrim. Effects, Geneva, Switz., Nov. 7-13, 2007 *Report,* ¶ 37, U.N. Doc CCW/MSP/2007/5 (Dec. 3, 2007). A draft mandate to begin negotiations on this Protocol was submitted by Germany on behalf of the European Union in June 2007. *See* Group of Gov'tl Experts of the States Parties to the Convent'n on Prohibit'ns or Restrict'ns on the Use of Certain Convent'l Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscrim. Effects, Geneva, Switz., June 19-22, 2007, *Draft CCW Negotiating Mandate on Cluster Munitions.*

249. *See* Group of Gov'tl Experts of the States Parties to the Convent'n on Prohibit'ns or Restrict'ns on the Use of Certain Convent'l Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscrim. Effects, *Procedural Report,* ¶ 13, U.N. Doc. CCW/GGE/2008-V/2 (Nov. 14, 2008).

250. Two sessions specifically addressing CMs were scheduled for 2009. *See* Meeting of the High Contract'g Parties to the Convent'n on Prohibit'ns or Restrict'ns on the Use of Certain Convent'l Weapons which may be Deemed to be Excessively Injurious or to have Indiscrim. Effects, Geneva, Switz., Nov. 13-14, 2008, *Report* ¶ 34, U.N. Doc. CCW/MSP/2008/4, (Jan. 23, 2009). *See also* Jeff Abramson, *CCW Fails to Reach Cluster Munitions Pact,* ARMS CONTROL TODAY, Dec., 2008, at 48.

251. After prolonged futile discussions even on the point whether it is a protocol or a proposal for protocol it was agreed that the GGE "will conclude its negotiations as rapidly as possible and report to the next Meeting of the High Contracting Parties", while two sessions were scheduled (Apr. 12-16 and

Critics of this attempt to address CM use under the auspices of the CCW have raised doubts whether such a protocol could ensure the prevention of a humanitarian crisis similar to that witnessed in South Lebanon.[252] Those critics, mainly CCM supporters, view the attempt as a means to undermine the CCM[253] and forestall the weapon's nascent stigmatization, which they had hoped the CCM would generate.[254] Moreover, they are concerned that, while the CCM seeks to delegitimize this weapon, the protocol's would-be effect can be expected to have polar results. Hence, the extensive CM use in the Second Lebanon War appears to provide an important lesson on what the preferable option in this still theoretical dilemma between banning and regulating the weapon should be. As this Article argues, a bilateral End-Use Agreement confronts Israel with severe restrictions vis-à-vis the use of CMs. Importantly, these restrictions are much more stringent and specific than the general principles incorporated in the CM Draft Protocol for the purpose of preventing future IHL violations associated with employment of CMs.[255]

On the one hand, approximately 4,000 thousand rockets descended on Israel's civil population (an average of 100 rockets daily); on the other hand, more than 173,000 artillery projectiles and rockets were fired on South Lebanon, whatever their aim. In retrospect, it was almost unavoidable that Israel would resort to CMs despite the stringent restrictions of the 1976 End-User Agreement. As the 2006 War strongly suggests, despite Israel's unique bilateral and legally binding commitment, when it comes to restraining the use of CM weapons in a bitter

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Aug.30-Sept.3). See Katherine Harrison, *Landmine Action Notes on CCW*, Nov. 14, 2009 (unpublished Note, on file with Author). As of late November no official report is available.

252. For a critical review, article by article, of an earlier, slightly modified version (July 2008) of the CCW Draft Protocol, see HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH OBSERVATIONS ON THE CONVENTION ON CONVENTIONAL WEAPONS (CCW) DRAFT PROTOCOL ON CLUSTER MUNITIONS 1, 6 (2008) [hereinafter HRW, OBSERVATIONS ON WEAPONS], *available at* http://hrw.org/english/docs/2008/09/02/global19723.htm.

253. As 25 CCW State Parties, mainly strong supporters of the Oslo Process, stated during the November 2008 session of the GGE upon objecting the proposed draft protocol, "...by allowing states to choose from a menu of vaguely-worded options . . . it [the Chair's text] could be used as a justification for the continued use of cluster munitions that have already proven over the past decades to cause exactly the humanitarian consequences that we are trying to address. For these reasons, the Chair's text as it stands is not acceptable to our delegations." For their joint statement see John Borrie, CCW: The Wailing Wall, http://disarmamentinsight.blogspot.com/2008/11/ccw-wailing-wall.html (Nov. 6, 2008) (as it was read into the record; no formal reference is available).

254. For a recent overview on this process with respect to a range of war instruments, see BRIAN RAPPERT, A CONVENTION BEYOND THE CONVENTION: STIGMA, HUMANITARIAN STANDARDS AND THE OSLO PROCESS 2-4 (Landmine Action 2008). *See also,* Micheál Martin, Ir. Foreign Minister, Closing Ceremony at the Dublin Diplomatic Conference on Cluster Munitions (May 30, 2008), *available at* http://www.clustermunitionsdublin.ie/pdf/Ireland.pdf ("[E]ven though we all know that there are important states not present, I am also convinced that together we will have succeeded in stigmati[z]ing any future use of cluster munitions.").

255. *See* Draft Protocol, *supra* note 18, at art. 3 (protecting civilians, civilian population and civilian objects). As expected, the HRW who reviewed the July 2008 draft, which was detailed and much harsher than the later drafts, found "serious shortcomings with this article." HRW, OBSERVATIONS ON WEAPONS, *supra* note 252, at 4. Eventually, all the paragraphs that represented new law and were critiqued by HRW have been deleted and the latest draft simply reiterates existing IHL.

conflict, no state is to be trusted, especially given the vague and loose restrictions characterizing the current draft proposal.

Unlike anti-personnel mines, for instance, CMs are still perceived by modern militaries as an effective weapon:[256] "They . . . provide distinct advantages against a range of targets . . . ."[257] Hence, if CMs remain part of an army's arsenal irrespective of the protocol's final stringency, it may be doomed—like the 1976 End-Use Agreement—to be violated.

Given the large number of possessor states, massive use of CMs may just be a matter of time, subject to a country's involvement in a bitter conflict. Only the total elimination of CMs as legitimate weapons can prevent the recurrence of the 2006 tragedy.

Historically, banning a weapon has not ensured its total elimination.[258] Regardless of the intrusiveness of the legal instrument applied, states can always develop and/or maintain a hidden arsenal.[259] Banning does guarantee, however, that the banned weapon is, at minimum, outside the reach of regular combat units when a bitter conflict does erupt, a restriction making it impossible for the alleged arsenal to be used other than as a last resort. That being the case, the salient question—underestimated by many CCM state supporters which are free from grave security concerns—remains as to whether there are appropriate alternatives to the military advantages offered by CMs.

V. CONCLUSION

While reading this Article, one may notice a sharp discrepancy between U.S. expressions of the CM's unquestionable legitimacy and the heavy restrictions imposed on Israel regarding its use. After all, notwithstanding U.S. practice (resorting to this weapon in most of the conflicts in which it was involved), only in

256. For discussion on the limited military utility attributed to AP mines see, e.g., Robert G. Gard, Jr., *The Military Utility of Anti-Personnel Mines*, *in* To Walk Without Fear: The Global Movement To Ban Landmines 136, 140-41, 143, 154 (Maxwell A. Cameron et al. eds., 1998).

257. Memorandum from Robert Gates, U.S. Secretary of Defense, for Sec'ys of the Military Dep't Chairman of Joint Chiefs of Staff Under Sec'y of Defense for Acquisition, Tech. and Logistics Under Sec'y of Defense for Policy Commanders of the Combatant Commands Gen. Counsel of the Dep't of Defense (June 19, 2008) (announcing a new U.S. policy on CMs), *available at* http://www.defenselink.mil/news/d20080709cmpolicy.pdf. In principle, the new policy (June 19, 2008) sets the goal of using CMs with less than one percent HDR within the next ten years.

258. *See* Diplomatic Conference for the Adoption of Convention on Cluster Munitions, Dublin, Ir., May 19-30, 2008, *Convention on Cluster Munitions,* art. 1(b). Note that Article 3(6) permits possession of a limited number of CMs and explosive sub-munitions for the development of and training in CM and explosive sub-munition detection, clearance, or destruction, and development of CM countermeasures. *See id.* at art. 3(6).

259. As Ken Alibek, a.k.a. Kanatjan Alibekov, former deputy head of Biopreparat, the Soviet Union's bio-weapons program, and President of Advanced Biosystems, Inc., wrote in his book's prologue, "[o]ver a twenty-year period that began, ironically, with Moscow's endorsement of the Biological Weapons Convention [BWC] in 1972, the Soviet Union built the largest and most advanced biological warfare establishment in the world." KEN ALIBEK WITH STEPHEN HANDELMAN, BIOHAZARD X (1999). It should be noted that the Soviet Union is one of the three BWC depository states.

June 2008 did the U.S. Secretary of Defence Robert Gates state that: "Cluster munitions are legitimate weapons with clear military utility. They are effective weapons . . . an integral part of U.S. . . . capabilities."[260] Five months later, during the November 2008 session of the GGE on CMs, after CCM supporters succeeded to thwart the U.S. efforts to conclude a draft protocol at that session, it hurried to clarify that: "On the 4th of December, after the signing ceremony of Oslo, cluster munitions will still remain as lawful and legitimate weapons."[261]

Yet, if CMs are such "legitimate" and "lawful" weapons, why has the U.S. chosen to single out this means of warfare for specific use restrictions from among the vast variety of weapons it has supplied to Israel over the years? Why does the general legislation that applies to all U.S.-made weapons (the 1952 Mutual Agreement and the 1976 AECA) not apply to CMs? After all, albeit the 1976 Agreement's stipulations and its willingness to engage with Israel over this weapon, *the U.S. has singled out CMs as special weapons requiring high military thresholds before they can be operated.* CMs therefore appear to represent an intermediate level between "regular" conventional weapons and WMD.

Furthermore, while the 1976 Agreement's birth can be explained within the context of the specific type of CM involved (i.e., FAEs, which continue to cause much concern in the international community), it remains difficult to accounts for the U.S.'s prolonged concern over Israel's use of CMs. Given its diplomatic battle with CCM supporters' over stigmatization of the weapon, the U.S decision to confront Israel over CMs use in the 2006 War was *highly counterproductive.*

As research on weapon stigmatized has shown, "[s]ingling out certain weapons or classes of weapon from the rest" is the first step in "differentiating them from other means of force that result in death and injury."[262]

Sincere U.S. concern over possible harm to the Arab civilian population can provide but a partial explanation in the face of numerous incidents where massive collateral damage resulted from Israel's use of U.S.-made weapons other than CMs. In many cases, the U.S. remained Israel's staunch ally, laboring to "protect" Israel from possible sanctions by the international community.[263]

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260. Gates, *supra* note 257.

261. Stephen Mathias, Head of U.S. Delegation, U.S. Delegation Statement on Proposed Changes by Group of 25 (Nov. 7, 2008), *available at* http://www.ccwtreaty.com/statements/1107Group25.html.

262. Rappert, *supra* note 254, at 18.

263. On November 8, 2006, for instance, 19 civilians were killed and 40 were wounded from 155mm HE U.S.-made shells fired by the IDF one day after the formal end of *Operation Autumn Clouds* in Beit Hanoun, Gaza Strip. Three days later, the U.S. *vetoed* a draft resolution by Qatar deploring, *inter alia,* Israel's military actions in Gaza and calling for an immediate withdrawal of Israeli forces from the Gaza Strip. *See* S.C., U.N. SCOR 5565th mtg., U.N. Doc. S/PV.5565 (Nov. 11, 2006) (10 in favor with 4 abstentions). It should be noted that after another six days, on November 17, a similar draft resolution was adopted in a General Assembly emergency session, with a recorded vote of 156 in favor and 7 against, with 6 abstentions. *See* U.N. GAOR, 61st Sess., 10th emergency special plen., U.N. Doc. A/ES-10/L.19, (Nov. 17, 2006). *See also,* Press Release, General Assembly, By Wide Margin, General Assembly Emergency Session Adopts Text Deploying Israeli: Military Actions in Gaza, Calling for Dispatch of UN Mission to Beit Hanoun, GA/10534 (Nov. 17, 2001).

A better explanation was provided—indirectly—by the IDF Attaché to the U.S. during the 1976 Agreement's formulation. Brig. Gen. Abraham "Bren" Aden, when referring to the sanctions imposed on Israel by the U.S. following Israel's "use of cluster bombs against terrorists in Lebanon," preferred not to blame the various U.S. administrations but, rather, "*U.S. public opinion*, which *perceives it as a 'dirty' weapon . . . .*"[264]

Such an explanation could also account for the highly forgiving manner in which the Bush Administration approached Israel's use in 2006 of U.S.-made CMs despite its extensiveness, especially in contrast to its 1982 use, for which Israel, too, was punished. First, if this explanation is correct, the Administration realized—as reflected in the overwhelming support Israel rallied in Congress—that *US public opinion* was much more inclined at the time to consent to Israeli employment of U.S.-made CMs. A probable reason for this support was the absence of Palestinians (especially Palestinian refugee camps) in the conflict as opposed to those presented as Iran's Proxy: Hezbollah. Second, given the dearth of significant domestic pressures to treat CM use seriously, the Administration may have realize that against its diplomatic campaign to forestall CMS stigmatization, any sanctions against Israel would be tantamount to admitting the virtue of CCM supporters' claims.[265]

However, looking beyond U.S.-Israel bilateral relations, one may notice that when Israel's top echelons underestimated U.S. sensitivity to its End-User Agreement—as recent Israeli war literature indicates—they had good reason.[266]

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264. *See* Abraham Aden, *The US Assistance to IDF Arming*, *in* THE WAR ON TERROR AND ISRAEL'S NATIONAL SECURITY 1979-1988 129 (Zeev Klein ed. 1988) (emphasis added). Aden served as the IDF Attaché to the U.S during 1974-77. He himself questioned the pros and cons of Israel's dependence in US military aid. *Id.*

265. For the intensive Bush Administration's diplomatic efforts to forestall the CCM's initiation, see, e.g., Kim Murphy, *Britain Deals a Setback to U.S.; Brown Overrules his Military and Joins in Cluster Bomb Ban*, L.A. TIMES, May 29, 2008, at A1. On the magnitude of the battle in which the Bush Administration was forced to engage, see Editorial, *Cluster Bombs, Made in America*, N.Y. TIMES, June 1, 2008, A11. ("At least this treaty, like the land-mine ban, will stigmatize cluster munitions and make it harder to use them.") (commenting on the Bush Administration's strong opposition to the CCM).

266. It turned out, for instance, that upon receiving the MLRSs in the late 1990s, Israel was obligated to submit a quarterly report on their use, which was limited to war use. During the War, however, former IDF Military Attaché to the U.S., Maj. Gen. Dan Harel, was instructed to repel possible U.S. queries over MLRS use by noting that Israel would submit a report on its 2006 use *as usual*, in its year-end quarterly report—a clear indication that the IDF high command underestimated the issue's effect on U.S.-Israel relations. *See* OFER SHELAH & YOAV LIMOR, CAPTIVES OF LEBANON 159 (2007). A second indication is the fact that wartime Minister of Defense, Amir Peres was not informed on that use until the War ended as his political adviser's testimony indicates. *See* Eldar, *supra* note 1, at 24. Indeed, this testimony contradicts a formal statement his office released on Nov. 22, 2006. According to the Hebrew version Peretz himself stated that "during the fighting, Peretz had been informed that the IDF used cluster bombs" and that—as the statement reads— he demanded an explanation and was told that the IDF was abiding by all international agreements and treaties. *See* Rapoport, *Peretz's Office Admits 'Irregularities'*, *supra* note 7; Rapoport, *A Testimony*, *supra* note 108. Nonetheless, as it was released a day after Halutz's surprising announcement its timing suggests that Peretz's formal statement was meant to address the 1978 demand that field commanders not employ

Given the reports on large-scale civilian harm in Iraq following heavy American use of similar weapons during the 1993 Gulf War, it is doubtful that the U.S. applied the same very strict limitations it imposed on Israel upon itself.[267] Hence, the U.S. persecution of Israel for its 2006 use of CM weapons is "somewhat hypocritical."[268] "If you look at the American use of force in Iraq against civilian targets, Israel is a far cry from that," explained an Israeli scholar in his assessment that no sanctions against Israel were expected in January 2007.[269] Indeed, Israel's Foreign Ministry Spokesperson has stressed that "if NATO countries stock these weapons and have used them in recent conflicts—in Yugoslavia, Afghanistan and Iraq—the world has no reason to point a finger at Israel."[270]

As a recent in-depth study of U.S. treaty behavior found, "[t]here is bewilderment at the inconsistency and unreliability that seem to characterize the United States' attitudes and actions toward international agreements."[271] U.S. practices regarding employment of CMs in conflicts in which it has participated during the last 27 years since the last crisis over this issue (1982)—e.g., Kosovo, Afghanistan and Iraq—have signaled anything but care and concern over the improper use of the weapon.[272]

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these weapons "without a decision by politically responsible superiors." Oberdorfer, *supra* note 30.

267. On the use in Iraq, s*ee* HUMAN RIGHTS WATCH, OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ 5, 7 (2003). *See* also Karen Hulme, *Of Questionable Legality: The Military Use of Cluster Bombs in Iraq in 2003*, 42 CAN. Y. INT'L L. 143, 144 (2004). The attack on Nadir on Mar. 31, 2003, for instance, with CMs resulted in 38 civilians killed and 156 injuries. HUMAN RIGHTS WATCH, *supra,* at 85-87.

268. *See* Meron Rapoport, *What Lies Beneath*, HAARETZ, Sept. 8, 2006, at B1.

269. Prof. Eitan Gilboa, *as quoted in* Teibel, *supra* note 133.

270. The spokesman, Mark Regev, *as cited in* Ina Friedman, *Deadly Remnants*, THE JERUSALEM REP. Nov. 13, 2006, at 20. In addition, Israeli officials view much of the criticism on Israel found in NGO reports as biased and betraying dual standards. *See, e.g., Human Rights Watch's, Cluster Munitions Report: Under The Façade* (NGO Monitor Rep.) Feb. 17, 2008, *available at* http://www.ngo-monitor.org/article/hrw_s_cluster_munitions_report_under_the_fa_ade.

271. Antonia Chayes, How American Treaty Behavior Threatens National Security, 33 INT'L SEC. 45, 45 (2008).

272. A reflection of this can be found in a recent NGO's report over various incidents of CM use since 1997. The report discussed the 2006 Lebanon case following a discussion of the NATO attack on Nis, Serbia in May 1999, although it is unclear whether U.S. or Dutch planes dropped the CMs that caused the civilian harm. *See* MASLEN & WIEBE, *supra* note 161, at 15-18. On cluster strikes in or near populated areas in Afghanistan, *see* HUMAN RIGHTS WATCH, *supra* note 204, at 1-4.