

The Use and Abuse of Self-Defence in International Law: The Israel–Hezbollah Conflict as a Case Study

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Well, they had been attacked. They were responding . . . The fact was that Israel was subject to a military threat from Hezbollah on a continuing basis, Hezbollah had committed an act of aggression, and Israel was acting in its own self-defence – and if reacting in its own self-defence meant defeating the enemy, that was perfectly legitimate under international law and, frankly, under good politics.

JOHN BOLTON, US Ambassador to the UN during the Lebanon crisis¹

1 INTRODUCTION

They say the “truth” (or “*al-haq*” as the Arabs like to say), is usually the first casualty of war. And so it was with the Israel–Hezbollah conflict that caught the world’s attention in the summer of 2006. As the editors of the *Yearbook* promised its readers in volume 11:

The UN’s inaction, backed, regrettably, by the US and Britain, has led to the destruction of the Lebanese infrastructure and the displacement of some 900,000 Lebanese from the south of the country. Although the UN has been slow to act a resolution has finally been passed, resolution 1701 . . . Despite the initial reluctance of some European countries to send troops, this is now being built up. A fragile peace remains. The action taken by Israel is a subject which will certainly be a dominant feature in next year’s volume.²

This article assesses the factual situation that led to the conflict and compares Israel’s recourse to armed force with the principles and norms of international law as set out in the Charter of the United Nations (hereafter “UN Charter”), the jurisprudence of the International Court of Justice (hereafter “ICJ”), and the writings

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¹ As quoted in *The Spectator*, 24 March, 2007, p. 14.

² See the preface to the *Yearbook of Islamic and Middle Eastern Law*, Vol 11 (2004–5) p. xi.



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of legal scholars.³ In the following pages, the question of what amounts to an “armed attack” entitling a State which has been attacked to respond with lawful force in self-defence in accordance with Article 51 of the UN Charter is examined in some detail. This article will not, however, address the extent to which Israel’s actions in Lebanon amount to a breach of international humanitarian law and what possible consequences might arise from this conclusion.⁴ Rather, it will focus on the rules regarding the recourse to armed force. Nor will it examine the relationship between the Lebanese Government and Hezbollah.⁵ Suffice it to say that the international responsibility of a state will be engaged if it *knowingly* allows its territory to be used to attack another state.⁶ In this respect, the Lebanese government has denied all responsibility.⁷

It is submitted that Israel’s bombardment, blockade and subsequent invasion of southern Lebanon could not be excused as an act of self-defence under international law, as these actions were unnecessary and disproportionate. Rather, it would seem that Israel’s actions, being both offensive and punitive, would be more accurately described as acts of aggression contrary to the purposes and principles of the UN Charter and customary international law. This article will further argue that even if Israel had invoked the “needle-prick” or “accumulation of events” theory of self-defence, which it has done in the past and which has been considered on occasion by the ICJ, the actions of Israel’s Armed Forces would not be justified.⁸ Nor, for that matter, would Israel’s actions in the Lebanon meet the *Caroline* test of necessity which will be examined in more depth below.⁹ Of course, this is not to say that Israel does

3 A similar article, on which some of this material is based, was published by the author in Vol 14 of *Human Rights Brief* (American University, Washington DC, 2006). See “Israel, Hezbollah and the Conflict in Lebanon: An Act of Aggression or Self-Defence?” which is available online at: <http://www.wcl.american.edu/hrbrief/14/1kattan.pdf?rd=1>.

4 On the question of international humanitarian law, see the fact sheet prepared by the author for Arab Media Watch: “Q & A: Violations of International Humanitarian and Human Rights Law During Israel’s War in Lebanon by Victor Kattan” at: <http://www.arabmediawatch.com/amw/CountryBackgrounds/Lebanon/QAInternationalLawandIsraelsWarinLebanon/tabid/343/Default.aspx> (last accessed 9 May 2007).

5 Although there are Hezbollah MPs in the Lebanese Parliament, this is not sufficient to establish state responsibility. See *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports (2007), para. 406 where the ICJ held that the acts complained of have to be attributable to the state. See also, Art 8 of the Draft Articles on State Responsibility, which the ICJ held to be a rule of customary international law, reproduced in Crawford, J., *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002), p. 110.

6 See the *Corfu Channel Case (U.K. v. Albania)*, Judgment-Merits, 9 April, ICJ Reports (1949), at p. 22.

7 See the letters sent from the Chargé d’affaires of the Permanent Mission of Lebanon to the UN Secretary-General and the President of the Security Council, signed by Caroline Ziade, UN doc. A/60/941 S/2006/529, 17 July 2006. (“The Lebanese Government announced from the first instance when the events broke, that it had no prior knowledge of what happened. Nor did it endorse the operation carried out by Hizbollah, which led to the abduction of the two Israeli soldiers.”)

8 See, e.g. Blum, Y.Z., “State Response to Acts of Terrorism” (1976), 19 *German Yearbook of International Law*, pp. 223–237 (where a former Israeli Ambassador to the UN argues in favour of the needle-prick theory of self-defence, i.e. that a consistent pattern of terrorist attacks may cumulatively amount to an armed attack for the purposes of Article 51 of the UN Charter).

9 See the letter from Daniel Webster, US Secretary of State, to Henry Fox, British Minister in Washington (24 April 1841), 29 *British and Foreign State Papers 1840–41* (London: James Ridgeway & Sons, 1857), pp. 1129–1139, at p. 1138. For commentary on the *Caroline* see Jennings, R.Y., “The Caroline and McLeod Cases” 31 *American Journal of International Law* (1938), pp. 82–99.



not have a right of self-defence – all States have such a right – but this right is not unlimited. When Israel's actions in the Lebanon that summer are examined in their totality, it becomes immediately apparent that they simply could not be justified as an act of "self-defence".

Moreover, while Hezbollah's initial cross-border raid was a use of force, it was not an act of aggression as alleged by Ambassador Bolton.¹⁰ Indeed, his statement that Israel's 34-day bombardment of Lebanon was an act of self-defence is an abuse of terminology. If one takes his statement literally, substituting the word "Hezbollah" for "Israel", it could be invoked by both Lebanon and Syria who could very well argue that they are subject to a military threat from Israel "on a continuing basis". The result would be total anarchy. It is therefore imperative that international lawyers (and those they advise) distinguish acts amounting to self-defence from acts of aggression because they are fundamentally distinct. In this respect, the customary international law principles of necessity and proportionality are a useful yardstick by which to assess whether a state's recourse to armed force is defensive or not. It will also be argued that the ICJ's dicta in the *Nicaragua* case¹¹ that "a mere frontier incident" does not amount to an armed attack triggering the applicability of Article 51 of the UN Charter is a perfectly logical and reasonable interpretation of that provision.¹²

Furthermore, it will be argued that the Israel–Hezbollah conflict is not a good example of state practice on the question of self-defence and the use of force, as what took place was not an act of self-defence but aggression.¹³ In this respect one should be cautious when citing statements made by diplomats at the UN as evidence of "State practice", particularly when it concerns sensitive political questions regarding the use of force. For when it comes to matters of war and peace, states have been known to lie or to twist "intelligence" on more than one occasion to justify acts of aggression.¹⁴ Ultimately, self-defence is the only exception which a state can legitimately invoke under international law to justify the use of force without prior UN

10 The UN General Assembly's Definition of Aggression provides in Article 3(g) that "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to the acts listed above, or its substantial involvement therein" amounts to an act of aggression (emphasis added). The definition is annexed to UN General Assembly resolution 3314 (XXIX), 14 December 1974. Leaving aside the question as to whether there was any state involvement, the Lebanese Government denying all responsibility, it is highly questionable whether the kidnapping of two soldiers at a frequent flashpoint on Israel's northern border would be of such gravity as to amount to an act of aggression for the purposes of Article 3(g). By contrast, the occupation of territory, particularly if it is prolonged amounts to an act of permanent aggression. For commentary see Rifaat, A.M., *International Aggression: A Study of the Legal Concept: Its Development and Definition in International Law* (Stockholm: Almqvist & Wiksell International, 1979), pp. 271–274.

11 See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Merits, 26 June, ICJ Reports 1986, pp. 14–150.

12 See *Nicaragua*, *ibid.*, para. 195. Although this has not been without criticism; see Dinstein, Y., *War, Aggression and Self-Defence* (Cambridge: Cambridge University Press, 2005), p. 195.

13 See, e.g., Trapp, K.N., "Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors" 56 *International & Comparative Law Quarterly* (2007), pp. 141–156, at pp. 153–155 (who cites Israel's use of force in Lebanese territory "as the most recent example" of an invocation of the right to self-defence in response to attacks by non-State actors).

14 For an interesting perspective on the State of British international law after the Anglo-American invasion of Iraq in March 2003, see Miéville, C., "Anxiety and the Sidekick State: British International Law After Iraq" 46 *Harvard International Law Journal* (2005), pp. 441–458.



Security Council authorisation.¹⁵ No wonder then that it is routinely abused by states as a subterfuge for acts of aggression. For it would be highly unlikely, though perhaps not improbable, that a state would declare openly that it intended to commit a brazen act of aggression in the interests of what it perceived to be necessary for its own security; it would be much better to invoke the controversial doctrine of “self-defence”, which has a certain propaganda value instead. Sometimes it is more convenient to lie than to tell the truth.

However, before embarking upon a legal analysis of the conflict in Lebanon, it is imperative that what actually happened in the summer of 2006 is properly understood because ultimately any legal analysis of the use of force in international relations will depend upon the facts. As the conflict only came to an end recently, this article will inevitably rely on press reports (international, Lebanese and Israeli), interviews with the actual participants in the conflict, the studies conducted by human-rights organisations, and the findings of the Winograd Commission of Inquiry established by the Government of Israel to examine the causes and consequences of the conflict.¹⁶

2 THE FACTUAL BACKGROUND

On 12 July 2006, a frontier dispute between the Israeli Army and the armed wing of Hezbollah rapidly developed into a full-scale armed conflict, leaving hundreds of civilians (mostly Lebanese) dead. Only the passing of UN Security Council resolution 1701¹⁷ brought a respite to the 34 days and nights of intense fighting in which approximately 1,164 people (mostly civilians) were killed.¹⁸ Of these, 162 were Israeli (of whom 119 were military personnel).¹⁹ Nearly 900,000 Lebanese and 300,000 Israelis were displaced from their homes with the former having little to return to, as the Israeli military had caused much destruction to southern Lebanon with an intense bombing campaign.²⁰ When a ceasefire was declared on 14 August,

15 The author is not as yet persuaded that the so-called doctrine of “humanitarian intervention” has any legal basis in international law to allow a State to use armed force against another State. For criticism of humanitarian intervention see Brownlie, I., “International Law and the Use of Force by States Revisited” 1 *Chinese Journal of International Law* (2002), pp. 1–19, especially pp. 11–13.

16 For the Winograd Commission, see *infra* n.115.

17 See UN Security Council resolution 1701, 11 August 2006 which was reprinted in volume 11 of the *Yearbook of Islamic and Middle Eastern Law* (2004–5), pp. 387–390.

18 Arab Media Watch, *Lebanon Body Count*, available at: <http://www.arabmediawatch.com/amw/CountryBackgrounds/Lebanon/LebanonBodyCount/tabid/325/Default.aspx> (last accessed 10 May 2007). The figure of 1,164 was that at the end of hostilities. The current figure on the AMW of 1,214 includes casualties since the end of hostilities. Many people continue to die from the cluster bombs Israel dropped on southern Lebanon in the last 72 hours of the conflict. When on the ground cluster bombs are akin to land mines and can cause death and lethal injury.

19 Israel Ministry of Foreign Affairs, *Israel-Hizbullah conflict: Victims of rocket attacks and IDF casualties*: <http://www.israel-mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hizbullah/Israel-Hizbullah+conflict-+Victims+of+rocket+attacks+and+IDF+casualties+July-Aug+2006.htm> (last accessed 30 September 2006).

20 “. . . more than 700,000 Lebanese were displaced inside their country and some 180,000 were sheltered in Syria”, UNHCR, *Lebanon Crisis*: <http://www.unhcr.org/cgi-bin/texis/vtx/lebanon-crisis?page=intro> (last accessed 30 September 2006).



at 8 a.m. local time, there were some 30,000 Israeli troops stationed inside Lebanon, south of the Litani River.²¹

During the month-long conflict, human rights organisations such as Amnesty International accused Israel of deliberately targeting civilian infrastructure and committing war crimes.²² Amnesty said that Israel's strikes on civilian buildings and structures went beyond "collateral damage" and amounted to indiscriminate and disproportionate attacks contrary to the Geneva Conventions and the laws of war.²³ It released aerial photographs that showed suburbs in Beirut being reduced to "grey wastelands" as a result of Israeli bombing.²⁴ According to a study Amnesty undertook with its field workers in Lebanon, Israel launched more than 7,000 air strikes against that country and naval vessels launched 2,500 shells.²⁵ In their bombing campaign the Israeli Air Force destroyed substantial Lebanese civilian infrastructure (most of which had been rebuilt after the 15-year civil war in 1975–1990) such as roads, bridges, airports, factories, prayer houses, power stations, residential suburbs, a lighthouse, and people fleeing in their cars.²⁶ In response, Louise Arbour, the UN High-Commissioner for Human Rights was quoted on the record as saying that some of these actions violated humanitarian law and could amount to war crimes.²⁷ The Israeli tactics prompted criticism from the UN Undersecretary-General for Humanitarian Affairs and Emergency Relief, Jan Egeland, who called it "a violation of international humanitarian law" whilst touring Beirut's war-torn neighbourhoods.²⁸ Hezbollah retaliated by firing rockets into Israel, with many reaching the Israeli coastal city of Haifa.²⁹ The war is estimated to have cost the Israeli economy 1.1 billion shekels per week³⁰ and the Lebanese economy \$1 billion in the first two weeks of fighting.³¹ The destruction by the Israeli Air Force of the power station at

21 Frickling, D., *The Guardian* (6 August 2006), "Israeli troops 'could be in southern Lebanon for months': <http://www.guardian.co.uk/israel/Story/0,,1851501,00.html> (last accessed 10 May 2007).

22 Frickling, "Amnesty report accuses Israel of war crimes", *The Guardian* (23 August 2006), <http://www.guardian.co.uk/israel/Story/0,,1856587,00.html> (last accessed 10 May 2007).

23 Israel/Lebanon – Deliberate Destruction or Collateral Damage? Israeli Attacks on Civilian Infrastructure, AI Index: MDE 18/007/2006 (23 August 2006), <http://web.amnesty.org/library/index/ENGMD180072006> (last accessed 10 May 2007).

24 See *ibid.*, "Before and after images of Lebanon": <http://web.amnesty.org/pages/lbn-satellite-eng> (last accessed 10 May 2007).

25 *Ibid.*

26 As reported by Agence France-Presse (12 July–12 August 2006).

27 See "UN warning on Mid-East war crimes", BBC News Online (20 July 2006) at: http://news.bbc.co.uk/1/hi/world/middle_east/5197544.stm (last accessed 10 May 2007).

28 See the Statement by Jan Egeland, UN Undersecretary-General for Humanitarian Affairs and Emergency Relief Coordinator where he condemned Israel's devastating air strikes on Beirut as a violation of international humanitarian law in "UN appalled by Beirut devastation", BBC News Online (23 July 2006) at: http://news.bbc.co.uk/1/hi/world/middle_east/5207478.stm (last accessed 10 May 2007).

29 On Hezbollah rocket attacks see News of the Israeli-Hezbollah confrontation as of noon (30 July 2006). This is available at: http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/Hezbollah_300706e.pdf (last accessed 10 May 2007).

30 "Israel adapts as it counts economic costs of war", *The Age* (14 August 2006): <http://www.theage.com.au/news/business/israel-adapts-as-it-counts-economic-cost-of-war/2006/08/13/1155407670129.html> (last accessed 10 May 2007).

31 See "Lebanon economy reels as attacks continue" by Jorn Madslie, BBC News Online (24 July 2006): <http://news.bbc.co.uk/1/hi/business/5209502.stm> (last accessed 10 May 2007).



Jiyyeh (19 miles south of Beirut) left a thick oil slick (10–35,000 tonnes of heavy fuel is feared to have escaped from broken tanks) covering the Lebanese coast which the UN Environment Programme said “could well rival the *Exxon Valdez* disaster of 1989”.³²

According to Israel, the war started with a cross-border raid by Hezbollah that led to the capture of two soldiers. Israel retaliated by sending a group of soldiers into Lebanon in hot pursuit in *Operation Just Reward*.³³ After the Israeli soldiers crossed the border, four were killed in an ambush by Hezbollah guerrillas when their tank drove over a mine (three soldiers were killed in the initial operation, four by the mine and another in the rescue mission).³⁴ In retaliation Israel launched *Operation Change of Direction* in which the Israeli army Chief of Staff, Lt. Gen. Dan Halutz, threatened to “turn back the clock in Lebanon by twenty years”.³⁵ In contrast, Hezbollah claims that Israel initiated the conflict by sending its soldiers into Aitaa al-Chaab (Ayta Al-Sha'b), a Lebanese village just north of the Israeli border.³⁶

It is important to stress from the outset that there were two military operations undertaken by the Israeli army in July 2006: The first operation, *Operation Just Reward*, was in response to the kidnapping and was presumably consistent with the Israeli Army's Rules of Engagement.³⁷ However, the second operation, *Operation Change of Direction*, was something different altogether. In the remainder of this article, it is the second operation that will be analysed in order to explain why Israel's actions could not be justified as an act of “self-defence” in international law and why the term “aggression” is a more suitable adjective to describe what took place.

In this respect, it should be pointed out that the crudely designed long-range rockets directed ostensibly at Israeli towns and cities, were fired by Hezbollah after Israel had initiated *Operation Change of Direction*. They were not the original *casus belli*. It is important to stress this point as many pundits and politicians (especially in the US) seem to be labouring under the impression that Israel launched its assault on Lebanon in order to prevent Hezbollah from firing rockets at it.³⁸ This is not the

32 See “Environmental ‘crisis’ in Lebanon”, by Richard Black, BBC News Online (31 July 2006) at: <http://news.bbc.co.uk/1/hi/sci/tech/5233358.stm> (last accessed 10 May 2007).

33 Harel, A., *Ha'aretz* (13 July 2006), “Hezbollah kills 8 soldiers, kidnaps 2 in offensive on northern border”: <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=737825> (last accessed 10 May 2007).

34 Harel, A. and Khoury, J., *Ha'aretz* (14 July 2006), “IDF retrieves bodies of four tank soldiers killed in south Lebanon”: <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=738310> (last accessed 10 May 2007).

35 Clements, J., *Daily Mirror*, 13 July 2006, “Israeli PM vows action as army blasts into Lebanon”: http://www.mirror.co.uk/news/tm_objectid=17376170&method=full&siteid=94762&headline=very-very-painful-name_page.html (last accessed 10 May 2007).

36 *Indo-Asian News Service (IANS)*, 12 July 2006, “Hezbollah captures two Israeli soldiers” available at: <http://in.news.yahoo.com/060712/43/65tzi.html> (last accessed 10 May 2007).

37 For a summary of the IDF's code of conduct (and presumably the IDF's rules of engagement allow it to respond to armed attacks) see Guiora, Lt.-Col. A., “Balancing IDF Checkpoints and International Law: Teaching the IDF Code of Conduct”, 3(8) *The Jerusalem Brief* (19 November 2003), available online at: <http://www.jcpa.org/brief/brief3-8.htm> (last accessed 17 August 2007).

38 On 20 July 2006, a resolution passed by the US House of Representatives by a 410:8 majority, endorsed Israel's actions in Lebanon without any criticism or equivocation. They accepted Israel's self-defence justification and condemned Hamas and Hezbollah “for engaging in unprovoked and reprehensible armed attacks against Israel on undisputed Israeli territory, for taking hostages, for killing Israeli soldiers, and for continuing to indiscriminately target Israeli civilian populations with



text of a draft Security Council resolution was published in the *New York Times*.⁴⁷ It is apparent from preambular paragraph 2 of the draft that the Council considered Hezbollah's attack on Israel of 12 July as the aggravating factor which led to the spiral of violence in the Middle East. However, notably, it does not use the expression "armed attack" associated with Article 51 of the UN Charter which proscribes the extent to which a State may legitimately defend itself under international law. In the actual text of resolution 1701 adopted unanimously six days later, the preambular and operative paragraphs referred to in the draft above were left unchanged.⁴⁸

During the fighting, it was reported that the US (and quite possibly France, the UK, and some Middle Eastern countries) were stalling negotiations for a ceasefire in New York in order to give Israel more time to "finish the job" which they hoped would enable it to destroy Hezbollah's presence in southern Lebanon.⁴⁹ It took the Council exactly one month to act (12 July–12 August) during which time gross violations of human rights and humanitarian law occurred. In this regard, it will be recalled that when it suited the Western powers it took the Security Council just 12 hours to act when Iraq invaded Kuwait in 1990.⁵⁰ Article 41 of the UN Charter uses the word "decides" in reference to the measures to be taken to maintain or restore international peace and security and Article 24 provides that:

In order to ensure *prompt* and *effective* action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.⁵¹

Presumably, the Council is therefore obliged to act in such situations as swiftly as possible.

According to a report in the *New Yorker* by the veteran-investigative journalist Seymour M. Hersh – who broke the story of the Mai Lai massacre in Vietnam and the Abu Ghraib prisoners abuse scandal in Iraq – the Israeli assault on Lebanon had been planned in advance as a prelude to a major attack by the US on Iran.⁵² High-level planners from the US and Israeli Air Forces had allegedly been developing a war plan for a decisive strike on Iran's nuclear facilities.⁵³ The Islamic Republic's proxy in Lebanon therefore had to be neutralised (should it in the event of a preemptive strike by the US Air Force on Iranian nuclear facilities, try to outflank the Americans and cause trouble by attacking Israel). The assault on Hezbollah was allegedly a demo for Iran.⁵⁴ According to a Pentagon consultant who is quoted in Hersh's report, President Bush had "been agitating for some time to find a reason for a preemptive blow against Hezbollah".⁵⁵ Apparently, Israel believed that by

47 Draft Security Council Resolution, *The New York Times*, 5 August 2006.

48 For the resolution, see *supra* n.17.

49 See "US delays action on Mideast peace deal", CBS News (7 August 2006): <http://www.cbsnews.com/stories/2006/08/07/ap/world/mainD8JBCS5O0.shtml>.

50 See SC Res. 660 (2 August 1990).

51 Emphasis added.

52 Hersh, S.M., "Watching Lebanon", *The New Yorker* (21 August 2006): http://www.newyorker.com/printables/fact/060821fa_fact (last accessed 10 May 2007).

53 *Ibid.*, p. 2.

54 *Ibid.*

55 *Ibid.*



targeting Lebanon's infrastructure it could persuade Lebanon's Christian and Sunni populations to turn against Hezbollah.⁵⁶ Hersh wrote:

In early discussions with American officials, I was told by the Middle East expert and the government consultant, the Israelis repeatedly pointed to the war in Kosovo as an example of what Israel would try to achieve. The NATO forces commanded by US Army General Wesley Clark methodically bombed and strafed not only military targets but tunnels, bridges and roads, in Kosovo and elsewhere in Serbia, for seventy-eight days before forcing Serbian forces to withdraw from Kosovo. "Israel studied the Kosovo war as its role model," the government consultant said. "The Israelis told Condi Rice, 'You did it in about seventy days, but we need half of that – thirty-five days.'"⁵⁷

Prior to the publication of Hersh's exposé in the American press, the British journalist John Kampfner, who is the editor-in-chief of the *New Statesman* and the author of an acclaimed biography on Tony Blair (fittingly entitled *Blair's Wars*),⁵⁸ reported that the British Prime Minister had prior knowledge of the Israeli attack and gave it his blessing.⁵⁹ Kampfner's sources were British Foreign Office officials. In other words, during the conflict, government officials on different sides of the Atlantic were saying that Israel's assault on Lebanon was premeditated.⁶⁰

On 8 March 2007 Israel's Prime Minister Ehud Olmert admitted to the Winograd Commission of Inquiry that his Government had decided "at least four months in advance" that any kidnap of Israeli troops on its borders would trigger war.⁶¹ Mr Olmert is also reported to have said that he believed that he acted as his predecessor Prime Minister Ariel Sharon, a man "with far greater military experience", would have done.⁶² As noted in an article published in last year's *Yearbook*, Mr. Sharon was implicated in war crimes trials for his role in his country's invasion of Lebanon in 1982, where he was alleged to have assisted the *Forces Libanaises* in the massacre of Palestinian men, women and children at the refugee camps of Sabra and Chatila for three consecutive days and nights.⁶³ There is consequently a prima facie case to be made that Israel's assault on Lebanon was not an act of self-defence but in fact an act of aggression.

3 INTERNATIONAL LAW AND THE USE OF FORCE

Recourse to war as a means of solving international controversies was outlawed by

⁵⁶ *Ibid.*, p. 4.

⁵⁷ *Ibid.*

⁵⁸ (London: Free Press, 2004).

⁵⁹ Kampfner, J., "Blood on his hands", *New Statesman* (7 August 2006), pp. 12–14.

⁶⁰ Moreover, two years prior to the outbreak of hostilities, Michael Byers, a Canadian Professor of International Law, recalled a conversation he had with a legal adviser to the Israeli army when he was a Visiting Professor at Tel Aviv University. In the meeting he and the female army officer discussed the legal implications of a pre-emptive strike against Hezbollah in Lebanon. See Byers, M., "Examining Israel's 'right to defend itself'", *Toronto Star* (16 July 2006), p. A17.

⁶¹ See PM 'says Israel pre-planned war', BBC News Online (7 May 2007). This story is available at: http://news.bbc.co.uk/1/hi/world/middle_east/6431637.stm (last accessed 7 May 2007).

⁶² *Ibid.*

⁶³ See Kattan, V., "From Beirut to Brussels: Universal Jurisdiction, Statelessness and the Sabra and Chatila Massacres" 11 *Yearbook of Islamic and Middle Eastern Law* (2004–5), pp. 33–82.



the Pact of Paris (the Kellogg–Briand Pact) in 1928.⁶⁴ Prior to this, it was restricted by the Charter of the League of Nations drafted at the end of the First World War (1914–18) although war as such was not unlawful.⁶⁵ However, the UN Charter drafted at the end of the Second World War (1939–1945) laid rest to this. Article 2(4) of the Charter provides: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”⁶⁶

Today, aggression is universally considered to have reached the status of a *jus cogens* norm.⁶⁷ In fact, crimes associated with war entail individual criminal responsibility, and the military commanders implicated in such atrocities can be indicted before the International Criminal Court in The Hague.⁶⁸ Alternatively, they can be tried in the courts of third States under the doctrine of universal jurisdiction.⁶⁹ This is relevant in the present situation since neither Israel nor Lebanon is a State Party to the Rome Statute. In recent years, Israeli military officials have been served with criminal and civil law writs for their alleged involvement in the war crimes that took place during Israel’s 1982 invasion of Lebanon,⁷⁰ and in the Occupied Palestinian Territories.⁷¹

In order to avoid accusations of aggression, states therefore have to rely on Article 51 of the UN Charter by claiming an inherent right of “self-defence” or a right of “humanitarian intervention” under customary international law, when they lack express authorisation from the Security Council acting under its enforcement powers provided for in Chapter VII to use force against another state. It would seem that some states (primarily Britain, the US, and Israel) are agitating to bend the rules by lowering the threshold of what amounts to an armed attack to ease the constraints on their freedom of action in the “global war on terror”.⁷² Although it is said that the rules of necessity and proportionality provide adequate safeguards to regulate the use of force in self-defence, the inherent vagueness of these terms and their questionable utility in the course of an armed conflict already in full flow may be questioned in the aftermath of Israel’s air campaign in Lebanon which resulted in

64 General Treaty for the Renunciation of War as an Instrument of National Policy (Pact of Paris) (1928) 94 *League of Nations Treaty Series*, p. 57.

65 See Articles 10–12 of the Covenant of the League of Nations 1 *League of Nations Official Journal* (1920) pp. 5–6.

66 See Article 2(4) of the UN Charter, XV United Nations Conference on International Organisation, p. 335.

67 See Report of the International Law Commission, 53rd Session, GAOR, 56th Session, Supp. No. 10 (A/56/10), 2001, pp. 283–284, paras. 4 and 5.

68 See, e.g., Cassese, A. (Ed.) *et al.*, *The Rome Statute for an International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002).

69 For commentaries see the series of papers in Macedo, S. (Ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Pennsylvania: University of Philadelphia Press, 2003).

70 See special dossier on the “Sabra and Shatila” case in Belgium in 12 *Palestine Yearbook of International Law* (2002/3), pp. 183–289.

71 See, e.g., Machover, D. and Maynard, K., “Prosecuting Alleged Israeli War Criminals in England and Wales” 20 *Denning Law Journal* (2006), pp. 95–114.

72 Generally, see Sands QC, P., *Lawless World: Making and Breaking Global Rules* (London: Penguin paperbacks, 2005).



excessive human casualties. Surely, it is infinitely better to prevent conflict rather than attempt to regulate it after it has already begun? Paradoxically, Hezbollah ended up killing more Israeli soldiers than civilians even though it was firing rockets into Israel indiscriminately which would be contrary to international humanitarian law for failing to make a distinction between civilians and combatants.⁷³ Whatever the merits of the Kosovo campaign as a “demo” for Israeli action in Lebanon, it is noticeable that NATO was not acting in self-defence and did not have express authorization to go to war from the Security Council when it struck in March 1999. Many distinguished academic commentators considered that war unlawful.⁷⁴

To make a legitimate claim of self-defence under international law, reference must be made to Article 51 of the UN Charter which provides in part:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

Israel’s UN Ambassador referenced Article 51, on 12 July, in identical letters to the UN Secretary-General and the Security Council. He wrote:

Israel thus reserves the right to act in accordance with Article 51 of the Charter of the United Nations and exercise its right of self-defence when an armed attack is launched against a Member of the United Nations. The State of Israel will take the appropriate actions to secure the release of the kidnapped soldiers and bring an end to the shelling that terrorises our citizens.⁷⁵

In *Nicaragua v. United States of America*, the ICJ ruled that:

the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such operation because of its scale and effects, would have been classified as an armed attack rather than a mere frontier incident had it been carried out by regular armed forces.⁷⁶

Thus, the attack has to be of a certain scale and inter-state in character. It must be serious, not trivial, and it is clear that frontier disputes do not amount to armed attacks. The jurisprudence of the court in the *Nicaragua* case was recently upheld in the *Oil Platforms* case,⁷⁷ the *Wall* advisory opinion,⁷⁸ and the case concerning *Armed activities on the territory of the Congo*.⁷⁹

⁷³ For human rights documentation on Israeli and Hezbollah actions during the war see Human Rights Watch: <http://hrw.org/doc/?t=mideast&c=lebanon> (last accessed 18 August 2006).

⁷⁴ See Ralph Zacklin, “Beyond Kosovo: The United Nations and Humanitarian Intervention” (2000–2001) 41 *Virginia Journal of International Law*, p. 925; Henkin, L., “Kosovo and the Law of Humanitarian Intervention” 93 *American Journal of International Law* (1999), p. 826; and Falk, R., “Kosovo, World Order, and the Future of International Law” 93 *American Journal of International Law* (1999), p. 848.

⁷⁵ Gillerman, D., UN Doc. A/60/937, S/2006/515 (12 July 2006).

⁷⁶ *Nicaragua v. US* *supra* n.11 at para. 195.

⁷⁷ See generally *Oil Platforms (Iran v. US)*, Judgment-Merits, 6 November, ICJ Reports (2003), pp. 161–219.

⁷⁸ See generally *Legal consequences of the construction of a wall in the occupied Palestinian territory*, Advisory Opinion, 2004 ICJ 131 (9 July 2004), available at: <http://www.icj-cij.org/docket/files/131/1671.pdf> (last accessed 10 May 2007).

⁷⁹ See *Armed activities on the territory of the Congo (Congo v. Uganda)*, Judgment-Merits 2005 ICJ 116 (19 December 2005): <http://www.icj-cij.org/docket/files/116/10455.pdf> (last accessed 10 May 2007).



For the sake of argument, it will be assumed that the Israeli version of events is correct – Hezbollah started the conflict by capturing two soldiers, killing several others, and firing a salvo of rockets into Israeli border villages on 14 July. Even so, it is not entirely clear whether Israel can claim a right of self-defence under the UN Charter. As established in *Nicaragua*, Israel can make a legitimate claim under Article 51 only if the attack by Hezbollah could be classified as an “armed attack” and not a mere frontier incident.

The *Nicaragua* court’s reasoning, however, is not without criticism.⁸⁰ American academia, in particular, has criticised the court on the issue of the identity of the perpetrator of the armed attack – that it must be directed from a State.⁸¹ This is because Article 51 is silent on the State requirement and the *travaux préparatoires* provide no explanation for this anomaly. Rather, the state requirement was the consensus interpretation placed upon the definition of an armed attack in Article 3(g) of the *Definition of Aggression* annexed to General Assembly resolution 3314, passed in the mid-1970s when wars of national liberation were in vogue. Yet, despite these criticisms, the state requirement still remains the majority interpretation advanced by students of the Charter according to a recent study on the subject.⁸² They point out that Article 51 is an exception to the prohibition on the use of force contained in Article 2(4) which only applies to states and which as a partner to Article 2(3) requires them to settle their disputes peacefully with one another.⁸³ And of course the Charter only applies to its members, which are restricted by Article 4(1) to “peace-loving” states.⁸⁴

Even assuming that customary international law can derogate from treaty law,⁸⁵ one may still question whether the law has changed in the aftermath of the 9/11 attacks so as to apply to non-state actors according to state practice and *opinio juris*. This will also seem to depend somewhat on the nature of the non-state actor.⁸⁶ For instance, whilst there has been a definite trend since 9/11, with most members of the Security Council (as well as NATO) invoking the right of self-defence against non-state actors,⁸⁷ this may not necessarily be universally accepted as reflecting the law

For commentary, see Kammerhofer, J., “The *Armed Activities* Case and Non-state Actors in Self-Defence Law” 20 *Leiden Journal of International Law* (2007), pp. 89–113.

80 See, e.g., the Dissenting Opinion of Judge Schwebel in the *Nicaragua* case, *supra* n.11.

81 Wedgwood, R., “The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defence” (2005) 99 *American Journal of International Law*, p. 52; Murphy, S.D., “Self-defence and the Israeli Wall Advisory Opinion: an Ipse Dixit from the ICJ?” (2005) 99 *American Journal of International Law*, p. 62.

82 See generally Kammerhofer, J., “Uncertainties of the Law of Self-Defence in the United Nations Charter” (2004) 35 *Netherlands Yearbook of International Law*, p. 143, pp. 178–18.

83 See Article 2(3) UN Charter. This provides: “All Members shall settle their international disputes by peaceful means in such a manner that international security, and justice, are not endangered.”

84 U.N. Charter, Article 4, para. 1.

85 See Kammerhofer, *supra* n.79 at p. 101 (who argues that the Charter remains valid as long as it is not changed by meta-law on treaty-making and questioning whether customary international law has the power to derogate from international treaty law).

86 For example, it is highly unlikely that a terrorist attack undertaken by an environmental campaigning group from the territory of State X would give the State where the attack occurred (State Y) the right to invoke “its inherent right of self-defence” under Article 51 of the UN Charter to attack State X.

87 Sir Michael Wood cites a statement made by the Russian Defence Minister in the context of its struggle with Chechnya to the effect that Article 51 does not stipulate that an armed attack must emanate from a State. See Wood, M.C., “Towards new circumstances in which the use of force may be autho-



in parts of Africa and the Islamic world.⁸⁸ In this regard, there may be disagreement amongst states as to whether a particular entity is a terrorist organisation.⁸⁹ Moreover, state practice by states like Israel and the US, as highlighted in articles by legal scholars, are not universally accepted as representing the current state of international law on the use of force and self-defence.⁹⁰ On the other hand, the fact that the G8 referred to Hezbollah specifically, rather than Lebanon, may be evidence of a new custom emerging.⁹¹ It may therefore be concluded that on the assumption that customary international law can derogate from international treaty law, current state practice seems to permit a state to defend itself according to Article 51 in the event of an armed attack by a non-state actor, but only if there is a link between the non-state actor and the state for the purposes of state responsibility.⁹²

4 AGGRESSION OR SELF-DEFENCE?

The crux of the issue, therefore, is whether Hezbollah's attack was so grave as to trigger the applicability of Article 51. While the attack may not independently trigger Article 51, Israel could invoke the *Nadelstichtaktik* (needle prick) doctrine, also known as the "accumulation of events" theory. According to the *Nadelstichtaktik* doctrine, each specific act of terrorism, or needle prick, though it may not independently qualify as an armed attack, could, taking into consideration the totality of incidents, amount to an armed attack entitling the victim state to respond with armed force.⁹³ Therefore, although the events of 14 July in isolation would likely not trigger Article 51, under *Nadelstichtaktik* the several incidents prior to 14 July may allow Israel to argue that it does.

rised? The cases of humanitarian intervention, counter-terrorism, and weapons of mass destruction" in Blokker, N. and Schrijver, N. (Eds), *The Security Council and the Use of Force: Theory and Reality – A Need for Change?* (Leiden: Brill, 2005), p. 87.

- 88 For a paper on Islamic 'perceptions' of the use of force, see Mahmoudi, S., "The Islamic Perception of the Use of Force in the Contemporary World" *Journal of the History of International Law* (2005), pp. 55–68. (Mahmoudi writes that the Arab States have tried to show solidarity in cases of an armed attack upon an Arab country and that condemnation of Israel's occupation of Palestine is a permanent issue in the statements of all Arab countries in the debates of the General Assembly).
- 89 The current debate over whether to keep the *Mujahadeen al-Khalq* (commonly known as the People's Mujahadeen Organisation of Iran) on the proscribed list of terrorist organisations in the EU is of interest. See, e.g., Brand, C., "European court overturns EU decision to add Iranian resistance movement to terror list", *Associated Press* (12 December 2006).
- 90 See, e.g., Gray, C., *International Law and the Use of Force* (Oxford: Oxford University Press, 2004), p. 160.
- 91 See Murphy, S.D., "Terrorism and the Concept of 'Armed Attack' in Article 51 of the UN Charter" 43 *Harvard International Law Journal* (2002), p. 41 (supportive of view that Article 51 can apply to non-State actors); Stahn, C., "Terrorist Acts as 'Armed Attack': The Right to Self-Defence, Article 51 (1/2) of the UN Charter, and International Terrorism" 27 *Fletcher Forum of World Affairs* (2003), p. 35 (supportive of view that Article 51 can apply to non-State actors); Scott, M., King, "The Legality of the United States War on Terror: Is Article 51 a Legitimate Vehicle for the War in Afghanistan or just a Blanket to Cover-Up International War Crimes?" (2002–2003) 9 *ILSA Journal of International & Comparative Law*, p. 457 (supportive of view that Article 51 can apply to non-State actors).
- 92 Ruys, T. and Verhoeven, S., "Attacks by Private Actors and the Right of Self-Defence" 10 *Journal of Conflict & Security Law* (2005), p. 89.
- 93 Menachem Feder, N., "Reading the UN Charter Connotatively: Toward a New Definition of Armed Attack" 19 *New York University Journal of International Law & Politics* (1986–1987), p. 415.



Since *Nadelstichtaktik* is just a theory and not a rule of international law, it carries little judicial weight. The ICJ, however, seems to have considered the doctrine in its judgment on *Nicaragua*⁹⁴ and more recently in *Armed activities in the Congo*.⁹⁵ While the court lacked sufficient evidence to rule conclusively on the matter in both cases, it appears from the ICJ's jurisprudence that the doctrine requires a series of attacks to be "collective", "cumulative in character", and attributable to a state.⁹⁶

If Israel is permitted to invoke the *Nadelstichtaktik* theory, it could just as easily be used by Lebanon, for Israel frequently enters Lebanon's territorial waters without its consent. Furthermore, the Lebanese Government accused Israel of regularly violating its airspace between May 2000 and July 2006.⁹⁷ Lebanon considers these incursions "a form of international terrorism", alleging that these low-altitude flights break the sound barrier over civilian-populated areas and "instill terror among Lebanese civilians, especially children".⁹⁸

In a letter addressed to the UN Secretary-General, Lebanon described these flights as "unlawful acts of aggression and provocation".⁹⁹ The letter said that Lebanon would "exercise its natural and lawful right of self-defence, opposing them with ground anti-aircraft fire".¹⁰⁰ Israel also has a long history of launching major attacks upon that country by carrying out bombardments, ground assaults, kidnappings, and assassinations (in 1968, 1973, 1978, 1982, 1993, 1996, 1999, as well as in other years) and by occupying substantial parts of the country whereupon it left thousands of land mines in the south of the country which the UN Committee on the Rights of the Child found Israel responsible for (Israel was the occupying power in southern Lebanon from 1982 to 2000).¹⁰¹ On the basis of the *Nadelstichtaktik* doctrine, Lebanon could therefore claim a right of self-defence which would preclude Israel from doing so as two states cannot validly assert such a right.

Moreover, even if the *Nadelstichtaktik* doctrine is applicable, it would not justify Israel's recent war against Lebanon. The border has been relatively stable since Israel's withdrawal from southern Lebanon in 2000, although there have been several clashes within the Blue Line (in Lebanon) in the *Shabaa* Farms area. Yet, Israel did not respond with such overwhelming force in its previous clashes with Hezbollah. One may question why Israel felt the need to respond so aggressively in the summer of 2006. Regardless of the various theories advanced in support of military action, it must be emphasised that the use of force in international relations is

94 *Nicaragua v. US*, supra n.11 at para. 231.

95 *Congo v. Uganda*, supra n.79 at para. 146.

96 *Ibid.*

97 *Associated Press*, "Lebanon to complain to UN of Israeli land, sea, air space violations", reprinted in *Ha'aretz* (16 December 2005): <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=658601> (last accessed 10 May 2007).

98 Letter from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General (4 February 2003); UN doc. A/57/722, S/2003/148 (5 February 2003).

99 *Ibid.*

100 *Ibid.*

101 Concluding Observations of the Committee on the Rights of the Child: Israel, UN Doc. CRC/C/15/Add.195, paras. 58 and 59 (9 October 2002) available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/7b3bc74d6890921bc1256c7f0033e856?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/7b3bc74d6890921bc1256c7f0033e856?Opendocument).



subject to the conditions of proportionality and necessity.¹⁰² This means that a State may only use force that is necessary to repel an armed attack and its response must be proportional to that attack. After all, the whole *raison d'être* of the UN Charter is to “save succeeding generations from the scourge of war”.

Yoram Dinstein, Yanowicz Professor of Human Rights at Tel Aviv University, has written that “it is not who fired the first shot but who embarked upon an apparently irreversible course of action, thereby crossing the legal Rubicon. The casting of the die, rather than the actual opening of fire, is what starts the armed attack.”¹⁰³ In other words, even though Hezbollah’s cross-border abduction preceded the Israeli response, it was the sheer scale of the latter’s actions that amounted to an armed attack. Whereas Hezbollah’s conduct was reversible (in the sense that it was not foreseeable that it would lead to an all-out conflict), Israel’s 34 days and nights of intense bombardment of Lebanon’s towns and cities in which over 1,000 souls were killed was not reversible (after all, Hezbollah could have released the two soldiers it captured on 14 July). Instead the conflict escalated after Israel attacked Beirut’s only international airport and its power stations. Indeed Lebanon is still, even a year after the end of the conflict, in crisis.¹⁰⁴

It should also be clearly stated that Israel may not resort to self-help in an attempt to coerce the Lebanese Government to act against Hezbollah. The right of states to use force to enforce international law was outlawed by the UN Charter. In the *Corfu Channel* case, the ICJ declared that British mine-sweeping operations in Albanian territorial waters without the latter’s consent amounted to:

the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.¹⁰⁵

Nor may Israel resort to armed reprisals.¹⁰⁶ This is clear from the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations which declares that “[s]tates have a duty to refrain from acts of reprisal involving the use of force.”¹⁰⁷ Having said this it is highly questionable whether Israel’s actions in Lebanon could even be described as “reprisals” since under pre-Charter law these were also subject to the conditions of necessity and proportionality.¹⁰⁸ Israel’s actions would therefore more accurately be described as “acts of aggression” which the International Military Tribunal at Nuremberg characterised as an offence in

102 For some of these theories, see Hersch, S.M., *The New Yorker*, “Watching Lebanon” and Kampfnier, J., *New Statesman*, “Blood on his hands,” supra nn.52 and 59.

103 See Dinstein, *War, Aggression and Self-Defence*, supra n.12 at p. 191.

104 In this respect, see e.g. the contribution by Nisrine Abiad in this *Yearbook*.

105 See the *Corfu Channel Case (U.K. v. Albania)*, supra n.6 at p. 35.

106 On the legality of armed reprisals see Barsotti, R., “Armed Reprisals”, in Cassese, A. (Ed.), *The Current Legal Regulation of the Use of Force* (Dordrecht: Martinus Nijhoff Publishers, 1986), pp. 79–110; see also Brownlie, I., *International Law and the Use of Force by States* (Oxford: Clarendon Press 1963), 281–282; Higgins, R., *The Development of International Law Through the Political Organs of the United Nations* (Oxford: Oxford University Press, 1963), pp. 217–218; and Falk, R., “The Beirut Raid and the International Law of Retaliation” 63 *American Journal of International Law* (1970), p. 415.

107 See the Annex to General Assembly resolution 2625 (XXV), 24 October 1970.

108 *Naulilaa Case (Germany v. Portugal)*, 2 *International Arbitral Awards* (31 July 1928), p. 1013.



1945.¹⁰⁹ It should also be said that Israel's blockade of Lebanon's ports and coastline also constitutes an "act of aggression".¹¹⁰ If maintained effectively – as it was for over one month – it could further be considered an armed attack allowing Lebanon to defend itself under Article 51.¹¹¹

Furthermore, the Israeli attack could not be justified as an act of necessity because, in the words of Daniel Webster in the famous *Caroline* incident,¹¹² there must be a "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation".¹¹³ As a regional superpower Israel had plenty of other means and the arsenal available to respond differently if it so wished, whether by commando action, police action, or through diplomacy. The fact that Israel did not even give the Lebanese Government the opportunity to arrest and detain the suspects on its soil before resorting to the use of force – which should always be a means of last resort, is revealing. Israel has exchanged prisoners with Hezbollah before, and it could have done so again.¹¹⁴ In this respect, it is telling that the Commission of Inquiry appointed by the Government of Israel to examine its own conduct in the "second Lebanon war" (which is an odd name to refer to the war as Israel has invaded Lebanon more than twice) found that:

[i]n making the decision to go to war, the government did not consider the whole range of options, including that of continuing the policy of "containment", or combining political and diplomatic moves with military strikes below the "escalation level", or military preparations without immediate military action – as to as to maintain for Israel the full range of responses to the abduction.¹¹⁵

Furthermore, it should be said that the *Caroline* criteria – even if it could be appealed to by Israel in the present instance – can all too easily be abused. For instance, Saddam Hussein's Government relied on it in order to justify their invasion of Iran in September 1980 (and interestingly, he adopted the same tactics Israel used in the

109 Charter of the International Military Tribunal, Article 6, appended to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945) 82 *United Nations Treaty Series* (1951), pp. 279–300.

110 General Assembly resolution 3314, Article 3(c) (14 December 1974).

111 Randelzhofer, A., "Article 51", 797, para. 23 in Simma, B. (Eds), *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 2002).

112 The author is of the opinion that the case of the *Caroline* should only be referred to with the utmost caution for it emanates from an era when there was no prohibition on the use of force by States. Article 51 of the UN Charter is still the starting point at which a State should turn to when invoking their "inherent right of self-defence". For criticism of the *Caroline* precedent, see Brownlie, I., "The use of force in self-defence" 37 *British Yearbook of International Law* (1961), pp. 239–241.

113 See the exchange of letters between Daniel Webster and Henry Fox, *supra* n.9.

114 Nessman, R., *The Age*, "Israel–Hizbollah prisoner swap to take place Thursday" (27 January 2004): <http://www.theage.com.au/articles/2004/01/27/1075088010362.html?from=storyrhs> (last accessed 10 May 2007).

115 On 30 April 2007, the Commission, headed by former Justice Dr. Eliyahu Winograd, submitted to the Prime Minister and Minister of Defence an interim report relating to the time from the IDF's exit from Lebanon to the soldiers' abduction on 12 July 2006 and to the time between 12 July and 17 July, when the decision to go to war was made. The interim report can be viewed on the website of the Israel Ministry of Foreign Affairs at: <http://www.mfa.gov.il/MFA/Government/Communiques/2007/Winograd+Inquiry+Commission+submits+Interim+Report+30-Apr-2007.htm> (last accessed May 9, 2007).



1967 so-called “Six-Day War” when he launched a preemptive strike on Tehran’s Mehrabad airport).¹¹⁶

For these reasons, it is submitted that Hezbollah’s 14 July attack on Israel did not threaten its territorial integrity or political independence, the only grounds for justifiable war.¹¹⁷ Rather, the converse is true: Israel’s bombardment of Lebanon’s major cities and its full-scale invasion of the south threatened its existence and political independence as a sovereign nation. Even if Israel could resort to Article 51 – assuming that it was subject to an armed attack – it would seem that Israel exhausted that right when it pursued the guerillas into Lebanon in the aftermath of the initial attack. Israel’s actions were neither necessary nor proportionate to the scale of the threat posed by Hezbollah. So even if, for arguments sake, Israel’s actions did fall within the Article 51 exemption, its actions were both disproportionate and unnecessary.

Indeed, it might be questioned whether Israel’s actions in the Lebanon were defensive at all, as many of the tactics it undertook there could be characterised as offensive and even punitive. During the Israeli army’s operation *Summer Rain* in the Gaza Strip in June 2006 (immediately preceding events in Lebanon), which took place after the armed wing of Hamas captured an Israeli soldier in reaction to a series of Israeli rocket and mortar attacks which left many Palestinian women and children dead, Amir Peretz, Israel’s Defence Minister, said: “We will take revenge against anyone who injures the soldier, including their leaders.”¹¹⁸ Words like “revenge”, “turning back the clock”, or “mortal blow” (which was used by Ariel Sharon to refer to his Gaza disengagement plan which was implemented in September 2005) can hardly be described as defensive.¹¹⁹

It may be therefore concluded that in addition to the specific acts enumerated in Article 3 of the Definition of Aggression,¹²⁰ the telltale signs of an act of aggression

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- 116 See, e.g. Wang, E.B., “The Iran–Iraq War Revisited: Some Reflections on the Role of International Law” 32 *Canadian Yearbook of International Law* (1994), pp. 83–109; and Ramazani, R.K., “Who started the Iraq–Iran war?: A Commentary” 33 *Virginia Journal of International Law* (1992–1993), pp. 69–89.
- 117 UN Charter Article 2, para. 4; Helsinki Final Act, Article II. See also Falk, R., *Zaman Daily News*, “Lurching Toward Regional War in the Middle East” (21 July 2006) available at: <http://www.zaman.com/?bl=commentary&alt=&trh=20060721&hn=34951> (last accessed 10 May 2007).
- 118 Fisher, I., “Israel’s Defence Minister is Faulted by Left and Right”, *The New York Times* (26 June 2006).
- 119 BBC News Online, “Sharon defers Palestinian State” (5 April 2004): http://news.bbc.co.uk/2/hi/middle_east/3601593.stm (last accessed 10 May 2007).
- 120 Article 3 of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX) of 14 December 1974 provides:
 “Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:
 “(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,
 “(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
 “(c) The blockade of the ports or coasts of a State by the armed forces of another State;
 “(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;



include the following: (a) that the conflict had been planned beforehand; (b) that the resort to force was unnecessary and disproportionate to the incident which allegedly caused the outbreak of hostilities; and (c) that diplomatic methods were not exhausted before hostilities commenced.

In the case of the Israel–Hezbollah conflict, it is intriguing that even after calls from international organisations to desist from further bombardment, Israel continued (indeed it killed four UN personnel monitoring the situation).¹²¹ This was the case even though the initial stage of bombing was completely ineffective in reducing the number of rockets fired by the Hezbollah against Israeli towns and cities and did not assist Israel in its quest to free its kidnapped soldiers (rather, it seems that the reverse occurred, it is even less likely now that they will be released without major Israeli concessions). And what is most disconcerting is that despite all these appeals, including a ceasefire call from the Security Council, Israel dropped more cluster bombs on Lebanon in the last 72 hours of fighting than in the previous four weeks.¹²²

With regard to the statements made by Ambassadors Bolton and Gillerman, who asserted that Israel was acting in self-defence, it will be recalled that Japan too advanced this argument during the Second World War. This was, however, rejected by the International Military Tribunal for the Far East in Tokyo in the case of *In re Hirota*, where it held that: “Under the most liberal interpretation of the Kellogg–Briand pact, the right of self-defence does not confer upon the State resorting to war the authority to make a final determination upon the justification of its action.”¹²³ In other words, whilst Messrs. Bolton and Gillerman are perfectly entitled to advance the claim that Israel’s actions were defensive, this would not necessarily be accepted by an international tribunal. Just because Israel said that it was acting in self-defence does not mean that it actually did act in self-defence, even if this claim is supported by the US.

5 CONCLUDING REMARKS

In spite of the misgivings amongst scholars on the scope of the right of self-defence

“(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

“(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

“(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”

121 See “Israeli bombs kill UN observers”, BBC News Online, 26 July 2006: http://news.bbc.co.uk/1/hi/world/middle_east/5215366.stm (last accessed 9 May 2007).

122 See “UN denounces Israel cluster bombs” BBC News Online, 30 August 2006: http://news.bbc.co.uk/1/hi/world/middle_east/5299938.stm (last accessed 9 May 2007) where Jan Egeland said: “What’s shocking and completely immoral is: 90% of the cluster bomb strikes occurred in the last 72 hours of the conflict, when we knew there would be a resolution.”

123 15 *Annual Digest and Reports of Public International Law Cases* (1948), pp. 356–376 at p. 364.



and the use of force in international law, particularly on the question of how much force is necessary for it to amount to an armed attack,¹²⁴ it is submitted that, in the aftermath of the 9/11 atrocities, trans-boundary attacks by non-state actors may amount to an armed attack triggering the applicability of Article 51.¹²⁵ Even so, this is provided that: (a) there is a sufficient link with a State for the purposes of State responsibility; and (b) the attacks are of a sufficient scale and effect (meaning, they are not trivial).

It is arguable whether the right of self-defence would be relevant to territory which is subject to belligerent occupation, particularly if it is prolonged and protracted.¹²⁶ In that case it is submitted that the law of occupation effectively derogates from the right of self-defence in Article 51 of the Charter.¹²⁷ Since Israel withdrew from southern Lebanon in 2000, this issue is of no consequence.¹²⁸ It would more likely seem that Hezbollah's initial raid on 12 July was a classic frontier dispute falling outside the scope of Article 51.

Whether the *Nadelstichtaktik* doctrine is relevant depends on the facts which are always hard to verify in cross-border disputes, which is probably one reason why they are excluded from the scope of an armed attack. In these circumstances, there are sound policy reasons not to assimilate border incidents with armed attacks.¹²⁹ The insistence on a high threshold for an armed attack in *Nicaragua* was to limit third party involvement which the use of necessity and proportionality alone would not exclude.¹³⁰ Muslim organisations have already been quick off the mark to advance the argument that "Lebanon has an inherent right to call other States to aide its self-defence efforts" by citing the example of Kuwait's call on the US for help when attacked by Iraq in 1990.¹³¹ In this respect it is worth recalling that Article 6 of the Pact of the League of Arab States provides that in cases where an act of aggression has been committed against a member of the Arab League, the state attacked may request a meeting of the Council with a view to determining the measures necessary

124 Higgins, R., *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), p. 251.

125 U.N.S.C. Res. 1368 (2001) and 1373 (2001).

126 *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, Article 43 (18 October 1907), available on the ICRC website at: <http://www.icrc.org/ihl.nsf/FULL/195> (last accessed 10 May 2007).

127 See Tams, C.J., "Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case" (2005) 12 *European Journal of International Law*, pp. 963, at p. 970 (arguing that the law of occupation effectively derogates from the right of self-defence in Article 51 of the Charter).

128 The Israeli Withdrawal from Southern Lebanon, Special Update, Israel Ministry of Foreign Affairs (updated 24 May 2000): <http://www.mfa.gov.il/MFA/History/Modern+History/Historic+Events/The+Israeli+Withdrawal+from+Southern+Lebanon+-+Spec.htm> (last accessed 10 May 2007).

129 For doctrinal support before *Nicaragua* for the position that the invasion of a State's territory by armed bands does not make Article 51 operative unless the invasion is of such dimensions that the territorial integrity of the invaded State is seriously impaired see García-Mora, M.R., *International Responsibility for Hostile Acts of Private Persons Against Foreign States* (The Hague: Martinus Nijhoff, 1962), pp. 118–119.

130 See Gray, *supra* n.90 at p. 148.

131 *Islamic Human Rights Commission*, The Blame Game: International Law and the Current Crisis in the Middle East (20 July 2006) available at: <http://www.ihrc.org.uk/show.php?id=1954> (last accessed 10 May 2007).



to repel the aggression.¹³² Therefore, lowering the threshold of what amounts to an “armed attack” so as to include border incidents could cause conflicts to spiral out of control leading to more death and destruction.

The ICJ, in its advisory opinion on *Nuclear Weapons*, upheld its decision in *Nicaragua* that the exercise of self-defence is subject to the conditions of necessity and proportionality which it said were rules of customary international law.¹³³ Even if it turns out that Hezbollah’s raid of 12 July was much more serious than was initially thought to have been the case, it is doubtful that Israel’s response can be justified as either necessary or proportionate to the threat posed by Hezbollah.¹³⁴ Israel did not restrict its actions to Hezbollah but launched air strikes against the Lebanese army, which played no role in the initial attack. Israel also launched attacks close to the border with Syria (and in fact attacked Syria in 2003).¹³⁵ In the process it killed over 1,000 civilians, destroyed 30,000 homes, 120 bridges, 94 roads, 24 fuel stations (causing a shortage of supply), and 900 businesses, which is hardly proportionate to the deaths of three soldiers and the capture of two.¹³⁶ As Dr Kim Howells, Minister of State for Foreign and Commonwealth Affairs, said in an official visit he made to Lebanon during the war on 22 July 2006:

I very much hope that the Americans understand what’s happening to Lebanon. The destruction of the infrastructure, the death of so many children and so many people. These have not been surgical strikes. And it’s very difficult, I think, to understand the kind of military tactics that have been used. You know, if they’re chasing Hezbollah, then go for Hezbollah. You don’t go for the entire Lebanese nation.¹³⁷

If one were to conclude that Israel’s actions were neither necessary nor proportionate it would be very difficult not to agree with the statement by the Chargé d’affaires of the Permanent Mission of Lebanon to the UN, that what had taken place was an act of aggression even if it was not, as has been alleged, a premeditated act.¹³⁸

132 See Pact of the League of Arab States, signed at Cairo, on 22 March 1945. Filed and recorded at the request of Egypt on 29 August 1950 70 *United Nations Treaty Series* (1950), pp. 238–247 (in Arabic), and pp. 248–262 (in English and French). The Arabic text is the official text. The Pact was recently amended at a recent meeting of the Arab League so that Member States can invoke collective self-defence on a majority vote of two-thirds rather than unanimity which was the previous rule. For the text of the amendment see the Bahrain survey in this *Yearbook* by Dr. Husain M. Al Baharna.

133 See *Legality of the Threat or use of Nuclear Weapons*, Advisory Opinion, para. 41 (8 July 1996) available at: <http://www.icj-cij.org/docket/files/95/7495.pdf> (last accessed 10 May 2007); see also See Kirgis, F.L., *ASIL Insight*, “Some Proportionality Issues Raised by Israel’s Use of Armed Force in Lebanon” (17 August 2006): <http://www.asil.org/insights/2006/08/insights060817.html> on the question of proportionality (last accessed 10 May 2007).

134 This was the conclusion reached by a House of Commons Foreign Affairs Committee, “Global Security: The Middle East”, Eighth Report of Session 2006–2007 (HMSO: 13 August 2007) at p. 49, para. 108: “We accept that Israel has an inalienable right to defend itself from terrorist threats. However, we conclude that elements of Israel’s military action in Lebanon were indiscriminate and disproportionate”. This report is available online at: <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfa/363/363.pdf> (last accessed 13 August 2007).

135 UN Press Release SG/SM/8918 (6 October 2003) available at: <http://www.unis.unvienna.org/unis/pressrels/2003/sc7887.html> (last accessed 10 May 2007).

136 See the Amnesty Report, *supra* n. 23.

137 See “Minister condemns Israeli action”, BBC News Online, 22 July 2006, available at: http://news.bbc.co.uk/1/hi/uk_politics/5205658.stm (last accessed 13 August 2006).

138 UN doc. A/60/941, S/2006/529 (17 July 2006).

