

Israel, Hezbollah and the Conflict in Lebanon: An Act of Aggression or Self-Defense?

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THE LEGAL ISSUES SURROUNDING THE USE of force, known to international lawyers as *jus ad bellum*, have once again been thrust into the legal limelight as a result of recent Israeli military action in Lebanon. Human rights organizations such as Amnesty International accused Israel of deliberately targeting civilian infrastructure and committing war crimes during the month-long conflict.¹ Amnesty said that Israel's strikes on civilian buildings and structures went beyond "collateral damage," amounting to indiscriminate and disproportionate attacks contrary to the Geneva Conventions and the laws of war.² It released aerial photographs that showed suburbs in Beirut being reduced to "grey wastelands" as a result of Israeli bombing. 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.³

This article will assess the factual situation that led to the conflict and will compare Israel's response to the principles and norms of international law as set out in the Charter of the United Nations (UN Charter), the jurisprudence of the International Court of Justice (ICJ), and the writings of legal scholars. This paper will not 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. Rather, it will focus on the rules regarding the recourse to armed force.

It is submitted that Israel's bombardment, blockade, and subsequent invasion of southern Lebanon could not be excused as an act of self-defense under international law, as these actions were clearly 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.

THE FACTUAL BACKGROUND

ON JULY 12, 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 1701 brought a respite to the 34 days and nights of intense fighting in which approximately 1,164 people (mostly civilians) were killed.⁴ Of these, 162 were Israeli (of whom 119 were military personnel).⁵ 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 extensive destruction to southern Lebanon with an intense bombing campaign.⁶ When a ceasefire was declared on August 14, at 8 a.m. local time, there were some 30,000 Israeli troops stationed inside Lebanon, south of the Litani River.⁷

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.⁸ After the Israeli soldiers crossed the border they were killed in an ambush by Hezbollah guerillas 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).⁹ 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."¹⁰ 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.¹¹

The G8, which was meeting in St. Petersburg at the time the violence broke out, accepted Israel's justification but cautioned Israel to be mindful of the strategic and humanitarian consequences of its actions.¹² On August 5, 2006, the text of a draft Security Council resolution was published in the *New York Times*.¹³ It is apparent from preambular paragraph 2 of the draft that the



Courtesy of Aisha Bains, *Civil Resistance in Lebanon*

A school in the Lebanese village of Bint Jbeil hit by Israeli missiles.

Council considered Hezbollah's attack on Israel of July 12 the aggravating factor which led to the spiral of violence in the Middle East. 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.

INTERNATIONAL LAW AND THE USE OF FORCE

RECOURSE TO WAR AS A MEANS OF SOLVING INTERNATIONAL CONTROVERSIES was outlawed by the Pact of Paris (the Kellogg-Briand Pact) in 1928. It was also restricted by the Charter of the League of Nations drafted at the end of the Great War (1914-18). The Atlantic Charter, the UN Charter, and the Helsinki Final Act restricted the scope of state resort to armed force still further. The UN Charter provides in Article 2(4): "All Members shall refrain in

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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.”

Today, the prohibition of aggression is universally considered to have reached the status of a *jus cogens* norm. 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. Alternatively, they can be tried in the courts of third states under the doctrine of universal jurisdiction. This is relevant in the present situation since neither Israel nor Lebanon is a State Party to the Rome Statute.

To make a legitimate claim of self-defense 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-defense 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 July 12, 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 terrorizes our citizens.¹⁴

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.”¹⁵ 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,¹⁶ the *Wall* advisory opinion,¹⁷ and the case concerning *armed activities on the territory of the Congo*¹⁸.

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 July 14. Even so, it is not entirely clear whether Israel can claim a right of self-defense 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.¹⁹ American academia, in particular, has criticized the court on the issue of the identity of the perpetrator of the armed attack — that it must be directed from a state.²⁰ This is because Article 51 is silent on the state requirement and the *travaux préparatoire* 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.²¹ 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 of course the Charter only applies to its members which are restricted by Article 4(1) to “peace-loving” states.²²

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* is open to debate. It should be stressed that the practice by states like Israel, the U.S., and even the UK, 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-defense.²³ On the other hand, the fact that the G8 referred Hezbollah specifically, rather than Lebanon, may be evidence of a new custom emerging.²⁴ In any event, for the sake of argument, it will be assumed that Article 51 permits a state to defend itself in the event of an armed attack by a non-state actor — but only if there is a certain link with a state.²⁵



Courtesy of Aisha Batin, *Civil Resistance in Lebanon*

Hundreds of homes in the Lebanese village of Bint Jbeil reduced to rubble.

AGGRESSION OR SELF-DEFENSE?

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.²⁶ Therefore, although the events of July 14 in isolation would likely not trigger Article 51, under *Nadelstichtaktik* the several incidents prior to July 14 may allow Israel to argue that it does.

Since *Nadelstichtaktik* is just a theory and not a rule of international law, it carries little juridical weight. The ICJ, however, seems to have considered the doctrine in its judgment on *Nicaragua*²⁷ and more recently in *armed activities in the Congo*.²⁸ 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.²⁹

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 accuses Israel of regularly violating its airspace between May 2000 and July 2006.³⁰ 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."³¹

In a letter addressed to the UN Secretary-General, Lebanon described these flights as "unlawful acts of aggression and provocation."³² The letter said that Lebanon would "exercise its natural and lawful right of self-defence, opposing them with ground anti-aircraft fire."³³ Israel also has a long history of launching major attacks upon that country (in 1968, 1973, 1978, 1982, 1993, 1996, and 1999) and has left thousands of land mines in the south which the UN Committee on the Rights of the Child found Israel responsible (Israel was an occupying power in southern Lebanon from 1982-2000).³⁴ On the basis of the *Nadelstichtaktik* doctrine, Lebanon could therefore claim a right of self-defense 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 emphasized that the use of force in international relations is subject to the conditions of proportionality and necessity.³⁵ 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."

It should 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."³⁶

Nor may Israel resort to armed reprisals.³⁷ 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." 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.³⁸ Israel's actions would therefore more accurately be described as acts of aggression which the International Military Tribunal at Nuremberg characterized as an offence in 1945.³⁹ It should also be said that Israel's blockade of Lebanon's ports and coastline is also deemed by the UN to consti-



Courtesy of Abba Bain, *Civil Resistance in Lebanon*

Human rights activists pick their way through the rubble of a flattened neighborhood in Al-Dahiya, a southern suburb of Beirut, after an Israeli attack.

tute an "act of aggression."⁴⁰ 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 51.⁴¹

Furthermore, the Israeli attack cannot be justified as self-defense because, in the words of Daniel Webster in the famous *Caroline* incident, there was not a "necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment of deliberation."⁴² 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.⁴³

It is submitted that Hezbollah's July 14 attack on Israel did not threaten its territorial integrity or political independence, the only grounds for justifiable war.⁴⁴ 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 aftermaths 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 Lebanon were defensive at all, as many of the tactics it undertook could be characterized 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 Defense Minister, said: "We will take revenge against anyone who injures the soldier, including their leaders."⁴⁵ 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.⁴⁶

CONCLUDING REMARKS

IN SPITE OF MISGIVINGS AMONGST SCHOLARS on the scope of the right of self-defense 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,⁴⁷ 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 51.⁴⁸ Even so, this is provided that: (a) there is a sufficient link with a state; and (b) the attacks are of a sufficient scale and effect (meaning, they are not trivial).

It is arguable whether the right of self-defense would be relevant to territory which is subject to belligerent occupation, particularly if it is prolonged and protracted.⁴⁹ In that case it is submitted that the law of occupation effectively derogates from the right of self-defense in Article 51 of the Charter.⁵⁰ Since Israel withdrew from southern Lebanon in 2000, this issue is of no consequence.⁵¹

It would more likely seem that Hezbollah's initial raid on July 12 was a classic frontier dispute falling outside the scope of Article 51.

Whether the *Nadelstichtaktik* doctrine is relevant depends on 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 confuse border incidents with armed attacks. 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.⁵² Muslim organizations have already been quick to advance the argument that "Lebanon has an inherent right to call other States to aide its self-defense efforts" by citing the example of Kuwait's call on the U.S. for help when attacked by Iraq in 1990.⁵³

The ICJ, in its advisory opinion on *Nuclear Weapons*, upheld its decision in *Nicaragua* that the exercise of self-defense is subject to the conditions of necessity and proportionality which it said is a rule of customary international law.⁵⁴ Even if it turns out that Hezbollah's raid of July 12 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. 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.⁵⁵ 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.⁵⁶ 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.⁵⁷ *HRB*

ENDNOTES: Israel, Hezbollah and the Conflict

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